

D R A F T

FOR DISCUSSION ONLY

## MODEL TRIBAL PROBATE CODE

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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March 29-30, 2019 Committee Meeting Draft

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March 8, 2019

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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 Model [Tribal]  
5 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  
27 **SECTION 1-103. GENERAL DEFINITIONS.** Subject to additional definitions  
28 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 whether the obligation was owed at death or  
9 was not yet due or was contingent. The term also includes liabilities of the estate which arise at  
10 or after the death of the decedent, including funeral expenses and expenses of administration.  
11 The term does not include estate or inheritance taxes, or demands or disputes regarding title of a  
12 decedent to specific assets alleged to be included in the estate.

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

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

18 [(7) “Control” means the direct or indirect power to direct the management, operations,  
19 or policies of the person through legal or beneficial ownership of voting power in the person or  
20 under a contract, arrangement, or understanding.]

21 (8) “Court” means the [Court] having jurisdiction in matters relating to the affairs of  
22 decedents.

23 (9) “Culturally significant property” means property that holds particular historical,

1 traditional, religious, or cultural significance for the [nation], but which under tribal law is  
2 capable of private appropriation and ownership, including the rights of alienation, intestate  
3 succession, and testate succession.

4 (10) “Descendant” of an individual means all of the individual’s descendants of all  
5 generations, with the relationship of parent and child at each generation being determined by the  
6 definition of child and parent contained in this [code].

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

9 (12) “Devisee” means a person designated in a will to receive a devise.

10 [(13) “Distributee” means any person who has received property of a decedent from the  
11 decedent’s personal representative other than as creditor or purchaser.]

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

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

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

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

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

1 nominative instrument of any similar type.

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

4 (20) “Heirs” means persons, including the tribe, who are entitled under the statutes of  
5 intestate succession to the property of a decedent.

6 (21) “Incapacitated individual” means an individual whose capacity is sufficiently  
7 diminished that a guardian or conservator could be appointed for the individual under applicable  
8 law.

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

15 (23) “Letters of office” means a document issued by the court or clerk certifying the  
16 personal representative’s appointment and authority. The term includes letters testamentary and  
17 letters of administration.

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

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

21 (26) “Parent” means any person entitled to take, or who would be entitled to take if the  
22 child died without a will, as a parent under this [code] by intestate succession from the child  
23 whose relationship is in question and excludes any person whose sole relationship is that of

1 stepparent, foster parent, or grandparent.

2 (27) “Person” means an individual, estate, business or nonprofit entity, public  
3 corporation, [tribe], government or governmental subdivision, agency or instrumentality, or other  
4 legal entity.

5 (28) “Personal representative” includes executor, administrator, successor personal  
6 representative, special representative, and persons who perform substantially the same function  
7 under the law governing their status. “General personal representative” excludes a special  
8 representative.

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

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

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

12 (32) “Record”, used as a noun, means information that is inscribed on a tangible medium  
13 or that is stored in an electronic or other medium and is retrievable in perceivable form.

14 (33) “Residuary devise” means a devise of the property remaining after any specific or  
15 general devises or a devise of the entire estate.

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

18 (35) “Sign” means, with present intent to authenticate or adopt a record:

19 (A) to execute or adopt a tangible symbol; or

20 (B) to attach to or logically associate with the record an electronic symbol, sound,  
21 or process.

22 (36) “Specific devise” means a devise of property specifically described in the will that  
23 was owned by the testator.

1 (37) “Special representative” means a personal representative as described in Section 2-  
2 309.

3 (38) “Successor personal representative” means a personal representative, other than a  
4 special representative, who is appointed to succeed a previously appointed personal  
5 representative.

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

8 (40) “Survive” means that an individual has neither predeceased an event, including the  
9 death of another individual, nor is deemed to have predeceased an event under Section 3-501.  
10 The term includes such derivatives as “survives,” “survived,” “survivor,” and “surviving.”

11 (41) “Tribal cultural property” means property that holds particular historical, traditional,  
12 religious, or cultural significance for the [nation], and that, while possibly subject to rights of  
13 custody, possession, or stewardship, is incapable of private appropriation or ownership,  
14 including the rights of alienation, intestate succession, or testate succession under tribal law.

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

17 **Reporters’ Note**

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

1 Rev. 69 (2005).

2

3

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

4

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

10

**Reporters’ Note**

11

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

14

15

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

27

A broader approach, which would leave tribes more flexibility in determining the extent of their  
28 claimed jurisdiction, could be taken by stating that “this Code shall apply to all property subject  
29 to tribal jurisdiction.”

30

31

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

32

(a) If notice of a hearing on a petition or other matter is required, and except as

33

specifically provided for in this [code] or as ordered by the court, the [petitioner] [clerk] shall

34

give notice of the time and place of hearing to any interested person or that person’s attorney.

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

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

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

8 (3) if the address, or identity of any person is not known and cannot be  
9 ascertained with reasonable diligence, [by publishing at least once a week for two consecutive  
10 weeks, a copy of the notice in both the tribal newspaper, if any, and in any newspaper or  
11 newsletter having general circulation in the [appropriate jurisdiction] where the hearing is to be  
12 held, the last publication of which must be at least [21] calendar days before the time set for the  
13 hearing] [by posting a copy of the notice in at least three conspicuous public places on the  
14 reservation, territory, or within the tribe's jurisdiction at least [21] calendar days before the  
15 hearing and by broadcasting the principal contents of the notice on a tribal radio program].

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

17 (d) A person may waive notice by a [writing] [record] signed by the person or the  
18 person's [attorney] and filed in the proceeding.

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

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

23



1 **Reporters' Note**

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

7  
8 **SECTION 1-106. WHEN PARTIES BOUND BY OTHERS; NOTICE.** In

9 proceedings under this [code], the following rules apply:

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

13 (2) A conservator or guardian may represent the person under conservatorship or  
14 guardianship.

15 (3) If no conservator or guardian has been appointed, a parent may represent a minor  
16 child.

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

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

23 **Reporters' Note**

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

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

26 (a) Whenever fraud has been perpetrated in connection with a proceeding under this

1 [code] or if fraud is used to circumvent the provisions or purposes of this [code], a person injured  
2 may obtain appropriate relief against the perpetrator of the fraud or restitution from any person  
3 (other than a bona fide purchaser for value) benefitting from the fraud, whether innocent or not.

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

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

9 **Reporters' Note**

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

13  
14 **SECTION 1-108. EVIDENCE OF DEATH.**

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

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

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

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

1 **Reporters' Note**

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

10  
11 **SECTION 1-109. TRIBAL CUSTOM.**

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

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

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

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

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

22 **ARTICLE 2**

23 **PROBATE OF WILLS AND ADMINISTRATION**

24 **PART 1.**

25 **GENERAL PROVISIONS**

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

27 (a) The power of a person to leave property by will, and the rights of creditors, devisees,  
28 and heirs to the decedent's property are subject to the restrictions and limitations contained in

1 this [code].

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

6 (c) [With the exception of Section 2-403 relating to estate inventory and Section []  
7 relating to custodial rights, this [code] does not apply to tribal cultural property not subject to  
8 administration.

9 **Reporters' Note**

10 This section is a shortened and modified version of Section 3-101 of the Uniform Probate  
11 Code.

12  
13 **SECTION 2-102. STATUTES OF LIMITATIONS ON DECEDENT'S CAUSE OF**  
14 **ACTION.** A statute of limitations on a cause of action belonging to a decedent that has not been  
15 barred as of the date of death is tolled for [one year] following the decedent's death but resumes  
16 thereafter.

17 **Reporters' Note**

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

20  
21 **SECTION 2-103. DEMAND FOR NOTICE OF ORDER OR FILING**  
22 **CONCERNING DECEDENT'S ESTATE.** A person having a financial or property interest in  
23 the estate of a decedent who desires notice of any order or filing pertaining to the estate may file  
24 a demand for notice with the court at any time after the death of the decedent. The demand shall  
25 state the name of the decedent, the financial or property interest in the estate of the person  
26 making the demand, and the address of the demandant or that of the demandant's attorney. The

1 clerk of court shall mail a copy of the demand to the personal representative, if a personal  
2 representative has been appointed. Unless the court otherwise directs, after the filing of a  
3 demand for notice, no order or filing to which the demand relates shall be made or accepted  
4 without notice as prescribed in Section 1-105 being given to the demandant or the demandant's  
5 attorney.

6 **Reporters' Note**

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

8 **PART 2.**

9 **PROBATE AND APPOINTMENT PROCEEDINGS**

10 **SECTION 2-201. PROBATE PROCEEDINGS; NATURE; WHEN**

11 **COMMENCED.**

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

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

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

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

20 **Reporters' Note**

21 This section provides a roadmap for navigating this part of the code. Similar to a number  
22 of tribal probate codes, under this code proceedings for intestate and testate estates are addressed  
23 in separate sections.  
24

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

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

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

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

7                   (2) contain the following statements:

8                           (A) the interest of the petitioner;

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

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

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

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

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

23                          (G) the tribal membership status of the decedent, the heirs, and the

1 devisees;

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

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

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

8 (c) If the petitioner requests the appointment of a personal representative, the petition  
9 must state the name and address of the proposed personal representative, whether the proposed  
10 personal representative was nominated in the will, and if not, the reason why the proposed  
11 personal representative should be appointed.

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

17 **Reporters' Note**

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

29

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

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

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

8                   (1) the interest of the petitioner;

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

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

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

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

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

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

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



1 state the priority of the person whose appointment is sought and the names of other persons  
2 having a prior or equal right to the appointment under Section 2-304.

3 **Reporters' Note**

4 This section draws language from several tribal probate code in addition to Sections 3-  
5 301 and 3-402 of the Uniform Probate Code. Language drawn from existing tribal probate codes  
6 include requirements that the petition address tribal status and also provide a general description  
7 of the decedent's property, including any trust or restricted real property or IIM accounts. This  
8 section applies only to intestate estates. The petition requirements for testate estates are  
9 addressed in Section 2-202.

10  
11 **SECTION 2-204. HEARING ON PETITION OPTIONAL.** The court may but need  
12 not order that a hearing be held on a petition to admit a will to probate or to determine intestacy  
13 or the priority of a proposed personal representative for appointment.

14 **Reporters' Note**

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

21  
22 **SECTION 2-205. PROOF OF PROPER EXECUTION OF WILL.**

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

25 (b) If the will is witnessed but not self-proved, proper execution may be established by  
26 the testimony or affidavit of at least one of the attesting witnesses or by other sufficient evidence.  
27 An attestation clause that is signed by the attesting witnesses raises a presumption that the events  
28 recited in the clause occurred.

29 **Reporters' Note**

30 Unlike the Uniform Probate Code, which has separate sections for proving contested as  
31 opposed to uncontested wills (see UPC Sections 3-405, 3-406), this section provides one

1 procedure for all wills. Because most wills are executed in front of a notary public, requiring that  
2 the witnesses to the will testify in court will rarely be necessary.

3  
4 **SECTION 2-206. CONTEST OF WILL.**

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

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

9 (c) In a contested case, the proponents of the will have the burden of establishing prima  
10 facie proof of due execution. A contestant of a will has the burden of establishing lack of  
11 testamentary intent or capacity, undue influence, fraud, duress, or revocation.

12 (d) If the contest of a will is filed, an order admitting or denying admission of a will to  
13 probate is final upon the expiration of the contest period as to all persons who were properly  
14 notified of the court's order. If a contest is filed within the contest period, the order is final upon  
15 the conclusion of the contest.

16 **Reporters' Note**

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

18 **PART 3.**

19 **PERSONAL REPRESENTATIVE; APPOINTMENT, CONTROL,**  
20 **AND TERMINATION OF AUTHORITY**

21 **SECTION 2-301. COMMENCING ADMINISTRATION.** The administration of an  
22 estate is commenced by the personal representative's appointment and the issuance of letters.  
23 The duties and powers of a personal representative commence upon the personal representative's  
24 appointment. Upon appointment, the powers of the personal representative relate back in time to  
25 give acts by the person appointed that are beneficial to the estate and that occur prior to

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

2 **Reporters' Note**

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

7  
8 **SECTION 2-302. QUALIFICATION AND BOND.**

9 (a) Prior to receiving letters, a personal representative must qualify by filing with the  
10 appointing court an acceptance of office and any required bond.

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

14 **Reporters' Note**

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

16 **SECTION 2-303. CONSENT TO JURISDICTION; NON-RESIDENT PERSONAL**  
17 **REPRESENTATIVES.**

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

21 (b) In addition to any other method for acquiring jurisdiction over a non-resident person,  
22 a personal representative appointed in another jurisdiction submits personally to the jurisdiction  
23 of the tribe in any proceeding relating to the estate by: (1) doing any act as a personal  
24 representative in this jurisdiction which would have given the tribal court jurisdiction over the  
25 representative as an individual; or (2) receiving payment of money or taking delivery of personal  
26 property that is subject to the jurisdiction of the tribal court. Jurisdiction under clause (2) is

1 limited to the money or value of personal property collected.

2 (c) Notice shall be given to a personal representative appointed in another jurisdiction in  
3 the manner prescribed by Section 1-105.

4 **Reporters' Note**

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

7  
8 **SECTION 2-304. PRIORITY AMONG PERSONS SEEKING APPOINTMENT AS**  
9 **PERSONAL REPRESENTATIVE.**

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

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

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

14 (3) other devisees of the decedent;

15 (4) the surviving spouse of the decedent;

16 (5) other heirs of the decedent;

17 (6) any other person who would act in the best interests of the estate;

18 (7) [60] days after the death of the decedent, any creditor;

19 (8) [the tribe] or person nominated by [the tribe];

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

24 (c) Unless otherwise ordered by the court, a personal representative appointed by a court  
25 of the decedent's domicile has priority over all other persons except where the decedent's will

1 nominates a different person to be personal representative in this jurisdiction. The domiciliary  
2 personal representative may nominate another, who shall have the same priority as the  
3 domiciliary personal representative.

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

6 **Reporters' Note**

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

9  
10 **SECTION 2-305. TERMINATION OF APPOINTMENT; GENERAL.**

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

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

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

21 **Reporters' Note**

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

23 **SECTION 2-306. TERMINATION OF APPOINTMENT BY REMOVAL;  
24 CAUSE; PROCEDURE.**

25 (a) An interested person may petition for removal of a personal representative for cause at

1 any time. The petitioner shall give notice of the petition to the personal representative, and to  
2 other persons as the court may order. Unless otherwise ordered by the court, after receiving  
3 notice of judicial proceedings to remove the personal representative, the personal representative  
4 shall not act except to account or to preserve the estate. If removal is ordered, the court shall  
5 direct by order the disposition of the assets remaining under the control of the personal  
6 representative being removed.

7 (b) Cause for removal exists when:

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

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

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

13 **Reporters' Note**

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

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

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

18 (1) the death of a personal representative or the appointment of a conservator for the  
19 estate of a personal representative;

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

21 (3) Upon approval by the court, the resignation of a personal representative;

22 (4) Except as otherwise ordered by the court, by the appointment of a different personal  
23 representative.  
24

1 **Reporters' Note**

2  
3 This section is based on Sections 3-609, 3-610 and 3-612 of the Uniform Probate Code  
4 although with modifications.  
5

6 Subsection (d) can apply in a variety of circumstances. These include probate of a will  
7 subsequent to the appointment of a personal representative in intestacy, the probate of a will  
8 which is superseded by probate of another will, or the vacating of the probate of a will under  
9 which the personal representative was appointed.  
10

11 **SECTION 2-308. SUCCESSOR PERSONAL REPRESENTATIVE.** After  
12 appointment and qualification, a successor personal representative may be substituted in all  
13 actions and proceedings to which the former personal representative was a party.  
14

14 **Reporters' Note**

15 This section is based on a portion of Section 3-613 of the Uniform Probate Code.  
16

17 **SECTION 2-309. SPECIAL PERSONAL REPRESENTATIVE; APPOINTMENT;**  
18 **POWERS AND DUTIES.**

19 (a) A special personal representative may be appointed by order of the court on the  
20 petition of an interested person and finding, after notice and hearing, that appointment is  
21 necessary to preserve the estate or to secure its proper administration. If the court finds that an  
22 emergency exists, the appointment may be ordered without notice.

23 (b) If a special personal representative is to be appointed pending the probate of a will,  
24 the person named personal representative in the will shall be appointed if available and if the  
25 person would act in the best interests of the estate. In other cases, any other person who would  
26 act in the best interests of the estate may be appointed as special personal representative.

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

29 (d) An appointment of a special personal representative terminates in accordance with the

1 order of appointment, on the appointment of a personal representative or as provided in Sections  
2 2-305 through 2-307.

3 **Reporters' Note**

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

6  
7 **PART 4.**

8 **DUTIES AND POWERS OF PERSONAL REPRESENTATIVE**

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

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

16 (b) A personal representative shall proceed expeditiously to administer and distribute the  
17 decedent's estate. Except as otherwise requested by the personal representative, specified or  
18 ordered by the court or in this [code], the personal representative may act without order of the  
19 court.

20 (c) A personal representative is not liable for acts of administration or distribution if the  
21 conduct in question was authorized at the time.

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



1 (e) Except as to proceedings that do not survive the death of a decedent, a personal  
2 representative of a decedent whose estate is being administered under this [code] has standing to  
3 sue and be sued in the courts of this or any other jurisdiction as the decedent had immediately  
4 prior death.

5 **Reporters' Note**

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

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

11 (a) Not later than [21] days after appointment of a personal representative, other than a  
12 special personal representative, the [personal representative] [clerk] shall give notice of the  
13 appointment, including the petition and a copy of the will, to the heirs, devisees, and to the  
14 [tribe].

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

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

24 **Reporters' Note**

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



1 management, protection and preservation of, the estate in the personal representative's  
2 possession or control. The personal representative may maintain an action to recover possession  
3 or control of property or to determine its title.

4 **Reporters' Note**

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

6 **SECTION 2-405. POWERS OF PERSONAL REPRESENTATIVE;**  
7 **GENERALLY; IMPROPER EXERCISE.**

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

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

16 (c) If the exercise of power concerning the estate is improper, the personal representative  
17 is liable to interested persons for breach of the fiduciary duty. The rights of purchasers and others  
18 dealing with a personal representative shall be determined as provided in Sections 2-406 and 2-  
19 407.

20 **Reporters' Note**

21 This section combines portions of Sections 3-711 and 3-712 of the Uniform Probate  
22 Code. Subsection (b) is identical to Section 3-607(a) of the Uniform Probate Code.  
23



1 (d) Comparable protective provisions of other laws of the [tribe] relating to commercial  
2 transactions or transfer of securities by fiduciaries prevail over the protections provided by this  
3 section.

4 (e) As used in this section, “good faith” means honesty in fact and the observance of  
5 reasonable standards of fair dealing.

6 **Reporters’ Note**

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

8 **SECTION 2-408. SALE OF PROPERTY; WHEN NOTICE REQUIRED.** At least  
9 [21] days before the sale of real property or personal property of the estate for which the fair  
10 market value is not readily ascertainable, the personal representative shall give written notice of  
11 the intent to sell to the beneficiaries of the estate whose interests might be affected by the sale  
12 and to persons who have filed a demand for notice under Section 2-104. If the sale is to be by  
13 auction, the notice shall contain the place, date and time of auction. If the sale is made pursuant  
14 to a sales contract, the notice shall contain a description of the property to be sold, the name of  
15 the purchaser, the sale price, the terms of payment, and the nature of the security if the payment  
16 of any portion of the purchase price is to be deferred. If an objection to the sale is filed with the  
17 court prior to the date set for the sale, the sale must be approved by the court unless the sale was  
18 authorized by the will.

19 **Reporters’ Note**

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

21 **SECTION 2-409. TRANSACTIONS AUTHORIZED FOR PERSONAL**  
22 **REPRESENTATIVE; EXCEPTIONS.** Except as restricted or otherwise provided by the will  
23 or by an order of court, a personal representative may exercise the following powers with respect

1 to property subject to administration in the decedent's estate without prior authorization of court:

2 (1) retain assets owned by the decedent pending distribution or liquidation including

3 those in which the representative is personally interested;

4 (2) perform, compromise or refuse performance of the decedent's contracts that continue

5 as obligations of the estate, as the personal representative may determine under the

6 circumstances;

7 (3) satisfy written charitable pledges of the decedent irrespective of whether the pledges

8 constituted binding obligations of the decedent;

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

10 immediately distributable, deposit or invest liquid assets of the estate, including moneys received

11 from the sale of other assets, in federally insured interest-bearing accounts or other prudent

12 investments;

13 (5) subject to tribal or other restriction, acquire or dispose of an asset [, including land],

14 for cash or on credit, at public or private sale; and manage, exchange, partition, or abandon an

15 estate asset when, in the opinion of the personal representative, it is valueless, or is so

16 encumbered, or is in condition that it is of no benefit to the estate;

17 (6) enter for any purpose into a lease as lessor or lessee, with or without option to

18 purchase or renew, for a term within or extending beyond the period of administration;

19 (7) enter into a lease or arrangement for exploration and removal of minerals or other

20 natural resources;

21 (8) insure the assets of the estate against damage, loss and liability and the personal

22 representative against liability as to third persons;

23 (9) borrow money with or without security to be repaid from the estate assets or

1 otherwise; and advance money for the protection of the estate;

2 (10) pay taxes, assessments, compensation of the personal representative, and other  
3 expenses incident to the administration of the estate;

4 (11) employ persons, including attorneys, auditors, investment advisors, or agents, even if  
5 they are associated with the personal representative, to advise or assist the personal  
6 representative in the performance of the personal representative's administrative duties; act  
7 without independent investigation upon their recommendations; and instead of acting personally,  
8 employ one or more agents to perform any act of administration, whether or not discretionary;

9 (12) prosecute or defend claims, or proceedings in any jurisdiction for the protection of  
10 the estate and of the personal representative in the performance of the representative's duties;

11 (13) continue or incorporate any unincorporated business or venture in which the  
12 decedent was engaged at the time of the decedent's death; and

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

14 (15) enter into a lease or arrangement for exploration and removal of minerals or other  
15 natural resources;

16 **SECTION 2-410. POWERS AND DUTIES OF SUCCESSOR PERSONAL**  
17 **REPRESENTATIVE.**

18 (a) A successor personal representative has the same powers and duties as the original  
19 personal representative to complete the administration and distribution of the estate, but the  
20 successor personal representative may not exercise any power expressly made personal to the  
21 personal representative named in the will.

22

23 (b) A successor personal representative is not individually liable for the action or failure

1 to act of a previous personal representative unless the successor has knowledge of a breach of  
2 fiduciary duty by the predecessor and fails to take reasonable corrective action.

3 **Reporters' Note**

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

6  
7 **SECTION 2-411. CO-REPRESENTATIVES; WHEN JOINT ACTION**

8 **REQUIRED.**

9 (a) Unless the will provides otherwise, the concurrence of all co-representatives is  
10 required on all decisions connected with the administration and distribution of the estate.  
11 Concurrence is not required when such agreement cannot readily be obtained in the time  
12 reasonably available for emergency action necessary to preserve the estate.

13 (b) A co-representative may delegate powers to another co-representative.

14 (c) A person who deals with a co-representative without knowledge that another has also  
15 been appointed to serve is as fully protected as if that co-representative with whom that person  
16 has dealt had full authority.

17 (d) Unless the terms of the will otherwise provide, every power exercisable by personal  
18 co-representatives may be exercised by the one or more remaining after the appointment of one  
19 or more of the others is terminated.

20 **Reporters' Note**

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

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

23 (a) A personal representative and an attorney for the personal representative are entitled  
24 to reasonable compensation for services as approved by the court. Reasonable compensation also  
25 may include compensation for the services of the agents or employees of the person seeking



1 compensation and may also include reimbursement for costs advanced. A determination of  
2 reasonable compensation may be based on one or more of the following factors:

3 (1) The time and labor involved;

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

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

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

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

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

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

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

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

19 **Reporters' Note**

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

22

23 **SECTION 2-413. INDIVIDUAL LIABILITY OF PERSONAL**

24 **REPRESENTATIVE.**

25 (a) A personal representative is individually liable on a contract properly entered into in

1 the personal representative's fiduciary capacity in the course of administration of the estate only  
2 if:

3 (A) the contract so provides, or:

4 (B) the contract fails to disclose the fiduciary capacity.

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

8 (c) Even though the personal representative is not individually liable under subsections

9 (a) or (b), a claim based on a contract, tort, or obligation arising from ownership or control of the  
10 estate, may be asserted against the estate in a judicial proceeding against the personal  
11 representative in the representative's fiduciary capacity.

12 **Reporters' Note**

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

14 **PART 5.**

15 **CREDITORS' CLAIMS**

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

17 **ADMINISTRATION.** A proceeding to enforce a claim against the estate of a decedent or the  
18 decedent's successors may not be commenced before the court has appointed a personal  
19 representative.

20 **Reporters' Note**

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

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

23 (a) Unless notice has already been given by a previously appointed personal

1 representative, a personal representative upon appointment shall [publish] [post and broadcast] a  
2 notice to creditors once a week for two successive weeks in the manner provided in Section 1-  
3 105. The notice shall announce the appointment, state the personal representative's address, and  
4 notify creditors of the decedent to present their claims within [four] months after the date of the  
5 [first publication] [posting] of the notice or the claim may be barred.

6 (b) Except as provided in subsection (c), a personal representative shall give written  
7 notice by mail or other delivery to a creditor of the decedent, who is either known to or  
8 reasonably ascertainable by the personal representative, informing the creditor to present the  
9 claim within [four] months after the date of the first publication of notice as provided in  
10 subsection (a), or within 60 days after the mailing or other delivery of the written notice,  
11 whichever is later, or be forever barred.

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

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

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

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

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

21 **Reporters' Note**

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



1 barred in this state.

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

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

5 (2) Any right to terminate or enforce a lease or license.

6 **Reporters' Note**

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

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

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

10 (1) The claimant may file the claim with the court in the form prescribed by court  
11 rule. The statement of claim shall indicate its basis, the name and address of the claimant, and the  
12 amount claimed. If a claim is not yet due, the date when it will become due shall be stated. If the  
13 claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is  
14 secured, the security shall be described. Upon the filing, the clerk shall send a copy of the claim  
15 to the personal representative or representative's attorney; or

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

20 (b) A presentation of a claim is not required in regard to matters claimed in a proceeding  
21 that was pending against the decedent at the time of death.

22 **Reporters' Note**

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

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

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

4                   (1) costs and expenses of administration;

5                   (2) reasonable funeral expenses;

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

7                   (4) reasonable and necessary medical and hospital expenses of the last illness of  
8 the decedent, including compensation of medical personnel attending the decedent;

9                   (5) all other claims.

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

12                                   **Reporters' Note**

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

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

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

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

21                                   **Reporters' Note**

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



1 the share of the surviving spouse who elects to take an elective share, shares of beneficiaries  
2 abate, without any preference or priority as between real and personal property, in the following  
3 order: (1) property not disposed of by the will; (2) residuary devises; (3) general devises; (4)  
4 specific devises; and (5) tribal cultural property. Abatement within each classification is in  
5 proportion to the amounts of property each of the beneficiaries would have received, if full  
6 distribution of the property had been made in accordance with the terms of the will.

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

10 **Reporters' Note**

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

12 **SECTION 2-602. RIGHT OF RETAINER.** Any indebtedness of a beneficiary of an  
13 estate shall be offset against the beneficiary's interest; but the beneficiary has the benefit of any  
14 defense which would be available to the beneficiary in a direct proceeding for recovery of the  
15 debt.

16 **Reporters' Note**

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

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

22 **Reporters' Note**

23 This section is identical to Section 3-904 of the Uniform Probate Code.  
24





1           **SECTION 2-606. IMPROPER DISTRIBUTION; LIABILITY OF BENEFICIARY.**

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

6           (b) The claim of a claimant to recover from a beneficiary who is liable to pay the claim,  
7 and the right of an heir or devisee, or of a successor personal representative acting in their behalf,  
8 to recover property improperly distributed or its value from any beneficiary is forever barred at  
9 the later of three years after the decedent's death or one year after the time of its distribution, but  
10 all claims of creditors of the decedent are barred one year after the decedent's death. This section  
11 does not bar an action to recover property or value received as a result of fraud.

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

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

15                   (2) Any right to terminate or enforce a lease or license.

16   **Reporters' Note**

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

18           **SECTION 2-607. DISTRIBUTION TO MINOR OR ADULT LACKING**  
19 **CAPACITY.**

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

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

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

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

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

8 (4) An insured savings account in the sole name of the minor in a governmentally-  
9 regulated financial institution, with notice of the deposit to be given to the minor;

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

12 (c) A personal representative may discharge an obligation to distribute the share of an  
13 adult person not under [conservatorship] but who the representative reasonably believes lacks  
14 capacity to manage his or her property or financial affairs by distributing the share as provided in  
15 the decedent's will or, in the absence of directions in the will, by distributing the share to:

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

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

19 (3) Any person responsible for or who has assumed responsibility for the adult  
20 person's care or custody, provided that the value of the share to be distributed does not exceed  
21 [\$10,000].

22 (d) The personal representative is not responsible for the proper application of money or  
23 property distributed pursuant to this section.

1 **Reporters' Note**

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

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

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

11 **Reporters' Note**

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

13 **[SECTION 2-609. DISPOSITION OF UNCLAIMED ASSETS.** If an heir, devisee,  
14 or claimant cannot be found, the personal representative shall distribute the share of the missing  
15 person to the person's conservator, if any, otherwise to the [tribal treasurer] to become a part of  
16 the [tribal jurisdiction escheat fund].]

17 **Reporters' Note**

18 This section is derived from Section 3-914(a) of the Uniform Probate Code. It is placed in  
19 brackets to indicate that an enacting tribal nation will need to modify it to match its unclaimed  
20 property statute or practice.

1 **PART 7.**

2 **CLOSING ESTATE**

3 **SECTION 2-701. CLOSING ESTATE BY ORDER OF COMPLETE**  
4 **SETTLEMENT.**

5 (a) The administration of an estate is concluded by an order of complete settlement. The  
6 personal representative may petition for an order of complete settlement no earlier than [four]  
7 months from the appointment of the original personal representative, and any other interested  
8 person may petition no earlier than one year from the appointment of the original personal  
9 representative. The petition of the personal representative shall be heard as a matter of course,  
10 but other petitions shall be heard only if there is good cause. The petition shall request the court  
11 to approve the account or to compel and approve an accounting, and to enter an order  
12 adjudicating that the estate has been fully administered, including that all presented claims have  
13 been paid, settled, or otherwise provided for, that all inheritance, estate, and other death taxes  
14 have been paid or provided for.

15 (b) After notice to all interested persons and hearing, and the filing of proof that a copy of  
16 the accounting was mailed to the heirs and devisees entitled to distribution of the remaining  
17 assets of the estate, and to all known creditors and other claimants whose claims are neither paid  
18 nor barred, the court may enter the appropriate orders, terminate the personal representative's  
19 appointment, and discharge the personal representative from further claims or demands.

20 (c) Any accounting required under this section may be waived if the persons entitled to a  
21 copy consent in [writing] [a record].

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

1 **Reporters' Note**

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

3 **SECTION 2-702. CLOSING ESTATE BY FILING STATEMENT.**

4 (a) Unless prohibited by order of the court, a personal representative may close an estate  
5 by filing with the court no earlier than six months after the date of the original appointment, a  
6 verified statement stating that the personal representative, or a previous personal representative,  
7 has:

8 (1) determined that the time for filing creditor claims has expired;

9 (2) fully administered the estate by making payment, settlement or other  
10 disposition of all presented claims, expenses of administration and estate, inheritance and other  
11 death taxes have been paid, except as specified in the statement, and that the assets of the estate  
12 have been distributed to the persons entitled to them; and

13 (3) sent a copy of the statement and full accounting of the estate administration to  
14 all beneficiaries of the estate; and

15 (4) sent a copy of the statement to all creditors or other claimants of whom the  
16 personal representative is aware whose claims are neither paid nor barred.

17 (b) The appointment of the personal representative terminates if no proceedings involving  
18 the personal representative are pending in the court one year after the closing statement is filed.

19 **Reporters' Note**

20 This section is based on Section 3-1003 of the Uniform Probate Code.

21 **SECTION 2-703. LIABILITY OF BENEFICIARY FOR UNDISCHARGED**  
22 **CLAIM.**

23 (a) After assets of an estate have been distributed, an undischarged claim not barred may

1 be prosecuted in a proceeding against one or more beneficiaries but only if the action is brought  
2 within the later of [three] years after the decedent's death or one year after the time of the  
3 distribution. A creditor of the decedent may bring an action under this section only if the claim  
4 has not been barred under Section 2-504.

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

7 **Reporters' Note**

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

9 **SECTION 2-704. SUBSEQUENT ADMINISTRATION.** If other property of the  
10 estate is discovered after an estate has been settled and the personal representative discharged,  
11 the court upon petition of any interested person and upon notice as it directs, may appoint the  
12 same or a successor personal representative to administer the subsequently discovered property.  
13 If a new appointment is made, unless the court orders otherwise, the provisions of this [code]  
14 apply as appropriate; but no claim previously barred may be asserted in the subsequent  
15 administration.

16 **Reporters' Note**

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

18 **PART 8.**

19 **SMALL ESTATES**

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

21 (a) Thirty days after the death of a decedent, any person indebted to the decedent or  
22 having possession of tangible personal property or control of intangible personal property  
23 belonging to the decedent shall make payment of the indebtedness, deliver the tangible personal

1 property, or transfer the intangible personal property to a person claiming to be the successor of  
2 the decedent upon being presented an affidavit made by or on behalf of the successor stating that:

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

5 (2) 30 days have elapsed since the death of the decedent; and

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

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

9 (b) The person paying, delivering, or transferring, property as provided in this section is  
10 discharged and released to the same extent as if the person dealt with a personal representative of  
11 the decedent. The person is not required to see to the application of the personal property or  
12 evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to  
13 whom an affidavit is delivered refuses to pay, deliver, or transfer any personal property or  
14 evidence thereof, it may be recovered or its payment, delivery, or transfer compelled upon proof  
15 of the person's right in a proceeding brought for the purpose by or on behalf of the persons  
16 entitled thereto. Any person to whom payment, delivery, or transfer is made is accountable  
17 therefor to any personal representative of the estate or to any other person having a superior  
18 right.

19 **Reporter's Note**

20 This section is an updated version of Sections 3-1201 and 3-1202 of the Uniform Probate  
21 Code.

22  
23 **SECTION 2-802. SUMMARY ADMINISTRATION PROCEDURE FOR SMALL**  
24 **ESTATE.**

25 (a) If it appears from the inventory and appraisal that the value of the entire estate, less



1 liens, does not exceed homestead allowance, exempt property, family allowance, costs and  
2 expenses of administration, and reasonable and necessary medical and hospital expenses of the  
3 last illness of the decedent, the personal representative may, without giving notice to creditors,  
4 summarily and immediately pay the above expenses and distribute the remaining assets of the  
5 estate to the persons entitled thereto, and file a closing statement as provided in subsection (b).

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

9 (1) to the knowledge of the personal representative, the value of the entire estate,  
10 less liens, did not exceed homestead allowance, exempt property, family allowance, costs and  
11 expenses of administration, reasonable funeral expenses, and reasonable, necessary medical and  
12 hospital expenses of the last illness of the decedent;

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

15 (3) the personal representative has sent a copy of the closing statement and has  
16 provided a full accounting in [writing] [a record] to all persons entitled to the estate, to all  
17 creditors who have filed timely claims against the estate whose claims have not been paid, and to  
18 all persons who have filed a demand for notice under Section 2-104.

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

## 22 Reporters' Note

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

1 **ARTICLE 3**

2 **INTESTATE AND TESTATE SUCCESSION**

3 **PART 1.**

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

5 **SECTION 3-101. INTESTATE ESTATE.** The intestate estate is any part of a  
6 decedent’s estate not effectively disposed of by will. The net intestate estate is the intestate  
7 estate reduced by:

8 (1) allowed claims;

9 (2) expenses;

10 (3) homestead allowance;

11 (4) exempt property;

12 (5) family statutory allowances for the spouse and children;

13 (6) Tribal nation cultural property, and

14 (7) property that is not otherwise barred from distribution by federal law, Tribal National  
15 law, or Tribal National leasing regulations.

16 The net intestate estate passes by intestate succession to the decedent’s heirs as described in this  
17 code.

18 **Reporters’ Note**

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

24  
25 This draft currently reflects Option #2 by proposing provisions applicable to non-trust or  
26 restricted property – all of which would be completely subject to tribal alteration to best suit that  
27 tribe’s needs and goals – and then saving a place for a streamlined version of AIPRA which  
28 would apply to trust and restricted property. This is essentially the approach taken by the  
29 Northern Cheyenne Probate Code (approved by SOI, 11/17/14) and the Fort Peck TPC Title 12

1 §§ 101, 106 (“Except as to trust or restricted land subject to the jurisdiction of the United States,  
2 the Tribal Court shall have jurisdiction to determine heirs ...”; “When an Indian dies without a  
3 valid will, the Indian’s property which is subject to the Court’s jurisdiction shall descend to the  
4 following persons”).

5  
6 **SECTION 3-102. SHARE OF SPOUSE.**

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

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

9 (2) all of the decedent’s surviving descendants are also descendants of the  
10 surviving spouse.

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

14 **Reporters’ Note**

15 TPCs take numerous approaches in determining the spousal share. The drafted model  
16 provision falls between codes that provide for the entire estate always to pass to the surviving  
17 spouse (if there is one), to those that limit the spouse to ½ if there are any surviving issue (*See*  
18 *e.g.* Chitimacha TPC § 302, Fort Peck § 106(a)(1)), to those that reduce the spousal share to a  
19 different fraction (*e.g.* Jicarilla TPC Chapter 8 § (B) (1/4 to spouse, ¾ to surviving children as to  
20 separate property) or in a greater number of instances, *e.g.* when the decedent is survived by  
21 parents or siblings, rather than only descendants. *See, e.g.*, Lummi Nation TPC Chapter 35.05  
22 §35.05.010 (“the surviving spouse shall receive . . . ¾ of the net separate estate if there is no  
23 surviving issue, but he intestate is survived by one or more of his parents, or by one or more of  
24 the issue of one or more of his parents.”). The approach taken here is designed, in part, to reduce  
25 further fractionation of estates.

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

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

29 part of the net intestate estate that does not pass to a decedent’s surviving spouse passes as  
30 follows:

31 (a) to the decedent’s surviving descendants by representation;

32 (b) if there is no surviving descendant, equally to any surviving parent;

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

4 (d) if there is no surviving descendant, parent, sibling, or descendant of a sibling, but the  
5 decedent is survived by one or more grandparents or surviving descendants of grandparents, to  
6 the grandparent or grandparents equally, or if there is no surviving grandparent, to the  
7 descendants of those grandparents by representation.

### 8 **Reporters’ Note**

9 *See Reporters’ Note* to drafted provision 3-102 (acknowledging the breadth of possible  
10 variations to intestate succession and to the determination of those who fit within it) and to  
11 drafted provision 3-107 (describing and providing examples of representation).

12  
13 More specifically, the determination of who should fit within the category of “heirs” after  
14 the surviving spouse reflects a policy choice between keeping that category within a fairly close  
15 set of relatives to the decedent (e.g. to spouse and descendants only), or more broadly to include  
16 some of the decedent’s ancestors and their descendants (e.g. the decedent’s parents and possibly  
17 their descendants, or the decedent’s grandparents and possibly their descendants) or to  
18 essentially broaden the class of potential heirs to anyone related to the decedent in any degree.  
19 State and tribal statutes reflect this distinction. Although most of them extend potential heirs  
20 through the decedent’s grandparents and their descendants (i.e. what is known as the third  
21 parentela), some go further to provide for step children and/or “next of kin,” no matter how  
22 distantly related, while others then shift to escheat. *See, e.g.,* Chitimacha TPC § 304; Fort Peck  
23 TPC Title 12 § 106 (through third parentela, limited to surviving cousins of the 3<sup>rd</sup> degree). For  
24 an example of a system permitting inheritance by in-laws absent surviving heirs of the decedent,  
25 *see* Jicarilla TPC Chapter 8 § 1(D)(3) (“if heirs are not found, the estate shall go to the heirs of  
26 the deceased spouse . . . [and if more than one,] each spouse’s share shall be divided equally  
27 among their heirs.”).

28  
29 The drafted provision begins by using a “parentelic” or parent and descendant-based  
30 representational system rather than a civil law system, which counts degrees of relationship from  
31 the decedent to the potential heir, and favors those closer in consanguinity. For an example of a  
32 parentelic system that arguably continues indefinitely (although heirship status would become  
33 increasingly difficult to establish), *see e.g.* Jicarilla TPC Chapter 8 § (D)(2) (after describing  
34 rights of parents and their descendants, continuing by providing that the estate shall pass “and so  
35 on through the ascending ancestors and their issue.”)

36  
37 A completely different approach – one that would trade enhanced flexibility for reduced  
38 predictability – would sidestep statutory identification of heirship status or priority, and leave

1 that determination to the tribal court. For example:

2  
3           When any member of the tribe dies leaving property other than trust real  
4 estate or other trust property subject to the jurisdiction of the United States, any  
5 member claiming to be heir of the decedent may bring suit in the Tribal Court to  
6 have the Court determine the heirs of the decedent.” [provisions re notice, then] In  
7 the determination of heirs the Court shall apply the custom of the Tribe as to  
8 inheritance if such custom is proved. Otherwise, the Court shall apply to be his  
9 heir . . . the Tribal Court may, in its discretion, turn over the question of  
10 determination of heirs and distribution of a descendant’s property to a state court.

11  
12 Blackfeet Tribal Law and Order Code, Chapter 3, § 4. *See also* Navajo Nation TPC § 2  
13 (“any member claiming to be an heir of the decedent may bring a suit in a Family court of  
14 the Navajo Nation to have the court determine the heirs of the decedent and to divide  
15 among the heirs such property of the decedent . . . in the determination of heirs the court  
16 shall apply the custom of the Navajo Nation as to inheritance if such custom is proved.  
17 Otherwise the court shall apply state law[.]”) For an example of a TPC that mediates the  
18 issue by providing for an order of heirship but leaving room for custom, *see e.g.* Jicarilla  
19 TPC Chapter 8 § 1(H) (“The Court shall resolve any questions of heirship not covered  
20 herein by referring to proven Jicarilla Apache customs and traditions.”)

21  
22           Note that unlike many codes, the drafted provision does not create a “maternal”  
23 and “paternal” division at the third parentela, instead providing that any grandparent will  
24 take to the exclusion of all collateral relatives within the third parentela regardless of  
25 whether they were related through the same parent.

26  
27           **SECTION 3-104. INDIVIDUALS RELATED TO DECEDENT THROUGH TWO**

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

31           **SECTION 3-105. INDIVIDUALS RELATED TO DECEDENT THROUGH A**  
32 **SINGLE ANCESTOR.** No distinction is made between individuals related to the decedent

33 through one ancestor and those related to the decedent through two ancestors.

34           **Reporters’ Note**

35           The most common scenario in which this issue arises is where a decedent dies survived  
36 by more than one sibling, sharing both genetic parents with one or more of them but only one  
37 genetic parent with one or more others. Such siblings are often referred to as related to the  
38 decedent “by the half-blood” rather than the whole blood.

1 Most non-tribal jurisdictions have eliminated the distinction, largely by asserting that it  
2 derives from undue concern with consanguinity and creates unnecessary complexity. Some,  
3 however, retain it. For example, Oklahoma law favors a sibling related by the whole blood for  
4 estate property that derives from the non-shared parent. *See* 84 Okl.St. Ann. § 222 (Kindred of  
5 the half-blood). Other states approach the matter differently, such as by giving those related by  
6 the whole blood a double share. *See generally* Comment, *Statutory Treatment of Ancestral*  
7 *Estate and the Half Blood in Intestate Succession*, 42 YALE L. J. 101 (1934).

8  
9 **SECTION 3-106. NO TAKER.** If there is no taker under the provisions of Section 3-  
10 102 and 3-103, the entire net estate will be distributed as ordered by the courts of the [Tribe or  
11 Nation] with jurisdiction, except that real property shall pass to any existing co-owner of the real  
12 estate.

### 13 **Reporters' Note**

14  
15 This section avoids the difficulties associated with escheat, such as the particular tribal  
16 nation to which the property will escheat. There are other ways to design this sort of provision,  
17 which could be included in these Reporters' Notes or in an implementation guide. For example,  
18 the TPC could state that "if the decedent is a tribal member, the entire net intestate estate will  
19 escheat to the Tribe and will be added to the general fund," adding some provision for the result  
20 if the decedent is not a tribal member, or, *e.g.*, "personal property found within the intestate  
21 estate will escheat to the Tribe and will be added to the general fund."

22  
23 This provision gives a significant amount of discretion to the tribal court within which  
24 probate has been opened, at least after heirship as described within Sections 3-102 and 103 has  
25 been exhausted. Factors that the court could consider in determining where the property should  
26 then pass might include: enrolled or membership status; biological, functional, dependent  
27 relationship with decedent; residence; ownership interest in subject property; etc. Moreover,  
28 reference should be made to Section 1-109, which highlights the role of tribal custom in  
29 resolving particular issues (such as the appropriate heirs to an estate should closely related heirs  
30 not survive the decedent).

31  
32 **SECTION 3-107. REPRESENTATION.** Wherever any part of a decedent's intestate  
33 estate passes by representation to descendants of the decedent, descendants of the decedent's  
34 parents, or descendants of the decedent's grandparents, the individuals who will take, and their  
35 respective shares, shall be determined as follows: (i) identify the first generation down from the  
36 decedent, decedent's parent, or decedent's grandparent with at least one surviving member; (ii)  
37 count the number of surviving members in that generation plus predeceased members in that

1 generation who left surviving descendants; (iii) allocate an equal share to each surviving member  
2 and allocate the share of each predeceased member who left descendants who survived the  
3 decedent in the same manner until the share is fully distributed.

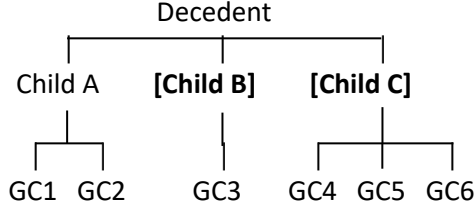
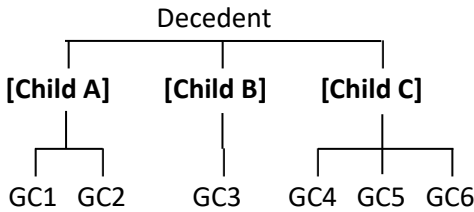
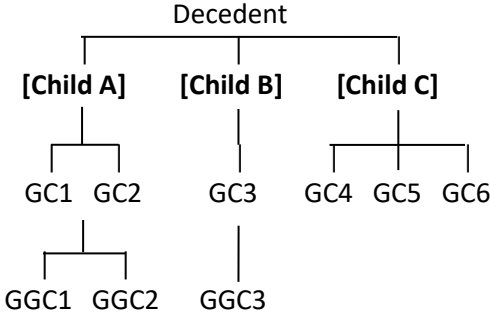
#### 4 **Reporters' Note**

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

9  
10 There are essentially three commonly employed methods of representation: Pure (aka  
11 "Strict" or "Classic") Per Stirpes, Modified (aka "Modern" or "Per Capita with Representation")  
12 Per Stirpes, and Per Capita at Each Generation (which is the representational approach adopted  
13 under the current UPC). Depending on the particular facts of the decedent's estate, the outcomes  
14 may differ, and sometimes drastically.

15  
16 The difference between the three approaches generally turns on the generation at which  
17 the estate is initially divided into equal shares, with pure per stirpes ensuring vertical equality of  
18 the shares among the decedent's (or others') descendants and per capita ensuring horizontal  
19 equality of the shares within each generation of heirs. This drafted provision adopts a modified  
20 per stirpes form of representation, which splits the difference somewhat by flattening (but not  
21 erasing) the potential for wide horizontal disparity of shares. For example, assume the following  
22 facts, with the individuals who are bolded and in brackets having predeceased the decedent, and  
23 thus ineligible to take from the decedent's estate.

24

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). MTPC § 3-103(b) and (d) do not employ  
16 representation at the second parentela if any parent of the decedent survives or at the third  
17 parentela if any grandparent of the decedent survives. For example, the estate of a decedent  
18 survived by no descendants, one parent, two siblings, and three descendants of a predeceased  
19 sibling will descend to the parent, irrespective of the existence of surviving descendants of the  
20 parent (the decedent's siblings, nieces, and nephews). The estate of a decedent survived by no  
21 descendants, no parents, and no descendants of parents but by three grandparents will descend to  
22 the grandparents 1/3 apiece, irrespective of the existence of surviving descendants of a  
23 predeceased grandparent (the decedent's aunts, uncles, or cousins).  
24

25 **SECTION 3-108. PARENT-CHILD RELATIONSHIP [; MARITAL STATUS].**

26 A parent-child relationship exists between a child and the child's parents upon proof of parentage  
27 under the law of the [Tribe or Nation] [regardless of whether the parents are married to each  
28 other].

29 **Reporters' Note**

30 The drafted provision leaves determination of marriage validity to the law of the Tribe or  
31 Nation. The bracketed option follows the broader trend within probate codes to avoid  
32 distinguishing maternity from paternity in determining heirship status for the children of  
33 unmarried parents. The TPC could instead choose to preserve the distinction, and/or could  
34 specify the manner of proof and the timing of the determination. For example:  
35

36 Person born out of wedlock is not treated as the child of the father unless the  
37 person is openly and notoriously so treated by the father or unless paternity has  
38 been judicially determined during the life of the father.  
39

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

1 The Court shall have jurisdiction of all suits brought to determine the paternity of  
2 a child and to obtain a judgment for the support of the child. A judgment of the  
3 Court establishing the identity of the father of the child shall be conclusive of that  
4 fact in all subsequent determination of inheritance by the Department of the  
5 Interior or by the Court.  
6

7 Blackfeet Tribal Law and Order Code, Ch. 3 § 3. For a sample broad clause placing evidentiary  
8 control within the court: “the words ‘children’ and ‘issue’ include adopted children and children  
9 of unwed parents where the Secretary of the Interior or the Tribal Court determines that paternity  
10 has been acknowledged or established[.]” Fort Peck TPC Title 12 § 106(b). For a sample  
11 provision that provides no special rule either way: “For the purposes of inheritance by, through,  
12 and from any child, the effects and treatment of the parent-child relationship shall not depend on  
13 whether or not the parents have been married.” Lummi Nation TPC title 35 § 35.05.020.  
14

15 Except as altered by adoption as per MTPC § 3-108, a parent-child relationship does not  
16 exist between a stepchild or foster child and a step- or foster parent.  
17

18 **[SECTION 3-109. PARENT BARRED FROM INHERITING IN CERTAIN**  
19 **CIRCUMSTANCES.**

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

21 (1) the parent’s parental rights were terminated and the parent-child relationship  
22 was not judicially reestablished; or

23 (2) the child died before reaching eighteen [18] years of age and there is clear and  
24 convincing evidence that immediately before the child’s death, the parental rights of the parent  
25 could have been terminated under the law of the [Tribe or Nation] or applicable state law.

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

28 **Reporters’ Note**

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

1 wish to add other possible factors, e.g. the existence of repeated protective orders against the  
2 parent, or nonsupport, abandonment, abuse, neglect, or other similar actions or inactions of the  
3 parent toward the child.

4  
5 For an example of a TPC including this sort of provision, see e.g.:

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

12  
13 An Order terminating the parent-child relationship shall have the same  
14 effect on the legal rights, privileges, duties, and obligations, including rights of  
15 inheritance of the parent and the child with respect to each other, as it would have  
16 had such action taken place under State Law.

17  
18 Blackfeet Law and Order Code Ch. 3, § 6(J) (Proceedings for the Termination of Parent-Child  
19 Relationship). See also Fort Peck TPC Title 12 § 106(12)(b)(2) (extending inheritance bar to  
20 rights flowing “up” as well as those flowing “down”).]

21  
22 **SECTION 3-110. INHERITANCE BY, FROM, AND THROUGH ADOPTED**  
23 **CHILD.**

24 (a) Except as provided in subsection (b), if an adoption is complete and lawful under  
25 Tribal Nation [and federal] law, a parent-child relationship exists for purposes of intestate  
26 succession between an adoptee and the adoptee’s adoptive parent or parents, and no longer exists  
27 between an adoptee and the adoptee’s pre-adoptive parent or parents.

28 (b) The termination of the adoptive child’s right to continue to inherit from and through  
29 the child’s pre-adoptive parent or parents shall not apply if:

30 (1) The decree of adoption provides for the continuation of the adoptee’s  
31 inheritance rights from the pre-adoptive family;

32 (2) At the time of the adoption, the adoptive parent is either a spouse, relative, or  
33 the spouse of a relative of either pre-adoptive parent; or

34 (3) The child is adopted after the death of both pre-adoptive parents.

1 (c) For the purposes of this section, a “relative” of a person is a grandparent, a descendant  
2 of a grandparent, or a spouse.

### 3 **Reporters’ Note**

4 State TPCs vary widely over the extent to which children retain inheritance rights from  
5 their biological families after an adoption is complete. The drafted provision generally cuts off  
6 inheritance lines between the child and the biological family except for the three instances  
7 identified (specific order; step-parent or relative adoption; post-death adoption). Note that in  
8 each of them, the inheritance rights would continue to flow “down” (i.e. to the adopted child)  
9 rather than “up” (i.e. back to the biological family). A TPC could provide that the child’s rights  
10 to inherit remain irrespective of the circumstances of the adoption, which is the less common  
11 approach taken in state PCs. *See, e.g.*, “An adopted person is the child of an adopting parent and  
12 of the natural parents for inheritance purposes only.” Chitimacha TPC § 309.

13  
14 For an example of provision deferring to state law: “All members of the Blackfeet Indian  
15 Tribe shall hereafter be governed by State Law and subject to state jurisdiction with respect to  
16 adoptions hereafter consummated.” Blackfeet Law and Order Code, Ch. 3, § 8 (Adoption).

### 17 **SECTION 3-111. ADVANCEMENT.**

18  
19 (a) Any property that an intestate decedent gave during life to one who ends up being an  
20 heir to the decedent’s estate is an advancement and shall be deducted from the heir’s intestate  
21 share only if a writing [or other record], made either by the decedent or the recipient, clearly  
22 establishes that the decedent intended that result.

23 (b) Absent an intent expressed in that writing [or other record], advancements shall not  
24 reduce the shares of a predeceasing recipient’s descendants.

25 (c) Property advanced is valued as of the time the beneficiary came into [control,]  
26 possession or enjoyment of the property or at the testator’s death, whichever first occurs.

### 27 **[PART 2.**

### 28 **INTESTATE SUCCESSION OF TRUST AND RESTRICTED REAL AND PERSONAL** 29 **PROPERTY]**

30 [Would be added by Tribe that wished to legislate the succession of property otherwise governed  
31 by the American Indian Probate Reform Act (AIPRA).]

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.**

16 (a) [Witnessed Will.] Except as otherwise provided in [subsection (b) and] Section 3-308  
17 [choice of law]], a will must be:

18 (1) in writing [or other record];

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 or more  
22 disinterested attesting adult witnesses; and

23 (4) signed by two or more of those disinterested attesting adult witnesses, each of  
24 whom sign within the presence of each other and the testator after the testator has declared that  
25 the writing [or other record] was the testator's will and has requested the witnesses to so serve.

26 **[SECTION 3-303. EXECUTION; HOLOGRAPHIC WILL.** A will that does not  
27 comply with Section 302 is valid as a holographic will, whether or not witnessed, if the signature

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

4 **[SECTION 3-304. TESTAMENTARY INTENT AND EXTRINSIC EVIDENCE.**

5 Intent that a document constitute the testator’s will can be established by extrinsic evidence,  
6 including, for holographic wills, portions of a will form or other document that are not in the  
7 testator’s handwriting.]

8 **Reporters’ Note**

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

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

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

35  
36 Additionally, the language of the regulations suggests that holographic and oral wills are  
37 completely prohibited, that signature by proxy is not permitted, that publication is still  
38 demanded, that the will must have been read by or read to the testator before execution, etc.  
39 While some of these provisions remain in state codes, many (if not most) have streamlined the

1 rules on the theory that the ends (upholding intent, avoiding carelessness, thoughtlessness, or  
2 fraud) may be as well and more easily met through other formality sets that impose fewer  
3 burdens and costs.

4  
5 There are a few theories and directions that the MTPC could take here:  
6

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

1 disagreed. To the Board, although “the will scrivener should perhaps have crossed  
2 out the language relating to publication and a request to sign before using BIA’s  
3 standard form affidavit,” the failure to do so did not impose additional execution  
4 requirements beyond those enumerated in 25 C.F.R. §§ 15.3, 15.4. *Id.* at 76, quoting  
5 Estate of Lena Abbie Big Bear Yellow Eagle, 17 IBIA 237, 238-39 (1989) (citing  
6 Estate of Carrie Standing Haddon Miller, 10 IBIA 128, 132 (1982) (holding that an  
7 Indian testatrix is neither required to publish her will nor be the person to request the  
8 witnesses to sign in order for the will to be properly executed)). The Board continued  
9 by recognizing that “at most, the absence of these formalities could defeat the self-  
10 proving character of the will, in which case testimony must be obtained from the will  
11 witnesses if they are available[.]” *Id.*, citing Estate of Margerate Arline Glenn, 50  
12 IBIA 5, 28 (2009); Estate of Sallie Fawbush, 34 IBIA 254, 257 (2000).

13  
14 Nevertheless, the mismatch between what the regulations require for a valid will and  
15 those strongly suggested within the self-proving affidavit forms create ambiguity and potential  
16 for confusion and mistake.

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

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

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

43  
44 If a tribe determines that holographic wills are worth the costs of confusion vis-à-vis fed  
45 law, a number of variations exist between tighter rules, strictly construed, and looser ones,  
46 flexibly construed. For example, could require that the will be “entirely handwritten, dated, and



1 signed,” or only “material portions + signature” in t’s handwriting. Suggest that MTPC go w/  
2 loosest possible if going to have at all, to support the practice (sloppy, but common) where will  
3 forms are filled in by hand, signed, but never appropriately witnessed. Moreover, if there is an  
4 independent requirement that “testamentary intent” exist, that should somewhat mitigate the  
5 concern that a draft document or worksheet would be considered a will.  
6

7 Along those lines, the drafted provision permits testamentary intent to be established  
8 through different methods, by contrast to some approaches that require it to appear on the face of  
9 the document. The tradeoff general cuts as efficiency versus intent, b/c the evidentiary burdens  
10 can be high when the decedent’s intent is the touchstone. Could avoid entirely by directing to  
11 tribal evidentiary code, but that seems to kick the drafting can.  
12

13 Most broadly: there are many options between protective and flexible. Variables could  
14 include notarization method, presence requirements (T & witnesses; contrast “reasonable time”).  
15 Sample set: to require that the will be (1) in writing; (2) signed by the testator or by another who  
16 signs the testator’s name at the testator’s request and in the testator’s conscious presence; (3)  
17 intended by the testator to dispose of the testator’s property or otherwise affect the testator’s  
18 estate at death; and (4) signed by two or more competent, adult witnesses who each sign within  
19 the testator’s conscious presence and after witnessing the actual signing of the will or the  
20 testator’s later acknowledgment of that signature or the will.  
21

22 Samples: “if the will was made in writing and signed by the decedent in the presence of a  
23 representative or representatives of the Superintendent of the Blackfeet Agency, who has or have  
24 signed such will as witness or witnesses. Provided that if a will is made under circumstances  
25 when the attendance of such representative cannot be secured, at least two other witnesses may  
26 serve.” . . . “but no distributed property shall be made in violation of a proved Tribal custom of  
27 law which restricts the privilege of Tribal members to distribute property by will.” Blackfeet  
28 Tribal Law and Order Code Ch. 3 Section 5 (Approval of wills).  
29

30 For an example of an open-ended determination resting with the tribal court, see Navajo  
31 Nation TPC § 3 (“A will shall be deemed valid . . . if the will was made in accordance with a  
32 proved Navajo custom or made in writing and signed b the decedent in the presence of two  
33 witnesses who also signed the will.”)  
34

35 **[SECTION 3-305. HARMLESS ERROR.** Although a document [or other record] or  
36 writing added upon a document [or other record] was not executed in compliance with Section 3-  
37 302, the document or writing [or record] is treated as if it had been executed in compliance with  
38 that section if the proponent of the document or writing [or record] establishes by clear and  
39 convincing evidence that the decedent intended the document or writing [or record] to constitute:

40 (1) the decedent’s will,

- 1 (2) a partial or complete revocation of the decedent’s will, or
- 2 (3) an addition to or an alteration of the decedent’s will.]

3 **Reporters’ Note**

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

7 **SECTION 3-306. SELF-PROVED WILL.**

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

13 [Insert Tribal Jurisdiction]

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

21 \_\_\_\_\_ Testator

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

29 \_\_\_\_\_ Witness #1

30 \_\_\_\_\_ Witness #2



1 beneficiary under the will.

## 2 **Reporters' Note**

3 This provision is very strict, and should be read together with Section 3-302. It was  
4 drafted to signal the requirement of, and to comport with, CFR reg 15.4, and again implicates the  
5 questions raised above about the desirability of moving all "validity" requirements to the highest  
6 common denominator to avoid inadvertent partial intestacy. Should the tribe decide that it would  
7 prefer a more forgiving rule regarding witness qualification, there are options:

8  
9 No "disinterested witness" requirement at all, as per UPC & many states. Theory:  
10 "punishment" not fit the "crime," can always directly attack the will itself on grounds of undue  
11 influence if concern is significant enough; trap for unwary in that most people trust their family  
12 members the most, and thus would naturally gravitate toward requesting the very people they've  
13 distributed property to under the will to also serve as witnesses thereto. Language: [alt: the  
14 signing of a will by an interested witness does not invalidate the will or any provision of it].  
15 Middle ground: purge, perhaps with broader definition of interested witness: "A will is not  
16 invalidated because it is signed by an interested witness; but, unless the will is also signed by two  
17 other disinterest witnesses, any beneficial provision of the will in favor of a witness or the  
18 witness's spouse is invalid to the extent that such provisions in the aggregate exceed in value  
19 what the witness or spouse would have received had the testator died intestate." See, e.g.,  
20 Chitimacha TPC § 206 (Who May Witness).

21  
22 Regarding no interest in beneficiary/spouse: See *Estate of Mabel Opal Beach*, 39 IBIA  
23 111, 112 (2003); *Estate of Orville Lee Kaulay*, 30 IBIA 116, 118 (1996); *Estate of Hiemstennie*  
24 *(Maggie) Whiz Abbott*, 4 IBIA 12, 20 (1975) (A witness is not disinterested "if his interest in the  
25 will is of a fixed, certain, and vested pecuniary character or one which otherwise gives him a  
26 direct and immediate beneficial right under the will."). Regarding interested witness  
27 disqualification, thus failure to satisfy the basic execution formalities, see *Estate of Edward*  
28 *Kappaisruk Ramoth, Sr.*, 56 IBIA 271 (I.B.I.A.), 2013 WL 3054072 (2013) (nevertheless holding  
29 that a notary's certification under a self-proving affidavit could qualify as a second required  
30 disinterested witness, and thus uphold the validity of the will).

### 31 **SECTION 3-308. CHOICE OF LAW AS TO EXECUTION.**

32  
33 (a) A will is valid if executed in compliance with the law of this jurisdiction; if at the time  
34 of execution or the time of death, its execution complies with the law of the place where it was  
35 executed or the testator has a domicile or place of abode; or if it complies with federal law.

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

1 **Reporters' Note**

2  
3 Again, this provision does not align with federal law depending on what the “other”  
4 jurisdiction demands for the valid will. But the valuable goal here is to validate as many wills as  
5 possible within certain channeling parameters (i.e. the laws of the other jurisdiction, rather than a  
6 broader “anything goes.”). Sample: “A written will is valid if executed in compliance with this  
7 Probate Code or if its execution complies with the law at the time of execution of the place  
8 where the will is executed, or of the law of the place where at the time of execution or at the time  
9 of death of the testator is domiciled.” Chitimacha TPC § 207.

10  
11 **SECTION 3-309. REVOCATION OF WILL.**

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

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

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

26 (d) Except as provided by the terms of the will, court order, or a contract relating to  
27 property division, and unless the parties remarry before the testator’s death, a will or any part  
28 thereof is revoked upon a final divorce decree or annulment to the extent that it benefitted the

1 testator’s former spouse or any of the former spouse’s relatives who are not also relatives of the  
2 testator.

### 3 **Reporters’ Note**

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

9  
10 For example, the Chitimacha Code permits revocation through both later will and  
11 physical act + by proxy, permits in whole or in part, and includes revocation by divorce. The  
12 latter provision reads “if provisions are revoked solely by this Section, they are revived by  
13 testator’s remarriage to the former spouse . . . a decree of separation which does not terminate the  
14 status of husband and wife is not a divorce for purposes of this Section. No change of  
15 circumstances other than as described in this Section revokes a will.” Chitimacha TPC § 209.  
16 The Fort Peck Code permits revocation by writing or by act, but appears to limit revocation by  
17 act to total rather than partial destruction. Fort Peck TPC Title 12 § 115.

18  
19 Specific to the drafted provision: it seems cleaner to limit revocation by physical act to  
20 *total* destruction to avoid the litigation that sometimes occurs over whether a partial destruction  
21 went “too far,” i.e. amounted to an attempt to revoke the entire will, or relatedly, an invalid  
22 attempt to dispose of property to a beneficiary without following appropriate codicil  
23 requirements. Where the revocatory act is performed by another at the testator’s request rather  
24 than by the testator directly, evidence of the circumstances of the testator’s request to, and  
25 presence with, that individual should be established by credible evidence.  
26 Regarding revocation upon divorce or annulment, what is of “benefit to” the surviving spouse is  
27 a matter for the court to decide, and along with a devise under the will could include a power of  
28 appointment to the former spouse or a nomination of that spouse to serve in any fiduciary  
29 capacity, such as executor or trustee.

30  
31 Regarding the presumption regarding lost wills: there was discussion at the first  
32 Committee Meeting over whether that presumption was useful or appropriate within the present  
33 context. Rather than reversing the common law presumption entirely, the draft retains it but  
34 highlights that it may be rebutted under the lower, preponderance standard. A tribe could decide  
35 to retain the original presumption with strength (e.g. rebuttable through C&C evidence) or to  
36 completely remove any presumption along these lines.

37  
38 Although presumptions pertaining to lost wills are nowhere codified in federal law, the  
39 Board has applied it in fairly traditional ways. Generally, the Board follows a two-step process  
40 to assess whether to approve a copy of a will in the absence of its original. “First, the record  
41 must establish that the will was properly executed, and, second, the absence of the original will  
42 must be adequately accounted for in order to defeat the presumption that the original was  
43 destroyed by the testator with the intent to revoke it.” *Estate of Dennis Calf Looking*, 52 IBIA  
44 1, 4, 2010 WL 2771673 (2010), citing *Estate of Eli*, 2 IBIA at 67, 80 I.D. at 622; *Estate of*

1 *Wishenko*, 8 IBIA at 147; and *Estate of Anthony Bitseedy*, 5 IBIA 270, 272 (1976), *aff'd Dawson*  
2 *v. Kleppe*, No. CIV-77-0237 (W.D. Okla Oct. 27, 1977). In Dennis Calf Looking, the Board  
3 determined that the presumption should not in fact apply given that there was insufficient  
4 evidence that the testator had taken possession of the original will, which was instead likely  
5 retained by the agency given its then-existing practice of locking the original in a safe located in  
6 a Realty vault. On lost wills generally, see *Estate of Florence Night Chase*, 38 IBIA 188 IBIA,  
7 02-148 2002 WL 32345895 (2002) (reiterating that federal and not state law controls the  
8 assessment of lost wills regarding trust or restricted property).

9  
10 **SECTION 3-310. REVIVAL OF REVOKED WILL.** A will that has been revoked by  
11 any method can only be revived by executing a new will containing clear and convincing  
12 evidence of the testator's intent to revive.

### 13 **Reporters' Note**

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

21  
22 **SECTION 3-311. WILL CHALLENGES.** A will or any part thereof offered for  
23 probate may be challenged or contested on the grounds of improper execution, lack of  
24 testamentary intent or capacity, undue influence, fraud, duress, or revocation.

25 **SECTION 3-312. COMPOSITION OF A WILL; INCORPORATION BY**  
26 **REFERENCE.** A will comprises any written pages [or record] that are [is] [physically] present  
27 at the execution of the will and are intended by the testator to be part of the will. However, a  
28 will may incorporate a writing [or other record] that is not [physically] present at the will's  
29 execution if

- 30 (1) the writing [or other record] is already in existence;  
31 (2) the will reflects the intent to incorporate the writing [or other record]; and  
32 (3) the will describes the writing [or other record] sufficiently to permit its identification.

1 **Reporters' Note**

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

9 **SECTION 3-313. TANGIBLE PERSONAL PROPERTY LIST.** A will may refer to  
10 a [written] statement or list [in a record] to dispose of items of [tangible] personal property, other  
11 than money, not otherwise specifically disposed of by the will. The statement or list is only valid  
12 and effective to dispose of the property if the writing [or other record] is signed by the testator  
13 and describes the items and the devisees with reasonable certainty.

14 **Reporters' Note**

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

20 **PART 4.**

21 **CONSTRUCTION OF A WILL**

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

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

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

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



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

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

### 8 **Reporters' Note**

9  
10 This provision streamlines by combining elective share (electing against a will  
11 irrespective of when the marriage occurred vis-à-vis the will's execution) and omitted shares  
12 (limited to post-execution marriage).

13  
14 For a sample TPC provision that provides for an alternate share of the estate: "When a  
15 married Indian dies and leaves a valid will in which the spouse is to receive less than one-third  
16 (1/3) of the net estate, the surviving spouse has a right to take an elective share of one-third (1/3)  
17 of the net estate." Fort Peck TPC Title 12 § 114.

### 18 **SECTION 3-402. CHILDREN UNPROVIDED FOR IN WILL.**

19  
20 (a) If a testator fails to provide in the testator's will for any child born or lawfully adopted  
21 after the execution of the will, including any codicil, then the omitted child shall receive a share  
22 of the estate as provided in this section.

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

27 (2) If the testator had one or more children living when the testator executed the  
28 will, and the will devised property to one or more of those then-living children, the omitted child  
29 shares in the amount received by the children to whom devises were made under the will [unless

1 the testator devised substantially all of the estate to the other parent of the omitted child who is  
2 not a parent of the then-living children receiving a devise;]

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

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

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

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

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

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

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

22 (2) A residuary devise will lapse to the other residuary taker or takers, if any;  
23 otherwise, to intestate succession.

1 (3) A class gift will pass to the surviving class member or members, if any;  
2 otherwise, to the residue or if none, to intestate succession.

3 **Reporters' Note**  
4

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

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

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

14 **NONADEMPTION OF SPECIFIC DEVICES.**

15 (a) Subject to creditors' claims and [other exemptions and allowances], a will beneficiary  
16 to whom a specific devise was to pass has a right to that specifically devised property if it  
17 remains a part of the testator's estate at the testator's death.

18 (b) If the specific devise is not part of the testator's estate at the testator's death, the  
19 beneficiary has a right to:

20 (1) any balance of the purchase price, together with any security [interest], owed  
21 by reason of disposition of the property;

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

24 (3) any proceeds unpaid at death on fire or casualty insurance on or other recovery  
25 for damage to the property or owed pursuant to a lease or license;

26 (4) any property owned by the testator at death and acquired as a result of  
27 foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically devised  
28 secured obligation; and

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

4 (c) If specifically devised property is disposed of or mortgaged by a conservator, or by an  
5 agent acting within the authority of a durable power of attorney for an incapacitated principal, or  
6 a condemnation award, insurance proceeds, or recovery for damage to the property is paid to a  
7 conservator or to an agent acting within the authority of a durable power of attorney for an  
8 incapacitated principal, the specific devisee has the right to a general pecuniary devise equal to  
9 the net consideration, the amount of the unpaid loan [replace with “credit”?], the condemnation  
10 award, the insurance proceeds, or the recovery for the damage.

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

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

### 17 **Reporters’ Note**

18  
19 The drafted provision avoids the litigation-producing difficulty of a catch-all provision  
20 regarding “anything not intended to be adeemed.” The concept of replacement property is  
21 admittedly messy, especially if there is little case law on point. But it seems to cover the  
22 possibility that, e.g., where a particular car that was then sold was to go to A, A can take the  
23 “replacement car,” especially under a time of death construction.  
24

### 25 **SECTION 3-405. SPECIFIC DEVISE SUBJECT TO MORTGAGE.**

26 (a) Unless the will provides specifically to the contrary, a specific devise of any property  
27 passes subject to any mortgage or other security interest [, lease, or license] existing at the

1 testator’s death, without right of the beneficiary of the devise to require that the indebtedness [,  
2 rent, or license fee] be paid from the estate’s other assets.

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

5 **SECTION 3-406. SATISFACTION.**

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

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

9 (2) there is a writing [or other record], made either by the testator or the recipient,  
10 that clearly establishes that the testator intended that result.

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

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

17 **Reporters’ Note**

18  
19 The drafted provision coordinates requirements for advancement (intestate succession)  
20 and satisfaction (testate succession).

21  
22 **SECTION 3-407. CLASS GIFTS CONSTRUED TO ACCORD WITH**  
23 **INTESTATE SUCCESSION; EXCEPTIONS.**

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

25 (1) “Adoptee” has the meaning set forth in Section 103(1).

26 (2) “Distribution date” means the date when an immediate or postponed class gift

1 takes effect in [control,] possession or enjoyment.

2 (3) [“Parent” in the phrase] “Functioned as a parent of the adoptee” has the  
3 meaning set forth in Section 103(25), substituting “adoptee” for “child” in that definition.

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

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

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

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

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

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

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

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

22 (f) A will shall apply to all real and personal property or interest therein that the testator  
23 owned at death and all property acquired by the estate after the death of the testator, and a

1 transfer by will of a trust interest in real property shall be presumed to include the interest of the  
2 testator in any permanent improvements attached to the real property.

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

6 **PART 5.**

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

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

9 (a) For the purposes of intestate succession, testate succession, and survivorship  
10 arrangements authorized under Article 4, and except as provided in subsection (b), an individual  
11 who did not survive another individual by 120 hours is deemed to have predeceased the other  
12 individual.

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

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

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

18 **Reporters' Note**

19  
20 Regarding the requirement of survival, probate codes generally divide into two  
21 approaches: older ones that require survival by an instant, and usually as established by a  
22 preponderance of the evidence (*see, e.g.*, Chitimacha TPC § 117) (“no sufficient evidence that  
23 the persons have died otherwise than simultaneously”) and newer ones tracking the amended  
24 Uniform Simultaneous Death Act and requiring survival by 120 hours as established by clear and  
25 convincing evidence. The newer version seems preferable as more efficient (by avoiding  
26 successive double administration of the subject property), more easily established (or not  
27 established) from an evidentiary perspective, and more likely to effectuate the decedent’s  
28 presumed intent (e.g. property would not pass to a predeceased spouse’s relatives, i.e. the  
29 decedent’s in-laws, over the decedent’s biological or adoptive relatives). The drafted provision

1 slightly tempers the burden of proof by removing the requirement that the 120-hour survival be  
2 established by clear and convincing evidence.

3  
4 Sub (b), which removes the 120-hour survival requirement in instances where the  
5 governing instrument establishes a different survivorship requirement or where its application  
6 would result in a tribal court determination of heirship. While state probate codes commonly  
7 contain a similar provision avoiding the requirement where it would result in escheat, tribes may  
8 prefer to delete this second exception to the 120-hour rule to encourage consolidation of  
9 fractional interests back into tribal ownership.

10  
11 *See* Section 1-107 for the provision covering Evidence of Death or Status  
12 The drafted provision streamlines the survivorship provision under the Uniform Simultaneous  
13 Death Act and the Uniform Probate Code by excluding treatment of such matters as protecting  
14 bona fide purchasers and exonerating payors of liability, as well as choice of law and powers of  
15 appointment. If coverage of these matters is deemed necessary, the Implementation Guide could  
16 address them more fully.

17  
18 **SECTION 3-502. POSTHUMOUS BIRTH.** All individuals who were in gestation at  
19 the time of the decedent’s death, and who survive their own birth by 120 hours, shall be treated  
20 as if living at the time of the decedent’s death.

### 21 **Reporters’ Note**

22  
23 This drafted provision intentionally avoids overt discussion of many forms of assistive  
24 reproductive technology, e.g., surrogacy arrangements and posthumously conceived children  
25 using cryogenically preserved (or posthumously retrieved) sperm. Moreover, it does not clearly  
26 address frozen embryos, but instead leaves to the tribal court to determine whether a  
27 cryogenically preserved embryo is already “in gestation” such that the provision above would  
28 apply.

29  
30 A provision that instead referenced “persons conceived” would probably be construed  
31 identically to “in gestation.” A provision that required the person to be “in utero” would clearly  
32 exclude ex utero, or frozen, embryos. *See, e.g.,* International Fertility Law Group  
33 <http://www.iflg.net/indian-child-welfare-act> (briefly discussing interplay of some of these issues  
34 within the Indian Child Welfare Act); Kimberly Self, *Self-Interested: Protecting the Cultural*  
35 *and Religious Privacy of Native Americans through the Promotion of Property Rights in*  
36 *Biological Materials*, 35 Am. Indian L. Rev. 729 (2010-2011).

37  
38 Some codes, e.g. Chitimacha § 306, do not require survival of own birth.

### 39 **SECTION 3-503. EFFECT OF HOMICIDE.**

40  
41 (a) An individual who feloniously and intentionally kills the decedent forfeits all benefits



1 with respect to and interests that would otherwise be acquired under the decedent's estate or the  
2 provisions of survivorship arrangements authorized under Article 4. The decedent's estate  
3 passes as if the wrongdoer predeceased the decedent.

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

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

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

14 **SECTION 3-504. STATUS OF SPOUSE.** For purposes of testate and intestate  
15 succession and survivorship arrangements authorized under Article 4, Tribal Nation law  
16 determines spousal status based upon Tribal Nation law or custom, and determines the extent to  
17 which abuse, abandonment, or other similar conduct disqualifies a spouse from succeeding to a  
18 property interest. Except as provided by the terms of the will, court order, or a contract relating  
19 to property division, and unless the parties remarry before the testator's death, a will or any part  
20 of a will is revoked upon a final divorce decree or annulment to the extent that it benefitted the  
21 testator's former spouse or any of the former spouse's relatives who are not also relatives of the  
22 testator.

1 **Reporters' Note**

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

10  
11 The issue of same sex marriage presents an interesting question within Indian Country.  
12 In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the USSCT held that the 14<sup>th</sup> Amendment Due  
13 Process and Equal Protection clauses protected the rights of same sex couples to marry, and that  
14 states could not refuse to recognize lawful same sex marriages performed in other states.  
15 However, the rights protected by the Fourteenth Amendment are not enforceable against tribal  
16 governments. *See, e.g., Talton v. Mayes*, 163 U.S. 376 (1896). Moreover, the Indian Civil  
17 Rights Act of 1968, 25 U.S.C. § 1301-1303, does not require Indian Nations to protect all  
18 Constitutional rights, instead extending that protection only to certain rights within the Bill of  
19 Rights. Even those that must be protected, such as those involving the rights of criminal  
20 defendants, provide some leeway through which tribes are able to interpret the scope of the  
21 individual protection through tribal norms.

22  
23 It is unclear whether or to what extent tribes would want to address the issue within tribal  
24 probate codes. For an discussion of how tribes have handled civil liberties generally, see Elmer  
25 R. Ruscoal, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions*  
26 *in Tribal Constitutions*, 14 Am. Indian L. Rev. 269 (1990). For extended treatment of the legal,  
27 political, and sociocultural ramifications of the issue, including the extent to which individual  
28 rights have been castigated as sounding the death knell to collectivist tribal concerns, see Carole  
29 E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 Ariz. State L. J. 889 (2003). For  
30 general discussion of same-sex marriage within tribal cultures, see, e.g., Trista Wilson, *Changed*  
31 *Embraces, Changes Embraced? Renouncing the Heterosexist Majority*, 36 Am. Indian L. Rev.  
32 161 (2012); Gregory Smithers, *Will Gay Marriage Split Indian Country?* Indian Country Today  
33 (5/30/15).

34  
35 **SECTION 3-505. DISCLAIMER OF INTERESTS.**

36 (a) Any person 18 years of age or older, or a fiduciary acting on that person’s behalf, may  
37 disclaim an interest under testate or intestate succession or a survivorship arrangement  
38 authorized under Article 4 by a signed and acknowledged declaration of disclaimer, either filed  
39 with the court, bank or insurance company or received by the person or entity holding the  
40 property subject to a survivorship arrangement. A disclaimer of an interest under testate or

1 intestate succession must be filed with a court before the entry of a final probate order.

2 (b) In no event shall a disclaimer be permitted after distribution or other acceptance by  
3 the heir or beneficiary of the subject property.

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

37

1 Chitimacha Comprehensive Codes of Justice Ch. 1 § 14 (Renunciation of Succession)

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

8 **PART 6.**

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

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

12 (a) Notwithstanding any other provision of Article 3 [or should this be broader], Tribal  
13 Nation cultural property in the [control,] possession or custody of the decedent is not privately  
14 owned and is not subject to testate succession or intestate succession. Tribal Nation cultural  
15 property is exempt from the claims of all creditors of the estate. [tribal claims; tax claims?]

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 Nation court] in  
18 accordance with the recognized customs and traditions of the family and the [ ] Tribal Nation.  
19 Particular items of culturally significant property are exempt from the claims of all creditors of  
20 the estate upon the order of the Tribal Nation court [or as qualifying under the provisions of  
21 Section 3-603].

22 **SECTION 3-602. HOMESTEAD.**

23 (a) Notwithstanding any other provisions of Article 3 relating to testate or intestate  
24 succession or elective share, the homestead, including a manufactured home that is the family

1 residence, descends free from any unsecured disposition thereof to which the spouse has not  
2 consented in writing [or other record] as follows:

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

4 or

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

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

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

11 (a) In addition to the homestead exemption provided in Section 3-602, if there is a  
12 surviving spouse, the surviving spouse is entitled from the estate to a value not exceeding  
13 [\$20,000.00] in excess of any security interest held therein, in household furniture, automobiles  
14 or other motorized vehicles, appliances, and personal effects (which may include culturally  
15 significant property). If there is no surviving spouse, the children of the decedent are entitled  
16 jointly to the same value. If there is not [\$20,000.00] worth of exempt property in the estate, the  
17 spouse or children are entitled to other assets of the estate to the extent necessary to make up the  
18 [\$20,000.00] value.

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

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

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

10          (b) The determination of what is a reasonable allowance in money is discretionary with  
11 the Tribal Nation court.

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

18          (d) The family allowance is exempt from and has priority over all allowed claims except  
19 the homestead. The family allowance is not chargeable against any benefit or share passing to  
20 the surviving spouse or children by the will of the decedent unless otherwise provided, by  
21 intestate 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] [record],  
11 including a 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] [record], including a will, executed before, at the same time as the instrument, or  
17 subsequently.

18 **Reporters’ Note**

19 This Section, which validates all transfers on death arrangements, is similar to Section 6-  
20 101 of the Uniform Probate Code.

21 **PART 2**

22 **REAL PROPERTY TRANSFERS**

23 **Reporters’ Note**

24 This part is adapted from the Uniform Real Property Transfer on Death Act, which was  
25  
26

1 completed in 2009.

2

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

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

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

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

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

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

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

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

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

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

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



1           **SECTION 4-206. TRANSFER ON DEATH DEED NONTESTAMENTARY.** A  
2 transfer on death deed is nontestamentary and is exempt from the requirements in Section[s] 3-  
3 302 [and 3-303] for the execution of a will.

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

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

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

9           (2) must state that the transfer to the designated beneficiary is to occur at the transferor’s  
10 death; and

11           (3) must be recorded before the transferor’s death in the appropriate public records for the  
12 property being transferred.

13           **SECTION 4-209. NOTICE, DELIVERY, ACCEPTANCE, CONSIDERATION**  
14 **NOT REQUIRED.** A transfer on death deed is effective without:

15           (1) notice or delivery to or acceptance by the designated beneficiary during the  
16 transferor’s life; or

17           (2) consideration.

18           **SECTION 4-210. REVOCATION BY INSTRUMENT AUTHORIZED;**  
19 **REVOCATION BY ACT NOT PERMITTED.**

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

22                   (1) is one of the following:

23                           (A) a transfer on death deed that revokes the deed or part of the deed

1 expressly or by inconsistency;

2 (B) an instrument of revocation that expressly revokes the deed or part of  
3 the deed; or

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

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

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

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

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

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

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

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

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

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

- 1 (5) create a legal or equitable interest in favor of the designated beneficiary; or
- 2 (6) subject the property to claims or process of a creditor of the designated beneficiary.

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

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

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

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

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

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

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

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

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

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

5                   (d) A transfer on death deed transfers property without covenant or warranty of title even  
6 if the deed contains a contrary provision.