

# Planning for the Seventh Generation:

## A Will Drafting and Estate Planning Workshop

*Presented by:*

The American Indian Law Clinic  
University of Colorado Law School



# Seventh Generation Sustainability

“In every deliberation we must consider the impact on the seventh generation . . . even if it requires having skin as thick as the bark of a pine.”



*--Great Law of the Iroquois*

# Have a will?

A. Yes

B. No

Do you want the federal, state or tribal government to decide what happens to your property after you pass?

A. Yes

B. No

# What We Hope to Accomplish Today

- 1) Help you determine whether you need to write a will
- 2) Help you figure out whether there are other steps you can take to protect your loved ones' futures
- 3) Alert you to the legal complexity involved in drafting an effective will
- 4) Help you become aware of the kinds of information and documents you need to collect to start your estate planning
- 5) Guide you to competent legal assistance to help you draft a will and other estate planning documents

# What We Won't Be Doing Today

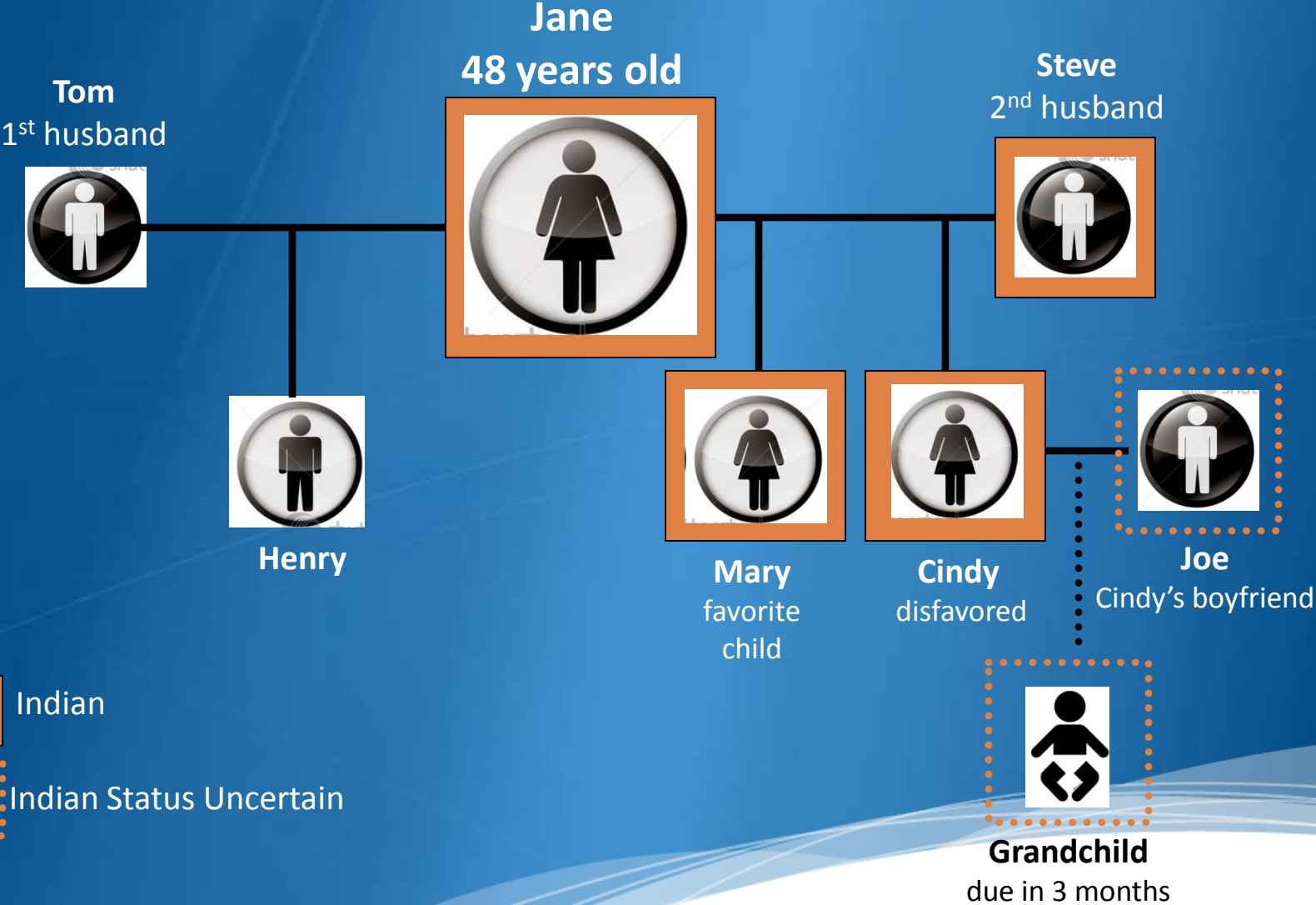
*We wouldn't be lawyers/student attorneys without a few disclaimers now— would we?*

- We will not be claim to be experts or to know everything about Indian estate planning
  - We will follow up with you though
- We will not be writing any wills today
- We will not be discussing any tax consequences
- We will not be talking about in any detail other estate planning options that may be available

# *Does Jane Feather Want a Will?*

A Hypothetical Situation

# Meet Jane Feather & Co.





# Jane's Family Situation

- Southern Ute tribal member
  - Blood quantum 1/4
- 48 years old
  - Diagnosed and being treated for breast cancer ☹️
  - Prognosis is good 😊
- Concerned about the future and wants to make sure her family is taken care of

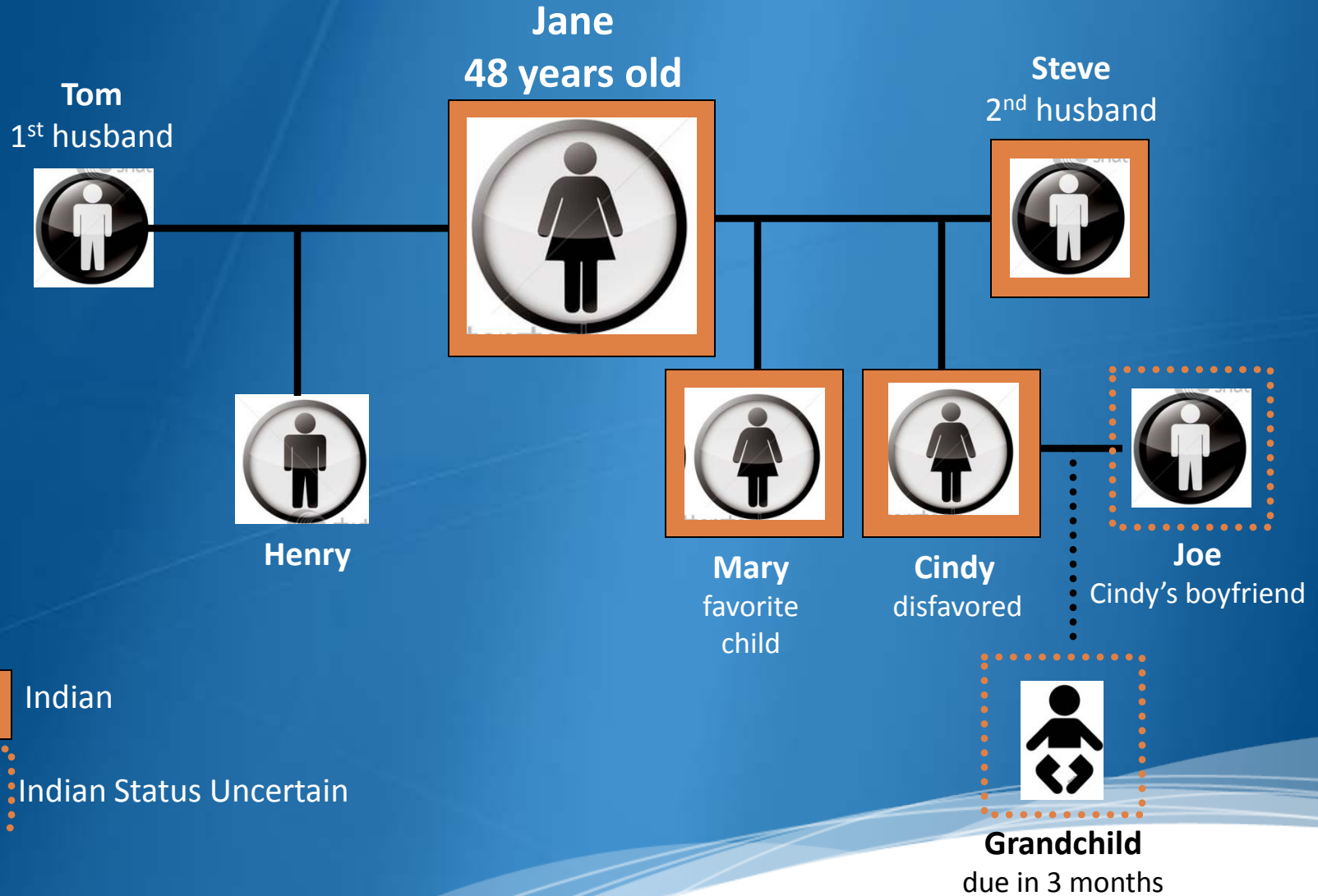
# Jane's Family Situation

- Married at age 21 to non-Indian, Tom Gonzales
  - Married only two years
  - One child together, Henry Gonzales, now age 27
    - Henry is married, no children
    - Owns successful sporting goods business in Durango
    - Seen as responsible and level-headed
- 24 years ago married Southern Ute tribal member, Steve Feather
  - Steve's blood quantum is 1/4

# Jane's Family Situation

- Jane and Steve have two daughters together:
  - Mary, age 20
    - Pre-Med Junior at Fort Lewis College
  - Cindy, age 17
    - Dropped out of high school and living with friends
    - Jane believes Cindy was drinking a lot
    - Boyfriend: Joe. Not sure if Native American
    - Six months pregnant, not sure if Joe is father
- Jane cannot have any more biological children

# Jane's Immediate Family



# Property and Assets

Rental Property  
in Durango

Tribal Home  
(Her assignment &  
Steve as beneficiary)

Fractionated  
Allotment with  
mineral royalties

Separate checking  
account

Life insurance  
through  
employment

Growth Fund  
Distributions

Joint Checking &  
Savings Accounts

*Estate < \$1 million*

# How much allotted land do I own?

- Must obtain an Individual Trust Interest (ITI) Report from the BIA
  - Shows the undivided interest in land and minerals you own on any reservation in the U.S.
    - Location of the tract
    - Size of the tract
    - Portion of the tract owned
    - Ownership of surface, mineral rights, or both
  - Contact the BIA Realty Office at Southern Ute
    - (970) 563-4514 to request your ITI
    - Must provide your name and census number

# IIM Reports

- Individual Indian Money Account (IIM) Report
  - Over time, individual tribal members have received monetary distributions from:
    - Judgment awards and revenue the tribe or allottee has earned on activities like mineral extraction

# IIM Reports

- Individual Indian Money Account (IIM) Report, continued
  - Most judgment and per capita payments were made directly to tribal members, but minors and other individuals not eligible for direct payment were paid through these IIM accounts
  - The Interior Department is undertaking a massive historical accounting (1887-present)
    - When completed, it will provide each individual with a Historical Statement of Account
    - Contact the BIA Office of Special Trustee at Southern Ute
      - (970) 563-4514 to request your IIM



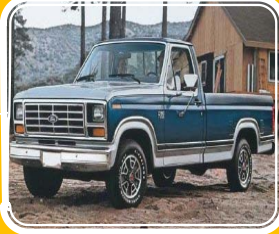
# Automobiles



1991 Subaru Legacy  
(joint)



2006 Dodge Ram Truck  
(joint)



1982 Ford Truck  
(separate)

# Other Personal Property



Jewelry



Pottery



Artwork & Navajo  
Rugs

Does Jane need a will to ensure all these items will go to a particular person after her passing?

- A. Yes
- B. No
- C. Not sure

# Getting property to recipients while avoiding the probate process

- Joint tenancy (owning things together)
  - Passes on death to the other joint tenant by operation of law
  - Real estate, automobiles, bank accounts
- Payable on Death (POD) accounts
  - Funds pass to named designee on death
- Life insurance proceeds
- Non-testamentary transfers
  - “*Inter vivos*” gifts & trusts

# Jane's Wishes

- Wants Steve to have her assignment and the house on it
- Wants Steve to have joint bank accounts and to keep the Dodge truck
- Wants Steve to have the allotment and royalties while he's alive
  - After he passes, wants it split equally between children
- Wants Mary (her favorite) to have the Subaru

# Jane's Wishes

- Angry at irresponsible Cindy but worried for expected grandbaby
  - Wants to provide for grandbaby's future
  - Wants to Henry and Mary to own the rental property but the income to go into a separate account for the baby until 18
    - Wants Henry to be in charge of account
  - Wants her separate bank account to be the start of the grandbaby's college fund
- Has a long list of jewelry, etc. she wants to give to each child and to some friends

Will Jane's wishes  
be carried out if  
she doesn't write  
a will?

A. Yes

B. No

C. Maybe

# What Happens If?



Intestacy



# If Jane passes away without a will...

- 1. Debts and the cost of probate
- 2. Spouse and children
- 3. Parents
- 4. Brothers and sisters
- 5. Grandparents and great aunts and uncles
- 6. Nearest lineal ancestors and descendants
- 7. Southern Ute after 10 years

# What happens to the rental property in Durango?

- 1. Spouse
- 2. Children
- 3. Parents
- 4. Parents' descendents
- 5. Grandparents
- 6. Grandparents' descendents

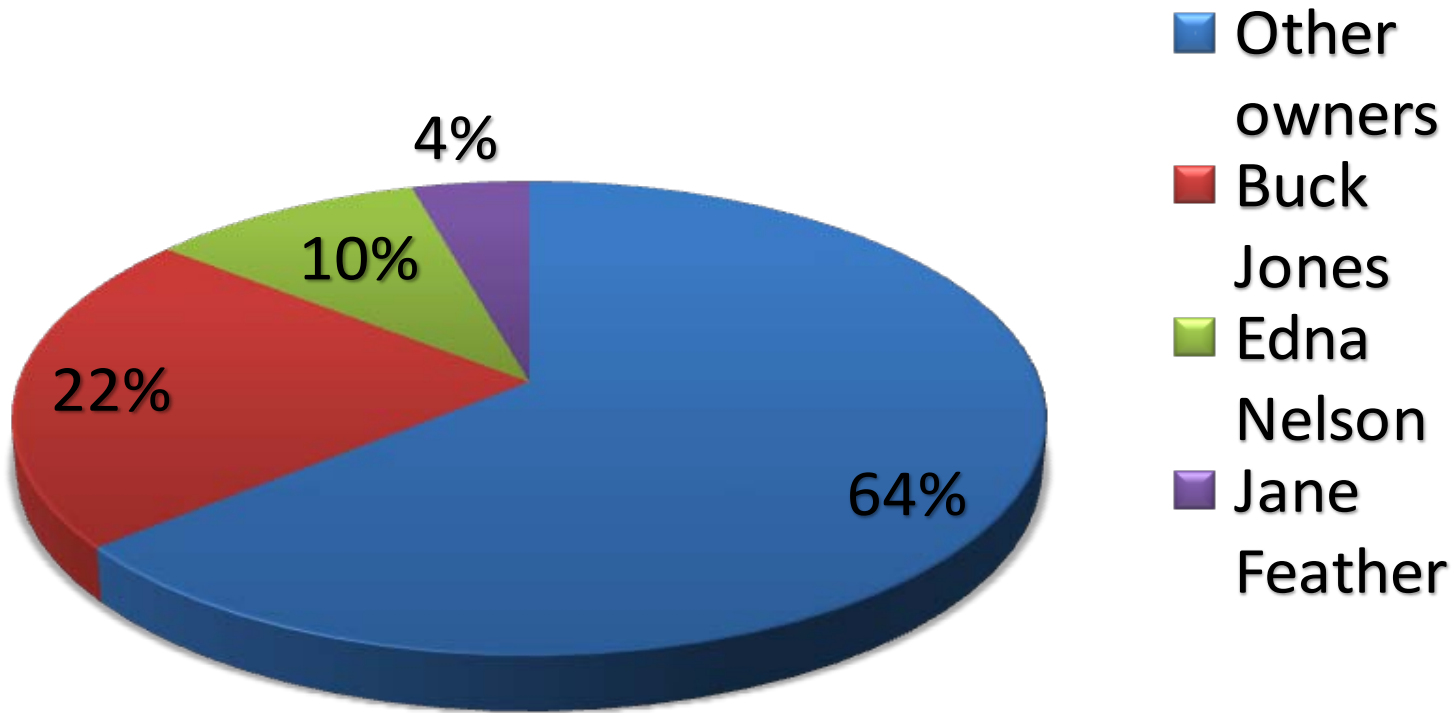
# The Home & Assignment

- **Without a will, the Home may not go to Steve, but will become part of the probate process.**
  - If she has a will, she can designate that the home goes to Steve.
- **Assignments cannot be automatically passed on to the beneficiary.**
  - However, with a will, Jane could make sure that Steve is listed as the beneficiary to be the next assignee. Steve would have to apply with the Tribe and be approved.

# The Home & Assignment

- **Without a will, there is a better chance that there could be a problem if the home and the assignment don't end up with the same person.**

# Jane's Allotment Presently



# Allotment Parcel



What will happen to the allotment if she doesn't write a will?

- A. Goes to spouse
- B. Goes to children evenly
- C. Goes to Henry
- D. Goes to the BIA

# What happens to Jane's allotment if she doesn't write a will?

- AIPRA will apply to Jane's 4% interest
  - The "Single Heir Rule" means that Henry, as Jane's oldest surviving eligible child, grandchild, or great-grandchild, will acquire her interest in the allotment.
    - Henry, a non-tribal member is considered an "Indian" under AIPRA
  - AIPRA will allow the 4% interest to be sold to co-owners of the allotment without Henry's consent because neither Jane nor any of her potential heirs resided on the land at the time of her death.



# Mineral Royalties

Mineral royalties on the allotment are part of the IIM account, discussed earlier.

If there is no will, these interests will end up in probate and be subject to the rules of AIPRA.

# What happens to Jane's IIM if she doesn't write a will?

- AIPRA also will apply to Jane's IIM account
  - 1/3 of the funds in her account will pass to Steve, Jane's spouse.
  - The other 2/3 will be divided equally between her children and grandchildren.

Jane decides she  
wants to write a will.  
Which laws must the  
will comply with?

- A. Tribal code
- B. State code
- C. Federal law & regs
- D. All of the above

Which jurisdiction will have authority to probate Jane's will?

- A. Tribal court
- B. State court
- C. BIA administrative court
- D. All of the above

# All Three: Tribal, State, Federal

Where to file depends on the type of property!



# All Three: Tribal, State, Federal

Jane's fee land on the reservation → TRIBAL CT  
Southern Ute Tribal Code Title 9: Probate Code



Jane's rental property in Durango → CO DISTRICT CT  
Colorado Revised Statutes 15-115-502 through 15-115-506



Jane's allotment, lease and IIM account → BIA  
American Indian Probate Reform Act (AIPRA)



Is there anything preventing Jane from making gifts of allotted land in the will in any manner she wants to?

A. Yes

B. No

# AIPRA Restrictions on Wills

- Trust interests must pass to spouses, eligible heirs, or lineal descendants (even if non-Indian)
- Trust interests remain in trust
- Non-restricted trust land interests passed to non-Indians convert to fee status, but tribe has the right to purchase
- Non-Indians get life estate in trust interests



# Will Interpretation Under AIPRA

- Trust interests left to more than one person are treated as a joint tenancy with right of survivorship
- Spouses unintentionally omitted may be able to take an intestate share
- Automatic revocation of gifts upon divorce or annulment
- Adopted children treated same as natural

# Protecting your children's future through a will.

- Cindy is still a minor.
- What can Jane and/or Steve do to make sure that she and the grandbaby will be taken care of in the event both her parents pass away before she reaches age 18?

# Things to consider when you have a minor child:

- If Jane dies, Steve will have custody over Cindy
- In the event that both Steve and Jane die, a guardian can be designated through a will:
  - They should choose a guardian that is trustworthy and responsible. For example:
    - They might select Jane's oldest son, Henry
    - They might select Jane's sister, Elizabeth Nelson
  - They should talk to the person who they would like to designate as guardian beforehand.

# How to get the rental money to the Grandbaby?



- Set up a trust for the baby's benefit
  - Fund with the money from the rentals
  - Ethical conflict to name Henry (a "remainder-man") as the trustee
    - Name another disinterested trusted person or a bank or trust institution
      - Aunt Elizabeth may be a good choice

Jane has seen template, fill-in-the blank wills on the Internet. Should she just use one of those?

A. Yes

B. No

# Internet Wills?

- In order to ensure that her estate is settled exactly the way she envisions, Jane should not try to do her will herself, or go to a dubious “Make Your Own Will” website.
  - Legal language is complicated
  - “Terms of art”
  - Experience counts
  - Peace of mind

Could the very smart  
Student Attorneys of the  
American Indian Law  
Clinic design a template  
will that all Southern Ute  
tribal members could  
use?

- A. Yes
- B. No
- C. Maybe

# Template for all Southern Ute Tribal Members?

- Although we all have some (or a lot of) property and some (or a lot of) family; everyone's situation is unique
- A will needs to be tailored not only to your estate, but also to your wishes







"Maybe I should see a lawyer ..."

# Important Questions You Should Ask Before You Hire an Attorney

- Are you familiar with the Southern Ute Probate Code?
- Are you familiar with the American Indian Probate Reform Act (AIPRA)?
- If not, would you be willing to become familiar with these?

# Finding a Lawyer

- Do you have experience writing wills dealing with real property?
- Are you familiar with preparing wills that deal with real and personal property located in two or more jurisdictions (i.e. Southern Ute Reservation and Colorado or Utah)?

# Finding a Lawyer

- What are your fees?
- Do you bill by the hour or charge a flat fee?
- Can you provide a written estimate for your services?
- How available are you? How can I contact you?
- How long will it take to return my call, letter, or email?

# Things you should expect from your lawyer

- Work *with* you to develop a will.
- Research and analyze all available facts and information related to your situation.
- Keep you informed and answer your questions.
- Discuss fees with you at your first visit and come to an agreement about payment.

# Things you should expect from your lawyer

- Be honest with you about any potential problems and how long it will take to solve them.
- Keep your case confidential.
- Prepare all necessary documents

Jane would like Mary,  
her favorite child, to sit  
in the meetings with  
the lawyer. Should  
Mary be allowed to?

A. Yes

B. No

Even though Mary is her favorite, Jane will want to come to the meeting with the lawyer alone.

- Attorney-Client relationship
- Confidentiality
- Conflict of Interest (Mary's self-interest may affect advice to her mother)
- Jane and Mary may have different expectations/goals



# Some more about Jane . . .

- Jane works at the Southern Ute Museum (Cultural Center) mostly with the gift shop
- Steve works at the Sky Ute Casino as a daytime Table Games Supervisor
  - He's very upset about Jane's cancer
  - Mary went to most of the treatment appointments
  - Steve does not like thinking about death and doesn't feel ready to write a will

What if Steve changes his mind and wants to write a will, can one attorney write both Steve and Jane's wills?

- A. Yes
- B. No
- C. Not sure

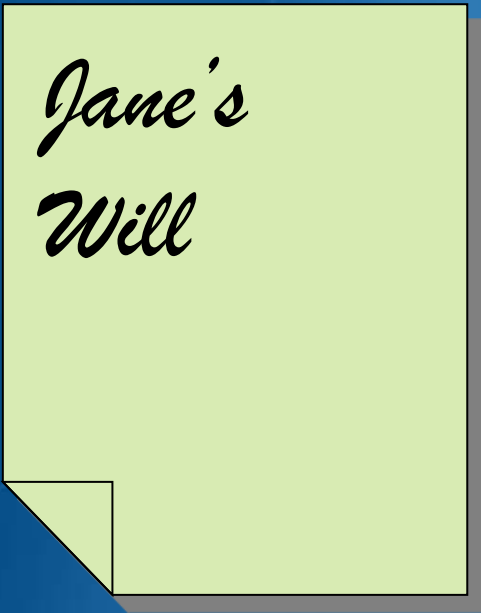
# Can one attorney write both Steve and Jane's wills?

- Yes, attorneys often do spouses' wills together
- If Jane chooses this option
  - She and Steve will be treated as one client
  - Jane will want to be sure that she and Steve agree on how they'd like to leave their property

Would it be okay for Jane to handwrite her will so long as she got it notarized?

- A. Yes
- B. No
- C. Only if she doesn't pay the notary

# The "Face" of the Will



Hmmm...what  
do I need to put  
on there?

Write one will to  
the strictest  
requirements

# For Jane's fee land on the Reservation, what does each jurisdiction require?

## Tribal Probate Code

- Testator's name;
- A description of the property to be bequeathed and the location;
- The name of the person or persons to whom the property is to be left;
- The date;
- Signature of the testator;
- Two witnesses who will verify his signature or mark.

## Colorado Probate Code

- Holographic (handwritten; not witnessed) is okay;
- If typed
  - Signed by at least two individuals, either prior to or after the testator's death, who can verify the signature or acknowledge of the will

# What does each jurisdiction require?

## Federal Regulations for Indian Trust Land & IIM

- Will must be in writing;
- Signed by testator;
- Dated; and
- Two disinterested adults who are + 18 years and not mentioned in the will as witness



# Jane's Will Should Have:

- Jane's name
- A description of her home and the allotment land and their locations
- Steve's name for the tribal home and allotment;
- The date
- Jane's signature
- Witnessed by two disinterested adults

# Other things Jane should know.

- Jane can combine all her different estates and write **ONE WILL** if it satisfies tribal, federal, and state requirements.
- The custodian of Jane's will needs to deliver it to the Southern Ute Indian Tribal Court within **10 days** after her death.

# What to Do With the All the Little Gifts & Personal Property?



- “Little gifts” and personal property are things such as jewelry, artwork, vehicles, keepsakes, clothing, & tools.

- These items are listed in a “**Personal Property Memorandum**” along with the person to whom you want each item to go.



# Personal Property Memorandum

- The will must expressly refer to the memorandum.
- Cannot include items already in the will, money, title, real estate, or securities.
- Can be used for cars, other vehicles, trailers, and business property.
- Be sure to use clear descriptions of both the items and the beneficiaries and date and sign the memorandum.
- Add alternative beneficiaries in case the first named does not survive you.
- You can make changes to the memorandum later.

Once Jane executes her will and she passes away, she can be confident that all the property will go as she planned.

- A. True
- B. False

# How Jane Can Avoid Future Arguments About Her Will

- “No Contest” clauses
  - If any beneficiary under the will sues, contesting the instrument, she loses whatever interest she would have gained under the will.
    - Not always enforceable (i.e., if there’s probable cause to support the contest)
    - Asking a court to *interpret* a will is not a “contest.”
    - Limited deterrent effect—nothing to lose!
- Better way
  - She should share her wishes with her intended beneficiaries ahead of time

# Disfavored Children

- It's okay to disinherit a child, **BUT:**
  - The will must show that failure to provide for the child is intentional (if the child isn't provided for outside the will).
    - Be as specific as possible; mention the child by name.
  - If not, deemed unintentional, and “omitted child” may take the amount she would receive if the parent died intestate.
    - This share is deducted from the named children's share.

# Disinheriting Spouses & "Elective Shares"

- Under Colorado law, it's okay to disinherit a child, but not one's spouse.
  - Spouses are guaranteed 1/3 of the testator's probate property, even if the testator wishes him to have less.
  - The spouse may choose this "elective share" if it is more than what he would get under the will
  - The duration of the marriage isn't relevant
- Elective share provision does not appear in the tribal probate code however



# Residuary Clauses

- What if Jane forgot property/accounts, etc?
  - Residuary clause establishes a beneficiary for forgotten property
- What happens if the beneficiary is dead?
  - A good idea to have a “back up” beneficiary
  - A good idea for trusts as well
  - There is virtually no limit to the number of back ups Jane can name, but she should have a stopping point.
    - Charities, organizations, etc.

# Keep Wills Up To Date

- Good idea for Jane to review your will periodically to make sure it's consistent with her wishes
- She should always review her will after major life changes to avoid problems when the will is probated
  - Divorce or re-marriage
  - Birth of children or grandchildren
  - Deaths of beneficiaries
  - Sale of real estate or other property

# What Can I Do to Start the Planning Process Now?

- 1) Estate Planning Checklist
- 2) Referral List of Estate Planning Attorneys
- 3) Estate Planning Handbook for Native Americans



Are you still awake?

A. Yes

B. No

The End!