



INTERIOR BOARD OF INDIAN APPEALS

Estate of Margerate Arline Glenn

50 IBIA 5 (07/06/2009)

Petition for Reconsideration dismissed:

50 IBIA 150



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

ESTATE OF MARGERATE ARLINE	)	Order Affirming Denial of Administrative
GLENN	)	Costs and Denial of Rehearing; But
	)	Setting Aside Decree and Remanding
	)	
	)	Docket No. IBIA 07-97
	)	
	)	July 6, 2009

Roberta Two Elk (Appellant or Roberta) appeals to the Board of Indian Appeals (Board) from two orders entered February 22, 2007,<sup>1</sup> by Administrative Law Judge Marcel S. Greenia (ALJ or Judge Greenia), in the Estate of Margerate Arline Glenn (Decedent), Deceased Oglala Sioux Indian, Probate No. P000003622IP. In one order, Judge Greenia denied Appellant’s Petition for Rehearing from an Order Determining Heirs, Approving Will, and Decree of Distribution, dated September 20, 2006 (2006 Decree), which distributed Decedent’s trust assets in equal 1/4 shares to the four lineal descendants of Decedent’s youngest child, Susie Rose Glenn, pursuant to Decedent’s will.<sup>2</sup> In her Petition for Rehearing, Appellant had sought to overturn the approval of the will on grounds that it had been revoked by the Decedent. In denying rehearing, the ALJ concluded that Appellant had not justified her failure to submit, at the probate hearing, information in support of her assertion that Decedent had revoked her will. Judge Greenia’s second order denied a “Petition for Allowance of Claim,” in which Appellant sought recovery of administrative expenses she “paid to manage this case \$6,680.00,” on the grounds that her request was untimely. We affirm Judge Greenia’s Order Denying Costs on other grounds, to clarify that it was neither a Petition to Reopen under 43 C.F.R. § 4.242,<sup>3</sup> nor a creditor

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<sup>1</sup> Both orders were erroneously styled as Orders Denying Petition for Reopening. One order was in substance a denial of a petition for rehearing and the other was a denial of a motion for administrative costs. We refer to them herein as an Order Denying Rehearing and an Order Denying Costs.

<sup>2</sup> Omitted interests were added in an Administrative Modification on December 5, 2006.

<sup>3</sup> The Department’s probate regulations were amended in 2008 to incorporate the provisions of the American Indian Probate Reform Act of 2004, 25 U.S.C. § 2201, *et seq.*

(continued...)

claim submitted under 43 C.F.R. § 4.250, but affirm his conclusion that Appellant's request for administrative expenses was untimely filed. Motions for administrative costs incurred before the initial probate decision is issued must be submitted in time for them to be considered in that decision. We affirm his Order Denying Rehearing because the sole issue raised by Appellant in her petition was a new claim — that Decedent had revoked her will — which, in any event, lacked merit. We also affirm that Order to the extent it avoided reconsidering Appellant's several arguments challenging Decedent's Will and construing various letters in the record. We nonetheless set aside and remand the 2006 Decree distributing the estate, pursuant to 43 C.F.R. § 4.318, to prevent a manifest error which may stem from newly presented evidence and the lack of notice to interested parties who appeared before this Board after issuance of the decisions rendered by Judge Greenia.

### Background

Decedent was born on June 11, 1920, to Edison Glenn and Susie Lip Glenn.<sup>4</sup> She resided in South Dakota, living towards the end of her life in the town of Wanblee. She was married to Royal Aaron Two Elk in 1940 and divorced from him in 1941. She bore two children as a result of that marriage. Aaron Edison Two Elk or Two Elk Glenn (Aaron) was born on May 25, 1940, and predeceased his mother in July 1999. Roberta Philmon Two Elk (also Two Elk Larkin) was born on November 17, 1941. Aaron fathered three children: Justyne Jo Two Elk Glenn, Michael Everett Two Elk, and Darrell Leander Two Elk Glenn. A handwritten note in the record suggests that Darrell may have been adopted. Roberta bore several children, but the record includes little about them.

Decedent did not remarry but bore four additional children; the first three were sons. Duroy John Glenn (Duroy) was born on March 8, 1946, but later changed his name to Donroy or Donald.<sup>5</sup> Aaron's obituary listed a "Duroy" as his son, which appears to be an error. Bruce Owen Glenn Davies (Bruce) was born on December 11, 1950. Richard

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<sup>3</sup>(...continued)

The rules governing Indian probate hearings will be codified at a new 43 C.F.R. Part 30. This case is governed by the prior version of the regulations, and the citations to 43 C.F.R. §§ 4.200-4.282 are to regulations as codified in 2006, unless otherwise noted.

<sup>4</sup> Her Birth Certificate identifies her as Margerate Glenn. It is unclear when she adopted "Arline" or "Arlene." Subsequent documents, including an obituary and her own handwriting, identify Margerate variously as "Margerate," "Margaret," or "Marjorie."

<sup>5</sup> In a letter date-stamped April 22, 1966, signed "Donroy Glenn," a Duroy John Bird Necklace asks for a name change to "Donald John Glenn."

Jeffrey Two Elk was born on March 17, 1954.<sup>6</sup> After his mother's death, Bruce sent a letter to the Pine Ridge Agency, Bureau of Indian Affairs (BIA), in which he explained that his mother sent himself and Richard to live in Louisiana when he was approximately 7 years old and Richard would have been approximately 3 years old. Bruce describes an erratic upbringing in which he and Richard returned after 18 months to live with their mother.<sup>7</sup> Bruce left to live with his "aunt" Roberta (Appellant), and later went into foster care and then boarding school.<sup>8</sup> A marriage certificate indicates that Richard married in 1973. A document in the record, on which the names of Decedent's first four children are typed and the names and birth dates of her two last-borne children are handwritten, includes the following handwritten notations: "Richard has twin boys born 8-17-71. Margarate is adopting," and "Richard has Tasha Marie Two Elk b. 10-21-72." Roberta states that she has not communicated with Duroy or Richard since the 1960s.

Decedent's last child was her daughter Susie (Susan) Rose Glenn born on April 27, 1959. Susie Rose bore four children with Myron Plenty Wolf: John Lee, Semele Dee, Willie Joseph, and Charlie, all with the surname Plenty Wolf. Susie died in a car accident on April 27, 1991.

On January 20, 1972, Decedent executed a Last Will and Testament (Will) leaving all of her property to her daughter Susie Rose. Will, Second Clause. Addressing the possibility that Susie Rose might predecease her mother, the Third Clause left in the alternative all property to son Richard's "twin sons," who, the testatrix (Decedent) declared, "I am adopting." A "Rest and Residue Clause" left any residuary portion of the estate to Susie Rose. The will was prepared on a BIA Indian will form by a BIA Realty Assistant and signed by two witnesses. Attached to and a part of the Will is a notarized Affidavit signed by Decedent, the will preparer, and the two witnesses, Emma T. Nelson and Madeline B. Lafferty. In the Affidavit, the witnesses and will scrivener all state that Decedent appeared to be of sound mind, to be capable of disposing of her property, and to be acting in the absence of undue influence or duress.

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<sup>6</sup> This person is elsewhere identified as Richard Glenn. "Aaron Royal Two Elk" is listed on the birth certificate as his father, possibly as a result of the transposition of the first two names of Decedent's husband.

<sup>7</sup> Bruce accuses his mother (Decedent) of changing his last name from "Davis" to "Davies" to avoid contact by his birth father.

<sup>8</sup> In two notarized letters dated November 15, 2005, Robert S. Russell, Jr., states that he did not adopt Bruce, Aaron Edison, or Roberta, but asserts that he was Bruce's foster parent from 1962 until 1966.

Decedent died at Kingsbury Memorial Manor in Lake Preston, South Dakota, on November 8, 1999. At the time of her death, she owned property on the Pine Ridge and Standing Rock Sioux Reservations, as well as money in an Individual Indian Money account. On November 9, 1999, the Oglala Sioux Tribal Court appointed Roberta as the Administratrix of the Estate for matters addressed by that tribunal.

Roberta completed and signed an Affidavit of Family History that was submitted to the Pine Ridge Agency on April 12, 2000. On page one, she identified all six of Decedent's children, with their dates of birth, and identified all except Aaron and Susie Rose as "living." On page 2, Roberta listed Duroy as "presumed dead, no wife or children," and Richard's whereabouts as "unknown." Next to a question asking if the decedent had left a will, Roberta checked "no." By letter dated July 30, 2001, she advised the Pine Ridge Agency that she had not found any information on either half-brother Duroy or Richard, after conducting a "national profile search."<sup>9</sup> She asserted that she had not seen Duroy for 39 years. Referring to Richard and/or his twins, Roberta's letter stated, "No information found on Richard J. Glenn; not even a birth certificate. No children found." This letter also stated "[t]he will is invalid. No such persons exist." On June 23, 2004, Bruce signed another Affidavit of Family History, generally attesting to the information regarding Decedent's six children and the total of seven grandchildren born to Decedent's deceased children Aaron and Susie Rose, but making no reference to a will.

On December 5, 2005, the Superintendent of the Pine Ridge Agency completed and forwarded to the Office of Hearings and Appeals (OHA) a Form OHA-7, "Data for Heirship Finding and Family History," listing the above people and their relationships and enrollment numbers. This document notified OHA that there are "some MAJOR FAMILY ISSUES going on with this probate." OHA-7 Additional Information. It predicted that Roberta "will attend the hearing prepared to fight the Will," and, based on contacting children and grandchildren of Decedent, cited as "unknown" the "whereabouts of Duroy Glenn (Donroy) and Richard Jeffery Glenn, John and Charlie Plenty Wolf. No choice but to send [notices] to C/O Superintendent."

On December 6, 2005, the Superintendent sent a notice to Appellant and other identified family members (some in care of the Superintendent) giving notice that the case had been assigned to Judge Greenia. The Notice attached a list of the contents of the probate package submitted by BIA, which included "Original Last Will and Testament."

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<sup>9</sup> Records from "Rocky Mountain Safety & Security" show "no hit" responses to searches for "Richard Jeff Two-Elk" and "Richard Glenn." A letter from the Department of Health of South Dakota indicates that Roberta sought a birth certificate for Richard Jeffrey Glenn borne to Decedent and "Tony Jones"; it located no certificate using those names.

On February 22, 2006, Judge Greenia issued a Notice of Hearing scheduled for March 24, 2006, at the Pine Ridge Agency. The Notice was issued to Decedent's children Roberta and Bruce at their addresses of record. It was served on Duroy and Richard in care of the Superintendent of the Pine Ridge Agency (Superintendent). The Notice was served on Aaron's three children (Justyne, Darrell, and Michael) at addresses of record, but service on Darrell was "returned to sender." It was also served on two of Susie's children, Semele and Willie, at addresses of record; service on Willie was "returned to sender." The Notice was served on Susie's children John and Charlie in care of the Superintendent. The service list includes Emma T. Nelson and "Madleine [sic] Lafferty," the witnesses to the Will, but identifies them as "deceased."

In a list of objections to Decedent's will signed March 22, 2006, Roberta asked that the "will dated 1-20-1972 be set aside or be disregarded." She set forth the following nine objections in support of this request:

1. No original as required by 15.104(8) and 15.201(F) uniform probate code of South Dakota.
2. A letter stating she wanted to change her will, June 14, 1978.
3. Will is not signed by the Office of the Examiner of Inheritance.
4. No clear inventory of descriptions.
5. No clear names or information as required by 15.104(7)(iv) and 15.104(5).
6. No information on adoption, 15.104(7)(iii).
7. Suzy predeceased her.
8. I request the estate be descend (be distributed) according to the State Laws of Intestate Succession.
9. Linear Descendants 29-A-2-103 by representation.

In a telefax dated by Roberta as May 24, 2006, Roberta also asserted: "I exercise my right to challenge the witnesses of the will of Margerate Glenn dated 1-20-72." This telefax is initialed with the date March 24, 2006, the date of the hearing.

Judge Greenia conducted the hearing on March 24, 2006. Only Roberta appeared. Judge Greenia and Roberta began by addressing facts regarding Decedent and family members. Transcript of Hearing (Tr.) at 3. Roberta proffered to the ALJ a set of papers which included family documents such as certificates of birth, death, marriage and divorce. *Id.* at 24. In addition to her letter objections to the Will, Judge Greenia accepted four sets of documents, which he identified as Exhibit X.<sup>10</sup>

At the hearing, Roberta sought to discount the relevance of any beneficiaries identified in the Will. She objected to the validity of Richard's birth certificate, which Judge Greenia found in the probate file. Roberta asked to "make a formal challenge to" the official birth certificate, and asserted that "this just, this isn't a fact." Tr. at 8-11. She claimed that her searches for information about Richard had been unproductive. She denied the existence of Richard's alleged twin sons. *Id.* at 20, 23.

Roberta contended that Susie Rose "turned over custody . . . to Social Services" of her children, apparently in an attempt to question whether they could be considered heirs or beneficiaries. Tr. at 22, 27. She claimed that the "children were not in [Susie Rose's] custody when she died . . .," and asserted that she had "found no proof" that Susie Rose had ever married the children's father, Myron Plenty Wolf. *Id.* at 22.<sup>11</sup>

In addition to her challenges or questions concerning Decedent's potential heirs or beneficiaries, Roberta also served on Judge Greenia her March 22 written request that he invalidate the Will and declare Decedent to have died intestate. Tr. at 14. Roberta repeated her challenge to the validity of the Will and claimed that it must be disregarded because the scrivener and witnesses are dead. *Id.* The ALJ responded to each of the nine points listed in that document, noting for example that the Office of Hearing Examiner was abolished and that it was up to the judge in charge of the probate proceeding to approve a will. *Id.* He explained that no property inventories were required on the face of the Will, given that it devised all of Decedent's property interests. *Id.* at 15.

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<sup>10</sup> These documents are divorce decrees (Ex. T); documents relating to Roberta's search for information about Richard (Ex. U); the letter regarding Duroy's name change (Ex. V), addressed above; and the 1978 Letter (Ex. W), addressed below.

<sup>11</sup> With her Notice of Appeal, post-dating proceedings before the ALJ, Roberta submits a May 2, 1991, letter from the Denver Department of Social Services to a Coronor. The letter was sent by a temporary legal custodian of the children, ranging from 6 to 11 years in age, and requested that Roberta, Aaron, Bruce, and Richard "take responsibility for the burial and financial arrangements for their sister, Susie Rose Two Elk."

Roberta provided the judge with a copy of the described 1978 letter that she offered as written by Decedent in which Decedent claimed an intent to change her Will. This 1978 handwritten letter is signed by Marjorie A. Glenn and was served on an ALJ in Billings, Montana, on June 14, 1978, “in regards to the probate hearing held in Rapid City, South Dakota on May 16, 1978,” pertaining to Decedent’s brother Riley M. Glenn. In this letter (hereafter 1978 Letter), Decedent had complained about the judge in and the process of that proceeding. *Id.* at 2. The ensuing pages contain complaints about a woman that Decedent’s father married in 1925, and allege that the children borne by Decedent’s stepmother (Decedent’s half-siblings) were not her own father’s offspring. *Id.* at 3-5. Decedent thus contended that only she was entitled to her brother’s estate, despite the lack of a will so stating. In the passage cited by Roberta, italicized below, the letter concludes:

Also I would like to say the agency at Pine Ridge S. Dakota never answers our letters [illegible] they say a will has to be on their will papers. *I have been trying to change my will for 5 yrs with no result.*

They say you can change your will by [sic] they did not send the paper forms, then they say a handwritten one is not sufficient.

My brother Riley M. Glenn wanted to sign everything over to me. At the time he insisted on the handwritten one.

1978 Letter (emphasized language quoted by Roberta).

Appellant also argued that Decedent was not competent to execute a will because she suffered from mental illness. Roberta testified that she herself is a retired nurse and mental health counselor with over 30 years experience and a bachelor of arts in psychology, and contended that her mother’s mental illness was longstanding and constant after traumatic violent incidents from the 1940s when Roberta was a toddler. In one instance, Roberta claimed her mother (Decedent) suffered from brain damage from violence inflicted upon her, and in another, she claimed Decedent was so violent towards Roberta that Roberta was left with permanent scars on her arm and an artificial eye. Tr. at 17.

Judge Greenia advised Roberta that she must provide evidence that Decedent had no testamentary capacity at the time directly surrounding the execution of her Will. Tr. at 16-18. He explained that such evidence must relate to a time “on or about the date [Decedent] executed her Will.” *Id.* at 18. Roberta explained that all of Decedent’s siblings are dead, and that there was no one but herself to testify. Nonetheless, Judge Greenia attempted to describe the kind of evidence that would be probative of Decedent’s testamentary capacity.

ROBERTA TWO ELK: But everyone else, all her nine sisters and brothers are all gone, all except for this one [Pearl Pourier, whom Roberta was unable to reach], everybody's gone. So this is why I cannot specify that one day.

JUDGE GREENIA: Or, you know, the week, the month, somewhere in that approximate time frame. You know. I want to explain to you that, *to invalidate a Will that was properly executed, and this appears to be prepared by the BIA, notarized, witnessed, in proper form, that it's really your burden of proof.*

ROBERTA TWO ELK: Alright sir, let me point out that mental illness is not just one day. There are different categories, and it's progressive, and it's like any other illness, like cancer, a little bit, and then it gets worse, and that sort of a thing. Mental illness is not just one day, one psychotic episode between 9 and 4.

JUDGE GREENIA: Okay.

ROBERTA TWO ELK: That's not the way mental illness goes.

JUDGE GREENIA: But I need . . . right, but just like cancer, or mental illness, it has to be existing on a certain day. Either it existed . . .

ROBERTA TWO ELK: Well I can . . .

JUDGE GREENIA: . . . or it didn't exist.

ROBERTA TWO ELK: Okay I can swear to two things. One, again we're going back to when I was about 3 years old, her mother, her stepmother . . .

JUDGE GREENIA: You know I'd let you continue, but again . . .

ROBERTA TWO ELK: . . . beat her in the head, so she had closed head injuries. She was unconscious for three days, while I sat at her feet eating raw potatoes off the floor, because she was unconscious.

JUDGE GREENIA: Okay.

ROBERTA TWO ELK: Clearly, with my medical profession, there was a post head injury, and her father died of diabetes, and probably she was undiagnosed childhood diabetes. Because I'm diabetic now.

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JUDGE GREENIA: I just want to make you aware of what evidence I need, in order to find what you are claiming. That's all I'm trying to do, is, in a sense I'm trying to help you. Because generalities, vague opinions, hearsays, that are uncorroborated, really are not evidence, and so, you know, I don't want you to find out in a decision that, well what you said about when you were two years old really doesn't matter. It's not material. That's why I'm trying . . .

ROBERTA TWO ELK: Okay, well then let me ask you this, if I need to prove that she was stable or not stable on that day, can you prove that she was stable when both . . . their witnesses are passed away.

JUDGE GREENIA: . . . it's not my burden. I have a Will that appears to be properly documented, and that's why they go through that documentation.

Tr. at 18-20 (emphasis added). Judge Greenia advised Roberta that he would address her objections in his decision. *Id.* at 20.

In his 2006 Decree, Judge Greenia approved Decedent's Will and rejected Roberta's efforts to have it invalidated. Judge Greenia explained that the Second Clause leaving all property to Susie Rose could not be effectuated because she had predeceased Decedent. He explained that the devise in the Third Clause to Richard Jeffrey Glenn's "twin sons" must also fail because there is no record of the existence of such children, or of Decedent's adoption of them. He thus effectuated the Rest and Residue Clause devising all of the remainder of the estate to Susie Rose. Pursuant to the anti-lapse provision of 43 C.F.R. § 4.261,<sup>12</sup> distribution of property is made to descendants of a predeceased devisee *per stirpes* "[w]hen an Indian testator devises or bequeaths trust property to any of his

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<sup>12</sup> We have explained the purpose of an anti-lapse provision as follows:

As a general rule, when a devise to a living person cannot be given effect because that person has predeceased the testator, the devise "lapses" as a matter of law and is rendered null and void. *See* 96 C.J.S. *Wills* § 1197. To prevent such a lapse, probate laws may contain "anti-lapse" provisions, which designate eligible alternative beneficiaries who may receive the devise by operation of statute. *Id.*

*Estate of Genevieve W. Pollak*, 47 IBIA 147, 150 n.3 (2008).

grandparents or to the lineal descendant of a grandparent.” Accordingly, he distributed Decedent’s estate to the four living children of Susie Rose.

Rejecting Roberta’s request that he reject the Will, Judge Greenia cited the burden of proof on the proponent of a motion to invalidate a will for lack of testamentary capacity, which would have required Roberta to “show that the testator did not know the natural objects of his bounty, the extent of his property, or the desired distribution.” 2006 Decree at 4 (citations omitted). He explained that Roberta had not met this burden because

she makes no attempt to show that these mental problems existed at the time of the execution of this will or affected the decedent’s competency. . . . No further evidence was presented at the hearing other than generalized statements [that Decedent] did not know what she was doing. No other cogent evidence was presented to prove mental incompetency.

*Id.* (citations omitted). Judge Greenia attached a memorandum of law addressing both the anti-lapse provision and the issue of testamentary capacity.

Roberta submitted a Petition for Rehearing dated November 14, 2006. For the first time, she asked that Decedent be determined to have died intestate on grounds that the Will had been revoked. In support, she submitted evidence that she had visited her mother at the Kingsbury Memorial Manor on August 23-24, 1999, as well as an August 25, 1999, Order of the Tribal Court granting Roberta Two Elk “medical Guardianship” of her mother. According to Roberta, in August 1999 her mother told her the Will “is void. She destroyed the original with intent to revoke. ‘I tore it into pieces and burned it, it means nothing.’ Margerate Glenn said it did not represent her wishes. She wanted it set aside as invalid. *As administrator, I vacate the will, render it void. My Mother had legally revoked it.*” Petition for Rehearing (emphasis added). Roberta claimed the trust assets should be distributed “by lineal descendants. At the time of death to heirs at law”: herself, Bruce, Aaron, and Susie Rose. *Id.*<sup>13</sup>

Roberta submitted a January 17, 2007, handwritten Petition for Allowance of Claim, listing “administrative expenses” totaling \$6,780.00, for which Roberta sought

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<sup>13</sup> It is impossible to determine from the record which documents were attached to her post-hearing petitions, as opposed to her subsequent notice of appeal. Such information may be critical to finding whether we can consider an argument to be timely or properly raised. It is the responsibility of records managers to correctly identify which documents were submitted when and to keep documents and their attachments together.

reimbursement.<sup>14</sup> The list includes “\$1,000 a year at 6 years to total \$6,000.00” for “costs of trips to Rapid City and Pine Ridge So. Dakota from 1999 to 2006 and one trip to Brookings So. Dak. 2 trips a year, 6 years[,] \$500.00 a trip 1 to Brookings at \$500.00; Bus fare, car rental, gas, room, food.” Roberta also claims \$280 for profile searches and telephone calls to look for her siblings. One copy of this document contains an added charge of \$50.00 for the cost of copying and mailing documents associated with the “appeal.” This addition is not dated.<sup>15</sup>

A telefax dated January 17, 2007, from Roberta to the ALJ edits the Petition for Rehearing to correct a “typing error,” mentions the 1978 Letter, asks for \$6,680.00 in paid costs, and asserts that a lawyer named Carder “is not to be involved in this case. Conflict of interest and ethics violation.” Possibly attached to this telefax, or a part of a February 2, 2007, filing with Judge Greenia, Roberta sent the ALJ a letter, with both typed and handwritten information, providing proper addresses for Aaron’s children, Michael, Darrell, and Justyne, and identifying them as legal heirs to Aaron’s estate. This filing included a letter signed by Roberta declaring that she had not seen Duroy since 1963, that he had not contacted her for 20 years, that she considered him deceased, and that she was “omitting him from this probate proceeding.”

On January 30, 2007, Roberta sent another handwritten “follow up to the fax [she] sent on 1-17-07.” She stated that her “brother Aaron Edison Two Elk Jr. (Deceased) and his heirs” should have been included in the 2006 Decree and “as Administratrix of his estate [she] claim[ed] interest . . . on their behalf.” She also asserted that Susie Rose’s “name is not on the birth certificate[s]” of the Plenty Wolf children and that three of those children were either jailed or involved in criminal activity. She identified the attorney, Dennis Carder, mentioned in a previous telefax, as someone who “unethically obtained information out of me to use for the advantage” of his “personal friend of Myron Lee Plenty Wolf.”

On February 22, 2007, Judge Greenia issued the Order Denying Rehearing and Order Denying Costs. *See* footnote 1, *supra*. In the Order Denying Costs, Judge Greenia denied Roberta’s Petition for Allowance of Claim, explaining that all claims were required to be “filed prior to the conclusion of the first hearing, and if they are not so filed, they shall

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<sup>14</sup> Judge Greenia’s Order Denying Costs cites this petition as filed on January 17, 2007. We cannot verify this. He apparently accepted it as filed with the Petition for Rehearing.

<sup>15</sup> In a separate document, possibly a part of a filing that included one or the other Petition, Roberta also submitted a document “declar[ing] Michael . . . Darrell . . . and Justyne Two Elk as legal heirs to their father’s [Aaron’s] estate . . . .”

be forever barred.” Order Denying Petition at 2, citing 43 C.F.R. § 4.250(a) (2000). He also cited section 4.250(d), referring to costs of a decedent’s care. He explained that Roberta had received notice of the hearing and of the fact that all monetary claims must be presented there. He noted that he raised the issue of claims against the estate at the hearing, but she presented none at that time. *Id.* at 2, citing Tr. at 13.

In the Order Denying Rehearing, Judge Greenia explained that all of the objections to the Will that Roberta had raised at the hearing were addressed at that time and in his 2006 Decree and attached memorandum of law. With respect to Roberta’s contention in the Petition for Rehearing that in August 1999 Decedent had told Roberta that the Will was destroyed, he explained that the “issue of revocation of a Will by intentional destruction” was not raised during the hearing or in Roberta’s other pleadings presented at that time. Order Denying Rehearing at 2. He noted that the new information (1999 Tribal Order of guardianship and Decedent’s alleged representation that she had destroyed her Will) had not been presented at the hearing; that under 43 C.F.R. § 4.241(a), Roberta was obligated to provide justification for failure to discover and timely present that evidence at the hearing; and that Roberta’s Petition “fails to state under oath justifiable reasons for the failure to discover and present the new evidence, *viz.* that decedent revoked her Will by intentional destruction, at the hearing held prior to the issuance of the decision.” Order Denying Rehearing at 3.

For the first time, in the course of responding to Appellant’s argument that Decedent had revoked her Will, Judge Greenia addressed Decedent’s 1978 Letter (Ex. W), which Appellant had offered at the hearing to show that Decedent had wanted to change the Will. Judge Greenia stated that the 1978 Letter did not constitute evidence of a revocation of the Will. He also noted that, although not necessary to his Order Denying Rehearing, the 1978 Letter “stands in stark contrast to the letter in the record authored by decedent to the Pine Ridge Agency on May 4, 1991.”

The referenced 1991 letter, Ex. Q, is a handwritten letter to the Pine Ridge Agency, signed “Margaret Glenn,” written 1 week after the death of Susie Rose. The author lists all six of Decedent’s children by date of and in order of birth, and then lists the children of all of them except for those borne to Susie Rose.<sup>16</sup> The author states that “Aaron Two Elks is not the father of Richard,” disowns her “children and their children,” and concludes:

They all have abused me, rejected me, insulted me, Aaron [is] continually saying “when Mom dies we’ll have a big land fight.[”] I do not want them to

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<sup>16</sup> This letter claims Richard to be father to “Tasa Marie Glenn” born November 17, 1975.

inherit any of my land. No respect for me. I made my will to Susie Rose Glenn my youngest daughter 22 years but she is dead now. All of them have taken my baby girl Susie Rose Glenn body away from me denying me my right to see or take her home for burial. I am sick of their fighting me for 30 yrs over my grandchildren and over my land. I hereby disowned all of them forever and taken off the Indian enrollment.

Ex. Q, May 4, 1991, Letter from Margaret Glenn to BIA (1991 Letter). Based on the record as a whole, Judge Greenia rejected Roberta's construction of the 1978 Letter, and concluded it was neither a modification nor revocation of Decedent's will. He then denied the Petition for Rehearing.<sup>17</sup>

Roberta timely submitted a Notice of Appeal dated April 26, 2007. She charges that Judge Greenia made up his mind as a result of improper influence of the "realty specialist."<sup>18</sup> She complains that the will is invalid and that no original exists:

(A) no original will only a copy 35 yrs old. (B) no opportunity required by law to have the original witnesses attest to the validity of the will and signature. They are both Deceased. I as administratrix did not submit an original certified will for the probate court to validate. The copy is not the last will of the decedent and it was not executed according to the laws of the state. The copy of a will submitted by a realty specialist has not been "proved" to the court to be a genuine and valid one. At the probate meeting on 3-24-06 I tried to submit a letter to the Judge concerning the validity of a 35 yr old copy. He said (I don't need that.)

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<sup>17</sup> At some point, Roberta submitted a letter to Judge Greenia asking for a copy of the probate file. This letter is attached to a copy of an envelope with an illegible date of either April 6 or 16, 2007. But this is the wrong date as, on April 3, 2007, Judge Greenia wrote to advise Roberta that her request would be construed as one filed under the Freedom of Information Act, 5 U.S.C. § 552. Appellant attached to her Opening Brief a copy of a May 18, 2007, response to her FOIA request from OHA's Principal Deputy Director. The Board has obtained a copy of the documents provided to Appellant in response to her FOIA request, some of which contain redactions, and has added them to the record.

<sup>18</sup> Roberta complains that Barbara Kratzbe improperly influenced the proceedings; we presume that Kratzbe is the cited realty specialist. We find nothing in the record suggesting that Judge Greenia was improperly influenced and address this issue no further.

Notice of Appeal at 1. She complains that the Will did not mention the future children of Susie Rose because Susie Rose was only 12 years old at the time it was executed. *Id.* at 2. Finally, she claims that \$15,000 was missing from her mother's account before she died. *Id.*

Roberta challenges the 1991 Letter and asserts that "they keep coming up with letters that are not notarized when it is to their advantage and we as legal heirs know nothing about it. . . . They make decisions based on these letters. We find out after the fact." *Id.* Roberta submits a line-by-line challenge to the 1991 Letter (Ex. Q), denying that it is a legal document that can be used "to decide anything of importance relating to 14 people." Roberta complains that names of Decedent's children or grandchildren were misspelled or their birthdays misdated on the letter, and asserts: "[I]f this letter were written by Marjorie (a mother) all this information would have been right." *Id.* She implies that Myron Plenty Wolf wrote the 1991 Letter. She attempts to refute the commentary set forth in 1991 Letter asserting that "Marjorie chose not to do anything [about Susie Rose's death] because she didn't want to pay for any funeral." *Id.*

On October 25, 2007, Appellant submitted a handwritten Opening Brief, in which she complains that 8 years have passed since her mother's death, without resolution, and claims that her costs have risen to \$10,000. Appellant repeats that the Will is not an original. She argues that "[t]here is no Susy R. Glenn, enrollment no OSN-62191," Opening Brief at 2, and asserts that "probate clerks cannot first hand out last names without certified birth certificates." *Id.* at 3. She complains that the cited enrollment number for Susie Rose Glenn "is not a Legitimate number. No such a person as OSN-62191." *Id.* at 4. She claims that there is "no such person as Richard Glenn, no enrollment, no birth certificate, no security search" and also cites a lack of "record of adoption of said twins." *Id.* Citing 43 C.F.R. § 4.320 (appeals), she claims that a will must be delivered "to the superintendent, so that it is valid and effective or complete." Opening Brief at 3. She asserts that the Will must be invalidated because the witnesses are not available to "certify" it. *Id.* at 4. She claims not to have known about the 1991 Letter; asserts that it was improperly withheld from her, which deprived her of the chance to see or dispute it; and denies that it bears her mother's signature. *Id.* at 4, 6. She charges that the 1991 Letter is an effort to "inflame her" and ignore her. *Id.* at 6. She complains about her treatment in the probate proceeding and also an earlier one involving her father's estate. *Id.* (passim).

On November 7, the Board received what appears to be a typed version of the Opening Brief. In this document, Appellant adds accusations against the Pine Ridge Agency, charging BIA with "knowingly act[ing] in premeditated malice by engaging in slanderous character assassination, psychological intimidation and attempts to inflame both myself and my family. The plan appears to be to illegally direct this estate toward somebody who cannot be found so that the state or tribe can take it." Second Brief at 2.

No other briefs were submitted. But OHA received other communications from Decedent's relatives. Between May of 2008 and January 2009, persons identifying themselves as Charlie, Willie, and Semele Plenty Wolf separately contacted this Board by telephone, each seeking information about the probate and providing addresses. On January 22, 2009, we received a Notice dated January 20, 2009, from the Pine Ridge Agency (Superintendent), explaining that Richard Jeffery Glenn had contacted that office, provided his address, and verified that he is the father of twin boys born August 9, 1970. According to the Superintendent, Richard explained that the twins were adopted in 1972, and that he and their mother later had other children. On April 20, 2009, the Superintendent provided another notice identifying names and a single address for the alleged twins, and attaching documents indicating their adopted names.

On April 20, 2009, the Board received another memorandum from the Superintendent with additional information regarding the twins. On June 23, 2009, the Board received from Appellant a compilation of laws of the State of South Dakota.

### **Discussion**

#### **I. The Board's Review of the Orders Denying the Two Petitions.**

Though identified as Orders Denying Petitions for Reopening, which are governed by 43 C.F.R. § 4.242, the post-hearing petitions were not so characterized by Appellant. One was properly filed as a Petition for Rehearing under 43 C.F.R. § 4.241; the other was styled as a "Petition for Allowance of Claim" which sought administrative expenses and should have been treated as a motion for administrative costs which could be filed under 43 C.F.R. § 4.251(a). Thus, while Judge Greenia erred in styling his orders as denying petitions for reopening, this error was harmless in this case. We address each order in turn.

##### **A. Order Denying "Petition for Allowance of Claim."**

Appellant challenges Judge Greenia's Order Denying Costs and asserts on appeal that her costs have now risen to \$10,000. She does not otherwise explain why she thinks the ALJ committed error in rendering his decision. The Board has not previously addressed the distinction between the deadline for a motion for administrative costs and the deadline for submission of creditor claims against the estate. Accordingly, we address this issue as a matter of first impression for the Board.

Judge Greenia rejected the Petition of Allowance of Claim because he asserted that it sought payment of a creditor claim against the estate under 43 C.F.R. § 4.250. He thus

concluded that the petition was untimely, and, citing the rule in effect when Decedent died, he asserted that claims were required to be filed “prior to the conclusion of the first hearing,” or “shall be forever barred.” 43 C.F.R. § 4.250(a) (2000).

The rules governing probate distinguish costs arising from actions taken by or with respect to the decedent before her death from costs incurred to administer the estate after her death. Section 4.250 (2000) addresses “creditor claims” as including charges for purchases by, or services rendered to, the decedent; claims for decedent’s care; claims based on contract with the decedent; claims against decedent sounding in tort; and claims “on account of social security or old-age assistance payments” for the decedent. Creditors were required to submit such claims prior to the conclusion of the first hearing.<sup>19</sup>

By contrast, 43 C.F.R. § 4.251 permits a deciding official in a probate proceeding to authorize the payment of costs of administration of the estate as they arise and before the allowance of any claims against the estate.<sup>20</sup> This rule allows the Superintendent “or an interested party” to submit a motion for such costs. That such costs are not covered by 43 C.F.R. § 4.250 is evident not only from the contrasting rules, but also as a matter of common sense. The costs of administering an estate arise as a consequence of the death and as a part of the probate proceeding, which may extend (as here) for a significant period after the death of the decedent. *See* 43 C.F.R. § 4.234(d) (costs of administration include witness costs); § 4.281 (attorneys fees). Accordingly, Judge Greenia misconstrued Appellant’s petition when he declared that it was a claim that was governed by the deadline in section 4.250. Although Appellant herself characterized her request as a “claim,” in substance it clearly was a request for administrative expenses and thus Judge Greenia erred in treating it as a creditor claim.

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<sup>19</sup> At the time of the hearing in this case, the deadline for filing creditor claims had been changed to the later of (1) 60 days after BIA received a certified copy of the decedent’s death certificate or other verification of death, or (2) 20 days after the creditor is chargeable with notice of the death. 43 C.F.R. § 4.250(a) (2005). Because we conclude that the creditor claim deadline in section 4.250(a) does not control the filing of motions for administrative costs, this change in the rule is not material, even assuming the 2005 regulations apply to Decedent’s estate.

<sup>20</sup> Though the rules in place in 2000 have been amended, like the rules in place in 2006 and 2007, section 4.250 addressed claims for costs for services and products incurred by a decedent, while section 4.251 addressed costs of administering the estate.

But Judge Greenia was correct that Appellant's request for the allowance of administrative expenses was untimely. Section 4.251 does not include a deadline for submitting a motion for costs of administration, instead allowing a motion for costs "as they arise." 43 C.F.R. § 4.251(a). But it also specifies that costs of administration are authorized "before the allowance of any claims against the estate." *Id.* (emphasis added). Accordingly, the probate judge may authorize the payment of administrative costs no later than the time he allows creditor claims against the estate, including claims under 43 C.F.R. § 4.250 and all other "general claims." *Id.* § 4.251(c). Administrative costs are considered at the initial or formal probate hearing, *id.* § 4.251(e) and (f), and unpaid claims are not enforceable after closure of the estate, *id.* § 4.251(g). All creditor claims and requests for administrative costs to be paid from the estate are to be resolved in the decision of the ALJ or probate judge. *Id.* § 4.240(a)(3). We thus agree with Judge Greenia that Appellant was obligated to submit her request for administrative costs, or at a minimum to notify the ALJ that she would file such a motion, at the probate hearing. The outside date for documenting such costs is necessarily bounded, under section 4.240, by the date of decision of the hearing officer.<sup>21</sup>

Appellant's request for costs of administration filed *after* Judge Greenia's 2006 Decree was therefore untimely. To file any petition after the decision, Appellant would have been bound by the strictures of the rules governing a petition for rehearing, and the requirement that, even should a pleading be based on newly discovered information, she would be required to provide justifiable reasons for the failure to discover and present that information at the hearing. 43 C.F.R. § 4.241(a)(2)(i). The information submitted by Appellant in her Petition for Allowance of Claim, extending back in time for a number of years, is not susceptible of any such justification. Accordingly, we affirm Judge Greenia's Order Denying Costs on the alternative ground that Appellant failed to submit a timely motion for costs of administration of the estate under 43 C.F.R. § 4.251.

#### B. Order Denying Rehearing.

Appellant bears the burden of showing that an order on rehearing is in error. *Estate of Verna Mae Pepion Hill Hamilton*, 45 IBIA 58, 63 (2007). Appellant has not met this

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<sup>21</sup> Because the rules plainly contemplated the possibility of the payment of witness and attorney fees from the estate as costs of administering the estate, it necessarily follows that 43 C.F.R. § 4.251 anticipated that some of those costs might be documented after a hearing but before the decision.

burden with respect to the Order Denying Rehearing. We affirm the conclusions set forth therein.<sup>22</sup>

*1. The ALJ Was Correct to Reject Appellant's Assertions That the Will Was Per Se Invalid.*

Appellant challenges the Order Denying Rehearing because she avers that the record contains no original will. We fail to understand the basis for this argument. The record contains a Will signed in original ink,<sup>23</sup> with an attached affidavit signed also in original ink by two witnesses and the notary. To the extent that Roberta argues that she, “as administratrix,” did not submit the original Will, nothing in the Department’s rules requires a will to be submitted by a person of such status in order to be original or valid.<sup>24</sup> To the contrary, until recently, the regulations provided that an Indian testator could submit her will to BIA for safekeeping. In such a case, BIA necessarily is the custodian of the original will and submits it to the probate judge. *See* 43 C.F.R. § 4.260(a) (2007); *Estate of Michael Oskolkoff*, 37 IBIA 291, 293 n.4 (2002). Likewise, we are unable to ascertain the basis for Appellant’s complaint that the Will was required to be submitted “to the superintendent.”

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<sup>22</sup> For reasons stated below, a new hearing may nevertheless be required. Because it will be critical at any subsequent proceeding for the hearing officer to know which of Appellant’s arguments were rejected and therefore potentially barred on “law of the case” grounds, we address those individual issues on which we affirm Judge Greenia.

<sup>23</sup> The record contains an original and also a copy of the Will stamped “File Copy.” Copies of both were provided to Appellant.

<sup>24</sup> Appellant appeared to be confused during the proceedings leading up to this order about the extent to which the 1999 designation by the Oglala Sioux Tribal Court of her as administrator is a factor to be considered by OHA. While that appointment extended to non-trust assets within the tribal court’s jurisdiction, it did not extend to proceedings to address trust property, because that jurisdiction lies exclusively with the United States. 25 U.S.C. § 348 (intestate), § 372 (testate); *Estate of Kathy Ann Bull Child*, 43 IBIA 235, 237 (2009). Appellant’s assignment as “administratrix” permitted her to garner information which she may convey to a hearing officer and which the officer may reasonably accept as relevant. But it does not mean that she possesses rights superior to those of any interested party as defined in OHA’s probate rules, 43 C.F.R. § 4.201 (2005).

Appellant's claim that there is no original will or that it can only be valid if she submitted it is without merit.<sup>25</sup>

We also reject Appellant's complaints that Judge Greenia erred in deciding not to reject the Will because it failed to mention the future children of Susie Rose. Judge Greenia distributed the estate under his 2006 Decree to Susie Rose's offspring under the anti-lapse provision of 43 C.F.R. § 4.261, not because they were or should have been identified in the Will. The purpose of an anti-lapse provision is to prevent a devise in a will from lapsing as a matter of law and being rendered null and void due to the death of an identified beneficiary. *See* 96 C.J.S. Wills 1197. An anti-lapse provision designates eligible alternative beneficiaries who may receive the devise by operation of statute. *Id.*; *Estate of Pollak*, 47 IBIA at 150. The failure of the Will to identify the unborn children of an identified beneficiary neither invalidates the will nor prevents the application of the anti-lapse provision.

Appellant objects to Judge Greenia's failure to adopt the 1978 Letter, which she contended was written and signed by Decedent, as evidence that Decedent repudiated her Will. We agree with Judge Greenia's conclusion. First, that Letter does not directly address the Will or assert an intention to revoke it.<sup>26</sup> Second, even if we were to construe the 1978 Letter as containing an indirect reference to such a plan, the Letter does not conform to the requirements of law attendant on such a revocation. To revoke or repudiate a will by a subsequent will or writing, a testator must execute the revocation with the same formalities as are required in the execution of the will. 43 C.F.R. § 4.260(c). Thus, written revocation must follow the same formality as an original, which must be "attested by two disinterested adult witnesses." *Id.* § 4.260(a). Nothing in the letter meets this standard. *Estate of Archie*

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<sup>25</sup> Appellant claims that the Will does not conform to unspecified "laws of the state," but it is the cited regulations that specify the proper execution of a will for purposes of distribution of trust assets.

<sup>26</sup> To the contrary, while the Letter contains a sentence in which Decedent asserts that she had been trying to change her will, in context, the point of the Letter was to convince the ALJ that Marjorie Glenn's brother wanted to execute a will devising all property to herself. She cited her own alleged efforts to change her will as evidentiary support for the contention that her brother must have failed to obtain assistance from BIA to execute a will in her favor; thus she claimed that BIA "never answers our letters [illegible] they say a will has to be on their will papers. *I have been trying to change my will for 5 yrs with no result.*" She neither asked to repudiate her Will nor substantiated that she had tried to do so at any time in the previous 5 years; rather she stated that her brother "wanted to sign everything over to me."

*Blackowl, Sr.*, 29 IBIA 195, 196 (1996). We reject Roberta's claim that the ALJ erred in failing to construe the 1978 Letter as constituting a revocation of Decedent's Will.

We also reject Appellant's complaints against Judge Greenia's discussion of the 1991 Letter. Judge Greenia cited the 1991 Letter to point out that another letter in the record, apparently signed by Decedent, asserted something entirely different from Roberta's averments regarding Decedent's views. Contrary to Roberta's inference, the Order neither accepted as true nor denied the facts averred by the author of the 1991 Letter about Decedent's children or their actions. Judge Greenia accepted the 1991 Letter as a record document relevant to Roberta's arguments that the 1978 Letter constituted a revocation of Decedent's Will. His construction of the 1978 Letter was not dependent on the 1991 Letter, and we would affirm Judge Greenia's conclusions about the 1978 Letter, whether or not he addressed the 1991 Letter.

We note, however, that Appellant fails to convince us to discount the 1991 Letter while at the same time elevating the 1978 Letter to a higher evidentiary level for the simple reason that her specific challenges to the 1991 Letter pertain to both. Appellant contends that the 1991 Letter was not a "legal document," was not proven to have been signed by Decedent, and was not notarized, and therefore cannot be used to decide anything of relevance to 14 people. Line-by-Line challenge to Ex. Q attached to Notice of Appeal. The 1978 Letter has no superior evidentiary qualities. Neither Letter is notarized as a "legal document," nor has either one been proved to have been signed by Decedent. Appellant offered the 1978 Letter as having been signed by Decedent, but fails to articulate in any respect how the actual signatures on the two Letters differ. To the Board, the signatures appear to be in the same handwriting, or at least Appellant fails to convince us otherwise. We cannot conclude that the 1991 Letter is fraudulent on the basis of the author's misspelling of names in a record when not only Decedent but also the many family members involved have written names under various appellations and spellings, and when Decedent's own son (Bruce) accused his mother in writing of deliberately misspelling his last name for personal reasons. Neither letter is signed under all the names Decedent used. Accordingly, we conclude that Appellant has not met her burden of demonstrating that the evidentiary value of the two letters should be treated differently. The hearing officer "may admit letters . . . not ordinarily admissible under the generally accepted rules of evidence," and attach weight "to the evidence in his discretion . . . taking into consideration all the circumstances of the particular case." 43 C.F.R. § 4.232(b). We cannot find that Judge Greenia abused his discretion in considering the 1991 Letter. We disagree that analysis by an ALJ of a letter, plainly received, date-stamped, and included by BIA in a record, is an effort to "inflamm" an interested party or commit "character assassination." *See* Opening Brief at 6; Typed Opening Brief, Nov. 1, 2007, at 2.

To the extent Appellant claims in her Notice of Appeal that Judge Greenia erred in approving the Will because “[t]here is no Susy R. Glenn,” Opening Brief at 2, and “no such person as Richard Glenn,” *id.*, she has not shown that the ALJ committed any error. The record contains birth certificates for both Richard and Susie Rose, at Exhibit H. Moreover, in the 2000 Affidavit of Family History signed by Roberta, she identified all of her siblings and half-siblings including Susie Rose and Richard. Roberta signed this document and had it notarized on April 7, 2000. In this and subsequent letters she noted the death of Susie Rose and her last communications with Richard and Duroy in the 1960s. In any event, we do not reverse Judge Greenia for his findings, which were based on evidence of record (birth certificates, Affidavits of Family History signed by Roberta and Bruce, and Bruce’s letter to OHA expressly describing his moving back and forth from Louisiana with his brother Richard) regarding Richard’s and Susie Rose’s relationships to Decedent.<sup>27</sup>

For similar reasons, we affirm Judge Greenia’s Order rejecting Roberta’s evidence, submitted with her Petition for Rehearing, regarding Decedent’s alleged assertions in August 1999 of her intentional destruction of the Will. The Petition documents that in August 1999 Roberta was assigned “medical guardianship” of her mother by the tribal court, and she avers that in a visit immediately prior to this assignment, which apparently generated the guardianship order, Decedent told Roberta that she had destroyed her Will.

We agree with Judge Greenia that the Petition presents no evidence of a revocation by Decedent. First, this information was not proffered at the hearing, and would have been a critical answer to Judge Greenia’s repeated requests for an explanation of Roberta’s position that the Will was not valid. Though directly asserting that the 1978 Letter showed Decedent’s intention of revoking the Will, Roberta was silent at the hearing regarding any suggestion that Decedent, in her waning days, had advised Roberta that the Will was destroyed, even when Judge Greenia asked “[a]re you saying that she did change her Will?” Tr. at 20. For such reasons, testimony of a person with an interest in the matter purporting to establish revocation of a will to her benefit must “be corroborated by other evidence.” *Estate of Arnita Lois Parton Gonzales*, 35 IBIA 207, 212 (2000).

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<sup>27</sup> Roberta’s complaint that the enrollment number listed for Susie Rose in the Will is wrong is probative of nothing. The record contains letters certifying Susie Rose’s tribal identification information. Tr. at 21. We are unaware of any precedent or rule establishing that an error in a tribal number, even if proven, would defeat a will. Factual misstatements in a will do not, without more, invalidate it. *Estate of Lyman Z. Penn*, 46 IBIA 272, 277 (2008), and cases cited.

Second, even if we were to accept these averments as true, we agree with Judge Greenia that Roberta was obligated, under 43 C.F.R. § 4.241(a)(2), to provide an affidavit or declaration explaining “justifiable reasons for the failure to discover and present [newly discovered] evidence” not presented during the probate hearing. He is correct that no such explanation has been given, and no such affidavit or declaration was provided.

Finally, we affirm Judge Greenia’s decision not to accept Roberta’s assertion that, “[a]s administrator, [Roberta chose to] vacate the will, render it void.” No party is in a position to vacate or void another person’s will 7 years after her death. The decision to revoke a will is one made by a testator, which, if proven, may require disapproval of the will by a hearing officer. 43 C.F.R. § 4.240.

2. *We Affirm the ALJ’s Conclusion that Appellant Failed to Meet Her Burden to Challenge the Will.*

In a telefax sent the day of hearing, Roberta asserted her plan to “exercise [her] right to challenge the witnesses of the will.” In the motion submitted at the hearing, she contended that the fact that the witnesses to the Will are no longer living meant that it must be disregarded. At the hearing, she challenged the Will on this stated basis – the unavailability of witnesses to authenticate the Will. Tr. at 14. She asked Judge Greenia how the validity of the Will had been shown “when both . . . their witnesses are passed away.” Tr. at 19.

In her Petition for Rehearing and associated documents, Roberta repeated her claims that the Will was to be disregarded as unproven. In her Notice of Appeal Roberta criticizes the ALJ for ignoring the “protocol” for proving the Will because there was “no original will” and because she had “no opportunity required by law to have the original witnesses attest to the validity of the will and signature. They are both Deceased.” In her Opening Brief she repeats that the “copy of a will submitted by a realty specialist has not been ‘proved’ to the court to be a genuine and valid one.” Opening Brief at 4.

Appellant errs in assuming that, because the Will was written so long ago that the witnesses predeceased Decedent, the Will can no longer be recognized. Though Roberta doggedly repeated that the lack of witnesses meant that the Will had not been proven valid, Judge Greenia correctly explained that the Will was self-proved.

The general rule is that a will must be proved at a probate hearing to be, or authenticated as, the final will and testament of the decedent through testimony, either by affidavit or by oral testimony, of subscribing witnesses. *Estate of Oskolkoff*, 37 IBIA at 298-99. By contrast, a “self-proved will” is one that avoids the formality of authentication by

including affidavits of attesting witnesses in a form prescribed by regulation or statute. *See* 43 C.F.R. §§ 4.233(a), 4.260 (2005); *see also Estate of Hamilton*, 45 IBIA at 60 (citing Black’s Law Dictionary 1630 (8th ed. 2004)). The content of the affidavit is set forth at 43 C.F.R. § 4.233(a)(1); to be a self-proved will, the affidavit of the testator and witnesses must be made before an officer authorized to administer oaths, must be attached to the will, and must be in substantially the form and content set forth in the rule. *Id.*

Judge Greenia found that the Will is self-proved, and we agree. It was signed by the testator and witnesses attesting that it was signed in their presence as a voluntary act without undue influence. It was notarized. Appellant does not disagree that the Will qualifies as a self-proved will, and as such, “testimony of the witnesses in the probate thereof may be made unnecessary . . . .” 43 C.F.R. § 4.233(a). “If uncontested, a self-proved will may be approved” without testimony of the attesting witnesses. *Id.* § 4.233(a)(2).

The probate regulations set forth requirements regarding how to proceed in the face of a challenge to a self-proved will:

(c) *Will Contest.* If the approval of a will . . . is contested, the attesting witnesses who are in the reasonable vicinity of the place of hearing and who are of sound mind must be produced and examined.

(1) If none of the attesting witnesses resides near the place of hearing at the time appointed for proving the will, the administrative law judge or Indian probate judge may:

(i) Admit the testimony of other witnesses to prove the testamentary capacity of the testator and the execution of the will; and

(ii) As evidence of the execution, admit proof of the handwriting of the testator and of the attesting witnesses, or any of them.

(2) The provisions of § 4.232 are applicable . . . to remaining issues.

43 C.F.R. § 4.233; *see Estate of Elizabeth Frank Greene*, 3 IBIA 110, 119 (1974) (contest requires testimony of witnesses). Section 4.232, in turn, governs “[e]vidence; form and admissibility,” and describes evidence that the hearing officer may require and the discretion of the officer to assign appropriate weight to evidence in the circumstances.

This Board has frequently addressed cases in which a party contested a self-proved will and the obligation on the proponent of the will to prove its validity in the face of a challenge. Ordinarily, where the will is self-proved, there is a presumption that the testator had testamentary capacity, and the burden falls on a will’s opponent to disprove the presumption. *Estate of Penn*, 46 IBIA at 278, and cases cited. On the one hand, where a

self-proved will is contested, we have gone so far as to characterize the self-proving affidavit as “surplusage.” See, e.g., *Estate of Sallie Fambush*, 34 IBIA 254, 257 (2000). In this situation, examination of witnesses may be required under section 4.233(c) and, where a challenge relates to testamentary capacity, the failure to require testimony of witnesses can be a “failure of proof.” *Estate of Joseph Caddo*, 7 IBIA 286, 290 (1979). On the other hand, to compel calling witnesses, the challenge must raise questions within the competence of the attesting witnesses. *Estate of Millie White Romero*, 41 IBIA 262, 286 (2005), *aff’d*, *Lyons v. United States*, No. 2:05-cv-1292-RLH-GWF (D. Nev. 2006), *aff’d sub. nom. Lyons v. Estate of Romero*, 271 Fed. App. 675 (9<sup>th</sup> Cir. 2008).

While a will contest can require the will witnesses to testify to prove the will, we nonetheless resist the Appellant’s suggested rule that the unavailability of witnesses automatically invalidates the will. To the contrary, such a rule would render the process of making a self-proved will a nullity depending on the witnesses’ longevity, force the testator to revise a will (with all the attendant problems of proof) every time a witness passes or moves away, and establish a ticket for any party disliking a will signed some years ago to invalidate it by demanding witnesses. To compel a will to automatically expire with its witnesses is not the purpose of 43 C.F.R. § 4.233(c); that this is true can be found in the fact that a hearing officer has other options for taking validating testimony, including proof of the testator’s handwriting, *id.* § 4.233(c)(1)(ii), or evidence admissible under section 4.232. See *id.* § 4.233(c)(2). Where witnesses are no longer available, an ALJ may consider other testimony or evidence as described in 43 C.F.R. § 4.233(c). *Estate of Oskolkoff*, 37 IBIA at 299.

To avoid the termination of a will with the death of its witnesses and to avoid defeating the purpose of a self-proved will, we find it appropriate to adopt what has been called the “ancient document rule.” “At common law, a document purporting to be 30 or more years old is generally admissible in evidence without the ordinary requirements as to proof of execution and authenticity, as long as it is produced from proper custody and is on its face free from suspicion, and circumstances exist which corroborate its authenticity.” 20A Am. Jur. 2d (Evidence) § 1203 (2008). Under the Uniform & Federal Rules of Evidence, the applicable age for the document is 20 years. *Id.* at § 1205. This rule applies to wills and creates a rebuttable presumption of authenticity, which suggests that the presumption prevails in the absence of rebuttal by the will contestant. This rule creates a prima facie case of a will’s authenticity, barring some facial defect on the will itself that is sufficient to draw its validity or proper execution into doubt, that places the burden on the will’s opponent to at least produce evidence to rebut the prima facie case of validity.

Though he did not expressly adopt the ancient document rule, Judge Greenia plainly found the Will to be subject to a rebuttable presumption of authenticity which established a prima facie case that it was valid. The original Will was produced from the proper custody of the BIA. It was self-proved by witnesses who attested as to the testator's testamentary capacity and lack of apparent undue influence. Appellant produced no evidence to the contrary, nor has she ever suggested that the witnesses are not to be trusted, or that their signatures were falsified. She does not show a plain facial defect in the Will requiring us to doubt its execution. We do not find any reason within her arguments on appeal to conclude that Judge Greenia erred in finding the self-proved Will to be presumptively valid. While Roberta may imply in her appeal that the handwriting on the Will is open to question, the genuineness of the handwriting may be determined by a trier of fact by comparing it to an authentic specimen of the person's writing. 80 Am. Jur. 2d (Wills) § 860. The signature on the Will appears to be in the same handwriting as the signature on the 1978 Letter, which Appellant contends was signed by Decedent. In any event, she has presented no material facts, witnesses, or evidence to cause us to question Judge Greenia's conclusion that the Will, with its signature, is valid.

Accordingly, Judge Greenia correctly found a prima facie case that the Will was presumptively valid and properly placed the burden on Appellant to produce evidence to disprove its validity. Likewise, he was correct to conclude that there was little support for her position that Decedent was incompetent to create a will. While Appellant presented convincing evidence of Decedent's difficult mental issues during her life, that a person has such issues does not correspond to a conclusion that she is not competent to execute a will. To the contrary, the proper test for determining testamentary capacity makes clear that Appellant bore the burden of establishing far more than a recitation of a testator's general mental health and events temporally unrelated to the time the testator executed a will.

"The correct standard of proof for determining issues related to testamentary capacity is preponderance of the evidence." *Estate of Rose Medicine Elk*, 39 IBIA 167, 171 (2003). In *Estate of Adams*, 39 IBIA at 33, we explained:

The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will. *Estate of Leon Levi Harney*, 16 IBIA 18, 20 (1987). To invalidate a will for lack of testamentary capacity, a will contestant must show that *the testator did not know the natural object of her bounty, the extent of her property, or the desired distribution. Further, the condition must be shown to exist at the time of execution of the will.* *Estate of Fannie Pandoah Fisher Silver*, 16 IBIA 26, 28 (1988); *Estate of Samuel Tsoodle*,

11 IBIA 163, 166 (1983). . . . See also *Estate of Sallie Fawbush*, 34 IBIA 254, 258 (2000).

(Emphasis added.)

“[T]he testator’s disinheritance of his heirs and blood relatives is not unnatural per se.” *Estate of Joseph Red Eagle*, 4 IBIA 52, 60 (1975). We do not upset the directive in a will solely for the reason that one child benefits more than others or some are disinherited. The law does not require that Indian trust property disposed of by will be distributed to the decedent’s children or other family members. *Estate of Romero*, 41 IBIA at 265. As we explained there, “the primary purpose of a will is to alter the normal course of descent of the property.” *Id.* Thus, an opponent of a will must show more than that a testator’s testamentary choices were seemingly unfair to establish that she was not competent to execute a will; the opponent must show that the testator did not meet particular elements of testamentary capacity at the time the will was executed.

Roberta did not present any evidence on those elements. She presented a case that her mother had emotional problems, was diabetic, had a traumatic head injury from being beaten in the 1940s, and was mentally ill. The comments of both Roberta and Bruce suggested that Decedent had experience with family violence and had difficulties raising her children. Judge Greenia correctly pointed out to Roberta at the hearing that none of these conditions was sufficient to show a lack of testamentary capacity at the time Decedent executed the Will. Nor would they preclude a person with property from executing a will to devise it. A medical diagnosis alone is not necessarily sufficient to show a lack of testamentary capacity, in the absence of a showing that the testator did not otherwise meet the standards articulated above. *Estate of Frederick Harry Jerred*, 49 IBIA 147, 162 (2009).

For the foregoing reasons, we find that Judge Greenia properly found a prima facie case that the Will was presumptively valid, and concluded that Appellant did not sufficiently meet her burden of showing that Decedent suffered a lack of testamentary capacity at the time of the Will’s execution. We therefore affirm the decision as it relates to the appeal.

## II. Manifest Error.

It is not enough, however, to address the appeal submitted by Appellant. As noted above, several interested parties, as defined in 43 C.F.R. 4.201 (2005), have contacted the Board since this appeal was filed. With respect to Charlie, Willie, and Semele Plenty Wolf, it is not entirely clear whether they received actual or constructive notice of the probate hearing. It appears, however, that Richard Jeffery Glenn and his twin adopted sons were not notified. We do not know how Richard ultimately became aware of the situation, but

he has now contacted the Superintendent and claims to have fathered the twin sons referred to in the Will, who he says were adopted, though to whom is not clear. Whether or not, as a factual and legal matter, these individuals should now be determined to be recipients of any part of Decedent's estate, it appears that persons claiming to identify Will beneficiaries have surfaced.

This Board may exercise its inherent authority to correct manifest error or manifest injustice. 43 C.F.R. § 4.318 (2007). This rule provides that

[a]n appeal will be limited to those issues that were before the administrative law judge or Indian probate judge upon the petition for rehearing . . . . However, . . . the Board will not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate.

*See Estate of Anthony "Tony" Henry Ross*, 44 IBIA 113, 119 (2007); *Estates of Walter George and Minnie Racehorse George Snipe*, 9 IBIA 20, 22-23 (1981). We stated in *Estate of Levi Junnile Smith*, 49 IBIA 275, 280 (2009): "Although the language of section 4.318 vests authority in the Board to "correct" manifest error or injustice, such language necessarily vests authority in the Board to avoid committing manifest error or injustice in rendering a final decision of the Secretary, and thus includes the authority to prevent it as well."

We find that it would be manifest error in this case not to permit full consideration of the Will in light of the appearance of Richard and the individuals he claims are his twin sons before a final Departmental decision is issued. We do not here decide that any of these persons is entitled to receive a portion of the estate; such issues would depend on facts not in the record and the proper application of probate laws. But to prevent the commission of a manifest error by simply affirming Judge Greenia's decision, we must vacate his 2006 Decree and remand the case for any additional proceedings that may be necessary to ensure that appropriate process is given. The matter will be somewhat complex in that the reappearance of Richard and the twins has the potential to raise concerns for interested parties in the proceeding that might not have been apparent in the absence of those persons. For the foregoing reasons, we set aside the 2006 Decree and remand the matter for appropriate proceedings to consider the interests of potential interested parties who were not notified of the hearing.

#### Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we affirm on other grounds the February 22,

2007, Order denying Appellant's petition for administrative expenses. We affirm the February 22, 2007, Order denying Petition for Reopening (Rehearing). We set aside the 2006 Decree and remand the case to the Hearings Division for additional proceedings to consider the new information submitted by the Superintendent, with appropriate notice to all interested parties.

I concur:

\_\_\_\_\_  
// original signed  
Lisa Hemmer  
Administrative Judge\*

\_\_\_\_\_  
// original signed  
Steven K. Linscheid  
Chief Administrative Judge

\*Interior Board of Land Appeals, sitting by designation.