



INTERIOR BOARD OF INDIAN APPEALS

Estate of Elizabeth Lewis a.k.a. Elizabeth Butterfly

56 IBIA 289 (04/29/2013)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF ELIZABETH LEWIS a.k.a.)	Order Affirming Order Denying
ELIZABETH BUTTERFLY)	Rehearing
)	
)	Docket No. IBIA 11-114
)	
)	April 29, 2013

Appellant Gala Upham seeks review from the Board of Indian Appeals (Board) of an Order Denying Rehearing and Affirming Decision (Rehearing Order) entered on April 26, 2011, by Administrative Law Judge R. S. Chester (ALJ) in the estate of Appellant’s grandmother, Elizabeth Lewis (Decedent).¹ In his Rehearing Order, the ALJ rejected Appellant’s challenge to Decedent’s will, which he had approved in an earlier decision and which omitted mention of Appellant, her siblings, and their mother who was Decedent’s predeceased daughter. The ALJ concluded that the omission of Appellant and her siblings from their grandmother’s will was not a mistake or accidental omission, and reaffirmed his underlying decision of September 30, 2010 (Decision).

We affirm. Appellant was granted a second hearing to present witness testimony and other evidence in support of her challenges, thus curing any injury she may have had as a result of any inadequate notice of the first hearing. Contrary to Appellant’s argument, a factually incorrect statement in Decedent’s will affidavit does not undermine the validity of her will. And, finally, we decline to overturn our well-settled precedent of declining to recognize intestate rights for heirs at law who are not mentioned in the will.

Background

Decedent was born December 28, 1925, and died testate on August 11, 2009. Decedent had seven children, three of whom predeceased her.² She was survived by her

¹ Decedent, a Blackfeet Indian, also was known as Elizabeth Butterfly. The probate of Decedent’s estate was docketed in the probate tracking system of the Department of the Interior as Probate No. P000082564IP.

² Two of Decedent’s children died shortly after birth in 1941 and 1942, and a third—Appellant’s mother, Olivia Ann (Lewis) Upham—died in 1980.

husband, Robert Dean Lewis (Robert), and their four daughters, Betty Jean Stevens, Ladean Miller, Linda Sue Trombley, and Mildred Lewis (Mildred). She was also survived by several grandchildren, including Mildred's son, Sean Lewis (Sean), Appellant, and Appellant's siblings, Gwen Lesley Upham (Gwen) and Glenn Patrick Upham.³

In 2002, Decedent visited the Bureau of Indian Affairs (BIA) with her husband for the purpose of having her will drawn. BIA employee Arlene Dusty Bull (Arlene) drafted the will and served as one of the will witnesses. Decedent executed the will on March 12, 2002. Under the terms of Decedent's will, which was a self-proved will,⁴ all four surviving daughters and Sean shared equally in the distribution of Decedent's estate. A separate provision in the will specifically acknowledges and excludes Robert because, since he is non-Indian, "he cannot hold the land in trust status and we have agreed that my trust property be devised to our children and grandson." Will at 1 (Probate Record (PR) Tab 2). Also included with the will was a boilerplate affidavit that was executed by Decedent. In a blank space on the affidavit form was typed, "All of my heirs at law have been included in the body of this will." Affidavit to Accompany Indian Will (PR Tab 2).

When Decedent's Indian trust estate was referred for probate, the ALJ issued a notice of hearing that included a copy of Decedent's will. The notice of hearing and will were sent to the will devisees and to Robert, but it is unclear whether they were sent to Appellant or her siblings. Notice of Initial Hearing, May 21, 2010 (PR Tab 1).⁵ Nevertheless, Appellant was present at the first hearing held on June 23, 2010, as were Robert, Gwen, another grandson (Adrian Stevens), and each of the five devisees under Decedent's will.⁶

The ALJ issued his Decision on September 30, 2010. In it, the ALJ approved Decedent's will, finding it to be a self-proved will. The ALJ asserted that "no one objected to its approval." Decision at 2. Appellant filed a rehearing petition, contending that she

³ Appellant's mother also had two sons who died less than a year after their birth.

⁴ A self-proved will is a will that is executed in compliance with 25 C.F.R. § 15.4 and includes affidavits by the testatrix and two witnesses in accordance with § 15.9.

⁵ The ALJ asserts in his Rehearing Order that his May 21, 2010, notice of the hearing was sent to Appellant. *See* Rehearing Order at 1. Appellant asserts that she did not receive notice of the hearing but heard about it through word of mouth. Opening Br. at 2. The service list for the May 21 notice does not reflect that it was sent to Appellant or to her siblings.

⁶ The ALJ reported to the Board that the recording of the hearing was damaged and could not be recovered. Therefore, no transcript is available for the June 23 hearing.

was not provided an opportunity at the hearing to object to the will and that she understood that she would be able to do so after the ALJ issued the Decision. Rehearing Petition, Oct. 20, 2010 (PR Tab 6). She maintains that she and her siblings either were omitted from the will through mistake or that the omission resulted from a lack of testamentary capacity. *Id.*

The ALJ gave notice of Appellant's petition, scheduled a supplemental hearing, and subpoenaed the attendance of the will witnesses and notary. At the supplemental hearing, held on March 29, 2011, he took the testimony of Arlene, Robert, and Appellant. Supplemental Hearing Transcript (Tr.). Arlene testified that Decedent and Robert visited her at BIA to have a will prepared for Decedent. Arlene further testified that Decedent did not mention her deceased daughter during the preparation of her will. Tr. 9:13-17. She opined that Decedent was "competent" at the time she met with her, and averred that Decedent knew what she was doing in having a will prepared and what she wanted to do with her property. Tr. 10:2-10. When asked about the statement that appears on Decedent's attached affidavit, "All of my heirs at law have been included in the body of this will," Arlene testified that it was probably already on the form when she drafted Decedent's will, and she averred that she did not discuss the statement with Decedent nor did she ascertain whether all of Decedent's heirs at law were named in the will. Tr. 13:2-14:5. She explained that she drafted the will and took it out to Decedent's home for execution. Tr. 14:6-8. At that time, Arlene reviewed the will and its contents with Decedent. Decedent expressed satisfaction with the will provisions and executed both the will and the affidavit. *Id.*

Appellant testified that the only reason she is challenging Decedent's will is due to the statement that all heirs at law were identified in the will and her belief that her grandmother would not have intentionally left her or her siblings out of the will. Tr. 18:15-19:15. Appellant testified that Decedent had a stroke in 1997 or 1998 that affected her mental status, that Decedent "had good and bad days," but admitted that she did not visit Decedent on the day the will was executed and did not have any personal knowledge concerning Decedent's status on that day. Tr. 19:16-20:9, 21:11-14.

Robert testified that he and Decedent were married for almost 66 years and that he was present when Decedent executed her will. Tr. 24:14-19. He testified that he refused any part of his wife's estate, preferring that it go to their "children." Tr. at 25:5-11. He stated that his wife understood what she was doing in executing her will. Tr. 25:16-17. When asked whether he and his wife had any discussion about leaving Appellant and others out of the will, Robert explained that his wife wanted their "immediate living family to benefit." Tr. at 26:12-20. With respect to Decedent's inclusion of Sean, Robert testified that he and Decedent had raised Sean from birth, and that "all th[ose] years he helped us quite a bit." *Id.*

Following the hearing, the ALJ denied rehearing and affirmed his Decision. He concluded that the sentence in Decedent's affidavit concerning all heirs at law being included in the will was never discussed with the Decedent and is "not considered a part of the will." Rehearing Order at 3. He determined that Decedent was fully cognizant of her actions in executing a will, its terms, her heirs, the extent of her property, and that Appellant was deliberately omitted. He concluded that Decedent did not lack testamentary capacity and that Appellant's omission from her will was not the product of error.

This appeal followed. Appellant submitted a brief with her notice of appeal. No other briefs were received.

Discussion

We affirm the ALJ's Rehearing Order because Appellant simply has not met her burden of showing that her grandmother's will was the product of mistake or a lack of testamentary capacity.

On appeal and as we explained in *Estate of Dominic Orin Stevens, Sr.*, 55 IBIA 53, 62 (2012),

[t]he 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 Appellant[] to show error in the [Rehearing] Order. See *Estate of Margerate Arline Glenn*, 50 IBIA 5, 21 (2009).

Appellant argues that the ALJ "breached his trust duty" when he did not give notice of his initial hearing to Appellant, did not determine that Appellant did not have adequate notice, and did not provide her the opportunity "to ascertain the legal issues involved." Opening Br. at 3-4. She also argues that she was not provided an opportunity to establish Decedent's lack of testamentary capacity. *Id.* at 5-6. We reject these arguments. When he received Appellant's rehearing petition, the ALJ scheduled a second hearing. The Notice of Supplemental Hearing specifically gave notice that it was being held to take and receive testimony and evidence "regarding a Will Contest." Notice of Supplemental Hearing, Feb. 16, 2011 (PR Tab 5). Witnesses were subpoenaed and questioned. At all times relevant to her petition for rehearing and to the second "supplemental" hearing, Appellant was represented by counsel. She took testimony from three witnesses, including herself. The record, including the hearing transcript, does not reflect that Appellant requested additional time to secure witnesses or evidence nor does Appellant explain to us now why

this second hearing failed to cure the due process deficiency, if any there was, resulting from the alleged lack of formal notice of the first hearing. Therefore, we conclude that Appellant had a full and fair opportunity to present her challenges to the will, including any lack of testamentary capacity.

Next, Appellant urges us to adopt a rule that allows pretermitted heirs⁷ to receive their intestate share of the decedent's estate and urges us to follow our decision in *In the Matter of the Will of Mural W. Barnes*, 30 IBIA 7 (1996). *Barnes* is inapposite because it involved an Osage will that, by law, is governed by Oklahoma law. Act of Oct. 21, 1978, 92 Stat. 1660, 1661, 25 U.S.C. § 331 note.⁸ And we decline to overturn our prior, settled case law in which we have held that we are not required to “ensure that Indian trust property disposed of by a decedent by will is distributed to the decedent's children or other heirs.” *Estate of Millie White Romero*, 41 IBIA 262, 265 (2005) (and cases cited therein), *aff'd sub nom. Lyons v. United States*, No. 05-1292 (D.Nev. Feb. 8, 2006), *aff'd sub nom. Lyons v. Estate of Millie White Romero*, 271 Fed. Appx. 675 (9th Cir. Mar. 26, 2008). As we explained in *Estate of Romero*, “the primary purpose of a will is to alter the normal course of descent [for] the [decedent's] property,” *id.*, and Congress explicitly authorized Indians to dispose of their trust property by will to others, *see* 25 U.S.C. §§ 373 and 2206(b), thereby implicitly recognizing that trust property could follow a different disposition scheme than would occur through intestate succession.⁹

Appellant also argues that the ALJ erred in failing to find that the will was a product of a mistake. The “mistake,” according to Appellant, is clear because a sentence in Decedent's will affidavit states that all of decedent's heirs at law were included in her will, which is untrue because Appellant and her siblings are among Decedent's heirs at law and

⁷ “Pretermitted heirs” are those individuals who are not mentioned, even in passing, in the testator's will *and* would inherit from the testator if there were no will. Here, it is undisputed that Appellant and her siblings were not mentioned in Decedent's will and would have shared in Decedent's estate had there been no will. *See* 25 U.S.C. § 2206(a)(2)(A)(i) & (B)(i).

⁸ In *Barnes*, we affirmed the decision to approve decedent's will subject to the intestate share of pretermitted heirs because Oklahoma law provides, “When any testator omits to provide in his will for any of his children, or for the issue of any deceased child unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator, as if he had died intestate.” 84 Okla. Stat. § 132.

⁹ “Intestate succession” refers to the statutory descent of a decedent's property where there is no will.

they were omitted from mention in the will.¹⁰ Therefore, according to Appellant, there must be a mistake *in the will*. We disagree.

The purpose of the affidavit is to permit Decedent's will to be self-proved. The affidavit is not part of the will;¹¹ the will itself stands alone. The will was properly executed by Decedent and two witnesses, and the language in Decedent's will is unambiguous. Thus, we need not resort to extrinsic evidence to give full effect to the will notwithstanding the sentence in Decedent's affidavit.

Even if we were to resort to extrinsic evidence to determine Decedent's intent, that evidence supports the will. Arlene testified that she met with Decedent on two separate occasions concerning the will: to obtain information for drafting the will, including Decedent's devises and the identities of the devisees, and a second time to review the terms of the will and execute it. Arlene explained that on both occasions Decedent knew the disposition she wanted to make of her trust property and she expressed no uncertainty. This testimony was corroborated by Robert, who explained that he was present on both occasions when Decedent met with Arlene, and testified that Decedent desired to leave her estate to her "immediate family," consisting of their four surviving daughters and the grandson that they had raised from birth. Thus, regardless of the statement in Decedent's affidavit, there is no evidence showing that any mistakes were made in the drafting of the will. To the extent that there is a mistake, it is in Decedent's affidavit.¹² We thus reject Appellant's contention that Decedent's affidavit is extrinsic evidence that "establishes that the Will was a mistake." Opening Br. at 5.

¹⁰ Pursuant to 25 U.S.C. § 2206(a)(2)(A)(i) & (B)(i), Decedent's heirs at law would have been her widower, her four surviving daughters, and the surviving children of her predeceased daughter, i.e., Appellant and her siblings.

Sean would not have inherited by intestacy from Decedent.

¹¹ The title of the affidavit is "Affidavit to *Accompany* Indian Will." PR Tab 2 (emphasis added).

¹² Appellant does not argue that the misstatement invalidates Decedent's affidavit. Even assuming that Decedent's affidavit was rendered invalid, the effect simply would be that the will is not self-proved. *See* 25 C.F.R. § 15.9. And Appellant has made no argument that the will itself was not properly executed.

Moreover, we are not convinced that any mistake was made *by Decedent* even in her will affidavit. There is no evidence in the record concerning Decedent’s understanding of the meaning of “heirs at law” and Arlene testified that she did not specifically discuss with Decedent either her “heirs at law” or whether Decedent had included all of her “heirs at law” in her will. Thus, Decedent may have understood the sentence, “All of my heirs at law have been included in the body of this will,” to mean that she had identified in her will all of the individuals to whom she wanted to leave her property, i.e., she may have assumed that “heirs at law” simply meant devisees. If Decedent believed that “heirs at law” meant the same as “devisees,” the sentence may well have been correct as far as Decedent was concerned and there would be no error.

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 April 26, 2011, Order Denying Rehearing.

I concur:

 // original signed
Debora G. Luther
Administrative Judge

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Thomas A. Blaser
Administrative Judge