

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

I. BROAD ISSUES

A. Level of Tribal Probate Code Specificity

1. comprehensive set of provisions dealing w/ many components with targeted code limited to issues important to that particular tribe
2. fewer rules + greater discretion to probate court to determine heirs etc. through particular tribal lens

B. Desirability of Correlations?

1. Between:
 - a. TPC - AIPRA: Extent of desired uniformity between particular tribal code and AIPRA; particularly relevant where decedent's estate contains fee or taxable property.
 - b. TPC - TPC: extent of desired uniformity from tribe to tribe
 - c. TPC - State Law: extent of desired uniformity from tribe to state.
2. *See, e.g., Abraham Bell & Gideon Parchomovsky, Property Lost in Translation, 80 U. CHI. L. REV. 515 (2013) (discussing translation costs attending localized versus state property rights systems).*

C. Underlying policy of Statutes of D&D

1. Traditional driver of state code = approximating what most decedents under same/similar circumstances would desire most of the time.
2. Policies driving AIPRA: essentially consolidation & cost efficiencies with an eye on actual and presumed testamentary freedom or intent.

D. Cultural component

1. Intestate succession = jurisdictional creation of family; what relationships do the state/tribe, through legislation, wish to encourage/legitimate
2. Testate succession = individual creation of "family"; means of actuating

testamentary freedom and intent, individual self-determination

3. Role of TPC in reflecting cultural diversity and identity; self-determination

II. GENERAL OVERVIEW

A. Issue Framework

Intestate Succession	Testate Succession	Will Substitutes	Probate Proc/Misc
SCHEME, STATUS, ALTERATION	EXECUTION, REVOCATION, CHALLENGE, COMPOSITION, CONSTRUCTION	TYPES, REQUISITES	REFORM PROCESSES

B. Overview of Components of Existing TPCs

III. INTESTATE SUCCESSION (scheme/status/alteration)

A. Scheme Issues

1. Differences based on type of property?
 - a. RP and PP
 - b. Small interests and large interests
 - c. TR/RP; T/PP
 - d. family heirlooms/ancestral property
2. How much to spouse?
 - a. Some v. all depending on other heirs: joint descendants; “separate” descendants of either decedent or survivor; parents; siblings; more distant relatives
 - b. Separated out between life estate v. fee?
 - c. If life estate, interplay with waste
3. Where next? Options:
 - a. Descendants trumping ancestors/collaterals

- b. Ancestors/collaterals first
- c. Tribe as heir? Co-owners? At what point to cut off relatives
- d. Different systems: parentelic, civil law, modified civil law; different representation schemes under same (pure per stirpes, modified per stirpes, per capita at each generation)

B. Status Issues

- 1. General: define in tribal probate code or refer to domestic relations code, or blend?
- 2. Spouse
 - a. Who is NOT a spouse: e.g. divorce or annulment
 - b. Who IS a spouse: e.g. customary/common law/same sex/separated
 - c. *See, e.g., Trista Wilson, Changed Embraces, Changes Embraced? Renouncing the Heterosexist Majority in Favor of a Return to Traditional Two-Spirit Culture, 36 AM. IND. L. REV. 161 (2012)*
- 3. Child:
 - a. Biological child
 - b. Adopted child
 - i. adopted as a child
 - ii. adopted as an adult
 - iii. adopted by intimate partner
 - iv. rights retained re biological family? (Step-parent adoption; post-death adoption; adoption w/in family circle)
 - c. Child born through assistive reproductive technology
 - i. surrogacy/gestational carrier
 - ii. genetic contributor
 - iii. posthumous conception
 - iv. *See, e.g., Kimberly Self, Self-Interested: Protecting the Cultural and Religious Privacy of Native Americans through the Promotion of Property Rights in Biological Materials, 35 AM. IND. L. REV. 729 (2010-2011).*
 - d. Non-marital child
- 4. Half v. full blood relatives with whom share only 1 ancestor

5. Step-relationships; in-law relationships
6. Biology v. Behavior: quality of functional relationship between parties; parental abandonment or neglect; ancestral neglect; relationship w/ tribe, e.g. member, eligible to be member, active member, etc.; “slayer” statutes; survival requirements (period of time and standard of proof)
7. Tribal membership or Indian status?

C. Alteration Issues

1. Effect of negative wills
 - a. effectuate as though disinherited person predeceased
 - b. ignore will provision for any property passing through intestacy
2. Transfer of expectancy (release v. assignment; enforceability)
3. Advancements
 - a. what will qualify as a “qualified” advance?
 - b. who can be an advancee?
 - c. what effect will an advance have?
4. Renunciation or disclaimers
 - a. redistribute entire estate or simply disclaimed share?
 - b. treat heir as though predeceased to apply appropriate rule, or permit disclaiming heir to “direct” the outcome?
5. Family agreements/consolidation agreements, voluntary v. forced

IV. TESTATE SUCCESSION (make/revoke/challenge/comprise/construe)

A. Execution Issues

1. Formal wills requirements should ensure validity under federal law and in all jurisdictions.
2. Permit both attested and holographic wills? Oral wills?
3. For attested wills

- a. Alternate notarization method (besides witnesses)
 - b. interested witness issues: any effect? If so, what? (E.g. purge all v. some of the “extra,” or supernumerary rules)
 - c. Necessity and/or evidentiary effect of attestation clause or self-proving affidavit
4. For holographic wills:
- a. Permissibility
 - b. Requirements
5. Compliance demanded, e.g. strict, substantial, “harmless error”

B. Revocation Issues

1. Acceptable methods, e.g.
- a. Subsequent instrument
 - b. Physical act
 - c. Operation of Law, e.g. divorce
2. Ways to “Undo” revocation, i.e.
- a. Revival (extent to which revocation of subsequent instrument revives earlier, valid instrument)
 - b. Dependent Relative Revocation (extent to which a revocation premised upon a mistake of fact or law is remediable)

C. Challenge

1. Case law v. statute
2. If statutory,
- a. Lack of Testamentary Intent
 - b. Lack of Compliance with Formalities
 - c. Lack of Testamentary Capacity/Standard
 - d. Undue Influence
 - e. Fraud/Forgery

D. Will Composition

1. What should constitute the will?
 - a. Common standard: “Integration,” or pages present at execution + intended to be part of the will
 - b. Common standard: “Incorporation by Reference” where facts warrant
 - i. Document to be incorporated “in existence” when will executed
 - ii. Document to be incorporated sufficiently identified
 - iii. Will reflects intent to incorporate extrinsic document
 - c. Common standard: “Acts with Independent Significance” given effect where driven by some non-testamentary (“independent”) intent
2. Uniform Testamentary Additions to Trusts Act

E. Will Construction

1. Intent: evidence from 4 corners of document v. extrinsic evidence permitted? If latter, when and to what extent, with what evidentiary standard?
2. Intent: extent to which court will “correct” latent or patent mistakes
3. Intent and the Spouse
 - a. Presumed oversight: omitted spouse
 - b. Intent Override: elective share for spouse
4. Intent and Descendants
 - a. Presumed oversight: omitted/pretermitted descendants
 - b. Intent Override: forced share for descendant(s)?

5. Post-execution changes
 - a. Relating to persons, i.e. where beneficiary predeceases testator (lapse/anti-lapse; void gifts)
 - b. Relating to Property
 - i. ademption by extinction
 - ii. ademption by satisfaction
 - iii. abatement
 - iv. accessions/accretions
 - v. exoneration
6. Policy limits on Testamentary Freedom - broad v. narrow?

V. Will Substitutes [non-probate transfers]

A. Hallmarks

1. ambulatory/amendable/wholly revocable
2. enjoy all retained rights to property until death

B. Benefits

1. General: avoidance of probate, i.e. less time & at lower cost + privacy + avoid challenges + occasionally avoid creditors. Touted as quick, easy, cheap, and flexible free-market alternative to the judicially-supervised probate process.
2. Specific to this context: all above plus reduce number of costly probates, expedite property transfers, possibly reduce cultural anxiety about will-making.
 - a. IIM account (e.g. beneficiary designation form)
 - b. TOD deed for real property

C. Form: essentially contract intermediary who promises to deliver the property or title to the identified beneficiary:

1. Individual retirement account

2. Life Insurance Policy
3. Joint tenancy, tenancy by the entirety to real estate
4. Jointly owned bank or brokerage accounts/survivor accounts; pay on death or transfer on death registration (e.g. securities, land)
5. revocable trust
6. Less common forms:
 - a. Family Limited Partnership or LLC with title held to the account or the real estate held by the entity; *see, e.g., Brian Sawers, Tribal Land Corporations: Using Incorporation to Combat Fractionation*, 88 NEB. L. REV. 385 (2009)
 - b. Gift deeds
7. *See generally* Anthony J. Franken, *Dealing with the Whip End of Someone Else's Crazy: Individual-Based Approaches to Indian Land Fractionation*, 57 S. D. LAW REV. 345 (2012) (encouraging provision of estate planning services); 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)

VI. Probate Procedure

A. Overarching issues

1. reduction of number of probates and streamlined process for remainder
2. enhanced coordination between Interior and tribal government

B. Purposes of Probate in state court, and extent to which means & ends (purposes) might differ under federal system

1. provide evidence of title transfer & render title marketable
2. collect estate to facilitate (or under non-claim statutes, bar) collection by creditors
3. distribute property to heirs & thereby effectuate decedent's wishes
4. discharge trust responsibility (federal)

C. What might an efficient procedure entail/include?

1. method for administration by affidavit for smaller estates or for certain types of property [e.g. state statutes to transfer title to car]
2. method for summary administration of smaller estates
3. other ways to expedite
4. Unclaimed property fund?

VII. MISCELLANEOUS

- A. Fixtures as real v. personal property; status of improved lands
- B. Digital Assets
- C. Special Provisions for cultural property under either testate or intestate succession
- D. Funeral/burial determinations
- E. Estate Planning opportunities