IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27515

In the Matter of the
ESTATE OF LORRAINE ISBURG FLAWS

TAMARA ALLEN,
Appellee,

vs.

AUDREY ISBURG COURSER AND CLINTON BAKER,
Appellants.

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
BRULE COUNTY, SOUTH DAKOTA

The Honorable Bruce V. Anderson

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Jurisdictional Statement

This is an appeal from the denial of Appellants' Motion for Partial Summary Judgment, which was rendered on January 23, 2015, and from the Judgment for Tamara Allen that she is entitled to a share of Lorraine's estate. The Judgment was entered on July 7, 2015. R 997. Notice of Appeal was filed and served on August 4, 2015. R 1066.

Statement of the Legal Issues

Issue 1: Did the circuit court err in ruling that the BIA's Order determining Donald Isburg's children was not conclusive?

The circuit court ruled that the BIA's Order was not conclusive in determining Donald Isburg's children.

- U.S. Const., Art. VI cl. 2.
- 25 U.S.C. § 372.
- *Shangreau v. Babbitt*, 68 F. 3d 208 (8th Cir.1995).
- *Spicer v. Coon*, 238 P. 833 (Okla.1925).
- *Estate of Ducheneaux v. Ducheneaux*, 861 N.W. 2d 519, 2015 S.D. 11.

Issue 2: Did the circuit court err in ruling that Tamara Allen did not sleep on her rights and had standing?

The circuit court denied Appellants' Motion for Summary Judgment, but did not rule on whether Tamara was barred by 43 C.F.R. § 30.243(a) because she slept on her right to reopen Donald's estate. The circuit court only ruled that she had not slept on her right to claim a share of Lorraine's estate.

- 43 C.F.R. § 30.243(a).

- *Estate of Carl Stomomish*, 52 IBIA 44 (2010).
- *Estate of McCullough v. Yates*, 32 So. 3d 403 (Miss. 2010).

Issue 3: <u>May the circuit court ignore fundamentals of Indian law and statutory construction to rule that Donald's acknowledgment of Tamara trumps an adverse federal probate determination of his children?</u>

The circuit court ruled that it could ignore the BIA Order Determining Donald's children and re-determine them in a collateral estate.

- 25 U.S.C. § 372.
- *Shangreau v. Babbitt*, 68 F. 3d 208 (8th Cir.1995).
- *Spicer v. Coon*, 238 P. 833 (Okla.1925).
- *Argus Leader v. Hagen*, 739 N.W. 2d 475, 2007 S.D. 96.
- *State v. Arguello*, 548 N.W. 2d 463, 1996 S.D. 57.

Statement of the Case

Audrey filed a petition for formal probate of Lorraine's estate on March 4, 2010. R 6. Yvette and Tamara objected. R 18. The circuit court appointed a special administrator. R 30. In June 2010, 31 years after Donald's death and 29 years after his BIA probate closed, Tamara and Yvette requested reopening it and attempted to present proof that they were his daughters and thus Lorraine's nieces. *Estate of Donald Isburg*, 59 IBIA 101 (2014). The BIA issued a show cause order on June 28, 2011. *Id.*, p.103. Audrey and Clinton responded. *Id*. On April 5, 2012 the BIA's probate judge denied Tamara and Yvette's requests to reopen Donald's estate. *Id.*, p.101. Only Yvette appealed. *Id*. On August 20, 2014 the Interior Board of Indian Appeals affirmed the order denying Tamara

and Yvette's request to reopen Donald's estate. On October 15, 2014 Audrey and Clinton filed a motion for summary judgment against Tamara. R 394. The circuit court denied it on January 23, 2015. R 514. The court took judicial notice of the BIA records at the February 17, 2015 court trial. R 972. Audrey and Clinton proposed findings, R 861, which were denied. R 997. Audrey and Clinton also objected to Tamara's proposed findings. R 857. Judgment was entered on July 7, 2015. R 997. Notice of Appeal was filed and served on August 4, 2015. R 1066.

Statement of the Facts

Lorraine Isburg Flaws died on February 18, 2010. *In re Estate of Flaws*, 2012 S.D. 3 at ¶ 2. She was a member of the Crow Creek Tribe. Her estate passes under the laws of intestacy. *Id*. She had no surviving spouse or child. *Id*. Her only sibling, Donald, died on August 24, 1979 at an Indian Health hospital in Arizona. R 433 at ¶ 6. He was a member of the Crow Creek Tribe. *Isburg*, at p. 101. His obituary from the Chamberlain newspaper disclosed he had only two children, Audrey and Clinton. R 417 at ¶ 1. They were born during his only marriage. *Flaws*, at ¶ 3.

The BIA acts as administrator of Indian probates and uses tribal membership records, which it maintains, to help determine heirs. 25 C.F.R. § 61.1. Donald's probate started when the BIA Superintendent for the Crow Creek Reservation filed with the BIA probate judge the form: "Data for Heirship Finding and Family History." Ex AC-4 ## 263-68. It was dated October 17, 1980. The form disclosed Donald's only assets were Indian trust property, and that his children, Audrey and Clinton, were enrolled members of the tribe.

The BIA notified Lorraine of Donald's probate proceedings. Ex AC-4 # 269. The BIA also notified the Crow Creek BIA Superintendant and posted notices. *Id.*

On June 8, 1981 the BIA completed Donald's probate by issuing an Order Determining Heirs that Audrey and Clinton were his only children. *Flaws*, at ¶ 3. Audrey and Clinton inherited Donald's Indian trust land and became tenants in common with their aunt, Lorraine. R 53, 80.

Lorraine named Audrey and Clinton the beneficiaries of her annuities. R 53. She also made them beneficiaries of her life insurance policy. R 410. In 2003 Lorraine had her land taken out of trust. R 53, 80. She also had Audrey and Clinton do the same. *Id*. Afterwards, Lorraine made gifts each year to Clinton and Audrey by paying their real estate taxes on their former trust land. *Id*. In 2006 Lorraine, Audrey and Clinton conveyed some of their land to a third party. *Id*.

Tamara Allen was born October 11, 1965. T 47. Her mother had six children by five different fathers. T 25-6. Tamara claims to be Donald's illegitimate daughter because of Donald's written acknowledgement. Although Tamara claimed Donald was her father, she used Thayer as her last name. T 51-2. Tamara admitted that she was not a member of the Crow Creek Tribe. R 433 at ¶ 9.

Donald never married either Tamara or Yvette's mothers. Tamara and Yvette never obtained a judicial determination of their paternity during Donald's lifetime. During Lorraine's lifetime, Tamara and Yvette did not present proof in the BIA proceedings to settle Donald's estate that they were his daughters. *Isburg*, p 101.

Lorraine acted as secretary for the Isburg family reunions in South Dakota for many years. R 417 at ¶ 4. The Isburg genealogy is updated annually. *Id.* The extensive family tree book, published bi-annually, with the last one several months before Lorraine's death, didn't acknowledge either Tamara or Yvette as Donald's children. *Id.*

The hospital records of Lorraine—10 days before her death in 2010—show that she acknowledged her niece, Audrey, and nephew, Clinton, as her only family. R 417 at ¶ 5. The nurse's entry on February 9, 2010 states: "SW [social worker] received auto trigger for Advance Directive. Patient [Lorraine Flaws] states copy is with attorney in Chamberlain. Patient states that her niece [Audrey] and nephew [Clinton] are the only family she has." *Id.*

Tamara produced nothing from Lorraine acknowledging her as a niece. R 410 at ¶ 1. Tamara admitted that Lorraine never wrote, called or gave her gifts. T 71, 101. Tamara didn't produce any letters, pictures, gifts or cards—absolutely nothing—from Lorraine. *Id*. Tamara did not attend Lorraine's funeral, or any Isburg family reunions. T 104, 98. Tamara claims to have visited Lorraine's home once, although Tamara's sisters and brother live in or near Chamberlain. T 70, 23, 95-6. The last time Tamara saw Lorraine was at the Ft. Thompson casino nine or ten years before her death. T 120.

Tamara attacked Lorraine's character while at the same time demanding a share of her estate. She claimed that Lorraine fraudulently withheld her identity from the BIA. R 480. If Lorraine had suspicions about her identity, Lorraine wasn't an interested party and had no duty to disclose her to the BIA Probate Judge or Superintendent. *Williams Services v. Sherman*, 492 N.W. 2d 122, 126 (S.D. 1992). Moreover, Tamara produced no proof that her name and address were reasonably ascertainable to the BIA before it entered the Order Determining Heirs in 1981. R 1010 at Ex 5, p 6.

Before the circuit court determined that Tamara was Lorraine's niece, she complained twice to the court administrator that the circuit judge was delaying granting her a share of

Lorraine's property—yet Tamara requested reopening Donald's probate, which caused a significant delay. R 1010, T 117-8.

Legal Argument

1. The BIA's Order determining Donald's children was conclusive.

The circuit court denied Audrey and Clinton's motion for summary judgment upon the erroneous conclusion that: a) once the BIA lost jurisdiction, its order determining Donald's children was no longer valid or conclusive, b) the Supremacy and Separation of Power doctrines do not apply, and c) Donald's children can be re-determined multiple times.

To reach its decision, the circuit court erroneously reframed the issues submitted by Audrey and Clinton as: "Does this Court have jurisdiction over determining heirship of Tamara or does the BIA and the Department of Interior possess exclusive jurisdiction over this proceeding." R 517.

While the circuit court correctly, "acknowledge[d] that in Donald's estate the BIA would have exclusive jurisdiction to determine his heirs to administer his estate if it contained land held in trust by the United States," R 519, the circuit court erroneously concluded that a South Dakota state court can ignore the BIA's prior determination of Donald's children and re-determine them because there is no Indian Trust land involved in Lorraine's estate. R 520.

1.1. The Supremacy Clause prohibits South Dakota courts from re-determining Donald's children.

Because the BIA had jurisdiction to decide Donald's children and heirs in 1979, the Supremacy Clause prohibits South Dakota courts from re-determining his children in 2015. The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *U.S. Const., Art. VI cl. 2*. South Dakota's Constitution also acknowledged the supremacy of the United States. *South Dakota Const.* Art. VI, § 26 and Art. XXII, § 2.

A state is precluded from exercising jurisdiction in Indian estate and probate matters by the Supremacy Clause and by the United States' exercise of its plenary power of over Indian tribes. Conclusive jurisdiction over estate and probate proceedings respecting descent and distribution of assets of an Indian is vested in the Secretary of the Interior by federal law pursuant to 25 U.S.C. § 372. It vested the Secretary with the power to determine the heirs, and provided that "his decision thereon shall be final and conclusive." *Hallowell v. Commons*, 239 U.S. 506 (1916); *Henrietta First Moon v. Starling White Tail*, 270 U.S. 243 (1926); *Johnson v. Kleppe*, 596 F. 2d 950 (10th Cir.1979) and *Red Hawk v. Wilbur*, 39 F. 2d 293 (App.D.C.1930). See also, *Estate of Ducheneaux v. Ducheneaux*, 861 N.W. 2d 519, 2015 S.D. 11.

In *Bertrand v. Doyle*, 36 F. 2d 351, 352 (10th Cir.1929), the court specifically ruled that the BIA's right to determine heirs relates to all questions of heirship. Significantly,

the Secretary of the Interior's determination of heirs is not subject to re-determination in a state court, *Spicer v. Coon*, 238 P. 833, 835 (Okla.1925):

> In view of the above authorities, we think it clear that the Secretary of the Interior was the sole tribunal for the determination of the legal heirs of John Coon, and that his determination was final and conclusive, and is not now subject to review by the district court of Ottawa county.... . (Emphasis added.)

1.2. The United States' plenary authority over Indians is not subject to judicial review unless specifically authorized by Congress.

Congress was recognized long ago as having plenary authority over Indians. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903): "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." If Congress allows judicial review of the Secretary of Interior's decisions concerning Indian matters, the jurisdictional grant is strictly construed. *Shangreau v. Babbitt*, 68 F. 3d 208 (8th Cir.1995).

1.3. After the land was removed from trust status with the United States, the BIA's 1981 Order determining Donald's children continued to be conclusive.

At Lorraine's request, Audrey and Clinton removed their inherited land from trust status and consequentially the BIA's jurisdiction in 2003. R 53, 80. The circuit court erroneously concluded that the BIA's loss of jurisdiction rendered the BIA's prior determination of Donald's children without any effect. R 521. Although a court may lose jurisdiction to change its order, the order remains valid. Similarly, this Court loses jurisdiction each time it renders a judgment and issues a remittitur—but its judgments remain binding. See, *In re Seydel's Estate*, 84 N. W. 397, 398 (S.D.1900): "a court of last resort has no power to grant a rehearing after the remittitur has gone down, and all

appellate courts lose jurisdiction over their decisions at the expiration of the term at which they are rendered." See also, *State v. Piper*, 842 N.W. 2d 338, 2014 S.D. 2, ¶ 10: "we release our jurisdiction when the remittitur is returned to the circuit court, except in the narrow circumstances of 'fraud, mistake, or inadvertence'."

1.4. The separation of powers principle prevents re-determination of Donald's heirs.

In addition to the Supremacy and Plenary Power doctrines, the Separation of Powers doctrine prevents the circuit court from ignoring a federal administrative decision just as it prohibits it from ignoring a state administrative decision. A court has jurisdiction over administrative decisions only by compliance with the appeal procedure. *Jundt v. Fuller*, 736 N.W. 2d 508, 2007 S.D. 62 at ¶ 10:

> It must be remembered that the constitutional separation of powers between the executive branch and the judicial branch prevents courts from involvement in review of administrative decisions unless there exists specific legislative empowerment for the judiciary to act regarding executive branch functions; when such delegation of power exists, appeals to the courts must follow such statutory procedures as a condition precedent to obtaining subject matter jurisdiction, because such conferred powers over executive branch functions are statutorily circumscribed.

The South Dakota Legislature also cannot instruct its courts to reopen final judgments. It would violate the separation of powers principles. *South Dakota Const*., Art. II and *Skinner v. Holt*, 69 N.W. 595 (S.D.1896). Likewise, Congress cannot instruct federal courts to reopen final judgments. *Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211, 115 S.Ct. 1447 (U.S.Ky.1995).

2. General limitations apply to probate orders to ensure their finality.

To inherit through a father, his children must be determined. A general statute of limitation, SDCL 29A-3-412, requires the determination to be made before the father's estate closes.

If children have been omitted from the father's estate and it remains open, they must timely request to amend the order determining heirs. *Id*. If the estate is closed, they first must request to reopen it because they are bound by the order determining the father's children. *Id*. Donald's probate was conducted under the BIA's regulations. Yvette and Tamara were unknown to the BIA because they were not members of the Crow Creek Tribe. The BIA is more liberal than South Dakota in reopening estates. The request must be made within one year of the discovery of the omission. 43 C.F.R. § 30.243(a). Yvette and Tamara waited more than 20 years after discovery to request reopening Donald's estate. They are barred from reopening it by 43 C.F.R. § 30.243(a), and therefore bound by the BIA's order determining Donald's children. *Estate of James Bongo, Jr*., 55 IBIA 227 (2012).

2.1. Public policy supports finality of probate orders.

In South Dakota, estates must be reopened within 12 months or less of the order determining heirs. SDCL 29A-3-412. Untimely requests by omitted heirs are routinely rejected to ensure the finality of probate orders. See, *Estate of Hayes*, 965 P. 2d 939, 944 (N.M.App.1998), where the court said:

> the United States Supreme Court held that "[a]fter an estate has been finally distributed, the interest in finality may provide [a] ... valid justification for barring the belated assertion of claims, even though they may be meritorious and even though mistakes of law or fact may have occurred during the probate process." *Reed v. Campbell*, 476 U.S. 852, 855-56 (1986); see also *Shaw v. First Interstate Bank of Wis., N.A.*, 695 F.Supp. 995, 999 (W.D.Wis.1988) (holding that probate

> orders are given the finality necessary to put an end to litigation, thereby allowing parties to adjust their affairs, knowing that their respective rights and liabilities have been finally settled). Consequently, public policy supports application of the statute of limitations here.

See also *Matter of DeTienne's Estate*, 656 P. 2d 827 (Mont.1983) where the court held the petition for an amended order of distribution was properly dismissed as untimely. It was filed nearly 36 years beyond the statutory time limit and was based on the claim that the heirs of decedent's daughter were mistakenly excluded from the distribution. Even if there was a mistake which could constitute fraud, the petition was not timely filed when done more than 60 days after discovery of the mistake.

In summary, Tamara is attempting to re-determine Donald's children after his estate was finally distributed in 1981. She did not try to establish paternity in his estate until 2010 and after Lorraine's death. Tamara did not allege that she was deprived of a reasonable amount of time to assert a claim. Significantly, Tamara waited more than 25 years after turning 18 before attempting to adjudicate paternity in his estate. As such, Tamara's claim is 25 years past-due and barred by the limitations set forth in the BIA regulations and would also be barred under South Dakota's statutes if his estate had been probated in state court in 1981. Tamara should have requested a hearing to reopen his estate in 1983, the year she turned 18 or soon thereafter.

2.2. Statutes of limitations promote probate efficiency, certainty and the prompt determination of heirs.

SDCL 29A-2-114(c) and 29A-3-412 are designed to ensure the final resolution of paternity claims and to minimize the potential for disruption of other estate administrations. They bar untimely claims and re-litigating paternity in collateral estates. South Dakota has a significant interest to require probate efficiency, promptness, and the

final determination of heirs. SDCL 29A-1-102. Tamara's argument that it supports the re-determination of Donald's children in 2015—34 years after the conclusion of his probate and distribution of his land—is absurd. Statutory certainty and efficiency would be destroyed. A court would become a legislature unto itself. *State v. Berget*, 853 N.W. 2d 45, 2014 S.D. 61, ¶ 18.

When the United States and South Dakota's Constitutions, BIA's regulations, UPC's limitations on reopening probates, and SDCL 29A-2-114(c) are construed together—children and paternity cannot be re-determined by a state court in a collateral estate 34 years after the BIA's determination.

SDCL 29A-2-114(c), 29A-3-412 and the BIA's rule barring reopening Donald's estate is in accord with the equitable maxim: *Ab assuetis non fit injuria*, no injury is done by things long acquiesced in. An unreasonable result occurs if one is able to re-determine children 34-years later, after Federal Trust patents have been issued, after land has been transferred to a third party, and after the limitation's deadline. It is inconceivable that our state legislature would approve the retroactive change of ownership previously established by Federal Trust Patents.

2.3. Statutes of limitations promote certainty in estate planning.

Descent statutes are designed to give effect to the presumed desires of an intestate decedent. It allows one the opportunity to dispose of their assets in a knowing manner. Estate planning and certainty will be adversely affected if Tamara is permitted to have Donald's children re-determined in a collateral estate.

2.4. A defense based on a statute of limitations is meritorious and should be favored.

SDCL 29A-3-412 and 29A-2-114(c) are statutes of limitations. Statutes of limitations are meritorious and are favored in law. They are:

> designed to eliminate fraudulent and stale claims and operate against those who sleep on their rights. In the operation of our judicial system they serve a beneficial purpose. ... This court has said that a defense based on a statute of limitations is meritorious and should not be regarded with disfavor. It should be treated like any other defense. In keeping with the admonition of SDC 65.0202 that our statutes generally be liberally construed with a view to effect their objects, statutes of limitations must be similarly applied. *Minnesota v. Doese*, 501 N.W. 2d 366, 370 (S.D.1993). (Citations omitted).

See also, *Citibank v. South Dakota Dept. of Revenue*, 2015 S.D. 67, ¶ 8: "we have consistently required strict compliance with statutes of limitation ...."

3. Tamara slept on her rights and lacks standing.

Tamara did not appeal the BIA's decision that it no longer had jurisdiction to change the order determining Donald's children. As such, the BIA's 1981 order remains conclusive and Tamara lacks standing. *Estate of McCullough v. Yates*, 32 So. 3d 403 (Miss. 2010).

Even if the BIA retained jurisdiction, Tamara could not change the Order determining Donald's children. Tamara slept on her right to reopen Donald's estate and is barred by 43 C.F.R. § 30.243. Tamara claims to have known that Donald was her father as long as she can remember. Tamara was born in October 11, 1965. R 433 at ¶ 15. She waited 29 years to try to reopen Donald's estate. R 433 at ¶ 20. Although a person can petition to reopen a BIA estate, similar to a Rule 60(b) motion, it must be done diligently and within one year after the discovery of an error. 43 C.F.R. § 30.243. The BIA liberally reopens estates. South Dakota doesn't allow an estate to be reopened after its closure, except for fraud, and that time period is limited. SDCL 29A-3-412 and SDCL 29A-1-106.

According to overwhelming case authority, the BIA will not reopen a probate unless compelling proof of due diligence is shown because of the need for finality in probate decisions. *Estate of Carl Stomomish*, 52 IBIA 44 at 46-47 (2010).

Chaos will result and burden probates if Tamara's arguments are accepted. There would be disorder administering estates and uncertainty in real estate titles. BIA probate judges have rejected Tamara's arguments in many similar probates involving minors who received only constructive or no notice. "The public interest requires that Indian probate proceedings be concluded within some reasonable time in order that the property rights of legitimate heirs or devisees be stabilized. … To hold that the property rights of heirs in the allotted lands be forever open to challenges such as that made by the petitioner here would, in our opinion, not only constitute an abuse, but would seriously erode the property rights of those whose heirship in the lands has already been determined." *Estate of Picknoll*, 1 IBIA 169 (1971) (10 year delay: not diligent). See also, *Estate of Ton-Nah-Pa*, 2 IBIA 152 (1974) (29 year delay: not diligent), *Estate of Everett Nopah*, 4 IBIA 25 (1975) (22 year delay: not diligent), *Estate of Enoch Abraham*, 5 IBIA 89 (1976) (12 year delay: not diligent), *Estate of Alvina Black Reed*, 18 IBIA 391 (1990) (19 year delay: not diligent), and *Estate of Albert Angus, Sr*., 46 IBIA 90 (2007), aff'd *Kakaygeesick v. Salazar*, 656 F.Supp. 2d 964 (D.Minn.2009), aff'd 2010 WL 3190768 (8th Cir.2010) (26 year delay: not diligent).

3.1. Equity supports the BIA's regulation barring Tamara from re-determining Donald's children.

Tamara's attempt to change the BIA's Order determining heirs more than 30 years after it was entered isn't to establish Donald as her father, but to get a windfall from

Lorraine's estate despite Lorraine's rejection of her. Moreover, she waited until after Lorraine died to assert her claim knowing that Lorraine would have contested her.

Tamara produced nothing from Lorraine acknowledging her as a niece. R 410 at ¶ 1. She wasn't acknowledged in the Isburg genealogy. *Id.* Tamara admitted that Lorraine never wrote, called or gave her gifts. T 71, 101. Tamara didn't produce any letters, pictures, gifts or cards—absolutely nothing. *Id.* Tamara did not attend Lorraine's funeral, or any Isburg family reunions. T 104, 98.

Lorraine named Audrey and Clinton beneficiaries of annuities on April 7, 1999. *Id.* She also made them beneficiaries of her life insurance policy. R 410 at ¶ 2.

The hospital records of Lorraine—10 days before her death in 2010—show that she acknowledged her niece, Audrey, and nephew, Clinton, as her only family. R 417 at ¶ 5. The nurse's entry on February 9, 2010 states: "SW [social worker] received auto trigger for Advance Directive. Patient [Lorraine Flaws] states copy is with attorney in Chamberlain. Patient states that her niece [Audrey] and nephew [Clinton] are the only family she has." *Id.*

Tamara claims to have visited Lorraine's home once, although Tamara had many opportunities because her sisters and brother live in or near Chamberlain. T 70, 23, 95-6. The last time Tamara saw Lorraine was at the Ft. Thompson casino nine or ten years before her death. T 120. Considering the lack of contact with Tamara, it is understandable why Lorraine didn't consider Tamara part of her family.

The circuit court ignored the presumption that Lorraine knew the law: that Tamara could not inherit from her because of the BIA order determining Donald's children, and 43 C.F.R. § 30.243(a)'s bar to delinquent attempts to reopen estates.

4. Statutory Construction of SDCL 29A-2-114(c).

SDCL 29A-2-114(c) states:

> The identity of the father may be established by the subsequent marriage of the parents, by a written acknowledgment by the father during the child's lifetime, by a judicial determination of paternity during the father's lifetime, or by a presentation of clear and convincing proof in the proceeding to settle the father's estate.

The circuit court cannot re-determine Donald's children because of the BIA's conclusive determination. Nonetheless, Tamara argues she may prove that Donald signed a written acknowledgment of her as his daughter in a collateral estate. This argument ignores Federal Indian law, the U.S. and South Dakota Constitutions, and basic rules of statutory construction. Tamara's argument is that the BIA's conclusive probate order was rendered meaningless because a written acknowledgement trumps it, and that the BIA's determination of Donald's children was a futile act. SDCL 29A-2-114(c) and 29A-3-412 clearly do not allow children that have been determined in the father's estate to be re-determined in a subsequent collateral estate.

4.1. The purpose of SDCL 29A-2-114(c).

The purpose of the UPC is to have probates quickly and efficiently administered. SDCL 29A-1-102. The purpose of 29A-2-114(c) and other UPC provisions (e.g., 12-month statute of limitation to reopen the probate, 29A-3-412(c) is to require the prompt determination of children (illegitimate or otherwise). Tamara's argument that it supports the re-determination of Donald's children—more than 30 years after the conclusion of his probate and distribution of his land—is absurd.

4.2. The statute does not allow children and heirs to be re-determined.

When SDCL 29A-2-114(c) is construed as a whole, it does not allow children that were determined in the father's estate to be re-determined in a subsequent collateral estate. Even if Tamara's argument creates an ambiguity in the statute, the ambiguity is solely caused by Tamara's stale claim of being Donald's daughter. The issue can be stated: when a decedent's children were determined in his probate more than 30 years ago, may they be re-determined in a collateral estate and may an acknowledgement trump the prior Order Determining Heirs, which the omitted child failed to change?

Although the circuit court ruled that Donald and Lorraine's intestate heirs are not the same, they are the same. Only through Donald can Tamara inherit from Lorraine and his children were previously determined. Under SDCL 29A-2-114(c) and Federal law:

- Donald's children were determined by the BIA in 1981.
- The BIA's decisions determining heirs are "final and conclusive" under 25 U.S.C. § 372.
- The BIA's determination of Donald's children cannot be re-determined by a state court because of the Supremacy Clause, *Spicer v. Coon*, supra, and *Shangreau*, supra.
- Moreover—Tamara could not change the determination of Donald's children if his probate had been filed in state court because of the statute making orders determining heirs final, SDCL 29A-3-412, or its prior statute, SDCL 30-1-1.

Despite the finality and conclusiveness of the BIA's Order determining Donald's children, the circuit court erroneously entered Conclusions of Law that Tamara was Donald's heir as of January 6, 1966 and that she received no notice of Donald Isburg's BIA probate proceedings. R 982 ## 45, and 48-52. The circuit court reversed a final and

conclusive Federal decision—without having jurisdiction to do so—and after Tamara failed to appeal the BIA's rejection of her petition to reopen Donald's probate.

4.3. "Or's" normal disjunctive meaning does not apply if it leads to a contradiction or absurdity.

Tamara argues that she is allowed to prove Donald was her father in a collateral estate because the statute's use of the word 'or.' However, that construction would lead to a contradiction or absurdity as well as ignore the conclusive BIA Order determining Donald's children and the purpose of the UPC. The word 'or' in legislative acts is not given its normal disjunctive meaning if adherence to the literal use of the word leads to a contradiction. *State v. Block*, 263 P. 3d 940 at ¶ 21 (N.M.App.2011). See also, *City of Hartford v. Godfrey*, 286 N.W. 2d 10 at 13 (Wis.App.1979):

> The interpretation of sec. 346.23(1), Stats., by the trial court renders the statute's reference to "Walk" or "Don't Walk" signals meaningless because it construes the traffic lights as controlling pedestrian traffic even where specific pedestrian signals are in operation. We cannot, in our discretion, simply ignore certain words in a statute in order to achieve a desired construction. The proper interpretation of sec. 346.23(1), Stats., is that pedestrians have the right of way on a green light [Tamara may be declared Donald's child] only where there are no pedestrian control signals [only if there was no prior determination of her father's heirs]. Where pedestrian signals are present, [where an Order Determining Heirs exits] a pedestrian's right to enter a highway ends when the "Don't Walk" signal comes on [Tamara's right to be re-determined as Donald's daughter, and Lorraine's heir ends].

Significantly, words are construed according to their context. See, for example, *Flaws*, 2012 S.D. 3 at ¶ 18: "Although, ordinarily, the word 'may' in a statute such as SDCL 29A-2-114(c) is given a permissive or discretionary meaning, in certain instances, it has the effect of 'must.'"

4.4. Ambiguity defined.

A statute is ambiguous when well-informed persons may reasonably disagree as to its meaning. "[L]anguage is ambiguous when it is reasonably capable of being understood in more than one sense." *Zoss v. Schaefers*, 598 N.W. 2d 550, 1999 S.D. 105, ¶ 6.

4.4.1. Ambiguity is resolved by rules of construction.

When the following rules of construction are applied, the BIA's order recognizing Audrey and Clinton as Donald's sole children must be honored and given full effect:

a. A statute is to be construed as a whole as well as enactments relating to the same subject, not just phrases or words in isolation.

b. No interpretation is allowed that renders any part of a statute surplusage, superfluous, meaningless, or nugatory.

c. Where statutory provisions appear to conflict, reasonable construction must be given to both, and if possible, to give effect to all provisions under consideration, construing them together to make them harmonious and workable.

d. It is presumed that the Legislature did not intend an absurd or unreasonable result.

e. A statute cannot be interpreted to require a vain, idle or futile thing.

f. When provisions in a statute conflict, the last provision is given effect.

4.4.1.1. A statute is to be construed as a whole.

The BIA determined Donald's children over 30 years ago and it is absurd to argue SDCL 29A-2-114(c) granted the circuit court the authority to re-determine them in a subsequent collateral estate. When the statute is construed as a whole, a decedent's children who have been determined by the BIA cannot be re-determined in another estate. See, *Argus Leader v. Hagen*, 739 N.W. 2d 475, 2007 S.D. 96, ¶ 25:

> Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result. "[W]here statutes appear to conflict, it is our responsibility to give reasonable construction to both, and if possible, to give effect to all provisions under consideration, construing them together to make them 'harmonious and workable.' (Citations omitted.)

4.4.1.2. No interpretation should render any part of a statute surplusage.

A rule of statutory construction is that no word, clause, sentence, or phrase is to be rendered surplusage, superfluous, meaningless, or nugatory. Tamara argues that she is entitled to show that Donald is her father irrespective of the BIA's order because the statute contained the word "or." But this argument renders as surplusage SDCL 29A-2-114(c)'s clause "by a presentation of clear and convincing proof in the proceeding to settle the father's estate."

This Court discussed this rule in Yvette's appeal. See, *Flaws* at ¶ 21:

> Yvette argues SDCL 29A–2–114 should be interpreted to permit proof of paternity through presentation of clear and convincing evidence, including DNA evidence, in any proceeding where the father's paternity is at issue. <u>This would essentially rewrite the statute to omit its last clause limiting establishment of paternity by clear and convincing evidence to "proceedings to settle the father's estate</u>." <u>This would violate any number of settled rules of statutory construction</u>. (Emphasis added and citations omitted.)

The circuit court instead ruled that by prohibiting Tamara from presenting proof of Donald's acknowledgement in Lorraine's estate, it would render part of the statute surplusage. The circuit court erroneously believed that if it accepted Audrey and Clinton's theory, Tamara would be required to prove her paternity twice. R 522. The circuit court failed to consider the overall probate process. If a tentative heir identified in the Application for Probate is unchallenged, proof of paternity is unnecessary. SDCL

29A-3-405, and 29A-3-308. However, if the tentative heir is challenged, proof of paternity is always necessary. SDCL 29A-3-407.

When disputed, SDCL 29A-2-114(c) requires proof of paternity to be established in the father's estate. It is similar to SDCL 29A-3-407, which also requires proof to be established in estates. Tamara failed to submit proof within Donald's estate proceeding and is barred from submitting proof in a collateral estate to re-litigate the Order Determining Heirs. 43 C.F.R. § 30.243(a).

4.4.1.3. Statutes must be harmonized.

To make laws agree with laws is the best mode of interpreting them: *concordare leges legibus est optimus interpretandi modus*. When the UPC's limitations on reopening probates, the U.S. and South Dakota Constitutions, SDCL 29A-2-114(c) and 29A-3-412 are harmonized—children cannot be re-determined by a state court 30 years after the BIA's determination. See, *Faircloth v. Raven Industries, Inc.*, 620 N.W. 2d 198, 2000 S.D. 158, ¶ 7:

> Reading each statute in isolation leads to contradictory conclusions. ... Where two statutes appear to conflict, it is our duty to reasonably interpret both, giving "effect, if possible, to all provisions under consideration, construing them together to make them harmonious and workable."

4.4.1.4. An absurd or unreasonable result must be avoided.

An unreasonable result occurs if one is able to re-determine a father's children 30-years after estate closure, after Federal Trust patents have been issued, and after the limitation's deadline. See, *Vitek v. Bon Homme County Bd. of Com'rs*, 650 N.W. 2d 513, 2002 S.D. 100, ¶ 19:

> [S]tatutes should be construed as a whole and according to their intent, but "it is presumed that the [L]egislature did not intend an absurd or unreasonable result."

4.4.1.5. An interpretation cannot require a vain, idle or futile thing.

The BIA's determination of Donald's children would be rendered a futile act if Tamara is allowed to have them re-determined. A construction of a statute should be avoided which would require the performance of a vain, idle or futile thing. "The law does not require futile acts." *Adrian v. McKinnie*, 684 N.W. 2d 91, 2004 S.D. 84, ¶ 16.

4.4.1.6. The last provision is given effect over another conflicting provision.

If there is a conflict between Donald's written acknowledgement of Tamara and the BIA's prior determination of his children, then the statute's last provision requires that the BIA's Order Determining Heirs controls. See, *State v. Arguello*, 1996 S.D. 57 at ¶ 11: "If conflict between provisions in the same act is resolvable no other way, the last provision in point of arrangement within the text of the act is given effect."

Conclusion

The U.S. Constitution, South Dakota Constitution, and Federal statutes gave jurisdiction to the BIA to determine Donald's children. The BIA's Order Determining Heirs went unchallenged for 29 years. Tamara made a calculated and strategic decision to wait until after Lorraine died before attempting to make a claim in Donald's estate that she was Donald's child knowing that Lorraine did not consider Tamara a part of her family. Once Tamara challenged the BIA's order, the BIA refused to change it, and Tamara didn't appeal. Under the BIA's regulations and *Estate of James Bongo, Jr*., 55 IBIA 227 at 229-230 (2012), Tamara was barred from reopening his estate because she

did not "provide compelling proof that [s]he exercised due diligence in pursuing h[er] rights as a possible heir to Decedent's estate."

The circuit court disagreed with Appellants' theory of the case and said: "You may prove me wrong. And if that's true, that's fine. I can live with that." T 259. However, other courts routinely reject untimely claims to establish paternity.

Lorraine knew Tamara could not inherit from her because of 43 C.F.R. § 30.243(a), and the BIA Order determining Donald's children. Tamara should not be permitted to circumvent the BIA's Order and regulations, Federal decisions and statutes, as well as Lorraine's rejection of her as a niece.

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Certificate of Compliance

The undersigned, one of the attorneys for the Appellant, certifies that this Brief complies with the type volume limitations stated in SDCL 15-26A-66(b)(2). There are 4,984 words and 26,429 characters.

_____

s/Robert R. Schaub

Certificate of Service

Robert R. Schaub certifies that on October 27, 2015 he served electronically the Appellants' Opening Brief upon each of the following:

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Appendix

Appendix

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:ss.	
COUNTY OF BRULE	)	FIRST JUDICIAL CIRCUIT
	)	07PRO10-000004
ESTATE OF LORRAINE ISBURG FLAWS, deceased.	)	JUDGMENT DECLARING HEIRSHIP

THIS MATTER having been tried to the court on February 17, 2015; the court having entered Findings of Fact and Conclusions of Law; and application for costs and disbursements having been made as provided by law; and the parties being represented by counsel; Steven Smith representing Tamara Allen; Paul Godtland and Robert Schaub representing the contestants Clinton Baker and Audrey Courser; and the court entering an Oral Judgment at the conclusion of the proceedings which the court now seeks to formalize into a written Judgment; and for good cause being hereby shown it is hereby

ORDERED, that the Plaintiff Tamara Allen be given judgment declaring her to be the biological child of Donald Isburg, making her an equal heir with Audrey Courser and Clinton Baker to the estate of Lorraine Flaws as by such judgment the court determines that she is a niece of Lorraine Flaws, deceased, of equal kinship entitled to inherit the same as Audrey Courser and Clinton Baker; and it is further

ORDERED, that Tamara Allen be allowed to pursue costs as allowed by statute in a separate order from the one contained herein, and to further seek any such other relief as is deemed to be just and equitable herein.

Signed: 7/6/2015 11:16:06 AM

Dated this _____ day of June, 2015.

BY THE COURT:

HON. BRUCE ANDERSON
CIRCUIT COURT JUDGE

ATTEST:
Attest
Nancy Adair, Clerk/Deputy

CLERK OF COURTS

(SEAL)

Filed on: 07/06/2015 BRULE County, South Dakota 07PRO10000004

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF BRULE	)	FIRST JUDICIAL CIRCUIT

ESTATE OF LARRAINE ISBURG FLAWS, **Deceased.**	**PRO. 10 - 004** **MEMORANDUM DECISION AND ORDER ON SUMMARY JUDGMENT RE: TAMARA ALLEN**

This matter came before the Court on the filing of a *Motion for Summary Judgment* against Tamara Allen by the known heirs of the deceased on November 18, 2014, the Honorable Bruce V. Anderson presiding. Audrey Courser and Clinton Baker, the known heirs, appeared through counsel, Paul Godtland and Robert Schaub, of Chamberlain, South Dakota. Tamara Allen appeared through her counsel, Steve Smith, of Chamberlain, South Dakota. The Court, having read the parties' briefs and having heard oral arguments, now issues the following Memorandum Decision and Order.

Facts

The Decedent in this case, Lorraine Isburg Flaws (hereinafter Lorraine), died on February 18, 2010. Lorraine was married but her husband and only child predeceased her. Her parents are also deceased. Her only brother, Donald Isburg (hereinafter Donald) passed away on August 24th, 1979. Donald's estate was probated by the United States Department of Interior, Bureau of Indian Affairs, Office of Hearings and Appeals, which agency completes probate matters for Native American Indians. This probate proceeding took place in the state of Oregon. Donald had two children from his marriage, Audrey Courser and Clinton Baker, (hereinafter Audrey and Clinton) the known heirs in this matter. Lorraine died with a will which gave her

property to her husband and/or daughter, both now deceased. The will made no other disposition of her estate, and since those heirs named in her will have predeceased her, this matter is an intestate estate.

Donald's probate was completed by the BIA on June 8th, 1981, by entering an Order Determining Heirs which ruled that Audrey and Clinton were the sole heirs of his estate. Audrey and Clinton inherited their father's land that was held in trust with the United States and became tenants in common with Lorraine. In 1999, Lorraine named Audrey and Clinton the beneficiaries of her IRAs. In 2003, Lorraine took her land out of trust and she directed Audrey and Clinton to do the same. Lorraine subsequently paid Audrey's and Clinton's real estate taxes on their father's former trust land. In 2006, a portion of this land was conveyed to a third party.

Tamara Allen (hereinafter Tamara) was born October 11, 1965, in Mitchell, South Dakota. A certificate of live birth was prepared by the hospital and filed with the Registrar's Office on October 15, 1965. The certificate listed the birth of "Tamara Sue Thayer Isburg" whose father is listed as "Donald Isburg," an "Indian" aged "32 years," whose occupation was a "carpenter." Less than two months later, January 5, 1966, Donald executed a Paternity Affidavit admitting to being the father of Tamara. The affidavit was sworn before a Notary Public and a social worker for the Dep't of Public Welfare (predecessor to the Department of Social Services).

From this affidavit and Donald's admission, a birth certificate was issued listing "Donald Isburg" as the father of "Tamara Sue Thayer." Tamara was thirteen years old when her father passed away. Tamara received social security survivor benefits upon Donald's death.

Procedural Posture

A-3

Lorraine's estate was commenced by the filing of an Application for Formal Appointment of Personal Representative and Determination of Heirs on March 4, 2010. After objections to the appointment of Audrey as the administrator of the estate, the Court appointed a special administrator, Stan Whiting, attorney at law, from Winner, South Dakota, to Lorraine's estate [1]. A hearing was set to determine Lorraine's heirs. Prior to that hearing, partial Summary Judgment was sought against Yvette Herman (hereinafter Yvette) seeking a declaration she did not have standing to assert she was an heir. This Court, on February 11, 2011, entered a memorandum decision declaring that Yvette Herman did not have standing to challenge if she was an heir. On appeal, the South Dakota Supreme Court remanded the case back to this Court to wait for the Bureau of Indian Affairs to make its final determination regarding Donald's estate.

Simultaneous to this action, Tamara and Yvette filed a petition to re-open Donald's estate in the probate courts of the BIA. The relief requested was denied on April 5, 2012. The BIA determined it did not have probate jurisdiction over Donald's estate as all of the trust assets had been removed and there was nothing left in the estate. Tamara did not appeal that decision.

After the BIA and the US Dept. of Interior made its final ruling concerning Yvette's appeal, Audrey and Clinton moved for Summary Judgment against Tamara on October 15, 2014, arguing that Tamara lacks standing to challenge she is an heir. After the November 18, 2014, hearing on the *Motion for Summary Judgment* against Tamara, the Court must decide the following issues:

[1] Stan Whiting passed away since being appointed Special Administrator and the court has substituted Jack Gunvordahl, Attorney at law, from Burke, South Dakota as his successor.

1. Does this Court have jurisdiction over determining heirship of Tamara or does the BIA and the Department of Interior possess exclusive jurisdiction over this proceeding?
2. After failing to get the BIA to reconsider its Order Determining Heirs in Donald's estate, is Tamara barred from challenging that she is an heir of Yvette in this Court?
3. Does a genuine issue of material fact exist as to whether Tamara can meet the statutory requirements of SDCL § 29A-2-114(c) to establish she is an heir of Donald and also Lorraine?

Analysis

I. Does this Court have jurisdiction over determining heirship of Tamara does the BIA and the Department of Interior possess exclusive jurisdiction over this proceeding?

Audrey and Clinton assert that the BIA had exclusive jurisdiction to decide Donald's heirs in 1979, as such the Supremacy Clause prohibits this Court from re-determining Donald's children for the purpose of Lorraine's estate. Tamara asserts that Lorraine's estate concerns no Indian lands but only non-trust land under South Dakota law making Lorraine's probate subject to South Dakota probate proceedings.

a. The Supremacy Clause

Audrey and Clinton attempt to defeat jurisdiction by implicating the Supremacy Clause of the United States Constitution. It reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. VI cl. 2. South Dakota's Constitution explicitly recognizes that the U.S. Constitution is the supreme law of the land. S.D. Const. Art. VI, § 26. "Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "Accordingly, the purpose of Congress is the ultimate touchstone of pre-emption analysis." *Id.* (internal quotations and citations omitted).

The United States Supreme Court has developed three distinct methods in which Federal Legislation supersedes or pre-empts State law. see generally *Cipollone,* 505 U.S. at 516. The first method is when Congress explicitly states in the statutory language or it is "implicitly contained in its structure and purpose." *Id.* (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). The second way Congress pre-empts state authority is when there is a direct conflict between state and federal law. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204 (1983). The final way Congress pre-empts state authority is when federal law "occupies a legislative field." *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982).

1. Explicit Federal Pre-emption

In addition to the Supremacy Clause, Audrey and Clinton cite 28 USC § 1360(b).[2] The statute reads in full:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is *held in trust* by the United States or is subject to a

[2] In the brief in support of the Motion for Summary Judgment, counsel refers to this statute as 28 USC § 1310(b). It appears to be a typographical error as the language cited in reference is the language of § 1360(b).

> restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

28 USC § 1360(b). Consistent with federal law, the South Dakota Constitution recognizes Congress's exclusive jurisdiction over Indian lands held in trust by the United States Government.

> That we, the people inhabiting the state of South Dakota, do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundary of South Dakota, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; . . . All such lands which may have been exempted by any grant or law of the United States, shall remain exempt to the extent, and as prescribed by such act of Congress.

S.D. Const. Art. XXII, § 2.

The Court acknowledges that in Donald's estate the BIA would have exclusive jurisdiction to determine his heirs to administer his estate if it contained land held in trust by the United States. Without notice, a hearing, a final adjudication, or any other proceeding over which the BIA had jurisdiction to make a determination on Donald's estate, it has no bearing on Lorraine's estate.

The fatal flaw to Audrey's and Clinton's position is that this land is *not* a trust allotment or trust land held by the United States. In fact, all parties to this action have admitted that Lorraine took her land out of trust in 2003. The cases cited by Audrey and Clinton are inapplicable to Lorraine's estate which is filed in State court. Those cases focus on trust land within the exclusive jurisdiction of Congress. The specific language of the statutory and

constitutional authority cited above unambiguously gives Congress exclusive authority over Indian lands held in trust. This land is not held in trust. In fact, the Court does not believe that the BIA would have *any* jurisdiction over Lorraine's estate involving personal property and fee simple owned real estate in the state of South Dakota. In addition, there is no implicit pre-emption contained in the structure or purpose of the jurisdictional statutes. In each of the state and federal statutes there is *specific* language giving Congress exclusive authority over trust land, not fee simple land. Presumably Congress knew exactly what it was doing when inserting that precise language.

2. Direct Conflict

Without explicit or implicit statutory language usurping state law, the Court must next consider whether federal law and state law are in a direct conflict. . *Pacific Gas & Elec. Co.*, supra. They are not. In fact, state and federal authority (cited above) is in harmony as to the purpose and direction of the statutes. Congress declared exclusive jurisdiction over Indian lands held in trust by Indians. The South Dakota Constitution recognizes just that exclusivity. There is no mention in the United States Code as to jurisdiction of non-trust Indian lands, there is no conflict.

In addition, there is no federal probate code. Probates are administered in accordance with the laws of the states. Thus, it is not possible to have a conflict between state and federal probate law. Without any trust land in Lorraine's estate, there is no conflict and her estate remains within the jurisdiction of the state of South Dakota.

3. Occupying the Legislative Field

The final way a state law will be preempted is if Congress intended to occupy the legislative field. The question the Court must answer is: Did Congress intend to "occupy the

field" in regards to non-trust probates involving Indians? Without getting into an in depth analysis, it is obvious that Congress has not intended to occupy the administration of non-Indian Land non-trust probates. These probates are treated exactly the same as any other probate involving fee simple land throughout the United States. Congress has not enacted a federal probate code, and leaves it to the individual states to develop its own probate code.

In addition, by the very nature of the federal statutes above, Congress has expressly limited its own jurisdiction in regards to Indian lands and probates. If Congress intended to have exclusive jurisdiction over all Indian probates, it certainly would have changed the language of the statutes. The Supremacy Clause does not preempt the state of South Dakota from administering the probate of an Indian person who does not own any trust land. Congress has not expressly impliedly preempted the states, the laws are not in direct conflict, and there is no clear Congressional intent to "occupy the field" in this area. As a result, South Dakota and this Court retain jurisdiction over this proceeding.

II. After failing to get the BIA to reconsider its Order Determining Heirs in Donald's estate, is Tamara barred from challenging that she is an heir of Yvette in this Court?

Audrey and Clinton contend that since Tamara did not successfully challenge the BIA's order she cannot now come back to this Court and get a favorable ruling. However, the BIA's ruling was that they no longer had jurisdiction over Donald's estate as all the assets of the estate had been removed and there was no longer anything left in trust. From the Court's knowledge, the BIA has never made a determination that Tamara is or is not a child of Donald.

In addition, declining to open Donald's estate for jurisdictional reasons does not bar the determination of heirs in a wholly different estate proceeding when there never was a prior determination in this forum.

III. Does a genuine issue of material fact exist as to whether Tamara can meet the statutory requirements of SDCL § 29A-2-114(c) to establish she is an heir of Donald and also Lorraine?

SDCL § 29A-2-114(c) requires the identity of the father to be established by (1) marriage of the parents, (2) a written acknowledgement by the father during the child's lifetime, (3) a judicial determination or (4) by a presentation of clear and convincing proof in the proceeding to settle the father's estate.

Audrey and Clinton assert that the aforementioned statute bars Tamara's claims. The Court is not persuaded by Audrey and Clinton's assertion that "or" is not to be read in the disjunctive in the aforementioned statute. If the Court were to agree with Audrey and Clinton, there would be conflicting provisions within the statute. If a father declares, by a written acknowledgement, that his daughter is his child during his lifetime, she has fulfilled the statutory requirements. If the Court were to now require clear and convincing evidence when settling an estate, it would render the paternity affidavit meaningless for the purposes of determining heirship. Every illegitimate child would essentially have to prove twice who the father was – once during his lifetime, and once again by clear and convincing evidence after his death. This notion is inconsistent with the statute's purpose and legislative intent. Thus, Tamara must only prove one of the three statutory methods to establish heirship.

In this case, the Court finds that a genuine issue of material fact exists as to whether Tamara can establish that she is Lorraine's niece through SDCL § 29A-2-114. It appears that there is some evidence that Donald acknowledged Tamara as his daughter during his lifetime. He executed a paternity affidavit in front of a Department of Public Welfare worker as well as in front of a notary public. Tamara's new birth certificate was issued to list Donald as her father. After her father's death she received social security survivor benefits. Tamara has presented ample evidence to this Court to defeat summary judgment and provide for a genuine issue of material fact as to whether she is the child of Donald and niece of Lorraine.

Conclusion

The Supremacy Clause, the South Dakota Constitution, and State and Federal Statutes are not in conflict concerning the administration of probates in this instance. This Court has the jurisdiction to determine the heirs of Lorraine Flaws. In this case, a genuine issue of material fact exists as to whether Tamara is a niece of Lorraine.

Order

Based on the above and foregoing, IT IS HEREBY ORDERED that Audrey Courser's and Clinton Baker's *Motion for Summary Judgment against Tamara Allen* is DENIED.

Dated this 23rd day of January, 2015.

BY THE COURT:

Honorable Bruce V. Anderson
First Circuit Court Judge

ATTEST:

_____

Clerk of Courts

STATE OF SOUTH DAKOTA	:	IN CIRCUIT COURT
	:SS	
COUNTY OF BRULE	:	FIRST JUDICIAL CIRCUIT
Estate of LORRAINE ISBURG FLAWS, Deceased.		PRO. NO. 10-4
		Statement of Material Facts for Summary Judgment Against Tamara Allen

Audrey Courser and Clinton Baker submit their Statement of Material Facts:

1. Lorraine Flaws died on February 18, 2010. *In re Estate of Flaws*, 2012 SD 3 at ¶ 2.
2. Lorraine's husband and only child predeceased her. *Id.*
3. Her estate passes under the laws of intestacy. *Id.*
4. Lorraine's only sibling was Donald Isburg. *Id.* at ¶ 3.
5. Donald's children with his marriage to Mavis are Audrey and Clinton. *Id.* at ¶ 3.
6. Donald died on August 24, 1979 at an Indian Health hospital in Arizona. Ex. 1.
7. He was a member of the Crow Creek Tribe. *Estate of Donald Isburg*, 59 IBIA 101 (2014).
8. The BIA keeps tribal membership records and uses it to determine heirs. 25 CFR § 61.1.
9. Tamara admitted she was not a member of the Crow Creek Tribe. Ex. 2.
10. Donald's probate started after October 17, 1980 when the Crow Creek BIA Superintendent filed with the BIA probate judge its form: "Data for Heirship Finding and Family History." Ex. 3.
11. This form disclosed Donald's assets. *Id.*
12. The BIA Superintendant indicated on the form that Donald's children were Audrey and Clinton and that they were enrolled members of the tribe. *Id.*
13. Lorraine was notified of Donald's probate proceedings. Ex. 4.
14. On June 8, 1981 the BIA completed his probate by issuing an Order Determining Heirs, which ruled that Audrey and Clinton were his only heirs. *In re Estate of Flaws*, 2012 SD 3 at ¶ 3, and Ex. 5.
15. Tamara Allen claims to be Donald's illegitimate daughter. Ex. 6.
16. Tamara claims that Donald acknowledged her as his daughter in writing. *Id.*

17. There was no marriage between Donald and either mother of Tamara and Yvette.

18. There was no judicial determination of paternity during Donald's lifetime that Tamara or Yvette were his children.

19. Before Lorraine died there was no presentation of proof in the BIA proceedings to settle Donald's estate that Tamara and Yvette were his illegitimate daughters.

20. In June 2010, 31 years after Donald's death and 29 years after his probate was closed, Tamara and Yvette requested it to be reopened and attempted to present proof that that they were his daughters. *Estate of Donald Isburg*, 59 IBIA 101 (2014).

21. The BIA issued a show cause order on June 28, 2011. Audrey and Clinton promptly responded to the order. *Id.* at p. 103.

22. On April 5, 2012 the BIA's probate judge denied Tamara and Yvette's requests to be declared as Donald's daughters. *Id.*

23. Only Yvette appealed the BIA order. *Id.*

24. Audrey and Clinton stated in their Appellees' Brief that the BIA's regulations and decisions prohibit Tamara and Yvette from claiming to be Donald's daughters because they failed to timely comply with the BIA's regulations to reopen his probate within one year of their paternal discovery. Audrey and Clinton also noted that the BIA lost jurisdiction once the land was taken out of trust and Federal Patents issued to them. Ex. 7.

25. On August 20, 2014, the BIA Appeal Court affirmed the 2012 decision denying Tamara and Yvette's request to reopen Donald's estate. *Estate of Donald Isburg*, 59 IBIA 101 (2014).

Dated October 15, 2014.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27515

In the Matter of
ESTATE OF LORRAINE ISBURG FLAWS

TAMARA ALLEN,
Appellee,

vs.

AUDREY ISBURG COURSER AND CLINTON BAKER,
Appellants.

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
BRULE COUNTY, SOUTH DAKOTA

The Honorable Bruce V. Anderson

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STATUTES:

PRELIMINARY STATEMENT

Reference to the settled record shall be referred to as "S.R." and thereafter reference to the place where such item may be found. Reference to Tamara Allen shall be as either “Allen” or “Tamara”. Reference to the Trial Transcript shall be by “TT” followed by the appropriate page number. Reference to Trial Exhibits shall be by "T.E." followed by reference to the Exhibit Number when introduced at trial. The Albert Ohlrogge Deposition will be referred to as "Ohlrogge" and then reference made to the specific page number where located.

JURISDICTIONAL STATEMENT

This appeal was made from Judgment entered by Judge Bruce Anderson on July 7, 2015. Appellant's filed their notice of appeal in a timely manner. This appeal is properly and timely made.

STATEMENT OF THE ISSUES

I. DOES FEDERAL PREEMPTION BAR STATE COURT JURISDICTION?

Appellants argued that federal preemption barred state court subject matter jurisdiction in this probate. The court ruled that it had jurisdiction to decide who the heirs were in the intestate probate.

FMC Corp. v. Holliday, 498 U.S. 52, 62; 111 S.Ct. 403; 112 L.Ed.2d 356 (1990)

Medtronic Ins. v. Lohr, 518 U.S. 470, 485; 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)

Interstate Towing Ass'n Inc. v. City of Cincinnati, Ohio, 6 F.3d. 1154 (6th Cir. 1993).

II. DID A 1981 PROBATE ORDER DETERMINING HEIRS BAR THE CIRCUIT FROM REDETERMIING HEIRS IN A NEW AND SEPARATE PROBATE?

Appellants argued that the circuit court was barred from redetermining heirs in this probate as the heirs of Donald Isburg were determined in a prior probate. The court ruled that this was a new probate and a new determination could be done.

Estate of Ducheneaux, 861 N.W.2d 519; 2015 S.D. 11

Williams v. Lee, 358 U.S. 217; 79 S.Ct. 269, 3 L.Ed.2d 251 (1959)

III. DID THE COURT'S REDETERMINATION OF HEIRS IN THE STATE PROBATE PROCEEDING VIOLATE SEPARATION OF POWERS LAW?

Appellants argued that the circuit could not redetermine Donald Isburg's heirs as to do so would require a state court to interfere with a matter that is jurisdictionally limited to the Department of

Interior. Judge Anderson ruled that determining heirs did not interfere with any federal law or administrative rule

Shade v. Downing, 333 U.S. 586, 68 S.Ct. 702 (1948)

Hallowell v. Commons, 239 U.S. 506, 36 S.Ct. 202 (1915)

Spicer v. Coon, 238 P. 833 (Okla 1925)

IV. WAS TAMARA ALLEN BARRED UNDER ISSUE PRECLUSION PRINCIPALS FROM ASKING THE CIRCUIT COURT TO REDETERMINE DONALD ISBURG'S HEIRS?

Appellants argued that the circuit court could not redetermine Donald Isburg's heirs as the statute of repose had run and Allen had no relief available to her. Judge Anderson ruled that the statute at issue allowed him to decide whether Allen was an heir of Lorraine Flaws.

Keith v. Willers Truck Service, 64 S.D. 274, 266 N.W. 256 (1936)

Matter of Estate of Nelson, 330 N.W.2d 151 (S.D. 1983)

Carr v. Preslar, 73 S.D. 610; 47 N.W.2d 497

V. DID THE STATUTE OF LIMITATIONS PREVENT ALLEN FROM ASKING THE COURT TO DETERMINE HEIRS IN AN INTESTATE PROBATE PROCEEDING?

Appellants argued that Allen was statutorily time barred from asking the court to redetermine heirs as the probate which had defined who they were had been closed for more than 1 year. Judge Anderson held that the statute did not apply and he had the authority to determine heirs.

Estate of Benson Potter, 49 IBIA 37 (2009)

Estate of O'Keefe, 1998 S.D. 92, 583 N.W.2d 138

L.R. Foy Const. Co. v. South Dakota Cement Comm., 399 N.W.2d 340 (SD 1987)

VI. IS THE INTESTACY DETERMINATION AS SET FORTH IN SDCL 29A-2-114 AMBIGUOUS SUCH THAT IT CANNOT BE APPLIED TO THE FACTS OF THIS CASE?

Appellants argued that the 'or' in the statute makes it ambiguous and that to make it harmonious the court would have to find that Allen's ability to prove paternity stopped the moment her father's probate was completed. Judge Anderson ruled that each part of the statute provides a separate manner under which paternity could either be proven or acknowledged.

Cudmore v. Cudmore, 311 N.W.2d 47 (SD 1981)

SDCL 29A-2-114(c)

STATMENT OF THE CASE

Lorraine Flaws died intestate on February 18, 2010. A Petition for Formal Probate was filed on March 4, 2010. An appeal of an adverse decision to a co-claimant ("Yvette Herman") was filed and this court reversed the decision on her case on January 25, 2012.

Thereafter Judge Bruce Anderson held the case in abeyance awaiting the decision of the Bureau of Indian Affairs on whether they would re-open the estate of Donald Isburg. On August 20, 2014, the Interior Board of Indian Appeals

affirmed the decision to not reopen based on their being no assets to probate. Being that there were no assets for the court to divide it was a court with no jurisdiction to hold a hearing in the case. Judge Anderson then set Motions and Trial date in the case for Tamara Allen and the co-claimant Yvette Herman and trial was held February 17, 2015.

At the conclusion of trial Judge Bruce Anderson orally awarded Judgment to Tamara Allen. Judge Anderson then withheld entry of the Findings of Fact and Conclusions of Law as well as Judgment of Heirship until decision was made on the Yvette Herman case. On July 7 2015, with both cases being resolved Judge Anderson entered final Judgment declaring Tamara Allen to be Donald D. Isburg's daughter, and being his daughter, an heir to the estate of Lorraine Flaws.

STATEMENT OF FACTS

This case is simple. Lorraine Flaws passed away February 18, 2010. In Re Estate of Flaws, 2012 SD 4, 811 N.W.2nd 749. Lorraine's husband and daughter pre-deceased her leaving as her nearest heirs any nieces and nephews whose paternity could be traced back to Lorraine's

only sibling, Donald D. Isburg, who himself had died August 24, 1979. In re: Estate of Flaws, supra.

Isburg had two children [Audrey Courser & Clinton Baker] born during a marriage he had with Mavis Baker making them presumptively legitimate. SDCL 25-8-17. Tamara's interests arise through Donald's written acknowledgement of paternity made during his lifetime. SDCL 29A-2-114(c).

Tamara Allen was born October 11, 1965 in St. Joseph's Hospital, Mitchell, Davison County, South Dakota. At the time of Tamara's birth a "Certificate of Live Birth" was created by the hospital. T.E. T1. In the body of that certificate the father was listed as "Donald Isburg", an "Indian" aged "32 years", whose occupation was as a "carpenter". T.E. T1. This certificate was filed in the Registrar's office on October 15, 1965. Less than 3 months later (January 5, 1966) "Donald Isburg" of Chamberlain, South Dakota, executed a Paternity Affidavit, admitting to being the father of "Tamara Sue Thayer" who was born on October 11, 1965. T.E.. T6.

The Paternity Affidavit was subscribed and sworn to before Donald J. Welsh, worker, and Faye B. Novak, a Notary Public for the State of South Dakota. T.E. T6. The Paternity Affidavit was on a form of the Department of

Public Welfare, and Donald J. Welsh was a worker for said agency. T.E. T7. The Department of Public Welfare became the Department of Social Services sometime in 1968. Spies Realty v. Dept. of Social Services, 321 N.W.2nd 924 (1982. [Footnote #1]. Judge Anderson took judicial notice of that fact during trial. T.T. 44.

Susan Flottmeyer, a human resource specialist for the Bureau of Human Resources for the State of South Dakota testified. Her testimony was that between July 1, 1963, and April 26, 1966, a "Donald J. Welsh" was employed by the State of South Dakota as a "social worker" in the Department of Public Welfare, assigned to the Brule County office. (T.T. 43-45).

The paternity affidavit was filed with South Dakota Department of Vital Statistics. T.T. 36.
Marie Pokorny, State Registrar for the Department, testified that her office had received and filed the affidavit. T.T. 36. According to the Registrar the affidavit was sufficient for her agency to issue a birth certificate listing the named to be declared the father of the child involved. T.T. 36-37. The Affidavit remained on file and was relied on by the Registrar when she created a

new birth certificate that issued the morning of trial. T.T. 37; T.E. T2.

Tamara's mother told Tamara that her father was Donald Isburg. T.T. 58-59. Tamara has few memories of Donald Isburg, with those few memories primarily about the fights that broke out over visitation issues involving her. T.T. 59. Tamara considered Donald to be an "absent father". T.T.60. The one happy memory she had of him was her getting money from him at a baseball game so she could buy candy. T.T. 60. She knew that Don abused alcohol. T.T. 60.

Tamara Allen has 5 brothers and sisters. The four older females all have different fathers. TT 24-25. Tamara is number four in the family and her oldest sister Bonnie Powell remembers Donald Isburg coming to the childhood home to visit Tamara. TT 27. Bonnie has always considered Donald Isburg to be Tamara's father. TT 26-27.

Tamara's maternal Aunt, her mother's sister Jeanne Hauser, also testified. She remembers Donald coming to Tamara's home to visit his daughter. TT 128. She remembers times Donald and Barb fought over visitations involving Tamara as well as good times when they shared a meal together as a family. (TT 133-137). Hauser also remembers a time when Lorraine Flaws approached her and Tamara's mother Barb at the grocery store asking why she

did not have Tamara `enrolled'. TT 131. It was her understanding that Isburg was Tamara's father and that is why the question was asked. TT 127.

Appellants offered no evidence contradicting the issue of paternity and Judge Anderson awarded Judgment to Tamara Allen.

ARGUMENT

DONALD ISBURG'S PUBLIC ACKNOWLEDGEMENTS OF HIS BEING THE FATHER OF TAMARA ALLEN MEAN THAT TAMARA INHERITS "THROUGH HIM" UNDER THE LAW.

Courser and Baker ask this court to allow them a remedy that would continue a wrong that started when Donald died in 1979. Though they acknowledge that Donald Isburg identified Tamara as his child while living they seek to undo her birthright status by what others had done after he was dead. It is their argument that Tamara's failure to demand inclusion in an estate she never knew existed bars her from having any interest in the estate involving her Aunt Lorraine. The reliefs they seek would require this court to issue a legal ruling finding that even though Tamara Allen is "factually" Donald Isburg's daughter she cannot be his "legal daughter" because she `slept on her rights' while being a minor.

Donald did all he legally needed to do while living to have Tamara deemed his daughter. Donald

publicly declared that Tamara was his daughter through South Dakota agencies. The State of South Dakota provided Donald with the affidavit that formalized his acknowledgment that Tamara was his daughter, and an employee of the state witnessed his execution of the same. The State of South Dakota then issued a birth certificate listing Donald as Tamara's father. Where this case has become twisted is in appellants adopting the position that Donald's public declarations made while living are trumped by secondary acts committed by others after Donald was dead.

The overarching fact in this case is that Tamara has never had a legal reason to reopen her deceased father's estate. Tamara knows who she is and has a birth certificate setting forth her birthright. Spinning this case in ways that devolve on whether Tamara timely asserted her interests in Donald's estate avoid the reality that this case involves Lorraine Flaws, the aunt from whom Tamara seeks to assert a right of inheritance.

I. NO FEDERAL PREEMPTION EXISTS.

When asked to defer to the Supremacy Clause state courts are to begin their analysis with the understanding that there is a strong presumption against federal preemption of State law. FMC Corp. v. Holliday, 498

U.S. 52, 62; 111 S.Ct. 403; 112 L.Ed.2d 356 (1990). Preemption is generally disfavored, and applied only when there is clear proof that Congress has taken over a certain area of law. See Generally Hartley Marine Corp. v. Mierke, 196 W.Va. 669; 474 S.E.2d 599 (1996.

When Congress legislates in areas traditionally regulated by states it is incumbent upon the courts to "start with an assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress". Medtronic Ins. v. Lohr, 518 U.S. 470, 485; 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). Under the Supremacy Clause state law must yield to federal law when application of the two conflict. See Gulf Offshore Co. vs. Mobil Oil Corp., 453 U.S. 474, 478; 101 S.Ct. 2870; 69 L.Ed.2d 784 (1981). In order to preempt state jurisdiction Congress must do so "...by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests". Id.

Here we have a case involving traditional state court proceedings--probates. There are no federal probate laws. No federal statute gives BIA exclusive province to declare who are the heirs of any deceased Native American. Without

some federal act being implicated it is impossible for assumption of state probate jurisdiction to be incompatible with a competing federal interest. Gulf Offshore Co. vs. Mobil Oil Corp. supra. The only relevant statute bars state's from assuming jurisdiction over real property the United States holds in trust status on behalf of individual Indians. 25 U.S.C. 372.

Flaws died intestate and some court must determine who her legal heirs are under statute. SDCL 29A-2-103. That determination has never been made in any court. Courser and Baker assert that the issue of Lorraine's heirs was a matter decided 29 years before her death. Their argument fails to account for the reality that this case was not ripe until the death of Lorraine and not rigidly set by Donald's estate.

Deciding if preemption exists boils down to how this Court answers the question of whether by law and fact Tamara Allen seeks relief that interferes with, or is contrary to, an act of Congress. That burden requires Courser/Baker to present proof of express preemption in a specific field of law contrary to the language of the statute that they seek to apply. Interstate Towing Ass'n Inc. v. City of Cincinnati, Ohio, 6 F.3d. 1154 (6th Cir. 1993).

Here there is nothing appellants offer which demonstrate that Congress has legislatively taken over factual issues in administration of probates. The BIA has been charged with sorting out issues of ownership involving trust lands held in the name of the United States on behalf of individual Indian people. Those administrative determinations of who the Indian heirs are in whom ownership should be placed are ancillary offshoots of that duty. That is all.

The Flaws probate involves state application of laws of descent and distribution by a determination of lawful heirs. The decision of the state court did not interfere with any special trust responsibilities of the BIA as the BIA's interests arise only when there is trust property to be divided. Flaws estate has no property involved over which the Department of Interior has a special trust responsibility.

Last, the answer to the question of whether the state has jurisdiction in this case was provided by the appellants who themselves filed the original Petition for Probate. It was Audrey Courser who asked the state circuit courts to take jurisdiction. They should not be able to complain now that Judge Anderson decided intestacy issues

as it was they who initiated the decision making process by the filing of the original Petition for Probate.

II. THE PROBATE ORDERS OF 1981 DO NOT BAR THE COURTS FROM DETERMINING WHO THE HEIRS ARE IN THIS PROBATE

Appellants have raised for the first time in this appeal the issue of application of 25 U.S.C. 372 to these proceedings. In the court below they had raised the issue of jurisdiction under 28 USCA 1360(b). Regardless of which is asserted the issue boils down to whether there exists subject matter jurisdiction that would allow a state court to make factual determinations of who Flaws heirs should be.

In the appeal they argue that 25 U.S.C.A. 372 bars state court jurisdiction. That statute provides as follows:

> When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as held hereinafter provided, the Secretary of the Interior, upon notice and hearing, under the Indian Land Consolidation Act [25 U.S.C.A. § 2201 et seq.] or a tribal probate code approved under such Act and pursuant to such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decisions shall be subject to judicial review to the same extent as determinations rendered under section 373 of this title.

The statute unambiguously limits the jurisdiction of the Secretary of the Interior to those cases where the decedent died owning an allotment of land still held in the trust. Rather than consolidate subject matter jurisdiction

in probates to the Department of Interior the act limits its application to those cases where special trust property interests are involved.

South Dakota recently addressed the issue in this appeal in Estate of Ducheneaux, 861 N.W.2d 519; 2015 S.D. 11. There the court held that Congress has sole authority over trust property as a state court's "... adjudicating the right to possession of Indian trust lands interferes with the interests of the United States". Id. In support of its ruling in the above the court cited Williams v. Lee, 358 U.S. 217; 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). The key statement there was that "...absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Williams, 358 U.S. at 220; 79 S.Ct. at 271.

Flaws died with no trust property. There are no laws which mandate state court deference to federal law or rule. It was the lack of trust property existing that stopped the IBIA from re-opening Donald's estate. The corollary to that holding is that with no trust property existing in the Flaws probate there is no federal preemption barring state court determination of heirs.

Isburg's estate was closed in 1981. Tamara was not a party to that proceeding and it is obvious she was unknown to that tribunal. The IBIA court's refusing to reopen the estate was based on their statement that absent the existence of property to probate they had no jurisdiction to act in that case. They could not reach the issue of Tamara's intestate rights as by law that issue was foreclosed to them as there was no property left to be divided.

Here Tamara is not seeking to have Indian Trust land re-divided; she simply asks that state law be followed which says she is an intestate heir of Lorraine through Donald, and that she should be given equal footing with Donald's other children. Tamara's being denominated Lorraine's niece impacts no federal interests. Tamara being declared a niece does not interfere with title to any real property Lorraine holds in trust. Federal law allows Interior to take jurisdiction when trust property exists and gives no special jurisdiction to them when it does not. As no special property interest exists 25 U.S.C.A. 372 does not apply in this case.

III. THE COURT'S DETERMINATION OF HEIRS DID NOT IMPACT ANY FEDERAL RIGHTS INVOKING THE SEPARATION OF POWERS CLAUSE.

In Shade v. Downing, 333 U.S. 586, 68 S.Ct. 702 (1948), the Supreme Court ruled that the United States is not a necessary party to a proceeding that involves a determination of heirship rights. The court's decision was that identification of heirs did not affect trust land restrictions. As the Supreme Court noted, the determination of heirship involves no special governmental interests. Id. at 589.

Similarly, in this case, the identification of Tamara as Donald's child does not impact any Indian trust issues which would invoke federal jurisdiction. Tamara simply asks the court to determine whether she is an heir of Lorraine, which was a matter that Donald addressed while alive but which appellants now challenge with him being dead. Where Audrey and Clinton are in error is in their failure to acknowledge that their rights are derivative of South Dakota statute [SDCL 25-18-7] the same as Tamara's.

The interests of Tamara are the same as Appellants with the only difference being the manner of proof she must present versus that which they need.

Appellants cite a number of cases including Hallowell v. Commons, 239 U.S. 506, 36 S.Ct. 202 (1915) and Spicer v.

Coon, 238 P. 833 (Okla 1925) in support of their position that Tamara must accept the Determination of Heirs Order of 1981. The problem with these, and all other cases cited in support of their propositions, is that all are premised on determination of heirs during the time when the real property was held in trust by the United States.

In Spicer the Court properly held that Interior had sole authority on issues involving title claims involving trust lands. In reaching that decision the court found that the determination of heirs was incidental to that duty. In Hallowell v. Commons,
supra, the court held that supervision by the BIA of trust land issues in estates was best due to the special nature of the relationship Interior had to supervise individual Indian allotments. Both cases show that the jurisdictional starting point to pre- emption is the existence of trust land.

Nothing in this case required any state court to exert control over decisions of the Secretary of Interior. The cases cited by appellants all involved 'trust lands' and none involved deeded lands over which the Secretary of Interior had no authority. The determination of decedent's heirs did not do harm to the principle that the Secretary

is the single arbiter of title when it comes to trust property.

Tamara is not seeking to redo a probate completed in 1981. She simply asks that her intestate rights be determined according to the laws of the jurisdiction where the probate was filed. When Lorraine died intestate paternity became an issue involving everyone.

Here Judge Anderson's decision simply applied statute setting forth how a father may acknowledge a child as being his. The court then determined whether a legally binding acknowledgement had been made. The Court's acceptance of that acknowledgment did not affect a federal right, it did not interfere with administration of a federal obligation, and it did not interfere with any duty the federal government has to Indians due to treaty trust responsibilities. The trial court merely determined who Lorraine's heirs were in a case where there were no trust lands involved. Appellants offered no proof that Judge Anderson's decision interfered with the Secretary of Interior's trust responsibilities to the Indian nations. Without some showing of prejudice to the duties Interior owes the Indian nations no federal
Supremacy can be found to exist in this case.

IV. SOUTH DAKOTA STATUTE DOES NOT BAR ALLEN'S

CLAIM BASED ON ISSUE PRECLUSION.

Without specifically saying what their issue is Appellants demand relief by asserting that issue preclusion rules bar the state court from revisiting a BIA Probate Court order. Rather than assert res judicata or collateral estoppel the appellant's argue for relief under public policy, judicial efficiency and the statute of limitations. No matter how defined this case became "ripe" only after Lorraine Flaws died intestate. It was then that some court had to decide intestacy issues, and once filed in Brule County the matter became one for state jurisdiction.

The primary rule of res judicata is that a final judgment bars future suits between parties or their agents. This preclusion applies when the causes of action are the same, or to those circumstances where an issue within a previous case involving the same parties had been previously decided. Keith v. Willers Truck Service, 64 S.D. 274, 266 N.W. 256 (1936). The rule is common sense as it bars relitigation of causes or issues when the parties are the same in the second lawsuit. What the rule is designed to do is to prevent relitigation of issues brought, or which should have been brought, within the context of an original suit. Matter of Estate of Nelson, 330 N.W.2d 151 (S.D. 1983); Schmidt v. Zellmer, 298 N.W.2d

178 (S.D. 1980). To successfully assert this defense the moving party must show that the remedy sought in the second case is the same as the remedy sought in the first. Hanson v. Hunt Oil Co., 505 F.2d 1237 (8th Cir. 1974).

That is where the disconnect exists in this case. Tamara Allen could not be an heir of Lorraine until Lorraine died, and until Lorraine died Tamara had no reason to prove up her being Lorraine's niece. This probate represents the first time that Tamara has had reason to demand due process and to have the law acknowledge that which she has factually known her entire life--who her father was.

"Res judicata is premised upon two maxims: A person should not be twice vexed for the same cause and public policy is best served when litigation has a repose." Carr v. Preslar, 73 S.D. 610; 47 N.W.2d 497 at 502-03. The rule prevents people who have had a fair opportunity to have their issues addressed in one suit from filing a second suit because they did not
like the decision made in the first case.

Here Lorraine Flaws and Tamara Allen had no issues determined by any court that involved them. It was not until Lorraine died intestate that the issue of Tamara's degree of kinship became relevant and ripe for decision.

This probate represents the first time that Tamara has had a fair opportunity to prove up who she is. The facts show that Tamara is Donald's daughter and that he acknowledged her as his own. Donald's Affidavit of Paternity may have been ignored in his probate but in this one, with notice being served, it is being properly addressed.

V. NO STATUTE OF LIMITATIONS EXISTS WHICH BARS A DETERMINATION OF HEIRS IN LORRAINE'S ESTATE.

Appellants argue that SDCL 29A-3-412 and 29A-2-114(c) bar Tamara's claims under statute of limitations theory. Their position is that construed together these statutes bar a re-opening of Donald's estate. The appellants argue that as the BIA probate cannot be reopened Judge Anderson was bound to abide by a 1981 Order entered in a situation where it is obvious BIA did not have all the facts before it.

First the issue in this appeal is whether Lorraine Flaws had any heirs. The 1981 determination of heirs in Donald's probate simply stops Tamara from having a claim to any of Donald's probate property. Lorraine's probate is a new and separate proceeding and Tamara's rights are dictated by law that applies in Lorraine's case.

Second, under the holding of Estate of Benson Potter, 49 IBIA 37 (2009) a probate closed for more than 3 years

may be reopened "...in order to modify a probate order which, if not corrected, would result in manifest injustice". Id.at 38. The probate order that was modified in the above was the Order Determining Heirs. Which incidentally the court applied California law in determining.

Factually there is no question that Donald publicly acknowledged Tamara as being his child. There can also be no denying that Lorraine had at least an 'inkling' of who Tamara was. Lorraine spoke with Tamara's mother about getting Tamara enrolled with the Crow Creek tribe. Lorraine specifically asked about Tamara when Tamara was brought to Donald's funeral [Ohlrogge Dep. p. 9-10]. Lorraine visited with Tamara when Tamara came back to South Dakota.

In Estate of O'Keefe, 1998 S.D. 92, 583 N.W.2d 138 the court held that probate involves equity, and as such the court has the right to fashion an equitable remedy in cases of wrong doing. In L.R. Foy Const. Co. v. South Dakota Cement Comm., 399 N.W.2d 340 (SD 1987), the Supreme Court held that "[e]stoppel may be applied to prevent a fraudulent or inequitable resort to a statute of limitations". That is what we have here. Lorraine had at least an idea of who Tamara was. With that backdrop no one

should be allowed to argue that statutes of limitations in a separate
estate proceeding bar a court from deciding here who Lorraine's heirs are to be.

Tamara will not deny that she and Lorraine were not close. But she was Lorraine's niece and Lorraine knew it. Lorraine also knew what a Will was as she had one, but she elected to not have a new one done after her husband and daughter died before her.

Forty-four years ago Donald told the world that Tamara was his daughter. Donald did all he had to do while living to have Tamara be not only his daughter but also a child who could inherit from him or through him. Lorraine could have avoided this case by simply re-doing a Will like she had once before done. Whether she did not because of neglect or purposeful intent is pure speculation. Equity and its fairness require this court to honor that which the legislature has set as far as intestate succession is concerned.

VI. NO AMIBIGUITY EXISTS IN THIS CASE

Appellants further claim that SDCL 29A-2-114(c) is ambiguous as it takes a strained interpretation to allow Tamara to make her claim in the Flaws estate.

The court's Findings of Fact and Conclusions of Law (Appendix Exhibit "A") reflect well how Tamara met her burden of production of evidence that she is Donald Isburg's daughter. Appellant's believe that those facts should be ignored due to a ruling made 31 years previous by a court that was never given the information regarding Donald's siring a daughter by the name of Tamara.

The relevant statute on intestate succession is SDCL 29A-2-114. The only difference between the illegitimate and the legitimate child is the quantum of proof each needs to present in the estate to be denominated an heir of the deceased.

A review of SDCL 29A-2-114(c) shows a legislative act that presents a step by step evidentiary format. Each 'step' toward acknowledgment involves an additional degree and level of proof in establishing paternity. The statute is set out below:

> (c) The identity of the mother of an individual born out of wedlock is established by the birth of the child. The identity of the father may be established by the subsequent marriage of the parents, by a written acknowledgment by the father during the child's lifetime, by a judicial determination of paternity during the father's lifetime, or by a presentation of clear and convincing proof in the proceeding to settle the father's estate.

It is clear that the evidentiary proof needed to prove paternity increases as you take each "step".

First, if a father marries the mother then paternity is proven. If the father does not want to get married he can accept paternity and its responsibilities by signing a written acknowledgement that he is the child's father. If the putative father does not want to get married and does not believe he is the birth parent he may force the mother to prove paternity in a judicial proceeding, usually with the aid of a blood test. Last, in those cases where there was no marriage, no written acknowledgement, and no judicial determination made while the father was living, the child is given the ability to prove his or her status via clear and convincing evidence of paternity presented in the father's estate proceedings.

The last point is extremely important as the normal burden of proof in a paternity action is by a preponderance of the evidence. Cudmore v. Cudmore, 311 N.W.2d 47 (SD 1981). By raising the evidentiary burden to clear and convincing status the statute requires more be done when the proofs are made after the putative father is dead.

This additional burden shows why appellants arguments are in error. The word "or" demonstrates why each way to acknowledgment or proof of paternity is separate from the other. SDCL 29A-2-114(c) applies only when the father is dead. The decision as to who may inherit from or through

him is then determined by resort to presentation of facts under that statutory scheme.

In order to give the statute effect you must read each clause separately to see if the putative father had his status voluntarily established (by marriage or written acknowledgment) or by court order while alive. If any of these were done then the child is the heir of the father to whom paternity is proven. If no paternity was acknowledged or proven during the father's lifetime the child could still prove kinship in the proceedings that settled the father's estate.

Using that simple standard it is plain that Tamara's rights to inherit through Donald Isburg were met in January 1966 when Donald executed the paternity affidavit in front of a witness from the Department of Welfare. Notarizing the statement added solemnity, but was something not legally required.

What happens after that is irrelevant. Tamara never had reason to force proof of who she was as Donald had long ago acknowledged he was her father. After that Tamara had proof of her being Donald's daughter every time she pulled out her birth certificate issued by the State of South Dakota based upon statement made by Donald himself.

Last the paternity proofs that existed in 1966

were defined by then SDCL 29-1-15. All that was required was the following: Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child.

In this case Donald Isburg executed a writing [a paternity affidavit], in front of a competent witness [Donald J. Welsh, a social worker with the Dept. of Public Welfare], acknowledging that he was the father of Tamara Thayer, born October 11, 1965. In fact he executed such writing under oath, though he was not statutorily required to do so. Donald then died in
1979. Due to this affidavit a Birth Certificate was issued in 1966 listing Donald as Tamara's father.
Thus at the time of Donald's death Donald had done all that was required of him under the law to acknowledge Tamara as being his daughter.

As to Tamara's 'sleeping on her rights' it is hard to respond to that as her birthright was known and her relief measured when South Dakota denominated Donald as her father, and the Social Security Administration paid benefits due to that status. The only right she may have slept on was her right to challenge a fraudulent probate. She is not doing that here, she simply wants recognition

given to that which she has known for as long as she can remember, who her biological father was. All her position does is create in her a birthright for which recognition is now being made. She is not a 'bastard', but a child of Lorraine's brother. She should be given some deference accordingly.

CONCLUSION

Audrey and Clinton assert that Tamara 'slept on her rights' and regardless of proofs of paternity this court should ignore the facts that cry for equity and instead apply a rule that would leave only an absurd result. It is hard to understand how they could say that Tamara '...made a calculated and strategic decision to wait until Lorraine died' as until Lorraine died intestate Tamara had no reason to seek a meaningless redress. Tamara has had a birthright in existence for almost 50 years and that birthright included Donald Isburg, Lorraine Flaws brother, as her father. Why Tamara was ignored in Donald's probate is subject to much speculation with only one known--that being that Donald purposefully signed the proper paperwork he need to accept the responsibility of being Tamara's father. The court should give deference to Tamara's dad's publicly sworn statement made in January of 1966.

Dated this _____ day of December, 2015.

_____

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REQUEST FOR ORAL ARGUMENT

Appellee Tamara Allen hereby requests Oral Argument.

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using New Courier typeface in 12 point type. Appellant's brief contains 6,280 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ___ day of December, 2015, he mailed the original and 2 copies of the foregoing APPELLEE'S BRIEF to Shirley A. Jameson-Fergel, Supreme Court Clerk, 500 East Capitol, Pierre, SD 57501; and that he electronically served the same upon:

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APPENDIX

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27515

In the Matter of the
ESTATE OF LORRAINE ISBURG FLAWS

TAMARA ALLEN,
Appellee,

vs.

AUDREY ISBURG COURSER AND CLINTON BAKER,
Appellants.

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
BRULE COUNTY, SOUTH DAKOTA

The Honorable Bruce V. Anderson

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Notice of Appeal Filed August 4, 2015

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Statement of the Facts

Tamara did not dispute Audrey and Clinton's statement of facts. Lorraine did not acknowledge or treat Tamara as her niece. Tamara admits her relationship with Lorraine "was not a close one." Pages 25 & 26. This is confirmed by her failure to attend Lorraine's funeral, by Lorraine's exclusion of Tamara from the family genealogy, and by Lorraine's death-bed statement that the only family she had were Audrey and Clinton.

Tamara's lengthy discussion about the proof of her paternity at pages 6 through 9 is evidence that she should have produced in a timely petition to reopen Donald's estate.

Legal Argument—Introduction

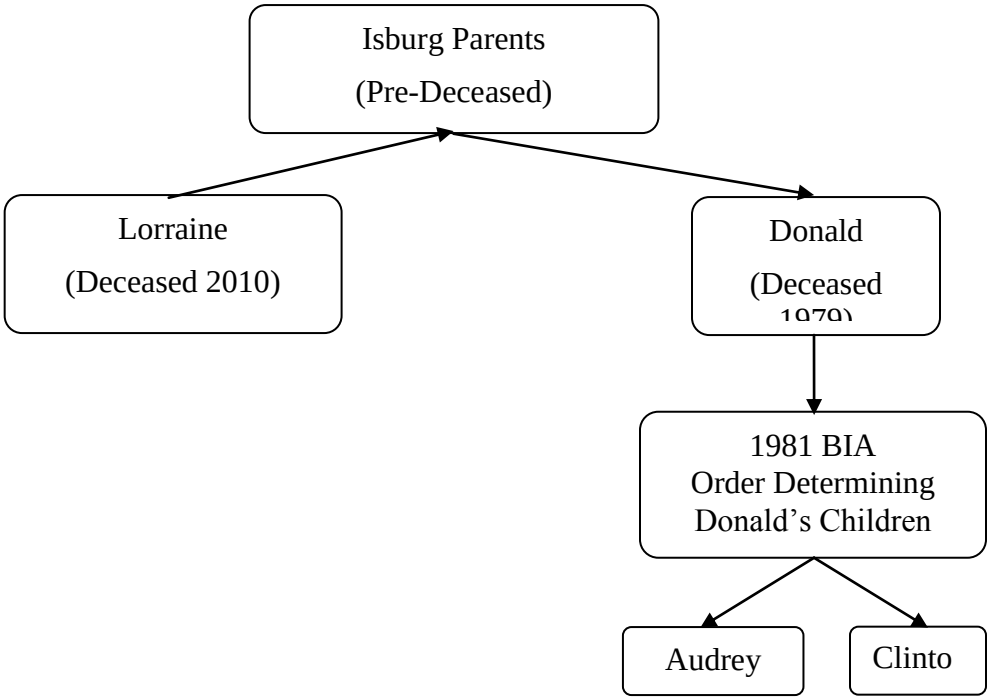
Audrey and Clinton maintain that there is no provision in SDCL 29A-2-114 that allows for re-determining the decedent's children in a subsequent collateral probate.

Lorraine's probate was suspended for over four years to allow Tamara to petition the BIA to re-determine Donald's heirs. When her petition failed, Tamara changed the arguments to maintain her claim to Lorraine's money. Tamara's flip-flop results in inconsistent arguments throughout her brief:

1. Tamara argues that a wrong was done by omitting her from Donald's "fraudulent probate" proceedings (pp. 10 & 31), but inconsistently argues "she never had a legal reason to reopen [his] estate" (p. 11), never "had reason to demand due process" until Lorraine's probate (p. 22), and "never had reason to force proof of who she was." P. 29. Tamara admits that she may have slept on her rights. P. 31.
2. Tamara claims she became Lorraine's heir in 1966 once Donald signed an affidavit acknowledging her, (pp. 29), but inconsistently argues that Lorraine's heirs could only be determined in her 2015 estate proceedings. P. 22.

Audrey and Clinton's rights in Lorraine's estate arise from the BIA Order determining Donald's children. Tamara cites SDCL 25-8-17 at pages 6 and 18 and erroneously claims that Audrey and Clinton's rights derive from it, but SDCL 25-8-17 was repealed in 1984 and only concerned paternity disputes involving illegitimate children. Audrey and Clinton are legitimate children.

Audrey and Clinton fundamentally disagree with the underlined part of Tamara's Facts at page 6: "Lorraine's husband and daughter predeceased her leaving as her nearest heirs any nieces and nephews whose paternity could be traced back to Lorraine's only sibling, Donald D. Isburg, who himself had died August 24, 1979." The right to inherit does not flow backwards from possible heirs. It flows from Lorraine through Donald, whose children were determined by the BIA in his estate proceedings to be only Audrey and Clinton—that is why Tamara attempted to reopen it.



1. The BIA's Order determining Donald's children was conclusive.

Tamara argues that Audrey and Clinton want a "remedy that would continue a wrong that started when Donald died in 1979." P. 10. Lorraine, Audrey and Clinton did nothing wrong, and there are no findings that they did. It was Tamara's duty to enroll with the Crow Creek tribe, and to promptly petition the BIA to reopen Donald's probate. The only wrongs were committed by Tamara.

Tamara distorts Appellants' argument. It isn't that "she 'slept on her rights' while being a minor." P.10. It is that Tamara slept on her rights once she turned 18 in 1983 and did not attempt to reopen Donald's probate until 2010—27 years of slumber.

At the top of page 11 Tamara claims that Donald's affidavit is a public declaration. It isn't. It is a confidential record and was never presented in Donald's probate or even in the request to reopen it. Tamara is asking that the unoffered affidavit should trump a legal determination by the BIA probate judge.

After claiming a wrong was committed when she was omitted in Donald's probate, Tamara makes a shocking statement: "The overarching fact in this case is that Tamara has never had a legal reason to reopen her deceased father's probate." P. 11. Tamara makes this claim to avoid admitting that the BIA's determination of Donald's children is conclusive. However, Tamara had to prove in Donald's estate that she was his child in order to inherit from or through him—that is why she requested to reopen it. Tamara now agrees that she cannot inherit from Donald under SDCL 29A-2-114(c) because her paternity was not proven in his estate. P. 24. Nonetheless, she illogically argues she can inherit through him even though SDCL 29A-2-114(c)'s plain language does not permit the re-determination of a decedent's children in a subsequent collateral estate.

1.1. The Supremacy Clause prohibits South Dakota courts from re-determining Donald's children.

In discussing the supremacy doctrine, Tamara only cites inapplicable decisions. Notably, she didn't discuss or refute the applicable United States Supreme Court decisions that the BIA's determination of heirs is final and conclusive. See Opening Brief, p. 7.

Tamara incorrectly claims at page 12 that there are no federal probate laws. But see 25 C.F.R. §15.11 et seq. These probate laws apply exclusively to Indians.

Tamara states: "No federal statute gives [the] BIA exclusive province to declare who are the heirs of any deceased Native American." P. 12. However, 25 U.S.C. 372 gives exclusivity to the BIA's order when there is trust property, and certainly when there is no conflicting order from an ancillary probate.

Tamara fails to recognize that if Donald were alive, Lorraine's property would pass to him. Because Donald predeceased Lorraine and his intestate probate is final, Lorraine's property passes by substitution to his already determined children.

Contrary to Tamara's assertion at page 13, Lorraine's intestate heirs were known once the BIA entered the Order determining Donald's children. If Lorraine did not want that result, she had to make a will.

Audrey and Clinton are not questioning the circuit court's jurisdiction over Lorraine's property. However, when one is attempting to inherit through a predeceased-father, and his children were determined in his estate, the plain language of SDCL 29A-2-114 does not allow re-determination of his children. Tamara is barred from inheriting because she failed to timely request to reopen his probate.

1.2. After the land was removed from trust status with the United States, the BIA's 1981 Order determining Donald's children remains conclusive.

To defeat the applicability of 25 U.S.C. 372, Tamara incorrectly argues at page 15 that the statute wasn't raised. It was. See Audrey and Clinton's brief in support of the motion for summary judgment. R 399.

Tamara's authority, *Williams v. Lee*, 358 U.S. 217 (1959), actually supports Audrey and Clinton's claim. Donald was an Indian. Absent a tribal probate court, the BIA determines an Indian's intestate children.

Tamara makes a leap in her argument that is unsupported by the facts and law when she claims at page 17 that the BIA "could not reach the issue of Tamara's intestate rights as by law that issue was foreclosed to them as there was no property left to be divided." The BIA already determined Tamara's rights in 1981. She fails to cite authority that the BIA's Order determining Donald's children is now void.

Unquestionably, the circuit court's 2015 re-determination of Donald's children infringes on the BIA's 1981 Order. The circuit court entered Conclusions of Law overruling the BIA's determination of Donald's children. See #45: "The court concludes as a matter of law that as far back as January 6, 1966 Tamara Allen Thayer was an heir of Donald D. Isburg," and # 49: "The court concludes as a matter of law that Tamara Allen had no notice that a probate was commenced on Donald Isburg's estate...." Tamara recognizes these Conclusions of Law are erroneous. To avoid the predicament, Tamara waives her claim to his estate at page 17: "Tamara is not seeking to have Indian Trust land re-divided," but this concession doesn't cure the circuit court's error of re-determining Donald's children.

1.3. The separation of powers principle prevents re-determination of Donald's children.

The Separation of Powers principle provides: a court cannot overrule an administrative determination unless there exists specific authority, and a legislature cannot overrule a judicial determination. Tamara completely avoids this principle, and under the Separation of Powers heading, she simply continues to argue that the Supremacy Clause was not violated.

1.4. 25 U.S.C. 372 bars the re-determination of Donald's Children.

Tamara cites *Shade v Dowling*, 333 U.S. 586 (1948) at page 18 and claims that the United States is not a necessary party in the determination of heirship rights. That case doesn't involve 25 U.S.C. 372. Tamara also argues that the identification of heirs is not a special government function, but 25 U.S.C. 372 specifically states otherwise—the Secretary of Interior, "shall ascertain the legal heirs of such decedent."

At page 19 Tamara argues it is only the manner of proof that is different between Tamara, Audrey and Clinton. However, Tamara fails to acknowledge when that proof must be presented—in Donald's estate.

Tamara cites no precedent where the conclusiveness of a BIA's Order evaporates once the land goes out of trust. She also misstates the holding of *Spicer v. Coon*, 238 P. 833 (Okla. 1925). She claims the court found that the determination of heirs was only an incidental duty of the BIA. The actual holding of *Spicer* is that the BIA is the sole determiner of an Indian's heirs; its determination is final and conclusive; and it cannot be challenged in a state court.

At page 20, Tamara claims that she "is not seeking to redo a probate completed in 1981." But she first sought to reopen Donald's probate to re-determine his children in 2010 and failed.

In response to Tamara's argument at pages 21-22, it must be reiterated: SDCL 29A-2-114 does not authorize the re-determination of a decedent's children in a subsequent collateral estate.

Tamara claims that 25 U.S.C. 372 does not bar her claim because the BIA's determination is not conclusive. Tamara cites no case where a BIA decision is subject to the full faith and credit analysis. The BIA's determination is conclusive under the Supreme Court holdings previously cited in the Opening Brief at pp. 7 & 8.

Tamara argues that the issues are not the same for Donald and Lorraine's estates, p. 22, but they are—who are Donald's children. Tamara claims she could not be an heir of Lorraine until she died. What Tamara ignores is she cannot be an heir unless Donald predeceased Lorraine. Tamara cannot inherit from or through Donald, until he died and his children were determined. His children were determined in 1981, and Tamara slept on her rights.

At pages 22 and 23 Tamara makes another shocking statement: "This probate represents the first time that Tamara has had reason to demand due process and to have the law acknowledge that which she has factually known her entire life--who her father was." Tamara argues that Lorraine was not a party to Donald's probate and therefore it isn't binding, but later admits she is bound by it. P. 24. It is irrelevant whether it is binding on Lorraine. The issue is whether the BIA's order is binding on Tamara.

2. General limitations apply to probate orders to ensure their finality.

At page 23 Tamara claims she is now receiving proper notice and a fair opportunity, but she previously received proper notice and had the fair opportunity in Donald's estate. She had more than 20 years to request reopening Donald's estate, but she ignored that opportunity. Tamara never responded why she waited so long to attempt to reopen Donald's probate—until now—she admits she didn't care about her father's estate. See pages 11 & 22.

Tamara claims there was no need be determined Donald's child in 1981, but now in 2015 she needs it. Tamara attempts to avoid the BIA's determination of Donald's children by always saying she is Lorraine's heir. But how does she become a possible heir—it is by being determined as Donald's child in his estate. Tamara wasn't, and she failed in her attempt to change the BIA's determination.

Tamara states at page 23, "Donald's Affidavit of Paternity may have been ignored in his probate but in this one, with notice being served, it is being properly addressed," but Tamara never attempted to introduce it in Donald's probate.

Tamara ignores Appellants' cases that bar Tamara from challenging the BIA's Order determining Donald's children. Instead, Tamara claims at page 24 that, "The 1981 determination of heirs in Donald's probate simply stops Tamara from having a claim to any of Donald's property." There were two determinations by the BIA: his children and property. Tamara did not explain why the BIA's determination is binding on the property but not on his children.

Tamara cites a new BIA case about manifest injustice, *Estate of Benson Potter*, 49 IBIA 37 (2009), but there was no manifest injustice to Tamara. *Potter* recognizes that to

reopen a probate, one must show manifest injustice. Cases before and after *Potter* have this requirement. See, Appellants' Opening Brief at pages 13 & 14, including *Estate of Carl Sotomish*, 52 IBIA 44 (2010), which cites *Potter* at page 46. In fact, the BIA cases state that it would be an injustice to the previously determined children, i.e., Audrey and Clinton, if an estate were reopened decades later. There is no manifest injustice to deny reopening an estate when an omitted child slept on her rights.

2.1. A defense based on a statute of limitations is meritorious and should be favored. Equity supports the BIA's regulation barring Tamara from re-determining Donald's children.

At page 24 Tamara admits that the BIA's determination of Donald's children bars her from claiming an interest in his estate. "The 1981 determination of heirs in Donald's probate simply stops Tamara from having a claim to any of Donald's probate property." However, Tamara argues that equity should bar the application of the BIA's Order in Lorraine's probate, because Lorraine "had at least an idea of who Tamara was." P. 25. There was no wrongdoing by Lorraine or a finding of it. Lorraine wasn't the administrator of Donald's probate, the BIA was. Certainly, Tamara's failure to enroll as a member of the Crow Creek tribe, her failure to use the Isburg name, her failure to appear at the Isburg family unions, or attempt to claim any inheritance from Donald's estate until 31 years after his death shows lack of interest in her father, not wrong-doing by Lorraine.

At page 25, Tamara incorrectly claims Donald told the world 45 years ago that Tamara was his daughter. Donald didn't tell the world. His affidavit was not a public document. It was a sealed and confidential document not open to the public for inspection.

In order to inherit from Lorraine, Tamara requests equity. The facts shows Lorraine had no interest in Tamara. Tamara is continually bad-mouthing Lorraine to inherit from her. Tamara should not be rewarded.

3. The plain language of SDCL 29A-2-114(c) contains no provision allowing a decedent's children to be re-determined in a subsequent collateral estate. Any other interpretation would render part of it as surplusage and make the BIA's determination of Donald's children vain, idle or futile.

At page 27 Tamara discusses the quantum of proof needed to establish paternity in a father's estate. The plain language of SDCL 29A-2-114(c) identifies the various forms of proof that are acceptable in his estate proceeding. Tamara's problem is that she never submitted proof.

At page 29 Tamara claims her: "rights to inherit through Donald Isburg were met in January 1966 when Donald executed the paternity affidavit..." Tamara is wrong. The affidavit is not proof unless it is introduced at the father's estate proceeding.

Also at page 29, Tamara argues what happened after Donald signed the affidavit in 1966 is irrelevant. She is wrong again. Tamara had to prove the affidavit in Donald's estate. Tamara slept on her right to do so by failing to timely reopen his estate.

Tamara states at pages 29-30 that she: "never had reason to force proof of who she was as Donald long ago acknowledged he was her father. After that Tamara had proof of her being Donald's daughter every time she pulled out her birth certificate issued by the State of South Dakota based upon the statement made by Donald himself." Tamara recognizes that although she had possible evidence, she had to pull it out, i.e., to present it to the BIA—but she never did.

At page 31, Tamara admits she slept on her rights, but excuses her error by claiming that Donald's probate was fraudulent. Donald's probate wasn't fraudulent, and there is no finding to support Tamara's claim that it was.

Lorraine was not the administrator of Donald's probate: the BIA was. Certainly the BIA did not know that Tamara was Donald's daughter because she failed to enroll in the Crow Creek tribe. Moreover, Tamara didn't use the Isburg surname or have a relationship with Lorraine. Tamara's mother had six children by five different fathers, and never married Donald. It is reasonable for Lorraine to conclude she was not part of her family.

Tamara demands equity, but in reality she wants a windfall, which is an injustice to Lorraine, who did not recognize her as a niece. Lorraine relied upon a valid determination of Donald's children. Tamara's admission that she and Lorraine were not close is an understatement. Tamara didn't attend Lorraine's funeral or respect her. Tamara has only shown interest in how quickly she can get Lorraine's money by complaining to the Court Administrator about the delay.

Because the affidavit was a sealed document and was never produced in Donald's probate, the only thing known and proven to Lorraine was that Audrey and Clinton were Donald's children.

Conclusion

Tamara is attempting to inherit through Donald Isburg. He died intestate in 1979. In 1981 Audrey and Clinton were determined by the BIA's Order as his only children and heirs. The BIA's order is final and conclusive under Federal law and the Supremacy Clause: it blocks Tamara's attempt to inherit through Donald. 31 years after Donald's death, Tamara failed to reopen his estate so that she could be declared as his daughter and thus inherit from Lorraine.

It is unjust for Tamara to inherit from Lorraine. Lorraine relied upon the BIA's Order and did not recognize Tamara as her niece or as part of her family. Moreover, the plain language of SDCL 29A-2-114(c) has no provision allowing a decedent's children to be re-determined in a subsequent collateral estate. Any other interpretation would make the BIA's conclusive determination of Donald's children vain, idle or futile.

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