

Probate Process for Native Americans

► 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. This guide does not focus upon Estate Planning or Wills. If you have questions regarding Indian Wills, please see our handout entitled, "What is the AIPRA?" This guide focuses on situations where the person who passed away had land in his or her name. Specifically the guide examines the situation where a person died who had interest in "trust" land (on a reservation or public domain allotment). This guide primarily discusses probates handled through the Bureau of Indian Affairs and the Office of Hearings and Appeals. It does not focus upon the state court system. Probate is a complicated area of law. This guide is only an introduction to the probate process.

For BIA probate information, see page 2.
For State probate information, see page 7.
For Definitions, see page 10.

⇒ **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 10.

► What is probate?

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

- what property a person owned or held in their name,
- who the person's legal heirs are; and
- what shares the heirs may be entitled to.

The judge will look to the terms under a Will, if the deceased left one. The probate process also resolves issues with any outstanding debts or rights of creditors of the deceased.

⇒ **TIP:** The law usually refers to a person who has died as a **decedent**.

► Where does probate happen?

Typically there are two kinds of probate proceedings for Indian people:

- One type of proceeding is conducted by the Department of the Interior's Office of Hearings and Appeals (with assistance from the Bureau of Indian Affairs, "BIA"). This type of proceeding is often referred to as a "BIA probate";
- Another type of proceeding is conducted in the State Court;
- On rare occasions there might also be a tribal court probate proceeding where the deceased held personal or non trust property within the boundaries of their reservation and their tribe operates a tribal court which determines the inheritance rights over that property.

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

► Could I have both a BIA probate and a state probate?

Yes. The BIA can *only* probate Indian trust assets (for example, a share in a trust allotment). But the BIA **cannot** probate other property. Similarly, a state court cannot probate Indian trust assets. 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 6 for more information about state probates. In fact, 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" or other non trust property (such as reservation home, bank accounts, cars, jewelry, personal property). **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.

⇒ **TIP:** If the deceased held non-trust 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.

✧ 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 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; the decedent's last known address; the names/addresses of others who may have information about the decedent; and any copies of newspaper articles, obituaries, death notices or church or court record.

⇒ **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 trust property's location. 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.

NOTE: 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.

► **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/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. Also, note that 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 does an average probate package contain?**

The probate package usually includes:

- evidence of death;
- a completed “Data for Heirship Findings and Family History Form” (also called an OHA-7 form) which is a “family tree” form showing enrollment or other identifying number for each potential heir;
- information as to whether each potential heir meets the definition of Indian under the American Indian Probate Reform Act (AIPRA);
- a certified inventory of trust or restricted property, including identification of any interests less than 5 percent of the undivided interest in a parcel created by BIA;
- a statement showing the IIM account balance as of the date of death;
- a list of income disbursements from the IIM account after the date of death;
- all Wills, codicils, or revocation of Wills and codicils;

- statement concerning any Wills, codicils or revocations that the BIA returned to the decedent;
- any statements renouncing any part of an interest in the decedent's estate;
- creditors claims;
- records of any IIM account monies used to pay the decedent's funeral services;
- records of any tribal or individual request to buy any of decedent's trust or restricted property interests;
- record of any request to consolidate decedent's estate with any lands not part of the estate; and
- the probate clerk/specialist's affidavit that all efforts were made to locate the beneficiaries including all information collected by the probate specialist/clerk as described in the prior question.

► **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 hearing officer the probate matter;
- the OHA's probate number for the case;
- that heirs, beneficiaries and creditor 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 with the heirs, and other family members.

If no special issues arise during the hearing, the hearing officer 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.

► **How does the hearing officer decide who gets what?**

All trust personalty will be distributed in accordance with the American Indian Probate Reform Act (also known as AIPRA). All trust land 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 probate code will determine how the estate is

distributed. 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 and restricted property.

*** 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 for the last illness;
- nursing home or other care facility expenses;
- tribal claims;
- judgments against the estate; or
- all other general claims.

*** Note that trust land cannot be sold to pay expenses.

► **Is the executor involved in the BIA probate process?**

BIA probates do not use an executor or personal representative. If a Will does name an executor/personal representative, the BIA may work with them to get the information needed for the probate package. Some ALJs prefer that Wills name a personal representative. 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 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. The BIA does not provide any legal assistance.

► **How long does BIA probate take?**

BIA probates generally take 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 interests 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.

✦ A Word About State Probates ✦

While this guide focuses on the BIA probate system, a short summary of state probate procedures is included because it is common for an Indian decedent's estate to require both a BIA probate and a state probate. However, CILS does not specialize in state probate matters. Individuals seeking more detailed information should consult with an attorney with estate planning specialty or contact your local legal aid program. Please note: This guide describes the probate process in the state of California only. The process may be different in other states.

► 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 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 or restricted properties that the BIA manages.

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

There are many situations where an estate does not need to be probated. However, the laws can be tricky and often require reviewing the decedent's property and state assets. Because of the number of potential variations, we recommend that you consider speaking with an attorney with an estate planning specialty or contact your local legal aid program.

Generally, in California if the estate is worth less than \$150,000 and there is no real property, then it might not have to go through probate. But if there is real property (fee lands) in the estate worth more than \$50,000, there usually must be some sort of probate proceeding. There are also a couple of simple procedures for transferring property (such as work wages, money, and even fee land) left to a surviving husband or wife but again, community property laws can be tricky so it is best to check with an attorney with estate planning specialty.

Other examples of property passing outside of a probate include but may not be limited to:

- insurance payments where a "beneficiary" is named. A **beneficiary** is the person who will inherit the insurance money.
- Bank accounts where the beneficiary is named (otherwise known as Payable on Death or PODs.)

- property that is owned as a “joint tenancy.” **Joint tenancy** is a way to own property where joint tenants are co-owners. When one of the tenants dies, the property automatically goes to the remaining tenant or tenants. The property does not pass to the deceased tenant’s heirs and the property cannot be left in a Will 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 and operate very differently. Note that while the word “trust” is used, it is a different meaning than Indian trust lands discussed in the BIA probate section.

► **Who is responsible for beginning and overseeing the 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 lawyers involved in state probate?**

The typical state probate involves paperwork and court appearances by lawyers. The lawyer’s fees, executor fees, and court costs are usually paid from the estate’s assets. The lawyer’s ordinary fees are established by a formula based on a percentage of the estate’s value. The court must approve the attorney and executor fees before they can be paid. Any additional legal fees are called “extraordinary” fees and can only be authorized by the court for work above and beyond what is normal.

► **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.

► **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, 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. You may need help filling out the forms, so 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 who 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.

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

Probate cases are public records, but since each court operates by local rules you should contact the local court clerk directly for details.

✦ 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 overseeing a probate estate. It includes the gathering, inventorying, valuing of the estate's property, calculating and paying debts and/or taxes, and distributing the remaining property to the family or other beneficiaries.

An **Administrator** has the same duties as an Executor but is the name used when the decedent did not appoint an Executor in the Will. 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. See **Executor**.

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 under penalty of perjury. Usually, an affidavit is "notarized" (signed in front of a notary).

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

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 trust lands and monies held in trust by the United States and managed 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.

Codicil is a written document that changes only part of a Will. It must 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.

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.

Fee land is real property and includes any improvements 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.

Heirs are people who could potentially inherit property but who may not receive any if there is a Will that names only other beneficiaries.

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.”

Restricted property is real property whose 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 the purposes of probate proceedings, restricted property is treated as if it were trust property.

Trust is a legal arrangement whereby one person looks after property, money, etc., on another's behalf.

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.

CILS Community Legal Education Self-Help Series

The Community Legal Education Self-Help Series is a project of CILS. The Series' mission is to expand access to legal resources that increase Indian self-sufficiency. This guide is part of our Community Legal Education Self-Help Series, providing Indians and Indian tribes with user-friendly information and self-help assistance pertaining to their legal status and rights. Community Legal Education Self-Help guides, and more information about CILS and California Indian issues, are available on our website at www.calindian.org and on our Facebook page at www.facebook.com/CaliforniaIndianLegalServices.

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

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