



orders issued between August 27, 2021, to and including, the order denying Appellants' Motion to Dismiss filed May 31, 2022, except for the specific order to open probate in Maricopa County Superior Court included within the order filed November 8, 2021. Also, given this decision in AP2022-0002 and the stayed briefing and argument on the second appeal AP2022-0003, we direct the Trial Court to reconsider its orders issued before August 27, 2021, and after May 31, 2022. Appellants are not foreclosed from pursuing their appeal in AP2022-0003 after the Trial Court rules on reconsideration of the remaining Orders.

We have jurisdiction to hear this appeal under the Constitution of the Tohono O'odham Nation (the Nation's Constitution), Article VIII, § 7. The judicial power to adjudicate is in Art. VIII, Sections 2 and 10 of the Nation's Constitution.

#### **I. FACTUAL BACKGROUND**

Cecelia Mae Miller, a member of the Tohono O'odham Nation, died on May 6, 2020. On July 8, 2020, Ms. Miller's family, through Appellants, filed a Petition to Appoint Personal Representative and Probate the Estate, attaching a copy of Ms. Miller's death certificate, proof of enrollment, and a copy of her Last Will and Testament, dated January 7, 2003.

The Trial Court held the initial hearing on August 26, 2020. In its resulting Order filed August 27, 2020, the Trial Court found Cecelia died with a valid will, appointed Appellants as co-personal representatives (also separately ordered on August 27, 2022), required filing of an inventory and appraisal by November 24, 2020, directed filing of the Perry Miller Trust documents, and set a review hearing for February 24, 2021.<sup>1</sup> The Court issued letters of administration on September 9, 2020.

Appellants filed the Perry Miller Trust documents on October 29, 2020. They also filed a Preliminary Probate Report on January 11, 2021, noting Cecelia Mae Miller signed her will

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<sup>1</sup> The Trial Court misstated the review hearing date as February 24, 2020, and corrected that date to February 24, 2021, in a separate Order filed September 15, 2020.

when she signed the Perry Miller Trust (“Trust”). Although Cecelia had consulted an attorney in 2019 to draft a new will and Power of Appointment Trust, the Report said she died before approving and signing those documents. The Appellants also reported that all bank accounts and real estate were located off the Tohono O’odham Nation lands, listed the assets not yet transferred into the Trust, and documented the receivables and debts for the Estate.

The Trial Court issued a Letter of Appointment on January 14, 2021, letting the co-personal representatives act for the Estate, even independent of each other, and let them transfer and convey title to any Estate property. On February 24, 2021, the same day of the review hearing, Sandra Miller, Appellants’ sister, and heir to the Estate, appeared through counsel Roberta Armstrong and objected to any transfer of Cecelia Miller’s 641 W. Linger Lane (“Linger Lane”) home to the Perry Miller Trust. Sandra Miller also objected to any change to the operation and ownership of the Fry Bread House, L.L.C. Before Cecelia Mae Miller’s death, she and Sandra Miller lived together at the Linger Lane home and Sandra managed and ran the Fry Bread House business.

In its resulting Order from the February 24, 2021 review hearing, the Trial Court found Cecelia died with a valid will and testament, found the Linger Lane property was in Maricopa County, Arizona, and asked the parties to brief five issues. First, whether Cecelia Miller had issued any written direction on acts related to the Linger Lane property and the Fry Bread House. Second, whether Cecelia Mae Miller owned the Linger Lane property at her death. Third, whether the statute of frauds would bar Sandra Miller’s claim to the Linger Lane property. Fourth, whether the Maricopa County Superior Court should resolve the dispute over the Linger Lane property given that the property is in Maricopa County and “[the trial] [c]ourt’s subject matter jurisdiction is limited since it cannot entertain a quiet title action”. Fifth and final, whether the Linger Lane property and the Fry Bread House L.L.C. were subject to equal division among the heirs or were subject to the pour over provisions of the existing will. The Trial Court also scheduled a Status Hearing for August 25, 2021.

The parties finished briefing their answers to the Trial Court's questions in late August and the Court held the scheduled August 25, 2021, Status Hearing. The resulting Order recognized the Linger Lane property was not within the Nation's jurisdictional boundaries and held it would "likely overstep its subject-matter jurisdiction by ordering the Linger Lane property is subject to being poured over"<sup>2</sup> to the Perry Miller trust. The Court then set a Status Hearing for October 13, 2021.

On November 8, 2021, the Trial Court issued its Order reviewing the October 13, 2021, Status Hearing. The Court found that it lacked subject matter jurisdiction over the Linger Lane property and directed the parties to file an ancillary probate in the Maricopa County Superior Court. The Court set a status hearing on January 12, 2022, to review the probate's progress.

After the January 12, 2022, status hearing, the trial court denied Appellants' request for a stay of its Order directing the parties to open an ancillary probate for the Linger Lane property in Maricopa County. The Court also set a status hearing for February 16, 2022, at 1:30 p.m.

On February 22, 2022, the Trial Court issued its status hearing order reviewing the case and expressed concern the Appellants had not yet started the ancillary probate in Maricopa County as it had directed on November 8, 2021. The Court repeated that it lacked subject matter jurisdiction over the Linger Lane property and reviewed the basis for its conclusion that Sandra Miller had a claim for unjust enrichment because Appellants had caused an undue delay. Based on these conclusions, the Trial Court directed Sandra Miller's attorneys, Roberta Armstrong and Christopher Jeffery, to file an Affidavit of Attorney's Fees and to serve it on the Appellants. The Trial Court also ordered the parties to exchange specific information it believed would help

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<sup>2</sup> See Trial Court Order filed August 27, 2021. The Court next stated the parties could stipulate to the Court's decision to pour over the Linger Lane property into the trust, and that the stipulation "would result in a fix to the jurisdictional issue." When a court lacks subject matter jurisdiction over all or part of an action, however, the parties cannot "by agreement or consent, confer subject matter jurisdiction on a court where it would not otherwise exist." See *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 596 (App. 2009).

further claims before the Maricopa County Superior Court. Finally, the Court set a status hearing for March 9, 2022.

On March 7, 2022, Appellants filed their request for the Court to issue certified, embossed copies of Cecelia Miller's Last Will and Testament, Letters of Administration issued August 27, 2020, and an Order of the same date finding Cecelia Miller died leaving a valid will. Then, on March 8, 2022, Appellants filed notice they had hired an attorney to help them file the ancillary probate in Maricopa County as ordered, and reported they expected to file it that week.

At the March 9, 2022, status hearing, the Court heard Appellants' request for certified, embossed copies of documents from the record and explained Appellants would receive certified copies of the copy of the will, not the original. At this notice, attorney Roberta Armstrong asked if the Court opened probate with a copy of the will and not the original version. The Court confirmed, noting that Appellants' Petition clarified they filed a copy of the will. The Court offered to have the Appellants testify under oath about the copy of the will they filed and if they knew where the original version of the will was located. The testimony from Appellants and Sandra Miller revealed no one knew the location of Cecelia Miller's original will.<sup>3</sup>

The Court then noted that Roberta Armstrong entered the case after the initial hearing. The Court confirmed it had elicited testimony, to its satisfaction, to open the probate. The Court also affirmed its power to open probate with a copy of the will. The Court let every party present ask questions of the Appellants to elicit testimony and information to determine whether the copy of the will could sustain the probate. After the questioning and having evaluated the testimony, the Court found the copy of the will sufficient to move forward with the probate. No party objected to that finding. The Court then scheduled a continued Status Hearing on March 16, 2022.<sup>4</sup>

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<sup>3</sup> See recording of March 9, 2022, hearing. See also Trial Court Order filed March 11, 2022.

<sup>4</sup> See recording of March 9, 2022, hearing. See also Trial Court Order filed March 11, 2022.

At the continued Status Hearing on March 16, 2022, the Court again confirmed it lacked subject matter jurisdiction over the Linger Lane property and again requested an affidavit of attorneys' fees from Sandra Miller. The Court also placed Richard Perry, Jennifer Miller, and Sandra Miller under oath and asked them questions, and allowed questioning from the parties and counsel present, to determine facts to order payment of the Linger Lane mortgage pending resolution of Sandra Miller's creditor claim. Because of that testimony, the Court ordered Appellants to pay the Linger Lane mortgage from Estate funds pending resolution of Sandra Miller's creditor claim and ordered Sandra Miller to pay for upkeep and utilities on that property.<sup>5</sup>

Roberta Armstrong then followed the Trial Court's direction and on April 4, 2022, filed her affidavit claiming attorney's fees of \$24,825.00, and \$1,345.37 in miscellaneous costs. Ms. Armstrong avowed she would resolve her claims in full for payment of \$15,500 in fees plus costs, if uncontested.

On April 20, 2022, Sandra Miller asked the Trial Court to reconsider its decision to probate a copy of the will, citing Arizona law, at A.R.S. § 14-3415(A), for the rebuttable presumption that a lost original will presumes its destruction and revocation. Ms. Miller also asked the trial Court to terminate the appointment of Appellants as co-personal representatives and to order supervised administration of the Estate. Finally, Sandra Miller asked the Trial Court to allow an emergency partial distribution of the Estate for \$30,000. The Trial Court set these pending motions for hearing on May 19, 2022 and ordered the parties to provide authority for their positions related to Sandra Miller's requests.

On April 22, 2022, Sandra Miller withdrew her request to remove the Appellants as co-personal representatives and withdrew her request for supervised administration. Three days later, Appellants filed their notice of service of the ancillary probate filings in Maricopa County

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<sup>5</sup> See Trial Court Order filed March 18, 2022.

Superior Court. Those filings showed that on April 14, 2022, Appellants had filed their application for informal ancillary probate and informal appointment of co-personal representatives in Maricopa County Superior Court, as the Trial Court had ordered. One week later, on May 2, 2022, Appellants responded and objected to the Trial Court's award of any attorney's fees, arguing that until Ms. Armstrong filed a detailed accounting of such fees, the Court should deny any award.

On May 5, 2022, the Trial Court, on its own initiative, found it had overlooked Arizona's rebuttable presumption that when a will is last seen in a testator's possession, yet cannot be found after death, it is presumed destroyed with intent to revoke. The Trial Court, *sua sponte*, declared it would correct the oversight and "mistake" it made, *nunc pro tunc*<sup>6</sup>. It then entered a decision with notice to the parties under Tohono O'odham Rules of Court, Section 2, Rules of Civil Procedure (T.O.R. Civ. Pro.), Rule 19(a).

The Trial Court explained it was considering prior testimony in its *sua sponte* decision. It reasoned that because Cecelia Miller hired an attorney to prepare a new will that she never signed, because she transferred property out of the Perry Miller Trust and directly to Jennifer Miller, and because she titled her newly bought Linger Lane home in her name and not that of the Perry Miller Trust, she intended to revoke her will and presumably destroyed it. The Trial Court also found Cecelia Miller's actions proved she was "not intent on funding the [Perry Miller] Trust which appears to have been the intent of the 2003 Will". It concluded Cecelia Mae Miller revoked her will and died without a will.

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<sup>6</sup> An order entered *nunc pro tunc* (Latin for "now for then") has little review in this Court's precedent but has extensive review in Arizona's courts which we reference as guidance. A *nunc pro tunc* order is an exercise of the court's inherent power over its records, but it is a ministerial power. A "court may not do more than make its records correspond to the actual facts; it cannot under the guise of amending a minute entry correct any judicial error it may have made or cause an order or judgment that was never in fact made to be placed [on the] record." *Rae v. Brunswick Tire Corp.*, 45 Ariz. 135, 143 (1935). A court should not use such an order "to supply omitted action by the court, but to furnish the record of an action really had, where its recording was omitted through inadvertence or mistake." *See Am. Sur. Co. of NY v. Mosher*, 48 Ariz. 552, 563 (1936). A *nunc pro tunc* order is not meant to supply judicial action but is intended to speak the truth. *See State v. Pyeatt*, 135 Ariz. 141, 143 (App. 1982).

The Trial Court further found, from the record alone, that Appellants had not rebutted the Court's presumption that Cecelia Miller intended to destroy her will. The Court then held Cecelia Miller died intestate. But the Trial Court also sustained Appellants as the co-personal representatives, affirmed they should move forward with the ancillary probate proceedings in Maricopa County, and directed them to quickly address Sandra Miller's creditor claim for her mortgage payments on the Linger Lane property in the Maricopa County action adding to \$68,536.95.

Yet, in the next paragraph of its decision, the Trial Court entered judgment in Sandra Miller's favor for that \$68,536.95 creditor claim bearing interest at 10 percent per year until paid. The Trial Court also entered judgment distributing the Beatitudes Assisted Living Campus entrance fee of \$151,842.87 among the six heirs, ordering each to immediately receive \$25,307.14. Finally, the Trial Court told Appellants that if they did not follow these orders, it would set an Order to Show Cause hearing to determine why they should not be fined, incarcerated, or both.<sup>7</sup>

On May 9, 2022, Appellants moved to set aside the Trial Court's May 5, 2022 Order, arguing they were denied due process and an opportunity to be heard. They argued (1) Sandra Miller's April 20, 2022, motion to reconsider probate of the will copy was untimely, (2) Appellants had no chance to file a Response to Sandra Miller's Motion for Reconsideration before the Trial Court issued its decision, and (3) the Trial Court did not give them opportunity to present evidence and rebut the A.R.S. § 14-3415(A) presumption of a destroyed will underpinning its decision.

The next day, the Trial Court entered an Order and clarified that its May 5, 2022, decision did not stem from Sandra Miller's motion, but its own *sua sponte* decision made after reviewing the audio transcripts, the pleadings, and all filings. The Trial Court explained that it

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<sup>7</sup> See Trial Court Order filed May 5, 2022.



first looked for guidance on lost wills in Tohono O’odham law and O’odham Custom and Tradition and, finding none, looked to A.R.S. § 14-3415(A). The Trial Court then told Appellants they could file a memorandum explaining why they did not tell the Court about the Arizona law and its presumption of a lost will. It also warned Appellants they should be ready at the next status hearing on May 19, 2022, to show proof the Beatitudes refund had been distributed. The Court added it was “very unlikely that the presumption will be rebutted based on the record now before the Court.”<sup>8</sup>

The Trial Court then said it had ordered immediate distribution of the Beatitudes refund and considered its jurisdiction proper because: (1) Appellants had filed their probate action in the Nation’s court; (2) they had consented to its jurisdiction; (3) the Court could look to Arizona law and enter judgment in agreement with the Nation’s law; and (4) the Nation’s Constitution, under Article 1, § 3, let it exercise sovereign powers, authority, and jurisdiction beyond the Nation’s geographical boundaries.<sup>9</sup> Finally, the Trial Court changed its May 5, 2022 Order to assess Sandra Miller’s \$68,536.95 creditor claim against Cecelia Mae Miller’s Estate and the Perry Miller Trust.

On May 10, 2022, attorney Roberta Armstrong filed her amended affidavit for award of attorney’s fees. Two days later, the Trial Court let Alisa J. Gray associate as counsel with Colin Bradley for Appellants. On May 16, 2022, Sandra Miller asked the Trial Court to terminate her share as a primary beneficiary to the Perry Miller Trust.

On May 18, 2022, Appellants moved the Trial Court to dismiss the matter for lack of subject matter jurisdiction, and on May 19, 2022, moved for reconsideration of the Trial Court’s orders of May 5, 2022, and May 10, 2022. On May 27, 2022, the Trial Court issued its Order reviewing the May 19, 2022, status hearing. The Trial Court denied Sandra Miller’s request for emergency partial distribution of \$30,000 from the Estate, finding it lacked jurisdiction because

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<sup>8</sup> See Trial Court Order filed May 10, 2022.

<sup>9</sup> *Id.*

the Trust required the parties file their request in Maricopa County Superior Court. After hearing argument, the Trial Court set aside the Court's previous May 10, 2022 Order directing immediate distribution of the Beatitudes Entrance Fee refund and the \$68,536.95 judgment against Cecelia Mae Miller's Estate and the Perry Miller Trust.

On May 31, 2022, the Trial Court issued its Order denying Appellants' motion to dismiss the case for lack of subject matter jurisdiction. The Court based its decision on the Nation's Constitution's general grant of the Nation's power, authority, and jurisdiction over its members beyond the geographical boundaries of the Nation (Article 1, § 3), the Nation's general power vested in its courts (Article 8, § 1), the specific judicial power of the Nation's courts to decide "cases and matters in law and equity" arising under the Nation's Constitution, the laws and ordinances of or applicable to the Nation, the Nation's customs (Article 8, § 2 & 4 T.O.C. § 1-101(a)), and the specific probate law found at Title 9, Chapter 1, §§ 16 & 17 of the Nation's Code. In concluding that it could exercise subject matter jurisdiction over the probate proceedings, the Trial Court also emphasized that Appellants had petitioned in the Court, had appeared without objection, the interested heirs lodged no objection to the Court's jurisdiction, and Cecelia Mae Miller, Jennifer Miller, and Sandra Miller were members of the Nation.

On June 17, 2022, Appellants filed their timely request for permission to file an interlocutory appeal. *See* Appellate Rule 14 (a).

Appellants then timely filed a Notice of Appeal on September 9, 2022, and an Amended Notice of Appeal, on October 13, 2022, from Trial Court orders issued after May 31, 2022, now captioned AP2022-0003. This Court has consolidated matters AP2022-0002 and AP2022-0003. This decision only addresses the matters raised in AP2022-0002, the Court having found it prudent to let the Trial Court first review its orders issued before August 27, 2021, and after May 31, 2022, given the holdings in this decision.

Should concerns remain after the Trial Court addresses this Court’s instructions, the parties may file notice of their intent to pursue their appeal in AP2022-0003. If so filed, this Court will establish a briefing and argument schedule.

## **II. STANDARD OF REVIEW AND LEGAL ANALYSIS**

We review the Trial Court’s interpretation of the Tohono O’odham Constitution and the Tohono O’odham Nation Tribal Code *de novo*. *See Tohono O’odham Council v. Garcia*, 1 TOR3d 10, 15 (T.O. Ct. App. 1989) (Court of Appeals is not bound by a Trial Court’s conclusions of law). Likewise, we review the Trial Court’s denial of a motion to dismiss for lack of subject matter jurisdiction *de novo*. “A court that lacks subject matter jurisdiction cannot adjudicate the action.” *See State v. Maldonado*, 223 Ariz. 309, 311 (Ariz. 2010).

Appellants seek dismissal of the probate of Cecelia Mae Miller’s Estate, arguing the Trial Court cannot exercise its jurisdiction to probate a Nation member’s estate where all the possessions and property are outside the exterior boundaries of the Nation. Because all of Cecelia Mae Miller’s property and assets lie outside the Nation’s exterior boundaries, they argue the Trial Court should have dismissed the entire action on their request. And although the Trial Court believed it could not exercise subject matter jurisdiction over several parts of Cecelia Mae Miller’s estate, including the Linger Lane property and the Perry Miller Trust, (*see* Orders filed August 27, 2021, November 8, 2021, February 22, 2022, March 18, 2022, May 5, 2022, May 10, 2022), it still denied dismissal in its May 5, 2022, May 10, 2022, and May 30, 2022 orders and awarded money judgments and specific relief about those properties over which it had found it had no subject matter jurisdiction.

The Tohono O’odham Nation’s Constitution grants the Judicial Court power to hear “all cases and matters in law and equity” arising under the Constitution, the laws, and the ordinances of or applicable to the Nation and its customs. *See* Nation’s Constitution, Article 1 § 3, and Article 8, §§ 1, 2, 7, 8, and 10. The Nation’s members also gave their Legislative Council power

to guide the courts and regulate inheritance of personal property and interests in land within the Nation's territory and interests in lands other than allotments consistent with federal law. *See* Nation's Constitution, Article 6, Section 1(c)(5).

Carrying out Article 6, Section 1(c)(5), the Legislative Council has enacted laws and ordinances that describe and define the process for regulating inheritance within the Nation. In Title 9, Chapter 1, Sections 16 and 17 of the Nation's code, Nation's members and "interested" parties can ask the Judicial Court to determine the heirs and divide the estate property of a deceased Nation member. Section 16 speaks to those who die without a will, and Section 17 speaks to those who die with a will. The Judicial Court's Civil Division is charged with hearing "[a]ny action relating to an interest in real or personal property located within the territorial jurisdiction of the Nation, including descent and distribution of a deceased person's estate." *See* Title 4, Chapter 1, Section 1-101(b)(8) of the Nation's Code.

#### **A. Subject Matter Jurisdiction**

Subject matter jurisdiction refers to a Court's constitutional and statutory power to hear and decide a particular case. Whether the Trial Court has subject matter jurisdiction to decide a case is always properly before this Court on review. The Nation's Constitution vests this Court with power to hear "all appeals from the Tohono O'odham Courts." *See* Nation's Constitution at Article 8, § 7; *see also Tohono O'odham Election Board v. San Lucy District 3* TOR3d 14, 15 (T.O. Ct. App. 2008). This Court's subject matter jurisdiction is to review the Trial Court's interpretation, construction, and application of the Nation's laws, and those laws applicable to the Nation, to a particular set of facts and decide whether the Trial Court's decision on appeal aligns with the Nation's Constitution and laws. *See* the Nation's Constitution, Article 6, Section 1(c)(5), Article 8, §§ 1, 2, 7, 8, and 10. This appeal requires nothing but that authority and this Court finds it has subject matter jurisdiction.

For the Trial Court, it can decide the heirs to an estate and divide the decedent's property among those heirs. *See* the Nation's Constitution, Article 8 generally, and the Nation's Domestic Relations Code, Chapter 1, §§ 16 and 17 and Civil Actions Code, Chapter 1, § 1-101(b)(8). This power exists when a member dies without a will, under the Domestic Relations Code, Chapter 1, § 16, or when they die with a will, under § 17. This jurisdiction is not unlimited, however. For example, the Trial Court may not probate allotments and trust property subject to United States jurisdiction<sup>10</sup> and may not probate interests in real or personal property located outside the Nation's territorial jurisdiction.<sup>11</sup>

At the start of any probate action, it can be difficult for the Trial Court to know the entire estate under review and whether all, some, or none of it falls within the Nation's jurisdiction. It is reasonable for any Nation member to ask the Nation's Trial Court to probate the estate of a deceased relative who was a Nation member, no matter the location of the property. Nation members are comfortable with their own court and may not be law trained or aware that another jurisdiction might be a more correct forum. Also, non-lawyers are often unfamiliar with the limitations on a court's jurisdiction, whether the court is tribal, state, or federal. It thus becomes the Trial Court's duty to review the filings and facts before it, which can change at various stages, and to determine its jurisdiction to begin with and as the case proceeds.

When the Trial Court learns that real property in a probate is not within the Nation's territorial jurisdiction, it must decide whether it should keep jurisdiction or dismiss it and direct the parties to file in a more convenient forum. The timing and nature of this decision can vary greatly depending on the extent of the estate and the information before the Trial Court. If the probate cannot continue because of limitations on the Trial Court's jurisdiction, the Trial Court can dismiss the action or, if appropriate under the circumstances, stay all proceedings in deference to a more convenient court with jurisdiction and authority.

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<sup>10</sup> *See* Tohono O'odham Code, Title 9, Domestic Relations, Chapter 1, §§ 16, 17.

<sup>11</sup> *See* Tohono O'odham Code, Title 4, Civil Actions, Chapter 1, Section 1-101(b)(8).

The Trial Court may also move forward through the case for a limited period, only to learn at some later date that another court can more appropriately probate the estate or resolve the problem(s) at issue. Although a court generally may not rule on the merits of a case without first determining that it has subject matter jurisdiction<sup>12</sup> over the cause and personal jurisdiction over the parties, it can dismiss a case without ruling on the jurisdictional questions on grounds of *forum non-conveniens*. See *Sinochem Int'l Co. v. Malaysia Int'l Shipping Co.*, 549 U.S. 422 (2007).

### **B. Forum Non-Conveniens**

The common-law doctrine of *forum non-conveniens* is a non-merits ground for dismissal and is used sparingly. *American Dredging Co. v. Miller*, 510 U.S. 443, 447-48 (1994). It is a court's self-assessment of many considerations that ultimately serve the convenience of the parties, and it may not follow the ordinary rules of venue. As non-merit grounds, it allows consideration, and even dismissal, without resolution of subject matter or personal jurisdiction—even when the court could otherwise find it can validly exercise both forms of jurisdiction. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). It can even override a plaintiff's well-thought choice of venue if it serves the convenience of the parties collectively, the ease of litigation, the interests of judicial economy, fairness, or addresses the court's own administrative and legal difficulties to hear a case. See *American Dredging Co.* at 447-48.

Dismissal for *forum non conveniens* reflects a court's assessment of a range of considerations, most important the convenience to the parties and the practical difficulties resulting from the adjudication of a dispute in a certain locality. *Sinochem Int'l Co. v. Malaysia*

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<sup>12</sup> Here, the Trial Court found that it could hear matters in probate for member estates and found personal jurisdiction over Jennifer Miller and Sandra Miller, based on membership within the Nation, with personal jurisdiction over Richard Perry and the other heirs by their presence and waiver of any objection to jurisdiction. While the Trial Court found that it did not have subject matter jurisdiction over much of the Estate (including the Linger Lane property and the Perry Miller Trust), the Court reasoned that it could exercise jurisdiction over the limited remainder of the Estate but did not provide analysis of the reasons and basis for that decision.

*Int'l Shipping Co.*, 549 U.S. 422, 429 (2007). In deciding whether to dismiss, a court should evaluate private and public factors that impact the efficiency of the court action. The private factors include the ease of access to evidence, the interest of the parties in their connections with the forums, the burden that plaintiff's chosen forum places on the defendant, the ease of obtaining witnesses, the enforceability of judgments, and other practical problems in the case that would interfere with judicial economy. *See generally, Parra v. Continental Tire N. Am., Inc.*, 222 Ariz. 212, 215 (Ariz. App. 2009), references omitted. The public factors include the impact on the court's docket and the local interest in deciding local cases<sup>13</sup>. *Id.* at 217. *See also Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947).

The test that trial courts should use to determine whether an adequate alternate forum is available is simply whether there is an alternate forum with subject matter and personal jurisdiction and whether it can provide the Plaintiff a remedy. Typically, a court will invoke *forum non conveniens* on its own, *sua sponte*, if retaining jurisdiction would consistently create more expense, delay, and practical problems with enforcement compared to the alternate forum. A court may dismiss on *forum non conveniens* grounds without first deciding whether it has jurisdiction to hear the action.

Here, when Appellants filed their first petition to probate Cecelia Mae Miller's Estate, the Trial Court did not have a full accounting of the Estate. Although the Trial Court could determine Cecelia Mae Miller's home and that of the heirs and could also locate most assets identified in the early stages, no party raised concern about the inconvenience or impracticality of the forum. In probate proceedings, the Nation's Courts must always have the power to hear preliminary matters to identify the claims and relevant parties and require an initial inventory and

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<sup>13</sup> Additional factors, in general, are whether the case would cause docket congestion for the Court where filed, if trial would involve using multiple sets of laws and risk confusing a jury, the need to have juries with connection to the case, the local interest in deciding local cases, and holding trial and hearings where the proper law governs. *See Parra v. Continental Tire North America, Inc.*, 222 Ariz. 212, 217 (Ariz. App. 2009), *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947).

accounting. The Nation's Constitution, Article 8, and the Nation's Domestic Relations Code, Chapter 1, §§ 16 and 17 and Civil Actions Code, Chapter 1, § 1-101(b)(8) grant the Trial Court this subject matter jurisdiction.

As a case moves forward, however, it may become clear the Court could not render a final and effective judgment about all matters raised in the probate of the estate and that a more convenient forum is available that would serve the interests of the parties and the administration of justice. Here, the Trial Court could recognize the difficulties it faced in giving complete relief along with the burdens and expense the parties have in litigating within the Tohono O'odham Judiciary compared to the Maricopa County Superior Court. The record and information before the Court at the start of the case gave early notice that most of the Estate assets and debts were located outside the Nation's exterior boundaries, including all the real property. The residence of all parties and decedent reflected locations in central Phoenix and California, rather than within the Nation or its surrounding areas of Tucson, Casa Grande, and Ajo.<sup>14</sup>

On January 11, 2022, Appellants filed their Preliminary Probate Report and avowed that all the real property was located outside the Nation's exterior boundaries, including the Linger Lane property, the single family, three-bedroom house at 4125 N. 6<sup>th</sup> Avenue in Phoenix, Arizona, and the 10-acre plot of land in Pinal County, Arizona. At the time of that report, the only connections the Estate had with the Nation were (1) a secured loan debt agreement between the Community Development Financial Institution of the Tohono O'odham Nation and the FryBread House, L.L.C., an Arizona Corporation based in Phoenix, Arizona, and (2) the membership status of the decedent and two heirs to the Estate.

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<sup>14</sup> At oral argument on December 13, 2022, Sandra Miller argued she had incurred considerable investments of time and expense travelling from her home in Maricopa County each time there was a hearing in the Trial Court. These burdens of travelling to a jurisdiction far from her domicile and the properties in question, along with the consistent application of Arizona law and the location of all estate assets and the heirs outside the Nation's exterior boundaries, illustrates that the Maricopa County Superior Court is the most convenient forum for the action.



In its May 19, 2021, Order, the Trial Court asked the parties to brief whether “the Linger Lane property should be addressed in the Maricopa County Superior Court, since the real property is located in said county”. Based on the parties’ response to its questions and its own review of the record the Court questioned its ability to probate at least part of the Estate because it recognized the property was outside the exterior boundaries of the Nation. In its August 27, 2021, order, the Trial Court told the parties they would need to address probate proceedings related to the Linger Lane property, including Sandra Miller’s creditor claim, in the Maricopa County’s Superior Court because that property was “not located within the jurisdictional boundaries of the Tohono O’odham Nation” and its action would “likely overstep its subject-matter jurisdiction”.

Even more convinced it lacked jurisdiction, on November 8, 2021, the Trial Court unconditionally declared it did not have subject-matter jurisdiction over the Linger Lane property because it was in Maricopa County and the Court ordered Appellants to file an ancillary probate in the Maricopa County Superior Court, specifically to address Sandra Miller’s creditor claim on the Linger Lane property. The Trial Court then repeated this order and reminded the parties of this finding in its Orders filed February 22, 2022, March 18, 2022, and May 5, 2022.

Because of the Trial Court’s legitimate questions about its jurisdiction over several estate assets and its order that Appellants open an ancillary proceeding in Maricopa County Superior Court, the jurisprudential common-law considerations of dismissal for *forum non-conveniens* were implicated. This Court finds the Trial Court, having evaluated the facts before it and doubting its jurisdiction to probate property within Maricopa County, had a basis for dismissal *sua sponte*, even over Appellants’ early objection and, when Appellants, the filing parties who chose the jurisdiction, moved to dismiss on May 20, 2022.

The Trial Court could have appropriately dismissed the action or stayed all proceedings and tried to help with Maricopa County Superior Court’s assumption of primary probate jurisdiction. But after concluding that it lacked jurisdiction over the main assets of the Estate

and having learned that ancillary probate proceedings had been filed, the Trial Court discussed several issues on the merits that pertain to those assets (the subject of AP2022-0003). While the Trial Court may have delayed dismissal to ensure the ancillary probate was underway, the Court lacked jurisdiction over those properties it found outside its subject matter jurisdiction.

Here, Appellants told the Trial Court that ancillary proceedings were underway in Maricopa County on April 25, 2022. That notice showed that on April 14, 2022, Appellants had filed their application for informal ancillary probate and informal appointment of co-personal representatives in Maricopa County Superior Court, as the Trial Court had ordered. Thus, in late April 2022, before the Trial Court issued its merits rulings affecting properties located outside the Nation's exterior boundaries, the private and public interest factors supported a dismissal of all proceedings on *forum non conveniens* grounds.

### **III. RULING**

We take *de novo* review of the Tohono O'odham Constitution and the Tohono O'odham Nation Tribal Code as applied to these facts, including review of a trial court's denial of a motion to dismiss for lack of subject matter jurisdiction. A court that lacks subject matter jurisdiction cannot adjudicate the action. *See Maldonado*, 223 Ariz. at 311, T.O. Rules of Court, Rule 11(h)(3). Under the Nation's Code, the Judicial Court has jurisdiction over probate actions involving the estates of deceased Nation members, but that jurisdiction may be lost if all assets of an estate are located outside the Nation's lands. *See* Title 9, Chapter 1, Sections 16 & 17; Title 4, Chapter 1, Section 1-101(b)(8). Thus, while the Trial Court properly exercised jurisdiction over the initial probate action involving the Miller Estate, when it became clear that all assets in the Estate were located outside the territorial jurisdiction of the Nation, the Trial Court had a duty to determine whether it should continue as the primary forum for probate of the Estate. Given that the doctrine of *forum non conveniens* provides a basis for dismissal or stay, we need not decide the question of subject-matter jurisdiction over the probate proceeding as a whole.

We find there was enough information in the record, as early as May 2021, for the Trial Court's *sua sponte* decision it was not a convenient or practical forum to probate the Miller Estate and that a more convenient forum was available. Without question, the Trial Court's ensuing orders on August 27, 2021, and November 8, 2021, recognized that the Maricopa County Superior Court was the more appropriate forum to probate the Linger Lane property and given similar proximity, the rest of the assets in the estate.

Reviewing the Trial Court's orders issued between the notice of ancillary probate filed April 25, 2022, and the denial of Appellants' Motion to Dismiss filed May 31, 2022, this Court finds the Trial Court lacked subject matter jurisdiction to issue orders affecting property situated outside the exterior boundaries of the Nation. This Court further holds that the most convenient forum to probate Cecelia Mae Miller's estate was and remains in the Superior Court of Maricopa County, as Maricopa County is where most heirs and interested parties live, where all the assets are located, and where the decedent was domiciled.

This Court therefore strikes the Trial Court's orders issued between August 27, 2021, to and including the order denying Appellants' Motion to Dismiss filed May 31, 2022, except for the specific order to open probate in Maricopa County Superior Court included within the order filed November 8, 2021. And the Trial Court is directed to take all necessary steps to transfer the probate proceeding to the Maricopa County Superior Court where the pending open probate of the Estate awaits further resolution.

Recognizing that the consolidated appeal AP2022-0003 seeks review of the Trial Court's orders issued after May 31, 2022, we direct the Trial Court to reconsider those orders and all applicable orders issued before August 27, 2021, given this decision. That appeal is stayed for 60 days to allow the Trial Court's review and notice of its decision on review and reconsideration. Once those 60 days have run, if appealable issues remain in AP2022-0003, the parties may file notice asking this Court to resume the pending appeal, or, if no appealable issues remain, the Appellants may dismiss the appeal.

To protect each party's interests and enable the Maricopa County Superior Court to probate Cecelia Mae Miller's Estate without delay, the parties must file, within 90 days of the date of this order and in the Trial Court, a certificate of compliance they have;

1. submitted to service of process and jurisdiction in Maricopa County Superior Court,

2. waived any defense under the statute of limitations in the open probate in Maricopa County Superior Court,

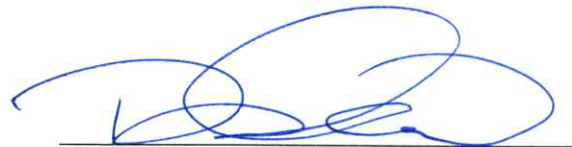
3. made the entire case file in the Nation's Trial Court available to the Maricopa County Superior Court,

4. waived objection to using any product of discovery made until now which they will use in the Maricopa County Superior Court and told the Maricopa County Superior Court they will follow discovery obligations in that Court,

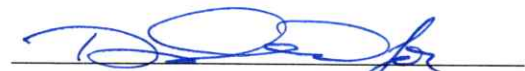
5. lodged notice in the Maricopa County Superior Court of all claims they have against the other party, including attorney's fees and costs, and

6. lodged notice in the Maricopa County Superior Court of all payments they have made and received from Cecelia Mae Miller's estate for any creditor's claim and judgment awarding fees and costs related to this probate.

Dated this January 24, 2023.



Judge David M. Osterfeld



Judge Barbara Atwood



Judge Mashone Antone

