



INTERIOR BOARD OF INDIAN APPEALS

Estate of Drucilla (Trucilla) W. Pickard

50 IBIA 82 (07/29/2009)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF DRUCILLA (TRUCILLA)) Order Affirming Decision
W. PICKARD)
) Docket No. IBIA 08-39
)
) July 29, 2009

Carrie Zipprich Garland (Appellant or Carrie) appeals to the Board of Indian Appeals (Board), from an Order Denying Petition for Rehearing entered December 11, 2007 (Order Denying Rehearing), by Administrative Law Judge Richard L. Reeh (ALJ or Judge) in the Estate of Drucilla (Trucilla) W. Pickard (Decedent or Drucilla), deceased Wichita Indian, Probate No. P-0000-37395-IP. The Order Denying Rehearing let stand an Order Approving Will and Decree of Distribution issued by Judge Reeh on October 8, 2007 (Decree). The Decree approved Decedent’s latest will and rejected the efforts of several will contestants to show that Decedent did not have testamentary capacity to execute the will or that she was subject to undue influence when she did so.

In her appeal to this Board, Appellant submits evidence in the form of a medical record showing Decedent to have experienced health problems, and an audiotape allegedly showing that Decedent changed her mind about her will approximately a year after signing it. Appellant claims to have more evidence, in the form of conversation between Appellant and her brother, showing that Decedent was subject to coercion from her brother. Finally, she challenges testimony of others at a probate hearing and findings rendered by Judge Reeh, and claims that Judge Reeh unfairly and prematurely terminated the probate proceeding. She asks the Board to order the release of medical records to be used as evidence of Decedent’s mental capacity, and to order a rehearing.

We affirm the Order Denying Rehearing. With respect to the medical record showing Decedent to have diabetes and to have been “noncompliant” in taking her medication, neither the submitted medical record nor Appellant’s proffer regarding what further records would show is probative of Decedent’s testamentary capacity to execute a will. Accordingly, we find that Judge Reeh correctly denied the petition under 43 C.F.R. 4.241.¹

¹ The Department’s probate regulations were amended in 2008 to incorporate the provisions of the American Indian Probate Reform Act of 2004, *as amended*, primarily
(continued...)

Appellant's several arguments and proffers of evidence constitute new information not raised at the hearing or in the petition. Such matters are not within the scope of the appeal and therefore not properly before the Board. 43 C.F.R. § 4.318. Moreover, we do not find that Appellant has presented a justification for us to consider new evidence or arguments through the exercise of our discretionary authority under section 4.318. We disagree that the record shows any evidence that Judge Reeh prematurely terminated the hearing or erred in construing the evidence, and we find nothing relevant to the validity of the will in Appellant's grievances regarding her siblings' testimony.

Background

Drucilla (Trucilla) W. Pickard (previous married names, Zipprich, Argo, and Parton) was born April 27, 1931, and died April 2, 2005, as a resident of Oklahoma. She died unmarried. She bore seven children, one of whom was adopted outside the family, as follows: William Albert Zipprich (born 1954); Michael Stephen Zipprich (born 1955); David Anthony Zipprich (born 1957); Jeanne Marie Zipprich Negron (born 1960); Judith Ann Zipprich, adopted name Lindsay Ann Knapp Barrilleaux (born 1963); Carrie Eileen Zipprich Garland (born 1965); and Ollie Jean Argo Nimsey (born 1976). Though Judith (Lindsay) was adopted out, she and Decedent maintained a personal relationship.

At the time of her death, Decedent had no money in her Individual Indian Money account. She owned a number of trust real estate interests, including some in minerals, in allotments described more fully below.

The record shows that Decedent made at least five wills. The first, in 1979, bequeathed her trust property interests to her seven biological children and to her then-husband Albert Argo. In 1983, she prepared another will devising her trust property to her six non-adopted children, her car to her daughter who was adopted out, and money to her then-husband Elton Parton. In 1995, she prepared a new will excluding a reference to any husband and expressly devising specific allotments to each biological child. In this will, she employed a format that she retained in subsequent amendments that she made in 2003. We set forth terms of the 1995 will to show, by contrast, amendments later made and opposed in this appeal.

¹(...continued)

codified at 25 U.S.C. §§ 2201, *et seq.* The rules governing Indian probate hearings will be codified at a new 43 C.F.R. Part 30. This case is governed by the prior version of the regulations, and the citations to 43 C.F.R. Part 4 are to the regulations as codified in 2006, unless otherwise noted.

Paragraph Second² – a devise to Jeanne M. Zipprich Negron and Michael Zipprich of all of Decedent’s interest in the “allotment of Daisy Caley, Wichita 561 in equal shares of an undivided one-half (1/2 each).”

Paragraph Third – a devise to William A. Zipprich of all of Decedent’s interest in the “allotments of Chester Collins, Wichita 245, Oscar Leonard, Wichita 487, and Rose Leonard, Wichita 488.”

Paragraph Fourth – a devise to David Zipprich of all of Decedent’s interest in the “allotments of Korhakeuskau, Wichita 408, Marcutdauace, Wichita 409, Wayneokachat, Wichita 240, and Ahshaykeahskates, Wichita 593.”³

Paragraph Fifth – a devise to Judith Ann Zipprich (Lindsay) of all of Decedent’s interest in the “allotment of Darcharsunahdekos, Wichita 365.”

Paragraph Sixth – a devise to Carrie Eileen Zipprich of all of Decedent’s interest in the “allotments of Luther Campbell, Wichita 573, and Schley Pickard, Wichita 482.”

Paragraph Seventh – a devise to “Ollie Jean Zipprich, daughter, all my interest in the allotment of Cap Pickard, Wichita 362.”⁴

Paragraph Eighth – a devise to Jeanne M. Zipprich of all of Decedent’s interest in the “allotment of Herbert Ross, Wichita 293.”

The “rest and residue” clause bequeathed any remaining property to Michael Zipprich. In sum, the 1995 will included specific bequeaths of allotments to all seven of her offspring. According to the record, the values of these allotments widely varied.

² The “Paragraph First” of all versions addressed payment of debts not relevant here.

³ This number 593, present in all versions of the will, is an error which was corrected by Judge Reeh in a manner not at issue here.

⁴ Paragraph Seventh of the 1995 will listed Ollie Jean under the name “Zipprich” rather than her name “Argo.” The use of the name “Ollie Jean Zipprich” was carried over into all subsequent versions of the will.

On January 14, 2003, Decedent amended her will to provide a life estate for Michael in the mineral interests in the Wichita 362, 487, and 488 allotments, with the remainder to be shared on Michael's death among the six remaining biological children. The will established this devise in a new Paragraph Second, renumbered other paragraphs, and limited the remaining devise of these three allotments to a "surface only" distribution. A final paragraph gave Michael, as life tenant, the right to issue leases, rights of way, and easements for the mineral estates at issue in the new Paragraph Second, and to receive any bonuses, royalties, or other monies, to the exclusion of the remaindermen.

On October 21, 2003, Decedent amended the January 2003 will. She changed the devise to Appellant (Carrie) to provide that Appellant must share her devise with Michael Zipprich, and also transferred the Luther Campbell allotment, Wichita 573, formerly devised to Appellant, to add it to the devise to David Zipprich. She also inserted a new Paragraph Tenth devising all personal belongings to Michael, and renumbered the eleventh paragraph. The residuary clause in both 2003 versions remained unchanged. The following presents the terms of the final will with January 2003 amendments made in bold and October 2003 changes in italics:

Paragraph **Second** – a devise to Michael Zipprich of the mineral interests in “the allotments of Capp Pickard, Wichita 362, Oscar Leonard, Wichita 487 and Rose Leonard, Wichita 488,” and upon his death to vest in the remaining six of Decedent's biological children as tenants in common.

Paragraph **Third** – a devise to Jeanne M. Zipprich Negron and Michael Zipprich of all of Decedent's interest in the “allotment of Daisy Caley, Wichita 561 in equal shares of an undivided one-half (1/2) each.”

Paragraph **Fourth** – a devise to William A. Zipprich of all of Decedent's interest in the “allotments of Chester Collins, Wichita 245, and surface only to the allotments of Oscar Leonard, Wichita 487, and Rose Leonard, Wichita 488.”

Paragraph **Fifth** – a devise to David Zipprich of all of Decedent's interest in the “allotments of Korhakeuskau, Wichita 408, Marcutdauace, Wichita 409, Wayneokachat, Wichita 240, and Ahshaykeahskates, Wichita 593, and *Luther Campbell, Wichita 573.*”

Paragraph **Sixth** – a devise to Judith Ann Zipprich (Lindsay) of all of Decedent's interest in the “allotment of Darcharsunahdekos, Wichita 365.”

Paragraph **Seventh** – a devise to Carrie Zipprich Garland *and Michael Zipprich* of all of Decedent's interest in *only* the “*allotment of Schley Pickard, Wichita 482.*”

Paragraph **Eighth** – a devise to “Ollie Jean Zipprich, daughter, all my interest of **surface only** to the allotment of Cap Pickard, Wichita 362.”

Paragraph **Ninth** – a devise to Jeanne M. Zipprich of all of Decedent’s interest in the “allotment of Herbert Ross, Wichita 293.”

Paragraph Tenth – a devise to Michael Zipprich of all personal belongings and the contents of Decedent’s home.

Paragraph **Eleventh** – a direction that Michael Zipprich could issue oil and gas leases, rights of way, or easements as the life tenant of the mineral estate, and collect monies, to the exclusion of the remaindermen.

Property records in the probate record do not sufficiently differentiate values of the mineral and surface estates of the three allotments divided in Paragraph Second to convey the effect of the January 2003 amendments to Decedent’s will, which separated the mineral estate of the three allotments (Cap Pickard, Wichita 362; Oscar Leonard, Wichita 487; and Rose Leonard, Wichita 488) and gave a life estate in minerals to Michael. It is possible to ascertain that the values of the trust real estate devised to Judith (Lindsay) (over \$4,000) and Jeanne M. (under \$300) were significantly less than values of devises to others. By contrast, the value of the real estate interests devised to David Zipprich exceeded \$100,000. The effect of the October 2003 amendments was to (a) change the bequest for the Luther Campbell allotment (Wichita 573) from Appellant to David Zipprich, a relative increase to him and a relative decrease to Appellant of \$16,586, and (b) cause Appellant to share with Michael Zipprich a 50% interest in the Schley Pickard allotment (Wichita 482), a total value of \$47,818, and an additional decrease in Appellant’s share of almost \$24,000.

After Decedent’s death, Appellant requested a hearing. Letter from Carrie to Judge Reeh, Oct. 20, 2006. This letter did not present any views with respect to the will. Judge Reeh conducted a hearing on September 12, 2007.

At the hearing, five of Decedent’s children appeared. David and William Zipprich did not. Two spouses appeared. The scrivener of the October 2003 will, Gwen Tongkeamah, appeared, along with a will witness, Jan Stumblingbear, and the notary public present at the will signing, Sandra Bointy-Tsotigh. The second will witness had died.

Tongkeamah testified that Decedent appeared on October 21, 2003, to change her will. Transcript of Hearing, Sept. 12, 2007 (Tr.), at 7-8. She explained that Decedent appeared alone at Tongkeamah’s office, where the two met with no others present for about

45 minutes, during which they discussed Decedent's plans to amend the will to make "two changes." *Id.* at 8-9, 13. Tongkeamah testified that Decedent seemed to be thinking clearly, and was clear about the changes she wanted to make. Tongkeamah testified that the January 2003 version of the will remained on the BIA computer system, and she thus "pulled up" the will, at which point Decedent advised her to take out the tract of land from Paragraph Seventh, and "add[] a person in." *Id.* at 10. Tongkeamah testified that Decedent signed the will in front of the witnesses and notary. *Id.* at 11. Sandra Bounty-Tsotigh testified that she witnessed the will signing, and that, while she did not remember the specific event, her signature as notary represented that the testator signed in her presence. *Id.* at 14-16. Stumblingbear testified that Decedent "made it clear to me, Dru did, what she wanted after introducing us, then she signed it and we signed it, witnessing her signature." *Id.* at 15.

Appellant and Ollie opposed the will, complaining that they did not believe their mother had been competent to execute a will because she had medical problems. Tr. at 18-19 (Ollie). Ollie complained that her own name was incorrectly listed as Zipprich, and that this reflected that her mother "was [not] really there." *Id.* at 19.⁵ Carrie testified regarding her mother's living conditions in a set of buildings and trailers near Anadarko which they called "the compound." *Id.* at 20-21. She asserted that her brothers Michael and David lived on the compound to take care of their mother, but she complained that they did not do a good job of it. *Id.* at 22. Carrie and her husband John Garland testified that Decedent was frequently admitted to hospitals for various conditions related to diabetes, insulin reactions, and congestive heart failure; had had amputations of her toes in 1999; and possibly suffered from Parkinson's disease. *Id.* at 22-26. They testified that they had tried to convince her to get nursing care but that she was under duress from Michael. *Id.* at 25.

Jose Negron, husband of Jeanne, objected to the Garlands' testimonies and asserted that Michael and David were "the only ones there helping" their mother. Tr. at 27. He testified that the sons would drive Drucilla from Anadarko to Norman to visit Jeanne, and disagreed that they abused Drucilla in any way. *Id.* at 28-29. He complained that Drucilla felt aggrieved and "hassled" by Carrie. *Id.* at 30. Judith (Lindsay) testified that she had developed a relationship with her biological mother in later life, that they communicated, that "Mike took care of her," that Decedent "would say that Carrie was difficult" and "mean," and that Decedent would otherwise complain about Carrie. *Id.* at 33, 35. Jeanne testified that "there was nothing wrong with [Decedent's] mind," *id.* at 36, and Michael agreed that she "was of sound mind." *Id.* at 37.

⁵ As noted above, Ollie was listed under the name Zipprich in the 1995 will, a devise which was either copied or carried through as part of the same document in the 2003 will. There is no argument in this case about Decedent's competence to execute a will in 1995.

The hearing devolved into grievances among the siblings, who raised a number of complaints against each other without relevance to the issue of Decedent's capacity to execute a will. Judge Reeh attempted to refocus the proceeding on Decedent's capacity at the time she executed her will but little was added on that point. Turning to Tongkeamah, Tsotigh, and Stumblingbear, Judge Reeh asked if any of the testimony had caused any of them to rethink or change her views regarding whether Decedent had appeared to be competent to execute a will on that date of its signing. They all responded "no." Tr. at 40.

Judge Reeh explained that he was compelled to conduct a hearing for a separate case, and gave all witnesses a chance to summarize their positions. Carrie concluded by asserting that her mother was not of sound mind, had bad health, frequently forgot to take her insulin causing sugar "highs and lows," and was subject to her brothers' dependency on her for her money. Tr. at 44. She asserted that her mother's "medical records prove" that she was not of sound mind. Carrie explained that she had a "tape recording of it" to prove her points. She explained that she had

recorded my mother crying and telling me Michael is mean to me and he mistreats me and he has no respect for me. I made a terrible mistake. I've changed my will. I realize now. I'm so sick and I'm not of sound [sic], I have it all on a recording and I recorded it. I have a recording of when she was in duress when David came and lunged at her and she felt threatened.

Id. at 45. Jose Negron gave a contradictory response. *Id.* at 47. Judge Reeh concluded the hearing. Carrie did not submit any evidence into the record at the hearing or thereafter.

On October 3, 2007, Judge Reeh issued his Decree. Describing the evidence and the interested parties' testimonies and positions, he found that none of them had demonstrated that the will was invalid, even if he assumed the factual assertions were entirely accurate. Decree at 4. He stated that no evidence had been presented that Decedent was subject to undue influence, and explained that, "[t]o invalidate a will, convincing proof must be furnished to show that undue influence was actually exerted." *Id.* at 4 (citations omitted). He also explained that the burden of proof of testamentary capacity was on the will contestants, and that they must show that the "will-maker did not know the natural objects of her bounty, the extent of her property, or the desired distribution." *Id.* at 5 (citations omitted). He noted that, at best, the will contestants had presented opinions as to Decedent's mental capacity at the relevant time, but that they had not overcome the "testimony, including independent evidence, [that] showed that the decedent was thinking clearly." *Id.* He explained:

Even though the decedent was diabetic, had congestive heart failure, had difficulty getting around, may have had lapses of analytic ability and was over the age of seventy, the scrivener and will witnesses were persuaded that she was acting independently of her own volition, that she was thinking clearly, that she was aware of the importance of making a will and that she had the capacity to do so. Their observations were not overcome by evidence that was presented by the contestants.

Id. Addressing Appellant’s assertion that Decedent had later changed her mind, he explained that in the absence of action by Decedent to change her will, the Department has no authority to disapprove it based on allegations of an intent different from that expressed in the will itself. *Id.* at 4 (citation omitted).

On November 27, 2007, Appellant submitted a “petition to appeal” which Judge Reeh properly construed as a Petition for Rehearing pursuant to 43 C.F.R. § 4.241. She claimed a need for additional time “to obtain documentation and witness testimony of undue influence on the part of heir Michael Zipprich.” She claimed that “it is necessary that the court order release of medical records” from the Indian Health Services and Comanche Memorial Hospital in Lawton, Oklahoma, and “any other medical entity that may hold records of the health of Drucilla Pickard” because “they will prove the incompetence of Drucilla Pickard” during the relevant time frame. She claimed that she did not produce medical evidence at the hearing as a result of the Health Insurance Portability and Accountability Act (HIPAA).⁶

On December 11, 2007, Judge Reeh issued the Order Denying Rehearing. He explained that the petition “was not under oath, and it did not specifically state grounds upon which relief should be granted.” He noted that requirements for a proper Petition for Rehearing were sent out with the decision, including the obligation to accompany newly discovered evidence with affidavits of witnesses stating fully what such testimony is to be and providing justifiable reasons why the evidence was not discovered and tendered at the hearing. Accordingly, he rejected Appellant’s petition for its failure to conform to that rule.

Appellant submitted a Notice of Appeal on February 11, 2008. She presents seven enumerated arguments — two arguments objecting to Judge Reeh’s conclusion in the Order Denying Rehearing and five submitting new arguments or evidence against the Decree. First, she objects to Judge Reeh’s conclusion in the Order Denying Rehearing that she did

⁶ HIPAA was enacted in 1996, *inter alia*, to regulate the disclosure of health information. See Pub. L. No. 104-191, 110 Stat. 1936 (1996).

not clearly state the grounds for her petition, asserting that her grounds were the need for medical records. Notice of Appeal point 1. Second, she claims that her petition had explained that HIPAA prevented her from obtaining them before the hearing. *Id.* point 2.

Appellant's third enumerated point relates to "new evidence" to challenge the Decree in the form of a medical record dated October 7, 2003, which states that Decedent was "non-compliant" in the requirement to take insulin for a diabetic condition." Notice of Appeal point 3. From this, Appellant concludes that "Drucilla Pickard was likely under the influence of a diabetic reaction during the timeframe of the October 2003 making of the will and thus not of sound mind." *Id.* Next, she submits the audiotape alluded to at the hearing, and claims that it shows that Decedent meant to change her will and make Carrie "sole heir of the 'West Place', Wichita 482." *Id.* point 4. Within her point 4, Appellant also claims, seemingly unrelated to the audiotape, that her brother Michael coerced their mother to make "the January 2003 and October 2003 change[s]," apparently because he was dependent on Drucilla for his income and lifestyle. *Id.*⁷ Appellant discusses a dispute between herself and Michael resulting in his eviction from the property after their mother's death. She asserts that "there is evidence that Michael intended to control the actions or livelihood of Drucilla Pickard," citing a conversation in which Michael allegedly admitted tapping their mother's phone, denying her any access to vehicles, and intercepting her mail. *Id.*

In her fifth point, Appellant asserts "discrepancies in the [Decree]." She challenges Judge Reeh's conclusions based on testimonies of Jose Negron and Judith (Lindsay), and states her belief that he misconstrued Ollie's assertion regarding whether Michael was present at their mother's death. Notice of Appeal point 5. Next, she claims that Judge Reeh improperly restricted testimony at the hearing in order to proceed to another case, and that she attempted to obtain a transcript and tape but was told they were not available. *Id.* point 6. Finally, she asks the Board to order the release of medical records. *Id.* point 7.

On June 4, 2008, Appellant submitted an Opening Brief enumerating six points. In points 1 and 2, she argues that Judge Reeh denied her due process rights by placing time constraints on the hearing, and adds that he should have called for a continuance because "all evidence was not available nor heard." She complains that she requested the ALJ to release medical records necessary to prove Decedent's medical capacity but her request was denied. Opening Brief points 3 and 4. She complains that Judge Reeh did not sufficiently respond to the fact that Ollie's last name was listed as Zipprich, instead of Argo, in the will. *Id.* point 5. Finally, she asserts that the ALJ "may have been biased." *Id.* point 6. She concludes by requesting a rehearing.

⁷ These comments suggest that Appellant opposes any changes made to the 1995 will. Our holding relates to evidence, or a lack thereof, for the entire 2003 time period.

On June 12, 2008, Jeanne Marie Zipprich Negron submitted an Answer. She submits evidence, including tribal court decisions, regarding the dispute between Carrie and Michael regarding his continued presence on “the compound.” She objects to Appellant’s appeal in all respects.

Discussion

Appellant bears the burden of showing that an order denying rehearing is in error. *Estate of Lizzie McBride Rhoan*, 46 IBIA 262, 265 (2008). Simple disagreement with or bare assertions concerning a challenged decision are insufficient to carry this burden of proof. *Estate of John Squally Kalama*, 49 IBIA 201, 204 (2009). Further, we normally decline to consider an issue presented for the first time on appeal. *Isaac A. Bunney and Cheri L. Bunney v. Pacific Regional Director*, 49 IBIA 26, 31 (2009).

Appellant has not met her burden and has raised a number of arguments and evidentiary issues for the first time on appeal. For both reasons we affirm the decision. It is worth explaining, however, the process of a probate hearing to provide Appellant with an explanation as to why Judge Reeh declined her petition and why she loses on appeal.

Judge Reeh was correct to deny the Petition for Rehearing because it failed entirely to comport with the applicable rule governing such a request. Under 43 C.F.R. § 4.241(a)(1), a petition must, under oath, clearly and concisely state the grounds on which it is based. If based on newly-discovered evidence, the petition must (i) be accompanied by an affidavit or declaration stating fully what the new testimony is to be, and (ii) provide “justifiable reasons for the failure to discover and present [newly discovered] evidence” not presented during the probate hearing. *Id.* § 4.241(a)(2).

The petition failed to meet this rule. Its arguments for rehearing fell into two categories. Appellant contended that she needed (a) more time “to obtain documentation and witness testimony of undue influence on the part of heir Michael Zipprich”; and (b) a “court order release of medical records” from the Indian Health Services and Comanche Memorial Hospital in Lawton, Oklahoma, and “any other medical entity that may hold records of the health of Drucilla Pickard,” which she had not produced because of HIPAA.

Neither argument met the standards of 43 C.F.R. § 4.241. Fundamentally, Appellant’s two assertions are requests for more time to obtain information for her will challenge; the petition demonstrated that Appellant came to the hearing unprepared to challenge the will with evidence necessary to support her contentions. Instead of defining the information she could provide to prove undue influence or identifying the exact facilities that would have evidence regarding her mother, Appellant’s petition sought to gather new

evidence. Her assertion that she had been precluded from gathering evidence by Federal law was unsupported by any plausible evidence that she had attempted to do so, and her comment regarding “any other medical entity that may hold records” suggests that she believed the burden may be on the Office of Hearings and Appeals (OHA) to conduct an investigation. To the contrary, “it was for those contesting the will or codicil, not the judge, to make the decision whether to obtain medical information and whether to submit it.” *Estate of Frederick Harry Jerred*, 49 IBIA 147, 161 (2009). A will contestant is required to raise all of his or her issues or arguments at the probate hearing. *Estate of Thomas Sun Goes Slow*, 23 IBIA 99, 100 (1992). The purpose of a petition for rehearing, as it relates to evidence, is to permit a petitioner to submit, under oath, evidence that is “newly discovered” along with a description of the evidence and why it was not presented before. A petition for rehearing is *not* an opportunity for a contestant to start an investigation to support her position. Judge Reeh was correct to deny the petition as failing to meet the standards of the applicable rule.

Neither the Notice of Appeal nor the Opening Brief meets Appellant’s burden of showing that Judge Reeh was wrong. To the extent she argues that she met the requirements of the rule in her Notice of Appeal points 1 and 2, those arguments merely reiterate those presented in the petition and fail to explain why she did not present a petition under oath, with newly discovered evidence, accompanied by an affidavit or declaration describing fully what the evidence is with justifiable explanation for failure to discover it before. Complaints regarding HIPAA, without proof that she did anything to obtain the medical records, are simply insufficient to meet her burden to show error in the Order Denying Rehearing.⁸

Other arguments submitted by Appellant seek to argue her case anew with information she did not present at the hearing. Relevant to this appeal, the Board’s jurisdiction is limited to review of an order on a petition for rehearing. 43 C.F.R. § 4.320; *Estate of David Martin Champagne*, 49 IBIA 209, 210 (2009). An appeal is not ordinarily an opportunity for presenting a new case, with information never provided in the hearing or in a petition for rehearing. *See* 43 C.F.R. § 4.318 (scope of review). Although this Board has

⁸ Though Appellant may remember the hearing as she describes in her Opening Brief points 3 and 4, where she claims that she asked the ALJ to “release medical records,” but he denied her request, the transcript reveals only that she alluded to the existence of medical records. There is no instance in which she timely sought medical records by asking for an OHA subpoena to specific institutions, nor is there a denial of such a request. As we held in *Estate of Jeannette Light Adams*, 39 IBIA 32, 39 (2003), the “Board declines to find that the Judge committed any error in failing to subpoena a witness that Appellants did not ask to have subpoenaed during the hearing phase of this proceeding.”

authority to correct a manifest injustice or error, reviewing the information provided, we find no basis for exercising that authority. Instead, we conclude that Appellant's evidence suggests a misunderstanding of the appropriate tests for determining either that Decedent was competent to execute a will, or that a will should be invalidated for undue influence.

In order to invalidate a will for lack of testamentary capacity, a will opponent must show that "the testator did not know the natural object of her bounty, the extent of her property, or the desired distribution," at the time of execution of the will. *Estate of Adams*, 39 IBIA at 33, citing *Estate of Fannie Pandoah Fisher Silver*, 16 IBIA 26, 28 (1988); *Estate of Samuel Tsoodle*, 11 IBIA 163, 166 (1983). That the testator may have disinherited putative heirs or blood relatives, or made an unequal distribution to them, is not evidence of a lack of testamentary capacity. *Estate of Joseph Red Eagle*, 4 IBIA 52, 60 (1975). Further, a medical diagnosis alone is not sufficient to show a lack of testamentary capacity, in the absence of a showing that the testator did not otherwise meet the standards articulated above. *Estate of Jerred*, 49 IBIA at 162.

The disinterested will scrivener, witness and notary all testified credibly that Decedent had testamentary capacity. The will opponents did not present any evidence that she "did not know the natural object of her bounty, the extent of her property, or the desired distribution" when executing her will. That she suffered diabetes, had sugar "highs" and "lows," refused or forgot to take her medicine, or had congestive heart failure is not probative of these elements. The medical record submitted by Appellant with her Notice of Appeal does not demonstrate a lack of testamentary capacity; likewise, Appellant's assertions at the hearing and to this Board regarding medical records showing diagnoses of Decedent's health issues are unsupported by any credible averments that they would prove that Decedent did not know the natural objects of her bounty, the extent of her property, or a plan for the desired distribution. Accordingly, we find no basis for reconsidering the outcome based on Appellant's proffer of medical records or her claim that she needs more of them. Notice of Appeal points 3 and 7.⁹

Likewise, Appellant's proffers regarding undue influence do not comport with the standards we must examine to determine whether a will should be invalidated for that reason. The burden of proof to show undue influence is on the will contestant. *Estate of Clarence Thompson Burke*, 18 IBIA 1 (1989). To overturn a will on grounds of undue influence, a will

⁹ Contrary to Appellant's request, Notice of Appeal point 7, this Board does not have authority to issue subpoenas. *Hardy v. Midwest Regional Director*, 46 IBIA 47, 59 (2007). In any event, the request submitted to this Board for a subpoena is the first direct request for Departmental assistance in obtaining the records, and such efforts are untimely.

opponent must meet a stringent four-part test to show: (1) decedent was susceptible of being dominated by another; (2) the person allegedly influencing decedent in the execution of his will was capable of controlling his mind and actions; (3) such a person did exert influence upon decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) the will is contrary to decedent's desires. *Estate of Lyman Z. Penn*, 46 IBIA 272, 280 (2008), citing *Estate of Adams*, 39 IBIA at 36. In addition, "where a confidential relationship exists, there is a presumption of undue influence, which does not depend upon proof that undue influence was actually exerted upon the testator." *Estate of George Fishbird*, 40 IBIA 167, 169 (2004). The presumption of undue influence is applied where: (1) a confidential relationship existed; (2) the person in the confidential relationship actively participated in the preparation of the will; and (3) the person in confidence was the principal beneficiary under the will. *Id.*

In the best case for Appellant, the evidence at the hearing suggested an *opportunity* for Michael or David to attempt to control or coerce Decedent. Nothing presented at the hearing suggested that either of them actually exerted such an influence as required in the four-part test, or actively participated in the will's preparation as required to establish a presumption of undue influence. Appellant's proffer of proof regarding Michael's actions, Notice of Appeal point 4, likewise, does not supply evidence necessary to prove undue influence, and, in any event, her allegations were contradicted by Michael, Negron, and Judith (Lindsay) at the hearing, and by Jeanne in her Answer. In light of such testimonials, we find no basis whatsoever to question Judge Reeh's conclusion that Appellant failed to meet her burden of proof to overcome the will based on undue influence, or to find that she could do so at another hearing. *Estate of Burke*, 18 IBIA at 1.

Appellant's audiotape, Notice of Appeal point 4, is not sufficient to establish that Decedent revoked or amended any provision of the will. At the hearing, Appellant testified that this tape would show that her mother was "crying" and complaining about her mistreatment at the hands of Michael and David. Tr. at 45. In fact, the audiotape primarily contains the voice of *Carrie* (and her husband) discussing *her* reasons for audiotaping her mother on October 3, 2004.¹⁰ Even assuming the third voice is that of Decedent, that voice states in its entirety:

OK, I told my daughter that I made a mistake by putting him on there. So I want that changed to the original way I had it fixed. I want her to have the

¹⁰ On the tape, Carrie explains the reason for making the record was in case her mother was "unable" to change her will before she passed away. We note that Decedent lived for another 6 months after Carrie made the recording.

whole thing, the whole 170 acres what's there. Drucilla Pickard, I'm speaking. I'm worried about this and now I have it off my mind. That's the way I want it.

Audiotape, as transcribed by the Board.

OHA cannot amend Decedent's will on this basis. The audiotape is not a will or an amendment to one. To revoke or repudiate a will, the testator must destroy the original or execute the revocation with the same formalities as are required in the execution of the will, 43 C.F.R. § 4.260(c), which in this case must include "attest[ation] by two disinterested adult witnesses." *Id.* § 4.260(a). The only way for Decedent to have accomplished a change in her will was to amend it. As we stated in *Estate of Henry Beavert*, "even if decedent had stated an intention to leave certain property to appellant, intent alone has never been held sufficient to create, alter, or revoke an Indian will. Because decedent took no action to change his will, the Department has no authority to disapprove [it]" 18 IBIA 73, 75 (1989). Similarly, in *Estate of Edith Walker Brown*, 43 IBIA 221, 227 (2006), we held: "While the Board acknowledges Appellant's apparent frustration that Decedent never signed a new will, assuming she desired to do so, the Board must give effect to the wishes stated in a valid will. It is immaterial whether Decedent desired to execute a new will — intent alone is not sufficient to create, alter, or revoke an Indian will."

Even assuming Appellant is correct that the audiotape shows that Decedent regretted her will, this would not change the fact that the will was never amended to accomplish a revision of it. Assuming that we were to make the many factual findings necessary to prove the identity of the voice on the audiotape, that it was not based on coercion, and that the references to property in the tape relate to Paragraph Seventh of the will, at most, the audiotape only shows what Appellant seeks to disprove. The person purporting to be Drucilla acknowledges that Drucilla had made a will which, upon her death, would transfer property to a son; was fully capable of understanding that she had done so; was aware of the will's contents and consequences; and implied that she regretted a portion of the will but still did nothing to change it. Accordingly, the audiotape would not provide a justification either for a finding that Judge Reeh committed any error in approving the will or a finding that a hearing is necessary to consider it.

Appellant's arguments regarding the process are unsupported. Though the transcript indicates that the ALJ advised the hearing participants of another hearing scheduled to take place after the closure of the hearing in Decedent's estate, it does not show that he violated their due process rights. Opening Brief points 1 and 2; Notice of Appeal point 6. To the contrary, he gave all participants, and particularly Appellant, the right to present a summary of his or her contentions. In her lengthy concluding statement, Carrie did not indicate that

she had additional evidence to present or another argument to make, nor did she express a desire for the continuance that she now claims he should have granted. We find no error on the part of Judge Reeh in the conduct of the hearing, or in his conclusions regarding the conflicting testimony, that would affect the outcome of this matter. *Id.* point 5.

Appellant's arguments regarding conflicting testimony would not alter the outcome. Even if Appellant's complaints regarding remarks of her brother could justify another hearing to allow Appellant and her brother to challenge each others' conversations, such a hearing would only revisit the debate between Appellant and her siblings at the prior probate hearing, which was irrelevant to Decedent's capacity to execute a will. And even assuming Appellant's contentions regarding her brother are true, they show at most that her brother was controlling toward Decedent and had an incentive to obtain his mother's property. That Michael may have had a controlling personality and behavior and a desire for a devise is not determinative of Appellant's underlying premise — that her mother's decision to change her will in 2003 was based on undue influence or a lack of competency to do so.

Finally, as noted above, Ollie's name first appeared as Ollie Jean Zipprich in the 1995 will which Appellant apparently seeks to enforce. Opening Brief point 5. We reject any suggestion that its carry-through into the 2003 wills is probative of Decedent's testamentary capacity in 2003. And we are unable to discern Appellant's basis for asking us to conclude that Judge Reeh was biased. *Id.* point 6. We thus find no basis, even in 43 C.F.R. § 4.318, for concluding that Appellant's arguments reflect that a manifest injustice or error may have occurred or may occur if we affirm Judge Reeh's decision.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we affirm the Order Denying Rehearing.

I concur:

// original signed
Lisa Hemmer
Administrative Judge*

// original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.