

1 The above Order granted CSKT's Petition for Adult Protection
2 Services and further stated: "IT IS FURTHER ORDERED, that pursuant to
3 Section 3-5-109 of CSKT Laws Codified this Order shall be for a period of
4 one (1) year ending July 9, 2015."

5 During the October 7, 2015, oral arguments, counsel for the Tribes
6 stated that since Ms. Frost could now leave Adult Protective Services at any
7 time she wished, her appeal is moot.

8 However, counsel for Ms. Frost disagreed that the matter was moot,
9 arguing that the matter was capable of repetition..

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11 **II. JURISDICTION AND STANDARD OF REVIEW.**

12 If there is a justiciable case or controversy here, this Court would have
13 jurisdiction to review it under CSKT Code Codified §1-2-817 (2015).

14 During oral arguments both parties agreed that there were mixed
15 questions of law and fact, however the parties disagreed what the standard of
16 review should be. In this Court, mixed questions of law and fact, including
17 questions of subject matter jurisdiction and evidence, are reviewed *de novo*.
18 *CSKT v. Michael*, Cause No. AP-09--1587-CR (2013), See, *Shell Gulf of*
19 *Mexico et al. v. Center for Biological Diversity et al.*, 771 F.3d 632 (9th
20 Circuit 2014).

21 Accordingly, the Tribal Court's admission of Dr. Patenaude's report
22 into evidence, and the extent to which it relied on that report for the truth
23 therein, will be reviewed *de novo*.

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III. DISCUSSION.

A. Was Inadmissible Hearsay Evidence Admitted During the July 9, 2014, Hearing For The Truth Therein?

During the July 9, 2014, hearing, over Ms. Frost's hearsay objections, the Tribal Court admitted into evidence the testimony of Dr. Heather Jones, M.D.² Dr. Jones was Ms. Frost's primary physician and testified that she had requested Ms. Frost be evaluated by a behavioral psychologist Dr. William Patenaude, Ph.D.

Dr. Jones was allowed to testify as to the findings of Dr. Patenaude's report about Ms. Frost. Ms. Frost objects because she feels Dr. Patenaude's report was used by the Tribal Court for the truth therein. Ms. Frost also argues that a bench trial should be considered in the same light as a jury trial for purposes of interpreting F.R. Evid. 703 (2015), in that otherwise inadmissible hearsay evidence must be singled out and ignored by the presiding judge.

The Tribes argue that F.R. Evid. 703 (2015) allows an expert to rely on otherwise inadmissible evidence to form an opinion. They also argue that there is a significant difference in how F.R. Evid. 703 (2015) pertains to a bench trial as opposed to a jury trial.

This Court has reviewed CSKT, and other Tribal, case law, and has found no guidance on this civil matter. Accordingly, we will look to federal case law. *CSKT v. Michael, supra, citing CSKT v. Moulton*, Cause No. AP-09-1864-CR (2013); CSKT Code Codified §4-1-104.

² We need not, and do not, address the arguments of either party regarding the December 19, 2013, Emergency Protective Order hearing, as it was superseded by the July 9, 2014, Hearing and Order.

1 This Court believes that the U.S. Supreme Court in *Williams v. Illinois*,
2 ___ U.S. ___, 132 S.Ct. 2221, 2234 (2012) controls here when it held that an
3 expert may testify about and disclose normally inadmissible evidence to a
4 judge in a bench trial, but also that the judge may not consider inadmissible
5 evidence to prove the truth of the matter asserted. However, the *Williams*
6 Court went on to state that: "As we have noted, in bench trials, judges
7 routinely hear inadmissible evidence that they are presumed to ignore when
8 making decisions (*citation omitted*). There is a well-established presumption
9 that the judge has adhered to the basic rules of procedure, when the judge is
10 acting as a factfinder." *Id.*

11 Accordingly, there is a legal presumption here that the Tribal Court
12 ignored Dr. Patenaude's report when it issued its final Order on July 9, 2014,
13 which presumption Ms. Frost must overcome.

14 The record in this matter, however, is not as clear as either party
15 would prefer. It is troubling to this Court that in the July 9, 2014, hearing, Dr.
16 Jones testified as to Dr. Patenaude's report, but when asked if her Opinion
17 was consistent with Dr. Patenaude's report only stated: "Yes. . . . We both
18 spoke about Rosemary and came to the agreement that we agree on the
19 medical diagnosis and the psychological testing she had done." *Transcript*,
20 *July 9, 2014 Hearing*, Page 19, lines 7-22. Other than this brief comment,
21 Dr. Jones did not testify about Ms. Frost's mental condition.

22 However, the July 9, 2014, Order states:

23 That the Respondent is unable to care for herself even with
24 home assistance and it is necessary to continue the adult protection
25 services in order to provide for her medical needs-based on testimony
26 of Dr. Heather Jones that the Respondent, whom has been a patient for
27 five years, is an insulin - dependent diabetic with a history of COPD
28 and other health problems, *including a mental health diagnosis which*
29 *has impacted her ability to provide self care (emphasis added)*

1 Order, Page 2, pp 3.

2 Were this matter a justiciable case or controversy, this Court believes
3 that emphasized portion above suggests that the Tribal Court may not have
4 simply ignored Dr. Patenaude's report as required by *Williams, supra*, that
5 accordingly Ms. Frost might successfully have overcome the *Williams*
6 presumption, and that F.R. Evid. 703 (2015) may have been violated.

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8 **B. Does This Appeal Present A Justiciable Case or**
9 **Controversy, And If Not Does This Court Have Subject Matter**
10 **Jurisdiction?**
11

12 A more pressing issue is whether this Court has subject matter
13 jurisdiction over this appeal, which is a matter of first impression for this
14 Court. CSKT Code Codified § 1-2-102 states in pertinent part: "The Tribal
15 Court may hear and decide *cases and controversies* as provided by Tribal
16 Law, subject to the any restriction imposed by the Constitution, treaties, or
17 laws of the United States (*emphasis added*)."

18 Accordingly, if there is no case or controversy in this matter, then this
19 Court lacks subject matter jurisdiction, and as it does not issue advisory
20 opinions, the appeal is moot, and should be dismissed.

21 It is clear from the July 9, 2014, Order, and oral arguments that there
22 currently is no valid Order in effect to keep Ms. Frost in Adult Protective
23 Services. Were the Tribes to again seek to place Ms. Frost in Adult
24 Protective Services, they would again have to go before the Tribal Court.
25 Therefore the matter is indeed moot.

26 However, an exception to mootness is when a matter of short duration,
27 such as the July 9, 2014, Order at issue here, is "capable of repetition yet
28 which might evade review." Conduct is capable of repetition but evading

1 review when (1) the duration of the challenged action is too short to be
2 litigated fully before the cessation or expiration of the challenged conduct,
3 and (2) if [Ms. Frost] is reasonably expected to be subject to the same action
4 in the future. *Spencer v. Kemna*, 523 U.S. 1, 17 (1996).

5 CSKT Code Codified, § 3-5-109(4) (2015) states:

6 (4) Term of an Adult Protective Services Order.

7
8 (a) An Adult Protective Services Order *shall be issued for a period*
9 *not to exceed one (1) year*; and

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11 (b) The order may be extended at one (1) year intervals as many times
12 as necessary to protect the elder or vulnerable adult, *but only after a*
13 *petition is filed by the party seeking an extension and notice,*
14 *opportunity for hearing, and a determination based on clear and*
15 *convincing evidence* that such an extension is necessary for the
16 protection of the elder or vulnerable adult (*emphasis added*).
17

18 Ms. Frost might argue that because the July 9, 2014, Order was
19 subject to review by this Court only after it expired on its own terms, the
20 duration of the July 9, 2014, Order was too short to be litigated successfully.
21 Assuming *arguendo* that this argument is factually correct,³ it misses the
22 point, however, in that an extension of the expired July 9, 2014, Order
23 cannot be issued without a full evidentiary hearing on the matter, and
24 without clear and convincing evidence that such an extension is necessary.
25 CSKT Code Codified, § 3-5-109(4)(b) (2015). Therefore the July, 9, 2014,
26 Order is not subject to repetition yet somehow will evade review.

27 Finally, the record contains no evidence that the Tribes will seek an
28 extension of the July 9, 2014, Order, only that they will investigate whether

³ This Court takes notice that one of the reasons why review on this matter took inordinately long, was because although Ms. Frost requested a copy of the Tribal Court's trial transcripts in this matter on October 1, 2014, she did not receive a copy of said transcripts until May of 2015.


1 an extension is necessary. Accordingly, there is no evidence in the record
2 that there will be a repetition of the challenged act as required by *Spencer*,
3 *supra*.


4 This Court holds that the instant appeal does not meet the "capable of
5 repetition yet evading review" exception to mootness, and that it is therefore
6 moot. As there is no case or controversy before it, this Court has no subject
7 matter jurisdiction over this appeal.⁴

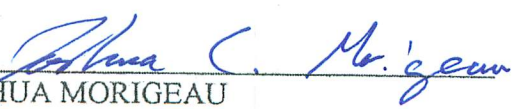
8 Pursuant to the CSKT Rules of Appellate Procedure, Rule 6, the
9 appeal of Ms. Frost in "In the Matter of Rosemary Frost" is hereby
10 **DISMISSED**. Pursuant to CSKT Rules of Appellate Procedure, Rule 20(1),
11 the parties will bear their own costs.

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15 **IT IS SO ORDERED** this 30th day of November, 2015.




KENNETH P. PITT
Acting Chief Justice for this Appeal


ROBERT McDONALD
Associate Justice


JOSHUA MORIGEAU
Associate Justice

⁴ This Court specifically retains subject matter jurisdiction over the corollary matter of the Alternative Writ of Mandamus in *Frost v. the Honorable Winona Tanner*, in her Official Capacity of Chief Judge of the CSKT Tribal Courts, Cause No. AP-13-515-AP.

Certificate of Mailing

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed a true and correct copy of the *Order Dismissing Appeal* to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 2nd day of December, 2015.

**Justin Kalmbach
Tribal Defenders Office
PO Box 278
Pablo, MT 59855**

**Laurence Ginnings
Tribal Prosecutors Office
PO Box 278
Pablo, MT 59855**

**Cara Croft
Clerk of the Tribal Court
PO Box 278
Pablo, MT 59855**


**Abigail Dupuis
Appellate Court Administrator**