

## **“Navigating the Probate Process” Webinar: Questions & Answers**

On Jan. 14, 2021 the Indian Land Tenure Foundation (ILTF) and the National Tribal Land Association (NTLA) co-hosted the webinar, "Navigating the Probate Process." The webinar elaborated on the Indian probate process and some of its institutional challenges, along with current and long-term challenges to the probate process overall. The panelists discussed the importance of properly executed wills and their storage, and provided an idea of what happens during a hearing and decisions stemming from it.

The panel included three representatives of the Probates and Hearing Division of the Office of Hearings and Appeals: John R. Payne, Chief Administrative Law Judge (Sacramento, CA); Mary Thorstenson, Acting Supervisory Indian Probate Judge (Rapid City, SD); and Christine Kelly, Supervisory Paralegal Specialist (Albuquerque, NM). The panel was moderated by Nicholas Emmons, Program/Development Officer with the Indian Land Tenure Foundation.

As part of the webinar, viewers were able to submit questions to the panelists who have now provided detailed answers. Responses were provided by Chief Administrative Law Judge Payne, with input and review by Judge Thorstenson and Ms. Kelly. The responses represent Judge Payne’s opinion and not necessarily that of the agency. The acronym “OHA” refers to the Office of Hearings and Appeals.

### **Q: At what stage when the holder of an outstanding loan balance file for potential probate consideration?**

**A:** By regulation, and for most cases, a claim must be filed before the conclusion of the first hearing. 43 C.F.R. 30.140(a).

Cases where the decedent owned no land interests and had less than \$5,000 in the Individual Indian Money account may be processed using a “summary” proceeding. 43 CFR 30.200. In a summary proceeding, no hearing is held, and the claim must be filed before the case is submitted to OHA by BIA. There is an exception for claims from an heir or devisee (e.g. someone paid for a headstone); these can be filed within 30 days of the notice of summary decision. 43 C.F.R. 30.140(b).

### **Q: What is the date to decide if federal or state law determines who the heirs are?**

**A:** The date is June 20, 2006. If the person died on or after June 20, 2006, heirs are determined under federal law (generally, the federal probate code at 25 U.S.C. 2206(a), but there are also special federal statutes that apply to specific areas, as well as approved tribal probate codes that apply to specific areas). If the person died before June 20, 2006, heirs are determined using state law.

Alaska is an exception. State law is still used to determine heirs for restricted land in Alaska, regardless of when the person died.

### **Q: When a decedent's loan from a tribal lender allows collection from “...first leases, land sales, timber sales and/or any trust income as soon as available” is that a limited recourse**

**loan or an exclusive remedy? In other words, does that preclude recovery from decedent's assets not mentioned?**

**A:** I don't know. That sounds like an issue that would have to be resolved in a specific case. Generally, only funds in the IIM account on the date of death, or due on or before that date, can be used to pay a claim filed in a probate case. 43 CFR 30.146. Claims may be disallowed because there are no funds to pay the claim.

**Q: How is OHA handling the probate of covered structures that are not covered by a lease?**

**A:** OHA only probates trust or restricted property. 43 CFR 30.102. BIA has the responsibility to maintain title records on trust or restricted property and include an inventory of a decedent's trust or restricted property as part of the probate packet submitted to OHA. The Interior Board of Indian Appeals has made clear that "the authority of a probate judge extends only to that property identified on the certified inventory prepared by [BIA] or otherwise identified as trust property by BIA." *Estate of Catherine Millie Janis-Red Feather*, 63 IBIA 195 (2016); see also *Barbara E. Guerrero v. Northwest Regional Director, Bureau of Indian Affairs*, 63 IBIA 346 (2016) (upholding a BIA finding that a house located on trust property was not itself trust property). Unless a permanent improvement is included in the inventory submitted by BIA with the probate packet, or otherwise identified as trust or restricted property by BIA, OHA will not consider the permanent improvement to be part of the decedent's trust or restricted property, and will not direct distribution of the improvement.

Federal law does address distribution of permanent improvements at 25 U.S.C. 2206(a)(2) [there are unfortunately two "2"s in 2206(a), so this is the second "2", right before 2206(b)] and at 2206(h)(1)(B); see also 43 CFR 30.236.

**Q: Who is tracking title ownership of permanent covered structures? During probate, who or what entity does OHA turn to for ownership information?**

**A:** OHA relies exclusively on BIA for information about the ownership of trust or restricted real property (land).

**Q: Would it be acceptable to scan in the hearing docket notice that is supposed to be physically posted and post it on the tribe's website or Facebook page? With my tribe, it would reach substantially more people.**

**A:** Yes, that's a great idea. The information on our posted notices is the kind of information that can be shared publicly – we do not include dates of birth or personal addresses, for example. We are developing a process to post these notices on OHA's website ([www.doi.gov/oha/organization/phd](http://www.doi.gov/oha/organization/phd)).

**Q: Judge Payne stated that you cannot have a trust on a trust. Where is that law, regulation, or case opinion written?**

**A:** My statement may have been overly broad; I'm not aware of a universal restriction in having a "trust on a trust." It may be possible for private property. In the context of Indian trust or

restricted property, my statement was based on the concept that the federal government holds land in trust for a certain limited set of persons or entities. Generally that will be American Indians and federally recognized Indian tribes, but it may also include, for example, certain descendants of American Indians. On the other hand the federal government does not hold property in trust for non-Indians, so that if a non-Indian inherits trust or restricted property, the property loses its trust or restricted status. *Estate of Dana Knight*, 9 IBIA 82, 86 (1981) (“[T]he Federal trust responsibility over allotted land or any fractional share thereof is extinguished as to that interest immediately upon its acquisition by a non-Indian.”). The federal government has no more authority to hold land in trust for a private entity such as a private trust than it does for a non-Indian.

In any event, as discussed in the presentation, and with one exception, trust or restricted land must be devised to a “person” – a word that is specifically defined to mean “natural person”. 25 U.S.C. 2206(b)(1)(A) and (b)(2)(A) (read them together and note the word “only”); 2201(8). The single exception is that property may be devised to the Indian tribe with jurisdiction over the land. 25 U.S.C. 2206(b)(1)(A)(iii).

**Q: When does our First Rights of Refusal come into play and how do we process it?**

**A:** I’m honestly not sure what is being asked here. Can you clarify?

**Q: I am told by our Superintendent that the family has first rights to purchase the lands that are being probated and those family members are not enrolled or don't qualify to inherit and before AIPRA lets the Tribes take these land?**

**A:** I can’t speak to what has been shared with you, but what I can say is that generally, while a co-owner of trust or restricted land can purchase property at probate, the co-owner can do so only with the consent of the heirs or devisees who would otherwise inherit. If the tribe is the designated heir under AIPRA, the tribe would have to consent to the purchase before it could proceed. 43 C.F.R. 30.163(a).

The one exception is a purchase option that comes into play when the Decedent owned at least 5% of an allotment. If a tribe is the heir of such an interest (meaning no children, grandchildren, parents, or surviving siblings who are eligible heirs), then a co-owner of the property can purchase the interest without the consent of that tribe. This is laid out at 25 U.S.C. § 2206(a)(2)(B), in the paragraph after subsection “(v).” If a co-owner is interested in purchasing a “5% or more” interest that a tribe would otherwise inherit, this issue should be raised with the judge at or before the hearing.

**Q: I am wondering how to overcome the presumption of joint tenancy 25 U.S. Code § 2206(c)(1) when leaving restricted interests in the same parcel of land to more than one person? The statute says there is a presumption of joint tenancy unless there is "clear and express language in the devise stating that the interest is to pass to the devisees as tenants in common." Does this require magic words? Is there a way appeal a finding of joint tenancy without magic words?**

**A:** For me, the clearest indication is a will that states specifically that the named devisees are to inherit their interests as “tenants in common.” Many wills do just that. Given the requirement in the statute for “clear and express language” to overcome the presumption of joint tenancy, a will that does not specify “tenants in common” may well be read as devising that property in joint tenancy.

Note that the presumption of joint tenancy does not apply to wills executed before June 20, 2006, even if the person died after that date. 25 U.S.C. 2206(c)(2).

**Q: What if you have a will that was notarized and witnessed by an interested party? Does the notary trump the interested party?**

**A:** It’s somewhat confusing, but “interested party” and “disinterested witness” are using “interest” to mean two different things. An “interested party” is a defined term in the regs, and refers to the people or entities (like tribes) who have an interest in the overall probate case, such as potential heirs or claimants. A “disinterested witness” means someone who would not directly and immediately benefit from having the will approved. The following cases have useful discussions of the “disinterested witness” question: *Estate of Orville Lee Kaulay*, 30 IBIA 116 (1996); *Estate of Ernestine Lois Ray*, 33 IBIA 92, 100 (1998); *Estate of Lucille Kingbird Owens*, 46 IBIA 306 (2008).

A valid will must be attested (signed) by two disinterested adult witnesses. A notary can be one of those witnesses if the notary is “disinterested.” *Estate of Edward Kappairsruk Ramoth, Sr.*, 56 IBIA 271 (2013).

**Q: I have a question about homes on tribal trust land that have no deeds. How can we get the decision about the home in the probate system?**

**A:** We often get these kinds of questions at hearing, and I’m glad you raised it. I understand that many tribes subdivide tribally owned trust land and “assign” lots of that land to individual tribal members for homes and so on (sometimes these are referred to as “tribal assignments”). Although land owned by a tribe can certainly be “trust land,” it is not the type of trust land that OHA probates. We only probate land interests owned by individuals. I suggest contacting the relevant tribe for information about this type of property and what happens to the home on tribal trust land after the owner has died.

**Q: If trust property is devised to a non-eligible person, does the Court automatically convert it to a life estate or fee bequest?**

**A:** If trust land is devised to someone who cannot inherit in trust or restricted status, it is a matter of interpreting the will to find the testator’s intent. The most common example would be the devise of property to a non-Indian spouse. Property devised to a non-Indian spouse may be distributed to that spouse in fee status under 25 USC 2206(b)(2)(A)(ii), if the judge finds that is the best reading of the will (it is the intent of the testator that controls). The *Estate of Harold Arthur Mathews*, 65 IBIA 61 (2017) has a good discussion of this issue. Note that a tribe with

jurisdiction over a land interest has the option to purchase that interest if it would otherwise pass to a non-Indian through a will. This is laid out at 25 USC 2205(c) (yes, 2205, not 2206).

Property located on a reservation where the tribe voted to accept the terms of the Indian Reorganization Act can generally not be transferred in fee status under a will. 25 USC 2206(b)(2)(B)(iii). An old document that sets out IRA elections and results can be found using the internet search "Haas IRA pdf." It is possible that the will would be read to give the ineligible devisee (e.g., non-Indian spouse) a life estate in property on an IRA reservation.

**Q: Does an existing HUD 184 loan meet the requirement to be Trust Property for the improvement?**

**A:** This is a question that's better presented to BIA. OHA relies on BIA to identify the trust or restricted property at issue in a probate case.

**Q: Would wills that have been recorded, such as with County Records Office, be acceptable?**

**A:** Yes, if the original will is with the County Records Office, and that office provides a certified copy of the original, that is acceptable.

**Q: Wanted to confirm if I heard correctly: If an aunt did not have any children, can she will her nieces or nephews her trust property?**

**A:** It depends. The set of people who can inherit in trust are: 1) lineal descendants; 2) co-owners; or 3) those who meet the definition of "Indian" at 25 U.S.C. 2201(2). This is laid out at 25 USC 2206(b)(1)(A). The nieces and nephews are not lineal descendants of the aunt, so in order for them to be eligible to inherit property in trust or restricted status by will, they must meet the definition of Indian at 25 U.S.C. 2201(2). Enrolled members of a federally recognized Indian tribe meet that definition, for example, and so do those who are eligible to be enrolled members of a federally recognized Indian tribe. If nephews or nieces do not meet the definition of "Indian," they may still be able to inherit the property, but in such cases it may pass to them in fee status as private property, losing its trust or restricted status. And they may not even be able to inherit in fee status, if the land is located on a reservation where the tribe voted to accept the terms of the Indian Reorganization Act. 25 USC 2206(b)(2)(B)(iii).

**Q: How does OHA or the ALJ verify or reconcile traditional Indian marriages when there isn't a marriage certificate recorded?**

**A:** Generally, through testimony or other evidence about the customs and traditions that make up a traditional Indian marriage, and evidence that these customs and traditions were followed. Suggest reviewing *Estate of Matthew Cook*, 9 IBIA 52 (1981) for a good discussion of this issue.

**Q: Is there a difference in the time of probating a testate versus intestate estate?**

**A:** Usually not. There can be if the will is contested, or OHA does not learn of the will until someone brings it into the hearing, or the will is vague and requires interpretation. A complex

will can take longer because the decision is harder to write, and care must be taken to be sure the decision accurately reflects the intent of the testator.