



## INTERIOR BOARD OF INDIAN APPEALS

Maynard and Florine Bernard v. Acting Great Plains Regional Director,  
Bureau of Indian Affairs

46 IBIA 28 (10/16/2007)

Judicial review of this case:

Affirmed, *Bernard v. U.S. Dept. of the Interior*, 2011 WL 1256658, 2011 WL 2160930  
CIV No. 08-1019 (D.S.D. Mar. 30, 2011 & June 1, 2011), denial of motion to alter  
judgment affirmed, 674 F.3d 904 (8th Cir. 2012)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

MAYNARD AND FLORINE BERNARD,	)	Order Affirming Decision
Appellants,	)	
	)	
v.	)	
	)	Docket No. IBIA 05-54-A
ACTING GREAT PLAINS REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	October 16, 2007

Appellants Maynard and Florine Bernard seek review of a February 3, 2005, decision of the Acting Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director declined to rescind or declare null and void an April 20, 2004, gift deed of a joint tenancy in trust realty from Appellants to Grady W. Renville that was approved by the Superintendent of the Sisseton Agency, BIA (Superintendent; Agency), on May 21, 2004. Appellants argue that the Regional Director erred in declining to declare the gift deed null and void. We decline to review Appellants' breach of trust claims on the merits and affirm the Regional Director on other grounds: We conclude that Appellants have failed to state a claim on which relief may be granted because we find no authority for declaring the gift deed null and void as relief for Appellants' breach of trust claims. We disagree with Appellants that BIA failed to comply with 25 U.S.C. § 2216(b) and 25 C.F.R. § 152.23, which arguably would render the deed null and void. We find that BIA complied with subsection 2216(b), which we conclude overrides the stricter requirements of 25 C.F.R. §§ 152.24 and 152.25(d), and we find that section 152.23 does not require approval of a gift deed application. Thus, we affirm the Regional Director's decision as to these latter claims.

## Background

The 45.5-acre property that is the subject of this contested gift deed is located along Pickerel Lake in Day County, South Dakota, on the Lake Traverse Reservation. In

early 2004, Appellant Maynard Bernard (Maynard) and his cousin, Grady W. Renville,<sup>1</sup> agreed to form a joint venture to develop that portion of the 45.5-acre property that abuts the lake. Their plan was to subdivide the lakefront portion and sell the individual lots. At that time, the land was held in trust by the United States exclusively for Maynard. Apparently, Maynard lacked the financial resources to develop the property on his own. Therefore, according to Maynard's and Renville's general and informal understanding, Maynard would supply the land and Renville would supply the capital to develop the lakefront property. Both parties expected to become wealthy through their joint venture.

At the time of the subject gift deed transaction, Maynard was a 76-year-old member of the Sisseton-Wahpeton Tribe (Tribe) with a formal education through the eighth grade. He received miscellaneous training while in the military and through various employment situations. Maynard's employment included active duty as a sergeant in the Air Force and civilian work as a BIA police officer, security guard, bus driver, and school custodian. He served as Chief Judge of the Sisseton-Wahpeton Tribal Court and as a member of the Sisseton-Wahpeton Tribal Council (Tribal Council). Maynard was a plaintiff in a *qui tam* action brought in Federal court pursuant to 25 U.S.C. § 81,<sup>2</sup> and was one of seven plaintiffs in an action brought in the tribal court against the Tribal Council seeking to enjoin the Tribal Council from giving themselves pay adjustments.

Appellant Florine Bernard, Maynard's wife, was 65 years old at the time of the gift deed transaction. She had previously been employed with the Realty Office at the Agency.

In early April 2004, Maynard contacted the Realty staff at the Agency to request a fee patent on ten acres of the subject property for "Lake Shore Development." The Tribal Council approved Maynard's request at a Council meeting on April 6, 2004. No further action was taken on Maynard's request for a fee patent by BIA.

On or about April 15, 2004, Maynard and Renville went to the Agency and met with BIA's Realty Officer Carol Jordan. Maynard signed a gift deed application for property described as "Sec. 15 - 124-53, M[etes] & B[ounds] Lot 2, containing 45.50

---

<sup>1</sup> Renville and Maynard share the same great-grandfather, Gabriel Renville, who was the father of Maynard's grandmother, Emma Renville, and Renville's grandfather, Moses Renville. Emma and Moses were half-siblings who had different mothers.

<sup>2</sup> See, e.g., *United States ex rel. Bernard v. Casino Magic Corp.*, 384 F.3d 510 (8th Cir. 2004); *United States ex rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419 (8th Cir. 2002).

acres, more or less.” Renville completed the application and Maynard signed it.<sup>3</sup> The application states that “I wish to Gift Convey my land to Maynard Bernard + Grady W. Renville Joint Tenancy with the right of survivorship.” The stated reason on the application for the gift deed is “Joint Business Venture.” The word “yes” is circled next to the statement, “I wish to waive the appraised value.” There is no evidence in the record that the gift deed application was approved by BIA.

Also at the April 15, 2004, meeting with Jordan, Maynard signed a gift deed application in favor of his daughter, Lynette Bernard (Lynette), for property described as “Sec. 15-124-53 SW SW NW SE of Lot 2, containing 2.50 acres, more or less.”<sup>4</sup> The application provided that the reason for the gift conveyance was “for homesite purposes,” and, again, Maynard circled “yes” to waive his right to an appraisal. There is no evidence in the record that BIA approved the gift deed application to Lynette.

On April 20, 2004, at Maynard’s request, Jordan and a notary public went to Appellants’ house with the two gift deeds to obtain Appellants’ signatures. Appellants each signed a “Deed to Restricted Indian Land” to “Maynard Bernard . . . and Grady W. Renville . . . joint tenants with the rights of survivorship” for Maynard’s “entire 1/1 interest in and to: Lot 2, excepting therefrom the SW<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub>NW<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub>, SW<sup>1</sup>/<sub>4</sub>SW<sup>1</sup>/<sub>4</sub>NW<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub>, in Sec. 15, T. 124 N., R. 53 W., Fifth Principal Meridian, South Dakota, containing 45.50 acres, more or less.”<sup>5</sup> The deed recites “One Dollar, Love and Affection,” as consideration. The Superintendent approved the deed on May 21, 2004,<sup>6</sup> and it was recorded at the Great

---

<sup>3</sup> The application erroneously noted that Maynard had attended four years of high school. It is undisputed that Maynard did not attend high school.

<sup>4</sup> The gift deed application to Renville had initially provided for the conveyance of 48.00 acres, but 48.00 was crossed out and 45.50 written in instead because Maynard wanted to give 2.5 acres to Lynette.

<sup>5</sup> One of the lots excepted was the lot intended for Lynette; the other excepted lot previously was deeded to Maynard’s brother.

<sup>6</sup> The gift deed states that the conveyance was made pursuant to the Act of October 26, 1974, Pub. L. No. 94-491, 88 Stat. 1468, *as amended by* the Act of September 30, 1978, Pub. L. No. 95-398, 92 Stat. 850. That statute authorizes the Secretary of the Interior (Secretary), in his discretion and upon request of the Sisseton-Wahpeton Tribe or its members to acquire lands in trust for the Tribe or its members through purchase, gift, or exchange any interests in land within the boundaries of the Tribe’s Reservation for the

(continued...)

Plains Land Titles and Records Office (LTRO), BIA on June 3, 2004, as Document No. 347-27602. There is no evidence in the record that Appellants contacted BIA between the day they signed the gift deed and the day the Superintendent approved the gift deed. According to Appellants, Maynard did not realize that he had conveyed an interest in his property by gift deed to Renville until he received his copy of the deed from BIA in mid-June 2004.

Also on April 20, 2004, Appellants signed a gift deed in favor of Lynette for the 2.5 acres identified in Maynard's second gift deed application. The gift deed was approved by Jordan as Acting Superintendent on April 21, 2004. This deed was recorded at the LTRO on April 29, 2004. Appellants have not contested this gift deed.

On April 26, 2004, Maynard and Renville, and one other individual chartered a South Dakota corporation named "DeRainville & Associates," to pursue the development of the subject property. Maynard and Renville are both listed as members of the Board of Directors. Renville apparently commenced development on the property in June 2004. He asserts that he has spent more than \$188,000 on the development project, including leasing of equipment, payment of employee wages, surveying costs, fuel costs, and other miscellaneous expenses. Appellants do not dispute these assertions.<sup>7</sup> Appellants and Renville both agree that soon thereafter the project went sour: Renville claims that when Maynard received his copy of the gift deed in mid-June 2004, Maynard unjustly demanded the return of his land; Maynard claims that Renville quit doing any work on the project in early July 2004.

On July 21, 2004, Appellants, through counsel, wrote to the Superintendent to request that the gift deed in favor of Renville be declared "null and void." Letter from Appellants to Superintendent, July 21, 2004, at 1. Appellants argued that

the fiduciary duties owed to [Appellants] were actively breached by misrepresentations made [by Jordan] to [Appellants], both of whom are

---

<sup>6</sup>(...continued)

purpose of consolidating land holdings, eliminating fractionated heirship interests in Indian trust lands, providing land for any tribal program for the improvement of the economy of the Tribe and its members, and the general rehabilitation and enhancement of the total resource potential of the Reservation.

<sup>7</sup> Appellants admit that Renville commenced "phase I" of the work to be done on the lakeshore parcels (water, sewer, electrical and graveling of roads).

elderly and frail (both have survived recent open-heart by-pass surgeries) and by misrepresentations of the nature of the purported gift conveyance and the legal effect of the purported deed.

*Id.* Appellants asserted that Jordan told them that the deed was a “temporary agreement,” and that this statement was a serious misrepresentation. *Id.* at 1-2. Appellants also asserted that an appraisal to determine the fair market value of the subject property was required but was not completed. Appellants requested that the Agency “fulfill its fiduciary obligation” and set aside “this fraudulent conveyance.” *Id.* at 2. Appellants’ counsel also asserted that, to his knowledge, no gift deed application had been submitted to Agency for the subject property.

On July 28, 2004, the Superintendent responded to Appellants’ letter. The Superintendent noted that Maynard’s gift deed application had been misfiled and therefore a copy had not been included with copies of other documents initially provided to Maynard. He enclosed a copy of the application with his decision. The Superintendent explained that an appraisal had not been completed because Maynard had stated that an appraisal would not be necessary and had circled “yes” on the application to waive the appraisal. The Superintendent stated that he lacked authority to set aside the deed, and that only the Regional Director had that authority.

Appellants appealed the Superintendent’s decision to the Regional Director. Maynard and Renville filed briefs. Appellants argued that (1) BIA breached its fiduciary duty to them when it approved the gift deed because BIA failed to ensure that Appellants understood and intended the effect of their actions in signing the gift deed, and failed to ensure that it was in their best interests; (2) BIA breached its fiduciary duty to Appellants by misrepresenting the purpose and effect of the gift deed as only a “temporary arrangement;” (3) the gift deed was invalid because no appraisal was completed pursuant to 25 U.S.C. § 2216(b) and 25 C.F.R. § 152.24, and because the Superintendent did not approve the application, as required by 25 C.F.R. § 152.23; and (4) no special relationship or special circumstances existed that would justify a gift deed to Renville pursuant to 25 C.F.R. § 152.25(d).

On August 19, 2004, the Superintendent sent a memorandum to the Regional Director summarizing the transaction. On August 23, 2004, Jordan executed an affidavit summarizing her role in the gift deed transaction. Jordan’s affidavit describes the April 15, 2004, meeting with Maynard and Renville at her office to discuss their proposal for

Maynard's land.<sup>8</sup> According to her affidavit, Jordan explained to them the difference between a joint tenancy in common and a joint tenancy with a right of survivorship. She stated that they expressed an interest in a joint tenancy with the right of survivorship, because they both had health problems and, should one die before the project was completed, "[t]hey did not want the land broken down to more owners, as it would be more difficult to sell the lots." Affidavit of Jordan, at 1. She then explained to them the gift deed process, including the appraisal requirement, and Maynard agreed to waive the appraisal. Jordan also advised Maynard that both he and his wife would have to sign the deeds. Jordan also noted that, at the April 15, 2004, meeting, Renville stated that when a survey was completed for the property they intended to develop, Renville would "convey back to Maynard the balance of the acreage remaining." *Id.*<sup>9</sup>

Finally, Jordan stated that on April 20, 2004, she traveled with a notary to Appellants' home at Appellants' request to have them sign the actual gift deeds for Renville and for Lynette. Jordan says that she explained both gift deeds to Appellants and, with respect to the gift deed for Renville, she asserts that

I explained the second deed between Maynard and [Renville] and the joint tenancy clause with the right of survivorship. This means if something should happen to Maynard and he died, [Renville] will get the land, and vi[ce] versa. However, this is a temporary situation right now on the full acreage. Once the lake shore acres are identified that would be placed in Fee status, [Renville] has verbally agreed to give [Appellant] back the remaining acres.

---

<sup>8</sup> In her affidavit, Jordan states that the meeting occurred on April 14, 2004, which is also supported by a handwritten note in the file in which she memorialized the meeting. She does not mention any events occurring on April 15, 2004. Renville and Maynard both appear to agree that they met with Jordan on April 15, 2004, which is also the date of Maynard's two gift deed applications. For our purposes, it is irrelevant to resolve whether this meeting occurred on the 14th or the 15th. To avoid confusion, we will use the date of April 15, 2004, in this decision.

<sup>9</sup> It is undisputed that Maynard and Renville only intended to develop that portion of the 45.5 acres that lay along the lakeshore.

*Id.* at 3. Jordan stated that Appellants signed the deeds, “[n]o questions were asked and we left.” *Id.*<sup>10</sup>

On February 3, 2005, the Regional Director issued the decision that is the subject of the present appeal. The Regional Director noted that Jordan had explained the effect of the gift conveyance to Maynard and had “observed that [Maynard was] capable of understanding everything that was explained to [him].” Decision at 1. The Regional Director determined that, if Maynard did not understand the conveyance, “there was ample time to make an objection to the transaction between the time [Appellants] signed the deed[] on April 20, 2004, and when the Superintendent approved [it] on May 21, 2004.” *Id.* The Regional Director concluded, “[i]n reviewing all of the facts and evidence of [Maynard’s] gift conveyance, we find the Realty Staff and [Superintendent] followed the correct procedures in approving the gift conveyance.” *Id.* The Regional Director therefore “reaffirm[ed] the Superintendent’s decision to not rescind the . . . deed [to Renville].” *Id.*

Appellants appealed to the Board. Appellants, the Regional Director, and Renville filed briefs.

### **Tribal Court Proceedings**

On or about October 18, 2004, Renville filed a claim in tribal court against Appellants for breach of contract. *Grady W. Renville v. Maynard Bernard and Florine Bernard*, Civ. No. C-05-010-130 (Sisseton-Wahpeton Tribal Court). In response, Appellants have filed a counterclaim against Renville to set aside the gift conveyance to Renville.

On March 29, 2007, the Board requested briefing from the parties on the status of the tribal court action and whether this appeal should be stayed, pending the outcome of the tribal court proceedings, including possible settlement. In response, the parties have advised the Board that the tribal court action remains pending. None of the parties argue in favor of a stay of this matter. Accordingly, we see no reason not to address the issues raised in the present appeal. *Cf. Zinke & Trumbo, Ltd. v. Phoenix Area Director*, 27 IBIA 105, 109 (1995) (the Board abstained from exercising jurisdiction to review Area Director’s approval of a tribal ordinance where it found that primary jurisdiction lies with the tribal court).

---

<sup>10</sup> No statement appears in the record by the notary, Debbie Sing, who also works in Realty with Jordan.

## Discussion

### 1. Summary

Appellants seek a decision from this Board that declares the “purported” conveyance to be “null and void.” Opening Brief at 16. Appellants claim that they are entitled to this relief based on BIA’s failure to comply with applicable regulations and statutes as well as based on BIA’s violation of its fiduciary duty to Maynard in the course of completing the gift deed process. The Regional Director responds that BIA properly discharged its trust responsibilities to Appellants and, further, that the Board’s decisions in *Estate of Clifford Celestine v. Acting Portland Area Director*, 29 IBIA 269 (1996), and *Big Lagoon Park Co. v. Acting Sacramento Area Director*, 32 IBIA 309 (1998), raise substantial questions about whether BIA has authority to administratively void an approved gift conveyance. Appellants did not respond to this argument.

We conclude that, with respect to Appellants’ breach of trust claims, Appellants have not identified any authority at law or in equity for the Board to determine the deed to be void *ab initio* as relief therefor. Consequently, we affirm the Regional Director’s decision without reaching the merits of Appellants’ breach of trust claims. A closer question is presented on the issue of whether a deed is void *ab initio* if certain statutory preconditions have not been met. We assume for purposes of our decision that such relief is appropriate, but we conclude that BIA complied with the requirements and, in particular, that the requirements of subsection 2216(b) override the stricter requirements of 25 C.F.R. § 152.24, 152.25(d). Therefore, we affirm the Regional Director’s decision with respect to BIA’s compliance with statutory prerequisites.

### 2. Standard of Review

Whether the Regional Director properly declined to find a gift deed to be null and void can raise issues of both law and fact. However, where, as here, the material facts are undisputed, the appeal then is limited to deciding whether the Regional Director made a proper legal determination, which we review *de novo*. *LeCompte v. Acting Great Plains Regional Director*, 45 IBIA 135, 142 (2007).

### 3. “Void” Deeds and “Voidable” Deeds

At the outset, we note that Appellants argue only that the gift deed to Renville is null and void, and do not argue that it is voidable nor do they seek rescission. The distinction between these two forms of relief is significant. A *voidable* deed is “both

operative to convey the property and creative of contractual obligations unless and until set aside by the court[, and] is capable of being either avoided or confirmed.” 23 Am. Jur. 2d *Deeds* § 162 (2002); *see also* Black’s Law Dictionary 1605 (8th ed. 2004). Deeds procured by fraudulent inducement and undue influence or based on mistake ordinarily are voidable, rather than void. *See* 26 C.J.S. *Deeds* § 68b (1956); 23 Am. Jur. 2d *Deeds* §§ 176, 184. A voidable deed passes a defeasible title that may be set aside, except when it has been acquired by an innocent purchaser for value. 26 C.J.S. *Deeds* § 68a.

A *void* deed is void *ab initio* and is “[o]f no legal effect, null.” Black’s Law Dictionary 1604; *see also id.* at 350 (“void contract” is a “contract that is of no legal effect, so that there is really no contract in existence at all. A contract may be void because it is technically defective, contrary to public policy, or illegal”). Therefore, a void deed conveys no title. Several cases address the failure of a deed to comply with statutory preconditions, however, each of these cases involve technical defects to the form of the deed itself. *See, e.g.*, 23 Am. Jur. 2d *Deeds* § 88; *Lewis v. Herrera*, 208 U.S. 309 (1908) (conveyances of real property were void *ab initio* for lack of acknowledgment required by state law); *Fremont v. United States*, 58 U.S. (17 How.) 542, 561-65 (1854) (deed is void unless or until accompanied by survey); *Muse v. Arlington Hotel Co.*, 68 F. 637, 642 (1895) (deed void where unaccompanied by survey, as required by Spanish law); *Bowling v. United States*, 233 U.S. 528 (1914) (conveyance of Indian trust or restricted land is void where conveyance is not approved by the Secretary as required by Federal law). In each of these instances, the absent acknowledgment, survey, or approval was a necessary and integral part of the deed itself. On the other hand, the requirements of 25 U.S.C. § 2216(b) and 25 C.F.R. § 152.23 do not affect or pertain to the form of the deed. Therefore, whether the failure to comply with sections 2216(b) or 152.23 would render a gift deed void *ab initio* or voidable is an open question and one we need not reach today.

With this background in mind, we turn to a discussion of Appellants’ claims.

#### 4. Breach of Trust as Grounds to Declare Gift Deed Null and Void

With respect to Appellants’ breach of trust claims, we affirm the Regional Director’s decision but without reaching the merits: We can find no authority for declaring a gift deed null and void based on allegations of breach of trust. At best, such allegations — if true, and if based on fraud or undue influence — would render the deed voidable, as discussed above. *See Estate of Celestine*, 29 IBIA at 273; 26 C.J.S. *Deeds* § 68b; 23 Am. Jur. 2d *Deeds* §§ 176, 184. Inasmuch as Appellants have not sought rescission of the gift deed as a remedy for their claims, but limit their request for relief to a declaration that the deed is

“null and void,” we affirm the Regional Director’s decision without reaching the merits of Appellants’ breach of trust claims.<sup>11</sup>

Although Appellants argue that Renville “took advantage of and preyed upon” Appellants, Opening Brief at 1, Appellants have not identified any specific acts by Renville that rise to the level of actionable misconduct. Had Appellants done so, they might have raised a possible ground for avoiding the gift transaction based on the grantee’s misconduct. *See, e.g., Estate of Celestine*, 29 IBIA at 273. In *Estate of Celestine*, the grantor conveyed his trust property by gift deed to his niece. Prior to his death, Celestine sought to void the gift deed because the niece had not kept a promise to him. Celestine argued that BIA had breached its trust duty towards him by approving the gift deed. The Board held that even though “BIA failed in its obligation toward Celestine, it is not aware of any relief which it has authority to grant appellant. Even if the Board has authority to void a gift deed on grounds of fraud or undue influence — a question the Board does not reach — neither fraud nor undue influence has been shown here.” *Id.*

In the appeal before us, Appellants claim only that Renville “filled out the [gift deed] application” and “convinced Maynard to sign it.” Opening Brief at 2. These bald allegations, without more, are insufficient to support a claim of undue influence or other misconduct by Renville. Because it is undisputed that Renville has altered his position in reliance upon the conveyance — by expending more than \$188,000 in developing the property — and is not a party to the allegations of breach made against BIA, we conclude that *Estate of Celestine* controls: The Board “is not aware of any relief which it has authority to grant appellant.” 29 IBIA at 273.

We conclude that, in light of these circumstances, we find no basis or authority to declare the gift deed null and void. Therefore, on these grounds, we affirm the Regional

---

<sup>11</sup> Although Appellants allege “active misrepresentation” by BIA (an issue that did not arise in *Estate of Celestine*), Appellants do not allege fraud or intent to deceive by BIA. Instead, it appears that their “misrepresentation” claim is, in substance, part of their breach of trust claim based on the alleged failure by BIA to satisfy the proper standard of care. Thus, even if we were to construe Appellants’ arguments to suggest rescission of the deed, we would still be faced with their failure to cite any authority to support that relief in this case, particularly where Renville altered his position in reliance on the gift deed and where there is no evidence in the record of misconduct by Renville to induce the gift deed. *See, e.g., Prieto v. United States*, 655 F. Supp. 1187, 1192 (D.D.C. 1987) (where Indian had relied on BIA’s decision to take title to her fee land into trust for her benefit, BIA could not rescind its decision).

Director's decision without reviewing the merits of Appellants' breach of trust claims. In so concluding, we express no opinion on the merits of these claims.

## 5. Compliance with Statutory Requirements

With respect to Appellants' claims that BIA failed to comply with 25 U.S.C. § 2216(b) or 25 C.F.R. §§ 152.23-152.25, we conclude that there is a colorable argument that BIA and the Board have authority to declare a gift deed void *ab initio*. See discussion at 35-36. We need not resolve this issue today, however, because we find for BIA on the merits: BIA complied with subsection 2216(b) and section 152.23 does not require approval of the gift deed application. Further, we hold that the more relaxed provisions of subsection 2216(b) override the stricter provisions of sections 152.24 and 152.25(d), such that compliance with subsection 2216(b) is sufficient for a grantor to effect a gift conveyance. We therefore affirm the Regional Director's decision with respect to Appellants' claims under sections 2216 and 152.23-152.25.

### a. 25 U.S.C. § 2216(b)(1)<sup>12</sup>

Appellants argue that BIA was required by 25 U.S.C. § 2216(b)(1)(A) to provide Appellants with an estimate of value or an appraisal for the subject property and, because it

---

<sup>12</sup> In its entirety, 25 U.S.C. § 2216(b)(1) provides

#### **(A) Estimate of value**

Notwithstanding any other provision of law and only after the Indian selling, exchanging, or conveying by gift deed for no or nominal consideration an interest in land, has been provided with an estimate of the value of the interest of the Indian pursuant to this section —

- (i) the sale or exchange or conveyance of an interest in trust or restricted land may be made for an amount that is less than the fair market value of that interest; and
- (ii) the approval of a transaction that is in compliance with this section shall not constitute a breach of trust by the Secretary.

#### **(B) Waiver of requirement**

The requirement for an estimate of value under subparagraph (A) may be waived in writing by an Indian selling, exchanging, or conveying by gift deed for no or nominal consideration an interest in land with an Indian person who is the owner's spouse, brother, sister, lineal ancestor of Indian blood, lineal descendant, or collateral heir.

did not do so, the gift deed to Renville is void *ab initio*. Appellants argue that the waiver-of-appraised-value statement (waiver statement) that Maynard executed is not effective because Renville is not a relative within the meaning of the waiver provision of subsection 2216(b)(1)(B). In addition, Appellants argue that the waiver statement is vague, misleading, and of no legal effect. We disagree with Appellants' arguments.

We recently explained the background of section 2216 in *LeCompte*, 45 IBIA at 145-46. In a nutshell, Congress enacted section 2216 as part of a package of amendments to the Indian Land Consolidation Act (ILCA), Pub. L. No. 106-462, 114 Stat. 2002 (Nov. 7, 2000). In an effort to reduce the fractionation of Indian trust lands, Congress relaxed the requirements of *inter vivos* conveyances of trust real property interests between individual Indians as well as conveyances between Indians and the tribes with jurisdiction over the particular parcel that is the subject of the conveyance: A prospective Indian grantor need not receive a formal appraisal, but must be provided with an estimate of the value of the interest being conveyed, unless — where the conveyance is for no or nominal consideration to “the owner’s spouse, brother, sister, lineal ancestor of Indian blood, lineal descendant, or collateral heir” — the grantor has executed a waiver in writing of the estimate of value. 25 U.S.C. § 2216(b). The legislative history to this subsection explains that it “facilitates transactions by eliminating the requirement for an appraisal of an interest [in trust land and substituting] an estimate of the value of the interest.” S. Rep. No. 106-361 at 21 (2000). Final regulations have not been published implementing these amendments.<sup>13</sup>

The amendments to ILCA that were passed in 2000 do not define collateral heir,<sup>14</sup> which is the only category of family member that could apply to Renville. Maynard claims without support that Renville is not Maynard’s collateral heir.<sup>15</sup> A “collateral heir” is

---

<sup>13</sup> On August 8, 2006, a proposed Part 152 implementing the 2000, 2004, and 2005 amendments was published in the Federal Register. *See* 71 Fed. Reg. 45,174, 45,214 (Aug. 8, 2006).

<sup>14</sup> *Cf.* 25 U.S.C. §§ 2201(5) defining “heirs of the first or second degree” and 2206(a)(3)(C) defining “collateral heirs of the first or second degree.” The latter is defined to mean “the brothers, sisters, aunts, uncles, nieces, nephews, and first cousins of a decedent.” *Id.*

<sup>15</sup> Maynard asserts that he and Renville are “half-cousins, twice removed,” Opening Brief at 15, while Renville maintains that they are second cousins. Renville is correct. *Compare* definition of second cousin, “[a] person related to another by descending from the same  
(continued...)

defined by Black's Law Dictionary as "[o]ne who is neither a direct descendant nor an ancestor of the decedent, but whose kinship is through a collateral line, such as a brother, sister, uncle, aunt, nephew, niece, or cousin." Black's Law Dictionary 741; *see also* 26A C.J.S. *Descent & Distribution* § 38 (1956). A "collateral line" is defined as "[a] line of descent connecting persons who are not directly related to each other as ascendants or descendants, but who are descendants of a common ancestor." Black's Law Dictionary 949.<sup>16</sup>

We conclude that the definition of "collateral heir" is not limited to collateral heirs of a certain degree but refers generally to descendants of a common ancestor. *See id.* at 741. It is undisputed that Maynard and Renville share a common ancestor — their great-grandfather Gabriel Renville. We find that, because Maynard and Renville share a common ancestor, Renville is a "collateral heir" of Maynard within the meaning of subsection 2216(b), and thus a family member for whom the estimate-of-value provision in subsection 2216(b) may be waived.

We turn now to Appellants' second argument concerning the waiver statement. On the gift deed application form, Maynard was requested to circle "yes" or "no" to the following statement: "I wish to waive the appraised value." The word "yes" is circled on the gift deed application signed by Maynard. Maynard does not deny circling "yes" but now maintains that the language of this statement "is vague and misleading; it was typed in as added language to the application for gift deed." Opening Brief at 14. Maynard concludes, without support, that "[s]uch language is of no legal effect." *Id.* On the other hand, Jordan asserts in her affidavit that she explained to Maynard that he was entitled to an appraisal of his land.

---

<sup>15</sup>(...continued)

great-grandfather," Black's Law Dictionary 391, *with* definition of cousin twice removed, "[a] grandchild of one's cousin[, a] cousin of one's grandparent," *id.*

<sup>16</sup> The proposed new Part 152 regulations do not refer to "collateral heir," but do propose that a grantor may waive the right to be provided with an estimate of value of his interest in trust realty "if the grantee is an Indian and is the grantor's spouse, lineal ancestor, lineal descendant, sibling, *or blood relative.*" *See* proposed § 152.210, 71 Fed. Reg. at 45,217 (emphasis added). Of course, because subsection 2216(b) governs *inter vivos* conveyances, there will be no grantees who are actual "heirs" of the grantors as long as the grantor is alive. The reference in subsection 2216(b) to "collateral heir" thus appears to be inartful drafting.

We conclude that while the waiver statement could be more specific and informative, Maynard does not dispute that his right to an appraisal was explained to him by Jordan. Moreover, Maynard does not claim that *he* did not understand the waiver statement, that he did not intend to waive his right to an appraisal, or that he did not know that he had, in fact, waived his right to an appraisal. Instead, the record shows that he knowingly chose to waive his right to an appraisal. Therefore, we find no merit in his argument that the waiver statement is vague, misleading and of no legal effect.

b. 25 C.F.R. §§ 152.24 and 152.25(d)<sup>17</sup>

Appellants also argue that BIA failed to comply with 25 C.F.R. §§ 152.24 and 152.25(d). We conclude that compliance with 25 U.S.C. § 2216(b) suffices for a grantor to effectively convey an interest in trust property for less than fair market value to family members of Indian blood. Section 152.24 contains a general requirement for an appraisal prior to making or approving a conveyance of trust property, except as otherwise provided by the Secretary. Subsection 152.25(d) authorizes an Indian grantor, with the approval of the Secretary, to convey property for less than the appraised fair market value, or for no consideration when the conveyance is to the grantor's spouse, siblings, lineal ancestor of Indian blood, lineal descendant, or "when some other special relationship exists." The authorization of gift conveyances found in subsection 152.25(d) does not require an appraisal, but it also does not extend to a "collateral heir" in the absence of a "special relationship" or "special circumstances."

To the extent that either section 152.24 or subsection 152.25(d) would otherwise limit the circumstances under which Indian grantors may convey their trust property under

---

<sup>17</sup> Section 152.24 of 25 C.F.R. provides:

Except as otherwise provided by the Secretary, an appraisal shall be made indicating the fair market value prior to making or approving a sale, exchange, or other transfer of title of trust or restricted land.

Section 152.25(d) provides:

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.

25 U.S.C. § 2216(b), we conclude that the broader authorization of the statute controls. Subsection 2216(b) provides that “notwithstanding any other provision of law,” Indian grantors may convey property to collateral heirs for less than fair market value without being provided with an estimate of value, if the grantor has waived the estimate-of-value requirement that is otherwise imposed by the statute. The statute thus eases the strictures required for grantors to give their trust real property to certain Indian family members, such as second cousins, for less than fair market value.

The Board has held that where there are discrepancies between a BIA regulation and a later-enacted statute, the statute controls. *Miller v. Rocky Mountain Regional Director*, 36 IBIA 305,, 309-10 (2001); *Prairie Island Indian Community v. Minneapolis Area Director*, 25 IBIA 187, 191 (1994). In the present case, to the extent that sections 152.24 and 152.25(d) create such discrepancies, we hold that the requirements of 25 U.S.C. § 2216(b) override the provisions of these two regulations. Moreover, the phrase, “notwithstanding any other provision of law,” supports an intent to “supersede all other laws . . . [and a] clearer statement is difficult to imagine.” *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993); *see also Bank of New England Old Colony, N.A. v. Clark*, 986 F.2d 600, 604 (1st Cir. 1993) (the language “[n]otwithstanding any other provision of law[,]’ manifest[s] a clear intent to override any conflicting statutes in existence”). Therefore, we interpret subsection 2216 as overriding the provisions in sections 152.24 and 152.25(d) that might otherwise have limited Appellants’ right to convey the property to Renville by gift. Thus, BIA was not required to find the existence of a special relationship or special circumstances before permitting the gift conveyance to Renville without an appraisal.

c. 25 C.F.R. § 152.23<sup>18</sup>

Appellants contend that, under 25 C.F.R. § 152.23, BIA was required to approve Maynard’s gift deed application and that the failure of BIA to approve the application renders the conveyance of a joint interest to Renville invalid. We disagree. It is the

---

<sup>18</sup> In its entirety, 25 C.F.R. § 152.23 provides

Applications for the sale, exchange or gift of trust or restricted land shall be filed in the form approved by the Secretary with the agency having immediate jurisdiction over the land. Applications may be approved if, after careful examination of the circumstances in each case, the transaction appears to be clearly justified in the light of the long-range best interest of the owner or owners or as under conditions set out in § 152.25(d) [concerning conveyances for less than fair market value].

approval of the transaction itself that is required and the failure to approve the application does not constitute grounds on which to declare an approved gift deed void *ab initio*.

It cannot be disputed that BIA must approve conveyances of trust property. *See, e.g.,* 25 U.S.C. § 392; 25 C.F.R. § 152.17. Section 152.23 provides that applications for the sale, exchange or gift of trust land “may be approved” following BIA’s examination of the circumstances of the transaction. While applications themselves “may be approved,” it is well established that an approved gift deed application itself is insufficient to convey title. *See Estate of Joseph Baumann*, 43 IBIA 127, 137 (2006). Additionally, the Board also has held that an approved gift deed application, together with a gift deed signed by the grantor, but not approved by BIA, is insufficient to convey title. *Bitonti v. Alaska Regional Director*, 43 IBIA 205, 213 (2006). As the Board’s decisions in *Estate of Baumann* and in *Bitonti* demonstrate, the key point in any gift deed transaction is BIA’s approval of the deed, not the application. Therefore, we construe section 152.23 to require BIA approval of the *transaction*, which *may* include approval of the gift deed application but *must* include approval of the gift deed. Thus, a gift deed conveyance is approved within the meaning of 25 U.S.C. §§ 392, 2216, and 25 C.F.R. §§ 152.17, 152.23 when an authorized BIA official signs the actual deed. In the present case, it is undisputed that BIA approved the gift deed and, therefore, the failure to approve the gift deed application does not render the deed void *ab initio*.

#### 6. Appellants’ request for an evidentiary hearing

Finally, Appellants argue that they are entitled to an evidentiary hearing, and request the opportunity to question Jordan and the Superintendent under oath. Appellants note that, by letter dated April 7, 2005, they requested permission to take the depositions of Jordan and the Superintendent from the Office of the Field Solicitor to assist them in the proceedings before the Board and the tribal court. The Field Solicitor denied their request.

Subsection 4.337(a) of 43 C.F.R. provides that “where the record indicates a need for further inquiry to resolve a genuine issue of material fact, the Board may require a hearing.” The Board will not order such a hearing when there is no issue of material fact in dispute. *All Materials of Montana, Inc. v. Billings Area Director*, 21 IBIA 202, 212 (1992). The party requesting an evidentiary hearing must affirmatively show the existence of a controversy concerning a genuine issue of fact, the resolution of which is necessary for a decision in the appeal. *Id.*

In the present case, Appellants have not requested a hearing on any specific grounds. In Appellants’ opening brief and deposition transcripts, they claim that Jordan never told

them they were applying for and executing a gift deed to Renville but told them it was a temporary arrangement that would not leave her office. It appears that Appellants seek to question Jordan further about her role in the gift deed transaction and to present testimony about the gift deed transaction. We conclude that no further factfinding is necessary. The issues have been thoroughly briefed before the Board and Appellants have offered depositions to support their respective version of events.

We conclude that Appellants have not met their burden to show the existence of an issue of fact that must be resolved in order to consider this case. Therefore, Appellants' request for an evidentiary hearing is denied.<sup>19</sup>

### Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's February 3, 2005, decision.

I concur:

\_\_\_\_\_  
// original signed  
Debora G. Luther  
Administrative Judge

\_\_\_\_\_  
// original signed  
Steven K. Linscheid  
Chief Administrative Judge

---

<sup>19</sup> To the extent that Appellants seek review of the Field Solicitor's denial of their request to depose Jordan for purposes of the tribal proceeding, the Board lacks jurisdiction. Such a decision is made pursuant to 43 C.F.R. Part 2. The Board's jurisdiction does not extend to decisions rendered under Part 2 of Title 43 of the Code of Federal Regulations. *See Preckwinkle v. Pacific Regional Director*, 44 IBIA 45 (2006).