



INTERIOR BOARD OF INDIAN APPEALS

Estate of Jo Anne Harrison

61 IBIA 262 (09/17/2015)

sought to have the second will witness subpoenaed and never produced a statement from that individual to support her assertion.

Background

Decedent died on March 23, 2010. Data for Heirship Finding and Family History, Aug. 22, 2011, at 1 (Administrative Record (AR) Tab 26). Decedent was survived by four daughters: Patricia Ann Spotted Wolf (Appellant), Cheryl Marie (Kuka) Spotted Wolf (Cheryl), Delores Lynn Spotted Wolf, and Billie Jo Myo (Billie Jo). *Id.* Decedent was also survived by grandchildren, two of whom, Lance Kicking Woman and Hope Kicking Woman, she may have adopted. Supp. Hearing Transcript (Tr.), May 9, 2012, at 6 (AR Tab 6).

On February 2, 2010, Decedent executed a will that devised all of her real property, “equally divided between my daughter Billie Jo Myo, my son/grandson Lance Kicking Woman and my granddaughter Kyra Harrison (Kyra).” Will, Feb. 2, 2010 (AR Tab 25). The will bears the signatures of two witnesses, Martha Harrison Spotted Eagle (Martha), who was Decedent’s cousin, and Gail Ann Braun (Gail),² a granddaughter of Decedent. *Id.*; *see* Supp. Hearing Tr. at 4-5 (AR Tab 6). The will was notarized by Carol Williamson (Carol). Will, Feb. 2, 2010; *see* Supp. Hearing Tr. at 9.

At the initial probate hearing, Decedent’s daughters who were not named as beneficiaries challenged the will, arguing that it was the product of undue influence and that Decedent lacked testamentary capacity on the date of its execution. Initial Hearing Tr., Nov. 15, 2011, at 6 (AR Tab 14). Appellant contended that Decedent “would never put her grandchildren” in her will, and argued that “she was not of sound mind the month before she passed away” because “she had leukemia for over a year.” *Id.* When the ALJ explained that there were two primary bases for challenging a will—lack of testamentary capacity and undue influence—Appellant stated, “That’s what I believe it is because I talked to Gail Ann Braun, one of the witnesses.” *Id.* at 7-8. Appellant continued, “And she’s in jail in Missoula, and she said she never did sign this will.” *Id.* at 8. The ALJ responded, “Okay,” and advised Appellant that she needed to come to the supplemental hearing “prepared to prove” lack of testamentary capacity or undue influence, but he did not respond directly to Appellant’s assertion that Braun denied signing the will. The ALJ did offer to assist the parties challenging the will by issuing subpoenas, if they wanted records or wanted people to testify. *Id.* at 10. The ALJ set the matter for a supplemental hearing, and advised Appellant and her sisters that “a party who challenges a will bears the burden of

² Also known as Gail Ann Brown. Data for Heirship Finding and Family History at 2 (AR Tab 26).

proving by a preponderance of the evidence . . . that the will was somehow invalid.” *Id.* at 7. The ALJ also advised the challengers to “seek legal counsel.” *Id.* at 15-18.

Following the initial hearing, the ALJ ordered that any party who desired to present evidence at the supplemental hearing must submit the evidence to the ALJ by February 3, 2012. Order to Present Evidence, Dec. 5, 2011 (AR Tab 12). The ALJ ordered that any party intending to call witnesses at the supplemental hearing must provide him with a statement by February 3, 2012, indicating, among other things, the facts to which the witness would testify. *Id.* at 2. The ALJ also ordered that if any party wanted any person subpoenaed, they must provide the same information, i.e., indicating the facts to which the person would testify. *Id.*

At Appellant’s request, the ALJ subpoenaed Decedent’s medical records from the Benefis Hospital in Great Falls, Montana. Letter from ALJ to Appellant, Mar. 12, 2012 (AR Tab 8); *see* Letter from Appellant to ALJ, Nov. 28, 2011 (requesting subpoenas) (AR Tab 13).³ The ALJ also subpoenaed Martha and Carol to testify at the supplemental hearing. *See* Subpoenas, Apr. 30, 2012 (AR Tab 7). The ALJ did not subpoena Gail to testify, nor did Appellant request that he do so.

At the supplemental hearing, Martha testified that Decedent had originally handwritten the will, and had asked her to type it up and witness it because they had “always been close.” Supp. Hearing Tr. at 4 (AR Tab 6). Martha testified that Decedent was not under any pressure by anyone to dispose of her property in a certain manner, and that Decedent confirmed that the will represented her wishes for the disposal of her property. *Id.* at 5. Martha noted that in February 2010, Decedent could be forgetful due to her cancer, but that “she was definitely of sound mind, made her decisions,” and “knew who her children were.” *Id.* at 6. Martha testified that when asked about her choices in the will, Decedent explained that she was “concerned for [her] younger kids because . . . they won’t have anything” and that she intentionally omitted her other daughters because “they’re older, they have jobs, [and] they . . . can provide for themselves.” *Id.* at 6-7. In response to a question from the ALJ about whether there was anyone else present when Decedent asked her to type up the will, Martha testified that “[Decedent’s] granddaughter, Gail Braun, was there.” *Id.* at 5.

Following Martha’s testimony, the ALJ asked if any family members wanted him to ask Martha any questions on their behalf. None responded. *Id.* at 8.

³ Due to the volume of records produced, the ALJ provided Appellant with a digital copy for review. *Id.*

The ALJ next called Carol to testify. Carol testified that she notarized the will at Decedent's request, and that in her opinion, Decedent's mental state "was good" and that she "knew what she was signing" on the date of the will's execution. *Id.* at 9-10. Carol testified that she had discussed the will with Decedent, had "asked [her], and [she] said that's what she wanted to do." *Id.* at 9. Carol also testified that she witnessed Decedent signing the will, and when asked by the ALJ whether she "witness[ed] and observe[d] the other two people sign it," Carol testified, "Yes." *Id.*

The ALJ asked whether there were any additional questions that anyone wanted him to ask Carol, and again no one responded. *Id.* at 10.

After Martha and Carol had completed their testimony, Appellant stated that she did not have any more evidence, but she proceeded to assert that Martha's husband had approached Appellant and her sisters after the funeral for Decedent, expressing an interest in purchasing the land in Decedent's estate. Appellant presented this information apparently to suggest that Martha influenced Decedent to devise her property in a way that might make it easier for Martha's husband to purchase the property. *See id.* at 13. Appellant also indicated generally that she wanted to rely on Decedent's medical records. *See id.* at 15. Appellant made no mention of Gail Braun's involvement—or purported denial of involvement—in the execution of the will, nor did she question the testimony of Martha and Carol regarding that involvement.

Following the supplemental hearing, Appellant wrote to the ALJ, suggesting that the testimony of Martha and Carol was not consistent. Appellant stated that Carol had testified that Martha had brought Decedent to her office in Browning, but Decedent was admitted to the hospital for a blood transfusion the same day. Letter from Appellant to ALJ, May 21, 2012, at 1 (AR Tab 5). Appellant argued in her letter that Martha had failed to explain how Gail was there to sign the will. Appellant asserted that "Gail . . . is in the Missoula Detention Center doing jail time. We wanted to bring her to court with us because she says she never seen no will and she never signed a will. Both times we had court for [Decedent's] estate Gail . . . has been in jail here in Missoula, MT." *Id.* Appellant also explained that when the ALJ had solicited questions for Martha and Carol at the supplemental hearing, Appellant had gone "blank," as she realized what Martha "was up to." *Id.* at 2 (unnumbered).

On May 29, 2012, the ALJ issued a decision approving Decedent's will and determining the distribution of her estate. Decision, May 29, 2012 (AR Tab 4). In approving the will, the ALJ gave "great weight" to the "compelling, very credible" testimony of Martha and Carol, which he found internally consistent. Decision at 1-2. The ALJ concluded that those challenging the will had "failed to support their challenge with evidence that would overcome the presumption that a will executed by Decedent and signed

by two witnesses is valid.” *Id.* at 4. To the contrary, the ALJ explained that the evidence showed that “Decedent expressed clear and logical reasons for her decisions on how her estate was to be distributed,” and that she was “under no pressure to dispose of her property in a particular manner.” *Id.* at 2. The ALJ explained that the will could not have been the product of undue influence exerted by Billie Jo because she “did not participate in the drafting or execution of the will, and there was no evidence offered that she was either capable of, or exercised undue influence over Decedent at any time.” *Id.* The ALJ concluded that “[t]he will executed on February 2, 2010 by Decedent reflected her intent as to the disposition of her property,” approved the will, and ordered that Decedent’s real property be distributed to the named beneficiaries—Billie Jo, Lance, and Kyra—in 1/3 shares. *Id.* at 2, 4.⁴

Appellant petitioned for rehearing. Petition for Rehearing, June 22, 2012 (AR Tab 3). Appellant argued that it was unjust to base the Decision “on the witness [and] notary testimon[y],” and she alleged that Martha “took advantage” of Decedent and influenced the content of the will. *Id.* at 1. Appellant also argued that she and her sisters were unprepared for cross-examination at the supplemental hearing because they are not lawyers and were not represented by counsel at the hearing. *Id.* at 2. Finally, Appellant contended that Decedent would not have intended for “only one daughter” to inherit her property. *Id.* Appellant did not repeat her earlier allegation that Gail had denied witnessing the will, nor did she otherwise specifically refer to Gail in the petition for rehearing.

On August 22, 2013, the ALJ denied Appellant’s petition for rehearing. Order Denying Rehearing (AR Tab 3). The ALJ began by explaining that the “petition . . . contains no assertion of newly discovered evidence whatsoever,” and as such, under the regulations, “at the very least, the petition must state specifically and concisely, the grounds upon which it is based.” *Id.* at 2. The ALJ then rejected each ground upon which Appellant based her petition for rehearing.

First, the ALJ concluded that Appellant had failed to prove that Decedent was unduly influenced into executing the will, much less by Martha, who “is not an interested party, is not a devisee and had no confidential relationship with the Decedent.” *Id.* at 4. Without any evidence to support Appellant’s contentions, the ALJ determined that “it is impossible . . . to find that Martha unduly influenced the Decedent or took advantage of her merely because [Appellant] says this is the case.” *Id.*

⁴ Decedent’s personal property was not distributed by the will, and passed intestate to her surviving children in equal shares. *Id.* at 5.

Next, the ALJ explained that “[d]espite being advised that they should consider obtaining counsel and despite assuring the undersigned that they would do so, the will contestants opted to appear at the supplemental hearing without representation.” *Id.* Citing Board precedent, the ALJ concluded that lack of representation at a hearing “does not mean that any decision rendered in the proceeding will not be binding upon that person” or that a party is relieved from their responsibility to present all of their evidence and arguments at that time. *Id.* (quoting *Estate of Wesley Emmett Anton*, 12 IBIA 139 (1984)). Thus Appellant’s lack of representation at the supplemental hearing, and resulting failure to cross-examine the witnesses, were not, without more, grounds for rehearing.

Finally, the ALJ rejected Appellant’s assertion that Decedent would not have intended to leave her property to only one of her daughters. The ALJ again concluded that Appellant had offered “nothing in the way of newly discovered evidence” that would merit rehearing on that ground. *Id.* The petition was therefore denied.

On his own initiative, the ALJ also addressed Appellant’s earlier allegations regarding Gail. The ALJ noted that despite Appellant’s allegations at the initial hearing that Gail had said she never signed a will, Appellant had “offered nothing concrete at the supplemental hearing, to include an affidavit from Gail Brown, which would have substantiated [her] assertion that Gail did not actually witness the will.” *Id.* at 2, 4.⁵

Appellant appealed to the Board. Notice of Appeal, Aug. 30, 2013. In her notice of appeal, Appellant contends (1) that Decedent lacked the mental capacity to execute the will, arguing that due to the medications she was taking for cancer treatment, she was “not of mental capacity to sign her property away”; (2) that “[e]very state requires at least two, sometimes three, witnesses” for a will, and Gail “says she never signed a will,” and was in jail on February 2, 2010; and (3) that Appellant “know[s]” Decedent would not include Billie Jo in her will because Billie Jo stole from Decedent.

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 Aimsback*, 45 IBIA 298, 303 (2007). We review questions of law and the sufficiency of the evidence *de novo*. *Estate of Dominic Orin Stevens, Sr.*, 55 IBIA 53, 62

⁵ The ALJ also addressed Appellant’s allegation that the testimony concerning the execution of the will was inconsistent with medical evidence that Decedent was admitted to the hospital for a blood transfusion the same day. The ALJ explained that the medical records indicated that Decedent was not admitted to the hospital until later in the day. *Id.* at 4.

(2012). Appellant bears the burden to show error in the Order Denying Rehearing. *See id.* 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 manifest error or injustice is shown, the Board's scope of review is limited to reviewing those issues brought before the ALJ on rehearing. 43 C.F.R. § 4.318 (Scope of review); *see 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 Sings Good*, 57 IBIA at 72; *Estate of Stevens*, 55 IBIA at 62.

Discussion

We can readily dispose of Appellant's argument that, based on the medication Appellant was taking, she lacked testamentary capacity. Notice of Appeal, Sept. 3, 2013, at 1. First, Appellant did not preserve this argument in her petition for rehearing, and thus it is not properly before the Board. Second, even if that were not the case, Appellant's bare allegation that Decedent was taking narcotics does not, by itself, demonstrate that she lacked testamentary capacity when she executed the will. *See Estate of Jeanette Little Light Adams*, 39 IBIA 32, 33 n.3 (2003).

We also summarily reject Appellant's argument that she "know[s]" that Decedent would not have included Billie Jo in her will as grounds to set aside the Order Denying Rehearing. Notice of Appeal at 1. Appellant's expression of personal belief in her petition for rehearing was insufficient to demonstrate proper grounds for granting rehearing.

Of somewhat greater concern is Appellant's allegation, first raised at the initial hearing and again raised on appeal, that Gail had told Appellant that she never signed the will. Arguably, when that allegation was made, the ALJ should either have sought to subpoena Gail or made a finding of Gail's unavailability. *See* 43 C.F.R. § 30.229 (When will testimony be required for approval of a will, codicil, or revocation?). Where, as was the case here, a non-self-proved will has been submitted for approval, "the attesting witnesses who are in the reasonable vicinity of the place of hearing must appear and be examined, unless they are unable to appear and testify because of physical or mental infirmity." *Id.* § 30.229(a). If an attesting witness is not in the reasonable vicinity or is unable to appear and testify, the judge may, among other options, "[o]rder the deposition of the attesting witness at a location reasonably near the residence of the witness," or "[a]dmit the testimony of other witnesses to prove the testamentary capacity of the testator and the execution of the will." *Id.* § 30.229(b)(1)&(2). Whether we might infer from Appellant's own allegation, i.e., regarding Gail's incarceration, that Gail was unavailable to testify, the

ALJ arguably should have made a finding to that effect in order to explain his failure to call her as an attesting witness, before resorting to the testimony of the notary.

For several reasons, however, we decline to find that the ALJ committed error in denying rehearing. First, in her petition for rehearing, Appellant made no mention of Gail, asserting only that it was unjust to approve the will based “on the witness & notary testimonies.” Petition for Rehearing at 1. Second, contrary to Appellant’s suggestion that three witnesses might be required, the absence of Gail’s testimony to establish that she signed the will did not render the will invalid. Under Federal law applicable to Indian wills, a will must be executed by the testatrix and “attested by two disinterested adult witnesses.” 25 C.F.R. § 15.4. And the Board has recognized that if one of the will witnesses is disqualified, a notary who substantively performed the same function may serve as the second will witness. *Estate of Edward Kappaisruk Ramoth, Sr.*, 56 IBIA 271, 272, 277-78 (2013).⁶ Thus, as a matter of satisfying the will *proponent’s* burden to demonstrate that the will was properly executed and witnessed by two disinterested witnesses, the testimony of Martha and Carol was sufficient as a matter of law.⁷

Third, once two will witnesses had testified to the will’s execution and to Decedent’s testamentary capacity, it became Appellant’s burden to demonstrate grounds to set aside the will. In this context, Appellant’s allegation that Gail had denied signing the will was, in effect, a claim that the will was somehow fraudulent (and that the testimony of Martha and Carol was untrue). Yet Appellant, while claiming several times that Gail had told her that she never witnessed the will, never produced any statement from Gail to that effect. Nor did Appellant ask that the ALJ subpoena Gail as a witness for Appellant. And at the supplemental hearing, Appellant did not challenge the testimony of either Martha or Carol, both of whom testified that Gail had been present and had witnessed the will.

On these facts, we are not convinced that the ALJ erred in denying Appellant’s petition for rehearing. We understand that Appellant is not an attorney, but she was afforded an adequate opportunity to proffer evidence, which could have included a

⁶ A will devising trust property does not need to be notarized in order to be valid, and thus the notary was not precluded from functioning as the second will witness required by § 15.4.

⁷ Appellant’s theory that Martha somehow influenced Decedent to devise her property to individuals who would be more willing to sell the land to Martha’s husband, aside from being pure speculation, would not defeat Martha’s status as a “disinterested” witness under the law because Martha was not a beneficiary named in the will nor did she have any relationship to the will beneficiaries that even arguably would disqualify her as a witness. See *Estate of Sings Good*, 57 IBIA at 77.

statement from Gail, and she did not do so. Appellant's unsupported assertions about what Gail purportedly said are insufficient to satisfy Appellant's burden on appeal to demonstrate that the ALJ erred in denying rehearing.

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 ALJ's August 22, 2013, Order Denying Rehearing.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge