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Native American Restricted Allotments: A Surviving Spouse's Elective Share Rights

JEFFREY S. KINSLER

I. INTRODUCTION

Nearly all states have laws that prohibit decedents from disinheriting their spouses.[1] In these states, if a surviving spouse is disinherited, the spouse may renounce the will and elect to take a certain percentage of the decedent's estate.[2] In Oklahoma[3] and Nebraska,[4] for instance, a surviving spouse may elect to take one-half of the decedent's estate in lieu of the devises, if any, made for the surviving spouse in the will. These "elective share" statutes afford long-term financial security for surviving spouses.

A century ago, Native Americans acquired real estate by allotment.[5] Under the allotment system, the federal government issued Native Americans parcels of former reservation land in order to assimilate them into white society.[6] Native Americans received individual land allotments, with the United States holding title in trust for the allottees for twenty-five years, during which time the allotment could not be sold, mortgaged, or taxed without the consent of the Secretary of the Interior.[7] After twenty-five years the allottee received the land in fee simple.[8]

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1. All but one of the separate property states give the surviving spouse a share of the decedent's property. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS & ESTATES 377-78 (4th ed. 1990). These "elective share" or "forced share" statutes serve a purpose similar to that of community property.

2. The only state without some form of elective share statute is Georgia. *See* Vernon F. Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession*, 10 GA. L. REV. 447 (1976).

3. OKLA. STAT. ANN. tit. 84, § 44(B)(2) (West 1990).

4. NEB. REV. STAT. § 30-2313 (1989). In some states, the percentage of the spouse's elective share depends on whether the testator was survived by descendants. *See, e.g.*, ILL. COMP. STAT. ch. 755, § 5/2-8 (1993).

5. *See* 25 U.S.C. §§ 331-358 (1992). "The paternalism that characterizes the Allotment Act undoubtedly now offends many Indians and non-Indians, but we are free neither to rewrite history nor to redraft the Act to conform to our notions of contemporary social attitudes." Estate of Kipp, 87 Interior Dec. 98, 104 (1980) (quoting Akers v. Morton, 499 F.2d 44, 48 n.3 (9th Cir. 1974), *cert. denied*, 423 U.S. 831 (1975)).

6. Nichols v. Rysavy, 809 F.2d 1317, 1321 (8th Cir.), *cert. denied*, 484 U.S. 848 (1987).

7. *Id.* at 1321.

8. *Id.*

Subject to certain restrictions, federal law permits Native Americans to dispose of their allotments by will.[9] There are no federal laws, however, mandating elective shares for the surviving spouses of Native American allottees, and state elective share statutes are not applicable to the disposal of allotted lands. Accordingly, a Native American can bequeath an allotment to someone other than his or her spouse, which is tantamount to disinheriting the surviving spouse because the allotment is often the only significant asset in the decedent's estate.[10] The absence of a federal elective share statute means, ironically, that a Native American's devise of restricted allotments is less restricted than the devise of real property by non-Native Americans. It is time to rectify this injustice by enacting a federal elective share regulation to protect Native American spouses from disinheritance.[11]

II. THE ALLOTMENT SYSTEM

On February 8, 1887, Congress enacted the General Allotment Act, also known as the Dawes Act, which codified the Indian allotment system.[12] The Dawes Act reflected a policy of encouraging the assimilation of Indians into the white man's culture.[13] This policy was carried out by allotting to individual Indians sufficient resources to enable them to become independent farmers and ranchers.[14] The Dawes Act divided up Indian reservations to the extent that they could be advantageously utilized for agricultural purposes.[15] The original allotments ranged in size from forty to 320 acres,[16] the size of a small American farm. Native Americans received individual land allotments, with the United States holding the land in trust for twenty-five years, during which time the allotment could not be sold, mortgaged, or taxed.[17] After twenty-five years, the allottee received the

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9. 25 U.S.C. § 373 (1983 & Supp. I 1992).

10. *See generally In re* Marriage of Wellman, 852 P.2d 559 (1993).

11. Although having a Chicago or New York business address reduces the probability of confronting this problem, such issues do occur nationwide. *See generally* Sharon J. Bell, *Indian Title Problems: A Survival Primer*, 1987 A.B.A. SEC. REAL PROP., PROB. & TRUST L. REP. 30.

12. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 332-358 (1992)).

13. Nichols v. Rysavy, 809 F.2d 1317, 1321 (8th Cir.), *cert. denied*, 484 U.S. 848 (1987).

14. *Id.*

15. *Id.*

16. John H. Leavitt, Note, Hodel v. Irving: *The Supreme Court's Emerging Takings Analysis — A Question of How Many Seeds Per Acre*, 18 ENVTL. L. 597, 600 (1988).

17. *Nichols*, 809 F.2d at 1321.

land in fee simple.[18] The main purpose of the twenty-five year trust period was for the new citizens to become accustomed to a new way of life, to learn the rights of citizens, and prepare to cope on an equal footing with the white man who, many believed, would attempt to cheat the Indian out of his newly acquired property.[19]

In 1906, Congress enacted the Burke Act,[20] which authorized the Secretary of the Interior to issue a fee patent whenever the Secretary, in his discretion, was satisfied that an allottee was competent and capable of managing his or her own affairs.[21] The purpose of the Burke Act was to accelerate the assimilation of Native Americans by truncating the length of the trust period.[22] The Burke Act also shifted responsibility for issuing fee patents from Congress to the Secretary of the Interior.[23] In addition, the Burke Act granted United States citizenship to allottees upon completion of the trust period and issuance of the fee patent.[24]

Several motives precipitated the establishment of the allotment system. Advocates of the Act hoped that the allotment system would be the first step toward indoctrinating Native Americans into the white culture:[25]

> The policy of allotting Indian lands in severalty, so as to break up the old tribal relations, has been going on for years. Ultimately the Indian must become a citizen and work upon the new lines necessarily created by his present environments. He must learn to farm, to raise live stock, and to abandon the aboriginal methods of life. Large

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18. *Id.* Congress later authorized the Secretary of Interior to issue fee patents prior to the expiration of the twenty-five-year trust period. *See* 25 U.S.C. § 349 (1983). When the fee patent is given, the land becomes subject to state law. *Estate of Kipp*, 87 Interior Dec. 98, 105 (1980).

19. *Nichols*, 809 F.2d at 1321 (quoting Statement of Rep. Skinner, 18 Cong. Rec. 190 (1887)). Section 6 of the Dawes Act granted allottees United States citizenship upon expiration of the trust period. *See* Burke Act of 1906, ch. 2348, 34 Stat. 182 (1906) (codified as amended at 25 U.S.C. § 349 (1992)).

20. Ch. 2348, 34 Stat. at 182-83.

21. *Nichols*, 809 F.2d at 1321.

22. *Id.* at 1322.

23. *Id.* at 1321. As a result of this shift, it was no longer necessary for Congress to issue fee simple patents to individual Indian allottees, as it had done in every session for the past several years. *Id.* at 1322. Instead, the responsibility rested with the Secretary of the Interior, who was in a better position to judge the progress of the allotment system. *See id.*

24. Section 6 of the General Allotment Act had conferred citizenship on allottees "[u]pon the completion of said allotments and the patenting of the lands to said allottees." General Allotment Act § 6, ch. 119, 24 Stat. 388 (1887). The Supreme Court interpreted this language to give Indians citizenship upon the initial issuance of the allotment. *See In re* Heff, 197 U.S. 488 (1905). The Burke Act amended § 6 of the General Allotment Act to clarify the law.

25. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 207 (1942).

> areas of Indian lands have already been thus allotted, and many of the tribes have become farmers and stock raisers.[26]

The prevailing view in Congress was that individual ownership of land would convert the Indians from tribal "communists" to enterprising agrarians.[27] There were, however, other factors motivating the passage of the Dawes Act. These included the hope that private ownership of land would relieve the federal government of its obligation to support Indian tribes and a long-range scheme by white settlers to acquire fertile reservation land.[28]

During the last decade of the nineteenth century, and the first three decades of the twentieth century, thousands of allotments were granted to individual Native Americans. The policy of allotment, however, soon proved disastrous.[29] After the expiration of the trust period, many Native Americans sold their fee simple interests to white settlers.[30] The cash generated by these sales was quickly dissipated, leaving the Native American without land or money.[31] Other Native Americans, instead of farming the land, leased their lands to white ranchers and farmers for meager rentals.[32] The failure of the allotment program became even clearer as successive generations came to hold allotted lands.[33] The original parcels soon became splintered into multiple undivided interests in land, with some parcels having hundreds of owners.[34] As a consequence of the progressive fractionation of ownership, the trust land could no longer be put to good use.[35]

This fractionation led Congress to enact a statute compelling escheatment to the tribe of minute allotment fractions.[36] The statute, in effect, abolished both the descent and devise of minute fractions of allotted land. According to Congressional studies, one-half of the twelve million acres of allotted trust lands were held in fractionated ownership, with over three million acres held by more than six heirs per parcel.[37] One heir may own minute fractional shares in thirty or

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26. Nichols v. Rysavy, 809 F.2d 1317, 1321 (8th Cir.) (quoting United States v. Overlie, 730 F.2d 1159, 1162 (8th Cir. 1984)), *cert. denied*, 484 U.S. 848 (1987).
27. COHEN, *supra* note 25, at 206-08.
28. *Id.*
29. Hodel v. Irving, 481 U.S. 704, 707 (1987).
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. Suzanne S. Schmid, Comment, *Escheat of Indian Land as a Fifth Amendment Taking in* Hodel v. Irving: *A New Approach to Inheritance?* 43 U. MIAMI L. REV. 739, 743 (1989).
36. Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Tit. II, 96 Stat. 2517 (1984).
37. Hodel v. Irving, 481 U.S. 704, 709 (1987).

forty different allotments.[38] It was not uncommon for an individual heir's share of a lease payment to be less than one cent per month.[39] The cost of leasing, bookkeeping, and distributing the proceeds in many cases exceeded the total rental income, making the property virtually worthless and causing large parcels of fertile land to lie fallow.[40] Section 207 of the Indian Land Consolidation Act sought to alleviate this problem:

> No undivided interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall [descend] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.[41]

As the Supreme Court has observed: "Congress made no provision for the payment of compensation to the owners of the interests covered by § 207."[42]

The constitutionality of section 207 was challenged by three members of the Oglala Sioux Tribe, who represented heirs of several deceased Native American allottees. The Oglala Sioux members claimed that section 207 resulted in a taking of property without just compensation in violation of the Fifth Amendment.[43] The Supreme Court agreed, although it did recognize that fractionation of Indian lands was a serious problem, the Court concluded that the compelled escheatment of the fractionated trust interests without compensation violated the Fifth Amendment.[44]

Suffice it to say, the federal government's allotment program systematically impoverished Native Americans and increased the costs the federal government expended on Indian tribes.[45] Given these failures, Congress discontinued the allotment system in 1934.[46] After that point, no more allotments were issued. As for the allotments in existence in 1934, Congress extended the trust period indefinitely.[47]

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38. *Id.* at 708.
39. *Id.*
40. *Id.*
41. Indian Land Consolidation Act § 207, 96 Stat. 2519 (1983).
42. Hodel v. Irving, 481 U.S. 704, 709 (1987).
43. *Id.* at 710. The Fifth Amendment provides no person "shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.
44. *Hodel*, 481 U.S. at 718.
45. COHEN, *supra* note 25, at 216.
46. Indian Reorganization Act, ch. 576, 48 Stat. 948 (1934) (current version at 25 U.S.C. §§ 461-463 (1983)).
47. Nichols v. Rysavy, 809 F.2d 1317, 1323 (8th Cir.), *cert. denied*, 484 U.S. 848 (1987). The Indian Reorganization Act of 1934 applies only to those tribes which voted to adopt its provisions. 49 U.S.C. § 478 (1992).

To this day, the trust period has not expired for those allotments.[48] Over time many allottees nonetheless received patents-in-fee to their allotments, which terminated the trust responsibilities of the federal government and allowed alienation of the allotted parcels.[49] Many of these patents eventually found their way into the hands of non-Native Americans.[50]

III. Testamentary Disposal of Allotments

Alienation of restricted allotment land is controlled exclusively by federal law.[51] The testamentary disposal of allotments is governed by federal statute:

> Any person of the age of eighteen years or older having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior.[52]

A will disposing of allotted land is valid only if it is approved by the Secretary of the Interior.[53] No state probate is necessary, but the Department of the Interior must hold a hearing to probate an Indian will and must notify all interested parties.[54] The Secretary may not revoke or rewrite a will that reflects a rational testamentary scheme,[55] but rather may disapprove of a will only if it is technically deficient

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48. *Nichols*, 809 F.2d at 1323; *see also* Oglala Sioux Tribe v. Hallett, 708 F.2d 326, 331 (8th Cir. 1983).

49. Conference of Western Attorneys General, American Indian Law Deskbook 46 (1993).

50. *Id.* at 46-47.

51. Akers v. Morton, 499 F.2d 44, 46 (9th Cir. 1974); Hanson v. Hoffman, 113 F.2d 780, 789 (10th Cir. 1940) (stating that state law is superseded by act of Congress and regulations of the Secretary of Interior). The disposal of a Native American's personal property and unrestricted real property is governed by Tribal law or, if none, state law. Cohen, *supra* note 25, at 139, 202-04.

52. 25 U.S.C. § 373 (Supp. I 1993). The Secretary of the Interior has enacted regulations governing the testamentary disposal of allotments. *See* 25 C.F.R. pts. 15-17 (1992); 43 C.F.R. pt. 4 (1992). By its terms, § 373 does not apply to the Five Civilized Tribes or the Osage Indians. Prior to the enactment of § 373, Native Americans were prohibited from disposing of allotments by will. *See, e.g.*, Taylor v. Parker, 235 U.S. 42 (1914).

53. 25 U.S.C. § 373 (1983 & Supp. I 1992). The Secretary may approve the will either before or after the death of the testator and can revoke the approval within one year if it is shown that the will was executed or procured by fraud.

54. Leavitt, *supra* note 16, at 609.

55. Tooahnippah v. Hickel, 397 U.S. 598, 602 (1970). If a will is disapproved or the decedent dies intestate, the property passes by descent and distribution according to the laws of the state where the land is located. Leavitt, *supra* note 16, at 610.

or irrational.[56] The Supreme Court ably summed up the Secretary's authority when it said "we cannot assume that Congress, in giving testamentary power to Indians respecting their allotted property with the one hand, was taking that power away with the other by vesting in the Secretary the same degree of authority to disapprove such a disposition."[57] Accordingly, absent a showing of fraud, undue influence, duress, mistake, or testamentary incapacity, the Secretary must approve the will.[58]

There is one substantive limit on the Secretary's power to approve an allottee's will, the Secretary can only approve those wills that devise the allotted property in accordance with restrictions on alienation set forth in 25 U.S.C. § 464. According to section 464, "the persons or entities to whom an Indian may devise trust property [are] as follows: (1) . . . the Indian tribe where the land is located; (2) . . . any member of such tribe; or (3) [the] heirs of the testator."[59] Read together, sections 373 and 464 permit Native Americans to dispose of their allotments by will, as long as the allotment is devised to the tribe where the land is located, to a member of the tribe, or to the decedent's heirs as defined by state law.[60]

A. Who Are The Heirs?

Federal law does not delineate a Native American's heirs for purposes of either testate or intestate succession. Instead, the Department of the Interior looks to the intestacy distribution statutes of the state where the trust property is located to ascertain the decedent's heirs.[61] At common law, a surviving spouse was not considered an heir of the decedent's estate.[62] "Heirs" were thought to mean only the blood descendants of the decedent.[63] This reasoning began to fade by the first part of the twentieth century. Courts and legislatures started to include surviving spouses within the definition of heirs. By the 1980's, ironically, surviving spouses had come to be the most favored of all heirs.

Attempts have been made to preclude surviving spouses from

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56. Akers v. Morton, 499 F.2d 44, 47 (9th Cir. 1974).

57. *Tooahnippah*, 397 U.S. at 608-09 (footnote omitted).

58. *See id.* at 601, 610.

59. Cultee v. United States, 713 F.2d 1455, 1459-60 (9th Cir. 1983) (quoting H.R. Rep. No. 1285, 96th Cong., 2d Sess. 2 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2916, 2917), *cert. denied*, 466 U.S. 950 (1984). "'Heirs'" is defined in accordance with the law of the [s]tate in which the property is located." *Id.* at 1460.

60. *Cultee*, 713 F.2d at 1459-60.

61. COHEN, *supra* note 25, at 633-34.

62. *See generally* Walker v. Walker, 118 N.E. 1014 (1918).

63. *See* THOMAS E. ATKINSON, LAW OF WILLS § 6 (2d ed. 1953).

receiving allotted land on the basis that spouses are not heirs of the decedent and thus are precluded from inheriting trust property. In *Tooisgah v. Kleppe*,[64] the sole surviving child of a deceased allottee claimed that he was entitled to the deceased's entire allotment. The surviving spouse, he argued, was precluded from taking because a spouse is not an heir under common law.[65] The court, applying Oklahoma's intestacy statute, determined that the spouse was an heir of the decedent and, as such, was entitled to a portion of the trust land.[66]

Under modern law, the determination of a person's heirs is usually made by looking at a state's intestate succession statute.[67] These statutes vary from state to state, but there is one common thread: the intestacy statutes protect the surviving spouse and children of the decedent at the expense of all other relatives. The Uniform Probate Code (UPC) is exemplary of this protection. Under the UPC, if the decedent left no surviving parents, the surviving spouse receives the entire estate.[68] This is true even if the decedent was survived by children.[69] If the decedent is survived by a spouse and at least one parent, the spouse receives the first $200,000, plus three-fourths of the balance of the estate, which, for all but the extremely wealthy, will encompass the entire estate. If, however, the decedent is not survived by a spouse or parent, the entire estate will pass to the decedent's descendants by representation.[70] Under the Uniform Probate Code, this includes descendants related to the deceased by adoption[71] and half-blood.[72] Federal law provides the distribution rules for illegitimate children.[73]

IV. INTESTACY

Although this article involves intentional disinheritance of surviving spouses, a few words about intestate distribution seem appro-

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64. 418 F. Supp. 913, 914 (W.D. Okla. 1976).
65. *Id.*
66. *Id.* at 914-15.
67. *See* WILLIAM J. BOWE & DOUGLAS H. PARKER, 4 PAGE ON THE LAW OF WILLS § 34.5 (4th ed. 1960) (the term "heir" is defined by reference to intestate distribution statutes and, as such, surviving spouses are usually included with the definition).
68. UNIF. PROB. CODE § 2-102(1) (1992). There is, however, one exception to this rule. If the decedent leaves a surviving spouse who has children from another marriage (and also children from the marriage to the decedent), the surviving spouse receives the first $150,000, plus one-half of the balance of the estate. UNIF. PROB. CODE at § 2-102(3) (1992). In most cases, this would be tantamount to the entire estate.
69. There is also an exception to this rule. If the decedent is survived by a spouse and descendants who are not descendants of the surviving spouse (usually children of a prior marriage), the surviving spouse receives the first $100,000 plus one-half of the balance of the estate.
70. UNIF. PROB. CODE § 2-103 (1992).
71. UNIF. PROB. CODE § 2-114; *see also* 25 U.S.C. § 373a (1993).
72. UNIF. PROB. CODE § 2-107 (1992).
73. 25 U.S.C. § 371 (1993).

priate. When a Native American to whom an allotment has been made dies without a valid will disposing of the allotment, the Secretary of the Interior ascertains the legal heirs of the allottee.[74] Until recently, section 372 provided that the Secretary's determination of the heirs was "final and conclusive." This provision led to a profusion of litigation in which putative heirs of the estate asked trial and appellate courts to review the Secretary's decision. More often than not the courts refused to review the Secretary's decision, concluding that they lacked subject matter jurisdiction.[75] Section 372 was recently amended by Congress to make clear the Secretary's decisions are subject to judicial review.[76]

V. Spousal Protection at the State Level

With only one exception, all of the separate property states give the surviving spouse a share of the decedent's estate.[77] The underlying policy is that the surviving spouse contributed to the decedent's acquisition of wealth and deserves to have a portion of it.[78] The policy is implemented by statutes giving the spouse an elective share of the decedent's property. Under the elective share statutes the spouse may take under the decedent's will or renounce the will and take a fractional share of the decedent's estate.[79]

The percentage of the elective share varies from state to state. The share usually ranges from one-third to one-half of the estate and may depend upon whether the decedent was survived by descendants. Under the Uniform Probate Code, the spouse's elective share comes from the "augmented estate" which includes not only those items in probate, but also most non-probate transfers made prior to death.[80] Ordinarily, the election must be made by the spouse personally and cannot be made by his or her estate or representatives.[81]

VI. Disinheriting Spouses

An allotment is often the only significant asset in a deceased Native American's estate.[82] Nonetheless, there are no laws, state or federal, which prohibit Native Americans from devising their allot-

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74. 25 U.S.C. § 372 (1993).
75. *See, e.g.*, First Moon v. White Tail, 270 U.S. 243 (1926); Johnson v. Kleppe, 596 F.2d 950, 952 (10th Cir. 1979).
76. 25 U.S.C. § 372.
77. Dukeminier & Johanson, *supra* note 1, at 377-78.
78. *Id.*
79. *Id.*
80. Unif. Prob. Code § 2-202 (1992).
81. Atkinson, *supra* note 63 at § 33. *But see* Unif. Prob. Code § 2-203 (1992).
82. *See supra* notes 5-9 and accompanying text.

ments to someone other than their spouses.[83] As a result, a Native American can devise the family home right out from under his or her spouse.

For instance, in *Ducheneaux v. Secretary of the Interior*,[84] Douglas Ducheneaux (Douglas), a member of the Cheyenne River Sioux Tribe, died testate leaving his entire estate, including five quarter sections of land, to his nieces and nephews.[85] At the time of his death, Douglas was still married to Marie Ducheneaux (Marie), a non-Native American, even though the couple had been separated for several years.[86] Marie petitioned the Secretary of the Interior to set aside Douglas's will, arguing that she had contributed at least one-half of the funds necessary to acquire the allotment and therefore was entitled to one-half of the restricted land.[87]

The Secretary rejected Marie's claim.[88] The district court reversed the Secretary's decision, but the Eighth Circuit reinstated it.[89] The Eighth Circuit gave two reasons for its refusal to set aside Douglas's will. First, the Quiet Title Act[90] precludes non-Indians from interfering with the federal government's title to trust land.[91] As such, Marie lacked standing to challenge the Secretary's disposal of Douglas's allotted land.[92] Second, the Eighth Circuit declared that the Secretary of the Interior could not disapprove Douglas's will because there were no federal laws which prohibit a Native American from disinheriting his or her spouse.[93]

Similarly, in *Akers v. Morton*,[94] John Akers (John), a Native American, died leaving a will that expressly disinherited his wife, Dolly Akers (Dolly), also a Native American.[95] Prior to John's death, John and Dolly had lived on restricted land located in Montana, but title to the land had been in John's name only.[96] Dolly challenged John's will before the Secretary of the Interior claiming that, as a surviving spouse, Montana's dower law entitled her to a portion of John's estate.[97] Affirming the decisions of the Secretary of the Interior

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83. WILLIAM J. BOWE & DOUGLAS H. PARKER, 1 PAGE ON THE LAW OF WILLS § 12.6, at 579 (4th ed. 1960).
84. 837 F.2d 340 (8th Cir.), *cert. denied*, 486 U.S. 1055 (1988).
85. *Id.* at 341.
86. *Id.*
87. *Id.*
88. *Id.* at 341-42.
89. *Id.* at 342, 345.
90. 28 U.S.C. § 2409a (1992).
91. Ducheneaux v. Secretary of the Interior, 837 F.2d 340, 343-44 (8th Cir.), *cert. denied*, 486 U.S. 1055 (1988).
92. *Id.*
93. *Id.* at 344-45.
94. 499 F.2d 44 (9th Cir. 1974), *cert. denied*, 423 U.S. 831 (1975).
95. *Id.* at 46.
96. *Id.*
97. *Id.*

and the district court, the Ninth Circuit held that section 373 pre-empted Montana's dower law,[98] and that there were no federal laws protecting Native American spouses from being disinherited of allotment property.[99]

While upholding John's right to disinherit his surviving spouse, the Ninth Circuit expressed its displeasure with the state of the law, noting that federal case law had produced:

> the anomalous result that an Indian's devise of restricted land is less restricted than an Indian's (or a non-Indian's) devise of any other realty. He or she can will that property free from any state law designed to protect a surviving spouse, and there is no federal law that fills the state law gap.[100]

Several cases in which a Native American has disinherited his or her spouse have ascended to the Supreme Court. For example, in *Blanset v. Cardin*,[101] a surviving husband challenged the will of his wife, a member of the Quapaw Tribe. The wife was an allottee of restricted lands valued at $40,000.[102] In her will, she left the entire allotment to her children and left her husband five dollars.[103] The husband challenged the Secretary of the Interior's approval of the will, claiming that he was entitled to one-third of his wife's estate under Oklahoma's dower law, which then read:

> Every estate and interest in real or personal property to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will: Provided, that . . . no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband . . . .[104]

The Supreme Court upheld the Secretary's approval of the will, finding that it was the intention of Congress that Indians should have the right to dispose of allotments by will free from state laws and regulations.[105] Because federal law in this area supersedes state law, and because there are no federal elective share or dower laws, the

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98. *Id.*

99. *Id.* at 48; *see also* Homovich v. Chapman, 191 F.2d 761 (D.C. Cir. 1951) (Oklahoma statute providing for revocation of pre-existing wills upon marriage not applicable to Native American's will disposing of restricted property).

100. Akers v. Morton, 499 F.2d 44, 48 (9th Cir. 1974), *cert. denied*, 423 U.S. 831 (1975).

101. 256 U.S. 319 (1921).

102. *Id.* at 321.

103. *Id.*

104. *Id.* at 322-23 (quoting OKLA. STAT. § 8341 [this section has since been replaced by OKLA. STAT. tit. 84, § 44 (1985)]).

105. 256 U.S. at 326.

Court concluded that Native Americans may disinherit their spouses of all allotment property, even if this action causes the surviving spouse to be evicted from the family homestead.[106]

VII. Proposed Elective Share Regulation

Regulations are needed to protect Native American spouses from disinheritance. A surviving spouse should not be subjected to eviction from the family home if his or her spouse dies. Most states currently provide protection for surviving spouses, but state laws do not apply to the testamentary disposal of allotments. The gap between state and federal law must be closed. Therefore, I propose that the Secretary of the Interior adopt the following regulation:

> An Indian of the age of 18 years or over and of testamentary capacity (the "decedent"), who has any right, title, or interest in trust property, may dispose of such property by will executed in writing and attested by two disinterested adult witnesses. Provided, however, that if the decedent is married at the time of death
> (1) the surviving spouse of the decedent may continue to possess and occupy the trust property for the remainder of the surviving spouse's life, if the trust property was the surviving spouse's primary homestead at the death of the decedent. At the surviving spouse's death, the trust property will be distributed in accordance with decedent's will; and
> (2) If the surviving spouse is a person who may acquire trust property pursuant to 25 U.S.C. § 464, the surviving spouse is entitled to renounce the decedent's will and elect to receive one-third of the trust property, in addition to the rights the surviving spouse has under subsection (1) of this regulation.[107]

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106. *Id.* at 326-27.

107. This regulation should be enacted in place of 43 C.F.R. § 4.260 (1992). That regulation reads:

> (a) An Indian of the age of 18 years or over and of testamentary capacity, who has any right, title, or interest in trust property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses.
> (b) When an Indian executes a will and submits the same to the Superintendent of the Agency, the Superintendent shall forward it to the Office of the Solicitor for examination as to adequacy of form, and for submission by the Office of the Solicitor to the Superintendent of any appropriate comments. The will or codicil or any replacement or copy thereof may be retained by the Superintendent at the request of the testator or testatrix for safekeeping. A will shall be held in absolute confidence, and no person other than the testator shall admit its existence or divulge its contents prior to the death of the testator.
> (c) The testator may, at any time during his lifetime, revoke his will be a subsequent will or other writing executed with the same formalities as are required in the case of the execution of a will, or by physically destroying the will with the intention of revoking it. No will that is subject to the regulations of this subpart shall be deemed to be revoked by operation of the law of any State.

43 C.F.R. § 4.260 (1992).

The proposed regulation ensures that surviving spouses, Native American or otherwise, will not be evicted from the family home and forced into the streets. It accomplishes this by granting a life estate to all surviving spouses of Native American allottees. The issuance of life estates to the surviving spouses of allottees is entirely consistent with the ownership restrictions in section 464.[108] In addition, if the surviving spouse is a person who may acquire trust property under section 464 — which will often be the case because spouses are considered heirs under the laws of most states — the surviving spouse may elect to take one-third of the trust property outright. This regulation fills the gap between state and federal law by placing surviving spouses of Native American decedents on equal footing with the surviving spouses of most other Americans.

VIII. Conclusion

In many states, a person cannot disinherit his or her spouse. If the spouse is disinherited, the spouse may renounce the will and elect to take a certain percentage of the decedent's estate. There is no such protection for the surviving spouses of Native Americans with respect to restricted allotments. Under the current state of the law, Native American spouses may be disinherited of the family homestead. This article proposes a regulation to protect the surviving spouses of Native Americans from being disinherited of trust property, without violating the federal laws which restrict the persons who may acquire trust property.

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108. The Secretary of the Interior has enacted an analogous regulation that grants surviving spouses life estates in trust property:

> When the heir or devisee whose interests are subject to the tribal option is a surviving spouse, the spouse may reserve a life estate in one-half of such interests. The spouse shall file a written notice to reserve with the Superintendent within 30 days after the tribe has exercised its option to purchase the interest in question, together with a certification that copies thereof have been mailed on the same date to the administrative law judge and the tribe. Failure to timely file a notice to reserve a life estate shall constitute a waiver thereof.

43 C.F.R. § 4.303 (1992).