THE SUPREME COURT OF

THE SISSETON-WAHPETON OYATE

OF THE LAKE TRAVERSE RESERVATION

IN THE MATTER OF THE ESTATE OF EVANGELINE BRANT SHIRLEY DEMARRIAS, Appellant, v. SEAVA SARTWELL AND DARRELL DECOTEAU JR., Appellee.	NO. APP-19-001-020 **OPINION AND ORDER**

Per Curiam (Thor Hoyte, Chief Justice and Associate Justices John Murphy and Pat Donovan)

I. Introduction

Evangeline Brant was a member of the Sisseton-Wahpeton Oyate and resided on the Lake Traverse reservation. After Brant passed away, Seava Sartwell, filed for administration to probate Brant's estate in Sisseton-Wahpeton Oyate Court. Sartwell also filed Brant's last will and testament with the Court. The will named Sartwell and her brother, Darrell Decoteau, Jr. as the executors of Brant's estate and will. Sartwell and Decoteau's mother was the daughter of Brant and predeceased Brant. Brant has another child, Shirley Demarrias, who survived her. Apparently, Brant owns interests in trust or restricted property held in trust by the United States government for the benefit of Brant. The will distributed Brant's estate to Sartwell and Decoteau, disinheriting Demarrias.

Demarrias challenged the validity of the will alleging Brant was not competent when she executed the will. The Tribal Court held a hearing and took testimony and found that will was valid as it complied with Sisseton-Wahpeton Oyate code and that Brant was competent at the time she executed her last will and testament.

Demarrias also challenged the validity of the will for not complying with two federal statutes that pertain to the will requirements for passing trust or restricted land in BIA probate. The Tribal Court concluded that it did not have the jurisdiction to address whether the will was valid to pass allotted land as that is an issue left solely to an ALJ for the DOI and found the will valid under Tribal law.

Demarrias timely filed her notice of appeal.

II. Issues

Demarrias raises the following issues on appeal:

1. The Tribal Court lacked jurisdiction

2. Whether the Tribal Court erred in finding the will valid when it was not approved by the secretary of the interior

3. The Tribal Court erred in finding the will valid when there is no provision for grandchildren to inherit over a child of the decedent

4. The Tribal Court erred in finding the will valid because a prior 2002 will executed by Brant was submitted to and kept by the Bureau of Indian Affairs (BIA)

5. Sartwell and Decoteau failed to prove there was no undue influence

6. The Tribal Court erred in finding Brant competent to make a will in 2014

7. The Tribal Court erred in finding the will valid because will drafter/scrivener is the step-daughter of Decoteau creating a potential undue influence

Each issue will be discussed in turn.

III. Standard of Review

Findings of fact, whether based on oral or documentary evidence shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Tribal Court to judge the credibility of the witnesses. A clearly erroneous fact means there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.[1]

Appeals challenging legal conclusions are reviewed under a "de novo" standard of review. Under the de novo standard, the Supreme Court accords no deference to the Tribal Court's conclusion of law, but instead independently analyzes the relevant facts to arrive at its own legal conclusion.[2]

III. Discussion

A. Whether the Tribal Court lacked jurisdiction

Demarrias argues SWO Tribal Court was without jurisdiction to probate Brant's estate because land in this matter is allotted. As a result, the Tribal Court lacked jurisdiction to entertain the probate or admit the will.

It is without question that SWO Tribal Court lacks jurisdiction to probate trust or restricted land. And the Tribal Court is well aware of these restrictions and has made no attempt to probate trust or restricted property. Nothing prevents the Tribal Court from probating non-trust and unrestricted property. Part of the probate process is for the administrator to determine if the decedent's estate consists of any non-trust and unrestricted property to be probated in Tribal Court. It is yet to be determined if Brant's estate consist of any non-trust or unrestricted property

[1] Rule 12(a)(1) Sisseton-Wahpeton Oyate of the Lake Traverse Reservation Rules of Appellate Procedure.
[2] Rule 12(a)(3) Sisseton-Wahpeton Oyate of the Lake Traverse Reservation Rules of Appellate Procedure.

that be within SWO Tribal Court's jurisdiction.

The Tribal probate code jurisdictional statement provides:

> Except as to trust or restricted land subject to the jurisdiction of the United States, the Court shall have jurisdiction to determine heirs, to determine the validity of wills and to probate the estate any wills of any member of the Tribe with respect to property located on the Lake Traverse Indian Reservation.[3]

Therefore, the Tribal Court has jurisdiction to determine if a decedent had a will or died intestate, to determine the validity of the will for purposed of Tribal Court probate proceedings, to determine the heirs of the estate, determine and safeguard non-trust estate property and to distribute any non-trust property of the estate. There is nothing in the record to indicate that trust or restricted property was attempted to be probated in Tribal Court as Demarrias suggests.

The Tribal Court has jurisdiction to probate non-trust property and to determine the validity of the will for Tribal Court probate purposes. The Tribal Court did not err in assuming jurisdiction or in determining the validity of the will under Tribal law for Tribal probate of non-trust property. Demarrias does not appeal the Tribal Court's finding and conclusion that Brant's last will and testament was valid under Tribal law and probate code and that finding is therefore not before this Court.

B. Whether the Tribal Court erred in finding the will valid when it was not approved by the secretary of the interior

Demarrias does not challenge the validity of the will under Tribal law however she argues the will is invalid because it was not approved by the Secretary of the interior as required by two federal statutes, PL98-513 and 25 U.S.C. §373. This argument has no merit and is flawed for several reasons.

PL98-513 pertains to the inheritance of trust or restricted land on the Lake Traverse Indian

[3] 44-01-01 Sisseton-Wahpeton Oyate of the Lake Traverse Reservation Codes of Law.

Reservation, North Dakota and South Dakota. It is silent on any requirement that a will must approved by the Secretary of the Interior. 25 U.S.C. §373 deals with will requirements to pass trust or restricted property through BIA probate. It does provide that no will is valid or have any force or affect unless or until it shall have been approved by the Secretary of the Interior. But this law, as the Tribal Court correctly found, pertains to any will passing an allotment held in trust status. These will requirements are not applicable in Tribal Court to probate non-trust property. Demarrias points to no authority to support her argument that for a will to be valid it must be approved by the Secretary of the Interior are applicable in Tribal Court probate. There are no such requirements in the statutes themselves. The Tribal probate code does not require approval of the will by the Secretary of the Interior to admit the will and probate the estate.[4]

The Tribal Court did not err for finding the will to be valid without the approval of the Secretary of the Interior.

C. Whether Tribal Court erred in finding the will valid when there is no provision for grandchildren to inherit over a child of the decedent

Demarrias argues the will is invalid for Tribal Court probate because it would allow grand children to inherit thereby disinheriting her violating PL98-513. She argues that she, as a daughter to Brant, cannot be disinherited in a will under PL98-513. This argument has no merit and is flawed for several reasons.

A review of PL98-513 reveals there is no such prohibition that would prevent Brant from leaving her estate to her grandchildren over a child under the terms of a will. Even if PL98-513 had such a prohibition, it is not applicable to Tribal Court probate proceedings as the Tribal Court concluded. The Tribal probate code does not prohibit a Tribal member from leaving their

[4] Chapter 44 Heirship and Probate Sisseton-Wahpeton Oyate of the Lake Traverse Reservation Codes of Law.

estate to grandchildren in a will, nor does it prevent Brant from disinheriting her daughter, Demarrias.[5]

PL98-513 deals with will requirements to pass trust or restricted property through BIA probate. Any prohibition in this federal statute is not be applicable in Tribal Court. Demarrias points to no authority in this federal statute or in Tribal law that would make this prohibition applicable in Tribal Court probate.

D. Whether the Tribal Court erred in finding the will valid when a prior will was submitted and kept by the BIA.

Demarrias argues that Brant executed a will in 2002 that was submitted to and kept by the BIA and that should make her 2014 will invalid. This argument has no merit.

The 2014 will has language that revoked all prior wills. This would include the 2002 will. There is no merit for any argument that since the 2002 will was submitted to and kept by the BIA makes it valid and the subsequent 2014 will invalid. Demarrias cannot point to any authority for this proposition.

There is no requirement under the Tribal probate code that for a will to be valid it must be submitted to and kept by the BIA. The Tribal Court did not err by finding the will valid because a prior will was submitted to and kept by the BIA.

E. Whether the Tribal Court erred by placing the burden of proof on Demarrias to prove undue influence

Demarrias argues that she did not have the burden of proving Brant was unduly influenced by Decoteau and Sartwell in making her will. She further argues that even though she is the party seeking to have the will declared invalid for undue influence, Decoteau and Sartwell had the

[5] Id.

burden of proving Brant was unduly influenced. There is no legal authority for this argument nor could Demarrias cite any authority for her argument that the burden of proving Brant was unduly influenced when she made her will rests on the party defending against a challenge to a will based on undue influence. A review of the record shows Demarrias did not prove any undue influence on the part of Decoteau or Sartwell. Contestants of a will who challenge the validity on the ground of undue influence has the burden of sustaining their challenge. See *Storman v. Weiss*, 65 N.W.2d 475 (ND 1954), *In re Melcher's Estate*, 232 N.W.2d 442, 445 (SD 1975).

F. Whether the Tribal Court erred by finding Brant competent to make and execute the will

Demarrias argued at oral arguments that even if she did have the burden of proving undue influence, she proved Brant was not competent to execute the will.

Demarrias argues the standardized cognitive test assessment was flawed. She claims the test was insufficient to assess Brant's cognitive ability and questions the qualifications of the person who performed the assessment. She claims given Brant's age, education and physical condition made it impossible for the test be performed. Demarrias made these arguments to the Tribal Court and they were rejected. The Tribal Court weighed and assessed the evidence and determined it was admissible. There was evidence to support Tribal Court's finding of competence and after a review of the entire record we are left with the definite and firm conviction that a no mistake has been committed. IHS is a Federally run hospital. The healthcare professional who performed the assessment has a Master of Social Work degree and is a Licensed Clinic Social Worker is qualified to see clients for issues of mental and emotional health and to administer cognitive testing. She is trained to detect cognitive impairments from assessments and from her observations of a client and obligated to report accurately her findings. There is no evidence to suggest she would have a motive not to report her findings accurately.

This is backed up by the will scrivener's testimony that Brant was able to identify her children, including one who predeceased her, and her grandchildren and that she knew the extent of her estate and knew she was asking the scrivener to prepare a will in accordance with her wishes. That is all that is required to determine a person's the mental capacity to make a will. Two witnesses to the will attested to Brant's competency.

After a review of the facts and the entire evidence, this Court is left with the definite and firm conviction that no mistake has been committed by the Tribal Court finding competent based on the evidence presented.

Demarrias argues that the Tribal Court erred in its legal conclusion that Brant was legally competent to make her will in 2014. Analyzing the Tribal Court's legal conclusions De Novo, this Court agrees with those conclusions and find no error in them.

For mixed questions of law and fact, the Supreme Court applies either the Clearly Erroneous or Abuse of Discretion standard to questions of fact and analyzes legal conclusions De Novo.[6]

The scrivener testified that when asked to prepare a will for Brant in 2014, she had Brant referred for evaluation of her mental capacity. Brant was administered a standardized test to assess functioning that found her cognitive function in the normal range. The will scrivener further testified Brant was able to identify her children, including one who predeceased her, and her grandchildren and that she knew the extent of her estate and knew she was asking the scrivener to prepare a will in accordance with her wishes.

Demarrias testified that Brant was suffering from heart disease and her functioning began to deteriorate in 2014, that Brant would go days without recognizing her and police were called because she was disoriented to time and place. Another witness testified that Brant was her

[6] Rule 12(a)(4) Sisseton-Wahpeton Oyate of the Lake Traverse Reservation Rules of Appellate Procedure.

mother in a traditional way, talked about the past as if they had just occurred and that the witness did not believe she understood things in 2014. Another witness testified she lived with Brant in 2015 but knew her prior, her hearing was bad, had trouble communicating orally so wrote things out and frequently heard and saw things not there and called law enforcement.

The Tribal Court also analyzed Brant's medical records submitted into evidence. The Tribal Court found that these records were not contemporaneous with the time the will was executed.

The Tribal Court also noted that it had found Brant not incompetent in a guardianship proceeding prior to her death some four years after she executed the 2014 will.

The Tribal Court determined Brant was competent to make a will in 2014 because she was able to identify her children and grandchildren, her awareness of the property she owns and the disposition she desired to make of such property. The Tribal Court utilized the accepted legal standard in determining if Brant was competent at the time she made her will. See *In re Kleeb's Estate*, 211 Neb. 763, 767 (1982) and *In the Matter of the Estate of Fred L. Berg*, 783 N.W.2d 831, 843 (SD 2010).

After careful De Novo analysis of the Tribal Court's legal conclusion that Brant was competent to make a will and independently analyzing the relevant facts, this Court arrives at our own legal conclusion, which is the same conclusion as the Tribal Court, that Brant was competent to make her last will and testament in 2014 and find no err in the Tribal Court's conclusions based on the underlying facts presented. Brant was referred by the will scrivener for a cognitive assessment that proved normal. Brant was able to identify her children, knew what her estate consisted of and knew how she wanted it distributed. Although Demarrias offered evidence to the contrary, it was not enough to overcome the evidence of Brant's competency when she made her will.

G. Whether the Tribal Court erred when if found the will drafter/scrivener, the step-daughter of Decoteau, did not create a potential for undue influence

A review of the record does not show Demarrias raised a presumption of undue influence argument to the Tribal Court. The Order denying the will challenge is silent on the issue and there is no finding by the Tribal Court that the issue was raised. Demarrias' pleadings, found in the record, are also silent on this point. Demarrias failed to request a transcript of the will challenge hearing therefore this Court cannot review the transcript.[7] This Court can only conclude that this issue and argument was not raised by Demarrias with the Tribal Court and is raised for the first time on appeal. Issues raised for the first time on appeal are normally waived on appeal.

Even if Demarrias raised the issue with the Tribal Court at the will challenge hearing she still would not prevail. Demarrias argues that because the will scrivener is the step-daughter of Decoteau creates a potential for undue influence. At the hearing, Demarrias presented evidence of Brant's incompetency but did not provide any evidence of undue influence on the part of the will scrivener. She argues it potentially causes undue influence.

After exhaustive research, the Court could find no cases that stand for the proposition that a step-child who drafts a will and the step-parent is one of the heirs under the will creates a presumption of undue influence. Even if there is presumptive undue influence, it was rebutted by other evidence. Brant personally approached the will scrivener to draft her will and no other person asked the scrivener to draft the will. The scrivener went to great lengths to determine Brant's competency to make a will. There is no evidence the step-father, Decoteau directed or participated in the preparation or execution of the will. Two witnesses to Brant's executing the

[7] Rule 7(a)(2) Sisseton-Wahpeton Oyate of the Lake Traverse Reservation Rules of Appellate Procedure.

will attested to her sound mind.

IV. Conclusion

For the above stated reasons, the Tribal Court order dated January 29, 2019 is affirmed in all respects.

Dated this 8th day of May, 2019.

For the Court:

Pat Donovan, Associate Justice