



## INTERIOR BOARD OF INDIAN APPEALS

Cheryl M. Mathias v. Acting Northwest Regional Director, Bureau of Indian Affairs

57 IBIA 250 (08/06/2013)



# 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

CHERYL M. MATHIAS,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 11-130
ACTING NORTHWEST REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	August 6, 2013

Appellant Cheryl M. Mathias appealed to the Board of Indian Appeals (Board) from a May 10, 2011, decision (Decision) issued by the Acting Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Decision affirmed a January 19, 2011, decision by BIA’s Flathead Agency Superintendent (Superintendent) declining to reform a gift deed from Appellant’s uncle, Antoine Mathias (Tony), that granted Appellant a life estate in a one-acre parcel of trust land located on the reservation of the Confederated Salish and Kootenai Tribes (Tribes) in Montana. We affirm the Decision.

The Superintendent declined to reform the gift deed for three reasons: He doubted that he had authority take the action requested; he found the evidence insufficient to support Appellant’s claims that the deed was fraudulently altered to convey a life estate rather than a full interest; and he held that Appellant’s lack of diligence in the matter weighed against reformation. The Regional Director affirmed the Superintendent’s decision for the same reasons.

Without reaching the issues of whether BIA is authorized to reform deeds after they have been executed and recorded or whether Appellant exercised diligence, we find on the merits that Appellant has not met her burden of showing that the deed should be reformed. Therefore, we affirm the Decision.

## Background

As early as 1982, Tony attempted to convey a small portion (one acre) of his land to Appellant. Appellant produced a typed statement, dated September 17, 1982, and addressed to the Superintendent, in which Tony asserts that he “ha[s] made [an] application to gift deed 1 acre . . . to . . . [Appellant] for a homesite.” Memorandum (Mem.) from

Appellant to Superintendent, Sept. 17, 1982, Ex. 1 (Administrative Record (AR) Tab 2). Tony also stated, “In the event that [Appellant] does not use this [land] for a homesite she is to gift[] deed [it] back to me.” *Id.* The statement was signed by Tony and two witnesses.

Appellant also produced a pre-printed “Application for Patent in Fee or for the Sale of Indian Land” (1988 Application) executed by Tony in 1988. *See* 1988 Application (AR Tab 2, Exh. 2). At the top of the form appeared the handwritten statement, “Gift Deed To Niece Cheryl Mathias.” *Id.* On the second page, a similar statement appears: “Gift Deed – niece Cheryl Mathias” followed by Tony’s signature. The 1988 Application sought to give Appellant surface rights in a portion of Allotment No. 2031. The application does not limit the gift to a life estate nor does it contain any language requiring Appellant to use the land as a homesite. Tony signed the bottom of the application and the Superintendent approved it in 1989, *id.*, but according to Appellant no deed was issued at that time, Opening Brief (Br.) at 1.<sup>1</sup>

Finally, on May 5, 1992, Tony executed a gift deed granting Appellant a life estate in an acre of land on Allotment No. 2031 for use as a homesite. Deed (AR Tab 1). Apart from the 1988 Application provided by Appellant, the administrative record does not contain a gift deed application. At the time Tony executed the deed, Appellant asserts that she and a Tribal Lands Program employee, Roberta Kay Decker (Decker), were present.<sup>2</sup> Appellant asserts that Tony told Appellant and Decker that “he was giving [Appellant] some of his land to build a house,” and that he was not giving Appellant a deadline to do so, that Appellant “can take all the time she wants [because] it’s her land.” Opening Br. at 1; *see also* Reply Br. at 1, 2 (same). The deed grants Appellant a life estate, provided that she uses the land as a homesite, and that Tony or his heirs, if Tony is deceased, own the remainder interest (i.e., own the land after Appellant’s death or after Appellant ceases to use the land for a homesite). Deed at 1. After Tony signed the deed, it was approved by the

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<sup>1</sup> The 1982 and 1988 documents were included with Appellant’s memorandum to the Superintendent, but were not otherwise included in the administrative record. It is unclear why they were not included in the record, and thus, we are unable to determine when they first became a part of BIA’s records.

<sup>2</sup> Appellant also claims that Virgil Dupuis (Virgil), Tribal Lands Program Manager, and Frenchy Burland (Burland), BIA Realty Supervisor, also were present. *See* Opening Br. at 1; *but see* Reply Br. at 1 (Decker and Appellant were present the day the deed was executed). In his affidavit, Virgil agrees that he visited Tony with Appellant, Decker, and Burland but did not say *when* the visit took place. In a separate, notarized statement that is undated, Virgil stated that the four of them visited Tony several years *prior* to the execution of the deed. AR Tab 2, Exh. 3.

Superintendent in May 1992, and was filed and recorded in BIA's Portland Area (now Northwest Regional) Land Titles and Records Office on May 12, 1992. *Id.* at 2. The record does not contain any notice to Tony or to Appellant from BIA informing them that BIA had approved a gift deed from Tony to Appellant that granted Appellant a life estate in Allotment No. 2031.

Tony died in 1996. The administrative record does not contain any communications from Tony or from Appellant concerning the deed at any time prior to Tony's death nor does Appellant assert that there were any such communications.

Sometime subsequent to Tony's death, Appellant apparently began to question the life estate. She does not state when she first learned that she had received a life estate instead of a full interest from Tony<sup>3</sup> nor does she state when she first contacted BIA. The administrative record from BIA does not reflect any contact by Appellant prior to October 2010 when Appellant petitioned the Superintendent to change the terms of the deed to give Appellant a full interest in the homesite instead of a life estate. In her petition, she argued that the deed Tony signed in 1992 "was signed as a gift deed and altered to a life estate." Mem. at 2. In support, she submitted Tony's 1982 statement and the 1988 Application. *Id.*, Exhs. 1-2. She also submitted affidavits from four people who had worked for or with the Tribe's Lands Program. *Id.*, Exhs. 4-7. Appellant further swears that Decker told her that someone told Decker to make the conveyance from Tony a life estate. *Id.* at 1. Appellant also states that Decker later denied making this statement to Appellant. *Id.* Appellant avers that she took the matter before the Tribes' Council and that the Council ordered an investigation into Appellant's allegations of tampering with the gift deed. *Id.* at 1-2. Neither Appellant nor the record inform us of the outcome of the investigation nor have any documents been provided to the Board concerning the purported investigation.

Turning to the affidavits provided by Appellant in support of her petition, the first affidavit was executed by Virgil, who worked for the Tribal Lands Program from 1985 through 1996. Virgil Aff., ¶ 1 (AR Tab 2, Exh. 4). He recalled accompanying Appellant, Decker, and Burland to Tony's home to discuss a gift deed, but he does not state whether Tony wanted to give Appellant an outright interest in the property or a life estate.<sup>4</sup> He did assert that he did not recall directing any employee to process the deed as a life estate. *Id.* ¶¶ 5-6, 9.

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<sup>3</sup> Virgil recalled that, in approximately 2008, Appellant told him that she had received a life estate from Tony. Virgil Affidavit (Aff.), Aug. 31, 2010 (AR Tab 2, Exh. 4), ¶ 8.

<sup>4</sup> See n.2 *supra*.

The next affidavit was from Gregory Dupuis (Gregory), the Tribal Land Technician who initially processed the paperwork for the gift deed. Gregory Aff., Oct. 4, 2010, ¶ 1 (AR Tab 2, Exh. 5). He averred that in 1990, certain individuals “asked [him] to interfere with this land transaction and prevent the transfer of the parcel of land from Tony . . . to [Appellant].” *Id.* ¶ 2.<sup>5</sup> He stated that Virgil removed him from the transaction soon thereafter because of the request to interfere with the land transaction. *Id.* ¶ 3.

The third affidavit came from John Carter (Carter), who has been an attorney for the Tribes since 1984. Carter Aff., July 8, 2010, ¶ 1 (AR Tab 2, Exh. 6). The affidavit establishes that on or about May 4, 1992, the Tribes’ Legal Department was requested by Decker, who worked in the Tribes’ realty services office, to provide language to modify a standard BIA deed form so that the deed would convey a life estate, i.e., requested to draft a reversionary clause. *Id.* ¶ 10. That task fell to Carter, who explained that it was regular practice for the Tribes’ attorneys to assist the Tribes’ realty services staff, e.g., in drafting deed language. *Id.* ¶¶ 3-6. He averred that he was only asked to revise the terms of the standard template, and he did not see the underlying application. *Id.* ¶ 10(2), (6). Attached to Carter’s affidavit were notes related to the reversionary clause and Carter’s hand-edited deed. *Id.*, Attach. Carter’s own handwritten note reflects that he provided a draft deed with edits to “Kay,” whom he believes was Decker. *Id.* ¶¶ 7, 10, Attach.

The final affidavit was signed by Beverly Neiss. Neiss Aff., June 24, 2010 (AR Tab 2, Exh. 7). She stated that she worked for the Tribe’s Division of Lands from 1996 through 2003, and she served as the Lands Program Manager for several months in 2002 and 2003, during which period she was Decker’s supervisor. *Id.* ¶¶ 1-2, 4. She averred that Decker told her that the Tribes’ Executive Secretary “had directed that no one from Lands contact Tony . . . regarding the gift deed because he had changed his mind and wanted to convey a life estate only to [Appellant].” *Id.* ¶ 6.<sup>6</sup>

After considering the above information, the Superintendent declined to reform the deed. Superintendent’s Decision (AR Tab 3). He doubted that BIA had the authority to change the terms of an executed, approved, and recorded deed. *Id.* at 2. He determined that there was no evidence that the deed was altered, no evidence that the deed did not reflect Tony’s intention when he signed it in 1992, and no evidence that Tony lacked the capacity to execute the deed. *Id.* at 2. He also held that the “significant and unexplained passage of time” between the deed’s execution and Appellant’s request to modify it

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<sup>5</sup> One of the individuals identified by Gregory is the same individual that allegedly told Decker that the conveyance to Appellant should be a life estate.

<sup>6</sup> The Neiss Affidavit contains two consecutive paragraphs numbered “6.” We refer here to the first paragraph in her affidavit that is numbered “6.”

demonstrated a lack of diligence on Appellant's part that weighed against reforming the deed. *Id.*

Appellant appealed to the Regional Director and reasserted the arguments she had raised before the Superintendent. She did not address the Superintendent's determination that she had not acted with diligence. The Regional Director affirmed the Superintendent's decision in full. Appellant then appealed to the Board. She filed opening and reply briefs and the Regional Director submitted an answer brief.

Before the Board, Appellant continues to argue that the deed was fraudulently altered. She asserts for the first time that she pursued her claim with diligence. Appellant makes several additional arguments to the Board that were not raised below: She argues that the 1988 Application was enforceable as soon as the Superintendent approved it; that the Superintendent approved the 1992 deed only because Decker "never showed anyone" the 1988 Application; and that Tony signed a blank gift deed into which language conveying a life estate was later inserted.

### Discussion

We affirm the Regional Director's May 10, 2011, Decision declining to reform the deed. We need not reach the issues of Appellant's diligence or BIA's authority to reform the deed because Appellant has not presented evidence sufficient to carry her burden of proof to justify reformation. None of the evidence shows that the deed was fraudulently prepared or altered. We decline to consider Appellant's remaining arguments, which are raised on appeal for the first time.

#### I. Arguments Not Raised Before the Regional Director

As an initial matter, it is well-settled that the Board does not consider arguments that could have been, but were not, raised before the Regional Director. 43 C.F.R. § 4.318; *Clingan v. Northwest Regional Director*, 56 IBIA 185, 191 (2013). Appellant argues for the first time in this appeal that the 1988 *Application* is enforceable because the Superintendent approved it and that the deed was only approved because Decker "never showed anyone" the 1988 Application. Opening Br. at 1-2. Appellant also now argues that Tony executed a blank gift deed that subsequently was completed with language conveying a life estate to Appellant. Because Appellant failed to raise these arguments below, we will not consider them now.<sup>7</sup>

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<sup>7</sup> If we did consider these arguments, we would reject them. First, gift deed applications are not enforceable on their own. Deeds, not applications, convey land. *Dumbeck v. Acting*  
(continued...)

We also decline to consider Appellant’s arguments concerning her diligence because she failed to contest this ground in her appeal to the Regional Director. However, we note that Appellant does not, even on appeal, set forth the operative facts that would demonstrate her due diligence, e.g., when did she first learn that the deed was for a life estate only. While there may not be a “bright line” test for determining due diligence when a grantee seeks reformation of a deed, the passage of time in this case between BIA’s approval (and recording) of the deed and Appellant’s petition for reformation would certainly warrant a clear explanation from Appellant with supporting evidence. On the other hand, we also note that nothing in the record would indicate that Appellant actually knew, in 1992 or shortly thereafter, that she had been granted a life estate. Based on appeals received by the Board, it appears that BIA may not have a procedure in place for informing parties to deeds that BIA has made a decision to approve the deed. Certainly, the decision to approve a deed is deserving of notice to the grantor and grantee.

By approximately 2008, Appellant knew that she had received only a life estate, and she sought reformation of the deed in October 2010. On appeal to the Board, Appellant suggests she made inquiries about the deed, but was thwarted in receiving information. She did not make this or any other argument concerning her diligence to the Regional Director. Thus, we need not decide whether BIA correctly determined that Appellant failed to act with diligence nor do we need to determine the standard for showing due diligence in a case such as this one, given Appellant’s failure to first present her arguments to the Regional Director.

## II. Appellant has not Met her Burden of Showing that the Deed Should be Reformed

Appellant argues that the deed fails to reflect what she claims is Tony’s intent to grant her a full interest, not a life estate, in the one-acre homesite. She maintains that his intent was thwarted through fraud, but continually changes her theory as to how the fraud was perpetrated. She argued to the Superintendent that Tony signed a deed conveying a full interest to Appellant that was subsequently altered to a life estate. This argument was

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(...continued)

*Great Plains Regional Director*, 47 IBIA 39, 44 (2008). Second, Appellant’s claim that Decker “never showed anyone” the approved 1988 Application is irrelevant in the absence of evidence showing that Tony believed he was granting Appellant a full interest in a one-acre parcel when he executed the actual deed. *See* discussion *infra*. Similarly, Appellant’s argument on the merits—that fraud was committed when the life estate language was added to a blank gift deed that Tony signed—fails for lack of evidence. Nothing in the affidavits or on the face of the deed suggests that it was altered or that language was subsequently added.

rejected. Before the Regional Director, Appellant argued only that fraud occurred but did not explain *how* it occurred (e.g., alteration in the deed or preparation of the deed with a life estate without Tony's knowledge). The Regional Director disagreed, expressly finding no evidence of fraud. Before the Board, Appellant continues to maintain that the deed was altered but now claims that Tony signed a blank deed into which the details of the life estate were later added. We decline to consider this newest argument. *See supra* at 254. What we will consider is the evidence proffered by Appellant in support of her general allegations of fraud, and we conclude that Appellant has not met her burden of proof.

In reviewing the evidence in the record, we conclude that (1) the 1982 statement and the 1988 Application demonstrate that Tony wanted to convey an interest in an acre of land to Appellant, but these documents are too far removed in time from the deed executed in 1992 to convince us that they represent Tony's intentions *at the time he signed the deed*, (2) Appellant avers that she heard Tony say she was to have the land and could take her time building her home, which is not inconsistent with a life estate, (3) Gregory's affidavit confirms that family members *attempted* to interfere with the transfer, (4) the remaining affidavits simply do not suggest that any fraud occurred, and (5) the deed itself, on its face, does not appear to have been altered in any way.

Therefore, we conclude that on the basis of the record presented to us there is insufficient evidence of fraud in connection with the execution of the deed conveying a life estate to Appellant. We reject Appellant's further contention that she has been deprived of a fair hearing where each of Appellant's witnesses could testify. Appellant presented the affidavits of her witnesses, which is evidence, and we have carefully considered each one and have assumed the truth of each assertion made by the affiants. Nothing further would be served by convening a hearing to receive their live testimony, even assuming that Appellant was entitled to such a hearing.<sup>8</sup>

In addition, we observe that Appellant states that Tony was of sound mind at the time he executed the deed, for which reason we may presume he was aware of what he was doing when he signed the gift deed and understood the terms of the deed. We further note that Tony lived another 4 years after executing the deed, during which time he apparently did not express any disagreement with his gift of a life estate or attempt to convey his remainder interest to Appellant. Finally, the terms of the deed are clear and unambiguous. For each of the above reasons, we conclude that Appellant has not met her burden of

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<sup>8</sup> Appellant cites no law in support of her claim for a hearing, and we know of none. BIA's administrative appeal process, set forth at 25 C.F.R. Part 2, does not provide for hearings. *See All Materials of Montana, Inc. v. Billings Area Director*, 21 IBIA 202, 210 (1992).

showing that fraud played any role in the gift deed executed by Tony. Thus, we affirm the Regional Director's decision.

### Conclusion

We decline to consider arguments raised by Appellant for the first time on appeal and we decline to reach the merits of her diligence in seeking reformation or BIA's authority to reform deeds. As to the allegations of fraud, we find nothing on this record to suggest—at the time Tony signed the deed—that the deed had been fraudulently prepared or subsequently altered.

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 May 10, 2011, Decision.

I concur:

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Debora G. Luther  
Administrative Judge

          //original signed            
Steven K. Linscheid  
Chief Administrative Judge