

**UNIFORM LAWS COMMISSION STUDY GROUP
MODEL TRIBAL PROBATE CODE
ISSUES LIST (3/20/15)**

I. Overview

By combining the critical elements of life, family, and property within a single legal structure, probate codes have the power to reflect and sometimes even affect the culture within which they operate. As such, drafting one generates unique issues that may not equally attend less culturally constitutive model or uniform legislation. The issues are compounded within the present context in light of the number of federally recognized tribes and the potential for vast differences between them across legal, political, and sociocultural fronts.

The inherent difficulties of the enterprise do not lessen the importance of the task. For a tribe to enact and implement a tribal probate code – particularly one that reflects its culture and responds to its needs – furthers tribal sovereignty and self-determination. This is especially important given that the absence of a tribal probate code may cede control, by default, to a state or federal system with its own perspective about what a death time transfer should look like and how it is best accomplished. As such, with our partners and participants within Indian Country, the ULC is working toward the creation of a Model Tribal Probate Code that will reflect an overall unified structure supporting alternate and optional provisions, with hopes that individual tribes and their members might consider it, and find it useful, when undertaking probate code design and implementation.

The accompanying draft represents an initial step. The ULC determined that first focusing on procedural issue might facilitate subsequent efforts of the drafting committee and the tribes to address more delicate substantive provisions detailing testate or intestate succession and the value choices that they will necessarily express. While the draft reflects many principles that have been worked out over the past fifty years within the Uniform Probate Code, it is critical to reiterate that the draft is but a first step, designed to invite questions, generate discussion, and drive refinement as we work toward a Model Tribal Probate Code that that might provide value to the tribes.

The working draft is comprehensive and includes provisions that are integrated internally, and occasionally with other uniform acts. Some of its provisions might be deleted, others amended, more added. The key will be to confront the draft with a careful eye toward whether and how the tribal context might precipitate additional issues or an alternate view over what the model code should include. The following section presents the framework and identifies assorted issues for consideration and discussion. Perhaps, however, the most important question, the answer to which may color one's perspective of any discrete section, is this: irrespective of their content, what components are absolutely critical to a tribal probate code, from either a tribal or individual perspective? That answers may vary highlights the utility of providing model code provisions, rather than attempting a single uniform act.

II. Specific Provisions & Issues

Article 1: General Provisions, Definitions, and Jurisdiction of Court

Part 1: Short Title, Construction, General Provisions

Section 1-101: Short Title

Section 1-102: Purposes; Rules of Construction

Section 1-103: Supplementary General Principles of Law Applicable

Section 1-104: Severability

Section 1-105: Construction Against Implied Repeal

Section 1-106: Evidence of Death or Status

Some tribal probate codes begin with driving policies and expressly encourage the code's interpretation and application through that lens. Others leave broad discretion in the tribal court. The MTPC could reflect either, both, or other options.

1. Should the MTPC present examples of the sorts of policy statements that exist and that might be generally relevant notwithstanding inter-tribal cultural variance, or should it leave the matter open-ended? Those policies might include general goals (*e.g.* the identification and effectuation of a particular decedent's intent; minimization of probate expenses) as well as specific ones (*e.g.* to protect the culture or land base of the tribe). [1-102]
2. Should the MTPC encourage consideration of those policies by not only the tribal court, but also any judge with respect to probate of assets subject to state or federal jurisdiction? [1-102]
3. Should the MTPC state goals that align with the Indian Land Consolidation Act or the American Indian Probate Reform Act? A tribal probate code needs no Secretarial approval to the extent that it does not govern trust or restricted property. [1-102]
4. Should the MTPC attempt to cover missing and protected persons as well as decedent's estates? This issue arises in numerous places throughout the drafted MTPC provisions, *e.g.* in Article 1, Parts 3 (Scope, Jurisdiction, and Courts) and 4 (Notice, Parties and Representation in Estate Litigation and Other Matters). [1-102]
5. Should the MTPC encourage adopting tribes to suggest consideration of other tribes', states', federal, or uniform code provisions as enacted or applied to supplement its own where an adopting tribe's code is ambiguous or silent? [1-103]
6. The drafted MTPC provision on Evidence of Death is lengthy. Should it continue to incorporate the Uniform Determination of Death Act, or be drafted stand-alone? If shortened, it could simply accept (1) a certified or authenticated copy of a death certificate, (2) any governmental record or report, and/or (3) any sufficient proof of death as determined by the tribal court. [1-106]

7. Irrespective of whether the MTPC otherwise purports to deal with missing persons, it could continue to provide for the presumption of death after a certain period of time, which in existing tribal codes tends to range from 5 to 7 years. [1-106]
8. Should the MTPC incorporate the Uniform Simultaneous Death Act by reference, or instead draft as per its current articulation (generally requiring clear and convincing proof that an heir or beneficiary survived the decedent by 120 hours) or some alternate standard (e.g. by requiring sufficient evidence that an heir or beneficiary survived the decedent by any period of time, including an instant). The former seems superior from evidentiary, efficiency, and presumed intent perspectives. [1-106]

Article 1: General Provisions, Definitions, and Jurisdiction of Court

Part 2: Definitions

[Reserved]

Article 1: General Provisions, Definitions, and Jurisdiction of Court

Part 3: Scope, Jurisdiction and Courts

Section 1-301: Territorial

Section 1-302: Subject Matter Jurisdiction

Section 1-303: Venue; Multiple Proceedings; Transfer

Section 1-304: Practice in Court

Section 1-305: Records and Certified Copies

Section 1-306: Appeals

Section 1-307: Oath or Affirmation on Filed Documents

1. The MTPC should only expressly exclude trust or restricted property governed by federal law if it is not intended to displace the provisions of AIPRA. Should the MTPC as drafted include an option or options that are AIPRA-compliant? Upside: enhanced sovereignty and potential (but limited) opportunity to alter unpopular AIPRA default rules. Downside: the existing constraints imposed by AIPRA might make the undertaking more costly than the benefits it could presently confer. [1-301]
2. Should there be a rebuttable presumption that any decedent who was a tribal member was domiciled within the jurisdiction of the tribe?
3. Should the MTPC address the estates of minor, incapacitated, and protected persons? Should it address all trusts or only testamentary ones? [1-302]
4. It appears that very few tribes have separately constituted probate courts. Should the provisions regarding venue be excised, or altered to require the transfer of probate to a tribal court where a proceeding was first commenced in a state court? [1-303]

Article 1: General Provisions, Definitions, and Jurisdiction of Court
Part 4: Notice, Parties and Representation in Estate Litigation and Other Matters

Section 1-401: Notice; Method and Time of Giving

Section 1-402: Notice; Waiver

Section 1-403: Pleadings; When Parties Bound by Others; Notice

1. The MTPC as drafted includes detailed requirements for giving notice. The MTPC could be streamlined to reflect more general notice provisions (*e.g.* by providing that an adopting tribe would incorporate the notice provisions that it has enacted in its general rules of civil procedure). [1-401]
2. The currently drafted provision places the duty to provide notice on the petitioner. This duty could instead be borne by a different party, *e.g.* tribal court personnel. [1-401]
3. How broadly should the determination of an “interested person” to whom notice is required be cast? Should it instead list specific persons or entities entitled to notice, *e.g.* spouse, children, any other putative heirs, beneficiaries under the present/prior will, the tribe? [1-401]
4. Consistent with United States Supreme Court precedent, the draft MTPC currently provides for differing methods of notice depending on whether the party is known or unknown. It could be drafted differently to embrace different methods (*e.g.* personal service, newspaper publication, public posting). [1-401]
5. Should the MTPC be specific regarding what the notice should include? [1-401]
6. Should the MTPC embrace “representative notice” whereby notice is deemed to occur whenever properly given to one with interests closely enough aligned with another’s? [1-401]

Article 2: Probate of Wills and Administration

Part 1: General Provisions

Section 2-101: Devolution of Estate at Death; Restrictions

Section 2-102: Necessity of Order of Probate for Will

Section 2-103: Necessity of Appointment for Administration

Section 2-104: Claims Against Decedent; Necessity of Administration

Section 2-105: Proceeding Affecting Devolution and Administration; Jurisdiction of Subject Matter

Section 2-106: Proceedings Within the Exclusive Jurisdiction of Court; Service; Jurisdiction over Persons

Section 2-107: Scope of Proceedings; Proceedings Independent; Exception

Section 2-108: Statutes of Limitation on Decedent’s Cause of Action

1. The MTPC as drafted provides that testate property passes to beneficiaries and intestate property passes to heirs, both subject to certain rights in others, such as creditors. Should the MTPC offer statutory protection to spouses and/or minor children of the decedent, or include a suggested elective share, under which a surviving spouse may elect against a will and claim an alternate amount as set by the code? [2-101]
2. The MTPC as drafted is set up such that no will is effective to prove the transfer of property or identify an executor until declared valid by an adjudication of probate by the court. More broadly, the issuance of letters testamentary or of administration by court order will permit the estate to be administered, and at that point, creditors may commence an action to recover from the estate property. Should the MTPC's drafted provision include some provision requiring secured creditors to prove that status and coverage before exempting them from the provisions of the section? [2-104]
3. The drafted MTPC provision provides that decedent's claims that would not have been time-barred by the date of the decedent's death are tolled for four months thereafter, providing the personal representative time to file the claim. Should that time period be extended? [2-108]

Article 2: Probate of Wills and Administration

Part 2: Priority to Administer; Demand for Notice

Section 2-201: Location of Property

Section 2-202: Appointment or Testacy Proceedings; Conflicting Claim of Domicile in Another State

Section 2-203: Priority Among Persons Seeking Appointment as Personal Representative

Section 2-204: Demand for Notice of Order or Filing Concerning Decedent's Estate

1. Should the MTPC include a provision that presumes that all assets, including debts owed to the decedent, are located within tribal property and subject to tribal jurisdiction unless proven otherwise? [2-201]
2. The MTPC provides an order of priority for persons seeking appointment as personal representative for the estate. Should that list continue to permit the person named in the will to nominate another to so serve? Should it require or factor a particular relationship between the personal representative and the tribe, e.g. that the personal representative be a member of the tribe? Should it provide that the tribe itself, through a designated individual or office, might serve as personal representative to the estate, or otherwise petition to open the estate? [2-203]
3. Should the provision covering selection of a personal representative be shortened and streamlined, even so far as to provide that the determination rests within the province of the court? [2-203]
4. Should the provision disqualify specific individuals from serving as personal representative with more specificity? [2-203]

5. This drafted provision, which permits interested parties to file a demand for notice of any order or filing pertaining to a decedent's estate, could be moved to Article 1, Part 4 (discussing notice). [2-204]

Article 2: Probate of Wills and Administration

Part 3: Testacy and Appointment Proceedings

Section 2-301: Testacy Proceedings; Nature; When Commenced

Section 2-302: Testacy or Appointment Proceedings; Petition; Contents

Section 2-303: Testacy Proceedings; Notice of Hearing on Petition

Section 2-304: Testacy Proceedings; Written Objections to Probate

Section 2-305: Testacy Proceedings; Uncontested Cases; Hearings and Proof

Section 2-306: Testacy Proceedings; Contested Cases

Section 2-307: Testacy Proceedings; Burdens in Contested Cases

Section 2-308: Testacy Proceedings; Will Construction; Effect of Final Order in Another Jurisdiction

Section 2-309: Testacy Proceedings; Order; Foreign Will

Section 2-310: Testacy Proceedings; Probate of More Than One Instrument

Section 2-311: Testacy Proceedings; Partial Intestacy

Section 2-312: Testacy Proceedings; Effect of Order; Vacation

Section 2-313: Testacy Proceedings; Vacation of Order for Other Cause

Section 2-314: Proceedings Concerning Appointment of Personal Representative

1. The drafted provision details the information that must be included in a petition for testate or intestate succession, and expressly provides that the petition is not inextricably connected to a petition seeking appointment as personal representative of an estate. Should the petition require other helpful or useful information as well, such as the status of any putative beneficiary or heir vis-à-vis the tribe with jurisdiction, or the status of property as "trust" or "restricted" and/or subject to federal control? [2-302]
2. The drafted MTPC provision provides that the petitioner should make a reasonably diligent search for the alleged decedent if the status of death is unknown. The provision continues by suggesting assorted methods for conducting that search. What other methods unique to this context might exist, e.g. inquiring of BIA or other governmental officials? [2-303]
3. Should there be any difference, and if so, what, between the strength of the presumption of due execution and validity where the will is self-proved, versus contains an attestation clause, versus reflects the signatures of two witnesses? [2-306]

Article 2: Probate of Wills and Administration

Part 4: Supervised Administration

Section 2-401: Supervised Administration; Nature of Proceeding

Section 2-402: Supervised Administration; Petition; Order

Section 2-403: Supervised Administration; Effect on Other Proceedings
Section 2-404: Supervised Administration; Powers of Personal Representative
Section 2-405: Supervised Administration; Interim Orders; Distribution and Closing Orders

1. The UPC assumes that a personal representative, once appointed, may administer the estate without court approval. Is this the correct approach? For example, should court approval be required to sell property?

Article 2: Probate of Wills and Administration

Part 5: Personal Representative; Appointment, Control and Termination of Authority

Section 2-501: Qualification
Section 2-502: Acceptance of Appointment; Consent to Jurisdiction
Section 2-503: Bond Not Required Without Court Order, Exceptions
Section 2-504: Order Restraining Personal Representative
Section 2-505: Termination of Appointment; General
Section 2-506: Termination of Appointment; Death or Incapacity
Section 2-507: Termination of Appointment; Voluntary
Section 2-508: Termination of Appointment by Removal; Cause; Procedure
Section 2-509: Termination of Appointment; Change of Testacy Status
Section 2-510: Successor Personal Representative
Section 2-511: Special Administrator; Appointment
Section 2-512: Special Administrator; Who May Be Appointed
Section 2-513: Special Administrator; Proceedings; Power and Duties
Section 2-514: Termination of Appointment; Special Administrator

1. Should the statute specify factors for the court to consider in deciding whether to require bond? [2-503]
2. Sections 2-511 through 2-514 address when a court may appoint a special administrator. Should the statute list specific circumstances when the appointment of a special administrator is encouraged?

Article 2: Probate of Wills and Administration

Part 6: Duties and Powers of Personal Representative

Section 2-601: Time of Accrual of Duties and Powers
Section 2-602: Priority Among Different Letters
Section 3-603: General Duties; Relation and Liability to Persons Interested in Estate; Standing to Sue
Section 2-604: Personal Representative to Proceed Without Court Order; Exception
Section 2-605: Duty of Personal Representatives; Information to Heirs and Devisees
Section 2-606: Duty of Personal Representative; Inventory and Appraisalment

Section 2-607: Employment of Appraisers
Section 2-608: Duty of Personal Representative; Supplementary Inventory
Section 2-609: Duty of Personal Representative; Possession of Estate
Section 2-610: Power to Avoid Transfers
Section 2-611: Powers of Personal Representatives; In General
Section 2-612: Improper Exercise of Power; Breach of Fiduciary Duty
Section 2-613: Sale, Encumbrance or Transaction Involving Conflict of Interest; Voidable; Exceptions
Section 2-614: Persons Dealing with Personal Representative; Protection
Section 2-615: Transactions Authorized for Personal Representatives; Exceptions
Section 2-616: Powers and Duties of Successor Personal Representative
Section 2-617: Co-Representatives; When Joint Action Required
Section 2-618: Powers of Surviving Personal Representative
Section 2-619: Compensation of Personal Representative
Section 2-620: Expenses in Estate Litigation
Section 2-621: Proceedings for Review of Employment of Agents and Compensation of Personal Representatives and Employees of Estate

1. The drafted provision provides that every personal representative has a right to take possession or control of the decedent's property, but "may" transfer or permit possession of real property or tangible personal property to remain with the presumptive heir. Should the MTPC instead require that certain types of real or personal property, e.g. cultural artifacts or finery, be left with the immediate members of the decedent's family or some other designated person or entity pending resolution of the property's ownership? [2-609]
2. This drafted section, covering the rights and powers of personal representatives, is quite long and specific. Could or should it be streamlined? Might it limit the personal representative's powers as suggested in item #12, above, regarding certain types of real or personal property? [2-615]

Article 2: Probate of Wills and Administration

Part 7: Creditors' Claims

Section 2-701: Notice to Creditors
Section 2-702: Statutes of Limitations
Section 2-703: Limitations on Presentation of Claims
Section 2-704: Manner of Presentation of Claims
Section 2-705: Classification of Claims
Section 2-706: Allowance of Claims
Section 2-707: Payment of Claims
Section 2-708: Individual Liability of Personal Representative
Section 2-709: Secured Claims
Section 2-710: Claims Not Due and Contingent or Unliquidated Claims
Section 2-711: Counterclaims
Section 2-712: Execution and Levies Prohibited

Section 2-713: Compromise of Claims

Section 2-714: Encumbered Assets

Section 2-715: Final Distribution to Domiciliary Representative

1. Should the MTPC add or delete some of the categories applied to testate transfers as relevant to certain types of assets and certain types of claimants? [2-705]
2. Should the MTPC always preserve certain types of property, e.g. cultural artifacts or personal property that has been subject to a giveaway, from creditors' claims?

Article 2: Probate of Wills and Administration

Part 8: Special Provisions Relating to Distribution

Section 2-801: Successors' Rights if No Administration

Section 2-802: Distribution; Order in Which Assets Appropriated; Abatement

Section 2-803: Right of Retainer

Section 2-804: Interest on General Pecuniary Devise

Section 2-805: Penalty Clause for Contest

Section 2-806: Distribution in Kind; Valuation; Method

Section 2-807: Distribution in Kind; Evidence

Section 2-808: Distribution; Right or Title of Distributee

Section 2-809: Improper Distribution; Liability of Distributee

Section 2-810: Purchasers from Distributees Protected

Section 2-811: Partition for Purpose of Distribution

Section 2-812: Private Agreement Among Successors to Decedent Binding on Personal Representative

Section 2-813: Disposition of Unclaimed Assets

Section 2-814: Distribution to Incapacitated Person

1. Should the provisions governing successor's rights where there has been no administration might be altered to include protection of persons or entities entitled to property by reason of its characterization as cultural property? [2-801] What about a possible interplay with advancements or ademption? [2-801]
2. Abatement addresses the order in which estate assets are used up to discharge estate debts. The provision as drafted follows a traditional order of abatement, i.e. intestate property, residuary devises, general devises, then specific devises. Moreover, the provision makes no difference between real and personal property or the identity of the particular beneficiary. Should the MTPC create more careful distinctions over estate assets, and differentiate based upon the type or location of the property, or the identity of the recipient? For example, if cultural artifacts are not specifically devised under the will but instead pass through the residuary clause, should they be exempt from abatement, or at least held until other estate assets are exhausted? [2-802]
3. As drafted, the MTPC provision provides that no penalty clause (otherwise known as an "in terrorem clause") may be enforced against one who contests a will or brings a related

action if that claimant had probable cause to bring the action. Should the MTPC be expanded to provide safe harbor, also, for one who brings the action “in good faith”? By contrast, should it instead be drafted so as to be strictly enforced irrespective of the circumstances surrounding the claim? The policies are essentially access to courts versus expeditious administration/disincentive to prolonged estate battles or “strike suits.” [2-805]

4. Should the MTPC include a provision mandating that certain types of personal property be distributed in kind rather than sold with the proceeds distributed? [2-807]
5. Should the MTPC include an exception under which a purchaser of certain types of personal property, such as cultural artifacts, not be protected in retaining ownership of the property? [2-810]

Article 2: Probate of Wills and Administration

Part 9: Closing Estates

Section 2-901: Proceedings Terminating Administration; Testate or Intestate Order of General Protection

Section 2-902: Closing Estates; By Sworn Statement of Personal Representative

Section 2-903: Liability of Distributees to Claimants

Section 2-904: Limitations on Proceedings Against Personal Representative

Section 2-905: Limitations on Actions and Proceedings Against Distributees

Section 2-906: Certificate Discharging Liens Securing Fiduciary Performance

Section 2-907: Subsequent Administration

1. The drafted MTPC provisions permit a personal representative to close an estate without obtaining a formal court order. Are there circumstances when obtaining a court order should be required? [2-902]

Article 2: Probate of Wills and Administration

Part 10: Collection of Personal Property by Affidavit and Summary Administration Procedure for Small Estates

Section 2-1001: Collection of Personal Property by Affidavit

Section 2-1002: Effect of Affidavit

Section 2-1003: Small Estates; Summary Administration Procedure

Section 2-1004: Small Estates; Closing by Sworn Statement of Personal Representative

1. As drafted, the MTPC provision provides for a faster and cheaper method of transfer (transfer by affidavit) for any estate that does not exceed \$25,000 (less liens and encumbrances). Should this number be higher or lower? [2-1001]
2. Either instead of or corollary to the summary administration procedure involving smaller estates, should the MPTC cover particular kinds of property, for example bank accounts?

As currently drafted, it is available to any successor. Should its availability be limited to someone with a particular relationship to the decedent, *e.g.* a spouse, or a child? Should its availability be limited to one with a particular relationship with the tribe itself, *e.g.* a member or an eligible member? [2-1001]

3. Should this provision, and the one preceding, include direct reference to the exemption of cultural artifacts in valuing the estate and initiating summary administration procedures? [2-1004]

Article 2: Probate of Wills and Administration

Part 11: Foreign Personal Representatives; Representatives; Ancillary Administration

Section 2-1101: Definitions

Section 2-1102: Payment of Debt and Delivery of Property to Domiciliary Foreign Personal Representative Without Local Administration

Section 2-1103: Payment or Delivery Discharges

Section 2-1104: Resident Creditor Notice

Section 2-1105: Proof of Authority; Bond

Section 2-1106: Power of Representatives in Transition

Section 2-1107: Ancillary and Other Local Administrations; Provisions Governing

Section 2-1108: Jurisdiction by Act of Foreign Personal Representative

Section 2-1109: Jurisdiction by Act of Decedent

Section 2-1110: Service on Foreign Personal Representative

1. Under what circumstances should a personal representative appointed in another jurisdiction have authority to act within the tribal jurisdiction? [all sections]