



INTERIOR BOARD OF INDIAN APPEALS

Estate of Ralph James (Elmer) Hail

12 IBIA 62 (11/10/1983)

Judicial review of this case:

Dismissed, *Hail v. Clark*, No. CIV-84-75-T (W.D. Okla. May 7, 1984)



# United States Department of the Interior

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

## ESTATE OF RALPH JAMES (ELMER) HAIL

IBIA 83-34

Decided November 10, 1983

Appeal from March 16, 1983, order denying petition to reopen issued by Administrative Law Judge Sam E. Taylor in Indian Probate Nos. IP OK 97 P 83, IP TU 173 P 80, IP TU 178 P 78, and H-202-70.

Affirmed as modified.

1. Board of Indian Appeals: Jurisdiction--Indian Probate: Reopening:  
Generally--Rules of Practice: Appeals: Failure to Appeal

The timely filing of a notice of appeal from an order denying reopening of an Indian decedent's estate is a jurisdictional prerequisite.

2. Regulations: Force and Effect as Law

Duly promulgated Departmental regulations have the force and effect of law.

APPEARANCES: Earl E. Goerke, Esq., Watonga, Oklahoma, for appellant. Counsel to the Board: Kathryn A. Lynn.

### OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On May 23, 1983, the Board of Indian Appeals (Board) received a notice of appeal and supporting brief from Delbert Allen Hail (appellant), through counsel, Earl E. Goerke, Esq., Watonga, Oklahoma. Appellant seeks reopening of the estate of Ralph James (Elmer) Hail (decedent) for the purpose of showing that he is decedent's son and is therefore entitled to share in decedent's Indian trust estate. For the reasons discussed below, the Board affirms the order denying reopening as modified by this opinion.

#### Background

Ralph James (Elmer) Hail, an unallotted Arapaho, died intestate on January 28, 1970, at the age of 52. A hearing to ascertain decedent's heirs

was conducted on September 14, 1970, at Concho, Oklahoma, by a Hearing Examiner of the Department of the Interior. Appellant, who was a minor at the time of the hearing, was notified of the hearing through notice to his mother, Amanda Roman Nose Hail, as his guardian ad litem. Neither Amanda Roman Nose Hail nor appellant appeared at the hearing. The Hearing Examiner appointed B.G. Imbrock, Realty Officer, Concho Agency, Bureau of Indian Affairs (BIA), as a second guardian ad litem to represent appellant's interests at the hearing.

Although the testimony at the hearing was sparse, the record shows that decedent and Amanda Roman Nose Hail had two children, Rosemary Hail Conner and Paul Wilfred Hail. These are the only children of decedent shown in the BIA family history records. Appellant was identified as the son of Amanda Roman Nose Hail and a man from Geary, Oklahoma, whose name was not known. The testimony further showed that appellant was born approximately 3 years after Amanda Roman Nose Hail and decedent separated.

By order dated October 16, 1970, the Hearing Examiner found that, in accordance with Oklahoma law, decedent's heirs were his daughter, Rosemary Hail Comer, and his son, Paul Wilfred Hail. The order did not mention appellant.

On September 6, 1978, appellant, appearing pro se, filed a petition for reopening with Administrative Law Judge Sam E. Taylor. Judge Taylor issued a notice to all parties in the estate on October 6, 1978, stating:

A review of the record, together with the above-mentioned letter and statement of Delbert Allen Hail, discloses that a manifest injustice may have been suffered by Delbert Allen Hail; that a reasonable possibility exists for correction of said error; that he did not have actual notice of the original proceedings at which time he was a minor; and that he was not on the reservation or otherwise in the vicinity when public notices of the original hearing were posted.

Based on these findings, the Administrative Law judge gave other interested parties 30 days in which to reply to the petition.

Although no filings were made pursuant to the Administrative Law Judge's order, appellant sought to withdraw his petition on April 2, 1979, prior to consideration of its merits. Appellant stated at that time:

I wish to drop the Petition for the reasons that I feel strongly it is a burden upon my brother and sister and all others concerned in the matter, I no longer wish for it to remain open, I pray that you will grant my wish for closing this matter.

In accordance with appellant's request, the Administrative Law Judge issued an order on April 13, 1979, dismissing the petition.

By letter dated July 25, 1980, appellant sought reopening a second time. In this letter he stated that the reason he had asked for dismissal of his original petition was that he was incarcerated at the time and did not know how long he would be confined.

The Administrative Law Judge denied the petition, stating in his September 24, 1980, order:

Notice of the original hearing held on September 14, 1970, was given Amanda Roman Nose Hail, as mother and guardian ad litem for Delbert Allen Hail a minor. The record of said hearing discloses that testimony pertaining to Delbert Allen Hail was received and considered by the Administrative Law Judge. Thereafter a copy of the Order Determining Heirs dated October 16, 1970, was given Amanda Roman Nose Hail, as guardian ad litem for Delbert Allen Hail, a minor.

By letter dated September 8, 1978, which was eight years after the Order Determining Heirs dated October 16, 1970, was issued, and four years after he had attained the age of 21 years, Delbert Allen Hail first requested that this estate be reopened. Now, fifteen months after said request to reopen was dismissed at his request, he seeks to revive and renew his request to reopen this estate.

The harassment of individuals determined to be heirs of a decedent should not be permitted by the repetitive filing of Petition to Reopen. Accordingly, I find and determine that the Petition to Reopen this estate by Delbert Allen Hail, dated July 25, 1980, should be denied.

Although advised that the decision would be final in 60 days unless an appeal was filed within that time, appellant did not appeal this denial of reopening.

On February 23, 1983, appellant, represented by present counsel, filed a third petition to reopen the estate. This petition was denied by the Administrative Law Judge on March 16, 1983, on the grounds that appellant would not be permitted to harass individuals found to be heirs of the decedent by the filing of repetitive petitions for reopening.

Appellant appealed this denial to the Board in a notice of appeal received on May 23, 1983. A brief in support of the appeal was filed with the notice. No other filings were received.

#### Discussion and Conclusion

This appeal potentially raises several legal questions. However, the Board finds that resolution of those questions is not required for a decision. Therefore, the Board will assume, for purposes of this discussion only, that appellant (1) did not receive actual or constructive notice of the original probate hearing into decedent's estate, either personally or through notice to a guardian ad litem; (2) was not properly represented at that hearing by his two guardians; (3) diligently pursued his rights; and (4) should be permitted

to file repetitive petitions for reopening. 1/ Even with these assumptions, the third petition for reopening was properly denied.

[1] The Administrative Law Judge denied appellant's second petition for reopening on September 24, 1980. A notice attached to the order denying reopening specifically informed appellant that unless he appealed the decision to the Board of Indian Appeals within 60 days, the decision would become final for the Department under regulations published in 43 CFR 4.291 (1980), now 43 CFR 4.320(a). Appellant did not file an appeal. 2/ Even if the Board were to treat the third petition for reopening as a notice of appeal, it would have to be dismissed as untimely because it was filed with the Administrative Law judge on February 23, 1983, more than 2 years after the issuance of the order denying reopening. The Board has consistently dismissed appeals that are not timely filed, holding that timely filing is a jurisdictional prerequisite. See, e.g., Face v. Acting Assistant Secretary--Indian Affairs, 11 IBIA 35 (1983); Beck v. Bureau of Indian Affairs, 8 IBIA 210, on reconsideration, 8 IBIA 211 (1980).

[2] When appellant failed to exercise his appeal rights within the time permitted by regulation and explained to him by the Administrative Law Judge, the denial of reopening became final and res judicata. Other parties to this proceeding are entitled to rely upon the finality of decisions of the Department after the expiration of time periods established in Departmental regulations. These regulations have the force and effect of law. See Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 146 (1983); Aleutian/Pribilof Islands Ass'n, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 9 IBIA 254, 89 I.D. 196 (1982).

Therefore, appellant's third petition for reopening, which again sought reopening on the same grounds and for the same reasons as the second petition, should have been dismissed because appellant's failure to appeal the September 24, 1980, order denying the second petition to reopen made that decision final for the Department.

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1/ Appellant argues on appeal that his Sept. 6, 1978, and July 25, 1980, letters should not have been treated as petitions for reopening because they merely sought information on how to seek reopening. The Board rejects this argument. Appellant did not question the characterization of his letters as petitions for reopening at the time. In fact, he assisted the Administrative Law Judge in his efforts to grant reopening in response to the first letter.

2/ Appellant contends that he should receive some special consideration because he was not represented by counsel before the filing of the third petition for reopening. Many parties appearing before the Department in Indian probate proceedings are not represented by counsel. The rules of practice before the Department specifically recognize the right of an individual to represent him or herself. See 43 CFR 1.3(b)(3). The fact that a person is not represented by counsel does not mean that any decision rendered in a proceeding will not be binding upon that person. See, e.g., Estate of Julia Tieyah, 11 IBIA 211 (1983); Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 21 (1982). The Board finds that the notice sent to appellant was clear and unambiguous as to the necessity for an appeal, even from the perspective of a layman.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 16, 1983, order denying reopening in this estate is affirmed as modified by this opinion.

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//original signed  
Jerry Muskrat  
Administrative Judge

We concur:

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//original signed  
Franklin D. Arness  
Administrative Judge

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//original signed  
Bernard V. Parrette  
Chief Administrative Judge