



INTERIOR BOARD OF INDIAN APPEALS

Estate of Aloysius Plainfeather

56 IBIA 154 (02/05/2013)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF ALOYSIUS)	Order Affirming Decision
PLAINFEATHER)	
)	Docket No. IBIA 11-052
)	
)	February 5, 2013

LuJuana Plainfeather (Appellant) appealed to the Board of Indian Appeals (Board) from an Order Modifying Decision After Rehearing (Rehearing Order) entered on December 28, 2010, by Indian Probate Judge (IPJ) Albert C. Jones in the estate of Aloysius Lee Plainfeather (Decedent).¹ The IPJ’s Rehearing Order modified his September 3, 2008, decision (Decision), in part, to distribute a share of Decedent’s estate to Doris Stewart (Stewart), as Decedent’s surviving spouse, who was omitted from Decedent’s will. The IPJ gave effect to the will, subject to Stewart’s right to receive a share of Decedent’s estate pursuant to protections for pretermitted (i.e., omitted) spouses in the American Indian Probate Reform Act of 2004 (AIPRA), 25 U.S.C. § 2206(j)(2)(A)(iii). Appellant, Decedent’s oldest daughter, contends for the first time on appeal that Stewart and Decedent were not married at the time of Decedent’s death, and that therefore Stewart has no inheritance rights as a pretermitted spouse under AIPRA.

We conclude that because Appellant could have but did not make her arguments to the IPJ, she waived them. If we reached the merits, we would also find that Appellant did not meet her burden to demonstrate that the IPJ’s Rehearing Order was erroneous. Therefore, we affirm the IPJ’s December 28, 2010, Rehearing Order.

Factual Background

Decedent was born on September 28, 1939, and died testate on June 18, 2007. Decedent was survived by three biological daughters who were not born to Stewart: Appellant, Mary Gayton, and Christie Medicine Tail, who was adopted out. Decedent was

¹ Decedent was a Crow Indian and his case was assigned Probate No. P000062322IP in the Department of the Interior’s probate tracking system, ProTrac. Several documents in the Probate Record (PR), including the Rehearing Order, spell Decedent’s first name “Aloyisius.” Decedent’s birth and death certificates, and his will and signature, spell his name “Aloysius.”

also survived by a biological son, Lee Tanner Plainfeather (Tanner), born to Stewart, as well as a total of 12 grandchildren and great-grandchildren.²

Decedent executed his will on June 22, 2004. The will provided for Decedent's estate to be distributed, after payment of his debts and last expenses, among his son, grandchildren, and great-grandchildren. *See* Will at 1-2 (unnumbered) (PR Tab 13). The will did not mention Stewart or Decedent's daughters.

In the probate proceedings, the IPJ appointed Appellant to represent the interests of two of Decedent's grandchildren (Darian Smart Enemy and Jimi The Boy) as guardian ad litem. *See* Appointment Orders, Aug. 4, 2008 (PR Tab 22). Before the proceedings commenced, the Bureau of Indian Affairs (BIA) issued a notice, listing both Stewart and Appellant as "probable heirs or beneficiaries," that Decedent's probate documents had been referred to the IPJ for review and decision. Referral Notice, Apr. 24, 2008, at 1-2 (unnumbered) (PR Tab 11). Thereafter, Stewart and Appellant were listed on the probate service list.

On August 12, 2008, the IPJ commenced the first of three hearings to probate Decedent's estate. Stewart, Tanner, and Appellant attended. *See* First Hearing Transcript (Tr.), Aug. 12, 2008, at 2-3 (added to record).³ Stewart introduced herself as "Doris Stewart Plainfeather. I'm the wife." *Id.* at 3. The IPJ and Appellant then had this exchange regarding Decedent's marital history:

Q: Lujuanna, I'm going to direct my questions to you. If anyone else has any information in addition to or different from what Lujuanna has, is going to testify to, then I'll take your testimony later. . . .

Q: [BIA] reported that [Decedent] was married twice in his lifetime, once to Carlene Steel. Is that correct?

[Appellant]: Yes, it is.

Q: And were they divorced?

² Darian Smart Enemy; Jimi The Boy; Edward Gayton, Jr.; Skylar Monroy; Debra LaRance; Sunnie LaRance; Kobe Big Lake; Darnell Not Afraid; Harmonii Not Afraid; Chelsey Not Afraid; Cedric Big Lake; and Kodi Big Lake. *See* Grandchildren's and Great-grandchildren's Birth Certificates (PR Tab 28).

³ The Board issued an order for the IPJ to have transcripts of the three probate hearings prepared and forwarded to BIA, Land Titles and Records Office (LTRO), for addition to the PR, and for LTRO to submit that complete PR to the Board. On May 26, 2011, the Board received the PR without any of the transcripts. The Board received the three transcripts on June 14, 2011, and added them to the PR.

[Appellant]: Carlene was, they were divorced.

Q: Okay. Was he married to Doris Stewart?

[Appellant]: Yes, he was.

Q: Okay. And Doris is here today. Correct?

[Appellant]: Yeah.

Q: In fact, I've got a Certificate of Marriage showing that they were married on February 27, 2002.

Id. at 3-5; *see* Marriage Certificate (PR Tab 6). Appellant also testified that she did not object to the will, that Tanner is Decedent's son, and that she had provided the names of Decedent's grandchildren and great-grandchildren (who were not identified by name in the will) to BIA. *See* First Hearing Tr. at 5, 9-10. No issue was raised concerning whether Stewart and Decedent were ever divorced.

Consistent with this testimony, the IPJ's September 3, 2008, Decision found: "Decedent was married twice in his lifetime. His first marriage to Carlene Steele terminated by divorce in 1980. His second marriage was to Doris Stewart. Doris survived the Decedent." Decision at 1 (PR Tab 23). The IPJ approved the will and found that Tanner is Decedent's son, as identified in the will. *See id.* at 1, 3.⁴

The IPJ ordered Decedent's trust personalty and trust or restricted property to be distributed according to the will's terms, after payment of Decedent's debts and last expenses,⁵ as follows: Allotment No. 3423 to Tanner; all of Decedent's remaining trust or restricted property to be shared equally among six named grandchildren (those whom BIA had reported to the IPJ at the time); and the rest and residue of the estate, real, personal, and mixed, to Tanner. *See id.* at 3-4.

Appellant petitioned for rehearing on the grounds that some of the rightful heirs—i.e., additional grandchildren or great-grandchildren—had been omitted from the Decision. *See* Rehearing Petition, Nov. 3, 2008 (PR Tab 25). Appellant also asked to "dispute" some

⁴ Two marriage certificates are contained in the Probate Record at Tab 6. Both state that Stewart and Decedent were married on February 27, 2002, however, one of the certificates states that this marriage was Decedent's fourth, with his last marriage ending by divorce on April 17, 1991. We do not need to resolve how many times Decedent was married prior to 2002; the relevant issue in this appeal is Appellant's claim that Stewart and Decedent were not married at the time of his death in 2007.

⁵ The IPJ approved in part a claim by Dahl Funeral Chapels against the estate (after denying an unsubstantiated estate charge). *See* Decision at 4-6.

of the names included in the decision, stating that she was preparing and would submit a “corrected list.” *Id.*

On December 11, 2008, the IPJ ordered rehearing to consider Appellant’s challenge to the inclusion of certain named heirs, and the omission of other heirs, in the list of Decedent’s grandchildren and great-grandchildren. *See* Order Granting Rehearing at 1-2 (PR Tab 26). The IPJ ordered Appellant to submit, “within 20 days, the names of those individuals she intends to contest.” *Id.* at 2. Appellant did not provide those names.

On March 9, 2009, the IPJ granted a motion for continuance by Stewart and Tanner to obtain counsel. *See* Order Granting Continuance (PR Tab 28). The next day, Stewart’s and Tanner’s counsel submitted a notice of appearance. *See* Notice of Appearance, Mar. 10, 2009 (PR Tab 28).⁶ On April 9, 2009, the IPJ gave notice of a supplemental hearing to be held on May 18, 2009, to consider the heirship issues raised in Appellant’s petition for rehearing. *See* Second Hearing Notice, Apr. 9, 2009 (PR Tab 28). Appellant did not attend the hearing. *See* Second Hearing Tr., May 18, 2009, at 2 (added to record).⁷

At the second hearing, however, Stewart’s counsel suggested that Stewart was a pretermitted spouse and that she should be treated for purposes of inheritance as though there was no will, pursuant to AIPRA, 25 U.S.C. § 2206(j)(2)(A)(iii). *See* Second Hearing Tr. at 9-14. The IPJ replied: “Interesting argument. I don’t think we can []entertain that today. Lujuanna’s not present, and I’m unwilling to continue this to give you an opportunity to present some evidence.” *Id.* at 14. The IPJ requested Stewart’s counsel to submit a brief on the issue prior to the next supplemental hearing. *See id.*

On July 2, 2009, the IPJ gave notice that the next supplemental hearing was to be held on August 5, 2009. The notice included the statement that “[f]ailure to appear may result in loss of rights by default.” Third Hearing Notice, July 2, 2009 (PR Tab 28). Before the hearing, on July 31, 2009, counsel for Stewart filed, and mailed to Appellant, a Motion for and Brief in Support of Order Granting Life Estate to Pretermitted Spouse (Stewart’s Br.) (PR Tab 28). Stewart asked the IPJ to grant her 1/3 of Decedent’s trust personalty, if any is available after paying properly submitted claims, and a life estate without regard to waste in Decedent’s interests in trust or restricted lands that amount to

⁶ Throughout the proceedings, Stewart and Tanner have been represented by the same counsel, and pleadings concerning Stewart’s claim have been filed on behalf of both. For convenience, we refer to counsel’s representation and the pleadings as for Stewart because of the nature of the claim.

⁷ The hearing transcript incorrectly identified the date of the second hearing as May 17, 2009, *see, e.g.*, Second Hearing Tr. at 1, which was a Sunday.

5% or more of the undivided ownership interest of each parcel. *See* Stewart’s Br. at 5, 9 (citing § 2206(a)(2)(A)(i) (rules governing descent of estate to surviving spouse in the absence of a will), made applicable to pretermitted spouses married at the time of the will under § 2206(j)(2)(A)(iii)).

Stewart argued that § 2206(j)(2)(A)(iii) applied because she and Decedent married in 2002, before Decedent executed his will in 2004; they remained married at the time of his death; and other requirements in AIPRA for including her as a pretermitted spouse were satisfied. *See* Stewart’s Br. at 3-6.⁸

In support of her motion, Stewart submitted an affidavit dated July 31, 2009, in which she stated—under penalty of perjury—that “Decedent and I were married on February 22, 2002, and remained married, without legal separation, until decedent’s death on June 18, 2007.” Stewart Affidavit (Aff.) at 1 (Stewart’s Br., Ex. A).

On August 3, 2009, Appellant asked the IPJ for a 30-day continuance “to gather and submit additional supporting documentation regarding [Decedent’s] estate . . . [by] September 5, 2009.” Appellant’s Continuance Motion (PR Tab 28). Stewart, Tanner, their counsel, and Christie Medicine Tail (Decedent’s adopted-out daughter) attended the third hearing on August 5, 2009, but Appellant did not. *See* Third Hearing Tr., Aug. 5, 2009, at 2 (added to record). At the third hearing, the IPJ orally denied Appellant’s request for a continuance. *See id.* at 6. The IPJ also stated that he would take Stewart’s motion under advisement and rule on it. *See id.* at 21. The record does not contain any evidence that Appellant objected to, or raised any questions about, Stewart’s motion to be added as a beneficiary pursuant to AIPRA.⁹

⁸ Specifically, Stewart asserted that she met two (of four) independent conditions for satisfying § 2206(j)(2)(A)(iii): Stewart and Decedent were continuously married for the 5-year period preceding Decedent’s death; and Stewart and Decedent share a surviving child, Tanner, who is the child of Decedent. *See* Stewart’s Br. at 3-5 & Ex. A at 1. Stewart also asserted that Decedent did not provide for her outside of the will. *See* Stewart’s Br. at 3, 6 & Ex. A at 2.

⁹ According to email correspondence among BIA staff, Appellant visited BIA, Crow Indian Agency, on September 2, 2009. *See* Email from Janice Morning to Alfredine Snell, Sept. 3, 2009 (PR Tab 28). There, Appellant “explained that she called the [Office of Hearings and Appeals] in Billings, and was informed that all the [IPJ] needed was a list of the grandchildren which she claim [sic] she had already given to you and to the [IPJ]. . . . Also, [Appellant] claims [the IPJ] is giving her up until Friday September 4, 2009, to provide a list.” *Id.* at 1.

On December 28, 2010, the IPJ issued the Rehearing Order from which Appellant appeals. The IPJ found that his original decision incorrectly omitted two grandchildren and four great-grandchildren, and he added them to the list of those entitled to share in the will. *See* Rehearing Order at 3, 6-7 (PR Tab 28). The IPJ declined to remove any of the six grandchildren already named, finding that Appellant had not appeared at either of the supplemental hearings and had not presented any evidence to support removing them as heirs. *See id.* at 3.

Turning to Stewart’s motion, the IPJ found that Stewart met the definition of a pretermitted spouse set forth in § 2206(j)(2)(A)(iii). As relevant to this appeal, the IPJ found: “Doris Stewart and the Decedent were married on February 22, 2002, and remained married, without separation, until the Decedent’s death on June 18, 2007. The Decedent wrote his will during this time period, omitting Doris Stewart.” Rehearing Order at 3.¹⁰

The IPJ ordered Decedent’s estate to be distributed, after payment of his debts and last expenses, according to both AIPRA and the terms of the will as follows: a life estate without regard to waste (as defined in 25 U.S.C. § 2201(10)) in Allotment No. 3432 to Stewart, with the remainder to Tanner; a life estate without regard to waste in Allotment Nos. 202-M2046 and 202-M2108B to Stewart, with the remainder to be shared equally among the 12 grandchildren and great-grandchildren; and the rest and residue of the estate, real, personal, and mixed, to Tanner (except for Decedent’s date of death Individual Indian Money account balance to which Stewart and Tanner are entitled, to be split 1/3 to Stewart and 2/3 to Tanner). *See* Rehearing Order at 3-7.

This appeal followed. Appellant filed a notice of appeal but no opening brief. Stewart and Tanner jointly filed an answer brief. No reply brief was received from Appellant.

Discussion

I. Standard of Review

In *Estate of Dominic Orin Stevens, Sr.*, 55 IBIA 53, 62 (2012), we set forth our well-known standard and scope of review:

¹⁰ The IPJ also found that Stewart and Decedent have a surviving son, Tanner, and that prior to Decedent’s death Decedent did not transfer funds or property outside the will provisions. *See* Rehearing Order at 3-4. Neither of these findings is disputed by Appellant.

The Board reviews factual determinations by the probate judge to determine whether they are substantially supported by the record. *Estate of Samuel Johnson (John) Aimsback (Aims Back)*, 45 IBIA 298, 303 (2007). We review legal determinations and the sufficiency of the evidence *de novo*. *Estate of Laberta Stewart*, 54 IBIA 198, 203 (2012). The burden lies with Appellants to show error in the [probate judge's] Order. *See Estate of Margerate Arline Glen*, 50 IBIA 5, 21 (2009).

Unless manifest error or injustice is shown, the Board's scope of review is limited to reviewing those issues brought before the [probate judge] on rehearing [or reopening]. 43 C.F.R. § 4.318 (scope of the Board's review ordinarily is limited to those issues raised before the probate judge on rehearing or reopening); *Estate of Edward Benedict Defender*, 47 IBIA 271, 280 (2008), *aff'd*, *Defender v. U.S. Dept. of the Interior*, Civ. No. 08-1022, 2010 WL 1299767 (D.S.D. Mar. 30, 2010). Therefore, we ordinarily will not consider allegations of error or evidence that could have been, but were not, presented to the probate judge.

II. Analysis

The only issue that Appellant raises on appeal is one that she did not raise below: whether Stewart and Decedent were married when he died.¹¹ Appellant contends that there is “lack of proof of a second marriage between [Decedent] and his former wife, Doris Stewart.” Notice of Appeal at 1. Appellant argues that there are “inconsistencies within Doris Stewart’s claims concerning her marital status with [Decedent] at the time of his death,” and “with her original claim to have been married, divorced, and remarried to [Decedent] at the time of his death.” *Id.* Appellant suggests that the copy of the 2002 marriage certificate does not prove a marriage. *See id.* (“[Stewart] was asked by [the IPJ] to provide the original document to verify this second marriage. I have not received any communication to the effect that this has been produced.”). Appellant asserts that she “can provide documentation which supports [her] claim that [Decedent] and Doris Stewart were not living as common law man and wife,” and that this documentation “should support the fact that [Stewart] was not his legal wife and his original will should be upheld.” *Id.* Appellant has submitted no documentation to the Board.

¹¹ Although AIPRA has additional requirements that must be satisfied for a surviving spouse to receive a share of an estate as a pretermitted spouse, the sole issue raised by Appellant is whether Stewart was Decedent’s “spouse” at the time of death.

Stewart contends that Appellant waived her right to raise this issue on appeal. *See* Answer Br. at 5-7. Hearing no objection from Appellant as she filed no reply brief, we find no reason to depart from our rule against considering allegations of error or evidence that could have been but were not presented to the IPJ. *See Estate of Stevens*, 55 IBIA at 62; *Estate of Edwin Melvin Long Soldier*, 52 IBIA 239, 240-41 (2010); *Estate of Thomas Pambrun Gallineaux*, 44 IBIA 230, 235 (2007).

During the rehearing proceedings, Appellant was served with a copy of Stewart's motion, and was advised that failure to attend the hearings "may result in loss of rights by default." Third Hearing Notice. Appellant did not attend the third hearing, at which Stewart's motion was considered, nor did she otherwise raise any objection to the motion. We find that by failing to raise the issue to the IPJ, Appellant waived her right to raise it on appeal.¹²

Had we reached the merits, we would agree with Stewart that Appellant has not met her burden, *see* Answer Br. at 7, which is to demonstrate error in the Rehearing Order, *see Estate of Stevens*, 55 IBIA at 62; *Estate of Lynas Thomas Low Dog*, 55 IBIA 105, 107 (2012); *Estate of David Jay Courchene, Jr.*, 16 IBIA 210, 212 (1988). First, the IPJ relied in part on Appellant's own hearing testimony that Stewart was Decedent's spouse. *See* First Hearing Tr. at 5; Decision at 1. The hearing transcript does not support Appellant's new assertion that the IPJ requested an original marriage license in order to verify Stewart's 2002 marriage to Decedent. *See* First Hearing Tr. at 5 (The IPJ stated: "In fact, I've got a Certificate of Marriage showing that they were married on February 27, 2002.").

Second, Appellant has not shown that Stewart and Decedent were divorced after their 2002 marriage. It is unclear from Appellant's arguments whether she believes that Decedent and Stewart were previously married to each other, divorced, and then allegedly remarried in 2002, but that the 2002 marriage was not properly proven, either by valid marriage certificate or by common law. The record does not support Appellant's assertion that Stewart claimed to have been married, divorced, and then remarried to Decedent. Stewart testified that she and Decedent "were married on February 27, 2002, and remained married, without legal separation, until Decedent's death on June 18, 2007." Stewart Aff. at 1. But whatever Appellant intends to argue, her unsubstantiated claim on appeal that

¹² Stewart also seems to argue that Appellant lacks standing because she is not a devisee under the will, and because "none of the devisees or their guardians ad litem have contested the validity of the marriage." Answer Br. at 7. However, Appellant was appointed guardian ad litem for two grandchildren who are devisees under the will, one of whom remains a minor. *See* Appointment Orders. Appellant's status as guardian ad litem is sufficient to allow her to bring the appeal.

Stewart was not legally married to Decedent at the time of his death is insufficient to demonstrate error in the IPJ's determination that Stewart was Decedent's surviving spouse. *See, e.g., Estate of Beverly M. Howard*, 55 IBIA 300, 303, 305 (2012). As a result, Appellant has not met her burden on appeal to show that the IPJ's Rehearing Order was erroneous.¹³

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 December 28, 2010, Rehearing Order.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

¹³ Although not mentioned by Appellant, we note that there is one document in the record that is consistent with her claim that Stewart and Decedent were not married at the time of death. The death certificate lists Decedent's marital status as "divorced." *See* Death Certificate (PR Tab 2). But the source of that purported information is not identified, and no other evidence in the record supports it. Under the circumstances, and in light of Stewart's sworn testimony, we do not find the death certificate sufficient to demonstrate manifest error in the Rehearing Order.