

**Additions to the Oglala Sioux Tribal Probate Code**  
January 12, 2006

1. **Renunciation of Disclaimer of Interests:** 25 U.S.C. § 2206 (a)(3) reads: Except as provided in any applicable Federal law, the Secretary shall not approve a tribal probate code, or an amendment to such a code, that prohibits the devise of an interest in trust or restricted land to—
- (A) an Indian lineal descendant of the original allottee; or
  - (B) an Indian who is not a member of the Indian tribe with jurisdiction over such interest unless the code provides for --
    - (i) the renouncing of interests to eligible devisees in accordance with the code;
    - (ii) the opportunity for a devisee, who is a spouse or lineal descendant of the testator to reserve a life estate without regard to waste; and
    - (iii) payment of fair market value in the manner prescribed under subsection (c)(2).

Comment: The OST Code does not address the issue of renunciation and under AIPRA it must be included in a tribal probate code.

**NEW LANGUAGE FOR OST CODE:**

**Renunciation of Trust Interests to Eligible Devisee:**

*Any heir or beneficiary may renounce trust interests to an eligible devisee in accordance with this code. A spouse may retain a life estate without regard to waste. If the owner of an interest in trust or restricted land devises an interest in such to a non-Indian, the Oglala Sioux Tribe may acquire such interest by paying to the Secretary FMV or such interest, as determined on the date of the decedent's death.*

**2. Intestate Succession:**

Throughout Title III. Intestate Succession it states that an interest will “descend in equal shares to .....by right of representation.” The drafter of the Code is confused in the use of these terms “descend in equal shares” is a term used in a Will whereas “by right of representation” is the term used in determining shares for intestate succession. The first phrase should be stricken in Title III and leave in the phrase “by right of representation.”

**Section (6) reads:**

If there are no surviving spouse, children, or children of a deceased child, the interest will devise in equal shares to siblings, if they are all in the same degree of kinship to the deceased, they shall take equally, or if of unequal degree, then those of more remote degree shall take by representation, subject to the restrictions on inheritance provided in this Code.

**NEW LANGUAGE FOR OST CODE:**

If there are no surviving spouse, children, or children of a deceased child; the interest will devise to the siblings by right of representation.

### **3. Definitions**

Change the Definition to read:

*"Child" includes children of a decedent, including a child or children that have been adopted in or out of the family.*

*"Representation" delete "with respect to an intestate" at the end of the first sentence. It is not required and is confusing.*

Include Definition of Spouse:

*"Spouse" shall mean a party to a marriage recognized by any jurisdiction, including the Oglala Sioux Tribe. It shall not include a party to a common law marriage unless the marriage is recognized by the jurisdiction in which the arrangement was entered.*

Include Definition of Trust Personalty:

*"Trust Personalty" shall include funds that are deposited into the decedent's Individual Indian Money Account (IIM).*

### **4. Section 7. Trust Property Passing to the Oglala Sioux Tribe**

(a) If there are no eligible heirs ....the intestate interest in trust property passes to the OST, provided that a tribal member who is a co-owner may acquire an interest ...by paying into the estate of the decedent, ...FMV. (Fair market value).

If there are no eligible heirs, why would a co-owner pay into the decedent's estate when there are no heirs who would inherit. It should read that:

*...a co-owner may acquire the trust interest that would otherwise descend to the Tribe by paying FMV as determined at the date of decedent's death, into a fund that is established for the Tribe to purchase other fractional trust interests within its exterior boundaries of the Pine Ridge Reservation.*

### **5. Inconsistent Language in Section 9, Children of a Spouse and Relative of Half Blood and Section 6 Intestate Succession.**

Section 9 states that "Relatives of half blood take as if they were of the whole blood" while Section 6 Intestate Succession states that "siblings of unequal degree of kinship take by right of representation rather than by equally.

Under this Code, half-blood is the term used when referring to step-siblings or half-siblings.

### **NEW LANGUAGE - Relatives of Half Blood**

*Relatives of half-bloods shall not take any trust interest by intestate succession. The trust property shall remain in the matriarchal or patriarchal lines for inheritance purposes under this Code.*

**6. Section 8, Rights of Adopted Children.**

It was my understand that the Tribe wanted to include decedent's children who were adopted out of the family so he or she could inherit from a biological parent under this Code. It is a sad story when a child who has been adopted out by non-Indians returns to the reservation and are denied the right to inherit trust property from biological parent(s).

**NEW LANGUAGE - Section 8, Rights of Adopted Children**

*A child or children of decedent who has been adopted out may inherit from his or her biological parents pursuant to this Code.*

**7. Section 20. Claims Against the Estate.**

The Code states that "All claims are barred unless presented within 60 days of notice of the decedent's death, except that the time limitations for presenting claims under this chapter do not accrue to the benefit to the of any liability of casualty insurer. ...."

Paragraph (a) should be stricken and the language below inserted:

**NEW LANGUAGE - Section, 20 Claims Against the Estate**

*Claim filed by Indians may be presented at the hearing and must be filed in writing at the close of such hearing. Such claims do not have to meet the requirements that other claimants are required to meet.*

**8. Section 23 - Trust Personalty - Addition to this Section**

*(c) Any judgment funds or per capita payments shall be distributed to the lineal descendants of the decedent and not by the rules of intestate succession unless the decedent executes a Will.*

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**Oglala Sioux Tribe**

**Proposed Draft – Revised Probate Code**

**TITLE I – GENERAL PROVISIONS**

**Section 1. Policy**

This Ordinance shall be referred to as the “Oglala Sioux Tribe Probate Code” (hereinafter “Probate Code” or “Code”). The policies underlying this Code are:

- (a) to preserve the land base of the Oglala Sioux Tribe, which is critical to the survival of our people;
- (b) to maximize the use and value of our lands through the consolidation of interests in land title; and
- (c) to maintain the trust land base within the exterior boundaries of the Pine Ridge Indian Reservation.

**Section 2. Purposes**

The purposes of the Oglala Sioux Tribe Probate Code are:

- (a) to consolidate fractionated interests and ownership of those interests into usable parcels;
- (b) to prevent the transfer of trust property by tribal members and other owners of trust lands upon their death, either by devise or descent, to persons who are not enrolled members of the Oglala Sioux Tribe, or who are eligible for enrollment;
- (c) to develop laws for descent and distribution of trust and restricted property within the Pine Ridge Reservation.

### **Section 3. Definitions**

As used in this code, the following words are defined as indicated below:

"Child" includes sons and daughters of an individual, including a child that has been adopted ~~according to Tribal law~~ *in or out of the family*.

"Claims" means liquidated debts or liabilities of the decedent and liquidated liabilities of the estate that arise at or after the death of the decedent.

"Decedent" means a deceased person.

"Descendent" of an individual means all of the individual's descendants of all generations, with relationship of parent and child at each generation, being determined by the definition of child and parent contained in this section.

"Devise" means a testamentary disposition of real or personal property or means to dispose of real or personal property by will.

"Devisee" means a person or class of persons designated in a will to receive a devise.

"Distribution" means the judicially-determined apportionment and division after the payments of debts and charges of the assets of an estate, among those legally entitled to share.

"Eligible to be enrolled" means a person who in fact meets the criteria for enrollment in the Oglala Sioux Tribe, under Tribal law, whether or not such person is an enrolled member.

"Enrolled Member" means a person designated as enrolled in the Oglala Sioux Tribe, as provided by Tribal law.

"Family" or "Parent" includes head of household, single parent, or the extended family.

"Heir" means a person including the surviving spouse, who is entitled, under Title III of this Code, to inherit the trust property of a decedent.

"Intestate" means that a person died without a valid will. The trust property owned by such person will be distributed pursuant to Title III of this Code.

"Representation" means a method of determining distribution in which the takers are in unequal degrees of kinship, ~~with respect to an intestate~~. It is accomplished by dividing the estate into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left children or the children of a

deceased child, who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his children or the children of a predeceased child, in the same manner.

"Testator" means a person who has made a will or dies leaving a will.

"Trust Property" refers to real property, the title of which the United States holds in trust for an individual Indian, subject to federal restrictions against alienation (sales or lease without approval) or encumbrance. This definition includes surface and mineral rights.

"Will" means an instrument validly executed as required by Title IV. of this Code, that disposes of an individual's estate at death.

## **TITLE II - RESTRICTION ON INHERITANCE OF TRUST PROPERTY**

### **Section 4. Enrolled Members of the Oglala Sioux Tribe Inherit**

Oglala Sioux Tribal enrolled members and persons eligible for enrollment under Tribal law may inherit trust property under this Code.

### **Section 5. Life Estate**

Persons that are not eligible for enrollment in the Oglala Sioux Tribe may take not more than a life estate to any interest in trust property held by a decedent, by devise or intestate succession under this Code. Any testamentary gift or devise purporting to transfer an interest in the decedent's trust property to a person who is not an enrolled member, or is not eligible for enrollment, shall fail, except that it shall be interpreted that the gift or devise is of a life estate.

## **TITLE III INTESTATE SUCCESSION**

### **Section 6. Intestate Succession**

(a) Whenever an enrolled member of the Oglala Sioux Tribe dies, holding any interest in trust property within the exterior boundaries of the Pine Ridge Reservation, which has not been devised by a will, such interest will descend to the following persons, subject to their being eligible to inheritance under this Code :

- (1) If the surviving spouse is an enrolled member or is eligible for enrollment,

- a. one half of the interest will descend to the surviving spouse;
  - b. the other one-half will descend in equal shares to the child or children of any deceased child by right of representation;
- (2) If the surviving spouse is not an enrolled member and is not eligible for enrollment;
- a. A life estate to one half of decedent's interest, whose remainder shall descend in equal shares to the surviving children by right of representation, and
  - b. one half of decedent's interest in equal shares to the surviving children by right of representation.
- (3) If there is no surviving spouse, the interest will devise in equal shares to the children of the decedent who are enrolled or eligible for enrollment, by representation;
- (4) If there are no surviving children or children of a deceased child, the entire interest will descend to the surviving spouse, subject to the restrictions on inheritance provided in this Code;
- (5) If there are no surviving spouse and no surviving children, or children of a deceased child, the interest will descend in equal shares to the surviving parent of the decedent, subject to the restrictions on inheritance provided in this Code;
- (6) If there are no surviving spouse, children, or children of a deceased child the interest will devise in equal shares to siblings, if they are all in the same degree of kinship to the deceased, they shall take equally, or if of unequal degree, then those of more remote degree shall take by representation, subject to the restrictions on inheritance provided in this Code.
- (7) If there are no surviving spouse, children, children of a deceased, parent, or siblings, the interest will be divided into as many shares as there are surviving heirs in the nearest degree of kinship.
- (b) If a person is entitled to take an interest in trust property pursuant to this section, and such person is not entitled to inherit pursuant to this Code because they are not enrolled or eligible for enrollment, the estate of the decedent passes as if such heir or devisee had predeceased the decedent.

## **Section 7.**

### **Trust Property Passing to the Oglala Sioux Tribe**

(a) If there are no heirs eligible to take pursuant to this Code, the intestate interest in trust property passes to the Oglala Sioux Tribe, provided that a Tribal member who is a co-owner of the tract may acquire an interest that would otherwise descend to the Tribe by paying into the estate of the decedent, before the close of probate, the fair market value of such interest in land. If there are more than one Indian co-owners seeking to purchase such interest, the highest bidder shall acquire such interest.

(b) No trust interest in land subject to this section, which represents less than 5 percent of the entire undivided ownership of the parcel, shall be divided amongst the heirs. Such interest shall descend as follows -

(1) A life estate to the surviving spouse, whose remainder shall devise to the oldest child;

(2) The surviving spouse, if the spouse is an enrolled member of the Tribe or is eligible for enrollment;

(3) the oldest surviving child, and if there are no surviving children, to the oldest surviving grandchild;

(4) if there are no surviving children or grandchildren, then to the oldest surviving great grandchildren, and if the interest does not pass under this section, then to the Oglala Sioux Tribe.

## **Section 8.**

### **Rights of Adopted Children**

A lawfully adopted child shall not be considered the heir of his or her biological parent, provided, however, that nothing in this section shall prevent a biological parent from giving or devising property to a child that has been adopted by another.

A child who has been cared for, considered adopted by custom, but not by law, shall remain an heir of their biological parent.

## **Section 9.**

### **Children of a Spouse and Relatives of Half Blood**

(a) For the purposes of intestate succession under Title III of this Code, the children of a spouse who are not the biological children of decedent, are not accorded the status of biological children of the decedent. Such children inherit through their biological maternal and paternal lines.

(b) Relatives of half blood take as if they were of the whole blood.

## TITLE IV - WILLS

### Section 10. Wills

(a) A will is valid if,

- (1) the testator is at least 18 years old and of sound mind;
- (2) the will is in writing;
- (3) the will is signed and acknowledged by the testator;
- (4) the will is witnessed by at least two disinterested individuals, age 18 or older, each of whom sign the will in the other's presence.

(b) No interest in trust land may be devised to a non-Indian or non-member of the Tribe, excepting a life estate to such interest. A devise purporting to convey the entire interest in trust land to a non-Indian or non-member shall be deemed to be a life estate, with the remainder to pass to the decedent's heirs according to the rules contained in Title II. of this Code, provided that, such devisee may disclaim their interest in trust property to a specific person or persons who is also an heir or co-owner of the subject trust property and is an enrolled member of the Oglala Sioux Tribe.

(c) A will of a deceased holding trust property within the exterior boundaries of the Pine Ridge Indian Reservation, which is executed outside of the Pine Ridge Indian Reservation, in the mode prescribed by the law of the place where executed or of the domicile of testator, shall be deemed to be legally executed, and shall be given force and effect, provided that any devise that violates a provision of this Code shall fail.

### Section 11. Pretermitted Spouse

(a) If-

- (1) A deceased person made a will;
- (2) He or she got married after the will was made; and
- (3) No provision has been made in the will for the surviving spouse;

then, the omitted spouse shall take a share of the estate as provided for under the rules for intestate succession, as provided in Title III. of this Code.

(b) The provisions of this section shall not apply if,

- (1) it appears from the will that the omission was intentional; or
- (2) the spouse was provided by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is supported by evidence.

#### **Section 12. Pretermitted Children**

If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

- (1) It appears from the will that the omission was intentional;
- (2) When the will was executed the same person executing the will had one or more children and devised substantially all of his estate to the other parent of the omitted child;
- (3) The person provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the person executing the will or from the amount of the transfer or other evidence.
- (4) If at the time of the execution of the will the person executing the will fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if he had died intestate.

#### **Section 13. Holographic Wills**

A will, which does not comply, with section 10 is valid as a holographic will, if the signature and the material provisions are in the handwriting of the person making the will. The proponent of a holographic will shall have the burden of proof as to the execution and the validity of the holographic will.

#### **Section 14. Preparation and Custody of Will**

At the request of a testator, the OST Land Office shall assist with the preparation of wills for the devise of trust lands, through the preparation of forms and such other measures deemed necessary by the Land Office.

The Bureau of Indian Affairs shall enter a contract pursuant to Public Law 93-638, as amended, for funding for the OST Land Office for the purpose of carrying out this section.

**Section 15. Revocation of Will**

- (a) A will or any part thereof is revoked by:
- (1) Another duly executed will, or
  - (2) By being burned, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the person making the will or by another person in his presence and at his direction.
- (b) If after executing a will the person making the will is divorced, the divorce revokes any disposition of trust property made by the will to the former spouse. It also revokes any provision conferring power of appointment on the former spouse as executor, trustee, or guardian, unless the will specially provides otherwise.

**Section 16. Revival of Revoked Will**

If a subsequent will that wholly revoked a previous will is thereafter revoked by an act under section 18, the provisions will remain revoked unless it is revived. The previous will is revived if it is evident from the circumstances of the revocation of the subsequent will or from the testator's cotemporary or subsequent declarations that the testator intended the previous will to take effect as executed.

**Section 17. Anti-Lapse**

If a will,

- (1) provides for a devise to a grandparent or a lineal descendent of a grandparent, and
- (2) the devisee fails to survive the testator,

that the entire interest of the devise shall be taken by the next of kin of the devisee.

**Section 18. Penalty Clause for Contest**

A provision in a will purporting to penalize an interested party for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

**Section 19. Requirement that Devisee Survive Testator by 120 Hours**

A devisee who does not survive the testator by 120 hours is treated as if he predeceased the testator, unless the will states otherwise.

**TITLE V. - ADMINISTRATION OF PROBATES**

**Section 20. Claims Against Estate**

(a) All claims against the decedent or his or her estate are barred unless presented within 60 days of notice of the decedent's death, except that the time limitations for presenting claims under this chapter do not accrue to the benefit to the of any liability of casualty insurer. Claims against the decedent that can be fully satisfied by applicable insurance coverage or proceeds need not be presented within 60 days of the date of receipt of notice of decedent's death, but the amount of recovery on any claim not so presented cannot exceed the amount of the insurance.

(b) A claimant, or their agent or attorney, shall file a claim against the decedent's estate by sending by regular first class mail to the estate or the personnel representative of the estate, and by filing with the Office of Hearings and Appeals, a statement containing the following information:

- (1) The name and address of the claimant, or, if sent by an agent or attorney of the claimant, the sender's name and address;
- (2) A statement of the facts or circumstances constituting the basis of the claim, attaching any documents evidencing the claim;
- (3) The amount of the claim.

(c) The debts of the estate shall be paid in the following order:

- (1) Funeral expenses;
- (2) Medical expenses for the last illness, including nursing home or other health care facility expenses;

- (3) Wages due for labor performed within 60 days immediately preceding the death;
- (4) Debts having preference by the laws of the United States;
- (5) Claims of the Oglala Sioux Tribe;
- (6) All other claims against the estate.

(d) All claims will be disallowed in their entirety if the value of the estate is \$2,500.00 or less and there is a surviving minor child or children.

(e) Claims shall be paid from funds available in the decedent's IIM account at the date of death.

#### **Section 21. Compromise Settlement Agreement**

If during the probate of an estate, a substantial issue develops between contending parties, and it further appears that the issue may be settled by agreement by the parties in interest to their advantage, such an agreement may be approved by the Administrative Law Judge if:

- (1) All parties to the compromise are fully advised as to all the material facts;
- (2) All parties are fully aware of the effect of the compromise upon their rights;
- (3) It is in the best interest of the parties to settle rather than to continue litigation; and
- (4) A compromise settlement agreement is final for all parties and cannot be appealed.

Upon finding that all four points are met, the Administrative Law Judge will issue an order of distribution of the estate in the settlement to accomplish the purpose of the settlement.

#### **Section 22. Procedures for Probate**

The procedures for the conduct of probate proceedings shall conform to the requirements of the American Indian Probate Reform Act, 25 U.S.C. §2201 *et seq.*, 43 CFR §4.201 *et seq.* and 25 CFR Part 15.

## **TITLE VI - TRUST PERSONALTY**

### **Section 23. Trust Personalty**

Individual Indian Monies (IIM) accounts or any other trust personalty shall descend in accordance with this section.

(a) The intestate succession of IIM accounts or any other trust personalty shall descend in accordance with the rules of intestate succession that are contained in Title III of this Code, provided, however, that the inheritance of a share of an IIM account or any other trust personalty to a non-Indian or non-member of the Tribe shall be deemed to be an inheritance of the full interest of such share, and be released from trust by the Secretary of the Interior.

(b) A devise of an IIM account or any other trust personalty or any share thereof, to a non-Indian or non-member of the Tribe, shall be deemed to be a devise of the full interest of such share, and be released from trust by the Secretary of the Interior.

## **TITLE VII - INTERPRETATION AND APPLICABILITY**

### **Section 24. Presumption of Death**

The Oglala Sioux Tribe or a tribal member can petition the Office of Hearings and Appeals (OHA) for a determination of whether a person because of unexplained absence is presumed dead. At least five years must elapse from the unexplained absence, in order for the Office of Hearings and Appeals to consider a petition under this section.

### **Section 25. Taking Life of Individual and Inheritance**

An heir or devisee convicted of homicide in the death of the deceased, or convicted of aiding and abetting the homicide of the deceased, and whose conviction is final, shall receive no inheritance under this Code. The estate of the decedent passes as if such heir or devisee had predeceased the decedent.

### **Section 26. Omitted Trust Property**

If it is discovered that trust property or interest belonging to a decedent that had not been included in the estate, it can be modified to include the omitted property.

**Section 27. Improperly-included Trust Property**

When, after an order approving the probate of an estate is entered, it is found that property has been improperly included in the estate, such devise is void.

**Section 28. Effective Date and Application of Ordinance**

The provisions of this Code will be effective when the Secretary of the Interior or his designee approves it. If the Secretary or his designee does not approve or disapprove of this Code within 180 days of receipt from the Oglala Sioux Tribe, this Code is deemed approved and shall be in effect.

The provisions of this Code will apply only to estates of decedents whose deaths occur on or after the date of enactment of this Code.

**Section 29. Interpretation**

(a) This Code shall be liberally interpreted to effectuate its policies and purposes.

(b) Nothing in this Code shall be construed as a relinquishment of any rights or claims of the Oglala Sioux Tribe arising under:

- (1) the Treaty of Fort Laramie of April 19, 1868 (15 Stat. 635);
- (2) the Treaty of Fort Laramie of September 15, 1851 (11 Stat. 749),
- (3) the constitution of the United States; or
- (4) the laws of the United States.

**Section 30. Applicability**

This Code shall apply to the probate of trust property located within the exterior boundaries of the Pine Ridge Indian Reservation, as defined in Article I of the Constitution and Bylaws of the Oglala Sioux Tribe.