



INTERIOR BOARD OF INDIAN APPEALS

Estate of Elsie Yvonne Deloria James Roberts

62 IBIA 267 (03/09/2016)



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 ELSIE YVONNE)	Order Affirming Order Denying
DELORIA JAMES ROBERTS)	Rehearing
)	
)	Docket No. IBIA 15-038
)	
)	March 9, 2016

David M. Deloria (Appellant) appeals to the Board of Indian Appeals (Board) from the October 29, 2014, Order Denying Rehearing entered by Indian Probate Judge (IPJ) Mary P. Thorstenson in the estate of Appellant’s biological mother, Elsie Yvonne Deloria James Roberts (Decedent).¹ The IPJ had held in her initial probate decision that Appellant was ineligible to inherit from Decedent because he had been adopted out of Decedent’s family. Appellant sought rehearing, arguing that Decedent had orally promised to give all of her property to Appellant. The IPJ rejected this argument in her Order Denying Rehearing. On appeal to the Board, Appellant does not contend that the IPJ erred in denying rehearing. Instead, he raises new arguments that were not first presented to the IPJ. Because our scope of review is limited to reviewing the argument made by Appellant before the IPJ and her ruling on it, which Appellant does not now challenge, we affirm the IPJ’s Order Denying Rehearing.

Background

Decedent, a Lower Brule Sioux Indian, died intestate on October 10, 2012. She was survived by her non-Indian husband, David Alan Stenblom Roberts, and two daughters, Teresa Marie Estes and Constance Lori James. Decedent was the biological mother of Appellant, who was placed for adoption at birth and adopted.²

¹ The case number assigned to Decedent’s probate in the Department of the Interior’s probate tracking system, ProTrac, is P000108060IP.

² Appellant’s birth name was James Arthur Deloria. *See In the Matter of the Adoption of James Arthur Deloria* (incomplete decree) (Administrative Record (AR) 49). Upon adoption, his name changed to Terry Michael Sundet. *Id.* As an adult, Appellant petitioned the Lower Brule tribal court to change his name to David Mikal Deloria, which
(continued...)

On April 30, 2014, the IPJ issued her initial probate decision in which she identified Decedent's heirs as her non-Indian husband and her two daughters. Pursuant to 25 U.S.C. § 2206(a)(2)(D)(iii),³ the IPJ ordered the disposition of Decedent's nominal land interests—interests of less than 5%—distributed to Decedent's oldest child, Teresa, who is 2 years older than Appellant. These interests included all of Decedent's interests on the Lower Brule Sioux Reservation. With respect to Decedent's remaining land interests—four allotments on the Crow Creek Reservation in which Decedent owned more than a 5% interest—the IPJ determined that a life estate⁴ passed to Decedent's husband, and, at his death, Decedent's two daughters will each receive half of Decedent's interests in these allotments. Finally, any funds in Decedent's Individual Indian Money account were split equally between Decedent's husband and her two daughters.

With respect to Decedent, the IPJ held that, given Appellant's adoption by other parents, he is ineligible to inherit from his birth mother pursuant to 25 U.S.C. § 2206(j)(2)(B)(iii).

Appellant sought rehearing, arguing that his birth mother had promised to give him all of her land interests. He asserted that an aunt and uncle were aware of this promise. In her Order Denying Rehearing, the IPJ rejected Appellant's claim and explained that oral agreements concerning the distribution of trust property are not recognized by the Board or by applicable probate law.

Appellant filed a timely notice of appeal and an opening brief. No other briefs were received.

Discussion

On appeal to the Board, Appellant does not disagree with the decision made by the IPJ on his argument for rehearing, *i.e.*, that an oral agreement or promise to give interests in trust real property is not recognized by the Board or by Indian probate law. Instead,

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was granted. *In the Matter of Terry M. Sundet*, No. Civ. 12-10-0089 (Lower Brule Sioux Tribal Court Nov. 2, 2012) (AR 36).

³ As relevant here, 25 U.S.C. § 2206(a)(2)(D)(iii) requires that when an intestate decedent owns less than 5% of an Indian land allotment, that interest will not be split among multiple heirs but will go instead to the eldest surviving child and eligible heir of the decedent.

⁴ A "life estate" is a limited ownership interest for the lifetime of a particular individual. *See* 25 C.F.R. §§ 162.101, 179.2; *Estate of Patricia Marie Manahan*, 62 IBIA 150, 153 (2016).

Appellant raises several new arguments that were not presented to the IPJ. We decline to consider these new arguments and, because Appellant has not met his burden of demonstrating error in the IPJ's decision on the issue that Appellant raised on rehearing, we affirm the IPJ's Order Denying Rehearing.

Before the Board, Appellant's burden is to show error in the decision appealed. *Estate of George Robert Brave Bull, Sr.*, 61 IBIA 228, 229 (2015); *Estate of Floyd Bill*, 60 IBIA 136, 139 (2015). However, doing so does not mean that wholly new arguments should or may be raised but, rather, that it is incumbent upon Appellant to show error in the IPJ's decision as to Decedent's alleged promise to give Appellant her land interests. Legal arguments and new evidence should be presented in the first instance to the probate judge at the scheduled hearing or as part of a petition for rehearing in or to reopen an estate. *See Estate of Bill*, 60 IBIA at 140-41. In the absence of manifest injustice or error, the scope of the Board's review is limited on appeal "to those issues that were before the . . . Indian probate judge upon the petition for rehearing . . ." 43 C.F.R. § 4.318. Thus, we ordinarily will not consider arguments that could have been but were not raised before the probate judge. *Estate of Bill*, 60 IBIA at 140.

Here, Appellant raises four new arguments before the Board. He argues that the American Indian Probate Reform Act, 25 U.S.C. § 2206, is unconstitutional insofar as it denies children who are adopted out of their birth families, such as he was, the right to inherit from their biological Indian parents. Appellant also argues that when he became a ward of the court as a juvenile, his adoptive parents lost their parental rights. He implies that the termination of the parental rights of his adoptive parents restored him to his birth mother. In a related argument, Appellant argues that his adoption terminated when he became an adult, and argues that he then returned to being Decedent's son. Finally, Appellant argues that, beginning in 1994, he began a close relationship with Decedent that lasted until her death and, thus, he is entitled to inherit from Decedent under an exception to the rule that adopted-out children are not considered the children of their biological Indian parents.⁵

None of these arguments were raised before the IPJ and we see no reason to consider them now. We note that it is well-settled that the Board lacks jurisdiction to decide whether Federal law is constitutional, *Estate of Roland Dean DeRoche*, 53 IBIA 114, 115-16 (2011), and we are not persuaded that the remaining arguments raised by Appellant

⁵ The provision cited by Appellant, 25 U.S.C. § 2206(j)(2)(B)(iii)(I), provides an exception for adopted-out children to inherit from "a natural kin, *other than the natural parent*, who has maintained a family relationship with the adopted person." Emphasis added. This provision would not aid Appellant.

merit an exception to our rule against considering arguments raised for the first time on appeal.⁶

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 October 29, 2014, Order Denying Rehearing.

I concur:

// original signed
Debora G. Luther
Senior Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

⁶ We note, however, that even assuming that any parental rights of Appellant's adoptive parents were extinguished when he became a ward of the State or the court or when he became an adult does not mean either *ipso facto* or as a matter of law that he then became eligible to inherit from Decedent.