



INTERIOR BOARD OF INDIAN APPEALS

Estate of Harold Frank Pickernell

32 IBIA 1 (01/09/1998)

Judicial review of this case:

Dismissed, *Anderson v. Babbitt*, No. C98 5077 RJB (W.D. Wash. Sept. 25, 1998)
Affirmed, 230 F.3d 1158 (9th Cir. Oct. 30, 2000)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF HAROLD FRANK
PICKERNELL

: Order Docketing Appeals;
: Order Affirming November 14,
: 1997, Order in Part and
: Remanding it in Part; and
: Order Affirming October 31,
: 1997, Order in Part,
: Reversing it in Part, and
: Dismissing Appeal in Part
:
: Docket Nos. IBIA 98-37
: IBIA 98-45
:
: January 9, 1998

Appellant Leda Anderson has filed two Notices of Appeal with the Board of Indian Appeals (Board). One Notice of Appeal, which is docketed under Docket No. IBIA 98-37, seeks review of a November 14, 1997, order issued in the estate of Decedent Harold Frank Pickernell by Administrative Law Judge William E. Hammett. Although the November 14, 1997, order does not address the entirety of the probate of Decedent's estate, it states that it is final in regard to the issues addressed unless appealed to the Board.

Based on the limited documents before the Board, it appears that a Cecil Garfield or Cecil Duncan filed a claim for approximately \$300,000 in Decedent's estate, apparently for care and maintenance of Decedent. It further appears that the personal representative of Decedent's estate, who was apparently also Decedent's guardian prior to Decedent's death, agreed to pay Garfield or Duncan \$175,000. Appellant argued to Judge Hammett that this was a fraudulent claim and sought to have the claim denied on a preliminary motion.

Most of the November 14, 1997, order discusses Judge Hammett's denial of a motion to set aside Decedent's will in advance of a hearing. Judge Hammett stated generally at page 1 of the order that he "[found] that all of the issues raised and the alleged evidence offered in support of the pleadings are matters which can be encompassed within a hearing and that a hearing would be a more appropriate arena within which to address them," and at page 2 denied the motion to deny the claim.

Appellant contends that Judge Hammett "gave no reason * * * why [he] denied the Motion denying Garfield's Creditor Claim. Accordingly, questions are present as to whether the [Judge] has accepted the claim * * *, [has accepted] the settlement * * * or is deferring judgment to trial. Since the Order is a final one and its consequences are unknown, Appellant feels appeal is appropriate in light of the Claim's large size." Notice of Appeal from Nov. 14, 1997, Order at 1.

Although it believes that Judge Hammett deferred consideration of the claim, the Board finds that the Judge's intentions are not altogether clear. Therefore, the Board remands this part of the November 14, 1997, order to Judge Hammett for clarification. If Judge Hammett intended to defer judgment on the claim until after the hearing, that fact should be made clear in an interim, non-final, order.

The remainder of the November 14, 1997, order is affirmed in the absence of any challenge to it.

Appellant's second Notice of Appeal is from an interim Order Denying Motion for discovery which Judge Hammett issued on October 31, 1997. This interlocutory appeal is docketed under Docket No. IBIA 98-45. In his order, Judge Hammett listed five types of records to which Appellant sought access, stated his belief that the request was tantamount to a "fishing expedition," denied access to four of the requested types of records, and granted limited access to the fifth type of record. On December 4, 1997, Judge Hammett certified the October 31, 1997, order to the Board under 43 C.F.R. § 4.28, which provides for interlocutory appeals, and requested that the Board expedite consideration of any appeal that might be filed. The request for expedited consideration is granted.

Before the Board, Appellant requests access to three of the types of records which were discussed in the October 31, 1997, order. The Board considers that Appellant's failure to mention the remaining two types of records constitutes an abandonment of the earlier request for those records. Therefore, the Board affirms that part of the October 31, 1997, order which denied Appellant's request for access to Decedent's enrollment records and "any other" documents relating to Appellant.

Appellant continues to seek access to all of Decedent's medical records. Judge Hammett allowed access to Decedent's medical records for the six months prior to the execution of Decedent's will. Appellant states that she intends to submit a declaration from a doctor whom she expects to state that medical records covering a longer period prior to the execution of the will are relevant, especially if Decedent was diagnosed with a progressive degenerative mental condition, and that records after the date of the execution of the will may also be relevant because symptoms of a progressive degenerative mental condition may be exhibited earlier than they are diagnosed.

As Judge Hammett stated in his October 31, 1997, order, the relevant question is Decedent's testamentary capacity at the time he executed his will. Appellant will be required to show at the hearing that any alleged progressive degenerative mental condition which Decedent may have had affected his testamentary capacity at the time he executed his will. Despite this, the Board concludes that Appellant should be allowed access to more of Decedent's medical records than was authorized by Judge Hammett.

However, Appellant's access to Decedent's medical records is not without limitation. Appellant requests "all" of Decedent's medical records. This request conceivably includes medical records back to the time of Decedent's birth, and is clearly unreasonably broad. Therefore, although the

Board reverses that part of the October 31, 1997, order which limited Appellant's access to Decedent's medical records to only those records for the six-month period immediately preceding the execution of Decedent's will, it requires Appellant to limit her request to a time period reasonably calculated to provide evidence of Decedent's mental condition during the period leading up to, and immediately following, the execution of his will. This matter is remanded to Judge Hammett for implementation.

Appellant also requests access to all the medical records of Decedent's wife, Ellen Pickernell. Judge Hammett ruled that these records were not relevant to the question of Decedent's competence. Appellant contends that she seeks these records in order to show a pattern of undue influence and for purposes of impeaching the will scrivener. Appellant also contends that these records may include information concerning other witnesses and statements which Ellen Pickernell may have made.

Under the circumstances, the Board can well understand Judge Hammett's belief that the request for Ellen Pickernell's medical records constituted a "fishing expedition." Furthermore, as with the request for Decedent's medical records, Appellant's request for "all" of Ellen Pickernell's medical records would be unreasonably broad in any event. However, the Board concludes that Appellant has shown adequate justification for having access to some of Ellen Pickernell's medical records, and therefore reverses that part of the October 31, 1997, order which denied access to those records. Appellant's access to Ellen Pickernell's medical records is limited in the same manner as discussed above in regard to Decedent's medical records, and this matter is also remanded to Judge Hammett for implementation.

The Board does not have information as to whether Ellen Pickernell had trust property and, if so, whether her estate has been probated by the Department. If she did have trust property and her estate has been probated by the Department, any information developed in the present proceeding may not be used to attack that probate except under the circumstances set forth in 43 C.F.R. § 4.241 and/or § 4.242.

In regard to the request for medical records, Judge Hammett also stated:

Beyond the issue of whether the requested records are relevant and material, there is a more fundamental issue involved here and that is one of jurisdiction. This forum is not a court of general jurisdiction and it is not aware of any authority with which it might be imbued to order the Quinault Tribe to produce its records. Since the medical records are now under the auspices of the Tribe either through self-determination contract or by compact, the only action open to this forum would be to request of the Tribe that it make available the records of medical services provided to [Decedent] during a finite time period. This forum is willing to request the Tribe to make available the [records of] medical services provided to [Decedent] for a period of time from January 1, 1984 to and including June 26, 1984. However, should the Tribe refuse such request, this

forum is not aware of any enforcement authority it might have to compel the Tribe to furnish such records.

Oct. 31, 1997, Order at 2.

Nothing before the Board indicates whether the Quinault Tribe has custody of these medical records under a self-determination contract or compact with the Indian Health Service to operate the hospital in which Decedent and/ or Ellen Pickernell was confined or otherwise to provide medical services, or under a contract or compact with the Bureau of Indian Affairs to provide probate services. In either case, however, the Tribe is performing services that would otherwise be performed by the Federal agency, and the contract or compact should require the Tribe to provide these Federal records the same as would the Federal agency if it were still performing the services. If Judge Hammett requests medical records from the Tribe and the Tribe refuses to provide them, Judge Hammett should contact the appropriate Indian Health Service or Bureau of Indian Affairs official for assistance in obtaining these Federal records.

Finally, Appellant seeks access to the records of the Quinault Tribal Court in the probate of Decedent's non-trust assets. Appellant states that although the Tribal Court has given her permission to copy its records at \$1 per page, for an alleged total of approximately \$700, she should not be required to pay these costs because she is indigent. Furthermore, Appellant argues, Judge Hammett's ruling that these records are irrelevant would preclude their admission at the hearing before him.

In distinction from the situation just discussed in which Appellant sought access to Federal records in the custody of the Quinault Tribe under a self-determination contract or compact, the records Appellant here seeks are tribal records. The Department of the Interior lacks authority to order the Quinault Tribal Court to provide copies of its records to Appellant without charge.

As to the relevance of these records, the Board has held that the Secretary is not bound by probate decisions reached by State and Tribal courts for non-trust property. However, that holding does not require a further holding that State and Tribal probate proceedings are irrelevant in Departmental probate proceedings. The Board therefore reverses Judge Hammett's ruling that these records would be irrelevant and holds that, should Appellant be able to obtain copies of the Quinault Tribal Court probate proceedings, those records can be used for whatever relevance they may have in the Departmental proceeding.

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 Judge Hammett's November 14, 1997, Order in part and remands it in part to the Judge for clarification as to his intent in regard to the claim filed by Cecil Garfield or Duncan. The Board affirms the October 31, 1997, Order in part, reverses it in part to allow enlarged discovery as to the medical records of Decedent and Ellen Pickernell, reverses the holding that tribal court probate proceedings are not relevant. In addition, the Board dismisses that part of the appeal from the October 31, 1997, Order which seeks

an order from the Board requiring the Quinault Tribal Court to provide copies of its probate proceeding for Decedent's non-trust property without payment of charges imposed by the Tribal Court on the grounds that the Board lacks authority to grant the relief Appellant requests. 1/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge

1/ All motions not addressed are denied.