



INTERIOR BOARD OF INDIAN APPEALS

Estate of Sarah Stewart Sings Good

57 IBIA 65 (05/28/2013)



# 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 SARAH STEWART	)	Order Affirming Denial of Rehearing
SINGS GOOD	)	
	)	Docket No. IBIA 11-117
	)	
	)	May 28, 2013

Irvin Stewart, Jr. (a.k.a. Irvin Stewart Sings Good, Jr.) (Appellant) appealed to the Board of Indian Appeals (Board) from a May 5, 2011, Order Denying Rehearing issued by Indian Probate Judge (IPJ) Albert C. Jones in the estate of Sarah Stewart Sings Good (Decedent).<sup>1</sup> The Order Denying Rehearing left in place the IPJ's March 18, 2010, Decision, which approved Decedent's March 17, 2003, will (2003 Will) and distributed her estate accordingly. Appellant, Decedent's son, and Louella Merchant (Louella), Decedent's daughter, stipulated that a prior October 2, 2002, will (2002 Will) is invalid. Appellant contends that the 2003 Will is also invalid because Decedent lacked testamentary capacity, the will was not properly witnessed, and it is a product of undue influence by Louella and her family. Appellant seeks to probate a November 2, 1995, will (1995 Will) instead. The IPJ found that Appellant's petition for rehearing was procedurally defective because the original petition was received in the IPJ's office after the filing deadline and it stated no grounds whatsoever for rehearing. On the merits, the IPJ denied the petition because Appellant's later-filed brief in support failed to show proper grounds for rehearing.

We hold that Appellant's petition was timely filed because he placed a copy in the mail to the IPJ by the filing deadline. We affirm the Order Denying Rehearing because Appellant has not met his burden to demonstrate that the IPJ erred in finding that the petition and brief in support failed to show merit.

## Background

### I. Decedent's Wills

Decedent died on October 28, 2007, at the age of 82. Decedent was married to Irvin Stewart Sings Good, Sr. (Irvin Sr.) until his death in 2001. Decedent was survived by

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<sup>1</sup> Decedent was a Crow Indian and her case was assigned Probate No. P000065098IP in the Department of the Interior's probate tracking system, ProTrac.

a biological son, Appellant; a biological daughter, Louella; and two adopted daughters who are the children of Louella: Lori Ann Crow (Lori) and Sarah Faith Stewart (Sarah).<sup>2</sup>

In 1995, Appellant's attorney in this appeal, Harold Stanton, prepared distinct wills for Decedent, *see* 1995 Will (Probate Record (PR) Tab 7), and her husband. Irvin Sr.'s will was probated without objection in 2002. *See* Decision, *Estate of Irvin Stewart, Sr.*, Probate No. RM-202-0038 (Oct. 30, 2002). Decedent's 1995 Will devised her interests in trust or restricted lands on the Crow Reservation and Crow Ceded Area to her husband and each of her children, grandchildren, and great-grandchildren who were then alive, as well as two nephews.

In their final years, Irvin Sr. and Decedent were initially cared for by Appellant's daughter, Irvina Stewart (Irvina), who was employed in a Tribal elder care program. After Irvin Sr. died, Irvina continued on as Decedent's caregiver for approximately a year. Then, Lori became Decedent's live-in caregiver.

Decedent next signed a holographic will, devising her entire estate to Louella, in 2002. *See* 2002 Will (PR Tab 5). According to the Field Solicitor, the 2002 Will was not properly witnessed. Letter from Field Solicitor to Superintendent, Nov. 1, 2002 (PR Tab 5).

In 2003, Decedent contacted LaVaune Fitzpatrick (LaVaune), of the Bureau of Indian Affairs (BIA), Crow Agency, and requested her to travel to Louella's home in Pryor, Montana, to be the scrivener of a new will. LaVaune asked her coworker Debbie Scott (Debbie) to attend as a witness, and Debbie in turn asked her coworker Alfredine Snell (Alfredine) to also participate as a witness. A fourth coworker was the notary public.

Decedent's 2003 Will devised her interests in land to 10 of the 13 relatives she named in her 1995 Will: The 2003 Will omits her late husband and 2 nephews, and adds 3 great-grandchildren born after the 1995 Will's execution. *See* 2003 Will (PR Tab 6).

## II. Probate Proceedings

The IPJ held two hearings in the probate of Decedent's estate, on March 18, 2009 (First Hearing), and May 21, 2009 (Supplemental Hearing). At the first hearing,

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<sup>2</sup> A third biological daughter of Louella, Nicole Merchant (Nicole), was not adopted by Decedent. Decedent was survived by a total of nine grandchildren and great grandchildren, not including Lori and Sarah. Appellant is the biological son of Decedent and Irvin Sr. Louella was adopted by Irvin Sr.

Appellant challenged the 2003 and 2002 Wills on the grounds that they are products of undue influence by Louella, and that the 1995 Will is a “reciprocal” will, made in consideration for Irvin Sr.’s will. First Hearing Transcript (Tr.), Mar. 18, 2009, at 26-28 (PR Tab 2). The IPJ requested a brief from Appellant on the reciprocal wills argument and stated that he would hold a supplemental hearing at which it would be Appellant’s burden, as the challenger of the 2003 and 2002 Wills, to prove undue influence. *Id.* at 28-33. Appellant subsequently notified the IPJ that “[t]he reciprocal will concept will not be a separate ground for contest, but will be a portion of the undue influence challenge.” Response to Order to Supply Brief Regarding Reciprocal Wills, May 4, 2009 (PR Tab 19). Appellant then submitted a motion to set aside the 2003 and 2002 Wills on the basis of undue influence, and to recognize and approve the 1995 Will. Motion to Set Aside 2003 and 2002 Wills, May 20, 2009 (PR Tab 14). The motion was supported with affidavits by Appellant, Irvina, and Attorney Stanton. *Id.*, Exs. C, E, F (PR Tab 15). Appellant also separately submitted an affidavit by Pamela Stops Stewart Sings Good (Pamela), who is an adopted sister of Irvin Sr. Affidavit of Pamela, May 21, 2009 (PR Tab 15). As proof of undue influence, the affidavits and motion collectively asserted that, after Irvin Sr.’s death, Louella terminated Irvina’s employment and installed Lori as Decedent’s caregiver; Louella and/or Lori took control of Decedent’s checking account; and as compared to the “reciprocal” 1995 Will, both the 2003 and 2002 Wills radically changed the beneficiaries.

Of these affiants, only Appellant testified at the supplemental hearing.<sup>3</sup> At the outset, he and Louella stipulated that the 2002 Will is invalid, and accordingly the IPJ took no testimony regarding it.<sup>4</sup> Supplemental Hearing Tr. at 29-30. With the hearing so narrowed, the IPJ heard testimony from LaVaune, Debbie, and Alfredine (all of whom the IPJ subpoenaed), as well as Appellant, Lori, and Louella, regarding the validity of the 2003 Will. Louella’s attorney also introduced a letter from Dr. Gregory Mock, Decedent’s

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<sup>3</sup> On appeal, Appellant contends that he was “effectively barred” from presenting further evidence of undue influence because the IPJ denied him a continuance to locate Irvina and Pamela after they “wandered off” from the hearing. Reply Brief (Br.) at 2, 10; Supplemental Hearing Tr., May 21, 2009, at 108, 165 (PR Tab 2). In actuality, although the IPJ sequestered Pamela in his office, she left. Supplemental Hearing Tr. at 108, 162. Irvina never appeared. *Id.* at 106, 165. Appellant had not requested a subpoena for either witness. The IPJ found that their affidavits were repetitive of Appellant’s testimony and therefore their testimony was unlikely to affect the outcome. *Id.* at 162-65; Decision at 13.

Attorney Stanton also attempted to testify at the hearing about his knowledge of and relationship with Decedent and Irvin Sr. The IPJ stopped his testimony, denied his request to withdraw as counsel and to serve as a witness, and agreed to take his affidavit into consideration. Supplemental Hearing Tr. at 76, 79-82.

<sup>4</sup> Thus, we consider the 2002 Will no further.

attending physician from February 2001 until the time of her death. *Id.* at 111. Dr. Mock's letter states:

[Decedent] had multiple medical problems including end stage renal disease for which she was on dialysis. Throughout the time that we took care of [her] she was a very bright, alert person who was in charge of her health care. Mentally she was very strong right up to the end. She was cognitively intact and able to make all decisions regarding medical matters to financial matters to all issues that may have come up in her life. There was no question as to whether she was competent or not.

Letter of Dr. Mock, May 21, 2009 (PR Tab 17). No one testified that Decedent lacked testamentary capacity, nor did Appellant attempt to elicit such testimony.

LaVaune recounted the making of the 2003 Will. She testified that, upon the BIA employees' arrival at Louella's home, Louella departed, leaving Decedent otherwise alone for the duration. Supplemental Hearing Tr. at 20, 69. The will witnesses and the notary went to the family room, where they stayed until the will's execution. *Id.* at 22, 26. LaVaune and Decedent sat in the kitchen and, speaking only in Crow, they made the will. *Id.* at 20. Decedent had her own maps and LaVaune brought additional maps, plat books showing the location of Decedent's property, and an Individual Trust Interest (ITI) Report of her land. *Id.* at 17-18. LaVaune testified that Decedent knew the location of her leases, knew her allotment numbers and acreages, and knew to whom she wanted to devise her land. *Id.* at 18, 21. LaVaune stated that Decedent "knew what she was doing," "knew what she wanted," and was mentally competent. *Id.* at 23, 65. LaVaune estimated that it took approximately 2 1/2 hours to review the information and to hand write specific bequests according to Decedent's wishes. *Id.* at 21-22. She spent another 45 minutes typing the will on her laptop and then printed it. *Id.* at 24-25. LaVaune testified that Decedent read the entire will. *Id.* at 25. And, she testified that she asked Decedent if it was what she wanted, and Decedent replied "yes." *Id.* at 26. LaVaune stated that she did not feel that Decedent was influenced to write the will in any way. *Id.* at 27, 68. She also testified that the fact that the will was written in Louella's home did not affect her opinion that Decedent was not unduly influenced. *Id.* at 70. She said that she had known Decedent for at least 30 years. *Id.* at 65.

After the will was drafted, LaVaune called the witnesses into the kitchen for the will's execution. *Id.* at 26. Debbie testified that LaVaune asked Decedent whether the witnesses were acceptable to her and Decedent responded affirmatively. *Id.* at 56. Debbie stated that Decedent's demeanor was relaxed, she knew what she was doing, and she did not appear to be under any duress. *Id.* at 36, 56-57. Alfredine also testified that Decedent was not at all confused or agitated, and was competent to draft a will that day. *Id.* at 46-47.

Debbie and Alfredine testified that they did not actually speak with Decedent, nor did Decedent announce that the document was her last will and testament. *Id.* at 37, 39-40. After they witnessed Decedent's signature, Debbie and Alfredine signed a standard BIA form affidavit to make the will self-proved. *Id.* at 58, 64. The affidavit states on the part of Decedent that the "witnesses heard me publish and declare the [will] to be my last will and testament," and it states on the part of the witnesses that Decedent "requested both of us to sign the same as witnesses." 2003 Will, Attach.

At the conclusion of the testimony by the scrivener and will witnesses, Appellant moved to set aside the 2003 Will because it was "not properly attested." Supplemental Hearing Tr. at 73. He argued that Decedent did not publish her will and did not personally request Debbie and Alfredine to be witnesses. *Id.* at 71-73. The IPJ orally denied the motion because the Indian probate statutes and regulations do not require those formalities. *Id.* at 74.

Turning to Appellant's challenge to the 2003 Will based on undue influence, Appellant initially testified that he believed that Louella "dominated" Decedent because Louella and her biological daughters (i.e., Lori and Sarah, who were adopted by Decedent, and Nicole) all helped take care of Decedent. *Id.* at 90, 95. He also testified that Lori "took over" Irvina's job. *Id.* at 104. And he testified that Lori managed Decedent's checking account. *Id.* at 89. However, under cross-examination, he acknowledged that someone providing care for Decedent does not equate to that person dominating her. *Id.* at 96. He also acknowledged that Irvina was laid off from her job because the Tribal elder care program ran out of funds. *Id.* at 105. And he testified that, even before Irvin Sr.'s death, Decedent would ask her family to write her checks, which only she would sign. *Id.* at 89-90. Appellant also testified that he helped take care of Decedent and could visit her whenever he wanted. *Id.* at 91, 96.

Lori testified that Decedent asked her to move into Decedent's house and that she was trained and had previously taken care of Decedent's brother through in-home care services for 12 years. *Id.* at 144. She stated that she was only paid, through Medicaid, to provide 1 1/4 hours of Decedent's daily care and did the rest on her own. *Id.* at 145. According to her, she never signed Decedent's checks; she simply filled out checks for Decedent to sign and maintained the register for her. *Id.* at 148, 160. She testified that Decedent maintained physical control of her own checkbook. *Id.* at 149, 159. She also testified that Decedent alone managed the leases of her property. *Id.* at 147-48.

Finally, Louella testified that Irvina stopped giving care to Decedent after she was laid off, and that Decedent specifically asked Lori to move in because Lori already lived next door, Lori was capable of caring for her, and Decedent was close with Lori's sons. *Id.* at 115-19. She testified that she did not cause Irvina to lose her job. *Id.* at 133. She also

testified that she did not participate in writing Decedent's checks and that only Lori helped Decedent in that regard. *Id.* at 132.

At the conclusion of the hearing, the IPJ ordered Louella's attorney to submit a brief responding to Appellant's motion, which she did. *Id.* at 166; Brief in Response to Motion to Set Aside 2003 Will, June 2, 2009 (PR Tab 13).

In his March 18, 2010, Decision, the IPJ concluded that Appellant did not support his assertion that the 1995 wills were reciprocal, there is no requirement in the Indian probate regulations for a testatrix to publish her will and personally request the witnesses to act as such, and Appellant failed to meet his burden to establish undue influence in the making of the 2003 Will.

### III. Petition for Rehearing

On the same day that the IPJ issued his Decision, he mailed a copy of it to Appellant and included a notice stating that the Decision would become final within 30 days from that date unless, "within such period, a written petition for rehearing shall have been filed *with the undersigned Indian Probate Judge.*" Notice of Decision, Mar. 18, 2010 (PR Tab 11) (emphasis in original). The notice also stated that any petition for rehearing "must be delivered or mailed to the [IPJ in Billings, Montana] within the time specified." *Id.* The notice was in accordance with 43 C.F.R. § 30.236 (2009),<sup>5</sup> therefore, Appellant's deadline to file a petition for rehearing with the IPJ was April 19, 2010.<sup>6</sup>

On April 16, 2010, instead of filing a petition for rehearing, Appellant mailed a "Notice of Appeal" of the Decision to the Office of Hearings and Appeals, "Hearings Division," in Arlington, Virginia. Notice of Appeal of Decision, Apr. 16, 2010 (First Notice of Appeal) (PR Tab 9). At the same time, Appellant mailed a service copy of the Notice of Appeal to the IPJ. Copy of First Notice of Appeal, Apr. 16, 2010 (PR Tab 10). Appellant then telephoned the Probate Hearings Division (PHD) in Arlington and explained that he did not want the IPJ to be involved in the matter.<sup>7</sup> Report of Contact,

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<sup>5</sup> We cite to the regulations in effect at the time that Appellant sought rehearing, unless otherwise stated.

<sup>6</sup> Thirty days from March 18 was April 17, which fell on a Saturday in 2010, making the due date the next business day, April 19. *See* 43 C.F.R. § 4.22(e); *Estate of Lyman Z. Penn*, 46 IBIA 272, 276 (2008).

<sup>7</sup> It appears that, although the Notice of Appeal was addressed to the "Hearings Division" and Appellant followed up with the PHD, Appellant intended his filing to be a direct  
(continued...)

Apr. 26, 2010 (PR Tab 9). The PHD nonetheless forwarded the original Notice of Appeal to the IPJ, who received it on April 28, 2010. *See* First Notice of Appeal.

The IPJ construed the Notice of Appeal as a petition for rehearing, and issued a notice of the petition to interested parties on May 4, 2010. PR Tab 10. Appellant then filed a brief in support of the petition (Brief in Support), on May 14, 2010. PR Tab 10. In his brief in support, Appellant challenged the IPJ's consideration of Appellant's Notice of Appeal as a petition for rehearing and at the same time sought rehearing or invalidation of the 2003 Will as a matter of law on the grounds that (1) the 2003 Will did not meet the regulatory requirements of a valid Indian will because Decedent lacked testamentary capacity and the will was not properly attested; and (2) Decedent was subject to undue influence in the preparation of the will.

The IPJ concluded that Appellant filed his petition out of time because only a copy had been mailed to the IPJ within the 30-day filing deadline, and the IPJ's office did not receive the *original* petition until April 28, after the April 19 deadline. Order Denying Rehearing at 2. The IPJ also concluded that the petition itself was facially deficient because it failed to state any grounds whatsoever for rehearing. *Id.*

On the merits, the IPJ denied Appellant's petition because, in sum, the brief in support did not set forth any new information or evidence not previously produced. *Id.* at 9. Instead, Appellant stated as "fact" information that was never elicited or established during the hearing, or that conflicted with the hearing testimony. *Id.*

In the instant appeal of the Order Denying Rehearing, Appellant filed a notice of appeal and an opening brief. Louella filed an answer brief as an interested party, and Appellant filed a reply.

## Discussion

### I. Standard and Scope of Review

The Board reviews factual determinations by the probate judge to determine whether they are substantially supported by the record. *Estate of Dominic Orin Stevens, Sr.*,

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(...continued)

appeal to the Board from the Decision. As explained below, had the First Notice of Appeal been transmitted to the Board, the Board would have been required to dismiss it for lack of jurisdiction (and the Board may also have referred it to the IPJ for consideration as a petition for rehearing).

55 IBIA 53, 62 (2012), and cases cited therein. We review legal determinations and the sufficiency of the evidence *de novo*. *Id.* The burden lies with Appellant to show error in the Order Denying Rehearing. *See id.* Simple disagreement with or bare assertions concerning a challenged decision are insufficient to carry Appellant's burden of proof. *See Estate of Drucilla (Trucilla) W. Pickard*, 50 IBIA 82, 91 (2009).

Unless manifest error or injustice is shown, the Board's scope of review is limited to reviewing those issues brought before the IPJ on rehearing. 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 Stevens*, 55 IBIA at 62. Therefore, we ordinarily will not consider allegations of error or evidence that could have been, but were not, presented to the probate judge. *Estate of Stevens*, 55 IBIA at 62.

## II. Analysis

### A. Timeliness of Appellant's Petition

Appellant asserts that he sought to appeal the IPJ's Decision directly to the Board based on his attorney's belief that he would not receive impartial treatment by the IPJ, it would be inefficient to seek rehearing, the purpose of rehearing seems to be based on consideration of newly discovered evidence but he had none to present to the IPJ, and the regulatory procedures are hard to understand and do not appear to expressly require a request for rehearing prior to an appeal to the Board. Reply Br. at 3-4. Notwithstanding any prior misunderstanding, in the instant appeal of the Order Denying Rehearing, Appellant continues to argue that the Board had jurisdiction to hear his initial "appeal" of the IPJ's Decision and that the IPJ erred by treating his Notice of Appeal as a petition for rehearing. *Id.* at 5; Opening Br. at 2.

Contrary to Appellant's arguments, because a petition for rehearing is a jurisdictional prerequisite to an appeal of a probate decision to the Board, the IPJ properly construed the Notice of Appeal as a petition for rehearing. *See* Order Denying Rehearing at 1 (citing *Estate of Eugenia Catherine Apodaca*, 31 IBIA 55 (1997)); 43 C.F.R. §§ 4.318 ("An appeal [to the Board] will be limited to those issues that were before the [IPJ] upon the petition for rehearing"), 4.320(a) ("Any interested party has a right to appeal to the Board if he or she is adversely affected by a decision or order of a judge under part 30 of this subtitle: (a) On a petition for rehearing.").

The IPJ concluded that Appellant filed his petition out of time because, although the date of filing a petition for rehearing by mail is the date it is mailed, and a copy was mailed before the filing deadline, the IPJ's office did not receive the *original* petition until after the deadline. *See* Order Denying Rehearing at 1-2; *Estate of Anthony Munks*, 37 IBIA 202, 209

(2002) (holding that the “date of mailing” rule applies to petitions for rehearing on and after June 18, 2001). But the rehearing regulations do not expressly make a distinction between filing an original petition and filing a copy. *See* 43 C.F.R. § 30.237. If a copy is filed, the probate judge may require the petitioner to produce the original, but we are not convinced, for purposes of meeting the 30-day jurisdictional deadline, that filing a copy does not suffice. We hold that the copy of the “Notice of Appeal” that Appellant mailed to the IPJ before the deadline, which the IPJ properly treated as a petition for rehearing, was timely filed. Nonetheless, we affirm the IPJ’s Order Denying Rehearing because Appellant failed to show error in it, and the Order Denying Rehearing in turn concluded that Appellant failed to show proper grounds for rehearing in either his (1) petition or (2) brief in support.

B. Whether the IPJ Erred in Determining that the Petition Failed to Show Merit

A petition for rehearing “must state specifically and concisely the grounds on which it is based.” 43 C.F.R. § 30.237(c). “If proper grounds are not shown,” i.e., grounds that appear to “show merit,” the IPJ “will” deny the petition. *Id.* § 30.239(a); *see, e.g., Estate of Rachel Nahdayaka Poco*, 54 IBIA 248, 251 (2012); *Estate of Pickard*, 50 IBIA at 91; *Estate of Millward Wallace Ward*, 4 IBIA 97, 101 (1975). Appellant’s petition stated only that he “gives Notice of Appeal in the matter of the Estate of [Decedent]” and that the “[a]ppeal is made of the [IPJ’s] decision.” First Notice of Appeal. Accordingly, the IPJ concluded that the petition could be denied because it “contains absolutely no indication of the grounds upon which the Petition is based.” Order Denying Rehearing at 2-3.<sup>8</sup>

But the IPJ also considered Appellant’s brief in support, filed 10 days after the IPJ’s notice of the petition for rehearing, and he concluded that, even if all of the procedural requirements for filing a petition for rehearing had been met, the petition should still be

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<sup>8</sup> Appellant contends that the IPJ impliedly determined that the petition was meritorious because he issued a notice of the petition for rehearing and transmitted a copy of the petition to interested parties. Opening Br. at 3. Under the regulations, if the IPJ finds that a petition appears to show merit, he must serve copies of the petition on all persons whose interest in the estate might be affected if the petition is granted *and* he will allow those persons a specified time in which to submit answers or legal briefs in response to the petition. 43 C.F.R. § 30.239(b)(1)-(2). The IPJ did not set a briefing schedule. To the contrary, pursuant to § 30.239(a), he issued an order denying the petition without hearing from any other interested parties. Thus, the IPJ unmistakably concluded that the petition was deficient for failure to identify proper grounds for rehearing. Nothing precluded the IPJ from providing notice to interested parties, even if such notice was not required, and the IPJ’s issuance of the notice cannot be construed as a merits determination by the IPJ.

denied under § 30.239(a) because the brief did not show merit. Assuming without deciding that the failure of the petition itself to state grounds for rehearing was not a jurisdictional defect, we affirm the IPJ's denial of Appellant's petition and brief in support for failure to show proper grounds for rehearing.

C. Whether the IPJ Erred in Determining that the Brief in Support Failed to Show Merit

On appeal, Appellant largely reiterates the arguments in his brief in support of the petition for rehearing: The 2003 Will did not meet the requirements of a valid Indian will pursuant to BIA's regulations, and it is a product of undue influence by Louella and her family. Appellant also asserts new arguments, which we reject as outside the scope of this appeal.

I. Whether the 2003 Will Met the Requirements of a Valid Will

Pursuant to the probate regulations, any person of at least 18 years of age and having testamentary capacity may dispose of their interest in trust or restricted land or trust personalty by a will. 25 C.F.R. § 15.3 (2011). The will must be executed in writing and be attested by two disinterested adult witnesses. *Id.* § 15.4. A will may be made self-proved at the time of its execution through the signing of an affidavit by the testator and the will witnesses, and in that case the testimony of the witnesses may not be needed to probate the will. *Id.* §§ 15.7, 15.8. Appellant contends that the IPJ erred in finding that Decedent had testamentary capacity to make her 2003 Will. Appellant also contends that the will is invalid as a matter of law because the hearing testimony established that Decedent did not personally request the will witnesses to sign the will and Decedent did not publish the will. Additionally, for the first time on appeal, Appellant contends that the will witnesses were not disinterested.

a. Testamentary Capacity

Appellant, as the challenger of the will, must prove, by a preponderance of the evidence, that Decedent lacked testamentary capacity. *See Estate of Stevens*, 55 IBIA at 71. Testamentary incapacity is established by showing that, at the time of execution, the testator did not know the "natural objects of her bounty,"<sup>9</sup> the extent of her property, or the desired distribution at death of her property. *Id.* As noted earlier, Appellant did not raise the issue

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<sup>9</sup> I.e., those persons "who naturally have a claim to benefit from the property left by [the decedent]." *Estate of Penn*, 46 IBIA at 278 n.12 (quoting 79 Am. Jur. 2d Wills § 63 (2002)).

of testamentary capacity at the hearing, nor object to the will on that ground—until he filed his petition for rehearing.

On appeal, far from meeting his burden to show error in the IPJ's conclusion that Decedent was competent to make her 2003 Will, Appellant argues that it is unknown whether Decedent knew the natural objects of her bounty, and that the will witnesses failed to conduct an "independent examination" to "ascertain" this. Opening Br. at 17. Appellant cites no authority for his proposition that the failure of will witnesses to converse with the testatrix, for the purpose of determining with certainty that she knew the natural objects of her bounty, is probative of a lack of testamentary capacity. Regardless of whether the will witnesses determined if Decedent knew the natural objects (or had any duty to ascertain this), the scrivener testified that she talked with Decedent for 2 1/2 hours and that Decedent knew how she was related to the devisees of her land. Supplemental Hearing Tr. at 22, 65-67. We agree with the IPJ that the scrivener, who had known Decedent for at least 30 years, "would have known if the Decedent was unclear as to her family members or her property." Order Denying Rehearing at 6.

In a similarly flawed argument, Appellant disputes that Decedent knew the extent of her property or the desired distribution thereof because there is "no independent evidence" to support a conclusion that she did. Opening Br. at 18. First, Appellant argues that the absence of testimony by the scrivener about the reasons *why* Decedent made her particular bequests in her 2003 Will indicates a problem, because in his view that will is radically different than the 1995 Will and effectively disinherits him in favor of Louella.<sup>10</sup> *Id.* at 7, 18, 22. Appellant fails to cite any authority for his contention that a will scrivener must question the testatrix's reasons for making her specific bequests in order to establish testamentary capacity. We agree with the IPJ that—even if the scrivener was aware of the 1995 Will, which was never established—"it was not her responsibility to question the Decedent's intentions in distributing her property." Order Denying Rehearing at 7. The scrivener's responsibility was to prepare a will that reflected Decedent's wishes. Next, Appellant contends that, although the will scrivener asked Decedent whether the bequests were consistent with her wishes, the scrivener never testified that Decedent advised her "as to *what* her property was or to *whom* it was to be transferred." Opening Br. at 18 (emphases added). In reality, the scrivener testified that Decedent looked at maps, plat

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<sup>10</sup> The IPJ did not find a radical change between the 1995 and 2003 Wills. He noted that 10 out of 13 named beneficiaries in the 1995 Will are named in the 2003 Will; the 3 beneficiaries who are omitted include Irvin Sr. and collateral relatives. Decision at 14. The IPJ also found credible Lori's testimony that, prior to making the 2003 Will, Decedent told her that because Appellant received land from Irvin Sr., Appellant would receive a lesser amount of land from Decedent. *Id.* at 15; *see* Supplemental Hearing Tr. at 154, 158.

books, and the ITI report, she knew where her leases were, she knew her allotment numbers and acreages, and she knew and told the scrivener to whom she wanted to give her property. Supplemental Hearing Tr. at 17-18, 20-21. Accordingly, we affirm the IPJ's conclusion that Appellant has not met his burden of proving testamentary incapacity.<sup>11</sup>

b. Publication of the Will and Request for the Witnesses to Sign

Appellant contends that the 2003 Will is invalid because, contrary to what is stated in the self-proving affidavit attached to it, Decedent neither published nor personally asked the witnesses to sign the will, and thus it has not been established that Decedent knew she was signing her *will*. Opening Br. at 16. The IPJ correctly determined that the failure to perform those formalities does not render a will invalid. Order Denying Rehearing at 5-6. Although in that situation “the will scrivener should perhaps have crossed out the language relating to publication and a request to sign before using BIA’s standard form affidavit,” a failure to do so does not impose will execution requirements that are not actually mandated in 25 C.F.R. §§ 15.3, 15.4. *Estate of Lena Abbie Big Bear Yellow Eagle*, 17 IBIA 237, 238-39 (1989) (citing *Estate of Carrie Standing Haddon Miller*, 10 IBIA 128, 132 (1982) (holding that an Indian testatrix is neither required to publish her will nor be the person to request the witnesses to sign in order for the will to be properly executed)). At most, the absence of these formalities could defeat the self-proving character of the will, in which case testimony must be obtained from the will witnesses if they are available, as it was here. *See Estate of Margerate Arline Glenn*, 50 IBIA 5, 28 (2009); *Estate of Sallie Fambush*, 34 IBIA 254, 257 (2000). Thus, at least in this case, the requirements of a self-proving affidavit are not relevant.

We also agree with the IPJ that the hearing was the time for Appellant to establish his allegation that Decedent’s diminished vision was so severe that the failure of the scrivener to read the will to her in English prevented her from understanding her will.<sup>12</sup> *See* Opening Br. at 16, 20; Order Denying Rehearing at 6. As the record stands, there is substantial evidence that Decedent knew what she was doing: The hearing testimony

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<sup>11</sup> We reject as untimely Appellant’s suggestion that re-examination of the scrivener might demonstrate that Decedent did not fully know or comprehend the extent of her property. Opening Br. at 19. The time for taking testimony from the scrivener was during the hearing when Appellant’s attorney was afforded an opportunity to do so. *See, e.g., Estate of Poco*, 54 IBIA at 251 (proper grounds for seeking rehearing do not include requests for additional time to obtain evidence).

<sup>12</sup> At times, Appellant suggests that Decedent’s ability to read and understand English was never established. Elsewhere, however, he suggests that she spoke and understood English fluently. Opening Br. at 16.

showed that Decedent read the entire will and that the scrivener may also have read the will, or portions, to Decedent; the scrivener asked Decedent whether the will reflected her wishes and Decedent replied “yes”; the scrivener asked Decedent whether the witnesses were acceptable and Decedent responded affirmatively; the witnesses watched Decedent sign; and the witnesses then signed. Supplemental Hearing Tr. at 25-26, 33, 36, 38-39, 55-56.

c. Disinterested Will Witnesses

In his final argument to invalidate the will as a matter of law, Appellant alleges, for the first time on appeal, that the will witnesses were not disinterested because Louella’s husband, Frank Merchant (Frank), had a position at BIA and was a supervisor of the will witnesses, the scrivener, and the notary. Opening Br. at 13, 19 & Ex. B; Reply Br. at 9. But nobody was asked or testified during the hearing about Frank’s employment or connection, if any, to these BIA employees. And even assuming that the allegation is true, the IPJ would not be required to find that the witnesses were not disinterested. The will witnesses are not devisees under any of Decedent’s wills, and the Board has held that even close relatives of a will beneficiary are not automatically precluded from being disinterested will witnesses so long as they do not personally take under the will. *See Estate of Mabel Opal Beach*, 39 IBIA 111, 112 (2003); *Estate of Orville Lee Kaulay*, 30 IBIA 116, 118 (1996). In any case, we reject this argument because Appellant offers no explanation why he did not present it to the IPJ. *See, e.g., Estate of Stevens*, 55 IBIA at 62.

2. Whether Decedent was under Undue Influence

To establish undue influence, Appellant, as the will opponent, bears the burden of proof to establish each of the following four elements by a preponderance of the evidence: (1) Decedent was susceptible of being dominated by another; (2) the person allegedly influencing Decedent in the execution of his will was capable of controlling her mind and actions; (3) such a person did exert influence upon Decedent of a nature calculated to induce or coerce her to make a will contrary to her own desires; and (4) the will is contrary to Decedent’s desires. *See Estate of Pickard*, 50 IBIA at 93-94.

Appellant generally asserts that the only reasonable explanation for Decedent to have replaced the 1995 Will with her 2003 Will is that Louella unduly influenced her, because no changes occurred in Decedent’s “immediate family” (e.g., no children were born to her or died) that might explain why Decedent would want to undo the “reciprocal” 1995 Will.<sup>13</sup>

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<sup>13</sup> Appellant has not shown, nor do we find, error in the IPJ’s conclusion that Decedent’s 1995 Will is not a reciprocal will, assuming without deciding that a reciprocal will would be enforceable under Federal law with respect to trust property.

Opening Br. at 23-24. But a mere change of testamentary intent does not warrant a presumption of undue influence. As the Board has stated before, “[w]e do not upset the directive in a will solely for the reason that one child benefits more than others or some are disinherited. . . . ‘[T]he primary purpose of a will is to alter the normal course of descent of the property.’” *Estate of Glenn*, 50 IBIA at 30 (quoting *Estate of Millie White Romero*, 41 IBIA 262, 265 (2005)). Moreover, a change in Decedent’s extended family did occur, i.e., three great-grandchildren were born after the 1995 Will—including both of Appellant’s grandchildren—all of whom Decedent named as beneficiaries in the 2003 Will. *See* 2003 Will ¶¶ 13, 16-17.

Appellant also makes sweeping undue influence allegations best summarized as attempting to show that Louella acted “in concert” with her biological daughters and four BIA employees (the scrivener, the will witnesses, and the notary), who in turn were allegedly “working under” Louella’s husband Frank, to unduly influence Decedent to make her 2003 Will contrary to her desires. *See* Opening Br. at 22, 31; Reply Br. at 11. Appellant claims that the scrivener could not possibly have prepared the will in 2 1/2 hours; therefore, she must have prepared the bequests at the direction of Louella and Lori ahead of time and merely arranged for Decedent to agree to them. *See* Opening Br. at 31. These contentions either find no support at all in the record or they distort the evidence that is in the record (and, as noted *supra*, Appellant acknowledges that he had no new evidence of undue influence to present to the IPJ as grounds for rehearing). Just as with Appellant’s unsubstantiated allegations concerning Frank, there is no evidentiary support for Appellant’s claims that the scrivener had a secret conversation with Louella about Decedent’s will, or that it is extraordinary for BIA staff to meet with a tribal elder in a residence to make her will. *See* Opening Br. at 22, 31. The scrivener testified that Decedent asked her to travel to Louella’s house to prepare the will, and she did not believe that Decedent was unduly influenced. Supplemental Hearing Tr. at 17, 69-70. The scrivener and the will witnesses testified that Louella was not home when the will was being prepared, and the will witnesses also testified that Decedent was relaxed and did not appear to be under the undue influence of another person. *Id.* at 19-20, 22, 36, 41, 51. Also contrary to Appellant’s claim that it only took 2 1/2 hours, including travel time, to make the will, *see* Opening Br. at 30, the scrivener’s actual testimony was that it took 2 1/2 hours just to prepare a handwritten will that she then typed and reviewed with Decedent before the will was executed, *see* Supplemental Hearing Tr. at 20-22, 24-25. Appellant’s attorney never asked how long the entire process took. *See* Order Denying Rehearing at 3-4.

In further support of his argument that Louella and Lori exercised control over Decedent’s mind and actions, Appellant asserts that, apart from their testimony, “there is no independent evidence that the Decedent was capable of caring for her own affairs or finances.” Opening Br. at 23. But as we have already made clear, it was Appellant’s burden to prove undue influence in the making of the will. In addition, Appellant ignores

Dr. Mock's letter, which the IPJ had found credible and corroborative of the 2003 Will proponents' testimony that Decedent was in control of her own affairs to the end.<sup>14</sup> Letter of Dr. Mock; Decision at 13; Supplemental Hearing Tr. at 111.

Finally, Appellant's claim that Louella and Lori had control over Decedent's checking account, and that Louella was responsible for Irvina's termination from the Tribal elder care program, *see* Opening Br. at 23-24, 28, was contradicted by, *inter alia*, Appellant's own testimony. There is substantial evidence in the record to support the IPJ's findings that Lori (not Louella) filled out checks at Decedent's request but Decedent signed her own checks and controlled her checkbook, and that Irvina was laid off due to lack of Tribal funding. *See* Order Denying Rehearing at 8-9; Supplemental Hearing Tr. at 89-90, 105, 132, 136, 148-50.

Therefore, based on all of the foregoing, we also affirm the IPJ's conclusion that Appellant failed to meet his burden of proving that the 2003 Will was the product of undue influence, or otherwise invalid.

### Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the IPJ's May 5, 2011, Order Denying Rehearing.

I concur:

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// original signed  
Thomas A. Blaser  
Administrative Judge  
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\_\_\_\_\_  
//original signed  
Steven K. Linscheid  
Chief Administrative Judge

<sup>14</sup> For the first time on appeal, Appellant contends that the "contents [of Dr. Mock's letter] are generally unknown to this party as a copy of the letter was not provided to Counsel, nor was the letter read into the record. Attorney Stanton was never provided an opportunity to question or to cross-examine the doctor, to fully explore the legal implications of his statements." Opening Br. at 13. Dr. Mock's letter was introduced into evidence at the hearing, Supplemental Hearing Tr. at 111, and although a copy was not available for Appellant at that time, Appellant was clearly on notice and could have followed up. Because Appellant could have but did not raise these arguments to the IPJ when he sought rehearing, we do not consider them now. *See Estate of Stevens*, 55 IBIA at 62.