

No. 355799/358160

**COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON**

Spokane County Cause No. 2010-4-01216-0

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ESTATE OF EDWARD AMOS COMENOUT JR.

Appellant,

v.

CHRISTOPHER GARDEE, GEORGE GARDEE and RICHARD  
GARDEE

Respondents.

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**SUPPLEMENTAL BRIEF OF APPELLANT**

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## **I. STATEMENT OF PROCEEDINGS TO DATE**

By Email dated January 29, 2018, Appeals Clerk Renee S. Townsley joined both appeals in this case. Both appeals, No. 355799 and 358160, are to be used on all correspondence and filings. Appellant filed his Opening Brief in this case on January 2, 2018. Respondent does not have to file a response brief until 30 days after service of Appellants' Supplemental Brief. The Statement of Arrangements was filed March 8, 2018. This brief is due April 6, 2018.

## **INTRODUCTION**

Both appeals concern insolvent administration of the Estate of Edward Amos Comenout Jr., an enrolled Quinault Indian who died June 4, 2010. Three probates were filed in his estate. Comenout owned over a one-half interest in an off-reservation Indian allotment in Puyallup, Washington. The land, but not the permanent building on the land, was probated by the probate division of the U.S. Department of Interior, No. P000086947IP. Decedent had interests in the Quinault Indian Reservation probated by a probate in the

Quinault Nation Court, No. CV-034. This probate, commenced on September 22, 2010, is to administer Comenout's interest in the permanent building on the land and other non-trust personal property in Puyallup.

The first appeal in this Court, No. 355799, is an appeal of two issues. See first appeal ( CP 351-357) and Appellant's Opening Brief filed January 2, 2018. One is whether the Spokane County Superior Court could exert jurisdiction over a \$22,135.94 Indian trust settlement check, written to the Spokane probate personal representative, that the Department of Interior ruled was not within jurisdiction of the BIA probate. The second issue was denial of payment of special administrator and attorney's fees earned through February 2017. This second appeal, filed January 4, 2018, ( CP 427-435) is to obtain a reversal of a stay order entered by the lower court on December 14, 2017, staying any further trial court order to pay fees in the case until the first appeal, in No. 355799, is final. Also appealed in this appeal is the Order Denying Additional Attorney's Fees from March 2017 forward.

The first appeal asked for payment for fees incurred from July 16, 2011 through February of 2017. The times do not overlap. The first appeal seeks payment for time spent through February of 2017. This appeal seeks fees from March 2017 forward.

## **II. BACKGROUND FACTS**

When this Spokane County Superior Court probate was commenced, the Estate was a defendant in *Quinault v. Comenout*, No. 3:10-cv-05345-BHS, 868 F.3d 1093 (9<sup>th</sup> Cir. 2017). The case was pending until August 29, 2017. The Estate was also in litigation as a claimant to recover 376,852 packs of cigarettes seized from the Puyallup allotment in July of 2008 by the Washington State Liquor Control Board. See *Comenout v. Washington State Liquor Control Board*, 195 Wash.App. 1035 (unpublished, 2016). The original motion in this case, filed March 13, 2017, (First Appeal, CP 36-108), also chronicles two other federal court litigations and the attempted lease by the Quinault Indian Tribe to lease the property at Puyallup as the motion in the first case sought legal fees

through February of 2017. It proved that time spent amounted to \$117,086. Since the Estate had no funds to pay the full amount, only \$49,000 was sought as a partial payment. The Court, on August 28, 2017, only awarded \$20,000 total, but indicated that the total amount was “denied at this time.” First appeal, CP 393.

### **Trial Court Proceedings that Comprise this Appeal**

On August 9, 2017, (CP 332-335) an additional request for payment of successive interim fees for the special administrator and for attorney’s fees and costs was filed. It also included some omitted time. As indicated in the Motion, (CP 333) \$40,559.32 of fees and costs were totaled and requested. The total amount of fees alleged as earned through July of 2017 was \$157,645.49. CP 333. The balance of cash on hand in the Estate, less \$1,000, was requested as a partial payment. CP 334. The only objection was filed on November 15, 2017 by the Gardee heirs, through their attorney, Charles Hostnik. CP 380-385. The Court acted on the supplemental request of August 9, 2017. On December 14, 2017, (CP 422-

426) the request was denied and ordered the parties to consult on a separate agreed order to reimburse costs. The Court also stayed “this matter until the conclusion of the appeal filed by the Special Administrator.” CP 425-426. At the oral argument on December 8, 2017, VRP of proceeding filed March 8, 2018, the Court stated “with respect to attorney’s fees, the Court is respectfully denying your Motion right now.” VRP 11. The Court also stated at VRP 11:

Here’s how the Court will rule; the Court, again, takes the position that the Court needs to look at the totality of the estate and all of its beneficiaries and the attorney’s fees do affect the estate at the end of the day because they affect the degree of insolvency.

So the Court is going to respectfully deny your request. I’m going to enter a stay that these requests for attorney fees should not occur until the end of the appeal, until there is a decision on the appeal; however, Mr. Kovacevich, I will allow one narrow exception. If you can provide precisely the amounts that you need to litigate, that otherwise you’d be prohibited from litigating, down to the dime, and you’ll need to confer with opposing counsel, the Court might be inclined to grant witness fees, for example, that need to be expended in continuing on with this case.

The appeal on this order was filed January 4, 2018. CP 427-435. A separate order of stay was also entered by the Court. It was also appealed. CP 431-2. At the argument on the motion for fees from March 1 through August of 2017, on December 8, 2017, page 8, VRP of Proceeding filed March 8, 2018, the following was presented to the Court:

MR. KOVACEVICH: This is a probate, Your Honor, it's an insolvent one as the Court knows and if asking for past fees would freeze the estate from going forward it couldn't proceed until the appellate court, which could be a long time, determines the fees up to the date that I've asked for.

I asked for fees through August of 2017, so the ongoing time would not be paid. The only decision, as I'm repeating, would be whether or not I would get the balance of the fees I asked for in March, which, again, chronologically have already passed. So, Your Honor, the Court can't stop a probate. I guess the Court can, but it would be inequitable to say, look, you don't get paid in the future because you appealed an award of attorney fees that was in a prior status of a prior time.

VRP, pages 10, 11

Your Honor, the appeal has no effect on the attorney's fees. The attorney's fees rule allow attorney's fees on any case. The probate is an ongoing matter, and I'm entitled to get paid. I have things to do to wind up this estate so I can't see the Court holding me or penalizing me because I appealed an issue as to what asset belongs in the estate. That's ongoing. This probate has been pending since 2010, so the statues of limitation would run out on various things. This is an ongoing

case, it's not like a traditional garden variety case where it goes to trial, there's a decision, it's ended; the probate's continued. Again, this one has been continuing for seven years.

So to stop because of one issue would be inequitable, Your Honor. I also have to hire, and I've got some people I think will agree to be personal representatives, I can't hire them representing the Court would pay them without having some ability to pay.

THE COURT: Okay. Thank you, Counsel, I appreciate that. Here's how the Court will rule; the Court, again, takes the position that the Court needs to look at the totality of the estate and all of its beneficiaries and the attorney's fees do affect the estate at the end of the day because they affect the degree of insolvency.

So the Court is going to respectfully deny your request. I'm going enter a stay that these requests for attorney fees should not occur until the end of the appeal, until there is a decision on the appeal; however, Mr. Kovacevich, I will allow one narrow exception. If you can provide precisely the amounts that you need to litigate, that otherwise you'd be prohibited from litigating, down to the dime, and you'll need to confer with opposing counsel, the Court might be inclined to grant witness fees, for example, that need to be expended in continuing on with this case.

With respect to attorney's fees, the Court is respectfully denying your motion right now.

VRP, pages 12, 13

MR. KOVACEVICH: The future fees, for instance, Mr. Hostnik has raised the issue of whether or not the building is part of this Spokane probate. I talked to Randy Brown who is the attorney for several of the heirs; he inferentially thinks this

probate probably has jurisdiction of that building. So perhaps it can be settled and if not it might be litigated.

I represent to the Court it's impossible for me to predict to the penny what kind of litigation fees would be needed. It may be settled which would be right thing to do, frankly, or it may go on for two years.

THE COURT: Are you not moving forward with the appeal until those issues are decided? What's your timeline for appeal?

MR. KOVACEVICH: I'm moving forward, that issue is going to come up, Your Honor. Again, there are three probates going as the Court knows.

The issue is there's also a billboard sign on the property that's partially constructed. They say Puyallup has put a stop on that. There's a question of whether they have jurisdiction. That is an ongoing issue to try and free up, allow the owners of the property to complete the billboard sign.

So there are things that are going on and I've got to be as direct as I can with the Court that I can't predict to the penny what kind of legal fees would be involved, it's just impossible because you don't know whether there will be litigation.

VRP, page 14

THE COURT: I'm not asking you to anticipate your legal costs and submit that to the Court, I'm asking you to hopefully wait until the appeal is done. If you find some necessity to expend and there are actual legal expenses, not attorney's fees, not money going to you, but it's necessary to expend at this moment, then the Court would make an exception to its ruling because the Court is not trying to tie up the estate wrap up, the Court is simply thinking that the issue of attorney's fees

should wait until a later time until the appeal has been decided. Does that make sense Mr. Hostnik?

MR. HOSTNIK: It does, Your Honor; however, I'm extremely concerned about the disclosure of this new case involving a billboard which is stylized as I'm assuming the estate as the plaintiff. We have an insolvent estate. If the estate is indeed the plaintiff and incurring expenses in that litigation that needs to be priorly approved by the Court because this is an insolvent estate.

THE COURT: Agreed, and hopefully the Court's ruling is consistent with that position as that was what my intention was.

The issues are ongoing, *Comenout v. Belin*, 3:16-cv-05464-RJB (Western District of Wn. at Tacoma), the issue on the City of Puyallup's ability to regulate the sign on the allotment, is still pending in litigation. The Estate is not charged for the case but the decision will affect the earning value of the sign. The lease issues are also ongoing. CP 363.

### **III. ASSIGNMENTS OF ERROR**

#### **ONE**

The Court erred in denying successive interim fees to the Special Representative and attorney for the Estate.

**TWO**

The Court abused its discretion in postponing the Motion of the Special Representative and attorney's fees until the first Appeal was determined.

**THREE**

The Court abused its discretion in taking the position that it must look to the "totality of the estate" in refusing to award currently due Special Representative and attorney's fees.

**FOUR**

The Court erred by assuming it had jurisdiction to enter an order in the ongoing probate that depended on the prior appeal that requested fees for an earlier date and not the period of time involved in this Appeal.

**FIVE**

The Court erred in imposing a stay order denying interim Special Representative pay until the prior appeal in this case, No. 355799, is final. The prior appeal had an unrelated issue, i.e. what assets were to be included in the Estate.

**SIX**

Probate administration fees are a first priority and “urgency” over all other payments. The Court abused its discretion in denying earned compensation to the Special Representative and attorney for the Estate apparently based on a need to conserve funds.

**SEVEN**

When an estate is clearly insolvent and the attorney’s fees are far more than assets, a beneficiary cannot question the award.

**EIGHT**

The Court erred in denying interim compensation to the Special Representative by refusing to apply the just and reasonable test.

**IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ONE**

Whether the Trial Court violated RAP 8.1 by staying the second appeal without requiring a bond.

**TWO**

Whether the Trial Court had jurisdiction to stay a subsequent fee request for a later time period on facts subsequent to the fee request pending on the first appeal.

**THREE**

Under the circumstances whether the trial court had jurisdiction to order a stay from further fee applications until the conclusion of an appeal on an earlier request for fees incurred in an earlier period.

**FOUR**

Whether RCW § 11.48.210 allowing fees “any time during administration” was violated by the Court.

**FIVE**

Whether the Court abused its discretion by postponing consideration of the award of fees.

**V. STATEMENT OF THE CASE**

The Special Administrator petitioned the Court on August 9, 2017 for additional fees. CP 332-347. Also included was an addition where attorney’s fees were omitted in August

and September of 2017. See Declaration of Counsel, CP 370-379. The first request was for fees incurred by the Special Administrator and attorney for fees earned from June 4, 2010 through February 28, 2017. CP 363-4. This request is for fees earned during the time period from March 1, 2017 through July 31, 2017. CP 364.

The Estate only has cash on hand of \$44,581.14. The request was to leave the balance of \$1,000.00 and pay \$43,581.14 to the account that now totaled \$168,267.54. CP 364-365. When the Estate was started in 2010, cash on hand was only \$1,814.80. The efforts of the Special Administrator, through defending litigation and motions, pursued against the bank holding the funds, produced a total of \$61,000.00. CP 364. The Gardee heirs were the only persons objecting to the payment. CP 380. They did not contest the amount but only that the payment should be stayed until the final hearing in this probate. CP 382. The Court agreed on a stay and ordered a stay until the final appeal. CP 431-432. Accordingly, the Court denied the fee application. CP 434. The Notice of Appeal

in this case, CP 426, noted that the earlier case had two issues and requested fees for time spent through February of 2017. CP 428. The current Appeal is to be paid for services rendered after February of 2017. CP 428.

## **VI. ARGUMENT**

### **A. Standard of Review.**

Probate matters are reviewable de novo. *In re Estate of Bowers*, 132 Wash.App. 334, 339, 131 P.3d 916 (2006); *In re Estate of Black*, 116 Wash.App. 476, 483, 66 P.3d 670 (2003) aff'd on other grounds, 153 Wash.2d 152, 102 P.3d 796 (2004). This probate is an insolvent probate. RCW § 11.48.210 allows compensation of personal representatives and attorneys fees under "just and reasonable standard." RCW § 11.96A.150, the TEDRA statute, reviews attorneys fees under an "equitable" standard. A finding of denial of probate attorney's fees must have evidentiary support. *In re Coates' Estate*, 55 Wash.2d 250, 261, 347 P.2d 875 (1959). Non routine legal matters require additional fees. *In re Wheeler's Estate*, 71 Wash.2d 789, 793, 431 P.2d 608 (1967). Results obtained in producing

additional assets of the estate merit additional consideration. *In re Coffin's Estate*, 7 Wash.App. 256, 268, 499 P.2d 223 (1972). The Gardee heirs contend that fees already awarded amount to over half the cash on hand. CP 385. This argument ignores the fact that \$168,267.54 of fees are owed as of October, 2017. CP 364-365, 379. The cash on hand at inception was \$1,814.80. The attorney obtained \$61,000 additional cash. CP 364. The Appellant's Opening Brief pages 11-18 notes the criminal case and 90 Million suit against the estate at decedent's death and includes testimony of the extensive litigation. Very few, if any, estate fee cases would chronicle the seven years of myriad litigation here involved. All the fees were earned. See *In re Merlino's Estate*, 48 Wash.2d 494, 498, 294 P.2d 941 (1956) supporting additional fees.

**B. The Special Representative/attorney asked for an award of fees from the assets on hand in the probate. The Court ruled that the fees would not be awarded until later. The effect is an Injunction against fee requests. A Supersedeas Bond should have been required.**

RAP 8.1(b)(2) allows a trial court decision to be enforced pending appeals. The funds were in the Appellant's trust account. The decision affected property in the account but the Court could order Appellant to withdraw the funds at a later time. A bond should have been posted. In *Guest v. Lange*, 195 Wash.App. 330, 381 P.3d 130 (Wash.App. 2016) a supersedeas bond was posted, so the *lis pendens* filing could not be cancelled. The case applies to illustrate that if, for some reason, the court orders the money to be withdrawn, the fee award could become moot. The fund is affected. Bonded, it would be guaranteed. In *Lowe v. N.B. Clark & Co.*, 150 Wash. 267, 272 P. 955 (1928) a supersedeas bond was posted. Another creditor that was owed a debt sought a writ of garnishment. It was quashed and postponed until the appeal was concluded. *Id.* at 273. Here, the federal government might have superior rights. Since no bond is posted, the fund is not secure. In *Pacific Coast Coal Co. v. Dist. No.10, United Mine Workers of America*, 122 Wash. 423, 210 P. 953 (1922) the posting of a supersedeas bond kept a temporary restraining

order in force. Without some sort of posting, the fund is not secure. Where fees paid by a receiver were appealed, the receiver's bond prevented further proceedings to enforce payment. *State v. Superior Court for Stevens County*, 110 Wash. 559, 556, 188 P. 384 (Wash. 1920).

**C. The Court abused its discretion by staying payment of Special Representative and attorney's fees requested for the period subsequent to the fees asked on the first appeal.**

*Town of Ruston v. Wingard*, 70 Wash.2d 388, 423 P.2d 543 (1967) is conclusive. The appellants, Wingard, contended that the trial court had no jurisdiction of a second contempt order since the first contempt order was on appeal. The second order was based on a separate act. The court held that the second trial could proceed stating:

We hold that giving of notice of an appeal from an order finding the defendant in contempt for violation of a permanent injunction does not divest the trial court of jurisdiction to enter a later order to show cause based upon a subsequent and separate act of contempt, committed after the defendant has purged himself of contempt in the action from which his appeal is pending." *Id.* at 390.

*Ruston* was followed in *Yalem v. Yalem*, 800 S.W.2d 811, 812 (C.A. Missouri, 1990) based on two separate acts, the second later in time. *Ruston* was also followed in *Russel v. Kerry Inc.*, 775 N.W.2d 420 (Neb. 2009). The case involved failure to pay benefits and attorney's fees. A first order was on appeal when a second violation of failure to pay another installment occurred. The court held "We conclude that Kerry's appeal of the first enforcement order did not divest the trial judge of jurisdiction to consider future violations of the award, which was final." *Id.* at 982. "To conclude otherwise would give the offending party carte blanche to decide whether to comply with the court's order pending its appeal." *Id.* at 985-6, citing *Ruston* fn 7. In Washington, it is a crime "To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services," RCW § 9A.56.020(1)(a).

**D. The Estate has to pay administration expenses first.**

RCW § 11.76.110 states: “After payment of costs of administration the debts of the estate shall be paid in the following order.” Expenses incurred during probate are administration expenses. RCW § 11.48.210. See *In re the Estate of Patton*, 1 Wash.App.2d 342, 405 P.3d 205 (2017), they are a “first urgency.” *Id.* at 349. A temporary administrator is entitled to his fees and also his attorney’s fees. *Estate of Flowers*, \_\_\_ So.3d \_\_\_, 2018 WL 259805 \*13 (Miss. Ct.App. 2018). Creditors of an estate must be paid before heirs receive any distribution. *Ibid.* at \*13. In the Comenout Estate, Martina Garrison filed a creditor’s claim. However, Ms. Garrison died and no estate substitution has been filed. The Gardee heirs would be entitled to inherit if the Estate becomes solvent. If, however, the Estate is an insolvent estate and the claims are well in excess of any possible inheritance, the error of an award or fees is harmless error. *In the Matter of the Estate of Fields*, 2017 WL 5504969 (S.C. Alaska, 2017). The attorney’s fees exceed the amount left in the Estate. The Court concluded that the request of the Personal Administrator to

pay his attorney's fees in full could not occur as they exceeded the assets left in the estate. Any objection was harmless as nothing would remain to distribute. At \*6, the ruling of the court was:

Charles has not been harmed by the court's denial of appellate attorney's fees. As the siblings note, 'the estate assets are insufficient to pay his existing administrative expenses, much less additional attorney's fees and costs.' The estate does not contain enough value to reimburse even the attorney's fees that have already been awarded to Charles. The standing master determined that the estate contains a maximum value of \$17,563.65, and Charles has been awarded at least \$87,065 in attorney's fees. Charles is already entitled to the entire remainder of the estate. No additional award can increase the amount of money Charles is able to recover from the estate. Therefore any defect in the superior court's refusal to award Charles appellate attorney's fees was harmless.

Because the superior court properly excluded the Washington property from the estate inventory, and because any abuse of discretion in denying reimbursement for appellate attorney's fees did not prejudice Charles, we AFFIRM the superior court's decision.

This case can be cited. See Alaska Rules of Appellate Procedure, Rule 214(d)(1). The rule applies here. At this time,

there are no assets left to pay all the attorney's fees. The Court must approve all further distributions. If assets are received, the Court will ultimately control the distribution of additional income.

**The Court Abused its Discretion in Postponing  
the Award of Fees**

*In re Estate of Black*, 116 Wash.App. 476, 66 P.3d 670 (2003) a Division Three case awarded one party fees but denied the personal representative attorney's fees "until after the litigation." *Id.* at 491. The case was on appeal. *Id.* at 492.

The ruling of the court of appeals was:

Ms. Black argues that equity requires that she, as the prevailing party in this probate action, be awarded her own fees from the estate, especially as the losing party was awarded fees.

Again, RCW 11.96A.150 gives the court broad discretion to award fees in any manner and to any party it sees fit. In circumstances such as these, where the proponent of a contested will prevails and probate is granted, RCW 11.24.050 authorizes the court to bill the contestants personally for the proponent's fees, however. RCW 11.24.050.

The court offers no explanation for its decision to award Mr. Burns fees from the estate

but to deny Ms. Black any fee award until after the litigation. This was an abuse of discretion. The estate benefits when all competing interests of all potential beneficiaries are resolved, regardless of the outcome. *Watlack*, 88 Wash.App. At 612, 945 P.2d 1154.

The court should have either awarded both Mr. Burns and Ms. Black their fees from the estate, or awarded neither their fees.

The Washington statute, RCW § 11.48.210, allows for interim attorney's fees "such compensation may be allowed at the final account; but at any time during administration a personal representative or his or her attorney may apply to the court for an allowance upon the compensation of the personal representative and upon attorney's fees." The statute also states "an attorney performing services for the estate at the instance of the personal representative shall have such compensation therefor out of the estate as the court shall deem just and reasonable." Here, the Court, without justification, ignored the "shall" mandate and postponed the decision.

*In re Peterson's Estate*, 12 Wash.2d 686, 123 P.2d 733 (Wash. 1942) concludes that the court can award fees to the probate attorney and established the change in the rule. "we

conclude that where an allowance has been made directly to the attorney, as was done in the case of the fee allowed in 1931, the court can order the attorney to return any portion of such fee later found to have been excessive.” *Id.* at 732. The court cited Rem Rev. Stat 1528 which is now RCW § 11.48.210. The trial court had no reason to depart from the statute on case law. “An abuse of discretion is found when a judge’s decision is exercised on untenable grounds or for untenable reasons.” *Rodriguez v. Zavala*, 188 Wash.2d 586, 598, 398 P.3d 1071 (2017). Here the court’s theory of totality of the estate cannot be defended in light of existing law.

## **VII. CONCLUSION**

The case must be reversed and returned to award the fees requested.

DATED this 3<sup>rd</sup> day of April, 2018.



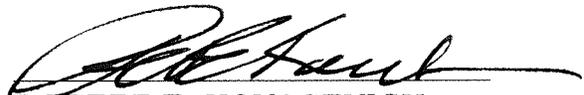
ROBERT E. KOVACEVICH, # 2723  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

This is to certify that on April 3, 2018, a copy of the Supplemental Opening Brief of Appellant was sent to the following, by Email and regular mail, in a postage-paid wrapper, addressed as follows:

Charles R. Hostnik  
6915 Lakewood Drive West, Suite A-1  
Tacoma, Washington 98467

DATED this 3<sup>rd</sup> day of April, 2018.

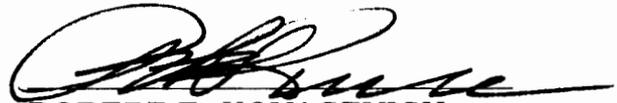
  
ROBERT E. KOVACEVICH  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

This is to certify that on April 17, 2018, a copy of the Revised Cover Page Including Tables to Supplemental Brief of Appellant filed April 3, 2018 was sent to the following, by Email and regular mail, in a postage-paid wrapper, addressed as follows:

Charles R. Hostnik  
6915 Lakewood Drive West, Suite A-1  
Tacoma, Washington 98467

DATED this 17<sup>th</sup> day of April, 2018.



ROBERT E. KOVACEVICH  
Attorney for Appellant