



**The Institute for Indian Estate Planning and Probate**





# Understanding AIPRA

## For Landowners

# New Federal Probate Law

## The American Indian Probate Reform Act (AIPRA)

- ❑ Applies to trust property owners who die on or after June 20, 2006
- ❑ Encourages you to make a will
- ❑ If you do not make a will, AIPRA will choose who takes your trust property



# AIPRA Terms Defined



“Indian” is - 25 U.S.C. § 2201(2)

- Enrolled tribal member in any federally recognized tribe, or
- Person eligible to be enrolled in any federally recognized tribe, or
- Person who owned an interest in trust or restricted lands prior to October 27, 2004
- Person who meets the definition of Indian under the Indian Reorganization Act. This means:
  - all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and
  - all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and
  - all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.
- For California lands, any person who owns any interest in trust or restricted lands in California

# AIPRA Terms Continued



- **“Heir”** – person who will receive property under AIPRA if you die without a will
  
- **“Eligible Heir” without a Will** – Indian, co-owner in trust property, or non-Indian children & grandchildren who are within two generations of an Indian 25 U.S.C. § 2201(9)
  
- **“Eligible Heir” with a Will (Devisee)** – any Indian, any co-owner, or any of your lineal descendants (children, grandchildren, great grandchildren, etc) whether “Indian” or not

# AIPRA Land Terms



- **“Undivided interest”** means each person owns a share of the whole, but not a specific physical section of the parcel
  - Example - you own your 4% interest of the entire 100 acres together with the other co-owners
  
- **“Highly fractionated interest”** is ownership of less than 5% of an entire parcel
  - 25 U.S.C. § 2201(6)
  - Example - a 100 acre parcel and you own a 4/100, or 4% undivided interest: a small, highly fractionated interest under AIPRA.

# AIPRA Land Terms

“LAND” means any real property. 2201(7)

- ❑ If you have a home or other buildings on trust property that you own or co-own, the Act will give the home or buildings to the heirs that receive your land. 25 U.S.C. § 2206(a)(2)
- ❑ With a will you can give the home to one person and the land to a different person(s) 25 U.S.C. § 2206(h)(1)(B)



# What happens when you pass on?

- ❑ If the tribe where your lands are located does not have an approved AIPRA probate code (and very few tribes have one as of January 2009), then AIPRA will apply to your trust lands when you pass on. Contact the tribe where the land is located to see if they have an AIPRA approved code. 25 U.S.C. § 2205
- ❑ If you pass without a Will, AIPRA determines who receives your trust property and trust money. 25 U.S.C. § 2206(a)
- ❑ A valid Will allows you to choose who receives trust property and trust money, but AIPRA has limitations as to who can receive your property.  
25 U.S.C. § 2206(b)
- ❑ The following slides show AIPRA's rules. Later in this presentation will be a discussion on what a will is and what you can do with a will.



# Under AIPRA, without a will...

Your Trust land interests are put into two baskets and different rules will apply at probate of your estate



1. Trust land interests **5% or greater**



2. Trust land interests **less than 5%**



## Without a will interests **less than 5%...**

Pass under “The Single Heir Rule” in this order:

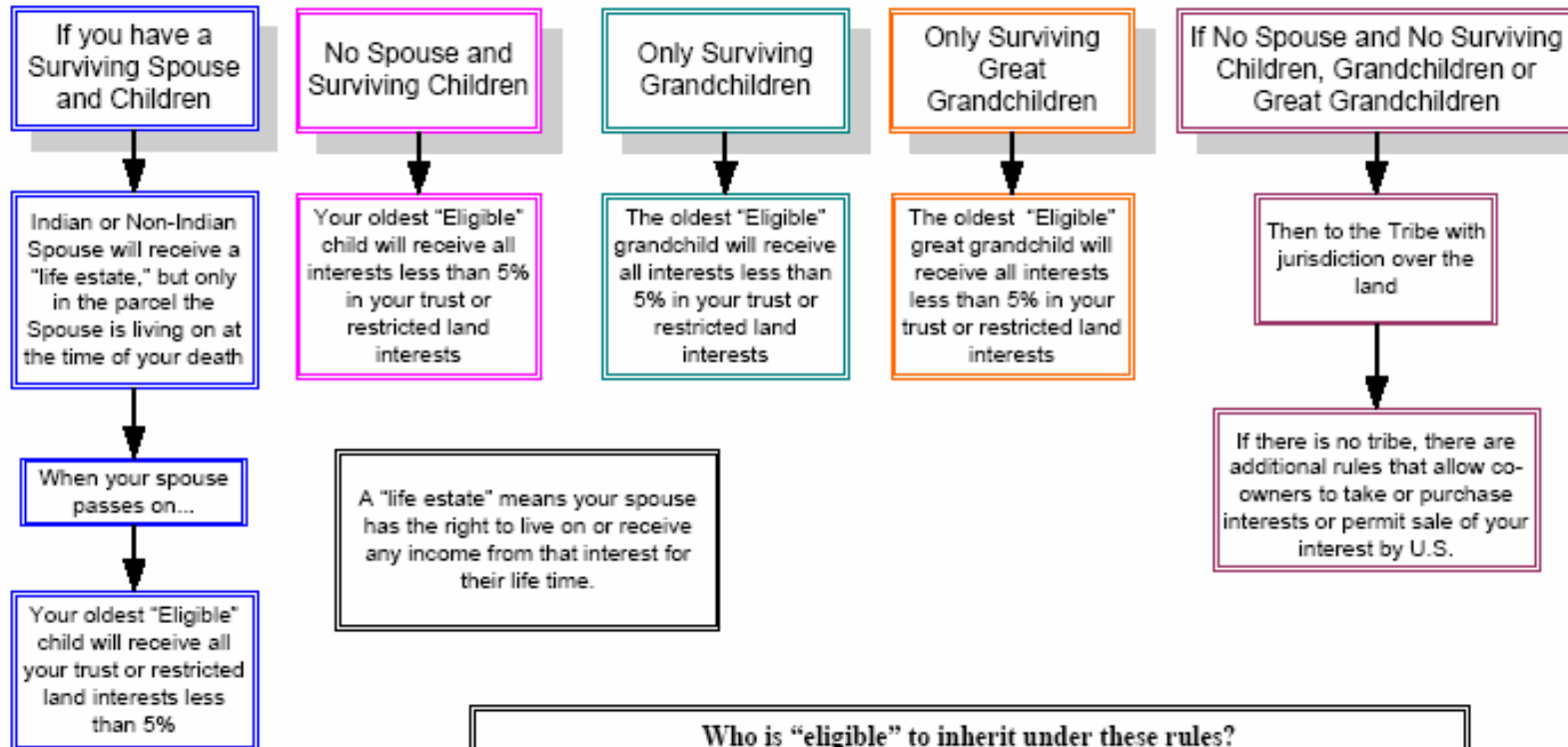
1. Your spouse will only receive a life estate in the interest if they are living on that parcel at the time of your death.
2. Any less than 5% interests will go to only your oldest eligible\* living child, and if no child is alive, then to your oldest eligible\* living grandchild or great grandchild.
3. If you have no living eligible children, grandchildren or great grandchildren, the interest then goes to the tribe where the lands are located.
4. When there is no tribe, the co-owners in the parcel will receive the interest and if no co-owners, then to the Secretary for sale.

25 U.S.C. § 2206(a)(2)(D)

Without a valid will, your Trust Land Interests  
less than 5% will be divided as follows:

### A SINGLE HEIR RULE

Chart by Cecella Burke, Institute for Indian Estate Planning © 2006



### Who is "eligible" to inherit under these rules?

Any one of the following:

- ♦ Member of an Indian Tribe, or
- ♦ Eligible to become a member of a Tribe, or
- ♦ Person who owns an interest in trust land on or before October 27, 2004, or
- ♦ Person who meets the definition of Indian under the Indian Reorganization Act, or
- ♦ In California, any person who owns an interest in trust or restricted land in California, or
- ♦ Decedent's lineal descendants within 2 degrees of relationship to any Indian, or
- ♦ A trust co-owner in same parcel



## Without a will interests 5% or greater...

### **Pass undivided interests 5% or greater to:**

- ❑ Your surviving spouse receives only a life estate
- ❑ Land passes to your eligible\* children equally
- ❑ If no surviving children, to your eligible\* grandchildren equally, or if none, to your eligible\* great grandchildren equally
  - If a child or grandchild has passed on before you, that child's or grandchild's surviving eligible children will receive their interest

25 U.S.C. § 2206(a)(2)

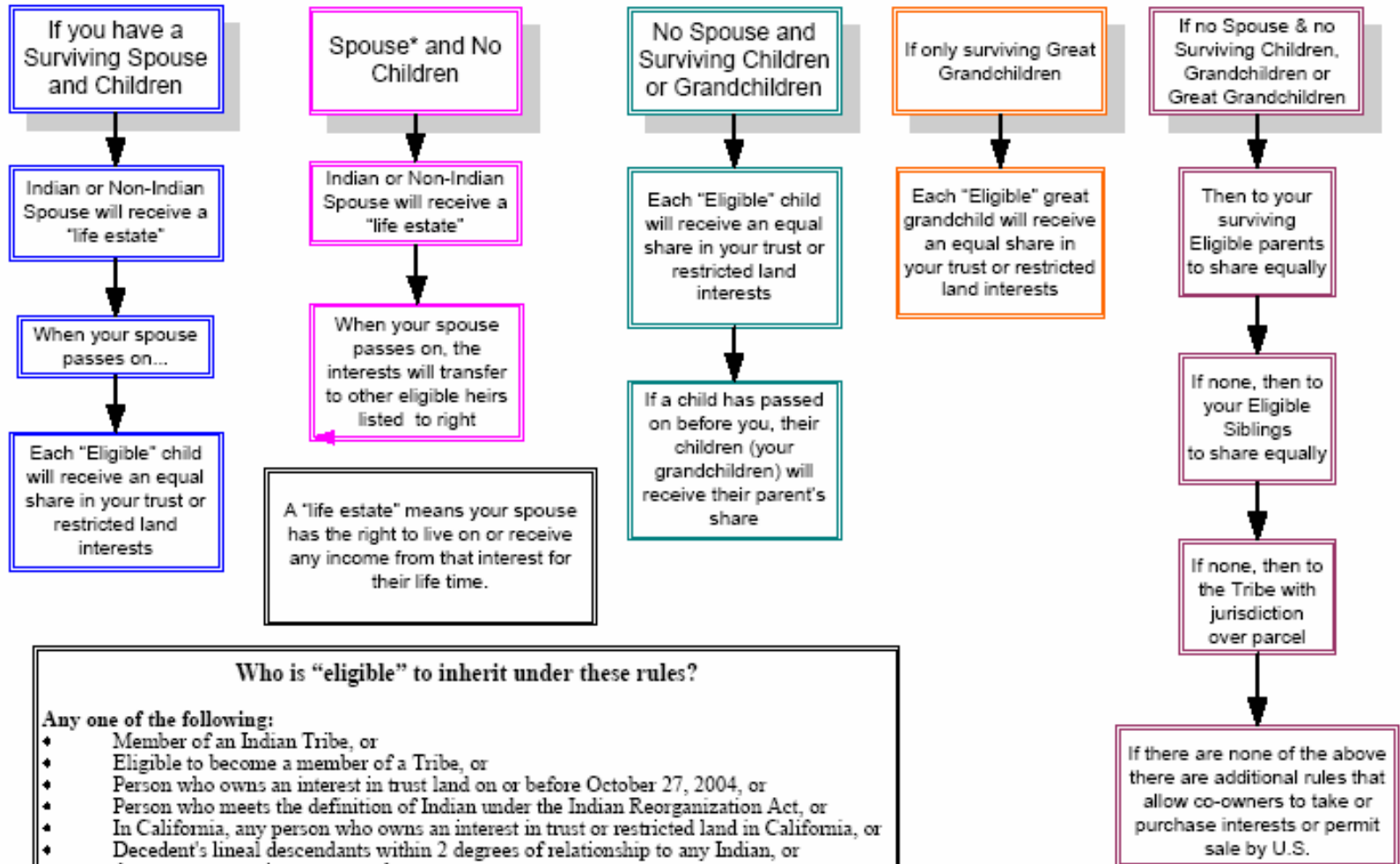


## 5% or greater continued...

- ❑ If no eligible\* children, grandchildren or great grandchildren, then to your surviving eligible\* parents equally.
- ❑ If no parents, to your eligible\* brothers and sisters equally
- ❑ If none, then to the Tribe with jurisdiction
- ❑ If no tribe than to other co-owners equally
- ❑ If no co-owners, then to the Secretary for sale with proceeds placed into a land acquisition account

Without a valid will, your Trust Land Interests  
5% or greater will be divided as follows:

Chart by Cecelia Burke, Institute for Indian Estate Planning © 2006



# Without a Will, who is “eligible” to receive land?

**Means your children, grandchildren, great grandchildren, parents or siblings who are one of the following:**

1. Member of a federally recognized Indian Tribe, or
2. Eligible to become a member of a Tribe, or
3. Your lineal descendants within 2 degrees of relationship to an Indian (for example - children or grandchildren of Indian),
4. They own an interest in trust land on October 27, 2004, or
5. They meet definition of Indian under the Indian Reorganization Act, (See earlier slide) or
6. In California, any person who owns an interest in trust or restricted land in California, or
7. A co-owner in same parcel

25 U.S.C. § 2201(9)



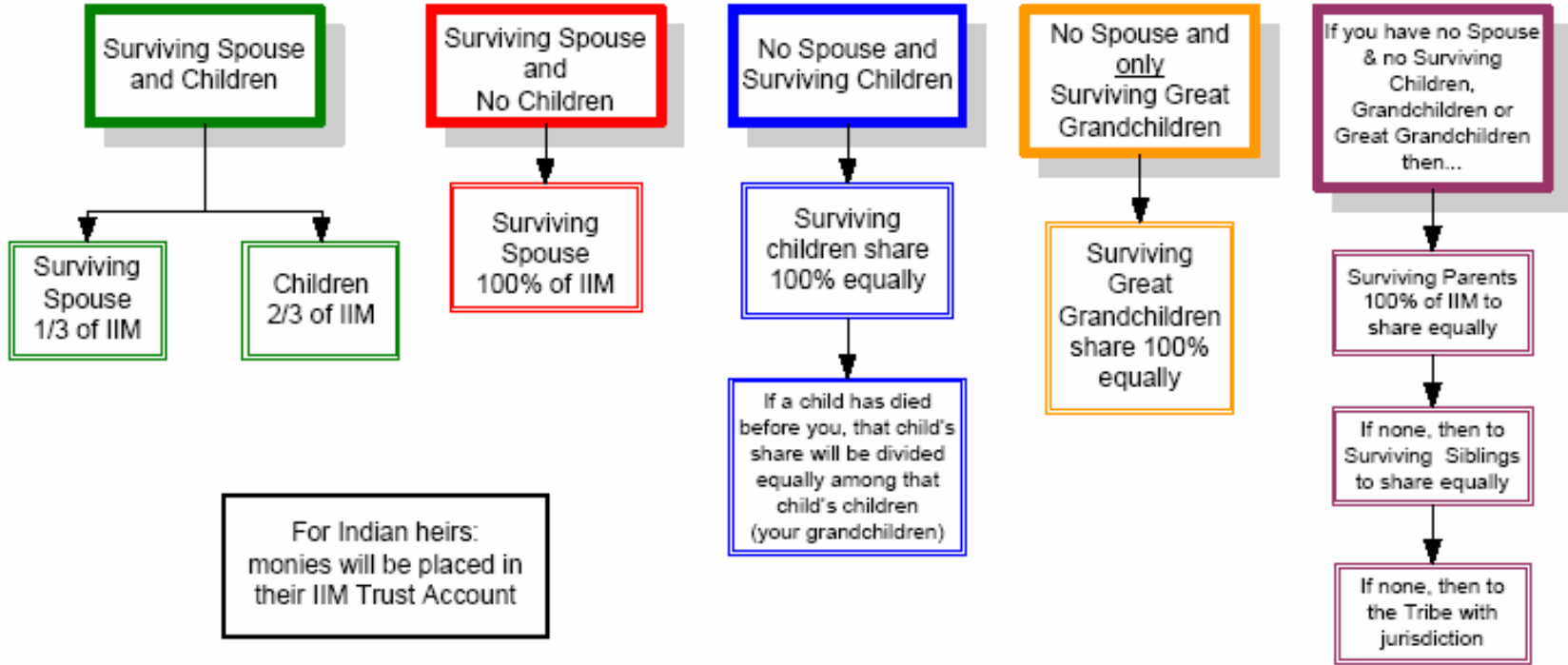
# Trust Personalty

Trust Personalty is held in your IIM account and distributed as follows:

1. Money received into the IIM account for income prior to your death will be distributed as the next slide shows.  
25 U.S.C. § 2206(a)(2)
2. Money income generated by the land after your death attaches to that parcel of land and will be given to the heirs who receive the land at probate.



Without a valid will, your Individual Indian Money Account (IIM) will be divided as follows:



For Indian heirs: monies will be placed in their IIM Trust Account

An approved Tribal Probate Code with jurisdiction over your lands can alter the federal rules.

Chart by Cecelia Burke, Institute for Indian Estate Planning and Probate © 2006



How does this law apply to  
the people I love?

# What about my spouse?

## If you pass on without a Will...

- AIPRA gives your spouse, Indian or non-Indian, a life estate only. A life estate is the right to live on, use, and take income from the land during their lifetime
- Interests less than 5%, your spouse will receive a life estate in only that parcel the spouse is living on at the time of your passing
- If spouse is not living on the land, all of your small interests pass to your oldest living eligible child, etc. (See previous Single Heir Rule slide)

# What about my spouse?



## **With a Will you can...**

- you can give your Indian spouse your land in trust status
- you can give your Indian or non-Indian spouse a life estate
- You can give your non-Indian spouse any non-IRA lands in fee status, but the tribe will have the right to purchase this interest before fee transfer is made in probate
- you can choose not to leave any trust interests to your spouse

# What about my kids?

## If you pass on without a will...

- If AIPRA gave your spouse life use, when your spouse passes on, AIPRA will give your eligible children equal ownership shares of interests 5% or greater (the remainder) and any income from the land.
- AIPRA will give your small land interests less than 5% to your oldest eligible child ***only***, or, if none living, to your oldest eligible grandchild (See Single Heir Rule)

# What about my kids?



## **With a will..**

- if you gave your spouse life use, you can choose any or all of your children to share your land when your spouse passes on
- you can give individual interests to different children or grandchildren
- You can give your land to your children as “joint tenants with right of survivor,” meaning all children will share the land with the last surviving child take all interests in that land
- You can leave no land to a child or children

# Giving trust land in fee status to someone

Different rules apply to IRA and Non-IRA lands as follows:

- You can pass on your Indian Reorganization Act (IRA) Lands in fee status (meaning taking it out of trust status) with your Will to a non-Indian only and, then only if the tribe where the land is located has passed a law, code or enactment to allow this.
- You can pass on your Non-IRA Lands interests in fee only to a non-Indian

25 U.S.C. § 2206(b)(2)(B)

- **Important:** The trust to fee rules above only apply to devise by Will. Trust to Fee applications can be made through the BIA during your lifetime. Any transfer in fee status, either through your Will or during your lifetime, may allow the tribe the right to purchase before transfer is made. Consult with your tribal realty or local BIA agency office.

# Purchase Options at Probate

**At probate, your trust land interest may be bought for fair market value by:**

- People who are eligible to receive by Will an interest in the same parcel of land
- Any trust co-owner in that parcel of land
- The Tribe with jurisdiction over the land
- Or the Secretary on behalf of the Tribe

**FOR SALE!**

25 U.S.C. § 2206(o)(2)



# Purchase at Probate - Consent

- For land interest 5% or greater, the surviving spouse and heirs must consent to the sale.
- The interest will be sold for fair market value with heir or surviving spouse receiving the proceeds
- If more than one interested purchaser, the heirs and surviving spouse choose who shall purchase their interest.

25 U.S.C. § 2206(o)(3)

**FOR SALE!**

# Purchase at Probate Consent

**For land interests less than 5%, NO consent is required from surviving spouse or heirs if:**

1. You have died without a valid Will, and
2. Your interest is less than 5%, and
3. The heir or surviving spouse is not living on the land at the time of your death
4. The heir or surviving spouse is not a member or eligible to be a member of that tribe.



# Estate Planning Information

# A will is...



- ❑ A legal document allowing you to decide who receives your property when you pass away
- ❑ Confidential. Other people will not know the contents of your will unless you tell them what your will says
- ❑ Not final until you pass away. Until then, you can change your will or give away your property

# You may need a will if...



- ❑ You are over age 18
- ❑ You have trust land, non-trust land or personal property
- ❑ You have children or stepchildren under 18
- ❑ You want to leave property to your spouse or to someone who is *not* in your immediate, blood family

# You should change your will if...

- ❑ You recently married or divorced
- ❑ Someone you named in your will recently passed away or became mentally unable to handle their own affairs
- ❑ You recently had or adopted a child
- ❑ You recently purchased or sold property



You should have an older will reviewed to be certain it complies with AIPRA

# With a will you can choose...



- ❑ Who receives your property, including friends, family, or extended relatives
- ❑ The person to oversee distribution of your non Trust Property estate (your Personal Representative or Executor)
- ❑ A Guardian to care for your minor children
- ❑ How to provide for your non-Indian spouse or non-Indian family members

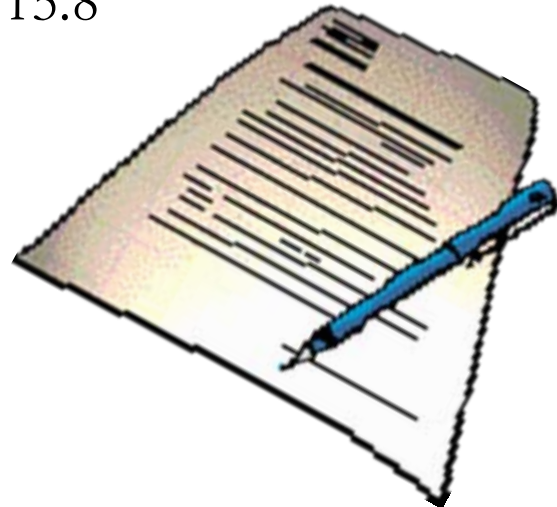
# What is needed for a valid will?

- ❑ You must be over age 18 to make a will
- ❑ You must know what you own and who you want to give it to (Competency)
- ❑ Written (oral not allowed)
- ❑ Dated
- ❑ Your signature witnessed by two people who will receive nothing from the Will (disinterested)
- ❑ Signed by you
- ❑ Notary (optional)



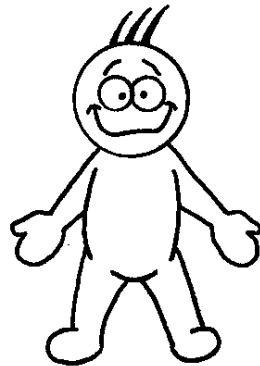
# What is needed for a valid will?

- ❑ To make a Will “self proving”, this means that the people who witnessed your signature won’t be required to testify at the probate hearing that they saw you sign the Will, a form called an affidavit can be filled out at the time you sign your Will.
- ❑ The Federal Affidavit to Accompany an Indian Will form is available on our website, [www.indianwills.org/Attorney.html](http://www.indianwills.org/Attorney.html) and can also be found at 25 C.F.R. Part 15.8



# Consolidation Options with A Will

There are many ways to reconsolidate trust lands, such as leaving all your land interests to one person in a will.



**Lucky**

**Consolidation** - It's also possible to consolidate your lands without having to choose one family member over another:

1. Give a Life Estate to your spouse and/or children so they can enjoy the property and any income from it for their life, then give the remainder to one eligible heir or the Tribe

2. If you hold several different fractionated interests, leave each child one of your interests, or give all interests to one child and give the other children life estates in the trust lands

3. Give to your children as joint tenants with right of survivor (JTROS). A JTROS allows all children to inherit equally then the interest transfers to the surviving children upon the death of a child. The last surviving child takes 100% of your interest in that parcel

4. Request a sale at probate of your fractionated interests with proceeds going to your estate to share equally among the heirs you choose

# Consolidation Options During Your Lifetime

# Gift Deeds

A Gift Deed will transfer your legal interests in lands to another person during your life time, or allow mutual exchange of interests with another co-owner to increase the size of each individual's interest

**Important** - Gift deeds are not revocable once they are approved by the Secretary (BIA). You can't change your mind later.

**Important** – Gift deed applications can take time, even years, so it's a good idea to write a Will too and make sure the will matches the gift deed transfer. That way if the gift deed does not go through before your death, the person you wanted to receive the land will get it.

# Partitioning

“Partitioning” under AIPRA is not a division of land in kind, but rather a consolidation of all interests in a “highly fractionated parcel” to one owner.

25 U.S.C. § 2206(o)(3)

The regular partitioning still exists, where application to the Secretary is made to have your share of a parcel removed from the whole so it becomes your own legal, 100% interest.

## Partitioning Continued

Any trust land co-owner or the tribe may apply to partition a highly fractionated parcel.

A “highly fractionated parcel” is:

A parcel that has 50 or more but less than 100 co-owners of undivided trust or restricted interests, and with no co-owner holding an interest 10 percent or greater; or

A parcel with 100 or more co-owners of undivided trust or restricted interests;



# Partitioning Continued

Written consent is required from:

1. The tribe
2. Those co-owners residing, farming, ranching or maintaining a business on the land for more than three years prior to partition

Consent is also required from at least 50% of the co-owners in that parcel. The Tribes interests are calculated for consent

After consent is received, appraisal of the land is completed and notice of appraised value sent to the tribe and all co-owners of the parcel with right to appeal

## Partitioning Continued

Once appraised value is accepted, the Secretary will open the parcel to competitive bid.

Eligible bidders are:

1. the Tribe
2. any tribal member or eligible to be enrolled tribal member,
3. any other Indian co-owners in that parcel, and
4. any Indian lineal descendant's of original allottee.

# Partitioning Continued

AIPRA recognizes the rights of the tribe and its members to maintain ownership over their land.

Once the highest bid is received, the tribe has a right to match the winning bid made by a non-member Indian if the tribe has a tribal law or resolution reserving this right.

Additionally, the largest interest holder in that parcel also has a right to match the highest winning bid of a non-member if they made a bid during the auction.

If both the tribe and the largest interest holder assert their right to purchase, the largest interest holder wins under AIPRA

# Legal Resources for Tribal Members

# LEGAL RESEARCH WEBSITES

- Tribal Legal Code Development website:  
<http://www.tribal-institute.org/codes/overview.htm>
- Tribal Court Clearing House <http://www.tribal-institute.org/lists/probate.htm>
- FindLaw <http://www.findlaw.com>
- Law.Com <http://www.law.com>
- SearchLaw <http://www.searchlaw.com>
- Virtual Chase <http://www.virtualchase.com>
- Virtual Law Library <http://www.law.indiana.edu/v-lib/>
- National Native American Bar Association <http://www.nativeamericanbar.org/>
- American Bar Associations <http://www.aba.org>

## **GOVERNMENT CONTACT INFORMATION**

- 2008 Winter National Directory of Tribal Leaders and Local Bureau of Indian Affairs Offices (PDF)
  - <http://www.doi.gov/bia/TLD-Final.pdf>
- Bureau of Indian Affairs Website
  - <http://www.doi.gov/bia/>

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