



INTERIOR BOARD OF INDIAN APPEALS

Estate of Dwight Osborne

61 IBIA 323 (10/06/2015)



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 DWIGHT OSBORNE) Order Affirming Decision
)
) Docket No. IBIA 14-016
)
) October 6, 2015

Carol Osborne (Appellant) appealed to the Board of Indian Appeals (Board) from an Order Denying Rehearing entered on September 19, 2013, by Administrative Law Judge (ALJ) Earl J. Waits in the estate of Appellant's father, Dwight Osborne (Decedent).¹ The ALJ denied a petition in which Appellant sought to revisit the ALJ's approval of Decedent's will in a decision dated December 21, 2012 (Decision). Appellant's petition was based on evidence developed subsequent to the Decision indicating that one of the will beneficiaries, L.S., a minor, who is identified in the will as Decedent's granddaughter, was not in fact his biological granddaughter. Appellant alleged that L.S.'s mother had used deception to gain Decedent's trust and cheat him out of his land for her personal gain, and that no property should pass to individuals who are not lineal descendants. The ALJ concluded that the dispute over L.S.'s paternity was not material to determining Decedent's testamentary intent at the time he made his will, and that it is neither possible nor appropriate to speculate whether the evidence of paternity would have altered Decedent's intention, had it been known prior to his death.²

We affirm the Order Denying Rehearing because Appellant produced no evidence that L.S.'s mother procured Decedent's will through fraud. Whether, as Appellant contends, Decedent would have reduced his bequest to L.S., and if so in what respect, had he known that she was not his biological granddaughter, is a matter that the ALJ properly concluded he could not determine. In addition, Appellant has produced no evidence that L.S. is not an Indian, and thus we reject Appellant's allegation that the ALJ erred in failing

¹ Decedent was a Shoshone-Bannock Indian of the Fort Hall Reservation. His probate case is assigned Probate No. P000092420IP in the Department of the Interior's probate tracking system, ProTrac.

² The Order Denying Rehearing also granted a separate petition from the Bureau of Indian Affairs to add certain property that had been devised to L.S., but which was omitted from the Decision.

to revisit that finding, as relevant to whether L.S. is eligible to be a devisee of Decedent's trust land.

Background

Decedent died on January 25, 2011, and left a will that he had executed on October 29, 2002. Decision, Dec. 21, 2012, at 1 (Administrative Record (AR) Tab 3). In his will, Decedent left his interests in various Fort Hall allotments to four beneficiaries—his two children and two “granddaughters.” To Appellant, Decedent devised his interests in four allotments, and to his son, Lance Deepwater Osborne (Lance), Decedent devised his interests in three allotments. Decedent devised an interest in one allotment to his step-granddaughter, Ja Neva,³ who is identified in the will as Decedent's granddaughter. Ja Neva is the daughter of Judy Hall (Judy), from a relationship prior to Judy's marriage to Lance. Decedent also devised his interests in ten allotments, and the residuary of the estate, to L.S., whom the will also describes as Decedent's granddaughter. L.S. was born during Judy's marriage to Lance. The two subsequently divorced. The obituary for Decedent indicates that he had a close relationship with L.S. (AR Tab 8).

Both Appellant and Lance attended the hearing for Decedent's probate. Attendance Roster, July 17, 2012 (AR Tab 10). Neither objected to Decedent's will, which was self-proved, and the ALJ approved the will in the Decision and ordered that Decedent's trust estate be distributed accordingly.

Within the time period allowed for seeking rehearing, Appellant filed a petition with the ALJ “appealing” the Decision and seeking to “stay” the probate case pending the outcome of tribal court proceedings in which Lance apparently sought to modify the divorce decree, and Judy apparently sought custody of L.S. *See* Letter from Appellant to Probate Hearings Division, Jan. 22, 2013 (Petition for Rehearing) (AR Tab 3). Appellant alleged that in those proceedings, Judy had advised the Tribal Court that L.S. is not Lance's daughter. Appellant submitted a tribal court order accepting a stipulation from the parties to obtain DNA testing. Appellant contended that it was her belief that Judy had used deception to gain Decedent's trust to cheat him out of his land “for her own personal gain.” Petition for Rehearing at 1. Appellant argued that Decedent's land had been in the Osborne family for generations and should not be awarded “outside of the family.” *Id.* Appellant also sought to exclude Ja Neva because she is not related by blood to Decedent. *Id.*

³ In documents in the record, Ja Neva is also spelled “Jeneve,” “JaNeva,” and “Janeva.” The record does not contain any official record, e.g., birth certificate, from which to ascertain the correct spelling, but there is some indication that Ja Neva is the preferred spelling.

While Appellant's petition for rehearing was pending, Lance and L.S. completed DNA testing and the results excluded Lance as L.S.'s biological father. The results of the DNA test were subsequently transmitted to the ALJ. *See* Letter from Lance to Shoshone-Bannock Tribes (Tribe), Mar. 19, 2013, and enclosure (copy received by Probate Hearings Division, Mar. 28, 2013) (AR Tab 3). In a letter to the Tribe, Lance stated that he had thought "all these years" that L.S. was his daughter, and he contended that Judy had committed fraud against him, his family, and the Tribe, which had enrolled L.S. based on Lance's blood degree. *Id.*

On September 19, 2013, the ALJ denied Appellant's petition for rehearing, rejecting her argument that both L.S. and Ja Neva should be excluded as beneficiaries of Decedent's will. The ALJ concluded that Decedent's testamentary intent, at the time he executed the will in 2002, was clear, and that Decedent's intent must be given effect. The ALJ found that it could not be known, nor could he speculate, on whether the DNA test results might have altered Decedent's intention, had those results been available and known prior to Decedent's death. The ALJ stated that Decedent had included Ja Neva as a beneficiary, even though she was not biologically related to Decedent, and even though Lance and Judy had commenced divorce proceedings 4 years before Decedent made his will. Thus, the ALJ rejected Appellant's argument, as relevant to both Ja Neva and L.S., that Decedent intended that his property pass only to blood relatives.

On appeal to the Board, Appellant argues that the ALJ erred in denying rehearing because (1) the bequests to L.S. were the result of fraud; (2) Decedent's clear intent was to give most of his property to blood relatives, and thus the ALJ should have rewritten the will to follow that intent; and (3) the ALJ failed to consider L.S.'s Indian status in order to determine whether she was an eligible devisee of Decedent's trust land.⁴

Standard of Review

As relevant to this appeal, the Board reviews questions of law and the sufficiency of evidence *de novo*. *Brian Chuchua v. Pacific Regional Director*, 42 IBIA 1, 5 (2005). An appellant has the burden to demonstrate error in the decision being appealed. *Estate of Verna Mae Pepion Hill Hamilton*, 45 IBIA 58, 63 (2007).

⁴ Although Lance submitted a letter during the rehearing proceedings, with the results of the DNA test, he did not appeal the Order Denying Rehearing or otherwise participate in this appeal. Appellant does not appeal from the denial of rehearing with respect to the devise to Ja Neva.

Discussion

I. Appellant Failed to Support Her Allegation that the Will Was Procured by Fraud

A will that was induced by fraud may be set aside. *See* 25 U.S.C. § 373 (authority to set aside approval of a will based on “fraud in connection with the execution or procurement of the will”)⁵; *see generally* *David v. Hermann*, 129 Cal. App. 4th 672, 685 (2005) (“False representations . . . have been held to constitute fraud if it can be shown that they were designed to and did deceive the testator into making a will different in its terms from that which he would have made had he not been misled.” (internal citation omitted)); *In re Estate of Estelle Champoux Lint*, 135 Wash. 2d 518, 957 P.2d 755, 763 (1998) (“If it can be shown that the will was induced by fraudulent representation of a person benefiting from the will, the will may be set aside.”); *Edwards v. Shumate*, 266 Ga. 374, 375-76, 468 S.E.2d 23 (1996) (“The type of fraud that ‘will invalidate a will must be fraud which operates upon the testator, i.e., a procurement of the execution of the will by misrepresentations made to him.’”).⁶ The elements of fraud include a showing of intent to induce reliance on a misrepresentation. *See In re Estate of Lint*, 957 P.2d at 763; *David v. Hermann*, 129 Cal. App. 4th at 685-86.

In the present case, in seeking rehearing (and on appeal), Appellant produced no evidence that Judy misrepresented L.S.’s paternity with the intent to deceive and induce Decedent to make a will with L.S. as a beneficiary, or that Decedent relied on representations made by Judy in making his will.⁷ Appellant’s bare allegation that Judy “misrepresented” L.S.’s paternity, and that Decedent “relied upon” those false representations, is unsupported by any evidence in the record. The fact that Lance has now

⁵ Appellant relies on § 373 without acknowledging that the language of that statute expressly limits the Secretary’s authority to set aside approval of a will “within one year after the death of the testator,” when fraud is subsequently discovered in connection with the execution or procurement of the will. But the Secretary has inherent authority to reconsider the approval of a will based on newly discovered evidence of fraud. *Estate of John J. Akers*, 1 IBIA 8, 12 (1970).

⁶ Indian wills are governed by Federal law, but in the absence of express Federal law, the Board may look to state law as guidance in determining Federal law.

⁷ Judy is not a beneficiary of the will, and we presume, solely for purposes of this decision that a will may be set aside based on fraudulent procurement by a third party who is not a beneficiary, but who may have a close relationship to a beneficiary. Notwithstanding Appellant’s assertion that Judy committed fraud against Decedent “for her own personal gain,” Petition for Rehearing at 1, any benefit to Judy that is derived from the ALJ’s approval of the will is contingent and uncertain.

been excluded as L.S.'s biological father is not, as Appellant assumes, the equivalent of demonstrating that Judy committed fraud in connection with Decedent's execution of the will that left an admittedly substantial portion of his estate to L.S. In fact, although Appellant's Petition for Rehearing alleged that it had "been brought fo[r]th" by Judy that L.S. is not Lance's daughter, no testimony or evidence, with details of any statements made by Judy, were submitted to the ALJ. It remains unclear, for lack of any evidence, to what extent and when Judy knew or believed that Lance was not or might not be the biological father of L.S. Appellant would have the ALJ, and the Board, assume that Judy knew with certainty in 2002, when Decedent prepared his will, that Lance was not L.S.'s biological father. The ALJ correctly refused to make that assumption. And even if Judy knew or suspected that Lance was not L.S.'s biological father, it would not necessarily follow that she induced Decedent to prepare a will and name L.S. as a beneficiary.

The cases relied upon by Appellant to support her allegation of fraudulent procurement are all readily distinguishable. See *In re Estate of Lint*, 957 P.2d 755; *David v. Hermann*, 129 Cal. App. 4th 672; *McDaniel v. McDaniel*, 288 Ga. 711, 707 S.E.2d 60 (2011). In each of those cases, there was substantial evidence that the will beneficiary actively and intentionally was involved in the procurement of the will.

In the present case, in the absence of any evidence other than the fact that Lance has been excluded as the biological father of L.S., Appellant did not make a sufficient showing that Decedent's will was procured by Judy through fraud, in order to warrant rehearing, and thus we find no error in the ALJ's decision on this issue.

II. Appellant Failed to Demonstrate that the Devise to L.S. Is Against Decedent's Testamentary Intent

Appellant also contends that by devising the bulk of his estate to individuals whom he believed to be blood relatives—Appellant, Lance, and L.S.—Decedent made clear his testamentary intent, and that intent provided grounds for the ALJ to rewrite the will to follow that intent. We disagree.

First, it is well-established that a probate judge is not vested with the power to rewrite a will that reflects a rational testamentary scheme, based on the judge's own view of a just and equitable result. See *Tooahnippah (Goombi) v. Hickel*, 397 U.S. 598 (1970); *Atewoofakewa v. Udall*, 277 F. Supp. 464 (W.D. Okla. 1967); *Estate of Dorothy Sheldon*, 7 IBIA 11 (1978); *Estate of Gerald Martinez*, 5 IBIA 162 (1976). The will in this case is both unambiguous in identifying the beneficiaries and the property being devised to each, and it reflects a rational testamentary scheme, regardless of whether or not L.S. is Decedent's biological granddaughter. See *Estate of Aaron (Allen) Ramsey*, 11 IBIA 16, 19 (1982) (nothing irrational about devises to individuals whom the testator believed to be his children, but who might not have been). Whether or not one might be able to infer from

the will's distribution scheme that Decedent favored blood relatives, it does not follow that the probate judge had authority to ignore the will's plain language and could rewrite it according to the judge's own suppositions about what Decedent might have done, had the information now available come to light before his death.

Second, a will based upon mistake, as opposed to fraud, cannot be set aside, as long as it reflects a rational testamentary scheme. For example, it has been found that a will in which a testator intentionally excludes an individual, based on the testator's mistaken belief that the individual is not his child, cannot be rewritten by a probate judge to include that individual. *York v. Smith*, 285 So. 2d 1110 (Dist. Ct. App. Fla. 1980). In that case, the court stated that "the testator's mistaken conception of some fact extrinsic to the document, inducing a particular testamentary disposition, does not vitiate the will." *Id.* at 1111. Other courts have followed the same principle. See, e.g., *In re Estate of Martin V. Henrich*, 389 N.W.2d 78, 83 (Ct. App. Iowa 1986) ("The general rule is that the validity of a will or any part of it is not affected by a mistake of either law or fact inducing the execution of the will, unless fraud or undue influence was perpetrated upon the testator."); *Forsythe v. Spielberg*, 86 So. 2d 427 (Fla. 1956) (same); *Carpenter v. Tinney*, 420 S.W.2d 241, 244 (Ct. Civ. App. Texas 1967) (same). In *Forsythe*, the court noted that a mistake in the inducement is not sufficient ground for invalidating a will, characterizing a mistake in the wording or content of an instrument as "quite different" from striking down a will "for error in the reasons for executing it." *Id.* at 430; see also *Martindale v. Bridgforth*, 210 Ala. 565, 567 (1924) ("If a will can be contested on the mere ground of mistake as to the facts which are supposed to have led the testator to dispose of his property as he did, a new and unlimited field of litigation would be opened up.").

Nothing in the language of Decedent's will expressly states that Decedent intended to devise his property only to blood relatives. On the contrary, it is undisputed that he knowingly devised property to Ja Neva, who he knew was his step-granddaughter. Even if the overall distribution scheme in the will might provide grounds to infer that Decedent intended to prefer blood relatives, we are not convinced that it permitted the ALJ to disregard the unambiguous language devising specific allotments, and the residue of the estate, to L.S., and to rewrite the will according to the ALJ's own judgment of how Decedent might have distributed his property, had he known the facts of L.S.'s paternity. Whether the reason for Decedent's devise to L.S. was induced by an erroneous factual belief does not change that result.

III. Appellant has Not Shown that the ALJ Erred in Failing to Grant Rehearing to Determine Whether L.S. is an Indian

In her notice of appeal, Appellant asserts, without citing any evidence, that Judy is "non-Indian." Notice of Appeal, Oct. 8, 2013, at 6. In her opening brief, Appellant retreats from that assertion by stating, based upon "[n]ew information," that Judy "may or

may not be Indian.” Opening Brief, Mar. 10, 2014, at 7 n.5. Appellant nevertheless contends that the ALJ erred in failing to grant rehearing in order to ascertain whether L.S. is an Indian because her status is relevant to determining whether she is legally eligible to receive devises of trust land.⁸

The record supports the ALJ’s determination that L.S. was legally qualified as an Indian at the time of the probate proceedings, as an enrolled member of the Shoshone-Bannock Tribes, to be devised trust land. *See* Email from Nagitsy to BlackHawk, Dec. 27, 2012 (listing enrollment number for L.S.) (AR Tab 12); Letter from Lance to Tribe, Mar. 19, 2013 (acknowledging that L.S. is enrolled) (AR Tab 3). Whether or not a subsequent change in L.S.’s enrollment status would provide grounds for revisiting the validity of the devise is not an issue that the ALJ was required to address. Thus, we find no error in his decision to deny rehearing without doing so.

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 September 19, 2013, Order Denying Rehearing.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Robert E. Hall
Administrative Judge

⁸ Appellant selectively quotes a portion of 25 U.S.C. § 2206(b)(1)(A), a provision in the American Indian Probate Reform Act (AIPRA), to argue that a non-Indian cannot receive a devise of trust land. Appellant omits critical language in that section, which clarifies that it prescribes what interests may be devised “in trust or restricted status,” i.e., as opposed to passing in a life estate or in fee. However, although not cited by Appellant, the Board recognizes that the Indian Reorganization Act (IRA) more broadly limits the categories of eligible devisees of trust land, and that limitation is incorporated in AIPRA, as applied to IRA tribes, such as the Shoshone-Bannock Tribes of the Fort Hall Reservation. *See* 25 U.S.C. § 464; 25 U.S.C. § 2206(b)(2)(B).