ESTATE PLANNING FOR AMERICAN INDIANS: AIPRA FOR THE GENERAL PRACTITIONER

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Indian law is sometimes viewed as niche practice area limited to those who work directly with tribes or those who work on or near a reservation. Despite this perception the general practitioner regardless of where they work should have passing familiarity with laws which affect tribal members who often reside outside of reservations. Two primary examples of this are the Indian Child Welfare Act and the American Indian Probate Reform Act (AIPRA). While the former is a subject worthy of an extended discussion this article will focus exclusively on AIPRA and related acts which effect the estate plans of American Indians wherever they live.

The 2010 U.S. Census Bureau noted that more than half of all American Indians reside outside of what is considered "Indian Country."[1] The city of Denver has thousands of American Indian residents, as do virtually all major cities and counties in the United States. This community has need of estate planning services akin to their non-Indian neighbors, to plan for transfer of real property or create trusts to ensure that minor children are cared for. This general estate planning is not affected by federal law in general; however, to draft a fully comprehensive plan the attorney must have an understanding of the federal laws which affect Indian landholding.

A bit of history is necessary to appreciate the nature and scope of Indian landholdings. Beginning in the 1860's through various treaties and later through the General Allotment Act passed in 1890, the remaining tribal lands in the U.S. were allotted to individual tribal members. The federal policy underlying this was that individual land ownership would lead Indian people to assimilate into the American economy more quickly and would eliminate the need for the Federal trust relationship to Indian people.[2]

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1. Tina Morris, Paul Vines, and Elizabeth Hoeffel, U.S. CENSUS BUREAU, *The American Indian and Alaskan Native Population 2010* (2012), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.

2. Kristina L. McCulley, *The American Indian Probate Reform Act of 2004: The Death of Fractionation or Individual Property Interests and Tribal Customs?*, 30 AM. INDIAN L. REV. 401, 403 (2005–2006). *available at* http://jay.law.ou.edu/faculty/Hampton/Mineral%20Title%20Examination/Session%202/Session%202%20-%20IndianTHEAMERICANINDIANPROBATEREFORMACTOF2004.pdf

These allotments were initially held in trust by the Department of Interior. Under the terms of the General Allotment Act fee simple title would pass to the allottee after twenty five years; however, later acts allowed this period to be shortened if the Secretary of Interior determined the allottee was competent to manage their own affairs. The overall allotment process led to the loss of two-thirds of the Indian land which remained in the U.S. in 1890, either by direct sale as excess lands or through tax foreclosure or other seizure once fee title was issued.[3]

The process of allotment was halted in 1934 with the passage of the Indian Reorganization Act. Unfortunately, a number of unforeseen consequences meant that this simple halt to the process would create land tenure issues through to the present. Throughout the allotment process individuals whose holdings were in trust passed away before fee title could be issued. The Department of the Interior applied state probate law to determine how such interest should be distributed, still in trust however, and since virtually all of these estates were intestate most lands passed per stirpes. Considering the poor conditions on many reservations that saw communities lose whole families, these interests could be split hundreds of ways. With the passage of the IRA all individual interests, which were then in trust, remained in trust and have passed down through multiple generations creating an issue of land fractionation where hundreds or even a thousand individuals are co-owners of a trust parcel.[4]

In 2009, there were more than four million individual interest in Indian land, spread across 150,000 parcels throughout the U.S. Many of these interests are quite small, but individuals may own interests in multiple parcels.[5] These small parcels must be addressed as part of an estate plan either for their economic value or the intangible value they may represent to a client.

To address the issue of land fractionation in Indian country congress passed the Indian land consolidation act. This act allowed tribes to create consolidation plans to repurchase, swap, or otherwise consolidate these fractionated interests into tribal control. Importantly for estate planning, this act created a system where small interests would escheat to the tribe where the land was located. This provision though was twice held unconstitutional by the U.S. Supreme Court as a taking.[6]

In response Congress enacted the American Indian Probate Reform Act in 2004. This Act creates a unified federal probate code for trust

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3. *Id.*

4. *Id.*

5. *Proposed Settlement of Cobell v. Salazar Before the Committee on Natural Resources*, 111th Cong. (2010) (statement of Deputy Secretary of the Interior David J. Hayes), *available at* http://www.doi.gov/ocl/hearings/111/CobellvsSalazar_031010.cfm

6. *See* McCulley, *supra* note 3, at 409.

lands—where previously the Department of Interior had applied state laws. The act also creates a system which limits who can inherit these trust lands even by will.[7]

At this point I should note that in Indian Country land has a very technical meaning. Although generally title to real property and permanently affixed improvements are one in the same, this is not the norm in Indian Country. Title to trust land is generally title to the land alone excluding improvements.[8] Improvements may have their own title, no title at all, or may be governed by leasing documents or tribal codes. This system creates many instances where the improvements and the land itself can have different owners. One example of this is where a tribe has allowed members to build homes on land which is owned by the tribe; the tribe retains title to the land, but the individual members own their improvements. Statutorily AIPRA breaks with this system, allowing inheritance of improvements where the decedent owned the underlying land, however the Department of Interior's regulations continue to treat the two as separate and despite some regulatory and statutory authority Administrative Law Judges with the Department of Interior do not routinely issue orders which cover improvements.[9]

To inherit land by will under AIPRA an individual must generally meet one of several categories of eligible heirs. First, they can be an Indian, which has a nuanced definition but includes all members of federally recognized tribes and individuals who are one half or more Indian by blood even if they are not enrolled in a tribe. Second, individuals who are lineal descendants of the testator even if they do not meet criteria for tribal membership. A third category of other co-owners of the parcel, regardless of their status as tribal members is available although rarely used.[10]

Under prior rules, land bequeathed to a person that was not eligible for tribal enrollment automatically lost its trust status, however AIPRA has limited the application in many instances. However if preserving the trust status is a concern of the client the specific bequest can be drafted as a life estate to a person who does not qualify as an Indian under AIPRA with the remainder passing to either the tribe or an individual who does met the definition of Indian in AIPRA. This is especially advantageous as life estates under AIPRA are without regard to waste so all revenues from the land would pass to the life tenant.[11]

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7. 25 U.S.C. §§ 2201–2221 (2012).
8. 76 F.R. 7501.
9. *Compare* 25 U.S.C. § 2206(a)(6), *and* 25 U.S.C. § 2206 (h)(1)(b), *with* 43 C.F.R. § 30.102 (2011)
10. 25 U.S.C. § 2206(b)(1)(A) 2012.
11. § 2006(b)(2).

The Interior probate process is rather straightforward, if slow, and an attorney should have some familiarity with it simply to advise clients although there is little role for an attorney in the process. When a testator passes away the family should give notice to the probate division of their local or regional Bureau of Indian Affairs Office, which can be accomplished with a phone call. Once informed of the death the bureau will assemble a probate packet—including the testator's death certificate, Indian land records, any marriage certificates or divorce decrees, as well as the will or a certified copy of the will. This packet is then forwarded to the Office of Hearings and Appeals who will conduct a Probate Hearing, either in the area where testator resided or where the land is located and any interested parties may participate by phone. These hearings are largely pro forma, giving the family a chance to confirm the information in the probate packet. The administrative law judge over this proceeding will then draft a written order. Once this order is mailed to the interested parties they have thirty days to appeal. These appeals go to OHA's Interior Board of Indian Appeals, and clients should seek out an attorney familiar with these appeals.[12]

A few differences in the process can arise during probate proceedings under AIPRA which clients should be aware of. First, a tribe or another co-owner of the trust parcel can purchase the property for fair market value. This purchase only requires the consent of the heirs if one lives on the property in question or if the decedent's interest is more than 5% of the property. Second, the disclaimer under AIPRA is not a general disclaimer, and must be directed in favor of a single individual who is an eligible heir.[13]

A handful of minor changes in client interviewing and drafting of documents will allow a general practitioner or estate-planning attorney to ensure they are compliant with AIPRA. While every attorney has their own technique or personal style a few recommended questions are:

"Are you American Indian, or do you own trust or reservation land?" Some tribal members may appear to be Caucasian, African-American, or Latino, so it may be worth asking the question as part of your general client intake.

"Do they know which reservation the land is on?" If they do not you can request a listing of their landholdings from the Department of Interior with a request for an Individual Trust Inventory.

"Do they make use of the land or plan to make use of it?"

"Do they own improvements (a house, cabin, dock) on the land?" If so, the attorney should conduct additional research on tribal law by con-

12. 43 C.F.R. 30 (2011).
13. § 2206(j)(8), (o).

tacting the tribe's legal department or land management office. If you cannot ascertain how such improvements will be passed or what you must do to ensure the estate plan the client should be expressly informed of this.

Finally, if they own trust lands who do they want them to pass to, and is that person or group eligible to inherit under AIPRA?

When drafting an estate plan, either a will or a trust, Indian lands require some additional language and special considerations. It may be best to consider trust property an addition to the estate plan, rather than comporting the entire estate plan to AIPRA and its limitations. However the trust property should still be addressed to assure a comprehensive plan.

In terms of will drafting there are some minor, and one major modification to standard will templates that a practitioner should follow. First, when drafting a will for a trust owner you should include their tribal affiliation and tribal enrollment number in the will; this allows the Department of the Interior to match the will to the individual's records at Interior and ensure correct identification of the testator. Since AIPRA also limits who can inherit trust lands in some circumstances, it is recommended to list the tribal affiliation or connection of any recipient of trust land.

The largest change in drafting for trust property is the necessity of including a separate article for the trust property rather than including it in general provisions. Treating trust property discretely in the will allows the testator to gift this property separately from class gifts, or broader gifts in the will. Additionally when Interior conducts their probate proceeding there will be no confusion as to whether there was testamentary intent to distribute these trust lands.[14]

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14. Sample Language for such an article is:

Article V. TRUST OR RESTRICTED PROPERTY

A. I give any remaining interests in trust or restricted real property that I may own at my death, or that may be distributed to me after my death, and that are not otherwise disposed of under this Will, to . in equal shares as tenants in common. This gift shall include any and all interests in trust or restricted real property that I may own at my death or that may be distributed to me after my death, including any and all interests located in the States of ----, and all other interests in trust or restricted real property, wheresoever situated.

1. If any of these beneficiaries does not survive me, the share that would have passed to the deceased beneficiary had he or she survived me shall pass by right of representation to his or her issue who survive me, if any. Persons adopted by a deceased beneficiary shall not be considered issue for purposes of inheriting my interests in trust or restricted real property under this Will. If there are no issue of the deceased beneficiary who survive me, the share that would have passed to the deceased beneficiary had he or she survived me shall pass in equal shares to those beneficiaries who survive me and by right of representation to the issue of any deceased beneficiary who survive me.

In terms of execution there are two minor points an attorney should keep in mind. First, under AIPRA a will can be deemed entirely invalid if either of the witnesses are an interested party—therefore the best practice is to use entirely disinterested witnesses in the execution. Second in order to avoid appearing at a later date for an OHA hearing you should complete affidavit to accompany the will, making it self-proving.[15]

If the estate plan involves the creation of trust in any form (revocable, irrevocable, or testamentary) the drafting attorney must treat the Indian lands separately. Under general rules of interpretation you cannot use property already in a trust as part of the corpus of another trust.[16] Therefore, Indian trust land cannot become part of another trust and has to be discretely dealt with. In most instances this will require the use of a will and a separate article referenced above.

If the client is cost conscious or would prefer a purely non-probate estate plan, the Department of the Interior will assist individuals with land titles including gift deeds. Tribal members can contact their local or regional Bureau of Indian Affairs Office and indicate that they would like to gift deed their land, and staff will prepare a packet which is then sent to the client directly and can be completed by them to request transfer. Such transfer can be outright gifts, or clients can retain a life estate if they choose. If clients have little interest in the land they may want to consider contacting the bureau as well since many tribes make use of land consolidation purchase programs and are willing to purchase fractionated interests from members.

There are a handful of tribe specific federal probate laws, most of which mirror AIPRA. However two laws differ from AIPRA significantly; the Osage Allotment Act and what is known as the Five Tribes Allotment Act which covers lands in Eastern Oklahoma owned by members of the Cherokee Nation, Choctaw Tribe, Chickasaw, and Creek (Muscogee) Nation. If an individual owns Osage rights or lands potentially governed by the Five Tribes Act you should contact an attorney in Oklahoma who has experience working with these acts as they are very

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B. Tenancy in Common. Any and all interests in trust or restricted real property that are distributed under this Article V shall pass to the beneficiaries as tenants in common.

C. I give the contents of my Individual Indian Monies account and any other trust personalty that I may own at my death, or that may be distributed to me after my death, to -------- in equal shares. If any of these beneficiaries does not survive me, the share that would have passed to the deceased beneficiary had he or she survived me shall pass by right of representation to his or her issue who survive me, if any. Persons adopted by a beneficiary shall not be considered issue for purposes of inheriting my trust personalty under this Will. If there are no issue of the deceased beneficiary who survive me, the share that would have passed to the deceased beneficiary had he or she survived me shall pass in equal shares to those beneficiaries who survive me and by right of representation to the issue of any deceased beneficiary who survive me.

15. 25 C.F.R. §§ 15.4–.7.

16. Holvering v. Clifford, 309 U.S. 331, 336 (1940).

specific and often rely on Oklahoma State law regardless of where the testator lives.[17]

In conclusion, estate-planning practitioners should bear AIPRA in mind as they create estate plans for tribal members. The minor changes to client interview techniques and drafting are relatively simple to implement however are necessary to create a comprehensive estate plan.

17. 25 C.F.R. §§ 16–17.