



RESPECTING YOUR WISHES

ESTATE PLANNING FOR CALIFORNIA NATIVE AMERICANS



CALIFORNIA INDIAN LEGAL SERVICES



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INTRODUCTION

Planning for future events is no easy task. Without a crystal ball to predict the future, it is important to plan for many different scenarios involving your health and belongings. California is a unique state, and Indian property can make planning ahead confusing. This guide is designed to help you understand the basics of estate planning. It is not meant as a comprehensive guide. When reading this guide for the first time, please read the guide from the beginning to end in order to best understand the information.

It is important to note that if you are specifically looking for information on Indian Wills or the American Indian Probate Reform Act (AIPRA) then see our handout entitled, “What is the AIPRA?” which is located on our CILS website, www.calindian.org.

Please note that while this guide is a valuable resource, it is not a replacement for legal advice. Contact California Indian Legal Services or a private attorney if you are unsure about your options. This area of law continues to change; the authors of this guide make no guarantee to the accuracy of the content.

That being said, you are already off to a great start by reading this guide and taking the first step to planning for your future.

⇒ **TIP:** The section “[Glossary and Definitions](#)” is a reference guide for legal terms. These words and terms are important to understanding each section of this guide. When a term is included in the “Glossary and Definitions” section, it is capitalized.

⇒ **TIP:** Whenever you see this symbol:  the law and principles discussed are unique to California.



ADVANCE PLANNING



What Can I Do to Plan Ahead?

This section of the guide addresses the concepts and legal documents that can ensure your wishes are honored when you may not be able to make decisions due to medical [Incapacity](#). When someone is so sick they are unable to make medical and financial decisions, it is important they have a person they trust to make decisions for them. After selecting such a person or persons, it is important to leave a written guide to assist your representative(s) in making the right choices for you.

⇒ **TIP:** a great resource for California laws, regulations and forms for advance planning concerns is the California Attorney General's website at <http://oag.ca.gov/consumers/general/care>.



Section 1: Health

Advance Health Care Directives (AHCD)



Many states allow for planning ahead for medical emergencies by filling out a [Living Will](#) and a separate document called a power of attorney for health care. However, in California, an AHCD combines a Living Will and [Power of Attorney](#) for health care in one document. This allows a person to make their medical wishes known and designates a representative, known as an **Agent**, to carry out those wishes if the person is Incapacitated. Some considerations you should make when selecting someone to be your Agent are:

- ❖ Is the person someone who understands your beliefs about how much medical treatment you desire?
- ❖ Is the person someone who understands your beliefs about how long you wish to be kept on [Artificial Life Support](#)?
- ❖ Is the person someone who lives close by or has the ability to come quickly to where you will likely be hospitalized? Are they easily accessible by phone?

- ❖ Is the person strong enough to stand up to doctors or nurses who may disagree with your medical decisions contained in your AHCD?

⇒ **TIP:** It is always a good idea to list an “Alternate Agent” in the event the first person is sick or unavailable to fulfill their duties.

⇒ **TIP:** The state of California has forms for AHCD at to the Attorney General’s website at http://oag.ca.gov/consumers/general/adv_hc_dir.

The following are some common topics covered in AHCD:

- ❖ *End of Life Decisions:* You should consider whether you wish to have doctors do everything in their power to keep you alive, including Artificial Life Support, or if you decline such medical intervention.
- ❖ *Time on Life Support:* If you choose to allow Artificial Life Support, think about how long you wish to be on it and when you would like to be taken off should you fail to recover.
- ❖ *Financial Impacts on Family:* Some people wish to set a financial cap on the amount of Artificial Life Support based on the cost to their family.

⇒ **TIP:** Remember that you can customize an AHCD to fit your concerns and needs. Contact California Indian Legal Services or other attorney if you are unsure about what you can and cannot include in your AHCD.

Do Not Resuscitate (DNR)

One issue that is often included in an ACHD, but also can be completed separately is a Do Not Resuscitate (DNR) order. Many hospitals offer DNR forms for their own use, to have on file in case of an emergency. You can limit the types and amount of treatment you receive. You should speak with your doctor, your local hospital, or your attorney regarding a DNR.

Physician’s Orders on Life Sustaining Treatment (POLST)

For individuals who have a terminal illness, you can express your wishes regarding the use of medications, artificial feeding and hydration, CPR, and other treatments. Printed on bright pink paper, and signed by both a doctor and the patient, a POLST helps give seriously ill patients more control over their end-of-life care.

⇒ **TIP:** The state of California has forms for POLST at the Emergency Medical Services Authority’ website at <http://www.emsa.ca.gov/pubs/pdf/ApprovedPOLSTForm.pdf>



Section 2: Finances

Power of Attorney for Financial Management

Separate from the AHCD is the **Power of Attorney for Financial Management (POAFM)**. An Agent authorized by a POAFM can act on your behalf to pay off bills and take care of financial transactions.

⇒ **TIP:** An AHCD will give your designated Agent access to personal health records. Some people prefer one person to have personal knowledge of their health history while another works with financial matters that will not contain health information. However, many people choose the same person to be their Agent for both health and financial matters.

There are two types of POAFM:

1. Immediate POAFM: This gives your Agent the authority to manage financial affairs on your behalf as soon as the document is signed. The length of the POAFM can be specified. By specifying you wish your Agent to continue to have authority over financial affairs, the POAFM becomes a “durable Power of Attorney for Financial Management.”

2. Springing POAFM: this type of POAFM “springs” into action when Incapacity is present. Your Agent will have the power to manage your finances should you be determined incompetent to make financial decisions.

⇒ **TIP:** California Probate Code Sections 810-813 explain that you can be found “incompetent” or “incapacitated” to make decisions if you cannot communicate that you understand the consequences of the decisions you make. (see definition of Incapacity). Usually this determination is made by the courts or a doctor, but the POAFM language you use can impact the determination. Ask for help from an attorney before signing your POAFM if you are unsure on how the determination will be made.

⇒ **TIP:** The Sacramento County Public Law Library has many forms, including POAFM forms, for free to download or available to copy at the library. The website is: <http://www.saclaw.org/pages/forms-page-topical.aspx>; and the general phone number for the library is (916) 874-6012. Other county law libraries will also have useful materials and can be accessed at <http://lawhelpca.org/>.

It is important to note that you have the power as the [Principal](#) to ensure the Agent does a good job.

One method to make sure the Agent is respecting your wishes is to designate a third person to receive accounting statements every few months to prove they are taking care of your financial matters. Also, you can require the Agent to be “bonded,” which means they purchase insurance that is paid to you in the event the Agent mismanages your money.

Bottom Line: It is crucial to plan ahead for times where you may not be able to make decisions over your healthcare or finances. Though the topic may be uncomfortable to discuss, it is very important to talk with your family about the possibility of experiencing Incapacity and their responsibilities in taking care of you.



CALIFORNIA PROPERTY



California is a unique state with different rules governing **Real**, **Personal**, and **Community Property**:

- ❖ **Real Property**: is property that is immovable, like someone's land or real estate.
- ❖ **Personal Property**: is all property that is not Real Property, which includes cash, cars and clothing.
- ❖ **Community Property**: is property shared between a **Married Couple** or **Domestic Partners**. California is a "Community Property State," which will be discussed further in this section.

Specifically this section addresses what happens to each type of property at the time of someone's death.



Section 1: Real & Personal Property

There are several ways Real Property is owned in California that can impact the ability of someone to give it away after they die. The two most common categories of ownership are **Joint Tenancy** and **Tenancy in Common**.

Joint Tenancy

- When a Joint Tenancy is formed there are two or more owners who own the property equally during their lifetimes.
- Whenever one owner dies, the interest is given to the other owners equally, until there is only one living owner left. The last owner has the right to pass on the property to his **Heirs**, referred to as **Right of Survivorship**.
- The **benefit**: Joint Tenancy has a Right of Survivorship and the ability for all owners to take out loans, use or sell the property.
- The **disadvantage**: no way to partition the property so that some owners might have a larger percentage of ownership than others. The family of Joint Tenants will not inherit the property if they die before other Joint Tenants.

⇒ **TIP**: Joint Tenancy is also applicable to personal property like bank accounts.

Tenancy in Common

- A Tenancy in Common means two or more owners own property during their lifetime. Shares of ownership in the property are not always equal. For example, person A could own 40%, Person B 50% and person C 10% of the property.
- The main difference from Joint Tenancy is that in a Tenancy in Common, when an owner dies the **Decedent** must pass their ownership interest onto someone else and there is no automatic transfer of ownership to the other co-owners.
- Because there is no Right of Survivorship to automatically pass on property to the other co-owners, the **Probate** process may be triggered.



California presumes all property co-owned is a Tenancy In Common, while a Joint Tenancy must have clear language in the ownership documents that the owners wish to form a Joint Tenancy.

Personal Property

- Personal Property is property that you can move or take with you.
- This includes such things as your jewelry, clothing and Indian regalia.
- It is important to remember that cash is personal property, but also a bank account is personal property. Each item of property, for example (1) cash and (2) bank account, is called an “asset.”



Section 2: California Community Property



California has its own specific type of law dealing with property jointly owned between Married Couples and Domestic Partners.

⇒ **TIP:** For more information on Domestic Partnership requirements look at California Family Code sections 297-297.5, or contact the California Secretary of State at <http://www.sos.ca.gov/dpregistry/>, or (916) 653–3984. For further explanations regarding Domestic Partnership formation and legal status look at information provided by the National

Center for Lesbian Rights entitled: "The California Domestic Partnership Law: What it Means for You and Your Family," located at :

<http://www.nclrights.org/site/DocServer/AB205.04.2007.pdf?docID=1264>

What is Community Property?

When it comes to property jointly owned by spouses or Domestic Partners there are three types of property that are involved:

1. **Separate Property:** all property owned by each spouse before marriage and property brought into the marriage by gift or inheritance is *presumed* to be the separate property of a spouse.
2. **Community Property:** It is generally *presumed* that all property acquired during marriage up to the point a Married Couple or Domestic Partners separate permanently is Community Property. The term "community" refers to the Married Couple or Domestic Partners.
3. **Quasi-Community Property:** This refers to property acquired during the marriage while living in another state that would have been deemed Community Property in California had they acquired the property in California.

⇒ **TIP:** "*presumed*" is in italics because there are ways of changing separate property into community property called "transmutation" and "commingling." Questions regarding transmutation and commingling should be handled by an attorney.

Restrictions on "Willing" Away Community Property

When a spouse dies, there are some restrictions on testamentary disposition, or "Willing," that a couple should consider when creating a Will.

⇒ **TIP:** Creating a Will is discussed in further detail in the next section "Wills and Trusts."

- If a spouse wants to give away their separate property at the time of their death, they can do so without any limitations.
- BUT, a spouse can only give away one-half of the ownership share of community property. This also applies to Quasi-Community property when the spouse that acquired the out of state property dies.

Community Property with the Right of Survivorship

- Under California Civil Code 682.1, a Married Couple or Domestic Partners may elect to hold community property with a right of survivorship. This is similar to the Joint Tenancy in that the co-owner who dies cannot give away their share in a [Will](#) to someone else. Instead, the remaining spouse or partner receives the decedent's share.
- Use of this form of ownership is only for a Married Couple or Domestic Partners and has benefits and disadvantages depending on the type of debts you may owe on the community property.
- The most beneficial aspect of this form of ownership is that Probate can be avoided because the surviving spouse or domestic partner automatically gets the Decedent spouse's share, one-half, of the community property.

⇒ **TIP:** Typically this consideration will require working with an [Estate](#) planner or attorney who can make suggestions to you based on tax consequences.

Summary of What Can Happen when a Spouse or Domestic Partner Dies

- If in [Intestacy](#), the surviving spouse or Domestic Partner inherits one-half (1/2) of the Community Property.
- If there is a Will, the Decedent has the power to dispose of one-quarter (1/4) the Community Property to whomever they wish and the other 1/4 goes to the surviving spouse or Domestic Partner. Remember that the surviving spouse or Domestic Partner already is entitled to 1/2 of the Community Property, so in this situation the surviving spouse would take at least three-quarters (3/4) of all Community Property.
- If the property is held as Community Property with Right of Survivorship then the surviving spouse or Domestic Partner automatically receives the Decedent's full share of that specific [Asset](#) whether there is a Will or not.

Examples of how distribution of Community Property Assets work:

Community Property without Right of Survivorship Distribution:



Community Property with Right of Survivorship Distribution:



Community Property and Indian Trust Assets

- [Indian Trust Assets](#) are shielded from state court Probate and are not subject to Community Property laws.
- However, disputes arise in divorce or Probate proceedings about whether a house or other structures on land [Held in Trust](#) is a Trust Asset or just non-Trust property sitting on top of land.
- Contact California Indian Legal Services or another attorney if you have questions about this topic after reading this guide.

⇒ **TIP:** In addition to Indian Trust Assets, inheritances and certain types of gifts are not considered Community Property. Speak with an attorney about this situation.

Bottom Line: Property ownership can be confusing at first. Taking the time to understand how you own your property is important to understanding what you can and can't give away. Married Couples and Domestic Partners should discuss how they wish to own something together before jointly owning things such as bank accounts, cars and houses.



WILLS & TRUSTS



This part of the guide discusses the differences between **Wills** and **Trusts**, the formation of Wills and Trusts, and what a Will or Trust actually does.

Section 1: California Will Basics

What is a Will?

A Will is a legal document you can use to transfer certain types of property to people and/or organizations after you pass away. If you pass away without a Will the laws of **Intestacy** apply. These laws distribute your property according to a standard method that may or may not be what you want.

⇒ **TIP:** California laws of Intestacy are found in Sections 6400-6414 of the California Probate Code.

How Do I Form a Will?

A Will can be formed in a variety of ways. A Will is usually legal if it is:

- Signed by you;
- Witnessed and signed by at least two persons that are not Beneficiaries to your Will;
- The document demonstrated your true intentions for which **Assets** go to each Beneficiary.

There is also a "**Statutory Will**" in California, which can be used only for property that is not an Indian Trust Asset.

⇒ **TIP:** The California Bar Association provides a sample Statutory Will for you to get an idea of what a Statutory Will looks like:

<http://www.calbar.ca.gov/Portals/0/documents/publications/Will-Form.pdf>

The California Bar Association can also be reached at their main office by calling them at (415) 538-2000.

⇒ **TIP:** In California, courts recognize a document entirely handwritten and signed and dated by you listing your Beneficiaries and which Assets you wish to pass to them as a valid Will. This type of document is called a “[Holographic Will](#).” However, it is best to have a typed document reviewed by an attorney to ensure what you have written is actually what you intend to happen.

Other Important Decisions Made In a Will

The following are other important decisions that are appropriate to include in your Will:

- A Will can be used to nominate who would take legal guardianship of your children should you pass away and there was no spouse or Domestic Partner to take care of them until they turn 18.
- A Will also names a legal representative for your **Estate** who will be in charge of giving your Assets to the Beneficiaries you named in your Will. This person is called an [Executor](#).
- A Will can create a Trust that gives more control over when and how property is distributed. For example, if you have minor children or grandchildren and in the event of your death you wish them to receive property. Since they are minors they will not be able to receive the gift, or you may want them to finish school or graduate from college before they are allowed to have the property you are giving them. A Trust can accomplish this. Trusts are explained more in further detail in Section 2 “Trust Basics.”

What a Will Does *NOT* Do

The following are common misconceptions about **Wills**:

- A Will does not pass on property that you co-own under a **Joint Tenancy** or **Community Property** with [Right of Survivorship](#). If this is confusing, review the part of this Guide entitled “California Property.”
- A Will does not automatically change when you have a “major life event” such as a new marriage, child or own new property. It is important to review your Will any time a major life event occurs to ensure it is what you want to happen when you die.
- A Will does not distribute money from a life insurance policy. A life insurance policy or other policies that require you to designate a Beneficiary are paid based on the Beneficiary you chose when signing that policy, not a Beneficiary named in a Will or Trust.



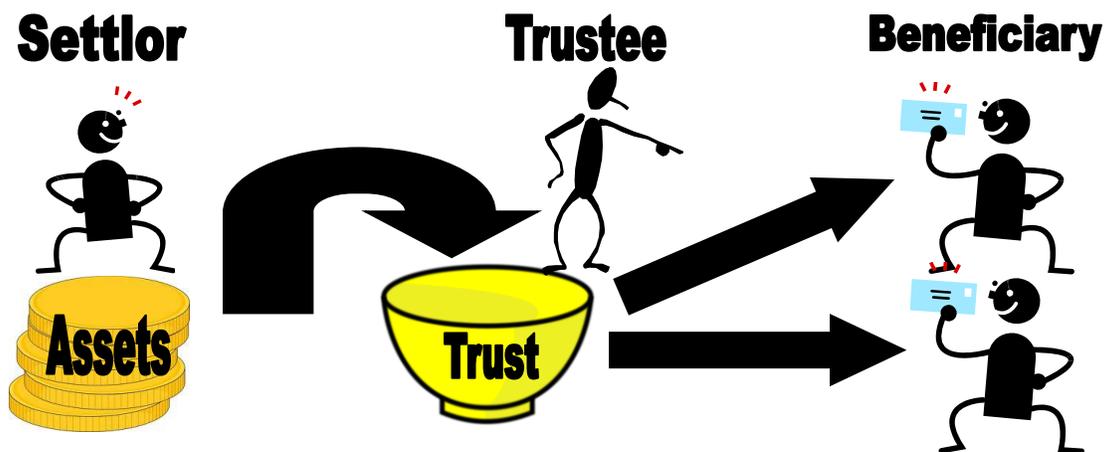
Section 2: Trust Basics

What is a Trust?

A Trust is another planning tool used to distribute your Assets and can be a part of a Will or separate from it. A Trust consists of Assets that are held and distributed according to your wishes under the guidance of a **Trustee**. The Assets in a Trust are not the same as Indian Trust Assets. This is explained further in the section of this guide entitled “Indian Trust Assets.” There are three main players involved in a Trust:

1. A “**Settlor**” who places property into the Trust.
2. A “Trustee” who is named by the Settlor and who is responsible for managing the property in the Trust.
3. A “Beneficiary” who receives the property from the Trust.

The following illustration is useful for understanding the roles of the Settlor, Trustee, and Beneficiary:



⇒ **TIP:** A Trustee can be an organization like a bank or an individual like a trusted relative or in some cases the Settlor can name themselves the Trustee.

How Do I Form a Trust?

There are many different types of Trusts that are specific and unique depending on your needs. Before deciding on a trust, you should discuss it with an experienced Estate planning attorney.

⇒ **TIP:** People with fewer Assets who do not wish to create complex requirements for distributing Assets from the Trust can use self-help guides to set up a Trust such as those published by Nolo Press:

<http://www.nolo.com/legal-encyclopedia/Wills-Trusts-estates>

What a Trust Does *NOT* Do

- A Trust can only give powers to the Trustee to manage and distribute property that is in the Trust. If you don't put Assets in the Trust then they cannot be controlled by the rules you gave the Trustee to follow.
- A Trustee cannot automatically make health care decisions. Review the "Advance Planning" part of this guide for more on healthcare decision making.

What is a Living Trust?

A "Living Trust" is a Trust you can setup while you are still alive. Many people set up a living trust to avoid the Probate process. You can set one up by putting your Assets into a Trust and then name yourself as Trustee. This way when you pass away the Assets in the Trust do not go through Probate because the Trust owns the property. For a more in-depth explanation on whether a living trust is helpful to you, check out the California State Bar Association's website on living trusts:

<http://www.calbar.ca.gov/Public/Pamphlets/LivingTrust.aspx>

⇒ **TIP:** The term "Trust" does *NOT* refer to "Indian Trust Assets" that are discussed in the next part of this guide. Indian Trust Assets refer to the trust relationship between the federal government and Native Americans.

⇒ **TIP:** Scams using Living Trusts have grown over the recent years, typically targeting the elderly. The scams frequently offer lunch and a presentation, followed by a pushy sales pitch. Never feel you must immediately agree to any offer to set up a Living Trust; you can always speak with a few attorneys specializing in Estate Planning before committing.



INTRODUCTION TO PROBATE

What is Probate?

Probate is a legal process that takes place after a person dies in which the Probate Court determines:

- the property a person owned or held in their name;
- the person's legal **Heirs**; and
- the portion of the **Decedent's Assets** the Heirs or [Beneficiaries](#) may receive.

The judge will look to the terms of the **Will**, if the Decedent left one, to determine distribution of an **Estate**.

⇒ **TIP:** The Probate process resolves issues with any outstanding debts or rights of creditors of the Decedent. Before you pay any of the Decedent's creditors, check to see if the debt is to be handled in the Probate process.

Who Handles My Probate?

There are typically two types of Probate for Indian people:

- One type of proceeding is conducted by the Department of the Interior's Office of Hearings and Appeals ("OHA") (with assistance from the Bureau of Indian Affairs "BIA"). This process is often referred to as "BIA Probate."
- The second type of proceeding is conducted in state court and only distributes **non-Trust Assets**.
- There might also be a tribal court Probate proceeding for property within the Tribal court's jurisdiction.



Could I have both a BIA Probate and a state Probate?

Yes. The BIA can *only* Probate Indian Trust Assets (for example a [Fractionated Interest](#) in land [Held in Trust](#)). The BIA *cannot* Probate other property. Also, a state court *cannot* Probate Indian Trust Assets. If the Estate includes both Indian Trust Assets and non-Trust Assets then both BIA and state Probate may apply. In fact, it is very common to go through both processes if an Indian person has property Held in Trust that is managed by the BIA and [Fee Land](#) or other non-Trust Assets (reservation home, bank accounts, jewelry, other personal property not managed by the BIA).

- ⇒ **TIP:** Fee Land is **Real Property** that is owned by the Indian person but not Held in Trust by the federal government. If you have to pay tax on some of your land then you probably have fee land.
- ⇒ **TIP:** If the Decedent held Fee Land or personal property within the reservation and the tribe has a tribal court, the Heirs should contact the tribal court to inquire whether they need to file a Probate in tribal court.
- ⇒ **TIP:** See the “Wills, Trusts & State Court Probate” section of this guide for more information on the California Probate process. See the “Indian Trust Assets” section of this guide for more information on the BIA Probate process.



What assets can be transferred *without* a Probate or Living Trust?

There are a number of assets that can be transferred without going through the Probate process or having a Living Trust.

- **Bank Accounts:** You can request to make your bank accounts “Payable on Death” to beneficiaries. This will transfer the money in the account to the beneficiary automatically once evidence of death (usually a death certificate) is provided to the bank. Speak with your bank about making your accounts Payable on Death.
- **Life insurance, 401(k) and other retirement accounts:** A beneficiary is normally listed on life insurance policies and retirement accounts, so that the proceeds and assets are transferred automatically once evidence of death is provided.
- **Vehicles:** The California Department of Motor Vehicles allows the transfer of a vehicle by using an affidavit, but only if there is not going to be a probate.
 - <https://www.dmv.ca.gov/forms/reg/reg5.pdf>



- Real Property held as Joint Tenants: If real property (land) is held as Joint Tenants, it will transfer to the other Joint Tenants when one Joint Tenant dies. An Affidavit of Death of Joint Tenant may need to be recorded with the county.
 - <http://www.saclaw.lib.ca.us/Uploads/files/forms/AffidavitDeathJointTenant.pdf>

Bottom Line: Probate is a tricky process. Also, state court Probate can be expensive. It is important to plan ahead, especially if you wish to avoid state court Probate. Probate of Indian Trust Assets can also be time consuming, but understanding the basics of Assets and distribution processes can minimize delays in distribution to your Beneficiaries.



State Court Probate and Procedures for Small Estates

This section explains the State Probate process, as well as the laws concerning procedures for small estates.



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 (not Indian Trust Assets). The state court determines what heirs, property, and debts the Decedent had at the time of death, approves an inventory and appraisal, and if there is a Will, ensures that the property and [Liabilities](#) are distributed according to the terms of the Will. However, the state court does not have jurisdiction over Trust Assets or [Restricted Property](#) that the BIA manages.

Who Is Responsible For Beginning and Overseeing State Probate?

Generally, when a person writes a **Will**, they name an Executor. The Executor is responsible for contacting the court and opening a Probate case. Often the Executor finds a Probate attorney to represent the Estate in the Probate. The Executor is also responsible for inventorying and collecting the property, paying debts and taxes, distributing the property and accounting to the court and Heirs.

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 Attorneys Involved In State Probate?

The typical state Probate involves paperwork and court appearances by attorneys. The attorney's fees, Executor's fees, and court costs are usually paid from the Estate's Assets, based on a percentage of the Estate's value. The court must approve the attorney and Executor fees before they can be paid.

What Are Assets In State Probate?

Assets are property that is worth money. Examples include: money in checking, savings, and other bank accounts (not [IIM Accounts](#)), **Real Estate** or land that is not managed by the BIA, leases of Real Estate or lands that are not managed by the BIA, cars or other vehicles, securities and other investments, **Personal Property** and household items. This includes Regalia and other items that you may not consider "yours".

What Are Debts?

Debts are the money that the Decedent owed to somebody (a "creditor") at the time of death. Debts might include money owed for: utility bills, credit card bills, personal loans, house payments, court judgments, taxes, health care costs, and death and funeral costs.

⇒ **TIP:** A Decedent's Estate may need to file a tax return. It is advisable to consult a tax specialist or accountant regarding any potential tax forms that need to be filed.

What happens during the State Probate process?

The person who has custody of the original Will is required to give it to the court clerk in the county where the Decedent died or owned land (this should happen within 30 days of the death). There are separate procedures for what happens when the original Will is lost or destroyed, and whether a copy can be admitted to Probate.

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:** The Probate process can often be confusing. You can get the forms you need at the court's website (www.courtinfo.ca.gov), but we recommend that you contact an attorney to assist you. If you need help filling out the forms, you may wish to contact your local Lawyer Referral Service at 1-866-442-2529 or 866-44-CA-LAW (toll free in California) for an attorney who specializes in Estate Planning or you can visit www.lawhelpcalifornia.org for a listing of organizations and legal aids that may be able to assist you.

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. This may include selling some or all of the Assets in order to pay off these debts or to equally divide Assets. If necessary an Executor/Administrator may represent the Estate in litigation, but may have to obtain permission from the court before using Estate Assets to litigate.

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, if the Assets are complex, or if someone disputes the Will or makes a claim against the Estate. 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.

⇒ **TIP:** You may want to check on the status of the Probate case. Probate cases are public records, but since each court operates by local rules you should contact the local court clerk directly for details.



Procedures for Small Estates



For small estates, there are different procedures that can be used. These procedures greatly reduce or eliminate the involvement of the Probate Court.

What is a small estate?

Estates worth less than \$150,000, including land (but not Indian land held in trust), vehicles, and personal property, are considered small estates.

What are the procedures for small estates?

There are several types of procedures for small estates. Choosing which to use depends on the assets in the Estate.

Money and personal property only (no land)

For small estates with only personal property and no land, an affidavit, as described in California Probate Code §13100-13116, allows an heir to collect personal property and money of the decedent without going to the Probate Court for Letters of Administration. The affidavit

cannot be used until forty (40) days after the date of decedent's death. Note: if the only asset in the Estate is money in a bank account, most major banks have the pre-printed affidavit available.

Land worth less than \$50,000

For small estates with fee (taxable) land worth less than \$50,000, a court form called "Affidavit re Real Property of Small Value" can be filed with the court six (6) months after the decedent's death. See California Probate Code §13200-13210 and California Court Form DE-305.

Land worth more than \$50,000 but less than \$150,000

For small estates with fee land worth more than \$50,000 but less than \$150,000, a court form called "Petition to Determine Succession of Real Property" can be filed with the court forty (40) days after the decedent's death. See California Probate Code §13150-13158 and California Court Form DE-310. Despite its name, the petition can also include personal property.

Compared to a full Probate, the procedures for small estates greatly reduce the amount of time and expense required to determine the distribution of an estate. Remember the items discussed in the Introduction to Probate section which are transferred without a Probate. Often, it is these items that push an estate over the \$150,000 threshold. If addressed properly, the time and expense involved in a full Probate could possibly be avoided.

Bottom Line: There are many ways to give property away in the event of your death. Some work better for some people depending on their situation. Consulting an attorney when forming a Will or Trust for your assets not managed by the BIA as Indian Trust Assets will go a long way in avoiding complications in the State Probate process. However, if you have a small amount of Assets then creating your own Will and a Trust may be a smart, low-cost alternative to hiring an attorney for the State Probate process.



PROBATE FOR INDIAN TRUST ASSETS

Indian **Trust Assets** are completely separate from state laws and state **Probate**. The following will help guide you through the BIA Probate process and give you the information you need to make informed decisions on distributing your Indian Trust Assets.



BIA Probate Process

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 a BIA Probate. BIA Probate involves only Trust Assets (Assets managed by the BIA), such as:

- land [Held in Trust](#);
- [Restricted Property](#);
- and [Individual Indian Money \(IIM\) Accounts](#).

How Does The BIA Probate Process Start?

- To start the BIA Probate process, someone should contact the BIA office nearest to where the **Decedent** was enrolled and tell them about the Indian person's death. The person who tells the BIA does not have to be a relative and there is no deadline for notifying the BIA. Usually the BIA asks the caller or the Decedent's close family members to send the BIA a certified copy of the death certificate.
- If the death certificate cannot be found, you must provide an [Affidavit](#) of death which contains information regarding the state, city, reservation, location, date and cause of death, along with other information.

⇒ **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).

In California Affidavits are also called "Declarations".



Who Handles the BIA Probate Process?

- Typically, the BIA office that serves the tribe where the Decedent was enrolled is the office that begins the process. Where there is no tribe, the office that begins the process would be the BIA office servicing the area nearest to the property Held in Trust.
- The BIA then assigns a probate specialist or probate clerk to prepare a “probate package” which is a file containing all the information about the Decedent’s tribal membership, family tree, **Will** and **Codicils** (if any exist), claims against the **Estate** and other relevant documents. If any information is missing, the Probate specialist/clerk will try to get that information.
- Once the Probate package is complete, it is transferred to the Office of Hearings and Appeals (OHA). The OHA will then assign either a judge or hearing officer to the case. This judge or hearing officer will conduct a Probate hearing and later issue a written decision or order. The BIA makes the **Trust/Restricted Property** distributions per the decision or order.

⇒ **TIP:** For Decedents belonging to one of the Five Civilized Tribes in Oklahoma (Cherokee, Choctaw, Chickasaw, Creek, Seminole) a 1947 law requires that their Estates’ Probates take place in the District Court (Oklahoma County Court) where their restricted land is located. These Estates cannot be probated in California or through California’s BIA offices. Often, **Heirs** to these Estates must get a private attorney in Oklahoma to file an Indian Probate case there.

- Some tribes have contracted with the Bureau of Indian Affairs for the tribe to prepare the probate package. However, no tribes in California currently have adopted this practice.

What Information/Documents about the Decedent does the Probate Specialist/Clerk Collect?

- ✓ death certificate or Affidavit of death (known as “evidence of death”);
- ✓ social security number;
- ✓ tribal enrollment number or census number & place of enrollment of Decedent;
- ✓ tribal enrollment number(s) or census number(s) & place of enrollment of potential Heirs;

- ✓ names and current addresses of Decedent's potential Heirs & devisees. (A devisee is an Heir who is named to take land in a Will or Codicil);
- ✓ marriage/divorce records;
- ✓ known creditors;
- ✓ adoption or guardianship records, if any;
- ✓ list of aliases used or name change court orders for the Decedent, if any;
- ✓ child or spousal support payment orders, if any;
- ✓ Will, [Revocations](#) and Codicils. A Codicil is a modification of part of a Will. Typically, it is a separate written document signed with the same formalities as required for the original Will. Revocations are separate written statements whereby the Decedent or a potential heir of the Decedent revokes their interest in Trust/Restricted Property.

⇒ **TIP:** Some BIA offices give specific mailing instructions to those mailing original Wills and Codicils. Some California BIA offices require the Wills/Codicils to be put in an envelope with the Decedent's name, date of birth and tribal affiliation. That envelope is placed into a larger envelope addressed to the BIA, with the words "Confidential Will and Information for Probate" written on the outside. However, before sending any Will, Codicil or Revocation document to the BIA, you should call them for specific mailing instructions.

What Happens after the Probate Package is referred to the OHA?

A notice is sent to the potential Heirs, Beneficiaries and creditors telling them:

- that a federal administrative proceeding will be held before an [Administrative Law Judge \(ALJ\)](#) or other appointed officer;
- the location, date, and time of the probate hearing;
- the name of the ALJ or hearing officer;
- the OHA's probate number for the case;
- that Heirs, Beneficiaries and creditors have a right to be present at the hearing in person or through an attorney; and
- that Heirs, Beneficiaries and creditors have the opportunity to consolidate and/or renounce their interests at the probate hearing.

Copies of Wills and Codicils should be attached to the notice.

The hearing officer then holds a formal hearing.

If no special issues arise during the hearing, the hearing officer issues a written decision or order and sends it to all [Interested Parties](#). An Interested Party is anyone who thinks they might have inherited Assets from the Decedent. If issues arise during the hearing, the hearing officer may schedule an additional hearing.

How does the hearing officer decide who gets what?

All Indian Trust Assets will be distributed under a valid Will, if one exists. If there is no Will (called [Intestacy](#)), but there is a valid tribal Probate code, the tribal rules are followed for distribution. If there is no Will and no valid tribal Probate code, the AIPRA will determine how the Estate is distributed. The AIPRA attempts to provide for a national, uniform distribution of Trust Assets and Restricted Property.

⇒ **TIP:** Please see CILS handout [“What is AIPRA?”](#) for further information about this law.

Can IIM Accounts be taken by Creditors?

The hearing officer may order the Estate to pay expenses from the Estate’s IIM Account. Such expenses may include:

- ✓ funeral expenses;
- ✓ medical expenses;
- ✓ nursing home or other care facility expenses;
- ✓ tribal claims;
- ✓ judgments against the Estate; or
- ✓ all other general claims.

⇒ **TIP:** Indian Trust Land cannot be sold to pay expenses.

Is the Executor Involved in the BIA Probate Process?

BIA Probates do not use an [Executor](#), but may use a personal representative. If a Will does name an Executor or personal representative, the BIA may 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 personal representative does not have a formal role in the BIA Probate process.

Are Attorneys Involved in the BIA Probate Process?

Attorneys are usually involved only if family members oppose the Will, or if attorneys are needed to provide assistance during the process. The BIA does not provide any legal assistance.

How long does BIA Probate take?

BIA Probate generally takes longer than a state Probate. The process usually ranges from four to eight years. Presently, the BIA Probates in California average eight years from date of death until completion of the Probate. However, depending upon the size of Decedent's Estate (meaning how many Trust Assets the Decedent held) and whether the Decedent's ancestors' estates have already been Probated, the hearing officer may choose to first Probate the ancestors' estates before tackling the Decedent's Probate. This usually extends the waiting time. You should check with the appropriate BIA office for wait times.

Bottom Line: The BIA Probate process is daunting when you first look at it. If you use this guide as a resource and keep good records of everything you send and receive from the BIA, then you will have a much better experience. Don't forget to look at our CILS handout [“What is AIPRA?”](#) for more information on Probate reform in Indian Country. For specific questions or more information about BIA probates, contact your local CILS office.

GLOSSARY AND DEFINITIONS

Administration means overseeing a Probate **Estate**. It includes gathering, inventorying, valuing the Estate's property, calculating and paying debts and/or taxes and distributing the remaining property to the **Heirs** or other **Beneficiaries**. (see definition of **Heirs** and **Beneficiary**).

Administrator is the person who collects the property, pays the debts and/or taxes and then distributes the **Estate** to the **Beneficiaries**. The **Probate Court** appoints the Administrator if the **Decedent** did not appoint an **Executor** in the Will (see definition for Executor). 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.

Affidavit is the written statement of a person who swears that the information in the statement is true and correct to the best of his or her knowledge under penalty of perjury. Sometimes an affidavit is "notarized" (signed in front of a notary). In California, an Affidavit is also known as a "Declaration."

Agent is a person you can designate to make legal, medical and financial decisions for you. When you give this power to someone you become the **Principal** and this relationship is referred to as "Principal-Agent."

Advance Health Care Directive or **AHCD** is a document in California that acts as both a "**Power of Attorney**" (see Definition of Power of Attorney) for health care decision making and is also a guide for medical professionals to ensure the person's health care wishes are followed if that person is no longer of good health or sound mind.

AIPRA is the American Indian Probate Reform Act, a federal law that attempts to overhaul the probate process for Indian Trust Assets. Please see our handout entitled, "What is the AIPRA?" which is located on our CILS website, www.calindian.org.

ALJ or **Administrative Law Judge** is an Office of Hearings and Appeals, Department of the Interior employee who has the power to make decisions in Indian Probate Cases. An ALJ is like a judge for an administrative or government hearing.

Artificial Life Support means to extend life through technological support such as breathing machines and feeding tubes.

Assets are all the Decedent's property including contracts or legal rights that 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 land and money **Held in Trust** (see definition of Held in Trust) by the United States and managed by the BIA. (see definition of Trust Assets).

Beneficiary is a person designated to receive the proceeds from an insurance policy, annuity, or retirement plan; to take **Assets** under a Will; or to receive benefits from a Trust. (see also definition of Heirs).

Codicil is a written amendment to an existing Will. Depending on the applicable tribal, state or federal laws, certain formalities may be required for a valid codicil. Terms in a Will not addressed by the **Codicil** are still valid.

Community Property is property shared between a **Married Couple** (see definition of Married Couple) or **Domestic Partners** during the term of the marriage or **Domestic Partnership**. (see definition of Domestic Partners).

Decedent is the person who died.

Domestic Partners are defined in California as (1) both persons of the same-sex, or (2) heterosexual couples where one or both persons are over the age of 62 and live together the majority of the time. Under California Family Code sections 297-297.5, California requires Domestic Partners to register with the state in order to be legally recognized. The time after Domestic Partners are registered until the time the partnership is dissolved is referred to in this guide as "the Domestic Partnership."

Do Not Resuscitate (DNR) is a form expressing an individual's wishes to limit medical treatment to be resuscitated if they experience an emergency or event that leads to their death.

Estate is all the Assets and debts left by the Decedent. See also, **Small Estate**.

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, or there is no Will, the court will appoint an Administrator to do these things.

Fee Land is **Real Property** and includes any improvements and new buildings permanently on that land. Title to fee land is owned in the same manner for Indian and non-Indian property owners. It is distinguishable from 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.

Fractionated Interest is part ownership of a whole property in common with all other owners. Each owner with a Fractionated Interest has the same rights as the other owners.

Heirs are people who could potentially **inherit** property if there is no Will, which is called “Intestacy” (see definition of Intestacy). If there is a Will people who are to receive property are “Beneficiaries.”

Held in Trust is a term that refers to the legal ownership of Indian lands and other Trust Assets. The federal government holds legal title to the property solely for the benefit of that Indian person or tribe.

Holographic Will is an entirely handwritten document signed by the **Testator** (the person who writes and signs Will while living and becomes a Decedent after death). The Testator must list the Assets they wish to distribute to Beneficiaries.

Incapacity means a person is temporarily or permanently physically or mentally impaired to the point they no longer understand the consequences of their actions.

IIM Account means an **Individual Indian Money Account** that contains income from Trust Assets or per capita payments which are administered by the BIA.

Inherit means to receive Assets from a Decedent either by Will or Intestacy. (see definition of Intestacy).

Interested Parties are people who think they might have inherited Assets from the Decedent.

Intestacy is the distribution of an Estate's Assets when a person dies *without* a Will. The court will distribute the Decedent's Assets according to the jurisdiction's rules of Intestacy or Probate code. A person who dies without a Will is said to have died "intestate".

Joint Tenancy is a special form of co-ownership of property where co-owners share undivided, fractional interests in a whole property (see definition of **Fractionated Interest**). It also creates a "Right of Survivorship" (see definition of **Right of Survivorship**).

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.")

Living Will is a valid legal document in many states outside of California that specifies which life-prolonging measures an individual does or does not wish to have performed. The Living Will takes effect when a person is medically incapacitated (see definition of Incapacity) and a person is selected in the Living Will to make those decisions. *In California there is no Living Will, but there is a similar document called an Advance Health Care Directive.* (see definition of Advance Health Care Directive).

Married Couple refers to legal marriage in California as defined by California Family Code Sections 300-310 and generally requires a man and a woman to each want to become married to the other and then for them to obtain a marriage license to make the marriage legal.

Personal Property is all property that is not Real Property which includes cash, cars, clothing and most other moveable things.

Physician's Orders on Life Sustaining Treatment (POLST) is a document used by terminally ill individuals and their doctors to express your wishes regarding the use of medications, artificial feeding and hydration, CPR, and other treatments. Printed on bright pink paper, it must be signed by both the individual and their doctor.

Power of Attorney is a legal document that authorizes a person to act on another's behalf as an Agent. There are various types of power of attorney documents that include AHCD and **Power of Attorney for Financial Management (POAFM)**.

Power of Attorney for Financial Management or **POAFM** is a legal document that authorizes a person to act on another's behalf as an Agent for the specific purpose to pay bills and take care of other necessary financial transactions while a person is of poor health and/or unsound mind to make those decisions. (see definition of Incapacity).

Principal is a person who gives legal authority to an Agent to make legal, medical and financial decisions. When you give this power to an Agent the relationship is referred to as "Principal-Agent."

Probate is the entire process of administering and distributing a Decedent's Estate, whether by Will or Intestacy. Probate is administered by a **Probate Court** in the state where the Decedent lived or executed the Will. The Probate of Trust Assets is not administered by the state, but by the BIA (see definition of Trust Assets). The Probate process attempts to find all of the Decedent's Assets, paying all of the Decedent's outstanding debts, and distributing the remainder of the Estate to either the Heirs or Beneficiaries.

Probate Court is a division of the California Superior Court that oversees the administration of an Estate for non-Trust Assets. (see definition of Trust Assets). However it can also be used to refer to a BIA Office of Hearings and Appeals (OHA) proceeding, which applies only to Trust Assets.

Probate Package is all of the required materials that are collected for a BIA Probate of Trust Assets. (see the section of this guide entitled "Indian Trust Assets" for a list of items in the Probate Package).

Real Property includes land, and anything permanently erected on or attached to the land (such as a house, or other building improvements). It means the same thing as "real estate."

Restricted Property is Real Property which title is held by an Indian but which cannot be sold, given away, Willed or encumbered without the consent of the Secretary of the Interior. For purposes of BIA Probate it is treated as a Trust Asset (see definition of Trust Assets).

Revocation refers to a separate written statement by the Decedent or potential Heir of the Decedent that revokes their interest in Trust Assets.

Right of Survivorship specifically means as each co-owner dies, his or her ownership interest automatically passes to the surviving co-owners. The last one living gets all the property. When the last owner dies, that person's Heirs/Beneficiaries inherit the property.

Settlor means the person who forms a Trust by picking the Trustee, the Assets to go into the Trust and each Beneficiary or class of Beneficiaries.

Small Estate means an estate worth less than \$150,000, including land (but not Indian land held in trust), vehicles, and personal property.

Statutory Will is a fill-in-the-blank form referenced in California Probate Code Sections 6240 – 6242 and is also called a “simple will” because it is useful for people with less complicated Assets. It is also a useful guide to look at when a person is deciding what should be in their Will.

Tenants in Common occur when co-owners share an undivided, fractional interest in property. (see definition of Fractionated Interest). Individual interests held as tenancy-in-common property are subject to Probate when a co-owner dies and do not pass automatically to surviving co-owners.

Testator is the living person who writes the will. After they die they become the Decedent. (see definition of Decedent).

Trust is a legal arrangement whereby the Settlor chooses one person or entity (the **Trustee**) to look after their property, money, etc., on another's (Beneficiary) behalf.

Trust Assets for the purpose of this guide are Assets that are managed by the BIA. Examples include land Held in Trust (also referred to as “Trust land” see definition of Held in Trust), Restricted Property and Individual Indian Money 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 (see definition of Holographic Will), 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.



IMPORTANT RESOURCES



Federal Laws

- ❖ Title 25 Code of Federal Regulations Chapter 1, Subchapter C governs BIA probate procedures.
- ❖ Title 43 Code of Federal Regulations Subtitle A, Part 4, Subpart D governs OHA probate hearings.

California Code Sections

- ❖ *California Civil Code Section 682.1* governs **Community Property with Right of Survivorship**.
- ❖ *California Family Code Sections 297-297.5* govern **Domestic Partnerships**.
- ❖ *California Family Code Sections 300-310* govern legal requirements for **Married Couples**.
- ❖ *California Family Code Sections 6240-6242* govern **Statutory Wills**.
- ❖ *California Probate Code Sections 810-813* govern **Incompetency**.
- ❖ *California Probate Code Sections 6400-6414* govern the laws of **Intestacy**.
- ❖ *California Probate Code Sections 13100-13210* govern **Small Estates**.

California Government Resources

- ❖ California Attorney General's website at: <http://oag.ca.gov/consumers/general/care> for general information on advance planning tools and advice.
- ❖ For general forms, instructions and other California **Advance Health Care Directive** resources visit the Attorney General's **AHCD** site at http://oag.ca.gov/consumers/general/adv_hc_dir.
- ❖ For the Physician's Orders on Life Sustaining Treatment (POLST) form, go to <http://www.emsa.ca.gov/pubs/pdf/ApprovedPOLSTForm.pdf>
- ❖ For information about Domestic Partnership and the Secretary of State's Domestic Partner Registry, go to <http://www.sos.ca.gov/dpregistry/>

- ❖ The Sacramento County Public Law Library website has free downloadable forms, including for POAFM, at <http://www.saclaw.org/pages/forms-page-topical.aspx>; the general phone number for the library is (916) 874-6012.
- ❖ For state court **Probate** forms, including for **Small Estates**, go to www.courtinfo.ca.gov.
- ❖ For transfer vehicles without a probate go to <https://www.dmv.ca.gov/forms/reg/reg5.pdf>
- ❖ For an Affidavit of Death of Joint Tenant go to <http://www.saclaw.lib.ca.us/Uploads/files/forms/AffidavitDeathJointTenant.pdf>

Other Helpful Resources

- ❖ for further explanations regarding **Domestic Partnership** formation and legal status look at information provided by the National Center for Lesbian Rights entitled: “The California Domestic Partnership Law: What it Means for You and Your Family,” located at: <http://www.nclrights.org/site/DocServer/AB205.04.2007.pdf?docID=1264>
- ❖ The California Bar Association provides a sample **Statutory Will** for you to get an idea on what a **Statutory Will** looks like:

<http://www.calbar.ca.gov/Portals/0/documents/publications/Will-Form.pdf>; The California Bar Association can also be reached at their main office by calling them at (415) 538-2000.
- ❖ California State Bar Association’s website on living trusts: <http://www.calbar.ca.gov/Public/Pamphlets/LivingTrust.aspx>
- ❖ Nolo Press provides low cost guides for setting up a **Trust** at <http://www.nolo.com/legal-encyclopedia/Wills-Trusts-estates>
- ❖ For Assistance in filling out state court **Probate** forms contact a local Lawyer Referral Service at 1-866-442-2529 or 866-44-CA-LAW (toll free in California) for an attorney who specializes in **Estate** planning.
- ❖ You can visit www.lawhelpcalifornia.org for a listing of organizations and legal aids that may be able to assist you.

VISIT OUR WEBSITE AT WWW.CALINDIAN.ORG

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OR CALL:

- **1(800) 829-0284 FOR THE SACRAMENTO OFFICE**
- **1(800) 743-8941 FOR THE ESCONDIDO OFFICE**
- **1(800) 347-2402 FOR THE EUREKA OFFICE**
- **1(800) 736-3582 FOR THE BISHOP OFFICE**

