



INTERIOR BOARD OF INDIAN APPEALS

Ella M. Chee v. Navajo Regional Director, Bureau of Indian Affairs

57 IBIA 54 (05/24/2013)

Related Board cases:

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ELLA M. CHEE,)	Order Vacating Decision and
Appellant,)	Remanding
)	
v.)	
)	Docket No. IBIA 11-098
NAVAJO REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	May 24, 2013

Appellant Ella M. Chee appealed to the Board of Indian Appeals (Board) from a February 23, 2011, decision (Decision) of the Navajo Regional Director (Regional Director),¹ Bureau of Indian Affairs (BIA). The Decision declined to retroactively approve a gift conveyance of trust land from Harrison H. Yazzie (Decedent),² to his wife, Mary H. Yazzie (Mary), and daughter, Appellant, as joint tenants. Decedent submitted his gift deed application to BIA in 1986, but died before BIA issued a decision on it. Appellant asked BIA to complete the gift after Decedent’s death, but the Regional Director declined to approve it on the grounds that (1) the record did not support a finding that Decedent intended to complete the conveyance, (2) there was insufficient evidence of the contents of the deed or its execution, (3) the gift may not be in the best interests of Decedent’s other heirs who would otherwise inherit interests in the land, and (4) the conveyance could not be retroactively approved because it was not approved during Decedent’s lifetime, and because the record does not contain any supporting documents signed or executed by Decedent.

We vacate the Regional Director’s Decision and remand the matter to him for further consideration. First, the Regional Director failed to consider evidence in the record that describes the details of the deed and its execution and shows Decedent’s continuing intent to complete the gift. Second, the Regional Director erred by considering Decedent’s

¹ During the course of the events at issue in this appeal, the title “area director” changed to “regional director.” For simplicity, we refer to the former area directors and the regional directors in this case as “Regional Director.”

² Decedent was also known as “Silth pie.” *See, e.g.*, Unsigned Gift Deed Application (Application), July 21, 1986 (Administrative Record (AR) Tab 11).

heirs' best interests because, as non-owners of the land at issue, BIA owes them no duty in this transaction. Finally, the Regional Director determined, incorrectly, that he lacked authority to retroactively approve the gift. A regional director may reconstruct and retroactively approve a lost but previously executed gift deed after the grantor's death, so long as evidence in the record unequivocally demonstrates the existence and contents of the missing, executed deed.

Background

I. Application for Gift Deed

Decedent met with an employee of the Eastern Navajo Agency (Agency) in July 1986 to prepare an "Application for Gift Deed of Indian Land"³ to convey Decedent's trust allotment (Allotment 1461) to Mary and Appellant, "as joint tenants with the right of survivorship." *See* Application; Agency Employees' Statements,⁴ Nov. 16, 2010 (AR Tab 4). The Application was not signed by Decedent.

In September 1986, the Agency Superintendent (Superintendent) submitted to the Regional Director, and recommended that he approve, an "Application for Gift Deed of Indian Land," a "Consent to Gift Deed," and a "Gift Deed to Restricted Indian Land Special Form," each having been "properly completed and executed." Memorandum from Superintendent to Regional Director, Sept. 16, 1986 (First Transmittal Mem.) (AR Tab 9).⁵ The Regional Director "returned [the application package] without action" to correct a typographical error in the deed and to add language to it regarding existing rights-of-way. Memorandum from Regional Director to Superintendent, Oct. 21, 1986 (First Return Mem.) (AR Tab 8).

The Superintendent resubmitted a corrected deed and supporting documents in December 1986. Memorandum from Superintendent to Regional Director, Dec. 16, 1986 (Second Transmittal Mem.) (AR Tab 7). The Regional Director again returned the application materials to the Superintendent, this time stating that the deed was improperly

³ The form on which the Application was drafted was titled "Application for Patent in Fee or for the Sale of Indian Land," but "Patent in Fee or for the Sale" was struck out and "Gift Deed" was written in by hand. *See* Application at 1.

⁴ Although they are called "Affidavits" in the record's table of contents, the Agency employees' statements are unsworn.

⁵ The transmittal memoranda were included in the record without any of the documents they purported to transmit.

executed. Memorandum from Regional Director to Superintendent, Feb. 19, 1987 (Second Return Mem.) (AR Tab 20).

The Superintendent again submitted the gift deed package on July 13, 1989.⁶ Logbook Entries (AR Tabs 10, 18, 19). Two logbook entries indicate that the Regional Director received the application on August 10, 1989. AR Tabs 17, 19. Another set of entries indicates that the materials were “submitted” and “routed for approval” to the Regional Director on September 1, 1989. AR Tabs 16, 18; *see also* Memorandum from Agency Realty Officer to Regional Director, Mar. 26, 2003 (Mar. 26 Mem.) (AR Tab 6).

Mary died in July 1989 and Decedent died in 1992. There is no evidence of any further action taken on the proposed conveyance after September 1, 1989.

Appellant asked the Agency about the transaction in 2002 and was told that the documents were not there. Typed notes, undated (Opening Brief (Br.), Ex. 3, Attach.); *see also* Mar. 26 Mem. & Attach. The Agency Realty Officer requested that the Navajo Regional Office (Regional Office) search for Decedent’s gift deed file documents, but nothing was found. Mar. 26 Mem. at 1; Agency Employees’ Statements at 1-2. A later search of the American Indian Records Repository⁷ also found nothing. Decision at 1 (unnumbered).

II. Probate and Other Proceedings

Indian Probate Judge (IPJ) Allan Toledo held hearings to probate Decedent’s estate in 2006 and 2007. *See* Decision Upon Reopening, Apr. 13, 2010 (Reopening Decision) at 2 (Opening Br., Ex. 1). He issued an Order Determining Heirs and Decree of Distribution (Probate Decision) on April 9, 2007, distributing Decedent’s estate, including Allotment 1461, to Decedent’s heirs (including Appellant). Opening Br., Ex. 4. The estate was distributed without regard to the gift deed because no copy of it could be located; the estate was divided equally between Appellant, her brother, and the estate of Decedent’s predeceased third child. Probate Decision at 2 (unnumbered).

Appellant and her brother, Paul, sought a “continuance” of the probate proceedings after the time for rehearing had expired. IPJ Michael Stancampiano, to whom the case was

⁶ There is no explanation of what happened between 1987 and 1989.

⁷ The American Indian Records Repository, located in Lenexa, KS, was created pursuant to a 2003 Memorandum of Understanding between the Department of the Interior and the National Archives and Records Administration to house non-active records of BIA and the Office of Special Trustee.

reassigned, denied the “continuance” but reopened Decedent’s probate *sua sponte*, finding that it would be manifest error for BIA to take no action on the proposed gift deed. *See* Reopening Decision at 3. In 2007 and 2008, the Probate Hearings Division (PHD) and BIA held hearings and issued memoranda and decisions related to the gift conveyance, and at no point were any gift deed or supporting documents produced.⁸

Eventually, Judge Stancampiano ordered BIA to approve the conveyance. Order to Agency and Region Concerning Gift Deed, Oct. 11, 2007 (Opening Br., Ex. 7). When BIA took no action, he ordered a *Ducheneaux* hearing⁹ in January 2008 to determine whether Allotment 1461 should be removed from Decedent’s estate inventory and transferred to Appellant. *See* Reopening Decision at 4. At the hearing, none of the interested parties objected to retroactively approving the gift deed. *Id.* No recommended decision, *see Estate of Ducheneaux*, 13 IBIA at 177, issued after the *Ducheneaux* hearing.

Revised probate regulations became effective on December 15, 2008, thereby rendering the *Ducheneaux* procedure null and divesting the PHD of jurisdiction over estate inventory disputes. Reopening Decision at 5; *see* 73 Fed. Reg. 67256, 67294 (Nov. 13, 2008). The new regulations require that inventory disputes arising in probate proceedings be referred to BIA for resolution. *See* 43 C.F.R. § 30.128(b); *see also Estate of Francis Marie Ortega*, 50 IBIA 322, 326 (2009).

The case was reassigned to IPJ Roberta Dee Joe, who issued the Reopening Decision on April 13, 2010. Opening Br., Ex. 1. She recognized that the new regulations had divested the PHD of jurisdiction over the inventory dispute, and dismissed the reopening “for lack of remedy and lack of jurisdiction.”¹⁰ *Id.* at 5.

Appellant then appealed the Reopening Decision to the Board. *See Estate of Yazzie*, 51 IBIA 307. The Board affirmed the Reopening Decision to the extent that the IPJ dismissed the reopening for lack of jurisdiction, but found that the IPJ erred in dismissing the matter for “lack of remedy.” *Id.* at 307-08. The Board held that the inventory dispute should have been referred to BIA pursuant to § 30.128(b), and thus the Board referred the matter to BIA for decision. *Id.* at 311.

⁸ For a more detailed discussion of these events, *see Estate of Harrison Yazzie*, 51 IBIA 307, 308-09 (2010); *see also* Reopening Decision at 2-5.

⁹ A *Ducheneaux* hearing was a process by which a probate judge could decide a dispute over the contents of a decedent’s estate inventory in the course of a probate proceeding. *See Estate of Douglas Leonard Ducheneaux*, 13 IBIA 169, 177-78 (1985).

¹⁰ Judge Joe noted that BIA had not located a deed executed by Decedent.

The Regional Director then issued the Decision declining to approve the gift.¹¹ This appeal followed. Appellant filed a statement of reasons and relied upon it in lieu of an opening brief. The Regional Director filed an answer brief and Appellant filed a reply.

Discussion

I. Standard of Review

The standard under which the Board reviews BIA decisions concerning retroactive postmortem approval of conveyances of trust or restricted land is well-established:

Conveyances of trust or restricted land require Secretarial approval and BIA has promulgated regulations governing such conveyances, including gift conveyances. *See* 25 C.F.R. §§ 152.17, 152.22(a), 152.23, 152.25(d); *see also Bitonti v. Alaska Regional Director*, 43 IBIA 205, 212-13 (2006); *Estate of Joseph Baumann*, 43 IBIA 127, 136 (2006). BIA has been delegated the authority to approve or deny an application for a proposed conveyance, and that authority involves the exercise of discretion. *Barber v. Western Regional Director*, 42 IBIA 264, 266 (2006). BIA's authority includes the authority to retroactively approve a conveyance after the death of the Indian grantor. *Bitonti*, 43 IBIA at 211; *Wishkeno v. Deputy Assistant Secretary - Indian Affairs (Operations)*, 11 IBIA 21, 32 (1982).

An appellant bears the burden of showing that BIA did not properly exercise its discretion. *Anderson v. Acting Southwest Regional Director*, 44 IBIA 218, 225 (2007). In reviewing such decisions, the Board may not substitute its judgment for that of BIA. *Barber*, 42 IBIA at 136. The Board's role is limited to determining whether BIA's decision is in accordance with the law, is supported by the record, and is adequately explained. *Scrivner v. Eastern Oklahoma Regional Director*, 44 IBIA 147, 150 (2007).

In approving a conveyance of trust land, BIA acts as trustee for the Indian owner. *Estate of Evan Gillette, Sr.*, 22 IBIA 133, 138 (1992). In determining whether or not to approve a gift deed retroactively [after the grantor's death], BIA should satisfy itself that the grantor's intent and

¹¹ Appellant had appealed to the Board from the Regional Director's inaction on the matter under 25 C.F.R. § 2.8, and that appeal was rendered moot when the Regional Director informed the Board that the Decision was forthcoming. *See Chee v. Navajo Regional Director*, 53 IBIA 29 (2011).

understanding were “reasonably clear.” *Willis v. Northwest Regional Director*, 45 IBIA 152, 167 (2007). Where there is reasonable doubt concerning a grantor’s intent, the Board will uphold a decision not to retroactively approve a gift deed [after the grantor’s death]. *See id.* at 166.

Kent v. Acting Northwest Regional Director, 45 IBIA 168, 174 (2007).

II. Merits

We vacate the Decision for three reasons. First, the Regional Director failed to consider evidence in the record of the contents and due execution of the proposed gift deed, and of Decedent’s continuing intent to complete the gift. Second, the Regional Director erroneously considered the potential interests of Decedent’s heirs when he decided not to approve the gift. Finally, contrary to the Regional Director’s contentions, he does have the authority to reconstruct and retroactively approve a gift deed after a grantor’s death, even if BIA had not approved the deed prior to the grantor’s death and even if the deed executed by the grantor was lost by BIA, so long as evidence of its contents and due execution by the grantor is clear in the record. We thus vacate the Decision and remand this matter for further consideration.

A. Decedent’s Intent

The Regional Director declined to retroactively approve the gift deed in part because he found that the record did not adequately support Decedent’s intent regarding the gift. However, he failed to consider evidence in the record relevant to the content of the proposed deed and its due execution. And, contrary to the Regional Director’s claim that Decedent may have decided not to complete the gift, the record instead supports a conclusion that the gift was not completed because the application materials were lost by BIA, and there is no suggestion in the record that this fact was made known to Decedent and that with such knowledge he decided not to execute new gift deed documents.

The Regional Director failed to consider all of the facts in the record relevant to the contents of the proposed deed and its due execution. He concluded that “[t]he only document [now in existence] that could show the decedent’s wishes or the content of the deed is a copy of” the preliminary, unsigned Application. Decision at 1-2 (unnumbered). The Regional Director “presum[ed]” that, like the preliminary Application, the applications and deeds that were submitted to BIA for approval also “lacked a signature or thumbprint from” Decedent. Answer Br. at 6-7. However, according to the Superintendent, when he first submitted the gift deed application, consent form, and gift deed to the Regional

Director for approval, each was “properly completed and executed.”¹² First Transmittal Mem. The First Transmittal Memorandum also specifically describes the deed’s contents: Decedent was the grantor, Mary and Appellant were the grantees receiving title as joint tenants with the right of survivorship, and the property to be conveyed was the surface and subsurface of Allotment 1461—the same as in the Application.¹³ *Id.* Appellant also attempted to execute another deed, which was included in the second submission. The Regional Director returned it as not properly executed, but at a minimum, Decedent applied his thumbprint to the deed. *See* Second Return Mem. (“Gift Deed [was] improperly executed,” in part because it did not indicate “[w]hich thumbprint.”). And there is additional detail about the contents of the second-submitted deed: The second deed included language stating that the conveyance was subject to valid existing rights-of-way. *See* Second Transmittal Mem.; First Return Mem. The Regional Director erred by not considering this additional evidence of the proposed deeds’ contents and due execution.¹⁴

The Regional Director speculates that “it is reasonably possible” that Decedent changed his mind and that Decedent expressed that sentiment “by never returning to complete the process.” Answer Br. at 7. But there is no evidence showing that Decedent had any reason to believe that the process had stalled. According to the Second Transmittal Memorandum, all necessary documents had been executed (albeit improperly) and submitted to the Regional Office. And, the record shows Decedent’s consistent intent, over several years, to convey the land by gift deed to Mary and Appellant. Not only did Appellant attempt to complete the gift transaction twice in 1986, but he continued to seek approval of the gift conveyance through 1989. *See* Logbook Entries dated July 13, 1989 (AR Tabs 10, 18, 19), Aug. 10, 1989 (AR Tabs 17, 19), & Sept. 1, 1989 (AR Tabs 16, 18). The 1989 gift deed submission was for the same grantor, grantees, and land as the 1986 submissions. Agency realty staff surmised that the gift deed documents were lost after the final submission to the Regional Office in 1989. Agency Employees’ Statements at 2.

¹² It may be inferred that the Regional Director found this deed to be properly executed, because improper execution was not among the errors identified in the First Return Memorandum. *See* First Return Mem.

¹³ Because the deed grants the land to Mary and Appellant as “joint tenants with the right of survivorship,” and because Mary is now deceased, if the conveyance is approved Mary’s interest in the Allotment would immediately vest in Appellant.

¹⁴ In fact, the Regional Director’s Decision acknowledges that a “gift deed was executed,” albeit with errors prohibiting approval. Decision at 1 (unnumbered). This stands in stark contrast with the position he took in the answer brief that “[a]t best, the only document that has ever existed in this case is” the unsigned Application. Answer Br. at 6.

The Regional Director erred in speculating that Decedent changed his mind, while failing to consider affirmative evidence showing that (1) Decedent acted consistently with an intention to complete the conveyance, and (2) the reason the conveyance was not completed was that BIA lost the documents. In addition, there is no evidence showing that Decedent knew BIA had lost the most recent documents he had executed or that he had been requested to complete a new set and never did so. Viewing the facts of this case as a whole, the mere fact that BIA did not complete the gift conveyance is insufficient to establish reasonable doubt as to Decedent's intent to complete the gift.¹⁵

The Regional Director thus failed to consider relevant evidence in determining the contents and execution of the proposed gift deed and failed to consider affirmative evidence of Decedent's continuing intent to complete the conveyance.

B. Heir's Interests

The Regional Director's Decision is also partly predicated on his finding of a potential adverse effect on the "long-range best interests" of Decedent's heirs who would otherwise inherit Allotment 1461. *See* Decision at 2 (unnumbered). That finding is based on 25 C.F.R. § 152.23, which states that "[a]pplications may be approved if . . . the transaction appears to be clearly justified in the long-range best interest of the owner or owners or as under conditions set out in § 152.25(d)." The Regional Director's consideration of the heirs' interests was erroneous because they are not owners of the land.

BIA owes a fiduciary duty to the Indian owners of trust or restricted property. *Kent*, 45 IBIA at 174. Where the owner/grantor is deceased at the time that BIA considers the conveyance, BIA's duty remains due to the grantor. Heirs are not "owners" within the meaning of § 152.23 and BIA owes no duty to them in the transaction, even if they are Indian or Native Alaskan. *Cloud v. Alaska Regional Director*, 50 IBIA 262, 271 (2009); *see Wishkeno*, 11 IBIA at 30-32 (holding that any third-party rights arising after the date of the attempted conveyance, including rights acquired through inheritance or devise, are

¹⁵ It is unclear which standard the Regional Director applied in considering the evidence of Decedent's intent. He first states that BIA may decline to retroactively approve a gift deed if "there is *reasonable doubt* concerning a grantor's intent." Answer Br. at 3 (citing *Willis*, 45 IBIA at 166) (emphasis added). But he then argues that "BIA *must refrain* from approving a gift deed where there is *any question* concerning an owner's intent." Answer Br. at 6 (citing, e.g., *Barber*, 42 IBIA at 266) (emphasis added). The Board clarified in *Willis* that the stricter "any question" standard applies to retroactive approvals *when the grantor is still alive*, and the less stringent "reasonable doubt" standard applies to retroactive approvals where, as here, *the grantor has died prior to the decision*. 45 IBIA at 166-67.

extinguished through retroactive approval). Therefore, the Regional Director's consideration of the heirs' interests was not in accordance with the law, and we vacate the Decision for that reason as well.¹⁶

C. Deeds May be Retroactively Approved and Lost Deeds May Be Reconstructed

Finally, the Regional Director declined to approve the conveyance because he did not believe he was authorized to approve a conveyance when the supporting documents had been lost. Decision at 2 (unnumbered). He further contends in his answer brief that “[b]ecause neither an application for gift-deed nor a conveyance instrument was ever approved by the BIA, the conveyance cannot now be retroactively accomplished in favor of the Appellant.” Answer Br. at 5. We reject both arguments.

First, to the extent that the Regional Director contends that he lacks authority to retroactively approve conveyances of trust or restricted land under 25 C.F.R. Part 152, he is plainly wrong. *See, e.g., Willis*, 45 IBIA at 166 (BIA has authority to retroactively approve a conveyance of trust or restricted Indian both before and after a grantor's death).

And to the extent that the Regional Director concluded that he lacks authority to reconstruct and retroactively approve a lost deed duly executed by the grantor *and* the contents of which are known—an issue of first impression for the Board—we hold that that conclusion is also incorrect. State law is not perfectly applicable here, but it provides a source for the general law on lost deeds, and is instructive in this case. *See Pappin v. Eastern Oklahoma Regional Director*, 50 IBIA 238, 243-44 n.10 (2009) (“Where, as here, there is no Federal law on point, the Board relies on state law and treatises to determine the applicable general law in this area.”).

“The loss . . . of a written instrument does not generally affect its validity” because the writing is merely evidence of the details of the transaction. 52 Am. Jur. 2d Lost and Destroyed Instruments § 2 (2013). Where an unrecorded deed has been lost, states permit

¹⁶ Additionally, the Board has held that, once a grantor dies, the “long-range best interest” inquiry under § 152.23 becomes moot. *Cloud*, 50 IBIA at 273. And, § 152.23 provides an alternative means of approval, without regard to the grantor's best interest, under § 152.25(d), which states that BIA may approve a conveyance of trust land by gift “when the prospective grantee is the owner's spouse . . . or lineal descendant.” 25 C.F.R. §§ 152.23, 152.25(d). In this case, the proposed gift was to Mary (a spouse) and Appellant (a lineal descendant). Therefore, even if the issue is not moot, no “best interest” determination is required.

an action to reconstruct the lost deed. *Id.* § 7. Extrinsic evidence (i.e., evidence outside of the deed itself) is permitted to establish its contents and due execution. *Id.* § 13. “[P]roof must be more than a mere preponderance of the evidence. In order to reestablish a deed, proof of the operative parts of the lost or destroyed document must be clear, strong and unequivocal, or clear and certain.” *Id.* § 37.

Here, the record is clear and certain that: Decedent duly executed several gift deed applications and gift deeds for Allotment 1461; Appellant and Mary were the grantees, as joint tenants with the right of survivorship, in each deed; the proposed conveyance was of Decedent’s entire interest in the allotment, subject only to valid existing rights-of-way; BIA had custody of the most recent gift deed application and deed; BIA failed to maintain any record of the disposition of Decedent’s final gift deed application and deed; and BIA failed to maintain either the original documents themselves or copies. It would be unreasonable in this case for BIA to disapprove this transaction simply because it misplaced the deed and the supporting documents. Where the grantor unquestionably executed a deed, where the deed’s contents are known, and where it was never approved only because BIA lost it, there is no legal reason for BIA, acting in its capacity as the trustee on behalf of the grantor, not to reconstruct the deed and complete the gift conveyance.¹⁷

Therefore, in the unique circumstances of this case, the absence in the record of the grantor’s signed application and executed gift deed does not prevent BIA from reconstructing the deed and exercising its discretion to decide whether to retroactively

¹⁷ BIA is the owner of record of Indian trust lands on behalf of Indian beneficiaries. In administering those lands, BIA is statutorily “empowered and directed” to maintain “a record of every deed executed by any Indian, his heirs, representatives, or assigns, which may require the approval of . . . the Secretary of the Interior.” 25 U.S.C. § 5. And, as both the legal owner of record and the recorder of beneficial Indian land titles, BIA has the ability to correct its own errors with respect to land titles. *See, e.g.*, 25 C.F.R. § 150.7. Here, BIA did maintain “a record” of the deed executed by Decedent, albeit not the deed itself. Given the particular facts of this case, summarized in the text above, we conclude that BIA—through its responsibility for the maintenance of accurate title records and, more particularly, as owner of legal title of Allotment 1461 and trustee on behalf of Decedent—is empowered to reconstruct the gift deed application and deed that were completed and executed by Decedent. BIA may then give due consideration to approving the same pursuant to 25 C.F.R. Part 152 and, if it concludes that the application and deed should be approved, it may effect the transfer of title in its land titles system.

approve the gift. We thus vacate the Regional Director's February 23, 2011, Decision and remand the matter to him for further consideration consistent with this order.¹⁸

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 vacates the February 23, 2011, Decision and remands the matter to the Regional Director for further consideration.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Debora G. Luther
Administrative Judge

¹⁸ Given that the interested parties testified at the *Ducheneaux* hearing that they did not object to conveyance of the allotment to Appellant, Reopening Decision at 4, the Regional Director may also explore during remand—as an alternative to reconstructing and retroactively approving the gift deed—whether the interested parties will stipulate to conveyance of the allotment to Appellant. If the interested parties will so stipulate, we leave it for BIA to determine in the first instance the procedures for completing the conveyance.