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PROBATING INDIAN ESTATES: CONQUEROR'S COURT VERSUS DECEDENT INTENT

*Antonina Vaznelis**

This article presents an overview of Indian probate problems and addresses the jurisdictional conflicts involved in probating the estates of Indians who have an interest in federal trust property.

Basic differences in Indian and non-Indian concepts of ownership formed the basis for many of today's problems. Fluctuating federal policy, the transitory and mutable nature of tribal powers, and past attempts to legislate Indian culture out of existence and Indian peoples into mainstream American society helped to deepen the problems.

Roots of Contemporary Probate Issues

The Concept of Ownership

Before a European foot stepped on this continent, actual ownership of the land was not an issue. Most nonagrarian Indian tribes believed tilling the soil was a desecration. All Indians, whether hunter or planter, considered the concept of individual land ownership a religious sacrilege. The earth belonged to the Great One. The idea of transferring real property interests by inheritance was nonexistent. Generally, personal property was shared by tribal members under a system of communal ownership.

The Indian tradition of community ownership contrasted sharply with the European concept of individual ownership, a carryover from feudal law. Initially, tribes were permitted to retain their traditional ways, but tolerance waned as non-Indian land hunger grew. Tribes were pushed westward and the United States government's Indian policy was shaped and reshaped. As is the case today, federal policy was based as much on non-Indian desires as on Indian needs. The trend to view tribal sovereignty as a philosophical ideal, rather than a political reality, began shortly after the Revolutionary War, when Indian soldiers and scouts were no longer needed to fight the British. Settlers wanted more and more Indian land as time went by.

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The Pendulum of Federal Indian Policy

From 1830 to 1860, Indian tribes endured the removal era.¹ Forced from their traditional homelands, some tribes migrated far from their ancestral lands. Others traveled to federally designated areas in the western United States. The assimilationist period encompassed 1860 to 1934, when federal policy encouraged Indians to adopt the dominant culture's customs and to assimilate into mainstream American society.² Federally sponsored training and educational programs were initiated, and native traditions were rigorously discouraged.³ The federal government also attempted to discourage the traditional Indian concept of tribal ownership of property by allotting "tribal land" to individual Indians. In 1934 federal policy shifted back toward the concept of tribal sovereignty with passage of the Indian Reorganization Act, which proposed to give tribes more freedom of self-government. Between 1950 and the mid-1960s, the federal government attempted to terminate its special relationship with the tribes by terminating federal recognition of certain tribes as entities.⁴ In 1968 the Indian Civil Rights Act was passed, marking a return to federal respect for tribal self-government so long as individual Indians were assured most of the same protections that non-Indian citizens enjoyed under the Bill of Rights.⁵ The Indian Self-Determination Act of 1975 established statutory authority for provision of necessary services to members through tribal, rather than governmental, programs.⁶

Federal Indian policy has shifted with the prevailing winds of public sentiment and national politics. The pendulum of federal

1. G. FOREMAN, *INDIAN REMOVAL* (1932).

2. H. FRITZ, *THE MOVEMENT FOR INDIAN ASSIMILATION: 1860-1890* (1963).

3. The Wounded Knee massacre of 1890 is an extreme example of the effects of this assimilationist policy. U.S. Seventh Cavalry troops, preoccupied with stifling a native religious practice known as the Ghost Dance, killed 146 Sioux Indians—men, women, and children.

4. Wilkinson & Biggs, *Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977); J. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953); W. CANBY, *AMERICAN INDIAN LAW* 50 (1981).

5. Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C.A. §§ 1301-1341 (1983).

6. The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C.A. §§ 450a-450n (1983), gave express authority to the secretaries of Interior and Health, Education and Welfare to make grants directly to and contract with Indian tribes and organizations for delivery of federal services. Tribal programs are to be funded by the federal government, but planned and administered by the tribes themselves. See D. GETCHES, D. ROSENFELT & C. WILKINSON, *FEDERAL INDIAN LAW* 110-11 (1979).

policy has never been still, but the central issue in Indian law today is the same issue that dominated debate in the 1800s: "Who governs the land, the resources, and the people?"

Tribal Sovereignty

In *Worcester v. Georgia*,⁸ United States Supreme Court Justice Marshall rested federal recognition of tribal sovereignty on "two basic principles of the tribal state relation . . . federal preemption of state control over Indian affairs and tribal political independence."⁹ The federal government intended to protect tribes from state interference and to uphold the tribes' inherent and unextinguished powers.

This view was conditionally reasserted by the Supreme Court in *United States v. Wheeler*¹⁰:

The powers of Indian tribes are, in general, "inherent powers of a limited sovereignty which has never been extinguished." . . . The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.¹¹

In order for a tribe to exercise its "limited sovereignty" and right to tribal self-government, it must have the power to govern both its members and its territory. These two necessary components of self-government were recognized in *Wheeler*: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."¹² Indian probate problems clearly illustrate that simply "possessing attributes of sovereignty" is a far cry from having sovereign control over members and property located within tribal territory.

"Within reservations, the tribes have plenary, direct, and ex-

7. GETCHES, ROSENFELT & WILKINSON, *supra* note 5, at 348.

8. 31 U.S. (6 Pet.) 515 (1832).

9. McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State and Federal Interest*, 13 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 357, 377 (1978).

10. 435 U.S. 313 (1978), *citing* F. COHEN, *FEDERAL INDIAN LAW* 122 (1945).

11. *Id.* at 322-23.

12. *United States v. Wheeler*, 435 U.S. 313, 323 (1978), *citing* *United States v. Mazurie*, 419 U.S. 544 (1975).

clusive authority over members except when expressly limited by federal law."¹³ This should also be the rule regarding authority over members' property located within the reservation. In this area, limitations are clear because the federal government has assumed exclusive jurisdiction over the descent and partition of all Indian trust property.¹⁴ Federal agents have the power to determine heirs and to disapprove wills made by Indians.¹⁵ When an Indian dies intestate or having made a holographic will and trust property is part of the estate, federal agents have the power to determine the beneficiaries of the Indian estate. Generally, in the past, nontrust property was distributed by the federal administrative law judge at the same time the trust interest was transferred. In such a practice, decedent's intent might be considered secondary to the Indian agent's determination of heirs. As tribes assert their powers of self-government and jurisdiction to probate Indian estates, these practices are rightfully eliminated.

One manner in which tribes can assert their power of self-government is to establish tribal court jurisdiction over that portion of a decedent's estate which consists of nontrust assets. Current federal policy seems supportive of such a move.

Present federal policy appears to be returning to a focus upon strengthening tribal self-government [citations omitted] and the Court of Appeals for the Ninth Circuit has expressed the view that courts "are not obliged in ambiguous instances" to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so would interfere with the present congressional approach to what is, after all, an ongoing relationship.¹⁶

Allotment

The concept of tribal sovereignty, as stated by Justice Marshall, was tempered by growing assimilationism during the late nineteenth and early twentieth centuries. Based primarily on popular resentment and belief that white settlers were being ex-

13. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 518 (1979).

14. 25 U.S.C.A. § 348 (1983).

15. 43 C.F.R. § 4.203 (1982).

16. *Bryan v. Itasca County*, 426 U.S. 373, 389 n.14 (1976), citing *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 663 (1975).

cluded from large tracts of reserved land, Congress passed the General Allotment Act of 1887.¹⁷

Prompted by a desire to "civilize" the Indian, the government began, in 1887, to grant fee title to individual tribes' members. Some 5½ million acres of reservation land were allotted to individual Indians in the first 15 years of the program. To prevent Indians unskilled in landowning from being defrauded of their tracts, titles were disabled by a total restraint against alienation, except by special permission of the Government. When an owner died, the land was divided among the heirs according to federal statutes, which provided for distributing the land according to state rules of intestate succession if no will had been made, and setting aside a will if all the decedent's family was not included. [Citations omitted.] The practical effect of these policies was progressive fractionation of ownership of the land, so that now over half the reservation allotments are held by so many owners in common that the Indians are helpless to make effective use of their property. Unless this pattern can be reversed, all Indian allotments inevitably will have an astronomical number of owners.¹⁸

Under the Allotment Act, title to each allotment was to be held in trust by the United States government for twenty-five years. Although the original twenty-five-year trust term was indefinitely extended¹⁹ and restraints against alienation remain, trust property has been sold with the federal trustee's special permission.

In 1887 there were 138 million acres of reservation area. Today there are less than 48 million acres, some 20 million of which is desert or semidesert.²⁰ Several commentators attribute white greed as the sole reason for this incredible land loss, noting that "Indian land is cheaper, easier and less politically dangerous to take."²¹ "Construction engineers, road builders and dam erectors

17. The General Allotment Act is also known as the Dawes Act, 24 Stat. 388. Its effect upon the Indian population has been nothing short of disastrous.

18. Williams, *Too Little Land, Too Many Heirs: The Indian Heirship Problem*, 46 WASH. L. REV. 709, 710-11 (1971).

19. The General Allotment Act of 1887 gave the president discretion to extend the trust period, which was done repeatedly. The Indian Reorganization Act (Wheeler-Howard) of 1934, 25 U.S.C. § 462, extended all Indian trust periods indefinitely.

20. STATISTICAL ABSTRACTS OF THE UNITED STATES, table 387, at 229 (U.S.B.I.A. 1982-83). See also CANBY, *supra* note 4, at 21.

21. Williams, *supra* note 18, at 720 n.50, citing E. CAHN, OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA 69, 73 (1969). See also V. DELORIA, JR., CUSTER DIED FOR YOUR SINS (1969).

have an uncanny knack for discovering that the only feasible and economical way to do what must be done will, unfortunately, necessitate taking the Indian's land."²² This tendency holds true for Bureau of Indian Affairs' (BIA) grants of right-of-way across Indian land as well.²³ With federal approval and often encouragement, sales are consummated between low-income Indian families and non-Indians with the necessary assets to put good grazing land, farmland, and mineral- or timber-rich property to full economic use. Many tribes sell their more valuable holdings as a means of economic survival.

Most allotment schemes directly contemplated non-Indian settlement within the reservation on what was deemed to be "surplus" Indian land, and the resulting integration was an affirmative policy of the government Some allotment schemes resulted in non-Indian ownership indirectly; Indian allotments were made alienable and were subsequently acquired by non-Indians [A]lienability was a deliberate policy of the government. Furthermore, the allotment schemes presupposed the eventual withering away of the reservations and tribal authority through assimilation of the Indians, a view that was not abandoned until 1934.²⁴

Abandonment of the assimilationist view did not alter the Allotment Act's disastrous effects. In fact, through inheritance and further division of allotment interests, those effects have been exacerbated. The federal government's management of allotted lands falls well short of the standard required of other trustees. Its fiduciary duty toward the tribes and allottee members seems more a matter of choice than an enforceable legal obligation.

In 1980 the Quinalt Reservation Indians filed suit alleging breach of duty to manage timber on trust land.²⁵ The tribe asserted that the government had failed to obtain fair market value in selling its trust assets (the timber), had failed to manage

22. CAHN, *supra* note 21, at 69. See the photograph, *id.* at 70, of the chairman of the Fort Berthold Indian Tribal Business Council weeping over the 1948 forced sale of 155,000 acres of reservation land in North Dakota. The Army Corps of Engineers decided it was necessary to flood one-fourth of the Three Affiliated Tribes' land in order to construct the Garrison Lake and Reservoir Project.

23. *Id.* at 73.

24. Collins, *supra* note 13, at 506-07, *citing* *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Mattz v. Arnett*, 412 U.S. 481 (1973).

25. *United States v. Mitchell*, 445 U.S. 535 (1980).

the trust property in such a manner that the *res* would not be diminished (lack of timber management), had failed to pay interest on funds held by the trustee (income from timber sales), and had exacted excessive administrative charges from the beneficiaries (the tribe). The United States Supreme Court abstained from addressing these specific charges, choosing instead to limit its review to the meaning of the Allotment Act.

[W]hen Congress enacted the General Allotment Act, it intended that the United States “hold the land . . . in trust” not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation.²⁶

The Supreme Court sidestepped the issue of whether the government had, in fact, breached its fiduciary duty to the tribe. By particularizing the timber management issue, the Court limited the scope of the government’s fiduciary duty to such an extent that it would be unrecognizable outside the field of Indian law. Assume identical breaches of fiduciary responsibility, that the trust *res* were real property other than allotted Indian land, and that the beneficiaries were other than Indian allottees: Would any court permit sale of trust property for less than market value, or condone failure to pay interest on funds held by a trustee? Would any court refuse to address the issue of blatant mismanagement by a trustee?

Where allotted trust lands are concerned, the government’s trust relationship extends to individual allottees as well as to the tribe as a whole. Trustee power to protect trust property can be used to thwart testamentary intent and to sell Indian land to the highest bidder.

The BIA realty officer can thwart the Indian’s wishes to will his land to whomever he wants—first through his power to determine whether it is “efficient” for the land to be divided, and secondly, through his power to affect the Bureau’s determination of the validity of the will.

The BIA can rule that a deceased Indian was incompetent in drawing his will, or that the will failed to make “adequate provision” for all the heirs. The Bureau refuses to define, or even

26. *Id.* at 544.

provide guidance for, what constitutes "adequate provision." Such rulings nullify the will and the land is often sold to the highest bidder—usually a non-Indian.²⁷

Multiple Heirship

The problem of mismanagement of trust land is only one facet of the allotment problem. An Indian who inherits an allotment interest is likely also to inherit problems with distant relatives. Under present law, unanimous consent of the "owners" is required before allotments can be sold.²⁸ Heirs may be

minors, recalcitrant, *non compos mentis*, or unavailable. Frictions arise because Indians cannot understand how land in which they have an equity can pass intestate to persons not immediately related to them or only related by marriage, and this misunderstanding compounds the difficulty in management of their land.

...

Nor is partition of the allotments feasible in most cases, since farmers cannot make economical use of a farm as small as 80 acres. The cost of partition is prohibitive unless the land is valuable and all the owners solvent—a combination of circumstances seldom found on an Indian reservation.²⁹

Leasing to non-Indians has become a common practice. "Over

27. CAHN, *supra* note 21, at 74.

28. 25 U.S.C.A. § 379 (1983) reads in part:

The adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court . . . but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchase. . . .

25 U.S.C.A. § 404 reads in part:

The lands, or any part thereof, allotted to any Indian or any inherited interest therein, which can be sold under existing law by authority of the Secretary of the Interior, except the lands in Oklahoma and the States of Minnesota and South Dakota, may be sold on the petition of the allottee, or his heirs, on such terms and conditions and under such regulations as the Secretary of the Interior may prescribe. . . .

25 U.S.C.A. § 483 reads in part: "The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians. . . ."

29. Williams, *supra* note 18, at 714-15.

half of the heirship land is now used by non-Indians because individual Indians cannot assemble sufficient acreage or credit to make farming profitable and because it is simpler for the Bureau of Indian Affairs to deal with operators who control large tracts."³⁰ Where leasing to non-Indians has been commonplace, it may be easier to rationalize eventual sales to non-Indians.

A Colville Indian, who testified before the House Committee on Interior and Insular Affairs, explained the effect of multiple heirship as follows:

My sister's allotment was 80 acres. She died and my dad, a white man, was willed the land. He died and all his children fell heir. His share was 13440/20160. We had that probated in court—four children share is 960/20160, and cousins one share 270/20160, five shares 128/20160, one share 320/20160, one share 140/20160, seven shares 35/20160 and these last seven are no relation only that this man was once a brother-in-law and they are the ones that won't sign so that we can have a hundred percent signers.³¹

The government has been aware of the multiple heirship problem since publication of the Merriam Report in 1928.³² Noting widespread poverty on the reservations and the fact that multiple heirship was one of its causes, the federally requested report advised the government to purchase heirship land. The problem of poverty could only increase as ownership of the land was increasingly fractionated generation after generation. The Commission's advice has never been followed and with each successive generation the effects of fractionation have multiplied at a rate beyond geometric progression.

Suggested solutions have included limiting the number of heirs permitted to inherit under federal law or setting up revolving funds that would permit tribes to purchase allotment interests from individual heirs. Had the trust land remained tribal land, the heirship problem would not exist. The Merriam Report's recommendation to provide tribes with funds to repurchase their

30. *Id.* at 712-13.

31. *House Comm. on Interior & Insular Affairs, Indian Heirship Land Study*, 86th Cong., 2d Sess., 463 (1960).

32. INST. FOR GOV'T RESEARCH, *THE PROBLEM OF INDIAN ADMINISTRATION* (1928), commonly known as the Merriam Report, documented the failure of the federal Indian policy during the allotment era and the abject poverty in which most Indians were forced to live.

lost lands is the only suggested solution that would place tribes in a position resembling the one they enjoyed before the Allotment Act. Of course, land owned in fee by non-Indians is probably unrecoverable. The alternative proposal for single descent could not retroactively correct the multiple heirship problem. Such a restriction very likely would interfere with testator intent, tribal self-government, and minor children's right to support. As the multiple heirship problem is perpetuated, the probate of Indian estates becomes a more and more complex area of the law.

Wills and the Old Ways

Conditions previously foreign to Indian culture present problems. Most older Indians refuse to make wills because the practice conflicts with traditional values of communal sharing and interdependency. Many younger Indians refuse to make wills because they resent BIA involvement in their personal and family affairs. Indication that this modern-day resentment is longstanding can be found, for example, in the Crow Tribe's constitution of 1948.

The Bureau of Indian Affairs, being a part of the United States Government, shall in no wise interfere directly or indirectly through its field representatives or agents with the deliberations or decisions of the Crow Tribal Council. The council, existing under the legal handicaps herein pointed out, belongs to the Crow Tribe only and not the government, and as such will make its decisions without Indian Bureau interference or advice, inasmuch as the Indian Bureau, under the broad powers in Indian administration conferred upon the Congress . . . and the courts, can and does nullify Indian tribal council actions the country over when same takes issue with its own views.³³

Standard BIA procedure for the drafting and approval of a will is generally a five-step process. The would-be testator makes an appointment to meet with a BIA employee to discuss the intended distribution of his property. The BIA employee searches agency records to determine all known heirs of the would-be testator. A will is drafted, often typed on a Bureau form. The tribal member is again called in to review the will and, upon approval, to sign in the presence of witnesses (generally two BIA

33. Constitution and Bylaws of the Crow Tribal Council, art. VII, § 8, *reprinted at* 16-17, *TRIBAL CONSTITUTIONS: THEIR PAST—THEIR FUTURE* (1978).

employees). The executed will is then sent by the agency superintendent to the field solicitor's office for approval as to form. In Montana agency superintendents on each of the seven reservations send executed wills to the field solicitor's office in Billings. If approved, the will is returned to the reservation superintendent. The will is generally kept on file in the superintendent's office until the testator's death.³⁴ The possibility exists that the superintendent's determination of trust property heirs and this federal imposition of a formal approval procedure interfere with testator intent regarding nontrust property.

The intent of the author of a holographic will is no more protected than are the wishes of an allottee who dies intestate. In both instances, a federal administrative law judge determines the decedent's heirs, based on information furnished by the agency superintendent.³⁵ A holographic will that does not name every heir of record will be disapproved, thus freeing the administrative law judge and agency superintendent to proceed in distributing property contrary to testator intent.

In *Spriggs v. United States*,³⁶ the Tenth Circuit upheld a will disposing of restricted land even though the will was approved after the testator's death. However, post-demise approval of a will is the exception rather than the rule. For instance, in *Browning*, Montana, Bureau policy is to invalidate any Blackfoot will that has not been formally approved prior to the testator's death.³⁷ There is no federal regulatory authority validating the Bureau's practice. The Code of Federal Regulations dictates the manner in which wills are to be approved, but does not specify the timing of such approval.

Upon an allottee's death, the agency superintendent supplies the administrative law judge with information regarding heirship, marriages and divorces, proof of death, creditors, decedent's property, and the executed will, if one is on file.³⁸ Within ninety days of receipt of notice of death, probate of the allottee's estate is to

34. 43 C.F.R. § 4.260(b) (1982).

35. 43 C.F.R. § 4.202 (1982).

36. 297 F.2d 460 (10th Cir. 1961), *cert. denied*, 369 U.S. 876.

37. For example, the holographic 1973 will of Emery Dennis Juneau, Sr., a Blackfoot tribal member who died in 1978, was invalidated for lack of formal approval prior to death and lack of proper witness attestation, although the agency superintendent had had custody of the will for approximately three years. *In re Estate of Juneau*, 7 I.B.I.A. 164 (1979).

38. 43 C.F.R. § 4.210 (1982).

begin.³⁹ The administrative law judge, who is a modern equivalent to the frontier circuit judge, serves notice on all interested parties and posts notice of the hearing in five or more conspicuous places for at least twenty days.⁴⁰ This federal notice requirement may differ from state probate hearing notice requirements.⁴¹ The minimum age at which an Indian may make a will, twenty-one years, is another area of possible discrepancy with state law.⁴²

The federal requirements for the making of wills, approval of wills, probate of estates, and technical distinctions between requirements placed on Indian estates and estates of other citizens exist only by virtue of the federal government's exclusive jurisdiction over allotted lands.⁴³ Although the original purpose of that jurisdiction was to protect Indian lands from acquisition by non-Indians, that purpose has failed. The tribal land base has been all but decimated in the wake of the Allotment Act. Indian land continues to slip through the federal trustee's fingers, and today's strong sentiment in favor of American energy development, especially on public lands, may act to encourage further alienation of Indian lands.

Failure to appreciate the religious and cultural association of the Indian with the tribal land has prevented understanding of the depth of his resistance to further reduction of the reservation land base. Uniformly, Indians have a tradition of naturalistic religion often rooted in particular tracts of land Thus, the detrimental effects of land loss are not only economic, but include a profound loss of identity on a tribal level.⁴⁴

Federal restrictions on trust property were imposed as a response to a failed assimilationist policy. Perpetual federal

39. 43 C.F.R. § 4.210(b) (1982).

40. 43 C.F.R. §§ 4.211-.212 (1982). Note the regulations do not specify the timing of notice, but merely advise that service be made "in sufficient time in advance to enable the person served to attend."

41. *E.g.*, see MONT. CODE ANN. § 72-1-301 (1983), which requires a 14-day notice period.

42. 25 U.S.C.A. § 373 (1983) requires the allottee to be 21 years old; MONT. CODE ANN. § 72-2-301 (1983) permits "any person 18 or more years of age" to make a will.

43. 25 U.S.C.A. § 348 (1983).

44. Williams, *supra* note 18, at 719, *citing* C. RELANDER, STRANGERS ON THE LAND 56, 61 (1962); W. BROPHY & S. ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 4, 63 (1966); COHEN, *supra* note 10, at 208; DELORIA, *supra* note 21, at 103; Note, *Indians: Better Dead Than Red?*, 42 SO. CAL. L. REV. 101 (1968).

jurisdiction seems as unlikely a solution to the clash of Indian and non-Indian values as forced assimilation was.

Concurrent jurisdiction over Indian estates may mean many fingers in the pie. Today when an Indian decedent owns personal and/or real property, located both on and off the reservation, it is possible for three separate forums to claim probate jurisdiction. The administrative law judge exercises exclusive jurisdiction over all property held in trust by the United States. The state asserts jurisdiction over all real property located off the reservation. State courts have also asserted at least concurrent jurisdiction over personal property located off the reservation or on a reservation other than the one of which decedent was a member. The tribal court may claim jurisdiction over all nontrust property, real and personal, owned by members within the reservation. Unless the tribal code specifies how the tribal judge is to distribute decedent's non-trust assets, probate generally occurs under the federal administrative law judge's pendent jurisdiction during the probate of federal trust property. In the past, many tribal codes have indicated that state law is to govern in intestacy matters. Thus, one estate may be affected by a hodgepodge of federal, state, and tribal court procedures and laws.

Establishment of Tribal Courts

The Indian Reorganization Act of 1934⁴⁵ was enacted partly in response to the Merriam Report and partly because of a realization that tribes are not effectively assimilated against their will. The Act allowed tribes to exercise some of the sovereignty they had always been assured they possessed. Under the Act, tribes adopted constitutions and bylaws, and they employed their own legal counsel. For the first time since treaties were signed, the federal government gave tribes a choice: whether to accept or reject coverage under the Act. Several tribes "rejected coverage of the Act, fearing additional federal direction."⁴⁶ Many tribes chose to follow federal suggestions in drafting their constitutions, instead of drafting original documents reflecting their individual tribal traditions.

Tribal-State Conflict

Today there are at least 161 tribal courts in America and 270

45. Indian Reorganization Act of 1934 (Wheeler-Howard), 25 U.S.C.A. §§ 461-479 (1983).

46. CANBY, *supra* note 4, at 25.

tribal judges.⁴⁷ Federal adoption of a uniform tribal probate code would fly in the face of tribal sovereignty and the right of self-government. On the other hand, considering the highly individualized needs and goals of each tribe, voluntary adoption of such a system is unlikely.⁴⁸

States, of course, have an interest in the probate of their citizens' estates. Tribal membership does not preclude state citizenship. State interest in property located within the state on decedent's date of death includes property owned by Indians. State courts are often willing to probate Indian nontrust estates under the theory of jurisdiction by default, i.e., where both the federal and tribal court decline to assert jurisdiction over the matter. A leading Montana case, *State ex rel. Iron Bear v. District Court*,⁴⁹ established a three-pronged test that can be used when dealing with questions of state court jurisdiction over Indian matters:

Before a district court can assume jurisdiction in any matter submitted to it, it must find subject matter jurisdiction by determining: (1) whether the federal treaties and statutes applicable have preempted state jurisdiction; (2) whether the exercise of state jurisdiction would interfere with reservation self-government; and (3) whether the Tribal Court is currently exercising jurisdiction or has exercised jurisdiction in such a manner as to preempt state jurisdiction.⁵⁰

Generally, absent federal or tribal jurisdiction, the state court may assume jurisdiction to fill the legal vacuum. The *Iron Bear* test includes consideration of state interference with tribal self-government and is not limited simply by assertion of jurisdiction by another forum. Assertion of jurisdiction by another forum, or by federal treaty rights, or by restrictive statutory language is only part of the test. Jurisdiction over the probate of Indian estates may also be disclaimed by state statute, either in a provision defining civil court jurisdiction or by limiting language in the probate code. In many western states, language disclaiming jurisdiction over Indian lands is also found in the enabling act of state constitutions. State statutory impediments are overcome by the

47. *Trends and Problems in Probate of Estates of Deceased Indian Tribal Members*, 9 ABA PROBATE AND PROPERTY NO. 16 (1981).

48. *Id.* at 17-19.

49. 162 Mont. 335, 512 P.2d 1291 (1973).

50. *Id.* at 346, 512 P.2d at 1299.

fact that Indian tribal members are state citizens as well. Enabling language in state constitutions prohibiting state jurisdiction over Indians has been consistently ignored.

As a general rule of probate law, the nature and location of decedent's property determines choice of law and primary jurisdiction. When one state asserts subject matter jurisdiction over property, the validity of a will and the administration of a decedent's estate are governed by the law of the location of "immovables" and by the law of the decedent's domicile as to "movables." However, when both tribes and states assert jurisdiction over an Indian decedent's estate, the nature and location of the property is only one factor in determining primary jurisdiction. The extent to which the state is willing to recognize tribal sovereignty is also a factor. When an Indian dies owning property both on and off the reservation, tension between the state and the tribe may occur. As a rule, state courts assume jurisdiction over estates of Indians who die domiciled off-reservation and over estates of non-Indians domiciled in Indian country. "It might well be argued that where a non-Indian dies domiciled in Indian country and leaves Indian heirs, an exercise of state jurisdiction has the potential of interfering with internal tribal affairs."⁵¹ This is also the case when a mixed estate, a common-law spouse, adopted children, or mixed-blood kin are involved.

The tribal-state jurisdictional conflict is usually defused by tribal court concession, i.e., refusal to assert exclusive jurisdiction over members' probate matters. However, in instances where the state court exercises ancillary or concurrent jurisdiction, tribal courts could choose to assert their reserved powers. For example, when an Indian dies domiciled on-reservation, owning nontrust personal property located off-reservation, both state and tribal courts may assert jurisdiction, but the tribal court could demand jurisdiction over the entire nontrust estate of deceased members.

The direct source of tribal power to preempt concurrent state jurisdiction is not constitutional in character. The source may be defined as one of either "delegation" or "recognition." The "delegation" perspective views tribal preemption as the exercise of expressly or impliedly delegated federal power. Under this view, the powers delegated to the Indians by Congress may be considered the comprehensive federal action

51. CANBY, *supra* note 4, at 141.

which preempts the states' jurisdiction over that subject matter.⁵²

In the past, tribal courts have been reticent about exerting concurrent, much less preemptive, jurisdiction even though state courts have extended their jurisdiction onto the reservation. The question of whether tribal court jurisdiction extends to members' movable assets located off-reservation on decedent's date of death has not been tested.

Under *Williams v. Lee*,⁵³ state jurisdiction over nontrust personalty of a tribal member who dies on-reservation clearly seems to violate a "significant tribal interest," i.e., tribal self-government. "[T]he view that tribal self-government is limited by territorial boundaries and tribal citizenship is inconsistent with existing case law . . . [T]he particular interests of tribes, states and the federal government" must be balanced.⁵⁴

In Indian law, territorial and citizenship factors do not control or furnish the forum with interest in applying its own laws. Tribal interest is frequently based on custom, tradition, and a healthy group desire for self-preservation. The state has an interest in the orderly descent of property located within its borders and in protection of its citizens' rights. Nontribal judges, unfamiliar with tribal tradition, often cannot intuit what a tribal judge might do under the same set of circumstances. "It is only by recognizing these interests that the courts can serve as effective tribunals for resolving tribal-state and tribal-federal conflicts."⁵⁵ The United States Supreme Court has noted that "the people of the States where they [Indian tribes] are found are often their deadliest enemies."⁵⁶ The Ninth Circuit has stated that: "The result, given the fact that Indians and surrounding communities are often likely to have differing views of . . . economic development, environmental amenity, public morals, and the like, is that there may inevitably be some abrasion between Indian communities

52. Collins, *supra* note 13, at 640-41. See also *United States v. Mazurie*, 419 U.S. 544 (1975).

53. 358 U.S. 217 (1959).

54. McCoy, *supra* note 9, at 389. "Essentially, absent governing Acts of Congress, the question has always been whether state action infringed on the right of reservation Indians to make their own laws and be governed by them." *Williams v. Lee*, 358 U.S. 219-20 (1959). An example of tribal off-reservation regulatory powers is found in *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974) (Yakima Tribe was held to have regulatory power over off-reservation fishing rights of tribal members).

55. McCoy, *supra* note 9, at 423.

56. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

and local neighbors.”⁵⁷ Clearly, each court has a duty to balance all three interests (tribal, federal, and state) before probating estates of deceased Indian tribal members.⁵⁸

Choice of Forum

United States constitutional authority, federal statutes, and treaties are used to determine jurisdiction. Except where expressly limited by federal law, tribes have plenary, direct, and exclusive authority over members within the reservation. The guardianship concept, with Indians as government wards, formed the basis for exclusive federal jurisdiction over trust assets, whether the Indian decedent was domiciled on or off the reservation at the time of death. State court jurisdiction over Indian-owned land located off the reservation is asserted regardless of the Indian decedent's domicile.⁵⁹ State courts also assert exclusive jurisdiction over all assets owned by non-Indians, even those located within Indian country.

Jurisdiction concerning movables is the grey area of Indian probate law. The established rule has been that movables owned by an Indian who dies on-reservation fall within the tribal court's primary jurisdiction. If he died off-reservation, the state had primary jurisdiction, but the tribe could assert concurrent jurisdiction over any on-reservation property. The case of *Estate of Standing Bear v. Belcourt*⁶⁰ has clouded this rule.

Douglas J. Standing Bear, a Wyoming Arapaho member of the Wind River Reservation, lived on the Rocky Boy's Reservation with his wife and adopted daughter, both of whom were members of the Chippewa-Cree Tribe of Montana. On the date of his death, decedent owned a grader that was located on another reservation. Standing Bear's widow moved the grader to her reservation and petitioned state court for appointment as personal representative of her husband's estate. Two weeks later, she petitioned the Rocky Boy's Tribal Court for probate of the estate. The state-tribal jurisdiction dispute was thus set in motion.

57. *Santa Rosa Band of Indians v. King County*, 532 F.2d 655, 664 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1976).

58. American courts are not unique in their responsibility to weigh tribal interest. See Note, *Civil Rights: Indian Woman Denied Administration of Husband's Estate as the Result of Ministerial Discretion*, 8 OTTAWA L. REV. 662 (1976).

59. See, e.g., MONT. CODE ANN. § 72-1-201 (1983).

60. 38 Mont. 1908, 631 P.2d 285 (1981).

In violation of a state court order, the widow sold the grader to her brother and the district court removed her as personal representative. The new personal representative brought a civil suit against the widow in state court for claim and delivery of the grader, but the court concluded it lacked jurisdiction over the action. Meanwhile, the tribal court declined jurisdiction over the estate because the decedent was a member of another tribe. The tribal court ceded probate jurisdiction to the state court.

The Montana Supreme Court assured the district court that it had subject matter jurisdiction over both the claim and delivery action and the probate proceedings. It reasoned that the state court had jurisdiction since the claim and delivery action was "the enforcement arm to recover property within the jurisdiction of the probate court."⁶¹ Personal jurisdiction over the Indian widow was based on her original election to be governed by state law in applying for letters of representation from the district court. The state supreme court concluded that the *Iron Bear* test had been satisfied by the tribal court's dismissal of the probate matter, wherein the tribal court expressly stated that jurisdiction was in state court.

The supreme court limited its decision to jurisdiction over the claim and delivery action; however, this limitation does not minimize the impact of extension of state jurisdiction to probate personalty located on a reservation. Strictly interpreted, *Standing Bear* applies only to situations where out-of-state tribal members are domiciled on reservations other than their own. In such instances, state jurisdiction over Indian estates is analogous to state jurisdiction over property located within state borders but owned by a decedent domiciled out of state. Read more broadly, the *Standing Bear* holding could be used to permit state court jurisdiction over all movables of any Indian who dies domiciled elsewhere than on the reservation of which he is a tribal member. Such an expansion of state jurisdiction over Indians living within federal enclaves goes beyond the theory of jurisdiction by default.

* * *

State and federal intrusions on tribal custom can be minimized by proper assertion of jurisdiction and choice of law, but the judicial intrusions are only part of the problem. Tribes may also

61. *Id.* at 1912, 631 P.2d at 289.

suffer because of administrative delay while BIA agents determine whether trust property is included in decedent's estate, the number of heirs of record, and the race of all possible heirs.⁶² Mixed estates with both trust and nontrust property can trigger disputes. State acceptance of and granting of full faith and credit to tribal judgments may be tempered, and disputes involving non-Indian beneficiaries are common. Where tribal codes instruct the tribal judge to follow state law in intestacy situations, a common law non-Indian spouse may take to the exclusion of the decedent's half-blood children. Adopted children who fail to meet tribal membership requirements and Indian named beneficiaries from a tribe other than the decedent's may also present problems. In *Simmons v. Eagle Seelatsee*,⁶³ a South Dakota federal district court held that children and grandchildren of a deceased Yakima tribal member were precluded from inheritance because they failed to meet the federal (not the tribal) minimum blood requirement. Clearly, federal restrictions may be used as a sword against inheritance by lineal descendants, as well as a shield for tribal holdings. With BIA agents drafting, approving, and witnessing Indian wills, there is also a real danger that decedent's intent may be reflected only when it coincides with Bureau standard practices.

Practitioner's Guide

An attorney with an Indian client must look to the laws of all three forums: federal, tribal, and state.⁶⁴ In probate matters, he

62. 43 C.F.R. §§ 4.200-.282 (1983).
63. 244 F. Supp. 808 (E.D. Wash. 1965); 25 U.S.C.A. § 372 (1983).
64. The following chart, adapted with substantial changes from CANBY, *supra* note 4, at 154, may be useful as a broad-brush illustration of Indian probate jurisdictional choices.

Decedent	Domicile	Type Of Property	Location Of Property	Jurisdiction
Indian	on reservation	real/personal trust assets	anywhere	federal (exclusive)
		real property	off reservation	state (exclusive)
		real property	on reservation	state/tribal (concurrent)*
		personal property	off reservation	state traditionally (possible tribal)

must determine first the type and location of the estate's assets, i.e., real or personal, trust or nontrust, located on or off the reservation on the date of death.

Real Property

If real property is included in the estate, the first question is always whether it is held in fee or in trust. If the Indian client is seeking assistance in making a will, he should be able to provide documentation regarding property held in fee. If the client is a potential beneficiary, a visit or call to the County Clerk and Recorder's Office should provide the answer. The agency superintendent will have records of any real property held in trust. Federal jurisdiction is exclusive as to the trust property, and in such cases the administrative law judge's determination of heirs is binding and final.⁶⁵

Trust/NonTrust Property

If the estate includes nontrust as well as trust property, the practitioner must decide whether to have the entire estate, in-

<i>Decedent</i>	<i>Domicile</i>	<i>Type Of Property</i>	<i>Location Of Property</i>	<i>Jurisdiction</i>
		personal property	on reservation	tribal primary (concurrent state)
	off reservation	all trust assets	anywhere	federal (exclusive)
		real property	off reservation	state (exclusive)
		real property	on reservation	state/tribal (concurrent)
		personal property	off reservation	state primary (possible concurrent tribal)
		personal property	on reservation	tribal primary (possible concurrent state)
Non-Indian	anywhere	all assets	off & on reservation	state (exclusive)

All designations of concurrent tribal jurisdiction are dependent on provisions in the tribal code. All concurrent state designations are dependent upon tribal court refusal to assert jurisdiction over members' property.

*With reservations regarding future development in light of *Estate of Standing Bear v. Belcourt*, 38 Mont. 1908, 631 P.2d 285 (1981).

65. *Crawford v. Andrus*, 472 F. Supp. 853 (D. Mont. 1979).

cluding the nontrust property, probated by the federal administrative law judge. The decedent's tribal code should be consulted to determine whether the beneficiary would be likely to suffer or benefit under tribal law: Are common law marriages recognized by the tribe? Is there a minimum blood or tribal membership requirement for heirship? How does the tribe's intestacy statute work? Is state law specified as the tribal judge's only choice of law? Is there a mention of a family allowance? Generally, tribal codes are not as well developed as state probate law, but tribal law regarding marital and membership status is critical to any decision in Indian probate law.

If tribal law seems to favor such beneficiaries as this client, but the estate contains mixed property, the practitioner should next consult the Code of Federal Regulations⁶⁶ to become familiar with procedures regarding approval of wills and determination of heirs. The attorney should contact the agency superintendent on the decedent's reservation to find out how the pertinent federal procedures are followed under the agency's supervision and whether any unwritten or agency-specific policy exists, e.g., refusal to approve wills post-mortem.

Conclusion

Suggested Solutions

One remedy for many of these jurisdictional problems would be exercise of exclusive tribal court jurisdiction over all personal and all nontrust property within the confines of the reservation. Exclusive tribal court jurisdiction could apply to all on-reservation property, regardless of Indian or non-Indian ownership. State-reservation jurisdictional disputes could thus be resolved by the same test used to resolve conflicts between states: territorial borders, location of property (subject matter jurisdiction), and domicile of decedent (personal jurisdiction). Indians who chose to leave the reservation would be bound by state law, just as out-of-state citizens moving to Oklahoma submit themselves to Oklahoma law. Non-Indians residing on the reservation would be subject to tribal law, just as Americans crossing the northern border are subject to Canadian law.

This shift in Indian civil law would provide the opportunity to implement the Merriam Report's suggestion that a revolving fund

66. 43 C.F.R. §§ 4.200-.282 (1983).

be established to reacquire the lost tribal land base. If non-Indian residents of a reservation preferred not to submit themselves or their property to tribal court jurisdiction, then their on-reservation property could be purchased on behalf of the tribe and they could move from the federal enclave.

In the meantime, many of the jurisdictional problems in Indian probate could be eliminated by assertion of tribal court jurisdiction over Indian nontrust property. At a minimum, tribal probate codes could be drafted or amended so as to apply to all nontrust on-reservation property owned by tribal members. As more tribal codes specify tribal court power to probate members' estates, tribal judges will be less likely to cede that power to state courts. Tribal interests and customs will be more likely to be protected if estates are governed by tribal law.

Uniform Probate Code

The fifty United States share a two-hundred-year-old culture that has permitted most Americans to share similar notions about the transfer of property from generation to generation. In our highly mobile society, the Uniform Probate Code is both practical and fair. With the 280 tribes, each with unique traditions, customs, and differing problems and goals, the better approach in Indian probate would be tribal self-government under individualized tribal codes. "[T]he fundamental differences among the tribes . . . make a uniform Indian probate code an unrealistic goal."⁶⁷

Particular Nature of Indian Probate Problems

Probate property must be categorized and consideration must be given to the applicable law of each forum where jurisdiction might be asserted. Advising Indian clients or potential beneficiaries of Indian decedents is a complicated aspect of probate practice. The practitioner is left to find his way as best he can through the jurisdictional maze engendered by the General Allotment Act. Merely being involved in the research required prior to every Indian probate produces frustration. That frustration, however, cannot equate to the feeling of Indian clients bound by a conqueror's court and laws not their own, especially when those laws conflict with their traditions. As is the case in so many areas of Indian law, the Indian probate problem could be substantially re-

67. *Trends and Problems in Probate*, *supra* note 47, at 17-19.

lieved by unfettered exercise of tribal sovereignty. If tribes were permitted to determine their own membership and heirship requirements and tribal courts enjoyed exclusive jurisdiction over persons and property located on the reservation, most probate problems would be solved. Today's probate problems should certainly diminish as tribes exercise more of their inherent, sovereign powers and as tribal courts become less reticent about exerting previously unexercised, concurrent jurisdiction over members' estates.