



INTERIOR BOARD OF INDIAN APPEALS

Andrew Harry Racine v. Rocky Mountain Regional Director,
Bureau of Indian Affairs

36 IBIA 274 (08/21/2001)



United States Department of the Interior

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

ANDREW HARRY RACINE, Appellant	:	Order Dismissing Appeal
	:	
	:	
v.	:	
	:	Docket No. IBIA 01-2-A
ROCKY MOUNTAIN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	
	:	
	:	August 21, 2001

This is an appeal from an August 14, 2000, decision of the Rocky Mountain Regional Director, Bureau of Indian Affairs (Regional Director; BIA), declining to void a 1991 gift deed by which Andrew Harry Racine, Blackfeet Allottee 3246 (Appellant), conveyed trust property to his niece Winnifred Salois McNeely (McNeely). ^{1/} Appellant's appeal was filed for him by his niece Carol Racine Pepion Gilham (Gilham), who holds a durable power of attorney for him and has been appointed his conservator/guardian by the Blackfeet Tribal Court.

For the reasons discussed below, the Board dismisses this appeal.

On March 18, 1991, Appellant applied to the Blackfeet Agency, BIA, to gift deed the property to McNeely. He gave as his reason for wanting to give the property to her: "Because I want a place to be able to use as my own for as long as I want and to scatter my ashes. I do not to [sic] sell and I do not want a big fight over my property after I'm gone." On April 3, 1991, the Agency Realty Officer recommended disapproval of the deed, stating in handwritten notations on a form worksheet, "can do this by will" and "do a letter." These notations evidently referred to advice he had given Appellant. In apparent response to the advice to "do a letter," Appellant prepared a letter explaining in more detail his reasons for wanting to gift deed the property to McNeely. Although undated, the letter was presumably signed on April 3 or 4, 1991. In the letter, which was notarized, Appellant expanded upon the statements he made in his application. He explained that he had no wife or children and emphasized his wish to prevent a disagreement over the property after his death. In conclusion, he stated: "The main reason I want to gift deed it to her is I know that she will always take care of it, and won't sell it, or wreck the place and I will always be able to use it whenever I come back to the country."

^{1/} The subject property is a 1.5 acre tract in Lot 14, sec. 27, T. 35 N., R. 14 W., Principal Meridian, Montana.

Appellant's original application was revised on April 4, 1991, to show the reservation of a life estate to Appellant. Appellant's initials appear next to that annotation, with the handwritten date "4.4.91." On April 4, 1991, the Realty Officer recommended approval of the gift deed, indicating that Appellant's letter described special circumstances 2/ and noting that Appellant had also devised the property to McNeely in his will. On the same day, the Superintendent approved the Realty Officer's recommendation.

On August 13, 1991, the Agency notified Appellant that the gift deed was ready for signature. Appellant signed the deed on August 20, 1991, before a notary. The Superintendent approved the deed on August 30, 1991.

On June 9, 1997, Appellant wrote to the Superintendent, asking him to void the gift deed. The Superintendent declined to do so, stating that the deed was a binding legal document. Appellant appealed to the Regional Director (then the Billings Area Director). On September 23, 1997, the Regional Director affirmed the Superintendent's decision. At page 3 of his decision, he stated:

The Statement of Reasons submitted on your behalf by your legal counsel claims that the gift deed was in some way induced by coercion, fraud and undue influence. A September 9, 1997, reply from [McNeely] answered to those reasons. The record before me contains insufficient evidence to substantiate that ". . . the deed was procured by duress."

CONCLUSION:

In considering your application and other documentation for disposal, we conclude that "special circumstance" was sufficient to support a decision to approve a conveyance of property for less than fair market value.

The Regional Director informed Appellant of his right to appeal his decision to the Board. Appellant did not appeal.

2/ 25 C.F.R. § 152.25(d) provides:

"Gifts and conveyances for less than the appraised fair market value. With the approval of the Secretary, Indian owners may convey trust or restricted land, for less than the appraised fair market value or for no consideration when the prospective grantee is the owner's spouse, brother, sister, lineal ancestor of Indian blood or lineal descendant, or when some other special relationship exists between the grantor and grantee or special circumstances exist that in the opinion of the Secretary warrant the approval of the conveyance."

McNeely died on February 4, 1999. On November 12, 1999, Gilham wrote to the Superintendent requesting, on behalf of Appellant, that Appellant's gift deed be nullified in light of McNeely's death. ^{3/} Gilham stated that Appellant "expressed a desire that the Gift Deed not to [sic] be directly passed on to any of [McNeely's] heirs." The Superintendent denied the request on July 5, 2000, stating: "The [gift] deed contained no clause that in the event the grantee predeceased [Appellant]; it would revert back to [Appellant]. * * * The only way [Appellant] can obtain the tract of land back now, would be for the heirs of [McNeely] to give the land back to [Appellant]."

Appellant, through Gilham, appealed the Superintendent's July 5, 2000, decision to the Regional Director. Gilham stated:

My appeal is based upon the following theories:

1. CAPACITY: My uncle did not have the capacity to convey the property in question at the time the deed was executed because:

- a. He could not hear properly
- b. His mental capacity was diminished

2. DURESS: My uncle was under duress at the time of the conveyance of the deed because Ms. McNeely threatened him with the prospect that his renters would force him out of his property.

3. MISTAKE: My uncle thought that he was signing a will not a deed. He thought he could revise it by codicil.

In his August 14, 2000, decision, the Regional Director noted that the gift deed had been the subject of an earlier appeal filed by Appellant. Thus, while he repeated much of the analysis included in his September 23, 1997, decision, he ultimately dismissed Appellant's second appeal in light of the earlier appeal proceedings.

On appeal to the Board, Appellant makes the same arguments he made in his second appeal to the Regional Director. Responses have been filed by Robin K. Foote, McNeely's daughter, and by Debra Kipling. Both dispute Appellant's allegations concerning McNeely.

^{3/} Gilham enclosed a copy of the power of attorney, dated June 16, 1997, by which Appellant authorized her to act for him.

The Regional Director's dismissal of Appellant's second appeal was, in effect, based on the doctrine of res judicata, although the Regional Director did not use that term. Concerning the doctrine, the Supreme Court stated in Commissioner v. Sunnen, 333 U.S. 591, 597 (1948):

The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." Cromwell v. County of Sac, 94 U.S. 351, 352 [1877]. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.

See also Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 578-79 (1974).

The Board has held that the doctrine of res judicata applies to proceedings before the Board and may bar a second appeal in the same matter. Cermak v. Acting Minneapolis Area Director, 32 IBIA 77 (1998).

In his first appeal to the Regional Director, Appellant contended that his execution of the gift deed was induced by coercion, fraud and undue influence. The Regional Director rejected those contentions. When Appellant failed to appeal the Regional Director's September 23, 1997, decision, despite being given proper appeal instructions, the Regional Director's decision became final for the Department of the Interior. 25 C.F.R. § 2.6(b).

In his second appeal, Appellant made three contentions, one of which (duress) is essentially the same as the contentions he made in his first appeal. In addition, he now contends that he lacked the capacity to execute a gift deed in 1991 and that he executed the deed by mistake, thinking it was a will.

The Board concludes that Appellant's duress claim is barred here because it was raised by Appellant in his earlier appeal to the Regional Director and addressed by the Regional Director in his September 23, 1997, decision)) a decision which, as noted above, is now final for the Department. The Board further concludes that, because Appellant is seeking the same relief he sought in his earlier appeal (voiding of the gift deed) and could have made his lack of capacity and mistake arguments at that time, those arguments are now barred as well. 4/

4/ As noted above, Appellant was represented by an attorney in his first appeal. His attorney was undoubtedly aware of the doctrine of res judicata.

Even if his new arguments were not barred by res judicata, Appellant could not prevail here. It was not until he reached the Board and his opening brief was due that Appellant made any attempt to support his contention that he lacked the capacity to execute a gift deed in 1991. ^{5/} Further, the materials he submitted (which he filed in lieu of a brief) are unpersuasive. ^{6/} If the Board were to consider those materials, it would be guided by its well established caselaw on the analogous subject of testamentary capacity. See, e.g., Estate of Leona Ketcheshawno Waterman Ely, 20 IBIA 205 (1991); Estate of Virginia Enno Poitra, 16 IBIA 32 (1988) (To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of his bounty, the extent of his property, or the desired distribution of that property. Further, the evidence must show that this condition existed at the time of execution of the will). Under standards corresponding to these, Appellant's materials would be entirely inadequate to show that Appellant lacked the capacity to execute a gift deed on August 20, 1991, the date on which the deed was executed, or during March and April 1991, when he applied for the gift deed.

Appellant submits no support whatsoever for his contention that he executed the gift deed by mistake, believing it to be a will.

Therefore, even if Appellant's new arguments were to be considered on the merits, they would have to be rejected.

^{5/} Indeed, as noted above, Appellant did not even make this contention, let alone support it, when he made his second request to the Superintendent to void the gift deed. The only reason he gave for his request at that time was that McNeely had died.

^{6/} The bulk of these materials consists of 14 identically worded affidavits stating:

"I, (name of affiant), hereby state that I personally knew [Appellant] around the time of March, 1991. I also knew him prior to that time and I have known him since that time. I know that he was and is very hard of hearing. I know that he was and is functionally illiterate, and for the most part unable to read or write. He was 79 years old at that time and on the verge of a diagnosis of Alzheimer's [sic] disease. I therefore believe that he did not understand the meaning of the gift deed which he signed to [McNeely] in March of 1991. He has since changed his mind and states that he did not intend to give the property to Ms. McNeely."

A 15th affidavit contains the above-quoted paragraph and an additional paragraph which is not relevant to the question of Appellant's capacity to execute a gift deed. Among the remaining materials, the only arguably relevant item is a medical report from October 1993 which, in that it makes no mention of the possibility of Alzheimer's disease, clearly appears to contradict the assertion that Appellant was on the verge of a diagnosis of Alzheimer's disease in March 1991.

In accordance with the discussion above, and pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal is dismissed as res judicata. 7/

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

7/ In light of its disposition of this appeal, the Board finds it unnecessary to reach the question of whether or not the Board would have authority to void this gift deed or order BIA to do so. See, e.g., Estate of Clifford Celestine v. Acting Portland Area Director, 29 IBIA 269, 273 (1996); Estate of Clifford Celestine v. Acting Portland Area Director, 26 IBIA 220, 229 (1994), concerning possible limitations in this regard.