

AGREEMENTS – the anti-fractionation tool !

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Fractionation – to the uninitiated

“... a riddle wrapped in a mystery inside an enigma.”

Winston Churchill, 1939

“... one of those cases where the imagination is baffled by the facts.”



Winston Churchill, 1941

Churchill

Federal Policy

It is the policy of the United States--

(1) to prevent the further fractionation of trust allotments made to Indians;

(2) to consolidate fractional interests and ownership of those interests into usable parcels;

(3) to consolidate fractional interests in a manner that enhances tribal sovereignty. . .

- Indian Land Consolidation Act Amendments of 2000

Solving Fractionation – what’s in it for us?

“If we don’t solve fractionation, trust reform doesn’t matter”

Ross Swimmer

“Fractionation is the death of Indian land”

Sally Willett

Fractionation Strategy

The Two Necessary Components of a Successful Anti – Fractionation Strategy

- Prevention of New Fractionation
- Reduction of Existing Fractionation

Keith Beartusk

AIPRA's Anti - Fractionation Tools

- Single Heir Rule
- Purchase
- Wills
- Disclaimers
- Agreements

The “Single Heir Rule”

“land...that is not disposed of by a valid will and represents less than 5 percent of the entire undivided ownership of the parcel of land of which such interest is a part, as evidenced by the decedent's estate inventory at the time of the heirship determination, shall descend in accordance with clauses (ii) through (iv).”

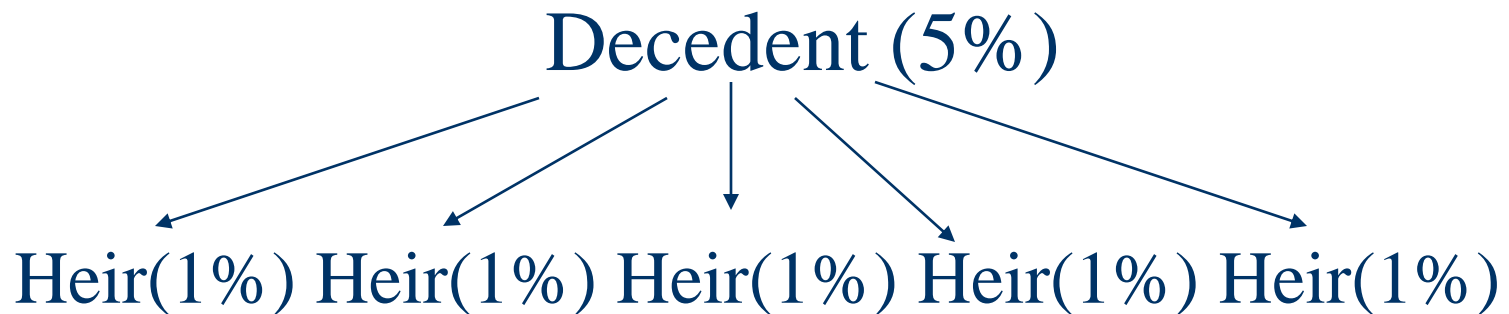
25 U.S.C. 2206 (a)(2)(D)(i)

The “Single Heirs”

- Oldest surviving child
- Oldest surviving grandchildren
- Oldest surviving great grandchildren
- Indian tribe with jurisdiction over the interest
- Co-owners of the parcel

“Single Heir Rule” – does it work?

“5 %” applies to the interest owned by the Decedent and not the interest received by the heirs



Are Purchase Options Helping ?

Billings Hearings Office:

- 4 Requests to Purchase in FY 2008
- 1 was withdrawn
- 3 are awaiting appraisal

Wills - the Anti-Fractionation Tool

“That any Indian of the age of twenty-one years, or over, to whom an allotment has been made . . . shall have the right . . . to dispose of such allotment by will”

1910 Act

Wills – the Anti-Fractionation Tool

“That any persons of the age of twenty-one years, having any right, title, or interest in any allotment. . . shall have the right . . . to dispose of such property by will”

1913 Act

AIPRA's Presumption of Joint Tenancy

“If a testator devises trust or restricted interests in the same parcel of land to more than 1 person, in the absence of clear and express language in the devise stating that the interest is to pass to the devisees as tenants in common, the devise shall be presumed to create a joint tenancy with the right of survivorship”

25 U.S.C. 2206 (c)(1)

Are Wills Preventing Fractionation ?

477 FY Decisions in New Estates in FY 2008

- Will 147 (31%)
- No Will 330 (69%)

Disclaimers

Two Types of Disclaimers

- Standard – 43 CFR 4.208
- Directional – 25 USC 2206(j)(8)

Situations When A Disclaimer Is Helpful



Standard Disclaimers

Any probable heir or beneficiary ... may wholly or partially renounce intestate succession or a devise or bequest of trust or restricted property...the renounced property passes as if the person renouncing the interest had predeceased the decedent.

43 CFR § 4.208

“Directional” Disclaimers

An heir or devisee may disclaim an interest in favor of an eligible heir, any person eligible to take the interest by devise, or the Tribe with jurisdiction over the property

25 USC 2206 (j)(8)

“Directional Disclaimers” are Agreements

“No renunciation or disclaimer of an interest shall be included in such order unless the recipient of the interest has been given notice of the renunciation or disclaimer and has not refused to accept the interest.”

25 USC § 2206(j)(8)(C)

Agreements

Two types of agreement:

- “Settlement” Agreements
- “Consolidation” Agreements

“Settlement” Agreements

A judge may approve a settlement agreement resolving any issue in the ... proceeding if:

- (1) All parties are fully advised;
- (2) All parties are fully cognizant of the effect of the agreement; and
- (3) It is in the best interest of the parties to settle rather than to continue litigation.

43 CFR 4.207

Consolidation Agreements

“The official authorized to adjudicate the probate of trust or restricted lands shall have the authority to approve agreements between a decedent's heirs and devisees to consolidate interests in trust or restricted lands. The agreements referred to in the preceding sentence may include trust or restricted lands that are not a part of the decedent's estate that is the subject of the probate.”

25 USC 2206 (e)

Consolidation Agreements

“...the decisionmaker is authorized to approve written consolidation agreements effecting exchanges or gifts ... between the decedent's eligible heirs or devisees, to consolidate interests in any tract of land included in the decedent's trust inventory. Such agreements may provide for the conveyance of interests already owned by such heirs or devisees in such tracts, without having to comply with the Secretary's rules and requirements otherwise applicable to conveyances by deed of trust or restricted interests in land.”

25 USC 2206 (j)(9)

The Right to Identify Co-owners

“[Upon request] the Secretary shall provide to such landowner the following information with respect to each tract of trust or restricted land in which the landowner has an interest:

- (1) The location of the tract of land involved.
- (2) The identity of each other co-owner of interests in the parcel of land.
- (3) The percentage of ownership of each owner of an interest in the tract.”

25 USC 2206 (k)

Reality Check

For FY 2008 the Billings Hearings Office:

- had 2 judges
- received 1279 new cases
- issued 1167 decisions

Reality Check # 2

“. . . parties to probate proceedings are presumed to have knowledge of the regulations governing those proceedings.”

Estate of John Martin Red Bear, 41 I.B.I.A. 273, 275 (2005)

Right to be Represented

You have the right to legal counsel

Estate of Peahner Mahseet, 5 IBIA 27 (1976).

Counsel will not be appointed for you

Estate of Blanche Russell Hosay, 18 IBIA 40 (1989).

Reality Check # 3

Probate injects new owners into the
fractionation miasma.

Special Master

. . . a judge may appoint a master:

- (1) To conduct hearings on the record and hear evidence as to all or specific issues in probate cases as assigned by the judge;
- (2) To make written reports including findings of fact and conclusions of law; and
- (3) To propose recommended decisions to the judge.

proposed 43 CFR 30.121

Practicality

Agreements should be practical:

- Surveys
- Access
- “After acquired” property