



INTERIOR BOARD OF INDIAN APPEALS

Estates of Morgan Black and Mary Grant Black

5 IBIA 219 (10/28/1976)



# United States Department of the Interior

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

## IN THE MATTER OF THE ESTATES OF MORGAN BLACK AND MARY GRANT BLACK

IBIA 76-34 (Supp. to 73-13)

Decided October 28, 1976

Petition to Reopen.

Granted.

1. Indian Probate: Reopening: Generally

While requests for reopening estates closed for more than 3 years face rigid requirements under Departmental regulations, exceptional cases arise in which such petitions should be granted.

2. Indian Probate: Reopening: Generally

Generally, three elements must be satisfied to justify reopening an estate which has been closed a long time. First, it must appear that a manifest injustice will likely prevail if the petition to reopen is denied. Second, it should be demonstrated by compelling proof that the delay in requesting relief was not occasioned by the lack of diligence on the part of the petitioning parties. Third, there should exist a possibility for correction of the error.

APPEARANCES: David L. Piester, Attorney, Legal Aid Society of Lincoln, Inc., for petitioner, James Morgan Black; and Nate C. Holman, Attorney for respondent, Opal May Black Canby.

OPINION BY ADMINISTRATIVE JUDGE WILSON

Pursuant to Preliminary Procedural Order on Petition for Reopening entered by the Board of Indian Appeals dated August 24, 1973, the above-entitled matter came on for hearing before Administrative Law Judge Frederick W. Lambrecht on November 11, 1974, at Omaha, Nebraska.

From the evidence adduced at said hearing, Judge Lambrecht, on March 29, 1976, issued a Recommended Order On Petition For Reopening. A copy of said order was furnished by the Judge to the attorneys for James Morgan Black, hereinafter referred to as petitioner, and Opal May Black Canby, hereinafter referred to as respondent. Petitioner and the respondent both were allowed 30 days from the issuing date of the order in which to file briefs for or against the recommendations as entered by Judge Lambrecht.

The facts regarding the matter herein are amply set forth in the recommended order and we see no necessity to repeat them in this opinion.

The Judge in his order of March 29, 1976, recommends reopening the two estates and including the petitioner as an heir therein.

In arriving at his recommendations, the Judge considered what he deemed to be the two central issues raised by the pleadings. The two issues are:

- (1) whether the petitioner was a legally adopted child of the decedents, and as such entitled to share in their estates;
- (2) whether the petitioner is barred by his nondiligence from the relief he seeks.

We are in agreement with the Judge's findings and conclusions reached regarding the foregoing issues. First, he concludes that the respondent has no standing to assert that the adoption decree of September 17, 1957, was void, and second, that the petitioner was not dilatory either in failing to discover his mistaken omission from heirship or in failing to act with promptness after making the discovery. But for Judge Lambrecht's opinion that the petitioner should not bear the burden of demonstrating diligence in seeking to reopen an estate closed for more than 3 years, with which we disagree, the Judge's Recommended Order on Petition For Reopening dated March 29, 1976, is adopted in its entirety. A copy of the Order is attached and made a part hereof.

[1] In arriving at its decision the Board is not unmindful of the rigid requirements heretofore adhered to in reopening estates closed for more than 3 years. We are however, also not unmindful

of exceptional cases where petitions to reopen would be justified. See Estate of David Marksman, 5 IBIA 56 (March 29, 1976), wherein the Board stated:

While requests for the reopening of estates closed for more than 3 years face rigid requirements under Departmental regulations (see 43 CFR 4.242(a)-(g) concerning requests for reopening submitted within 3 years of a final probate decision and 43 CFR 4.242(h) which governs requests filed after a 3-year period), exceptional cases arise in which such petitions should be granted. [Cases cited therein omitted.]

[2] The Board in the Marksman case, supra, in considering the requirements for reopening estates closed for more than 3 years stated:

Generally, three elements must be satisfied to justify reopening an estate which has been closed a long time. First, it must appear that a manifest injustice will likely prevail if the petition to reopen is denied. The Board has previously held that omission of an heir is a type of injustice which Department regulations permitting reopening under 43 CFR 4.242(h) were designed to correct. [Cases cited therein omitted.]

Second, it should be demonstrated by compelling proof that the delay in requesting relief was not occasioned by the lack of diligence on the part of the petitioning parties. [Case cited therein omitted.]

\* \* \* \* \*

The third factor which bears on whether a closed estate should be reopened is the status of the land. It is often the case that interests in land become so divided over the years, and property owners so dispersed, that the administrative burden of correcting probate errors outweighs the advantages of correction. Our regulations recognize this dilemma by requiring "possibility for correction" of a manifest injustice (43 CFR 4.242(h)). In this case, however, the Great Lakes Indian Agency has advised that the property of the decedent and his deceased spouse is still intact.

A review of the record in the appeal herein indicates that the three elements hereinabove mentioned have been met or satisfied and we see no reason why the petition should not be granted as recommended by Judge Lambrecht in his order of March 29, 1976, supra.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Petition to Reopen dated January 23, 1973, of James Morgan Black be and the same is hereby GRANTED and,

IT IS FURTHER ORDERED, that Judge Lambrecht shall forthwith issue appropriate orders in the estates of Mary Grant Black and Morgan Black to include the petitioner as an heir therein.

This decision is final for the Department.

Done at Arlington, Virginia.

\_\_\_\_\_  
//original signed

Alexander H. Wilson  
Administrative Judge

We concur:

\_\_\_\_\_  
//original signed

Mitchell J. Sabagh  
Administrative Judge

\_\_\_\_\_  
//original signed

Wm. Philip Horton  
Board Member

Attachment



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
ROOM 674, FEDERAL BUILDING, FORT SNELLING  
TWIN CITIES, MINNESOTA 55111

IN THE MATTER OF THE ESTATES OF	)	
	)	
MORGAN BLACK & MARY GRANT BLACK	)	RECOMMENDED ORDER ON
	)	PETITION FOR REOPENING
DECEASED UNALLOTTED OMAHA	)	
INDIANS	)	
PROBATE FILES NOS. H-172-61 & H-151-61	)	

This matter is before the undersigned Administrative Law Judge pursuant to a preliminary procedural Order on Petition for Reopening entered by the Board of Indian Appeals dated August 24, 1973. In accordance with the provisions of said Order, a hearing was held at Omaha, Nebraska, on November 11, 1974. The petitioner herein, James Morgan Black, was represented by William H. Nollkamper III, Attorney at Law, Legal Aid Society of Lincoln, Inc. Opal Mae Black Canby, respondent, was represented by Mr. Nate C. Holman, Attorney at Law, Lincoln, Nebraska.

The procedural history leading to the Board's Order of August 24, 1973, is outlined in that Order and need not be repeated here. Subsequent to the rendition of that Order and in accordance with it, the undersigned on October 25, 1973, entered an Order to Show Cause why the estates herein should not be reopened. Pursuant to the provisions of that Order, the petitioner filed his written petition with me. That petition in essence reaffirmed the allegations in his original petition wherein the petitioner asserted to be the adopted child of the decedents, and as such, should have been included as an heir in their

estates. The petitioner further alleged that he used diligence in seeking to discover and assert his rights. Respondent answered by generally denying the allegations contained in the petitioner's amended Petition for Reopening.

There are two central issues raised by the pleadings: (1) whether petitioner was the legally adopted child of the decedents, and as such, entitled to share in their estates; and (2) whether the petitioner is barred by his nondiligence from the relief he seeks. The answer to these questions, of course, will determine whether the matter should be reopened so that petitioner is included as an heir in the respective estates.

No serious dispute exists as to the basic facts regarding the first issue. Those facts, briefly stated, are as follows: James Morgan Grant, petitioner, was born in Lincoln, Nebraska, on July 8, 1951, the son of Naomi Phillips and Loren Grant. The records of the County Court of Lancaster County, Nebraska, reveal an adoption proceeding was instituted by Morgan and Mary Grant Black, culminating in a decree of adoption entered by the County Court on September 17, 1957, which by its terms made the petitioner herein the adopted child of Morgan Black and Mary G. Black. Said decree, Exhibit B herein, on its face appears regular in all respects. That decree contained a finding that "James Morgan Grant is the son of Naomi Phillips, an unwed mother." The records of that same adoption proceeding show a subsequent decree nunc pro tunc, dated March 15, 1973, identical in all respects to the first decree except there is a finding that "James Morgan Grant is the son of Naomi Phillips," This is at variance with the original decree in that Naomi Phillips is not shown as an unwed mother.

At the hearing, and in her brief, respondent contends that these adoption proceedings were void because the natural father of the petitioner did not receive notice of, or consent to the adoption proceedings. This contention by the respondent is a collateral attack upon the judgment of the Lancaster County Court. The Nebraska statutes, in common with those of most states, provide that notice shall be given to the natural parent of the child. Failure to give the required statutory notice to the natural parent renders the adoption proceedings irregular and voidable, since the person not notified is not bound by the proceeding.

Courts, in construing statutes similar to the Nebraska statute, have held the parent who is not properly notified is the only person who can complain of failure of notice, Satterly v. Hartford-Connecticut Trust Co., 254 Mich. 671, 236 N.W. 902. Paraphrasing the language of another court, the rule is stated as follows: Where adoptive parents seek and obtain a decree of adoption, and take the child into their home as their own, they and their heirs are estopped from attacking the decree collaterally. The presumptive heirs' claim arises through their ancestors, and they are in no better position to question its validity, Kenning v. Raichel, 148 Minn. 433, 182 N.W. 517, 16 A.L.R. 1016; Pugh v. Cox, 185 Wis. 33, 200 N.W. 686; Milligan v. McLaughlin, 94 Neb. 171, 142 N.W. 675. The rationale for the rule is that the rights of the person, such as the respondent herein, are derived solely as an heir of the deceased, and she can have no greater right to question the validity of the adoption proceedings than the decedent. The decedents created their relationships of life, and upon death those relationships become fixed. One of the relationships

which they created was that of a son by adoption. Their daughter, Opal Canby, cannot change the legal effects which naturally flow from the relationship which the decedents established, not by the operation of the laws of nature, but by their deliberate overt act in institution of the adoption proceedings. As stated by the Supreme Court of California, see In Re Adoption of Sewall, 51 California Reporter 367, 376, it is only when the defrauded unduly influenced or mentally incompetent adoptive parent might attack the adoption decree during his lifetime, that his heirs may do so. If the adopting parent might not make the attack, neither may the heir. Since there is nothing in the record which would indicate that the decedents, during their lifetime, would have grounds to set aside the adoption decree, and since there is nothing in the record which indicated that they ever attempted to set aside that decree, I conclude that the respondent herein has no standing to assert the adoption decree was void.

The Nebraska state statutes regarding adoption establish that an adoptive child has all the rights and duties of a natural child, Neb. Rev. Stat. §43-110 and §43-111 (1968). The Nebraska Supreme Court has construed the adoption statute and the descent and distribution statutes together. In recognition of the humanitarian aspects and purposes of adoption that court has placed a liberal rather than a strict construction on those statutes and has held that an adoptive child has all the rights, including inheritance, of a natural child, Wulf v. Ibsen, 84 Neb. 314, 167 N.W. 2d 181. Accordingly, unless petitioner is barred by nondiligence, he should be included as an heir in these estates.

Unlike the evidence relative to the first issue, the evidence presented by the opposing sides on the second issue, at least in part, cannot be reconciled.

From the testimony on file, including reasonable inferences to be drawn therefrom, I find the facts on that issue as follows. The petitioner was born in Lincoln, Nebraska, on July 8, 1951. His parents were Loren Grant and Naomi Phillips. Naomi and Loren Grant were separated from time to time but when together lived at Lincoln, Nebraska, next door to another Omaha Indian couple; namely, Morgan and Mary Grant Black. The Blacks were married and had two children, a James Morgan Black who died on January 19, 1950, without issue, and Opal Mae Black, the respondent herein, now married to one, Duane Canby. Although the record is somewhat obscure as to where the petitioner lived during his childhood, and while the testimony is somewhat irreconcilable, I find that the petitioner stayed or lived with the Blacks off and on since his infancy. During his childhood, both prior and subsequent to his adoption, he primarily lived with the Blacks. Throughout his childhood he was known as James Black. He continued to live with Morgan Black after Mary passed away on October 11, 1958. When Morgan passed away on March 11, 1961, the petitioner returned to live with his natural mother. Apparently his father was not around and there is little testimony concerning him. The petitioner would have been about ten years old at the time he returned to live with his natural mother. He was enrolled in the Lincoln Public Schools and graduated from high school in 1970, at the age of eighteen. Any of the other details concerning the petitioner's childhood will not be dealt with herein since an infant is not sui juris and laches may not be imputed to him during the continuance of his minority, see Gibson v. Herriott, 55 Ark. 85, 17 S.W. 589; Jose v. Lyman, 316 Mass. 271, 55 N.E. 2d 433; Fouche v. Royal Indem. Co., 212 S.C. 194, 47 S.E. 2d 209; 30A C.J.S. Equity at p. 76. This is true even though the minor is under

guardianship, 154 A.L.R. 190. Although I can find no decision by the Board giving explicit recognition to this principle, it has impliedly recognized it, Estate of Linda M. Whitetail (Drunkard) Penn, 2 IBIA 285. The rule, recognized in most jurisdictions is that when a judgment is voidable on grounds arising from a person's minority, it may be avoided by him on attaining his majority, 43 C.J.S. Infants §123, and cases cited therein.

Since the decedent owned property in the States of Oklahoma and Nebraska, a question arises as to what age the petitioner reached his majority. Under the laws of the State of Oklahoma, Okla. Stat. Ann. Tit. 14 §13, he reached his majority upon reaching the age of eighteen. Under the laws of the State of Nebraska, the petitioner would have reached his majority on his twentieth birthday, July 8, 1971, Nev. Rev. Stat §3801. For purposes of this recommended decision, I will assume the petitioner reached his majority at the age of eighteen after which his nondiligence can be imputed to him as an adult.

During the year 1969 when petitioner turned eighteen, he first realized that he possibly was an adopted child. Testimony is obscure as to whether or not he first became aware of this possibility as the result of a conversation he had with the respondent herein, or when he applied for his driver's license. In either event, it is uncontroverted that the petitioner and respondent had a conversation which included the subject of the petitioner's parentage (see Tr. p. 61, line 18; p. 83, line 23). The respondent apparently called petitioner "brother" and offered him an unspecified sum of money. This conversation did not convince the petitioner that he was the adopted child of Morgan and Mary Black, but it made him curious (Tr. p. 62, lines 1-7). During that same year, petitioner also made application for a Nebraska driver's license.

As proof of his age, he sought a copy of his birth certificate under the surname of Grant. The Nebraska Bureau of Vital Statistics had no certificate under that name, and thereupon petitioner requested the certificate under the surname of Black. The petitioner testified that it was at this time he first found out, or had a realization, that he had been adopted (Tr. p. 61, lines 16 & 17). He still hadn't become aware of the probate proceedings had in his adoptive parents' estates, and first learned of them when petitioner's attorney herein informed him of that fact (Tr. p. 16, line 14; p. 84, line 24; p. 85, line 2).

After first realizing that he was possibly adopted, petitioner made inquiry of his mother concerning that fact (Tr. p. 62, line 22 et seq.). His mother was uncertain as to whether he had been adopted (Tr. p. 62, line 25; 63, line 1). His mother informed him that Harold Muffly was the attorney who had handled the legal affairs of Mary and Morgan Black (Tr. p. 66, line 5). The petitioner's mother, in attempting to secure information concerning the facts, contacted a Mrs. Roper, but to no avail (Tr. p. 40, p. 41, p. 49, lines 1-3). The petitioner testified that he and his mother then went to see Mr. Muffly in 1970, after the petitioner's graduation from high school. This is not directly controverted by Mr. Muffly, but it is his recollection that he was never consulted by either the petitioner or the petitioner's mother. The petitioner and his mother steadfastly maintain they together briefly visited Mr. Muffly concerning the petitioner's inheritance rights. It is their testimony that Mr. Muffly indicated that he could do no work on the matter unless he was paid a \$50.00 retainer. This is not controverted by Mr. Muffly, although he doubts he would reject a case due to a person's inability to pay. It is

petitioner's contention that since he didn't have the money to hire Mr. Muffly (Tr. p. 39, line 14), and since he didn't know any lawyers personally and was under the general impression that all lawyers were expensive (Tr. p. 42, lines 16), his state of mind was such he felt it hopeless to ascertain what inheritance rights he may have (Tr. p. 46, line 18).

After his mother's unsuccessful attempts to contact Mrs. Roper, petitioner did nothing since, as stated, he felt he didn't have the money to pay a lawyer. Things remained unchanged until petitioner learned of the Legal Aid Clinic at Lincoln, Nebraska. Prior to that time, and subsequent to his alleged visit to Mr. Muffly's office, the petitioner worked until January 1971, at which time he started the second semester at the University of Nebraska. He finished that semester in June 1971, and then attended Lincoln Technical College, beginning in September of 1971. While attending the technical college, he had a conversation with a friend of his, who informed him of the Legal Aid Society of Lincoln, Inc., who represents the petitioner in these proceedings. Although the record is not precise as to the exact date of the conversation, it occurred early in 1972, approximately three or four months after he started the technical college (Tr. p. 73, lines 1-8). Approximately two months after that conversation, the petitioner went to the Legal Aid Society (Tr. p. 73, lines 18-25). When asked why he waited two months, the petitioner indicated he hadn't thought about the time element, and did not know he could be penalized for taking his time (Tr. p. 74, lines 8-15; P. 21, lines 1-19). As previously stated, it was at this time the petitioner first learned that proceedings were held regarding the estates of Morgan and Mary Black (Tr. p. 16, line 14; p. 84, line 24; p. 85, lines 1-3).

It is unclear from the record as to what actions were instituted by Legal Aid Society of Lincoln, Inc. between the time they were first contacted the petitioner and when they first wrote the office of the Administrative Law Judge on September 5, 1972. Among other things, they no doubt were investigating the matter since their letter of September 5, 1972, to the Administrative Law Judge indicates they had checked with the Winnebago Indian Agency, Winnebago, Nebraska, relative to the estates herein. If that letter should have possibly been construed as a Petition for Reopening by the Department, see Estate of Opie Samuel Bordeaux, Sr., 5 IBIA 24, at 26, approximately six months elapsed from the time petitioner first learned of the original probate proceedings and the time his attorneys took action to attempt to rectify the mistake. If viewed in this context, it is hard to conceive how petitioner's actions could, in any way, be construed as nondiligent; however, a resolution of this issue hinges on the construction to be given the word "diligence."

Prior decisions by the Board have uniformly held that in order for a petitioner to be entitled to a reopening, he, among other things, must show that he was diligent in pursuing his claim. None of the Board's decisions have defined the word "diligence," nor indicated in detail the relationship between diligence and the facts presented by the cases being decided. Since other tribunals have treated nondiligence and laches synonymously, see Withers v. Reed, 194 Or. 541, 245 P. 2d 283, Davidson v. Grady, 106 F. 2d 272; McIntire v. Pryor, 173 U.S. 38, 43 L. Ed. 606, 19 S. Ct. 352; Southern P. Co. v. Bogert, 250 U.S. 483, 63 L. Ed. 1099, 30 S. Ct. 533; Arnovitch v. Levy 238 Minn. 237, 56 N.W.2d 570, 34 A.L.R. 2d 1306, I could assume for purposes of my recommended decision that the general concept of the word "laches" should be given to the word "nondiligence."

This could be the Board's intent in uniformly holding nondiligence as a bar to relief. Assuming this to be the Board's intent and since laches is dependent on many circumstances, I will first generalize concerning the doctrine and import of laches and then list the elements which I feel should be considered by me, as the finder of fact, in determining whether or not petitioner is to be barred from having these estates reopened.

The doctrine of laches may be defined generally as a rule of equity by which equitable relief is denied to one who has been guilty of unconscionable delay, as shown by surrounding facts and circumstances, in seeking that relief, see 34 A.L.R. 2d 1314, §1. It has been defined as such neglect or omission to assert a right, taken in conjunction with lapse of time and other circumstances, causing prejudice to an adverse party, as will operate as a bar in equity, see Re O'Donnell's Estate, 8 Ill. App. 2d 348, 132 N.E. 2d 74.

The concept imported by the term "laches" is fundamental to the notion of responsibility in general, and it finds expression in a variety of other words or statements, see Boehnke v. Roenfanz, 246 Iowa 240, 67 N.W. 2d 585, 54 A.L.R. 2d 1, wherein laches was held to be such delay in enforcing one's rights, as working in disadvantage to another; Denison v. McCann, 303 Ky. 195, 197 S.W. 2d 248, indicating laches is a delay which results in injury or works a disadvantage. A common expression found in many of the cases is the word "negligent," see United States v. Beebe, 180 U.S. 343, 45 L. Ed. 563, 21 S.Ct. 371; Brown v. Buena Vista County, 95 U.S. 157, 24 L. Ed. 422. As to "laches or negligence" of a party seeking relief, see Osincup v. Henthorn, 89 Kan. 58, 130 P. 652; Aetna Indem. Co. v. Baltimore, S.P. & C.R. Co., 112 Md. 389, 76 A. 251. It has been said that "laches" is

negligence or omission to assert a right seasonably, see 70 A.L.R. 2d 1241. Laches has also found expression in the word “diligence,” see McIntire v. Pryor, 173 U.S. 38, 43 L. Ed. 606, 19 S. Ct. 352. The idea of “laches” is embodied also in the words acquiescence, see Menendez v. Holt, 128 U.S. 514, 32 L. Ed. 526, 9 S.Ct. 143; “election” see Barrier v. Kelly, 82 Miss. 233, 33 So. 974; “estoppel,” see Finucane v. Hayden, 86 Idaho 199, 384 P. 2d 236, saying that “laches” is a species of equitable estoppel; “abandonment”, see Osincup v. Henthorn, 89 Kan. 58, 130 P. 652; and “ratification”, see Montgomery v. First National Bank, 114 Mont. 395, 136 P. 2d 760.

The foregoing has been an effort to elucidate principles involved behind the concept of laches, rather than a discussion of particular legal situations. From the multitudinous decisions of the courts I would conclude that, as a minimum, in order to bar a petitioner from the relief he seeks, it must be shown that:

- (a) There was unexcusable delay in asserting,
- (b) a known right,
- (c) which results in injury, or prejudice to the respondent or an innocent intervening third person.

Regarding the element of delay, the decisions have uniformly held that lapse of time, is not of itself, decisive, see Archambault v. Sprouse, 215 S.C. 336, 55 S.E. 2d 70; 30 C.J.S. Equity §116, p. 531, and cases cited therein. That is to say, lapse of time is only one, and moreover, not ordinarily the controlling or most important one, of the elements to be considered in determining the existence and application of whether petitioner should be barred from relief,

see Reynolds v. Sumner, 126 Ill. 58, 18 N.E. 334; Patterson v. Hewitt, 11 N.M. 1, 66 P. 552, at 558. Laches, unlike a statutory period of limitations, is not a mere matter of elapsed time, but is primarily a question of the inequity of permitting the claim to be enforced -- an inequity founded upon some change in the conditions or relations of the property or the parties, see Holmberg v. Armbrrecht, 327 U.S. 392, 90 L. Ed. 743, 66 S.Ct. 582, 162 A.L.R. 719. Therefore, mere delay in the assertion of a claim, in and of itself, does not amount to laches, see Davidson v. Grady (CA5 Fla.) 105 F.2d 405, reh den 106 F.2d 272; Mattison-Greenlee Serv. Corp. v. Culhane (CA7 Ill.) 103 F.2d 608; Robert Hind, Ltd. v. Silva (CA9 Hawaii) 75 F.2d 741; Finucane v. Hayden, 86 Idaho 199, 384 P.2d 236; Flora v. Gusman, 76 Idaho 188, 279 P.2d 1067; Sinclair v. Allender, 238 Iowa 212, 26 N.W.2d 320; Jennings v. Schmitz, 237 Iowa 580, 20 N.W. 2d 897; Strom v. Giske (N.D.) 68 N.W.2d 838; Grandin v. Gardiner (N.D.) 63 N.W. 2d 128; Acker v. Martin, 136 W.Va. 503, 68 S.E.2d 721.

Accordingly, I conclude the evidence before me as finder of fact should be such that I can conclude that the petitioner was actually or presumptively aware of his rights and failed to assert them against a party who has in good faith permitted his position to become so changed that he cannot be restored to his former status, see Larson v. Quanrad Brink & Reibold, 78 N.D. 70, 47 N.W.2d 743, 29 A.L.R. 2d 230. As will be discussed infra, this should obviously be the rule where the petitioner can show an excuse for his failure to seek relief more promptly.

In summary, the period establishing laches is not one which can be measured out in days and months as though it were a Statute of Limitations. The determination of the question as to laches proceeds in the light of the circumstances

of the particular case before the Administrative Law Judge, and according to right and justice, see Burnett v. New York Cent. R. Co. 380 U.S. 424, 13 L. Ed. 2d 941, 85 S.Ct. 1050; Hammond v. Hopkins, 143 U.S. 224, 36 L.Ed. 134, 12 S.Ct. 418; Hayward v. Eliot Nat. Bank, 96 U.S. 611, 24 L.Ed. 855; Brown v. Buena Vista County, 95 U.S. 157, 24 L.Ed. 422; Sullivan v. Portland & K.R. Co. 94 U.S. 806, 24 L.Ed. 324; Wounick v. Pittsburgh Consolidation Coal Co. (CA3 Pa.) 283 F.2d 325, 91 A.L.R. 2d 1411, cert den 364 U.S. 902, 5 L.Ed. 2d 195, 81 S.Ct. 234; Gilmer v. Morris, 80 Ala. 78; Finucane v. Hayden, 86 Idaho 199, 384 P.2d 236; Reynolds v. Sumner, 126 Ill. 58, 18 N.E. 334; Paducah v. Gillispie, 273 Ky. 101, 115 S.W. 2d 574; Starck v. Foley, 209 Ky. 332, 272 S.W. 890, 41 A.L.R. 756; Galway v. Metropolitan Elev. R. Co. 128 N.Y. 132, 28 N.E. 479; Grandin v. Gardiner (N.D.) 63 N.W. 2d 128; State ex rel. Madderson v. Nohle, 16 N.D. 168, 112 N.W. 141; Bowen v. Hamilton (Okla.) 393 P. 2d 858; Pendleton v. Holman, 177 Or. 532, 164 P.2d 434, 162 A.L.R. 249; Schireson v. Shafer, 354 Pa. 458, 47 A.2d 665, 165 A.L.R. 1133; Fallow v. Oswald, 194 S.C. 387, 9 S.E. 2d 793; De Cordova v. Smith, 9 Tex. 129; Selden v. Kennedy, 104 Va. 826, 52 S.E. 635; Depue v. Miller, 65 W. Va. 120, 64 S.E. 740.

Regarding the second element of delay, it is based on the general theory that for laches or nondiligence to be a valid defense, the delay must be unexplained and inexcusable, see Pascale v. Board of Zoning Appeals, 150 Conn. 133, 186 A.2d 377, 94 A.L.R. 2d 414; Flammia v. Maller, 66 N.J. Super. 440, 169 A.2d 488; Mitchell v. Alfred Hofmann, Inc., 48 N.J. Super. 396, 137 A.2d 569, Esso Standard Space Oil Co. v. Taylor, 399 Pa. 324, 159 A.2d 692; Silver v. Korr, 392 Pa. 26, 139 A.2d 552.

Matters of explanation or excuse, are of course infinitely varied. Moral as well as legal considerations, such as ignorance of the law or regard

for the feelings or relatives, has been considered and given weight in determining whether a cause of action based upon a purely equitable right has become barred, see Depue v. Miller, 65 W. Va. 120, 64 S.E. 740. The relationships of the party, such as a confidential relationship between them, may have a direct bearing on the type of diligence which may be required, see Townsend v. Vanderwerker, 160 U.S. 171, 40 L.Ed. 383, 16 S.Ct. 258. If the conduct of the party asserting laches has contributed to the delay, then, of course, this should have an ultimate bearing on the outcome, see Gaskill v. Neal, 77 Idaho 428, 293 P.2d 957, 61 A.L.R.2d 501.

Another relevant factor is whether petitioner had knowledge of his rights. If the petitioner had no knowledge of the facts giving rise to his claim, he should not be barred unless knowledge can be imputed to him. Ignorance with justification is recognized excuse for delay, see Holmberg v. Armbrecht, 327 U.S. 392, 90 L.Ed. 743, 66 S.Ct. 582, 162 A.L.R. 719; United States v. Beebe, 180 U.S. 343, 45 L.Ed. 563, 21 S.Ct. 371; Tarien v. Katz, 216 Cal. 554, 15 P.2d 493, 85 A.L.R. 334; Butler v. Butler, 253 Iowa 1084, 114 N.W.2d 595; Stewart v. Finkelstone, 206 Mass. 28, 92 N.E. 37; Oklahoma City Federal Sav. & Loan Assoc. v. Swatek, 191 Okla. 400, 130 P.2d 514; Stephens v. Dubois, 31 R.I. 138, 76 A. 656; Burningham v. Burke, 67 Utah 90; 245 P. 977, 46 A.L.R. 466; Johnson v. Black, 103 Va. 477, 49 S.E. 633; Jameson v. Rixey, 94 Va. 342, 26 S.E. 861; McEachern v. Brackett, 8 Wash. 652, 16 P. 690; Hale v. Hale, 62 W.Va. 609, 59 S.E. 1056; Northern Trust Co. v. Snyder, 113 Wis. 516, 89 N.W. 460.

In determining the issue as to petitioner's knowledge of his rights, consideration should be given to his age, mentality, experience and general information, see Long v. Mulford, 17 Ohio St. 484, (where petitioner's youth

was held to be a determinative factor; Highberger v. Stiffler, 21 Md. 338 (where a person's weak-mindedness was held to be a factor); McIntire v. Pryor, 173 U.S. 38, 43 L.Ed. 606, 19 S.Ct. 352 (where a person's race and ignorance were relevant factors).

Another element constituting excuse, relevant herein, is a person's disability due to insanity, incompetency, or minority, see Gibson v. Herriott, 55 Ark. 85, 17 S.W. 589, Jose v. Lyman, 316 Mass. 271, 55 N.E. 2d 433; Fouche v. Royal Indem. Co., 212 S.C. 194, 47 S.E. 2d 209.

Regarding the factor of prejudice, or disadvantage to the respondent or an innocent third person, it is safe to say the cases are too numerous to completely cite herein, which hold this as a necessary ingredient to bar the petitioner from the relief to which he would otherwise be entitled, see Am. Jur., Equity §508; O'Brien v. Wheelock, 184 U.S. 450, 46 L.Ed. 636, 22 S.Ct. 354; Abraham v. Ordway, 156 U.S. 416, 39 L.Ed. 1036, 15 S.Ct. 894; Graham v. Boston, H. & E.R. Co., 118 U.S. 161, 30 L.Ed. 196, 6 S.Ct. 1009; Columbian Nat. L. Ins. Co. v. Black (CA10 Colo.) 35 F.2d 571, 71 A.L.R. 128; Cherry v. Brizzolara, 89 Ark. 309, 116 S.W. 668; Greek Catholic Church v. Roizdestvensky, 67 Colo. 217, 184 P. 295, 18 A.L.R. 690; Van Meter v. Kelsey (Fla.) 91 So. 2d 327; Flora v. Gusman, 76 Idaho 188, 279 P.2d 1067; Engel v. Mathley, 113 Ind. App. 458, 48 N.E.2d 463; Sinclair v. Allender, 238 Iowa 212, 26 N.W. 2d 320; Jennings v. Schmitz, 237 Iowa 580, 20 N.W. 2d 897; Simmerman v. Ft. Hartford Coal Co., 310 Ky. 572, 221 S.W. 2d 442, 11 A.L.R. 2d 381; Mills v. Borskey (La. App.) 163 So. 416; Whitney v. Union R. Co., 77 Mass. (11 Gray) 359; Bausman v. Kelley, 38 Minn. 197, 36 N.W. 333; Montana Power Co. v. Park Electric Co-op., 140 Mont. 293, 371 P. 2d 1; Bull Creek Oil & Gas Development v. Bethel, 127 Mont. 222, 258 P.2d 960; Union Paving Co. v. Teglia, 70 Nev. 494, 274 P.2d 841; Allen v. Colburn, 65 N.H.

37, 17 A. 1060, Mitchell v. Alfred Hofmann, Inc., 48 N.J. Super. 396, 137 A.2d 569; Morris v. Ross, 58 N.M. 379, 271 P.2d. 823; Parsons v. Lipe, 158 Misc. 32, 286 N.Y.S. 60; Stell v. First Citizens Bank & Trust Co. 223 N.C. 550, 27 S.E. 2d 524; Smith v. Smith, 168 Ohio St. 447, 7 Ohio Ops. 2d 276, 156 N.E.2d 113, 70 A.L.R. 2d 1241; Johnston v. Board of Education, 194 Okla. 150, 148 P. 2d 195; McIver v. Norman, 187 Or. 516, 213 P. 2d 144, 13 A.L.R. 2d 749; Esso Standard Oil Co. v. Taylor, 399 Pa. 324, 159 A. 2d 692; Silver v. Korr, 392 Pa. 26, 139 A.2d 552; Nelson v. Dodge, 76 R.I. 1, 68 A. 2d 51, 14 A.L.R. 2d 638; Stephens v. Dubois, 31 R.I. 138, 76 A. 656; Gieseler v. Remke, 117 W. Va. 430, 185 S.E. 847; Snyder v. Charleston & S. Bridge Co., 65 W.Va. 1, 63 S.E. 616; Hahn v. Walworth County, 14 Wis. 2d 147, 109 N.W. 2d 653, 94 A.L.R. 2d 618; Re Seefeldt's Estate, 1 Wis. 2d 509. 85 N.W.2d 500.

The cases proceed upon the theory that laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced -- an inequity founded upon some change in the condition or circumstances of the party or parties such as the expenditures of money or the incurring of obligations by the respondent in the belief that he had an unencumbered right to the property or his substantial improvement to the property. Consistent with this theory, unless there is evidence in the record to show prejudice, there is no basis for a contention that petitioner should be barred by laches, Osincup v. Henthorn, 89 Kan. 58, 130 R. 652; Thorndike v. Thorndike, 142 Ill. 450, 32 N.E. 510; Bank of Marlinton v. McLaughlin, 121 W. Va. 41, 1 S.E. 2d 251.

In its Preliminary Procedural Order dated August 24, 1973, the Board, consistent with its prior decisions regarding reopenings, indicates the claimant is required to prove the allegations made in the petition, including the exercise of diligence by a preponderance of the evidence. Placing this burden on the petitioner is at odds with the view that laches is considered to be a shield of equitable defense, rather than a sword for the investiture of legal title, see Meadows v. Hardcastle, 219 Ark. 406, 242 S.W. 2d 710. That view serves as a basis for the decisions holding that a petitioner need not incorporate in his petition, an allegation concerning change or absence of change in the situation of a respondent, since the facts in this respect constitute matters of defense and hence are not required to be negated in the petitioner's petition, Pratt Land and Improvement Co. v. McClain, 135 Ala. 452, 33 So. 185; Marietta Realty and Development Co. v. Reynolds, 189 Ga. 147, 5 S.E. 2d 347. In short, the burden should be on the one asserting laches, to prove that he was prejudiced by the delay. Re Seefeldt's Estate, 1 Wis. 2d 509, 85 N.W. 2d 500.

By its previous holdings, the Board in effect presumes that prejudice has resulted from delay and has cast the burden on the petitioner to show that the delay has not prejudiced the respondent. This is in derogation of the generally accepted view that prejudice will not be presumed from unreasonable delay, but it must be shown that substantial rights of a party were prejudiced by the delay, Harris Exrx v. Chesapeake and O.R. Co., 304 Ky. 840, 202 S.W. 2d 154.

The disposition of this case could hinge on the party having the burden of proof. The record is silent on the question of whether there has been prejudice to the respondent as a result of a change in circumstances or otherwise. For the reasons stated supra, prejudice to respondent cannot be inferred from the

mere passage of time. The inconvenience to respondent of being deprived of a one-half interest in premises to which she was never entitled cannot, standing alone, be deemed material prejudice. Since the respondent has submitted no evidence showing a change in circumstances since the Orders Determining Heirs which resulted in prejudice to her or another party, I cannot see the validity of her claim. This is consistent with the generally accepted theory that laches should be used as a defense and not as a sword, and the attendant rule that laches should be pled and proved by the party seeking to bar a petitioner from relief to which he would otherwise be entitled.

In making my decision, I am doing so consistent with decisions of other tribunals as outlined above, both in terms of the substantive elements constituting laches or nondiligence, and in terms of the burden of proof thereof.

Based on the foregoing, it is my recommendation that the matter be reopened and the petitioner included as an heir in the two estates. On the record before me, there is nothing which would support a finding that there has been a change in the circumstances from the entry of the original Order Determining Heirs, which would result in injury or prejudice to the respondent or an innocent intervening third person in the event the petition is granted. In fact, there is nothing in the record which would support a finding that the respondent would be in any way prejudiced by the matters being reopened. Furthermore, the record would more than support a finding that the petitioner did not become aware of his rights, vis-a-vis a discovery of the two probate proceedings, until sometime in January, February or March of 1972, when he contacted the Legal Aid Society of Lincoln, Nebraska, in order to ascertain his possible rights of heirship. From that time on, the evidence or reasonable inferences to be

drawn therefrom, would support a finding that actions were ongoing to attempt to rectify the previous mistakes which had been made in these two probate proceedings. No one would have questioned the right of petitioner to the relief he seeks if it had been asked for within a short time after the mistake was made; and it should not be denied now, unless there are other considerations than the mere lapse of time. If there was prejudice to someone other considerations would arise. On all of the testimony, I cannot find petitioner as being nondiligent either in failing to discover the mistake or in failing to act with promptness after making the discovery. Accordingly, consistent with the viewpoints expressed in this opinion, without further discussion of the evidence or law, the undersigned is of the opinion that on the entire record, after a careful consideration of all facts and circumstances in the case, that petitioner has legally established his claim to heirship, and should not be barred therefrom as a result of the passage of time.

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//original signed  
Frederick W. Lambrecht  
Administrative Law Judge