COURT OF APPEALS OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION **STATE OF MINNESOTA**

James Van Nguyen,

Appellant.

vs. File No. Ct. App. 047-20

Amanda Gustafson,

Respondent.

MEMORANDUM OPINION AND ORDER

This appeal arises from a January 6, 2020 Memorandum Opinion and Order of the Trial Court that granted a motion by the Respondent Amanda Gustafson ("Gustafson") that (i) sought a modification of the portions of the Trial Court's May 3, 2019 Order ("May 3 Order") that governed legal custody, physical custody, and visitation, for the parties' child, and (ii) sought monetary sanctions against the Appellant James Van Nguyen ("Nguyen"). For the reasons set forth below we affirm in part and reverse in part.

1. <u>Proceedings before May 3, 2019</u>.

This is the third time that the parties have been before us. Much of the history of their litigation, in the Courts of the Shakopee Mdewakanton Sioux Community and in other jurisdictions, is set forth in our opinion in *James Van Nguyen v. Amanda Gustafson*, File No. Ct. App. 045-19 (Jan. 21, 2020), and need not be repeated here. But aspects of that history bear directly on the questions presented to us. Specifically, the time that certain disputes were presented to the Trial Court is central to the manner in which we resolve the appeal from the Trial Court's sanctions.

Proceedings in the Trial Court began in July, 2017, when Gustafson petitioned to dissolve her marriage to Nguyen. Thereafter, pretrial activity did not go smoothly, and on June 28, 2018, Gustafson

moved for an order directing Nguyen to respond to certain discovery requests and sought an award of the attorney's fees she incurred in bringing the motion. The Trial Court heard her motion on July 13, 2018, and ordered Nguyen to provide complete responses to the requests at issue, while reserving any ruling on Gustafson's request for sanctions.

Gustafson's sanctions motion had not been ruled on before September 19, 2018, when the trial was scheduled to begin, and on that date, the parties reached a stipulated settlement that was read into the record and that the Trial Court approved. The record does not indicate that, in the stipulation, Gustafson preserved the right to object to, or to seek sanctions for, Nguyen's failure to respond to the discovery requests that were the subject of her sanctions motion.

One of the terms that the parties agreed to in their stipulation had to do with title to and occupancy of a house located at 5511 Southwood Drive in Bloomington, Minnesota ("the Bloomington Property"). For a period of time, the parties had lived together in the Bloomington Property, and at the time of their stipulated settlement Nguyen continued to reside there; but under the stipulation, Gustafson received title to the property, together with the responsibility for paying significant past-due real estate taxes, and Nguyen agreed to vacate the property not later than October 17, 2018. In the event, however, he remained in the Bloomington Property past that date, he would be subject to sanctions by the Court. Nguyen did not vacate the property by October 17, 2018. Gustafson, therefore, sought an order directing him to leave, and on November 7, 2018, the Trial Court entered an Order –

> 7. … directing [Nguyen] to immediately vacate the property located at 5511 Southwood Drive, in the City of Bloomington, State of Minnesota, and that if necessary, law enforcement from the City of Bloomington and Hennepin County shall be engaged to assist in his removal from these premises.
>
> 8. In the event … Nguyen refuses to immediately vacate these premises, this Court will then consider appropriate additional sanctions being levied against [him].

As we discussed in *James Van Nguyen v. Amanda Gustafson,* File No. Ct. App. 045-19 (Jan. 21, 2020), the parties were unable to reduce their September 19, 2018 stipulated agreement to a formal writing, and additional disputes arose between them. Therefore, to implement the stipulation that had been read into the record, the Trial Court, on February 13, 2019, entered an Order for Partial Judgment, withholding entry of its Order to permit the parties to file objections. Within the time provided, each party did file objections; and having received those materials the Trial Court then entered the May 3 Order.

2. <u>The May 3 Order</u>.

In the May 3 Order, the Trial Court granted the parties joint legal custody of parties' child, specifying –

> Legal custody means that the parents shall share in the making of major parental decisions in the best interests of the child in the areas of education, religion and health. The parties are granted joint physical custody of the minor child of the parties and parenting time shall be scheduled on a four day on/four day off rotation to allow quality time to be spent by both parties with the minor child as set forth in Conclusions of Law 8[1]… .

The Trial Court's Conclusion of Law 8 set forth an elaborate grid, listing birthdays, holidays, and cultural events[2], and included a vacation schedule:

> Vacation Schedule: Each party is granted three non-consecutive weeks of vacation time with the minor child, which shall superseded [sic] the four-day rotation schedule, and which shall not disrupt the above holiday schedule. Said vacation time shall be selected and mutually agreed upon no later than April 1st of the year for which said vacation time is sought.

The May 3 Order also specified that the parties would appoint a Parenting Consultant, and it set forth in detail that person's responsibilities and authority for handling "issues regarding parenting time, requests to modify custody, school selection, and whether to seek out therapy for the minor child"[3].

Finally, as relevant here, the May 3 Order said: "The Court will schedule an evidentiary hearing on [Gustafson's] request for sanctions."[4]

3. <u>Events after May 3, 2019</u>.

The filing of the May 3 Order did not end the parties' conflicts. Significant disagreements arose, repeatedly, relating to parenting time for the parties' child, and to the school she would attend, and to the appointment of the parenting consultant that the May 3 Order contemplated. On June 7, 2019, Gustafson brought a motion relating to the parenting consultant's non-appointment. On June 17, 2019, Nguyen filed a "Declaration for Change of Custody of Minor Child" and Memorandum of Law but did not file a motion relating to those filings. Also, on June 17, 2019, Nguyen's attorney filed a Motion to Withdraw as

---

[1] May 3 Order, at 21.
[2] In an earlier appeal, we modified one aspect of that schedule, relating to the Vietnamese holiday of Tet. *James Van Nguyen v. Amanda Gustafson*, File No. Ct. App. 045-19 (Jan. 21, 2020).
[3] May 3 Order, at pp. 26 – 29.
[4] *Ibid*, at 6.

counsel. Thereafter, in June, August, and September, the parties sent the Trial Court multiple letters concerning their disputes relating to their child's school registration and denial of parenting time. On October 7, 2019, Nguyen filed a motion seeking child support, although the parties had stipulated that neither would seek child support from the other. On October 21, 2019, Gustafson moved for (i) sanctions against Nguyen for having failed to timely vacate the Bloomington Property, (ii) sanctions for having failed to respond in a timely fashion to a draft Judgment and Decree to implement the September 19, 2018 stipulation, (iii) sanctions for having failed to properly respond to discovery requests that preceded the September 19, 2018 stipulation, (iv) sanctions for having failed to cooperate in the selection of the Parenting Consultant that the September 19, 2018 stipulation contemplated, (v) an order directing Nguyen to return any of her personal property that he continued to possess, and (vi) an order granting Gustafson sole legal and physical custody of the parties' child and limiting Nguyen's visitation to alternating weekends, vacations, and holidays, and extended time during summer months "as the Court deems appropriate." And on October 31, 2019, the day that the Trial Court had scheduled an evidentiary hearing on all of the issues that then were before it, Nguyen filed a Notice of Motion and Motion for Additional Educational Support and Therapy for the Parties [sic] Minor Child.

The Trial Court heard testimony and received evidence on October 31, November 13, and November 26, 2019. On the first of those days, before the Court went on the record, Nguyen, who was *pro se* at the time, left the courtroom and did not return, after he had been asked, by an attorney for the Shakopee Mdewakanton Sioux Community's Conservator of Estate who had responsibility for Gustafson's financial affairs, to sign a quitclaim deed for the Bloomington Property. Nguyen informed the Court that he was having a panic attack and could not participate in the hearing, but he declined offers of assistance, and the Trial Court decided to proceed to hear Gustafson's evidence, and to schedule an additional hearing after a transcript of the October 31 proceeding was available, in order that Nguyen could cross-examine Gustafson's witnesses and present his own evidence.

During the October 31 proceeding, the Trial Court heard direct examination of Gustafson and of her present husband, Andrew Bui. During the November 13 and November 26 proceedings, Nguyen was represented by new counsel. On November 13, Nguyen testified under direct examination. On November 26 his direct examination concluded and he and Gustafson and Bui were cross-examined. During the three days of testimony, the Trial Court received a total of twenty-seven exhibits.

The Trial Court took the issues before it under advisement, and on January 6, 2020, it filed a Memorandum Opinion and Order. For the reasons set forth in the Memorandum, the Trial Court:

i. Denied Nguyen's motion to delay consideration of sanctions pending a ruling, by this Court, on Nguyen's then-pending appeal on the question of the Trial Court's jurisdiction over him.

ii. Granted Gustafson's motion for sanctions in the amount of $4,035.00 in attorney's fees for Nguyen's failure to comply with the Trial Court's order that he timely vacate the Bloomington Property.

iii. Denied Gustafson's motion for sanctions for Nguyen's alleged failure to timely respond to Gustafson's draft of a Final Judgment and Decree.

iv. Granted Gustafson's motion for sanctions in the amount of $4,811.00 in attorney's fees for Nguyen's failure to comply with discovery requests that pre-dated the parties September 19, 2018 stipulated agreement.

v. Denied Gustafson's motion for sanctions in the form of attorney's fees incurred during the unsuccessful process of naming a Parenting Consultant.

vi. Granted sole legal and physical custody of the parties' child to Gustafson, set forth a visitation schedule, and detailed instructions on how the parents with respect to the parties communications with each other.

Nguyen timely appealed the aspects of the Trial Court's order dealing with child custody and visitation and the two monetary sanction awards. As in any appeal from an evidentiary hearing, our review is to determine whether the Trial Court's findings of fact were clearly erroneous and whether it erred in its conclusions of law. *Kostelnik v. LSI*, 1 Shak. A.C. 92, 96 (Mar. 17, 1998).

4. Child custody and visitation.

Because the May 3, 2019 Order dealt with the parties' custody of and visitation with their child, when the Trial Court was asked to modify those provisions it looked to Chapter III, Section 5 of the Domestic Relations Code of the Shakopee Mdewakanton Sioux Community ("the Code"). That section provides:

Modification of Custody Orders.

a. Unless agreed to in writing by the parties, no motion to modify a custody order may be made earlier than (1) one year after the date of the entry of a decree of dissolution containing a provision dealing with custody, except in accordance with subsection c of this Section

b. …

c. The time limitations prescribed in subsections a and b shall not prohibit a motion to modify a custody order if the Tribal Court has reason to believe that there may be persistent and willful denial or interference with the visitation, or has reason to believe that the child's present environment may endanger the child's physical or emotional health or impair the child's

emotional development. The Tribal Court shall make such determinations based upon the affidavits of the parties.

A. Gustafson's affidavit.

In his appeal, Nguyen argues that the Trial Court erred when it concluded that the affidavit which Gustafson submitted in support of her motion to modify custody was, as a matter of law, sufficient to permit the Trial Court to hold a hearing on the motion. He contends that the affidavit lacked "supporting documentation or exhibits", and therefore, as a matter of law, the affidavit could not create "reason to believe that there may be persistent and willful denial or interference with the visitation, or has reason to believe that the child's present environment may endanger the child's physical or emotional health or impair the child's emotional development."

But Nguyen's argument misreads both the language of Section 5.c. and the role of the Trial Court in this vital area. What Section 5.c. requires, for the Trial Court to proceed to consider modifying a custody order, is something arising in the particular circumstances of a given case and set forth in an affidavit – and hence sworn to – that in the sound discretion of the Trial Court creates reasonable possibility that the deeply concerning circumstances described in the Section 5.c. may exist. The section does not speak to documentation, it does not mandate that the affidavit include exhibits, it simply requires statements that in the sound judgment of the Trial Court make it appropriate for the parties to appear and to present testimony and evidence at a hearing.

In her October 21, 2019 affidavit Gustafson said, *inter alia*, that at the evidentiary hearing which she sought she would offer evidence that Nguyen had refused to follow the parties' parenting time schedule, had refused to support their daughter's attendance at the International School of Minnesota preschool program, and had "interfered at the International School in ways that have caused enormous difficulties for me, school personnel and [their child], and he has refused to work with me to get [redacted] the therapy and behavioral assessments that the school says are essential and would only help [redacted]". Clearly, the Trial Court did not abuse its discretion in concluding that Gustafson's affidavit created a reason to believe that the circumstances contemplated by Section 5.c. existed, and that an evidentiary hearing should be held to determine whether a change in custody was appropriate.

B. Modification of Custody.

Turning to the Trial Court's decision that, based upon the evidence received during the three days of hearings, it should modify the custody arrangements set forth in the May 3 Order, the applicable provisions of the Code are Chapter III, Sections 5.d. and 2.a. Section 5.d speaks to the standard which must be applied in considering a modification of custody:

> **d.** The Tribal Court shall not modify a prior custody order after hearing on the motion unless it finds, upon the basis of facts that have arisen since the prior order or that were unknown to the Tribal Court at the time of the prior order, that a change has occurred in the circumstances of the child or the custodian and that the modification is necessary to serve the best interest of the child. In applying these standards the Tribal Court shall –retain the custodian established by the prior order unless the Tribal Court finds:
>
> (1) the custodian agrees to the modification;
>
> (2) the child has been integrated into the family of the petitioner with the consent of the custodian; or
>
> (3) the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

(Emphasis added.)

Section 2.a. sets forth a list of factors which are or may be relevant in determining what the best interests of a child are:

> The Tribal Court shall determine custody, including physical custody and decision-making responsibilities in accordance with the best interests of the child. The Tribal Court shall consider all relevant factors including, but not limited to:
>
> (1) the capacity and willingness of each parent to ensure that the child receives adequate care, including but not limited to providing food, clothing, shelter, medical care, and a safe living environment. A safe living environment means an environment free of domestic abuse, substance abuse, maltreatment, and neglect;
>
> (2) the presence or history of domestic abuse by either parent, regardless of whether the abuse was directed against or witnessed by the child;
>
> (3) the capacity and willingness of each parent to follow visitation and custody orders;

(4) the quality of the relationship between the child and each parent and the capacity and willingness of the parent to provide love, affection, guidance, and to continue educating and raising the child in the child's culture;

(5) the capacity and willingness of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, the capacity and willingness of each parent to keep the other parent informed on matters regarding the child, the capacity and willingness of the parents to place the needs of the child first and the ability to cooperate with one another for the sake of the child;

(6) each parent's maturity and capacity and willingness to avoid conflict with one another;

(7) the parenting skills of both parents and each parent's willingness to accept full parenting responsibilities;

(8) the child's developmental or special needs and the capacity and willingness of each parent to meet those needs, both in the present and in the future;

(9) the interaction and interrelationship of the child with siblings, extended family, or other people who may significantly affect the child's best interests;

(10) the physical, mental and emotional fitness of the parties involved, including presence or history of controlled substance abuse;

(11) the child's Tribal or cultural background and the Tribal membership/affiliation of the parent or petitioning party if other than the parent;

(12) the capacity and willingness of each parent to encourage school attendance, to be involved in school conferences and activities, and to take responsibility to ensure school work is completed;

(13) the length of time the child has lived in a stable home environment with either or both parents and the desirability of maintaining continuity;

(14) the permanence, as a family unit, of the existing or proposed custodial home;

(15) the reasonable preference of the child, if the Tribal Court deems the child to be of sufficient age to express a preference; and

(16) the wishes of the child's parent or parents as to custody.

In applying these sections to the evidence it received during the three days of its hearings, the Trial Court said this:

> It is beyond doubt that the parties have an entirely dysfunctional and non-existent co-parenting relationship. This failure to fulfill the joint custody terms of the Judgment constitutes a sufficient change in circumstances to warrant a custody modification. The child currently is caught in the middle of a never-ending co-parenting tug of war. She is in a parenting environment which endangers her emotional health and impairs her emotional development. A sole custody arrangement is the appropriate and necessary remedy. The Court acknowledges that change for a child can be problematic but finds that any possible harm that might result from a change to a sole custody arrangement is outweighed by the advantages of a stable environment where there is one decisionmaker and clear boundaries between the custodial and non-custodial parents.
>
> . . .
>
> The Court finds that the child's best interest require that [Gustafson] be the sole custodian. While each parent bears a degree of responsibility for this co-parenting dysfunctionality, the Court finds [Nguyen] bears the bulk of it.
>
> Gustafson at times has not followed the required parenting schedule and has exhibited behavior unbecoming of a loving parent. [footnote omitted] She admits to struggles with substance dependency and mental health issues, for which she is seeking assistance and treatment. [footnote omitted] These are concerning aspects for the Court to consider. However, the Court assesses [Gustafson] as a basically honest individual who is willing to admit her faults and errors, who strives to overcome them, and who, most important, does her best to keep her problems from interfering with or undermining her daughter's best interests. She professes to put her daughter's interests before her own. [footnote omitted]. The Court finds her credibility to be high in this regard.
>
> [Nguyen] also admits to not following the required parenting schedule and has exhibited inappropriate behavior as a parent. [footnote omitted] He asserts that he is the "rock" of the parental relationship with the parties' daughter and provides the type of stability and guidance that, according to him, [Gustafson] cannot provide. [footnote omitted] He too professes to put his daughter's best interest before his own. [footnote omitted] However, in contrast to [Gustafson] in this regard, the Court finds [Nguyen's] credibility to be extremely low. The Court does not come to this conclusion lightly. It does so only after observing t[Nguyen's] demeanor on the witness stand as well as his pattern of evasive, non-compliant, and retaliatory behavior throughout this matter.

> The Court concludes that [Nguyen] is prone to actions and behavior that place his daughter in the middle of his efforts to undermine a successful co-parenting relationship and to find ways for it to fail. For example, he admits that he unilaterally kept his daughter for extra days of "compensatory" parenting time to which he was not entitled [footnote omitted]. He also fails to accept the Court's Order that the child should attend the International School of Minnesota and seeks to undermine it [footnote omitted]. The Court is extremely concerned that the type of evasive, recalcitrant, non-compliant, and contemptuous behavior that [Nguyen] has shown throughout this matter [footnote omitted] also is evident in his role as a parent. …
>
> In sum, Nguyen has exhibited a pattern of evading compliance with the Judgment and other Orders in this matter, as well as of hostile, manipulative, and/or abusive behavior toward [Gustafson], the minor child [footnote omitted], professionals involved in this case, and other people in the child's life. All of this, in the Court's view, has placed the parties' minor child in an environment that endangers her emotional health and impairs her emotional development. Nguyen consistently and repeatedly has demonstrated his inability and/or unwillingness to co-parent and to place his daughter's health, safety, and well-being before his own desires, anger and emotions. …
>
> In considering the minor child's best interests, the Court has been particularly mindful of the following statutory relevant factors for determining custody: unwarranted denial of interference with duly established visitation [footnote omitted], 'the capacity and willingness of each parent to follow visitation and custody orders" [footnote omitted], "the capacity and willingness of the parents to place the needs of the child first and the ability to cooperate with one another for the sake of the child" [footnote omitted], "each parent's maturity and capacity and willingness to avoid conflict with one another" [footnote omitted], "each parent's willingness to accept full parenting responsibilities" [footnote omitted], and "the child's Tribal or cultural background" [footnote omitted].
>
> The weight of the evidence and the assessment of each party's respective credibility support application of these criteria in favor of [Gustafson] being the sole custodian.[5]

In his appeal, Nguyen argues that the Trial Court abused its discretion and committed reversible error in several ways. He contends that the Trial Court's findings with respect to his actions relating to the selection of a Parenting Consultant, and with respect to interference with parenting time, were "in contradiction with the record".[6] As to this contention, we have reviewed the testimony given and the exhibits received during the three days of the Trial Court's hearings, and we conclude that the Trial Court committed no reversible error when it made its custody determination. Both parents provided extensive

[5] January 6, 2020 Memorandum Opinion and Order, at 20 – 24.
[6] April 7, 2020 Brief of Appellant, at 18

and often-conflicting testimony with respect to the reasons that no Parenting Consultant was engaged, and also with respect to their parenting time and visitation and various other aspects of their parenting. The Trial Court, therefore, was obliged to determine what weight to give to their conflicting testimony. That is a fundamental responsibility of any trial court, and one that should not be disturbed on appeal unless the decision clearly erroneous – meaning that it "' is manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.'" *Brooks v. Corwin*, 2 Shak. A.C. 5, at 6 (2008) quoting *Fraser v. Fraser*, 702 N.W.2d 283, 287 (Minn. Ct. App. 2005). Here, the Trial Judge had extended opportunity to observe the parties as they testified, and his determinations as to their credibility should not be disturbed. *Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise v Prescott,* 2 Shak. A.C. 1 (Aug. 9, 2006).

Nguyen also argues that as a matter of law the Trial Court's Order does not comply with Section 2.a. of the Code, because the Order does not name, and make explicit findings with respect to, every factor that Section 2.a. lists. Specifically, Nguyen contends that the Trial Court should have explicitly named and dealt with the section's factor numbers 2, 4, 6, 7, 8, 9, 10, 11, 12, 13, and 14.

But, as is quite clear from the portions of its Memorandum quoted above, the Trial Court did make explicit findings with respect to factor number 6 (each parent's maturity and capacity and willingness to avoid conflict with one another), number 7 (the parenting skills of both parents and each parent's willingness to accept full parenting responsibilities), number 11 (the child's Tribal or cultural background and the Tribal membership/affiliation), and number 12 (the capacity and willingness of each parent to encourage school attendance, to be involved in school conferences and activities, and to take responsibility to ensure school work is completed).

Also, the Trial Court's powerful discussion of the parents' personalities and histories, as they were revealed by the evidence it had received, makes it clear that in its decision it considered information bearing on factors number 2 (the presence or history of domestic abuse by either parent, regardless of whether the abuse was directed against or witnessed by the child); number 4 (the quality of the relationship between the child and each parent and the capacity and willingness of the parent to provide love, affection, guidance, and to continue educating and raising the child in the child's culture); number 8 (the child's developmental or special needs and the capacity and willingness of each parent to meet those needs, both in the present and in the future); number 9 (the interaction and interrelationship of the child with siblings, extended family, or other people who may significantly affect the child's best interests); number 10 (the physical, mental and emotional fitness of the parties involved, including presence or history of controlled substance abuse); number 13 (the length of time the child has lived in a stable home environment with either or both parents and the desirability of maintaining continuity); and number 14 (the permanence, as a family unit, of the existing or proposed custodial home). When the Trial Court said that

"the parties have an entirely dysfunctional and non-existent co-parenting relationship," and that their "child currently is caught in the middle of a never-ending co-parenting tug of war … in a parenting environment which endangers her emotional health and impairs her emotional development," the Trial Court fundamentally was speaking to the substance of each of those factors.

Nguyen makes one argument with which we agree: the Trial Court's reference, in its footnote number 67 in the January 6, 2020 Memorandum and Order, to an Order for Contempt that the Trial Court had filed on December 30, 2019 – and, presumably, with that reference, to events that prompted the Order – was not proper. The Trial Court could not properly refer to or rely on any event that occurred after the closure of the record on November 26, 2019.

However, given the body of evidence supporting the Trial Court's findings that was properly received during the three days of hearings, that single improper reference in one footnote constitutes harmless error. We, therefore, hold that the record before the Trial Court supports its factual findings, that it properly applied the applicable law, and that it made no reversible error when it awarded Gustafson full legal and physical custody of the parties' child.

C. **Modification of Visitation.**

In addition to amending the portions of the May 3 Order relating to custody, the Trial Court's January 6, 2020 Order also modified the provisions of the May 3 Order that dealt with Nguyen's visitation with the parties' daughter, and Nguyen appeals from that modification as well.

The portions of the Code that are relevant to this aspect of his appeal appear at Chapter III, sections 3.a. and 3.e.:

> a. In any proceeding for dissolution, the Tribal Court shall, upon the request of either parent, grant such rights to visitation on behalf of the child and noncustodial parent to maintain a child-to-parent relationship. If the Tribal Court finds, after a hearing, that visitation is likely to endanger the child's physical or emotional health or impair the child's emotional development, the Tribal Court shall restrict visitation by the noncustodial parent as to time, place, duration, or supervision and may deny visitation entirely, as the circumstances warrant. A parent's failure to pay support because of the parent's inability to do so will not be sufficient cause for denial of visitation.
>
> ...
>
> e. The Tribal Court shall modify an order granting or denying visitation rights whenever modification would serve the best interests of the child. Except as provided below, the Tribal Court may not restrict visitation rights by modification unless it finds that:

(1) The visitation is likely to endanger the child's physical or emotional health or impair the child's emotional development; [or]

(2) The noncustodial parent has chronically and unreasonably failed to comply with the Tribal Court-ordered visitation …

Nguyen argues that there is no evidence in the record, other than "hearsay submitted by Gustafson from the joint minor child and uncorroborated testimony regarding parenting time exchanges[7]", suggesting either that his visitation endangered the parties' child or that he had chronically and unreasonably failed to comply with the Trial Court's visitation order. But the Trial Court expressly found Gustafson's testimony to be more credible than Nguyen's. Her testimony regarding the difficulties she encountered in holding Nguyen to the Court-ordered schedule was extensive and, in our view, was sufficient to justify the Trial Court's conclusion that the visitation schedule should be amended. Transcript 62:12 – 18; 66:7 – 77:14; 83:1 – 85:6 (Oct. 31, 2019).

We therefore affirm the Trial Court's decision with respect to visitation for the parties' child.

5. <u>Attorney's Fee Sanctions.</u>

Nguyen contends that the Trial Court abused its discretion when it granted two of Gustafson's motions for attorney's fees as sanctions for improper behavior. We agree with one of his contentions.

The record indicates that during the period before the scheduled trial date of September 19, 2018, Nguyen repeatedly had failed to provide reasonable responses to Gustafson's discovery responses, and had not complied with orders of the Trial Court related to those matters. Therefore before the parties entered into a stipulated settlement agreement, the imposition of monetary sanctions in the amounts of attorney's fees incurred by Gustafson in her attempts to receive proper discovery in all likelihood would have been within the sound discretion of the Trial Court. In our view though, matters changed when on September 19, 2018, avoiding trial, the parties negotiated their stipulated settlement. As we have noted above, nothing in the record suggests that, in the stipulation, Gustafson reserved her claim for discovery-related attorney's fees. We think it is entirely reasonable to believe that the stipulation would not exist if Gustafson in fact had insisted on such a reservation. On September 19, 2018, the parties clearly intended their stipulation to resolve all pending issues between them (the chaotic subsequent history of their relationship

[7] April 7, 2020 Brief of Appellant at 28.

notwithstanding). So we think that Gustafson's power to later give new life to her claim for discovery-related attorney's fees must fail. Her claim disappeared when she agreed to the stipulation, and although the Trial Court had broad authority to consider discovery-related sanctions before it approved the parties' stipulation, when the Trial Court approved the stipulation it lost the authority to grant something that Gustafson had implicitly foresworn: it did not retain the authority, that it claimed in the May 3 Order, to hear Gustafson's motion for discovery-related sanctions.

The second attorney's-fee sanction imposed by the Trial Court stands on different ground. It arose entirely from events that followed the parties' stipulation, when Nguyen did not leave the Bloomington Property by the deadline he had agreed to, and indeed when he did not immediately leave after the Trial Court entered an order directing him "to immediately vacate the property." This Court observed, in *Brooks v. Corwin*, 2 Shak. A.C. 5 (Aug. 4, 2008), at 4 (quoting *Shimman v. Int'l Union of Operating Engineers*, 744 F.2d 1226, 1330 (6th Cir. 1984)), that "[b]ad faith in the conduct of litigation, resulting in a fee award as a sanction for abuse of the judicial process, is the most familiar type of bad faith under which [attorney's] fees are awarded". Nguyen's direct disregard both of the stipulation that the Trial Court had approved, and then of the Trial Court's specific order to vacate, clearly constitutes sanctionable bad faith. We, therefore, affirm the Trial Court's order directing Nguyen to pay the attorney's fees that Gustafson incurred in obtaining possession of the Bloomington Property.

6. <u>Conclusion.</u>

For the foregoing reasons, the portions of the Trial Court's January 6, 2020 Order relating to custody and visitation of the parties' child, and relating to sanctions for Nguyen's failing to properly vacate the Bloomington Property are AFFIRMED, and the portions of the Trial Court's January 6, 2020 Order relating to sanctions for failing to properly respond to discovery requests are REVERSED.

Dated: July 10, 2020

Chief Judge John E. Jacobson

Judge Terry Mason Moore

Judge Jill E. Tompkins