THE Indian Land Tenure FOUNDATION.
MessageRunner
Volume 2

Message from the Indian Land Tenure Foundation President

Indian lands – passing our most treasured asset to future generations

Prior to the colonization of this continent by Europeans, the native nations that thrived throughout the hemisphere had their own specific methods of transferring the assets of a tribal member who had passed on. These methods of inheritance were varied among the tribes depending on their basic culture.

In matriarchal societies the assets were often inherited along the female lines of the family; the oldest or youngest daughter receiving the vast majority of the parent's possessions.

Similarly, in patriarchal societies, the males would be the recipients of the assets. In other tribes there were very unique methods including those that had give-away traditions. In some cases, the family of the deceased would give all of the person's belongings to others in the community that were close to the person or were in need.

These traditions had been developed and practiced throughout many centuries and had provided the means for the orderly inter-generational transfer of assets or possessions. The traditions would significantly change with the arrival of Europeans and the traditions of inheritance they introduced to the original inhabitants of the continent.

In order to understand the transition from the traditional practices of tribal inheritance to European traditions, one needs to understand the basic changes in land ownership that occurred as this was the asset that Europeans were most interested in.

For time immemorial the various tribes would occupy a traditional area that they were able to defend from, or in agreement with, other neighboring tribes. In relatively few instances did an individual member or family of the tribe actually "own" the land that it might occupy. Rather, the tribe would allow an individual or family to occupy the area with the understanding that should they cease to need the area or in some fashion disrespect the land, the tribe would assign the area to others for their use.

As the colonists pushed westward and agreements and treaties were made with the tribes on land ownership in trade for peaceful coexistence, the tribes retained ownership title to smaller areas of land.

Fast forward nearly a century to the end of the treaty-making period of American history. Reservations had been established through treaty or executive order for the exclusive use and occupation of the tribes. These treaties and executive orders were made with tribal nations and the reserved land was held in tribal title.

However, the demand for more land for homesteaders, the discovery of gold and other resources, and other enticements led the federal government to explore new means for taking land from Indian people. The passage of the General Allotment Act of 1887, also known as the Dawes Act, provided that reservations lands would be surveyed and parcels allotted to individual tribal members. Lands not allotted would be declared "surplus" and what was not retained for tribal or federal purposes was opened to settlement by non-Indians. Some reservations were allotted pursuant to specific acts of Congress and Treaties.

This egregious Act was important for several reasons. First, lands retained in tribal ownership were held in trust by the United States which means that the United States held legal title while the tribe retained beneficial title or the right to use those lands. Secondly, it resulted in the alienation from Indian ownership – some 90,000,000 acres between 1887 and 1934. Finally, it required that all allotments be held in trust for a period of 25 years after which Indian people were expected to be competent to manage their affairs and hold title to their allotments in fee simple.

Without a will, the Act provided that upon death of the allottee, the land would not be physically divided but rather the beneficial ownership title would be divided among heirs of the deceased according to the state laws of intestate succession. This was largely the end of the longstanding cultural practices of the tribes for transferring assets from one generation to the next.

The subsequent problems of fractionated land ownership and the many attempts to stop the further dividing of reservation land ownership have been well documented. The first edition of *The Message Runner* outlined many of these. However, substantial changes are now looming.

The passage of the American Indian Probate Reform Act of 2004 (AIPRA) has changed the landscape related to the inheritance of trust lands. The primary thrust of this law, which began as a set of amendments to the Indian Land Consolidation Act of 1983, is to curtail continued fractionation of trust land ownership.

Given the lack of success that earlier consolidation legislation had in stemming the growth of the number of owners in the average allotment, this Act contains several rather aggressive provisions. This edition of *The Message Runner* broadly outlines the provisions of the Act and highlights those that need the immediate attention of Indian landowners.

It is important for owners of trust or restricted property to have wills if they do not wish those continued on page 2

Message from the President continued

assets to pass according to the intestate provisions of APIRA which could subject some interests to sale without the consent of the heirs. In addition, having a will gives Indian landowners an opportunity to consolidate interests in trust land or to minimize further fractionation, increasing values for future generations.

The importance of these steps in preparing for passing assets to the next generation cannot be understated. This is a fundamental right and responsibility of Indian landowners.

Additionally, AIPRA defines specific conditions for the development and approval of tribal probate codes. This is an opportunity for tribes to define their own inheritance process while reducing the complex problems associated with fractionated land ownership. The development of tribal probate codes is a positive exercise of self-determination and governance.

The Indian Land Tenure Foundation views estate planning by tribal code development by tribes as being in complete alignment with the Foundation's mission—*to reestablish Indian ownership and control of all lands within the original boundaries of every reservation.*

To that end, the Foundation is excited about the creation of the Institute for Indian Estate Planning and Probate, a project of the Indian Land Tenure Foundation at Seattle University School of Law. The Institute will oversee existing Indian estate planning projects, develop new projects as funding becomes available, provide tribes, attorneys and individuals with training and information about AIPRA and its effects, assist with tribal probate code development and serve as a clearinghouse for information about Indian estate planning and probate.

The passing of our most treasured asset – Indian land – is something that we, as Indian people, should not allow the courts and federal government to control.

Cris Stainbrook, ILTF President

Glossary of Terms

Administration
The process of managing the probate of an estate. It includes finding and inventorying property, identifying and paying valid debts and taxes owed, and distributing remaining property to heirs and beneficiaries.

Affidavit
A written statement where a person who signs it swears that the information on the form is true and correct to the best of his or her knowledge. Usually an affidavit is notarized (signed in front of a notar y).

American Indian Probate Reform Act (AIPRA)
Amendments to the Indian Land Consolidation Act of 1983 (25 U.S.C. §§ 2201 – 2221) intended to curtail continued fractionation of trust land ownership and encourage tribes to enact tribal probate codes. AIPRA does not apply to the Five Civilized Tribes or the Osage Nations trust or restricted lands. Also separate rules may apply to Alaska and to tribes of California.

Assets
The property the person owned prior to death that is worth money. In non-federal probate, assets include fee land, taxable land, money from checking and savings accounts, vehicles, personal property, etc. In BIA probate, assets include trust lands and monies held in Individual Indian Money (IIM) accounts by the BIA.

Beneficiaries
People who actually inherit property from an estate regardless of whether by will or intestate succession. Beneficiaries are different from heirs.

Codicil
A written document that changes a will. It has to be written and signed (or executed) with all the legal formality of a will. The terms of the will that are not changed by the codicil remain in effect.

Collateral Heir
One who is neither a direct descendent nor an ancestor of the decedent, but whose kinship is through a collateral line, such as a brother, sister, uncle, aunt, nephew, niece or cousin.

Decedent
A person who has died.

Eligible heir as defined by AIPRA
The decedent's children, grandchildren, great grandchildren, full siblings, half siblings by blood and parents who are (a) Indian; or (b) lineal descendents within 2 degrees of consanguinity of an Indian; or (c) owners of a trust or restricted interest in a parcel of land for purposes of inheriting by descent, renunciation, or consolidation agreement under section 2206, another trust or restricted interest in such parcel from the descendent.

Escheats
The reversion of land ownership back to a government when a person dies without heirs. In some instances, under AIPRA, land may escheat to a tribe.

Estate
In the context of probates, an estate is the real and personal property that a person possesses at the time of death and that passes to the heirs or testamentary beneficiaries.

Executor
The person responsible for settling a deceased person's estate. Duties include inventorying, appraising and distributing assets; paying taxes; and settling debts owed by the deceased. The legal obligation is to act in the inter ests of the deceased, following the wishes expressed in his or her will.

Fractionated Land
This term has come to be a common description of land that has multiple undivided interests held by many individuals as a result of ownership or original allotments passing by state laws of intestate succession for many generations.

Fee Land
Land held in fee simple which is the broadest property interest allowed by law.

General Allotment Act
The General Allotment Act, also known as the Dawes Act, was passed by Congress in 1887. 24 Stat. 388, as amended, 25 U.S.C. §§ 331 et seq. This law and the policy it implemented allocated parcels of reser vation land to tribal members in an effort to direct them towards agrarian pursuits. Typically, lands not allotted or reserved for tribal or federal use were declared "surplus" and opened to settlement by non-Indians. The allotment policy was repudiated by the Indian Reorganization Act of 1934 but only after some 90,000,000 acres had been lost to tribal ownership.

Heir
A person who receives property from an individual who dies without a will (Intestate).

Indian as defined by AIPRA
For estates of people who die after June 20, 2006, a person who: (a) is a member of a federally recognized Indian tribe; (b) is eligible to become a member of a federally recognized Indian tribe; (c) was an owner of trust or restricted land on October 27, 2004; (d) meets the definition of "Indian" under the Indian Reorganization Act; or (e) in California, also includes a person who owns trust or restricted land in California.

A "California Indian" is a person of any degree of Indian ancestry who owns trust or restricted land in California. A California Indian may inherit additional land in the State of California in trust.

Interested Parties
People who believe they may inherit assets from the decedent's estate.

Intestate
When a person dies without leaving a valid will.

Land Tenure
The method or mode by which land is held or owned.

Liabilities
Debts and other claims that reduce the value of an estate, including mortgages, liens (records of debt), taxes and easements at the time of death.

Life Estate
An estate in real property with a term that is defined by the life of the grantor or of another.

Personal Property
A person's belongings, except for real estate and buildings. Personal property includes one's car, furniture, jewelry, etc.

Predecent/Predeceased
In the context of wills, a person who dies befor e the person whose estate is being probated.

Probate
Probate is the process of identifying and distributing the decedent's estate.

Probate Code
A body of laws that governs the probate process. Indian tribes may have probate codes as do states and now, under AIPRA, so does the federal government.

Real Property
Land and improvements permanently affixed to it such as a house.

Trust Assets
Indian trust assets are those assets to which the United States owns legal title. Examples: trust land, r estricted land, and Individual Indian Money (IIM) accounts.

Undivided Interest
Undivided interests in land are common interests in the whole parcel that are owned by two or more people. Owners of undivided interests do not own a specific piece of a parcel of land, rather they own a percentage interest in the whole.

Will
A will is a document in which the person making the will describes how they wish to have their property distributed after their death. Wills must be formally executed in the manner required by law applicable in the jurisdiction where the will is made.

Traditional Beliefs on Land Stewardship

An old Anishinabe legend tells how Gitche Manido (The Great Spirit) made the crane and sent it down to the earth. The crane circled and chose a resting-place, then called to the bear, catfish, loon, moose, and martin clans to build a community together . Every tribe has a similar creation story of the earth being entrusted to its inhabitants by a Creator who hopes they will recognize and preserve its mystery and beauty.

When thinking of the old ways of giving and receiving, what it meant to be a Keeper of something and how this was handed down from one generation to the next needs to be framed in the complexities of societies cur - rently existing in Indian Country.

Whether it is the jingle dress a younger daughter will inherit from her aunt, or 10 acres of shoreline where they grew up believing the stones could speak - what is handed from generation to generation matters. Indian peoples' relationship with one another and the land itself has been taught throughout the years. When it comes to the land, Indian people need to understand, manage, and control all aspects of land ownership including mortgages, leases, titles and resources.

As Louise Erdrich eloquently reminds us, "Every feature of the land around us spoke its name to an ancestor. Perhaps, in the end, that is all that we are. . ." These words ring true for many Indian people. There is a need to find ways to protect individual Indian rights with modern land ownership without forgetting timeless values the ancestors understood and shared.

By the late 1800s, federal Indian policies began to focus on devastating ways of end - ing native culture and practices. Native communities had limited access to ancestral lands. However, the customs of sharing the best harvesting and hunting grounds, the safest places to live, or the most sacred sites for burial and renewal were passed from generation to generation.

It was by practice and with appropriate behavior that one person or community was associated with a place. A family might maintain or lose the right to harvest an area when they no longer understood the crop. Another then earned that right. Boundaries were clearly understood between bands and tribes. These complex negotiations of stewardship were overlooked when the U.S. government first allowed settlers to grab acreage.

While land rights varied from tribe to tribe, all communities had ways of recognizing those rights to certain areas. Although they were not outlined on paper , the boundaries had been maintained and defended for years. The relationship with the land was visible and tangible to each tribe.

If Indian landowners take steps to protect their lands they will, as a result, protect their alternate view of its stewardship, their com - munities' sovereignty, and the stories of how the relationship between the land and its original people came to be.

The passage of the American Indian Probate Reform Act (AIPRA) will change the way Indian people pass their land to future generations. It is too early to assess its effectiveness. The Act may provide an opportunity for tribal governments and individual landowners to more fully engage the traditional, cultural, and economic value of the land.

Each tribe needs to consider adapting their own probate code and legal systems to reflect long-standing traditions. Being a steward and donor of the land for future genera - tions is important to all tribal members.

As tribes interpret these new laws the older notions of stewardship, earned rights and responsibilities, and shared or gifted land should be considered. There is a way to sat - isfy both the binding legal requirements needed to protect individual Indian rights and the careful consideration of land use for future generations.

There is much work to be done to encourage estate planning by Indian people that includes a current written will and consolidation of land or gifting of fractionated interest. Lands will eventually move through the probate process to be once again guarded by a new heir as part of a continuing relationship with a strong community.

As with all forms of knowledge and health, part of the responsibility lies in the hands and hearts of those willing to learn and pursue a better future. Preserving sovereignty includes protecting the place as well as the memories shared by Indian people.

These stories and customs still speak to us and we must pass them to future generations.

"Every feature of the land around us spoke its name to an ancestor. Perhaps, in the end, that is all that we are. . ."

Importance of Estate Planning

Today Indian families and tribes continue to see valuable land resources diminish as fractionation spreads throughout Indian Country . A will, properly done, is one of several ways in which fractionation can be reduced and consolidation of land ownership interests achieved.

A 1910 act of Congress (Act of June 25, 1910, 36 Stat. 855-856) allowed original allottees to write wills passing their ownership interest. Few Indian people wrote wills to distribute the land according to their wishes which left that land to be distributed according to state laws of intestate succession as required under the General Allotment Act.

Today, through educational efforts regarding fractionation and loss of land, Indian people recognize the importance of writing a will to disburse their trust land and other assets. Although people are not required to have a will, without a will, personal property , trust land and asset distributions are made according to laws of intestate succession which may be tribal, state, or federal.

Because wills must meet certain legal standards and can be complex, it is recommended that individuals wishing to have a will done consult with an attorney or legal services program. When trust land is involved, it is important to work with an attorney who understands probate laws pertaining specifically to trust land and the American Indian Probate Reform Act (AIPRA).

Why write a will?

A will allows you to:

- choose the friends and family members you want to receive your trust property and personal property. (Beneficiaries)
- choose what property and in what amounts should go to specific people. (Distribution)
- choose a trusted person to oversee the administration and distribution of your non-trust property after death. (Executor)
- select the special person you would like to care for your minor children. (Guardian)
- reconsolidate trust property.
- prevent forced purchase sales of your trust lands at probate.

Call 1-888-678-6836 for a current record of your Individual Indian Money (IIM) account.

What do I need to know?

In order to make a will, a person must be 18 years of age or older and of sound mind. A will must comply with the requirements of the law of the jurisdiction where the will is made. It can be written or typed, dated and must be signed and witnessed by two people.

A will typically contains:

- name and address
- list of specific assets and who they wish them to go to
- charitable donations
- guardian for minor children
- executor to oversee estate distribution

A person must sign their will in front of two witnesses, and the two witnesses must sign the will. The witnesses should be disinterested – this means they are not receiving anything from the will. The witnesses can then sign another document, called an affidavit, that says the person appeared before them, was of sound mind and that no force or undue influence was used against the person in writing or signing the will. An affidavit makes the will "self-proving" in probate court and can help reduce contests or disputes during the probate process. An affidavit is not required but it is a good idea to use one if trust lands or assets are part of a will.

It is important to know what trust lands you have or may inherit in pending probates when you write a will. You should contact your local BIA office and request a copy of your Individual Trust Inventory Record (ITI or ITR). This report will list all of your land interests, including any you hold from outside your tribe. You should also contact the Office of Special Trustee for American Indians Trust Beneficiary Call Center for a current record of your Individual Indian Money account (IIM). They can be reached at 1-888-678-6836.

How do I start?

Historically all wills were processed by the local BIA office, forwarded to the field solicitor for approval, then returned to the local BIA office for storage. As of April 29, 2005 the BIA no longer provides assistance in drafting or storing a will.

The local BIA office is a good place to start when gathering information and inquiring about estate planning for trust land and assets. The BIA office may make referrals to other organizations and attorneys who can draft a will. Some tribes have employed staff who can assist in writing wills for tribal members.

For more information, contact:
Institute for Indian Estate
Planning and Probate
Seattle University School of Law
Sullivan Hall
P. O. Box 222000
901 12th Avenue
Seattle,WA 98122-1090
206/398-4284
www.indianwills.org

Writing of a Will – more important then ever before!

American Indian Probate Reform Act of 2004

With the passing of the American Indian Probate Reform Act of 2004 (AIPRA), having a will is more critical than ever. The law regarding how trust assets will be distributed if there is no will and who can inherit trust assets, either with or without a will, has changed.

Historical background leading to AIPRA is critical to understanding how the U. S. government is dealing with the growing fractionation problem throughout Indian Country.

In 1983 the Indian Land Consolidation Act [ILCA] was enacted by Congress to deal with the rapidly growing problem of fractionated interests of individual allotments. Amendments in 2000 created a provision for majority consent regarding use of inherited trust land. The passage of AIPRA amended ILCA establishing a federal probate process and encourages tribes to enact tribal probate codes. (Effective June 20, 2006.)

The Pre-AIPRA Probate Process

The General Allotment Act (GAA) was passed by Congress in 1887. The GAA gave the Secretary of the Interior the ability to divide the original treaty reserved lands into individual allotments and give those allotments to individual tribal members or households with some lands reserved for the tribe. Reservation lands not allotted or reserved for tribal or other use were considered surplus and open to purchase and settlement by non-Indians. The GAA and later amendments reduced the original treaty reserved lands by more than two thirds—over 90 million acres were lost by 1934.

The Secretary allotted the lands in "trust" meaning the U. S. government holds legal title and the allottee holds beneficial title. This remains true today. With only a beneficial title, the allotment owner cannot transfer, encumber, lease or manage their allotted lands without approval from the Bureau of Indian Affairs. Under the GAA, ownership of interests in trust allotments passed according to state laws of intestate succession.

Prior to 1910, except for the Five Civilized Tribes and the Osage Tribe, tribal members could not lawfully make wills. In 1910 Congress passed a law that allowed only the original allottee to write a will. In 1913, the law was changed to include all Indian landowners. Without a will and within a few generations, the allotted lands were held by many heirs as undivided interest holders. This created what today is called highly fractionated lands with at best, dozens, and at worst, thousands of holders of undivided interests.

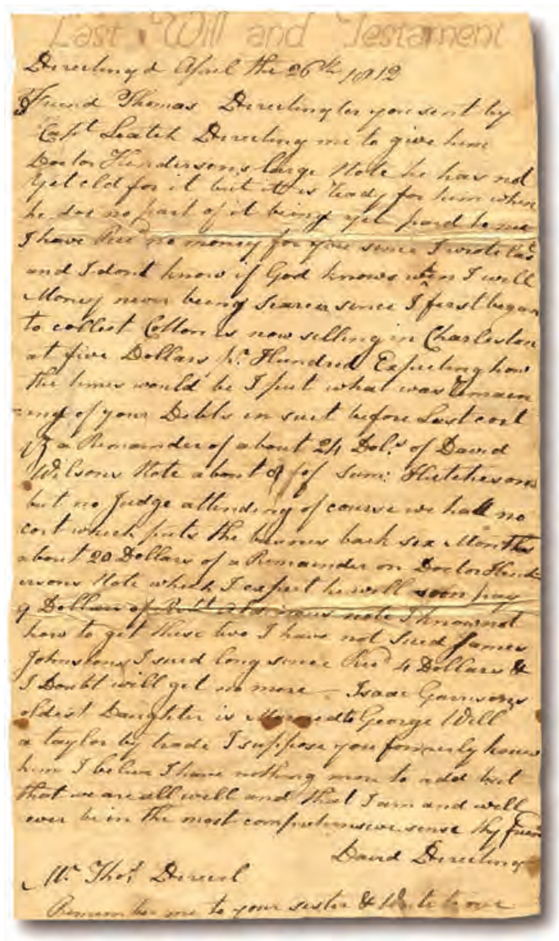
In 1983, Congress passed the Indian Land Consolidation Act (ILCA) in an attempt to slow the rapidly growing fractionation of trust lands. ILCA authorized tribes to draft their own land consolidation plans and to write their own probate codes which could limit inheritance by non-Indians and non-tribal members. The provision in ILCA that required small fractionated interests to escheat to the tribe on whose reservation the interest was located, was held to be unconstitutional. Amendments to ILCA were passed in 2000 but never fully implemented.

AIPRA, approved in October 2004, became law in June 2006. The Act replaces portions of ILCA and creates, for the first time, a federal probate code that defines who will receive your trust property without a will. AIPRA removes any state laws from determining who will receive the property without a will.

AIPRA Probate Process For Trust Property

Trust lands and Individual Indian Money Accounts are probated by the U.S. Department of Interior, Office of Hearings and Appeals (OHA). Tribal and State courts cannot probate trust property.

Since 1983, Tribes have had the authority to create their own federally approved tribal probate codes. Without a tribal probate code, AIPRA's federal probate code will determine how trust property will be distributed, both with a will and without a will. State intestate succession laws are no longer a part



of OHA's probate process. OHA must follow tribal probate codes that have received secretarial approval when probating trust property of individuals from that tribe. Currently, at least one tribe has a probate code approved under AIPRA.

AIPRA seeks to:
- preserve the trust status of Indian lands by restricting non-Indian inheritance;
- limit further fractionation by cutting off collateral heir inheritance and limiting fractionation without a will; and
- reduce fractionation by earmarking federal funds for consolidation and authorizing tribal purchase and sale of ownership interests.

If An Indian Trust Land Owner Dies Without A Will (Intestate)

One of the key provisions of AIPRA is the establishment of a uniform federal probate code that replaces state law in probating Indian trust land and assets. This code applies where no valid will or applicable tribal probate code existed. After June 20, 2006 state probate law no longer applies to the probate of trust assets.

Under the Act a probate judge will divide an Indian's trust property estate into two categories and each category is treated differently by the probate court.

<u>Interests greater than 5% without a will</u>

First, AIPRA provides that interests greater than 5% be given to the surviving spouse in a life estate. A life estate allows the spouse to receive all income from the land and continue to live on or use the land for as along as the spouse lives.

Second, when the non-Indian spouse dies, all interests greater than 5% will go to all surviving eligible children equally in undivided interest. If no children, then to grandchildren or others as shown in the AIPRA chart on page 10.

<u>Interests less than 5% without a will</u>

The probate court will give the spouse a life estate in only the trust property that was lived on at the landowner's time of death. All other interests less than 5% will go to a "single heir." This is the oldest surviving child or grandchild. If there are no surviving children or grandchildren, then the interests will go to the tribe with jurisdiction. If no tribe, then to any co-owners in that allotment. See AIPRA chart on page 10.

Under this uniform probate code, without a will trust land can go to a decedent's spouse or immediate family only if they are eligible heirs as defined by AIPRA (see Glossary). Houses on that trust land are considered part of the trust asset. If a decedent's spouse or immediate family members are not eligible heirs, they would receive a life estate. The remainder would go to an immediate family member who is an eligible heir or, if there are none, to the tribe.

If An Indian Trust Land Owner Dies With A Will

A decedent with a properly drafted will can pass his/her interest in trust or restricted lands to any of the following people, in trust.

- Any lineal descendent of the testator.
- Any person who owns a pre-existing undivided trust or restricted interest in the same parcel of land.
- The Indian tribe with jurisdiction over the interest in land.
- Any Indian.

If an heir is not in one of the four categories listed above, that person may receive individual trust land as a "life estate" similar to that described previously for a non-Indian spouse in an intestate process. This means the land stays in trust status and the non-eligible heir retains rights to the land as long as they live. The remainder goes to an immediate family member or to the tribe upon death.

There are important provisions for omitted spouse or children. If you do not want to leave property to your spouse or child, you must clearly state this in the will. If you do not, the provisions can invalidate your will if certain conditions are met.

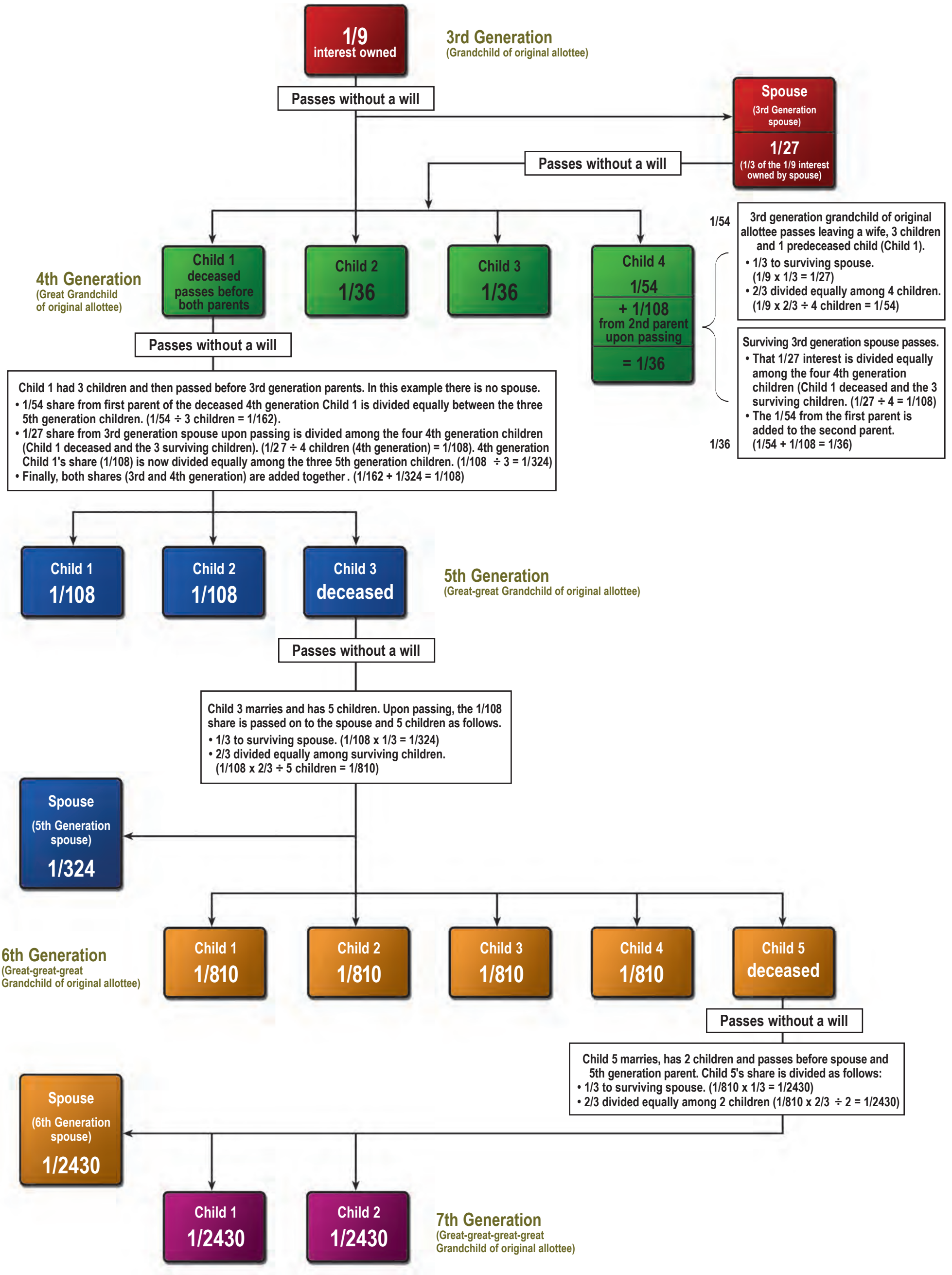
Alternatively, by using a valid will, the decedent can leave their individual trust land in fee simple title (except for land under the jurisdiction of an IRA tribal government) if the will clearly states the intent to do so. The land is then taken out of trust status and subject to state taxation and regulation. However, the tribe has a right to prevent the removal of this allotment from trust status, unless the allotment is part of a family farm, by purchasing the landowner's interest.

Estate planning, will writing and the provisions of AIPRA provide Indian people with an opportunity to exert control over their trust property in a manner not previously possible. For future generations, the most important of those opportunities are those that allow for consolidation of ownership interests and those that minimize fractionation. AIPRA is not an easy law to understand but every individual owner of an interest in trust or restricted land should make the effort to learn what options they have in estate planning under the Act.

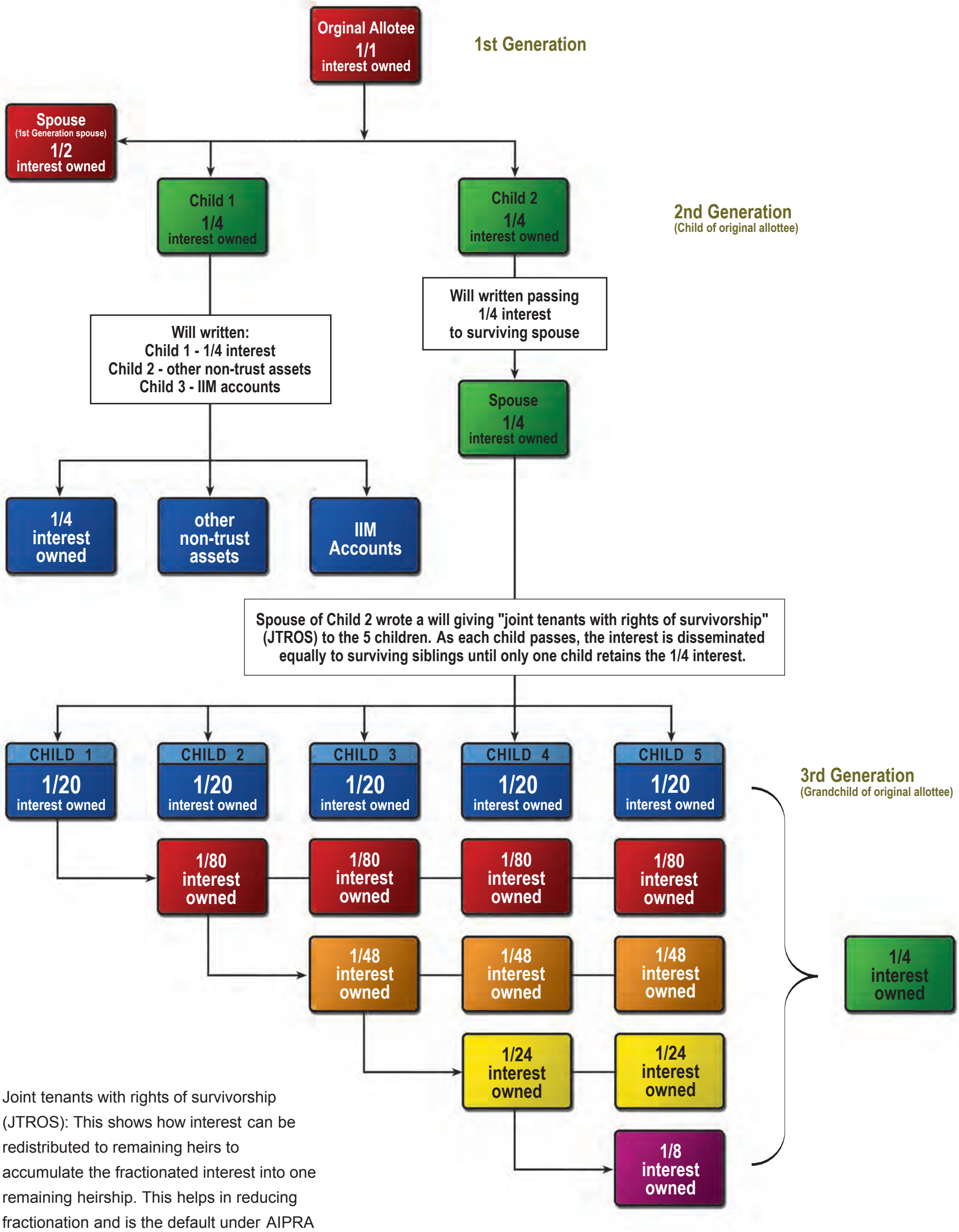
It is more important now than ever before for each person to write a will. Talk to your parents, grandparents, brothers, sisters, even children—make it happen.

Tribes having their own probate code may provide for culturally relevant and traditional distribution practices and strategies for consolidating fractionated lands. If a tribal probate code does not exist the probate is sent to the Office of Hearings and Appeals where an administrative law judge or decision-maker renders a decision on trust assets.

INHERITANCE WITHOUT ESTATE PLANNING RESULTING IN FRACTIONATION OF THE ALLOTMENT



INHERITANCE THROUGH ESTATE PLANNING
ELIMINATING FRACTIONATION OF AN ALLOTMENT



Joint tenants with rights of survivorship (JTROS): This shows how interest can be redistributed to remaining heirs to accumulate the fractionated interest into one remaining heirship. This helps in reducing fractionation and is the default under AIPRA if your will leaves trust land to more than one person without specifically making them tenants in common.

Control Your Land Through Estate Planning

It is estimated that millions of acres of fractionated trust land stands idle or is leased at less than favorable rates on Indian reservations. The landowners themselves are unable to use the land for planting or development because of severe fractionation.

It is important that Indian people explore the options that estate planning provides to them as a means to protect future generations from the effects of fractionated interests in trust and restricted land.

Fractionation resulting from the General Allotment Act was acknowledged as far back as 1910 when Congress passed legislation authorizing Indian people to write wills aimed at stopping and reducing further fractionation of their trust lands. Since very few original allottees wrote wills at the time, and relatively few have written wills today , the ownership interests in the original allotments have continued to fractionate for over 100 years resulting in thousands of Indian interest holders.

"We have very old cases from the 1900s. It is hard to find relatives, especially if [the deceased] are the original allottees and have no children," said Tom Burr, a BIA Realty Specialist in Bemidji, MN.

Interests in trust land owned by an Indian person who died prior to June 20, 2006 (effective date of AIPRA) without a valid will would pass according to state laws of intestate succession. After June 20, 2006, those interests pass according to the intestate succession provisions of AIPRA or those contained in a federally-approved tribal probate code.

Laws of intestate succession specify which heirs receive the property of the decedent in the absence of a will. For example, it is common for state laws to specify that a surviving spouse receive 1/2 of the estate with the balance divided equally among the deceased's surviving children. Applying this law to a person with a 40 acre parcel of trust land, a spouse with four children, the spouse receives 1/2 and the other 1/2 is shared equally by the four children (a 1/8th interest each). The spouse and children's interest are undivided in the whole, meaning no one receives a specific portion of the 40 acres but all hold their interests in common. As generations go on, this piece of land may be shared among many more heirs who may not leave wills creating tiny, undivided interests owned by hundreds of people.

In 2003, arguing for an improved probate process and to eliminate probate backlog, a BIA employee told the Committee on Indian Affairs at a U.S. Senate hearing that there are four million owner interests in 10 million acres of individually owned trust lands. The employee noted that these "four million interests could expand to 1 1 million by the year 2030" and that "there are single pieces of property with ownership interest of less than .000002 percent of the whole interest."

Small amounts of undivided interests like those mentioned above can leave a tract of land with many owners unable to come to a consensus on use of the land. Without agreement, the BIA administers land usage for the owners. If an individual landowner wants to build a home, start a business or farm the land, there must be majority approval. It can be difficult just to contact all the heirs let alone get agreement on how to use the land.

The Indian Land Consolidation Act – Amendments of 2000, has a provision for majority consent regarding use of inherited trust land with a sliding scale based on number of fractionated interest owners.

Estate planning, including will writing, can ensure that interest in land will be distributed according to the wishes of the deceased and that may be done in a manner that stops or reduces fractionation. With a will, a person may leave their property to anyone they chose and may pass interest in trust or restricted land to those categories of people defined in AIPRA as being authorized to receive interests in trust.

Land can be willed to the tribe of the reservation where the land sits. Individuals inheriting trust lands can sell it back to the tribe. This consolidates small pieces of land into larger pieces that can be put to better economic use by the tribe.

Probate proceedings may be complex. Estate planning is a fairly prescribed process that can reduce the complexities of the probate process, prevent land fractionation issues for heirs, and in some instances, eliminate the need for probate altogether . At probate hearings, heirs can be advised of other options available to them.

Now is the time to take control of your land through estate planning and prevent further land fractionation. Write a will!

Indian Land Consolidation Act – Amendments of 2000, has a provision for majority consent regarding use of inherited trust land using a sliding scale based on number of fractionated interest owners. Consent requirements are as follows:

- 1 to 5 owners – 100 %
- 6 to 10 owners – 80 % majority
- 11 to 19 owners – 60 % majority
- 20 or more owners – majority of interests (51%)

Land owned by one to five owners can quickly have double-digit owners if the original owners have many heirs and die without a will, which is a common occurrence.

Lack of Wills Hinders Probate Process

Imagine that your father passed away. You and your extended family are grieving. During the wake and funeral you start discussing your father's land holdings and how he obtained them. Now, what do you do?

To complicate matters, your father did not write a will.
- How will his estate be settled?
- Who gets what?
- How long will all this take?
- Who will do it?

In American society, most adults have a will with someone designated in the will as executor of the estate. That individual is responsible for administering the estate, i.e. collect and manage assets, file tax returns, and settle taxes and debts; as well as distribute any assets or bequests as the deceased directed under the provisions of the will. This responsibility is often left to the eldest surviving child or an executor assigned by the courts.

For Indian people, the deceased' s estate often includes fractionated interest in a parcel of land. The land, depending on whether it is trust or fee land and if a will was written or not, adds another layer to the settlement of the estate.

In the example above, there was no will and the father's "undivided interest" in the parcel of land, if any, has now been passed on to all surviving heirs. This could include: wife, children, grandchildren, brothers, sisters, common-law wife, etc.

Probate is the legal process of distributing the assets of the deceased's estate to heirs and can be a complicated and extensive process. This is especially true when individual trust or restricted land is involved. Indian people have the right to use their trust land, but ownership remains with the federal government who determines how it is probated, particularly if a valid will is not involved.

The major problem with probating estates without wills that include individual trust land is finding heirs and dealing with paternity issues. There are also claims by creditors that families need to settle. Funds from the deceased's Individual Indian Money (IIM) accounts can be used to pay creditors.

Legislation created in 1887 – The General Allotment Act – has complicated probate for both heirs and tribes by creating fractionated interest of individual allotments. The Act provided that land would not be divided among heirs, but rather ownership interest of the land would be divided.

Today probated trust land without instruction in the form of a will is distributed to heirs as an undivided interest according to probate laws in the deceased's state of residence. This means that 40 acres bequeathed to four heirs gives each a one-fourth ownership interest rather than each receiving 10 acres. Over just a few generations, this process resulted in parcels of land with hundreds and even thousands of undivided interest owners – some individuals with interest holdings equivalent to less than a square foot of land. Another important item is that in order to use this land, majority consensus must be reached by all fractionated interest landowners of the allotment.

What do I need to know?
- Is there trust land?
- Is there an IIM account?
- Does the tribe have a tribal probate code?
- Who is the BIA probate clerk?

It is also important to note that the BIA has jurisdiction over trust land, but not fee land. Therefore, fee land and other non-trust assets would be probated through tribal or state probate systems.

Where do I get this information?
- The BIA probate clerk will have all information related to trust assets.
- Fee land information is obtained from the County Register of Deeds.
- Information on other assets and liabilities will need to be collected through other means.

The BIA does not have jurisdiction over fee land. Fee land would be dealt with at the state or tribal level of jurisdiction.

BIA Probate Backlog Problem

The BIA has a significant backlog of unprobated Indian "trust estate accounts." In the Cobell v. Norton case the Office of Trust Reform Management (OTFM) reported to the court, "The Trust Funds Accounting System...contains 25,404 open estate accounts. Of these, 13,481 are classified as official deaths, where OTFM has confirmed the death, but the case has not been recorded as sent to probate. Another 7,617 of these accounts are classified as unofficial deaths, where OTFM has received some indication of death which has not yet been confirmed."

Backlog BIA probates, especially those involving trust land and assets of Indians who died more than sixty years ago, can involve extensive research, including the need to prove lineage and show how people are related.

The Department of Interior 's administrative law judges are required to make probate determinations based on a properly documented paper trail: birth certificate, marriage license, death certificate, and other official records. Certified documentation for Indians was not readily available well into the 1940s. Some of the earlier records are tainted by allotment frauds which proliferated in the late 1800s and early 1900s.

To see if you are among the BIA's "Whereabouts Unknown" go to: http://www.ost.doi.gov/LocatingIIM/whereabouts.html

Finding missing heirs continues to be a problem for the BIA. Under AIPRA an heir may be considered as having predeceased the decedent if they have not had any contact with other heirs or the Department of the Interior relating to trust or restricted land for the 6 year period preceding the hearing to determine heirs.

In some cases tribal membership and 'blood quantum' rest, in part, on the sometimes-fraudulent genealogies and heirship determinations of yesteryear. Attempts to probate trust land and assets of a long-gone great-great-uncle can tap into vigorous and hotly-contested controversy. Compiling and verifying official documentation of numerous heirs can be time-consuming. It can take a year or more of research by the BIAbefore the probate case is ready to be sent to the administrative law judge.

The 'paper trail' can also be obscured by the BIA's use of several names to refer to the same person. English-language as well as "Indian names," variable phonetic spellings of Indian names, and turn-of-the-century Indian Agents' fairly common use of 'generic' names like the Anishinabe words, "Ah-ke-wain-zee" [old man], "Que-we-zaince" [boy], and "Equay" [woman] in official records compounds the problem.

Skip-tracing the collateral heirs of someone who died without surviving children half a century ago is made more complicated by the BIA 's policies of relocation and of f-reservation adoption. These policies led to the loss of lineage and community connections.

Probates are still being reopened as a result of the 1996 U.S. Supreme Court decision in the Babbitt v. Youpee, Sr. case requiring the return of fractionated interest taken from heirs without payment. This complicates and causes further probate backlog as cases are reopened to determine rightful heirs for redistribution of fractionated interests.

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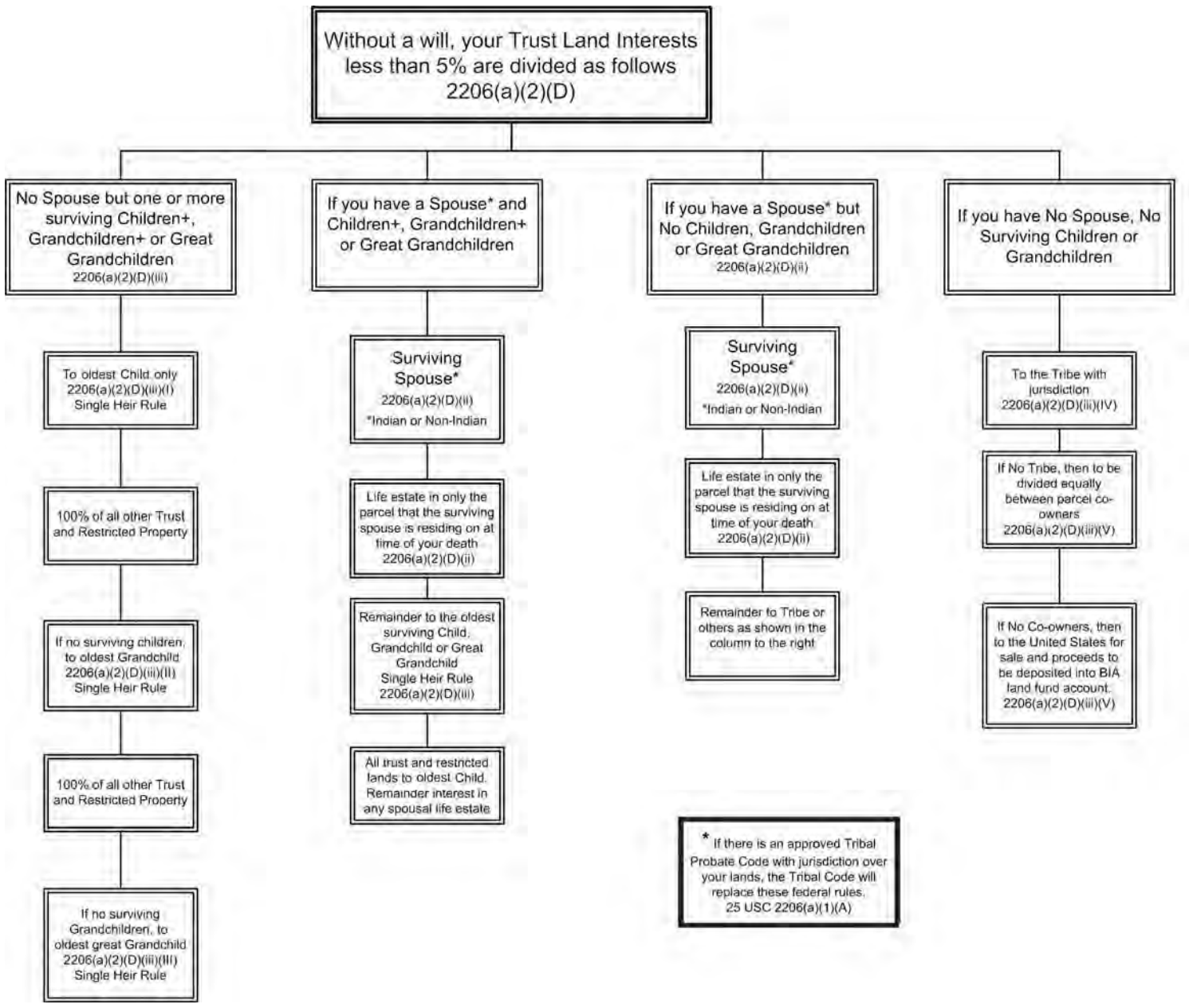
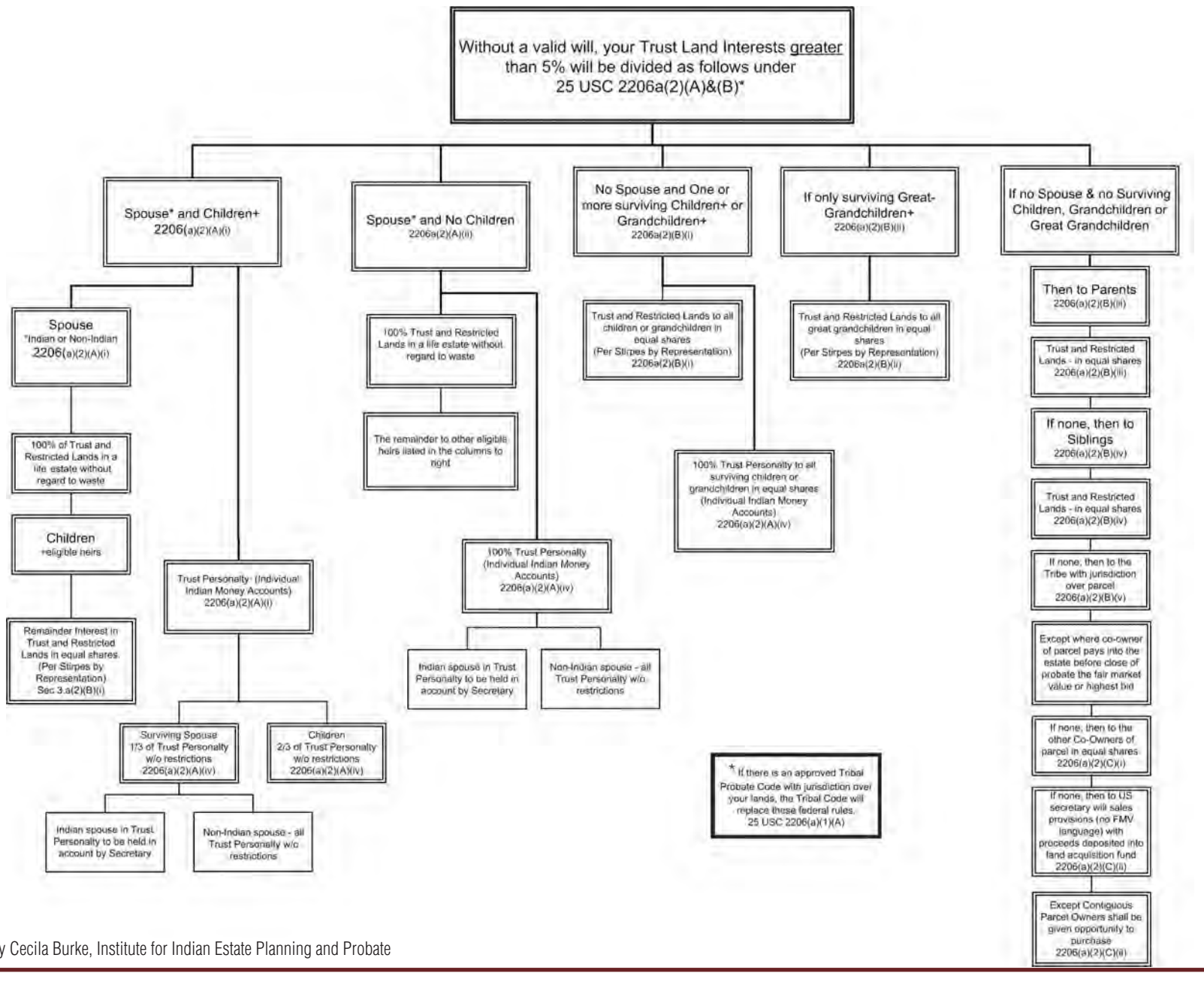
American Indian Probate Reform Act 2004

Distribution of trust assets without a will – 5% interest determination





Charts by Cecila Burke, Institute for Indian Estate Planning and Probate

A Probate Primer

Taken from "What Do I Need To Know About Probate When My Indian Loved One Passes Away?"

The Probate Process

Probate is a legal process that takes place after a person dies. Generally, probate includes:

- proving in court that a person's will is valid
- if there is no will, determining who will inherit the property
- identifying and listing the property
- having the property appraised (determining its value)
- paying outstanding debts and taxes
- distributing all of the property by court or der, including saying who now owns interests in any land.

There are two kinds of probate proceedings for Indian people:

- One type of proceeding is conducted in state court.
- Another type of proceeding is conducted by the Bureau of Indian Affairs (BIA).

A probate could include both state and BIA probate:

- Only the BIA can probate Indian trust assets (for example, a share in a trust allotment). But the BIA cannot probate other property. If the estate includes both Indian trust assets and other property, then it may need to go through both state and BIA probate.
- It is very common to go through both processes if an Indian person has both trust property that is managed by the BIA and fee lands. Fee land is "real property" that is owned by the Indian person (not land that is held in trust for the person by the U.S. government).

Applicable tribal probate code would replace the BIA process.

State Probate

Applies to all off-reservation non-trust property and any non-trust on-reservation property unless tribal probate code exists.

The state probate process is a legal proceeding that takes place in state court:

- States have varying probate laws, and it is important to know the probate process in your particular state.
- State probate deals with property that is not managed by the BIA.
- The state court determines what property and debts the decedent has.
- The state court also decides how the property will be distributed.
- The typical state probate involves paperwork and court appearances by lawyers.
- The lawyers and court fees are usually paid from the estate's assets.
- The lawyer's fees are usually a set percentage of the estate's value. You should find out what this amount is to make sure you are not overchar ged by the probate lawyer.

Assets in state probate include:

- Money in checking, savings, and other bank accounts.
- Real estate or land that is not managed by the BIA.
- Cars or other vehicles.
- Securities and other investments.
- Personal property and household items.

Debts are the money that is owed to somebody at the time of death. Debts include money owed for:

- Final bills, such as utility or credit card bills
- Personal loans
- Court judgments
- Taxes
- Health care costs
- Death and funeral costs

The state probate process usually takes about one year. It may take longer if there are a lot of assets or the assets are complex.

NOTE: State probate cases are public records. Anyone can get copies of anything filed in the case by contacting the court.

BIA Probate

If there are assets managed by the Bureau of Indian Affairs (BIA), those assets will have to go through BIA probate. BIA probate involves only trust assets such as:

- land held in trust
- restricted property
- Individual Indian Money (IIM) accounts
- If a person has trust property, such as an allotment or Indian monies, the BIA determines who will get that property.

How the BIA probate process starts:

- To start the BIA probate process, someone must tell the BIA about the Indian person's death.
- Someone must give the BIA a certified copy of the death certificate.
- If the death certificate can't be found, an obituar y notice from a local newspaper can be used. You can also use an affidavit of death prepared by a representative from the decedent's tribe.
- The BIA probate process begins after the BIA receives notice and proof of the death.
- The probate is assigned to a probate specialist or probate clerk.
- If the will names an executor, the BIA will often work with them to get the information needed for the probate package. However, it is the BIA's duty to manage trust assets. So, the executor will not be actively involved in the BIA probate process.

Lawyers are usually involved in the BIA process only if:

- family members oppose the will, or
- if lawyers are needed to provide assistance during the process.

The probate specialist/clerk gathers information and documents about the decedent, including their:

- social security number
- birth certificate
- record of death
- marriage/divorce records
- known creditors
- names of potential heirs
- adoption or guardianship records
- will and codicils.

The probate specialist/clerk then completes a probate package which includes:

- evidence of death
- a completed OHA-7 Form: a family tree showing the relatives and saying which relatives are Indian
- a certified inventory of trust real property
- a list of income sources
- all wills, codicils, or repeal of wills
- debts owed
- the probate clerk/specialist's affidavit that all efforts were made to locate the beneficiaries

The probate specialist/clerk reviews the completed probate package, and then gives it to the BIA deciding official who will probate the estate. Deciding officials are BIA employees who have the power to make decisions in probate court: they can be a judge, may simply be a BIA staff member.

After the probate package is referred to the BIA deciding official the BIA sends notice to the heirs telling them:

- about their right to request a formal hearing before an Administrative Law Judge
- who the heirs are and which heirs are listed in the will
- all known claims against the estate
- the address of the office where the probate packa ge has been sent
- who the BIA deciding official is.

The BIA deciding official then holds a formal hearing with the heirs:

- If no special issues arise during the hearing, the BIA deciding official will issue a written decision or order and send it to all interested par ties.

The deciding official may order the estate to pay, in the following order:

- funeral expenses
- medical expenses for the last illness
- nursing home and care facility expenses
- tribal claims
- judgments against the estate
- all other general claims

BIA probate generally takes longer than state probate. It usually ranges from one to four years.

NOTE: BIA probates will be affected by the American Indian Probate Reform Act 2004 (AIPRA).

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The Institute for Indian Estate Planning and Probate

The Indian Land Tenure Foundation's (ILTF) Board of Directors started the Foundation on a journey to directly impact the fractionation and consolidation of Indian lands. The development and funding of legal extern programs throughout several states for estate planning and community education started in 2003.

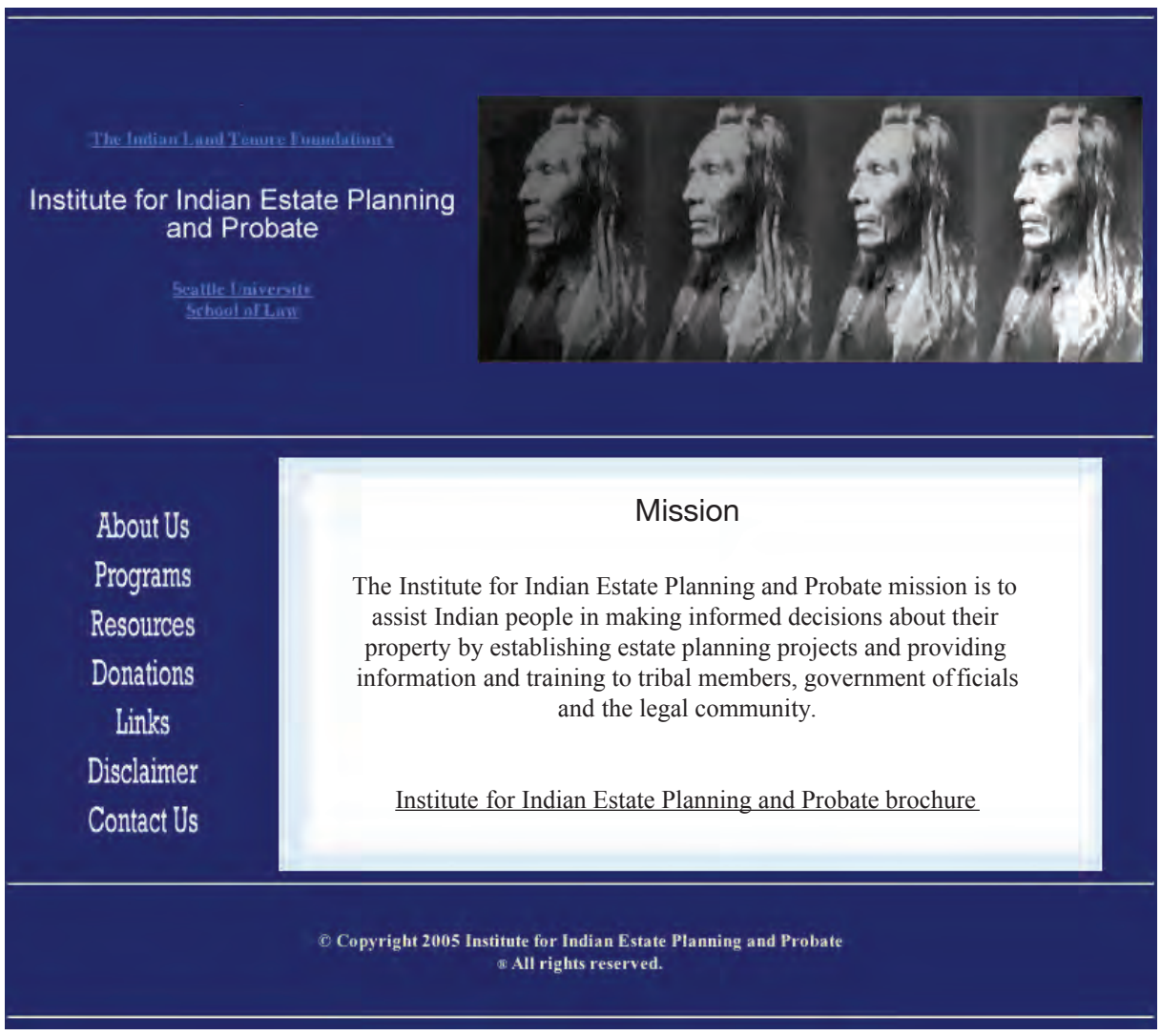
The planning and implementation of the legal extern program was commenced prior to the deliberations and strategy sessions leading to the passage of P.L. 1721; now referred to as the American Indian Probate Reform Act of 2004 (AIPRA).

Being proactive, prior to the enactment of AIPRA, the Foundation proposed a plan to expand the legal extern program.

In addition, ILTF, working with community members, assisted in the creation of the Institute for Indian Estate Planning and Probate at Seattle University School of Law. The Institute, with ILTF as a partner, will oversee existing Indian estate planning projects, develop new projects as funding becomes available, provide tribes, attorneys and individuals with training and information about AIPRA and its effects, assist with tribal probate code development and serve as a clearing-house for information about Indian estate planning and probate.

The Institute's mission:

To assist Indian people in making informed decisions about their property by: 1) establishing regional projects which provide free and reduced cost estate planning services to tribal members; 2) providing estate planning information and training to tribal governments, officials and the legal community; and 3) serving as a clearinghouse for current information on Indian estate planning, tribal probate codes, and the American Indian Probate Reform Act.



Housed at Seattle University School of Law, the Institute has been enthusiastically received and supported. The Institute began operations on August 1, 2005 and assumed responsibility for ILTF's existing and future estate-planning projects.

The Institute relies on public and private grants, government contracts, and generous donations for funding.

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ILTF Website

Add the Indian Land Tenure Foundation Website **http://www.indianlandtenure.org** to your list of favorites. The Foundation's aim is to have the site evolve into a national clearing-house for information on land tenure issues.

The site contains links to Native organizations working on land issues, government sites, educational materials and estate planning resources. Requests for Proposals will be announced on the Foundation's website.

The website is one of the Foundation's primary methods of distributing information. It is efficient, cost-effective and provides the greatest opportunity to reach many audiences.

The Foundation hopes to play a role in educating tribes, individual landowners, and other key constituencies such as policy makers. To learn more about the Foundation and land tenure issues, or to participate in the Foundation's efforts, visit the site.

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