



INTERIOR BOARD OF INDIAN APPEALS

Estate of George Dragswolf, Jr.

31 IBIA 228 (10/31/1997)

Modifying:

30 IBIA 188

Judicial review of this case:

Voluntary withdrawal, *Morgan v. United States*, Civil No. A4-97-35
(D.N.D. July 8, 1998)

Related Board cases:

13 IBIA 28

17 IBIA 10



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF GEORGE DRAGSWOLF, JR.

IBIA 96-8, 96-9 (on reconsideration)

Decided October 31, 1997

Reconsideration of a decision issued on February 24, 1997, 30 IBIA 188.

Decision modified.

1. Board of Indian Appeals: Generally--Indians: Lands: Allotments: Alienation--Indians: Lands: Individual Trust or Restricted Lands: Alienation

In a case where a person purporting to convey trust property is determined not to be the owner of the property at the time of the conveyance, the Board of Indian Appeals has authority to recognize the invalidity of the conveyance despite the fact that the deed has been approved by the Bureau of Indian Affairs.

APPEARANCES: Reed A. Soderstrom, Esq., Minot, North Dakota, for Donna Crow Flies High Morgan, June Crow Flies High Lizotte, Corrine Crow Flies High Yazzie, Martha Crow Flies High Jarski, Leroy Crow Flies High, Rose Ann Crow Flies High Johnson, and Howard Crow Flies High; James F. Wagenlander, Esq., and David Heisterkamp II, Esq., Denver, Colorado, for Carmen Fox; Wade G. Enget, Esq., Stanley, North Dakota, for Terry Roberts; Marcia M. Kimball, Esq., Office of the Field Solicitor, Fort Snelling, Minnesota, for the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE VOGT

The Board issued a decision in these appeals on February 24, 1997. 30 IBIA 188. On March 27, 1997, it received a petition for reconsideration from the appellants in Docket No. 96-8, *i.e.*, Donna Crow Flies High Morgan, June Crow Flies High Lizotte, Corrine Crow Flies High Yazzie, Martha Crow Flies High Jarski, Leroy Crow Flies High, Rose Ann Crow Flies High Johnson, and Howard Crow Flies High (Crow Flies High heirs). For the reasons discussed below, the Board denies the Crow Flies High heirs' petition for reconsideration but nevertheless reconsiders and modifies its earlier decision.

On April 14, 1997, the Board denied the Crow Flies High heirs' petition in part but allowed responses to the petition as to one argument. The Board's order stated:

The petition for reconsideration makes a number of arguments, all of which either were or should have been made during the briefing period for this appeal. The Board has held, time and time

again, that where a party petitioning for reconsideration simply repeats the same arguments that were made earlier, or makes new arguments which could, and therefore should, have been made earlier, the party has failed to show extraordinary circumstances warranting reconsideration of the Board's original decision. E.g., Swinomish Tribal Community v. Portland Area Director, 30 IBIA 89 (1996); Hamilton v. Acting Sacramento Area Director, 29 IBIA 188 (1996); Brooks v. Muskogee Area Director, 25 IBIA 96 (1994); Estate of Little Snake (John Smith), 24 IBIA 153 (1993), and cases cited therein; Pima Country Club v. Phoenix Area Director, 21 IBIA 70 (1991), and cases cited therein.

Under the precedent of these cases, this petition for reconsideration should be denied outright. In all respects but the one discussed below, the petition will be denied.

One contention now made by the Crow Flies High heirs may require consideration despite the fact that the Crow Flies High heirs had ample opportunity to raise the issue earlier and failed to do so. They present, for the first time in this petition for reconsideration, a gift deed executed in their favor by Rose Crow Flies High and approved by the Superintendent, Fort Berthold Agency, BIA, on January 4, 1994. This gift deed covers a mineral interest in Fort Berthold Allotment 370A, which is a part of the estate at issue in this case.

The Crow Flies High heirs offer no explanation whatsoever for their failure to raise this issue earlier, a lapse which is particularly difficult to understand in light of the fact that Carmen Fox, appellant in Docket No. 96-9, made extensive arguments concerning a gift deed executed in her favor. Even if the Crow Flies High heirs did not realize initially that the gift deed to them was relevant to their case, a supposition the Board finds hard to believe, they should have been made aware of its relevance by Fox's arguments. Clearly, they should have brought the matter to the Board's attention long before now.

Despite the failings of these appellants, the Board finds that it should consider this new issue in order to prevent title questions from arising in the future. Accordingly, all parties are given until May 26, 1997, to respond to the Crow Flies High heirs' petition for reconsideration, only insofar as it contends that the reopening of this estate should not affect the interest covered by the gift deed approved on January 4, 1994.

Apr. 14, 1997, Order at 1-2.

Responses to the Board's order were filed by Terry Roberts and by the Bureau of Indian Affairs (BIA), through Departmental counsel. Roberts argued that the Board should not recognize the gift deed approved on January 4, 1994. The BIA agreed with Roberts in this regard. Further, it argued that

the Board should reconsider its February 24, 1997, decision insofar as that decision recognized the gift deed to Carmen Fox approved on March 4, 1980.

By order of July 24, 1997, the Board allowed responses to the BIA brief, stating:

Arguably [BIA's] contention [concerning the deed to Fox] constitutes an untimely petition for reconsideration of the Board's February 24, 1997, decision. However, under the unusual circumstances of this case, and in the hope that the case can be resolved finally for the Department of the Interior, the Board believes that it may be appropriate for it to consider the contention.

Responses were filed by Fox and by the Crow Flies High heirs.

At this point, the Board observes that it erred in failing to invite participation by BIA in the earlier proceedings once an issue arose concerning the deed to Fox. Fox's contention concerning the deed was, in essence, a challenge to the estate inventory and should have prompted the Board to invoke the so-called Ducheneaux procedure. ^{1/} Had the procedure been invoked, BIA, which normally does not participate in probate appeals, would have been informed that an issue affecting the estate inventory had arisen and would have been given an opportunity to participate in the proceeding to address the inventory issue. In this case, BIA had no opportunity to participate and did not become aware of the inventory issue until after the time for filing petitions for reconsideration had passed. See 43 C.F.R. § 4.315.

Because BIA's non-participation in the earlier proceedings was the fault of the Board, the Board now invokes its authority to "exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate," 43 C.F.R. § 4.318, under which it undertakes to consider BIA's petition for reconsideration with respect to the deed to Fox.

The BIA contends:

The basic tenet of law underlying conveyances by gift has been overlooked by all parties to the long and convoluted history of this transaction. "The effectiveness of a gift depends, of course, upon whether the donor has some legal or equitable interest to give. If the donor lacks title to the property which is the subject of the gift, the gift is ineffective because the title of the donee cannot rise higher than the title of the donor." 38 Am. Jur. Gifts § 12 (1968).

^{1/} See Estate of Douglas Leonard Ducheneaux, 13 IBIA 169, 92 Interior Dec. 247 (1985). See also Estate of Donna Gottschalk, 30 IBIA 82, 87-88 (1996), and cases cited therein.

Approval of the gift deeds by BIA cannot operate to affirm or create good title in the grantor where it did not exist. Both gift deeds are void because the grantors did not ever have an interest to convey.

* * * * *

* * * In this case, neither Grace Medicine Crow Dragswolf nor Rose Crow Flies High ever held valid title to the property they attempted to convey by gift deeds. Neither conveyance should be upheld. BIA approval of a deed which conveys nothing because the grantor owned nothing has no effect. Neither Carmen Fox nor the Crow Flies High heirs should be in a position superior to that of their grantors (or of those who inherited via intestate succession from the same grantors) following reopening and redistribution of the George Dragswolf, Jr. estate.

* * * [T]he Board must have the authority to correct title documents in cases in which the BIA approves a grantor's attempt to convey property she does not own. A conveyance of property not owned by the grantor cannot be recognized, even if the deed has been approved by the BIA. The conveyance must be declared void.

* * * * *

* * * This brief does not argue that the Board has general authority to revoke BIA approval of conveyances of trust land; only that neither it nor the Department should give legal effect to the approval of a conveyance in situations in which the grantor does not hold title to the trust property. If the conveyance itself is without legal effect, then so must the BIA's approval of the conveyance.

BIA Brief at 4-7.

The Crow Flies High heirs filed a document which they described as a response to BIA's brief. In fact, however, their filing does not respond to the arguments made by BIA but, instead, repeats and enlarges upon arguments they made in their petition for reconsideration. Again, they seek "a fresh review of the entire administrative record and for arguments to be presented again on all issues." Crow Flies High Heirs' Sept. 5, 1997, Response at 2. They contend that both Judge Rausch and the Board erred in allowing reopening of this estate to recognize Terry Roberts as an heir. The Board had already denied their petition for reconsideration except for their contention concerning the gift deed approved on January 4, 1994. The reasons for denial were stated in the Board's April 14, 1997, order, quoted above. Nothing in the Crow Flies High heirs' most recent filing alters the conclusions stated in that order. Accordingly, the April 14, 1997, order is reaffirmed.

Fox contends that the Board properly recognized the 1980 gift deed to her. As she did in the earlier proceedings, she contends that she is a bona fide purchaser and therefore has rights superior to heirs who were unknown

at the time of the conveyance to her. In its earlier decision, the Board found it unnecessary to determine whether the conveyance was a sale or a gift, 30 IBIA at 200, because it concluded that it could not declare the deed to Fox void.

[1] In light of BIA's argument here, however, the Board reconsiders that conclusion and finds that, in a case where the grantor had no title to the property he/she purported to convey, the Board can recognize the invalidity of the conveyance despite the fact that the deed has been approved by BIA. As BIA argues here, such a conveyance is distinguishable from that in Estate of Clifford Celestine v. Acting Portland Area Director, 26 IBIA 220 (1994), in which there was no question that the grantor owned the property being conveyed. In a case where the person purporting to convey property is determined not to be the owner of the property, the Board would not be called upon to void a deed, as in Celestine, but simply to recognize that the purported grantor was not the owner of the property and therefore could not have conveyed it.

In light of this conclusion, the Board must return to some questions left unanswered in its original decision. The first such question is whether Fox may be deemed a bona fide purchaser. If Fox is a bona fide purchaser, the Board must then determine whether, under the authority cited by Fox and discussed in the original decision, 30 IBIA at 195, Fox's title should be deemed superior to that of Roberts. Finally, the Board must determine whether, under the Department's cases concerning reopening of long-closed estates, 30 IBIA at 195-200, this portion of the estate should be reopened.

In order to show that she is a bona fide purchaser, Fox must demonstrate, inter alia, that she furnished valuable consideration. 77 Am. Jur. 2d Vendor and Purchaser § 487 (1997); 92 C.J.S. Vendor and Purchaser § 323.b(1) (1955). The deed to Fox recites consideration of "One dollar, love and affection." Nominal consideration and "love and affection" are not valuable consideration sufficient to afford a person protection as a bona fide purchaser. 77 Am. Jur. 2d Vendor and Purchaser at §§ 488, 490; 92 C.J.S. Vendor and Purchaser at §§ 323.b(2); 323.c. Fox does not contend that she furnished any other consideration. Accordingly, the Board concludes that she is not a bona fide purchaser. The Board further concludes that the authority cited by Fox, all of which concerns bona fide purchasers, is not relevant here.

Under the original decision, the Board allowed reopening of this estate with the exception of the interest conveyed to Fox. The BIA argues that "[t]he Board should not allow those donees of Indian trust property who receive Indian trust property by gift conveyances to stand in a better or different position than those who inherit by Departmentally-approved will or by an heirship determination for intestate succession." BIA Brief at 5.

Having concluded that the Board has the authority to recognize the invalidity of the deed to Fox, the Board further concludes that, for purposes of this reopening, there is no valid basis for excepting the interest covered by the deed to Fox from the remainder of decedent's estate.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the petition for reconsideration filed by the Crow Flies High heirs is denied. However, the Board modifies its February 24, 1997, decision to hold that this estate must be reopened in its entirety. Therefore, the Superintendent shall distribute decedent's estate in its entirety to Terry Roberts and shall also distribute to Roberts all income to the estate which has accumulated since March 14, 1990.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge