



Managing On-Reserve Estates and the Impact of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*

Presentation Objectives

At the end of this session, participants will have a general understanding of:

- Terms related to estate administration
- The legislation pertaining to on-reserve estates
- INAC's role in estate administration
- The stages of estate administration
- Where and how the ***Family Homes on Reserves and Matrimonial Interests or Rights Act*** impacts the administration of an on-reserve estate

NOTE:

This session is intended to be a general overview of on-reserve estates and how FHRMIRA applies when managing such an estate . More detailed information is offered through NALMA as specialized training including:

**Estates Management Toolkit Training; and
Matrimonial Real Property Toolkit Training**

**NALMA Specialized Training schedules can be found at
www.nalma.ca or www.coemrp.ca**

The Constitution Act of 1867

- The Constitution Act, 1867 originally known as the British North America Act was the law passed by the British Parliament creating the Dominion of Canada at Confederation.
- The Act outlines the distribution of powers between parliament and the provincial legislatures.

Jurisdiction in Canada

- The Constitution Act establishes the following areas of jurisdiction:

FEDERAL	PROVINCIAL
• Criminal Code	• Civil Law
• Divorce Law	• Property and Civil Rights
• Indian Act: Indians and Lands Reserved for Indians S. 91 (24)	• Marriage Law
	• Wills and Estates

Legislation – Indian Act

- In addition to sections **42-52 of the Indian Act** that govern estates, various sections of FHRMIRA or a First Nation MRP law must also be considered to determine what rights and remedies may be available to survivors on the death of a spouse or common-law partner.

Legislative Gap

- As a result of the division of powers established in the Constitution Act a legislative gap was identified with respect to Matrimonial Real Property on Reserve.
- The Supreme Court of Canada found in *Derrickson v. Derrickson and Paul v. Paul* that courts cannot apply provincial or territorial legislation to Matrimonial Real Property on reserves.

Legislative Gap

- The *Indian Act* does not address this issue.
- As a result, many of the legal protections and rights relating to Matrimonial Real Property applicable off reserves, **on separation or the death of a spouse or common-law partner**, were not available to individuals living on reserves.

Closing the Gap

- The *Family Homes on Reserves and Matrimonial Interests or Rights Act* (FHRMIRA) was enacted in 2013 to ensure that people living on reserves have similar protections and rights as other Canadians when it comes to the family home and the division of interests or rights.

Legislation - FHRMIRA

- The *Family Homes on Reserves and Matrimonial Interests or Rights Act* (FHRMIRA) came into effect in two stages.
- **Sections 7-11**, the First Nation lawmaking provisions, came into force on December 16th, 2013 and provide the authority for First Nation's to enact their own matrimonial real property law.

Legislation - FHRMIRA

- Sections 12-52 came in to force on December 16th, 2014. These sections are often referred to as the provisional federal rules.
- They provide a set of interim rules that allow married spouses and common-law partners to determine what they are entitled to when their relationship breaks down **or upon the death of a spouse or common-law partner.**

Application of FHRMIRA

- FHRMIRA cannot be applied retroactively. The date of death (or separation) must have taken place on or after the coming into force of the provisional federal rules.
- In most First Nation's the coming into force date is December 16th, 2014.
- However, some First Nation's received an extension to June 19th, 2016.
- It is important to determine when and if FHRMIRA applies in the decedent's First Nation.

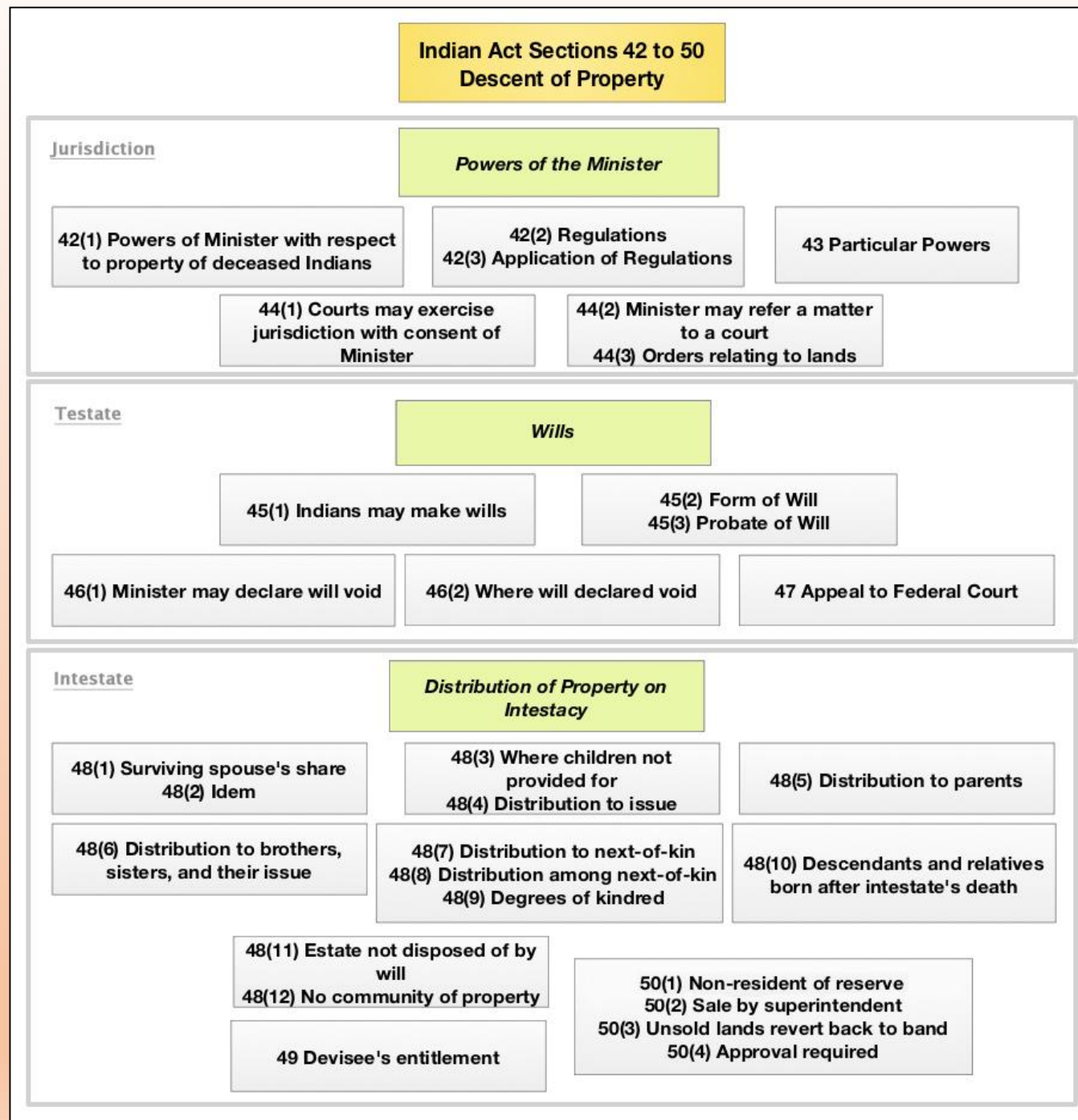
Application of FHRMRIA

- Once a First Nation has its own validly enacted MRP law, (under FHRMIRA or a Land Code enacted under the Framework Agreement for First Nations Land Management) the provisional federal rules **cease to apply**.

Application of FHRMIRA

- The impact of FHRMIRA respecting on-reserve estates will be explored further in upcoming slides. Those of you who have already enacted MRP laws should **review the estates** provisions contained therein.
- For now, lets take a look at estates administration generally.

Indian Act sections 42-50



Important Definitions

- **Beneficiary:** no automatic right to inheritance but can receive gifts as listed in the will
- **Bequest:** a gift of personal property in a will
- **Decedent:** a deceased person
- **Estate:** All of the assets you own when you die, including land and buildings, bank accounts, earnings, personal property, pensions, insurance settlements after all your debts are paid.

Important Definitions

- **Executor:** an individual named in the will to manage the estate
- **Heir:** has a right to inheritance and can also receive gifts as listed in a will
- **Intestacy:** Where there is no valid or complete will
- **Survivor:** spouse or common-law partner of the deceased
- **Testator:** the person who has made a will
- **Will:** A legal document that expresses the Testator's wishes regarding the final distribution of his or her property

What is a Will:

A Will, or a Testament

- Is a legal document
- Is written by the Testator
- expresses the Testator's wishes about the final distribution of his/her property
 - Bequests of personal property (monies or chattels)
 - Devise of real property (real estate)
 - Residue clause directs the disposition of assets that are not outlined elsewhere in the Will
- Usually names the Executor(s) to carry out these wishes
- names one or more beneficiaries

Who's Estate is Covered by the Indian Act?

The decedent must be:

1. Status (registered, or entitled to be registered, in the Indian Register); **and**
2. Make their home on reserve.
 - **This includes** people who **normally reside** on-reserve but are away to
 - attend school,
 - for seasonal employment or
 - who have had to leave to seek care in a facility off-reserve eg. long term care home or medical facility.

Who's Estate is **NOT** Covered by the Indian Act?

The Indian Act's estates provisions DO NOT apply to:

- status First Nation people who do not live on-reserve; **OR**
- people who live on-reserve but do not have status.

Who is Covered by FHRMIRA?

- spouses or common-law partners and survivors of estates who hold or held matrimonial real property.
- Spouse or common-law partner need not be a First Nation member.

What is INAC's Role?

- Section 42. (1) of the *Indian Act* assigns the authority to manage Indian estates to the Minister
- The Minister may delegate this authority to the Regional Managers
- The *Indian Act* covers:
 - **Powers of the Minister**
 - **Wills**
 - **Distribution of Property on Intestacy**
 - Living Estates
 - Guardianship and Moneys for Indian Children

What is INAC's Role?

After a death, the Minister's authority (generally carried out by regional offices) includes:

- Approving Wills
- Appointing someone to act as executor or administrator of the estate
- Administering an estate when no family member is able or willing to do so; and
- Declaring a will to be void in whole or in part (with Deputy Ministers approval)

What is INAC's Role?

To approve a will, it must:

- Be in writing (handwritten or typed)
- Be signed by the deceased
- Express the deceased's wishes
- Be intended to take effect on death

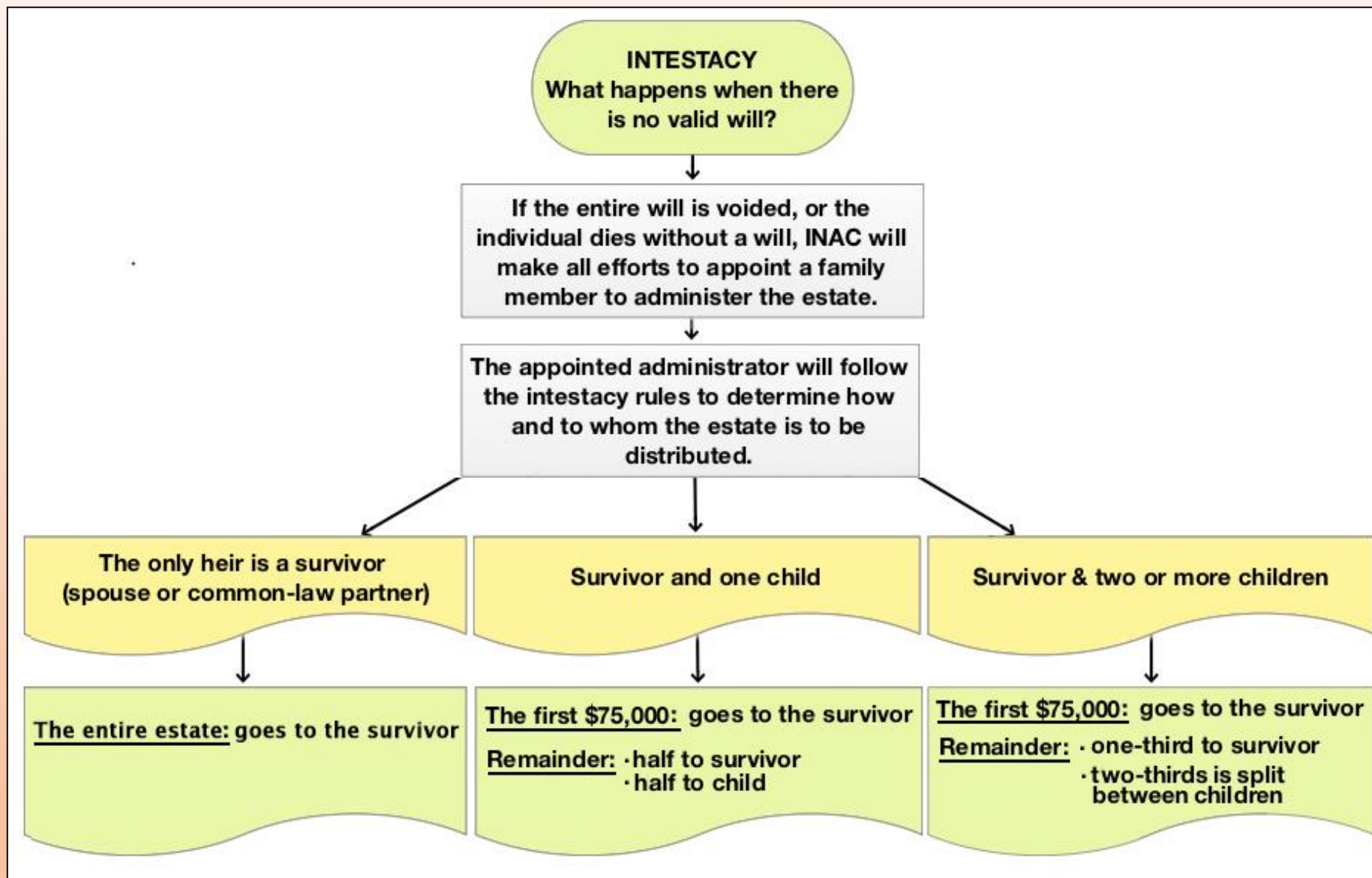
While not required, if you are writing a will it is good practice to date the will and have your signature witnessed.

What is INAC's Role?

What happens when there is no valid will?

- If an individual dies without a will, or the entire will is voided, INAC will make all efforts to appoint a family member (usually an heir) to administer the estate.
- The appointed administrator will follow the intestacy rules to determine how and to whom the estate will be distributed.

Intestacy – Section 48 of the *Indian Act*



Is There a Survivor?

- If there is a survivor (spouse or common-law partner), there may be Matrimonial Real Property (MRP)
 - MRP on reserve includes land and the family home situated on that land, as defined by *FHRMIRA* (*Family Homes on Reserve and Matrimonial Interests or Rights Act*)
- The survivor should be informed whether or not the First Nation has its own MRP law, or if *FHRMIRA* applies
- The provisions of a Will may be more/less advantageous than the regulations of *FHRMIRA*

Notice to INAC

- Notice to INAC initiates estate administration
- Proof of death is required with a...
 - Death Certificate
 - Funeral Home Director's statement
 - Burial Permit/Interment Certificate
 - Record of Death from Vital Statistics

Notice To INAC

- INAC is often notified by:
 - Family Members
 - The Indian Registry System; and/or
 - The Indian Registry Administrator or Band Council Employee
- By notifying INAC of a death, the heirs and beneficiaries can get help to begin settling the estate.
- INAC initiates correspondence with the next of kin.

Creating the Estate Record

- INAC will want to know:
 - If the deceased lived on reserve
 - If the deceased had a Will
 - Who the deceased's family members are
- INAC creates an Estate Record (paper) containing:
 - Information about the deceased's estate
 - This information is then recorded in the Estates Reporting System (ERS)
 - All estate information is protected

Creating the Estate Record

There are 4 ways estates can be managed:

- 1) By a family member (i.e., non-departmental Exec/Admin)
- 2) By a departmental Estates Officer (last resort)
- 3) By a transfer of jurisdiction to a Prov/Terr Court (requested by family or by the Minister)
- 4) By an assumption of jurisdiction (e.g., from prov/terr to federal)

Establishing Jurisdiction

There are 2 criteria required for INAC to assume jurisdiction:

First criteria: The deceased must have been an Indian

- Registered with INAC's Indian Registrar, **or**
- Eligible to be registered with INAC's Indian Registrar

Note: membership in a First Nation does NOT imply eligibility

Establishing Jurisdiction

Second criteria: The deceased must have died ordinarily resident on reserve or Crown land

- **This includes** people who **normally reside** on-reserve but are away to
 - attend school,
 - for seasonal employment or
 - who have had to leave to seek care in a facility off-reserve eg. long term care home or medical facility.

Jurisdiction Established

- If **both** conditions are met, jurisdiction remains with INAC
 - Administration of estate proceeds according to the *Indian Act*
- If **either one** of the conditions is **NOT** met, jurisdiction remains with the Province/Territory
- NOTE: in either case, any reserve lands
 - remain under INAC Minister's responsibility
 - are subject to the *Indian Act* rules and regulations

Jurisdiction Established

- The spouse or next of kin is forwarded an estates package from INAC. It includes a variety of forms and applications. Examples are:
 - **Application for Approval of Will**
 - Used to apply for approval of a Will that names an Executor.
 - **Application for Administration (where there is no Will)**
 - Used to apply for an Administrator where there was no Will.
 - **Renunciation by Executor/Administrator**
 - Used by an Executor/Administrator to renounce administering an estate.
 - **Common-Law Partner Statutory Declaration 1**
 - Used by person claiming to be the common-law partner of the deceased.
 - **Common-Law Partner - Declaration of Third Party**
 - A third-party confirmation of a common-law relationship

Jurisdiction Established

- **Notice to Creditors, Heirs and Other Claimants**
 - **Used by the Executor/Administrator to give public notice to creditors, heirs, and any other claimants to make their claims.**
- **Request for Transfer of Land by Executor/Administrator**
 - **Used when the Executor/Administrator is effecting a transfer of reserve land from the deceased member of a First Nation to another member of the same First Nation.**

NOTE: The band office, a lawyer, or the INAC Regional Estate Officer will be able to help an executor or administrator to understand, complete and process these forms.

Locate the Will

- Locate the Will – it may be
 - at home
 - in a bank safety deposit box
 - at a lawyer's office
- Multiple Wills:
 - Choose the most recently dated Will

Challenges to Will

- When an heir or beneficiary makes a claim to INAC to challenge the Will **with** proof or supporting documentation
 - INAC will inform all heirs and beneficiaries
 - INAC will determine if the challenge is valid
 - If not valid → heirs and beneficiaries are informed, and
→ estate administration proceeds
 - If valid → INAC HQ voids the Will, (or portions of it)
→ Intestacy provisions of *Indian Act* take effect

When Might a Will be Voided?

- It was made under duress
- The Testator lacked mental capacity (unable to understand what a Will is, or what it says at the time it was signed)
- The terms of the Will create undue hardship for dependents
- The Will provides for the disposition of reserve land contrary to the interest of the band or the *Indian Act*
- The Will is too vague or uncertain
- The terms of the Will are against the public interest

Intestacy

- Intestacy occurs when
 - There is no Will
 - **OR**
 - The Will has been voided (often as a result of a successful challenge to the existing Will)
 - Distribution of the deceased's property follows Section 48 of the *Indian Act*: the process is initiated by INAC

Executor or Administrator?

- One of the first tasks to undertake upon notice of death is for INAC to determine who will be the Executor or the Administrator of the estate.
- An Executor is the person named in the Will to carry out the deceased's wishes.
- If no Executor has been named or they cannot or will not act, INAC will appoint an administrator.

Executor or Administrator?

- If the entire will is voided, or if **an individual dies without a will**, INAC will make all efforts to appoint a family member to administer the estate. Three options are:
 - An heir requests to be appointed Administrator
 - An heir nominates someone else to be Administrator
 - An heir requests a departmental employee be appointed as Administrator

Executor or Administrator?

- **EXECUTOR** – named in the will to carry out the wishes of the deceased.
- **ADMINISTRATOR** – appointed by INAC to administer the estate

Executor or Administrator?

- Once appointed, the Executor or Administrator now has responsibility for all aspects of the estate including:
 - organizing the estate,
 - determining assets and debts,
 - settling debts,
 - distributing the assets and
 - final reporting to close the file.

Organizing the Estate

- Identify and locate any vulnerable assets:
 - Pets
 - Livestock
 - Insurance policies to be kept current
 - Buildings are winter-ready, if applicable
- Arrange funeral if not already arranged or if requested

Organizing the Estate

- If there is no Will, determine who the heirs are
- If there is a Will, identify the beneficiaries

Organizing the Estate

- Advise the survivor (if there is one) about *FHRMIRA* and whether or not the First Nation has its own MRP law

Organizing the Estate

- FHRMIRA provides an **automatic** right to the survivor to remain in the family home on the death of their spouse or common-law partner.
- s. 14 of FHRMIRA states: ***When a spouse or common-law partner dies, a survivor who does not hold a right or interest in or to the family home may occupy that family home for a period of **180 days** after the day on which the death occurs, whether or not the survivor is a First Nation member or an Indian***

Organizing the Estate

- In addition to the automatic 180 days, where a family cannot come to an agreement, a survivor might choose to make an application on under s. 21 of FHRMIRA
- s. 21 of FHRMIRA states: ***A court may, on application by a survivor whether or not that person is a First Nation member or an Indian, order that the survivor be granted exclusive occupation of the family home and reasonable access to that home, subject to any conditions and for the period that the court specifies.***

Organizing the Estate

- Where the First Nation is subject to FHRMIRA, the survivor has the option to choose:
 - Between the **Will** and the provisions of *FHRMIRA*
 - Or if there is no Will, between **Intestacy (*Indian Act* s 48)** and *FHRMIRA*
- The survivor should be provided information early in the process to allow adequate opportunity to assess their options and choose accordingly
- This will be explained in greater detail when discussing distribution of estate assets.

Organizing the Estate

- Ideally, individuals, potential heirs and/or beneficiaries would already be aware of the rights and protections contained in FHRMIRA. Awareness of these rights can avoid unnecessary conflict caused by misunderstanding during an already emotional time. In most cases, families can resolve their MRP issues without the need to involve the courts.
- **Residents of First Nations who have enacted their own MRP Law** should be aware of any similar rights or protections that may exist under the First Nation MRP Law.

Organizing the Estate

- Determining the Heirs:

Heirs: are those who have a right to inheritance if there is **no** Will

Heirs include:

- Surviving spouse or common-law partner
- Blood relatives such as children, parents, siblings,
- Adopted children
- Adopted children by Band Custom
- Children born out of wedlock
(if deceased died after April 17, 1985)

- Heirs are determined as of the **date of death** of the deceased

Organizing the Estate

Heirs do not include:

- Step children, unless they were adopted
- Spouses of heirs (other than the survivor)
 - Examples: daughters-in-law or sons-in-law

Heir

- Deceased did NOT have a Will (i.e., is intestate)
- An heir has a right to inheritance under s. 48, i.e., is entitled because the person is related (by blood or adoption)

Beneficiary

- Deceased has made a valid Will
- A beneficiary named in the Will to receive a bequest (a gift of chattel or financial compensation) or a devise (land)

Organizing the Estate

Now that the heirs and/or beneficiaries have been identified
Executor/Administrator must determine:

- all the assets
- all the debts
- commitments (e.g., employment, memberships, etc)

Organizing the Estate

Notify:

-Banks and financial institutions

- Cancel recurring charges to credit cards or recurring debits to bank accounts
- Request information about assets held by and/or debts with these institutions
- Enquire about requirements to access the safety deposit box (especially if the key is not available)

Organizing the Estate

Notify:

-Insurance Companies

- To end payments to private health or life insurance

-DO NOT CANCEL INSURANCE POLICIES THAT COVER:

- Dwellings

- Buildings,

- business,

- cars,

- Boats etc.

Organizing the Estate

Notify:

-Service Canada

-If the deceased was receiving in any pensions, you will need to notify Service Canada (you will need the deceased's social insurance number) and attach a certified copy of appointment document

Organizing the Estate

Determine Assets:

- Identify land holdings
 - On-reserve land ... talk to the Band Land Manager or to INAC to determine the status of any land holdings
 - CPs, COs, joint-tenancy or tenancy-in-common land holdings, land transfers in progress?
 - Off-reserve land ... search municipal and provincial registries

Organizing the Estate

Determine Assets:

- Determine if INAC holds any funds in trust
- Inquire from family members about any other assets such as
 - chattels of value or cultural significance; have appraisals done if they are deemed valuable
 - contract payments owed to the deceased; collect these funds
- Inquire from employer and businesses if
 - salary or wages are due to the deceased
 - there are any death benefits payable to the deceased's estate, private or CPP

Organizing the Estate

Determine Assets:

- Identify financial assets, e.g.,
 - Funds, investments, and securities held in financial institutions
 - Any life insurance policies
 - Initiate the process for receiving payouts from life insurance policies
- **Exclude** any assets owned jointly with anyone
 - They now belong to the joint owner(s)
 - They do NOT form part of the estate

Organizing the Estate

Determine Debts:

- In the same manner as determining assets, research must be carried out to locate all creditors and to determine all debts and their amounts
- Enquire from financial institutions about outstanding mortgages, loans, credit card balances

Organizing the Estate

Determine Debts:

- To ensure that all debts are identified
 - Post a Notice to Creditors, Heirs and Other Claimants , and keep a copy for the estate files
 - The posting must be up for 8 weeks
 - The posting should be at the Bank Office, the Post Office, local newspaper, other locations where the deceased had business
- Calculate the total debts

Organizing the Estate

Determine Debts:

- Determine if there is sufficient cash money to settle the debts
- Debts are only paid from the assets of the estate
- Family members and the Administrator are not expected to cover any shortfall
- If there is not enough money to cover the debts, some assets will have to be sold

Organizing the Estate

Settling Debts:

- Some debts take priority over others
- **Priority** is important if **not enough assets** to cover the debts
- General priority order (may vary by province):

1) Funeral expenses

2) Secured creditors

3) Preferred creditors

4) Ordinary creditors

– e.g., house mortgage,
car loan

–e.g., wages owed to
deceased's employees

–Unsecured debt

Organizing the Estate

Sale of Assets to Pay Debts:

- If assets must be sold to cover debts, discuss the choice of assets with the heirs and beneficiaries
- Other assets can be sold; suggested order or priority:
 - Personal items not gifted
 - Any real estate designated for paying debts
 - Other real estate
 - General legacies, then specific legacies

Organizing the Estate

Sale of Assets to Pay Debts:

- If reserve land is involved and the heir/beneficiary is not a member of the same FN, the land must be sold: a Section 50 sale
 - Other member heirs or beneficiaries may decide to buy it
 - All heirs and beneficiaries may decide on an Heirs Agreement
 - Otherwise, any band member can bid on the land
 - If there are no bids, the land reverts back to the FN who must compensate the heir or beneficiary

Organizing the Estate

Sale of Assets to Pay Debts:

- May also be required if spouse or common-law partner has received an order under s. 36 of FHRMIRA or under a First Nation MRP Law.

Organizing the Estate

- Where FHRMIRA applies, its provisions must be considered when administering an estate.
- The survivor of the estate has 2 options:
 - **Option 1:** The survivor may choose to apply to court for an amount equal to half the value of the deceased's interest in or right to the family home and other matrimonial interests or rights under the provisional federal rules in the Act or;
 - **Option 2:** The survivor may choose to inherit from the deceased's will or under the estates provisions of the *Indian Act* in respect of the family home and other matrimonial interests.
- In both cases, the option is specific to the matrimonial home or other matrimonial interests or rights. It does not preclude the survivor from inheriting other assets from the deceased, such as personal items.

Organizing the Estate

Option 1

- To claim survivor rights and interests under the provisional federal rules, a survivor has to make an application to the court **within 10 months** of the death of their spouse or common-law partner. Survivors may be entitled to an amount equal to half the value of the deceased's interests in or right to the family home. **A court can extend the 10-month period.**
- The executor of the will or administrator of the estate who receives notice of such an application must notify beneficiaries of the will or heirs to the estate. If neither an executor nor an administrator has been appointed, the Minister must make the notification.

Organizing the Estate

Option 2

- The survivor can inherit pursuant to the deceased's will or estate without making an application to the court under the FHRMIRA. The *Indian Act* estate process must withhold distribution of assets until the 10 month period expires.
- Alternatively, distribution can occur within the 10 month period where the survivor indicates in writing that he or she chooses to inherit under the will and not under FHRMIRA.

Organizing the Estate

- The court may determine how much the survivor is owed, and how that amount should be paid. (S.36)
- If an application to court was made by the survivor within 10 months,(or longer if an extension was granted), after the death of their spouse or common-law partner, then the administrator or executor must advise beneficiaries and heirs of the application.
- The heirs or beneficiaries may inform the executor or administrator that they want the court to hear their views before an order is made. The executor must then act on behalf of the heirs or beneficiaries.

Organizing the Estate

- The administrator must work with the survivor to ensure that the estate is distributed accordingly if the survivor makes application to court and an order is granted.

Organizing the Estate

Settling Debts – Best Practices:

- Maintain accurate and clear records of debt payments
- Pay ALL debts before distributing any bequests
 - ... unless there is hardship and the assets easily outweigh the debts
- Obtain a “paid-in-full” letter from all creditors
 - (these letters will be part of your final reporting)
- If bequests are paid before the debts are settled, and there is a shortfall, the Administrator is liable!!

Organizing the Estate

- In organizing the estate, the Executor/Administrator has
 - Identified heirs/beneficiaries
 - Determined the assets of the estate
 - Determined the debts held by the estate
 - Settled the debts

Distributing the Estate

The next steps for the Executor/Administrator is the distribution of estate assets.

Distributing the Estate

Compose a **Proposal for Distribution**, which includes

- List of all assets with estimated or appraised values
- List of debts and amounts
- List of assets sold for debt repayment and amounts received
- List of assets sold to satisfy financial bequests
- List of bequests (\$\$ and chattels), devises (land), and shares being distributed to the heirs and beneficiaries according to the Will
- Calculation showing the proportionate shares going to heirs and beneficiaries where there was insufficient funds
- An Heirs Agreement, if applicable ...

Distributing the Estate

Heirs Agreement

- May be used for a situation where heirs want to find a creative solution to a family disagreement
- Generally is in the same spirit as the deceased's wishes
- It is a written document signed by all heirs
- It acknowledges that they have a right to inherit
- The document must set out how the new distribution will be carried out

Best Practice: have it drawn up by a lawyer

Distributing the Estate

- If there is a survivor, distribution may only begin **after** survivor chooses MRP provisions or the *Indian Act*
- Survivor has 10 months after the death to make this decision (unless survivor decides sooner or waives the right in writing)
- Distribute Matrimonial Real Property first, if applicable
- Distribute remaining assets according to the Proposal for Distribution or the Heirs Agreement
- **Obtain a sign-off from each heir and beneficiary**

Close the Estate

- Prepare an accounting showing:
 - Assets (including value or sale proceeds)
 - Debts paid
 - Distributed assets
- Close estate bank accounts (if any)
- Provide a copy of the accounting and the sign-offs to all heirs and beneficiaries
- Keep a copy of the accounting and the sign-offs

Legal Disclaimer

The Centre of Excellence for Matrimonial Real Property DOES NOT provide legal advice. This presentation is for information purposes only. In all matters relating to estates and matrimonial real property on reserve, we strongly recommend that individuals obtain legal counsel from a lawyer well versed in the application of the Indian Act, FHRMIRA and the specific circumstances of the estate.

Contact Us

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