



INTERIOR BOARD OF INDIAN APPEALS

Estate of Nels John Johnson

55 IBIA 171 (07/05/2012)

At the time of Decedent's death, he owned a restricted fee interest in Native Allotment No. A-053991, consisting of 58.39 acres.⁴ Although an Individual Indian Monies (IIM) account was established for Decedent, the account did not contain any funds at his death. At the probate hearing, Appellant sought to demonstrate that Decedent had orally advised Appellant and various family members or other individuals that Decedent wanted his entire estate to pass to Appellant. Appellant argued that Decedent's oral wishes, as evidenced by written statements of various individuals, should be granted. The IPJ explained that the law did not permit him to distribute Decedent's estate based on Decedent's oral expressions of intent during his lifetime. In his Decision, the IPJ applied Alaska state law to Decedent's trust estate, and ordered the distribution of Decedent's trust estate, 1/5 each to Appellant, Desiree, Norman, and Nick; the remaining 1/5 interest was divided equally among Rachael's three children, i.e., 1/15 each to Kasandra, Michael, and Karl. Decision at 1-2 (applying Alaska Stat. § 13.12.103(1)).

Appellant petitioned for rehearing on his own behalf and on behalf of his brother, Norman. As grounds for rehearing, the petition stated, "We would like a rehearing of this case with another judge. I have learned that the statutes and/or laws are different from state to state. Therefore, we would prefer to have the case reheard by an Alaskan judge, and if that is not possible, then have the case heard by another judge besides [the IPJ]." Rehearing Petition, Apr. 12, 2010. Appellant did not identify what statutes or laws were misapplied by the IPJ or what statutes or laws should have been but were not applied.

The matter was assigned to a new judge (the ALJ), who reviewed the Decision and the record. The ALJ concluded that "the appropriate Alaska intestacy statute was applied properly in reaching the Decision issued [by the IPJ], and t]he Petitioners do not offer any new evidence or legal reasons why this matter should be reheard." Order Denying Rehearing at 2. The ALJ denied rehearing.

Appellant appealed the Order Denying Rehearing to the Board.⁵ Apart from receiving several submissions from Appellant, no briefs or submissions were received from

⁴ During his lifetime, Appellant conveyed portions of his allotment to others. At the time of his death, he owned the remaining 58.39 acres.

⁵ Appellant also purports to appeal on behalf of Norman, two nephews (Gust and Michael), and one niece (Kasandra). Appellant has provided copies of powers of attorney granted by each individual to Appellant for the limited purpose of acting as their agent with respect to "real estate transactions" and "transactions involving tangible personal property, chattels, and goods." Specifically excluded from the power of attorney, *inter alia*, is any authority to act as the principal's agent for purposes of "claims and litigation." Nothing in the powers of attorney speaks directly to probate matters. Given our disposition of this appeal, we

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any other individual. One of Appellant's submissions included a request for a stay pending the adoption of a probate code by Appellant's tribe, which the Board denied because the Act⁶ passed by Congress that permits approved tribal probate codes to apply to the estates of deceased Indians and Native Alaskans expressly prohibits their application to the descent of trust or restricted land interests in Alaska.⁷ See Order Denying Stay, Apr. 21, 2011, at 2. In addition to arguing that Decedent's oral wishes should be given effect, Appellant also seeks reconsideration of our denial of his request for a stay.

Discussion

We deny Appellant's motion for reconsideration because we lack authority to override Congress' unambiguous refusal to permit tribal law to apply to the descent of trust or restricted lands in Alaska. To the extent Appellant seeks a stay to explore "other possibilities," such an assertion is not a proper basis for a stay. As to the merits of Appellant's appeal, we find that Appellant failed to first present his arguments in his petition for rehearing. Thus Appellant waived the arguments he seeks to assert on appeal, and in the absence of any discussion of arguments that were preserved for appeal, Appellant has failed to meet his burden of showing error in the ALJ's decision. But even if we were to consider Appellant's substantive argument—that Decedent's oral wishes should be given effect—we would affirm the ALJ's Order Denying Rehearing because no Federal statute or regulation recognizes oral wills.

A. Reconsideration

To the extent that Appellant seeks reconsideration of our denial of his request for a stay, we deny his motion. In response to our denial, Appellant seeks reconsideration and argues: "[W]hy [does] the Department give[] American Indians jurisdiction when handling probate cases, but not Alaska Natives[?]. Why is Alaska excluded from AIPRA? Why does AIPRA not apply to Alaska land? Is this not discrimination? . . . The tribe is

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need not decide whether the powers of attorney entitle Appellant to pursue the instant appeal on anyone's behalf other than his own.

⁶ The Board's order cited the American Indian Probate Reform Act (AIPRA) of 2004, 25 U.S.C. §§ 2201 *et seq.*

⁷ In addition, the Board observed that the Act also prohibits the retroactive application of an approved tribal probate code to the estate of a decedent who died prior to the effective date of an approved tribal probate code.

working diligently on this matter, so do not pass judgment on this case until we have explored all other possibilities.” Letter from Appellant to Board, May 2, 2011.

The Department is required to follow the laws enacted by Congress. One of the provisions enacted by Congress authorizes tribal probate codes approved by the Secretary of the Interior to govern the devise and descent of certain trust and restricted interests. *See* 25 U.S.C. § 2205. But, Congress also included another provision in the same statutory scheme that expressly states that it shall not apply to trust or restricted land interests in Alaska:

§ 2219. Application to Alaska

(a) Findings

Congress finds that—

(1) numerous academic and governmental organizations have studied the nature and extent of fractionated ownership of Indian land outside of Alaska and have proposed solutions to this problem; and

(2) despite these studies, there has not been a comparable effort to analyze the problem, if any, of fractionated ownership in Alaska.

(b) Application of chapter to Alaska

Except as provided in this section, this chapter^[8] shall not apply to land located within Alaska.

(c) Rule of construction

Nothing in this section shall be construed to constitute a ratification of any determination by any agency, instrumentality, or court of the United States that may support the assertion of tribal jurisdiction over allotment lands or interests in such land in Alaska.

We do not have the authority to override Congress and ignore the laws enacted by Congress. *See Ballinger v. United States*, 216 U.S. 240, 249 (1910); *see also Estate of John Crow, Jr.*, 52 IBIA 337, 343-44 (2010) (“we are bound by the words of the statute”). Thus we have no authority to consider a claim that § 2219 impermissibly discriminates between Alaskan Natives, Alaskan corporations, or Alaskan tribes and the tribes and Indians in the continental United States.

Therefore, to the extent that Appellant seeks to revisit our denial of his motion to stay his appeal until such time as his tribe promulgates a probate code, we deny his request.

⁸ “This chapter” refers to Chapter 24, which includes 25 U.S.C. § 2205.

Moreover, as we also explained in our order denying Appellant’s motion, even if § 2219 did not exist, we would be prohibited by 25 U.S.C. § 2205(b)(4)(A) from applying a tribal probate code that had not been approved and had not become effective by the time of Decedent’s death. To the extent that Appellant seeks a stay to enable him to explore “other possibilities,” this vague assertion is an insufficient basis for us to stay our disposition of his appeal.⁹

B. Appellant’s Appeal of the Denial of Rehearing

Appellant fails to show any error in the ALJ’s decision. Instead, he raises new arguments that should have been raised in the first instance before the ALJ in Appellant’s petition for rehearing: Appellant argues to the Board that his father’s oral wishes should be given effect,¹⁰ and that a ruling by the United States Supreme Court in the late Anna Nicole Smith’s case supports Appellant’s claim because, in that case, an oral will was approved. This argument was not raised in Appellant’s petition for rehearing and is therefore waived. *See Estate of Dominic Orin Stevens*, 55 IBIA 53, 62 (2012); *see also Theresa Underwood Dick*, 51 IBIA 31, 33 n.3 (2009) (objections not raised in response to a recommended decision are waived). Instead, the sole issue that Appellant raised in his petition for rehearing was his request for the matter to be heard by a new judge. On rehearing, a new judge reviewed the record and concluded that the IPJ correctly applied Alaska probate law. Appellant does not argue before us that Alaska law was misapplied or that having his petition for rehearing heard by a new judge did not fully address the objection raised in his petition.

Even if we were to consider Appellant’s arguments, we would still affirm the denial of rehearing. Congress has stated that *written* wills may be honored, not *oral* wills. *See* 25 U.S.C. § 373; 43 C.F.R. § 30.101 (defining “will” to be “a *written* testamentary document that was executed by the decedent and attested to by two disinterested adult witnesses.” Emphasis added.); *Estate of Baz Nip Pah*, 22 IBIA 72, 74 (1992) (“Oral wills cannot be recognized for the purpose of conveying trust or restricted property.”). And the two U.S. Supreme Court decisions on which Appellant relies that involve the late Anna Nicole Smith do not support Appellant’s claim that Smith “was permitted to have an oral

⁹ During the pendency of this appeal, Appellant has had ample time to explore other options or possibilities. He has not contacted the Board to assert that he has discovered any other “possibilities” for the disposition of Decedent’s estate.

¹⁰ Appellant characterizes Decedent’s oral wishes and the supporting evidence of those wishes as a “holographic will.” A holographic will is a will that is entirely or predominantly handwritten by the testator, but it is still in writing. Appellant does not contend that Decedent left a written will, and we understand his reference as intended to refer to an “oral will.”

will of her husband’s wishes.” Appellant’s Second Notice of Appeal, Nov. 12, 2012. First, neither of the decisions¹¹ addressed the merits of Smith’s claim—both were decided on jurisdictional grounds. Second, Smith’s underlying claim was not to enforce an “oral will” or an “oral trust” against the estate of her deceased husband, as Appellant appears to believe. Smith brought a tort-based claim *against her stepson*, arguing that he “imprisoned” Smith’s husband, prevented him from executing a written trust for a gift to Smith, and falsified paperwork. Smith claimed that her stepson should be liable to her for his wrongful conduct, which she contended had prevented her husband from completing a gift to her. Thus, the two decisions in Anna Nicole Smith’s case have no relevance to Appellant’s claim in this probate proceeding.

As we explained in denying Appellant’s renewed request that we stay issuance of a decision, there is no current authority that would permit an Alaska Native tribal court to probate Decedent’s estate, and no foreseeable prospect that the Department will be divested of its authority and obligation to probate this estate. On the merits, Appellant has not satisfied his burden of proving error in the ALJ’s decision because he waived his arguments by failing to present them in his petition for rehearing. But even if we were to consider them, we would still affirm the ALJ’s Order Denying Rehearing. There is no Federal statute or regulation that would permit the ALJ or the Board to give effect to Decedent’s oral wishes.

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 corrects the date of death in the IPJ’s Decision, *see* n.2, and affirms the ALJ’s Order Denying Rehearing.¹²

I concur:

// original signed
Debora G. Luther
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

¹¹ *See Stern v. Marshall*, ___ U.S. ___, 131 S. Ct. 2594 (2011); *Marshall v. Marshall*, 547 U.S. 293 (2006).

¹² Nothing in our decision or in the decisions of the IPJ or ALJ preclude any of Decedent’s heirs from conveying their inherited interest in Decedent’s allotment to Appellant, if any desire to do so. *See* 25 C.F.R. Part 152.