



WRITING AIPRA COMPLAINT WILLS

Casey Ross and Lori Harless
American Indian Wills Clinic
Oklahoma City University School of Law

25 CFR PART 15

15.3 WHO CAN MAKE A WILL DISPOSING OF TRUST OR RESTRICTED LAND OR TRUST PERSONALTY?

Any person 18 years of age or over and of testamentary capacity, who has any right, title, or interest in trust or restricted land or trust personality, may dispose of trust or restricted land or trust personality by will.



15.4 WHAT ARE THE REQUIREMENTS FOR A VALID WILL?

You must meet the requirements of § 15.3, date and execute your will, in writing and have it attested by two disinterested adult witnesses.



TESTATE DISTRIBUTION

- To maintain the interest in TRUST status, the testator can will it to:
 - A lineal descendant
 - A co-owner
 - The Tribe
 - Any Indian



A TESTATOR MAY...

- Devise a LIFE ESTATE to any other person, but still maintain the property's trust status, so long as the remainder vests in:
 - A lineal descendant of the testator
 - A co-owner
 - The Tribe
 - Any Indian



CLOSELY READ!

- If the testator wants to devise the property in fee to:
 - A lineal descendant of the testator
 - A co-owner
- He must clearly state such intention that the interest passes in fee.
- If the testator wants to devise the property in fee to:
 - The Tribe
 - Any Indian
- **HE CANNOT!**
- If the testator devises the property to a non-Indian, it will go in fee status.



PRESUMPTION OF JOINT TENANCY

- If a testator devises trust or restricted interests in the same parcel of land to more than 1 person, in the absence of clear and express language in the devise stating that the interest is to pass to the devisees as tenants in common, the devise shall be presumed to create a joint tenancy with right of survivorship.



PRETERMITTED SPOUSES

- If the testator marries after execution of the will, the surviving spouse shall receive the intestate share he or she would have been entitled to but-for the will.
- SEE NEXT SLIDE FOR EXCEPTIONS!



SPOUSE WILL NOT INHERIT INTESTATE SHARE IF . . .

- The will was executed before AIPRA
 - Or
- The spouse is non-Indian and the testator devised the trust land to one or more Indians.
- Or
- It appears that the will was made in contemplation of marriage
 - Or
- The testator provided for the spouse outside of the will and that intent for such transfer to serve in lieu of a testamentary provision can be reasonably inferred.



WHAT IF TESTATOR WAS MARRIED AT THE TIME OF THE WILL?

- If testator left spouse out, spouse will inherit intestate share
SO LONG AS
- The testator and surviving spouse were continuously married without legal separation for the 5-year period preceding the decedent's death. OR
- The testator and the surviving spouse have a surviving child together. OR
- The surviving spouse has made substantial payments toward the purchase or improvement of the trust land. OR
- The surviving spouse is under binding obligation to continue making loan payments for the trust land for a substantial period of time.
- **THIS CLAUSE WILL NOT APPLY IF THE TESTATOR ADEQUATELY PROVIDED FOR THE SURVIVING SPOUSE AND ANY MINOR CHILDREN OUTSIDE OF THE WILL.**



WHAT IF THE TESTATOR GETS A DIVORCE AFTER EXECUTION OF THE WILL?

- A surviving former spouse shall not be treated as a surviving spouse in intestate succession. (separation does not count as divorce)
- As of the effective date of any divorce, the former surviving spouse shall not inherit, EVEN BY WILL, unless the will provides for the devise notwithstanding a divorce. Former surviving spouse shall be treated as having predeceased the testator.



PRETERMITTED CHILDREN

- If the testator executed the will before the birth or adoption of a child AND
- The omission was a product of inadvertence, rather than intentional omission THEN
- The omitted children shall inherit the intestate share.



ADOPTED CHILDREN

- If child is given up for adoption by the decedent, the child shall not be considered the heir of the decedent.
- If a child is adopted by the decedent, the child shall be considered the heir of the decedent so long as there was a legal adoption decree.



15.9 WHAT INFORMATION MUST BE INCLUDED IN AN AFFIDAVIT FOR A SELF-PROVED WILL, CODICIL, OR REVOCATION?

(a) A testator's affidavit must contain substantially the following content:

Tribe of _____ or

State of _____

County of _____.

I, _____, swear or affirm under penalty of perjury that, on the _____ day of _____, 20_____, I requested _____ and _____ to act as witnesses to my will; that I declared to them that the document was my last will; that I signed the will in the presence of both witnesses; that they signed the will as witnesses in my presence and in the presence of each other; that the will was read and explained to me (or read by me), after being prepared and before I signed it,

and it clearly and accurately expresses my wishes; and that I willingly made and executed the will as my free and voluntary act for the purposes expressed in the will.

Testator



(b) Each attesting witness' affidavit must contain substantially the following content:

We, _____ and _____, swear or affirm under penalty of perjury that on the ____ day of _____, 20____, _____, of the State of _____, published and declared the attached document to be his/her last will, signed the will in the presence of both of us, and requested both of us to sign the will as witnesses; that we, in compliance with his/her request, signed the will as witnesses in his/her presence and in the presence of each other; and that the testator was not acting under duress, menace, fraud, or undue influence of any person, so far as we could determine, and in our opinion was mentally capable of disposing of all his/her estate by will.

Witness

Witness

Subscribed and sworn to or affirmed before me this ____ day of _____, 20____, by _____ testator, and by _____ and _____, attesting witnesses.

(Title)



15.104 DOES THE AGENCY NEED A DEATH CERTIFICATE TO PREPARE A PROBATE FILE?

- (a) Yes. You must provide us with a certified copy of the death certificate if a death certificate exists. If necessary, we will make a copy from your certified copy for our use and return your copy.
- (b) If a death certificate does not exist, you must provide an affidavit containing as much information as you have concerning the deceased, such as:
 - (1) The State, city, reservation, location, date, and cause of death;
 - (2) The last known address of the deceased;
 - (3) Names and addresses of others who may have information about the deceased; and
 - (4) Any other information available concerning the deceased, such as newspaper articles, an obituary, death notices, or a church or court record.



15.105 WHAT OTHER DOCUMENTS DOES THE AGENCY NEED TO PREPARE A PROBATE FILE?

In addition to the certified copy of a death certificate or other reliable evidence of death listed in § 15.104, we need the following information and documents:

- (a) Originals or copies of all wills, codicils, and revocations, or other evidence that a will may exist;
- (b) The Social Security number of the decedent;
- (c) The place of enrollment and the tribal enrollment or census number of the decedent and potential heirs or devisees;
- (d) Current names and addresses of the decedent's potential heirs and devisees;
- (e) Any sworn statements regarding the decedent's family, including any statements of paternity or maternity;
- (f) Any statements renouncing an interest in the estate including identification of the person or entity in whose favor the interest is renounced, if any;
- (g) A list of claims by known creditors of the decedent and their addresses, including copies of any court judgments; and
- (h) Documents from the appropriate authorities, certified if possible, concerning the public record of the decedent, including but not limited to, any:
 - (1) Marriage licenses and certificates of the decedent; 10
 - (2) Divorce decrees of the decedent;
 - (3) Adoption and guardianship records concerning the decedent or the decedent's potential heirs or devisees;
 - (4) Use of other names by the decedent, including copies of name changes by court order; and
 - (5) Orders requiring payment of child support or spousal support.

15.107 WHO PREPARES A PROBATE FILE?

The agency that serves the tribe where the decedent was an enrolled member will prepare the probate file in consultation with the potential heirs or devisees who can be located, and with other people who have information about the decedent or the estate.



15.202 WHAT ITEMS MUST THE AGENCY INCLUDE IN THE PROBATE FILE?

We will include the items listed in this section in the probate file.

- (a) The evidence of death of the decedent as provided under § 15.104.
- (b) A completed “Data for Heirship Findings and Family History Form” or successor form, certified by BIA, with the enrollment or other identifying number shown for each potential heir or devisee.
- (c) Information provided by potential heirs, devisees, or the tribes on:
 - (1) Whether the heirs and devisees meet the definition of “Indian” for probate purposes, including enrollment or eligibility for enrollment in a tribe; or
 - (2) Whether the potential heirs or devisees are within two degrees of consanguinity of an “Indian.”
- (d) If an individual qualifies as an Indian only because of ownership of a trust or restricted interest in land, the date on which the individual became the owner of the trust or restricted interest.
- (e) A certified inventory of trust or restricted land, including:
 - (1) Accurate and adequate descriptions of all land; and
 - (2) Identification of any interests that represent less than 5 percent of the undivided interests in a parcel.

- (f) A statement showing the balance and the source of funds in the decedent's IIM account on the date of death.
- (g) A statement showing all receipts and sources of income to and disbursements, if any, from the decedent's IIM account after the date of death.
- (h) Originals or copies of all wills, codicils, and revocations that have been provided to us.
- (i) A copy of any statement or document concerning any wills, codicils, or revocations the BIA returned to the testator.
- (j) Any statement renouncing an interest in the estate that has been submitted to us, and the information necessary to identify any person receiving a renounced interest.
- (k) Claims of creditors that have been submitted to us under § 15.302 through 15.305, including documentation required by §15.305.
- (l) Documentation of any payments made on requests filed under the provisions of § 15.301.
- (m) All the documents acquired under § 15.105.
- (n) The record of each tribal or individual request to purchase a trust or restricted land interest at probate. 12
- (o) The record of any individual request for a consolidation agreement, including a description, such as an Individual/Tribal Interest Report, of any lands not part of the decedent's estate that are proposed for inclusion in the consolidation agreement.

MAKING A STANDARD INDIAN WILL ACCESSIBLE

- Project purpose
 - Pro se
 - Legal Aid/Law Clinic intake tool
 - Tribal land offices
- Project design
 - AIPRA Standardization
 - State usability
 - Online distribution
 - Common maintenance



ELECTRONIC WILLS PROJECT

- Electronic Will Interview
- Will handout



QUESTIONS?

