



*Historically, Native nations had specific methods of inheritance that were developed over centuries by individual tribes according to their traditions.*

## Passing our most treasured asset to future generations

**P**rior 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 varied among the tribes depending on their culture.

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

Similarly, in patriarchal societies the males would receive the assets. In other tribes there were 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 who were close to the person or were in need.

These traditions had been developed and practiced for centuries and 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 methods 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, tribes would occupy a traditional area that they were able to defend from, or in agreement with neighboring tribes. In relatively few instances did an individual member or family of the tribe actually "own" the land they occupied. 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 it 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 communal ownership title to smaller areas of land. Fast forward nearly a century to the end of the treaty making period of American history and reservations had been established for the exclusive use and occupation of the tribes. 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.

Passage of the General Allotment Act of 1887, also known as the Dawes Act, provided that reservation lands would be surveyed and parcels allotted to individual tribal members. Lands not allotted would be declared "surplus to Indian needs," and land not retained for tribal or federal purposes was opened to settlement by non-Indians or sold to businesses. 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 and individual Indian ownership were held in trust by the United States, which means that the United States held legal title while the tribe or individual Indian retained beneficial title or the right to use those lands.

Secondly, it resulted in the alienation from Indian ownership of some 90 million 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.





*Having a will gives Indian landowners an opportunity to consolidate interests in trust land or minimize further fractionation.*

*Continued from page 1*

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.

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 assets to pass according to the intestate provisions of AIPRA 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 minimize further fractionation, thereby 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 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.

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*

Cris Stainbrook, ILTF President

*“AIPRA has  
changed the  
landscape”*





*The American Indian Probate Reform Act (AIPRA) changed the way Indian people pass their land to future generations.*

## Traditional beliefs on land stewardship

**A**n 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, it needs to be framed in the complexities of current societies in Indian Country.

Whether it is the jingle dress a younger niece 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 the writer Louise Erdrich so 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 ending 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, but 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 communities' 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) changed the way Indian people pass their land to future generations. AIPRA provides an opportunity for tribal

governments and individual landowners to more fully engage the traditional, cultural, and economic value of the land. Without action by the tribes and/or individual landowners, AIPRA may also have negative results for Indian land.

Each tribe needs to consider adapting its own probate code and legal systems to reflect long-standing traditions. Being a steward and donor of the land for future generations 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 satisfy 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 fractional interests. Lands will eventually move through the probate process to once again be 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.



# Writing a will is more important than ever

**W**ith the passing of the American Indian Probate Reform Act of 2004 (AIPRA), having a will is more critical than ever. In 1983 the Indian Land Consolidation Act [ILCA] was enacted by Congress to deal with the rapidly growing problem of fractionated title of individual allotments. Amendments in 2000 created a provision for majority consent regarding use of inherited trust land. The passage of AIPRA amended ILCA, established a federal probate process and encouraged tribes to enact tribal probate codes.

## The pre-AIPRA probate process

The General Allotment Act (GAA) of 1887 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 to Indian needs and opened to purchase and settlement by non-Indians. The Act and later amendments and actions reduced the original treaty reserved lands by more than two thirds. Over 90 million acres was lost to Indian ownership 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. The allottee cannot transfer, encumber, lease or manage their allotted lands without approval from the Secretary of Interior through the Bureau of Indian Affairs. Under the General Allotment Act, when an allottee passed on, their ownership of interests in trust allotments passed according to state laws of intestate succession.

Prior to 1910, most tribal members could not lawfully make wills, and within a few generations the allotted lands were held by many heirs as undivided interest holders. This created highly fractionated lands which can have dozens, hundreds, even thousands of interest holders.

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 probate codes which could limit inheritance by non-Indians and non-tribal members. The provision in ILCA that required small fractional interests to revert to the tribe was declared unconstitutional. Amendments to ILCA passed in 2,000 but were never fully implemented.

AIPRA became law in 2006, replacing portions of ILCA and creating a federal probate code that defines who will receive an individual's trust property when they don't have a will. AIPRA removes any state laws from determining who will receive the trust property.



## 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. When probating trust property, OHA must follow the tribe's code. Without a tribal code, AIPRA's federal probate code will determine how trust property is distributed, both with and without a will. State intestate succession laws are no longer a part of OHA's probate process.

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.
- ▶ Reduce fractionation by earmarking federal funds for consolidation, and authorizing tribal purchase and sale of ownership interests.

## If an Indian trust landowner 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 exists. A probate judge divides an individual's trust property estate into two categories.

- ▶ Interests greater than 5% without a will
- ▶ Interests are given to the surviving spouse in a life estate, allowing the spouse to receive all income from the land, and continue to live on or use the land, until the spouse dies.
- ▶ When a non-Indian spouse dies, all interests greater than 5% go equally to the

surviving eligible children in undivided interest. If there are no children, then interests go to grandchildren or others. (See chart on page 10)

- ▶ Interests less than 5% without a will
- ▶ The probate court will give the spouse a life estate in only the trust property that was being lived on at the landowner's time of death. All other interests less than 5% will go to a “single heir,” the oldest surviving child or grandchild. If there are no surviving children or grandchildren, interests go to the tribe with jurisdiction or to any co-owners in that allotment if there is no tribe. (See 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. Houses on that trust land (permanent improvements) are no longer considered part of the trust asset (See Glossary on page 12 for definitions). 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 landowner 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 tribe with jurisdiction
- ▶ 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 an omitted spouse or children. If an individual does not want to leave property to their spouse or child, that must be clearly stated in the will or the will can be invalidated if certain conditions are not met.

Alternatively, by using a valid will the decedent can leave their individual trust land in fee simple title in most cases if the will clearly states the intent to do so. The land is then taken out of trust status and is subject to state taxation and regulation. Unless the allotment is part of a family farm, the tribe has a right to prevent the removal of this allotment from trust status 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. For future generations, the most important opportunities are those that allow for consolidation of interests and minimize fractionation. It is more important than ever for each person to talk with their parents, grandparents, siblings and children and write a will.

*"Tribes can create their own probate code"*



# The importance of estate planning

**T**oday Indian families and tribes continue to see valuable land resources diminish as fractionation spreads. A will, properly done, is one of several ways that 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 Indian people recognize the importance of writing a will to disburse their trust land and other assets. 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 consult with a legal services program or an attorney who understands probate laws pertaining specifically to trust land and American Indian Probate Reform Act (AIPRA).

For a current record of your Individual Indian Money (IIM) Account.

**Call (800)678-6836**

## Why write a will?

A will allows individuals to:

- ▶ Choose who they want to receive their trust property and personal property. (Beneficiaries)
- ▶ Choose what property should go to specific people. (Distribution)
- ▶ Choose a trusted person to oversee the administration and distribution of non-trust property after death. (Executor)
- ▶ Select the person they want to care for their minor children. (Guardian)
- ▶ Reconsolidate trust property.
- ▶ Prevent forced purchase sales of trust lands at probate.

## 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 beneficiaries
- ▶ Charitable donations
- ▶ Guardian for minor children
- ▶ Executor to oversee estate distribution

A person must sign their will in front of two witnesses, and the witnesses must sign the will.

They should be disinterested – meaning they are not receiving anything from the will. The witnesses can also sign 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. Although not required, an affidavit makes the will “self-proving” in probate court and can help reduce contests or disputes during the probate process.

When Individuals write a will, it is important to know what trust land interests they have or may have inherited. They should contact the local Bureau of Indian Affairs (BIA) office and request a copy of the Individual Trust Inventory Record (ITI or ITR). This report lists all land interests, including any held outside the individual’s tribe. Individuals should also contact the Office of Special Trustee for American Indians Trust Beneficiary Call Center for a current record of their Individual Indian Money account (IIM). (Telephone: 1-888-678-6836 ext. 0)

## How do I get started?

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. The BIA no longer provides assistance in drafting or storing wills.

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

# Not having a will hinders the probate process

**I**magine 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. The family soon discovers that dad did not write a will. This complicates matters and raises a series of questions:

- ▶ How will his estate be settled?
- ▶ Who gets what assets?
- ▶ How long will the process take?
- ▶ Who will be involved?

In American society, approximately half of the adults have a will that designates an executor of the estate. That individual is responsible for administering the estate – collecting and managing assets, filing tax returns, and settling taxes and debts, as well as distributing assets or bequests as the deceased directed in 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 fractional 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 of complexity to the settlement of the estate.

In the example above, the father’s “undivided interest” in the parcel of land has been passed on to all surviving heirs. This could include a wife, children, grandchildren, brothers, sisters, common-law wife and so forth.

Probate is the legal process of distributing the assets of the deceased’s estate to heirs and can be a long, complicated 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 in the hands of the federal government which determines how it is probated, particularly if there is not a valid will.

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 need to be settled. Funds from the deceased’s Individual Indian Money (IIM) accounts can be used to pay creditors.

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

This means that 40 acres left to four heirs gives each a one-fourth ownership interest in the whole of the allotment rather than each receiving 10 acres. Over just a few generations, this process resulted in parcels of land with hundreds, even thousands of owners – some individuals with interests equivalent to less than a square foot of land. In order to use this land, majority consensus must be reached by all fractional 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 Bureau of Indian Affairs (BIA) probate clerk?

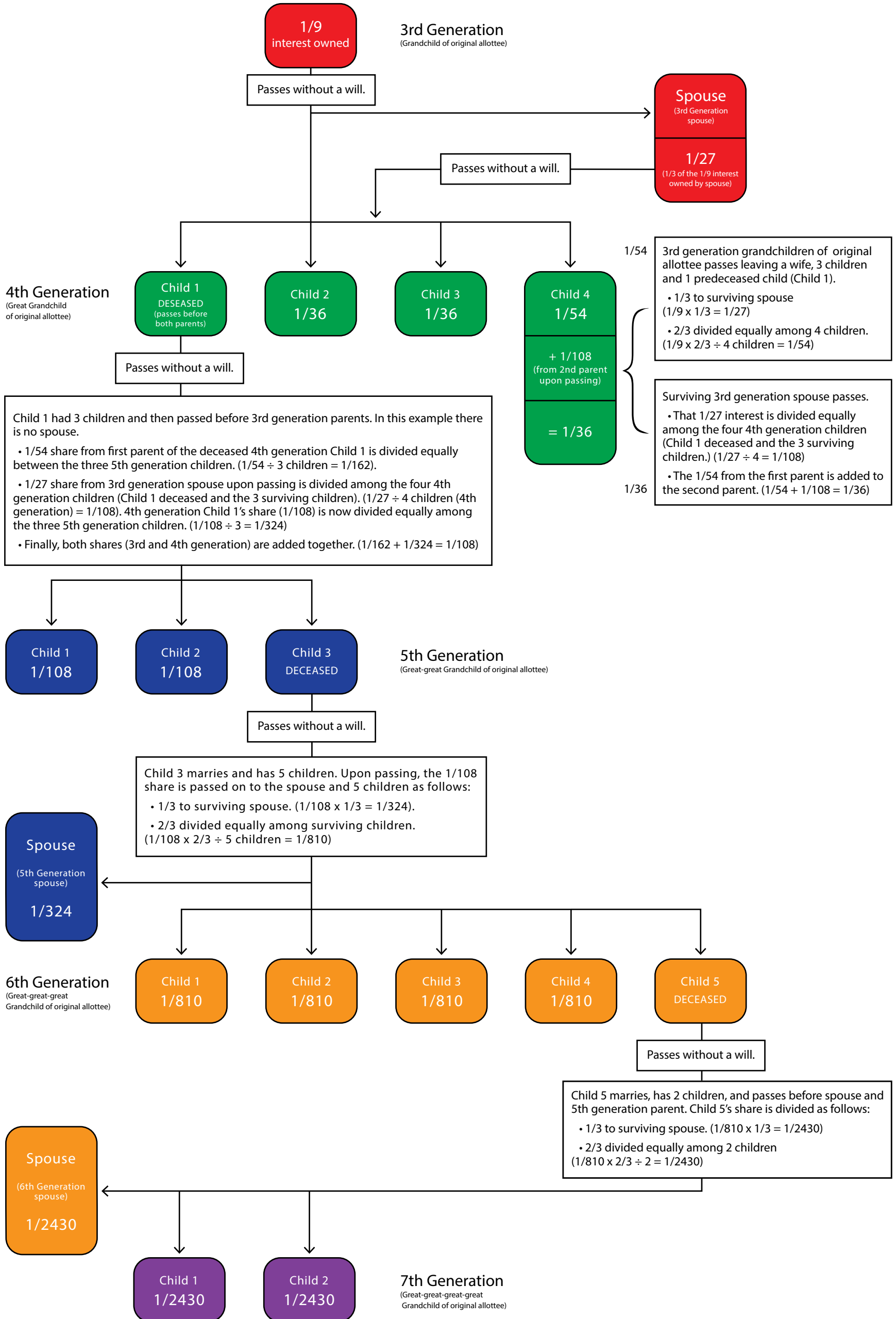
It is important to note that the BIA has jurisdiction over trust land, but not fee land. Therefore, fee land and other non-trust assets would be probated through tribal or state probate systems.

## Where do I get this information?

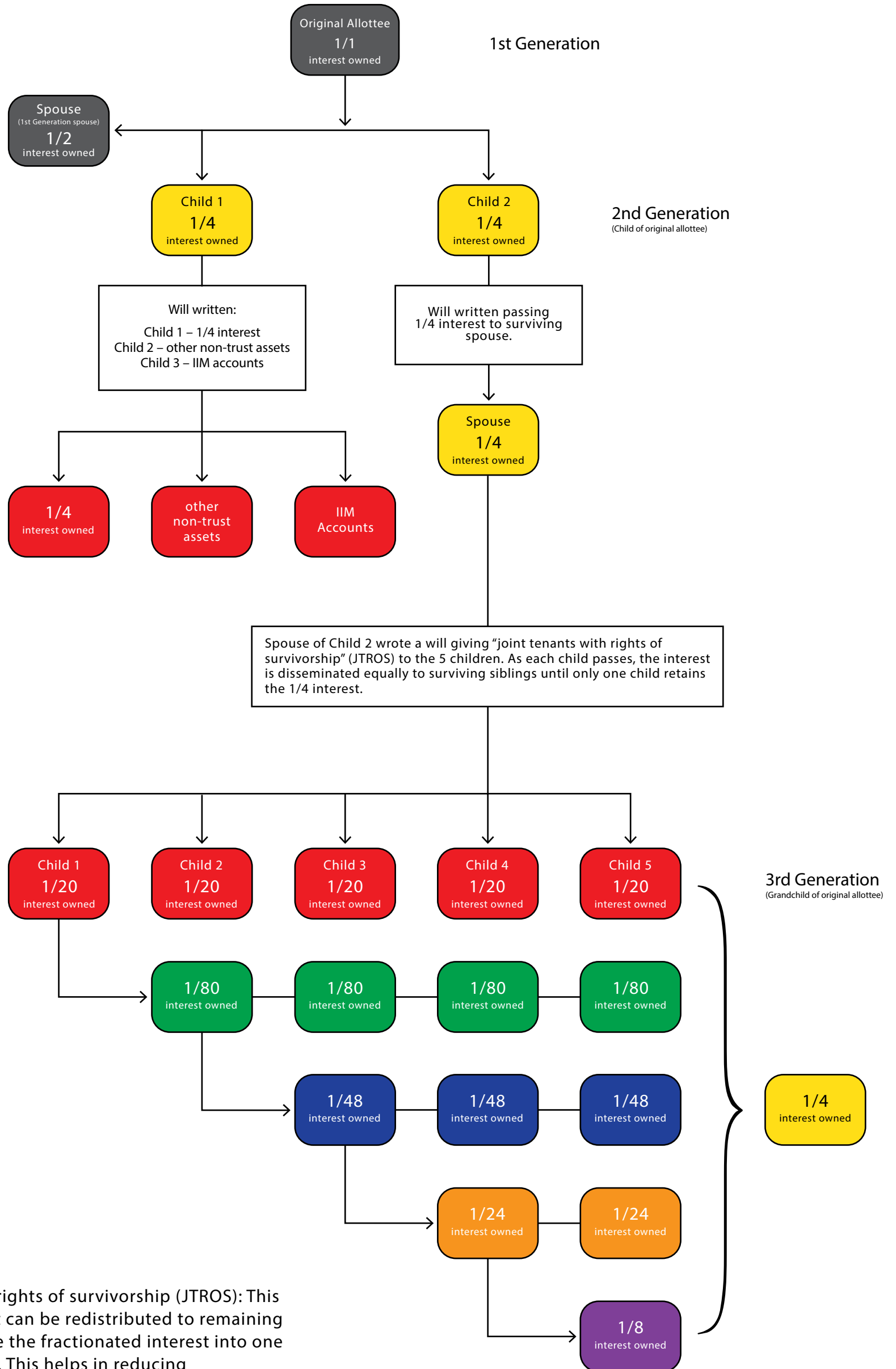
- ▶ The BIA probate clerk has all information related to trust assets.
- ▶ Fee land information is obtained from the County Register of Deeds. Information on other assets and liabilities will need to be collected through other means.

*"Probate can be a long, complicated process."*

# 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.





*Writing a will ensures that an Indian landowner's interest in trust land will be distributed to family members according to his or her wishes.*

## 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 estate planning provides 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 of 1887 (also known as the Dawes 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 more than 130 years, resulting in thousands of Indian interest holders.

Interests in trust land owned by an Indian person who died without a valid will prior to June 20, 2006 – the effective date of the American Indian Probate Reform Act (AIPRA) – would pass according to state laws of intestate succession. For deaths after that date, 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 half 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 and a spouse with four children, the spouse

receives half and the other half is shared equally by the four children (a 1/8<sup>th</sup> 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 which creates tiny, undivided interests owned by hundreds of people.

### Indian Land Consolidation Act – Amendments of 2000

There is a provision for majority consent regarding use of inherited trust land using a sliding scale based on number of fractional interest owners. Consent requirements are:

- ▶ 1 to 5 owners – 100%
- ▶ 6 to 10 owners – 80% majority
- ▶ 11 to 19 owners – 60% majority
- ▶ 20 or more owners – 51% majority

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.

In 2003, arguing for an improved probate process and to eliminate probate backlog, a Bureau of Indian Affairs (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 11 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 fractional interest owners.

Estate planning, including will writing, can ensure that interest in land will be distributed according to the wishes of the deceased which can be done in a way that stops or reduces fractionation. With a will, a person may leave their property to anyone they choose and 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 relatively straightforward process that can reduce the complexities of the probate process, prevent land title 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!



# The probate primer

Adapted from "What Do I Need To Know About Probate When My Indian Loved One Passes Away?"  
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## The probate process

**Probate is a legal process that takes place after a person dies. It usually includes:**

- ▶ Proving in court the person is deceased.
- ▶ Proving in court a person's will is valid.
- ▶ If no will, determining who will inherit the property.
- ▶ Identifying and listing the property.
- ▶ Appraising the property (determining value).
- ▶ Paying outstanding debts and taxes.

*Distributing the property by court order, saying who now owns interests in any land.*

**There are two kinds of probate proceedings for Indian people:**

- ▶ State probate
- ▶ BIA/Office of Hearings and Appeals probate

**A probate could include State and BIA probate:**

- ▶ Only the BIA can probate Indian trust assets (e.g., a share in trust allotment) but not other property. If the estate includes both Indian trust assets and other property, it may need to go through both state and BIA probate.
- ▶ It is 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" owned by the Indian person (not land held in trust).

Applicable tribal probate code takes precedence over 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 probate laws vary, and it is important to know the process in your state.
- ▶ State probate deals with property that is not managed by the BIA.
- ▶ State court determines what property and debts the decedent has.
- ▶ State court decides how the property will be distributed.
- ▶ Usually involves paperwork and court appearances by lawyers.
- ▶ Lawyers and court fees are usually paid from the estate's assets.
- ▶ Lawyer's fees are usually a set percentage of the estate's value.

**Assets in state probate include:**

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

**Debts include:**

- ▶ Final bills, such as utility or credit card bills
- ▶ Personal loans
- ▶ Court Judgments
- ▶ Taxes
- ▶ Healthcare costs
- ▶ Death and funeral costs

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

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

## BIA probate

**Assets managed by the BIA must go through federal probate, which involves only trust assets such as:**

- ▶ Land held in trust
- ▶ Restricted property
- ▶ Individual Indian Money (IIM) accounts
- ▶ If a person has trust property the BIA determines who will receive that property.

**How the BIA process begins:**

- ▶ When someone informs the BIA about the person's death
- ▶ After the BIA has received a copy of the death certificate
- ▶ If the death certificate cannot be found, an obituary 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 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. 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
- ▶ Lawyers are needed to provide assistance

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

- ▶ Tribal enrollment identification
- ▶ 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 completes a probate package that includes:**

- ▶ Evidence of death
- ▶ A completed OHA-7 Form: a family tree showing the relatives and indicating which are Indian.
- ▶ Certified inventory of trust real property
- ▶ List of income sources
- ▶ All wills, codicils, or repeal of wills
- ▶ Debts owed
- ▶ Probate specialist/clerk's affidavit that all efforts were made to locate beneficiaries

The probate specialist/clerk reviews the completed package and 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 or may be a BIA staff member.)

**After the probate package is referred to the BIA deciding official, the BIA sends notice to the heirs informing 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 package has been sent
- ▶ Who the BIA deciding official is

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

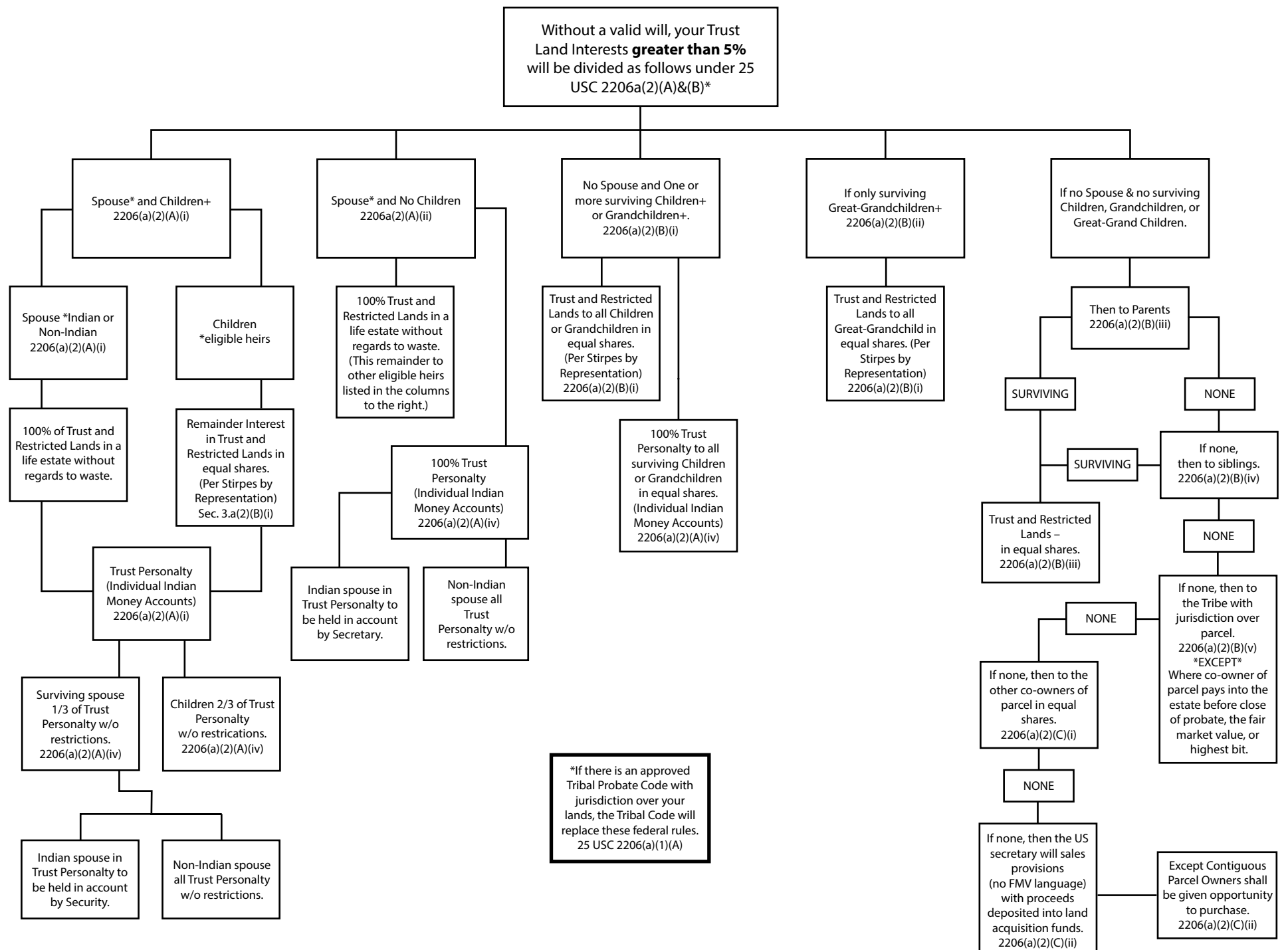
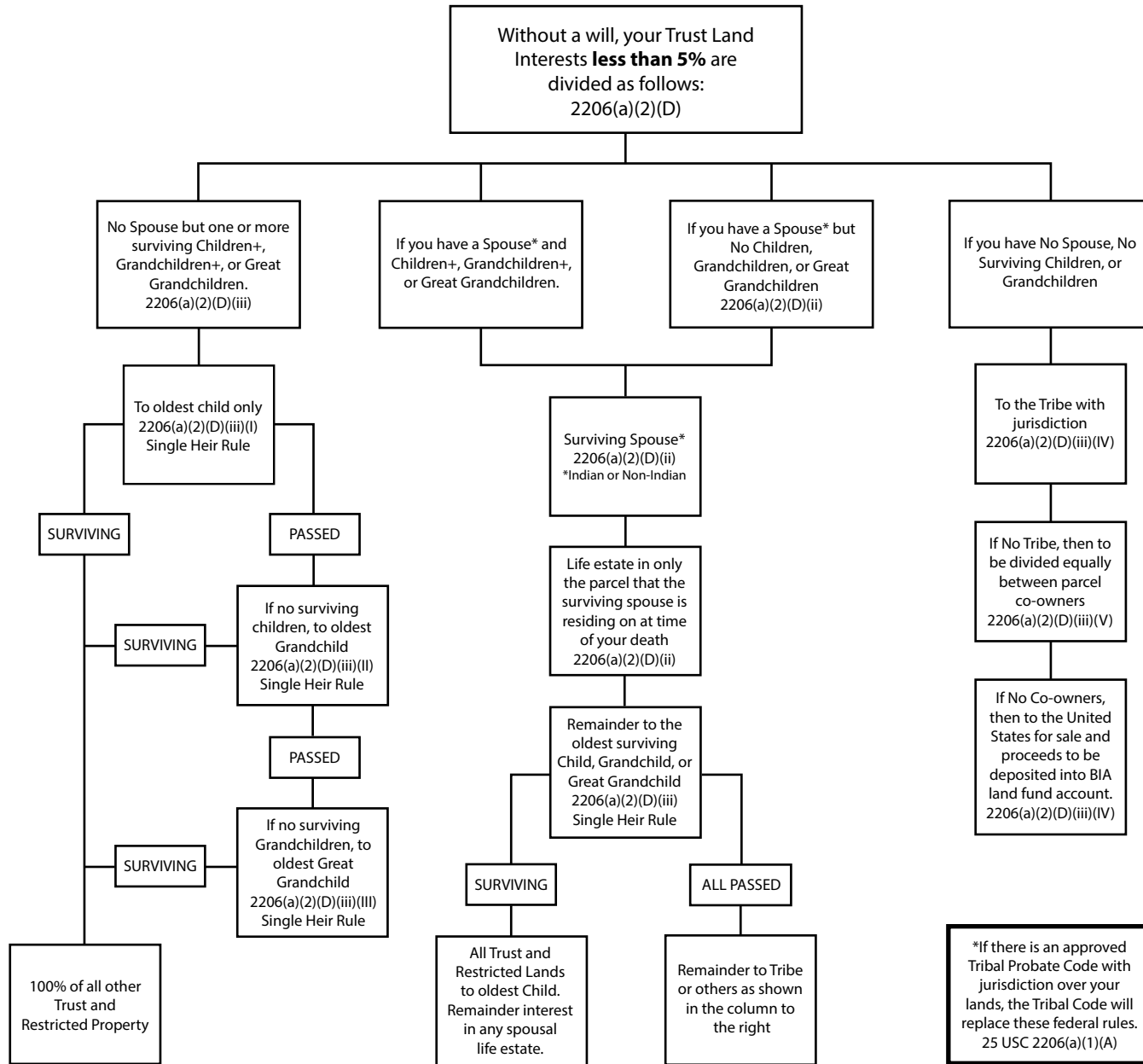
- ▶ If no special issues arise during the hearing, the BIA deciding official issues a written decision or order and sends it to all interested parties.

**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
- ▶ Judgements against the estate
- ▶ All other general claims

BIA probate generally takes longer than state probate. It usually ranges from 1-4 years.

# American Indian Probate Reform Act of 2004





# The BIA probate backlog problem

**T**he Bureau of Indian Affairs (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 60 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 fraud which proliferated in the late 1800s and early 1900s.

In some cases tribal membership and ‘blood quantum’ rest on the sometimes-fraudulent genealogies and heirship determinations of the distant past. Attempts to probate trust land and assets of a long-gone great-great-uncle can be difficult to say the least. Compiling and verifying official documentation of numerous heirs can be time consuming. It can take a year or more of research by the BIA before the probate case is ready to send to the administrative law judge.

Finding missing heirs continues to be a problem for the BIA. Under the provisions of 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.



*Writing a will can reduce the amount of time it takes to go through the lengthy BIA probate process.*

The paper trail can also be obscured by the BIA’s use of multiple names for the same person. English names, “Indian names,” variable phonetic spellings of Indian names, and turn-of-the-century Indian Agents’ common use of ‘generic’ names in official records – for example, the Anishinabe words, “Ah-ke-wain-zee” [old man], “Que-we-zaince” [boy], and “Equay” [woman] – compounds the problem.

Locating the collateral heirs of someone who died without surviving children a half-century ago is made more complicated by the BIA’s policies of relocation and off-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 the process and causes further probate backlog as cases are reopened to determine rightful heirs for redistribution of fractional interests.

A standard BIA probate may take up to two years to complete and distribute trust assets. Here are four things an individual can do to accelerate the probate process.

- ▶ Provide direct notice of a person’s death to the BIA. Heirs should not assume that the Bureau will know or take necessary steps to determine an Indian’s death. The family should obtain a certified copy of the Death Certificate and deliver it to BIA Probate.
- ▶ Provide copies of all documentation requested by BIA Probate in a timely manner.
- ▶ Work with the tribe’s enrollment department and develop a good rapport with their staff. They may have the most accurate records to help determine/ demonstrate family relationships for heirship eligibility.
- ▶ Be honest in your dealings with BIA in preparing the probate package and with the deciding official during the probate hearing. Honesty and cooperation will reduce or eliminate the need to resolve conflicts with or challenges to the process.

To see if you are among the BIA’s “Whereabouts Unknown” go to:

[www.ost.doi.gov/LocatingIIM/whereabouts.html](http://www.ost.doi.gov/LocatingIIM/whereabouts.html)

## The Message Runner



ILTF first published the *Message Runner* in 2002 to provide Indian people and others with much-needed information about Indian land tenure issues. Previous volumes include:

- Vol. 1** — “Restoring Indian Lands.” Major issues surrounding Indian land tenure along with solutions and strategies.
- Vol. 2** — A primer on Indian estate planning and probate, including the 2004 American Indian Probate Reform Act (AIPRA). The issue you are reading is a 2019 update of Vol. 2.
- Vol. 3** — “Rights-of-Way.” History of rights-of-way in Indian Country, including a helpful how-to section for landowners and tribes.
- Vol. 4** — “From Removal to Recovery: Land Ownership in Indian Country,” an historical account of Indian land ownership from pre-contact to today.

**Vol. 5** — “Cutting through the Red Tape: An Indian Landowner’s Guide to Reading and Processing Federal Forms.”

**Vol. 6** — “Native Land Law: Can Native American People Find Justice in the U.S. Legal System?”

**Vol. 7** — “Now hiring! Exploring career opportunities in tribal land.”

**Vol. 8** — “Appraisals are at the heart of federal trust responsibility.”

**Vol. 9** — “Managing Indian land in a highly fractionated future.”

To learn more about the *Message Runner*, visit [www.iltf.org/resources/publications](http://www.iltf.org/resources/publications). To order copies, email [info@iltf.org](mailto:info@iltf.org) or call (651)766-8999.

# Glossary

## 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 signed by a person who 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 notary).

## 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. Separate rules may apply to Alaska and California tribes.

## Assets

The property the person owned prior to death that has monetary value. 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 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 must be written and signed (or executed) with the legal formality of a will. 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

The 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 descendants 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.

## 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 interests of the deceased, following the wishes expressed in his or her will.

## Fractionated Land Title

A term commonly used to describe trust land that has multiple undivided interests held by many individuals as a result of ownership or original allotments passing to beneficiaries through division of the title for many generations.

## Fee Land

Land held in fee simple; 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. The Act allocated parcels of reservation 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 ended with the Indian Reorganization Act of 1934, but only after 90 million acres had been lost to tribal ownership.

## Heir

A person who is eligible to receive property from an individual who dies without a will (Intestate).

## Indian as defined by AIPRA

For estates of people who died 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 Oct. 27, 2004; (d) meets the definition of "Indian" under the Indian Reorganization Act; or (e) in California it 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 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 at the time of death that reduce the value of an estate, including mortgages, liens (records of debt), taxes and easements.

## Life Estate

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

## Permanent Improvements

Covered permanent improvements are buildings, other structures and associated infrastructure attached to a parcel of trust property. These are not considered trust assets and are therefore subject to the state probate process.

## 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 before 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 their own tribal probate codes as do states and now, under AIPRA, so does the federal government.

## Indian Trust Assets

Assets to which the United States owns legal title. Examples: trust land, restricted land, and Individual Indian Money accounts.

## Undivided Interest

Common interests in the title of the whole parcel owned by two or more people. Owners of undivided interests do not own a specific physical piece of a parcel of land but rather a percentage interest in the title of the whole.

## Will

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.



The Indian Land Tenure Foundation (ILTF) is a national, community-based organization focused on American Indian land recovery and management. ILTF's primary aim is to ensure that all reservation and important off-reservation lands are owned and managed by Indian people and Indian nations.

As a community foundation, ILTF relies on funding from private foundations and donations from Indian nations, corporations and individuals to support its programming in Indian Country. Please consider making a donation to the Indian Land Tenure Foundation today.

To learn more about our work and programs, and to make a donation, visit our website at: [www.iltf.org](http://www.iltf.org).

## Indian Land Tenure Foundation

151 East County Road B2  
Little Canada, MN, 55117-1523  
651-766-8999  
[www.iltf.org](http://www.iltf.org)

Fall 2019, Volume 2\*