

**The Great Lakes Indian Law Center
University of Wisconsin School of Law**

**ESTATE PLANNING
HANDBOOK
FOR NATIVE AMERICANS**

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INTRODUCTION

Planning for unexpected events and for the future is a difficult task for us all. The decisions that must be made are challenging, and it can be uncomfortable to imagine that physical and financial hardship can occur at any time. We struggle with how we would like our health care to be handled if we are ever unable to make those decisions ourselves. We have a hard time deciding how to distribute property among our loved ones so that conflicts do not arise. And we worry that if we plan for these situations in advance, they might actually happen.

On the other hand, planning can make us feel confident and secure. When there is a plan in place for how to handle our health care decisions if we are ever unable to do so, we protect ourselves and our wishes by making them known to the people we trust. In addition, we have made those decisions easier for our loved ones because they can be confident that they are upholding our wishes if they must act on our behalf. A plan not only helps us protect ourselves and our families, it can also help preserve cultural resources, such as Indian trust land, so that the resources can be enjoyed by future generations.

For these reasons and more, many people have decided that although the planning process may be challenging, it is better to have a plan than to be caught unprepared. This handbook was created to provide you with basic information about your planning options so that you can evaluate your wishes, consider your personal situation, and start making a plan that meets your needs. This information has been compiled in one handbook so that you can read the materials at your own pace in a safe, comfortable place, before you have to make any decisions.

Please note, however, that this handbook will NOT provide you with legal advice and it is NOT meant to be a substitute for speaking to an attorney or someone else who can advise you about your planning needs. The needs and desires of every person are unique and this handbook is not designed to address individual situations. There are many important issues that should be addressed when you make your plan and this handbook is not able to address them all. As well, laws vary from state to state and tribe to tribe, and even federal law may be applied differently in different states. This area of law is always evolving, and this handbook can not anticipate or reflect any future changes to the law. Therefore, the creators of this handbook make no warranty or guarantee concerning the accuracy or reliability of the content provided by this handbook.

GLOSSARY

Asset. Anything a person owns that has value.

Beneficiary. A person designated to receive the income or proceeds from an insurance policy, annuity, or retirement plan; to take assets under a will; or to receive benefits from a trust.

Claims. A decedent's creditors may file claims against the decedent's estate to collect on any remaining debts of the decedent. Typically, creditors collect on debts out of an estate before any remaining assets are distributed to the intended heirs or beneficiaries.

Codicil. A written amendment to an existing will. Depending on the applicable tribal, state, or federal laws, certain formalities may be required for a codicil to be valid. Typically, the terms of an existing will that are not changed by the codicil will remain in effect.

Decedent. The person who has died.

Eminent Domain. A governmental power to take (or "condemn") private property for public purpose. The person whose property is taken must be provided due process and just compensation.

Estate. All the assets left by the decedent. The "probate estate" includes all of the estate assets that fall within the jurisdiction of a given probate court.

Estate Planning. The process by which a person plans for transferring his or her assets at death.

Executor. (Also called "personal representative.") A person appointed in a will to collect the estate assets, pay the decedent's outstanding debts and taxes, and ultimately distribute the assets of the estate to the beneficiaries. If there is no will, or the will does not name an executor, a probate court may appoint an "administrator" to perform this function.

Fee land. Real property that is owned by an Indian person but is not held in trust by the BIA. Fee land is sometimes also called "taxable land," because an Indian landowner may have to pay property tax on it.

Gift deed. A mechanism used to give property during the giver's life to another person for little or no compensation.

Heir. A person entitled to inherit all or a portion of the estate of a person who has died without a will. Technically, beneficiaries are different from heirs. Heirs are people who could, or do, inherit assets from a decedent under the laws of intestacy. Beneficiaries take assets pursuant to a will.

Individual Property. Property that is owned by a married person and that is not classified as marital property. Individual property generally consists of property that was acquired by each spouse before marriage or acquired by each spouse by gift or inheritance during the marriage. Mixing individual property with marital property can reclassify the individual property as marital property.

Intestacy. The distribution of estate assets when the person dies without a will. In intestacy, a court with jurisdiction over property in the estate distributes a deceased person's assets by applying a single, one-size-fits-all formula. This is done according to the jurisdiction's law of intestacy or probate code. A person who dies without a will is said to be "intestate."

Joint tenancy with right of survivorship. A special form of co-ownership of property. In a joint tenancy with right of survivorship, co-owners share undivided, fractional interests in the whole property. As each co-tenant dies, his or her interest passes automatically to the surviving co-tenants. The last surviving joint tenant will own the entire interest in the land individually, and at that joint tenant's death, the property will be distributed pursuant to his or her estate plan. A co-owner's interest in a joint tenancy with right of survivorship is non-probate property.

Jurisdiction. The power or authority of a court to hear and decide a particular matter. Jurisdiction can be limited by geographic area or by the type of case being heard. For example, the Bureau of Indian Affairs (BIA) has jurisdiction only over the probate of Indian-owned trust assets, which include trust lands and money held in trust by the BIA. An Indian landowner's other assets—including any fee land, personal checking account balances, and other personal possessions—are subject to the jurisdiction of a state or tribal probate court.

Lease. A legal contract that transfers the right to use and possess specific property, subject to stated conditions and limitations, during a specific period of time, and for a specific payment.

Life estate. A limited property interest that lasts only as long as the natural life of its owner. A person possessing a life estate has the right to use, occupy, or collect revenue from the property for the duration of his or her life. When the holder of the life estate dies, a full remaining ownership interest in the property transfers automatically to another designated person, called the "remainderman." For example, an estate plan may give a life estate in trust assets to a non-Indian spouse, and provide that when the spouse dies, full title to the assets should pass—in trust—to the Indian children.

Living Will. A legal document that specifies which the life-prolonging measures an individual wants or does not want taken on his or her behalf in the event of medical incapacitation. Also called an "advance health care directive."

Marital Property. Generally, property that is acquired and income that is earned by married people during their marriage. Marital property is owned equally by both spouses: each spouse owns an undivided one-half interest in each item of marital property. The law in Wisconsin presumes that all income and property acquired during the marriage is marital property unless such property is proven to be individual property.

Non-probate property. Probate affects some, but not necessarily all, of a person's assets. Non-probate property includes things like annuities, life insurance policies, and payable-on-death (POD) bank accounts that are paid directly to a beneficiary other than the deceased person's estate. This non-probate property is said to transfer automatically at death, and therefore is not part of the decedent's estate that needs to be administered.

Partition. Generally, partition is a court-supervised process of subdividing out the proportionate interests of co-owners in a tract of land. In a "partition in kind," the tract is physically divided up so that each co-owner becomes the single owner of a smaller, subdivided piece of the whole. In a "partition sale," the entire tract is sold, and the proceeds are allocated to co-owners proportionately.

Personal property. All property other than real property, or real estate. Personal property may include money held in any type of account, vehicles, household possessions, clothing, and the right to collect any amounts due from another person. May also be called "personalty."

Power of attorney. A legal document that authorizes a person to act on another's behalf for specific purposes and under specific conditions.

Probate. The entire process of administering and distributing a deceased person's estate, whether by will or intestacy. Probate is typically supervised by a court and may include a determination of the validity of a will. Probate includes finding and collecting all of the decedent's assets, paying all of the decedent's outstanding debts and other obligations, and distributing the remaining estate assets to the decedent's heirs or beneficiaries.

Probate code. A package of laws passed by a tribal, state, or federal legislature that governs the entire process of settling a decedent's estate, whether intestate or testate.

Probate court. A court with the power to probate wills and settle estates. For Indian landowners, multiple probate courts may need to probate different types of Indian-owned assets. See definition of "jurisdiction."

Real property. Includes land and anything permanently erected on or attached to the land, such as a house or other building. Real property means the same thing as "real estate."

Right of way. The power of another party to pass over or regularly cross another's property. For example, a utility that installs electric wires across a person's property must obtain a right of way for those lines and access to them. Also called an "easement."

Tenants in common. In a tenancy in common, co-owners share undivided, fractional interests in property. Each co-owner has an individual, partial interest in the whole property. Their interests are undivided, which means no owner has a specific area or section of the property; instead, all co-owners must collectively share in ownership of the whole. Individual interests in jointly held tenancy-in-common property are subject to probate and do not pass automatically to anyone without additional legal steps.

Testate. Dying with a will. A person who makes or has made a will is a “testator.”

Trust. Generally, a trust is a legal mechanism in which property is held by one person or entity (the “trustee”) for the benefit of another person (the “beneficiary”) pursuant to the terms of a written trust agreement. There are many different kinds of trusts.

Trust assets, trust property. For an Indian landowner, “trust assets” and “trust property” generally refer to assets managed by the BIA. Examples include land held in trust, restricted property, and Individual Indian Money (IIM) Accounts.

Undivided interests in property. Co-owners of property share undivided interests in property, meaning they share collectively in ownership the entire tract. The tract is not divided up or allocated into separate areas or sections for each co-owner.

Will. A legally executed document that explains how a person wants his or her property distributed after death. This type of distribution in a will is called a “devise.” Rules for determining the validity of a will vary by jurisdiction.

ADVANCED PLANNING WITH ADVANCE CARE DIRECTIVES

The next three sections of this handbook cover a group of documents called *Advance Care Directives*. These documents are tools that you can use to plan how to handle your health and financial affairs if you are ever unable to handle these matters by yourself.

When someone is unable to make decisions about finances or health care by himself, the person may be considered *incapacitated* by the law. A person can become incapacitated in many ways. Sometimes people who have suffered a stroke or who have a serious illness, such as Alzheimer's disease, can become incapacitated if their illness affects their ability to think clearly. People can also become incapacitated if, because of an accident or illness, they are in a coma or unconscious. A person can be declared "incapacitated" according to the law in Wisconsin if two doctors, or a doctor and a psychologist, personally examine the person and agree in a signed statement that he or she is unable to evaluate information and communicate wishes to others.

Planning for incapacity can be scary and intimidating. It is hard to think about serious illness or injury happening to you and your loved ones. But planning ahead is a gift that you can give yourself and your family. When you complete your Advance Care Directives and make sure that your friends and family know your wishes, you can give yourself peace of mind and help make a difficult time easier for your loved ones.

POWER OF ATTORNEY FOR HEALTH CARE

A Power of Attorney for Health Care (POAHC) is the advance care directive where you choose someone to make health care decisions for you if you ever are unable to make these decisions for yourself. A POAHC only gives your nominated person, called your *agent*, the authority to make decisions for you if you are legally incapacitated and unable to make decisions for yourself. You are always the first and best decision maker for deciding what kind of health care you want. If you are able to make your own decisions, your agent under your POAHC cannot make them for you.

Generally, a power of attorney for health care gives your agent the right to make all health care decisions for you, including decisions about what kinds of health care you should get, what kinds of medicines you should take, and what hospital or doctor should care for you. However, there are a few decisions that your health care agent cannot make for you unless you specifically give them permission, including the decision to place you in a nursing home, the decision to withhold or remove a feeding tube, and any health care decisions for a pregnant woman. There are also some types of inpatient and experimental treatment for mental health that your agent is never allowed to consent to.

You should think very carefully about who you nominate as your agent under your POAHC. It is important to choose someone whom you trust to follow your wishes and to make the kind of decisions about your health care that you would make yourself. Your agent should also be someone who is strong enough to stand up for you when talking to doctors and nurses about your care. If you choose an agent who lives far away, you should talk to them about whether they would be able to come to your side on short notice. It is important that you choose an agent with whom you feel comfortable. You do not have to nominate someone because he or she expects to be chosen, or because you worry that someone's feelings will be hurt if not chosen. Instead, try to pick the best person for the job. It is a good idea to nominate a second person to serve as an alternate agent just in case the first person is unable to serve for some reason. However, it is generally recommended that only one person at a time acts as your agent.

The State of Wisconsin has written a fill-in-the-blank style form to help people complete a POAHC. You can get this form on the internet at: <http://dhfs.wisconsin.gov/forms/AdvDirectives/index.htm>, or you can request that a form be sent to you by writing and sending a stamped, self-addressed envelope to:

Living Will/ Power of Attorney
Division of Public Health
PO Box 2659
Madison, WI 53701-2659

Alternatively, your hospital or local social work agency may have copies of the forms, and someone there may be able to provide you with assistance as you complete the POAHC form.

Once your POAHC is completed, signed and witnessed, it is important that you store it in a safe place where it will be found easily in an emergency. A good place is a clearly marked, brightly

colored folder that is stored in the same place as your other important papers. Safety deposit boxes, bank boxes, and safes are not always good places to store your POAHC because they might not be accessible if it is late at night or if the keys cannot be found. You can also file a copy with your doctor or with the county probate office if you want to. Make sure you have told someone close to you where to find the form if it is needed.

Even though it may be difficult, it is important to talk with your family about your health care wishes as you complete your POAHC and afterward. The more information your agent has about your wishes, the easier his or her job will be if he or she ever has to make decisions for you.

Power of Attorney for Health Care	Living Will
Tells your agent what your wishes are, your agent is responsible for talking to your doctor about what kind of care you want.	Gives direction to your doctor directly
Is for any kind of incapacity, whether it's permanent or temporary.	Is only for terminal conditions and persistent vegetative state.
Allows pretty much any kind of health care decisions you want to give your agent the power to make on your behalf.	Only allows decisions about feeding tubes and life-sustaining procedures

LIVING WILL / DECLARATION TO PHYSICIANS

1. What is a living will?

A living will is a document that you can complete to tell your doctor about your preferences regarding end-of-life care under certain circumstances. Your doctors would refer to your living will if you were no longer able to communicate your preferences when those decisions needed to be made. The instructions in a living will apply only in very limited circumstances.

2. What are the differences between a living will and a power of attorney for health care?

Both the living will and the power of attorney for health care (POAHC) are documents that you can use to plan in advance for decisions about your medical care. The POAHC is a broad document that nominates an agent to make many different kinds of health care decisions for you. With a POAHC, your agent is your voice and communicates with your doctors for you. A living will, on the other hand, directly communicates to your doctors and instructs them to make certain health care decisions if you have a terminal condition or if you are in a persistent vegetative state. The laws of Wisconsin define what these technical terms mean, but a terminal condition, generally, is an illness or injury which will cause a person to pass away imminently, and a persistent vegetative state is when a person is not conscious, parts of the brain are no longer working, and there is no reasonable expectation that consciousness or brain function will be regained.

3. What decisions can be made by a living will and a POAHC?

Your agent nominated under your POAHC can make almost any health care decision for you if you are incapacitated. There are certain decisions which you must specifically authorize your agent to make and certain kinds of treatment which your agent can not agree to at any time, but these exclusions and exceptions are limited. Please see the previous POAHC section for more details. Unlike the POAHC, a living will can only make a limited set of health care decisions. In your living will you can decide: (1) if you want feeding tubes if you are in a terminal condition, (2) if you want feeding tubes if you are in a persistent vegetative state, and (3) if you want life-sustaining measures used to keep you alive if you are in a persistent vegetative state. Life-sustaining procedures are medical procedures that will not prevent your death, though they may postpone the moment of death.

4. When is a living will effective?

For a living will to be effective, the patient first must be examined by two medical doctors who agree in writing that the patient has a terminal condition or is in a persistent vegetative state. Whether you have a living will or a POAHC, if you are able to communicate with your doctors in any way, your wishes will come first. If you are not able to communicate, doctors will turn to your agent under your POAHC or to your living will to decide how to care for you.

5. Can I have both? Should I have both?

You may have both a POAHC and a living will. It is not necessary to have both – your agent would have the authority under a POAHC to handle all of the circumstances that a living will covers. However, because the living will communicates directly to your health care provider, it can be a useful way to reinforce your decisions about end-of-life care – especially if you have a reason to think your family might struggle with your decisions. It can also make difficult decisions easier for your agent because it is another place where you have clearly written down your wishes.

If you have both a power of attorney and a living will, **MAKE SURE THE TWO DOCUMENTS AGREE ABOUT THE CARE THAT YOU WANT.** If you say in your POAHC that you do not want feeding tubes, but say the opposite in your living will, the people making the decisions will be confused about your true wishes and questions about your care might have to be resolved by a court instead.

6. For moral reasons, I would want lifesaving measures to be taken and I would not want feeding tubes removed. Should I still have a living will?

Yes. If you feel strongly about having life-sustaining procedures and feeding tubes used for your end-of-life care, the Wisconsin living will form is one way to make your wishes known. However, because the living will addresses those circumstances under which you wish that your dying not be prolonged, if you wish that all possible measures be used to sustain your life, you could also complete a POAHC and state what your wishes are in greater detail than is allowed in the living will form.

7. How do I complete my living will?

There is a standardized living will form in Wisconsin that is widely available. The Wisconsin form asks you to fill in your name, and then make three choices:

- Whether you want feeding tubes used if you are in a terminal condition
- Whether you want life sustaining procedures used if you are in a persistent vegetative state
- Whether you want feeding tubes used if you are in a persistent vegetative state.

You may check “yes” or “no” for each choice. You must sign the form in the presence of two disinterested witnesses – this means that your witnesses cannot be relatives, people who might inherit from you, or health care workers. A social worker or a chaplain can witness this document. After the document is signed, you should make copies and give them to your doctor or clinic so they can be included in your medical record, give one to a family member (or place it with your POAHC) and, if you want, you can file a copy with the county probate office for a small fee.

POWER OF ATTORNEY FOR FINANCIAL MANAGEMENT

When someone becomes ill or injured, worries about paying the monthly bills may not be the person's primary concerns. But bills still need to be paid, checks need to be deposited, and financial matters still require a watchful eye. A power of attorney for financial management (POAFM) is a legal document that gives another person, your *agent*, the authority to make decisions about your money and property so that financial matters can be taken care of while you are not able to manage them yourself.

Unlike a power of attorney for health care (POAHC), which requires incapacity before authorizing the agent to make decisions, a POAFM can be used by a person who is not incapacitated. In certain circumstances, a person who is not incapacitated might like someone to help them pay their bills, balance their budget, or make purchases on their behalf. For this reason, the POAFM can be written in two different ways.

The first way is called an immediate POAFM. It gives your agent the authority to manage your money as soon as you sign the document. You and your agent share the power and can make financial decisions on your behalf. You can choose to have the agent's authority end if you become incapacitated, or you can allow the agent's authority to continue despite your incapacity. If the agent's authority continues despite your incapacity, the document is generally referred to as a durable power of attorney because it does not end with your incapacity – it endures.

The second way is called a springing POAFM. This means that the document does not give any power to the agent until you are found to be incapacitated. Then it “springs into action” and gives your agent authority to handle your finances. A springing POAFM works very much like a POAHC because it only lets someone else make decisions for you if you are unable to make them yourself. A springing POAFM is also a durable power of attorney because it grants authority to your agent even while you are incapacitated – it endures.

You should be very careful when making decisions about your POAFM. On one hand, a POAFM can authorize your agent to do many important things on your behalf if you become incapacitated – things like file your taxes, resolve any insurance claims (if, for instance, you were incapacitated because of a car accident), pay your bills, and manage investments or benefit payments that come to you. Without this document, your family might be required to go to court for a guardianship to handle these matters.

On the other hand, a POAFM can be abused if the person who is your agent is not capable, trustworthy, and honest. Because it can be abused, it is also a document that you may want a lawyer to advise you or draft a tailored POAFM for you. Wisconsin has a standard POAFM form that you can fill in without talking to a lawyer. However, you may have questions about the powers you are granting and how your decisions might affect you. A lawyer can explain these powers and give you advice. In addition, there are some powers that you can not give your agent if you use the standard form, including changing a trust, changing a beneficiary to an insurance policy, and making gifts from your estate. If you want your agent to have some of these powers, you will need to consult a lawyer and have them draft a POAFM specifically for you.

There are things that you can do when writing your POAFM to reduce the opportunity for financial abuse. First, be very careful in selecting your agent. Ideally, your agent is a person whom you trust to make decisions, who has experience dealing with financial matters, and who is wise and honest with his or her own money. Second, you can insist in the document that your agent be bonded, which means that your agent must purchase insurance in case he or she mismanages your money. Third, you can insist that your agent send an accounting of what he or she is doing with your funds to another person every so often so that someone is checking the agent's work.

Finally, you can choose how much power you want to give your agent under your POAFM. For instance, you could give your agent the power to file your taxes and pay bills, but not to borrow money on your behalf or sell investments. Although limiting the powers that you give your agent can be an important way to protect yourself against abuse, you still want to make sure that your agent will have the authority he or she needs to handle your financial affairs on your behalf. Otherwise, if you are incapacitated and your agent cannot handle certain financial tasks, your family may need to get a guardianship so that they have legal authority to handle those tasks.

A NOTE ABOUT GIFTING POWER

Gift-giving power is specifically allowing your agent to make gifts of money or property on your behalf from you to other people. These gifts could be given to a favorite charity or to help out a friend or family member, or to celebrate an occasion like the wedding of a child or grandchild. They can also be used to reduce the amount of money you have if you need to get access to public benefits like Medicaid in order to provide health care. This power can be important, but it can also be dangerous. For this reason the state power of attorney for financial management form does not allow you to give gift-giving power to your agent. If you think gift-giving power is something you might need or want your agent to have, you will need to speak to an attorney.

GUARDIANSHIP

A guardianship is a legal relationship between two people where one person has the legal authority to act for the other. The person who is being acted for is called the *ward* and the person who has the authority to act for the ward is called the *guardian*. Technically, when a guardianship is created, some of the rights of the ward are transferred to the guardian to exercise on the ward's behalf. This relationship is created by the court after a legal hearing to determine whether the ward is competent to manage his or her personal affairs. If found to be incompetent, the ward will have a guardian appointed.

Guardianships are an important tool in caring for people, but they generally are not the preferred method for managing the affairs of someone who is unable to do so independently. Obtaining a guardianship is expensive because it involves court costs and attorney's fees. It takes time to establish a guardianship and a lot of work is required from the ward, the family and advocates for the ward, and the guardian. If a guardianship can be avoided, through power of attorney documents, for instance, it is often preferable to do so. But if there is no other choice, a guardianship can be a useful tool for taking care of someone who is not able to do so.

There are two main types of guardianship: guardianship of the estate and guardianship of the person. A *guardianship of the estate* gives the guardian control over the money and property of the ward so that it can be managed and used to benefit the ward. This means that the guardian is not allowed to use the property for his or her personal use or benefit, although the court can authorize the guardian to be paid a reasonable amount for his or her work. The guardian of the estate has certain powers to act independently, but other actions by the guardian may require oversight by the court so that the ward's interests are protected. *Guardianship of the person* is a second type of guardianship which is used to protect the ward's physical well-being. In this kind of guardianship, the guardian is responsible for making sure that the ward is well taken care of, making medical decisions for the ward, deciding where the ward should live, and monitoring the ward's care. A guardian of the person, however, does not have the right to place a ward in a nursing home or other types of live-in care facilities unless the court issues an order called a *protective placement order* that specifically gives this authority to the guardian. Getting a protective placement order can be a part of a guardianship proceeding or it can be done separately.

A ward may have a guardian of the person only, a guardian of the estate only, or a guardian of the estate and a guardian of the person. If a person needs both a guardian of the person and a guardian of the estate, the court can appoint the same person to do both jobs or the court can appoint different people. There is also the possibility of a *limited guardianship*, under which only some of the ward's rights are transferred to a guardian.

Guardianship proceedings can be complex and difficult for friends and family members of the proposed ward and for the proposed guardian as well. The process generally requires the involvement of one or more attorneys. In many cases, it is best to avoid the need for a guardianship if possible by using advance directives and talking to your family or others who are close to you about your wishes and plans.

MARITAL PROPERTY

When you begin to think about drafting a will or creating an estate plan, it is useful to know what you own and what ownership rights you have. For married people, it is important to understand the concept of marital property law, how this system affects the way that property is owned by married people during life, and what rights married people have in marital property at death.

On January 1, 1986, the Wisconsin Marital Property Act became effective and Wisconsin joined the handful of states which apply the principles of marital property (called community property in other states) to the property of married people. The system of marital property reflects the belief that marriage is an equal partnership between spouses and that the ownership of property acquired during the marriage should reflect this equality.

In brief, marital property law divides the property of married people into three categories: marital property, individual property, and property acquired when marital property law did not apply. In general terms, marital property law presumes that all property earned or acquired during the marriage by either spouse's income is marital property. Marital property is owned equally by both spouses during the marriage, even if only one spouse uses the item and even if only one spouse is listed as owner on the title. The term property is used broadly here and includes a variety of assets, such as real property, vehicles, household furnishings, life insurance, and retirement plans. As each spouse technically owns one-half of every item of marital property, each spouse also has the right to pass his or her half by will or by the laws of intestacy.

Example: Imagine that Alfred and June are married. They purchase a truck during their marriage from money in their joint savings account. June's name is not on the title of the truck and they both think of the truck as Alfred's because June never drives it. Nonetheless, because Alfred and June were married when Alfred bought the truck using money from their joint savings account, the truck is marital property. June therefore owns one-half. In Alfred's will, when he leaves "his" truck to his son, Glen, Alfred is only passing his one-half share to Glen. June still owns her one-half. The result is that Glen and June technically own the truck together after Alfred's estate is settled.

Property that is not marital property is either individual property or property that was acquired by either or both spouses when marital property laws did not apply to them (e.g., when they were living in another state or before marital property existed in Wisconsin). Individual property is property that is specifically excepted from classification as marital property and is typically that property that each spouse owned individually before the marriage or property that either spouse acquired during the marriage by gift or inheritance. When property is classified as individual property, it remains the property of the spouse who was the original owner unless he or she takes certain steps to change its classification to marital property. For property to be considered individual property, the owner must have records proving that the property is not marital property. For property to remain individual property, it should be kept separate from marital property.

The last category of property is neither marital property nor individual property because it was acquired when marital property law did not apply to the couple. Generally, this property is that which a married couple acquired before the adoption of marital property law in Wisconsin or property that a married couple acquired while living in a state other than Wisconsin. During life, marital property law will not be applied to this property (unless the spouses have a written agreement to do so), but a surviving spouse may have some elective rights to the property when the other spouse passes on.

If a married couple wishes to have their property classified differently from the way that the law presumes and proscribes, they may do so by executing a marital property agreement together.

In many cases, the classification of property is not important to married people until there is a reason to calculate who owns what. This is part of the probate process and is called inventorying the estate. It can be complicated to determine exactly what property a person owned, especially if there is some marital property, some individual property, and some property from a non-marital property system. In more complex situations, there are specific rules to help you make such evaluations that are not covered in these materials. An attorney could help you sort through the details.

REAL PROPERTY AND PERSONAL PROPERTY

The term property can be used to describe many different assets, but they generally fall within two categories: real property and personal property. Real property is land and all permanent structures on the land, such as homes and outbuildings. Personal property is most everything else: bank accounts, stocks, bonds, cars, computers, furniture, etc. One way to determine if property is personal or real is to ask whether a person could physically take the property with him when he moves. If it can be transported, it is probably personal property.

The rights that a person has in an item of real property depend on how the property is owned. There are many ways to own property, but two common forms of ownership are as *tenants in common* and as *joint tenants with right of survivorship*. If the property is owned by two or more tenants in common, the ownership is referred to as a *tenancy in common*. If the property is owned by joint tenants with right of survivorship, it is called a *joint tenancy*.

When a joint tenancy is created, the joint owners own the property together and equally during life. However, when one of the joint tenants passes on, his rights to the property end and the surviving joint owners become the new owners of the property. This process continues until only one owner remains. He is the last man standing and has the right to pass the property to his heirs by will or by the laws of intestacy. To create a joint tenancy, you must intend to do so and must use certain words in the title or bill of sale (e.g., as joint tenants, as joint owners, jointly, or with right of survivorship). This form of ownership can be used for property other than real property, and you may encounter these terms and concepts when working with other assets, such as bank accounts and investment accounts.

When a tenancy in common exists, the tenants in common also own the property together during life. The difference is that when a tenant in common passes on, he has the right to pass his share to his heirs by will or by the laws of intestacy. Whoever inherits his share will become a new tenant in common with the original tenants in common who are still living. This process of replacing tenants in common continues indefinitely, until the property is physically divided or sold. To create a tenancy in common, you can include the phrase “as tenants in common” in the title or bill of sale. However, the law will presume that the property is owned as a tenancy in common unless there is clear language stating that the property is instead owned as a joint tenancy.

When selling or buying real property, there are certain requirements that must be completed for the transaction to be legal and binding. First, the agreement must be written. Second, the agreement must identify the seller, the buyer, and describe the property involved. Third, both the seller and the buyer must sign the agreement. When an agreement is completed, it must be registered at the Register of Deeds office in the county where the property is located. The website for the Wisconsin Register of Deeds Association (<http://www.wrdaonline.org/>) is a useful resource where you can find the contact information for every Register of Deeds office in Wisconsin.

It is important to keep in mind that different laws may be applied to tribal land and to county land. Some tribes have passed extensive laws which govern real property and real property transactions within their reservations. These laws may be different from the laws of Wisconsin. As well, the

discussion of ownership rights in land may not be as relevant on a reservation where land is primarily leased to instead of owned by tribal members. In the case of leased land, the rights to the property may be found in the lease document itself, in tribal land use or real property laws, and in federal law.

To determine what right a person has to leave leased land to someone else when he passes away, one should begin by looking at the lease document, tribal law, and federal law. Further, the procedure used to designate a successor to leased or assigned land varies from tribe to tribe. Sometimes a successor is named in the lease papers, sometimes in a will, and sometimes by a separate Designation of Successor form. Every tribe manages its land differently, so any questions about your current ownership rights of land, how to transfer your land, or how to acquire land can be directed to the land management department of the tribe where the land is located.

LAST WILL AND TESTAMENT

A *will* is a legal document that you can use to transfer certain kinds of property to people and organizations when you pass on. While the general population is loosely familiar with the concept of a will and how a will works, there are some details that are often misunderstood.

One reason to have a will is to make sure that your property is distributed as you wish when you pass on. The laws used to distribute property when a person passes on without a will, called the *laws of intestacy*, are based on certain assumptions about what families look like and how property should be distributed among the heirs. Those assumptions may or may not match your family arrangement and your beliefs. With a will, however, you can override those assumptions and distribute your property as you wish.

A will is also very important to those who own interests in trust land. Under the new American Indian Probate Reform Act (AIPRA), your trust land will only pass to a limited group of heirs, and perhaps to just one heir, unless you write a will that states otherwise. You will have more flexible options for passing on your trust land if you use a will.

The primary use of a will is to transfer property to *beneficiaries* when a person passes on. The gifts to the beneficiaries can be made in general terms (e.g., everything to my surviving spouse) or specific terms (e.g., my sapphire ring to my sister, Beth).

A will also makes important nominations. First, a will can be used to nominate a legal guardian who would be responsible for any minor child if both parents were to pass away before the child reaches 18 years of age. This is a very important decision for most parents – it is a reason to have a will, even if you have very few assets. Second, a will names a *personal representative* (also referred to as the *executor*) who will be in charge of collecting and distributing your property when you pass on according to the instructions in your will. Finally, if the will has a trust, a *trustee* for the trust can be nominated in the will.

A will can be used to create a trust that will control how your property is distributed and used by the beneficiaries you name in the trust. For example, if you wish to leave property to minor children or other beneficiaries who may not be able to handle the gift responsibly if it is received all at once when you pass on, you can use a trust to direct how, when, and for what purposes the property shall be given to them. As trusts are a more complicated tool for transferring property when a person passes on, it is wise to consult an attorney advisor.

Although a will can do many things, it is important to know that your will does not control how some property is distributed when you pass on. For instance, if you have a life insurance policy or an investment account where you have named someone as beneficiary to the account, any money due from those accounts at your passing will go to the person you designated as beneficiary. Your will does not change who you have listed as beneficiary for those accounts, even if those designations were completed long before your will. Instead, the beneficiary designation that you completed for the life insurance or investment companies will determine who receives the funds. Therefore, it is very important to review these beneficiary designations, to keep record of them, and

to change them when necessary because your will does not do this for you. It is a good idea to review these designations annually or when major events occur in your life, such as marriage, birth, adoption, divorce, and death.

A will also does not pass property that you own with another person as a joint tenancy with right of survivorship. For instance, if you and your spouse own your home and your bank accounts as joint tenants with right of survivorship, when one spouse passes away, his right to the property also passes away. The surviving spouse automatically becomes the sole owner (though there might be some paperwork involved). Your will cannot change how the house or the money in the bank account is distributed when such things are owned as a joint tenancy.

For a will to be valid, it must be written, dated, signed by you and at least two valid witnesses. The witnesses should not be people who are receiving gifts in your will. It is also a good idea to complete an affidavit that is signed by you and the witnesses and then notarized so that there is less opportunity to question the validity of your will.

A will becomes final only when you pass on or when you no longer have the mental capacity to make changes to it. Up until that point, you can change or make a new will as many times as you need to. To make minor changes to an existing will, you can write a *codicil* to make the necessary amendments. The codicil works together with the existing will, which is still valid except for those changes that the codicil makes. If there are more than minor changes to be made, you can revoke your will and create a new one that matches your wishes.

There are many ways to write a will because there are many ways to own and distribute property when a person passes on. When appropriate, a will can be a very simple document. A will can also be several pages long if a person wishes to include numerous specific gifts, a trust, or other more complicated instructions. The most important consideration is that the will is prepared according to the legal requirements for it to be valid and that it be written so that your property is distributed as you intend. There is a standard simple will form in the Wisconsin statutes that can be used, though this basic will is not sufficient for everyone. Others, especially those who have more complicated estates or more complicated plans for distributing their property, prefer to work with an attorney to be sure that the will is completed accurately.

If a person passes away without a valid will, it is said that he or she passed away *intestate*, meaning without a will. In this case, the state laws of intestacy will determine which of his heirs will receive his property and in what proportions. The state laws of intestacy are default laws that are written into the Wisconsin statutes and applied uniformly to every Wisconsin resident who passes away intestate. It is not the judge who decides what the heirs receive. Keep in mind that the state laws will only be applied to that property that is under the state jurisdiction and that a tribal probate code, if there is one, may be applied instead. As well, trust property is distributed according to federal laws of intestacy or an approved tribal probate code under the American Indian Probate Reform Act, and not according to state law.

TRUSTS

Trusts are another estate planning tool with many different forms and uses. A trust can be simple or complex, depending on the needs and the property of the person creating the trust. A trust can be part of a will or separate from a will. A person can set up a trust so that it takes effect during his lifetime or only after he passes on. Trusts are often used to prevent young or irresponsible people from not taking good care of their inheritance. A person does not necessarily need to have to a lot of money to establish a trust or to find it useful.

One way to explain how a trust works is to think of the trust as a container that holds assets. The assets vary according to the kinds of property you own and wish to transfer to the trust, such as money, investments, real estate, and anything else of value. A trust involves three different kinds of people: the *settlor*, who places his or property in the trust, the *trustee*, who is named by the settlor and who is responsible for managing the property in the trust, and the *beneficiary*, who receives property from the trust.

The trustee can be a person or an institution, such as the trust department of a bank. In some cases, the person who created the trust serves as trustee while they are still living and an alternate trustee takes over only after the original trustee passes on. In other cases, the person creating the trust will select a relative, friend, or other trusted person to serve as trustee. In any case, it is important to name an alternate trustee in case the first trustee is unable or unwilling to serve.

One main difference between transferring property at death through a trust and rather than through a will is that the settlor retains some control over the property placed in the trust, even after he has passed on. This is because the rules of the trust, which the settlor determines, control how the property in the trust is used and managed even if the settlor is not there to make those decisions. For instance, the trust could state that the beneficiary will not receive all of the money in the trust until he reaches a certain age, or perhaps the beneficiary will receive only a certain amount of money from the trust per month or per year.

A trust can do many things, including:

- Provide for financial management of the property in the trust. The trustee is responsible for managing the property in the trust, which can be useful when the beneficiary is a minor, disabled, or incapacitated.
- Provide for the care of minor children or surviving spouse. Although this also can be done in a will, some people prefer the extended control and other planning tools that a trust offers.
- Distribute property directly to the beneficiaries without going through probate. When property is transferred to a trust during the settlor's lifetime, the probate process is no longer needed to transfer the property. Transferring the property to the trust has already accomplished that step.
- Provide privacy. When a trust is used to transfer property rather than the probate process, the terms of the trust will not be part of the public record.

There are some things, however, that a trust cannot do:

- A trustee only has power over property that is already in the trust. Any other property that a person owns when he passes on – either personal property or money or benefits that he received after death – must be transferred by some other mechanism. In addition, a trustee cannot manage property that is not owned by the trust if you become disabled or incapacitated before transferring it.
 - A trustee cannot make health care decisions like a power of attorney for health care can.
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WHAT IS A LIVING TRUST?

A living trust is a trust that you set up while you are living. Living trusts became popular as a tool to avoid probate and were actively marketed for that purpose. Although there are good reasons to use a living trust, not everyone needs one. The way a living trust generally works is that the settlor sets up the trust and transfers his property to the trust while he is living. When the settlor passes on, the probate process is not involved with transferring the settlor's property to the beneficiaries because the settlor does not own the property anymore – the trust does. Probate is avoided, but only if all of the settlor's property was successfully transferred to the trust. If some property was not transferred to the trust, probate would be required to distribute it according to the instructions in the will (if there was one) or the laws of intestacy. There are reasons to have a living trust and reasons to have a will – the best choice depends on each person's individual circumstances. A trusted attorney or advisor can help you sort through all of the options.

KEEPING AND STORING DOCUMENTS

Power of Attorney for Health Care / Living Will / Power of Attorney for Financial Management

When you are thinking about where to store your Power of Attorney for Health Care, Living Will, or Power of Attorney for Financial Management, remember that these are documents that could be needed in an emergency. With that in mind, it is a good idea to keep these documents in a safe place that can be accessed easily by someone other than you. You should tell your loved ones that you have completed any or all of these documents. You also should tell them where you have stored these documents. You may also choose to provide some of them with a signed copy.

You may keep an original, signed form of your Power of Attorney for Health Care and/or Living Will on file with your health care provider so that they are immediately aware of your wishes. Alternatively, you can file your Power of Attorney for Health Care and/or Living Will for safe-keeping at the office of the Register in Probate in the county where you reside. There is a small fee for this service.

Important note: if you make changes to your Power of Attorney for Health Care, Living Will, or Power of Attorney for Financial Management, it is very important that you replace all of the outdated documents with updated documents so that there is no confusion about your wishes. To make sure that you have replaced all of the outdated copies, it is a good idea to keep a record of where you have stored them and who has received copies of your signed documents.

Last Will and Testament

You should keep your signed, original will in a very safe place because the signed, original is the one that the Probate Court will require. Wherever you decide to store your will, it should be located where someone, other than you, can retrieve it. If you store your will in your house, you should tell someone where it is located. If you have stored your will in a safe in your house, you should make sure that someone whom you trust can open the safe. Some people choose to store their wills in safe-deposit boxes at a bank. If this is where your will is stored, you should tell someone whom you trust that you have stored your will there. You should also make sure that someone whom you trust can open your safe-deposit box when necessary. You may also file your will for safe-keeping at the office of the Register in Probate in the county where you reside. There is a small fee for this service. This can be a convenient option for some people because the signed, original will is already located at the Probate Court and available when the probate process is initiated. However, if you make frequent changes to your will, it may be more convenient for you to store your will in a more easily accessed location.

STATE COURT PROBATE

When a person passes on, the probate process is used to determine his or her heirs, validate (or question the validity of) the will, itemize and value the property in the estate, and distribute the property according to the instructions in the will or the laws of intestacy if there was no will. All of these steps occur under the supervision of the probate court so that they are handled properly. Court supervision is one benefit of the probate system, but it is something that other people wish to avoid.

There is some misunderstanding about when probate is required and the role that having a will plays. It is a common misconception that having a will means that you will not have a probate. On the contrary, the probate process is used when a person passes away with a will. Probate is the way that the instructions of the will are put into action – this does not happen spontaneously. The probate process is also needed when a person passes away without a will, trust, or other mechanism to transfer his property when he passes. In these cases, the probate court will apply the laws of intestacy to the person's property to transfer it to his heirs. Unless a person takes steps to transfer legal ownership of his property to someone else when he passes, the probate process will be needed, with or without a will.

The transfer of property from the *decedent* (the person who has passed away) to someone who is living is an important part of the probate process. If the decedent's family wishes to sell his house or withdraw funds from his bank account, a new owner with rights to these assets must be legally named. Unless the decedent transferred his house and bank account to someone else by using a joint tenancy or trust, the probate process will be needed to legally name the new owner.

When someone with a will passes on, whoever has access to the will must file it with the Register in Probate within thirty days of the death, regardless of whether or not the probate process is required. The will should be submitted to the Register in Probate in the county where the decedent was a permanent resident. When the will is submitted, there is a standard state form to start the process. Some counties, such as Milwaukee County, have specific forms to use in addition to the state forms. All of these forms can be found on the Wisconsin Courts website or with the county Clerk of Court. After the proper forms are complete and submitted, the court can appoint a personal representative to distribute the decedent's property according to his will or according to the state laws of intestacy if there was no will. The personal representative has four main jobs: (1) assemble and identify all the decedent's assets; (2) notify the decedent's heirs of the probate and will, if any; (3) notify all possible creditors of the decedent's death and pay off the decedent's debt with the decedent's assets; and (4) distribute the remaining assets.

The probate process is not the same for all estates. If the value of the property passing through the probate is less than \$50,000, it does not need to go through the complete probate process. Instead, the property can be transferred by filling out a Transfer by Affidavit form. Transfer by Affidavit and all other state probate forms can be found on the Wisconsin Courts website:

<http://www.wicourts.gov/forms1/circuit.htm#probate>.

If the property will not be transferred by affidavit, there is a choice between using a formal or informal probate administration. Informal administration is often less expensive, can be handled at the county Register in Probate office, and generally can be done through the mail. Formal administration takes place in a probate court which is located at the county court. If there are any disputes over who should receive the decedent's property, formal administration is required.

If the probate process is required, the duration of the probate is estimated to be approximately six months. The probate can be longer depending on the circumstances. For example, if the decedent did not have a will, or had a very large estate, or had a complex set of heirs, such as children from multiple marriages, it may be longer before the probate is closed. The cost of probate varies as well. The court fees are standardized and not large. There are small fees for the filing of certain documents and a general fee of 0.2% of the value of the property going through probate, less liens and other encumbrances. If an attorney is hired, those fees will vary based on the work required and the agreement with the attorney. An attorney is not necessarily required for a probate administration. However, if there are contested issues or the distribution of the property is complex, an attorney might be helpful.

TRIBAL COURT PROBATE

Tribal law may be involved in probate in two different ways. The first way is through the creation of a tribal probate code that governs property within the tribe's jurisdiction that would otherwise be handled by the state probate courts. When the tribe develops its own probate code, tribal members can use tribal court to handle probate matters according to tribal law. Not all tribes have developed a tribal probate code and only a few tribal courts in Wisconsin are able to handle probate matters. Interest in this subject is growing rapidly among members and tribal governments, so it is a good idea to inquire periodically about the status of a tribal probate code if you are interested in using the tribal court to handle probate matters.

Tribes also have authority to develop tribal probate codes that will be used for the probate of Indian trust property, such as interests in trust land and funds in Individual Indian Monies (IIM) accounts. For a tribal probate code to be applied to trust or restricted land that are either within the tribe's reservation or otherwise subject to the jurisdiction of the tribe, it must be adopted by the tribe and approved by the Secretary of the Interior. When the tribal probate code is approved, it will be applied to members' trust property instead of the federal probate laws in the American Indian Probate Reform Act of 2004 (AIPRA). At this point, the probate of Indian trust property will continue to be handled by the federal government, as it is today, but the approved tribal probate laws will be applied by the federal decision maker.

It is important to know what rules will be applied to your property when you pass on. Not everyone agrees with how state laws of intestacy distribute property and presumably not all members will agree with their tribal laws of intestacy. This is one reason to write a will, so that you decide what happens with your property and not the laws of intestacy.

AMERICAN INDIAN PROBATE REFORM ACT OF 2004 (AIPRA)

On October 27, 2004, the American Indian Probate Reform Act (AIPRA) was passed by Congress. The Act became fully effective on June 20, 2006, although it continues to be discussed and revised. AIPRA contains many provisions regarding Indian trust land, including a federal probate code to govern how trust property is distributed when an Indian landowner passes on. Until now, state laws were relied on to make these determinations.

One goal of AIPRA is to combat the problems of fractionated Indian trust land by preventing further division of the land. In order to do so, some limitations were placed on who can inherit interests in trust land under different circumstances. There are more ways to pass on interests in Indian trust land under AIPRA if you write a will than if you do not, so the interest and need for landowners to write wills is growing quickly. Because these laws are complex, they cannot be covered fully here. If you have questions about your options, you can contact the Bureau of Indian Affairs or an attorney who is familiar with AIPRA for additional explanations.

Before reviewing how trust property is distributed under AIPRA, there are two important definitions to keep in mind.

- An *Indian* is any person who is a member or eligible to be a member of any Indian tribe, any owner (as of the date of enactment) of a trust or restricted interest in land, or a person who meets the definition of Indian under the IRA and its regulations.
- *Eligible heirs* are any of the decedent's children, grandchildren, great grandchildren, full siblings, half siblings by blood, and parents who are:
 - (1) Indian,
 - (2) lineal descendants within two degrees of consanguinity of an Indian, or
 - (3) an existing co-owner in the parcel of land for purposes of inheriting another interest in such parcel.

It is important to remember that a person must meet both criteria to be an eligible heir.

Passing On WITHOUT a Will:

When a person passes on without a will, the laws of intestacy under AIPRA determine who inherits the property unless there is an approved tribal probate code.

If there is a surviving spouse and other heirs, the spouse will receive one-third of the money in the decedent's IIM account. The remaining two-thirds of the IIM account will go to the decedent's heirs. If there is no surviving spouse, the heirs get all of the money in IIM account. If there are no heirs, the surviving spouse gets all of money in the IIM account.

The surviving spouse also will receive a life estate interest in the decedent's trust land, and when the surviving spouse passes on, the life estate will end and the land will transfer to the decedent's heirs. With a life estate, the surviving spouse gets to use and enjoy the land for his or her life, but full ownership of the land will transfer to someone else (the heirs in this case) when the surviving spouse passes on. If there is no surviving spouse, then the heirs will receive the trust land right away.

Important exception: there are different rules if the decedent's trust land represents a less than 5% share of the parcel. This exception will be discussed below.

The rules of AIPRA determine who the decedent's heirs are. After property has passed to the surviving spouse, the decedent's children are designated as the heirs. If these children have passed away already, their children (the decedent's grandchildren) are the heirs. If the children and grandchildren have passed away already, then the great grandchildren are the heirs. If there are no children, grandchildren or great grandchildren, then the decedent's parents are the heirs. If there are no parents, then the decedent's siblings are the heirs. If there are no siblings, then the Indian tribe with jurisdiction over the interests in trust or restricted land is the heir. Furthermore, in order for the heirs listed above to receive the decedent's trust land, they must also meet the definition of "eligible heir" (see above).

The 5% Exception: When the decedent's interest in trust land is a less than 5% share of the parcel, there are stricter rules about who can inherit the land when there is no will. The surviving spouse will receive a life estate interest in the trust land, but only if he or she was living on that parcel when the decedent passed away. If the surviving spouse was not living on the parcel, then he or she receives no interest in the trust land. When the surviving spouse passes on and the life estate ends, the land can only pass to one heir according to the Single Heir Rule. The single heir will be the decedent's eldest living child, grandchild, or great-grandchild. The single heir must also meet the definition of "eligible heir" (see above). If there is no living child, grandchild, or great-grandchild, or if none of them are eligible heirs, then the trust land will pass to the tribe with jurisdiction over the land.

Passing on WITH a Will:

If you write a will, you have many more options than those discussed above. You can leave your trust land to:

- any of your lineal descendants (children, grandchildren, etc)
- any person who owns a preexisting undivided trust or restricted interest in your land
- the Indian tribe with jurisdiction over your land, or
- any Indian.

When you leave your interests in trust land to any of these people, or to the tribe, it will continue to be held in trust. There is also the option of leaving a life estate interest to someone who is not part of the above list, as long as the land passes to someone in the list or to the tribe when the life tenant passes on. If the way that property is distributed under AIPRA is not agreeable to a landowner, the simple solution to the conflict is to write a will.

OTHER PROVISIONS IN AIPRA

AIPRA is more than a probate code. It contains many other rules and procedures regarding trust land, including:

- Consolidating fractionated land interests by agreement during the probate process
- Purchasing land interests during the probate process
- Partitioning fractionated land
- Disclaiming inheritance of trust property

FRACTIONATION

Fractionation is the term used to describe the process of splintering ownership that has affected Indian trust land for generations. The process of fractionation began with the federal policy of allotment. When a reservation was allotted, parcels of land were given to individual tribal members. The reservation land was no longer owned by the tribe because it was owned by individual tribal members instead. The land was held in trust for the individuals who were the new owners, and the federal government became responsible for managing the land for the landowners' benefit.

Fractionation began when landowners passed away and their trust land was distributed to their heirs. In general, state laws of inheritance were applied to distribute a landowner's trust land to his or her heirs. Typically, this meant that the trust land was inherited by the landowner's surviving spouse, by his children as tenants in common, or by some combination of the surviving spouse and children as tenants in common. When the trust land was distributed to the heirs, the parcel was never physically divided among them. Instead, the group of heirs became co-owners of the original parcel. Each heir owned a certain fractional interest in the parcel, but every co-owner had a right to use and enjoy the entire parcel. With each generation, the original size of the parcel remained the same but the number of co-owners grew whenever a co-owner passed on and his interests were divided among his heirs. The size of the fractions shrank quickly. This process is called fractionation. In some cases today, land is so fractionated that hundreds of co-owners share ownership of the original parcel. As you can imagine, it can be an impossible challenge to manage the property efficiently with so many people involved. The co-owners may not be related, they may not know each other, and they may be unable to simply locate each other.

Fractionation has become an important issue by everyone who is interested in preserving trust land for future generations. It is important to landowners because they want their land to be managed efficiently, in a way that supports the best use of the land. It is important to tribes as they develop their communities and need access to trust land for building projects and other improvements. And it is important to the federal government because it is legally responsible for managing these fractionated interests and all of the associated land records. All of these groups have an interest in simplifying the ownership of fractionated trust land.

AVOIDING FRACTIONATION AND LAND CONSOLIDATION

If you own interests in trust land, the issue of fractionation is probably of interest to you. You may wish to learn more about how you can prevent further fractionation of your trust land. There are a number of techniques available to landowners who are interested in avoiding further fractionation or who are interested in consolidating their fractionated interests. Listed below are some of the options that you may wish to consider. As always, each landowner's circumstances are different and it is important to select those legal techniques which match your specific needs. It is advisable to consult a knowledgeable professional who is competent in this area of land law to assist you with your plan.

- **Gift Deeds.** A landowner can transfer property to someone else by completing a gift deed. Once the gift deed is completed and approved by the BIA, it cannot be undone. Relatives and co-owners of one parcel of land might choose to use a gift deed to transfer interests to each other so that the land can be more efficiently used by those participating in the transaction. For instance, imagine that A and B are brother and sister and co-owners of a small parcel of trust land. A lives far from the reservation but B lives and works in the community and would like to put a house on their trust land. A might choose to transfer by gift deed his interest in the parcel to B so that her interest is large enough for her to put a house on it.
- **Gift Deed with Retained Life Estate.** When a landowner transfers property to someone else by gift deed, he might wish to keep certain rights to that property until he passes on. This is called retaining a life estate. Imagine that A and B are father and son. A, the father, wishes to leave all of his interests in trust land to B, his son, but he does not want his son to get all of the income earned by those interests until A has passed on. To accomplish this, A can gift deed his interests to B and retain a life estate for himself. A will continue to manage and receive the income from his interests for the rest of his life. When A passes on, B will become the owner of the interests in land and he will start receiving the income from the land.
- **Land Exchanges.** Sometimes landowners have an opportunity to exchange their interests in trust land for interests in trust land that better meets the landowner's needs. Exchanges can be made between landowners or between a landowner and the tribe with jurisdiction over the land. Imagine that A owns many fractionated interests in Allotment #1001 and only one small interest in Allotment #4004, where her great-great-grandfather was the original allottee. B owns many fractionated interests in Allotment #4004 and only one small interest in Allotment #1001, where her great-great-grandfather was the original allottee. A and B can exchange their interests so that they each own larger interests in the Allotment that is tied closely to their families. This may give them greater control over the use of that allotment so that they can protect it for future generations.
- **Indian Land Consolidation Program.** Several years ago, the Bureau of Indian Affairs began a pilot program to buy back small fractionated interests from landowners who were willing to sell. The interests that were purchased from individuals remained in trust and

were given back to the tribe with jurisdiction over the land. The program has expanded since its beginning and many tribes now participate. If you are interested in selling your interests, you can contact the Great Lakes Agency Land Consolidation Office to see if your interests are eligible for sale. You can also contact the tribe where your interests are located to see if there is a tribally-funded program for purchasing interests in land.

- **Last Will and Testament.** Not everyone wishes to transfer his or her interests in trust land during life. When this is the case, consolidation can still be accomplished by making gifts of trust land by will, but you must carefully consider how those gifts of trust land are made. For instance, imagine that A has four children and owns many small, fractionated interests in four parcels of trust land. A very common gift of trust land by Will might say: "I give all of my interests in trust land to my children in equal shares as tenants in common." This gift will further fractionate A's interests because each child will inherit a $\frac{1}{4}$ share of each interest that A owns in four parcels. The beneficiaries will be added to the growing list of co-owners of the parcel, and their decision-making power, with respect to the whole parcel, will be $\frac{1}{4}$ of what A's was. Instead of the above gift, A could leave all of his interests in Parcel 1 to Child 1, all of his interests in Parcel 2 to child 2, and so forth. If A makes the gift in this way, each of his children will inherit trust land from him, but his interests will not be further fractionated. Each child will inherit decision-making power with respect to the whole parcel that is the same as A's.
- **Joint Tenants With Right of Survivorship.** If you are interested in leaving your interests in trust land to multiple people, but you are concerned with further fractionating those interests, you could also leave your interests to multiple people as joint tenants with right of survivorship. This means that the people to whom you leave your interests will share ownership of the inherited interests for their lifetimes. However, when one beneficiary passes on, her rights to your interests will end and only the beneficiaries who are still living will continue on as owners of your interests. This process continues until only one beneficiary is living, and that one beneficiary is the person who has the ability to transfer the interests by will, gift deed, and so forth. Imagine that A has three children and owns fractionated interests in trust land. A writes a will and leaves her interests to her children, B, C, and D as joint tenants with right of survivorship. While B, C, and D are living, they have rights to A's interests in trust land and each gets a $\frac{1}{3}$ share of the income that A was receiving. B passes on and C and D become the owners of the interests. They each get $\frac{1}{2}$ of the income that A was receiving because B's rights ended with his passing. Then C passes on. D will get all of the income that A was receiving and D has the right to transfer all of the inherited interests by gift deed, will, and so forth.
- **Other Options.** The techniques discussed briefly above are only some of the options available to landowners who are interested in consolidating and more actively managing their trust land. Some other techniques a landowner may consider are partition (physical division) of a parcel of trust land; creation of a legal entity to manage a family's interests in trust land; and creation of a lease council. As stated earlier, each landowner's circumstances are different and it is important to select those legal techniques which match your specific needs. It is advisable to consult a knowledgeable professional who is competent in this area of land law to assist you with your plan.

ESTATE PLANNING RESOURCES IN WISCONSIN

When you decide that you are ready to write a will or that you would like to complete a power of attorney for health care, living will, or power of attorney for financial management, you may wish to consult a professional for assistance. Listed below are some resources in Wisconsin.

Indian Law Office of Wisconsin Judicare, Inc., (Wausau, WI)

The Indian Law Office can provide assistance in civil matters to income-eligible members of tribes in Wisconsin. To apply for services through Wisconsin Judicare, call: **(800) 472-1638**. If you are a member of an Indian tribe in Wisconsin, you should mention that so that your call is directed to the Indian Law Office. More information can be found at: **www.judicare.org**.

State Bar of Wisconsin, Lawyer Referral and Information Service (LRIS)

The State Bar of Wisconsin provides a number of services to the community. If you already know you need to talk to a lawyer, there is the Lawyer Referral Service which can help you locate a lawyer in your area who is interested in working with legal situations similar to yours. If you are looking for general legal information or an answer to a simple legal question, the Lawyer Hotline may be able to help you. If you have a legal concern that possibly could be addressed by an organization or agency, the Community Referral service can help you located such organizations and agencies.

To contact the Lawyer Referral and Information Service, call **(800) 362-9082**, or in the Dane County area call **(608) 257-4666**. The service is open 8:00 a.m. - 5:00 p.m., Monday – Friday. You can find additional information about these services and the on-line lawyer referral service at: **www.legalexplorer.com**

Wisconsin Guardianship Support Center

The Wisconsin Guardianship Support Center answers questions about the law in Wisconsin relating to guardianships, protective placements, conservatorships, Powers of Attorney for Health Care, Living Wills, DNR orders, and Powers of Attorney for Finances. The Center provides legal information, case consultation and referrals. The Center does not provide legal representation or legal advice, or find or provide guardians.

You can contact the Guardianship Support Center by:

- Calling the Guardianship Hotline toll-free at 800-488-2596 ext. 314. Please note that the Hotline is operated on a call-back basis – you will be asked to leave a message and your call will be returned as soon as possible
- Calling the Guardianship Hotline locally in Madison, Wisconsin at 608-224-0606 ext.314
- E-mailing the Guardianship Hotline at guardianship@cwag.org
- Faxing the Guardianship Hotline at 608-224-0607

Land Consolidation, Bureau of Indian Affairs

If you are interested in your options for land consolidation, you should contact the Land Consolidation Office at the BIA or your tribe's land management office.

Land Consolidation
Great Lakes Agency
Bureau of Indian Affairs
916 Lake Shore Drive West
Ashland, WI 54806

(715) 682-4527

Great Lakes Indian Law Center

975 Bascom Mall
Law Building Room 6112
Madison, WI 53706

Director: Richard Monette at (608) 263-7409
Deputy Director: Huma Ahsan at (608) 263-5019

Email: glilc@law.wisc.edu

GETTING STARTED WITH YOUR ESTATE PLAN: QUESTIONNAIRE AND CHECKLIST

When you decide to prepare a will or other estate planning document, the first step is to gather information about your property and the people who will be involved in your estate plan. As you are gathering papers and organizing them, you should begin thinking about what you would like to accomplish by your estate plan. If you want to discuss your plans with your family members, or with any other person, now is a good time to start.

This list of tasks will help you prepare for an initial meeting regarding your estate plan:

1. Make a family tree. This will help you explain your family to the person who is helping you with your estate plan.
2. Gather important personal information. You will need the full legal names and dates of birth for the people whom you are including in your will. You will also need enrollment numbers for yourself and for any other people who will receive trust property in your will.
3. Find your current will, if you have one.
4. If you are or have been married, gather any important documents regarding property ownership in your marriage. These documents may include a marital agreement, agreement in a divorce settlement, or trust documents.
5. Gather any important documents regarding your family. These documents may include adoption papers or guardianship papers.
6. Gather your financial records. It will be helpful for you to have a list of your financial accounts and balances or to have recent statements from your bank accounts, investment accounts, retirement accounts, and any other accounts.
7. Think about beneficiaries. Do you know who is listed as beneficiary on your life insurance policies, investment accounts, and any other accounts? These beneficiaries may need to be updated as part of your estate plan.
8. Gather any documents regarding your interest in a business.
9. Gather any documents regarding your interest in real property. These documents may include a land assignment, lease agreement, mortgage contract, deed, surveyor map, or probate order.
10. Gather information on your trust property. These documents may include a recent statement of your Individual Indian Money (IIM) account, a probate order, or an inventory of your interests in trust land from the BIA. If you do not already have a current inventory of your interests in trust land and a statement of your IIM account, now is a good time to make a written request for these documents through your local BIA office.

Things to think about as you gather documents:

1. Would you like to make gifts of property now, or would you like your property to be distributed only after you have passed on? A Will passes property after you have passed on, but you can transfer property today in a number of different ways. If you are unsure, you can talk to the person who is helping you with your estate plan about this.
2. Do you want to make any gifts of specific property under your Will? If so, start making a list of these gifts and the recipients.
3. Who will receive your interests in trust land? If you are unsure, you can talk to the person who is helping you about ways that you can encourage productive use of your trust land through your estate plan.
4. If the unfortunate occurs, and the person to whom you made a gift in your Will is not living at the time of your death, what would you like to happen to that gift? Think about alternate recipients for any gift that you make under your Will.
5. Do you have minor children? You can appoint a guardian for your minor children in your Will and you can protect property that would pass to a minor child by including a trust in your Will. Whom would you want to take care of your minor children?
6. Whom would you like to be the Executor, or Personal Representative, of your estate? This person is responsible for working with the probate court to gather and distribute your property according to the instructions in your Will.
7. Have you thought about who will help take care of your finances and make decisions regarding your health care if ever you need help? Documents such as a power of attorney and a living will can help protect your wishes by putting them in writing and by nominating a trustworthy person to help you with your affairs. Is there anyone whom you would trust to make decisions for you if ever you are not able to make them alone?

QUESTIONS AND NOTES:
