



INTERIOR BOARD OF INDIAN APPEALS

Estate of Dorothy Glende

61 IBIA 183 (08/19/2015)



# 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 DOROTHY GLENDE ) Order Affirming Denial of Rehearing  
)  
) Docket No. IBIA 13-080  
)  
) August 19, 2015

Peggy K. Connor (Appellant) appealed to the Board of Indian Appeals (Board) from an Order Denying Petition for Rehearing (Order Denying Rehearing) entered on March 8, 2013, by Indian Probate Judge (IPJ) Thomas K. Pfister in the estate of Appellant’s mother, Dorothy Glende (Decedent).<sup>1</sup> The IPJ denied Appellant’s petition for rehearing from the IPJ’s January 18, 2013, Decision, which disapproved Decedent’s will executed in 2004 (2004 Will) on the separate grounds that Appellant unduly influenced Decedent to make the will,<sup>2</sup> and that Decedent lacked testamentary capacity at the time of the will’s execution. The Decision instead approved a will executed by Decedent in 2000 (2000 Will) and ordered that Decedent’s trust estate be distributed in accordance with that will.

In her petition for rehearing and again on appeal, Appellant argues that the IPJ was biased and that the IPJ’s findings are unsupported. The Board disagrees. What Appellant points to as instances of bias by the IPJ actually illustrate that the IPJ sought to fully develop the record, whether or not the evidence favored Appellant, regarding the making and execution of Decedent’s 2004 Will, which was challenged by Appellant’s siblings who were disinherited under that will. Nor does Appellant meet her burden on appeal to demonstrate error in the Order Denying Rehearing. We conclude that Appellant’s objections amount to disagreement with the IPJ’s weighing of the evidence and his decision, and mere disagreement is insufficient to meet Appellant’s burden. Therefore, we affirm the IPJ’s denial of rehearing.

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<sup>1</sup> Decedent, who was also known as Dorothy Porter, was a Bois Forte Band (Nett Lake) Minnesota Chippewa Indian. The probate number assigned to Decedent’s case in the Department of the Interior’s probate tracking system, ProTrac, is No. P000040413IP.

<sup>2</sup> This conclusion was based on an un rebutted legal presumption of undue influence.

## Background

Decedent died testate on December 25, 2005. Death Certificate, Jan. 12, 2006 (Administrative Record (AR) Tab 19).<sup>3</sup> She was married three times, to different men, and is survived by nine children and several grandchildren. Data for Heirship Finding and Family History, Sept. 15, 2009, at 1-2 (AR Tab 138).

Decedent executed her last will on September 17, 2004, with assistance from the Minnesota Agency Office of the Bureau of Indian Affairs (BIA). *See* Will, Sept. 17, 2004 (2004 Will) (AR Tab 210). The will devises all of Decedent's trust or restricted real property and trust personalty to two surviving children and one grandchild: Appellant; Roger Kletschka; and Appellant's son, Patrick Connor. *Id.* at 1 (unnumbered). Specifically, except for Decedent's interests in two allotments that are devised to Roger and Patrick, the will devises all of Decedent's trust or restricted estate, including four other allotments that are specifically identified in the will, to Appellant. *Id.* The will states that it was Decedent's wish to "intentionally omit [her seven other surviving] children, Richard E. Kletschka, Ricardo Kletschka, Dorothea Lynn Kletschka, Cindy Kletschka, Pamela Jean Kletschka Dauk [or Gersemehl], Roxanne Kletschka Tolzmann, and Robin Leigh Kletschka Nordberg from this will."<sup>4</sup> *Id.*

The 2004 Will is preceded by a will that Decedent executed on October 30, 2000, with assistance from the Bois Forte Band. *See* Will, Oct. 30, 2000 (2000 Will) (AR Tab 226). The 2000 Will devises Decedent's estate more broadly among her children, giving interests in specified trust or restricted real property to each of her surviving children and Patrick, and providing for any residual interests to be distributed among her surviving children in equal shares.<sup>5</sup> *See id.* at 2 (unnumbered).

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<sup>3</sup> The Table of Contents is incorrectly numbered. The tab numbers cited in this decision correspond to the tab behind which the referenced document is actually found.

<sup>4</sup> The will also states that Decedent intentionally omitted her other surviving grandchildren, none of whom are named, from the will. *See* 2004 Will at 1 (unnumbered).

<sup>5</sup> In 2005, Decedent sold most of the trust or restricted real property interests she owned at the time, including her fractional shares of all the tracts devised to Appellant's siblings under the 2000 Will. *See* Deeds (AR Tabs 205-07). While the IPJ noted the conveyances in his Decision, he did not address the propriety of any such conveyances made before Decedent's death. Decision at 1 n.1. Nor do we.

The 2004 and 2000 wills also devise Decedent's house. 2004 Will at 2 (unnumbered); 2000 Will at 2 (unnumbered). The IPJ found that he lacked jurisdiction to probate the house, and Appellant did not challenge his finding. Decision at 3.

(continued...)

The IPJ held an initial hearing in May 2011 to confirm Decedent's family history. Initial Hearing Transcript (Tr.), May 24, 2011 (AR Tab 125). Between October 2012 and December 2012, the IPJ held four supplemental hearings, which we discuss below, to take testimony and evidence regarding Decedent's wills. Appellant's siblings who were disinherited by the 2004 Will challenged this will on the grounds that it was the product of undue influence exerted by Appellant and that Decedent lacked testamentary capacity at the time of its execution.<sup>6</sup> Some of the challengers were represented by counsel. The proponents of the 2004 Will, including Appellant, appeared pro se.

The testimony was undisputed that, after the death of Decedent's third husband in 2002, she became increasingly dependent on the assistance of her children, and primarily Appellant, in handling her daily needs, including her financial affairs. There was evidence of friction between Appellant and some of her siblings regarding how best to meet Decedent's needs. *See* First Supplemental (Supp.) Hearing Tr., Oct. 3, 2012, at 53-64 (AR Tab 93).

In August 2004, Decedent moved into Appellant's home, where Decedent remained until she moved into a nursing home in 2005. *Id.* at 235, 273-74. In her testimony, Appellant stated that she did not recall whether she had a valid power of attorney at the time Decedent executed the 2004 Will in September 2004, and also testified that Decedent executed a second power of attorney<sup>7</sup> in favor of Appellant in August or September of 2004 and that it was never revoked. *Id.* at 261-63. Appellant further testified that Decedent subsequently executed two more powers of attorney in favor of Appellant. *Id.* at 257-64. In addition, Appellant testified that Appellant and Decedent shared bank accounts at times beginning in 2002, including at least until April 2004, and that Appellant assisted Decedent with her finances at times before and after the 2004 Will's execution. *Id.* at 264-74.

The IPJ subpoenaed the BIA employees who assisted Decedent with the 2004 Will to give testimony regarding its making and execution, including the will scrivener, Cathey Eidem; the two witnesses to the will's execution, Michele Luzius and Gwen Johns; and the notary, Janis Rock.

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(...continued)

We also note that Roxanne Tolzman filed a challenge to the estate inventory, concerning Decedent's Individual Indian Money account balance, and the IPJ referred the inventory dispute to BIA for resolution. Notice of Inventory Challenge and Order Referring Inventory Challenge to BIA, June 10, 2011 (AR Tab 120). The disposition of the inventory dispute is unknown.

<sup>6</sup> Three grandchildren of Decedent also indicated that they objected to the 2004 Will.

<sup>7</sup> In June 2004, Decedent revoked the first power of attorney given to Appellant earlier that year. First Supp. Hearing Tr. at 70-71.

According to the will scrivener, Eidem, Appellant contacted her by phone on September 14, 2004, to prepare a will for Decedent. Second Supp. Hearing Tr., Nov. 15, 2012, at 18-19 (AR Tab 49). The following day, Eidem faxed a draft of the will to Appellant, who later phoned Eidem to say that “[s]he thought [the] draft looked OK.”<sup>8</sup> *Id.* at 26; Notes of Telephone Contact, Sept. 14, 2004, at 1 (Second Supp. Hearing Tr., IPJ Exhibit A). During the call, Appellant explained that Decedent wished to omit her other children from the will because they had not visited Decedent, and Appellant inquired whether additional beneficiaries could be added at a later time if Decedent decided to do so. Second Supp. Hearing Tr. at 26, 28; Notes of Telephone Contact at 1-2.

Three days after Appellant’s initial contact with Eidem, on September 17, 2004, Appellant drove Decedent to the Minnesota Agency Office to finalize and execute the will. Second Supp. Hearing Tr. at 35-37. Appellant left the premises shortly after their arrival. *Id.* at 37, 90.

Eidem described an initial interview that she conducted with Decedent, for the purpose of verifying her notes of the family history, in a memorandum that she wrote for the file on the same day of the interview. Memorandum from Eidem to File, Sept. 17, 2004 (Eidem Memo) (Second Supp. Hearing Tr., IPJ Exhibit A). Eidem’s memo states that Decedent “knew how many children she had given birth to (14) and knew that 3 boys and 6 girls were still living,” but “could not name them [except that she] named one that I did not have on my list who was deceased and told some information about him.” *Id.* When Eidem named the names on her list, Decedent “agreed that each was her child.” *Id.*

In her testimony at the hearing, Eidem confirmed her memo and notes that Decedent could not remember all of the children’s names without prompting. Second Supp. Hearing Tr. at 36-37, 50-51; *see also* Affidavit of Family History at 2 (Second Supp. Hearing Tr., IPJ Exhibit A) (containing Eidem’s list of names and notes from her interview with Decedent). Eidem testified that she was “a little uneasy” about Decedent being unable to name her children on her own, but reiterated that Decedent independently identified a predeceased child who was omitted from Eidem’s list. Second Supp. Hearing Tr. at 43-44. Eidem opined that Decedent knew what she was doing, and stated that Decedent had told her that she was disinheriting certain children because they did not visit Decedent. *Id.* at 55-56. Eidem recalled that the interview lasted over an hour. *Id.* at 45. She described Decedent as being nervous and “having trouble with recall” at the beginning of the

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<sup>8</sup> Eidem testified that the word “she” in the notes of the telephone call could have referred to Decedent or Appellant. Second Supp. Hearing Tr. at 27. The IPJ concluded that it was most likely Appellant who had reviewed and approved the draft. Decision at 8 n.7.

interview, but that within approximately an hour Decedent became more relaxed and her recall improved. *Id.*

One of the will witnesses, Luzius, testified that she sat through the initial interview with Eidem and Decedent, and that it lasted approximately 15 minutes. *Id.* at 90. Luzius stated that she then met separately with Decedent for about an hour while they waited for Eidem to prepare the will. *Id.* at 91-96. Conversely, Eidem recalled that Luzius spoke with Decedent for 15 minutes, and she did not believe that they met alone. *Id.* at 53-54, 66.

Regarding Luzius's meeting with Decedent, Luzius testified that she spoke with Decedent about her family and other matters, and that Decedent was confused and could not recall, among other things, the names of her children, grandchildren, and husbands. *Id.* at 92-93. Luzius testified that she expressed concerns about Decedent's testamentary capacity to her supervisor, Janis Rock, and that Rock told her to put those concerns in writing. *Id.* at 95. Luzius swore that she provided Eidem with a written statement that she was not comfortable signing the will, including that she felt "under duress."<sup>9</sup> *Id.* at 112-14. Luzius nonetheless signed the will as a witness, which she stated she has regretted ever since. *Id.*

Luzius also testified that, when Appellant dropped Decedent off at the BIA office, Appellant explained to Eidem before leaving the premises that Decedent wished to disinherit Appellant's siblings. *Id.* at 90, 98-99. In contrast, Eidem testified that the will was not discussed in any way in Appellant's presence. *Id.* at 37.

The second will witness, Johns, testified that she had no recollection regarding the execution of Decedent's will, including signing the will. Fourth Supp. Hearing Tr., Dec. 21, 2012, at 18 (AR Tab 35).

According to the testimony of Eidem, Luzius, and Johns, they did not or—to the extent they had no specific recollection—would not have discussed the effect of the 2004 Will with Decedent. Second Supp. Hearing Tr. at 61-62, 66-67, 131-32; Fourth Supp. Hearing Tr. at 25-26.

After Eidem prepared the will for signature, Decedent signed the will in the presence of the two will witnesses. Second Supp. Hearing Tr. at 58, 134. The will witnesses then

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<sup>9</sup> There is no specific mention in Eidem's memo of any *written* statement by Luzius expressing discomfort about witnessing the will, nor is Luzius's written statement contained in the administrative record.

signed the will, and it was notarized by Rock. *See id.* at 7. Rock testified that she had no recollection of the will's execution, including notarizing the will. *Id.*

Thus, the testimony and evidence regarding the 2004 Will's execution came primarily from Eidem and Luzius, who disagreed in their testimony regarding whether they believed that Decedent had testamentary capacity to execute the will. In his Decision, the IPJ gave "substantial weight" to Luzius's hearing testimony, explaining that she had the best recall of the events at the BIA office on the day the will was executed. Decision at 9.

Based on the testimony and other evidence presented at the probate hearings, the IPJ disapproved the 2004 Will. First, the IPJ concluded that "[w]hile there is certainly evidence in the record of actual undue influence by [Appellant] regarding the 2004 Will, I find that the contestants of the 2004 Will do not have the burden to prove actual undue influence . . . because the preponderance of the evidence establishes that a presumption of undue influence by [Appellant] exists . . . and . . . is not rebutted by the evidence." Decision at 10. Next, the IPJ concluded that the preponderance of the evidence also showed that Decedent lacked testamentary capacity at the time of the 2004 Will's execution. *Id.* at 12. After disapproving the 2004 Will on these grounds, the IPJ overruled Appellant's only objection to the 2000 Will that it was replaced by the 2004 Will, and approved the 2000 Will. *Id.* at 13.

Appellant petitioned for rehearing. Petition for Rehearing, Feb. 16, 2013 (AR Tab 24). Appellant alleged that the IPJ was biased against her and conducted the probate hearings in an unfair manner, and she requested that a different judge consider her petition. *Id.* at 1-3 (unnumbered). Appellant challenged the IPJ's finding of presumptive undue influence by arguing that Decedent knew exactly what she wanted to do and intentionally omitted her other children. *Id.* at 1-4 (unnumbered). Appellant also challenged the IPJ's findings regarding lack of testamentary capacity as without evidentiary support or as insufficient when weighed against other evidence in the record. *Id.*

The IPJ denied Appellant's petition. Order Denying Rehearing, Mar. 8, 2013 (AR Tab 17). The IPJ found no merit in Appellant's allegations of bias, and found that Appellant had not shown error in his determination that the will should be disapproved based on presumptive undue influence and/or lack of testamentary capacity. *Id.* at 3-5.

Appellant appealed to the Board and included arguments in her notice of appeal. Notice of Appeal, Apr. 5, 2013 (AR Tab 14). Appellant also attached her petition for

rehearing,<sup>10</sup> as well as several documents that had not been submitted to the IPJ. Appellant did not file an opening brief, and no other pleadings have been received since the Board issued the Order Setting Briefing Schedule on July 12, 2013.<sup>11</sup>

## Discussion

### I. Standard of Review

The Board reviews challenges to factual determinations by the probate judge to determine whether the factual determinations are supported by substantial evidence. *Estate of Samuel Johnson (John) Aimsback (Aims Back)*, 45 IBIA 298, 303 (2007). We review questions of law and the sufficiency of the evidence *de novo*. *Estate of Anita Adakai*, 61 IBIA 2, 7 (2015). Appellant bears the burden to show error in the Order Denying Rehearing. *See Estate of Dominic Orin Stevens, Sr.*, 55 IBIA 53, 62 (2012). Simple disagreement with or bare assertions concerning a challenged decision are insufficient to carry an appellant's burden of proof. *Estate of Edward Teddy Heavyrunner*, 59 IBIA 338, 346 (2015).

Unless some manifest error or injustice exists, the Board's scope of review is limited to reviewing those issues brought before the probate judge on rehearing. 43 C.F.R. § 4.318 (scope of review); *see Estate of Leroy Charles Dennison*, 61 IBIA 66, 68 (2015); *Estate of Sarah Stewart Sings Good*, 57 IBIA 65, 72 (2013). 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 Dennison*, 61 IBIA at 68; *Estate of Sings Good*, 57 IBIA at 72.

### II. Judicial Bias

In her petition for rehearing and again on appeal, Appellant argues that the IPJ was “bias[ed] from the beginning” of Decedent's probate. Petition for Rehearing at 1 (unnumbered); Notice of Appeal at 2. In her petition for rehearing, Appellant requested that a different probate judge be assigned to consider the petition. Petition for Rehearing

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<sup>10</sup> An appellant who simply reiterates the same arguments raised in a petition for rehearing, without arguing why the decision denying the petition was in error, will generally fail to meet her burden of proof, especially where, as here, the arguments pertain to evidentiary findings. *Estate of Esther Eleanor Trevino*, 40 IBIA 271, 272 (2005). But to the extent that Appellant's petition for rehearing serves to supplement and explain her arguments on appeal, we have considered it.

<sup>11</sup> A challenger of the 2004 Will, Ricardo Kletschka, and his wife and daughter, submitted letters in response to the notice of appeal. Ricardo also submitted a letter in response to a third party letter submitted by one Trudy King in support of Appellant's notice of appeal.

at 1. The IPJ rejected Appellant’s claims of bias as based on a misunderstanding of the IPJ’s “responsibility to develop the record and ensure that the facts, both pro and con, are brought out,” and denied her request to reassign the petition.<sup>12</sup> Order Denying Rehearing at 3-4 (quoting *Estate of Rose Medicine Elk*, 39 IBIA 167, 172 (2003) (citation and internal quotation marks omitted)).

In this appeal from the Order Denying Rehearing, Appellant does not make any specific allegation of bias regarding the denial of rehearing. Appellant repeats an allegation she made in her petition for rehearing that the IPJ did not allow her to make comments during the testimony of others, and only allowed her to rebut testimony by questioning witnesses after they had finished their testimony. Notice of Appeal at 2. The IPJ responded to this allegation by explaining that, “because [Appellant] was not represented by counsel at the October 3, 2012 hearing, the [IPJ’s] calling of [Appellant] as a witness afforded her the opportunity to present her own testimony in response to the testimony and evidence presented by others.” Order Denying Rehearing at 3. On appeal, Appellant fails to respond to the IPJ’s explanation and show that it is deficient, e.g., by identifying testimony or other evidence that the IPJ prevented her from introducing.

We conclude that Appellant does not meet her burden of proof on appeal. We agree that Appellant misunderstood probate hearing procedures and the IPJ’s authority and responsibility to ensure that “relevant facts are elicited in a probate proceeding.” *Estate of Theresa Underwood Dick*, 50 IBIA 279, 293 (2009); *see also Estate of Stevens*, 55 IBIA at 66 n.16 (“[E]specially when parties are not represented by counsel, the judge may need to assume a more active role in eliciting testimony.”). What Appellant points to as evidence of bias instead shows, in our opinion, that the IPJ simply sought to develop the record, regardless of whether the evidence supported approval of the 2004 Will.

### III. Presumptive Undue Influence

We turn now to Appellant’s argument that the IPJ erred in determining that the 2004 Will was the product of undue influence, and we reject Appellant’s argument.

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<sup>12</sup> To the extent that Appellant’s petition for rehearing might be construed as a motion for the IPJ to disqualify himself from the case, *see* 43 C.F.R. 4.27(c)(2) (motion for disqualification of deciding official), Appellant did not follow the procedures for appealing the IPJ’s decision not to withdraw, and the Board lacks authority to review that decision, *see id.* §§ 4.27(c)(3) (officials with authority to review disqualification decisions), 30.132(a) (request for immediate review may be filed with the Chief Administrative Law Judge). Thus, assuming that Appellant seeks the Board’s review of whether the IPJ should have reassigned the petition for rehearing, we decline to do so.

A will contestant bears the burden of showing undue influence, unless a presumption of undue influence applies, in which case the burden shifts to the will proponent to show that the testator was not subjected to undue influence. *Estate of Anthony J. Andreas, Jr.*, 60 IBIA 326, 333 (2015). A presumption of undue influence arises when: “(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 the confidential relationship was the principal beneficiary under the will.” *Estate of George Fishbird*, 40 IBIA 167, 169 (2004). The Board has found a confidential relationship 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 Dick*, 50 IBIA at 301. Confidential relationships are not limited to fiduciary relationships, however, and the Board may look to the totality of the circumstances to determine whether a confidential relationship exists. *Id.* at 301-02. To rebut the presumption of undue influence, a will proponent must show that an objective, independent person thoroughly discussed the effect of the will with the testator. *Id.* at 301; *Estate of Jesse Pawnee*, 15 IBIA 64, 69 (1986).

In his original Decision, the IPJ found that each element of the test for presumptive undue influence was met, and that Appellant had failed to rebut the presumption. Specifically, the IPJ found: (1) that Appellant had a confidential relationship with Decedent at the time of the 2004 Will’s execution, as evidenced by Appellant’s testimony regarding the bank accounts she shared with Decedent, her assistance with Decedent’s financial affairs, and her powers of attorney for Decedent; (2) that Appellant played an active role in the preparation of the 2004 Will by coordinating with the will scrivener to have the will drafted and executed, reviewing the draft will, and discussing the contents of the will with the scrivener; (3) that Appellant was the principal beneficiary of the 2004 Will; and (4) that Appellant presented no evidence that an independent and objective person discussed the effect of the 2004 Will with Decedent. Decision at 11. The IPJ also explained that he found Appellant’s testimony that she did not take an active role in the preparation of the will, *see* First Supp. Hearing Tr. at 233-34, was not credible in light of Appellant’s demeanor while testifying and other evidence in the record, Decision at 9; *see also* Order Denying Rehearing at 3.

In seeking rehearing, Appellant did not specifically challenge any of these findings, but instead argued that Decedent was strong willed and intended to disinherit her children. *See* Petition for Rehearing at 1-4 (unnumbered).

The IPJ denied rehearing on the grounds that Appellant had not presented any arguments or newly discovered evidence to show error in his findings regarding presumptive undue influence. Order Denying Rehearing at 4. In doing so, the IPJ cited statements by Appellant in her petition for rehearing as supporting his original findings.

*Id.* (citing Petition for Rehearing at 3-4 (unnumbered) (Appellant stated that she “helped Ma with her bills since Jan[uary] 2004” and “helped her so she could get her will done.”)).

On appeal to the Board, Appellant asserts that Decedent was an “Elder and requested help to get a will done,” and that Appellant was a caregiver to Decedent and “helped her whenever [she] could.” Notice of Appeal at 2. Appellant also suggests that the IPJ found that she had a confidential relationship with Decedent on the basis that they had a parent-child relationship. *See id.* We find that Appellant’s statements regarding the assistance she provided Decedent are consistent with the IPJ’s findings regarding Appellant’s role in the preparation of the will, and that the confidential relationship identified by the IPJ was that of a fiduciary rather than simply a daughter. We also note that none of Appellant’s arguments address whether an independent, objective person thoroughly discussed the effect of the will with Decedent so as to rebut the presumption of undue influence.

We therefore conclude that Appellant’s objections do not show error in the IPJ’s finding of presumptive undue influence, and instead amount to disagreement with the Decision. Simple disagreement with or bare assertions concerning a challenged decision are insufficient to carry Appellant’s burden of proof. *See Estate of Heavyrunner*, 59 IBIA at 346.

#### IV. Testamentary Capacity

Next, Appellant disputes the IPJ’s finding that Decedent lacked testamentary capacity at the time of the 2004 Will’s execution. Here again, Appellant fails to meet her burden to show error in the Order Denying Rehearing.

Testamentary incapacity is established by showing that, at the time of the will’s execution, the testatrix did not know the natural objects of her bounty, the extent of her property, or the desired distribution at death of her property. *Estate of Dick*, 50 IBIA at 294. The “natural objects” of one’s bounty are the decedent’s children. *Id.* at 294. Disinheritance of one’s heirs is not unnatural per se, and a will may not be set aside simply because one child benefits more than others where the evidence shows that a testatrix “remembered and discussed the personal situations of each of her children,” and had a testamentary plan to distribute her property. *Id.* (quoting *Estate of Catalina Clifford*, 9 IBIA 165, 165 (1982)). Those contesting the will have the burden to prove that the testatrix lacked testamentary capacity by a preponderance of the evidence. *Estate of Dick*, 50 IBIA at 294.

The IPJ found that Decedent did not know the natural objects of her bounty, based on her inability to name her children without prompting. Decision at 12 (citing *Estate of Joseph Red Eagle*, 4 IBIA 52, 60 (1975)). As evidence, the IPJ cited Eidem’s memo to the

file, and Luzius’s “credible and reliable” testimony, that Decedent could not name her children without prompting on the day of the 2004 Will’s execution. *Id.*

In her petition for rehearing, Appellant argued that the IPJ actually rested his finding of testamentary incapacity on what Appellant claims was inaccurate witness testimony that Decedent had been diagnosed with dementia. Petition for Rehearing at 1 (unnumbered). According to Appellant, Decedent never had dementia, and any apparent shortcomings in her mental capacity were the result of diabetes and hearing loss. *Id.* Appellant further argued that the IPJ gave too much weight to Luzius’s testimony, and insufficient weight to Eidem’s testimony. *Id.* at 1-2 (unnumbered). Appellant argued that the IPJ should have also given more weight to a letter submitted by James Davenport,<sup>13</sup> which stated that during a visit with Decedent in November 2005, Decedent showed no signs of mental infirmity. *Id.* at 1 (unnumbered); Letter from Davenport to IPJ, Oct. 29, 2012 (AR Tab 66). And, Appellant argued that the IPJ should have given greater weight to tribal court findings, made in June 2004, regarding Decedent’s competency to terminate Appellant’s first power of attorney and to choose her place of residence. Petition for Rehearing at 4 (unnumbered); *In re Dorothy Glende*, No. 04-795 (Bois Forte Band Tribal Court, June 5, 2004) (First Supp. Hearing Tr., Exhibit 5) (AR Tab 93).

In his Order Denying Rehearing, the IPJ clarified that his finding that Decedent lacked testamentary capacity “was not based on whether she suffered from dementia.”<sup>14</sup> Order Denying Rehearing at 5. The IPJ explained that his finding was based on the testimony and evidence presented by Luzius and Eidem, and that he gave greater weight to Luzius’s testimony than Eidem’s testimony because Luzius “had the best recall of the events surrounding the execution of the 2004 Will and she provided very detailed and credible testimony concerning those events.” *Id.* The IPJ noted that he did rely on Eidem’s memo, to the extent that it memorialized Decedent’s inability to recall the names of her children, and he found that this was not explained by a hearing problem as Appellant alleged. *Id.* With respect to the Davenport letter and the tribal court’s finding regarding Decedent’s competence, the IPJ found they merited “little weight” because the question of whether Decedent possessed testamentary capacity must be decided based on her mental capacity at the time of the will’s execution in September 2004. *Id.* (citing *Estate of Samuel Tsoodle*, 11 IBIA 163, 166 (1983)).

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<sup>13</sup> Davenport described himself as a foster parent of several of Decedent’s pre-deceased children.

<sup>14</sup> The IPJ’s clarification is consistent with the structure and content of his original Decision, in which the IPJ stated on page 7 that Decedent was “diagnosed with dementia,” but makes no further mention of any dementia, including in the IPJ’s specific discussion of testamentary capacity on page 12 of the Decision. *See* Decision at 7, 12.

On Appeal, Appellant again argues the Decision found that Decedent was diagnosed with dementia, and argues that Decedent was never treated for dementia. Notice of Appeal at 1. She reiterates that Decedent was hard of hearing. *Id.* at 2. Appellant also repeats her argument that Luzius’s testimony is not credible because it conflicts with the fact that she signed the will. *Id.* We reject these arguments as grounds for setting aside the Order Denying Rehearing.<sup>15</sup>

The Board will not disturb a probate judge’s findings of fact when they are supported by substantial evidence in the record, nor will it normally disturb a probate judge’s determination of witness credibility when he or she had an opportunity to hear the witnesses and observe their demeanor. *Estate of Peter Many Hides*, 60 IBIA 200, 215 (2015); *Estate of Medicine Elk*, 39 IBIA at 169. The IPJ adequately explained that his determination that Decedent lacked testamentary capacity did not depend on whether Decedent had dementia, and that the actual basis for his decision—Decedent’s inability to name her children—was not due to a hearing deficit. The IPJ also explained that his decision was based on the weight of the evidence, and the credibility of Luzius’s testimony, that Decedent was unable to name her children on the day of the 2004 Will’s execution. Unlike the Board on appeal, the IPJ was able to hear the witnesses and observe their demeanor, and thus was in the best position to assess their credibility. Based on his observations, the IPJ determined that Luzius’s description of the events surrounding the will’s execution and Decedent’s confusion regarding her family members was the most reliable due to the detail she was able to provide. We will not disturb the IPJ’s determination.

## V. New Arguments and Evidence

Appellant attaches several documents to her notice of appeal that she did not present to the IPJ at the probate hearings or in Appellant’s petition for rehearing, and requests that the Board consider them for the first time on appeal.<sup>16</sup> Appellant also appears to raise an issue regarding the 2000 Will that she did not previously assert as a basis to challenge that will. Notice of Appeal at 2. The Board ordinarily will not consider allegations of error or evidence that could have been, but were not, presented to the probate judge. *Estate of Dennison*, 61 IBIA at 68; *Estate of William Fox*, 60 IBIA 16, 19 (2015) (“Precedent of long

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<sup>15</sup> On appeal, Appellant does not challenge the IPJ’s determinations in the Order Denying Rehearing regarding the Davenport letter or the tribal court finding.

<sup>16</sup> The documents include medical records from a May 2003 examination of Decedent’s hearing; a March 20, 2013, statement of Decedent’s treating physician; an April 2, 2013, statement by Patrick, Appellant’s son; and an undated statement of Eileen Barney, Decedent’s niece. Notice of Appeal, Attachments 1-4.

standing directs that newly discovered evidence shall be presented [to the probate judge] and will not be considered on an appeal.”). Appellant offers no justification for her failure to obtain and produce her new evidence or arguments to the IPJ. Even if we were to consider them, we would find no error, let alone manifest error, in the IPJ’s decision.

**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 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