



Huron Potawatomi Tribal Court

The Nottawaseppi Huron Band of the Potawatomi

2221 1-1/2 Mile Road • Fulton, Michigan 49052
Phone: (269) 729-5151 • Fax: (269) 729-4826

CASE NO: 13-052 ECPP

IN RE J

NANCY A. BOGREN (P40652)
Attorney for Petitioner
303 Paw Paw Street, Suite 6
Paw Paw, Michigan 49079
269-657-5357

CAMERON FRASER (P71403)
Michigan Indian Legal Services
Attorney for Elder
814 S. Garfield Avenue, Suite A
Traverse City, Michigan 49686-2401
231-947-0122

OPINION AND 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 14th day of March 2013

Present: Honorable Melissa L. Pope

INTRODUCTION

This case involves a Petition for a Person in Need of Care filed under the NHBP Elderly Services and Protection Code ("Code"). The Code requires in Section 402 that all matters relating to these proceedings be confidential and any hearings be closed. However, as this Court is holding that portions of the Code are void for vagueness, this Opinion and Order must be public to the extent that it can be reviewed by the NHBP Elderly Care Protection Team, the NHBP Tribal Council, the NHBP Legal Department, NHBP Tribal Members and other interested persons. As such, the facts of the case are limited to the extent necessary to protect the Elder who shall only be referred to as the Respondent.

JURISDICTION

The NHBP Tribal Court has jurisdiction over this matter pursuant to Article XI, Sections 3(a) of the NHBP Constitution:

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.

The present case involves the NHBP Elderly Services and Protection Code, a law passed by the NHBP Tribal Council, as amended on October 28, 2010 by Resolution Number 10-28-10-07, with the Respondent being a Tribal Member. As such, this Court properly has jurisdiction over the case.

FACTS OF THE CASE

A member of the Elderly Protection Team (EPT) filed a Petition for a Person in Need of Care pursuant to the NHBP Elderly Services and Protection Code ("Code") regarding the Respondent in February of 2013. As required by the Code, the Hearing was held in an expedited manner. At the Hearing, the Respondent requested an adjournment in order to retain an attorney. Because the Petition did not provide specific information regarding what danger the Respondent was allegedly in, the Court heard testimony from the Petitioner who was represented by the Tribal Prosecutor. Following witness testimony, the Respondent agreed to take certain steps to address the concerns of the Petitioner and the Court granted the adjournment. An Interim Order followed.

The Respondent retained an attorney who filed an Appearance, a Motion to Adjourn and a Motion for Summary Disposition. The Court granted the Adjournment and scheduled a Hearing for the Motion for Summary Disposition.

Both parties, by and through their attorneys, filed briefs on the Motion for Summary Disposition. Both parties also appeared at the Hearing and presented oral arguments before the Court. The Court, having determined that certain provisions of the Code should be void for

vagueness, issued a Revised Interim Order pending the issuance of this Opinion and Order that lifted the requirements on the Respondent that were stated in the Interim Order.

ANALYSIS

The NHBP Tribal Court is a young court, having been established in 2006. The first NHBP Supreme Court was sworn in December of 2010 and, at the time of this Opinion and Order, has only issued one Opinion although another is pending. In addition, this is the first Petition filed under the NHBP Elderly Services and Protection Code. As such, as with the majority of the cases before the Court, this is a case of first impression. This Court has, therefore, attempted to fully explain all aspects of its decision in this Opinion and Order.

The Code is divided into the following four (4) chapters: Chapter 1, although not titled, provides the purpose and definitions for the Code; Chapter 2 is titled Investigation and Provisions of Protective Services; Chapter 3 is titled Petition for Protective Services; and Chapter 4 is titled Recordkeeping and Access to Records. Although this Opinion and Order will reference different sections of the Code, the primary chapter under review in this case is Chapter 3 –Provisions of Protective Services.

The purpose of the Code as stated in Section 101 is as follows:

To provide protection of the health and wellbeing of Tribal Elders living on Tribal lands or who are otherwise within the jurisdiction of the Tribe.

This Court has no doubt that this Code was drafted and implemented with nothing but the best of intentions. The NHBP as a Nation has demonstrated repeatedly and in many ways its devotion to and respect for its Elders. Unfortunately, on its face, also known as at first sight or at first appearance, the Code does not provide sufficient protections for Elders to support the self-determination of their lives.

As applicable to the present case, Section 201 provides the process for investigating reports of abuse:

Upon receiving a report of abuse of an elderly person living on Tribal lands, or a report that an Elderly Person living on Tribal lands is living conditions that are unsafe, unsanitary or dangerous, or a report that an Elderly Person living on Tribal lands is causing himself to be in imminent danger, the EPT shall make a prompt and thorough investigation to determine is such abuse or such

conditions exists and whether the Elderly Person is a Person in Need of Care.

Section 202 states:

(A) Upon completion of the investigation, if the EPT determines based on the investigation that: (1) the Elderly Person has been abused; (2) the Elderly Person is living in unsafe, unsanitary or dangerous conditions; or (3) the Elderly Person is in imminent danger; and thus is a Person in Need of Care, the EPT shall develop a plan for provision of such services.

The Code then goes on to address providing those services in Section 203:

The EPT shall not provide protective services to a Person in Need of Care unless that person consents, except as provided in Chapter 3 of this Title. The EPT shall notify the Person in Need of Care that it may seek a Court Order if the person is unwilling or unable to consent to such care.

In summary, the Code states that the EPT shall conduct an investigation when it receives a report that an Elderly Person is being abused, living in conditions that are unsafe, unsanitary or dangerous, or causing himself to be in imminent danger. They will determine whether the abuse or conditions exist and whether the Elderly Person is a Person in Need of Care. If they find the report to be true, the EPT will develop a plan for the provision of services. The EPT will then communicate the plan to the Elder and request their consent. If the Elder declines services, the EPT is required to inform the Elderly Person that they may seek a Court Order. For the purposes of this Opinion and Order, the Court shall use the terms Elderly Person and Elder interchangeably.

In reviewing the Code, the sections referring to allegations of abuse and/or neglect by a third-party are not at issue in this case. This case addresses the sections that relate to an Elderly Person's decisions about their own care.

The primary issue causing concern with regard to the investigative portion of the Code is in relation to how the EPT determines whether the Elder is living in conditions that are unsafe, unsanitary or dangerous, or causing himself to be in imminent danger. The terms "unsafe," "unsanitary" and "dangerous", which first appear in Section 201, are not defined in the Code.

When a term is not defined in a law, Courts frequently turn to the Black's Law Dictionary for guidance. Black's Law Dictionary defines "unsafe" as "[d]angerous; not secure". It does not have a definition for "unsanitary". It defines "dangerous" as "[a]ttended with risk; perilous; hazardous; unsafe". The terms defined reference each other in the Black's Law Dictionary with little explanation and one term is not defined at all. This makes these terms problematic on their face.

The next place in the Code where the lack of definitions is problematic is in Section 203. If an Elder refuses to consent to the services the EPT has determined are appropriate, the EPT "shall notify the Person in Need of Care that it may seek a Court Order if the person is unwilling or unable to consent to such care." Unlike the portions of the Code relating to abuse and neglect, both "unwilling" and "unable," critical terms for Chapter 3, are not defined in the Code.

Black's Law Dictionary defines "unable" as:

This term, as used in a statute providing that evidence given in a former trial may be proved in a subsequent trial, where the witness is unable to testify, means mentally and physically unable.

There is no definition for the term "unwilling" in Black's Law Dictionary. The fact that the term "unable" is limited to when a witness is both mentally and physically unable to testify – an application that is clearly not relevant to the current discussion – and that there is no legal definition for the term "unwilling" makes these terms problematic on their face.

When terms are not defined, and there is little or no guidance in the law to define the terms, there can be no consistency in interpretation. The terms will be defined by whoever is interpreting and applying the law at the time. In practical terms in reference to this Code, it means that the law itself will change according to who is on the EPT. This does not provide notice to the community as to what the law is.

The Void for Vagueness Doctrine utilized in federal courts, as well as many state and tribal courts, is defined by Black's Law Dictionary as follows:

Void for Vagueness Doctrine

A law which is so obscure in its promulgation that a reasonable person could not determine from a reading what the law purports to command or prohibit is void as violative of due process.

In other words, the Void for Vagueness Doctrine states that, if a reasonable person does not understand what the law requires or forbids, it violates due process.

Due process is guaranteed in Article VII of the NHBP Constitution:

Section 1. Individual Rights

a) The Band, in exercising the powers of self-government, shall not:

8. Deny to any person in its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law

Imbedded in the concept of due process in federal courts is the value that there be “fundamental fairness and substantive justice”. *Vaughn v. State*, 3 Tenn. Crim. App. 54, 456 S.W. 2d 879, 883.

While federal cases are not binding precedent, the NHBP Supreme Court has discussed “fundamental fairness” in relation to the traditional concept of MnoBmadzewen.

In its *Spurr v. Nottawaseppi Huron Band of the Potawatomi Tribal Council* Opinion, the NHBP Supreme Court stated:

MnoBmadzewen informs individual Anishinaabe life choices, but also informs the direction of tribal governance. Fred Kelly, an Anishinaabe and member of the Onigaming First Nation in Canada, draws the connection between MnoBmadzewen and Anishinaabe legal principles:

The four concentric circles in the sky –Pagonekiishig – show the four directions, the four stages of life, the four seasons, the four sacred lodges (sweat, shaking tent, roundhouse, and the Midewe'in lodge), the four sacred drums (the rattle, hand, water, and big ceremonial drum), and the four orders of Sacred Law. Indeed, the four concentric circles of stars is the origin of the sacred four in Pimaatiziwin that is the heart of the supreme law of the Anishinaabe. And simply put that is the meaning of a constitution.

Fred Kelly, Anishinaabe Leadership, at 3 (Dec. 14, 2005), quoted in Vanessa A. Watts, Towards Anishinaabe Governance and Accountability: Reawakening our Relationships and Sacred Bimaadziwin, at 77, unpublished master's thesis, University of Victoria (2006).

Spurr v. Nottawaseppi Huron Band of the Potawatomi Tribal Council, No. 12-005APP, at 6 (NHBP S. Ct. Feb. 21, 2012).

The NHBP Supreme Court emphasized that “MnoBmadzewen is not a legal doctrine, but forms the implicit basis for much of tribal custom and tradition, and serves as a form of fundamental law.” *Id* at 6. They utilized the principles of MnoBmadzewen as a guide in determining whether certain actions were prohibited. They stated:

We hold that Article IX elections, while not governed by any specific standards provided for in the Constitution or in the Tribal Code, must comport with a standard of fundamental fairness as a matter of Potawatomi custom and tradition. We are guided in determining whether the election is fundamentally fair by acknowledging the principles of MnoBmadzewen and the intent of the Constitution “to provide a means for ... the free expression of the community will....” CONST. preamble. *Id* at 8.

In applying the above to the present case, we consider whether the portions of the Code discussed in this Opinion and Order comport with, or are in agreement or in harmony with, the principles of MnoBmadzewen. With the community not knowing what is required or what is prohibited because key terms are not defined in the Code, the portions of the Code at issue are not in harmony with MnoBmadzewen.

The Petitioner argues that the Code does not violate the due process clause of the NHBP Constitution because the Respondent is afforded a hearing before the Tribal Court in order for any action to be taken. Section 301 provides the specific requirements for seeking a protective order from the Tribal Court:

(A) If the EPT determines that an Elderly Person is a Person in Need of Care and the person fails to consent or is unable to consent to protective services, EPT may petition the Tribal Court for an order authorizing the EPT services. The Petition must allege specific facts to show that the Elderly Person is a Person in Need of Care and is unwilling or is unable to consent to such services.

(B) Upon receiving a Petition, the Tribal Court shall immediately schedule a Hearing to determine if such care is necessary because the Elderly Person is (1) being abused; (2) is an imminent danger

to himself; or (3) is living in unsafe, unsanitary, or dangerous living conditions.

(C) Absent good cause, a Hearing on the Petition must be held within five (5) days of the Petition being filed.

The Code goes on to define the rights of Elders in Section 303:

The Elderly Person shall immediately be notified in writing that a Petition has been filed in Tribal Court, the reasons for the Petition, and the date and time of the hearing. The Elderly Person shall have the right to be present at the hearing, to be represented by counsel at his expense, and to present testimony on his behalf.

While it is true that a hearing provides a safeguard to the Elder, the hearing is not sufficient due process with how the Code is currently written. First, this protection is somewhat after the fact. While the EPT is required to advise the Elder that a Petition for a Person in Need of Care could be filed, there are no other steps required by a plain reading of the Code. The reality is that, as soon as the Elder declines services, they could have to defend their very personal decision in a legal action. The Petition does not need to allege that the Elder is incompetent or incapacitated, but rather, only that the Elder is unwilling to accept the protective services recommended by the EPT.

The Respondent argues that it is not legally appropriate to force an Elder to accept services by force of court proceedings when the Elder is a competent adult. They cited a New York case that mirrors the situation here:

The integrity of the elderly, no less than any other group of our citizens, should not be invaded, nor their freedom of choice taken from them by the State simply because we believe that decisions could be "better" made by someone else. If Ms. Fisher is really *"incompetent" to manage her own affairs, or if she can be shown to be a danger to herself or others, and if the burden of making the showing can be carried by clear and convincing evidence, including a determination of these facts by a jury, if requested, then the State can intervene in the manner which has been urged in this proceeding. Until that occurs, she must be permitted to make her own decisions, whether good or bad, wise or foolish, as a condition of the liberty and integrity accorded all other citizens who have not been declared legally incompetent.* *In re Fisher.* 552 N.Y.S. 2d 807, 813 (Sup. Ct. 1989).

While this Court is not holding that an Elder must be proved incompetent or a danger to themselves or others, it does agree that there needs to be more than an unwillingness to consent to services as determined by the EPT for a legally competent Elder to lose the right to make their own decisions about how they are going to live their life, regardless of whether the EPT, or for that matter the Court, thinks that a different course of action would be better for the Elder. The current Code, in having such a vague and/or low threshold for denying an Elder the right to self-determination when they are legally competent, violates the principles of MnoBmadzewen.

The second reason that the process in the Code does not provide sufficient due process is rooted in the previous discussion that the terms used in the Code – unsafe, unsanitary, dangerous, unwilling and unable – are vague. Just as the Code does not provide sufficient notice to the community as to what is required or prohibited under the Code, so does it not provide sufficient notice to the Court as to what is required or prohibited. Of equal importance is that the current text of the Code would allow, perhaps even dictate, that it must find an Elder to be a Person in Need of Care only because they are “unwilling” to accept the services as determined by the EPT. This not only fails to provide the due process guaranteed by the NHBP Constitution, it is not in harmony with MnoBmadzewen.

In holding that certain provisions are unconstitutional and violate the principles of MnoBmadzewen, this Court once again stresses that it is clear that this Code was implemented out of respect for the Elders of this Nation. In fact, this Opinion and Order has been particularly difficult to write as this Court is very well aware that the leaders of this Nation, the members of the EPT, the staff at the Legal Department, the staff at the NHBP Health Department and the Tribal Prosecutor are committed to providing nothing but the best of care to the Elders of this Nation. It is also aware that the striking down of some of the Code’s provisions leaves these Elders vulnerable until the Code is amended. However, this Court is entrusted with the responsibility of reviewing the laws of the Nation to ensure that equal protection, due process and fundamental fairness is provided to the citizens of this Nation and this Code, on its face, violates both the Constitution and the principles of MnoBmadzewen.

CONCLUSION

In the present case, the Court holds the NHBP Elderly Services and Protection Code, as amended on October 28, 2010 and passed by the NHBP Tribal Council by Resolution Number 10-28-10-07, relating to a Petition for a Person in Need of Care when an Elder does not consent to the protective services as determined by the Elderly Protection Team, fails to define key terms that are also not defined in the law. This lack of definitions prevents Tribal Members from knowing what is required or prohibited, as well as fails to provide sufficient definitions, guidelines or standards for the Court to determine whether an Elder is a Person in Need of Care, making it Void for Vagueness in violation of equal protection and due process of law as guaranteed by Article VII, Section(a)(8) of the NHBP Constitution and in violation of the traditional notions of fundamental fairness known as MnoBmadzewen.

ORDER

For the reasons set forth in this Opinion and Order, Chapter 3 of the NHBP Elderly Services and Protection Code as it relates to Elders who decline protective services as determined by the Elderly Protection Team is Void for Vagueness in violation of equal protection and due process of law as guaranteed in Article VII, Section(a)(8) of the NHBP Constitution. The Elderly Protection Team may continue to investigate when a report is made, create a protection services plan and offer services to an Elder. If the Elder declines services, however, the EPT may not "notify the Person in Need of Care that it may seek a Court order if the person is unwilling or unable to consent to such care" pursuant to the latter half of Section 203 of the Code, or engage in the process as defined in Chapter 3 of the Code.

All provisions relating to the investigation of reports of abuse and neglect by a third-party remain in effect.



4/15/2013
Dated

Melissa L. Pope, Chief Judge

CERTIFICATE OF MAILING

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

4/5/2013
Date



R. Scott Ryder, Tribal Court Administrator