

CHEROKEE COUNCIL HOUSE
CHEROKEE, NORTH CAROLINA

Date: MAR 14 2019

ORDINANCE NO. 519 (2019)

WHEREAS, Tribal law reserves to the Tribe "[t]he power and responsibility to control ... the manner and method of inheritance and devise" of possessory holdings in Tribal trust land (C.C. § 47B-2(b)).

WHEREAS, Tribal law and practice allow enrolled members to give their possessory holdings, and improvements thereon, to beneficiaries named in the respective enrolled member's will; and

WHEREAS, if the enrolled member dies with a will, Tribal Council relies on the will and Tribal law to determine to whom the deceased's possessory holdings should be distributed; and

WHEREAS, if the enrolled member dies without a will, or with a will that fails in a relevant respect, Tribal Council relies on the law of intestate succession to determine who should inherit the possessory holdings; and

WHEREAS, enrolled members rightfully expect Tribal Council to honor and give effect to the distributions made by enrolled members in their lawful wills, so long as the distributions are consistent with Tribal law; and

WHEREAS, the Cherokee Code does not provide adequate guidance to Tribal Council or to enrolled members regarding how and when wills should be honored by Tribal Council for the purpose of inheritance of possessory holdings; and

WHEREAS, this ordinance amends Cherokee Code Chapter 28 to provide that guidance.

NOW THEREFORE BE IT ORDAINED by the Eastern Band of Cherokee Indians in Tribal Council assembled, at which a quorum is present, that Cherokee Code Chapter 28 is hereby amended by adding the following new sections:

Sec. 28-1. - Inheritance laws of North Carolina adopted.

(a) For purposes of determining the identity of the lawful heirs of Tribal members for the inheritance of both personal and real property, the Tribal Council does hereby adopt the laws of intestate succession and other inheritance laws, including laws governing wills, of the State of North Carolina, except as those laws conflict with the provisions of this chapter. In the case of conflict, this chapter shall control. Further ~~Exception~~ to North Carolina inheritance law: The Tribe follows "per stirpes" distribution rather than the North Carolina rule of per capita distribution.

(b) Upon written request from the Cherokee Court or the BIA Tribal Realty Program, the Tribal Enrollment Office shall provide a list of the descendants of a deceased enrolled member. Such list shall be based on documentation on file with the Enrollment Office and shall not include descendants who are not recognized as heirs under North Carolina law, including the following:

(1) Children who have been formally adopted are not the heirs of their birth parents, but are the heirs of their adoptive parents.

(2) Children born out of wedlock are not the heirs of a putative father, unless they have been recognized as his children by a court order or by a formal acknowledgement duly executed by the putative father.

The Enrollment Office shall consult with the Office of the Attorney General when in doubt about whether the documentation on file establishes that a descendant is an heir.

(c) The Cherokee Court and BIA Tribal Realty shall establish such procedures as are necessary to ensure that:

(1) A surviving spouse married to the decedent at the time of his or her death is included as an heir, and

(2) Notice of the descendant list is posted or published for at least 10 days to allow any potential heir who is not listed the opportunity to present documentation proving that s/he is an heir.

The final determination regarding the heirs of a deceased enrolled member shall be made by the Cherokee Court for personal property and by the Tribal Council for real property. Decisions of the Cherokee Court may be appealed to the Cherokee Supreme Court; decisions of the Tribal Council are not subject to appeal to the Cherokee Supreme Court.

28-5. Role of Tribal Council regarding estates.

(a) Tribal Council's role regarding the estate of a deceased enrolled member of this Tribe shall be limited to determining the proper assignment and distribution of the possessory holdings (and improvements thereon) of the deceased member in a manner that is consistent with Tribal law and the lawful, governing will of the deceased enrolled member, if such a will exists and is presented.

(b) Tribal Council has the sole authority and responsibility to determine the proper assignment and distribution of possessory holdings that are part of the estate of a deceased enrolled member; provided, however, that Tribal Council may, by resolution, delegate this authority and responsibility to the Lands Committee or to the Business Committee.

28-6. Tribal Council shall give effect to lawful wills.

(a) Tribal Council's assignment and distribution of a possessory holding that is part of the estate of a deceased Tribal member is proper if: (1) the action is consistent with Tribal law; and (2) the action is consistent with the scheme of distribution provided by the testator in his or her lawful, governing will, if such a will exists and is presented to Tribal Council.

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2 (b) If an enrolled member of the Tribe dies intestate, the Tribe shall apply the law of intestate
3 succession adopted in C.C. § 28-1, to determine the proper assignment and distribution of
4 the deceased's possessory holdings.

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6 (c) When making its determinations, Tribal Council shall be guided by the following general
7 rules of construction:

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9 1. If a lawful will applies, the plain language of the will shall control.

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11 2. If a lawful will applies but is ambiguous in some manner regarding a possessory
12 holding, Tribal Council shall attempt to resolve the ambiguity by attempting to
13 ascertain the testator's intent when the testator executed the will, and that intent
14 shall be derived from the words used in the will. When construing a will, Tribal
15 Council should place itself as nearly as practicable in the position of the testator at
16 the time the testator executed the will, and the will should be considered in the light
17 of the conditions and attendant circumstances that existed when the will was
18 executed. In this subsection, the phrase "attendant circumstances" refers to the
19 relationships between the testator and the beneficiaries named in the will, and the
20 condition, nature and extent of the testator's possessory holdings at the time the
21 will was made; provided, however, consideration of attendant circumstances shall
22 not be used to alter the plain language of the will.

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24 3. Testators make wills, witnesses do not. Extrinsic evidence provided by witnesses,
25 that is, evidence that is not expressed on the pages of the will itself, shall not be
26 used to establish the intent of the testator, but only to establish the identity of
27 beneficiaries and of possessory holdings.

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29 (d) In this Chapter, the terms possessory interest and possessory holding are used
30 interchangeably, and include the improvements located thereon.

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33 BE IT FINALLY ORDAINED that all ordinances that are inconsistent with this ordinance are
34 rescinded, and that this ordinance shall become effective when ratified by the
35 Principal Chief.

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38 *Submitted by Principal Chief Richard G. Sneed and the Office of the Attorney General*
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