IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27511

In the Matter of the
ESTATE OF LORRAINE ISBURG FLAWS

YVETTE HERMAN,
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 appeal is from the denial of Appellants' Motion for Partial Summary Judgment, which was rendered on January 28, 2015, and from the Judgment for Yvette Herman, which declared that SDCL 29A-2-114(c) was unconstitutional as applied to her, and that she was entitled to a share of Lorraine's estate. Judgment was entered on July 7, 2015. R 993. Notice of Appeal was filed and served on July 31, 2015. R 1028, 1063.

Statement of the Legal Issues

Issue 1: Whether the circuit court violated the Supreme Court's 2012 mandate by also reconsidering and revoking its 2011 decision that SDCL 29A-2-114(c) was constitutional to subsequently rule that it violated the Equal Protection Clause as applied to Yvette.

The circuit court revoked its 2011 decision that SDCL 29A-2-114(c) was constitutional and ruled that it violated the Equal Protection Clause.

- SDCL 15-30-11 and 15-30-14.
- *State v. Piper*, 842 N.W. 2d 338, 2014 S.D. 2.

Issue 2: Whether the circuit court erred by denying Appellants' Motion for Summary Judgment against Yvette Herman.

The circuit court denied Appellants' Motion for Summary Judgment.

- SDCL 15–6–56(c).
- *In re Estate of Flaws*, 811 N.W. 2d 749, 2012 S.D. 3.
- *Estate of Donald Isburg*, 59 IBIA 101 (2014).

Issue 3: <u>Whether the circuit court erred by declaring that SDCL 29A-2-114(c) violated the Equal Protection Clause as applied to Yvette Herman</u>.

The circuit court ruled that SDCL29A-2-114(c) was facially constitutional but it violated the Equal Protection Clause as applied to Yvette.

- U.S.C.A. Const. Amend. 14.
- S.D. Const. art. VI, § 18.
- *Matter of Erbe*, 457 N.W. 2d 867 (S.D.1990).
- *Reed v. Campbell*, 476 U.S. 852 (1986).
- *Tibbs v. Moody County Bd. of Com'rs*, 851 N.W. 2d 208, 2014 S.D. 44.

Issue 4: <u>Whether the circuit court erred by ruling that Yvette Herman had standing and did not sleep on her rights</u>.

The circuit court did not decide whether Yvette slept on her right to reopen Donald's estate; it only ruled that she did not sleep on her right to claim a share of Lorraine's estate.

- 43 C.F.R. § 30.243(a).
- *Estate of James Bongo, Jr.*, 55 IBIA 227 (2012).
- *State v. Rolfe*, 825 N.W. 2d 901, 2013 S.D. 2.
- *Petro-Chem Processing, Inc. v. E.P.A.*, 866 F. 2d 433 (C.A.D.C.1989).
- *Estate of McCullough v. Yates*, 32 So. 3d 403 (Miss.2010).

Issue 5: <u>Whether the circuit court erred by ruling that the BIA did not have conclusive jurisdiction to determine Donald Isburg's children</u>.

The circuit court ruled that the BIA did not have conclusive jurisdiction to determine 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.

Statement of the Case

Audrey filed a petition for formal probate of Lorraine Isburg Flaw'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. *Estate of Donald Isburg*, 59 IBIA 101 (2014). On July 13, 2010, Audrey and Clinton moved for summary judgment against Yvette that she had no standing in Lorraine's estate. R 52. The circuit court granted it on February 3, 2011 and ruled that SDCL 29A-2-114 was constitutional, facially and as applied to Yvette. R 67. During Yvette's appeal to the South Dakota Supreme Court, the BIA issued a show cause order on June 28, 2011. *Isburg*, p.103. Audrey and Clinton responded. *Id*. On January 25, 2012 the South Dakota Supreme Court partially reversed the circuit court and mandated that the court wait a reasonable amount of time for the BIA's decision and proceed accordingly. *In re Estate of Flaws*, 2012 SD 3, ¶ 22. On April 5, 2012 the BIA's probate judge denied Tamara and Yvette's requests to reopen

Donald's estate. *Isburg*, p.101. Only Yvette appealed. *Id*. On August 20, 2014 the Interior Board of Indian Appeals affirmed the order denying Tamara and Yvette's requests to reopen Donald's estate. *Id*. Yvette did not appeal it to the U.S. District Court. T 238. On September 8, 2014 Audrey and Clinton filed a motion for summary judgment against Yvette. R 350. On January 28, 2015 the circuit court ruled that Yvette had no standing, but refused to grant summary judgment because it was reconsidering the constitutionality of SDCL 29A-2-114. R 525. At the February 17, 2015 court trial, the court took judicial notice of the BIA records, R 972, but disallowed the special administrator's testimony on behalf of Audrey and Clinton. T 245-6. Audrey and Clinton proposed findings, R 861, which were denied. R 981. The court ruled on June 9, 2015, that SDCL 29A-2-114(c) was unconstitutional as applied to Yvette, and she was Lorraine's niece. R 940. Audrey and Clinton objected to the court's jurisdiction and its violation of the Supreme Court's mandate. R 959. Judgment was entered on July 7, 2015. R 993. Notice of Appeal was filed and served on July 31, 2015. R 1028.

Statement of the Facts

Lorraine Flaws died on February 18, 2010. She was a member of the Crow Creek Tribe. Lorraine's husband and only child predeceased her. Lorraine's estate passes under the laws of intestacy. Her only sibling was Donald Isburg. *Flaws*, ¶ ¶ 2 and 3

Donald died on August 24, 1979 at an Indian Health hospital in Arizona. Ex T 9. He was a member of the Crow Creek Tribe. *Isburg*, p. 101. Audrey and Clinton are children from his marriage to Mavis. *Flaws*, ¶ 3.

Yvette Herman was born June 1, 1970 and claims to be Donald's illegitimate daughter. *Flaws*, ¶ 4. The original birth certificate showed her father as Gene Russel

Rilling. *Flaws*, ¶ ¶ 4 and 5, R 80. Yvette is not a member of the Crow Creek Tribe. T 174. In 1988 Yvette learned her putative father was Donald. R 943. T 213. By 1989, Yvette knew Donald had a house on Isburg-Brule Bottom. T 241. However, in 1991 when Yvette's son was enrolled as a member of the Crow Creek Tribe, Donald was not listed as his ancestor. T 231. In 1998, Yvette obtained affidavits to prove that Donald was her father. Ex AC-5 and 7. In 2008 Yvette changed her birth certificate to show Donald was her father. *Flaws*, ¶ 5.

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. It also notified the BIA Superintendent for the Crow Creek Reservation 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*, ¶ 3. Audrey and Clinton inherited Donald's Indian trust land and became tenants in common with their aunt, Lorraine. R 53, 80.

On July 18, 2003 Lorraine had her Indian land taken out of trust. *Id*. 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.*

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

The hospital records for Lorraine—10 days before her death in 2010—show that she acknowledged only her niece, Audrey, and nephew, Clinton, as her family. 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." R 371.

Donald didn't acknowledge Yvette as his daughter in writing. Donald never married Yvette's mother. T163. Yvette never obtained a judicial determination of her paternity during Donald's lifetime. During Lorraine's lifetime, Yvette did not present proof in the BIA proceedings to settle Donald's estate that Yvette was his daughter. *Isburg*, p 101.

Yvette attacked Lorraine's character. Yvette claimed Lorraine committed fraud in Donald's probate by concealing her identity. Even if Lorraine had suspicions about her identity, Lorraine wasn't an interested party and had no duty to disclose them to the BIA Probate Judge or Superintendent. *Williams Services v. Sherman*, 492 N.W. 2d 122, 126 (SD 1992). Yvette 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. Significantly, the circuit court found that Yvette's mother hid Donald's identity. R 940. T 164, 186, 187. Also, Yvette was presumed to be the marital child of Rilling. SDCL 25-5-3. Although Yvette's mother had divorced Rilling a few days before Yvette's birth, they continued to live together until Yvette was six months old. T 162.

He was named as her father for 38 years until Yvette changed her birth certificate in 2008 to claim a different father. *Flaws*, ¶ 5.

Yvette and Tamara produced nothing from Lorraine acknowledging them as nieces. They didn't produce any letter, picture, gift or card—absolutely nothing—from Lorraine. R 410.

In 2005 Yvette obtained DNA test results of herself and Lorraine. The tests revealed evidence that Yvette was Donald's daughter and Lorraine's niece. *Flaws*, ¶ 5. On the basis of DNA and testimony, the circuit court ruled that Yvette was Donald's daughter and Lorraine's niece. R 940. Nonetheless, after the DNA testing, Lorraine did not list Yvette in the biannually published Isburg family tree, add Yvette as a co-owner to any of her property, R 216, or change Audrey and Clinton as beneficiaries of her annuities and life insurance. R 410, 417. Lorraine also continued to make annual gifts to Audrey and Clinton. R 53, 80.

Tamara complained twice to the court administrator that the circuit court was delaying her share of Lorraine's property—yet she and Yvette requested reopening Donald's probate, which caused a significant delay. R 1010. T 118.

Lorraine's probate started more than five years ago, March 4, 2010. R 6. No estate distribution has been made to the known heirs, Audrey and Clinton. Additional administrative expenses continue to increase because of Yvette and Tamara's attempt to have Donald's children re-determined in Lorraine's estate. R 999.

Legal Argument

1. The circuit court did not follow the Supreme Court's mandate: it was without jurisdiction to declare SDCL 29A-2-114(c) violates the Equal Protection Clause.

The circuit court's jurisdiction on remand must conform to the Supreme Court's mandate. *State v. Piper*, 842 N.W. 2d 338, 2014 S.D. 2, ¶10, SDCL 15-30-11 and 15-30-14. It required the circuit court to wait for the BIA's decision and then proceed accordingly:

> …the trial court did not err in determining that the methods and time limits in the statute for establishing paternity are exclusive ... [however] Yvette's efforts to reopen Donald's probate may still prove successful, permitting her to comply with SDCL 29A–2–114(c) to establish Donald's paternity ... therefore, we remand this matter to the trial court to wait for a reasonable time for the Bureau of Indian Affairs' decision and to proceed accordingly. Having reached this conclusion, we decline to address Yvette's constitutional arguments.... *Estate of Flaws*, ¶ 22.

The BIA refused to reopen Donald's probate. Yvette admitted she could not qualify as Donald's child under SDCL 29A–2–114(c). R 829, ¶ 1. The circuit court should have entered an order dismissing her claim. Instead, the circuit court ignored the Supreme Court's mandate by partially revoking its 2011 decision and ruling that SDCL 29A–2–114(c) was unconstitutional as applied to Yvette. The Supreme Court's mandate did not give the circuit court jurisdiction to reexamine SDCL 29A–2–114(c). Thus, the circuit court's 2015 ruling on its constitutionality is void.

2. Summary judgment should have been granted to Audrey and Clinton.

Yvette failed to reopen Donald's probate in order to qualify as his daughter. Yvette admitted she could not qualify as Donald's child under SDCL 29A–2–114(c). R 829, ¶ 1. The circuit court erred by denying Audrey and Clinton's motion for summary judgment. SDCL 15-6-56(c).

3. SDCL 29A-2-114(c) does not violate the Equal Protection Clause.

As discussed below, SDCL 29A-2-114(c), when read in conjunction with other probate statutes, does not violate the Equal Protection Clause. U.S. Const. Amend. 14, and S.D. Const. Art. VI, § 18. It does not create classifications between legitimates and

illegitimates. Even if it does, the classification is not arbitrary. All children have an equal opportunity to inherit from and through their father if they timely assert a claim in the father's estate.

3.1. SDCL 29A-2-114(c) creates no classification between legitimates and illegitimates when read in conjunction with other probate statutes.

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

> [t]he 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.

On February 3, 2011 the court concisely stated the parties' claims:

- "Yvette's claim is that she is the daughter of Donald and therefore the niece of Lorraine, entitled to inherit from her estate." R 69.
- "Audrey and Clinton argue since Donald's estate was settled almost three decades ago, Yvette should not be allowed to present clear and convincing evidence of paternity in this collateral estate to inherit from Donald's sister." R 70.

In 2011, the circuit court held that the statute was constitutional, facially and as applied, because: "the legislature established the last catchall phrase allowing the child to establish the identity of her father by presenting clear and convincing evidence in the father's estate proceedings." R 72.

On June 9, 2015 the circuit court again held the statute was facially constitutional: "The Court feels that [the 2011 decision] was the correct ruling and will not re-visit the facial challenge." R 948. But, the circuit court reconsidered its 2011 constitutionality ruling 'as applied' to Yvette because of her facial argument—that illegitimacy has risen significantly since the 1960s. R 526. The circuit court then reversed itself and ruled that the statute was unconstitutional as applied to Yvette.

The circuit court reviewed the constitutionality of SDCL 29A-2-114(c) in isolation and did not consider its role in the overall probate process. However, under an Equal

Protection challenge, a statute's constitutionality must be determined by reviewing it as well as enactments relating to the same subject. *Tibbs v. Moody County Bd. of Com'rs*, 851 N.W. 2d 208, 2014 S.D. 44, ¶ ¶ 3 and 4, and *Argus Leader v. Hagen*, 739 N.W. 2d 475, 2007 S.D. 96, ¶ 25.

The probate process in this controversy involves undisputed, disputed and omitted children, the required proof necessary to enable them to inherit from or through their father, and the applicable time limits to claim an estate share:

- Undisputed children. If uncontested, proof of paternity is unnecessary. Normally, proof of paternity is not submitted in probates, only a verified application listing known children, SDCL 29A-3-402, and 29A-3-301. Based upon the application, the judge enters an order determining heirs, SDCL 29A-3-405, or the clerk of courts makes its findings, SDCL 29A-3-308. Yvette and Tamara did not dispute the paternity of Audrey or Clinton.
- Disputed children. If contested, proof of paternity is necessary. Both disputed marital and non-marital children have the burden of proof, but there is a non-conclusive presumption that marital children are legitimate. SDCL 29A-3-407 and 25-5-3. If the presumption was conclusive, Yvette, as the presumed marital child of Rilling, could not claim that she was Donald's daughter. Both marital and non-marital children can submit DNA test results and any relevant evidence in the father's estate. SDCL 29A-2-114(c) and 29A-3-407. Audrey and Clinton disputed Yvette and Tamara's paternity.
- Omitted children. No proof of paternity is allowed if the claim is untimely. General limitations apply equally to marital and non-marital children. If the estate is open,

omitted children must timely request to amend the order determining heirs. SDCL 29A-3-412. 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).

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. Similarly, SDCL 29A-2-114(c) requires a final determination in the father's estate proceedings.

3.1.1. General limitations on the time and the manner in which heirs may be established are not subject to Equal Protection scrutiny.

Although the Court in *Reed v. Campbell*, 476 U.S. 852 (1986), ruled that special limitations on illegitimates may be unconstitutional, general non-discriminatory limitations on the time and manner to assert claims are constitutional and justified for the orderly disposition of estates:

> The state interest in the orderly disposition of decedents' estates may justify the imposition of special requirements upon an illegitimate child who asserts a right to inherit from her father, and, <u>of course, it justifies the enforcement of generally applicable limitations on the time and the manner in which claims may be asserted</u>. After an estate has been finally distributed, the interest in finality may provide an additional, 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. *Id*., 855-6.

3.1.2. 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 ...."

In summary, when read in conjunction with the other probate statutes, SDCL 29A-2-114(c) does not create a classification between illegitimate and legitimate children. South Dakota and the BIA's probate process apply equally to illegitimate and legitimate children. They have a right to inherit from and through their father and have their paternity determined—if the claim is timely asserted South Dakota imposes a general time limit that prevents omitted heirs from making untimely claims to reopen estates. The BIA also has a general time limit, but it is more liberal. It only requires that the petition to reopen must be made within one year of discovering that the heir was omitted. If there has been a determination of the father's children in his estate, which didn't include legitimate and illegitimate children, either must get it changed—otherwise either is barred from inheriting from his estate and through him. As a consequence, SDCL 29A-2-114(c) does not create a classification between illegitimate and legitimate children and does not violate the equal protection clause.

3.2. SDCL 29A-2-114(c) does not violate the Equal Protection clause because of the *stare decisis* doctrine.

In its 2011 decision, the circuit court relied upon *Matter of Erbe,* 457 N.W. 2d 867 (S.D. 1990), to rule that SDCL 29A–2–114(c) did not violate the Equal Protection Clause either facially or as applied. However in 2015, the circuit court ignored its 2011 rationale—including *Erbe*—and reversed itself. It ruled that the South Dakota Legislature was out of touch with modern science because DNA was disallowed in a collateral estate to re-determine Donald's children:

> 5. The legislature has not kept up with modern means of establishing paternity or heirship in this area of the law. R 956.

In its 2011 decision, the court ruled that SDCL 29A-2-114(c) was constitutional under *Lalli v. Lalli*, 439 U.S. 259 (1978), and *Erbe*, because it was not an insurmountable obstacle in proving paternity:

> Under SDCL 29A-2-114 the claim does not die with the father but rather survives and can be proven in his estate. In such a case it is up to the child, her mother or legal guardian to establish the claim and assert those rights during the estate proceeding. This is not an insurmountable obstacle but a legitimate limitation on the right of the child to establish their rights, a limitation that is in excess of what the court found sufficient for equal protection analysis in *Lalli*. Consequently, since SDCL 29A-2-114 provides more protection than the law found to be constitutional in both *Lalli* and *Estate of Erbe*, and since it does not create an insurmountable burden for the child, this court denies Yvette's constitutional challenge to the statute. R 523.

The *Erbe* Court ruled that a statute requiring the establishment of paternity during the lifetime of the father did not violate the Equal Protection Clause, facially or as applied. The illegitimate son was barred from conducting blood tests and inheriting from his father. The *Erbe* Court based its decision on *Lalli,* to hold that there was a legitimate state interest in requiring paternity to be established before the father's death:

> In light of the fact that the United States Supreme Court recognizes that there are legitimate state interests which can justify treating legitimate and illegitimate children differently, we find that Lassle has failed to carry his burden of proving

> that SDCL 29-1-15 bears no rational relationship to a legitimate state interest. … SDCL 29-1-15, while providing a means for the illegitimate child to inherit from his father, also serves state interests by establishing safeguards to protect the sanctity of a will and to provide for the orderly settlement of estates. As such, equal protection of the law is afforded to illegitimates." *Erbe* at 869.

SDCL 29-1-15, which prohibited proving paternity in the father's estate, was replaced in 1995 with a less restrictive statute, SDCL 29A–2–114(c), which allows proving paternity in the father's estate. Nonetheless, the circuit court allowed re-litigating paternity in a collateral estate—rewriting SDCL 29A-2-114(c), because the court deemed it unfair. But the question isn't fairness about general time-limits, "[t]he question is whether the alternative chose by the legislature denies equal protection of the laws—without a view as to any alternative a court might have chosen had it been the primary decision-maker." *Prudential Ins. Co. of America v. Moorhead*, 916 F. 2d 261, 266 (5th Cir.1990). (Congress can limit the class of life insurance beneficiaries so that only illegitimate children, who take action during insured father's lifetime, can be eligible beneficiaries.)

Under United States Supreme Court precedent, one cannot assert an "as-applied" challenge to a statute based on the same factual and legal arguments the Supreme Court considered when rejecting a prior facial challenge to it. The Supreme Court treats the claim not as an as-applied challenge but as an argument for overruling a precedent. *Republican Nat. Comm. v. Fed. Election Comm'n*, 698 F.Supp. 2d 150, 157 (D.D.C.2010) (three judge court), aff'd, 561 U.S. 1040, 130 S.Ct. 3544, 177 L.Ed. 2d 1119 (U.S.2010).

The *Erbe* decision involved an illegitimate, who was not allowed to inherit or introduce blood test results, and involved a more restrictive statute that was declared constitutional, both facially and as applied. The same result should have happened in this

case. However, the circuit court erroneously ignored *Erbe* and the *stare decisis* doctrine to hold that SDCL 29A-2-114(c) was unconstitutional as applied to Yvette.

3.3. SDCL 29A-2-114(c) creates no arbitrary classification between of legitimates and illegitimates.

Although the circuit court said in 2015 that its 2011 ruling "was the correct ruling and will not re-visit the facial challenge," R 948, it did so anyway:

> SDCL 29A-2-114 undoubtedly makes a classification and a distinction between illegitimate and legitimate children. [1] The statute automatically presumes that the father of a child born into wedlock is the mother's spouse. [2] On the other hand, if the child is born out of wedlock, the child and/or father must take some affirmative step to establish the biological father's paternity. R 950.

The circuit court misconstrued the probate process. As previously discussed, [1] the statute does not automatically presume that the father of a child born into wedlock is the mother's spouse. A different statute provides a rebuttable presumption, SDCL 25-5-3, which wasn't challenged as unconstitutional. [2] An illegitimate child—as well as a marital child—must take an affirmative step to establish paternity only if they are challenged. SDCL 29A-3-405 and 29A-3-407. Significantly, both disputed illegitimate and legitimate children have the burden of proof. *Id*.

This Court utilizes a two-part test to determine whether the Equal Protection Clause has been violated:

> The first part of this test is whether the statute does set up arbitrary classifications among various persons subject to it. The second part of the test is the application of the appropriate standard of review to the arbitrary classification. *Tibbs* at ¶ 6.

Even if one construes SDCL 29A-2-114(c) separately and determines legitimates and illegitimates are classified differently, it does not create an arbitrary classification because all illegitimates can inherit from and through their father unless time-barred. Its time-limit is reasonable and coincides with a general time-limit, which affects all potential heirs.

3.3.1. Orderly estate administration is a permissible basis for legitimacy distinctions.

In *Reed v. Campbell*, 476 U.S. 852 (1986), the U. S. Supreme Court ruled that distinctions made on the basis of legitimacy may be permissible for the orderly and just administration of estates:

> We have, however, also recognized that there is a permissible basis for some "distinctions made in part on the basis of legitimacy"; specifically, we have upheld statutory provisions that have an evident and substantial relation to the State's interest in providing for the orderly and just distribution of a decedent's property at death. *Id*., 854-55.

3.3.1.1. States may enact statutes of limitations involving paternity.

States may enact statutes of limitations involving paternity, such as those involving inheritances from or through the father and child support. *Dotson v. Serr,* 506 N.W. 2d 421 (S.D.1993), cert. denied, 510 U.S. 1177, 114 S.Ct. 1218, 127 L.Ed. 2d 564 (1994) (Statute extending limitations period for paternity actions until child reached 18th birthday could not be applied retroactively).

Many states have enacted statutes of limitations barring untimely demands of inheritances from the father's estate. These limitations are sometimes similar to those barring paternity actions or untimely creditor claims. See, *In re Estate of Murcury*, 868 A. 2d 680 (Vt.2004) (parentage action must be brought before illegitimate child turns 21; omitted child is not constitutionally entitled to genetic testing beyond the time-limit), *Bell v. McDonald*, 432 S.W.3d 18 (Ark.2014) (presumed child of mother's husband, but the illegitimate child of another man, must file and prove heirship claim within six months of father's death), *Estate of McCullough v. Yates*, 32 So. 3d 403 (Miss.2010) (illegitimates could not inherit from aunt when they failed to establish father's paternity within one year of his death), *Estate of Wright*, 950 S.W. 2d 530 (Mo.App. W.D.1997) (heirship claim by legitimate and illegitimate children must be filed within six months after publication),

and *Turner v. Nesby*, 848 S.W. 2d 872 (Tex.App.1993) (illegitimate child, who did not receive actual notice of probate, had four years to correct order determining heirs, and was barred from attacking a seven-year-old order).

The Federal Government and states also limit eligibility to inherit through the father by requiring paternity established no later than in the father's estate. See for example, *Shangreau v. Babbitt*, 68 F. 3d 208 (8th Cir.1995), and *Estate of McCullough v. Yates*, supra.

In *Shangreau*, land was sold out of trust more than fifty years prior to the grandson's claim. The BIA's administrative law judge and the Interior Board of Indian Appeals dismissed the grandson's claim and appeal for lack of jurisdiction. However, the U.S. District Court held it had jurisdiction to decide constitutional issues. The Eighth Circuit affirmed and ruled that the statute was constitutional because it would have been an administrative burden to re-determine heirs and include the grandson by representation through his deceased father:

> Given the problems of identification and proof, granting heirship status to illegitimate children claiming by representation through the father would impose an administrative burden on the settlement process…. *Id.* at 211.
> Refusing to expand heirship status to include illegitimate children claiming by right of representation through their fathers is substantially related to the federal government's important interest in accurately and efficiently settling the claims involving the White Earth Reservation allotments. *Id.* at 213.

Shangreau conforms to numerous holdings that deny omitted heirs' untimely requests to reopen estates in order to safeguard the finality of probate orders. See, *Estate of Hayes*, 965 P. 2d 939, 944 (N.M.App.1998) (omitted heirs who did not receive actual notice of probate were nonetheless barred under the UPC from challenging the order determining heirs entered 16 months before: the challenge was four months late), *Matter of DeTienne's Estate*, 656 P. 2d 827 (Mont.1983) (omitted daughter could not change 36-

year-old order of distribution; if the order was obtained by fraud, the petition had to be filed within 60 days of discovery—not eight months later), and *Turner v. Nesby*, (illegitimate child who did not receive actual notice of probate had four years to correct order determining heirs; illegitimate was barred from attacking a seven-year-old order).

In its 2011 ruling, the circuit court agreed that SDCL 29A-2-114's time-limit was justified:

> [I]n the present case the statute requires establishment of paternity in the proceeding to settle the father's estate. SDCL 29A-2-114 is less restrictive than the statute considered in *Lalli*. Under the statute in *Lalli*, a child's right to pursue this issue was terminated at the death of the father. Under South Dakota law it survives the death and may be established during the administration of his estate, a significant extension of the limitation period. Presumably the legislature knew what they were doing when they drafted SDCL 29A-2-114 and intended the last phrase to provide a last resort, so to speak, and established an extended limitations period. However, it is doubtful that the legislature intended to extend the limitation period indefinitely. R 73.

But in 2015, the court confused the general time limit barring omitted children from submitting late claims with Yvette's incorrect argument that DNA evidence cannot be considered:

> Had the land in Donald's estate not been transferred out of trust status, or had Yvette's mother disclosed that Donald was her father and taken action to preserve her interests in his estate, the BIA court would have had sufficient jurisdiction to rule upon the issue presented here. Under the circumstances here, that issue was stranded and left without a resolution in favor of or against Yvette. R 957-58.

The court concluded that the BIA decision was unfair without considering the BIA's regulation and South Dakota's similar statute that prohibit reopening an estate if heirs slept on their rights. The circuit court treated the BIA's decision as non-binding, but it is binding, just like any order that has not been vacated. Moreover, because of the Supremacy Clause, the BIA's decision was a conclusive determination of Donald's children as discussed in section 5.

SDCL 29A-2-114(c)'s time limit for illegitimates to inherit from and through their father was logically set at closure of the fathers' probates because of the recognized need for finality in estate proceedings and the conclusiveness of orders determining heirs. Its time limit is the same as the general limitation statute, SDCL 29A-3-412(3). Its affect on illegitimates does not result in an arbitrary classification.

In summary, Yvette is attempting to re-determine her paternity and 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. Yvette did not allege that she was deprived of a reasonable amount of time to assert a claim after discovering Donald's identity in 1988. Significantly, Yvette waited more than 22 years after her discovery before attempting to adjudicate paternity in his estate. As such, Yvette's claim is 22 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. Yvette should have requested a hearing to reopen his estate in 1988, the year of discovery or soon thereafter. Her claim for deprivation of equal protection fails.

3.3.1.2. 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. Yvette's argument that it supports the re-determination of Donald's children—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.

Moreover, the South Dakota Legislature cannot instruct its courts to reopen final judgments. It would violate the separation of powers principles. S.D. Const. Art. II and *Skinner v. Holt*, 69 N.W. 595 (S.D.1896).

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.

3.3.1.3. 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 Yvette is permitted to have her father's children and her paternity re-determined in a collateral estate.

Because Lorraine did not re-write her will to exclude Yvette after receiving the DNA test results, the court ruled that Lorraine wanted Yvette to inherit from her:

> 3. Lorraine knew of the results of the genetic testing and did not take action to write a new will and exclude Yvette as an heir which she had the right to do (this becomes very important when you consider that Lorraine was a very astute business person), and
> 4. The only thing prohibiting Yvette from inheriting from her aunt through her father is the statute in question that limits the means of establishing paternity. R 956.

The court ignored the legal presumption that Lorraine knew the law and knew that Yvette could not inherit from her because of SDCL 29A-2-114(c). Moreover, the court disregarded Lorraine's knowledge of the BIA order determining Donald's children, and the Federal regulation barring Yvette from claiming that she was Donald's daughter, 43 C.F.R. § 30.243(a).

The court also overlooked that Lorraine did not publicly or privately acknowledge Yvette. Lorraine did not include Yvette in the biannually published Isburg family tree. R 417. She did not add Yvette to any of her property, nor did she alter the beneficiaries of her annuities and life insurance. R 410, 417. Lorraine continued to make annual gifts to Audrey and Clinton—not Yvette. R 53.

Significantly, Audrey called Lorraine in 2005 and said that Yvette had contacted her, and asked Lorraine what she should do. Lorraine told Audrey to ignore her. R 53. Lorraine's rejection of Yvette as her niece is further confirmed by the nurse's notes of Lorraine's death bed statement that the only family she had were Audrey and Clinton. R 371.

3.3.2. Yvette had fair opportunity to establish her paternity.

SDCL 29A-2-114(c) does not create an insurmountable obstacle and gives a non-marital child fair opportunity to prove paternity in the father's estate. It complies with *Reed*.

In 2011, the circuit court ruled that SDCL 29A-2-114(c) was constitutional because it was not an insurmountable obstacle to proving paternity; it merely was: "a legitimate limitation on the right of the child to establish their rights, a limitation that is in excess of what the court found sufficient for equal protection analysis in *Lalli*." R 76.

In 2015 the circuit court erroneously concluded that Yvette did not have a fair opportunity to establish her paternity in Donald's estate. "Donald died when she was nine years old and was unable to protect her own interests." R 949. But Yvette's opportunity did not end when she was nine years old. It continued until she was 33 years old, when the land was taken out of trust in 2003, plus another six years, when statute of limitations expired for Yvette's claim against the government that it wrongful distributed the trust land.

Yvette had fair opportunity to establish paternity in Donald's estate but she waited too long and lost it. She made a calculated and strategic decision to wait until after Lorraine died. The BIA has denied many petitions similar to Yvette's to reopen an estate because compelling proof of diligence wasn't presented—even though the petitioner was a minor during the probate, didn't receive notice of the probate proceedings or may have been entitled to a share of the estate. These are the type of meritorious claims that the Supreme Court held may be barred in the interest of finality. *Reed* at pp. 855-856. See also, *Estate of James Bongo, Jr.*, 55 IBIA 227 (2012) (Petitioner showed lack of diligence by waiting two years after discovery of evidence to request reopening the estate.)

4. Yvette has no standing to attack SDCL 29A-2-114(c) because she squandered her right to establish paternity.

The Court reviews a statute's constitutionality only when necessary and will first ascertain whether a construction, which avoids the constitutional question, is fairly possible. *State v. Rolfe*, 825 N.W. 2d 901, 2013 S.D. 2, ¶ 13. Yvette had a fair opportunity to establish her paternity but slept on her rights. Yvette learned that Donald was her father in 1988 when she was 18 years old. By 1989, Yvette knew Donald had a house on Isburg-Brule Bottom. She collected affidavits regarding her paternity in 1998. Yvette failed to promptly request reopening Donald's probate. Yvette made the request in 2010 when she was 40 years old and Lorraine had died. Under the BIA regulation, 43 C.F.R. § 30.243(a), an omitted heir must reopen a BIA probate within one year after the discovery of the erroneous probate order. *Estate of James Bongo, Jr.*, 55 IBIA 227 (2012). A maxim is that one must be vigilant in protecting their rights. A defense based on a statute of limitations is meritorious and should not be regarded with disfavor. *Citibank v. S. Dak. Dept. of Revenue*, 2015 S.D. 67, ¶ 8.

The purpose of statutes of limitations is the speedy and fair adjudication of the parties' respective rights. SDCL 29A–2–114(c)'s time-bar and the question of its constitutionality could have been avoided had Yvette not slept on her rights. Because her injury is self-inflicted, she has no standing to raise a constitutional issue. *Petro-Chem Processing, Inc. v. E.P.A.*, 866 F. 2d 433 (C.A.D.C.1989), *Estate of McCullough*, supra, and *Phillips v. Ledford*, 590 S.E. 2d 280 (N.C.2004) cert denied. 597 S.E. 2d 133 (2004).

5. The BIA had conclusive jurisdiction to determine Donald's children.

Yvette and Tamara knew the BIA had conclusive jurisdiction to determine Donald's children because they requested to reopen his estate in June 2010—a month before

Audrey and Clinton first moved for summary judgment. The circuit court also recognized in 2011 that it had no jurisdiction to re-determine Donald's children. It said:

> [I]t is obvious that the state court does not have jurisdiction to probate an estate in tribal trust land as such jurisdiction lies with the tribal courts and the federal government, more specifically the Department of Interior. The invitation to allow Yvette to establish paternity in such a manner is inviting, but after serious consideration this court finds that it has no jurisdiction to do so. R 74.

However, in 2015 the circuit court held that it was unfair to Yvette when the BIA lost jurisdiction in 2003. The circuit court ignored that Yvette was 33 years old when the BIA lost jurisdiction. It also ignored the Federal decisions and BIA regulation barring the untimely redetermination of heirs:

> 7. In this case Yvette's right to establish paternity in Donald's estate was foreclosed, not because she lost on the merits, but because the estate was started and closed when she was a very young child, her mother had kept the true identity of her father a secret from her which resulted in her being unable to protect her interest, and because the BIA Court lost jurisdiction to determine the issue after she had become aware of the true identity of her father. R. 956-57.

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

The BIA's decisions are final under 25 U.S.C. § 372. Congress vested the Secretary with the power to determine the heirs, and provided that "his decision thereon shall be final and conclusive." See also, *Shangreau*, supra at p. 212.

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

The decision of *Estate of Ducheneaux v. Ducheneaux*, 2015 S.D. 11, reaffirms the finality and conclusiveness of the BIA probate orders: "it is apparent federal legislation in this area has preempted the circuit court from exercising whatever equitable power it

might have otherwise had over Ducheneaux." *Id.*, ¶ 11. And, "[e]ven if we were to conclude the circuit court's decision on the merits would be given full faith and credit (at least in federal court), we are convinced the involvement of the circuit court in hearing the merits of the Estate's claim would "stand as an obstacle to the accomplishment and execution of the full objectives of Congress." *Id.*, ¶ 16.

The Supremacy Clause, U.S. Const., Art. VI cl. 2, and 25 U.S.C. § 372 prohibit South Dakota courts from ignoring the BIA's determination of Donald's children and re-determining them.

Conclusion

Lorraine, while on her death bed, did not consider Yvette part of her family. Also, Lorraine knew that Yvette could not inherit from her because of 43 C.F.R. § 30.243(a) and SDCL 29A-2-114(c)'s time-bars. However, Yvette argues she was denied equal protection because SDCL 29A-2-114(c) does not allow her to re-determine her paternity in a collateral estate. Yvette is treated the same as others who do not timely challenge orders determining heirs. There is no classification or unequal treatment, and even if so, she had a fair opportunity to prove her paternity. Yvette had many years after Donald's death to attempt to reopen Donald's probate to prove her paternity, but eventually was prohibited by federal regulation from reopening his estate because she did not act diligently after discovering her paternity.

SDCL 29A-2-114(c) is constitutional. Summary Judgment should have been granted to Audrey and Clinton.

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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 5,670 words and 30,254 characters.

s/Robert R. Schaub

Certificate of Service

Robert R. Schaub certifies that on October 20, 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
Estate of LORRAINE ISBURG FLAWS, Deceased.		PRO. NO. 10-4 JUDGMENT IN FAVOR OF YVETTE HERMAN

This action came on regularly for trial before the Court, sitting without a jury, on February 17, 2015; Paul O. Godtland and Robert R. Schaub appeared as attorneys for Audrey Isburg Courser and Clinton Banker; and David J. Larson and Jessica Hegge appeared as attorneys for Yvette Herman.

The Court having heard the testimony and having examined the proof offered by the respective parties, and being fully advised, having filed its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance with the same,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, DECREED, AND DECLARED as follows:

1. Yvette Herman is declared to be the child of Donald Isburg, and as such the niece and heir of Lorrain Isburg Flaws, on equal footing with, and having the same rights and entitlements as Tamara Allen, Audrey Isburg Courser, and Clinton Banker; and

2. In view of the specific and unique facts of this case, SDCL 29A-2-114 is unconstitutional in its specific application to Yvette Herman under both the Constitution of the State of South Dakota, and the Constitution of the United States; and

3. The Special Personal Representative of the estate shall in all respects consider Yvette Herman to be an heir of Lorraine Isburg Flaws on equal footing with the other parties named herein, and having the same rights and entitlements; and

4. The multiple Summary Judgment Motions of Audrey Isburg Courser and Clinton Baker are denied.

Made and entered this 2nd day of July, 2015.

BY THE COURT:

(SEAL OF COURT)

Circuit Court Judge

ATTEST:

Clerk

by _____
Deputy

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, VERDICT AND ORDER ON PARTIAL SUMMARY JUDGMENT RE: YVETTE HERMAN**

This matter came before the Court for trial on the Petition to Determine Heirs on February 17th, 2015, the Honorable Bruce V. Anderson presiding. Following the hearing Audrey Courser and Clinton Baker renewed their motions for Summary Judgment (Judgment as a Matter of Law). Audrey Courser and Clinton Baker, the known heirs, appeared through counsel, Paul Godtland and Robert Schaub, of Chamberlain, South Dakota. Yvette Herman appeared through her counsel, David Larsen, of Chamberlain, South Dakota. Following the testimony the Court ordered the parties to submit additional briefs concerning the constitutionality of SDCL 29A-2-114 and on the renewed motion for summary judgment. The Court, having heard the trial testimony, having reviewed the exhibits, and having read the parties' briefs, now issues the following Memorandum Decision and Order.

Facts and Procedural Posture

The background facts of this case are reflected in the Court's *Amended Memorandum Decision and Order* dated January 16, 2011, as well as in the South Dakota Supreme Court decision *In re Flaws*, 2012 S.D. 3.

The Supreme Court's decision in *In re Flaws* remanded this case to this Court with instructions to wait for the BIA Court to make a ruling on Yvette Herman's Motion to re-open

the estate to establish paternity of Donald Isburg as her father. Following the Supreme Court's decision in January of 2012, the BIA probate judge denied Yvette Herman's (hereinafter Yvette) request to re-open Donald's estate so that she could be declared Donald's daughter in April 2012. The BIA Court ruled that since the real property of the estate had been transferred out of trust status it no longer had jurisdiction to consider such a motion in the estate. No ruling on the merits of Yvette's motion as to Donald's paternity was made. In August 2014, that decision was affirmed by the U.S. Dept. of Interior, Office of Hearing and Appeals, Interior Board of Indian Appeals (the BIA Court and Board of Indian Appeals collectively referred to herein as BIA Court). Again, no ruling was made on the merits of Yvette's motion based upon the final phrase in SDCL 29A-2-114(c). This ruling, as well, found that the BIA Court lacked jurisdiction since the real property of Donald's estate was transferred out of trust status.

Audrey Courser and Clinton Baker (hereinafter Audrey and Clinton) then filed a *Motion for Partial Summary Judgment* against Yvette. Audrey and Clinton sought to again have this Court declare Yvette has no standing to challenge that she is an heir of Lorraine Isburg Flaws (hereinafter Lorraine). They argued that because Donald's estate was a federal probate, this Court was bound by that ruling under the supremacy clause and the matter was exclusively a federal question. They argue that since she has no standing in the BIA Court that she has no standing to challenge heirship here and that this Court, in determining heirs of Lorraine Flaws, is bound by the BIA Court's ruling. This Court denied that argument in its ruling on the summary judgment motion. Yvette argued that the exclusive means to establish paternity set forth by SDCL § 29A-2-114 are unconstitutional as applied to her. The Court denied Audrey and Clinton's motion for Summary Judgment without prejudice to its renewal at the conclusion of Yevette's evidence at trial. After a trial to the Court on February 17, 2015, Audrey and Clinton

renewed their motion for summary judgment and the Court took it under advisement to determine the constitutionality of SDCL § 29A-2-114 as applied to Yvette.

Testimony at the trial revealed that Yvette Herman was NOT told about the identity of her father until sometime around her eighteenth birthday. In 2003, Patricia Ross, a good friend of Donald told Yvette that Donald was her father. Patricia Ross also spoke with Lorraine about Yvette being Donald's daughter. Grace Donner, a longtime friend and co-worker of Donald, also knew and told Yvette that Donald was her father. Grace Donner testified Donald told her to tell Yvette that he is her father before he passed away in Arizona. She knew Donald well and was employed by him as a truck driver for three years. She credibly testified that prior to Donald's death she visited with him at his home in Arizona. During that visit Donald expressed that he was concerned he would not make it back to South Dakota to clear things up with Yvette and consequently, he wanted Grace to tell Yvette he was her father when Yvette was older. Grace testified she told Yvette this when Yvette's oldest son turned ten years old. Grace also testified (over objection) that she was aware of Yvette's general ancestral reputation in the Crow Creek Reservation community and that reputation was that Yvette was the daughter of Donald.

Yvette's mother, Joyzelle Gingway-Godfrey (hereinafter Joyzelle), testified she had separated from her husband Gene Rillings for a period of time and was involved in a romantic relationship with Donald Isburg during a time frame consistent with Yvette's conception. Joyzelle testified that Donald knew Yvette was his daughter. After her divorce from Mr. Rillings she moved to Spearfish, South Dakota and attended Black Hills State University. She credibly testified that Donald visited her and Yvette several times while she attended school there. She also credibly testified that Donald provided her some financial assistance for Yvette.

Joyzelle further testified that after she graduated from BHSU she lost all contact with Donald. She testified she never told Yvette who her actual father was until Yvette questioned her sometime in her adult life. Joyzelle also explained that she knew Lorraine personally, had conversations about Yvette with Lorraine, and that Lorraine had known for many years that Donald was Yvette's father. Joyzelle also credibly testified that she and Lorraine spoke of Yvette on numerous occasions and that Lorraine knew that Donald was her father. Lorraine also sat on the board at the local casino and was manager for a period of time. She was aware Yvette worked at the casino and expressed to Joyzelle that she was happy about the fact that Yvette worked there and was employed.

Yvette testified that Donald was not originally on her birth certificate, rather, Gene Rillings, Joyzelle's husband was. Testimony indicates Yvette found out Donald was her father when she was 18. Later, after moving back to Ft. Thompson from the Rosebud area, some of the Isburg family members told her Donald Isburg was her father, despite Yvette not knowing who Donald was.

After returning to Ft. Thompson Yvette had befriended some of the Isburgs. When she met older family members at their residence it became known to her that some of the Isburgs had notified family members that Yevette was a relative and she was off limits for dating. This caused Yevette concern for her own children dating family members in the area.

After becoming aware that Donald was possibly her father Yvette began investigating the matter. She testified that her motive was to make sure her birth record and ancestry records were correct for her and her children. She spoke with her mother who had kept this a secret from her. She spoke with other family members and others who had knowledge. All indicated that Donald was her father. She also spoke with Tamara Allen (half-sister and party here) and

Lorraine Flaws. In her discussions with Lorraine, Yvette advised her that Tamara Allen had agreed to submit to genetic testing to determine if they were sisters. Yvette had focused on Tamara because she knew that Donald had signed a paternity affidavit for her, paid support and acknowledged her as his daughter. Yvette was making arrangements to have this genetic testing completed.

In October or November of 2005 Yvette, Joyzelle, and Lorraine bumped into each other at the IHS hospital in Ft. Thompson. They had a discussion about how Yvette was attempting get Gene Rillings off of her birth certificate and her attempts to obtain the genetic testing from Tamara. According to Yvette's credible testimony, Lorraine told her "oh no, you don't have to do that, I will do it for you". Yvette credibly testified Lorraine offered this voluntarily and wanted it done. Based upon this conversation Yvette made arrangements with Dr. Kahler's office at Identify Genetics to have the DNA samples collected. Lorraine voluntarily presented herself to Sioux Valley Hospice and Homecare with Yvette and provided the DNA samples on February 8th, 2005, five years before Lorraine's death. Lorraine did this knowing that Yvette's goal was to establish Donald as her father in order to correct her birth record and as a logical conclusion from there, also establish Lorraine as her aunt.

Linda Johnson, a nurse at Sioux Valley Hospice and Home Care testified that she collected DNA samples for Identity Genetics and was familiar with their protocol. She collected the samples from Lorraine and Yvette. She knew Lorraine personally but nevertheless verified her identity by reviewing her driver's license at the time of the sample collection. The evidence shows that Ms. Johnson dutifully followed all protocols to ensure authenticity and chain of custody of the DNA samples and sent them to the laboratory for testing in accordance with the

chain of custody protocols required. This Court finds that the DNA samples tested were from Lorraine and Yvette and were authentic.

Yvette also presented evidence from Dr. Alex Kahler of Identity Genetics in Brookings, South Dakota. Dr. Kahler is an expert in genetic testing and received a Ph.D. in genetics from the University of California Davis. Dr. Kahler's testimony indicated that DNA samples from Yvette Herman and Lorraine Flaws were sent to him for genetic testing. Dr. Kahler explained the science behind the testing and what could be scientifically proven from the 17 allele markers that were tested. Dr. Kahler found that 15 out of the 17 matched between Yvette and Lorraine. From this data, Dr. Kahler testified that he could exclude a mother-daughter relationship, but the two test subjects were "very closely related." He testified there is a 94.82% chance Yvette and Lorraine are related. Dr. Kahler concluded that the two parties are most likely related as an aunt and a child. The credibility of Dr. Kahler's testimony and his scientific findings were not significantly challenged at trial and this Court finds that his testimony is scientifically reliable and credible. In this Court's view, the DNA evidence establishes conclusively that Donald is Yvette's father.

After obtaining the genetic testing (DNA) results from the testing that was done Yvette undertook to have her birth record corrected. Based upon this information and supporting affidavits, Yvette amended her birth certificate to include Donald Isburg as her biological father. Exhibit Y7 contains an Amended Order from the Crow Creek Sioux Tribal Court dated October 27, 2008, ordering a certificate of birth amendment. Indeed, Exhibit Y14, which was also received into evidence, is Yvette's current certificate of birth from the South Dakota Department of Health showing Donald Dale Isburg as her biological father. All of his was done while

Lorraine was alive. Lorraine was made aware of and had knowledge of both the results of the genetic testing and the amendment to the birth record.

Lorraine Flaws was an astute business woman who had a reputation in the community as being intelligent and highly motivated. Many years before she passed away she had a Last Will and Testament prepared and executed. Lorraine's Will left her estate to her late husband and late daughter who both pre-deceased her. She had knowledge of both Yvette and Tamara and that her brother Donald was their father or was alleged to be their father. Despite this knowledge, she took no action to amend or modify her will, or make other estate planning changes, to exclude Yvette or Tamara from inheriting any portion of her estate.

At the close of evidence the Court invited any renewed motions. After Audrey and Clinton renewed their motion for partial summary judgment, the Court advised the parties that it would be taking the matter under advisement to decide the issues, most importantly, the constitutionality of SDCL §29A-2-114 as it applies to Yvette Herman and he circumstances.

Analysis

The Court must first acknowledge that the South Dakota Supreme Court stated, "based upon the plain language of SDCL § 29A-2-114 and the foregoing authorities, we hold that the trial court did not err in determining that the methods and time limits in the statute for establishing paternity are exclusive." *In re Flaws*, 2012 SD 3. Thus, under the current statutory scheme, Yvette must establish she is Donald's daughter 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. However, the Supreme Court stopped short of affirming this Court's decision that SDCL 29A-2-114 was constitutional and remanded the matter so that Yvette's BIA Court paternity motion

could be exhausted in Donald's estate. That effort was thwarted not because Yvette lost that issue on the merits, but because the BIA Court no longer had jurisdiction. Consequently, because of the procedural and jurisdictional issues that determination was never made in favor of or against Yvette. Essentially, that issue was stranded without resolution.

According to Audrey and Clinton, Yvette cannot provide this Court with any evidence to establish she is Donald's daughter in accordance with SDCL § 29A-2-114. They argue the time limitation for Yvette to establish Donald as her father ended after Donald's death and when his estate was settled. The BIA declined to re-open Donald's estate and, thus, Yvette is without standing to establish she is an heir of Lorraine under the current statutory scheme.

Yvette argues that the DNA evidence presented at trial unquestionably proves she is Donald's daughter and Lorraine's niece and heir. Yvette again raises the argument that the statute is unconstitutional, but this time focuses her argument that it violates equal protection as applied to her and her circumstances. The South Dakota Supreme Court declined to decide the constitutionality issue in its 2012 decision. This Court gave a detailed analysis in its 2011 Memorandum Decision concerning the constitutionality of the statute. That decision focused almost exclusively on whether the statute was unconstitutional on its face. With a slightly different argument and presentation by Yvette presently, the Court will again analyze the constitutionality of SDCL § 29A-2-114 as it applies to Yvette.

Constitutionality of SDCL § 29A-2-114 and Equal Protection

The Equal Protection Clause of the South Dakota Constitution guarantees "[n]o law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." S.D. Const. art. VI, § 18. It is important to note that Yvette's challenge is not a facial challenge, but an as applied

challenge to the statute in question. The Court will not focus its analysis on whether the statute is constitutional on its face.[1]

The present case offers some unique new issues in this area of law especially when considering the structure of Yvette's argument. First of all, Yvette's counsel point out that illegitimacy has risen significantly since the 1960s. It is further pointed out that the issue of illegitimacy is not going to go away and affects a substantial and growing number of children in today's society and their ability to inherit from their biological fathers.

Yvette goes onto argue that the efficient administration of estates, commonly found as a ground to allow discrimination against non-marital children, is not a factor in the estate of Lorraine Flaws. Even though the estate was filed many years ago, it does remain in its initial stages due to the litigation over the determination of heirs. Moreover, this Court finds that with respect to this estate Yvette has not sat on her rights. She promptly filed and applied for formal probate and filed a Petition for Formal Probate and Determination of Heirs within 26 days of Audrey filing the initial petition. Her competing petition was filed prior to a hearing on Audrey's similar petition. Yvette further relies on *Reed v. Campbell*, 476 U.S. at 855, for the proposition that the orderly administration and finality of estates do not bear much weight in the constitutional analysis in certain estates.

Further, Yvette argues, the only credible state interest at stake in the current case is the avoidance of false claims, and points out that when SDCL § 29A-2-114 was adopted in 1995 DNA evidence was an evolving forensic science and was regarded with skepticism by the

[1] The Court already delved into this analysis and issued a decision concerning the facial constitutionality of SDCL § 29A-2-114 on February 16, 2011. This Court feels that was the correct ruling and will not re-visit the facial challenge.

courts.[2] Yvette points out that since that time DNA evidence has been accepted as reliable and "virtually dispositive" on certain evidentiary items. She goes on to argue that with the use of current genetic-based technology, such evidence has now become widely accepted in the scientific and legal communities and is even more reliable than proof based upon clear and convincing evidence to establish paternity. She concludes by arguing that it would not further the government's interest in preventing fraudulent claims by excluding genetic evidence of paternity or familial relationship and to do so in this case causes a discrimination against her as an illegitimate child, and obfuscates the truth. This is especially the case, according to Yvette, when she has 15 of 17 markers of DNA that match Lorraine and that Donald died when she was nine years old and was unable to protect her own interests. Consequently, Yvette argues, when considering the three enumerated means of establishing paternity as outlined in SDCL § 29A-2-114, denying her the right to establish paternity through substantially reliable and unrefuted scientific evidence denies her the equal protection of the law.

> In deciding any constitutional challenge, the Court is guided by the principle that:
>
> any legislative act is accorded a presumption in favor of constitutionality and that presumption is not overcome until the unconstitutionality of the act is clearly and unmistakably shown and there is no reasonable doubt that it violates fundamental constitutional principles.

Accounts Management, Inc. v. Williams, 448 N.W.2d 297, 299 (S.D. 1992). Further, in an equal protection claim, the Court must apply a two part test: (1) does the statute create an arbitrary classification among citizens, and (2) if the classification does not involve a fundamental right or suspect group, is there a rational relationship between legislative purpose and the classification

[2] SDCL 29A-2-114 has not been amended or revised since 1995, before DNA was generally acceptable as the best possible evidence for identification.

created? *See generally Tibbs v. Moody County Bd. Of Com'rs*, 2014 S.D. 44, ¶ 6, ¶ 11. Yvette has not argued that it is a fundamental right for a person to inherit from their biological father.

In deciding the first prong, the Court must look at "whether the statute applies equally to all people." *Tibbs* at ¶ 12. However, equal protection does not prohibit, "the Legislature from making classifications based upon differences in 'terms' surrounding individuals. . . . though there can be no discrimination between the members of one class." *Id.*

SDCL § 29A-2-114 undoubtedly makes a classification and a distinction between illegitimate and legitimate children. The statute automatically presumes that the father of a child born into wedlock is the mother's spouse. On the other hand, if the child is born out of wedlock, the child and/or father must take some affirmative step to establish the biological father's paternity. The statute does not, however, facially discriminate between members of one class. All illegitimate children are bound by the exclusive means set forth in the statute.

Since there is no suspect class or fundamental right at issue, the Court is not guided by strict scrutiny. *Tibbs*, ¶ 12. The appropriate standard outlined in *Lalli* and adopted in *Matter of Erbe* is that classifications based upon illegitimacy "must be substantially related to permissible state interests." *Matter of Erbe*, 457 N.W.2d 867, 869 (S.D. 1990) *citing Lalli v. Lalli*, 439 U.S. 259 (1978). Therefore, the differentiation "must bear some rational relationship to a legitimate state purpose." *Id.*

"The next inquiry is whether the classification is arbitrary. Equal protection of the law does not deny a state the right to make classifications in law, so long as those classifications are rooted in reason." *Tibbs*, at ¶ 13. "A statute will not be declared invalid 'unless it is patently and arbitrary and bears no rational relationship to a legitimate governmental interest.'" *Accounts*

Management, 448 N.W.2d at 300 *citing South Dakota Physicians Health Group v. State*, 447 N.W.2d 511, 515 (S.D. 1989); *see also Erbe* and *Lalli*, supra.

To begin the analysis it is important to recognize the legitimate governmental interest courts have recognized surrounding illegitimate heirship and a statute such as SDCL § 29A-2-114. The United States Supreme Court as well as the South Dakota Supreme Court has recognized that the two most important governmental interests are (1) to provide for the orderly administration of estates and (2) to protect the sanctity of the will or, in other words, to avoid false claims. *See Erbe* and *Lalli*, supra. The Court will look at each recognized governmental interest in turn.

1. Orderly Administration of Estates

It has been recognized that the state has an important governmental interest in the finality of estates and an orderly disposition of said estate matters. However, Yvette correctly points out that the United States Supreme Court has rejected this notion when the administration of the estate is pending and in its initial stages. *see Reed v. Campbell,* 475 U.S. 852 (1986). As this present case stands, it is in its initial stages and not finalized. Moreover, Yvette asserted her rights in this case early and promptly.

Audrey and Clinton take the position that since this estate is many years old that this is precisely the type of delay the legislature had in mind when adopting the statute. The Court does not agree. Any delay in this case is the unfortunate result of the timeliness and thoroughness of the judicial process, delays with the South Dakota Supreme Court appeal and the lengthy delay in the BIA Court appeal, not because Yvette did not timely bring a claim or chose to unjustly delay the administration of this estate.

While there is undoubtedly a rational basis for wanting finality and the orderly disposition of an estate, it is no basis in this case to deny Yvette's claim as Lorraine's heir. The government cannot show that by denying Yvette's claim that it would further the state's interest in finality of estates. The two, as applied in this case, are not rationally related.

Other evidence that the state's interest in the orderly disposition of estates is not furthered by denying Yvette's claim is the fact that her half-sibling Tamara's claim for an intestate share was still pending and in litigation. Even if Yvette's claim was resolved years prior, the estate could not still be finally administered until Tamara's claim had been resolved. Audrey and Clinton did not file a motion for Summary Judgment against Tamara as they had against Yvette. It was at this Court's insistence that the claims of Tamara and Yvette be considered simultaneously after remand so as to avoid further delay. In this light, neither Audrey and Clinton's assertions concerning the lengthy delay nor the state's interest in the orderly disposition of this estate carries any weight in light of the procedural history of this action.

2. Sanctity of the Will and Avoiding False or Spurious Claims

Undoubtedly the government has a legitimate interest in avoiding false claims and preserving the sanctity of the decedent's disposition of her property. Yvette argues, however, that there is no rational basis for not allowing her to prove through DNA evidence she is an heir on equal footing with Audrey, Clinton, and Tamara in her aunt's estate. She argues that DNA evidence is now "virtually dispositive" and proves she is Lorraine's niece as alleged. Audrey and Clinton argue that Yvette is attempting to re-litigate Donald's heirs which would have adverse effects on estate planning.

The Court recognizes two significant differences in this case and the *Lalli* line of rationale. First, the statutes analyzed and considered in those lines of cases were adopted before

DNA evidence was widely accepted in the scientific and legal communities. Second, Yvette is not trying to reopen, re-litigate, or dispute Donald's *closed* probate proceedings. Rather, Yvette is trying to establish she is an heir in the *open and pending* estate of Lorraine Flaws.

Yvette has cited numerous cases for the proposition that DNA evidence is the most reliable and "clear and convincing evidence" establishing paternity, or in this case, a familial connection. *see generally Davi v. Class*, 2000 S.D. 30, *In the Matter of C.W.*, 1997 S.D. 57. Furthermore, the legislative history of SDCL 29A-2-114 shows that it has not been amended since 1995. This indicates that there has not been serious consideration given to the advances in science with respect to establishing familial relationships. For this Court to find that Yvette is barred from inheriting in a pending probate because the Court must ignore the advancements in science and the exactness of DNA evidence causes an untenable and unjust result requiring this court to ignore reality and the truth. This case appears to be one in which the legislature is lagging behind the scientific realities of today's society.

With regard to the argument that the statute is unconstitutional as applied, the law recognizes that a statute may be constitutional on its face but that under circumstances, it may violate the constitution as applied. As stated in 16B Am. Jur. 2d, Constitutional Law § 940:

> One purpose of the Equal Protection Clause is to protect every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents. Thus, the guarantee of equal protection applies not only to facial legislative classifications but also to the administration of laws as well. Equal protection can be violated by discriminatory administration of a law impartial on its face. The Constitution not only forbids discriminatory laws making distinctions without a rational basis but also forbids the discriminatory and selective enforcement of nondiscriminatory laws. The validity of a state statute under the Equal Protection Clause therefore often depends on how it is construed and applied. Whether a statute or regulation valid on its face has been applied in a discriminatory manner is a factual question. The Supreme Court has stated that a determination of this question is not confined to the language of the statute under

> challenge in determining whether that statute has any discriminatory effect; just as a statute nondiscriminatory on its face may be grossly discriminatory in its operation, so may a statute discriminatory on its face be nondiscriminatory in its operation.
>
> Although facially neutral laws that may have an impact on certain classes do not violate the Equal Protection Clause, at least in the absence of an element of intentional or purposeful discrimination, a provision not objectionable on its face may be adjudged unconstitutional because of its effect and operation. A law, though fair on its face and impartial in appearance, which is of such a nature that it may be applied and administered with an evil eye and unequal hand so as to make it unjust and illegal discrimination is, when so applied and administered, within the prohibition of the Federal Constitution. Hence, in a consideration of the classification embodied in a statute, regard should be given not only to its final purpose but likewise to the means provided for its administration. For example, it is a denial of equal protection of the law to make the execution of a statute dependent on the unbridled discretion of a single individual or an unduly limited group of individuals.

16B Am. Jur. 2d, Constitutional Law, § 940.

The Supreme Court at an early date recognized the rule that an act of the legislature which in terms would give to one individual certain rights and the benefit of certain modes of procedure, and would deny to another similarly situated the same rights, could be challenged successfully on the ground of unjust discrimination and denial of the equal protection of the laws. *Id.* at § 928. The 14th Amendment was not intended to deprive the states of their power to establish and regulate judicial proceedings, and its provisions therefore only restrain acts which so transcend the limits of classification as to cause them to conflict with the fundamental conceptions of just and equal legislation. *Id.*

> It is a general rule that equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected, if such a course would also be applied to any other person in the state under similar circumstances and conditions. Furthermore, the Equal Protection Clause does not exact uniformity of procedure; the legislature may classify litigation and adopt one type of procedure for one class and a different type for another, so long as the classification meets the test of reasonableness.

Id. at § 931.

"Incidental individual inequality resulting from the operation of a rule of court does not make it offensive to the 14th Amendment. The legislature may prescribe novel and unprecedented methods of procedure, provided that they afford the parties affected substantial security against arbitrary and unjust spoliation." *Id.* at § 931.

Supreme Court has given some guidance on the issue. In *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 321 (2006) the Court gave the following passage:

> Generally speaking, when confronting a statute's constitutional flaw, this Court tries to limit the solution to the problem, preferring to enjoin only the statute's unconstitutional applications while leaving the others in force, see *United States v. Raines,* 362 U.S. 17, 20–22, or to sever its problematic portions while leaving the remainder intact, *United States v. Booker,* 543 U.S. 220, 227–229. Three interrelated principles inform the Court's approach to remedies. First, the Court tries not to nullify more of a legislature's work than is necessary. Second, mindful that its constitutional mandate and institutional competence are limited, the Court restrains itself from "rewrit[ing] state law to conform it to constitutional requirements." *Virginia v. American Booksellers Assn., Inc.,* 484 U.S. 383, 397. Third, the touchstone for any decision about remedy is legislative intent. After finding an application or portion of a statute unconstitutional, the Court must ask: Would the legislature have preferred what is left of its statute to no statute at all? See generally, *e.g., Booker, supra,* at 227. Here, the courts below chose the most blunt remedy—permanently enjoining the Act's enforcement and thereby invalidating it entirely. They need not have done so. In *Stenberg v. Carhart,* 530 U.S. 914, —where this Court invalidated Nebraska's "partial birth abortion" law in its entirety for lacking a health exception—the parties did not ask for, and this Court did not contemplate, relief more finely drawn, but here New Hampshire asked for and respondents recognized the possibility of a more modest remedy. Only a few applications of the Act would present a constitutional problem. So long as they are faithful to legislative intent, then, in this case the lower courts can issue a declaratory judgment and an injunction prohibiting the Act's unconstitutional application. On remand, they should determine in the first instance whether the legislature intended the statute to be susceptible to such a remedy.

Ayotte at 321.

In *U.S. v. Booker*, 543 U.S. 220 (2005), Justice Thomas, dissenting in part, stated:

> When a litigant claims that a statute is unconstitutional as to him, and the statute is in fact unconstitutional as applied, we normally invalidate the statute only as applied to the litigant in question. We do not strike down the statute on its face. In the typical case, "we

neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants." *United States v. Treasury Employees,* 513 U.S. 454, 478 (1995); see also *Renne v. Geary,* 501 U.S. 312, 323–324 (1991); *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469 (1989); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

Booker, supra, at 314 (Justice Thomas dissenting).

With these principals in mind, the Court has considered this case very carefully and has summarized its findings on the law and facts as follows:

1) Substantial credible evidence and the DNA testing establishes that Yvette is the daughter of Donald and the niece of Lorraine, and
2) Lorraine knew that Yvette may be her niece and consequently agreed to help her by submitting to a DNA test to establish the same, and
3) Lorraine knew of the results of the genetic testing and did not take action to write a new will and exclude Yvette as an heir which she had the right to do (this becomes very important when you consider that Lorraine was a very astute business person), and
4) The only thing prohibiting Yvette from inheriting from her aunt through her father is the statute in question that limits the means of establishing paternity, and
5) The legislature has not kept up with modern means of establishing paternity or heirship in this area of the law, and
6) The statute works a discrimination against Yvette as an illegitimate because it treats her differently and disinherits her when she clearly stands on equal footing with Donald's other children, and
7) In this case Yvette's right to establish paternity in Donald's estate was foreclosed, not because she lost on the merits, but because the estate was started and closed when she was a very young child, her mother had kept the true identity of her father a secret from her which

resulted in her being unable to protect her interests, and because the BIA Court lost jurisdiction to determine the issue after she had become aware of the true identity of her father, and

8) The legislative intent in adopting the Uniform Probate Code shows a desire to expand the means of establishing paternity for a child born out of wedlock, not to restrict such means; and

9) The failure of the statute to allow this important and unrefuted evidence to be used to establish the right to inherit is NOT substantially related to a legitimate government/state interest.

This Court cannot find any rational basis to justify the state's interest in preventing fraudulent claims by denying Yvette the opportunity to present DNA evidence in a pending probate. There is not a constitutionally justifiable reason that Yvette cannot stand on equal footing as Donald's other children. It has been "*clearly and unmistakably*" shown and there is no reasonable doubt that the statute violates fundamental constitutional principles when applied to the circumstances of Yvette's claim here. *Accounts Management, Inc. v. Williams*, 448 N.W.2d 297, 299 (S.D. 1992). SDCL §29A-2-114, as applied to Yvette, acts in an arbitrary and discriminatory manner without justification, hides the truth, and works an injustice. Precluding her from standing on equal footing as the statute and her siblings attempt to do is a violation of the equal protection clause of the United States and South Dakota Constitutions.

By so ruling, this Court's decision is strictly limited to the circumstances Yvette's case presents. The Court is limiting its ruling in this regard and will not re-write the statute. Had the land in Donald's estate not been transferred out of trust status, or had Yvette's mother disclosed that Donald was her father and taken action to preserve her interests in his estate, the BIA court

would have had sufficient jurisdiction to rule upon the issue presented here. Under the circumstances here, that issue was stranded and left without a resolution in favor of or against Yvette. Consequently, with these limitations, "the Court tries not to nullify more of a legislature's work than is necessary", "restrains itself from "rewrit[ing] state law to conform it to constitutional requirements", and leaves the statute substantially intact as opposed to leaving no statute at all. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 321 (2006).

Verdict and Order

Based on the above and foregoing, IT IS HEREBY ORDERED that the Motion for Partial Summary Judgment against Yvette Herman is DENIED; and it is further

ORDERED, that SDCL 29A-2-114 is unconstitutional as applied to Yvette Herman and the circumstances of her claim, and

It is further the VERDICT of this Court that Yvette Herman is the heir of Lorraine Flaws and shall inherit through the intestate succession laws accordingly.

THIS MEMORANDUM DECISION SHALL BE CONSIDERED THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW IN ACCORDANCE WITH SDCL 15-6-52(a)

Dated this 9th day of June, 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 LARRAINE ISBURG FLAWS, **Deceased.**	**PRO. 10 - 004** **MEMORANDUM DECISION AND ORDER ON PARTIAL SUMMARY JUDGMENT RE: YVETTE HERMAN**

This matter came before the Court on the filing of a *Motion for partial Summary Judgment* against Yvette Herman 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. Yvette Herman appeared through her counsel, David Larsen, of Chamberlain, South Dakota and Jonathan Van Patten of Vermillion, South Dakota. The Court, having read the parties' briefs and having heard oral arguments, now issues the following Memorandum Decision and Order.

Facts and Procedural Posture

The pertinent facts and posture of this case are accurately reflected in the Court's *Amended Memorandum Decision and Order* dated January 16, 2011, as well as in the South Dakota Supreme Court decision *In re Flaws*, 2012 SD 3.

Since the Supreme Court's decision in January of 2012, the BIA probate judge denied Yvette's request to be declared Donald's daughter in April 2012. In August, that decision was affirmed. Audrey Courser and Clinton Baker (hereinafter Audrey and Clinton) then filed a *Motion for Partial Summary Judgment* against Yvette Herman (hereinafter Yvette). Audrey and Clinton are seeking to again have this Court declare Yvette has no standing to challenge that she

is an heir of Lorraine Isburg Flaws (hereinafter Lorraine). Yvette argues that the exclusive means set forth by SDCL § 29A-2-114 are unconstitutional as applied to her.

Analysis

The Court wants to first acknowledge that the South Dakota Supreme Court stated, "based upon the plain language of SDCL § 29A-2-114 and the foregoing authorities, we hold that the trial court did not err in determining that the methods and time limits in the statute for establishing paternity are exclusive." *In re Flaws*, 2012 SD 3. Thus, Yvette must establish she is Donald's daughter 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.

Yvette has not provided this Court with any evidence to establish she is Donald's daughter in accordance with SDCL § 29A-2-114. The time limitation for Yvette to establish Donald as her father ended after Donald's estate was settled. The BIA declined to re-open Donald's estate and, thus, Yvette is without standing to establish she is an heir of Lorraine.

Yvette again raises the argument that the statute is unconstitutional as applied to her. The South Dakota Supreme Court declined to decide the constitutionality issue in its 2012 decision. This Court gave a detailed analysis in its 2011 Memorandum Decision concerning the constitutionality of the statute. With a slightly different argument and presentation by Yvette, the Court will again analyze the constitutionality of SDCL § 29A-2-114 as it applies to Yvette.

The Court is tasked with deciding whether the procedural demands that the statute places on Yvette bear an "evident and substantial relation to the particular state interests the statute is designed to serve." *Lalli v. Lalli*, 439 U.S. 259, 268 (1978). It is well-settled law that a classification based upon illegitimacy must be substantially related to a permissible state interest.

Id.; see also *Trimble v. Gordon*, 430 U.S. 762 (1977). Courts have held that a primary goal of "considerable magnitude" to the challenged statute is the "just and orderly disposition of property at death." *Id.* at 524 – 25. An additional, substantial state interest is the prevention of spurious or fraudulent claims. *Id.* at 526.

The Court points out that several cases have held *more* restrictive statutes than SDCL § 29A-2-114 to be constitutional as the state's interest in finality of the estate is substantially related to the statute. *Lalli*, supra; *Trimble*, supra; *Matter of Erbe*, 457 N.W.2d 867 (S.D. 1990). It is significant that the Supreme Court in *Lalli* stated, "Our inquiry under the Equal Protection Clause does not focus on the abstract "fairness of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks rationality contemplated by the Fourteenth Amendment." *Lalli* at 272 – 73.

The present case offers some unique, new issues in this area of law, especially when considering the structure of Yvette's argument. First of all, Yvette's counsel point out that illegitimacy has risen significantly since the 1960s. It is further pointed out that this issue of illegitimacy is not going to go away and affects a substantial number of children in today's society.

Yvette goes onto argue that the efficient administration of estates, commonly found as a ground to allow discrimination against non-marital children, is not a factor in the estate of Lorraine Flaws. Even though the estate was filed many years ago, it does remain in its initial stages due to the litigation over the determination of heirs. Yvette further relies on *Reed v. Campbell*, 476 U.S. at 855, for the proposition that the orderly administration and finality of estates do not bear much weight in the constitutional analysis in certain estates.

Yvette's counsel goes onto argue that the only credible state interest at stake in the current case is the avoidance of false claims, and points out that when SDCL § 29A-2-114 was adopted DNA evidence was regarded with skepticism. Yvette's counsel goes on to point out that since that time DNA evidence has been accepted as reliable and "virtually dispositive" on certain evidentiary items. They go onto argue that with the use of current genetic-based technology, such evidence has now become even more reliable than proof based upon clear and convincing evidence to establish paternity. They conclude that it would not further the government's interest in preventing fraudulent claims by excluding genetic evidence of paternity or familial relationship. This is especially the case, according to Yvette, when she has 15 of 17 markers of DNA that match Lorraine. Consequently, Yvette argues that when considering the three enumerated means of establishing paternity as outlined in SDCL § 29A-2-114, denying Yvette the right to establish paternity through substantially reliable scientific evidence denies her the equal protection of the law.

In part two of Yvette's brief, counsel invites the Court to exhaust all avenues before addressing the constitutional question. This would require denying the motion for summary judgment and setting the matter for trial. This Court believes this to be the best avenue to approach this important question of law. Rather than ruling upon the constitutionality of the statute on summary judgment, this Court would prefer to have a full and complete trial on the evidence, where the geneticist can be examined and cross-examined as to the veracity of the scientific conclusions before ruling upon such an important motion.

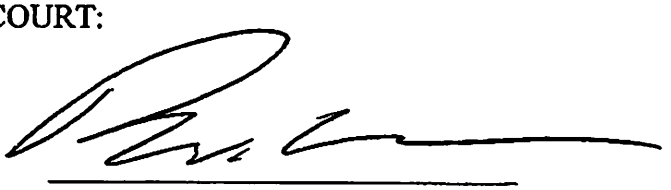
Consequently, this Court has decided to deny the motion for summary judgment and proceed with the trial which is already scheduled. The motion for summary judgment is denied without prejudice and may be renewed after Yvette has rested her case-in-chief.

Order

Based on the above and foregoing, IT IS HEREBY ORDERED that the partial Summary Judgment against Yvette Herman is DENIED WITHOUT PREJDUICE to its renewal following the presentation of Ms. Herman's evidence at trial.

Dated this 28 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 JUCICIAL CIRCUIT

	)	PRO 10-4
	)	
In the Matter of the Estate	)	AMENDED
Of Lorraine Isburg Flaws,	)	MEMORANDUM DECISION
Deceased	)	AND ORDER
	)	
	)	

The court previously entered the foregoing Memorandum Decision and Order and subsequently it was brought to the court's attention that there was a factual mistake on page 8 of that decision. The amendment to this decision is underlined herein.

This matter came before the court on the filing of a Motion for Partial Summary Judgment on behalf of the known heirs of the estate requesting that this court find, as a matter of law, that Yvette Herman does not have standing to maintain her claim that she is an heir of the estate. A hearing was held on said motion on the 20th day of July, 2010, in the Courtroom of the Brule County courthouse in Chamberlain, South Dakota. Paul Gotland, attorney at law, appeared on behalf of the known heirs, Audrey Courser and Clinton Baker. Robert Schaub, attorney at law, appeared on behalf of Audrey Courser. David Larson and Jonathan Van Patten appeared on behalf of Yvette Herman.

PROCEEDURAL HISTORY

This estate was commenced by the filing of an Application for Formal Appointment of Personal Representative and Determination of Heirs. Yvette Herman, through counsel, opposed the Application on the basis that she was a niece of the decedent and equally entitled to appointment, or that a special administrator should be appointed. The Court appointed Stan Whiting, attorney at law, form Winner, South Dakota as Special Administrator and set a hearing to determine heirs. Prior to that hearing, this motion was filed claiming that pursuant to the provisions of SDCL 29A-2-114 that Yvette Herman did not have standing to assert that she was an heir of the estate.

FACTS

The Decedent in this case, Lorraine Isburg Flaws, (hereinafter Lorraine) was married but her husband and only child have 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. Yvette was eleven years old at that time and was not given actual notice of those proceedings, and due to her age at the time it is highly unlikely that she was a recipient of any published notice.

In Donald's BIA probate Audrey and Clinton did inherit an interest in real property on the Crow Creek Reservation in South Dakota. After the probate, Lorraine, Audrey and Clinton owned some of this land as tenants in common. In 2003, Lorraine had her tribal land taken out of trust and had Audrey and Clinton do the same thing. Fee Simple Patents were issued to them as owners by the United State's Government. Audrey and Clinton claim that Lorraine made gifts to them since 2003 by paying taxes each year on the land taken out of trust, as the record shows that Lorraine paid all such taxes. In 2006 Lorraine, Audrey and Clinton conveyed some of this land to a third party.

Yvette Herman (hereinafter Yvette) was born on June 1st, 1970 and credibly claims to be Donald's daughter. At the time of her conception Yvette's mother, Joyzelle Rilling, was married to Gene Rilling. Joyzelle Divorced Gene Rilling a month before

Yvette's birth. Joyzelle has provided a sworn statement that the true biological father of Yvette is Donald Isburg. There is some evidence in the record, submitted by affidavits, that Donald acknowledged to friends that he was Yvette's father, but no evidence that he ever acknowledged such to Yvette, Lorraine, Audrey, Clinton, or the public.

In 2005, Yvette contacted Lorraine with regard to her claim that Donald was her father. At Yvette's request Lorraine agreed to provide a DNA sample for testing to determine if Donald was her father. The sample was taken on December 12, 2005. As a result of that testing Identity Genetics, a genetics laboratory, concluded that there was a 94.82% probability that Yvette was the daughter of Donald.

With this information Yvette petitioned the Crow Creek Sioux Tribal Court for an order of Paternity and to correct her birth record. Following a hearing on the matter the Crow Creek Tribal Court entered an order on June 20th, 2008 declaring that Donald was the father of Yvette and ordering that the birth record would be changed to include him as the biological father. Based upon that order the South Dakota Department of Health, Vital Records, has issued a new birth certificate naming Donald as the biological father of Yvette. Lorraine died February 18, 2010. The facts show that Lorraine, Audrey and Clinton were not given any notice of the tribal proceedings. However, there is evidence in the record that indicates all three knew of Yvette and her claims. The record does not show if Lorraine was made aware of the results of the genetic testing. The court notes, without making a specific finding, that there is substantial evidence in the record supporting Yvette's claim that she is the daughter of Donald.

Yvette has petitioned the Department of the Interior, Bureau of Indian Affairs, Office of Hearings and Appeals to reopen Donald's probate to include her as an heir. The court had initially taken this matter under advisement to wait and see if that petition was granted. Upon further inquiry this court has determined that it could take more than a year to have Yvette's petition heard before that tribunal. Yvette has also filed a petition in this court to probate Donald's estate despite the fact that his BIA probate had jurisdiction over his assets and was completed and settled almost three decades ago.

Yvette's claim is that she is the daughter of Donald and therefore the niece of Lorraine, entitled to inherit from her estate. Audrey and Clinton claim that she has no standing to establish herself as an heir pursuant to SDCL 29A-2-114.

DECISION

In deciding this motion for summary judgment the court must view the evidence most favorably to the nonmoving party and resolve all reasonable doubts in her favor. The court must determine if the moving party has demonstrated the absence of any genuine issue of material fact and that they are entitled to judgment in their favor as a matter of law. *Cowan Brothers, LLC v. American State Bank*, 2007 SD 131 ¶ 12.

ARE THE METHODS AND TIME LIMITATIONS TO ESTABLISH PATERNITY IN SDCL 29A-2-114 EXCLUSIVE OR ARE OTHER METHODS AND TIME LIMITATIONS PERMITTED?

This case is determined by the language of SDCL 29A-2-114. That statute provides:

> **"Parent and child relationships**
> (a) For purposes of intestate succession by, from, or through a person, and except as is provided in subsection (b), an individual born out of wedlock is the child of that individual's birth parents. (language omitted as to birth parents kindred inheriting from the child)
> (b) (language of adopted children omitted)
> (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 acknowledgement by the father during the child's lifetime, by a judicial determination of paternity during the father's lifetime, or by the presentation of clear and convincing proof in the proceedings to settle the father's estate". (emphasis added)

Since Yvette claims to inherit from the estate of Lorraine as her niece she is inheriting "through" her father under subsection (a) of the statute. However, her ability to do so is limited by the language in subsection (c) as to proof of the identity of her father. Audrey and Clinton argue that the statute provides the exclusive means to establish the identity of the father and based upon the undisputed facts, Yvette's claim fails because: 1) Her mother and Donald did not subsequently marry; 2) Donald has never made a written acknowledgment of any kind; 3) a judicial determination was never made during Donald's lifetime; and 4) Since Donald's estate was settled almost three decades ago, Yvette should not be allowed to present clear and convincing evidence of paternity in this collateral estate to inherit from Donald's sister. Yvette argues that the use of the

word "may" in the statute indicates that the list of means to establish the identity of the father is permissive, especially when read in conjunction with subsection (a) and consequently, the four means set forth in the statute are not the exclusive means to establish paternity in estates. Yvette argues correctly that the phrase in subsection (a) "for purposes of intestate succession by, from or through a person . . . an individual born out of wedlock is the child of that individual's birth parents" was written to reverse the long-standing discrimination against what were termed "illegitimate" children, and relies upon *Lalli v. Lalli*, 439 U.S. 259 (1978) and *Trimble v. Gordon*, 430 U.S. 762 (1977).

Yvette also cites several cases that hold that the word "may" in the statute is permissive and not mandatory or exclusive. *In re Estate of Rogers*, 81 P.3d 1190 (Hawaii 2003); *Estate of Palmer*, 658 NW2d 197 (Minn. 2003); *Lewis v. Schnieder*, 890 P.2d 148, 150-151 (Colo App. 1994). In almost all of these cases, the court was considering a similar version of the Uniform Probate Code (UPC) provision at issue here that essentially stated that parentage in a probate matter may be established under the Uniform Parentage Act (UPA), and concluded that in such a situation the language was permissive. All of these cases deal with some form of language that acts as a statute of limitations on asserting the father child relationship in an estate. What this court has observed on reading the many and various cases on the issue is that almost all states have adopted different versions of the statute.

South Dakota adopted the UPC in 1995. The actual UPC language is as follows:

> "Section **2-114. Parent and Child Relationship.**
> (a) Except as provided in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status. The parent and child relationship may be established under [the Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference]. (emphasis added)
>
> (b)(omitted portion as to adopted children)
>
> (c) Inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child." [1]

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[1] The comments to the UPC provision at issue provide: `Subsection` (a). Subsection (a) sets forth the general rule: For purposes of intestate succession, a child is the child of his or her natural parents, regardless of their marital status. In states that have enacted the Uniform Parentage Act (UPA), the parent and child relationship

South Dakota has not adopted the UPA. Consequently, the cases dealing with this issue have generally had to decide if the phrase "may be decided under the UPA" was the exclusive manner in which to establish the parent and child relationship or if it could be established by some other means, especially one with a longer statute of limitations or one which would revive a claim that was already expired by the language of the UPA or similar acts. The cases almost unanimously rule in favor of the child born out of wedlock and apply a longer limitation period.[2]

It appears that South Dakota, when it adopted it's version of the UPC, used a hybrid formula which established four separate methods to establish paternity and set forth for each of those a separate limitations period. Most importantly, the legislature established the last catchall phrase allowing the child to establish the identity of her father by presenting clear and convincing evidence in the father's estate proceedings. Prior to adoption of the UPC, the South Dakota Supreme Court had already decided Estate of Erbe, 457 NW2d 867 (SD 1990) and In Re Kessler's Estate, 74 NW2d 599 (SD 1956). In Erbe, the court ruled that a child born out of wedlock was not denied equal protection of the law by a statute that limited his ability to establish paternity and affirmed the trial court in dismissing his claim that he was an heir to the deceased[3]. In Kessler's Estate the court affirmed the trial court's ruling that the father had acknowledged the child as his son repeatedly in the community under a statute that required public acknowledgement and "receiving it as such into his family". Furthermore, The U.S. Supreme Court had

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may be established under the UPA. Non-UPA states should insert a reference to its own statute or, if it has no statute on the question, should insert the phrase "applicable state law." **Subsection (b).** Subsection (b) contains exceptions to the general rule of subsection (a). Subsection (b) states the rule that, for inheritance purposes, an adopted individual becomes part of the adopting family and is no longer part of the natural family. (omitted portions concerning adoption) **Subsection (c).** Subsection (c) is revised to provide that neither natural parent (nor that natural parent's kindred) can inherit from or through a child unless that natural parent, mother or father, has openly treated the child as his or hers and has not refused to support the child. Prior to the revision, that rule was applied only to the father. The phrase "has not refused to support the child" refers to the time period during which the parent has a legal obligation to support the child. **Companion Statute.** A state enacting this provision should also consider enacting the Uniform Status of Children of Assisted Conception Act (1988). **Historical Note.** This Comment was revised in 1993. For the prior version, see 8 U.L.A. 118 (Supp. 1992).

[2] Lewis v. Schneider, 890 P2d 148, 150-151 (Colo. App.1994); Ellis v. Ellis, 752 SW2d 781-782 (Ky, 1988); Estate of Palmer, 658 NW2d 197-199 (Minn. 2003); In Re Nocita, 914 SW2d 358,359 (Mo. 1996); Wingate v. Estate of Ryan, 693 A.2d 457,459 (NJ 1997); In Re Estate of Greenwood, 587 A.2d 749, 762 (Pa. 1991) and Taylor v. Hoffman, 544 S.E.2d 387 (W.Va. 2001).

[3] In *Erbe*, the statute required that to establish paternity for inheritance purposes the mother and father of the child must subsequently marry and the father must acknowledge him as his child or adopt him into his family. Mr. Erbe did not marry the child's mother but did acknowledge the child as his son.

decided *Lalli*, 439 U.S. 259 and *Trimble v. Gordon*, 430 U.S. 762 (1977). In *Lalli*, the court ruled that a statute requiring the child to establish paternity during the father's lifetime did not deny the child equal protection of the law.

In the present case the statute requires establishment of paternity in the proceeding to settle the father's estate. SDCL 29A-2-114 is less restrictive than the statute considered in *Lalli*. Under the statute in Lalli, a child's right to pursue this issue was terminated at the death of the father. Under South Dakota law it survives the death and may be established during the administration of his estate, a significant extension of the limitation period. Presumably the legislature knew what they were doing when they drafted SDCL 29A-2-114 and intended the last phrase to provide a last resort, so to speak, and established an extended limitations period. However, it is doubtful that the legislature intended to extend the limitation period indefinitely.

Consequently, since SDCL 29A-2-114 does not refer to other statues to establish the identity of the father and contains a list of means of establishing such identity, each with its own limitation period, the cases relied upon by Yvette to establish that the statute is permissible are distinguishable. From a reading of the statute as a whole, the word "may" refers to the four separate exclusive methods set forth therein to establish identity and nothing in the plain meaning of the statute indicates that some other time limitation would or could be applicable. Since Yvette did not establish Donald as her father in proceedings to settle his estate, the limitations period to do so has expired. She has also failed to show the existence of any other genuine issue of material fact as to the other three means of establishing identity and therefore, Audrey and Clinton are entitled to judgment as a matter of law.

The court realizes that this is a harsh and unjust result. Thus, the reason the court has had this matter under advisement for such a long time. It appears that Yvette has substantial evidence to support her claim that Donald is her father and Lorraine is her aunt. It is unfortunate that the statute imposes such an inequitable result.

SHOULD THE COURT DEFER RULING UNTIL PROCEEINGS ARE HAD ON YVETTE'S NEW STATE COURT PETITION FILED IN THIS COURT?

Yvette also argues that that if this court rules that the means to establish the identity of the father in SDCL 29A-2-114 are exclusive, which it has, then the court should defer ruling until she can present such evidence in the new probate proceeding she has initiated in this court for Donald. The court has given this issue serious thought and consideration as a means to avoid the harsh and unjust result in part one of this opinion. However, at the time of his death Donald lived in Arizona, was a member of the Crow Creek Sioux Tribe in South Dakota, and his estate was probated by the Bureau of Indian Affairs in the State of Oregon as Audrey and Clinton were residents of Washington, and the BIA court in Oregon had jurisdiction due to their residence in Washington. His estate in South Dakota consisted of tribal land located on the Crow Creek Reservation held in trust by the United States Government. His estate was completely settled in the BIA probate proceedings in Oregon. Without citing authority, it is obvious that the state court does not have jurisdiction to probate an estate in tribal trust land as such jurisdiction lies with the tribal courts and the federal government, more specifically the Department of Interior. The invitation to allow Yvette to establish paternity in such a manner is inviting, but after serious consideration this court finds that it has no jurisdiction to do so.

IS SDCL 29A-2-114 UNCONSTITUTIONAL AS APPLIED TO YVETTE?

Yvette' final argument is that if SDCL 29A-2-114 provides the exclusive means and time limitations to submit her claims, then the statute denies her the equal protection of the law. It is well recognized that classifications based upon illegitimacy must be substantially related to a permissible state interest. *Lalli v. Lalli*, 439 U.S. 259 (1978) and *Trimble v. Gordon*, 430 U.S. 762 (1977). The law in question in *Trimble* required that the child be legitimized by intermarriage of the parents as a precondition of inheritance. Such is not the case here. The law in *Lalli*, allowed an illegitimate child to inherit from his father only if a court of competent jurisdiction entered an order of paternity during the father's lifetime. The *Lalli* court, in considering the permissible state interest considered the Bennett Commission report, a commission that considered significant material in recommending the adoption of the statute in question, and found that the primary goal of

the statute at issue was to provide for the just and orderly disposition of property at death and to enhance accuracy of proof by allowing the father to participate and defend the proceedings.[4] The *Lalli* court found these to be significant state interests. In finding that the statute was substantially related to those significant state interests, the court stated:

> "We do not question that there will be some illegitimate children who would be able to establish their relationship to their deceased fathers without serious disruption of the administration of estates and that, as applied to such individuals (the statute) appears to operate unfairly. But few statutory classifications are entirely free from the criticism that they sometimes produce inequitable results. Our inquiry under the Equal Protection Clause does not focus on the abstract "fairness" of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment." *Lalli* at 272-273.

Movants argue that this case is settled by following *Matter of Erbe*, 457 NW2d 867 (SD 1990). It is not. That was a case decided in 1990 prior to South Dakota adopting the UPC. It is a completely different statute and is of little assistance in deciding this matter, other than it reinforces the point laid out in *Lalli* generally, that the there are legitimate state interests which can justify different treatment of children born out of wedlock.

During oral argument counsel for Yvette argued that the statute is unconstitutional as applied to Yvette because she was eleven years old at the time of her father's death, she was not given actual notice of the proceedings and it was highly unlikely that she benefitted from any posted or published notice. Counsel did not cite any authority for this proposition in his brief. However this court has considered the matter extensively

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[4] The court quoted the Bennett Commission: "An illegitimate, if made an unconditional distributee in intestacy, must be served with process in the estate of his parent or if he is a distributee in the estate of the kindred of a parent. . . . And, in probating the will of his parent (though not named a beneficiary) or in probating the will of any person who makes a class disposition to 'issue' of such parent, the illegitimate must be served with process. . . . How does one cite and serve an illegitimate of whose existence neither family nor personal representative may **526 be aware? And of greatest concern, how achieve finality of decree in any estate when there always exists the possibility however remote of a secret illegitimate lurking in the buried past of a parent or an ancestor of a class of beneficiaries? Finality in decree is essential in the Surrogates' Courts since title to real property passes under such decree. Our procedural statutes and the Due Process Clause mandate notice and opportunity to be heard to all necessary parties. Given the right to intestate succession, all illegitimates must be served with process. This would be no real problem with respect to those few estates where there are 'known' illegitimates. But it presents an almost insuperable burden as regards 'unknown' illegitimates. The point made in the [Bennett] commission discussions was that instead of affecting only a few estates, procedural problems would be created for many-some members suggested a majority-of estates."

and has considered a number of cases that have addressed some similar points and resolved them under the insurmountable burden doctrine. In *Daniels v. Sullivan,* 979 F.2d 1516 (11th Cir. 1992) (citing Mills v Habluetzel, 456 U.S. 91 (1982)), the court found that the Social Security Administration's application of Georgia's intestacy statute that required paternity to be established during the fathers lifetime created an "insurmountable burden" and denied the child equal protection of the law. In *Handley v. Schweiker*, 697 F.2d 999 (11th Cir. 1993) the court made a similar finding as to Alabama's similar statute. In each of the above cases the court found that due to the infancy of the claimant at the time of the death of the father an insurmountable burden was established that denied equal protection. The statues at issue required that paternity of the father be established prior to the death of the father.

SDCL 29A-2-114 allows the child to inherit if they present clear and convincing evidence in the father's estate proceedings. As compared to those statutes considered in *Mills v Habluetzel* and *Handley v. Schweiker,* there is a significant difference. In those cases the child is completely foreclosed from proceeding on his claim when the father suddenly dies. Upon his death, and in those cases without much notice, (*Handley,* four months before birth; *Mills,* father died when child was two and a half yeas of age who was born to a 14 year old mother), the child's claim to benefits or inheritance dies with the father. Under SDCL 29A-2-114 the claim does not die with the father but rather survives and can be proven in his estate. In such a case it is up to the child, her mother or legal guardian to establish the claim and assert those rights during the estate proceeding. This is not an insurmountable obstacle but a legitimate limitation on the right of the child to establish their rights, a limitation that is in excess of what the court found sufficient for equal protection analysis in *Lalli.*

Consequently, since SDCL 29A-2-114 provides more protection than the law found to be constitutional in both *Lalli* and *Estate of Erbe*, and since it does not create an insurmountable burden for the child, this court denies Yvette's constitutional challenge to the statute.

Once again, this court recognizes the harsh and unjust result in this case. These inequities were recognized by the court in Lalli when is found that the statute may operate unfairly. It is for this reason that this court recommends that if Yvette decides to

request an intermediate appeal that the Supreme Court grants such a request so that these issues may be resolved before the estate is distributed and possibly consumed.

ORDER

Based upon the above and foregoing, it is hereby

ORDERED that the Motion for Partial Summary Judgment is GRANTED, and it is further

ORDERED that if Yvette intends to take an intermediate appeal she shall file her certification of final judgment in accordance with SDCL 15-6-54 (b) an in accordance with *Weisser v. Jackson Tp. of Charles Mix County*, 767 N.W.2d 888 (SD 2009) within 14 days of receipt of this decision.

ORDERED that this Memorandum Decision and Order shall constitute the Courts Findings of Fact and Conclusions of Law.

Dated this 16th day of ~~January~~ February, 2011.

BY THE COURT

Bruce V. Anderson
Circuit Court Judge

Attest:

Clerk of Courts

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 27511

IN THE MATTER OF THE ESTATE OF
LORRAINE ISBURG FLAWS, DECEASED.

YVETTE HERMAN,
Appellee,

v.

AUDREY ISBURG COURSER
AND CLINTON BAKER,
Appellants.

Appeal from the First Judicial Circuit
Brule County, South Dakota
The Honorable Bruce V. Anderson, Circuit Judge

APPELLEE'S BRIEF

Notice of Appeal Filed: July 31, 2015

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PRELIMINARY STATEMENT

References to the Clerk's Register of Actions will be referred to as "RA" with the applicable page number. References to the Trial Transcript, held on February 17, 2015, will be referred to as "TT" with the applicable page number. References to Appellee's Index will be referred to as "App." with the applicable page number. References to Appellants' Brief will be referred to as "Appellants' Brief" with the applicable page number.

STATEMENT OF JURISDICTION

This Appeal stems from an estate proceeding captioned "*Estate of Lorraine Isburg Flaws*" (07 Pro. 10-000004), venued in Brule County, First Judicial Circuit, South Dakota, the Honorable Bruce V. Anderson presiding. Appellants Audrey Isburg Courser and Clinton Baker appeal from the circuit court's January 28, 2015 Memorandum Decision and Order on Partial Summary Judgment Re: Yvette Herman. (RA 524-528) (App. 0001-0005.) Appellants also appeal from the circuit court's July 6, 2015 Judgment in Favor of Yvette Herman. (RA 990-991) (App. 0006-0007.) Notice of Entry of Judgment was served on July 7, 2015. (RA 993-996) (App. 0008-0011.) Notice of Appeal was filed by Appellants on July 31, 2015. (RA 1028-1029) (App. 0012-0013.) This Honorable Court has jurisdiction pursuant to SDCL § 15-26A-10 and SDCL § 15-26A-3(1).

REQUEST FOR ORAL ARGUMENT

Appellee Yvette Herman respectfully requests oral argument.

STATEMENT OF THE ISSUES

1. Whether the circuit court correctly determined that SDCL § 29A-2-114(c) was unconstitutional, as applied to Yvette, because it violated the Equal Protection Clause.

The circuit court concluded that SDCL § 29A-2-114(c) creates a classification between "legitimate" and "illegitimate" children. (Appellants' Brief 8-9.) As a result, the circuit court subjected SDCL § 29A-2-114(c) to an equal protection analysis. After doing so, the circuit court concluded that SDCL § 29A-2-114(c) unconstitutionally discriminated against Yvette.

- SDCL § 29A-2-114.
- *Accounts Management, Inc. v. Williams*, 448 N.W.2d 297 (S.D. 1992).
- *Kraft v. Meade County ex rel. Bd. Com'rs*, 2006 S.D. 113, 726 N.W.2d 237.
- *Reed v. Campbell*, 476 U.S. 852, 106 S.Ct. 2234 (1986).

2. Whether the circuit court properly denied Appellants' second motion for summary judgment against Yvette.

The circuit court concluded that summary judgment was not proper because material issues of fact existed. Appellants now assert that summary judgment should have been granted because a BIA estate, which was opened in 1979 and closed in 1981, was not reopened by the United States Department of the Interior, Bureau of Indian Affairs ("BIA"). (Appellants' Brief 8.) The circuit court properly rejected that argument because that BIA estate does not affect Lorraine's open, pending South Dakota probate proceeding.

- *Estate of Flaws*, 2012 S.D. 3, 811 N.W.2d 749.
- *Chem-Age Industries, Inc. v. Glover*, 2002 S.D. 122, 652 N.W.2d 756.
- *Murphy v. Connolly*, 81 S.D. 644, 140 N.W.2d 394 (1966).

3. Whether the circuit court correctly concluded that Yvette had standing in Lorraine's estate proceeding.

The circuit court ruled that Yvette plainly has standing. It reached this conclusion after rejecting Appellants' argument that Yvette "squandered her right to establish paternity" in Donald Isburg's (Yvette's father) long-closed BIA proceeding. (Appellants' Brief 23.) The circuit court noted that the decades old and closed BIA proceeding is irrelevant to Lorraine's pending South Dakota estate proceeding.

- *Estate of Flaws*, 2012 S.D. 3, 811 N.W.2d 749.
- *Chem-Age Industries, Inc. v. Glover*, 2002 S.D. 122, 652 N.W.2d 756.
- *Good Lance v. Black Hills Dialysis*, 2015 S.D. 83, __ N.W.2d __.

4. Whether the circuit court correctly concluded that an unrelated 1979 BIA determination did not supercede or control the outcome of Lorraine's pending South Dakota probate proceeding.

The circuit court again ruled that a decades old and long-closed BIA proceeding did not supercede or foreclose determining the proper heirs in Lorraine's open South Dakota estate proceeding.

- *Chem-Age Industries, Inc. v. Glover*, 2002 S.D. 122, 652 N.W.2d 756.
- 25 U.S.C. § 372.
- *Spitzer v. Spitzer*, 84 S.D. 147, 168 N.W.2d 718.

STATEMENT OF THE CASE

Appellant Audrey Isburg Courser filed a Petition for Formal Probate of Lorraine Isburg Flaws' Estate on March 4, 2010. (RA 6-8.) Appellee Yvette Herman and her half-sibling, Tamara Allen, timely objected to the Petition and requested to be recognized as rightful heirs to Lorraine's estate. (RA 18-25.)

On July 13, 2010, Appellants moved for summary judgment against Yvette

asserting that Yvette did not have standing as an heir in Lorraine's estate. (RA 52.) On February 3, 2011, the circuit court ruled that SDCL § 29A-2-114(c) applied to Yvette. (RA 67-77.) Yvette then appealed to the South Dakota Supreme Court on March 15, 2011. (RA 94.) *Estate of Flaws*, 2012 S.D. 3, 811 N.W.2d 749 ("*Flaws I*"). This Court reversed and remanded the circuit court's decision, while specifically preserving the Constitutional issue. *Id.* On September 8, 2014, Appellants again filed for summary judgment against Yvette. (RA 350.) On January 28, 2015, the circuit court denied that motion. (RA 524-528) (App. 0001-0005.)

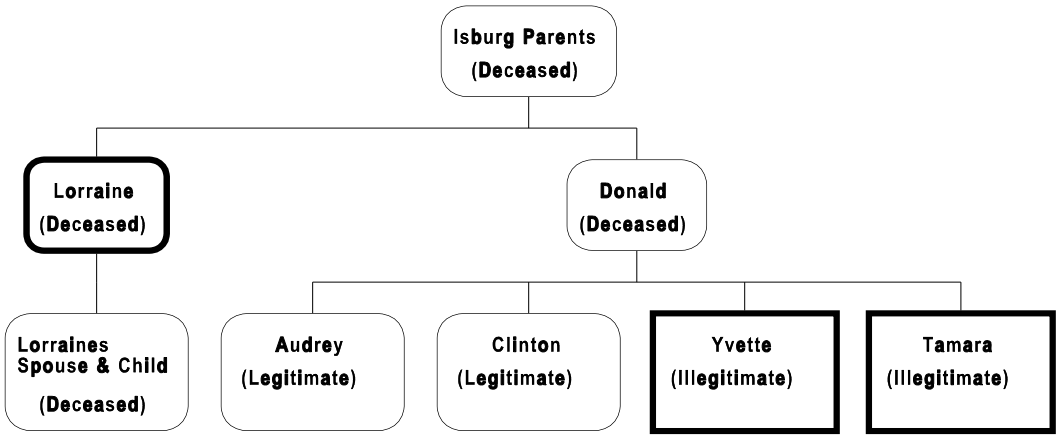
A court trial was held on February 17, 2015. The circuit court stated in its June 9, 2015 Memorandum Decision and subsequent Judgment that SDCL § 29A-2-114(c) was unconstitutional as applied to Yvette. (RA 940-958) (App. 0014-0032.) The court noted in its incorporated Findings of Fact that Yvette was, in fact, Lorraine's niece. (RA 956, FOF 1) (App. 0030, FOF 1.) Appellants did not object to this Finding of Fact. (RA 959) (App. 0033.) The circuit court entered its Judgment in Favor of Yvette Herman on July 6, 2015. (RA 990-991) (App. 0006-0007.) Notice of Entry was filed July 7, 2015. (RA 993-996) (App. 0008-0011.) Appellants filed their Notice of Appeal on July 31, 2015. (RA 1028-1029) (App. 0012-0013.)

STATEMENT OF THE FACTS

Contrary to Appellants' meandering and confusing rendition of the facts, this case is legally and factually straightforward. To keep things plain and understandable, a synopsis of the relevant facts follows.

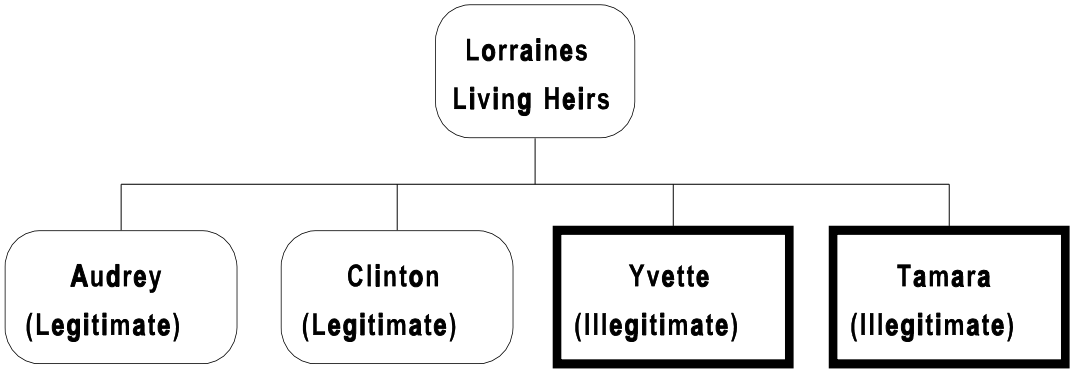
Lorraine is Yvette's aunt. (RA 956, FOF 1) (App. 0030, FOF 1.) Conclusive

DNA evidence proved this fact. (*Id*.) The circuit court's first Finding of Fact – *a fact that is not disputed by Appellants themselves* – found that Yvette is Lorraine's niece. (*Id*.) Notwithstanding that Yvette is Lorraine's niece, Appellants assert that Yvette should not inherit as an heir because she is an "illegitimate" or "bastard" child that was not recognized during her father's (Lorraine's brother's) lifetime. For clarity and simplification of how Yvette's status as Lorraine's niece informs this case, the following diagram is provided:



As shown, Lorraine and Donald (Yvette's father) were siblings. *Flaws I*, 2012

S.D. 3, ¶ 3, 811 N.W.2d at 749. Lorraine had a spouse and one child, both of whom predeceased her. *Id.* Lorraine and Donald's parents predeceased Lorraine. *Id.* Donald also predeceased Lorraine. *Id.* Donald, however, had four biological children, who are all still living: Yvette Herman, Tamara Allen, Audrey Courser, and



Clinton Baker. *Id.* at ¶¶ 4-6, 811 N.W.2d at 750. Because Lorraine's spouse, child, parents, and brother predeceased her, Lorraine's estate must pass by intestate succession. (RA 68.) The only estate at issue here is that of Lorraine.[1] So, the following becomes the only relevant genealogy:

[1] Appellants repeatedly and unyieldingly cite to Donald's BIA estate. A full 14 of 19 pages of argument in Appellants' Brief is dedicated to Donald or the BIA. That BIA estate, which has nothing to do with Lorraine's open estate, was probated in 1979 and closed in 1981. Every reference to Donald's long-closed BIA estate by Appellants is a factual distraction. This case is a South Dakota probate proceeding captioned "*Estate of Lorraine Isburg Flaws*." This case (Lorraine's estate) is venued in Brule County, South Dakota. Lorraine's South Dakota probate proceeding has nothing to do with the BIA, Indian Trust Lands, or anything else related to the BIA. (RA 941) (App. 0015.) And it is undisputed that Lorraine's estate is not subject to the BIA's jurisdiction. (*Id.*) Thus, every reference to Donald's 1979 BIA estate is properly ignored.

The dispositive issue in this case is whether Lorraine's "illegitimate" nieces (Yvette and Tamara)[2] should inherit from Lorraine's estate on equal legal footing as Lorraine's "legitimate" niece and nephew (Audrey and Clinton).[3] The legal issue now before this Court is that simple.

I. It is undisputed Lorraine died intestate.

Importantly, Lorraine did not leave any of her living heirs – including Appellants – anything in her Last Will and Testament. (RA 1-5; RA 68.) Lorraine's will expressly included only her husband and child. (RA 1-5.) *See also Flaws I,* 2012 S.D. 3, ¶ 2, 811 N.W.2d at 750. But because her husband and child predeceased her, the laws of intestate succession control. *Id.* Thus, this dispute is a function of the application of statutes – not Lorraine's written wishes. Notwithstanding this fact, Appellants seek to exclude their biological siblings from inheriting anything simply because they are "illegitimate" children.

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[2] Tamara is Yvette's co-claimant in this proceeding. Tamara is the Appellee in the South Dakota Supreme Court companion case (Appeal 25515), also involving Appellants and many of the same legal arguments. Tamara's brief in Appeal 25515 is hereby incorporated by reference to save this Court time. The issues particularly applicable in both cases include Appellants' "standing" and "jurisdiction" issues. Appellees' legal arguments on both issues compliment, augment, and bolster each other's.

[3] Even after finding out who her biological father was, it was unknown to Yvette for many years, that her father had three other biological children. Two of those children, Appellants, were "legitimate" because they were born when Donald was married to Appellants' mother. The third sibling, Tamara, like Yvette, is "illegitimate." And while impolite to simply refer to someone as an "illegitimate" child, it is manifestly offensive and repugnant to common decency to argue that those same "illegitimate" children should be afforded different rights or protections under the law. But that is exactly what Appellants seek here.

II. It is undisputed that Yvette is Lorraine's niece.

Lorraine's brother, Donald, died in 1979. Donald is Yvette's biological father. (RA 956, FOF 1) (App. 0030, FOF 1.) Thus, Lorraine is Yvette's aunt. This was proven through extensive and undisputed evidence at trial. (RA 20; RA 692.) This evidence, which the circuit court specifically described as "credible," included:

1. DNA evidence proving, beyond any doubt, that Lorraine is Yvette's aunt.[4] (RA 944-945) (App. 0018-0019.)

2. The DNA sample proving Lorraine is Yvette's aunt was given by Lorraine herself, who volunteered to assist Yvette – with full knowledge of the purpose behind the DNA testing – five years before Lorraine's death. (RA 944; RA 956, FOF 2) (App. 0018; App. 0030, FOF 2.)

3. A Sioux Valley nurse testified regarding her collection of the DNA samples from Lorraine and Yvette, the protocols used to ensure accuracy, that she "knew Lorraine personally, but nevertheless verified her identity by reviewing [Lorraine's] driver's license" to be absolutely sure, and "followed all protocols to ensure authenticity and chain of custody of the DNA samples." (RA 944-945) (App. 0018-0019.) Thus, the circuit court concluded the DNA samples "were authentic."

4. Dr. Alex Kahler of Identity Genetics, an expert in genetic testing,

[4] The question in the probate proceeding was whether Yvette is Lorraine's heir. Conclusive DNA testing found a 94.82% match between Lorraine and Yvette. (RA 0020; RA 0021; RA 692.) 94.82% is the *highest possible match* between an aunt and a niece. (RA 945) (App. 0019.) Thus, Yvette has scientifically proven that she is Lorraine's niece beyond all doubt. And so found the circuit court as a matter of fact. (RA 956, FOF 1) (App. 0030, FOF 1.)

testified regarding the scientific process, accuracy, and scientific conclusion that Yvette is Lorraine's niece. (RA 945) (App. 0019.) Appellants did not and do not challenge or dispute any part of Dr. Kahler's testimony or conclusion.

Based on this evidence at trial, the circuit court definitively found that "DNA evidence establishes conclusively that Donald is Yvette's father." (RA 945) (App. 0019.) And, therefore, Lorraine is Yvette's biological aunt. (RA 956, FOF 1) (App. 0030, FOF 1.)

But this conclusive DNA evidence was not all of the evidence proving that fact. There was also extensive credible testimony that:

5. Donald confirmed to his friend that he (Donald) was Yvette's father. (RA 942) (App. 0016.)

6. Yvette's ancestral reputation on the Crow Creek Reservation in South Dakota was that she was Donald's daughter. (*Id.*)

7. Yvette's mother testified that Donald is Yvette's biological father. (*Id.*)

8. Yvette's mother testified that Donald visited her and Yvette, and provided them with financial assistance, after Yvette and her mother moved to Spearfish, South Dakota, because Donald recognized Yvette as his daughter. (*Id.*)

9. Yvette's mother and Lorraine had conversations about Donald being Yvette's father. (RA 943) (App. 0017.)

10. Lorraine knew Yvette was Donald's daughter. (*Id.*)

11. After Yvette moved to Fort Thompson, South Dakota, Donald's kin notified family members that Yvette was "off limits" for dating because she was

Donald's daughter. (*Id.*)

12. Other family members (in addition to Yvette's mother) with knowledge confirmed that Donald was Yvette's father. (*Id.*)

13. After the conclusive DNA test results were in, Yvette's birth certificate was amended to include Donald as her biological father. (RA 25; RA 945) (App. 0019.) *See also Flaws I*, 2012 S.D. 3, ¶ 5, 811 N.W.2d at 749.

Thus, there was overwhelming evidence, including Donald's own statements, that proved Yvette was Donald's daughter and Lorraine's niece. And again, Appellants do not dispute these facts – nor could they, credibly.

III. This case is about Lorraine's estate, not Donald's.

This case is not about Donald's estate. It is about Lorraine's. Appellants' ongoing references to Donald's 1979 BIA estate, probated in Portland, Oregon, is a factual distraction. (TT 76.) One must simply look at the caption of this case to ascertain that it is a South Dakota probate. In fact, Appellants themselves are the ones who filed this action in Brule County, South Dakota. Donald died in 1979. (RA 68.) His BIA estate closed in 1981. (*Id.*) Appellants' repeated references to Donald's estate are intended to distract and distort the case now before this Court. But that is not proper. Again, this case is only about determining Lorraine's living heirs for intestate succession purposes.

Additionally, Yvette was only 9 years old when her father died. Yvette never knew her father, and would not learn who her father was until a family member told her when she was 18. (RA 942; RA 943) (App. 0016; App. 0017.) Donald's estate was

probated by the BIA because it involved Indian Trust Lands, which are not at issue here. (RA 68.) Yvette was only 11 years old when the BIA closed Donald's estate. Thus, Donald's estate was probated approximately seven years before Yvette even knew who her dad was.[5]

Further, Yvette never received any notice of her father's BIA proceeding and could not intervene or assert her rights. (RA 956-957, FOF 7) (App. 0030-0031, FOF 7.) For that reason, the circuit court found that Yvette never had any opportunity to appear in the BIA proceeding.[6] (*Id*.) Appellants do not challenge this finding. (RA 959-960.)

[5] It is not just that Yvette did not know who her biological father was until she was 18. It is also that her biological father's identify was unknowable to her until she was 18 when a family member finally informed her. (RA 942; RA 943) (App. 0016; App. 0017.) Thus, the circuit court correctly found that Yvette – at all times – sought her father's identity and never "sat on her rights." (RA 948) (App. 0022.) More importantly, nothing about Donald's BIA proceeding affects Lorraine's estate or Yvette's ability or right to prove that she is Lorraine's niece in Lorraine's open estate proceeding.

[6] Importantly, nothing was decided regarding the paternity of Yvette during her father's estate proceeding. According to the circuit court, the BIA never made any determination – one way or the other – regarding Yvette being Donald's daughter, thus, that issue "was stranded and left without a resolution in favor of or against Yvette." (RA 948) (App. 0022.) Thus, for Appellants to now argue that Donald's long-closed estate proceeding – that began when Yvette was 9 years old – now bars her from proving heirship in another, unrelated estate (Lorraine's) is legally and factually unsound. But that is exactly the thrust of Appellants' appeal.

Consequently, the question now before this Court is whether Yvette can prove that she is Lorraine's heir as part of Lorraine's open and ongoing South Dakota estate proceeding. The question is not whether Yvette can prove so in her father's long-closed BIA estate proceeding. And the circuit court found that Yvette *has* proven that she is Lorraine's heir through "substantial credible evidence and DNA testing." (RA 945; RA 956, FOF 1) (App. 0019; App. 0030, FOF 1.)

Under these facts and in a rational world, each of Lorraine's heirs should have inherited equally from Lorraine's estate under South Dakota's intestate succession laws. There would have been no controversy. Four heirs dividing Lorraine's estate four ways leaves each with 25%. This case should have been that simple. And that fair.

But rather than let that happen, Appellants filed a motion to exclude both Yvette and Tamara from their share of Lorraine's estate because they were "illegitimates," notwithstanding that they timely and properly presented as Lorraine's rightful heirs – just like Appellants – "within 26 days of Audrey filing the initial petition after Lorraine's death." (RA 948) (App. 0022.)

So, at its core, the legal issue before this Court is whether "illegitimate" or "non-marital" children should inherit on equal legal footing as "legitimate" or "marital" children.

STANDARD OF REVIEW

This Court's standard of review in estate cases is settled. Findings of fact are reviewed under the "clearly erroneous" standard. *Estate of Laue*, 2010 S.D. 80, ¶ 10,

790 N.W.2d 765, 768. Questions of law are reviewed "de novo." *Id*. This Court reviews "alleged violations of constitutional rights de novo." *Good Lance v. Black Hills Dialysis*, 2015 S.D. 83, ¶ 8, __ N.W.2d __.

ARGUMENT

Appellants raise two issues in their Notice of Appeal. (RA 1028-1029) (App. 0012-0013.) First, whether the circuit court erred when it denied Appellants' second motion for partial summary judgment. Second, whether the circuit court erred when it concluded that SDCL § 29A-2-114(c) was unconstitutional as applied to Yvette. Because the second issue is dispositive, it will be addressed first.

1. The circuit court properly concluded that SDCL § 29A-2-114(c) was unconstitutional as applied to Yvette.

Appellants' Brief appears to address this central issue by identifying four "legal issues." (Appellants' Brief 1-2.) Appellants' framing of the "legal issues" as four distinct "arguments" is unnecessary and confusing. For simplification, Yvette will simply address the single issue identified in Appellants' Notice of Appeal and as addressed by the circuit court in its Memorandum Decision (RA 67-77) (App. 0001-0005) from which Appellants' appeal. That issue, stated plainly, is whether the circuit court erred when it concluded that SDCL § 29A-2-114(c) was unconstitutional *as applied* to Yvette. (*Id*.)

As the circuit court correctly stated, when deciding any constitutional challenge, a court must be guided by the principle that:

> any legislative act is accorded a presumption in favor of constitutionality and that presumption is not overcome until the unconstitutionality of the

> act is clearly and unmistakably shown and there is no reasonable doubt that it violates fundamental constitutional principles.

Accounts Management, Inc. v. Williams, 448 N.W.2d 297, 299 (S.D. 1992).

Here, as an "as applied" challenge – not a facial challenge – Yvette does not have to show that the statute is unconstitutional in all possible applications, only that it is unconstitutional as applied in her case. *See, e.g., State v. Page*, 2006 S.D. 2, ¶ 89, 709 N.W.2d 739, 768-69.

A. A straightforward equal protection analysis.

Yvette challenged SDCL § 29A-2-114(c), as applied to her, on equal protection grounds. The Equal Protection Clauses of the United States and South Dakota Constitutions guarantee that "No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." U.S. Const. Amend. XIV; S.D. Const. Art. VI, § 18. Yvette argued that SDCL § 29A-2-114(c) was unconstitutional as applied to her because it characterizes and discriminates against her as an "illegitimate" child. Such discrimination based on "legitimacy" is constitutionally impermissible on equal protection grounds under these unique facts.

When conducting an equal protection analysis, a court must apply a two-part test:

> First, courts must determine whether a statute creates arbitrary classifications among citizens. Second, if the classification does not involve a fundamental right or suspect group, courts must determine whether a rational relationship exists between a legitimate legislative purpose and the classifications created.

Kraft v. Meade County ex rel. Bd. Com'rs, 2006 S.D. 113, ¶ 8, 726 N.W.2d 237, 241 (citing *In re Davis*, 2004 S.D. 70, ¶ 5, 681 N.W.2d 452, 454). Classifications based on legitimacy "must be substantially related to permissible state interests."[7] *Matter of Erbe*, 457 N.W.2d 867, 869 (S.D. 1990) (citing *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518 (1978)).

[7] The United States Supreme Court has repeatedly held that laws creating classifications that discriminate against non-marital children "must be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 1914 (1988) (citing *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-724 n. 9, 102 S.Ct. 3331, 3336 n. 9 (1982); *Mills v. Habluetzel*, 456 U.S. 91, 99, 102 S.Ct. 1549, 1554-55 (1982); *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 456-57 (1976); *Mathews v. Lucas*, 427 U.S. 495, 505-06, 96 S.Ct. 2755, 2762-63 (1976)). *See also Lalli*, 439 U.S. 259, 99 S.Ct. 518 (1978); *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459 (1977).

Under the first part of this analysis, the question is whether SDCL § 29A-2-114 "creates arbitrary classifications among citizens." *Kraft*, 2006 S.D. 113, ¶ 8, 726 N.W.2d at 241. The circuit court definitively addressed this question by concluding that "SDCL 29A-2-114 undoubtedly makes a classification and a distinction between illegitimate and legitimate children." (RA 940-958) (App. 0014-0032.) The circuit court noted that this statute automatically and conclusively presumes that the father of a child born into wedlock is the husband's (father's) biological child. (RA 950) (App. 0024.) But, if the child is born out of wedlock, there is a presumption that the child is not the father's, and the child and/or father "must take some affirmative step to establish the biological father's paternity." (*Id*.) As a result, two otherwise equal people are treated differently based only on their label as "legitimate" or "illegitimate." That is, "legitimate" people inherit; "illegitimate" people do not. Thus, a classification is created by SDCL § 29A-2-114. Because a classification based on legitimacy exists under SDCL § 29A-2-114, the equal protection analysis continues. The question, then, becomes whether the classification created by SDCL § 29A-2-114 is "substantially related to a permissible state interest." *Erbe*, 457 N.W.2d at 869.

In evaluating that question here, the circuit court identified the State's interests regarding estate administration as expressed by SDCL Ch. 29A-2. Those interests include: (1) providing for the orderly administration of estates; and (2) protecting the sanctity of a person's will to guard against false claims. *See Erbe*, 457 N.W.2d 867 (S.D. 1990), and *Lalli*, 439 U.S. 259, 99 S.Ct. 518 (1978). The circuit court addressed each of these interests in turn.

i. Orderly administration of estates.

The circuit court stated that the "state has an important governmental interest in the finality of estates and an orderly disposition of [] estate matters." (RA 951) (App. 0025.) But as the United States Supreme Court has recognized, a State's interest in "finality" is drastically curbed when the "administration of the estate is pending and in its initial stages." (RA 951) (App. 0025 (citing *Reed v. Campbell*, 476 U.S. 852, 106 S.Ct. 2234 (1986)).

In *Reed*, the United States Supreme Court addressed whether an illegitimate child should inherit equally with legitimate children. In resolving that issue, the Court held that a Texas probate statute differentiating inheritance on the basis of a legitimacy classification was unconstitutional. *Reed*, 475 U.S. at 854, 106 S.Ct. at 2237. The *Reed* Court also held, definitively, that the State's interest in orderly administration of estates is served "equally well" so long as a purported heir properly appears *while the estate remains open*. *Id.* at 855-56 (emphasizing that the State's interest in "finality" only applies "[a]fter an estate has been finally distributed"). And so it goes here.

Yvette asserted her rights as Lorraine's heir in Lorraine's estate early and often. (RA 948; RA 951) (App. 0022; App. 0025.) Yvette immediately made her claims known, worked diligently to protect her interests as Lorraine's heir, and has at all times continued in her efforts to be treated on equal footing as her siblings. (RA 948) (App. 0022.) Yvette has not hindered or delayed the efficient administration of Lorraine's estate in any way. (RA 951) (App. 0025.) In fact, the circuit court aptly noted that any delays in this case have been the result of the "timeliness and thoroughness of the

judicial process." (RA 951) (App. 0025.)

The circuit court further found that Lorraine's estate remains in its infancy, even now. The circuit court stated, "[This Estate] is [in the] initial stage . . . we haven't even got – the plane hasn't even taken flight. *We're trying to determine who the heirs are*." (TT 21) (emphasis added.) The circuit court went on to note that identifying heirs is the first step in a probate proceeding because "if we can't determine who the heirs are, it's impossible to even do simple division to figure out how the estate would be divided up." (*Id*.) Consequently, Lorraine's estate remains in its "initial stage." (*Id*.) As such, under *Reed*, there has been no delay, and the orderly administration of Lorraine's estate has not been impacted by Yvette's presence as a rightful heir.

Thus, the circuit court's holding that while the South Dakota Legislature had a permissible interest for desiring efficiency in estate matters, that interest – as applied here – provides "no basis [] to deny Yvette's claim as Lorraine's heir." (RA 952) (App. 0026.) Simply put, Yvette's involvement in Lorraine's estate has not hindered, slowed, or changed its administration and, as such, it cannot be shown "that by denying Yvette's claim[,] [] it would further the state's interest in finality of estates." (RA 952) (App. 0026.) The circuit court's conclusion that SDCL § 29A-2-114's classification based on "legitimacy" is not even "rationally related" (let alone "substantially related") to the State's interest in promoting "finality" is factually and legally correct. Thus, the first "State interest" regarding efficient administration is not implicated here.

To buttress this point, the South Dakota Attorney General has been provided notice of all proceedings in this matter because the constitutionality of a statute is at

issue. *See* SDCL § 15-6-24(c) (requiring notice to attorney general when challenging constitutionality of a statute). The Attorney General has declined to appear in any capacity. That non-appearance is telling.

ii. Sanctity of wills and false claims.

The second "State interest" implicated under SDCL § 29A-2-114(c) is protecting the sanctity of a person's will to guard against false claims. (RA 525 (citing *Lalli v. Lalli*, 439 U.S. 259, 268 (1978)). Again, the circuit court acknowledged this legitimate interest. It noted, however, that this interest is not served under these circumstances and that it is *actually better served* by allowing Yvette's dispositive, undisputed DNA evidence to prove heirship. (RA 952) (App. 0026.)

The circuit court found that this legitimate interest had no application here. Lorraine's will is not at issue. Her will's beneficiaries predeceased her. That gave rise to this intestate succession dispute. *Flaws I*, 2012 S.D. 3, ¶¶ 2-3, 811 N.W.2d at 750. So, the "sanctity of the will" is not a legitimate concern.

The conclusive DNA evidence proves beyond a doubt that Yvette is Lorraine's niece and proper heir. And that conclusive DNA evidence was an extremely reliable, fast, and judicially useful tool for determining a proper heir. So, the "State interest" regarding "false claims" is not implicated here.

The circuit court's Findings of Fact that the State interests are not at play are compelled on this record. And because those interests are not at issue, there is no constitutionally permissible reason to discriminate against Yvette on the basis of legitimacy. Thus, this Court should affirm the circuit court's judgment for Yvette on

this basis alone.

iii. SDCL § 29A-2-114's disparate treatment of "illegitimate" children is not "substantially related," or even "rationally related," to any government interest under these facts.

Given the absence of either State interest to the specific facts of this case, it is not necessary to even analyze whether SDCL § 29A-2-114(c) is substantially related to those State interests. But even if evaluated, there is no permissible basis to discriminate against Yvette.

The circuit court adroitly analyzed this issue as well. SDCL § 29A-2-114(c) provides four methods for rebutting "illegitimacy." These methods include:

1. The subsequent marriage of the parents.
2. A written acknowledgment by the father during child's lifetime.
3. A judicial determination of paternity during the father's lifetime.
4. The presentation of clear and convincing proof in the proceeding to settle the father's estate.[8]

(App. 0033.)

[8] Definitionally, this statute creates a classification between legitimate and illegitimate children. As the circuit court noted, this statute "automatically presumes that the father of a child born into wedlock is the mother's spouse." (RA 950) (App. 0024.) No such presumption exists for illegitimate children. That creates a classification.

Appellants assert that these four subsections are the exclusive methods for establishing heirship. Appellants then argue that this Court must ignore the conclusive DNA evidence proving that Yvette is one of Lorraine's rightful heirs. (Appellants' Brief 13-15.) But Appellants' strict and exclusive application of SDCL § 29A-2-114(c) demonstrates the lack of any rational relationship to the State's interest previously discussed, which undermines the very argument Appellants attempt to advance. To narrowly apply SDCL § 29A-2-114(c)'s language requires this Court to ignore the essential purpose of that statute, which is to identify legitimate heirs. (RA 957-958) (App. 0031-0032.) And because Yvette has scientifically proven that she is Lorraine's niece through DNA evidence, it is absurd and unjust to exclude her on a technicality simply because a statute, drafted and untouched since 1995, does not reflect advances in science or society.

For example, SDCL § 29A-2-114(c) allows someone to present evidence of heirship through a mere "written acknowledgment by the father during the child's lifetime." That "written acknowledgment" need not be witnessed, notarized, authenticated, or confirmed in any meaningful way. *Id.* That "written acknowledgment" could be scribbles on a paper napkin. But that napkin could satisfy SDCL § 29A-2-114(c). Yet, DNA evidence, which is more accurate and efficient, does not suffice? That is ludicrous and not "rationally related" – let alone "substantially related" – to any interest anywhere.

When considering this issue, the circuit court found that barring conclusive, reliable, and unrefuted DNA evidence required it to reject "advancement in science and

the exactness of DNA evidence," which would cause an "untenable and unjust result requiring [the] court to ignore reality and the truth." (RA 953) (App. 0027.) Moreover, by considering the DNA evidence, the circuit court recognized a method for determining familial relationships that is statutorily *required* in other contexts. *See, e.g.*, SDCL § 25-8-57 and § 25-8-58 (requiring "genetic test results," or DNA evidence, to establish paternity). Thus, the circuit court's recognition of the DNA evidence here was consistent with the Legislature's directive in similar circumstances.

In summary, the State's interests in orderly estate administration and preventing false claims are not at issue here. Thus, a strict and artificially narrow application of SDCL § 29A-2-114(c), which bars Yvette from inheriting anything from Lorraine because she is "illegitimate," is not "rationally related" – let alone "substantially related" – to its intended purposes. The only thing that SDCL § 29A-2-114(c) does is arbitrarily determine that Yvette, while factually the same as her brother and sisters, cannot inherit from Lorraine's estate because she is an "illegitimate" or "bastard" child. Thus, SDCL § 29A-2-114 is unconstitutional on equal protection grounds.

And Appellants do not dispute these findings or conclusions directly. Instead, Appellants' Brief superficially references inapplicable legal concepts (jurisdiction and standing), asserts opaque and circular legal arguments (the BIA), and ignores or rejects undisputed facts (every finding of fact) – all of which are designed to distract from the circuit court's straightforward and readily understandable equal protection analysis. Each of Appellants' arguments are now addressed in turn.

B. Appellants' various and vacillating arguments are legally infirm and factually distorted.

Appellants first argue that SDCL § 29A-2-114 "does not create classifications between legitimates and illegitimates." (Appellants' Brief 8-9.)[9] But, of course, classifications are created, and Appellants' argument to the contrary is patently, manifestly, and demonstrably false – even as acknowledged in Appellants' own Brief. (Appellants' Brief 9, 15 (acknowledging classification, but arguing it is not "arbitrary")).

SDCL § 29A-2-114 plainly treats "legitimates" and "illegitimates" differently. "Legitimates" are presumed heirs, to which SDCL § 29A-2-114 *does not* apply; "Illegitimates" are not, to which SDCL § 29A-2-114 *does* apply. That disparate treatment is based only on a person's label or classification (legitimate versus illegitimate). Hence, a classification is created by the statute, as the circuit court found. (RA 950) (App. 0024 ("SDCL § 29A-2-114 undoubtedly makes a classification and a distinction between illegitimate and legitimate children.")). Indeed, the classification is demonstrated in this case by the fact that Appellants did not have to comply with SDCL § 29A-2-114 because they were "blessed" with being

[9] Appellants do not cite any legal authority for this breathless pronouncement that is contrary to settled South Dakota and United States Supreme Court precedent. *See, e.g., Matter of Erbe*, 457 N.W.2d 867, 869 (S.D. 1990) (citing *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518 (1978)). *See also Reed v. Campbell*, 475 U.S. 852, 106 S.Ct. 2234 (1986). By failing to cite authority, Appellants' argument is waived. *Chem-Age Industries, Inc. v. Glover*, 2002 S.D. 122, ¶ 22, 652 N.W.2d at 767 ("[F]ailure to cite authority waives the argument that depends on it." (additional citations omitted)).

"legitimized" on account of Yvette's father marrying Appellants' mother. Appellants' argument to the contrary simply ignores United States Supreme Court and this Court's precedent. *Matter of Erbe*, 457 N.W.2d 867, 869 (S.D. 1990) (citing *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518 (1978)). *See also Reed v. Campbell*, 476 U.S. 852, 106 S.Ct. 2234 (1986).

Additionally, Appellants' Brief recognizes that undisputed children, like those born during the marriage ("legitimate" or "marital children") do not require "proof of paternity." (Appellants' Brief 10 (citing SDCL § 29A-3-301, § 29A-3- 308, § 29A-3-402, and § 29A-3-405)). As undisputed "marital" children, Appellants had to prove nothing to be conclusively accepted as Lorraine's heirs.

Standing in stark contrast to "marital" or "legitimate" children are "non-marital" or "illegitimate" or "bastard" children, like Yvette and Tamara, who must bear the "burden of proof" to prove heirship. (Appellants' Brief 10 (citing SDCL § 25-5-3, § 29A-2-114, and § 29A-3-407)). By identifying the disparate treatment between the two classes of children, Appellants themselves disprove their own contention that SDCL § 29A-2-114 does not "create a classification." (Appellants' Brief 10.) Appellants' Brief, settled law, the facts in this case, and the statute itself prove that a classification is created.[10]

i. *Erbe* has no application here.

[10] As part of this argument, Appellants appear to assert that statutes of limitation are "meritorious." (Appellants' Brief 12.) As a general proclamation, Appellants are correct. What relevance that proclamation has to this case remains unclear. This is an equal protection case – not a statute of limitation case.

Next, Appellants' reliance on *Erbe* is misplaced. First, *Erbe* has nothing to do with the circuit court's equal protection analysis *under the unique facts of this case.* Therefore, *Erbe* has no precedential value on the intensely factual equal protection analysis now before this Court. And Appellants do not explain or argue otherwise.

Second, *Erbe* involved a testate proceeding, not an intestate proceeding. 457 N.W.2d at 868 (noting that the decedent had a will with living heirs named). The Court emphasized that its holding was based on the State's "interests [in] establishing safeguards to protect the sanctity of a will[.]" 457 N.W.2d at 869. Unlike the facts in *Erbe*, there is no will to protect in this intestate succession case. Thus, *Erbe* is materially distinguishable and offers no guidance. *Id.*

Third, *Erbe,* authored by Justice Henderson in 1990 and addressing a since-repealed statute (SDCL § 29-1-15), was written before DNA evidence was widely recognized or accepted. *See, e.g., State v. Wimberly*, 467 N.W.2d 499, 505 (S.D. 1991), abrogated on other grounds by *State v. Moeller*, 1996 S.D. 60, ¶ 52, 548 N.W.2d 465, 479; *Andrews v. Florida*, 533 So.2d 841 (Fla.App.Ct. 1988) (noted as the first state appellate court decision to uphold the admission of DNA evidence). Now, in 2015, DNA evidence is recognized as "virtually dispositive." *See Davi v. Class*, 2000 S.D. 30, ¶ 24, 609 N.W.2d 107, 113; *Matter of CW*, 1997 S.D. 57, ¶ 6, 562 N.W.2d 903, 904-05. Given that DNA evidence is now the gold standard, and is even required by the Legislature in paternity proceedings, this Court cannot rely on a

pre-DNA case in a post-DNA world.[11] *See, e.g.*, SDCL § 25-8-57 and § 25-8-58 (requiring "genetic test results," or DNA evidence, to establish paternity). The circuit court recognized this. As should this Court.

Fourth, there was a dispute in *Erbe* as to whether the petitioner was factually Erbe's son. 457 N.W.2d at 868. Specifically, the petitioner's mother "apparently told members of Erbe's family that Erbe was [the petitioner's] father. Erbe *never* admitted to [petitioner's mother] that he was [the petitioner's] father." *Id.* (emphasis added.) The questionable nature of the petitioner's claim in that case is simply not present here. And DNA confirms paternity here beyond any doubt.

Finally, *Erbe's* dissent actually predicted this case and the absurdity of ignoring conclusive DNA evidence. The dissent in *Erbe* noted that it "offended [his] sense of justice that an illegitimate child cannot inherit" in the same way a "legitimate" child could. *Erbe*, 457 N.W.2d at 871 (Wuest, J. dissenting). Justice Wuest went on to note that an "illegitimate" child should fairly be permitted to provide "clear and convincing" evidence of heirship, including through DNA. *Id*. at 872. In this way, Justice Wuest's dissent has been vindicated and proven correct by modern science.

ii. Appellants never directly address the circuit court's equal

[11] States routinely rely on DNA evidence to uphold convictions for which the penalty is death. *State v. Moeller*, 1996 S.D. 60, 548 N.W.2d 465; *Moeller v. Weber*, 2004 S.D. 110, 689 N.W.2d 1. DNA evidence is also routinely used to exonerate those wrongfully convicted. *See* Innocence Project, *DNA Exonerations Nationwide*, http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide (listing 333 post-conviction DNA exonerations in the United States). If properly used for cases literally involving life and death, then DNA evidence must also be considered in probate proceedings.

protection analysis.

Appellants' Brief does not directly address the circuit court's equal protection analysis. Appellants do not dispute that the State's interests do not have any application here. Nor do Appellants argue that DNA evidence is contrary to SDCL § 29A-2-114(c)'s intended purpose. Instead, Appellants simply assert, re-assert, and re-re-assert that SDCL § 29A-2-114(c) is controlling and constitutional. But concluding a statute controls and is constitutional – without even addressing the circuit court's reasoning for finding it unconstitutional – does not make it so. Appellants' hopeful contentions to the contrary are properly rejected as having no basis in fact or law.

Further, Appellants' Brief takes issue with the circuit court's Findings of Fact. (RA 956-957) (App. 0030-0031.) Appellants reject, or continue to argue against, factual findings for which Appellants *never objected*. (RA 959-60) (App. 0030-0031.) Consequently, every one of the circuit court's Findings of Fact are deemed admitted. *See Canyon Lake Park, L.L.C. v. Loftus Dental, P.C.*, 2005 S.D. 82, ¶ 11, 700 N.W.2d 729, 733. Therefore, every single factual argument Appellants make in their brief must be rejected by this Court. *Id.*

Additionally, Appellants fail to show – even now – how any of the circuit court's Findings are "clearly erroneous." *Estate of Laue*, 2010 S.D. 80, ¶ 10, 790 N.W.2d at 768 (noting the "clearly erroneous" standard of review for factual findings). Thus, they must be accepted as true. And when accepted as true, those facts establish that Yvette is Lorraine's niece and her rightful, true, and legitimate heir.

2. Appellants' summary judgment was properly denied.

Appellants next assert that summary judgment should have been granted after Donald's estate was not reopened by the BIA. (Appellants' Brief 8.) Because Appellants again fail to cite any legal authority to support this proposition, the argument is waived. *Chem-Age*, 2002 S.D. 122, ¶ 22, 652 N.W.2d at 767 ("[F]ailure to cite authority waives the argument that depends on it." (additional citations omitted)). And, of course – and more importantly – Donald's estate is not at issue here. Lorraine's is.

The only question before the circuit court was whether Yvette was Lorraine's heir. After a court trial, at which DNA evidence conclusively proved that Yvette was Lorraine's heir, the circuit court held that Yvette should inherit on the same legal footing as her siblings. Appellants did not, and do not, challenge the circuit court's Finding of Fact that Yvette is the biological niece of Lorraine. (RA 959-960.) As the biological niece, Yvette is entitled to inherit on equal footing as Lorraine's biological nephew (Clinton), and biological nieces (Audrey and Tamara).

Furthermore, this case is captioned "*Estate of Lorraine Isburg Flaws*." *Appellants* filed this case in South Dakota circuit court. *Appellants* concede that there is no Indian Trust Land at issue. (Appellants' Brief 5.) The circuit court stated that Lorraine had all of her land removed from Indian Trust Land before her death. (RA 0068) (TT 257.) Thus, the BIA has no jurisdiction. (*Id*.) Instead, South Dakota courts do. (*Id*.)

Moreover, Donald's estate proceeding never included any "determination [] in

favor of or against Yvette." (RA 947) (App. 0021.) Rather, the issue of Yvette's parentage "was stranded without resolution" through no fault of Yvette's. (RA 956-957, FOF 7) (App. 0030-0031, FOF 7.) Thus, there can be no preclusive effect even if Donald's long-closed BIA estate is considered. Because no determination was ever made, no procedural bar existed for Yvette to prove her heirship to Lorraine. And that is exactly what Yvette did through conclusive DNA evidence. (RA 956, FOF 1) (App. 0030, FOF 1.) And, again, Appellants have not, and do not, dispute that conclusion.

i. A 34-year old BIA estate proceeding does not dictate Lorraine's open South Dakota estate proceeding.

Most significantly is that the circuit court saw through what Appellants actually seek. That is, that Donald's long-closed BIA estate proceeding controls how Lorraine's open South Dakota probate proceeding, which involves no Tribal or Indian Trust Lands, is resolved. That legal argument is absurd. But at its core, when Appellants now argue that the circuit court was barred from determining Lorraine's heirs because of Lorraine's brother's long-closed BIA estate, that is exactly what the Appellants now promote.[12] The very notion that a long-closed BIA proceeding can dictate how a South Dakota court resolves an open estate involving only South Dakota property is farcical. And Appellants' argument should be dismissed as such.

[12] None of Lorraine's heirs had any rights to Lorraine's estate until Lorraine died in 2010. Heirs are determined at death, not before. *See, e.g., Murphy v. Connolly*, 81 S.D. 644, 140 N.W.2d 394 (1966) ("Before a man's death he has no heirs." (citation omitted)). Therefore, it was not until 2010 when *any* court administering Lorraine's estate would have begun looking for *Lorraine's* heirs.

3. Yvette has "standing" in Lorraine's estate proceeding.

Appellants next argue that Yvette "lacked standing" because she "squandered her right to establish paternity" in Donald's 1979 BIA proceeding. (Appellants' Brief 23.) Because Appellants again fail to cite any legal authority to support this proposition, the argument is waived. *Chem-Age*, 2002 S.D. 122, ¶ 22, 652 N.W.2d at 767 ("[F]ailure to cite authority waives the argument that depends on it." (additional citations omitted)). Appellants do not even cite the applicable standard for assessing whether a party has standing. *See Good Lance v. Black Hills Dialysis*, 2015 S.D. 83, ¶ 12, __ N.W.2d __ (recognizing five criteria a party must establish to prove standing).[13] Moreover, this is yet another intentional reference to Donald's estate that has nothing to do with Lorraine's open and pending South Dakota estate involving the necessary determination of Lorraine's heirs.

[13] Yvette meets all five criteria because she has: (1) suffered an injury; (2) had her rights violated; (3) her injury is protected by the Constitution; (4) her injury stems from SDCL § 29A-2-114; and (5) a court can grant redress for her injury. *Good Lance*, 2015 S.D. 83, ¶ 12, __ N.W.2d __ . Thus, Yvette plainly has standing. *Id.*

And again, Appellants argue – even though Yvette was 9 years old when her father died and *never received any notice* – that she "sat on her rights"[14] by not appearing in her father's estate. (Appellants' Brief 23.) Yes, Appellants argue to this Court that Yvette "sat on her rights" when she was 9 years old by not intervening in her then-unknown father's estate. (*Id*.) That argument was properly dismissed by the circuit court. (RA 947; RA 956) (App. 0021; App. 0022.) The circuit court's summary dismissal of that legally specious claim should follow here.

4. "Jurisdiction" is not at issue.

Appellants next contend that the circuit court "was without jurisdiction" to address the "as applied" constitutional issue. (Appellants' Brief 7-8.) Appellants cite no legal authority for this expansive, unparalleled proclamation. Because Appellants fail to cite any legal authority to support this proposition, the argument is waived. *Chem-Age*, 2002 S.D. 122, ¶ 22, 652 N.W.2d at 767 ("[F]ailure to cite authority waives the argument that depends on it." (additional citations omitted)). Moreover, the circuit court plainly had jurisdiction.[15]

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[14] The circuit court expressly found that Yvette "has not sat on her rights." (RA 948) (App. 0022.) Without objecting to it and thereby having waived the issue, Appellants disagree, nonetheless.

[15] The South Dakota Constitution, Article V, § 14 gives circuit courts broad "jurisdiction of all actions and causes, both at law and in equity." *Spitzer v. Spitzer*, 84 S.D. 147, 153, 168 N.W.2d 718, 721. Moreover, South Dakota's Constitution, Article V § 20, also vests "[circuit] courts with original jurisdiction in all matters of probate, guardianship and settlement of estates of deceased persons." The circuit court has, at all times, plainly had "jurisdiction." Appellants' citations to SDCL § 15-30-11 and § 15-30-14 are unrelated to any issue before this Court.

Furthermore, and wholly unrelated to "jurisdiction," this Court's 2012 opinion in *Flaws I* never addressed the constitutional issue now before it. 2012 S.D. 3, ¶ 22, 811 N.W.2d at 754-55. In fact, this Court expressly preserved that issue. *Id.* In its decision, this Court reversed and remanded for further proceeding because the BIA's decision may have resolved the paternity question under SDCL § 29A-2-114's express terms.[16] *Id*. For that reason, this Court "*decline[d] to address Yvette's constitutional arguments*." *Id*. (emphasis added).[17]

Notwithstanding this Court's "declin[ation] to address Yvette's constitutional arguments," Appellants now appear to argue that the circuit court, and Yvette, were precluded from raising any constitutional arguments on remand – even though those issues had never been fully or finally resolved. *Id*. Appellants' argument on this issue is circular and nonsensical.

[16] It should be noted that Yvette filed to reopen her father's BIA estate proceeding. *Flaws I*, 2012 S.D. 3, ¶ 22 n. 5, 811 N.W.2d at 754 n. 5. The BIA rejected that request. So Yvette appealed that denial, which was also denied. The BIA denied Yvette's requests because there was no trust property left (from 1981) for the BIA to probate, as Appellants had already inherited everything from Donald.

[17] Yvette's Brief in *Flaws I* included the exact constitutional issue now raised, which should be judicially noticed for this limited purpose. Now having been properly brought before the Court, as indicated by the circuit court, this Court can address the issue for the first time.

The preclusive principle Appellants espouse here could be reconstrued as some misapplied derivation of res judicata.[18] But because this Court "declined to address" the constitutional issue, there has been no final judgment or decision on the issue. *See Dakota, Minnesota, & Eastern RR. Corp. v. Acuity*, 2006 S.D. 72, ¶ 15, 720 N.W.2d 655, 660 (noting that res judicata's preclusive effect applies only after a "final judgment on the merits"). And in South Dakota, "it is well settled that the decision upon which one may base a claim of res judicata must be final and unreversed." *Bank of Hoven v. Rausch*, 449 N.W.2d 263, 265 (S.D. 1989) (citing *Rosebud Sioux Tribe v. Strain*, 432 N.W.2d 259, 262 (S.D.1988); *Black Hills Jewelry Mfg. v. Felco Jewel Ind.*, 336 N.W.2d 153, 157 (S.D. 1983)). Here, there has never been a "final decision" on the "as applied" constitutional issue and the prior decision was not final and was reversed. Thus, res judicata does not apply and the circuit court had "jurisdiction" to address the issue.[19]

i. The Supremacy Clause has nothing to do with Lorraine's South Dakota estate proceeding.

Appellants finally argue that the Supremacy Clause barred Yvette from proving heirship in Lorraine's estate proceeding because "The BIA decisions are final under 25

[18] There are myriad legal distinctions – all of which are important – between "jurisdiction" and "res judicata." Appellants' Brief does not distinguish between these two separate, distinct concepts.

[19] Although unclear, Section 3.2 of Appellants' Brief referring to stare decisis may similarly be related to this "jurisdictional" or "res judicata" issue. (Appellants' Brief 13.) For the same reasons discussed above, namely that the circuit court expressly reserved ruling on the "as applied" issue, and this Court previously declined to address it, stare decisis has no application here.

U.S.C. § 372." (Appellants' Brief 25.) That assertion, however, does not account for the fact that the BIA never determined anything related to Donald's paternity of Yvette. Again, as the circuit court found, Yvette never had an opportunity to appear in Donald's proceeding. She was 9 years old and did not receive notice of the proceeding. And no determination was made in that proceeding – one way or the other – regarding Yvette. (RA 948) (App. 0022.)

More importantly, the non-decision of the BIA regarding Yvette has no effect or impact whatsoever on Yvette's right to prove that she is *Lorraine's* heir in *Lorraine's* South Dakota probate proceeding 34 years later. This argument has been made *ad nauseam*. And, again, Yvette is not attempting to relitigate her father's BIA estate. Yvette is not attempting to re-divide Donald's estate. Appellants Audrey and Clinton already inherited everything from Donald when Yvette was only 9 years old. Yvette will never inherit anything from her father. Nor is she now trying to. These facts are not disputed.[20]

Even so, Yvette has proven beyond any doubt that she is *Lorraine's* heir as part of *Lorraine's* open South Dakota estate proceeding. (RA 956, FOF 1) (App. 0030, FOF 1.) The BIA has nothing to do with that. And yet, Appellants ignore these facts and persist in exhaustively referencing Donald's unrelated, 34-year old BIA

[20] Because Yvette does not stand to inherit anything from her father, Appellants' citations to *Spicer v. Coon*, 110 Okla. 223 (1925); *Bertrand v. Doyle*, 36 F.2d 351 (10th Cir. 1929); and *In re Ducheneaux v. Ducheneaux*, 2015 S.D. 11, 861 N.W.2d 519, have no application here. This dispute involves Lorraine's estate, probated through South Dakota circuit court – not the BIA.

proceeding. This Court should not be distracted or persuaded by those misleading references.

CONCLUSION

This pending case involves the estate of Lorraine Isburg Flaws. As part of this open and pending South Dakota estate proceeding, Yvette has proven that she is Lorraine's niece – and therefore a rightful heir. Because Lorraine died intestate, Yvette is entitled to inherit on equal legal and factual footing as Lorraine's other living heirs.

At its core, this case is about affirming the circuit court's decision that in an open, pending probate proceeding that remains in its "initial stage," "illegitimate" children have the same inheritance rights as "legitimate" children under South Dakota intestate succession laws. This is especially true under the unique facts of this case because there is no dispute that Appellants, Tamara Allen, and Yvette are all Lorraine's nieces and nephew. It is that simple.

Every so often, good facts make good law. And these facts give this Court that exact opportunity. Yvette respectfully requests that this Court affirm the circuit court.

Respectfully submitted this 1st day of December, 2015.

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I certify that on the 1st day of December, 2015, I e-filed with the South Dakota Supreme Court's office, and served via electronic mail, a true and correct copy of the foregoing Appellee's Brief and Appellee's Appendix, upon:

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that Appellee's Brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Word PerfectX3 and contains 8,043 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

_____

One of the Attorneys for Appellee

Appellee's Appendix

STATE OF SOUTH DAKOTA
:SS
COUNTY OF BRULE

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

PRO. 10 - 004

ESTATE OF LARRAINE ISBURG FLAWS,

Deceased.

MEMORANDUM DECISION AND ORDER ON PARTIAL SUMMARY JUDGMENT RE: YVETTE HERMAN

This matter came before the Court on the filing of a *Motion for partial Summary Judgment* against Yvette Herman 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. Yvette Herman appeared through her counsel, David Larsen, of Chamberlain, South Dakota and Jonathan Van Patten of Vermillion, South Dakota. The Court, having read the parties' briefs and having heard oral arguments, now issues the following Memorandum Decision and Order.

Facts and Procedural Posture

The pertinent facts and posture of this case are accurately reflected in the Court's *Amended Memorandum Decision and Order* dated January 16, 2011, as well as in the South Dakota Supreme Court decision *In re Flaws*, 2012 SD 3.

Since the Supreme Court's decision in January of 2012, the BIA probate judge denied Yvette's request to be declared Donald's daughter in April 2012. In August, that decision was affirmed. Audrey Courser and Clinton Baker (hereinafter Audrey and Clinton) then filed a *Motion for Partial Summary Judgment* against Yvette Herman (hereinafter Yvette). Audrey and Clinton are seeking to again have this Court declare Yvette has no standing to challenge that she

is an heir of Lorraine Isburg Flaws (hereinafter Lorraine). Yvette argues that the exclusive means set forth by SDCL § 29A-2-114 are unconstitutional as applied to her.

Analysis

The Court wants to first acknowledge that the South Dakota Supreme Court stated, "based upon the plain language of SDCL § 29A-2-114 and the foregoing authorities, we hold that the trial court did not err in determining that the methods and time limits in the statute for establishing paternity are exclusive." *In re Flaws*, 2012 SD 3. Thus, Yvette must establish she is Donald's daughter 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.

Yvette has not provided this Court with any evidence to establish she is Donald's daughter in accordance with SDCL § 29A-2-114. The time limitation for Yvette to establish Donald as her father ended after Donald's estate was settled. The BIA declined to re-open Donald's estate and, thus, Yvette is without standing to establish she is an heir of Lorraine.

Yvette again raises the argument that the statute is unconstitutional as applied to her. The South Dakota Supreme Court declined to decide the constitutionality issue in its 2012 decision. This Court gave a detailed analysis in its 2011 Memorandum Decision concerning the constitutionality of the statute. With a slightly different argument and presentation by Yvette, the Court will again analyze the constitutionality of SDCL § 29A-2-114 as it applies to Yvette.

The Court is tasked with deciding whether the procedural demands that the statute places on Yvette bear an "evident and substantial relation to the particular state interests the statute is designed to serve." *Lalli v. Lalli*, 439 U.S. 259, 268 (1978). It is well-settled law that a classification based upon illegitimacy must be substantially related to a permissible state interest.

Id.; see also *Trimble v. Gordon*, 430 U.S. 762 (1977). Courts have held that a primary goal of "considerable magnitude" to the challenged statute is the "just and orderly disposition of property at death." *Id.* at 524 – 25. An additional, substantial state interest is the prevention of spurious or fraudulent claims. *Id.* at 526.

The Court points out that several cases have held *more* restrictive statutes than SDCL § 29A-2-114 to be constitutional as the state's interest in finality of the estate is substantially related to the statute. *Lalli*, supra; *Trimble*, supra; *Matter of Erbe*, 457 N.W.2d 867 (S.D. 1990). It is significant that the Supreme Court in *Lalli* stated, "Our inquiry under the Equal Protection Clause does not focus on the abstract "fairness of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks rationality contemplated by the Fourteenth Amendment." *Lalli* at 272 – 73.

The present case offers some unique, new issues in this area of law, especially when considering the structure of Yvette's argument. First of all, Yvette's counsel point out that illegitimacy has risen significantly since the 1960s. It is further pointed out that this issue of illegitimacy is not going to go away and affects a substantial number of children in today's society.

Yvette goes onto argue that the efficient administration of estates, commonly found as a ground to allow discrimination against non-marital children, is not a factor in the estate of Lorraine Flaws. Even though the estate was filed many years ago, it does remain in its initial stages due to the litigation over the determination of heirs. Yvette further relies on *Reed v. Campbell*, 476 U.S. at 855, for the proposition that the orderly administration and finality of estates do not bear much weight in the constitutional analysis in certain estates.

Yvette's counsel goes onto argue that the only credible state interest at stake in the current case is the avoidance of false claims, and points out that when SDCL § 29A-2-114 was adopted DNA evidence was regarded with skepticism. Yvette's counsel goes on to point out that since that time DNA evidence has been accepted as reliable and "virtually dispositive" on certain evidentiary items. They go onto argue that with the use of current genetic-based technology, such evidence has now become even more reliable than proof based upon clear and convincing evidence to establish paternity. They conclude that it would not further the government's interest in preventing fraudulent claims by excluding genetic evidence of paternity or familial relationship. This is especially the case, according to Yvette, when she has 15 of 17 markers of DNA that match Lorraine. Consequently, Yvette argues that when considering the three enumerated means of establishing paternity as outlined in SDCL § 29A-2-114, denying Yvette the right to establish paternity through substantially reliable scientific evidence denies her the equal protection of the law.

In part two of Yvette's brief, counsel invites the Court to exhaust all avenues before addressing the constitutional question. This would require denying the motion for summary judgment and setting the matter for trial. This Court believes this to be the best avenue to approach this important question of law. Rather than ruling upon the constitutionality of the statute on summary judgment, this Court would prefer to have a full and complete trial on the evidence, where the geneticist can be examined and cross-examined as to the veracity of the scientific conclusions before ruling upon such an important motion.

Consequently, this Court has decided to deny the motion for summary judgment and proceed with the trial which is already scheduled. The motion for summary judgment is denied without prejudice and may be renewed after Yvette has rested her case-in-chief.

Order

Based on the above and foregoing, IT IS HEREBY ORDERED that the partial Summary Judgment against Yvette Herman is DENIED WITHOUT PREJDUICE to its renewal following the presentation of Ms. Herman's evidence at trial.

Dated this 28 day of January, 2015.

BY THE COURT:

Honorable Bruce V. Anderson

First Circuit Court Judge

ATTEST:

Clerk of Courts

STATE OF SOUTH DAKOTA :
:SS
COUNTY OF BRULE :

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

FILED

JUL 06 2015

Doris Juhnke

BRULE/BUFFALO COUNTY CLERK OF COURTS
FIRST JUDICIAL CIRCUIT COURT OF SD

Estate of LORRAINE ISBURG FLAWS,

Deceased.

PRO. NO. 10-4

JUDGMENT IN FAVOR OF YVETTE HERMAN

This action came on regularly for trial before the Court, sitting without a jury, on February 17, 2015; Paul O. Godtland and Robert R. Schaub appeared as attorneys for Audrey Isburg Courser and Clinton Banker; and David J. Larson and Jessica Hegge appeared as attorneys for Yvette Herman.

The Court having heard the testimony and having examined the proof offered by the respective parties, and being fully advised, having filed its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance with the same,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, DECREED, AND DECLARED as follows:

1. Yvette Herman is declared to be the child of Donald Isburg, and as such the niece and heir of Lorrain Isburg Flaws, on equal footing with, and having the same rights and entitlements as Tamara Allen, Audrey Isburg Courser, and Clinton Banker; and

2. In view of the specific and unique facts of this case, SDCL 29A-2-114 is unconstitutional in its specific application to Yvette Herman under both the Constitution of the State of South Dakota, and the Constitution of the United States; and

3. The Special Personal Representative of the estate shall in all respects consider Yvette Herman to be an heir of Lorraine Isburg Flaws on equal footing with the other parties named herein, and having the same rights and entitlements; and

4. The multiple Summary Judgment Motions of Audrey Isburg Courser and Clinton Baker are denied.

Made and entered this 2nd day of July, 2015.

BY THE COURT:

(SEAL OF COURT)

Circuit Court Judge

ATTEST:

Clerk

by _____
Deputy

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

Estate of LORRAINE ISBURG FLAWS,

Deceased.

PRO. NO. 10-4

NOTICE OF ENTRY OF JUDGMENT

TO: AUDREY ISBURG COURSER, CLINTION BAKER, AND THEIR ATTORNEYS ROBERT R. SCHAUB AND PAUL O. GODTLAND, AND TO TAMARA ALLEN, AND HER ATTORNEY STEVEN R. SMITH.

You will please take NOTICE that the Judgment, pursuant to the decision of the Court rendered in the entitled action was entered on the 6th day of July, 2015, by being reducted to writing, signed by the Court, attested by the Clerk, and filed in the Clerk's office on the 6th day of July, 2015, a true copy thereof being attached hereto and incorporated herein by this reference.

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CERTIFICATE OF SERVICE

The undersigned certifies that he served a copy of this legal document upon the person herein next designated, all on the date shown, by means of the UJS efile & serve system and by depositing a copy hereof in the United States mail at Chamberlain, South Dakota, first class postage prepaid, in an envelope addressed to said addressee, to-wit:

Which address is the last address of the persons indicated known to the subscriber.

Filed: 7/7/2015 1:22:12 PM CST Brule County, South Dakota 07PRO10000004

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Dated this 7th day of July, 2015.

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STATE OF SOUTH DAKOTA	:	IN CIRCUIT COURT
	:SS	
COUNTY OF BRULE	:	FIRST JUDICIAL CIRCUIT
Estate of LORRAINE ISBURG FLAWS, Deceased.		PRO. NO. 10-4 JUDGMENT IN FAVOR OF YVETTE HERMAN

This action came on regularly for trial before the Court, sitting without a jury, on February 17, 2015; Paul O. Godtland and Robert R. Schaub appeared as attorneys for Audrey Isburg Courser and Clinton Banker; and David J. Larson and Jessica Hegge appeared as attorneys for Yvette Herman.

The Court having heard the testimony and having examined the proof offered by the respective parties, and being fully advised, having filed its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance with the same,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, DECREED, AND DECLARED as follows:

1. Yvette Herman is declared to be the child of Donald Isburg, and as such the niece and heir of Lorrain Isburg Flaws, on equal footing with, and having the same rights and entitlements as Tamara Allen, Audrey Isburg Courser, and Clinton Banker; and

2. In view of the specific and unique facts of this case, SDCL 29A-2-114 is unconstitutional in its specific application to Yvette Herman under both the Constitution of the State of South Dakota, and the Constitution of the United States; and

3. The Special Personal Representative of the estate shall in all respects consider Yvette Herman to be an heir of Lorraine Isburg Flaws on equal footing with the other parties named herein, and having the same rights and entitlements; and

4. The multiple Summary Judgment Motions of Audrey Isburg Courser and Clinton Baker are denied.

Made and entered this 2nd day of July, 2015.

BY THE COURT:

(SEAL OF COURT)

Circuit Court Judge

ATTEST:

Clerk
by _____
Deputy

Attachment p. 2

FILED

JUL 31 2015

STATE OF SOUTH DAKOTA Doris Juhnke IN CIRCUIT COURT

:SS

COUNTY OF BRULE BRULE/BUFFALO COUNTY CLERK OF COURTS FIRST JUDICIAL CIRCUIT COURT FIRST JUDICIAL CIRCUIT

PRO. NO. 10-4

Estate of LORRAINE ISBURG FLAWS, Deceased.

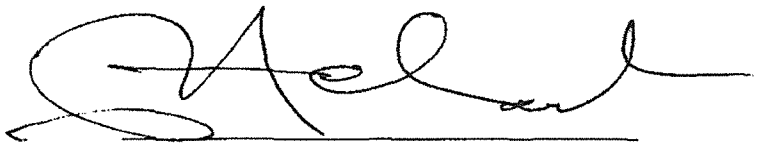
Notice of Appeal

To: David J. Larson and Jonathan Van Patten, attorneys for Yvette Herman, Steven R. Smith, attorney for Tamara Allen, Marty J. Jackley, Attorney General for the State of South Dakota, and Jack Gunvordahl, Special Administrator of the Estate of Lorraine Isburg Flaws.

Please take notice that the Appellants, Audrey Isburg Courser, and Clinton Baker, appeal to the South Dakota Supreme Court from the following Order and final Judgment:

1. Memorandum Decision and Order on Partial Summary Judgment re: Yvette Herman dated January 28, 2015, rendered in the above action, which denied Audrey Isburg Courser and Clinton Baker's Motion for Summary Judgment.
2. Judgment dated July 7, 2015, rendered in the above action, declaring SDCL 29A-2-114 unconstitutional as applied to Yvette Herman and that Yvette is a child of Donald Isburg, thus an heir and niece of Lorraine Isburg Flaws.

Dated at Chamberlain, South Dakota, this 31 th day of July, 2015.



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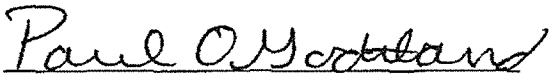

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STATE OF SOUTH DAKOTA : SS COUNTY OF BRULE	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT

ESTATE OF LARRAINE ISBURG FLAWS, **Deceased.**	**PRO. 10 - 004** **MEMORANDUM DECISION, VERDICT AND ORDER ON PARTIAL SUMMARY JUDGMENT RE: YVETTE HERMAN**

This matter came before the Court for trial on the Petition to Determine Heirs on February 17th, 2015, the Honorable Bruce V. Anderson presiding. Following the hearing Audrey Courser and Clinton Baker renewed their motions for Summary Judgment (Judgment as a Matter of Law). Audrey Courser and Clinton Baker, the known heirs, appeared through counsel, Paul Godtland and Robert Schaub, of Chamberlain, South Dakota. Yvette Herman appeared through her counsel, David Larsen, of Chamberlain, South Dakota. Following the testimony the Court ordered the parties to submit additional briefs concerning the constitutionality of SDCL 29A-2-114 and on the renewed motion for summary judgment. The Court, having heard the trial testimony, having reviewed the exhibits, and having read the parties' briefs, now issues the following Memorandum Decision and Order.

Facts and Procedural Posture

The background facts of this case are reflected in the Court's *Amended Memorandum Decision and Order* dated January 16, 2011, as well as in the South Dakota Supreme Court decision *In re Flaws*, 2012 S.D. 3.

The Supreme Court's decision in *In re Flaws* remanded this case to this Court with instructions to wait for the BIA Court to make a ruling on Yvette Herman's Motion to re-open

the estate to establish paternity of Donald Isburg as her father. Following the Supreme Court's decision in January of 2012, the BIA probate judge denied Yvette Herman's (hereinafter Yvette) request to re-open Donald's estate so that she could be declared Donald's daughter in April 2012. The BIA Court ruled that since the real property of the estate had been transferred out of trust status it no longer had jurisdiction to consider such a motion in the estate. No ruling on the merits of Yvette's motion as to Donald's paternity was made. In August 2014, that decision was affirmed by the U.S. Dept. of Interior, Office of Hearing and Appeals, Interior Board of Indian Appeals (the BIA Court and Board of Indian Appeals collectively referred to herein as BIA Court). Again, no ruling was made on the merits of Yvette's motion based upon the final phrase in SDCL 29A-2-114(c). This ruling, as well, found that the BIA Court lacked jurisdiction since the real property of Donald's estate was transferred out of trust status.

Audrey Courser and Clinton Baker (hereinafter Audrey and Clinton) then filed a *Motion for Partial Summary Judgment* against Yvette. Audrey and Clinton sought to again have this Court declare Yvette has no standing to challenge that she is an heir of Lorraine Isburg Flaws (hereinafter Lorraine). They argued that because Donald's estate was a federal probate, this Court was bound by that ruling under the supremacy clause and the matter was exclusively a federal question. They argue that since she has no standing in the BIA Court that she has no standing to challenge heirship here and that this Court, in determining heirs of Lorraine Flaws, is bound by the BIA Court's ruling. This Court denied that argument in its ruling on the summary judgment motion. Yvette argued that the exclusive means to establish paternity set forth by SDCL § 29A-2-114 are unconstitutional as applied to her. The Court denied Audrey and Clinton's motion for Summary Judgment without prejudice to its renewal at the conclusion of Yevette's evidence at trial. After a trial to the Court on February 17, 2015, Audrey and Clinton

renewed their motion for summary judgment and the Court took it under advisement to determine the constitutionality of SDCL § 29A-2-114 as applied to Yvette.

Testimony at the trial revealed that Yvette Herman was NOT told about the identity of her father until sometime around her eighteenth birthday. In 2003, Patricia Ross, a good friend of Donald told Yvette that Donald was her father. Patricia Ross also spoke with Lorraine about Yvette being Donald's daughter. Grace Donner, a longtime friend and co-worker of Donald, also knew and told Yvette that Donald was her father. Grace Donner testified Donald told her to tell Yvette that he is her father before he passed away in Arizona. She knew Donald well and was employed by him as a truck driver for three years. She credibly testified that prior to Donald's death she visited with him at his home in Arizona. During that visit Donald expressed that he was concerned he would not make it back to South Dakota to clear things up with Yvette and consequently, he wanted Grace to tell Yvette he was her father when Yvette was older. Grace testified she told Yvette this when Yvette's oldest son turned ten years old. Grace also testified (over objection) that she was aware of Yvette's general ancestral reputation in the Crow Creek Reservation community and that reputation was that Yvette was the daughter of Donald.

Yvette's mother, Joyzelle Gingway-Godfrey (hereinafter Joyzelle), testified she had separated from her husband Gene Rillings for a period of time and was involved in a romantic relationship with Donald Isburg during a time frame consistent with Yvette's conception. Joyzelle testified that Donald knew Yvette was his daughter. After her divorce from Mr. Rillings she moved to Spearfish, South Dakota and attended Black Hills State University. She credibly testified that Donald visited her and Yvette several times while she attended school there. She also credibly testified that Donald provided her some financial assistance for Yvette.

Joyzelle further testified that after she graduated from BHSU she lost all contact with Donald. She testified she never told Yvette who her actual father was until Yvette questioned her sometime in her adult life. Joyzelle also explained that she knew Lorraine personally, had conversations about Yvette with Lorraine, and that Lorraine had known for many years that Donald was Yvette's father. Joyzelle also credibly testified that she and Lorraine spoke of Yvette on numerous occasions and that Lorraine knew that Donald was her father. Lorraine also sat on the board at the local casino and was manager for a period of time. She was aware Yvette worked at the casino and expressed to Joyzelle that she was happy about the fact that Yvette worked there and was employed.

Yvette testified that Donald was not originally on her birth certificate, rather, Gene Rillings, Joyzelle's husband was. Testimony indicates Yvette found out Donald was her father when she was 18. Later, after moving back to Ft. Thompson from the Rosebud area, some of the Isburg family members told her Donald Isburg was her father, despite Yvette not knowing who Donald was.

After returning to Ft. Thompson Yvette had befriended some of the Isburgs. When she met older family members at their residence it became known to her that some of the Isburgs had notified family members that Yevette was a relative and she was off limits for dating. This caused Yevette concern for her own children dating family members in the area.

After becoming aware that Donald was possibly her father Yvette began investigating the matter. She testified that her motive was to make sure her birth record and ancestry records were correct for her and her children. She spoke with her mother who had kept this a secret from her. She spoke with other family members and others who had knowledge. All indicated that Donald was her father. She also spoke with Tamara Allen (half-sister and party here) and

Lorraine Flaws. In her discussions with Lorraine, Yvette advised her that Tamara Allen had agreed to submit to genetic testing to determine if they were sisters. Yvette had focused on Tamara because she knew that Donald had signed a paternity affidavit for her, paid support and acknowledged her as his daughter. Yvette was making arrangements to have this genetic testing completed.

In October or November of 2005 Yvette, Joyzelle, and Lorraine bumped into each other at the IHS hospital in Ft. Thompson. They had a discussion about how Yvette was attempting get Gene Rillings off of her birth certificate and her attempts to obtain the genetic testing from Tamara. According to Yvette's credible testimony, Lorraine told her "oh no, you don't have to do that, I will do it for you". Yvette credibly testified Lorraine offered this voluntarily and wanted it done. Based upon this conversation Yvette made arrangements with Dr. Kahler's office at Identify Genetics to have the DNA samples collected. Lorraine voluntarily presented herself to Sioux Valley Hospice and Homecare with Yvette and provided the DNA samples on February 8th, 2005, five years before Lorraine's death. Lorraine did this knowing that Yvette's goal was to establish Donald as her father in order to correct her birth record and as a logical conclusion from there, also establish Lorraine as her aunt.

Linda Johnson, a nurse at Sioux Valley Hospice and Home Care testified that she collected DNA samples for Identity Genetics and was familiar with their protocol. She collected the samples from Lorraine and Yvette. She knew Lorraine personally but nevertheless verified her identity by reviewing her driver's license at the time of the sample collection. The evidence shows that Ms. Johnson dutifully followed all protocols to ensure authenticity and chain of custody of the DNA samples and sent them to the laboratory for testing in accordance with the

chain of custody protocols required. This Court finds that the DNA samples tested were from Lorraine and Yvette and were authentic.

Yvette also presented evidence from Dr. Alex Kahler of Identity Genetics in Brookings, South Dakota. Dr. Kahler is an expert in genetic testing and received a Ph.D. in genetics from the University of California Davis. Dr. Kahler's testimony indicated that DNA samples from Yvette Herman and Lorraine Flaws were sent to him for genetic testing. Dr. Kahler explained the science behind the testing and what could be scientifically proven from the 17 allele markers that were tested. Dr. Kahler found that 15 out of the 17 matched between Yvette and Lorraine. From this data, Dr. Kahler testified that he could exclude a mother-daughter relationship, but the two test subjects were "very closely related." He testified there is a 94.82% chance Yvette and Lorraine are related. Dr. Kahler concluded that the two parties are most likely related as an aunt and a child. The credibility of Dr. Kahler's testimony and his scientific findings were not significantly challenged at trial and this Court finds that his testimony is scientifically reliable and credible. In this Court's view, the DNA evidence establishes conclusively that Donald is Yvette's father.

After obtaining the genetic testing (DNA) results from the testing that was done Yvette undertook to have her birth record corrected. Based upon this information and supporting affidavits, Yvette amended her birth certificate to include Donald Isburg as her biological father. Exhibit Y7 contains an Amended Order from the Crow Creek Sioux Tribal Court dated October 27, 2008, ordering a certificate of birth amendment. Indeed, Exhibit Y14, which was also received into evidence, is Yvette's current certificate of birth from the South Dakota Department of Health showing Donald Dale Isburg as her biological father. All of his was done while

Lorraine was alive. Lorraine was made aware of and had knowledge of both the results of the genetic testing and the amendment to the birth record.

Lorraine Flaws was an astute business woman who had a reputation in the community as being intelligent and highly motivated. Many years before she passed away she had a Last Will and Testament prepared and executed. Lorraine's Will left her estate to her late husband and late daughter who both pre-deceased her. She had knowledge of both Yvette and Tamara and that her brother Donald was their father or was alleged to be their father. Despite this knowledge, she took no action to amend or modify her will, or make other estate planning changes, to exclude Yvette or Tamara from inheriting any portion of her estate.

At the close of evidence the Court invited any renewed motions. After Audrey and Clinton renewed their motion for partial summary judgment, the Court advised the parties that it would be taking the matter under advisement to decide the issues, most importantly, the constitutionality of SDCL §29A-2-114 as it applies to Yvette Herman and he circumstances.

Analysis

The Court must first acknowledge that the South Dakota Supreme Court stated, "based upon the plain language of SDCL § 29A-2-114 and the foregoing authorities, we hold that the trial court did not err in determining that the methods and time limits in the statute for establishing paternity are exclusive." *In re Flaws*, 2012 SD 3. Thus, under the current statutory scheme, Yvette must establish she is Donald's daughter 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. However, the Supreme Court stopped short of affirming this Court's decision that SDCL 29A-2-114 was constitutional and remanded the matter so that Yvette's BIA Court paternity motion

could be exhausted in Donald's estate. That effort was thwarted not because Yvette lost that issue on the merits, but because the BIA Court no longer had jurisdiction. Consequently, because of the procedural and jurisdictional issues that determination was never made in favor of or against Yvette. Essentially, that issue was stranded without resolution.

According to Audrey and Clinton, Yvette cannot provide this Court with any evidence to establish she is Donald's daughter in accordance with SDCL § 29A-2-114. They argue the time limitation for Yvette to establish Donald as her father ended after Donald's death and when his estate was settled. The BIA declined to re-open Donald's estate and, thus, Yvette is without standing to establish she is an heir of Lorraine under the current statutory scheme.

Yvette argues that the DNA evidence presented at trial unquestionably proves she is Donald's daughter and Lorraine's niece and heir. Yvette again raises the argument that the statute is unconstitutional, but this time focuses her argument that it violates equal protection as applied to her and her circumstances. The South Dakota Supreme Court declined to decide the constitutionality issue in its 2012 decision. This Court gave a detailed analysis in its 2011 Memorandum Decision concerning the constitutionality of the statute. That decision focused almost exclusively on whether the statute was unconstitutional on its face. With a slightly different argument and presentation by Yvette presently, the Court will again analyze the constitutionality of SDCL § 29A-2-114 as it applies to Yvette.

Constitutionality of SDCL § 29A-2-114 and Equal Protection

The Equal Protection Clause of the South Dakota Constitution guarantees "[n]o law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." S.D. Const. art. VI, § 18. It is important to note that Yvette's challenge is not a facial challenge, but an as applied

challenge to the statute in question. The Court will not focus its analysis on whether the statute is constitutional on its face.[1]

The present case offers some unique new issues in this area of law especially when considering the structure of Yvette's argument. First of all, Yvette's counsel point out that illegitimacy has risen significantly since the 1960s. It is further pointed out that the issue of illegitimacy is not going to go away and affects a substantial and growing number of children in today's society and their ability to inherit from their biological fathers.

Yvette goes onto argue that the efficient administration of estates, commonly found as a ground to allow discrimination against non-marital children, is not a factor in the estate of Lorraine Flaws. Even though the estate was filed many years ago, it does remain in its initial stages due to the litigation over the determination of heirs. Moreover, this Court finds that with respect to this estate Yvette has not sat on her rights. She promptly filed and applied for formal probate and filed a Petition for Formal Probate and Determination of Heirs within 26 days of Audrey filing the initial petition. Her competing petition was filed prior to a hearing on Audrey's similar petition. Yvette further relies on *Reed v. Campbell*, 476 U.S. at 855, for the proposition that the orderly administration and finality of estates do not bear much weight in the constitutional analysis in certain estates.

Further, Yvette argues, the only credible state interest at stake in the current case is the avoidance of false claims, and points out that when SDCL § 29A-2-114 was adopted in 1995 DNA evidence was an evolving forensic science and was regarded with skepticism by the

[1] The Court already delved into this analysis and issued a decision concerning the facial constitutionality of SDCL § 29A-2-114 on February 16, 2011. This Court feels that was the correct ruling and will not re-visit the facial challenge.

courts.[2] Yvette points out that since that time DNA evidence has been accepted as reliable and "virtually dispositive" on certain evidentiary items. She goes on to argue that with the use of current genetic-based technology, such evidence has now become widely accepted in the scientific and legal communities and is even more reliable than proof based upon clear and convincing evidence to establish paternity. She concludes by arguing that it would not further the government's interest in preventing fraudulent claims by excluding genetic evidence of paternity or familial relationship and to do so in this case causes a discrimination against her as an illegitimate child, and obfuscates the truth. This is especially the case, according to Yvette, when she has 15 of 17 markers of DNA that match Lorraine and that Donald died when she was nine years old and was unable to protect her own interests. Consequently, Yvette argues, when considering the three enumerated means of establishing paternity as outlined in SDCL § 29A-2-114, denying her the right to establish paternity through substantially reliable and unrefuted scientific evidence denies her the equal protection of the law.

> In deciding any constitutional challenge, the Court is guided by the principle that:
>
> any legislative act is accorded a presumption in favor of constitutionality and that presumption is not overcome until the unconstitutionality of the act is clearly and unmistakably shown and there is no reasonable doubt that it violates fundamental constitutional principles.

Accounts Management, Inc. v. Williams, 448 N.W.2d 297, 299 (S.D. 1992). Further, in an equal protection claim, the Court must apply a two part test: (1) does the statute create an arbitrary classification among citizens, and (2) if the classification does not involve a fundamental right or suspect group, is there a rational relationship between legislative purpose and the classification

[2] SDCL 29A-2-114 has not been amended or revised since 1995, before DNA was generally acceptable as the best possible evidence for identification.

created? *See generally Tibbs v. Moody County Bd. Of Com'rs*, 2014 S.D. 44, ¶ 6, ¶ 11. Yvette has not argued that it is a fundamental right for a person to inherit from their biological father.

In deciding the first prong, the Court must look at "whether the statute applies equally to all people." *Tibbs* at ¶ 12. However, equal protection does not prohibit, "the Legislature from making classifications based upon differences in 'terms' surrounding individuals. . . . though there can be no discrimination between the members of one class." *Id.*

SDCL § 29A-2-114 undoubtedly makes a classification and a distinction between illegitimate and legitimate children. The statute automatically presumes that the father of a child born into wedlock is the mother's spouse. On the other hand, if the child is born out of wedlock, the child and/or father must take some affirmative step to establish the biological father's paternity. The statute does not, however, facially discriminate between members of one class. All illegitimate children are bound by the exclusive means set forth in the statute.

Since there is no suspect class or fundamental right at issue, the Court is not guided by strict scrutiny. *Tibbs*, ¶ 12. The appropriate standard outlined in *Lalli* and adopted in *Matter of Erbe* is that classifications based upon illegitimacy "must be substantially related to permissible state interests." *Matter of Erbe*, 457 N.W.2d 867, 869 (S.D. 1990) *citing Lalli v. Lalli*, 439 U.S. 259 (1978). Therefore, the differentiation "must bear some rational relationship to a legitimate state purpose." *Id.*

"The next inquiry is whether the classification is arbitrary. Equal protection of the law does not deny a state the right to make classifications in law, so long as those classifications are rooted in reason." *Tibbs*, at ¶ 13. "A statute will not be declared invalid 'unless it is patently and arbitrary and bears no rational relationship to a legitimate governmental interest.'" *Accounts*

Management, 448 N.W.2d at 300 *citing South Dakota Physicians Health Group v. State*, 447 N.W.2d 511, 515 (S.D. 1989); *see also Erbe* and *Lalli*, supra.

To begin the analysis it is important to recognize the legitimate governmental interest courts have recognized surrounding illegitimate heirship and a statute such as SDCL § 29A-2-114. The United States Supreme Court as well as the South Dakota Supreme Court has recognized that the two most important governmental interests are (1) to provide for the orderly administration of estates and (2) to protect the sanctity of the will or, in other words, to avoid false claims. *See Erbe* and *Lalli*, supra. The Court will look at each recognized governmental interest in turn.

1. Orderly Administration of Estates

It has been recognized that the state has an important governmental interest in the finality of estates and an orderly disposition of said estate matters. However, Yvette correctly points out that the United States Supreme Court has rejected this notion when the administration of the estate is pending and in its initial stages. *see Reed v. Campbell,* 475 U.S. 852 (1986). As this present case stands, it is in its initial stages and not finalized. Moreover, Yvette asserted her rights in this case early and promptly.

Audrey and Clinton take the position that since this estate is many years old that this is precisely the type of delay the legislature had in mind when adopting the statute. The Court does not agree. Any delay in this case is the unfortunate result of the timeliness and thoroughness of the judicial process, delays with the South Dakota Supreme Court appeal and the lengthy delay in the BIA Court appeal, not because Yvette did not timely bring a claim or chose to unjustly delay the administration of this estate.

While there is undoubtedly a rational basis for wanting finality and the orderly disposition of an estate, it is no basis in this case to deny Yvette's claim as Lorraine's heir. The government cannot show that by denying Yvette's claim that it would further the state's interest in finality of estates. The two, as applied in this case, are not rationally related.

Other evidence that the state's interest in the orderly disposition of estates is not furthered by denying Yvette's claim is the fact that her half-sibling Tamara's claim for an intestate share was still pending and in litigation. Even if Yvette's claim was resolved years prior, the estate could not still be finally administered until Tamara's claim had been resolved. Audrey and Clinton did not file a motion for Summary Judgment against Tamara as they had against Yvette. It was at this Court's insistence that the claims of Tamara and Yvette be considered simultaneously after remand so as to avoid further delay. In this light, neither Audrey and Clinton's assertions concerning the lengthy delay nor the state's interest in the orderly disposition of this estate carries any weight in light of the procedural history of this action.

2. Sanctity of the Will and Avoiding False or Spurious Claims

Undoubtedly the government has a legitimate interest in avoiding false claims and preserving the sanctity of the decedent's disposition of her property. Yvette argues, however, that there is no rational basis for not allowing her to prove through DNA evidence she is an heir on equal footing with Audrey, Clinton, and Tamara in her aunt's estate. She argues that DNA evidence is now "virtually dispositive" and proves she is Lorraine's niece as alleged. Audrey and Clinton argue that Yvette is attempting to re-litigate Donald's heirs which would have adverse effects on estate planning.

The Court recognizes two significant differences in this case and the *Lalli* line of rationale. First, the statutes analyzed and considered in those lines of cases were adopted before

DNA evidence was widely accepted in the scientific and legal communities. Second, Yvette is not trying to reopen, re-litigate, or dispute Donald's *closed* probate proceedings. Rather, Yvette is trying to establish she is an heir in the *open and pending* estate of Lorraine Flaws.

Yvette has cited numerous cases for the proposition that DNA evidence is the most reliable and "clear and convincing evidence" establishing paternity, or in this case, a familial connection. *see generally Davi v. Class*, 2000 S.D. 30, *In the Matter of C.W.*, 1997 S.D. 57. Furthermore, the legislative history of SDCL 29A-2-114 shows that it has not been amended since 1995. This indicates that there has not been serious consideration given to the advances in science with respect to establishing familial relationships. For this Court to find that Yvette is barred from inheriting in a pending probate because the Court must ignore the advancements in science and the exactness of DNA evidence causes an untenable and unjust result requiring this court to ignore reality and the truth. This case appears to be one in which the legislature is lagging behind the scientific realities of today's society.

With regard to the argument that the statute is unconstitutional as applied, the law recognizes that a statute may be constitutional on its face but that under circumstances, it may violate the constitution as applied. As stated in 16B Am. Jur. 2d, Constitutional Law § 940:

> One purpose of the Equal Protection Clause is to protect every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents. Thus, the guarantee of equal protection applies not only to facial legislative classifications but also to the administration of laws as well. Equal protection can be violated by discriminatory administration of a law impartial on its face. The Constitution not only forbids discriminatory laws making distinctions without a rational basis but also forbids the discriminatory and selective enforcement of nondiscriminatory laws. The validity of a state statute under the Equal Protection Clause therefore often depends on how it is construed and applied. Whether a statute or regulation valid on its face has been applied in a discriminatory manner is a factual question. The Supreme Court has stated that a determination of this question is not confined to the language of the statute under

> challenge in determining whether that statute has any discriminatory effect; just as a statute nondiscriminatory on its face may be grossly discriminatory in its operation, so may a statute discriminatory on its face be nondiscriminatory in its operation.
>
> Although facially neutral laws that may have an impact on certain classes do not violate the Equal Protection Clause, at least in the absence of an element of intentional or purposeful discrimination, a provision not objectionable on its face may be adjudged unconstitutional because of its effect and operation. A law, though fair on its face and impartial in appearance, which is of such a nature that it may be applied and administered with an evil eye and unequal hand so as to make it unjust and illegal discrimination is, when so applied and administered, within the prohibition of the Federal Constitution. Hence, in a consideration of the classification embodied in a statute, regard should be given not only to its final purpose but likewise to the means provided for its administration. For example, it is a denial of equal protection of the law to make the execution of a statute dependent on the unbridled discretion of a single individual or an unduly limited group of individuals.

16B Am. Jur. 2d, Constitutional Law, § 940.

The Supreme Court at an early date recognized the rule that an act of the legislature which in terms would give to one individual certain rights and the benefit of certain modes of procedure, and would deny to another similarly situated the same rights, could be challenged successfully on the ground of unjust discrimination and denial of the equal protection of the laws. *Id.* at § 928. The 14th Amendment was not intended to deprive the states of their power to establish and regulate judicial proceedings, and its provisions therefore only restrain acts which so transcend the limits of classification as to cause them to conflict with the fundamental conceptions of just and equal legislation. *Id.*

> It is a general rule that equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected, if such a course would also be applied to any other person in the state under similar circumstances and conditions. Furthermore, the Equal Protection Clause does not exact uniformity of procedure; the legislature may classify litigation and adopt one type of procedure for one class and a different type for another, so long as the classification meets the test of reasonableness.

Id. at § 931.

"Incidental individual inequality resulting from the operation of a rule of court does not make it offensive to the 14th Amendment. The legislature may prescribe novel and unprecedented methods of procedure, provided that they afford the parties affected substantial security against arbitrary and unjust spoliation." *Id.* at § 931.

Supreme Court has given some guidance on the issue. In *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 321 (2006) the Court gave the following passage:

> Generally speaking, when confronting a statute's constitutional flaw, this Court tries to limit the solution to the problem, preferring to enjoin only the statute's unconstitutional applications while leaving the others in force, see *United States v. Raines*, 362 U.S. 17, 20–22, or to sever its problematic portions while leaving the remainder intact, *United States v. Booker*, 543 U.S. 220, 227–229. Three interrelated principles inform the Court's approach to remedies. First, the Court tries not to nullify more of a legislature's work than is necessary. Second, mindful that its constitutional mandate and institutional competence are limited, the Court restrains itself from "rewrit[ing] state law to conform it to constitutional requirements." *Virginia v. American Booksellers Assn., Inc.*, 484 U.S. 383, 397. Third, the touchstone for any decision about remedy is legislative intent. After finding an application or portion of a statute unconstitutional, the Court must ask: Would the legislature have preferred what is left of its statute to no statute at all? See generally, *e.g., Booker, supra*, at 227. Here, the courts below chose the most blunt remedy—permanently enjoining the Act's enforcement and thereby invalidating it entirely. They need not have done so. In *Stenberg v. Carhart*, 530 U.S. 914, —where this Court invalidated Nebraska's "partial birth abortion" law in its entirety for lacking a health exception—the parties did not ask for, and this Court did not contemplate, relief more finely drawn, but here New Hampshire asked for and respondents recognized the possibility of a more modest remedy. Only a few applications of the Act would present a constitutional problem. So long as they are faithful to legislative intent, then, in this case the lower courts can issue a declaratory judgment and an injunction prohibiting the Act's unconstitutional application. On remand, they should determine in the first instance whether the legislature intended the statute to be susceptible to such a remedy.

Ayotte at 321.

> In *U.S. v. Booker*, 543 U.S. 220 (2005), Justice Thomas, dissenting in part, stated:
>
> When a litigant claims that a statute is unconstitutional as to him, and the statute is in fact unconstitutional as applied, we normally invalidate the statute only as applied to the litigant in question. We do not strike down the statute on its face. In the typical case, "we

neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants." *United States v. Treasury Employees,* 513 U.S. 454, 478 (1995); see also *Renne v. Geary,* 501 U.S. 312, 323–324 (1991); *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469 (1989); *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491 (1985).

Booker, supra, at 314 (Justice Thomas dissenting).

With these principals in mind, the Court has considered this case very carefully and has summarized its findings on the law and facts as follows:

1) Substantial credible evidence and the DNA testing establishes that Yvette is the daughter of Donald and the niece of Lorraine, and
2) Lorraine knew that Yvette may be her niece and consequently agreed to help her by submitting to a DNA test to establish the same, and
3) Lorraine knew of the results of the genetic testing and did not take action to write a new will and exclude Yvette as an heir which she had the right to do (this becomes very important when you consider that Lorraine was a very astute business person), and
4) The only thing prohibiting Yvette from inheriting from her aunt through her father is the statute in question that limits the means of establishing paternity, and
5) The legislature has not kept up with modern means of establishing paternity or heirship in this area of the law, and
6) The statute works a discrimination against Yvette as an illegitimate because it treats her differently and disinherits her when she clearly stands on equal footing with Donald's other children, and
7) In this case Yvette's right to establish paternity in Donald's estate was foreclosed, not because she lost on the merits, but because the estate was started and closed when she was a very young child, her mother had kept the true identity of her father a secret from her which

resulted in her being unable to protect her interests, and because the BIA Court lost jurisdiction to determine the issue after she had become aware of the true identity of her father, and

8) The legislative intent in adopting the Uniform Probate Code shows a desire to expand the means of establishing paternity for a child born out of wedlock, not to restrict such means; and

9) The failure of the statute to allow this important and unrefuted evidence to be used to establish the right to inherit is NOT substantially related to a legitimate government/state interest.

This Court cannot find any rational basis to justify the state's interest in preventing fraudulent claims by denying Yvette the opportunity to present DNA evidence in a pending probate. There is not a constitutionally justifiable reason that Yvette cannot stand on equal footing as Donald's other children. It has been "*clearly and unmistakably*" shown and there is no reasonable doubt that the statute violates fundamental constitutional principles when applied to the circumstances of Yvette's claim here. *Accounts Management, Inc. v. Williams*, 448 N.W.2d 297, 299 (S.D. 1992). SDCL §29A-2-114, as applied to Yvette, acts in an arbitrary and discriminatory manner without justification, hides the truth, and works an injustice. Precluding her from standing on equal footing as the statute and her siblings attempt to do is a violation of the equal protection clause of the United States and South Dakota Constitutions.

By so ruling, this Court's decision is strictly limited to the circumstances Yvette's case presents. The Court is limiting its ruling in this regard and will not re-write the statute. Had the land in Donald's estate not been transferred out of trust status, or had Yvette's mother disclosed that Donald was her father and taken action to preserve her interests in his estate, the BIA court

would have had sufficient jurisdiction to rule upon the issue presented here. Under the circumstances here, that issue was stranded and left without a resolution in favor of or against Yvette. Consequently, with these limitations, "the Court tries not to nullify more of a legislature's work than is necessary", "restrains itself from "rewrit[ing] state law to conform it to constitutional requirements", and leaves the statute substantially intact as opposed to leaving no statute at all. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 321 (2006).

Verdict and Order

Based on the above and foregoing, IT IS HEREBY ORDERED that the Motion for Partial Summary Judgment against Yvette Herman is DENIED; and it is further

ORDERED, that SDCL 29A-2-114 is unconstitutional as applied to Yvette Herman and the circumstances of her claim, and

It is further the VERDICT of this Court that Yvette Herman is the heir of Lorraine Flaws and shall inherit through the intestate succession laws accordingly.

THIS MEMORANDUM DECISION SHALL BE CONSIDERED THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW IN ACCORDANCE WITH SDCL 15-6-52(a)

Dated this 9th day of June, 2015.

BY THE COURT:

Honorable Bruce V. Anderson
First Circuit Court Judge

ATTEST:

Clerk of Courts

29A-2-114. Parent and child relationships. (a) For purposes of intestate succession by, from, or through a person, and except as provided in subsection (b), an individual born out of wedlock is the child of that individual's birth parents. However, inheritance from or through the child by a birth parent or that birth parent's kindred is precluded unless that birth parent has openly treated the child as kindred, and has not refused to support the child.

(b) For purposes of intestate succession by, from, or through a person, an adopted individual is the child of that individual's adopting parent or parents and not of that individual's birth parents, except that:

(1) Adoption of a child by the spouse of a birth parent has no effect on (i) the relationship between the child and the birth parent whose spouse has adopted the child or (ii) the right of the child or a descendant of the child to inherit from or through the other birth parent; and

(2) Adoption of a child by a birth grandparent or a descendant of a birth grandparent of the child has no effect on the right of the child or a descendant of the child to inherit from or through either birth parent;

(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.

Source: SL 1995, ch 167, § 2-114.

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Appeal No. 27511

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Appellee,

vs.

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Appellants.

APPEAL FROM THE CIRCUIT COURT
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Notice of Appeal Filed July 31, 2015

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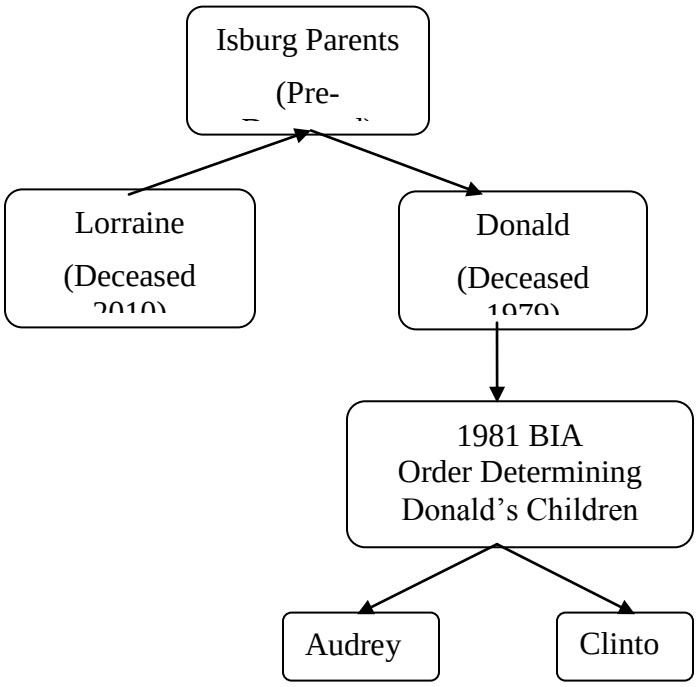
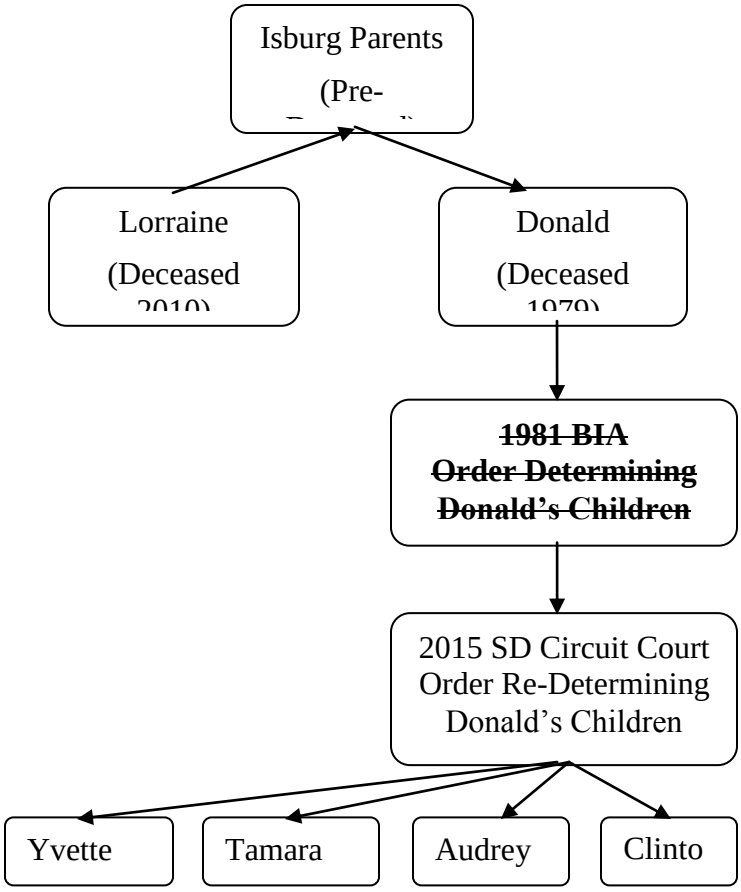


Yvette didn't attempt to challenge the BIA's 1981 Order until after Lorraine died in 2010. The BIA rejected Yvette's attempt to change Donald's children, and Yvette didn't appeal the denial to the United States District Court. Despite this, the Circuit Court incorrectly rejected the BIA's 1981 Order and re-determined Donald's children in 2015. Yvette's demand is shown in the following chart:



Procedurally, Audrey and Clinton inherit from Lorraine because they are undisputed as heirs—not because they are Donald's "blessed" legitimate children.

Legal Argument

1. The circuit court did not follow the Supreme Court's mandate: it was without jurisdiction to declare SDCL 29A-2-114(c) violates the Equal Protection Clause.

Whether the circuit court violated the Supreme Court's mandate on remand was concisely raised by Appellants. Yvette refuses to discuss the merits of the issue, the cited case or even mention the word "mandate." Instead, Yvette mischaracterizes the issue and falsely claims Appellants failed to cite authority. The issue isn't whether a circuit court has jurisdiction to decide a constitutional issue before the lawsuit is

appealed to the Supreme Court. The issue is whether a circuit court has jurisdiction to violate the Supreme Court's mandate. The mandate did not authorize the circuit court to reconsider the constitutionality of SDCL 29A-2-114(c).

Judicial certainty will be destroyed and endless litigation will result if circuit courts are allowed to reconsider issues beyond the Supreme Court's mandate. See, *State v. Piper*, 842 N.W. 2d 338, 2014 S.D. 2, ¶10: "If the circuit court's original jurisdiction could spontaneously resurrect on remittal, the defined roles of our tiered judicial system—as set forth in statute and case law—and the judicial certainty and efficiency they foster would be nullified." Similarly see, *Rabo Agrifinance, Inc. v. Rock Creek Farms,* 836 N.W.2d 631, 2013 S.D. 64, where Circuit Court Judge Pfeifle correctly recognized it had no jurisdiction to reconsider a prior order after an appeal.

On remand the circuit court had no jurisdiction to revoke its prior ruling that SDCL 29A-2-114(c) is constitutional or to subsequently declare it was unconstitutional as applied to Yvette. Its ruling is void.

2. Summary judgment should have been granted to Audrey and Clinton.

Yvette ignores or mischaracterizes Appellants' arguments in support of summary judgment. Yvette frivolously argues Appellants waived their arguments by failing to cite authority. Apparently, Yvette only looked at Appellants' Table of Contents to make this claim. A comparison of the Table of Authorities shows that Yvette did not respond to most of the cases cited by Appellants. Yvette also argues that insufficient objections were made to the Court's Findings, but this dispute involves questions of law on the denial of summary judgment. Yvette ignores the Appellants' proposed Findings, R 861, which were refused by the circuit court, R 981.

Appellants preserved the issues for an appeal. *Tri-City Associates, L.P. v. Belmont, Inc. Eyeglasses*, 845 N.W.2d 911, 2014 S.D. 23 at ¶ 19.

Once the BIA rejected Yvette's appeal in 2014, summary judgment should have been granted to Appellants.

3. SDCL 29A-2-114(c) does not violate the Equal Protection Clause.

Because Yvette cannot credibly dispute Appellants' authority, she refuses to discuss the non-discriminatory probate process in South Dakota and the time-limits to establish paternity. She ignores the various state and federal decisions that uphold time-limits that bar attempts by illegitimates to inherit through a father. Significantly, she refused to discuss the Eighth Circuit decision, *Shangreau v. Babbitt*, 68 F. 3d 208 (8th Cir.1995), that ruled that paternity must be established in the father's estate in order to subsequently inherit from a grandfather through the predeceased-father.

Yvette justifies her refusal to discuss Appellants' authority by claiming that the South Dakota Attorney General's non-appearance confirms that Appellants' arguments lack merit. Yvette ignores that the Attorney General also did not appear in the *Matter of Erbe*, 457 N.W. 2d 867 (S.D. 1990)—where this Court ruled that a more restrictive predecessor to SDCL 29A-2-114(c) did not violate the Equal Protection Clause either facially or as applied.

3.1. SDCL 29A-2-114(c) creates no classification between legitimates and illegitimates when read in conjunction with other probate statutes.

Yvette fails to discuss how the probate procedure in South Dakota makes SDCL 29A-2-114(c) discriminatory as applied. Yvette also incorrectly claims at pages 15, 20, 23 and 24 that Audrey and Clinton inherit simply because they are the "blessed" legitimate children of Donald. Procedurally, Audrey and Clinton inherit

because they are undisputed as Donald's children—not because of any "blessed" status.

Notably, Yvette ignores that both martial and non-martial children:

- have the same burden of proof when their paternity is challenged, and
- are treated the same when they are omitted from an estate proceeding and do not timely request to reopen it.

Yvette's refusal to address the probate process is telling.

3.1.1. General limitations on the time and the manner in which heirs may be established are not subject to Equal Protection scrutiny.

Incredibly, Yvette argues that this is not a statute of limitation case—that SDCL 29A-2-114(c)'s requirement that paternity must be proved no later than in the father's estate is not a time limit. Yvette conveniently overlooks the holding of two cases she cited, *Erbe*, supra, and *Lalli v. Lalli*, 439 U.S. 259 (1978). Those held that South Dakota and New York's deadline for establishing paternity—before the father's death—did not violate the Equal Protection clause. SDCL 29A-2-114(c) increased the time-limit for establishing paternity to include the father's estate proceeding. Although Donald died in 1979 and Yvette discovered his identity in 1988, she had the right and opportunity until 2003 to prove in his estate proceedings that she was his daughter—if she could also hurdle 43 C.F.R. § 30.243(a)'s requirement that she was diligent. Yvette was not diligent. While the circuit court may theoretically question if the BIA's requirements are unfair or even unconstitutional, it had no jurisdiction to ignore or invalidate them. *Kansas City Power & Light Co. v. State Corp. Com'n,* 715 P.2d 19, 22 (Kan.,1986).

3.2. SDCL 29A-2-114(c) does not violate the Equal Protection clause because of the *stare decisis* doctrine.

Yvette claims *Erbe* is not controlling because of Yvette's unique facts, but the fundamental facts are the same in both cases. Each involves illegitimates who failed to meet the time-requirement of the statutes. In *Erbe*, the illegitimate failed to prove in the father's estate that paternity had been established before the deadline—the father's death. In this case, Yvette failed to prove paternity in Donald's estate before the deadline for further proceedings in his estate—when the land was taken out of Federal trust in 2003—24 years after his death.

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

Yvette argues that the Supremacy Clause is inapplicable:

- She repetitively argues that Donald's probate proceeding is not an issue, but that wasn't her argument in *Flaws I*. There she argued that it was vital. This Court granted Yvette's request to wait until the BIA's ruling in Donald's estate. Then after BIA ruled against her, she flip-flops and argues that Donald's probate proceeding is irrelevant.
- She argues that there was no determination of her paternity in Donald's estate. There certainly was. In Donald's estate proceedings, the BIA determined that he died intestate. Thus, the sole issue was the identity of his children. The BIA determined that his children were Audrey and Clinton, and that each was entitled to one-half of his estate. There was no proviso in the order that it was a conditional determination. App. 1, Ex AC-4 # 261.

- Under unanimous federal statutes and decisions, the BIA's determination of heirs is final and conclusive. It isn't subject to a full faith and credit analysis because it is an Indian matter under the BIA's exclusive jurisdiction. *Shangreau*, p. 212 and Opening Brief pages 25-26. Instead, Yvette argues without citing authority that, "there can be no preclusive effect [of the BIA's Order Determining Heirs] even if Donald's long-closed BIA estate is considered." (pp 28-29).

Appellants agree with Yvette's footnote 12 that heirs are determined at death. Donald's children were determined in 1981 by the BIA. Yvette is attempting to inherit through Donald—when his children were already determined in 1981. Significantly, Lorraine knew of the BIA's determination and relied upon it year after year to lease the land that she, Audrey and Clinton owned together.

Yvette repeatedly claims she received no notice. But, she received the notice required by the BIA regulations for unknown heirs—constructive notice. Yvette also repeats that she was only 9 years old when Donald died, but under the BIA's regulations and decisions her age at his death is insignificant. The critical factors are:

- when did she learn she was an omitted child [which was in 1988 when she was 18], and
- was she diligent when she requested the BIA to reopen the estate proceedings in 2010 [she waited 22 years after discovering Donald's identity]. Tellingly, she waited until after Lorraine died.

Yvette finally admits at page 34 what she previously disputed vociferously. Her admission is to the ultimate issue. She admits she is bound by the BIA's determination of Donald's children: that she "does not stand to inherit anything from her father; nor is she now trying to. These facts are not disputed."

Conclusion

Lorraine did not consider or treat Yvette as a niece. Lorraine knew and relied upon the BIA's determination in Donald's estate that Audrey and Clinton were his only children. Yvette didn't challenge the BIA's determination of Donald's children until after Lorraine died, but now concedes she is bound by the BIA's 1981 Order.

SDCL 29A-2-114(c) is constitutional as applied. Summary Judgment should have been granted to Audrey and Clinton.

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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 1,699 words and 9,087 characters.

s/Robert R. Schaub

Certificate of Service

Robert R. Schaub certifies that on December 16, 2015 he served electronically the Appellants' Reply Brief upon each of the following:

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s/Robert R. Schaub

Appendix

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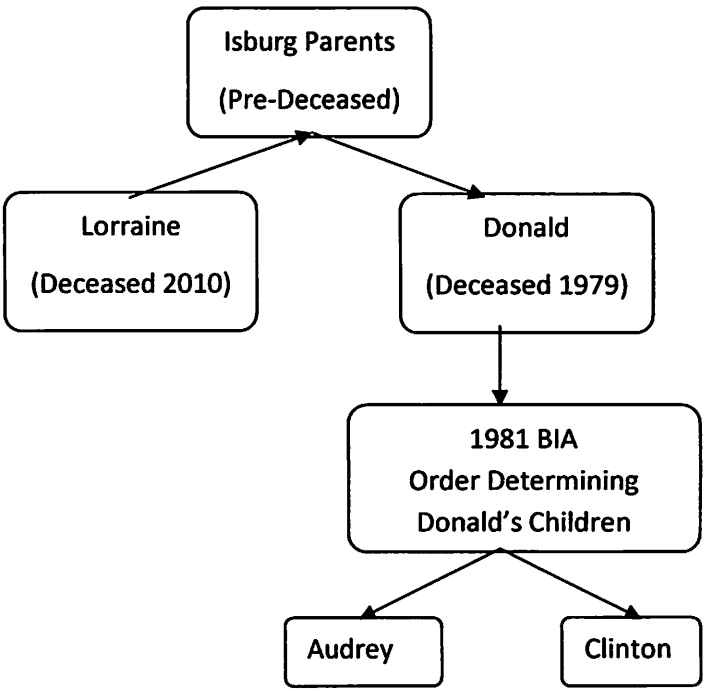

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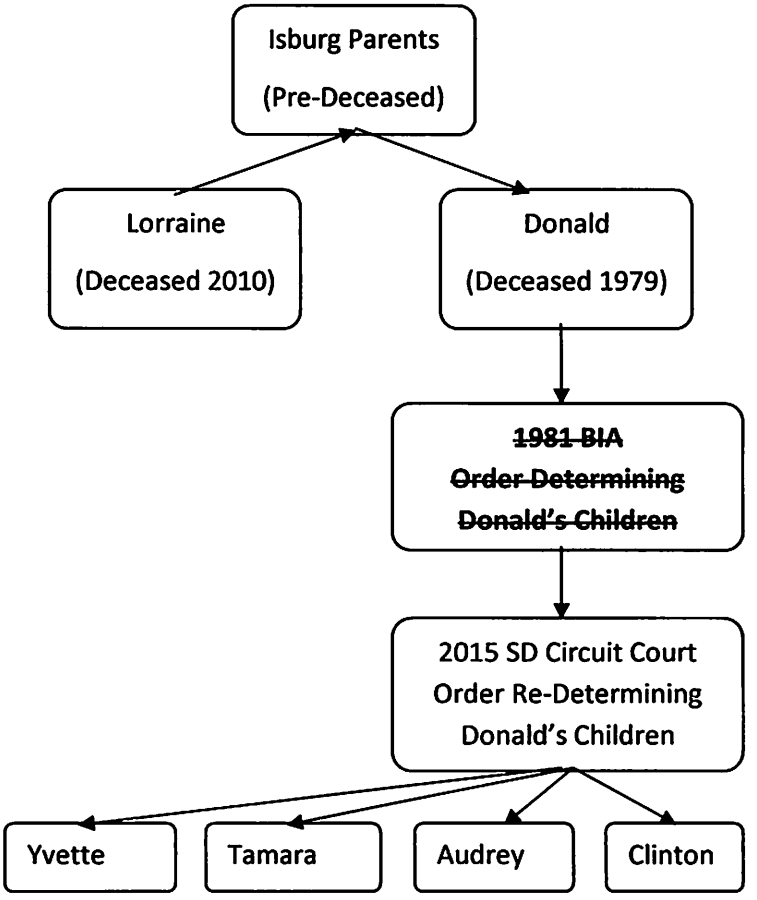

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Clinton, and that each was entitled to one-half of his estate. There was no proviso in the order that it was a conditional determination. App. 1, Ex AC-4 # 261.

- Under unanimous federal statutes and decisions, the BIA's determination of heirs is final and conclusive. It isn't subject to a full faith and credit analysis because it is an Indian matter under the BIA's exclusive jurisdiction. *Shangreau*, p. 212 and Opening Brief pages 25-26. Instead, Yvette argues without citing authority that, "there can be no preclusive effect [of the BIA's Order Determining Heirs] even if Donald's long-closed BIA estate is considered." (pp 28-29).

Appellants agree with Yvette's footnote 12 that heirs are determined at death. Donald's children were determined in 1981 by the BIA. Yvette is attempting to inherit through Donald—when his children were already determined in 1981. Significantly, Lorraine knew of the BIA's determination and relied upon it year after year to lease the land that she, Audrey and Clinton owned together.

Yvette repeatedly claims she received no notice. But, she received the notice required by the BIA regulations for unknown heirs—constructive notice. Yvette also repeats that she was only 9 years old when Donald died, but under the BIA's regulations and decisions her age at his death is insignificant. The critical factors are:

- when did she learn she was an omitted child [which was in 1988 when she was 18], and

- was she diligent when she requested the BIA to reopen the estate proceedings in 2010 [she waited 22 years after discovering Donald's identity]. Tellingly, she waited until after Lorraine died.

Yvette finally admits at page 34 what she previously disputed vociferously. Her admission is to the ultimate issue. She admits she is bound by the BIA's determination of Donald's children: that she "does not stand to inherit anything from her father; nor is she now trying to. These facts are not disputed."

Conclusion

Lorraine did not consider or treat Yvette as a niece. Lorraine knew and relied upon the BIA's determination in Donald's estate that Audrey and Clinton were his only children. Yvette didn't challenge the BIA's determination of Donald's children until after Lorraine died, but now concedes she is bound by the BIA's 1981 Order.

SDCL 29A-2-114(c) is constitutional as applied. Summary Judgment should have been granted to Audrey and Clinton.

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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 1,699 words and 9,087 characters.

s/Robert R. Schaub

Certificate of Service

Robert R. Schaub certifies that on December 16, 2015 he served electronically the Appellants' Reply Brief upon each of the following:

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s/Robert R. Schaub

Appendix

PROBATE

IDENTIFICATION NO.
IP-~~BI~~ 48R 81-37
TC

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
P.O. Box 3785
Portland, Oregon 97208

ORDER DETERMINING HEIRS

WHEREAS, DONALD ISBURG, Unal. ~~Allottee~~ No. CCU-00597
of the Crow Creek Indian Agency
in the State of South Dakota died intestate possessed of trust or restricted
property on August 24, 1979 at the age of 47 years, and

WHEREAS, a hearing was duly held/concluded at Portland, Oregon
on May 19, 1981, for the purpose of ascertaining the heirs of said decedent:

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by section 1 of the act of June 25, 1910 (25 USC 372) and other applicable statutes, and pursuant to 43CFR 4, I hereby find that the heirs of said decedent, determined in accordance with the laws of the State of South Dakota and their respective shares in decedent's estate are:

AUDREY JEAN COURSER	CCU-1250	Born 8/12/56	Daughter	1/2
CLINTON DALE BAKER	CCU-1253	Born 11/22/57	Son	1/2

The estate inventory and appraisement of trust real property is attached hereto and by this reference made a part hereof.

No claims were filed as against this estate.

The estate of said decedent subject to the jurisdiction of this Department is valued at $13,243.00.

Dated this 8th day of June, 1981, at Portland, Oregon.

ROBERT C. SNASHALL
Administrative Law Judge

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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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.

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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

APPELLEE'S BRIEF

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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

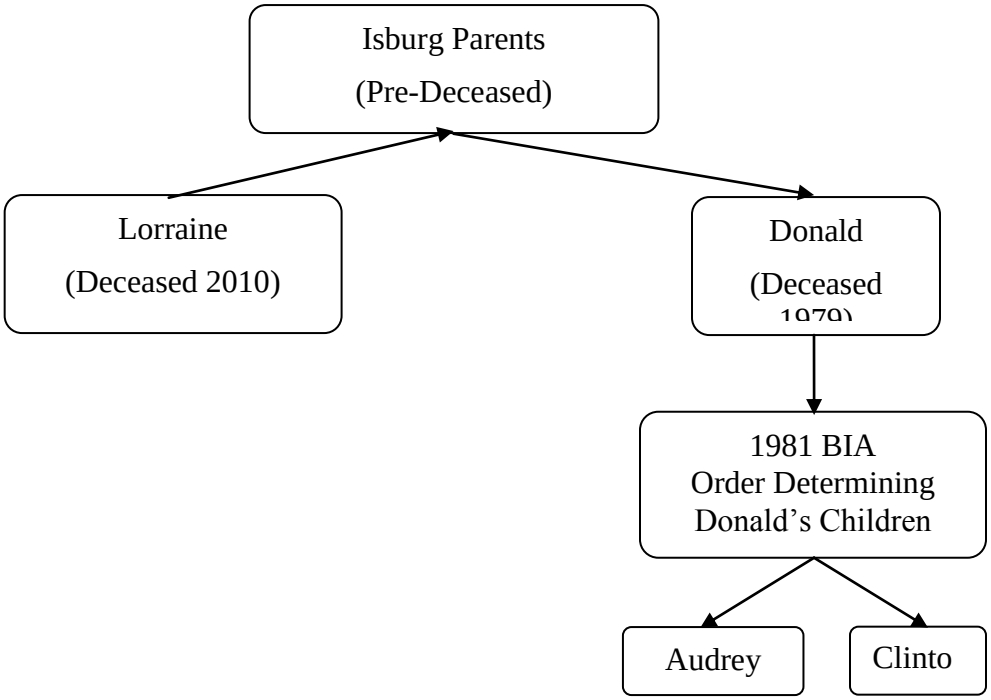
Audrey and Clinton maintain that there is no provision in SDCL 29A-2-114 that allows for re-determining the decedent's children in a subsequent collateral probate.

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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