INTERIOR BOARD OF INDIAN APPEALS

Estate of Alice Grace Demontigny

50 IBIA 174 (09/02/2009)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

ESTATE OF ALICE GRACE DEMONTIGNY	)	Order Affirming Denial of Rehearing But Referring Petition to Probate Hearings Division for Consideration as a Petition for Reopening
	)	Docket No. IBIA 09-103
	)	September 2, 2009

Kerri Davis, Rachel Dionne, Patrick Demontigny, Helen Thomas, Edward Demontigny, and Franklin C. Demontigny (Appellants) appeal to the Board of Indian Appeals (Board) from an Order Denying Rehearing (Order Denying Rehearing or Order) entered on May 20, 2009, by Indian Probate Judge (IPJ) James Yellowtail in the estate of their mother, Alice G. Demontigny (Decedent), deceased Turtle Mountain Indian, Probate No. P000046722IP. The IPJ concluded, in a December 10, 2008, Decision (Decision), that specific devises in Articles III and V of Decedent's will were inconsistent and irreconcilable with respect to Decedent's trust real property interests located in the NE¼SE¼ of Section 11, Township 162 North, Range 70 West, in Rolette County, North Dakota. The IPJ ordered that the property pass pursuant to the residuary clause in Decedent's will, which divided residual property equally among Decedent's children (with the children of a predeceased child to take that child's share), including a daughter who was expressly excluded from the Article III devise and implicitly excluded from the specific devise in Article V.[1] Appellants sought rehearing, contending that the language of the two devises could be reconciled. The IPJ denied Appellants' petition for rehearing on the ground that it was untimely, after Appellants failed to respond to an order to file a statement detailing the date(s) and circumstances of the mailing of their petition.

We affirm the IPJ's denial of rehearing because Appellants have not demonstrated that the evidence before the IPJ showed that their petition for rehearing was timely, and

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[1] Article V included one specific devise, to Decedent's son, Appellant Edward Demontigny, but it also contained the residuary clause. Decedent had ten biological children, one adopted child, and one foster child (Appellant Kerri Davis) whom the will lists as among Decedent's children. Appellants are six of Decedent's children, as so defined.

because Appellants failed to respond to the IPJ when he allowed them an opportunity to provide evidence of timeliness. But because Appellants have alleged a specific and material error — that the Decision failed to consider a plausible interpretation of the will language that would avoid what the IPJ concluded was an "irreconcilable" conflict — and because the IPJ would not have been precluded from considering the petition for rehearing, even if untimely, as a petition for reopening, we refer this case to the Probate Hearings Division for consideration of Appellants' petition, including their pleadings on appeal, as a petition to reopen the estate.

The IPJ's Denial of Rehearing

At the time the Decision was issued, the applicable regulations allowed petitions for rehearing to be filed within 60 days from the date of mailing of the notice of decision. *See* 43 C.F.R. § 4.241 (2008).[2] The Order Denying Rehearing recites that Appellants' petition for rehearing was sent to the IPJ by fax on March 5, 2009 — after the 60-day deadline had expired — along with a handwritten note on the fax that the petition had been sent by mail at the end of January but the receipt had been lost. The Order states that the IPJ had no record of previously having received the petition, and that the IPJ had given Appellants an opportunity to explain the circumstances of their filing and to submit evidence that their petition actually had been mailed and was timely. The Order states that no response was received, concludes that the petition was untimely, and denies rehearing on those grounds.

On receipt of this appeal, the Board issued an order for Appellants to show cause why the IPJ's Order should not be summarily affirmed based on the grounds set forth by the IPJ. Appellants, who represented themselves before the probate judge, but who are now represented by counsel, responded to the Board's show cause order. On the issue of timeliness, Appellants submit an affidavit by Kerri, stating that she mailed the petition for rehearing to the Office of Hearings and Appeals in Billings, Montana, the last week of January 2009. With respect to their failure to respond to the IPJ on the timeliness issue, Appellants argue that they were not represented by counsel at the time and that they believed that the IPJ had already made up his mind and would not listen to a response.

We affirm the IPJ's denial of rehearing because Appellants have not demonstrated that the IPJ erred. The IPJ had no authority to extend the 60-day deadline for filing a

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[2] Effective December 15, 2008, the time period for filing a petition for rehearing was shortened to 30 days. *See* 73 Fed. Reg. 67,256, 67,301 (Nov. 13, 2008), *to be codified at* 43 C.F.R. § 30.237.

petition for rehearing and, in the absence of any response from Appellants, the only record before him showed that the petition was untimely. *See Estate of Florence Ethel Boury Lane*, 46 IBIA 188, 192 (2008); *Estate of Thomas Tointigh*, 17 IBIA 17, 19 (1988). Although Appellants present Kerri's affidavit, for the first time on appeal, to support their contention that their petition for rehearing was timely filed, as a general rule the Board does not consider new evidence presented on appeal. *See Estate of Jesse Jay Kirn*, 41 IBIA 113, 116 n.3 (2005). We find no reason to depart from that rule here, given the fact that the IPJ gave Appellants an opportunity to provide evidence of timeliness and they completely failed to respond to him. Appellants' argument that they failed to respond because they believed the IPJ had already made up his mind is unconvincing, and provides no basis for us to consider the new evidence or to now find fault in the IPJ's conclusion that the petition for rehearing was untimely. A party who fails to comply with an order providing him or her an opportunity to produce evidence cannot complain when an adverse ruling is issued based on the only evidence available to the judge. We understand that Appellants were not represented by counsel, but that fact does not excuse them from making a good faith effort to respond to the IPJ's order, as best they could, and thus does not provide grounds for us to consider the additional evidence submitted on appeal relevant to the timeliness of their petition for rehearing.

Consideration as Petition for Reopening

The Board has recognized that a petition for rehearing that is untimely may nevertheless properly be treated as a petition for reopening. *See Estate of Lane*, 46 IBIA at 192. In the present case, Appellants failed to respond to the opportunity provided them by the IPJ to address the timeliness problem, and thus by implication failed to indicate an interest in pursuing their request for review of the matter. Under these circumstances, it is understandable why the IPJ simply dismissed the petition without giving it further consideration. Nevertheless, our review of Appellants' notice of appeal, their response to the Board's show cause order, and the Decision, leads us to conclude that it is appropriate for the Board to refer Appellants' substantive allegations of error to the Probate Hearings Division for consideration as a petition to reopen the estate.

Appellants contend that there is a plausible interpretation of the will language, based on a distinction between trust and fee interests in different parcels located within Section 11 (and originally included in Allotment No. 304-69-A), and which they offered to the IPJ prior to the Decision, that would avoid what the IPJ found to be an "irreconcilable" conflict between the two specific devises of the subject property, thus requiring that the property must pass pursuant to the residuary clause. We express no opinion on the merits of

Appellants' interpretation,[3] but we do note that the Decision does not specifically address that interpretation. Moreover, whether or not it is indeed "impossible" to ascertain Decedent's "true" *affirmative* testamentary intent, *see* Decision at 5, with respect to the subject trust real property, her clear intent to exclude her daughter Margaret (Peggy) DeCoteau from the devise of the property counsels against a finding of irreconcilable conflict, unless truly compelled.

Where, as here, an Indian decedent's will has been approved, the objective of the probate proceedings is to determine the intent of the testator and carry out that intent. *See Estate of Larry Michael Oskolkoff*, 37 IBIA 291, 295 (2002), and cases cited therein. In light of the above considerations, we conclude that it is appropriate to refer this case for consideration of Appellants' petition, including their pleadings on appeal, as a petition to reopen the estate.

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, the Board affirms the IPJ's denial of rehearing but refers the case to the Probate Hearings Division for consideration of Appellants' petition as a petition for reopening.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge

[3] This case comes before the Board on appeal from the IPJ's denial of a petition for rehearing as untimely, and given that limited scope and our decision that the IPJ did not err in denying rehearing, we conclude that consideration of whether reopening is in fact appropriate is an inquiry properly undertaken, in the first instance, by the probate judge.