

FILED
Court of Appeals
Division III
State of Washington
5/31/2018 2:41 PM
No. 355799/358160

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

Spokane County Cause No. 10-4-01216-0

ESTATE OF EDWARD AMOS COMENOUT JR.

Appellant,

v.

**CHRISTOPHER GARDEE, GEORGE GARDEE and RICHARD
GARDEE**

Respondents

**ESTATE'S AMENDED REPLY BRIEF TO RESPONDENT'S
SUPPLEMENTAL BRIEF**

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I. INTRODUCTION

By Order of January 29, 2018, the Appeals Clerk combined both appeals in this case. The first appeal, No. 355799 (CP 387-389), appealed disbursement of a three fourths of a \$29,514.58 check (see CP 208) directly to three of the four heirs of the Estate, free of administration expenses. The second issue is payment of attorney and Special Administrator's fees from July 30, 2010 through February 2017. The second appeal, No. 358160 (CP 427-435), is from a Stay Order prohibiting payment of attorney fees until the first case, #355799 is final, CP 422, 425; CP 425-426. The Estate filed two briefs in this case. The Opening Brief was filed January 2, 2018; the Supplemental Brief on April 3, 2018. The Gardee heirs filed a Supplemental Brief on April 26, 2018. This Amended Reply Brief is filed in answer to the Gardee heirs' Supplemental Brief.

Counter Statement to Respondent's Introduction

Respondent's brief, (hereafter the Gardee heirs), at page 6, states that Edward Comenout III is represented by the Special Administrator. This is incorrect. Edward Amos Comenout III is represented by Robert E. Kovacevich in *Comenout v. Belin*, No. 3:16-cv-05464-RJB, as Plaintiff, with his grandfather, Robert Reginald Comenout Sr. See page 9 of Supplemental

Opening Brief of the Estate, filed April 3, 2018. He does not represent Edward Amos Comenout III here. Estate's March 13, 2017 Motion, CP 43. Edward Amos Comenout III never timely objected to either Motion. CP 334. As stated at CP 208, Edward's father verified to counsel that Edward Amos Comenout III had no objection. The statement of the Gardee heirs is materially misleading and an attempt to create a conflict.

II. ARGUMENT

A. The Inclusion of the Cobell Check was Excluded from the BIA Probate by BIA Judge Payne. *Christensen v. Grant County Hospital Dist. No. 1*, 152 Wn.2d 299, 96 P.3d 957 and Other Cases Bar Relitigation by Collateral Estoppel.

The Gardee heirs do not controvert the estate's res judicata argument in the estate's Opening Brief at page 7, nor the fact that the state court has no jurisdiction. The BIA court decision, CP 219, n.1 was cited at pages 9-10 of the Estate's Opening Brief filed January 2, 2018: "The distribution does not include funds from the Cobell Settlement. The settlement check was paid to the Personal Representative of the Spokane probate, CP 146, Exhibit 1, CP 157. *Christensen v. Grant County Hospital Dist. No.1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004), a case applying res judicata to an administrative agency decision, was cited at page 31 of the Opening Brief. The first judge had jurisdiction and decided where the Cobell check was to be sent. *Schibel v.*

Eymann, 189 Wn.2d 93, 94, 399 P.3d 1129 (2017) was cited at page 30. Judge Payne held that the Office of Special Trustee must verify the distributions. The Cobell settlement was not part of the BIA estate. CP 219-220. Issue preclusion applied.

The issue of res judicata is reviewed extensively at pages 30-33 of the Estate's Opening Brief. The issue is waived by the Gardee heirs. The BIA judge approved the distribution. CP 219-20. *Black Hills Institute of Geological Research v. South Dakota School of Mines and Technology*, 12 F.3d 737, 741 (8th Cir. 1993) states: "Outside of the permitted transactions not applicable here, the only way such owners may alienate an interest in their trust land is by securing the prior approval of the Secretary. An attempted sale of an interest in Indian trust land in violation of this requirement is void and does not transfer title." What is personality and realty located on an off reservation allotment is a federal question. *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153, 1157 (9th Cir. 2013) and 25 U.S.C. § 5108 hold that federal law preempts state law on this issue.

At page 10, the Gardee heirs quote 43 C.F.R. § 30.146, arguing that the Cobell check "belongs directly to the Decedent's heirs." The citation

applies to the \$108.56. The order closed the BIA probate. When a probate is closed income thereafter goes to the heirs. The settlement check became a part of the ongoing probate. Money accrued at date of death, in an IIM account, may be used to pay claims. 73 Fed.Reg. 67, 263(2) (November 13, 2008) applies only to a life tenant. 73 F.R. 67256-01, 2008 WL 4871346 (F.R.) 25 C.F.R. parts 15, 18 and 179; Office of the Secretary, 43 C.F.R. part 4; 30 R.I.N. 1076-AE59, a 124 page document on additional BIA probate management dated Thursday, November 13, 2008 under c. **Claims** states: “the final provision at 43 C.F.R. 30.146 makes it clear that claims may be paid only from intangible trust personality in a decedent’s IIM account or due and payable to the decedent on the date of death.” The settlement check is intangible property. Judge Payne, the BIA administrative judge ruled that the Cobell check was not part of the BIA probate. CP 219. *Lineback v. Howerton*, 26 S.W.2d 74 ((Ark. 1930) applies. It involved Indian personal property off reservation. It held that the probate administrator has a “duty . . . to protect the rights of the domestic creditors.” *Id.* at 76. “Permanent improvements,” including the 73,000 square foot building on the land, are excluded from the Edward A. Comenout BIA probate. The modification by Judge Payne in the BIA states, at footnote 1, “That the distribution does not

include the funds from the Cobell settlement.” CP 219. The citation in the probate, CP 215, is to 43 C.F.R. 30.236(b)(2). That statute requires the property to go according to will. The BIA order approving distribution (CP 51) states that the permanent improvements are governed “by other tribunals of competent jurisdiction.” The Spokane probate includes all off reservation property of Edward A. Comenout Jr., except the land. However, the building on the land and moveable and intangible property is administered by the Spokane probate. The Cobell check was a settlement of a case. It cannot and was not traced to any trust land. CP 157.

B. Administration Expenses can be Charged Against Non Probate Assets.

At page 9 of their Brief, the Gardee heirs cite RCW § 11.44.015, the inventory statute in support of the argument that the Cobell check need not be inventoried. The Brief then argues that the statute necessarily excludes assets acquired after the death of the Decedent. Such assets belong to the heirs. No citation of authority is given for this conclusion. RCW § 11.48.030 does not state inventory, it states that the estate includes all accounts that come into possession of the administrator. RCW § 11.04.250 vests real estate to heirs subject to “his or her debts, family allowance” and “expenses of administration.” The Gardee heirs were not sent individual Cobell checks

on Estate assets. The Personal Representative had to cash the check. If the Cobell money was to be paid personally, the BIA would have sent checks to each of them. Apparently, they applied for the money but their application was ignored (CP 147). If the BIA was wrong, the Gardee heirs should seek their remedy from the BIA. There is no exception excluding Indian money. Debts of administration are given priority and are paid first. See RCW § 11.76.110. After that, last sickness, creditors and taxes are paid. *In re Verbeek's Estate*, 2 Wn.App. 144 at 154, 467 P.2d 178 (1970) is also cited by the Gardee heirs at page 9 of their brief, holding a real estate contract is to be inventoried in an estate. *Id.* at 154. The case did not involve Indian property. *Landauer v. Landauer*, 95 Wn.App. 579, 975 P.2d 577 (1999) holds that a community property agreement is void where signed by an Indian to convey trust property. Only the Secretary of Interior can convey trust property. *Id.* at 587. *Armstrong v. Maple Leaf Apartments, Ltd.*, 508 F.2d 518 (10th Cir. 1974) applies. It holds “Second, contrary to the alternative argument of defendants-appellees, the doctrine of primary jurisdiction is not applicable because the federal district court and the probate division do not both have jurisdiction over the subject matter and this condition is essential to application of the primary jurisdiction doctrine.” *Id.* at 523.

The Spokane probate includes all property of Ed Comenout Jr., who lived off reservation. It is a tribunal of competent jurisdiction (CP 51). The Cobell check was a settlement of a case. It cannot and was not traced to any trust land. CP 157. It was excepted from the BIA probate, was written to Mary Pearson, who was the Personal Representative of the Spokane County Probate; it was listed to the Spokane address of probate counsel and has to be administered by Spokane County. At page 12 and 13 of their Brief the Gardee heirs cite two cases: *Anthis v. Copland*, 173 Wn.2d 752, 270 P.3d 574 (2012) and *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 392, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976). The cases were cited to support liberal construction of 25 U.S.C. § 410. The statute does not apply to probates. 25 U.S.C. § 2206, the American Indian Probate Reform Act, Pub L. No 108-374, 1185 Stat 1809 (2004) Section 25 U.S.C. § 2201 et seq applies only to BIA probates. 25 U.S.C. § 2206(d)(2)(A) “descent of off reservation lands” applies to Edward Amos Comenout’s probate as he lived on an off reservation allotment. See *Cohen’s Handbook of Federal Indian Law* § 16.05[2][f] page 1100 f 63 (Nell Jessup Newton ed. 2012). “Trust or restricted lands located outside any reservation and not subject to the jurisdiction of any Indian tribe may pass by intestate succession to any Indian

person in trust or to any devisees in fee.” “Indian probate judges have jurisdiction.” 25 U.S.C. § 372-2. The Gardee heirs objections were answered by the Response on June 6, 2017 and again on August 9, 2017. CP 332.

The case of *Swain v. Hildebrand*, 36 P.2d 924 (Okla. 1934) holding state courts have no jurisdiction over Indian funds was referenced. Also referenced is *Estate of McMaster*, 5 IBIA 61 (1976) directly on point on BIA jurisdiction was attached as Appendix 3 of the January 2, 2018 Brief. *Landauer v. Landauer*, 95 Wn.App. 579, 975 P.2d 577 (1999) was argued at page 25. It holds that state courts have no authority over Indian trust property. *Lineback v. Howerton*, 26 S.W.2d 74 (Ark. 1930) was argued at page 25. It holds that domestic creditors have jurisdiction to collect against off reservation assets of an enrolled Indian “to appoint an administrator to protect the rights of domestic creditors.” *Id.* at 76. *In re Estate of Gopher*, 310 P.3d 521, 523 (Mont. 2013) holds the same as *Lineback*. The Supplemental Brief of the Gardee heirs never mentions any of the authority cited in this summary. None of the cases cited by the Estate’s briefs were cited in the Gardee brief. The authority applies and must be considered as waived since it was not contested. *In re Wheeler's Estate*, 71 Wn.2d 789, 431 P.2d 608 (1967) applies. It states: “this issue was not raised by the

pleadings.” *Id.* at 798. The court “could not determine the issue.” *Ibid.* at 798.

C. Non Probate Assets are Liable for Debts of Administration.

RCW § 11.18.200(1) states that the person who gets a non probate asset takes the asset subject to liabilities, claims, estate taxes and the fair share of expenses of administration.” RCW § 11.18.020 2(b) states that a “beneficiary of property held in a joint tenancy form with right of survivorship . . . takes the property subject to . . . administration expenses.” 2(c) states that a beneficiary takes a trust account subject to liabilities. *In re Estate of Wegner v. Tesche*, 157 Wn.App. 554, 237 P.3d 387 (2010) awarded attorney’s fees on litigation over non probate assets whether or not “the assets belonged to the estate.” *Id.* at 565.

The Court never explained its concerns nor applied the “amount and nature of the services rendered, the time required in performing them, the diligence with which they have been executed, the skill and training required, the good faith in which the various legal steps in connection with the administration were taken, and all other matters.” *In re Peterson’s Estate*, 12 Wn.2d 686, 728, 123 P.2d 733 (1942). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.

Rosander v. Nightrunners Transport, Ltd., 147 Wn.App. 392, 403, 196 P.3d 711 (2008). Here, it is unreasonable as only \$49,000 was requested when over \$217,000 of fees were owed. See Motion, CP 36-57 and VRP 7. Attorney Roger Peven spent the afternoon reviewing the records, interviewed Kovacevich and was well qualified. VRP 3, 5, 14, 15. His testimony was not questioned. VRP 8.

At page 6 of their brief, the Gardee heirs argue that the Personal Representative, Mary Pearson, who died June 9, 2015 “Took the position that the Cobell monies were handled separately.” They were not.

At page 7, the introduction states that the “Personal Representative” is now taking the position that the assets are part of the estate referencing, CP 47. The Estate check was payable to Mary Pearson as Personal Representative of the Estate of Edward Comenout Jr. See CP 157. “Judge Pearson determined that it should be a Spokane probate asset.” CP 206. The Gardee heirs questioned the payment in 2015, hence, it was considered a disputed asset. There is no reference that supports this argument. It was deposited in the same attorney pooled trust account as other estate funds. See CP 42. There has never been an inconsistent position by the Estate.

No one has been Personal Representative after the death of Mary Pearson in 2015. Kovacevich was appointed Special Administrator under RCW Ch. 11.32, to “commence and maintain existing suits.” CP 31. See RCW § 11.32.030. He is not liable “to an action by any creditor.” RCW § 11.32.050. In *Peterson v. Johnson*, 49 Wn.2d 869, 307 P.2d 564 (1957), *Johnson, supra* at 873, dismissed a replevin action against a special administrator. A suit cannot be brought against a special administrator. See *Sutton v. Hirvonen*, 113 Wn.2d 1, 775 P.2d 448 (1989) denying collection where the estate was “not brought into court”. *Id.* at 10. The special administrator does not have to inventory the estate. There is no law requiring the duty. Presently there is no personal representative. The Estate needs funds to engage a new personal representative. For this reason, the arguments, at page 7-9 by the Gardee heirs, regarding duties of a personal representative do not apply. Judge Pearson’s final account does not have to be filed until a new personal representative is appointed. See RCW §§ 11.28.280, 290.

The Gardee heirs, at page 10 of their brief, cite the BIA Decree of Distribution in the Estate. CP 52. The decision noted a request for future legal fees. It was denied since a specific amount could not be specified. The

specific amount of future fees would be impossible, hence, the Court stated “it is herein noted that the denial of the claims of the Comenouts does not prevent them from seeking redress in other forums or competent jurisdiction.”

The Gardee heirs apparently, as heirs, objected to payment of costs and fees as heirs on May 11, 2015. CP 411. The Estate’s Supplemental Brief, filed April 3, 2018, at pages 19-20, cited *Matter of Estate of Fields*, 2017 WL 5504969 (S.C. Alaska 2017) where legal fees were awarded in the amount of \$87,065 or \$97,065. \$81,300 in administration expenses was also awarded. Only \$9,763 or \$17,563 remained in the estate “after the approved costs and attorney fees, there are no assets left to distribute.” *Id.* at *3. Unlike the effort in the Comenout Estate, in *Fields*, “the master found that, in light of the complex and long term litigation surrounding the estate” the amount was reasonable. *Ibid.* at *3. The Estate does not contain enough value to reimburse even the attorney’s fees that have already been awarded to Charles.” *Id.* at *6. The denial of additional fees was harmless error as administrative costs would exceed any amount that could be distributed. The court held: “Charles has not been harmed by the court’s denial of attorney fees.” *Id.* at *6. The case applies here as \$168,267.54 in fees accrued as of

October 2017. See CP 364. As stated earlier, there is much more to be done to close the estate. *State v. Bello*, 142 Wn.App. 930, 932 f.3 (2008), states the rule on controverting issues:

Lopez separately assigns error to his conviction in the superior court by contending that the police did not have probable cause to arrest him. However, Lopez presents neither legal authority nor argument supporting this assignment of error. RAP 10.3(a)(5) requires the appellant to present argument supporting the issues presented for review, citations to legal authority, and references to relevant parts of the record. “Assignments of error unsupported by citation authority will not be considered on appeal unless well taken on their face.” *State v. Kroll*, 87 Wash.2d 829, 838, 558 P.2d 173 (1976). We need not consider arguments that a party has not developed in the briefs and for which the party has cited no authority. *State v. Dennison*, 115 Wash.2d 609, 629, 801 P.2d 193 (1990). We hold, therefore, that Lopez waived this assignment of error and we do not consider it further.

Griffis v. Cedar Hill Health Care Corp., 967 A.2d 1141 (Vt. 2008) states: “The question before us on appeal is not whether there was a basis upon which the court might have reached a different conclusion, but whether there was a basis in the record upon which the court could reach the conclusion it did.” *Id.* at 1146. *Graphic Controls Corp. v. Utah Medical Products, Inc.*, 149 F.3d 1382, 1385 (Fed Cir. 1998) holds “arguments may not be properly raised by incorporating them by reference from the

appendix.” *Id.* at 1385. The Gardee heirs have not disputed the issue of harmless error. Therefore it is waived.

The Gardee heirs, at page 12 of their brief, cite *First Citizens Bank & Trust Co. v. Harrison*, 181 Wn.App 595, 326 P.3d 808 (2014) as “exactly the issue presented to this Court.” The case did not involve or mention whether the state court had jurisdiction to resolve the issue. The case did not involve an Indian probate or what assets were available to pay costs of administration. It is not the issue presented here. Here, the BIA decided the issue and res judicata applies. Res judicata was not an issue in *Harrison*. It concerned a deposit of the IIM owner into their personal bank account. The statute relied on was 25 U.S.C. § 410. It applies to “money accruing from any lease or sale of lands.” There was no adjudication that the Cobell check was not “a distribution from the individual Indian money account.” The funds here were paid to Mary Pearson, Personal Representative, not the individual Indian. Pearson could charge her administrative fees from the entire estate including “rents and profits.” RCW §§ 11.48.020, 030 and RCW § 11.18.200. There is no exception against the estate first collecting debts of administration. RCW § 11.76.110. *First Citizens* did not, like this case, have an adjudication that the Cobell check was not part of the BIA probate of Edward Amos

Comenout Jr. If the estate in the Spokane probate had been distributed, it would still have to be reopened to give Judge Pearson authority to cash the check. RCW § 11.76.250 provides that if property is later “discovered” after final settlement, the estate can be reopened.

D. The Legal Fees Sought in Both Cases were not Controverted by Admissible Evidence.

The Estate cites RCW § 11.28.210 at page 38 of its April 3, 2018 brief. The Gardee heirs, at page 16 of their brief, cite the statute and admits that it “permits an award that is just and reasonable.” Their Brief does not respond to the issue of what the Court must consider to arrive at the amount of fees to be awarded. The Gardee heirs argue that RCW § 11.28.210 does not address attorney’s fees. The estate addresses the statutes that do apply: RCW § 11.48.210 requiring fees that the court determines are “just and reasonable”. RCW § 11.96A.150 also applies an equitable standard. In its Order, the court found that it had “concerns” about the reasonableness of the hours billed and detailed.” CP 392. The court never referenced any detail or admissible evidence for its conclusion. The standard of review was never applied by the court. *In re Peterson’s Estate*, 12 Wn.2d 686, 123 P.2d 733 (1942), contains the elements that a court should consider in fixing the fees. They are:

In fixing the amount to be allowed as a fee for the attorney of a decedent's personal representative, the court should consider the amount and nature of the services rendered, the time required in performing them, the diligence with which they have been executed, the value of the estate, the novelty and difficulty of the legal questions involved, the skill and training required in handling them, the good faith in which the various legal steps in connection with the administration were taken, and all other matters which would aid the court in arriving at a fair and just allowance.

Id. at 728

Here, the time that had to be spent was far different from the normal estate. There were three probates. CP 38-39. The death of the Personal Representative, CP 36; a \$90 million dollar claim in federal court against the estate at the time of death, CP 40; a later federal case, CP 41; a contested lease, CP 41, 42; a BIA probate dispute, CP 43; and a forfeiture case, CP 44-45. The will did not appoint a Personal Representative, hence the Spokane probate, a catch-all probate had to act for all the property. Allowing \$20,000 for seven years defending or bringing fruitful litigation on many complex cases is manifestly unreasonable, especially when the attorney collected \$61,000 to benefit the estate. The estate was insolvent, hence orders had to be obtained. It would not be unreasonable that a few months defense of a \$90 million dollar claim would incur \$20,000 of legal fees. *In re Wheeler's Estate*, 71 Wn.2d 789, 431 P.2d 608 (1967) is good precedent. The case

allowed additional fees to be rendered in a condemnation matter that was settled. An equitable lien was imposed in the \$51,000 condemnation settlement. The court states “We note that the services rendered by Mr. Monheimer included several matters which are not usually included in handling an estate. Mr. Hamlin was the only disinterested witness who testified as to the value of Mr. Monheimer’s services.” *Id.* at 794. The *Wheeler* court allowed the fees requested. The case illustrates what happened here. Seldom is major litigation pending on death of a defendant who is insolvent. The Estate, at pages 11 through 18 of its Brief, filed January 3, 2018, reviews the facts of the issue. It repeated much of the undisputed testimony of Roger Peven at 13-18. VRP 3-10.

At page 18 of the Gardee heirs Brief, they complain that the results obtained exceeded the size of the estate. However, they do not include a \$730,000 building in which the estate has about a 56% interest. They attempt to ignore the fact of \$61,000 obtained and the dismissal of a \$90 million dollar claim.

At pages 20-30 of the Estates January 3, 2018 Brief, the law on Indian off reservation land was set forth. Collateral estoppel was reviewed at 30-33. The Gardee heirs never attempted to distinguish the relevant law.

E. The Gardee Heirs Summary is Unsupported.

The summary of the Gardee heirs in their Supplemental Brief, at page 17, is not supported by any admissible facts or citation to the record as required by RAP 10.3(a)(6). The Estate has responded with citations to the record. The arguments are waived and in addition are contradicted by the record. The summary is without merit as the objections are arguments that cannot be transmuted to facts. Conflicts are alleged. *In re Estate of Ehlers*, 80 Wn.App. 751, 761, 911 P.2d 1017 (1996) acknowledges that probates may include conflicts, but are only actionable if they cause harm.

F. The Building is Personal Property and an Asset of the Spokane Probate.

At page 18 of their Brief the Gardee heirs argue that the Estate only consists of \$56,329.38. The argument is irrelevant as an insolvent probate must be conducted to conclusion, See RCW §§ 11.76.030, 11.76.150, 110. The Gardee heirs also seek to exclude the building from the assets of the Spokane estate. The building was not part of the BIA probate. “The OHA does not probate them. Accordingly, this decision does not further address the ownership rights of any structures located on said allotment.” The probate references 43 C.F.R. § 30.236. CP 51. Since the building is off any

reservation, the Spokane probate has jurisdiction. It is considered personal property. See *In re Estate of Gopher*, 310 P.3d 521, 523 (Mont. 2013). The Gardee heirs contend that the BIA Court mis-cited a regulation. It should be § 43 C.F.R. 30.236(b)(2). The will did not directly address the building. The will is set forth at CP 54-57.

76 F.R. 7501, at B 3, declares unconditionally that “as a general rule the Department considers permanent improvements to be non trust property. . . .The courts of competent jurisdiction that normally probate non trust property (i.e. Tribal and State courts) would then apply the substantive rules of descent.” Regardless of date of death the state probate here would have jurisdiction as the building is not on an Indian reservation. 25 U.S.C. § 2206(d)(2) provides that off-reservation land not subject to tribal jurisdiction and descend by will. Off-reservation land cannot be governed by an Indian tribe. *Miami Tribe of Oklahoma v. U.S.*, 656 F.3d 1129 (10th Cir. 2011) states “The tribe does not have jurisdiction.” *Id.* at 1143. The Gardee heirs contend that the land was not part of the probate. The decision referenced at page CP 395-409 did not reopen the probate decision. CP 216-217. At page 417, the Ricky Joseph litigation is cited. The Ricky Joseph litigation, *Robert R. Comenout Sr. et al v. Joseph*, No. 16-35124, DC W.D. Wn at Tacoma, was

settled on August 19, 2016. The Estate of Edward Amos Comenout Jr. was one of the plaintiffs. The settlement promised that Plaintiffs, including the Estate, would not be ejected from the property. In a proposed lease the BIA has admitted that the co-owners need to consent. This includes the Estate. *nunc pro tunc* Orders cannot be entered in cases where Indian personal and real property are defined. See *Black Hills Institute of Geological Research v. South Dakota School of Mines and Technology*, 12 F.3d 737, 744 (8th Cir. 1993).

G. No Appeal Attorney's Fees are Payable.

The Gardee heirs request attorney's fees admitting that they did not request fees at trial. The Gardees will not be able to obtain a distribution. They are not harmed. *Matter of Geer's Estate*, 29 Wn.App. 822, 629 P.2d 458 (1981) denies attorney's fees where the argument is how the estate is distributed. Regardless of outcome, the Appeal has merit. The Estate is not closed. At most, many creditors will request payments. The Special Administrator is immune from creditors. RCW § 11.32.050. There are no assets left after administration fees. Expenses of last sickness are over \$200,000. Taxes must be determined. Even if payable, they would be seventh in line in an insolvent estate. In any event, until all the fees are

awarded, including on-going fees, no attorney's fees could be awarded. *In re Estate of Stevens*, 94 Wn.App. 20, 37-38, 971 P.2d 58 (1999) citing *In re Estate of Stockman*, 59 Wn.App. 711, 715, 800 P.2d 1141 (1990).

III. CONCLUSION

The Estate proved that the fees were just and reasonable by verified pleadings and testimony. They were equitable as only a portion of time spent was requested. The trial court exceeded its jurisdiction on the Cobell check. The issue was precluded and was in federal jurisdiction. The decisions should be reversed.

DATED this 31st day of May, 2018.

/s/ Robert E. Kovacevich
ROBERT E. KOVACEVICH, # 2723
Attorney for Appellant

CERTIFICATE OF SERVICE

This is to certify that on May 23rd, 2018, the Estate's Reply Brief to Respondent's Supplemental Brief was filed and served on Counsel for Respondent/Appellee via the Washington State Appellate Court's Secure Portal Electronic Filing system.

DATED this 31st day of May, 2018.

/s/Robert E. Kovacevich
ROBERT E. KOVACEVICH
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May 31, 2018 - 2:41 PM

Transmittal Information

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Appellate Court Case Title: Estate of Edward Amos Comenout
Superior Court Case Number: 10-4-01216-0

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