

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Court of Appeals

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FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY

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4 In the Matter of the Estate of:) Case No.: AP2022-0001
5) (Ref: AV2021-0033)
6)
7) OPINION
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Belinda BreMiller and Suzanne Laursen, Counsels for the Appellant.

Before Judges Kyle Fields, Barbara Atwood, and Joseph Hardy Jr.

13 In this case, the Court must decide whether a surviving spouse, who is not currently a
14 member of the Tohono O'odham Nation, may inherit a home that is attached to an assigned
15 homesite. For the reasons listed below, we vacate the Trial Court's decision and remand with
16 instructions.

17 **Background**

18 Mr. Anita passed away on August 18, 2020. When Mr. Anita passed away, he did not have
19 a will. His heirs are Melva Anita Lopez, Mr. Anita's estranged spouse; Rose Martin, Mr. Anita's
20 sister; Evelyn Ortiz, Mr. Anita's sister; and the children of Mr. Anita's deceased sisters, Marlene
21 Baptisto and Darlene Miguel.

22 Eventually, a family member filed a petition to probate Mr. Anita's estate. The Trial Court
23 appointed a personal representative and distributed the personal property to Ms. Lopez, which
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included a vehicle, a bank account, and a pending per capita distribution. The parties, however, disagreed about the distribution of a HUD home, N-026-0028-01, in the Gu Achi District.

1 The other heirs asserted that Ms. Lopez could not take the HUD home because she is not a
2 member of the Nation. In response, Ms. Lopez stated that her mother submitted an application on
3 her behalf about 10 to 15 years ago, but she has yet to hear anything about her membership
4 application. After an evidentiary hearing, the Trial Court awarded Ms. Lopez a lifetime occupancy
5 of the house with the condition that the house would become hers if she became a member. If Ms.
6 Lopez passed away before becoming a member, the house would go to the other heirs.

7 The personal representative filed an interlocutory appeal and the Trial Court stayed its
8 order. We accepted jurisdiction. The Trial Court clarified that Ms. Lopez had a power of
9 appointment to distribute the HUD home to anyone who is eligible to own the HUD home.

10 This Court set the briefing schedule, including multiple extensions of time for filing the
11 briefs. Ms. Lopez did not file a responsive brief.

12 **Analysis**

13 We review the Trial Court’s interpretation of law de novo. *See Tohono O’odham Council*
14 *v. Garcia*, 1 TOR3d 10, 15 (Ct. App. 1989).

15 *A. Attached Structures to Unallotted Land*

16 Under the Tohono O’odham Constitution, all individual developments on the lands of the
17 Tohono O’odham Nation are personal property. T.O. Const. Art. XVI, § 6; *see Chavez v. Sells*
18 *Comm. Land Comm.*, -- TOR --- (Ct. App. May 25, 2022), AP2021-0002 (publication
19 forthcoming). The Constitution provides two functional classifications for unallotted lands. *See*
20 T.O. Const. Art. XVI § 5 (1. Unallotted lands under use, lease, disposition authorized by the
21 Tohono O’odham Council, or assignment made by a district counsel. 2. All other unallotted lands
22 not in the first category, which may be used for “communal pastures and gardens . . . or for public
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purposes of any sort.”).¹ The Constitution also provides that the attached structures to unallotted land are subject to disposal according to the customary procedures of the District or enacted Tohono O’odham law. *Id.* § 6.

The Constitution states that the Districts have the power to assign homesites for beneficial use and occupancy to members of the Tohono O’odham Nation. *Id.* § 4(a). When interpreting the Constitution, the Court reads all the sections as a whole. *See Manuel v. T.O. Legislative Council*, 2021 TOR Supp. 121, 126 (Tr. Ct. Dec. 22, 2016). Likewise, the Court must avoid any interpretation that would render one section void or superfluous. *Id.* at 127.

When reading Sections 4(a) and 6 together as a whole, the Constitution provides that structures attached to unallotted land can be owned only by members. Because the Constitution limits beneficial homesite use and occupancy on unallotted lands only to members, it follows that beneficial use and occupancy of any residential structure permanently attached to a homesite must also be limited to members. *See T.O. Const. Art. XVI, § 4(a)*. For instance, one could not use and occupy a residential structure permanently attached to a homesite without having to use and occupy the homesite. The Court notes that mobile homes or other removable items would be personal property that would not have the same restrictions limiting ownership to members. *See id.* (providing that the District has the power to assign homesites to members to use and occupy).

In this case, Mr. Anita’s HUD home is attached to an assigned homesite in the Gu Achi District. As such, the Court can only distribute it to members of the Tohono O’odham Nation.

B. Determining Membership in a Probate Case

The Constitution lists the requirements for membership. T.O. Const. Art. II, § 1. In a probate case, the Court will determine heirs or identify people named in a will at the beginning of the case. *See generally* 95 C.J.S. Wills § 657 (discussing the start of a probate case). When distributing the estate’s assets, the Court must distribute the assets in accordance with the

¹ Tohono O’odham Constitution Article XVI Section 2 addresses allotted lands.

Constitution. Tohono O’odham law does not specify when the Court must determine if an heir is a member. As a result, the Court will look to Arizona law. *See* 4 T.O.C. Ch. 1 § 1-102 and T.O. R. Gen. Prac. 1(c).

Under Arizona Law, heirs are determined if they survive the decedent (the person who passed away) for 120 hours. *See* A.R.S. §§ 14-2103 & 14-2104. Moreover, Arizona law often uses “time of the decedent’s death” for determining if a person meets the particular qualifications. *See* A.R.S. § 14-1201 (defining multiple terms in accordance with a judicial determination at the time of death). As it can take many years for a person to become a member, the Court finds that determining membership for a potential heir is at the time of the decedent’s death. This would avoid prolonging the finalization and closure of the person’s estate. *See generally* 42 C.J.S. Indians § 21 (discussing the process to become a member of a tribe). As a practical matter, the heir would be in the best position to know if he or she is a member.² Therefore, the potential heir has the burden to show that he or she is a member or in the case of a minor that he or she is eligible to become a member of the Tohono O’odham Nation.

Here, Ms. Lopez stated that her mother submitted a membership application on her behalf 10 to 15 years ago. Ms. Lopez’s parents are not members of the Tohono O’odham Nation, and Ms. Lopez is not a minor. While Ms. Lopez may eventually become a member, the Court must determine membership as of the time of Mr. Anita’s death. Therefore, Ms. Lopez is not a member of the Tohono O’odham Nation for this probate proceeding.

C. Distributions when the Surviving Spouse is not a Member

Under Tohono O’odham case law, the Court distributes an estate to the surviving spouse and to any children of the decedent who are not children of the surviving spouse. *See, e.g., In re Francisco*, 1 TOR3d 55, 56 (Tr. Ct. Jun. 3, 1988).

² An adult has the burden of showing that he or she is a member of the Nation at the time of the decedent’s death. As a practical matter, a minor would have the burden of showing that he or she is eligible to become a member at the time of the decedent’s death.


1 Because the attached structures are on a homesite assignment and the surviving spouse is
2 unable to establish membership, the Court must treat the surviving spouse as if he or she
3 predeceased the decedent as to that asset. *See id.* (discussing how heirs are determined under both
4 Arizona law and Bureau of Indian Affairs' regulations). Under Arizona law, the results are the
5 same. *See* A.R.S. § 14-2103 (providing that if a surviving spouse cannot take an asset, the court
6 distributes the asset to other heirs).

7 In this case, the HUD home can only be distributed to members. Ms. Lopez is not a
8 member. Therefore, the Trial Court erred in granting Ms. Lopez any interest in the HUD home.
9 The Trial Court also erred in granting a power of appointment to Ms. Lopez as the Trial Court
10 should have distributed the HUD home to other heirs by representation.

11 **Conclusion**

12 The Court vacates the orders entered on December 30, 2021 and January 20, 2022. This
13 Court directs the Trial Court to award the HUD home to the other surviving heirs, who are
14 members of the Tohono O'odham Nation. The Court remands the case to the Trial Court.

15 Dated February 8, 2023.

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18 Judge Kyle Fields, for the Court

