OMAHA TRIBAL CODE (2013)

TITLE 20. PROBATE

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TITLE 20. PROBATE

CHAPTER 1. GENERAL PROVISIONS

SECTION 20-1-1.

(a) The traditional Omaha way for distribution of property upon death is hereby recognized and reaffirmed by this code. There shall be no involvement of or by the Omaha Tribal Courts in such distribution or disposition of estates upon death except upon referral by the Omaha Tribal Council following petition to the Council for such referral by any family member. The Tribal Court shall have no jurisdiction over any probate proceeding except as provided in the preceding sentence.

(b) The Court may adjudicate any question relating to title to any beneficial interest in trust property on petition filed by the Bureau of Indian Affairs.

(c) Reference to Other Law. The law of the State of Nebraska relative to decedents' estates may be referred to and followed in situations where this Probate Code provides no guidance regarding the handling of decedent's estates, but only so far as such law is not inconsistent with the provisions and spirit of this Probate Code.

(d) Nothing in this title shall bar any second party from filing an appropriate action in the Tribal Court to secure possession of any property pledged as security on any credit instrument if the obligations on the instrument are in default.

SECTION 20-1-2. Construction.

These provisions relating to decedents' estates shall be liberally construed and applied to give effect to the underlying policy of distributing a decedents' property according to the decedent's intent where there is a valid will manifesting such intent, or according to the provisions of this Probate Code where there is not a valid will.

SECTION 20-1-3. Effect of Fraud and Evasion.

Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Probate Code or if fraud is used to avoid or circumvent the provisions or purposes of this Probate Code, 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 who purchased without knowledge of the fraud) benefiting from the fraud, whether innocent or not. Any proceeding must be commenced within 5 years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than 2 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 lifetime which affect the succession of his estate.

SECTION 20-1-4. Evidence as to Death or Status.

In proceedings under this Code the rules of evidence in the trial court are applicable unless specifically displaced by the Probate Code. In addition, the following rules relating to determination of death and status are applicable:

(a) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie proof of the fact, place, date and time of death and the identity of the decedent;

(b) A certified or authenticated copy of any record 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;

(c) A person who is absent for a continuous period of 5 years, during which he has not been. heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. His death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

SECTION 20-1-5. Practice in Court.

Unless specifically provided to the contrary in this Probate Code or unless inconsistent with its provisions, the Omaha Rules of Civil Procedure, including the rules governing vacation of orders and appellate review, control formal proceedings under this Probate Code.

SECTION 20-1-6. Records and Certified Copies.

The Clerk shall keep a file for each decedent of all documents filed with the Court under this Probate Code and shall keep a numerical index of all such estates to facilitate access to such records. Upon payment of the fee (not to exceed fifty cents per copy page), the Clerk shall issue certified copies of any document or paper so filed.

SECTION 20-1-7. Jury Trial

If properly demanded, a party is entitled to a trial by jury in any proceeding in which any genuine controverted question of fact arises, or the trial judge may order a jury trial on any such issue on his own motion. Otherwise all proceedings under this Probate Code shall be handled by a trial judge or the Clerk, as is appropriate.

SECTION 20-1-8. Oath or Affirmation on Filed Documents.

Except as specifically provided in this Probate Code, every document filed with the Court under this Probate 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 thereof.

SECTION 20-1-9. 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 attorney if he has appeared by attorney or requested that notice be sent to his attorney. Notice shall be given:

(1) by mailing a copy thereof at least 14 days before the time set for the hearing by certified, registered or ordinary first-class mail addressed to the person being notified at the post office address given in his demand for notice, if any, or at his office or place of residence, if known; or

(2) by delivering a copy thereof to the person being notified personally at least 14 days before the time set for the hearing; or

(3) 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 on the Reservation at least 14 days before the time set for the hearing.

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

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

(d) A person, including a guardian ad litem, or other fiduciary, may waive notice by a writing signed by him or his attorney and filed in the proceeding.

SECTION 20-1-10. Renunciation of Succession.

A person (or his 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 Court not later than 6 months after the decedent's death 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 death. The instrument shall:

(a) describe the property or part thereof or interest therein renounced,

(b) be signed by the person renouncing and

(c) declare the renunciation and the extent thereof.

Upon proper renouncement, the interest renounced passes as if the renouncing person had predeceased the decedent or donee.

SECTION 20-1-11. Effect of Divorce, Annulment, And Decree of Separation.

A person who is divorced from a decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he is married to the decedent at the time of death. A decree of separation which does not terminate the status of husband and wife is not, a divorce for purposes of the Probate Code.

SECTION 20-1-12. Effect of Homicide on Intestate Succession, Wills, Joint Assets, Life Insurance and Beneficiary Designations.

(a) A surviving spouse, heir or devisee, who criminally and intentionally kills the decedent, is not entitled to any benefits under the will or under this Probate Code, and the estate of the decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

(b) Any joint tenant who criminally and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship. This provision applies to joint tenancies in real and personal property, joint accounts in banks, savings and loan associations, credit unions and other institutions, and any other form of co-ownership with survivorship incidents.

(c) A named beneficiary of a bond, life insurance policy or other contractual arrangement who criminally and intentionally kills the principle obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy or other contractual arrangements, and it becomes payable as though the killer had predeceased the decedent.

(d) Any other acquisition of property or interest by the killer shall be treated in accordance with the principles of this section.

(e) A final judgment of conviction of an offense containing the elements of criminal and intentional killing is conclusive for purposes of this section. In the absence of a conviction of criminal and intentional killing, the Court may determine by a preponderance of evidence whether the killing was criminal and intentional for purposes of this section.

CHAPTER 2. INTESTATE SUCCESSION

SECTION 20-2-1. Intestate Estate.

In any probate preceding properly before the Court, when any member of the Tribe dies without disposing of all or part of his property by a valid will, all such property not so disposed will pass in accordance with the traditional Omaha way for distribution of property upon death.

CHAPTER 3. PROBATE AND INTESTATE SUCCESSION

SECTION 20-3-1. Petition.

(a) When any member of the Tribe dies leaving an intestate estate subject to the jurisdiction of the Omaha Tribal Court, any person claiming to be an heir of the decedent, or the Tribe, may petition the Court for a determination of the heirs of the decedent and for distribution of such property. The petition shall contain the names and addresses of all persons known to the petitioner who may be entitled to share in the distribution of the estate.

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

SECTION 20-3-2. Administrator of Intestate Estate.

(a) If an executor 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 Court shall appoint an administrator over the estate. It shall not be necessary to appoint an administrator if the value of the decedent's property appears to be less than $1,000.00 in value, no problems in administering the estate are foreseen, and no interested party requests that one be appointed.

(c) The following persons, if legally competent, shall be afforded priority in order of their listing for appointment as administrator: the surviving spouse, children in descending order of age, other blood relatives in order of their closeness of relationship; any adult tribal member.

(d) The dutes of the administrator shall be:

(1) to take possession of all property of the decedent subject to this Probate Code;

(2) within one month of his appointment make an inventory and appraisement of such property and file it with the Court;

(3) determine and file with the Court a list of all known relatives of the decedent, their ages, and their relationship to the decedent;

(4) subject to the approval of the 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 Court and file receipts with the Court showing distribution of the estate.

(e) The Administrator shall file a bond in an amount to be set by the Court to insure his faithful, honest performance of his duties as administrator. Unless otherwise made to appear necessary or desirable, no bond shall be required of an administrator who is the spouse or child of a decedent.

SECTION 20-3-3. Appointment Of Administrator.

(a) Upon receipt of a petition to administer an intestate estate, the clerk shall schedule a hearing at which an administrator will be appointed. Said hearing shall be scheduled far enough in advance to allow the required notice to be made.

(b) Notice of the hearing shall be made by the petitioning party or by the posting at the Tribal Administration Building.

(c) The Court shall determine who is the proper person to appoint as administrator, and if such person manifests his willingness to serve, order his appointment as such.

SECTION 20-3-4. Oath of Administrator; Letters of Administration.

(a) Upon his appointment as administrator, the person appointed shall take an oath to be prescribed by the Court to the effect that he will faithfully and honestly administer the estate.

(b) Upon taking the oath and filing the bond, if any is required, the administrator shall be granted Letters of Administration as proof of his appointment.

SECTION 20-3-5. Notice to Credit

The administrator of the estate or the Clerk if no administrator is appointed shall cause notices to creditors to be posted in at least three conspicuous places on the Reservation and published at least twice in a publication of general distribution on the Reservation. Said notice shall state that creditors have 90 days from the date of the first publication of the notice to present their claims to the administrator or Clerk and that only those claims so presented shall be paid by the estate. Notice by mailing shall also be given to each creditor of whom the administrator of Clerk has actual knowledge.

SECTION 20-3-6. Payment of Creditors.

(a) Payment of creditors of the decedent shall be made by the administrator 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 only after payment of the family allowance and homestead allowance as provided herein.

SECTION 20-3-7. Accounting.

Prior to the distribution of every estate for which an administrator has been appointed, such administrator 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 that it is ready for distribution, and also showing the computation of any attorney's and/or administrator's fees involved for which approval for payment is sought. In estates in which no administrator is appointed, the Clerk shall account to the Court for all transactions relating to the estate.

SECTION 20-3-8. No Taker.

If there is no taker under the provisions of this part, the intestate estate passes to the Omaha Tribe.

SECTION 20-3-9. Advancements.

If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in contemporaneous writing by a decedent or acknowledged in writing by the heir to be an advancement. For this purpose, the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. 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 acknowledgement provides otherwise.

SECTION 20-3-10. 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 share of the debtor's issue.

SECTION 20-3-11. Status Of Heirs.

No person is disqualified to take as an heir because he or a person through whom he claims is not a member of the Omaha Tribe or because he does not live on the Reservation.

CHAPTER 4. WILLS

SECTION 20-4-1. Who May Make A Will.

Any person 18 or more years of age who is of sound mind may make a will.

SECTION 20-4-2. Execution.

Except as provided for holographic wills, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two (2) persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

SECTION 20-4-3. Holographic Will.

A will which does not comply with the next preceding section is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.

SECTION 20-4-4. Self-Proved Will.

An attested will may, at the time of its execution or at any subsequent date, be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before a notary public or Tribal judge and evidenced by the notary or judge's certificate, under official seal, attached or annexed to the will in form and content substantially as follows:

THE STATE OF

COUNTY OF

We,

and , the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will, and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness, and that to the best of his knowledge the testator was at the time 18 or more years of age, of sound mind and under no constraint or undue influence.

Testator
Witness
Witness
Subscribed, sworn to and acknowledged before me by _____,
the testator, and subscribed and sworn to before me by_____, and
_____witnesses, this _____day of _____ , 19___.

(Signed)
(Official capacity of Officer)
(S E A L)

SECTION 20-4-5. Who May Witness.

(a) Any person generally competent to be a witness may act as a witness to a will.

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness.

SECTION 20-4-6. Choice of Law as to Execution.

A written will is valid if execution in compliance with this Probate Code or if its execution complies with the law at the time of execution of 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 death the testator is domiciled or has a place of abode.

SECTION 20-4-7. Revocation by Writing or by Act.

A will or any part thereof is revoked:

(a) By a subsequent will which revokes the prior will in whole or in part expressly or by inconsistency; or

(b) By being burned, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose in his presence and by his direction.

SECTION 20-4-8. Revocation by Divorce; No Revocation by Other Changes of Circumstances.

If, after executing a will, the testator is divorced or his marriage 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 executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. 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, and other provisions conferring some power or office on the former spouse are interpreted as if the 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. No change of circumstances other than as described in this section revokes a will.

SECTION 20-4-9. Revival of Revoked Will.

(a) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed.

(b) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect.

SECTION 20-4-10. 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.

SECTION 20-4-11. Events of Independent Significance.

A will may dispose of property by reference to acts and events which have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of a will of another person is such an event.

SECTION 20-4-12. Requirement That Devisee Survive Testator by 100 Hours.

A devisee who does not survive the testator by 100 hours is treated as if he predeceased the testator, unless the will of the decedent contains some language dealing explicitly with simultaneous deaths or deaths in a 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.

SECTION 20-4-13. Simultaneous Death.

(a) Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person

shall be disposed of as if he had survived, except as provided otherwise.

(b) Where two or more beneficiaries are designated to take successively by reason of survivorship under another person's disposition of property and there is no 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 respectively to those who would have taken in the event that each designated beneficiary had survived.

(c) Where there is no sufficient evidence that two joint tenants by the entirety have died otherwise than simultaneously, the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them have so died, the property thus distributed shall be in the proportion that one 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 no 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) These provisions on simultaneous death shall not apply in cases where the decedent has made provision for a different distribution in a will, trust, deed or contract of insurance.

SECTION 20-4-14. Rules of Construction and Intention.

The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this Probate Code apply unless a contrary intention is indicated by the will.

SECTION 20-4-15. Construction that Will Passes All Property; After-Acquired Property.

A will is construed to pass all property which the testator owns at his death, including property acquired after the execution of the will.

SECTION 20-4-16. Anti-Lapse; Deceased Devisee; Class Gifts.

If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, the issue of the deceased devisee who survive the testator by 100 hours take in place of the deceased devisee, and if they are all of the same degree of kinship to the devisee, they take equally; but if of unequal degree, then those of more remote degree take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.

SECTION 20-4-17. Failure of Testamentary Provision.

(a) Except as provided in the next proceeding section, if a devisee other than a residuary devisee fails for any reason, it becomes a part of the residue.

(b) Except as provided in the next proceeding section, if the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.

SECTION 20-4-18. 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 held by the testator unless specific reference is made to the power or there is some other indication of intention to include the property subject to the power.

SECTION 20-4-19. Non-Exoneration.

A specific devise passes subject to any security interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

SECTION 20-4-20. Construction of Generic Terms to Accord With Relationship as Defined for Intestate Succession.

Half-bloods, adopted persons and persons born out of wedlock are included in a class gift terminology and terms of relationship in accordance with rules for determining relationship for purposes of intestate succession.

SECTION 20-4-21. Ademption By Satisfaction.

Property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part only if the will provides for deduction of the lifetime gift or the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in writing that the gift is in satisfaction. For purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first.

CHAPTER 5. PROBATE OF WILLS

SECTION 20-5-1. 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 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 executor and the address of such person if known. The original copy of the will shall be submitted to the Court with the petition.

SECTION 20-5-2. Qualification of Executor.

The Court shall appoint an executor to administer the estate. The executor shall be a competent adult Tribal member 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 or child of the decedent with preference given in descending order of age.

SECTION 20-5-3. Appointment of Executor.

(a) Upon receipt of a petition for Letters Testamentary, the clerk shall schedule a hearing at which an executor will be appointed and Letters Testamentary authorized. The hearing shall be scheduled so that adequate notice to interested persons can be made.

(b) Notice of the 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 takers, and also by posting notice in a conspicuous place in the Tribal Administrative Building.

(c) At the hearing, the Court shall first determine the validity of the decedent's will and then appoint an executor to administer the estate according to the terms of this Probate Code and the decedent's will.

(d) Letters Testamentary shall be granted to the person appointed as executor upon his taking an oath, to be prescribed by the Court, to the effect that he will faithfully and honestly administer the estate, and upon his filing of bond, if required.

SECTION 20-5-4. Duties Of Executor, Bond.

The duties of the executor shall be the same as those prescribed in this Probate Code for the Administrator of an intestate estate, and he shall file a bond in a like manner and subject to the same exceptions.

SECTION 20-5-5. Creditors.

Notice to creditors, determination of the validity of claims, and payment of claims shall be handled as prescribed for intestate estates.

SECTION 20-5-6. Accounting.

Prior to the distribution of the estate remaining after payment of all just claims and priority payments, the executor shall submit to the Court for approval an accounting of all receipts and disbursements for the estate, showing the present status of the estate and that it is ready for distribution, and also showing the computation of any attorney and/or executor's fees involved for which approval for payment is sought.

SECTION 20-5-7. Distribution; Closing Estate.

(a) When it is made to appear to the Court that an estate is ready to be distributed, the 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.

(b) The estate shall be closed and the personal representative of the estate dismissed and his bond, if any, released upon filing with the 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.

SECTION 20-5-8. Distribution; Order in Which Assets Appropriated; Abatement.

(a) Except as provided in subsection (b), 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.

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.

(b) 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 subsection (a), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(c) 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.

SECTION 20-5-9. Property Discovered After Estate Closed.

An estate may be reopened whenever necessary to dispose of a decedent's property discovered after his estate has been closed. The Court shall order distribution of the property to the person or persons entitled thereto after making whatever orders appear necessary to assure a just participation of the after-discovered property in the expenses of the estate.

SECTION 20-5-10. Personal Representative's and Attorney's Fees.

(a) An administrator or executor may receive a fee of 5% of the value of the gross estate, but not less than $50.00, to be paid from the estate prior to final distribution of the estate.

(b) An attorney who represents the personal representative of an estate for purposes of administering the estate may be paid from the estate a fee of 5% of the gross estate, but not less than $50.00. A greater amount may be approved upon a showing of extraordinary service to the estate.

CHAPTER 6. FAMILY RIGHTS

SECTION 20-6-1. Right to Elective Share.

If a married Tribal member domiciled on the Reservation dies, the surviving spouse has a right to elect to take an elective share of one-third of the 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 $1,000.00 transferred by the decedent to any person other than the surviving spouse in the three years preceding his death to which the surviving spouse has not joined by written consent.

SECTION 20-6-2. Right of Election Personal to Surviving Spouse.

The right of election of the surviving spouse may be exercised only during his lifetime by him. In the case of an incompetent or protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending, after finding that exercise is necessary to provide adequate support of the protected person during his probable life expectancy.

SECTION 20-6-3. 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 homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before 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 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, homestead allowance, exempt property and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

SECTION 20-6-4. Proceeding for Elective Share; Time Limit.

(a) The surviving spouse may elect to take his elective share in the estate by filing in the Court and mailing or delivering to the personal representative a petition for the elective share within six months after the publication of notice to creditors for filing claims which arose before the death 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 of election has expired.

(b) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the estate whose interests will be finally determined by the Court.

(c) The surviving spouse may withdraw his demand for an elective share at any time before entry of a final determination by the Court.

(d) After notice and hearing, the Court shall determine the amount of the elective share and shall order its payment from the assets of the estate or by contribution as appears appropriate under the following section. If it appears that a fund or property included in the estate has not come into the possession of 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 he would have been if relief had been secured against all persons subject to contribution.

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

SECTION 20-6-5. 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 estate passing to the surviving spouse by testate or intestate succession shall, unless renounced by the spouse in his petition, be counted against his elective share.

(b) When an election to take an elective share has been made and there is insufficient 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 their interests therein.

(c) Only original transferees from, or appointees of, the decedent and their donees are subject to the contributions to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time transferred in lieu of making a contribution payment.

SECTION 20-6-6. Omitted Spouse.

(a) Notwithstanding the provisions of Section 20-6-1 of this Code, if a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will, unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will. 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) In satisfying a share provided by this section, the devises made by the will abate as provided in the section of this Probate Code which concerns "abatement."

SECTION 20-6-7. Pretermitted Children.

(a) If a testator fails to provide in his will for any of his children living or born or adopted after the execution of his will, the omitted child receives a share in the estate equal in the value to that which he 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 or more children and devised substantially all his estate to the other parent of the omitted child; or

(3) the testator provided for the child by transfer outside the will. The intent that the transfer be in lieu of a testamentary provision must be 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 will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he 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 the section of the Probate Code which concerns "abatement."

SECTION 20-6-8. Homestead Allowance.

A surviving spouse of a decedent who was domiciled on the reservation is entitled to a homestead allowance of $2,500.00. If there is no surviving spouse, each minor dependent child of a decedent is entitled to a homestead allowance amounting to $2,500.00 divided by the number of minor dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. The homestead allowance is in addition to any share passing to the surviving spouse or minor dependent child by the will of the decedent unless otherwise provided by intestate succession or by way of elective share.

SECTION 20-6-9. Exempt Property.

In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled on the Reservation is entitled from the estate to a value not exceeding $2,500.00 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects. 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 $2,500.00, or if there is not $2,500.00 worth of exempt property in the estate, if any, to the extent necessary to make up the $2,500.00 value, 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 assets to make up a deficiency have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and 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.

SECTION 20-6-10. Family Allowance.

In addition to the right to the homestead allowance and exempt property, if the decedent was domiciled on the Reservation, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid in a lump sum or in periodic installments. It 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 their care and custody as their needs may appear. The family allowance is exempt from and has priority over all claims except for the homestead allowance.

The family allowance is not chargeable against 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. The death of any person entitled to family allowance terminates his right to allowances not yet paid.

SECTION 20-6-11. Source, Determination and Documentation.

If the estate is otherwise sufficient, property specifically devised shall not be used to satisfy rights to homestead and exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and 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 of deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. He may determine the family allowance in a lump sum not exceeding $300.00 per month for one year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. 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.

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