

D R A F T

FOR DISCUSSION ONLY

MODEL TRIBAL PROBATE CODE

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SIXTH YEAR
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MODEL TRIBAL PROBATE CODE

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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June 13, 2017

DRAFTING COMMITTEE ON MODEL TRIBAL PROBATE CODE

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

TIMOTHY BERG, 2394 E. Camelback Rd., Suite 600, Phoenix, AZ 85016, *Chair*

OWEN L. ANDERSON, University of Texas School of Law, 727 E. Dean Keeton St., Austin, TX 78705

JACK BURTON, 119 E. Marcy St., Suite 200, Santa Fe, NM 87501-20416

THOMAS E. GEU, University of South Dakota School of Law, 414 Clark St., Suite 214, Vermillion, SD 57069-2390

DALE G. HIGER, 1302 E. Warm Springs Ave., Boise, ID 83712

RYAN LEONARD, 100 Park Ave., Suite 500, Oklahoma City, OK 73102

EDWARD F. LOWRY, 4200 N. 82nd St., Suite 2001, Scottsdale, AZ 85251

FRED H. MILLER, 80 S. 8th St., 4200 IDS Center, Minneapolis, MN 55402-2274

HARRY M. WALSH, 456 Summit Ave., #206, St. Paul, MN 55102

STEPHANIE J. WILLBANKS, Vermont Law School, 164 Chelsea St., P.O. Box 96, South Royalton, VT 05068

ELISA WHITE, 419 Natural Resources Dr., Little Rock, AR 72205

CANDACE ZIERDT, Stetson University School of Law, 1401 61st St. S., Gulfport, FL 33707

DAVID M. ENGLISH, University of Missouri-Columbia School of Law, 203 Hulston Hall, Columbia, MO 65211, *Co-Reporter*

KATHELEEN GUZMAN, University of Oklahoma College of Law, Andrew M. Coats Hall, 300 Timberdell Rd., Norman, OK 73069, *Co-Reporter*

EX OFFICIO

RICHARD T. CASSIDY, 1233 Shelburne Rd., Suite D5, South Burlington, VT 05403-7753, *President*

PAMELA WINSTON BERTANI, 728 Texas St., Suite 4, Fairfield, CA 94533, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

NANCY APPLEBY, 333 N. Fairfax St., Suite 302, Alexandria, VA 22314-2632, *ABA Advisor*

EXECUTIVE DIRECTOR

LIZA KARSAI, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
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1 **MODEL TRIBAL PROBATE CODE**

2 **ARTICLE I**

3 **GENERAL PROVISIONS, DEFINITIONS, JURISDICTION OF COURT**

4 **SECTION 1-101. SHORT TITLE.** This [act] may be cited as the
5 Model [Tribal] Probate Code.

6 **SECTION 1-102. PURPOSES; RULE OF CONSTRUCTION.**

7 (a) This [code] shall be liberally construed and applied to promote its underlying
8 purposes and policies.

9 (b) The underlying purposes and policies of this [code] are:

10 (1) to clarify the law concerning the estates of decedents;

11 (2) to discover and make effective the intent of a decedent in distribution of
12 property;

13 (3) to promote an efficient system for administering the estates of decedents and
14 for making non-probate transfers;

15 [(4) to promote the application of tribal law, including the sovereignty, culture,
16 customs and values of the _____ [Tribe].

17 **Reporters' Note**

18 Subsections (a) and (b)(1)-(3) are statements of purpose typical of probate codes.
19 Subsection (b)(4) provides a place for the enacting tribe to enter tribal policies relevant to
20 probate. Because tribes will vary on which language to insert, subsection (b)(4) has been placed
21 in brackets. Among the statement of values that have been inserted into tribal probate codes are
22 “[t]o comply with tribal custom and tradition,” “[t]o prevent the transfer of land out of tribal
23 ownership and control,” and “[t]o promote and further the tribe’s inherent right to self-
24 governance.” See Fond du Lac Section 1.102; Nez Perce §10-1-1; Stockbridge Munsee Section
25 6.1.1.

26 **SECTION 1-103. GENERAL DEFINITIONS.** Subject to additional definitions
27 contained in the subsequent [articles] that are applicable to specific [articles,] [parts,] or sections

1 and unless the context otherwise requires, in this [code]:

2 (1) “Adoptee” means _____.

3 (2) “Agent” includes an attorney-in-fact under a durable or nondurable power of attorney.

4 (3) “Child” means an individual entitled to take as a child under this [code] by intestate
5 succession from the parent whose relationship is involved and excludes a person whose sole
6 relationship is that of a stepchild, a foster child, a grandchild, or any more remote descendant.

7 (4) “Claims,” in respect to estates of decedents, includes liabilities of the decedent,
8 whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or
9 after the death of the decedent, including funeral expenses and expenses of administration. The
10 term does not include estate or inheritance taxes, or demands or disputes regarding title of a
11 decedent to specific assets alleged to be included in the estate.

12 (5) “Codicil” means a document meeting the requirements of Section 3-302 [or 3-303]
13 that alters or supplements, rather than replaces, an existing will. A codicil need not reference or
14 be attached to the existing will.

15 (6) “Conservator” means a person who is appointed by a court to manage the estate of a
16 minor or adult individual.

17 (7) “Court” means the [..... Court] having jurisdiction in matters relating to the
18 affairs of decedents.

19 (8) “Culturally significant property” means property that holds particular historical,
20 traditional, religious, or cultural significance for the _____ [nation], but which under tribal law is
21 capable of private appropriation and ownership, including the rights of alienation, intestate
22 succession, and testate succession.

23 (9) “Descendant” of an individual means all of the individual’s descendants of all

1 generations, with the relationship of parent and child at each generation being determined by the
2 definition of child and parent contained in this [code].

3 (10) “Devise,” when used as a noun means a testamentary disposition of real or personal
4 property and, when used as a verb, means to dispose of real or personal property by will.

5 (11) “Devisee” means a person designated in a will to receive a devise.

6 (12) “Distributee” means any person who has received property of a decedent from the
7 decedent’s personal representative other than as creditor or purchaser.

8 (13) “Estate” includes the property of the decedent as originally constituted and as it
9 exists from time to time during administration.

10 (14) “Exempt property” means the property described in Sections 3-603.

11 (15) “General devise” means a devise of a specified amount of money or other devise that
12 neither refers to specific property owned by the testator at the time the will was made nor devises
13 the residue of the estate or all of the testator’s property.

14 (16) “General personal representative” means a personal representative as appointed
15 under Sections 2-202 or 2-203 who is granted complete authority to settle the estate.

16 (17) “Governing instrument” means a deed, will, trust, insurance or annuity policy,
17 account with POD designation, security registered in beneficiary form (TOD), transfer on death
18 (TOD) deed, pension, profit-sharing, retirement, or similar benefit plan, instrument creating or
19 exercising a power of appointment or a power of attorney, or a dispositive, appointive, or
20 nominative instrument of any similar type.

21 (18) “Guardian” means a person appointed by a court to make decisions regarding the
22 personal affairs of a minor or adult individual.

23 (19) “Heirs” means persons, including the tribe, who are entitled under the statutes of

1 intestate succession to the property of a decedent.

2 (20) “Incapacitated individual” means an individual whose capacity is sufficiently
3 diminished that a guardian or conservator could be appointed for the individual under applicable
4 law.

5 (21) “Interested person” includes heirs, devisees, children, spouses, creditors,
6 beneficiaries, the [tribe], and any other person having a property right in or claim against the
7 estate of a decedent. It also includes persons having priority for appointment as personal
8 representative and other fiduciaries representing interested persons. The meaning as it relates to
9 particular persons may vary from time to time and must be determined according to the
10 particular purposes of, and matter involved in, any proceeding.

11 (21) “Letters of office” means a document issued by the court or clerk certifying the
12 personal representative’s appointment and authority. The term includes letters testamentary and
13 letters of administration.

14 (23) “Minor” means an individual under [18] years of age.

15 (24) “Mortgage” means any conveyance, agreement, or arrangement in which property is
16 used as security and includes a deed of trust or land contract.

17 (25) “Parent” means any person entitled to take, or who would be entitled to take if the
18 child died without a will, as a parent under this [code] by intestate succession from the child
19 whose relationship is in question and excludes any person whose sole relationship is that of
20 stepparent, foster parent, or grandparent.

21 (26) “Person” means an individual, estate, business or nonprofit entity, public corporation,
22 [tribe], government or governmental subdivision, agency or instrumentality, or other legal entity.

23 (27) “Personal representative” includes executor, administrator, successor personal

1 representative, special representative, and persons who perform substantially the same function
2 under the law governing their status. “General personal representative” excludes a special
3 representative.

4 (28) “Petition” means a written request to the court for an order.

5 (29) “Proceeding” includes an action at law and a suit in equity.

6 (30) “Property” includes both real and personal property or any interest therein.

7 (31) “Residuary devise” means a devise of the property remaining after any specific or
8 general devises or a devise of the entire estate.

9 (32) “Settlement,” in reference to a decedent’s estate, includes the full process of
10 administration, distribution and closing.

11 (33) “Specific devise” means a devise of property specifically described in the will that
12 was owned by the testator.

13 (34) “Special representative” means a personal representative as described in Section 2-
14 309.

15 (35) “Successor personal representative” means a personal representative, other than a
16 special representative, who is appointed to succeed a previously appointed personal
17 representative.

18 (36) “Successors” means persons, other than creditors, who are entitled to property of a
19 decedent under the decedent’s will or this [code].

20 (37) “Survive” means that an individual has neither predeceased an event, including the
21 death of another individual, nor is deemed to have predeceased an event under Section 3-501.

22 The term includes such derivatives as “survives,” “survived,” “survivor,” and “surviving.”

23 (38) “Tribal cultural property” means property that holds particular historical, traditional,

1 religious, or cultural significance for the _____ [nation], and that, while possibly subject to rights
2 of custody, possession, or stewardship, is incapable of private appropriation or ownership,
3 including the rights of alienation, intestate succession, or testate succession under tribal law.

4 (39) “Will” means any testamentary instrument, including one that merely appoints an
5 executor, revokes or revises another will, or nominates a guardian.

6 **Reporters’ Note**

7 Some of these terms, such as “tribal cultural property” and “culturally significant
8 property,” should be redefined by adopting nations to best serve their particular needs and
9 purposes. Tribal probate codes that have referenced these or similar concepts have used such
10 terms as “family heirlooms,” “Indian finery,” “Indian artifacts,” and “cultural patrimony” to
11 describe the types of property that might fit within these concepts. These codes have included
12 such explicit definitions or examples as “items of personal adornment made in the Indian
13 tradition by human craft,” ceremonial clothing or artifacts, including feathers, beadwork, dance
14 sticks, flutes, drums, rattles, blankets, baskets, pottery, medicines, and animal skins. Other codes
15 have referenced the provisions of the Native American Graves Protection and Repatriation Act
16 (NAGPRA), 18 U.S.C. 1170, 25 U.S.C. 3001-3013 (defining human remains, funerary objects,
17 sacred objects, and cultural patrimony subject to its provisions). See generally Angela R. Riley,
18 *Straight Stealing: Towards an Indigenous System of Cultural Property Protection*, 80 Wash. L.
19 Rev. 69 (2005).

20 **SECTION 1-104. TERRITORIAL APPLICATION AND SUBJECT MATTER**

21 **JURISDICTION.** This [code] applies to and the court has jurisdiction over the estates of
22 deceased tribal members with respect to property, real or personal, that is subject to the laws of
23 this [tribe] [, excluding trust or restricted property governed by federal law.] This [code] applies
24 to the estate of a deceased non-tribal member if and only to the extent the decedent’s estate
25 includes property located on the [reservation]. This [code] also applies to and the court has
26 jurisdiction over survivorship arrangements authorized under Article 4.

27 **Reporters’ Note**

28 This section grants the tribal court broad jurisdiction. The enacting tribe may or may not
29 decide to exclude trust or restricted property controlled by federal law from its version of this
30 code, which is why this language is placed in brackets.
31
32

1 A number of tribal codes take a more restrictive approach to the tribal court's
2 jurisdiction. The Fond du Lac limit the court's jurisdiction to the estates of Band members
3 domiciled on or who have an interest in real property located on the Reservation. Fond du Lac
4 Code Section 4.101. The Lac du Flambeau expands this jurisdiction to include estates not only to
5 Tribal members but also the spouses and children of Tribal members. Lac du Flambeau Code
6 Section 82.401. The Nez Perce grant the court jurisdiction over the estate of any Indian
7 domiciled on the Reservation whether or not they were members of the Nez Perce tribe. Nez
8 Perce Code Section 10-1-8. The Poarch Band clarifies that jurisdiction over the enrolled tribal
9 member would by necessity need to also include jurisdiction over the beneficiaries of the estate.
10 Poarch Band Code Section 16-1-1. The Pueblo San Ildefonso Code is the most expansive,
11 granting the court jurisdiction over the estate of any person, tribal member or not, who resided at
12 the Pueblo. Pueblo San Ildefonso Code Section 28.1.

13
14 A broader approach, which would leave tribes more flexibility in determining the extent
15 of their claimed jurisdiction, could be taken by stating that "this Code shall apply to all property
16 subject to tribal jurisdiction."

17 **SECTION 1-105. METHOD AND TIME OF GIVING NOTICE.**

18 (a) If notice of a hearing on a petition or other matter is required, and except as
19 specifically provided for in this [code] or as ordered by the court, the [petitioner] [clerk] shall
20 give notice of the time and place of hearing to any interested person or that person's attorney.

21 (b) Unless the court for good cause shown provides for a different method or time for
22 giving notice, notice shall be given:

23 (1) by mailing a copy of the notice and petition at least [21] calendar days before
24 the time set for the hearing by first class mail addressed to the person being notified at the
25 person's office or place of residence, if known;

26 (2) by delivering a copy of the notice and petition to the person being notified
27 personally at least [21] calendar days before the time set for the hearing; or

28 (3) if the address, or identity of any person is not known and cannot be
29 ascertained with reasonable diligence, [by publishing at least once a week for two consecutive
30 weeks, a copy of the notice in both the tribal newspaper, if any, and in any newspaper or
31 newsletter having general circulation in the [appropriate jurisdiction] where the hearing is to be

1 held, the last publication of which must be at least [21] calendar days before the time set for the
2 hearing] [by posting a copy of the notice in at least three conspicuous public places on the
3 reservation, territory, or within the tribe’s jurisdiction at least [21] calendar days before the
4 hearing and by broadcasting the principal contents of the notice on a tribal radio program].

5 (c) Proof of notice shall be filed in the proceeding on or before the date of the hearing.

6 (d) A person may waive notice by a writing signed by the person or the person’s
7 [attorney] and filed in the proceeding.

8 (e) The court may determine who is an interested person for the giving of a particular
9 notice.

10 [(f) The tribal court may specify the language or languages in which notice must be
11 given.]

12 **Reporters’ Note**

13 This section is based partially on Section 1-401 of the Uniform Probate Code and
14 partially on several tribal probate codes. Copying Section 6-1-10(c) of the Ute Code, subsection
15 (b)(3) contains an optional provision providing for the giving of notice by posting instead of
16 publication. Subsection (d), which allows an interested person to waive notice, is copied from the
17 Stockbridge Munsee Code Section 6.1.13(D) and Ute Code 6-1-10(d).

18 **SECTION 1-106. WHEN PARTIES BOUND BY OTHERS; NOTICE.** In
19 proceedings under this [code], the following rules apply:

20 (1) Unless otherwise represented, a minor or an incapacitated, unborn, or unascertained
21 individual person is bound by an order to the extent the person’s interest is adequately
22 represented by another party having a substantially identical interest in the proceeding.

23 (2) A conservator or guardian may represent the person under conservatorship or
24 guardianship.

25 (3) If no conservator or guardian has been appointed, a parent may represent a minor

1 child.

2 (4) an agent having authority to act with respect to the particular question or dispute may
3 represent and bind the principal;

4 (5) At any point in a proceeding, if the court determines that an interest of a person is not
5 represented or adequately represented, the court may appoint a [representative] to receive notice,
6 give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or
7 unborn individual, or a person whose identity or location is unknown.

8 **Reporters' Note**

9 This section is a shortened version of Section 1-403 of the Uniform Probate Code.

10 **SECTION 1-107. EFFECT OF FRAUD AND EVASION.**

11 (a) Whenever fraud has been perpetrated in connection with a proceeding under this
12 [code] or if fraud is used to circumvent the provisions or purposes of this [code], a person
13 injured may obtain appropriate relief against the perpetrator of the fraud or restitution from any
14 person (other than a bona fide purchaser for value) benefitting from the fraud, whether innocent
15 or not.

16 (b) A proceeding must be commenced within two years after the discovery of the fraud,
17 but no proceeding may be brought against one not a perpetrator of the fraud later than five years
18 after the time of commission of the fraud.

19 (c) This section has no bearing on remedies relating to fraud practiced on a decedent
20 during the decedent's lifetime which affects the succession of the decedent's estate.

21 **Reporters' Note**

22 This section, which is similar to Section 1-106 of the Uniform Probate Code, is also
23 found at Section 4.102 of the Fond du Lac Code, at Section 6.1.6 of the Stockbridge Munsee
24 Code, and at Section 6-1-4 of the Ute Code.

25

1 **SECTION 1-108. EVIDENCE OF DEATH.**

2 (a) In addition to the rules of evidence in courts of this [tribe], the fact of death may be
3 established by any sufficient evidence, including:

4 (1) A certified or authenticated copy of a death certificate issued by an
5 appropriate official or agency.

6 (2) A certified or authenticated copy of a record or report of any tribal, state, or
7 other governmental agency, domestic or foreign, that an individual is missing or dead.

8 (b) An individual whose death is not established under subsection (a) and who is absent
9 for a continuous period of [five] years, during which the individual has not been heard from, and
10 whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be
11 dead. The decedent’s death is presumed to have occurred at the end of the period unless there is
12 sufficient evidence for determining that death occurred earlier.

13 **Reporters’ Note**

14 This section is found in several tribal probate codes. See Fond du Lac Section 4.103; Lac
15 du Flambeau Section 82.111; Stockbridge Munsee Section 6.1.7; Ute Section 6-1-5. It is also
16 similar to portions of Section 1-107 of the Uniform Probate Code. The primary purpose of
17 subsection (a) is to allow for proof of death based on a death certificate or other official
18 document. Subsection (b) provides a presumption of death for missing individuals. Jurisdictions
19 are split over whether the period of absence should be five years or seven years. The Fond du
20 Lac Code provides for seven years. The other tribal probate codes reviewed provide for five
21 years. Because of this split, the required number of years has been placed in brackets.

22 **SECTION 1-109. TRIBAL CUSTOM**

23 (a) Upon the motion of an interested person, the court may order that tribal custom shall
24 apply to resolve a particular issue. The court may also prescribe the weight to be given to a
25 particular tribal custom.

26 (b) To determine tribal custom, the court shall defer to any tribal procedure of law created
27 to authenticate tribal custom.

1 (c) Absent such law, the court shall conduct a hearing during which all interested persons
2 or parties may present evidence of tribal custom.

3 (d) The person seeking the application of tribal custom bears the burden of proof.

4 (e) The court may question witnesses called for the purpose of providing evidence of
5 tribal custom, and may call its own witnesses, including tribal elders, to offer evidence.

6 **ARTICLE 2**

7 **PROBATE OF WILLS AND ADMINISTRATION**

8 **PART 1.**

9 **GENERAL PROVISIONS**

10 **SECTION 2-101. PASSING OF ESTATE AT DEATH.**

11 (a) The power of a person to leave property by will, and the rights of creditors, devisees,
12 and heirs to the decedent's property are subject to the restrictions and limitations contained in
13 this [code].

14 (b) Upon the death of a person, the decedent's real and personal property passes
15 according to the decedent's will, or in the absence of a disposition by will, to the decedent's heirs
16 in either case subject to rights of creditors, expenses of administration, [the elective share of the
17 surviving spouse and to statutory allowances of spouse and children].

18 (c) [With the exception of Section [] relating to estate inventory and Section [] relating to
19 custodial rights, this [code] does not apply to tribal cultural property not subject to
20 administration.

21 **Reporters' Note**

22 This section is a shortened and modified version of Section 3-101 of the Uniform Probate
23 Code.
24

1 **SECTION 2-102. STATUTES OF LIMITATIONS ON DECEDENT’S CAUSE OF**
2 **ACTION.** A statute of limitations on a cause of action belonging to a decedent that has not been
3 barred as of the date of death is tolled for [one year] following the decedent’s death but resumes
4 thereafter.

5 **Reporters’ Note**

6 This section is based on Section 3-109 of the Uniform Probate Code except that the
7 tolling period has been increased from four months to one year.

8 **SECTION 2-103. DEMAND FOR NOTICE OF ORDER OR FILING**
9 **CONCERNING DECEDENT’S ESTATE.** A person having a financial or property interest in
10 the estate of a decedent who desires notice of any order or filing pertaining to the estate may file
11 a demand for notice with the court at any time after the death of the decedent. The demand shall
12 state the name of the decedent, the financial or property interest in the estate of the person
13 making the demand, and the address of the demandant or that of the demandant’s attorney. The
14 clerk of court shall mail a copy of the demand to the personal representative, if a personal
15 representative has been appointed. Unless the court otherwise directs, after the filing of a
16 demand for notice, no order or filing to which the demand relates shall be made or accepted
17 without notice as prescribed in Section 1-105 being given to the demandant or the demandant’s
18 attorney.

19 **Reporters’ Note**

20 This section is a shortened version of Section 3-204 of the Uniform Probate Code.

1 **PART 2.**

2 **PROBATE AND APPOINTMENT PROCEEDINGS**

3 **SECTION 2-201. PROBATE PROCEEDINGS; NATURE; WHEN**
4 **COMMENCED.**

5 (a) A proceeding to open the estate of a decedent may be commenced by an interested
6 person, including the [tribe], by:

7 (1) filing a petition as described in Section 2-202 for an order admitting the will to
8 probate; or

9 (2) filing a petition in accordance with Section 2-203 for an order that the
10 decedent died intestate.

11 (b) A proceeding to open the estate of a decedent may, but need not, involve a request for
12 the appointment of a personal representative.

13 **Reporters' Note**

14 This section provides a roadmap for navigating this part of the code. Similar to a number
15 of tribal probate codes, under this code proceedings for intestate and testate estates are addressed
16 in separate sections.

17
18 **SECTION 2-202. PETITION FOR PROBATE OF WILL; CONTENTS.**

19 (a) A petition for probate of a will, with or without a request for appointment of a
20 personal representative, must be directed to the court, must request a judicial order after notice
21 and hearing, and must contain further statements as required in this section.

22 (b) A petition for probate of a will must:

23 (1) request an order to admitting the will to probate; and

24 (2) contain the following statements:

25 (A) the interest of the petitioner;

1 (B) the name and date of death of the decedent, the location of the
2 decedent's residence at the time of death, and the names and addresses of the heirs and devisees
3 and the ages of any who are minors so far as known or reasonably ascertainable with reasonable
4 diligence by the petitioner;

5 (C) whether the petitioner has received a demand for notice, or is aware of
6 a demand for notice or a probate or appointment proceeding concerning the decedent that may
7 have been filed in this [tribal court] or elsewhere;

8 (D) that the petitioner, to the best of the petitioner's knowledge, believes
9 the will to have been validly executed and that after the exercise of reasonable diligence, the
10 petitioner is unaware of any instrument amending or revoking the will;

11 (E) whether the original will of the decedent is in the possession of the
12 court or accompanies the petition, and if not, where the original is located, if known;

13 (F) whether the will has been admitted to probate by the United States
14 Department of the Interior;

15 (G) the tribal membership status of the decedent, the heirs, and the
16 devisees;

17 (H) a general description of the decedent's estate subject to the jurisdiction
18 of the court;

19 (I) whether the estate includes trust and restricted real property or
20 Individual Indian Money (IIM) accounts; and

21 (J) whether the decedent has possession of any tribal cultural property or
22 culturally significant property.

23 (c) If the petitioner requests the appointment of a personal representative, the petition

1 must state the name and address of the proposed personal representative, whether the proposed
2 personal representative was nominated in the will, and if not, the reason why the proposed
3 personal representative should be appointed.

4 (d) If the original will is not available to the court and no certified copy of a will probated
5 in another jurisdiction accompanies the petition, the petition also must state that the will is lost,
6 destroyed, or otherwise unavailable. The contents of the will can be proved by a copy of the will
7 and the will may be admitted to probate if the court is satisfied that the will was not revoked as
8 provided in Section 3-308.

9 **Reporters' Note**

10 This section draws language from Sections 3-301 and 3-402 of the Uniform Probate Code
11 as well as from several tribal probate codes. Under this Code, all probate proceedings are
12 conducted in court. This differs from the Uniform Probate Code, which contains separate
13 procedures depending on whether the estate is opened in front of the clerk of court instead of the
14 judge. Because the court in which the estate is opened may have jurisdiction over only a portion
15 of the decedent's assets, to enable decisions of that court to be better informed, the petition must
16 include a description of the decedent's other assets, including trust or restricted real property or
17 IIM accounts. Subsection (d) on proof of lost wills is copied from South Dakota Codified Laws
18 Section 29A-3-402(d). Unlike the UPC, this Code places the petition requirements for testate and
19 intestate estates in separate sections. The petition requirements for an intestate estate are located
20 in Section 2-203.

21 **SECTION 2-203. PETITION FOR INTESTACY; CONTENTS.**

22 (a) A petition for an adjudication of intestacy, with or without a request for appointment
23 of a personal representative, must be directed to the court, request a judicial order after notice
24 and hearing, and contain further statements as required in this section.

25 (b) A petition for adjudication of intestacy must request a judicial finding and order
26 determining the heirs and that the decedent did not leave a valid will, and must contain the
27 following statements:
28

29 (1) the interest of the petitioner;

1 (2) the name and date of death of the decedent, the location of the decedent's
2 domicile at the time of death, and the names and addresses of the heirs and the ages of any who
3 are minors so far as known or ascertainable with reasonable diligence by the petitioner;

4 (3) whether the petitioner has received a demand for notice, or is aware of a
5 demand for notice or a probate or appointment proceeding concerning the decedent that may
6 have been filed in the [tribal court] or elsewhere;

7 (4) that after the exercise of reasonable diligence, the petitioner is not aware of
8 any will relating to property subject to probate in this [tribal Nation] or, a statement why a will of
9 which the petitioner may be aware is not being probated;

10 (5) the tribal membership status of the decedent and heirs and devisees;

11 (6) whether the estate includes trust and restricted real property or Individual
12 Indian Money (IIM) accounts; and

13 (7) whether the decedent has possession of any tribal cultural property or
14 culturally significant property.

15 (c) If the petition requests the appointment of a personal representative, the petition must
16 state the priority of the person whose appointment is sought and the names of other persons
17 having a prior or equal right to the appointment under Section 2-304.

18 **Reporters' Note**

19
20 This section draws language from several tribal probate code in addition to Sections 3-
21 301 and 3-402 of the Uniform Probate Code. Language drawn from existing tribal probate codes
22 include requirements that the petition address tribal status and also provide a general description
23 of the decedent's property, including any trust or restricted real property or IIM accounts. This
24 section applies only to intestate estates. The petition requirements for testate estates are
25 addressed in Section 2-202.

26
27 **SECTION 2-204. HEARING ON PETITION OPTIONAL.** The court may but need
28 not order that a hearing be held on a petition to admit a will to probate or to determine intestacy

1 or the priority of a proposed personal representative for appointment.

2 **Reporters' Note**

3

4 Under this code, notice of the hearing to open the estate is required only if the petition
5 does not request the appointment of a personal representative. Giving notice prior to the hearing
6 can foreclose rights to object, such as potential objections by devisees under prior wills. On the
7 other hand, requiring prior notice can significantly delay the opening of an estate. Pursuant to
8 Section 2-402, a personal representative, following the appointment, must always give notice to
9 the heirs and devisees.

10 **SECTION 2-205. PROOF OF PROPER EXECUTION OF WILL.**

11 (a) If the will is self-proved, compliance with signature and other execution requirements
12 is presumed upon the filing of the will and the self-proving affidavits.

13 (b) If the will is witnessed but not self-proved, proper execution may be established by
14 the testimony or affidavit of at least one of the attesting witnesses or by other sufficient evidence.

15 An attestation clause that is signed by the attesting witnesses raises a presumption that the events
16 recited in the clause occurred.

17 **Reporters' Note**

18 Unlike the Uniform Probate Code, which has separate sections for proving contested as
19 opposed to uncontested wills (see UPC Sections 3-405, 3-406), this section provides one
20 procedure for all wills. Because most wills are executed in front of a notary public, requiring that
21 the witnesses to the will testify in court will rarely be necessary.

22

23 **SECTION 2-206. CONTEST OF WILL.**

24 (a) Within [six] months after the admission of a will to probate, an interested person may
25 file a petition contesting the validity of the will.

26 (b) Within [six] months after denial of the admission of a will to probate, an interested
27 person may file a petition seeking to admit the will to probate.

28 (c) In a contested case, the proponents of the will have the burden of establishing prima
29 facie proof of due execution. A contestant of a will has the burden of establishing lack of

1 testamentary intent or capacity, undue influence, fraud, duress, or revocation.

2 (d) If the contest of a will is filed, an order admitting or denying admission of a will to
3 probate is final upon the expiration of the contest period as to all persons who were properly
4 notified of the court’s order. If a contest is filed within the contest period, the order is final upon
5 the conclusion of the contest.

6 **Reporters’ Note**

7 Subsection (d) is a shortened version of Section 3-414 of the Uniform Probate Code.

8 **PART 3.**

9 **PERSONAL REPRESENTATIVE; APPOINTMENT, CONTROL,**

10 **AND TERMINATION OF AUTHORITY**

11 **SECTION 2-301. COMMENCING ADMINISTRATION.** The administration of an

12 estate is commenced by the personal representative’s appointment and the issuance of letters.

13 The duties and powers of a personal representative commence upon the personal representative’s

14 appointment. Upon appointment, the powers of the personal representative relate back in time to

15 give acts by the person appointed that are beneficial to the estate and that occur prior to

16 appointment the same effect as acts occurring after the appointment.

17 **Reporters’ Note**

18
19 This section is based on Sections 3-103, 3-501, 3-601, and 3-701 of the Uniform Probate
20 Code. Unlike the UPC, which provides for both supervised and unsupervised administration, this
21 Code provides for only one type of administration which at all times is under the continuing
22 authority of the court.

23 **SECTION 2-302. QUALIFICATION AND BOND.**

24 (a) Prior to receiving letters, a personal representative must qualify by filing with the

25 appointing court an acceptance of office and any required bond.

1 (b) A bond may be required by court order at the time of appointment of a personal
2 representative, but in making this determination the court shall consider whether the will relieves
3 the personal representative of a bond.

4 **Reporters' Note**

5 This section is similar to Sections 3-601 and 3-602 of the Uniform Probate Code.

6 **SECTION 2-303. CONSENT TO JURISDICTION; NON-RESIDENT PERSONAL**
7 **REPRESENTATIVES.**

8 (a) By accepting appointment, a personal representative appointed under this [code]
9 submits personally to the jurisdiction of the court in any proceeding relating to the estate that
10 may be instituted by an interested person.

11 (b) In addition to any other method for acquiring jurisdiction over a non-resident person,
12 a personal representative appointed in another jurisdiction submits personally to the jurisdiction
13 of the courts of this tribal jurisdiction in any proceeding relating to the estate by: (1) doing any
14 act as a personal representative in this jurisdiction which would have given the tribal court
15 jurisdiction over the representative as an individual; or (2) receiving payment of money or taking
16 delivery of personal property that is subject to the jurisdiction of the tribal court. Jurisdiction
17 under clause (2) is limited to the money or value of personal property collected.

18 (c) In addition to jurisdiction conferred by subsection (b), a personal representative
19 appointed in another jurisdiction is subject to the jurisdiction of the courts of this [tribe] to the
20 same extent that the decedent was subject to jurisdiction immediately prior to death.

21 (d) Notice shall be given to a personal representative appointed in another jurisdiction in
22 the manner prescribed by Section 1-105.

1 **Reporters' Note**

2 Subsection (a) is similar to 3-603 of the Uniform Probate Code. Subsections (b)-(d) are
3 drawn from Article IV of the UPC.
4

5 **SECTION 2-304. PRIORITY AMONG PERSONS SEEKING APPOINTMENT AS**
6 **PERSONAL REPRESENTATIVE.**

7 (a) The following persons have priority for appointment in the following order:

8 (1) the person designated in a probated will including a person nominated
9 pursuant to a power to nominate conferred in a will;

10 (2) the surviving spouse of the decedent who is a devisee of the decedent;

11 (3) other devisees of the decedent;

12 (4) the surviving spouse of the decedent;

13 (5) other heirs of the decedent;

14 (6) any other qualified person and [60] days after the death of the decedent, any
15 creditor.

16 (7) [the tribe];

17 (b) The court may appoint a person having lower or no priority if it determines that the
18 person having priority would likely not act in the best interests of the estate. Before appointing
19 one with lower or no priority, the court must determine that administration is necessary and that
20 those having a higher priority were given notice of the proceedings.

21 (c) Unless otherwise ordered by the court, a personal representative appointed by a court
22 of the decedent's domicile has priority over all other persons except where the decedent's will
23 nominates a different person to be personal representative in this [tribal jurisdiction]. The
24 domiciliary personal representative may nominate another, who shall have the same priority as
25 the domiciliary personal representative.

1 (d) This section governs priority for appointment of a successor personal representative
2 but does not apply to the appointment of a special representative.

3 **Reporters' Note**

4 This Section is a shortened and modified version of Section 3-203 of the Uniform Probate
5 Code and is much less detailed.

6
7 **SECTION 2-305. TERMINATION OF APPOINTMENT; GENERAL.**

8 (a) Termination of appointment of a personal representative ends the right and power
9 pertaining to the office of a personal representative as conferred by this [code] or any will.

10 (b) A personal representative whose appointment has been terminated may perform acts
11 necessary to protect the estate and may deliver the assets to a successor personal representative
12 unless restrained or enjoined by court order.

13 (c) Termination does not discharge a personal representative from liability for
14 transactions or omissions occurring before termination, or relieve the personal representative of
15 the duty to preserve assets subject to the representative's control and to account for and deliver
16 the assets. Termination does not affect the jurisdiction of the court over the personal
17 representative.

18 **Reporters' Note**

19 This section is similar to Section 3-608 of the Uniform Probate Code.

20 **SECTION 2-306. TERMINATION OF APPOINTMENT BY REMOVAL;
21 CAUSE; PROCEDURE.**

22 (a) An interested person may petition for removal of a personal representative for cause at
23 any time. The petitioner shall give notice of the petition to the personal representative, and to
24 other persons as the court may order. Unless otherwise ordered by the court, after receiving
25 notice of judicial proceedings to remove the personal representative, the personal representative

1 shall not act except to account or to preserve the estate. If removal is ordered, the court shall
2 direct by order the disposition of the assets remaining under the control of the personal
3 representative being removed.

4 (b) Cause for removal exists when:

5 (1) removal is in the best interests of the estate;

6 (2) the personal representative has disregarded an order of the court, has failed to
7 perform a duty of office, or has become incapable of discharging the duties of office; or

8 (3) the personal representative or person petitioning for the appointment
9 misrepresented material facts in the proceeding leading to the appointment.

10 **Reporters' Note**

11 This Section is similar to Section 3-611 of the Uniform Probate Code although less
12 detailed.

13
14 **SECTION 2-307. TERMINATION OF APPOINTMENT; OTHER REASONS.**

15 The following circumstances terminate the appointment of a personal representative:

16 (a) the death of a personal representative or the appointment of a conservator for the
17 estate of a personal representative;

18 (b) The entry of an order completely settling the estate as provided in Section 2-701;

19 (c) Upon approval by the court, the resignation of a personal representative;

20 (d) Except as otherwise ordered by the court, by the appointment of a different personal
21 representative.

22 **Reporters' Note**

23 This section is based on Sections 3-609, 3-610 and 3-612 of the Uniform Probate Code
24 although with modifications.

25
26 Subsection (d) can apply in a variety of circumstances. These include probate of a will
27 subsequent to the appointment of a personal representative in intestacy, the probate of a will

1 which is superseded by probate of another will, or the vacating of the probate of a will under
2 which the personal representative was appointed.

3
4 **SECTION 2-308. SUCCESSOR PERSONAL REPRESENTATIVE.** After

5 appointment and qualification, a successor personal representative may be substituted in all
6 actions and proceedings to which the former personal representative was a party without the need
7 for additional notice.

8 **Reporters' Note**

9 This section is based on a portion of Section 3-613 of the Uniform Probate Code.

10 **SECTION 2-309. SPECIAL PERSONAL REPRESENTATIVE; APPOINTMENT;**
11 **POWERS AND DUTIES.**

12 (a) A special representative may be appointed by order of the court on the petition of an
13 interested person and finding, after notice and hearing, that appointment is necessary to preserve
14 the estate or to secure its proper administration. If it appears to the court that an emergency
15 exists, appointment may be ordered without notice.

16 (b) If a special personal representative is to be appointed pending the probate of a will,
17 the person named executor in the will shall be appointed if available and qualified for
18 appointment. In other cases, a qualified person may be appointed as special personal
19 representative.

20 (c) A special personal representative has the power and duties prescribed in the order of
21 appointment.

22 (d) An appointment of a special personal representative terminates in accordance with the
23 order of appointment, on the appointment of a personal representative or as provided in Sections
24 2-305 through 2-307.

1 **Reporters' Note**

2 This section combines in one place portions of Sections 3-614, 3-616, 3-617, and 3-618
3 of the Uniform Probate Code.

4 **PART 4.**

5 **DUTIES AND POWERS OF PERSONAL REPRESENTATIVE**

6 **SECTION 2-401. GENERAL DUTIES; RELATION AND LIABILITY TO**
7 **PERSONS INTERESTED IN ESTATE; STANDING TO SUE.**

8 (a) A personal representative is a fiduciary who shall observe the duties of loyalty and
9 prudence, shall keep the beneficiaries of the estate reasonably informed about administration,
10 and shall otherwise act in the best interests of the estate. The personal representative shall settle
11 and distribute the estate of the decedent in accordance with the terms of any probated will and
12 this [code].

13 (b) A personal representative shall proceed expeditiously with the settlement and
14 distribution of a decedent's estate. Except as otherwise requested by the personal representative,
15 specified or ordered by the court or in this [code], the personal representative may act without
16 adjudication, order, or direction of the court.

17 (c) A personal representative may not be surcharged for acts of administration or
18 distribution if the conduct in question was authorized at the time.

19 (d) This section does not affect the duty of the personal representative to administer and
20 distribute the estate in accordance with the rights of claimants whose claims have been allowed,
21 the rights of surviving spouse, any minor and dependent child, and any omitted child as
22 described elsewhere in this [code].

23 (e) Except as to proceedings that do not survive the death of a decedent, a personal
24 representative of a decedent whose estate is being administered under this [code] has the same

1 standing to sue and be sued in the courts of this [tribal jurisdiction] and the courts of another
2 jurisdiction as the decedent had immediately prior to death.

3 **Reporters' Note**

4 Subsection (b) is identical to Section 3-704 of the Uniform Probate Code. This section
5 otherwise is a shortened version of Section 3-703 of the Uniform Probate Code.

6
7 **SECTION 2-402. DUTY OF PERSONAL REPRESENTATIVE: NOTICE TO**
8 **HEIRS AND DEVISEES.**

9 (a) Not later than [21] days after appointment of a personal representative, other than a
10 special personal representative, the [personal representative] [clerk] shall give notice of the
11 appointment to the heirs, devisees, and to the [tribe].

12 (b) The notice shall include the name and address of the personal representative, state that
13 it is being sent to the heirs and, if a will has been admitted to probate, to the devisees, state
14 whether bond has been filed, and describe the court where papers relating to the estate are on
15 file. The notice also must state that the estate is being administered by the personal
16 representative under the [name of tribe] Probate Code and that recipients are entitled to
17 information regarding the administration from the personal representative and can petition the
18 court in any matter relating to the estate.

19 [(c) A failure to give notice under this section does not affect the validity of the personal
20 representative's appointment or exercise of powers.]

21 **Reporters' Note**

22 This section is a similar to portions of Section 3-705 of the Uniform Probate Code.

23 **SECTION 2-403. DUTY OF PERSONAL REPRESENTATIVE; INVENTORY**
24 **AND APPRAISEMENT.**

25 (a) Within three months after appointment, a personal representative other than

1 a special personal representative shall prepare and file with the court an inventory of property
2 owned by or in the custody or possession of the decedent at the time of death. The inventory
3 shall list each item of property with reasonable detail, [and, except for tribal cultural property,]
4 specify its fair market value as of the date of the decedent's death, and the type and amount of
5 any encumbrance to which the item is subject. In preparing the inventory, a personal
6 representative may employ appraisers. The personal representative shall mail or deliver a copy of
7 the inventory to interested persons that request it. A successor personal representative need not
8 file an inventory if an inventory was previously filed.

9 (b) A personal representative shall file a supplemental inventory with the court if the
10 personal representative learns that property was not included in the original inventory or that the
11 value or description of any item in the original inventory was erroneous or misleading. The
12 personal representative shall mail or deliver a copy of the supplemental inventory to the persons
13 sent a copy of the original inventory and to other interested persons that request it.

14 **Reporters' Note**

15 This section is a modified version of Sections 3-706, 3-707, and 3-708 of the Uniform
16 Probate Code.

17 **SECTION 2-404. DUTY OF PERSONAL REPRESENTATIVE; POSSESSION OF**
18 **ESTATE.** Except as otherwise provided by a decedent's will, a personal representative has a
19 right to, and shall take possession or control of, the property owned by or in the possession or
20 custody of the decedent. The personal representative shall pay taxes on, and take all steps
21 reasonably necessary for the management, protection and preservation of, the estate in the
22 personal representative's possession or control. The personal representative may maintain an
23 action to recover possession or control of property or to determine its title.
24

1 **Reporters' Note**

2 This section is based on a portion of Section 3-709 of the Uniform Probate Code.

3 **SECTION 2-405. POWERS OF PERSONAL REPRESENTATIVE;**
4 **GENERALLY; IMPROPER EXERCISE.**

5 (a) A personal representative has the same power over the title to property of the estate
6 that an absolute owner would have, in trust however, for the benefit of the creditors and others
7 interested in the estate. This power may be exercised without notice, hearing, or order of court.

8 (b) If it appears that a personal representative may take some action that would jeopardize
9 unreasonably the interest of the petitioner or of some other interested person, the court may order
10 the personal representative to refrain from performing specified acts of administration,
11 disbursement or distribution, or make any other order to secure proper performance of the
12 personal representative's duty.

13 (c) If the exercise of power concerning the estate is improper, the personal representative
14 is liable to interested persons for damage or loss resulting from breach of the fiduciary duty.
15 The rights of purchasers and others dealing with a personal representative shall be determined as
16 provided in Sections 2-406 and 2-407.

17 **Reporters' Note**

18 This section combines portions of Sections 3-711 and 3-712 of the Uniform Probate
19 Code. Subsection (b) is identical to Section 3-607(a) of the Uniform Probate Code.

20
21 **SECTION 2-406. SALE, ENCUMBRANCE OR TRANSACTION INVOLVING**
22 **CONFLICT OF INTEREST; VOIDABLE; EXCEPTIONS.** A sale, encumbrance, or other
23 transaction that the personal representative, the personal representative's spouse, agent or
24 attorney, or any business entity in which the personal representative has a substantial beneficial
25 interest, or a transaction that is affected by a substantial conflict of interest on the part of the

1 personal representative, is voidable through an action for rescission by any person affected by
2 the transaction unless:

3 (1) the person bringing the action consented after fair disclosure;

4 (2) the will or a contract entered into by the decedent expressly authorized the
5 transaction; or

6 (3) the transaction is approved by the court after notice to interested persons.

7 **Reporters' Note**

8 This section is similar to Section 3-713 of the Uniform Probate Code.

9 **SECTION 2-407. PERSON DEALING WITH PERSONAL REPRESENTATIVE;**
10 **PROTECTION.**

11 (a) A person who in good faith either assists a personal representative or deals with the
12 personal representative for value is protected as if the personal representative was properly
13 authorized to act.

14 (b) The fact that a person knowingly deals with a personal representative with knowledge
15 of the representative capacity does not alone require the person to inquire into the existence of a
16 power or the propriety of its exercise.

17 (c) A person is not bound to see to the proper application of estate assets paid or
18 delivered to a personal representative.

19 (d) Comparable protective provisions of other laws relating to commercial transactions or
20 transfer of securities by fiduciaries prevail over the protections provided by this section.

21 (e) As used in this section, "good faith" means honesty in fact and the observance of
22 reasonable standards of fair dealing.

1 **Reporters' Note**

2 This section is similar to portions of Section 3-714 of the Uniform Probate Code.

3 **SECTION 2-408. SALE OF PROPERTY; WHEN NOTICE REQUIRED.** At least
4 [21] days before the sale of real property or personal property of the estate for which the fair
5 market value is not readily ascertainable, the personal representative shall provide written notice
6 of the intent to sell to the beneficiaries of the estate whose interests might be affected by the sale
7 and to persons who have filed a demand for notice under Section 2-104. The notice shall contain
8 a description of the property to be sold, the name of the purchaser, the sale price, the terms of
9 payment, and the nature of the security if the payment of any portion of the purchase price is to
10 be deferred.

11 **Reporters' Note**

12 This section borrows in part from South Dakota Codified Laws Section 3-715(b).

13 **SECTION 2-409. TRANSACTIONS AUTHORIZED FOR PERSONAL**
14 **REPRESENTATIVE; EXCEPTIONS.** Except as restricted or otherwise provided by the will
15 or by an order of court, a personal representative, acting reasonably for the benefit of the estate,
16 may properly exercise the following powers:

17 (1) retain assets owned by the decedent pending distribution or liquidation including
18 those in which the representative is personally interested;

19 (2) perform, compromise or refuse performance of the decedent's contracts that continue
20 as obligations of the estate, as he may determine under the circumstances.

21 (3) satisfy written charitable pledges of the decedent irrespective of whether the pledges
22 constituted binding obligations of the decedent.

23 (4) if funds are not needed to meet debts and expenses currently payable and are not

1 immediately distributable, deposit or invest liquid assets of the estate, including moneys received
2 from the sale of other assets, in federally insured interest-bearing accounts or other prudent
3 investments;

4 (5) acquire or dispose of an asset, including land in this or another state, for cash or on
5 credit, at public or private sale; and manage, exchange, partition, change the character of, or
6 abandon an estate asset when, in the opinion of the personal representative, it is valueless, or is
7 so encumbered, or is in condition that it is of no benefit to the estate;

8 (6) make ordinary or extraordinary repairs or alterations in buildings or other structures,
9 demolish any improvements, raze existing or erect new party walls or buildings;

10 (7) enter for any purpose into a lease as lessor or lessee, with or without option to
11 purchase or renew, for a term within or extending beyond the period of administration;

12 (8) enter into a lease or arrangement for exploration and removal of minerals or other
13 natural resources;

14 (9) insure the assets of the estate against damage, loss and liability and the personal
15 representative against liability as to third persons;

16 (10) borrow money with or without security to be repaid from the estate assets or
17 otherwise; and advance money for the protection of the estate;

18 (11) pay taxes, assessments, compensation of the personal representative, and other
19 expenses incident to the administration of the estate;

20 (12) employ persons, including attorneys, auditors, investment advisors, or agents, even if
21 they are associated with the personal representative, to advise or assist the personal
22 representative in the performance of his administrative duties; act without independent
23 investigation upon their recommendations; and instead of acting personally, employ one or more

1 agents to perform any act of administration, whether or not discretionary;

2 (13) prosecute or defend claims, or proceedings in any jurisdiction for the protection of
3 the estate and of the personal representative in the performance of his duties;

4 (14) sell, mortgage, or lease any real or personal property of the estate or any interest
5 therein for cash, credit, or for part cash and part credit, and with or without security for unpaid
6 balances;

7 (15) continue or incorporate any unincorporated business or venture in which the
8 decedent was engaged at the time of the decedent's death; and

9 (16) satisfy and settle claims and distribute the estate as provided in this [code].

10 **SECTION 2-410. POWERS AND DUTIES OF SUCCESSOR PERSONAL**
11 **REPRESENTATIVE.**

12 (a) A successor personal representative has the same power and duty as the original
13 personal representative to complete the administration and distribution of the estate, but the
14 successor personal representative may not exercise any power expressly made personal to the
15 personal representative named in the will.

16 (b) A successor personal representative is not individually liable for the action or failure
17 to act of a previous personal representative unless the successor has knowledge of a breach of
18 fiduciary duty by the predecessor and fails to take reasonable corrective action.

19 **Reporters' Note**

20 Subsection (a) is identical to Section 3-716 of the Uniform Probate Code. Subsection (b)
21 is identical to South Dakota Codified Laws Section 3-716(b).

22
23 **SECTION 2-411. CO-REPRESENTATIVES; WHEN JOINT ACTION**
24 **REQUIRED.**

25 (a) Unless the will provides otherwise, the concurrence of all co-representatives is

1 required on all decisions connected with the administration and distribution of the estate.
2 Concurrence is not required when such agreement cannot readily be obtained in the time
3 reasonably available for emergency action necessary to preserve the estate, or when a co-
4 representative has been delegated to act for the others. A person who deals with a co-
5 representative without knowledge that another has also been appointed to serve is as fully
6 protected as if that co-representative with whom they dealt had full authority.

7 (b) Unless the terms of the will otherwise provide, every power exercisable by personal
8 co-representatives may be exercised by the one or more remaining after the appointment of one
9 or more of the others is terminated.

10 **Reporters' Note**

11 This section is based on Sections 3-717 and 3-718 of the Uniform Probate Code.

12 **SECTION 2-412. COMPENSATION OF PERSONAL REPRESENTATIVE.**

13 (a) A personal representative and an attorney for the personal representative are entitled
14 to reasonable compensation for services as approved by the court. Reasonable compensation may
15 include compensation for the services of the agents or employees of the person seeking
16 compensation and may also include reimbursement for costs advanced. A determination of
17 reasonable compensation may be based on one or more of the following factors:

18 (1) The time and labor involved;

19 (2) The novelty and difficulty of the questions involved, and the skill requisite to
20 perform the service properly;

21 (3) The likelihood that the acceptance of the particular employment will preclude
22 other employment by the person;

(4) The fee customarily charged in the locality for similar services;

1 (5) The nature, economic and otherwise, of the assets of the estate and their
2 respective values, the amount of income earned by the estate, and the responsibilities and
3 potential liabilities assumed by the person;

4 (6) The time limitations imposed by the circumstances;

5 (7) The familial relationship between the person performing the service and the
6 beneficiaries of the estate; and

7 (8) The experience, reputation, diligence, and ability of the person performing the
8 services.

9 (b) A personal representative may renounce the right to all or any part of the
10 compensation to which the personal representative would otherwise be entitled.

11 **Reporters' Note**

12 Subsection (a) is copied from South Dakota Codified Laws Section 3-719(a). Subsection
13 (b) is copied from Section 3-719 of the Uniform Probate Code.

14 **SECTION 2-413. INDIVIDUAL LIABILITY OF PERSONAL** 15 **REPRESENTATIVE.**

16 (a) A personal representative is individually liable on a contract properly entered into in
17 the personal representative's fiduciary capacity in the course of administration of the estate only
18 if the contract so provides or the contract fails to disclose the fiduciary capacity.

19 (b) A personal representative is individually liable for torts committed in the
20 administration of the estate or for obligations arising from ownership or control of the estate only
21 if the personal representative is personally negligent.

22 (c) Even though the personal representative is not individually liable under subsections
23 (a) or (b), a claim based on a contract, tort, or obligation arising from ownership or control of the
24 estate, may be asserted against the estate in a judicial proceeding against the personal
25

1 representative in the representative’s fiduciary capacity.

2 **Reporters’ Note**

3 This section is similar to Section 3-808(a)-(c) of the Uniform Probate Code.

4 **PART 5.**

5 **CREDITORS’ CLAIMS**

6 **SECTION 2-501. CLAIMS AGAINST DECEDENT; NECESSITY OF**

7 **ADMINISTRATION.** A proceeding to enforce a claim against the estate of a decedent or the
8 decedent’s successors may not be commenced before the appointment of a personal
9 representative.

10 **Reporters’ Note**

11 This section is based in part on Section 3-104 of the Uniform Probate Code.

12 **SECTION 2-502. NOTICE TO CREDITORS.**

13 (a) Unless notice has already been given by a previously appointed personal
14 representative, a personal representative upon appointment shall publish a notice to creditors
15 once a week for two successive weeks in a newspaper of general circulation in the [tribal nation]
16 announcing the appointment and the personal representative’s address and notifying creditors of
17 the decedent to present their claims within [four] months after the date of the first publication of
18 the notice or the claim may be barred.

19 (b) Except as provided in subsection (c), a personal representative shall give written
20 notice by mail or other delivery to a creditor of the decedent, who is either known to or
21 reasonably ascertainable by the personal representative, informing the creditor to present the
22 claim within [four] months after the date of the first publication of notice as provided in
23 subsection (a), or within 60 days after the mailing or other delivery of the written notice,

1 whichever is later, or be forever barred.

2 (c) A personal representative need not give written notice to a creditor if any of the
3 following apply:

4 (1) The creditor has presented a claim against the estate;

5 (2) The creditor has been paid in full;

6 (3) The creditor was neither known to nor reasonably ascertainable by the
7 personal representative within [four] months after the first publication of notice as provided in
8 subsection (a).

9 (d) A personal representative is not liable for a non-negligent or non-willful failure to
10 give notice to a particular creditor. Liability, if any, for the failure shall attach to the estate.

11 **Reporters' Note**

12 This section is similar to South Dakota Codified Laws Section 29A-3-801.

13 **SECTION 2-503. STATUTE OF LIMITATIONS.**

14 (a) The running of a statute of limitations measured from an event other than death or the
15 giving of notice to creditors is suspended for [four] months after the decedent's death, but
16 resumes thereafter as to claims not otherwise barred.

17 (b) For purposes of a statute of limitations, the presentation of a claim pursuant to Section
18 2-505 is equivalent to commencement of a proceeding on the claim.

19 **Reporters' Note**

20 This section is similar to Section 3-802 of the Uniform Probate Code

21 **SECTION 2-504. LIMITATION ON PRESENTATION OF A CLAIM.**

22 (a) If not barred earlier by another statute of limitations or nonclaim statute, a claim
23 against a decedent's estate which arose before the death of the decedent, including a claim of the

1 [tribe] or any subdivision thereof, whether due or to become due, absolute or contingent,
2 liquidated or unliquidated, founded on contract, tort, or other legal basis, is barred against the
3 estate, the personal representative, and the heirs and devisees of the decedent, unless presented
4 within the earlier of:

5 (1) As to a creditor not entitled to a written notice who is barred by publication
6 alone, [four] months after the first publication of notice as provided in Section 2-502(a) or [one
7 year] after the decedent's death, whichever is earlier;

8 (2) As to a creditor entitled to written notice, on the date specified in the written
9 notice as provided in Section 2-502(b) or [one year] after the decedent's death, whichever is
10 earlier.

11 (b) A claim described in subsection (a) which is barred by the nonclaim statute of the
12 decedent's domicile before the giving of notice to creditors in this state is barred in this state.

13 (c) Nothing in this [part] affects or prevents:

14 (1) Any proceeding to enforce any mortgage, security interest, or other lien upon
15 property of the estate;

16 (2) Any right to terminate or enforce a lease of license;

17 (3) Any proceeding to establish liability of the decedent or the personal
18 representative to the extent there is protection through liability insurance.

19 **Reporters' Note**

20 This section is a modified version of Section 3-803 of the Uniform Probate Code.

21 **SECTION 2-505. MANNER OF PRESENTATION OF CLAIM.**

22 (a) A claim against a decedent's estate may be presented as follows:

23 (1) The claimant may file the claim with the court in the form prescribed by court

1 rule. The statement of claim shall indicate its basis, the name and address of the claimant, and the
2 amount claimed. If a claim is not yet due, the date when it will become due shall be stated. If
3 the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim
4 is secured, the security shall be described. Upon the filing, the clerk shall send a copy of the
5 claim to the personal representative or representative's attorney; or

6 (2) The claimant may commence a proceeding against the personal representative
7 in any court where the personal representative may be subjected to jurisdiction, to obtain
8 payment of the claim against the estate, but the commencement of the proceeding must occur
9 within the time limit for presenting the claim.

10 (b) A presentation of a claim is not required in regard to matters claimed in proceedings
11 against the decedent which were pending at the time of death.

12 **Reporters' Note**

13 This section is a greatly shortened version of Section 3-804 of the Uniform Probate Code.

14 **SECTION 2-506. CLASSIFICATION OF CLAIM.**

15 (a) If the applicable assets of an estate are insufficient to pay all claims in full, a personal
16 representative shall make payment in the following order:

17 (1) costs and expenses of administration;

18 (2) reasonable funeral expenses;

19 (3) debts and taxes with preference under federal or tribal law;

20 (4) reasonable and necessary medical and hospital expenses of the last illness of
21 the decedent, including compensation of persons attending the decedent;

(5) debts and taxes with preference under other laws of this [tribe];

22 (6) all other claims.

1 (b) Preference may not be given in the payment of any claim over any other claim of the
2 same class.

3 **Reporters' Note**

4 This section is identical to Section 3-805 of the Uniform Probate Code

5 **SECTION 2-507. ALLOWANCE OF CLAIM.**

6 (a) Upon the petition of the claimant in a proceeding for the purpose, the court may allow
7 in whole or in part any claim or claims filed with the clerk of the court. Notice in this proceeding
8 shall be given to the claimant, the personal representative and other persons interested in the
9 estate as the court may direct by order entered at the time the proceeding is commenced.

10 (b) A judgment in a proceeding in another court against the personal representative to
11 enforce a claim against the decedent's estate is an allowance of the claim.

12 **Reporters' Note**

13 This section is a partial enactment of Section 3-806 of the Uniform Probate Code.

14 **SECTION 2-508. PAYMENT OF CLAIM.**

15 (a) Upon the expiration of the earlier of the time limitations provided in Section 2-504 for
16 the presentation of claims, the personal representative shall pay the claims allowed against the
17 estate in the order of priority prescribed, after making provision for [statutory allowances for the
18 spouse and children], for claims already presented that have not yet been allowed or whose
19 allowance has been appealed, and for costs and expenses of administration.

20 (b) A claimant whose claim has been allowed but not paid may petition the court to
21 secure an order directing the personal representative to pay the claim to the extent funds of the
22 estate are available to pay it.

23 (c) The personal representative at any time may pay any valid claim that has not been

1 barred, with or without formal presentation, but is personally liable to any other claimant whose
2 claim is allowed and who is injured by its payment if:

3 (1) payment was made before the expiration of the time limitation provided in
4 Section 2-504 for the presentation of claims; or

5 (2) payment was made because of the negligence or willful fault of the personal
6 representative, in such manner as to deprive the injured claimant of priority.

7 **Reporters' Note**

8 This section is a shortened version of Section 3-807 of the Uniform Probate Code

9 **PART 6.**

10 **SPECIAL PROVISIONS RELATING TO DISTRIBUTION**

11 **SECTION 2-601. DISTRIBUTION; ORDER IN WHICH ASSETS**

12 **APPROPRIATED; ABATEMENT.**

13 (a) Except as provided in the decedent's will and except as provided in connection with
14 the share of the surviving spouse who elects to take an elective share, shares of distributees
15 abate, without any preference or priority as between real and personal property, in the following
16 order: (1) property not disposed of by the will; (2) residuary devises; (3) general devises; (4)
17 specific devises. Abatement within each classification is in proportion to the amounts of property
18 each of the beneficiaries would have received, if full distribution of the property had been made
19 in accordance with the terms of the will.

20 (b) If the subject of a preferred devise is sold or spent incident to administration,
21 abatement shall be achieved by appropriate adjustments in the distribution of the remaining
22 assets.

1 **Reporters' Note**

2 This section is a partial enactment of Section 3-902 of the Uniform Probate Code.

3 **SECTION 2-602. RIGHT OF RETAINER.** Any indebtedness of a distributee of an
4 estate shall be offset against the distributee's interest; but the distributee has the benefit of any
5 defense which would be available to the distributee in a direct proceeding for recovery of the
6 debt.

7 **Reporters' Note**

8 This section is a modified version of Section 3-903 of the Uniform Probate Code.

9 **SECTION 2-603. INTEREST ON DEVISE OF SPECIFIED AMOUNT OF**
10 **MONEY.** A devise of a specified amount of money bears interest at the [legal rate on
11 judgments] beginning one year after the first appointment of a personal representative until
12 payment, unless a contrary intent is expressed by the will.

13 **Reporters' Note**

14 This section is identical to Section 3-904 of the Uniform Probate Code.

15 **SECTION 2-604. DISTRIBUTION IN KIND; EVIDENCE OF TITLE.**

16 (a) Unless a contrary intent is expressed by the will, the distributable assets of a
17 decedent's estate shall be distributed in kind to the extent possible.

18 (b) If distribution of the estate assets is made in kind, the personal representative shall
19 execute a document of distribution transferring the assets to the distributee as evidence of the
20 distributee's title or right to the property.

21 (c) Proof that a distributee has received a document of distribution of assets in kind, or
22 payment in distribution, from a personal representative, is conclusive evidence that the
23 distributee has received the interest of the estate in the distributed assets, as against all persons

1 interested in the estate, except that the assets or their value may be recovered if the distribution
2 was improper.

3 **Reporters' Note**

4 This section combines Sections 3-907 and 3-908 of the Uniform Probate Code with a
5 partial enactment of Section 3-906(a) of the UPC.

6
7 **SECTION 2-605. PROPOSAL FOR DISTRIBUTION.** After the probable charges
8 against an estate are known, the personal representative may mail or deliver a proposal for
9 distribution to all persons who have a right to object to the proposed distribution. If the proposed
10 distribution informed the distributee of the right to object and of the applicable time limit the
11 right of any distributee to object on the basis of the kind or value of asset the distributee is to
12 receive, terminates if the distributee fails to object to the personal representative in writing
13 within 30 days after mailing or delivery of the proposal.

14 **Reporters' Note**

15 This section is a modified version of Section 3-906(b) of the Uniform Probate Code.

16 **SECTION 2-606. IMPROPER DISTRIBUTION; LIABILITY OF DISTRIBUTE.**

17 (a) Unless the distribution or payment can no longer be questioned because of
18 adjudication, estoppel, or limitation, a distributee of property improperly distributed, or a
19 claimant who was improperly paid, is liable to return the property improperly received and its
20 income, or an equivalent value if the distributee or claimant no longer has the property.

21 (b) The claim of a claimant to recover from a distributee who is liable to pay the claim,
22 and the right of an heir or devisee, or of a successor personal representative acting in their behalf,
23 to recover property improperly distributed or its value from any distributee is forever barred at
24 the later of three years after the decedent's death or one year after the time of its distribution, but
25 all claims of creditors of the decedent are barred one year after the decedent's death. This section

1 does not bar an action to recover property or value received as a result of fraud.

2 **Reporters' Note**

3 This section is similar to Section 3-909 of the Uniform Probate Code.

4 **SECTION 2-607. DISTRIBUTION TO MINOR OR ADULT LACKING**
5 **CAPACITY.**

6 (a) A personal representative may discharge an obligation to distribute the share of a
7 person for whom a [conservator] has been appointed only by distributing to the [conservator]. If
8 the personal representative is aware that a proceeding for appointment of a [conservator] is
9 pending, the personal representative shall delay distribution until the proceeding is decided.

10 (b) A personal representative may discharge an obligation to distribute the share of a
11 minor not under [conservatorship] by distributing the share as provided in the decedent's will or
12 in the absence of directions in the will, by distributing the share to:

13 (1) The minor if married or otherwise emancipated;

14 (2) A [guardian] of the minor;

15 (3) A custodian of the minor as authorized by a Uniform Gifts or Transfers to
16 Minors Act of any applicable jurisdiction;

17 (4) A financial institution incident to a deposit in an insured savings account or
18 certificate in the sole name of the minor with notice of the deposit to the minor;

19 (5) Any person responsible for or who has assumed responsibility for the minor's
20 care or custody, provided that the value of the share to be distributed does not exceed [\$10,000].

21 (c) A personal representative may discharge an obligation to distribute the share of an
22 adult person not under [conservatorship] but who the representative reasonably believes lacks
23 capacity to manage his or her property or financial affairs by distributing the share as provided in

1 the decedent's will or, in the absence of directions in the will, by distributing the share to:

2 (1) An agent under a durable power of attorney who has authority to receive and
3 collect property for the adult person;

4 (2) A [guardian] of the adult person;

5 (3) Any person responsible for or who has assumed responsibility for the adult
6 person's care or custody, provided that the value of the share to be distributed does not exceed
7 [\$10,000].

8 (d) The personal representative is not responsible for the proper application of money or
9 property distributed pursuant to subsection (a).

10 **Reporters' Note**

11 This section is identical to South Dakota Codified Laws Section 3-915.

12 **SECTION 2-608. FINAL DISTRIBUTION TO DOMICILIARY**

13 **REPRESENTATIVE.** An estate of a non-resident decedent being administered by a personal
14 representative appointed in this [tribal nation] shall, if there is a personal representative of the
15 decedent's domicile willing to receive it, be distributed to the domiciliary personal
16 representative for the benefit of the successors of the decedent unless (1) the personal
17 representative of this [Tribal Nation], after reasonable inquiry, is unaware of the existence or
18 identity of a domiciliary personal representative; or (2) the court orders otherwise. In other cases,
19 distribution of the estate of a decedent shall be made in accordance with the other [parts] of this
20 [article].

21 **Reporters' Note**

22 This section is similar to Section 3-816 of the Uniform Probate Code.

1 appointment, and discharge the personal representative from further claims or demands.

2 (c) Any accounting required under this section may be waived if the persons entitled to a
3 copy consent in writing.

4 (d) An order of complete settlement shall be conclusive as to the matters determined on
5 all persons given notice, subject only to being reversed, set aside or modified on appeal.

6 **Reporters' Note**

7 This section is a shortened version of South Dakota Codified Laws Section 29A-3-1001.

8 **SECTION 2-702. LIABILITY OF DISTRIBUTEE TO CLAIMANT.**

9 (a) After assets of an estate have been distributed, an undischarged claim not barred may
10 be prosecuted in a proceeding against one or more distributees but only if the action is brought
11 within the later of [three] years after the decedent's death or one year after the the time of the
12 distribution. A creditor of the decedent may bring an action under this section only if the claim
13 has not been barred under Section 2-504.

14 (b) This section does not bar an action to recover property or value received as a result of
15 fraud.

16 **Reporters' Note**

17 This section is a partial enactment of Section 3-1004 of the Uniform Probate Code.

18 **SECTION 2-703. SUBSEQUENT ADMINISTRATION.** If other property of the
19 estate is discovered after an estate has been settled and the personal representative discharged,
20 the court upon petition of any interested person and upon notice as it directs, may appoint the
21 same or a successor personal representative to administer the subsequently discovered property.
22 If a new appointment is made, unless the court orders otherwise, the provisions of this [code]
23 apply as appropriate; but no claim previously barred may be asserted in the subsequent

1 administration.

2 **Reporters' Note**

3 This section is identical to Section 3-1008 of the Uniform Probate Code.

4 **PART 8.**

5 **COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT AND SUMMARY**

6 **ADMINISTRATION PROCEDURE FOR SMALL ESTATE**

7 **SECTION 2-801. COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT.**

8 (a) Thirty days after the death of a decedent, any person indebted to the decedent or
9 having possession of tangible personal property or an instrument evidencing a debt, obligation,
10 stock or chose in action belonging to the decedent shall make payment of the indebtedness or
11 deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or
12 chose in action to a person claiming to be the successor of the decedent upon being presented an
13 affidavit made by or on behalf of the successor stating that:

14 (1) the value of the entire estate, including exempt property, wherever located,
15 less liens and encumbrances, does not exceed [\$25,000]; and

16 (2) 30 days have elapsed since the death of the decedent; and

17 (3) no application or petition for the appointment of a personal representative is
18 pending or has been granted in any jurisdiction; and

19 (4) the claiming successor is entitled to payment or delivery of the property.

20 (b) A transfer agent of any security shall change the registered ownership on the books of
21 a corporation from the decedent to the successor or successors upon the presentation of an
22 affidavit as provided in subsection (a).

23 (c) The person paying, delivering, transferring, or issuing personal property or the

1 evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt
2 with a personal representative of the decedent. The person is not required to see to the
3 application of the personal property or evidence thereof or to inquire into the truth of any
4 statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver,
5 transfer, or issue any personal property or evidence thereof, it may be recovered or its payment,
6 delivery, transfer, or issuance compelled upon proof of their right in a proceeding brought for the
7 purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery,
8 transfer or issuance is made is answerable and accountable therefor to any personal
9 representative of the estate or to any other person having a superior right.

10 **Reporter's Note**

11 This section is copied from Sections 3-1201 and 3-1202 of the Uniform Probate Code.

12 **SECTION 2-802. SUMMARY ADMINISTRATION PROCEDURE FOR SMALL**
13 **ESTATE.**

14 (a) If it appears from the inventory and appraisal that the value of the entire estate, less
15 liens and encumbrances, does not exceed homestead allowance, exempt property, family
16 allowance, costs and expenses of administration, and reasonable and necessary medical and
17 hospital expenses of the last illness of the decedent, the personal representative may, without
18 giving notice to creditors, summarily and immediately disburse and distribute the estate to the
19 persons entitled thereto, and file a closing statement as provided in subsection (b).

20 (b) Unless prohibited by order of a court, the personal representative may close an estate
21 administered under this summary administration procedure by filing with the court, at any time
22 after disbursement and distribution of the estate, a verified statement stating that:

23 (1) to the knowledge of the personal representative, the value of the entire estate,

1 less liens and encumbrances, did not exceed homestead allowance, exempt property, family
2 allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable,
3 necessary medical and hospital expenses of the last illness of the decedent;

4 (2) the personal representative has fully administered the estate by disbursing and
5 distributing it to the persons entitled thereto; and

6 (3) the personal representative has sent a copy of the closing statement and has
7 provided a full accounting in writing to all persons entitled to the estate, to all creditors who have
8 filed claims against the estate whose claims have not been paid or barred, and to all persons who
9 have filed a demand for notice under Section 2-104.

10 (c) If no actions or proceedings involving the personal representative are pending in the
11 court [six months] after the closing statement is filed, the appointment of the personal
12 representative terminates.

13 **Reporters' Note**

14 This section is similar to Sections 3-1203 and 3-1204 of the Uniform Probate Code.

15 **ARTICLE 3**

16 **INTESTATE AND TESTATE SUCCESSION**

17 **PART 1.**

18 **INTESTATE SUCCESSION OF NON-TRUST PROPERTY**

19 **SECTION 3-101. INTESTATE ESTATE.** The intestate estate is any part of a
20 decedent's estate not effectively disposed of by will. The net intestate estate, which is the
21 balance of the decedent's estate after claims, expenses, homestead allowance, exempt property,
22 and family statutory allowances for the spouse and children, tribal cultural property, and property
23 that is not otherwise barred from distribution by federal law, tribal law, or tribal leasing

1 regulations, passes by intestate succession to the decedent’s heirs as described in this code.

2 **Reporters’ Note**

3 There are numerous ways that intestate succession can be, and has been, handled within a
4 tribal probate code: (1) completely align with AIPRA, essentially importing its provisions
5 wholesale; (2) split trust/restricted off from non-trust and non-restricted property, with separate
6 provisions for each; or (3) cover all property and seek approval under AIPRA for this broad
7 application.

8
9 This draft currently reflects Option #2 by proposing provisions applicable to non-trust or
10 restricted property – all of which would be completely subject to tribal alteration to best suit that
11 tribe’s needs and goals – and then saving a place for a streamlined version of AIPRA which
12 would apply to trust and restricted property. This is essentially the approach taken by the
13 Northern Cheyenne Probate Code (approved by SOI, 11/17/14) and the Fort Peck TPC Title 12
14 §§ 101, 106 (“Except as to trust or restricted land subject to the jurisdiction of the United States,
15 the Tribal Court shall have jurisdiction to determine heirs ...”; “When an Indian dies without a
16 valid will, the Indian’s property which is subject to the Court’s jurisdiction shall descend to the
17 following persons”).

18
19 **SECTION 3-102. SHARE OF SPOUSE.**

20 (a) The intestate share of a decedent’s surviving spouse is the entire net intestate estate if

21 (1) no descendant of the decedent survives the decedent; or

22 (2) all of the decedent’s surviving descendants are also descendants of the
23 surviving spouse.

24 (b) The intestate share of a decedent’s surviving spouse is ½ of the entire net intestate
25 estate if the decedent is survived by one or more descendants who are not also descendants of the
26 surviving spouse.

27 **Reporters’ Note**

28 TPCs take numerous approaches in determining the spousal share. The drafted model
29 provision falls between codes that provide for the entire estate always to pass to the surviving
30 spouse (if there is one), to those that limit the spouse to ½ if there are any surviving issue (*See*
31 *e.g.* Chitimacha TPC § 302, Fort Peck § 106(a)(1)), to those that reduce the spousal share to a
32 different fraction (*e.g.* Jicarilla TPC Chapter 8 § (B) (1/4 to spouse, ¾ to surviving children as to
33 separate property) or in a greater number of instances, *e.g.* when the decedent is survived by
34 parents or siblings, rather than only descendants. *See, e.g.*, Lummi Nation TPC Chapter 35.05
35 §35.05.010 (“the surviving spouse shall receive . . . ¾ of the net separate estate if there is no

1 surviving issue, but he intestate is survived by one or more of his parents, or by one or more of
2 the issue of one or more of his parents.”).

3 Note that the definition of “spouse” will be a matter for tribal nations to decide, such as
4 the effect given to customary marriage.

5 **SECTION 3-103. SHARE OF HEIRS OTHER THAN SURVIVING SPOUSE.**

6 (a) Any part of the net intestate estate that does not pass to a decedent’s surviving spouse
7 passes as follows:

8 (1) to the decedent’s surviving descendants by representation;

9 (2) if there is no surviving descendant, equally to any surviving parent;

10 (3) if there is no surviving descendant or parent, to the decedent’s siblings in
11 equal shares, with the descendant or descendants of any predeceased sibling taking their parent’s
12 share by representation;

13 (4) if there is no surviving descendant, parent, sibling, or descendant of a sibling,
14 but the decedent is survived by one or more grandparents or surviving descendants of
15 grandparents, to the grandparent or grandparents equally, or if there is no surviving grandparent,
16 to the descendants of those grandparents by representation.

17 **Reporters’ Note**

18 *See Reporters’ Note* to drafted provision 3-102 (acknowledging the breadth of possible
19 variations to intestate succession and to the determination of those who fit within it).

20
21 More specifically, the determination of who should fit within the category of “heirs” after
22 the surviving spouse reflects a policy choice between keeping that category within a fairly close
23 set of relatives to the decedent (e.g. to spouse and descendants only), or more broadly to include
24 some of the decedent’s ancestors and their descendants (e.g. the decedent’s parents and possibly
25 their descendants, or the decedent’s grandparents and possibly their descendants) or to
26 essentially broaden the class of potential heirs to anyone related to the decedent in any degree.
27 State and tribal statutes reflect this distinction. Although most of them extend potential heirs
28 through the decedent’s grandparents and their descendants (i.e. what is known as the third
29 parentela), some go further to provide for step children and/or “next of kin,” no matter how
30 distantly related, while others then shift to escheat. *See, e.g.*, Chitimacha TPC § 304; Fort Peck
31 TPC Title 12 § 106 (through third parentela, limited to surviving cousins of the 3rd degree). For
32 an example of a system permitting inheritance by in-laws absent surviving heirs of the decedent,

1 *see* Jicarilla TPC Chapter 8 § 1(D)(3) (“if heirs are not found, the estate shall go to the heirs of
2 the deceased spouse . . . [and if more than one,] each spouse’s share shall be divided equally
3 among their heirs.”).
4

5 The drafted provision begins by using a “parentelic” or parent and descendant-based
6 representational system rather than a civil law system, which counts degrees of relationship from
7 the decedent to the potential heir, and favors those closer in consanguinity. For an example of a
8 parentelic system that arguably continues indefinitely (although heirship status would become
9 increasingly difficult to establish), *see e.g.* Jicarilla TPC Chapter 8 § (D)(2) (after describing
10 rights of parents and their descendants, continuing by providing that the estate shall pass “and so
11 on through the ascending ancestors and their issue.”)
12

13 A completely different approach – one that would trade enhanced flexibility for reduced
14 predictability – would sidestep statutory identification of heirship status or priority, and leave
15 that determination to the tribal court. For example:
16

17 When any member of the tribe dies leaving property other than trust real
18 estate or other trust property subject to the jurisdiction of the United States, any
19 member claiming to be heir of the decedent may bring suit in the Tribal Court to
20 have the Court determine the heirs of the decedent.” [provisions re notice, then] In
21 the determination of heirs the Court shall apply the custom of the Tribe as to
22 inheritance if such custom is proved. Otherwise, the Court shall apply to be his
23 heir . . . the Tribal Court may, in its discretion, turn over the question of
24 determination of heirs and distribution of a descendant’s property to a state court.
25

26 Blackfeet Tribal Law and Order Code, Chapter 3, § 4. *See also* Navajo Nation TPC § 2
27 (“any member claiming to be an heir of the decedent may bring a suit in a Family court of
28 the Navajo Nation to have the court determine the heirs of the decedent and to divide
29 among the heirs such property of the decedent . . . in the determination of heirs the court
30 shall apply the custom of the Navajo Nation as to inheritance if such custom is proved.
31 Otherwise the court shall apply state law[.]”) For an example of a TPC that mediates the
32 issue by providing for an order of heirship but leaving room for custom, *see e.g.* Jicarilla
33 TPC Chapter 8 § 1(H) (“The Court shall resolve any questions of heirship not covered
34 herein by referring to proven Jicarilla Apache customs and traditions.”)
35

36 Note that unlike many codes, the drafted provision does not create a “maternal”
37 and “paternal” division at the third parentela, instead providing that any grandparent will
38 take to the exclusion of all collateral relatives within the third parentela regardless of
39 whether they were related through the same parent.
40

41 **SECTION 3-104. INDIVIDUALS RELATED TO DECEDENT THROUGH TWO**

42 **LINES.** An individual who is related to the decedent through two lines of relationship is entitled
43 to only a single share based on the relationship that would entitle the individual to the larger

1 resolving particular issues (such as the appropriate heirs to an estate should closely related heirs
2 not survive the decedent).

3
4 **SECTION 3-107. REPRESENTATION.** Wherever any part of a decedent's intestate

5 estate passes by representation to descendants of the decedent, descendants of the decedent's
6 parents, or descendants of the decedent's grandparents, the individuals who will take, and their
7 respective shares, shall be determined as follows: (i) identify the first generation down from the
8 decedent, decedent's parent, or decedent's grandparent with at least one surviving member; (ii)
9 count the number of surviving members in that generation plus predeceased members in that
10 generation who left surviving descendants; (iii) allocate an equal share to each surviving member
11 and allocate the share of each predeceased member who left descendants who survived the
12 decedent in the same manner until the share is fully distributed.

13 **Reporters' Note**

14 Theoretically, a jurisdiction could avoid representation entirely by taking a per capita
15 approach, which depending on its form, generally either completely cuts out or cuts in
16 descendants of pre-deceased relatives at some degree of relationship to the decedent. Like most
17 probate codes, however, these drafted provisions adopt a representational scheme.

18
19 There are essentially three commonly employed methods of representation: Pure (aka
20 "Strict" or "Classic") Per Stirpes, Modified (aka "Modern" or "Per Capita with Representation")
21 Per Stirpes, and Per Capita at Each Generation (which is the representational approach adopted
22 under the current UPC). Depending on the particular facts of the decedent's estate, the outcomes
23 may differ, and sometimes drastically.

24
25 The difference between the three approaches generally turns on the generation at which
26 the estate is initially divided into equal shares, with pure per stirpes ensuring vertical equality of
27 the shares among the decedent's (or others') descendants and per capita ensuring horizontal
28 equality of the shares within each generation of heirs. This drafted provision adopts a modified
29 per stirpes form of representation, which splits the difference somewhat by flattening (but not
30 erasing) the potential for wide horizontal disparity of shares. For example, assume the following
31 facts, with the individuals who are bolded and in brackets having predeceased the decedent, and
32 thus ineligible to take from the decedent's estate.

Hypothetical			
Approach	Pure per stirpes	Modified per stirpes	Per capita at each gen.
Intestate Outcome	Child A takes 1/3, GC3 takes 1/3, GC4, GC5, and GC6 each take 1/3 of 1/3 or 1/9 of the decedent's estate.	Same.	Child A takes 1/3, GC 3, 4, 5, and 6 each take 1/4 of 2/3 or 1/6 of the decedent's estate.
Hypothetical			
Approach	Pure per stirpes	Modified per stirpes	Per capita at each gen.
Intestate Outcome	GC 1 & 2 would each take 1/2 of 1/3 (or 1/6) of the decedent's estate; GC 3 would take 1/3 of the decedent's estate; GC 4, 5 & 6 would each take 1/3 of 1/3 (or 1/9) of the decedent's estate.	GC 1-6 would each take 1/6 of the decedent's estate.	GC 1-6 would each take 1/6 of the decedent's estate.
Hypothetical			
Approach	Pure per stirpes	Modified per stirpes	Per capita at each gen.
Intestate Outcome	Child A takes 1/3, GGC1 and GGC2 each take 1/2 of 1/3 or 1/6, and GC4, GC6, and GGC3 each take 1/3 of 1/3 or 1/9 of the decedent's estate.	Same as Pure per stirpes.	Child A takes 1/3, GC4 and GC 6 take 1/6 of the decedent's estate, and GGC1, GGC2, and GGC3 each take 1/9 of the decedent's estate.

1 Arguably, a pure per stirpes representational scheme affords the cleanest method and
2 always ensures that each child's line takes an equal amount of the decedent's estate. However,
3 modified per stirpes seems superior in (1) comporting with what most decedents would
4 presumably want were all of their children to predecease them and (2) lessening the potential for
5 smaller and more heavily fractionated shares. Per Capita at Each Generation most closely hews
6 to Modified Per Stirpes, with the difference in application arising infrequently enough that
7 Modified Per Stirpes was selected as the applicable representational scheme in the drafted
8 provision.

9
10 As earlier stated, some TPCs limit representational rights in whole or in part. *See, e.g.*,
11 Fort Peck TPC Title 12 § 106(b) (moving straight from siblings of decedent to grandparents of
12 decedent without providing for possibility of inheritance by nieces and nephews of predeceased
13 sibling, but permitting their potential inheritance after moving through aunts and uncles);
14 Mashantucket Pequot TPC § 81 (limiting representation to descendants of parents and siblings,
15 then moving to next of kin, then step-children).

16
17 **SECTION 3-108. PARENT-CHILD RELATIONSHIP; MARITAL STATUS.**

18 Except as altered by adoption, a parent-child relationship exists between a child and the child's
19 biological parents upon proof of parentage under tribal law, regardless of whether the parents are
20 married to each other. [Except as altered by adoption, a parent-child relationship does not exist
21 between a stepchild or foster child and a step- or foster parent.]

22 **Reporters' Note**

23 The drafted provision follows the broader trend within probate codes to avoid
24 distinguishing maternity from paternity in determining heirship status for the children of
25 unmarried parents. The TPC could instead choose to preserve the distinction, and/or could
26 specify the manner of proof and the timing of the determination. For example:

27
28 Person born out of wedlock is not treated as the child of the father unless the
29 person is openly and notoriously so treated by the father or unless paternity has
30 been judicially determined during the life of the father.

31
32 Chitimacha § 213(b)(6) (Rules of Construction and Intention). Note, however, that the quoted
33 code provision was limited to construction of the meaning of a term used in a will rather than a
34 broader limit to heirship status. For a sample jurisdictional clause:

35
36 The Court shall have jurisdiction of all suits brought to determine the paternity of
37 a child and to obtain a judgment for the support of the child. A judgment of the
38 Court establishing the identity of the father of the child shall be conclusive of that
39 fact in all subsequent determination of inheritance by the Department of the
40 Interior or by the Court.

1 Blackfeet Tribal Law and Order Code, Ch. 3 § 3. For a sample broad clause placing evidentiary
2 control within the court: “the words ‘children’ and ‘issue’ include adopted children and children
3 of unwed parents where the Secretary of the Interior or the Tribal Court determines that paternity
4 has been acknowledged or established[.]” Fort Peck TPC Title 12 § 106(b). For a sample
5 provision that provides no special rule either way: “For the purposes of inheritance by, through,
6 and from any child, the effects and treatment of the parent-child relationship shall not depend on
7 whether or not the parents have been married.” Lummi Nation TPC title 35 § 35.05.020.
8

9 **[SECTION 3-109. PARENT BARRED FROM INHERITING IN CERTAIN**

10 **CIRCUMSTANCES.**

11 (a) A parent is barred from inheriting from the parent’s minor child if:

12 (1) [there were repeat protective actions brought by the tribe against the parent];

13 (2) the parent’s parental rights were terminated and the parent-child relationship
14 was not judicially reestablished; or

15 (3) the child died before reaching eighteen [18] years of age and there is clear and
16 convincing evidence that immediately before the child’s death, the parental rights of the parent
17 could have been terminated under any Tribal or state law on the basis of nonsupport,
18 abandonment, abuse, neglect, or other similar actions or inactions of the parent toward the child.

19 (b) For the purpose of intestate succession from the deceased minor child, a parent who is
20 barred from inheriting under this section is treated as if the parent predeceased the child.]

21 **Reporters’ Note**

22 The drafted provision represents a minor trend within probate codes, and bears both
23 merits and demerits. For that reason, it is bracketed as an optional addition to the MTPC. On the
24 plus side, it arguably ensures that the presumed intent of minor children, who by necessity will
25 die intestate, is met. Moreover, it may modestly contribute to the quality of parentage of the
26 minor child, although relevant data would be difficult to collect. On the minus side, it might
27 create more litigation than it is worth, and involve difficult questions over what it takes to be a
28 parent and who gets to determine whether that standard has been met. The drafted provision
29 tries to mediate the negatives by including a relatively precise assessment standard.

30
31 For an example of a TPC including this sort of provision, see e.g.:
32

1 Given the philosophy that wherever possible family life should be
2 strengthened and preserved and that the issue of severing the parent-child
3 relationship is of such vital importance as to require a judicial determination in
4 place of attempts at severance by contractual arrangements, express or implied,
5 for the surrender or relinquishment of children.
6

7 An Order terminating the parent-child relationship shall have the same
8 effect on the legal rights, privileges, duties, and obligations, including rights of
9 inheritance of the parent and the child with respect to each other, as it would have
10 had such action taken place under State Law.
11

12 Blackfeet Law and Order Code Ch. 3, § 6(J) (Proceedings for the Termination of Parent-Child
13 Relationship). See also Fort Peck TPC Title 12 § 106(12)(b)(2) (extending inheritance bar to
14 rights flowing “up” as well as those flowing “down”).]
15

16 **SECTION 3-110. INHERITANCE BY, FROM, AND THROUGH ADOPTED**

17 **CHILD.**

18 (a) Except as provided in subsection (b), if an adoption is complete and lawful under
19 tribal [and federal] law, a parent-child relationship exists for purposes of intestate succession
20 between an adoptee and the adoptee’s adoptive parent or parents, and no longer exists between
21 an adoptee and the adoptee’s biological parent or parents.

22 (b) The termination of the adoptive child’s right to continue to inherit from and through
23 the child’s biological parent or parents shall not apply if:

24 (1) The decree of adoption provides for the continuation of the adoptee’s
25 inheritance rights from the biological family;

26 (2) The adoptive parent is either a spouse, relative, or the spouse of a relative of
27 either biological parent; or

28 (3) The child is adopted after the death of both biological parents.

29 **Reporters’ Note**

30 State TPCs vary widely over the extent to which children retain inheritance rights from
31 their biological families after an adoption is complete. The drafted provision generally cuts off
32 inheritance lines between the child and the biological family except for the three instances
33 identified (specific order; step-parent or relative adoption; post-death adoption). Note that in

1 each of them, the inheritance rights would continue to flow “down” (i.e. to the adopted child)
2 rather than “up” (i.e. back to the biological family). A TPC could provide that the child’s rights
3 to inherit remain irrespective of the circumstances of the adoption, which is the less common
4 approach taken in state PCs. *See, e.g.*, “An adopted person is the child of an adopting parent and
5 of the natural parents for inheritance purposes only.” Chitimacha TPC § 309.
6

7 For an example of provision deferring to state law: “All members of the Blackfeet Indian
8 Tribe shall hereafter be governed by State Law and subject to state jurisdiction with respect to
9 adoptions hereafter consummated.” Blackfeet Law and Order Code, Ch. 3, § 8 (Adoption).
10

11 For purposes of this section, a “relative” of a person is one who would be entitled to take
12 under this code from that person’s intestate estate.
13

14 **SECTION 3-111. ADVANCEMENT.**

15 (a) Any property that an intestate decedent gave during life to a presumptive heir is an
16 advancement and shall be deducted from the heir’s intestate share only upon a writing, made
17 either by the decedent or the recipient, that clearly establishes that the decedent intended that
18 result.

19 (b) Absent an intent expressed in the writing, advancements shall not reduce the shares of
20 a predeceasing recipient’s descendants, and property advanced is valued as of the time the
21 beneficiary came into possession or enjoyment of the property or at the testator’s death,
22 whichever first occurs.

23 **PART 2.**

24 **INTESTATE SUCCESSION OF TRUST AND RESTRICTED REAL AND PERSONAL**
25 **PROPERTY**

26 [To be added as possible provisions per AIPRA; continue to review currently approved codes]]

1 **PART 3.**

2 **TESTATE SUCCESSION OF TRUST AND NON-TRUST PROPERTY [WILL**
3 **EXECUTION, REVOCATION, CHALLENGE, COMPOSITION, AND**
4 **CONSTRUCTION]**

5 **SECTION 3-301. WHO MAY MAKE WILL.** Any person of sound mind who is 18
6 years of age or older may make a will.

7 **Reporters' Note**

8
9 This provision could provide more detail incorporating mental state, e.g. "A will shall be
10 deemed to be valid if the decedent had a sane mind and understood what he was doing when he
11 made the will and was not subject to any undue influence of any kind from another person[.]"
12 Blackfeet Tribal Law and Order Code Ch. 3 § 5; Same basic provision Chitimacha TPC Chapter
13 2 (Wills), § 201 (Who May Make a Will).
14

15 **SECTION 3-302. EXECUTION; WITNESSED WILL; HOLOGRAPHIC WILL.**

16 (a) [Witnessed Will.] Except as otherwise provided in [subsection (b) and] Section 3-307
17 [choice of law]], a will must be:

18 (1) in writing;

19 (2) dated;

20 (3) signed by the testator [or by another who signs the testator's name at the
21 testator's request and in the testator's conscious presence] in the presence of two attesting
22 witnesses; and

23 (4) signed by two or more [competent] disinterested adult witnesses who each
24 sign within the testator's and each other's presence after the testator declared that the document
25 was the testator's will and requested the witnesses to so serve.

26 [(b) Holographic Will. A will that does not comply with subsection (a) is valid as a
27 holographic will, whether or not witnessed, if the signature and material portions of the

1 document are in the testator’s handwriting and the testator intended that document to dispose of
2 the testator’s property or otherwise affect the testator’s estate at death.]

3 [(c) Extrinsic Evidence. Intent that a document constitute the testator’s will can be
4 established by extrinsic evidence, including, for holographic wills, portions of a will form or
5 other document that are not in the testator’s handwriting.]

6 **Reporters’ Note**

7
8 The MTPC provision covering the requirements for a valid will includes many complex
9 components. Most importantly, there is significant ambiguity involved. 25 CFR Ch. 1 §§ 15.4
10 and 15.7 discuss, respectively, the requirements for a valid will and for making a will self-
11 proved. A strict reading of these regulations together, particularly those covering what must be
12 included in a self-proving affidavit, suggests a fairly strict set of rules, strictly construed, with the
13 potential for harsh outcomes (i.e. intestate succession) where an attempted will is deemed non-
14 compliant.

15
16 For example, it seems that the regulations include the requirement of actually
17 disinterested witnesses rather than any competent adult witness plus a purging act. Not one state
18 statute shares this result, which is an archaic rule imposed under early English law. Instead,
19 most states judicially or more commonly, legislatively determine either that (1) there is no need
20 for a disinterested witness at all (see, e.g., UPC for rule & theory) or (2) that the will is still valid
21 but the interest is purged, with the interested witness taking “whichever is less” under the will
22 versus some other source, e.g. a prior will, or intestate succession. For an example of a TPC
23 taking this sort of “purging” approach (and expressly limiting what sort of interest will trigger
24 purging), *see* Mashantucket Pequot TPC Ch. 5 § 4:

25
26 Every devise or bequest given in any will or codicil to a subscribing witness, or to
27 the husband or wife of such subscribing witness, shall be void unless such will or codicil
28 is legally attested without the signature of such witness, or unless such devisee or legatee
29 is an heir to the testator. The competency of such witness shall not be affected by any
30 such devise or bequest. The interest of any witness in any community, church, society,
31 association of corporation, beneficially interested in any devise or bequest, shall not
32 affect such devise or bequest or the competency of such witness.

33
34 Additionally, the language of the regulations suggests that holographic and oral wills are
35 completely prohibited, that signature by proxy is not permitted, that publication is still
36 demanded, that the will must have been read by or read to the testator before execution, etc.
37 While some of these provisions remain in state codes, many (if not most) have streamlined the
38 rules on the theory that the ends (upholding intent, avoiding carelessness, thoughtlessness, or
39 fraud) may be as well and more easily met through other formality sets that impose fewer
40 burdens and costs.

1 There are a few theories and directions that the MTPC could take here:
2

- 3 1. As the federal regulations only apply to trust or restricted land or trust personalty, a
4 tribe is always free to alter the wills formalities for non-covered property, and it
5 appears that many tribes do (e.g. by permitting oral wills or holographic wills).
6 However, the difficulty is that doing so creates confusion and facilitates unintended
7 outcomes, whereby a single will may be valid only as to some (non-trust or restricted)
8 of the decedent's property. The more efficient approach would be to track the more
9 restrictive execution requirements for *all* wills to ensure compliance under any
10 federal, tribal, or state system. If the formalities are super clear, and relatively
11 cheaply accomplished, then the unfair effects of a strict rule set are mitigated (even if
12 they cannot be avoided entirely).
13
- 14 2. Perhaps a particular tribe could seek approval of a tribal probate code that supplanted
15 (and presumably, liberalized) the execution requirements found in the regulations.
16 The difficulty there, however, is that the federal government might resist, fearing the
17 inefficiency created if OHA had to pass on the validity of a will under a number of
18 possibly different tribal codes. It might be that the "validity" function could be
19 determined at the tribal level, with the probate packet then sent on to OHA for
20 subsequent administration.
21
- 22 3. The ambiguity of 15.4 (date and "execute" your will in writing and have it attested by
23 two disinterested adult witnesses) does create some flexibility over what "execution"
24 means, in which case some of the additional requirements – e.g. publication &
25 presence – are only demanded to render a will *self-proving* rather than to make it
26 initially valid. But that doesn't entirely solve matters. A related problem is the
27 tension caused by having a party swear to a more restrictive set of requirements to
28 make the will "self proved" than are necessary to render the will valid, in which case
29 that witness is exposed to a perjury charge as well as subject to more intense scrutiny
30 over the veracity of the representations necessary to support initial will validity.
31 Indeed, it might be that swearing to a ceremony that did not actually take place could
32 expose the will more readily to a successful challenge based on undue influence.
33 Admittedly, the requirement of "disinterested witnesses" mitigates this somewhat, but
34 that partly turns on how tightly or loosely the court defines who is interested and who
35 is not. The mismatch is problematic, and counsels toward approach #1 in the absence
36 of some belief that approach #2 would work.
37
- 38 4. It does appear that under IBIA decisions interpreting other provisions of Title 43 regs,
39 approach #3 holds water. For example, in *Estate of Sarah Stewart Sings Good*, 57
40 IBIA 65 (I.B.I.A.), 2013 WL 3054080 (2013), a will challenger asserted that the will
41 was improperly executed for failing to meet the asserted requirements of publication
42 and witness request as set forth in the proposed self-proving affidavit form. The IBIA
43 disagreed. To the Board, although "the will scrivener should perhaps have crossed
44 out the language relating to publication and a request to sign before using BIA's
45 standard form affidavit," the failure to do so did not impose additional execution
46 requirements beyond those enumerated in 25 C.F.R. §§ 15.3, 15.4. *Id.* at 76, quoting

1 Estate of Lena Abbie Big Bear Yellow Eagle, 17 IBIA 237, 238-39 (1989) (citing
2 Estate of Carrie Standing Haddon Miller, 10 IBIA 128, 132 (1982) (holding that an
3 Indian testatrix is neither required to publish her will nor be the person to request the
4 witnesses to sign in order for the will to be properly executed)). The Board continued
5 by recognizing that “at most, the absence of these formalities could defeat the self-
6 proving character of the will, in which case testimony must be obtained from the will
7 witnesses if they are available[.]” *Id.*, citing Estate of Margerate Arline Glenn, 50
8 IBIA 5, 28 (2009); Estate of Sallie Fawbush, 34 IBIA 254, 257 (2000).

9
10 Nevertheless, the mismatch between what the regulations require for a valid will and
11 those strongly suggested within the self-proving affidavit forms create ambiguity and potential
12 for confusion and mistake.

13
14 The drafted provision does not recognize oral wills, which is consistent with federal law.
15 See *Estate of Nels John Johnson*, 55 IBIA 171 (I.B.I.A.), 2012 WL 8436502 (2012) (no federal
16 statute or regulation recognizes oral wills); *Estate of Baz Nip Pah*, 22 IBIA 72, 74 (1992)
17 (“Oral wills cannot be recognized for the purpose of conveying trust or restricted property.”).
18 However, this may be a point for tribes to consider, as some TPCs do recognize them for non-
19 trust or restricted property. Example: “valid as an oral will under Chitimacha custom, if all
20 children, whether residing in testator’s home or not, and testator’s spouse, if alive, are present at
21 the announcement of the oral will and agree that the testator orally made known the testator’s last
22 will before them.” Chitimacha, § 204.

23
24 The drafted provision does, however, recognize holographic wills. This is inconsistent
25 with federal law, which somewhat confusingly (depending on how “holographic” is defined, i.e.
26 as handwritten) states that holographic wills are valid if also witnessed by two disinterested adult
27 witnesses. See, e.g., *Estate of Julia Tieyah*, 11 IBIA 211 (I.B.I.A.), 1983 WL 41947 (1983).
28 Some TPCs also recognize. Sample: “[valid] whether or not witnessed, if the signature and the
29 material provisions are in the handwriting of the testator.” Chitimacha §203.

30
31 The MTPC should offer different choices & options, along with ramifications. For
32 example, it might include the holographic will but with reservations – as noted above – given the
33 competition w/ federal law & the clarity of having one standard that works for all. Rationale:
34 with the enhanced estate planning efforts as promoted under AIPRA etc. has come a proliferation
35 of will forms. What is more, the desire to avoid the more unpopular components of default
36 intestacy provisions, and the more general desire to encourage, enhance, and uphold the
37 actuation of testamentary freedom, suggest that more rather than fewer opportunities for valid
38 will execution are desirable.

39
40 If a tribe determines that holographic wills are worth the costs of confusion vis-à-vis fed
41 law, a number of variations exist between tighter rules, strictly construed, and looser ones,
42 flexibly construed. For example, could require that the will be “entirely handwritten, dated, and
43 signed,” or only “material portions + signature” in t’s handwriting. Suggest that MTPC go w/
44 loosest possible if going to have at all, to support the practice (sloppy, but common) where will
45 forms are filled in by hand, signed, but never appropriately witnessed. Moreover, if there is an
46 independent requirement that “testamentary intent” exist, that should somewhat mitigate the

1 concern that a draft document or worksheet would be considered a will.

2
3 Along those lines, the drafted provision permits testamentary intent to be established
4 through different methods, by contrast to some approaches that require it to appear on the face of
5 the document. The tradeoff general cuts as efficiency versus intent, b/c the evidentiary burdens
6 can be high when the decedent's intent is the touchstone. Could avoid entirely by directing to
7 tribal evidentiary code, but that seems to kick the drafting can.

8
9 Most broadly: there are many options between protective and flexible. Variables could
10 include notarization method, presence requirements (T & witnesses; contrast "reasonable time").
11 Sample set: to require that the will be (1) in writing; (2) signed by the testator or by another who
12 signs the testator's name at the testator's request and in the testator's conscious presence; (3)
13 intended by the testator to dispose of the testator's property or otherwise affect the testator's
14 estate at death; and (4) signed by two or more competent, adult witnesses who each sign within
15 the testator's conscious presence and after witnessing the actual signing of the will or the
16 testator's later acknowledgment of that signature or the will.

17
18 Samples: "if the will was made in writing and signed by the decedent in the presence of a
19 representative or representatives of the Superintendent of the Blackfeet Agency, who has or have
20 signed such will as witness or witnesses. Provided that if a will is made under circumstances
21 when the attendance of such representative cannot be secured, at least two other witnesses may
22 serve." . . . "but no distributed property shall be made in violation of a proved Tribal custom of
23 law which restricts the privilege of Tribal members to distribute property by will." Blackfeet
24 Tribal Law and Order Code Ch. 3 Section 5 (Approval of wills).

25
26 For an example of an open-ended determination resting with the tribal court, see Navajo
27 Nation TPC § 3 ("A will shall be deemed valid . . . if the will was made in accordance with a
28 proved Navajo custom or made in writing and signed b the decedent in the presence of two
29 witnesses who also signed the will.")

30
31 **[SECTION 3-303. HARMLESS ERROR.** Although a document or writing added
32 upon a document was not executed in compliance with Section 3-302, the document or writing is
33 treated as if it had been executed in compliance with that section if the proponent of the
34 document or writing establishes by clear and convincing evidence that the decedent intended the
35 document or writing to constitute:

- 36 (1) the decedent's will,
37 (2) a partial or complete revocation of the will, or
38 (3) an addition to or an alteration of the will.

1 **Reporters' Note**

2 This provision would not comport with federal law, which appears to require strict
3 compliance (at least on the validity, although perhaps not on the "self-proved" front) by stating
4 "you *must* meet [certain requirements].

5 **SECTION 3-304. SELF-PROVED WILL.**

6 (a) A witnessed will or codicil may be made self-proved at any time at or after its
7 execution by the acknowledgment thereof by the testator and the affidavits of the witnesses, each
8 made before an officer authorized to administer oaths under the laws of the jurisdiction in which
9 the acknowledgment occurs and evidenced by the officer's certificate, under official seal,
10 attached or annexed to the will or codicil in substantially the following form:

11 [Insert Tribal Jurisdiction]

12 I, [testator], swear or affirm under penalty of perjury that on [date], I requested [Witness
13 #1 and Witness #2] to act as witnesses to my will; that I ____declared to them that the document
14 was my last will; that I signed the will in the presence of both witnesses; that they signed the will
15 as witnesses in my presence and in the presence of each other; that the will was read and
16 explained to me (or read by me), after being prepared and before I signed it, and it clearly and
17 accurately expresses my wishes; and that I willingly made and executed the will as my free and
18 voluntary act for the purposes expressed in the will.

19 _____ Testator

20 We, [Witness #1 and Witness #2] swear or affirm under penalty of perjury that on [date],
21 [Testator] published and declared the attached document to be his/her last will, signed the will in
22 the presence of both of us, and requested both of us to sign the will as witnesses; that we, in
23 compliance the Testator's request, signed the will as witnesses in the Testator's presence and in
24 the presence of each other; and that the testator was not acting under duress, menace, fraud, or
25 undue influence of any person, so far as we could determine, and in our opinion was mentally
26 capable of disposing of the estate by will.

27 _____ Witness #1

28 _____ Witness #2

1 executed or the testator has a domicile or place of abode; or if it complies with federal law.

2 (b) A will executed in compliance with the law of this jurisdiction may include a will
3 executed before the effective date of this code.

4 **Reporters' Note**

5
6 Again, this provision does not align with federal law depending on what the “other”
7 jurisdiction demands for the valid will. But the valuable goal here is to validate as many wills as
8 possible within certain channeling parameters (i.e. the laws of the other jurisdiction, rather than a
9 broader “anything goes.”). Sample: “A written will is valid if executed in compliance with this
10 Probate Code or if its execution complies with the law at the time of execution of the place
11 where the will is executed, or of the law of the place where at the time of execution or at the time
12 of death of the testator is domiciled.” Chitimacha TPC § 207.

13 14 **SECTION 3-307. REVOCATION OF WILL.**

15 (a) A will, or any part thereof, is revoked by executing a later will that revokes the prior
16 will either expressly or by inconsistency. A later will revokes a prior one by inconsistency if the
17 testator intended the later will, or part of the will, to replace rather than supplement the prior will.
18 A later will is presumed to replace a prior will if it distributes all of the decedent’s property. A
19 later will is not presumed to replace the prior will if the testator intended it to dispose of different
20 property.

21 (b) A will may be revoked in whole but not in part by the testator’s performing a physical
22 act on the will with the intent to revoke or by another performing a physical act on the will at the
23 testator’s request and in the testator’s conscious presence. A physical act on the will includes a
24 burn, tear, cancellation, obliteration, or destruction.

25 (c) If a will known to have been last in the possession of the testator before death is not
26 found after the testator’s death, it is presumed to have been physically destroyed by the testator
27 with the intent to revoke it. This presumption is rebuttable by a preponderance of the evidence
28 upon either direct proof of, or circumstances suggesting that, there was no revocatory intent.

1 (d) Except as provided by the terms of the will, court order, or a contract relating to
2 property division, and unless the parties remarry before the testator's death, a will or any part
3 thereof is revoked upon a final divorce decree or annulment to the extent that it benefitted the
4 testator's former spouse or any of the former spouse's relatives who are not also relatives of the
5 testator.

6 **Reporters' Note**

7 Unlike 25 CFR 15.4 re will *execution*, 25 CFR 15.5 & 15.6 re will *revocation* permits the
8 revocation of the will "by any means authorized by Tribal or Federal law." This provides leeway
9 to experiment with methods, presumptions, etc.; perhaps the Department of Interior was less
10 concerned with the manner of revocation than execution because the former would cause the
11 estate to pass through the federal default intestacy scheme.

12
13 For example, the Chitimacha Code permits revocation through both later will and
14 physical act + by proxy, permits in whole or in part, and includes revocation by divorce. The
15 latter provision reads "if provisions are revoked solely by this Section, they are revived by
16 testator's remarriage to the former spouse . . . a decree of separation which does not terminate the
17 status of husband and wife is not a divorce for purposes of this Section. No change of
18 circumstances other than as described in this Section revokes a will." Chitimacha TPC § 209.
19 The Fort Peck Code permits revocation by writing or by act, but appears to limit revocation by
20 act to total rather than partial destruction. Fort Peck TPC Title 12 § 115.

21
22 Specific to the drafted provision: it seems cleaner to limit revocation by physical act to
23 *total* destruction to avoid the litigation that sometimes occurs over whether a partial destruction
24 went "too far," i.e. amounted to an attempt to revoke the entire will, or relatedly, an invalid
25 attempt to dispose of property to a beneficiary without following appropriate codicil
26 requirements. Where the revocatory act is performed by another at the testator's request rather
27 than by the testator directly, evidence of the circumstances of the testator's request to, and
28 presence with, that individual should be established by credible evidence.
29 Regarding revocation upon divorce or annulment, what is of "benefit to" the surviving spouse is
30 a matter for the court to decide, and along with a devise under the will could include a power of
31 appointment to the former spouse or a nomination of that spouse to serve in any fiduciary
32 capacity, such as executor or trustee.

33
34 Regarding the presumption regarding lost wills: there was discussion at the first
35 Committee Meeting over whether that presumption was useful or appropriate within the present
36 context. Rather than reversing the common law presumption entirely, the draft retains it but
37 highlights that it may be rebutted under the lower, preponderance standard. A tribe could decide
38 to retain the original presumption with strength (e.g. rebuttable through C&C evidence) or to
39 completely remove any presumption along these lines.
40

1 Although presumptions pertaining to lost wills are nowhere codified in federal law, the
2 Board has applied it in fairly traditional ways. Generally, the Board follows a two-step process
3 to assess whether to approve a copy of a will in the absence of its original. “First, the record
4 must establish that the will was properly executed, and, second, the absence of the original will
5 must be adequately accounted for in order to defeat the presumption that the original was
6 destroyed by the testator with the intent to revoke it.” *Estate of Dennis Calf Looking*, 52 IBIA
7 1, 4, 2010 WL 2771673 (2010), citing *Estate of Eli*, 2 IBIA at 67, 80 I.D. at 622; *Estate of*
8 *Wishenko*, 8 IBIA at 147; and *Estate of Anthony Bitseedy*, 5 IBIA 270, 272 (1976), *aff’d Dawson*
9 *v. Kleppe*, No. CIV-77-0237 (W.D. Okla Oct. 27, 1977). In *Dennis Calf Looking*, the Board
10 determined that the presumption should not in fact apply given that there was insufficient
11 evidence that the testator had taken possession of the original will, which was instead likely
12 retained by the agency given its then-existing practice of locking the original in a safe located in
13 a Realty vault. On lost wills generally, see *Estate of Florence Night Chase*, 38 IBIA 188 IBIA,
14 02-148 2002 WL 32345895 (2002) (reiterating that federal and not state law controls the
15 assessment of lost wills regarding trust or restricted property).

16
17 **SECTION 3-308. REVIVAL OF REVOKED WILL.** A will that has been revoked by
18 any method can only be revived by executing a new will containing clear and convincing
19 evidence of the testator’s intent to revive.

20 **Reporters’ Note**

21 This flattens somewhat the provisions regarding presumptions for revival that are
22 possible, e.g. the interplay between later wills wholly v. partially revoking earlier ones. Instead,
23 it requires proof of intent for any form of revival. To consider: whether (a) the MTPC should
24 have a revival provision at all, (b) if so, whether it should include circumstances under which
25 revival is presumed. As drafted, this provision is a softened anti-revival stance. E.g.:
26 Chitimacha Tribe has provision on revival, but it is effectively anti-revival and only applies to
27 revocation of Will 2 by Will 3. Sec. 210 (Revival of Revoked Will)

28
29 **SECTION 3-309. WILL CHALLENGES.** A will or any part thereof offered for
30 probate may be challenged or contested on the grounds of improper execution, lack of
31 testamentary intent or capacity, undue influence, fraud, duress, or revocation.

32 **SECTION 3-310. COMPOSITION OF A WILL; INCORPORATION BY**
33 **REFERENCE.** A will comprises any written pages that are physically present at the execution
34 of the will and are intended by the testator to be part of the will. However, a will may
35 incorporate a writing that is not physically present at the will’s execution if

36 (1) the writing is already in existence;

1 (2) the will reflects the intent to incorporate the writing; and

2 (3) the will describes the writing sufficiently to permit its identification.

3 **Reporters' Note**

4 Chitimacha has IBR with elements, essentially, as above. See § 211 (IBR). Re Acts with
5 Independent Significance: “A will may dispose of property by reference to acts and events
6 which have significance apart from their effect upon the disposition made by the will, whether
7 they occur before or after the execution of the will or before or after the testator’s death. The
8 execution or revocation of a will of another person is such an event. Chitimacha TPC § 112
9 (Events of Independent Significance).]

10 **SECTION 3-311. TANGIBLE PERSONAL PROPERTY LIST.** A will may refer to a

11 written statement or list to dispose of items of tangible personal property, other than money, not
12 otherwise specifically disposed of by the will. The list is only valid and effective to dispose of
13 the property if the writing is signed by the testator and describes the items and the devisees with
14 reasonable certainty.
15

16 **Reporters' Note**

17 Unlike the requirements of Section 3-311 (Incorporation by Reference), the writing under
18 this section need not already exist. Instead, it may be referred to as one to be in existence at the
19 time of the testator’s death; it may be prepared before or after the execution of the will; and it
20 may be altered by the testator after its preparation.
21

22 **PART 4.**

23 **CONSTRUCTION OF A WILL**

24 **SECTION 3-401. SPOUSAL SHARE.**

25 (a) If the testator is survived by a spouse, the spouse is entitled to an elective share
26 whether or not the will provides for the spouse. The amount of the elective share equals in value
27 what the spouse would have received had the testator died intestate, unless the testator provided
28 for the spouse by a transfer of funds or property outside the will and

29 (1) there is clear and convincing evidence of intent that the transfer be in lieu of a
30 testamentary provision, or

1 (2) the non-probate transfer was substantial in relation to the total value of the
2 share.

3 (b) The property, if any, that the spouse was devised under the will, is applied first in
4 satisfying the elective share.

5 (c) The right of election of a surviving spouse and the rights of the surviving spouse to
6 homestead allowance, exempt property, family allowance for the spouse and children, cultural
7 artifacts, or any of them, may be waived, wholly or partially, before or during the marriage, by
8 an enforceable written contract, agreement, or waiver signed by the surviving spouse.

9 **Reporters' Note**

10
11 This provision streamlines by combining elective share (electing against a will
12 irrespective of when the marriage occurred vis-à-vis the will's execution) and omitted shares
13 (limited to post-execution marriage).

14
15 For a sample TPC provision that provides for an alternate share of the estate: "When a
16 married Indian dies and leaves a valid will in which the spouse is to receive less than one-third
17 (1/3) of the net estate, the surviving spouse has a right to take an elective share of one-third (1/3)
18 of the net estate." Fort Peck TPC Title 12 § 114.

19
20 **SECTION 3-402. CHILDREN UNPROVIDED FOR IN WILL.**

21 (a) If a testator fails to provide in the testator's will for any child born or lawfully adopted
22 after the execution of the will, including any codicil, then the omitted child shall receive a share
23 of the estate as provided in this section.

24 (1) If the testator had no living child when the testator executed the will, the
25 omitted child receives a share of the estate equal in value to an intestate share unless the testator
26 devised substantially all of the estate to the other parent of the omitted child and that other parent
27 survives the testator;

28 (2) If the testator had one or more children living when the testator executed the
29 will, and the will devised property to one or more of those then-living children, the omitted child

1 shares in the amount received by the children to whom devises were made under the will [unless
2 the testator devised substantially all of the estate to the other parent of the omitted child who is
3 not a parent of the then-living children receiving a devise;]

4 (3) If the testator had one or more children living when the testator executed the
5 will, and the will did not devise property to any of the then-living children, the omitted child is
6 not entitled to a share under the will.

7 (b) If at the time of execution of the will, the testator failed to provide for a child solely
8 because the testator either did not know that the child existed or believed the child to be dead, the
9 child is entitled to share as an omitted after-born or after-adopted child.

10 (c) In satisfying a share under this section, devises made by the will abate as under
11 Section 2-601.

12 **SECTION 3-403. WILL CONSTRUCTION REGARDING BENEFICIARIES:**
13 **DEATH OF BENEFICIARY BEFORE TESTATOR.**

14 (a) In the absence of a finding of a contrary intent, if a beneficiary under a will or transfer
15 on death arrangement dies before the testator or owner, the interest that the predeceasing
16 beneficiary would have taken had the beneficiary survived lapses unless the predeceasing
17 beneficiary was a grandparent, any descendant of a grandparent, or a stepchild, and the
18 predeceasing beneficiary left descendants who survived the testator by at least 120 hours, in
19 which case the interest passes to those descendants by representation.

20 (b) Where the provisions of subsection (a) do not apply:

21 (1) a devise other than a residuary devise will lapse to the residue, if any;
22 otherwise, to intestate succession.

23 (2) A residuary devise will lapse to the other residuary taker or takers, if any;

1 otherwise, to intestate succession.

2 (3) A class gift will pass to the surviving class member or members, if any;

3 otherwise, to the residue or if none, to intestate succession.

4 **Reporters' Note**

5

6 This drafted provision avoids the dispute over survivorship language prompted by the
7 relative specificity demanded within the Uniform Probate Code for sufficiently expressed
8 contrary intent.

9

10 For a provision that limits the application of the anti-lapse principle expressed in part (b)
11 above to more closely related predeceasing beneficiaries, see Fort Peck TPC Title 12 § 117 (only
12 applies if beneficiary was grandparent, parent, or lineal descendant of decedent).

13

14 **SECTION 3-404. WILL CONSTRUCTION REGARDING PROPERTY:**

15 **NONADEMPTION OF SPECIFIC DEVICES.**

16 (a) Subject to creditors' claims and [other exemptions and allowances], a will beneficiary

17 to whom a specific devise was to pass has a right to that specifically devised property if it

18 remains a part of the testator's estate at death.

19 (b) If the specific devise is not part of the testator's estate, at the testator's death, the

20 beneficiary has a right to:

21 (1) any balance of the purchase price, together with any security agreement, owed

22 by a purchaser by reason of sale of the property;

23 (2) any amount of a condemnation award for the taking of the property unpaid at

24 death;

25 (3) any proceeds unpaid at death on fire or casualty insurance on or other recovery

26 for injury to the property;

27 (4) any property owned by the testator at death and acquired as a result of

28 foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically devised

1 obligation; and

2 (5) any real property or tangible personal property owned by the testator at death
3 which the testator acquired as a replacement for specifically devised real property or tangible
4 personal property.

5 (c) If specifically devised property is sold or mortgaged by a conservator or by an agent
6 acting within the authority of a durable power of attorney for an incapacitated principal, or a
7 condemnation award, insurance proceeds, or recovery for injury to the property is paid to a
8 conservator or to an agent acting within the authority of a durable power of attorney for an
9 incapacitated principal, the specific devisee has the right to a general pecuniary devise equal to
10 the net sale price, the amount of the unpaid loan, the condemnation award, the insurance
11 proceeds, or the recovery.

12 (d) The right of a specific devisee under subsection (c) is reduced by any right the devisee
13 has under subsection (b).

14 (e) For the purposes of the references in subsection (c) to a conservator, subsection (c)
15 does not apply if, after the sale, mortgage, condemnation, casualty, or recovery, it was
16 adjudicated that the testator's incapacity ceased and the testator survived the adjudication for at
17 least one year.

18 **Reporters' Note**

19
20 The drafted provision avoids the litigation-producing difficulty of a catch-all provision
21 regarding "anything not intended to be adeemed." The concept of replacement property is
22 admittedly messy, especially if there is little case law on point. But it seems to cover the
23 possibility that, e.g., where a particular car that was then sold was to go to A, A can take the
24 "replacement car," especially under a time of death construction.

25

26 **SECTION 3-405. SPECIFIC DEVISE SUBJECT TO MORTGAGE.**

27 (a) Unless the will provides specifically to the contrary, a specific devise of any property

1 passes subject to any mortgage or other security interest existing at the testator’s death, without
2 right of the beneficiary of the devise to require that the indebtedness be paid from the estate’s
3 other assets.

4 (b) A general directive in the will to pay the testator’s debts is not sufficient to indicate
5 that this section is not to apply.

6 **SECTION 3-406. SATISFACTION.**

7 (a) Any property that a testator gave during life to an intended devisee is treated as a total
8 or partial satisfaction of the devise if

9 (1) the will provides for deduction of the devise; or

10 (2) there is a writing, made either by the testator or the recipient, that clearly
11 establishes that the testator intended that result.

12 (b) For purposes of subsection (a), property given during the testator’s lifetime is valued
13 as of the time the beneficiary came into possession or enjoyment of the property or at the
14 testator’s death, whichever first occurs.

15 (c) For purposes of either total or partial satisfaction, property given during the testator’s
16 lifetime is not charged against the testate share of any descendant of a predeceasing beneficiary,
17 unless the writing provides to the contrary.

18 **Reporters’ Note**

19
20 The drafted provision coordinates requirements for advancement (intestate succession)
21 and satisfaction (testate succession).

22
23 **SECTION 3-407. CLASS GIFTS CONSTRUED TO ACCORD WITH**
24 **INTESTATE SUCCESSION; EXCEPTIONS.**

25 (a) [Definitions.] In this section:

26 (1) “Adoptee” has the meaning set forth in []

1 (2) “Distribution date” means the date when an immediate or postponed class gift
2 takes effect in possession or enjoyment.

3 (3) “Functioned as a parent of the adoptee” has the meaning set forth in [],
4 substituting “adoptee” for “child” in that definition.

5 (4) “Relative” has the meaning set forth in []

6 (b) Terms of Relationship. A class gift that uses a term of relationship to identify the
7 class members presumptively includes a posthumous child, and a child born to parents who are
8 not married to each other, and their respective descendants if appropriate to the class, in
9 accordance with the rules for intestate succession regarding parent-child relationships.

10 (c) [Relatives by Blood and Marriage.] Terms of relationship in a governing instrument
11 that do not differentiate relationships by blood from those by marriage, such as uncles, aunts,
12 nieces, or nephews, are presumptively construed to exclude relatives by marriage, and are
13 presumed to apply with no distinction made between those related to the decedent through one
14 versus more than one ancestor;

15 (d) A transfer to the testator’s or another’s “heirs, “next of kin,” “relatives,” or “family”
16 shall mean those persons who would be entitled to take an intestate share.

17 (e) [Transferor Not Adoptive Parent.] In construing a dispositive provision of a transferor
18 who is not the adoptive parent, an adoptee is presumptively not considered the child of the
19 adoptive parent unless:

20 (1) the adoption took place before the adoptee reached [18] years of age;

21 (2) the child lived while as a minor in the household of the adoptive parent; or

22 (3) the adoptive parent was the adoptee’s stepparent or foster parent.

23 (f) A will shall apply to all real and personal property or interest therein that the testator

1 owned at death and all property acquired by the estate after death, and a transfer by will of a trust
2 interest in land shall be presumed to include the interest of the testator in any permanent
3 improvements attached to the land.

4 **SECTION 3-408. CONSTRUCTION OF A WILL; PENALTY CLAUSE FOR**
5 **CONTEST.** A provision in a will purporting to penalize an interested person for contesting the
6 will is unenforceable if probable cause exists for commencing the proceeding.

7 **PART 5.**

8 **RULES OF CONSTRUCTION NOT LIMITED TO WILLS**

9 **SECTION 3-501. REQUIREMENT OF SURVIVAL BY 120 HOURS.**

10 (a) For the purposes of intestate succession, testate succession, and survivorship
11 arrangements authorized under Article IV, and except as provided in subsection (b), an
12 individual who is not established to have survived another individual by 120 hours is deemed to
13 have predeceased the other individual.

14 (b) Survival by 120 hours is not required if:

15 (1) the will or other governing instrument specifically provides for an alternate
16 outcome with language that applies to the facts of the case, or;

17 (2) the application of a 120-hour requirement of survival would cause the estate to
18 be distributed by tribal court order under Section 3-106.

19 **Reporters' Note**

20
21 Regarding the requirement of survival, probate codes generally divide into two
22 approaches: older ones that require survival by an instant, and usually as established by a
23 preponderance of the evidence (*see, e.g.*, Chitimacha TPC § 117) (“no sufficient evidence that
24 the persons have died otherwise than simultaneously”) and newer ones tracking the amended
25 Uniform Simultaneous Death Act and requiring survival by 120 hours as established by clear and
26 convincing evidence. The newer version seems preferable as more efficient (by avoiding
27 successive double administration of the subject property), more easily established (or not
28 established) from an evidentiary perspective, and more likely to effectuate the decedent’s

1 presumed intent (e.g. property would not pass to a predeceased spouse’s relatives, i.e. the
2 decedent’s in-laws, over the decedent’s biological or adoptive relatives). The drafted provision
3 slightly tempers the burden of proof by removing the requirement that the 120-hour survival be
4 established by clear and convincing evidence.
5

6 Sub (b), which removes the 120-hour survival requirement in instances where the
7 governing instrument establishes a different survivorship requirement or where its application
8 would result in a tribal court determination of heirship. While state probate codes commonly
9 contain a similar provision avoiding the requirement where it would result in escheat, tribes may
10 prefer to delete this second exception to the 120-hour rule to encourage consolidation of
11 fractional interests back into tribal ownership.
12

13 See Section 1-107 for the provision covering Evidence of Death or Status
14 The drafted provision streamlines the survivorship provision under the Uniform Simultaneous
15 Death Act and the Uniform Probate Code by excluding treatment of such matters as protecting
16 bona fide purchasers and exonerating payors of liability, as well as choice of law and powers of
17 appointment. If coverage of these matters is deemed necessary, the Implementation Guide could
18 address them more fully.
19

20 **SECTION 3-502. POSTHUMOUS BIRTH.** All individuals who were in gestation at
21 the time of the decedent’s death, and who survive their own birth by 120 hours, shall be treated
22 as if living at the time of the decedent’s death.

23 Reporters’ Note

24

25 This drafted provision intentionally avoids overt discussion of many forms of assistive
26 reproductive technology, e.g., surrogacy arrangements and posthumously conceived children
27 using cryogenically preserved (or posthumously retrieved) sperm. Moreover, it does not clearly
28 address frozen embryos, but instead leaves to the tribal court to determine whether a
29 cryogenically preserved embryo is already “in gestation” such that the provision above would
30 apply.
31

32 A provision that instead referenced “persons conceived” would probably be construed
33 identically to “in gestation.” A provision that required the person to be “in utero” would clearly
34 exclude ex utero, or frozen, embryos. See, e.g., International Fertility Law Group
35 <http://www.iflg.net/indian-child-welfare-act> (briefly discussing interplay of some of these issues
36 within the Indian Child Welfare Act); Kimberly Self, *Self-Interested: Protecting the Cultural
37 and Religious Privacy of Native Americans through the Promotion of Property Rights in
38 Biological Materials*, 35 Am. Indian L. Rev. 729 (2010-2011).
39

40 Some codes, e.g. Chitimacha § 306, do not require survival of own birth.
41

1 **SECTION 3-503. EFFECT OF HOMICIDE.**

2 (a) An individual who feloniously and intentionally kills the decedent forfeits all benefits
3 with respect to and interests that would otherwise be acquired under the decedent’s estate or the
4 provisions of survivorship arrangements authorized under Article IV. The decedent’s estate
5 passes as if the wrongdoer predeceased the decedent.

6 (b) [Felonious and Intentional Killing; How Determined.]

7 (1) After all right to appeal has been exhausted, a judgment of conviction
8 establishing criminal accountability for the felonious and intentional killing of the decedent
9 conclusively establishes the convicted individual as the decedent’s killer for purposes of this
10 section.

11 (2) In the absence of a conviction, the court, upon the petition of an interested
12 person, must determine whether, under the preponderance of evidence standard, the individual
13 would be found criminally accountable for the felonious and intentional killing of the decedent.
14 If so, the determination conclusively establishes that individual as the decedent’s killer for
15 purposes of this section.

16 **SECTION 3-504. STATUS OF SPOUSE.** For purposes of testate and intestate
17 succession and survivorship arrangements authorized under Article IV, tribal law determines
18 spousal status based upon tribal law or custom, and determines the extent to which abuse,
19 abandonment, or other similar conduct disqualifies a spouse from succeeding to a property
20 interest. Except as provided by the terms of the will, court order, or a contract relating to
21 property division, and unless the parties remarry before the testator’s death, a will or any part
22 thereof is revoked upon a final divorce decree or annulment to the extent that it benefitted the
23 testator’s former spouse or any of the former spouse’s relatives who are not also relatives of the

1 testator.

2 **Reporters' Note**

3
4 Some tribes defer to state law on the issues of marriage and divorce. Some tribes
5 explicitly reject common law marriage or divorce. *See, e.g.*, “All members of the Blackfeet
6 Indian Tribe shall hereafter be governed by State Law and subject to State Jurisdiction with
7 respect to marriage hereafter consummated. Common-law marriages and Indian Customs
8 marriage shall not be recognized within the Blackfeet Reservation.” Blackfeet Tribal Law and
9 Order Code, Chapter 3 Domestic Relations, § 1 (Marriage). (See also § 2, which similarly
10 abolishes Indian customs divorces.)

11
12 The issue of same sex marriage presents an interesting question within Indian Country.
13 In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the USSCT held that the 14th Amendment Due
14 Process and Equal Protection clauses protected the rights of same sex couples to marry, and that
15 states could not refuse to recognize lawful same sex marriages performed in other states.
16 However, the rights protected by the Fourteenth Amendment are not enforceable against tribal
17 governments. *See, e.g., Talton v. Mayes*, 163 U.S. 376 (1896). Moreover, the Indian Civil
18 Rights Act of 1968, 25 U.S.C. § 1301-1303, does not require Indian Nations to protect all
19 Constitutional rights, instead extending that protection only to certain rights within the Bill of
20 Rights. Even those that must be protected, such as those involving the rights of criminal
21 defendants, provide some leeway through which tribes are able to interpret the scope of the
22 individual protection through tribal norms.

23
24 It is unclear whether or to what extent tribes would want to address the issue within tribal
25 probate codes. For an discussion of how tribes have handled civil liberties generally, see Elmer
26 R. Ruscoal, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions*
27 *in Tribal Constitutions*, 14 Am. Indian L. Rev. 269 (1990). For extended treatment of the legal,
28 political, and sociocultural ramifications of the issue, including the extent to which individual
29 rights have been castigated as sounding the death knell to collectivist tribal concerns, see Carole
30 E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 Ariz. State L. J. 889 (2003). For
31 general discussion of same-sex marriage within tribal cultures, see, e.g., Trista Wilson, *Changed*
32 *Embraces, Changes Embraced? Renouncing the Heterosexual Majority*, 36 Am. Indian L. Rev.
33 161 (2012); Gregory Smithers, *Will Gay Marriage Split Indian Country?* Indian Country Today
34 (5/30/15).

35
36 **SECTION 3-505. DISCLAIMER OF INTERESTS.**

37 (a) Any person 18 years of age or older, or a fiduciary acting on that person’s behalf, may
38 disclaim an interest under testate or intestate succession or a survivorship arrangement
39 authorized under Article IV by a signed and acknowledged declaration of disclaimer, either filed
40 with the court, bank or insurance company or delivered to the person or entity holding the

1 property subject to a survivorship arrangement. A disclaimer of an interest under testate or
2 intestate succession must be filed with a court before the entry of a final probate order.

3 (b) In no event shall disclaimer be permitted after distribution or other acceptance of the
4 subject property.

5 (c) The disclaimer may be in full or in part, or subject to the reservation of a life estate
6 interest in the land. No interest so disclaimed shall be considered to have vested in the
7 disclaimant, nor shall the disclaimer be considered to be a transfer of the disclaimed interest.

8 (d) Unless the governing instrument (if any) expressly provides otherwise, the interest
9 disclaimed shall be treated as though the disclaimant had predeceased the decedent.

10 **Reporters' Note**

11
12 In a significant break from traditional disclaimer doctrine, the AIPRA permits a “directed
13 disclaimer,” which permits the disclaimant to identify (from within a limited category of eligible
14 parties) who will acquire the interest so disclaimed. Especially given extant USSCT
15 jurisprudence covering situations where far less control had been exercised by the disclaimant,
16 the right to direct the disclaimer suggests that there has been an actual receipt and subsequent
17 transfer of the property disclaimed, triggering the disclaimant’s potential exposure to certain tax
18 laws and creditors’ claims. *See Drye v. United States*, 528 U.S. 49 (1999).

19
20 The provision above instead provides that the disclaimed interest will pass as though the
21 disclaimant had predeceased the decedent. It also tracks TPC and AIPRA language, however,
22 that specifically negates the characterization of a disclaimer as a transfer and therefore avoids
23 concerns over fraudulent transfers or conveyances.

24
25 Note that a successor’s disclaimer could trigger lapse as described in Section 3-403.

26
27 Sample tribal provision:

28 A person (or his or her personal representative) who is an heir, devisee [etc] may
29 renounce in whole or in part the succession to any property or interest therein by filing a
30 written instrument with the Chitimacha Tribal Court not later than six months after the
31 decedent’s death or the time at which it is determined that the person is entitled to take
32 property if such is not known at the time of death. The instrument shall (a) describe the
33 property or part thereof or interest therein renounced, (b) be signed by the person
34 renouncing and (c) declare the renunciation and the extent thereof. Upon property
35 renouncement, the interest renounced passes as if the renouncing person had predeceased
36 the decedent.

2
3 **SECTION 3-506. REFORMATION TO CORRECT MISTAKES.** The court may
4 reform the terms of a governing instrument, even if unambiguous, to conform the terms to the
5 transferor's intention if it is proved by clear and convincing evidence what the transferor's
6 intention was and that the terms of the governing instrument were affected by a mistake of fact
7 or law, whether in expression or inducement.

8 **PART 6.**

9 **SPECIAL PROPERTY, EXEMPT PROPERTY AND ALLOWANCES**

10 **SECTION 3-601. TRIBAL CULTURAL PROPERTY AND CULTURALLY**
11 **SIGNIFICANT PROPERTY.**

12 (a) Notwithstanding any other provision of this article, tribal cultural property in the
13 possession or custody of the decedent is not privately owned and is not subject to testate
14 succession or intestate succession. Tribal cultural property is exempt from all creditors of the
15 estate.

16 (b) Although culturally significant property is subject to testate and intestate succession,
17 the distribution of that property is subject to modification by [the tribal court] in accordance with
18 the recognized customs and traditions of the family and the [] tribe. Particular items of
19 culturally significant property are exempt from the claims of all creditors of the estate upon the
20 order of the tribal court [or as qualifying under the provisions of Section 3-603].

21 **SECTION 3-602. HOMESTEAD.**

22 (a) Notwithstanding any other provisions of this article relating to testate or intestate
23 succession or elective share, the homestead, including a manufactured home that is the family
24 residence, descends free from any unsecured disposition thereof to which the spouse has not

1 consented in writing as follows:

2 (1) If there is a spouse but no surviving descendant of the decedent, to the spouse;

3 or

4 (2) If there is a spouse and surviving descendants of the decedent, to the spouse
5 for the term of the spouse's life, and the remainder in equal shares to the decedents' descendants
6 by representation.

7 (b) The homestead is exempt from and has priority over all unsecured claims against the
8 estate.

9 **SECTION 3-603. EXEMPT PROPERTY.**

10 (a) In addition to the homestead exemption provided in Section 3-602, if there is a
11 surviving spouse, the surviving spouse is entitled from the estate to a value not exceeding
12 [20,000.00] in excess of any security interest held therein, in household furniture, automobiles or
13 other motorized vehicles, appliances, and personal effects (which may include culturally
14 significant property). If there is no surviving spouse, the children of the decedent are entitled
15 jointly to the same value. If there is not [20,000.00] worth of exempt property in the estate, the
16 spouse or children are entitled to other assets of the estate to the extent necessary to make up the
17 [20,000.00] value.

18 (b) Rights to exempt property and assets needed to make up a deficiency of exempt
19 property have priority over all unsecured claims against the estate, and are in addition to any
20 interest passing to the surviving spouse or children by testate or intestate succession or by
21 elective share.

22 **SECTION 3-604. FAMILY ALLOWANCE.**

23 (a) During the period of administration, in addition to the homestead exemption provided

1 in Section 3-602 and the exempt property provided in Section 3-603, the surviving spouse and
2 any [minor or dependent] child or children who were either entitled to or actually receiving
3 support from the decedent are entitled to a reasonable allowance in money out of the estate for
4 their maintenance during the period of administration, which may not continue for longer than
5 one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a
6 lump sum or in periodic installments, and terminates upon the death of any person with the right
7 thereto before the lump sum or any installment has been paid.

8 (b) The determination of what is a reasonable allowance in money is discretionary with
9 the tribal court.

10 (c) The family allowance is payable to the surviving spouse, if living, for the use of the
11 surviving spouse and any dependent children. If the surviving spouse is not living, the family
12 allowance is payable to the children or to those in whose custody and care the children have been
13 placed. If the surviving spouse is living but the dependent children are in the custody and care of
14 another, the family allowance may be apportioned between the parties in the discretion of the
15 tribal court.

16 (d) The family allowance is exempt from and has priority over all claims except the
17 homestead. The family allowance is not chargeable against any benefit or share passing to the
18 surviving spouse or children by the will of the decedent unless otherwise provided, by intestate
19 succession, or by elective share.

1 **ARTICLE 4**

2 **TRANSFER ON DEATH ARRANGEMENTS**

3 **PART 1**

4 **GENERAL AUTHORIZATION**

5 **SECTION 4-101. TRANSFER ON DEATH ARRANGEMENTS AUTHORIZED.**

6 Any governing instrument other than a will containing any of the following provisions is
7 nontestamentary and the instrument containing these provisions are exempt from the
8 requirements in Section[s] 3-302 [and 3-303] for the execution of a will. These provisions are:

9 (1) That money or other benefits shall be paid after the decedent's death to a person or
10 persons designated by the decedent in either the instrument or a separate writing, including a
11 will, executed either before, at the same time as the instrument, or subsequently;

12 (2) That any money due or to become due under the instrument shall cease to be payable
13 in event of the death of the promisee or the promisor before payment or demand;

14 (3) That any property which is the subject of the instrument shall pass on decedent's
15 death to a person or persons designated by the decedent in either the instrument or a separate
16 writing, including a will, executed before, at the same time as the instrument, or subsequently.

17 **Reporters' Note**

18 This Section, which validates all transfers on death arrangements, is similar to Section 6-
19 101 of the Uniform Probate Code.

20 **PART 2**

21 **REAL PROPERTY TRANSFERS**

22 **Reporters' Note**

23 This part is adapted from the Uniform Real Property Transfer on Death Act, which was
24 completed in 2009.

1 **SECTION 4-201. DEFINITIONS.** In this [part]:

2 (1) “Beneficiary” means a person that receives property under a transfer on death deed.

3 (2) “Designated beneficiary” means a person designated to receive property in a transfer
4 on death deed.

5 (3) “Joint owner” means an individual who owns property concurrently with one or more
6 other individuals with a right of survivorship.

7 (4) “Property” means an interest in real property located in this [tribal nation] which is
8 transferable on the death of the owner, and a structure located on real property, whether or not
9 the owner of the structure also owns the underlying real property.

10 (5) “Transfer on death deed” means a deed authorized under this [part].

11 (6) “Transferor” means an individual who makes a transfer on death deed.

12 **SECTION 4-202. APPLICABILITY.** This [part] applies to a transfer on death deed
13 made before, on, or after [the effective date of this [Code]] by a transferor dying on or after [the
14 effective date of this [Code]].

15 **SECTION 4-203. NONEXCLUSIVITY.** This [act] does not affect any method of
16 transferring property otherwise permitted under the law of this state.

17 **SECTION 4-204. TRANSFER ON DEATH DEED AUTHORIZED.** An individual
18 may transfer property to one or more beneficiaries effective at the transferor’s death by a transfer
19 on death deed.

20 **SECTION 4-205. TRANSFER ON DEATH DEED REVOCABLE.** A transfer on
21 death deed is revocable even if the deed or another instrument contains a contrary provision.

22 **SECTION 4-206. TRANSFER ON DEATH DEED NONTESTAMENTARY.**

23 A transfer on death deed is nontestamentary and is exempt from the requirements in Section[s] 3-

1 302 [and 3-303] for the execution of a will.

2 **SECTION 4-207. CAPACITY OF TRANSFEROR.** The capacity required to make or
3 revoke a transfer on death deed is the same as the capacity required to make a will.

4 **SECTION 4-208. REQUIREMENTS.** A transfer on death deed:

5 (1) except as otherwise provided in paragraph (2), must contain the essential elements
6 and formalities of a properly recordable inter vivos deed;

7 (2) must state that the transfer to the designated beneficiary is to occur at the transferor's
8 death; and

9 (3) must be recorded before the transferor's death in the appropriate public records for the
10 property being transferred.

11 **SECTION 4-209. NOTICE, DELIVERY, ACCEPTANCE, CONSIDERATION**

12 **NOT REQUIRED.** A transfer on death deed is effective without:

13 (1) notice or delivery to or acceptance by the designated beneficiary during the
14 transferor's life; or

15 (2) consideration.

16 **SECTION 4-210. REVOCATION BY INSTRUMENT AUTHORIZED;**

17 **REVOCATION BY ACT NOT PERMITTED.**

18 (a) Subject to subsection (b), an instrument is effective to revoke a recorded transfer on
19 death deed, or any part of it, only if the instrument:

20 (1) is one of the following:

21 (A) a transfer on death deed that revokes the deed or part of the deed
22 expressly or by inconsistency;

23 (B) an instrument of revocation that expressly revokes the deed or part of

1 the deed; or

2 (C) an inter vivos deed that expressly revokes the transfer on death deed or
3 part of the deed; and

4 (2) is acknowledged by the transferor in the public records where the original
5 deed is recorded.

6 (b) If a transfer on death deed is made by more than one transferor, revocation by a
7 transferor does not affect the deed as to the interest of another transferor who does not join in the
8 revocation.

9 (c) After a transfer on death deed is recorded, it may not be revoked by a revocatory act
10 on the deed or by a will.

11 (d) This section does not limit the effect of an inter vivos transfer of the property.

12 **SECTION 4-211. EFFECT OF TRANSFER ON DEATH DEED DURING**
13 **TRANSFEROR'S LIFE.** During a transferor's life, a transfer on death deed does not:

14 (1) affect an interest or right of the transferor or any other owner, including the right to
15 transfer or encumber the property;

16 (2) affect an interest or right of a transferee, even if the transferee has actual or
17 constructive notice of the deed;

18 (3) affect an interest or right of a secured or unsecured creditor or future creditor of the
19 transferor, even if the creditor has actual or constructive notice of the deed;

20 (4) affect the transferor's or designated beneficiary's eligibility for any form of public
21 assistance;

22 (5) create a legal or equitable interest in favor of the designated beneficiary; or

23 (6) subject the property to claims or process of a creditor of the designated beneficiary.

1 **SECTION 4-212. EFFECT OF TRANSFER ON DEATH DEED AT**
2 **TRANSFEROR’S DEATH.**

3 (a) Except as otherwise provided in the transfer on death deed[,] [or] in this section[,] [or
4 in [cite state statutes on antilapse, revocation by divorce or homicide and survival,] on the death
5 of the transferor, the following rules apply to property that is the subject of a transfer on death
6 deed and owned by the transferor at death:

7 (1) Subject to paragraph (2), the interest in the property is transferred to the
8 designated beneficiary in accordance with the deed.

9 (2) The interest of a designated beneficiary is contingent on the designated
10 beneficiary surviving the transferor. The interest of a designated beneficiary that fails to survive
11 the transferor lapses.

12 (3) Subject to paragraph (4), concurrent interests are transferred to the
13 beneficiaries in equal and undivided shares with no right of survivorship.

14 (4) If the transferor has identified two or more designated beneficiaries to receive
15 concurrent interests in the property, the share of one which lapses or fails for any reason is
16 transferred to the other, or to the others in proportion to the interest of each in the remaining part
17 of the property held concurrently.

18 (b) Subject to other law of the [Tribal Nation], a beneficiary takes the property subject to
19 all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to
20 which the property is subject at the transferor’s death.

21 (c) If a transferor is a joint owner and is:

22 (1) survived by one or more other joint owners, the property that is the subject of
23 a transfer on death deed belongs to the surviving joint owner or owners with right of

1 survivorship; or

2 (2) the last surviving joint owner, the transfer on death deed is effective.

3 (d) A transfer on death deed transfers property without covenant or warranty of title even

4 if the deed contains a contrary provision.