

TITLE ONE

PROBATE AND GUARDIANSHIP

Chapter 1 - Tribal Probate Code

Chapter 2 - Guardianship

CHAPTER ONE

TRIBAL PROBATE CODE

1-1-1 JURISDICTION--The Rosebud Sioux Tribal Court shall have the authority to appoint Executors and Administrators, determine heirs, determine the validity of Wills, and to probate and distribute the estates and Wills of any member of the Rosebud Sioux Tribe with respect to property located on the reservation which is outside the jurisdiction of the Bureau of Indian Affairs. The Tribal Court shall also exercise such functions over restricted or trust lands in the jurisdiction of the Bureau of Indian Affairs to the greatest extent allowed by law.

1-1-2 APPLICABILITY OF OTHER LAWS--It is recognized by this Code that the Department of the Interior is obligated by current federal law to distribute trust real estate pursuant to the laws of descent and distribution of the State of South Dakota. So that consistency can be maintained for the benefit of the Rosebud Sioux Tribe, the Rosebud Tribal Court will admit for probate any Will which is valid as a Last Will and Testament under the appropriate provisions of the Code of Federal Regulations for trust real estate upon the Rosebud Reservation, or, which would be valid under the laws of the State of South Dakota. For decedent's estates where no Will is admitted to probate, the Tribal Court shall apply the rules of descent and distribution then in effect for the State of South Dakota and as applied by the Department of the Interior for trust real estate.

1-1-3 EVIDENCE OF DEATH--A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the jurisdiction where a death purportedly occurred is prima facia evidence of the fact, place, date, and time of death and the identity of the decedent.

~~----- A person who is absent for a continuous period of seven years during which time he has not been heard from and whose absence cannot be satisfactorily explained after diligent search and inquiry into his whereabouts is presumed to be dead. His death is presumed to have occurred at the end of the seven year period unless there is sufficient evidence for determining that death occurred at some other time.~~

1-1-4 RECORDS--The Clerk of the Tribal Court shall keep a file for each decedent's estate of all the documents filed with the Court pursuant to this chapter.

1-1-5 OATHS--Except as otherwise provided in this Code, every document filed with the Clerk pursuant to this probate chapter shall be deemed to include an oath to the effect that the representations are true to the best knowledge, information and belief of the person subscribing and signing the document. The penalties for perjury shall follow deliberate falsifications of such documents.

1-1-6 NOTICES--Whenever notice of a hearing on any petition or other probate document or matter is required and except for specific notice requirements otherwise provided, proper notice of the time and place of any hearing to be given to any interested person or his attorney shall be given as follow:

(1) By mailing a true copy of said notice together with the supporting documents at least 10 days prior to the time fixed for hearing by first class mail addressed to the person to be notified or his attorney at the last known post office address given for either or at his last known office or place of residence, or

(2) By delivering a true copy thereof to the person to be notified at least 10 days prior to the date fixed for hearing.

(3) If the address or identity of any such person is not known and cannot by the exercise of reasonable diligence be ascertained, notice shall be given by posting a copy of such notice in at least three conspicuous public places on the reservation for at least 10 days prior to the time fixed for hearing. Such three conspicuous places shall be fixed by the Tribal Council for the purpose of posting probate notices.

Proof of the giving of such notice shall be made by affidavit by the person accomplishing the posting or mailing or personal service and shall be filed with the Court at or prior to the time fixed for hearing.

1-1-7 RENUNCIATION OF INHERITANCE--Any person who is an heir, devisee, legatee, or beneficiary under a testamentary instrument or under the laws of intestate succession may renounce in whole or in part his inheritance or interest by filing with the Court a written instrument verified under oath at any time prior to the entry of a decree of distribution. Upon such proper renouncement, the interest renounced passes as if the person renouncing it predeceased the decedent.

1-1-8 EFFECT OF DIVORCE, ANNULMENT, OR DECREE OF SEPARATION--Any 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 remarriage he is married to the decedent at the time of death. A decree of separation which does not terminate the marital status of husband and wife shall not be considered a divorce for inheritance purposes.

~~1-1-9 DISQUALIFICATION OF WIFE-LE SLAYER--Any surviving spouse, heir, devisee, surviving joint tenant, beneficiary of a bond, life insurance policy, or other testamentary device who criminally and intentionally kills the decedent is not entitled to any benefit under a Will or under this probate code or any other law of the Rosebud Sioux Tribe regarding decedent's estate, and the estate of such decedent will pass as if the killer had predeceased the decedent.~~

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

1-1-10 PETITION FOR APPOINTMENT OF ADMINISTRATOR OR EXECUTOR--Whenever any member of the Rosebud Sioux Tribe dies with or without a Will leaving property on the Reservation which is subject to the jurisdiction of the Rosebud Sioux Tribal Court, any person claiming to be an heir of the decedent or a creditor of the decedent may petition the Court for appointment of an Administrator or Executor of the decedent's estate and for admission to probate of any instrument purporting to be the Last Will and Testament of the decedent and for distribution of the property. The Petition shall state the names and last known addresses of all persons known to the Petitioner who may be heirs, devisees, or legatees of the decedent; shall request that a hearing date be fixed on the question of appointment of an Administrator or Executor of the estate; shall request that notice to creditors be given; shall establish the interest of the petitioner in the estate; shall submit with the petition the purported instrument alleged to be the Last Will and Testament of the deceased, and shall request that notice of hearing be given.

Upon receipt of such petition, the Court shall fix a time and place for hearing and shall order that all persons named in the petition be given notice as provided by this chapter.

1-1-11 PRIORITIES OF APPOINTMENT— The following persons, legally competent, shall be afforded priority in order of their listing for appointment as Administrator or Executor.

- (1) Any person nominated in the Last Will and Testament of the deceased.
- (2) The surviving spouse.
- (3) Children in descending order of age.
- (4) Other blood relatives in the order of their closeness of relationship.
- (5) Any other adult Tribal member who is a creditor of the deceased.
- (6) Any other adult Tribal member.

1-1-12 DUTIES OF ADMINISTRATOR OR EXECUTOR—The duties of the Administrator or Executor shall be to take possession of all property of the deceased subject to this chapter and within one month after his appointment make an inventory and appraisal of such property and file the original with the Court and mail copies thereof to all persons named in the petition.

Such Administrator or Executor shall within 60 days investigate and attempt to determine and file with the Court a report listing all of the known relatives of the decedent and heirs and devisees who, in the opinion of the Executor or Administrator, are entitled to distribution of the decedent's estate.

The Executor or Administrator shall give notice to creditors as provided elsewhere in this chapter, and upon completion of the notice to creditors, shall report to the Court on the amount and nature of each creditor's claim and recommend to the Court with reference to each claim whether or not the same should be allowed and paid.

The Executor or Administrator shall prosecute and defend all actions by and against the estate and shall have the authority to institute actions for the purpose of recovering assets of the decedent's estate. In addition, the Executor or Administrator shall submit accountings to the Court in accordance with this chapter, and upon the completion of his duties, shall distribute the estate in accordance with any Order of the Court.

The Administrator or Executor shall file a bond in an amount set by the Court to insure his faithful and honest performance of his duties as Administrator with such sureties as the Court may require. Said bond may be waived by the Court with the consent of the persons entitled to distribution of the decedent's estate or if waived by the decedent's Will.

1-1-13 OATH AND LETTERS OF APPOINTMENT—Upon his appointment as Administrator or Executor, the person appointed shall take an oath subscribed in open Court to the effect that he will faithfully and honestly perform the duties of the Administrator or Executor. Upon the taking of such oath and filing of the bond, if any, the Administrator or Executor shall be granted Letters of Administration or Letters Testamentary as proof of his appointment.

1-1-14 NOTICE TO CREDITORS--The Administrator or Executor of the estate shall cause notice to creditors to be posted in at least three conspicuous places on the Reservation at the places designated by the Tribal Court. Said notice shall state that an Administrator or Executor has been appointed for the estate of the decedent and that any person claiming to be a creditor of the decedent shall have 90 days from the date of the first posting of said notice to present their claim to the Clerk of the Tribal Court and that only those claims which are timely presented shall be paid by the estate. Notice by mailing as otherwise provided by this chapter shall also be given to any creditor actually known to be such by the Administrator or Executor. No creditor who holds a security interest in any asset of the decedent's estate shall be required to file a claim in order to be paid.

1-1-15 PRIORITY OF PAYMENT OF DEMANDS AGAINST THE ESTATE--Where any lien for any demand or claim exists by virtue of a mortgage, pledge, attachment, judgment or execution levy, such lien shall have preference according to its priority to the extent of such demand on any specific property upon which such lien shall have attached.

Otherwise, all demands against the estate of any deceased person must be paid in the following order:

- (1) The expenses of administration;
- (2) Funeral expenses including the reasonable cost of a burial lot and a reasonable sum for the marker on the grave;
- (3) The expenses of last illness;
- (4) Any debt that may be due by the decedent personally to servants and employees for services rendered within 60 days preceeding the decedent's death;
- (5) Debts having preference by the laws of the United States;
- (6) All other claims.

If the estate is insufficient to pay all of the debts of any one class, each creditor must be paid prorata in proportion to his claim, and no creditor of any class shall receive any payment until all of those of the preceeding class are paid in full.

If the Executor or Administrator disputes the amount or validity of any claim filed against the estate, he shall report the same to the Court who shall fix a time and place for hearing on the validity of such claim, and notice as provided by this chapter shall be given to the creditor or claimant. At the time and place fixed for such hearing, the Court shall determine the extent and validity of the claim and shall enter an appropriate Order, either allowing or discarding said claim.

1-1-16 ACCOUNTING--After the time for filing claims has expired and the Administrator or Executor has resolved all of the pending claims and after the Administrator or Executor has marshalled all of the assets of the estate and has performed such other duties as may have been required of him by this code or by any Order of the Court, and in any event, within one year after his appointment and annually thereafter, such Administrator or Executor 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 whether or not the same is ready for distribution and also showing the computation of any attorney's or Administrator's or Executor's fees involved for which approval for payment is requested. True copies of the accounting shall be sent to all interested persons named in the petition or otherwise by Order of the Court. If any interested person requests a hearing on said accounting, the Court shall fix a time and place for hearing the same, and the Administrator shall cause notice to be given as required by this chapter. If the accounting is for a final accounting and the Administrator or Executor claims that the estate is available for distribution, such notice and hearing shall be given automatically. In the event the accounting is approved, the Court shall thereupon enter a decree of distribution directing the Executor or Administrator to distribute the property to the persons entitled thereto, spelling out in said decree the details of such distribution. Upon completion of the distribution and compliance with the decree, the Executor or Administrator shall present evidence to the Court of the completion of his duties and shall thereupon be discharged by Order of the Court and his bond released.

1-1-17 DISTRIBUTION OF PROPERTY IF NO TAKER--If there is no person available to take all or any portion of the decedent's estate, then the property shall pass to the Rosebud Sioux Tribe.

1-1-18 STATUS OF HEIRS--No person is disqualified to take as an heir because he or any person through whom he claims is not a member of the Rosebud Sioux Tribe or because he does not live on the Reservation.

1-1-19 DEBTS OWED TO THE DECEDENT--No debt owed to decedent is charged against the share of any person except the debtor.

~~1-1-20 ATTORNEY'S FEES AND FEES FOR EXECUTOR OR ADMINISTRATOR~~ An Administrator or Executor may upon approval of the Court receive a fee of not more than 3% of the value of the gross estate or the sum of \$100 whichever is greater, to be paid from the estate prior to the final distribution, which fees are only paid once.

An attorney who represents the Administrator or Executor of an estate for such purpose may, with the approval of the Court, be paid the same fee as the Administrator or Executor.

1-1-21 REOPENING OF ESTATES--Any estate may be reopened whenever necessary to dispose of decedent's property discovered after the estate has been closed or to make other necessary corrections.

1-1-22 RULE OF INTERPRETATION-- In any question arising under the provisions of this probate code, the Tribal Court shall apply the general principles of probate as announced in the statutory rules of the State of South Dakota except where such rules conflict with specific enactments of this code or other enactments of the Tribal Code.

CHAPTER TWO

GUARDIANSHIP

1-2-1 GUARDIAN DEFINED--A guardian is a person appointed to take care of the person or property of another.

The person over whom or over whose property a guardian is appointed is called a ward.

A general guardian is the guardian of the person or of all property of the ward within this state or of both. Every other is a special guardian. A guardian ad litem is a person appointed to represent the interests of any minor or incompetent in any lawsuit or matter pending before any Court. Guardians ad litem shall be appointed pursuant to Rule 17(c) of the Rules of Civil Procedure. All other guardians shall be appointed as provided by this chapter.

1-2-2 AUTHORITY TO APPOINT GUARDIAN--The Rosebud Sioux Tribal Court shall have authority in its discretion to appoint guardians for persons or for property of persons who are minors or incompetent by reason of physical or mental illness or deficiency, advanced age, or chronic use of drugs or alcohol, or for recipient of public assistance where it is found that such recipient is wasteful and unable to manage the receipt and disbursement of assistance payments so as to substantially accomplish the purpose for which such assistance is given.

The Tribal Court's authority may be exercised only over Tribal members or children of Tribal members or property of Tribal members or property of children of Tribal members which property ~~is within the jurisdiction of the Tribal Court. These powers may be exercised either by the adult or juvenile divisions of the Tribal Court.~~

1-2-3 PETITION FOR GUARDIANSHIP--Guardianship proceedings shall be initiated by the filing of a petition by any interested person on behalf of a minor alleged incompetent or by the minor himself if over the age of 14 years or by the Court upon its own motion.

The Petition shall set forth the name of the Petitioner and the Petitioner's relationship to the minor or alleged incompetent. It shall list all known immediate relatives of the minor or incompetent and their last known address, relationships, and ages and shall list all property of the minor or incompetent, both real and personal, known to the Petitioner. The Petition shall list in detail the present conditions and circumstances which demonstrate the need for appointment of a guardian and shall request that letters of guardianship be issued to the Petitioner or some other suitable person. The Petition shall state whether a Will exists which nominates any person as guardian. The Petition shall be verified.

1-2-4 NOTICE AND HEARING--Upon receipt of a verified Petition, the Tribal Court shall fix a time and place for the hearing. The Clerk of Courts shall cause notice of said hearing to be given to all the interested persons listed in the Petition by mailing to said persons at their last known post office addresses by first class mail a true and correct copy of the Court's order fixing the hearing together with a copy of the Petition on file, which mailing shall be accomplished not less than seven days prior to the date fixed for hearing.

At the time fixed for the hearing, the Court shall examine the Petition and Petitioner and hear all evidence relative to whether or not a guardian shall be appointed; determine if any person nominated by a Will is available and consents to act; determine if the proposed ward is of sufficient age or mental capacity to make an intelligent decision regarding a preference and given due consideration to the proposed ward's preference of a guardian, setting forth the scope of the guardian's authority, whether or not security for his performance will be required, and the duration of such appointment.

If the Petition for guardianship is for an incompetent, the Court shall make the same inquiries as noted above, and in addition, shall attempt to secure the best evidence available including medical reports so that the Court is satisfied by clear and convincing evidence that the person allegedly incompetent is not presently able to handle his property or affairs.

1-2-5 QUALIFICATIONS OF GUARDIANSHIP--Any adult person of the age of 21 years or older and subject to the jurisdiction of the Tribal Court may serve as a guardian. In appointment of the guardian, the first preference shall be given to those persons named in a Will of a deceased parent. Next preference shall be given to relatives of the ward in the order of closeness of the relationship with due consideration being given to any person with whom a minor shall have been living at the time of the guardianship hearing. Due consideration should also be given to any person preferred by a minor if he is old enough to make an intelligent decision in that regard. In all cases the Court shall be finally guided by the best interests of the minor or incompetent in selecting a guardian.

1-2-6 SECURITY OF GUARDIAN--The Court shall, unless the Court finds that no need exists therefore, require a guardian to provide security in the form of a bond or otherwise to assure the faithful performance of the guardian's duties. ~~Any surety of any such security will be deemed to have consented to the jurisdiction of the Rosebud Sioux Tribal Court for the purpose of action against such surety.~~

1-2-7 LETTERS OF GUARDIANSHIP--Any guardian appointed by the Court shall be required to take an oath to the effect that he will faithfully perform his duties as guardian. Upon taking the oath and filing with the Court such security as may have been required, the guardian shall be issued Letters of Guardianship under the seal of the Tribal Court. Any limitation of the guardian's authority shall be set forth on the Letters of Guardianship.

1-2-8 INVENTORY AND APPRAISAL--Within 45 days after the appointment of a general guardian or guardian of property, the guardian shall prepare and submit to the Court an inventory and appraisal of the assets of the estate. The appraisal shall be made by at least one disinterested person who shall certify under oath to the appraisal and may be awarded reasonable compensation for his services upon application to the Court by the guardian and approval of the same by the Court.

1-2-9 ANNUAL ACCOUNTING--Any guardian of an estate shall submit an annual accounting of the receipts and disbursements of estate funds and estate assets on the first anniversary date of his appointment as guardian and annually thereafter, which account shall be verified under oath by the guardian and shall contain an accounting of all additions to and withdrawals of the estate assets, and upon request of the Court shall be accompanied by supporting cancelled checks, vouchers, receipts, statements, or books of record.

1-2-10 COMPENSATION OF GUARDIAN--No guardian shall receive any compensation for acting as such without prior approval of the Court. The Court shall approve for payment unto a guardian reasonable fees which fees should not annually exceed 10% of estates of \$1,000 or less, 5% of estates of more than \$1,000 but not more than \$ 5,000 and 2½% of estates in excess of \$5,000.

1-2-11 POWERS OF GUARDIANS--Every guardian appointed for the person and estate of a minor or incompetent shall have the care and management of said estate until the guardian is legally discharged.

The relationship of guardian and ward is a confidential one requiring the fidelity and obligation arising from trusts as is prescribed by the law generally on that subject.

1-2-12 SALE OF PROPERTY--No guardian has the authority to sell assets of the guardianship estate without prior permission of the Court unless such property is ordinarily traded on a day to day basis in a recognized market, for example, grain and livestock. The Court shall grant approval for sale of guardianship assets when the Court finds that such sale is in the best interests of the estate and when the Court also finds that the method of sale is reasonably likely to obtain the best price for the estate.

1-2-13 ACTIONS AGAINST THE GUARDIAN--A guardian shall derive no personal benefit except as authorized by this chapter from the management of the estate of his ward and shall be civilly liable to the ward for any losses to the estate attributable to a breach of the guardian's duties. Any action to enforce such liability shall be brought by the ward or by a subsequently appointed guardian on behalf of the ward within two years after the appointment of a new guardian or the removal of the incompetency or the arriving at the age of the majority of the ward.

1-2-14 DISCHARGE OF GUARDIAN--Every guardian appointed by this chapter shall serve until discharged by the Court.

A guardian of a minor not otherwise incompetent or the minor himself may petition the Court within one year after the date the minor reaches the age of majority to have the guardian discharged and the estate turned over to the minor. The Court may grant such discharge ex parte upon the receipt of sufficient competent evidence that the minor has reached the age of majority unless it appears to the Court that the minor is otherwise incompetent, in which case the Court will order a hearing with notice to make a determination of competency.

Any person who has had a guardian appointed for reasons of incompetency or such guardian or a relative of such incompetent person may petition the Court for a determination of his restoration to competency and for discharge of the guardian. Upon receipt of such petition, the Court shall order notice of hearing to be given by mailing or otherwise, and after such notice, the Court shall receive evidence as to the current status of the ward's competency. If it be found that the ward is of sound mind and capable of taking care of himself and his property, the guardianship shall be terminated. If it be found that the ward is of sound mind and capable of taking care of himself and his property, the guardianship shall be terminated. If the Court finds otherwise, the guardianship shall be continued.

1-2-15 GUARDIANSHIP RECORDS--The Clerk of the Tribal Court shall keep a separate permanent file for each guardianship proceeding and shall file all papers relevant thereto.

1-2-16 GUARDIANSHIP AND TRUST PROPERTY--The Tribal Court is hereby authorized to appoint guardians pursuant to this chapter for minors or incompetents for the purpose of dealing in trust property. In addition to abiding by the procedures of this chapter, such guardian shall also be required to abide by the appropriate federal rules and regulations regarding the sale and handling of trust property.

1-2-17 TEMPORARY GUARDIANSHIP AND CUSTODY--The Tribal Court shall have the authority to grant emergency orders for guardianship and custody when the Court is satisfied that a true emergency exists by virtue of a sworn affidavit establishing the facts to the satisfaction of the Court. Such Orders will be good for not more than 10 days. Within such 10 days, the Court shall order and fix a date for hearing upon the question of whether a more permanent type guardianship or custody arrangement should be invoked.

1-2-18 REMOVAL OF GUARDIANS--Any guardian may be removed by the Tribal Court for any of the following reasons:

- (1) For breach of his trust;
- (2) For continued failure to perform his duties;
- (3) For incapacity to perform his duties;
- (4) For gross immortality;
- (5) For having an interest adverse to the faithful performance of his duties;
- (6) For removal from the jurisdiction of this Court;
- (7) In the case of a guardian of property, for insolvency; or
- (8) When it is no longer proper that the ward should be under guardianship.

A guardian may also resign with the permission of the Court.

1-2-19 NOTICE FOR REMOVAL OF GUARDIAN--Whenever it is called to the attention of the Court by a Petition from an interested person or upon the Court's own motion that grounds for removal of a guardian exists, or in the event that the guardian has failed to render an accounting or perform other duties as ordered by the Court, the Tribal Court may, upon such notice to the guardian as the Court may require, remove the guardian and compel him to surrender the estate of the ward to the persons found to be lawfully entitled thereto.