

April 7, 1947

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ARIZONA ATTORNEY GENERAL

Mr. Allen D. Sanford, Jr.
U.S. Department of Interior
Office of Indian Affairs
4100 Rhoads Circle
Phoenix, Arizona

Dear Mr. Sanford:

In your letter of February 13, 1947, you ask our opinion on the status of the Arizona law with respect to the descent and distribution of unrestricted Indian property and Indian custom marriages and divorces. As the first proposition you mention, "the department, of course, has no jurisdiction over the unrestricted property of deceased restricted Indians. Therefore this office would like to be advised of the state's position in such matters."

The Federal law where imposed by Congress or implemented by ruling of the Secretary of Interior is, of course, pre-eminent on the question of the rights and duties of restricted Indians. Congress has plenary authority over the Indians and all their tribal relations and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage or dependency and it rests with Congress to determine when the relationship shall cease. Winston v. Amos, 255 U.S. 373, 65 L. Ed. 684.

As you mention in your letter the Department of Interior has full jurisdiction to determine heirship in all cases where restricted property is involved, 25 USCA, sections 371, 373. Under the various acts of congress, the question of legitimacy is decided and ascertainment of the heirs of an allottee rests with the Secretary.

With respect to unrestricted property (and this includes, by Section 399 of 25 USCA, allotments finally vesting by patents in fees) Congress has made no provision except to declare in section 399, supra, that "each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state and territory of which they may reside". Thus with respect to allotted land finally vested, Congress itself has provided that the land shall be subject to state law and this includes the law of descent.

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It seems to be the general rule that unrestricted property in general passes by the law of descent of the state in which the restricted Indian and the land is situated. It was stated as follows in Gray v. McKnight, 183 P. 493 (Okla.):

"As we have already seen, although the decedent's allotment descended to his heirs according to the Oklahoma laws of descent, during the trust period the state courts were without jurisdiction to determine who, in fact, were his heirs, and this condition existed at the time of the appointment of the executor for his estate. However, the probate court of Caddo county lacked jurisdiction to determine who in fact were his heirs only because the plenary authority to legislate for the Indians relative to their allotted lands rested solely with Congress, and not because the Oklahoma law did not make provisions therefor. The county courts of this state, in the exercise of their probate jurisdiction, have jurisdiction to determine heirship in the distribution of the estate of a deceased person. It follows that when the Secretary of Interior, pursuant to the aforementioned act of Congress, issued a patent to the heirs of John Nestell, which operated to remove all restrictions as to the sale, incumbrance, or taxation of the land therein conveyed, without having determined subsequent to his death who were in fact his heirs, all federal supervision over the allotment ceased, and the same became a part of the estate of the said decedent, and came within the jurisdiction of the probate court of Caddo county, and was subject to be distributed to his heirs the same as any other property of which he died seized, although it was not subject to the payment of his debts, or to be taken pursuant to any contract made prior to the removal of restrictions on the land. The probate court of Caddo county was, therefore, acting within its jurisdiction in determining who, in fact were heirs of the decedent, and in ordering the estate distributed according to such findings."

On this same subject the Supreme Court of the United States ruled in the case of Kendall v. Ewart, 259 U. S. 139, 66 L.

Ed. 362, that "there being no Congressional legislation providing for such intestate property, the state law is applicable, and we think the administrator is a competent party to exert the right of the state, whatever it may be, to rents and royalties derived from the land during Red La Jo's lifetime." There is contrary authority in early decisions, such as Oklahoma Land Company v. Shuman, 137 Pac. 8, (Okla.) and Thorn v. Hood, 25 Kan. 372, but these cases either turn on special tribal treaties giving the tribes exclusive authority over their domestic affairs or were decided at a time prior to the present federal legislation. Arizona courts have not passed upon this subject but we believe they would follow the rule announced in the Gray case.

Your second question involves the attitude of Arizona toward Indian custom marriages and divorces. The general rule is set out in the Oklahoma Land Company case, supra, where it is stated that marriages and divorces by reservation Indians which are valid by established tribal custom will be recognized as such by the state in which the tribe is situated. The same is followed in Hussac v. McKinney, 270 Fed. 1036, (Okla.), and the numerous cases cited in an annotation in 74 A.L.R. at page 1538.

In the early Arizona case in the Estate of Walker, 5 Ariz. 74, the tribal marriage of Walker, a white man, to the Alma squaw was held null and void under a territorial miscegenation law. The attitude taken by the court was that this tribal marriage was governed by the territorial rule on the subject which was the Federal law. Cases upholding such marriages in other states were distinguished on this principle of the identity of the sovereignty. In view of our subsequent statehood and the deletion of "Indians" from the miscegenation law by Chapter 12, Laws 1912, (1st Special Session) the Walker case is no longer authority on the subject of tribal marriages. You mention in your letter the situation where an off-the-reservation civil marriage is followed by a tribal divorce. There is no law that we could find on this subject, but we believe it would be the better policy to require such civil marriages to be covered by civil divorce since the parties have submitted themselves to the civil law. This is the safe rule on the subject and would save all parties from, for example, the jeopardy of a bigamy charge by the state.

Our opinion therefore on these subjects may be summarized as follows: the descent of unrestricted property of restricted Indians, where not determined by Federal law, is governed

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by the Arizona law of descent; and the ceremonial marriages and divorces of restricted Indians which are valid by established tribal custom are of the same force and effect in this state.

Very truly yours,

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Attorney General

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