



INTERIOR BOARD OF INDIAN APPEALS

Estate of Dominic Orin Stevens, Sr.

55 IBIA 53 (05/22/2012)

Related Board case:
51 IBIA 252

Decedent was in declining health prior to his death. On October 17, 2003, Decedent executed a broad power of attorney (POA) in favor of his wife, Janet L. Stevens (Janet). PR Tab 2. After Janet died in December 2003 and pursuant to the terms of the POA, Steve succeeded Janet as Decedent's agent under the terms of the POA. Meanwhile, Lois assumed responsibility for assisting Decedent with meals, companionship, and transportation. It is not entirely clear from the testimony, but in the time up to and after executing the 2004 will, Decedent apparently would spend time living with Lois in her home as well as time living in his own home.

On June 18, 2004, Lloyd Pickett, a loan officer with BIA, conducted a "field visit" of Decedent's cow-yearling ranching enterprise. His visit is memorialized in a memorandum dated June 22, 2004 (Pickett Memorandum), which describes the purpose of his visit as related to Decedent's real estate loan. *See* PR Tab 40.³ In his memorandum, Pickett notes that Decedent is "in ill health" and that the intent is "to keep the ranch . . . consolidated in one economic unit, intact[,] and the land holdings . . . in trust ownership status by the family." *Id.* at 2 (unnumbered). The memorandum asserts that Decedent voluntarily added Donna as a joint owner of all livestock and that Decedent intended to transfer ownership of all farm equipment to Steve. With respect to Decedent's lands, Pickett noted that there were gift deed applications for the transfer of Decedent's land holdings to Steve, Donna, and Lois, several fee-to-trust applications, and applications for land exchanges between Decedent and the Tribe, all of which were then pending before BIA. Pickett recommended, at the family's request, that the land transactions be processed expeditiously in light of Decedent's declining health. The memorandum does not identify who attended the meeting with Pickett, although it is evident from the memorandum that Pickett spoke with Steve.

According to Donna, on or about July 24, 2004, a family gathering took place apparently at Lois' request. Hearing Transcript (Tr.), Apr. 16, 2008, at 218:9-219:8. Various family members attended the meeting, including Steve, Donna, Lois, and Decedent. At this meeting, Lois became upset about the Pickett Memorandum, a copy of which she had obtained, and claimed that it left nothing for her or for Decedent. *Id.* at 219:2-220:16. Steve and Donna tried to explain to her that the report was wrong, but Lois could not be placated. *Id.* Lois finally exclaimed that she and Decedent were "going to go to the BIA and . . . do something about this." *Id.* at 221:4-9. Decedent also became agitated by the discussion, *id.* at 220:18-221:2, and ultimately Lois took Decedent and they left, *id.* at 221:7-9.

³ According to the Pickett Memorandum, the loan was secured by a mortgage on approximately 19 percent of Decedent's land holdings.

On or about Monday, July 26, 2004, Lois took Decedent to BIA's Crow Agency. According to Lois, it was Pickett's idea for Decedent to make out a will. Tr., Nov. 28, 2007, at 12:12-17. At BIA, he and Lois both met with several individuals, including the superintendent of BIA's Crow Agency and several other personnel. *Id.* at 13:3-14. At this meeting, Decedent revoked the POA, and apparently did not execute a new one. Lois testified that Decedent also told the BIA personnel "his intentions of what he wanted done with his property," but denied that he ever said that he was leaving it all to her. *Id.* at 17:8-16. Lois explained that Decedent's "main intention" was to keep the land in trust status for the benefit of his descendants. *Id.* at 17:17-19:1. After the meeting ended, one of the BIA staff members informed BIA's Probate Specialist, Debbie Scott, who was not present at the meeting, that Decedent would return the next day to see Scott for the purpose of making his will.

Lois brought Decedent back to BIA the next day, July 27, to meet with Scott. Lois did not stay for the meeting. Scott testified that she recalled preparing Decedent's will. She stated that they met alone in her office for approximately 30 minutes discussing the terms of Decedent's will and preparing the will. Scott asked Decedent a number of questions to determine his intent and understanding of the process, and stated that Decedent appeared to understand the conversation they had concerning his will and that he appeared alert to her. Tr., Apr. 16, 2008, at 24:7-14. Scott testified that she took care to ensure that Decedent understood and knew what he was doing by directing her to prepare and execute a will that left everything to Lois. In particular, Scott asked Decedent several times if he really intended for one child, Lois, to get the entire "ranch,"⁴ and Decedent repeatedly assured her that that was what he wanted. *Id.* at 22:10-23:6. He volunteered to Scott that Lois was taking care of him. *Id.* at 17:1-3. Scott further asserted that Decedent told her that he had four children and that, in terms of his property, he spoke mostly about his ranch. *Id.* at 15:18-19, 18:6-16, 37:9-12. After she had drafted the will, Scott read it to Decedent in its entirety and Decedent expressed satisfaction with it. *Id.* at 25:3-9. She testified that "he didn't hesitate to, to [put his] thumb print [on] [his will]." *Id.* at 25:10-14; *see also id.* at 16:17-17:1 (Decedent did not seem hesitant in any way nor did he have trouble answering Scott's questions). Scott further stated that he appeared healthy, wide awake, and to have a clear mind. *Id.* at 17:13-19, 18:4-5.

Carla Morning, one of the will witnesses, testified that she remembered witnessing Decedent's will. *Id.* at 50:4-13. Decedent looked up and smiled at her when she came into the room and they were introduced. *Id.* at 52:16-53:2. She also said that she did not recall

⁴ According to the Pickett Memorandum, the ranch consisted of approximately 6,250.59 acres.

seeing Lois there. *Id.* at 61:19-21, 62:14-16. She further testified that Decedent did not hesitate when he affixed his thumbprint to his will. *Id.* at 54:20-21, 57:10-11. Nothing in Decedent's conduct or behavior caused her to question whether he had the capacity to execute his will. *Id.* at 56:18-20, 67:12-16. The other will witness, Alfredine Snell, also testified that Decedent looked like he was of "sound mind" because he seemed "ordinary." *Id.* at 72:15-21. She also confirmed that Decedent did not hesitate to affix his thumbprint to his will. *Id.* at 77:20-21.

B. Probate Proceedings

The IPJ held four hearings in the probate of Decedent's estate — on October 31, 2006, November 28, 2007, February 12, 2008, and April 16, 2008. The first two hearings were in the nature of status conferences inasmuch as the parties informed the IPJ that they were working on a settlement. However, at the second hearing, Lois informed the IPJ that she wanted the 2004 will to be honored and that she was working on "other paperwork" that "all of us will be on" for the trust lands. Tr., Nov. 28, 2007, at 8:9-11, 10:19-11:8. Testimony then was taken at this first supplemental hearing from Lois, Steve, and Donna. Lois testified generally concerning her knowledge of how Decedent came to execute his 2004 will. Steve testified that Decedent's doctor had told him that Decedent had "some Alzheimer's," but he did not recall what Decedent's mental state was in July 2004. *Id.* at 20:8-17. He testified that Decedent was still driving a car and able to communicate his wishes. *Id.* at 21:2-7. Donna testified that she spent nearly every day with Decedent, that Decedent told her that he had been diagnosed with Alzheimer's and that he had "some thinking problems at times, not all the time" but "he was still able to make decisions about things [related to the family's propane business]." *Id.* at 25:4-5, 26:8-20; *see also id.*, Apr. 16, 2008, at 234:5-14 (Decedent had periods of lucidity in 2004 and "possibly" could have been lucid when he executed his will). When asked if she had "any concern" that Decedent had been subjected to undue influence in executing his 2004 will, Donna responded, "No." *Id.*, Nov. 28, 2007, at 27:3-5. No one testified at this first supplemental hearing that, at the time he executed his will, Decedent did not know (or was not likely to have known) the immediate members of his family, the extent of his property, or otherwise suggest that Decedent lacked testamentary capacity or was unduly influenced at the time he executed his 2004 will. At the conclusion of this hearing, the children of Decedent's predeceased son requested time to confer and decide whether to challenge the will. The IPJ granted their request and gave them 30 days to do so.

Thereafter, on January 4, 2008, Appellants filed a formal challenge to the 2004 will with the IPJ. On January 8, 2008, the IPJ wrote to the parties, acknowledging the will challenge and advising them that a second supplemental hearing would be scheduled "to

take testimony regarding the Decedent's [2004] will." PR Tab 6 at 1. He specifically informed Appellants that they, "as the contesting parties, must attend the second supplemental hearing and *be prepared to present evidence proving that the Decedent's will is invalid* and should not be honored." *Id.* at 1-2 (emphasis added). He further advised them that

[e]vidence may include medical and other records, testimony of witnesses, and anything else that would support the will contestants' position that the [2004] will should be rendered invalid. To assist this process, I will subpoena the witnesses to the will, as well as the will scrivener, so that interested parties might take testimony from them.

Id. at 2.

At the second supplemental hearing on February 12, 2008, the parties informed the IPJ that they had renewed settlement discussions, and requested a 60-day continuance. The IPJ granted the request, but scheduled a final hearing for April 16, 2008. Letter from IPJ to parties, Mar. 19, 2008 (PR Tab 17). He informed the parties,

In advance of the hearing, I will subpoena the will witnesses and scrivener, Sherry Kirschenmann, and [other BIA employees in connection with the gift deed applications]. I will take testimony from these people. However, this does not mean that I will bear the burden of establishing Decedent's competency for those parties objecting to the will. Therefore, all interested parties need to appear and be ready to present their evidence, whether it be medical testimony, medical documentation, or other witness statements. In addition, interested parties may testify themselves. Should an interested party wish to have a particular witness subpoenaed, that party may contact my office in a timely fashion and I will cause such a subpoena to issue.

Id. at 2. He further cautioned the parties that no further hearings would be held nor would he permit any further delays. *Id.*

The parties failed to reach settlement, and the final supplemental hearing went forward as scheduled on April 16, 2008. The IPJ subpoenaed the will scrivener, Scott, as well as the will witnesses, Alfredine Snell and Carla Morning, and the notary, Janice Morning. According to the record, none of the parties requested the IPJ to issue subpoenas for any witnesses. The testimony concerning the making of the 2004 will and the recollections of the BIA employees involved in that process is recounted above at 53-56.

We focus here on the evidence produced by Appellants to show undue influence and lack of testamentary capacity.

Harold Stanton, Esq., testified on behalf of Appellants that he observed in fall 2003 that Decedent “was just not with us sometimes and sometimes he was.” Tr., Apr. 26, 2008, at 116:2-8; *see also id.* at 119:4-7 (same). He also testified that he was asked to draft a will for Decedent when Decedent was in the hospital in March 2004. He declined to do so because, after visiting with Decedent, he did not believe Decedent was competent to execute a will at that time. *Id.* at 121:14-17.⁵ Stanton further testified that that visit with Decedent was the last time he saw Decedent alive. *Id.* at 121:18-21; 123:3-5.

Appellants offered a notarized statement from Dr. Bunt, who wrote generally of Decedent’s medical condition during the period of February to July 2004. PR Tab 20.⁶ Dr. Bunt stated that Decedent was diagnosed with dementia relatively soon after Dr. Bunt began treating him in 1995. Between February and July 2004, Dr. Bunt noted that Decedent “was easily confused,” “his ability to reason was limited,” and he “had impairment of short term memory.” Statement of Clayton Bunt, M.D., at 3 (unnumbered) (PR Tab 20). Dr. Bunt opined that during this period, Decedent “was very susceptible to manipulation, and . . . he had little comprehension of any legal processes he might have entered into.” *Id.* at 4 (unnumbered). Also in the record are Decedent’s medical records of his visits with Dr. Bunt. The last medical entry prior to Decedent executing his will was made on July 14, 2004. Dr. Bunt saw Decedent that day and noted that Decedent was “still driving, but unable to focus on any work per daughter,” and his “Dementia [was] progressing.” Medical records, July 14, 2004 (PR Tab 35). The next medical note is dated September 13, 2004. Relative to Decedent’s dementia, Dr. Bunt noted that Decedent “appears spry today,” “drives short distances, hasn’t gotten lost,” and “memory varies day to

⁵ According to Decedent’s medical records, he was hospitalized in March 2004, reportedly for pulmonary edema. His primary physician, Dr. Clayton Bunt, noted in Decedent’s chart that one week after Decedent’s discharge from the hospital, Decedent exhibited “confusion” and “appear[ed] feeble.” Medical records, Mar. 29, 2004 (PR Tab 35). On his next visit a week later with Dr. Bunt, the doctor noted in the medical record that Decedent appeared “considerably more alert and active, getting out to visit [but] remains mostly in house,” “occasional trip on 4-wheeler,” “orientation improving,” and that his “dementia improved.” *Id.*, Apr. 5, 2004.

⁶ The IPJ refers to Dr. Bunt’s affidavit as “sworn.” Decision at 14. In fact, the statement is not sworn, but in treating it as such, the IPJ afforded it the status of sworn testimony, and thus his mischaracterization did not prejudice Appellants.

day.” *Id.*, Sept. 13, 2004. Neither the affidavit nor the medical records address the issue of whether Decedent knew the extent of his property, knew the natural heirs of his bounty, i.e., his children, or knew how he wanted his property to be distributed at his death.

Donna testified generally that she believed Decedent “understood what he wanted to do . . . with his property [in July 2004].” Tr., Apr. 16, 2008, at 235:14-21. When asked about undue influence, however, Donna also testified that she thought Lois had unduly influenced Decedent in creating his will, relying on the family dispute over the Pickett Memorandum as the basis for her belief. *Id.* at 244. Sherry Kirschenmann testified on behalf of Appellants, but she had no knowledge of Decedent’s lucidity on the day he executed his will. Rolanda Plain Feather testified on behalf of Lois. Her testimony was equivocal: On the one hand, she testified that Decedent “wasn’t all there” between 2004 and 2005, *id.* at 288:3-11; on the other hand, she testified that Decedent was competent at the time he executed his will and up to the time of his death, *id.* at 289:18-290:8. Donna waived her right to cross examine Plain Feather, *id.* at 290:13-14, while Steve wanted to ask her about events occurring in June 2005, which the IPJ refused to allow, *id.* at 290:15-20.

On August 29, 2008, the IPJ issued his Decision, in which he upheld the 2004 will. The IPJ carefully reviewed the evidence, and determined that Appellants had not met their burden of establishing either that the will was the product of undue influence or that Decedent lacked testamentary capacity at the time he executed the will. He also rejected a document, characterized as a will by Appellants and signed by Decedent in 2005, because the document purported to direct a present conveyance of property via gift deeds rather than set forth a future distribution of property to take place at Decedent’s death. Thus, the IPJ rejected the 2005 document as a will because it lacked testamentary intent, while noting several other possible issues that would preclude treating the document as a will.

After receiving the Decision, Appellants retained counsel and sought rehearing. The IPJ provided Appellants with a compact disc (CD) of the hearings and allowed full briefing. As grounds for seeking rehearing, Appellants argued that the IPJ erred in finding that Decedent had testamentary capacity when he executed his 2004 will and finding that Lois did not exert undue influence over Decedent. Appellants also argued that the IPJ erred in (1) limiting witness testimony to events that occurred on or prior to the date Decedent executed his 2004 will, (2) misapplying the test for testamentary capacity, (3) failing to recognize an inconsistency in the testimony of Scott and Lois, and (4) failing to develop the record by questioning Scott concerning her adherence to BIA’s will-drafting procedures or inquiring further into her determination of Decedent’s testamentary capacity or existence of undue influence. In support of their claim that Decedent lacked testamentary capacity, Appellants offered new evidence, consisting of recently obtained hospital records for

Decedent as well as affidavits from Dr. Joseph D. Rich,⁷ Bill and Mary Sue Redfield, Terry Birdinground, Gary Graham, Merrille Mullenberg, Steve, and Donna.⁸ Finally, Appellants sought the opportunity to depose Dr. Bunt or otherwise present his testimony at a supplemental hearing.

On October 16, 2009, the IPJ denied Appellants' petition for rehearing. In his decision, the IPJ characterized Appellants' petition as offering, for the most part, "newly-discovered evidence." Order Denying Rehearing at 2. He found good cause for the late production of the Redfields' testimony and he agreed to consider their affidavits.⁹ He rejected the remainder of Appellants' late-submitted evidence (or offers of evidence) on the grounds that no good cause existed for their late submission.

In his Order Denying Rehearing, the IPJ acknowledged that his Decision could be read as misapplying the test for testamentary capacity because of his inadvertent use of the conjunctive "and," rather than the disjunctive "or." The IPJ clarified that testamentary incapacity could be established if the evidence showed an absence of *any one* of the three factors of testamentary capacity — i.e., that Decedent did not know the natural objects of his bounty, did not know the extent of his property, *or* was unable to articulate an intended distribution of his property. The IPJ reiterated that while he agreed with Appellants that Decedent had dementia, he concluded that Appellants did not "produce any evidence indicating the Decedent did not know his family members, did not know what property he owned *or* did not understand the distribution of his estate at the time he executed the will [in 2004]." Order Denying Rehearing at 9-10 (emphasis added). He expressly rejected Dr. Rich's affidavit, finding it "interesting" that "Dr. Rich, who never met the Decedent, could firmly conclude that *on the date the will was executed*, the Decedent would have been completely incompetent under all three prongs of the testamentary capacity test." *Id.* at 10.

⁷ Dr. Rich is a psychiatrist retained by Appellants as an expert witness.

⁸ Appellants also referred to "voluminous" medical records, which Dr. Rich apparently reviewed, but these records have not been produced. No new medical records were produced with Appellants' petition for rehearing.

⁹ The Redfields, both of whom knew Decedent well, asserted that they had fully intended to appear and testify at the April 16, 2008, hearing but Bill Redfield unexpectedly was hospitalized in serious condition. Therefore, neither Bill or his wife, Mary Sue, appeared at the hearing.

The IPJ also rejected Appellants' arguments that he had erred in failing to find that they had shown undue influence. The IPJ noted that while Dr. Bunt believed that "Decedent was susceptible of being dominated by another," Appellants failed to produce any "actual, concrete evidence that the Decedent was unduly influenced by anyone at all." *Id.* at 10-11. The IPJ similarly rejected additional arguments raised by Appellants.

This appeal followed. Appellants submitted an opening brief. No answer brief was received from Lois or any other party.¹⁰

Discussion

A. Introduction

We affirm the ALJ's Order Denying Rehearing. Appellants raise several issues for the first time on appeal, which we decline to review. We also reject Appellants' claims that procedural defects require that this matter be remanded for rehearing. For example, Appellants argue that the hearing transcripts are so inadequate that this matter must be remanded. But Appellants, who had a CD of the hearings, could have directed the Board's attention to material testimony on the CD if the transcript was inadequate on a particular point. They did not. Nor did Appellants argue to the IPJ that the CD was inaudible. In addition, Appellants argue that the IPJ erred in failing to require or permit certain witnesses to testify. We disagree. The written testimony of these witnesses was received, considered, and did not convince the IPJ to rule in Appellants' favor. Appellants now want another opportunity to present the witnesses' testimony, this time on the stand. But no good cause is proffered for their failure to present their full testimony previously, much less do Appellants make an offer of proof.

We further find no error in the IPJ's conclusion that the evidence does not support a finding that undue influence was exerted on Decedent to execute his 2004 will. At best, Appellants showed that Lois had an opportunity to exert such influence, but we cannot find on the basis of the record before us that Lois in fact did so. We agree with Appellants that the IPJ, relying on Board precedent that we now reject, applied too high of an evidentiary standard of proof for showing undue influence. But we need not remand this matter for further consideration because the IPJ found *no* evidence to support two of the four elements

¹⁰ The Board's legal assistant was informed by Lois' attorney of record that he was not served with a copy of Appellants' opening brief. However, Lois did not request a copy of the brief from the Board nor did she request leave to file a brief out of time.

necessary for showing undue influence, a conclusion with which we agree. Therefore, there is no evidence to be reweighed.

Finally, the record supports the IPJ's finding that Appellants failed to meet their burden of showing testamentary incapacity. Appellants did not offer any specific evidence showing that on the day Decedent executed his 2004 will he did not know the natural objects of his bounty, did not know the extent of his property, or did not know how he wanted his property distributed at his death. At most, their evidence showed, in general terms, that during the relevant time period, Decedent had dementia and was affected by it to a greater or lesser degree at various times. In contrast, the more specific evidence offered by the will scrivener, and even by Donna, reasonably supports the IPJ's conclusion that Appellants did not prove testamentary incapacity by a preponderance of the evidence.

B. Standard and Scope of Review

The Board reviews factual determinations by the probate judge to determine whether they are substantially supported by the record. *Estate of Samuel Johnson (John) Aimsback (Aims Back)*, 45 IBIA 298, 303 (2007). We review legal determinations and the sufficiency of the evidence *de novo*. *Estate of Laberta Stewart*, 54 IBIA 198, 203 (2012). The burden lies with Appellants to show error in the Order Denying Rehearing. See *Estate of Margerate Arline Glenn*, 50 IBIA 5, 21 (2009).

Unless manifest error or injustice is shown, the Board's scope of review is limited to reviewing those issues brought before the IPJ on rehearing. 43 C.F.R. § 4.318 (scope of the Board's review ordinarily is limited to those issues raised before the probate judge on rehearing or reopening); *Estate of Edward Benedict Defender*, 47 IBIA 271, 280 (2008), *aff'd*, *Defender v. U.S. Dept. of the Interior*, Civ. No. 08-1022, 2010 WL 1299767 (D.S.D. Mar. 30, 2010). Therefore, we ordinarily will not consider allegations of error or evidence that could have been, but were not, presented to the probate judge.

C. Issues Not Raised in the Petition for Rehearing

1. Alleged Error in Rejecting 2005 Document as a Will

Appellants maintain that Decedent executed his last will in June 2005 and argue that the IPJ erred in disapproving this document as Decedent's last will and testament. We decline to reach the merits of this claim, or several other arguments raised by Appellants

related to this claim,¹¹ because Appellants failed to raise this issue before the IPJ in their rehearing petition.

The IPJ squarely rejected the characterization of the 2005 document as a “will” in his Decision. *See* Decision at 18-19. Appellants had clear notice of the IPJ’s ruling on this document and could have addressed it in their rehearing petition, but apparently chose not to do so. Thus, this issue falls outside the scope of this appeal.

2. Exhibits

Appellants seek a new hearing on various grounds concerning exhibits. We reject each of Appellants’ arguments because, once again, Appellants did not preserve any arguments concerning exhibits for the Board’s review by first raising them before the IPJ. Accordingly, these arguments are outside the scope of this appeal.¹²

3. Presumption of Undue Influence

For the first time on appeal to the Board, Appellants argue that a confidential relationship existed between Lois and Decedent, that the elements to establish a presumption of undue influence existed, and that Lois failed to rebut the presumption. We decline to consider this argument as it is raised too late.¹³

¹¹ *See, e.g., infra* at 64-66 (Appellants claim that IPJ impermissibly limited testimony, which would have been directed at the 2005 “will.”).

¹² We note that Appellants’ arguments concerning the exhibits border on the frivolous. For example, Appellants argue that the IPJ did not identify Exhibits A-G in his Summary of Hearing; we find them clearly identified in his Decision. *See* Decision at 10-12, 14, and 17. Appellants also claim that the IPJ rejected an 11-page affidavit from Donna at the conclusion of her testimony, and argue that they cannot determine whether the IPJ’s ruling was correct because a copy of the affidavit is not in the record. This argument makes no sense. First, Appellants presumably have a copy of Donna’s own affidavit, and could have raised arguments about it on rehearing, whether or not the IPJ accepted it. Second, the IPJ unmistakably rejected the affidavit on the grounds that Donna was, at that moment, on the stand and able to testify to the matters in her affidavit. *That* is the reason for the IPJ’s rejection of the affidavit, and Appellants could have argued the merits of the IPJ’s ruling without regards to the content of the affidavit. They did not.

¹³ To the extent Appellants suggest that the IPJ had a duty to address this issue *sua sponte*, *see* Opening Br. at 63 (the IPJ “apparently overlooked” the existence of a confidential
(continued...)

4. Transcript

Appellants argue that the transcripts of the hearings conducted by the IPJ contain too many omissions and errors to provide “any meaningful review.” Opening Br. at 21. This argument is difficult to follow, but appears to allege in part that the recording itself includes inaudible portions or is missing certain testimony, or that the written transcript failed to accurately and fully capture the recording. With respect to the first issue, Appellants failed to raise it on rehearing, even though the IPJ provided them with a CD copy of the hearings and allowed full briefing on rehearing. And with respect to the second issue, if Appellants believed that the hearing transcripts were deficient, Appellants had the CD and could cite to material testimony thereon. They did not do so.¹⁴

D. Additional Witnesses

Appellants claim that their petition for rehearing should have been granted to permit certain witnesses to provide additional testimony, namely, William and Mary Sue Redfield, Dr. Bunt, and Rolanda Plain Feather. Appellants assert that the IPJ should have permitted the Redfields to testify at a later date in light of the medical emergency that prevented the Redfields from testifying at the final hearing, that the IPJ should have required Dr. Bunt to appear and testify; and that the IPJ impermissibly limited Plain Feather’s testimony. We disagree.

With respect to the Redfields’ testimony, the IPJ agreed that Appellants met their burden of showing that the Redfields intended to testify at the time of the hearings and were prevented from doing so through no fault of their own or Appellants’. Appellants submitted the Redfields’ affidavits in which they set out in detail the testimony that each

¹³(...continued)

relationship between Decedent and Lois), that argument could have been presented to the IPJ — had Appellants themselves not apparently overlooked it. Moreover, the contention lacks merit. It is the IPJ’s duty to remain impartial. *See* note 16 *infra*. This is not to say that he is to turn a blind eye to evidence plainly before him. But here, the evidence did not manifest the existence of the facts necessary to trigger the presumption of undue influence, and no one argued before the IPJ that it did.

¹⁴ This case is easily distinguished from *Estate of James John Scott*, 40 IBIA 152 (2004). In that case, Appellants’ contentions were based on express allegations concerning representations and statements made by the probate judge at the hearing, and Appellants squarely presented those contentions in seeking rehearing.

would offer. Their affidavits *were accepted* by the IPJ, who considered their written testimony and addressed the merits in his order. *See* Order Denying Rehearing at 4. Appellants now want a second bite at the apple by arguing that the IPJ erred by not providing the Redfields an opportunity to testify in person. But the IPJ cannot be faulted for accepting the evidence offered by Appellants on the ground that, if the proffered testimony is deemed insufficient, Appellants must be allowed to try again. Appellants could have had the Redfields present in their affidavits whatever knowledge or evidence was available to these witnesses. If Appellants chose to hold back certain evidence, they did so at their own peril.

Appellants also want a second bite with Dr. Bunt's testimony. Appellants argue that the IPJ somehow had the burden to inform Appellants that Dr. Bunt needed to testify in person or by video specifically on the three-factor test for testamentary capacity. They claim that doing so is "part of the IPJ's burden of ensuring that all relevant facts are brought out when some of the parties are not represented by counsel." Opening Br. at 47 (citing *Estate of Wesley Emmett Anton*, 12 IBIA 139, 142 (1984)). But Appellants failed to raise this particular argument in their petition for rehearing despite the fact that they argued that the IPJ failed to develop the record in other respects. In fact, in seeking rehearing Appellants only requested the opportunity to take Dr. Bunt's deposition. Br. in Support of Motion for Rehearing at 3. We decline to consider Appellants' argument for the first time on appeal except to note the obvious: Dr. Bunt was Appellants' own witness, they contacted him in the first instance to obtain his affidavit, and they could have asked him to address any and all matters directly or indirectly relating to the three criteria for establishing testamentary incapacity, and to do so with as much specificity as possible. Either they failed to do so, or they did do so and learned that Dr. Bunt's opinion would not be helpful. It is not for the IPJ to presume that Dr. Bunt may hold additional opinions concerning Decedent that were not addressed in his affidavit. *Estate of Anton*, 12 IBIA at 142 (An IPJ is not "generally required to anticipate or discover additional legal arguments or evidence that might be beneficial to an individual's case.").

Finally, with respect to Plain Feather, Appellants failed to argue in their rehearing petition that she was prohibited from testifying on certain matters, for which reason we decline to consider the issue now.¹⁵ Even assuming that Appellants did preserve this argument for appeal, Appellants concede that additional testimony from Plain Feather would only relate to the 2005 purported will. As discussed *supra*, Appellants failed to raise

¹⁵ In their rehearing petition, Appellants argued generally that the IPJ disallowed Donna from presenting witnesses. However, Plain Feather was Lois' witness and Donna expressly waived her right to cross examine Plain Feather.

any issues concerning the 2005 purported will in their rehearing petition, for which reason additional testimony from Plain Feather would be irrelevant.

Ultimately, Appellants claim that because of the above alleged errors by the IPJ, he failed to discharge his “affirmative duty in an Indian probate hearing to develop the record and to ensure that the facts, both pro and con, are brought out.” Opening Br. at 35 (quoting *Estate of Jeanette Little Light Adams*, 39 IBIA 32, 35 (2003)). Nothing in Appellants’ arguments convinces us that the IPJ failed in this duty. The IPJ accepted the affidavits of the Redfields and Dr. Bunt, and gave due consideration to their content. No “duty” required him to do more.¹⁶ And Appellants chose not to include any arguments concerning Plain Feather in their rehearing petition and, thus, by their choice, foreclosed review of this issue.

E. Undue Influence

Appellants argue that the IPJ applied the wrong standard of proof – clear, cogent, and convincing – to his analysis of undue influence, and claim that under the correct standard – preponderance – the evidence shows that Lois exerted undue influence on Decedent to execute the 2004 will. We agree that the correct standard is preponderance of the evidence, and we thus overrule *Estate of Joseph Red Eagle*, 4 IBIA 52 (1975), to the extent it purports to impose a higher standard. But we conclude that, viewing the record favorably to Appellants, the IPJ did not err in concluding that there was no evidence to support a finding of undue influence. Therefore, we affirm.

1. Standard of Proof for Establishing Undue Influence

Citing *Estate of Red Eagle*, the IPJ held that the evidence in support of a finding of undue influence must be “clear, cogent, and convincing.” Decision at 17. Appellants argue that the correct standard of proof is a preponderance of evidence. We agree. Although one

¹⁶ While probate judges must determine as a threshold matter whether a will conforms to statutory requirements to be admitted to probate, it is not incumbent upon them to anticipate arguments that the parties may wish to make or to determine where to seek evidence in support of any party’s position. Undoubtedly, especially when parties are not represented by counsel, the judge may need to assume a more active role in eliciting testimony. But the judge’s function is not to be an advocate for one side or the other but to weigh the evidence presented, consider the arguments before him, and issue a well-reasoned and supported decision. Even when a more active role is appropriate for the judge in soliciting evidence, the parties are not relieved of their responsibility to determine what evidence they wish to produce and whether the evidence is complete for purposes of making their case to the judge.

Board case since *Estate of Red Eagle* applied the preponderance of the evidence standard for finding undue influence, and a few have impliedly accepted that standard, the Board has never squarely rejected the language in *Estate of Red Eagle* nor clarified the standard to be applied. We do so now to reconcile the apparent inconsistency in Board decisions, although ultimately we conclude that applying the preponderance of the evidence standard does not aid Appellants.¹⁷

In *Estate of Red Eagle*, the Board did not cite to any authority for adopting a “clear, cogent, and convincing” standard of proof for establishing undue influence, and we find no other Board decision in which this standard has been applied in the context of undue influence. To the contrary, in 1990, the Board adopted, as its own, a decision by Administrative Law Judge William Hammett that applied the preponderance of the evidence standard to find undue influence. See *Estate of Philip Malcolm Bayou*, 19 IBIA 20, 21, 25, 27, 29 (1990). Several other Board decisions also appear to accept preponderance of the evidence as the correct standard for finding undue influence. See, e.g., *Estate of Clara G. Moonlight*, 39 IBIA 119, 123-24 (2003); *Estate of Henry Beavert*, 18 IBIA 73, 75 (1989); *Estate of Asmakt Yumpquitat (Millie Sampson)*, 8 IBIA 1, 4-5 (1980), *aff’d*, *Lewis v. Andrus*, 512 F. Supp. 1096 (E.D.Wash. 1981). The Board has held that factual issues related to lack of testamentary capacity shall be established by a preponderance of the evidence, *Estate of Rose Medicine Elk*, 39 IBIA 167, 171 (2003), as well as paternity, *Estate of Thomas Boe*, 47 IBIA 138, 145 (2008). We see no reason why a higher standard of evidentiary proof should apply to establishing the elements of undue influence, and thus we reaffirm the standard adopted by the Board in *Estate of Bayou* and decline to follow *Estate of Red Eagle*.

For these reasons, we agree with Appellants that the applicable standard of proof required to establish the elements of undue influence is a preponderance. However, clarification of this standard does not aid Appellants as we do not agree with Appellants that they have shown proof of *each* of the four elements required to show undue influence, much less proof that would require us to remand this matter for a determination of whether a preponderance of evidence has been shown.

2. Appellants Failed to Meet Their Burden of Establishing Undue Influence

Appellants argue that they have met their burden of showing that Lois coerced their father into executing the 2004 will. We disagree.

¹⁷ Although Appellants did not raise this issue in their petition for rehearing, we address it here to resolve a conflict in the Board’s decisions.

To establish undue influence, will opponents must establish each of the following four elements by a preponderance of the evidence:

(1) decedent was susceptible of being dominated by another; (2) the person allegedly influencing decedent in the execution of his will was capable of controlling his mind and actions; (3) such a person did exert influence upon decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) the will is contrary to decedent's desires.

Estate of Drucilla (Trucilla) W. Pickard, 50 IBIA 82, 94 (2009). The IPJ found that the first element — Decedent's susceptibility to being dominated — was established through the opinion of Dr. Bunt, and Lois has not contested that finding. Therefore, Appellants have met their burden with respect to the first element of undue influence. But the IPJ found the evidence lacking on the next two elements, ultimately concluding that Appellants "failed to prove that any specific person, let alone Lois Stevens, actually dominated or controlled the Decedent." Order Denying Rehearing at 10. The IPJ accurately summarized the evidence in stating that Appellants

did not offer any actual, concrete evidence that the Decedent was unduly influenced by anyone at all.

All we know for certain is that the Decedent went to [BIA] and met with the Superintendent and other staff. The topic of the meeting has never been made clear, although it resulted in the Decedent revoking his power of attorney and making arrangements to have a will drafted. There is absolutely no indication or proof that Lois Stevens engineered either of these activities.

Id. at 11. The IPJ did not address the fourth element in either his Decision or his Order Denying Rehearing.

We agree with the IPJ that there is no evidence of the second and third elements, which we discuss in turn. With respect to the second element, Appellants make three arguments. First, Appellants cite several examples of Lois caring for her father, including taking him into her home to care for him. Caring for one's elderly relatives does not, without more, give rise to an inference that the caregiver is controlling the relative's mind and actions. At best, it shows that the opportunity exists to exert control and influence. Here, Appellants concede that Lois "took [Decedent] wherever *he* wanted to go, prepared *his* meals, and ended up as *his* 'helper' doing everything *for him*." Opening Br. at 57 (emphasis added). As the IPJ observed, Appellants' description of Lois' care for their father

suggests that it was Decedent who controlled Lois, rather than the other way around, and that Lois was very attentive to their father.

Second, Appellants claim that Lois is a healer and held influence over Decedent by virtue of this status. Appellants did not explain or provide any evidence concerning the status of healers among the Crow or, more specifically, how Lois' status as a healer would lead her to have influence over her father nor do they do so on appeal. We reject any suggestion that an individual's status as a healer *ipso facto* compels a finding as a matter of law that undue influence has been exerted, and thus find no basis to conclude that the IPJ erred in rejecting this argument as proof of undue influence.

Finally, Appellants claim that Lois deliberately created a furor over the Pickett Memorandum to agitate Decedent, and accused her siblings of taking everything from their father and leaving nothing for either of them. After Decedent was agitated, Appellants claim that Lois told Decedent to walk out of the house and get in her car, but Decedent continued to stand there. Apparently, he eventually left with Lois, but he did not do so immediately in response to her demand. Thus, this situation fails to show that Lois controlled Decedent's mind or actions. And even assuming that Decedent were agitated and susceptible to influence on the night of the family meeting, there is no evidence that he remained agitated when he met with Scott a few days later to execute his will or that he was then acting pursuant to Lois' will or coercion.

Thus, we agree with the IPJ that Appellants have not produced any evidence showing that Lois was capable of controlling Decedent's mind and actions. Turning now to the third element, we similarly conclude that Appellants' arguments concerning the IPJ's findings are unfounded. Appellants claim that evidence of Lois' actual influence over Decedent is found in the following:

- Lois called a family meeting to discuss the Pickett Memorandum, at which she became angry and Decedent became upset
- Lois ordered Decedent to leave the family meeting with her, which he eventually did
- Lois "cleverly used" the family meeting incident to take Decedent to BIA the next day to change his will
- Lois convinced BIA staff to revoke the power of attorney that Decedent had executed in favor of Steve
- Lois told BIA staff that she would bring Decedent the next day for the purpose of executing a will that would leave all of his property to Lois

- BIA staff “obviously” told Scott what to put in the will because Scott “already knew what the Decedent wanted” when he arrived in her office and therefore she did not need “to ‘go into any conversation with him’”

Appellants’ Opening Br. at 59-60. With two exceptions, there simply is no evidence in support of Appellants’ allegations. The exceptions concern the family meeting, discussed *supra*. But nothing in the events of the meeting establishes that Lois induced or coerced Decedent to write his will *or* to write it to leave his estate to her. As the IPJ pointed out, it is just as plausible that Decedent was angry enough at Appellants that he, and he alone, decided to leave his estate to Lois.

It is undisputed that Lois was not present when Scott met with Decedent during the drafting and execution of the will. There is no evidence that Lois told BIA staff that Decedent wanted to execute a will to leave her his entire estate, and no evidence that Lois told the staff that Decedent would be back the next day to execute a will. There is also no evidence that Lois said anything during the meeting with the Superintendent and BIA personnel, much less what Lois may have said. What the evidence does show is that *Decedent* met with BIA and revoked a power of attorney, that *Decedent* and BIA also discussed his interest in executing a will, and that *Decedent* asserted that he would return the next day to do so.

Appellants have not identified any evidence in the record showing that Lois *did* cause, induce, or coerce Decedent to execute the 2004 will, nor has the Board identified such evidence. In arriving at this conclusion, we assume that Lois drove Decedent to BIA for the express purpose of executing a new will. We further assume that Lois did get angry at the family meeting during a discussion of the Pickett Memorandum and asserted that she and Decedent would visit BIA and get this matter “take[n] care of.” Opening Br. at 58. But there simply is no evidence showing that Lois took any action(s) calculated to, and that did, convince Decedent to execute the 2004 will. She was not present during the drafting of the will. There is no evidence that Lois told Decedent he needed to execute a will, let alone a will leaving his entire estate to her. Appellants have not met their burden of showing that a preponderance of the evidence supports finding that Lois was capable of controlling Decedent’s mind and actions *and* that Lois did convince Decedent against his will to leave her his estate. In fact, before Appellants chose to contest the will, Donna testified that she did not believe Decedent had been subjected to undue influence in executing the 2004 will. Therefore, we agree with the IPJ that Appellants failed to adduce

evidence that would support a finding that the 2004 will was the product of Lois' undue influence over Decedent.¹⁸

F. Testamentary Capacity

It is a given that Decedent had dementia. But a person can have a diagnosis of dementia and still have testamentary capacity at the time of executing his will. *See Estate of Virginia Enno Poitra*, 16 IBIA 32 (1988). And Appellants simply did not meet their burden of showing that the IPJ erred in finding that they had failed to show that, on the day he executed his will, Decedent lacked this capacity, or that Decedent's dementia was so advanced that it was more likely than not that Decedent lacked testamentary capacity on any given day, including the day he executed his will.

The burden of proof on this issue is not contested. Appellants correctly acknowledge that, as the contestants to a properly executed will, they have the burden of showing, by a preponderance of the evidence, that Decedent lacked testamentary capacity. Opening Brf. at 18. Testamentary incapacity is established by showing that, *at the time of execution*, the testator did not know the natural objects of his bounty, the extent of his property, or the desired distribution at death of his property. *Estate of Theresa Underwood Dick*, 50 IBIA 279, 294, *recons. denied*, 51 IBIA 31 (2009); *Estate of Pickard*, 50 IBIA at 93. The burden of proof is a preponderance of the evidence. *Estate of Dick, supra*.

Appellants argue that Decedent's dementia "affected his judgment and reasoning ability," but we are not told *how* or *in what way* the dementia affected Decedent's ability to engage in and understand the preparation and execution of his will. Opening Br. at 46. It was Dr. Bunt's opinion that Decedent "had little comprehension of any legal processes he might have entered into [during the period February - July 2004]." *Id.* (quoting Dr. Bunt's affidavit at 4). As the IPJ explained, this opinion does not address the specific issues the IPJ needed to determine. It is not entirely clear what Dr. Bunt meant by "little comprehension of any legal processes," especially when his notes also reflected, in April 2004, that Decedent's "dementia improved." *See supra*, note 5.¹⁹ Testamentary capacity does not

¹⁸ Because the IPJ did not reach the fourth element for showing undue influence, we do not consider it here.

¹⁹ Indeed, the rule in at least one state is that "[l]ess capacity is required to enable one to make a will than to make . . . contracts." *Matter of Coddington*, 281 A.D. 143, 146 (1952), *aff'd*, 307 N.Y. 181 (1954). Although the present case does not require us to decide
(continued...)

require that a testator understand the probate process, or the “legal processes” for making a valid will. Rather, the testator need only understand who would ordinarily be considered his heirs, what property he owns, and how he wants it distributed at his death. These specific factual issues are not addressed by Dr. Bunt, whose general opinion stands in contrast to the more specific testimony by Scott concerning Decedent’s testamentary capacity.

Appellants also argue that they met their burden of proving testamentary incapacity by showing that Decedent was not taking his “dementia medicine,” he did not recognize his daughter or granddaughter on two occasions, that he was not lucid the night before he executed his will, that the will’s designation of Lois as Decedent’s sole heir is contrary to the words and actions of Decedent both before and after the execution of the 2004 will, that BIA personnel did not adequately assess Decedent’s capacity to execute a will, and that the will scrivener was biased in favor of Lois based on family ties. Opening Br. at 48-54. None of these arguments is persuasive, but we address only those that Appellants raised before the IPJ in their petition for rehearing. *See Estate of Defender*, 47 IBIA at 280 (we ordinarily decline to consider arguments raised for the first time on appeal to the Board).

There is no testimony or other evidence in the record that Decedent was not lucid the night before he executed his will. Appellants claim that Donna testified “that the Decedent was not lucid the night before he signed the Will.” Opening Br. at 51. Under cross examination, Donna first stated that Decedent was not lucid after the family meeting called by Lois, that “[h]e was totally agitated.” Tr., Apr. 16, 2008, at 250:1-4. She was then asked, “You don’t know if he was lucid,” to which she replied, “I just know he was agitated.” *Id.*, at 250:7-9. At best, this testimony was equivocal on the issue of Decedent’s lucidity several days before Decedent executed his will, and more likely reflects Donna’s correction of her own testimony to say that Decedent was agitated but not necessarily lacking lucidity when he executed his will.

Appellants argue that Decedent did not know Donna on one occasion or a granddaughter on another occasion. But, again, there is no testimony showing that, on the day he executed his will, Decedent did not know the natural objects of his bounty nor is there any testimony that Decedent had been unable to recognize family members on a persistent, continuous basis, e.g., prior to executing his 2004 will, or that he did not know

¹⁹(...continued)

whether to adopt such a rule, the logic behind the rule is that the law favors giving effect to the last wishes of a decedent as expressed in a will, and, in contrast to obligations that attach to a contract, a will creates no risk to a testator.

the names of his close family members, or that he was unaware of how many children he had. And Donna conceded that while Decedent sometimes had “thinking problems,” Tr., Nov. 28, 2007, at 26:15-16, he could have had a lucid interval when he executed his will. *See* 79 Am Jur. 2d *Wills* § 89 (2002) (will executed during lucid interval is valid).

Appellants further argue that Decedent always wanted all of his children to share equally in his estate. However, as the IPJ points out, Jeffrey was omitted from the gift deeds as well as from the 2005 purported will proffered by Appellants. Ultimately, as we have previously stated, the fact that Decedent may have decided to disinherit certain family members is not evidence of a lack of testamentary capacity. *Estate of Pickard*, 50 IBIA at 93; *Estate of Red Eagle*, 4 IBIA at 60.

Appellants’ remaining arguments were not raised in their petition for rehearing for which reason we disregard them.

We recognize the burden placed on opponents of a will made by a person diagnosed with dementia, particularly when the opponents were unaware that a will was being executed and no longer have specific recall of the testator’s mental status at the time. However, after examining the record in detail, we are not convinced that Appellants have shown that the IPJ erred in finding that Appellants did not meet their burden of showing testamentary incapacity. Neither Dr. Bunt nor Decedent’s medical records characterize Decedent’s dementia in July 2004, e.g., whether it is mild, moderate, advanced or severe (and explain the consequent limitations resulting from such a diagnosis), nor does the record contain any mental status examinations. What we do have is the testimony of various disinterested BIA employees that, on the day Decedent executed his will, he was adamant that his property go to Lois and he explained that he was leaving it to her because she was taking care of him. *See* Tr., Apr. 16, 2008, at 17:1-5. He stated that he had four children, thus acknowledging those who would be his natural heirs. Because Decedent owned vast tracts of land that he knew as “the ranch,” the will scrivener made certain that he intended to give all of “the ranch” to Lois and that he understood what he was doing. In addition to this testimony are the following indicators of testamentary capacity at or about the time Decedent executed his will: BIA permitted Decedent to revoke his durable POA the day prior to executing his will, which is additional evidence of BIA’s determination that Decedent was competent to handle his own affairs; notations in the medical records that Decedent was still driving and able to articulate appropriately how he was feeling (e.g., “allright,” “annoyed”); and Appellants’ concessions that, in July 2004, Decedent was still “able to communicate his wishes” and make decisions concerning the family’s propane business. In the face of this evidence, we agree with the IPJ that the evidence was insufficient to prove, by a preponderance, that Decedent lacked testamentary capacity.

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 October 16, 2009, Order Denying Rehearing.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge