

## Practical Estate Planning Tips for Native Americans

### □ What happens if a Native American dies without a Will?

If a Native American dies without a Will, the decedent's U.S. Trust Property (consisting primarily of allotments, restricted lands and Individual Indian Money Accounts) will pass in accordance with the American Indian Probate Reform Act of 2004 ("AIPRA")<sup>1</sup>. Any other property the decedent owns, including any off-reservation property, will pass in accordance with the laws of intestate succession of the state in which the decedent resides.

### □ What is the American Indian Probate Reform Act of 2004?

The AIPRA provides rules governing how U.S. Trust Property passes if a Native American dies without a Will. The AIPRA provides different rules depending on whether the decedent owned greater or less than 5% of an allotment. If a decedent owns less than 5% of an allotment, then a "single heir rule" applies so that, as a general rule, only the oldest member of the next generation will inherit. If the decedent owns more than 5% of an allotment, then the members of the next generation will inherit equally.

### □ How Do I Plan for Off-Reservation Property?

The AIPRA does not apply to off-reservation property or any other property that is not U.S. Trust Property. If a Native American dies owning that type of property, it will pass in accordance to the laws of intestate succession of the state in which the decedent resided. Those laws generally provide a disposition similar to the disposition of allotments greater than 5% under the AIPRA.

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□ Who is Eligible to Inherit under the AIPRA?

Under the AIPRA, only “eligible” people are entitled to inherit U.S. Trust Property. Eligible people include a member of an Indian Tribe, a person eligible to become a member of an Indian Tribe, a person who owns an interest in trust land on or before October 27, 2004, or a person who meets the definition of an Indian under the Indian Reorganization Act. A spouse who is not otherwise an eligible person is entitled to receive a life estate in U.S. Trust Property.

□ How Do I Plan For My Off-Reservation Property?

Depending on how your Will is drafted, the Will may govern off-reservation property as well as any U.S. Trust Property. Off-reservation property is not subject to probate by the BIA. Rather, it is subject to probate by the state courts in which the property is located (in the case of real property) or the decedent resided (in the case of personal property). Accordingly, a Native American owning off-reservation property should follow the estate planning procedures that are customary in the state in which he or she resides. For example, in California estate plans are typically implemented through a revocable living trust in order to avoid the necessity of a probate. For a Native American residing in California, it is advisable to create a revocable living trust in order to implement the estate plan for off-reservation property while preparing a Will that meets the requirements of the BIA in order to dispose of any U.S. Trust Property.

□ Is My Property Subject to Federal or State Estate Tax?

Generally, U.S. Trust Property is not subject to estate tax, but any other property will be subject to estate tax.

<sup>1</sup> *Except property situated in Alaska, the Five Civilized Tribes, and Osage.*

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