

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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March 25, 2016

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1 **MODEL TRIBAL PROBATE CODE**

2 **ARTICLE 1**

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

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

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

7 (a) This [code] shall be liberally construed and applied to promote its underlying
8 purposes and policies as determined by the tribe.

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

10 (1) to clarify the law concerning the estates of decedents;

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

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

15 [(4) to promote the culture and the values of the _____ Tribe,
16 specifically_____].

17 **Reporters' Note**

18
19 Subsections (a) and (b)(1)-(3) are statements of purpose typical of probate codes.
20 Subsection (b)(4) provides a place for the enacting tribe to enter tribal policies relevant to
21 probate. Because tribes will vary on which language to insert, subsection (b)(4) has been placed
22 in brackets. Among the statement of values that have been inserted into tribal probate codes are
23 "[t]o comply with tribal custom and tradition," "[t]o prevent the transfer of land out of tribal
24 ownership and control," and "[t]o promote and further the tribe's inherent right to self-
25 governance." See Fond du Lac Section 1.102; Nez Perce §10-1-1; Stockbridge Munsee Section
26 6.1.1.
27

28 **SECTION 1-103. GENERAL DEFINITIONS.** Subject to additional definitions
29 contained in the subsequent [articles] that are applicable to specific [articles,] [parts,] or sections

1 and unless the context otherwise requires, in this [code]:

2 [Add definitions when drafting has further progressed. Among the definitions to add are the
3 terms of relationship found in UPC 2-705 and a definition of “interested person”].

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

5 **JURISDICTION.** This [code] applies to and the court has jurisdiction over the estates of
6 decedents with respect to property, real or personal, that is subject to the laws of the [Tribe] [,
7 excluding trust or restricted property governed by federal law]. This [code] also applies to and
8 the court has jurisdiction over survivorship arrangements authorized under Article 4.

9 **Reporters’ Note**

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.

13
14 A number of tribal codes take a more restrictive approach to the tribal court’s
15 jurisdiction. The Fond du Lac limit the court’s jurisdiction to the estates of Band members
16 domiciled on or who have an interest in real property located on the Reservation. Fond du Lac
17 Code Section 4.101. The Lac du Flambeau expands this jurisdiction to include estates not only to
18 Tribal members but also the spouses and children of Tribal members. Lac du Flambeau Code
19 Section 82.401. The Nez Perce grant the court jurisdiction over the estate of any Indian
20 domiciled on the Reservation whether or not they were members of the Nez Perce tribe. Nez
21 Perce Code Section 10-1-8. The Poarch Band clarifies that jurisdiction over the enrolled tribal
22 member would by necessity need to also include jurisdiction over the beneficiaries of the estate.
23 Poarch Band Code Section 16-1-1. The Pueblo San Ildefonso Code is the most expansive,
24 granting the court jurisdiction over the estate of any person, tribal member or not, who resided at
25 the Pueblo. Pueblo San Ildefonso Code Section 28.1.

26 27 **SECTION 1-105. NOTICE; METHOD AND TIME OF GIVING.**

28 (a) If notice of a hearing on a petition or other matter is required, and except as
29 specifically provided for in this [code] or as ordered by the court, the petitioner shall give notice
30 of the time and place of hearing to any interested person or that person’s attorney.

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

1 (1) by mailing a copy of the notice and petition at least 14 days before the time set
2 for the hearing by first class mail addressed to the person being notified at the person's office or
3 place of residence, if known;

4 (2) by delivering a copy of the notice and petition to the person being notified
5 personally at least 14 days before the time set for the hearing; or

6 (3) if the address, or identity of any person is not known and cannot be
7 ascertained with reasonable diligence, [by publishing at least once a week for two consecutive
8 weeks, a copy of the notice in both the tribal newspaper, if any, and in any newspaper having
9 general circulation in the county where the hearing is to be held, the last publication of which
10 must be at least 14 days before the time set for the hearing] [by posting a copy of the notice in at
11 least three conspicuous public places on the reservation at least 14 days before the hearing].

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

13 (d) A person may waive notice by a writing signed by the person or the person's attorney
14 and filed in the proceeding.

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

17 **Reporters' Note**

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

24
25 **SECTION 1-106. WHEN PARTIES BOUND BY OTHERS; NOTICE.** In
26 proceedings under this [code], the following rules apply:

27 (1) Unless otherwise represented, a minor or an incapacitated, unborn, or unascertained

1 person is bound by an order to the extent the person's interest is adequately represented by
2 another party having a substantially identical interest in the proceeding.

3 (2) A conservator or guardian may represent the person under conservatorship or
4 guardianship.

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

7 (4) Notice is required as follows:

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

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

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

17 **Reporters' Note**

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

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

20 (a) Whenever fraud has been perpetrated in connection with a proceeding or in a
21 statement filed under this [code] or if fraud is used to avoid or circumvent the provisions or
22 purposes of this [code], a person injured may obtain appropriate relief against the perpetrator of
23 the fraud or restitution from any person (other than a bona fide purchaser for value) benefitting
24 from the fraud, whether innocent or not.

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

Reporters' Note

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

SECTION 1-108. EVIDENCE OF DEATH OR STATUS.

(a) In addition to the rules of evidence in courts of general jurisdiction, the fact of death may be established by any sufficient evidence, including:

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

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

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

1 **Reporters' Note**

2 This section is found in several tribal probate codes. See Fond du Lac Section 4.103; Lac
3 du Flambeau Section 82.111; Stockbridge Munsee Section 6.1.7; Ute Section 6-1-5. It is also
4 similar to portions of Section 1-107 of the Uniform Probate Code. The primary purpose of
5 subsection (a) is to allow for proof of death based on a death certificate or other official
6 document. Subsection (b) provides a presumption of death for missing individuals. Jurisdictions
7 are split over whether the period of absence should be five years or seven years. The Fond du
8 Lac Code provides for seven years. The other tribal probate codes reviewed provide for five
9 years. Because of this split, the required number of years has been placed in brackets.
10

11 **ARTICLE 2**

12 **PROBATE OF WILLS AND ADMINISTRATION**

13 **PART 1.**

14 **GENERAL PROVISIONS**

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

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

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

24 **Reporters' Note**

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

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

1 **Reporters' Note**

2 This section is intended to give the court the maximum possible jurisdiction without
3 attempting to specify the precise limits.
4

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

9 **Reporters' Note**

10 This section is based on Section 3-109 of the Uniform Probate Code except that the
11 tolling period has been increased from four months to one year.
12

13 **SECTION 2-104. DEMAND FOR NOTICE OF ORDER OR FILING**
14 **CONCERNING DECEDENT'S ESTATE.** A person desiring notice of any order or filing
15 pertaining to a decedent's estate may file a demand for notice with the court at any time after the
16 death of the decedent stating the name of the decedent, the nature of the demandant's interest in
17 the estate, and the demandant's address or that of the demandant's attorney. The clerk of court
18 shall mail a copy of the demand to the personal representative, if one has been appointed. Unless
19 the court otherwise directs, after filing of a demand, no order or filing to which the demand
20 relates shall be made or accepted without notice as prescribed in Section 1-303 to the demandant
21 or the demandant's attorney.

22 **Reporters' Note**

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

1 **PART 2.**

2 **PROBATE AND APPOINTMENT PROCEEDINGS**

3 **SECTION 2-201. PROBATE PROCEEDINGS; NATURE; WHEN**
4 **COMMENCED.**

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

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

11 **Reporters' Note**

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

15
16 **SECTION 2-202. PETITION FOR PROBATE OF WILL; CONTENTS.**

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

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

21 (1) request an order determining the heirs and probating the will; and

22 (2) contain the following statements:

23 (A) the interest of the petitioner;

24 (B) the name, date of death and age of the decedent, the location of the
25 decedent's domicile at the time of death, and the names and addresses of the heirs and devisees
26 and the ages of any who are minors so far as known or reasonably ascertainable with reasonable

1 diligence by the petitioner;

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

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

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

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

12 (G) if the petitioner requests the appointment of a personal representative,
13 the name and address of the proposed personal representative, whether the proposed personal
14 representative was nominated in the will, and if not, the reason why the proposed personal
15 representative should be appointed;

16 (H) the tribal membership status of the decedent and heirs and devisees;

17 (I) a general description of the decedent's estate subject to the jurisdiction
18 of the court and a description of any portions of the estate not subject to the jurisdiction of the
19 court; and

20 (J) whether the estate includes trust and restricted real property or
21 Individual Indian Money(IIM) accounts.

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

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

Reporters' Note

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

SECTION 2-203. PETITION FOR INTESTACY; CONTENTS.

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

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

(1) the interest of the applicant;

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

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

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

6 (5) that after the exercise of reasonable diligence, the petitioner is unaware of an
7 unrevoked will relating to property having a situs in this [tribal jurisdiction] under Section 1-301,
8 or, a statement why an unrevoked will of which the petitioner may be aware is not being
9 probated;

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

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

14 (8) whether the estate includes trust and restricted real property or Individual
15 Indian Money accounts.

16 **Reporters' Note**

17
18 This section draws language from several tribal probate code in addition to Sections 3-
19 301 and 3-402 of the Uniform Probate Code. Language drawn from existing tribal probate codes
20 include requirements that the petition address tribal status and also provide a general description
21 of the decedent's property, including any trust or restricted real property or IIM accounts. This
22 section applies only to intestate estates. The petition requirements for testate estates are
23 addressed in Section 2-202.

24 25 **SECTION 2-204. NOTICE OF HEARING ON PETITION.**

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

28 (b) If the petition requests the appointment of a personal representative, the petitioner

1 may but need not give prior notice of the hearing as provided in Section 1-105 to interested
2 persons, including the heirs, the devisees and personal representative in the will being offered for
3 probate, and any devisees or personal representatives under a prior or subsequent will of the
4 decedent that is not being offered for probate.

5 (c) If the petition does not request the appointment of a personal representative, notice as
6 provided in Section 1-105 must be given to the heirs and the devisees and personal representative
7 in the will being offered for probate.

8 (d) Whether or not the petition requests the appointment of a personal representative,
9 notice must be given to a person who has filed a demand for notice under Section 2-104, and a
10 personal representative previously appointed whose appointment has not been terminated.

11 **Reporters' Note**

12 Under this code, notice of the hearing to open the estate is required only if the petition does not
13 request the appointment of a personal representative. Giving notice prior to the hearing can
14 foreclose rights to object, such as potential objections by devisees under prior wills. On the other
15 hand, requiring prior notice can significantly delay the opening of an estate. Pursuant to Section
16 2-405, a personal representative, following the appointment, must always give notice to the heirs
17 and devisees.

18 **SECTION 2-205. PROOF OF PROPER EXECUTION OF WILL.**

19 (a) If the will is self-proved, compliance with signature and other requirements is
20 presumed and other requirements of execution are presumed subject to rebuttal without the
21 testimony of a witness upon filing the will and the affidavits annexed or attached thereto.

22 (b) If the will is witnessed but not self-proved, the testimony of at least one of the
23 attesting witnesses is ordinarily required to establish proper execution but proper execution may
24 be established by other evidence, including an affidavit of an attesting witness. An attestation
25 clause that is signed by the attesting witnesses raises a rebuttable presumption that the events
26 recited in the clause occurred.
27

1 **Reporters' Note**

2 Unlike the Uniform Probate Code, which has separate sections for proving contested as
3 opposed to uncontested wills (see UPC Sections 3-405, 3-406), this section provides one
4 procedure for all wills. Because most wills are executed in front of a notary public, requiring that
5 the witnesses to the will testify in court will rarely be necessary.
6

7 **SECTION 2-206. CONTEST OF WILL.**

8 (a) Within six months after the admission of a will to probate, an interested person may
9 file a petition contesting the validity of the will. Within six months after denial of the admission
10 of a will to probate, an interested person may file a petition seeking to admit the will to probate.

11 (b) In a contested case, a petitioner seeking to establish intestacy has the burden of
12 establishing prima facie proof of death, jurisdiction and heirship and the proponents of the will
13 have the burden of establishing prima facie proof of due execution and, if the proponents are also
14 petitioners, prima facie proof of death and jurisdiction. A contestant of a will has the burden of
15 establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or
16 revocation.

17 **SECTION 2-207. EFFECT OF ORDER.** Upon the expiration of the contest period, an
18 order admitting a will to probate or denying admission of a will to probate is final as to all
19 persons who were properly notified of the court's order. If a contest is filed within the contest
20 period, the order is final upon the conclusion of the contest.

21 **Reporters' Note**

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

1 **PART 3.**

2 **PERSONAL REPRESENTATIVE; APPOINTMENT, CONTROL, AND TERMINATION**
3 **OF AUTHORITY**

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

8 **Reporters' Note**

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

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

13 **Reporters' Note**

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

15 **SECTION 2-303. BOND NOT REQUIRED WITHOUT COURT ORDER,**
16 **EXCEPTIONS.** A bond may be required by court order at the time of appointment of a personal
17 representative but in making this determination the court shall consider whether the will relieves
18 the personal representative of a bond. No bond is required of any personal representative who,
19 pursuant to statute, has deposited cash or collateral with an agency of this [tribal jurisdiction] to
20 secure performance of the personal representative's duties.

21 **Reporters' Note**

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

23 **SECTION 2-304. CONSENT TO JURISDICTION.** By accepting appointment, a
24 personal representative submits personally to the jurisdiction of the court in any proceeding

1 relating to the estate that may be instituted by an interested person. Notice of any proceeding
2 shall be delivered to the personal representative, or mailed to the personal representative by
3 ordinary first class mail at the address as listed in the application or petition for appointment or
4 as later reported to the court and to the personal representative's address as then known to the
5 petitioner.

6 **Reporters' Note**

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

8 **SECTION 2-305. PRIORITY AMONG PERSONS SEEKING APPOINTMENT AS** 9 **PERSONAL REPRESENTATIVE.**

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

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

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

14 (3) other devisees of the decedent;

15 (4) the surviving spouse of the decedent;

16 (5) other heirs of the decedent;

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

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

22 (c) A personal representative appointed by a court of the decedent's domicile has priority
23 over all other persons except where the decedent's will nominates different persons to be
24 personal representative in this [tribal jurisdiction] and in the jurisdiction of domicile. The

1 domiciliary personal representative may nominate another, who shall have the same priority as
2 the domiciliary personal representative.

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

5 **Reporters' Note**

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

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

15 **Reporters' Note**

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

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

1 representative.

2 **Reporters' Note**

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

4 **SECTION 2-308. TERMINATION OF APPOINTMENT BY REMOVAL;**
5 **CAUSE; PROCEDURE.**

6 (a) An interested person may petition for removal of a personal representative for cause at
7 any time. The petitioner shall give to the personal representative, and to other persons as the
8 court may order. Except as otherwise ordered as provided in Section 2-306, after receipt of
9 notice of removal proceedings, the personal representative shall not act except to account, to
10 correct mismanagement, or to preserve the estate. If removal is ordered, the court shall direct by
11 order the disposition of the assets remaining under the control of the personal representative
12 being removed.

13 (b) Cause for removal exists when:

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

15 (2) the personal representative has disregarded an order of court, has become
16 incapable of discharging the duties of office, has mismanaged the estate, or has failed to perform
17 a duty pertaining to the office.

18 **Reporters' Note**

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

21 **SECTION 2-309. TERMINATION OF APPOINTMENT; OTHER REASONS.**

22 (a) The death of a personal representative or the appointment of a conservator for the
23 estate of a personal representative terminates the representative's appointment.

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

1 terminates the personal representative's appointment.

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

4 (d) Except as otherwise ordered by the court, 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 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 must be given to or served on the successor in order to
17 preserve a 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 an
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

exists, appointment may be ordered without notice.

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

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

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

Reporters' Note

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

PART 4.

DUTIES AND POWERS OF PERSONAL REPRESENTATIVE

SECTION 2-401. ADMINISTRATION; NATURE OF PROCEEDING.

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

Reporters' Note

This section is based in part on Section 3-501 of the Uniform Probate Court. Unlike the UPC, which provides for both supervised and unsupervised administration, this Code provides

1 for only one type of administration which at all times is under the continuing authority of the
2 court.

3
4 **SECTION 2-402. TIME OF ACCRUAL OF DUTIES AND POWERS.** The duties
5 and powers of a personal representative commence upon the personal representative's
6 appointment. The powers of a personal representative relate back in time to give acts by the
7 person appointed which are beneficial to the estate occurring prior to appointment the same
8 effect as those occurring thereafter.

9 **Reporters' Note**

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

11 **SECTION 2-403. GENERAL DUTIES; RELATION AND LIABILITY TO**
12 **PERSONS INTERESTED IN ESTATE; STANDING TO SUE.**

13 (a) A personal representative is a fiduciary who shall observe the standards of care
14 applicable to trustees. The personal representative is under a duty to settle and distribute the
15 estate of the decedent in accordance with the terms of any probated will and this [code], and as
16 expeditiously and efficiently as is consistent with the best interests of the estate. The personal
17 representative shall use the authority conferred by this [code], the terms of the will, if any, and
18 any order in proceedings to which the personal representative is party for the best interests of the
19 estate.

20 (b) A personal representative may not be surcharged for acts of administration or
21 distribution if the conduct in question was authorized at the time.

22 (c) Except as to proceedings that do not survive the death of a decedent, a personal
23 representative of the decedent domiciled in this [tribal jurisdiction] at death has the same
24 standing to sue and be sued in the courts of this [tribal jurisdiction] and the courts of another
25 jurisdiction 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 the 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 REPRESENTATIVE: NOTICE TO**
12 **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 notice 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 notice shall
17 include the name and address of the personal representative, indicate that it is being sent to
18 persons that 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 notice must state that the estate is being administered by the personal representative under the
21 [Tribal Jurisdiction] Probate Code and that recipients are entitled to information regarding the
22 administration from the personal representative and can petition the court in any matter relating
23 to the estate, including distribution of assets and expenses of administration.

24 (c) A personal representative's failure to give notice under this section is a breach of the

1 personal representative's duty to the persons concerned but does not affect the validity of the
2 personal representative's appointment, powers or other duties.

3 **Reporters' Note**

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

5 **SECTION 2-406. DUTY OF PERSONAL REPRESENTATIVE; INVENTORY**
6 **AND APPRAISEMENT.** Within three months after appointment, a personal representative
7 other than a special administrator or a successor to another representative who has previously
8 discharged this duty, shall prepare and file with the court an inventory of property owned by the
9 decedent at the time of the decedent's death, listing it with reasonable detail, and indicating as to
10 each listed item, its fair market value as of the date of the decedent's death, and the type and
11 amount of any encumbrance that may exist with reference to any item. In preparing the
12 inventory, a personal representative may employ appraisers. The personal representative shall
13 send a copy of the inventory to interested persons that request it.

14 **Reporters' Note**

15 This section is based on Sections 3-706 and 3-707 of the Uniform Probate Code.

16 **SECTION 2-407. DUTY OF PERSONAL REPRESENTATIVE;**
17 **SUPPLEMENTAL INVENTORY.** A personal representative shall file a supplemental
18 inventory with the court where the original inventory was filed if the personal representative
19 learns that property was not included in the original inventory or that the value or description for
20 any item in the original inventory was erroneous or misleading. The personal representative shall
21 mail or deliver a copy of the supplemental inventory to the persons sent a copy of the original
22 inventory and to other interested persons who request it.

23 **Reporters' Note**

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

1 corporation or trust in which the personal representative has a substantial beneficial interest, or a
2 transaction which is affected by a substantial conflict of interest on the part of the personal
3 representative, is voidable by any person interested in the estate except one who has consented
4 after fair disclosure, unless:

5 (1) the will or a contract entered into by the decedent expressly authorized the
6 transaction; or

7 (2) the transaction is approved by the court after notice to interested persons.

8 **Reporters' Note**

9 This section is similar to Section 3-713 of the Uniform Probate Code.

10 **SECTION 2-411. PERSON DEALING WITH PERSONAL REPRESENTATIVE;** 11 **PROTECTION.**

12 (a) A person who in good faith either assists a personal representative or deals with the
13 personal representative for value is protected as if the personal representative was properly
14 authorized to act.

15 (b) The fact that a person knowingly deals with a personal representative with knowledge
16 of the representative capacity does not alone require the person to inquire into the existence of a
17 power or the propriety of its exercise.

18 (c) A person is not bound to see to the proper application of estate assets paid or
19 delivered to a personal representative.

20 (d) Comparable protective provisions of other laws relating to commercial transactions or
21 transfer of securities by fiduciaries prevail over the protections provided by this section.

22 **Reporters' Note**

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

24 **SECTION 2-412. SALE OF PROPERTY; WHEN NOTICE REQUIRED.** Not less

1 than 14 days prior to the closing of a sale of real or personal property of the estate for which the
2 fair market value is not readily ascertainable, the personal representative shall provide written
3 notice of the intent to sell to the persons who have filed a demand for notice under Section 2-
4 104. The notice shall contain a description of the property to be sold, the name of the purchaser,
5 the sale price, the terms of payment, and the nature of the security if the payment of any portion
6 of the purchase price is to be deferred.

7 **Reporters' Note**

8 This section is similar to South Dakota Codified Laws Section 3-715(b).

9 **SECTION 2-413. TRANSACTIONS AUTHORIZED FOR PERSONAL**

10 **REPRESENTATIVE; EXCEPTIONS.** Except as restricted or otherwise provided by the will
11 or by an order in a proceeding and subject to the priorities stated in Section 2-601, a personal
12 representative, acting reasonably for the benefit of the estate, may properly: [drafting of the list
13 of management powers is currently deferred].

14 **SECTION 2-414. POWERS AND DUTIES OF SUCCESSOR PERSONAL**

15 **REPRESENTATIVE.**

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

20 (b) A successor personal representative is not individually liable for the action or failure
21 to act of a previous personal representative unless the successor has knowledge of a breach of
22 fiduciary duty by the predecessor and fails to take reasonable corrective action.

23 **Reporters' Note**

24 Subsection (a) is identical to Section 3-716 of the Uniform Probate Code. Subsection (b)

1 is identical to South Dakota Codified Laws Section 3-716(b).

2
3 **SECTION 2-415. CO-REPRESENTATIVES; WHEN JOINT ACTION**

4 **REQUIRED.** If two or more persons are appointed co-representatives and unless the will
5 provides otherwise, the concurrence of all is required on all acts connected with the
6 administration and distribution of the estate. The concurrence of all is not required when such
7 concurrence cannot readily be obtained in the time reasonably available for emergency action
8 necessary to preserve the estate, or when a co-representative has been delegated to act for the
9 others. A person dealing with a co-representative if actually unaware that another has been
10 appointed to serve is as fully protected as if the personal representative with whom they dealt had
11 been the sole personal representative.

12 **Reporters' Note**

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

14 **SECTION 2-416. POWER OF SURVIVING PERSONAL REPRESENTATIVE.**

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

18 **Reporters' Note**

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

20 **SECTION 2-417. COMPENSATION OF PERSONAL REPRESENTATIVE.**

21 (a) A personal representative and an attorney for the personal representative are entitled
22 to reasonable compensation for services as approved by the court. Reasonable compensation may
23 include compensation for the services of the agents or employees of the person seeking
24 compensation and may also include reimbursement for costs advanced. A determination of
25 reasonable compensation shall be based on the following factors:

- 1 (1) The time and labor involved;
- 2 (2) The novelty and difficulty of the questions involved, and the skill requisite to
- 3 perform the service properly;
- 4 (3) The likelihood that the acceptance of the particular employment will preclude
- 5 other employment by the person;
- 6 (4) The fee customarily charged in the locality for similar services;
- 7 (5) The nature and value of the assets of the estate, the amount of income earned
- 8 by the estate, and the responsibilities and potential liabilities assumed by the person;
- 9 (6) The time limitations imposed by the circumstances; and
- 10 (7) The experience, reputation, diligence, and ability of the person performing the
- 11 services.

12 (b) If the will provides for compensation of a personal representative and there is no

13 contract with the decedent regarding compensation, the personal representative may renounce the

14 provision before qualifying and be entitled to reasonable compensation. The personal

15 representative also may renounce the right to all or any part of the compensation.

16 **Reporters' Note**

17 Subsection (a) is copied from South Dakota Codified Laws Section 3-719(a). Subsection

18 (b) is copied from Section 3-719 of the Uniform Probate Code.

19 **SECTION 2-418. INDIVIDUAL LIABILITY OF PERSONAL**

20 **REPRESENTATIVE.**

21 (a) Unless otherwise provided in the contract, a personal representative is not individually

22 liable on a contract properly entered into in the personal representative's fiduciary capacity in the

23 course of administration of the estate unless the personal representative fails to reveal the

24 representative capacity or identify the estate in the contract.

25

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

4 (c) A claim based on a contract entered into by a personal representative in a fiduciary
5 capacity, on an obligation arising from ownership or control of the estate, or on a tort committed
6 in the course of estate administration may be asserted against the estate by proceeding against the
7 personal representative in the representative's fiduciary capacity, whether or not the personal
8 representative is individually liable.

9 **Reporters' Note**

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

11 **PART 5.**

12 **CREDITORS' CLAIMS**

13 **SECTION 2-501. CLAIMS AGAINST DECEDENT; NECESSITY OF**
14 **ADMINISTRATION.** A proceeding to enforce a claim against the estate of a decedent or the
15 decedent's successors may not be revived or commenced before the appointment of a personal
16 representative. This section does not limit whatever right a secured creditor might otherwise
17 have to enforce a right to the security but it does limit the right of a secured creditor to a
18 deficiency judgment.

19 **Reporters' Note**

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

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

22 (a) Unless notice has already been given under this section, a personal representative
23 upon appointment shall publish a notice to creditors once a week for two successive weeks in a
24 newspaper of general circulation in the [tribal jurisdiction] announcing the appointment and the

1 personal representative's address and notifying creditors of the decedent to present their claims
2 within four months after the date of the first publication of the notice or the claim may be barred.

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

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

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

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

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

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

18 **Reporters' Note**

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

20 **SECTION 2-503. STATUTE OF LIMITATIONS.**

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

24 (b) The running of a statute of limitations measured from an event other than death or the

1 giving of notice to creditors is suspended for four months after the decedent's death, but resumes
2 thereafter as to claims not otherwise barred.

3 (c) For purposes of a statute of limitations, the presentation of a claim pursuant to Section
4 2-506 is equivalent to commencement of a proceeding on the claim.

5 **Reporters' Note**

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

7 **SECTION 2-504. LIMITATION ON PRESENTATION OF A CLAIM.**

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

14 (1) As to a creditor barred by publication, four months after the first publication
15 of notice as provided in Section 2-503(a);

16 (2) As to a creditor barred by written notice, on the date specified in Section 2-
17 503(b);

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

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

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

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

24 (2) To the limits of the insurance protection only, any proceeding to establish

1 liability of the decedent or the personal representative for which there is protection through
2 liability insurance.

3 **Reporters' Note**

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

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

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

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

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

17 (b) A presentation of a claim is not required in regard to matters claimed in proceedings
18 against the decedent which were pending at the time of death.

19 **Reporters' Note**

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

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

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

24 (1) costs and expenses of administration;

- 1 (2) reasonable funeral expenses;
- 2 (3) debts and taxes with preference under federal law;
- 3 (4) reasonable and necessary medical and hospital expenses of the last illness of
- 4 the decedent, including compensation of persons attending the decedent;
- 5 (5) debts and taxes with preference under other laws of this state;
- 6 (6) all other claims.

7 (b) Preference may not be given in the payment of any claim over any other claim of the

8 same class.

9 **Reporters' Note**

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

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

12 (a) Upon the petition of the claimant in a proceeding for the purpose, the court may allow

13 in whole or in part any claim or claims presented to the personal representative or filed with the

14 clerk of the court. Notice in this proceeding shall be given to the claimant, the personal

15 representative and other persons interested in the estate as the court may direct by order entered

16 at the time the proceeding is commenced.

17 (c) A judgment in a proceeding in another court against the personal representative to

18 enforce a claim against the decedent's estate is an allowance of the claim.

19 **Reporters' Note**

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

21 **SECTION 2-508. PAYMENT OF CLAIM.**

22 (a) Upon the expiration of the earlier of the time limitations provided in Section 2-505 for

23 the presentation of claims, the personal representative shall pay the claims allowed against the

24 estate in the order of priority prescribed, after making provision for [statutory allowances for the

1 spouse and children], for claims already presented that have not yet been allowed or whose
2 allowance has been appealed, and for costs and expenses of administration.

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

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

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

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

13 **Reporters' Note**

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

15 **PART 6.**

16 **SPECIAL PROVISIONS RELATING TO DISTRIBUTION**

17 **SECTION 2-601. DISTRIBUTION; ORDER IN WHICH ASSETS**

18 **APPROPRIATED; ABATEMENT.**

19 (a) Except as provided in the decedent's will and except as provided in connection with
20 the share of the surviving spouse who elects to take an elective share, shares of distributees
21 abate, without any preference or priority as between real and personal property, in the following
22 order: (1) property not disposed of by the will; (2) residuary devises; (3) general devises; (4)
23 specific devises. Abatement within each classification is in proportion to the amounts of property
24 each of the beneficiaries would have received, if full distribution of the property had been made

1 in accordance with the terms of the will.

2 (b) If the subject of a preferred devise is sold or used incident to administration,
3 abatement shall be achieved by appropriate adjustments in the distribution of the remaining
4 assets.

5 **Reporters' Note**

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

7 **SECTION 2-602. RIGHT OF RETAINER.** Any indebtedness of a distributee of an
8 estate shall be offset against the distributee's interest; but the distributee has the benefit of any
9 defense which would be available to the distributee in a direct proceeding for recovery of the
10 debt.

11 **Reporters' Note**

12 This section is a modified version of Section 2-602 of the Uniform Probate Code.

13 **SECTION 2-603. INTEREST ON GENERAL PECUNIARY DEVISE.** A general
14 pecuniary devise bears interest at the legal rate beginning one year after the first appointment of
15 a personal representative until payment, unless a contrary intent is indicated by the will.

16 **Reporters' Note**

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

18 **SECTION 2-604. DISTRIBUTION IN KIND; EVIDENCE OF TITLE.**

19 (a) Unless a contrary intention is indicated by the will, the distributable assets of a
20 decedent's estate shall be distributed in kind to the extent possible.

21 (b) If distribution of the estate assets is made in kind, the personal representative shall
22 execute an instrument or deed of distribution assigning, transferring, or releasing the assets to the
23 distributee as evidence of the distributee's title to the property.

24 (c) Proof that a distributee has received an instrument or deed of distribution of assets in

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

5 **Reporters' Note**

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

8
9 **SECTION 2-605. PROPOSAL FOR DISTRIBUTION.** After the probable charges
10 against an estate are known, the personal representative may mail or deliver a proposal for
11 distribution to all persons who have a right to object to the proposed distribution. The right of
12 any distributee to object to the proposed distribution on the basis of the kind or value of asset the
13 distributee is to receive if not waived earlier in writing, terminates if the distributee fails to object
14 in writing received by the personal representative within 30 days after mailing or delivery of the
15 proposal but only if the proposal informed the distributee of the right to object and of the
16 applicable time limit.

17 **Reporters' Note**

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

19 **SECTION 2-606. IMPROPER DISTRIBUTION; LIABILITY OF DISTRIBUTE.**
20 Unless the distribution or payment no longer can be questioned because of adjudication,
21 estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who
22 was improperly paid, is liable to return the property improperly received and its income since
23 distribution if the distributee or claimant has the property. If the distributee or claimant does not
24 have the property, then the distributee or claimant is liable to return the value as of the date of
25 disposition of the property improperly received and its income and gain received by the

1 distributee or claimant.

2 **Reporters' Note**

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

4 **SECTION 2-607. PRIVATE AGREEMENT AMONG SUCCESSORS TO**
5 **DECEDENT BINDING ON PERSONAL REPRESENTATIVE.** Subject to the rights of
6 creditors and taxing authorities, competent successors may agree among themselves to alter the
7 interests, shares, or amounts to which they are entitled under the will of the decedent, or under
8 the laws of intestacy, in any way that they provide in a written contract executed by all who are
9 affected by its provisions. The personal representative shall abide by the terms of the agreement
10 subject to the obligation to administer the estate for the benefit of creditors, to pay all taxes and
11 costs of administration, and to carry out the responsibilities of the office for the benefit of any
12 successors of the decedent who are not parties.

13 **Reporters' Note**

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

15 **SECTION 2-608. DISTRIBUTION TO INCAPACITATED PERSON.**

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

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

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

24 (2) A guardian of the minor;

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

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

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

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

11 (1) an agent under a durable power of attorney who has authority to receive and
12 collect property for the adult person;

13 (2) a guardian of the adult person;

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

17 (d) The personal representative is not responsible for the proper application of money or
18 property distributed pursuant to this Section (a). The personal representative may discharge an
19 obligation to distribute to a person who is a minor or incapacitated person by distributing in a
20 manner expressly provided in the will.

21 **Reporters' Note**

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

23 **[SECTION 2-609. DISPOSITION OF UNCLAIMED ASSETS.** If an heir, devisee,
24 or claimant cannot be found, the personal representative shall distribute the share of the missing

1 person to the person's conservator, if any, otherwise to the [tribal treasurer] to become a part of
2 the [tribal jurisdiction escheat fund].]

3 **Reporters' Note**

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

7 **PART 7.**

8 **CLOSING ESTATE**

9 **SECTION 2-701. PROCEEDING TERMINATING ADMINISTRATION; ORDER** 10 **OF COMPLETE SETTLEMENT.**

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

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

24 (c) Any accounting required under this section may be waived if the persons entitled to a
25 copy consent in writing.
26

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

Reporters' Note

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

SECTION 2-702. LIABILITY OF DISTRIBUTEE TO CLAIMANT. After assets of an estate have been distributed and subject to Section 2-705, an undischarged claim not barred may be prosecuted in a proceeding against one or more distributees. A distributee may not be liable to claimants for amounts received as [statutory allowances for spouse and children], or for amounts in excess of the value of the distribution as of the time of distribution.

Reporters' Note

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

SECTION 2-703. SUBSEQUENT ADMINISTRATION. If other property of the estate is discovered after an estate has been settled and the personal representative discharged, the court upon petition of any interested person and upon notice as it directs, may appoint the same or a successor personal representative to administer the subsequently discovered estate. If a new appointment is made, unless the court orders otherwise, the provisions of this [code] apply as appropriate; but no claim previously barred may be asserted in the subsequent administration.

Reporters' Note

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

PART 8.

SUMMARY ADMINISTRATION PROCEDURE FOR SMALL ESTATE

SECTION 2-801. SMALL ESTATE; SUMMARY ADMINISTRATION PROCEDURE. If it appears from the inventory and appraisal that the value of the entire estate, less liens and encumbrances, does not exceed homestead allowance, exempt property, family

allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative may, without giving notice to creditors, immediately disburse and distribute the estate to the persons entitled thereto, and file a closing statement as provided in Section 2-802

Reporters' Note

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

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

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

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

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

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

(b) If no actions or proceedings involving the personal representative are pending in the

1 court one year after the closing statement is filed, the appointment of the personal representative
2 terminates.

3 **Reporters' Note**

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

5 **PART 9.**

6 **DELIVERY OF PERSONAL PROPERTY TO FOREIGN PERSONAL**

7 **REPRESENTATIVES; ANCILLARY ADMINISTRATION**

8 **SECTION 2-901. DEFINITIONS.** In this [part]

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

11 (2) "Local personal representative" means a personal representative appointed in this
12 tribal jurisdiction pursuant to appointment proceedings described in this [Article].

13 **Reporters' Note**

14 This section is based on a portion of Section 4-101 of the Uniform Probate Code.

15 **SECTION 2-902. ANCILLARY AND OTHER LOCAL ADMINISTRATION;**
16 **PROVISIONS GOVERNING.** In respect to a nonresident decedent, the provisions of this
17 [part] govern:

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

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

23 **Reporters' Note**

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

1 **SECTION 2-903. FINAL DISTRIBUTION TO DOMICILIARY**

2 **REPRESENTATIVE.** An estate of a non-resident decedent being administered by a personal
3 representative appointed in this [tribal jurisdiction] shall, if there is a personal representative of
4 the decedent's domicile willing to receive it, be distributed to the domiciliary personal
5 representative for the benefit of the successors of the decedent unless; (1) by virtue of the
6 decedent's will, if any, and applicable choice of law rules, the successors are identified pursuant
7 to the local law of this [tribal jurisdiction] without reference to the local law of the decedent's
8 domicile; (2) the personal representative of this tribal jurisdiction, after reasonable inquiry, is
9 unaware of the existence or identity of a domiciliary personal representative; or (3) the court
10 orders otherwise in a proceeding for a closing order under Section 2-701 or incident to the
11 closing of a supervised administration. In other cases, distribution of the estate of a decedent
12 shall be made in accordance with the other [parts] of this [article].

13 **Reporters' Note**

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

15 **SECTION 2-904. JURISDICTION BY ACT OF FOREIGN PERSONAL**

16 **REPRESENTATIVE.** A foreign personal representative submits personally to the jurisdiction
17 of the courts of this tribal jurisdiction in any proceeding relating to the estate by; (1) filing
18 certified copies of the personal representative's appointment in the other jurisdiction; (2) doing
19 any act as a personal representative in this jurisdiction which would have given the tribe
20 jurisdiction over the representative as an individual; or (3) receiving payment of money or taking
21 delivery of personal property. Jurisdiction under clause (3) is limited to the money or value of
22 personal property collected.

23 **Reporters' Note**

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

SECTION 2-905. JURISDICTION BY ACT OF DECEDENT. In addition to jurisdiction conferred by Section 2-904, a foreign personal representative is subject to the jurisdiction of the courts of this state to the same extent that the decedent was subject to jurisdiction immediately prior to death.

SECTION 2-906. SERVICE ON FOREIGN PERSONAL REPRESENTATIVE. Notice shall be given to a foreign personal representative in the manner prescribed by Section 1-303.

Reporters' Note

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

ARTICLE 3

INTESTATE AND TESTATE SUCCESSION

PART 1.

INTESTATE SUCCESSION OF NON-TRUST PROPERTY

SUBPART 1. BASIC INTESTATE SUCCESSION SCHEME – NON-TRUST PROPERTY

SECTION 3-101. INTESTATE ESTATE. The intestate estate is any part of a decedent's estate not effectively disposed of by will. The net intestate estate, which is the balance of the decedent's estate after claims, expenses, statutory allowances for the spouse and children, exempt property, cultural artifacts, and property which is not otherwise barred from distribution by tribal law or tribal leasing regulations, passes by intestate succession to the decedent's heirs as described in this code.

Reporters' Note

There are numerous ways that intestate succession can be, and have been, handled within a tribal probate code: (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.

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

SECTION 3-102. SHARE OF SPOUSE.

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

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

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

(b) The intestate share of a decedent’s surviving spouse is $\frac{1}{2}$ of the entire net intestate estate if the decedent is survived by one or more descendants who are not also descendants of the surviving spouse.

Reporters’ Note

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

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

(a) Any part of the net intestate estate that does not pass to a decedent’s surviving spouse

1 passes as follows:

2 (1) to the decedent's surviving descendants by representation;

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

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

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

10 (A) half to the decedent's surviving paternal grandparent or grandparents
11 equally, or if neither has survived, to his, her or their descendants (i.e. cousins) by representation,
12 with the other half passing to the maternal side in the same manner.

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

16 **Reporters' Note**

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

18 More specifically, the determination of who should fit within the category of "heirs" after
19 the surviving spouse reflects a policy choice between keeping that category within a fairly close
20 set of relatives to the decedent (e.g. to spouse and descendants only, or more broadly to include
21 some of the decedent's ancestors and their descendants (e.g. the decedent's parents and possibly
22 their descendants, or the decedent's grandparents and possibly their descendants) or to
23 essentially broaden the class of potential heirs to anyone related to the decedent in any degree.
24 State statutes reflect this distinction. Although most of them extend potential heirs through the
25 decedent's grandparents and their descendants (i.e. what is known as the third parentela), some
26 go further to provide for step children and/or "next of kin," no matter how distantly related,
27 while others then shift to escheat. *See, e.g.,* Chitimacha TPC § 304; Fort Peck TPC Title 12 §
28 106 (through third parentela, limited to surviving cousins of the 3rd degree). For an example of a
29 system permitting inheritance by in-laws absent surviving heirs of the decedent, *see* Jicarilla TPC

Chapter 8 § 1(D)(3) (“if heirs are not found, the estate shall go to the heirs of the deceased spouse . . . [and if more than one,] each spouse’s share shall be divided equally among their heirs.”).

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

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

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

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

SECTION 3-104. INDIVIDUALS RELATED TO DECEDENT THROUGH TWO LINES. An individual who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship that would entitle the individual to the larger share.

SECTION 3-105. NO TAKER. If there is no taker under the provisions of Section 3-

103, the entire net estate will be distributed as ordered by the court.

Reporters' Note

This section avoids the difficulties associated with escheat, such as the particular tribe to which the property will escheat. There are other ways to design this sort of provision, which could be included in these Reporters' Notes or in an implementation guide. For example, the TPC could state that "if the decedent is a tribal member, the entire net intestate estate will escheat to the Tribe and will be added to the general fund," adding some provision for the result if the decedent is not a tribal member, or, *e.g.*, "personal property found within the intestate estate will escheat to the Tribe and will be added to the general fund, whereas real property will pass to any existing co-owners of the real estate."

SECTION 3-106. REPRESENTATION. Wherever any part of a decedent's intestate estate passes by representation to the descendants of the decedent, the decedent's parents, or the decedent's grandparents, the following steps should be taken to calculate the share or shares passing to those who so take: (i) identify the first generation down from the decedent or other designated relative with at least one surviving member; (ii) count the number of living members in that generation plus predeceased members in that generation who left surviving descendants; (iii) allocate an equal share to each living member and divide down the share of each predeceased member of that generation who left surviving descendants in the same manner until the share is fully distributed.

Reporters' Note

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

There are essentially three commonly employed methods of representation: Pure (aka "Strict" or "Classic") Per Stirpes, Modified (aka "Modern" or "Per Capita with Representation") Per Stirpes, and Per Capita at Each Generation (which is the representational approach adopted under the current UPC). Depending on the particular facts of the decedent's estate, the outcomes may differ, and sometimes drastically. The difference between the three approaches generally turns on the generation at which the estate is initially divided into equal shares, with pure per stirpes ensuring vertical equality of the shares among the decedent's (or others') descendants and per capita ensuring horizontal equality of the shares within each generation of heirs. Modified

- 1 per stirpes splits the difference somewhat, flattening (but not erasing) the potential for wide
 2 horizontal disparity of shares. For example, assume the following facts, with the individuals who
 3 are bolded and in brackets having predeceased the decedent, and thus ineligible to take from the
 4 decedent's estate [work with hypo & formatting]:

| | | | |
|--------------------|---|--|---|
| Hypothetical | Decedent <div style="text-align: center;"> Child A [Child B] [Child C] GC1 GC2 GC3 GC4 GC5 GC6 </div> | | |
| Approach | Pure per stirpes | Modified per stirpes | Per capita at each gen. |
| Intestate Outcome | Child A takes 1/3, GC3 takes 1/3, GC4, GC5, and GC6 each take 1/3 of 1/3 or 1/9 of the decedent's estate. | Same. | Child A takes 1/3, GC 3, 4, 5, and 6 each take 1/4 of 2/3 or 1/6 of the decedent's estate. |
| Hypothetical | Decedent <div style="text-align: center;"> [Child A] [Child B] [Child C] GC1 GC2 GC3 GC4 GC5 GC6 </div> | | |
| Approach | Pure per stirpes | Modified per stirpes | Per capita at each gen. |
| Intestate Out Come | GC 1 & 2 would each take 1/2 of 1/3 (or 1/6) of the decedent's estate; GC 3 would take 1/3 of the decedent's estate; GC 4, 5 & 6 would each take 1/3 of 1/3 (or 1/9) of the decedent's estate. | GC 1-6 would each take 1/6 of the decedent's estate. | GC 1-6 would each take 1/6 of the decedent's estate. |
| Hypothetical | Decedent <div style="text-align: center;"> Child A [Child B] [Child C] GC1 GC2 [GC3] GC4 [GC5] GC6 GGC1 GGC2 GGC3 </div> | | |
| Approach | Pure per stirpes | Modified per stirpes | Per capita at each gen. |
| Intestate Outcome | Child A takes 1/3, GGC1 and GGC2 each take 1/2 of 1/3 or 1/6, and GC4, GC6, and GGC3 each take 1/3 of 1/3 or 1/9 of the decedent's estate. | Same as Pure per stirpes. | Child A takes 1/3, GC4 and GC 6 take 1/6 of the decedent's estate, and GGC1, GGC2, and GGC3 each take 1/9 of the decedent's estate. |

1 Arguably, a pure per stirpes representational scheme affords the cleanest method and
2 always ensures that each child's line takes an equal amount of the decedent's estate. However,
3 modified per stirpes seems superior in (1) comporting with what most decedents would
4 presumably want were all of their children to predecease them and (2) lessening the potential for
5 smaller and more heavily fractionated shares. Per Capita at Each Generation most closely hews
6 to Modified Per Stirpes, with the difference in application arising infrequently enough that
7 Modified Per Stirpes was selected as the applicable representational scheme in the drafted
8 provision.

9 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).

15 **SUBPART 2.**

16 **STATUS ISSUES: WHO FITS WITHIN THE BASIC SCHEME**

17 **[Drafting notes:** this part is heavily culturally dependent, and the drafting committee will want
18 to consider how minimalist the drafted provisions should be. Much can be handled within the
19 definitions section, e.g. "unless elsewhere defined within Tribal law, the decedent's spouse shall
20 mean ____."

21 Additionally, some of this material could be moved to the later section covering matters
22 applicable to both intestate and testate succession, and survivorship arrangements authorized
23 under Article IV.]

24 **SECTION 3-107. PARENT-CHILD RELATIONSHIP; MARITAL STATUS.**

25 Except as altered by adoption, a parent-child relationship exists between a child and the child's
26 biological parents, regardless of whether the parents are married to each other, upon proof of
27 parentage under tribal law. Except as altered by adoption, a parent-child relationship does not
28 exist between a stepchild or foster child and a step- or foster parent.

29 **Reporters' Note**

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

1 Person born out of wedlock is not treated as the child of the father unless the
2 person is openly and notoriously so treated by the father or unless paternity has been
3 judicially determined during the life of the father Chitimacha § 213(b)(6) (Rules of
4 Construction and Intention). Note, however, that the quoted code provision was limited
5 to construction of the meaning of a term used in a will rather than a broader limit to
6 heirship status.

7
8 For a sample jurisdictional clause:

9
10 The Court shall have jurisdiction of all suits brought to determine the paternity of
11 a child and to obtain a judgment for the support of the child. A judgment of the Court
12 establishing the identity of the father of the child shall be conclusive of that fact in all
13 subsequent determination of inheritance by the Department of the Interior or by the
14 Court. Blackfeet Tribal Law and Order Code, Ch. 3 § 3.

15
16 For a sample broad clause placing evidentiary control within the court: “the words
17 ‘children’ and ‘issue’ include adopted children and children of unwed parents where the
18 Secretary of the Interior or the Tribal Court determines that paternity has been acknowledged or
19 established[.]” Fort Peck TPC Title 12 § 106(b). For a sample provision that provides no special
20 rule either way: “For the purposes of inheritance by, through, and from any child, the effects and
21 treatment of the parent-child relationship shall not depend on whether or not the parents have
22 been married.” Lummi Nation TPC title 35 § 35.05.020.

23
24 **Drafting Note:** The Uniform Parentage Act is working on matters pertaining to the
25 interplay between parentage and same-sex marriage. We have chosen to defer such coordination
26 here pending completion of that work.

27
28 **[SECTION 3-108. PARENT BARRED FROM INHERITING IN CERTAIN**
29 **CIRCUMSTANCES.**

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

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

33 (2) the child died before reaching eighteen [18] years of age and there is clear and
34 convincing evidence that immediately before the child’s death, the parental rights of the parent
35 could have been terminated under any Tribal or state law on the basis of nonsupport,
36 abandonment, abuse, neglect, or other similar actions or inactions of the parent toward the child.

37 (b) For the purpose of intestate succession from or through the deceased minor child, a

parent who is barred from inheriting under this section is treated as if the parent predeceased the child.

Reporters' Note

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

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

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

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

SECTION 3-109. INHERITANCE BY, FROM, AND THROUGH ADOPTED

CHILD.

(a) Subject to the exceptions found within subsection (c), if an adoption is complete and lawful under tribal [and federal] law, a parent-child relationship exists between an adoptee and the adoptee’s adoptive parent or parents, and no longer exists between an adoptee and the adoptee’s biological parent or parents.

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

(1) The decree of adoption provides for the continuation of the adoptee’s

1 inheritance rights from the biological family;

2 (2) The adoptive parent is either a spouse, relative, or the spouse of a relative of
3 either biological parent; or

4 (3) The child is adopted after the death of both biological parents.

5 **Reporters' Note**

6 State TPCs vary widely over the extent to which children retain inheritance rights from
7 their biological families after an adoption is complete. The drafted provision generally cuts off
8 inheritance lines between the child and the biological family except for the three instances
9 identified (specific order; step-parent or relative adoption; post-death adoption). Note that in
10 each of them, the inheritance rights would continue to flow "down" (i.e. to the adopted child)
11 rather than "up" (i.e. back to the biological family). A TPC could provide that the child's rights
12 to inherit remain irrespective of the circumstances of the adoption, which is the less common
13 approach taken in state PCs. *See, e.g.*, "An adopted person is the child of an adopting parent and
14 of the natural parents for inheritance purposes only." Chitimacha TPC § 309.
15 For an example of provision deferring to state law: "All members of the Blackfeet Indian Tribe
16 shall hereafter be governed by State Law and subject to state jurisdiction with respect to
17 adoptions hereafter consummated." Blackfeet Law and Order Code, Ch. 3, § 8 (Adoption).

18 **SUBPART 3.**

19 **ALTERATIONS TO THE BASIC SCHEME**

20 **SECTION 3-110. ADVANCEMENT.**

21 (a) Any property that an intestate decedent gave during life to one who ends up being
22 entitled to an intestate share is considered an advancement and shall be deducted from the heir's
23 intestate share only upon written proof, made either by the decedent or the recipient, that clearly
24 reflects that intent through formal or informal language.

25 (b) The writing shall control the effect of the advancement, such as the value of the
26 advancement and whether, if the recipient predeceases the decedent, the advancement will
27 reduce the intestate share of the recipient's descendants. Absent intent expressed in the writing,
28 advancements shall not reduce the shares of a predeceasing recipient's descendants, and property
29 advanced shall be valued as of the time of the first to occur of the heir coming into possession or
30

1 enjoyment of the property or the decedent's death.

2 **PART 2.**

3 **INTESTATE SUCCESSION OF TRUST AND RESTRICTED REAL AND PERSONAL**
4 **PROPERTY**

5 [To be added as possible provisions per AIPRA; continue to review currently approved codes
6 (Umatilla, Fond du Lac, Northern Cheyenne); review Interior sample]

7 **PART 3.**

8 **TESTATE SUCCESSION OF TRUST AND NON-TRUST PROPERTY [WILL**
9 **EXECUTION, REVOCATION, CHALLENGE, COMPOSITION, AND**
10 **CONSTRUCTION]**

11 **SUBPART 1.**

12 **WILL EXECUTION AND REVOCATION**

13 **SECTION 3-301. WHO MAY MAKE WILL.** Any person of sound mind who is 18
14 years of age or older may make a will.

15 **Reporters' Note**

16
17
18 This provision could provide more detail incorporating mental state, e.g. "A will shall be
19 deemed to be valid if the decedent had a sane mind and understood what he was doing when he
20 made the will and was not subject to any undue influence of any kind from another person[.]"
21 Blackfeet Tribal Law and Order Code Ch. 3 § 5; Same basic provision Chitimacha TPC Chapter
22 2 (Wills), § 201 (Who May Make a Will).

23
24 **SECTION 3-302. EXECUTION; WITNESSED WILL; HOLOGRAPHIC WILL.**

25 (a) [Witnessed Will.] Except as otherwise provided in subsection (b) [holographic] and
26 3-307 [choice of law]], a will must be:

27 (1) in writing;

28 (2) dated;

1 (3) signed by the testator [or by another who signs the testator's name at the
2 testator's request and in the testator's conscious presence] in the presence of the two attesting
3 witnesses; and

4 (4) signed by two or more [competent] disinterested adult witnesses who each
5 sign within the testator's and each other's presence after the testator declared that the document
6 was the testator's will and requested the witnesses to so serve.

7 (b) A will executed before the effective date of this Code is valid if it complied with the
8 law in existence at the time of its execution.

9 [(c) Holographic Will. A will that does not comply with subsection (a) is valid as a
10 holographic will, whether or not witnessed, if the signature and material portions of the
11 document are in the testator's handwriting and the testator intended that document to dispose of
12 the testator's property or otherwise affect the testator's estate at death.

13 (d) Extrinsic Evidence. Intent that a document constitute the testator's will can be
14 established by extrinsic evidence, including, for holographic wills, portions of a will form or
15 other document that are not in the testator's handwriting.]

16 **Reporters' Note**

17
18 The MTPC provision covering the requirements for a valid will includes many complex
19 components. Most importantly, there is significant ambiguity involved. 25 CFR Ch. 1 §§ 15.4
20 and 15.7 discuss, respectively, the requirements for a valid will and for making a will self-
21 proved. A strict reading of these regulations together, particularly those covering what must be
22 included in a self-proving affidavit, suggests a fairly strict set of rules, strictly construed, with the
23 potential for harsh outcomes (i.e. intestate succession) where an attempted will is deemed non-
24 compliant.

25
26 For example, it seems that the regulations include the requirement of actually
27 disinterested witnesses rather than any competent adult witness plus a purging act. Not one state
28 statute shares this result, which is an archaic rule imposed under early English law. Instead,
29 most states judicially or more commonly, legislatively determine either that (1) there is no need
30 for a disinterested witness at all (see, e.g., UPC for rule & theory) or (2) that the will is still valid
31 but the interest is purged, with the interested witness taking "whichever is less" under the will
32 versus some other source, e.g. a prior will, or intestate succession. For an example of a TPC

1 taking this sort of “purging” approach (and expressly limiting what sort of interest will trigger
2 purging), *see* Mashantucket Pequot TPC Ch. 5 § 4:
3

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

11 Additionally, the language of the regulations suggests that holographic and oral wills are
12 completely prohibited, that signature by proxy is not permitted, that publication is still
13 demanded, that the will must have been read by or read to the testator before execution, etc.
14 While some of these provisions remain in state codes, many (if not most) have streamlined the
15 rules on the theory that the ends (upholding intent, avoiding carelessness, thoughtlessness, or
16 fraud) may be as well and more easily met through other formality sets that impose fewer
17 burdens and costs.
18

19 There are a few theories and directions that the MTPC could take here:
20

- 21 1. As the federal regulations only apply to trust or restricted land or trust personality,
22 a tribe is always free to alter the wills formalities for non-covered property, and it
23 appears that many tribes do (e.g. by permitting oral wills or holographic wills).
24 However, the difficulty is that doing so creates confusion and facilitates unintended
25 outcomes, whereby a single will may be valid only as to some (non-trust or restricted)
26 of the decedent’s property. The more efficient approach would be to track the more
27 restrictive execution requirements for *all* wills to ensure compliance under any
28 federal, tribal, or state system. If the formalities are super clear, and relatively
29 cheaply accomplished, then the unfair effects of a strict rule set are mitigated (even if
30 they cannot be avoided entirely).
31
- 32 2. Perhaps a particular tribe could seek approval of a tribal probate code that
33 supplanted (and presumably, liberalized) the execution requirements found in the
34 regulations. The difficulty there, however, is that the federal government might
35 resist, fearing the inefficiency created if OHA had to pass on the validity of a will
36 under a number of possibly different tribal codes. It might be that the “validity”
37 function could be determined at the tribal level, with the probate packet then sent on
38 to OHA for subsequent administration.
39
- 40 3. The ambiguity of 15.4 (date and “execute” your will in writing and have it
41 attested by two disinterested adult witnesses) does create some flexibility over what
42 “execution” means, in which case some of the additional requirements – e.g.
43 publication & presence – are only demanded to render a will *self-proving* rather than
44 to make it initially valid. But that doesn’t entirely solve matters. A related problem
45 is the tension caused by having a party swear to a more restrictive set of requirements
46 to make the will “self proved” than are necessary to render the will valid, in which
47 case that witness is exposed to a perjury charge as well as subject to more intense

1 scrutiny over the veracity of the representations necessary to support initial will
2 validity. Indeed, it might be that swearing to a ceremony that did not actually take
3 place could expose the will more readily to a successful challenge based on undue
4 influence. Admittedly, the requirement of “disinterested witnesses” mitigates this
5 somewhat, but that partly turns on how tightly or loosely the court defines who is
6 interested and who is not. The mismatch is problematic, and counsels toward
7 approach #1 in the absence of some belief that approach #2 would work.
8

- 9 4. It does appear that under IBIA decisions interpreting other provisions of Title 43
10 regs, approach #3 holds water. For example, in *Estate of Sarah Stewart Sings Good*,
11 57 IBIA 65 (I.B.I.A.), 2013 WL 3054080 (2013), a will challenger asserted that the
12 will was improperly executed for failing to meet the asserted requirements of
13 publication and witness request as set forth in the proposed self-proving affidavit
14 form. The IBIA disagreed. To the Board, although “the will scrivener should
15 perhaps have crossed out the language relating to publication and a request to sign
16 before using BIA's standard form affidavit,” the failure to do so did not impose
17 additional execution requirements beyond those enumerated in 25 C.F.R. §§ 15.3,
18 15.4. *Id.* at 76, quoting *Estate of Lena Abbie Big Bear Yellow Eagle*, 17 IBIA 237,
19 238-39 (1989) (citing *Estate of Carrie Standing Haddon Miller*, 10 IBIA 128, 132
20 (1982) (holding that an Indian testatrix is neither required to publish her will nor be
21 the person to request the witnesses to sign in order for the will to be properly
22 executed)). The Board continued by recognizing that “at most, the absence of these
23 formalities could defeat the self-proving character of the will, in which case
24 testimony must be obtained from the will witnesses if they are available[.]” *Id.*, citing
25 *Estate of Margerate Arline Glenn*, 50 IBIA 5, 28 (2009); *Estate of Sallie Fawbush*, 34
26 IBIA 254, 257 (2000).
27

28 Nevertheless, the mismatch between what the regulations require for a valid will and
29 those strongly suggested within the self-proving affidavit forms create ambiguity and potential
30 for confusion and mistake.
31

32 The drafted provision does not recognize oral wills, which is consistent with federal law.
33 See *Estate of Nels John Johnson*, 55 IBIA 171 (I.B.I.A.), 2012 WL 8436502 (2012) (no federal
34 statute or regulation recognizes oral wills); *Estate of Baz Nip Pah*, 22 IBIA 72, 74 (1992)
35 (“Oral wills cannot be recognized for the purpose of conveying trust or restricted property.”).
36 However, this may be a point for tribes to consider, as some TPCs do recognize them for non-
37 trust or restricted property. Example: “valid as an oral will under Chitimacha custom, if all
38 children, whether residing in testator’s home or not, and testator’s spouse, if alive, are present at
39 the announcement of the oral will and agree that the testator orally made known the testator’s last
40 will before them.” Chitimacha, § 204.
41

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

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

9
10 If a tribe determines that holographic wills are worth the costs of confusion vis-à-vis fed
11 law, a number of variations exist between tighter rules, strictly construed, and looser ones,
12 flexibly construed. For example, could require that the will be “entirely handwritten, dated, and
13 signed,” or only “material portions + signature” in t’s handwriting. Suggest that MTPC go w/
14 loosest possible if going to have at all, to support the practice (sloppy, but common) where will
15 forms are filled in by hand, signed, but never appropriately witnessed. Moreover, if there is an
16 independent requirement that “testamentary intent” exist, that should somewhat mitigate the
17 concern that a draft document or worksheet would be considered a will.
18 Along those lines, the drafted provision permits testamentary intent to be established through
19 different methods, by contrast to some approaches that require it to appear on the face of the
20 document. The tradeoff general cuts as efficiency versus intent, b/c the evidentiary burdens can
21 be high when the decedent’s intent is the touchstone. Could avoid entirely by directing to tribal
22 evidentiary code, but that seems to kick the drafting can.

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

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

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

45
46 **[SECTION 3-303. HARMLESS ERROR.** Although a document or writing added

1 upon a document was not executed in compliance with Section 3-302, the document or writing is
2 treated as if it had been executed in compliance with that section if the proponent of the
3 document or writing establishes by clear and convincing evidence that the decedent intended the
4 document or writing to constitute:

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

10 **Reporters' Note**

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 **SECTION 3-304. CODICIL.** A codicil is a document meeting the requirements of
18 Section 3-302 or [3-303] that alters or supplements, rather than replaces, an existing will. A
19 codicil need not reference or be attached to the existing will.

20 **Reporters' Note**

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

23 **SECTION 3-305. SELF-PROVED WILL.**

24 (a) A witnessed [(but not holographic)] will or codicil may be made self-proved at any
25 time at or after its execution by the acknowledgment thereof by the testator and the affidavits of
26 the witnesses, each made before an officer authorized to administer oaths under the laws of the
27 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)
25 _____

26 (Official capacity of officer)

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

30 (c) A will that is self-proved creates a rebuttable presumption that all execution

1 formalities have been met. If a will is self-proved, it is not necessary than an attesting witness
2 testify in court or that other evidence of proper execution be presented as to the circumstances of
3 its execution.

4 **Reporters' Note**

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

10
11 On allowing the signature on the SPA to count as a disinterested witness's signature to
12 the will: see *Estate of Edward Kappaisruk Ramoth, Sr.*, 56 IBIA 271 (I.B.I.A.), 2013 WL
13 3054072 (2013) (clarifying earlier dicta to hold that a will signed by only one disinterested
14 witness along with a notary's signature on the self-proving affidavit could qualify as a validly
15 executed (although not self-proved) will, irrespective of the intent with which the notary signed
16 the affidavit).

17
18 Note that b/c of some semantic difficulty, this drafted provision avoids a single-paragraph
19 acknowledgment/attestation as can sometimes be found in TPCS. *See, e.g.*, Chitimacha § 205
20 (Self-Proved Will-Form)

21
22 **SECTION 3-306. WHO MAY WITNESS.** Any disinterested adult individual
23 generally competent to be a witness in court under Tribal law may act as a witness to a will. The
24 spouse or close relative of a witness is not considered interested unless that witness is also a
25 beneficiary under the will. A will executed without the required number of disinterested
26 witnesses is invalid.

27 **Reporters' Note**

28 This provision is very strict. It was drafted to signal the requirement of, and to comport
29 with, CFR reg 15.4, and again implicates the questions raised above about the desirability of
30 moving all "validity" requirements to the highest common denominator to avoid inadvertent
31 partial intestacy.
32 Should the tribe decide that it would prefer a more forgiving rule regarding witness qualification,
33 there are options:

34
35 No "disinterested witness" requirement at all, as per UPC & many states. Theory:
36 "punishment" not fit the "crime," can always directly attack the will itself on grounds of undue
37 influence if concern is significant enough; trap for unwary in that most people trust their family

members the most, and thus would naturally gravitate toward requesting the very people they've distributed property to under the will to also serve as witnesses thereto. Language: [alt: the signing of a will by an interested witness does not invalidate the will or any provision of it]. Middle ground: purge, perhaps with broader definition of interested witness: "A will is not invalidated because it is signed by an interested witness; but, unless the will is also signed by two other disinterested witnesses, any beneficial provision of the will in favor of a witness or the witness's spouse is invalid to the extent that such provisions in the aggregate exceed in value what the witness or spouse would have received had the testator died intestate." See, e.g., Chitimacha TPC § 206 (Who May Witness).

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

SECTION 3-307. CHOICE OF LAW AS TO EXECUTION. A will is valid if executed in compliance with the law of this jurisdiction or if, at the time of execution or the time of death, its execution complies with the law of the place where it was executed or the testator has a domicile or place of abode.

A will executed in compliance with the law of this jurisdiction may include a will executed before the effective date of this code.

Reporters' Note

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

SECTION 3-308. REVOCATION OF WILL.

(a) A will, or any part thereof, is revoked by executing a later will that revokes the prior will either expressly or by inconsistency. A later will revokes a prior one by inconsistency if the

1 testator intended the later will, or part of the will, to replace rather than supplement the prior will.
2 [There is no presumed intent for the later will to replace the prior will if the testator intended
3 both wills to be effective, as where one will covers trust or restricted property and the other will
4 does not.]

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

9 (c) Except as provided by the express terms of the will, court order, or a contract relating
10 to property division, and unless the parties remarry before the testator's death, a will or any part
11 thereof is revoked upon a final divorce decree or annulment to the extent that it benefitted the
12 testator's former spouse or any of the former spouse's relatives who are not also relatives of the
13 testator.

14 (d) If a will in the possession of the testator before death is not found after the testator's
15 death, it is presumed to have been physically destroyed by the testator with the intent to revoke
16 it. This presumption is rebuttable by a preponderance of the evidence upon either direct proof of,
17 or circumstances suggesting that, there was no revocatory intent.

18 **Reporters' Note**

19 [Drafting note: careful consideration of scenario where the testator executes two wills,
20 e.g. one for trust property, the other for non-trust property, and the effect of standard revocation
21 boilerplate thereon. Possibly could statutorily address.]

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

27
28 For example, the Chitimacha Code permits revocation through both later will and
29 physical act + by proxy, permits in whole or in part, and includes revocation by divorce. The

1 latter provision reads “if provisions are revoked solely by this Section, they are revived by
2 testator’s remarriage to the former spouse . . . a decree of separation which does not terminate the
3 status of husband and wife is not a divorce for purposes of this Section. No change of
4 circumstances other than as described in this Section revokes a will.” Chitimacha TPC § 209.
5 The Fort Peck Code permits revocation by writing or by act, but appears to limit revocation by
6 act to total rather than partial destruction. Fort Peck TPC Title 12 § 115.
7

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

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

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

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

1 **Reporters' Note**

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

9
10 **SUBPART 2.**

11 **WILL CHALLENGES, COMPOSITION, AND CONSTRUCTION**

12 **SECTION 3-310. WILL CHALLENGES.** A will or document or any part thereof
13 offered for probate may be challenged or contested on the grounds of lack of proper execution,
14 lack of testamentary capacity, lack of testamentary intent, undue influence, duress, fraud, or
15 revocation.

16 [Drafting note: consider extent to which should list or identify factors found in IBIA decisions
17 exploring Undue Influence & Testamentary Capacity.]

18 **SECTION 3-311. COMPOSITION OF A WILL; INCORPORATION BY**
19 **REFERENCE.** A will comprises any written pages that are physically present at the execution
20 of the will and are intended by the testator to be part of the will. However, a will may
21 incorporate a writing that is not physically present at its execution if

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

25 **Reporters' Note**

26 [Drafting notes: this drafted provision avoids reference to the Uniform Testamentary
27 Additions to Trusts Act, which could be discussed in an implementation guide. Some TPCs
28 include. Model draft also avoids reference to acts or facts with independent significance,
29 contracts regarding estates, and lists of tangible personal property (i.e. UPC 2-513). Again, some
30 of the TPCs do so, but seems like perhaps unwarranted here at this stage.
31

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

SECTION 3-312. [HEADING] Whether or not the provisions of Section ____ (pertaining to execution formalities) or Section ____ (pertaining to Incorporation by Reference) apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money. To be admissible under this section as evidence of the intended disposition, the writing must be signed by the testator and must describe the items and the devisees with reasonable certainty.

Reporters’ Note

The explicit reference to Section ____ is intended to make clear that the writing under this section need not already exist. Instead, it may be referred to as one to be in existence at the time of the testator’s death; it may be prepared before or after the execution of the will; and it may be altered by the testator after its preparation.

SECTION 3-313. CONSTRUCTION OF A WILL; GENERAL. Unless there is a clear finding of contrary intent, wills shall be construed as follows:

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

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

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

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

1 **Reporters' Note**

2
3 Note that a transfer by will of a trust interest in land shall be presumed to include the
4 interest of the testator in any permanent improvements attached to the land.
5

6 **SECTION 3-314. CONSTRUCTION OF A WILL; PENALTY CLAUSE FOR**

7 **CONTEST.** A provision in a will purporting to penalize an interested person for contesting the
8 will or instituting other proceedings relating to the estate is unenforceable if probable cause
9 exists for instituting the proceedings.

10 **SECTION 3-315. SPOUSAL SHARE.**

11 (a) If the testator is survived by a spouse, the spouse is entitled to an elective share
12 whether or not the will provides for the spouse. That amount of the elective share equals in
13 value what the spouse would have received had the testator died intestate unless

14 (1) the testator provided for the spouse by a transfer of funds or property outside
15 the will and an intent that the transfer be in lieu of a testamentary provision is clear and
16 convincing, or

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

19 (b) The property, if any, that the spouse was devised under the will, is applied first in
20 making up the elective share.

21 (c) The right of election of a surviving spouse and the rights of the surviving spouse to
22 homestead allowance, exempt property, cultural artifacts, and family allowance, or any of them,
23 may be waived, wholly or partially, before or after the marriage, by a written contract,
24 agreement, or waiver signed by the surviving spouse.

25 **Reporters' Note**

26
27 This provision streamlines by combining elective share (electing against a will
28 irrespective of when the marriage occurred vis-à-vis the will's execution) and omitted shares

(limited to post-execution marriage).

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

SECTION 3-316. CHILDREN UNPROVIDED FOR IN WILL.

(a) If a testator fails to provide in the testator’s will for any child born or lawfully adopted after the execution of the will, including any codicil, then the omitted child shall receive a share of the estate as provided in this section so long as such child survives the testator [and lives 120 hours after the child’s birth.]

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

(2) If the testator had one or more children living when the testator executed the will, and the will devised property to one or more of those then-living children, the omitted child shares in the amount received by the children to whom devises were made under the will [unless the testator devised substantially all of the estate to the other parent of the omitted child;]

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

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

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

1 **SECTION 3-317. WILL CONSTRUCTION REGARDING BENEFICIARIES:**
2 **DEATH OF BENEFICIARY BEFORE TESTATOR.**

3 (a) In the absence of a finding of a contrary intent, if a beneficiary under a will dies
4 before the testator, the interest that the beneficiary would have taken had the beneficiary
5 survived lapses unless the predeceasing beneficiary was a grandparent or any descendant of a
6 grandparent or a stepchild and the predeceasing beneficiary left descendants who survived the
7 testator by at least 120 hours, in which case the gift will pass to those descendants.

8 (b) A devise other than a residuary devise will lapse to the residuary, if any; otherwise, to
9 intestate succession. A residuary devise will lapse to the other residuary taker or takers, if any;
10 otherwise, to intestate succession. If a member of a class predeceases the testator, the share
11 passes to the surviving class member or members, if any.

12 **Reporters' Note**

13
14 This drafted provision avoids the dispute over survivorship language prompted by the
15 relative specificity demanded within the Uniform Probate Code for sufficiently expressed
16 contrary intent.

17
18 For a provision that limits the application of the anti-lapse principle expressed in part (b)
19 above to more closely related predeceasing beneficiaries, see Fort Peck TPC Title 12 § 117 (only
20 applies if beneficiary was grandparent, parent, or lineal descendant of decedent).

21
22 **SECTION 3-318. WILL CONSTRUCTION REGARDING PROPERTY:**
23 **NONADEMPTION OF SPECIFIC DEVISES.**

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

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

29 (1) any balance of the purchase price, together with any security agreement, owed

1 by a purchaser by reason of sale of the property;

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

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

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

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

12 (c) If specifically devised property is sold or mortgaged by a conservator or by an agent
13 acting within the authority of a durable power of attorney for an incapacitated principal, or a
14 condemnation award, insurance proceeds, or recovery for injury to the property is paid to a
15 conservator or to an agent acting within the authority of a durable power of attorney for an
16 incapacitated principal, the specific devisee has the right to a general pecuniary devise equal to
17 the net sale price, the amount of the unpaid loan, the condemnation award, the insurance
18 proceeds, or the recovery.

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

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

1 **Reporters' Note**

2
3 The drafted provision avoids the litigation-producing difficulty of a catch-all provision
4 regarding "anything not intended to be adeemed." The concept of replacement property is
5 admittedly messy, especially if there is little case law on point. But it seems to cover the
6 possibility that, e.g., where a particular car that was then sold was to go to A, A can take the
7 "replacement car," especially under a time of death construction.
8

9 **SECTION 3-319. NONEXONERATION.**

10 (a) A specific devise of any property passes subject to any mortgage or other security
11 agreement interest existing at the date of the testator's death, without right of the beneficiary to
12 whom the property was to pass to require that the indebtedness be paid from the estate's other
13 assets, unless the will provides specifically to the contrary.

14 (b) A general directive in the will, such as the testator's request that the executor "pay my
15 just debts," is not sufficiently specific to trigger exoneration.

16 **SECTION 3-320. ADEPTION BY SATISFACTION.**

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

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

20 (2) there is written proof, made either by the testator or the recipient, that clearly
21 reflects that intent through formal or informal language.

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

25 (c) For purposes of either total or partial satisfaction, property given during the testator's
26 lifetime is not charged against the testate share of any descendant of a predeceasing beneficiary.

27 **Reporters' Note**

28
29 The drafted provision coordinates requirements for advancement (intestate succession)

1 and satisfaction (testate succession).

2
3 **SECTION 3-321. CLASS GIFTS CONSTRUED TO ACCORD WITH**
4 **INTESTATE SUCCESSION; EXCEPTIONS.**

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

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

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

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

13 (4) “Genetic father” has the meaning set forth in []

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

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

19 (c) [Relatives by Marriage.] Terms of relationship in a governing instrument that do not
20 differentiate relationships by blood from those by marriage, such as uncles, aunts, nieces, or
21 nephews, are presumptively construed to exclude relatives by marriage.

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

25 (e) [Transferor Not Adoptive Parent.] In construing a dispositive provision of a transferor

1 who is not the adoptive parent, an adoptee is presumptively not considered the child of the
2 adoptive parent unless:

- 3 (1) the adoption took place before the adoptee reached [18] years of age;
- 4 (2) the adoptive parent was the adoptee's stepparent or foster parent; or
- 5 (3) the adoptive parent functioned as a parent of the adoptee before the adoptee
6 reached [18] years of age.

7 (f) [Class-Closing Rules.] A child in utero at a particular time is treated as living at that
8 time if the child lives 120 hours after birth.

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

11 **PART 4.**

12 **GENERAL PROVISIONS CONCERNING PROBATE AND NON-PROBATE** 13 **TRANSFERS**

14 **SECTION 3-401. REQUIREMENT OF SURVIVAL BY 120 HOURS.**

15 (a) For the purposes of intestate succession, testate succession, and survivorship
16 arrangements authorized under Article IV, and except as provided in subsection (b), an
17 individual who is not established to have survived another individual by 120 hours is deemed to
18 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 cause the estate to
23 be distributed under tribal court order under Section [3-104].

1 **Reporters' Note**

2
3 Regarding the requirement of survival, probate codes generally divide into two
4 approaches: older ones that require survival by an instant, and usually as established by a
5 preponderance of the evidence (*see, e.g.*, Chitimacha TPC § 117) (“no sufficient evidence that
6 the persons have died otherwise than simultaneously”) and newer ones tracking the amended
7 Uniform Simultaneous Death Act and requiring survival by 120 hours as established by clear and
8 convincing evidence. The newer version seems preferable as more efficient (by avoiding
9 successive double administration of the subject property), more easily established (or not
10 established) from an evidentiary perspective, and more likely to effectuate the decedent’s
11 presumed intent (e.g. property would not pass to a predeceased spouse’s relatives, i.e. the
12 decedent’s in-laws, over the decedent’s biological or adoptive relatives). The drafted provision
13 slightly tempers the burden of proof by removing the requirement that the 120-hour survival be
14 established by clear and convincing evidence.
15

16 Sub (b), which removes the 120-hour survival requirement in instances where the
17 governing instrument establishes a different survivorship requirement or where its application
18 would result in a tribal court determination of heirship. While state probate codes commonly
19 contain a similar provision avoiding the requirement where it would result in escheat, tribes may
20 prefer to delete this second exception to the 120-hour rule to encourage consolidation of
21 fractional interests back into tribal ownership.
22

23 *See* Section 1-107 for the provision covering Evidence of Death or Status
24 The drafted provision streamlines the survivorship provision under the Uniform Simultaneous
25 Death Act and the Uniform Probate Code by excluding treatment of such matters as protecting
26 bona fide purchasers and exonerating payors of liability, as well as choice of law and powers of
27 appointment. If coverage of these matters is deemed necessary, the Implementation Guide could
28 address them more fully.
29

30 **SECTION 3-402. POSTHUMOUS BIRTH.** All individuals who were in gestation at
31 the time of the decedent’s death, and who survive their own birth by 120 hours, shall be treated
32 as if living at the time of the decedent’s death.

33 **Reporters' Note**

34
35 This drafted provision intentionally avoids overt discussion of many forms of assistive
36 reproductive technology, e.g., surrogacy arrangements and posthumously conceived children
37 using cryogenically preserved (or posthumously retrieved) sperm. Moreover, it does not clearly
38 address frozen embryos, but instead leaves to the tribal court to determine whether a
39 cryogenically preserved embryo is already “in gestation” such that the provision above would
40 apply.
41

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

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

6
7 Some codes, e.g. Chitimacha § 306, do not require survival of own birth.

8 9 **SECTION 3-403. EFFECT OF HOMICIDE.**

10 (a) An individual who feloniously and intentionally kills the decedent forfeits all benefits
11 with respect to and interests that would otherwise be acquired under the decedent's estate or the
12 provisions of survivorship arrangements authorized under Article IV. The decedent's estate
13 passes as if the wrongdoer predeceased the decedent.

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

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

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

24 Drafting note: Check AIPRA preadjudication rule to trigger all of this at front end upon
25 charge (indictment, information, etc., by US, tribe, state w/ voluntary manslaughter or homicide)
26 – efficiency/fairness balance (earlier wrap of estate v. no final judgment). Other possibilities:
27 “criminally and intentionally kills” and that “estate of decedent passes as if killer had
28 predeceased decedent.” Could state either “final judgment of conviction of an offense containing
29 the elements of criminal and intentional killing is conclusive for purposes of this Section; In the
30 absence of a conviction of criminal and intentional killing Tribal Court may determine by a
31 preponderance of evidence whether the killing was criminal and intentional for purposes of this
32 Section.” See, e.g., Chitimacha Ch. 1, § 116 (Effect of Homicide on Intestate Succession, Wills,

1 Joint Assets, Life Insurance and Beneficiary Designation.

2
3 **SECTION 3-404. STATUS OF SPOUSE.** For purposes of testate and intestate
4 succession and survivorship arrangements authorized under Article IV, tribal law determines
5 spousal status based upon tribal law or custom, and determines the extent to which abuse,
6 abandonment, or other similar conduct disqualifies a spouse from succeeding to a property
7 interest.

8 **Reporters' Note**

9
10 [Drafting note: to what extent should the MTPC address who & how gets to determine
11 marriage and divorce?] Some tribes defer to state law on the issues of marriage and divorce.
12 Some tribes explicitly reject common law marriage or divorce. *See, e.g.*, “All members of the
13 Blackfeet Indian Tribe shall hereafter be governed by State Law and subject to State Jurisdiction
14 with respect to marriage hereafter consummated. Common-law marriages and Indian Customs
15 marriage shall not be recognized within the Blackfeet Reservation.” Blackfeet Tribal Law and
16 Order Code, Chapter 3 Domestic Relations, § 1 (Marriage). (See also § 2, which similarly
17 abolishes Indian customs divorces.) [Drafting note: the MTPC could provide something more
18 explicit, e.g., divorce & annulment mean “no surviving spouse” unless later marriage; decree of
19 separation is not to be considered a divorce.” *See, e.g.*, Chitimacha Ch. 1, § 115 (Effect of
20 Divorce, Annulment, and Decree of Separation).
21

22 The issue of same sex marriage presents an interesting question within Indian Country.
23 In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the USSCT held that the 14th Amendment Due
24 Process and Equal Protection clauses protected the rights of same sex couples to marry, and that
25 states could not refuse to recognize lawful same sex marriages performed in other states.
26 However, the rights protected by the Fourteenth Amendment are not enforceable against tribal
27 governments. *See, e.g.*, *Talton v. Mayes*, 163 U.S. 376 (1896). Moreover, the Indian Civil
28 Rights Act of 1968, 25 U.S.C. § 1301-1303, does not require Indian Nations to protect all
29 Constitutional rights, instead extending that protection only to certain rights within the Bill of
30 Rights. Even those that must be protected, such as those involving the rights of criminal
31 defendants, provide some leeway through which tribes are able to interpret the scope of the
32 individual protection through tribal norms.
33

34 It is unclear whether or to what extent tribes would want to address the issue within tribal
35 probate codes. For an discussion of how tribes have handled civil liberties generally, see Elmer
36 R. Ruscoal, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions*
37 *in Tribal Constitutions*, 14 Am. Indian L. Rev. 269 (1990). For extended treatment of the legal,
38 political, and sociocultural ramifications of the issue, including the extent to which individual
39 rights have been castigated as sounding the death knell to collectivist tribal concerns, see Carole
40 E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 Ariz. State L. J. 889 (2003). For
41 general discussion of same-sex marriage within tribal cultures, see, e.g., Trista Wilson, *Changed*
42 *Embraces, Changes Embraced? Renouncing the Heterosexual Majority*, 36 Am. Indian L. Rev.

1 161 (2012); Gregory Smithers, *Will Gay Marriage Split Indian Country?* Indian Country Today
2 (5/30/15).

3
4 [Drafting note: General Status Question: some tribes have limits on inheritance by non-
5 Indians. *See, e.g.*, Chitimacha Chapter 5, § 501, which incorporates Tribal Constitutional
6 provisions that essentially limit such rights to a life estate, surviving spouse and/or children
7 included.]
8

9 **SECTION 3-405. DISCLAIMER OF INTERESTS.**

10 (a) Any person 18 years of age or older, or a fiduciary acting on that person's behalf, may
11 disclaim an interest under testate or intestate succession or a survivorship arrangement
12 authorized under Article IV by a signed and acknowledged declaration of disclaimer, either filed
13 with the court before the entry of a final probate order or delivered to the person or entity holding
14 the property subject to a survivorship arrangement [before the actual distribution of that interest
15 to the disclaiming survivor.] In no event shall disclaimer be permitted after acceptance of the
16 subject property.

17 (b) The disclaimer may be in full or in part, or subject to the reservation of a life estate
18 interest in the land. No interest so disclaimed shall be considered to have vested in the
19 disclaimant, nor shall the disclaimer be considered to be a transfer of the disclaimed interest.

20 (c) Unless the governing instrument (if any) expressly provides for a different particular
21 result, the interest disclaimed shall be treated as though the disclaimant had predeceased the
22 decedent.

23 **Reporters' Note**

24
25 In a significant break from traditional disclaimer doctrine, the AIPRA permits a "directed
26 disclaimer," which permits the disclaimant to identify (from within a limited category of eligible
27 parties) who will acquire the interest so disclaimed. Especially given extant USSCT
28 jurisprudence covering situations where far less control had been exercised by the disclaimant,
29 the right to direct the disclaimer suggests that there has been an actual receipt and subsequent
30 transfer of the property disclaimed, triggering the disclaimant's potential exposure to certain tax
31 laws and creditors' claims. *See Drye v. United States*, 528 U.S. 49 (1999).
32 The provision above instead provides that the disclaimed interest will pass as though the
33 disclaimant had predeceased the decedent. It also tracks TPC and AIPRA language, however,

1 that specifically negates the characterization of a disclaimer as a transfer and therefore avoids
2 concerns over fraudulent transfers or conveyances.

3
4 **[Drafting note:** AIPRA says “renunciation or disclaimer,” some other provisions &
5 TPCs often just say “renunciation.” This drafted provision selects the term “disclaimer” rather
6 than using both terms.]

7 Sample tribal provision:

8
9 A person (or his or her personal representative) who is an heir, devisee [etc] may
10 renounce in whole or in part the succession to any property or interest therein by filing a
11 written instrument with the Chitimacha Tribal Court not later than six months after the
12 decedent’s death or the time at which it is determined that the person is entitled to take
13 property if such is not known at the time of death. The instrument shall (a) describe the
14 property or part thereof or interest therein renounced, (b) be signed by the person
15 renouncing and (c) declare the renunciation and the extent thereof. Upon property
16 renouncement, the interest renounced passes as if the renouncing person had predeceased
17 the decedent.

18
19 Chitimacha Comprehensive Codes of Justice Ch. 1 § 14 (Renunciation of Succession)

20
21 **[Drafting notes:** left out other forms of alterations, e.g. family settlement (no possibility
22 for family settlement agreement to alter the intestate outcome; see *Estate of Teresa Mitchell*, 25
23 IBIA 88 (I.B.I.A.), 1993 WL 581562 (1993), which stated that family settlement agreements are
24 not recognized under federal law, and that state law re execution and construction of wills not
25 imported or incorporated into federal law on point). Neither releases and assignments nor
26 negative wills seemed critical for inclusion.]

27
28 **SECTION 3-406. REFORMATION TO CORRECT MISTAKES.** The court may
29 reform the terms of a governing instrument, even if unambiguous, to conform the terms to the
30 transferor’s intention if it is proved by clear and convincing evidence what the transferor’s
31 intention was and that the terms of the governing instrument were affected by a mistake of fact
32 or law, whether in expression or inducement.

33 **PART 5.**

34 **EXEMPT PROPERTY**

35 **SECTION 3-501. FAMILY HEIRLOOMS AND CULTURAL ARTIFACTS.**

36 Notwithstanding any other provision of this article relating to intestate succession, the surviving
37 spouse or other surviving next of kin may distribute any family heirlooms or cultural artifacts

1 belonging to the decedent in accordance with the customs and traditions of the []. This
2 distribution shall be exempt from all creditors of the estate.

3 **SECTION 3-502. HOMESTEAD.**

4 (a) Notwithstanding any other provisions of this article relating to testate or intestate
5 succession or elective share, the homestead, including a manufactured home which is the family
6 residence, descends free from any disposition thereof to which the spouse has not consented in
7 writing as follows:

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

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

13 (b) The homestead is exempt from and has priority over all claims against the estate, and
14 passes to the spouse or the decedent's descendants exempt from all debts which were not valid
15 charges on it at the time of the decedent's death.

16 **Reporters' Note**

17
18 [Drafting note: consider making this a monetary amount, i.e. "homestead allowance"
19 rather than homestead.]

20 **SECTION 3-503. EXEMPT PROPERTY.**

21
22 (a) In addition to the homestead exemption provided in Section 3-502, if there is a
23 surviving spouse, the surviving spouse is entitled from the estate to a value not exceeding [] in
24 household furniture, automobiles, furnishings, appliances, and personal effects. If there is no
25 surviving spouse, the children of the decedent are entitled jointly to the same value. If
26 encumbered chattels are selected, the value is that in excess of the security interest. If there is

not [] worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate to the extent necessary to make up the [] value.

(b) One automobile, if any, shall be exempt property, regardless of value.

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

SECTION 3-504. FAMILY ALLOWANCE.

(a) In addition to the homestead exemption provided in Section 3-502 and the exempt property provided in Section 3-503, the surviving spouse and any child or children who were either entitled to or actually receiving support from the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments, and terminates upon the death of any person with the right thereto before the lump sum or any installment has been paid.

(b) The determination of what is a reasonable allowance in money is discretionary with the tribal court, although in no event should that amount exceed [].

(c) The family allowance is payable to the surviving spouse, if living, for the use of the surviving spouse and dependent children. If the surviving spouse is not living, the family allowance is payable to the children or to those in whose custody and care the children have been placed. If the surviving spouse is living but the dependent children are in the custody and care of another, the family allowance may be apportioned between the parties in the discretion of the tribal court.

(d) The family allowance is exempt from and has priority over all claims except the

1 homestead allowance. The family allowance is not chargeable against any benefit or share
2 passing to the surviving spouse or children by the will of the decedent unless otherwise provided,
3 by intestate succession, or by elective share.

4 **ARTICLE 4**

5 **TRANSFER ON DEATH ARRANGEMENTS**

6 **PART 1.**

7 **GENERAL AUTHORIZATION**

8 **SECTION 4-101. TRANSFER ON DEATH ARRANGEMENTS AUTHORIZED.**

9 Any of the following provisions in an insurance policy, contract of employment, bond,
10 mortgage, promissory note, stock certificate, account agreement, custodial agreement, deposit
11 agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan,
12 trust agreement, declaration of trust, conveyance or other instrument of a similar nature is
13 nontestamentary and the instrument containing these provisions are exempt from the
14 requirements in Sections _____ for the execution of a will. These provisions are:

15 (1) That money or other benefits theretofore due to, controlled or owned by a decedent
16 shall be paid after the decedent's death to a person or persons designated by the decedent in
17 either the instrument or a separate writing, including a will, executed either before, at the same
18 time as the instrument, or subsequently;

19 (2) That any money due or to become due under the instrument shall cease to be payable
20 in event of the death of the promisee or the promisor before payment or demand;

21 (3) That any property which is the subject of the instrument shall pass on decedent's death
22 to a person or persons designated by the decedent in either the instrument or a separate writing,
23 including a will, executed before, at the same time as the instrument, or subsequently.

1 **Reporters' Note**

2
3 This Section, which validates all transfers on death arrangements, is similar to Section 6-
4 101 of the Uniform Probate Code.

5
6 **PART 2.**

7 **REAL PROPERTY TRANSFERS**

8 **Reporters' Note**

9 This part is copied from the Uniform Real Property Transfer on Death Act, which was
10 completed in 2009. It will need to be modified to accommodate tribal property interests.

11
12 **SECTION 4-201. DEFINITIONS.** In this [part]:

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

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

16 (3) “Joint owner” means an individual who owns property concurrently with one or more
17 other individuals with a right of survivorship. The term includes a joint tenant[,][and] [owner of
18 community property with a right of survivorship[,][and tenant by the entirety]. The term does
19 not include a tenant in common [or owner of community property without a right of
20 survivorship].

21 (4) “Property” means an interest in real property located in this state which is transferable
22 on the death of the owner.

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

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

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

28 **SECTION 4-203. NONEXCLUSIVITY.** This [act] does not affect any method of

transferring property otherwise permitted under the law of this state.

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

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

SECTION 4-206. TRANSFER ON DEATH DEED NONTESTAMENTARY.
A transfer on death deed is nontestamentary and is exempt from the requirements in Sections _____ for the execution of a will.

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

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

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

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

(3) must be recorded before the transferor's death in the public records in [the office of the county recorder of deeds] of the [county] where the property is located.

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

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

(2) consideration.

1 **SECTION 4-210. REVOCATION BY INSTRUMENT AUTHORIZED;**

2 **REVOCATION BY ACT NOT PERMITTED.**

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

5 (1) is one of the following:

6 (A) a transfer on death deed that revokes the deed or part of the deed
7 expressly or by inconsistency;

8 (B) an instrument of revocation that expressly revokes the deed or part of
9 the deed; or

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

12 (2) is acknowledged by the transferor after the acknowledgment of the deed being
13 revoked and recorded before the transferor's death in the public records in [the office of the
14 county recorder of deeds] of the [county] where the deed is recorded.

15 (b) If a transfer on death deed is made by more than one transferor:

16 (1) revocation by a transferor does not affect the deed as to the interest of another
17 transferor; and

18 (2) a deed of joint owners is revoked only if it is revoked by all of the living joint
19 owners.

20 (c) After a transfer on death deed is recorded, it may not be revoked by a revocatory act
21 on the deed.

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

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

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

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

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

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

(5) create a legal or equitable interest in favor of the designated beneficiary; or

(6) subject the property to claims or process of a creditor of the designated beneficiary.

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

(a) Except as otherwise provided in the transfer on death deed[,][or] in this section[,][or in [cite state statutes on antilapse, revocation by divorce or homicide, survival and simultaneous death, and elective share, if applicable to nonprobate transfers]], on the death of the transferor, the following rules apply to property that is the subject of a transfer on death deed and owned by the transferor at death:

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

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

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

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

5 (b) Subject to [cite state recording act], a beneficiary takes the property subject to all
6 conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to
7 which the property is subject at the transferor's death. For purposes of this subsection and [cite
8 state recording act], the recording of the transfer on death deed is deemed to have occurred at the
9 transferor's death.

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

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

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

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

17 **SECTION 4-213. LIABILITY FOR CREDITOR CLAIMS AND STATUTORY**
18 **ALLOWANCES.**

19 (a) To the extent the transferor's probate estate is insufficient to satisfy an allowed claim
20 against the estate or a statutory allowance to a surviving spouse or child, the estate may enforce
21 the liability against property transferred at the transferor's death by a transfer on death deed.

22 (b) If more than one property is transferred by one or more transfer on death deeds, the
23 liability under subsection (a) is apportioned among the properties in proportion to their net values
24 at the transferor's death.

- 1 (c) A proceeding to enforce the liability under this section must be commenced not later
- 2 than [18 months] after the transferor's death.