



INTERIOR BOARD OF INDIAN APPEALS

Estate of Frederick Harry Jerred

49 IBIA 147 (04/30/2009)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF FREDERICK HARRY) Order Affirming Decision
JERRED)
) Docket Nos. IBIA 08-4; 08-5; 08-15
)
) April 30, 2009

Dorothy Mellon Riehart (Riehart), Deborah S. Spratling (Spratling), and Louise Jerred Hill (Hill) (collectively, Appellants) appeal to the Board of Indian Appeals (Board) from an Order Denying Rehearing entered October 10, 2007, by Administrative Law Judge Steven R. Lynch (ALJ or Judge Lynch) in the Estate of Frederick Harry Jerred (Decedent or Fred), deceased Colville Indian, Probate No. P000017383IP/P000038847IP.¹ Judge Lynch's Decision let stand an Order Approving Will and Codicil and Decree of Distribution (Decree), dated July 12, 2007, in which the ALJ approved a will as amended by a codicil, both executed by Decedent in 2004. The codicil bequeathed Decedent's entire estate to his nephew, LeRoy Jerred (LeRoy). The ALJ rejected Appellants' and two additional Petitions for Rehearing of the Decree; these petitions argued that Decedent was incompetent to sign the will or codicil and claimed that the petitioners needed Decedent's medical records to prove this fact. Appellants fail to show in their appeal to this Board that Judge Lynch erred in concluding that their petitions failed to support requests for an additional hearing with new evidence.

Judge Lynch conducted two hearings in this probate matter. In the first hearing, Judge Lynch articulated the burden of proof on the opponent of a will and explained the evidence necessary to prove that a decedent lacked testamentary capacity at the time of testamentary disposition. Judge Lynch continued the matter for 6 months to permit interested parties to garner and present any evidence at a second hearing in support of their claim of Decedent's incompetence. They did not do so then, or justify their failure to do so, in their Petitions for Rehearing. We therefore affirm the decision on appeal.

¹ Probate No. P000017383IP appears on all notices and decisions concerning Decedent's estate until July 2007. Thereafter, a second number, P000038847IP, appears. The probate is docketed in the records of the Probate Hearings Division as No. P000038847IP.

Background

Decedent was born on July 31, 1925, and died unmarried and without issue on November 17, 2005, at the Colville Tribe Convalescent Center (CTCC) in Nespelem, Washington. His immediate cause of death was pneumonia, but dysphagia, chronic alcoholism, and cerebellar tremor were listed on his death certificate as significant contributing factors.² When he died, Decedent owned no interest in trust real property, but he did own an Individual Indian Money (IIM) account with a balance of \$87,257.57. By the time of the probate hearing, the IIM account had grown to almost \$100,000.

Decedent was one of 21 children born between 1909 and 1934 to Cecil Bill Jerred, a non-Indian, and Margaret Semenska, a member of the Colville Tribe. By the time of Decedent's death, only his younger brother, Clarence, remained living, in Alaska. Some of Decedent's siblings produced offspring, leaving Decedent with nieces, nephews, grand-nieces, and grand-nephews. He apparently did not know some of them. Letter from Nancy A. Atchison (Mellon), May 18, 2006 ("for the most part of the heirs (probable) name did not know Uncle Fred . . ." [sic]). The Form OHA-7, "Data for Heirship Finding and Family History," available to the ALJ at that time of the hearings, lists 42 nieces and nephews and their children, some of whom predeceased Decedent. It identifies Hill and Riehart as nieces and Spratling as a grandniece.

The record contains a Last Will and Testament, dated January 16, 2004, in which Decedent bequeathed his entire estate to his sister, Agnes Mellon (Agnes), or, in the event his sister predeceased him, to Agnes's daughter, Shirley Mellon Lesser (Shirley), "and to all other of my living nieces and nephews, share and share alike," subject to restrictions on drug and alcohol abuse. The will was witnessed by James Edmonds and Dana Cleveland, and was accompanied by their affidavits and the affidavit of S. Lane Throssell, Esq., an attorney from the Colville Tribal Legal Services, who drafted the will at Decedent's direction. The record also contains a June 24, 2004, codicil which directed the appointment of LeRoy as executor of the will and made LeRoy the sole heir and beneficiary. The codicil explains that Decedent learned that both Agnes and Shirley had predeceased him and therefore he wished to change the designated beneficiary. The codicil was witnessed by Wanda Kitterman and Kathy Ensminger. Decedent's signatures are represented on both the will and the codicil by a thumbprint.

² According to *Merriam-Webster's Medical Dictionary* (2002), dysphagia is a disorder that produces difficulty in swallowing, and a cerebellar tremor is a rhythmic muscular shaking caused by one of a number of neurodegenerative diseases, including Parkinson's, that damage or destroy parts of the brainstem or the cerebellum.

After Decedent's death, Judge Lynch received several requests for hearing. On May 11, 2006, he received a letter from Appellant Hill stating, in its entirety: "I am requesting that a formal hearing be held on the *Estate of Frederick Harry Jerred*, preferably in person hearing at a site convenient to most of the parties." On May 18, 2006, he received a letter from Nancy A. Atchison (Mellon), requesting a hearing. Claiming that her uncle did not know many of his relatives, or conversely that they did not know him, she stated: "[T]his would not [be] what he wanted, he would not want his estate to go to unknowns or anyone that may have used his fingerprint or other means to change any executed will. . . ."

In a follow-up letter to Judge Lynch dated September 22, 2006, Hill complained of BIA's "Notice of Case Referral to OHA, dated May 5, 2006, served on all heirs," in which the probable heirs were advised of Decedent's will and codicil and their terms. She denied that the will could be valid if it bequeathed property to people who had died prior to its issuance. She complained that the ALJ had not replied to her May 2006 letter concerning Decedent's estate and that she had unsuccessfully sought information concerning the status of another relative's estate, and maintained that Decedent was both an alcoholic and also had been incompetent for several years before his death in 2005. Letter from Hill to ALJ, Sept. 22, 2006. She requested information about both relatives' estates from the ALJ. Judge Lynch responded to this letter on October 3, 2006, providing information regarding the estates of three of Hill's relatives including Decedent and Agnes. He advised her that she would be given notice of the hearing date for Decedent's estate at which time she could establish her case that Decedent was not competent to execute his will.

After notice to all known potential heirs, including all three Appellants, Judge Lynch conducted a hearing on November 15, 2006 (2006 hearing), at the Colville Agency in Nespelem. Hill and Riehart testified as witnesses. Spratling apparently did not attend as her name does not appear on the attendance list. Judge Lynch discussed questions raised by the fact that Decedent signed the will on January 16, 2004, leaving his estate to Agnes, even though Agnes had died on December 19, 2003, and thence to Shirley, who had died in 2001. Because Decedent had bequeathed his estate to relatives who had died and because other relatives objected to the codicil bequeathing Decedent's entire estate to LeRoy, the ALJ continued the hearing for a matter of months to allow the interested parties to prepare for a "more formalized" hearing regarding Decedent's "state of mind when he made that will." Transcript, Nov. 15, 2006 (2006 Tr.), at 14, 22; *see* 43 C.F.R. § 4.231.

Judge Lynch took some portion of the 2006 hearing to explain the burden of proof on any opponent of a will. 2006 Tr. at 13-22. He explained that the burden was high, and advised the attendees that the fact that Decedent had medical issues, even ones that would affect his thinking, did not in and of itself compel a judge find that a testator was incompetent. *Id.* at 19. He advised the participants that it was their burden to produce

evidence and described the kind of testimony they must present to challenge a testator's competence. *Id.* at 16-17. He advised the participants that it would be useful at the second hearing to have testimony from Decedent's medical providers. *Id.* at 16. He stated that he had the power to issue subpoenas to medical providers, but that he would not compel medical testimony or records unless an interested party submitted a request to him, and advised the witnesses to do so. *Id.* at 17, 21. He explained that he would subpoena the witnesses to the will, *id.* at 19, and advised the interested parties that they could hire a lawyer. *Id.* at 22.³

The ALJ subpoenaed witnesses to the will and to the codicil, and also Throssel, for a second hearing scheduled for May 21, 2007. In addition, the record shows that the ALJ received a number of documents prior to the 2007 hearing:

- * *Letter from Colville Tribal Court to Judge Lynch, Dec. 4, 2006.* This letter verified that the Tribal Court had no record declaring Decedent to be incompetent.
- * *Memorandum of Louella Anderson, Tribal TAMF [sic] Program, "To Whom It May Concern," Dec. 11, 2006.* Anderson explained that she had been Fred's Social Service caseworker because of his "physical disability" when he lived at his apartment. She described him as physically shaky but mentally lucid, as having a sense of humor, and as "always remember[ing] her."
- * *Memorandum from the Administrator, CTCC, to LeRoy Jarred, Dec. 22, 2006.* The Administrator explained the circumstances under which Decedent was admitted to the CTCC on May 17, 2004. She explained that Fred had been placed in the Alzheimer's Unit at the Summerwood facility at Moses Lake because of "Behavior issues" he had exhibited at the Coulee Community Hospital/Nursing Home. She explained that she met with him in preparation for moving him from Summerwood to the CTCC, to discuss the behavior expected of him. She described Fred as "alert, conversant and agreeable"; he "clearly let his needs be known and his likes and dislikes be known without any discrepancies, and was very verbal about his wishes, despite having a Medical Diagnosis of alcohol dementia." She stated that CTCC's

³ The applicable rules in effect in 2006 required that, where a self-proved will is contested, the attesting witnesses must be produced and examined in certain circumstances. 43 C.F.R. § 4.233; see *Estate of Elizabeth Frank Greene*, 3 IBIA 110, 119 (1974) (contest requires testimony of attesting witnesses); cf. 43 C.F.R. 30.279, 73 Fed. Reg. 67,300 (Nov. 13, 2008). All references in this decision to the probate regulations are to the rules in effect when Judge Lynch issued his decision.

Social Services Director Wanda Kitterman and Patient Care Coordinator Karen Monnin assisted Fred in meeting with the Colville Tribal Legal Services to “upgrade” his will “per his wishes since his Sister Agnes and Niece had both passed away, due to his shakiness he signed with a thumbprint and had 2 witnesses.”

- * *Letter from Kathy Ensminger to Judge Lynch, Nov. 27, 2006.* This letter explained the circumstances surrounding Ensminger’s involvement as a witness to the codicil. She explained that Fred indicated to her on several occasions that he wished to name LeRoy as his beneficiary, given that Agnes had preceded him in death. “During [Fred’s] time in the nursing home, Leroy was the only family member that showed interest in Fred. He would go visit him often, feed Mr. Jerred his meals, and make sure his needs were being met.” She explained that she was “working at Social Services” on the date Fred signed the codicil, and that she acted as a witness. Fred “changed his will and appeared content with his decision . . . as this was Mr. Fred H. Jerred’s final wish.” She added: “Leroy Jerred was not present during the signing of this will. There was myself, Wanda Kidderman [sic], the Notary person and Mr. Fred H. Jerred. The will was read to Mr. Jerred, he was asked if he understood the will, and if he was willing to sign it. He indicated yes. The only question he asked was where is Leroy? He wanted help with his breakfast.”
- * *Memorandum “To Whom It May Concern,” Jan. 8, 2007, signed by six self-described members of the staff of the Nespelem Tribal Convalescent Center.* These staff members claimed that “[t]o the best of our knowledge, and to the best of our records for visitation — [Fred’s] niece Louise (Jerred) Hill did not visit him at any time during his stay with us!!” They claimed that Fred was visited regularly by LeRoy and occasionally by his nephew Lyle Jerred.

Judge Lynch conducted the second hearing on May 21, 2007, and Hill and Riehart attended and testified.⁴ In addition, Edmonds and Ensminger appeared as witnesses to the will and codicil, respectively, and Throssel attended as the scrivener of the will.

Throssell testified that he was a lawyer at the offices of the Colville Tribe. Transcript of Hearing, May 21, 2007 (2007 Tr.), at 7. He stated that LeRoy appeared at his office seeking assistance for his Uncle Fred who wanted to execute a will. *Id.* at 11. Throssell claimed that in response he met with Fred individually at a residential facility in October 2003; returned in November 2003 with Edmonds; and returned again with Edmonds in December 2003. Based on the three interviews, he drafted the will. *Id.* at 8. He testified

⁴ Spratling did not attend the hearing.

that Decedent “understood the provisions of the will, he agreed with them, and wanted to execute the will and brought in other persons to do the execution of the will, and I was witness to that execution.” *Id.* He stated that Fred knew who his family was and who he wanted to leave his property to, and that at the time he drafted the will Agnes was alive. *Id.* at 9. “These are really extraordinary measures that we went to in visiting him that many times. He had some trouble verbalizing, so we were very careful.” *Id.* at 9-10.

Edmonds, also an attorney at Colville Legal Services, testified that he accompanied Throssel at two of the described meetings and attended the execution of the will as a witness. He stated that, according to standard procedure, Throssel met privately with Fred before the actual signing of the will, which, in this case, occurred by Fred’s thumbprint. 2007 Tr. at 12-14. Questioned by the ALJ as to whether he had “an opportunity to develop [his] own opinion, as far as whether [Fred] was sufficiently competent to make a will,” he responded: “I did, and I would answer that in the affirmative.” *Id.* at 14.

Ensminger testified that she was Fred’s social worker for 4-5 years, 2007 Tr. at 19, and visited him once or twice a month after he was placed in residential care. She explained that Fred had told her that he had a will leaving everything to Agnes. She testified that: “[A]fter Agnes passed away I asked him about his will, what he wanted to do with his possessions, and he told me that he wanted to leave his things to Leroy . . . because Leroy was the only one that come down to visit him and spend any amount of time with him.” *Id.* at 20-21. She stated that she did not prepare the codicil, but only witnessed it; she stated that she asked Fred “if this is what he wanted to do. And I asked him that on several occasions and he indicated that, yes, that’s what he wanted.” *Id.* at 21.⁵

Next, the ALJ allowed family members to testify in support of the will and codicil or to challenge them. LeRoy testified that he was close to Fred, who told him that he wanted to leave his estate to Agnes because “she took care of him before she passed away.” 2007 Tr. at 28. LeRoy denied being aware of the will when it was signed, *id.*, and explained that Fred thereafter indicated that he wished to leave his estate to LeRoy. *Id.* at 29. LeRoy described helping to sell Fred’s trailer and testified that the proceeds were deposited in the IIM account. *Id.* He testified that the reason Fred was in the Alzheimer’s unit was that he “couldn’t get along down there [at the nursing home] so they couldn’t place him. So they placed him in the alzheimer place . . . [T]here was no other place to put him, at that time . . .” *Id.* at 32. Fred signed himself out, according to LeRoy, because “that place was bad,” and, as a result, the CTCC staff eventually brought him back to that facility.

⁵ Ensminger also testified that she acquired from “social services” the title to Fred’s trailer so that Leroy could sell it. She stated that Fred “knew about the sale.” *Id.* at 23.

Judge Lynch permitted other relatives to question Leroy. Riehart questioned when LeRoy obtained the power of attorney from Fred; he responded that he was unsure but believed it was in 2004. 2007 Tr. at 37. She questioned whether he brought alcohol to Fred. *Id.* at 37. Judge Lynch noted that there was no evidence that Fred was intoxicated when he prepared the will or codicil; Riehart responded, “we don’t have any proof that he wasn’t.” *Id.* She questioned what LeRoy did with personal property from Fred’s apartment. *Id.* at 41. LeRoy refused to answer. *Id.* After the Judge pointed out that he was not “endearing [himself] to the court” with his intransigence, LeRoy responded that he took the property as his own. *Id.* at 42. Responding to Riehart’s question regarding who prepared the codicil, LeRoy denied knowing but asserted that he had contacted the Colville Tribe attorneys again when Fred sought to amend the will. *Id.*

Another relative, Trudi Tonasket, accused LeRoy of being “greedy” and chasing Fred and his money after another uncle (Walt) died, leaving behind a sum of money. 2007 Tr. at 40. She testified that Fred had signed himself out of the Summerwood facility and had nearly frozen to death. *Id.* at 55. She also alleged that LeRoy had attempted to obtain a gun from her own father’s estate after his death; she stated that this was consistent with LeRoy’s behavior when their Uncle Walt had died. She stated that it was predictable that LeRoy would befriend Fred, after seeing how much money Walt had. *Id.* at 55-56.

Hill testified that her Uncle Fred had lived with her family when he was young, and moved with them “[e]ven after he was a grown man” 2007 Tr. at 44.⁶ She denied that Fred would have excluded his brother Clarence from the will. *Id.* She expressed concern that Agnes and Shirley had both died before Fred signed his will. She described a time during which both Fred and Agnes were living in the same residential facility and she would visit Agnes. She asserted that Fred would appear at Agnes’s door but he did not know who Hill was, and he asserted, erroneously, that Agnes was his grandmother. *Id.* at 45. Hill testified that she visited Fred in his apartment between 1996 and 2000, and that he was always drunk. She mentioned that he was in the Alzheimer’s Unit in Moses Lake and that he would become violent in the nursing home. *Id.* at 46. She concluded that Fred was incompetent, had Alzheimer’s for many years before he died, and could not have been competent to sign the will or the codicil. *Id.* at 45, 47.

Judge Lynch questioned Hill about the fact that the CTCC claimed not to have seen her visit her uncle. She claimed that she had visited him, and denied that she had to sign in order to do so. 2007 Tr. at 49. She then asserted that she “couldn’t visit him because [she] couldn’t make him understand anything.” *Id.* at 50.

⁶ Hill did not give dates for these events; Fred would have turned 20 in 1945.

Riehart testified that she had visited Fred but not often because he did not recognize her. 2007 Tr. at 52. She claimed to have lived with him in his apartment, at which time, most recently in 1996, she asserted, Decedent verbalized clearly that he wanted to leave LeRoy “nothing but \$1.” *Id.* at 53.

Based upon the hearings and the additional evidence cited above, Judge Lynch issued the Decree on July 12, 2007. After listing Decedent’s relatives, the ALJ explained that Hill had contested the validity of the codicil. Decree at 4. The ALJ set forth the elements that must be established to demonstrate that a decedent lacked testamentary capacity — that the testator did not know the natural objects of his bounty, the extent of his property, or the desired distribution, at the time of execution of the will. *Id.* at 4, *citing, inter alia, Estate of Virginia Enno Poitra*, 16 IBIA 32, 36 (1988). Acknowledging that evidence supported the conclusion that Decedent suffered a form of alcohol-related dementia, the ALJ nonetheless explained that the existence of such a condition did not *ipso facto* prove that Decedent lacked testamentary capacity when he executed the codicil. *Id.* at 5, *citing, inter alia, Estate of Jean Light Adams*, 39 IBIA 32, 33 n.3 (2003). Judge Lynch noted that Ensminger testified that Fred appeared to be of sound mind when he signed the codicil, that she questioned him about whether the codicil reflected his wishes, and that he responded affirmatively. Decree at 5. Judge Lynch also explained that no evidence was submitted to establish any of the four factors necessary to prove undue influence. *Id.*, *citing Estate of Leona Ketcheshawno Ely*, 20 IBIA 205, 207 (1991).⁷ Accordingly, Judge Lynch found that the codicil was properly made and executed, that Fred possessed testamentary capacity and was free of undue influence, and that the will, as revalidated by the codicil, was approved.⁸

Five persons — Nancy A. Mellon (formerly Atchison), Clarence Jerred, and all three Appellants — submitted petitions for rehearing to the ALJ pursuant to 43 C.F.R. § 4.241:

- * Mellon asserted that the “decision is not what our uncle would have wanted” and that she “felt that the doctors and or their statements should be at the hearing along

⁷ To prove “undue influence,” it must be shown that (a) the decedent was susceptible of being dominated by another; (b) the person allegedly influencing the decedent in the execution of a will was capable of controlling decedent’s mind and actions; (c) that the person did exert such influence in a manner calculated to coerce decedent to make a will contrary to his own desires; and (d) the will contradicted the decedent’s own desires. *Id.*

⁸ Judge Lynch cited 79 Am. Jur. 2d *Wills* § 608 (2002) in support of his determination that a valid codicil may “republish[] and validate[]” a will that is invalid due to a procedural infirmity, undue influence, or lack of competency. Decree at 4 n.3.

with any medical staff that cared for Uncle Fred. I believe that persons at the hearing need clarification as to what was expected or required in order to have the real requests of our Uncle met.” Mellon Petition for Rehearing.⁹

- * Clarence Jerred argued that because he was “the last living sibling, should the will be declared invalid, [he] should be declared the heir to the estate.” Clarence Jerred Petition for Rehearing.
- * Hill agreed with and supported Mellon’s Petition; she also argued that Judge Lynch was incorrect that she challenged only the codicil and asserted that she challenged both the will and the codicil. Hill Petition for Rehearing.
- * Riehart claimed that Fred would not have wanted any money to go to LeRoy; she cited her own testimony that Fred had told family members that when he died he was leaving LeRoy \$1, and stated that she does not “believe he would have changed his mind.” Riehart Petition for Rehearing. She claimed to be seeking medical records to prove that “Uncle Fred was incompetent and unable to make any decisions, also he was heavily sedated daily, because he was mean to the staff and other patients at the nursing home.” *Id.* She claimed that because LeRoy had a power of attorney he was refusing to authorize release of such records and that she would have to “file with the court to have a subpoena to attain the records needed to prove Uncle Fred’s state of mind.” *Id.*
- * Spratling stated that she believed her “Uncle Fred was incompetent and unable to make any changes to his will at the time when LeRoy Jerred was named sole beneficiary.” Spratling Petition for Rehearing.

Judge Lynch entered the Order Denying Rehearing on October 10, 2007.¹⁰ He explained that the petitions were not submitted under oath as required by 43 C.F.R. § 4.241(a). Order Denying Rehearing at 1, *citing Estate of Peter Joseph Chalwain*, 20 IBIA 128, 130 (1991). In addition, he explained that under the rule the petition must state the

⁹ Mellon asserted that her letter was a Notice of Appeal. The ALJ properly recognized that the appropriate procedure for challenging the Decree is reflected in 43 C.F.R. § 4.241, and thus correctly identified her request and all others as petitions for rehearing.

¹⁰ The ALJ originally issued this order on September 28, 2007. Because of a procedural infirmity, that order was withdrawn on October 10, on which date the Order Denying Rehearing was reissued.

grounds on which it was based, and, if based on new evidence, it must be accompanied by affidavits or declarations of witnesses explaining what such evidence would be. *See* 43 C.F.R. § 4.241(a)(1) and (2). He noted that none of the petitions presented such information or new evidence. Finally, he reminded the petitioners that he had already conducted a hearing on the issue of Decedent's competence at which time they had been provided an opportunity to submit relevant evidence. He denied all five petitions.

Riehert, Spratling, and Hill submitted Notices of Appeal to the Board, pursuant to 43 C.F.R. § 4.320, docketed as IBIA Nos. 08-4, 08-5, and 08-15, respectively.¹¹ Clarence Jerred also submitted a Notice of Appeal, though it was not properly served on this Board and was therefore not separately docketed.¹² Clarence Jerred's argument appears in its entirety: "I believe that the will naming Leroy Jerred was executed when Mr. Jerred was not of sound mind because he was an alcoholic and was not coherent at the time." As this argument is insufficient to add any additional facts or law to what we consider in addressing the three docketed appeals, we do not separately address his appeal further.

In her October 2007 Notice of Appeal, Riehert cites as the reason for her appeal her belief that the will "makes no sense" given that Agnes and Shirley had predeceased Decedent, and she states that she continues to seek medical records to prove that Fred was incompetent and heavily sedated at the time the codicil was signed. She attached various petitions for rehearing filed by others, the will and codicil, and the Decree, with handwritten notes, and also a letter she sent to Decedent's relatives asking them to appeal.

On March 24, 2008, Riehert submitted a letter asking for a "short continuance so [she] can get medical records from Coulee Community Hospital to show Uncle Fred's incompeten[ce] from 2001 to November of 2005 time of his death." She claimed that LeRoy would not sign a release allowing the CTCC to release Decedent's records and stated she needed help in getting them. The Board granted an extension of time by order dated November 28, 2008.

On April 16, 2008, Riehert submitted an Opening Brief, claiming that Decedent would not have wanted to leave his money to LeRoy. She claims that LeRoy is hiding important information and repeats that Agnes and Shirley were already dead when

¹¹ Spratling also submitted a notarized Petition for Rehearing to this Board; as this was denied on the merits by the ALJ's order on rehearing, we consider its content as subsumed within his decision. She subsequently submitted the Notice of Appeal considered here.

¹² Appeals must be filed with the Board, 43 C.F.R. § 4.332(a), and not with the ALJ.

Decedent signed his will leaving his estate to one or the other of them. Riehart then presents arguments and posits at least 20 questions against the evidence. She dissects LeRoy's testimony, asking abstract questions as to LeRoy's responses and how they can be true.¹³ She queries why LeRoy did not deny that, in 1996, his Uncle Fred had asserted an unwillingness to leave LeRoy money. Riehart attaches testimony transcripts and documents previously appended to her Notice of Appeal.

In a November 5, 2007, Opening Brief, Hill asserts that, at the November 2006 hearing, "[she] asked the ALJ if he could or would get the Medical Records of Uncle Fred, and he replied in the affirmative, but this was not done as far as I know. I, and other family members would like your Court to secure these, and we would like to have access to them for our review." She attaches a May 16, 2006, letter she wrote, a year in advance of the second hearing, to a Dr. Myers, asking for a "statement of her Uncle Fred's stability or state of mind." She asserts that Dr. Myers did not respond. She lists the addresses of the CTCC, the Grand Coulee Hospital (Nursing Home), and the Summerwood Center, asking this Board to contact those facilities to obtain Decedent's medical records.

No other briefs were submitted.

Discussion

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.* Appellants have not met this burden and thus we affirm.

We find that Judge Lynch correctly applied the rule governing petitions for rehearing. Under 43 C.F.R. § 4.241(a)(1)(ii), the petition must clearly and concisely state the grounds on which it was based. If the petition is based on newly-discovered evidence, the petition must (i) be accompanied by an affidavit or declaration stating fully what the new testimony is to be, and (ii) provide "justifiable reasons for the failure to discover and present [newly discovered] evidence" not presented during the probate hearing. 43 C.F.R.

¹³ For example, Riehart queries: "If Uncle Fred was of sound mind and memory on January 16 2004 why would he draw up a will leaving everything to his sister Agnes or niece Shirley who both died before the will was written?"; "If he was mentally capable of disposing his estate by Will, then why wasn't his brother Clarence included in the immediate family?"; and "Why did LeRoy [refuse to] answer some of our questions?"

§ 4.241(a)(2). Judge Lynch was correct in concluding that none of the petitions met the standards of this rule.¹⁴

The petitioners' arguments for rehearing fell into two categories: they contended that (a) Decedent would not have left everything in his IIM account to LeRoy and that he would or should have left his estate to his surviving brother or other relatives; and (b) medical evidence from the facilities and service providers would have been useful in proving that Fred was incompetent to execute the will and codicil. In Riehart's petition, she averred for the first time that Fred was incompetent because he was sedated to quell a violent temperament.

We agree with the ALJ that these averments are insufficient to show that a new hearing is warranted under 43 C.F.R. § 4.241. As to the assertions made by petitioners as to what Decedent would or should have done in his will, these allegations merely stand as a disagreement with both the outcome and with the evidence of record. The evidence showed clearly, most significantly through the testimony and letters of observers and witnesses with no potential benefit to be gained by distribution of the estate, that Decedent communicated with attorneys and witnesses and expressly stated his desires, which were effectuated in the will and codicil. The various petitioners' averments that Fred was incompetent, would never have left any money to LeRoy, and should have left his money to Clarence, contradict the testimony of and evidence submitted by disinterested witnesses. They do not constitute new evidence nor do they show error in the ALJ's decision.

The law does not require that Indian trust property disposed of by will be distributed to the decedent's children or other family members. *Estate of Romero*, 41 IBIA 262, 265 (2005), *citing Estate of Charette*, 15 IBIA 92 (1987); *Estate of Cultee*, 9 IBIA 43, 50 (1981), *aff'd sub nom. Cultee v. United States*, No. 81-1164C (W.D. Wash. Sept. 14, 1982), *aff'd*, 713 F.2d 1455 (9th Cir. 1983); *Estate of Bitseedy*, 5 IBIA 270, 275 (1976), *aff'd sub nom. Dawson v. Kleppe*, No. CIV-77-0237-T (W.D. Okla. Oct. 27, 1977). The appropriate descent of property when an Indian dies without a legally executed will is guided by 25 U.S.C. § 348, while administration of a will proceeds under 25 U.S.C. § 373. As we explained in *Estate of Romero*, "the primary purpose of a will is to alter the normal course of descent of the property." 41 IBIA at 265, *citing Estate of Bitseedy*, 5 IBIA at 276. Thus, "25 U.S.C. § 373 clearly demonstrates Congress's intent to depart from the

¹⁴ We recognize that Hill complains that the ALJ erred in concluding that she only challenged the codicil, and claims that she challenged both the will and the codicil. Without parsing through her comments to determine whether she was clear as to this point, we accept for purposes of this decision that she challenged both testamentary documents.

limitations of section 348 and to allow owners of trust allotments to devise their property by will to others.” *Estate of Romero*, 41 IBIA at 265.

When an Indian decedent leaves a will with provisions for the distribution of trust assets, the probate judge may not admit the will to probate unless he determines that it was properly executed. *See* 43 C.F.R. §§ 4.233, 4.260(a). If a will is contested, a hearing determines whether the will may be admitted to probate. 43 C.F.R. §§ 4.233(c). At this hearing, the testimony of will witnesses or the scrivener ordinarily is taken to determine whether the will was properly executed. *Id.*

Opponents of the will may also offer evidence at this hearing to show that the will is invalid due to fraud, incompetence, or undue influence. In considering Appellants’ contest of the will and the codicil on grounds that Decedent should have left his estate to his surviving brother, or would not have wanted to leave his estate to LeRoy, the ALJ’s proper role was to discern the intent of the Decedent as reflected by the testamentary documents, and to determine whether the evidence supported any finding that Decedent was not competent to make decisions, or was subjected to undue influence, at the time he executed the will or codicil. The ALJ would have acted improperly had he equated the fact that Decedent left property to a single heir with “incompetency” to issue a will. Likewise, we recognize that Appellants believe, whether it is true or not, that LeRoy’s motives for visiting his uncle included being named the recipient of his estate. But allegations regarding either the motivation of a person in proffering assistance to an elderly or dying relative or the judgment of the decedent in responding to such help by compensating the relative in his will have no bearing on Decedent’s competence to issue his will or codicil.¹⁵ Accordingly, we do not find that the ALJ erred in failing to grant the Appellants’ (or any other) petitions for rehearing on the basis of petitioners’ complaints regarding the outcome.

Likewise, we do not find Riehart’s 22 questions to properly substantiate an appeal challenging the ALJ’s refusal to grant a petition for rehearing. The many questions she submits generally fall into the category of disagreements with the testimonies of various witnesses, including LeRoy. While the record suggests answers to some or many of the

¹⁵ It is conceivable that the interested parties made these assertions in an aborted effort to prove that LeRoy unduly influenced Decedent, but, as the ALJ noted, no evidence meeting the test to prove undue influence was submitted, and Appellants do not argue that the ALJ was wrong on this point.

questions,¹⁶ the evidentiary hearing was the proper occasion to question the witnesses and she did so. Her later culling through the testimony to draw negative inferences about Ensminger and LeRoy suggests that she has a grievance with LeRoy, not proof that Decedent was incompetent. It was Riehart's burden to prove the latter point in order to contest the will or the codicil. She did not meet this burden.

We also affirm the ALJ's Order Denying Rehearing in finding that the petitioners did not sufficiently justify a new hearing under 43 C.F.R. § 4.241(a)(2), on grounds of newly discovered evidence. As he correctly noted, the petitions were not accompanied by affidavits or declarations explaining the alleged new evidence, and in addition, as he explained, to the extent the "evidence" was information that the petitioners had occasion to present at the 2007 hearing, they did not justify their failure to do so at the time.

The "newly discovered evidence" alluded to by petitioners was not actual evidence in their possession but rather evidence that they hoped to acquire from Decedent's medical providers. The petitioners presume that such information will assist them in proving that Fred was incompetent in January and July 2004, when the will and codicil were signed.

We agree with the ALJ that, even if such information were probative to disprove the evidence in the record, the proper time to present that information was at the May 21, 2007, hearing; the petitioners did not explain sufficiently their failure to provide that information at that time. Moreover, we do not find their explanations, taken together, in their notices of appeal to be sufficient now.

As we understand the Appellants' arguments, they contend that the ALJ should have obtained medical evidence at the time of the hearing to prove or disprove Fred's state of mind. Riehart complains that (a) this is what she had understood that the ALJ was going to do; (b) she asked him at the November 2006 hearing to provide such records; and (c) he responded affirmatively. Thus, the implication of Appellants' arguments is that the reason

¹⁶ Riehart's questions as to why Fred would have issued a will, or attorneys would have drafted one, to a beneficiary who had died, were answered by Throssell, who testified that he met with Decedent on three occasions when Agnes was still alive. In the event of Agnes's predeceasing Decedent, Shirley was expressly mentioned but was not singled out as the beneficiary; rather, the estate would have been distributed among all of Decedent's heirs so long as they had no drug or alcohol problems. Riehart's question as to why LeRoy did not deny Riehart's testimony about a 1996 conversation with Decedent is answered quite sensibly by the facts that (a) it was too remote in time to be relevant, and (b) LeRoy would not have been competent to confirm or deny a conversation that he did not hear.

they do not yet have this information is that they presumed the ALJ would supply it, and that LeRoy will not authorize the medical facilities to release the medical data so that they must seek a subpoena now. Riehart asks the Board to issue such subpoenas.

These arguments suffer several flaws. First, Appellants again misunderstand the ALJ's role. It was Appellants' burden, not the ALJ's, to demonstrate that the will or codicil was invalid because Decedent was not competent to execute it. Thus, it was up to the Appellants, or other interested parties, to determine what evidence to present to prove their point; it was for those contesting the will or codicil, not the judge, to make the decision whether to obtain medical information and whether to submit it. That the ALJ did not himself make these determinations for purposes of deciding what evidence would be sufficient at the hearing is a reflection of the fact that he was the adjudicator, not the opponent of a will. His failure to take up this role was not error; and the fact that he did not do so is not sufficient reason either to justify Appellants' failure to have presented whatever evidence they thought relevant to the issue of Decedent's competency at the hearing, or to justify a rehearing to get such information now.

Second, we do not find that the ALJ was either improper or ambiguous in advising the interested parties of their role at the November 2006 hearing. In fact, as noted above, the ALJ explicitly described the burden on the opponent of a will and the kind of information necessary to overcome it, including medical information. 2006 Tr. at 17. The ALJ advised Riehart at the 2006 hearing that he had the authority to issue subpoenas but that a request would have to be submitted to his office for issuance of medical subpoenas:

UNIDENTIFIED SPEAKER: Do we have to have a court order for [a doctor] to release the information because of the privacy law?

THE COURT: We could subpoena his medical records; I have the authority to do that, *if somebody requests that. I would probably not do it on my own*, but —

UNIDENTIFIED SPEAKER: I wrote to Dr. Myers before, but I never received an answer.

THE COURT: *Well, if you'll get that to my office, I'll see what I can do about getting a release for the medical records.*

2006 Tr. at 22 (emphasis added). The record contains no suggestion that, in the 6 months between this hearing and the May 2007 hearing, Riehart or any other interested party followed this invitation, or otherwise pursued relevant medical information. In light of the

fact that Judge Lynch made clear that the family members bore the burden of contacting him for subpoenas and that this information was to be presented at the next hearing, Appellants have no argument that they were justified in waiting until the petitions for rehearing to ask for assistance in producing evidence from Decedent's medical providers.

Appellants have done nothing to convince the ALJ or this Board that medical professionals will provide any information sufficiently probative of Decedent's mental state at the time he signed the will and codicil to overcome the evidence of record. Appellants appear to presume that a medical diagnosis would be sufficient. But, as noted above, the ALJ accepted a diagnosis of "alcohol dementia." He also noted correctly that such a diagnosis does not preclude a patient from executing a will so long as the patient knows the natural objects of his bounty, the extent of his property, and the desired distribution at the time he executes the will. Decree at 4, *citing, inter alia, Estate of Poitra*, 16 IBIA at 36. Riehart speculates that Decedent was sedated. Whether or not this is so, such speculation would not overcome that unwavering testimony of the disinterested witnesses who testified that Decedent knew what he was doing, what he was trying to accomplish, and that the documents he was signing met that goal. Finally, there is no evidence to support such speculation. The petition for rehearing is not the appropriate time for a fishing expedition into other possible avenues for challenging a will, when the time for challenging it has passed, the interested parties had at least 6 months to garner their evidence, and the ALJ offered to assist them if they contacted him with a requests for subpoenas.¹⁷

We conclude that Appellants have not met their burden of showing error in the ALJ's denial of their petitions for rehearing. We thus affirm his decision.

¹⁷ This Board does not have authority to issue subpoenas. *Hardy v. Midwest Regional Director*, 46 IBIA 47, 59 (2007). Were we to determine that subpoenas were called for at this time, our only avenue would be to set aside or reverse the ALJ's Order Denying Petition and remand for the ALJ to make the best determination as to how to proceed on such a request. For the reasons stated above, we do not believe such relief is warranted on the facts of record.

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, we affirm the Order Denying Petitions for Rehearing.

I concur:

// original signed
Lisa Hemmer
Administrative Judge*

// original signed
Debora G. Luther
Administrative Judge

*Interior Board of Land Appeals, sitting by designation.