

D R A F T
FOR DISCUSSION ONLY

MODEL TRIBAL PROBATE CODE

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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ON UNIFORM STATE LAWS

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September 23, 2015

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1 **MODEL TRIBAL PROBATE CODE**

2 **ARTICLE I**

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

4 **PART 1. SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS**

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

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

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

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

11 (1) to simplify and clarify the law concerning the estates of decedents;

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

14 (3) to promote a speedy and efficient system for liquidating the estate of the
15 decedent and making distribution to the decedent’s successors;

16 (4) to promote the culture and the values of the _____ Tribe,
17 specifically []

18 **Reporters’ Note**

19
20 This section is similar to Section 1-102 of the Uniform Probate Code except that
21 subsection (b)(4) has been added and references to guardianship and conservatorship have been
22 deleted.

23
24 Some statements of legislative purpose in existing tribal probate codes are quite brief,
25 such as these statements from the Lac du Flambeau and Ute tribal provisions:

26
27 Lac du Flambeau Section 82.103 Purpose

28 The purpose of this Code is to regulate the inheritance of real and personal Property
29 within the Reservation by establishing laws governing Intestate Succession and the

1 making of wills and by providing a simple, efficient and inexpensive method for
2 probating the estates of Tribal Members and their families.

3
4 Ute §6-1-2. Construction.

5
6 These provisions relating to decedent's estates shall be liberally construed and applied to
7 give effect to the underlying policy of distributing a decedent's property according to the
8 decedent's intent where there is a valid will manifesting such intent, or according to the
9 provisions of this Probate Code where there is not a valid will.

10
11 Other statements of legislative purpose, such as in the codes for the Fond du Lac, Nez
12 Perce and Stockbridge Munsen, are quite detailed:

13
14 Fond du Lac Section 1.102 Findings and Purposes

15
16 The Fond du Lac Reservation Business Committee finds that the determination of how
17 property is disposed upon a person's passing is an exercise of self-governance crucial to
18 the Band's sovereignty and that a Probate Code will simplify the probate process for
19 Band members. The purposes of this Ordinance are accordingly:

- 20
21 (a) To ensure that the property of decedents passes to the rightful heirs or
22 beneficiaries;
- 23
24 (b) To comply with the decedent's wishes as much as possible;
- 25
26 (c) To comply with tribal custom and tradition;
- 27
28 (d) To provide a simple, efficient, and inexpensive method for probating the
29 decedent's property;
- 30
31 (e) To prevent the transfer of land out of tribal ownership and control; and
- 32
33 (f) To ensure that the rights of creditors of decedents are protected to the extent
34 possible and fair.

35
36 Nez Perce § 10-1-1. Legislative Findings

37
38 The Nez Perce Tribal Executive Committee (NPTEC), the governing body of the Nez
39 Perce Tribe hereby finds that the loss of lands from Indian ownership, and the increase in
40 fractionated ownership of many lands held by tribal members threatens the long term
41 viability of the Nez Perce Reservation as a homeland for the exclusive use of the Tribe
42 and its members; the NPTEC further finds that authorizing and directing the Nez Perce
43 Tribal Court to hear and determine probate proceedings will simplify the probate process
44 for surviving family members, will encourage tribal members to plan for the transfer of
45 their property upon their deaths, and further strengthen the Tribe's powers of self-
46 governance.

1 Nez Perce § 10-1-2. Declaration of Policy

2
3 The Nez Perce Tribal Executive Committee (NPTEC) hereby declares that the policy of
4 the Nez Perce Tribe is to prevent further deterioration of the land base of the Tribe, to
5 prevent as far as possible the further fractionation of ownership of tribal members'
6 property, to encourage tribal members to plan for the transfer of their property upon their
7 deaths by making wills, and to strengthen the Tribe's self-governance by providing a
8 means for probating estates in Nez Perce Tribal Court.

9
10 The enactment of the Nez Perce Tribal Probate Code preempts the present usage of the
11 Idaho Uniform Probate Code except as hereinafter specifically provided to the contrary
12 and places jurisdiction of any and all probate matters concerning any person who is a
13 member of, or eligible for enrollment in a federally recognized Indian tribe, or who does
14 not otherwise meet the definition of "Indian" in the Indian Land Consolidation Act, as
15 amended, and any non-Indians who may elect coverage with the Nez Perce Tribal Court.

16
17 Stockbridge Munsee Section 6.1.1 Purpose

18
19 (A) The following title shall hereinafter be referred to as the Probate Code. The objective
20 of the Probate Code is to provide for the exercise of the greatest possible tribal
21 jurisdiction over the probate of the estate of decedents who were domiciled or owned real
22 or personal property on the Stockbridge-Munsee Community Indian Reservation. The
23 Stockbridge-Munsee Tribal Council finds that probate procedure in the Stockbridge-
24 Munsee Tribal Court is in the best interest of tribal members in that probate may be
25 concluded more economically and more expeditiously than by other jurisdictions.
26 Furthermore, the determination of how property is disposed upon a person's death is an
27 exercise of self-governance crucial to tribal sovereignty.

28
29 (B) This code shall be liberally construed and applied to meet the following objectives:

30
31 (1) To ensure that the property of decedents passes to the rightful heirs or beneficiaries.

32
33 (2) To comply with the decedent's wishes as much as possible.

34
35 (3) To comply with tribal custom and tradition.

36
37 (4) To provide a simple, efficient and inexpensive method for probating decedent's
38 property.

39
40 (5) To prevent the transfer of land out of tribal ownership and control.

41
42 (6) To ensure that the rights of creditors of decedents are protected to the extent possible
43 and fair.

44
45 (7) To promote and further the tribe's inherent right to self-governance.

1 perpetrator of the fraud or restitution from any person (other than a bona fide purchaser)
2 benefitting from the fraud, whether innocent or not.

3 (b) Any proceeding must be commenced within two years after the discovery of the
4 fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five
5 years after the time of commission of the fraud. This section has no bearing on remedies relating
6 to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

7 **Reporters' Note**

8 This section, which is taken from Section 1-106 of the Uniform Probate Code, is also
9 found at Section 4.102 of the Fond du Lac Code, at Section 6.1.6 of the Stockbridge Munsee
10 Code, and at Section 6-1-4 of the Ute Code.

11
12 **SECTION 1-107. EVIDENCE OF DEATH OR STATUS.** In addition to the rules of
13 evidence in courts of general jurisdiction, the following rules relating to a determination of death
14 and status apply:

15 (1) A certified or authenticated copy of a death certificate issued by an appropriate
16 official or agency is prima facie evidence of the fact, place, date, and time of death and the
17 identity of the decedent.

18 (2) A certified or authenticated copy of any record or report of any tribal, state, or other
19 governmental agency, domestic or foreign, that an individual is missing, detained, dead, or alive
20 is prima facie evidence of the status and of the dates, circumstances, and places disclosed by the
21 record or report.

22 (3) In the absence of prima facie evidence of death under paragraph (1) or (2), the fact of
23 death may be established by any other sufficient circumstantial evidence.

24 (4) An individual whose death is not established under the preceding paragraphs who is
25 absent for a continuous period of five years, during which the individual has not been heard

1 from, and whose absence is not satisfactorily explained after diligent search or inquiry, is
2 presumed to be dead. The decedent's death is presumed to have occurred at the end of the period
3 unless there is sufficient evidence for determining that death occurred earlier.

4 (5) In the absence of evidence disputing the time of death stated on a document described
5 in paragraph (1) or (2), a document described in paragraph (1) or (2) that states a time of death
6 120 hours or more after the time of death of another individual, however the time of death of the
7 other individual is determined, establishes by clear and convincing evidence that the individual
8 survived the other individual by 120 hours.

9 **Reporters' Note**

10 This section is similar to Section 1-107 of the Uniform Probate Code except that the
11 language in the UPC on how death is medically determined, which was added to the UPC in
12 1991, has been omitted. The UPC as originally approved in 1969 included only paragraphs (1),
13 (2), and (4) above. Paragraphs (3) and (5) are later additions. Several tribes have enacted this
14 provision in the form originally approved in 1969 and have yet to add paragraphs (3) and (5)..
15 See Fond du Lac Section 4.103; Lac du Flambeau Section 82.111; Stockbridge Munsee Section
16 6.1.7; Ute Section 6-1-5. Unlike the other tribal codes, the Fond du Lac Code provides for a
17 seven instead of five-year presumption of death.

18 **PART 2. DEFINITIONS**

19 **SECTION 1-201. GENERAL DEFINITIONS.** [subject to additional definitions

20 contained in the subsequent [articles] that are applicable to specific [articles,] [parts,] or sections
21 and unless the context otherwise requires, in this [code]: [presently defer]

22 **PART 3. SCOPE, JURISDICTION, COURTS AND NOTICE**

23 **SECTION 1-301. TERRITORIAL APPLICATION AND SUBJECT MATTER** 24 **JURISDICTION.**

25 (a) This [code] applies to the estates of decedents with respect to any property, real or
26 personal, that is subject to the laws of the [Tribe] [, excluding trust or restricted property
27 governed by federal law].
28

1 (b) To the full extent permitted by the tribal and federal constitution and law, the court
2 has jurisdiction over all subject matter relating to the estates of decedents. The court has the
3 broadest possible authority to make orders, judgments and decrees and otherwise carry out its
4 duties and responsibilities under the [code].

5 (c) For purposes of this [code], an enrolled member of the [insert name of Tribe] shall be
6 presumed to be domiciled within the [reservation], regardless of residence elsewhere, in the
7 absence of proof of domicile in another location.

8 **Reporters' Note**

9
10 This section grants the tribal court the maximum possible jurisdiction. The enacting tribe
11 may or may not decide to exclude trust or restricted property controlled by federal law from its
12 version of this code, which is why this language is placed in brackets. The second sentence of
13 subsection (b) is based on Nez Perce Code Section 10-1-8. Subsection (c) is based on Nez Perce
14 Code Section 10-1-9.

15
16 A number of tribal codes take a more restrictive approach to the tribal court's
17 jurisdiction. The Fond du Lac limit the court's jurisdiction to the estates of Band members
18 domiciled on or who have an interest in real property located on the Reservation. Fond du Lac
19 Code Section 4.101. The Lac du Flambeau expands this jurisdiction to include estates not only to
20 Tribal members but also the spouses and children of Tribal members. Lac du Flambeau Code
21 Section 82.401. The Nez Perce grant the court jurisdiction over the estate of any Indian
22 domiciled on the Reservation whether or not they were members of the Nez Perce tribe. Nez
23 Perce Code Section 10-1-8. The Poarch Band clarifies that jurisdiction over the enrolled tribal
24 member would by necessity need to also include jurisdiction over the beneficiaries of the estate.
25 Poarch Band Code Section 16-1-1. The Pueblo San Ildefonso Code is the most expansive,
26 granting the court jurisdiction over the estate of any person, tribal member or not, who resided at
27 the Pueblo. Pueblo San Ildefonso Code Section 28.1.

28 **SECTION 1-302. PRACTICE IN COURT.**

29
30 (a) Unless specifically provided to the contrary in this [code] or unless inconsistent with
31 its provisions, the tribal code rules of civil procedure including the rules concerning vacation of
32 orders and appellate review govern proceedings under this [code].

33 (b) All trials under this [code] shall be in the court.

1 **Reporters' Note**

2 Subsection (a) is similar to Section 1-304 of the Uniform Probate Code.

3
4 Subsection (b) is copied from Stockbridge Munsee Code Section 6.1.11. Although the
5 issue of whether a jury may be demanded is not addressed in most tribal codes, the Ute Code
6 does authorize jury trials in probate cases. Ute Code Section 6-1-8. A jury demand is also
7 authorized in the probate courts of most states, particularly for will contests.

8
9 **SECTION 1-303. NOTICE; METHOD AND TIME OF GIVING.**

10 (a) If notice of a hearing on any petition is required and except for specific notice
11 requirements as otherwise provided, the petitioner shall cause notice of the time and place of
12 hearing of any petition to be given to any interested person or that person's attorney if the
13 petitioner has appeared by attorney or requested that notice be sent to the attorney. Notice shall
14 be given:

15 (1) by mailing a copy thereof at least 14 days before the time set for the hearing
16 by certified, registered or ordinary first class mail addressed to the person being notified at the
17 post office address given in the demand for notice, if any, or at the office or place of residence, if
18 known;

19 (2) by delivering a copy thereof to the person being notified personally at least 14
20 days before the time set for the hearing; or

21 (3) if the address, or identity of any person is not known and cannot be
22 ascertained with reasonable diligence, by publishing at least once a week for two consecutive
23 weeks, a copy thereof in both the tribal newspaper and in any newspaper having general
24 circulation in the county where the hearing is to be held, the last publication of which is to be at
25 least 14 days before the time set for the hearing.

26 (b) The court for good cause shown may provide for a different method or time of giving
27 notice for any hearing.

1 (c) Proof of the giving of notice shall be made on or before the hearing and filed in the
2 proceeding.

3 (d) A person, including a guardian ad litem or other fiduciary, may waive notice by a
4 writing signed by the person or the person's attorney and filed in the proceeding.

5 **Reporters' Note**

6 This section is based on Section 1-401 of the Uniform Probate Code. The UPC in Section
7 1-402 also has a detailed provision on waiving notice. Instead if enacting a separate section
8 covering waiver, waiver of notice is addressed in subsection (d) of this section, copying a
9 provision in the Stockbridge Munsee and Ute Codes. See Stockbridge Munsee Code Section
10 6.1.13(D); Ute Code Section 6-1-10(d).

11
12 **SECTION 1-304. PROCEEDINGS WITHIN THE EXCLUSIVE JURISDICTION**
13 **OF COURT; SERVICE; JURISDICTION OVER PERSONS.** In proceedings within the
14 jurisdiction of the court where notice is required by this [code] or by rule, interested persons may
15 be bound by the orders of the court in respect to property in or subject to the laws of this [tribal
16 jurisdiction] by notice in conformity with Section 1-303. An order is binding as to all who are
17 given notice of the proceeding though less than all interested persons are notified.

18 **Reporters' Note**

19
20 This section is identical to Section 1-306 of the Uniform Probate Code.

21
22 **SECTION 1-305. WHEN PARTIES BOUND BY OTHERS; NOTICE.** In
23 proceedings involving estates of decedents, and in judicially supervised settlements, the
24 following rules apply:

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

28 (2) A conservator or guardian may represent the person under conservatorship or

1 guardianship.

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

4 (4) Notice is required as follows:

5 (A) The notice prescribed by Section 1-303 must be given to every interested
6 person or to one who can bind an interested person.

7 (B) Notice is given to unborn or unascertained persons by giving notice to all
8 known persons whose interests in the proceedings are substantially identical to those of the
9 unborn or unascertained persons.

10 (5) At any point in a proceeding, a court may appoint a guardian ad litem to represent the
11 interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity
12 or address is unknown, if the court determines that representation of the interest otherwise would
13 be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to
14 represent several persons or interests. The court shall state its reasons for appointing a guardian
15 ad litem as a part of the record of the proceeding.

16 **Reporters' Note**

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

18 **SECTION 1-306. DEMAND FOR NOTICE OF ORDER OR FILING**

19 **CONCERNING DECEDENT'S ESTATE.** Any person desiring notice of any order or filing
20 pertaining to a decedent's estate in which the person has a financial or property interest, may file
21 a demand for notice with the court at any time after the death of the decedent stating the name of
22 the decedent, the nature of the demandant's interest in the estate, and the demandant's address or
23 that of the demandant's attorney. The clerk shall mail a copy of the demand to the personal

1 representative, if one has been appointed. After filing of a demand, no order or filing to which
2 the demand relates shall be made or accepted without notice as prescribed in Section 1-303 to the
3 demandant or the demandant's attorney. The validity of an order which is issued or filing which
4 is accepted without compliance with this requirement shall not be affected by the error, but the
5 petitioner receiving the order or the person making the filing may be liable for any damage
6 caused by the absence of notice. The requirement of notice arising from a demand under this
7 provision may be waived in writing by the demandant and shall cease upon the termination of the
8 demandant's interest in the estate.

9 **Reporters' Note**

10 This section is identical to Section 3-204 of the Uniform Probate Code.

11 **ARTICLE 2**

12 **PROBATE OF WILLS AND ADMINISTRATION**

13 **PART 1. GENERAL PROVISIONS**

14 **SECTION 2-101. PASSING OF ESTATE AT DEATH; RESTRICTIONS.**

15 (a) The power of a person to leave property by will, and the rights of creditors, devisees,
16 and heirs to the decedent's property are subject to the restrictions and limitations contained in
17 this [code] to facilitate the prompt settlement of estates.

18 (b) Upon the death of a person, the decedent's real and personal property passes
19 according to the decedent's will, or in the absence of a disposition by will, to the decedent's heirs
20 in either case subject to [here insert references to statutory allowances of spouse and children],
21 [cultural property not subject to administration], to rights of creditors, elective share of the
22 surviving spouse, and expenses of administration.

1 **Reporters' Note**

2 This section is a shortened version of Section 3-101 of the Uniform Probate Code.

3 **SECTION 2-102. LOCATION OF PROPERTY.** Other than for real property located
4 in another jurisdiction, all property of a decedent whose estate could be administered under this
5 [code] is subject to the jurisdiction of the court regardless of where that property may be located.

6 **Reporters' Note**

7 This section is intended to give the court the maximum possible jurisdiction without
8 attempting to specify the precise limits.

9
10 **SECTION 2-103. STATUTES OF LIMITATIONS ON DECEDENT'S CAUSE OF**
11 **ACTION.** The running of any statute of limitations on a cause of action belonging to a decedent
12 which has not been barred as of the date of death is suspended for one year following the
13 decedent's death but resumes thereafter unless otherwise tolled.

14 **Reporters' Note**

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

17
18 **PART 2. PROBATE AND APPOINTMENT PROCEEDINGS**

19 **SECTION 2-201. PROBATE PROCEEDINGS; NATURE; WHEN**
20 **COMMENCED.**

21 (a) A proceeding to open a decedent's estate may be commenced by an interested person,
22 including the [name of tribe], by filing a petition as described in Section 3-202 in which the
23 petitioner requests that the court enter an order determining the heirs and probating a will, or a
24 petition in accordance with Section 3-203 for an order that the decedent died intestate.

25 (b) A proceeding to probate a will or determine intestacy may, but need not, involve a
26 request for appointment of a personal representative.

1 **Reporters' Note**

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

5
6 **SECTION 2-202. PETITION FOR PROBATE OF WILL; CONTENTS.**

7 (a) Petitions for probate of a will, with or without request for appointment of a personal
8 representative, must be directed to the court, request a judicial order after notice and hearing and
9 contain further statements as indicated in this section.

10 (b) A petition for probate of a will

11 (1) requests an order determining the heirs and probating the will,

12 (2) contains the following statements:

13 (A) the interest of the petitioner;

14 (B) the name, date of death and age of the decedent, the location of the
15 decedent's domicile at the time of death, and the names and addresses of the heirs and devisees
16 and the ages of any who are minors so far as known or reasonably ascertainable with reasonable
17 diligence by the petitioner;

18 (C) if the decedent was not domiciled in this [tribal jurisdiction] at the
19 time of death, a statement showing the court's jurisdiction;

20 (D) whether the petitioner has received a demand for notice, or is aware
21 of any demand for notice or any probate or appointment proceeding concerning the decedent that
22 may have been filed in this [tribal jurisdiction] or elsewhere;

23 (E) that the petitioner, to the best of the petitioner's knowledge, believes
24 the will to have been validly executed and that after the exercise of reasonable diligence, the
25 applicant is unaware of any instrument revoking the will;

1 (F) whether the original of the will of the decedent is in the possession of
2 the court or accompanies the petition;

3 (G) the tribal membership status of the decedent and heirs and devisees;
4 and

5 (H) whether the estate includes trust and restricted real property or IIM
6 accounts.

7 (c) If the original will is not available to the court and no certified copy of a will probated
8 in another jurisdiction accompanies the petition, the petition also must state the contents of the
9 will, and indicate that it is lost, destroyed, or otherwise unavailable.

10 (d) If the original will, or certified copy of the will as probated in another jurisdiction, is
11 not available, the contents of the will can be proved by a copy of the will and the will may be
12 admitted to probate if the court is reasonably satisfied that the will was not revoked by the
13 testator. If a copy of the will is not available, the contents of the will can be proved only by clear
14 and convincing proof, and the court shall enter an order setting forth the contents and the names
15 of the witnesses.

16 **Reporters' Note**

17 Subsections (a)-(c) draw language from Sections 3-301 and 3-402 of the Uniform Probate
18 Code but without distinguishing between informal and formal proceedings as do the UPC
19 provisions. The language has also been modified to require that the petition address tribal status
20 and whether the estate includes trust or restricted real property or IIM accounts. Under this Code,
21 all proceedings are conducted in court so there is no need for the distinction. Subsection (d) on
22 proof of lost wills is copied from South Dakota Codified Laws Section 29A-3-402(d). Unlike the
23 UPC, this Code places the petition requirements for testate and intestate estates in separate
24 sections. The petition requirements for an intestate estate are located in Section 2-203.

25
26 **SECTION 2-203. PETITION FOR INTESTACY; CONTENTS.**

27 (a) Petitions for an adjudication of intestacy with or without request for appointment of a
28 personal representative, must be directed to the court, request a judicial order after notice and

1 hearing and contain further statements as indicated in this section.

2 (b) A petition for adjudication of intestacy and appointment of an administrator in
3 intestacy must request a judicial finding and order determining the heirs and that the decedent
4 left no will, and must contain the following statements:

5 (1) the interest of the applicant;

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

9 (3) if the decedent was not domiciled in this [tribal jurisdiction] at the time of
10 death, a statement showing jurisdiction;

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

14 (5) that after the exercise of reasonable diligence, the petitioner is unaware of any
15 unrevoked will relating to property having a situs in this [tribal jurisdiction] under Section 1-301,
16 or, a statement why any such instrument of which the applicant may be aware is not being
17 probated;

18 (6) if the petition requests the appointment of a personal representative, the
19 priority of the person whose appointment is sought and the names of any other persons having a
20 prior or equal right to the appointment under Section 2-305;

21 (7) the tribal membership status of the decedent and heirs and devisees; and

22 (8) whether the estate includes trust and restricted real property or IIM accounts.

1
2
3 **Reporters' Note**

4 This section draws language from Sections 3-301 and 3-402 of the Uniform Probate Code
5 but without distinguishing between informal and formal proceedings as do the UPC provisions.
6 Language has also been added requiring that the petitioner address tribal status and whether the
7 estate includes trust or restricted real property or IIM accounts. Under this Code, all proceedings
8 are conducted in court so there is no need for the distinction. This section applies only to
9 intestate estates. The petition requirements for testate estates are addressed in Section 2-202.

10 **SECTION 2-204. NOTICE OF HEARING ON PETITION.**

11 (a) Upon commencement of a proceeding to probate a will or determine intestacy, the
12 court shall fix a time and place of hearing.

13 (b) If the petition requests the appointment of a personal representative, the petitioner
14 may but need not give prior notice of the hearing as provided in Section 1-303 to interested
15 persons, including the heirs, the devisees and personal representative in the will being offered for
16 probate, and any devisees or personal representatives under any other prior or subsequent will of
17 the decedent that is not being offered for probate.

18 (c) If the petition does not request the appointment of a personal representative, notice as
19 provided in Section 1-303 must be given to the heirs and the devisees and personal representative
20 in the will being offered for probate.

21 (d) Whether or not the petition requests the appointment of a personal representative,
22 notice must be given to any person who has filed a demand for notice under Section 1-306, and
23 any personal representative previously appointed whose appointment has not been terminated.

24 **Reporters' Note**

25 Under this code, notice may but need not be given prior to the hearing. Giving notice
26 prior to the hearing can foreclose rights to object, such as potential objections by devisees under
27 prior wills. On the other hand, requiring prior notice can significantly delay the opening of an
28 estate. Pursuant to Section 2-405, a personal representative, following the appointment, must
29 always give notice to the heirs and devisees. Should the petition not request the appointment of a
30 personal representative, this section requires that the heirs and devisees be given notice prior to
31 the hearing.

1 Contestants of a will have the burden of establishing lack of testamentary intent or capacity,
2 undue influence, fraud, duress, mistake or revocation.

3 **Reporters' Note**

4 This section is a shortened version of Section 3-407 of the Uniform Probate Code.

5 **SECTION 2-208. EFFECT OF ORDER; VACATING OF ORDER.** Subject to

6 appeal and subject to vacation as provided in this section, and within the time allowed for appeal,
7 an order probating a will or that the decedent left no valid will, and an order determining heirs, is
8 final as to all persons who were properly notified of the proceeding with respect to all issues
9 concerning the decedent's estate that the court considered or might have considered, except that:

10 (1) The court shall entertain a petition for modification or vacation of its order and
11 probate of another will of the decedent if the proponents of the later-offered will were given no
12 notice of the earlier proceeding.

13 (2) If intestacy of all or part of the estate has been ordered, the determination of heirs of
14 the decedent may be reconsidered if it is shown that one or more persons were omitted from the
15 determination and it is also shown that the persons were (i) unaware of their relationship to the
16 decedent, (ii) unaware of the decedent's death, or (iii) given no notice of the earlier proceeding.

17 (3) A petition for vacation under paragraph (1) or (2) must be filed prior to the earlier of
18 the following time limits:

19 (A) if a personal representative has been appointed for the estate, the time of entry
20 of any order approving final distribution of the estate, or, if the estate is closed by statement, six
21 months after the filing of the closing statement; or

22 (B) if a personal representative has not been appointed for the estate, twelve
23 months after the entry of the order sought to be vacated.

1 (4) The order originally rendered in the prior proceeding may be modified or vacated, if
2 appropriate under the circumstances, by the order of probate of the later-offered will or the order
3 redetermining heirs.

4 **Reporters' Note**

5 This section is based on Section 3-412(1)-(4) of the Uniform Probate Code.

6 **SECTION 2-209. PROCEEDINGS CONCERNING APPOINTMENT OF**
7 **PERSONAL REPRESENTATIVE.**

8 (a) A petition to adjudicate priority or qualification of a personal representative may be
9 combined with a petition to probate a will or determine intestacy. The petition shall describe the
10 question relating to priority or qualification of the personal representative which is to be
11 resolved.

12 (b) After notice to interested persons, including any previously appointed personal
13 representative and any person claiming priority for appointment as personal representative, the
14 court shall determine who is entitled to appointment under Section 2-305, make a proper
15 appointment and, if appropriate, terminate any prior appointment.

16 **Reporters' Note**

17 This section is a shortened version of Section 3-414 of the Uniform Probate Code.

18 **PART 3. PERSONAL REPRESENTATIVE; APPOINTMENT, CONTROL AND**
19 **TERMINATION OF AUTHORITY**

20 **SECTION 2-301. NECESSITY FOR ADMINISTRATION.** To acquire the powers
21 and undertake the duties and liabilities of a personal representative of a decedent, a person must
22 be appointed by order of the court, qualify and be issued letters. Administration of an estate is
23 commenced by the issuance of letters.

1 **Reporters' Note**

2 This section is copied from Section 3-103 of the Uniform Probate Code.

3 **SECTION 2-302. QUALIFICATION.** Prior to receiving letters, a personal
4 representative shall qualify by filing with the appointing court an acceptance of office and any
5 required bond.

6 **Reporters' Note**

7 This section is identical to Section 3-601 of the Uniform Probate Code.

8 **SECTION 2-203. BOND NOT REQUIRED WITHOUT COURT ORDER,**
9 **EXCEPTIONS.** Bond may be required by court order at the time of appointment of a personal
10 representative but in making this determination the court shall consider whether the will relieves
11 the personal representative of bond. No bond is required of any personal representative who,
12 pursuant to statute, has deposited cash or collateral with an agency of this [tribal jurisdiction] to
13 secure performance of the personal representative's duties.

14 **Reporters' Note**

15 This section is based in part on Section 3-603 of the Uniform Probate Code

16 **SECTION 2-304. CONSENT TO JURISDICTION.** By accepting appointment, a
17 personal representative submits personally to the jurisdiction of the court in any proceeding
18 relating to the estate that may be instituted by any interested person. Notice of any proceeding
19 shall be delivered to the personal representative, or mailed to the personal representative by
20 ordinary first class mail at the address as listed in the application or petition for appointment or
21 as thereafter reported to the court and to the personal representative's address as then known to
22 the petitioner.

1 **Reporters' Note**

2 This section is similar to Section 3-602 of the Uniform Probate Code.

3 **SECTION 2-305. PRIORITY AMONG PERSONS SEEKING APPOINTMENT AS**
4 **PERSONAL REPRESENTATIVE.**

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

6 (1) the person designated in a probated will including a person nominated by a
7 power conferred in a will;

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

9 (3) other devisees of the decedent;

10 (4) the surviving spouse of the decedent;

11 (5) other heirs of the decedent;

12 (6) [the tribe] or any other qualified person;

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

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

23 (d) This section governs priority for appointment of a successor personal representative

1 but does not apply to the appointment of a special representative.

2 **Reporters' Note**

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

5
6 **SECTION 2-306. ORDER RESTRAINING PERSONAL REPRESENTATIVE.** If it
7 appears that the personal representative may take some action that would jeopardize
8 unreasonably the interest of the petitioner or of some other interested person. The court may
9 order the personal representative to refrain from performing specified acts of administration,
10 disbursement or distribution, or make any other order to secure proper performance of the
11 personal representative's duty.

12 **Reporters' Note**

13 This section is identical to Section 3-607(a) of the Uniform Probate Code.

14 **SECTION 2-307. TERMINATION OF APPOINTMENT; GENERAL.** Termination
15 of appointment of a personal representative ends the right and power pertaining to the office of
16 personal representative as conferred by this [code] or any will, except that a personal
17 representative, at any time prior to distribution or until restrained or enjoined by court order, may
18 perform acts necessary to protect the estate and may deliver the assets to a successor
19 representative. Termination does not discharge a personal representative from liability for
20 transactions or omissions occurring before termination, or relieve the personal representative of
21 the duty to preserve assets subject to the representative's control, to account therefore and to
22 deliver the assets. Termination does not affect the jurisdiction of the court over the personal
23 representative.

24 **Reporters' Note**

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

1 one year after the filing.

2 (c) The resignation of a personal representative terminates the persona; representative's
3 appointment. A personal representative may resign only upon approval of the court.

4 (d) Except as otherwise ordered by the court, the probate of a will subsequent to the
5 appointment of a personal representative in intestacy, the probate of a will which is superseded
6 by probate of another will, or the vacation of the probate of a will under which the personal
7 representative was appointed, terminates the personal representative's appointment upon the
8 appointment of a qualified successor.

9 **Reporters' Note**

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

12
13 **SECTION 2-310. SUCCESSOR PERSONAL REPRESENTATIVE.** After
14 appointment and qualification, a successor personal representative may be substituted in all
15 actions and proceedings to which the former personal representative was a party, and no
16 additional notice, process or claim need be given to or served upon the successor in order to
17 preserve any prior position or right the person giving the notice or filing the claim had with
18 reference to the former personal representative.

19 **Reporters' Note**

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

21 **SECTION 2-311. SPECIAL ADMINISTRATOR; APPOINTMENT; POWERS**
22 **AND DUTIES.**

23 (a) A special administrator may be appointed by order of the court on the petition of any
24 interested person and finding, after notice and hearing, that appointment is necessary to preserve
25 the estate or to secure its proper administration. If it appears to the court that an emergency

1 exists, appointment may be ordered without notice.

2 (b) If a special administrator is to be appointed pending the probate of a will, the person
3 named executor in the will shall be appointed if available and qualified. In other cases, any
4 qualified person may be appointed special administrator.

5 (c) A special administrator has the power of a regular personal representative except as
6 specified in the appointment and duties as prescribed in the order.

7 (d) The appointment of a special administrator terminates in accordance with the
8 provisions of the order of appointment, or on the appointment of a regular personal
9 representative. In other cases, the appointment of a special administrator is subject to
10 termination as provided in Sections 2-307 through 2-309.

11 **Reporters' Note**

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

14 **PART 4. DUTIES AND POWERS OF PERSONAL REPRESENTATIVE**

15 **SECTION 2-401. ADMINISTRATION; NATURE OF PROCEEDING.**

16 Administration of a decedent's estate, whether the decedent had a will or died intestate, is a
17 single proceeding to secure complete administration and settlement of a decedent's estate under
18 the continuing authority of the court which extends until entry of an order approving distribution
19 of the estate and discharging the personal representative. A personal representative is responsible
20 to the court, as well as to the interested persons, and is subject to directions concerning the estate
21 made by the court on its own motion or on the motion of any interested person.

22 **Reporters' Note**

23 This section is based in part of Section 3-501 of the Uniform Probate Court. Unlike the
24 UPC, which provides for both supervised and unsupervised administration, this Code provides
25 for only one type of administration which at all times is under the continuing authority of the
26

1 court.

2

3

SECTION 2-402. TIME OF ACCRUAL OF DUTIES AND POWERS. The duties

4

and powers of a personal representative commence upon the personal representative's

5

appointment. The powers of a personal representative relate back in time to give acts by the

6

person appointed which are beneficial to the estate occurring prior to appointment the same

7

effect as those occurring thereafter.

8

Reporters' Note

9

This section is copied from a portion of Section 3-701 of the Uniform Probate Code.

10

SECTION 2-403. GENERAL DUTIES; RELATION AND LIABILITY TO

11

PERSONS INTERESTED IN ESTATE; STANDING TO SUE.

12

(a) A personal representative is a fiduciary who shall observe the standards of care

13

applicable to trustees. A personal representative is under a duty to settle and distribute the estate

14

of the decedent in accordance with the terms of any probated will and this [code], and as

15

expeditiously and efficiently as is consistent with the best interests of the estate. A personal

16

representative shall use the authority conferred by this [code], the terms of the will, if any, and

17

any order in proceedings to which the personal representative is party for the best interests of the

18

estate.

19

(b) A personal representative may not be surcharged for acts of administration or

20

distribution if the conduct in question was authorized at the time.

21

(c) Except as to proceedings that do not survive the death of the decedent, a personal

22

representative of a decedent domiciled in this [tribal jurisdiction] at death has the same standing

23

to sue and be sued in the courts of this [tribal jurisdiction] and the courts of any other jurisdiction

24

as the decedent had immediately prior to death.

1 **Reporters' Note**

2 This section is a shortened version of Section 3-703 of the Uniform Probate Code.

3 **SECTION 2-404. PERSONAL REPRESENTATIVE TO PROCEED WITHOUT**
4 **COURT ORDER; EXCEPTION.** A personal representative shall proceed expeditiously with
5 the settlement and distribution of a decedent's estate and, except as otherwise specified or
6 ordered by the court or in this [code], may do so without adjudication, order, or direction of the
7 court, but a personal representative may invoke the jurisdiction of the court, in proceedings
8 authorized by this [code], to resolve questions concerning the estate or its administration.

9 **Reporters' Note**

10 This section is identical to Section 3-704 of the Uniform Probate Code.

11 **SECTION 2-405. DUTY OF PERSONAL REPRESENTATIVES:**
12 **INFORMATION TO HEIRS AND DEVISEES.**

13 (a) Not later than 30 days after appointment every personal representative, except any
14 special administrator, shall give information of the appointment to the heirs and devisees.

15 (b) The information shall be delivered or sent by ordinary mail to each of the heirs and
16 devisees whose address is reasonably available to the personal representative. The information
17 shall include the name and address of the personal representative, indicate that it is being sent to
18 persons who have or may have some interest in the estate being administered, indicate whether
19 bond has been filed, and describe the court where papers relating to the estate are on file. The
20 information shall state that the estate is being administered by the personal representative under
21 the [Tribal Jurisdiction] Probate Code and that recipients are entitled to information regarding
22 the administration from the personal representative and can petition the court in any matter
23 relating to the estate, including distribution of assets and expenses of administration.

1 (c) The personal representative's failure to give this information is a breach of the
2 personal representative's duty to the persons concerned but does not affect the validity of the
3 personal representative's appointment, powers or other duties.

4 **Reporters' Note**

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

6 **SECTION 2-406. DUTY OF PERSONAL REPRESENTATIVE; INVENTORY**
7 **AND APPRAISEMENT.**

8 (a) Within three months after appointment, a personal representative other than a special
9 administrator or a successor to another representative who has previously discharged this duty,
10 shall prepare and file an inventory of property owned by the decedent at the time of the
11 decedent's death, listing it with reasonable detail, and indicating as to each listed item, its fair
12 market value as of the date of the decedent's death, and the type and amount of any encumbrance
13 that may exist with reference to any item.

14 (b) The personal representative shall send a copy of the inventory to interested persons
15 who request it. The personal representative shall also file the original of the inventory with the
16 court.

17 **Reporters' Note**

18 This section is identical to Section 3-706 of the Uniform Probate Code.

19 **SECTION 2-407. EMPLOYMENT OF APPRAISERS.** The personal representative
20 may employ a qualified and disinterested appraiser or appraisers to assist the personal
21 representative in ascertaining the fair market value as of the date of the decedent's death of any
22 asset the value of which may be subject to reasonable doubt. The names and addresses of any
23 appraiser shall be indicated on the inventory with the item or items appraised.

1 **Reporters' Note**

2 This section is similar to Section 3-707 of the Uniform Probate Code.

3 **SECTION 2-408. DUTY OF PERSONAL REPRESENTATIVE;**

4 **SUPPLEMENTAL INVENTORY.** The personal representative shall file a supplemental
5 inventory with the court where the original inventory was filed if the personal representative
6 learns that property was not included in the original inventory or that the value or description for
7 any item in the original inventory was erroneous or misleading. The personal representative shall
8 mail or deliver a copy of the supplemental inventory to the persons sent a copy of the original
9 inventory and to other interested persons who request it.

10 **Reporters' Note**

11 This section is a modified version of Section 3-708 of the Uniform Probate Code.

12 **SECTION 2-409. DUTY OF PERSONAL REPRESENTATIVE; POSSESSION OF**

13 **ESTATE.** Except as otherwise provided by a decedent's will, every personal representative has
14 a right to, and shall take possession or control of the decedent's property, except that any real
15 property or tangible personal property may be left with or surrendered to the person
16 presumptively entitled thereto unless or until, in the judgment of the personal representative,
17 possession of the property by the personal representative will be necessary for purposes of
18 administration. The personal representative shall pay taxes on, and take all steps reasonably
19 necessary for the management, protection and preservation of, the estate in the personal
20 representative's possession. The personal representative may maintain an action to recover
21 possession of property or to determine its title.

22 **Reporters' Note**

23 This section is similar to Section 3-709 of the Uniform Probate Code.

1 personal representative.

2 **Reporters' Note**

3 This section is a modified version of Section 3-717 of the Uniform Probate Code.

4 **SECTION 2-417. POWERS OF SURVIVING PERSONAL REPRESENTATIVE.**

5 Unless the terms of the will otherwise provide, every power exercisable by personal co-
6 representatives may be exercised by the one or more remaining after the appointment of one or
7 more is terminated.

8 **Reporters' Note**

9 This section is a partial enactment of Section 3-718 of the Uniform Probate Code.

10 **SECTION 2-418. COMPENSATION OF PERSONAL REPRESENTATIVE.**

11 (a) Personal representatives and the attorneys for personal representative are entitled to
12 reasonable compensation for services as approved by the court. Reasonable compensation may
13 include compensation for the services of the agents or employees of the person seeking
14 compensation and may also include reimbursement for costs advanced. A determination of
15 reasonable compensation shall be based on the following factors:

16 (1) The time and labor involved;

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

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

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

22 (5) The nature and value of the assets of the estate, the amount of income earned
23 by the estate, and the responsibilities and potential liabilities assumed by the person;

1 (6) The time limitations imposed by the circumstances; and

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

4 (b) If a will provides for compensation of the personal representative and there is no
5 contract with the decedent regarding compensation, the personal representative may renounce the
6 provision before qualifying and be entitled to reasonable compensation. A personal
7 representative also may renounce the right to all or any part of the compensation.

8 **Reporters' Note**

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

11 **SECTION 2-419. EXPENSES IN ESTATE LITIGATION.** If any personal
12 representative or person nominated as personal representative defends or prosecutes any
13 proceeding in good faith, whether successful or not, the personal representative is entitled to
14 receive from the estate necessary expenses and disbursements including reasonable attorneys'
15 fees incurred.

16 **Reporters' Note**

17 This section is identical to Section 3-720 of the Uniform Probate Code.

18 **SECTION 2-420. INDIVIDUAL LIABILITY OF PERSONAL**
19 **REPRESENTATIVE.**

20 (a) Unless otherwise provided in the contract, a personal representative is not individually
21 liable on a contract properly entered into in the personal representative's fiduciary capacity in the
22 course of administration of the estate unless the personal representative fails to reveal the
23 representative capacity or identify the estate in the contract.

24 (b) A personal representative is individually liable for obligations arising from ownership
25

1 or control of the estate or for torts committed in the course of administration of the estate only if
2 the personal representative is personally negligent.

3 (c) Claims based on contracts entered into by a personal representative in a fiduciary
4 capacity, on obligations arising from ownership or control of the estate or on torts committed in
5 the course of estate administration may be asserted against the estate by proceeding against the
6 personal representative in the representative's fiduciary capacity, whether or not the personal
7 representative is individually liable therefor.

8 **Reporters' Note**

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

10 **PART 5. CREDITORS' CLAIMS**

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

12 **ADMINISTRATION.** No proceeding to enforce a claim against the estate of a decedent or the
13 decedent's successors may be revived or commenced before the appointment of a personal
14 representative. This section does not limit whatever right a secured creditor might otherwise
15 have to enforce a right to the security but it does limit the right of a secured creditor to a
16 deficiency judgment.

17 **Reporters' Note**

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

19 **SECTION 2-502. POWER TO AVOID TRANSFERS.** The property liable for the

20 payment of unsecured debts of a decedent includes all property transferred by the decedent by
21 any means which is in law void or voidable as against the decedent's creditors. Subject to prior
22 liens, the right to recover this property, so far as necessary for the payment of unsecured debts of
23 the decedent, is exclusively in the personal representative.

1 **Reporters' Note**

2 This section is identical to Section 3-710 of the Uniform Probate Code.

3 **SECTION 2-503. NOTICE TO CREDITORS.**

4 (a) Unless notice has already been given under this section, a personal representative
5 upon appointment shall publish a notice to creditors once a week for two successive weeks in a
6 newspaper of general circulation in the [tribal jurisdiction] announcing the appointment and the
7 personal representative's address and notifying creditors of the decedent to present their claims
8 within four months after the date of the first publication of the notice or the claim may be barred.

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

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

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

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

19 (3) The creditor was neither known to nor reasonably ascertainable by the
20 personal representative within four months after the first publication of notice as provided in
21 subsection (a).

22 (d) No personal representative is liable for a non-negligent or non-willful failure to give
23 notice to a particular creditor. Liability, if any, for such failure shall attach to the estate.

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Reporters' Note

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

SECTION 2-504. STATUTES OF LIMITATIONS.

(a) Unless an estate is insolvent or would thereby be rendered insolvent, the personal representative, with the consent of all successors whose interests would be affected, may waive any defense of limitations available to the estate.

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

(c) For purposes of a statute of limitations, the presentation of a claim pursuant to Section 2-506 is equivalent to commencement of a proceeding on the claim.

Reporters' Note

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

SECTION 2-505. LIMITATIONS ON PRESENTATION OF CLAIMS.

(a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or nonclaim statute, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

- (1) As to creditors barred by publication, four months after the first publication of notice as provided in Section 2-503(a);
- (2) As to creditors barred by written notice, on the date specified in Section 2-

1 503(b);

2 (3) As to all creditors, within one year after the decedent's death.

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

5 (c) Nothing in this section affects or prevents:

6 (1) Except as to a deficiency judgment, any proceeding to enforce any mortgage,
7 pledge, or other lien upon property of the estate; or

8 (2) To the limits of the insurance protection only, any proceeding to establish
9 liability of the decedent or the personal representative for which there is protection through
10 liability insurance.

11 **Reporters' Note**

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

13 **SECTION 2-506. MANNER OF PRESENTATION OF CLAIMS.**

14 (a) Claims against a decedent's estate may be presented as follows:

15 (1) The claimant may deliver or mail to the personal representative a written
16 statement of the claim indicating its basis, the name and address of the claimant, and the amount
17 claimed or may file a written statement of the claim with the clerk of the court, in the form
18 prescribed by court rule, and mail or deliver a copy thereof to the personal representative. The
19 claim is deemed presented on the first to occur of receipt of the written statement of claim by the
20 personal representative, or the filing of the claim with the court.

21 (2) If a claim is not yet due, the date when it will become due shall be stated. If
22 the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim
23 is secured, the security shall be described.

1 allowance has been appealed, and for costs and expenses of administration.

2 (b) By petition to the court in a proceeding for the purpose, a claimant whose claim has
3 been allowed but not paid may secure an order directing the personal representative to pay the
4 claim to the extent funds of the estate are available to pay it.

5 (c) The personal representative at any time may pay any valid claim that has not been
6 barred, with or without formal presentation, but is personally liable to any other claimant whose
7 claim is allowed and who is injured by its payment if:

8 (1) payment was made before the expiration of the time limit stated in subsection
9 (a); or

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

12 **Reporters' Note**

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

14 **SECTION 2-510. CLAIMS NOT DUE AND CONTINGENT OR**
15 **UNLIQUIDATED CLAIMS.**

16 (a) If a claim which will become due at a future time or a contingent or unliquidated
17 claim, becomes due, or certain, before the distribution of the estate, and if the claim has been
18 allowed it is paid in the same manner as presently due and absolute claims of the same class.

19 (b) In other cases the personal representative or, on petition of the personal representative
20 or the claimant in a special proceeding for the purpose, the claim shall be paid as the court may
21 direct.

22 **Reporters' Note**

23 This section is a partial enactment of Section 3-810 of the Uniform Probate Code.

1 (c) Proof that a distributee has received an instrument or deed of distribution of assets in
2 kind, or payment in distribution, from a personal representative, is conclusive evidence that the
3 distributee has succeeded to the interest of the estate in the distributed assets, as against all
4 persons interested in the estate, except that the personal representative may recover the assets or
5 their value if the distribution was improper.

6 **Reporters' Note**

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

9
10 **SECTION 2-606. PROPOSAL FOR DISTRIBUTION.** After the probable charges
11 against the estate are known, the personal representative may mail or deliver a proposal for
12 distribution to all persons who have a right to object to the proposed distribution. The right of
13 any distributee to object to the proposed distribution on the basis of the kind or value of asset the
14 distributee is to receive if not waived earlier in writing, terminates if the distributee fails to object
15 in writing received by the personal representative within 30 days after mailing or delivery of the
16 proposal but only if the proposal informed the distributee of the right to object and of the
17 applicable time limit.

18 **Reporters' Note**

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

20 **SECTION 2-607. IMPROPER DISTRIBUTION; LIABILITY OF DISTRIBUTE.**
21 Unless the distribution or payment no longer can be questioned because of adjudication,
22 estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who
23 was improperly paid, is liable to return the property improperly received and its income since
24 distribution if the distributee or claimant has the property. If the distributee or claimant does not
25 have the property, then the distributee or claimant is liable to return the value as of the date of

1 disposition of the property improperly received and its income and gain received by the
2 distributee or claimant.

3 **Reporters' Note**

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

5 **SECTION 2-608. PRIVATE AGREEMENTS AMONG SUCCESSORS TO**
6 **DECEDENT BINDING ON PERSONAL REPRESENTATIVE.** Subject to the rights of
7 creditors and taxing authorities, competent successors may agree among themselves to alter the
8 interests, shares, or amounts to which they are entitled under the will of the decedent, or under
9 the laws of intestacy, in any way that they provide in a written contract executed by all who are
10 affected by its provisions. The personal representative shall abide by the terms of the agreement
11 subject to the obligation to administer the estate for the benefit of creditors, to pay all taxes and
12 costs of administration, and to carry out the responsibilities of the office for the benefit of any
13 successors of the decedent who are not parties.

14 **Reporters' Note**

15 This section is a partial enactment of Section 3-912 of the Uniform Probate Code.

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

20 **Reporters' Note**

21 This section is derived from Section 3-914(a) of the Uniform Probate Code. It is placed in
22 brackets to indicate that an enacting tribal government will need to modify it to match its
23 unclaimed property statute or practice.
24

1 **SECTION 2-610. DISTRIBUTION TO INCAPACITATED PERSON.**

2 (a) A personal representative may discharge an obligation to distribute the share of a
3 person for whom a conservator has been appointed only by distributing to the conservator. If the
4 personal representative is aware that a proceeding for appointment of a conservator is pending,
5 the personal representative shall delay distribution until the proceeding is decided.

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

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

10 (2) A guardian of the minor;

11 (3) A custodian of the minor as authorized by a uniform gifts or transfers to
12 minors act of any applicable jurisdiction;

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

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

17 (c) A personal representative may discharge an obligation to distribute the share of an
18 adult person not under conservatorship but who the representative in good faith believes lacks
19 capacity to manage his or her property or financial affairs by distributing the share as provided in
20 the decedent's will or, in the absence of directions in the will, by distributing the share to:

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

23 (2) A guardian of the adult person;

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

4 (d) The personal representative is not responsible for the proper application of money or
5 property distributed pursuant to this section.(a) A personal representative may discharge an
6 obligation to distribute to any person who is a minor or incapacitated person by distributing in a
7 manner expressly provided in the will.

8 **Reporters' Note**

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

10 **PART 7. CLOSING ESTATES**

11 **SECTION 2-701. PROCEEDINGS TERMINATING ADMINISTRATION; 12 ORDER OF GENERAL PROTECTION.**

13 (a) The administration of an estate may be concluded by an order of complete settlement.
14 The personal representative may petition for an order of complete settlement after four months
15 from the appointment of the original personal representative, and any other interested person
16 may petition after one year from the appointment of the original personal representative. The
17 petition of the personal representative shall be granted as a matter of course, but other petitions
18 shall be granted only if there is good cause.

19 (b) The petition shall request the court to approve the account or to compel and approve
20 an accounting, and to adjudicate the final settlement and distribution of the estate.

21 (c) After notice to all interested persons and hearing, and the filing of proof that a copy of
22 the accounting was mailed to the heirs and devisees entitled to distribution of the remaining
23 assets of the estate, and to all known creditors and other claimants whose claims are neither paid

1 nor barred, the court may enter the appropriate orders, terminate the personal representative's
2 appointment, and discharge the personal representative from further claims or demands.

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

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

7 **Reporters' Note**

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

9 **SECTION 2-702. CLOSING ESTATES; BY SWORN STATEMENT OF**
10 **PERSONAL REPRESENTATIVE.**

11 (a) Alternatively, a personal representative may close an estate by filing with the court no
12 earlier than six months after the date of original appointment of a personal representative for the
13 estate, a verified statement stating that the personal representative, or a previous personal
14 representative, has:

15 (1) determined that notice to creditors was properly given and that the time limited
16 for presentation of creditors' claims has expired;

17 (2) fully administered the estate of the decedent by making payment, settlement,
18 or other disposition of all claims that were presented, expenses of administration and taxes,
19 except as specified in the statement, and that the assets of the estate have been distributed to the
20 persons entitled. If any claims remain undischarged, the statement must state whether the
21 personal representative has distributed the estate subject to possible liability with the agreement
22 of the distributees, or state in detail other arrangements that have been made to accommodate
23 outstanding liabilities; and

1 for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's
2 estate.

3 **Reporters' Note**

4 This section is identical to Section 3-1005 of the Uniform Probate Code.

5 **SECTION 2-705. LIMITATIONS ON ACTIONS AND PROCEEDINGS**

6 **AGAINST DISTRIBUTEES.** Unless previously adjudicated or otherwise barred, the claim of a
7 claimant to recover from a distributee who is liable to pay the claim, and the right of an heir or
8 devisee, or of a successor personal representative acting in their behalf, to recover property
9 improperly distributed or its value from any distributee is forever barred (i) if a claim by a
10 creditor of the decedent, one year after the decedent's death, and (ii) any other claimant and any
11 heir or devisee, at the later of three years after the decedent's death or one year after the time of
12 its distribution. This section does not bar an action to recover property or value received as a
13 result of fraud.

14 **Reporters' Note**

15 This section is similar to Section 3-1006 of the Uniform Probate Code.

16 **SECTION 2-706. SUBSEQUENT ADMINISTRATION.** If other property of the
17 estate is discovered after an estate has been settled and the personal representative discharged or
18 after one year after a closing statement has been filed, the court upon petition of any interested
19 person and upon notice as it directs, may appoint the same or a successor personal representative
20 to administer the subsequently discovered estate. If a new appointment is made, unless the court
21 orders otherwise, the provisions of this [code] apply as appropriate; but no claim previously
22 barred may be asserted in the subsequent administration.

1 **Reporters' Note**

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

3 **PART 8.**

4 **SUMMARY ADMINISTRATION PROCEDURE FOR SMALL ESTATES**

5 **SECTION 2-801. SMALL ESTATES; SUMMARY ADMINISTRATION**

6 **PROCEDURE.** If it appears from the inventory and appraisal that the value of the entire estate,
7 less liens and encumbrances, does not exceed homestead allowance, exempt property, family
8 allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable
9 and necessary medical and hospital expenses of the last illness of the decedent, the personal
10 representative may, without giving notice to creditors, immediately disburse and distribute the
11 estate to the persons entitled thereto, and file a closing statement as provided in Section 2-702

12 **Reporters' Note**

13 This section is identical to Section 3-1203 of the Uniform Probate Code.

14 **SECTION 2-802. SMALL ESTATES; CLOSING BY SWORN STATEMENT OF**
15 **PERSONAL REPRESENTATIVE.**

16 (a) Unless prohibited by order of the court and except for estates being administered by
17 supervised personal representatives, a personal representative may close an estate administered
18 under the summary procedures of Section 2-801 by filing with the court, at any time after
19 disbursement and distribution of the estate, a verified statement stating that:

20 (1) to the best knowledge of the personal representative, the value of the entire
21 estate, less liens and encumbrances, did not exceed homestead allowance, exempt property,
22 family allowance, costs and expenses of administration, reasonable funeral expenses, and
23 reasonable, necessary medical and hospital expenses of the last illness of the decedent;

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

3 (3) the personal representative has sent a copy of the closing statement to all
4 distributees of the estate and to all creditors or other claimants of whom the personal
5 representative is aware whose claims are neither paid nor barred, and has furnished a full account
6 in writing of the personal representative's administration to the distributees whose interests are
7 affected.

8 (b) If no actions or proceedings involving the personal representative are pending in the
9 court one year after the closing statement is filed, the appointment of the personal representative
10 terminates.

11 (c) A closing statement filed under this section has the same effect as one filed under
12 Section 2-702.

13 **Reporters' Note**

14 This section is identical to Section 3-1204 of the Uniform Probate Code.

15 **PART 9. DELIVERY OF PERSONAL PROPERTY TO FOREIGN PERSONAL** 16 **REPRESENTATIVES; ANCILLARY ADMINISTRATION**

17 **SECTION 2-901. DEFINITIONS.** In this [article]

18 (1) "local administration" means administration by a personal representative appointed in
19 this tribal jurisdiction pursuant to appointment proceedings described in this [Article].

20 (2) "local personal representative" includes any personal representative appointed in this
21 tribal jurisdiction pursuant to appointment proceedings described in this [Article].

22 (3) "resident creditor" means a person domiciled in, or doing business in this tribal
23 jurisdiction, who is, or could be, a claimant against an estate of a non-resident decedent.

1 **Reporters' Note**

2 This section is identical to Section 4-101 of the Uniform Probate Code.

3 **SECTION 2-902. PAYMENT OF DEBT AND DELIVERY OF PROPERTY TO**
4 **DOMICILIARY FOREIGN PERSONAL REPRESENTATIVE WITHOUT LOCAL**
5 **ADMINISTRATION.**

6 (a) At any time after the expiration of 60 days from the death of a nonresident decedent,
7 any person indebted to the estate of the nonresident decedent or having possession or control of
8 personal property, or of an instrument evidencing a debt, obligation, stock or chose in action
9 belonging to the estate of the non-resident decedent may pay the debt, deliver the personal
10 property, or the instrument evidencing the debt, obligation, stock or chose in action, to the
11 domiciliary foreign personal representative of the nonresident decedent upon being presented
12 with proof of the representative's appointment and an affidavit made by or on behalf of the
13 representative stating:

14 (1) the date of the death of the nonresident decedent,

15 (2) that no local administration, or application or petition therefor, is pending in
16 this [tribal jurisdiction],

17 (3) that the domiciliary foreign personal representative is entitled to payment or
18 delivery.

19 (b) Payment or delivery made in good faith on the basis of the proof of authority and
20 affidavit releases the debtor or person having possession of the personal property or of the
21 instrument evidencing a debt, obligation, stock, or chose in action to the same extent as if
22 payment or delivery had been made to a local personal representative.

23 (c) Payment or delivery under this section may not be made if a resident creditor of the

1 nonresident decedent has notified the debtor of the nonresident decedent or the person having
2 possession of the personal property or of the instrument evidencing a debt, obligation, stock, or
3 chose in action belonging to the nonresident decedent that the debt should not be paid nor the
4 property delivered to the domiciliary foreign personal representative.

5 **Reporters' Note**

6 This section combines Sections 4-201, 4-202, and 4-203 of the Uniform Probate Code.

7 **SECTION 2-903. ANCILLARY AND OTHER LOCAL ADMINISTRATIONS;**

8 **PROVISIONS GOVERNING.** In respect to a nonresident decedent, the provisions of this
9 [Article] of this [code] govern:

10 (1) proceedings, if any, in a court of this tribal jurisdiction for probate of the will,
11 appointment, removal, supervision, and discharge of the local personal representative, and any
12 other order concerning the estate; and

13 (2) the status, powers, duties and liabilities of any local personal representative and the
14 rights of claimants, purchasers, distributees and others in regard to a local administration.

15 **Reporters' Note**

16 This section is based on Section 4-207 of the Uniform Probate Code.

17 **SECTION 2-904. FINAL DISTRIBUTION TO DOMICILIARY**

18 **REPRESENTATIVE.** The estate of a non-resident decedent being administered by a personal
19 representative appointed in this [tribal jurisdiction] shall, if there is a personal representative of
20 the decedent's domicile willing to receive it, be distributed to the domiciliary personal
21 representative for the benefit of the successors of the decedent unless (i) by virtue of the
22 decedent's will, if any, and applicable choice of law rules, the successors are identified pursuant
23 to the local law of this [tribal jurisdiction] without reference to the local law of the decedent's

1 domicile; (ii) the personal representative of this state, after reasonable inquiry, is unaware of the
2 existence or identity of a domiciliary personal representative; or (iii) the court orders otherwise
3 in a proceeding for a closing order under Section 2-701 or incident to the closing of a supervised
4 administration. In other cases, distribution of the estate of a decedent shall be made in
5 accordance with the other [parts] of this [article].

6 **Reporters' Note**

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

8 **SECTION 2-905. JURISDICTION BY ACT OF FOREIGN PERSONAL**

9 **REPRESENTATIVE.** A foreign personal representative, submits personally to the jurisdiction
10 of the courts of this tribal jurisdiction in any proceeding relating to the estate by (I) filing
11 certified copies of the personal representative's appointment in the other jurisdiction, (ii)
12 receiving payment of money or taking delivery of personal property under Section 2-902, or (iii)
13 doing any act as a personal representative in this jurisdiction which would have given the tribe
14 jurisdiction over the representative as an individual. Jurisdiction under clause (ii) is limited to
15 the money or value of personal property collected.

16 **Reporters' Note**

17 This section is similar to Section 4-301 of the Uniform Probate Code.

18 **SECTION 2-906. SERVICE ON FOREIGN PERSONAL REPRESENTATIVE.**

19 Notice shall be given to a foreign personal representative in the manner prescribed by
20 Section 1-303.

21 **Reporters' Note**

22 This section is similar to South Dakota Codified Laws Section 29A-4-303.

1 **ARTICLE III**

2 **INTESTATE AND TESTATE SUCCESSION**

3 **PART 1.**

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

5 **Subpart 1. Basic Intestate Succession Scheme – Non-Trust Property**

6 **SECTION 3-101. INTESTATE ESTATE.** The intestate estate is any part of a

7 decedent’s estate not effectively disposed of by will. The net intestate estate, which is the

8 balance of the decedent’s estate after claims, expenses, statutory allowances for the spouse and

9 children, exempt property, and property which is not otherwise barred from distribution by

10 Tribal law or Tribal leasing regulations, passes by intestate succession to the decedent’s heirs as

11 described in this code.

12 **Reporters’ Note**

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

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

27
28 **SECTION 3-102. SHARE OF SPOUSE.**

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

30 (1) no descendant of the decedent survives the decedent or (2) all of the decedent’s surviving

1 descendants are also descendants of the surviving spouse.

2 (b) The intestate share of a decedent’s surviving spouse is one-half of the entire net
3 intestate estate if the decedent is survived by one or more descendants who are not also
4 descendants of the surviving spouse.

5 **Reporters’ Note**

6 TPCs take numerous approaches in determining the spousal share. The drafted model
7 provision falls between codes that provide for the entire estate always to pass to the surviving
8 spouse (if there is one) to those that limit the spouse to $\frac{1}{2}$ if there are any surviving issue (*See*
9 *e.g.* Chitimacha TPC § 302, Fort Peck § 106(a)(1)) to those that reduce the spousal share to a
10 different fraction (*e.g.* Jicarilla TPC Chapter 8 § (B) ($\frac{1}{4}$ to spouse, $\frac{3}{4}$ to surviving children as to
11 separate property) or in a greater number of instances, *e.g.* when the decedent is survived by
12 parents or siblings, rather than only descendants. *See, e.g.*, Lummi Nation TPC Chapter 35.05
13 §35.05.010 (“the surviving spouse shall receive . . . $\frac{3}{4}$ of the net separate estate if there is no
14 surviving issue, but he intestate is survived by one or more of his parents, or by one or more of
15 the issue of one or more of his parents.”).

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

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

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

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

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

24 (4) if there is no surviving descendant, parent, sibling, or descendant of a sibling,
25 but the decedent is survived by one or more grandparents or surviving descendants of
26 grandparents:

27 (A) half to the decedent’s surviving paternal grandparent or grandparents
28 equally, or if neither has survived, to his, her or their descendants (*i.e.* cousins) by representation,

1 with the other half passing to the maternal side in the same manner.

2 (B) if the decedent is survived by one or more grandparents or descendants
3 of grandparents on one side but not the other, the entire intestate estate shall pass as described in
4 paragraph (4)(A) to the ancestral side with the surviving member or members.

5 **Reporters' Note**

6 *See* Reporters' Note to drafted provision 3-102.

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

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

29 A completely different approach would sidestep statutory identification of heirship status
30 or priority, and leave that determination to the tribal court. For example:

31 When any member of the Tribe dies leaving property other than trust real estate or
32 other trust property subject to the jurisdiction of the United States, any member
33 claiming to be heir of the decedent may bring suit in the Tribal Court to have the
34 Court determine the heirs of the decedent." [provisions re notice, then] In the
35 determination of heirs the Court shall apply the custom of the Tribe as to
36 inheritance if such custom is proved. Otherwise, the Court shall apply to be his
37 heir . . . the Tribal Court may, in its discretion, turn over the question of
38 determination of heirs and distribution of a descendant's property to a state court.

1 approach, which depending on its form, generally either completely cuts out or cuts in
2 descendants of pre-deceased relatives at some degree of relationship to the decedent. Like most
3 probate codes, however, these drafted provisions adopt a representational scheme.

4 There are essentially three commonly employed methods of representation: pure (aka
5 strict or classic) per stirpes, modified (aka modern) per stirpes, and per capita with representation
6 at each generation (which is followed under the current UPC). Depending on the particular facts
7 of the decedent's estate, the outcomes may differ, and sometimes drastically. the difference
8 between the three approaches generally turns on the generation at which the estate is initially
9 divided into equal shares, with pure per stirpes ensuring vertical equality of the shares among the
10 decedent's (or others') descendants and per capita ensuring horizontal equality of the shares
11 within each generation of heirs. Modified per stirpes splits the difference somewhat, flattening
12 (but not erasing) the potential for wide horizontal disparity of shares. For example, assume the
13 following facts, with the individuals who are bolded and in brackets having predeceased the
14 decedent, and thus ineligible to take from the decedent's estate [work with hypo & formatting]:

Hypothetical	Decedent		
	[Child A]	[Child B]	[Child C]
	GC 1 & 2	GC 3	GC 4, 5 & 6
Approach	Pure per stirpes	Modified per stirpes	Per capita at each gen.
Intestate Outcome	Grandchildren 1 & 2 would each take ½ of 1/3 (or 1/6) of the decedent's estate; grandchild 3 would take all of 1/3 of the decedent's estate; grandchildren 4, 5 & 6 would each take 1/3 of 1/3 (or 1/9) of the decedent's estate.	All grandchildren would each take 1/6 of the decedent's estate.	All grandchildren would each take 1/6 of the decedent's estate. If, for example, Grandchildren 1, 2, and 3 had all also predeceased the decedent, a modified per stirpes approach would give their descendants the share that they each would have taken. A Per Capita at Each Generation approach would combine 2/3 of the decedent's estate and distribute it equally among those qualified to take in the next generation.

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

1 **Reporters' Note**

2
3 This drafted provision intentionally avoids overt discussion of many forms of assistive
4 reproductive technology, e.g., surrogacy arrangements and posthumously conceived children
5 using cryogenically preserved, or posthumously retrieved, sperm. Moreover, it does not clearly
6 address frozen embryos, but instead leaves to the tribal court to determine whether a
7 cryogenically preserved embryo is already “in gestation” such that the provision above would
8 apply.

9 A provision that instead referenced “persons conceived” would probably be construed
10 identically to “in gestation.” A provision that required the person to be “in utero” would clearly
11 exclude ex utero, or frozen, embryos.

12
13 *See, e.g.*, International Fertility Law Group <http://www.iflg.net/indian-child-welfare-act>
14 (briefly discussing interplay of some of these issues within the Indian Child Welfare Act);
15 Kimberly Self, *Self-Interested: Protecting the Cultural and Religious Privacy of Native*
16 *Americans through the Promotion of Property Rights in Biological Materials*, 35 Am. Indian L.
17 Rev. 729 (2010-2011).

18
19 Some codes, e.g. Chitimacha § 306, do not require survival of own birth.

20
21 **SECTION 3-108. PARENT/CHILD RELATIONSHIP; DEFINITIONS.** In this

22 [subpart]:

23 (1) “Adoptee” means an individual whose adoption is legal under tribal and federal law.

24 [drafting note: could deal explicitly with customary adoption or equitable adoption here, or hold
25 for definitions/elsewhere]

26 (2) “Genetic father” means the man whose sperm fertilized the egg of a child’s genetic
27 mother. If the father-child relationship is established under the presumption of paternity under
28 [insert applicable law], the term means only the man for whom that relationship is established.

29 (3) “Genetic mother” means the woman whose egg was fertilized by the sperm of a
30 child’s genetic father.

31 (4) “Relative” means a grandparent or a descendant of a grandparent.

32 **SECTION 3-109. PARENT-CHILD RELATIONSHIP; MARITAL STATUS.**

33 Except as altered through adoption, a parent-child relationship exists between a child and the

1 child’s genetic parents, regardless of whether the parents are married to each other, upon proof of
2 parentage under Tribal law. Except as altered through adoption, a parent-child relationship does
3 not exist between a stepchild or foster child and the step- or foster parent.

4 **Reporters’ Note**
5

6 The drafted provision follows the broader trend within probate codes to avoid
7 distinguishing maternity from paternity in determining heirship status. The TPC could instead
8 choose to preserve the distinction, and/or could specify the manner of proof and the timing of the
9 determination. For example:

10
11 Person born out of wedlock is not treated as the child of the father unless the
12 person is openly and notoriously so treated by the father or unless paternity has
13 been judicially determined during the life of the father
14

15 Chitimacha § 213(b)(6) (Rules of Construction and Intention). Note, however, that the quoted
16 code provision was limited to construction of the meaning of a term used in a will rather than a
17 broader limit to heirship status.
18

19 For a sample jurisdictional clause:
20

21 The Court shall have jurisdiction of all suits brought to determine the paternity of
22 a child and to obtain a judgment for the support of the child. A judgment of the
23 Court establishing the identity of the father of the child shall be conclusive of that
24 fact in all subsequent determination of inheritance by the Department of the
25 Interior or by the Court.
26

27 Blackfeet Tribal Law and Order Code, Ch. 3 § 3.
28

29 For a sample broad clause placing evidentiary control within the court: “the words
30 ‘children’ and ‘issue’ include adopted children and children of unwed parents where the
31 Secretary of the Interior or the Tribal Court determines that paternity has been acknowledged or
32 established[.]” Fort Peck TPC Title 12 § 106(b). For a sample provision that provides no special
33 rule either way: “For the purposes of inheritance by, through, and from any child, the effects and
34 treatment of the parent-child relationship shall not depend on whether or not the parents have
35 been married.” Lummi Nation TPC title 35 § 35.05.020.
36

37 **SECTION 3-110. PARENT BARRED FROM INHERITING IN CERTAIN**
38 **CIRCUMSTANCES.**

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

40 (1) the parent’s parental rights were terminated and the parent-child relationship

1 was not judicially reestablished; or
2 (2) the child died before reaching [18] years of age and there is clear and
3 convincing evidence that immediately before the child’s death, the parental rights of the parent
4 could have been terminated under any Tribal or state law on the basis of nonsupport,
5 abandonment, abuse, neglect, or other similar actions or inactions of the parent toward the child.

6 (b) For the purpose of intestate succession from or through the deceased minor child, a
7 parent who is barred from inheriting under this section is treated as if the parent predeceased the
8 child.

9 **Reporters’ Note**

10
11 The drafted provision represents a minor trend within probate codes, and bears both
12 merits and demerits. On the plus side, it arguably ensures that the presumed intent of minor
13 children, who by necessity will die intestate, is met. Moreover, it may modestly contribute to the
14 quality of parentage of the minor child, although relevant data would be difficult to collect. On
15 the minus side, it might create more litigation than it is worth, and involve difficult questions
16 over what it takes to be a parent and who gets to determine whether that standard has been met.
17 The drafted provision tries to mediate the negatives by including a relatively precise assessment
18 standard.

19
20 For an example of a TPC including this sort of provision, see e.g.:

21
22 Given the philosophy that wherever possible family life should be strengthened
23 and preserved and that the issue of severing the parent-child relationship is of
24 such vital importance as to require a judicial determination in place of attempts at
25 severance by contractual arrangements, express or implied, for the surrender or
26 relinquishment of children.

27
28 An Order terminating the parent-child relationship shall have the same effect on
29 the legal rights, privileges, duties, and obligations, including rights of inheritance
30 of the parent and the child with respect to each other, as it would have had such
31 action taken place under State Law.

32
33 Blackfeet Law and Order Code Ch. 3, § 6(J) (Proceedings for the Termination of Parent-Child
34 Relationship). See also Fort Peck TPC Title 12 § 106(12)(b)(2) (extending inheritance bar to
35 rights flowing “up” as well as those flowing “down”).
36

1 **SECTION 3-111. INHERITANCE BY, FROM, AND THROUGH ADOPTED**
2 **CHILD.**

3 (a) Subject to subsection (c), if an adoption is complete and lawful under tribal and
4 federal law, a parent-child relationship exists between an adoptee and the adoptee's adoptive
5 parent or parents, and no longer exists between an adoptee and the adoptee's biological parent or
6 parents.

7 (b) Subject to subsection (c), if the adoption is lawful but not yet complete when an
8 intended adoptive parent dies intestate, a parent-child relationship nevertheless exists between
9 the adoptee and that intended adoptive parent, and no longer exists between an adoptee and the
10 adoptee's biological parent or parents, but only if:

11 (1) there is clear and convincing evidence that the adoption would have been
12 completed but for the adoptive parent's death; or

13 (2) if the spouse of the intended adoptive parent either proceeds with and is
14 granted the adoption or is the biological parent of the intended adopted child and survives the
15 intended adoptive parent by 120 hours.

16 (c) The termination of the adoptive child's right to continue to inherit from and through
17 the child's biological parent or parents shall not apply if:

18 (1) the decree of adoption provides for the continuation of the adoptee's
19 inheritance rights from the biological family;

20 (2) the adoptive parent is either a spouse, relative, or the spouse of a relative of
21 either genetic parent; or

22 (3) the child is adopted after the death of both genetic parents.

1 **Reporters' Note**

2
3 State TPCs vary widely over the extent to which children retain inheritance rights from
4 their biological families after an adoption is complete. The drafted provision generally cuts off
5 inheritance lines between the child and the biological family except for the three instances
6 identified (specific order; step-parent or relative adoption; post-death adoption). Note that in
7 each of them, the inheritance rights would continue to flow “down” (i.e. to the adopted child)
8 rather than “up” (i.e. back to the biological family). A TPC could provide that the child’s rights
9 to inherit remain irrespective of the circumstances of the adoption, which is the less common
10 approach taken in state PCs. *See, e.g.*, “An adopted person is the child of an adopting parent and
11 of the natural parents for inheritance purposes only.” Chitimacha TPC § 309.

12
13 For an example of provision deferring to state law: “All members of the Blackfeet Indian Tribe
14 shall hereafter be governed by State Law and subject to state jurisdiction with respect to
15 adoptions hereafter consummated.” Blackfeet Law and Order Code, Ch. 3, § 8 (Adoption).

16
17 **SECTION 3-112. STATUS OF SPOUSE.** For purposes of testate and intestate
18 succession, the Tribal court has the ability to determine spousal status based upon tribal law or
19 custom or any other law, including the rights of parties within a same-sex marriage and the
20 extent to which abuse, abandonment, or other similar conduct disqualifies a spouse from intestate
21 succession rights.

22 **Reporters' Note**

23
24 [Drafting note: to what extent should the MTPC address who & how gets to determine
25 marriage and divorce?] Some tribes defer to state law on the issues of marriage and divorce.
26 Some tribes explicitly reject common law marriage or divorce. *See, e.g.*, “All members of the
27 Blackfeet Indian Tribe shall hereafter be governed by State Law and subject to State Jurisdiction
28 with respect to marriage hereafter consummated. Common-law marriages and Indian Customs
29 marriage shall not be recognized within the Blackfeet Reservation.” Blackfeet Tribal Law and
30 Order Code, Chapter 3 Domestic Relations, § 1 (Marriage). (See also § 2, which similarly
31 abolishes Indian customs divorces.) [Drafting note: the MTPC could provide something more
32 explicit, e.g., divorce & annulment mean “no surviving spouse” unless later marriage; decree of
33 separation is not to be considered a divorce.” *See, e.g.*, Chitimacha Ch. 1, § 115 (Effect of
34 Divorce, Annulment, and Decree of Separation).

35
36 The issue of same sex marriage presents an interesting question within Indian Country.
37 In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the USSCT held that the 14th Amendment Due
38 Process and Equal Protection clauses protected the rights of same sex couples to marry, and that
39 states could not refuse to recognize lawful same sex marriages performed in other states.
40 However, the rights protected by the Fourteenth Amendment are not enforceable against tribal
41 governments. *See, e.g.*, *Talton v. Mayes*, 163 U.S. 376 (1896). Moreover, the Indian Civil

1 Rights Act of 1968, 25 U.S.C. § 1301-1303, does not require Indian Nations to protect all
2 Constitutional rights, instead extending that protection only to certain rights within the Bill of
3 Rights. Even those that must be protected, such as those involving the rights of criminal
4 defendants, provide some leeway through which tribes are able to interpret the scope of the
5 individual protection through tribal norms.
6

7 It is unclear whether or to what extent tribes would want to address the issue within tribal
8 probate codes. For an discussion of how tribes have handled civil liberties generally, see Elmer
9 R. Ruscoal, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions*
10 *in Tribal Constitutions*, 14 Am. Indian L. Rev. 269 (1990). For extended treatment of the legal,
11 political, and sociocultural ramifications of the issue, including the extent to which individual
12 rights have often (unfairly?) been castigated as sounding the death knell to collectivist tribal
13 concerns, see Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 Ariz. State L.
14 J. 889 (2003). For general discussion of same-sex marriage within tribal cultures, see, e.g.,
15 Trista Wilson, *Changed Embraces, Changes Embraced? Renouncing the Heterosexist Majority*,
16 36 Am. Indian L. Rev. 161 (2012); Gregory Smithers, *Will Gay Marriage Split Indian Country?*
17 *Indian Country Today* (5/30/15).
18

19 [Drafting note: General Status Question: some tribes have limits on inheritance by non-
20 Indians. See, e.g., Chitimacha Chapter 5, § 501, which incorporates Tribal Constitutional
21 provisions that essentially limit such rights to a life estate, surviving spouse and/or children
22 included.]
23

24 **Subpart 3. Alterations to the Basic Scheme**

25 **SECTION 3-112. ADVANCEMENTS.**

26 (a) Any property that an intestate decedent gave during life to one who ends up being
27 entitled to an intestate share is considered an advancement. The value of an advancement is
28 deducted from that heir's intestate share, but only upon written proof, made either by the
29 decedent or the recipient, that clearly reflects that intent through formal or informal language.

30 (b) The writing shall control the effect of the advancement, such as the value of the
31 advance and whether it will affect distribution where the recipient has predeceased the intestate
32 decedent leaving descendants entitled to take by representation. Absent intent expressed in the
33 writing, advances shall not bind descendants of the recipient who take by representation, and
34 property advanced is valued as of the time the heir came into possession or enjoyment of the
35 property or at the decedent's death, whichever first occurs.

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

2
3 [Drafting notes: left out other forms of alterations, e.g. family settlement (no possibility for
4 family settlement agreement to alter the intestate outcome; see *Estate of Teresa Mitchell*, 25
5 IBIA 88 (I.B.I.A.), 1993 WL 581562 (1993), which stated that family settlement agreements are
6 not recognized under federal law, and that state law re execution and construction of wills not
7 imported or incorporated into federal law on point). Neither releases and assignments nor
8 negative wills seemed critical for inclusion.]
9

10 **PART 2. INTESTATE SUCCESSION OF TRUST AND RESTRICTED REAL AND**

11 **PERSONAL PROPERTY**

12 [To be added as possible provisions per AIPRA]

13
14 **PART 3. TESTATE SUCCESSION OF TRUST AND NON-TRUST PROPERTY**

15 **Subpart 1. Will Execution and Revocation**

16 **SECTION 3-301. WHO MAY MAKE A WILL.** Any person of sound mind who is 18
17 years or older, or any emancipated minor, may make a will.

18 **Reporters' Note**

19
20 This provision could provide more detail incorporating mental state, e.g. "A will shall be
21 deemed to be valid if the decedent had a sane mind and understood what he was doing when he
22 made the will and was not subject to any undue influence of any kind from another person[.]"
23 Blackfeet Tribal Law and Order Code Ch. 3 § 5; Same basic provision Chitimacha TPC Chapter
24 2 (Wills), § 201 (Who May Make a Will).
25

26 **SECTION 3-302. EXECUTION; WITNESSED WILLS; HOLOGRAPHIC**

27 **WILLS.**

28 (a) [Witnessed Wills.] Except as otherwise provided in subsection (b) [holographic] and
29 Section 3-307, a will must be:

30 (1) in writing;

31 (2) dated;

32 (3) signed by the testator [or by another who signs the testator's name at the
33 testator's request and in the testator's conscious presence] in the presence of both witnesses;

1 Every devise or bequest given in any will or codicil to a subscribing
2 witness, or to the husband or wife of such subscribing witness, shall be void
3 unless such will or codicil is legally attested without the signature of such witness,
4 or unless such devisee or legatee is an heir to the testator. The competency of
5 such witness shall not be affected by any such devise or bequest. The interest of
6 any witness in any community, church, society, association of corporation,
7 beneficially interested in any devise or bequest, shall not affect such devise or
8 bequest or the competency of such witness.

9
10 Additionally, the language of the regulations suggests that holographic and oral wills are
11 completely prohibited, that signature by proxy is not permitted, that publication is still
12 demanded, that the will must have been read by or read to the testator before execution, etc.
13 While some of these provisions remain in state codes, many (if not most) have streamlined the
14 rules on the theory that the ends (upholding intent, avoiding carelessness, thoughtlessness, or
15 fraud) may be as well and more easily met through other formality sets that impose fewer
16 burdens and costs.

17
18 There are a few theories and directions that the MTPC could take here:

19
20 1. As the federal regulations only apply to trust or restricted land or trust personalty, a
21 tribe is always free to alter the wills formalities for non-covered property, and it appears that
22 many tribes do (e.g. by permitting oral wills or holographic wills). However, the difficulty is
23 that doing so creates confusion and facilitates unintended outcomes, whereby a single will may
24 be valid only as to some (non-trust or restricted) of the decedent's property. The more efficient
25 approach would be to track the more restrictive execution requirements for *all* wills to ensure
26 compliance under any federal, tribal, or state system. If the formalities are super clear, and
27 relatively cheaply accomplished, then the unfair effects of a strict rule set are mitigated (even if
28 they cannot be avoided entirely).

29
30 2. Perhaps a particular tribe could seek approval of a tribal probate code that supplanted
31 (and presumably, liberalized) the execution requirements found in the regulations. The difficulty
32 there, however, is that the federal government might resist, fearing the inefficiency created if
33 OHA had to pass on the validity of a will under a number of possibly different tribal codes. It
34 might be that the "validity" function could be determined at the tribal level, with the probate
35 packet then sent on to OHA for subsequent administration.

36
37 3. The ambiguity of 15.4 (date and "execute" your will in writing and have it attested by
38 two disinterested adult witnesses) does create some flexibility over what "execution" means, in
39 which case some of the additional requirements – e.g. publication & presence – are only
40 demanded to render a will *self-proving* rather than to make it initially valid. But that doesn't
41 entirely solve matters. A related problem is the tension caused by having a party swear to a more
42 restrictive set of requirements to make the will "self proved" than are necessary to render the will
43 valid, in which case that witness is exposed to a perjury charge as well as subject to more intense
44 scrutiny over the veracity of the representations necessary to support initial will validity. Indeed,
45 it might be that swearing to a ceremony that did not actually take place could expose the will
46 more readily to a successful challenge based on undue influence. Admittedly, the requirement of

1 “disinterested witnesses” mitigates this somewhat, but that partly turns on how tightly or loosely
2 the court defines who is interested and who is not. The mismatch is problematic, and counsels
3 toward approach #1 in the absence of some belief that approach #2 would work.
4

5 4. It does appear that under IBIA decisions interpreting other provisions of Title 43 regs,
6 approach #3 holds water. For example, in *Estate of Sarah Stewart Sings Good*, 57 IBIA 65
7 (I.B.I.A.), 2013 WL 3054080 (2013), a will challenger asserted that the will was improperly
8 executed for failing to meet the asserted requirements of publication and witness request as set
9 forth in the proposed self-proving affidavit form. The IBIA disagreed. To the Board, although
10 “the will scrivener should perhaps have crossed out the language relating to publication and a
11 request to sign before using BIA's standard form affidavit,” the failure to do so did not impose
12 additional execution requirements beyond those enumerated in 25 C.F.R. §§ 15.3, 15.4. *Id.* at
13 76, quoting *Estate of Lena Abbie Big Bear Yellow Eagle*, 17 IBIA 237, 238-39 (1989) (citing
14 *Estate of Carrie Standing Haddon Miller*, 10 IBIA 128, 132 (1982) (holding that an Indian
15 testatrix is neither required to publish her will nor be the person to request the witnesses to sign
16 in order for the will to be properly executed)). The Board continued by recognizing that “at
17 most, the absence of these formalities could defeat the self-proving character of the will, in
18 which case testimony must be obtained from the will witnesses if they are available[.]” *Id.*,
19 citing *Estate of Margerate Arline Glenn*, 50 IBIA 5, 28 (2009); *Estate of Sallie Fawbush*, 34
20 IBIA 254, 257 (2000).
21

22 Nevertheless, the mismatch between what the regulations require for a valid will and
23 those strongly suggested within the self-proving affidavit forms create ambiguity and potential
24 for confusion and mistake.
25

26 The drafted provision does not recognize oral wills, which is consistent with federal law.
27 See *Estate of Nels John Johnson*, 55 IBIA 171 (I.B.I.A.), 2012 WL 8436502 (2012) (no federal
28 statute or regulation recognizes oral wills); *Estate of Baz Nip Pah*, 22 IBIA 72, 74 (1992)
29 (“Oral wills cannot be recognized for the purpose of conveying trust or restricted property.”).
30 However, this may be a point for tribes to consider, as some TPCs do recognize them for non-
31 trust or restricted property. Example: “valid as an oral will under Chitimacha custom, if all
32 children, whether residing in testator’s home or not, and testator’s spouse, if alive, are present at
33 the announcement of the oral will and agree that the testator orally made known the testator’s last
34 will before them.” Chitimacha, § 204.
35

36 The drafted provision does, however, recognize holographic wills. This is inconsistent
37 with federal law, which somewhat confusingly (depending on how “holographic” is defined, i.e.
38 as handwritten) states that holographic wills are valid if also witnessed by two disinterested adult
39 witnesses. See, e.g., *Estate of Julia Tieyah*, 11 IBIA 211 (I.B.I.A.), 1983 WL 41947 (1983).
40 Some TPCs also recognize. Sample: “[valid] whether or not witnessed, if the signature and the
41 material provisions are in the handwriting of the testator.” Chitimacha §203.
42

43 The MTPC should offer different choices & options, along with ramifications. For
44 example, it might include the holographic will but with reservations – as noted above – given the
45 competition w/ federal law & the clarity of having one standard that works for all. Rationale:
46 with the enhanced estate planning efforts as promoted under AIPRA etc. has come a proliferation

1 of will forms. What is more, the desire to avoid the more unpopular components of default
2 intestacy provisions, and the more general desire to encourage, enhance, and uphold the
3 actuation of testamentary freedom, suggest that more rather than fewer opportunities for valid
4 will execution are desirable.

5
6 If a tribe determines that holographic wills are worth the costs of confusion vis-à-vis fed
7 law, a number of variations exist between tighter rules, strictly construed, and looser ones,
8 flexibly construed. For example, could require that the will be “entirely handwritten, dated, and
9 signed,” or only “material portions + signature” in t’s handwriting. Suggest that MTPC go w/
10 loosest possible if going to have at all, to support the practice (sloppy, but common) where will
11 forms are filled in by hand, signed, but never appropriately witnessed. Moreover, if there is an
12 independent requirement that “testamentary intent” exist, that should somewhat mitigate the
13 concern that a draft document or worksheet would be considered a will.

14
15 Along those lines, the drafted provision permits testamentary intent to be established
16 through different methods, by contrast to some approaches that require it to appear on the face of
17 the document. The tradeoff general cuts as efficiency versus intent, b/c the evidentiary burdens
18 can be high when the decedent’s intent is the touchstone. Could avoid entirely by directing to
19 tribal evidentiary code, but that seems to kick the drafting can.

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

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

37
38 For an example of an open-ended determination resting with the tribal court, see Navajo
39 Nation TPC § 3 (“A will shall be deemed valid . . . if the will was made in accordance with a
40 proved Navajo custom or made in writing and signed by the decedent in the presence of two
41 witnesses who also signed the will.”).

42
43 **SECTION 3-303. HARMLESS ERROR.** Although a document or writing added upon
44 a document was not executed in compliance with Section 3-302, the document or writing is

1 treated as if it had been executed in compliance with that section if the proponent of the
2 document or writing establishes by clear and convincing evidence that the decedent intended the
3 document or writing to constitute:

- 4 (1) the decedent’s will,
- 5 (2) a partial or complete revocation of the will,
- 6 (3) an addition to or an alteration of the will, or
- 7 (4) a partial or complete revival of a formerly revoked will or of a formerly revoked
8 portion of the will.

9 **Reporters’ Note**

10
11 This provision would not comport with federal law, which appears to require strict
12 compliance (at least on the validity, although perhaps not on the “self-proved” front) by stating
13 “you *must* meet [certain requirements]. [Drafting notes: check all TPCs for this sort of
14 provision. Also: was feared in the states that adopted this from UPC 2-503, but not seem like
15 there has been a welter of litigation on point anyway. Intent-enhancing, of course, shifts heavy
16 lifting to “what is intent, and how can it be established.”]

17
18 **SECTION 3-304. CODICIL.** A codicil is a document meeting the requirements of
19 either Section 3-302 or 3-303 that is intended to alter or supplement, rather than replace, an
20 existing will. A codicil need not reference or be attached to the existing will.

21 **Reporters’ Note**

22
23 Federal law requires that the codicil be physically attached, which in part undermines its
24 utility but enhances efficiency. Cite fed reg.

25
26 **SECTION 3-305. SELF-PROVED WILL.**

27 (a) A witnessed (but not holographic) will or codicil may be made self-proved at any time
28 at or after its execution by the acknowledgment thereof by the testator and the affidavits of the
29 witnesses, each made before an officer authorized to administer oaths under the laws of the
30 jurisdiction in which the acknowledgment occurs and evidenced by the officer’s certificate,

1 under official seal, attached or annexed to the will or codicil in substantially the following form:
2 [Insert Tribal Jurisdiction]

3 I, [testator], swear or affirm under penalty of perjury that on [date], I requested [Witness
4 #1 and Witness #2] to act as witnesses to my will; that I ____declared to them that the document
5 was my last will; that I signed the will in the presence of both witnesses; that they signed the will
6 as witnesses in my presence and in the presence of each other; that the will was read and
7 explained to me (or read by me), after being prepared and before I signed it, and it clearly and
8 accurately expresses my wishes; and that I willingly made and executed the will as my free and
9 voluntary act for the purposes expressed in the will.

10 _____ Testator

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

18 _____ Witness #1

19 _____ Witness #2

20 Subscribed and sworn to or affirmed before me this [date] by _____, the
21 Testator, and by _____ and _____, witnesses.

22 (Seal)

23
24

(Signed)

1
2
3 _____
(Official capacity of officer)

4 (b) A signature affixed to a self-proving affidavit attached to a will is considered a
5 signature affixed to the will, if necessary to prove the will's due execution. If so, however, the
6 will is not to be considered self-proved.

7 (c) A will that is self-proved creates a rebuttable presumption that all execution
8 formalities have been met. If a will is self-proved, it is not necessary than an attesting witness
9 testify in court or that other evidence of proper execution be presented as to the circumstances of
10 its execution.

11 **Reporters' Note**

12
13 This provision is related to the earlier discussion regarding the mismatch between the
14 requirements for validity and the requirements to make a will self-proved, and is drafted to
15 comport with the federal regulations found in 25 CFR §§ 15.7 and 15.8. Again, whatever the
16 tribe determines within its own TPC, the question remains over whether/to what extent it would
17 meet the existing rules for trust/restricted property.
18

19 On allowing the signature on the SPA to count as a disinterested witness's signature to
20 the will: see *Estate of Edward Kappaisruk Ramoth, Sr.*, 56 IBIA 271 (I.B.I.A.), 2013 WL
21 3054072 (2013) (clarifying earlier dicta to hold that a will signed by only one disinterested
22 witness along with a notary's signature on the self-proving affidavit could qualify as a validly
23 executed (although not self-proved) will, irrespective of the intent with which the notary signed
24 the affidavit).
25

26 Note that b/c of some semantic difficulty, this drafted provision avoids a single-paragraph
27 acknowledgment/attestation as can sometimes be found in TPCS. See, e.g., Chitimacha § 205
28 (Self-Proved Will-Form).
29

30 **SECTION 3-306. WHO MAY WITNESS.** Any disinterested adult individual
31 generally competent to be a witness under Tribal law may act as a witness to a will. The spouse
32 or close relative of a witness is not considered interested unless that witness is also a beneficiary
33 under the will. A will executed without the required number of disinterested witnesses is invalid.
34

1 **Reporters' Note**

2
3 This provision is very strict. It was drafted to signal the requirement of, and to comport
4 with, CFR reg 15.4, and again implicates the questions raised above about the desirability of
5 moving all “validity” requirements to the highest common denominator to avoid inadvertent
6 partial intestacy.

7
8 Should the tribe decide that it would prefer a more forgiving rule regarding witness
9 qualification, there are options:

10
11 No “disinterested witness” requirement at all, as per UPC & many states. Theory:
12 “punishment” not fit the “crime,” can always directly attack the will itself on grounds of
13 undue influence if concern is significant enough; trap for unwary in that most people trust
14 their family members the most, and thus would naturally gravitate toward requesting the
15 very people they’ve distributed property to under the will to also serve as witnesses
16 thereto. Language: [alt: the signing of a will by an interested witness does not invalidate
17 the will or any provision of it].

18 Middle ground: purge, perhaps with broader definition of interested witness: “A will is
19 not invalidated because it is signed by an interested witness; but, unless the will is also
20 signed by two other disinterest witnesses, any beneficial provision of the will in favor of
21 a witness or the witness’s spouse is invalid to the extent that such provisions in the
22 aggregate exceed in value what the witness or spouse would have received had the
23 testator died intestate.” See, e.g., Chitimacha TPC § 206 (Who May Witness).

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

34
35 **SECTION 3-307. CHOICE OF LAW AS TO EXECUTION.** A written will is valid
36 if executed in compliance with Section 3-502 or 3-503 or if its execution complies with the law
37 at the time and in the place of execution, the place of the testator’s domicile at execution, or the
38 place of the testator’s domicile at death.

39 **Reporters' Note**

40
41 Again, this provision does not align with federal law depending on what the “other”
42 jurisdiction demands for the valid will. But the valuable goal here is to validate as many wills as

1 possible within certain channeling parameters (i.e. the laws of the other jurisdiction, rather than a
2 broader “anything goes.”). Sample: “A written will is valid if executed in compliance with this
3 Probate Code or if its execution complies with the law at the time of execution of the place
4 where the will is executed, or of the law of the place where at the time of execution or at the time
5 of death of the testator is domiciled.” Chitimacha TPC § 207.

6
7 **SECTION 3-308. REVOCATION OF WILL.**

8 (a) A will, or any part thereof, is revoked:

9 (1) by executing a later will that revokes the prior will, in whole or in part, either
10 expressly or by inconsistency. A later will revokes a prior one by inconsistency if the testator
11 intended the later will, or part of the will, to replace rather than supplement the prior will; or

12 (2) by wholly destroying the prior will with the intent to revoke it, if destroyed by
13 the testator or by anyone else at the testator’s request and in the testator’s conscious presence, if
14 these facts are established by two disinterested witnesses; or

15 (3) unless the parties remarry before the testator’s death, upon a final divorce
16 decree or annulment, in which case the prior will is revoked to the extent that it benefitted the
17 testator’s former spouse or any of the former spouse’s relatives who are not also relatives of the
18 testator.

19 (b) A testator is presumed to intend partial replacement rather than supplementation if the
20 later will alters the identity of the recipient of a specific devise or completely disposes of the
21 testator’s estate, as through a residuary clause. A testator is presumed to have intended
22 supplementation rather than replacement if the later will does not make a complete disposition of
23 the testator’s estate.

24 (c) If a will that was known to have been in the possession of the testator before death is
25 not found after the testator’s death, it is presumed to have been destroyed by the testator with the
26 intent to revoke it. This presumption is rebuttable by a preponderance of the evidence upon

1 either direct proof of, or circumstances suggesting that, there was no revocatory intent.

2 **Reporters' Note**

3
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.

24
25 Regarding the presumption re lost wills: there was discussion at the first Committee
26 Meeting over whether that presumption was useful or appropriate within the present context.
27 Rather than reversing the common law presumption entirely, the draft retains it but highlights
28 that it may be rebutted under the lower, preponderance standard. A tribe could decide to retain
29 the original presumption with strength (e.g. rebuttable through C&C evidence) or to completely
30 remove any presumption along these lines.

31
32 Although presumptions pertaining to lost wills are nowhere codified in federal law, the
33 Board has applied it in fairly traditional ways. Generally, the Board follows a two-step process
34 to assess whether to approve a copy of a will in the absence of its original. “First, the record
35 must establish that the will was properly executed, and, second, the absence of the original will
36 must be adequately accounted for in order to defeat the presumption that the original was
37 destroyed by the testator with the intent to revoke it.” *Estate of Dennis Calf Looking*, 52 IBIA
38 1, 4, 2010 WL 2771673 (2010), citing *Estate of Eli*, 2 IBIA at 67, 80 I.D. at 622; *Estate of*
39 *Wishenko*, 8 IBIA at 147; and *Estate of Anthony Bitseedy*, 5 IBIA 270, 272 (1976), *aff’d Dawson*
40 *v. Kleppe*, No. CIV-77-0237 (W.D. Okla Oct. 27, 1977). In *Dennis Calf Looking*, the Board
41 determined that the presumption should not in fact apply given that there was insufficient
42 evidence that the testator had taken possession of the original will, which was instead likely
43 retained by the agency given its then-existing practice of locking the original in a safe located in
44 a Realty vault. On lost wills generally, see *Estate of Florence Night Chase*, 38 IBIA 188 IBIA,
45 02-148 2002 WL 32345895 (2002) (reiterating that federal and not state law controls the

1 assessment of lost wills regarding trust or restricted property).

2
3 **SECTION 3-309. REVIVAL OF REVOKED WILL.** A will that has been revoked by
4 any method can only be revived by the re-execution of its terms or by other clear and convincing
5 evidence of the testator's intent to revive.

6 **Reporters' Note**

7
8 This flattens somewhat the provisions re presumptions for revival that are possible, e.g.
9 the interplay between later wills wholly v. partially revoking earlier ones. Instead, it requires
10 proof of intent for any form of revival. To consider: whether (a) the MTPC should have a
11 revival provision at all, (b) if so, whether it should include circumstances under which revival is
12 presumed. As drafted, this provision is a softened anti-revival stance. E.g.: Chitimacha Tribe
13 has provision on revival, but it is effectively anti-revival and only applies to revocation of Will 2
14 by Will 3. Sec. 210 (Revival of Revoked Will).

15
16 **Subpart 2. Will Challenges, Composition, and Construction**

17 **SECTION 3-310. WILL CHALLENGES.** A will or document offered for probate
18 may be challenged or contested on the grounds of lack of proper execution, lack of testamentary
19 capacity, lack of testamentary intent, undue influence, or fraud.

20 **Reporters' Note**

21 [Consider extent to which should list or identify factors found in IBIA decisions exploring
22 Undue Influence & Testamentary Capacity.]

23
24 **SECTION 3-311. COMPOSITION OF A WILL; INCORPORATION BY**

25 **REFERENCE.** A will consists of any written pages that are literally, physically present at the
26 execution of the will and are intended by the testator to be part of the will. However, a will may
27 incorporate a writing that is not literally, physically present at its execution if:

- 28 (1) the writing is in existence at execution;
- 29 (2) the will reflects the intent to incorporate the writing; and
- 30 (3) the will describes the writing sufficiently to permit its identification.

1 **Reporters' Note**

2
3 [Drafting notes: this drafted provision avoids reference to the Uniform Testamentary Additions
4 to Trusts Act, which could be discussed in an implementation guide. Some TPCs include.
5 Model draft also avoids reference to acts or facts with independent significance, contracts
6 regarding estates, and lists of tangible personal property (i.e. UPC 2-513). Again, some of the
7 TPCs do so, but seems like perhaps unwarranted here at this stage.
8

9 Chitimacha has IBR with elements, essentially, as above. See § 211 (IBR). Re Acts with
10 Independent Significance: “A will may dispose of property by reference to acts and events
11 which have significance apart from their effect upon the disposition made by the will, whether
12 they occur before or after the execution of the will or before or after the testator’s death. The
13 execution or revocation of a will of another person is such an event. Chitimacha TPC § 112
14 (Events of Independent Significance).]
15

16 **SECTION 3-312. CONSTRUCTION OF A WILL; GENERAL.** Unless there is clear
17 evidence of contrary intent, wills shall be construed as follows:

18 (1) A will shall apply to all real and personal property that the testator owned at death and
19 all property acquired by the estate after death;

20 (2) A transfer by will of a trust interest in land shall be presumed to include the interest of
21 the testator in any permanent improvements attached to the land;

22 (3) Terms of relationship, such as “brother,” “sister,” “niece,” and “aunt,” are presumed
23 to apply only to those individuals so related to the testator by blood and not by marriage;

24 (4) Terms of relationship, such as “brother,” “sister,” “niece,” and “aunt,” that do not
25 differentiate relationships by the half blood from those by the whole blood are construed to
26 include both types of relationships; and

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

29 **SECTION 3-313. CONSTRUCTION OF A WILL; PENALTY CLAUSE FOR**
30 **CONTEST.** A provision in a will purporting to penalize an interested person for contesting the
31 will or instituting other proceedings relating to the estate is unenforceable if probable cause

1 entitled to share in the amount received by the children to whom devises were made under the
2 will.

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

6 (e) If the testator devised substantially all of the estate to the other parent of the omitted
7 child, the omitted child is not entitled to a share under the will.

8 **SECTION 3-316. WILL CONSTRUCTION REGARDING BENEFICIARIES:**
9 **DEATH OF BENEFICIARY BEFORE TESTATOR.**

10 (a) Subject to subsections (b) and (c), if a beneficiary under a will dies before the testator,
11 the interest that the beneficiary would have taken had the beneficiary survived will lapse unless
12 distributed under subsection (b). A devise other than a residuary devise will lapse to the
13 residuary, if any; otherwise, to intestate succession. A residuary devise will lapse to the other
14 residuary taker or takers, if any; otherwise, to intestate succession. If a member of a class
15 predeceases the testator, the share passes to the surviving class member or members, if any.

16 (b) Subject to subsection (c), if the predeceasing beneficiary was any relative of the
17 testator except a spouse and left descendants who survived the testator by at least 120 hours, the
18 lapsed gift will pass to the predeceasing beneficiary's descendants rather to the takers under
19 subsection (a) above.

20 (c) Subsections (a) and (b) do not apply if the will specifically provides for a contrary
21 result.

22 **Reporters' Note**
23

24 This drafted provision avoids the dispute over survivorship language prompted by the
25 relative specificity demanded within the Uniform Probate Code for sufficiently expressed

1 contrary intent.

2

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

6

7 **SECTION 3-317. WILL CONSTRUCTION REGARDING PROPERTY:**

8 **NONADEMPTION OF SPECIFIC DEVICES.**

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

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

14 (1) any balance of the purchase price, together with any security agreement, owed
15 by a purchaser by reason of sale of the property;

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

18 (3) any proceeds unpaid at death on fire or casualty insurance on or other recovery
19 for injury to the property;

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

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

26 (c) If specifically devised property is sold or mortgaged by a conservator or by an agent

1 acting within the authority of a durable power of attorney for an incapacitated principal, or a
2 condemnation award, insurance proceeds, or recovery for injury to the property is paid to a
3 conservator or to an agent acting within the authority of a durable power of attorney for an
4 incapacitated principal, the specific devisee has the right to a general pecuniary devise equal to
5 the net sale price, the amount of the unpaid loan, the condemnation award, the insurance
6 proceeds, or the recovery.

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

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

13
14 **Reporters’ Note**

15
16 The drafted provision avoids the litigation-producing difficulty of a catch-all provision
17 regarding “anything not intended to be adeemed.” The concept of replacement property is
18 admittedly messy, especially if there is little case law on point. But it seems to cover the
19 possibility that, e.g., where a particular car that was then sold was to go to A, A can take the
20 “replacement car,” especially under a time of death construction.

21
22 [drafting notes: clarify that it doesn’t apply to general devise, or that general can be
23 satisfied out of general estate assets? Also, check against DE’s comment re SD ademption]

24
25 **SECTION 3-318. NONEXONERATION.** A testamentary transfer of any real property
26 passes subject to any mortgage interest existing at the date of the testator’s death, without right
27 of the beneficiary to whom the property was to pass to require that the mortgage indebtedness be
28 paid from the estate’s other assets, unless the will provides specifically to the contrary.

29 **SECTION 3-319. ADEPTION BY SATISFACTION.**

30 (a) Any property that a testator gave during life to a person who was to be a beneficiary
31 of the testator’s estate under the will is treated as a total or partial satisfaction of the beneficiary’s

1 gift under the will if:

2 (1) the will specifically provides for that result; or

3 (2) upon the presentation of any other writing made by either the testator or the
4 beneficiary that clearly reflects that intent.

5 (b) For purposes of partial satisfaction, property given during lifetime is valued as of the
6 time the beneficiary came into possession or enjoyment of the property or at the testator's death,
7 whichever first occurs.

8 **Reporters' Note**

9
10 The drafted provision coordinates requirements for advancement (intestate succession)
11 and satisfaction (testate succession). [Drafting note: be sure that results in one mirror results in
12 the other, e.g. whether descendants bound by the advance/ademption.].

13

14 **SECTION 3-320. REQUIREMENT OF SURVIVAL BY 120 HOURS.**

15 (a) For the purposes of intestate succession, testate succession, joint tenancy with right of
16 survivorship, and other will substitutes requiring survival, and except as provided in subsection

17 (b), an individual who is not established by clear and convincing evidence to have survived
18 another individual by 120 hours is deemed to have predeceased the other individual.

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

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

22 (2) the application of a 120-hour requirement of survival would result in escheat
23 or an unintended failure or duplication of a disposition.

24 (c) In either case referenced in paragraph (b), survival must still be established by clear
25 and convincing evidence.

1 **Reporters’s Note**

2
3 Drafted provision excluded lengthy materials often found in PCs protecting BFPs and
4 exonerating payors of liability, as well as choice of law and powers of appointment. If necessary
5 to cover, implementation guide could address.

6
7 **SECTION 3-321. CLASS GIFTS CONSTRUED TO ACCORD WITH**
8 **INTESTATE SUCCESSION; EXCEPTIONS.**

9 (a) [Definitions.] In this section: [drafting note: place saver until determine all
10 definitions/whether & to what extent MTPC wants to tackle; limited to construction issues under
11 will.]

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

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

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

17 (4) “Functioned as a parent of the child” has the meaning set forth in []

18 (5) “Genetic parent” has the meaning set forth in []

19 (6) “Relative” has the meaning set forth in [].

20 (b) [Terms of Relationship.] A class gift that uses a term of relationship to identify the
21 class members presumptively includes a child of assisted reproduction, a posthumous child, and,
22 except as otherwise provided in subsections (e) and (f), an adoptee and a child born to parents
23 who are not married to each other, and their respective descendants if appropriate to the class, in
24 accordance with the rules for intestate succession regarding parent-child relationships.

25 (c) [Relatives by Marriage.] Terms of relationship in a governing instrument that do not
26 differentiate relationships by blood from those by marriage, such as uncles, aunts, nieces, or

1 nephews, are presumptively construed to exclude relatives by marriage.

2 (d) [Half-Blood Relatives.] Terms of relationship in a governing instrument that do not
3 differentiate relationships by the half blood from those by the whole blood, such as brothers,
4 sisters, nieces, or nephews, are presumptively construed to include both types of relationships.

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

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

9 (2) the adoptive parent was the adoptee's stepparent or foster parent; or

10 (3) the adoptive parent functioned as a parent of the adoptee before the adoptee
11 reached [18] years of age.

12 (f) [Class-Closing Rules.] The following rules apply for purposes of the class-closing
13 rules:

14 (1) A child in utero at a particular time is treated as living at that time if the child
15 lives 120 hours after birth.

16 (2) If a child of assisted reproduction is conceived posthumously and the
17 distribution date is the deceased parent's death, the child is treated as living on the distribution
18 date if the child lives 120 hours after birth and was in utero not later than 36 months after the
19 deceased parent's death or born not later than 45 months after the deceased parent's death.

20 (3) An individual who is in the process of being adopted when the class closes is
21 treated as adopted when the class closes if the adoption is subsequently granted.

22 [Drafting notes: avoids discussion of will substitutes (e.g. life insurance, retirement plans,
23 POD/TOD accounts); Doctrine of Worthier Title.]
24

1 conclusively establishes the convicted individual as the decedent’s killer for purposes of this
2 section.

3 (2) In the absence of a conviction, the court, upon the petition of an interested
4 person, must determine whether, under the preponderance of evidence standard, the individual
5 would be found criminally accountable for the felonious and intentional killing of the decedent.
6 If the court determines that, under that standard, the individual would be found criminally
7 accountable for the felonious and intentional killing of the decedent, the determination
8 conclusively establishes that individual as the decedent’s killer for purposes of this section.

9 **Reporter’s Note**

10 Check AIPRA preadjudication rule to trigger all of this at front end upon charge
11 (indictment, information, etc., by US, tribe, state w/ voluntary manslaughter or homicide) –
12 efficiency/fairness balance (earlier wrap of estate v. no final judgment). Other possibilities:
13 “criminally and intentionally kills” and that “estate of decedent passes as if killer had
14 predeceased decedent.” Could state either “final judgment of conviction of an offense containing
15 the elements of criminal and intentional killing is conclusive for purposes of this Section; In the
16 absence of a conviction of criminal and intentional killing Tribal Court may determine by a
17 preponderance of evidence whether the killing was criminal and intentional for purposes of this
18 Section.” *See, e.g.,* Chitimacha Ch. 1, § 116 (Effect of Homicide on Intestate Succession, Wills,
19 Joint Assets, Life Insurance and Beneficiary Designation).

20
21 **SECTION 3-402. REFORMATION TO CORRECT MISTAKES.** The court may
22 reform the terms of a governing instrument, even if unambiguous, to conform the terms to the
23 transferor’s intention if it is proved by clear and convincing evidence what the transferor’s
24 intention was and that the terms of the governing instrument were affected by a mistake of fact
25 or law, whether in expression or inducement.

26 **PART 5. EXEMPT PROPERTY AND ALLOWANCES**

27 [homestead allowance; exempt property e.g. furniture, auto, furnishings, appliances, personal
28 effects to spouse; if none, to surviving children; interplay w/ security interest; cultural artifacts;
29 family allowance]

30 [drafting in progress].