INTERIOR BOARD OF INDIAN APPEALS

Estate of Theresa Underwood Dick

50 IBIA 279 (11/02/2009)

Reconsideration denied:
51 IBIA 31

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 THERESA UNDERWOOD DICK	)	Order Affirming Decision
	)	
	)	Docket No. IBIA 07-107
	)	
	)	November 2, 2009

Alfreda LaBonte (Appellant or Alfreda) appeals to the Board of Indian Appeals (Board) from a Final Decision on Rehearing (Final Decision) entered April 9, 2007, by Indian Probate Judge M.J. Stancampiano (Judge Stancampiano or IPJ), in the Estate of Theresa Underwood Dick (Theresa or Decedent), deceased Quinault Indian, Probate No. P000000368IP (formerly, No. IP SA 316 N 95). The Final Decision reversed a November 19, 2002, Order Approving Will and Decree of Distribution (2002 Order), entered by Administrative Law Judge William E. Hammett (Judge Hammett or ALJ), which distributed 100% of Decedent's trust assets to Alfreda, who is one of Decedent's grandchildren. On August 22, 2003, Judge Hammett issued an Interim Order on Rehearing (2003 Interim Order), in response to a Petition for Rehearing submitted by opponents of Theresa's Last Will and Testament (Will). This order permitted the Will opponents to depose the will scrivener, and advised the parties that the ALJ would thereafter take further briefing on the Petition for Rehearing. In a November 4, 2003, Order Allowing Limited Supplemental Deposition and Granting Motion to Strike (2003 Order), Judge Hammett advised the parties, *inter alia*, that he would consider issues regarding witness credibility based on anticipated briefing on the Petition for Rehearing in a final decision on rehearing. Judge Hammett died before ordering briefing or issuing a final decision.

The case was reassigned to the IPJ, who ordered briefing on the Petition for Rehearing and subsequently ordered a hearing de novo.[1] Based on testimony and other evidence submitted in hearings conducted over four days in 2006, the IPJ reversed the 2002 Order approving Decedent's Will. Final Decision, Apr. 9, 2007. The IPJ found that Decedent had been subjected to undue influence in the preparation of her Will and ordered her estate distributed to her heirs by intestacy.

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[1] Judge Hammett had conducted hearings on three dates between 1995 and 1999.

On appeal, Appellant contends that the IPJ committed procedural errors when he took over the case from the ALJ's docket. She argues that the IPJ's decision to conduct a hearing de novo was prejudicial to her because, by 2006, some witnesses had died or were otherwise unavailable, memories had faded, and family members with an interest in the outcome had opportunity to reconstruct evidence adverse to her as the Will's sole heir. She requests the Board to reverse the Final Decision and reinstate the ALJ's 2002 Order.

Appellant cannot sustain her request for reinstatement of Judge Hammett's 2002 Order. Before he died, Judge Hammett himself had reopened the record to receive additional evidence and argument for the purpose of considering the Petition for Rehearing. Therefore, if we were to reverse any aspect of the Final Decision for any reason, it would nonetheless be legal error to reinstate the 2002 Order without consideration of the evidence allowed and briefing anticipated by the ALJ in response to the Petition for Rehearing.

We would not, in any event, reverse or vacate the IPJ's Final Decision on the arguments presented. We disagree with Appellant's contention that Judge Stancampiano abused his discretion in ordering a de novo hearing. Appellant fails to show that he erred in his analysis of the factors related to undue influence. We affirm the IPJ's ruling on the grounds stated herein.

Background

I. A Brief History of Decedent's Life.

Decedent was born in 1895 or 1897 in Canada.[2] In the early 20th century, she moved to Washington and was adopted as a member of the Quinault Tribe. She died in California on August 14, 1994, a resident of Washington, during a visit with her only surviving daughter, Mabel Colegrove (Mabel). During her lifetime, she amassed approximately $1 million in trust assets in the form of real property, timber interests, and an Individual Indian Money account. The value of her estate grew to over $2 million by 2006.

Theresa bore seven children. She outlived all of them except Mabel, who was 76 years old when Theresa died. Theresa was survived by 23 heirs at law, including Mabel and descendants of three predeceased children.

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[2] Theresa's medical records identify her birth date as October 15, 1897, but her Death Certificate lists her date of birth as October 15, 1895.

In the 1970s, Theresa moved in with her daughter Leona Capoeman Youckton (Leona), where she lived until Leona's death in 1988. Theresa then moved in with her daughter Thelma James (Thelma) and Joe LaBonte, in one of two trailers eventually owned by Thelma in Quinault, Washington. Thelma died in January 1994. Thereafter, in late January or early February 1994, Alfreda moved into the trailer with Theresa and Joe LaBonte. Alfreda beneficially assisted Decedent until her death, taking her to multiple doctor's appointments, which are documented, and performing other services.[3]

II. Theresa's Will.

Less than a month after Alfreda moved in to care for Theresa, a private attorney, Gladys Phillips, Esq., and a Bureau of Indian Affairs (BIA) realty specialist and will scrivener, J.Y. Tomlinson, received visits — on February 21 and 22, 1994, respectively — from Theresa and Alfreda to address preparation of Theresa's will. They were accompanied by an elderly family friend, Martha Lott. Tomlinson and Phillips separately documented the visits, in which they each advised Alfreda and Decedent that concerns regarding Theresa's ability to recall either the natural objects of her bounty or the nature of her property prevented preparation of a will for her. Tomlinson recorded that he understood Alfreda to be Theresa's daughter, instead of her granddaughter, and that Theresa did not know two of her own children or "what was going on" with respect to her property. Documentation of Personal Visit, Feb. 22, 1994.

On March 1, 1994, Alfreda took Decedent to Decedent's treating physician, Dr. Bruce Worth, who recorded that the purpose of the visit was to address Theresa's pain complaints from "osteoporotic fractures in her back." Nonetheless, he recorded that Theresa denied any pain to him and he wrote: "I'm not sure that she recalls."

On April 14, 1994, Alfreda, Theresa, and Lott returned to Tomlinson for the preparation of a will. Tomlinson recorded that he believed Theresa to be competent to execute a will. But Tomlinson recorded that Theresa could not remember Alfreda's actual name and knew her only by a nickname ("Dutchie"); identified the beneficiary of her will by pointing at Alfreda; and, as a specific devise in the Will, identified only the trailer owned by Thelma where she lived with Alfreda. Will. Tomlinson's notes explained that, when Theresa could not remember Alfreda's name, Alfreda wrote down five names and Theresa

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[3] The extent to which Alfreda's assistance was needed by her grandmother, given Joe LaBonte's ongoing presence, was the subject of much testimony. Alfreda averred that she was needed by Decedent for physical assistance. The Will opponents contend that Alfreda only moved in because she had no paying employment and lived off of others' money.

picked Alfreda's name from this list. Besides her own name, Alfreda did not write the name of any of Theresa's surviving children or grandchildren who might have been heirs at law.[4] Tomlinson reported that he asked Alfreda and Lott to leave the room, but Theresa would not proceed without them. Tomlinson drafted the Will, and two BIA employees, Karen Watkins and Dolores McNevins, signed as witnesses a standard form affidavit in which they swore that Decedent was competent to execute a will and was not subject to undue influence. *See* Documentation of Personal Visit, Apr. 14, 1994; Will, Attesting Affidavit.

On June 11, 1994, Alfreda brought Theresa to an emergency room for a swollen ankle and unrelated infection. Again Theresa was unaware of the symptoms that brought her there. The treating physician, Dr. Alvarez, recorded that he saw the symptoms of ankle swelling, that the granddaughter (Alfreda) reported various pain complaints expressed by Theresa, but that Theresa had "absolutely no complaints of any kind."

In August 1994, a granddaughter took Theresa to visit Mabel in California. Theresa died during this trip.

III. Probate Proceedings Before Judge Hammett.

When Theresa's relatives discovered the existence of the Will, they demanded a probate hearing. Judge Hammett conducted three hearings in 1995, 1997, and 1999. At the 1997 hearing, he characterized the will scrivener as "an indispensable witness" and advised the parties that he would seek BIA's approval to make funds available for Tomlinson's costs to attend a subsequent hearing. 1997 Transcript (Tr.) at 3. The ALJ disallowed pre-hearing briefing, promising to give the parties "the opportunity of filing post-hearing briefs." *Id.* at 6. He issued subpoenas for the will witnesses to appear at the 1999 hearing but did nothing to secure Tomlinson's appearance.

Alfreda testified in 1995, and returned to do so in 1999 represented by counsel. She claimed that it was entirely Theresa's idea to make a will, and that Theresa had approached Alfreda to do so. 1995 Tr. at 43-44. Alfreda denied visiting either Tomlinson or Phillips with Theresa in February 1994. 1999 Tr. at 183-84. She testified that she and Lott took Theresa to visit both only once, on April 14, 1994, the date on which the Will was executed. 1995 Tr. at 42-43, 159, 186. Phillips testified that, as an attorney, she would never discuss a will with anyone but the testator; that, based on her office records, the three arrived at her office on February 21; that she met with Theresa alone, but that Theresa was

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[4] In their order of appearance on this list, the names are "Marth [sic] Lott, Larissa Waugh, Trena Waugh, Alfreda LaBonte, and Burl Shaw."

entirely "mute"; and that Phillips gave up and advised them all that she could not prepare a will. By contrast, Alfreda recalled that, though Theresa and Phillips were alone for 20 minutes, Phillips questioned Theresa in front of Alfreda and Lott, asking about all of Theresa's children, a question that Theresa answered, "nam[ing] every one for her." 1999 Tr. at 161-62; 196-97.

Though Tomlinson's notes record the February 22 visit, Alfreda denied that this visit took place or that Tomlinson ever told her the things he recorded in his notes. 1999 Tr. at 184. Though Tomlinson's April 14 notes show that he drafted the Will and read it back to Theresa with Alfreda and Lott present, Alfreda testified that Tomlinson took Theresa from the room and that Alfreda had no idea what the Will provided until after Theresa's death. *Id.* at 185; 1995 Tr. at 47, 49.

Lott testified that she was a friend who visited Theresa two to three times a week for years. 1999 Tr. at 215. Like Alfreda, she denied going to Phillips's or Tomlinson's offices in February and claimed that they went to Phillips's office and, after lunch, to Tomlinson's office, only on April 14. *Id.* at 227. Tomlinson's notes reflected a morning meeting on that date. Lott contended that, at Phillips's office, Theresa listed her children in chronological order and "answered everything, you know, pretty good." *Id.* at 221-22. By contrast with Tomlinson's April 14 notes, Lott stated that Theresa identified all of her children and grandchildren to Tomlinson. *Id.* at 230. She verified that Alfreda wrote the list of names from which Theresa selected Alfreda's name, *id.* at 234-35, but denied that Alfreda and Lott were present or could hear when Tomlinson prepared or read the Will. *Id.* at 238. Lott claimed she and Alfreda were otherwise out of earshot when the Will was read, and denied that she and Alfreda had any idea that the estate was left to Alfreda. *Id.* at 240, 249. On cross-examination, Lott explained that she had known Alfreda since birth; that they are close friends and saw each other quite regularly; and that she had taken Alfreda "under her wing." Lott also admitted that she and Alfreda had repeatedly attempted to convince Theresa to make a will. *Id.* at 245-46, 261-62, 264-65.[5]

At the end of the 1999 hearing, Judge Hammett prohibited family members who were not represented by attorneys from presenting their cases, due to time constraints. He

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[5] Lott testified about an instance where she and Alfreda took Theresa to deposit a check, raising an implication that Theresa had her own checking account. 1999 Tr. at 223-24. Rodney Colegrove, the administrator of Theresa's non-trust estate, testified that Theresa did not have a checking account. *Id.* at 257-58. The Will opponents subsequently challenged Lott's veracity, an issue on which Judge Hammett ordered briefing, but which neither the ALJ or IPJ ultimately decided. *See infra* at Background, heading 5.

stated that "people have . . . s[a]t through this hearing, [and] there [have] been no questions interposed here. I assume that the unrepresented parties in interest here have no questions of the witnesses who have appeared here, I'm going to so determine." 1999 Tr. at 268. He stated his intention to recall Phillips as a rebuttal witness and to call Tomlinson in his capacity as will scrivener, and "on that basis the hearing record remains open." *Id.* He promised to make arrangements for this testimony, *id.* at 269, and promised that "post-hearing briefing" would follow the testimonies of Phillips and Tomlinson. *Id.* at 270.

IV. Judge Hammett's 2002 Order.

The next thing Judge Hammett did was approve the Will. He presented a summary of the witnesses' testimony, and recited the facts set forth in Tomlinson's notes, including the scrivener's "feeling" that Theresa "knew what was going on." 2002 Order at 13. He concluded that the Will opponents had not met their burden of showing a lack of testamentary capacity. He explained that, even though Theresa was mistaken when she prepared her Will as to whether her own property included the trailer she lived in, shown to be owned by Thelma, "factual discrepancies in a will do not necessarily invalidate [it]." *Id.* at 15 (citations omitted). Judge Hammett acknowledged that the record "does contain some reason to question the credibility of [Alfreda], particularly her insistence that she did not know, until after the death of the decedent, that she was the sole beneficiary under the will." *Id.* He noted that Tomlinson's notes repudiated that assertion. *Id.* at 15-16. He also pointed out that Alfreda's claim that she "did not at any time tell the decedent to make a will" was refuted by her own and Lott's admissions. *Id.* at 15. He acknowledged that discrepancies between Alfreda's statements and other evidence were "troubling," but concluded that the Will opponents had not met their burden of showing that the Will was invalid. *Id.* at 16. Finally, addressing his decisions not to call Phillips on rebuttal, or Tomlinson, he noted that Phillips had died in the interim between the 1999 Hearing and the 2002 Order, and that he had decided, because Tomlinson lived in Oklahoma, not to call him in light of his "meticulous" notes. *Id.* at 17.

V. The Will Opponents' Petition for Rehearing and Judge Hammett's Responses.

After the 2002 Order issued, 22 of Decedent's heirs at law together hired counsel David Knodel, and an attorney who had represented a few of them withdrew. Alfreda hired new counsel, Thomas A. Brown. Knodel submitted a timely Petition for Rehearing. In a series of pleadings, Knodel submitted a letter from Theresa's physician, Dr. Worth, who asserted that, based upon his treatment of her on March 1, 1994, he believed that she was not competent. Letter from Dr. Worth, Mar. 17, 2003. Knodel informed the ALJ that a 1993 videotape existed which showed Theresa's demeanor at that time. And Knodel

submitted a declaration of J.Y. Tomlinson, who declared that, as a BIA realty specialist and will scrivener, it was his consistent practice to ask testators to identify surviving children, and that he would name all surviving children in a will, even if they were excluded as beneficiaries. He remembered asking Alfreda to leave the room when Theresa's Will was executed, but that Theresa objected. Tomlinson Declaration, Mar. 7, 2003.

Recognizing that the Will opponents had reasonably anticipated both that he would secure Tomlinson for the hearing, and also would schedule post-hearing briefing, Judge Hammett issued his 2003 Interim Order allowing the parties to depose Tomlinson. 2003 Interim Order at 4, 8. The ALJ noted that the Will opponents' reliance on his commitments at the 1997 and 1999 hearings to call Tomlinson as an indispensable witness was "justifiable." *Id.* He denied the Will opponents' request to present either the testimony of Dr. Worth or the videotape, and rejected any suggestion that he had deprived hearing participants of rights to present testimony or evidence. *Id.* at 9-15. Acknowledging that the Tomlinson Declaration revealed that Tomlinson "may clarify certain critical facts in this case," *id.* at 8, he gave the parties 60 days to conduct the deposition, after which he promised to schedule briefing on the Petition for Rehearing. *Id.* at 15.

Knodel and Brown deposed Tomlinson on September 17, 2003. Tomlinson testified that he had prepared hundreds of wills and that, in 1994, he asked testators about surviving children 100% of the time.[6] Tomlinson Deposition Tr., Sept. 17, 2003, at 11-12. His consistent practice was to include the names of all surviving children in wills, with express avowals as to a testator's desire to disinherit children, so as to avoid will contests. *Id.* at 14, 69. He denied that he was aware of the existence of Theresa's sole surviving child, Mabel, at either the February or April 1994 meetings with Theresa, Alfreda, and Lott. *Id.* at 61-62. Based on the fact that Mabel was not mentioned in the Will, he asserted his belief that Theresa had been either unaware of Mabel's existence or unaware that Mabel remained alive. *Id.* at 70. He stated that, had he known of Mabel's existence, he would not have considered Theresa to be competent. *Id.* Theresa's insistence that Alfreda stay in the room against his advice was unique in his experience and thus memorable. *Id.* at 30, 51. He stated that Alfreda was in the room during the entire will-drafting process; she "was there the entire time and understood everything about it because we discussed it openly." *Id.* at 33, 36. He confirmed two visits by Alfreda, Lott, and Theresa to his office, and stated that Alfreda's testimony to the contrary was "untrue." *Id.* at 32-34. On September 26, 2003, Tomlinson signed a second declaration to oppose Brown's insistence, during the deposition, that Tomlinson's testimony was tainted by his having read the transcript of the prior

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[6] Will witness, Karen Watkins, had testified that Tomlinson prepared the majority of the wills for a period of time at the Olympic Peninsula BIA Agency. 1999 Tr. at 21.

hearings. "LaBonte's allegation that Mr. Knodel got me to believe these things is false. I got there all by myself." Tomlinson Declaration, Sept. 26, 2003, at 12. He stated that "MABEL COLEGROVE was not in the mind of THERESA DICK on April 14, 1994"; that the Will should be set aside; and that an injustice had occurred. *Id.* at 10, 12.

Thereafter, Knodel asked for a new hearing, based on charges that Alfreda and Lott had perjured themselves at the 1999 hearing. Oct. 20, 2003, Petition Requesting Ruling on the Issues of Misconduct by LaBonte in Will Procurement and Perjury at Trial as a Basis for Rehearing. Brown moved to strike those motions. Judge Hammett's November 2003 Order granted the motion to strike and rejected the motion regarding perjury. But he promised to reconsider his credibility findings in a final order on rehearing. He advised the Will opponents to present "arguments concerning witness credibility in the briefs which are to be scheduled as set forth above" after a final, supplemental deposition of Tomlinson that he also allowed. 2003 Order at 3.

The parties thereafter pursued mediation. All parties except the Youckton family, and a great-grandson, William Vitalis, agreed to a settlement. The Youckton family, seven descendants of Decedent's daughter Leona, objected to any form of settlement, even by a portion of the heirs at law, on grounds that a settlement adversely affected their interests, including their fee obligations to the several attorneys by then involved, and also the way in which the remaining estate would be protected. Knodel withdrew as the Youcktons' counsel, unable simultaneously to represent them and the parties attempting to settle.

On April 30, 2004, Judge Hammett issued an Order Conditionally Approving Partial Settlement. He explained, however, that the settlement before him was not final because it did not protect the interests of the Youcktons or Vitalis in outstanding fee claims or division of the estate. He explained that if these issues could not be resolved, he would proceed to order briefing on the Petition for Rehearing. He directed the parties to submit a joint status report and a final settlement agreement. No agreement was submitted. In a February 2005 Order, Judge Hammett stated that he understood the parties to be pursuing some form of settlement that would protect all interests.

Judge Hammett died on April 28, 2005.

VI. Judge Stancampiano's Decision to Conduct a Hearing De Novo.

Now assigned to the case, Judge Stancampiano ordered the parties to brief the Petition for Rehearing. Represented by new counsel, the Youcktons moved for a hearing de novo, contending that many of the potential heirs were not represented by counsel at the 1999 hearing and were not permitted to present their cases because Judge Hammett

restricted the hearing to counsel presentations. They claimed that such potential heirs at law had been denied due process.

Judge Stancampiano granted that motion on January 20, 2006. Order Granting Motion for De Novo Hearing, Jan. 20, 2006. He scheduled and conducted four days of hearings. In three days from June 27-29, 2006, the parties presented their cases anew. Several heirs at law testified in opposition to the Will; Phillips (now deceased) and Lott did not testify; Dr. Worth testified that Theresa suffered from dementia; and Tomlinson and will witness McNevins testified. On August 28, 2006, the parties presented expert witnesses regarding the issue of Decedent's mental health. The Will opponents presented Dr. Richard Adler. Dr. Csaba Hegyvary testified for Alfreda.

VII. Judge Stancampiano's Final Decision.

In his April 9, 2007, Final Decision, Judge Stancampiano set forth in great detail the testimony and documentary evidence of every witness that appeared before him at the 2006 hearing, including the testimony of family members who had not been allowed to present testimony in the 1990s. Final Decision at 4-57. By contrast, the IPJ did not mention some testimony, including Lott's or Phillips's, presented at the hearings in the 1990s which were more contemporaneous with the Will.[7]

The IPJ addressed the opinions of the parties' expert witnesses for purposes of considering whether Theresa had testamentary capacity at the time she signed the Will. He described the testimonies of: (a) Dr. Adler, who contended that Theresa, more likely than not, had dementia in April 1994, based on interviews he conducted of a number of family members, certain documentary evidence, and the 1993 videotape of Theresa, Final Decision at 45-54; and (b) Dr. Hegyvary, who testified that he could not conclude that Theresa had dementia because her doctors had not written the diagnosis on their records. *Id.* at 54-56.

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[7] Evidence not submitted at any hearing in the 1990s included an 80-minute videotape of Theresa and Thelma taken in 1983 to preserve Theresa's "oral history." The IPJ *sua sponte* refused to consider the tape because he concluded it would be "prejudicial." He did allow a member of the film crew, Christina Winn, to testify and describe Theresa's general non-responsiveness and silence. Alfreda's expert witness, Dr. Hegyvary, testified that he would have reviewed the tape as a part of his assessment of Theresa had it been made available to him. 2006 Transcript at 807 ("I did not have time to review. Obviously, if I had more time, I would have asked for it, but I didn't.").

Ultimately, the IPJ concluded that Theresa had testamentary capacity based on Tomlinson's testimony in 2006 that he believed she had it at the time he prepared the Will, and also based on the IPJ's belief that Tomlinson would not otherwise have prepared a will. Final Decision at 69. Recognizing that Tomlinson stated that Theresa did not name her children on the date of the Will scrivening, and concluding that Theresa's "memory was probably impaired," *id.*, the IPJ nonetheless cited the natural objects of Theresa's bounty as Mabel and Theresa's grandchildren and great-grandchildren, and concluded that the "ability of the decedent to 'name her children' at the time she executed the will, including children who had died many years before, is therefore irrelevant to the question of testamentary capacity." *Id.* He was influenced by Dr. Hegyvary, "whose point was that the record was not adequate to support a solid medical diagnosis of the decedent after the fact." *Id.* at 72.

Judge Stancampiano concluded, however, that the record supported a finding of undue influence, based upon the three-part test in *Estate of Grace American Horse Tallbird*, 26 IBIA 87, 88 (1994). He determined first that a confidential relationship existed between Theresa and Alfreda. Final Decision at 73 (citing *Estate of Ernestine Lois Ray*, 33 IBIA 92 (1998)). In support of this conclusion, he explained:

> The decedent was at least 96 at the time the will was executed; Alfreda LaBonte was 41. The record shows that the decedent was dependent on Alfreda LaBonte for cooking, transportation, and, to some extent, personal hygiene, at the time the will was executed. . . . Moreover, the record established that the decedent was, at a minimum, in a diminished state at the time the will was executed. Her memory was impaired, and she sometimes failed to recognize close relatives. . . .

Final Decision at 75-76 (citing 79 Am. Jur. 2d *Wills* § 384 (2002)). He cited Alfreda's 1995 testimony that Theresa "wanted [Alfreda] to handle things"; Theresa's insistence that Alfreda stay in the room while the Will was prepared, over Tomlinson's objection and explanation that it could undermine the validity of the Will; and Theresa's entrusting the Will to Alfreda for its safekeeping. Final Decision at 76-77; 1995 Tr. at 38.

Second, Judge Stancampiano found that Alfreda actively participated in the preparation of the Will, based on Alfreda's active involvement in taking Theresa to Phillips's and Tomlinson's offices. "Perhaps most importantly, it was Ms. LaBonte who prepared the list of names that the decedent used to identify, for Mr. Tomlinson, Ms. LaBonte's proper name as the primary beneficiary of the will." Final Decision at 78. The IPJ found, finally, that Alfreda is the undisputed sole beneficiary of the Will. Based on these facts, he found undue influence and disapproved the Will.

VIII. Notice of Appeal and the Partial Settlement.

Alfreda submitted a timely Notice of Appeal to this Board. Thereafter, the parties submitted a settlement agreement. The presiding ALJ, Thomas F. Gordon, requested that the Board grant him limited jurisdiction to entertain a settlement proposal. On July 30, 2007, the Board granted that motion. On November 28, 2007, Judge Gordon entered a Recommended Decision on Partial Settlement, Final Decision on Attorney Fees, which covered all issues, including accrued attorneys fees and costs, except the Youcktons' and Vitalis's share of the estate should the Final Decision be upheld. No opposition having been filed, on April 9, 2008, the Board entered an Order Adopting Recommended Decision and Approving Partial Settlement. Thereafter, the Board set a schedule for briefing by Appellant (Alfreda, represented by Brown) and the remaining Will opponents (the Youcktons, represented by family member Jessica Goddard).[8]

In her Opening Brief, Alfreda contends that Judge Stancampiano erred in ordering a de novo hearing and that this Board must reverse that conclusion (and the Final Decision) and reinstate Judge Hammett's 2002 Order. Appellant characterizes Judge Hammett's intentions in issuing his 2003 orders as administrative clean up in furtherance of a plan she imputes to him of reasserting his 2002 Order, which she presumes to have been final. She claims that Judge Hammett permitted the Tomlinson testimony only as "one single 'loose end'." Opening Brief, Aug. 1, 2008, at 3. She accuses Knodel of supplying Tomlinson with "materials" to influence his testimony, and thereby characterizes Judge Hammett's assertion in his 2003 Order that he intended to consider anew the credibility of witness testimony as based only on those "shocking events" related to Tomlinson's deposition. *Id.* at 3. Alfreda presents a list of "facts" she claims to be "undisputed and [which] should be treated as verities on appeal." *Id.* at 6. One such "verity" is that Theresa was competent to make a will. *Id.*

Alfreda contends that the IPJ was legally bound to deny the Petition for Rehearing and adopt the 2002 Order, because otherwise "all of the meticulous work of [Judge] Hammett was lost, including his extensive evaluations of the credibility of the witnesses and their candor." Opening Brief at 15.[9] She claims that the 2002 Order should "trump the concerns of credibility." *Id.*

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[8] Though Vitalis has been served with all relevant documents, he has not participated in any of the proceedings before the ALJ, IPJ, or this Board.

[9] In fact, however, Appellant's argument relates only to the IPJ's decision to grant a hearing "de novo." Opening Brief at 8-15. She does not actually argue that he erred in granting the Petition for Rehearing.

Alfreda claims that Judge Stancampiano erred by "refusing — prior to the hearing he ordered — to approve a settlement that had been reached among the parties . . . ." Opening Brief at 15. Appellant contends the IPJ should have enforced the partial settlement, excluding the Youcktons and Vitalis, conditionally approved in 2004. She asserts that Judge Hammett's conditional approval of settlement was final, subject only to "two 'housekeeping' matters that did not affect the substance" of the settlement agreement as approved in 2004. *Id.* at 4. She also argues that Judge Stancampiano erred in failing to approve an alleged "second settlement" reached among the same parties in 2006, before issuing his Final Decision. *Id.* at 25-26.

Third, Appellant argues that Judge Stancampiano erred in his finding of undue influence. She claims that his finding that Theresa and Alfreda were in a confidential relationship is a misconstruction of *Estate of Ray* which, according to Appellant, required "the type of relationship where a person would repose total trust — like the quasi-attorney/client relationship in the *Ray* case." Opening Brief at 20. She argues that *Estate of Ray* cannot apply because Judge Hammett wrote that decision, had superior knowledge of how to apply it, and "would be able to spot and identify a *Ray*-type 'confidential relationship' a mile away. But it was obviously so clear to him that it did not apply here, **he didn't even mention it!**" *Id.* at 21. She suggests that it was *per se* error for the IPJ to have disregarded Judge Hammett's 2002 conclusion on undue influence. She argues that the IPJ erred when he "relied on the holding of a generalized treatise (*AmJur2d)*, rather than direct decisional law applicable to the demonstrated facts, as can be found in numerous IBIA decisions . . . too numerous to cite." *Id.* at 21-22. Accusing the IPJ of omitting critical language from the treatise, she claims that the treatise requires a confidential relationship to be founded on "*whether the people maintained joint accounts and whether there was a power of attorney!!*," and "goes on to state that the 'confidential relationship' is present where there is an 'overmastering influence' on one side, a situation that nobody could argue existed in this case. Of course, that language was left out also." *Id.* at 22.

Alfreda argues that Judge Stancampiano erred in the "shocking finding" that Alfreda "actively participated" in the preparation of the Will. Citing the list of participation events in the *Estate of Ray* case, she claims that there is no correlation between the actions of the will proponents there and here. She cites as support *Estate of Helen Fisher Parker*, 27 IBIA 271 (1995), and *Estate of Leona Ketcheshawno Waterman Ely*, 20 IBIA 205 (1991).

Appellant argues that Judge Stancampiano erred in allowing testimony "prohibited by the so-called 'Deadman's Statute' of the State of Washington, RCW 5.60.030." Opening Brief at 26. Finally, she also claims that Judge Stancampiano erred in refusing to "give any weight to the arguments of the parties." In his decision, at 58, 60, 61, and 63-66,

the Judge refused to consider the parties' arguments because they did not give citations to the record. She argues that this practice "calls into question the validity of the entire decision" notwithstanding "that both sides suffered from this conduct, rather it compounds the resulting confusion and uncertainty arising from the decision." Opening Brief at 26.

The Youckton family, represented by Goddard, submitted an Answer. Because of our holding in this appeal, we do not address it further.

Discussion

Appellant's challenges are unsuccessful. Whatever our views of the Final Decision, there is no basis in this appeal for us to grant Appellant's requested relief — reinstatement of Judge Hammett's 2002 Order. Once Judge Hammett permitted the addition of post-2002 evidence and briefing into the record, it would have been error either for him or Judge Stancampiano to adopt the 2002 Order without express consideration of that material. Likewise, it would be error for this Board to do so now. Thus, if the IPJ had denied the request for a hearing de novo, the proper procedural course would have been for him to determine whether to grant or deny the Petition for Rehearing on the basis of the record as it existed at the time he issued that ruling (2006), and not as if closed to further evidence in 2002. The best possible relief available to Appellant, in response to her argument that Judge Stancampiano erred in ordering a de novo hearing, would be a remand for consideration of the evidence available to Judge Hammett, and thus at the time the IPJ was assigned the case. The intervening evidence allowed by Judge Hammett after his 2002 Order casts doubt on his 2002 finding of Theresa's testamentary capacity and reinforces his asserted concern, stated in the 2002 Order, regarding Alfreda's credibility.

In any event, we affirm the Final Decision with respect to the issues appealed to the Board. Appellant fails to show that Judge Stancampiano abused his discretion in conducting a de novo hearing. We reject her argument that the IPJ committed error by failing to approve a partial settlement that Judge Hammett expressly had refused to approve until resolution of issues relating to preserving the estate and fairly allocating fees and costs for the non-settling parties. On the merits, we uphold the IPJ's conclusion that Theresa was subject to undue influence. We reject as unsupported and unavailing Appellant's additional challenges to the Final Decision.

I. Appellant's Request That The Board Reinstate the 2002 Order Must Be Denied.

We begin our analysis by rejecting Appellant's request for relief. She argues that Judge Stancampiano's actions, analysis, and logic were so pervasively wrong that the series of rulings, from his first decision to conduct a hearing de novo on January 20, 2006, and

thereafter, must be reversed by this Board and summarily replaced with the 2002 Order, as reinstated. While we do not subscribe to Appellant's many criticisms of the IPJ's conduct during the proceedings, the goal of Appellant's efforts to sweep away his rulings is to reinstate a 2002 Order that Judge Hammett himself had already undertaken to revisit. No scenario would permit that order simply to be summarily reinstated as if it were Judge Hammett's final decision, and especially since post-2002 material undercuts it.

A. Judge Hammett's 2002 Order Never Became Final.

The 2002 Order never became final because Judge Hammett received a timely petition for rehearing and thereafter issued orders to continue the proceedings. *See* 43 C.F.R. § 4.241(c). Moreover, in his 2003 Interim Order and 2003 Order, Judge Hammett expressly acknowledged that he had created expectations in 1999 that he would proceed with decisionmaking only *after* providing the parties with the opportunity to present Phillips's rebuttal testimony, Tomlinson's testimony, and post-hearing briefing. At the 1999 hearing, Judge Hammett had explicitly left the record open for those purposes. Tr. at 270. Recognizing this, Judge Hammett asserted that he intended to permit a deposition of Tomlinson which could "clarify certain critical facts in this case," and asserted his intention to consider such evidence and additional briefing before ruling on the petition for rehearing. 2003 Interim Order at 8. The 2002 Order did not become final merely on account of the ALJ's death, and reinstatement of that 2002 Order would not be appropriate relief in the absence of a formal determination regarding the Petition for Rehearing, including consideration of evidence and briefing.

Appellant implies that the 2002 Order can be summarily reinstated because Judge Hammett's 2003 orders were formalities. She asserts that he was merely "striving to make sure that each 'loose end' was tied up, and to make sure that everyone had their say." Opening Brief at 26. Appellant implies that Judge Hammett would not seriously have considered the evidence and argument he permitted to be submitted, and infers that Judge Hammett understood his 2002 Order to have been final and all actions between 2002 and his death to be meaningless process. *Id.* We disagree. Judge Hammett would not force the parties through an expensive and time-consuming exercise merely to protect unscathed a ruling he issued prematurely.

Indeed, failure to consider evidence and argument developed as a result of his 2003 Interim Order and 2003 Order would have constituted legal error and we do not assume he intended to commit it. When Judge Stancampiano took over the case and he was presented with the briefing of the parties, his options were (1) to grant the request for a de novo hearing, or (2) deny the request for de novo hearing and (a) grant the Petition for Rehearing after full consideration of the record developed before *and after* the 2002 Order

as a result of the ALJ's rulings, or (b) deny the Petition for Rehearing also after full consideration of the same record developed before and after the 2002 Order. He could not simply have reinstated the 2002 Order then, and we cannot do so now.

We have explained the duty of an ALJ to ensure that all relevant facts are elicited in a probate proceeding:

> "Administrative Law Judges involved in the probate of Indian estates share the duty imposed upon the Department of the Interior to carry out the Federal trust responsibility toward Indians." *Estate of Rose Parshall Dragswolf Crow Flies High*, 36 IBIA 54, 57 (2001), and cases cited therein. The Judge has an affirmative duty in an Indian probate hearing "to develop the record and to ensure that the facts, both pro and con, are brought out." *Estate of Blanche Russell (Hosay)*, [18 IBIA 40,] 46 [(1989)], and cases cited therein.

Estate of Jeanette Little Light Adams, 39 IBIA 32, 35 (2003). In *Estate of Larry Michael Oskolkoff*, 37 IBIA 291, 299 (2002), we found that an ALJ had "abused his discretion by failing to seek the testimony of the attesting witnesses in any form and by relying solely upon the testimony of witnesses who stood to gain by approval of the will." *See also Estate of Arnita Lois Parton Gonzales*, 35 IBIA 207, 212 (2000) (evidence of testamentary capacity insufficient where the only witness suffered "credibility problems"). We remanded the matter for the ALJ to accept testimony of witnesses "as long as those witnesses are disinterested." *Id.* Either Judge Hammett or his successor, Judge Stancampiano, would have committed error to rule on the Petition for Rehearing without consideration of the post-2002 evidence, including Tomlinson's deposition, while adopting evidence of a self-interested witness.

B. The Record At the Time of Judge Hammett's Death Substantially Undercut Judge Hammett's 2002 Order.

Moreover, Appellant errs in presuming that the outcome of legal consideration of the record as it existed at the time the IPJ was assigned to the case would be in her favor. Tomlinson testified in his 2003 deposition that if a testatrix intended to disinherit a living child, his consistent practice was to address both that child and also the deliberate act of disinheritance in the will. He did not recall that Theresa mentioned Mabel to him when he prepared the Will, and he did not include mention of Mabel in it, contrary to his practice. Indeed, it is only to escape the consequences of Tomlinson's 2003 testimony and declarations that Appellant promotes reinstatement of the 2002 Order. To explain why the

affirmation of the 2002 Order assumed by Appellant would not necessarily result from application of law to the record when the IPJ acquired it, we address below: (1) the test for testamentary capacity; (2) the record available at the time of the 2002 Order; (3) the 2002 Order's construction of that record evidence; and (4) the subsequent changes in record information generated by Judge Hammett's 2003 orders.

(1) The Test. The "correct standard of proof for determining issues related to testamentary capacity is preponderance of the evidence." *Estate of Rose Medicine Elk,* 39 IBIA 167, 171 (2003). In *Estate of Adams*, 39 IBIA at 33, we explained:

> The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will. *Estate of Leon Levi Harney*, 16 IBIA 18, 20 (1987). To invalidate a will for lack of testamentary capacity, a will contestant must show that the testator did not know the natural object of her bounty, the extent of her property, or the desired distribution. Further, the condition must be shown to exist at the time of execution of the will. *Estate of Fannie Pandoah Fisher Silver*, 16 IBIA 26, 28 (1988); *Estate of Samuel Tsoodle*, 11 IBIA 163, 166 (1983). . . . *See also Estate of Sallie Fawbush*, 34 IBIA 254, 258 (2000).

The "natural objects of [one's] bounty" are the decedent's "subsequent-born children." *Estate of Ronald Richard Saubel*, 9 IBIA 94, 106 (1981). A "will that disinherits the natural object of the testator's bounty should be scrutinized closely." *Id.* at 105. "[T]he testator's disinheritance of his heirs and blood relatives is not unnatural per se." *Estate of Joseph Red Eagle*, 4 IBIA 52, 60 (1975). But,

> *the testatrix had to know without prompting not only who were the natural objects of her bounty but also the nature and extent of the property* of which she was about to dispose, and the consequences of the dispositions . . . . The *requisite mental capacity which a testator must have to make a valid disposition of his property is the ability to remember, at least in a general and approximate way, the nature and extent of his property, to recognize those who are the natural objects of his bounty, and to comprehend the nature of the testamentary act itself* . . . .

Id. (emphasis added, citation omitted). We will not upset a will's directive, even where one child benefits more than others or another is disinherited, where the evidence shows that a testator "remembered and discussed the personal situations of each of her children," and "had made a testamentary plan by which she wished to distribute her property . . . ." *Estate of Catalina Clifford*, 9 IBIA 165, 165 (1982); *Estate of Leona Hunts Along Hale*, 8 IBIA 8, 16 (1980).

(2) The 2002 Record. The record at the time of the 2002 Order contained testimony of Theresa's grandson (Delmar Colegrove) that he had attempted in 1992-93 to persuade Theresa to create a will, but that she refused. 1999 Tr. at 136. He testified that Theresa "had no recollection or understanding of what she owned," *id.* at 135, and eventually "would have nothing to do with it." *Id.* at 136-39. Theresa finally told Colegrove to make her will himself ("you do it"), but he explained that this was not possible. *Id.* at 140. Medical records from 1994 show that Theresa visited two different physicians, each time without recalling symptoms. 1994 Medical Records.

On February 21, 1994, Alfreda and Lott brought Theresa to Phillips' office to make a will. Note of Sharon Chestnut, Phillips's assistant, taking call and making appointment; 1999 Tr. at 44. Phillips testified that a receptionist brought Theresa into Phillips's private office, but that Theresa "sat mute in [the] office the entire time. She did not speak a word. . . . I tried to get her to talk to me. I tried to have her tell me her name. She would not answer. I tried to find out from her who her heirs were. She would not speak." *Id.* at 40. Phillips stated that the situation was unique for her, *id.* at 40-41, 44, and that she ended the meeting by delivering Theresa to her companions and "suggested that [Alfreda] take her to the Indian office where her records would be and see if they could do something for her," *id.* at 41, but did not otherwise communicate with the companions. *Id.* at 42.

The next day, February 22, 1994, Alfreda and Lott took Theresa to Tomlinson, who also refused to prepare a will. He "provided a copy" of her trust property list and then:

> I stated that I observed that Ms. [Dick] did not seem to understand what was going on re her property and that the daughter [presumably, Alfreda] had indicated that she (testatrix) did not even know 2 of her children. I said I would be glad to speak to her privately when they came back, but that, in good conscience, I could not do a will for her if I did not feel she (testatrix) knew/was capable of making decisions about the distribution of her estate.

Documentation of Personal Visit, Feb. 22, 1994.

On April 14, 1994, Alfreda and Lott again took Theresa to Tomlinson at 11:00 a.m. Theresa stated that she wanted her entire estate to go to "Dutchie," and pointed her thumb at Alfreda to indicate who that was. Tomlinson required Theresa to name the beneficiary. Alfreda drew up a list with five names on it, none of which, except Alfreda, represented Theresa's heirs at law, and Theresa pointed to Alfreda's written name. At Theresa's insistence, Alfreda stayed in the room against Tomlinson's "suggestion that no one be present at the time we discussed the scriving of her will, and she insisted that 'Dutchie' be present, along with a friend of the testatrix." Documentation of Personal Visit, Apr. 14,

1994. Tomlinson wrote that it was his "feeling that she understood what she was doing and was capable of making decisions as to her trust property." *Id.* Neither Theresa's actual trust property, nor the list of it, was mentioned in the Will or in Tomlinson's notes; the only property identified was a trailer which had belonged to Thelma. Theresa declined to identify an alternative beneficiary in the event of Alfreda's death. *Id.* When they left Tomlinson's office, Theresa gave the Will to Alfreda.

In their testimonies at the 1995-99 hearings, Alfreda and Lott denied having taken Theresa to make a will in February at all; claimed to have made one visit on April 14 to both Phillips and Tomlinson; denied that Tomlinson ever refused to make a will for Theresa; claimed that Theresa named all of her children to both Phillips and Tomlinson; and denied being present during the will-making process with Tomlinson or hearing the Will read or knowing its contents until after Theresa's death.

The will witnesses, Watkins and McNevins, signed standard form language in an Affidavit to Accompany Indian Will, that the "testatrix was not acting under duress, menace, fraud or undue influence of any person so far as we could ascertain and in our opinion was mentally capable of disposing of all her estate by will . . . ." 1994 Will, Affidavit, at 3. Watkins testified that Tomlinson asked her to witness the Will. 1999 Tr. at 19. Tomlinson's routine procedure was to "introduce [a testator] to us and . . . give us a few minutes to get acquainted and . . . then, you know, the casual talk." *Id.* at 20. "It could have been about the weather." *Id.* at 24. The witnesses were unaware of the Will's content. *Id.* Watkins stated both that she did and did not recall Theresa; she did not recall any conversation they had, but testified that her notes did not indicate a problem. *Id.* at 28-29, 31. McNevins recalled being introduced to Theresa, 1999 Tr. at 54, but recalled no specific conversation. *Id.* at 55, 58-59.

(3) The 2002 Order. Judge Hammett's 2002 Order questioned Alfreda's credibility. Nonetheless, he relied on critical record facts in support of the conclusion that Theresa had testamentary capacity: (a) on April 14, 1994, Tomlinson prepared the Will and stated his "feeling" that Theresa knew "what she was doing" and was "capable of making decisions" about her trust property; and (b) the Will witnesses testified that they had no concerns.[10]

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[10] A self-proving affidavit is intended to take the place of witness testimony in cases where a will is uncontested. 43 C.F.R. § 4.233(a) (2004). When a will is contested, however, as in this case, the testimony of witnesses becomes necessary, and the self-proving affidavit no longer serves its intended purpose. *Estate of Fawbush*, 34 IBIA at 257 n.7.

(4) The Record as Supplemented by Judge Hammett. The record available in 2005 when Judge Hammett died and the IPJ took the case included the testimony of Tomlinson — an indispensable witness as characterized by Judge Hammett — in the form of his deposition and two declarations. Tomlinson made clear that he did not recall being aware that Theresa had a living child (Mabel) when he drafted the Will and would not have prepared the Will as he did had he known Mabel was alive. This testimony potentially undermined his "feeling" in 1994 that Theresa had testamentary capacity. Moreover, Tomlinson's 2003 evidence further undermined Alfreda's credibility.[11]

Tomlinson testified that he did not recall being aware of Mabel's existence at either 1994 meeting with Theresa, Alfreda, and Lott. Tomlinson Deposition Tr., Sept. 17, 2003, at 61-63, 69. Had he known of Mabel's existence, he said, he would not have considered Theresa to be competent. *Id.* at 70. Tomlinson challenged Alfreda's professed ignorance of the Will's terms, because she "was there the entire time and understood everything about it because we discussed it openly." *Id.* at 33, 36. He confirmed *two* visits made by Alfreda, Lott, and Theresa to his office, and described Alfreda's and Lott's denials as "untrue." *Id.* at 32-34. Tomlinson's declarations described his routine practices of requiring testators to identify surviving children and of naming them in a will; noted that Alfreda stayed in the room when the Will was prepared; asserted that "Mabel Colegrove was not in the mind of Theresa Dick on April 14, 1994"; and concluded that the Will should be set aside and that an injustice had occurred. Tomlinson Declaration, Sept. 26, 2003, at 10, 12; Tomlinson Declaration, Mar. 7, 2003.

Tomlinson's 2003 declarations and deposition thus potentially undermined any reliance Judge Hammett placed on Tomlinson's 1994 "feeling" about Theresa's testamentary capacity. By reiterating what he consistently did to ensure that a testator understood the objects of his or her bounty 100 percent of the time, Tomlinson revealed that he failed to accomplish this goal with respect to Theresa. Theresa had to "know . . . the natural objects of her bounty." *Estate of Joseph Red Eagle*, 4 IBIA at 60. Tomlinson did not verify that Theresa knew her living children in April, and his 2003 testimony showed that he came to believe she did not. Theresa had to know this "without prompting." *Id.* Yet, Tomlinson permitted a process to figure out if Theresa knew "Dutchie's" real name whereby Alfreda created a self-serving list that included no persons to whom Theresa might

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[11] The Will opponents also proffered both a letter of Dr. Worth dated March 17, 2003, in which he concluded based on his 5 years of treating Theresa that she was no longer competent, and the 1993 videotape of Theresa. Though Judge Hammett determined not to consider such evidence, no final decision on the Petition for Rehearing had been rendered when the IPJ took the case.

have otherwise wanted to leave her property. A testator had to know the "the nature and extent of the property of which she was about to dispose." *Id.* It is unclear whether Tomlinson was aware of the nature of Theresa's trust property, or used her property list to ascertain it in April, despite the fact that he *did* document giving her a list in his notes of the February visit.[12] A testator had to know "the consequences of the dispositions which she was making." *Id.* The deposition revealed that Tomlinson had neither understood the consequences nor addressed them with Theresa. Whether or not he believed on April 14 that Theresa was competent to execute a will, his 2003 testimony presented no credible explanation for that point of view other than his failure to inquire.

Faced in 2002 with only Tomlinson's 1994 notes, which he saw as "meticulous," Judge Hammett believed that Alfreda's credibility issues were not critical, and Tomlinson's credibility was unassailed. But neither judge could have ignored the challenge to both credibility findings presented by Tomlinson's testimony without "abusing his discretion . . . by relying solely upon the testimony of witnesses who stood to gain by approval of the will." *Estate of Oskolkoff*, 37 IBIA at 299. In his 2003 Order, Judge Hammett revealed that he understood that his credibility determinations must be revisited when he directly advised the parties of his intention to reevaluate witness credibility and told the Will opponents to brief the issue. Normally, we rely on the credibility determinations of the ALJ. *Estate of George Dragswolf, Jr.*, 30 IBIA 188, 193 (1997) (citing *Estate of Donald Paul Lafferty*, 19 IBIA 90 (1990)). But in this case, Judge Hammett had already revealed his intention to revisit those determinations after accepting Tomlinson's "indispensable" testimony.

A factfinder could reasonably determine that this evidence undercut Judge Hammett's 2002 Order with respect to Theresa's "requisite mental capacity" to execute a will. *Estate of Red Eagle*, 4 IBIA at 60. Neither judge could have ignored the post-2002 information in considering whether the Will opponents met their burden of proof. It follows that if Judge Stancampiano had determined not to grant a hearing de novo, he would have examined the record before him at the time he considered the briefing on the Petition for Rehearing, and that record shows that the 2002 Order could not have been reinstated as final. Thus, it would be plain error for us to grant Appellant's requested relief, and we could reject her appeal on this basis alone and affirm the IPJ's ultimate conclusion based on Appellant's failure to satisfy her burden of proof.

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[12] It is not clear that in April 1994 Tomlinson remembered the February visit or consulted his notes. Had he looked at his previous notes concluding that Theresa was unable to prepare a will, unaware of her trust property, and uncomprehending of her own children, it would have been incumbent upon him to inquire as to why he thought Theresa's situation had changed.

II. We Reject Appellant's Challenges To Judge Stancampiano's Rulings.

We nonetheless turn to Appellant's arguments against Judge Stancampiano's Final Decision, if for no other reason than to clarify that we affirm it based on his findings regarding undue influence. We explain what in the Final Decision we explicitly affirm and our responses to Alfreda's arguments.

A. Judge Stancampiano Did Not Commit Error In Ordering a Hearing De Novo.

Appellant claims that the IPJ erred in conducting a de novo hearing, stating that doing so in 2006, 12 years after Decedent's death and 7 years after the last hearing, placed her at a substantial disadvantage. She attempts to refute the cases relied on by the Youcktons' attorney in support of a de novo hearing. Opening Brief at 9-15 (citing *Gamble-Skogmo, Inc. v. FTC*, 211 F.2d 106 (8th Cir. 1954); *Van Teslaar v. Bender*, 365 F.Supp. 1007 (D. Md. 1973); *Art National Manufactuers Distributing Co. v. FTC*, 298 F.2d 476 (2nd Cir. 1962); and *Knott Co. v. Chesapeake & Potomac Telephone Co.*, 772 F.2d 78 (4th Cir. 1985)). Alfreda argues that the alleged error presented by de novo review was that it deprived her of credibility findings made by Judge Hammett and "those fresh evaluations of credibility of witnesses would be lost forever." Opening Brief at 12.[13]

We have two difficulties with Appellant's argument. First, it depends entirely on her presumption that Judge Hammett's 2002 Order was his final decision. She claims that, forced through a de novo hearing, she lost the benefit of credibility determinations in the 2002 Order. But that loss occurred when Judge Hammett himself determined that he must entertain additional evidence and *witness credibility* arguments in his 2003 Interim Order and 2003 Order as part of his review of the Petition for Rehearing. Second, her argument presumes that she had a right to retain Judge Hammett's other factual findings. Again, that decision never became final and Appellant misses the point of his 2003 rulings, which was to receive additional evidence and briefing. In any event, to the extent her argument is based on a claim that Judge Stancampiano's January 20, 2006, Order Granting Rehearing De Novo denied her due process, she has not supported that claim. The existence of her right of appeal to this Board has solved any such problem. *Quantum Entertainment, Ltd. v. Acting Southwest Regional Director*, 44 IBIA 178, 208 (2007) ("appellant's due process

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[13] Judge Hammett made only two credibility determinations in the 2002 Order. First, he stated that the "record does contain some reason to question the credibility of some of the statements made by Alfreda LaBonte." 2002 Order at 15. Second, he asserted that Tomlinson's 1994 notes were "credible because they come from a disinterested party." *Id.* As noted above, Judge Hammett signaled his intention to reexamine those findings.

rights are protected by the right to appeal a BIA decision to this Board"), and cases cited therein.

Judge Stancampiano had considerable discretion in deciding whether to grant a de novo hearing. 43 C.F.R. § 4.241(d)(3) (2005). Under that rule, he was allowed to "reconsider, with or without a hearing as he shall determine" a petition for rehearing. Considering the fact that Judge Hammett did, in fact, deny certain Will opponents a right to present their cases in opposition to the Will in 1999 and failed to receive the testimony of the "indispensable" will scrivener, we find no reason to question the IPJ's exercise of discretion. Appellant's problem was that the Will opponents ultimately were convincing, not that the IPJ granted the hearing. We reject this argument.

B. The IPJ Committed No Error By Failing to Adopt a Settlement Prior to Decision.

Appellant argues that the IPJ committed error because he should have enforced the partial settlement agreement adopted conditionally by Judge Hammett in 2004, or a subsequent one the settling parties entertained in 2006. As we understand Appellant's argument, she believes that the IPJ should necessarily have adopted the partial settlement reached among all family members except the Youcktons and Vitalis, because those who had agreed to settle considered the matter finished. We give short shrift to this argument. Judge Hammett expressly conditioned his approval of a settlement on protecting the non-settling parties' interests in the remainder of the estate and their share of the burden of fees and costs. Appellant fails to support her contention with a settlement agreement in which these conditions were resolved prior to the one submitted to Judge Gordon in 2007 and approved by the Board in 2008. Accordingly, we deny this assertion as well.[14]

C. We Uphold the IPJ's Holding That Theresa Was Subject To Undue Influence.

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

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[14] Given that the Youcktons never settled, Appellant fails to show how the outcome would have been different had the IPJ accepted a partial settlement. The rehearing proceedings would have persisted and would have been decided by the IPJ. The only difference that we can imagine is that, had the the parties entered into a binding settlement that resolved Judge Hammett's conditions prior to the 2006 hearing , Knodel would not have appeared because he represented settling parties and the Youcktons were represented by Goddard. Appellant has no entitlement to a hearing in which her opponent is represented by a non-attorney.

influence, a will opponent must normally meet a stringent four-part test, which requires the opponent to provide proof of the exertion of undue influence. *Estate of Lyman Z. Penn*, 46 IBIA 272, 280 (2008). But in "cases 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). A three-part test establishes that the presumption of undue influence applies 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 such cases, the "burden shifts [from the will opponents] to the will proponents to show that the testator was not subjected to undue influence." *Id.* (citing, *inter alia, Estate of Ray*, 33 IBIA at 96). To rebut the presumption, "the will proponent must show an objective, independent person thoroughly discussed the effect of the will with the testator." *Estate of Jessee Pawnee*, 15 IBIA 64, 69 (1986).

Appellant contends that the IPJ erred in applying the first element of this test because a confidential relationship requires the testator to have treated the person in confidence "like her attorney" or else have given her a controlling financial role. Opening Brief at 19-20. Appellant denies that the second part of the test — active participation in preparation of the will — was met because she contends that Board cases applying it require that the influencing party participate to the point of writing, preparing and witnessing the will. *Id.* at 24 (citing *Estate of Parker*, 27 IBIA 271, and *Estate of Ely*, 20 IBIA 205).

We reject Appellant's suggestion that our precedent requires a finding of either financial control or quasi-attorney/client relations to establish a "confidential relationship." The Board's decisions clearly have found a confidential relationship in such circumstances. For example, in *Estate of Joseph Poolaw,* 18 IBIA 358, 363 (1990), we held: "Questions concerning confidential relationships arise most often where a will proponent has had control over the decedent's finances, such as under a power of attorney or a guardianship. *See Estate of [Virginia Enno] Poitra*, 16 IBIA [32,] 37 [(1988)]." And, in *Estate of Ely*, 20 IBIA at 208, the Board discussed powers of attorney and financial control as relevant to a finding of a confidential relationship. But we have not insisted that these factors be the only relevant ones.[15] In *Estate of Ray*, the Board noted that to assess the existence of a

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[15] To the contrary, in past cases this Board has found a confidential relationship merely where the influencing party was the "payee" of money from decedent's financial account so that the payee could pay the testator's bills. *Estate of Charles Webster Hills*, 13 IBIA 188, 194-95 (1985). In *Estate of Philip Malcolm Bayou*, 13 IBIA 200, 207 (1985), we explained that the "rebuttable presumption of undue influence exists in order to prevent persons in

(continued...)

confidential relationship, the Board pays "particular attention to relations involving financial matters." 33 IBIA at 97. Where no financial relationship existed, we went on to examine "another kind of confidential relationship" based on the facts there that the person in confidence engaged in actions to prepare the will in question that "were similar to those of an attorney." *Id.* at 98. Thus, a confidential relationship is determined on a case-by-case basis. *Id.* (citing *Estate of Pawnee*, 15 IBIA at 68 n.6). Appellant suggests that prior to *Estate of Ray*, the Board required a "fiduciary relationship" and that *Estate of Ray* was a departure from precedent that had previously compelled that the relationship be "rooted in finances or law." Opening Brief at 19-20. We do not find Appellant's proffer of these prescribed tests to be accurate, either with respect to *Estate of Ray*, or its roots.[16]

Thus, contrary to Appellant's insistence, Opening Brief at 20, we do not find our case law to require Alfreda to have been Theresa's attorney, payee, or legal guardian; to have held a power of attorney for Theresa; or to have drafted or witnessed the Will in order for a confidential relationship to be found. These factors are important. But the IPJ noted Decedent's frail state and her dependence and reliance on Alfreda for her daily needs, a situation in which the presumption exists "to prevent persons in whom a testator would normally repose trust from using that trust to their own personal advantage." *Estate of Bayou*, 13 IBIA at 207. Alfreda herself testified that she moved in with her grandmother to care for her; that Theresa delivered the Will to Alfreda for safekeeping; and that Theresa relied on Alfreda to handle things for her. We find this situation little different from that in *Estate of Parker*, where decedent was elderly, incapacitated, and entirely dependent on the persons of confidence for the vast majority of daily tasks. The difference here is that the record reflects that Alfreda was in charge of Theresa's care, and assumed control of her care *before* a will was ever pursued, whereas in *Estate of Parker* the will was prepared years before

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[15](...continued)
whom a testator would normally repose trust from using that trust to their own personal advantage." It is raised when "a special confidential relationship, particularly one involving financial matters, is shown to exist . . . ." *Id.*

[16] In *Estate of Parker*, 27 IBIA at 272, the probate judge had found a confidential relationship where decedent was "elderly and partially incapacitated" and relied on the persons in confidence for the "vast majority of her needs," including financial arrangements. This Board reversed. The record showed that the testator had suffered a stroke but was otherwise "very strong willed, clear of mind and capable of performing many tasks for herself." *Id.* Most importantly, the will was executed in 1976 — 13 years *before* decedent moved to a nursing home and became financially dependent on the beneficiaries of her will.

the confidential relationship was established. We find that the law and the record support the IPJ's determination that a confidential relationship existed between Alfreda and Theresa.

Likewise, we find no error in his ruling that Alfreda actively participated in procuring the Will. Again, Appellant relies on *Estate of Ray* for her argument, noting that the person in confidence in that case actually wrote the will, signed it as a witness, and read it back to the testator. She contends that active participation therefore requires those precise facts.

We disagree. While our cases on this topic are few in number, their limitations on a finding of active participation are also few. In *Estate of William Cecil Robedeaux*, 1 IBIA 106, 126 (1971), we stated that driving the decedent to procure a will was not enough to show "active participation" in its preparation "in the absence of evidence showing that the testator went there at such person's instigation, and that the testator was not in acting in accordance with his own desires." Here, the facts show that Theresa had no desire to prepare a will until Alfreda moved in with her and drove her, with Lott, on three different trips to prepare one. In *Estate of Parker*, 27 IBIA at 272-73, like here, the person of influence drove the testator to procure a will and sat in on the interview process at the direction of the testator. But there, the person in confidence "did not speak one word during the testamentary discussions." *Id.* at 273. Here, Alfreda wrote a list of people to prompt Theresa to remember her name. We agree with the IPJ that this constituted active participation. We conclude that: when a sole beneficiary of a will repeatedly urges a testator to have a will made and drives the testator on three different dates to two unrelated and disinterested will scriveners; where the beneficiary remains in the room and listens to the will scrivening process; and when the testator cannot remember her name and she (the beneficiary) writes it down for the testator on a list with the names of non-heirs at law, the beneficiary has crossed a line from inactive participation to active participation in preparation of the will, and the presumption of undue influence is established. Finally, Appellant has not rebutted the presumption by showing that "an objective, independent person thoroughly discussed the effect of the will with the testator." *Estate of Pawnee*, 15 IBIA at 69. We find no error in the IPJ's analysis of undue influence.[17]

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[17] Appellant complains that the IPJ relied on 79 Am. Jur. 2d *Wills* to reach his conclusion. We have not needed to do so to reach our own conclusion. In any event, from its inception to the present, this Board has relied on the applicable edition of *American Jurisprudence* for general principles of law, and we address that argument no further. *See, e.g., Estate of Edward Benedict Defender*, 47 IBIA 271, 286 (2008) (citing 23 Am. Jur. 2d *Descent and Distribution* and 80 Am. Jur. 2d *Wills*); *Estate of Loretta Pederson*, 1 IBIA 14, 17 (1970) (citing 57 Am. Jur. *Wills*).

D. We Do Not Affirm The Final Decision In Its Entirety.

Our decision to affirm the Final Decision is confined to Judge Stancampiano's ruling on undue influence. Appellant argues that Theresa's testamentary capacity must be accepted as a "verity." We decline to rule on the IPJ's discussion of Theresa's testamentary capacity. Alfreda prevailed on this issue, and thus had no reason to challenge the ruling. Because the Will opponents prevailed on the outcome, albeit on the alternate ground of undue influence, they had no reason to appeal his holding on testamentary capacity. The lack of a challenge to the IPJ's holding by a party who otherwise won its case does not make that holding a verity, and the Board's rules do not establish a procedure for cross-appeals that would have put the Will opponents on notice that they could have sought review of that conclusion. Given that the portion of the IPJ's decision that addressed testamentary capacity has not been appealed to the Board, and given the Board's decision today affirming Judge Stancampiano's ruling on the topic of undue influence, we do not reach the issue of Theresa's testamentary capacity.

If that issue were to be resurrected for any reason, the Will challengers would then have the opportunity to appeal and brief their position regarding Judge Stancampiano's determination. Without expressing an opinion on the merits, we note that there are several grounds on which Judge Stancampiano's determination might be challenged. For example, the IPJ described a test for testamentary capacity in which he cited Decedent's inability to remember a natural object of her bounty — her living child — as potentially "irrelevant" due to the facts that so many of her children had died and that her living lineal descendants were numerous. Additionally, the IPJ equated the test for testamentary capacity with the need for a documented medical diagnosis of Theresa's mental health in April 1994. Final Decision at 72; *see Estate of Penn*, 46 IBIA at 279 (discussion of diagnosis in testamentary capacity analysis); *Estate of Poitra*, 16 IBIA at 36 (same). Further, the IPJ relied on Tomlinson's description of his 1994 notes, without addressing the effect on their weight when considered with other evidence put forth by Tomlinson between 1994 and 2006. Final Decision at 69; *see Estate of Pawnee*, 15 IBIA at 68-69 (analysis of will scrivener's actions). Other issues arguably could be raised in a challenge to Judge Stancampiano's holding on Theresa's testamentary capacity.

Accordingly, we affirm that part of the Final Decision in which Judge Stancampiano addressed undue influence. We need not and do not reach the merits of his ruling on Theresa's testamentary capacity.

E. Appellant's Additional Arguments Are Unavailing.

We address two final points raised by Appellant. First, Appellant cites the "so-called 'Deadman's Statute' of the State of Washington, RCW 5.60.030," and claims that the IPJ

repeatedly considered evidence in violation of it. Opening Brief at 26. In the absence of any discussion of specific testimony that Appellant claims was improperly relied on and to which she interposed a timely objection, we find it impossible to address Appellant's argument or guess at her complaint. In any event, that provision governs the taking of evidence and addresses parties in interest and their testimony; it asserts that one "shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with" a deceased person. It was briefed by the parties to the IPJ; counsel for the Will opponents submitted a brief on the topic to which Appellant did not present response. Will Contestant Boyd Colegrove's Brief on the Deadman's Statute, August 2006. Given the testimony proffered by Alfreda on her own behalf as to "transactions with" Theresa and her failure to identify specific testimony that she contends was improperly allowed, we are unwilling to guess how she believes this argument could possibly assist her appeal, and address it no further.

Second, Appellant complains that the IPJ committed legal error by refusing to consider the parties' arguments that were not documented with citation. Any problem, however, was solved by Appellant's right of appeal. To prove her case, Appellant was obligated to show a legal error that was committed by the practice, and that would change the outcome. For example, it was incumbent upon her to show to this Board that the IPJ would have ruled differently if only a particular citation she could have cited had been considered. She does not do so. Appellant's only argument is that the outcome was "resulting confusion and uncertainty." Opening Brief at 26. There is nothing confusing or uncertain about the outcome; the Will proponent did not prevail. Any other issues were available to be solved by detailed arguments on appeal that she did not make.

Appellant bears the burden of showing that an order on rehearing is in error. *Estate of Verna Mae Pepion Hill Hamilton*, 45 IBIA 58, 63 (2007). Appellant has not met this burden and thus we affirm.

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, and on the grounds stated in this decision, we affirm the April 9, 2007, Final Decision on Rehearing to disapprove Decedent's Will.

In our Order adopting Judge Gordon's Recommended Decision on Final Settlement, dated November 28, 2007, the Board authorized the immediate distribution of that portion of Theresa's estate that was settled, and ordered the retention of the remaining portion of her estate pending this Board's final decision with respect to the appeal. Order Adopting Recommended Decision and Approving Partial Settlement, Apr. 9, 2008.

Therefore, we now order the distribution of the remainder of Theresa's estate in accordance with the terms of Judge Gordon's Recommended Decision, at pages 18, 22-23. The following chart identifies the proper distribution of the remainder of Theresa's estate:

1. Alfreda LaBonte	Granddaughter	3/25
2. William Vitalis	Great-grandson	1/25
3. Rodney Youckton	Grandson	3/25
4. Winona Youckton	Granddaughter	3/25
5. Arland Youckton	Grandson	3/25
6. Theresa Youckton	Granddaughter	3/25
7. Jessica Goddard	Granddaughter	3/25
8. Stanley Youckton	Granddaughter	3/25
9. Vanessa Youckton	Granddaughter	3/25.

I concur:

// original signed
Lisa Hemmer
Administrative Judge*

// original signed
Debora G. Luther
Administrative Judge

*Interior Board of Land Appeals, sitting by designation.