



INTERIOR BOARD OF INDIAN APPEALS

Estate of Lucille Kingbird Owens

46 IBIA 306 (03/20/2008)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF LUCILLE KINGBIRD) Order Affirming Decision
OWENS)
) Docket No. IBIA 07-105
)
) March 20, 2008

Appellant Patricia Ann Owens has appealed to the Board of Indian Appeals (Board) from an Order Denying Petition for Rehearing entered on March 23, 2007, by Administrative Law Judge Richard J. Hough (ALJ) in the estate of Appellant's mother, Lucille Kingbird Owens (Decedent), deceased Red Lake Chippewa Indian, Probate No. P-000017614-IP. The order let stand the ALJ's Order Determining Heirs and Decree of Distribution (Order Determining Heirs), entered on January 16, 2007, in which the ALJ disapproved Decedent's will because it was not executed in compliance with regulatory requirements. The ALJ ordered Decedent's trust property distributed in equal shares to her ten heirs under the laws of intestate succession of Montana and Minnesota, including Appellant.

Appellant sought rehearing to challenge the ALJ's disapproval of Decedent's will on the grounds that the will reflected Decedent's true intent and her failure to comply with the regulatory requirements was justified by her lack of knowledge about the process of drafting a will. The ALJ denied rehearing on the ground that Appellant had not shown any error of fact or law in the Order Determining Heirs. We affirm the ALJ's denial of rehearing because Appellant does not dispute the ALJ's conclusion that the will was not attested by two disinterested adult witnesses as required by the regulations, and does not otherwise demonstrate any error in the ALJ's finding that Decedent's will was not valid.

Background

Decedent died on June 14, 2004, at Fargo, North Dakota. According to her death certificate and to the testimony at the hearing held to probate Decedent's estate, Decedent lived in Minnesota at the time of her death. Decedent died owning interests in trust or restricted property located on the Fort Peck Reservation in Montana and funds were on deposit in her Individual Indian Money (IIM) account. Relevant to this appeal, Decedent was survived by four sons, five daughters, and one grandson by a predeceased son.

Decedent purported to execute a will on November 13, 2001, in which she devised certain trust property, as well as any money earned by that property, in equal shares to six of her nine living children, including Appellant. Decedent signed the will and her signature was notarized by Debra J. Kingbird. No one else signed the will.

The ALJ held a hearing to probate Decedent's estate on July 12, 2006. Three of Decedent's children, including Melissa Owens, attended the hearing. Melissa Owens, one of the beneficiaries under the will, testified that she prepared the will for Decedent and witnessed the signing of the will by Decedent. She also testified that the only other individual present when Decedent executed the will was the notary public.

The ALJ issued the Order Determining Heirs on January 16, 2007. The ALJ disapproved Decedent's will because it had not been executed in compliance with the requirements for a will found in 43 C.F.R. § 4.260(a).¹ The ALJ determined that the heirs to Decedent's trust property under the laws of intestate succession of both Montana and Minnesota were her nine surviving children and one son of Decedent's predeceased son.² The ALJ ordered the distribution of Decedent's estate to her ten heirs, including Appellant, in equal shares.

Appellant and three of her siblings filed a timely petition for rehearing. They argued that Decedent's intent was clearly reflected in her will: that her property be distributed to six of her children in equal shares. They asserted that Decedent was not familiar with the process of drafting legal documents, and that she executed her will to the best of her knowledge.

On March 23, 2007, the ALJ issued the Order Denying Petition for Rehearing. The ALJ concluded that Decedent's will was properly disapproved because it was not attested by two disinterested adult witnesses, as required by 43 C.F.R. § 4.260(a). The ALJ

¹ Subsection 4.260(a) provides that "An Indian 18 years of age or over and of testamentary capacity, who has any right, title, or interest in trust property, may dispose of this property by a will executed in writing and attested by two disinterested adult witnesses."

² The ALJ properly determined that Decedent's interests in trust real property, including the income that accrues from that property after Decedent's death, are distributed in accordance with the laws of intestacy where the land is located (Montana) and that Decedent's IIM account, which is personal property, is distributed in accordance with the laws of the state where she resided at the time of her death (Minnesota). See *Estate of Samuel R. Boyd*, 43 IBIA 11, 16, 21 & n.12 (2006).

determined that Decedent's lack of familiarity with the execution of legal documents was legally irrelevant. The ALJ concluded that petitioners had failed to point to any errors of law or fact in the Order Determining Heirs.

Appellant appealed to the Board, and set forth the reasons for her appeal in her notice of appeal. No briefs were received by the Board.

Discussion

Appellants bear the burden of showing that an order on rehearing is in error. *Estate of Verna Mae Pepion Hill Hamilton*, 45 IBIA 58, 63 (2007). We conclude that Appellant has not met her burden, and therefore we affirm.

The execution and interpretation of wills disposing of Indian trust property is controlled by Federal law. *Id.* at 68 (citing 25 U.S.C. § 373). In particular, 43 C.F.R. § 4.260(a) requires such a will to be attested by two disinterested adult witnesses. *See also* 43 C.F.R. § 4.201 (defining "will" as a written testamentary document that is signed by the decedent, that is attested by two disinterested adult witnesses, and that designates the beneficiaries of the decedent's trust or restricted property); *Estate of Calvin Leroy Leighton*, 36 IBIA 215, 217 (2001). A devisee is not qualified to be a witness to the will under which he or she inherits. *See Estate of Leighton*, 36 IBIA at 217.

Appellant does not dispute the ALJ's determination that Decedent's will was not attested by two disinterested adult witnesses, but contends that Decedent's failure to comply with the requirements for a valid will should be excused because Decedent was not familiar with the process of drafting a will, had little formal education, and was a stay-at-home mother. Appellant maintains that the will reflected Decedent's true intent and should have been approved.

We reject Appellant's argument. The Board has no authority to waive or ignore a duly promulgated Departmental regulation. *Estate of Florence Ethel Boury Lane*, 46 IBIA 188, 192 (2008). Moreover, the testator's intent alone is insufficient to create, alter, or revoke an Indian will. *Estate of Edith Walker Brown*, 43 IBIA 221, 227 (2006); *see also Estate of Richard Burke (Thompson)*, 9 IBIA 75 (1981) (In the absence of a properly executed will by a deceased Indian, the Secretary cannot distribute his property according to how the deceased may have intended to provide by will).

We conclude that Appellant has failed to satisfy her burden of showing error in ALJ's determination that the will was not valid. Only one individual other than Decedent

signed the will and the only other witness to the signing of the will, Melissa Owens, is one of the will beneficiaries. Even if the notary could be considered an attesting witness in this case, *see generally Estate of Orville Lee Kaulay*, 30 IBIA 116, 120-21 n.4 (1996), Melissa Owens could not have been — even if she had signed as a witness — because, as a will beneficiary, she was not a disinterested witness. *See Estate of Leighton*, 36 IBIA at 217.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the March 23, 2007, Order Denying Petition for Rehearing.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge