

**Oneida Nation of the Thames
Lands and Estates Department**

Community Information Session on :

“Wills and the Rules of Succession”

November 28 , 2007 & December 01 , 2007

Purpose of Session

Series of Workshops and Information Sessions to be held over the next 6 months will provide opportunity for Community Member input .

Opportunity to hear from the people what types of issues they face and what should be included in a Lands and Estates Code for Oneida .

Will eventually prepare a Draft Oneida Nation of the Thames “Custom Land Code” for community consideration / ratification / rejection .

Introduce and define various terms used in Wills and Estates and Land Matters that will be included in our Draft Code and discussion sessions .

Begin the process of developing written Rules , Policies and Procedures that will lend certainty to the Land Transfer Process at Oneida .

Begin discussions on how Estates are handled/administered/ distributed when a person dies with a Will and without a Will .

Discussions on how we verify Wills , what we should look for , what are proper requirements , how do we interpret Wills and enforce compliance with the wishes of the deceased person .

Discussion and options identification on the rights of Spouses (Legally Married or Common Law) . Are there any differences ? Should there be ?

When a person dies without a Will , what are the rights of a Spouse vs. Siblings and Children ?

DEFINITIONS / TERMINOLOGY

Administrator – When a person Dies without a Will (Intestate) , someone has to be appointed to handle the personal affairs of the deceased . An application is made by an interested person and they must get the agreement of the “next of kin” before being appointed.

Beneficiary – A person who is named in a Will to receive personal property or money from the person writing the Will (Testator) or is entitled to share a part of the Estate when there was no Will .

Capacity – The presence or lack of Mental Ability to appreciate the consequences of signing documents and their effects . Also the ability to give instructions for Wills and Powers of Attorney .

Common Law Spouse – Persons living in a conjugal relationship of some permanence who are not legally married.

Estate – The Land and or Personal Property of a Deceased Individual , including Estate Debts and Outstanding Obligations .

Executor – Person named in a Will to handle the Testators affairs after they have passed away (Personal Representative) .

Formal Validity of a Will – Capacity of Testator , Signed and Properly Witnessed , in Writing and Dated

Guardian – A person appointed to look after the affairs of a mentally incompetent person .

Heir – Persons entitled to share in the division of property of a deceased person .

Intestate – When a person dies without a Will .

Incompetent – A person who does not have the requisite mental capacity to make decisions in their own best interest .

Joint Tenancy – Means Joint Ownership whereby the sole surviving party automatically inherits the totality of the interest . (Right of survivorship)

Limitation – Some things are time sensitive (ie) You must file a claim against an Estate within 90 days of the Posting of the “Notice to Creditors” . Some legal actions are time limited by the Limitations Act.

Member – Means a Registered Member of the Oneida Nation of the Thames .

Per Stirpes – Means distribution amongst the heirs in a “representative manner “. (ie) There were 3 Kids of a Testator “X” (A , B and C) , who each had 3 kids of their own (A= D and E , B = F and G , C= H and I) .

When “X” dies , A has already predeceased “X” and “X” had planned to leave his monies to “A , B and C equally “. Per Stirpes means that A’s Kids D and E , will take the share that “A” would have been entitled to .

In other words D and E get a $\frac{1}{3}^{\text{rd}}$ interest , B gets $\frac{1}{3}^{\text{rd}}$ and C gets $\frac{1}{3}^{\text{rd}}$

Per Capita – Means that in the above example D and E would get $\frac{1}{4}$ of the estate , B and C would also get $\frac{1}{4}$ of the estate

Powers of Attorney – A document whereby a person who is competent gives power over their affairs to another person to act in their place .

2 Types – Power of Attorney for property and Power of Attorney for Personal care.

Revocable at any time in writing . May limit scope of powers and when the document is to take effect .

Preferential Share - In Ontario when a person dies without a Will , the Spouse (Legally Married Surviving Spouse) would automatically inherit the first \$ 200,000.00 (Two Hundred Thousand Dollars) of the Estate .

In Indian Act Jurisdictions the preferential share is \$ 75,000.00 .

Remainder of Estate – Means the property the Testators Estate may be entitled to which has not been given under the Will .

Succession – Rules which govern who will inherit property when someone dies without a Will .

Testator/Testatrix – Person who is making out a Will .

Will – A written expression of the last wishes of the Testator as to what shall happen with their property after they pass away .

WILLS

Purpose – An opportunity for the Testator to express in writing what they wish to happen with their Estate after they pass away . This is done so that the Testator may have some certainty that what their final wishes are will be carried out .

Form – Must be in writing , dated and signed by two independent witnesses who are both present at the time the Testator signs the Will and who are of the age of at least 19 years old .

Testator must be of legal age and have the requisite capacity to be able to instruct the drafter of the Will . Also they must be able to appreciate the extent of their Estate and the consequences of the document that they are signing .

Interpretive Principles – There should be a plain reading of the document and the words used must be taken in their ordinary meaning unless there is some specific legal principle behind the use of some terms.

All efforts must be taken to honor the words and intent used by the Testator since they took the time to draw up the document and this is their final wishes .

The most recent Will shall be taken as definitive (should always use a revocation of previous Wills clause) .

Doctrine of Lapse – When a gift is mentioned under a Will when it is drafted and when the Will is read the gift no longer exists , the gift is said to have lapsed because it is no longer available for distribution under the Will .

Will speaks from the date of death – Until the time of death , the Will does not have any effect . A person cannot demand performance of a gift or promise under a Will until the Testator has actually died .

Public Policy – Wills that have provisions for doing or directing someone to do something illegal are void as against public policy . For example , a testator cannot say I give \$500 to “X” providing that he murders “Y” . Would be a clause that is void as being against public policy .

Conditional Gifts are Discouraged – The law of Wills and Estates does not recognize certain conditional gifts because they are not absolute . In other words , either you give something to someone outright or the gift may fail .

Example : “I give my house and land to Bobby provided that he is never to sell the land outside of the family” .

This is not an absolute gift . The house is never rightfully Bobby’s because the term of the Will never gives the full interest to him to be able to do whatever he wants with it . It is always subject to that condition (not to sell out of the family) .

It would be more prudent to outright gift Bobby with the house and then discuss with him that it is your wish that he not sell it out of the Family . However , that final decision would be totally up to Bobby as to whether or not he is going to honor your wish .

In this way the gift does not fail because it absolutely vests in Bobby and he can do with it what he wants.

If you intend for him to have the house then give it to him outright . If you had concerns that he might sell it then give him a life estate only with directions as to who gets it upon the death of the Life Tenant .

In other words , if you do give a conditional gift it may be held to be not valid because it may never vest in the beneficiary .

