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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF TONAWANDA SENECA NATION,

Appellant,

-against-

No. 114

NOONAN,

Respondent.

20 Eagle Street
Albany, New York 12207
June 01, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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1 CHIEF JUDGE DIFIORE: Next on the court's
2 calendar is number 114, matter of Tonawanda Seneca
3 Nation v. Noonan.

4 Good afternoon, counsel.

5 MS. MURPHY: May it please the court. My
6 name is Margaret Murphy, and I represent the
7 Tonawanda Seneca Nation.

8 I'd like to reserve five minutes for rebuttal.

9 CHIEF JUDGE DIFIORE: You have five
10 minutes.

11 MS. MURPHY: Thank you.

12 Two-and-a-half years ago, the Tonawanda Seneca
13 Nation filed an Article 78 proceeding in the Appellate
14 Division for the Fourth Judicial Department.

15 At that point, it was challenging the
16 jurisdiction of Judge Robert Noonan, who is now retired.
17 At that point, Judge Noonan, when we filed our petitions,
18 we recognized that he was the elected county court judge
19 in a county where there was no separately elected
20 surrogate.

21 JUDGE STEIN: But doesn't - - - doesn't our
22 State Constitution require at least one surrogate
23 judge in each county?

24 MS. MURPHY: Absolutely.

25 JUDGE STEIN: Okay. So why isn't then - -

1 - or wasn't Judge Noonan the - - - there was no other
2 surrogate judge in this county, correct?

3 MS. MURPHY: Exactly.

4 JUDGE STEIN: Why wasn't Judge Noonan a
5 surrogate judge as well as a county judge?

6 MS. MURPHY: Well, the Constitution
7 requires is that a judge will sit in the position of
8 surrogate. That person has to be elected by the
9 voters of Genesee County. So as they count an
10 elected county court judge, he fits all the
11 requirements to be designated under the statute, the
12 judiciary law, to be designated as a surrogate. But
13 he had to be the county court judge. As - - -

14 JUDGE GARCIA: But he is a surrogate
15 though, right? Once he's - - - by operation of that
16 judiciary law, he's then is a surrogate here.

17 MS. MURPHY: Yes. I agree with that. But
18 if you look to the statute, if the legislature
19 intended that you look to what the function the judge
20 was serving, they would made that clear. What it
21 basically says is they wanted to make sure that
22 county court judges and Supreme Court judges who are
23 elected to those positions, that they would have
24 their cases - - - if you had to bring an Article 78
25 challenging their jurisdiction, it would be heard.

1 The venue would be heard in the Appellate Division.
2 The Appellate Division would have original
3 jurisdiction. Now - - -

4 JUDGE GARCIA: But there's two ways to look
5 at that.

6 MS. MURPHY: Sure.

7 JUDGE GARCIA: Right. The purpose of that.
8 One is you want a higher bench reviewing your work,
9 right, your decisions, or making an Article 78
10 proceeding, you don't want coequal judges - - -

11 MS. MURPHY: Right.

12 JUDGE GARCIA: - - - doing that. The other
13 is, you know, you don't want the appearance that
14 you're going to favor a peer judge.

15 If it's the first, and this is - - - a
16 person is acting as a surrogate, you don't really
17 have that issue, right? You're just reviewing their
18 work of a surrogate.

19 MS. MURPHY: Oh no, that's not true, Your
20 Honor. For example, when we went to file this
21 petition, the first thing we did, we were intending
22 to file it in Supreme Court. So we looked to see who
23 in Genesee County, if we filed our petition there,
24 would hear the case. It would've been Judge Noonan,
25 because he was appointed by designation to be the

1 Supreme Court judge.

2 JUDGE GARCIA: But that would be a problem,
3 right?

4 MS. MURPHY: Yeah. So now you look to - -
5 - the statute then says, look to the surrounding
6 counties. In the 8th judicial district, the eight
7 counties that comprise the eight judicial districts,
8 four of those counties have judges who are exactly
9 like Judge Noonan.

10 They are elected to the county court bench,
11 but because of the judiciary law, they - - - they are
12 no - - - there is no separately elected surrogate, so
13 they serve in the surrogate's position. And by
14 designation, most of them serve as Supreme Court
15 judges. So that would have been an instant where the
16 case could be heard by people who have coequal rank
17 to Judge Noonan.

18 JUDGE PIGOTT: That's a - - - that's a
19 function I guess of this, everybody is a Supreme now,
20 right?

21 MS. MURPHY: Yeah. But that is a function
22 of everybody is a Supreme but, Your Honor, more
23 importantly, it is a function in upstate counties.
24 It's not true in Westchester, it's not true in Erie,
25 but in a lot of upstate counties, there are multi-hat

1 judges.

2 JUDGE PIGOTT: But aren't you suggesting in
3 - - - by the way you're proceeding that if you bring
4 an action against the surrogate in Erie, Monroe,
5 Onondaga, you go to Supreme. If you bring it against
6 the surrogates in - - - in Genesee, you go to the
7 Appellate Division. Does that make any sense?

8 MS. MURPHY: Well, it makes sense to the
9 extent that those judges, their power to hear a case
10 in the surrogate court comes from the fact that
11 they're county court judges. And the legi - - - and
12 the New York State legislature made it clear that
13 county court judges, their cases are to be heard in
14 the Appellate Division.

15 JUDGE GARCIA: But it really comes from
16 their - - - from the judiciary law. Right. I mean -
17 - -

18 MS. MURPHY: Um-hum.

19 JUDGE GARCIA: - - - the difference with
20 B.T. Productions is, that judge was sitting in a town
21 court or whatever it was, as a function of his role
22 as a county court judge, I believe in that case. It
23 was derivative; this is not derivative, right.

24 So B.T. Productions doesn't control, you
25 have the separate authority here of a surrogate judge

1 by operation of that statute.

2 MS. MURPHY: I wouldn't say it was
3 derivative because we know that - - - we know that
4 county court judges, in fact Judge Stein had sat in
5 the city court, we know that city court judges, town
6 and village justices are considered local criminal
7 judges - - - normal - - - sit in local criminal
8 courts. A county court judge and the Supreme Court
9 judge hearing criminal matters are considered to be
10 superior court judges. And - - -

11 JUDGE GARCIA: But it says in that case,
12 "Indeed his power to sit as a local criminal court is
13 derived from his position as a county court judge
14 unless it's part of his authority as a county court
15 judge."

16 MS. MURPHY: Right.

17 JUDGE GARCIA: And that's not the case
18 here, right?

19 MS. MURPHY: No, I think it's exactly here.
20 Remember, if you look - - -

21 JUDGE STEIN: Well, let me say it in a
22 different way. In that case, he wasn't - - - his
23 powers were not coming from his acting as a local
24 court judge. His powers were based on his county
25 court judge position, allowing him to do those

1 things.

2 JUDGE GARCIA: Right.

3 MS. MURPHY: And that's what allows Judge
4 Noonan to sit here as a surrogate. I see my time is
5 up. This is such an important point.

6 CHIEF JUDGE DIFIORE: Finish your thought.

7 MS. MURPHY: Yes. My thought is - - - is
8 precisely this. If you look to the judiciary law, I
9 think it's 22 3-f. The legislature has not set forth
10 a separate - - - they have not created a position;
11 they have not funded position for a surrogate in
12 Genesee County.

13 In fact, there is a number of counties they
14 have not done that. It is by the act of the
15 judiciary law that says, the county court judge shall
16 serve as a surrogate. Now, you can imagine the
17 catch-22 we would have been in. When - - - If we
18 would had filed this in Supreme Court, and then the
19 Attorney General turns around and says, but he's
20 really a county court judge, who by the - - - by
21 operation of law is - - - is told that he has to
22 serve in the surrogate's position as well.

23 You should have brought this matter in the
24 Appellate Division. We did not come here to find new
25 law. We were trying to find a form to bring our

1 complaint.

2 JUDGE RIVERA: I'm sorry to interrupt you,
3 but I just want to clarify this. So is your point
4 that he could not serve as a surrogate other than by
5 the fact - - - but for the fact - - -

6 MS. MURPHY: That's right.

7 JUDGE RIVERA: - - - that he is an elected
8 county court judge, he cannot serve in this title - -
9 -

10 MS. MURPHY: That's right.

11 JUDGE RIVERA: - - - and therefore, it is
12 derivative.

13 MS. MURPHY: That's right, exactly. The
14 family court judge, for example, in that county, it
15 could have been by designation put into the surrogate
16 court. If - - - if the family court judge, it's not
17 because of that statute requiring the family court
18 that, then we would've had to sued - - - sue it in
19 Supreme Court.

20 I know it seems odd to the court that
21 you're going to have an Erie, and Westchester, and
22 certain county, those cases heard in Supreme Court.
23 But that's because those judges, the surrogates never
24 act has a county court judge. And therefore, when
25 they act as a surrogate, they're only acting as a

1 surrogate.

2 This judge's power derived from the fact
3 that he was a county court judge, and thereby, by the
4 power of the statute, his power as a surrogate is
5 because he was elected in that county, serving in the
6 county court position.

7 JUDGE RIVERA: If I may have just one more
8 - - -

9 MS. MURPHY: Sure.

10 JUDGE RIVERA: - - - my apologies to the
11 Chief Judge, because we have gone way over. So are
12 you saying, in other words, when he ran - - -

13 MS. MURPHY: Um-hum.

14 JUDGE RIVERA: - - - someone else could not
15 run against him to be the surrogate?

16 MS. MURPHY: That's right.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 MS. MURPHY: Thank you.

19 CHIEF JUDGE DIFIORE: Counsel.

20 MS. NEPVEU: Good afternoon, Your Honors.

21 Kate Nepveu for Judge Noonan.

22 Your Honors, I want to step back. The question
23 here today is whether petitioner can seek to prohibit
24 something that's already been done. Petitioner can't do
25 that; this appeal is moot, because the actions that

1 petitioner sought to prohibit have already been taken.

2 Petitioner sought to prevent the surrogate from
3 exercise - - - exercising jurisdiction of a real property,
4 in 2014, Judge Noonan said, I will not exercise
5 jurisdiction of a real property. Petitioner - - -

6 JUDGE STEIN: But - - -

7 JUDGE PIGOTT: I will or will not?

8 MS. NEPVEU: I'm sorry, I didn't hear you,
9 Your Honor.

10 JUDGE PIGOTT: I didn't hear what your
11 answer was. You said, I will or will not?

12 MS. NEPVEU: Will not, will not.
13 Absolutely. And then - - -

14 JUDGE STEIN: But he did direct certain
15 actions with regard to this business that kind of - -
16 -

17 MS. NEPVEU: Yes, Your Honor.

18 JUDGE STEIN: - - - kind of go possibly
19 over that line. So I mean, is - - - do we know what
20 the status of that business is today?

21 MS. NEPVEU: The decision - - - a decision
22 was reached in 2015, this last December, as I
23 referred to in my letter to the court, which decided
24 the ownership of the business, and that decision is
25 now on appeal.

1 That does not - - - that decision did not
2 actually fall within the scope of the petition. Judge
3 Noonan said, the nation can do what it likes with who is
4 allowed to operate the business on its territory, but the
5 business has bank accounts, inventory, those things are
6 personal property, that's what - - -

7 JUDGE STEIN: Weren't there lockouts and
8 things like that?

9 MS. NEPVEU: There was an allegation of
10 that. There was - - - it was an orders of assistance
11 in 2014 which said, pending the decision on the busi
12 - - - ownership of the business, put the business
13 assets under the estate in the court's control so
14 that we can marshal these and make a decision.

15 There are a number of reasons why that does
16 not - - - those orders to not render this case moot.
17 The principle one is, those orders have been carried
18 out. There's nothing to prohibit, they are not now
19 being actively pursued. Again, even if - - -

20 JUDGE RIVERA: I'm sorry. What if anything
21 could the nation do right now?

22 MS. NEPVEU: There's nothing pending - - -
23 there is an appeal pending - - -

24 JUDGE RIVERA: Forget the pending. With
25 respect to this property.

1 MS. NEPVEU: The nation has control over
2 the property. The judge - - - Judge Noonan said, I
3 am not going to decide who gets the real property.

4 JUDGE RIVERA: And the things that were
5 covered - - - I'm sorry, the things that were covered
6 pursuant to the judge's initial decision about the -
7 - - the real property, not the real property, excuse
8 me, the personal property and all that?

9 MS. NEPVEU: Well, Your Honors, the nation
10 hadn't been a party to the surrogate's court of
11 proceeding. It entered a limited notice of
12 appearance only on jurisdiction, and then withdrew
13 that. So it's not a party before surrogate's court.
14 But there are no proceedings currently in surrogate's
15 court about any real property. There is one pending
16 regarding ownership of a truck - - -

17 JUDGE PIGOTT: Could that be - - -

18 MS. NEPVEU: - - - that's alleged to own -
19 - - belong to the business. That has nothing to do
20 with the nation, as far as I'm aware.

21 JUDGE PIGOTT: Could there be?

22 MS. NEPVEU: Yes, Your Honor.

23 JUDGE PIGOTT: Could there be?

24 MS. NEPVEU: Could there be what?

25 JUDGE PIGOTT: Further proceedings in

1 surrogate's court with respect to Seneca Nation
2 property?

3 MS. NEPVEU: If there were, that would be
4 something that could be dealt with at that time;
5 that's too speculative to support finding that this
6 is not moot now.

7 But what has happened - - - what is
8 currently the status is that Judge Newman found that
9 the business was an asset of the estate. That is on
10 appeal. Notices of appeal have been filed and I am
11 told that they have not been perfected yet. That was
12 after a trial.

13 So presumably, the Fourth Department would
14 either find that that trial decision was incorrect,
15 in which case, if it wasn't an estate - - - there
16 wasn't an asset of the estate, it was - - - belonged
17 instead to decedent's mother, and then decedent's
18 mother would do whatever she liked with it, that is
19 also not something that involves the nation.

20 But again, the decisions that petitioner
21 said they wanted to stop were exercise of
22 jurisdiction of a real property, Judge Noonan said, I
23 won't do it. And then decide who owns the business.
24 And even if that involved the real property, which it
25 didn't, that has been made. There is nothing to

1 prohibit because there are in - - - all the decisions
2 they objected to have been made. Now, with regard to
3 - - -

4 JUDGE PIGOTT: I - - - I just wonder why if
5 - - - if you are already here, you know, we're where
6 we are, why we would send it back with the thought
7 that we were going to get right back into the Seneca
8 Nation, asserting that the surrogate in Genesee
9 County, whoever the next one may be, does not have
10 jurisdiction over Seneca Nation property.

11 MS. NEPVEU: Well, Your Honor, there is no
12 showing that an exception to mootness applies. There
13 is no showing - - -

14 JUDGE PIGOTT: I thought I just gave you
15 one.

16 MS. NEPVEU: Because there is still - - -
17 thank you for - - - what I was trying to say is that
18 there is plentiful ways that this can be reviewed.
19 This doesn't evade review, there - - - it is in fact
20 - - - there is an appeal pending right now; there was
21 a prohibition proceeding, there was a very lengthy
22 prohibition proceeding.

23 They could bring a new one on actual facts
24 instead of hypothesizing on what might be a problem
25 later. We don't know what kind of - - -

1 JUDGE PIGOTT: If they do that, where would
2 - - - where would they bring it?

3 MS. NEPVEU: They would bring it in Supreme
4 Court. And the reason they would bring it in Supreme
5 Court is that the judiciary law says that the judge -
6 - - the county court judge shall be - - -

7 JUDGE PIGOTT: Well, wouldn't they bring it
8 in that court because Appellate Division has said
9 that in the Matter of Tonawanda Seneca Nation v.
10 Noonan, that's where it should be brought?

11 MS. NEPVEU: I would - - - I would think
12 that they would bring a new prohibition proceeding,
13 Your Honor, because the existing prohibition
14 proceeding is now moot. But - - -

15 JUDGE PIGOTT: No, no, what I'm saying is
16 if - - - if we leave this one standing, is what you
17 want us to do, you want us to say this case is over -
18 - -

19 MS. NEPVEU: Yes.

20 JUDGE PIGOTT: - - - the Appellate Division
21 is where it is, the next time Ms. Murphy decides to
22 bring an action, for and on behalf of the binding
23 precedent, is going to be this case. So she must
24 bring it in Supreme, right?

25 MS. NEPVEU: Yes, Your Honor, but that

1 decision was also correct. But merely - - -

2 JUDGE PIGOTT: But she wants to argue that
3 that's - - - we should fix that now.

4 MS. NEPVEU: And on the merits, the
5 Appellate Division's decision was also correct
6 because the - - - petitioner is arguing that you
7 should look to the individual person in deciding how
8 to apply 506. The correct argument, what this court
9 decided in B.T. Productions, is you should look to
10 the role; you should look to the court. It is not,
11 which of the many hats, pick the highest. Or, which
12 of the many robes. You should pick what court is
13 they - - - are they actually in.

14 In B.T. Productions, the record on appeal
15 shows that the challenged search warrants were issued
16 out of county court. It's county court in the
17 caption, they were signed, Monroe County Judge.
18 Here, they were in surrogate's court. There's no
19 confusion here, there is no need to look to who was
20 elected, who was appointed, who is acting, who is
21 not.

22 JUDGE RIVERA: Your point is that the
23 person who signed would not have been a - - - have
24 had authority to sign but for the fact that he was
25 elected as a county court judge.

1 MS. NEPVEU: Well he - - - I mean, the
2 ballot says county court and surrogate. So there - -
3 - we argue that he is in fact elected. But
4 regardless, he is the surrogate. He has the full - -
5 -

6 JUDGE RIVERA: Could someone have run
7 against him - - -

8 MS. NEPVEU: As county court?

9 JUDGE RIVERA: - - - to be a surrogate.

10 MS. NEPVEU: No. But whether it's by
11 election or by virtue of the judiciary law, he was
12 the surrogate. There is - - - it's not a limited
13 derivation as it was in B.T. Productions.

14 And there is not - - - it is not the case
15 that the duties of the county court judge include the
16 duties of the surrogate, as the duties of the county
17 court judge included limited criminal court powers in
18 B.T. Productions.

19 So the question of - - - derived from the
20 proper reading, the sensible reading of B.T.
21 Productions that does not lead to confusion and
22 results where some counties go to the Appellate
23 Division and some don't is, look to the court that a
24 multi-bench judge is in, and what is in the caption,
25 where are you.

1 And that is a simple rule, it follows
2 directly from B.T. Productions - - -

3 JUDGE ABDUS-SALAAM: Where would they have
4 gone, assuming your adversary is correct that Judge
5 Noonan wore three hats, county court, surrogate's
6 court, and Supreme Court, and he - - - and they filed
7 it in Supreme Court, who would have heard the case?

8 MS. NEPVEU: I believe, and, Your Honor,
9 I'm going to confess that I am not a hundred percent
10 certain on this, and I'd be happy to investigate, but
11 I would believe that they would pull in somebody from
12 another county.

13 But when judges wear multiple hats, it is
14 understood that in different courts, that different
15 procedures apply. Things are different in different
16 courts. There is no incongruity, there is no problem
17 with the idea that, when you act as a surrogate, your
18 decisions - - - prohibition proceeding against you
19 would be brought in Supreme Court, and if you act as
20 a county court judge, then it would be brought in the
21 Appellate Division, because those are different
22 courts.

23 JUDGE STEIN: So for example - - -

24 MS. NEPVEU: Yes, Your Honor.

25 JUDGE STEIN: - - - we have in - - - in the

1 Albany area, we have a lot of court of claims judges
2 - - -

3 MS. NEPVEU: Precisely, Your Honor.

4 JUDGE STEIN: - - - that are acting as
5 Supreme Court judges. Does that mean that every
6 time, you know, would we be saying that every time
7 that a - - - a court of claims judge that's
8 designated acting Supreme was sitting in the court of
9 claims, then that judge also, if there was a
10 prohibition, would have to go to the Appellate
11 Division?

12 MS. NEPVEU: No, that would be the result
13 under petitioner's reasoning.

14 JUDGE STEIN: Exactly.

15 MS. NEPVEU: And that's why that doesn't
16 make any sense.

17 JUDGE STEIN: So we would be swallowing up
18 this limited rule as to - - -

19 MS. NEPVEU: Precisely. And as we
20 mentioned, the intent - - - the legislative intent
21 was to restrict the amount of original proceedings in
22 the Appellate Division. If you look strictly to the
23 court, you look by the court and not by the many
24 different roles that judge could be holding, you will
25 have actions in Supreme Court, whether from an acting

1 judge who is appointed to the court of claims, or by
2 an elected Supreme Court justice; those all go to the
3 Appellate Division.

4 A surrogate, whether a surrogates
5 separately elected, or by virtue of the judiciary
6 law, go to Supreme Court. That is a simple rule, and
7 one that was properly adopted by the Appellate
8 Division. Unless the court has further questions,
9 we'll rest on our brief.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MS. NEPVEU: Thank you.

12 CHIEF JUDGE DIFIORE: Counsel.

13 JUDGE PIGOTT: Ms. Murphy, why - - - why
14 would, other than you say the statute requires it, if
15 you go - - - if you go to Supreme Court - - -

16 MS. MURPHY: Um-hum.

17 JUDGE PIGOTT: - - - you get a decision
18 next week. If you go to the Appellate Division, you
19 may get one next year.

20 MS. MURPHY: Um-hum.

21 JUDGE PIGOTT: Why - - - why would you
22 prefer, assuming you could make the choice, one to
23 the other? In other words, wouldn't a decision from
24 us saying Supreme is better, be better for you as
25 well?

1 MS. MURPHY: Well, Your Honor, it's not
2 that we didn't choose the Appellate Division as a
3 preference. Of course, if you do bring a matter in
4 Supreme Court, your appellate road is Supreme, the
5 Appellate Division, perhaps the Court of Appeals.

6 We commenced this action because we read
7 the statute. And the statute, the plain language of
8 the statute says, "The proceeding against a justice
9 of the Supreme Court or a judge of the county court
10 shall be commenced in the Appellate Division to - - -
11 in the judicial department where the action lies."

12 We read the statute; it's unambiguous.
13 Justice - - -

14 JUDGE PIGOTT: Well, except it doesn't say
15 surrogate. And I understand - - -

16 MS. MURPHY: Yes.

17 JUDGE PIGOTT: - - - all the arguments that
18 go with that, and - - - but I'm trying to picture - -
19 -

20 MS. MURPHY: Um-hum.

21 JUDGE PIGOTT: - - - a situation where you
22 have a judge sitting in Erie County - - -

23 MS. MURPHY: Right.

24 JUDGE PIGOTT: - - - or any of the other
25 ones, that says, I think, you know, that this case is

1 a wrong, and I am - - - so I'm going to find in this
2 fashion. And at the same time, an identical case can
3 be brought in Genesee, let's say, and it doesn't go
4 over here, it goes to five judges instead of one.

5 MS. MURPHY: Right.

6 JUDGE PIGOTT: These five judges are not
7 bound by this one. So whoever is deciding the case
8 in Erie County is living at the peril - - -

9 MS. MURPHY: Um-hum.

10 JUDGE PIGOTT: - - - of five judges in
11 Rochester who are going to say, no, no, no, we
12 disagree with that. And then you got to go - - - the
13 surrogate in Erie County has got to go back around
14 and say, I'm sorry to say this, but you've been
15 overruled in a different case; it makes no sense to
16 me. I mean, I don't know why all surrogates go the
17 same way.

18 MS. MURPHY: I - - - I understand what
19 you're saying, except that we go back to the statute,
20 Your Honor. And I will say this. You've got to look
21 as to how the person got elected. Now, they're
22 saying they were elected because it said on the
23 ballot, on an absentee ballot, county/surrogate. But
24 if you look at the judiciary law, the judiciary law
25 did not - - - the legislature has not designated

1 anyone, any position.

2 They haven't paid, they haven't created a
3 surrogate's position specifically for Genesee County.
4 The statute specifically says, in a county where
5 there is no separately elected surrogate, that the
6 county court judge shall serve as a surrogate.

7 JUDGE STEIN: Does a county court judge
8 have authority to resolve disputes over estates and
9 trusts?

10 MS. MURPHY: If they sit in a county where
11 there is no separately elected surrogate, yes.

12 JUDGE STEIN: Well, but then they're
13 sitting as a surrogate, not as a county court judge,
14 right?

15 MS. MURPHY: Your Honor, just as is for
16 county court - - -

17 JUDGE STEIN: If - - - if you look - - - if
18 you look in the surrogate court procedure act - - -

19 MS. MURPHY: Right.

20 JUDGE STEIN: - - - does it say that or
21 wherever, does it say that a county court judge can
22 hear these matters?

23 MS. MURPHY: No, Your Honor, no. But in
24 the same manner, a county court judge is not supposed
25 to sign a search warrant, except the criminal

1 procedure law says - - -

2 JUDGE STEIN: That a county court judge can
3 sign a search warrant - - -

4 MS. MURPHY: As - - -

5 JUDGE STEIN: - - - under those
6 circumstances.

7 MS. MURPHY: - - - as - - - as acting as a
8 local criminal judge.

9 JUDGE PIGOTT: You know this probably
10 better than I do, maybe you can answer this. There
11 were three hatters too - - -

12 MS. MURPHY: Um-hum.

13 JUDGE PIGOTT: - - - correct?

14 MS. MURPHY: Um-hum. Yes.

15 JUDGE PIGOTT: Family, surrogate and - - -

16 CHIEF JUDGE DIFIORE: - - - hatters.

17 MS. MURPHY: Right.

18 JUDGE PIGOTT: If you have a three hatter -
19 - -

20 MS. MURPHY: Right.

21 JUDGE PIGOTT: - - - and you want to take
22 some action against that county court judge in his
23 role as a family court judge, are you suggesting that
24 you can't - - - that you have to go to Rochester, or
25 to the Fourth Department in this case, to address a

1 family court issue - - - order issued by a county
2 court judge?

3 MS. MURPHY: What I'm saying is you have -
4 - - each judge who gets elected knows whether they
5 have been elected as a family court judge, if they
6 were elected as a county court judge, or a Supreme
7 Court judge, or a surrogate court judge. In counties
8 where there is - - - and there's a lot of counties
9 where the only person who is elected is the county
10 court judge.

11 And the statute - - - the judiciary law
12 says that in a county where there is no separately
13 elected family court judge, the county court judge is
14 the family court judge. If there is no separately
15 elected surrogate, the county court judge is also the
16 surrogate. But there is still the county court
17 judge.

18 And that's the one thing that's not in
19 dispute here. Judge Noonan, when he was elected, he
20 was elected as the county court judge in Genesee
21 County; that's all that was funded. There was - - -
22 he was - - - his pay - - -

23 JUDGE PIGOTT: I don't - - - I don't think
24 that makes a difference.

25 MS. MURPHY: Yeah.

1 JUDGE PIGOTT: What - - - what I was
2 talking about was if - - - if you brought an action
3 to prevent a - - - a three hatter from taking some
4 action in family court - - -

5 MS. MURPHY: Right.

6 JUDGE PIGOTT: - - - you would go to - - -
7 you would go to the Appellate Division to stop a
8 family court action brought by a three hatter?

9 MS. MURPHY: There are some family court
10 judges who are elected as family court, and they are
11 designated as Supreme, they're designated as
12 surrogate, and they are designated as county, but
13 they are elected as family court. If they are sued,
14 they go to Supreme Court.

15 JUDGE PIGOTT: But there are county court
16 judges that are the three hatters.

17 MS. MURPHY: That's right. And if they are
18 a county court judge, the statute claims, "A
19 proceeding against a judge of the county court shall
20 be commenced in the Appellate Division."

21 JUDGE RIVERA: So then your answer to Judge
22 Pigott is yes.

23 MS. MURPHY: Yes.

24 JUDGE RIVERA: For that category.

25 MS. MURPHY: For that category.

1 JUDGE RIVERA: If I could just ask you,
2 what - - - why isn't a - - - the way to deal with
3 this - - -

4 MS. MURPHY: Right.

5 JUDGE RIVERA: - - - problem, just as your
6 adversary suggested, which is you would have filed,
7 and if it is indeed Judge Noonan - - -

8 MS. MURPHY: Um-hum.

9 JUDGE RIVERA: - - - another judge from
10 another county would have been brought in. Why isn't
11 that - - - why doesn't that resolve it?

12 MS. MURPHY: Because you - - - because you
13 would have the same situation. If we had filed in
14 another county - - -

15 JUDGE RIVERA: Because he's a coequal.

16 MS. MURPHY: We got coequals because it
17 could be another county court judge who is now
18 assigned as the surrogate, a multi hat judges. In
19 fact, in four other counties, this is exactly what
20 would have been the case. They would've been
21 coequals deciding whether or not Judge Noonan had
22 done something wrong.

23 JUDGE GARCIA: But the other way around,
24 you have the Appellate Division deciding family court
25 in surrogate cases in Article 78 proceedings, when

1 the clear thrust of the statute is they want to limit
2 those proceedings in the Appellate Division.

3 MS. MURPHY: Well, except for - - - except
4 for one thing, Justice Garcia. This was challenging
5 whether a judge has jurisdiction, whether they had
6 subject matter jurisdiction.

7 JUDGE GARCIA: Yeah, but any Article 78, it
8 doesn't matter - - - any Article 78 proceeding
9 against any of these three hatters or four hatters
10 we've been talking about now - - -

11 MS. MURPHY: Right.

12 JUDGE GARCIA: - - - under your rule, would
13 always go to the Appellate Division. If the person
14 is elected as a county or Supreme.

15 MS. MURPHY: Right. If - - - if it's a
16 mandamus case where if - - - because you could have
17 an appeal so that makes it moot. Prohibition cases
18 are what we're talking about here. And what we're
19 basically saying, Noonan, in fact all state court
20 judges wouldn't have jurisdiction, subject matter
21 jurisdiction that has been Federally preemptive from
22 exercising jurisdiction in this case.

23 So yes, it probably because of the
24 importance of the type of case it is, it should have
25 been heard in the Appellate Division. It had to be

1 heard in the Appellate Division because the statute
2 is so clear.

3 The proceeding had to be brought because he was
4 elected as the county court judge.

5 JUDGE ABDUS-SALAAM: Counsel, very quickly
6 - - -

7 MS. MURPHY: Yes.

8 JUDGE ABDUS-SALAAM: Your light has been on
9 for a while, but why isn't this case moot?

10 MS. MURPHY: Okay. The case is not moot
11 because for a lot of reasons. First of all, we - - -
12 because they have taken action way beyond the real
13 property.

14 When we filed this action, no decision had
15 been made about a determination about the property.
16 But we also identified in our petition all the
17 provisions of the Will, which we felt the Seneca
18 Nation had jurisdiction over it that no state court
19 judge had, including the intangible right to operate
20 a business on the Nation's territory.

21 This goes to the heart of the Nation's
22 ability to make and enforce its own laws. It decides
23 who may operate a business. And this business, prior
24 to Mr. Peters' death, was in defiance of those laws.
25 And so, the first question becomes, at the time of

1 his death, did he have anything that he could give to
2 anyone, and to, that is the prerogative of the
3 Nation.

4 So those issues are going to be repetitive.
5 There are other businesses on the Nation. We don't
6 want a situation where estate planners are saying,
7 you know, the Court of Appeals, or the - - -

8 JUDGE STEIN: So are you talking about the
9 exception to the mootness doctrine now - - -

10 MS. MURPHY: Well, I - - - I believe it's -
11 - -

12 JUDGE STEIN: - - - or are you talking
13 about is it moot or isn't it an exception?

14 MS. MURPHY: Well, those - - - those orders
15 of the surrogate still have to be enforced. And we
16 believe those orders are not moot because if the
17 court lacks subject matter jurisdiction, they
18 shouldn't be subject to enforcement. And therefore -
19 - -

20 JUDGE RIVERA: So this is not about the
21 appeal that she says is pending relating to the
22 business?

23 MS. MURPHY: No. The appeal - - - those
24 appeals were not a party in that action, so those are
25 by people who inherited under the will, who are

1 appealing those determination.

2 We are saying that any order issued that
3 touches upon the use of property, the intangible
4 right to operate a business, or those assets -- whose
5 assets of, those are all for the nation to decide,
6 and this court lacked subject matter jurisdiction.

7 So in light of the fact that subject matter
8 jurisdiction can be brought any time by a party who
9 has standing, is not moot. But, if you even want to
10 look to one of the exception, if you're an estate
11 planner, if you're someone like myself, who has to
12 now advise other people who are citizens of the
13 Nation how to draft Wills, they need to have this
14 answer resolved.

15 CHIEF JUDGE DIFIORE: Thank you, Ms.
16 Murphy.

17 MS. MURPHY: Thank you.

18 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Tonawanda Seneca Nation v. Noonan, No. 114 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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