

Estate of a Deceased Indian
By Leslie Moore, Duty Counsel
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When a status Indian who is normally resident on a reserve passes away the *Indian Act* and the *Indian Estates Regulations* determine what happens to the estate of that person. Section 42 to section 52.5 of the *Indian Act* sets out a general framework concerning the estate of a deceased Indian. However, the *Indian Act* and *Indian Estates Regulations* do not set out a complete code with respect to the estate of a deceased Indian. There may be instances where the estate of a deceased Indian may fall into the jurisdiction of the courts.

The first step in deciding whether or not the Minister of Indian Affairs or the courts have jurisdiction is to determine if the Indian was “ordinarily resident” on a reserve. Whether or not an Indian is ordinarily resident on a reserve is determined on a case-by-case basis. Some factors that are taken into consideration include the duration, intention and location of where the Indian physically resides. They may even be considered to be ordinarily resident on a reserve if they are away temporarily for health or employment reasons.

Once a deceased Indian is deemed to be ordinarily resident on a reserve, the estate falls within the exclusive jurisdiction of the Minister of Indian Affairs. However, the Minister of Indian Affairs may assume jurisdiction of an estate of a deceased Indian who was not ordinarily resident on a reserve if there is a written request from one of the heirs requesting that the Minister assume jurisdiction. Generally this will only happen if the estate does not have land off reserve, the estate is of minimal value, the Minister will not be exposed to liability and the other heirs are unwilling to administer the estate and are not objecting to the request.

The reason the Minister of Indian Affairs has jurisdiction over the estate of a deceased Indian ordinarily resident on a reserve is because of the *Constitution Act, 1867*. Section 91(24) of the *Constitution Act, 1867* grants exclusive jurisdiction to Parliament over all matters dealing with “Indians and lands reserved for Indians”.

The reason the Minister of Indian Affairs may not have jurisdiction over the estate of a deceased Indian off-reserve is because the *Constitution Act, 1867* section 91(13) grants exclusive jurisdiction to the province over matters concerning “Property and Civil Rights”. Property and Civil Rights include estate matters.

As stated above the *Indian Act* the *Indian Act Regulations* do not set out a complete code so there is a possibility that compatible provincial legislation may be incorporated by reference through section 88 of the *Indian Act*. For example, estates of deceased Indians who are not ordinarily resident on reserve generally are referred to the appropriate provincial courts. Claims involving child support against the estate may also be referred to the courts even though jurisdiction over the estate rests with the Minister.

There is also a possibility that the Minister of Indian Affairs may consent to the transfer

of jurisdiction to the appropriate provincial courts. Section 44 of the *Indian Act* permits the Minister to transfer jurisdiction to the court that would have jurisdiction if the deceased were not an Indian. This may happen when matters are complex and involves substantial amounts of cash and property.

As you can see determining whether or not an estate of a deceased Indian is a matter for the court or the Minister of Indian Affairs can be confusing. If you find yourself in this position it may be best to consult a lawyer or if you are a NAN member to contact Nishnawbe Aski Legal Services for assistance.

(This article is for information only and is not a legal opinion. For more information please contact a lawyer who practices in this area of law.)