

INDIAN SOVEREIGNTY SYMPOSIUM

THE MODEL TRIBAL PROBATE CODE PROJECT

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JUNE 2014

The purpose of this paper is to describe a project being undertaken by the Uniform Law Commission (ULC) with the assistance of numerous participants from Indian Country. The project objective is to draft a Model Tribal Probate Code that tribal governments may adapt to meet their particular needs and issues.

The drafting committee held its first meeting at the Buffalo Thunder Resort near Santa Fe on April 12th and 13th. The purpose of this meeting was to gather input from participants on issues the Code might address. It is expected that the project will not be completed until at least 2017. Additional participation in the project from Indian Country is encouraged, whether in person or by email. Requests to participate may be sent to ULC staff attorney Ben Orzeske [borzeske@uniformlaws.org].

I. ABOUT THE UNIFORM LAW COMMISSION (ULC)

The Uniform Law Commission, which was formed in 1892, consists of representatives from each state but is independent of state governments. The ULC comprises approximately 350 Commissioners representing each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. All Commissioners must be lawyers and are appointed by the Governor or other governmental appointing authority in each jurisdiction. Commissioners include practicing lawyers, judges, legislators, law school faculty, and state government officials.



Commissioners serve without compensation on drafting and study committees.

The traditional purpose of the ULC is to draft uniform and model laws for enactment by the states. A uniform act is intended to be enacted with as little local variation as possible. By contrast, Model Acts contain ideas that legislative bodies will hopefully find useful, and uniform enactment is not expected and may not be desirable.

II. THE ULC AND INDIAN COUNTRY

A. The Model Tribal Secured Transactions Act

The ULC has not traditionally adopted legislation specifically tailored to the needs of tribal governments. As an entity supported by dues appropriated by state governments, the ULC's primary mission is to draft uniform and model state legislation. But there is an important exception. The Model Tribal Secured Transactions Act (MTSTA), completed in March 2006, was drafted by the ULC in consultation with numerous tribal participants to provide legislation specifically adapted to the needs of tribal governments in this critical area of commercial law. The Model Tribal Probate Code is the second such project, and hopefully there will be additional such projects in the future.

B. History of the Model Tribal Probate Code Project

The Model Tribal Probate Code proposal is an outgrowth of the work of a ULC Study Committee appointed in 2008 to study the feasibility of drafting a model tribal code regarding either tribal probate or the mortgaging or other collateralization of Indian lands. The Study Committee met twice, first in Fort McDowell, Arizona, in December 2009, and later in June 2010 in conjunction with the Indian Sovereignty Symposium in Oklahoma City. At its 2009 meeting, the Study Committee concluded that complex issues of federal law would make the

drafting of a model act with respect to the mortgaging or other collateralization of Indian trust or restricted lands extremely difficult, and perhaps impossible, without significant changes in federal law. The Study Committee therefore decided to focus on probate issues. At its 2010 meeting, the Study Committee presented an educational program on Indian probate issues at the Indian Sovereignty Symposium. Following this presentation, the Study Committee decided to recommend the drafting of a Model Tribal Probate Code.

Critical input for the project was also provided by the Advisory Board to the Office of the Special Trustee for American Indians, which reviewed the proposed drafting project at its June 2010 meeting, and which formally endorsed it at its September 2010 meeting. The project was also discussed at a meeting of the Inter Tribal Monitoring Association in April 2012. Funding for the project was finally secured in the Summer of 2013. The drafting committee was appointed in Fall 2013, and the first in-person drafting committee meeting held in April 2014. Drafting committee meetings will be held once or twice per year until the project is completed.

Numerous letters voicing support for the project were received from within Indian country, including from the following:

National Native American Bar Association, April 18, 2012
Crow Tribe, April 10, 2012
Chippewa Cree Tribe (Rocky Boy Reservation), April 10, 2012
Latona Old Elk, March 28, 2012
Fond du Lac Band of Lake Superior Chippewa, April 26, 2011
Turtle Mountain Band of Chippewa Indians, December 7, 2010
Native American Rights Fund, November 30, 2010
Federal Reserve Bank of Minneapolis, September 27, 2010

This support was critical in the determination to move the project forward and secure the necessary funding involved.

III. What Issues Might the Model Tribal Probate Code Address

The April 2014 meeting generated robust discussion along with 23 pages of single-spaced notes capturing possible issues that the Code might address or avoid. The following summary of that discussion is by necessity selective.

A. Overriding Issues

1. To what extent should the drafting committee recommend changes to federal law? Areas for possible revision include (a) the enactment of provisions authorizing the transfer of trust/restricted interests and IIM accounts by beneficiary deed, and (b) the enactment of provisions allowing for summary administration of trust/restricted interests.
2. To what extent should the Model Code track the American Indian Probate Reform Act (AIPRA) with regard to provisions concerning trust and fee lands and personal property? Benefits of tracking include simplicity and consistency but not all provisions of AIPRA may be desirable.
3. AIPRA does not deal with many issues found in a typical probate code. Should the Tribal Probate Code merely supplement AIPRA or should the Act deal with trust/fee lands in ways different than AIPRA although hopefully consistent with AIPRA's broader policies?
4. To what extent should the rules be the same for trust/restricted lands, fee lands, and personal property?
5. How should the Model Code recognize the importance of chthonic law and tribal custom?
6. Some tribes have allottees while others do not. How might the Model Code be adapted to meet the needs of tribes with different histories? One possibility is to include alternate or optional provisions on selected issues.
7. The drafting committee has collected close to 30 existing tribal probate codes, some quite brief, others, detailed. Recognizing the many differences in tribal systems, laws, and cultures across Indian Country, to what extent should existing codes inform drafting efforts?
8. How should the Model Code address fee lands given the general lack of monitoring of this type of ownership?
9. How might the Model Code handle disparate types of assets, such as

interests in tribal accounts, public domain allotments, and inchoate transfers from fee to trust status?

10. Additional identified suggestions:
 - a. Provisions covering burial instructions are too culturally specific to be addressed within a Model Code
 - b. Not all forms of tribal organization can necessarily be addressed, e.g. issues involving the Five Tribes.
11. Identified suggestions for an accompanying Implementation Guide rather than within the Model Code:
 - a. real property terms, e.g. definition of joint tenancy property
 - b. related acts for possible enactment, e.g. the Uniform Fiduciary Access to Digital Assets Act

B. Testate Succession (Wills)

1. Storage of original paper wills is problematic. The Model Code might consider a provision allowing for the safekeeping of electronic copies during testator's lifetime and possibly, filing of electronic copy at testator's death. The Model Code could also address electronic storage of other related documents, such as health care powers of attorney.
2. The Model Code should include a provision allowing for the disposition of tangible personal property by means of a written list instead of a will. Should culturally significant objects be excluded as subject to disposition under other tribal law?
3. The Model Code should include a provision covering holographic wills for tribes interested in permitting them.
4. For will execution, consider copying the Office of Hearings and Appeals requirements so that one will is effective for all types of assets.
5. Consider reversing the presumption that a will known to have been in the testator's possession at death but thereafter not found is presumed to have been intentionally revoked by the decedent by physical destruction.
6. Consider drafting a provision on after-born children and omitted spouses.

7. For anti-lapse statutes and rules of construction generally, drafted provisions should be more straightforward than the Uniform Probate Code. For abatement of property to satisfy creditors, cultural property should be off limits; consider treating real estate differently than bank accounts.

C. Intestate Succession (Statutes of Descent and Distribution)

1. Given variety of views on share of spouse and treatment of adopted children and children born out-of-wedlock, the Model Code should avoid actual statutory language but rather a template covering how a particular tribe might choose to approach these issues, with an emphasis on different possible options and different possible rules depending on the type of property.
2. The Model Code should consider the effect of formal and informal divorce, spousal abuse, and abandonment on intestate shares.
3. Consider including provision on advancements.
4. The Model Code should address certain issues lightly, such as the inheritance rights of children created through assistive reproductive technologies.

D. Estate Administration

1. AIPRA is unique in providing dispositional control to one who has disclaimed a testate or intestate share. Consider tracking that approach
2. Model Code should draft an abbreviated and direct small estates procedure.
3. Consider making the signing requirements the same for trust/restricted lands, fee lands, and personal property. Easiest way to accomplish this would be to adopt OHA signing requirements.
4. Probate code provisions are needed for non-trust/restricted interests. Consider how the Model Code could draft them more simply than the Uniform Probate Code.
5. Consider amending the UPC to require that states honor orders of the tribal court regarding transfer of bank accounts and other assets that might be physically located off-reservation but that are subject to the tribal probate court's jurisdiction.

E. Additional Issues

1. Spouse: Under AIPRA, the spouse receives a life estate but with no penalty for waste. Should the provision for fee lands be consistent? How might the Model Code accommodate tribal restrictions on who may reside in the home? For example, should the provision merely state that tribe should provide for a spouse consistent with its pre-existing land code?
2. Buildings: Under current federal law, title to real property improvements is severable from the title to the trust or restricted land itself. This inverts traditional fixtures law and may require special treatment on a number of topics.
3. Minors: Should the Model Code include a provision mirroring the Uniform Transfers to Minors Act but permit donors to designate age of distribution, e.g., at age 25?

IV. MODEL TRIBAL PROBATE CODE/ANTICIPATE FINAL PRODUCT

The great diversity among and between tribal cultures and governments suggests that no tribal government would be expected to enact all of the proposed Model Code provisions. On many issues, the Model Code may include two or more alternative options that a tribal government might enact. On others, the Code might not include suggested statutory language at all, but offer general suggestions over how an issue might be addressed. The Model Code would be accompanied by an Implementation Guide to offer suggestions over how a tribal government might adapt its provisions to meet particular circumstances within that tribe's unique cultural context.