

CHAPTER 6

STOCKBRIDGE-MUNSEE TRIBAL LAW PROBATE CODE

PART 1 GENERAL PROBATE PROVISIONS

Section 6.1.1 Purpose

(A) The following title shall hereinafter be referred to as the Probate Code. The objective of the Probate Code is to provide for the exercise of the greatest possible tribal jurisdiction over the probate of the estate of decedents who were domiciled or owned real or personal property on the Stockbridge-Munsee Community Indian Reservation. The Stockbridge-Munsee Tribal Council finds that probate procedure in the Stockbridge-Munsee Tribal Court is in the best interest of tribal members in that probate may be concluded more economically and more expeditiously than by other jurisdictions. Furthermore, the determination of how property is disposed upon a person's death is an exercise of self-governance crucial to tribal sovereignty.

(B) This code shall be liberally construed and applied to meet the following objectives:

- (1) To ensure that the property of decedents passes to the rightful heirs or beneficiaries.
- (2) To comply with the decedent's wishes as much as possible.
- (3) To comply with tribal custom and tradition.
- (4) To provide a simple, efficient and inexpensive method for probating decedent's property.
- (5) To prevent the transfer of land out of tribal ownership and control.
- (6) To ensure that the rights of creditors of decedents are protected to the extent possible and fair.
- (7) To promote and further the tribe's inherent right to self-governance.

Section 6.1.2 Definitions

As used in this title, unless the context otherwise requires:

(A) "**Abatement**" means a reduction or decrease.

(B) "**Administrator**" means the person appointed by the Tribal Court to administer the estate of a decedent according to this Probate Code and may include an Administrator nominated by the decedent's will, appointed at the request of an interested party, appointed by the Court, or the public Administrator.

(C) "**Beneficiary**" means any person nominated in a will to receive an interest in property other than in a fiduciary capacity.

(D) "**Class Gift**" means a devise or gift to a body of people, uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal, or other definite proportions, the share of each being dependent for its amount upon the ultimate number of people in the class. Example: "I leave \$10,000 to my grandchildren." In the example, the decedent's grandchildren constitute a class of people which may grow over time, but will be a certain number upon the death of the decedent.

(E) "**Codicil**" means a supplement or an addition to a will; it may explain, modify, add to, subtract from, qualify, alter, restrain or revoke provisions in an existing will. A codicil does not purport to dispose of the entire estate or to contain the entire will of the testator, nor does it ordinarily expressly or by implication revoke an entire prior will.

(F) "**Decedent**" means a person who has died leaving property that is subject to administration.

(G) "**Devisee**" means any person to whom lands or other real property are given by will.

(H) "**Devolution**" means the passage or transfer from one person to another; the falling on or accrual to one person as the successor of another.

(I) "**Distributee**" means any person to whom property of a decedent is distributed other than in payment of a claim, or who is entitled to property of a decedent under their will or the laws governing intestate succession.

(J) "**Domicile**" means the place where a person has his or her true, fixed and permanent home and principal establishment, and to which whenever s/he is absent s/he has the intention of returning.

(K) "**Donee**" means the recipient of a gift or conveyance. In contrast to the giver or donor.

(L) "**Escheat**" means reversion of property to the Tribe because no valid heir or person to inherit exists.

(M) "**Fiduciary**" as a noun means that person or institution who manages money or property for another and who must exercise the highest standard of care in such management activity; as an adjective, it describes the nature of a trust, which is the highest and most scrupulous duty owed to another.

(N) "**Half-blood**" means the degree of relationship which exists between those who have the same father or the same mother, but not both parents in common.

(O) "**Heir**" means any person, including the surviving spouse, who is entitled under the law governing intestate succession to an interest in the property of a decedent.

(P) **“Incompetent”** means a person who is substantially incapable of managing his or her property or caring for himself or herself by reason of infirmities of aging, developmental disabilities, or other like incapacities. Physical disability without mental incapacity is not sufficient to establish incompetence.

(Q) **“Indian”** means a member of the Stockbridge-Munsee Tribe, or any other person of Indian blood who is a member of a federally recognized Indian tribe or any other person on the Reservation who is recognized by the community as an Indian, including a Canadian Indian, Latin American Indian, Alaska Native, and/or Hawaiian Native.

(R) **“Interested Witness”** means any of the following:

- (1) An heir of the decedent.
- (2) A beneficiary named in any document offered for probate as the will of the decedent.
- (3) A beneficiary of a trust created under any document offered for probate as the will of the decedent.
- (4) A person named as Administrator or personal representative in any document offered for probate as the will of the decedent.
- (5) Additional persons as the Tribal Court may include.

(S) **“Intestate”** means one who dies without leaving a valid will, or the circumstance of dying without leaving a valid will effectively disposing of all of the estate.

(T) **“Intestate succession”** means succession to property of a decedent who dies without a will or with a will that has certain provisions which are not valid.

(U) **“Issue”** when used to refer to persons who take by intestate succession, means children, grandchildren, lineal descendants of more remote degree, except those who are the lineal descendants of living descendants. The term includes adopted children and non-marital children and their issue.

(V) **“Letters testamentary”** means the formal document of authority and appointment given to an executor or administrator by the Court, empowering him or her to fulfill his or her duties as required by his position as executor or administrator.

(W) **“Member”** means an enrolled member of the Stockbridge-Munsee Tribe.

(X) **“Personal Property”** means all property other than real property.

(Y) **“Pretermitted”** means a child or other descendant omitted from the will of a testator.

(Z) **“Property”** means any interest, legal or equitable in real or personal property, without distinction as to kind, except trust property.

(AA) **“Real property”** means all interest in land or in buildings or improvement permanently attached to land.

(AB) "**Renounce**" means to make an affirmative declaration of abandonment. A waiver of rights.

(AC) "**Reservation**" means the Stockbridge-Munsee Reservation in Wisconsin.

(AD) "**Residue**" means the surplus or left over part of a testator's estate remaining after all the debts and distributions have been completed.

(AE) "**Take by Representation**" means the principle upon which the issue of a decedent take or inherit the share of an estate which their immediate ancestor would have taken or inherited, if living.

(AF) "**Testator**" means a decedent who dies leaving a valid will.

(AG) "**Tribal Court**" means the Tribal Court of the Stockbridge-Munsee Community Band of Mohican Indians.

(AH) "**Tribe**" means the Stockbridge-Munsee Community Band of Mohicans.

(AI) "**Trust Property**" means real or personal property title to which is in the United States for the benefit of an Indian or Indian Tribe.

Section 6.1.3 Jurisdiction

The Tribal Court shall have jurisdiction to administer in probate the estate of a decedent who, at the time of their death, was domiciled or owned real or personal property situated within the Stockbridge-Munsee Community Indian Reservation to the extent that such estate consists of property which does not come within the exclusive jurisdiction of the Secretary of the Interior of the United States.

Section 6.1.4 Control of Funeral Arrangements

(A) Control of funeral arrangements and disposition of the remains of the decedent shall be based upon any wishes, instructions or directions of the decedent as expressed in the decedent's will.

(B) If the decedent dies intestate or the decedent's will is silent on the issue of funeral arrangements, the control of funeral arrangements and disposition of the remains of the decedent shall be based upon a decision of the decedent's family.

(C) If the decedent dies intestate and the decedent's will is silent on the issue of funeral arrangements and the decedent has no family available to make a decision, control of the decedent's funeral arrangements and disposition of the remains shall be based on the customs of the Tribe.

Section 6.1.5 Indian Custom and Tradition Distribution of Indian Finery and Artifacts

Notwithstanding the provisions of this Probate Code relating to descent and distribution, the surviving spouse or other surviving next of kin may distribute any Indian artifacts and finery belonging to the decedent in accordance with the customs and traditions of the Tribe prior to the initiation of the administrative of the estate. Such distribution shall be in accordance with directions left by the decedent, if any.

Section 6.1.6 Effect of Fraud and Evasion

(A) Whenever fraud has been perpetuated in connection with any proceeding or in any statement filed under this Probate Code or if fraud is used to avoid or circumvent the provisions or purposes of this Probate Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud including restitution from any person (other than a bona fide purchaser) benefitting from the fraud, whether innocent or not.

(B) Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during their lifetime which affect the succession of the estate.

Section 6.1.7 Evidence as to Death or Status

(A) In proceedings under this Probate Code, the following rules relating to determination of death and status are applicable:

- (1) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie proof of the fact, place, date and time of death and the identity of the decedent;
- (2) A certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that a person is missing, detained, dead, or alive, is prima facie evidence of the status and of the dates, circumstances and places disclosed by the record or report;
- (3) A person who is absent for a continuous period of five years, during which they have not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry is presumed to be dead. Their death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

Section 6.1.8 Practice in Court

Unless specifically provided to the contrary in this Probate Code or unless inconsistent with its provisions, the Stockbridge-Munsee Tribal Court Code and Rules of Procedure,

including the rules concerning vacation of orders, govern formal proceedings under this Probate Code. Appeals shall be taken in accordance with the Tribal Court rules on appeals.

Section 6.1.9 Judicial Powers and Duties

(A) The judge of the Court may make orders for the sale of personal property at public or private sale for the compounding of debts, for the settlement of an estate as insolvent, for the approval of bonds and all other orders of an ex parte nature as may facilitate the settlement of estates. The orders shall be in writing, signed by the judge issuing the same, and shall be filed and recorded as an entry in the proper record.

(B) The judge shall examine the bonds filed by the personal representations, with a view to ascertaining their sufficiency and may approve the same. The judge may examine any inventory, sale, bill, account current, final account and vouchers filed therewith, or examine into the condition of an estate generally. Bond may be waived for good cause shown.

(C) The Court shall have the authority to draft orders requesting property of funds outside the exterior boundaries of the Reservation to be delivered to the Court for probate in the Tribal Court.

Section 6.1.10 Records and Certified Copies

The clerk shall keep a file for each decedent of all documents filed with the Court under this Probate Code and shall keep a numerical index of all such estates to facilitate access to such records. Upon payment of a fee, the Clerk shall issue certified copies of any document or paper so filed.

Section 6.1.11 Trial

All trials under this Probate Code shall be to the Court.

Section 6.1.12 Oath or Affirmation on Filed Documents

Except as specifically provided in this Probate Code, every document filed with the Court under this Probate Code shall be deemed to include an oath, affirmation, or statement to the effect that its representations are true as far as the person executing or filing it knows or is informed, and the penalties for perjury shall follow deliberate falsification therein.

Section 6.1.13 Notice

(A) If notice of a hearing on any petition or other matter is required and except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or their advocate if they have appeared by advocate or requested that notice be sent to their advocate. Notice shall be given:

(1) By mailing a copy thereof at least 14 days before the time set for the hearing by certified, registered or ordinary first class mail addressed to the person being notified at the post office address given in their demand for notice, if any, or at their office or place of residence, if known;

(2) By delivering a copy thereof to the person being notified personally at least 14 days before the time set for the hearing; or

(3) If the address, or identity of any person is not known and cannot be ascertained by reasonable diligence, by posting a copy of the notice in at least three conspicuous public places on the reservation at least 14 days before the time set for the hearing.

(B) The Court for good cause shown may provide for a different method or time of serving notice for any hearing.

(C) Proof of the giving of notice shall be made at or before the hearing and filed in the proceeding.

(D) A person, including a guardian ad litem, or other fiduciary, may waive notice by a writing signed by the person or their attorney and filed in the proceeding.

Section 6.1.14 Renunciation of Succession (Choosing not to Inherit)

(A) A person (or their personal representative) who is an heir, devisee, person succeeding to a renounced interest, beneficiary under a testamentary instrument or person designated to take pursuant to a power of appointment exercised by a testamentary instrument, may renounce in whole or in part the succession to any property or interest therein by filing a written instrument with the Court not later than six months after the decedent's death or the time at which it is determined that the person is entitled to take property if such is not known at the time of death.

(B) The instrument shall: (1) describe the property or part thereof or interest therein renounced, (2) be signed by the person renouncing and (3) declare the renunciation and the extent thereof. Upon proper renouncement, the interest renounced passes as if the renouncing person had predeceased the decedent or donee.

Section 6.1.15 Effect of Divorce, Annulment, and Decree of Separation

A person who is divorced from a decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he or she is married to the decedent at the time of death. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this Probate Code.

Section 6.1.16 Effect of Homicide on Intestate Succession, Wills, Joint Assets Life Insurance and Beneficiary Designation

(A) A surviving spouse, heir or devisee who criminally and intentionally kills the decedent is not entitled to any benefits passing under this Probate Code and the estate of the decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

(B) Any joint tenant who criminally and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as their property and the killer has no rights by survivorship. This provision applies to joint tenancies in real and personal property, joint accounts in banks, savings and loan associations, credit unions and other institutions, and any other form of co-ownership with survivorship incidents.

(C) A named beneficiary of a bond, life insurance policy, or other contractual arrangement who criminally and intentionally kills the principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent.

(D) Any other acquisition of property or interest by the killer shall be treated in accordance with the principles of this section.

(E) A final judgment of conviction of an offense containing the elements of criminal and intentional killing is conclusive for purposes of this section. In the absence of a conviction of criminal and intentional killing, the Court may determine by a preponderance of evidence whether the killing was criminal and intentional for purposes of this section.

Section 6.1.17 Simultaneous Death Provisions

(A) Where the title to property covered under this Probate Code or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if they had survived except where provided otherwise in this Probate Code.

(B) Where two or more beneficiaries are designated to take successively by reason of survivorship under another person's disposition of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries and these portions shall be distributed in the proportion that the beneficiary bears to the decedent or decedents.

(C) Where there is not sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously, the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them have so died, the property thus shall be distributed in the proportion that one bears to the whole number of joint tenants.

(D) Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.

(E) These provisions on simultaneous death shall not apply in cases where the decedent has made provision for a different distribution in a will, trust, deed, contract or insurance.

PART 2 WILLS

Section 6.2.1 Who May Make a Will

Any person 18 or more years of age and who is of sound mind may make a will.

Section 6.2.2 Execution

Except as otherwise provided for oral wills (§ 6.2.4) or holographic wills (§ 6.2.3), every will shall be put in writing and signed by the testator, or in the testator's presence and at the testator's direction signed by another person, and shall be signed by at least two persons each of whom either witnessed the signing by the testator of the will or the testator's acknowledgment of the signature and direction to do so.

Section 6.2.3 Holographic Will

A will which does not comply with § 6.2.2 of this Probate Code is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.

Section 6.2.4 Oral Will

(A) A will which does not comply with § 6.2.2 of this Probate code is valid as an oral will under custom if all children, whether residing in testator's home or not, and testator's spouse, if alive, are present at the announcement of the oral will and agree that the testator orally made known the testator's last will before them.

(B) An oral will is also valid under custom if made in the presence of a competent disinterested adult person by a testator who declares at the time that it is his or her wish that their property descend in a specific manner upon the event of the testator's death.

"Disinterested" means that the person hearing the oral declaration of testator's intent will not benefit in any way directly or indirectly nor will a spouse or any relative of said disinterested person benefit in any way directly or indirectly.

(C) The Court shall hear testimony from the disinterested person who heard such declaration and the Court shall decide the following: (1) whether such testimony is credible; and (2) whether the manner of disposition of testators property is reasonable and customary. If the Court finds that both of the foregoing conditions prevail, the testator's expressed intent shall be carried out as a valid will.

Section 6.2.5 Self-Proved Will-Form

An attested will may, at the time of its existence or at any subsequent date, be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before a notary public or a judge, under official seal, attached or annexed to the will in form and content and substantially as follows:

State of _____
County of _____

We,____,____, and____, the testator and the witnesses, respectively, whose names are signed to the attached and foregoing instrument, being first duly sworn, do hereby declare to the foregoing authority that the testator signed and executed the instrument as the testator's last will and that the testator signed willingly or directed another to sign for the testator, and that the testator executed the instrument as their free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of their knowledge the testator was at the time 18 years or more of age, of sound mind and under no constraint or undue influence.

TESTATOR

WITNESS

Date:

Address

WITNESS

Date:

Address

Subscribed, sworn to and acknowledged before me by _____ the testator, and subscribed and sworn to before me by _____ and _____ witnesses, this _____ day of _____ 19 _____.

SIGNED BY JUDGE OR NOTARY

Section 6.2.6 Who May Witness

(A) Any person who, at the time of execution of the will, would be competent to testify as a witness in Court to the facts relating to execution may act as a witness to the will. Subsequent incompetency of a witness is not a ground for denial of probate if the execution of the will is otherwise satisfactorily proved.

(B) A will is not invalidated because signed by an interested witness; but, unless the will is also signed by 2 disinterested witnesses, any beneficial provisions of the will for a witness or the witness' spouse are invalid to the extent that such provisions in the aggregate exceed in value what the witness or spouse would have received had the testator died intestate. Valuation is to be made as of testator's death.

Section 6.2.7 Choice of Law as to Execution

A written will is valid if executed in compliance with this Probate Code or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death of the testator is domiciled, has a place of abode or was a national.

Section 6.2.8 Revocation by Writing or by Act

(A) A will or any part thereof is revoked:

(1) By a subsequent valid will, codicil, or other instrument which revokes the prior will in whole or in part expressly or by inconsistency; or

(2) By being burned, torn, canceled, obliterated, or destroyed with the intent and for the purpose of revoking it by the testator or by another person in the testator's presence and at the testator's direction.

Section 6.2.9 Revocation by Divorce; No Revocation by Other Changes of Circumstances

(A) If, after executing a will, the testator is divorced or the testator's marriage is annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse and any nomination of the former spouse as Executor, trustee, conservator, or guardian, unless the will expressly provides otherwise.

(B) Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will.

Section 6.2.10 Revival of Revoked Will

If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part unless it is evident from the circumstances and the terms of the revocation of the second will or from the testator's contemporary or subsequent declarations that the testator intended the first will to take effect as executed.

Section 6.2.11 Incorporation by Reference

Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

Section 6.2.12 Events of Independent Significance

A will may dispose of property by reference to acts and events which have significance apart from their effect upon the disposition made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of a will of another person is such an event.

Section 6.2.13 Rules of Construction and Intention

(A) The intention of a testator as expressed in the testator's will controls the legal effect of the testator's dispositions;

(B) The following rules of construction apply unless a contrary intent is clear in the will:

(1) **All property; after-acquired property.** A will is construed to pass all property which the testator owns at their death including property acquired after the execution of their will;

(2) **Devisee must survive testator by 120 hours.** A devisee who does not survive the testator by 120 hours is treated as if they predeceased the testator, unless the will of the decedent contains such language dealing explicitly with simultaneous deaths, including common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will;

(3) **Failure of testamentary provision.** If a devise other than a residuary devise fails for any reason, it becomes part of the residual estate. If the residual estate is devised to two or more persons and the share of one of the residuary devisees fails for any reason, their share passes to the other residuary devisees, or to other residuary devisees in proportion to their interests in the residue.

(4) **Class Gifts.** One who would have been a devisee under a class gift if they had survived the testator is treated as a devisee for purposes of this section whether their death occurred before or after the execution of the will;

(5) **Exercise of power of appointment.** A general residuary clause in a will, or a will making general disposition of all the testator's property, does not exercise a power of appointment unless specific reference is made to that power;

(6) **Generic Terms.** Half-bloods, adopted persons and persons born out of wedlock are included in class gifts terminology and terms of relationships in accordance with rules for determining relationships for purposes of intestate succession, but a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father or unless paternity has been judicially determined during the life of the father or in some other manner which satisfies the court by clear and convincing evidence that paternity has been conclusively established.

(7) **Ademption by satisfaction.** Property which a testator gave in their lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part, only if the will provides for deduction of the lifetime gift, or the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction. For the purpose of partial satisfaction, property given during the lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first.

PART 3 INTESTATE SUCCESSION

Section 6.3.1 Intestate Succession

Any part of the estate of a decedent not effectively disposed of by the decedent's will passes to the decedent's heirs as prescribed in the following sections of this Probate Code.

Section 6.3.2 Share of the Spouse

(A) The intestate share of the surviving spouse is:

- (1) if there is no surviving issue or parent of the decedent, the entire intestate estate;
- (2) if there is no surviving issue but the decedent is survived by a parent or parents, the first \$20,000, plus one-half of the balance of the intestate estate;
- (3) if there are surviving issue all of whom are issue of the survived spouse also, the first \$20,000, plus one-half of the balance of the intestate estate;
- (4) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

Section 6.3.3 Share of Heirs Other Than Surviving Spouse

The part of the intestate estate not passing to the surviving spouse under § 6.3.2 of this Probate Code, or the entire intestate estate if there is no surviving spouse, passes as follows:

(A) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;

(B) if there is no surviving issue, to the decedent's parent or parents equally;

(C) if there is no surviving issue or parent, to the issue of the parents or either of them by representation;

(D) if there is no surviving issue, parent or issue of a parent, and the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

Section 6.3.4 No Taker

If there is no taker under the provisions of this chapter, the intestate estate passes to the Tribe.

Section 6.3.5 Representation

If representation is called for by this Probate Code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent. Each surviving heir in the nearest degree receives one share and the share of each deceased person in the same degree is divided among their issue in the same manner.

Section 6.3.6 Posthumous Persons

Person conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent.

Section 6.3.7 Kindred of Half Blood; Stepchildren; Foster Children

Persons of the half blood inherit the same share they would inherit if they were of the whole blood, but stepchildren and foster children and their descendants do not inherit, unless adopted.

Section 6.3.8 Divorce

Divorces of husband and wife do not affect the right of children to inherit their property.

Section 6.3.9 Determination of Relationship of Parent and Child

If for purpose of intestate succession a relationship of parent and child shall be established to determine succession by, through or from a person:

- (A) An adopted person is the child of an adopting parent and of the natural parents for inheritance purposes only. The adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and that natural parent;
- (B) An adopted person shall inherit from all other relatives of an adoptive parent as though the adopted person was the natural child of the adoptive parent and the relatives shall inherit from the adoptive parent's estate as if they were the adoptive parent's relatives;
- (C) In cases not covered by Subsection 6.3.9 (a), a person born out of wedlock is a child of the mother and is a child of the father, if the relationship of parent and child has been established in accordance with the Stockbridge-Munsee Youth Code.

PART 4 FAMILY RIGHTS\PROTECTION

Section 6.4.1 Spouse's Right to Elective Share

If a married person domiciled on the reservation dies, the surviving spouse has a right to elect to take an elective share of one-third of the estate of the decedent, less funeral and administration expenses, family allowance and enforceable claims against the estate, plus the value of all property in excess of \$1,000 transferred by the decedent to any person other than the surviving spouse in the three years preceding the decedent's death to which the surviving spouse has not joined by written consent.

Section 6.4.2 Right of Election Personal to Surviving Spouse

The right of election of the surviving spouse may be exercised only during the surviving spouse's lifetime and only by the surviving spouse. In the case of an incompetent person, the right of election may be exercised only by order of the Court in which protective proceedings as to the surviving spouse's property are pending, after finding that exercise is necessary to provide adequate support for the protected person during their probable life expectancy.

Section 6.4.3 Waiver of Right to Elect and of Other Rights

The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all

rights" (or equivalent language) in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other and a renunciation of each of all benefits which would otherwise pass to them from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

Section 6.4.4 Duty of Court to Advise

(A) If a surviving spouse has a right to election under § 6.4.1 of this Probate Code, then at any time after the filing of an inventory and not more than three months after admission to probate, the Court shall advise the surviving spouse of his/her right to election and shall explain fully the right and that in the event of the failure to exercise the right of election the will shall govern and control the distribution of the estate.

(B) If the surviving spouse dies or becomes incompetent before being advised of the right of election under § 6.4.1 of this Probate Code and has not filed a waiver or renunciation of the right of election, the Court shall advise the personal representative or guardian of the estate of the deceased or incompetent surviving spouse of the right of election as provided in § 6.4.4 (a).

Section 6.4.5 Proceeding for Elective Share; Time Limit

(A) The surviving spouse may elect to take their elective share in the estate by filing in the Court and mailing or delivering to the personal representative a petition for the elective share within three months after the publication of notice to creditors for filing claims which arose before the death of the decedent. The Court may extend the time for election as it sees fit for cause shown by the surviving spouse before the time for election has expired.

(B) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the estate whose interests will be adversely affected by the taking of the elective share.

(C) The surviving spouse may withdraw their demand for an elective share at any time before entry of a final determination by the Court.

(D) After notice and hearing, the Court shall determine the amount of the elective share and shall order its payment from the assets of the estate or by contribution as appears appropriate under the following section.

(E) If it appears that a fund or property included in the estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the Court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than there would have been if relief had been secured against all persons subject to contribution.

(F) The order or judgment of the Court may be enforced as necessary in a suit for contribution or payment.

Section 6.4.6 Effect of Election on Benefits by Will

(A) An election by a surviving spouse does not affect the right of such spouse to participate in a family allowance but the value of any part of the estate passing to the surviving spouse by testate or intestate succession shall, unless renounced by the spouse in their petition, be counted against their elective share.

(B) When an election to take an elective share has been made and there is insufficient property in the estate which is not specifically disposed of to pay the elective share, liability for payment of the elective share shall be equitably apportioned among the other recipients of the estate in proportion to the value of their interests therein.

(C) Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to them or to pay its value as of the time transferred.

Section 6.4.7 Omitted Spouse

(A) Notwithstanding the provisions of § 6.4.1 of this Probate Code, if a testator fails to provide by will for their surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate they would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(B) In satisfying a share provided in this section, the devises made by the will abate as provided in § 6.7.10 of this Probate Code, which concerns "abatement".

Section 6.4.8 Pretermitted Children

(A) If a testator fails to provide in his or her will for any of their children living or born or adopted after the execution of the will, the omitted child receives a share in the estate equal in value to that which they would have received if the testator had died intestate unless:

(1) It appears from the will that the omission was intentional; or

(2) When the will was executed the testator had one or more children and devised substantially all their estate to the other parent of the omitted child; or

(3) The testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(B) If at the time of execution of the will, the testator fails to provide in their will for a living child solely because they believe the child to be dead, the child receives a share in the estate equal in value to that which they would have received if the testator had died intestate.

(C) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 6.7.10 of this Probate Code, which concerns "abatement".

Section 6.4.9 Homestead Allowance

A surviving spouse of a decedent who was domiciled on the reservation is entitled to a homestead allowance of \$5,000. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to \$5,000 divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent unless otherwise provided by intestate succession or by way of elective share.

Section 6.4.10 Exempt Property

(A) In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled on the reservation is entitled from the estate to value not exceeding \$3,500 therein in household furniture, automobiles, furnishings, appliances and personal effects. The \$3,500 in value of the aforementioned items shall be over and above any security interest in said items. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than \$3,500, or if there is not \$3,500 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the \$3,500 value.

(B) Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share.

Section 6.4.11 Family Allowance

(A) In addition to the right to homestead allowance and exempt property, if the decedent was domiciled on the reservation, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent are entitled

to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments.

(B) It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody; but in case of any minor child or dependent child that is not living with the surviving spouse, the allowance may be made partially to the child or their guardian or other person having their care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims but not over the homestead allowance.

(C) The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates their right to allowances not yet paid.

Section 6.4.12 Source, Determination, and Documentation

(A) If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to homestead and exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make these selections if the surviving spouse, the children or the guardians of the minor children are unable or fail to do so within a reasonable time or if there are no guardians of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property.

(B) The personal representative may determine the family allowance in a lump sum not exceeding \$6,000 or periodic installments not exceeding \$500 per month for one year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the Court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined.

Section 6.4.13 Dwelling Exemption

Upon the appraisal of an estate and it appearing that a dwelling is personal property in which other heirs and/or creditors have an interest, and the dwelling is occupied by the surviving spouse and/or the dwelling is necessary for the welfare and protection of such surviving spouse and/or children, the Court may, by order, set aside such dwelling for the benefit of said surviving spouse and/or children as a homestead for a period not to exceed ten years, provided that in case of special hardship or emergency, the Court may extend such term from year to year thereafter, provided that any heir or heirs or creditors of the deceased shall have the opportunity to appear before the Court and protest the extension of the original terms setting aside said homestead. The

Court may also set aside such sums from the estate as the Court may deem necessary for maintenance and upkeep of the home. The Court shall hear evidence on any contest before making any order of extension.

Section 6.4.14 Summary Probate of Exempt Estates.

(A) **Exempt Estates.** An estate having an appraised value which does not exceed \$5,000 and which is to be inherited by a surviving spouse and/or minor children of the deceased shall be exempt from the claims of all general creditors and the probate thereof may be summarily concluded as provided in this section.

(B) **Notice of Hearing to Determine Whether the Estate is an Exempt Estate.** Upon petition of the Administrator, the Court shall enter an order stating that it appears, from the appraised value that the whole estate does not exceed \$5,000 and that such estate is to be inherited by the surviving spouse and/or minor children of the decedent and shall set a date and hour for hearing objections of any interested persons, if any there be, why the whole estate should not be declared to be exempt from the claims of all general creditors and distributed to the surviving spouse and/or minor children of the decedent. Notice of such hearing shall be given by posting a true copy of such order in three public places within the Stockbridge-Munsee Indian Reservation and by sending a true copy of such order by certified mail to all persons known to the Administrator to be an heir, devisee or legatee of the decedent. Such notice shall be posted or mailed not less than ten days before the time set for such hearing. On or before the time set for such hearing, the Administrator shall file his affidavit with the Court indicating compliance with this requirement of giving notice.

(C) **Hearing to Determine Whether the Estate is an Exempt Estate.** If, upon such hearing, the Court finds that such estate is an exempt estate, the Court shall enter an order directing the Administrator to distribute such estate to the surviving spouse and/or the minor children of the deceased as set forth in the order and provide that no further proceedings are necessary and that, upon distributing the distributive share or shares of such estate to those entitled thereto and filing receipts therefor, the estate shall be closed.

PART 5 INHERITANCE BY NON-INDIANS/FRACTIONATED HEIRSHIP

Section 6.5.1 Restrictions on Inheritance of Individual Trust/Restriction Lands by Non-Indians

(A) Non-Indians shall not be entitled to receive by devise or descent any interest in individual trust or restricted lands within the Stockbridge-Munsee Reservation or otherwise subject to the jurisdiction of the Tribe provided that:

(1) if an Indian dies intestate, the surviving non-Indian spouse and/or children may elect to receive a life estate in as much of the trust or restricted lands as such person or persons would have been entitled to take in the absence of such restriction on eligibility for inheritance and the remainder shall vest in the Indians who would have been heirs in the absence of a qualified person taking a life estate;

(2) if an intestate Indian decedent has no heir to whom interests in trust or restricted lands may pass, such interests shall escheat to the Tribe, subject to any non-Indian spouse and/or children's rights as described in paragraph (1) of this section;

(3) if an Indian decedent has devised interests in trust or restricted lands to persons who are ineligible for such an inheritance by reason of a tribal ordinance enacted pursuant to this section, the devise shall be voided only if, while the estate is pending before the Secretary for probate, the Tribe acquires such interests by paying to the Secretary, on behalf of the devisees, the fair market value of such interests as determined by the Secretary as of the date of the decedent's death: Provided, That any non-Indian and/or children of such decedent who have been devised such interests may retain, at their option, a life estate in such interests.

(B) Any ineligible devisee shall also have the right to renounce their devise in favor of a person or persons who are eligible to inherit in accordance with Section 6.1.14 (Renunciation of Succession) of this Probate Code.

(C) The right to receive a life estate under this section shall be limited to:

(1) a spouse and/or children who, if they had been eligible, would have inherited an ownership interest of 10 per cent or more in the tract of land; or

(2) a spouse and/or children who occupied the tract as a home at the time of the decedent's death.

Section 6.5.2 Escheat of Certain Fractionated Interests

The following section is enacted under Section 2206 (c) of Title 25 of the United States Code - The Indian Land Consolidation Act - to take precedence over the escheat provisions of Section 2206 of Title 25 of the United States Code.

(A) No undivided interest in any tract of trust or restricted land within the Stockbridge-Munsee Indian Reservation or otherwise subject to the Tribe's jurisdiction shall descend by intestacy or devise but shall escheat to the Tribe if such interests represents 2 per cent or less of the total acreage in such tract and is incapable of earning to the respective heirs \$100 in any one of the five years from the date of decedent's death, and is otherwise without significantly greater future potential value, Provided, that:

(1) in determining the future earning capacity of such interest the hearing examiner shall consider the presence of known or probable minerals and timber;

(2) in determining whether such interest is otherwise without significantly greater future potential value the hearing examiner shall consider, among other things, the geographic location of such property and its potential for commercial or other exploitation;

(3) where the fractional interest has earned to its owner less than \$100 in any one of the five years before it is due to escheat, in absence of previously unexploited known or probable mineral reserves or standing timber, there shall be a rebuttable presumption that such interest is incapable of earning to the respective heirs \$100 in any one of the five years from the date of decedent's death, and that the property is otherwise without significantly greater future potential value.

(B) Nothing in this section shall prohibit the devise of such a fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.

(C) Any beneficiary who, but for the provisions of this section, would have inherited such fractional interest, may assign such interest to any other owner of an undivided fractional interest in such trust or restricted land, such assignment to be made and filed with the hearing examiner within 60 days of the issuance of notice of intent to escheat the interest to the Tribe. The hearing examiner shall formally notify the beneficiary of their rights under this subsection at the time of the notice of intent to escheat and shall assist with the assignment process as needed.

(D) The Tribal Court Judge and the Federal Administrative Law Judge shall have the discretion to order any appropriate distribution of the decedent's estate as needed to reduce further fractionation so long as the distribution is fair and equitable.

PART 6 ADMINISTRATION OF INTESTATE ESTATES

Section 6.6.1 Petition

(A) When any person dies leaving an intestate estate subject to the jurisdiction of the Stockbridge-Munsee Tribal Court under this Probate Code, any person claiming to be an heir of the decedent, or the Tribe, may petition the Court for a determination of the heirs of the decedent and for the distribution of such property. The petition shall contain the names and addresses of all persons known to the petitioners who may be entitled to share in the distribution of the estate.

(B) Whenever there is a valid will probated by the Court which does not dispose of all the decedent's property, a determination of the heirs entitled to such property and its distribution shall be made by the Court at or before the time the remainder of the estate is distributed without the necessity of a separate petition and proceeding.

(C) The following persons, if legally competent, shall be afforded the priority in order of their listing for appointment as Administrator: the surviving spouse, any child over 18 years of age, other blood relatives, any adult tribal member, any adult person.

(D) To take constructive or physical possession of all property of the decedent subject to this Probate Code as the Court shall order, taking into consideration the interests of the person who may have occupied the homestead of the decedent at the time of his or her death.

Section 6.2 Administration of Intestate Estate

(A) If an Executor is appointed over a decedent's property which is disposed of by a valid will, such person shall likewise assume authority over the decedent's intestate estate and administer it with the rest of the decedent's estate.

(B) Whenever it reasonably appears that such is necessary to the preservation, administration and/or distribution of a decedent's intestate estate, the Court shall appoint an Administrator over the estate. It shall not be necessary to appoint an Administrator if the value of the decedent's property appears to be less than \$5,000 in value, no problems in administering the estate are foreseen, and no one requests that one be appointed.

(C) The following persons, if legally competent, shall be afforded priority in order of their listing for appointment as Administrator: the surviving spouse, children over 18 years of age in descending order of age, other blood relatives in order of their closeness of relationship, any adult tribal member, any adult person.

(D) The duties of the Administrator shall be:

(1) To take constructive or physical possession of all property of the decedent subject to this Probate Code as the Court shall order, taking into consideration the interests of the person or persons who may have occupied the homestead of the decedent at the time of his or her death.

(2) Within one month of appointment make an inventory and appraisal of such property and file it with the Court;

(3) Within one month of appointment, determine and file with the Court a list of all known relatives of the decedent, their ages, their relationship to the decedent, and their whereabouts if known;

(4) Subject to the approval of the Court, ascertain and pay all of the debts and legal obligations of the decedent;

(5) Prosecute and defend actions for or against the estate;

(6) Distribute the estate in accordance with the order of the Court and file receipts with the Court showing distribution of the estate.

(E) The Administrator shall file a bond in an amount to be set by the Court to insure their faithful, honest performance of their duties as Administrator. Unless otherwise made to appear necessary or desirable, no bond shall be required of an Administrator who is the spouse or child of a decedent.

Section 6.6.3 Appointment of Administrator

(A) Upon receipt of a petition to administer an intestate estate, the clerk shall schedule a hearing at which an Administrator will be appointed. Said hearing shall be scheduled far enough in advance to allow the required notice to be made.

(B) Notice of the hearing shall be made by the petitioning party or by the clerk if the Tribe is the petitioning party and shall also be posted in a conspicuous place in the Court building.

(C) The Court shall determine who is the proper person to appoint as Administrator, and if such person manifests their willingness to serve, order their appointment as Administrator.

Section 6.6.4 Oath of Administrator; Letters of Administration

(A) Upon their appointment as Administrator, the person appointed shall take an oath to be prescribed by the Court to the effect that they will faithfully and honestly administer the estate.

(B) Upon taking the oath and filing the bond, if any is required, the Administrator shall be granted letters of administration as proof of their appointment.

(C) The Court may waive the requirement that the Administrator file a bond if the Court finds good cause to do so.

Section 6.6.5 Notice to Creditors

The Administrator of the estate or the clerk if no Administrator is appointed shall cause notice to creditors to be posted in at least three conspicuous places on the Reservation and published for three consecutive issues in a publication of general distribution on the Reservation. Said notice shall state that creditors have 90 days from the date of the first publication of the noticed to present their claims to the Administrator or clerk and that only those claims so presented may be paid to the estate.

Section 6.6.6 Payment of Creditors

(A) Payment to creditors of the decedent shall be made by the Administrator or by the clerk if no Administrator is appointed only upon the order of the Court after determining the validity of the claims by affidavit or personal testimony of the claimant.

(B) All just claims of creditors allowed by the Court shall be paid before distribution of the estate but shall be paid only after payment of the family allowance and homestead allowances as provided herein.

Section 6.6.7 Accounting

Prior to the distribution of every estate for which an Administrator has been appointed, such Administrator shall render an accounting to the Court, for its approval, of all receipts and

disbursements from the estate, showing the present status of the estate and that it is ready for distribution, and also showing the computation of any attorney's and/or Administrator's fees involved for which approval for payment is sought. In estates in which no Administrator is appointed, the clerk shall account to the Court for all transactions relating to the estate.

Section 6.6.8 No Taker/Escheat To Tribe

If there is no taker of the intestate estate, the intestate estate passes or escheats to the Tribe.

Section 6.6.9 Advancements

If a person dies intestate, property which they gave in their lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose, the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue, unless the declaration or acknowledgment provides otherwise.

Section 6.6.10 Debts to Decedent

A debt owed to the decedent is not charged against the intestate share of any person except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate or other share of the debtor's issue.

Section 6.6.11 Distribution: Closing Estate

(A) When it is made to appear to the Court that an estate is ready to be distributed, the Court shall order such according to the rules of intestate succession and this Probate Code.

(B) The estate shall be closed and the Administrator dismissed and their bond released upon the filing of receipts and an affidavit showing the estate is fully distributed, and after being fully administered, is now ready to be closed.

PART 7 PROBATE OF WILLS

Section 6.7.1 Duty to Present Will for Probate

Every custodian of a will shall deliver the will to the Tribal Court within 30 days after receipt of information that the testator is deceased. Any will custodian who fails or neglects to do so shall be liable for damages sustained by any person injured thereby.

Section 6.7.2 Proving, Contesting and Admitting Will

(A) Proof of Will

(1) Upon initiating the probate of an estate, the will of the decedent shall be filed with the Court. The will may be proven and admitted to probate by filing the affidavit of an attesting witness which identifies such will as being the will which the decedent executed and declared to be their last will.

(2) If the evidence of none of the attesting witnesses is available, the Court may allow proof of the will by testimony or other evidence that the signature of the testator or at least one of the witnesses is genuine.

(B) Contest of Will

(1) At any time within 90 days after a will has been admitted to probate, or within such time as the Court shall establish in the case of an exempt estate, any person having an interest in the decedent's estate may contest the validity of the will. In the event of a will contest, the Court shall take no further action with respect to the probate of the estate, but shall set a day and hour for hearing on the will contest.

(2) Relevant evidence shall be presented at the will hearing concerning the decedent's capacity to execute a valid will and the circumstances surrounding its execution. Every reasonable effort shall be made to procure the testimony of the attesting witnesses to the will, or if their testimony is not reasonably available, an effort shall be made to identify signatures to the will through other evidence.

(C) Admission of Contested Will to Probate

(1) Upon considering all relevant evidence concerning the will, the Tribal Court shall enter an order affirming the admission of the will to probate or rejecting such will and ordering that the probate of the decedent's estate proceed as if the decedent had died without executing the will.

Section 6.7.3 Petition for Letters Testamentary

A petition for letters testamentary may be made by any person having possession of a decedent's will. The petition must be in writing, signed by the petitioner, and shall state the basis for the Court's jurisdiction, the names of the heirs of the decedent, if known, and the name or names of any person specified in the will as Executor and the address of such person if known. The original copy of the will shall be submitted to the Court with the petition.

Section 6.7.4 Qualification of Executor

The Court shall appoint an Executor to administer the estate. The Executor shall be a competent adult and preference shall be given, if such persons are otherwise qualified, to the

person named in the will as such, followed by the surviving spouse, child of the decedent over 18 years of age with preference given in descending order of age, other blood relatives in order of their closeness of relationship, any adult tribal member, any adult person.

Section 6.7.5 Appointment of Executor

(A) Upon receipt of a petition for letters testamentary, the clerk shall schedule a hearing at which an Executor will be appointed and letters testamentary authorized. The hearing shall be scheduled so that adequate notice to interested parties can be made.

(B) Notice of hearing shall be made by the petitioning party to all persons named as takers under the will, and to all known heirs of the decedent if different from the named takers, and also posted in a conspicuous place in the Court building.

(C) At the hearing, the Court shall first determine the validity of the decedent's will and then appoint an Executor to administer the estate according to the terms of this Probate Code and the decedent's will.

(D) Letters testamentary shall be granted to the person appointed as Executor upon their taking an oath, to be prescribed by the Court, to the effect that the Executor will faithfully and honestly administer the estate, and upon the Executor's filing of bond, if required.

Section 6.7.6 Duties of Executor; Bond

The duties of the Executor shall be the same as those prescribed in this Probate Code for the Administrator of an intestate estate (Part 6), and the Executor shall file a bond in a like manner and subject to the same exceptions.

Section 6.7.7 Creditors

Notice to creditors, determination of the validity of claims, and payment of claims shall be handled as prescribed for intestate estates (Part 6).

Section 6.7.8 Accounting

Prior to the distribution of the estate remaining after payment of all just claims and priority payments, the Executor shall submit to the Court for approval an accounting of all receipts and disbursements from the estate, showing the present status of the estate and that it is ready for distribution, and also showing the computation of any attorney's and/or Executor's fees involved for which approval for payment is sought.

Section 6.7.9 Distribution; Closing Estate

(A) When it is made to appear to the Court that an estate is ready to be distributed, the Court shall order such distribution according to the provisions of the decedent's will or the rules of

intestate succession, whichever is applicable, and according to the rules set forth in this Probate Code.

(B) The estate shall be closed and the personal representative of the estate dismissed and their bond, if any, released upon filing with the Court receipts showing that the estate is fully distributed, and also upon filing the personal representative's affidavit that the estate is fully administered and ready to be closed. "Personal representative" as used herein includes both Administrators and Executors.

Section 6.7.10 Distribution: Order in which Assets Appropriated; Abatement

(A) Except as provided in subsection 6.7.10 (b), and except as provided in connection with the share of the surviving spouse who elects to take an elective share, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

- (1) Property not disposed of by the will;
- (2) Residuary devises;
- (3) General devises;
- (4) Specific devises.

For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

(B) If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection 6.7.10 (a), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(C) If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

Section 6.7.11 Property Discovered After Estate Closed

An estate may be reopened whenever necessary to dispose of a decedent's property discovered after their estate has been closed. The Court shall order distribution of the property to the person or persons entitled thereto after making whatever orders appear necessary to assure a just participation of the after discovered property in the expenses of the estate.

CHAPTER 8 GUARDIANSHIP

Section 6.8.1 Definition of Guardian

(A) A guardian is an adult appointed to take care of the person or property of another. The guardian must exercise the highest standard of care for the ward, and is subject to regulation by the Tribal Court.

(B) The Court, when it appears necessary or convenient, may appoint guardians for the persons and/or property of either children under the Court's jurisdiction or incompetents who have no guardian legally appointed by will or deed. Such appointment may be made on the petition of a relative or other person on behalf of the child or incompetent, or a petition of the child if at least fourteen (14) years of age. Before making such appointment, the Court must cause such notice as the Court deems reasonable to be given to any person having the care of a child, and to such other relatives of a child residing on the reservation as the Court may deem proper, and in cases of adult incompetents, the Court may cause notice to be given to the incompetent at least five (5) days before hearing the petition.

(C) If a child is under the age of fourteen (14) years, the Court may nominate or appoint their guardian. If the child is fourteen (14) years of age or older, the child may nominate their own guardian who, if approved by the Court, must be appointed accordingly. If the guardian nominated by the child is not approved by the Court, or if the child resides outside of the reservation, or if, after being duly cited by the Court, the child neglects for ten (10) days to nominate a suitable person, the Court may nominate and appoint the guardian in the same manner as if the child were under the age of fourteen (14) years.

(D) When a guardian has been appointed by the Court for a child under the age of fourteen (14) years, the child, at any time after the child attains that age, may nominate their own guardian, subject to the approval of the Court. A guardian appointed may as specified by the Court have the custody and care of the education of the child and the care and management of their property until such child arrives at the age of eighteen (18), marries, is emancipated by the Court, or until the guardian is legally discharged, provided, however, that said guardian shall not have the authority, without express written consent of the Court, to dispose of any real or personal property of the child in any manner, including, but not limited to, the child's Individual Indian Money Account and any trust fund account. With respect to a child's trust fund account, the guardian shall be bound by this code and any requirements and provisions of the Tribe's Revenue Allocation Plan. Said guardian shall also have the authority to consent to the medical care and treatment of the child.

(E) The Court may order that the Court disburse monthly reimbursement payments to the person or agency to whom custody is granted under this code, provided sufficient funds have been appropriated by the Tribal council. Said disbursements must be used by the person or agency with custody of the child for the sole purpose of covering expenses incurred in the care and custody of said child and shall not be used for any other purpose. The use of said funds for any

purpose other than that described in this section shall subject said person or agency to contempt of Court and to any criminal and civil penalties or remedies provided by the Tribal code.

Section 6.8.2 How Guardians are Appointed

(A) By will. The last surviving parent or spouse of a minor or mental incompetent may designate in a will the guardian for the minor or mental incompetent. Upon determination by the Court that the will is valid, and that the person designated is willing to accept the responsibilities of guardianship, the Court shall appoint the person designated; provided that for good cause shown, the Court may decline to appoint the person designated.

(B) By Court appointment. Where a minor or mental incompetent is in need of a guardian, and no guardian is appointed pursuant to a valid will, the Court may appoint a guardian, to promote the best interests of the minor or mental incompetent.

(C) Hearing. In each case where a guardian is to be appointed, either by will, or by Court appointment, a hearing shall be held following notice to all interested parties.

Section 6.8.3 Types of Guardianship

The types of guardianship shall include guardianship of property and/or guardianship of the person. Guardianship of the person shall include both temporary guardianship and permanent guardianship.

Section 6.8.4 Guardianship of Property

The Court may appoint a guardian of the property of a child or incompetent person under such terms and conditions as the Court sets forth in the written order. The guardianship may cover all property until the child reaches eighteen (18) years of age or until the incompetent person becomes competent or it may be limited to only specific property or a specific legal action as set forth in the written order. A temporary or permanent guardianship of the person may also include guardianship of the child's property if set forth in the written order.

Section 6.8.5 Permanent Guardianship

The Court may appoint a permanent guardian for the child under such terms and conditions as the Court sets forth in the written order. Permanent guardianship provides for permanent custody of a child to someone other than the parent(s), although there is no termination of the parental rights of the parents. There shall be a presumption of continued permanent guardianship in order to provide stability for the child. Permanent guardianship shall only be terminated based upon the unsuitability of the permanent guardian(s) rather than the competency or suitability of the parent(s). The parent(s) and the child's extended family shall be granted liberal visitation rights unless deemed inappropriate by the Court.

Section 6.8.6 Temporary Guardianship

The Court may appoint a temporary guardian under such terms and conditions as the Court sets forth in the written order. A temporary guardianship may be terminated if the Court determines that it is in the best interests of the child to change custody from the temporary guardian to a new guardian or to return the child to the parent, guardian or custodian. The parent(s) and the child's extended family shall be granted liberal visitation rights unless deemed inappropriate by the Court.

Section 6.8.7 Who May File Guardianship Petition

Any person may file a petition for guardianship. The petition shall be initiated either by the proposed guardian or by the child if at least fourteen (14) years of age.

Section 6.8.8 Contents of Guardianship Petition

(A) The petition for guardianship shall include the following, to the best information and belief of the petitioner.

- (1) The full name, address and tribal affiliation of the petitioner;
- (2) The full name, sex, date and place of birth, residence and tribal affiliation of the proposed ward;
- (3) The basis for the Court's jurisdiction;
- (4) The relationship of the proposed guardian to the proposed ward;
- (5) The name and address of the person or agency having legal or temporary custody of the proposed ward;
- (6) The type of guardianship requested;
- (7) In the case of alleged incompetent persons, the grounds for incompetency under § 8.1; and
- (8) A full description and statement of value of all property owned, possessed, or in which the proposed ward has an interest (if guardianship of property is requested).

(B) All petitions must be signed and dated by the petitioners, and must be notarized.

Section 6.8.9 Guardianship Report

(A) Upon the filing of a guardianship petition, the Court shall immediately request that the social services department or other qualified agency conduct a guardianship report on the proposed guardian and report on the proposed ward. The guardianship report shall contain all

pertinent information necessary to assist the Court in determining the best interests of the proposed ward.

(B) No determination can be made on a petition for guardianship until the report has been completed and submitted to and considered by the Court. The guardianship report shall be submitted to the Court no later than ten (10) days before the hearing. The Court may order additional reports as it deems necessary.

Section 6.8.10 Management of Property

(A) In the event that any guardian shall receive any money or funds of any child or incompetent person during their term of office as guardian, before taking and receiving into custody such money or funds, the Court must require of such person a bond with sufficient surety to be approved by the Court and in such sum as the Court shall order, conditioned that the guardian will faithfully execute the duties of their trust, and the following conditions shall form the part of such bond without being expressed therein:

(1) To make an inventory of all the estate of the ward that comes into their possession or knowledge and to return the same within such time as the Court may order, and;

(2) To dispose of and manage the estate according to law and for the best interests of the ward, and faithfully to discharge their trust in relation thereto, and also in relation to the care, custody and education of the ward, and;

(3) To render an account on oath of the property, estate and money of the ward in their hand and all the proceeds or interests derived therefore, and of the management and disposition of the same, within three (3) months after their appointment, and at such other times as the Court directs, and at the expiration of their trust, to settle their accounts with the Court or judge or with the ward if the ward is of full age, or their legal representative, and to pay over and deliver all the estate, monies and effects remaining in their hands, or due from them on such settlement to the person who is legally entitled thereto.

(4) The funds of any child or incompetent must be used by their guardian solely for the support and education of such child and for the support of such incompetent, and shall be expended by the guardian in a reasonable manner according to the circumstances and station in life of such ward, and in such manner as can reasonably be afforded according to the income and estate of said ward.

(5) If determined to be appropriate by the Court, the written order may set forth that the child's property may not be used for the child's care, but rather to be managed for the child until the child reaches the age of eighteen (18) or is emancipated by the Court.

Section 6.8.11 Incompetent Persons

(A) In case of incompetent persons, if after a full hearing and examination upon such petition, and upon further proof by the certificates of at least two qualified physicians showing that any

person is incompetent as defined in this Code, it appears to the Court that the person in question is not capable of taking care of himself or herself and of managing their property, such Court must appoint a guardian of the person and estate within the powers and duties specified in this Part.

(B) Every guardian of an incompetent person appointed as provided herein has the care and custody of the person of their ward and the management of their estate until such guardian is legally discharged; the guardian must give bond to such ward in like manner and with like conditions as before specified with respect to the guardianship of a child.

(C) A person who has been declared insane or incompetent or the guardian, or any relative of such person within the third degree or any friend, may apply by petition to the Court in which they were declared insane, to have the fact of their restoration to capacity judicially determined. The petition shall be verified and shall state that such person is then sane or competent. The Court shall require notice to be given of a hearing upon said petition at some date after said petition has been filed; and at the hearing upon said petition, witnesses shall be examined and a determination made by the Court as to whether the petition should be granted and the insane or incompetent person be declared of sound mind and capable of taking care of himself or herself and his or her property, their restoration to capacity shall be adjudged and the guardianship of such person, if such person shall not be a child, shall cease.

Section 6.8.12 Termination of Guardianship

(A) Upon motion of any person, or the Tribe, the Court may provide notice and a hearing on whether to terminate a guardianship. Grounds for termination shall include, but not be limited to, personal use by the guardian of the assets of the ward, failure to provide a reasonable level of care for the ward, or the marriage of a minor ward.

(B) Guardianship, including guardians of the property of the ward, shall terminate automatically upon a minor reaching age 18, or upon a mental incompetent being adjudged by the Court to have regained legal capacity.

LEGISLATIVE HISTORY:

Probate Code adopted by Resolution #039-96, July 23, 1996.

Amendments to the Probate Code adopted by Resolution #120-97, April 15, 1997

TRIBAL PROBATE CODE COMMENTARY

PART 1. GENERAL PROBATE PROVISIONS

This Part begins by setting out the purpose and philosophy of this Probate Code.

Section 6.1.1 provides that the code should be liberally interpreted to meet the following objections:

- (A) To ensure that the property of decedents passes to the rightful heirs or beneficiaries.
- (B) To comply with the decedent's wishes as much as possible.
- (C) To comply with tribal custom and tradition.
- (D) To provide a simple, efficient and inexpensive method for probate decedent's property.
- (E) To prevent the transfer of land out of tribal ownership and control.
- (F) To ensure that the rights of creditors of decedents are protected to the extent possible and fair.
- (G) To promote and further the Tribe's inherent right to self-governance.

It is very useful to begin a probate code by getting forth the purpose and philosophy to guide the court in interpreting and applying the code. The Tribal Council should carefully review these objectives to determine whether these objectives are appropriate and consistent with the needs of the community.

Section 6.1.2 sets forth a long series of specific definitions due to the fact that probate law in general and Indian probate law specifically has a unique language which often needs explanation.

Section 6.1.3 provides for a broad statement of jurisdiction. It provides for the exercise of the greatest possible tribal jurisdiction over the probate of the estate of decedents who were domiciled or owned real or personal property on the Indian Reservation. Jurisdiction is not limited to Indian decedents or to tribal members. Instead, it allows the court to assert probate jurisdiction over anyone who was domiciled or owned real or personal property on the reservation. It does not mean that the court must assert jurisdiction in all of the potential cases - but it does give the court flexibility to assert jurisdiction when it is appropriate.

Sections 6.1.4 and 6.1.5 allow for the use of tribal custom and tradition. Section 6.1.4 is important because it allows anyone to renounce any property or interest and sets forth the procedure for renunciation of succession.

The remaining sections are standard general probate provisions as follows:

Section 6.1.6 - Allows relief when fraud is involved

Section 6.1.7 - Provides procedure for determining evidence of death

Section 6.1.8 - Allows for use of civil procedure and appellate review when appropriate

Section 6.1.9 - Sets forth judicial powers and duties

Section 6.1.10 - Sets out rules for records and copies

Section 6.1.11 - Allows for trials to the court