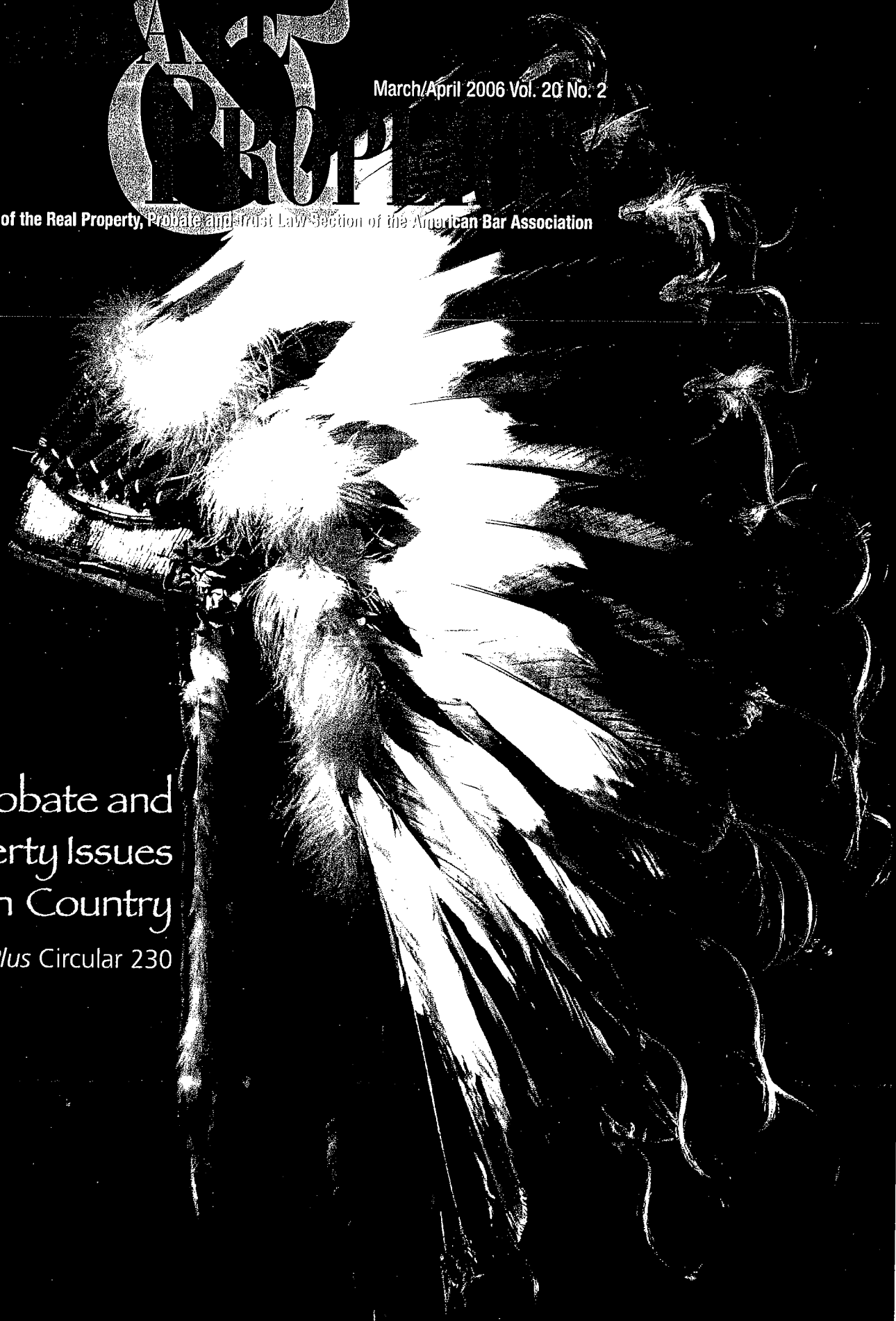


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CRPPT

March/April 2006 Vol. 20 No. 2

A Publication of the Real Property, Probate and Trust Law Section of the American Bar Association



Probate and
Property Issues
in Indian Country
Plus Circular 230

A Uniform Probate Code *for* Indian Country at Last

By David M. English

The estates of most deceased American Indians are administered under a different system than are the estates of other Americans. Much Indian wealth is derived from allotment of tribal lands. Tribal lands were originally held by the tribes as a whole. But between 1887 and 1934, substantial portions of tribal lands were allotted into parcels for individual Indians and what was left was often opened to homestead by non-Indians. The individual allotments are held in "trust" or "restricted" title for the Indian owners by the U.S. government.

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Except for a minority of allotted lands that are managed directly by their owners, the federal government leases the trust or restricted land, collects the rents, and periodically distributes the net rental to the owners. Undistributed rentals from trust or restricted lands are held in individual Indian money (IIM) accounts. On the death of an Indian owner, the disposition of trust or restricted lands and IIM accounts is governed by federal law and the estate is administered by the Department of the Interior.

Tribes are free to enact probate codes governing disposition of all a tribal member's property, both allotted lands and other assets, but few tribes have done so. Absent enactment of a tribal probate code, lands owned by Indians not subject to federal jurisdiction (referred to as "fee" or "taxable" land) and personal property other than IIM accounts are subject to state law.

Federal law allows for the execution of wills for the disposition of trust or restricted lands and IIM accounts. 25 U.S.C. § 373. The federal requirements

for executing a will are similar to the requirements in the states. Two witnesses are necessary and provision is made for self-proof through notarization. 43 C.F.R. §§ 4.233, 4.260. If an Indian owns assets subject to both federal and state probate, there is no need to execute two wills. Unless a state's requirements for executing a will are unusual, compliance with the execution requirements for the Indian's state of residence also will meet the federal requirements. In addition, enough disputes have arisen for a body of administrative case law to have developed on the grounds for contest. Federal law also controls the will's interpretation, although here the law is less developed. It is uncertain which rules on construction of wills apply and, if applicable, the details of their application.

Most Indians, however, do not make wills but instead die intestate. Many Indians have large families, and sales of trust or restricted lands, whether within or without the family, are rare. This combination of large families and

AP Photo/Mark Duncan



Camille George, left, her daughter Rose Ann Abrahamson, center, and granddaughter Leela Abrahamson pose in the Lemhi Valley near Salmon, Idaho, Oct. 26, 2002. The Shoshone women trace their ancestry directly to Chief Cameahwait, brother of Sacajawea, who helped the Lewis and Clark Expedition at a critical point.

intestate succession has resulted in severe fractionation of title to allotted lands, particularly among the tribes whose lands were allotted a century or more ago. Because the heirs will typically be the owner's several children, who in turn may have large families, over several generations the number of owners can reach exponential proportions. It is not unusual for trust lands to have over 100 individual owners, each owning minute interests. It is also not unusual for an individual Indian to own interests in a score or more parcels, sometimes located in multiple states.

The problem of fractionation is not new but has been recognized in numerous congressional reports dating back to the early 20th century. Nothing much was done about the problem until enactment of the Indian Land Consolidation Act of 1983 (ILCA), Pub. L. No. 97-459, 96 Stat. 2515. ILCA authorizes tribes to develop land consolidation plans, which could include tribal purchase of fractionated interests. ILCA also permits tribes to enact laws restricting inheritance by nonmembers

of the tribe. Most significantly, ILCA provided for the escheat to the tribe of an interest of less than 2% on its owner's death. But this escheat provision was ruled unconstitutional as a violation of due process in *Hodel v. Irving*, 481 U.S. 704 (1987), and an amended version was thrown out in *Babbitt v. Youpee*, 519 U.S. 234 (1997).

Barred from applying escheat to limit further fractionation, Congress next attacked the problem through reform of the probate process. The ILCA Amendments of 2000, Pub. L. No. 106-462, 114 Stat. 1991, enacted major reforms in probate, but many tribes objected, asserting that the amendments had received insufficient tribal consultation. The 2000 amendments, which were made contingent on certification by the Secretary of the Interior, were never implemented.

The American Indian Probate Reform Act of 2004 (AIPRA), Pub. L. No. 108-374, 118 Stat. 1773, which was signed by the President on October 27, 2004, will not suffer the same fate. Unlike its predecessor, AIPRA was enacted following extensive consulta-

tion in Indian country. Also, shortly after enactment the Secretary began work on implementation.

AIPRA makes major reforms to the Indian probate system. Federal law long provided that trust or restricted lands and IIM accounts owned by an Indian intestate are to be distributed to the heirs as determined under state law. AIPRA replaces this with one uniform intestacy scheme for the distribution of trust lands and IIM accounts in lieu of the 30-plus state systems that now apply. AIPRA also fills out the federal law on wills, enacting numerous provisions on the interpretation of wills, most adapted from the Uniform Probate Code. In addition to providing Indian country with a uniform and more complete body of probate law, AIPRA contains several provisions encouraging the purchase or consolidation of fractionated interests. AIPRA affects ownership rights in trust or restricted lands in all states other than Alaska.

The probate provisions of AIPRA take effect on June 20, 2006, one year after a notice of the Act was sent to

approximately 290,000 landowners. Other provisions of AIPRA take effect on varying dates continuing through 2007. AIPRA and ILCA are codified at 25 U.S.C. §§ 2201-2221.

Intestate Succession

The modern purpose of intestate succession statutes is to accomplish what the average decedent would likely have done had the decedent made a will. Most Americans who make wills and who were married only once leave their entire estates to their surviving spouses. Recognizing this strong preference, the 1990 Uniform Probate Code and a growing number of state intestacy statutes grant the surviving spouse the entire estate unless the decedent also was survived by a descendant from another relationship.

The intestate succession provisions of AIPRA are based on different assumptions. Spousal rights under AIPRA are significantly less than under state law, there is a preference for retaining property within the tribe, and the continued fractionation of small interests is disfavored. Should a tribe be dissatisfied with the results under AIPRA, the tribe is free to enact its own superseding probate code.

Under AIPRA, the key factor in determining heirs is the decedent's percentage ownership in the relevant parcels of trust or restricted lands. Different provisions apply if the decedent's ownership interest in a parcel is less than 5%. Also, the class of relatives who can inherit is limited. Other than for the spouse, inheritance is allowed only by an "eligible heir," a class that may include only Indians, a child or grandchild of an Indian, or another person who is already a co-owner of the same parcel. 25 U.S.C. § 2201(9). Property that would otherwise pass to a relative who fails to qualify as an eligible heir instead passes to the tribe or, if no tribe has jurisdiction over the trust interest, to the other co-owners.

The limitation of "eligible heirs" to Indians and close descendants of Indians was a source of controversy during the drafting of AIPRA. Because of intermarriage, an increasing percentage of individuals have less than the

25% blood quantum required for membership in many tribes. Should members of different tribes marry, it is also not unusual for their offspring not to qualify as a member of any tribe despite having a high percentage of Indian blood.

The only collateral relatives who may inherit under AIPRA are the decedent's brothers and sisters. 25 U.S.C. § 2206(a)(2)(B). Inheritance by nieces and nephews and more distant collateral relatives is not allowed. The property will instead pass to the tribe. The limitation on the categories of collateral relatives who may inherit is more restrictive than state law. In many states, any relative, no matter how dis-

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tant, may potentially inherit. Even under the Uniform Probate Code § 2-103, inheritance is cut off only if the decedent was not survived by a descendant of a grandparent or closer relative. Under the UPC, potential heirs can include uncles and aunts, first cousins, and their descendants, all of whom are prohibited from inheriting under AIPRA.

Share of Spouse

The spouse receives one-third of the personalty (that is, IIM account) outright if the decedent also was survived by an eligible heir or all of the personalty if no eligible heir survives. 25 U.S.C. § 2206(a)(2)(A). Trust or restricted lands are treated differently. If the decedent owned 5% or more of a particular parcel, the spouse receives a life

estate. If the decedent's interest was less than 5%, the spouse receives nothing unless the spouse was living in a residence on the parcel. In such a case, the spouse may continue to occupy the residence for life. 25 U.S.C. § 2206(a)(2)(D).

Share of Eligible Heirs

Trust or restricted lands and IIM accounts not passing to the spouse, or the entire estate if the decedent was not survived by a spouse, pass to the eligible heirs. Personalty and a 5% or more interest in a parcel of trust or restricted land pass in the following order of priority:

- children in equal shares, with the share of a predeceased child to be divided among that child's children (that is, grandchildren of decedent),
- great-grandchildren in equal shares,
- surviving parent or parents in equal shares, and
- surviving siblings in equal shares.

25 U.S.C. § 2206(a)(2)(B). If all of the children are deceased, distribution among the grandchildren is not equal but is per stirpital based on the parental roots. If no person in any of the above classes survives, the property passes to the tribe or, if no tribe has jurisdiction over the trust interest, to the other co-owners. 25 U.S.C. § 2206(a)(2)(C).

Single Heir Rule

To stem further fractionation, interests in trust or restricted lands of less than 5% pass to a single heir. The oldest surviving child takes all or, if no child survives, the oldest surviving grandchild takes all; if no grandchild survives, the oldest surviving great-grandchild takes all. If no person in these classes survives, the interest passes to the tribe or, if no tribe has jurisdiction over the trust interest, to the other co-owners. 25 U.S.C. § 2206(a)(2)(D). The single heir rule may be AIPRA's most important provision. Unless the owner executes a will that further divides the interest, the single heir rule will stop further

