



# NHBP TRIBAL COURT

NOTTAWASEPPI HURON BAND OF THE POTAWATOMI

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**FILED**

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TRIBAL COURT CASE NO. 19-069-GM ET AL

IN THE MATTERS OF  
NHBP MINOR CHILDREN

**NHBP TRIBAL COURT**

## PUBLISHED ORDER REGARDING STANDING IN TEMPORARY AND PERMANENT GUARDIANSHIPS OF A MINOR CHILD

### INTRODUCTION

When the Court has addressed issues in a confidential and closed matter that may affect procedures in future cases, it has issued a public opinion with minimal information on the persons involved to protect their identity and personal information. In the present matter, there are numerous issues addressed by the Court, such as the authority of the Court under the *Guardianship and Conservatorship Code*, the approach of this Court to guardianship hearings, the duties and standing of the NHBP Social Services Department under the *Guardianship and Conservatorship Code*, positions authorized to have access to matters filed under and pursuant to the *Guardianship and Conservatorship Code*, and the representation of the Tribe, Tribal Government Departments, and Tribal Government employees. The Court has attempted to protect the confidential information of the family by omitting personal details not pertinent to the issues addressed, such as the relationship between the Temporary Guardian(s) and Parent(s). The Court also references the Tribal Court Case Numbers but does not include the initials of the minor children, instead titling the underlying case, "In the Matter of NHBP Children". The Court also attempts to keep confidential details about the NHBP Social Services Department employee involved by using gender-neutral language so that their gender is not identified, as well as refraining from disclosing the employee's position. The argument presented by the NHBP Social Services Department and documents submitted on behalf of the Department, however, require disclosure of the Department to address the issues presented.

### FACTS OF THE CASE

A Petition for Temporary and Permanent Guardianship of a Minor was filed. The Minor Child is enrolled at the Nottawaseppi Huron Band of the Potawatomi (NHBP) and permanently resides in NHBP Tribal Housing. The Parent of the Minor Child is enrolled at the NHBP and permanently resides in NHBP Tribal Housing. With the Minor Child enrolled at NHBP with a permanent

residence in NHBP Tribal Housing, the NHBP Tribal Court has exclusive jurisdiction over this matter.

The Court issued an *Order Appointing Temporary Guardian of Minor Child* on the Petition and scheduled a Hearing pursuant to the *NHBP Guardianship and Conservatorship Code*, providing proper notice pursuant to the NHBP Tribal Court Rules.

The Hearing on the Petition for Temporary Guardianship was held. Upon agreement of the interested persons and permission of the Court, the *Order Appointing Temporary Guardian of Minor Child* remained in effect after the Hearing.

After the Hearing, the Temporary Guardians and Parent filed separate motions, both requesting that a new Case Manager be appointed.

On April 26, 2019, Nancy Bogren, who identified herself as the “NHBP Presenting Officer” and is also the Tribal Prosecutor, Tribal Special Assistant United States Attorney in federal court, and Presenting Officer under the *Children’s Protection Code*, the *Juvenile Justice Code*, and the *Mental Health Code*, filed a “Request to File Appearance on Behalf of NHBP Social Services Department”.

On April 29, 2019, Attorney Bogren filed her “Conditional Request to Withdraw Request to File Appearance on Behalf of Social Services Department”.

On April 29, 2019, Elizabeth Cook, an Attorney in the NHBP Legal Department, filed a Limited Appearance “representing the Social Services Department and the Tribal Government interests”.

On May 3, 2019, a Hearing on the Temporary Guardians’ and Parent’s request was held with Attorney Cook appearing on behalf of and with the NHBP Department Social Services Staff present. The Department of Social Services, by and through its attorney, argued that Staff in the NHBP Department of Social Services have the limited role of issuing a guardianship report under the *Guardianship and Conservatorship Code* or specific, written order of the Court. After hearing the argument presented, the Court dismissed the Social Services employee and her attorney and continued with the Hearing.

## ANALYSIS

This Native Nation prioritizes the care of children. The Citizens of this Nation state in Article II § 2 (b) of the NHBP Constitution:

- (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;
4. Promote efforts that ensure the perpetual preservation and revitalization of the Band's sovereignty and self-determination; and
5. Promote open and transparent governance by providing Tribal Members, and where appropriate, other persons subject to Tribal jurisdiction, with notice and opportunity to comment on financial, policy or legislative business under consideration.

This Court intentionally cites all of the Guiding Principles as the preservation and revitalization of Bode'wadmimen and Bode'wadmi culture is the foundation for all cases before the Court, as well as the day-to-day administration of the Judicial Branch. The Court strives to incorporate these values into how it approaches every aspect of every case. One manner in which the Court tries to follow traditional approaches to justice is open and respectful communication in the spirit of the Seven Grandfathers Teachings. This may seem to be a “standard” value, but it is not. It first takes the commitment of the Court.

Conducting Court hearings in the spirit of the Seven Grandfathers Teachings involves the Judiciary being educated about historical trauma, including but not limited to: the unique history of the Nottawaseppi Huron Band of the Potawatomi, including the specific trauma survived by this Nation and its Citizens; the initial and ongoing impact of U.S. policies, executive actions, Congressional actions, and decisions of the U.S. Supreme Court to American Indian children, families, and Nations; the ongoing epidemics of violence against Native People, including the jurisdictional issues that often create further trauma and denial of justice; the dynamics of domestic violence; the effects of sexual violence; the long-term impact of child abuse; the long-term impact of removal of American Indian children from their families, in particular when placed with individuals and agencies outside of the Tribe; the general impact of victimization, both short-term and long-term with the latter significantly impacted by how that victimization is addressed; and the generational impact of violence, abuse, cycles of family abuse, and removal of children. Also important for a judge to know is the treatment of Tribal Citizens by the various justice systems, historically and within families. For reference, working from this place of knowledge is currently being referred to as a “trauma-informed” approach. The NHBP Tribal Court has taken this approach since 2011, independent of whether it has used the popular language in mainstream society.

The Court has been working on establishing a PeaceKeeping or PeaceMaking Program. The Court not only envisions a program where PeaceMakers may take an active role in matters involving the youth, the specific focus requested by Tribal Elders, Tribal Veterans, and other Tribal

Citizens, but also where Members of the Judiciary may consult PeaceMakers for a better understanding of Bode'wadmimen and Bode'wadmi culture, such as to learn stories that it may share in a hearing or in a written opinion to provide guidance within the traditions and values of the Tribe, properly using traditional language, and implementing culturally and spiritually based activities to encourage greater connection to traditional ways. In the interim, the Court – the Judiciary and Court Staff within the various Departments of the Court – has and will continue to seek guidance from the Elders, Veterans, and Staff in the Culture Department to provide this connection to Bode'wadmimen and Bode'wadmi culture.

The Court conducting hearings in the spirit of the Seven Grandfathers Teachings also requires the presiding judge to be mindful of Bode'wadmi culture as it relates to communication. One manner many American Indian Tribes demonstrate respect to Elders, Veterans, and other positions of authority is to listen to them. In certain instances, it may even be disrespectful for those who are not Elders or Veterans – or simply younger than the majority of the individuals in the room – to speak. In the context of a guardianship hearing, a parent younger than a temporary or permanent guardian, attorney, judge, or other individual at the hearing may feel it disrespectful to speak, especially if she or he disagrees with what has been said. Their silence could easily be misinterpreted. To utilize this traditional approach, therefore, the presiding judge must not only provide the opportunity to speak; it must encourage it.

The Court further seeks to conduct hearings in the spirit of the Seven Grandfathers Teachings by attempting to reach agreements whenever possible. The devastating impact of U.S. policies to adopt out American Indian children to non-American Indian families, documented in the testimony presented at the hearings for the adoption of the Indian Child Welfare Act, as well as numerous studies, books, and federal, state, and tribal court opinions, has created significant distrust of courts, social service agencies, and child protective service agencies. The ongoing issues within Michigan, and in particular with the Michigan Department of Health and Human Services and its Children's Protective Services program, directly impacts cases in the NHBP Tribal Court. One specific example of this impact is the preference for a family member who is also an NHBP Tribal Citizen to serve as a temporary or permanent guardian. This type of placement facilitates the values of the NHBP in several ways: it reflects the value of extended family and their roles in supporting the well-being of children beyond mainstream society's focus on "immediate" family members; it facilitates children's connection to their Nation; it facilitates children's understanding of their Native Nation, Tribal Government, and their responsibilities as Tribal Citizens; and it facilitates the long-term sustainability and success of the Tribe by the children having the connection needed to become contributing Tribal Citizens as adults who are active in their Tribal Government for the well-being of the children born in the seventh generation after them.

This Court focuses on healing whenever possible. In guardianship cases, the focus on healing strengthens the family for the well-being of the children, the "immediate" family, the "extended" family, and ultimately, the Tribe. Although the Court is in full support of family being preferred guardians of minor children, working towards healing is even more critical when a family member is appointed as a guardian as the children, parents, and guardians will still be family after

the case has been dismissed and the Court is no longer involved. One avenue for focusing on healing is to facilitate agreements throughout the case. This can be challenging at the start of the case as parents may feel anger or resentment that a guardianship for their children was sought and the guardian may feel anger or resentment that the parents are behaving in a way that does not support the well-being of the children – with the children frequently aware of and distressed by this anger or resentment.

There is a multitude of ways that a strained relationship between the guardian and parents may affect the well-being of the children, regardless of whether the children discuss their feelings directly. Children may not want to share anything positive about time with the guardian or parents out of fear of hurting the other person or share anything of concern about a parent’s behavior out of fear the parent will “get in trouble”. They may engage in behavioral issues at home or school or there may be a change in their performance at school. Children may also internalize the mistaken belief that they are somehow at fault for the strained relationship. The Court, therefore, works towards agreements between the guardian and parents as any agreement – however small – strengthens the focus on the children. Reaching agreements between the guardian and parents acknowledges all of their perspectives while keeping the focus on the children. It also begins the healing process so that, hopefully, the guardian and parents have a positive relationship at the end of the case where they continue to support the well-being of the minor children in a loving way.

The Court explains its approach for several reasons. The first being providing Tribal Citizens and the public an understanding of what the Court means when it states that “the preservation and revitalization of Bode'wadmimen and Bode'wadmi culture is the foundation for all cases before the Court”. The second is to share the many reasons the Court frequently has lengthy hearings, from committing the time needed to strive to collectively create an environment where every person feels listened to, valued, and respected in order to try and reach agreements whenever possible to strengthen relationships and promote healing, endeavors especially important in cases involving children. The final reason is to explain the environment in which previous hearings have been conducted in order to address the arguments presented that this Court must address.

The Court must first note that it will attempt to protect the identity of the NHBP Staff Person involved in this matter as much as possible, including not identifying their title or gender. However, with the NHBP Social Services Department named by both Attorney Bogren and the Legal Department in their requests to represent the Social Services Department and the legal argument ultimately made that the Social Services Department does not have any responsibilities pursuant to the *Guardianship and Conservatorship Code* other than the initial investigation through issuance of the report or as ordered by the Court, the Court must name the Department.

An initial matter to address is standing. Standing is a foundational issue generally, but especially critical in guardianship cases as they are confidential matters before the Court. The importance of confidentiality in a guardianship matter cannot be overstated. Whether the case involves the guardianship of a minor child or an adult, the details shared in Court are extremely personal. This includes but is not limited to: medical information; details about disabilities; past

and current traumas, including domestic violence, sexual assault, and child abuse; mental health diagnoses and treatment; substance abuse and treatment; academic performance; work performance; learning disabilities; previous and current financial information; and much more. This personal information is shared about those involved in the case – guardians, parents, minor children, protected persons – as well as family and friends not present who have impacted the interested persons in the case.

Confidentiality is also critical to a guardianship case because the Court needs open and honest communication in order to assess the safety of the environment for the minor children or protected person, evaluate the barriers interested persons are facing, and evaluate the success of attempted solutions to those barriers. As such, the Court fiercely guards access to guardianship cases to promote the well-being of guardians, protected persons, interested persons, parents, and minor children by protecting the confidentiality of their personal lives.

An example of a manner in which the Court protects the confidentiality of guardianship proceedings can be found in Chapter 14 – Tribal Court Rules for Guardianship and Conservatorship Proceedings § 6:

#### **Section 6: Persons Permitted at Hearings**

- A. Guardianship or conservatorship hearings are private matters and only persons having a “direct interest in the matter” will be allowed to attend the proceedings. Court files shall not be open to the general public but only accessed by persons with permission of the Court.
- B. For the purposes of this Chapter of Court Rules, persons having a “direct interest in the proceedings” are defined as:
  1. The petitioner;
  2. The proposed ward;
  3. The LGAL;
  4. Any attorney who has entered an appearance accepted by the Court;
  5. If the proposed ward is a minor, the minor’s parents, custodian or any other person responsible for the minor’s care;
  6. All persons listed as having an interest in this matter in the petition;
  7. Immediate family;
  8. Witnesses as identified by the Court; and

9. Any other person authorized by the Court.

The Hearing scheduled was to address concerns that both the Temporary Guardians and the Parent had in relation to a Social Services employee. There were three documents submitted to the Court relating to representation of the Social Services Department. The first was submitted on April 26, 2019 by Nancy Bogren and entitled “Request to File Appearance on Behalf of NHBP Social Services Department”. On April 29, 2019, Attorney Bogren submitted the “Conditional Request to Withdraw Request to File Appearance on Behalf of NHBP Social Services Department”. In this Conditional Request, Attorney Bogren stated in pertinent part, “[t]hat if no one from the NHBP Legal Department files an Appearance in this matter, or if that Appearance is not accepted by the Court or is withdrawn prior to the hearing on May 3, 2019, the Presenting Officer would ask this Honorable Court to grant her request to enter an appearance in this matter”. The Court also received the request to enter an appearance on April 29, 2019 from Elizabeth Cook in which she entered a “limited appearance” for “representing the Social Services Department and the Tribal Government interests”.

Attorney Cook appeared at the Hearing and made the argument to the Court on behalf of the Social Services Department that, once the Social Services employee issues the report on the proposed guardianship, the employee – and Social Services Department – has no duties under the *Guardianship and Conservatorship Code* unless duties are imposed by order of the Court; the motion to change the Social Services employee involved with the case was, therefore, premature since the Social Services employee was not ordered by the Court to serve in an official capacity. With the argument that the Social Services employee did not have any responsibilities in the case, the Court dismissed the Social Services employee and Attorney Cook to protect the confidentiality of the proceedings.

The Court agrees that the *Guardianship and Conservatorship Code* does not assign any independent and specific duties to the NHBP Social Services Department or its employees. There are several details relating to this holding, however, that the Court must address for future guardianship cases.

The *Guardianship and Conservatorship Code* provides the requirements for the Court upon receipt of a petition for guardianship in § 7.2-10 as follows:

Upon the filing of a petition for guardianship, the Tribal Court shall immediately order that the Tribal Social Services Department or other qualified agency conduct a guardianship evaluation on the proposed guardian and the proposed ward. The resulting guardianship report shall contain all pertinent information necessary to assist the Tribal Court in determining the best interests of the proposed ward. The report shall be filed with the Tribal Court, and a copy shall be provided to all parties who have received notice of the petition. The Tribal Court may order that a person alleged to be legally incapacitated be examined by a physician or mental health professional who shall submit a report to the Tribal Court.

The *Guardianship and Conservatorship Code* vests the Court with the authority to select the agency to conduct the guardianship evaluation. It also specifies the responsibilities of the individual and/or agency appointed. The Court notes for the record that it has consistently included a deadline for filing the written report and ordered the individual to testify at the hearing in the order of appointment. With the NHBP Social Services Department asserting they have no responsibilities under the *Guardianship and Conservatorship Code* after the guardianship evaluation report is filed, the Court finds it important to note that the NHBP Social Services Department does not have any duties under the *Guardianship and Conservatorship Code*; the role of the NHBP Social Services Department is completely dependent upon the orders of the Court, including whether it conducts the initial guardianship evaluation.

The Court has consistently issued written orders of appointment for conducting the initial guardianship evaluation due to the appointment being made before court is convened. It has not, however, always followed orders from the bench with written orders. Although one reason is that an order from the bench has the same force and effect as a written order, there are also substantive reasons for the Court to intentionally refrain from issuing a written order with the most important being potential harm to an interested person who is struggling in the case that is before the Court.

The Court encourages open and honest communication. The Court also asks a person who is struggling to share the difficult details about their struggles. Discussing these struggles, however, is far different from reading the details of those struggles in print. A detailed account of unhealthy behavior may erode the self-confidence being built. A detailed account of trauma survived may trigger further unhealthy behavior, including relapse if substance abuse is an issue. For a person still leaning towards denial, a detailed account of problematic behavior may lead to further denial, anger, or a focus on what they feel is inaccurate or unfair instead of accountability. Of significant concern is that a detailed account of the programs and services that must be completed – a written account of how far they still have to go – may make the path seem so overwhelming that they stop the journey. Providing written orders with these details later in the case, however, can show a person how far they have come instead of how far they still have to go.

The Court is not intending to imply that the Social Services employee did not fulfill orders of this Court by providing this explanation. The Court makes no comment on whether it issued any orders from the bench at the previous Hearing in this case. It does, however, acknowledge that it did not issue a written order appointing this Social Services Department to perform services. With the Social Services Department arguing, by and through its attorney, that it had no responsibilities under the *Guardianship and Conservatorship Code* and no written order from the Court to provide services, the focus at the Hearing shifted from this family to the duties of the Social Services Department. Further, this argument meant it was not appropriate for the Social Services employee to be involved with this confidential matter. With the priority being returning the focus to this family, and the issues presented transcending this individual case, the Court dismissed the Social Services employee from the Hearing and issues this published *Opinion* to address the legal questions presented, clarify the issuance of Court orders, and share the

considerations of the Court for a greater overall understanding of the approach of the Court moving forward.

With these issues arising due to the Temporary Guardians and Parent raising concerns about a Social Services employee, the Court clarifies approaches to such requests as they will occur again in the future. Although the Court has not previously articulated in writing the details of how it incorporates traditional values and processes, any individual who has been in this Court for a guardianship case – or juvenile case, personal protection order case, or any case that involves individuals or families facing personal challenges – has witnessed the approach of this Court. There have been requests to change staff in the past and there will be requests to change staff again in the future. People are not generally in court for happy reasons. We often see people at one of the most difficult times in their lives. It is a process for a person to heal, change, and grow. A person may be resistant in the beginning. Some may blame others for their unhealthy behavior. Some may feel unfairly judged. Some may not agree with the approach of the Court, staff assigned, or the services required. And sometimes those involved in a case simply have a personality conflict.

To find a solution, however, the Court begins with an open and honest discussion about what the issues are. The Court has fashioned a variety of solutions based on these discussions, from assigning additional staff to assist with the case, to assigning a specific staff person to a specific task, to denying a request, to name but a few outcomes. In some instances, a person has withdrawn their request after having the opportunity to share concerns and listen to each other. These discussions often lead to a better understanding of each other, even if the conflict cannot be resolved at that moment. Again, the Court strives for agreements in these situations versus court-imposed orders. This approach has often been successful. This Court has witnessed the healing of relationships that seemed impossible at the time a request was made. In one instance, the Court witnessed a person who had ferocious objections to an NHBP Social Services employee providing services hugging that same employee at the end of the case with both having tears in their eyes, expressing the pride they felt in working together for a good resolution to the case.

With the argument presented by the Social Services Department, there was no opportunity for this discussion – or healing – in this situation. The argument that the Social Services Department had no duties under the *Guardianship and Conservatorship Code* and that the Court had not issued a written order assigning duties meant that the Department and its employees were not interested persons in the case and, thus, it was not appropriate under the *Guardianship and Conservatorship Code* for the Social Services employee to participate in this confidential matter. As noted previously, this argument also changed the focus from this family to a legal issue. Had the Court been notified in advance of the Hearing of the argument that was going to be presented, it may have approached the issue differently. At minimum, the family would have been prepared for the argument and the fact that they may not have the opportunity to share their concerns.

With it likely that there will be future requests to change an employee providing services in a case before the Court, this *Opinion* provides clarification on the Court's approach to requests to change a service provider for those who have not been a service provider in this Court. The

Court must emphasize that a service provider in this context is not the focus of this Court, especially in guardianship, juvenile, and other confidential matters. The focus has and always will be on the children and the family. The Court seeks to listen to the concerns of both the family and the employee to find solutions that will keep those struggling moving forward. This is especially true in a case involving children with the goal of this Court – in part as a reflection of the values of this Native Nation – being the reunification of a safe, healthy, and happy family.

Keeping the focus where it belongs on the family, as well as protecting the due process rights of an employee, serves as the catalysts for the two instances where there could be consequences for an individual providing services who has engaged in problematic behavior. The first is if an attorney allegedly engaged in misconduct with the NHBP Tribal Court Rules governing this process. The second is if the employee violated an order of the Court. If such a situation should occur, the Court would protect the due process rights of the employee by scheduling a show cause hearing where that employee could be represented by the NHBP Legal Department.

With there now being a more comprehensive understanding of the considerations of the Court in guardianship matters, the Court now returns to the issue of standing. The standing of the NHBP Social Services Department is dependent upon the orders of the Court. If the Court appoints an NHBP Social Services Department employee to conduct the guardianship evaluation, there is standing until the employee submits his or her report and testifies at the hearing, if ordered to testify in the order of appointment. An NHBP Social Services Department employee also has standing if ordered to perform other services pursuant to the terms of the Court's order. The Court may order the Social Services employee to perform services from the bench when the employee is present in court or in a written order. With the Court adopting the argument of the NHBP Social Services Department that the Department does not have any independent duties under the *Guardianship and Conservatorship Code*, the NHBP Social Services Department does not have standing in guardianship matters unless it is appointed by the Court to perform duties.

The legal representation of the NHBP Social Services Department and NHBP employees is an issue that the Court must also address due to there being two requests to file an appearance on behalf of the NHBP Social Services Department with one of those withdrawn, but only on a "conditional" basis.

In her "Conditional Request to Withdraw Request to File Appearance on Behalf of Social Services Department", Attorney Bogren states in pertinent part:

"That when the Presenting Officer requested permission to enter her Appearance it was because she had been informed that no other attorneys from NHBP would be attempting to enter an Appearance for the hearing on May 3, 2019"

"That if a Member of NHBP's Legal Department files an Appearance and that Appearance is accepted by this Honorable Court and there is legal representation for NHBP at the hearing on May 3, 2019, the Presenting Officer believes her appearance would be superfluous"

“That if no one from the NHBP Legal Department files an Appearance in this matter, or if that Appearance is not accepted by the Court or is withdrawn prior to the hearing on May 3, 2019, the Presenting Officer would ask this Honorable Court to grant her request to enter an appearance in this matter”

While the reason for Attorney Bogren’s requests may have been tied to the nature of the argument presented – that the request was unnecessary as there was no written order assigning duties to the Social Services employee – Attorney Bogren’s statements make clear that she was only withdrawing her request because the NHBP Legal Department indicated that it would represent the Social Services Department and/or employee at the Hearing. The underlying argument that Attorney Bogren appears to maintain, therefore, is that she may serve as legal counsel for the NHBP Social Services Department. Although the issue is now moot, with the Court anticipating that there will be requests to change Social Services staff appointments in the future as they are a common occurrence, in part due to the very nature of these types of cases, and Attorney Bogren making her withdrawal conditional, the Court anticipates that this issue will arise again in the future. When an issue is moot but likely to occur again in the future without the opportunity to address the issue, it is known as “capable of repetition, yet evading review” or an exception to the mootness doctrine in many jurisdictions.

The Court begins this analysis by noting that Attorney Bogren identified herself as the “NHBP Presenting Officer” in this matter. The *Children’s Protection Code*, the *Juvenile Justice Code*, and the *Mental Health Code* all reference the position of “Presenting Officer”. To the best of the information, knowledge, and belief of the Court, Attorney Bogren currently serves as the Presenting Officer under these Codes, as well as the Tribal Prosecuting Attorney and a Special Assistant United States Attorney (SAUSA) for the Tribe in federal court. There is no reference in the *Guardianship and Conservatorship Code* to a “Presenting Officer”. There is one reference, however, to the Tribal Prosecutor in § 7.2-3 (B) (1):

Where proceedings authorized under this chapter are subject to the concurrent jurisdiction of any state and a proceeding involving the appointment of a guardian for a minor who does not reside on tribal lands is first commenced in the courts of that state, the Tribe’s Prosecutor may, in accordance with the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.), and/or the Michigan Indian Family Preservation Act (MCLA § 712B.1 et seq.), as applicable, request that the state court hold the matter in abeyance until the question of venue is decided and a determination is made as to whether it is necessary and appropriate to transfer the proceeding to the Tribal Court.

With no reference to a “Presenting Officer” in the *Guardianship and Conservatorship Code* and the only reference to the Tribal Prosecutor relating to transferring a guardianship case to

the NHBP Tribal Court, this Court cannot identify a basis for Attorney Bogren to be identified as the “Presenting Officer” in a guardianship proceeding.

However, in the first document she submitted, Attorney Bogren references the *Children’s Protection Code* as a basis for her request to file an appearance on behalf of the NHBP Social Services Department and its employees stating, “[t]hat the Presenting Officer acts as a legal advisor to the NHBP Social Services Department in many instances under Tribal Code, including Child Protection matters under NHBP Tribal Code (See Section 7.5-9)”. The Section referenced states as follows:

Presenting Officer:

- (1) Is authorized to represent NHBP in proceedings arising under this code and proceedings in state courts under the ICWA;
- (2) May provide legal counsel to SSUs with respect to matters under this code; and
- (3) May make recommendations to the SSU, the MDT, and the Tribal Council regarding amendments to this code.

To the best of the information, knowledge, and belief of this Court, the NHBP Legal Department represents both the Tribe and its employees unless that authority is delegated to another department or position under Tribal law. It is critical to the administration of justice for the department or position responsible for the legal representation of the Tribe, its departments, and/or its employees to be clear. Having two entities represent the same department or person could result in a multitude of problems, the most obvious example being the presentation of opposing arguments for the same department or employee. There could even be opposing arguments presented on behalf of the Tribe in Court – Tribal, state or federal. Of equal, if not greater, concern is the potential due process issue of service with it not clear what entity the Court or a party is required to serve. These are but a few problems that could arise with multiple agencies claiming the authority to represent the Tribe, a governmental department, or an employee. As such, the Court finds the language in the Codes discussed of critical importance.

The Presenting Officer is “authorized to represent NHBP in proceedings arising under this code and proceedings in state courts under the ICWA”. This provision authorizes representation of NHBP, not the NHBP Social Services Department. This provision also limits that authorization to proceedings arising under the *Children’s Protection Code*. The present case was filed under the *Guardianship and Conservatorship Code* and not the *Children’s Protection Code*. Further, this Tribal Court is not a state court.

The language of the provision that specifically references the NHBP Social Services Department (identified as the “SSU” or “Social Services Unit of the Health and Human Services Department” in the *Children’s Protection Code*) also does not authorize the Presenting Officer of the *Children’s Protection Code* to represent the Social Services Department. Unlike the previous

paragraph, the provision does not use the word “represent”; it states that the Presenting Officer “[m]ay provide legal counsel to SSUs with respect to matters under this code”. Again, the *Guardianship and Conservatorship Code* is not the *Children’s Protection Code*.

The *Children’s Protection Code* provides further support that the Presenting Officer does not represent the Social Services Department in § 7.5-28:

Formal proceedings. The presenting officer or the SSU Case Manager, or SSU Manager, may initiate formal child protection proceedings by filing a petition for adjudication of a protected child in Tribal Court on behalf of the Tribe and in the best interests of the child.

This provision authorizes the Presenting Officer, the Social Services Case Manager, or the Social Services Manager to initiate formal child protection proceedings by filing a petition. It does not state that the Presenting Officer is authorized to represent the Social Services Department in filing a petition under the *Children’s Protection Code*. A plain reading of the language in the *Children’s Protection Code*, therefore, makes clear that the Presenting Officer does not represent the NHBP Social Services Department or its employees. This is also supported by the structure of the Tribal Government with the NHBP Legal Department the body with the authority to represent the Tribe and its employees. It, therefore, follows that the Presenting Officer would not have the authority to represent the NHBP Social Services Department in guardianship proceedings in the Tribal Court.

Attorney Bogren also references a companion matter in a foreign jurisdiction as a basis for her arguing that she has the authority to represent the Social Services Department in Tribal Court. Although the Court will not disclose the type of matter referenced nor any details to protect the personal information of this family, the Court notes that Attorney Bogren is correct that this companion matter is under the responsibilities of her position as Presenting Officer under another Code. However, the filing of the request to file an appearance on behalf of the Social Services Department in this guardianship proceeding under her duties as the Presenting Officer under the *Children’s Protection Code* presents an issue the Court must address.

The *Children’s Protection Code* defines the Presenting Officer in § 7.5-2 as follows:

**PRESENTING OFFICER**

The Tribal Prosecuting Attorney or an Assistant Tribal Prosecuting Attorney who represents the Tribe in all matters related to this code and the Indian Child Welfare Act 25 U.S.C. § 1901 et seq.; or one authorized by the Tribal Council to present cases involving abuse and neglect to the NHBP Court for adjudication and to represent the interests of NHBP in court cases involving NHBP member families.

As plainly stated, the Presenting Officer is “[t]he Tribal Prosecuting Attorney or an Assistant Tribal Prosecuting Attorney”. To the best of the information, knowledge, and belief of this Court, no Assistant Prosecuting Attorney has been appointed. As such, one individual serves

as the Tribal Prosecuting Attorney and, thus, the Presenting Officer under the *Children's Protection Code*. To the best of the information, knowledge, and belief of this Court, that same individual also serves as the "NHBP Presenting Officer" under the *Juvenile Justice Code* and the *Mental Health Code*<sup>1</sup>. The authority for both creating and filling these positions is vested with Tribal Council. This Court does not question this authority. This Court also does not question the manner in which Tribal Council has filled these positions.

The *Guardianship and Conservatorship Code*, however, does not reference a Presenting Officer, either in the context of a role for a Presenting Officer within the *Guardianship and Conservatorship Code* or a role for a Presenting Officer under a different Code. It also does not include duties for the Tribal SAUSA or the Tribal Prosecutor, other than the Tribal Prosecutor being responsible for requesting transfer of cases from state court to this Tribal Court. With there being no reference to these positions, other than regarding the transfer of cases to this Tribal Court, there is also no reference in the *Guardianship and Conservatorship Code* to the administration of these duties by the individual positions if granted access to guardianship matters. Further, the Court notes that it can find no guidance in the law for the administration of the duties of these multiple positions when they are held by the same individual to which it can turn to guide the involvement of the Presenting Officer under the *Children's Protection Code*, who is also the sole Tribal Prosecutor, the sole Tribal SAUSA, and the Presenting Officer under the *Juvenile Justice Code* and the *Mental Health Code*, in cases filed under the *Guardianship and Conservatorship Code*, including when these duties are in conflict. Without guidance in the law for an individual serving in multiple positions, the traditional manner in which this Court conducts guardianship hearings

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<sup>1</sup> The Court notes that the *Mental Health Code* defines the "Presenting Officer" in § 7.6-4 as, "[t]he Prosecuting Attorney for the Nottawaseppi Huron Band of the Potawatomi or other person assigned the duties of the Presenting Officer for proceedings under this code through a resolution of the Tribal Council. The Presenting Officer shall be the attorney for the petitioner in all proceedings brought under this chapter." The Court notes that the "Individuals Eligible to File a Petition/Application" are also defined in § 7.6-4 and states, "[a] mental health professional, peace officer, or qualified tribal employee who bases his/her assertions on reliable and trustworthy information. A mental health professional, peace officer, or qualified tribal employee may use hearsay in the petition/application if they can demonstrate the reliability and trustworthiness of the assertions". The *Mental Health Code*, therefore, requires the Presenting Officer to represent a petitioner in Tribal Court. The Court notes that, while a member of the Social Services Department may be the petitioner, this Code also does not authorize the Presenting Officer to represent the Social Services Department under that Code, nor does it authorize the Presenting Officer to represent the petitioner, Social Services Department or Social Services Department employees under another Code. The Court further notes that it has not found any provisions in the *Mental Health Code* that provide guidance to the Presenting Officer if he or she does not find sufficient evidence to support the petition pursuant to the law nor guidance on whether proceeding with such a petition under the duties as articulated in the *Mental Health Code* – specifically being required to represent the petitioner if he or she does not find sufficient evidence to support the petition – would violate § 6 (A) of Chapter 4 – Tribal Court Rules of Professional Conduct for Attorneys that states in pertinent part that, "[a]n attorney shall not bring or defend a proceeding, or assert or controvert an issue in the proceeding, unless there is a basis for doing so that is not frivolous". However, the Court also notes that it is highly unlikely that the individuals authorized under the *Mental Health Code*, "[a] mental health professional, peace officer, or qualified tribal employee who bases his/her assertions on reliable and trustworthy information", would file a frivolous petition. The only issue the Court envisions would be if a person appearing to be trustworthy was being dishonest to the petitioner. In such a circumstance, the claim would not be frivolous. Nonetheless, it is wise to consider the unlikely in order to ensure rights are properly protected. As such, the Court may amend the Tribal Court Rules to provide clarification on this Court Rule.

and the honesty this Court has witnessed from families striving towards reunification may be problematic.

As discussed, open and honest communication is a primary focus of guardianship matters involving minor children. In these cases, individuals other than the parents are either seeking or have already been granted guardianship, whether temporary or permanent, over minor children. Guardianship is not granted because parents are properly caring for their children; they are facing challenges that make caring for their children difficult. The *Guardianship and Conservatorship Code*, along with the Tribal Court Rules, are designed to reflect the values of this Native Nation by providing support and services to the parents to empower them to become healthy parents capable of properly caring for their children while providing oversight to ensure the safety of the children while we are striving towards reunification. There are multiple avenues for protecting the safety of the minor children that may be ordered depending on the specific needs of the family including, but not limited to: appointment of a Legal Guardian Ad Litem to represent the children; orders for services, such as counseling, parenting programs, substance abuse treatment, etc.; accountability for the conduct of the parents, including fulfilling orders of the court, such as successfully completing parenting classes, substance testing, and other orders specific to the challenges the parents are facing; appointment of service providers; orders for investigations based on the testimony of the parents and guardians; and much more. The open and honest communication is critical to accomplishing these goals. Put simply, full disclosure is necessary to know what the problems are and how to address them.

One common issue is substance abuse with the Court frequently ordering substance testing. Substance testing identifies if the individual has used a substance, but the parents and the guardians must be honest about the circumstances, triggers, and treatment to know how to move forward in the case. The honesty that has aided the Court in the safe reunification of families would be compromised with the Tribal Prosecuting Attorney and Tribal SAUSA involved with the proceedings without guidance in the law about when criminal charges may be filed. This honesty being compromised not only applies to the potential for an individual who has engaged in such behavior as illegal drug use not discussing the reasons and circumstances for the substance use out of fear of prosecution, but the guardian – who is often family of the parents – refraining from sharing suspicions out of fear that their family may be prosecuted.

There is also a potential for harm to the well-being of the children we are trying to protect. As previously discussed, children are frequently aware of conflict between the guardian and parents, regardless of whether they know or understand the details. They are also often aware of when something they have shared with a guardian, LGAL, or other person they trust has been shared within the guardianship case, most commonly when there is a consequence, such as overnight parenting time being temporarily suspended or unsupervised parenting time changing to supervised parenting time, or in the most unfortunate of circumstances, when the parents tell the children that something the children did or said “got them into trouble”. It would be very difficult for the well-being of the children if they thought their parents were in jail or prison because “they told”. The fact that this is, of course, not true, is difficult for children to understand. This Court is

well aware of the fact that the protection of the well-being of children is also a focus in abuse and neglect proceedings. In a guardianship case, however, the family is already under the jurisdiction of the Tribal Court with the Court utilizing all of the resources to which it has access – through the Court, through NHBP Departments in the other branches of Tribal Government, and through non-Tribal partners – to protect the physical safety of the children while supporting their physical, emotional, and spiritual well-being.

Authorizing the Prosecuting Attorney to participate in guardianship matters without clear guidelines in the law defining the role and duties of the Prosecuting Attorney, Tribal SAUSA, and Presenting Officer under the *Children's Protection Code*, *Juvenile Justice Code*, and *Mental Health Code*, as well as the administration of these roles and duties when some or all of these positions are held by one sole person, could not only have a chilling effect on the traditional approach to that individual case, but also the willingness of potential guardians to file petitions in the future if they think the parents – who are frequently family members – may be prosecuted as a result of the guardianship proceedings. Children will be at a greater risk of harm to their well-being if petitions for guardianship are delayed or not filed at all because potential guardians know that the Tribal Prosecutor, Tribal SAUSA, and Presenting Officer under the *Children's Protection Code*, *Juvenile Justice Code*, and *Mental Health Code* has access to the proceedings without these roles and duties defined in the law, including when all or some are held by one person, and fear that the parents will be prosecuted in Tribal Court, federal court, or both. It should be noted that there are also significant actions that can be taken by the Presenting Officer under the *Juvenile Justice Code* and the *Mental Health Code* that could discourage potential petitioners. These concerns are compounded by the fact that there was a focus solely on the Social Services Department and its employees with two separate entities filing requests to appear on behalf of the Department and the withdrawal of that request from the Prosecuting Attorney conditional upon the Legal Department filing an Appearance, as well as the legal argument ultimately made by the Social Services Department presented by and through its attorney at the Hearing, instead of a focus on the family, the concerns of both the Temporary Guardians and Parent, and the well-being of the children.

## CONCLUSION

The preservation and revitalization of Bode'wadmimen and Bode'wadmi culture is the foundation for all cases before the Court, as well as the day-to-day administration of the Judicial Branch. One manner in which the Court strives to fulfill this value is conducting hearings in the spirit of the Seven Grandfathers Teachings with this *Opinion* discussing the many considerations for the Judiciary when presiding over hearings in the Tribal Court.

Pursuant to the *Guardianship and Conservatorship Code*, this Tribal Court has exclusive jurisdiction when the child or protected person is a Tribal Citizen and resides on Tribal land.

The *Guardianship and Conservatorship Code* vests the Tribal Court with the authority to appoint the Social Services Agency to conduct the initial guardianship evaluation with the

responsibilities of that Social Services Agency employee fulfilled with the filing of the guardianship evaluation report pursuant to the Code and Court Rules, and testimony at the Hearing, if ordered by the Court to testify. The NHBP Social Services Department does not have any specific duties under the *Guardianship and Conservatorship Code* with standing dependent upon the Tribal Court ordering or appointing the NHBP Social Services Department to fulfill duties or perform services for guardianship cases filed under the *Guardianship and Conservatorship Code* in Tribal Court.

An order by the Court when Court is convened is known as an order from the bench and has the same force and effect as a written order issued by the Court. This *Opinion* contains some of the reasons this Court may choose to not issue a written order following a guardianship hearing.

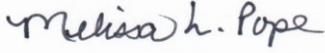
The NHBP Legal Department is authorized to represent the Tribe, Tribal Government Departments, and Tribal Government employees unless Tribal Council authorizes a different body or position to represent the Tribe, Tribal Government Departments, and Tribal Government employees.

There is no Presenting Officer under the *Guardianship and Conservatorship Code*.

Authorizing the Tribal Prosecuting Attorney, Presenting Officer under the *Children's Protection Code*, Tribal SAUSA in federal court, Presenting Officer under the *Juvenile Justice Code*, and Presenting Officer under the *Mental Health Code*, to participate in matters under the *NHBP Guardianship and Conservatorship Code* could have a chilling effect on the traditional manner in which the Court conducts guardianship matters and on the filing of petitions for guardianship without guidance under the law for administering these duties, including when there is a conflict of interest or conflict in duties.

**IT IS HEREBY ORDERED:**

June 26, 2019  
Date

  
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Hon. Melissa L. Pope  
Chief Judge

P55328  
Bar. No.