

Uniform Law Commission
Model [Tribal] Nation Probate Code Drafting Committee
Issues List
(English & Guzman 4/4/17)

I. Overview

Probate codes hold profound descriptive, prescriptive, and constitutive power within their operational spheres, which may explain the clear and often-expressed recognition of native nations' inherent power to control inheritance rules governing members.¹ "Tribal cultures are not all alike[, and] tribal laws reflect a tribe's economic system, cultural beliefs, and sensitive sacred knowledge in nuanced ways that top-down . . . regimes simply cannot."² As such, while complexity is unavoidable in any attempt to distill numerous or even fundamentally distinct approaches into a single model code, creating a working model for tribal probate codes generates even more complications given the added layer of federal legislation and regulation and, perhaps, heightened opportunity for competing claims to resources between nations, groups, clans, and individuals (who, regarding the latter, may or may not also be a relative of the decedent, citizen of the particular nation with jurisdiction, or enrolled member of any tribe). Moreover, while clarity, efficiency, and standardization might be independently valuable goals, they are clearly not the only possible ones, and might often yield to other critical values depending on an enacting nation's culture.

Therefore, the Model Tribal Probate Code ("MTPC") must continue to be viewed in terms of how it might best support the internal work of tribes in flagging critical issues and presenting possible (and for primarily administrative matters, perhaps even optimal) ways in which a probate code could respond. Relatedly, the MTPC working draft should continue to attend to whether and how well its suggested provisions capture matters that might be particularly compelling for tribal nations and their citizens writ large, recognize that fundamental cultural perspectives on key philosophical issues (indeed, including the very desirability of the private property regime that lies at the heart of succession) might drive quite different traditional "ownership versus stewardship" outcomes between distinct nations, and offer information over how tribes or states that have existing and published probate codes have handled particular matters that might arise. At bottom, therefore, the MTPC is less a blueprint for enactment than a starting point designed to assist the work of others who may be confronting or continuing the discussion and drafting task.

¹ See, e.g., *Montana v. U. S.*, 450 U.S. 544, 564 (1981) ("Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members") (citing *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (additional internal citations omitted)); *Solis v. Matheson*, 563 F.3d 425, 430 (9th Cir. 2009) (noting the "tribal self-government exception . . . designed to except purely intramural matters such as . . . inheritance rules . . . from the general rule that otherwise applicable federal statutes apply to Indian tribes"). See also *In re Estate of Big Spring*, 255 P.3d 121 (Mont. 2011) (district court could not exercise jurisdiction over probate of tribal citizen's estate).

² **Error! Main Document Only.** Angela R. Riley, "Straight Stealing": *Towards an Indigenous System of Cultural Property Protection*, 80 Wash. L. Rev. 69, 74 (2005). See also Jessica Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 Mich. L. Rev. 487 (2017) (local flexibility can create critical space for reservation-by-reservation positive transformation of property systems).

A few broad observations:

1. This draft implements the decisions made at the last drafting meeting and attempts to synthesize and balance issues where discussion but no resolution occurred.
2. Should the title of the Act be changed to the Model [Tribal] Nation Probate Code?
3. There has been sustained discussion over the importance, however difficult the task, of trying to identify what constitutes cultural property and discerning whether and how it might be dealt with in the MTPC in terms of intestate distribution, testate distribution, exemptions and allowances, and creditors' rights. The current working draft of the MTPC does not include a drafted provision, which is instead broadly raised here to facilitate discussion before drafting specific text.
4. Toward the close of the last meeting, there was brief discussion over the extent to which the MTPC should seek integrations with the federal land buy-back program or other consolidation strategies. No resolution was reached, but the issue warrants further consideration.
5. Status questions, which ineluctably reflect core aspects of self-determination and sovereignty, continue to cause difficulty and thus continue to warrant ongoing discussion over how best to address them. For example, to what extent should the MTPC key heirship to membership questions of citizen or native/non-native status? How should the MTPC handle matters pertaining to domestic relations, such as who is entitled to the status of "spouse," "child," "parent," or other label that generates particular rights or privileges? Again, these sorts of questions are undoubtedly in the hands of tribal nations, and may best be suited to the Implementation Guide rather than the MTPC provisions or reporters' notes.
6. Both the Indian Land Consolidation Act (ILCA) and the American Indian Probate Reform Act (AIPRA) specifically note nations' powers to enact their own probate codes (although in the latter instance, subject to Secretarial approval). The ongoing difficulty has been whether and how to tease out how to address provisions that would replace federal law (and apply to trust lands or money accounts currently subject to AIPRA) or instead, at this point, work with a clean, non-federally controlled slate and suggest replacement provisions later. This draft continues to adopt the latter approach, but presents the approved probate codes as an appendix for those seeking to consult them.

II. Specific Provisions & Issues

ARTICLE 1

GENERAL PROVISIONS, DEFINITIONS, JURISDICTION OF COURT

1. This Article has been further shortened based on the discussion at the last meeting and as part of a continuing effort to streamline as many of the MTPC code provisions as possible. No sections were deleted.
2. The broad goal of this Article is to support sovereignty, and to balance the empowerment of the application of tribal law with the avoidance of controversial questions over jurisdiction.

3. Section 1-102(4) continues to be expressed overtly as a fundamental goal of the MTPC, rather than importing the goals as expressed within AIPRA.
4. Section 1-103 now includes definitions with the exception of adoptee, cultural, cultural property, and family heirlooms. See issues raised in Article 3, below.
5. Section 1-105 is new. It provides for the recognition of a choice of law provision.
6. Section 1-106 again attempts to broaden the forms in which notice may be given.
7. Should we add an additional provision in this Article that would address the role of tribal custom. Such a provision might read as follows:
 - (a) Whenever motion of an interested person, the court may order that tribal custom shall apply to resolve a particular issue. The court may also prescribe the weight to be given to a particular tribal custom.
 - (b) To determine tribal custom, the court shall defer to any tribal procedure of law created to authenticate tribal custom.
 - (c) Absent such law, the court shall conduct a hearing during which all interested persons parties may present evidence of tribal custom.
 - (d) The person seeking the application of tribal custom bears the burden of proof.
 - (e) The court may question witnesses called for the purpose of providing evidence of tribal custom and may call its own witnesses, including tribal elders, to offer evidence.

ARTICLE 2

PROBATE OF WILLS AND ADMINISTRATION

This Article provides one procedure for opening an estate and one procedure for closing an estate. This Article also contains provisions on small estates.

Since the last meeting, numerous provisions have been shortened, combined or rearranged to make the probate process as streamlined as possible.

A next step would be to add some sample forms.

PART 1.

GENERAL PROVISIONS

1. Note that Section 2-102 continues to take an expansive view of the property subject to the court's jurisdiction. This is consistent with the broad approach to jurisdiction taken in Section 1-104.
2. Section 2-103 suspends the statute of limitations on a decedent's claim against others for one year following the decedent's death. There is great variation in probate codes concerning the appropriate time limit.

3. The participants in the drafting project have often discussed whether funeral arrangements should be covered within the probate code. This draft continues to reflect what seems to have been the overriding sentiment that the topic should be entirely left to tribal nations. However, many tribal probate codes do address funeral arrangements. Although not included in the statute, it might be helpful if the implementation guide offered samples of ways that the topic of funeral arrangements could be addressed.
4. Section 2-104 has been revised to provide that a demand for notice is limited to individuals with a financial or property interest in the estate.

PART 2. PROBATE AND APPOINTMENT PROCEEDINGS

Sections 2-203 and 2-203 now require that the petition to open the estate specify whether the estate contacts cultural property or family heirlooms.

PART 3. PERSONAL REPRESENTATIVE, APPOINTMENT, CONTROL AND TERMINATION OF AUTHORITY

1. We should add a provision here or elsewhere dealing with the authority of a personal representative to deal with digital assets.
2. Instead of having a separate part of the code for the rules on PRs appointed and estates opened in other jurisdictions, these provisions have been incorporated into the main body of the Code. Section 2-303 is where one of the provisions has been relocated.
3. Section 2-305 has been revised to give a last place priority for appointment as PR to the tribe and, 60 days after the decedent's death, any creditor.

PART 4. DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

1. This Part is a streamlined version of Article 3, Part 7 of the UPC. One area where this Part could be further shortened would be to omit the list of factors on PR compensation in Section 2-412.
2. Section 2-401 has been clarified to specify the PRs' overriding duties of loyalty, prudence, and information.
3. The notice provision in Section 2-402 has been shortened from 30 days to 14 days for consistency with other notice provisions in the Code. A choice is now provided to specify whether the notice is to be given by the clerk or by the personal representative.
4. We may want to clarify in Section 2-403 that cultural property and family heirlooms are

not subject to appraisal.

5. A definition of “good faith” has been added in Section 2-407.
6. Section 2-408 addresses an issue of concern to many families: the sale by a personal representative of real property, family businesses, and tangible personal property. This issue deserves close study.
7. Nearly all probate codes contain a laundry list of PR powers. This provision is found at Section 2-409.
8. In Section 2-412, do we want to address the possibility of fee shifting in litigation?

PART 5. CREDITORS’ CLAIMS

Section 2-504 has been rewritten to exclude leases and licenses from the probate claims procedures.

PART 6. SPECIAL PROVISIONS RELATING TO DISTRIBUTION

1. In Section 2-603, should we place “legal rate” in brackets?
2. Section 2-606 on improper distributions has been rewritten and should be discussed.

PART 7. CLOSING ESTATES

Unlike many probate codes, this Part provides for a single procedure for closing an estate.

PART 8. COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT AND SUMMARY ADMINISTRATION FOR SMALL ESTATE

1. In the title, “Small Estate” should be changed to “Exempt Estate.”
2. Section 2-801, which allows the collection of personal property by affidavit, is new. It was drawn from the comparable provision of the UPC.

ARTICLE 3
INTESTATE AND TESTATE SUCCESSION

PART 1.
INTESTATE SUCCESSION OF NON-TRUST OR RESTRICTED PROPERTY

1. 3-101: the net estate subject to distribution excludes claims, expenses, and exempt property. A later subpart has been added to address those exemptions, which will require careful review in terms of content and scope.
2. 3-103: this Section was redesigned and streamlined in sub (4) to avoid drawing distinctions between “maternal” and “paternal” ancestry and to avoid further splitting of the estate by representation if any grandparents survive.
3. 3-105: this Section was added to comport with the constructional preference that applies within testate succession and other donative instruments.
4. 3-107: this Section was again edited to enhance readability.
5. Either the model provisions, or the Implementation Guide, could create distinctions to the foregoing in terms of (1) status of potential heir as native, citizen of particular nation/enrolled or unenrolled status, member of particular clan or other sub-group, etc. and/or (2) category of particular property as real property, cultural resource, family heirloom, Indian artifact, or Indian finery, etc. Some of these distinctions could be drawn at the intestate/testate line v. across the board.
6. Relatedly, we’d discussed including some sort of provision granting tribal court discretion to reduce or even remove any share going to an heir who “misbehaved”? Thus far, the only provision that finds such expression pertains to parents of minor children, although it could include, e.g., elder or spousal abuse. The difficulty with this sort of “bad conduct” statute is identifying an appropriate trigger or limiting too many ad hoc results. One idea discussed was to key this sort of determination on a particular criminal conviction, much like slayer statutes. Others have argued that if the behavior is bad enough, the decedent will make a will anyway. This might not hold true for those with a significant life-limiting physical or mental condition, who may lack testamentary capacity.
7. These provisions, particularly 3-108 through 3-110, continue to contain sensitive, culturally driven issues. Assorted changes as discussed at the last drafting session have been made, with the overarching thought that some combination of the Reporters’ Notes and the Implementation Guide can provide information over how different nations have handled the issues. Our robust discussion of customary adoptions versus TPR & potentially unwinding the termination of parental rights or reestablishment did not end up finding expression in the statutory text per se, although discussion could be placed within either the Reporters’ Notes or the Implementation Guide. Note also that in 3-109, the parent is only barred from inheriting from a “minor” child, which significantly limits the

number of instances that the rule would apply. The drafted text avoids a bright line rule regarding the evidentiary effect of repeat protective actions by the tribe, although that factor could be included in the Reporters' Notes or the Implementation Guide.

PART 2.

INTESTATE SUCCESSION OF TRUST AND RESTRICTED REAL AND PERSONAL PROPERTY

Continues to be reserved pending drafting; see Appendix for tribal probate codes that have earned Secretarial approval.

PART 3.

TESTATE SUCCESSION OF TRUST AND NON-TRUST PROPERTY

1. 3-302: As maximizing the validity of wills and reducing the instance of intestate succession is desirable, the MTPC should include some form of holographic will. Nevertheless, we should continue to assess the potential for confusion, and how to minimize it, by reminding that current federal law does not permit the holographic will unless it is also validly attested. The same cautions apply to the "harmless error" approach taken under 3-303 and the choice of law clause in 3-307.
2. Although there continues to be discussion about whether to excise harmless error completely from the MTPC, the current draft retains but shortens it. Section 3-307 continues to apply only to a document and does not validate oral wills or other acts.
3. Although Section 3-312 [Tangible Personal Property List] continues to appear within the working MTPC as a flexible and easy tool, we might touch base again to over periodic suggestions to enhance its evidentiary and protective features, e.g. to require that it be in the decedent's native language, or that it be witnessed or notarized, similarly to a will. The difficulty is in balancing those protections with flexibility, and all against the backdrop of the rules that would apply to trust lands.

PART 4.

CONSTRUCTION OF A WILL

This is a new part pulling together assorted provisions previously found elsewhere, largely to enhance readability and avoid repetition. Most of the changes have been non-substantive, with amendments made for readability.

PART 5.

RULES OF CONSTRUCTION NOT LIMITED TO WILLS

This is a new part breaking out the construction rules that are not limited to wills. Most of the changes have been stylistic, with amendments made for readability.

PART 6. EXEMPT PROPERTY

1. This section discusses particular categories of property that should earn special treatment under the code in terms of rights of the decedent to control it and rights of the decedent's creditors to access it. It might be helpful to consider the following, which includes possible and suggested definition, before assessing the text as drafted.
2. At many points in meeting discussions, participants have struggled with how to handle particular forms of property that might hold unique significance to both the deceased individual/her immediate family and the tribal nation involved. Discussion has largely focused on the extent to which such property should be subject to succession rules, potentially insensitive inventory or appraisal, tribal notice, and creditors' rights.
3. Part of the difficulty might have been a conflation of what might be some fundamentally different concepts. An initial conceptual division should be drawn between such property that is capable of being owned by the decedent and property that is not. For purposes of this discussion, the former category seems to include and be often referenced as family heirlooms, Indian finery and Indian artifacts (however defined). The latter category would include cultural property. More specifically,

Individual/Ownership [title-based]	Collective/Stewardship [trust model]
<p>Fuller complement of rights to possess, use, consume, etc.</p> <p>Property can be alienated during life by sale and/or gift; can be transferred at death through intestate (descent) or testate succession (devise).</p>	<p>Property in care/custody of individual caretaker or group but is not subject to alienation without explicit tribal consent, nor capable of descent or devise through custodian's estate. "Ownership" as culturally defined usually inheres in tribe itself or smaller group/sub-group thereof. <i>See, e.g., Chilkat Indian Vill., IRA v. Johnson</i>, 20 Indian L. Rep. 6127 (Chilkat Tribal Ct. 1993) (caretaker had no authority to sell certain artifacts); <i>In re Sacred Arrows</i>, 3 Okla. Trib. 332 (Chey.-Arap. D.C. 1990) (sacred arrows held by arrow keeper); <i>In re Guardianship of William Bell, Sr.</i>, 24 Indian L. Rep. 6105 (Ft. Bert. Tribal Ct. 1997) (discussing bifurcation of "keeper" and owner (tribe) of treaty document and succession of "keeper's rights" under tribal law). <i>See generally</i> Cohen's Handbook of Federal Indian Law § 20.01.</p>
Depending on the type of property at issue, property may possibly be reached by	Property should never be subject to creditors' claims.

creditors of the decedent's estate.	
Property might include family heirlooms. Could differentiate between testate and intestate succession, with former (will) permissible either as of right or subject to claim that disposition fails to comport with tribal custom, and latter (intestacy) distributed according to recognized tribal custom.	Shared cultural resource of the native nation, holding particular significance for the nation's history, culture, future; NAGPRA provides direction (see below).
	Any possessory interest held by an individual decedent should pass according to tribal custom.
Definition of "family heirloom" etc. might vary among tribes	Definition of "cultural property" could probably written broadly with ability of nation to highlight key aspects as relevant to its particular needs.
"Family heirloom" could either be distributed outside of estate process or within, could be considered a sub-set of "exempt property," and could be free of homestead and/or statutory allowances or not.	

4. Example definitions/treatment of Family Heirlooms within accessed tribal probate codes to compare against current code provision:

<p>"Indian Finery and Artifacts"</p> <p>Notwithstanding any other provision re descent or distribution, the surviving spouse or other surviving next of kin may distribute any Indian artifacts and finery belonging to the decedent in accordance with the customs and traditions of the [tribal] Nation before the administration of the estate. Such distribution shall be in accordance with directions left by the decedent, if any.</p> <p>[note that directions need not constitute a valid will]</p>	<p>Chitimacha Code § 105</p> <p>Similar: Fond du Lac § 4.107 (adding "family heirlooms" to title and description; adds explicit statement that distribution exempt from all creditors.)</p> <p>Similar: Lummi Code § 35.03.040 (adding that tribal court lacks jurisdiction to hear the issue; adds particular controlling order for "next of kin," with oldest adult sibling of decedent following spouse, etc.)</p> <p>Similar: Stockbridge-Munsee (draft) § 6.1.5; Swinomish § 6.1.5.</p> <p>Similar: Puyallup § 0.04.020 (adding that anyone so distributing should prepare a list of items to enter into probate record)</p>
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	Similar: White Earth Nation § 3 & Leech Lake Ojibwe Ch. 2 § 3 (adding that where possible, tribal court should consult traditional elders from decedent's community)
Indian Finery and Indian Artifacts Shall be distributed in accordance with the customs and traditions of the [] tribe; implicit right of family to decide as tribal court will make determination based on hearing evidence in accordance with the tribal rules of evidence if family disagrees. Decedent's directions control, but if none, personal/family items distributed according to the customs and traditions of the family or the tribe. Tribal court as arbiter.	Nez Perce Section 10-1-11
"Indian Finery": Items of personal adornment, made in the Indian tradition, by human craft; "Indian Artifacts": An object, irrespective of age, made by human craft an in the Indian tradition	Nez Perce § 10-1-07 (definitions)
Personal property may be distributed at the traditional ten day meal by family members, and includes clothing, furnishings, jewelry and personal effects not valued at more than \$100/item and ceremonial clothing or artifacts, including eagle feathers, beadwork, dance sticks, flutes, drums, rattles, blankets, baskets, pottery, medicines, and animal skins.	Oneida Tribe of Wisconsin § 67.9.5
Family heirlooms, artifacts, articles of traditional or religious significance may be funeral gifted or descend to closest enrolled relative (with gender components depending on gender of decedent)	San Ildefonso Pueblo § 31.2

5. Section 3-601: Should the drafted provision define the family heirlooms or provide that tribal court or tribal court's designated entity defines? Should the drafted provision specifically provide for precise order of determination among "next of kin" regarding the disposition of these items? Should the drafted provision specifically provide that a list or other type of inventory be filed, or cap the amount of any particular item, or leave all of it to discretion of tribal court? In consultation with elders? Should these issues be subsumed within 3-603 under "exempt property"?

6. Examples/treatment of cultural resources [note: only found reference in single TPC]

b. Could include land, objects, traditions, and symbols in property form, e.g. funerary objects, masks, totem poles; tribal conception could be broader than federal/international; “object of cultural heritage”: valued by tribal tradition or protected by its law; could include any “individual or group creation of either a tangible or intangible good which, via creation process, customary use, historical event, or simply geographic proximity, becomes important expression of human or cultural life.” See Cohen Handbook at § 20.01; Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 Ariz. St. L. J. 291, 303 (1999).

c. Native American Graves Protection and Repatriation Act (NAGPRA) (1990), 18 USC 1170; 25 USC 3001-3013 identifies, as “cultural items”: human remains, funerary objects (intentionally placed w/ or near, or designed to contain, individual human remains); sacred objects (special ceremonial objects needed for religious practice); “cultural patrimony” (inalienable tangibles with ongoing historical, traditional, or cultural import central to the group culture). See, e.g., Northern Cheyenne § 9-3-4 (“notwithstanding the provisions . . . relating to descent and distribution, Cultural Patrimony possessed by the decedent shall be distributed in accordance with the customs and traditions of the Tribe” (later defining term to comport with NAGPRA and noting that it cannot be owned, conveyed, or appropriated by any individual)).

7. Proposal: both family heirlooms and cultural property exempt from creditors’ rights; former under general exemptions, latter b/c that property is not owned by decedent (similar to trust theory). Nevertheless, wise to include both within the MTPC draft and with their own headers (latter not yet covered) to highlight the matter and the desirability of particular tribal nations paying special heed to the provision and the ways that it might be tailored to suit that nation’s customs and culture. See Angela R. Riley, “*Straight Stealing*”: Towards an Indigenous System of Cultural Property Protection, 80 Wash. L. Rev. 69 (2005).
8. Proposal: family heirlooms, Indian artifacts, and Indian finery captured within broader definition of exempt property under 3-603 and subject to those rules vis-à-vis homestead and statutory allowance.
9. Section 3-602 Homestead provisions: could continue as drafted or be converted to dollar amount, e.g. 25k to spouse, 5k minor or dependent child.
10. Family allowances range in amount; eg = \$250/month to spouse, \$75/month to each child until estate closed; discretionary w/ court based on suggested factors such as demonstrated need.
11. Should all of the enumerated categories (homestead, family allowance, exemptions, heirlooms) be listed under a single heading with a single set of creditors’ rights applicable to all of them? See, e.g., Lac du Flambeau.

ARTICLE 4
TRANSFER ON DEATH ARRANGEMENTS

PART 1.
GENERAL AUTHORIZATION

This Part is a general provision authorizing payable-on-death arrangements. It has been shortened considerably for clarity.

PART 2.
REAL PROPERTY TRANSFERS

1. In Section 4-201, the definition of "property" has been clarified to include structures located on real property. The provisions on creditor claims against non-probate assets has been dropped.
2. For Part 2, should we add anti-lapse statute here or instead expand Section 3-404 to cover non-probate transfers.