

American Indians and Wills

Highlights from the
American Indian Probate Reform Act of 2004



prepared by the
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Bureau of Indian Affairs
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The American Indian Probate Reform Act of 2004 ("AIPRA"), Public Law 108-374, was signed into law on October 27, 2004. The law changes the way that Indian land and property is inherited, plus other changes about land management and purchases. This booklet highlights the effects of AIPRA on wills and inheritance.

AIPRA affects trust or restricted property owned by American Indians. It does not affect property owned by Indians if that property is not trust or restricted property. If you have Indian land located in Alaska or Oklahoma, special provisions apply which are talked about later in this booklet.

After learning about the new law, you may decide to make a will for your Indian trust or restricted property, or change a will you have already signed. If that is the case, you should talk to your lawyer. If you do not have a lawyer, your local agency or Fiduciary Trust Officer can give you a list of local and state legal organizations that may be willing to help you.

This booklet is not intended to provide legal advice. Although your Fiduciary Trust Officer may be able to answer some of your general questions, you should always talk to your lawyer for specific legal advice.

What happens to my trust or restricted property after my lifetime?

After your lifetime, your trust or restricted property will go to the person or persons you name in your will. If you do not have a will, your property will go to your eligible Indian heirs. Federal law or certain approved tribal probate codes will determine who your heirs are. Your heirs may include your husband or wife, your children, certain relatives, or your tribe. This is done through the probate process.

What is probate?

Probate is a legal proceeding that determines heirs and beneficiaries and to whom property is to be distributed after an owner's lifetime.

What is a will?

A will is a legal document used to direct who you want to receive your property after your lifetime.

Who can I give my property to with a will?

A will allows you to give your property to anyone. The person named in the will does not have to be an Indian. If the person is not an Indian, however, the property he or she inherits from you might not stay in trust.

Do I need more than one will?

It is not necessary to have more than one will. A single will, if written correctly, can take care of all of your Indian and non-Indian property. If you have multiple wills, you should talk to your lawyer.

Who can I give my property to if I want it to stay in trust?

The Department of the Interior will keep property in trust or restricted status if you leave it to an Indian or to a person who already owns a trust or restricted interest in the same parcel of land you own. You may also give it to the tribe. You can leave your property to your children, grandchildren, great-grandchildren, or even great-great-grandchildren, and it can still be trust property, even if they are not Indians.

In certain cases, your parents and siblings who are not Indian may be able to inherit your property in trust if they are closely related to an Indian. Your lawyer can tell you whether or not one of these people meets the new requirement.

You may also leave your property to your family or heirs out of trust, whether the person is Indian or not. Your lawyer can tell you if that is a good idea for you and your family.

What happens when someone inherits out of trust?

You can leave your property to someone who is not eligible to own property in trust. Their interest would become a regular non-trust property interest.

What if I own Indian land in Alaska or Oklahoma?

Congress has made special laws for trust or restricted Indian lands in Alaska, and for the restricted lands and property of members of the Osage Tribe and the Five Civilized Tribes of Oklahoma. These laws were not changed by AIPRA.

There are other complex laws dealing with Alaska and Oklahoma lands, and you may wish to talk with your lawyer about how they affect you and your family.

Who is an "Indian" under AIPRA?

AIPRA changed the legal meaning of the word "Indian" for purposes of inheriting trust or restricted property. It does not change the meaning of "Indian" for other purposes. Under AIPRA, an "Indian" is a person who:

- Is a member of a federally-recognized Indian tribe, or
- Is eligible to become a member of a federally-recognized Indian tribe, or
- Was an owner of trust or restricted land on October 27, 2004, or
- Meets the definition of "Indian" under the Indian Reorganization Act of 1934, or
- Owns trust or restricted Indian land in California.

Who is an eligible heir?

Anyone who is an "Indian" (see definition above) is an eligible heir.

In addition, certain people who are not Indians may inherit trust or restricted property if they are your children, grandchildren, great-grandchildren, parents, or siblings who are:

- 1) your lineal descendants within two generations of any Indian, or
- 2) someone who already owns an undivided trust or restricted interest in the same parcel of trust or restricted land.

Who is a descendant?

A descendant is your child, grandchild, great-grandchild, great-great-grandchild, and so forth. Under AIPRA, a descendant can be either a natural-born blood family member, or someone who is legally adopted into the family. Brothers, sisters, nieces, nephews, parents, and so forth are not descendants.

Who are siblings and half-siblings?

A sibling is a brother or a sister who has the same mother and the same father as you do. A half-sibling is a brother or a sister who only has one parent in common with you. Under AIPRA, half-siblings have the same rights to inherit as full siblings. Also, if your parent legally adopts a child, that child has the same rights under AIPRA as a natural born sibling.

What happens if I do not have a will?

If you do not leave a valid will, AIPRA directs how your property will be distributed through the probate process.

If you pass away before June 20, 2006, the laws of the state where your trust land is located will be followed in distributing your property. If you have trust or restricted land in more than one state, it is possible that your heirs might get different shares of your trust assets in each state.

If you pass away on or after June 20, 2006, AIPRA says how your trust or restricted property will be distributed. Under AIPRA, if you do not have a will, your heirs must be "eligible heirs."

AIPRA permits tribes to write probate laws. If a tribe has its own probate laws, those laws will be followed in distributing your property. The tribe's probate law has to be approved by the Secretary of the Interior. Your agency can tell you which tribes have an approved probate law.

If I do not have a will, what will my surviving spouse inherit?

Under AIPRA, if there is no tribal probate code, your husband or wife will inherit as follows:

- if you also have living eligible descendants, parents, or siblings, your spouse will receive 1/3rd of the money in your IIM account at the time of your passing and a life estate in your trust or restricted land. Your living eligible heirs will inherit the rest of the property. After your spouse's lifetime, your interest in your trust or restricted land will go to your eligible heirs.
- if you do not have living eligible descendants, parents or siblings, your spouse will receive all of the money in your IIM account at the time of your passing and a life estate in your trust or restricted land. After your spouse's lifetime, your interest in your trust or restricted land will go to the tribe with jurisdiction over the land. If no tribe has jurisdiction, then your interest will go to the federal government.

If your interest in a tract of land is less than 5%, your husband or wife will only get a life estate in the tract if he or she is actually living on that tract of land at the time you pass away. If he or she is not living on a tract, your spouse will receive nothing from that tract.

If you would like to change the way your estate is left to your family or others, you should see a lawyer to help you write a will, or you may want to think about gifts, life estates, or sales during your lifetime.

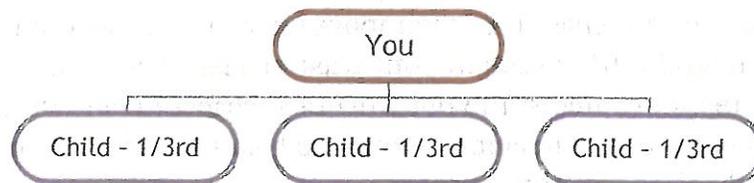
If I am not married and I do not have a will, who will inherit my estate?

First, under AIPRA, if there is no tribal probate code, there are some special rules:

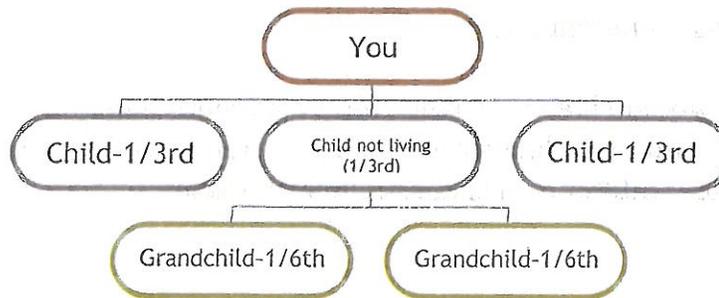
- A family member must live longer than you to inherit.
- All of your family members who inherit this way must be "eligible heirs."
- Adopted family members are treated the same as natural-born family members.
- Step-children will not inherit from you.

Here is how AIPRA works when your interest in a tract of land is 5% (1/20th) or more of the tract:

First, your eligible children will inherit from you. We will look to see how many of your children were living at the time you passed away. We will also look to see if you had any children who passed away before you did, but who had children of their own who are still living. We do not count children who passed away before you did who did not leave living eligible children. We will add up all of these children, and divide your property among them in equal shares. If you had a child who passed away before you and left children (your grandchildren), we will divide your child's share among that child's living eligible children.

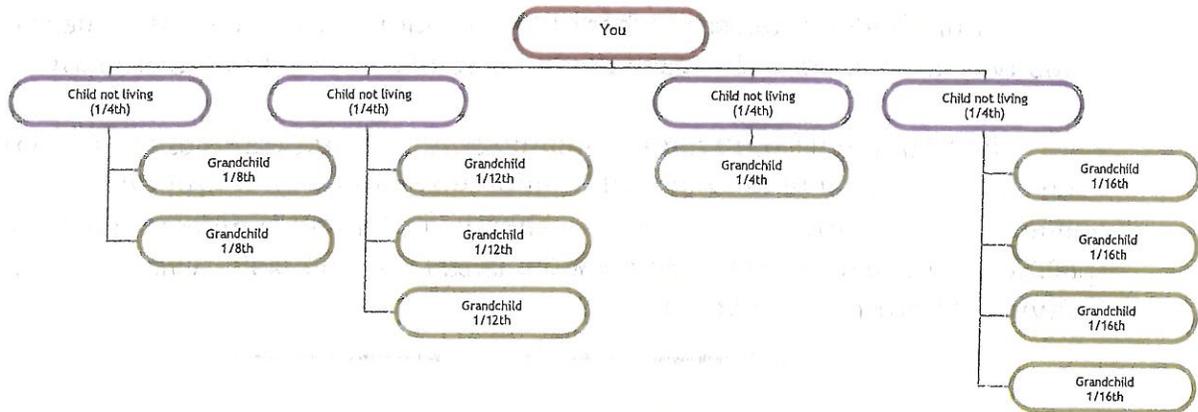


This is when you are survived by three living children.



This is when you had three children, but only two lived longer than you did.

Second, if all of your children passed away before you did, your eligible grandchildren will inherit from you. Each grandchild's share is divided according to their branch of the family, the same way shares are determined if you have some children who are living and some children who are not, in the first example above.



This shows how your grandchildren will inherit if none of your children live longer than you do.

Third, if you have no living grandchildren, then your eligible great-grandchildren will all inherit your estate in equal shares. We will not divide your estate for your great-grandchildren based upon their branch of the family, like we would do for grandchildren, as we explained in the two charts above.

Fourth, if you have no living great-grandchildren, then we will divide your estate equally between your living eligible parents. If you have living great-great-grandchildren, they will receive nothing.

Fifth, if you have no living eligible parents, then we will divide your estate equally among your living eligible siblings.

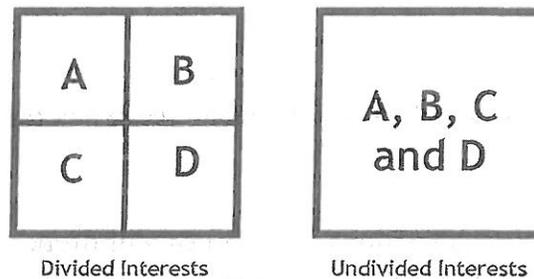
Sixth, if you have no living siblings, your estate will go to the Tribe with jurisdiction over your trust or restricted land. If you have nieces, nephews, aunts, uncles, or cousins, they will receive nothing. If there is no tribe with jurisdiction over your land, AIPRA has more rules for handling your property.

These rules apply *only* when you pass away without leaving a valid will. If you would like to change the way your estate is left to your family or others, you should see a lawyer to help you write a will, or you may want to consider the use of gifts, life estates, or sales during your lifetime.

What is an undivided interest?

An undivided interest is where two or more people own the same piece of property as co-owners. They each own a share in every part of the property.

For example, if you are the sole owner of a forty-acre tract of land and you leave it to four people in your will, they will each own a 1/4th (25%) undivided interest in the entire forty acres. There is no single ten-acre tract which is specifically owned by any one person. Instead, each person owns a 1/4th (25%) undivided interest in the entire tract.



There are both advantages and disadvantages to undivided ownership of land. One aspect is that the co-owners must agree on the use of the land. Another aspect is that, if income is produced by the land, all of the owners would share in the income.

What is the Single Heir Rule?

The Single Heir Rule is a rule in AIPRA that helps limit the fractionation of trust or restricted lands. It applies when:

- there is no valid will, and
- your land interest is less than 5% (1/20th) of the entire parcel of land, regardless of the value or size of that land.

Other than a husband's or wife's share, your estate will be distributed only as follows:

- 1) Your oldest living eligible child will get everything, and your other children will get nothing.
- 2) If none of your eligible children are living, then your oldest living eligible grandchild will get everything, and your other grandchildren will get nothing.

- 3) If none of your eligible grandchildren are living, then your oldest living eligible great-grandchild will get everything, and your other great-grandchildren will get nothing.
- 4) If you have no living eligible children, grandchildren, or great-grandchildren, then the tribe with jurisdiction over the land will get the entire interest in the land. If there is no tribe with jurisdiction over the land, AIPRA has more rules for handling your property.

No other family members will inherit under the Single Heir Rule.

If you are married, in most cases your husband or wife will get nothing. However, there is an exception: if your spouse was actually living on a tract of land when you pass away, your spouse will get a life estate in that property, and he or she may continue to live in the home during his or her lifetime. After your spouse's lifetime, the property goes to your heirs as explained above.

If you would like to change the way the Single Heir Rule distributes your property, you should see a lawyer to help you write a will, or you may want to think about gifts, life estates, or sales during your lifetime.

What is a purchase option at probate?

AIPRA allows the Department of the Interior, co-owners, or tribes to purchase any tract of your land during probate for fair market value with or without consent of your heirs, following these special rules:

- If the share your heir will receive is less than 5% of the total interest in a tract of land, then your heir's interest can be purchased **without** his or her consent.
- If the share your heir will receive is greater than 5% of the total interest in a tract of land, your heir's consent is required for purchase.
- If an heir is living on a tract of land, his or her consent is required for purchase of that tract.
- Any interest passing under a will always requires the consent of your heir before purchase.

What other options do I have?

Estate planning offers other options for distributing your property during your lifetime:

- You may sell your property to anyone, including a family member, a co-owner, a tribe, or the Indian Land Consolidation Project.
- You may give someone a gift during your lifetime.
- With either a gift or sale, you may keep a life estate.

What is a life estate?

A life estate means a person has the right to the use the land and receive the income from that land during his or her lifetime. "Income" has a special definition for trust or restricted Indian land, as you can see below.

For example, you might own an interest in a tract of trust land. You can give your interest in the tract to your nephew Joe, but keep a life estate for yourself. For the rest of your life, you would continue to have the benefit of using the surface of the land (to the same extent you could before), and you would receive all of the lease rentals from your share of the land interest. You would receive the interest from the account set up to hold any royalties, and you and Joe would share in any bonuses paid. You would also have the ability to change the shares of rents, bonuses, and royalties that you and Joe receive in your gift deed to Joe, or in a separate written agreement with Joe.

In another example, you might give your interest to your child, and keep a life estate for your non-Indian spouse. After your spouse's lifetime, your child would have full benefit of your land interest.

Where can I get more information about wills and estate planning?

If you would like to talk with someone about your options, including making wills, making gifts, creating life estates, or selling your property, the Office of the Special Trustee for American Indians has Fiduciary Trust Officers who serve Indian trust beneficiaries. Your local agency or tribal office can put you in touch with a Fiduciary Trust Officer.

Your Fiduciary Trust Officer or your BIA agency can also give you a list of legal organizations that might help you. We cannot "recommend" or endorse any of these lawyers or legal organizations. Some of these organizations may offer free or low-cost legal services, based on financial need.

Also, the Office of the Special Trustee for American Indians offers a toll-free telephone number for Indian trust beneficiaries who have questions. The Trust Beneficiary Call Center number is 1-888-678-6836, ext. 888. It is available from 8 a.m. to 5 p.m. Mountain Time, Monday through Friday.

