



INTERIOR BOARD OF INDIAN APPEALS

Estate of Jessie McGaa Craven

1 IBIA 157 (10/08/1971)

ESTATE OF JESSIE McGAA CRAVEN

IBIA 71-9

Decided October 8, 1971

Syllabus

Indian Probate: Appeal: Generally

Pleadings on appeal which are not timely filed may be stricken.

Indian Probate: Appeal: Matters Considered on Appeal

An issue which has not been submitted to the Examiner in the petition for rehearing will not be considered on appeal.

Indian Probate: Compromise Settlements: Generally

A "Family Agreement" which constitutes a compromise settlement diverting distribution of the estate from the pattern required by the statutes or by the decedent's will is not to be considered except upon the unanimous consent of all the parties to the agreement.

Indian Probate: Wills: Construction of

When the intent of the testator is clear from the record as a whole, technical defects in the writing such as a scrivener's erroneous reference to a date shall not defeat such intent.



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF JESSIE McGAA CRAVEN : Examiner Affirmed
:
Deceased : IBIA 71-9
Pine Ridge Allottee No. 3809 :
Probate N-766 : October 8, 1971

This is an appeal from the Examiner's order entered December 10, 1970, denying the cross petitions for rehearing filed by the parties appearing here. The petition of Edith Craven Knight was timely filed on February 2, 1971. The Notice of Docketing was issued February 22, 1971, and the limit on the time for filing "written arguments" with the Board was set at April 9, 1971.

"Objection to The Petition Of Appeal Of Edith Craven Knight" by Ben M. Craven was filed with the Superintendent at Pine Ridge Agency on February 8, 1971. It constitutes an answer brief. The reply brief of Edith Craven Knight was filed with the Board April 1, 1971, in full compliance with 25 CFR 15.19(c) then in effect. The letter petition of Ben M. Craven dated April 7, filed April 12, 1971, was late filed and is stricken from the record. Similar action is taken relative to the letter answer of Edith Craven Knight dated April 27, filed April 30, 1971. Estate of Mary Wellknown, 1 IBIA 83, 86, 78 I.D. 179 (May 21, 1971); Estate of Jack Fighter, 71 I.D. 203; Estate of Jackson Searle, IA-S-2(c) (Supp.) (December 12, 1969). No other interested parties have participated in this appeal.

Background of Proceeding

The decedent died testate on August 3, 1964. Her will was executed March 22, 1963, and she thereafter executed codicils on April 29, 1963, May 8, 1963, and October 15 1963. The codicil of May 8, 1963, reaffirmed the will but specifically revoked paragraphs seven, nine, and thirteen thereof, the latter being the residuary paragraph for which a new one was substituted. The codicil of October 15, 1963, modified the will of March 22, 1963, and contained the following clause: "I hereby ratify said will of March 22, 1963, and Codicil of May 13, 1963, wherein I made changes in Paragraphs Seven, Nine, and Thirteen of said will. By this writing I hereby revoke all other Codicils than the one mentioned above." The will, as amended by the codicils (including that of May 8, 1963) was approved by the Examiner's order entered July 13, 1970. Without a specific finding, but by implication and reference,

the Examiner approved the codicil of May 8 as being one and the same codicil as that which was modified and republished by the October 15, 1963 codicil, albeit incorrectly referred to therein as one dated May 13, 1963.

Earlier wills mentioned in the Examiner's decision of July 13, 1970, Approving and Construing Will and Decree of Distribution, are not under consideration since they are held to have been revoked by the will of March 22, 1963.

The trust land owned by the testatrix at the date of her death under the probate jurisdiction of the Secretary consisted of two allotments on the Pine Ridge Reservation containing 480 acres. This land had been used for many years in conjunction with leases of large tracts of trust land and with acreages of nontrust land all of which constituted a stock-growing ranch. The trust land represented a very minor portion of the total value of the estate and was not the subject of a specific devise.

The testatrix left five children and four grandchildren (children of a predeceased son) as her heirs at law to share in the estate had she died intestate. However she omitted the grandchildren from her will naming only her children as beneficiaries. The children, being dissatisfied with the distribution of the estate as provided in the will, including the codicils, entered into a "Family Agreement" which included a provision for the total liquidation of the estate with distribution of the proceeds of sale to be made under an agreed formula. There is no documentary evidence in the record, but the undisputed statement is made that the provisions of the "Family Agreement" approved by the state court have been consummated as to all nontrust property.

The Examiner has had occasion to hold numerous hearings and to issue a number of orders during the course of these proceedings by which he twice approved the "Family Agreement" in its application to the trust lands and twice revoked such orders. The revocation orders in each instance were issued when it became apparent that the parties to the agreement were in such dispute as to its interpretation and application that performance was impossible. The Examiner correctly applied the rule laid down in Estates of Alex Dixon and Kenneth A. Dixon, IA 1148 (April 28, 1961).

Following the entry of the order of July 13, 1970, the contending parties filed cross petitions for rehearing. The order denying such petitions was issued December 10, 1970.

Issues Raised on Appeal

Edith Craven Knight raises two issues in her notice of appeal:

(1) That no codicil dated May 13, 1963, is in existence and that the codicil dated May 8, 1963, was revoked by the general provision of the codicil of October 15, 1963, with the result that, as she contends, there is no residuary clause contained in the testamentary documents. As a corollary, she contends that a will and codicils cannot be approved and distribution made thereunder when a part of the whole is missing; and

(2) That the will, together with the codicils, "horrendously discriminates against her [the testatrix's] legitimate daughter, Edith Craven Knight, OS-3821 in full and in every detail and manner." Edith Knight is named as a legatee in the will but is disinherited for all practical purposes considering the apparent total value of the estate.

Findings

Were it not for the fact that the record does not show a probative inquiry concerning the existence of a codicil dated May 13, 1963, and the fact that the Examiner's decision fails to include a specific finding concerning the identity of the codicil dated May 8, 1963, with the codicil dated May 13, 1963, it would not be necessary here to delve so deeply into this entire matter to arrive at a rationale upon which to base a decision. A detailed consideration of the record becomes necessary.

The first hearing in this matter was held at Kadoka, South Dakota, by Examiner Wheaton on July 15, 1965, almost a year following the death of the testatrix on August 3, 1964. At the original hearing Ben M. Craven was represented by Julius F. Sieler as counsel; Cornelius A. Craven and Theda Craven, grandchildren, were represented by Donald L. Heck; and Isabel Stair was represented by E. W. Christol. The other parties appearing, including Edith Craven Knight, were unrepresented. At the hearing the Examiner indicated that certain testamentary instruments were to be offered in evidence, photographic copies of which were available at the hearing. "Exhibit 3" was the codicil dated May 8, 1963, and "Exhibit 4" was the codicil dated October 15, 1963. The Examiner stated at the opening of the proceedings, "The parties are asked first to examine the testamentary instruments and state whether there is to be a contest of them." Whereupon the parties appearing at the hearing were polled concerning their attitudes as to both the testamentary documents and a claim which was then in issue.

During the taking of the poll the following transpired:

EXAMINER: I would like to hear from Mr. Sieler about the will and I wish to point out there is an apparent error in the codicil Exhibit #4 or there is a missing document.

EXAMINER: Mr. Sieler, what is your position on the Will?

Mr. SIELER: We are in favor of it.

EXAMINER: Do the rest of the parties want it approved?

MRS. STAIR: If there are discrepancies we want them cleared.

MRS. CRANE: I don't know how to answer.

MRS. STAIR: Mr. Christol, attorney, left for Kadoka as he felt he was subpoenaed but he must have had car trouble.

EXAMINER: Irene Crane, you don't know at this moment whether you want the will approved?

MRS. CRANE: Do you mean as my mother wrote it? Yes, sir, I do.

EXAMINER: I don't know the contestants will agree with my answer to you. Mr. Heck may maintain your mother did not write the will in the first place.

MRS. CRANE: YES SHE DID.

EXAMINER: Mrs. Knight?

A. I wish to wait for my attorney. (tr. 4, 5)

The Examiner then recessed for thirty minutes awaiting the appearance of Mrs. Knight's attorney who had been unavoidably detained. He did not appear, but Mr. E. W. Christol did.

Upon resumption, Mr. Heck, representing two of the grandchildren stated that the will should be rejected on the ground that the testatrix did not have testamentary capacity and that she was subject to undue influence. It was then stipulated that the proceedings before the State Court should be admitted in this proceeding, but these are not included in this record. Thereafter:

EXAMINER: As to the paper marked Exhibit 4, I understand that we desire testimony from Mr. Christol.

MR. SIELER: We refer to the codicil dated May 13 was actually dated May 8, should have referred to.

MR. CHRISTOL: I cannot stipulate to that. (tr. 8)

Mrs. Knight was called as a witness and gave testimony concerning vital statistics and the family relationships establishing the heirship of the parties without exception or contradiction. The hearing was closed upon Mr. Heck's statement that he wished to have a further hearing on the will concerning the grounds of mental incapacity and undue influence.

At this hearing, Edith Knight voiced no objection to the will, or to any of the codicils.

The probate jurisdiction of the Pine Ridge Reservation was thereafter transferred from Examiner Wheaton to Examiner Gordon of Denver, and a hearing was held at Rapid City on May 13, 1966, by Mr. Gordon. The Examiner announced that the hearing was held to settle two issues. The first related to the claim of Edith Knight not included in this appeal and, "Issue No. 2 is to determine the validity of the execution and whether or not the Last Will and Testament of Jessie Craven should be approved or disapproved." (tr. 1)

At this hearing Edith Knight was represented by Roswell Bottum, and Ben M. Craven was represented by Franklin J. Wallahan. The Examiner verified the fact that the Indians on the Pine Ridge Reservation were organized under the Indian Reorganization Act of 1934 (25 U.S.C. §464). He then took evidence concerning the identity and enrollment of the various devisees named in the will and codicil. He reviewed the proceedings before Examiner Wheaton and made specific reference to the various testamentary documents including the codicil of May 8, 1963, marked "Exhibit 3." (tr. 11)

Also on May 13, 1966, Examiner Gordon noted that Examiner Wheaton had continued the case in order to enable the heirs and beneficiaries under the will to obtain counsel and asked:

EXAMINER: . . . I ask counsel and those present who are in attendance here who are not represented by counsel if there is going to be any contest to the will in regard to the decedent's trust and restricted property. Mr. Wilson?

A. No, sir.

Q. Mr. Bottum?

A. No, sir.

Q. Mr. Wallahan?

A. No contest. (tr. 12-13)

It was then made to appear to the Examiner that the beneficiaries had entered into a "Family Agreement" on September 25, 1964, disposing of the nontrust property, and it was required that a supplemental agreement be executed to specifically include the trust property. (tr. 18-21) Following that:

EXAMINER: I am of the opinion that we should take the testimony on the validity of the execution of the wills together with the three codicils. . . . (tr. 21)

The Examiner then questioned E. W. Christol, one of the witnesses to "Exhibit 1," the will dated March 22, 1963 (tr. 22); Isabel Stair, one of the witnesses to "Exhibit 2" (tr. 24); Bertha E. Pasek, one of the witnesses to "Exhibit No. 3" (tr. 25); Arthur L. Pasek, one of the witnesses to "Exhibit 4" (tr. 27). He questioned James H. Wilson in relation to the signature of Ernest Gunderson, one of the witnesses on each of "Exhibits 3" and "4" (tr. 29), and concluded the hearing.

At the hearing held October 21, 1968, Edith Knight was again represented by Mr. Bottum. At that hearing the following exchange occurred:

EXAMINER: Now I say to you, Mr. Bottum, as Mrs. Knight's attorney, knowing that if I approved the will that does not name Edith Knight as a beneficiary -

MR. BOTTUM: (Incomprehensible.)

EXAMINER: - do you still withdraw any contest of this will or do you desire to contest the will?

MR. BOTTUM: We do not desire to contest the will. We have been through that in State Court, the will was upheld, we are in no position to contest it, sir. Mrs. Knight was not the contestant. It was one of the other heirs, and the County Court upheld the will. (tr. 22)

There is no record as to what considerations were entertained by the parties and their attorneys in arriving at the formula for the division of the estate in the "Family Agreement." As heretofore indicated the Examiner approved the agreement and then vacated such order. Thereafter on April 11, 1969, he again approved the "Family Agreement," but was forced to vacate that order on February 16, 1970, upon a showing that the matter could not be completed as to the trust

property because of the refusal of Edith Knight to file an application with the Bureau of Indian Affairs for approval of the necessary deeds. By that order of February 16, 1970, he restored the proceedings to the same posture as if the "Family Agreement" had not been considered; he reinstated the claims which Edith Knight had withdrawn; and he raised the question of the validity of the will and the three codicils being "Exhibits" 1, 2, 3, and 4. He set a hearing for March 18, 1970, at the Pine Ridge Indian Agency for the taking of evidence on the issues.

Edith Knight appeared at the March 18, 1970, hearing without counsel; Benjamin M. Craven was represented by Louis K. Frieberg; and Mrs. Griffith by James Olson of the firm of Wilson, Gunderson and Olson. Testimony was taken to prove the signatures of the deceased witnesses W. K. Wilson and Patience Wilson as they appeared on "Exhibit 2," the codicil dated April 29, 1963. Evidence was taken in support of the will and codicils and at no point did Edith Knight raise any question as to the validity of the will or codicils. She failed to raise the question of the existence of a codicil dated May 13, 1963. The Examiner explained the problem of the family agreement and the effects of the disputes concerning it. It was obvious that Mrs. Knight did not understand or comprehend the import of what was being said, or the instructions received from the Examiner. Before announcing a continuance of the hearing of March 18, 1970, this exchange took place:

EXAMINER: Well, Mrs. Knight I am continuing the case until April 15th or thereabouts . . . and meanwhile I advise you to talk to your attorney. There is one other thing that I am expecting. If there is no agreement, I am going to give you your "day in court" to prove any claim--you have withdrawn two claims in this estate in consideration of entering into the "Family Agreement" and I think good conscience requires that your claim be reinstated and we give you your "day in court". So be prepared to prove your claim.

MRS. KNIGHT: Are you talking about those claims that I filed with you? Or the claims on this land?

EXAMINER: I am talking about whichever claim you wish to rely on. No, I am not talking about the claim on the land. I am talking about your money claims. So be prepared to do that.

MRS. KNIGHT: Yes.

EXAMINER: If you have not reached an agreement.

MRS. KNIGHT: I still can't get it through my head. I can't understand, Mr. Gordon, when you have an Act of Congress here that governs you, why it doesn't take precedence over this "Family Agreement."

EXAMINER: I would suggest that your attorney argue it before me at our next hearing, Mrs. Knight. (tr. 19, 20)

The continued hearing was concluded on April 23, 1970, at Rapid City. Mr. Olson and Mr. Frieberg, attorneys, appeared and Edith Knight was again unrepresented. Upon statement of the positions of the various persons it was evident that no agreement had been reached between Mrs. Knight and her brother, Ben Craven. Mrs. Knight continued to refuse to sign those documents necessary to permit the Bureau of Indian Affairs to approve the deeds.

For the first time since the hearing held in 1965 by Examiner Wheaton, Mrs. Knight on April 23, 1970, mentioned the fact that there was no codicil dated May 13, 1963;

MRS. KNIGHT: I like to say something. In her will she has three codicils, and she completely cancelled out codicil number one, and then in the second codicil she cancels out paragraphs seven and nine and thirteen, in the second codicil. The second codicil is dated May the 8th, dated twice May the 8th, and in the third and last codicil she cancels out all codicils except the codicil of May the 13th, and there is no codicil of May the 13th.

EXAMINER: All right. This much can be said, Mrs. Knight, and that is that I am going to decree that the property go - the trust property in Mrs. Craven's estate go in accordance with her will as construed. . . . (tr. 12)

In spite of the remarks made by the Examiner, Mrs. Knight made no protest, but most significantly she offered no evidence or any witness suggesting anything other than a scrivener's error in the codicil of October 15, 1963, wherein it referred to a codicil dated

"May 13, 1963." She did not pursue the matter although she had been represented by counsel. The Examiner gave her every opportunity and expended every effort short of becoming an advocate in her behalf in an attempt to lead her through the matter and to protect her rights as an interested party.

Conclusions of the Board

The only genuine issue raised by Edith Knight in her petition for rehearing was that concerning the existence of a codicil dated May 13, 1969, not in evidence. No consideration need be given to the ultimate disposition under any "Family Agreement" since, as previously shown, it is inoperative as regards the trust property over which the Secretary has jurisdiction. In review it is noted that at the hearing conducted by Examiner Wheaton in 1965, Edith Knight indicated in response to the Examiner's inquiry concerning a contest of the will that she wished to talk to her attorney. It is also established that at the hearing on May 13, 1966, before Mr. Gordon, at which she was represented by Mr. Roswell Bottum, he indicated, no contest, in response to the Examiner's inquiry as to the position of the parties. This commitment by Mr. Bottum, on behalf of Edith Knight, must be considered in the context of the other evidence adduced at that hearing to the effect that all parties in interest believed that there was an enforceable "Family Agreement" between them whereby the will and codicils were eliminated from consideration. During the October 21, 1968 hearing Mr. Bottum had a more complete picture of the situation from a legal standpoint and made an even more firm commitment of no contest than at the May 13, 1966 hearing. Had he had evidence that a codicil had actually been signed on May 13, 1963, he would not have passed the matter over as he did.

At the March and April hearings held in 1970 the Examiner reinstated the conditions which existed prior to the execution of the "Family Agreement." At these hearings Edith Knight had not overlooked or forgotten the discrepancy in the dates of the codicils for she mentioned this fact at the continued hearings on April 23, and she was told at that time what the decision was to be. We think it may safely be presumed and a finding is here made that if Edith Knight had any evidence whatsoever which would support the execution or existence of a codicil dated May 13, 1963, she had an obligation to produce all evidence known to her.

There was a tacit agreement strengthened by the decision of the State Probate Court among all parties in interest that the October 15, 1963 codicil contained a scrivener's error wherein reference was made to a codicil dated "May 13, 1963" which was intended to be a reference to the codicil dated May 8, 1963.

We have also considered that the reference in the October 15, 1963 codicil includes a description of the May 8, 1963 codicil to the extent that it specifically refers to changes in paragraphs seven, nine,

and thirteen of the will of March 13, 1963. Since no evidence has been proffered to substantiate any codicil dated May 13, 1963, we are of the opinion that we are required to interpret the will and codicils as the demonstrated intention of the testatrix. In the absence of evidence to the contrary we hold that the intention of the testatrix was to modify the will of March 22, 1963, by the codicils of May 8, 1963, and October 15, 1963, and to revoke only those codicils inconsistent therewith. The Examiner's construction of the codicil of October 15, 1963, as containing such scrivener's error is affirmed.

The second issue raised by Edith Knight is that relative to the discrimination against her in the will, including the codicils. It is raised for the first time in this appeal. At no place in the record, least of all in her petition for rehearing, is there any assertion of this ground as part of her effort to upset the will. It was properly ruled by the Solicitor in the Estate of Josephine Six Feathers, IA-D-21 (April 11, 1968):

In order for an appellant to raise a ground on appeal he first must have alleged that ground in his petition for rehearing. If a ground is raised for the first time on appeal without the Examiner having been afforded the opportunity to pass upon the ground when considering appellant's petition for rehearing, appellant's appeal insofar as it relates to that ground will be dismissed. Estate of Augustine Greybull, IA-D-2 (September 7, 1966).

The same rule was announced earlier in Estate of Pokibro, IA 861 (June 30, 1958), and Estate of Robert Vernie La Belle, 71 I.D. 119 (1964)

Under the authority delegated to the Board of Indian Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081) the decision appealed from is affirmed with distribution to be made forthwith. This decision is final for the Department.

//original signed
David J. McKee, Chairman
Board of Indian Appeals

Concur:

//original signed
C. E. Rogers, Jr.
Alternate Board Member

Dated: October 8, 1971