



## INTERIOR BOARD OF INDIAN APPEALS

Calvin R. and Myrna First v. Rocky Mountain Regional Director, Bureau of Indian Affairs

42 IBIA 76 (12/06/2005)

Petitions for reconsideration dismissed:

42 IBIA 188

50 IBIA 278



# 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

CALVIN R. and MYRNA FIRST,	:	Order Adopting Recommended
Appellants,	:	Decision as Modified
	:	
v.	:	
	:	Docket No. IBIA 04-40-A
ROCKY MOUNTAIN REGIONAL	:	
DIRECTOR, BUREAU OF	:	
INDIAN AFFAIRS,	:	
Appellee.	:	December 6, 2005

Calvin R. and Myrna First (Appellants), *pro se*, seek review of a Recommended Decision Confirming Inventory issued on November 18, 2003 by Administrative Law Judge Robert G. Holt (ALJ) in the estate of Reynold R. First (Decedent), deceased Fort Peck Indian, Probate No. RM 206-0098. 1/ For the reasons discussed below, the Board adopts the ALJ's Recommended Decision as modified here.

### Background

Decedent died intestate on December 25, 2001 at Culbertson, Montana. At the time of his death, he possessed interests in trust or restricted property located on the Fort Peck Reservation in Montana. Relevant to this appeal, one of Decedent's interests was an undivided 10395/29160 interest in Fort Peck Allotment No. 358 (Allotment 358), described as N½, sec. 22, T. 28 N., R. 54 E., Principal Meridian, Montana, containing 320 acres, more or less.

On October 25, 2002, Appellant Calvin First submitted a claim against Decedent's estate. Calvin First is Decedent's brother and Myrna First is Calvin's wife. Calvin alleged that Decedent had agreed to pay him \$11,400 in exchange for Calvin's undivided 10395/29160 interest in Allotment 358. The Bureau of Indian Affairs (BIA) processed the transfer of Calvin's interest to Decedent as a gift deed application in January 1980 and

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1/ In the same November 18, 2003 document, the ALJ issued a Decision Distributing Estate. That decision has not been appealed.

approved the application on January 28, 1980. In his claim letter, Calvin asserted that Decedent had never paid him for his interest. Calvin also submitted an affidavit in support of his claim, dated October 24, 2002, in which he requested that \$11,400 be paid to him from Decedent's estate or that the land be returned to him.<sup>2/</sup>

The ALJ held an initial probate hearing on February 5, 2003. At the hearing, it became apparent that there were facts in dispute and that Calvin was challenging BIA's inventory of Decedent's estate, which included an interest in Allotment 358. On March 5, 2003, the ALJ issued a Notice of Disputed Estate Inventory and Notice of Supplemental Hearing, pursuant to the Board's standing order in Estate of Douglas Leonard Ducheneaux, 13 IBIA 169 (1985).<sup>3/</sup> The ALJ also issued a subpoena directing the Superintendent of the Fort Peck Agency to prepare the gift deed file for Allotment 358 and to designate an employee of the Agency to testify concerning the gift deed.

The supplemental hearing concerning the trust inventory was held on May 5, 2003. Calvin First and his son, Calvin First, Jr., testified in support of Calvin's challenge to the BIA inventory. Del First, Decedent's son, testified in opposition to Calvin's claim. Florence Youpee, who represented Decedent in an action brought by Calvin requesting that Decedent return his interest in Allotment 358 before the Fort Peck Tribal Court, also testified. The BIA's gift deed file was admitted into evidence through an employee of the Fort Peck Agency.

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<sup>2/</sup> The ALJ denied Calvin's monetary claim for \$11,400 in the Decision Distributing Estate, on the grounds that (1) the written documents concerning Allotment 358 showed that the property was given by Calvin to Decedent as a gift; (2) the claim was barred by the statute of limitations; and (3) there were insufficient funds in Decedent's IIM account to cover the claim. Calvin has not appealed the decision denying his monetary claim.

<sup>3/</sup> In Ducheneaux, the Board established a procedure under which alleged errors in BIA's estate inventory are to be considered during a probate proceeding. Rather than separately refer inventory questions to BIA to consider and decide challenges to the correctness or completeness of the inventory of the trust estate, Ducheneaux allows an ALJ to take evidence concerning the trust estate inventory and issue a recommended decision for the Board on disputed issues concerning the inventory. 13 IBIA at 177-178; see also Estate of Joseph Baumann, 38 IBIA 150, 153 (2002). The BIA is to be afforded an opportunity to participate in the proceedings before the ALJ. In this way, an ALJ may address both probate matters and estate inventory matters in a unified proceeding, subject to the parties' right of appeal to the Board.

The ALJ issued a Recommended Decision on November 18, 2003. With respect to the evidence adduced at the May 5, 2003, hearing, the Recommended Decision states, in part:

Calvin testified that he and Decedent had a verbal agreement whereby Decedent promised to pay Calvin the value of Calvin's interest in Allotment 358 when Decedent received lease monies for the allotment.

Records of the [BIA] at Fort Peck Agency \* \* \* show that on January 22, 1980 Calvin signed an "Application for Patent in Fee or For the Sale of Indian Land." The application has the words "(patent in fee) and (supervised sale)" crossed out and the phrase "Gift Deed to: Reno First" inserted in their place. Decedent was also known as Reno First. The application states in paragraph 15(b): "I [meaning Calvin] intend to use the proceeds of sale for the following purposes: purchase of trailer home (mobile)."

The BIA records contain a form on which the BIA calculated the estimated value of Calvin's interest in allotment 358 at \$11,400.00. The BIA records do not contain a formal appraisal.

The BIA records also contain an Affidavit signed by Calvin on January 24, 1980 which states in relevant part:

I, [Calvin] hereby certify that I was fully informed by the Superintendent, Fort Peck Agency on 1/23/80 that my undivided 10395/29160 interest in [allotment 358] is valued at approximately \$11,400.00.

Having knowledge of this value, I still wish to give this undivided interest by GIFT DEED to [Decedent] without payment of monies to me for the value of this land. My GIFT deed of this undivided interest shall be for \$1.00, Love and Affection.

On January 24, 1980, Calvin and his wife signed a "Deed to Restricted Indian Land Special Form" conveying allotment 358 to Decedent. The Deed recites the consideration as "\$1.00, love and affection."

At some point, Decedent apparently offered Calvin \$300.00 for allotment 358, but Calvin refused the offer because it was not the amount agreed upon.

On October 4, 1985, Calvin filed a Civil Action in Fort Peck Tribal Court for recovery of allotment 358 from Decedent. Decedent was represented by tribal advocate, Florence Youpee in the proceeding. She testified at the supplemental hearing that the court records of the proceeding had been lost. [4/]

On October 10, 2000, before Decedent died, Calvin wrote to the Superintendent, Fort Peck Agency, asking to void or cancel the gift deed. On October 27, 2000, the Superintendent responded. The Superintendent cited the authority in the regulations for approval of gift deeds and the facts stated above. The letter noted “If you and your brother had made an agreement between yourselves whereby he would pay you a certain sum for the property, this would be a matter handled between the two of you and requires no knowledge or participation of the [BIA].”

\* \* \* \* \*

A conflict in the evidence exists as to whether Decedent had promised to pay Calvin for allotment 358. Calvin testified that Decedent did promise additional compensation for the gift deed that Calvin signed. The documents in the BIA file described above indicate that no additional compensation was expected. Calvin’s son, Calvin First, Jr., pointed out at the hearing that the application signed by Calvin on January 22, 1980 indicated in paragraph 15(b) that Calvin intended to use the proceeds for purchase of a trailer thus showing that some significant compensation was intended.

Having observed the demeanor of the witnesses and judged their credibility and having considered all of the evidence submitted, the undersigned concludes that Decedent did not promise to pay Calvin additional compensation for allotment 358. The undersigned places more weight on the written statements Calvin made in the affidavit he signed on January 24, 1980 that “I still wish to give this undivided interest by GIFT DEED to [Decedent] without payment of monies to me for the value of this land.” \* \* \* \* \* This written statement of the party’s agreement is more

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4/ Florence Youpee also testified that the tribal court had ruled in favor of Decedent but she did not have a copy of the order, and Appellants insisted that they had never received a final order.

reliable than the oral testimony received after Decedent's death and more than twenty years later.

The undersigned has also considered the argument that the application contemplated additional significant compensation. However, the affidavit signed some two days later is more detailed and unequivocally states that no payment of money is being made. This document is thus given more weight than the application.

November 18, 2003 Decision and Recommended Decision at 6-8. The ALJ also considered Calvin's argument, articulated in a letter addressed to the ALJ and presented at the supplemental hearing, that BIA had not lived up to its trust responsibility because it did not conduct an appraisal for the gift deed. The ALJ cited to the federal regulations governing gift deeds, and concluded that no appraisal was required. The ALJ explained, "[p]erformance of an appraisal when the land can be conveyed for no consideration would be a needless act." Decision and Recommended Decision at 7.

The ALJ set forth the standard for legal challenges to the inventory of a deceased Indian's trust or restricted estate prepared by the BIA, as articulated by the Board in Estate of Aaron Francis Walter, 16 IBIA 192 (1988). He concluded that, under this test, Calvin had not satisfied the burden of proof required to have Decedent's inventory modified to exclude Allotment 358.

Appellants filed a timely notice of appeal. No briefs were received by the Board.

### Discussion

On appeal to the Board, Appellants generally repeat the arguments they presented to the ALJ below. Appellants contend that BIA "has failed to live up to its Trust Responsibility when looking over applications when money and land are at stake" because (1) BIA knew that there was an agreement between the brothers whereby Decedent would pay Calvin for his interest but still processed a gift deed application; and (2) Appellants had requested that BIA conduct an appraisal and BIA did not tell Appellants that an appraisal had not been done.

In order to be successful in a challenge to an inventory, the person seeking correction of a decedent's estate must establish that BIA committed an error or omission that was responsible for the property being erroneously omitted from or included in the decedent's estate. See Estate of Aaron Francis Walter, 16 IBIA at 197 n.6, 198. The standard of proof is a preponderance of the evidence. Id.

Appellants have not shown that the ALJ erred in finding that they had not satisfied their burden of proof. Nor have they shown that BIA committed an error that was responsible for an erroneous inclusion of Allotment 358 in Decedent's estate. Appellants' argument that BIA knew that the interest in Allotment 358 was not intended to be a gift and thus should not have processed a gift deed application lacks merit. There is no evidence in the record that Appellants objected to BIA's completion of the paperwork at the time of the transfer. In fact, Calvin did not complain about BIA's processing of the gift deed until more than 20 years after the gift deed was approved, when Appellant sent a letter to the Superintendent on October 10, 2000.<sup>5/</sup> Further, as noted by the ALJ, Calvin signed an affidavit stating that his "GIFT DEED of this undivided interest [in Allotment 358] shall be for \$1.00, Love and Affection" two days after submitting his application for a gift deed. Appellants also both signed a Deed to Restricted Indian Land Special Form on January 24, 1980, which provided that the interest was being transferred for "\$1.00, love and affection."

The ALJ reviewed the documentary evidence and evaluated the credibility of oral testimony. The Board finds no error in the ALJ's determination that, to the extent that Calvin's statements on his original application created a question as to whether Calvin wanted to transfer his interests by gift deed or for money, any such question was resolved by Calvin's clear statements in his affidavit and on the Deed to Restricted Indian Land Special Form.

As to Appellants' argument that BIA was required to conduct an appraisal of Calvin's interest in Allotment 358 prior to its transfer, the Board declines to address the merits of this argument. Even if BIA erroneously failed to conduct an appraisal, such failure is harmless error and does not compel a determination that the transfer was invalid. Calvin signed the affidavit attesting that he intended to gift deed Appellants' interests in the allotment despite its estimated value of \$11,400, and Appellants do not allege that an appraisal would have shown that their interests were worth more than the BIA estimate or that this would have caused them to decide not to gift deed their interests in the allotment. Thus, Appellants suffered no prejudice from the lack of an appraisal. Because we do not reach the question whether BIA was required to appraise the allotment, we adopt the ALJ's ultimate conclusion rejecting Appellant's argument regarding the lack of an appraisal but not the reasoning for that conclusion.

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<sup>5/</sup> The civil action Calvin brought in Fort Peck Tribal Court did not allege any errors on the part of BIA. October 4, 1985 Civil Action.

In conclusion, the Board has reviewed the entire record and concludes that it amply supports the ALJ's Recommended Decision Confirming Inventory. 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 adopts the ALJ's Recommended Decision as modified in this decision.

I concur:

\_\_\_\_ // original signed \_\_\_\_\_  
Katherine J. Barton  
Acting Administrative Judge

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