Planning for the Passing of Reservation Lands to Future Generations

July 2021

FACT SHEET #9

Writing a *Will*

A *will* is a written instrument that describes how you want your interests in land and other assets distributed after your passing.

Certain sections of the American Indian Probate Reform Act of 2004 (AIPRA) make writing a *will* very important. If you pass away without writing a *will*, AIPRA controls who receives your property. If you own non-trust property, this property will be distributed under state law if you pass away without writing a *will*.

Your *will* has no effect during your lifetime. Only upon your passing does your written *will* have effect. You can change your *will* at any time while you are alive. This fact sheet answers questions often asked about *wills*.

Why do I need to write a *will*?

Many people think that *wills* are written only by elderly persons who are ready to pass away. Some say, "*I am young and healthy. Why should I write a will? I don't want to think about dying*." The truth is, anyone, regardless of age, could be fatally injured in an accident at anytime.

By reading the fact sheets in this packet, you have become more aware of the *fractionation* problem that may exist in allotments on your reservation. Your family may have experienced difficulties because multiple co-owners couldn't agree about the terms of a lease or about the use of land that has been inherited from relatives.

With the passing of each generation, *fractionation* becomes a bigger problem (review Fact Sheet #3). Check your Individual Trust Interest (ITI) report to see how *fractionated* the allotments are in which you own *undivided interests* (review Fact Sheet #4).

You can avoid further *fractionation* of trust land upon your passing by writing a *will*. A written *will* lets you decide:

- Who is to receive your property,
- How much each person will receive, and;
- When they will own it.

A written *will* also provides your heirs the power to refuse a "forced" sale (see Fact Sheet #10).

What is an *Indian will*?

An *Indian will* is a written instrument that passes your trust or restricted land or an IIM account to those you name. Like any other *will*, an *Indian will* is not submitted for probate until you pass away. Your *Indian will* is probated through an administrative probate hearing before an adjudicator from the Department of Interior for trust property.

If you also own *non-trust property*, such as *fee* land, money in a checking or savings account, a savings certificate, a vehicle, livestock, machinery and/or equipment, your *will* can distribute such non-trust property to whomever you wish as well. If you don't write a *will*, your non-trust property is distributed according to state law or tribal law depending on where the property is located (review the chart on page 4 of Fact Sheet #1). You can have an attorney write a *will* to cover both types of property (trust and non-trust).

At what age can I write my *will*?

If you are age 18 or over and have any right, title, or interest in trust land in the United States, you may leave your *undivided interests* in trust lands and your IIM account (if you have one) to others with an *Indian will*.

Does my *will* have to be written?

Yes! A *will* must be in writing. Verbal or video taped *wills* are **not** legally recognized by federal law. A *will* should be signed by the maker, dated, and witnessed by two *disinterested* persons age 18 and over. *Disinterested* means the witnesses cannot be named as beneficiaries in your written *will*.

Who can write my *will*?

While you can write your own *will* it is advisable that you seek legal counsel. Attorneys are familiar with the legal aspects of writing *wills*.

A *will* in your own handwriting must be witnessed by two disinterested persons (persons who are not named in the written *will*). Your *will* should be signed and dated.

If you type your own *will* or use a computer software program to print your *will* you must also have two disinterested witnesses sign it. Then you should date and sign the *will* as well.

Attorneys on and off the reservation can prepare written *wills*, but they must be familiar with the special rules that apply to *trust or restricted* land and IIM accounts.

Does my *will* have to be witnessed?

Federal law requires that two adults witness your signing of the *will*. A disinterested witness must be an adult who is at least 18 years old and competent. A witness cannot be named as a beneficiary in your *will*.

Where should I keep my *will*?

You may keep the original written *will* at home or place it in a safe deposit box at a local bank. The Bureau of Indian Affairs no longer accepts *wills* for safe keeping.

A disadvantage of keeping the original copy of your written *will* in a desk drawer or other storage place around your home is that it could be stolen, lost, or destroyed by fire or other disaster. Your *will* could also be found and destroyed or tampered with by an heir who may be unhappy with the contents of your *will*.

Can my *will* be changed?

You can change your *will* during your lifetime, as long as you have *testamentary capacity*. *Testamentary capacity* is the amount of mental functioning that is recognized as legally sufficient for you to make a *will*.

Testamentary capacity requires that you must have the ability:

- To remember the nature and extent of your property;
- To know the natural objects of your bounty (that is, your heirs);
- To know in a general way property you own; and,
- To know the purpose of writing a *will*.

If you want to make changes to your *will*, you can *revoke* it and make an entirely new one. Or you could write a *codicil*: a supplement to your original *will*. A *codicil* must be signed and witnessed. Be sure to date your *codicil*.

Marking out words or adding words to an existing *will* is not acceptable. Such actions may cause your *will* to be invalidated during an administrative hearing in which your *will* is probated.

How often should I review my *will*?

Your *will* should be reviewed periodically to see if it continues to express your wishes. Changes in your family or financial situation such as those listed below may necessitate an update of your *will*:

- marriage, remarriage or divorce
- birth of a child
- death of an heir
- desire to name different heirs
- a move to another reservation
- acquiring additional property
- changes in the title of your land or other assets

What property cannot be distributed by my *will*?

If you have property in joint tenancy with others, it will only pass to the person you named to receive it in your *will* if you are the last surviving joint tenant. Examples of properties that could be held in *joint tenancy with right of survivorship* include:

- Fee or trust land
- Checking and savings accounts
- Vehicles

By contract law, at your passing your joint tenancy interest ends. Your survivors (the persons listed in joint tenancy contract) become joint tenants of the land or accounts.

> **Example 4:** Siblings Floyd, LeRoy, and Tamara own land as *joint tenants with right of survivorship*. If Floyd passes away, his share of the joint tenancy land ends. LeRoy and Tamara are now joint owners. If LeRoy passes away, his share of the joint
>
> tenancy ends. Tamara now owns all the land.
>
> Once Tamara becomes sole owner of the land she can leave it to whomever she wants by writing a *will*. If she passes away without a *will*, her property passes under AIPRA, state or tribal law depending on the location and type of property (See Fact Sheet #1).
>
> The title for Floyd, LeRoy, and Tamara's joint tenancy would read as follows:
>
> *Floyd Plainfeather, LeRoy Plainfeather and Tamara Plainfeather as joint tenants with right of survivorship and not as tenants in common.*

Proceeds from any assets on which you named a beneficiary cannot be distributed by a *will* unless you have named your "estate" as the beneficiary. Examples of such assets include:

- Life insurance policies
- Pension funds
- Individual Retirement Accounts
- Payable on death (POD) deposits
- Transfer on death (TOD) designations

Do I have to leave anything to my children?

If you have children, you can choose not to leave anything to one or all of them. However, you should name all of your children to show that you are aware of their existence and that you did not forget them. If a child is born or adopted after you write your *will* he or she may be able to claim an intestate share unless you write otherwise in a *will*.

> **Example 5:** I leave allotment A to my son, John. If I have other children I still want allotment A to pass to John.

What about children born after my *will* was written?

Under AIPRA, if an individual fails to provide for any children born or adopted after a *will* is signed, the omitted children will be able to inherit the same share they would have received had there been no *will*.

If you want to disinherit a child you must state your intent in the *will*. You do not have to provide a reason why you are disinheriting a specific child.

> **Example 6:** LeAnn, a mother wrote in her *will*, "I realize I have a son, Jack Smith, but I am not leaving any of my land to him in this *will*."

Do my adopted children inherit?

If you have children whom you have legally adopted, each can receive whatever interests or other assets you leave to them in your *will*. The lands will remain in trust if your children are *eligible heirs* (See Fact Sheet #5).

What is the effect of a divorce on my *will*?

A divorced spouse is not considered as the surviving spouse of the person who wrote a *will*. Under AIPRA, a divorce or marriage dissolution revokes all gifts of property to the former spouse. Any property left to the former spouse passes as if the former spouse had passed away before the person who wrote the *will*.

> **Example 7:** Mary wrote a *will* leaving her *undivided interest* in an allotment on the Fort Belknap reservation to her husband. They were later divorced. Mary passed away before changing her *will*. The gift of land to her former husband is revoked by the divorce. Instead, the land passed to her two children, not to her former husband.

A separation or legal separation is not equivalent to a divorce. Until there is a legal decree of divorce or marriage dissolution, a husband and wife who say they are separated or who are legally separated remain legally married. If a separated husband or wife passes away, the surviving spouse receives gifts made in the *will*.

Who receives my life insurance policy proceeds?

If you named a primary or secondary beneficiary on the beneficiary designation form, that individual receives the life insurance proceeds upon your passing. Your *will* has no effect on who receives your life insurance proceeds unless your estate is designated as the beneficiary on the policy.

> **Example 8:** Tony named, his wife, Claire, as the primary beneficiary of his $50,000 life insurance policy. He later wrote a *will* leaving the life insurance proceeds equally to his two children from a prior marriage. Upon his passing the $50,000 went to his wife because she was the primary beneficiary named on Tony's policy. The beneficiary designation on the life insurance policy took priority over Tony's written *will* even though the *will* was written five years after naming Claire as beneficiary on his life insurance designation form.

If you didn't name a primary or secondary beneficiary for your life insurance proceeds, or if your primary and secondary beneficiaries passed away before you, or if you named your estate as the beneficiary, then your *will* controls who receives your life insurance proceeds.

> **Example 9:** Floyd named his "estate" as the beneficiary of his $30,000 life insurance policy. He later wrote a *will* leaving all assets equally to his three children. Because Floyd's estate was named as the beneficiary, his *will* controls who receives the life insurance proceeds as well as any other property. Each of his three children received $10,000 from the life insurance policy ($30,000 ÷ 3 = $10,000).

What is a "residuary clause" in my *will*?

A *residuary clause* is usually the last clause in a *will*. The *residuary clause* names a person or persons to receive any part of your trust or fee land and other assets that may be left after the rest of the clauses in your *will* are carried out. It covers any property that you may have left out of the *will*. It is a catch-all phrase to ensure that all your property has been left to someone.

Example 10: Mary wrote in her *will*, "I give, devise, and bequeath all of the rest and residue of my estate, to my sister, Karen Jones."

My friend says that she has an affidavit with her *will*. What is an affidavit?

An *affidavit* is a part of a *will* in which the will maker and witnesses testify that the paper being signed is actually the *will* of the will maker. The will maker and two witnesses sign and date this written statement before a *Notary* who then also signs and dates it.

When a *will* is accompanied by an *affidavit*, witnesses do not have to be present to testify to the competency of the deceased person during the administrative hearing if the *will* is not contested. If the *will* is contested the *affidavit* is not used. The witnesses must then appear to testify regarding and the *will* and the competence of the will maker.

Summary

You can write an *Indian will* to describe how you want your *undivided interests* in trust lands and money in your IIM account (if you have one) to be distributed after you pass away. By writing a *will* you can avoid having your property distributed under the intestate (dying without a will) provisions of AIPRA.

A written *will* has no affect during your lifetime. Only upon your passing does your written *will* become effective for passing your property.

Acknowledgements

We wish to express appreciation to the Montana and Idaho Reservation Extension agents and Reservation Extension student assistants on the Blackfeet, Fort Belknap, Fort Hall, and Fort Peck reservations for their assistance in reviewing the fact sheets and presenting the information to tribal members on their home reservations. This MontGuide has also been reviewed with the assistance of students from the Alexander Blewett III School of Law at the University of Montana.

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This publication was supported by the Community Outreach and Assistance Partnership Program of the Risk Management Agency USDA number 051E08310186.

Disclaimer

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Future change in laws cannot be predicted and statements in this fact sheet are based solely on the rules and regulations in force on the date of publication.