

**Uniform Law Commission
Model Tribal Probate Code Drafting Committee
Issues List
(3/29/16)**

I. Overview

As has been the case regarding prior working drafts, probate codes combine critical sociocultural elements (e.g. life, death, and interpersonal relationships) with property and with law. For that reason, they both reflect and have the power actually to shape the communities bound thereby. The working draft of the Model Tribal Probate Code must, therefore, constantly be assessed across many fronts, including clarity and efficiency, but also in whether and how well its provisions respond to matters that might be particularly compelling for tribes and their members.

Moreover, irrespective of their content, what components are absolutely critical to a tribal probate code, from either a tribal or individual perspective? Again, that answers may vary highlights the utility of providing model code provisions, rather than attempting a single uniform act.

A few broad observations:

1. This draft implements the decisions made at the last drafting meeting. The most significant changes are the additions of (1) a first cut at exemptions (Article III, Part 5) and (2) new Article IV (authorizing transfer-on-death arrangements).
2. There was discussion at the last meeting involving whether/to what extent we should be citing particular tribal code provisions in either the Reporters' Notes or the Implementation Guide. The issue is sensitivity to tribal concerns v. information through which to make comparisons or assist with particularized drafting issues.
3. Should the MTPC attempt to integrate with the federal land buy-back program or other consolidation strategies? If so, what would be the most logical ways to do so?

II. Specific Provisions & Issues

ARTICLE 1 GENERAL PROVISIONS, DEFINITIONS, JURISDICTION OF COURT

This Article has been shortened based on the discussion at the last meeting. Many sections have been deleted. The Article now consists of eight sections, all in one part.

Section 1-102 contains a statement of purpose. Subsection (b)(4) provides a place for a tribe to insert its own values. The provision is placed in brackets to accommodate variation. Is the language that was chosen appropriate?

Section 1-103 definitions will be inserted into a future draft.

Section 1-104 gives the court the maximum possible jurisdiction without specifying exactly the limits of that jurisdiction.

Section 1-105 now adds an optional provision allowing for notice to be given by posting.

ARTICLE 2 **PROBATE OF WILLS AND ADMINISTRATION**

This Article now provides one procedure for opening an estate, one procedure for closing an estate, and one procedure for handling a small estate. This allowed the Article to be considerably shortened.

The bulk of the Article is devoted to a single process in which, following the probate of the will, a personal representative will administer the estate under the supervision of the court. Part 8 then provides an alternate system of summary administration for small estates. Unlike the UPC and most state probate codes, all estates are basically opened the same way and administered the same way. A number of tribal probate codes have been examined for ideas although this effort will continue.

PART 1. **GENERAL PROVISIONS**

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

PART 2. **PROBATE AND APPOINTMENT PROCEEDINGS**

1. Unlike the UPC and many other probate codes, this Code creates separate procedures for testate and intestate estates (see Sections 2-302 and 2-303).
2. To encourage prompt opening of estates, advance notice of the court hearing on the will and the appointment of a personal representative is not generally required. Rather, notice must be given following the appointment of the personal representative (see Section 2-405). However, advance notice is permitted and is in fact required if the petition doesn't request the appointment of a PR (see Section 2-204).
3. Section 2-206 imposes a six-month limit of the contest of a will. While a six month limit is common, perhaps the period should be placed in brackets to accommodate local variation.

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

1. Unlike many state probate codes, Section 2-303 leaves the issue of bond largely to the discretion of the court.
2. Section 2-305 adds the Tribe to the priority list of who can be appointed as personal representative, although the Tribe is placed at the bottom of the list. Thought should be given to whether there are other places in Article 2 where the Tribe should be mentioned.

PART 4.
DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

1. This Part is a streamlined version of Article 3, Part 7 of the UPC. One area where this Part could be shortened would be to omit the list of factors on PR compensation in Section 2-417.
2. Section 2-412 addresses an issue of concern to many families, the sale by a personal representative of real property, family businesses, and tangible personal property. This issue deserves close study.
3. Nearly all probate codes contain a laundry list of PR powers. This provision, which will be inserted at Section 2-413, has not yet been drafted pending a determination of which powers are critical to include.

PART 5.
CREDITORS' CLAIMS

1. This Part requires the publication of notice to creditors (Section 2-502). Publication is optional in some states.
2. Section 2-504 provides that claims must be presented within four months after the first publication of notice. Some jurisdictions provide a different period such as six months.
3. Section 2-504 also provides that all claims are barred absolutely if not presented within one year of death. Some jurisdictions provide a longer period such as two years.

PART 6.
SPECIAL PROVISIONS RELATING TO DISTRIBUTION

1. Section 2-601, which deals with abatement, omits mention of demonstrative devises, a type of devise that is rarely found.
2. Section 2-603, dealing with payment of interest on cash devises paid late, may need to be modified to deal with local practice.
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3. Section 2-604, which is adapted from the UPC, provides for the delivery of an instrument or deed of distribution to the beneficiaries receiving the estate. Many probate codes omit this type of provision.
4. Section 2-605, giving the PR the ability to send out a proposed distribution prior to the closing of the estate, has been a very useful provision in jurisdictions that have adopted it.
5. Section 2-609, dealing with the escheat of unclaimed assets, will need to be conformed to local practice. The provision has been placed in brackets to signal the need for modification.
6. Section 2-610, dealing with distribution to incapacitated beneficiaries, will need to be conformed to local practice on the appointment of guardians or conservators.

PART 7. CLOSING ESTATES

This Part creates a single procedure for closing an estate. The personal representative must petition the court for an order of complete settlement (Section 2-701). Many jurisdictions permit an estate to be closed either in front of a judge or by mailing a statement to the beneficiaries but this dual approach complicates the statute.

PART 8. SUMMARY ADMINISTRATION

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

PART 9. ANCILLARY ADMINISTRATION

Just like there is only one procedure for opening an estate, this Part provides a single procedure for transferring property of a non-resident decedent. Normally, this is an issue only with respect to real property. If a non-resident own real property on tribal land it will be necessary to open a probate for that real property in the tribal court.

Due to the streamlining of this Part the title should be shortened to “Ancillary Administration.”

ARTICLE 3 **INTESTATE AND TESTATE SUCCESSION**

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

SUBPART 1.

BASIC INTESTATE SUCCESSION OF NON-TRUST OR RESTRICTED PROPERTY

1. 3-101: the net estate subject to distribution excludes claims, expenses, and exempt property. A later subpart has been added to address those exemptions, which will require careful review in terms of content and scope.
2. 3-102: the share of the spouse continues to be limited to either all or $\frac{1}{2}$ of the decedent's estate, and without a minimum lump sum guaranteed to the surviving spouse. That decision was made in light of the exemptions that could apply.
3. 3-104: adds a provision dealing with the situation where a survivor is related to the decedent through more than one line; selects the larger share.
4. 3-105: the draft now avoids questions of escheat, and to which tribe, by shifting to "trial court order" to determine where the decedent's property should go if there are no surviving heirs within the appropriate parentela.
5. 3-106: the examples are again designed to facilitate comprehension of the representational method used. Thank you for suggested examples! They will look "more professional" once their content is approved.

SUBPART 2.

STATUS ISSUES: WHO FITS WITHIN THE BASIC SCHEME

1. These provisions continue to contain sensitive, culturally driven issues. As discussed at the last drafting session, assorted changes have been made, with the overarching thought being to leave most of the heavy lifting on options to the implementation guide and to the tribes.
2. 3-108: Question whether the MTPC should include the so-called "bad parent" section at all. Modest trend in state probate codes, along with protections of elders. Should the MTPC also include another conduct-based provision discouraging elder abuse?

SUBPART 3.

ALTERATIONS TO THE BASIC SCHEME

1. Most of the material here has been moved to a later section covering both testate and intestate succession and authorized transfer on death arrangements.

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

1. Continues to be reserved pending drafting. The approach taken might be to import all of Part 1 except for certain particular exceptions targeted at maximizing the likelihood of Secretarial Approval.
2. A second idea: that similarly to Military Wills under federal law, the TPC could include a provision that states that a will that is valid under federal law is “deemed valid” for the purposes of any other state law irrespective of different or additional requirements that that state law might impose. That said, federal law on point is probably more strict than any state law in most instances.

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

SUBPART 1.
WILL EXECUTION AND REVOCATION

1. 3-302: As maximizing the validity of wills and reducing the instance of intestate succession is desirable, the MTPC should include some form of holographic will. Nevertheless, we should continue to assess the potential for confusion, and how to minimize it, by reminding that current federal law does not permit the holographic will unless it is also validly attested. The same cautions apply to the “harmless error” approach taken under 3-303 and the choice of law clause in 3-307.

SUBPART 2.
WILL CHALLENGES, COMPOSITION, AND CONSTRUCTION

1. 3-312: validates the testamentary effect of a tangible personal property list.
2. 3-315: provides more detail for the spousal share, including instances in which that share will be unavailing based upon the explicit or implicit intent behind non-probate transfers (including their value). Also upholds both pre- and post-nuptial agreements as means through which to waive elective share rights.
3. Should the draft include an alternate community property provision?
4. 3-316: continues to work with the instances in which pretermitted children are protected from disinheritance, and adds that protections to those children can arise where the testator either did not know of the child’s existence, or believed the child to be dead.
5. 3-317: streamlined the lapse / anti-lapse provision.

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

1. This is a new part pulling together assorted provisions previously found elsewhere, largely to enhance readability and avoid repetition. It also adds reference to authorized non-probate transfers as found in new Article 4.
2. 3-405: will need a careful review to determine whether the notice provisions for disclaiming a survivorship interest are appropriate.
3. 3-406: somewhat forward-thinking in permitting even unambiguous documents to be corrected to reflect mistake; arguably tempered by requirement for “clear and convincing” evidence of same.

PART 5.
EXEMPT PROPERTY

1. This is an entirely new Part, aimed at addressing cultural property, homestead, exempt property, and family allowance, mainly working from similar provisions in existing probate codes and testing things against the UPC. All of it will need to be reviewed carefully, including the extent to which it matches or is at cross-purposes with the Model Tribal Secured Transactions Act provision.

ARTICLE 4
TRANSFER ON DEATH ARRANGEMENTS

This Article, which is new, validates transfer-on-death arrangements. Part 1 authorizes transfer-on-arrangements of any type. Part 2 is a copy of the Uniform Real Property Transfer-on-Death Act. We will need to discuss how to modify this Article to focus on categories of property of interest to tribal members.