

**UNIFORM LAWS COMMISSION DRAFTING COMMITTEE
MODEL TRIBAL PROBATE CODE
ISSUES LIST (9/22/15)**

**ARTICLE 1
GENERAL PROVISIONS, DEFINITIONS, JURISDICTION OF COURT**

The key issue to consider in connection with Article 1 is whether all of the provisions are necessary and whether any key issues have been omitted.

PART 1. SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

1. Section 1-102 contains a statement of purpose. Statements of purpose are common in tribal probate codes. Several examples of legislative purpose statements in tribal probate codes are given in the Reporters' Note. These provisions should be examined re possible revision of Section 1-102.
2. Section 1-106, which is borrowed from the UPC, is found in many probate codes, tribal and non-tribal, but is omitted in others. Is this provision desirable? Is the statute of limitations period in subsection (b) appropriate?
3. Section 1-107 contains a presumption of death provision for missing persons. This is a common and helpful provision but there is a split on whether the appropriate time period is 5 years or 7 years.

PART 2. DEFINITIONS

Almost all probate codes of any length contain a list of definitions. Definitions will be added in a subsequent draft.

PART 3. SCOPE, JURISDICTION, COURTS AND NOTICE

1. Section 1-301 takes a broad view of the court's jurisdiction without specifying precise limits. Other jurisdictional statements, discussed in the Reporters' Note, are more limited.
2. Section 1-302 through 1-306 contains a series of provisions found in many but not all probate codes, both tribal and non-tribal. Note that 1-302(b) provides that all trials are in the court, thereby negating jury trials. The issue with respect to Sections 1-303 and 1-304 are whether any of these issues are already address in local rules of civil procedure. Sections 1-305 and 1-306, relating to representation and demands for notice, has proven useful in states which have enacted these concepts.

ARTICLE 2
PROBATE OF WILLS AND ADMINISTRATION

Unlike the UPC, which has numerous choices, this draft contains only two methods for administering a decedent's estate. The bulk of the Article is devoted to a single process in which, following the probate of the will, a personal representative will administer the estate under the supervision of the court. Part 8 then provides an alternate system of summary administration for small estates. Unlike the UPC, all estates are basically opened the same way and administered the same way. Since the meeting last April, the provisions on estate administration have been substantially shortened from the prior draft although further editing is welcome. A number of tribal probate codes have been examined for ideas although this effort will continue.

PART 1. GENERAL PROVISIONS

1. Note that Section 2-102 takes an expansive view of the property subject to the court's jurisdiction. This is consistent with the broad approach to jurisdiction taken in Section 1-301.
2. Section 2-103 suspends the statute of limitations on a decedent's claim against others for one year following the decedent's death. There is great variation in probate codes concerning the appropriate time limit.

PART 2. PROBATE AND APPOINTMENT PROCEEDINGS

1. Unlike the UPC and many other probate codes, this Code creates separate procedures for testate and intestate estates (see Sections 2-302 and 2-303).
2. To encourage prompt opening of estates, advance notice of the court hearing on the will and the appointment of a personal representative is not generally required. Rather, notice must be given following the appointment of the personal representative (see Section 2-405). However, advance notice is permitted and is in fact required if the petition doesn't request the appointment of a PR (see Section 2-204).
3. Section 2-207 specifies the grounds for contest. Thought should be given to whether a short statute of limitations should be added in which the will may be contested. A common provision would be six months following first publication of the notice to creditors.
4. Although Section 2-208 on vacating the order is a useful provision, thought might be given to deleting it on grounds of complexity. Rather, the rules on vacating of orders might be left to the general rules of civil practice and procedure.

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

1. Unlike many state probate codes, Section 2-203 leaves the issue of bond largely to the discretion of the court.
2. Section 2-305 adds the Tribe to the priority list of who can be appointed as personal representative, although the Tribe is placed at the bottom of the list. Thought should be given to whether there are other places in Article 2 where the Tribe should be mentioned.
3. The provisions on termination of appointment found in Sections 2-307 through 2-309 have been greatly simplified from the prior draft but might perhaps be combined into one section.

PART 4. DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

1. This Part is a streamlined version of Article 3, Part 7 of the UPC. One area where this Part could be shortened would be to omit the list of factors on PR compensation in Section 2-418.
2. Section 2-413 addresses an issue of concern to many families, the sale by a personal representative of real property, family businesses, and tangible personal property. This issue deserves close study.
3. Nearly all probate codes contain a laundry list of PR powers. This provision, which will be inserted at Section 2-414, has not yet been drafted pending a determination of which powers are critical to include.

PART 5. CREDITORS' CLAIMS

1. This Part requires the publication of notice to creditors (Section 2-503). Publication is optional in some states.
2. Certain categories of claims, such as claims not yet due or contingent claims, are not a regular occurrence. This Part could be slightly reduced in length if reference to these sorts of claims were omitted.

PART 6. SPECIAL PROVISIONS RELATING TO DISTRIBUTION

1. Section 2-601, which deals with abatement, omits mention of demonstrative devises, a type of devise that is rarely found.
2. Section 2-603, dealing with payment of interest on cash devises paid late, may need to be modified to deal with local practice.
3. Certain issues, such as the validity of a no-contest clause, can be dealt with in this Article

or instead addressed in Article 3, dealing with the validity of wills.

4. Section 2-605, which is adapted from the UPC, provides for the delivery of an instrument or deed of distribution to the beneficiaries receiving the estate. Many probate codes omit this type of provision.
5. Section 2-606, giving the PR the ability to send out a proposed distribution prior to the closing of the estate, has been a very useful provision in jurisdictions that have adopted it.
6. Section 2-609, dealing with the escheat of unclaimed assets, will need to be conformed to local practice. The provision has been placed in brackets to signal the need for modification.
7. Section 2-610, dealing with distribution to incapacitated beneficiaries, will need to be conformed to local practice on the appointment of guardians or conservators.

PART 7. CLOSING ESTATES

This Part creates two procedures for closing an estate. The PR may petition the court for an order of complete settlement (Section 2-701) or may instead send a closing statement to interested persons (Section 2-702). If a closing statement is sent, an interested person has one year to file an objection. This dual method for closing an estate is typical of many probate codes. An alternative would be to require court approval in all cases.

PART 8. SUMMARY ADMINISTRATION

This Part, which was copied from the UPC, will require careful study.

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

Although a similar provision is contained in many probate codes, there is some question whether 2-902, dealing with delivery of personal property to foreign personal representatives, is really necessary. If deleted, this Part could be made much simpler and the remaining provisions could perhaps be combined with another Part.

ARTICLE 3
INTESTATE AND TESTATE SUCCESSION

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

SUBPART 1. BASIC INTESTATE SUCCESSION OF NON-TRUST OR RESTRICTED PROPERTY

1. There are numerous ways that intestate succession can be, and have been, handled within a tribal probate code. Essentially, the provisions could (1) completely align with AIPRA, essentially importing its provisions wholesale; (2) split trust/restricted off from non-trust and non-restricted property, with separate provisions for each; or (3) cover all property and seek approval under AIPRA for this broad application. Option #1 is basically what was promulgated by the department as a template for tribal probate codes. Option #3 is possible, but perhaps risky, at least unless all provisions hew fairly closely to the goals expressed within AIPRA. This draft currently follows Option #2, saving a place for insertion of AIPRA provisions for covered property. Should it? With specifics over the other options, particularly #3, detailed within the implementation guide? [general]

On the plus side, including AIPRA-compliant provisions might provide some informational benefit and might ease DOI approval. Moreover, it would be easy for a tribe to sever that portion off wholesale were the tribe either to limit its TPC to non-trust and restricted property only, or seek approval of all of its provisions for all types of property. [general]

2. There are innumerable ways that a probate code could go with regard to specifics of any intestacy scheme. Should the MTPC, either within Reporters' Notes or the Implementation Guide, address many/most/all of the different permutations under every existing and published TPC? Should it include examples from state PCs also? [general]
3. Relatedly, should the MTPC instead set up the code to state that the tribal court shall have authority to determine heirs, without having a particular set of priorities as detailed in the draft? [general]
4. The drafted provisions select an middle-of-the-road approach for the surviving spouse, suggesting all if there are no surviving children or if there are children but all of them are joint descendants of both the spouse and the decedent, and ½ if there are stepchildren of the surviving spouse/children of the decedent only. Is this an appropriate starting point for the MTPC, or should it be more or less complex about the existence of other relatives of the decedent, e.g. parents or siblings? [3-102]
5. The same questions can be asked regarding the shares of heirs other than spouses. In running the estate through the third parentela (grandparents and their descendants) and then permitting escheat, does it go too far? Not far enough? Additionally, the drafted provision employs representation at every level. Should it? Or, e.g., should surviving siblings take to the exclusion of children of predeceased siblings, i.e. nieces and nephews? This would be essentially a per capita without representation at each

generation. As the Reporters' Note states, different TPCs do it different ways. [2-103; 2-104; 2-105].

6. Assuming that a representational rather than a non-representational scheme is even appropriate rather than a civil law, degree of kinship (non-representational) one, should it be modified per stirpes, pure per stirpes, or per capita with representation at each generation? The drafted provision adopts a modified per stirpes approach. [3-105]
7. Given concerns about fractionation and the efficiencies of consolidation, would it be better to cut inheritance rights off earlier, such that, e.g., the estate escheated if there were no descendants, parents, or siblings? Additionally, should all of the decedent's property so escheat, or only, e.g., real property subject to the jurisdiction of the tribe? [3-103; 3-104].

SUBPART 2. STATUS ISSUES: WHO FITS WITHIN THE BASIC SCHEME

1. All of these provisions contain sensitive issues, heavily dependent on culture and context which clearly differ across tribes, and probably to a far greater extent than they differ across states. To what extent should the MTPC even attempt assorted definitions, or provisions covering, e.g., customary marriage or divorce, customary adoption, etc? [general]. It is possible that the MTPC could simply set up a bare scheme using terms (e.g. ½ to spouse, ½ to descendants), and then leave to the court the determination of who is a spouse, or a descendant, etc., for purposes of distribution. [general]
2. The choice made in the draft was for 120 hours of survival rather than an instant. Implicitly, it is up to the tribal court to determine when death has occurred such that survival may be tracked. [3-106].
3. The choice made in the draft was to avoid complex questions of reproductive technology, and instead draft so as to leave room for differing interpretations by the respective tribal courts over such matters as surrogacy and cryogenically preserved gametic material. Still, does this go too far? At some level, it would seem that the code would almost need to address "in gestation" to effectively cover "survival," which implies "life." Recall that the jurisdictions are in significant disagreement over the extent to which posthumously conceived children are entitled to inherit (or take other forms of survivors' benefits). This drafted provision avoids that entanglement. [3-107]
4. The draft does not create any special inheritance rules covering non-marital children, replacing the variety of state evidentiary rules and burdens with a requirement for "proof of parentage," applicable to both mothers and to fathers, and leaving to the court to determine what that proof could or should be. Should the MTPC be more explicit? [3-109]
5. So-called "bad parent" statutes are not common (although becoming more so) in the states. Should the MTPC include this sort of provision, or does it create too many difficulties over fundamental relational questions? Relatedly, should there be a similar provision regarding spouses, e.g. no inheritance as a spouse upon proof of spousal abuse?

[3-112]

SUBPART 3. ALTERATIONS TO THE BASIC SCHEME

1. As drafted, the MTPC addresses advancements, but not negative wills, family settlement agreements, releases or assignments of the expectancy. Should it? The latter two scenarios are fairly uncommonly litigated as it is. A question would be whether there is something unique within the tribal context for which codified discussions of these other forms of altering schemes would be useful. [general]
2. As drafted, the MTPC discusses disclaimers but does not permit directed disclaimers. AIPRA clearly does so. Should the default rule in the MTPC also do so, or simply note that possibility w/in the implementation guide? [3-113]

PART 2. INTESTATE SUCCESSION OF TRUST AND RESTRICTED REAL AND PERSONAL PROPERTY

PART 3. TESTATE SUCCESSION OF TRUST AND NON-TRUST PROPERTY

SUBPART 1. WILL EXECUTION AND REVOCATION

1. The most critical issue within this section is also the most difficult to wrestle with, and is fully explored in the drafted Reporters' Note to Section 3-302. Should the MTPC set forth requirements for a valid will that perfectly match existing federal regulations for trust and/or restricted property under AIPRA? Although it would seem that modern trends in general, coupled with the push for easier and more efficient and attractive estate planning w/in Indian Country, would counsel toward easing burdensome restrictions and requirements and strict compliance requirements. The downside to having a Model Code with such provisions, however, is the confusion that could result when there are different validity requirements for different types of property that may be located within a decedent's estate. This is a very large, and difficult, choice to make, and its answer affects most of the provisions in this section. [general]
2. The same question drives whether the MTPC should, either in text, notes, or guide, promote holographic wills, oral wills, harmless error, interested witnesses, choice of law clauses, etc. Many of these issues, e.g. the interplay between oral and some customary wills, are presumably quite specific to the particular norms etc. of the particular tribe. Again, perhaps the MTPC could be drafted so as to defer to the tribal court on such matters as spoken deathbed wills. [general]
3. As drafted, the MTPC permits total revocation by physical act and later will, but partial revocation only by later will (codicil). This departs from the law in many states which permit partial revocation by physical act, mainly because the case law on point is very disjointed and often turns on the court's finding of a valid holographic codicil, which this code does not currently permit (so as to comport w/ federal regs). [3-308]

4. The drafted provision does not do away with the lost will presumption of revocation, but instead notes that it can be rebutted and suggests forms of evidence that would accomplish rebuttal. Does this work w/in participants' past concerns about the presumption as unique to the tribal context? [3-308] Relatedly, the MTPC as drafted never presumes revival, although it does permit it. Appropriate? Optimal? [3-308]

SUBPART 2. WILL CHALLENGES, COMPOSITION, AND CONSTRUCTION

1. Regarding the composition of a will, the Code only discusses Incorporation by Reference, avoiding Acts with Independent Significance, lists of personal property, and the Uniform Testamentary Additions to Trusts Act. Some TPCs do discuss some of these issues, e.g. Mashantucket re UTATA. Should the MTPC include similar provisions, or leave them to an Implementation Guide? [general]
2. Should the MTPC include a provision encouraging a peace-keeping mediation for will contests? [3-313]
3. Do participants agree that a streamlined elective share/omitted spouse provision is optimal, or should the issues be (a) avoided or (b) severed? [3-314] Similarly, should omitted children continue to be covered? Should the drafted provision be simplified? It currently only provides for "after born or adopted" children, presuming that those alive when the will was drafted were contemplated and intentionally left out. [3-315]
4. As drafted, the MTPC includes a lapse/anti-lapse provision. Is it possible, particularly if participants think that the intestacy scheme should be non-representational, that it should be deleted or significantly (or somewhat) constrained? For example, might the Code limit the "qualifying predeceasing beneficiary" to a descendant of the testator? Otherwise stated, should the Code presume that if a beneficiary uncle predeceased the decedent, that decedent would prefer for the uncle's children to stand in the shoes of the uncle vis-a-vis the share, rather than, e.g., a residuary taker or even a more closely related family member under intestate succession? How do concerns about fractionation fit in here? [3-316]

PART 4. GENERAL PROVISIONS CONCERNING PROBATE AND NON-PROBATE TRANSFERS

1. Is there a superior and constitutional way to streamline the determination over whether and when to bar an alleged "slayer" so as to ensure speedier distribution of a decedent's estate? And if so, is doing so desirable? [3-401]

PART 5. EXEMPT PROPERTY AND ALLOWANCES

[in drafting progress, along with consideration of whether/how much to include non-probate transfers]

CRITICAL WRAP-UP ISSUES GIVEN THE “MODEL TRIBAL PROBATE CODE” CONTEXT:

1. What provisions were not included that clearly should be?
2. What provisions were included that for whatever reason, should not be?
3. What provisions inadequately addressed concerns that you or others raised during the past two meetings?
4. What should be the target length? Existing TPCs range between around 5 to approximately 80.
5. What is the optimal mix between Code provisions, Reporters’ Notes, and an Implementation Guide?
6. Reviewing the “main headers” of this draft, are there any that seem far more or far less important to focus upon than others?