



INTERIOR BOARD OF INDIAN APPEALS

Estate of Verena Gean Kitchell

12 IBIA 258 (05/31/1984)

Judicial review of this case:

Summary judgment for defendant, *Kitchell v. Clark*, No. CIV-84-1803-W
(W.D. Okla. July 16, 1985)

Related Board case:

11 IBIA 248



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

ESTATE OF VERENA GEAN KITCHELL

IBIA 84-2

Decided May 31, 1984

Appeal from an order denying rehearing issued by Administrative Law Judge Keith L. Burrowes in IP TU 18P 79.

Affirmed.

1. Indian Probate: Wills: Testamentary Capacity--Indian Probate: Wills: Undue Influence

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

2. Indian Probate: Appeal: Generally

The burden of proving that the initial decision in the probate of a deceased Indian's trust estate was erroneous is on the person challenging the decision.

3. Indian Probate: Wills: Undue Influence

To invalidate an Indian will because of undue influence upon a testator, it must be shown: (1) That he was susceptible of being dominated by another; (2) that the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions; (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

4. Indian Probate: Wills: Disapproval of Will

In determining whether an Indian will presents a testamentary scheme that is so unnatural or so lacking in rationality that it must be disapproved, the Department is bound by the holding of the Supreme Court in Tooahnippah v. Hickel, 397 U.S. 598 (1970).

APPEARANCES: Justus Hefley, Esq., and Amos Black III, Esq., Anadarko, Oklahoma, for appellants; Ken Johnston, Esq., Chickasha, Oklahoma, for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

On October 14, 1983, the Board of Indian Appeals (Board) received a notice of appeal from Louis Lee Kitchell, Lewis Snakeman, Ann Snakeman, Linda Latoma Snakeman, Sandra Kay Snakeman Markwardt, and Rita Jo Snakeman Alexander (appellants). Appellants sought review of an order denying rehearing entered in the estate of Verena Gean Kitchell (decendent) by Administrative Law Judge Keith L. Burrowes on August 19, 1983. The denial of rehearing let stand a May 19, 1983, order approving decendent's will and, in accordance with its terms, ordering distribution of decendent's Indian trust property to Charles Wayne King (appellee), a non-Indian. For the reasons discussed below, the Board affirms those decisions.

Background

Decendent, an unallotted Delaware-Caddo-Shawnee, was born on May 3, 1927, and died of cancer on May 29, 1978, at the age of 51. At the time of her death, decendent owned fractional interests in approximately 460.21 acres of Indian trust land with a value for probate purposes of \$86,161.50. A hearing to probate her trust estate was held on June 18, 1979, before Administrative Law Judge Vernon J. Rausch. Because Judge Rausch was on temporary assignment to assist with a backlog of cases in the Oklahoma area, he continued the hearing when it appeared that there would be a challenge to the document presented as decendent's last will and testament. The continuance was ordered so that the Judge deciding the case could conduct the hearing.

The case was subsequently reassigned to Administrative Law Judge Keith L. Burrowes, who held two further hearings on April 3, 1980, and May 29, 1980. In addition, three depositions were taken and admitted into evidence.

Evidence presented at the hearings showed that decendent was not married and had no children. She was survived by a maternal half-brother (Louis Lee Kitchell), two paternal half-brothers (Lewis Snakeman and Amos Snakeman), two paternal half-sisters (Linda Latoma Snakeman and Sandra Kay Snakeman Markwardt), and the daughter of a predeceased paternal half-brother (Rita Jo Snakeman Alexander). Decendent did not know her paternal relatives, and her relationship with Louis Kitchell was strained. The reason for and the duration of the strained relationship was disputed. It was shown, however, that decendent had great affection for her nephew, Louis Lee Kitchell, Jr., the son of Louis Kitchell.

Testimony showed that for approximately 20 years before her mother's death, decendent had cared for her diabetic mother. This care had resulted in the exclusion of almost all other social relationships. Although during this time decendent bore the whole burden of physically caring for her mother, Louis Kitchell, who was then living in Chicago, said that he sent money to assist with his mother's care and to support both her and decendent.

After her mother's death, decendent met and began seeing appellee. Decendent was aware that appellee was married and had three children, and that many of her friends and relatives, including Louis Kitchell, did not approve of the relationship. Nevertheless, decendent and appellee spent a great deal of time together, with appellee spending most of his waking non-working hours

with decedent. Except for occasional weekends when he and decedent would go away together, appellee nevertheless returned home to spend nights with his wife and children. On July 15, 1977, decedent and appellee went through a marriage ceremony in Wichita, Texas.

In September 1977 decedent was diagnosed as having a uterine tumor. She was admitted to the hospital on November 2, 1977, for a hysterectomy. The operation and later biopsy revealed metastatic adenocarcinoma. After the operation, decedent received a series of cobalt treatments, and in January 1978, a radium implant was inserted. She was again admitted to the hospital on April 23, 1978, where she remained until her death on May 29, 1978.

The nature of the relationship between decedent and appellee was disputed at all three hearings. It was shown that decedent was a small woman, approximately 5 feet, 2 or 3 inches, tall, who had led a relatively sheltered life. Appellee was 6 foot, 2 inches, tall, weighed around 220 pounds, and was a former member of the Army Green Berets. There was no dispute that decedent was a rather quiet person, although able to handle her own business affairs; and that appellee had an assertive and perhaps violent personality.

Appellants characterized the relationship as one of total domination of decedent by appellee through force, violence, and fraudulent statements of love and affection. They attempted to show that the relationship between decedent and Louis Kitchell was good until decedent began seeing appellee. They alleged that appellee was the sole reason for the estrangement between decedent and her family. They further contended that decedent's personality changed during the time she knew appellee; that she became nervous and upset; that she was frightened of and intimidated by appellee; and that appellee controlled her to the extent of precluding all contact with her family and friends, and forcing her into a fraudulent marriage, which she believed was real even at the time of her death. Appellants also argued that because of decedent's illness and the medication she was taking, she lacked testamentary capacity when she executed her will less than 50 days before she died.

Appellee alleged that he and decedent loved each other; that decedent knew at all times that he was married; that she requested they go through a marriage ceremony even though she knew it was not valid; that decedent's already strained relationship with Louis Kitchell was aggravated by Louis' prejudice and hostility toward him and by Louis' failure to help decedent during her fight with cancer; and that decedent saw and communicated with friends and relatives, including both Louis Kitchell and his son, throughout the time appellee and decedent were seeing each other. Appellee attempted to show that Louis Kitchell had essentially abandoned decedent, except for the times when Louis wanted something from her.

During their time together, decedent executed two wills under which appellee was the primary beneficiary. The first will, dated October 6, 1977, was prepared by an attorney with the Department. The will, which stated that decedent was not married and had no children, devised a life estate in all of decedent's property to appellee. Appellee was given full power to dispose of or encumber the property. The remainder, if any, was to vest in appellee's three children. The second will, executed by a private attorney and dated

April 10, 1978, left all of decedent's property to appellee without restriction, and specifically disinherited Louis Kitchell, Louis Kitchell, Jr., and Steven Moore, Louis Kitchell's step-son. This will also stated that decedent was single.

In issuing his May 19, 1983, decision approving decedent's April 10, 1978, will, Judge Burrowes found that decedent was susceptible to being dominated by appellee and that appellee was capable of controlling the mind and actions of decedent. He further indicated his belief that appellee was a person willing to obtain money from other people and to convert it to his personal use. Judge Burrowes also found, however, that the evidence was not sufficient to prove that appellee, when decedent made her will, influenced her to make a will she did not wish to make, or that the ultimate disposition of decedent's property was contrary to her desires.

Appellants filed a notice of appeal with the Board from the order approving decedent's will. Because appellants had not sought rehearing from the Judge before appealing to the Board, as is required by 43 CFR 4.241, the Board docketed and dismissed the appeal on July 15, 1983. The Board sent the matter to the Judge with instructions to treat the notice of appeal as a timely filed petition for rehearing. Estate of Verena Gean Kitchell, 11 IBIA 248 (1983).

Judge Burrowes considered the petition and denied rehearing on August 19, 1983. Appellants again appealed to the Board. ^{1/} Briefs on appeal were filed by both parties.

Discussion and Conclusions

On appeal, appellants raise essentially the same arguments they had raised before Judge Burrowes. Appellants contend that decedent's will was procured through undue influence exerted upon her by appellee; that appellee, the beneficiary under the will, practiced fraud and deceit upon decedent, with whom he had a confidential relationship; that the disposition of decedent's property is unnatural; that appellee's attention to decedent was part of a common plan and scheme to deprive Indian women of their property; that appellee should not be permitted to benefit from his felonious and bigamous marriage to decedent; and that decedent lacked testamentary capacity. Appellants add that the Administrative Law Judge breached his fiduciary duties to decedent by allowing her Indian trust property to pass to a non-Indian. ^{2/}

Appellee counters with general denials of appellants' charges.

^{1/} Appellee's motion to dismiss the second appeal as untimely was denied by Board order dated Feb. 2, 1984.

^{2/} The mere fact that Indian trust property passes to a non-Indian does not show a violation of the trust responsibility. In every probate case the Department is required to ascertain and carry out the wishes of the decedent. Such wishes may result in the removal of property from trust. If it is a decedent's desire that trust property pass to a non-Indian to the exclusion of Indian relatives, and such a disposition is not prohibited by law, see, e.g., the Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2210 (Supp. VI 1982), the Department is legally bound to carry out that intention.

[1, 2] In general, the burden of proving undue influence or lack of testamentary capacity is on the person contesting the will. Estate of Grace Dion Antelope Horse Ring, 12 IBIA 232 (1984); Estate of Evelyn Westwolf Bear Walker Romero, 12 IBIA 215 (1984); Estate of Asmakt Yumpquitat (Millie Sampson), 8 IBIA 1 (1980). Furthermore, the burden of proving that the initial probate decision was erroneous is on the person challenging the decision. Cf., Estate of Wilma Florence First Youngman, 12 IBIA 219 (1984); Estate of Joseph Wyatt, 11 IBIA 244 (1983) (both cases sought reopening of closed Indian estates). Thus, appellants bear the burden of proof in this matter.

[3] The Board has reviewed the entire probate record, including the transcripts of the hearings, the exhibits, the briefs of the parties, and the decision. The Board concludes that Judge Burrowes' May 19, 1983, Discussion, Findings of Fact and Conclusions of Law, which is attached to this opinion and hereby incorporated by reference, properly sets forth the law relating to undue influence and correctly applies that law to the facts of this case. It is, therefore, adopted as the Board's opinion. 3/

The following discussion pertaining to this appeal supplements the Judge's order. Appellants again argue that decedent lacked testamentary capacity. Appellants cite the fact that decedent was on medication throughout the period before and after the execution of the will as evidence that her mental capacity was diminished. However, both the will scrivener, who also witnessed the document, and the second witness testified that decedent was alert and not apparently under the influence of drugs when the will was executed. Decedent's doctor testified that the medication decedent was receiving would not affect her mental abilities, if taken as directed.

Appellants also cite decedent's belief that she and appellee were legally married to illustrate appellee's domination over her and her lack of testamentary capacity. The record does not support the allegation that decedent actually believed the marriage to be real. Decedent clearly identified herself as single in the preparation of both of her wills. She continued to transact her own business activities in the name of Kitchell. She never represented to her family or to the community that she and decedent were married. When she gave appellee a right to certain property, such as her last car and her safety deposit box, she did not suggest that appellee was her husband. The record indicates that the marriage license was produced at the hospital and decedent's records were changed only after the hospital staff attempted to prevent appellee from remaining with decedent through the night during her last hospitalization.

Appellants have, therefore, failed to prove that decedent lacked testamentary capacity.

[4] Appellants assert that the devise of decedent's property to appellee is an unnatural disposition. In determining whether a will presents a testamentary scheme that is so "unnatural" as to require disapproval, the

3/ See Judge Burrowes' decision, *infra*, for the discussion of undue influence. See also, *Horse Ring, supra*; *Romero, supra*.

Department is bound by the holding of the Supreme Court in Tooahnippah v. Hickel, 397 U.S. 598 (1970). ^{4/} That decision held that in enacting 25 U.S.C. § 373 (1982), Congress gave testamentary power to the Indian testator, not to the Secretary. The Court stated at pages 609-10:

Whatever may be the scope of the Secretary's power to grant or withhold approval of a will under 25 U.S.C. § 373, we perceive nothing in the statute or its history or purpose that vests in a governmental official the power to revoke or rewrite a will that reflects a rational testamentary scheme * * *.

The Secretary's job is not always an easy one and perhaps is rendered more difficult by the absence of regulations giving guidelines. It is not difficult to perceive of dispositions so lacking in rational basis that the Secretary's approval could reasonably be withheld under § 373 even though the same scheme of disposition by a non-Indian of unrestricted property might pass muster in a conventional probate proceeding * * *"

The Board notes that there was very little likelihood that any disposition of decedent's property would be "natural" by conventional standards. The five paternal appellants, who did not appear at any of the three hearings and do not appear to be active participants in the present proceeding, would inherit the property of a woman whom they did not know and with whom they had no familial relationship. ^{5/} Louis Kitchell attempts to inherit decedent's property by showing that even though she did not want him to have any part of her estate, she intended to leave her property to his son, for whom she had special affection. Louis' son would not inherit under any scheme of distribution applicable to this estate, but Louis could. Appellee was found by the Judge to be a domineering person with few moral scruples. The Board, like the Administrative Law Judge, must attempt to determine decedent's desires under circumstances that provide little objective evidence of her intentions, but that show much about the intentions of her survivors.

The evidence shows that, for whatever reason, decedent was estranged from Louis Kitchell. Although Louis stated that decedent was only joking when she said that he would never get any of her estate, he admits that she made such statements. There is no dispute that decedent liked her nephew and had indicated on various occasions that she intended to leave her property to him. Appellee entered decedent's life before she became ill and stayed with her through her illnesses, until the time of her death. Whatever his motive, appellee assisted decedent with her medical problems when it appears that no one else was available to her.

^{4/} Appellants cite the concurring opinion of Mr. Justice Harlan in Tooahnippah, *supra*, in support of their position. Although this concurrence presents thoughtful arguments and considerations, it was not adopted by the majority and is not part of the holding in the case.

^{5/} The probability that decedent did not consider these relatives the natural objects of her bounty is seen in the fact that she did not mention them in writing her second will, which specifically disinherited Louis Kitchell and his children.

The Board recognizes that appellee's motives in beginning and maintaining his relationship with decedent may be suspect, and that the Federal trust responsibility may require the disapproval of an Indian will that is proved to have been procured through the use of fraud and deceit. The evidence in the record, however, is not sufficient to prove that appellee deceived decedent in order to inherit her property. Under the circumstances, the Board cannot find that the testamentary scheme established in decedent's will is so unnatural that it must be disapproved.

Finally, appellants argue that the approval of decedent's will allows appellee to benefit from his felonious and bigamous marriage to decedent. Such is not the case. Decedent, acknowledging herself to be a single person, devised her property to a friend; her property is not passing under a will alleging that appellee is her husband, nor to a spouse under laws of intestate succession.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision approving decedent's will and ordering distribution in accordance with its terms is affirmed.

//original signed

Anne Poindexter Lewis
Administrative Judge

We concur:

//original signed

Jerry Muskrat
Administrative Judge

//original signed

Bernard V. Parrette
Chief Administrative Judge

Attachment



United States Department of the Interior

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IN THE MATTER OF THE) DISCUSSION,
LAST WILL AND TESTAMENT OF) FINDINGS OF FACT AND
VERENA GEAN KITCHELL,) CONCLUSIONS OF LAW
DECEASED DELAWARE-CADDO-)
SHAWNEE OF THE ANADARKO)
INDIAN AGENCY IN THE STATE) PROBATE
OF OKLAHOMA) IP TU 187P 79

Verena Gean Kitchell, a 51-year-old Delaware-Caddo-Shawnee Indian of Anadarko, Oklahoma, passed away on May 29, 1978. Verena was not married and had no children. Her parents were deceased, and she was survived by one half brother she knew well and four other half brothers and sisters and the child of a predeceased half brother (all from her father's side of the family and persons she was not acquainted with).

During the last twenty-one months of her life Verena had established a relationship with Charles W. King. Mr. King was a 34-year-old black man, married and the father of three young children. All of this family also lived in Anadarko.

Verena executed a will on October 6, 1977, made at the Office of the Solicitor in Anadarko. Verena executed another will on April 10, 1978, at the office of Red Ivy, Attorney, Chickasha, Oklahoma.

The above facts gave rise to a hotly contested probate with both contestants and proponent being represented by able counsel. Three separate hearings were held in Anadarko, and depositions of other individuals were taken and submitted as part of the record. Briefs have been submitted on the issues by counsel for the respective parties.

Contestants claim that Verena was not acting of her own free will, but was actually acting under the undue influence of Charles W. King. They further contend that Charles W. King used fraud and deceit to become the sole beneficiary of the will of Verena. They further contend that Verena did not have sufficient testamentary capacity on April 10, 1978, to make a valid will.

Contestants correctly point out that the Estate of William Cecil Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971), properly sets forth the law governing this court on the issue of undue influence. To invalidate an Indian will because of undue influence it must be shown that: (1) the decedent was susceptible to being dominated by another; (2) the person allegedly influencing the decedent in the execution of the will was capable of controlling his mind and actions; (3) such person, at the time of the testamentary act, did exert influence upon the 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 the decedent's own desires.

Although Verena Kitchell is shown to have handled her own business affairs, it is also abundantly clear that she led a comparatively sheltered life and was not a very assertive person. Several witnesses testified that Verena changed during the last two years of her life and that she lacked the strength of will to overcome the powerful personality of Mr. King. The weight of the evidence establishes, and I so find, that Verena Kitchell was susceptible to being dominated by Charles W. King.

My personal observation of Charles W. King at two different hearings establishes to my satisfaction that he has an extremely assertive personality and is capable of dominating nearly all people. The evidence is uncontroverted that Charles W. King was in fact capable of controlling the mind and actions of Verena.

The last two prerequisites as set forth in Robedeaux, supra, are not so clearly established by the evidence and require a closer analysis.

On April 10, 1978, Verena and Charles traveled together to the law office of Red Ivy in Chickasha, Oklahoma, and there Verena executed the last of her wills. Other than Charles, Red Ivy and Patricia Carpenter (Mr. Ivy's secretary and one of the witnesses to the will) are the only persons who testified concerning the events of April 10, 1978.

Red Ivy, concerned because Verena and Charles were of different races, made special inquiry of her to determine if there was undue influence or if he (Charles) has some special hold over Verena. Mr. Ivy satisfied himself that Verena was mentally competent and that she was not acting under the undue influence of Mr. King.

Patricia Carpenter, identified above, testified that she talked with Verena by herself and that Verena told her that she wanted to give her property to Charles because he had been so good to her and that she and her half brother were not close.

The only testimony concerning the actual execution of the will certainly indicates that Verena Kitchell was acting of her own free will in giving property to Mr. King. However, contestants claim that the entire relationship between Verena and Charles was a fraud and deceit by Charles for the express purpose of obtaining Indian property. The argument is plausible and may be strengthened by his later actions involving Lay Lonnie Kaulity Bread. It might also help explain the phony marriage between Charles and Verena performed in Texas in July of 1977 and explain why Rex Herron refused to prepare a second will for Verena. Each of these events needs a closer examination.

Mr. King testified that Mrs. Bread was giving him checks from her place of employment because he had loaned her money and she was paying it back. Quite frankly, I think Charles King was lying. However, lying on one matter does not make him a liar on all matters. He may have a grand scheme or plan to get property from Indian women, but that also does not prove that that is his only motivation or that it was the motivation for the relationship with Verena.

The marriage between Verena and Charles is vaguely explained by Charles as just something they wanted to do themselves (especially Verena) even though they both knew that he was already married and that this second marriage was illegal. I believe that Verena was a lonely person and that even a phony marriage was of some satisfaction to her. She was well aware of her half-brother's dissatisfaction over her relationship with a black man, and the marriage ceremony may have helped her with that problem.

Rex Herron testified that he would not make a second will for Verena because he did not think he could satisfy himself that Verena was acting of her own free will. This was because Verena had told him she wanted to change her first will because it was not just the way Charles wanted it. Mr. Herron was satisfied that the will he had made for Verena was valid, but he was not comfortable in preparing another.

I believe that Charles W. King has an assertive, dominating personality, and many people are not comfortable in his presence. I also believe that he has no qualms about obtaining other people's property for himself, using just about any means that are necessary to reach an objective.

However, I also believe that his style might be attractive to some people and that they may agree with his motivation and objectives. Verena Kitchell may have been such a person.

Verena had spent her entire life caring for her mother. She had little, if any, independent social life. After her mother passed away, Verena herself experienced poor health. Charles King, for whatever reason, came into her life and filled a void. They did many things together, and according to letters and testimony, there was in fact a loving relationship that developed between Verena and Charles.

The relationship between Verena and Charles may not be accepted by either of their families or friends or by government officials or by me, but that cannot enter into a determination of whether or not Verena wanted to and did validly devise and bequeath all of her property to Charles.

