

DRAFT
FOR DISCUSSION ONLY

MODEL TRIBAL PROBATE CODE

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

April 7-8, 2017 Drafting Committee Meeting

Copyright © 2017
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws of the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

March 20, 2017

DRAFTING COMMITTEE ON MODEL TRIBAL PROBATE CODE

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

TIMOTHY BERG, 2394 E. Camelback Rd., Suite 600, Phoenix, AZ 85016, *Chair*

OWEN L. ANDERSON, University of Texas School of Law, 727 E. Dean Keeton St., Austin, TX 78705

JACK BURTON, 119 E. Marcy St., Suite 200, Santa Fe, NM 87501-20416

THOMAS E. GEU, University of South Dakota School of Law, 414 Clark St., Suite 214, Vermillion, SD 57069-2390

DALE G. HIGER, 1302 E. Warm Springs Ave., Boise, ID 83712

RYAN LEONARD, 100 Park Ave., Suite 500, Oklahoma City, OK 73102

EDWARD F. LOWRY, 4200 N. 82nd St., Suite 2001, Scottsdale, AZ 85251

FRED H. MILLER, 80 S. 8th St., 4200 IDS Center, Minneapolis, MN 55402-2274

HARRY M. WALSH, 456 Summit Ave., #206, St. Paul, MN 55102

STEPHANIE J. WILLBANKS, Vermont Law School, 164 Chelsea St., P.O. Box 96, South Royalton, VT 05068

ELISA WHITE, 419 Natural Resources Dr., Little Rock, AR 72205

CANDACE ZIERDT, Stetson University School of Law, 1401 61st St. S., Gulfport, FL 33707

DAVID M. ENGLISH, University of Missouri-Columbia School of Law, 203 Hulston Hall, Columbia, MO 65211, *Co-Reporter*

KATHELEEN GUZMAN, University of Oklahoma College of Law, Andrew M. Coats Hall, 300 Timberdell Rd., Norman, OK 73069, *Co-Reporter*

EX OFFICIO

RICHARD T. CASSIDY, 100 Main St., P.O. Box 1124, Burlington, VT, 05401mtpc, *President*

PAMELA WINSTON BERTANI, 728 Texas St., Suite 4, Fairfield, CA 94533, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

NANCY APPLEBY, 333 N. Fairfax St., Suite 302, Alexandria, VA 22314-2632, *ABA Advisor*

EXECUTIVE DIRECTOR

LIZA KARSAI, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org

MODEL TRIBAL PROBATE CODE

TABLE OF CONTENTS

ARTICLE I GENERAL PROVISIONS, DEFINITIONS, JURISDICTION OF COURT

SECTION 1-101. SHORT TITLE.....	8
SECTION 1-102. PURPOSES; RULE OF CONSTRUCTION.....	8
SECTION 1-103. GENERAL DEFINITIONS.....	8
SECTION 1-104. TERRITORIAL APPLICATION AND SUBJECT MATTER JURISDICTION.	13
SECTION 1-105. CHOICE OF LAW PROVISION.....	14
SECTION 1-106. NOTICE; METHOD AND TIME OF GIVING.....	14
SECTION 1-107. WHEN PARTIES BOUND BY OTHERS; NOTICE.....	15
SECTION 1-108. EFFECT OF FRAUD AND EVASION.....	16
SECTION 1-109. EVIDENCE OF DEATH OR STATUS.....	16

ARTICLE 2 PROBATE OF WILLS AND ADMINISTRATION

PART 1. GENERAL PROVISIONS

SECTION 2-101. PASSING OF ESTATE AT DEATH.....	17
SECTION 2-102. LOCATION OF PROPERTY.	18
SECTION 2-103. STATUTES OF LIMITATIONS ON DECEDENT’S CAUSE OF ACTION.	18
SECTION 2-104. DEMAND FOR NOTICE OF ORDER OR FILING CONCERNING DECEDENT’S ESTATE.....	18

PART 2. PROBATE AND APPOINTMENT PROCEEDINGS

SECTION 2-201. PROBATE PROCEEDINGS; NATURE; WHEN COMMENCED.....	19
SECTION 2-202. PETITION FOR PROBATE OF WILL; CONTENTS.	19
SECTION 2-203. PETITION FOR INTESTACY; CONTENTS.	22
SECTION 2-204. HEARING ON PETITION OPTIONAL.....	23
SECTION 2-205. PROOF OF PROPER EXECUTION OF WILL.	23
SECTION 2-206. CONTEST OF WILL.	24

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

SECTION 2-301. COMMENCING ADMINISTRATION.....	24
SECTION 2-302. QUALIFICATION AND BOND.	25

SECTION 2-303. CONSENT TO JURISDICTION; NON-RESIDENT PERSONAL REPRESENTATIVES.....	26
SECTION 2-304. PRIORITY AMONG PERSONS SEEKING APPOINTMENT AS PERSONAL REPRESENTATIVE.	26
SECTION 2-305. TERMINATION OF APPOINTMENT; GENERAL.	28
SECTION 2-306. TERMINATION OF APPOINTMENT BY REMOVAL; CAUSE; PROCEDURE.....	28
SECTION 2-307. TERMINATION OF APPOINTMENT; OTHER REASONS.....	29
SECTION 2-308. SUCCESSOR PERSONAL REPRESENTATIVE.	29
SECTION 2-309. SPECIAL PERSONAL REPRESENTATIVE; APPOINTMENT; POWERS AND DUTIES.....	30

PART 4.

DUTIES AND POWERS OF PERSONAL REPRESENTATIVE

SECTION 2-401. GENERAL DUTIES; RELATION AND LIABILITY TO PERSONS INTERESTED IN ESTATE; STANDING TO SUE.....	31
SECTION 2-402. DUTY OF PERSONAL REPRESENTATIVE: NOTICE TO HEIRS AND DEVISEES.....	32
SECTION 2-403. DUTY OF PERSONAL REPRESENTATIVE; INVENTORY AND APPRAISEMENT.	32
SECTION 2-404. DUTY OF PERSONAL REPRESENTATIVE; POSSESSION OF ESTATE.....	33
SECTION 2-405. POWERS OF PERSONAL REPRESENTATIVE; GENERALLY; IMPROPER EXERCISE.	34
SECTION 2-406. SALE, ENCUMBRANCE OR TRANSACTION INVOLVING CONFLICT OF INTEREST; VOIDABLE; EXCEPTIONS.	34
SECTION 2-407. PERSON DEALING WITH PERSONAL REPRESENTATIVE; PROTECTION.....	35
SECTION 2-408. SALE OF PROPERTY; WHEN NOTICE REQUIRED.....	36
SECTION 2-409. TRANSACTIONS AUTHORIZED FOR PERSONAL REPRESENTATIVE; EXCEPTIONS.	36
SECTION 2-410. POWERS AND DUTIES OF SUCCESSOR PERSONAL REPRESENTATIVE.	38
SECTION 2-411. CO-REPRESENTATIVES; WHEN JOINT ACTION REQUIRED.	38
SECTION 2-412. COMPENSATION OF PERSONAL REPRESENTATIVE.....	39
SECTION 2-413. INDIVIDUAL LIABILITY OF PERSONAL REPRESENTATIVE.....	40

PART 5.

CREDITORS' CLAIMS

SECTION 2-501. CLAIMS AGAINST DECEDENT; NECESSITY OF ADMINISTRATION.....	41
SECTION 2-502. NOTICE TO CREDITORS.....	41
SECTION 2-503. STATUTE OF LIMITATIONS.....	42
SECTION 2-504. LIMITATION ON PRESENTATION OF A CLAIM.	42

SECTION 2-505. MANNER OF PRESENTATION OF CLAIM.	43
SECTION 2-506. CLASSIFICATION OF CLAIM.	44
SECTION 2-507. ALLOWANCE OF CLAIM.	45
SECTION 2-508. PAYMENT OF CLAIM.	45

PART 6.
SPECIAL PROVISIONS RELATING TO DISTRIBUTION

SECTION 2-601. DISTRIBUTION; ORDER IN WHICH ASSETS APPROPRIATED; ABATEMENT.	46
SECTION 2-602. RIGHT OF RETAINER.	47
SECTION 2-603. INTEREST ON DEVISE OF SPECIFIED AMOUNT OF MONEY.	47
SECTION 2-604. DISTRIBUTION IN KIND; EVIDENCE OF TITLE.	47
SECTION 2-605. PROPOSAL FOR DISTRIBUTION.	48
SECTION 2-606. IMPROPER DISTRIBUTION; LIABILITY OF DISTRIBUTE.	48
SECTION 2-607. DISTRIBUTION TO MINOR OR ADULT LACKING CAPACITY.	48
SECTION 2-608. FINAL DISTRIBUTION TO DOMICILIARY REPRESENTATIVE.	50
[SECTION 2-609. DISPOSITION OF UNCLAIMED ASSETS.]	50

PART 7.
CLOSING ESTATE

SECTION 2-701. PROCEEDING TERMINATING ADMINISTRATION; ORDER OF COMPLETE SETTLEMENT.	51
SECTION 2-702. LIABILITY OF DISTRIBUTE TO CLAIMANT.	52
SECTION 2-703. SUBSEQUENT ADMINISTRATION.	52

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

SECTION 2-801. COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT.	53
SECTION 2-802. SUMMARY ADMINISTRATION PROCEDURE FOR EXEMPT ESTATE.	54

ARTICLE 3
INTESTATE AND TESTATE SUCCESSION

PART 1.
INTESTATE SUCCESSION OF NON-TRUST PROPERTY

SECTION 3-101. INTESTATE ESTATE.	55
SECTION 3-102. SHARE OF SPOUSE.	56
SECTION 3-103. SHARE OF HEIRS OTHER THAN SURVIVING SPOUSE.	57
SECTION 3-104. INDIVIDUALS RELATED TO DECEDENT THROUGH TWO LINES.	58

SECTION 3-105. INDIVIDUALS RELATED TO DECEDENT THROUGH A SINGLE ANCESTOR.	58
SECTION 3-106. NO TAKER.	59
SECTION 3-107. REPRESENTATION.	59
SECTION 3-108. PARENT-CHILD RELATIONSHIP; MARITAL STATUS.	62
[SECTION 3-109. PARENT BARRED FROM INHERITING IN CERTAIN CIRCUMSTANCES.].....	63
SECTION 3-110. INHERITANCE BY, FROM, AND THROUGH ADOPTED CHILD.	64
SECTION 3-111. ADVANCEMENT.	65

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

PART 3.
**TESTATE SUCCESSION OF TRUST AND NON-TRUST PROPERTY [WILL
EXECUTION, REVOCATION, CHALLENGE, COMPOSITION, AND
CONSTRUCTION]**

SECTION 3-301. WHO MAY MAKE WILL.....	66
SECTION 3-302. EXECUTION; WITNESSED WILL; HOLOGRAPHIC WILL.....	66
[SECTION 3-303. HARMLESS ERROR.].....	70
SECTION 3-304. CODICIL.	71
SECTION 3-305. SELF-PROVED WILL.....	71
SECTION 3-306. WHO MAY WITNESS.	73
SECTION 3-307. CHOICE OF LAW AS TO EXECUTION.....	74
SECTION 3-308. REVOCATION OF WILL.	74
SECTION 3-309. REVIVAL OF REVOKED WILL.....	76
SECTION 3-310. WILL CHALLENGES.	77
SECTION 3-311. COMPOSITION OF A WILL; INCORPORATION BY REFERENCE.....	77
SECTION 3-312. TANGIBLE PERSONAL PROPERTY LIST. A.....	77

PART 4.
CONSTRUCTION OF A WILL

SECTION 3-401. CONSTRUCTION OF A WILL; PENALTY CLAUSE FOR CONTEST....	78
SECTION 3-402. SPOUSAL SHARE.	78
SECTION 3-403. CHILDREN UNPROVIDED FOR IN WILL.	79
SECTION 3-404. WILL CONSTRUCTION REGARDING BENEFICIARIES: DEATH OF BENEFICIARY BEFORE TESTATOR.	80
SECTION 3-405. WILL CONSTRUCTION REGARDING PROPERTY: NONADEMPTION OF SPECIFIC DEVICES.....	81
SECTION 3-406. SPECIFIC DEVISE SUBJECT TO MORTGAGE.	82
SECTION 3-407. SATISFACTION.....	83
SECTION 3-408. CLASS GIFTS CONSTRUED TO ACCORD WITH INTESTATE SUCCESSION; EXCEPTIONS.....	83

PART 5.
RULES OF CONSTRUCTION NOT LIMITED TO WILLS

SECTION 3-501. REQUIREMENT OF SURVIVAL BY 120 HOURS.	85
SECTION 3-502. POSTHUMOUS BIRTH.	86
SECTION 3-503. EFFECT OF HOMICIDE.	86
SECTION 3-504. STATUS OF SPOUSE.	87
SECTION 3-505. DISCLAIMER OF INTERESTS.	89
SECTION 3-506. REFORMATION TO CORRECT MISTAKES.	90

PART 6.
EXEMPT PROPERTY

SECTION 3-601. FAMILY HEIRLOOMS AND CULTURAL ARTIFACTS.	90
SECTION 3-602. HOMESTEAD.	91
SECTION 3-603. EXEMPT PROPERTY.	91
SECTION 3-604. FAMILY ALLOWANCE.	92

ARTICLE 4
TRANSFER ON DEATH ARRANGEMENTS

PART 1
GENERAL AUTHORIZATION

SECTION 4-101. TRANSFER ON DEATH ARRANGEMENTS AUTHORIZED.	93
--	----

PART 2
REAL PROPERTY TRANSFERS

SECTION 4-201. DEFINITIONS.	94
SECTION 4-202. APPLICABILITY.	94
SECTION 4-203. NONEXCLUSIVITY.	94
SECTION 4-204. TRANSFER ON DEATH DEED AUTHORIZED.	95
SECTION 4-205. TRANSFER ON DEATH DEED REVOCABLE.	95
SECTION 4-206. TRANSFER ON DEATH DEED NONTTESTAMENTARY.	95
SECTION 4-207. CAPACITY OF TRANSFEROR.	95
SECTION 4-208. REQUIREMENTS.	95
SECTION 4-209. NOTICE, DELIVERY, ACCEPTANCE, CONSIDERATION NOT REQUIRED.	95
SECTION 4-210. REVOCATION BY INSTRUMENT AUTHORIZED; REVOCATION BY ACT NOT PERMITTED.	96
SECTION 4-211. EFFECT OF TRANSFER ON DEATH DEED DURING TRANSFEROR'S LIFE.	96
SECTION 4-212. EFFECT OF TRANSFER ON DEATH DEED AT TRANSFEROR'S DEATH.	97

1 **MODEL TRIBAL PROBATE CODE**

2 **ARTICLE I**

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.

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 administering the estates of
14 decedents and for making non-probate transfers;

15 [(4) to empower the application of tribal law, including the sovereignty, culture,
16 customs and values of the _____ Tribal Nation].

17 **Reporters' Note**

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

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

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

(1) “Adoptee” means _____.

(2) “Agent” includes an attorney-in-fact under a durable or nondurable power of attorney.

(3) “Child” includes an individual entitled to take as a child under this [code] by intestate succession from the parent whose relationship is involved and excludes a person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

(4) “Claims,” in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person, whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(5) “Conservator” means a person who is appointed by a court to manage the estate of a minor or adult individual.

(6) “Court” means the [..... Court] having jurisdiction in matters relating to the affairs of decedents.

(7) “Cultural artifacts” means _____.

(8) “Cultural property” means _____.

(9) “Descendant” of an individual means all of the individual’s descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this [code].

(10) “Devise,” when used as a noun means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will.

1 (11) "Devisee" means a person designated in a will to receive a devise.

2 (12) "Distributee" means any person who has received property of a decedent from the
3 decedent's personal representative other than as creditor or purchaser.

4 (13) "Estate" includes the property of the decedent, trust, or other person whose affairs
5 are subject to this [code] as originally constituted and as it exists from time to time during
6 administration.

7 (14) "Exempt property" means the property described in Sections 3-601-3-604.

8 (15) "Family heirlooms" means _____.

9 (16) "General devise" means a devise of a specified amount of money or other devise that
10 neither refers to specific property owned by the testator at the time the will was made nor devises
11 the residue of the estate or all of the testator's property.

12 (17) "General personal representative" means a personal representative as appointed
13 under Sections 2-202 or 2-203 who is granted complete authority to settle the estate.

14 (18) "Governing instrument" means a deed, will, trust, insurance or annuity policy,
15 account with POD designation, security registered in beneficiary form (TOD), transfer on death
16 (TOD) deed, pension, profit-sharing, retirement, or similar benefit plan, instrument creating or
17 exercising a power of appointment or a power of attorney, or a dispositive, appointive, or
18 nominative instrument of any similar type.

19 (19) "Guardian" means a person appointed by a court to make decisions regarding the
20 personal affairs of a minor or adult individual.

21 (20) "Heirs" means persons, including the surviving spouse and the state, who are
22 entitled under the statutes of intestate succession to the property of a decedent.

23 (21) "Incapacitated individual" means an individual whose capacity is sufficiently

diminished that a guardian or conservator could be appointed for the individual under [insert reference to guardianship or conservatorship statutes of tribal nation].

(22) “Interested person” includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

(23) “Letters of office” means a document issued by the court or clerk certifying the personal representative’s appointment and authority. The term includes letters testamentary and letters of administration.

(24) “Minor” means an individual under [18] years of age.

(25) “Mortgage” means any conveyance, agreement, or arrangement in which property is encumbered or used as security and includes a deed of trust or land contract.

(26) “Parent” includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this [code] by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

(27) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency or instrumentality, or other legal entity.

(28) “Personal representative” includes executor, administrator, successor personal representative, special representative, and persons who perform substantially the same function

1 under the law governing their status. “General personal representative” excludes special
2 representative.

3 (29) “Petition” means a written request to the court for an order after notice.

4 (30) “Proceeding” includes action at law and suit in equity.

5 (31) “Property” includes both real and personal property or any interest therein and
6 means anything that may be the subject of ownership.

7 (32) “Residuary devise” means a devise of the property remaining after any specific or
8 general devises have been satisfied or a devise of the entire estate if the will does not contain any
9 specific or general devises.

10 (33) “Settlement,” in reference to a decedent’s estate, includes the full process of
11 administration, distribution and closing.

12 (34) “Specific devise” means a devise of property specifically described in the will that
13 was owned by the testator when the will was made.

14 (35) “Special representative” means a personal representative as described in Section 2-
15 309.

16 (36) “Successor personal representative” means a personal representative, other than a
17 special representative, who is appointed to succeed a previously appointed personal
18 representative.

19 (37) “Successors” means persons, other than creditors, who are entitled to property of a
20 decedent under the decedent’s will or this [code].

21 (38) “Survive” means that an individual has neither predeceased an event, including the
22 death of another individual, nor is deemed to have predeceased an event under Section 3-501.
23 The term includes its derivatives, such as “survives,” “survived,” “survivor,” and “surviving.”

(39) “Will” includes codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.

SECTION 1-104. TERRITORIAL APPLICATION AND SUBJECT MATTER JURISDICTION.

(a) This [code] applies to and the court has jurisdiction over the estates of decedents with respect to property, real or personal, that is subject to the laws of this [tribal nation] [, excluding trust or restricted property governed by federal law]. This [code] also applies to and the court has jurisdiction over survivorship arrangements authorized under Article 4.

(b) The laws of this [tribal nation] apply to all members of the [tribe] and to all property located within the tribal territory or reservation that is subject to tribal jurisdiction.

(c) This [code] applies without regard to the decedent’s place of domicile.

Reporters’ Note

This section grants the tribal court broad jurisdiction. The enacting tribe may or may not decide to exclude trust or restricted property controlled by federal law from its version of this code, which is why this language is placed in brackets.

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

SECTION 1-105. CHOICE OF LAW PROVISION. The meaning and effect of the terms of a governing instrument are determined by the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue.

Reporter's Note

This provision is adapted from Section 107 of the Uniform Trust Code.

SECTION 1-106. NOTICE; METHOD AND TIME OF GIVING.

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

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

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

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

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

1 tribe's jurisdiction at least 14 calendar days before the hearing] [by broadcasting the principal
2 contents of the notice on a tribal radio program].

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

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

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

8 [(f) The tribal nation court may specify whether a notice must be given in a native
9 language.]

10 **Reporters' Note**

11 This section is based partially on Section 1-401 of the Uniform Probate Code and
12 partially on several tribal probate codes. Copying Section 6-1-10(c) of the Ute Code, subsection
13 (b)(3) contains an optional provision providing for the giving of notice by posting instead of
14 publication. Subsection (d), which allows an interested person to waive notice, is copied from the
15 Stockbridge Munsee Code Section 6.1.13(D) and Ute Code 6-1-10(d).

16 **SECTION 1-107. WHEN PARTIES BOUND BY OTHERS; NOTICE.** In
17 proceedings under this [code], the following rules apply:

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

21 (2) A conservator or guardian may represent the person under conservatorship or
22 guardianship.

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

25 (4) At any point in a proceeding, if the court determines that an interest is not represented

1 or adequately represented, the court may appoint a [representative] to receive notice, give
2 consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn
3 individual, or a person whose identity or location is unknown.

4 **Reporters' Note**

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

6 **SECTION 1-108. EFFECT OF FRAUD AND EVASION.**

7 (a) Whenever fraud has been perpetrated in connection with a proceeding under this
8 [code] or if fraud is used to circumvent the provisions or purposes of this [code], a person
9 injured may obtain appropriate relief against the perpetrator of the fraud or restitution from any
10 person (other than a bona fide purchaser for value) benefitting from the fraud, whether innocent
11 or not.

12 (b) A proceeding must be commenced within two years after the discovery of the fraud,
13 but no proceeding may be brought against one not a perpetrator of the fraud later than five years
14 after the time of commission of the fraud.

15 (c) This section has no bearing on remedies relating to fraud practiced on a decedent
16 during the decedent's lifetime which affects the succession of the decedent's estate.

17 **Reporters' Note**

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

21 **SECTION 1-109. EVIDENCE OF DEATH OR STATUS.**

22 (a) In addition to the rules of evidence in courts of general jurisdiction, the fact of death
23 may be established by any sufficient evidence, including:
24

25 (1) A certified or authenticated copy of a death certificate issued by an

1 appropriate official or agency.

2 (2) A certified or authenticated copy of a record or report of any tribal, state, or
3 other governmental agency, domestic or foreign, that an individual is missing, detained, dead, or
4 alive.

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

10 **Reporters' Note**

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

19 **ARTICLE 2**

20 **PROBATE OF WILLS AND ADMINISTRATION**

21 **PART 1. GENERAL PROVISIONS**

22 **SECTION 2-101. PASSING OF ESTATE AT DEATH.**

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

26 (b) Upon the death of a person, the decedent's real and personal property passes
27 according to the decedent's will, or in the absence of a disposition by will, to the decedent's heirs

1 in either case subject to rights of creditors, expenses of administration, [and to] [here insert
2 references to the elective share of the surviving spouse and to statutory allowances of spouse and
3 children] [, and excluding cultural property not subject to administration].

4 **Reporters' Note**

5 This section is a shortened and modified version of Section 3-101 of the Uniform Probate
6 Code.

7
8 **SECTION 2-102. LOCATION OF PROPERTY.** All property of a decedent whose
9 estate could be administered under this [code] is subject to the jurisdiction of the court regardless
10 of where that property may be located.

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

15 **Reporters' Note**

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

18 **SECTION 2-104. DEMAND FOR NOTICE OF ORDER OR FILING**
19 **CONCERNING DECEDENT'S ESTATE.** A person having a financial or property interest in
20 a decedent's estate who desires notice of any order or filing pertaining to the estate may file a
21 demand for notice with the court at any time after the death of the decedent. The demand shall
22 state the name of the decedent, the demandant's financial or property interest in the estate, and
23 the address of the demandant or that of the demandant's attorney. The clerk of court shall mail a
24 copy of the demand to the personal representative, if a personal representative has been
25 appointed. Unless the court otherwise directs, after the filing of a demand for notice, no order or

1 filing to which the demand relates shall be made or accepted without notice as prescribed in
2 Section 1-106 being given to the demandant or the demandant's attorney.

3 **Reporters' Note**

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

5 **PART 2.**

6 **PROBATE AND APPOINTMENT PROCEEDINGS**

7 **SECTION 2-201. PROBATE PROCEEDINGS; NATURE; WHEN**
8 **COMMENCED.**

9 (a) A proceeding to open a decedent's estate may be commenced by an interested person,
10 including the [tribal nation], by:

11 (1) filing a petition as described in Section 2-202 in which the petitioner requests
12 that the court enter an order determining the heirs and admitting the will to probate; or

13 (2) filing a petition in accordance with Section 2-203 for an order that the
14 decedent died intestate.

15 (b) A proceeding to open a decedent's estate may, but need not, involve a request for the
16 appointment of a personal representative.

17 **Reporters' Note**

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

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

22 (a) A petition for probate of a will, with or without a request for appointment of a
23 personal representative, must be directed to the court, request a judicial order after notice and
24 hearing, and contain further statements as indicated in this section.
25

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

2 (1) request an order determining the heirs and admitting the will to probate; and

3 (2) contain the following statements:

4 (A) the interest of the petitioner;

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

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

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

14 (E) that the petitioner, to the best of the petitioner's knowledge, believes
15 the will to have been validly executed and that after the exercise of reasonable diligence, the
16 applicant is unaware of any instrument amending or revoking the will;

17 (F) whether the original of the will of the decedent is in the possession of
18 the court or accompanies the petition, and if not, where the original is located, if known;

19 (G) whether the will has been admitted to probate by the United States
20 Department of the Interior;

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

22 (I) a general description of the decedent's estate subject to the jurisdiction
23 of the court and a description of any portions of the estate not subject to the jurisdiction of the

1 court;

2 (J) whether the estate includes trust and restricted real property or
3 Individual Indian Money(IIM) accounts; and

4 (K) whether the estate includes any family heirlooms or cultural artifacts.

5 (c) If the petitioner requests the appointment of a personal representative, the petition
6 must state the name and address of the proposed personal representative, whether the proposed
7 personal representative was nominated in the will, and if not, the reason why the proposed
8 personal representative should be appointed.

9 (d) If the original will is not available to the court and no certified copy of a will probated
10 in another jurisdiction accompanies the petition, the petition also must state that the will is lost,
11 destroyed, or otherwise unavailable. The contents of the will can be proved by a copy of the will
12 and the will may be admitted to probate if the court is satisfied that the will was not revoked as
13 provided in Section 3-308. If a copy of the will is not available, the contents of the will can be
14 proved only by clear and convincing proof, and the court shall enter an order setting forth the
15 contents and the names of the witnesses.

16 **Reporters' Note**

17 This section draws language from Sections 3-301 and 3-402 of the Uniform Probate Code
18 as well as from several tribal probate codes. Under this Code, all probate proceedings are
19 conducted in court. This differs from the Uniform Probate Code, which contains separate
20 procedures depending on whether the estate is opened in front of the clerk of court instead of the
21 judge. Because the court in which the estate is opened may have jurisdiction over only a portion
22 of the decedent's assets, to enable decisions of that court to be better informed, the petition must
23 include a description of the decedent's other assets, including trust or restricted real property or
24 IIM accounts. Subsection (d) on proof of lost wills is copied from South Dakota Codified Laws
25 Section 29A-3-402(d). Unlike the UPC, this Code places the petition requirements for testate and
26 intestate estates in separate sections. The petition requirements for an intestate estate are located
27 in Section 2-203.
28

1 **SECTION 2-203. PETITION FOR INTESTACY; CONTENTS.**

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

5 (b) A petition for adjudication of intestacy must request a judicial finding and order
6 determining the heirs and that the decedent did not leave a valid will, and must contain the
7 following statements:

8 (1) the interest of the petitioner;

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

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

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

17 (5) that after the exercise of reasonable diligence, the petitioner is not aware of
18 any will relating to property subject to probate in this [tribal Nation] or, a statement why a will of
19 which the petitioner may be aware is not being probated;

20 (6) the tribal membership status of the decedent and heirs and devisees;

21 (7) whether the estate includes trust and restricted real property or Individual
22 Indian Money accounts; and

23 (8) whether the estate includes any family heirlooms or cultural artifacts.

(c) If the petition requests the appointment of a personal representative, the petition must state the priority of the person whose appointment is sought and the names of other persons having a prior or equal right to the appointment under Section 2-304.

Reporters' Note

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

SECTION 2-204. HEARING ON PETITION OPTIONAL. The court may but need not order that a hearing be held on a petition to admit a will to probate or to determine intestacy or the priority of a proposed personal representative for appointment.

Reporters' Note

Under this code, notice of the hearing to open the estate is required only if the petition does not request the appointment of a personal representative. Giving notice prior to the hearing can foreclose rights to object, such as potential objections by devisees under prior wills. On the other hand, requiring prior notice can significantly delay the opening of an estate. Pursuant to Section 2-402, a personal representative, following the appointment, must always give notice to the heirs and devisees.

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

(a) If the will is self-proved, compliance with signature and other execution requirements is presumed upon the filing of the will and affidavits thereto.

(b) If the will is witnessed but not self-proved, proper execution may be established by the testimony or affidavit of at least one of the attesting witnesses or by other sufficient evidence. An attestation clause that is signed by the attesting witnesses raises a presumption that the events recited in the clause occurred.

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.

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

12 (c) In a contested case, the proponents of the will have the burden of establishing prima
13 facie proof of due execution. A contestant of a will has the burden of establishing lack of
14 testamentary intent or capacity, undue influence, fraud, duress, or revocation.

15 (d) If the contest of a will is filed, an order admitting or denying admission of a will to
16 probate is final upon the expiration of the contest period as to all persons who were properly
17 notified of the court's order. If a contest is filed within the contest period, the order is final upon
18 the conclusion of the contest.

19 **Reporters' Note**

20 Subsection (d) is a shortened version of Section 3-414 of the Uniform Probate Code.

21 **PART 3.**

22 **PERSONAL REPRESENTATIVE; APPOINTMENT, CONTROL,**

23 **AND TERMINATION OF AUTHORITY**

24 **SECTION 2-301. COMMENCING ADMINISTRATION.**

25 (a) Administration of a decedent's estate, whether the decedent had a will or died
26 intestate, is a single proceeding to secure complete administration and settlement of a decedent's

1 estate under the continuing authority of the court which extends until entry of an order approving
2 distribution of the estate and discharging the personal representative. A personal representative is
3 responsible to the court, as well as to the interested persons, and is subject to directions
4 concerning the estate made by the court on its own motion or on the motion of any interested
5 person.

6 (b) Administration of an estate is commenced by the personal representative's
7 appointment and the issuance of letters.

8 (c) The duties and powers of a personal representative commence upon the personal
9 representative's appointment but the powers of a personal representative relate back in time to
10 give acts by the person appointed which are beneficial to the estate occurring prior to
11 appointment the same effect as those occurring thereafter.

12 **Reporters' Note**

13 This section is based on Sections 3-103, 3-501, 3-601, and 3-701 of the Uniform Probate
14 Code. Unlike the UPC, which provides for both supervised and unsupervised administration, this
15 Code provides for only one type of administration which at all times is under the continuing
16 authority of the court.

17 **SECTION 2-302. QUALIFICATION AND BOND.**

18 (a) Prior to receiving letters, a personal representative must qualify by filing with the
19 appointing court an acceptance of office and any required bond.

20 (b) A bond may be required by court order at the time of appointment of a personal
21 representative, but in making this determination the court shall consider whether the will relieves
22 the personal representative of a bond. No bond is required of any financial institution that is
23 granted trust powers under other law of this [tribal nation].

24 **Reporters' Note**

25 This section is similar to Sections 3-601 and 3-602 of the Uniform Probate Code.

SECTION 2-303. CONSENT TO JURISDICTION; NON-RESIDENT PERSONAL REPRESENTATIVES.

(a) By accepting appointment, a personal representative appointed under this [code] submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by an interested person.

(b) In addition to any other method for acquiring jurisdiction over a non-resident person, a personal representative appointed in another jurisdiction submits personally to the jurisdiction of the courts of this tribal jurisdiction in any proceeding relating to the estate by; (1) doing any act as a personal representative in this jurisdiction which would have given the tribal nation over the representative as an individual; or (2) receiving payment of money or taking delivery of personal property. Jurisdiction under clause (2) is limited to the money or value of personal property collected.

(c) In addition to jurisdiction conferred by subsection (b), a personal representative appointed in another jurisdiction 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.

(d) Notice shall be given to a foreign personal representative in the manner prescribed by Section 1-106.

Reporters' Note

Subsection (a) is similar to 3-603 of the Uniform Probate Code. Subsections (b)-(d) are drawn from Article IV of the UPC.

SECTION 2-304. PRIORITY AMONG PERSONS SEEKING APPOINTMENT AS PERSONAL REPRESENTATIVE.

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

(1) the person designated in a probated will including a person nominated pursuant to a power to nominate conferred in a will;

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

(3) other devisees of the decedent;

(4) the surviving spouse of the decedent;

(5) other heirs of the decedent;

(6) [the Tribal Nation];

(7) any other qualified person and [60] days after the death of the decedent, any creditor.

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

(c) Unless otherwise ordered by the court, a personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates a different persons to be personal representative in this [tribal nation]. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

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

Reporters' Note

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

SECTION 2-305. TERMINATION OF APPOINTMENT; GENERAL.

(a) Termination of appointment of a personal representative ends the right and power pertaining to the office of a personal representative as conferred by this [code] or any will.

(b) A personal representative whose appointment has been terminated may perform acts necessary to protect the estate and may deliver the assets to a successor representative unless restrained or enjoined by court order.

(c) Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination, or relieve the personal representative of the duty to preserve assets subject to the representative's control and to account for and deliver the assets. Termination does not affect the jurisdiction of the court over the personal representative.

Reporters' Note

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

**SECTION 2-306. TERMINATION OF APPOINTMENT BY REMOVAL;
CAUSE; PROCEDURE.**

(a) An interested person may petition for removal of a personal representative for cause at any time. The petitioner shall give notice of the petition to the personal representative, and to other persons as the court may order. Unless otherwise ordered by the court, after receiving notice of judicial proceedings to remove the personal representative, the personal representative shall not act except to account or to preserve the estate. If removal is ordered, the court shall direct by order the disposition of the assets remaining under the control of the personal representative being removed.

(b) Cause for removal exists when:

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

2 (2) the personal representative has disregarded an order of court, has failed to
3 perform a duty of office, or has become incapable of discharging the duties of office.

4 (3) the personal representative or person petitioning for the appointment
5 misrepresented material facts in the proceeding leading to the appointment.

6 **Reporters' Note**

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

9
10 **SECTION 2-307. TERMINATION OF APPOINTMENT; OTHER REASONS.**

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

13 (b) The entry of an order completely settling the estate as provided in Section 2-701
14 terminates the personal representative's appointment.

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

17 (d) Except as otherwise ordered by the court, a personal representative's appointment is
18 terminated by the appointment of a different personal representative.

19 **Reporters' Note**

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

22
23 Subsection (d) can apply in a variety of circumstances. These include probate of a will
24 subsequent to the appointment of a personal representative in intestacy, the probate of a will
25 which is superseded by probate of another will, or the vacating of the probate of a will under
26 which the personal representative was appointed.

27
28 **SECTION 2-308. SUCCESSOR PERSONAL REPRESENTATIVE.** After
29 appointment and qualification, a successor personal representative may be substituted in all

1 actions and proceedings to which the former personal representative was a party without the need
2 for additional notice.

3 **Reporters' Note**

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

5 **SECTION 2-309. SPECIAL PERSONAL REPRESENTATIVE; APPOINTMENT;** 6 **POWERS AND DUTIES.**

7 (a) A special representative may be appointed by order of the court on the petition of an
8 interested person and finding, after notice and hearing, that appointment is necessary to preserve
9 the estate or to secure its proper administration. If it appears to the court that an emergency
10 exists, appointment may be ordered without notice.

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

15 (c) A special personal representative has the power and duties as prescribed in the order
16 of appointment.

17 (d) An appointment of a special personal representative terminates in accordance with the
18 order of appointment, on the appointment of a general personal representative or as provided in
19 Sections 2-305 through 2-307.

20 **Reporters' Note**

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

1 **PART 4.**

2 **DUTIES AND POWERS OF PERSONAL REPRESENTATIVE**

3 **SECTION 2-401. GENERAL DUTIES; RELATION AND LIABILITY TO**
4 **PERSONS INTERESTED IN ESTATE; STANDING TO SUE.**

5 (a) A personal representative is a fiduciary who shall observe the duties of loyalty and
6 prudence, shall keep the beneficiaries of the estate reasonably informed about administration,
7 and shall otherwise act in the best interests of the estate. The personal representative shall settle
8 and distribute the estate of the decedent in accordance with the terms of any probated will and
9 this [code].

10 (b) A personal representative shall proceed expeditiously with the settlement and
11 distribution of a decedent's estate and, except as otherwise specified or ordered by the court or in
12 this [code], may do so without adjudication, order, or direction of the court, but the personal
13 representative may invoke the jurisdiction of the court, in proceedings authorized by this [code],
14 to resolve questions concerning the estate or its administration.

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

17 (d) This section does not affect the duty of the personal representative to administer and
18 distribute the estate in accordance with the rights of claimants whose claims has been allowed,
19 the rights of surviving spouse, any minor and dependent child, and any omitted child as
20 described elsewhere in this [code].

21 (e) Except as to proceedings that do not survive the death of a decedent, a personal
22 representative of the decedent domiciled in this [tribal nation] at death has the same standing to
23 sue and be sued in the courts of this [tribal nation] and the courts of another jurisdiction as the

1 decedent had immediately prior to death.

2 **Reporters' Note**

3 Subsection (b) is identical to Section 3-704 of the Uniform Probate Code. This section
4 otherwise is a shortened version of Section 3-703 of the Uniform Probate Code.

5
6 **SECTION 2-402. DUTY OF PERSONAL REPRESENTATIVE: NOTICE TO**
7 **HEIRS AND DEVISEES.**

8 (a) Not later than 14 days after appointment of a personal representative, other than a
9 special personal representative, the [personal representative] [clerk] shall give notice of the
10 appointment to the heirs and devisees.

11 (b) The notice shall include the name and address of the personal representative, indicate
12 that it is being sent to the heirs and if a will has been admitted to probate, to the devisees,
13 indicate whether bond has been filed, and describe the court where papers relating to the estate
14 are on file. The notice also must state that the estate is being administered by the personal
15 representative under the [Tribal Nation] Probate Code and that recipients are entitled to
16 information regarding the administration from the personal representative and can petition the
17 court in any matter relating to the estate.

18 (c) A personal representative's failure to give notice under this section is a breach of the
19 personal representative's duty to the persons concerned but does not affect the validity of the
20 personal representative's appointment or exercise of powers.

21 **Reporters' Note**

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

23 **SECTION 2-403. DUTY OF PERSONAL REPRESENTATIVE; INVENTORY**
24 **AND APPRAISEMENT.**

25 (a) Within three months after appointment, a personal representative other than a special

1 personal representative shall prepare and file with the court an inventory of property owned by
2 the decedent at the time of death, listing it with reasonable detail, and specifying each item, its
3 fair market value as of the date of the decedent's death, and the type and amount of any
4 encumbrance to which the item is subject. In preparing the inventory, a personal representative
5 may employ appraisers. The personal representative shall mail or deliver a copy of the inventory
6 to interested persons that request it. A successor personal representative need not file an
7 inventory if an inventory was previously filed.

8 (b) A personal representative shall file a supplemental inventory with the court if the
9 personal representative learns that property was not included in the original inventory or that the
10 value or description of any item in the original inventory was erroneous or misleading. The
11 personal representative shall mail or deliver a copy of the supplemental inventory to the persons
12 sent a copy of the original inventory and to other interested persons that request it.

13 **Reporters' Note**

14 This section is a modified version of Sections 3-706, 3-707, and 3-708 of the Uniform
15 Probate Code.

16
17 **SECTION 2-404. DUTY OF PERSONAL REPRESENTATIVE; POSSESSION OF**
18 **ESTATE.** Except as otherwise provided by a decedent's will, a personal representative has a
19 right to, and shall take possession or control of, the decedent's property. The personal
20 representative shall pay taxes on, and take all steps reasonably necessary for the management,
21 protection and preservation of, the estate in the personal representative's possession or control.
22 The personal representative may maintain an action to recover possession or control of property
23 or determine its title.

24 **Reporters' Note**

25 This section is based on a portion of Section 3-709 of the Uniform Probate Code.

1 **SECTION 2-405. POWERS OF PERSONAL REPRESENTATIVE;**
2 **GENERALLY; IMPROPER EXERCISE.**

3 (a) A personal representative has the same power over the title to property of the estate
4 that an absolute owner would have, in trust however, for the benefit of the creditors and others
5 interested in the estate. This power may be exercised without notice, hearing, or order of court.

6 (b) If it appears that a personal representative may take some action that would jeopardize
7 unreasonably the interest of the petitioner or of some other interested person, the court may order
8 the personal representative to refrain from performing specified acts of administration,
9 disbursement or distribution, or make any other order to secure proper performance of the
10 personal representative's duty.

11 (c) If the exercise of power concerning the estate is improper, the personal representative
12 is liable to interested persons for damage or loss resulting from breach of the fiduciary duty to
13 the same extent as a trustee of an express trust. The rights of purchasers and others dealing with
14 a personal representative shall be determined as provided in Sections 2-406 and 2-407.

15 **Reporters' Note**

16 This section combines portions of Sections 3-711 and 3-712 of the Uniform Probate
17 Code. Subsection (b) is identical to Section 3-607(a) of the Uniform Probate Code.

18
19 **SECTION 2-406. SALE, ENCUMBRANCE OR TRANSACTION INVOLVING**
20 **CONFLICT OF INTEREST; VOIDABLE; EXCEPTIONS.** A sale, encumbrance, or other
21 transaction that the personal representative, the personal representative's spouse, agent or
22 attorney, or any business entity in which the personal representative has a substantial beneficial
23 interest, or a transaction that is affected by a substantial conflict of interest on the part of the
24 personal representative, is voidable through an action for rescission by any person affected by
25 the transaction unless:

1 (1) the person bringing the action consented after fair disclosure;

2 (2) the will or a contract entered into by the decedent expressly authorized the
3 transaction; or

4 (3) the transaction is approved by the court after notice to interested persons.

5 **Reporters' Note**

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

7 **SECTION 2-407. PERSON DEALING WITH PERSONAL REPRESENTATIVE;**
8 **PROTECTION.**

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

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

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

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

19 (e) As used in this section, "good faith" means honesty in fact and the observance of
20 reasonable standards of fair dealing.

21 **Reporters' Note**

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

SECTION 2-408. SALE OF PROPERTY; WHEN NOTICE REQUIRED. At least 14 days before the closing of a sale of real or personal property of the estate for which the fair market value is not readily ascertainable, the personal representative shall provide written notice of the intent to sell to the beneficiaries of the estate whose interests might be affected by the sale and to persons who have filed a demand for notice under Section 2-104. The notice shall contain a description of the property to be sold, the name of the purchaser, the sale price, the terms of payment, and the nature of the security if the payment of any portion of the purchase price is to be deferred.

Reporters' Note

This section borrows in part from South Dakota Codified Laws Section 3-715(b).

SECTION 2-409. TRANSACTIONS AUTHORIZED FOR PERSONAL REPRESENTATIVE; EXCEPTIONS. Except as restricted or otherwise provided by the will or by an order of court, a personal representative, acting reasonably for the benefit of the estate, may properly:

(1) retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested;

(2) perform, compromise or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances.

(3) satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent.

(4) if funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts or other prudent

1 investments which would be reasonable for use by trustees generally;

2 (5) acquire or dispose of an asset, including land in this or another state, for cash or on
3 credit, at public or private sale; and manage, develop, improve, exchange, partition, change the
4 character of, or abandon an estate asset when, in the opinion of the personal representative, it is
5 valueless, or is so encumbered, or is in condition that it is of no benefit to the estate;

6 (6) make ordinary or extraordinary repairs or alterations in buildings or other structures,
7 demolish any improvements, raze existing or erect new party walls or buildings;

8 (7) enter for any purpose into a lease as lessor or lessee, with or without option to
9 purchase or renew, for a term within or extending beyond the period of administration;

10 (8) enter into a lease or arrangement for exploration and removal of minerals or other
11 natural resources;

12 (9) insure the assets of the estate against damage, loss and liability and the personal
13 representative against liability as to third persons;

14 (10) borrow money with or without security to be repaid from the estate assets or
15 otherwise; and advance money for the protection of the estate;

16 (11) pay taxes, assessments, compensation of the personal representative, and other
17 expenses incident to the administration of the estate;

18 (12) employ persons, including attorneys, auditors, investment advisors, or agents, even if
19 they are associated with the personal representative, to advise or assist the personal
20 representative in the performance of his administrative duties; act without independent
21 investigation upon their recommendations; and instead of acting personally, employ one or more
22 agents to perform any act of administration, whether or not discretionary;

23 (13) prosecute or defend claims, or proceedings in any jurisdiction for the protection of

1 the estate and of the personal representative in the performance of his duties;

2 (14) sell, mortgage, or lease any real or personal property of the estate or any interest
3 therein for cash, credit, or for part cash and part credit, and with or without security for unpaid
4 balances;

5 (15) continue any unincorporated business or venture in which the decedent was engaged
6 at the time of his death;

7 (16) incorporate any business or venture in which the decedent was engaged at the time
8 of his death;

9 (17) satisfy and settle claims and distribute the estate as provided in this [code].

10 **SECTION 2-410. POWERS AND DUTIES OF SUCCESSOR PERSONAL**
11 **REPRESENTATIVE.**

12 (a) A successor personal representative has the same power and duty as the original
13 personal representative to complete the administration and distribution of the estate, but the
14 successor personal representative may not exercise any power expressly made personal to the
15 personal representative named in the will.

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

19 **Reporters' Note**

20 Subsection (a) is identical to Section 3-716 of the Uniform Probate Code. Subsection (b)
21 is identical to South Dakota Codified Laws Section 3-716(b).

22
23 **SECTION 2-411. CO-REPRESENTATIVES; WHEN JOINT ACTION**
24 **REQUIRED.**

25 (a) Unless the will provides otherwise, the concurrence of all co-representatives is

1 required on all decisions connected with the administration and distribution of the estate.
2 Concurrence is not required when such agreement cannot readily be obtained in the time
3 reasonably available for emergency action necessary to preserve the estate, or when a co-
4 representative has been delegated to act for the others. A person who deals with a co-
5 representative without knowledge that another has also been appointed to serve is as fully
6 protected as if that co-representative with whom they dealt had full authority.

7 (b) Unless the terms of the will otherwise provide, every power exercisable by personal
8 co-representatives may be exercised by the one or more remaining after the appointment of one
9 or more of the others is terminated.

10 **Reporters' Note**

11 This section is based on Sections 3-717 and 3-718 of the Uniform Probate Code.

12 **SECTION 2-412. COMPENSATION OF PERSONAL REPRESENTATIVE.**

13 (a) A personal representative and an attorney for the personal representative are entitled
14 to reasonable compensation for services as approved by the court. Reasonable compensation may
15 include compensation for the services of the agents or employees of the person seeking
16 compensation and may also include reimbursement for costs advanced. A determination of
17 reasonable compensation may be based on one or more of the following factors:

18 (1) The time and labor involved;

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

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

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

1 (5) The nature, economic and otherwise, of the assets of the estate and their
2 respective values, the amount of income earned by the estate, and the responsibilities and
3 potential liabilities assumed by the person;

4 (6) The time limitations imposed by the circumstances;

5 (7) The familial relationship between the person performing the service and the
6 beneficiaries of the estate; and

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

9 (b) A personal representative may renounce the right to all or any part of the
10 compensation to which the personal representative would otherwise be entitled.

11 **Reporters' Note**

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

14 15 **SECTION 2-413. INDIVIDUAL LIABILITY OF PERSONAL** 16 **REPRESENTATIVE.**

17 (a) A personal representative is individually liable on a contract properly entered into in
18 the personal representative's fiduciary capacity in the course of administration of the estate only
19 if the contract so provides or the contract fails to disclose the fiduciary capacity.

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

23 (c) Even though the personal representative is not individually liable under subsections
24 (a) or (b), a claim based on a contract, tort, or obligation arising from ownership or control of the
25 estate, may be asserted against the estate in a judicial proceeding against the personal

1 representative in the representative's fiduciary capacity.

2 **Reporters' Note**

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

4 **PART 5.**

5 **CREDITORS' CLAIMS**

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

7 **ADMINISTRATION.** A proceeding to enforce a claim against the estate of a decedent or the
8 decedent's successors may not be commenced before the appointment of a personal
9 representative.

10 **Reporters' Note**

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

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

13 (a) Unless notice has already been given by a previously appointed personal
14 representative, a personal representative upon appointment shall publish a notice to creditors
15 once a week for two successive weeks in a newspaper of general circulation in the [tribal nation]
16 announcing the appointment and the personal representative's address and notifying creditors of
17 the decedent to present their claims within [four] months after the date of the first publication of
18 the notice or the claim may be barred.

19 (b) Except as provided in subsection (c), a personal representative shall give written
20 notice by mail or other delivery to a creditor of the decedent, who is either known to or
21 reasonably ascertainable by the personal representative, informing the creditor to present the
22 claim within [four] months after the date of the first publication of notice as provided in
23 subsection (a), or within 60 days after the mailing or other delivery of the written notice,

1 whichever is later, or be forever barred.

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

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

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

6 (3) The creditor was neither known to nor reasonably ascertainable by the
7 personal representative within [four] months after the first publication of notice as provided in
8 subsection (a).

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

11 **Reporters' Note**

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

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

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

17 (b) For purposes of a statute of limitations, the presentation of a claim pursuant to Section
18 2-505 is equivalent to commencement of a proceeding on the claim.

19 **Reporters' Note**

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

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

22 (a) If not barred earlier by another statute of limitations or nonclaim statute, a claim
23 against a decedent's estate which arose before the death of the decedent, including a claim of the

1 state or any subdivision thereof, whether due or to become due, absolute or contingent,
2 liquidated or unliquidated, founded on contract, tort, or other legal basis, is barred against the
3 estate, the personal representative, and the heirs and devisees of the decedent, unless presented
4 within the earlier of:

5 (1) As to a creditor not entitled to a written notice who is barred by publication
6 alone, [four] months after the first publication of notice as provided in Section 2-502(a) or [one
7 year] after the decedent's death, whichever is earlier;

8 (2) As to a creditor entitled to written notice, on the date specified in the written
9 notice as provided in Section 2-502(b) or [one year] after the decedent's death, whichever is
10 earlier.

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

13 (c) Nothing in this [part] affects or prevents:

14 (1) Any proceeding to enforce any mortgage, security interest, or other lien upon
15 property of the estate;

16 (2) Any right under the law to terminate or enforce a lease of license;

17 (3) Any proceeding to establish liability of the decedent or the personal
18 representative to the extent there is protection through liability insurance.

19 **Reporters' Note**

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

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

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

23 (1) The claimant may file the claim with the court in the form prescribed by court

1 rule. The statement of claim shall indicate its basis, the name and address of the claimant, and the
2 amount claimed. If a claim is not yet due, the date when it will become due shall be stated. If
3 the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim
4 is secured, the security shall be described. Upon the filing, the clerk shall send a copy of the
5 claim to the personal representative or representative's attorney; or

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

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

12 **Reporters' Note**

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

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

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

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

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

Reporters' Note

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

SECTION 2-507. ALLOWANCE OF CLAIM.

(a) Upon the petition of the claimant in a proceeding for the purpose, the court may allow in whole or in part any claim or claims filed with the clerk of the court. Notice in this proceeding shall be given to the claimant, the personal representative and other persons interested in the estate as the court may direct by order entered at the time the proceeding is commenced.

(b) A judgment in a proceeding in another court against the personal representative to enforce a claim against the decedent's estate is an allowance of the claim.

Reporters' Note

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

SECTION 2-508. PAYMENT OF CLAIM.

(a) Upon the expiration of the earlier of the time limitations provided in Section 2-504 for the presentation of claims, the personal representative shall pay the claims allowed against the estate in the order of priority prescribed, after making provision for [statutory allowances for the spouse and children], for claims already presented that have not yet been allowed or whose allowance has been appealed, and for costs and expenses of administration.

(b) A claimant whose claim has been allowed but not paid may petition the court to secure an order directing the personal representative to pay the claim to the extent funds of the estate are available to pay it.

(c) The personal representative at any time may pay any valid claim that has not been

1 barred, with or without formal presentation, but is personally liable to any other claimant whose
2 claim is allowed and who is injured by its payment if:

3 (1) payment was made before the expiration of the time limitation provided in
4 Section 2-504 for the presentation of claims; or

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

7 **Reporters' Note**

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

9 **PART 6.**

10 **SPECIAL PROVISIONS RELATING TO DISTRIBUTION**

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

12 **APPROPRIATED; ABATEMENT.**

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

20 (b) If the subject of a preferred devise is sold or spent incident to administration,
21 abatement shall be achieved by appropriate adjustments in the distribution of the remaining
22 assets.

1 **Reporters' Note**

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

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

7 **Reporters' Note**

8 This section is a modified version of Section 3-903 of the Uniform Probate Code.

9 **SECTION 2-603. INTEREST ON DEVISE OF SPECIFIED AMOUNT OF**
10 **MONEY.** A devise of a specified amount of money bears interest at the legal rate beginning one
11 year after the first appointment of a personal representative until payment, unless a contrary
12 intent is expressed by the will.

13 **Reporters' Note**

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

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

16 (a) Unless a contrary intent is expressed by the will, the distributable assets of a
17 decedent's estate shall be distributed in kind to the extent possible.

18 (b) If distribution of the estate assets is made in kind, the personal representative shall
19 execute a document of distribution transferring the assets to the distributee as evidence of the
20 distributee's title or right to the property.

21 (c) Proof that a distributee has received a document of distribution of assets in kind, or
22 payment in distribution, from a personal representative, is conclusive evidence that the
23 distributee has received the interest of the estate in the distributed assets, as against all persons

1 interested in the estate, except that the assets or their value may be recovered if the distribution
2 was improper.

3 **Reporters' Note**

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

6
7 **SECTION 2-605. PROPOSAL FOR DISTRIBUTION.** After the probable charges
8 against an estate are known, the personal representative may mail or deliver a proposal for
9 distribution to all persons who have a right to object to the proposed distribution. If the proposed
10 distribution informed the distributee of the right to object and of the applicable time limit the
11 right of any distributee to object on the basis of the kind or value of asset the distributee is to
12 receive, terminates if the distributee fails to object to the personal representative in writing
13 within 30 days after mailing or delivery of the proposal.

14 **Reporters' Note**

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

16 **SECTION 2-606. IMPROPER DISTRIBUTION; LIABILITY OF DISTRIBUTE.**

17 Unless the distribution or payment can no longer be questioned because of adjudication,
18 estoppel, or limitation, a distributee of property improperly distributed, or a claimant who was
19 improperly paid, is liable to return the property improperly received and its income, or an
20 equivalent value if the distributee or claimant no longer has the property.

21 **Reporters' Note**

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

23 **SECTION 2-607. DISTRIBUTION TO MINOR OR ADULT LACKING**
24 **CAPACITY.**

25 (a) A personal representative may discharge an obligation to distribute the share of a

1 person for whom a [conservator] has been appointed only by distributing to the [conservator]. If
2 the personal representative is aware that a proceeding for appointment of a [conservator] is
3 pending, the personal representative shall delay distribution until the proceeding is decided.

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

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

8 (2) A [guardian] of the minor;

9 (3) A custodian of the minor as authorized by a Uniform Gifts or Transfers to
10 Minors Act of any applicable jurisdiction;

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

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

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

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

21 (2) A [guardian] of the adult person;

22 (3) Any person responsible for or who has assumed responsibility for the adult
23 person's care or custody, provided that the value of the share to be distributed does not exceed

[\$10,000].

(d) The personal representative is not responsible for the proper application of money or property distributed pursuant to subsection (a).

Reporters' Note

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

SECTION 2-608. FINAL DISTRIBUTION TO DOMICILIARY

REPRESENTATIVE. An estate of a non-resident decedent being administered by a personal representative appointed in this [tribal nation] shall, if there is a personal representative of the decedent's domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent unless (1) the personal representative of this [Tribal Nation], after reasonable inquiry, is unaware of the existence or identity of a domiciliary personal representative; or (2) the court orders otherwise. In other cases, distribution of the estate of a decedent shall be made in accordance with the other [parts] of this [article].

Reporters' Note

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

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

Reporters' Note

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

1 **PART 7.**

2 **CLOSING ESTATE**

3 **SECTION 2-701. PROCEEDING TERMINATING ADMINISTRATION; ORDER**
4 **OF COMPLETE SETTLEMENT.**

5 (a) The administration of an estate is concluded by an order of complete settlement. The
6 personal representative may petition for an order of complete settlement no earlier than [four]
7 months from the appointment of the original personal representative, and any other interested
8 person may petition no earlier than one year from the appointment of the original personal
9 representative. The petition of the personal representative shall be heard as a matter of course,
10 but other petitions shall be heard only if there is good cause. The petition shall request the court
11 to approve the account or to compel and approve an accounting, and to adjudicate the complete
12 settlement and distribution of the estate.

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

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

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

22 **Reporters' Note**

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

SECTION 2-702. LIABILITY OF DISTRIBUTE TO CLAIMANT.

(a) After assets of an estate have been distributed, an undischarged claim not barred may be prosecuted in a proceeding against one or more distributees but only if the action is brought within the later of [three] years after the decedent's death or one year after the the time of the distribution. A creditor of the decedent may bring an action under this section only if the claim has not been barred under Section 2-504.

(b) This section does not bar an action to recover property or value received as a result of fraud.

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 property. 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.

1 **PART 8.**

2 **COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT AND SUMMARY**

3 **ADMINISTRATION PROCEDURE FOR SMALL ESTATE**

4 **SECTION 2-801. COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT.**

5 (a) Thirty days after the death of a decedent, any person indebted to the decedent or
6 having possession of tangible personal property or an instrument evidencing a debt, obligation,
7 stock or chose in action belonging to the decedent shall make payment of the indebtedness or
8 deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or
9 chose in action to a person claiming to be the successor of the decedent upon being presented an
10 affidavit made by or on behalf of the successor stating that:

11 (1) the value of the entire estate, wherever located, less liens and encumbrances,
12 does not exceed [\$25,000]; and

13 (2) 30 days have elapsed since the death of the decedent; and

14 (3) no application or petition for the appointment of a personal representative is
15 pending or has been granted in any jurisdiction; and

16 (4) the claiming successor is entitled to payment or delivery of the property.

17 (b) A transfer agent of any security shall change the registered ownership on the books of
18 a corporation from the decedent to the successor or successors upon the presentation of an
19 affidavit as provided in subsection (a).

20 (c) The person paying, delivering, transferring, or issuing personal property or the
21 evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt
22 with a personal representative of the decedent. The person is not required to see to the
23 application of the personal property or evidence thereof or to inquire into the truth of any

1 statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver,
2 transfer, or issue any personal property or evidence thereof, it may be recovered or its payment,
3 delivery, transfer, or issuance compelled upon proof of their right in a proceeding brought for the
4 purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery,
5 transfer or issuance is made is answerable and accountable therefor to any personal
6 representative of the estate or to any other person having a superior right.

7 **Reporter's Note**

8 This section is copied from Sections 3-1201 and 3-1202 of the Uniform Probate Code.

9 **SECTION 2-802. SUMMARY ADMINISTRATION PROCEDURE FOR EXEMPT** 10 **ESTATE.**

11 (a) If it appears from the inventory and appraisal that the value of the entire estate, less
12 liens and encumbrances, does not exceed homestead allowance, exempt property, family
13 allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable
14 and necessary medical and hospital expenses of the last illness of the decedent, the personal
15 representative may, without giving notice to creditors, summarily and immediately disburse and
16 distribute the estate to the persons entitled thereto, and file a closing statement as provided in
17 subsection (b).

18 (b) Unless prohibited by order of a court, the personal representative may close an estate
19 administered under this summary administration procedure by filing with the court, at any time
20 after disbursement and distribution of the estate, a verified statement stating that:

21 (1) to the knowledge of the personal representative, the value of the entire estate,
22 less liens and encumbrances, did not exceed homestead allowance, exempt property, family
23 allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable,

1 necessary medical and hospital expenses of the last illness of the decedent;

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

4 (3) the personal representative has sent a copy of the closing statement and has
5 provided a full accounting in writing to all persons entitled to the estate, to all creditors who have
6 filed claims against the estate whose claims have not been paid or barred, and to all persons who
7 have filed a demand for notice under Section 2-104.

8 (c) If no actions or proceedings involving the personal representative are pending in the
9 court [six months] after the closing statement is filed, the appointment of the personal
10 representative terminates.

11 **Reporters' Note**

12 This section is similar to Sections 3-1203 and 3-1204 of the Uniform Probate Code.

13 **ARTICLE 3**

14 **INTESTATE AND TESTATE SUCCESSION**

15 **PART 1.**

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

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

23 **Reporters' Note**

24 There are numerous ways that intestate succession can be, and have been, handled within

1 a tribal probate code: (1) completely align with AIPRA, essentially importing its provisions
2 wholesale; (2) split trust/restricted off from non-trust and non-restricted property, with separate
3 provisions for each; or (3) cover all property and seek approval under AIPRA for this broad
4 application.

5
6 This draft currently reflects Option #2 by proposing provisions applicable to non-trust or
7 restricted property – all of which would be completely subject to tribal alteration to best suit that
8 tribe’s needs and goals – and then saving a place for a streamlined version of AIPRA which
9 would apply to trust and restricted property. This is essentially the approach taken by the
10 Northern Cheyenne Probate Code (approved by SOI, 11/17/14); Fort Peck TPC Title 12 §§ 101,
11 106 (“Except as to trust or restricted land subject to the jurisdiction of the United States, the
12 Tribal Court shall have jurisdiction to determine heirs ...”; “When an Indian dies without a valid
13 will, the Indian’s property which is subject to the Court’s jurisdiction shall descend to the
14 following persons”).

15 16 **SECTION 3-102. SHARE OF SPOUSE.**

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

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

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

21 (b) The intestate share of a decedent’s surviving spouse is ½ of the entire net intestate
22 estate if the decedent is survived by one or more descendants who are not also descendants of
23 the surviving spouse.

24 **Reporters’ Note**

25 TPCs take numerous approaches in determining the spousal share. The drafted model
26 provision falls between codes that provide for the entire estate always to pass to the surviving
27 spouse (if there is one) to those that limit the spouse to ½ if there are any surviving issue (*See*
28 *e.g.* Chitimacha TPC § 302, Fort Peck § 106(a)(1)) to those that reduce the spousal share to a
29 different fraction (*e.g.* Jicarilla TPC Chapter 8 § (B) (1/4 to spouse, ¾ to surviving children as to
30 separate property) or in a greater number of instances, *e.g.* when the decedent is survived by
31 parents or siblings, rather than only descendants. *See, e.g.*, Lummi Nation TPC Chapter 35.05
32 §35.05.010 (“the surviving spouse shall receive . . . ¾ of the net separate estate if there is no
33 surviving issue, but he intestate is survived by one or more of his parents, or by one or more of
34 the issue of one or more of his parents.”).

35 Note that the definition of “spouse” will be a matter for tribal nations to decide.

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

2 (a) Any part of the net intestate estate that does not pass to a decedent's surviving spouse
3 passes as follows:

- 4 (1) to the decedent's surviving descendants by representation;
- 5 (2) if there is no surviving descendant, equally to any surviving parent;
- 6 (3) if there is no surviving descendant or parent, to the decedent's siblings in
7 equal shares, with the descendant or descendants of any predeceased sibling taking their parent's
8 share by representation;
- 9 (4) if there is no surviving descendant, parent, sibling, or descendant of a sibling,
10 but the decedent is survived by one or more grandparents or surviving descendants of
11 grandparents, to the grandparent or grandparents equally, or if there is no surviving grandparent,
12 to the descendants of those grandparents by representation.

13 **Reporters' Note**

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

15

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

31

32 The drafted provision begins by using a "parentelic" or parent and descendant-based
33 representational system rather than a civil law system, which counts degrees of relationship from
34 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.”)

Note that unlike many codes, the drafted provision does not create a “maternal” and “paternal” division at the third parentela, instead providing that any grandparent will take to the exclusion of all collateral relatives within the third parentela regardless of whether they were related through the same parent.

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. INDIVIDUALS RELATED TO DECEDENT THROUGH A SINGLE ANCESTOR.

No distinction is made between individuals related to the decedent through one ancestor and those related to the decedent through two ancestors.

1 **Reporters' Note**

2 The most common scenario in which this issue arises is where a decedent dies survived
3 by more than one sibling, sharing both genetic parents with one or more of them but only one
4 genetic parent with one or more others. Such siblings are often referred to as related to the
5 decedent “by the half-blood” rather than the whole blood.
6

7 Most non-tribal jurisdictions have eliminated the distinction, largely by asserting that it
8 derives from undue concern with consanguinity and creates unnecessary complexity. Some,
9 however, retain it. For example, Oklahoma law favors a sibling related by the whole blood for
10 estate property that derives from the non-shared parent. *See* 84 Okl.St. Ann. § 222 (Kindred of
11 the half-blood). Other states approach the matter differently, such as by giving those related by
12 the whole blood a double share. *See generally* Comment, *Statutory Treatment of Ancestral*
13 *Estate and the Half Blood in Intestate Succession*, 42 YALE L. J. 101 (1934).
14

15 **SECTION 3-106. NO TAKER.** If there is no taker under the provisions of Section 3-
16 102 and 3-103, the entire net estate will be distributed as ordered by the tribal court with
17 jurisdiction.

18 **Reporters' Note**

19
20 This section avoids the difficulties associated with escheat, such as the particular tribal
21 nation to which the property will escheat. There are other ways to design this sort of provision,
22 which could be included in these Reporters' Notes or in an implementation guide. For example,
23 the TPC could state that “if the decedent is a tribal member, the entire net intestate estate will
24 escheat to the Tribe and will be added to the general fund,” adding some provision for the result
25 if the decedent is not a tribal member, or, *e.g.*, “personal property found within the intestate
26 estate will escheat to the Tribe and will be added to the general fund, whereas real property will
27 pass to any existing co-owners of the real estate.”
28

29 This provision gives a significant amount of discretion to the tribal court within which
30 probate has been opened, at least after heirship as described within Sections 3-102 and 103 has
31 been exhausted. Factors that the court could consider in determining where the property should
32 then pass might include: enrolled or membership status; biological, functional, dependent
33 relationship with decedent; residence; ownership interest in subject property; etc.
34

35 **SECTION 3-107. REPRESENTATION.** Wherever any part of a decedent's intestate
36 estate passes by representation to descendants of the decedent, descendants of the decedent's
37 parents, or descendants of the decedent's grandparents, the individuals who will take, and their
38 respective shares, shall be determined as follows: (i) identify the first generation down from the

decedent, decedent's parent, or decedent's grandparent with at least one surviving member; (ii) count the number of surviving members in that generation plus predeceased members in that generation who left surviving descendants; (iii) allocate an equal share to each surviving member and allocate the share of each predeceased member who left descendants who survived the decedent 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. This drafted provision adopts a modified per stirpes form of representation, which splits the difference somewhat by flattening (but not erasing) the potential for wide horizontal disparity of shares. For example, assume the following facts, with the individuals who are bolded and in brackets having predeceased the decedent, and thus ineligible to take from the decedent's estate.

Hypothetical	<pre> graph TD Decedent --> ChildA[Child A] Decedent --> ChildB["[Child B]"] Decedent --> ChildC["[Child C]"] ChildA --> GC1[GC1] ChildA --> GC2[GC2] ChildB --> GC3[GC3] ChildC --> GC4[GC4] ChildC --> GC5[GC5] ChildC --> GC6[GC6] </pre>		
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 1/6 of 2/3 or 1/6 of the decedent's estate.

Hypothetical	<pre> graph TD Decedent --> ChildA[Child A] Decedent --> ChildB[Child B] Decedent --> ChildC[Child C] ChildA --> GC1 ChildA --> GC2 ChildB --> GC3 ChildC --> GC4 ChildC --> GC5 ChildC --> GC6 </pre>		
Approach	Pure per stirpes	Modified per stirpes	Per capita at each gen.
Intestate Outcome	GC 1 & 2 would each take $\frac{1}{2}$ of $\frac{1}{3}$ (or $\frac{1}{6}$) of the decedent's estate; GC 3 would take $\frac{1}{3}$ of the decedent's estate; GC 4, 5 & 6 would each take $\frac{1}{3}$ of $\frac{1}{3}$ (or $\frac{1}{9}$) of the decedent's estate.	GC 1-6 would each take $\frac{1}{6}$ of the decedent's estate.	GC 1-6 would each take $\frac{1}{6}$ of the decedent's estate.
Hypothetical	<pre> graph TD Decedent --> ChildA[Child A] Decedent --> ChildB[Child B] Decedent --> ChildC[Child C] ChildA --> GC1 ChildA --> GC2 ChildB --> GC3 ChildC --> GC4 ChildC --> GC5 ChildC --> GC6 GC1 --> GGC1 GC2 --> GGC2 GC3 --> GGC3 </pre>		
Approach	Pure per stirpes	Modified per stirpes	Per capita at each gen.
Intestate Outcome	Child A takes $\frac{1}{3}$, GGC1 and GGC2 each take $\frac{1}{2}$ of $\frac{1}{3}$ or $\frac{1}{6}$, and GC4, GC6, and GGC3 each take $\frac{1}{3}$ of $\frac{1}{3}$ or $\frac{1}{9}$ of the decedent's estate.	Same as Pure per stirpes.	Child A takes $\frac{1}{3}$, GC4 and GC 6 take $\frac{1}{6}$ of the decedent's estate, and GGC1, GGC2, and GGC3 each take $\frac{1}{9}$ of the decedent's estate.

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

As earlier stated, some TPCs limit representational rights in whole or in part. *See, e.g.,* Fort Peck TPC Title 12 § 106(b) (moving straight from siblings of decedent to grandparents of decedent without providing for possibility of inheritance by nieces and nephews of predeceased

sibling, but permitting their potential inheritance after moving through aunts and uncles); Mashantucket Pequot TPC § 81 (limiting representation to descendants of parents and siblings, then moving to next of kin, then step-children).

SECTION 3-108. PARENT-CHILD RELATIONSHIP; MARITAL STATUS.

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

Reporters' Note

[Drafting note: Sections 3-107 – 3-109 are heavily culturally dependent, and the drafting committee will want to consider how minimalist the drafted provisions should be. Much can be handled within the definitions section, e.g. “unless elsewhere defined within Tribal law, the decedent's spouse shall mean ____.”

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

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

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

For a sample jurisdictional clause:

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

For a sample broad clause placing evidentiary control within the court: “the words ‘children’ and ‘issue’ include adopted children and children of unwed parents where the

1 Secretary of the Interior or the Tribal Court determines that paternity has been acknowledged or
2 established[.]” Fort Peck TPC Title 12 § 106(b). For a sample provision that provides no special
3 rule either way: “For the purposes of inheritance by, through, and from any child, the effects and
4 treatment of the parent-child relationship shall not depend on whether or not the parents have
5 been married.” Lummi Nation TPC title 35 § 35.05.020.

6
7 **Drafting Note:** The Uniform Parentage Act is working on matters pertaining to the
8 interplay between parentage and same-sex marriage. We defer coordination here pending
9 completion of that work.

10
11 **[SECTION 3-109. PARENT BARRED FROM INHERITING IN CERTAIN**
12 **CIRCUMSTANCES.**

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

14 (1) [there were repeat protective actions brought by the tribe against the parent];

15 (2) the parent’s parental rights were terminated and the parent-child relationship
16 was not judicially reestablished; or

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

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

23 **Reporters’ Note**

24 The drafted provision represents a minor trend within probate codes, and bears both
25 merits and demerits. For that reason, it is bracketed as an optional addition to the MTPC. On the
26 plus side, it arguably ensures that the presumed intent of minor children, who by necessity will
27 die intestate, is met. Moreover, it may modestly contribute to the quality of parentage of the
28 minor child, although relevant data would be difficult to collect. On the minus side, it might
29 create more litigation than it is worth, and involve difficult questions over what it takes to be a
30 parent and who gets to determine whether that standard has been met. The drafted provision
31 tries to mediate the negatives by including a relatively precise assessment standard.
32 For an example of a TPC including this sort of provision, see e.g.:
33

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

6
7 An Order terminating the parent-child relationship shall have the same
8 effect on the legal rights, privileges, duties, and obligations, including rights of
9 inheritance of the parent and the child with respect to each other, as it would have
10 had such action taken place under State Law.

11
12 Blackfeet Law and Order Code Ch. 3, § 6(J) (Proceedings for the Termination of Parent-
13 Child Relationship). See also Fort Peck TPC Title 12 § 106(12)(b)(2) (extending inheritance bar
14 to rights flowing “up” as well as those flowing “down”).]

15
16 **[Drafting note:** discussion of possibility of unwinding TPR or re-establishment upon
17 reconnection w/ parents; determination that best left to IG.]

18
19 **[Drafting note:** this section could be retitled and modified to include a bar of any
20 putative heir who had been convicted of abuse of an elder or dependent adult.]

21
22 **SECTION 3-110. INHERITANCE BY, FROM, AND THROUGH ADOPTED**
23 **CHILD.**

24 (a) Except as provided in subsection (b), if an adoption is complete and lawful under
25 tribal [and federal] law, a parent-child relationship exists for purposes of intestate succession
26 between an adoptee and the adoptee’s adoptive parent or parents, and no longer exists between
27 an adoptee and the adoptee’s biological parent or parents.

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

30 (1) The decree of adoption provides for the continuation of the adoptee’s
31 inheritance rights from the biological family;

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

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

1 **Reporters' Note**

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

11
12 For an example of provision deferring to state law: “All members of the Blackfeet Indian
13 Tribe shall hereafter be governed by State Law and subject to state jurisdiction with respect to
14 adoptions hereafter consummated.” Blackfeet Law and Order Code, Ch. 3, § 8 (Adoption).

15
16 For purposes of this section, a “relative” of a person is one who would be entitled to take
17 under this code from that person’s intestate estate.

18
19 **SECTION 3-111. ADVANCEMENT.**

20 (a) Any property that an intestate decedent gave during life to a presumptive heir is an
21 advancement and shall be deducted from the heir’s intestate share only upon a writing, made
22 either by the decedent or the recipient, that clearly establishes that the decedent intended that
23 result.

24 (b) Absent an intent expressed in the writing, advancements shall not reduce the shares of
25 a predeceasing recipient’s descendants, and property advanced is valued as of the time the
26 beneficiary came into possession or enjoyment of the property or at the testator’s death,
27 whichever first occurs.

28 **PART 2.**

29 **INTESTATE SUCCESSION OF TRUST AND RESTRICTED REAL AND PERSONAL**
30 **PROPERTY**

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

1 **PART 3.**

2 **TESTATE SUCCESSION OF TRUST AND NON-TRUST PROPERTY [WILL**
3 **EXECUTION, REVOCATION, CHALLENGE, COMPOSITION, AND**
4 **CONSTRUCTION]**

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

7 **Reporters' Note**

8
9 This provision could provide more detail incorporating mental state, e.g. "A will shall be
10 deemed to be valid if the decedent had a sane mind and understood what he was doing when he
11 made the will and was not subject to any undue influence of any kind from another person[.]"
12 Blackfeet Tribal Law and Order Code Ch. 3 § 5; Same basic provision Chitimacha TPC Chapter
13 2 (Wills), § 201 (Who May Make a Will).
14

15 **SECTION 3-302. EXECUTION; WITNESSED WILL; HOLOGRAPHIC WILL.**

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

18 (1) in writing;

19 (2) dated;

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

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

26 [(b) Holographic Will. A will that does not comply with subsection (a) is valid as a
27 holographic will, whether or not witnessed, if the signature and material portions of the

document are in the testator's handwriting and the testator intended that document to dispose of the testator's property or otherwise affect the testator's estate at death.]

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

Reporters' Note

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

For example, it seems that the regulations include the requirement of actually disinterested witnesses rather than any competent adult witness plus a purging act. Not one state statute shares this result, which is an archaic rule imposed under early English law. Instead, most states judicially or more commonly, legislatively determine either that (1) there is no need for a disinterested witness at all (see, e.g., UPC for rule & theory) or (2) that the will is still valid but the interest is purged, with the interested witness taking "whichever is less" under the will versus some other source, e.g. a prior will, or intestate succession. For an example of a TPC taking this sort of "purging" approach (and expressly limiting what sort of interest will trigger purging), see Mashantucket Pequot TPC Ch. 5 § 4:

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

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

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

1. As the federal regulations only apply to trust or restricted land or trust personalty, a tribe is always free to alter the wills formalities for non-covered property, and it appears that many tribes do (e.g. by permitting oral wills or holographic wills). However, the difficulty is that doing so creates confusion and facilitates unintended outcomes, whereby a single will may be valid only as to some (non-trust or restricted) of the decedent's property. The more efficient approach would be to track the more restrictive execution requirements for *all* wills to ensure compliance under any federal, tribal, or state system. If the formalities are super clear, and relatively cheaply accomplished, then the unfair effects of a strict rule set are mitigated (even if they cannot be avoided entirely).
2. Perhaps a particular tribe could seek approval of a tribal probate code that supplanted (and presumably, liberalized) the execution requirements found in the regulations. The difficulty there, however, is that the federal government might resist, fearing the inefficiency created if OHA had to pass on the validity of a will under a number of possibly different tribal codes. It might be that the "validity" function could be determined at the tribal level, with the probate packet then sent on to OHA for subsequent administration.
3. The ambiguity of 15.4 (date and "execute" your will in writing and have it attested by two disinterested adult witnesses) does create some flexibility over what "execution" means, in which case some of the additional requirements – e.g. publication & presence – are only demanded to render a will *self-proving* rather than to make it initially valid. But that doesn't entirely solve matters. A related problem is the tension caused by having a party swear to a more restrictive set of requirements to make the will "self proved" than are necessary to render the will valid, in which case that witness is exposed to a perjury charge as well as subject to more intense scrutiny over the veracity of the representations necessary to support initial will validity. Indeed, it might be that swearing to a ceremony that did not actually take place could expose the will more readily to a successful challenge based on undue influence. Admittedly, the requirement of "disinterested witnesses" mitigates this somewhat, but that partly turns on how tightly or loosely the court defines who is interested and who is not. The mismatch is problematic, and counsels toward approach #1 in the absence of some belief that approach #2 would work.
4. It does appear that under IBIA decisions interpreting other provisions of Title 43 regs, approach #3 holds water. For example, in *Estate of Sarah Stewart Sings Good*, 57 IBIA 65 (I.B.I.A.), 2013 WL 3054080 (2013), a will challenger asserted that the will was improperly executed for failing to meet the asserted requirements of publication and witness request as set forth in the proposed self-proving affidavit form. The IBIA disagreed. To the Board, although "the will scrivener should perhaps have crossed out the language relating to publication and a request to sign before using BIA's standard form affidavit," the failure to do so did not impose additional execution requirements beyond those enumerated in 25 C.F.R. §§ 15.3, 15.4. *Id.* at 76, quoting *Estate of Lena Abbie Big Bear Yellow Eagle*, 17 IBIA 237, 238-39 (1989) (citing *Estate of Carrie Standing Haddon Miller*, 10 IBIA 128, 132 (1982) (holding that an

1 Indian testatrix is neither required to publish her will nor be the person to request the
2 witnesses to sign in order for the will to be properly executed)). The Board continued
3 by recognizing that “at most, the absence of these formalities could defeat the self-
4 proving character of the will, in which case testimony must be obtained from the will
5 witnesses if they are available[.]” *Id.*, citing *Estate of Margerate Arline Glenn*, 50
6 IBIA 5, 28 (2009); *Estate of Sallie Fawbush*, 34 IBIA 254, 257 (2000).
7

8 Nevertheless, the mismatch between what the regulations require for a valid will and
9 those strongly suggested within the self-proving affidavit forms create ambiguity and potential
10 for confusion and mistake.
11

12 The drafted provision does not recognize oral wills, which is consistent with federal law.
13 See *Estate of Nels John Johnson*, 55 IBIA 171 (I.B.I.A.), 2012 WL 8436502 (2012) (no federal
14 statute or regulation recognizes oral wills); *Estate of Baz Nip Pah*, 22 IBIA 72, 74 (1992)
15 (“Oral wills cannot be recognized for the purpose of conveying trust or restricted property.”).
16 However, this may be a point for tribes to consider, as some TPCs do recognize them for non-
17 trust or restricted property. Example: “valid as an oral will under Chitimacha custom, if all
18 children, whether residing in testator’s home or not, and testator’s spouse, if alive, are present at
19 the announcement of the oral will and agree that the testator orally made known the testator’s last
20 will before them.” Chitimacha, § 204.
21

22 The drafted provision does, however, recognize holographic wills. This is inconsistent
23 with federal law, which somewhat confusingly (depending on how “holographic” is defined, i.e.
24 as handwritten) states that holographic wills are valid if also witnessed by two disinterested adult
25 witnesses. See, e.g., *Estate of Julia Tieyah*, 11 IBIA 211 (I.B.I.A.), 1983 WL 41947 (1983).
26 Some TPCs also recognize. Sample: “[valid] whether or not witnessed, if the signature and the
27 material provisions are in the handwriting of the testator.” Chitimacha §203.
28

29 The MTPC should offer different choices & options, along with ramifications. For
30 example, it might include the holographic will but with reservations – as noted above – given the
31 competition w/ federal law & the clarity of having one standard that works for all. Rationale:
32 with the enhanced estate planning efforts as promoted under AIPRA etc. has come a proliferation
33 of will forms. What is more, the desire to avoid the more unpopular components of default
34 intestacy provisions, and the more general desire to encourage, enhance, and uphold the
35 actuation of testamentary freedom, suggest that more rather than fewer opportunities for valid
36 will execution are desirable.
37

38 If a tribe determines that holographic wills are worth the costs of confusion vis-à-vis fed
39 law, a number of variations exist between tighter rules, strictly construed, and looser ones,
40 flexibly construed. For example, could require that the will be “entirely handwritten, dated, and
41 signed,” or only “material portions + signature” in t’s handwriting. Suggest that MTPC go w/
42 loosest possible if going to have at all, to support the practice (sloppy, but common) where will
43 forms are filled in by hand, signed, but never appropriately witnessed. Moreover, if there is an
44 independent requirement that “testamentary intent” exist, that should somewhat mitigate the
45 concern that a draft document or worksheet would be considered a will.
46

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

6
7 Most broadly: there are many options between protective and flexible. Variables could
8 include notarization method, presence requirements (T & witnesses; contrast "reasonable time").
9 Sample set: to require that the will be (1) in writing; (2) signed by the testator or by another who
10 signs the testator's name at the testator's request and in the testator's conscious presence; (3)
11 intended by the testator to dispose of the testator's property or otherwise affect the testator's
12 estate at death; and (4) signed by two or more competent, adult witnesses who each sign within
13 the testator's conscious presence and after witnessing the actual signing of the will or the
14 testator's later acknowledgment of that signature or the will.

15
16 Samples: "if the will was made in writing and signed by the decedent in the presence of a
17 representative or representatives of the Superintendent of the Blackfeet Agency, who has or have
18 signed such will as witness or witnesses. Provided that if a will is made under circumstances
19 when the attendance of such representative cannot be secured, at least two other witnesses may
20 serve." . . . "but no distributed property shall be made in violation of a proved Tribal custom of
21 law which restricts the privilege of Tribal members to distribute property by will." Blackfeet
22 Tribal Law and Order Code Ch. 3 Section 5 (Approval of wills).

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

27
28 **[SECTION 3-303. HARMLESS ERROR.** Although a document or writing added
29 upon a document was not executed in compliance with Section 3-302, the document or writing is
30 treated as if it had been executed in compliance with that section if the proponent of the
31 document or writing establishes by clear and convincing evidence that the decedent intended the
32 document or writing to constitute:

- 33 (1) the decedent's will,
34 (2) a partial or complete revocation of the will, or
35 (3) an addition to or an alteration of the will.

36 **Reporters' Note**

37 This provision would not comport with federal law, which appears to require strict

1 compliance (at least on the validity, although perhaps not on the “self-proved” front) by stating
2 “you *must* meet [certain requirements]. **[Drafting note:** check all TPCs for this sort of
3 provision. Also: was feared in the states that adopted this from UPC 2-503, but not seem like
4 there has been a welter of litigation on point anyway. Intent-enhancing; shifts heavy lifting to
5 “what is intent, and how can it be established.”]

6 [Drafting note: the inclusion of this provision has been discussed, with wide variance in
7 opinion over whether it should remain within the model tribal nation probate code or not.]

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

11 **Reporters’ Note**

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

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

15 (a) A witnessed will or codicil may be made self-proved at any time at or after its
16 execution by the acknowledgment thereof by the testator and the affidavits of the witnesses, each
17 made before an officer authorized to administer oaths under the laws of the jurisdiction in which
18 the acknowledgment occurs and evidenced by the officer’s certificate, under official seal,
19 attached or annexed to the will or codicil in substantially the following form:

20 [Insert Tribal Jurisdiction]

21 I, [testator], swear or affirm under penalty of perjury that on [date], I requested [Witness
22 #1 and Witness #2] to act as witnesses to my will; that I ____declared to them that the document
23 was my last will; that I signed the will in the presence of both witnesses; that they signed the will
24 as witnesses in my presence and in the presence of each other; that the will was read and
25 explained to me (or read by me), after being prepared and before I signed it, and it clearly and
26 accurately expresses my wishes; and that I willingly made and executed the will as my free and
27 voluntary act for the purposes expressed in the will.

28 _____ Testator

29 We, [Witness #1 and Witness #2] swear or affirm under penalty of perjury that on [date],

1 [Testator] published and declared the attached document to be his/her last will, signed the will in
2 the presence of both of us, and requested both of us to sign the will as witnesses; that we, in
3 compliance the Testator's request, signed the will as witnesses in the Testator's presence and in
4 the presence of each other; and that the testator was not acting under duress, menace, fraud, or
5 undue influence of any person, so far as we could determine, and in our opinion was mentally
6 capable of disposing of the estate by will.

7 _____ Witness #1

8 _____ Witness #2

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

11 (Seal)

12 _____
13 (Signed)

14 _____
15 (Official capacity of officer)

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

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

23 Reporters' Note

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

29
30 On allowing the signature on the SPA to count as a disinterested witness's signature to

1 the will: see *Estate of Edward Kappaisruk Ramoth, Sr.*, 56 IBIA 271 (I.B.I.A.), 2013 WL
2 3054072 (2013) (clarifying earlier dicta to hold that a will signed by only one disinterested
3 witness along with a notary's signature on the self-proving affidavit could qualify as a validly
4 executed (although not self-proved) will, irrespective of the intent with which the notary signed
5 the affidavit).

6
7 Note that b/c of some semantic difficulty, this drafted provision avoids a single-paragraph
8 acknowledgment/attestation as can sometimes be found in TPCS. See, e.g., Chitimacha § 205
9 (Self-Proved Will-Form)

10
11 **SECTION 3-306. WHO MAY WITNESS.** Any disinterested adult individual
12 generally competent to be a witness in court under Tribal law may act as a witness to a will. The
13 spouse or close relative of a witness is not considered interested unless that witness is also a
14 beneficiary under the will. A will executed without the required number of disinterested
15 witnesses is invalid.

16 **Reporters' Note**

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

22
23 No "disinterested witness" requirement at all, as per UPC & many states. Theory:
24 "punishment" not fit the "crime," can always directly attack the will itself on grounds of undue
25 influence if concern is significant enough; trap for unwary in that most people trust their family
26 members the most, and thus would naturally gravitate toward requesting the very people they've
27 distributed property to under the will to also serve as witnesses thereto. Language: [alt: the
28 signing of a will by an interested witness does not invalidate the will or any provision of it].
29 Middle ground: purge, perhaps with broader definition of interested witness: "A will is not
30 invalidated because it is signed by an interested witness; but, unless the will is also signed by two
31 other disinterest witnesses, any beneficial provision of the will in favor of a witness or the
32 witness's spouse is invalid to the extent that such provisions in the aggregate exceed in value
33 what the witness or spouse would have received had the testator died intestate." See, e.g.,
34 Chitimacha TPC § 206 (Who May Witness).

35
36 Regarding no interest in beneficiary/spouse: See *Estate of Mabel Opal Beach*, 39 IBIA
37 111, 112 (2003); *Estate of Orville Lee Kaulay*, 30 IBIA 116, 118 (1996); *Estate of Hiemstennie*
38 *(Maggie) Whiz Abbott*, 4 IBIA 12, 20 (1975) (A witness is not disinterested "if his interest in the
39 will is of a fixed, certain, and vested pecuniary character or one which otherwise gives him a
40 direct and immediate beneficial right under the will."). Regarding interested witness
41 disqualification, thus failure to satisfy the basic execution formalities, see *Estate of Edward*

1 Kappaisruk Ramoth, Sr., 56 IBIA 271 (I.B.I.A.), 2013 WL 3054072 (2013) (nevertheless holding
2 that a notary's certification under a self-proving affidavit could qualify as a second required
3 disinterested witness, and thus uphold the validity of the will).

4
5 **SECTION 3-307. CHOICE OF LAW AS TO EXECUTION.**

6 (a) A will is valid if executed in compliance with the law of this jurisdiction; if at the time
7 of execution or the time of death, its execution complies with the law of the place where it was
8 executed or the testator has a domicile or place of abode; or if it complies with federal law.

9 (b) A will executed in compliance with the law of this jurisdiction may include a will
10 executed before the effective date of this code.

11 **Reporters' Note**

12
13 Again, this provision does not align with federal law depending on what the "other"
14 jurisdiction demands for the valid will. But the valuable goal here is to validate as many wills as
15 possible within certain channeling parameters (i.e. the laws of the other jurisdiction, rather than a
16 broader "anything goes."). Sample: "A written will is valid if executed in compliance with this
17 Probate Code or if its execution complies with the law at the time of execution of the place
18 where the will is executed, or of the law of the place where at the time of execution or at the time
19 of death of the testator is domiciled." Chitimacha TPC § 207.

20
21 **SECTION 3-308. REVOCATION OF WILL.**

22 (a) A will, or any part thereof, is revoked by executing a later will that revokes the prior
23 will either expressly or by inconsistency. A later will revokes a prior one by inconsistency if the
24 testator intended the later will, or part of the will, to replace rather than supplement the prior will.
25 A later will is presumed to replace a prior will if it distributes all of the decedent's property. A
26 later will is not presumed to replace the prior will if the testator intended it to dispose of different
27 property.

28 (b) A will may be revoked in whole but not in part by the testator's performing a physical
29 act on the will with the intent to revoke or by another performing a physical act on the will at the
30 testator's request and in the testator's conscious presence. A physical act on the will includes a

1 burn, tear, cancellation, obliteration, or destruction.

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

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

11 **Reporters' Note**

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

15
16 Unlike 25 CFR 15.4 re will *execution*, 25 CFR 15.5 & 15.6 re will *revocation* permits the
17 revocation of the will "by any means authorized by Tribal or Federal law." This provides leeway
18 to experiment with methods, presumptions, etc.; perhaps the Department of Interior was less
19 concerned with the manner of revocation than execution because the former would cause the
20 estate to pass through the federal default intestacy scheme.

21
22 For example, the Chitimacha Code permits revocation through both later will and
23 physical act + by proxy, permits in whole or in part, and includes revocation by divorce. The
24 latter provision reads "if provisions are revoked solely by this Section, they are revived by
25 testator's remarriage to the former spouse . . . a decree of separation which does not terminate the
26 status of husband and wife is not a divorce for purposes of this Section. No change of
27 circumstances other than as described in this Section revokes a will." Chitimacha TPC § 209.
28 The Fort Peck Code permits revocation by writing or by act, but appears to limit revocation by
29 act to total rather than partial destruction. Fort Peck TPC Title 12 § 115.

30
31 Specific to the drafted provision: it seems cleaner to limit revocation by physical act to
32 *total* destruction to avoid the litigation that sometimes occurs over whether a partial destruction
33 went "too far," i.e. amounted to an attempt to revoke the entire will, or relatedly, an invalid
34 attempt to dispose of property to a beneficiary without following appropriate codicil
35 requirements. Where the revocatory act is performed by another at the testator's request rather
36 than by the testator directly, evidence of the circumstances of the testator's request to, and

presence with, that individual should be established by credible evidence.

Regarding revocation upon divorce or annulment, what is of “benefit to” the surviving spouse is a matter for the court to decide, and along with a devise under the will could include a power of appointment to the former spouse or a nomination of that spouse to serve in any fiduciary capacity, such as executor or trustee.

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

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

SECTION 3-309. REVIVAL OF REVOKED WILL. A will that has been revoked by any method can only be revived by executing a new will containing clear and convincing evidence of the testator's intent to revive.

Reporters' Note

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

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

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

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

(1) the writing is already in existence;

(2) the will reflects the intent to incorporate the writing; and

(3) the will describes the writing sufficiently to permit its identification.

Reporters' Note

[Drafting note: this drafted provision avoids reference to the Uniform Testamentary Additions to Trusts Act, which could be discussed in an implementation guide. Some TPCs include. Model draft also avoids reference to acts or facts with independent significance and contracts regarding estates. Again, some of the TPCs do so, but seems like perhaps unwarranted here at this stage.

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. TANGIBLE PERSONAL PROPERTY LIST. A will may refer to a written statement or list to dispose of items of tangible personal property, other than money, not otherwise specifically disposed of by the will. The list is only valid and effective to dispose of the property if the writing is signed by the testator and describes the items and the devisees with reasonable certainty.

1 **Reporters' Note**

2 Unlike the requirements of Section 3-311 (Incorporation by Reference), the writing under
3 this section need not already exist. Instead, it may be referred to as one to be in existence at the
4 time of the testator's death; it may be prepared before or after the execution of the will; and it
5 may be altered by the testator after its preparation.
6

7 **[Drafting note:** there was significant discussion of this provision. Suggestions included
8 that if tangible personal property lists were to be retained, they be required to be (1) holographic;
9 (2) witnessed; or (3) in the decedent's native language. Others suggested that this negated the
10 flexibility and viability of the list, as there must be a valid will itself before this sort of list may
11 comprise a part of it.]
12

13 **PART 4.**

14 **CONSTRUCTION OF A WILL**

15 **SECTION 3-401. CONSTRUCTION OF A WILL; PENALTY CLAUSE FOR**
16 **CONTEST.** A provision in a will purporting to penalize an interested person for contesting the
17 will is unenforceable if probable cause exists for commencing the proceeding.

18 **SECTION 3-402. SPOUSAL SHARE.**

19 (a) If the testator is survived by a spouse, the spouse is entitled to an elective share
20 whether or not the will provides for the spouse. The amount of the elective share equals in value
21 what the spouse would have received had the testator died intestate, unless the testator provided
22 for the spouse by a transfer of funds or property outside the will and

23 (1) there is clear and convincing evidence of intent that the transfer be in lieu of a
24 testamentary provision, or

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

27 (b) The property, if any, that the spouse was devised under the will, is applied first in
28 satisfying the elective share.

29 (c) The right of election of a surviving spouse and the rights of the surviving spouse to

homestead allowance, exempt property, family allowance for the spouse and children, cultural artifacts, or any of them, may be waived, wholly or partially, before or during the marriage, by an enforceable written contract, agreement, or waiver signed by the surviving spouse.

Reporters' Note

This provision streamlines by combining elective share (electing against a will 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.

[Drafting note: some have suggested that part (c) be excised completely; others have suggested that it more carefully deal with explicit protections for the spouse against duress, etc. As drafted, the provision broadly addresses the latter issue by noting that the written contract, agreement, or waiver be "enforceable."]

SECTION 3-403. 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.

(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 and that other parent survives the testator;

(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 who is

not a parent of the then-living children receiving a devise;]

(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 Section 2-601.

SECTION 3-404. WILL CONSTRUCTION REGARDING BENEFICIARIES:
DEATH OF BENEFICIARY BEFORE TESTATOR.

(a) In the absence of a finding of a contrary intent, if a beneficiary under a will or transfer on death arrangement dies before the testator or owner, the interest that the predeceasing beneficiary would have taken had the beneficiary survived lapses unless the predeceasing beneficiary was a grandparent, any descendant of a grandparent, or a stepchild, and the predeceasing beneficiary left descendants who survived the testator by at least 120 hours, in which case the interest passes to those descendants by representation.

(b) Where the provisions of subsection (a) do not apply, a devise other than a residuary devise will lapse to the residue, if any; otherwise, to intestate succession. A residuary devise will lapse to the other residuary taker or takers, if any; otherwise, to intestate succession. A class gift will pass to the surviving class member or members, if any; otherwise, to the residue or if none, to intestacy.

1 **Reporters' Note**

2
3 This drafted provision avoids the dispute over survivorship language prompted by the
4 relative specificity demanded within the Uniform Probate Code for sufficiently expressed
5 contrary intent.
6

7 For a provision that limits the application of the anti-lapse principle expressed in part (b)
8 above to more closely related predeceasing beneficiaries, see Fort Peck TPC Title 12 § 117 (only
9 applies if beneficiary was grandparent, parent, or lineal descendant of decedent).
10

11 **SECTION 3-405. WILL CONSTRUCTION REGARDING PROPERTY:**

12 **NONADEMPTION OF SPECIFIC DEVICES.**

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

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

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

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

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

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

27 (5) any real property or tangible personal property owned by the testator at death
28 which the testator acquired as a replacement for specifically devised real property or tangible

1 personal property.

2 (c) If specifically devised property is sold or mortgaged by a conservator or by an agent
3 acting within the authority of a durable power of attorney for an incapacitated principal, or a
4 condemnation award, insurance proceeds, or recovery for injury to the property is paid to a
5 conservator or to an agent acting within the authority of a durable power of attorney for an
6 incapacitated principal, the specific devisee has the right to a general pecuniary devise equal to
7 the net sale price, the amount of the unpaid loan, the condemnation award, the insurance
8 proceeds, or the recovery.

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

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

15 **Reporters' Note**

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

22 23 **SECTION 3-406. SPECIFIC DEVISE SUBJECT TO MORTGAGE.**

24 (a) Unless the will provides specifically to the contrary, a specific devise of any property
25 passes subject to any mortgage or other security interest existing at the testator's death, without
26 right of the beneficiary of the devise to require that the indebtedness be paid from the estate's
27 other assets.

(b) A general directive in the will to pay the testator's debts is not sufficient to indicate that this section is not to apply.

SECTION 3-407. SATISFACTION.

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

(1) the will provides for deduction of the devise; or

(2) there is a writing, made either by the testator or the recipient, that clearly establishes that the testator intended that result.

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

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

Reporters' Note

The drafted provision coordinates requirements for advancement (intestate succession) and satisfaction (testate succession).

SECTION 3-408. CLASS GIFTS CONSTRUED TO ACCORD WITH INTESTATE SUCCESSION; EXCEPTIONS.

(a) [Definitions.] In this section: [drafting note: have been working with definitions; this continues to be a current place saver until all determined & decision is made over which precise definitions MTPC will tackle & whether they will all be found within Introductory Material or in this specific section.]

(1) "Adoptee" has the meaning set forth in []

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

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

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

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

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

11 (c) [Relatives by Blood and Marriage.] Terms of relationship in a governing instrument
12 that do not differentiate relationships by blood from those by marriage, such as uncles, aunts,
13 nieces, or nephews, are presumptively construed to exclude relatives by marriage, and are
14 presumed to apply with no distinction made between those related to the decedent through one
15 versus more than one ancestor;

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

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

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

22 (2) the child lived while as a minor in the household of the adoptive parent; or

23 (3) the adoptive parent was the adoptee’s stepparent or foster parent.

1 (f) A will shall apply to all real and personal property or interest therein that the testator
2 owned at death and all property acquired by the estate after death, and a transfer by will of a trust
3 interest in land shall be presumed to include the interest of the testator in any permanent
4 improvements attached to the land.

5 **PART 5.**

6 **RULES OF CONSTRUCTION NOT LIMITED TO WILLS**

7 **SECTION 3-501. REQUIREMENT OF SURVIVAL BY 120 HOURS.**

8 (a) For the purposes of intestate succession, testate succession, and survivorship
9 arrangements authorized under Article IV, and except as provided in subsection (b), an
10 individual who is not established to have survived another individual by 120 hours is deemed to
11 have predeceased the other individual.

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

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

15 (2) the application of a 120-hour requirement of survival would cause the estate to
16 be distributed by tribal court order under Section 3-106.

17 **Reporters' Note**

18
19 Regarding the requirement of survival, probate codes generally divide into two
20 approaches: older ones that require survival by an instant, and usually as established by a
21 preponderance of the evidence (*see, e.g.*, Chitimacha TPC § 117) (“no sufficient evidence that
22 the persons have died otherwise than simultaneously”) and newer ones tracking the amended
23 Uniform Simultaneous Death Act and requiring survival by 120 hours as established by clear and
24 convincing evidence. The newer version seems preferable as more efficient (by avoiding
25 successive double administration of the subject property), more easily established (or not
26 established) from an evidentiary perspective, and more likely to effectuate the decedent’s
27 presumed intent (e.g. property would not pass to a predeceased spouse’s relatives, i.e. the
28 decedent’s in-laws, over the decedent’s biological or adoptive relatives). The drafted provision
29 slightly tempers the burden of proof by removing the requirement that the 120-hour survival be
30 established by clear and convincing evidence.

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

7
8 See Section 1-107 for the provision covering Evidence of Death or Status
9 The drafted provision streamlines the survivorship provision under the Uniform Simultaneous
10 Death Act and the Uniform Probate Code by excluding treatment of such matters as protecting
11 bona fide purchasers and exonerating payors of liability, as well as choice of law and powers of
12 appointment. If coverage of these matters is deemed necessary, the Implementation Guide could
13 address them more fully.

14
15 **SECTION 3-502. POSTHUMOUS BIRTH.** All individuals who were in gestation at
16 the time of the decedent's death, and who survive their own birth by 120 hours, shall be treated
17 as if living at the time of the decedent's death.

18 **Reporters' Note**

19
20 This drafted provision intentionally avoids overt discussion of many forms of assistive
21 reproductive technology, e.g., surrogacy arrangements and posthumously conceived children
22 using cryogenically preserved (or posthumously retrieved) sperm. Moreover, it does not clearly
23 address frozen embryos, but instead leaves to the tribal court to determine whether a
24 cryogenically preserved embryo is already "in gestation" such that the provision above would
25 apply.

26 A provision that instead referenced "persons conceived" would probably be construed
27 identically to "in gestation." A provision that required the person to be "in utero" would clearly
28 exclude ex utero, or frozen, embryos.

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

34
35 Some codes, e.g. Chitimacha § 306, do not require survival of own birth.

36 **SECTION 3-503. EFFECT OF HOMICIDE.**

37
38 (a) An individual who feloniously and intentionally kills the decedent forfeits all benefits
39 with respect to and interests that would otherwise be acquired under the decedent's estate or the
40 provisions of survivorship arrangements authorized under Article IV. The decedent's estate

1 passes as if the wrongdoer predeceased the decedent.

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

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

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

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

22
23 **SECTION 3-504. STATUS OF SPOUSE.** For purposes of testate and intestate
24 succession and survivorship arrangements authorized under Article IV, tribal law determines
25 spousal status based upon tribal law or custom, and determines the extent to which abuse,
26 abandonment, or other similar conduct disqualifies a spouse from succeeding to a property
27 interest. Except as provided by the terms of the will, court order, or a contract relating to
28 property division, and unless the parties remarry before the testator's death, a will or any part
29 thereof is revoked upon a final divorce decree or annulment to the extent that it benefitted the

testator's former spouse or any of the former spouse's relatives who are not also relatives of the testator.

Reporters' Note

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

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

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

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

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28
- 29
- 30
- 31
- 32

(d) Unless the governing instrument (if any) expressly provides otherwise, the interest disclaimed shall be treated as though the disclaimant had predeceased the decedent.

In a significant break from traditional disclaimer doctrine, the AIPRA permits a “directed disclaimer,” which permits the disclaimant to identify (from within a limited category of eligible parties) who will acquire the interest so disclaimed. Especially given extant USSCT jurisprudence covering situations where far less control had been exercised by the disclaimant, the right to direct the disclaimer suggests that there has been an actual receipt and subsequent transfer of the property disclaimed, triggering the disclaimant’s potential exposure to certain tax laws and creditors’ claims. *See Drye v. United States*, 528 U.S. 49 (1999).

The provision above instead provides that the disclaimed interest will pass as though the disclaimant had predeceased the decedent. It also tracks TPC and AIPRA language, however, that specifically negates the characterization of a disclaimer as a transfer and therefore avoids concerns over fraudulent transfers or conveyances.

Note that a successor's disclaimer could trigger lapse as described in Section XXXX.

[Drafting note: AIPRA says “renunciation or disclaimer,” some other provisions &

1 TPCs often just say “renunciation.” This drafted provision selects the term “disclaimer” rather
2 than using both terms.]

3 Sample tribal provision:
4

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

15 Chitimacha Comprehensive Codes of Justice Ch. 1 § 14 (Renunciation of Succession)
16

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

24 **SECTION 3-506. REFORMATION TO CORRECT MISTAKES.** The court may
25 reform the terms of a governing instrument, even if unambiguous, to conform the terms to the
26 transferor’s intention if it is proved by clear and convincing evidence what the transferor’s
27 intention was and that the terms of the governing instrument were affected by a mistake of fact
28 or law, whether in expression or inducement.

29 **PART 6.**

30 **EXEMPT PROPERTY**

31 **SECTION 3-601. FAMILY HEIRLOOMS AND CULTURAL ARTIFACTS.**

32 Notwithstanding any other provision of this article relating to intestate succession, the surviving
33 spouse or other surviving next of kin may distribute any family heirlooms or cultural artifacts
34 belonging to the decedent in accordance with the customs and traditions of the []. This

1 distribution shall be exempt from all creditors of the estate.

2 **[Drafting note:** should this right be limited to family heirlooms rather than family heirlooms
3 and cultural artifacts? Should this right be limited to the surviving spouse only, or to surviving
4 spouse or other surviving next of kin? Should this right be limited to one of those parties who is
5 also a citizen of the particular tribe with jurisdiction?]
6

7 **SECTION 3-602. HOMESTEAD.**

8 (a) Notwithstanding any other provisions of this article relating to testate or intestate
9 succession or elective share, the homestead, including a manufactured home that is the family
10 residence, descends free from any [unsecured] disposition thereof to which the spouse has not
11 consented in writing as follows:

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

13 or

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

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

20 **Reporters' Note**

21
22 **[Drafting note:** continue to consider converting this to a monetary amount, "homestead
23 allowance"]
24

25 **SECTION 3-603. EXEMPT PROPERTY.**

26 (a) In addition to the homestead exemption provided in Section 3-602, if there is a
27 surviving spouse, the surviving spouse is entitled from the estate to a value not exceeding [10k]
28 in excess of any security interest held therein, in household furniture, automobiles, furnishings,

1 appliances, and personal effects. If there is no surviving spouse, the children of the decedent are
2 entitled jointly to the same value. If there is not [10k] worth of exempt property in the estate, the
3 spouse or children are entitled to other assets of the estate to the extent necessary to make up the
4 [10k] value.

5 (b) Subject to any valid security interest therein, one automobile worth up to [10k], if
6 any, shall be exempt property.

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

11 **SECTION 3-604. FAMILY ALLOWANCE.**

12 (a) During the period of administration, in addition to the homestead exemption provided
13 in Section 3-602 and the exempt property provided in Section 3-603, the surviving spouse and
14 any [minor or dependent] child or children who were either entitled to or actually receiving
15 support from the decedent are entitled to a reasonable allowance in money out of the estate for
16 their maintenance during the period of administration, which may not continue for longer than
17 one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a
18 lump sum or in periodic installments, and terminates upon the death of any person with the right
19 thereto before the lump sum or any installment has been paid.

20 (b) The determination of what is a reasonable allowance in money is discretionary with
21 the tribal court.

22 (c) The family allowance is payable to the surviving spouse, if living, for the use of the
23 surviving spouse and dependent children. If the surviving spouse is not living, the family

1 allowance is payable to the children or to those in whose custody and care the children have been
2 placed. If the surviving spouse is living but the dependent children are in the custody and care of
3 another, the family allowance may be apportioned between the parties in the discretion of the
4 tribal court.

5 (d) The family allowance is exempt from and has priority over all [unsecured] claims
6 except the homestead allowance. The family allowance is not chargeable against any benefit or
7 share passing to the surviving spouse or children by the will of the decedent unless otherwise
8 provided, by intestate succession, or by elective share.

9 **ARTICLE 4**

10 **TRANSFER ON DEATH ARRANGEMENTS**

11 **PART 1**

12 **GENERAL AUTHORIZATION**

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

14 Any governing instrument other than a will containing any of the following provisions is
15 nontestamentary and the instrument containing these provisions are exempt from the
16 requirements in Section[s] 3-302 [and 3-303] for the execution of a will. These provisions are:

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

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

22 (3) That any property which is the subject of the instrument shall pass on decedent's
23 death to a person or persons designated by the decedent in either the instrument or a separate

1 writing, including a will, executed before, at the same time as the instrument, or subsequently.

2 **Reporters' Note**

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

5 **PART 2**

6 **REAL PROPERTY TRANSFERS**

7 **Reporters' Note**

8 This part is adapted from the Uniform Real Property Transfer on Death Act, which was
9 completed in 2009.

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

11 (1) "Beneficiary" means a person that receives property under a transfer on death deed.

12 (2) "Designated beneficiary" means a person designated to receive property in a transfer
13 on death deed.

14 (3) "Joint owner" means an individual who owns property concurrently with one or more
15 other individuals with a right of survivorship.

16 (4) "Property" means an interest in real property located in this [tribal nation] which is
17 transferable on the death of the owner, and a structure located on real property, whether or not
18 the owner of the structure also owns the underlying real property.

19 (5) "Transfer on death deed" means a deed authorized under this [part].

20 (6) "Transferor" means an individual who makes a transfer on death deed.

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

24 **SECTION 4-203. NONEXCLUSIVITY.** This [act] does not affect any method of
25 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 Section[s] 3-302 [and 3-303] 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 appropriate public records for the property being transferred.

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 in the public records where the original
13 deed is recorded.

14 (b) If a transfer on death deed is made by more than one transferor, revocation by a
15 transferor does not affect the deed as to the interest of another transferor who does not join in the
16 revocation.

17 (c) After a transfer on death deed is recorded, it may not be revoked by a revocatory act
18 on the deed or by a will.

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

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

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

- 1 (2) affect an interest or right of a transferee, even if the transferee has actual or
2 constructive notice of the deed;
- 3 (3) affect an interest or right of a secured or unsecured creditor or future creditor of the
4 transferor, even if the creditor has actual or constructive notice of the deed;
- 5 (4) affect the transferor's or designated beneficiary's eligibility for any form of public
6 assistance;
- 7 (5) create a legal or equitable interest in favor of the designated beneficiary; or
- 8 (6) subject the property to claims or process of a creditor of the designated beneficiary.

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

11 (a) Except as otherwise provided in the transfer on death deed[,][or] in this section[,][or
12 in [cite state statutes on antilapse, revocation by divorce or homicide and survival,] on the death
13 of the transferor, the following rules apply to property that is the subject of a transfer on death
14 deed and owned by the transferor at death:

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

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

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

22 (4) If the transferor has identified two or more designated beneficiaries to receive
23 concurrent interests in the property, the share of one which lapses or fails for any reason is

1 transferred to the other, or to the others in proportion to the interest of each in the remaining part
2 of the property held concurrently.

3 (b) Subject to other law of the [Tribal Nation], a beneficiary takes the property subject to
4 all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to
5 which the property is subject at the transferor's death.

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

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

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

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