

**ULC/MODEL TRIBAL PROBATE CODE  
WORKING MEMO: BACKGROUND ISSUES**

**I. OVERVIEW: HISTORICAL CONTEXT**

**A. General**

1. The story of the relationship between tribes, tribal members, and the federal government has always been about land.
2. “Title by conquest” (legal limits on ownership) and reservation policy (physical limits on ownership).

**B. The Allotment Era**

1. Privatized reservations by dividing up land and parceling it out, in individual ownership, to tribal members.
  - a. Trust Allotments: Dawes Act, aka General Allotment Act. Title retained by federal government; individual allottee took as beneficiary.
  - b. Restricted Fee Allotments: Curtis Act, 5 Tribes. Title transferred to individual allottee, but transfers restricted absent secretarial approval. *See generally* Katherine R. Guzman, *Give or Take an Acre: Property Norms and the Indian Consolidation Act*, 85 IOWA L. REV 595, (2000).
2. “Although the roots of allotment extend back to the Colonial period, the Dawes Allotment Act of 1887 was the first comprehensive proposal to replace tribal consciousness with an understanding of the value of private property.” Douglas Nash & Cecilia Burke, *The Changing Landscape of Indian Estate Planning and Probate: The American Indian Probate Reform Act*, 5 SEATTLE J. FOR SOC. JUST. 121, 124 (2006).
3. For cultural and legal reasons, most allottees died intestate. “State law determined the identity of the heirs, even though state courts did not have jurisdiction over Indian probate proceedings.” Diane K. Lutt, *The American Indian Probate Reform Act: A Five-Year Review*, 51 WASHBURN L. J. 105, 111 (2011); *see also* 24 Stat. 388, 389. Until recently, “allotments descended through the general rules of intestate succession and probate that were applicable to non-Indian interests in the state where the Indian land interest was situated.” Casey Roth-Petherick,

*Estate Planning for Indian Land in Oklahoma: A Practitioner's Guide*, 84 Ok. B. J. (2013). There was little uniformity in applicable law or forum for Indian land from state to state. *Id.*

### **C. Fractionation**

1. Allotment policy plus intestate succession drove land fractionation, or the situation where many individuals hold what may be minute interests in the same land. This creates economic inefficiencies, as the costs of managing a small interest may well exceed its economic value.
2. Examples:
  - a. Real Property: tract of land discussed in *Hodel v. Irving* which has 439 owners, the largest yielding \$82.85/year, the smallest, less than .01 each 177 years. 1/3 of the interests generate less than .05/year in rent. Were the parcel to sell for \$8,000, the smallest owner would take .000418 of the proceeds. *See, e.g., KRISTIN RUPPEL, UNEARTHING INDIAN LAND: LIVING WITH THE LEGACIES OF ALLOTMENT* (Univ. of Arizona Press 2008).  
  
There are over 2.9 million fractional interests in land owned by about 219,000 individuals. [OST Report.]
  - b. Personal Property: DOI maintains about 380,000 open IIM accounts; costs of maintaining each account exceeds 45.00/year, or over 17,000,000 /year. Probate administration of each takes over 2 years, w/ average cost exceeding 3k no matter the size of the underlying estate. There are approximately 40k IIM “estate” accounts. [OST Report.]

### **D. Ending Allotment/Reconsolidating Land**

1. Indian Reorganization Act (IRA) (1934)
  - a. Ended policy of allotment, IRA goals of “self determination, economic development, and a revival of tribalism among Indians.” Lutt at 111-12.
  - b. Member of tribe that adopted IRA could only devise trust land by will to “Indians, tribes w/ jurisdiction over the land, or non-Indian heirs or lineal descendants”; procedure for probate “muddled and tedious.” *Id.*

2. Indian Land Consolidation Acts (ILCA, versions 1&2) (80s-90s)
  - a. Attempted to deal with ongoing legacy of failed allotment policy through, e.g., forced consolidation of small fractional interests through “escheat” to the tribe.
  - b. Failed constitutional muster both as originally enacted and as amended. *See Hodel v. Irving*, 481 U.S. 704 (1987) and *Babbitt v. Youpee*, 519 U.S. 234 (1997).

Original ILCA, 96 Stat. 2519 § 207 (1985)	Amended ILCA 26 U.S.C.A. § 2206 (1984)
“No undivided fractional interest in any [trust or restricted Indian land] shall [descend] by intestacy or devise but shall escheat to that tribe if such interest represents 2 [%] or less of the total acreage in such tract and has earned to its owner less than \$100 [in the year preceding death].”	(a) “No undivided interest held by a member or nonmember Indian in any [trust or restricted Indian land] shall descend by intestacy or devise but shall escheat to the [recognized tribal government possessing jurisdiction] if such interest represents 2 [%] or less of the total acreage in such tract and is incapable of earning \$100 in any [1 of 5 years succeeding death].”
	(b) “Nothing in this section shall prohibit the devise of such an escheatable fractional interest to [anyone who already owns an interest in the parcel or tract].”
	(c) “[A]ny Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section ... [as long as it does not] fail[] to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.”
Overall effect: Bars both descent and devise of “escheatable interest”	Overall effect: Bars descent, limits but does not bar devise of “escheatable interest”

- c. *See generally* Guzman, *supra*; Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001); Jessica Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729 (2003); Stacy L. Leeds, *Borrowing from Blackacre: Expanding Tribal Land Bases Through the Creation of Future Interests and Joint Tenancies*, 80 N. D. L. Rev. 827 (2004).

**II. OVERVIEW: LEGAL/JURISDICTIONAL CONTEXT**

**A. General**

Substantive and jurisdictional control over the decedent’s estate varies depending on the decedent’s domicile at death, the tribe to which the decedent belongs, and the type and situs of the subject property.

**B. Primary Jurisdictional Issues**

Trust or Restricted Real Property; Trust Personal Property (IIM Accounts)	Non-Trust or Restricted Real or Personal Property Subject to Tribal Jurisdiction	Non-Trust or Restricted Real or Personal Property Not Subject to Tribal Jurisdiction (located off-reservation)
<p><u>Controlling Substantive Law:</u> Federal Probate Code (American Indian Probate Reform Act, or “AIPRA”) absent SOI-approved Tribal Probate Code.</p> <p>Pub. L. 108-374, 118 Stat. 1773, codified as amended 25 USC §§ 2201-2226 (enacted 10/27/04; effective 6/20/2006). <i>See also</i> ILCA 1983/1984, Pub. L. No. 97-459; 96 Stat. 2517; ILCA 2000, Pub. L. No. 106-462, 114 Stat. 1991 (never implemented).</p> <p><u>Probate Proceeding:</u> initiated by BIA, completed at Office of Hearings &amp; Appeals (admin forum w/in DOI). Implementation: 43 CFR Subt.A, Pt. 4, Subpt. D &amp; tit.30; 25 CFR Ch. I, Subch. C, pt. 15</p>	<p><u>Controlling Substantive Law:</u> Tribal Probate Code (if any) or other relevant tribal law.</p> <p><u>Probate Proceeding:</u> Tribal Court, tribe has exclusive probate jurisdiction.</p> <p><i>See</i> Cohen §16.05[1]</p>	<p><u>Controlling Substantive Law:</u> law of decedent’s domicile at death (personal property) or situs (real property).</p> <p><u>Probate Proceeding:</u> State proceeding, state probate court. Note that ancillary probate may be required for real property located in a different jurisdiction.</p> <p>Often referred to as “fee” or “taxable” land.</p>

**C. Exceptions**

Exempt Tribes	5 Tribes	Osage
<p>AIPRA’s provisions regarding descent &amp; distribution do not affect specific legislation.</p>	<p>Choctaw, Creek, Cherokee, Chickasaw, Seminole; exempt from GAA &amp; AIPRA; <i>see</i> Curtis Act</p>	<p>Exempt from AIPRA</p>
<p><i>See</i> 25 U.S.C. § 2206(g); <i>see also</i> 25 U.S.C. §§ 564(h) (Klamath); 697 (Western Oregon); 747 (Paiute of Utah).</p> <p><i>See also</i> Cohen at § 1605[2][c] and n. 40 (noting Devil’s Lake Sioux and Umatilla).</p>	<p>Fee allotment; title vested in individual but federal restrictions on alienation absent approval.</p>	<p>Federal law severed mineral interests of Osage lands from surface and reserved them to the tribe; common ownership by members. Federal government maintained oversight of individual allotments but managed under special set of rules.</p>
	<p>Specific statutes keyed on such factors as tribe, age &amp; blood quantum of transferor, land status (homestead v. surplus). <i>See</i> Rarick Chacts and 1947 Act, 61 Stat. 731 (applicable law for testate &amp; intestate succession; law of state of Oklahoma with forum as Oklahoma District Court). Must have ½ or greater Indian blood of 5T to hold 5T property in restricted status. [Petherick at 1030]. FB wills must be approved if disinherit parent, spouse or children. Act of April 26, 1906 (34 Stat. 137) amended by Act of May 27, 1908 (35 Stat. 312), and 58 O.S. § 901.</p> <p><i>See also</i> 25 C.F.R Part 16.</p>	<p>25 C.F.R. part 17; Dept. of Interior role in probating Osage estates; procedures &amp; appeal processes from superintendent decision.</p>

## D. Tribal Probate Codes

### 1. Non-trust or restricted real property; non-trust personal property

Tribal Probate Codes may govern the probate of non-trust or restricted real property or personal property (which is instead governed by federal law). Enactments vary in breadth and specificity. Some simply reference and incorporate the law of the state in which the tribal property exists.

### 2. Trust or restricted real property; trust personal property

- a. AIPRA permits procedurally compliant Tribal Probate Codes (TPC) to override its provisions for trust or restricted lands (but not personal property) located within its reservation or otherwise subject to its jurisdiction. *See* 25 U.S.C § 2205; 25 C.F.R. §§ 18.101-12.
- b. The TPC may include rules of intestate succession and “other tribal probate code provisions [which presumably include testate succession, probate, and will substitutes] that are consistent with Federal law and that promote the policies set forth in section 102 of the Indian Land Consolidation Act Amendments of 2000.” 25 U.S.C. § 2205(a)(2). Although it is arguable that this “consistency directive” does not apply to rules regarding intestate succession, it appears that Secretarial approval will not issue absent this determination of the TPC as a whole. 25 U.S.C. § 2205(b)(2)(C).
- c. Policies of ILCA section 102, PL 106–462, November 7, 2000, 114 Stat 1991:
  - i. prevent the further fractionation of trust allotments made to Indians;
  - ii. to consolidate fractional interests and ownership of those interests into usable parcels;
  - iii. to consolidate fractional interests in a manner that enhances tribal sovereignty;
  - iv. to promote tribal self-sufficiency and self-determination; &
  - v. to reverse the effects of the allotment policy on Indian tribes.
- d. The Secretary “shall not approve” any TPC that prohibits the testate devise of TR/RP to (1) an Indian lineal descendant of the original allottee or (2) an Indian “who is not a member of the

Indian tribe with jurisdiction” unless the code also provides for

- i. code-compliant renunciation of interests to eligible devisees;
  - ii. the ability for a devisee who is T’s spouse or lineal descendant to reserve a life estate without regard to waste; and
  - iii. payment by tribe of FMV to that devisee as per subsection (c)(2) of 2205.
- e. Although many tribes have submitted codes, only a small number have been approved. *See, e.g.*, AMERICAN INDIAN PROBATE REFORM ACT: HEARING BEFORE THE S. COMM. ON INDIAN AFFAIRS, 112th Cong. 7 (2011) (statement of Majel M. Russell, General Counsel for Coalition of Large Tribes). It appears that approval has only been granted for the codes of the Confederated Tribes of the Umatilla, the Lummi Nation, the Oglala Sioux, and the Nez Perce. *See, e.g.*, INSTITUTE FOR INDIAN ESTATE PLANNING AND PROBATE, TRIBAL PROBATE CODE MATRIX 1, <http://www.law.seattleu.edu>]

### **III. AMERICAN INDIAN PROBATE REFORM ACT**

#### **A. General**

1. Brief History of Passage/Components; AIPRA consulted w/ the tribes, and early versions “took form in 3 separate bills.” Lutt, *supra*, at 115.
2. Overview/Key Goals
  - a. Reduce fractionation (e.g. single heir rule; partition/consolidation; encourage will-making & estate planning with role of education to encourage avoidance of both AIPRA and fractionation);
  - b. Facilitate creation of TPC
  - c. Fill gaps of Federal Probate Law
  - d. Create efficiencies/cost savings; Congressional Budget Office projections

3. Overview Key Provisions: Complex, but understanding necessary to extent TPC “consistent w/” same pre-Secretarial approval.

**B. Intestate Succession [2206(a)]**

1. Scheme

- a. Basic

Real Property Interests = to or Greater Than 5% of the entire undivided ownership interest in the parcel		Real Property Interests Lesser Than 5% of the entire undivided ownership interest in the parcel [2206(a)(2)(D)]
1 <sup>st</sup> : Surviving spouse plus:		1 <sup>st</sup> : Surviving spouse LE [if resided on parcel at decedent’s death], w/out impeachment for waste.
+ 1 or more “EH”:  1/3 of T/PP LE (no waste) in TR/RP	No “EH”:  all T/PP LE (no waste) in TR/RP	Below: halts fractionation/like primogeniture
2 <sup>nd</sup> : “Other Heirs” [no SS, or remainder; modified parentelic 2 <sup>nd</sup> w/ limited rep]  EH children + GC w/ representation; if 0, to  EH GGC = shares; if none, to  EH parent(s); if none, to  EH sibling(s) =; if none, to  Tribe w/ jxdn [Except Indian co-owner can pay FMV before probate closes; highest bidder]; if none, to  co-owners equally; if none, to  US (SOI sell for acquisition fund; right of 1 <sup>st</sup> refusal in contiguous owner)		2 <sup>nd</sup> : “Single Heir” [no SS, or remainder; 1 <sup>st</sup> parentela, 3 degrees, “+”]  Oldest EH child; if none, to  Oldest EH GC; if none, to  Oldest EH GGC; if none, to  Tribe w/ jxdn; if none, to  Co-owners equally; if none, to  US (SOI sell for acquisition fund)  each must be an EH, or eligible heir; SOI determines “oldest” status



- b. Eligible Heir "EH": 25 U.S.C. § 2201(9): any of decedent's children, grandchildren, great-grandchildren, full or ½ siblings by blood, and parents [limited representation w/in 1<sup>st</sup> & 2<sup>nd</sup> parentelas] who are:
  - i. Indian: (actual or eligible to become member of any tribe) or owner of TR/RP as of 10/27/04 or meets IRA definition under 25 U.S.C. § 479 or special CA definition) or
  - ii. Lineal descendants w/in 2 degrees of consanguinity of an Indian or
  - iii. co-owners of a TR/RP interest in the decedent's parcel
  - iv. note: no blood quantum requirement for EH or "Indian," although tribe can impose same for membership

2. Status and Alteration issues

- a. Lifetime gift of T/PP to EH treated as advancement if such intent reflected in either contemporaneous writing by decedent or any writing by heir; not charged against share of predeceasing advancee's issue
- b. Heir related through 2 succession lines takes single, larger share
- c. Must survive by 120 hours as proven by C&C evidence
- d. Renunciation or disclaimer is possible. The "Single Heir" can renounce in writing to:
  - i. other EH or Indian person related to EH by blood;
  - ii. 1 other co-owner; or
  - iii. Tribe

**C. Testate Succession (§ 2206(b))**

1. General Rules [less expansive than state codes, which maximize testamentary freedom]

TR/Real Property (2206(b)(1); (b)(2))		T/Personal Property (2206 (b)(3))	
If devise to any (1) “Indian” or (2) tribe with jxdn, then:	If devise to (3) T’s lineal descendant or (4) co-owner who is not also ◀◀, then:	can be devised to any person or any entity	
“Deemed” to be in TR status	“Presumed” to be in TR status unless clear intent to transfer as LE or fee as below.		
If not devised as above, can <u>only</u> pass as: LE to <i>anyone</i> but w/ remainder either as in 1-4 above (or for IRA tribes, as below)	OR	if to eligible devisee 1-4, remains in trust	if not, outright distribution in fee
except as per below, as an unrestricted fee to any non-Indian (unless IRA tribe absent tribal request to DOI).			
TR/RP IRA lands can only be devised under 25 U.S.C. § 464, or as 1-4 above or in LE w/ remainder in 1-4 above, unless duly adopted tribal enactment (e.g. constitution or by-laws) requests SOI to permit devise in fee.			
If either will is invalid or devise violates rules above, the interest passes through intestate succession.		If will is invalid, the interest passes through intestate succession.	

**D. Interpretation Issues**

1. Presume JTWROS absent “clear & express” contrary language
2. Presume that will passes all T’s TR/RP and T/PP owned at death
  - a. Presume that TR/RP includes interest in attached “permanent improvements”

- b. even where not held in trust and w/out affective its non-trust status
3. When a class gift is used:
    - a. Presume against relationships by affinity (e.g. in-laws, nephews by marriage); presume for relationships “by the half blood”
    - b. “heirs,” “next of kin,” “relatives” and “family” means those who would take in intestacy as determined at T’s death
    - c. classes other than those just above are determined at enjoyment, with right of representation in member’s issue
  4. “Die without issue” means decedent’s death, not bloodline
  5. Lapse applies w/in third parentela to the “lineal descendants” of the predeceasing beneficiary.
    - a. Re lapsed/void devises and class gifts, non-marital children are considered the children of both biological parents
    - b. Gifts not saved by anti-lapse fall into the residuary estate and be proportionately divided among the residuary devisees.
    - c. Absent a specific devise, the family cemetery plot will not pass through the residuary estate, but instead will pass through intestate succession.
  6. Status Issues
    - a. “Heir by killing” treated as predeceased w/r/t testate and intestate succession, as surviving spouse, under a right of survivorship, or under any future interest.
    - b. charge of voluntary manslaughter or homicide will suspend estate distribution until dismissed, withdrawn, or verdict (plus appeals if conviction)
    - c. Spousal rights:
      - kick in absent divorce or annulment; revokes pre-divorce provisions to SS (unless will expresses otherwise) who is thereafter treated as having predeceased.

If marriage occurs after execution, surviving spouse takes intestate share unless:	If marriage existed at execution, surviving spouse takes intestate share if:
(1) will executed before one year after AIPRA certification; (2) spouse is non-Indian and T devised the interests in RP to 1 or more Indians; (3) & (4) the will was made in contemplation of the marriage or reveals intent to be effective notwithstanding later marriage; or (5) T provided for spouse by non-testamentary transfer with evidence of “replacement intent.”	(1) had been married without legal separation for the preceding 5 years; (2) T and SS have a surviving child; (3) SS has made substantial payments on or improvements to the land; or (4) SS is under binding obligation to continue loan payments for “substantial period of time” AND UNLESS evidence that T “adequately provided” for SS and minor child outside of will.

d. Children’s rights:

Category	Rule
unintentionally omitted child(ren) born/adopted after will execution	take intestate share
adopted in children	treated as child of decedent if recognized as heir under 25 U.S.C. 372(a) for purposes of subsection (omitted children)
adopted out children	except for “step-parent adoptions,” child no longer considered child of natural parents but can take through those parents from other biological relatives who have maintained a “family relationship.”
after-born heirs	child in gestation at decedents death is treated as having survived decedent if alive 120+ hours after child’s birth.

- e. Missing heir: presumed if whereabouts remain unknown 60 days post-completion of notice efforts and had no contact with any other heirs or DOI during preceding 6 years; presumed to have predeceased decedent for purposes of descent & devise

7. Alterations

- a. Renunciation or Disclaimer can be made by any devisee or heir who is over age 18.
- i. Must be made by signed and acknowledged writing

- ii. Treated as “bypassing” disclaimant (not considered as a transfer or gift from disclaimant to ultimate taker, with effect on creditors’ rights); differs from traditional state law which treats disclaimant as having predeceased and prohibits selection of recipient
  - iii. if interest in RP: may only be renounced in favor of: (1) an EH as per 25 U.S.C. § 2201(9) (any of decedent’s children, grandchildren, great-grandchildren, full or ½ siblings by blood, and parents who are Indian or lineal descendants w/in 2 degrees of consanguinity of an Indian or co-owners of a TR/RP interest in the decedent’s parcel) or (2) an eligible devisee under 25 U.S.C. § 2206 (b)(1)(A) (T’s lineal descendant, any co-owner, tribe with jurisdiction, or any Indian). The property will remain in trust or restricted status.
  - iv. if interest in PP: may be renounced in favor of any person or entity as per 25 U.S.C. § 2206 (b)(3)(B).
  - v. if subject to 25 U.S.C. § 2206 (a)(2)(D) (i.e. small fractional interest under the “Single Heir Rule,” can only be in favor of 1 person
- b. Consolidation Agreements: written voluntary agreements between EH and devisees are permissible and final if decisionmaker approves and when implemented in an order; these & those under (e) not available for purchase under subsection (o) of section unless not approved

**E. METHODS OF CONSOLIDATION**

- 1. Federal Buy-Back (25 U.S.C. § 2212)
  - a. AKA “Fractional Interest Acquisition Program,” under which SOI can acquire any fractional interest in trust or restricted land at Secretarial discretion and with the consent of the owner or heir (if during probate in accordance with 25 U.S.C. § 2206(o), below).
  - b. Purchase is at FMV.
- 2. Tribal Land Consolidation Plan (25 U.S.C. 2203(a))

3. Other

	Purchase Option (any time)	Purchase Option at Probate	Consolidation Agreement	Partition
provision	§2204(a)(2)	§2206(o)	§2206(j)(9)	§2204(c)
covers	TR/RP interest w/in reservation or subject to tribal jxdn	TR/RP in decedent's estate	TR/RP in decedent's "trust inventory" while probate pending	"highly fractionated" TR/RP; effects reconsolidation
who can initiate	tribe	Eligible purchaser: other EH or devisee, co-owner, tribe w/ jxdn	Heirs & devisees determine for selves how to divide estate at probate hearing	co-owning tribe w/ jxdn or eligible co-owner; limits on eligible purchaser
purchase price	at/above FMV	At/above FMV; if competition, to eligible purchaser selected by seller (unless small interest being purchased by SOI).	Agreed price	At/above FMV to highest bidder from among eligible bidders
effect	tribe purchases all interests in a tract if consent of 50% or more of co-owners as above; can include own interest in consent percentages	heirs get purchase price instead of property	can decide to sell to other Indian person, co-owners, or tribe; avoids forced purchase at probate unless agreement not approved	proceeds distributed proportionately to owners
consent?	Req. of owners of interests equal to at least 50% of interest; Indian co-owner having used/possessed for at least 3 yrs prior may match tribal offer	Req. by heirs or devisees (& SS receiving LE) taking 5%+ of entire parcel, or who reside there at decedent's death, or who took under a will.	Voluntary exchange or agreement	Req. of co-owning tribe w/ jxdn, any owner who lived/worked there prior 3 years, & owners of at least 50% of parcel if value of any 1 over \$1,500