






What Do I Need To Know About Probate When My Indian Loved One Passes Away?

What's in this guide and how can it help me?

This guide answers some of the most frequently asked questions about probate that you may have after an Indian loved one passes away. The guide focuses on situations where the person who passed away had land in his or her name (on- or off-reservation). Probate is a complicated area of law, and this guide is only an introduction to the probate process.

 **TIP:** This guide describes the probate process **in the state of California** only. The process may be different in other states.

 **TIP:** This guide also explains the meaning of some legal words used in probate. These words appear in bold in the guide. They will be defined in the guide, and again at the end of the guide in the section called “Some Helpful Terms About Probate” that starts on Page 7.


 If you are an Indian person and you are planning an estate or writing a will, call CILS or an attorney who specializes in estate planning.

What is probate?

Probate is a legal process that takes place after a person dies.

Generally, probate includes:


- proving in court that a person's will is valid
- if there is no will, determining who will inherit the property
- identifying and listing the property
- having the property appraised (determining its value)
- paying outstanding debts and taxes
- distributing all of the property by court order, including saying who now owns interests in any land.

 **TIP:** In the law, a person who has died is usually referred to as a **decedent**.

Where does probate happen?

There are two kinds of probate proceedings for Indian people.


- One type of proceeding is conducted in state court.
- Another type of proceeding is conducted by the Bureau of Indian Affairs (BIA).


 **TIP:** In the law, the total property owned by a person who has died (the decedent) is called the **estate**.

Could I have both a state and a BIA probate?

Yes.

- Only the BIA can probate Indian trust assets (for example, a share in a trust allotment). But the BIA cannot probate other property. If the estate includes both Indian trust assets and other property, then it may need to go through both state and BIA probate. See Page 5 for more information about trust assets.
- It is very 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” that is owned by the Indian person (not land that is held in trust for the person by the United States government). Fee land is sometimes referred to as “taxable land.” **Real property** includes land and anything that is permanently erected on land – such as a house.

 **TIP:** If you have to pay property tax on some of your land, then you probably have fee land or other real property.

 If you have questions about whether or not your estate has to go through both BIA and state probate, contact your local CILS office.

State Probate

What is state probate?

- The state probate process is a legal proceeding that takes place in state court.
- State probate deals with property that is not managed by the BIA.
- The state court determines what property and debts the decedent has.
- The state court also decides how the property will be distributed.

Do all estates have to go through the state probate process?

- No. If the estate is worth less than \$100,000 and there is no real property, then it might not have to go through probate.
- But if there is real property (fee lands) worth more than \$20,000, there usually must be some sort of probate proceeding.
- There is also a simple procedure for transferring property left to a surviving husband or wife.
- Some types of property pass outside of a will. This property does not have to go through the probate process. Examples include:
 - ◆ insurance payments where a “beneficiary” is named. A **beneficiary** is the person

who will inherit the insurance money.

- ◆ bank accounts where a beneficiary is named.
- ◆ property that is owned as a “joint tenancy.” **Joint tenancy** is a way to own property. Joint tenants are co-owners. When one of the tenants dies, the property automatically goes to the remaining tenant or tenants. The property cannot be willed to someone else.
- ◆ property in a “living trust.” A **living trust** allows you to transfer use of your property to your heirs **before** you die. A living trust is an alternative to a will, which distributes your property after you die. Living trusts are usually longer and more complicated than wills.

Who takes care of state probate?

- Generally, when a person writes a will, they name an “executor” in the will. The **executor** is responsible for answering all of the court’s questions about the probate. The executor also collects the property, pays debts and taxes, and distributes the property.
- If there is no executor, the court will appoint an “administrator” to do all the things an executor would do. An **administrator** is usually the

decedent’s closest capable relative. It can also be someone else, like the person who will inherit most of the estate.

Are lawyers involved in state probate?

- The typical state probate involves paperwork and court appearances by lawyers.
- The lawyers and court fees are usually paid from the estate’s assets.
- The lawyer’s fees are usually a set percentage of the estate’s value. You should find out what this amount is to make sure you are not overcharged by the probate lawyer.

What are assets in state probate?

Assets are property that is worth money. Assets for state probate include:

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

What are debts?

Debts are the money that is owed to somebody (a “creditor”) at the time of death. Debts might include money owed for:


- Final bills, such as utility or

- credit card bills
- Personal loans
- Court judgments
- Taxes
- Health care costs
- Death and funeral costs

What happens during the state probate process?

Someone takes a copy of the decedent's will to the court clerk in the county where he or she died or owned land (this should happen within 30 days of the death).

If you are the executor or administrator, you have to submit other legal forms to the local county probate court where the decedent lived or owned land.

 **TIP:** To find your local county probate court, you'll need to find your local county Superior Court. You can find your local Superior Court by going to their website at www.courtinfo.ca.gov, or by looking in the County Government section of your phone book. You can get the forms you need at the court's website, but we recommend that you contact an attorney to assist you. You may need help filling out the forms, so you may wish to contact your local CILS office or an attorney who specializes in estate planning.

If you are the executor/administrator, you then:

- prove that the will belongs to the decedent. To do this, there must be witnesses who saw the person signing the will, and who swear that the signature is theirs and that they signed the will freely. In California,

courts often make sure there are two witnesses to the will.

- give the court a list of assets
- give the court a list of debts, **and**
- identify the people who will inherit the property.

You also contact the creditors and "heirs" of the estate. **Heirs** are people who could **potentially** inherit property. You notify the creditors so that they can collect on their debts before the estate is divided among the "beneficiaries." **Beneficiaries** are the people who **actually** inherit property.

What else does the executor/administrator do during state probate?

The executor/administrator identifies, protects, and manages all assets.

The executor/administrator also pays the decedent's debts. You may have to sell some or all of the assets in order to pay off these debts. If necessary, you may also represent the estate in litigation.

How long does state probate take?

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

Eventually, the court will allow the executor/administrator to pay all debts and taxes and divide the remaining assets among the beneficiaries. The property will then be transferred to its new owners.

Does the family have to wait until the end of the probate to get the money?

Not always. If the probate is not contested, the beneficiaries may be able to ask the court to give them short-term support funds during the probate proceedings.

How do I find out what's happening with a probate?

Probate cases are public records. Anyone can get copies of anything filed in the case by contacting the court.

☪ BIA Probate ☪

When does an estate go through the BIA probate process?

If there are assets managed by the Bureau of Indian Affairs (BIA), then those assets will have to go through BIA probate.

BIA probate involves **only** trust assets (assets managed by the BIA), such as:

- land held in trust
- restricted property
- Individual Indian Money (IIM) accounts

If a person has trust property, such as an allotment or Indian monies, the BIA determines who will get that property.

How does the BIA probate process start?

- To start the BIA probate process, someone must tell the BIA about the

Indian person's death. The person who tells the BIA does not have to be a relative.

- Someone must also give the BIA a certified copy of the death certificate.
- If the death certificate cannot be found, a copy of the 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 BIA probate process begins after the BIA receives notice and proof of the death.

👉 TIP: An **affidavit** is a written statement where the person who signs it swears that the information on the form is true and correct to the best of their knowledge. An affidavit usually has to be "notarized" (you have to sign the statement in front of a notary public).

Who handles the BIA probate process?

The probate is assigned to a probate specialist or probate clerk.

Is the executor involved in the BIA probate process?

If the will names an executor, the BIA will often work with them to get the information needed for the probate package. However, it is the BIA's duty to manage trust assets. So, the executor will not be actively involved in the BIA probate process.

Are lawyers involved in the BIA probate process?

Lawyers are usually involved only if:

- family members oppose the will, **or**
- if lawyers are needed to provide assistance during the process.

What steps does the probate specialist/clerk take?

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

- social security number
- birth certificate
- record of death
- marriage/divorce records
- known creditors
- names of potential heirs
- adoption or guardianship records
- will and “codicils.” **Codicils** are separate, legal documents that change part of a will.

The probate specialist/clerk then completes a probate package which includes:

- evidence of death
- a completed OHA-7 Form, which is a “family tree” showing the relatives and saying which relatives are Indian
- a certified inventory of trust real property
- a list of income sources
- all wills, codicils, or repeal of wills and codicils
- debts you owe
- the probate clerk/specialist’s affidavit that all efforts were made to

locate the beneficiaries

Next, the probate specialist/clerk reviews the completed probate package.

Finally, the probate specialist/clerk gives the completed probate package 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. The deciding official can be a judge, but he or she may simply be a BIA staff member.

What happens after the probate package is referred to the BIA deciding official?

The BIA sends notice to the heirs telling them:


- about their right to request a formal hearing before an Administrative Law Judge (ALJ)
- 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, **and**
- who the BIA deciding official is.

The BIA deciding official then holds a formal hearing with the heirs.

If no special issues arise during the hearing, the BIA deciding official will issue a written decision or order and send it to all “interested parties.” An **interested party** is


anyone who thinks they might have inherited assets from the decedent.


The law of the state where the decedent lived will determine how the estate is distributed. Congress is trying to pass a law that creates a national standard for distributing estates that does not vary from state to state.

 Call CILS or an attorney who specializes in estate planning to find out if the law has been changed.

The deciding official may order the estate to pay, in the following order:

- funeral expenses
- medical expenses for the last illness
- nursing home or other care facility expenses
- tribal claims
- judgments against the estate
- all other general claims

 **TIP:** Some BIA probates will be affected by the Indian Land Consolidation Act (ILCA). ILCA is a complex federal law that limits who can inherit Indian lands held in trust.

 Contact your local CILS office for more information about ILCA and its possible effect on your probate.

How long does BIA probate take?

BIA probate generally takes longer than state probate. It usually ranges from one to four years.

Some Helpful Terms About Probate

What do some of the legal words I hear about probate mean?

Probate, like other areas of law, has its own special language. Some of the words you might hear or see, and their meaning, are listed below.

- **Administration** means handling an estate. It includes finding and listing the property, calculating and paying debts and/or taxes, and distributing the remaining property to the family or other beneficiaries.
- **Affidavit** is a written statement where a person who signs it 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).
- **Assets** are the property the decedent owns at death that are worth money. In state probate, assets include fee land, money from checking and savings accounts, vehicles, personal property, etc. In a BIA probate, assets include trust lands and monies held in trust by the BIA.
- **Beneficiaries** are the people who actually inherit the property. If there is a will, they are the people named in the will to inherit the property. Beneficiaries are different from heirs. **Heirs** are people who could

potentially inherit property but who may not receive any if there is a will that names only other beneficiaries.

- **Codicil** is a written document that changes a will. It has to be written and signed (or “executed”) with all the legal formality of a will. The terms of the will that are not changed by the codicil are valid and remain in effect.
- **Decedent** is the person who died.
- **Deciding officials** are BIA employees who have the power to make decisions in probate court. Deciding officials can be judges, but they may simply be BIA staff members.
- **Estate** is all the property left by the decedent.
- **Executor** is the person who collects the property, pays the debts and/or taxes, and then distributes the estate to the beneficiaries. The executor is usually named in the will. If the will does not name an executor, the court will appoint an “administrator” to do these things. An **administrator** is usually the decedent’s closest capable relative. It can also be someone else, like the person who will inherit most of the estate.
- **Fee land** is land, and any property permanently built on or attached to that land, that is owned by the Indian person (not land that is held in trust for the person by the United States government). Fee land is sometimes called “taxable land,” because you have to pay property tax on it.
- **Interested parties** are people who think they might have inherited assets from the decedent.
- **Liabilities** are the debts and other claims that reduce the value of an estate, including mortgages, “liens” (records of debt), taxes, and “easements.” (Easements give people or companies the right to come onto or use your property in a continuing way. The most common example is giving PG&E an easement to read your utility meters. Easements are also known as “rights of way.”)
- **Probate Court** is a division of the California Superior Court that oversees the **administration** of an **estate**.
- **Real property** includes land, and anything permanently erected on or attached to the land (such as a house, or other building). It means the same thing as “real estate.”
- **Trust assets** are assets that are managed by the BIA. Examples include land held in trust, restricted property and Individual Indian Money (IIM) Accounts.
- **Will** is a legal document that tells others how the decedent wants his/her estate distributed after his/her death. Wills can be in the decedent’s own handwriting, they can be typed,

or they can be on a Statutory Will Form. Each style has special rules and requirements to make it a valid document.



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Disclaimer

This information is intended to assist you with your legal problem. Each area of the law is complex and changing. Your case may have special factors that could affect the applicability of this information. CILS does not guarantee that this information is sufficient to resolve your legal problem. If you have any questions, you should seek the advice and counsel of an attorney.

ACORN Community Legal Education Series

The Advocacy, Collaboration, and Referral Network (ACORN) is a project of CILS. ACORN's mission is to expand access to legal resources that increase Indian self-sufficiency. This guide is part of our Community Legal Education Series, providing Indians and Indian tribes with user-friendly information and self-help assistance pertaining to their legal status and rights. ACORN Community Legal Education guides, and more information about CILS and California Indian issues, are available on our website at www.calindian.org.

California Indian Legal Services

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Do you have a legal problem? For assistance, contact your local CILS office:

Bishop: (760) 873-3581, or (800) 736-3582

Escondido: (760) 746-8941, or (800) 743-8941

Eureka: (707) 443-8397, or (800) 347-2402

Oakland: (510) 835-0284, or (800) 829-0284

Santa Rosa: (707) 573-8016, or (866) 251-8016

