



INTERIOR BOARD OF INDIAN APPEALS

Estate of Catalina Clifford

9 IBIA 165 (01/29/1982)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF CATALINA CLIFFORD

IBIA 81-19

Decided January 29, 1982

Appeal from order by Administrative Law Judge Keith L. Burrowes approving will and ordering distribution.

Affirmed as modified.

1. Indian Probate: Wills: Testamentary Capacity: Witnesses' Testimony

Where the agency clerk to whom decedent dictated her will had known the decedent and her family since youth and the clerk's testimony established that the testatrix knew the nature and extent of her property, remembered and directed devises of trust property to each of her surviving children, and had made a testamentary plan by which she wished to distribute her property, the fact that one of her children ultimately benefited more than any of the others did not tend to show the decedent lacked testamentary capacity, nor was the testamentary plan unreasonable under the circumstances.

2. Indian Probate: Wills: Testamentary Capacity: Witnesses' Testimony

Where the witnesses to an Indian will were agency clerks who were acquainted through prior business dealings with decedent and testified they knew her to be the competent manager of a farm composed largely of trust lands which she was instrumental in acquiring through land purchases, exchanges, and leases which she arranged, the testimony of a group of treating physicians concerning the effect of two amputations upon decedent's overall health did not tend to contradict the witnesses' testimony that

decedent was competent to make a will, nor did the fact that decedent had become an invalid indicate that she lacked competence to make a will.

3. Indian Probate: Wills: Generally--Indian Probate: Administrative Procedure: Applicability to Indian Probate

The Administrative Procedure Act, which is applicable to proceedings in Indian probate, requires that the factfinder develop a sufficient record to support his findings and conclusions. Where the record fails to support inconsistent findings by the factfinder below concerning periods of incompetence of the decedent prior to execution of a will found to be valid, the Interior Board of Indian Appeals will, on appeal, limit the conclusions of law to conclusions which are based upon the record. The Board finds that the factfinder's assertion that decedent was "confused" prior to the execution of her valid will in 1977 is not supported by the record developed at hearing, nor is a finding that influence was exerted upon her at times not relevant to the probate proceeding based upon evidence of record.

APPEARANCES: Ronald Clabaugh, Esq., for appellants Mortimer Clifford, Evelyn Clifford Ballard, and Gloria Clifford Stone; Lawrence E. Long, Esq., for appellee Calvin Clifford.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On June 29, 1978, Catalina Clifford, the beneficial owner of interests in trust real property administered by the Department died at Gordon, Nebraska, at the age of 83. She was survived by four children, all parties to this appeal. Her will dated November 1, 1977, was approved by the Administrative Law Judge's order dated October 29, 1980, based upon findings of fact and conclusions of law also dated October 29, 1980. While the devises appearing in the will are not apparently disproportionate, the record establishes that decedent had, shortly before executing her will, transferred the bulk of her trust property to appellee Calvin Clifford. It is this circumstance upon which appellants base their arguments that the will was obtained by undue influence, arguing that the disposition of decedent's lands by will and gift deed, taken together, show an unnatural scheme which,

under the circumstances, could not represent the true wishes of the testatrix. They also argue, somewhat inconsistently, that their mother was incompetent to make the will and execute the gift deeds by reason of physical and mental infirmity resulting from old age and disease. This contention seeks to find support in stated conclusions in a later order dated January 8, 1981, inconsistent with the ultimate holding made by the factfinder below. Appellants also contend a presumption that undue influence was practiced upon decedent is available under the circumstances of decedent's living arrangements as shown by the recorded testimony.

[1] The limitations imposed upon an Indian testatrix to dispose of her trust property are defined by the holding in Tooahnippah v. Hickel, 1/ which indicates that a will executed in conformity to Departmental regulation is valid, absent proof of the successful imposition of the will of another for that of the testatrix. 2/ The Secretary is without power to rewrite wills otherwise in conformity to Departmental regulation, simply because the testamentary scheme does not conform to popular or personal notions of fairness. 3/ Here, the testimony of the subscribing witnesses and the parties themselves establish that the November 1977 will made by decedent conforms to the requirements of Departmental regulation, and that, considering all the circumstances of the parties there was neither undue influence nor was decedent incompetent at any time relevant to the issues raised concerning her November 1, 1977, will.

The testimony by the agency clerk, who both prepared the will at decedent's direction and acted as an attesting witness, establishes that she knew the decedent and had known both her and her family for over 20 years. While the clerk was employed at the agency real estate office at Pine Ridge, South Dakota, she had observed decedent at work

1/ 397 U.S. 598 (1970). Numerous Departmental decisions have considered these same issues since 1970; for a discussion of those opinions, see Estate of Ronald Richard Saubel, 9 IBIA 94, 88 I.D. 993 (1981).

2/ But see the concurring opinion in Tooahnippah v. Hickel, 397 U.S. 619, where Justice Harlan opined that wills disinheriting certain persons should be carefully considered

“[i]f 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 clearly offends a similar public policy; or if the disinheritance can be fairly said to be the product of inadvertence * * *.”

The testamentary circumstances in this case are also examined against this stated standard.

3/ In Akers v. Morton, 499 F.2d 44 (9th Cir. 1974), cert. denied, 423 U.S. 831 (1975), the Court, following Tooahnippah, affirmed the Secretary's approval of a will disinheriting a wife even though the circumstances favoring the wife's claims were most compelling.

building the estate which is the subject of this appeal. She had numerous business dealings with decedent, many of which concerned the trust property owned by decedent. She considered decedent to be a shrewd businesswoman who was inclined to be aggressive and independent to the point of oppressiveness. Decedent was a woman who knew her own mind and did not tolerate incompetence or intrusiveness in others. One did not question her too closely about her private affairs, for such inquiry would not be tolerated.

The testimony of the other attesting witness corroborated the testimony of the principal witness exactly. The second witness also observed the decedent as she dictated her will to the clerk who prepared the written instrument, and opined that the manner in which the directions were given were those of a person who knew what she wished to do. Decedent carried with her a plat of her holdings, and referred to the plat while she directed the planned division of her remaining lands to the clerk who was to write out the decedent's plan in testamentary form.

Prior to making the will, decedent had executed gift deeds of the bulk of her trust property to appellee. This transaction was clearly consistent with her testamentary plan, and inquiry into it was relevant to determine the validity of the November 1 will and decedent's mental state at the time she made the will. In an application for approval of a part of the transfer made in 1976, which was also handled by the same clerk who prepared the will, decedent declared it was her intention to transfer her land to appellee in order to enable her farm to remain together as an operational unit. ^{4/} While appellants and another witness, Ethel Merrival, sought to characterize decedent's wishes somewhat differently, their testimony does not directly contradict decedent's

^{4/} Deposition of Donna Mae Pourier at 32-33:

"Q. * * * 'to keep the ranch in operation'?"

"A. That's what she told me.

"Q. That's why she wanted to give it to Calvin?"

"A. That's what she said.

"Q. Did she tell you why she wanted to--or why she thought it was necessary to do that, in order to keep the ranch in operation?"

"A. You didn't ask her those kinds of questions. She just told me what she wanted to do.

"Q. What did she tell you?"

"A. That's just--I wrote just what she said.

"Q. That's all that was--

"A. * * * 'to keep the ranch in operation,' she said. 'I want him to keep that place going.'

"Q. You didn't ask any more questions than that?"

"A. Huh uh.

"Q. Felt it wasn't any of your business?"

"A. Right. If you knew Catalina, you would, too."

clear statement of intention to the clerk. Decedent's statement of intention, considered within the context of decedent's own circumstances, appears to be a rational testamentary plan consistent with her actions over an extended period, to leave the bulk of her trust estate to a male surviving heir who would actively pursue a farm business through use of the trust lands.

The record establishes without conflict of any kind that at the time decedent made her will on November 1, 1977, she was a woman in her 80's who had accumulated over 3,500 acres of trust land. She had five children: Appellants, appellee, and Sidney Clifford. Until 1964 the trust land owned by decedent was worked as a single unit by decedent's husband and Sidney Clifford, who was decedent's youngest son and who had never married. While each of her other children helped work the land, it was operated principally by decedent, her husband, and her son Sidney.

In 1964 decedent's husband died. From 1964 to 1976, the day-to-day farm work was done for the most part by Sidney. During this time appellant Ballard owned a majority of the cattle on the decedent's trust land. From the early 1940's until 1972, appellee Calvin Clifford and his wife, Jeanette, lived at Rapid City, South Dakota. They periodically returned to decedent's ranch to provide assistance during roundups and at other times when the farm demanded extra labor. In 1972 appellee returned to the Pine Ridge reservation.

From 1964 to 1976, decedent's youngest son, Sidney, remained on the ranch with her and cared for her needs. He provided companionship and her principal care and support. He was the farm's operator and chief worker. On August 12, 1976, Sidney died. After his death, appellee took over the daily farm work that had been performed by his brother. Shortly after Sidney's death, decedent, who was diabetic, underwent minor surgery on her right foot. For reasons that are not fully explained by the medical experts who testified, gangrene developed in her foot. Sixty days after the death of Sidney, decedent was hospitalized at Gordon, Nebraska, with this diagnosis:

An eighty year old lady who had a toenail removed from the toe two to three weeks ago, and that she developed infection and blackness of the toe. She's diabetic for more than fourteen years. She had had difficulty with her vision, and recently had a cataract operation. She had no heart problems * * *.

The admitting physician also noted decedent had some obstructive pulmonary disease. 5/

Just prior to decedent's hospital admission on October 13, appellee's wife took decedent to the agency realty office to prepare

5/ Deposition of Thomas H. Wallace at 3-4.

a will. When decedent appeared at the office, according to the testimony of the agency clerk, she appeared to be apprehensive. She said, "They are going to cut my foot off." Later, the same agency clerk was called to the Gordon hospital on October 17, 1976, to prepare another will. ^{6/} The second will was prepared 1 day before the amputation of decedent's right leg below the knee. These wills were later destroyed by decedent; they are not now an issue in this proceeding.

At the same time the will was prepared on October 17, 1976, Catalina Clifford executed two deeds conveying 800 acres to appellee. In November 1976, decedent's right leg was amputated again, this time above the knee. On December 7, 1976, a hearing was held involving probate proceedings in Sidney Clifford's estate. Decedent appeared at that hearing with her friend and advisor, Ethel Merrival. At the hearing decedent testified in answer to questions by the Administrative Law Judge concerning her estate planning and the consequences of her son's death.

The apparent meaning of her testimony ^{7/} is that appellee is to be substituted for his brother in decedent's testamentary scheme. If not immediately clear, the fact of his substitution is later clarified by decedent's actions taken in 1977. Her statement to the Administrative Law Judge at her son's probate hearing is consistent with the directions given by decedent to the agency clerks when she later conveyed the bulk of her estate to appellee and then executed the November 1, 1977, will dividing the remainder among her surviving children.

[2] The testimony of four treating physicians appears in the record: The two surgeons who performed amputations of decedent's foot and lower leg in 1976, a general practitioner who treated decedent's diabetes in 1977 and 1978, and a neurologist to whom decedent was referred for a single examination in October 1977. ^{8/} The physicians agree that decedent was an invalid from shortly before the amputation of her foot in 1976 until her death. She suffered from poor eyesight, diabetes, and apparently had a stroke and experienced some heart problems. Her diabetes was generally controlled by medication. Although decedent was clearly dependent physically on whomever she was staying with, there is no testimony to establish she was emotionally or mentally dependent upon anyone else. The testimony of the two attesting witnesses to her will that she was competent is uncontradicted by any

^{6/} Deposition of Donna Mae Pourier at 20.

^{7/} The record of Sidney Clifford's probate hearing is not part of the record in this proceeding; the parties and the Administrative Law Judge quote extensively from the proceeding (Appellant's Brief at 5; Appellee's Brief at 13). There is no dispute concerning the accuracy of the quoted matter. The parties disagree, however, concerning the meaning of the reported statement.

^{8/} Depositions of Thomas H. Wallace, James Panzer, Frederick Van Saun, and John Daniel Sabow.

other testimony in the record, including that of the four medical witnesses, although several witnesses seem to confuse or equate the fact that decedent was an invalid with a conclusion that she was incompetent. On the record presented, there is no basis for such a conclusion. Decedent had a plan of long duration for the disposition of her lands; while she altered her plan to compensate for a changed condition caused by the death of her youngest son, her ability to adjust to change indicates, if anything, a continuing mental capability and intelligence. The change made was not a radical departure from her declared prior plan, since it merely substituted one son for another as the principal proprietor of the trust estate. Indeed, her piecemeal conveyance to appellee coupled with retained ownership of a substantial acreage indicates the caution with which she was independently planning the division of her estate.

[3] The factfinder below also confuses physical incapacity with mental incompetence. After finding the November 1 will to be valid and ordering distribution in accordance with the will, he then, on January 8, 1981, in affirming his prior order, finds that a number of previously executed wills and deeds by decedent were obtained by undue influence. This curiously unnecessary conclusion is not based upon any finding of fact earlier announced by him, however, nor upon evidence produced at the probate hearings, but upon an error of law concerning the effect of a guardianship proceeding in tribal court.

The record indicates that appellant Gloria Stone initiated the tribal court proceeding, ^{9/} which terminated inconclusively. ^{10/} Appellee received from decedent a power of attorney of some sort at the conclusion of this proceeding. Decedent remained with appellee until May 1978, when she moved in with appellant Stone for the last weeks of her life. From this, the factfinder concluded that there had been a "confidential relationship" between appellee and decedent and then concludes that appellee practiced "undue influence" upon decedent at the time the gift deeds and prior wills were executed. Whether these circumstances constituted a "confidential relationship" is doubtful. Nonetheless, had they done so, decisions of the Department do not permit a presumption of irregularity based upon the existence of such a relationship absent a showing of the four elements described in Estate of Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971). ^{11/} Thus, in this case, if appellants are to prevail, it must be shown the testatrix was (1) susceptible to influence, (2) from appellee who was able to control her effectively,

^{9/} Deposition of Gloria Stone at 33-34.

^{10/} Deposition of Calvin Clifford at 69-71; deposition of Jeanette Clifford at 23-24.

^{11/} State law does not control Indian probate proceedings. Estate of Green, 3 IBIA 110, 81 I.D. 556 (1974). Robedeaux, *supra*, has been consistently followed by the Department since 1971. See Estate of Charles Hall, Sr., 8 IBIA 53, 64 n.15 (1980).

(3) when he performed actions which resulted in the execution of the will of November 1, 1977, which (4) contains a testamentary scheme contrary to decedent's wishes.

Susceptibility is not shown by proving that decedent was diabetic and an invalid. ^{12/} Nor does residence in the house of a beneficiary of the will establish that the beneficiary had the power to effectively control his mother's testamentary act. ^{13/} Although appellee participated as a party to some proceeding in tribal court affecting his mother, there is no showing that his participation was inimical to her interests or contrary to her wishes so as to alter her decision for the plan of the November 1, 1977, will. Finally, the entire record indicates a pattern of estate planning by decedent extending more than 10 years into the past which culminated in the November 1977 will. Every action on her part respecting her trust estate is consistent with her statement to the agency clerk recorded in 1976 when she applied for a gift deed of part of her holdings to appellee that she wished appellee "[t]o keep the ranch in operation." ^{14/}

The record establishes that the conclusion by the factfinder below that decedent was "confused" as a result of adversity which made her susceptible to undue influence by appellee during the period from August 1976 until January 1977 is without recorded basis; also implicit in the holding is an assumption that decedent's failing health affected her mental state which is nowhere supported by the recorded evidence. More, the holding is unnecessary to a disposition of the matter before the Administrative Law Judge, who correctly ruled that he lacked the competence to inquire into the validity of the deeds to appellee except insofar as the circumstances of the making of the deeds and the previous wills served to explain the circumstances of the testamentary act by decedent on November 1, 1977.

The confusion of mental incompetence with physical infirmity by the Administrative Law Judge also appears a factor in a second conclusion stated in his order of January 8, 1981, which directly contradicts his first holding concerning undue influence:

There is no doubt in my mind that Catalina Clifford was incapable of making a rational decision concerning her property between August of 1976 and January of 1977. There is also no doubt in my mind that she was capable of making such a decision between January of 1977 and April of 1978. The medical testimony and the testimony of all those who had business dealings with her during this period substantiate this fact. She may well have been influenced by

^{12/} Estate of Hunts Along Hale, 8 IBIA 8, 87 I.D. 64 (1980).

^{13/} Estate of Caddo, 7 IBIA 286 (1979).

^{14/} Deposition of Donna Mae Pourier at 33; deposition Exhs. 8 and 9.

Calvin, her only child who had anything to do with her the last many months of her life, but there is no evidence that such influence, if any, was undue.

Besides being contradictory of the earlier conclusion that undue influence was present in this case, the stated conclusion that decedent was incompetent prior to making the 1977 will is unsupported by the record and appears without any prior factfinding by the Administrative Law Judge to support it. While decedent was sick several times during the 6-month period indicated, neither the evidence concerning her hospitalization nor the testimony about her subsequent surgery indicates she had become mentally incompetent. This finding, like the one preceding it, is irrelevant to the probate of the 1977 will. Both findings are erroneous, and both are disapproved. ^{15/}

Accordingly, the Board finds that the will dated November 1, 1977, expressed the will of a competent testatrix not unduly influenced by any person. Conclusions of the Administrative Law Judge not consistent with this finding and with the other findings of fact stated in this decision are disapproved; except as so modified, the order approving will and the findings of fact and conclusions of law dated October 29, 1980, are affirmed. Distribution according to the provisions of the will dated November 1, 1977, as previously ordered is approved pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1.

This decision is final for the Department.

//original signed
Franklin D. Arness
Administrative Judge

We concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge

//original signed
Jerry Muskrat
Administrative Judge

^{15/} Findings which are unnecessary to the determination of inheritance are not properly part of the decision. Estate of Rena Marie Edge, 7 IBIA 53 (1978). As counsel for appellee observes in his brief, such gratuitous observations merely add confusion and complicate the review process.