



## INTERIOR BOARD OF INDIAN APPEALS

Rita Larney, Irby Larney, Russell Larney, Samaria Rich, and Lou Weaver v. Eastern  
Oklahoma Regional Director, Bureau of Indian Affairs

63 IBIA 284 (08/01/2016)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
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ARLINGTON, VA 22203

RITA LARNEY, IRBY LARNEY,	)	Order Affirming Decision
RUSSELL LARNEY, SAMARIA RICH,	)	
and LOU WEAVER,	)	
Appellants,	)	
	)	
v.	)	Docket No. IBIA 15-055
	)	
EASTERN OKLAHOMA REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	August 1, 2016

Rita Larney, Irby Larney, Russell Larney, Samaria Rich, and Lou Weaver (collectively, Appellants), appealed from the Bureau of Indian Affairs’ (BIA) approval to pay an Oklahoma state court’s award of attorney fees in the amount of \$14,703.84 to Colclazier & Associates (Colclazier) and \$2,393.79 to Jeremy Pittman, Esq. (Pittman), from the Individual Indian Money (IIM) account of Appellants’ late father, Ryder Larney (Decedent), deceased Seminole Indian of the Five Civilized Tribes of Oklahoma. Oklahoma state courts have exclusive jurisdiction to determine heirs of deceased Indians of the Five Civilized Tribes. With BIA approval, IIM funds of a deceased Indian of the Five Civilized Tribes may be disbursed to pay the costs of determining heirs to restricted property. Appellants assert that Colclazier should not be paid from Decedent’s IIM account funds, before distribution of the funds to his heirs, because Colclazier was not Appellants’ attorney during the probate proceedings held for Decedent’s estate. Appellants also assert that their attorney during the probate proceedings, Pittman, should not be paid with Decedent’s IIM account funds because Appellants adequately compensated Pittman based on the work that he performed. Lastly, Appellants seek to raise an issue regarding whether Marie Barefoot Larney (Barefoot Larney) is Decedent’s common law spouse and an heir—a matter that was decided in the state court probate proceedings and not considered by BIA.

We affirm BIA’s decision. Appellants assert—without offering legal argument or factual evidence—that neither Colclazier nor Pittman should be compensated from Appellants’ share of the pre-distribution IIM funds. But bare assertions are insufficient to meet Appellants’ burden on appeal to show error in BIA’s decision. And Appellants’ challenge to the Oklahoma court ruling concerning Barefoot Larney’s status is outside the scope of the Board’s review of BIA’s decision.

## Background

Decedent died intestate on July 16, 2008, leaving 19 heirs. Order Nunc Pro Tunc Allowing Final Account, Determination of Heirship and Distribution at 2, 8-10, *Estate of Ryder Larney*, No. P-08-46 (Dist. Ct. Seminole Cnty. Dec. 4, 2014) (Final Order Nunc Pro Tunc) (Administrative Record (AR) 76).<sup>1</sup> The probate was filed by counsel whose fees, incurred on behalf of Barefoot Larney as the personal representative for Decedent's estate, are not at issue in this appeal.

During the probate proceedings, several of Decedent's heirs challenged Barefoot Larney's claim that she was married to Decedent through a common law marriage. On October 28, 2008, after two days of hearings,<sup>2</sup> the Court concluded that she was his surviving common law spouse. *See* Final Order Nunc Pro Tunc at 8; Decision of the Eastern Oklahoma Regional Director (Regional Director), BIA, Dec. 2, 2014, at 2 (Decision) (AR 74).

At least two of Decedent's heirs, William Larney and Larry Larney, then hired Colclazier to represent them in the probate proceedings, and to appeal the Court's common law spouse ruling. *See* Final Order Nunc Pro Tunc at 6; Objection to Final Account, Determination of Heirship and Distribution and Motion to Continue Hearing, May 23, 2013, at 2 (Objection to Final Order) (AR 51). On August 31, 2009, the Oklahoma Court of Civil Appeals affirmed the lower court's ruling. *See* Objection to Final Order at 2. On November 9, 2009, the Oklahoma Supreme Court denied review. *See id.* at 3. Meanwhile, Appellants and other heirs separately hired Pittman to represent them in the probate proceedings.<sup>3</sup> Citing their "wish to retain other counsel," however, Pittman moved to withdraw from the proceedings on October 16, 2009, and the Court granted the

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<sup>1</sup> The Final Order Nunc Pro Tunc corrected typographical errors in the Court's February 10, 2014, Order Allowing Final Account, Determination of Heirship and Distribution (Final Order) (AR 61). *See* Application for Order Nunc Pro Tunc, Dec. 2, 2014 (AR 75). BIA's decision to approve payment of the fees at issue, in accordance with the Final Order, was not impacted by the corrections.

<sup>2</sup> At the hearings held on October 14, 2008, and October 21, 2008, three of Decedent's heirs (Mulleana Larney, William Larney, and Larry Larney) were represented by attorneys. *See* Hearing Transcript (Tr.), Oct. 14, 2008, at 1 (AR 11b); Hearing Tr., Oct. 21, 2008, at 1 (AR 11c). Those attorneys' fees are not at issue in this appeal.

<sup>3</sup> Pittman represented Appellants as well as Mulleana Larney, Neena Emarthle, Angela Emarthle, Selena Emarthle, and Stefanie Emarthle. *See* Entry of Appearance, Dec. 4, 2008 (AR 7).

motion. Motion to Withdraw (AR 31); Order Allowing Attorney to Withdraw, Oct. 21, 2009 (AR 33).

Pittman and Colclazier each also moved the Court for awards of unpaid attorney fees. Pittman Motion to Approve Attorney Fees, Sept. 13, 2012 (AR 36); Colclazier Motion for Supplemental Attorney Fees, Oct. 8, 2012 (AR 38). On October 17, 2013, Colclazier obtained a judgment against William Larney<sup>4</sup> for \$14,703.84 in a separately filed action to recover unpaid attorney fees for services related to Decedent's estate. Journal Entry of Judgment at 2, *Colclazier v. Larney*, No. CJ-2012-134 (Dist. Ct. Seminole Cnty. Oct. 17, 2013) (AR 54).

On January 14, 2014, the Court held a hearing on the attorney fee requests. *See* Court Minute, Jan. 21, 2014 (AR 60). Notice of the hearing was published and mailed to each of the heirs. *See* Final Order Nunc Pro Tunc at 1-2. Only one of the Appellants, Russell Larney, attended the hearing. *See* Court Minute. The Court concluded, after hearing from the heirs in attendance, Colclazier, Pittman, and Departmental counsel, that attorney fees were to be paid "as recommended by the Office of the Field Solicitor." *Id.* In its order awarding fees, the Court further explained that "[t]he parties present agreed and consented . . . as equitable" to the payment of Colclazier's judgment from pre-distribution funds.<sup>5</sup> Final Order Nunc Pro Tunc at 7. The Court also ordered that Pittman's outstanding fees in the amount of \$2,393.79 be paid from Decedent's IIM account before making distributions to the heirs. *Id.* The Court caveated that "[a]ny payments ordered by the Court are subject to the approval of [BIA]." *Id.*

At the recommendation of the Field Solicitor, *see* Letter from Field Solicitor to Superintendent, Feb. 19, 2014 (AR 63), on March 5, 2014, BIA's Wewoka Agency Superintendent (Superintendent) approved payment of the fee awards from Decedent's IIM funds, asserting only that "[w]e have made a decision to pay these claims pursuant to 25 CFR 115.105."<sup>6</sup> Letter from Superintendent to Heirs of Ryder Larney (AR 66).

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<sup>4</sup> Larry Larney died on December 6, 2012. Final Order Nunc Pro Tunc at 8.

<sup>5</sup> The Court separately awarded attorney fees to Colclazier, for services rendered in *Estate of Jack Herbert Larney*, No. S-P-07-7, from the IIM account of Jack Herbert Larney, subject to BIA approval. Final Order Nunc Pro Tunc at 6. Those fees were not addressed in BIA's decision and are not at issue in this appeal.

<sup>6</sup> Section 115.105 of 25 C.F.R. provides:

*Funds of a deceased Indian of the Five Civilized Tribes may be disbursed to pay ad valorem and personal property taxes, Federal and State estate and income taxes, obligations approved by the Secretary or his authorized representative*

(continued...)

Appellants appealed to the Regional Director, and on December 2, 2014, the Regional Director affirmed the Superintendent's decision. Decision at 6 (AR 74).

The Regional Director confirmed that the Superintendent "applied the correct law in this situation" but, finding the factual analysis lacking, provided reasoning for why the fees should be paid. *Id.* at 4. He explained that BIA has discretionary authority under § 115.105 to decide whether to abide by a state probate court's order awarding attorney fees from a decedent's IIM account. *Id.* at 3-4 (citing *Smith v. Acting Muskogee Area Director*, 30 IBIA 104 (1996)). And he examined Colclazier's and Pittman's hourly rate and list of services. *See id.* at 4-5 (citing *In re Attorney Fees Request of Joanne Foster*, 12 IBIA 172 (1984)). The Regional Director considered that Appellants had not argued or provided any evidence in opposition to the hourly rate or the number of hours expended on the case, *id.*, and he determined that the fees were reasonable and based on the actual provision of legal services, *id.* at 5. He concluded that Appellants "failed to meet their burden of showing that the . . . decision to pay the attorney fees in accordance with the Final Order . . . is unreasonable under the facts or not supported by law." *Id.* at 6.

Appellants appealed to the Board of Indian Appeals (Board). Appellants filed an opening brief. BIA, Colclazier, and Pittman each filed an answer brief or other responsive pleading.<sup>7</sup> Appellants did not reply.<sup>8</sup>

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(...continued)

prior to death of decedent, expenses of last sickness and burial and claims found to be just and reasonable which are not barred by the statute of limitations, *costs of determining heirs to restricted property by the State courts*, and claims allowed pursuant to part 16 of this chapter.

Emphases added.

<sup>7</sup> Pittman stated that he mistakenly charged Appellants for leaving a message on April 9, 2009, and that the charge "should be removed from my bill." Pittman's Response to Appellants' Document, Mar. 30, 2015, at 2 (unnumbered). BIA should adjust the fee payment to Pittman accordingly.

<sup>8</sup> During the time for filing answer briefs, William Larney submitted documents without certifying that he served the documents on all interested parties, as required by 43 C.F.R. §§ 4.310(b) and 4.333(a), and as advised in the Board's order setting the briefing schedule. Thus, we do not consider them. Even if the Board were to consider the documents, it would not change the outcome. William Larney attended the Court's hearing on attorney fees and consented to payment of Colclazier's fees. *See Court Minute; supra* at 286. The documents add nothing to Appellants' arguments in opposition to the Decision. And the documents raise new issues, which were not raised to the Regional Director and are thus outside the scope of the Board's review of the Decision. *See* 43 C.F.R. § 4.318.

## Standard of Review

Appellants bear the burden of proving that the Regional Director's decision was legally incorrect, was not supported by substantial evidence, or was unreasonable. *See Newtok Traditional Council v. Acting Alaska Regional Director*, 61 IBIA 167, 169-70 (2015); *Kosechata v. Acting Anadarko Area Director*, 33 IBIA 198, 201 (1999) (citing *Smith*, 30 IBIA at 114). This burden is not met by mere disagreement with the decision but must be supported by identifying specific error(s) of law or of material fact. *See Kelley v. Eastern Oklahoma Regional Director*, 54 IBIA 26, 30 (2011). Thus, Appellants are charged with directing the Board's attention to evidence in the record in support of their factual contentions (or, as appropriate, to the absence of evidence supporting the Regional Director's findings) and to citations to the law in support of their legal contentions. *See id.*

## Discussion

On appeal, Appellants argue that Colclazier's attorney fees should not be paid from Decedent's IIM funds, before the distributions to the heirs, because Colclazier did not represent Appellants and they should not be required to pay for Colclazier's services out of their respective shares of the IIM funds. Notice of Appeal, Dec. 28, 2014, at 1-2 (unnumbered); Opening Brief (Br.), Mar. 24, 2015, at 2-4 (unnumbered). Appellants next argue that Pittman has already been paid for the services that he performed. Notice of Appeal at 2 (unnumbered); Opening Br. at 1-2 (unnumbered). They assert that Pittman is not owed additional attorney fees because he withdrew as Appellants' counsel and did not adequately represent their interests. Notice of Appeal at 2 (unnumbered); Opening Br. at 1-2 (unnumbered). Finally, Appellants object to the Oklahoma state court determination that Barefoot Larney was Decedent's common law spouse and an heir. Notice of Appeal at 2-3 (unnumbered); Opening Br. at 4-6 (unnumbered). We address each argument in turn.

Appellants were given notice and an opportunity to present their objections regarding payment of Colclazier's and Pittman's attorney fees to the Court prior to its issuance of the fee awards for which BIA ultimately approved payment. Among the Appellants, only Russell Larney attended the hearing, which was duly noticed, and the heirs in attendance consented to the payment of Colclazier's attorney fees from pre-distribution IIM funds in Decedent's account. *See* Final Order Nunc Pro Tunc at 1-2, 7. Appellants do not argue, much less show, that they raised any objection to the payment of Pittman's fees. Nor did they appeal the Court's awards. Although challenging the awards in the state courts may not have been necessary to preserve Appellants' ability to challenge BIA's decision to approve payment from Decedent's IIM account, their failure to attend the hearing and lodge their objections is relevant in reviewing their arguments that BIA erred in approving payment of the awards. To the extent that they could have raised the same objections in the state court proceeding but failed to do so, they arguably bear a high

burden in seeking to revisit those issues before BIA. To hold otherwise would render the hearing meaningless, and we do not condone the withholding of objections to attorney fees awards until after BIA approves payment.

With that said, Appellants do not even meet the usual burden to show error in BIA's decision. Appellants have not explained why, as a matter of law, Colclazier should not be paid with pre-distribution funds from Decedent's IIM account. Nor do they cite any evidence in the record to contradict, or identify an absence of evidence in the record to support, the Regional Director's conclusions that Colclazier and Pittman provided the legal services for which they billed, and that their hourly rates were reasonable. Instead, Appellants make self-serving and conclusory allegations—including that they have adequately paid for Pittman's services—without providing factual or legal support. Appellants' allegations on appeal amount to mere disagreement with the Regional Director's decision, and are insufficient to meet Appellants' burden to show error in the Decision. *See Kelley*, 54 IBIA at 30.

The Board also rejects Appellants' attempt to re-litigate Barefoot Larney's status as Decedent's common law spouse and an heir. The issue of Barefoot Larney's status is outside the scope of review of the Regional Director's decision, which was limited to approving payment of attorney fees. *See* 43 C.F.R. § 4.318 ("An appeal will be limited to those issues that were before . . . the BIA official on review."). Moreover, Oklahoma state courts have "exclusive jurisdiction of . . . all proceedings to administer estates or to probate the wills of deceased Indians of the Five Civilized Tribes, and of all actions to determine heirs arising under section 1 of the Act of June 14, 1918 (40 Stat. 606)." Act of August 4, 1947, § 3(a), 61 Stat. 731, 732. Appellants cite no authority, and the Board is aware of none, that would permit BIA or the Board to countermand the Court's determination of Decedent's heirs.

### Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's December 2, 2014, decision.

I concur:

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// original signed  
Thomas A. Blaser  
Administrative Judge

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//original signed  
Robert E. Hall  
Administrative Judge