

TRIBAL CODE

CHAPTER 82:

PROBATE CODE

CONTENTS

CHAPTER I: General Provisions

- 82.101 Title.
- 82.102 Authority.
- 82.103 Purpose.
- 82.104 Effective Date.
- 82.105 Interpretation.
- 82.106 Severability.
- 82.107 Repealer.
- 82.108 Sovereign Immunity.
- 82.109 Application.
- 82.110 Status of Adopted Persons.
- 82.111 Simultaneous Death.
- 82.112 Definitions.

CHAPTER II: Intestate Succession

- 82.201 Basic Rules for Intestate Succession.
- 82.202 Heir Must Survive Decedent for a Time.
- 82.203 Intentional Killing of Decedent by Heir.
- 82.204 Escheat.
- 82.205 Representation.
- 82.206 Computing Degrees of Kinship.
- 82.207 Nonmarital Child.
- 82.208 Advancements.
- 82.209 Right to Disclaim.

CHAPTER III: Wills

- 82.301 Capacity to Make or Revoke a Will.
- 82.302 Execution of Wills.
- 82.303 Execution of Wills Under Other Law.
- 82.304 Witnesses.
- 82.305 Revocation.
- 82.306 When a Will is Contractual.
- 82.307 Equitable Election When Will Disposes of Beneficiary's Property.
- 82.308 Unintentional Failure to Provide for Issue.
- 82.309 Anti-Lapse.
- 82.310 After Acquired Property.
- 82.311 Presumption That Will Passes All Property Interest.
- 82.312 Incorporation of Certain State Law Provisions.
- 82.313 Disclaimer.
- 82.314 Assistance With and Deposit of Wills.
- 82.315 Mixed Will.

CHAPTER IV: Probating an Estate

- 82.401 Jurisdiction.
- 82.402 Duty to Present Will for Probate.
- 82.403 Proving and Admitting Will.
- 82.404 Initiating Probate.
- 82.405 Allowance During Administration.
- 82.406 Appointment, Qualifications and Removal of Administrator.
- 82.407 Powers and Duties of Administrator.
- 82.408 Appointment and Duties of Appraiser.
- 82.409 Summary Probate of Exempt Estates.

- 82.410 Claims Against the Estate.
- 82.411 Payment of Claims.
- 82.412 Family Rights.
- 82.413 Additional Selections by Spouse.
- 82.414 Sale of Property.
- 82.415 Accounting.
- 82.416 Final Account.
- 82.417 Approval of Final Account.
- 82.418 Order Allowing Final Account and Distribution.
- 82.419 Closing Estate.
- 82.420 Reopening Estate.
- 82.421 Relation to BIA Probate.
- 82.422 Compromise of Claims.
- 82.423 Dead Man's Statute.

HISTORY NOTE:

Adopted February 13, 1989, Resolution No. 64(89).  
Secretarial approval by inaction per Constitution Art. VI,  
effective May 15, 1989.

TRIBAL CODE

CHAPTER 82:

PROBATE CODE

CHAPTER I: GENERAL PROVISIONS

82.101 Title.

This ordinance shall be known as the Lac du Flambeau Probate Code.

82.102 Authority.

This code is adopted pursuant to Article VI, Section 1(a), (p), and (u) of the Tribal Constitution.

82.103 Purpose.

The purpose of this code is to regulate the inheritance of real and personal property, other than trust property, within the reservation by establishing laws governing intestate succession and the making of wills and by providing a simple, efficient and inexpensive method for probating the estates of tribal members and their families.

82.104 Effective Date.

This code shall take effect upon its approval by the Superintendent of the Great Lakes Agency of the Bureau of Indian Affairs pursuant to Article VI, Section 2 of the Tribal Constitution.

82.105 Interpretation.

The provisions of this code shall not be deemed a limitation or repeal of any tribal power or authority. In the event that this code is silent on some aspect of intestate succession, wills, or probate procedure, the laws of the State of Wisconsin may be looked to as a guide to the interpretation of this Code.

82.106 Severability.

If any section, provision, or portion of this code is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this code shall not be affected thereby.

82.107 Repealer.

All other tribal ordinances and codes or portions thereof which are inconsistent with this code are hereby repealed to the extent of the inconsistency only.

82.108 Sovereign Immunity.

Nothing in this code is intended or shall be construed as a waiver of the sovereign immunity of the Tribe. No employee or agent of the Tribe shall be authorized to waive the immunity of the Tribe.

82.109 Application.

This code shall apply to tribal members, their spouses and their children residing on the reservation. This code does not apply to trust property.

82.110 Status of Adopted Persons.

(1) A legally adopted person is treated as a natural child of his adoptive parents for purposes of intestate succession by, through and from the adopted person and for purposes of any statute, code or ordinance provision conferring rights upon children, issue or relatives in connection with the laws of intestate succession or wills.

(2) A legally adopted person ceases to be treated as a child of his natural parents for the same purposes except:

(a) If a natural parent marries or remarries and the child is adopted by the step-parent, the child is treated as the child of his natural parent for all purposes;

(b) If a natural parent of a marital child dies and the other natural parent remarries and the child is adopted by the stepparent, the child is treated as the child of the deceased natural parent for purposes of inheritance through that parent and for purposes of any statute, code or ordinance provision conferring rights upon children, issue or relatives of that parent under the law of intestate succession or wills.

82.111 Simultaneous Death.

The provisions of the Uniform Simultaneous Death Act, Wis. Stat. s. 851.55, are hereby incorporated herein by reference as if fully set forth herein.

82.112 Definitions.

In this code, unless the context otherwise requires:

(1) "Administrator" means the person appointed by the tribal court to administer the estate of a decedent according to this code, and is the functional equivalent of a personal representative under the probate procedures of the State of Wisconsin.

(2) "Beneficiary" means any person nominated in a will to receive an interest in property other than in a fiduciary capacity.

(3) "Decedent" means a person who has died leaving property that is subject to administration.

(4) "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 will or the laws governing intestate succession.

(5) "Heir" means any person, including the surviving spouse, who is entitled under the law governing intestate succession to an interest in the property of a decedent.

(6) "Intestate" means a person who dies without leaving a will, or the circumstance of dying without leaving a valid will effectively disposing of all of the estate.

(7) "Intestate succession" means succession to property of a decedent who dies intestate or partially intestate.

(8) "Issue" means children, grandchildren, great-grandchildren, and lineal descendants of more remote degrees, including those who occupy that relation by reason of adoption and nonmarital children and their lineal descendants to the extent provided by s. 82.207.

(9) "Member" means an enrolled member of the Tribe.

(10) "Person interested" means any of the following:

(a) An heir of the decedent.

(b) A beneficiary named in any document offered for probate as the will of the decedent.

(c) A beneficiary of a trust created under any document offered for probate as the will of the decedent.

(d) A person named as administrator or personal representative in any document offered for probate as the will of the decedent.

(e) Additional persons as the tribal court may by order include.

(11) "Property" means any interest, legal or equitable in real or personal property, without distinction as to kind, except trust property.

(12) "Reservation" means the Lac du Flambeau Indian Reservation.

(13) "Testator" means a decedent who dies leaving a valid will.

(14) "Tribal court" means the Lac du Flambeau Tribal Court.

(15) "Tribe" means the Lac du Flambeau Band of Lake Superior Chippewa Indians.

(16) "Trust property" means real or personal property title to which is in the United States for the benefit of an Indian.

## CHAPTER II: INTESTATE SUCCESSION

### 82.201 Basic Rules for Intestate Succession.

The net estate of a decedent which he has not disposed of by will, whether he dies without a will, or with a will which does not completely dispose of his estate, passes to his surviving heirs as follows:

(1) To the spouse:

(a) If there are no surviving issue of the decedent, or if the surviving issue are all issue of the surviving spouse and the decedent, the entire estate.

(b) If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of that portion of the decedent's net estate not disposed of by will consisting of decedent's property other than marital property or deferred marital property as provided in Wis. Stat. s. 861.02.

(2) To the issue, the share of the estate not passing to the spouse under par. (1), or the entire estate if there is no surviving spouse. If the issue are all in the same degree of kinship to the decedent they take equally, but if they are of unequal degree then those of remote degrees take by representation.

(3) If there is no surviving spouse or issue, to the parents.

(4) If there is no surviving spouse, issue or parent, to the brothers and sisters and the issue of any deceased brother or sister by representation.

(5) If there is no surviving spouse, issue, parent or brother or sister, to the issue of brothers and sisters. If such issue are all in the same degree of kinship to the decedent they take equally, but if they are of unequal degree then those of more remote degrees take by representation.

(6) If there is no surviving spouse, issue, parent or issue of a parent, to the grandparents.

(7) If there is no surviving spouse, issue, parent, issue of a parent, or grandparent, to the intestate's next of kin in equal degree.

82.202 Heir Must Survive Decedent for a Time.

If any person who would otherwise be an heir under sec. 82.201 dies within 72 hours of the time of death of the decedents, the net estate not disposed of by will passes under this section as if that person had predeceased the decedent.

82.203 Intentional Killing of Decedent by Heir.

If any person who would otherwise be an heir under sec. 82.201 has feloniously and intentionally killed the decedent, the net estate not disposed of by will passes as if the killer has predeceased the decedent.

82.204 Escheat.

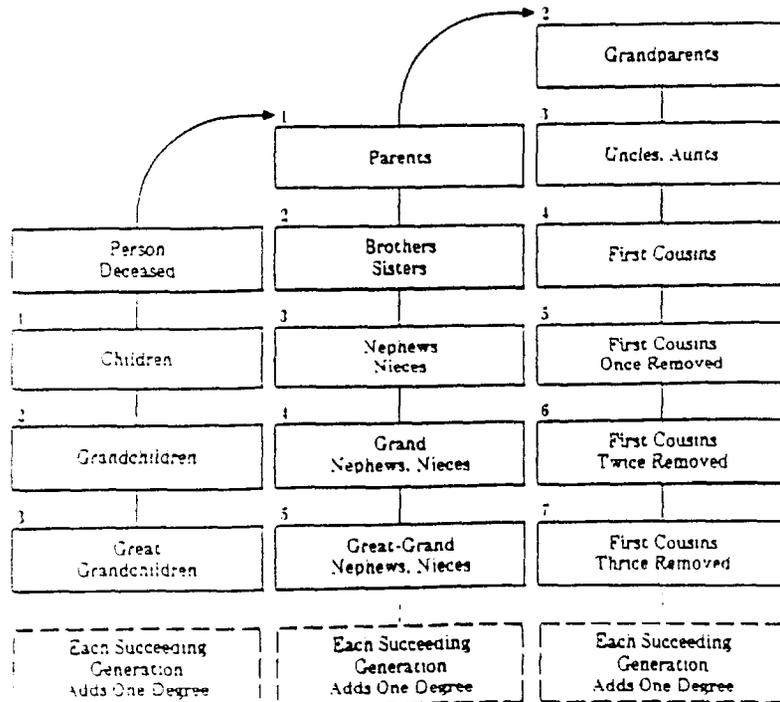
If there are no heirs of the decedent under secs. 82.201 and 82.202 and the decedent is a member, the net estate escheats to the Tribe to be added to the general fund.

82.205 Representation.

When representation is called for by sec. 82.201, succession is accomplished as follows: The estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner until each part passes to a surviving heir.

82.206 Computing Degrees of Kinship.

(1) The degree of kinship is computed according to the following chart:



(2) Relatives of the half blood take the same share as if they had been of the whole blood.

(3) A person may be an heir under sec. 82.201 even though born after the death of the decedent if that person was conceived before decedent's death.

#### 82.207 Nonmarital Child.

(1) A nonmarital child or the child's issue is entitled to take in the same manner as a marital child by intestate succession from and through his or her mother, and from or through his or her father if the father has either been adjudicated to be the father in a paternity proceeding, or has admitted in open court that he is the father, or has acknowledged himself to be the father in writing signed by him.

(2) Property of a nonmarital child passes in accordance with sec. 82.201 except that the father or his kindred can inherit only if the father has been adjudicated to be the father in a paternity proceeding.

(3) This section does not apply to a child who becomes a marital child by the subsequent marriage of the child's parents. The status of a nonmarital child who is legally adopted is governed by sec. 82.110.

#### 82.208 Advancements.

(1) A gift by the decedent during his lifetime to an heir is an advance against his intestate share to be taken into account by the court in a final judgment only if:

(a) there is a writing by the decedent clearly stating that the gift is an advance whether or not such writing is contemporaneous with the gift, or

(b) the heir states by writing or in court that the gift was an advance.

(2) If the gift is made during lifetime to a prospective heir and such gift would have been an advance under sub. (1) but for the death of the prospective heir prior to the decedent or within the time prescribed in sec. 82.202, the amount of the advance shall be taken into account in computing the shares of the issue of the prospective heir to whom the gift was made, whether or not the issue take by representation.

#### 82.209 Right to Disclaim.

Any person to whom property would otherwise pass under sec. 82.201 may disclaim all or part of the property as provided in Wis. Stat. s. 853.40.

CHAPTER III: WILLS

82.301 Capacity to Make or Revoke a Will.

Any person of sound mind 18 years of age or older may make and revoke a will.

82.302 Execution of Wills.

Every will in order to be validly executed must be in writing and executed with the following formalities:

(1) It must be signed

(a) by the testator; or

(b) in the testator's name by one of the witnesses or some other person at the testator's express direction and in his presence, such a proxy signing either to take place or to be acknowledged by the testator in the presence of the witnesses; and

(2) It must be signed by 2 or more witnesses in the presence of the testator and in the presence of each other.

82.303 Execution of Wills Under Other Law.

A will is validly executed if it is in writing executed according to sec. 82.302 or if it is in writing and executed in accordance with either of the following:

(1) the law of the place where the will is executed; or

(2) the law of the place where the testator is domiciled at the time of execution of the will.

Any such will has the same effect as if executed on the reservation in accordance with sec. 82.302.

82.302 Witnesses.

(1) Any person 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.

(2) A will is not invalidated because signed by an interested witness; but, unless the will is also signed by 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 death.

(3) An attesting witness is interested only if the will gives to him or his spouse some personal and beneficial interest. The following are not interests which are personal and beneficial:

(a) A provision for employment as executor or trustee or in some other capacity after death of the testator and a provision for compensation at a rate or in an amount not greater than that usual for services to be performed;

(b) A provision which would have conferred a benefit if the testator had died immediately following execution of the will.

82.305 Revocation.

(1) A will is revoked in whole or in part by:

(a) A subsequent will, codicil or other instrument which is executed in compliance with sec. 82.302 or 82.303 and which revokes the prior will or a part thereof expressly or by inconsistency; or

(b) Burning, tearing, cancelling or obliterating the will or part, with the intent to revoke, by the testator or by some person in the testator's presence and by his direction.

(2) A will is revoked by a subsequent marriage of the testator if the testator is survived by his spouse, unless:

(a) The will indicates an intent that it not be revoked by subsequent marriage or makes provision for issue of the decedent; or

(b) Testator and the spouse have entered into a contract before or after marriage, which complies with Wisconsin marital property law, Wis. Stat. Ch. 766, and which makes provisions for the spouse or provides that the spouse is to have no rights in the estate of the testator.

(3) Any provision in a will in favor of the testator's spouse is revoked by an annulment of the marriage to such spouse or by an absolute divorce.

(4) If any beneficiary under a will has feloniously and intentionally killed the decedent, the property that the killer would have taken passes as if the killer had predeceased the decedent unless a court decides that, under the factual situation created by the killing, the decedent's wishes would best be carried out by means of another disposition of the decedent's property.

(5) A will is revoked only as provided in this section.

(6) Except as modified by sub. (7) this section is not intended to change in any manner the doctrine of dependent relative revocation.

(7) When a will, codicil or part thereof has been revoked by a subsequent will, codicil or other instrument under sub. (1)(a), the later revocation of the revoking instrument by act under sub. (1)(b) revives the prior will or codicil or part thereof:

(a) if there is clear and convincing evidence that the testator intended to revive the prior will, codicil or part; or

(b) if the revoking instrument is a codicil which revoked only a part of the will by inconsistency and not expressly, and the evidence is insufficient to prove that the testator intended no revival.

Proof of testator's statements at or after the act of revocation is admissible to establish intent. A will, codicil or part cannot be revived under this subsection unless the original will or codicil is produced in court.

82.306 When a Will is Contractual.

(1) A contract not to revoke a will can be established only by:

(a) provisions of the will itself sufficiently stating the contract; or

(b) an express reference in the will to such a contract and evidence proving the terms of the contract; or

(c) if the will makes no reference to a contract, clear and convincing evidence apart from the will.

(2) This section applies to a joint will as well as to any other will; there is no presumption that the testators of a joint will have contracted not to revoke it.

82.307 Equitable Election When Will Disposes of Beneficiary's Property.

(1) Unless the will provides otherwise, if a will gives a bequest or devise to one beneficiary and also clearly purports to give another beneficiary a property interest which does not pass under the will but belongs to the first beneficiary by right of ownership, survivorship, beneficiary designation, election of deferral marital property, or otherwise, the first beneficiary must elect to take either under the will and transfer his or her property interest in accordance with the will, or retain his or her property interest and not take under the will. If the beneficiary elects not to take under the will, unless the will provides otherwise the bequest or devise given him or her under the will is to be assigned by the court to the other beneficiary in lieu of the property interest which does not pass under the will.

(2) This section does not require an election if the property interest belongs to the first beneficiary by reason of transfer or

beneficiary designation made by the decedent after the execution of the will.

(3) If an election is required, the procedure provided in Wis. Stat. ss. 853.15(2) shall be followed.

82.308 Unintentional Failure to Provide for Issue.

(1) If a testator fails to provide in his or her will for any child born or adopted after the making of the will, that child is entitled to receive a share in the estate of the testator equal in value to the share which the child would have received if the testator had died intestate, unless:

(a) the testator left all or substantially all of his or her estate to the mother of the child; or

(b) the testator eliminated all of his children known to him to be living at the time of execution of the will from any share under the will; or

(c) the testator provided for the subsequently born or adopted child by transfers outside the will and the intent that the transfers be in lieu of a testamentary gift is either shown by statements of the testator or inferred from the amount of the transfers and other circumstances; or

(d) in any other case it appears from the will or evidence outside the will that the omission was intentional.

If a child entitled to a share under this section dies before the testator, and the child leaves issue who survive the testator, the issue who represent the child are entitled to his or her share.

(2) If clear and convincing evidence proves that by mistake or accident the testator failed to provide in his or her will for a child living at the time of making of the will, or for the issue of any then deceased child, the child or issue is entitled to receive a share in the estate of the testator equal in value to the share which he or she or they would have received if the testator had died intestate. But failure to mention a child or issue in the will is not in itself evidence of mistake or accident.

(3) A demand for relief under this section must be presented to the tribal court in writing not later than six months after allowance of the will.

(4) Except as provided in sub. (5), the tribal court shall in its final judgment assign the share provided by this section:

(a) From any intestate property first;

(b) The balance from each of the beneficiaries under the will in proportion to the value of the estate each would have

received under the will as written, unless the obvious intention of the testator in relation to some specific gift or other provision in the will would thereby be defeated, in which case the tribal court may adopt a different apportionment and may exempt a specific gift or other provision.

(5) If in any case under sub. (1) or (2) the tribal court determines that the intestate share is a larger amount than the testator would have wanted to provide for the omitted child or issue of a deceased child, because it exceeds the value of a provision for another child or for issue of a deceased child under the will, or that assignment of the intestate share would unduly disrupt the testamentary scheme, the court may in its final judgment make such provision for the omitted child or issue out of the estate as it deems would best accord with the probable intent of the testator.

#### 82.309 Anti-Lapse.

Unless a contrary intent is indicated by the will, if provision in the will is made for any relative of the testator and the relative dies before the testator and leaves issue who survive the testator, then the issue as represent the deceased relative are substituted for him or her under the will and take the same interest as he or she would have taken had he or she survived the testator.

#### 82.310 After Acquired Property.

A will is presumed to pass all property which the testator owns at his or her death and which he or she has power to transmit by will, including property acquired after the execution of the will.

#### 82.311 Presumption That Will Passes All Property Interest.

Any gift of property by will is presumed to pass all the estate or interest which the testator could lawfully will in the property unless it appears by the will, interpreted in light of surrounding circumstances, that the testator intended to pass a less estate or interest.

#### 82.312 Incorporation of Certain State Law Provisions.

The following provisions of Wis. Stat. Ch. 853 are hereby incorporated herein by reference:

(1) Wis. Stat. s. 853.17: Effect of will provision changing beneficiary of life insurance or annuity.

(2) Wis. Stat. s. 853.18: Designation of beneficiary, payee or owner.

(3) Wis. Stat. s. 853.19: Advancement in testate estate.

(4) Wis. Stat. s. 853.33: Gifts of securities construed as specific.

(5) Wis. Stat. s. 853.35: Nonademption of specific gifts in certain cases.

(6) Wis. Stat. s. 853.50 through 853.62: Wisconsin basic will and Wisconsin basic will with trust.

82.313 Disclaimer.

(1) A person who is an heir, person succeeding to a disclaimed intestate interest, beneficiary under a will, person succeeding to a disclaimed interest created by a will, donee of a power created by will, appointee under a power exercised by will or taker in default under a power created by will, may disclaim any property or interest in property, including contingent or future interests or the right to receive discretionary distributions, by delivering a written instrument of disclaimer under this section.

(2) Property may be disclaimed in whole or in part, except that a partial disclaimer of property passing by will or by the exercise of a power may not be made if partial disclaimer is expressly prohibited by a will or by the instrument exercising the power.

(3) The right to disclaim exists notwithstanding any limitation on the interest of the disclaimant in the nature of a spendthrift provision or similar restriction.

(4) A person's right to disclaim survives the person's death and may be exercised by the person's administrator with the approval of the court after notice to interested persons and a hearing.

(5) The disclaimer shall be made within the time and in the manner provided by Wis. Stat. ss. 853.40(3), (4) and (5).

(6) The property or interest disclaimed under this section shall be deemed not to have been vested in, created in or transferred to the disclaimant. Such property or interest shall thereafter devolve in accordance with Wis. Stat. ss. 853.40(6) (b) and (c).

(7) A person's right to disclaim property or an interest in property is barred by the person's:

(a) Assignment, conveyance, encumbrance, pledge or transfer of the property or interest or a contract therefor; or

(b) Written waiver of the right to disclaim; or

(c) Acceptance of the property or interest or benefit of the property.

(8) The disclaimer or the written waiver of the right to disclaim is binding upon the disclaimant or person waiving and all persons claiming through or under that person.

(9) This section does not abridge the right of a person to waive, release, disclaim or renounce property or an interest in property under any other statute, provision of tribal law, the common law, or as provided in the creating instrument.

82.314 Assistance With and Deposit of Wills.

(1) The Tribe's Realty Department shall provide assistance to members and their families in the making and revising of wills, including wills which dispose of trust property. The Department may make use of the Wisconsin basic will and Wisconsin basic will with trust, but any will purporting to dispose of trust property shall conform with the requirements of 25 C.F.R. s. 4.260.

(2) The Department shall at the request of the testator submit any will disposing of trust property to the Superintendent of the Great Lakes Agency, Bureau of Indian Affairs, for examination and safekeeping in accordance with 25 C.F.R. s. 4.260(b).

(3) Any testator may deposit his or her will with the Tribe's Realty Department. The will shall be sealed in an envelope with the name and address of the testator, and the date of deposit noted thereon. Unless withdrawn under sub. (4) or opened in accordance with sub. (5), the will shall be kept on file indefinitely.

(4) A testator may withdraw his or her will during his or her lifetime, but the Realty Department shall deliver the will only to the testator personally or to a person duly authorized to withdraw it for the testator by a writing signed by the testator and two witnesses other than the person authorized.

(5) If a will has been deposited with the Realty Department for safekeeping under this section during the testator's lifetime, the department on learning of the death of the testator shall tender the will to the tribal court, which shall open the will and give notice of the court's possession to the administrator named in the will, otherwise to some person interested in the provisions thereof. If probate jurisdiction belongs to any other court, the will shall be delivered to that court.

(6) Unless a will has been opened in accordance with sub. (5), a will shall be held in absolute confidence by personnel of the Realty Department, and no person other than the testator shall admit its existence or divulge its contents prior to the death of the testator..`

82.315 Mixed Will.

A will is not rendered invalid because it purports to dispose of trust property and other property in one instrument.

## CHAPTER IV: PROBATING AN ESTATE

### 82.401 Jurisdiction.

(1) The tribal court shall have jurisdiction over the probating of the estate of any member or spouse or child of a member, provided the decedent was a resident of the reservation at the time of death, if the gross estate exclusive of trust property has a value of less than \$100,000.

(2) In accordance with P.L. 280, the jurisdiction provided for herein is not exclusive but is concurrent with that of the courts of the State of Wisconsin.

(3) Tribal court jurisdiction does not extend to trust property. The probate of interests in trust property is within the exclusive jurisdiction of the U.S. Department of the Interior in accordance with 43 C.F.R. Part 4, Subpart D.

### 82.402 Duty to Present Will for Probate.

(1) Every custodian of a will shall deliver the same to the tribal court within 30 days after receipt of information that the testator is deceased. Any such custodian who fails or neglects to do so shall be liable for damages sustained by any person injured thereby.

(2) If upon delivery of a will or at any later stage in probate proceedings the tribal court determines that probate jurisdiction belongs to another court, the will shall be delivered to that court.

### 82.403 Proving and Admitting Will.

(1) Upon initiating the probate of an estate, the will of the decedent shall be filed with the tribal court. Such will may be proven and admitted to probate by one of the following methods:

(a) By the filing of a self-proved will meeting the requirements of 43 C.F.R. s. 4.233.

(b) 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.

(c) If the evidence of none of the attesting witnesses is available, the tribal court may allow proof of the will by testimony or other evidence that the signature of the testator or of at least one of the witnesses is genuine.

(2) At any time within 90 days after a will has been admitted to probate, or within such time as the tribal court shall establish in the case of an exempt estate having a value which does not exceed \$5,000, any person interested in the decedent's estate may contest the validity of such will. In the event of such contest, the tribal court shall take no further action with respect to the probate of the estate, but

shall set a hearing to determine the validity of such will. All relevant evidence shall be presented at such 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 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.

(3) Upon considering all relevant evidence concerning the will, the tribal court shall enter an order affirming the admission of such will to probate or rejecting such will and ordering that the probate of decedent's estate proceed as if the decedent had died intestate.

#### 82.404 Initiating Probate.

(1) Any person interested in the administration of an estate which is subject to the jurisdiction of the tribal court may file a written petition with the tribal court requesting that such estate be administered in probate. Such petition shall set forth:

(a) The name, date of death and residence address of the decedent at the time of his or her death;

(b) The decedent was a member, or spouse or child of a member, who at the time of his or her death resided upon the reservation;

(c) The nature and estimated value of the estate and any other facts that may be necessary to give the tribal court jurisdiction to probate the estate;

(d) Whether decedent owned any trust property which is or may be subject to probate under 43 C.F.R. Part 4, Subpart D;

(e) That decedent left a will which has been presented for probate, or that decedent died intestate so far as is known to petitioner;

(f) The name, age, and residence address of the person nominated in the decedent's will, if any, to act as administrator of decedent's estate and, if such person desires to be appointed, a sworn statement from the person so stating;

(g) The names, ages, relationship to decedent, and residence addresses of all of the decedent's heirs and beneficiaries, so far as is known to the petitioner;

(h) The name and address of a disinterested and competent person to appraise the value of the decedent's estate or a statement of reasons why no appraisal should be required; and

(i) Whether family allowance during probate is needed, or the nature of any any special circumstances requiring the tribal

court to take immediate action to protect the property of the estate.

(2) Upon finding that the tribal court has jurisdiction over the probating of decedent's estate and that it is necessary to probate such estate, the tribal court shall enter an order that the estate be probated. The order shall state whether a will has been admitted to probate and, if so, that any person desiring to contest the validity of such will must do so within the time provided in sec. 82.403(2). The order shall also appoint an administrator to administer decedent's estate and an appraiser to appraise the value of decedent's estate unless the tribal court determines that an appraisal is not necessary per sec. 82.408(1).

(3) Immediately following the entry of an order to probate the estate, the administrator shall send by certified mail true copies of the order and of the will admitted to probate by such order, if any, to the Tribe's Accounting Department and to each person interested at their last known address so far as is known to the administrator. The order shall also be posted by the tribal court clerk on the tribal bulletin board and at three other public places within the reservation. The administrator shall within 30 days following entry of the order file an affidavit showing compliance with the notice requirement, including a list to whom the order was sent.

#### 82.405 Allowance During Administration.

The tribal court may, without notice or on such notice as the court directs, order payment by the administrator of such allowance as it determines necessary or appropriate for the support of the surviving spouse and any minor children of the decedent during the administration of the estate. The tribal court may direct that the allowance be charged against income or principal, either as an advance or otherwise, but in no event may an allowance for support of minor children of the decedent be charged against the income or principal interest of the surviving spouse.

#### 82.406 Appointment, Qualifications and Removal of Administrator.

(1) Upon ordering an estate to be probated, the tribal court shall appoint an administrator to administer the estate according to this code. The person nominated by the decedent's will to administer the estate shall be appointed if such person is qualified and willing to serve. Otherwise, the tribal court may appoint any qualified individual willing to serve or, if no suitable person is available, the head of the Tribe's Realty Department shall be appointed.

(2) A person is qualified for appointment as administrator if the person is over 21 years of age and is otherwise competent to perform the duties required of an administrator. At the request of the administrator, the head of the Realty Department may assist an administrator in performing his or her duties.

(3) The tribal court shall require the administrator to post bond in such amount and form as may be required by the court unless decedent's will directs that the administrator shall serve without bond.

(4) An appointed administrator other than the head of the Realty Department shall receive no compensation unless the administrator is appointed pursuant to a will and the will directs that the administrator receive compensation. In such event, compensation shall be limited to one-third of one percent (0.33 1/3%) of the value of the property of the estate.

(5) If the tribal court determines that there is no person qualified for appointment as administrator who is willing to serve, the tribal court shall appoint the head of the Realty Department as administrator, absent a showing that he or she should be disqualified because of a conflict of interest with respect to a particular estate. It shall not be grounds for disqualification that the Realty Department assisted in the making of the will being probated. No bond shall be required of the head of the Realty Department. In all cases where the head of the Realty Department is appointed, a fee of \$100 plus one-half of one percent (0.5%) of the value of the property of the estate shall be assessed, which shall be paid to the Tribe and attributed as income of the Realty Department.

(6) The tribal court may order the administrator to appear and show cause why he or she should not be discharged. After opportunity for hearing, if it appears that the administrator should be discharged, the tribal court may discharge the administrator for failure, neglect, or improper performance of his or her duties.

#### 82.407 Powers and Duties of Administrator.

The administrator appointed by the tribal court shall have the following duties and powers during the administration of the estate and until discharged by the tribal court:

(1) To preserve and protect the decedent's property within the estate for the benefit of the estate and the heirs and beneficiaries, so far as possible;

(2) To promptly investigate all claims against the decedent's estate and determine whether such claims are just and proper;

(3) To promptly determine the names, ages, and residence addresses of all persons interested in the estate;

(4) To promptly cause a written inventory of all of decedent's property within the estate and cause such property to be exhibited to and appraised by the appraiser, the inventory and appraisal to be filed with the tribal court;

(5) To promptly give all persons entitled thereto such notice as is required by this code;

(6) To account for all property within the estate which may come into his or her possession or control, and to maintain accurate records of all income received and disbursements made during the course of the administration; and

(7) To exercise those powers and perform those duties set forth in Wis. Stat. Ch. 857 which are not inconsistent with the provisions of this code.

#### 82.408 Appointment and Duties of Appraiser.

(1) Unless the tribal court finds that an appraisal is not required for a given estate, upon ordering an estate to be probated the tribal court shall appoint a disinterested and competent person to appraise all of decedent's property within the estate. If at the time of entry of the order that the estate be probated the tribal court is unsure whether an appraisal is required, the tribal court may delay that decision until an administrator has been appointed and an inventory has been filed.

(2) Before making the appraisal the appraiser shall file a verified oath of office with the tribal court to the effect that the appraiser has no interest in the estate and that he or she will honestly, impartially and to the best of his or her ability appraise all of the property within the estate that is exhibited to him or her.

(3) It shall be the duty of the appraiser to separately appraise the true cash value of each article or item of property within the estate, including debts due the decedent, and to indicate the appraisal value of each such article or item of property set forth in the inventory of the estate and to certify such appraisal by subscribing his or her name to the inventory and appraisal.

(4) In lieu of appraisal under this section, the court may order that the property within the estate or a part thereof be liquidated at auction without reserve.

#### 82.409 Summary Probate of Exempt Estates.

(1) An estate having a value of less than \$5,000 and which is to be inherited by a surviving spouse and/or the minor children of the decedent shall be exempt from the claims of all creditors and the probate thereof may be summarily concluded as provided in this section.

(2) Upon petition of the administrator, the tribal court shall enter an order stating that it appears from the inventory or inventory and appraisal filed with the tribal court that the value of the estate does not exceed \$5,000 and that such estate is to be inherited by the surviving spouse and/or minor children of the decedent and shall set a hearing on objections of any person interested, if any there be, why the whole 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.

(3) Notice of such hearing shall be sent by the administrator by sending a true copy of the order by certified mail to each person interested. On or before the time set for hearing the administrator shall file an affidavit indicating compliance with this notice requirement, including a listing of to whom the notice was sent. In addition, the notice shall be posted by the tribal court clerk on the tribal bulletin board and at three other public places within the reservation. Notice shall be posted and mailed not less than ten days before the date set for the hearing.

(4) If upon the hearing the tribal court finds that the estate is an exempt estate, the tribal court shall enter an order directing the administrator to distribute such estate to the surviving spouse and/or the minor children of the decedent as set forth in the order and provide that no further proceeding is necessary and that, upon distributing the shares of the estate to those entitled thereto and filing receipts therefor, the estate shall be closed.

#### 82.410 Claims Against the Estate.

(1) Unless an estate shall be determined by the tribal court to be an exempt estate under sec. 82.409, notice shall be given to the creditors of the decedent and the the Tribe's Accounting Department to present their claims against the decedent's estate. Such notice shall state the name, date of death, and residence address of the decedent at the time of his/her death; the date upon which the notice is being given; that all persons having claims against the estate are required to present such claims, in writing, with proper vouchers, to the administrator, at a stated address, within 90 days after the date upon which the notice was first given.

(2) The notice to creditors shall be sent by the administrator by ordinary mail to all persons known or believed by the administrator to be creditors of the decedent. The administrator shall exercise due diligence to discover the creditors of the decedent. The administrator shall also cause the notice to creditors to be published once in the Lakeland Times not less than 60 days prior to the expiration of the period for filing claims. Prior to the expiration of the period for filing claims the administrator shall file an affidavit indicating compliance with the notice requirement, including a listing of to whom the notice was sent. In addition, the notice shall be posted by the tribal court clerk on the tribal bulletin board and at three other public places on the reservation for a period of not less than 30 days.

(3) A claim not presented to the administrator within the 90 day notice period is not barred, but such claim cannot be paid until the claims presented within that period have been satisfied. Until the final account is filed, a claim against the estate is not barred and may be presented or allowed and paid out of any assets then in the hands of the administrator not otherwise appropriated.

(4) All claims presented to the administrator shall be examined, dated and endorsed with the words "examined and allowed" if the administrator is satisfied that the claim is valid, or endorsed with

the words "examined and rejected" if the administrator is not so satisfied.

(5) If a claim is allowed, it shall be paid in the due course of administration. If a claim is rejected, the administrator shall file notice with the tribal court that the claim has been rejected and serve by certified mail upon the claimant a notice of rejection. If the administrator neither allows nor rejects the claim within 60 days of receipt, it shall be deemed rejected.

(6) Any claimant whose claim has been rejected may request a hearing before the tribal court concerning the rejection of the claim by filing a petition requesting a hearing within 30 days after the administrator filed notice of rejection of the claim or, if no such rejection is filed, within 90 days of receipt of the claims by the administrator. If no such petition is timely filed, the claim shall thereafter be of no validity and shall be barred.

(7) If the claim falls within the jurisdiction of the tribal court or the parties stipulate that the matter may be decided by the tribal court, the tribal court shall set the matter for hearing as in other civil proceedings and determine whether the claim should be allowed or rejected. If the matter is outside the jurisdiction of the tribal court and the parties do not stipulate to its resolution by the tribal court, the tribal court shall stay further proceedings to allow the claimant to pursue the claim in a court of competent jurisdiction.

#### 82.411 Payment of Claims.

(1) Claims, charges and allowances against the estate shall be classified in one of the following classes. If the applicable assets of the estate are insufficient to pay all claims, charges and allowances in full, the administrator shall make payment in the following order:

- (a) Costs and expenses of administration.
- (b) Reasonable funeral and burial expenses.
- (c) Provisions for a family allowance during administration made under sec. 82.405.
- (d) Reasonable and necessary expenses of last illness.
- (e) All debts, charges or taxes owed to the Tribe.
- (f) All debts, charges or taxes owing to the United States.
- (g) Wages due to employees which have been earned within three months before the date of death of decedent, up to \$500 per employee.
- (h) Property assigned for the support of the surviving spouse under sec. 82.413(4).

(i) All other claims allowed within the 90 day notice period.

(j) All other claims allowed.

(2) Preference shall not be given in the payment of any claim over any other claim of the same class, nor shall a claim due and payable be entitled to a preference over claims not due. If the amount of the estate is insufficient to pay all of the claimants in the same class, the claimants in the class shall be paid a pro rata share of the estate remaining in proportion to the size of their claims.

#### 82.412 Family Rights.

The Tribe recognizes the marital property law of the State of Wisconsin and the right of a spouse to elect deferred marital property and the augmented marital estate and certain other rights, allowances and exemptions. Accordingly, the following provisions of Wis. Stat. Ch. 861 are hereby adopted and incorporated herein by reference:

(1) s. 861.01: Ownership of marital property at death.

(2) s. 861.02: Election of deferred marital property.

(3) s. 861.03: Election of augmented marital property estate.

(4) s. 861.05: Transfers included in augmented marital property.

(5) s. 861.07: Property of surviving spouse charged against elective share of augmented marital property estate.

(6) s. 861.09: Satisfaction and apportionment of augmented marital property estate.

(7) s. 861.11: Procedure for electing.

(8) s. 861.13: Barring election of certain property at death.

(9) s. 861.17: Rights in property transferred in fraud of surviving spouse.

(10) s. 861.20: Surviving spouse's right in nondomiciliary decedent's real property.

(11) s. 861.35: Special allowance for support of spouse and support and education of minor children.

#### 82.413 Additional Selections by Spouse.

(1) In addition to all other allowances and distributions, the surviving spouse may file with the tribal court a written selection of the following personal property, which shall thereupon be transferred to the spouse by the administrator unless the items have been specifically bequeathed:

(a) Decedent's wearing apparel and jewelry held for personal use;

(b) Automobile;

(c) Normal household furniture, furnishings and appliances, excluding antiques, family heirlooms and collections which are of significant value.

(d) Other tangible personalty, not used in trade, agriculture or other business, not to exceed \$1,000 in inventory value.

(2) If it appears that claims against the estate may not be paid in full, and the estate is not an exempt estate under sec. 82.409, the tribal court shall limit the value of property transferred to the spouse under sub. (1) to \$3,000 in aggregate inventory value or, if the property has already been transferred, may require the spouse to retransfer property in excess of \$3,000.

(3) The administrator has the power, without court order, to execute appropriate documents to effect transfer of title to any personal property selected by a spouse under sub. (1). A person may not question the validity of the documents of transfer or refuse to accomplish the transfer on the grounds that the administrator is also the surviving spouse.

(4) After the amount of claims against the estate has been ascertained, if the estate is not an exempt estate under sec. 82.409 the surviving spouse may petition the tribal court to set aside as exempt from the claims of creditors in the classes set forth in sec. 82.411(1)(i) and (j) and an amount of property reasonably necessary for the support of the spouse, not to exceed \$10,000 in value, in addition to selections and allowances, if it appears that the assets are insufficient to pay all claims and leave the spouse the property requested. The tribal court shall grant the petition if it determines that an assignment ahead of creditors is reasonably necessary for the support of the spouse.

#### 82.414 Sale of Property.

(1) No sale of property of an estate is valid unless it is made pursuant to an order of the tribal court.

(2) After the filing of the inventory and the appraisal, if one is required, the administrator may petition the tribal court for authority to sell personal property of the estate for purposes of paying the claims listed in sec. 82.411 and for the purpose of distribution. If the sale is in the best interests of the estate the tribal court shall order such sale and prescribe the terms upon which the property shall be sold. No sale shall be ordered unless the surviving spouse has had the opportunity to select personalty in accordance with sec. 82.413.

(3) If the proceeds of the sale of personal property and other funds of the estate have been exhausted, and the charges, expenses and claims against the estate have not all been satisfied, or if it appears that it would be in the best interest of the heirs and beneficiaries that all or a portion of the real property of the estate be sold for the purpose of distribution, the administrator shall petition the tribal court for authority to sell real property of the estate, or so much thereof as may be necessary for that purpose. If the tribal court determines that the sale is in the best interest of the estate, the tribal court shall order such sale and shall prescribe the terms upon which the real property shall be sold. Any such sale shall be subject to the surviving spouse's exemption of property pursuant to sec. 82.413(4).

#### 82.415 Accounting.

Annually, within 30 days of the anniversary date of the order appointing the administrator, the administrator shall file an account with the tribal court, verified under oath, showing the amount of money received and expended, from whom received and to whom paid, with vouchers for such payment, the name and amount of each claim against the estate which has been presented, and the disposition of such claim, the property sold or distributed, if any, and any other matter necessary to show fully the condition and affairs of the estate.

#### 82.416 Final Account.

When the affairs of the estate have been fully administered, the administrator shall file a final account with the tribal court, verified upon oath, which shall affirmatively set forth:

(1) That all claims against the estate have been paid, or that such claims have been paid with the exceptions shown;

(2) The amount of money received and expended, from whom received and to whom paid, referring to the vouchers for each such payment;

(3) The property selected by the surviving spouse under sec. 82.413 and family allowances paid under sec. 82.405, if any;

(4) The remaining assets of the estate, including unexpended and unappropriated money;

(5) That there is nothing further to be done in the administration of the estate except as shown in the final account;

(6) The proposed determination of distributees, indicating the name, age, address and relationship to the decedent of each distributee, and the proposed distributive share that each distributee is to receive;

(7) A request that the tribal court set a time for filing objections to the final account, or to the proposed determination of

the distributees, or to the proposed distributive share of each distributee;

(8) A request that the tribal court set a hearing on any objections filed; and

(9) A request that the tribal court determine the distributees and the distributive share of each and approve the final account.

82.417 Approval of Final Account.

(1) Upon the filing of a final account, the tribal court shall enter an order setting a time for filing objections to the final account, which date shall be not less than twenty (20) days after such order, and set a hearing on objections, if any there be, which hearing shall be not less than ten (10) days after the deadline for filing objections.

(2) Immediately following entry of the order, the administrator shall send by certified mail a true copy of the order to each person interested at their last known address so far as is known to the administrator, and to the Tribe's Accounting Department. The order shall also be posted by the tribal court clerk on the tribal bulletin board and at three other public places within the reservation. The administrator shall before expiration of the deadline for objections file an affidavit showing compliance with this notice requirement.

(3) On or before the deadline for filing objections, any person interested may file an objection to the final account, the proposed determination of distributees or the proposed distributive share of each distributee, specifying the particulars of such objections with reasonable certainty. If any such objection is filed, the tribal court shall hold the hearing as provided in the order, shall consider all evidence relevant to the objections, and shall determine the controversy.

(4) If no objections are filed within the time set by the tribal court, and if the final account appears to be proper, the tribal court shall dispense with the hearing and enter an order pursuant to sec. 82.418.

82.418 Order Allowing Final Account and Distribution.

After hearing on objection to the final account, or without hearing if no objections are filed, the tribal court shall enter an order:

(1) Allowing the final account, either in whole or in part, as may be just and proper, and directing the administrator to pay those unpaid claims, charges and allowances against the estate as shown in the final account;

(2) Determining the decedent's distributees, indicating their names, ages, addresses and the distributive share of the remaining estate which each is to receive; and

(3) Directing the administrator to distribute such distributive share or shares to each distributee.

#### 82.419 Closing Estate.

(1) At such time as the estate is ready to be closed, the administrator shall petition the tribal court for an order closing the estate and discharging the administrator and his or her bondsman, if any. Such petition shall indicate that all required tax returns have been filed and all applicable estate and death taxes paid and shall be accompanied by vouchers for any sums paid since entry of the order approving the final account and by a signed receipt for the distributive share for each of the distributees.

(2) Upon finding that the estate has been fully administered and is in a condition to be closed, the tribal court shall enter an order closing the estate and discharging the administrator and his or her bondsman, if any.

#### 82.420 Reopening Estate.

(1) An estate may be reopened if additional property is discovered which should have been distributed in the estate, an inconsistent order has been entered in the BIA probate of decedent's estate, any necessary act remains unperformed, or for any other proper cause appearing to the tribal court to require the reopening of a closed estate.

(2) Upon receipt of a petition to reopen an estate from any person interested, the tribal court shall set a hearing upon not less than thirty (30) days notice to all persons interested, except that if the petition is for inclusion of omitted property the tribal court may upon the same notice order the additional property to be distributed in accordance with the original order of distribution without a hearing.

(3) If the tribal court reopens the estate, it shall appoint an administrator, which may be the former administrator or another qualified person. The provisions of this chapter as to original administration shall apply insofar as applicable to accomplish the purpose for which the estate is reopened.

#### 82.421 Relation to BIA Probate.

(1) Decisions and orders entered in the BIA probate of a decedent's estate in trust property under 43 C.F.R. Part 4, Subpart D shall be conclusive and binding upon the tribal court in the probate of the same decedent's estate in tribal court. This shall include determinations as to distributees, admission of a will to probate, the validity of claims filed, and any other matter related to the estate not governed by a contrary express provision of this code.

(2) If it appears to the tribal court that a decedent whose estate is before the tribal court also died possessed of an estate in trust property subject to BIA probate, the tribal court shall notify the appropriate administrative law judge that a probate has been initiated in tribal court, direct the administrator to provide notice to the administrative law judge as a person interested, and provide the administrative law judge all orders entered in the probate.

(3) Except for exempt estates, the tribal court may stay proceedings in tribal court to await a determination in the BIA probate of the same decedent's estate in trust property. During any such stay the tribal court shall proceed with such actions with regard to the estate as are appropriate pending a determination in the BIA probate, such as appointment of an administrator, appointment of an appraiser if necessary, proceeding with notice to creditors, providing for a family allowance, or similar matters.

(4) The administrator shall coordinate with the BIA probate the processing of claims against the estate to ensure that claims are properly paid and that there is no duplication of payment of claims.

#### 82.422 Compromise of Claims.

The tribal court may authorize the administrator to adjust by compromise any controversy that may arise between different claimants to any estate or property in their hands, to which agreement the administrator and all other parties in being who claim an interest in the estate and whose interests are affected by the proposed compromise shall be parties. An agreement of compromise shall be made in writing. If such agreement is found by the tribal court to be just and reasonable in its effects upon the interests in the estate or property of persons subject to guardianship, unknown persons, or the future contingent interests of persons not in being, it shall be approved by the tribal court and shall be valid and binding upon such interests as well as upon the interests of adult parties of sound mind.

#### 82.423 Dead Man's Statute.

No party or person in his or her own behalf or interest, and no person from, through or under whom a party derives his or her interest or title, shall be examined as a witness in respect to any transaction or communication by him or her personally with a deceased person in any action or proceeding under this code, in which the opposite party derives his or her title or sustains his or her liability to the cause of action from, through or under such deceased person, unless such opposite party shall first, in his or her own behalf, introduce testimony of himself or herself or some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in respect to matters to which such testimony relates.