

Chapter 9

PROBATE*

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***Editor's note**—Ord. No. SRO-560-2023, adopted July 19, 2023, repealed the former ch. 9, §§ 9-1—9-3 and 9-25, and enacted a new ch. 9 as set out herein. The former ch. 9 pertained to similar subject matter and derived from the 1976 Code, §§ 4.1—4.3; the 1981 Code, §§ 2-7 and 9-1—9-3; the 2012 Code, §§ 9-1—9-4; Ord. No. SRO-138-91, § 1, adopted March 27, 1991; Ord. No. SRO-150-92, adopted May 6, 1992; Ord. No. SRO-169-93, § 1, adopted Aug. 9, 1993; and Ord. No. SRO-402-2012, adopted May 30, 2012.

ARTICLE I. PURPOSE, POLICY AND DEFINITIONS

Sec. 9-0. Purpose and policy.

(a) *Purpose.* The purpose of this chapter is to provide guidance to the Community, the Community departments and the Community court as to how to process a probate of a decedent's estate.

(b) *Community input in federal law.* The other purpose of this chapter is to provide guidance where federal law allows for tribal input and guidance in the OHA adjudication of trust land and assets that are located within the boundaries of the Community or otherwise under the jurisdiction of the Community.

(c) *Timely adjudication.* It is the policy of the Community to provide its members clarity in the probate process to allow for a fair and expeditious adjudication of a decedent's estate whether testate or intestate.
(Ord. No. SRO-560-2023, 7-19-2023)

Sec. 9-1. Definitions.

AIPRA means the American Indian Probate Reform Act, as may be amended, a federal law that governs the probate of Indian trust land and assets of estates after June 20, 2006.

BIA means the Bureau of Indian Affairs within the Department of the Interior.

CDD means the Community development department, a department of the Community.

Community means the Salt River Pima-Maricopa Indian Community, a federally recognized Indian tribe.

Consolidation agreement means a written agreement by which a decedent's heirs and devisees consolidate interests in trust land, entered during the OHA probate process, and implemented by an OHA issued probate order.¹

Decedent means a person who is deceased.

Devise means a gift of property by will (testate).

¹See 25 USC § 2206(e) and 25 USC § 2206(j)(9).

Devisee means a person or entity that receives property under a will.

Department or *DOI* means the Department of the Interior.

Eligible devisee and eligible heir means, for purposes of trust land or trust assets, any of a decedent's children, grandchildren, great grandchildren, full siblings, half siblings by blood, and parents who are:

- (1) Indian; or
- (2) Lineal descendants within two degrees of consanguinity of an Indian; or
- (3) Owners of a trust or restricted interest in a parcel of land for purposes of inheriting by descent, renunciation, or consolidation agreement, another trust interest in such parcel from the decedent.²

Estate means the land and assets owned by the decedent at the time of death.

Heir means any person or entity eligible to receive land or assets of a decedent in an intestate proceeding.

Indian means:

- (1) Any person who is a member of a federally recognized Indian tribe, is eligible to become a member of any federally recognized Indian tribe, or is an owner (as of October 27, 2004) of an interest in trust or restricted land; or
- (2) Any person meeting the definition of Indian under 25 USC 479; and the regulations promulgated thereunder.

Intestate means the decedent died without a valid will.

Non-testamentary means a written instrument (other than a will) that effectively controls the disposition of property or interest in property after the decedent dies and can include a bank account, individual retirement plan, compensation plan, pension plan, trust, mortgage agreement, marital property agreement, transfer upon death deed, insurance policy, homesite lease. A written instrument is non-testamentary if the

²See 25 USC § 2206.

money or asset is controlled and owned by the decedent before death and the decedent designated a person to whom the money or asset is payable to in the event of the decedent's death. Non-testamentary does not apply to trust land or assets.

OHA means the office of hearings and appeals, a department under the Secretary of the Interior that conducts the probating of Indian trust estates.

Permanent covered improvement means a permanent improvement that is included in the estate of the decedent, and is attached or affixed to a parcel of trust land, including but not limited to a decedent's house. Permanent covered improvements are not trust assets.

Probate means the legal process that affects the distribution of a decedent's estate to:

- (1) Determine the heirs;
- (2) Determine the validity of wills and determine devisees;
- (3) Determine whether claims against the estate will be paid from trust funds (OHA court only);
- (4) Order the transfer of any trust or restricted land or trust assets to the heirs, devisees, or other persons or entities entitled by law to receive the funds or land (OHA court only); and
- (5) Order the transfer of any personal property to the persons determined to be heirs or devisees (Community court only).

Testate means that the decedent executed a valid will.

Testamentary capacity means that a person who is executing a will means to execute their will, knows the extent of their property and knows to whom they are giving their property to.

Trust asset(s) (also known as *trust personalty*) means all funds and securities of any kind that are held in trust in an individual Indian money account (IIM account) or otherwise owned in trust by the United States for the benefit of an individual Indian.

Trust or allotted land means any trust or allotted land or any interest that is held in trust status by the United States for the benefit of individual Indians.

Will means a written document executed with the required formalities and intended to facilitate the passage of the decedent's property upon death (this may include a will for OHA as outlined in section 9-33 or other types of wills for the Community court).

Without regard to waste means, with respect to a life estate interest in land, that the holder of such estate is entitled to the receipt of all income, including bonuses and royalties, from such land to the exclusion of the remainderman. (Ord. No. SRO-560-2023, 7-19-2023)

Secs. 9-2—9-3. Reserved.

ARTICLE II. SCOPE, JURISDICTION AND COURTS

Sec. 9-4. Approval of this probate code by the Secretary of the Interior.

(a) *Federal approval required.* Articles I through IV of the Community's probate code pertain to federal Indian trust lands and assets, and therefore these articles I—IV and any amendments to them must be submitted to the Secretary of the Interior, Department of the Interior ("DOI") for approval.

(b) *Federal requirements.* This article is also required to be consistent with federal law and promote the following policies:

- (1) Prevent further fractionation of trust allotments;
- (2) Consolidate fractional interests and ownership of those interests into usable parcels;
- (3) Consolidate fractional interests in a manner that enhances tribal sovereignty;
- (4) Promote tribal self-sufficiency and self-determination;

- (5) Reverse the effects of the allotment policy on Indian tribes.³
(Ord. No. SRO-560-2023, 7-19-2023)

Sec. 9-5 Jurisdiction over Indian trust (or allotted) land and trust assets matters.

Federal office of hearings and appeals exclusive jurisdiction. Per federal law, office of hearing and appeals ("OHA") has exclusive jurisdiction over the adjudication of probate estates for owners of trust or allotted lands and trust assets (also known as individual Indian monies accounts ("IIM"), trust personalty or trust monies).
(Ord. No. SRO-560-2023, 7-19-2023)

Sec. 9-5.5 Probate services offered by the Community.

(a) *Community development department and probate packages.* The CDD prepares probate packages for submission to the BIA for eventual submission to the OHA. CDD works in close collaboration with the deceased's immediate family to assist the family in locating the required documentation necessary for OHA adjudication. However, the family of the deceased must initiate the OHA probate package process with CDD.

(b) *Legal services office will drafting services.* The Community's legal services office ("LSO") provides estate planning services, specifically, the LSO provides "will drafting" services to enrolled Community members and other Indian landowners who own trust or allotted land within the boundaries of the SRPMIC.
(Ord. No. SRO-560-2023, 7-19-2023)

Sec. 9-6. Jurisdiction over SRPMIC minors and protected persons.

(a) *Not a personal or probate asset.* Per federal law Indian Gaming Regulatory Act ("IGRA") Trusts (also known as IGRA Trusts) are not owned by an individual beneficiary until the assets are distributed out of the SRPMIC Minors or Protected Persons Trust. The SRPMIC Minors and Protected Persons Trust are not a personal

asset nor a probate asset, and are therefore not subject to probate adjudication by any court, including the Community court.

(b) *Consistent with federal law.* The SRPMIC Minors and Protected Person's Trusts are fully consistent with Internal Revenue Service Revenue Procedure 2011-56, "under which the Internal Revenue Service treats an Indian tribe as the grantor and owner of a trust for the receipt of gaming revenues under the Indian Gaming Regulatory Act (25 USC §§ 2701-2721) for the benefit of minors or legal incompetents." Until distributed out of the trust, all trust assets are owned by the Community.

(c) *CDD assistance.* In the event of the death of a beneficiary, the SRPMIC Minors and Protected Person's Trust provides a distribution process. CDD can assist the immediate family of the deceased minor or protected person in initiating the distribution process and gathering all necessary documentation required by BIA and OHA.
(Ord. No. SRO-560-2023, 7-19-2023)

Sec. 9-7. Non-probate or non-testamentary asset when a beneficiary has been named for personal property.

(a) *Designated beneficiary.* When a beneficiary has been designated for a bank account, individual retirement plan, compensation plan, pension plan, trust, mortgage agreement, marital property agreement, transfer upon death deed, insurance policy, homesite lease, or other personal property, it is called a "non-testamentary" asset, meaning that it is not controlled by a will and is outside the testamentary estate. The beneficiary designation on record with the institute of record is controlling and determines who will receive the asset.

(b) *Written instrument.* A written instrument is non-testamentary if the following is met:

- (1) The money or asset is controlled and owned by the decedent before death, and
- (2) In a written instrument, the decedent designated a person to whom the asset is payable in the event of the decedent's death.

³25 C.F.R. 18.106(b)(1)–(5).

(c) *Transfers directly.* Non-testamentary assets allow for personal assets to transfer directly and without delay to the named beneficiary without a probate order.

(d) *Record keeping.* In order, to update a beneficiary designation, it must be done with the institution of record and not through a will. A will does not override the direction already provided to the institution.

(e) *Beneficiary pre-deceases the decedent.* If the beneficiary pre-deceases the decedent, depending on the legal contract and applicable law, the Community court may decide who will take benefit from the non-testamentary asset. (Ord. No. SRO-560-2023, 7-19-2023)

Sec. 9-8. Subject matter jurisdiction regarding personal property.

(a) *Jurisdiction in probate.* The Community court has jurisdiction to administer the probate of an estate's personal property and any real property (that is not federal trust or allotted land under the jurisdiction of the United States) of any enrolled Community member or other nonmember Indian or non-Indian person who, at the time of his or her death, was domiciled or has had significant contacts with the SRPMIC.

(b) *Non-trust land and assets.* The Community court has jurisdiction over all non-trust land and assets including:

- (1) Estates of decedents (excluding any trust land or assets), including construction of wills, determination of heirs, successors of decedents, and estates of protected persons; and
- (2) Protection of minors and incapacitated persons.

(Ord. No. SRO-560-2023, 7-19-2023)

Sec. 9-8.5. Court's authority to appoint an administrator.

The Community court has the authority to appoint an administrator to oversee to the estate. An administrator is the legal representative of the deceased who collects all the assets of the deceased, pays creditors and distributes the remaining assets to the heirs or beneficiaries.

This provision only applies to Community court, and therefore does not pertain to trust land or assets.

(Ord. No. SRO-560-2023, 7-19-2023)

Sec. 9-9. Evidence of death.

In addition to the rules of evidence in courts of general jurisdiction, the following rules relating to a determination of death apply:

- (1) *Certified death certificate for trust land and assets.* A certified copy of a death certificate is required to probate the estate of a person who has an interest in federal land or trust assets. A certified copy of the death certificate shall be attached to the probate petition or provided to the court at least five days before the first hearing.
- (2) *Certified death certificate for personal property.* A certified copy of death certificate is required to probate the estate of a person who has personal property. A certified copy of the death certificate shall be attached to the probate petition or provided to the court at least five days before the first hearing.
- (3) *Presumed dead.* An individual whose death is not established under the preceding paragraphs who is absent for a continuous period of not less than six years, during which he has not been in contact with those who knew him and whose absence is not satisfactorily explained after a diligent search or inquiry, is presumed to be dead via a valid court order.

(Ord. No. SRO-560-2023, 7-19-2023)

Secs. 9-10—9-19. Reserved.

ARTICLE III. HOMESITE LEASE DISPOSITION

Sec. 9-20. Homesites are not a trust interest or asset.

Homesite leases, and any permanent covered improvements on the homesite lease are not a trust asset or interest per federal law.⁴
(Ord. No. SRO-560-2023, 7-19-2023)

Sec. 9-21. Valid homesite lease with beneficiary designated.

(a) *Designated beneficiary for homesite lease.* If there is a valid homesite lease on allotted lands and the lease provides a beneficiary, the beneficiary designation on record with the CDD is controlling and determines who will receive the homesite lease and home for the remaining term of the lease.⁵

(b) *Status as a non-testamentary asset.* As a "non-testamentary asset", a valid homesite lease with a beneficiary designated is not controlled by a will, nor is it superseded by a will.

(c) *Recordation.* A designation of beneficiary on a valid homesite lease is recorded as part of the official title of the homesite lease with the Salt River Land Title and Records Office which is housed in CDD and is the official BIA's chain of title for the homesite and the underlying allotted or tribal lands.

(d) *Transfer by operation of law.* Because the designation of beneficiary is controlling, and ownership of the home will transfer by operation of law. A beneficiary does not need a Community court order announcing the homesite lease ownership change to take possession of the homesite.

- (1) If the beneficiary pre-deceases the homesite lessee, then the Community court

⁴ See 25 USC § 2206(a)(5)(2)(C).

⁵ Per 25 CFR 162.313(a)(5), a homesite lease must identify the ownership of permanent improvements and the responsibility for constructing, operating, maintaining, and managing a permanent improvement.

Also, 25 CFR 162.315 requires a homesite lease to specify who will own any permanent improvements the lessee constructs during the entire lease term.

must decide who will take over the lessee's responsibilities for the remainder of the homesite lease term.

(Ord. No. SRO-560-2023, 7-19-2023)

Sec. 9-22. Valid homesite lease, with no beneficiary designated, and a valid will.

(a) *No beneficiary or no living beneficiary.* If the decedent had a valid homesite lease on allotted lands that does not provide a beneficiary or the beneficiary has pre-deceased the decedent, the Community court shall look to the decedent's valid will as to whom the decedent intended to own their permanent covered improvement and receive the homesite lease for the remainder of the lease term.

(b) *Application to a permanent covered improvement.* If a valid will expressly states how the permanent covered improvement will be handled, then the person designated in the will shall receive the permanent covered improvement.⁶

- (1) Unless otherwise stated in the decedent's valid will, a devise of an interest in trust land shall be presumed to include any permanent covered improvement owned by the decedent that is attached to the trust land.⁷ Therefore, if the valid will only discusses ownership of the allotted lands underlying the homesite lease, the homesite lease and permanent covered improvement should transfer to the same allotted or trust land owners.⁸

(c) *Multiple heirs.* If multiple heirs inherit the home, the individuals must agree who will reside in the home. Such determination should be based on the ability for that individual to pay for the mortgage, if applicable, and qualify for a homesite lease amongst other considerations.

- (1) The residing home owner may move out the home but shall provide notice to the other home owners and the other home owners must agree whom will reside in the home thereafter.

⁶ 43 CFR 30.236(b)(1).

⁷ 25 USC § 2206(h)(1)(B). ⁸ 43 CFR 30.236(b)(2).

- (2) The homesite lease shall be updated with the new residing home owner's information.

(Ord. No. SRO-560-2023, 7-19-2023)

Sec. 9-23. Intestate (no valid lease, no beneficiary and no will).

(a) *Surviving spouse.* If there is a surviving spouse of the decedent, the spouse shall receive a life estate, without regard to waste, in the trust or restricted lands of the decedent, including the homesite lease and the permanent covered improvements there on.

(b) *Eligible heir.* If there was no surviving spouse or when determining the of the remainderman, pursuant to federal law, the home would descend to each eligible heir to whom the underlying trust land descended too; or pass to a recipient of the trust lands pursuant to a renunciation agreement (a situation where the family has agreed as to who should own the home).⁹ The land will vest in the heir in the same trust status as the interest was immediately held in prior to the decedent's death.

(c) *Application to permanent covered improvement.* Per federal law, this provision applies to decedent's lease and the permanent covered improvement when it is attached to decedent's trust land, even though the permanent covered improvement is not a trust asset and does not become a trust asset.

(Ord. No. SRO-560-2023, 7-19-2023)

Secs. 9-24—9-29. Reserved.

ARTICLE IV. TRUST LANDS AND ASSETS

Sec. 9-30. Purpose.

The purpose of this article is to provide guidance, where federal law allows for tribal input, in the OHA adjudication of trust land and assets that are located within the boundaries of the Community or otherwise under the jurisdiction of the Community. OHA will use federal law and this article to adjudication probates involving

⁹25 USC § 2206(a)(5)(2)(A)—(C)(also known as AIPRA).

trust land and assets that are within the boundaries of the Community or otherwise under the jurisdiction of the Community.

(Ord. No. SRO-560-2023, 7-19-2023)

Sec. 9-31. Trust land intestate estate.

Any trust interest in trust land that is not disposed of by a valid will shall descend according to this subsection and applicable federal law.

- (1) *Share of surviving spouse.* If there is a surviving spouse of the decedent, the spouse shall receive a life estate, without regard to waste, in the trust or allotted lands of the decedent, and also the appropriate trust assets as outlined in AIPRA. The remainder of the estate shall pass as set forth below in subsection 9-31(b).

- (2) *No surviving spouse.* Where there is no surviving spouse of the decedent, or there is a remainder interest, the trust or restricted estate or such remainder shall pass as follows:

- a. First, to those of the decedent's children who are eligible heirs in equal shares (or if one or more of such children do not survive the decedent, the children of any such deceased child who are eligible heirs, by right of representation, but only if such children of the deceased child survive the decedent).
- b. Second, if the property does not pass under paragraph (1) of this subsection (b), then to those of the decedent's surviving grandchildren who are eligible heirs, in equal shares.
- c. Third, if the property does not pass under paragraph (1) or (2) of this subsection (b), then to those of the decedent's surviving great-grandchildren who are eligible heirs, in equal shares.
- d. If the property does not pass under paragraph (1), (2) or (3) of this subsection, then to the decedent's

surviving parent or parents who is an eligible heir, and if both parents survive the decedent and are both eligible heirs, to both parents in equal shares.

- e. If the property does not pass under paragraph (1), (2), (3) or (4) of this subsection, then to those of the decedent's surviving siblings who are eligible heirs, in equal shares.
 - f. If the property does not pass under paragraph (1), (2), (3), (4) or (5) of this subsection, then to the Community. Except that notwithstanding paragraph (e), an Indian co-owner (including the Community referred to in paragraph (e)) of a parcel of trust or restricted land may acquire an interest that would otherwise descend under that paragraph by paying into the estate of the decedent, before the close of the probate of the estate, the fair market value of the interest in the land; if more than one Indian co-owner offers to pay for such interest, the highest bidder shall acquire the interest).
- (3) *Escheat for want of heirs.* If there is no eligible heir who can take under the provisions of this chapter, the intestate estate escheats to the Community.
- (4) *Intestate descent of small (less than five percent) interest in trust land.* Any interest in trust land in the decedent's estate that represents less than five percent of the entire undivided ownership of the parcel of land of which such interest is a part, as evidenced by the decedent's estate inventory at the time of the heirship determination, shall descend as stated below:
- a. *Surviving spouse.* If there is a surviving spouse, and such spouse was residing on a parcel of trust or restricted land representing less than five percent of the entire undivided ownership of the parcel of land of

which such interest is a part at the time of the decedent's death, the spouse shall receive a life estate without regard to waste in the decedent's trust or restricted interest in only such parcel, and the remainder interest in that parcel shall pass in accordance with the single heir rule.

- b. *Single heir rule.* Where there is no life estate created for a surviving spouse or there is a remainder interest under that paragraph, the trust or restricted interest or remainder interest that is subject to this part shall descend, in trust or restricted status, to:
 - 1. The decedent's surviving child, but only if such child is an eligible heir; and if two or more surviving children are eligible heirs, then to the oldest of such children;
 - 2. If the interest does not pass under subparagraph 1. of this subsection, the decedent's surviving grandchild, but only if such grandchild is an eligible heir; and if two or more surviving grandchildren are eligible heirs, then to the oldest of such grandchildren;
 - 3. If the interest does not pass under subparagraph 1. or 2. of this section, the decedent's surviving great grandchild, but only if such great grandchild is an eligible heir; and if two or more surviving great grandchildren are eligible heirs, then to the oldest of such great grandchildren;
 - 4. If the interest does not pass under subparagraphs 1., 2., or 3. of this section, then to the Community.
- (5) *Right of representation.* If, under this article, all or any part of the estate of a

decedent is to pass to children of a deceased child by right of representation, that part is to be divided into as many equal shares as there are living children of the decedent and pre-deceased children who left issue who survive the decedent. Each living child of the decedent, if any, shall receive one share, and the share of each pre-deceased child shall be divided equally among the pre-deceased child's children.

- (6) *Requirement that heir survive the decedent for at least 120 hours.* In the case of intestate succession under this article, if an individual fails to survive the decedent by at least 120 hours, as established by clear and convincing evidence:

- a. The individual shall be deemed to have predeceased the decedent for the purpose of intestate succession; and
- b. The heirs of the decedent shall be determined in accordance with this article.

(Ord. No. SRO-560-2023, 7-19-2023)

Sec. 9-33. Wills.

(a) *Who may make a will.* Any person 18 years of age or over and of testamentary capacity, who has any right, title, or interest in trust or restricted land or trust assets, may dispose of trust or restricted land or trust assets by will.

(b) *Requirements for wills.* A will must be executed and dated in writing and attested by two disinterested adult witnesses.

(Ord. No. SRO-560-2023, 7-19-2023)

Sec. 9-34. Testamentary disposition per the terms of a will.

- (a) *Eligible devisee.* Per federal law, the owner of a trust or restricted interest in land may only devise such interest to an eligible devisee who meets the following requirements:

- (1) Any lineal descendant of the testator,

- (2) Any person who owns a pre-existing undivided trust or restricted interest in the same parcel of land,
- (3) The Community, or
- (4) Any Indian.¹⁰

(b) *Prohibited devisee.* The Community will not prohibit the devise of trust land or assets to any Indian descendent of an original allottee, and an Indian who is a member from another Indian tribe, unless this prohibited devisee renounces their interest to an eligible devisee, or there is an opportunity for the decedent's spouse to obtain a life estate without regard to waste, or there is payment in fair market value to the prohibited devisee.¹¹

(c) *Rules of interpretation.* Any devise of a trust land pursuant to section 9-34(a) above to an Indian or the Community shall be deemed to be a devise of the interest in trust status. Any devise of a trust interest in land to a person who is only eligible to be a devisee under paragraph (a)(1) or (a)(2) above shall be presumed to be a devise of the interest in trust status unless language in such devise clearly evidences an intent on the part of the testator that the interest is to pass as a life estate or fee interest in accordance with section 9-34 (d) below.

(d) *Devise of a trust land as a life estate.* Except as provided for under any applicable federal law, any trust interest in land that is not devised in accordance with subsection 9-34(a) above may be devised only as:

- (1) A life estate to any person, with the remainder being devised only in accordance with subsection 9-34(a), or
- (2) Except as provided in subsection 9-34(b), as a fee interest without federal restrictions against alienation to any person who is not eligible to be a devisee under the definition of "Indian."¹²

(e) *Invalid devises and wills.* Any trust or restricted interest in land or trust assets that is not devised in accordance with the above sec-

¹⁰ See 25 USC § 2206.

¹¹ See 25 USC § 2205(a)(3).

¹² See 25 USC § 2206.

tions or that is not disposed of by a valid will shall descend in accordance section 9-31, intestate.

(f) *Presumption of joint tenancy with the right of survivorship.* If a testator devises trust or restricted interests in the same parcel of land to more than one person, in the absence of clear and express language in the devise stating that the interest is to pass to the devisees as tenants in common, the devise shall be presumed to create a joint tenancy with the right of survivorship in the interests involved.

(Ord. No. SRO-560-2023, 7-19-2023)

Secs. 9-35—9-39. Reserved.

ARTICLE V. MISCELLANEOUS

Sec. 9-40. Miscellaneous.

(a) *Reserved rights of adoptees.* A termination of parental rights order shall not prevent a child or person from receiving an inheritance from their natural born parents.

(b) *Severability.* If any provision of this chapter or its application to any person or circumstance is held invalid, the remainder of this chapter or the application of the provision to other persons or circumstances shall remain valid and shall not be thereby affected.

(Ord. No. SRO-560-2023, 7-19-2023)

