



INTERIOR BOARD OF INDIAN APPEALS

Estate of Ursula Rock Wellknown

1 IBIA 83 (05/21/1971)

Also published at 78 Interior Decisions 179

Judicial review of this case:

Dismissed, *Shaw v. Morton*, Civil No. 974 (D. Mont. July 6, 1973)

Estate of Mary Ursula Rock Wellknown

IBIA 70-7

Decided May 21, 1971

Indian Probate: Wills: Disapproval of Will

The Secretary is authorized to exercise his discretion in disapproving a devise in the will of a deceased Indian where approval of such devise would sanction a practice permitting the acquisition of Indian lands contrary to the public policy expressed in the statutory restrictions against the alienation of Indian lands held in trust.

Indian Probate: Evidence: Generally--Indian Probate: Wills: Applicability of State Law

Indian probate proceedings involve considerations which go beyond the conventional issues of a state probate proceeding and evidence may be admitted in an Indian probate proceeding which would not be relevant to the probate of a will in a state proceeding.



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF MARY URSULA ROCK	:	Examiner's Order Affirmed
WELLKNOWN,	:	
	:	
Deceased	:	IBIA 70-7
Crow Allottee No. 1838	:	
Probate No. K-1-68	:	May 21, 1971

William T. Shaw, Jr. and Richard E. Shaw, devisees under the Last Will and Testament of the decedent, Mary U. Rock Wellknown, dated February 8, 1963, have appealed from the Examiner's Order Approving Will and Decree of Distribution, dated January 8, 1968, and from the Examiner's Decision After Rehearing Affirming Original Decision and Ordering Partial Distribution dated February 9, 1970. This appeal was originally filed with the Regional Solicitor. The authority of a Regional Solicitor to decide an appeal from an order and decision of an Examiner of Inheritance has been superseded by the Secretary's delegation of such authority to the Board of Indian Appeals and this matter is now before us for the final decision of the Department. 35 F.R. 12081.

The will of Mary U. Rock Wellknown devised the SW $\frac{1}{4}$, NE $\frac{1}{4}$, Sec. 19, T. 9 S., R. 37 E., P.M., Montana, containing 40 acres to "Richard E. Shaw, a Whiteman [sic], friend," and the S $\frac{1}{2}$, Sec. 24, T. 7 S., R. 34 E., P.M., Montana, containing 320 acres to "William T. Shaw, Jr., a Whiteman [sic], a friend." Both

of these parcels of land were portions of decedent's allotted lands, Crow Allotment No. 1838. In addition, the will devised to William T. Shaw, Jr. all of the decedent's interest (which constituted a 100% interest) in the allotment of Charles F. Wellknown, deceased Crow Allottee No. 2765, described as the NE $\frac{1}{4}$, Sec. 24, T. 7 S., R. 34 E., P.M., Montana, containing 160 acres. The lands devised to the Shaws totaled 520 acres, and represent almost 30% of the assets of the estate based upon the inventory and appraisal conducted by the agency realty officer.

The decedent died on January 10, 1965. After a probate hearing, at which the appellants were not present, the Examiner issued an Order Approving Will and Decree of Distribution, both dated January 8, 1968. The Examiner disapproved the paragraphs of the will containing the aforesaid devises to William T. Shaw, Jr. and Richard E. Shaw, and ordered distribution of those lands under the Montana laws of intestacy, there being no residual clause in the will. After notice of the Examiner's order, William T. Shaw, Jr. and Richard E. Shaw filed a petition for rehearing with the Examiner. A rehearing was held after which the Examiner issued his Decision of February 9, 1970, affirming his order of January 8, 1968, and ordering partial distribution.

William T. Shaw, Jr. and Richard E. Shaw appealed the aforesaid order and decision on April 28, 1970. The appellees filed a memorandum, dated July 15, 1970, in support of Examiner's Decision. The appellants filed a motion to strike appellees' memorandum contending that it was not timely filed and the appellees wrote the Secretary challenging appellants' motion to strike.

We agree with the appellants that the appellees' memorandum in support of Examiner's Decision was not timely filed in accordance with 25 CFR 15.19(c). Under this rule of Indian probate procedure, the appellees had sixty days from the filing of appellants' Notice of Appeal within which to submit written arguments to the Secretary. We believe that the appellees' failure to file within this time is a sufficient basis upon which to grant the appellants' motion to strike.

The Examiner found that there was insufficient evidence in the record to conclude that the decedent had been subjected to fraud, duress, coercion, or undue influence exerted by the Shaws in providing for them in her will. His original order and his decision on rehearing were based rather upon the following proviso contained in 25 U.S.C. § 373 (1964), dealing with the disposition of restricted Indian lands by will:

Provided further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator,

Exercising the discretion granted the Secretary by the above proviso, 1/ the Examiner disapproved the devises to the appellants primarily on the basis of evidence of William Shaw's gradual acquisition of Indian lands as a result of devises to him in the wills of four other deceased Indians. This evidence led the Examiner to conclude that approval of the devises to the appellants would contribute to the allowance of a practice whereby a white man could deplete the Indian ownership of land contrary to the congressional legislation designed to prevent such occurrence. We affirm the decision of the Examiner.

Appellants contend that evidence introduced at the rehearing relating to the transactions and relationships between William Shaw and numerous Crow Indians was inadmissible in that such evidence is not relevant or material to the probate of Mary U. Rock Wellknown's will.

An Indian probate proceeding involves considerations, as discussed below, which go beyond the conventional issues of a state probate proceeding and therefore the Secretary, in

1/ The Secretary's authority relating to Indian Probate matters has been delegated to Examiners of Inheritance. 25 CFR 15.1.

order to exercise appropriately his discretion as to the approval or disapproval of an Indian will, may consider evidence which would not be relevant in a state probate proceeding. We therefore turn to the evidence which warrants the exercise of discretion under 25 U.S.C. § 373 (1964) to disapprove the devises to the appellants in the will of Mary U. Rock Wellknown.

The appellant William Shaw has been the postmaster for over 30 years at Lodge Grass, Montana, an incorporated town located within the boundaries of the Crow Indian Reservation. The town has not been excluded from the reservation and is, therefore, in "Indian country." William Shaw became acquainted with the decedent in 1936, but it was not until the death of Mary Wellknown's son, Felix, in 1949 that William Shaw commenced a relationship with Mary Wellknown and her husband, John Wellknown, which involved supplying the Wellknowns with groceries, small amounts of cash, transportation, and other goods and services.

After the death of John Wellknown in 1951, William Shaw, on many occasions and over a period of many years, advanced money to Mary U. Rock Wellknown and her family for her care, furnished her or arranged for her to be furnished food and meals, and provided various other services for her benefit. William Shaw claimed that his basic expenditures toward the welfare of the decedent consisted of \$2,635.84 in cash payments of amounts between \$1 and \$20 paid from the years 1948 through 1964; \$1,237.37 in

checks dated between 1948 and 1964 payable to the order of the deceased or her family; and payment of grocery bills for the deceased and her family in the sum of \$2,054.36 starting in 1960 until just prior to the decedent's death. ^{2/} William Shaw's testimony was conflicting as to whether these expenditures were considered by him as loans or gifts. He made no effort to collect for his expenditures on behalf of the decedent during her lifetime or to preserve his legal right as a creditor in Mary Wellknown's estate by filing a claim for reimbursement of his expenses.

Richard Shaw is the son of William Shaw. He transported the decedent several times during her lifetime to a medical clinic in Sheridan, to the burial place of her son, Felix, from the business area in Lodge Grass to her home, and to and from other places. On several occasions he delivered to Mary U. Rock Wellknown food and coal purchased by his father. Richard Shaw did not file any claim against the estate as a creditor.

In addition to his occupation as a postmaster, William Shaw engaged in numerous business transactions with Crow Indians relating to personal loans, the sale of their crop shares, and the lease and sale of Indian lands.

^{2/} The appellants introduced into evidence a ledger book which William Shaw claimed was used to record the cash payments as they were made. Appellants also introduced the canceled checks and grocery bill receipts.

William Shaw made personal loans to Crow Indians, often accepting pawned goods as security. Etheline Hill pawned her personal goods with William Shaw to secure small loans at 25% interest. William Shaw admitted that he would withhold from mail delivery the per capita checks to an individual Crow Indian if such Indian owed him money.

William Shaw often prepared the contracts or deeds which formalized business transactions involving Crow Indians and, as a notary public, he often notarized such documents. On one occasion he prepared and notarized a document which Etheline Hill believed to be a mortgage on her \$6,000 home to secure a \$300 loan given to her by William Shaw as agent for a Mr. C. D. Moore. The document was, in fact, a warranty deed conveying Etheline Hill's house to C. D. Moore. Legal action was required in order for Mrs. Hill to clear her title upon repayment of the \$300.

William Shaw provided business services to both Crow Indian land owners and non-Indian lessees. He represented all of the twenty to twenty-five small operators around Lodge Grass in their lease arrangements of allotted lands owned by competent Crow Indians, furnishing them advice and services in dealing with the Indian allottees. His non-Indian clients leased about one-half of the total leased land in the Lodge Grass area. Mr. Shaw received a total fee of \$1,000 in 1969 for the services he rendered his non-Indian clients, the principal service being the obtaining of leases from Crow Indian land owners. He represented both the

non-Indian tenants and the Indian land owners in the same transactions and customarily gave the Indians "something" when they would sign leases. (Tr. p. 68)

In exchange for loans to Crow Indians, William Shaw entered into transactions with them whereby he purchased their crop shares in the lands they owned and leased for crop raising. In 1956 a bank loaned money to Martin Spotted Horse only on the signature of William Shaw and on condition that Shaw would guarantee the crop as security for the loan. Subsequently, Shaw prepared leases between Martin Spotted Horse and non-Indian tenants of his land whereby Shaw purchased portions of Martin Spotted Horse's crop shares under a crop-share agreement.

In 1963 William Shaw, personally and through his attorney, made efforts to obtain a fee patent for lands held in trust for an enrolled Canadian tribeswoman, Ila Mae Bear All Time, who inherited approximately 3,000 acres from her husband. If it were established that Ila Mae Bear All Time was not a citizen of the United States, she would have been entitled to ownership of the land free of trust. William Shaw intended to purchase this land from her for approximately \$40,000 in order to protect the interests of his white tenant clients using this land by insuring that their neighboring competitors would not obtain the land first. The Solicitor affirmed the ruling of the Crow Indian Agency Superintendent denying issuance

of the fee patents to Ila Mae Bear All Time who was deemed to be a United States citizen. 3/

William Shaw received an aggregate of 840 acres of allotted Crow Indian land by devise under the wills of deceased Crow Indians in four previous instances. Eighty acres of land were received under the will, dated March 28, 1950, of John F. Wellknown, the deceased husband of Mary U. Rock. His will contained the following provision:

The conveyance of the third devise to William T. Shaw, Jr., is made to him for the reason that he has helped my son, Felix F. Wellknown before his death, and he expressed the desire that I leave 80 acres of land to him, and I wish to carry out his wish. (Emphasis added.)

William Shaw inherited 520 acres from Clara White Hip by a will made in 1960. His relationship to her was of the same nature as his relationship to Mary Wellknown in that both regarded him as a son. He rendered assistance to Clara White Hip in the form of groceries, coal, and other goods and services similar to that provided for Mary Wellknown. William Shaw inherited 160 acres through the will, made in 1950, of Pup Plays With Himself with whom Shaw also had a relationship similar to his relationship with Mary Wellknown and Clara White Hip. William Shaw also rendered assistance to Mr. Bull Weasel who left him 80 acres in his will made in 1954.

3/ Letter decisions dated February 8, 1965, and April 19, 1965.

William Shaw's aid to Crow Indians was thus directed to those Indians who were owners of real property. Moreover, in each case, while the recipients of his assistance owned some lands in which they owned only a fractional interest, the devises to William Shaw in these four prior wills were in lands in which the testator owned a full interest. ^{4/} This enabled Shaw to obtain a fee patent to these lands, thus passing the lands out of Indian ownership, and then to sell the lands without restriction. Similarly, in the case of Mary U. Rock Wellknown, her fractional interest in several allotments was devised to several of her heirs, but the devises to Richard E. Shaw and William T. Shaw, Jr. consisted of either her own allotment or a portion of land in which she owned the total interest.

^{4/} A non-Indian owner of a fractional interest in land jointly owned by Indians subject to trust would find himself restricted in dealing with the property. He cannot, as a practical matter, manage, use, or lease the land except with the consent and agreement of all his Indian co-owners. His own interest, although free of the trust, is virtually unsaleable unless the trust is lifted as to all of his Indian co-owners upon their request. 25 CFR 121.2. Partition is provided for by statute if requested by the Indian co-owners. 25 U.S.C. §378 (1964); 25 CFR 121.8. Allotted lands devised to a non-Indian where the devise is approved are subject only to a dry and passive trust. The sole remaining power of the United States as trustee is to issue a fee patent to the non-Indian devisee. See *Bailess v. Paukune*, 344 U.S. 171 (1952).

We believe that William Shaw's role as a postmaster and a notary public placed him in a position of public trust. ^{5/} However, we find that his transactions with Crow Indians demonstrated a pattern of dealing with them for the undisclosed purpose of obtaining personal financial gain. This finding leads us to conclude that the devises to the appellants in the will of Mary U. Rock Wellknown were the result of the moneys, goods, and services advanced by William Shaw to the decedent during her lifetime for the purpose of acquiring her land by devise.

The question is presented as to whether our findings warrant the exercise of the Secretary's discretion to disapprove the devises to William Shaw and his son under the authority of 25 U.S.C. §373 (1964). The resolution of this question requires an examination of the statutory scheme designed for the protection of Indians. Federal legislation relating to the allotment of restricted lands to Indians has been designed primarily for the protection and benefit of the Indians. See Poafpybitty v. Skelly

^{5/} The Code of Ethical Conduct for Postal Employees, Ch. 7, Postal Manual, Sec. 742.13 (1968) states:

The postal service has the unique privilege of having daily contact with the majority of the citizens of the Nation, and is in many instances their most direct contact with the Federal Government. Thus, it is an especial opportunity and responsibility for each postal employee to act with honor and dignity worthy of the public trust

Oil Co., 390 U.S. 365 (1968); Squire v. Capoeman, 351 U.S. 1 (1956); United States v. Daney, 370 F.2d 791 (10th Cir. 1966); Big Eagle v. United States, 300 F.2d 765 (Ct. Cl. 1962).

The General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified in scattered sections of 25 U.S.C. (1964)), authorized the President to allot Indian reservation lands in severalty. Section 5 of the Act provided that the allotted lands would be held in trust for the sole use and benefit of the Indian or, in case of his death, for his heirs. It was provided that conveyances of or contracts concerning the allotted lands made prior to expiration of the trust period would be "absolutely null and void" and there was no provision whereby an Indian could devise his trust allotment by will.

By a series of enactments, Congress has gradually eased some of the restrictions of the General Allotment Act and has given the Indian more control over the utilization and disposition of his lands. These statutes, however, have always provided that transactions relating to Indian lands must be with the approval of the Secretary of the Interior.

The Act of May 27, 1902, 25 U.S.C. §379 (1964), permitted the adult heirs of any deceased Indian owning interest in a restricted allotment to sell and convey the lands inherited from such decedent, subject to the approval of the Secretary. The Act of May 29, 1908,

25 U.S.C. § 404 (1964), provided that the allotted lands of an Indian may be sold upon the petition of the allottee or his heirs, and the Act of March 1, 1907, 25 U.S.C. §405 (1964), provided for the sale of the allotment of a noncompetent Indian. Both of these latter acts provided that the sale must be on such terms and conditions and under such regulations as the Secretary of the Interior may prescribe. ^{6/}

The Act of June 25, 1910, 25 U.S.C. § 202 (1964) provides that:

It shall be unlawful for any person to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land or any interest therein held by the United States in trust for such Indian,

A criminal penalty is imposed for violation of this statute.

The general policy to keep Indian trust property in Indian hands is further exemplified by the Act of November 24, 1942, 25 U.S.C. § 373a (1964), which provides that the trust or restricted estate of an Indian who dies intestate without heirs escheats, not to the State or to the United States, but to his tribe.

These statutes exhibit a concern on the part of Congress to protect Indians against alienation of their lands due to improvident inter vivos conveyances. This same concern is demonstrated in

^{6/} The Secretary's regulations relating to approval of petitions for the sale of Indian lands provide:

Sales will be authorized only if, after careful examination of the circumstances in each case, a sale appears to be clearly justified in the light of the long-range best interests of the owner(s). 25 CFR 121.11.

the statutes relating to the disposition by will of an Indian's lands held in trust.

The Act of June 25, 1910, as amended, 25 U.S.C. § 373 (1964), authorized an Indian allottee to devise by will property held in trust for said allottee; but the act qualified this right of disposition by the following language:

Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior:
Provided further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator,

The act additionally provided that the approval of an allottee's will by the Secretary and the death of the allottee shall not operate to terminate the trust of the land.

Congress was thus entrusted the Secretary with the role of protecting Indians against alienation of their lands by either improvident inter vivos transactions of an allottee or his heirs or by improvident dispositions of allotted Indian lands by the will of the allottee. We therefore believe that Congress intended to give the Secretary flexibility in considering all the circumstances relating to the potential benefit or detriment to Indians as a result of approving or disapproving a given conveyance or devise, and we therefore hold that evidence relating to the transactions and relationships between William Shaw and Crow Indians was properly admissible in this case.

The question remains - is this a proper case for the exercise of the Secretary's discretion to disapprove a will?

The question of the scope of the Secretary's discretion to disapprove a will under the authority of 25 U.S.C. § 373 (1964) was before the Supreme Court in Tooahnippah v. Hickel, 397 U.S. 598 (1970). The Court there held that the Secretary cannot disapprove a will based upon his subjective opinion that approval of such will would not achieve a just and equitable disposition of the estate as between the beneficiaries under the will and the decedent's heirs at law. The Court recognized, however, that the Secretary was authorized under 25 U.S.C. § 373 (1964) to disapprove a will under certain circumstances that might not otherwise be a valid basis for disapproval of a will in a conventional probate proceeding because of the Secretary's special role under the statutes as the trustee of Indian lands, stating at 609:

The power to make testamentary dispositions arises by statute; here we deal with a special kind of property right under allotments from the government. The right is not absolute; the allottee is the beneficial owner while the government is trustee. 25 U.S.C. 348.

In his concurring opinion Justice Harlan amplified the view expressed by Chief Justice Burger's majority opinion, summarizing at 619:

A will that disinherits the natural object of the testator's bounty should be scrutinized closely. If such a will was the result of overreaching by a beneficiary, or fraud; if the will is inconsistent with the decedent's existing legal obligation of support, or in some other way offends a similar public policy, . . . the Secretary might properly disapprove it (emphasis added).

We believe that it is a proper exercise of discretion for the Secretary to disapprove a devise in the will of an Indian allottee where approval of such devise would be contrary to the public policy designed for the protection of Indians against the improvident alienation of their lands.

We have found that William Shaw provided Mary U. Rock Wellknown with financial and other assistance for the purpose of obtaining a portion of her land through a devise in her will and that William Shaw followed this tactic in the case of four other Indian allottees who owned a full interest in land. We do not believe Congress intended that Indian lands were to be alienated in this manner upon giving Indians the right to transfer their allotments through testamentary disposition.

Approval of the devises to William Shaw and Richard Shaw would sanction a practice whereby individuals may obtain Indian lands for inadequate consideration. Under such practice, the value of the land devised may well be disproportionate to the value of the assistance which an individual may render to an allottee of Indian lands. This arrangement may not operate to the detriment of the

allottee, who receives immediate assistance without any obligation to reimburse the source of assistance during the allottee's lifetime, but the heirs of the allottee are deprived of the land or the full value thereof which they would otherwise receive.

We note that nothing prevented William Shaw from filing a timely claim as a creditor in the estate of Mary U. Rock Wellknown under the contention that his expenses on her behalf were with the expectation of reimbursement. This fact indicates that were we to approve the practice engaged in by William Shaw, an Indian allottee could devise land to one such as William Shaw with the intent to reimburse him for assistance rendered, without knowledge on the part of the Indian allottee that a creditor's claim would also be filed against his estate.

We do not decide here whether the value of the lands received by William Shaw and Richard Shaw exceeds the value of their services rendered to Mary U. Rock Wellknown since our holding is based upon disapproval of the practice per se engaged in by William Shaw. We do emphasize, however, that such a practice is particularly offensive to public policy where, as here, it results in the transfer of Indian lands to a white man who is employed in a federal position of public trust in the Indian community.

We hold that this is an appropriate case wherein the Secretary may exercise his discretion, under authority of 25 U.S.C. § 373 (1964), to disapprove a will.

The appellants contend that the Examiner did not have authority to disapprove parts of Mary U. Rock Wellknown's will, but that a will can only be disapproved in its entirety.

Appellant's argument is contrary to the general rule:

A will which is presented for probate may be valid in part and invalid in part; the invalid provisions may be severable from the valid provisions. In a case like this, the invalidity of part of the will does not prevent the probate of, at least, the valid part of the will; and it is error to exclude the whole will from probate because of such partial invalidity. 3 Bowe-Parker: Page on Wills § 26.111 (New Revised Treatise 1961).

Since the clauses held invalid by the Examiner are severable, we hold that he was authorized to disapprove them. See Estate of Milton Holloway, 66 I.D. 411 (1959).

In their Notice of Appeal, the appellants attached a prior will of the decedent dated February 12, 1953, and a codicil to that will dated April 21, 1959, each of which indicates a devise to William T. Shaw, Jr. The appellants contend that these documents indicate Mary U. Rock Wellknown's past and continuing intention to devise allotted lands to William Shaw, Jr. Appellants did not offer the prior will and codicil into evidence but claim on appeal that the Examiner should have known or could have found out about these documents, and he is therefore responsible for failing to develop

a complete record. We disagree with the appellant's attempt to include such evidence into the record on this basis, but even so, we find that the prior will and codicil are not relevant because the intent of the testator is not at issue in this case.

The Decision and Order of the Hearing Examiner are affirmed. Clauses five and seven of the testatrix's will are disapproved, and we order that the property described in such clauses be distributed under the Montana laws of intestacy in accordance with the Examiner's Decree of Distribution dated January 8, 1968. This decision is final for the Department. 35 F.R. 12081.

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

Concur:

//original signed
David Doane,
Alternate Board Member

Dated: May 21, 1971