

No. 355799

**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

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

Edward Amos Comenout Jr., a Quinault Indian, died June 4, 2010, at age 81. He owned an approximate 56% ownership of an off-reservation restricted Indian allotment, No. 130-1027, located at 908/912 River Road, Puyallup, Washington. He lived on the property. "The property was purchased for the Comenout family in 1926 with funds held in trust by the United States for its benefit under authority of the Treaty of the Quinaults, 12 Stat. 971 (1855) and the General Allotment Act as amended. The land is not now and has never been a part of the Puyallup reservation and was, at the time of purchase, on the tax rolls of the State of Washington." *Matheson v. Kinnear*, 393 F.Supp. 1025, 1026 (D.C. W.D. Wash., 1974). The Motion for Interim Payment, CP 36-108, contains most of the salient facts on the issues presented on this appeal. Three probates were needed to administer Comenout's estate. He owned an interest in land on the Quinault Reservation; the allotment with a 7,300 square foot building on it at Puyallup; and personal property including a

truck, trailer and inventory at the allotment. The Bureau of Indian Affairs probated the restricted allotment at Puyallup, but not the permanent building on the land. The Quinault probate laws probated the land within the Quinault Reservation, CV-034. The reservation is about 120 miles from the allotment. On September 22, 2010, a probate was opened in the Spokane County Superior Court, 10-4-01216-0. The Spokane County probate is a catch-all probate. It has jurisdiction of all non trust, non Quinault reservation property. The decedent, Edward Amos Comenout Jr., left a Will but did not name a Personal Representative. CP 54-57. Judge Mary Pearson, who lived in Spokane, was named Special Administrator and later Administrator With Will Annexed in the Spokane County probate. CP 10. The Will left Comenout's estate equally to four grand nephews: Richard Edward Gardee, George William Gardee, Christopher Tony Gardee and Edward Amos Comenout III. The first three are the Respondents in this case. The fourth grand nephew, Edward Amos Comenout III, agrees with the Estate's administration. All four are enrolled

Native American Indians. The decedent had extensive debts due to uninsured last illness. They include a claim of \$59,999.27 filed by Martina Garrison, now deceased, and a \$90 million dollar law suit filed about 21 days before Mr. Comenout's death by the Quinault Indian Nation against Edward Amos Comenout Jr. and his brother, Robert R. Comenout Sr. *Quinault Indian Nation v. Edward A. Comenout*, No. 3:10-cv-05345-BHS (U.S.D.C.W.D. Wn.), 868 F.3d 1093 (9th Cir. 2017). CP 215-6. Other claims for last illness, etc. amount to over \$200,000. Thus, the Spokane probate was commenced as an insolvent estate, a status still existing. At the time of his death, decedent was a criminal Defendant in *State v. Comenout*, 173 Wash.2d 235, 267 P.3d 355 (Wash. 2011) then pending. Litigation to recover cigarettes seized in the same 2008 raid that resulted in Comenout's arrest was also pending. *Comenout v. Washington State Liquor Control Board*, 195 Wash.App. 1035 (Div. 1, 2016) (not reported). Another case, *U.S. v. 1,784,000 Contraband Cigarettes*, No 5992-BHS (U.S.D.C. W.D. Wn.), CP 44, filed after Comenout's

death, sought to forfeit cash money later deposited in the Estate bank account by a still unknown depositor. It was settled for \$36,000, paid to the Spokane probate. The Spokane probate contested a lease also sought by the Quinault Indian Nation and succeeded in holding the lease invalid. CP 42. At death of the decedent, the Spokane probate had less than \$2,000.00 on hand. CP 47. The myriad of lawsuits were defended, commenced and settled over the seven year period. Detailed time records were filed in the Spokane probate to support the \$49,000 in fees. CP 57-108. Additionally, since no administrator was appointed in the BIA probate, the Spokane probate had to answer all questions that concerned the property. The total time and costs advanced amounted to \$117,086. CP 48. The suits were vigorously contested and required extensive legal work. The ownership of the allotment is a magnet for attacks by state governments, the Quinault Tribe and the Gardees. The amount sought is for interim fees and requested payment of the cash available to pay the \$49,000.

Two unrelated issues are presented in this Appeal. They are :

1. Are the three fourths of the check, dated September 19, 2014, paid to Mary Pearson, Personal Representative as part of an Indian trust settlement, funds of the Spokane probate or are they to be distributed in the amount of \$22,135.94 directly to the three Gardee heirs. The check was in the amount of \$29,514.58 and was cashed by Judge Pearson and placed in the attorney trust account of Robert E. Kovacevich. CP 42. Edward Amos Comenout III, the forth heir, does not contest the Estate's ownership of his share of the settlement. CP 329-331. The settlement is presumed to be from the Cobell case as the date of the check is near the Cobell settlement date. The Department of Interior, in a contested issue, held that the check was not included in Decedent's IIM account at death. CP 43.

2. The second issue is to obtain the \$49,000, from cash on hand, of the attorney's and Special Administrator's fees requested for 6½ years of services from July 16, 2010 through February, 2017. The Estate asked for a total of \$49,000. The Trial Court, stating it had "concerns about the reasonableness", allowed only \$20,000.00 of the requested \$49,000.00.

II. ASSIGNMENTS OF ERROR

The \$22,135.94 Payment

ONE

Are the Gardee heirs prevented from recovery by the prior decision on the same issue by the BIA probate judge?

TWO

Whether the state probate court is without jurisdiction to adjudicate the persons entitled to the "Cobell" check.

The Special Administrator and Legal Fees Issue.

THREE

Is the decision on interim fees final?

FOUR

Did the Trial Court have any evidence on which the denial was based?

FIVE

Where the Estate introduced substantial evidence by expert testimony that the fees were reasonable, can the trial court ignore this un rebutted evidence?

SIX

Were the fees proven by the evidence?

SEVEN

In any event, are the amounts within quantum meruit determination?

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ONE

Res judicata and claim preclusion applies to the "Cobell Check" as the issue decided in the earlier proceeding was

between the same parties, was identical and was decided on the merits. No injustice occurred to the Gardee heirs.

TWO

Since trust funds are within federal jurisdiction of the BIA, does the state court have jurisdiction to rule on Indian trust funds?

THREE

On the issue of fees, the trial court merely had “concerns.” This is not sufficient to deny the amount.

IV. STATEMENT OF THE CASE

A. The Lawsuit Settlement Check.

The settlement check, CP 146, Exhibit 1, page 155-158 (copy attached for convenience as Appendix 1), dated September 19, 2014, is paid to the Edward A. Comenout Jr. Estate, c/o Mary Pearson. It states: Indian Trust Settlement Disbursement Account, but no case number is listed. The address is the probate attorney’s address. C/o Mary Pearson, meaning Judge Mary Pearson who served the Spokane probate as Administratrix With Will Annexed or as Special

Administrator until her death on March 21, 2015. CP 36. The Gardee heirs, through their attorney, contended that the proceeds of the check should be paid directly to the heirs of Edward Amos Comenout Jr. CP 146-204. On July 14, 2015 an Order (see CP 205, page 219-220) was issued by the U.S. Department of Interior Office of Hearings and Appeals to show cause why the decree of distribution by the Department of Interior probate proceeding of December 31, 2012 (CP 51-53) should not be modified to add the check proceeds to the BIA. Attorney Charles Hostnik responded representing the Gardee heirs. CP 146-154. A joint response was filed by Robert R. Comenout Sr. and Robert E. Kovacevich, dated August 4, 2015, CP 205-208, indicating that there were no objections to distribution of the non Cobell funds in the Indian-to-Indian money account. The joint response alleged that “[T]he Cobell check is Spokane probate property subject to administration expense and creditors of the Estate.” An order was entered on April 12, 2016, by Indian Probate Judge Payne, stating “it is noted that the distribution does not include funds from the

'Cobell' Settlement." CP 219 fn. 1, CP 208. No appeal was taken from Judge Payne's Order. 43 C.F.R. § 30.126 (CP 232) states that the Secretary of the Interior Indian Probate Court has jurisdiction of determining whether omitted property is to be added to a BIA probate. The Gardee heirs response in the BIA proceeding, CP 146-204, requested that the check not be part of the State probate and be disbursed directly to the heirs. CP 153-4. Judge Payne held that the check was not part of the decedent's IIM (Individual Indian Money) account. In the Spokane probate, Charles Hostnik, on June 12, 2017, representing the Gardee heirs (CP 146-204), again requested that the same money be "assets of this State probate proceeding not to be an estate asset" even though the BIA judge denied the relief to the Gardee heirs that the funds were not a BIA probate asset. CP 154. On June 16, 2017, the estate responded to the motion of the Gardee heirs. CP 205-232. It alleges res judicata, exclusive BIA jurisdiction and the principle of comity. Notwithstanding, the Court, without opinion or findings of fact or conclusions of law, held that the Gardee

heirs receive the money outright, free of costs of administration or payment of debts of the estate. CP 348-350.

B. The Request for Special Representative and Attorney's Fees.

The second issue, that of payment of personal representative and attorney's fees, sought an interim payment of a total of \$49,000. It sought Personal Representative and attorney's fees from inception of the probate through February of 2017. CP 36-108. The Motion chronicles time spent, adding to \$117,086.00, that far exceeded cash on hand. In addition, \$5,006.80 was asked for personal representative fees of Judge Pearson payable to her estate. The amount of Judge Pearson's fees were allowed in full. The Motion (CP 36-108) reviews *Quinault Indian Nation v. Comenout*, No. 3:10 cv-005345-BHS, 868 F.3d 1093 (U.S. D.C. W.D. Wn. at Tacoma, 9th Cir. 2017), a case pending at the time of Edward Amos Comenout Jr.'s death on June 4, 2010. It was filed May 14, 2010, a few weeks before his death and still pending, it notes that the multi million dollar claim was determined against the

estate on March 23, 2015. The claim was tripled to \$90 million dollars, was pending for almost 5 years and defended by the attorney seeking payment. Another federal case, *Comenout v. Whitener*, 692 Fed.App. 474 (9th Cir. 2017) involved some of the estate's property. The case succeeded from the standpoint that the immunity of Whitener was not decided. *Lewis v. Clarke*, 137 S.Ct. 1285, 197 L.Ed.2d 631 (2017) now would allow a direct suit against Whitener. The motion details a lease negotiation. The Motion also notes new lease negotiations. CP 36-108. The Estate was defended in another federal case, *U.S. v. 1,784,000 Contraband Cigarettes*, No. C-12-5992-BHS (U.S. D.C. Wn. at Tacoma). The Estate received \$36,000 to compromise the case so the new balance was \$91,723.88. CP 333. The efforts of the attorney also yielded the \$25,000 obtained from the bank account that was apparently deposited by an unknown person after Comenout's death. It was deposited in his trust account. Funds added by the efforts of the personal representative and the attorney augmented the Estate to the amount of \$61,000 which is more than sought.

The Motion (CP 47) notes that at inception the estate had \$1.76 in one account and \$1,813.04 in the other. The Motion was not disputed by anyone except Charles Hostnik representing the Gardee heirs, CP 146-204, June 12, 2017. The Estate filed a response on June 6, 2017. CP 205-232. The Gardee heirs also filed specific objections, CP 233-246, on July 17, 2017. The objections were answered on July 31, 2017. CP 267-238. The Court, on August 28, 2017, without explanation, only allowed the attorney, who also served as special administrator after Judge Pearson's death, cutting it to \$20,000, CP 348-350, stating "the Court has concerns about the reasonableness and details in the records." No detail was reviewed. To testify as to reasonableness, the Estate called Washington attorney Roger Peven. His June 23, 2017 testimony is set forth on file in the partial transcript. Relevant excerpts are:

Q: And you're an attorney and a member of the Washington bar; is that correct?

A: That is correct.

Q: And you've been an attorney for quite a long time I'm sure.

A. Since '75.

Q: And you also were awarded or invited into the American Trial Lawyers Association as a member.

A: American College of Trial Lawyers.

Q: American College. That's by invitation only, I understand, among the top lawyers in the country are the only people invited in.

A: That's what the people in it say, yes.

THE COURT: Counsel, just so you know, I'm very familiar with Mr. Peven.

MR. KOVACEVICH: Thank you, Your Honor, I won't go on.

Q: (By Mr. Kovacevich) You also worked for over 20 years at the Federal Public Defender's Office as director of that office for quite a long time, were you not?

A: I was. And as it becomes relevant, in 1992 I took the job as what could be described as first assistant. I did that until 2002 and then from 2002 to 2012 I was executive director of that organization.

Q: And as part of your duties in order to keep funding and justify the staffing, did you have to review the time records of people on your staff?

A: I did. It's kind of counterintuitive to some people that the public defender's office would have to keep time records but our funding agency, the Administrative Office of the Courts, required very stringent time records for two reasons, essentially. One was to get an understanding how long a certain type of case would take and to gather that nationwide so when appointed counsel on conflicts put in a funding request for certain types of cases, they would have a baseline of understanding how long those cases take. The other part of it was to justify staffing. If you asked for an additional staff member you would be required to show time records that would justify that.

Q: And included in the time records were attorneys in your office; is that correct? Did you review the attorney's time records?

A: That's right. I reviewed both attorneys and investigators, but mostly attorneys.

Q: And some of those attorneys also worked on forfeiture cases on cigarettes; am I correct on that?

A: We had cigarette cases, the kind you're talking about, assigned to us both in the District of Idaho, which my office covered, and the District of Eastern Washington. A number of them came to our office over the course of time, I would say.

Q: And did you review time records regarding those cases?

A: Yes, and I worked on one case for a while myself so I understood.

Q: Now, at my request you came to my office and we spent the better part of an afternoon reviewing files that I dug out of my office regarding the time records listed in this motion; isn't that correct?

A: I was given a detailed time record sheet and also was invited to your office and was able to review the numerous boxes of materials if I wanted to see certain things, which I did. I had the opportunity to do it.

Q: It covered the counsel table, didn't it, the files and archived boxes?

A: There were a great number of banker boxes, let's put it that way.

Q: Now, during your review you and I discussed the time spent on and reviewed highlights of some of the cases and what time was spent and so forth; isn't that correct?

A: That is correct.

Q: Now, based upon your review and background, do you think that time spent was reasonable based on the review of the files?

A: The records that were provided were easy to read and they were fairly inclusive of the work that was done and the time that was spent and the resulting amounts from that time. So what I did was to review what it said in the description of the time spent, what it was for, and the amount of time that was claimed being spent to see whether that met my experience with working on motions, working on depositions, working on other things that were – many things that were worked on in this case by yourself, if that answers your question.

Q: Did that appear reasonable to you?

A: By reasonable I'd have to say I made no judgment of whether or not the work was well done or whether or not it was necessary in the sense that I didn't handle the case. I saw nothing that made me say why would somebody do that. Those things I did see, I paid more attention to the higher numbers. The longest amount of time claimed for any one item and 40-some pages was five hours. So I looked to see the nature of the work, whether it was doing research. Obviously, not having done it myself, I wasn't there when it was done but I made judgments as to whether it was reasonable. I saw nothing that was unreasonable.

Q: And you noticed the hourly rate. Did that seem out of line to you?

A: It seemed low actually but now that I'm in private practice I have a different view than

I did when I was a public defender. I didn't really judge that, per se. I wouldn't say I'm an expert on what hourly rates should be among the Bar. It's lower than what I charge as a private attorney, that's neither here nor there.

No other opinion, findings or conclusions were made. The Court also held that the \$22,135.94 be immediately disbursed to the Gardee heirs. CP 348-350. It is held in the trust account of Mr. Hostnik. This appeal followed. CP 351-357.

V. ARGUMENT

A. Standards of Review.

Jurisdiction of a state court to adjudicate the ownership of Indian trust property is a question of law "which we review de novo." *Landauer v. Landauer*, 95 Wash.App. 579, 582, 975 P.2d 577 (Div. 1, 1999); *Crosby v. County of Spokane*, 137 Wash.2d 296, 301, 971 P.2d 32 (Wash. 1999); *Condon v. Condon*, 177 Wash.2d 150, 156-7, 298 P.3d 86 (Wash. 2013). The application of facts to the law is a mixed question and reviewed de novo. *State v. Dearbone*, 125 Wash.2d 173, 177, 883 P.2d 303 (Wash. 1994).

The issue of res judicata regarding the inclusion of assets in the Estate is reviewed de novo. *Schibel v. Eymann*, 189 Wash.2d 93, 98, 399 P.3d 1129 (Wash. 2017).

“Proceedings for probate of wills are equitable in nature. Review is therefore de novo on the entire record.” *In re Estate of Black*, 116 Wash.App. 476, 483, 66 P.3d 670 (Div. 3, 2003). The probate proceedings in the Estate of Edward Amos Comenout Jr., the case before this Court, has always been as an insolvent probate. Therefore it is administered by Ch. 11.76 and Ch. 11.48. RCW § 11.68.011(2) requires solvency for non intervention. The attorney and Special Representative brings the request for fees pursuant to RCW § 11.48.210. The standard for allowance is “just and reasonable.” RCW § 11.96A.150, the TEDRA statute, approves only attorney’s fees. The standard is “to be paid in such amount and in such manner as the Court determines to be equitable.” The Washington Constitution, Article 1, Section 21 does not exclude probate matters. *Rainier View Court Homeowners Ass’n, Inc. v. Zenker*, 157 Wash.App. 710, 719, 238 P.3d 1217

(Div. 2, 2010). “We review questions of law and conclusions of law de novo.” *Id.* at 719. “We review a trial court’s findings of fact under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a fair-minded person that the premise is true.”

B. The Trial Court Did Not Support its Decision by any Reasoning. The Review is De Novo.

Findings must be “adequate to support the judgment.” *Bowman v. Webster*, 42 Wash.2d 129, 131, 253 P.2d 934 (1953). *In re Coates’ Estate*, 55 Wash.2d 250, 347 P.2d 875 (1959) reversed a decision denying the amount of fees requested. The proponent offered evidence of an attorney who reviewed the records. The opponent only produced hypothetical evidence. The Court concluded that there was no evidentiary foundation to support the denial. “The record does not disclose any evidence upon which findings to that effect could have been predicated. A mere honest difference of opinion is not enough.” *Id.* at 260. Whether the trial court’s decision is sufficient to support the trial court’s decision is

reviewed de novo. *Bartlett v. Betlach*, 136 Wash.App. 8, 18, 146 P.3d 1235 (Div. 3, 2006). If the trial court does not give a reason, it is an abuse of discretion.

Expert testimony of attorney Roger Peven was offered to obtain the fees. It was not rebutted. “Expert testimony on attorney’s fees is substantial evidence.” *In re Coffin’s Estate*, 7 Wash.App. 256, 266, 499 P.2d 223 (Div. 1, 1972). Disputes over fees are a mixed question of law and fact. *Erwin v. Cotter Health Centers*, 161 Wash.2d 676, 167 P.3d 1112 (Wash. 2007). “The process of determining the applicable law and applying it to these facts is a question of law that we review de novo.” *Id.* at 687. William W. Schwarzer, in *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1983) states:

“the major source of complexity under Rule 56 is the treatment of issue of ultimate fact which may also be called mixed questions of law and fact. An ultimate fact, to be distinguished from historical or circumstantial facts is an outcome determinative fact which ‘implies the application of standards of law’ it is a matter of fact and law; fact because it is derived by inference or reasoning from the evidence, and law because the division is

informed by legal principles and policies, producing a fact of independent legal significance.”
Id. at 470.

In this case the Court should have considered the difficulty of the questions involved, the time and labor required and the skill required to properly handle the matter. *In re Peterson's Estate*, 12 Wash.2d 686, 728, 123 P.2d 733 (Wash. 1942). In this case the trial court ignored the expert testimony; did not explain why it arbitrarily cut the request and ignored the legal principles. The lack of explanation supports de novo review.

When an order of the court is “unsupported by adequate reasons or tenable grounds” the case can be reversed as it is manifestly unreasonable. *State ex rel Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (Wash. 1971). Both standards are met to require reversal here. However, it is submitted that the lack of adequate procedure here would apply the de novo standard.

**C. The Spokane Probate was Opened to Probate
“Non Trust” Property.**

The probate in Spokane is an insolvent probate. The Spokane probate has several creditor's claims that might prevent any distribution to the heirs, unless the interest in the building in Puyallup is sold or rented. Costs of administration have priority. Tax debts prevail over other claims. RCW §§ 11.76.110; 11.40.090. The Spokane probate had no jurisdiction to determine the disposition of the Indian Trust settlement check. The Puyallup Allotment is a public domain allotment as it was created from public land and is not within any Indian reservation. *Cohen's Handbook of Federal Indian Law*, § 16.03[2][e], page 1076. (Nell Jessup Newton ed. 2012). "Approximately 11 Million acres of land are held in allotments." *Cobell v. Babbitt*, 91 F.Supp.2d at 9. The BIA Probate Order Approving Will and Decree of Distribution does not probate "non trust" property. (CP 36-108, Appendix 1, page 51). The same page references 43 C.F.R. § 30.236 and concludes that "other tribunals" dispose of permanent buildings. It concludes that the permanent buildings are "non trust" property. The Spokane County Superior Court probate is the "other tribunal".

The Puyallup property has a large 7,300 square foot building on it. 43 C.F.R. § 30.236(b)(2) states if the decedent had a will, then the persons designated in the will are to receive the permanent buildings on trust property. The decedent was not living on the Quinault Indian Reservation, hence, the Quinault Tribe has no jurisdiction over property that is not on the reservation. See Quinault Tribal Code 22.01.020. (Copy attached as Appendix 2). See also *Miami Tribe of Oklahoma v. U.S.*, 656 F.3d 1129, 1143 (10th Cir. 2011). Renowned judge and author Richard Posner in *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin*, 732 F.3d 837 (7th Cir. 2013) explains assimilation as the scatter of allotments within cities. It also answers the ultimate issue in this case that allotments “are subject to only as much regulation by states and local governments as the federal government permits”. *Id.* at 839. Federal jurisdiction is granted to allotment owners to defend their rights. 25 U.S.C. § 345, 28 U.S.C. § 1353. The state jurisdiction does not apply when other courts have original jurisdiction. R.C.W. § 2.08.010. The check is not

within the probate jurisdiction of the BIA or Quinault Tribe. The federal government determined who was to get the check. It wrote it to the Personal Representative of the Spokane probate. The issuance is conclusive. The probate had to cash the check. If the federal government decided it be sent outright to the Gardees, four checks would have been sent made out to each heir. In *Lineback v. Howerton*, 26 S.W.2d 74 (Ark. 1930), an Indian who had government bonds in a local bank had creditors off reservation. The Court held that domestic creditors had a right to bring a state court probate if non reservation property is part of the estate. *Id.* at 76. Here, the Gardee heirs object only for the reason that the Spokane probate is insolvent. If solvent, they would get it in ultimate distribution. They do not want off reservation creditors and costs of administration to be paid. CP 149.

Landauer v. Landauer, 95 Wash.App. 579, 975 P.2d 579 (Div. 1 1999) makes the critical distinction on lack of state court jurisdiction of Indian trust property, real or personal. It quotes 28 U.S.C. § 1360(b) and 25 U.S.C. § 1322(h). The case

denied the application of a Washington community property agreement. Both provide that trust land and personal property, “belonging to an Indian”, subject to a restriction was not within state jurisdiction. “[F]ederal law prohibits the conveyance of Indian trust land without approval of the Secretary of the Interior.” *Id.* at 587. The check here undoubtedly was personal property belonging to an Indian.

U.S. v. City of Tacoma, Wash., 332 F.3d 574 (9th Cir. 2003) also applies. It holds that the state had no jurisdiction to condemn Indian trust allotments. *Id.* at 581. The case also cited *U.S. v. Ramsey*, 271 U.S. 467, 470-1, 46 S.Ct. 559, 70 L.Ed. 1039 (1926), *id.* at 580, treating trust allotments and restricted allotments the same. Both are Indian country. *McMaster v. U.S. Department of Interior*, 1976 WL 17290, 1976 WL 2273, 5 IBIA 61 (1976), 83 interior Dec. 145, (copy attached for convenience as Appendix 3) construed the ownership of an IIM account and held that the state community property agreement was void. “We find that the community property agreement, relating to allotted lands and

proceeds derived therefrom, entered into by the appellant and the decedent without the consent and approval of the Secretary of the Interior is null and void for the reasons stated.” *Id.* at 5 IBIA 69. The Gardee heirs, at CP 146-204, cite *First Citizens Bank & Trust Co. v. Harrison*, 181 Wash.App. 595, 326 P.3d 808 (Div. II, 2014) to support the state jurisdiction. *Harrison* holds that IIM funds are exempt when deposited into a state bank account. There was no dispute that the money was from the Harrison’s trust land. The case applied the statute, 25 U.S.C. § 410, exempting money from leases. The ownership and source of the money was not disputed. A non Indian tried to collect and collection was denied. Here, the dispute is between a probate of an enrolled Indian and three of the four Indian beneficiaries. The BIA paid the check to the Estate. The money was from a lawsuit settlement. The statute in the *Harrison* case involved concurrent jurisdiction. Here the BIA had to decide whether the Estate or heirs owned the check. The determination was exclusively in the Department of Interior. A similar Washington case, *Pioneer Packing Co. v.*

Winslow, 159 Wash. 655, 665, 294 P. 557 (1930), upholds exclusive federal jurisdiction. *Id.* at 663.

Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145 (New Mexico, 1938) also applies. It holds that an Indian living in Indian country killed in an auto accident off reservation may appoint a personal representative in state court to pursue a wrongful death action.

The check at issue here was received off reservation at Spokane, Washington. “The state had authority to require that it be administered for both protection of creditors and claimants to the estate.” *Voorhees v. Spencer*, 504 P.2d 1321, 1324 (Nevada, 1973). However, federal law applies to the distribution of a settlement of a case creating a fund for Indians. Here the check was omitted from the BIA probate inventory. The modification order issued by Judge Payne, BIA Judge, in his Order (See Response to Gardee Heirs Motion to Disburse Monies, CP 205-232) was in Response to the show cause motion of the Gardee Heirs to include the \$29,514.58 check as part of the distribution to the BIA probate. See

Motion to Disburse Cobell Monies, CP 146-204. The BIA probate judge declared that the BIA had jurisdiction “pursuant to 25 U.S.C. §§ 372 and 373 and other applicable statutes, and pursuant to 43 C.F.R. part 30.” The BIA court held that the Cobell settlement was not part of the BIA settlement. “The distribution does not include funds from the Cobell settlement.” 43 C.F.R. § 30.126 is in 43 C.F.R. part 30. CP 208. It allows for an appeal. The Gardee heirs did not appeal the decision. The issue was identical. The Gardee heirs are bound by the BIA decision. The BIA judge had jurisdictional authority over the check and ruled that the check was not distributed as property of the BIA probate. See also 25 C.F.R. § 1.4(a). Restricted funds are not subject to state law. Collection of royalties and interest from Indian land preempts state law. *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 927 (10th Cir. 1994). In *Armstrong v. Maple Leaf Apartments, Ltd*, 508 F.2d 518 (10th Cir. 1974) the federal appellate court held that the state probate court could not reform a restricted allotment deed. An injunction was upheld against the state

probate court as it acted “in excess of its jurisdiction.” *Id.* at 523. The state probate court had no jurisdiction to reform an allotment deed. “If the state court were to act over the objection of Mrs. Armstrong, it would be acting outside the law and without jurisdiction.” *Id.* at 525.

D. The Federal Judgment was a Final Judgment on the Issue of the Lack of BIA Jurisdiction of the Check. State Court Jurisdiction Over the Check does not exist. Regardless, Collateral Estoppel Applies.

“Collateral estoppel, also know as issue preclusion, bars relitigation of an issue in a later proceeding involving the same parties.” *Schibel v. Eymann*, 189 Wash.2d 93, 94, 399 P.3d 1129 (2017). For collateral estoppel to apply, the party seeking it must show (1) the issue was identical to the issue in the later proceeding, (2) the earlier proceeding ended with a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party, or in privity with a party, to the earlier proceedings and (4) applying collateral estoppel would not be an injustice.” *Id.* at 99. Injustice does not apply if the parties received a fair hearing on the issue. *Id.* at 102.

All the elements apply here and the Gardee heirs are foreclosed by issue preclusion.

“The doctrine of res judicata is based on public policy. Its purpose is to relieve the court from the burden of twice trying the same issue between the same parties.” *Luisi Truck Lines, Inc. v. Wash. Utilities and Transportation Commission*, 72 Wash.2d 887, 896, 435 P.2d 654 (Wash. 1967). *Christensen v. Grant County Hospital Dist. No. 1*, 152 Wash.2d 299, 96 P.3d 957 (Wash. 2004) is a leading case in the state. “Claim preclusion, also called res judicata, is intended to prevent relitigation of an entire cause of action.” *Id.* at 306. It is distinguished from issue preclusion that “[p]revents a second litigation of *issues* between the parties, even though a different claim or cause of action is asserted.” *Ibid.* at 306. (Internal quotes omitted.) In *Christensen*, like this case, an administrative board’s ruling was held to be a bar to the litigation. The Court stated: “three additional factors must be considered under Washington law before collateral estoppel may be applied to agency findings: (1) whether the agency

acted within its competence, (2) the differences between procedures in the administrative proceeding and court procedures and (3) public policy considerations.” *Id.* at 307. In *Christensen*, the Court noted that the agency’s factual findings might preclude a “later tort claim.” *Id.* at 312. The Court noted that the litigant chose the agency as the place to litigate and there was no significant disparity of relief. *Id.* at 313.

Nielson By and Through Nielson v. Spanaway General Medical Clinic, Inc., 135 Wash.2d 255, 956 P.2d 312 (Wash. 1998) is also exactly in point and denies relitigation. In the case, the issue was decided in the federal court action. *Id.* at 263. The parties admitted that the issue was identical and that they were parties to a prior federal court action.

In *State v. Buchanan*, 138 Wash.2d 186, 978 P.2d 1070 (Wash. 1999) the state argued that a trial court decision was not binding on it. *Id.* at 197. The court held “However, the State was a party to the federal court case and is bound by its ruling.” *Ibid.* at 197. Collateral estoppel applied. The case

also upheld Indian treaty rights in the state's open and unclaimed land stating "[T]he statute admitting Washington reserves from Washington the right to control land owned or held by any Indian or Indian tribe." *Id.* at 213.

E. The State Probate Court has no Subject Matter Jurisdiction to Determine Disposition of IIM (Individual Indian Money) Account Funds.

IIM Accounts are created by the Department of Interior to hold income of Native American Indians. The history of the IIM accounts is reviewed in *Cobell v. Babbitt*, 91 F.Supp.2d 1 (D.D.C. 1999), *aff'd sub nom, Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001). The check issued that is the subject of the dispute in this case did not identify any particular settlement. It merely stated "Indian Trust Settlement Disbursement Account. P.O. Box 9577, Dublin, Ohio 43017-4817." It was issued to the "Edward A. Comenout Jr. Estate c/o Mary Pearson, Personal Representative, 818 West Riverside Ave. Suite 525, Spokane, WA 99201-0995." CP 2. The check does not describe the source of money. It was a lawsuit settlement. Some persons obtain a windfall from the settlement. *Cobell*,

supra at 11 fn. 8. The accounts may contain per capita payments or other funds. *Cobell, supra* at 16 fn. 4. “Although the United States freely gives out “balances’ to plaintiffs, it admits that currently these balances cannot be supported by adequate transactional documentation.” *Cobell, supra* at 10. One reason is that the accounts have at least a 42 Million dollar overdraft. *Cobell supra* at 11, fn. 8.

In *Ahboah v. Housing Authority of Kiowa Tribe of Indians*, 660 P.2d 625. (Okla. 1983) the issue was the authority of a state of Oklahoma Housing Authority to evict owners of off reservation allotments for failure to pay the rent on a lease back transaction with the state agency. The court held that Oklahoma, like Washington, is a disclaimer state. *Id.* at 630. The court also held that Indian trust allotments do not have to be within a reservation. *Id.* at 629. The court cited 25 C.F.R. 1.4(a) providing that state statutes including use of personal property is applicable to property restricted from alienation by the department of interior. *Id.* at 633 fn. 38. “In sum, we find that neither Public Law 280 nor 63 O.S. 1981, 1057 authorizes

Oklahoma adjudicatory jurisdiction over disputes involving Indian trust property.” *Id.* at 634. The American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat., 25 U.S.C. § 162(a), et seq. 4001-4061, requires the Secretary of the Treasury to account for the funds. “Under the conflict of law rules in most states, the law of the place of domicile of the decedent at time of death is usually applied to determine succession of personal property.” *Cohen’s Handbook of Federal Indian Law*, § 16.05[2][a], page 1094 (Nell Jessup Newton ed. 2012). The decedent, Edward Amos Comenout Jr., was domiciled and lived on the Indian Country off-reservation, allotment at the time of his death.

“Probate jurisdiction over individual trust and restricted property rests with the Department of Interior.” *Cohen’s Handbook of Federal Indian Law*, § 16.05[2][g], page 1101 (Nell Jessup Newton ed. 2012). “Federal statutes control most aspects of devise, inheritance and probate of federal allotments, Individual Indian Money accounts and other individual trust or restricted Indian property.” *Cohen’s*

Handbook of Federal Indian Law, § 16.05[2][a], page 1094 (Neil Jessup Newton ed. 2012).

43 C.F.R. § 30.126 applies. It is attached to the Estates Response, CP 205-232. It unequivocally confers exclusive jurisdiction on the Department of Interior to determine Indian Trust matters.

In re Frank-Hill, 300 B.R. 25 (Bkcy. D.C. Arizona, 2003) the IIM account of a deceased Indian was claimed by the bankruptcy trustee. The argument was “any payments deposited into the IIM accounts are subject to the rules and regulations of the Secretary of Interior.” *Id.* at 28. A department probate judge held that the funds were in a restricted account and as such, the funds were not controlled by bankruptcy law and “other federal law will determine the issues in this case.” *Ibid.* at 29. Among the cases considered by the Court in the case was *Swain v. Hildebrand*, 36 P.2d 924 (Okla. 1934). *Id.* at 35. *Swain* applies. It holds that state courts have no jurisdiction over restricted funds of a deceased Osage Indian. The deceased Indian had an interest in a

restricted trust allotment. This is the same type ownership as the deceased, Edward Amos Comenout, had in his allotment. See 18 U.S.C. § 1151. The income from mineral interests of the allotment “all such moneys to be held to the credit of the tribe and the individual members thereof.” *Id.* at 926. The trial court in Oklahoma reviewed a decision of the Secretary of Interior that all of the estate be awarded to Swain. The state court determined that the Department of Interior was wrong and that only one half should be awarded. The Court referenced the Oklahoma Constitution, Art. 1, § 3, which is identical to the Washington State Constitution, disclaiming jurisdiction to any public lands held by an Indian to be subject to the jurisdiction and control of the United States. The Washington Constitution, Article 26, Second, is more explicit. It states “absolute jurisdiction”, a word not in the Oklahoma Constitution. The *Swain* Court stated “The state courts had only such authority and jurisdiction in reference thereto as was given and granted to such courts by virtue of and in strict accord with some enactment of Congress.” *Ibid.* at 927. “The

Secretary of the Interior, having proceeded in this matter pursuant to the authority of the Act of Congress and Congress having the sole authority to legislate with reference thereto, no state court, either county or district, can review or annul or undertake to correct any such action of the Secretary of the Interior.” *Id.* at 928.

F. RCW § 11.28.210 Applies as Both Special Representative and Attorney’s Fees are Sought

The attorney was appointed Special Representative on April 3, 2015, CP 35, and has served continuously since that time. He has been the primary attorney for the Estate since the probate was commenced on September 22, 2010. CP 10. RCW § 11.28.210 includes both capacities. “Additional compensation may be allowed for his or her services as attorney and for other services not required of a Personal Representative.” This appeal is from an interim order seeking payment for services rendered as both a Special Representative and attorney from June 16, 2010 through February 2017. It is a final order. See *Tucker v. Brown*, 20 Wash.2d 740, 150 P.2d 604 (Wash. 1944). After citation of authorities, the Court

stated “These cases hold that the Superior Courts sitting in probate are courts of general jurisdiction, including all matters in probate, that interim orders made during the course of probate after notice of the hearing are final in their nature and cannot be attacked or re-litigated at the hearing on the final report.” *Id.* at 635. *In re Merlino’s Estate*, 48 Wash.2d 494, 496, 299 P.2d 941 (1956) states “An interim order made during the course of probate, after notice of the hearing, is final in its nature, and cannot, except upon a showing of extrinsic fraud (see *Farley v. Davis*, 10 Wn. (2d) 62, 71, 116 P. (2d) 263, 155 A.L.R. 1302), be attacked or relitigated at the hearing upon the final report.” *In re McDonald’s Estate*, 110 Wash. 366, 188 P. 523 (1920) applies. The estate was open for 16 years. The attorneys periodically paid themselves. The heirs rejected to an interim payment. The Court reversed the decision and allowed the interim payment, stating “In any event, it is not likely to be closed for many years. Manifestly, the executors cannot wait all those years before receiving any pay, and to refuse to periodically compensate them would be tantamount to

requiring their resignations.” In *Cornett v. West*, 102 Wash. 254, 173 P. 44 (1918) the Court held that “But where, as here, a non intervention will makes the executors trustees for a long period and no compensation is provided in the will, they are entitled to reasonable compensation for extra services commensurate therewith.” *Id.* at 262. In *Shufeldt v. Hughes*, 55 Wash. 246, 104 P. 253 (1909) the attorney was experienced and had to determine the laws of three states to find whether it was community or separate property, determine taxes, commenced two lawsuits, one in state and one in federal court, answered objections to his fees and performed the usual duties of an estate that was a full intervention estate. A larger amount was allowed. Applied to the Comenout Estate, the federal tax issue, dealing with creditors’ claims and selling or leasing assets requires much more time and effort. It is an abuse of discretion to postpone fee awards until the case is over. *In re Estate of Black*. 116 Wash.App. 476, 491, 66 P.3d 670 (Div. III, 2003).

G. The Estate Documented the Fees to Indicate Time and Labor Performed, the Novelty and Difficulty of Questions Involving Skill Required to Properly Handle the Matter and the Amount Involved.

In re Holmgren's Estate, 189 Wash. 94, 63 P.2d 504 (Wash. 1937) stated the standards in determining reasonable fees for an attorney. "In determining what is reasonable, it is proper to consider the time and labor required, the novelty and difficulty of the questions involved, the skill required to properly handle the matter and the amount involved." *Id.* at 97. Citing *Shufeldt v. Hughes*, 55 Wash. 246, 254, 104 P. 263 (Wash. 1909; *in re Peterson's Estate*, 12 Wash.2d 686, 728, 123 P.2d 733 (Wash. 1942) states the same criterion. Where expert testimony is offered, as here, "expert testimony on attorney's fees is substantial evidence." *In re Coffin's Estate*, 7 Wash.App. 256, 266, 499 P. 2d 223 (Div. 1,1972). In the case, the attorney pursued a claim that recovered assets "The probate estate was thereby augmented." *Id.* at 258. "[T]he discovery of the legal principle began with Mr. McCann and that subsequent estate efforts based on that discovery succeeded in

substantially augmenting the estate.” *Id.* at 267. “Mr. McCann’s services were ‘a very material factor’, the cause of the augmentation.” “It was proper for the trial court to have considered the amount involved in the controversy as well as the benefits derived by the respondents from the services of their attorneys.” *Id.* at 269. In Comenout’s Estate, the court failed to consider that Kovacevich recovered \$25,000 and \$36,000 for the benefit of the estate. The Estate was insolvent, hence the probate had to be administered to conclusion in any event. He earned the amount by augmenting the Estate. Further, he spent \$117,000 of time on, what is now seven years work, handling the management of the Estate that was constantly in major litigation. Cutting \$29,000 off the \$49,000 sought is unconscionable. It amounts to less than \$3,000.00 a year. Expert testimony proved the nature and extent of the litigation. Regardless of the size of the Estate, it had to be administered to process the claims and protect the allotment as no Personal Representative was appointed to manage the land and building. Fee requests “must provide reasonable

documentation of the work performed.” *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 597, 675 P.2d 193 (1983), at page 596, adopted the formula set forth in the model rules of professional conduct to determine reasonableness. R.P.C. 1.5 states that the factors to determine reasonableness are:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent; and (9) the terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer’s billing practices.

Bowers, supra at 597 states: “ This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the

work (i.e. senior partner, associate, etc.).” Here all the necessary information was set forth in the Motion. CP 36-108. The trial court did not go through the detail of hours submitted. The Court merely stated “the Court has concerns about the reasonableness of the hours billed and detailed in the record.” CP 348-350. The Court never stated the reason for “concerns”. The statement denies due process as the estate has no way to explain or appeal that the concerns were not warranted. This documentation need not be exhaustive or in minute detail. The determination of the fee award should not become an unduly burdensome proceeding for the court or the parties. *Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wash.App. 841, 848, 917 P.2d 1086 (1995); *Beckman v. Wilcox*, 96 Wash.App 355, 368, 979 P.2d 890 (1999).

The skill involved required experience in actual Indian cigarette state tax cases. The attorney has considerable experience and has prevailed in such matters. See *Paul v. State, Department of Revenue*, 110 Wash.App. 387, 40 P.3d 1203 (Div. 1, 2002). He also has handled many Indian issues

for many years, has an LLM in taxation from New York University and has litigated probate matters. See *Estate of Georgia Moe Hansen*, 128 Wash.2d 605, 910 P.2d 1281 (Wash. 1996). It is submitted that the skills of state taxation, Indian cigarette taxation and probate litigation were all present. Often, different attorneys would have to be associated to obtain these areas of experience. Additionally, the representation succeeded in yielding \$61,000 in funds to an estate that had only cash on hand of \$1,813.04. CP 36-108.

H. The Extensive Seven Years Defending Litigation Mandates a Quantum Meruit Award.

The testimony of Roger Peven and the Motion, CP 36-108, proves the amount. The defense of the *Quinault Indian Nation v. Comenout* suit resulting in a dismissal of the ninety million dollar claim against the Estate would alone justify the \$49,000 asked. In addition, the yield of *1,784,000 Contraband Cigarettes* case yielding \$36,000 to the Estate. The Motion for fees, CP 38-108, details activity on both cases. It also, at page 6 and 7, notes that the Quinault Nation attempted to obtain a lease on the property to demolish the building appraised at

\$730,000, 56% owned by the Estate. The Estate succeeded in getting the lease voided. The Gardee heirs contend that the building is not part of the Estate. However, the BIA Probate ruled that it did not probate the building. All during the seven years, legal issues were pending and addressed by Robert E. Kovacevich. The testimony of Roger Peven commenting on his view of the various files stated "There were a great number of banker boxes." The Gardee heirs never asked to review the copious files. In *Kimball v. Public Utility District No. 1, of Douglas County*, 64 Wash.2d 252, 391 P.2d 205 (1964), the attorneys had a monthly retainer contract. The attorneys did not keep "daily time records." Similar to this case, Spokane lawyer Del Cary Smith testified the services were reasonable. *Id.* at 256. The Court upheld a jury verdict based on quantum meruit. *Id.* at 255. *Rogers Walla Walla, Inc. v. Ballard*, 16 Wash.App. 92, 553 P.2d 1379 (Div. 2, 1976) also allowed fees based on quantum meruit. In *State v. Perala*, 132 Wash.App. 98, 130 P.3d 852 (Div. 3, 2006), the court held that "however the court must award an amount that will allow the financial

survival of his or her practice.” *Id.* at 120. The court must consider time and effort expended, nature and extent of the services rendered, the fees paid for similar services and legal responsibilities. *Id.* at 121. Here the expert was asked whether the time spent was reasonable. He stated, “Saw nothing that (was) unreasonable.”

VI. CONCLUSION

The check for \$29,514.58 was payable to the Spokane probate representative. The BIA had exclusive jurisdiction and decided it was not in the BIA probate. Only the Department of Interior could decide the issue. It was *res judicata*. It is an estate asset.

The Special Representative and attorney’s fees were reasonable and must be paid in full. The decisions must be reversed.

DATED this 2nd day of January, 2018.



ROBERT E. KOVACEVICH, # 2723
Attorney for Appellant

CERTIFICATE OF SERVICE

This is to certify that on January 2, 2018, a copy of the Opening Brief of Petitioner 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 2nd day of January, 2018.


ROBERT E. KOVACEVICH
Attorney for Appellant

Appendix 1

Acct # 103900980

Check # 651731

Amount 29,514.58

Seq# 9980564918

Indian Trust Settlement
Disbursement Account
P.O. Box 9577
Dublin, OH 43017-4877

JP Morgan Chase Bank, N.A.
Syracuse, NY

90-937213

CHECK NUMBER: 00651731
CHECK DATE: 06/19/14

Twenty nine thousand five hundred fourteen and 58/100 Dollars

*****\$29,514.58

Valid After 90 Days

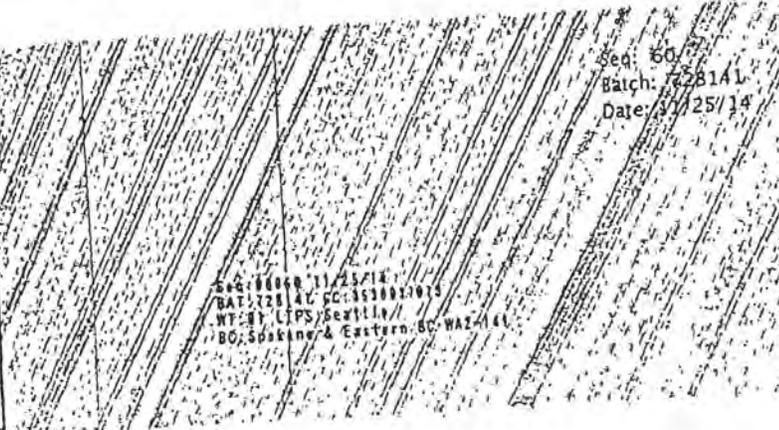
PAY TO THE ORDER OF
EDWARD A COMENOUT JR ESTATE
C/O MARY PEARSON
PERSONAL REPRESENTATIVE
818 W RIVERSIDE AVE
SUITE 625
SPOKANE WA 99201 0995

DeB Isaac
AUTHORIZED SIGNATURE

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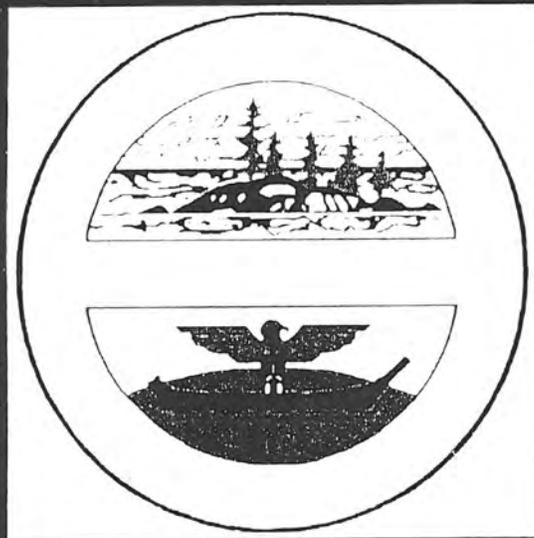
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Appendix 2

Quinault Indian Nation



Title 22 Probate Procedure

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TITLE 22
PROBATE PROCEDURE

22.01 Jurisdiction

22.01.010 Jurisdiction

When a member of the Quinault Tribe or any other Indian residing on the Quinault Reservation dies, the heirs of the decedent, the claims of creditors, and the distribution of such property shall be determined by the Quinault Tribal Court under this Title. The jurisdiction of the Court in such cases covers all of the decedent's property that is on the Quinault Reservation except property and funds which are restricted or held in trust by the federal government.

22.03 Small Estates

22.03.010 Small Estates

Any interested person may file a petition with the Clerk of the Quinault Tribal Court for the distribution, without administration, of the estate of the decedent in any case in which the total estate consisting of personal property not exceeding \$3,000.00 in value, provided that, the decedent in such case is survived by a widow or widower or by one or more minor children.

possession and control of the property of the decedent until the administration of the estate has been completed, and he has been discharged by order of the Court.

(c) It shall be the duty of the executor or administrator to preserve and protect the property for the benefit of the estate and heirs.

(d) Prior to appointment of the executor or administrator, the Court shall have authority to take possession and control of the property.

22.05.020

Wills

Every custodian of a will must deliver the will to the Quinault Tribal Court or to the executor named therein within 10 days of the death of its maker. Failure to do so may subject that person to liability for damages sustained by any person injured thereby.

(a) A will may be proven by the affidavit of the attesting witnesses identifying the signature of the testator and affirming that the will was executed by the decedent in the presence of the witnesses and declared by him to be his last will and testament.

(b) In the event that any person contests the validity of the will, the Court shall take no

(b) Claims shall be preferred in the following order:

- (1) All expenses of last illness and burial.
- (2) Any amount due the Quinault Tribe of the Quinault Reservation.
- (3) Expenses of administration.
- (4) All other claims.

22.05.050

Administration of Estate

(a) Within 90 days after the appointment of the executor or administrator, he shall file a petition of the determination of heirs and distribution of the estate.

(b) The petition shall be filed in duplicate and shall be sworn to or affirmed and shall contain:

- (1) The name of decedent.
- (2) Place and date of decedent's death.
- (3) Names, ages and relationship to decedent of all heirs of decedent, and if decedent dies testate, of all beneficiaries under his will.
- (4) Nature and extent of decedent's property and location of same.
- (5) State of existence or absence of will, and attachment of original will if decedent died testate.
- (6) Copy of death certificate or other adequate proof of death.

()
(e) Discharge the executor or administrator and close the estate upon finding that the executor or administrator has faithfully discharged his duties.

22.07.020

Descent and Distribution

In the event there is no will admitted to probate, the estate shall be distributed by order of the Court as follows:

(a) Surviving spouse of the decedent, upon finding of the Court that a valid marriage existed at the time of the death of the decedent.

(b) If there is no spouse, then to the surviving children.

(c) If there is no spouse nor surviving children, then the estate shall be distributed in accordance with the laws of the state of Washington relating to descent and distribution until such time as a law on descent and distribution is enacted by the Quinault Tribe.

22.07.030

Expenses and Fees

()
After the payment of all expenses in connection with the distribution of the estate, the Court may charge such fees as may be deemed proper, taking into consideration the appraised value of the estate of the decedent, but not to exceed \$100.00.

Appendix 3



INTERIOR BOARD OF INDIAN APPEALS

Estate of Elizabeth C. Jensen McMaster

5 IBIA 61 (04/06/1976)

Also published at 83 Interior Decisions 145

Judicial review of this case:

Dismissed, *McMaster v. U.S. Department of the Interior*, No. C76-129T
(W.D. Wash. June 29, 1978)



United States Department of the Interior

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

ESTATE OF ELIZABETH C. JENSEN McMASTER

IBIA 76-9

Decided April 6, 1976

Appeal from an order denying petition for rehearing.

Dismissed.

1. Indian Probate: Trust Property: Generally

Where trust patents for allotments for lands were issued in conformity with the General Allotment Act and contained usual provision that the United States would hold lands subject to statutory provisions and restrictions for a period of years, in trust for the sole use and benefit of Indians, and lands were chiefly valuable for their timber, the restraint

upon alienation, effected by terms of trust patents, extended to timber and proceeds derived therefrom as well as to lands.

APPEARANCES: Oberquell and Ahlf, by Argal D. Oberquell, Esq., for appellant.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

This case is before the Board on appeal from an order of Administrative Judge Robert C. Snashall, denying petition for rehearing.

The decedent, Elizabeth Jensen McMaster, an allotted Quinault, died intestate possessed of trust property on July 1, 1974. After hearing held at Tacoma, Washington, on May 21, 1975, the Administrative Law Judge found the heirs of the decedent, in accordance with the laws of the State of Washington, to be:

Raymond C. McMaster	Non-Indian-husband-	1/2 (Non-trust)
Ivan Keith Farrow	son-	1/6
Bruce Dennis Farrow	son-	1/6
Dennis Merle Farrow	grandson-	1/6

The trust property belonging to the decedent at the time of her demise consisted of decedent's allotment described as: SW 1/4 NE 1/4 Sec. 18, T. 22 N., R. 11 W., and NW 1/4 SE 1/4 Sec. 7, T. 22 N. R. 12 W., W.M., Washington, consisting of 80 acres, and approximately \$351,947.99 on deposit in her Individual Indian Money Account, apparently the proceeds from the sale of timber on said land allotment.

At the hearing, the decedent's surviving spouse submitted for consideration an agreement entitled Community Property Agreement, executed by the decedent and her surviving spouse on July 24, 1973, before a notary of Olympic, Washington. The agreement was not approved by the Secretary of the Interior, and there is no evidence in the record that it was ever presented to him for his approval.

The community property agreement referred to above, in substance provides that:

1. All community property presently owned by the parties or hereafter acquired by them shall be subject to the terms and conditions of this agreement.

2. At the time of the death of either of the parties hereto, any separate property of the person passing away shall be deemed at that time to have the status of community property and be

included as a part of community property of the parties, subject to the terms and conditions hereof.

3. Upon the death of either of the parties hereto title to all community property as herein defined shall immediately vest in fee simple in the survivor.

The Judge essentially found that the community property agreement was null and void because the agreement was not approved by the Secretary of the Interior since the allotted lands and the proceeds derived from the sale of the timber thereon were impressed with a trust, the trustee being the Secretary of the Interior.

A petition for rehearing was thereafter denied by the Judge. Whereupon, the surviving spouse filed a timely appeal, contending the community property agreement was valid. He further contends that by virtue of this agreement, all moneys in the IIM account and the allotted land belonging to the decedent passed to the surviving spouse immediately upon her death; and that in addition, the individual Indian moneys that accrued from timber sales prior to the death of his late wife should have been paid out to her because she was never mentally incompetent though she was physically disabled from a stroke in June 1972.

We consider the crux of this case to hinge on whether or not the decedent, an Indian married to a non-Indian, may enter into a contract regarding the alienation of trust property without the consent and approval of the Secretary of the Interior.

By virtue of the Act of February 8, 1887, hereinafter referred to as the General Allotment Act, and other statutory enactments, certain lands were allotted and trust patents issued relating to individual Indians, including the decedent. The patents contained the usual restrictions against alienation of title and inability to contract, and provided that the United States would hold the title in trust for the allottee for a period of 25 years. See 25 U.S.C. § 348, 24 Stat. 389.

The trust period was extended by Executive Order and the restrictions have never been removed. See Executive Order No. 10191, December 13, 1950, 15 FR 8889.

The General Allotment Act further provides that the Secretary of the Interior may in his discretion whenever he is satisfied that an Indian allottee is competent and capable of managing his or her affairs issue a patent in fee simple. 25 U.S.C. § 349, section 6 of the Act

An Indian, competent and capable of managing his affairs, must at least have sufficient ability, knowledge, experience, and judgment to enable him to conduct negotiations for the sale of his land, and to care for, manage, invest or dispose of its proceeds with a reasonable degree of prudence and wisdom and an uneducated Indian, inexperienced in business affairs is incapable of managing his affairs, and especially incompetent to sell his land and handle the proceeds thereof. U.S. v. Debell, 227 F. 760 (8th Cir. 1915).

The judgment of the Secretary of the Interior as to removing restrictions upon alienation of Indian allotted lands will not be disturbed by the courts, unless clearly arbitrary. United States v. Lane, 258 F. 520 (1919); see also 25 U.S.C. § 331 et seq., 406.

As the trustee of the Indians, the Secretary of the Interior administers the trust that arose by virtue of the General Allotment Act and he has the right to administer the trust as he sees fit and terminate it when he gets ready. He has the right to discharge himself of the trust by paying the money to the allottee or to a legally appointed guardian, provided there is nothing in the law prohibiting it.

So long as the lands and their proceeds are held or controlled by the United States, and the terms of the trust have not expired, they are instrumentalities employed by the United States in the lawful exercise of its powers of government to protect Indians. It does establish the rule that the proceeds of the sale are impressed with the same trust that existed upon the land, but only insofar as the United States retains the possession or control of same.

The Act of May 27, 1902, 32 Stat. 275, section 8, authorizes the adult heirs of any deceased Indian to whom allotted lands have been patented to sell inherited lands subject to the approval of the Secretary of the Interior and provides that when so approved full title shall pass to the purchaser, the same as if a final patent without restriction on the alienation had been issued.

It has been consistently held that where lands were allotted under the General Allotment Act restraining alienation, the Act of 1902 did not vacate the trust of such lands held by the United States, but, on the sale of the lands with the consent of the Secretary of the Interior by the heirs of the deceased allottee, the trust becomes attached to the proceeds, which are payable to such heirs under rules prescribed by the Interior Department. The statute provides that the land may be sold with the consent of the Secretary of the Interior. It thus permits a change in form

of the trust property from land to money. This change may only be effected with the consent of the trustee represented in the person of the Secretary of the Interior. No citation of authority is needed to sustain the general doctrine that into whatever form trust property is converted, it continues to be impressed with the trust. That doctrine must be applied to the present case in the absence of the expressed intention of Congress not to end the trust but to permit a change of the form of the trust property. National Bank of Commerce v. Anderson, 147 F. 87 (9th Cir. 1906); United States v. Thurston County, 143 F. 287 (8th Cir. 1906).

Restrictions imposed on alienation of Indian land are not personal to the allottee but run with the land. United States v. Reily, 290 U.S. 33, 54 S. Ct. 41 (1933).

The granting of citizenship to an Indian allottee or his heirs does not affect property in trust pursuant to the Indian Allotment Act. Spriggs v. United States, 297 F.2d 460 (10th Cir. 1961).

[1] Where the United States holds allotted lands, subject to statutory provisions and restrictions in trust for sole use and benefit of Indians, and lands were chiefly valuable for their timber, the restraint upon alienation, effected by terms of trust

patents, extended to timber and proceeds derived therefrom as well as lands. United States v. Eastman, 118 F.2d 421 (9th Cir.), cert. denied, 314 U.S. 635, 62 S. Ct. 68 (1941).

We find that the community property agreement, relating to allotted lands and proceeds derived therefrom, entered into by the appellant and the decedent without the consent and approval of the Secretary of the Interior is null and void for the reasons stated, 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, it is ordered that the Interim Order and Final Order Determining Heirs entered June 5 and July 10, 1975, respectively, be, and the same are hereby, AFFIRMED, and the appeal herein is DISMISSED.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Mitchell J. Sabagh
Administrative Judge

We concur:

//original signed
Alexander H. Wilson
Administrative Judge

//original signed
Wm. Philip Horton
Member