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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 355799

No. 358160

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

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

ESTATE OF EDWARD AMOS COMENOUT JR.

Appellant,

v.

CHRISTOPHER GARDEE, GEORGE GARDEE
and RICHARD GARDEE

Respondents.

BRIEF OF RESPONDENTS

Charles R. Hostnik, WSBA # 10834
Attorney for Respondents
6916 Lakewood Dr. W., Suite A-1
Tacoma, WA 98467
Ph: (253) 475-4200

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I. INTRODUCTION

This probate proceeding was commenced in Spokane County in September 2010. This is an insolvent probate estate. *See, Opening Brief of Appellant, at pp. 19, 23.* The probate has not been concluded. In the words of the Special Administrator: “Much other work is needed to complete the Estate.” *CP 417.*

Counsel for the Personal Representative, who is now the Special Administrator, requested an award of interim attorney’s fees. The Trial Court granted an award of \$20,000.00. *See, CP at 349.*

It is undisputed that under the Will of the Decedent, that there were originally five Heirs of the Estate, one of whom held a life estate. *See, CP 118.* The life estate Heir, Martina Garrison, passed away in September of 2016. *See, CP 118.* As a result, there are now four Heirs remaining – Richard Gardee, George Gardee, Christopher Gardee, and Edward Comenout III.

Under the Decedent’s Will each Heir is entitled to an equal share of the proceeds of the Estate. The Gardee Heirs - Richard Gardee, George Gardee, and Christopher Gardee – are represented by Respondents’ counsel.

The fourth Heir – Edward Comenout III – is represented by Mr. Kovacevich, counsel for the Appellant. *See, CP 208, at line 21.5.* Mr. Kovacevich also is the Special Administrator and counsel for the Estate.

Counsel for the Gardee Heirs became aware that a distribution had been made to the Personal Representative of this Estate as a result of nationwide litigation entitled Cobell v. Salazar, concerning the failure of the Federal Government to properly account for Indian trust monies. *See, Cobell v. Salazar, 573 F.3d 808, 387 U.S. App. D.C. 339, 2009 U.S. App. LEXIS 16666, 39 ELR 20163, rev. den. 130 S. Ct. 3497 (2010).* The federal litigation eventually resulted in a settlement, which directed certain funds be provided to owners of Indian Trust Property. The settlement was approved and funded by Congress under the Claims Resolution Act of 2010, Pub. L. 111-291, signed December 28, 2010.

Although the Garrison family (Martina Garrison and her three sons, Richard Gardee, George Gardee, and Christopher Gardee) applied for their portions of the settlement, unbeknownst to them the Personal Representative in this Estate proceeding had submitted an application that was paid in September of 2014. The payment amount was \$29,514.58. *See, Opening Brief of Appellant, Appendix 1.*

The Personal Representative originally took the position that the Cobell monies were being held separately, and accounted for separately,

pending direction from the Court on proper distribution of those funds. *See, CP 20, line 21 to p. 21, line 4.* However, the Personal Representative is now taking the position that those monies are part of the assets of the Estate, despite not being listed as an Estate asset in the Inventory. *CP 47, at line 6.* The Special Administrator is now requesting that his fees be paid out of the proceeds of those Cobell settlement funds.

II. COBELL MONIES

A. Inventory Does Not Include Cobell Monies

In this probate proceeding, an inventory was requested by the Gardee Heirs. The initial request for an inventory of the Estate was submitted to counsel for the Personal Representative. *CP 436 – 437.* One of the items requested was “All income received by the Estate, including the proceeds of Cobell v. Salazar settlement monies.” *CP 437, at lines 11.5 - 12.5.*

An inventory was filed on October 3, 2014. *CP 438 - 442.* That inventory did not include the Cobell proceeds. As a result, the Gardee Heirs requested an updated inventory and accounting for the Cobell monies. *CP 443 - 445.* No response has been made to that request for an updated inventory.

Pursuant to RCW 11.44.025, the Personal Representative has a duty to update the inventory:

Whenever any property of the estate not mentioned in the inventory and appraisal comes to the knowledge of a personal representative, the personal representative shall cause the property to be inventoried and appraised and shall make and verify by affidavit a true inventory and appraisal of the property within thirty days after the discovery thereof, unless a longer time shall be granted by the court, and shall provide a copy of the inventory and appraisal to every person who has properly requested a copy of the inventory and appraisal under RCW 11.44.015(2).

RCW 11.44.025, quoted in its entirety. The Gardee Heirs are persons who properly requested a copy of the Updated Inventory and Appraisal under RCW 11.44.015(2), which requires the inventory to be provided to requesting heirs.

. . . upon receipt of a written request for a copy of the inventory and appraisal from any heir . . . the personal representative shall furnish to the person, within ten days of receipt of a request, a true and correct copy of the inventory and appraisal.

RCW 11.44.015(2), quoted in applicable part.

As noted above, there was no response to the Request for an Updated Inventory. The Cobell monies have never been characterized or accounted

for as an asset of this Estate, until the recent request by the Special Administrator for attorney's fees.

State law provides that the assets of the Decedent's estate consists of the property owned by the Decedent as of the date of Decedent's death. *See, RCW 11.44.015; see also, In re Estate of Verbeek, 2 Wn. App. 144, at 154, 467 P.2d 178 (1970).* This necessarily excludes assets acquired after the death of the Decedent. Such assets belong to the Heirs.

Therefore, as a matter of state law, the Cobell monies are not an asset of this probate Estate, and cannot be used as a source for the payment of creditor claims or administrative expenses.

B. Original BIA Probate Decision

When an enrolled Indian dies owning an interest in Indian trust land, the BIA has exclusive jurisdiction through the Office of Hearings and Appeals, to probate the Decedent's trust interests. *25 U.S.C. §372; 25 CFR §15.10(a); 43 CFR §30.102(a).* The Decedent in this case died owning an interest in Indian trust land in the Puyallup, Washington area. It is that interest in Indian trust land that formed the basis for the Cobell settlement disbursement to the Personal Representative.

In this case, the original BIA decision probating the trust land interests is dated December 31, 2012. In that decision, the BIA Probate Judge noted the following:

This forum notes that even if the foregoing claims [Creditor Claims] could be approved, payment could only be approved up to the amount of money in the decedent's IIM Account as of the date of his death, i.e., \$108.56. **The Department has determined that "money generated after the decedent's date of death belongs to the heirs or devisees * * * [and money] that accrues after the date of the decedent's death from trust or restricted property is not available for payment of claims against the estate".** 73 Fed. Reg. 67,263 (November 13, 2008);43 C.F.R. §30.146.

CP 52, paragraph 3 (quoted in full, emphasis added). Therefore, under this language from the decision, the Cobell monies which were distributed to the Personal Representative of this Estate in a check dated September 19, 2014 in the sum of \$29,514.58 (*see Appellant's Opening Brief, at Appendix 1*) is money generated after the Decedent's date of death, and therefore belongs directly to the Decedent's Heirs, not to the Decedent's Estate. As such, it is not available for payment of creditor claims or administrative expenses in this state probate proceeding.

Appellant mischaracterizes the holding of the BIA probate decision. The Administrative Judge determined that his probate jurisdiction only

applied to the monies in the Decedent's IIM account at the date of death. Any monies received after the date of death were owned by the heirs directly (*See, CP 52, paragraph 3, quoted above*). The Cobell monies dated September 19, 2014, were monies received after the Decedent died on June 4, 2010. *See CP 10; see also CP 35*. Therefore, under the reasoning of the BIA probate decision, the monies were owned by the Heirs directly. It is the Heirs who held the ownership interest in the trust property after the date of death. Therefore, it is the Heirs who were the owners of the Decedent's trust interest in the land that was the basis for the distribution of those Cobell monies.

C. Exemption of Cobell Monies

As noted above, the Cobell litigation was based exclusively on the failure of the federal government to properly account for the proceeds of leases of Indian trust property. The litigation resulted in payments to certain class members, based upon the ownership interest of those class members in Indian trust property. The federal government has exclusive jurisdiction over probates involving Indian trust property. *See, 25 U.S.C. §372; 25 CFR §15.10(a); 43 CFR §30.102(a)*.

The Special Administrator argues that since the Cobell funds were received by him and deposited into his trust account, they have lost their

protected character as proceeds of Indian trust property, and have therefore been transformed into an asset of this state court probate proceeding. However, as a matter of Washington State law, that position is incorrect.

This issue was addressed in *First-Citizens Bank & Trust Co. v. Harrison*, 181 Wn. App. 595, 326 P.3d 808 (2014), *pet. for rev. den'd*, 181 Wn.2d 1015, 337 P.3rd 326 (2014). In that case a bank attempted to garnish proceeds from the lease of Indian trust property that were placed into a bank account. The Court determined that the character of the property as proceeds from ownership of Indian trust land was not altered by deposit into a bank account. Since the money retained its trust character, it was therefore exempt from garnishment pursuant to 25 U.S.C. §410, and could not be applied to fund the claims of creditors. This is exactly the issue presented to this Court.

In reaching that conclusion, the Court of Appeals relied upon two key principles of statutory construction. First, the Court cited *Anthis v. Copland*, 173 Wn.2d 752, 270 P.3d 574 (2012), for the principle that exemption statutes should be liberally construed to give effect to their intent and purpose. Under 25 U.S.C. §410, any money accruing from the lease of Indian Trust land is exempt from the claims of creditors. Therefore, as an exemption statute, it must be liberally construed to give effect to its intent and purpose.

The second key statutory construction principle relied upon in First-Citizens Bank v. Harrison, is that statutes passed for the benefit of dependent Indian tribes “. . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians”, citing Bryan v. Itasca County, 426 U.S. 373, 392, 96 S. Ct. 2102, 48 L.Ed.2nd 710 (1976).

The Court then applied these two statutory construction principles to the Federal statute at issue. 25 U.S.C. §410 provides as follows:

No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior.

See, First-Citizens Bank v. Harrison, *supra*, 181 Wn. App. at 603, ¶17.

The Washington Court of Appeals determined that this federal statute protects money “accruing” from the lease of Indian trust land. The Court determined that in the context of lease proceeds the term “accruing” is synonymous with “paid” or “distributed”. See, First-Citizens Bank v. Harrison, *supra*, 181 Wn. App. at 603, ¶17.

In this State probate case the Cobell funds clearly “accrued” from ownership by the Gardee Heirs of the Decedent’s Indian trust lands and are therefore clearly within this Federal exemption. Therefore, such monies are

not liable for the payment of any debt or claim against the Estate of Edward Comenout, Jr.

The Cobell monies are simply not an asset of the Estate – which is acknowledged by the intentional omission of the Cobell monies on the Estate’s Inventory filed with the Court. *CP 438 - 442*. That Inventory was not supplemented or updated after the request by the Gardee Heirs for an Updated Inventory, which request specifically included an accounting for the Cobell proceeds. *CP 443 - 445*.

In the words of the Washington Court of Appeals:

“As a result, the plain language of 25 U.S.C. §410 unambiguously provides protection for the money in the . . . bank accounts.”

See, First-Citizens Bank v. Harrison, supra, 181 Wn. App. at 603, ¶18. This result is in keeping with the statutory construction principles that first require exemption statutes to be liberally construed to give effect to their intent and purpose, and the second principle that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with any doubtful expressions being resolved in favor of the Indian. The Gardee Heirs, as enrolled Native Americans, are the beneficiaries of both principles of statutory construction.

The Appellate Court concluded as follows:

We conclude that the plain language of 25 U.S.C. §410 supports a holding that money from a lease of Indian trust land remains protected even after it has been paid to a Native American and placed in a private bank account, as long as the Native American can show that the funds in the account are traceable to the lease.

See, First-Citizens Bank v. Harrison, supra, 181 Wn.App.at 606, ¶26.

The fact that the Cobell monies were located in the trust account of attorney Robert Kovacevich does not change the character of those monies as being derived from the ownership by the heirs in the Indian trust property at issue. Therefore, these funds are not an asset of the State probate, and are exempt from the claims of creditors, including administrative claims, pursuant to federal law as set forth in 25 U.S.C. §410, and pursuant to Washington State case law as declared in First-Citizens Bank v. Harrison.

III. APPELLANT'S REQUEST FOR INTERIM

ATTORNEY'S FEES

As noted by Appellant, the Trial Court had concerns about the reasonableness of the attorney's fees being requested by Mr. Kovacevich in his various roles as counsel for the Personal Representative, counsel for the Estate, Special Administrator, and counsel for one of the heirs of the Estate. The Gardee Heirs have similar concerns.

A. No Right To Fees Under RCW 11.28.210

Appellant relies upon RCW 11.28.210 to support his request for interim attorney's fees. *See, Opening Brief of Appellant, at p. 38.* That provision does not address attorney's fees. Any request for attorney's fees based upon that statute should be denied.

B. Standard of Review

Respondent Gardee Heirs assert that the source and standard of review for this request is pursuant to RCW 11.48.210, which permits an award of attorney's fees "as the Court shall deem just and reasonable."

In addition, RCW 11.96A.150 can be used as a basis for an award of attorney's fees. That statute permits an award of attorney's fees ". . . to be paid in such amount and in such manner as the Court determines to be equitable." *RCW 11.96A.150(1).*

C. Objections of Gardee Heirs

The Trial Court had discretion to determine what was reasonable, based upon the affidavit of fees presented by the Appellant. The Gardee Heirs have numerous objections to the fees being requested, as detailed in the Objection to Interim Payment of Personal Representative and Probate

Administration Attorney's Fees, filed May 15, 2017 (*CP 118-135*), and the Specific Objections of Gardee Heirs to Administration Attorney's Fees, filed July 17, 2017. (*CP 233 – 246*). Rather than duplicate those objections, those filings are attached hereto as **Appendix A** and **Appendix B** for the Court's convenience.

In summary, the objections included the following:

1. Fees incurred prior to institution of the probate proceeding;
2. Fees related to an "administrative probate";
3. Fees related to inappropriate representations to the Court;
4. Fees related to a Motion to Dismiss not related to the probate;
5. Fees related to a Quinault Tribal Court proceeding;
6. Fees incurred in unrelated actions during 2010-2011;
7. Fees related to alleged prorations without explanation;
8. Fees incurred in 2013 when nothing occurred in the probate case;
9. Fees charged the Estate for filing a Creditor Claim of an Adverse Party;
10. Fees related to clear conflicts of interest;
11. Fees related to a Quinault Lease.

*See CP 118 – 135 attached as **Appendix A**; also see CP 233 - 246, attached as **Appendix B**.* All of these objections are incorporated herein, and reiterated by the Gardee Heirs.

The Gardee Heirs do not believe the fees being requested are either reasonable or equitable in light of these specific objections. The Court reviewed the objections, and expressed “concerns,” but nonetheless made a discretionary decision to award a substantial sum of the available remaining estate assets to the Appellant.

D. Amount Involved and Results Obtained

A factor that must be considered in reviewing the Trial Court’s award is the size of the Estate. The Inventory filed with the Court at the request of the Gardee Heirs in 2014 shows: (1) cash of \$26,814.80, (2) one 2008 motor vehicle, (3) a single wide trailer of unknown value, and claims for the value of illegal cigarettes seized by the US government. *CP 438 - 442*. This is a total declared value of \$26,814.80. When the Cobell monies of \$29,514.58 are added to this total, the sum increases to \$56,329.38. This is the value acknowledged by Appellant in his Motion for Interim Payment of Attorney’s Fees. *CP 47, at line 9*.

E. Building Not Asset of Estate

Appellant now contends that the assets of the Estate include a building on the trust real property that has been distributed by the BIA

probate to the Gardee Heirs and the remaining Heir. It is not an asset of this Estate.

The Special Administrator made the same claim with regard to an appeal from a decision of the BIA to approve a lease of the property on which that building is situated. The Regional Director of the Bureau of Indian Affairs denied that claim on two grounds. *CP 403 - 405*.

The first basis was BIA Probate Regulations:

. . . Where, as here, there is a testate case in which the Will does not expressly state how to treat covered permanent improvements, the covered permanent improvements pass to “. . . the person(s) designated in the Will to receive the trust or restricted interest in the parcel.” 43 CFR §30.326(b)(2).

CP 404, at 3rd paragraph. [NOTE: The reference to 43 CFR §30.326(b)(2) was in error – the reference should have been to 43 CFR §30.236(b)(2)].

The second basis for denying the building claim is Public Law 110-453. The BIA’s reasoning was as follows:

Additionally, Public Law 110-453 amended the Indian Land Consolidation Act and American Indian Probate Reform Act to establish a *presumption for permanent improvements* attached to trust or restricted land where the decedent owned an interest in both the permanent improvement and the underlying trust or restricted land. The presumption is that the devise includes the interests of the decedent in any permanent

improvements attached to that trust land. The presumption applies only to decedents who died on or after *December 2, 2008*. Thus, if a decedent owned an interest in a parcel that is trust or restricted property, and also owned an interest in the house or permanent improvement on the parcel, then ownership of the decedent's interest in the permanent improvement passes to the devisee(s) receiving the decedent's interest in the trust land or restricted land, if (1) the decedent died on or after December 2, 2008, and (2) the Will does not expressly provide otherwise. Edward Amos Comenout, Jr. died on June 4, 2010 and thus, the decedent's permanent improvements on Public Domain Allotment 130-1027 passed to the individuals designated in the Will to receive the trust or restricted interest in the land.

CP 404, last paragraph (quoted in full; emphasis in original).

The BIA Regional Director who authored that document found the Special Administrator's argument that the building is personal property "to be without merit." *CP 405, end of first paragraph.* The building is permanently affixed to the trust property upon which it sits, and all interest in that building has already passed to the Heirs of this Estate. It is not an asset of this State Court probate proceeding.

The Regional Director's decision was dated June 17, 2015. Mr. Kovacevich, as legal counsel for some of the owners of the land, received a copy of that decision. The last page of that decision informs the parties

of their right to appeal the decision. *See, CP 409.* No appeal was filed and the decision has become final for purposes of the building at issue in this case in Puyallup, Washington. All interest in the building passed to the Heirs named in the Will at issue in this case in the federal probate proceeding. That Federal probate case has been concluded, and the building interest has passed. The building is not part of the assets in this State probate case.

Since the building is not an asset of the Estate, the Special Administrator's accounting of assets leaves \$26,814.80 as the assets of this Estate, after disbursal of the Cobell monies.

Against these assets of \$26,814.80, the Special Administrator has requested an award of attorney's fees of \$164,202.66. The Special Administrator has already been paid \$20,000.00. The Trial Court acted appropriately in awarding Appellant \$20,000.00 in attorney's fees on an interim basis.

The Estate is not yet concluded. At the final hearing on the probate, the Appellant is free to again request an award of fees, and undoubtedly will do so.

IV. APPELLANT'S SECOND APPEAL ISSUES

Appellant filed a second appeal designated as No. 358160. That appeal addresses: (1) the Trial Court's Order of Stay of Proceedings pending the outcome of Appellant's first appeal (No. 355799), and (2) the Trial Court's Order Denying Additional Attorney's Fees.

A. Order of Stay of Proceedings

After filing the first Notice of Appeal on September 19, 2017 (*CP 351-357*), Appellant then pursued additional Motions in the Trial Court, which resulted in the Trial Court Order of Stay, and the Trial Court Order Denying Additional Attorney's Fees.

A Notice of Appeal is "accepted" by the Court of Appeals upon filing. *See, RAP 6.1*. Once a Notice of Appeal is filed, the Trial Court's jurisdiction and authority to continue hearing matters in this case is restricted. *See, RAP 7.2*.

The provisions of RAP 7.2(i) do permit litigation in the Trial Court related to attorney's fees, but that is only with respect to attorney's fees post-judgment, and is designed to complete the record for review by the Court of Appeals.

In his Notice of Appeal, the Appellant specifically identified the Trial Court's Order on the attorney's fees award as one of the primary issues on appeal:

The above entitled Estate, through it's *[sic]* attorney and Special Administrator, Robert E. Kovacevich, seeks review by Division III of the Washington State Court of Appeals of the Order to Disburse Cobell Monies and the Order failing to grant interim attorney's fees in excess of \$20,000.00.

See, CP 351, Notice of Appeal at p. 1.

Since the Trial Court's Order on attorney's fees is now the subject of the appeal in this Court, that issue has now passed to the jurisdiction of the Court of Appeals. The Special Administrator has chosen this course of action, and is now stuck with it until the Court of Appeals rules on the request for \$117,000.00 in attorney's fees, which was denied by the Trial Court except to the extent of \$20,000.00. The Trial Court properly recognized that the Appellant chose to litigate that issue at the appellate level, and therefore the Trial Court was correct in entering a Stay of further proceedings until the appeal is resolved.

B. Order Denying Additional Attorney's Fees

In denying the Appellant's request for additional attorney's fees beyond the \$20,000.00 previously authorized, the Trial Court again acted

properly in light of the limited jurisdiction it had due to Appellant's choice to file a Notice of Appeal. *See, RAP 7.2.* Once the Notice of Appeal was filed, jurisdiction passed to the Court of Appeals.

V. REQUEST BY RESPONDENTS FOR **ATTORNEY'S FEES**

Pursuant to this Court's rules, either party may request an award of attorney's fees from this Court. *RAP 18.1.* Although the Respondent Gardee Heirs did not do so before the Trial Court, it is appropriate to do so for the costs and expenses incurred by the Gardee Heirs in defending this appeal.

The basis for the requested award of fees and costs is the following:

Either the superior court or **any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party:** (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. **The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable.** In exercising its discretion under this section, the court may

consider any and all factors that it deems to be relevant and appropriate . . .

RCW 11.96A.150(1), quoted in relevant part, emphasis added.

This appeal was unnecessary. The probate case has not yet been concluded, and will be remanded to the Trial Court to finish the probate proceedings. Normally a case is appealed after the final judgment of the Court below. This is truly an interlocutory appeal.

Regardless, the arguments raised by the Appellant were presented to the Trial Court, and the Trial Court exercised its discretion, determined the reasonable amount of attorney's fees to be awarded half-way through the probate proceedings, and authorized Mr. Kovacevich to pay to himself from his trust account, approximately 50% of the Estate assets.

The request for \$117,000.00 in fees was supplemented twice – once to a total of \$157,645.49, and then again to \$168,267.54. *See, CP 333 and CP 364.* It was the latter amount of fees that was the request by Appellant before the Trial Court when it rendered its decision denying any additional attorney's fees to the Special Administrator beyond the \$20,000.00 originally awarded. *CP 422 - 424.* It must be remembered that this is an insolvent Estate.

The Gardee Heirs objected in 2015:

. . . Continuing litigation on behalf of the Estate and having this insolvent Estate incur substantial additional attorney's fees for litigation that has little likelihood of success, constitutes a waste of any Estate assets that exist, and therefore should not be permitted. At the very least the Court should specifically inquire into the necessity of such litigation, and the anticipated return of assets to the Estate that such litigation would presumably provide. It is anticipated that the Special Administrator has already incurred tens of thousands of dollars in attorney's fees, and an accounting of such expenses and fees should be made at this time for the Court and Heirs to review.

At this time the Heirs are not requesting a hearing on this matter, but are placing the Special Administrator and the remaining single Heir on notice of the objections of Heirs Martina Garrison, George Gardee, Christopher Gardee, and Richard Gardee. Before any hearing can be scheduled, the Special Administrator should provide a detailed accounting of the attorney's fees and expenses incurred, so that a meaningful hearing can be conducted.

CP 446 - 447. The first time that any accounting of the fees and costs incurred by the Appellant were provided was the Appellant's Motion for Interim Fees filed two years later. *CP 36 - 108.*

It appears that one of the cases that Mr. Kovacevich litigated was settled in April of 2017. *CP 109, at lines 23–26.* However, the Special Administrator was not authorized to settle any cases without Court approval:

This Order does not authorize the Special Administrator to agree to settlement amounts. Any settlement must be only by Court approval.

CP 32, at lines 9 - 11. No Motion to Approve Settlement was brought before the Court. No party had an opportunity to review the settlement. The Court did not review the settlement. The Court did not approve the settlement.

There is no basis in the record to determine whether a settlement of \$36,000.00 on a claim for \$1,784,000.00 is reasonable, or an appropriate return to the Estate. The Special Administrator accepted the settlement without Court authorization. This violation of the Court's Order must also be taken into account in determining whether the requested fees were reasonable.

Appellant requests that the remainder of the cash on hand in the Estate be disbursed to him. *CP 419, at lines 19 - 20.* Such an action is unreasonable, irresponsible, and not appropriate for this insolvent Estate. The Court should protect what little Estate assets remain until the conclusion of the probate proceeding. It is up to the Gardee Heirs, who were dragged

into this appeal, to protect the Estate. They should be awarded their attorney's fees and costs in responding to this appeal, in such amount as this Court deems equitable.

Respectfully submitted this 26th day of April, 2018.

ANDERSON HOSTNIK PLLC

By: 
Charles R. Hostnik, WSBA # 10834
Attorneys for Respondent Gardee Heirs:
Richard Gardee, George Gardee, and
Christopher Gardee

Attachments:

APPENDIX A - Objection to Interim Payment of Personal Representative and Probate Administration Attorney's Fees, filed May 15, 2017 (*CP 118 - 135*)

APPENDIX B - Specific Objections of Gardee Heirs to Administration Attorney's Fees, filed July 17, 2017 (*CP 233 - 246*)

CERTIFICATE OF SERVICE

This is to certify that on April 26th, 2018 a copy of this Brief of Respondent was sent to the following, by both email and by U.S. postal mail, in a postage-paid envelope, addressed as follows:

Mr. Robert E. Kovacevich
Attorney for Appellant/Special Administrator
818 W. Riverside Avenue, Ste. 525
Spokane, WA 99201-0995

Email: kovacevichrobert@qwestoffice.net

Dated this 26th day of April, 2018.

ANDERSON HOSTNIK PLLC

By: C.R. Hostnik
Charles R. Hostnik, WSBA # 10834
Attorneys for Respondent Gardee Heirs:
Richard Gardee, George Gardee, and
Christopher Gardee

APPENDIX A

**Objection to Interim Payment of
Personal Representative and Probate Administration**

Attorney's Fees

filed May 15, 2017

Referred to in Respondent's Brief

at p. 17

COPY
Original Filed
MAY 15 2017

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SPOKANE COUNTY**

In Re the Estate of:

**EDWARD AMOS COMENOUT, JR.,
Deceased.**

Cause No. 10-4-01216-0

**OBJECTION OF GARDEE HEIRS TO
INTERIM PAYMENT OF PERSONAL
REPRESENTATIVE AND PROBATE
ADMINISTRATION ATTORNEYS FEES**

COME NOW three of the four Heirs to this proceeding, by and through their counsel of record, Charles R. Hostnik and Anderson Hostnik PLLC, and hereby respond to the Motion for Order for Interim Payment of Personal Representative and Probate Administration Attorneys Fees.

I. BRIEF BACKGROUND

The Heirs represented by the undersigned are Richard Gardee, George Gardee, and Christopher Gardee (hereinafter referred to as the "Gardee Heirs"). The undersigned previously also represented Martina Garrison, who was given a life estate in this probate matter under the Last Will and Testament of the Decedent. Unfortunately, Martina Garrison passed away on September 29, 2016.

**OBJECTION OF GARDEE HEIRS TO
INTERIM PAYMENT OF PERSONAL
REPRESENTATIVE AND PROBATE
ADMINISTRATION ATTORNEYS FEES**

Page 1 of 10

Anderson Hostnik PLLC
6915 Lakewood Drive West, Suite A-1
Tacoma, WA 98467
(253) 475-4200 Fax: (253) 475-2596

1 This matter comes before the Court upon a request for interim payment of Personal
2 Representative and probate administration attorney's fees. Issues with regard to the validity of
3 creditor claims are not before the Court at this time. However, as the Court is aware, this is an
4 insolvent estate.

7 II. COBELL MONIES

8 As a result of Federal litigation concerning the trust responsibilities of the Bureau of
9 Indian Affairs, Congress funded a settlement of that litigation and directed that certain funds be
10 provided to owners of Indian trust property. *See, Claims Resolution Act of 2010, Pub.L. 111-291,*
11 *signed 12/28/2010.* Although the Garrison family (Martina Garrison and her three sons, Richard
12 Gardee, George Gardee, and Christopher Gardee) applied for their portion of the settlement,
13 unbeknownst to them the previous Personal Representative under this Estate had submitted an
14 application that was paid in September of 2014. The payment amount was \$29,514.58.

15
16 Mr. Kovacevich has previously reported to this Court and provided an Estate Inventory
17 filed on October 3, 2014. That inventory did not include the Cobell funds. In response, the
18 undersigned filed a Request for Updated Inventory and/or Accounting for Cobell Monies on
19 January 20, 2015. No response has been made to that Request.

20
21 The Motion for Order for Interim Payment acknowledges that the Cobell check is being
22 held in Mr. Kovacevich's trust account. It is interesting to note that those funds are now
23 accounted for in the Motion for Order for Interim Payment as funds of the Estate. *See, Motion for*
24 *Order for Interim Payment, at pp. 11-12.* Those funds should not be part of this Estate as they are

1 designed to compensate Indian trust owners for BIA mismanagement of trust funds, and are
2 payable to enrolled Tribal members simply because of their ownership of Indian trust property.
3 Those funds should be ordered to be disbursed in equal shares to Richard Gardee, George Gardee,
4 Christopher Gardee, and Edward Comenout III, as they are the distributees of the Indian trust real
5 property interest of the Decedent. Those funds should not be part of this probate administration,
6 and should not be used to pay any administrative or other costs of this case.
7

8
9 **III. OBJECTION TO REQUEST FOR ORDER FOR INTERIM**
10 **PAYMENT TO PERSONAL REPRESENTATIVE**

11 Attached as Exhibit A to the Motion for Order for Interim Payment is a one page
12 accounting of the time devoted by Mary L. Pearson as Personal Representative of this Estate.
13 However, that accounting raises more questions than it answers.

14 The accounting indicates that the Personal Representative inventoried silver jewelry in
15 April and May of 2013. However, that silver jewelry does not appear on the inventory filed with
16 this Court in October of 2014.

17 In reviewing the time devoted by the Personal Representative, the hours listed are claimed
18 to be 17 hours. However, the request immediately below the column of hours is for 21.7 hours.
19 That discrepancy is not explained.

20 The request is for compensation of the Personal Representative at the rate of \$225.00 per
21 hour. No basis for that hourly rate has been presented, either in terms of a fee agreement or any
22 other documentation. It is noted that the Personal Representative's hourly rate is higher than the
23 hourly rate requested in the attorney's fees request, which rate is \$200.00 per hour.
24
25

1 Absent such documentation, the Gardee Heirs and the Court are unable to determine what
2 the arrangements were to compensate the Personal Representative for her time, and whether her
3 hourly rate was reasonable for the duties she performed. That must be determined, and the
4 discrepancy in time resolved, before any payment should be authorized by the Court.
5

6
7 **IV. OBJECTION TO PROBATE ADMINISTRATION ATTORNEY'S FEES**

8 The Court is being asked to approve attorney's fees as listed in **Exhibit B** to the Motion
9 for Interim Payment. Again, there is no fee agreement or other document to provide a basis for
10 that request.

11 **Pierce County Probate**

12 The request for payment of attorney's fees commences on July 16, 2010. This probate
13 proceeding commenced on September 22, 2010. It is apparent from reviewing the Exhibit B
14 description of services, that the services described during the month of July related to attempts to
15 commence probate proceedings in the Pierce County Superior Court.
16

17 The Pierce County Probate Petition was prepared by Mr. Kovacevich, which accounts for
18 the time entries prior to July 30, 2010. The time entry for July 30, 2010 indicates that "County
19 would not accept probate." In fact, the County did accept the filing of the Petition on July 30,
20 2010. See, **Exhibit A hereto**. However, the County would not appoint the proposed Personal
21 Representative, Robert Reginald Comenout, Sr., because he had a felony record and therefore was
22 disqualified from acting as Personal Representative. See, **Exhibit B**. A Memorandum Journal
23 Entry entered by the Pierce County Superior Court on August 4, 2010 indicates the following:
24
25

1 This Court declines to appoint Robert Comenout, Sr. due to felony
2 record. Mr. Brown [the attorney who appeared on behalf of the
3 Petitioner] will need to provide information on another Personal
Representative.

4 *See, Exhibit B.* When nothing further occurred in the Pierce County probate, an Order closing the
5 probate was signed and filed one year later - on August 5, 2011. *See, Exhibit C.* It is therefore
6 questionable whether the more than \$2,000.00 in attorney's fees incurred in the month of July of
7 2010 were of any benefit to the Heirs of the Estate. In any event those services were not
8 performed in connection with this proceeding.

9 Administrative Probate

10 The time entry for August 27, 2010 for \$400.00 is described as "Draft administrative
11 probate." It is unknown what that relates to, but the only administrative probate related to this
12 matter would be services rendered for the BIA probate proceeding. The client is not identified
13 with regard to that entry, but it clearly was not the Gardee family, who at that time represented
14 eighty percent (80%) of the Heirs, and who were separately represented.

15 In any event, this proceeding had not yet commenced, so it clearly was not related to this
16 proceeding.

17 Motion To Dismiss in September of 2010

18 There are several entries related to a Motion to Dismiss in September of 2010. There was
19 no Motion to Dismiss in this probate proceeding, which had not commenced until September 22,
20 2010. The description of services is again unclear as to who was the client. However, it is clear
21 that those services were not rendered in this probate proceeding.
22
23
24

1 Randy [Brown] and Robert.” Aaron Lowe and Randy Brown were attorneys that were working
2 with Mr. Kovacevich in representing Robert Comenout, Sr. in various cases during this period of
3 time.

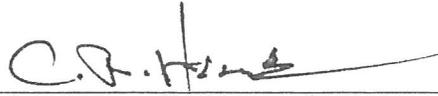
4
5 **Ambiguous Nature of Entries**

6 It is extremely difficult to determine what services were rendered in connection with this
7 probate proceeding, as opposed to the Quinault Tribal Court probate proceeding and other
8 litigation prosecuted by Mr. Kovacevich. It is also extremely difficult to determine the client and
9 the scope of services to be rendered in connection with this request for payment of attorney’s fees.
10 That would be clarified by a written and signed Fee Agreement, but that document is not included
11 in the record in this case.

12 The current state of the record is not sufficient to award any attorney’s fees at this point in
13 the proceeding. Since this is an insolvent Estate, the Court must carefully monitor the
14 disbursements to be made. The Gardee Heirs therefore request that the Motion for Interim
15 Disbursement be denied in its entirety at this time.
16

17
18 Dated this 12th day of May, 2017.

19
20 ANDERSON HOSTNIK PLLC

21
22 By: 

23 Charles R. Hostnik, WSBA #10834
24 Attorneys for Richard Gardee,
25 George Gardee, and Christopher Gardee,
26 Heirs to the Estate of Edward Amos
Comenout, Jr.

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EXHIBIT A

**Petition for Letters of Administration ad
Prosequendum**

Pierce County Superior Court



10-4-01148-2 34759160 PTLTRS 08-02-10

FILED
IN COUNTY CLERK'S OFFICE

A.M. JUL 30 2010 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
DEPUTY

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE**

IN THE MATTER OF THE ESTATE)	
)	NO. 10 4 01148 2
OF)	
)	PETITION FOR LETTERS
EDWARD AMOS COMENOUT,)	OF ADMINISTRATION
)	AD PROSEQUENDUM
<u>Deceased.</u>)	

Petitioner, Robert Reginald Comenout Sr., respectfully shows:

1. Jurisdiction and Intestacy. Decedent died on June 4, 2010, at Puyallup, Washington. He was unmarried and had no children. Petitioner is named as Personal Representative in deceased's Indian Will dated March 18, 2010. Decedent was an enrolled member of the Quinault Tribe of Indians. The reservation is in Western Washington. The office of the Quinault Tribe is at Taholah, Washington. The probate of the Decedent is within the jurisdiction of the Bureau of Indian Affairs as Decedent owned property held in trust by the United States Secretary of Interior Bureau of Indian Affairs. The approval must be made by judges of the Bureau of Indian Affairs who travel from California. The

Petition for Letters Ad Prosequendum - 1

ROBERT E. KOVACEVICH, P.L.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
818 WEST RIVERSIDE
SUITE 525
SPOKANE, WASHINGTON 99201-0995
509/747-2104
FAX 509/625-1914

1 Will cannot be admitted in time to substitute Petitioner as the Indian probate
2 must be approved by the Bureau of Indian Affairs. The BIA is months behind.
3
4 The earliest time for admission of the Will is several months from the current date
5 and possibly even one year.

6 2. Heirs. The Decedent was survived by heirs who are interested parties
7 in the trust land at Puyallup, Washington. Petitioner Robert Comenout is the
8 brother of the deceased. His relationship is among the closest inheritance class
9 to Decedent as Decedent was unmarried, had no children and his parents pre-
10 deceased him.
11

12 3. Valuation. The valuation of property is not relevant for the reason that
13 the estate involves trust land and will be probated by the Bureau of Indian Affairs.
14

15 4. Petitioner. Petitioner Robert Reginald Comenout Sr., is the surviving
16 brother of Decedent, and resides within Pierce County at Puyallup, Washington.
17 As stated, he is the Personal Representative named in the Will dated March 18,
18 2010, not yet admitted to Indian probate. Robert Reginald Comenout Sr.'s
19 address is 908 River Road, Puyallup, WA 98371.
20

21 5. Petitioner, surviving brother and Personal Representative, requests
22 to be appointed as Personal Representative Ad Prosequendum. The term ad
23 prosequendum is latin for "during the litigation and is necessary here as the
24 Bureau of Indian Affairs probate will not be started for at least six months. If
25 there is no party to existing suits, the estate will be damaged. The Decedent is
26

27
28 Petition for Letters Ad Prosequendum - 2

1 plaintiff, defendant or claimant in the litigations listed in 7 below. The
2 appointment is necessary to substitute Petitioner as personal representative to be
3 a party to the litigation so that it can proceed.
4

5 6. Waiver of Bond. Waiver of bond is requested as this appointment is
6 only to complete or participate in lawsuits. The request for letters is only for this
7 limited purpose, therefore no bond is required. No Order of Solvency is requested.
8 If the Court so requests, all settlements will be reviewed by the probate court if
9 money or property is to be received by the estate.
10

11 7. The Decedent's estate is a party in the following litigations:

12 7.1. The estate is one of the claimants in the matter of 376,852 packs of
13 cigarettes, State of Washington Office of Administrative Hearings for the
14 Washington State Liquor Control Board, Docket No. 2008-1-LCB-0035.
15

16 7.2. The estate is a Defendant in *Quinault Indian Nation v. Edward*
17 *Comenout*, et al No. 10-CV-05345 BHS, United States District Court, Western
18 District of Washington at Tacoma.
19

20 7.3. The estate is engaged in litigation with the City of Puyallup regarding
21 jurisdiction to regulate a billboard sign located on Indian trust land.

22 7.4. The estate is plaintiff in the Tribal Court of the Quinault Indian Nation
23 No. CV 10-015, a damage action for refusal to issue a permit to do business.
24

25 7.5. The estate may also need to prosecute or defend other legal actions.
26
27

28 Petition for Letters Ad Prosequendum - 3

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WHEREFORE, Petitioner prays that an order be entered as follows:

Appointing Robert Reginald Comenout Sr., as Administrator of the estate of the Decedent ad prosequendum directing the issuance of Letters of Administration limited to this purpose.

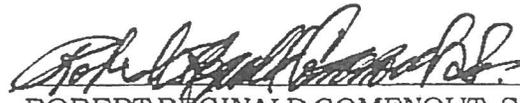
DATED this 30th day of July, 2010.



ROBERT E. KOVACEVICH
WSBA # 02723
818 West Riverside, Suite 525
Spokane, WA 99201-0995
Telephone: (509) 747-2104
Facsimile: (509) 625-1914
Attorney for Petitioner



RANDAL B. BROWN
WSBA #24181
25913 163rd Ave SE
Covington, WA 98042-8805
Telephone: (253) 630-0794
Facsimile: (253) 630-0879
Attorney for Petitioner



ROBERT REGINALD COMENOUT, SR.
Petitioner

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STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

Robert Reginald Comenout Sr., being first duly sworn, on oath deposes and says:

I am the Petitioner herein; I have read the foregoing Petition for Letters of Administration Ad Prosequendum, know the contents thereof, and believe the same to be true.


ROBERT REGINALD COMENOUT SR.
Petitioner

SUBSCRIBED AND SWORN to before me this 30th day of July, 2010.




Notary Public in and for the State of Washington.
Residing at: Spokey
My commission expires: 10/14/2013

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EXHIBIT B

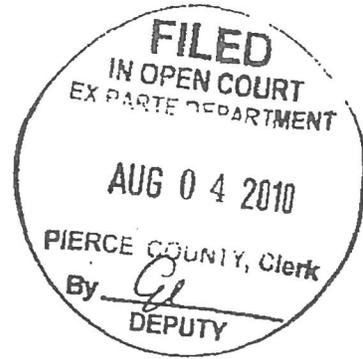
Memorandum of Journal Entry

August 4, 2010

Pierce County Superior Court



10-4-01148-2 34787449 CME 08-05-10



IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

ESTATE OF EDWARD AMOS COMENOUT

Cause Number:10-4-01148-2

MEMORANDUM OF JOURNAL ENTRY

Page 1 of 2

Judge/Commissioner: Mark L Gelman
Court Reporter: Smart Court
Judicial Assistant/Clerk: Elizabeth Sugai

COMENOUT, ROBERT REGINALD SR
COMENOUT, EDWARD AMOS

Robert Eugene Kovacevich

Attorney for Plaintiff/Petitioner

Proceeding Set: Exparte Action
Proceeding Outcome: Held
Resolution:

Outcome Date:08/04/2010 14:14

Clerk's Scomis Code:MTHRG
Proceeding Outcome code:HELD
Resolution Outcome code:
Amended Resolution code:

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

ESTATE OF EDWARD AMOS COMENOUT

Cause Number: 10-4-01148-2
**MEMORANDUM OF
JOURNAL ENTRY**

Page: 2 of 2
Judge/Commissioner:
Mark L Gelman

MINUTES OF PROCEEDING

Judicial Assistant/Clerk: Elizabeth Sugai
Start Date/Time: 08/04/10 2:32 PM

Court Reporter: Smart Court

August 04, 2010 02:32 PM

Randal Brown, attorney for Petitioner, appears before This Court to present a Will and appoint a PR.

JIS reviewed. This Court declines to appoint Robert Comenout Sr due to felony record. Mr. Brown will need to provide information on another PR.

End Date/Time: 08/04/10 2:33 PM



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EXHIBIT C

Order Closing Probate Case

Pierce County Superior Court



10-4-01148-2 36909518 ORCC 08-08-11

FILED
DEPT. 8
IN OPEN COURT

AUG 05 2011

By BM
DEPUTY

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IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

Cause No: 10-4-01148-2

ESTATE OF EDWARD AMOS COMENOUT,

ORDER CLOSING PROBATE CASE

THIS MATTER having come on regularly for Mandatory Court Review Hearing on August 5, 2011, and there being no order appointing personal representative entered, and no declaration of completion of probate filed, and there being no pending proceedings, it is hereby ordered that the file be closed and no further action will be taken on this matter. This order does not relieve any personal representative of any potential liability or deprive a creditor or heir of the ability to pursue proper claims that may exist as of this date.

DATED this 5th day of August, 2011.

JUDGE BRIAN TOLLEFSON

APPENDIX B

**Specific Objections of Gardee Heirs
to Administration Attorney's Fees
filed July 17, 2017**

Referred to in Respondent's Brief

at p. 17

COPY
Original Filed
JUL 17 2017

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SPOKANE COUNTY

In Re the Estate of:

EDWARD AMOS COMENOUT, JR.,
Deceased.

Cause No. 10-4-01216-0

SPECIFIC OBJECTIONS OF GARDEE
HEIRS TO ADMINISTRATION
ATTORNEY'S FEES

COME NOW the Gardee Heirs, by and through their counsel of record, Charles R. Hostnik and Anderson Hostnik PLLC, and hereby provide their specific objections to the attorney's fees detailed in Exhibit B to the Administrator's Motion for Order for Interim Payment of Administration Attorney's Fees, hereinafter referred to as "Motion for Interim Payment of Attorney Fees."

1. Fees Incurred Prior to Institution of this Probate

This probate matter commenced on September 22, 2010. The Administrator requests fees preceding that date, for matters unrelated to this probate proceeding. See *Exhibit B, pp.1-2*. These requested fees relate to an unsuccessful attempt to open a probate in Pierce County, including a charge of \$1,600.00 on July 30, 2010 to go to Tacoma and file the probate action.

1 The fee detail includes “County would not accept probate.” In fact, the probate action was
2 filed, but the Court would not appoint Robert Comenout, Sr. as the Personal Representative
3 because he had a felony record, and therefore was disqualified by state law from being appointed.
4 Persons with a felony record are prohibited by RCW 11.36.010(1)(a) from serving in that capacity.

5 The Pierce County probate was then dropped, and no further action was taken on it until it
6 was dismissed for want of prosecution approximately one year later. *See Objection of Gardee*
7 *Heirs to Interim Payment of Attorney’s Fees, filed May 15, 2017, at Exhibit A, Exhibit B, and*
8 *Exhibit C.* These services totaling **\$2,102.92** should be deducted from the fees request.

10 **2. Administrative Probate**

11 The services for August 27, 2010 include two hours spent drafting an “administrative
12 probate.” *See, Motion for Interim Payment of Attorney Fees, Exhibit B, p. 1, entry for 8/27/10.* In
13 his response to the Gardee objections, Mr. Kovacevich filed a Declaration under penalty of perjury
14 indicating this entry “. . . was apparently an effort to start the Quinault probate.” *See, Declaration*
15 *of Robert E. Kovacevich in Response to Objection of Gardee Heirs, filed May 16, 2017, at p.4,*
16 *§4.7.* It is apparent from this entry that: first, Mr. Kovacevich is unsure what that \$400.00 charge
17 was for, and second, that it did not relate to this probate proceeding. That **\$400.00** should be
18 deducted.
19

21 **3. Inappropriate Representations to the Court**

22 The following entry relates to time spent drafting a Declaration of Robert Comenout, which
23 is presumably the Declaration filed with this Court on September 22, 2010. Section 3 on the first
24 page of that Declaration indicates that Robert R. Comenout, Sr. was “. . . named as the sole
25

1 Personal Representative in Edward A. Comenout's Will dated March 18, 2010." That allegation is
2 repeated in the initial Petition filed in this Court on September 22, 2010 by Mr. Kovacevich
3 wherein he states "Decedent left a Last Will dated March 18, 2010. Decedent's brother, Robert
4 Reginald Comenout, Sr., is appointed as Personal Representative." See, *Petition for Appointment*
5 *of Special Administrator Ad Prosequendum*, at p. 3, lines 1-2.
6

7 Both the Declaration and the Petition filed in this Court are false. A copy of the Will of
8 March 18, 2010 is attached to the Motion for Order of Interim Payment of Attorney's Fees as
9 Appendix 1. There is no personal representative named in that Will. In Mr. Kovacevich's Motion
10 itself he states as follows:

11 Edward Amos Comenout, Jr. left a Will dated March 28,
12 2010. The Will is on file as an exhibit in the Petition of Judge
13 Pearson filed in this probate on June 14, 2012. It is notable that the
14 Will did not appoint a personal representative. . .

15 *Motion for Interim Payment of Attorney's Fees, filed March 13, 2017, at p. 4, lines 12-16.* The
16 Administrator should not be awarded attorney's fees for preparing Declarations or filing other
17 pleadings with this Court that are at least inaccurate, but truly just outright false.

18 **4. Motion to Dismiss**

19 There are a number of entries in the Motion for Interim Payment of Attorney Fees at page 2
20 of Exhibit B detailing services related to a Motion to Dismiss. See entries for 9/20/10 for \$195.00;
21 9/21/10 for \$130.00; 9/22/10 for \$700.00; 9/24/10 for \$600.00. These amounts total **\$1,625.00** and
22 are clearly not related to this probate because there is no Motion to Dismiss filed in this probate at
23 or around the time the probate was commenced on September 22, 2010.
24

1 **5. Quinault Tribal Court**

2 There are a number of entries related to action in the Quinault Tribal Court. This includes
3 time entries on 10/15/10, 10/19/10, 10/21/10, 10/22/10, 11/24/10, 12/2/10, 12/11/10, 12/13/10,
4 12/14/10, 12/17/10, 12/20/10, 12/27/10, 12/28/10, 12/29/10, 12/30/10, 12/31/10, 4/25/11, 4/27/11,
5 7/10/11, 7/11/11, and 8/24/12. The Quinault Tribal probate related to the Estate of Edward
6 Comenout, Jr. was a petition filed by a separate attorney and had nothing to do with this Spokane
7 probate proceeding. All of the time attributed to those entries, totaling **\$4,892.08** should be
8 excluded from the attorney fee request.
9

10 **6. Unrelated actions 2010-2011**

11 The time entries from October of 2010 through June of 2012 have nothing to do with this
12 probate proceeding. *See, Motion for Interim Payment of Attorney Fees, at p. 2 (entry for 10/4/10)*
13 *through p. 9 (entry for 06/07/12).* There was nothing filed in this probate during that period.
14

15 A large portion of those entries related to action in the Quinault Tribal Court. This includes
16 time entries on 10/15/10, 10/19/10, 10/21/10, 10/22/10, 11/24/10, 12/2/10, 12/11/10, 12/13/10,
17 12/14/10, 12/17/10, 12/20/10, 12/27/10, 12/28/10, 12/29/10, 12/30/10, 12/31/10, 4/25/11, 4/27/11,
18 as well as 7/10/11, 7/11/11, and 8/24/12. The Quinault Tribal probate related to the Estate of
19 Edward Comenout, Jr. was a petition filed by a separate attorney and had nothing to do with this
20 Spokane probate proceeding.
21

22 All of those entries through 06/07/2012, plus the Quinault Tribal Court entry for
23 08/24/2012, all of which total **\$13,770.69**, should be disallowed.
24
25

1 **7. Prorations**

2 A few entries in the attorney's fees request are prorated. *See entries for the following*
3 *dates: 5/10/11, 3/8/13, 3/26/13, 4/4/13, 4/24/13, 5/5/13, 5/14/13, 1/6/14, 2/22/14, 4/10/14, 4/12/14,*
4 *4/22/14, 5/21/14, 6/17/14, 6/30/14, 10/3/14, 12/13/14, 12/14/14, 12/15/14, 12/23/14, 12/28/14,*
5 *2/1/15, 2/3/15 [x2], 4/17/15, 5/26/15, 6/10/15, 6/11/15, 6/12/15, 6/28/15, 6/29/15, 6/30/15, 8/1/15,*
6 *8/3/15, 8/4/15 [x2], 8/5/15, 9/12/15, 11/6/15, 11/8/15, 11/10/15, 11/13/15, 2/19/16, 7/29/16,*
7 *8/27/16, 8/28/16, 8/29/16, 9/2/16, 9/3/16, 9/5/16, and 10/16/16.* There is no explanation as to why
8 these prorations occur, but obviously they are due to the fact that Mr. Kovacevich was working on
9 the same task for two clients at the same time.
10

11 There is no basis to determine how accurate the proration was, or what the conflicting
12 matters were, or even who the client was. All of those time entries should be excluded from the
13 attorney's fees request because there is no reasonable basis to determine how much of that time is
14 related to this probate proceeding. Those time records total **\$12,207.50**.
15

16 **8. 2013 Time**

17 In reviewing the Index of Pleadings filed in this case, nothing was filed in this case between
18 October 19, 2012 and April 15, 2014 when the Clerk's Office issued a Notice of Intent to Dismiss
19 this action. However, between those dates there is a whole host of activity detailed in the
20 attorney's fees request related to various matters, none of which appear to relate to this particular
21 probate proceeding. *See Motion for Interim Order for Payment of Attorney's Fees, Exhibit B, at*
22 *pp. 14-19.* These activities include a Motion of Judge Pearson, a Memorandum of Authorities, an
23 Affidavit of Judge Pearson, drafting pleadings for an estate claim, emailing Notice to Creditors,
24
25

1 answering a forfeiture, reviewing a response to the Estate's Motion to Dismiss, and a lot of activity
2 related to matters clearly outside of this probate proceeding. None of that work related to this
3 probate and therefore all of those activities should be denied. Those activities total **\$11,754.64**.

4 **9. Creditor Claim of Adverse Party**

5
6 The time entry for October 12, 2012 indicates that the Estate is being charged for "Draft
7 Creditor's Claim for Spokane County." On October 19, 2012 a Creditor's Claim was filed in this
8 action purportedly on behalf of Robert R. Comenout, Sr. and Robert R. Comenout, Jr. *See, Exhibit*
9 *A attached hereto.*

10 It is interesting to note that the Creditor's Claim is filed on pleading paper, but the pleading
11 paper does not have Mr. Kovacevich's identifying information in the lower right-hand corner.
12 However, the Certificate of Service indicates that the Creditor's Claim was served on counsel for
13 the Gardee Heirs by Mr. Kovacevich as "Attorney for the Estate." *See, Exhibit A, p.3.*

14
15 If the Estate, or the Administrator of the Estate, is the client, then there is a direct conflict of
16 interest in preparing, billing the Estate for, and then filing a Creditor's Claim on behalf of an
17 adverse party, especially where the attorney for the Estate also represents an Heir of the Estate.
18 *See, RPC 1.7(a)(1).* The conflict of interest cannot be waived. *See, RPC 1.7(b)(3).* This is an
19 ethical problem for the attorney, which should not be condoned by the Court.

20 **10. Clear Conflicts of Interest**

21
22 As noted at oral argument on the Motion for Interim Payment of Attorney's Fees, the
23 Gardee Heirs have a very grave concern about who really is Mr. Kovacevich's real client in
24 interest. The Gardee Heirs suspect it is Robert Comenout, Sr., who has been a long-time client of
25

1 Mr. Kovacevich in a number of matters, including running an illegal business in untaxed cigarettes
2 that has been the subject of repeated raids and forfeiture actions by the Federal and State
3 Governments.

4
5 This fear is confirmed by the attorney's fee records attached as Exhibit B to the Motion for
6 Interim Payment. Throughout the 47 pages of records detailed are entries such as "Phone call
7 Robert", "Two phone calls Comenout", "Draft letter Robert Sr.", "Phone call Robert Sr.", "Draft
8 fax to Robert". These entries are simply too numerous to list here, but they are consistent
9 throughout the attorney's fees records.

10 Perhaps the most telling entry is the entry for 10/4/10 which states, in part, ". . . letter to
11 Robert Sr. enclosing Mary Pearson's bill." If Robert Sr. was not the true client in interest, there
12 would be no reason whatsoever that the bill for the Personal Representative in this probate
13 proceeding should be sent to him.

14
15 Another instance occurs on September 22, 2014 where the entry states: "Make copies of
16 pleadings to mail to Robert Sr., send fax regarding Cobell check to Robert Sr." Robert Comenout,
17 Sr. is not an heir of the Estate, and is not entitled to any portion of the Cobell check. There is no
18 legitimate reason why that information would be shared by the Administrator of the Estate with a
19 non-party to this probate proceeding, except perhaps if that non-party was the real client in interest
20 during the course and history of this probate proceeding. That is the only interpretation that is
21 consistent with the repeated telephone calls, faxes, letters, and other communications between Mr.
22 Kovacevich and Robert Comenout, Sr. None of those communications are legitimate expenses of
23 this probate proceeding.
24

1 Any time entry that indicates communication with Robert Comenout, Sr. should be denied.
2 Those entries total **\$20,964.83**.

3
4 **11. Quinault Lease**

5 From March of 2013 through May 6, 2013 and then recommencing December 20, 2013
6 through April 21, 2014, and then again between May 20, 2014 and May 21, 2014, and again in July
7 of 2014, and then November of 2014 through early February of 2015, the bulk of the work that was
8 being charged to the Estate related to a Lease whereby the Quinault Indian Tribe proposed to lease
9 the property related to this probate proceeding. During that period of time both counsel to this
10 Motion had extensive dealings with one another, and it was clear that Mr. Kovacevich was
11 representing Robert Comenout, Sr. and his family. Those lease negotiations had nothing
12 whatsoever to do with this probate proceeding, and all of those time entries should be deleted from
13 this request for attorney's fees. Those entries total **\$13,139.88**.

14
15
16 **SUMMARY OF DEDUCTIONS**

17 Based upon the foregoing, the following deductions should be made from the request for
18 attorney's fees:

19
20

21	1. Fees Incurred Prior to Institution of This Probate	\$ 2,102.92
22	2. Administrative Probate	\$ 400.00
23	3. Motion to Dismiss	\$ 1,625.00
24	4. Quinault Tribal Court	\$ 4,892.08

25

1	5. Unrelated Actions 2010-2011	\$ 13,770.69
2	6. Prorations	\$ 12,207.50
3	7. 2013 Time	\$ 11,754.64
4	6. Clear Conflicts of Interest	\$ 20,964.83
5	7. Quinault Lease	<u>\$ 13,139.88</u>
6	TOTAL	\$ 80,857.54
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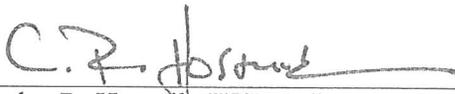
9 In addition to these specific objections, it is apparent that the administration of this probate
10 proceeding is being charged for the costs of litigating a number of cases, none of which can be
11 particularly identified in the list of attorney's services presented as **Exhibit B** to the Motion for
12 Interim Payment of Attorney's Fees. As both parties have pointed out to the Court there must be a
13 reasonable basis for the award of attorney's fees. The record demonstrated that the nature of the
14 entries is ambiguous, related to a number of cases, clients and other items that are not part of this
15 probate proceeding.
16

17 Denial of the award for attorney's fees at this point does not prejudice counsel for the
18 Estate to present a more specific accounting and reapply for an award of attorney's fees as part of
19 the final probate hearing in this matter. However, the Court at oral argument on June 23, 2017
20 indicated that the Court was inclined to award some amount of attorney's fees at this point. The
21 only attorney's fees that should be awarded as an interim payment is the sum of \$10,000.00,
22 because anything in excess of that, as demonstrated above, is an inappropriate charge against this
23 Estate.
24

1 Before any additional attorney's fees are requested, it is incumbent upon counsel for the
2 Estate to clearly show what charges are solely related to this probate proceeding, and not the
3 myriad of other litigation that is claimed to somehow be related to this probate proceeding.
4

5 Dated this 14th day of July, 2017.
6

7
8 ANDERSON HOSTNIK PLLC
9

10 By: 

11 Charles R. Hostnik, WSBA #10834
12 Attorneys for Gardee Heirs,
13 Richard Gardee, George Gardee, and
14 Christopher Gardee
15

16 **Attachments:**

17 **EXHIBIT A - Creditor's Claim, filed 10/19/2012**
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EXHIBIT A

Creditor's Claim of Robert R. Comenout Sr.
And Robert R. Comenout Jr.
filed 10/19/2012

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FILED

OCT 19 2012

THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE**

IN THE MATTER OF THE ESTATE)	
)	No. 10-4-01216-0
of)	
)	JOINT CREDITOR'S
EDWARD AMOS COMENOUT,)	CLAIM OF ROBERT R.
)	COMENOUT SR. AND ROBERT
Deceased.)	R. COMENOUT JR.
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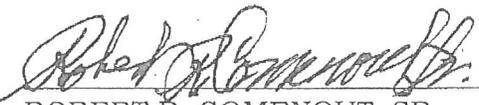
Robert R. Comenout Sr., and Robert R. Comenout Jr., hereby file claims for unpaid compensation for working at the business of Indian Country owned or controlled by Decedent's estate. The amount will be proven at a future time. Claimants also seek approval for legal expenses that were incurred in their criminal defense to the Information filed against them in *State of Washington v. Robert Reginald Comenout, Jr., and Robert Reginald Comenout Sr.*, Supreme Ct. No. 85067-4; Court of Appeals No. 39741-2-II; Pierce County Superior Court No. 08-1-04680-1, a case that

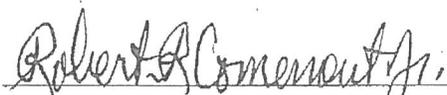
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has now been dismissed.

The Claimants were acting in the scope of their service at the Indian Country Store and were charged in the case listed for activity in alleged product sales and distribution. They are entitled to be given a continuing defense in these and any other cases related to the business.

DATED this 18th day of October 2012.


ROBERT R. COMENOUT, SR.


ROBERT R. COMENOUT, JR.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the Creditor's Claim was served on
Counsel by mailing the same by First Class mail on October 15th, 2012, in
a postage-paid wrapper addressed as follows:

Mr. Charles R. Hostnik
Anderson Hostnik PLLC
6915 Lakewood Drive West, Suite A-1
Tacoma, WA 98467-3299

DATED this 19th day of October 2012.



ROBERT E. KOVACEVICH, #2723
Attorney for the Estate