



## **Huron Potawatomi Tribal Court**

**The Nottawaseppi Huron Band of the Potawatomi**

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**IN RE K**

**CASE NO: 13-123 GM**

### **OPINION AFTER ORDER**

At a session of said Court held in the Courthouse of the Nottawaseppi Huron Band of the Potawatomi on the Pine Creek Reservation on the 31<sup>st</sup> day of May 2013

Present: Honorable Melissa L. Pope

### **INTRODUCTION**

This case involves the Petition for Guardianship of a Minor. To protect the Minor, his name and the names of his family are not included in this Opinion After Order.

The Minor, who does not live on trust lands of the Nottawaseppi Huron Band of the Potawatomi (NHBP), was identified by the NHBP as eligible for enrollment pursuant to the Indian Child Welfare Act and the Michigan Indian Family Preservation Act. The Minor cannot be enrolled as enrollment at the NHBP is currently closed.

Pursuant to the MIFPA, the state transferred the case to the NHBP Tribal Court. This Opinion After Order discusses the basis for this Court accepting jurisdiction in this case.

### **FACTS OF THE CASE**

The Minor is seventeen (17) years old. The parents of the Minor divorced in 2008. The Minor resided with the mother following the divorce. The father, an enrolled member of the Nottawaseppi Huron Band of the Potawatomi, was ordered to pay child support.

In approximately February of 2012, the Minor began residing with his maternal Grandmother due to conflict in his mother's home. The Minor's mother paid the child support she received from the father to the Grandmother to assist with the care of the Minor. The father stopped paying child support in December of 2012.

On or about February 15, 2013, a Petition for Appointment of Guardian of Minor was filed in the Family Division of the Probate Court for the County of Calhoun Circuit Court.

A Hearing was properly noticed and held on or about February 26, 2013 before the Honorable Michael L. Jaconette in the Calhoun County Probate Court. The Court appointed Kelly L. Feneley as Guardian ad Litem.

On or about April 4, 2013, the Nottawaseppi Huron Band of the Potawatomi, by and through their Indian Child Welfare Act Attorney, Nancy Bogren, filed an Appearance and Statement of Position of the Nottawaseppi Huron Band of the Potawatomi. It provided in pertinent part (with the names redacted):

[The Minor] is an Indian child as defined by the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA). [The Minor] is eligible to become a member of the Nottawaseppi Huron Band of the Potawatomi, and his father...is an enrolled member of the NHBP, therefore both ICWA and MIFPA apply, and the NHBP is an interested party. The NHBP wishes to exercise its right to participate in the proceedings.

A Hearing was properly noticed and held on or about April 8, 2013 before Judge Jaconette in the Calhoun County Probate Court. Guardian ad Litem Feneley submitted a report to the Court that supported the appointment of the Minor's maternal Grandmother as guardian of the Minor.

Pursuant to the Michigan Indian Family Preservation Act, Judge Jaconette properly entered an Order Transferring Case to the NHBP Tribal Court. This Tribal Court accepted transfer for the reasons stated in the Jurisdictional Analysis and Holding in this Opinion After Order.

A Hearing was properly noticed and held on May 31, 2013 in the NHBP Tribal Court. The Minor, the maternal Grandmother, NHBP ICWA Attorney Bogren, Guardian ad Litem Feneley and other NHBP staff appeared at the Hearing. Neither the mother nor the father appeared at the Hearing. The Court granted guardianship of the Minor to the maternal



Grandmother. An Order followed. This Opinion After Order is now issued to address the jurisdictional issues raised at the Hearing.

## **JURISDICTIONAL ANALYSIS AND HOLDING**

This case presents the question of whether the Nottawaseppi Huron Band of the Potawatomi ("NHBP") Tribal Court has jurisdiction in a petition for guardianship involving a minor child who is eligible for enrollment in the NHBP, but is not enrolled and does not reside on NHBP trust lands. This is a matter of first impression. "With cases of first impression, the NHBP Tribal Court looks to other courts for guidance to determine what the law shall be at the NHBP. All other court opinions whether from a tribal court, state court or federal court are persuasive authority, meaning that the NHBP Tribal Court does not have to follow them, unless required by federal law. (*Chivis et al v. NHBP et al*, No. 12-068-CV, September 26, 2012) Although the Court may look to other jurisdictions for persuasive authority, the proper place to begin matters of first impression is with the NHBP Constitution.

Article XI, Sections 3(a) and (b) of the NHBP Constitution states:

### **Section 3(a)**

The judicial power of the Nottawaseppi Huron Band of the Potawatomi shall be in the Tribal Court system. The judicial power shall extend to all civil and criminal cases arising under this Constitution, all legislative enactments of the Band, including codes, statutes, ordinances, regulations, all resolutions, agreements, and contracts to which the Band or any of its entities are a party, and the judicial decisions of the Tribal Court System.

### **Section 3(b)**

The judicial power of the Tribal Court system may be exercised to the fullest extent consistent with self-determination and the sovereign powers of the Band, and, as exercised, shall govern all persons and entities submit to the jurisdiction of the Band under Article II of this Constitution.

Article II, §2(a) of the NHBP Constitution provides the following "Guiding Principles" regarding jurisdiction:

**Jurisdiction.** The jurisdiction and sovereign powers of the Band shall, consistent with applicable federal law, extend and be

exercised to the fullest extent consistent with tribal self-determination, including without limitation, to all of the Band's territory as set forth in Section 1 of this Article, to all natural resources located within the Band's territory, to any and all persons within the Band's territory and to all activities and matters within the Band's territory. The Band's jurisdiction shall also extend beyond its territory whenever the Band is acting pursuant to jurisdiction that is created or affirmed by rights reserved or created by treaty, statutes adopted by the Tribal Council in the exercise of the Band's inherent sovereignty, Federal statute, regulation or other federal authorization, or a compact or other agreement entered into with a state or local government under applicable law.

In the present case, these "Guiding Principles" have a direct impact on determining jurisdiction as there is a Federal statute, the Indian Child Welfare Act ("ICWA"), to take into consideration.

The ICWA defines an "Indian child" in 25 USC 1903(4) as follows:

"Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe

This definition means that both enrolled members of a Native Nation and those eligible for enrollment are treated in the same manner or have the same legal status. As such, Native Nations have the right to participate in proceedings with cases involving both children enrolled in their Nation and those eligible for enrollment.

In addition to the ICWA, we now have the Michigan Indian Family Preservation Act (MIFPA), 2012 PA 565, which took effect on January 2, 2013. This Act codifies the ICWA into Michigan state law, clarifies court proceedings, and expands the protections for American Indian children, families and Nations. The passage of this Act involved dedicated, consistent and ongoing advocacy on the part of: Native Nations, with the NHBP taking a leadership role on behalf of Tribes located within Michigan; State Legislators; justices; judges; attorneys; parents; individual advocates in Indian country; tribal staff; state staff; organizations; and State Bar of Michigan sections and standing committees. These numerous individuals exemplified the value, traditional to the NHBP and many other Native Nations, of working not just for our children or our grandchildren, but for the seventh generation.



The NHBP Constitution provides in pertinent part that “[t]he Band’s jurisdiction shall also extend beyond its territory whenever the Band is acting pursuant to jurisdiction that is created or affirmed by...a compact or other agreement entered into with a state or local government under applicable law.” The MIFPA is not a compact or other agreement entered into between the NHBP and the state of Michigan. However, the NHBP advocated for its adoption. Further, the MIFPA is consistent with the Band’s inherent sovereignty, as well as the ICWA, a federal statute. As such, it is appropriate to consider the MIFPA in a jurisdictional analysis.

In looking at the MIFPA for the purposes of this discussion, this Court first notes that it contains a similar definition of “Indian,” which is applicable to minor children, as to that in ICWA:

Section 3(k)

“Indian child” means an unmarried person who is under the age of 18 and is either of the following:

- i. A member of an Indian tribe.
- ii. Eligible for membership is an Indian tribe.

The above definition confirms that both enrolled minors and minors eligible for enrollment are considered “Indian children” for the purposes of the ICWA and the MIFPA.

In reference to the issue of guardianship of a minor, the MIFPA defines guardian as follows:

Section 3(h)

“Guardian” means a person who has qualified as a guardian of a minor under a parental or spousal nomination or a court order issued under section 19a or 19c of chapter XIIA, section 5204 or 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5204 and 700.5205, or sections 600 to 644 of the mental health code, 1974 PA 258, MCL 330.1600 to 330.1644. Guardian may also include a person appointed by a tribal court under tribal code or custom. Guardian does not include a guardian ad litem.

The Court specifically references this definition as the guardianship in the present case has been filed pursuant to the Estates and Protected Individuals Code (EPIC), MCL 700.5204 (Court appointment of guardian of minor; conditions for appointment) and 700.5205 (Court

appointment of limited guardian; requirements). As such, the MIFPA is applicable to the present case.

The MIFPA provides the following with regard to jurisdiction:

Section 1(3)

In any state court child custody proceeding, for an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer the proceeding to the Indian tribe's jurisdiction, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe, provided that the transfer is subject to declination by the tribal court of the Indian tribe.

This Section of the MIFPA makes it clear that a state court must transfer a guardianship case involving an Indian child, regardless of where the child resides, to the appropriate tribal court unless a parent objects or the tribal court declines to take the case. This latter provision, an affirmation of the inherent sovereignty of Native Nations, requires this Court to address whether it is appropriate to accept jurisdiction of guardianship cases involving minors who are eligible for enrollment at the NHBP, but who do not live on trust land.

Article VI of the NHBP Constitution provides in pertinent part:

Section 1. Powers. The Tribal Council of the Nottawaseppi Huron Band of the Potawatomi shall be vested with the sovereign powers of the Band, subject to any express restrictions upon such powers in this Constitution. Such powers shall include, but not be limited to, the following:

- a) To adopt statutes, which are consistent with this Constitution, which shall be necessary and proper to carry out the sovereign powers of the Band and to promote and protect the health, safety, education, and general welfare of the Band and its members
- g) To protect the interests of minors, the incompetent and the elderly members of the Band



Pursuant to this constitutional authority, the NHBP Tribal Council properly enacted the Nottawaseppi Huron Band of the Potawatomi Guardianship and Conservatorship Code ("Code") by Resolution Number 09-20-12-06. The Code provides as follows:

#### SECTION 101. PURPOSE

The Tribal Court, when it appears necessary, in order to protect the best interests of a member of the Nottawaseppi Huron Band of the Potawatomi (NHBP or Tribe) or an individual over whom the Tribal Court has jurisdiction, may appoint a guardian for the individual adult or child, and/or a conservator of the individual adult or child, or member of the Tribe (protected individual or ward). This Guardianship and Conservatorship Code does not apply to a Lawyer Guardian ad Litem, appointed by the Tribal Court to represent the interests of a minor in a child protective services hearing.

In Section 102(i) of the Code, a minor is defined as follows:

Minor – means an individual who is not married and has not attained the age of eighteen (18) years of age or who has not been deemed emancipated by the Tribal Court or a court of competent jurisdiction and who resides on trust land.

Based on the above, there was concern expressed at the Hearing regarding whether the NHBP Tribal Court has jurisdiction over this matter as the Minor does not reside on trust land.

As we know that the MIFPA permits a tribal court to exercise jurisdiction in guardianship cases involving an Indian child who does not live on trust lands, the question is whether the Code may also include minors eligible for enrollment who do not live on trust lands. This Court finds that the values of the NHBP as expressed in the NHBP Constitution and the actions of the NHBP in protecting the children of this Nation, including those who are eligible for enrollment, but who do not reside on trust lands, support accepting jurisdiction in this case.

This Court recently upheld the garnishment of per capita distributions for past-due child support in *Kent County Friend of the Court v. Day*. (*Kent County Friend of the Court v. Day*, Numbers 12-142CS/PC through 12-146CS/PC, June 26, 2013). While the substantive laws explored were different from the issues presented in this case, much of the analysis around the values of this Nation in relation to the care of children is applicable. "The care of its members, including within the context of Bode'wadmi values, traditions and beliefs, is established

throughout the NHBP Constitution.” (*Id* at 7) In that case, the Court referenced the following excerpts from the NHBP Constitution:

Preamble

We, the members of the Nottawaseppi Huron Band of the Potawatomi Tribe of Michigan, in order to establish a recognized and approved tribal government to provide a means for the orderly transaction of community business, consistent with our Bode’wadmi traditions and cultural values, and as the free expression of the community will; to insure treaty rights and establish an affable relationship with the Federal Government via the Bureau of Indian Affairs and other agencies; to promote the betterment of the socio-economic welfare and best interests of our community, and to implement any corporate mechanism to achieve these goals, do establish and adopt the following Constitution for the government, protection, and common welfare of the Nottawaseppi Huron Band of the Potawatomi.

Article II – Territory; Jurisdiction, Section 2. Jurisdiction; Guiding Principles

b) Guiding Principles. In exercising the jurisdiction and sovereign powers of the Band, the Tribal Council and other institutions of the Band’s government shall be guided by the following principles:

1. Promote the preservation and revitalization of Bode’wadmimen and Bode’wadmi culture;
2. Promote sustainable development strategies and practices to ensure the health and balance of the next seven generations of Tribal Members;
3. Promote the health, educational and economic interests of all Tribal Members, especially our elders and children

The NHBP has been honoring these values by consistently exercising its rights in state cases that involve minor children who are enrolled NHBP Tribal Members or eligible for enrollment under the ICWA and now the MIFPA. This active participation has and continues to include the contracting of an NHBP ICWA Attorney to represent the Nation at state court proceedings.



In the present case, NHBP ICWA Attorney Bogren filed an Appearance and Statement of Position of the Nottawaseppi Huron Band of the Potawatomi with the Probate Court. It provides in pertinent part (with the names redacted):

[The Minor] is an Indian child as defined by the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA). [The Minor] is eligible to become a member of the Nottawaseppi Huron Band of the Potawatomi, and his father...is an enrolled member of the NHBP, therefore both ICWA and MIFPA apply, and the NHBP is an interested party. The NHBP wishes to exercise its right to participate in the proceedings.

The NHBP not only identified the Minor as eligible for enrollment at the NHBP, but exercised its right to participate in the state proceedings under the ICWA and MIFPA. These actions demonstrate that caring for its children is of the utmost importance to this Nation, regardless of whether the minor child lives on or off trust lands.

The NHBP Constitution states that its actions are to be done in a manner that is "consistent with our Bode'wadmi traditions and cultural values" with the care of its children a specific constitutionally mandated responsibility. The NHBP Constitution also states that "[t]he Band's jurisdiction shall also extend beyond its territory whenever the Band is acting pursuant to jurisdiction that is created or affirmed by rights reserved or created by treaty, statutes adopted by the Tribal Council in the exercise of the Band's inherent sovereignty, Federal statute, regulation or other federal authorization, or a compact or other agreement entered into with a state or local government under applicable law." To determine whether to include minor children as defined in the ICWA and the MIFPA in the Code, the Court must take many factors into consideration including, but not limited to: the definition of an "Indian child" in the ICWA and MIFPA; the provision in the MIFPA that requires the state to transfer cases to the appropriate tribal court when an Indian child is involved; the leadership role the NHBP took in the passage of the MIFPA; the consistent and ongoing commitment of the NHBP in exercising its right to participate in state cases involving minor children enrolled at the NHBP or eligible for enrollment; and the constitutionally mandated responsibility to expand jurisdiction beyond trust lands to exercise the Band's inherent sovereignty. It is clear based on all of these factors that accepting jurisdiction over a guardianship case where the minor child is eligible for enrollment, but does not live on trust lands is appropriate. Most importantly, accepting jurisdiction in this

case honors the Bode'wadmi values, traditions and beliefs as articulated in the NHBP Constitution.

## CONCLUSION

This Tribal Court has the constitutionally mandated judicial power to review and interpret Legislative enactments. Under the "Guiding Principles of Jurisdiction" articulated in the NHBP Constitution, the Court may do so in a manner that extends jurisdiction off of trust land by reading the Legislative enactment in conjunction with applicable Federal statutes, as well as "any other agreement entered into with a state or local government under applicable law." Pursuant to Article II, §2(a) of the NHBP Constitution, the NHBP Tribal Court is interpreting the NHBP Guardianship and Conservatorship Code in conjunction with the ICWA and MIFPA, holding that it may accept jurisdiction of a petition for guardianship involving a minor who has been identified by the NHBP as eligible for enrollment, but who does not live on trust land.

The MIFPA provides that "the transfer is subject to declination by the tribal court of the Indian tribe." This Court holds that it is appropriate to accept transfer of this petition for guardianship of a minor who is eligible for enrollment, but who does not live on trust land as it reflects and honors the Bode'wadmi values, traditions and beliefs as articulated in the NHBP Constitution.

7-11-2013  
Dated

Melissa L. Pope  
Melissa L. Pope, Chief Judge

## CERTIFICATE OF MAILING

I certify that on this day I mailed a copy of the *Opinion After Order* by first-class mail with proper postage affixed to the parties, or their attorneys, at the addresses listed above.

7/11/2013  
Date

R. Scott Ryder  
R. Scott Ryder, Tribal Court Administrator