

## Probate Law Outline

- For cases relating to general property interests, including customary trusts, *see* Property Outline.
- For cases relating to constructive trusts, *see* Equity Outline.

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## I. General probate concepts

### A. Jurisdiction

- Pursuant to 7 N.N.C. § 252, the Family Court of the Navajo Nation has original jurisdiction over probate matters arising on the Navajo Nation. *In the Matter of the Estate of Lee*, 8 Nav. R. 820 (Ship. Dist. Ct. 2004).
- Pursuant to 8 N.N.C. § 1, the Navajo Family Court has original jurisdiction over distribution of deceased Indian's unrestricted property found within the court's territorial jurisdiction. *In the Matter of the Estate of Lee*, 8 Nav. R. 820 (Ship. Dist. Ct. 2004).
- The family court has original jurisdiction over probate matters. *In the Matter of the Estate of Kindle*, 8 Nav. R. 150 (Nav. Sup. Ct. 2001).
- The courts of the Navajo Nation have the authority to probate the unrestricted property of the decedent. *Matter of Estate of Wauneka*, 5 Nav. R. 79 (Nav. Sup. Ct. 1986).

### B. *Diné bi beenahaz'áanii*

- Although the Navajo Probate Code states that state law should apply unless custom is "proved," the subsequent passage of the statute affirming the Fundamental Laws of the Diné, and the amendment of the choice of law provision in Title 7 of the Code means that a trial court may take judicial notice of *Dine' Bi Beenahaz 'aanii*. *Matter of Estate of Kindle*, No. SC-CV-40-05, slip op. (Nav. Sup. Ct. May 18, 2006).

### C. Peacemaking

- It is reversible error for court to fail to give notice of peacemaking session to heir entitled to per stirpes distribution pursuant to alleged oral will. *In the Matter of the Estate of Kindle*, 8 Nav. R. 150 (Nav. Sup. Ct. 2001).

### D. Definitions

#### 1. "Immediate family"

- Father and step-sister who did not participate in life of deceased were not "immediate family" for purposes of inheriting non-producing property. *In the Matter of the Estate of Tsinahnajinnie*, 8 Nav. R. 69 (Nav. Sup. Ct. 2001).
- Immediate family encompasses those related by blood who give each other mutual assistance and support. *Estate of Howard*, 7 Nav. R. 262 (Nav. Sup. Ct. 1997).
- Immediate family included both the children and other relations who co-resided with the decedent. *Estate of Joe Thomas*, 6 Nav. R. 51 (Nav. Sup. Ct. 1988).
- Immediate family encompasses those related by blood who give each other mutual assistance and support. *Matter of Estate of Apachee*, 4 Nav. R. 178 (W.R. Dist. Ct. 1983).
- ~~Children of the decedent's first marriage, who were not living with the decedent when he died, are not members of the immediate family for the purpose of an oral will.~~ *Estate of Benally*, 1 Nav. R. 219 (Nav. Ct. App. 1978) overruled by *Estate of Joe Thomas*, 6 Nav. R. 51 (Nav. Sup. Ct. 1988).

## 2. “Productive” and “non-productive property”

- Property capable of producing, like land, sheep and grazing permits, are “productive goods”. These benefit the whole family. *Matter of Estate of Chee*, 6 Nav. R. 460 (W.R. Dist. Ct. 1989).
- Tools, jewelry and non-subsistence livestock are “non-productive goods”. These benefit the individual. *Matter of Estate of Chee*, 6 Nav. R. 460 (W.R. Dist. Ct. 1989).
- Property capable of producing, like land, sheep and grazing permits, are “productive goods”. These benefit the whole family. Tools, jewelry and non-subsistence livestock are “non-productive goods”. These benefit the individual. *Matter of Estate of Apachee*, 4 Nav. R. 178 (W.R. Dist. Ct. 1983).

## II. Pleadings and procedure

- Trial court erred in dismissing petition where petitioner proved not to be an heir. Petition may be brought by one claiming to be an heir. *In the Matter of the Estate of Kindle*, No. SC-CV-40-05, slip op. (Nav. Sup. Ct. May 18, 2006).
- Any member of the Navajo Nation claiming to be an heir may petition family court to determine heirs and divide property. *In the Matter of the Estate of Kindle*, 8 Nav. R. 150 (Nav. Sup. Ct. 2001).

## III. Wills

### A. Oral wills

#### 1. General

- Navajo courts recognize oral wills. *Estate of Howard*, 7 Nav. R. 262 (Nav. Sup. Ct. 1997).
- There is a well-established custom that a Navajo may orally state who shall have his property after his death when all of his immediate family are present and agree. *Estate of Joe Thomas*, 6 Nav. R. 51 (Nav. Sup. Ct. 1988).
- Navajo custom is for family members to get together to discuss distribution of a person’s property after their death. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).
- Navajo courts recognize oral wills. *Estate of Benally*, 1 Nav. R. 219 (Nav. Ct. App. 1978).
- There is a well-established custom that a Navajo may orally state who shall have his property after his death when all of his immediate family are present and agree. *Matter of Estate of Lee*, 1 Nav. R. 27 (Nav. Ct. App. 1971).

#### 2. Evidence of will

- Court did not err in disregarding oral will when party neglected to enter evidence of oral will despite ample opportunity. *In the Matter of the Estate of Kindle*, No. SC-CV-40-05, slip op. (Nav. Sup. Ct. May 18, 2006).
- The Navajo Nation has never adopted a Dead Man’s Act, and a person may testify about statements made by the deceased for the purpose of establishing the existence of an oral will. *Estate of Benally*, 1 Nav. R. 219 (Nav. Ct. App. 1978).
- ~~A party to an action against the estate will not be permitted to testify as to a transaction with or statement by the deceased.~~ *Matter of Estate of Lee*, 1 Nav. R. 27 (Nav. Ct. App. 1971). Although

there is no express reference to the case, this concept was rejected in *Estate of Benally*, 1 Nav. R. 219 (Nav. Ct. App. 1978).

### 3. Immediate family

- Unless all members of the family are present and agree, a Navajo cannot make an oral will. *Estate of Howard*, 7 Nav. R. 262 (Nav. Sup. Ct. 1997).
- All the children of the testator, including the spouse, if living, must be present in order for an oral will to be valid. *Estate of Joe Thomas*, 6 Nav. R. 51 (Nav. Sup. Ct. 1988).
- No oral will is made unless all members of family are present. *Matter of Estate of Thomas*, 5 Nav. R. 232 (W.R. Dist. Ct. 1987).
- ~~Children from previous marriage do not have to be present for oral will.~~ *Matter of Estate of Thomas*, 5 Nav. R. 232 (W.R. Dist. Ct. 1987) reversed on appeal *Estate of Joe Thomas*, 6 Nav. R. 51 (Nav. Sup. Ct. 1988).
- Navajo custom is that family members meet to discuss a person's property matters after that person's death. *Estate of Benally*, 1 Nav. R. 219 (Nav. Ct. App. 1978).
- Unless all members of the family are present and agree, a Navajo cannot make an oral will. *Estate of Benally*, 1 Nav. R. 219 (Nav. Ct. App. 1978).
- Navajo custom is that family members meet to discuss a person's property matters after that person's death. *Matter of Estate of Lee*, 1 Nav. R. 27 (Nav. Ct. App. 1971).
- Unless all members of the family are present and agree, a Navajo cannot make an oral will. *Matter of Estate of Lee*, 1 Nav. R. 27 (Nav. Ct. App. 1971).

### B. Written wills

- Unless a will is established by Navajo custom, it must be in writing made in writing and signed by the decedent in the presence of two witnesses who also sign the will. *Matter of Estate of Lee*, 1 Nav. R. 27 (Nav. Ct. App. 1971).

## IV. Intestate estates

### A. Determination of heirs

#### 1. Generally

- In intestate succession, children of the decedent are second in order, brothers and sisters sixth, and nephews and nieces seventh. *Dawes v. Yazzie*, 5 Nav. R. 161 (Nav. Sup. Ct. 1987).

#### 2. Navajo custom

- Pursuant to 8 N.N.C. § 2(b), in the determination of heirs the court shall apply the custom of the Tribe as to inheritance if such custom is proved. Otherwise, the court shall apply state law in deciding what relatives of the decedent are entitled to be heirs. *In the Matter of the Estate of Lee*, 8 Nav. R. 820 (Ship. Dist. Ct. 2004).
- Navajo Nation Courts have interpreted 7 N.N.C. § 204 to mean that Navajo law shall apply whenever possible. However, the application of Navajo custom is not automatic and requires the Courts to thoroughly evaluate and examine the matter before them. *In the Matter of the Estate of Lee*, 8 Nav. R. 820 (Ship. Dist. Ct. 2004).

- Navajo courts apply Navajo inheritance customs, but if a custom is not proved, the court may apply state law to determine the heirs of a decedent. *In the Matter of the Estate of Kindle*, 8 Nav. R. 150 (Nav. Sup. Ct. 2001).
- The property of decedent belonged to his wife and children living with him at the time of his death according to Tribal custom. *Matter of Estate of Bighthumb*, 6 Nav. R. 453 (W.R. Dist. Ct. 1989).
- The property of decedent belonged to his wife and children living with him at the time of his death according to Tribal custom. *Matter of Estate of Bighthumb*, 6 Nav. R. 453 (W.R. Dist. Ct. 1989).
- The court shall apply the Navajo custom as to inheritance, if such custom is proven, to establish heirs. *Estate of Joe Thomas*, 6 Nav. R. 51 (Nav. Sup. Ct. 1988).
- In traditional Navajo inheritance customs, children were always provided for. *Estate of Joe Thomas*, 6 Nav. R. 51 (Nav. Sup. Ct. 1988).
- In the determination of heirs the court shall apply the custom of the Tribe as to inheritance if such custom is proved. Otherwise, the court shall apply state law in deciding what relatives of the decedent are entitled to be his heirs. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).
- Navajo custom is that family members meet to discuss a person's property matters after that person's death. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).
- If there is shown to be a Navajo custom concerning the distribution of the property, the property will descend according to that custom, even if the custom is in conflict with any other provision of the Navajo Rules of Probate Procedure. *Dawes v. Yazzie*, 5 Nav. R. 161 (Nav. Sup. Ct. 1987).
- In the determination of heirs the court shall apply the custom of the Tribe as to inheritance if such custom is proved. Otherwise, the court shall apply state law in deciding what relatives of the decedent are entitled to be his heirs. *Dawes v. Yazzie*, 5 Nav. R. 161 (Nav. Sup. Ct. 1987).
- If there is shown to be a Navajo custom concerning the distribution of the property, the property will descend according to the custom, even if the custom is in conflict with any other provisions of the Probate Rules. *In re Estate of Belone*, 5 Nav. R. 151 (Nav. Sup. Ct. 1987).
- Navajo custom, if proven, controls the distribution of intestate property. Custom take priority even if it conflicts with our Rules of Probate. *Matter of Estate of Wauneka*, 5 Nav. R. 79 (Nav. Sup. Ct. 1986).
- Navajo courts award intestate property to the most suitable heir. *Matter of Estate of Wauneka*, 5 Nav. R. 79 (Nav. Sup. Ct. 1986).
- In the determination of heirs the court shall apply the custom of the Tribe as to inheritance if such custom is proved. Otherwise, the court shall apply state law in deciding what relatives of the decedent are entitled to be his heirs. *Matter of Estate of Apachee*, 4 Nav. R. 178 (W.R. Dist. Ct. 1983).
- The property of decedent belonged to his wife and children living with him at the time of his death according to Tribal custom. *Matter of Trust of Benally*, 1 Nav. R. 10 (Nav. Ct. App. 1969).

### 3. Federal law

- The Navajo courts will apply the beneficiary rules of the Federal Employees' Group Life Insurance Act. *Estate of Jumbo*, 6 Nav. R. 171 (Nav. Sup. Ct. 1990).

### 4. State law

- Pursuant to 7 N.N.C. § 204(C) any matters not covered by the traditional customs and usages or laws or regulations of the Navajo Nation or by applicable federal laws and regulations, may be decided by the courts of the Navajo Nation according to the laws of the state in which the matter in dispute may lie. *In the Matter of the Estate of Lee*, 8 Nav. R. 820 (Ship. Dist. Ct. 2004).

- In the New Mexico part of the Navajo Nation, where a decedent has no surviving spouse, the properties is divided among the issue. *In the Matter of the Estate of Kindle*, 8 Nav. R. 150 (Nav. Sup. Ct. 2001).
- If the decedent is survived by a spouse and by issue, in Arizona, if all of the children of the decedent are also children of the surviving spouse, the spouse gets everything. *Matter of Estate of Bighthumb*, 6 Nav. R. 453 (W.R. Dist. Ct. 1989).
- Under New Mexico law, if a decedent leaves a will that fails to pervade for one or more of his children, whether born before or after the will was executed, the omitted child receives a share in the estate equal in value to that which he would have received under the intestate succession law. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).
- Under New Mexico law, if the decedent did not leave a will, the decedent's half of the community property also goes to the surviving spouse. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).

## 5. Per stirpes distributions

- A child may step into their deceased parent's shoes for a per stirpes distribution. *In the Matter of the Estate of Kindle*, 8 Nav. R. 150 (Nav. Sup. Ct. 2001).

## B. Distribution of property

### 1. Producing property

- The object of Navajo common law probate is to benefit the camp or residence group as a unit in the case of productive property. *Estate of Howard*, 7 Nav. R. 262 (Nav. Sup. Ct. 1997).
- Productive property, in this case a tractor, is family property not community property. *Matter of Estate of Chee*, 6 Nav. R. 460 (W.R. Dist. Ct. 1989).
- Under Navajo custom, productive goods remain with the camp. *Estate of Joe Thomas*, 6 Nav. R. 51 (Nav. Sup. Ct. 1988).
- Under Navajo custom, productive goods remain with the camp. *Matter of Estate of Apachee*, 4 Nav. R. 178 (W.R. Dist. Ct. 1983).
- The object of Navajo common law probate is to benefit the camp or residence group as a unit in the case of productive property. *Matter of Estate of Apachee*, 4 Nav. R. 178 (W.R. Dist. Ct. 1983).

### 2. Non-producing property

- In an estate without a will, non-producing property such as money should be distributed to the immediate family. *In the Matter of the Estate of Tsinahnajinnie*, 8 Nav. R. 69 (Nav. Sup. Ct. 2001).
- Father and step-sister who did not participate in life of deceased were not "immediate family" for purposes of inheriting non-producing property. *In the Matter of the Estate of Tsinahnajinnie*, 8 Nav. R. 69 (Nav. Sup. Ct. 2001).
- The object of Navajo common law probate is to benefit those living together and those in need in the case of nonproductive property. *Estate of Howard*, 7 Nav. R. 262 (Nav. Sup. Ct. 1997).
- Under Navajo custom, the supervised distribution of nonproductive goods was made during a gathering of the decedent's children, other immediate family members and other relatives not living in the camp. *Estate of Joe Thomas*, 6 Nav. R. 51 (Nav. Sup. Ct. 1988).

- Distribution of non-productive goods was based on immediacy to decedent and need. Children were always provided for. *Estate of Joe Thomas*, 6 Nav. R. 51 (Nav. Sup. Ct. 1988).
- Under Navajo custom, the supervised distribution of non-productive goods was made during a gathering of the decedent's children, other immediate family members and other relatives not living in the camp. *Matter of Estate of Apachee*, 4 Nav. R. 178 (W.R. Dist. Ct. 1983).
- Distribution of non-productive goods was based on immediacy to decedent and need. Children were always provided for. *Matter of Estate of Apachee*, 4 Nav. R. 178 (W.R. Dist. Ct. 1983).
- The object of Navajo common law probate is to benefit those living together and those in need in the case of non-productive property. *Matter of Estate of Apachee*, 4 Nav. R. 178 (W.R. Dist. Ct. 1983).

### 3. Community property

- Whenever a decedent is survived by a spouse, the court probating the estate must first determine what part of the estate is community property, and what part was the decedent's separate property. In doing so, the court must apply the laws of the state in which the decedent resided, interpreted in light of the Navajo Rules of Probate Procedure and Navajo case law. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).
- On the death of a spouse, one-half of the community property belongs to the surviving spouse, and cannot be willed away. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).
- Insurance policy obtained and paid for during marriage is community property and spouse is entitled to half of the proceeds upon the death of the insured. *Matter of Estate of Tsosie*, 5 Nav. R. 232 (W.R. Dist. Ct. 1986).
- Upon death of husband, one-half of the community property goes to the wife. This one-half is not part of the probate estate and cannot be willed away by the decedent. *Matter of Estate of Tsosie*, 4 Nav. R. 198 (W.R. Dist. Ct. 1983).

### 4. Separate property

- One-fourth of the decedent's separate property goes to the surviving spouse, and the remaining three-fourths goes to the decedent's children. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).

### 5. Land rights and grazing permits

- A grazing permit is like the sacred mountain bundle where life exists and should continue to be cared for and remain within the caretaker's clan. For example, if the permit came from the paternal side, then it should remain with them. Likewise, if it came from the maternal side, then it should remain with them. Only if children exist, then the children should be included and the surviving spouse should hold the permit for the welfare of the children. This is the teaching of the grazing permit holders in the Diné Culture. *In the Matter of the Estate of Luna*, 8 Nav. R. 779 (Kay. Fam. Ct. 2003).
- Although land use and grazing permits are sold or passed through inheritance, all transfers are subject to regulation by district land boards and grazing committees. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).
- Tribal courts have authority to order that land use permits be transferred to the decedent's most logical heir. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).

- Navajo land policy, which opposes dividing the land into ever smaller parcels, precludes the literal application intestate succession laws under some circumstances. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).
- Land placed in a customary trust is held for the benefit of the family unit. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).
- Navajo land policy, which opposes dividing the land into ever smaller parcels, precludes the literal application intestate succession laws under some circumstances. *Matter of Estate of Wauneka*, 5 Nav. R. 79 (Nav. Sup. Ct. 1986).
- The descendant in the best position to use land should inherit the possessory right to the land. *Matter of Estate of Wauneka*, 5 Nav. R. 79 (Nav. Sup. Ct. 1986).

#### 6. Personal effects

- The decedent's parents and siblings are entitled to one item of the decedent's personal effects, as selected by the family. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).

#### 7. Insurance proceeds

- Insurance policy obtained and paid for during marriage is community property and spouse is entitled to half of the proceeds upon the death of the insured. *Matter of Estate of Tsosie*, 5 Nav. R. 232 (W.R. Dist. Ct. 1986).
- Heir not designated as beneficiary in insurance policy is not entitled to proceeds. *Matter of Estate of Tsosie*, 5 Nav. R. 232 (W.R. Dist. Ct. 1986).

#### 8. Distribution to surviving spouse

- Rule 6(3)(a), Nav.R.Prob.P., indicates that the surviving spouse gets everything if all the children of decedent are also children of the surviving spouse. *In the Matter of the Estate of Luna*, 8 Nav. R. 779 (Kay. Fam. Ct. 2003).

### V. Administrators and Executors

- The administrator of an estate is a trustee for the benefit of the heirs and creditors of the estate. *In the Matter of the Estate of Tsinahnajinnie*, 8 Nav. R. 69 (Nav. Sup. Ct. 2001).
- The administrator is the proper representative of the estate and where the estate's interest is involved he may sue and be sued. *Matter of Estate of Wauneka*, 5 Nav. R. 79 (Nav. Sup. Ct. 1986).
- The administrator's primary duty is marshalling the assets of the estate. *Matter of Estate of Wauneka*, 5 Nav. R. 79 (Nav. Sup. Ct. 1986).
- The administrator's duty requires that he maintain all necessary actions to recover property of the estate including suits against unauthorized users of the estate property. *Matter of Estate of Wauneka*, 5 Nav. R. 79 (Nav. Sup. Ct. 1986).

### VI. *Inter vivos* gifts

- The question of whether a party has a rightful claim to a trailer received as a gift lies in the area of property law not contract law. *Green Tree Servicing v. Bahe*, 8 Nav. R. 885 (Chin. Dist. Ct. 2005).

- Navajo law concerning gifts follows American law: to constitute an inter vivos gift, there must be intent, delivery and vesting of irrevocable title upon such delivery. *Green Tree Servicing v. Bahe*, 8 Nav. R. 885 (Chin. Dist. Ct. 2005).
- Navajo custom does not differ from what the courts have stated are the elements necessary to establish a gift, which gives the receiver of the gift superior claim to possession over all other parties. Once a gift is given, the gift is irrevocable and it belongs to the receiver. *Green Tree Servicing v. Bahe*, 8 Nav. R. 885 (Chin. Dist. Ct. 2005).
- Public handing over of a prize is sufficient to show donative intent. The transfer of the keys to a gifted mobile home shows delivery. *Green Tree Servicing v. Bahe*, 8 Nav. R. 885 (Chin. Dist. Ct. 2005).
- To constitute an inter vivos gift, there must be donative intent, delivery and the vesting of irrevocable title upon such delivery. *Damon v. Damon*, 8 Nav. R. 226 (Nav. Sup. Ct. 2002).
- Delivery comprehends any acts or conduct of the donor which a court will regard as legally sufficient to manifest an intention to transfer ownership from donor to donee. *Damon v. Damon*, 8 Nav. R. 226 (Nav. Sup. Ct. 2002).
- To complete gift of mobile home, title must be transferred. *Damon v. Damon*, 8 Nav. R. 226 (Nav. Sup. Ct. 2002).
- To make a valid gift, there must be delivery amounting to present transfer of title. *Damon v. Damon*, 8 Nav. R. 226 (Nav. Sup. Ct. 2002).
- A gift of property evidenced by a written instrument executed by the donor is valid without a manual delivery of the property. *Damon v. Damon*, 8 Nav. R. 226 (Nav. Sup. Ct. 2002).
- A gift has been judicially defined as a voluntary transfer of property by one to another, without any consideration or compensation. *Damon v. Damon*, 8 Nav. R. 226 (Nav. Sup. Ct. 2002).
- A gift is a voluntary transaction without consideration. Until the donor has divested himself absolutely and irrevocably of the title, dominion and control of the subject of the gift, he has the power to revoke, and a court of equity will not compel him to complete his gift. *Damon v. Damon*, 8 Nav. R. 226 (Nav. Sup. Ct. 2002).
- To constitute an inter vivos gift, there must be donative intent, delivery and the vesting of irrevocable title upon such delivery. *Matter of Estate of Nelson*, 1 Nav. R. 162 (Nav. Ct. App. 1977).
- To make a valid gift, there must be delivery amounting to present transfer of title. *Matter of Estate of Nelson*, 1 Nav. R. 162 (Nav. Ct. App. 1977).
- A gift may be revoked before it is completed. *Matter of Estate of Nelson*, 1 Nav. R. 162 (Nav. Ct. App. 1977).
- To make a valid gift, there must be delivery amounting to present transfer of title. *Matter of Estate of Nelson*, 1 Nav. R. 273 (Ship. Dist. Ct. 1977).