



INTERIOR BOARD OF INDIAN APPEALS

Estate of Dorothy Zaste (Elizabeth Marcellais Appeal)

61 IBIA 333 (10/23/2015)

Related Board case:
58 IBIA 238



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF DOROTHY ZASTE) Order Affirming Reopening Order
)
(Elizabeth Marcellais Appeal)) Docket No. IBIA 14-054
)
) October 23, 2015

Elizabeth Marcellais (Appellant) appealed to the Board of Indian Appeals (Board) from an Order Reopening Estate and Modifying Decision (Reopening Order) entered on January 28, 2014, by Indian Probate Judge (IPJ) Albert C. Jones in the estate of Dorothy Zaste (Decedent).¹ The Reopening Order determined that because Appellant is not enrolled in the Sisseton-Wahpeton Oyate Tribe (Tribe), and is a cousin of Decedent, she is not entitled to receive any interest in Decedent’s trust or restricted land on the Sisseton-Wahpeton Oyate (Lake Traverse) Reservation, North and South Dakota. Appellant argues that she was adopted by Decedent and that the Reopening Order is contrary to Decedent’s will. For the reasons explained below, the Board affirms the Reopening Order.

Background

Decedent died on September 26, 2012. Data for Heirship Finding and Family History, Oct. 26, 2012, at 1 (Administrative Record (AR) Tab 72). At the time of her death, Decedent owned interests in trust or restricted property on the Lake Traverse Reservation in South Dakota, the Turtle Mountain Reservation in North Dakota, and the Turtle Mountain Public Domain at Fort Belknap and Fort Peck, Montana. *Id.* at 3. She had a zero balance in her Individual Indian Money account. *Id.* Decedent was survived by six biological children: Donna M. Wilkie, Linda Zaste, Susan S. Keplin, Marie LaVallie, Cindy J. Zaste, and Shelly A. Martin.² *See id.* at 1. Decedent left a will, executed on January 28, 2003, which devises certain property on the Turtle Mountain Reservation to Cindy and Shelly. *See Will* ¶ 2 (AR Tab 99). The will devises Decedent’s remaining trust property to her “children . . . , including [Appellant],” in 1/7 shares as tenants in common. *Id.* ¶ 3.

¹ Decedent was a Turtle Mountain Chippewa Indian. Her probate is assigned Probate No. P000107843IP in the Department of the Interior’s probate tracking system, ProTrac.

² Decedent’s husband and two infant children preceded her in death.

On March 26, 2013, IPJ Jones held a hearing to determine the heirs and settle Decedent's estate. Transcript, Mar. 26, 2013 (AR Tab 33). There were no objections to the will, which was self-proved. *See id.* at 8-10.

On April 24, 2013, the IPJ issued his Decision. The IPJ found that Appellant is a cousin of Decedent. Decision at 2-3 (AR Tab 30). Appellant's mother, Mary Martell, and Decedent's mother, Virginia Pays, were sisters. *See* Data for Heirship Finding and Family History at 1-2; Letter from Appellant to IPJ, Feb. 16, 2013 (AR Tab 49). The IPJ also found that Decedent did not adopt any children, and that her children were not adopted out. Decision at 1.

In his Decision, the IPJ concluded that Decedent's estate is subject to the American Indian Probate Reform Act of 2004 (AIPRA), 25 U.S.C. § 2201 *et seq.*, except that the distribution of Decedent's trust or restricted land on the Lake Traverse Reservation is determined in accordance with the Act of October 19, 1984, Pub. L. No. 98-513, 98 Stat. 2411 (Sisseton-Wahpeton Act). Decision at 1. The IPJ approved the will and ordered the distribution of Decedent's interest in the property on the Turtle Mountain Reservation to Cindy and Shelly in accordance with the will. *Id.* at 2. The IPJ also determined that, pursuant to the will, Decedent's six surviving children and Appellant were each entitled to a 1/7 share in the remainder of Decedent's trust estate—except for Decedent's interests in trust or restricted land on the Lake Traverse Reservation. *Id.* at 2-3. Regarding that land, the IPJ found that none of the devisees under the will were enrolled members of the Sisseton-Wahpeton Oyate Tribe, and that under the Sisseton-Wahpeton Act, nonmember surviving children may take only a life estate in such land devised by a will.³ *Id.* at 3. The IPJ determined that Decedent's six surviving children—and Appellant, who the IPJ identified as Decedent's "cousin"—were each entitled to a 1/7 share life estate in the Lake Traverse land, with the remainder to be distributed to the Tribe in trust status. *Id.*

No party sought rehearing of the IPJ's Decision. On June 19, 2013, the Turtle Mountain Agency Acting Superintendent, Bureau of Indian Affairs (BIA), petitioned for reopening on the grounds that the Sisseton-Wahpeton Act "has no provision for [a] cousin of the decedent to inherit a Life Estate in Sisseton trust property." Petition for Reopening to Redistribute Trust Property (AR Tab 28). On December 19, 2013, the IPJ issued an

³ As relevant here, the Sisseton-Wahpeton Act provides that only the Tribe or persons who are enrolled members of the Tribe shall be entitled to receive, by devise or descent, any interest in trust or restricted land on the Tribe's reservation, except that the nonmember "surviving spouse," "surviving children," and "surviving issue of any children" are entitled to receive a life estate in such interests devised by a will approved by the Secretary of the Interior. Sisseton-Wahpeton Act §§ 2(a) and 4(a).

order to show cause (OSC) for interested parties to explain why the Decision should not be modified to reflect that Appellant, as Decedent's cousin, was not an heir to the Lake Traverse land. OSC at 1 (AR Tab 26).

Appellant, through counsel, responded that Decedent raised Appellant from the time she was an infant and, therefore, Appellant was Decedent's daughter per the "customs and culture" of the Turtle Mountain Band of Chippewa Indians. Appellant's Motion to Show Cause Why Decision *Should* Be Modified, Jan. 9, 2014, at 1-2 (unnumbered) (AR Tab 25).⁴ Five of Decedent's biological children, Donna, Linda, Susan, Marie, and Shelly (collectively, Interested Parties in Support of Reopening), responded that Appellant is a cousin of Decedent and was never legally adopted by her. *See* Fax from Interested Parties in Support of Reopening to IPJ, Jan. 13, 2014 (AR Tab 21).

On January 28, 2014, the IPJ issued the Reopening Order from which Appellant appeals. The IPJ acknowledged that Appellant was raised by Decedent. Reopening Order at 3 (AR Tab 14). The IPJ concluded that Appellant did not demonstrate that she is entitled to be recognized as an heir of Decedent by adoption under Federal law concerning the determination of heirs by adoption, 25 U.S.C. § 372a.⁵ *Id.* at 2-3. Therefore, the IPJ granted BIA's petition for reopening and modified the Decision. *Id.* at 3-4. The effect of the modification is that Decedent's surviving children would each receive a 1/6 share life estate in the Lake Traverse property, with the remainder to be distributed to the Tribe in trust. *See id.* at 4.

Appellant filed a notice of appeal, *pro se*,⁶ and an opening brief, through counsel. The Interested Parties in Support of Reopening filed an answer brief. The Board received filings in support of Appellant's appeal and/or in response to the answer brief, from Cindy

⁴ Appellant styled her response to the OSC as a motion to modify the Decision because she sought to be referred to as a daughter, not a "cousin," of Decedent in the Decision.

⁵ The Reopening Order inadvertently referred to § 372a as § 372(a) and § 327(a).

⁶ Appellant attached several documents to her notice of appeal. Some of these documents are dated the day before, or in the time period after, the Reopening Order, and thus it is unclear whether they were considered by or were before the IPJ when he issued the Reopening Order. The Board ordinarily will not consider for the first time on appeal arguments or evidence that could have been, but were not, presented to the probate judge. *See* 43 C.F.R. § 4.318 (scope of review); *Estate of Dominic Orin Stevens, Sr.*, 55 IBIA 53, 62 (2012). Were we to assume that these documents are properly before the Board, they would not affect the outcome, as they are cumulative of other evidence in the record that Appellant was raised by Decedent.

Zaste, Richard Marcellais, and Theresa Martell Patnaude. Appellant did not file a reply brief.⁷

Standard of Review

We review legal determinations and the sufficiency of the evidence *de novo*. *Estate of Martha Matilda Bordeaux*, 53 IBIA 53, 56 (2011). Appellant bears the burden of establishing error in the Reopening Order. *See Estate of Fannie Birds Bill Levings Benson*, 59 IBIA 328, 330 (2015); *Estate of Stella M. Flute*, 52 IBIA 163, 164 (2010). “Disagreement with, or bare allegations concerning, a challenged decision are insufficient to satisfy an appellant’s burden of proof.” *Estate of Benson*, 59 IBIA at 330.

Discussion

On appeal, Appellant primarily argues that the IPJ erred in his finding that Appellant is a cousin rather than an adopted daughter of Decedent. Appellant argues that the will does not identify her as a “cousin” of Decedent; that other evidence shows Decedent, family members, and friends considered Appellant to be a daughter of Decedent; and that she was adopted by Decedent under the “laws and customs” of the Turtle Mountain Band of Chippewa Indians. Notice of Appeal, Feb. 2, 2014, at 1-2 (unnumbered); Opening Brief (Br.), June 2, 2014, at 2-3. We affirm the Reopening Order because Appellant has not met her burden on appeal to demonstrate error by the IPJ.

We begin with 25 U.S.C. § 372a, which is the Federal law that generally governs the determination of heirs by adoption in Indian probate matters. *Estate of Josephine J. Palone*, 59 IBIA 49, 52 (2014); *see also Estate of Richard Crawford*, 42 IBIA 64, 68 (2005) (explaining that § 372a applies “when an individual seeks to inherit from an Indian decedent based on having been adopted into the decedent’s family”). The statute provides in relevant part:

In probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption—

(1) Unless such adoption shall have been—

⁷ After the time period for filing briefs expired, the Board received a letter from the Interested Parties in Support of Reopening, attaching numerous exhibits. Finally, the Board received a letter in support of Appellant’s appeal from Appellant, Cindy Zaste, and Richard Marcellais. Even if the Board were to consider these late-filed documents, they would not result in a different decision.

- (a) by a judgment or decree of a State court;
 - (b) by a judgment or decree of an Indian court;
 - (c) by a written adoption approved by the superintendent of the agency having jurisdiction over the tribe of which either the adopted child or the adoptive parent is a member, and duly recorded in a book kept by the superintendent for that purpose; or
 - (d) by an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose; or
- (2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this section[, January 8, 1941,] or in the distribution of the estate of an Indian who has died prior to that date

25 U.S.C. § 372a.

Appellant did not offer any evidence in her response to the IPJ's order to show cause, and we find no evidence in the record, which would demonstrate that any of the requirements of § 372a have been satisfied.⁸ To the contrary, according to Appellant, Decedent wished to adopt Appellant but Appellant's biological parents would not consent. *See* Opening Br., Attachment (Letter from Appellant to IPJ, Feb. 16, 2013); AR Tab 49 (same). Appellant did not show that the rights of her biological parents were terminated and given to Decedent through a legal adoption.

While Appellant does not allege any particular error by the IPJ in his application of § 372a, Appellant does argue that the definition of "children" in the Sisseton-Wahpeton Act includes adopted children, and that the will should be given effect under AIPRA.⁹ *See* Opening Br. at 3-4. Neither statute produces a different outcome. AIPRA explicitly does not "amend[] or otherwise affect[] the application of" the Sisseton-Wahpeton Act. 25 U.S.C. § 2206(g). The Sisseton-Wahpeton Act defines the term "children" to include, as relevant to Appellant's argument, "children adopted under the laws of a State or foreign

⁸ Although § 372a sets forth various substantive requirements for establishing a valid adoption, it does not address the sufficiency of evidence necessary to prove that a relevant requirement is satisfied. The Board has held that a formal adoption may be established by a preponderance of the evidence. *Estate of Bordeaux*, 53 IBIA at 58.

⁹ Although AIPRA does not define "child," the Department's regulations define the term to mean a "natural or adopted child." 43 C.F.R. § 30.101.

country, or in accordance with the laws of an Indian tribe.” Sisseton-Wahpeton Act § 3(b). Apart from Appellant’s assertion in her opening brief that she was adopted pursuant to unspecified “laws” of the Turtle Mountain Band of Chippewa Indians, Opening Br. at 2, Appellant has identified no evidence that she was adopted in accordance with tribal law. Thus, to the extent the standard for demonstrating adoption under the Sisseton-Wahpeton Act may differ from § 372a, Appellant nonetheless had not made the required showing.

It was Appellant’s burden to show error in the IPJ’s Reopening Order, *see Estate of Benson*, 59 IBIA at 330, and she has not done so. Therefore—although we do not disagree with Appellant’s description of her personal relationship with Decedent as that of a mother-daughter—we affirm the IPJ’s conclusion that, for the purpose of the probate of Decedent’s trust estate, Appellant is not entitled to be recognized as a child and heir of Decedent through adoption. And, pursuant to the Sisseton-Wahpeton Act, Appellant—as a cousin of Decedent rather than one of her “surviving children”—is not entitled to take a life estate in the Lake Traverse land that was devised by Decedent’s will.¹⁰ *See* Sisseton-Wahpeton Act § 4(a).

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 January 28, 2014, Order Reopening Estate and Modifying Decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Robert E. Hall
Administrative Judge

¹⁰ To the extent that Appellant’s notice of appeal and opening brief suggest that she may be seeking to challenge the Sisseton-Wahpeton Act itself, the Board lacks jurisdiction to declare unconstitutional any provision of the Sisseton-Wahpeton Act, or any other Federal statute. *See Estate of Palome*, 59 IBIA at 54 n.6; *Estate of Nicholas Joseph Belland*, 29 IBIA 54, 54 (1996).