



HO-CHUNK NATION CODE (HCC)
TITLE 8 – HOUSING, REAL ESTATE AND PROPERTY CODE
SECTION 13 – PROBATE CODE FOR NON-TRUST PROPERTY

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CHAPTER I GENERAL PROVISIONS

1. Authority.

a. Article V, Section 2(a) of the Ho-Chunk Nation Constitution (“Constitution”) grants the Legislature the power to make laws, including codes, ordinances, resolutions, and statutes.

b. Article V, Section 2(l) of the Constitution grants the Legislature the power to enact laws to manage, lease, permit, or otherwise deal with the Nation’s Lands, interests in Lands or other assets.

c. Article V, Section 2(p) of the Constitution grants the Legislature the power to create and regulate a system of Property including but not limited to use, Title, Deed, Estate, Inheritance, Transfer, Conveyance, and Devise.

d. Article V, Section 2(r) of the Constitution grants the Legislature the power to protect and foster Ho-Chunk religious freedom, culture, language, and traditions.

e. Article V, Section 2(u) of the Constitution grants the Legislature the power to enact laws to regulate domestic relations of persons within the jurisdiction of the Nation.

2. Findings, Applicability, Purpose, Objectives and Restrictions.

a. Findings.

(1) The Ho-Chunk Nation Legislature finds that creating a Probate procedure in the Ho-Chunk Nation Judiciary is in the best interest of tribal members. Probate matters may be concluded more economically and quickly in the Ho-Chunk Nation Judiciary than in other government’s Courts.

(2) Further, when a person passes it is up to the Nation to determine how his or her property is handled. Handling these matters is an important aspect of the Nation’s sovereignty.

(3) Findings with respect to American Indian Probate Reform Act of 2004, 25 U.S.C. 2201 et seq., (“AIPRA”):

(a) Prior to the effective date of AIPRA, the descent and distribution of interests in trust and restricted assets were governed by the intestate succession law of the state where the property was located. AIPRA provides for the first time a federal probate code that governs the passing of trust and restricted assets.

(b) On June 20, 2006, AIPRA became effective. AIPRA is a federal law passed by Congress in 2004 that overhauls the federal probate process for Indian trust property. It creates a federal Probate code that can be replaced by an approved Tribal probate code, which shall govern the intestate succession of trust assets in federal probate.

(c) AIPRA provides that:

1. The probating of trust property, including an Individual Indian Money Account (hereinafter IIM Account), is handled by the Office of Hearings and Appeals, which is a federal agency under the Department of the Interior.

a. If the *Probate Code for Trust and Restricted Property* (8 HCC § 12) is approved by the Secretary of the Interior, upon becoming effective it shall be applied by the Office of Hearings and Appeals during the probate process to determine what will happen to a Ho-Chunk Nation Member's trust interests.

b. The United States Department of the Interior Administrative Law Judges or others hearing probates of trust and restricted property subject to the *Probate Code for Trust or Restricted Property* (8 HCC § 12) shall apply the provisions of the *Probate Code for Trust or Restricted Property* (8 HCC § 12) to the maximum extent permitted by AIPRA and other federal laws and regulations.

2. All Non-Trust Property (including, but not limited to, a house, car, personal items and Native American finery and artifacts) must be probated through state courts or the Ho-Chunk Nation Judiciary. In exercising its sovereignty the Ho-Chunk Nation wishes to maximize the probating of non-trust property by the Ho-Chunk Nation Judiciary instead of state courts. To accomplish this goal it has created and passed this *Probate Code for Non-Trust Property* (8 HCC § 13).

b. **Applicability.** The Nation's *Probate Code for Trust or Restricted Land* (8 HCC § 12) and the *Probate Code for Non-Trust Property* (8 HCC § 13) shall be applicable in the following instances:

(1) The *Probate Code for Trust or Restricted Property* (8 HCC § 12) shall only be applicable to:

(a) govern the descent and distribution of trust and restricted lands within:

(1) the Nation's reservation; or

(2) otherwise subject to its jurisdiction.

(b) govern the descent and distribution of money contained within IIM accounts or other trust personalty.

(2) This *Probate Code for Non-Trust Property* (8 HCC § 13) shall be applicable to all other Probate matters.

c. Purpose. Both the *Probate Codes for Trust or Restricted Property* (8 HCC § 12) and this *Probate Code for Non-Trust Property* (8 HCC § 13) will provide for the exercise of the greatest possible tribal jurisdiction over:

(1) the probate of the estate of decedents who were domiciled or owned real or personal property on the Ho-Chunk Nation tribal trust and restricted lands.

(2) the probate of the estate for fee-simple properties that are owned by tribal members when the tribal member received a mortgage through the Ho-Chunk Nation's *Housing for the General Welfare of Veterans, Elders and Non-Elders Act* (8 HCC § 5).

(3) the probate of the estate of tribal members who were domiciled or owned real or personal property on non-Ho-Chunk Nation lands.

d. Objectives. This *Probate Code for Non-Trust Property* (8 HCC § 13) shall be liberally construed and applied to meet the following objectives:

(1) To comply with Ho-Chunk tribal custom and tradition.

(2) To ensure that the property of a deceased person is given to the rightful heirs or beneficiaries.

(3) To comply with the decedent's wishes.

(4) To provide a simple, efficient and inexpensive method for probating a decedent's property.

(5) To prevent the transfer of land out of tribal ownership and control.

(6) To ensure that the rights of creditors of Decedents are.

(7) To ensure consistency with Ho-Chunk custom and tradition, as much as possible to discourage disagreements over a decedent's property.

(8) To promote and further the Nation's inherent right of self-governance.

(9) To encourage the Trial Court to consult with the Traditional Court as much as possible whenever a question of custom or tradition arises in handling Probate matters.

e. Restrictions. Pursuant to 25 U.S.C. § 2205(a)(3) neither *Probate Code for Trust or Restricted Property* (8 HCC § 12) or the *Probate Code for Non-Trust Property* (8 HCC § 13) shall prohibit the gift of property by will ("devise") of an interest in trust or restricted Land to:

(1) an Indian lineal descendent of the original allottee; or

(2) an Indian who is not a member of the Nation over such an interest; unless the Code provides for:

(a) the renouncing of interests to eligible devisees in accordance with the Code;

(b) the opportunity for a devisee who is the spouse or lineal descendent of a testator to reserve a life estate without regard to waste; and

(c) payment of fair market value in the manner prescribed under 25 U.S.C. § 2205(c)(2).

3. **Definitions.** As used in this *Probate Code for Non-Trust Property* (8 HCC § 13), unless the context otherwise requires, the following terms shall have the meaning as indicated:

a. "Abatement" means a reduction or decrease.

b. "Absent Member" means a member of the Ho-Chunk Nation who, for a period of at least one (1) year, ~~has not cashed a per capita distribution check, whose per capita distribution check is returned undeliverable, or the member~~ has not completed an annual address verification form and whose absence is unexplained.

c. "Adopted Person" is the child of an adopting parent and of the natural parents for inheritance purposes only. The adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and that natural parent.

d. "Adoption" means the legal process pursuant to statute in which a child's legal rights and duties toward his or her natural parents are terminated and similar rights and duties toward his or her adoptive parents are substituted. Adoption also means the formal process of taking into one's family the child of another and giving the child the rights, privileges, and duties of a child and heir. This legal definition of adoption does not include the customary adoption traditionally practiced by members of the Nation.

e. "Beneficiary" means any person for whose benefit property is held in trust.

f. "BIA" means the Bureau of Indian Affairs within the United States Department of the Interior.

g. "Bond" means an obligation to pay a sum of money upon the happening of a stated event or "Children" for purposes of this *Probate Code for Non-Trust Property* (8 HCC § 13), includes any formally adopted child.

i. "Class Gift" means a devise or gift to a body of people, uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal, or other definite proportions, the share of each being dependent for its amount upon the ultimate number of people in the class. (Example: "I leave ten-thousand dollars (\$10,000.00) to my grandchildren." In the example, the decedent's grandchildren constitute a class of people which may grow over time, but will be a certain number upon the passing of the decedent.)

j. "Codicil" means a supplement or an addition to a will; it may explain, modify, add to, subtract from, qualify, alter, restrain or revoke provisions in an existing will. A codicil does not purport to dispose of the entire estate or to contain the entire Will of the Testator, nor does it ordinarily expressly or by implication revoke an entire prior Will.

k. "Consolidation Agreement" means a written agreement under the provisions of 25 U.S.C. §2206(e) or 25 U.S.C. §2206(j)(9), by which a decedent's heirs and devisees consolidate interests in trust or restricted land, entered during the probate process, approved by the judge, and implemented by the probate order.

l. "Conveyance" means the transfer of legal title to property from one person, or a class of person, to another person by deed. This term may also include assignment, lease, mortgage or encumbrance of land.

m. "Court" means the Trial Court of the Ho-Chunk Nation.

n. "Decedent" means a person who is deceased.

o. "Deed" means a conveyance of realty by a writing signed by a grantor, whereby title to realty is Transferred from one to another.

p. "Department" means the United States Department of the Interior.

q. "Devise" means a gift or distribution of a gift of property by will.

r. "Devisee" means a person or entity that receives property under a will.

t. "Disinterested" means a person who has neither an interest directly or indirectly in the cause or matter at issue nor will a spouse or any relative of the person benefit in any way directly or indirectly, and who is lawfully competent to testify.

u. "Distributee" means any person to whom property of a decedent is distributed other than in payment of a claim, or who is entitled to property of a decedent under his or her will or the laws governing intestate succession.

v. "Domicile" means the place where a person has his or her true, fixed and permanent home and principal establishment. In addition, whenever the person is absent he or she intends to return to the permanent home.

x. "Eligible Heirs" means, for purposes of Article 2 Part 1 (25 U.S.C. §2206), any of a decedent's children, grandchildren, great-grandchildren, full siblings, half siblings by blood, and parents who are:

(1) Indian; or

(2) Lineal descendants within two degrees of consanguinity of an Indian; or

(3) Owners of a trust or restricted interest in a parcel of Land for purposes of inheriting by descent, renunciation, or Consolidation Agreement under Article 2 Part 1 of this code or 25 U.S.C. §2206, another trust or restricted interest in such parcel from the Decedent.

y. "Estate" means the land and property not attached to real estate owned by the decedent at the time of death.

z. "Fraud" means an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or her or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he or she shall act upon it to his or her injury.

aa. "Guardian" means a person empowered by the law to care for another whom, by virtue of age or lack of mental capacity or other reason is legally unable to care for himself or herself. Guardianship may also involve the duty to manage the estate of a child or incompetent person.

bb. "Heir" means any individual or entity eligible to receive Land and Personal Property from a Decedent in an Intestate proceeding.

cc. "Heirs of the first or second degree" means parents, children, grandchildren, grandparents, brothers and sisters of a decedent.

ee. "Incompetent" means a ward or person who is recognized by a court of law to be substantially incapable of managing his or her property or caring for himself or herself by reason of infirmities of aging, developmental disabilities, or other like incapacities. Physical disability without mental incapacity is not sufficient to establish incompetence.

ff. "Indian" means:

(1) Any person who is a member of a federally recognized Indian Tribe, is eligible to become a member of any federally recognized Indian Tribe, or is an owner (as of October 27, 2004) of an interest in trust or restricted Land;

(2) Any person meeting the definition of Indian under 25 U.S.C. §479; and the regulations promulgated thereunder; and

(3) With respect to the inheritance and ownership of trust or restricted land in the State of California under 25 U.S.C. §2206, any person described in Section 4, subparagraph kk. (1) or (2) of this definition or any person who owns a trust or restricted interest in a parcel of land in that State.

gg. "Indian Tribe" or "Tribe" means any Indian Tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds land in trust.

hh. "Individual Indian Money" or "IIM" account means an interest-bearing account for trust funds held by the Secretary that belong to a person who has an interest in trust assets. These accounts are under the control and management of the Secretary. The accounts contain money collected from various sources including but not limited to leases, Per Capita funds, minerals, timber or sales, from land in which Indians own interests. The money in a person's IIM account will retain trust status if it passes to eligible heirs. Eligible heirs are children, grandchildren, great grandchildren, full brothers and sisters, half brothers and sisters, and parents as long as they are Indian or lineal descendants within two degrees of an Indian. If any heirs are not eligible to hold an IIM account in trust, the Office of the Special Trustee will distribute the money from the IIM account to them and must arrange for the money to be deposited in a private non-trust bank account.

ii. "Inheritance" means property received from another under the laws of intestacy.

jj. "Interested Witness" means any of the following:

(1) Any devisee, beneficiary, or grantee of any document offered for probate to which they also served as a witness on the same;

(2) A person named as personal representative in any document offered for probate as the will of the decedent; or

(3) Any additional persons as the Trial Court may include.

kk. "Intestate" means the decedent died without a valid will.

ll. "Intestate Succession" means the succession of property of a decedent who passes without a will or with a will that has certain provisions which are not valid, *i.e.* no longer alive or available.

mm. "Issue" when used to refer to persons who take by intestate succession, means children, grandchildren, and lineal descendants of more remote degree, except those who are the lineal descendants of living descendants. The term includes legally adopted children and non-marital children and his or her issue. In the case of a non-marital child

for the father of the issue, paternity must be legally established prior to the passage of the father.

nn. "Land" means any real property and includes within its meaning for purposes of this *Probate Code for Non-Trust Property* (8 HCC § 13) improvements permanently affixed to real property.

oo. "Letters Testamentary" means the formal document of authority and appointment given to a personal representative by the Court, empowering him or her to fulfill his or her duties as required by his or her position as a personal representative.

pp. "Life Estate" means an interest in real or personal property that is limited in duration to the lifetime of its owner or some other designated person or persons or measurable period of time.

qq. "Living Will" means a document in which a person sets forth directions regarding medical treatment to be given if he or she becomes unable to participate in decisions regarding his or her medical care.

rr. "Member" means an enrolled member of the Ho-Chunk Nation pursuant to the Constitution of the Ho-Chunk Nation and Ho-Chunk Nation *Tribal Enrollment and Membership Code* (2 HCC §7).

ss. "Minor" means an individual who has not reached the age of majority as defined by the applicable law. For all trust and restricted property, the age of majority is eighteen (18) years of age.

tt. "Nation" means the Ho-Chunk Nation.

uu. "Passes" or "Passed" means dies or has died.

vv. "Per Capita" means the Nation's distribution of net gaming revenue to members under the Indian Gaming Regulatory Act (25 U.S.C. § 2710(b)(3)) and pursuant to the Ho-Chunk Nation's *Per Capita Distribution Ordinance* (2 HCC §12).

ww. "Personal Property" means all property, other than Real Property, not including trust personal property (trust personalty).

xx. "Personal Representative" means that person or entity appointed to oversee the probate process and ensure the decedent's estate is settled appropriately. It may be the person named by a testator in his or her will; however, the court ultimately determines who will be appointed as personal representative of the decedent's estate by granting letters testamentary to administer the estate. The term personal representative as used in this *Probate Code for Non-Trust Property* (8 HCC § 13) includes both the terms administrator and executor, which may be used in other jurisdictions.

yy. "Presumptive Death" means that an absent member is presumed to have passed from proof of a six (6) year continued unexplained absence after being declared an "absent member" (see absent member definition) by the Office of Tribal Enrollment and during which absence the absent member is unheard from. The presumption is that duration of life ceases at the expiration of six (6) years from the time the tribal member was declared an absent member and after the lapse of the six (6) years there is a presumption of death.

zz. "Probate" means the legal process by which applicable tribal, federal, or state law that affects the distribution of a decedent's estate is applied to:

- (1) Determine the heirs;
- (2) Determine the devisees and validity of wills;
- (3) Determine whether claims against the estate will be paid from trust funds; and
- (4) Order the transfer of any trust or restricted land or trust personal property (trust personalty) to the heirs, devisees, or other persons or entities entitled by law to receive the funds or land.

aaa. "Property" means any interest, legal or equitable in real or personal property.

bbb. "Purchase option at probate" refers to the process by which eligible purchasers can purchase a decedent's interest during the probate proceeding.

ccc. "Real Property" or "Land" means all interest in land or in buildings or improvement permanently attached to land.

ddd. "Remainder" means the part of decedent's estate that remains after all specific bequests have been satisfied.

eee. "Renounce" means to make an affirmative legal declaration of abandonment. A waiver of rights.

fff. "Residue" means the surplus or left over part of a testator's estate remaining after all the debts and distributions have been completed.

ggg. "Restricted property" means real property, the title to which is held by an Indian but which cannot be alienated or encumbered without the consent of the Secretary. For the purposes of probate proceedings, restricted property is treated as if it were trust property.

hhh. "Secretary" means the Secretary of the Interior or an authorized representative. The authorized representative of the Secretary for the performance of probate functions is

BIA. The authorized representative of the Secretary for adjudication of probate for trust and restricted interests is the Office of Hearings and Appeals.

iii. "Take by Representation" means the principle upon which the issue of a decedent takes or inherits the share of an Estate which the decedent would have taken or inherited, if living.

jjj. "Testate" means that the decedent executed a valid will.

kkk. "Testator" means a person who has executed a valid will.

lll. "Title" means the formal rights of ownership of property. Title is the means whereby the owner of lands and property has the just possession of his or her property.

mmm. "Transfer" means an act of the parties, or of the law, by which the title to property is conveyed from one person to another.

nnn. "Traditional Court" means pursuant to the Constitution of the Ho-Chunk Nation, Article VII, Section 1, "a forum of special jurisdiction for traditional dispute resolution." The Traditional Court is a court of special jurisdiction within the Ho-Chunk Nation Judiciary which handles matters related to custom and tradition of the Ho-Chunk Nation.

ooo. "Trial Court" means the Ho-Chunk Nation Trial Court. Pursuant to the Constitution of the Ho-Chunk Nation, Article VII, the Trial Court is one of the constitutionally mandated Courts within the Ho-Chunk Nation Judiciary.

ppp. "Trust or Restricted Lands" and "Trust or Restricted Interest" means lands or interests in lands within the jurisdiction of the Ho-Chunk Nation, Title to which is held by the United States in trust for the Nation or an individual, or which is held by the Ho-Chunk Nation or individual subject to a restriction by the United States against alienation.

qqq. "Trust Personal Property" or "Trust Personalty" means all funds and securities of any kind that are held in trust in an IIM account or otherwise owned in trust by the United States for the benefit of an individual Indian. Throughout this Probate Code for Non-Trust Property (8 HCC § 13) whenever the term "Trust Personal Property" is used for legal purposes it shall mean "Trust Personalty" and vice versa.

rrr. "Trust property" means real or personal property, or an interest therein, for which the United States holds the title to the property in trust for the benefit of an individual Indian or Tribe.

sss. "Waste" means the destruction or material alteration or deterioration of the life estate, or of the improvements forming a material part thereof, by the life estate holder.

ttt. "Will" means a written document executed with the required formalities and intended to facilitate the passage of the testator's property upon death.

uuu. "Without Regard to Waste" means, with respect to a life estate interest in land, that the holder of such state is entitled to the receipt of all income, including bonuses and royalties, from such land to the exclusion of the person or organization who is to receive the remaining interest in a property or estate after prior interests have been satisfied (the remainderman).

CHAPTER II DESCENT AND DISTRIBUTION OF PROPERTY

4. **Descent and Distribution of Trust and Restricted Land.** The descent and distribution of trust and restricted land shall solely be controlled by the Ho-Chunk Nation *Probate Code for Trust or Restricted Property* (8 HCC § 12).

5. **Descent and Distribution of Non-Trust Property.** The descent and distribution of non-trust property shall solely be controlled by the Ho-Chunk Nation *Probate Code for Non-Trust Property* (8 HCC § 13).

6. **Trust Personal Property.** The descent and distribution of IIM accounts or any other trust personal property (trust personalty) shall solely be controlled by the Ho-Chunk Nation *Probate Code for Trust or Restricted Property* (8 HCC § 12).

CHAPTER III ACTS OF INDEPENDENT SIGNIFICANCE

7. **Renunciation or Disclaimer of Interests.** A person (or his or her personal representative) who is an Heir, Devisee, person succeeding to a renounced interest, beneficiary under a testamentary instrument or person designated to take pursuant to a power of appointment exercised by a testamentary instrument, may renounce in whole or in part the succession to any property or interest therein by filing a written instrument with the Ho-Chunk Nation Trial Court at any time before the distribution of the estate after the decedent's passing or the time at which it is determined that the person is entitled to take property if such is not known at the time of passing. No interest so renounced or disclaimed shall be considered to have vested in the renouncing or disclaiming heir or devisee, and the renunciation or disclaimer shall not be considered to be a transfer or gift of the renounced or disclaimed interest.

a. **Non-Trust Property.** There shall be no restrictions in renunciation of non-trust property.

b. **Trust Property.** The renunciation of trust property shall be controlled by the Ho-Chunk Nation *Probate Code for Trust or Restricted Property* (8 HCC § 12).

c. **Acceptance of Interest.** A renunciation or disclaimer of an interest filed in accordance with this Section shall be considered accepted when implemented in a final order by the Ho-Chunk Nation Trial Court, and shall thereafter be irrevocable. No renunciation or disclaimer of an interest shall be included in such order unless the recipient of the interest has been given notice of the renunciation or disclaimer and has not refused to accept the interest. All disclaimers and renunciations filed and implemented in probate orders made effective prior to date of enactment and effective dates of both the *Probate Code for Trust or Restricted Property* (8 HCC § 12) and the *Probate Code for Non-Trust Property* (8 HCC § 13) are hereby ratified.

d. **Rules of Construction.** Nothing in this Section shall be construed to allow the renunciation of an interest that is subject to the provisions of Section 28 in favor of more than one (1) person.

e. Upon proper renouncement, the interest renounced passes as if the renouncing person had predeceased the Decedent or recipient of a gift (donee).

f. Instruments for renunciation shall conform to the following:

- (1) It shall describe the Property or part thereof or interest therein renounced.
- (2) It shall be signed by the person renouncing.
- (3) It shall declare the renunciation and the extent thereof.
- (4) It shall state that the renunciation is irrevocable.
- (5) It shall be dated and properly notarized.

8. Effect of Divorce, Annulment and Decree of Separation.

a. Surviving Spouse.

(1) An individual who is divorced from a decedent, or whose marriage to the decedent has been annulled, shall not be considered to be a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death of the decedent.

(2) **Separation.** A decree of separation that does not dissolve a marriage, and terminates the status of husband and wife, shall not be considered a divorce or annulment for the purpose of this Section.

(3) Nothing in Section 8, subparagraph a. (1), above, shall prevent the Ho-Chunk Nation Trial Court from giving effect to a non-trust property right settlement if one (1) of

the parties to the settlement dies before the issuance of a final decree dissolving the marriage of the parties to the property settlement.

b. Subsequent Divorce.

(1) If, after executing a will, a testator is divorced or the marriage of the testator is annulled, as of the effective date of the divorce or annulment, any disposition of non-trust property made by the will to the former spouse of the testator shall be considered to be revoked unless the will expressly provides otherwise.

(2) Property that is prevented from passing to a former spouse of a decedent under Section 8, subparagraph a. (1) or b. (1), above, shall pass as if the former spouse failed to survive the decedent.

(3) Any provision of a will that is considered to be revoked solely by operation of this Section 8, subparagraph b shall be revived by the remarriage of a testator to the former spouse of the testator.

9. Heirship by Killing. For purposes of this Section the term “heir by killing” shall mean any person, who knowingly participates, either as a principal or as an accessory before the fact, in the willful and unlawful killing of the decedent:

a. No heir by killing shall in any way acquire any non-trust property as the result of the death of the decedent, but such property shall pass in accordance with this Section.

b. The heir by killing shall be deemed to have predeceased the decedent as to decedent's non-trust property which would have passed from the decedent or his or her estate to such heir:

- (1) under intestate succession under Chapter V; unless otherwise provided for;
- (2) as the surviving spouse;
- (3) by devise;
- (4) as a reversion or a vested remainder;
- (5) as a survivorship interest; and
- (6) as a contingent remainder or executory or other future interest.

c. Joint Tenants, Joint Owners, and Joint Obligees.

(1) Any non-trust property held by only the heir by killing and the decedent as joint tenants, joint owners, or joint obligees shall pass upon the death of the decedent to his or her estate, as if the heir by killing had predeceased the decedent.

(2) As to non-trust property held jointly by three (3) or more persons, including both the heir by killing and the decedent, any income which would have accrued to the heir by killing as a result of the death of the decedent shall pass to the estate of the decedent as if the heir by killing had predeceased the decedent and any surviving joint tenants.

(3) Notwithstanding any other provision of this Section, the decedent's non-trust property that is held in a joint tenancy with the right of survivorship shall be severed from the joint tenancy as though the property held in the joint tenancy were to be severed and distributed equally among the joint tenants and the decedent's interest shall pass to his or her estate; the remainder of the interests shall remain in joint tenancy with the right of survivorship among the surviving joint tenants.

d. Life Estate for the Life of Another. If the estate is held by a third (3rd) person whose possession expires upon the passing of the decedent, it shall remain in such person's hands for the period of time following the decedent's passing equal to the life expectancy of the decedent but for the killing.

e. Preadjudication Rule.

(1) If a person has been charged, whether by indictment, information, or otherwise by the United States, a Tribe, or any state, with voluntary manslaughter or homicide in connection with a decedent's death, then any and all non-trust property that would otherwise pass to that person from the decedent's estate shall not pass or be distributed by the Ho-Chunk Nation Trial Court until the charges have been resolved.

(2) Upon dismissal or withdrawal of the charge, or upon a verdict of not guilty, such land and personal property shall pass as if no charge had been filed or made.

(3) Upon conviction of such person, and the exhaustion of all appeals, if any, the non-trust property in the estate shall pass in accordance with this Section.

f. Broad Construction. This Section shall not be considered penal in nature, but shall be construed broadly in order to affect the policy that no person shall be allowed to profit by his or her own wrong doing, wherever committed.

10. Simultaneous Passing Provisions.

a. Where the title to property covered under this *Probate Code for Non-Trust Property* (8 HCC § 13) or the passage or transfer from one (1) person to another thereof depends upon priority of passing and there is not sufficient evidence that the persons have died other than simultaneously, the property of each person shall be disposed of as if they had survived except where provided otherwise in this *Probate Code for Non-Trust Property* (8 HCC § 13).

b. Where two (2) or more beneficiaries are designated to take successively by reason of survivorship under another person's disposition of property and there is not sufficient evidence that these beneficiaries have died otherwise than simultaneously the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries and these portions shall be distributed in the proportion that the beneficiary bears to the decedent or decedents.

c. Where there is not sufficient evidence that two (2) joint tenants or tenants by the entirety have died otherwise than simultaneously, the property so held shall be distributed one-half (½) as if one (1) had survived and one-half (½) as if the other had survived. If there are more than two (2) joint tenants and all of them have so died, the property thus shall be distributed in the proportion that one (1) bears to the whole number of joint tenants.

d. Where the insured and the beneficiary in a policy of life or accident insurance have died and there is not sufficient evidence that they have died otherwise than simultaneously, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.

e. The above provisions on simultaneous passing shall not apply in cases where the decedent has made provisions for a different distribution in a will, trust, deed, contract or insurance policy.

CHAPTER IV

WILLS

11. **Who May Make a Will.** Any person eighteen (18) or more years of age and who is of sound mind (possessing testamentary capacity) who has any right, title, or interest in non-trust property, may dispose of non-trust property by will.

12. **Execution.** Except as otherwise provided for in the oral wills (Section 14) or the holographic wills (Section 13) section, every will shall be put in writing and dated and signed by the testator, or in the testator's presence and at the testator's direction signed by another person, and shall be signed by at least two (2) persons who shall serve as witnesses. Each of the witnesses shall either have witnessed the signing by the testator of the will or the testator's acknowledgment of the signature and direction to do so. The two (2) witnesses must each be:

(a) eighteen (18) or more years of age;

(b) of sound mind; and

(c) Disinterested.

13. Handwritten (Holographic) Will. For purposes of this Section the term “Holographic Will” means a will that is entirely written and signed by the testator in his or her own handwriting:

(a) The provisions of Section 15 allowing for the creation of a handwritten will shall not be as personal property.

(b) A will that does not comply with Section 14 is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

(c) Intent that the document constitutes the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting.

14. Oral Will.

a. The provisions of Section 14 allowing for the creation of an oral will shall not be applicable for a will any portion of which devises trust or restricted property or trust personal property.

b. A will which does not comply with Section 14 is valid under custom if:

(1) All children, whether residing in testator's home or not, and testator's spouse, if alive, are present at the announcement of the oral will and agree that the testator orally made known the testator's last will before them; or

(2) The will is made in the presence of two (2) competent disinterested adult persons by a testator who declares at the time that it is his or her wish that his or her property descend in a specific manner upon the event of the testator's passing. The court shall hear testimony as to whether or not the oral will as declared by the two (2) competent disinterested adult persons represents the testator's expressed intent. The testimony shall come from the two (2) competent disinterested adult persons who heard such declaration and the Ho-Chunk Nation Trial Court shall decide the following:

(a) Whether such testimony is credible; and

(b) Whether the manner of disposition of testator's property is reasonable and customary.

15. Self-Proved Will.

a. A will may remove some of the formalities of proof by complying with this section of the *Probate Code for Non-Trust Property* (8 HCC § 13) and shall be considered a self-proved will. Unless contested, a self-proved will may be admitted to probate without testimony of the two (2) disinterested witnesses.

b. A will witnessed by two (2) disinterested witnesses may be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before a notary public, under official seal, attached or annexed to the will in form and content.

(1) A testator's affidavit must contain substantially the following content:

Ho-Chunk Nation citizen located in
State of _____
County of _____

I, _____, swear or affirm under penalty of perjury that, on the ___ day of _____, 20____, I requested _____ and _____ to act as witnesses to my will; that I declared to them that the document was my last will; that I signed the will in the presence of both witnesses; that they signed the will as witnesses in my presence and in the presence of each other; that the will was read and explained to me (or read by me), after being prepared and before I signed it, and it clearly and accurately expresses my wishes; and that I willingly made and executed the will as my free and voluntary act for the purposes expressed in the will.

TESTATOR

Tribal Enrollment Number

Subscribed, sworn to and acknowledged before me by the testator, and subscribed and sworn to before me by _____ and _____ witnesses, this _____ day of _____ 20 ____.

SIGNED BY NOTARY

(2) Each attesting witness's affidavit must contain substantially the following content:

We, _____ and _____, swear or affirm under penalty of perjury that on the ___ day of _____, 20____, _____ of the State of _____, published and declared the attached document to be his/her last will, signed the will in the presence of both of us, and requested both of us to sign the will as witnesses; that we, in compliance with his/her request, signed the will as witnesses in his/her presence and in the presence of each other; and that the Testator was not acting under duress, menace, fraud, or undue influence of any person, so far as we could determine, and in our opinion was mentally capable of disposing of all his/her estate by will.

WITNESS

Address

Date

WITNESS Address Date

Subscribed, sworn to and acknowledged before me by the testator, and
subscribed and sworn to before me by _____ and
_____ witnesses, this ____ day of _____
20 ____.

SIGNED BY NOTARY

16. Who May Witness.

a. Any person eighteen (18) or more years of age who, at the time of execution of the will, would be competent to testify as a witness in court to the facts relating to execution, may act as a witness to the will. Subsequent incompetency of a witness is not a ground for denial of probate if the execution of the will is otherwise satisfactorily proved.

b. A will is not invalidated because signed by an interested witness; but, unless the will is also signed by two (2) disinterested witnesses, any beneficial provisions of the will for a witness or the witness' spouse are invalid to the extent that such provisions in the aggregate exceed in value what the witness or spouse would have received had the testator died intestate. Valuation is to be made as of testator's passing.

17. Choice of Law as to Execution.

a. For non-trust property, a written will is valid if executed in compliance with this *Probate Code for Non-Trust Property* (8 HCC § 13) or if its execution complies with the law at the time of execution in the place where the will is executed, or of the law of the place where at the time of execution or at the time of passing of the testator is domiciled or has a place of abode.

b. For a will any section of which devises trust property or restricted land or trust personal property (trust personality), a written will is valid if executed in compliance with the *Probate Code for Trust or Restricted Property* (8 HCC § 12) and in addition shall comply with all the lawful requirements of American Indian Probate Reform Act, 25 U.S.C. §2201 et seq., and applicable federal regulations including 43 CFR §4.201 et seq., 43 CFR Part 30 et. seq. and 25 CFR Part 15 et. seq. presently enacted or hereafter amended.

18. Revocation by Writing or by Act. A will or any part thereof is revoked by either of the following:

a. By a subsequent valid will, codicil, or other instrument which revokes the prior will in whole or in part, expressly or by inconsistency.

b. By being burned, torn, canceled, obliterated, or destroyed with the intent and for the purpose of revoking it by the testator or by another person in the testator's presence and at the testator's direction.

19. Revocation by Divorce; No Revocation by Other Changes of Circumstances.

a. If, after executing a will, the testator is divorced or the testator's marriage is annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse and any nomination of the former spouse as personal representative, trustee, conservator, or guardian, unless the will expressly provides otherwise.

b. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section.

c. No change of circumstances other than as described in this section or Section 20 revokes a will.

20. Revival of Revoked Will.

a. If a subsequent will that partly revoked a previous will is itself revoked by a revocatory act under Section 18, the revoked part of the previous will is revived. This section does not apply if it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator did not intend the revoked part of the previous will to take effect as executed.

b. If a subsequent will that wholly revoked a previous will is itself revoked by a revocatory act under Section 18, the previous will remains revoked unless it is revived. The previous will is revived if it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declaration that the testator intended the previous will to take effect as executed.

21. Incorporation by Reference. Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

22. Events of Independent Significance. A will may dispose of property by reference to acts and events which have significance apart from the disposition made by the will. These events of independent significance may occur before or after the execution of the will or before or after the testator's passing. The execution or revocation of a will of another person is such an event.

23. Rules of Construction and Intention.

a. The intention of a testator as expressed in the testator's will controls the legal effect of the testator's dispositions.

b. The following rules of construction apply unless a contrary intent is clear in the will:

(1) **All Property and After-acquired Property.** A will is construed to pass all property which the testator owns at his or her passing including property acquired after the execution of his or her will.

(2) **Devisee Must Survive Testator by One-Hundred and Twenty (120) Hours.** A devisee who does not survive the testator by one-hundred and twenty (120) hours is treated as if he or she predeceased the testator, unless the will of the decedent contains such language dealing explicitly with a simultaneous passing, including common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will.

(3) **Failure of Testamentary Provision.** If a devise other than a residuary devise fails for any reason, it becomes part of the residual estate. If the residual estate is devised to two (2) or more persons and the share of one (1) of the residuary devisees fails for any reason, his or her share passes to the other residuary devisees, or to other residuary devisees in proportion to his or her interests in the residue.

(4) **Class Gifts.** One (1) who would have been a devisee under a class gift if he or she had survived the testator is treated as a devisee for purposes of this section whether his or her passing occurred before or after the execution of the will.

(5) **Exercise of Power of Appointment.** A general residuary clause in a will, or a will making general disposition of all of the testator's property, does not exercise a power of appointment unless specific reference is made to that power.

(6) **Generic Terms.** A person who shares only one (1) parent in common with another person, adopted persons and persons born out of wedlock are included in class gifts terminology and terms of relationships in accordance with rules for determining relationships for purposes of intestate succession, but a person born out of wedlock is not treated as the child of the father unless paternity has been established during the life of the father. Determination of as to whether or not paternity has been established shall be controlled by the laws to establish the paternity of a child contained within Title 4 of the Ho-Chunk Nation Code.

(7) Property given during the lifetime of the testator will reduce the amount given through the will only if:

(a) The will provides for deduction of the lifetime gift; or

(b) The testator declares in a contemporaneous writing that the gift will reduce the amount given by the testator's will.

The value of the property shall be determined based on when the devisee comes into possession of the property.

c. Joint Tenancy; Right of Survivorship. If a testator devises a non-trust property interests in the same parcel of land to more than one (1) person, in the absence of clear and express language in the devise stating that the interest is to pass to the devisees as tenants in common, the devise shall be presumed to create a joint tenancy with the right of survivorship in the interests involved.

CHAPTER V

INTESTATE DISPOSITION

24. Intestate Succession.

a. If any part of an estate contains non-trust property and it is not effectively disposed of by a valid will, it shall pass to the decedent's heirs as prescribed in this Chapter.

b. If any part of an estate contains trust or restricted land or trust personalty and it is not effectively disposed of by a valid will, it shall pass to the decedent's heirs as prescribed in the *Probate Code for Trust or Restricted Property* (8 HCC § 13).

25. Descent and Distribution of Non-Trust Property.

a. **Surviving Spouse.** The non-trust property Intestate share of the surviving spouse shall be distributed as follows:

(1) If there is no surviving issue or parent of the decedent, the entire intestate estate.

(2) If there is no surviving issue, but the decedent is survived by a parent or parents, the first twenty thousand dollars (\$20,000.00), plus one-half (½) of the balance of the intestate estate.

(3) If there are surviving Issue all of whom are issue of the survived spouse also, the first twenty thousand dollars (\$20,000), plus one-half (½) of the balance of the intestate estate.

(4) If there are surviving issue one (1) or more of who are not issue of the surviving spouse, one-half (½) of the intestate estate.

b. Share of Heirs Other Than Surviving Spouse. The part of the non-trust intestate estate not passing to the surviving spouse or the entire intestate estate if there is no surviving spouse, shall be distributed as follows:

(1) To the Decedent's eldest child by date of the birth. If the eldest enrolled child predeceased the decedent or after his passing then to the next eldest child by date of birth then if the children are all deceased then distribution will be in accordance with Section 25, subparagraph b. (2).

(2) If the property does not pass under Section 25, subparagraph b. (1) of this section then to the Decedent's Father. If the Father has predeceased the Decedent then distribution will be in accordance with Section 25, subparagraph b. (3).

(3) If the property does not pass under Section 25, subparagraph b. (1) or (2) of this section then to the Decedent's Mother. If the Mother has predeceased the Decedent then distribution will be in accordance with Section 25, subparagraph b. (4).

(4) If the property does not pass under Section 25, subparagraph b. (1), (2) or (3) of this section then to the Decedent's paternal grandfather. If the paternal grandfather has predeceased the Decedent then distribution will be in accordance with Section 25, subparagraph b. (5).

(5) If the property does not pass under Section 25, subparagraph b. (1), (2), (3) or (4) of this section then to the Decedent's paternal grandmother. If the paternal grandmother has predeceased the Decedent then distribution will be in accordance with Section 25, subparagraph b. (6).

(6) If the property does not pass under Section 25, subparagraph b. (1), (2), (3), (4) or (5) of this section then to the Decedent's maternal grandfather. If the maternal grandfather has predeceased the Decedent then distribution will be in accordance with Section 25, subparagraph b. (7).

(7) If the property does not pass under Section 25, subparagraph b. (1), (2), (3), (4), (5) or (6) of this section then to the Decedent's maternal grandmother. If the maternal grandmother has predeceased the Decedent then distribution will be in accordance with Section 25, subparagraph b. (8).

(8) If the property does not pass under Section 25, subparagraph b. (1), (2), (3), (4), (5), (6) or (7) of this section then to the Decedent's eldest paternal sibling by date of the birth. If the eldest paternal sibling predeceased the decedent or after their passing then to the next eldest paternal sibling by date of birth then if the paternal siblings are all deceased then distribution will be in accordance with Section 25, subparagraph b. (9).

(9) If the property does not pass under Section 25, subparagraph b. (1), (2), (3), (4), (5), (6), (7) or (8) of this section then to the Decedent's eldest maternal sibling by date of the birth. If the eldest maternal sibling predeceased the decedent or after their

passing then to the next eldest maternal sibling by date of birth then if the siblings are all deceased then distribution will be in accordance with Section 25, subparagraph b. (10).

(10) If the property does not pass under Section 25, subparagraph b. (1), (2), (3), (4), (5), (6), (7), (8) or (9) of this section then to the Decedent's eldest grandchild by date of the birth. If the eldest grandchild predeceased the decedent or after their passing then to the next eldest grandchild by date of birth then if the grandchildren are all deceased then distribution will be in accordance with Section 25, subparagraph b. (11).

(11) If the property does not pass under Section 25, subparagraph b. (1), (2), (3), (4), (5), (6), (7), (8), (9) or (10) of this section then to the Decedent's eldest paternal cousin by date of the birth. If the eldest paternal cousin predeceased the decedent or after their passing then to the next eldest paternal cousin by date of birth then if the paternal cousins are all deceased then distribution will be in accordance with Section 25, subparagraph b. (12).

(12) If the property does not pass under Section 25, subparagraph b. (1), (2), (3), (4), (5), (6), (7), (8), (9), (10) or (11) of this section then to the Decedent's eldest maternal cousin by date of the birth. If the eldest maternal cousin predeceased the decedent or after their passing then to the next eldest maternal cousin by date of birth then if the maternal cousins are all deceased then distribution will be in accordance with Section 25, subparagraph b. (13).

(13) If the property does not pass under Section 25, subparagraph b. (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11) or (12) of this section then to the Decedent's eldest paternal cousin's child by date of the birth. If the eldest paternal cousin's child predeceased the decedent or after their passing then to the next eldest paternal cousin's child by date of birth then if the paternal cousins' children are all deceased then distribution will be in accordance with Section 25, subparagraph b. (14).

(14) If the property does not pass under Section 25, subparagraph b. (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12) or (13) of this section then to the Decedent's eldest maternal cousin's child by date of the birth. If the eldest maternal cousin's child predeceased the decedent or after their passing then to the next eldest maternal cousin's child by date of birth then if the maternal cousins' children are all deceased then distribution will be in accordance with Section 25, subparagraph b. (15).

(15) If the property does not pass under Section 25, subparagraph b. (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13) or (14) of this section then the property will pass to the Ho-Chunk Nation. Except that notwithstanding Section 25, subparagraph b. (15), an Indian co-owner (including the Ho-Chunk Nation referred to in Section 25, subparagraph b. (15)) of a parcel of trust or restricted land may acquire an interest that would otherwise descend under that paragraph by paying into the estate of the Decedent, before the close of the probate of the estate, the fair market value of the interest in the land; if more than one Indian co-owner offers to pay for such interest, the highest bidder shall acquire the interest.

26. **Small Fractional Interests in Trust or Restricted Land.** The descent and distribution of small fractional interests in trust or restricted land shall be controlled by the *Probate Code for Trust or Restricted Property* (8 HCC § 12).

27. **No Person to Acquire Intestate Estate/Intestate Estate Passes To Nation.** If there is no person who takes or acquires an estate or portion of the estate of the intestate estate, the intestate estate passes to the Nation.

28. **Right of Representation.** If, under this *Probate Code for Non-Trust Property* (8 HCC § 13), all or any part of the estate of a decedent is to pass to children of a deceased child by right of representation, that part is to be divided into as many equal shares as there are living children of the decedent and predeceased children who left issue who survive the decedent. Each living child of the decedent, if any, shall receive one (1) share, and the share of each predeceased child shall be divided equally among the pre-deceased child's children.

29. **Posthumous Persons.** A person conceived before the decedent's passing but born thereafter and who lives at least one-hundred and twenty (120) hours after birth inherits as if he or she had been born in the lifetime of the decedent.

30. **Kindred of a Person Who Shares Only One Parent in Common with Another Person; Stepchildren; Foster children.** A person who shares only one (1) parent in common with another person inherits the same share he or she would inherit if he or she were of the whole blood, but stepchildren and foster children and descendants of stepchildren or foster children do not inherit.

31. **Divorce.** A divorce(s) of husband and wife does not affect the right of a child(ren) to inherit the parent's property.

32. **Determination of Relationship of Parent and Child.** If for purpose of intestate succession a relationship of parent and child shall be established to determine succession by, through or from a person as follows:

a. An adopted person shall inherit from all other relatives of an adoptive parent as though the adopted person was the natural child of the adoptive parent and the relatives shall inherit from the adoptive parent's estate as if they were the adoptive parent's relatives.

b. A person born out of wedlock is a child of the mother and is a child of the father, if the relationship of parent and father has been legally established in accordance with the laws to establish the paternity of a child contained within Title 4 of the Ho-Chunk Nation Code.

33. Special Rule Relating to Survival. In the case of intestate succession under this Chapter, if established by clear and convincing evidence an individual fails to survive the decedent by at least one - hundred and twenty (120) hours:

a. the individual shall be deemed to have predeceased the decedent for the purpose of intestate succession; and

b. the heirs of the decedent shall be determined in accordance with this Chapter.

34. Advancements.

a. Non-Trust Property.

(1) If a person passes without a valid will, property which he or she gave in his or her lifetime shall only be reduced from heir's share of the estate if:

(a) The person who passed upon giving the property declared in a contemporaneous writing to treat the property as such; or

(b) The heir declares in a writing that the property should be treated as such.

(2) The value of the property shall be determined based on when the heir comes into possession of the property.

(3) If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue, unless the declaration or acknowledgment of the person who passed intestate provides otherwise.

b. Advancements of Trust Personal Property during Lifetime; Effect on Distribution of Estate.

(1) The trust personal property of a decedent who dies intestate as to all or a portion of his or her estate, given during the decedent's lifetime to a person eligible to be an heir of the decedent shall be treated as an advancement against the heir's inheritance, but only if the decedent declared in a contemporaneous writing, or the heir acknowledged in writing, that the gift is an advancement or is to be taken into account in computing the division and distribution of the decedent's intestate estate.

(2) For the purposes of both the *Probate Code for Trust or Restricted Property* (8 HCC § 12) and the *Probate Code for Non-Trust Property* (8 HCC § 13), trust personal property advanced during the decedent's lifetime is valued as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent's death, whichever occurs first.

(3) If the recipient of the trust personal property predeceases the decedent, the property shall not be treated as an advancement or taken into account in computing the division and distribution of the decedent's estate unless the decedent's contemporaneous writing provides otherwise.

35. **Debts to Decedent.** A debt owed to the decedent is not charged against the intestate share of any person except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate or other share of the debtor's issue.

CHAPTER VI FAMILY RIGHTS AND PROTECTIONS

36. **Spouse's Right to Elective Share of Non-Trust property.**

a. **Right of Election.** If a married person domiciled on Nation trust or restricted land passes, the surviving spouse has a right to elect to take an elective share of one-third ($\frac{1}{3}$) of the non-trust estate of the decedent, less funeral and administration expenses, family allowance and enforceable claims against the estate, plus the value of all property in excess of one-thousand dollars (\$1,000.00) transferred by the decedent to any person other than the surviving spouse in the three (3) years preceding the decedent's passing, to which the surviving spouse has not joined by written consent.

b. **Right of Election Personal to Surviving Spouse.** The right of election of the surviving spouse may be exercised only during the surviving spouse's lifetime and only by the surviving spouse. In the case of an Incompetent person, the right of election may be exercised only by order of the court in which protective proceedings as to the surviving spouse's property are pending, after finding that exercise is necessary to provide adequate support for the protected person during his or her probable life expectancy.

c. **Waiver of Right to Elect and of Other Rights.** The right of election of a surviving spouse and the rights of the surviving spouse to exempt property and family allowance, or any of them, may be waived, wholly or partially, before (pre-nuptial agreement) or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" (or equivalent language) in the non-trust property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share exempt property and family allowance by each spouse in the property of the other and a renunciation of each of all benefits which would otherwise pass to them from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

d. Duty of Court to Advice.

(1) If a surviving spouse has a right to election under Section 36, subparagraph a, above, then at any time after the filing of an inventory and not more than three (3) months after admission to probate, the court shall advise the surviving spouse of his or her right to election and shall explain fully the right and that in the event of the failure to exercise the right of election the will shall govern and control the distribution of the non-trust estate.

(2) If the surviving spouse passes or becomes Incompetent before being advised of the right of election under Section 36, subparagraph a, above, and has not filed a waiver or renunciation of the right of election, the court shall advise the personal representative or guardian of the estate of the deceased or Incompetent surviving spouse of the right of election as provided in Section 36, subparagraph d. (1), immediately above.

e. Proceeding for Elective Share; Time Limit.

(1) The surviving spouse may elect to take his or her elective share in the non-trust estate by filing in the court and mailing or delivering to the personal representative a petition for the elective share within three (3) months after the publication of notice to creditors for filing claims which arose before the passing of the decedent. The court may extend the time for election as it sees fit for cause shown by the surviving spouse before the time for election has expired.

(2) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the non-trust estate and to the distributees and recipients of portions of the non-trust estate whose interests will be adversely affected by the taking of the elective share. The surviving spouse may withdraw his or her demand for an elective share at any time before entry of a final determination by the court.

(3) After notice and hearing, the court shall determine the amount of the elective share and shall order its payment from the non-trust assets of the estate or by contribution as appears appropriate under Section 37, below.

(4) If it appears that a fund or property included in the estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than there would have been if relief had been secured against all persons subject to contribution.

(5) The order or judgment of the court may be enforced as necessary in a suit for contribution or payment.

37. Effect of Election on Benefits by Will.

a. An election by a surviving spouse does not affect the right of such spouse to participate in a family allowance but the value of any part of the non-trust estate passing to the surviving spouse by testate or intestate succession shall be counted against his or her elective share, unless renounced by the spouse in his or her petition.

b. When an election to take an elective share has been made and there is insufficient non-trust property in the estate which is not specifically disposed of to pay the elective share, liability for payment of the elective share shall be equitably apportioned among the other recipients of the estate in proportion to the value of his or her interests therein.

c. Only original transferees from, or appointees of, the decedent and his or her recipient of a gift(s) (donees), to the extent the recipient of a gift(s) (donees) have the non-trust property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the non-trust property transferred to them or to pay its value as of the time transferred.

38. Pretermitted Spouse. For purposes of this section the term “pretermitted” means those persons not known by the testator at the time of the execution of the will and omitted in the will.

a. Except as provided in Section 38, subparagraph b, immediately below, if the surviving spouse of a testator married the testator after the testator executed the will of the testator, the surviving spouse shall receive the intestate share in the decedent's non-trust property and trust or restricted land and trust personal property that the spouse would have received if the testator had died intestate.

b. **Exceptions.** Section 38, subparagraph a, immediately above, shall not apply to a trust or restricted interest in land where:

(1) the will of a testator is executed before the date of enactment of both the *Probate Code for Trust or Restricted Property* (8 HCC § 12) and the *Probate Code for Non-Trust Property* (8 HCC § 13);

(2) the spouse of the testator is a non-Indian and the testator devised the interests in trust or restricted land of the testator to one (1) or more Indians;

(3) it appears, based on an examination of the will or other evidence, that the will was made in contemplation of the marriage of the testator to the surviving spouse;

(4) the will expresses the intention that the will is to be effective notwithstanding any subsequent marriage; or

(5) the testator provided for the spouse by a transfer of funds or property outside the will and an intent that the transfer be in lieu of a testamentary provision is demonstrated by statements of the testator or through a reasonable inference based on the amount of the transfer or other evidence.

c. Omitted Spouse.

(1) Notwithstanding the provisions of Section 38, subparagraph b. if a testator fails to provide by will for his or her surviving spouse, who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate they would have received if the decedent had left no will, unless it appears from the will that the omission was intentional or the testator had provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(2) In satisfying a share provided in this section, the devises made by the will abate as provided in Section 66 which concerns "abatement."

39. Pretermitted Children. For purposes of this section the term "pretermitted" means those persons not known by the testator at the time of the execution of a will and omitted in the will.

a. If a testator fails to provide in his or her will for any of his or her children living or born or adopted after the execution of the will, the omitted child receives a share in the non-trust estate equal in value to that which they would have received if the testator had died Intestate unless:

(1) it appears from the will that the omission was intentional; or

(2) when the will was executed the testator had one (1) or more children and devised substantially all his or her estate to the other parent of the omitted child; or

(3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

b. If at the time of execution of the will, the testator fails to provide in his or her will for a living child solely because he or she believes the child to be dead, the child receives a share in the non-trust estate equal in value to that which they would have received if the testator had died intestate.

c. In satisfying a share provided by this section, the devises made by the will abate as provided in Section 66, below, which concerns "abatement."

40. Exempt Property.

a. The surviving spouse of a decedent who was domiciled on the trust or restricted land is entitled from the non-trust estate to value not exceeding ten-thousand dollars (\$10,000) therein in household furniture, automobiles, furnishings, appliances and personal effects. The ten-thousand dollars (\$10,000.00) in value of the aforementioned items shall be over and above any security interest in said items. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than ten-thousand dollars (\$10,000.00), or if there is not ten-thousand dollars (\$10,000.00) worth of exempt property in the estate, the spouse or children are entitled to other non-trust assets of the estate, if any, to the extent necessary to make up the ten-thousand dollar (\$10,000.00) value.

b. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to any non-trust assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share.

c. If a deceased enrolled Ho-Chunk Nation tribal member has passed without a will (intestate) and the deceased enrolled Ho-Chunk Nation tribal member and/or family members choose a burial ceremony in accordance with the custom and traditions of the Ho-Chunk Nation, then the disbursement of personal property, including Ho-Chunk Finery and Artifacts, will be handled according to such Ho-Chunk Nation custom and traditions.

d. Custom and Traditional Distribution of Ho-Chunk Finery and Artifacts. If a deceased enrolled Ho-Chunk tribal member has passed with a will, then the distribution of Ho-Chunk Nation Finery and Artifacts shall be controlled by the will. If a deceased enrolled Ho-Chunk Nation tribal member has passed without a will (intestate) and the deceased enrolled Ho-Chunk Nation tribal member and/or family member choose a burial ceremony not in accordance with the custom and traditions of the Ho-Chunk Nation or the will does not address the distribution of a Ho-Chunk Nation Finery and Artifact, then the distribution of Ho-Chunk Nation Finery and Artifacts shall be controlled by this section as follows:

(1) To the Decedent's eldest Ho-Chunk enrolled child by date of the birth. If the eldest Ho-Chunk enrolled child predeceased the decedent or after his passing then to the next eldest Ho-Chunk enrolled child by date of birth then if the children are all deceased then distribution will be in accordance with Section 40, subparagraph d. (2).

(2) If the property does not pass under Section 40, subparagraph d. (1) of this section then to the Decedent's Ho-Chunk enrolled Father. If the Ho-Chunk enrolled

Father has predeceased the Decedent then distribution will be in accordance with Section 40, subparagraph d. (3).

(3) If the property does not pass under Section 40, subparagraph d. (1) or (2) of this section then to the Decedent's Ho-Chunk enrolled Mother. If the Ho-Chunk enrolled Mother has predeceased the Decedent then distribution will be in accordance with Section 40, subparagraph d. (4).

(4) If the property does not pass under Section 40, subparagraph d. (1), (2) or (3) of this section then to the Decedent's Ho-Chunk enrolled paternal grandfather. If the Ho-Chunk enrolled paternal grandfather has predeceased the Decedent then distribution will be in accordance with Section 40, subparagraph d. (5).

(5) If the property does not pass under Section 40, subparagraph d. (1), (2), (3) or (4) of this section then to the Decedent's Ho-Chunk enrolled paternal grandmother. If the Ho-Chunk enrolled paternal grandmother has predeceased the Decedent then distribution will be in accordance with Section 40, subparagraph d. (6).

(6) If the property does not pass under Section 40, subparagraph d. (1), (2), (3), (4) or (5) of this section then to the Decedent's Ho-Chunk enrolled maternal grandfather. If the Ho-Chunk enrolled maternal grandfather has predeceased the Decedent then distribution will be in accordance with Section 40, subparagraph d. (7).

(7) If the property does not pass under Section 40, subparagraph d. (1), (2), (3), (4), (5) or (6) of this section then to the Decedent's Ho-Chunk enrolled maternal grandmother. If the Ho-Chunk enrolled maternal grandmother has predeceased the Decedent then distribution will be in accordance with Section 40, subparagraph d. (8).

(8) If the property does not pass under Section 40, subparagraph d. (1), (2), (3), (4), (5), (6) or (7) of this section then to the Decedent's eldest Ho-Chunk enrolled paternal sibling by date of the birth. If the eldest Ho-Chunk enrolled paternal sibling predeceased the decedent or after their passing then to the next eldest Ho-Chunk enrolled paternal sibling by date of birth then if the paternal siblings are all deceased then distribution will be in accordance with Section 40, subparagraph d. (9).

(9) If the property does not pass under Section 40, subparagraph d. (1), (2), (3), (4), (5), (6), (7) or (8) of this section then to the Decedent's eldest Ho-Chunk enrolled maternal sibling by date of the birth. If the eldest Ho-Chunk enrolled maternal sibling predeceased the decedent or after their passing then to the next eldest Ho-Chunk enrolled maternal sibling by date of birth then if the siblings are all deceased then distribution will be in accordance with Section 40, subparagraph d. (10).

(10) If the property does not pass under Section 40, subparagraph d. (1), (2), (3), (4), (5), (6), (7), (8) or (9) of this section then to the Decedent's eldest Ho-Chunk enrolled grandchild by date of the birth. If the eldest Ho-Chunk enrolled grandchild predeceased the decedent or after their passing then to the next eldest Ho-Chunk enrolled grandchild

by date of birth then if the grandchildren are all deceased then distribution will be in accordance with Section 40, subparagraph d. (11).

(11) If the property does not pass under Section 40, subparagraph d. (1), (2), (3), (4), (5), (6), (7), (8), (9) or (10) of this section then to the Decedent's eldest Ho-Chunk enrolled paternal cousin by date of the birth. If the eldest Ho-Chunk enrolled paternal cousin predeceased the decedent or after their passing then to the next eldest Ho-Chunk enrolled paternal cousin by date of birth then if the paternal cousins are all deceased then distribution will be in accordance with Section 40, subparagraph d. (12).

(12) If the property does not pass under Section 40, subparagraph d. (1), (2), (3), (4), (5), (6), (7), (8), (9), (10) or (11) of this section then to the Decedent's eldest Ho-Chunk enrolled maternal cousin by date of the birth. If the eldest Ho-Chunk enrolled maternal cousin predeceased the decedent or after their passing then to the next eldest Ho-Chunk enrolled maternal cousin by date of birth then if the maternal cousins are all deceased then distribution will be in accordance with Section 40, subparagraph d. (13).

(13) If the property does not pass under Section 40, subparagraph d. (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11) or (12) of this section then to the Decedent's eldest Ho-Chunk enrolled paternal cousin's child by date of the birth. If the eldest Ho-Chunk enrolled paternal cousin's child predeceased the decedent or after their passing then to the next eldest Ho-Chunk enrolled paternal cousin's child by date of birth then if the paternal cousins' children are all deceased then distribution will be in accordance with Section 40, subparagraph d. (14).

(14) If the property does not pass under Section 40, subparagraph d. (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12) or (13) of this section then to the Decedent's eldest Ho-Chunk enrolled maternal cousin's child by date of the birth. If the eldest Ho-Chunk enrolled maternal cousin's child predeceased the decedent or after their passing then to the next eldest Ho-Chunk enrolled maternal cousin's child by date of birth then if the maternal cousins' children are all deceased then distribution will be in accordance with Section 40, subparagraph d. (15).

(15) If the property does not pass under Section 40, subparagraph d. (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13) or (14) of this section then the property will pass to the Ho-Chunk Nation. Except that notwithstanding Section 40, subparagraph d. (15), an Indian co-owner (including the Ho-Chunk Nation referred to in Section 40, subparagraph d. (15)) of a parcel of trust or restricted land may acquire an interest that would otherwise descend under that paragraph by paying into the estate of the Decedent, before the close of the probate of the estate, the fair market value of the interest in the land; if more than one Indian co-owner offers to pay for such interest, the highest bidder shall acquire the interest.

41. Family Allowance.

a. In addition to the right to exempt property, if the decedent was domiciled on trust or restricted land, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance in money out of the non-trust estate for his or her maintenance during the period of administration, which allowance may not continue for longer than one (1) year if the non-trust estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments.

b. A reasonable allowance is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having his or her care and custody; but in case of any minor child or dependent child who is not living with the surviving spouse, the allowance may be made partially to the child or his or her guardian or other person having his or her care and custody, and partially to the spouse, as his or her needs may appear. The family allowance is exempt from and has priority over all claims.

c. The family allowance is not chargeable against any benefit or share conveying to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. The passing of any person entitled to family allowance terminates his or her right to allowances not yet paid.

42. Source, Determination and Documentation.

a. If the non-trust estate is otherwise sufficient, non-trust property specifically devised is not used to satisfy rights to exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children or children who are adults may select non-trust property of the estate as exempt property. The personal representative may make these selections if the surviving spouse, the children or the guardians of the minor children are unable or fail to do so within a reasonable time or if there are no guardians of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of non-exempt property taken as exempt property.

b. The personal representative may determine the family allowance in a lump sum not exceeding six thousand dollars (\$6,000.00) or periodic installments not exceeding five hundred dollars (\$500.00) per month for one (1) year, and may disburse funds of the estate in payment of the family allowance. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined.

43. Dwelling Exemption. Upon the appraisal of a non-trust estate and it appearing that a dwelling, which is on non-trust property, is personal property in which other heirs and/or creditors have an interest, and the dwelling is occupied by the surviving spouse

and/or the dwelling is necessary for the welfare and protection of such surviving spouse and/or children, the Ho-Chunk Nation Trial Court may, by order, set aside such dwelling for the benefit of said surviving spouse and/or children as a homestead for a period not to exceed ten (10) years, provided that in case of special hardship or emergency, the Ho-Chunk Nation Trial Court may extend such term from year to year thereafter, provided that any heir or heirs or creditors of the deceased shall have the opportunity to appear before the Ho-Chunk Nation Trial Court and protest the extension of the original terms setting aside said homestead. The Ho-Chunk Nation Trial Court may also set aside such sums from the estate as the Ho-Chunk Nation Trial Court may deem necessary for maintenance and upkeep of the home. The Ho-Chunk Nation Trial Court shall hear evidence on any contest before making any order of extension.

44. Summary Probate of Exempt Estates.

a. **Exempt Estates.** A non-trust estate having an appraised value which does not exceed five thousand dollars (\$5,000.00) and which is to be inherited by a surviving spouse and/or minor children of the deceased shall be exempt from the claims of all general creditors and the probate thereof may be summarily concluded as provided in this Section.

b. **Notice of Hearing to Determine Whether the Estate is an Exempt Estate.** Upon petition of the personal representative, the court shall enter an order stating that it appears, from the appraised value that the whole non-trust estate does not exceed five thousand dollars (\$5,000.00) and that such estate is to be inherited by the surviving spouse and/or minor children of the decedent and shall set a date and hour for hearing objections of any interested persons, if any there be, why the whole non-trust estate should not be declared to be exempt from the claims of all general creditors and distributed to the surviving spouse and/or minor children of the decedent. Notice of such hearing shall be in accordance with Section 65. On or before the time set for such hearing, the personal representative shall file his or her affidavit with the Ho-Chunk Nation Trial Court indicating compliance with this requirement of giving notice.

c. **Hearing to Determine Whether the Non-Trust Estate is an Exempt Estate.** If, upon such hearing, the Ho-Chunk Nation Trial Court finds that such non-trust estate is an exempt estate, the Ho-Chunk Nation Trial Court shall enter an order directing the personal representative to distribute such estate to the surviving spouse and/or the minor children of the deceased as set forth in the order and provide that no further proceedings are necessary and that, upon distributing the distributive share(s) of such estate to those entitled thereto and filing receipts therefore, the estate shall be closed.

**CHAPTER VII
ADMINISTRATION OF INTESTATE ESTATES**

45. Petition.

a. When any person passes leaving an intestate estate subject to the jurisdiction of the Ho-Chunk Nation Trial Court under this *Probate Code for Non-Trust Property* (8 HCC § 13), any person claiming to be an heir of the decedent, or the Nation, may petition the Ho-Chunk Nation Trial Court for a determination of the heirs of the decedent and for the distribution of such property.

b. The petition shall contain:

- (1) The name of the decedent,
- (2) The decedent's enrollment status with the Ho-Chunk Nation (enrolled, eligible for enrollment, enrolled in another federally recognized Indian Tribe),
- (3) The date of death of the decedent,
- (4) The names and addresses of the decedent's surviving family so far as such information is known to the petitioner,
- (5) Whether the decedent left a will, and, if so, the names and addresses of the beneficiaries under the will,
- (6) A general description of the decedent's estate subject to probate in the Ho-Chunk Nation Trial Court, and a general description those portions of the decedent's estate, if any, that are not subject to probate in the Ho-Chunk Nation Trial Court, including, but not limited to any interests in trust or restricted property or trust personalty,
- (7) A statement of whether any probate proceedings are pending in any other jurisdiction, and, if so, the name and address of the personal representative appointed in such proceedings,
- (8) A request for appointment of a personal representative and a statement of the qualifications of the proposed personal representative,
- (9) A request for approval of the last will and testament of the decedent, or a request that the court find that the decedent died without a valid will, if applicable, and
- (10) A verification under oath or penalty of perjury signed by the petitioner that the contents of the petition are true and correct.

c. The petitioner shall file with the petition, or as soon after filing as such documents can be obtained:

(1) A certified copy of the decedent's death certificate, and

(2) The original or a true and correct copy of any will found or document alleged to be the last will and testament of the decedent. If no original is available, the petition shall include a description of the efforts made to obtain the original and any facts relating to its absence.

d. Whenever there is a valid will probated by the Ho-Chunk Nation Trial Court, which does not dispose of all the decedent's property, a determination of the heirs entitled to such property and its distribution shall be made by the Ho-Chunk Nation Trial Court at or before the time the remainder of the estate is distributed without the necessity of a separate petition and proceeding.

46. Administration of Intestate Estate.

a. If a personal representative is appointed over a decedent's property, which is disposed of by a valid will, such person shall likewise assume authority over the decedent's intestate estate and administer it with the rest of the decedent's estate.

b. Whenever it reasonably appears that such is necessary to the preservation, administration and/or distribution of a decedent's intestate estate, the Ho-Chunk Nation Trial Court shall appoint a personal representative over the estate. It shall not be necessary to appoint a personal representative if the value of the decedent's property appears to be less than five thousand dollars (\$5,000.00) in value, no problems in administering the estate are foreseen, and no one requests that one be appointed.

c. The following persons, if legally competent, shall be afforded the priority in order of his or her listing for appointment of a personal representative: the surviving spouse, any child of the decedent over eighteen (18) years of age with preference given in descending order of age, other blood relatives in order of their closeness of relationship, any adult Ho-Chunk Tribal member, or any adult person.

d. The duties of the personal representative shall be as follows:

(1) To take constructive or physical possession of all property of the decedent subject to this *Probate Code for Non-Trust Property* (8 HCC § 13) as the Ho-Chunk Nation Trial Court shall order, taking into consideration the interests of the person or persons who may have occupied the homestead of the decedent at the time of his or her passing.

(2) Within one (1) month of appointment make an inventory and appraisal of such property and file it with the Ho-Chunk Nation Trial Court.

(3) Within one (1) month of appointment, determine and file with the Ho-Chunk Nation Trial Court a list of all known relatives of the decedent, their ages, their relationship to the decedent, and their whereabouts, if known.

(4) Subject to the approval of the Ho-Chunk Nation Trial Court, ascertain and pay all of the debts and legal obligations of the decedent.

(5) Prosecute and defend actions for or against the estate.

(6) Distribute the estate in accordance with the order of the Ho-Chunk Nation Trial Court and file receipts with the Ho-Chunk Nation Trial Court showing distribution of the estate.

e. The personal representative shall file a bond in an amount to be set by the Ho-Chunk Nation Trial Court to insure his or her faithful, honest performance of his or her duties as personal representative. Unless otherwise made to appear necessary or desirable, no bond shall be required of a personal representative who is the spouse or child of a decedent.

47. Appointment of Personal Representative.

a. Upon receipt of a petition to administer an intestate estate, the Clerk of Courts shall schedule a hearing at which a personal representative shall be appointed. Said hearing shall be scheduled in accordance with Sections 64 and 65.

b. Notice of the hearing shall be made by the petitioning party or by the Clerk of Courts if the Nation is the petitioning party. The Notice shall be in accordance with Section 65.

c. The Ho-Chunk Nation Trial Court shall determine who is the proper person to appoint as personal representative, and if such person manifests his or her willingness to serve, order his or her appointment as personal representative.

48. Oath of Personal Representative; Letters of Testamentary.

a. Upon his or her appointment as personal representative, the person appointed shall take an oath to be prescribed by the Ho-Chunk Nation Trial Court to the effect that he or she will faithfully and honestly administer the estate.

b. Upon taking the oath and filing the bond, if any is required, the personal representative shall be granted letters testamentary as proof of his or her appointment.

c. If the Ho-Chunk Nation Trial Court finds good cause to do so, the Ho-Chunk Nation Trial Court may waive the requirement that the personal representative file a bond.

49. Notice to Creditors. The personal representative of the estate, or the Clerk of Courts if no personal representative is appointed, shall cause notice to creditors to be posted in at least three (3) conspicuous places within the Nation and published for three (3) consecutive issues in the official newsletter of the Ho-Chunk Nation, currently known as the Hocak Worak. Said notice shall state that creditors have ninety (90) days from the date of the first publication of the noticed to present their claims to the personal representative or Clerk of Court and that only those claims so presented may be paid to the estate.

50. Payment of Creditors.

a. Payment to creditors of the decedent shall be made by the personal representative or by the Clerk of Courts if no personal representative is appointed, only upon the order of the court after determining the validity of the claims by affidavit or personal testimony of the claimant.

b. All just claims of creditors allowed by the court shall be paid before distribution of the estate but shall be paid only after payment of the family allowance as provided herein.

51. Accounting. Prior to the distribution of the estate for which an personal representative has been appointed, such personal representative shall render an accounting to the court, for its approval, of all receipts and disbursements from the estate, showing the present status of the estate and distribution of the estate can commence and also showing the computation of any attorney's and/or personal representative's fees involved for which approval for payment is sought. In estates in which no personal representative is appointed, the Clerk of Court shall account to the Ho-Chunk Nation Trial Court for all transactions relating to the estate.

52. Distribution and Closing Estate.

a. When it is made to appear to the Ho-Chunk Nation Trial Court that an estate is ready to be distributed, the Ho-Chunk Nation Trial Court shall order such according to the rules of intestate succession and this *Probate Code for Non-Trust Property* (8 HCC § 13).

b. The Estate shall be closed and the personal representative dismissed and his or her bond released upon the filing of receipts and an affidavit showing the estate is fully distributed, and after being fully administered, is now ready to be closed.

CHAPTER VIII PROBATE OF WILLS

53. **Duty to Present Will and Petition for Probate.**

a. Every custodian of a will containing provisions to distribute real or personal property other than trust or restricted land or trust personalty shall deliver the will to the Ho-Chunk Nation Trial Court within thirty (30) days after receipt of information that the testator has passed. Any will custodian who fails or neglects to do so shall be liable for damages sustained by any person injured thereby.

b. Along with the will, the will custodian shall include a petition containing the information required by Section 45, subparagraph b. and c.

54. **Proving, Contesting and Admitting Will.**

a. **Proof of Will.**

(1) Upon initiating the probate of an estate, the will of the decedent shall be filed with the Ho-Chunk Nation Trial Court. The will may be proven and admitted to probate by filing the affidavit of an attesting witness, which identifies such will as being the will which the decedent executed and declared to be his or her last will.

(2) If the evidence of none of the attesting witnesses is available, the Ho-Chunk Nation Trial Court may allow proof of the will by testimony or other evidence that the signature of the testator or at least one (1) of the witnesses is genuine.

b. **Contest of Will.**

(1) At any time within ninety (90) days after a will has been admitted to probate, or within such time as the Ho-Chunk Nation Trial Court shall establish in the case of an exempt estate, any person having an interest in the decedent's estate may contest the validity of the will. Notice of such contest shall be made directly to the Ho-Chunk Nation Trial Court. In the event of a will contest, the Ho-Chunk Nation Trial Court shall take no further action with respect to the probate of the estate, but shall set a day and hour for hearing on the will contest.

(2) Relevant evidence shall be presented at the will hearing concerning the decedent's capacity to execute a valid will and the circumstances surrounding its execution. Every reasonable effort shall be made to procure the testimony of the attesting witnesses to the will, or if their testimony is not reasonably available, an effort shall be made to identify signatures to the will through other evidence.

c. **Admission of Contested Will to Probate.** Upon considering all relevant evidence concerning the will, the Ho-Chunk Nation Trial Court shall enter an order affirming the

admission of the will to probate or rejecting such will and ordering that the probate of the decedent's estate proceed as if the decedent had died without executing the will.

55. Petition for Letters Testamentary. A petition for letters testamentary may be made by any person having possession of a decedent's will. The petition must be in writing, signed by the petitioner, and shall state the basis for the Ho-Chunk Nation Trial Court's jurisdiction, the names of the heirs of the decedent, if known, and the name or names of any person specified in the will as personal representative and the address of such person, if known. The original copy of the will shall be submitted to the Ho-Chunk Nation Trial Court with the petition.

56. Qualifications of Personal Representative. The Ho-Chunk Nation Trial Court shall appoint a personal representative to administer the estate. The personal representative shall be a competent adult and preference shall be given, if such persons are otherwise qualified, to the person named in the will as such, followed by the surviving spouse, child of the decedent over eighteen (18) years of age with preference given in descending order of age, other blood relatives in order of their closeness of relationship, any adult Ho-Chunk Nation tribal member, or any adult person.

57. Appointment of Personal Representative.

a. Upon receipt of a petition for letters testamentary, the Clerk of Court shall schedule a hearing at which a personal representative shall be appointed and letters testamentary authorized. The hearing shall be scheduled and notice provided to interested parties in accordance with Section 65. Notice of hearing shall be made by the petitioning party to all persons named as takers under the will, and to all known heirs of the decedent if different from the named beneficiaries and also posted in a conspicuous place in the Ho-Chunk Nation Trial Court building.

b. At the hearing, the Ho-Chunk Nation Trial Court shall first determine the validity of the decedent's will and then appoint a personal representative to administer the estate according to the terms of this *Probate Code for Non-Trust Property* (8 HCC § 13) and the decedent's will.

c. Letters testamentary shall be granted to the person appointed as personal representative upon his or her taking an oath, to be prescribed by the Court, to the effect that the personal representative will faithfully and honestly administer the estate, and upon the personal representative filing of bond, if required.

58. Creditors. Notice to creditors, determination of the validity of claims, and payment of claims shall be handled as prescribed for Intestate Estates (Chapter V).

59. Accounting. Prior to the distribution of the estate remaining after payment of all just claims and priority payments, the personal representative shall submit to the Ho-Chunk Nation Trial Court for approval an accounting of all receipts and disbursements from the Estate, showing the present status of the estate and that distribution of the estate can

commence, and also showing the computation of any Attorney's and/or personal representative's fees involved for which approval for payment is sought.

60. Distribution and Closing Estate.

a. When it is made to appear to the Ho-Chunk Nation Trial Court that distribution of an estate can commence, the Ho-Chunk Nation Trial Court shall order such distribution according to the provisions of the decedent's will or the rules of intestate succession, whichever is applicable, and according to the rules set forth in this *Probate Code for Non-Trust Property* (8 HCC § 13).

b. The estate shall be closed and the personal representative of the estate dismissed and his or her bond, if any, released upon filing with the Ho-Chunk Nation Trial Court receipts showing that the estate is fully distributed, and also upon filing the personal representative's affidavit that the estate is fully administered and ready to be closed.

61. Property Discovered After Estate Closed. An estate may be reopened whenever necessary to dispose of a decedent's property discovered after his or her estate has been closed. The court shall order distribution of the property to the person or people entitled thereto after making whatever orders appear necessary to ensure a just distribution of the after discovered property.

CHAPTER IX
JUDICIAL CONSTRUCTION

62. Subject Matter Jurisdiction.

a. The Trial Court shall have exclusive jurisdiction to administer in probate the estate of a decedent who, at the time of his or her death was domiciled or owned real property situated within the Ho-Chunk Nation trust or restricted lands, to the extent that such estate consists of property which does not come within the exclusive jurisdiction of the Department of the Interior.

b. The Department of the Interior:

(1) The Department of the Interior has exclusive jurisdiction over the adjudication of probate estates for owners of trust or restricted property. This function may not be delegated through a compact or contract.

(2) When probating an estate, the Department shall apply the *Probate Code for Trust or Restricted Property* (8 HCC § 12) for all trust and restricted estates, subject to the jurisdiction of the *Probate Code for Trust or Restricted Property* (8 HCC § 12).

c. **Ho-Chunk Nation Trial Court.** To the extent permitted by the Constitution of the Ho-Chunk Nation, applicable Federal and State laws, the Trial Court has jurisdiction over all non-Trust property subject matter relating to:

(1) Estates of decedents, including construction of wills, determination of heirs, successors of decedents, and estates of protected persons;

(2) Protection of minors and incapacitated persons; and

(3) Trusts that are not under the exclusive jurisdiction of the Department of the Interior.

d. Except for Native American Finery and Artifacts, if an estate contains property that is subject to both the jurisdiction of the Department of the Interior and the Ho-Chunk Nation Trial Court, the Ho-Chunk Nation Trial Court shall hold the probating of the portion of the estate subject to its jurisdiction in abeyance until such time as the Department of Interior has issued a final ruling with respect to the probating of the portion of the estate subject to its jurisdiction.

63. Evidence as to Passing. In proceedings under both the *Probate Code for Trust or Restricted Property* (8 HCC § 12) and the *Probate Code for Non-Trust Property* (8 HCC § 13), in addition to the *Ho-Chunk Nation Rules of Civil Procedure* and rules of evidence in Courts of general jurisdiction, the following rules relating to a determination of death apply:

a. **Decedent:**

(1) A certified or authenticated copy of a death certificate issued by an official or agency of the place where the passing occurred is prima facie proof of the fact, place, date and time of passing and the identity of the decedent.

(2) A certified copy of a death certificate is required to probate the estate of a trust or restricted landowner.

(3) A certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that a person is missing, detained, dead, or alive, is prima facie evidence of the status and of the dates, circumstances and places disclosed by the record or report.

(4) **Absent Member Presumptive Death.**

(a) A member may be presumed to have passed if the member:

(1) has been declared an absent person,

(2) is further absent for a continuous period of not less than six (6) years, during which that person has not been in contact with those who knew the member, and

(3) remains unfound after diligent search or inquiry by the Nation.

(b) After the conditions are satisfied as immediately noted immediately above in paragraph a, the Trial Court or other court of competent jurisdiction may declare presumptive death if the absent member's whereabouts remain unknown for sixty (60) days after completion of notice under Section 65 by the Office of Tribal Enrollment.

(c) Upon the court's or other court of competent jurisdiction's declaration of presumptive death, the member shall be deemed to have passed.

b. Missing Heirs.

(1) An heir may be presumed missing if:

(a) such heir's whereabouts remain unknown for sixty (60) days after completion of notice efforts under Section 66; and

(b) in the proceeding to determine a decedent's heirs, the Trial Court finds that the missing heir has had no contact with the other heirs of the decedent, if any, or with the Nation or Bureau of Indian Affairs relating to trust or restricted land, trust personal property assets or, if the missing heir is a member, relating to his or her accrued per capita distribution account (Section 63, subparagraph a. (4) (a) 3, above) at any time during the six (6) year period preceding the hearing to determine Heirs.

(2) An heir determined to be missing shall be deemed to have predeceased the decedent for purposes of descent and devise of trust or restricted land and trust personal property within that decedent's estate.

64. Court Procedures, Rules and Powers.

a. Unless specifically provided to the contrary in this *Probate Code for Non-Trust Property* (8 HCC § 13) or unless inconsistent with its provisions, the *Ho-Chunk Nation Rules of Civil Procedure*, including the rules concerning vacation of orders, govern formal proceedings under this *Probate Code for Non-Trust Property* (8 HCC § 13). Appeals shall be taken in accordance with the Ho-Chunk Nation Rule of Appellate Procedures.

b. Judicial Powers and Duties of Trial Court.

(1) The Trial Court may make orders for the sale of personal Property at public or private sale for the compounding of debts, for the settlement of an estate as insolvent, for the approval of bonds and all other orders of an ex parte nature as may facilitate the

settlement of estates. The orders shall be in writing, signed by the judge issuing the same, and shall be filed and recorded as an entry in the proper record.

(2) The court shall examine the bonds filed by the personal representations, with a view to ascertaining his or her sufficiency and may approve the same. The court may examine any inventory, sale, bill, account current, final account and vouchers filed therewith, or examine into the condition of an estate generally. Bond may be waived for good cause shown.

(3) The court shall have the authority to draft orders requesting property of funds outside the exterior boundaries of Ho-Chunk Nation trust or restricted lands to be delivered for probate to the court.

(4) The court shall have the authority to make declarations of presumptive death in accordance with Section 63, subparagraphs a. & b.

c. Records and Certified Copies. The Clerk of Court shall keep a file for each decedent of all documents filed with the court under this Code and shall keep a numerical index of all such estates to facilitate access to such records. Unless the Court labels a document or paper confidential, upon payment of a fee, as established by the Court, the Clerk shall Issue certified copies of any document or paper so filed.

d. Trials. All trials under the *Probate Code for Non-Trust Property* (8 HCC § 13) shall be by the Ho-Chunk Nation Trial Court.

e. Oath or Affirmation on Filed Documents. Except as specifically provided in this Code, every document filed with the court under this Code shall be deemed to include an oath, affirmation, or statement to the effect that its representations are true as far as the person executing or filing it knows or is informed, and the penalties for perjury shall follow deliberate falsification therein.

f. Traditional Court.

(1) Whenever a question of custom or tradition, including distribution and possession of finery and/or artifacts, arises in handling probate matters the Trial Court shall consult with the Traditional Court.

65. Notice.

a. If notice of a hearing on any petition or other matter is required and except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or his or her advocate if they have appeared by advocate or requested that notice be sent to his or her advocate. Notice shall be given by any of the following methods:

(1) By mailing a copy thereof at least forty-five (45) days before the time set for the hearing by certified or registered mail.

(2) If the address, or identity of any person is not known and cannot be ascertained by reasonable diligence, by posting a copy of the notice in at least three (3) conspicuous public places within the Nation at least forty-five (45) days before the time set for the hearing and publishing the notice in the official newsletter of the Ho-Chunk Nation, currently known as the Hocak Worak, for three (3) consecutive issues.

(3) The Court for good cause shown may provide for a different method or time of serving notice for any hearing.

b. Proof of the giving of notice shall be made at or before the hearing and filed in the proceeding.

c. A person, including a Guardian ad litem, or other person or institution who manages money or Property for another and who must exercise the highest standard of care in such management activity (fiduciary), may waive notice by a writing signed by the person or his or her attorney and filed in the proceeding.

66. Distribution: Order in which Assets Appropriated; Abatement. A person who has executed a valid will may determine the order in which the assets of his estate are applied to the payment of his debts. If he or she does not, then the provisions of this section express rules which may be regarded as approximating what people who have executed a valid will generally want. The statutory order of abatement is designed to aid in resolving doubts concerning the intention of a particular person who has executed a valid will, rather than to defeat his or her purpose. Hence, Section 66, subsection (c) directs that consideration be given to the purpose of a person who has executed a valid will.

a. Except as provided in Section 66, subparagraph b, immediately below, and except as provided in connection with the share of the surviving spouse who elects to take an elective share, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

- (1) Property not disposed of by the will.
- (2) Residuary devises.
- (3) General devises.
- (4) Specific devises.

b. For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

c. If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the Order Of Abatement stated in Section 66, subparagraphs a. and b., immediately above, the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

d. If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

67. Effect of Fraud and Evasion. This section is an overriding provision that provides an exception to the procedures and limitations provided in the *Probate Code for Trust or Restricted Property* (8 HCC § 12). The remedy of a party wronged by fraud is intended to be supplementary to other protections provided in the Code and can be maintained outside the process of settlement of the estate. Thus, if a will which is known to be a forgery is probated informally, and the forgery is not discovered until after the period for contest has run, the defrauded heirs still could bring a fraud action under this section.

a. Whenever fraud has been perpetuated in connection with any proceeding or in any statement filed under this *Probate Codes for Non-Trust Property* (8 HCC § 13) or if fraud is used to avoid or circumvent the provisions or purposes of this *Probate Code for Non-Trust Property* (8 HCC § 13), any person injured thereby may obtain appropriate relief against the perpetrator of the fraud including restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not.

b. Any proceeding must be commenced within two (2) years after the discovery of the fraud, but no proceeding may be brought against someone not a perpetrator of the fraud later than five (5) years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his or her lifetime, which affect the succession of the estate.

68. Reference to Foreign Law. Unless the traditions and customs of the Ho-Chunk People would dictate a different result, the Ho-Chunk Nation Trial Court is encouraged to refer to foreign law, including laws of other tribes and states, federal law, common law and uniform or model laws, for assistance in resolving issues of probate and inheritance law on which this *Probate Code for Non-Trust Property* (8 HCC § 13) is silent.

69. Severability. If any provision of this *Probate Code for Non-Trust Property* (8 HCC § 13) or the application thereof to any person or circumstances is held invalid or unconstitutional, the invalidity or unconstitutionality shall not affect other provisions or applications of this *Probate Code for Non-Trust Property* (8 HCC § 13) which can be given effect without the invalid provision or application, and to this end the provisions of this Code are declared to be severable.

70. Construction against Implied Repeal. This *Probate Code for Non-Trust Property* (8 HCC § 13) is a general act intended as a unified coverage of its subject matter and no

part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.

71. **Captions.** Headings, captions, section, and subparagraph headings are employed for convenience or reference purposes only and will not be deemed a part of the text of any section.

72. **Sovereign Immunity.**

a. Nothing in this *Probate Code for Non-Trust Property* (8 HCC § 13) shall be deemed to waive the sovereign immunity of the Ho-Chunk Nation or any of its enterprises, officers, agents, or employees.

b. Pursuant to Article XII, Sections 1 and 2 of the Constitution of the Ho-Chunk Nation, the Legislature in taking any action shall be deemed to not have waived the Nation's sovereign immunity from suit, unless the Legislature expressly waives the Nation's sovereign immunity.

73. **Secretarial Approval.**

a. This *Probate Code for Non-Trust Property* (8 HCC § 13) shall not be subject to the approval of the Secretary. It shall not govern the descent and distribution of trust or restricted lands or trust personalty. The Ho-Chunk Nation Legislature has adopted the *Probate Code for Trust and Restricted Property* (8 HCC § 12) to govern the descent and distribution of trust or restricted lands.

Legislative History:

10/14/04	Administration Committee review draft Probate Code and refers to full Legislature.
10/19/04	Legislature places draft Probate Code out for 45-Day Public Review.
12/11/04	45-Day Public Review period ends.
04/07/05	Legislature reviews draft Code at Off-Site Meeting.
04/06/06	Legislature reviews draft Code at Off-Site Meeting. Decided to send to outside counsel for review and editing.
05/22/08	Legislature reviews draft Code at Off-Site Meeting and makes determination with respect to incorporating provisions provided by outside counsel and incorporation of provisions from Model Probate Code.
06/17/08	By Resolution 06-17-08 H, Legislature places draft Probate Code out for 45-Day Public Review.
03/16/09	Legislative Counsel meets with Traditional Court to discuss their concerns with previous version of Code placed out for public comment and informs them that two versions of the Code Will be developed and that Traditional Court Will be advised of developments on both Codes prior to the holding of an off-site to discuss both versions of the Probate Code.
06/04/13	By Resolution 06-04-13N, Legislature places draft Probate Code for Non-Trust Property out for 45-Day Public Comment.

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- 09/23/14 By Resolution 09-23-14G, Legislature places draft Probate Code for Non-Trust Property out for 45-Day Public Comment.
- 10/20/15 By Resolution 10-20-15F, Legislature places draft Probate Code for Non-Trust Property out for 45-Day Public Comment.
- 09/20/16 By Resolution 09-20-16L, Legislature enacts the Probate Code for Non-Trust Property.