



## INTERIOR BOARD OF INDIAN APPEALS

Estate of John J. Akers

1 IBIA 246 (05/24/1972)

Also published at 79 Interior Decisions 404

### Judicial review of this case:

Dismissed for failure to prosecute, No. 71-3002 (9th Cir. May 3, 1972)

Reinstated and affirmed, 499 F.2d 44 (9th Cir. 1974)

Certiorari denied, 423 U.S. 831 (1975)

### Related cases:

Consent judgment, *Estate of John Akers, Deceased v. Commissioner of Internal Revenue*, Tax Court Docket No. 61338 (May 25, 1964)

Interior Probate IA-D-18 (1968)

Interior Probate IA-D-18 (Supp.) (1968)

1 IBIA 8

Affirmed, *Akers v. Morton*, 333 F.Supp. 184 (D. Mont. 1971)

3 IBIA 300



# United States Department of the Interior

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

ESTATE OF JOHN J. AKERS  
(DECEASED FORT PECK INDIAN  
ALLOTTEE NO. 1921)

IBIA 70-9

Decided May 24, 1972

Appeal from examiner's decision allowing attorney's fees and setting priority of payment of claims against the estate.

Reversed.

Indian Probate: Claim Against Estate: Allowable Items

A claim for attorney's fees is not allowable as a charge against the estate where the services were performed on behalf of the attorney's client and were neither on behalf of the estate nor of benefit to the estate.

Indian Probate: Claim Against Estate: Allowable Items

A claim for attorney's fees by an attorney who successfully represented a client whose interests were in opposition to creditors of the estate and the heir at law is a private business matter with his client and not a proper claim against the estate as an administration expense.

Indian Probate: Claim Against Estate: Source of Funds for Payment

Where the restricted estate, consisting only of trust land, is awarded the devisee in the probate proceeding, the interest so received cannot be subjected to a claim for attorney's fees.

OPINION BY MR. HARRIS

The District Director of the Internal Revenue Service (Internal Revenue) has appealed an order, entered February 20, 1969, by Hearing Examiner (Indian Probate) David J. McKee, directing distribution of John Akers' estate and setting priorities of payment on claims allowed against the estate. 1/ There having been extensive litigation of the

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1/ Examiner McKee has since become chairman of the Board of Indian Appeals. He took no part in the decision of this case.

several issues involved in probating this estate we will set out a brief chronicle of significant events before reaching the issues raised by this appeal.

John J. Akers died on February 19, 1959. His will, dated December 10, 1958, was submitted for probate to Hearing Examiner Francis Elge on February 20, 1959. In his will John Akers in effect disinherited his wife Dolly with a bequest of one dollar, devised his mineral interest in real estate held in fee to his niece and in the residuary clause gave his sister, Hazel Trinder, his allotment in real estate held in trust for his benefit by the United States.

On March 13 , 1959, proceedings began in a Montana court to probate the unrestricted estate of John Akers, including the mineral interest devised in the will to his niece; and which now includes approximately \$5,000 received as a cash bonus when the Superintendent executed an oil lease of these mineral interests on October 6, 1966. Subsequently, a dry well resulted and the lease was dropped. The unrestricted estate has received no other income. The estate is being administered under Montana law, and an attorney, John Marriott Kline, was appointed as Special Administrator of the estate.

On April 20, 1959, the United States filed an irrigation claim against the restricted estate of John Akers in the amount of \$310.

After a lengthy hearing with sessions conducted in several places Examiner Frances Elge, in a written decision dated April 28, 1964, found that John Akers, as a result of alcoholism, lacked testamentary capacity when he executed the will dated December 10, 1959, disapproved it and transferred the case to Examiner McKee for further proceedings.

On November 5, 1964, Internal Revenue filed a claim to collect unpaid income taxes for which both John Akers and his wife, Dolly were alleged liable. The priority to be given the claim is an issue raised by this appeal.

On March 7, 1966, in a written decision, Examiner McKee found John Akers had testamentary capacity during lucid intervals and approved a will executed during such an interval on December 5, 1958. As in the will of December 10th, John Akers gave his wife one dollar, devised his mineral interest to his niece and in the residuary clause gave his sister Hazel Trinder his trust or restricted property. In that decision Examiner McKee fixed the Probate Fee due the United States at \$75, allowed the \$310 irrigation claim filed by the United States, and disapproved the claim for unpaid income tax as having been untimely filed because it had not been filed before the conclusion of the first hearing as required by departmental regulations.

Dolly Akers appealed the approval of the will and Internal Revenue appealed the denial of the claim for unpaid income taxes. The allowance of the irrigation claim was not contested.

On appeal, Examiner McKee's approval of the will was affirmed but his holding on the tax claim was reversed: it was found that the filing limitation does not apply to claims of the United States and the case was remanded to the Examiner to receive proof of the claim filed by Internal Revenue. (Estate of John J. Akers, IA-D-18 (February 26, 1968)).

Dolly Akers filed a renunciation of the will and a claim for dower rights with Examiner McKee on June 20, 1968. On June 24, 1968, Mr. Hubert Massman, who had been the attorney for Hazel Trinder before Examiner Elge when the first will was disallowed and who had represented her before Examiner McKee when the second will was approved, filed a claim for attorney's fees. The disposition of that claim is also an issue raised by this appeal.

Examiner McKee issued a decision on June 24, 1968, in which he allowed the Internal Revenue claim in the amount of \$14,338.60. The claim of dower rights filed by Dolly Akers in her renunciation of the will was dismissed as having no application against trust property.

Dolly Akers appealed. The dismissal of Dolly Akers' claim was affirmed as res judicata and the allowance of the Internal Revenue claim was affirmed in that it was based on a consent judgment of the Tax Court which had been entered In Estate of John Akers, Deceased, John Marriott Kline, Special Administrator, and Dolly Coster Akers, Petitioner v. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 61338 (May 25, 1964). See Estate of John J. Akers, IA-D-18 (Supp.) (September 23, 1968).

The supplemental decision's affirmance of Examiner McKee's holding was a final decision for the Department. On that basis Examiner McKee, on February 20, 1969, issued an order fixing attorney's fees and establishing priority of payment of claims against the John Akers estate. The order reads:

1. The probate fees shall be first paid; and
2. The attorney's fees to be allowed to Hubert J. Massman, attorney for the successful parties in this litigation are fixed at \$7,500.00, and all of the cash funds in the hands of the Superintendent, whether they be in the form of certificates of deposit or cash in the Individual Indian Money account, shall be devoted first to the payment of said fee and the income from the lands included in the inventory to be received in the future shall be devoted to the payment of said fee for so long as necessary to liquidate the full amount thereof; and
3. Priority of the United States claims for irrigation O & M charges and for payment of the Tax Court

Judgment shall be deferred until the payment of the attorney's fee is complete;

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Both Dolly Akers and Internal Revenue appealed. Dolly Akers' appeal was considered by the Secretary in a complete review de novo, although her appeal rights had been exhausted by her previous appeals. The Secretary issued his decision on June 1, 1970, in which Examiner McKee's approval of the will was affirmed and his denial of her claim to dower by her renunciation of the will were also affirmed.

Following the establishment of the Interior Board of Indian Appeals Dolly Akers appealed the Secretary's decision to the Board. The Board affirmed Examiner McKee's denial of the dower rights in allowing the will to stand and on a finding that Dolly Akers had obtained four appellate considerations of her claims instead of the one appeal authorized her, declared the Board's decision final for the Department. Estate of John J. Akers, 1 IBIA 8, 77 I.D. 268 (1970).

Dolly Akers appealed the Board's decision to the U.S. District Court, District of Montana, Billings Division. The decision of that Court, Akers v. Morton, Civil No. 907 (D. Mont., September 22, 1971), affirmed Examiner McKee's finding that John Akers was competent, that his

December 5, 1958 will required approval, that his property be distributed accordingly and affirmed the denial of dower rights to Dolly Akers. The District Court's decision was appealed to the 9th Circuit Court of Appeals. That appeal was dismissed for lack of prosecution. Akers v. Morton, C.A. 9, 71-3002 (May 3, 1972).

The estate of John J. Akers over which the Secretary of the Interior has probate jurisdiction consists of a restricted allotment of land, held in trust in accordance with 25 U.S.C. § 348 (1964), which was appraised by the Superintendent at \$15,000 for probate purposes, and cash in the Individual Indian Money account of \$5,888.96 from the cash bonus and interest thereon obtained when the Superintendent executed an oil lease for the benefit of the estate on October 6, 1966.

Internal Revenue contends on appeal that the attorney's fee was improperly allowed against the estate or, in the alternative, that if proper it was improperly given a higher priority than the United States tax claim.

The Departmental Regulations applicable to Indian Probate on February 20, 1969, the date of the order appealed from, are contained in Title 25, Subchapter C of the Code of Federal Regulations. The pertinent sections therein read as follows:

§ 15.1 Administration of estates.

The heirs of Indians who die intestate possessed of trust or restricted property shall be determined by examiners of inheritance except as otherwise provided in the regulations in this part. The wills of deceased Indians disposing of trust or restricted property shall be approved or disapproved by examiners of inheritance, except as otherwise provided in the regulations in this part. Claims against the estates of Indians shall be allowed or disallowed by examiners of inheritance in accordance with the regulations in this part. (Emphasis added)

§ 15.25 Priority of claims.

(a) Claims shall be allowed priority in payment in the following order, except as is otherwise provided in paragraph (b) of this section:

(1) Probate fee;

(2) Claims for expenses not previously authorized, for last illness not in excess of \$500, and for funeral not in excess of \$250;

(3) Unsecured claims of indebtedness to the United States or any of its agencies;

(4) Unsecured claims of indebtedness to the tribe of which the decedent was a member or to any of its subsidiary organizations;

(5) [Reserved]

(6) Claims of general creditors, including that portion of expenses of last illness not previously authorized in excess of \$500 and that portion of funeral charges not previously authorized in excess of \$250.

(b) The preference of the probate fee and of other claims may be deferred, in the discretion of the examiner, in making adjustments or compromises beneficial to the estate.

(c) No claim of general creditors shall be allowed if the value of the estate is \$1,500 or less and the decedent is survived by a spouse or by one or more minor children. If the estate is valued in excess of \$1,500, or if the estate is valued at \$1,500 or less and the decedent is not survived by a spouse or by any minor children, the claims of general creditors may be allowed in the discretion of the examiner of inheritance. If the income of the estate is not sufficient to permit the payment of allowed claims of general creditors within three years from the date of allowance, the unpaid balance of such claims shall not be enforceable against the estate or any of its assets. (Emphasis added.)

§ 15.26 Claims for attorney fees.

Attorneys representing Indians under the regulations in this part shall be allowed compensations in reasonable amounts. In determining attorneys' fees, consideration shall be given to the fact that the property of the decedent is restricted or held in trust and that it is the duty of the Department to protect the rights of all interested parties. Such fees as may be allowed shall be charged against the interests of the attorneys' clients. (Emphasis added.)

A reading of the three sections discloses that under § 15.1 the examiner is bound by 25 CFR §§ 15.25 and 15.26 in approving claims against the estate and setting the priority of payments as well as in the setting of attorney's fees and their source of payment. Absent a showing that the attorney performed a service that was of benefit to the estate or on behalf of the estate so as to bring the allowance of a fee within the purview of § 15.25(b) and the examiner's

discretionary authority to defer other claims, it must be presumed that when an attorney appears on behalf of a client his services were for the sole benefit of the client and his fee allowance by an examiner would be regulated by § 15.26.

In his brief on appeal Mr. Massman contends the first priority should be the expense of administration and that the services he has performed for the proponent of the will (his client, Hazel Trinder) benefitted not only his clients but the estate, and its creditors, in that, but for his efforts, the estate would have been distributed prior to the time Internal Revenue became involved and therefore his services should be allowed as a proper expense of administration.

The position advocated by Mr. Massman is entirely untenable. Aside from the obvious fact that the many appeals of Dolly Akers has prohibited distribution of the estate, Internal Revenue has been protecting its own interests by filing appeals, and thus prohibiting distribution. Additionally, Mr. Massman's services were not sought on behalf of the estate and, in fact, the administration of the estate has been in the hands of the Superintendent who secured a property appraisal and executed an oil lease for the estate's benefit. Further, the Department has consistently refused to allow outside administrators or executors to act on behalf of the estates of Indians where

trust or restricted property is involved. Estate of Great Deal of Plenty Woman (Otawin) or Elizabeth Saul, C.C. #140 (37136-11). Finally, it is apparent that Mr. Massman's efforts, though strenuous, have always been directed to having John Akers' will declared valid in order that his client, the residuary beneficiary therein, might receive the entire restricted estate. Clearly the service of Mr. Massman to his client is service to a testate beneficiary whose interests are directly opposed to those of the decedent's intestate heir and creditors and as such are not a proper charge against the estate as an administration fee.

The claims of Internal Revenue and the irrigation claim, when totaled, far exceed the \$5,888.96 in funds available to the estate to pay claims. However, until exhausted, this fund will be applied to pay these claims in accordance with the terms of this decision. The remainder or residue of the estate, consisting solely of trust land, passes to Hazel Trinder in accordance with the terms of John Akers' will.

Therefore, Hazel Trinder's only interest in the restricted estate is that of devisee of the trust land. Land to be continued in trust for an Indian devisee is not subject to a charge for indebtedness incurred by the devisee. 25 U.S.C. § 348 (1964). Consequently, Hazel

Trinder has no interest in the estate that is subject to a charge for attorney's fees awarded pursuant to 25 CFR § 15.26. A proper construction of the last sentence of the regulation precludes an award of attorney's fees where the attorney's client has no interest in the restricted estate against which the fee can be charged. The award to Mr. Massman of attorney's fees in the amount of \$7,500 is therefore vacated. If Mr. Massman and his client are unable to agree on a fee, Mr. Massman's rightful claim for compensation from his client, whether based on contract or quantum merit, must be pursued in a state or federal court with appropriate civil jurisdiction. See Chemah v. Fodder, 259 F. Supp. 910, 914 (W.D. Okla. 1966).

Having decided that the attorney's fee is not a proper claim against the estate of John Akers the issue of priority of payment is resolved simply by application of the controlling regulation, § 15.25, which is set out above. Both the irrigation claim and the Internal Revenue claim fall within category (3) as unsecured claims of indebtedness to the United States or any of its agencies. The irrigation claim will be paid first from the funds in the Individual Indian Money account and the remainder in the account will be paid toward satisfying the Internal Revenue claim for unpaid income taxes of John and Dolly Akers.

Since the amount of income taxes due Internal Revenue exceeds the funds of the estate in the Individual Indian Money Account the income accruing to the estate is liable for payment until the full amount due is paid. See § 15.25(c) set out above (underlined portion); Solicitor's Opinion, 61 I.D. 37 (1952), Regional Solicitor's Memorandum re Estate of Celeste Red Thunder (October 12, 1967). Only the income accruing to the restricted estate is available to pay claims against the estate for the land cannot be sold to satisfy such debts since under 25 U.S.C. § 348 (1964), the land is held in trust for the sole use and benefit of the Indian. See also Memorandum Opinion of Regional Solicitor re Estate of Antoine Bordeau, Jr., R.S. # 7501 (June 9, 1967).

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7; 35 F.R. 12081, the Superintendent shall:

A. Distribute all cash funds in the Individual Indian Money account:

1. in payment of the probate fee of \$75; and
2. in payment of the irrigation claim of \$310; and
3. the balance of the fund shall be paid toward satisfaction of the Internal Revenue claim and the

Superintendent shall pay any future income accruing to the estate until the debt is satisfied.

B. Deliver to Hazel Trinder, in accordance with the will of John Akers, the trust lands which form the residue of John Akers' estate.

This decision is final for the Department.

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//original signed  
Daniel Harris, Member

I concur:

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//original signed  
James M. Day, Member

Date: May 24, 1972