IN THE TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

In Re Marriage of:
Amanda Gustafson,

Court File No. 867-17

Petitioner,

v.

James Van Nguyen,

Respondent.

ORDER ON RESPONDENT'S REQUEST FOR STAY OF PROCEEDINGS AND FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL

The above-entitled matter came before the Honorable Henry M. Buffalo, Jr., Judge of the Shakopee Mdewakanton Sioux Community (SMSC or Community) Court, on Respondent's "Notice of Basis for Appeal and Request for a Stay of Proceedings" filed on December 8, 2017.

In this Notice and Request, Respondent seeks an order from this Court staying further proceedings in this marital dissolution case in light of the Notice of Appeal that Respondent filed on December 4, 2017. By that Notice of Appeal, Respondent seeks appellate review of this Court's November 10, 2017 Memorandum Opinion and Order in which this Court found that it has subject matter jurisdiction to decide this dissolution matter, personal jurisdiction over the Respondent, and a substantial interest in continuing to exercise its jurisdiction here, and therefore denied Respondent's Motion to Dismiss. The November 10, 2017

Order set a schedule for further proceedings, including a pre-hearing conference for December 19, 2017

Respondent argues that a stay of those proceedings should be granted because his appeal is a "collateral order" under 28 U.S.C. § 1292 and *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541 (1949). Alternatively, he asks that the decision be certified for purposes of an interlocutory appeal under 28 U.S.C. §1292(b).

Discussion

I. Procedure governing Appellate review

Shakopee Tribal Court Rule 31 governs appeals. The rule provides a party "may appeal any decision of the assigned Judge that would be appealable if the decision had been made by a judge of a United States District Court." The law governing appeals from decisions of federal district court judges generally only permits appeals from final judgments in a case. 28 U.S.C. § 1291. Federal law, however, makes some narrow exceptions under which an interlocutory decision may be subject to immediate appeal. One occurs under the "collateral order" doctrine. Another is for questions certified under 28 U.S.C. § 1292(b). The SMSC Tribal Courts have also addressed these two exceptions.

A. The collateral order doctrine.

The Shakopee Tribal Courts, like the United States Supreme Court, have addressed the collateral order doctrine. As the Tribal Court explains, 'The collateral order doctrine allows for an immediate appeal of orders which (1) conclusively determine a disputed question, (2) are separate from the merits of

the action, and (3) which would be effectively unreviewable on appeal from a final judgment. *LSI v. Prescott*, 4 Shak. T.C. 98 (Dec. 29, 2000). *Accord Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541 (1949). In addressing the collateral order doctrine, the Supreme Court has made clear that the circumstances under which a non-final decision might be subject to appellate review, are to be narrowly construed. "The conditions are stringent," otherwise this exception would swallow the rule that permits appeals only from final judgments. *Will v. Hallock*, 546 U.S. 345, 349–50 (2006) (citation omitted). The Supreme Court has emphasized that the collateral order doctrine has a modest scope, and is narrowly and selectively applied to only a small class of orders in order to avoid "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise.'" *Id.* at 350

The Shakopee Tribal Court has also applied the collateral order doctrine narrowly. As the Court has explained, "an order denying a motion to dismiss is not usually considered an appealable final order." *LSI v. Prescott*, 4 Shak. T.C. 98, 100 (Dec. 29, 2000). *See also Crooks-Bathel v. Bathel*, 6 Shak. T.C. 12 (Mar. 18, 2010). This Court, like the United States Supreme Court, has found the denial of a motion to dismiss based on an assertion of sovereign or qualified immunity to be immediately appealable under the collateral order doctrine, because of the important government interests at stake when sovereign immunity is raised. As the SMSC Court of Appeal has stated:

> "[o]rders rejecting defenses of absolute or qualified immunity are immediately appealable because immunity is not simply a defense from

> liability, but entitles its possessor to complete protection against suit. . . . The protection is effectively lost if, based on the lower court's error, the matter goes to trial."

LSI v. Prescott, 4 Shak. T.C. 98, 100 (Dec. 29, 2000) (quoting *LSI v, Prescott*, Nos. 017-97, 018-97 (SMSC Ct. App. September 9, 1997) at 2). *Accord Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, (1993). This Court, like the United States Supreme Court has not applied the collateral order doctrine more broadly to other kinds of interlocutory decisions. *LSI v. Prescott*, 4 Shak. T.C. at 101 (declining to apply collateral order doctrine to permit interlocutory review of a ruling on res judicata). *Mohawk industries v. Carpenter*, 558 U.S. 100 (2008) (declining to apply collateral order doctrine to a trial court ruling on attorney-client privilege); *Will v. Hallock*, 546 U.S. 345, 352–53 (2006) (declining to apply the collateral order doctrine to allow the federal government to take an interlocutory appeal from a trial court ruling that rejected the federal government's statutory defense). As explained in *Will*, where the claimed interest in interlocutory review is one of avoiding the burdens of trial, the collateral order doctrine does not apply unless "some particular value of a high order was marshaled in support of the interest in avoiding trial," such as "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests," where trial would "imperil a substantial public interest." *Will v. Hallock*, 546 U.S. at 352–53.

This Court's decision denying Respondent's motion to dismiss does not fall within the collateral order doctrine. This Court found it had subject matter and personal jurisdiction over this marital dissolution action and the

parties to it. Those jurisdictional decisions can be fully and effectively reviewed by the Court of Appeals after a final judgment is entered.

Respondent asserts that if "forced to litigate the dissolution proceeding in Tribal Court without the ability to obtain review of personal and subject matter jurisdiction until the end of the case, any subsequent review would be moot at that point." Respondent's Notice and Request at 2. That is simply not correct. If, following a final decision in this case, Respondent appeals, the Court of Appeals can determine whether this Court was correct in finding jurisdiction. If the Court of Appeals were to conclude that this Court erred on the jurisdictional issues, the final judgment would be reversed, and the Respondent would free to advance claims for marital dissolution in another court.

The cases cited by Respondent do not change this conclusion. In *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), the interest that justified interlocutory review was a question of a state's Eleventh Amendment immunity – sovereign and constitutional interests which are not at issue here. In *United States v. Archer-Daniels-Midland Co.*, 785 F.2d 206, 211 (8th Cir. 1986), the court allowed interlocutory review of a decision denying a motion to disqualify counsel in unique circumstances that affected the secrecy of grand jury proceedings – interests that are also inapplicable here.

B. Certification of an issue for appeal

Respondent asks that, in the alternative, this Court certify that the order denying Respondent's motion to dismiss "involves a controlling issue

of law for which there is substantial ground for difference of opinion and which will material advance the ultimate determination of the litigation" for purposes of an interlocutory appeal under Rule 31(a) and 28 U.S.C. §1292(b). Respondent's Notice and Request at 3. This Court has addressed the circumstances under which a non-final decision might be certified for appellate review. As stated in *Crooks-Bathel v. Bathel*, 6 Shak. T.C. 12 (Mar. 18, 2010):

> Our Rule 31 incorporates the substantive requirements of finality embodied in 28 U.S.C. §1292, which prohibits the appeal of a non-final order unless the appeal involves a controlling question of law as to which there is a substantial difference of opinion, and the appeal would materially advance the termination of the litigation. LSI Board of Directors v. Smith, *supra;* LSI v. Prescott, 4 T.C. 98, 100 (Dec. 29, 2000). If the trial court concludes that all of those elements are present, the trial court can so state, and the appellate court can, in its discretion, hear the appeal. The general purpose of both our Rule 31 and 28 U.S.C. §1292 is to allow an interlocutory appeal in exceptional cases in order to avoid protracted and expensive litigation

For a decision to be certified for appellate review all elements must be met. *Id.* "The general purpose of both our Rule 31 and 28 U.S.C. §1292 is to allow an interlocutory appeal in exceptional cases in order to avoid protracted and expensive litigation." *Id.*

As noted in *Crooks-Bathel*, a question of the Court's jurisdiction constitutes a controlling question of law. However, to be certified for appellate review, there must also be "a substantial difference of opinion as to whether this Court has jurisdiction over non-members in a divorce proceeding." *Crooks-Bathel*, 6 Shak. T.C. at 13; *see also Dedeker v. Stovern*, 7 Shak. T.C. 72

(Sep. 12, 2014). This Court's November 10, 2017 Decision applied well-settled law from the Shakopee Tribal Courts which recognize this Court's jurisdiction over non-members in a divorce proceeding and which rejects arguments that Public Law 280, ICWA or *Montana v. United States*, deprive this court of such jurisdiction.

Respondent, in seeking certification, does not present any basis for showing that this Court's jurisdictional decision is one on which there is a substantial difference of opinion. "Generally, a difference of opinion would be demonstrated by citing to cases or other authorities expressing opposing views. Mere reference to the *parties'* difference of opinion is insufficient." *Dedeker v. Stovern*, 7 Shak. T.C. 72 (Sep. 12, 2014). As explained in *Crooks-Bathel*:

> The fact that the parties themselves disagree on an issue does not constitute "a difference of opinion" sufficient to warrant certification of an interlocutory order for immediate appeal, Williston v. Eegleston, 410 F.Supp. 274, 277 (S.D.N.Y. 2006), because if the parties' disagreement were all that is required to create a substantial difference of opinion the criterion always would be met and it would be superfluous.

Crooks-Bathel, 6 Shak. T.C. at 13. The conclusion reached in *Crooks-Bethel* has equal application here. Given "this Court's longstanding practice of hearing and deciding marriage dissolution proceedings that involve non-member residents of the Shakopee Reservation, a reversal seems unlikely. Hence, accepting an appeal at this point seems far more likely to prolong this case than to resolve it." *Id.*

II. Respondent's Request for a Stay.

This Court's decision of November 30, established a schedule for further proceedings. It required the submission of information statements and disclosures

within 30 days of that order, and set a pre-hearing conference for December 19, 2017 at 10:00 am. Consistent with the procedures set out in 28 U.S.C. § 1292(b) – which expressly provide that an application for certification of an appeal does not stay the proceedings in the trial court – this schedule shall remain in effect absent an order from the Court of Appeals directing otherwise.

CONCLUSION

This Court finds that the Court's November 10 2017 Decision denying Respondent's motion to dismiss is not a collateral order for purposes of interlocutory appeal and does not meet the standard for certification. Accordingly, this Court denies Respondent's request for a stay of the proceedings. The parties shall comply with the schedule established by this Court's order of November 10, 2017.

SO ORDERED.

Dated: December 11, 2017

Henry M. Buffalo, Jr.
Judge, Shakopee Mdewakanton
Sioux Community Tribal Court