



INTERIOR BOARD OF INDIAN APPEALS

Estate of Samuel Picknoll (Pickernell)

1 IBIA 168 (11/01/1971)

Also published at 78 Interior Decisions 325

ESTATE OF SAMUEL PICKNOLL (PICKERNELL)

IBIA 71-12

Decided November 1, 1971

Syllabus

Reopening: Waiver of Time Limitation

A petition to reopen filed more than three years after the entry of the order determining heirs and some ten years after the petitioner learned of his relationship to the decedent without explanation for the delay, will be denied for the reason that the petitioner has been dilatory in submitting his petition.

Reopening: Waiver of Time Limitation

The Board of Indian Appeals will not exercise Secretarial discretion duly delegated to it to waive the three-year time limitation for reopening where there is no showing of fraud, accident or mistake so compelling in nature as to require reopening and the petitioner has not shown a capability of establishing his claim by a preponderance of the evidence even if the matter were reopened.



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

|                           |   |                  |
|---------------------------|---|------------------|
| ESTATE OF SAMUEL PICKNOLL | : | Reopening Denied |
| (PICKERNELL)              | : |                  |
|                           | : |                  |
| Deceased                  | : | IBIA 71-12       |
| Quinault Allottee No. 376 | : |                  |
| Probate No. E-180-52      | : |                  |
| 13850-52                  | : | November 1, 1971 |

This matter is before the Board upon the petition of Kenneth D. Pickernell for the reopening of the Estate of Samuel Picknoll (Pickernell). 1/ The petition for reopening was filed in the office of the Examiner of Inheritance, Portland, Oregon, on April 7, 1971. 2/ Since more than three years had elapsed following the entry of the Order Determining Heirs, the Examiner of Inheritance properly forwarded the petition to the Board of Indian Appeals.

The petitioner was born on March 9, 1942, in Eureka, California, and he alleges that the decedent, Samuel Pickernell, was his father. In support of his petition, Mr. Pickernell attached a photocopy of a

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1/ The final order closing the estate, viz., Order Determining Heirs, was entered on October 23, 1952.

2/ From the record before us it appears that at the time of the filing of his petition, the petitioner was incarcerated in the Washington State Penitentiary, Walla Walla, Washington. On June 10, 1971, a document entitled "Limited Power of Attorney" was received in the office of the Examiner of Inheritance in Portland, Oregon, together with a letter from one Robert J. Riddell. The letter explains that the petitioner might be moved to another location within the jurisdiction of the institution and that since he is unable to adequately understand the "legal aspects" of his case, he appointed Mr. Riddell as "next friend." We gather that Mr. Riddell is not a member of the bar.

birth certificate naming Samuel Pickernell as his father and Hazel Charlot Bagley as his mother.

In his petition, which was filed nearly eight years after he reached 21 years of age, petitioner alleges that neither he nor anyone representing him was notified of the hearing which was held on April 18, 1951, at Hoquian, Washington, to determine the heirs of his alleged father; that at the time of the probate of his father's estate he was a minor and uneducated and would not have understood the purport of the notice even had he received one; that during his lifetime, and until he reached the age of eighteen, he was not aware of his father's name; that shortly after his birth, his parents separated and his mother left California with one Melvin Peterson, taking him and part of the Pickernell family to Idaho; that he went by the name Peterson until he was eighteen years of age, at which time his mother told him that his real name was Pickernell so that he might register with Selective Service; that in his youth, he did not live with his mother at all times but spent periods of time with relatives.

The petitioner does not explain why he permitted eight years to pass before filing his petition for reopening. Nor is his petition supported by affidavits from persons who would be in a position to give testimony in his behalf should his reopening petition be granted. 3/

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3/ For example, in Estate of Alvin Hudson, IA-P-17 (May 29, 1969), reopening was allowed where the petition was promptly filed and supported by affidavits from petitioner's mother and first cousin.

Furthermore, he makes no allegations or showing that any previous efforts have been made to procure reopening.

At the 1951 hearing, petitioner's mother testified that seven children were born of her union with decedent, but the petitioner was not one of the seven she named. We quote verbatim pertinent portions of her testimony:

Q. Were you acquainted with the decedent?

A. I was his wife. We got married about 1930, according to state law, in South Bend. We started divorce proceedings but I don't know how it came out. We separated and then went back together again. We separated for good in 1939.

Q. Did he have children from you?

A. Yes.

Q. What are their names, living and dead, and did any of the dead ones have children?

A. Tessie Marie Pickernell, age 20, living, Nampa, Idaho, William Clarence Pickernell, age 19, living, Taholah, Wash. c/o Frank Pickernell, Taholah, Wash., Winifred Pickernell, age 16, living, Nampa, Idaho, Emma Jean Pickernell, age 15, living, Nampa, Idaho, Edward Alexander Pickernell, age 13, living, legally adopted by Daisy Wiley, 308 W. King St., Aberdeen, Washington, Nathan Pickernell, age 12, living, c/o Mrs. Mattie Howeattle, Taholah, Wash., Florence Violet (now Myrtle Lee Sigo), c/o Florence Sigo, Shelton, Wash., legally adopted about 1941, in Port Orchard. That is all.

The decedent's brother, Frank Pickernell, also testified at the 1951 hearing. His testimony corroborated that of petitioner's mother.

Since the petition for reopening was filed more than 3 years after the issuance of the examiner's Order Determining Heirs, and

since the applicable regulation, 25 CFR 15.18, permits an examiner to reopen petitions filed within the three-year period "but not thereafter," we must determine if this is a proper case for the exercise of Secretarial discretion to waive the three-year limitation and permit reopening. <sup>4/</sup> The question as to whether a proper basis for reopening exists has arisen with particular frequency with respect to minors who were not given the opportunity to be heard during the original probate proceedings. Estate of Betty May Black Garcia, IA-P-3 (July 21, 1967); Estate of Jesse Swan, IA-1268 (April 28, 1966); Estate of Alvin Hudson, *supra*; Estate of George Minkey, 1 IBIA 1 (1970), *aff'd* on reconsideration, 1 IBIA 56 (1970).

Generally speaking, requests for reopening filed beyond the three-year period will be denied unless it appears that the original decision was procured by or resulted from fraud, mistake or accident. Estate of Betty May Black Garcia, *supra*; Estate of George Squawlie (Squally), IA-1231 (April 5, 1966). Over the years the Department

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<sup>4/</sup> The Department's regulations setting forth procedural rules for Indian probate proceedings, including hearings, reopenings, and appeals in such matters, were formerly codified in Subchapter C, Part 15, Title 25 of the Code of Federal Regulations. The regulations contained therein were the subject of recent modification and renumbering. Such amendments became effective as of April 15, 1971, the date of their publication in the Federal Register (36 F.R. 7185 *et seq.*), and will appear in Title 43, Code of Federal Regulations. However, since the petition herein was filed on April 7, 1971, it precedes the new regulations and will be governed by the old procedural rules contained in Subchapter C, Part 15, 25 CFR. Accordingly, the power of this Board to determine the matter is derived from discretionary power retained by the Secretary to waive or make exceptions to his regulations, 25 CFR §1.2, as delegated to the Board of Indian Appeals in 211 DM 13.5; 35 F.R. 12081. See Estate of Eliza Shield Him, 1 IBIA 80 (1971).

of the Interior has adopted a strict policy of refusing to entertain appeals not timely filed. Estate of Ralyen or Rabyea Voorhees, 1 IBIA 62 (1971). This same policy will be applied to petitions for reopening filed beyond the three-year limitation provided in the regulations, Estate of George Minkey, supra, and the power of the Secretary to waive and make exceptions to his regulations in Indian probate matters will be exercised only in cases where the most compelling reasons are present. Estate of Charles Ellis, IA-1242 (April 15, 1966); Estate of George Minkey, supra. Reopening will be permitted only where it appears that the petitioner has not been dilatory in seeking his remedy. Estate of Alvin Hudson, supra; Estate of George Squawlie (Squally), supra; Estate of George Minkey, supra.

In summary, then, as prerequisites to the exercise of Secretarial discretion to grant petitions for reopening filed beyond the three-year limitation, it must appear from the record, including the petition and any supporting affidavits or documentation, that:

- (1) the petitioner has been diligent in asserting his claim;
- (2) the original probate determination resulted from fraud, accident or mistake of such a compelling nature that a manifest injustice will occur unless reopening is granted; and
- (3) there exists the strong possibility that the petitioner, upon reopening, will be able to carry his burden of proof and establish his claim by a preponderance of the evidence.

In Hudson, *supra*, reopening was allowed where the petitioner alleged he did not learn of his relationship to the decedent until he was 24 years of age, at which time he promptly initiated proceedings to establish his claim. In Squawlie, *supra*, Secretarial discretion was exercised to permit reopening where, within fourteen months after expiration of the three-year period, petitioners sought to reopen on the basis of newly discovered evidence showing that they were related to the decedent. Such newly discovered evidence consisted of earlier probate determinations of the Department reflecting that the petitioners were related to the decedent in the sixth degree. As in Hudson, *supra*, a specific finding was made that there was no indication that petitioners were "dilatatory or neglectful in their submission of their petition, or that they could have been more diligent in their pursuit of their rights."

By contrast, the petitioner here alleges that he first learned of his father's identity from his mother when he was 18 years of age, yet he fails to explain why he waited over ten years to seek reopening.

The public interest requires that Indian probate proceedings be concluded within some reasonable time in order that the property rights of legitimate heirs or devisees be stabilized. Estate of Abel Gravelle, IA-75 (April 11, 1952). To hold that the property rights of heirs in the allotted lands be forever open to challenges such

as that made by the petitioner here would, in our opinion, not only constitute an abuse, but would seriously erode the property rights of those whose heirship in the lands has already been determined. See Estate of Jesse Swan, supra. The grounds for reopening must be truly compelling. On the record before us we are unable to find such grounds. There is no showing of fraud, accident, or mistake such as would warrant reopening. Petitioner alleges he was born on March 9, 1942, yet his mother testified that she and decedent "separated for good in 1939." Furthermore, not only has the petitioner failed to diligently prosecute his claim, but the record developed at the 1951 hearing constitutes strong and substantial evidence of the correctness of the original decision herein as well as the invalidity of petitioner's contentions. Thus, the person best qualified to resolve petitioner's paternity by virtue of having both a unique and exclusive knowledge thereof, his mother, has already testified adversely to him. In these circumstances, we are unable to find that a manifest injustice has occurred since it is unlikely that petitioner would prevail if reopening were permitted. The original probate determination will not be disturbed.

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.5; 35 F.R. 12081, the Petition for Reopening filed herein on April 7, 1971, is denied, and the Order Determining Heirs entered herein on

October 23, 1952, by D. H. Bruce, Examiner of Inheritance, is affirmed. This decision is final for the Department.

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//original signed  
David J. McKee, Chairman  
Board of Indian Appeals

Concur:

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//original signed  
Michael A. Lasher  
Alternate Board Member

Dated: November 1, 1971