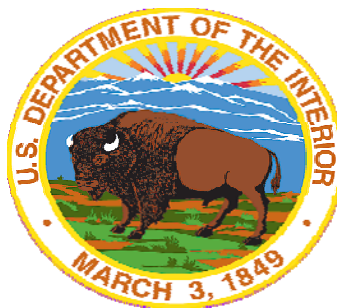


THE FEDERAL PROBATE PROCESS

By

James J. Yellowtail, Indian Probate Judge, Billings, Montana



The Federal Indian Probate Process Overview

Written by Jim Yellowtail
Indian Probate Judge
Office of Hearings & Appeals – Billings, Montana

The Federal Indian Probate Process - 25 C.F.R. 15.4

- a. We find out about a person's death;
- b. We prepare a probate package that includes documents you send us;
- c. We refer the completed probate package to OHA for assignment to a deciding official;
- d. The deciding official decides how to distribute the property and/or funds deposited in an IIM account and we make the distribution.

The “Real” Federal Indian Probate Process

1. Bureau of Indian Affairs (BIA) is notified of a death of a trust property owner
2. BIA Assembles the Probate Package & Refers It to OHA
3. BIA & Office of Hearings and Appeals (OHA) Provide Interested Parties With Notice
4. OHA Conducts One or More Decision-Making Process[es] to:
 - a. Determine the Heirs
 - b. Assess the Validity of the Will
 - c. Allow or Disallow Claims Against the Estate
 - d. Resolve Special Issues – Compromise / Settlement Agreements, Consolidation Agreements, Disclaimers, Purchase Options
 - e. Correct the Inventory of the Estate
 - f. Correct Errors in the Probate Process
5. BIA adds or subtracts property to / from the inventory
6. BIA & Office of Special Trustee (OST) Distributes the Estate

The Proceedings in Federal Indian Probate

- Initial Hearing
- Supplemental Hearing
- Ducheneaux Hearing
- Rehearing
- Reopening
- Appeal
- Remand
- Modification (w/ or w/o hearing)

Federal Indian Probate – to the Uninitiated

“... a riddle wrapped in a mystery inside an enigma.”
Winston Churchill, 1939

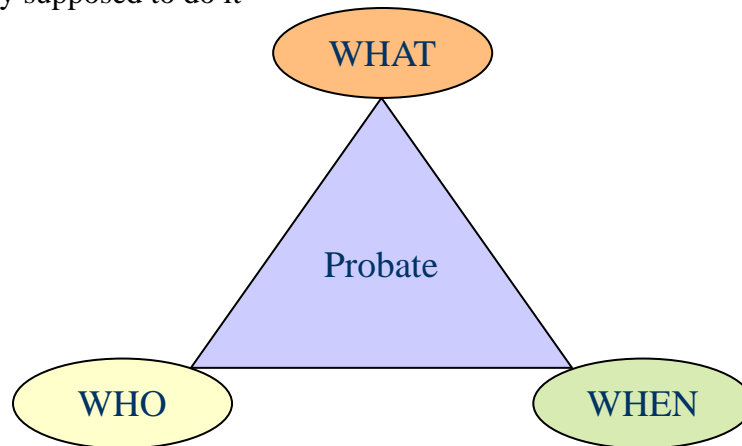
“... one of those cases where the imagination is baffled by the facts.”
Winston Churchill, 1941

Making Sense of the Federal Indian Probate Process

What tasks need to be accomplished

Who does what

When are they supposed to do it



The Federal Indian Probate Process

– Who Does What

- a. Bureau of Indian Affairs (BIA) finds out about a person’s death;
- b. BIA (or the Tribe) prepares a probate file;
- c. BIA refers the probate package to OHA;
- d. Office of Hearings and Appeals (OHA) decides how to distribute the estate;
- e. BIA (& OST) distributes the estate.

Starting the Probate Process – BIA’s Perspective

25 C.F.R. 15.105

The Probate Process begins when BIA:

1. Learns of the death; and
2. Determines the deceased person owned trust or restricted property (other than restricted Osage or Five Civilized Tribes property)

25 C.F.R. 15.102

Anyone can notify BIA of a death

The Probate Package

25 C.F.R. 15.101 & 104

Death certificate (or other proof of death), birth records, marriage records, divorce records, adoption records, statements of paternity or maternity, names & addresses of potential heirs & beneficiaries (spouse, children, parents, siblings, etc), wills & codicils & revocations, creditor claims, name changes or aliases, inventory of trust property, plus any other relevant information

BIA’s Notice of Referral of the Probate Package

25 C.F.R. 15.301(b)

BIA notifies Interested Parties of:

1. Referral of the probate package to OHA
2. The address of the OHA office

OHA Field Offices

Aberdeen, Albuquerque, Anchorage, Arlington, Billings, Bismarck, Oklahoma City, Phoenix, Portland, Rapid City, Sacramento, Twin Cities

Starting the Probate Process – OHA’s Perspective

43 C.F.R. 4.210

Commencement of probate.

The probate of a trust estate before a deciding official will commence when the probate specialist files with OHA all information shown in the records relative to the family of the deceased and his or her property.

Re-starting the Probate Process

43 C.F.R. 4.210 (a)

1. The information must include the complete probate package described in 25 CFR 15.203 and any other relevant information.
2. If OHA determines that the probate package is not complete, it may request the missing information from BIA or return the case to BIA for further processing.

Assignment to Deciding Official - OHA

- Attorney Decision Maker
- Indian Probate Judge
- Administrative Law Judge

Notice of Initial Hearing - OHA

43 C.F.R. 4.215

- a. Constructive Notice – notice is posted in 5 or more conspicuous places
- b. Actual Notice – interested parties receive personal service or by mail at last known address
- c. Tribal Purchase Option – Tribes are noticed when “a record reveals a Tribe has a statutory purchase option”

The Initial Hearing in Federal Indian Probate Proceedings

43 C.F.R.4.202 (c)

OHA deciding officials must:

1. Determine the heirs of any Indian who dies intestate;
2. Approve or disapprove the will;
3. Accept or reject any full or partial renunciations;
4. Allow or disallow creditors’ claims;
5. Decree the distribution of trust property to heirs and beneficiaries

The Initial Hearing In Federal Indian Probate Proceedings

3 C.F.R. 4.206(a)

When continuation of trust status depends thereon, the OHA deciding official must determine:

1. Indian or non-Indian status
2. Nationality or citizenship

You Are Presumed To Know the Federal Indian Probate Process

“ . . . parties to probate proceedings are presumed to have knowledge of the regulations governing those proceedings.”

Estate of John Martin Red Bear, 41 I.B.I.A. 273, 275 (2005)

Right to be Represented

You have the right to legal counsel

Estate of Peahner Mahseet, 5 I.B.I.A. 27 (1976).

Counsel will not be appointed for you

Estate of Blanche Russell Hosay, 18 I.B.I.A. 40 (1989).

You may chose a lay representative

Estate of Benjamin Kent, Sr., 13 IBIA 21 (1985).

The Judge’s Role

“ . . . the Judge is not an advocate for any party and is not required to anticipate a party's arguments or evidence.”

Estate of Rose Medicine Elk, 39 I.B.I.A. 167 (2003).

“The Judge has an affirmative duty in an Indian probate hearing ‘to develop the record and to ensure that the facts, both pro and con, are brought out.’”

Estate of Jeanette Little Light Adams, 39 I.B.I.A. 32, 35 (2003).

“This responsibility does not arise when all parties are represented by counsel.”

Estate of Ella Dautobi, 15 I.B.I.A. 111, nt 6 (1987).

Can You Review the Probate File to Prepare for the Hearing?

Current / old regulations – unclear
Impending /draft regulations - yes

Standards of Proof in Federal Indian Probate

Preponderance of the Evidence

Estate of Rose Medicine Elk, 39 I.B.I.A. 167 (2003).

Clear and Convincing Evidence

43 C.F.R 4.250 (d)

The “Rules” of Evidence

43 C.F.R 4.232(a)

“ . . . the generally accepted rules of evidence of the State in which the evidence is taken[.]”

43 C.F.R 4.232(b)

“The administrative law judge or Indian probate judge may admit ... evidence not ordinarily admissible under the generally accepted rules of evidence.”

The Controlling Law

- Federal Law
- State Law
- Tribal Law
- Statutory Law
- Regulatory Law
- Administrative & Judicial Case Law

The Applicable Regulations in Federal Indian Probate

Pre-2001

Regulations Published 1-22-2001,

6-18-2001, 12-31-2001, 3-9-2005

Title 25 Regulations

Title 43 Regulations

The Code of Federal Regulations to implement AIPRA are currently being revised and yet to published as of July 27, 2006, these include new Title 25 and Title 43

Issues at the Initial Hearing

1. Determination the heirs;
2. Approve or disapprove the will;
3. Accept or reject renunciations, settlement agreements, consolidation agreements;
4. Tribal or co-owner purchase options
5. Allow or disallow creditors’ claims;
6. Inventory disputes

The Supplemental Hearing

43 C.F.R. 4.235

“the deciding official may upon his or her own motion or upon motion of any interested party schedule a supplemental hearing if he or she deems it necessary.”

Reasons for Supplemental Hearings

- Disputed family relationship (paternity, adoption, common law marriage)
- Will contest (proper execution, testamentary capacity, undue influence, revocation, will copy)
- Claims
- Disputes involving the inventory
-

Inventory Corrections

- 43 C.F.R 4.271 & 272
Administrative with or without a hearing
- Estate of Douglas Leonard Ducheneaux, 13 IBLA 169 (1985)
Standing order of the Board of Indian Appeals

Ducheneaux vs Administrative

“Administrative corrections most frequently result from errors in the description of property or errors or backlogs in recordkeeping. . .”

Estate of Aaron Frances Walter, 16 I.B.I.A. 192 (1988).

Ducheneaux vs Modification

“In distinction, legal challenges to the inventory result from an allegation that BIA . . . took or failed to take some action . . . that either resulted in property being in the decedent's estate that should have been transferred to another person, or in property not being in the decedent's estate that should have been transferred to the estate.

Estate of Aaron Frances Walter, 16 I.B.I.A. 192 (1988).

OHA’s Tasks at the End of Federal Indian Probate Proceedings

1. Assemble and lodge the record
2. Issue and mail a written decision – which is final in 60 days
3. Issue and mail a notice of decision specifying rehearing rights

The Elements of the Decision

1. In all cases, the names, identifying numbers as assigned by BIA, birth dates, relationships to the decedent, and shares of heirs, with citations to the law of descent and distribution in accordance with which the decision is made, or the fact that the decedent died leaving no legal heirs;
43 C.F.R. 4.240 (a)

The Numbers in Federal Indian Probate

“A” Numbers
“U” Numbers
“N” Numbers
“X” Numbers
“B” Numbers
“J” Numbers

2. In testate cases, approval or disapproval of the will with construction of its provisions, and the names, identifying numbers as assigned by BIA, and relationships to the testator of all beneficiaries and a description of the property which each is to receive;
3. Allowance or disallowance of claims against the estate;
4. Whether heirs or beneficiaries are non-Indian, exclusively alien Indians, or Indians whose property is not subject to Federal supervision;
5. A determination of any rights of dower, curtesy, or homestead that may constitute a burden upon the interest of the heirs.

Error Correction In Federal Indian Probate Proceedings

- 43 C.F.R. 4.242 Rehearing
- 43 C.F.R. 4.242 Reopening
- 43 C.F.R. 4.320 Appeal
- 43 C.F.R. 4.271 Omitted Property
- 43 C.F.R. 4.272 Improperly Included Property

Inherent Authority to Correct Error

“ [The Board of Indian Appeals] exercises the inherent authority of the Secretary of the Interior, delegated to it under 43 C.F.R. § 4.318, to correct a manifest injustice or error.”

Estate of Delmer Arrow, 37 I.B.I.A 211, 212 (2002)

Distribution of the Estate

43 C.F.R. 4.273 (a)

The Superintendent must initiate payment of allowed claims, distribution of the estate, and all other actions required by the deciding official's final order 75 days after a final order has been issued.

How is the Estate Distributed?

1. The Land Title Records Office changes land title records.
2. Office of Special Trustee pays claims and distributes the IIM account.

In a Nutshell: The Federal Indian

Probate Process

- Step 1: BIA is Notified of Death
- Step 2: BIA prepares a probate package
- Step 3: BIA refers the probate package to OHA
- Step 4: OHA decides how to distribute the estate
- Step 5: BIA and OST distributes the estate.

IMPORTANT DISCLAIMER:

The Code of Federal Regulations to implement AIPRA are in their comment period and a new set of technical amendments is currently pending before Congress as of the date of this writing. The information provided in these materials may be outdated.

Please review the current Act and the published CFRs before commencing any estate planning services.