



INTERIOR BOARD OF INDIAN APPEALS

Estate of George Minkey

1 IBIA 1 (08/13/1970)

Reconsideration denied:

1 IBIA 56

ESTATE OF GEORGE MINKEY
Decided Aug. 13, 1970

Reopening

Appeal: Indian Lands: Descent and Distribution

Unless there are compelling reasons shown, the Board of Indian Appeals will not depart from its rule requiring strict compliance with regulations governing the timely filing of appeals.

Reopening: General

A petition to reopen will be denied when it is filed more than three years after the final heirship determination was made and the petitioner was under no apparent disability due to minority or lack of competency at the time of the hearing or during the three year period.

Reopening: Waiver of time limitation

A petition to reopen on the grounds of lack of notice, filed more than three years after the entry of the order determining heirs, will not be granted unless there is compelling proof that the delay was not occasioned by the petitioner's lack of diligence.



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
OFFICE OF INDIAN APPEALS
WASHINGTON, D.C. 20240

Estate of George Minkey : IBIA - 70-2
Unallotted Washoe : Probate No. 23426-48
: Appeal from Order Denying
: Petition for Reopening

Robert Minkey, by and through his attorney, has appealed from a decision of the Hearing Examiner, dated October 10, 1969, denying his petition to reopen the within estate in which an Order Determining Heirs was issued October 8, 1948.

The decedent, George Minkey, died intestate in August 1946, at the age of 61 years. After a Notice of Hearing to determine Heirs was duly issued, a hearing was held on July 16, 1948. The record before the Hearing Examiner indicated that George Minkey had neither been married nor fathered a child. On the basis of this record the Hearing Examiner determined that Richard E. Barrington, a cousin, was the sole heir and that the decedent's fractional interests in twelve parcels of land passed to him.

The appellant, a long time resident of Oregon and Washington, filed with the Hearing Examiner on September 24, 1969, a petition to reopen the estate claiming that he was the only legal son of the decedent and that it was not until September 17, 1969, that he learned that his father had died in 1946. While 25 CFR 15.18 provides for the reopening of an estate by a Hearing Examiner upon proper petition within three years from the date of his

decision, a Hearing Examiner has no authority to grant a petition once the three years has passed; thus, appellant's petition was properly denied. As will be discussed hereinafter, the Secretary may waive his regulations 1/ and reopen an estate where good cause is shown. Estate of Billy Smith, IA-S-3.

The Hearing Examiner's order denying the petition set forth the appeal procedure in 25 CFR 15.19 that requires a written notice of appeal to be filed within 60 days stating specifically and concisely the reasons for the appeal. The appellant, in disregard of the appeal procedure included in the Hearing Examiner's order and purportedly acting upon instructions from "the land manager" at the Nevada Indian Agency, merely forwarded another copy of his petition to the Regional Solicitor within the 60-day time period. An appeal in the proper form prepared by appellant's attorney was not filed until February 23, 1970.

Over the years, the Department of the Interior has adopted a strict policy of refusing to entertain appeals not timely filed. This policy has been reaffirmed in the recent case of Estate of Raylen Voorhees, IA-L-2 (1969). In that case, the Department ruled that an appeal must be dismissed where the notice of appeal was not timely filed. See also Estate of Jackson Searle, IA-S-2B(1969).

1/ 25 CFR 1.2 - Applicability of regulations and reserved authority of the Secretary of the Interior.

It should be noted that in the Estate of Alvin Bobidosh, IA-D-26 (1968), the Department refused to consider an appeal, even though it was filed just one day late. The reasons for the late filing were not considered in the decision, but merely stated, “. . . appellant's failure to file her written notice of appeal within the extended period allowed by this office . . . is fatal to her right of review. . .” See also Estate of Bearshead, IA-T-6 (1968).

We are not unmindful of the fact, that, as previously stated, the Secretary of the Interior, by express terms, has reserved to himself the power to waive and make exceptions to his regulations affecting Indian matters. However, such power will be exercised by the Secretary only in cases where the most compelling reasons are present. Estate of Charles Ellis, IA-1242 (1966). The facts of this case present no compelling reasons to depart from the usual strict rule of compliance with departmental regulations governing the timely filing of appeals. The record discloses the appellant, from the outset of this matter, has had the assistance of counsel (although apparently not formally retained until January 1970) and could have availed himself of that aid in perfecting a timely appeal. The purported following of erroneous advice of a Bureau employee does not remedy the situation or confer any right on the appellant. Wayne E. Bright, A-30475 (1966).

Even if it had been determined that the regulations governing the filing of a timely appeal should be waived, the facts of this case are not such to justify granting the petition to reopen the estate. Regulations establishing a time limitation on the reopening of estates were first enacted in 1929. Estate of Long Dog, IA-25 (1950). The original limitation of 10 years was reduced to 3 years in 1948 and is set forth at 25 CFR 15.18.

The Department's rule refusing to reopen cases decided many years before is one of long-standing. Language from the following cases is typical of the Department's rule to this effect:

"In the present case, the petitioner waited for approximately 30 years before submitting a request for the reopening of the proceedings relative to the determination of the heirs of Lone Dog. Even if the current departmental regulations on this subject provided for the waiver of the 3-year period in extraordinary cases, the mere fact that, as asserted in the petition, the hearing in this case was held on February 10, 1919, without actual notice of the hearing having been given to the petitioner, who was the widow of a predeceased son of Lone Dog, would not constitute a compelling reason for the reopening of a case closed 30 years ago". Estate of Lone Dog, Supra.

The public interest requires that proceedings relating to the probate of Indian estates be brought to a final conclusion some time in order that the property rights of the heirs or devisees may be stabilized. It is for this reason that the departmental regulations have prescribed, and now prescribe, a maximum period within which petitions for the reopening of Indian probate proceedings may be filed. 2/

2/ See Estate of Jack Bowstring, IA-1250, 68 I.D. 262 (1961) [petition to reopen filed 16 years after final order], citing Estate of Smoky Jim, IA-148 (1955) and Estate of Blue Bug, IA-174 (1955).

While there have been cases that have been reopened after the time limitation, Estate of Alvin Hudson, IA-P-17 (1969) and Estate of Sam Shawagon, IA-D-10 (1967), the factual situations were such to justify the reopening. In Estate of Alvin Hudson the petitioner was a minor less than eight years old at the time of the entry of the original order determining heirs. No guardian ad litem was appointed to represent the interests of the minor as required by 25 CFR 15.6 and neither the petitioner nor anyone representing his interest had notice of the probate proceeding. The petition for reopening was filed less than 4 years after the petitioner reached his 21st birthday and immediately upon his acquisition of the facts regarding heirship.

In Estate of Sam Shawagon both petitioners were under the age of 21 at the date of death of their parents and their purported grandfather. In addition, they were both declared incompetents during the period of their minority and were not restored to competency prior to the time of the petition for reopening. No guardian ad litem was appointed for either petitioner therein prior to the time of reopening and thus, neither had actual or constructive notice of the hearing to determine heirs.

The appellant, Robert Minkey, was 26 years old at the time of the original hearing to determine heirs and 47 years old at the time of the filing of the petition to reopen. The appellant alleged that he served

in the armed forces and was otherwise gainfully employed prior to the time of the original hearing in 1948 and that he has been gainfully employed since that time. The appellant, by his own pleading, admits he had no disability due to minority or lack of competency and waited 21 years from the date of the original order before initiating any formal action in this estate.

A petition to reopen on the grounds of lack of notice, filed more than three years after the entry of the order determining heirs, will not be granted unless there is compelling proof that the delay was not occasioned by petitioner's lack of diligence. On the basis of the record it would stretch the bounds of reason to conclude that the appellant has not been dilatory in pursuing his alleged rights.

The appellant has not shown that there is a compelling reason to reopen the estate nor has he shown that there is a compelling reason to waive his failure to file his written notice of appeal within the time specified by CFR 15.19. The order denying the petition to reopen the estate is affirmed.

Dated: AUG 13, 1970

//original signed
James M. Day, Director, Office of
Hearings and Appeals and Member of
the Board of Indian Appeals.