INTERIOR BOARD OF INDIAN APPEALS

Estate of Bernice Estes a.k.a. Bernice Sitting Crow

63 IBIA 207 (07/07/2016)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF BERNICE ESTES	)	Order Affirming Order Denying
a.k.a. BERNICE SITTING CROW	)	Reopening
	)	
	)	Docket No. IBIA 15-069
	)	
	)	July 7, 2016

Appellants Elizabeth Estes Garcia, Roberta M. Estes Scheerer, Frederic Estes, and Deborah Estes-Nava appealed to the Board of Indian Appeals (Board) from an Order Denying Rehearing/Reopening (Order Denying Reopening) by Administrative Law Judge (ALJ) R. S. Chester, dated February 25, 2015, in the estate of Bernice Estes, a.k.a. Bernice Sitting Crow (Decedent).[1] We affirm the Order Denying Reopening because Appellants have not shown any error in the decision.

Background

Decedent, an Indian from the Three Affiliated Tribes, died testate on April 12, 2009, at the age of 86. She was survived by her daughter (Appellant Roberta), and by her adopted son (Appellant Frederic). She was predeceased by her son, Manfred Estes. Manfred was survived by two sons (Nathan Estes and Zackery Estes) and three daughters (Sheila Estes Smith and Appellants Deborah[2] and Elizabeth). Decedent also was survived by a great-granddaughter, Layla Daugherty.

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[1] In ProTrac, the probate tracking system used by the Department of the Interior, the case number for Decedent's estate is P000077148IP.

[2] In his Order Denying Reopening, the ALJ held that Appellant Deborah lacked standing because she was adopted out of the Estes family and there was no evidence that she and Decedent "maintained a family relationship" prior to Decedent's death. Thus, pursuant to the American Indian Probate Reform Act, 25 U.S.C. § 2206(j)(2)(B)(iii)(I), the ALJ concluded that she lacked standing to challenge the Decision. In their appeal to the Board, Appellants do not challenge this portion of the ALJ's decision and it is, therefore, final. Consequently, Deborah lacks standing to appeal his Order Denying Reopening.

In proceedings before Indian Probate Judge (IPJ) Albert C. Jones, Appellant Roberta challenged Decedent's will on grounds of incompetency and undue influence by Decedent's friend, Kendra Williams-Brown, who received a life estate in Decedent's trust property under the terms of the will. The IPJ held three separate hearings at which interested parties could present evidence challenging the will. The IPJ also encouraged the family members and will devisees to participate in mediation to resolve the dispute, which they did. When mediation was unsuccessful, the IPJ issued a 23-page decision dated August 28, 2013. In it, he recited the evidence, reviewed the law, concluded that the will was valid, and ordered the distribution of Decedent's trust estate accordingly. The IPJ gave great weight to the testimony of the attorney who prepared Decedent's will and who testified that he met alone with Decedent to draft her will.

Appellants and Sheila filed a joint petition to reopen Decedent's estate.[3] With their petition, they submitted new evidence. The ALJ reviewed the newly submitted evidence and the parties' arguments, then concluded that "[t]he petition primarily reasserts arguments that were addressed in the Decision," and later concluded that "[t]here is absolutely nothing in these arguments that was not previously addressed or considered." Order Denying Reopening at 2, 3. As for the new evidence, which consisted of an affidavit from one of Decedent's former caregivers, the ALJ noted that it "contains nothing that is relevant to the execution of the will [inasmuch as the declarant] cared for the Decedent . . . four years prior to the date of the will." *Id.* at 3.

Consequently, the ALJ denied the petition to reopen on February 25, 2015, and this appeal followed. In their opening brief, Appellants raise the following concerns: They maintain that their due process rights were violated; they maintain that the IPJ unduly pushed settlement discussions, gave confusing guidance for those discussions, and ultimately, that his emphasis on settling the dispute resulted in bias against Appellants' position; they maintain that Decedent lacked testamentary capacity and was subjected to undue influence in the creation of her will; and they maintain that they were unable to obtain Decedent's medical records. A brief in opposition was submitted on Layla's behalf by her guardian *ad litem*. No reply brief was received.

Discussion

Appellants fail to meet their burden on appeal. They have not identified any error in the Order Denying Reopening and, instead, continue to assert their disagreement with the

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[3] Although the petition bore the title of "petition for rehearing," it was filed too late to be considered as a petition for rehearing. Therefore, the ALJ considered it as a petition to reopen Decedent's estate.

IPJ's decision. Moreover, Appellants raise wholly new issues that were not brought before the ALJ in their petition to reopen. Therefore, we affirm.

Except to correct manifest error or injustice, the Board's scope of review is limited to reviewing those issues on appeal that were first raised in the petition for rehearing or reopening. 43 C.F.R. § 4.318; *Estate of Sarah Stewart Sings Good*, 57 IBIA 65, 72 (2013). Consequently, we ordinarily will not consider those issues not first presented to the probate judge in a petition for rehearing or reopening. *Id.* Moreover, as we explained in *Estate of John Squally Kalama*, 49 IBIA 201, 204 (2009),

> Appellant bears the burden of showing that an order on rehearing is in error. *Estate of Verna Mae Pepion Hill Hamilton*, 45 IBIA 58, 63 (2007). Simple disagreement with or bare assertions concerning a challenged decision are insufficient to carry this burden of proof. *Id.*

Here, we are confronted not only with issues not previously raised but with allegations too vague and general to evaluate, even assuming they had been raised before the ALJ. The vague allegations are, in essence, an invitation for us to comb through the voluminous record on our own to determine whether we might tease out some basis for Appellants' appeal. Such is Appellants' burden, not the Board's.

First, Appellants claim that their "constitutional due process" rights were denied and that they should "not be deprived of the opportunity to exhaust all legal remed[ies]" in the course of challenging Decedent's will. Appellants' Brief (Br.), Sept. 3, 2015, at 1. Appellants do not identify any legal remedies that they have been (or that they anticipate will be) denied. According to the record, three hearings were held between January 2011 and December 2012 for which Appellants could have gathered and presented whatever evidence they had to challenge the will.[4] The IPJ clearly and on multiple occasions throughout the first and second hearings explained to Appellant Roberta that it is her burden, as the will challenger, to produce and present evidence in support of her challenge. In addition, the IPJ outlined the elements of a claim for both undue influence and lack of testamentary capacity, and, at her request, provided her with an audio recording of the hearings, which would have included the instructions. Appellants availed themselves of their right to seek reopening and they have availed themselves of their appeal rights to this Board. Not only did Appellants fail to raise any issue of lack of due process in their petition to reopen, they have not identified any lack of due process in their appeal to the Board.

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[4] Appellant Roberta determined that she intended to challenge Decedent's will prior to the date of the first hearing. *See* Hearing Presentation from Appellant Roberta to IPJ, Jan. 27, 2011 (Administrative Record (AR) 72, Exhibit C).

Appellants also complain that they received confusing guidance from the IPJ concerning settlement and argue that he sought "to promote settlement at all costs." Appellants' Br. at 1. Again, this issue was not raised in their petition to reopen. Moreover, Appellants provide no evidence in support of this assertion, much less have they shown that it somehow impacted the IPJ's decision to approve Decedent's will. Had an agreement been reached among the parties, settlement would have benefited Appellants because, in the wake of the IPJ's decision to approve the will, Appellants did not succeed to any of Decedent's trust assets.[5]

Next, Appellants make the bald assertion that the IPJ was "bias[ed] against our concerns" because he suggested that the parties consider whether their differences could be settled. Appellants' Br. at 2. We fail to see the logic in Appellants' assertion, even assuming it had been raised below, which it was not. Had settlement been successful, presumably Appellants would have been satisfied. If, as Appellants believe, the IPJ had already decided that he would approve Decedent's will, then the IPJ gave Appellants an opportunity to improve their position by engaging in settlement and avoiding any adverse decision that the IPJ might issue.

Finally, Appellants argue that they seek reopening to "allow[] for appropriate submittal of all supporting documentation," including medical records to support their allegations of undue influence and lack of testamentary capacity. *Id*. As with Appellants' previous arguments on appeal, this argument was not made in Appellants' petition for reopening, for which reason we do not consider it. But even if this argument were properly presented to the Board, Appellants fail to show why they were unable to do so for 3 years, beginning with the notice of the referral of the matter to the IPJ in August 2010, through 3 separate hearings over the course of 23 months, and even through the course of the settlement negotiations and up to the time of the IPJ's decision in August 2013. Appellants' argument that the settlement negotiations somehow prevented them from obtaining witnesses or medical records is not convincing. There is simply no evidence in the record that Appellants sought, much less were denied, subpoenas to obtain documents or witnesses. Additionally, there is no explanation of what any such new evidence would show or how it would support Appellants' contentions.

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[5] Appellants make much out of guidance provided by the IPJ to aid the parties in settlement, citing instructions provided at the December 2012 hearing and a letter dated February 14, 2013. As Appellants are aware, the IPJ rescinded this guidance and provided revised direction in a subsequent letter that he sent to the parties, including Appellants, in April 2013. Letter from IPJ to Interested Parties, Apr. 4, 2013 (AR 17).

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 February 25, 2015, Order Denying Reopening.

I concur:

// original signed
Debora G. Luther
Senior Administrative Judge

//original signed
Robert E. Hall
Administrative Judge