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A Uniform Probate Code for Indian Country at Last

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The estates of most deceased American Indians are administered under a different system than are the estates of other Americans. Much Indian wealth is derived from allotment of tribal lands. Tribal lands were originally held by the tribes as a whole. But between 1887 and 1934, substantial portions of tribal lands were allotted into parcels for individual Indians and what was left was often opened to homestead by non-Indians. The individual allotments are held in "trust" or "restricted" title for the Indian owners by the U.S. government. Except for a minority of allotted lands that are managed directly by their owners, the federal government leases the trust or restricted land, collects the rents, and periodically distributes the net rental to the owners. Undistributed rentals from trust or restricted lands are held in individual Indian money (IIM) accounts. On the death of an Indian owner, the disposition of trust or restricted lands and IIM accounts is governed by federal law and the estate is administered by the Department of the Interior.

Tribes are free to enact probate codes governing disposition of all a tribal member's property, both allotted lands and other assets, but few tribes have done so. Absent enactment of a tribal probate code, lands owned by Indians not subject to federal jurisdiction (referred to as "fee" or "taxable" land) and personal property other than IIM accounts are subject to state law.

Federal law allows for the execution of wills for the disposition of trust or restricted lands and IIM accounts. 25 U.S.C. § 373. The federal requirements for executing a will are similar to the requirements in the states. Two witnesses are necessary and provision is made for self-proof through notarization. 43 C.F.R. §§ 4.233, 4.260. If an Indian owns assets subject to both federal and state probate, there is no need to execute two wills. Unless a state's requirements for executing a will are unusual, compliance with the execution requirements for the Indian's state of residence also will meet the federal requirements. In addition, enough disputes have arisen for a body of administrative case law to have developed on the grounds for contest. Federal law also controls the will's interpretation, although here the law is less developed. It is uncertain which rules on construction of wills apply and, if applicable, the details of their application.

Most Indians, however, do not make wills but instead die intestate. Many Indians have large families, and sales of trust or restricted lands, whether within or without the family, are rare. This combination of large families and intestate succession has resulted in severe fractionation of title to allotted lands, particularly among the tribes whose lands were allotted a century or more ago. Because the heirs will typically be the owner's several children, who in turn may have large families, over several generations the number of owners can reach exponential proportions. It is not unusual for trust lands to have over 100 individual owners, each owning minute interests. It is also not unusual for an individual Indian to own interests in a score or more parcels, sometimes located in multiple states.

The problem of fractionation is not new but has been recognized in numerous congressional reports dating back to the early 20th century. Nothing much was done about the problem until enactment of the Indian Land Consolidation Act of 1983 (ILCA), Pub. L. No. 97–459, 96 Stat. 2515. ILCA authorizes tribes to develop land consolidation plans, which could include tribal purchase of fractionated interests. ILCA also permits tribes to enact laws restricting inheritance by nonmembers of the tribe. Most significantly, ILCA provided for the escheat to the tribe of an interest of less than 2% on its owner's death. But this escheat provision was ruled unconstitutional as a violation of due process in *Hodel v. Irving*, 481 U.S. 704 (1987), and an amended version was thrown out in *Babbitt v. Youpee*, 519 U.S. 234 (1997).

Barred from applying escheat to limit further fractionation, Congress next attacked the problem through reform of the probate process. The ILCA Amendments of 2000, Pub. L. No. 106–462, 114 Stat. 1991, enacted major reforms in probate, but many tribes objected, asserting that the amendments had received insufficient tribal consultation. The 2000 amendments, which were made contingent on certification by the Secretary of the Interior, were never implemented.

The American Indian Probate Reform Act of 2004 (AIPRA), Pub. L. No. 108–374, 118 Stat. 1773, which was signed by the President on October 27, 2004, will not suffer the same fate. Unlike its predecessor, AIPRA was enacted following extensive consultation in Indian country. Also, shortly after enactment the Secretary began work on implementation.

AIPRA makes major reforms to the Indian probate system. Federal law long provided that trust or restricted lands and IIM accounts owned by an Indian intestate are to be distributed to the heirs as determined under state law. AIPRA replaces this with one uniform intestacy scheme for the distribution of trust lands and IIM accounts in lieu of the 30-plus state systems that now apply. AIPRA also fills out the federal law on wills, enacting numerous provisions on the interpretation of wills, most adapted from the Uniform Probate Code. In addition to providing Indian country with a uniform and more complete body of probate law, AIPRA contains several provisions encouraging the purchase or consolidation of fractionated interests. AIPRA affects ownership rights in trust or restricted lands in all states other than Alaska.

The probate provisions of AIPRA take effect on June 20, 2006, one year after a notice of the Act was sent to approximately 290,000 landowners. Other provisions of AIPRA take effect on varying dates continuing through 2007. AIPRA and ILCA are codified at 25 U.S.C. §§ 2201–2221.

Intestate Succession

The modern purpose of intestate succession statutes is to accomplish what the average decedent would likely have done had the decedent made a will. Most Americans who make wills and who were married only once leave their entire estates to their surviving spouses. Recognizing this strong preference, the 1990 Uniform Probate Code and a growing number of state intestacy statutes grant the surviving spouse the entire estate unless the decedent also was survived by a descendant from another relationship.

The intestate succession provisions of AIPRA are based on different assumptions. Spousal rights under AIPRA are significantly less than under state law, there is a preference for retaining property within the tribe, and the continued fractionation of small interests is disfavored. Should a tribe be dissatisfied with the results under AIPRA, the tribe is free to enact its own superseding probate code.

Under AIPRA, the key factor in determining heirs is the decedent's percentage ownership in the relevant parcels of trust or restricted lands. Different provisions apply if the decedent's ownership interest in a parcel is less than 5%. Also, the class of relatives who can inherit is limited. Other than for the spouse, inheritance is allowed only by an "eligible heir," a class that may include only Indians, a child or grandchild of an Indian, or another person who is already a co-owner of the same parcel. 25 U.S.C. § 2201(9). Property that would otherwise pass to a relative who fails to qualify as an eligible heir instead passes to the tribe or, if no tribe has jurisdiction over the trust interest, to the other co-owners.

The limitation of "eligible heirs" to Indians and close descendants of Indians was a source of controversy during the drafting of AIPRA. Because of intermarriage, an increasing percentage of individuals have less than the 25% blood quantum required for membership in many tribes. Should members of different tribes marry, it is also not unusual for their offspring not to qualify as a member of any tribe despite having a high percentage of Indian blood.

The only collateral relatives who may inherit under AIPRA are the decedent's brothers and sisters. 25 U.S.C. § 2206(a)(2)(B). Inheritance by nieces and nephews and more distant collateral relatives is not allowed. The property will instead pass to the tribe. The limitation on the categories of collateral relatives who may inherit is more restrictive than state law. In many states, any relative, no matter how distant, may potentially inherit. Even under the Uniform Probate Code § 2–103, inheritance is cut off only if the decedent was not survived by a descendant of a grandparent or closer relative. Under the UPC, potential heirs can include uncles and aunts, first cousins, and their descendants, all of whom are prohibited from inheriting under AIPRA.

Share of Spouse

The spouse receives one-third of the personalty (that is, IIM account) outright if the decedent also was survived by an eligible heir or all of the personalty if no eligible heir survives. 25 U.S.C. § 2206(a)(2)(A). Trust or restricted lands are treated differently. If the decedent owned 5% or more of a particular parcel, the spouse receives a life estate. If the decedent's interest was less than 5%, the spouse receives nothing unless the spouse was living in a residence on the parcel. In such a case, the spouse may continue to occupy the residence for life. 25 U.S.C. § 2206(a)(2)(D).

Share of Eligible Heirs

Trust or restricted lands and IIM accounts not passing to the spouse, or the entire estate if the decedent was not survived by a spouse, pass to the eligible heirs. Personalty and a 5% or more interest in a parcel of trust or restricted land pass in the following order of priority:

- children in equal shares, with the share of a predeceased child to be divided among that child's children (that is, grandchildren of decedent),
- great-grandchildren in equal shares,
- surviving parent or parents in equal shares, and
- surviving siblings in equal shares.

25 U.S.C. § 2206(a)(2)(B). If all of the children are deceased, distribution among the grandchildren is not equal but is per stirpital based on the parental roots. If no person in any of the above classes survives, the property passes to the tribe or, if no tribe has jurisdiction over the trust interest, to the other co-owners. 25 U.S.C. § 2206(a)(2)(C).

Single Heir Rule

To stem further fractionation, interests in trust or restricted lands of less than 5% pass to a single heir. The oldest surviving child takes all or, if no child survives, the oldest surviving grandchild takes all; if no grandchild survives, the oldest surviving great-grandchild takes all. If no person in these classes survives, the interest passes to the tribe or, if no tribe has jurisdiction over the trust interest, to the other co-owners. 25 U.S.C. § 2206(a)(2)(D). The single heir rule may be AIPRA's most important provision. Unless the owner executes a will that further divides the interest, the single heir rule will stop further fractionation of these small interests. The single heir rule has an antecedent in the British doctrine of primogeniture. But primogeniture applied only to the male line. AIPRA treats men and women equally. The oldest survivor in the generation takes all regardless of sex.

120-Hour Survivorship

Similar to Uniform Probate Code § 2–702, a person is not eligible to take as an heir or devisee unless the person survives the decedent by at least 120 hours. 25 U.S.C. § 2206(a)(4), (k)(4).

Testamentary Dispositions

AIPRA does not change the requirements for executing an Indian will but it does add numerous provisions relating to the interpretation and construction of wills, most of which are adapted from the Uniform Probate Code. Included are provisions relating to lapsed devises, slayers, omitted spouses and children, effect of divorce, disclaimers, and interpretation of class gifts and terms of relationship. 25 U.S.C. § 2206(b), (i)–(k).

More unusual is a rule of construction providing that an interest devised to two or more devisees is presumed to be held by the devisees as joint tenants with right of survivorship. 25 U.S.C. § 2206(c). This provision, intended to encourage consolidation of title, is the opposite of standard doctrine, which presumes that a transfer to two or more persons without further indication creates a tenancy in common. Another unusual provision relates to disposition of a family cemetery plot; it passes by intestacy and not as part of the residue unless the will specifically refers to the plot. 25 U.S.C. § 2206(i)(7).

The major reason for executing a will is to distribute assets differently than provided by intestate succession. AIPRA clarifies that Indians, like other Americans, may execute wills leaving their estates to anyone. Indians dissatisfied with the single heir rule may execute wills distributing trust or restricted lands to their children in equal shares. Indians with relatives who are not Indian may leave their estates, including trust or restricted lands, to these individuals. Property devised to any lineal descendant, a co-owner, the tribe, or to another Indian retains its trust or restricted status. 25 U.S.C. § 2206(b)(1). Property devised to anyone else loses its trust or restricted status unless the ineligible person was devised only a life estate. 25 U.S.C. § 2206(b)(2).

Estate Planning Assistance

AIPRA requires that estate planning assistance be provided to Indian landowners to the extent that funds are appropriated for this purpose. 25 U.S.C. § 2206(f)(1). The purpose of such assistance is to dramatically increase the use of wills, substantially reduce the number of intestate estates, and help Indian landowners obtain information concerning their trust or restricted holdings. 25 U.S.C. § 2206(f)(2). Ironically, enactment of AIPRA has led the Bureau of Indian Affairs to conclude that it will no longer assist in the drafting of Indian wills. Although this revision of BIA policy is certainly laudable from the perspective of the unauthorized practice of law, it heightens the need for a knowledge of AIPRA among the legal profession and for lawyers to take a more active role in the drafting of Indian wills.

Purchase and Consolidation

Expanding on the provisions originally enacted as part of ILCA, AIPRA adds several provisions designed to encourage consolidation of title to allotted lands. The most significant new device is a provision authorizing the partition sale of "highly fractionated Indian land." This defined term includes land having more than 100 owners and land having 50 to 100 owners if no person owns an interest greater than 10%. 25 U.S.C. § 2201(6). A partition action may be initiated either by the tribe having jurisdiction over the parcel or by a co-owner entitled to bid at the sale. 25 U.S.C. § 2204(d)(2)(A). The sale is not public. Bidders are limited to (1) the tribe having jurisdiction over the parcel, (2) members of or persons eligible to become members of that tribe, and (3) co-owners and descendants of an original allottee who are members or eligible to become members of any tribe. 25 U.S.C. § 2204(d)(2)(I)(i). Consent to the partition sale also must be obtained from (1) the tribe having jurisdiction over the parcel if the tribe owns an undivided interest in the parcel, (2) any co-owner who during the preceding three years has maintained a residence or operated a business on the parcel, and (3) the co-owners of at least 50% of the undivided interests if the value of any owner's interest is greater than $1,500. 25 U.S.C. § 2204(d)(2)(D)(i).

The addresses or identities of a sizeable percentage of Indian allotment owners are unknown or undetermined. To facilitate partition, AIPRA authorizes the Secretary of the Interior to consent to partition on behalf of missing or unknown owners. 25 U.S.C. § 2204(d)(2)(D)(ii). The proceeds of a partition sale that are allocable to missing or unknown owners will stay on deposit in Department of Interior accounts, theoretically in perpetuity.

Also new is a provision granting an option to purchase a parcel during a probate proceeding. A purchase may be made either by (1) an eligible heir or devisee of the property, (2) the other co-owners of the parcel, or (3) the tribe having jurisdiction over the parcel. 25 U.S.C. § 2206(p)(2). No purchase during probate is allowed unless consent is first obtained from the heirs or devisees not participating in the purchase and from the surviving spouse, if any, receiving a life estate in the property. 25 U.S.C. § 2206(p)(3)(B). Other than for an heir residing on the land, however, consent is waived if the decedent died intestate and the heir whose consent would otherwise be required will receive less than a 5% interest in the parcel. 25 U.S.C. § 2206(p)(5).

Toward a New Model

A system in which an allotted parcel has hundreds of owners is not economically efficient. Accounting for these interests is difficult and expensive. Unlike a private trust, this expense is not paid from the trust property itself, but is paid for by the U.S. government as part of its trust responsibility to the tribes and trust beneficiaries. Although self-management by the Indian owners may be arranged at the owners' request, most of these interests are so small that there is little incentive to take this step. It is also unrealistic. Attorneys often counsel against the creation of tenancies in common having even two owners because of the difficult management problems that can arise. A typical allotted parcel of Indian land will have 20, 50, or even 100 or more owners.

AIPRA encourages the development of other methods of management akin to those typically used by real estate developers and their counsel. Specifically, the Secretary, following consultation with the tribes, individual landowner organizations, and Indian advocacy organizations, is directed to implement a pilot project for the creation of entities such as private or family trusts, partnerships, corporations, or other organizations to improve, facilitate, and assist in the efficient management of allotted lands. 25 U.S.C. § 2206(m)(1). Whether such business models will work in a culture with deep personal attachment to the land and a desire to retain a piece of ancestral heritage is another matter. The better tack would have been for Congress to have devised a legislative solution several decades ago when the fractionation problem was serious but still possible to solve.

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