LIST OF SMSC COURT OF APPEALS OPINIONS

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COURT OF APPEALS OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION **STATE OF MINNESOTA**

In re the marriage of:

James Van Nguyen,

Appellant/Respondent.

vs.

Amanda Gail Gustafson,

Appellee/Petitioner.

File No. Ct. App. 045-19

Memorandum Opinion and Order

In this marriage dissolution matter, James Van Nguyen appeals a May 3, 2019 decision by the Trial Court of the Shakopee Mdewakanton Sioux Community, contending that the Trial Court lacked subject-matter jurisdiction over his marriage to the Appellee, Amanda Gail Gustafson, and also lacked personal jurisdiction over him. Nguyen also contends that in its decision the Trial Court abused its discretion when it adopted a parenting time schedule for the parties' child that denied Nguyen's request for parenting time each year during the Vietnamese New Year ("Tet").

Today we affirm the Trial Court with respect to both its subject-matter jurisdiction and its personal jurisdiction, but we reverse it with respect to the aspect of the parties' parenting time to which Nguyen objects, and we remand the matter as to that issue.

Several distinct reasons underlie our conclusions. First, the Trial Court's dissolution of parties' marriage was an exercise of its *in rem* jurisdiction over the marriage, which was entirely proper given the Trial Court's findings with respect to Gustafson's residence at the time of the filing of her petition. Second, the Trial Court's orders, with respect to the custody and parenting time of the parties' Community-member child, who remains a ward of the Community's Children's Court as a consequence of prior proceedings in that Court, was appropriate given the Court's duty to ensure her continued protection and welfare. Third, the Trial Court's Final Judgment, dealing with all aspects of Gustafson's petition, was a proper exercise of the Community's inherent retained power to regulate the domestic affairs of its members. Finally, although for the foregoing reasons we believe that the doctrines set out by

the Supreme Court of the United States in *Montana v. United States*, 450 U.S. 544 (1981) do not apply to this case, we also believe that, if that case in fact is applicable, then as the Trial Court found, each of the case's two exceptions, relating to permissible tribal court jurisdiction over non-Indians, apply here.

I. The Parties and Their Child.

Gustafson is a member of the Shakopee Mdewakanton Sioux Community ("the Community"). Nguyen is not a member of an Indian tribe. Gustafson and Nguyen are the parents of one child, who is a member of the Community and who, as a consequence of child welfare proceedings that were instituted in 2015 and are discussed below, continues to be a ward of the Community's Children's Court.

II. The Parties' Litigation History.

The parties and their marriage have generated a considerable judicial history, within the Community's Courts and in other jurisdictions, and a significant amount of that history bears directly on the jurisdictional questions raised in this appeal.

The parties were married in Las Vegas, Nevada, on June 13, 2014. At the time of their marriage, Gustafson was the subject of a Conservatorship of Person, created by and supervised by the Community Court under the Community's Amended and Restated Conservatorship Ordinance, SMSC Ordinance No. 03-11-08-016. Appendix to Appellant's Brief at 53, *Nguyen v. Gustafson*, No. 045-19 (SMSC Ct. App. filed July 5, 2019) (hereinafter "Nguyen App."). The Conservatorship had been created with the knowledge of, and the agreement of, Nguyen. *Id.* It was prompted by Gustafson's admitted drug use, her pregnancy, and her significant emotional and psychological problems. *Id.* Under the Conservatorship, Gustafson's drug treatment, medical care, and therapy were directed and supervised by the Community Court, and both she and Nguyen participated on the record in the Court's monitoring hearings (although the Court and the Court-appointed Conservators did not learn of the marriage until after the event had occurred). *Id.* at 47, 53. During the pendency of her Conservatorship, Gustafson successfully completed drug treatment and gave birth to a healthy baby, and in September 2014, the Court closed her Conservatorship file.

Less than one month later, Gustafson initiated marriage dissolution proceedings in the Community Court. *Id.* at 53; *see In re the Marriage of Amanda Gustafson and James Van Nguyen*, SMSC Court File No. 803-14 (filed Oct. 8, 2014). In her petition, she averred that there had been an irretrievable breakdown in the marriage and, *inter alia*, that by virtue of the existence of the Conservatorship in June 2014, she had lacked the legal capacity necessary to contract a marriage.[1]

Shortly after Gustafson's filing, Nguyen initiated two proceedings in the Minnesota District Court for the First Judicial District. He sought and received an *ex parte* protective order against Gustafson, in

[1] The Trial Court took judicial notice of the records of this proceeding, Nguyen App. at 53 n.1, and we do as well.

MN District Court File No. 70-FA-14-17526, and he sought marriage dissolution, in File No. 70-FA-14-18705. *Id.* at 55.

In the Community Court, responding to Gustafson's action, Nguyen argued that neither he nor Gustafson had been a resident of the Shakopee Mdewakanton Sioux Community Reservation for at least ninety days prior to the commencement of Gustafson's proceeding, as required under the Community's Domestic Relations Code, and therefore the Community Court lacked jurisdiction over the dissolution proceedings. *See id.* at 54–55. He also contended that, if the Community Court did have jurisdiction, it should find that the parties' marriage was not void, and that the Court should award him sole physical and legal custody of the parties' child and should allocate to him certain of the parties' jointly held real and personal property. *See id.*

The Community Court resolved the question of Gustafson's legal capacity to marry in February 2015, when a three-judge panel concluded that Gustafson's Conservatorship did not void her legal capacity to marry. *Id.* at 54. The panel left all other questions in the litigation open for further proceedings. *See id.*

During this time, while the parties' competing marriage-dissolution proceedings were pending, the Community's Family and Children's Services Department petitioned the Community's Children's Court for an order protecting the parties' daughter. *Id.* at 54-55; *see In re* [redacted] SMSC Court File No. [redacted] (filed Nov. 26, 2014).[2] In response, the Children's Court held a hearing where it received testimony indicating that there had been repeated physical confrontations between the parents in the presence of their child and that there were valid concerns about each parent's substance abuse and about the persons with whom the child was being left when the parents were absent. The Children's Court, therefore, appointed a Guardian *ad Litem*, and ordered the parents to work with the Community's Child Welfare Officers to develop a plan to ensure that both parents were able to properly meet their child's needs. *Id.* at 54. The parents thereafter complied with the Children's Court's orders, and the Court closed its active file in July 2015, but in its closure order it directed that the child would remain a ward of the Court, pursuant to the Indian Child Welfare Act, 25 U.S.C. § 1911(a). *Id.* at 55.

When the Children's Court file closed, the parties apparently had reconciled: stipulated dismissals were filed in the marriage dissolution proceedings that had been pending in the Community Court and in the Minnesota District Court. *Id.* at 54.

The proceeding that gave rise to the present appeal began on July 20, 2017, when Gustafson filed a new petition seeking dissolution of the parties' marriage. *Id.* at 40. Shortly before that filing, Nguyen had filed a petition for dissolution in the Superior Court of California, Humboldt County CA Court File No. FL170479 ("the California Proceeding"). *Id.* at 55-56. In the California Proceeding evidentiary

[2] The Trial Court also took judicial notice of the records in this proceeding, *id.* at 54 n.2, and we do as well.

hearings were held on July 27 - 28, 2017. *Id.* at 56. At the conclusion of the hearing, the court concluded that, based on California's adoption of the Uniform Child Custody Jurisdiction and Enforcement Act,[3] it did not have home-state jurisdiction over the matter because the parties' child had not resided in California for the requisite time, and then declined to exercise jurisdiction pending the Community Court's acceptance of jurisdiction. Nguyen App. at 56–57.

Thereafter, on August 7, 2017, the Trial Court issued an order in Gustafson's dissolution proceeding, confirming the pendency of her dissolution petition on its docket, ordering joint physical custody and shared parenting for the parties' child, noting that the prior conservatorship proceedings and the child welfare matter had been heard in the Community's Courts, and also noting specifically that under the Children's Court Order, the Community Court "maintains exclusive, ongoing child welfare jurisdiction" over the parties' child. *Id.* at 57. That order was then filed with the Humboldt County Court, which Court then dismissed the California Proceeding[4]

Nguyen then filed a marriage dissolution petition in the Minnesota District Court for the Fourth Judicial District, Hennepin County District Court File No. 27-FA-17-5535 ("the Hennepin County Case"), and moved the Trial Court of the Community to dismiss Gustafson's petition, again arguing that it lacked both subject-matter jurisdiction over the parties' marriage and their child, and personal jurisdiction over him. *Id.* at 57–58. The Trial Court denied that motion in a forty-eight page opinion on November 17, 2017. *See id.* at 51–98.

Nguyen sought interlocutory review of that decision before this Court, and on January 30, 2016 we denied his request, noting that under our Rules and pertinent federal case law a trial court's denial of a motion to dismiss on jurisdictional grounds is not properly the subject of interlocutory review unless the jurisdictional challenge is immunity-based. *Id.* at 112–17. Then, Nguyen sought declaratory and injunctive relief in the United States District Court for the District of Minnesota. *Nguyen v. Gustafson*, No. 0:18-cv-0052-SRN-KMM ("the Federal District Court case"). That Court denied his motion for preliminary relief, *Nguyen v. Gustafson*, No. 18-522, 2018 WL 1413463, at *7 (D. Minn. Mar. 21, 2018), and on September 26, 2018 it dismissed his complaint without prejudice, directing him to exhaust his Tribal Court remedies before seeking relief in federal court, *Nguyen v. Gustafson*, No. 18-522, 2018 WL 4623072, at *3 (D. Minn. Sept. 26, 2018).

In the Trial Court, trial was scheduled to begin on September 19, 2018; but on that morning the parties reached a settlement with respect to some of the issues that had been pending, and the substance of that agreement – which awaited written explication – was read into the record. Nguyen App. at 121–23.

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[3] *See* CAL. FAM. CODE § 3421 (West 2020).

[4] Portions of the records of the California Proceeding are included in the Appendix to Gustafson's brief in this appeal. *See* Appendix to Appellee's Brief, *Gustafson v. Nguyen*, No. 045-19 (SMSC Ct. App. filed Aug. 6, 2019).

At the same time, Nguyen filed an objection to the Trial Court's jurisdiction over any aspect of the proceedings. *Id.* at 120–22. In succeeding weeks, the parties were unable to reduce their agreement to writing, and additional disputes arose between them. *See id.* at 2–3. 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, but withheld entry of its Order to permit the parties to file objections. *Id.* at 2. Within the time provided, each party did so, with Gustafson asking the Trial Court to vacate the entirety of the September 19, 2018 settlement, and Nguyen objecting to specific aspects of the Trial Court's Order. *Id.* at 2–6. Having received those materials the Trial Court, on May 8, 2019, filed Findings of Fact, Conclusions of Law, and Order for Final Judgment, and a Judgment and Decree, in which it denied Gustafson's motion to vacate the parties' settlement, dealt serially with Nguyen's objections, and comprehensively resolved all matters relating to custody and visitation of the parties' child and questions relating to the parties' property. *Id.* at 2–39.

This appeal followed. Nguyen challenges the Trial Court's determination that it had subject-matter jurisdiction over his marriage, that it had personal jurisdiction over him, and that it properly allocated parenting time on the annual Vietnamese holiday of Tet.

Whether a court has subject-matter or personal jurisdiction is an issue of law. *Gisslen v. City of Crystal*, 345 F.3d 624, 627 (8th Cir. 2003); *Bandemer v. Ford Motor Co.*, 931 N.W.2d 744, 749 (Minn. 2019). We review issues of law de novo. *In re Estate of Feezor*, 2 Shak. A.C. 30, 38 n.20 (Apr. 5, 2012); *Welch v. SMS(D)C*, 1 Shak. A.C. 35, 37 (Oct. 14, 1996). We review findings of fact supporting a legal conclusion for clear error. *See Corwin v. Corwin-Brooks*, 2 Shak. A.C. 5, 6 (Aug. 4, 2008). The Trial Court's factual finding is clearly erroneous if it is "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Id.* (quoting *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000)).

III. Subject-Matter Jurisdiction.

Nguyen contends that the Trial Court erred, under the Domestic Relations Code, and also under pertinent provisions of federal law, when it concluded that it had subject-matter jurisdiction over the dissolution proceeding. We conclude, however, that the Trial Court indeed did have subject-matter jurisdiction under both bodies of law.

A. Subject Matter Jurisdiction under the Domestic Relations Code.

The Domestic Relations Code conditions the Tribal Court's exercise of jurisdiction over the subject-matter of a divorce on a residency requirement:

> The Tribal Court shall have jurisdiction over dissolution of marriage proceedings if either the petitioner or respondent in an action for dissolution has resided on the Shakopee Mdewakanton Sioux Community Reservation or on Tribally owned lands, whether in

> trust or fee status, for at least (90) ninety days prior to commencing any action for dissolution.

SMSC Domestic Relations Code, Ch. II, § 1 (2017).

Hence, under the Domestic Relations Code, subject matter jurisdiction over a proceeding seeking the dissolution of a marriage is predicated on establishing that either the petitioner *or* the respondent resided on the Community's Reservation for at least 90 days prior to the petition for dissolution being filed. Under our case law, the Trial Court has discretion with respect to the manner it resolves factual disputes bearing on residence, and may decide the matter " 'based solely on the papers or by a proceeding at which evidence is heard.' " *Thomas v. Lightfoot,* 6 Shak. T.C. 61, 80 (Dec. 23, 2013) (quoting *Cutco Indus. v. Naughton,* 806 F.2d 361, 363 (2d Cir. 1986)).

Essential here is the distinction between residence and domicile: residency requirements may be satisfied under Community law "when a party regularly spent time on the Shakopee Reservation, availed herself or himself to the Community's services, and maintains personal property in a home on the Shakopee Reservation." *Id.* at 86. "A person 'can reside in one place but be domiciled in another.' " *Id.* at 80 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989)). A domicile, on the other hand, is "a person's permanent, established home, as distinguished from a temporary, although actual, place of residence." *Id.* Hence, "[a] person may have more than one residence, but can have only one domicile." *Id.* (citation omitted).

Consistent with these principles, the Trial Court in its November 17, 2017 Order noted that the "use of multiple residencies does not preclude this Court from having jurisdiction of a marriage dissolution proceeding under the Domestic Relations Code." Nguyen App. at 73.

The Trial Court cited several facts in the record supporting Gustafson's residency on the Community's Reservation during the 90 days that preceded her filing of the dissolution action. In an affidavit accompanying her opposition to Nguyen's motion to dismiss, Gustafson stated that she has maintained a home and legal address on the Community's Reservation for her entire adult life, as many other Community members do. Appendix to Appellee's Brief at 5-6, *Nguyen v. Gustafson*, No. 045-19 (hereinafter "Gustafson App."). She has "always consider[ed] the Reservation to be [her] primary residence, both for cultural and legal reasons." *Id.* at 2. Both Gustafson and her daughter "are members of this Community and it is essential to who [they] are that [they] maintain residential and physical contacts with this Community and its reservation lands, which," Gustafson said, "we have always done." *Id.* at 10. As to her legal address, Gustafson averred, "My tax returns used my reservation address as my legal address, as do my driver's license and passport." *Id.* at 9. She also noted that, "[s]everal of [her and Nguyen's] cars remain licensed and registered in Minnesota, even after [she and Nguyen] begun spending

more time at [their] homes in California; in fact, the truck that is [Nguyen's] primary vehicle remains registered to me at my parents' address on the reservation." *Id.* at 11.

These statements should be weighed against the evidence provided to the Trial Court by Nguyen, which was scant and generalized at best. He presented no evidence to refute the specific averments in Gustafson's affidavit regarding her legal address and her residence with family members on the Reservation. Nguyen App. at 76. Instead, he made a general denial that Gustafson had met the Code's residency requirement in his Answer, *id.*, and in the Affidavit which accompanied his motion to dismiss he simply stated that neither he nor Gustafson has "maintained or owned a residence on Community property." *Id.* at 47.

In considering these submissions, the Trial Court correctly concluded that the residency requirement of the Domestic Relations Code "does not require that residency be established solely by proof that one owned or maintained a residence", and that "[a] person may reside on the Reservation by living with other family members, which [Gustafson] avers that she has done." *Id.* at 76. It bears noting that the record contains additional specific evidence supporting the legal conclusion that Gustafson satisfied the residency requirement, beyond that expressly relied on by the Trial Court. In her Petition for Dissolution, Gustafson stated that at the time of filing her Petition, her mailing address was 3879 Eagle Creek Circle in Prior Lake and that her legal address for at least 90 days prior to petitioning was 2711 Dakota Trail in Prior Lake, which is her parents' home. *Id.* at 41-42. Each of these addresses is located on the Community's Reservation. *Id.*

The Trial Court considered each of the statements in Gustafson's affidavit in concluding that Gustafson had resided on the Reservation for at least 90 days prior to her petitioning for dissolution, and its findings of fact are not clearly erroneous, particularly in light of Nguyen's failure to meaningfully contest them. We, therefore, affirm the Trial Court's conclusion that under the Domestic Relations Code it had subject-matter jurisdiction over the dissolution proceeding.

B. Subject-Matter Jurisdiction under Federal Law.

The core of Nguyen's subject-matter jurisdiction challenge under federal law relates to his contention that the Trial Court had no jurisdiction over *him* (a non-Indian). He argues that neither of the exceptions that are set forth in *Montana v. United States*, 450 U.S. 544 (1981), relating to the jurisdiction of tribal courts over non-Indians, are satisfied in this proceeding, and therefore that the Trial Court could not exercise jurisdiction over any aspect of the parties' marriage, or their child's custody, or their property. As we discuss below, we disagree with Nguyen's contention that neither *Montana* exception is satisfied here. But in our view, the jurisdiction that was exercised by the Trial Court both in dissolving the parties' marriage and in deciding issues relating to the parties' child was not contingent on its exercising personal jurisdiction over Nguyen. We conclude that the marriage dissolution was a proper

exercise of the Trial Court's *in rem* jurisdiction and that its orders with respect to custody and parenting time of the parties' child were made pursuant to the Community's inherent jurisdiction over the child, who is a ward of the Tribal Court. *See* Nguyen App. at 13, 22, 24, 27.

With respect to *in rem* jurisdiction over the marriage, we join the many jurisdictions which hold that insofar as a dissolution or annulment affects marital status only, the action is one *in rem*. *See, e.g.*, *Roberge v. Roberge*, 188 B.R. 366, 367 (E.D. Va. 1995); *Patel v. Patel*, 380 S.W.3d 625, 628 (Mo. Ct. App. 2012. "It is the marriage status which constitutes the res, making a divorce proceeding one in rem, and not an action in personam." *Johnston v. Johnston*, 74 F.2d 774, 775 (D.C. Cir. 1934). In these circumstances, "[p]ersonal jurisdiction over the respondent is not . . . required in order to" change the status of the marriage through annulment or dissolution. *Shahani v. Said*, No. 13-08-00438-CV, 2009 WL 1693066, at *2 (Tex. Ct. App. June 18, 2009); *see Williams v. North Carolina*, 317 U.S. 287, 297–99 (1942) (holding that states may change the marital status of a petitioning spouse even though they do not have personal jurisdiction over the absent respondent spouse).

We acknowledge that the dissolution of a marriage is not always simply a change in marital status. It often involves " 'an amalgam of contractual right and status.' " *In re Marriage of Berry,* 155 S.W.3d 838, 840 (Mo. App. 2005) (quoting *Ferrari v. Ferrari,* 585 S.W.2d 546, 547 (Mo. App. 1979)). This is recognized by Chapter 2 of the Community's Domestic Relations Code, which authorizes the Community Court to issue a decree of dissolution in addition to orders governing the division of property upon dissolution. *See* SMSC Domestic Relations Code, Ch. 2, §§ 2, 5. "Insofar as the proceeding affects certain contractual aspects of the marriage . . . the action is *in personam* and requires personal service or presence of the other spouse for valid judgment." *Patel*, 380 S.W.3d 625 at 628 (internal quotation marks omitted). "Lack of personal jurisdiction precludes consideration of orders pertaining to maintenance, child support, attorney's fees, and division of property (not within the State)." *Id.* (citing *Thompson v. Thompson,* 657 S.W.2d 629, 631 (Mo. 1983) (en banc)); *see Roberge*, 188 B.R. at 367 (failure to establish personal jurisdiction over a spouse in a dissolution proceeding precludes the court from affecting "equitable distribution of the marital estate"). Therefore, when a court exercises jurisdiction over aspects of a dissolution proceeding that affect contractual aspects of the marital relationship, the court must be exercising jurisdiction over both of the individuals in the marital relationship.

Here, the Trial Court's Final Judgment includes discrete orders on various topics, some of which, in our view did require it to have personal jurisdiction over Nguyen. Specifically, we think the Trial Court's distribution of the marital estate precludes a conclusion that exercise of jurisdiction over Nguyen was unnecessary *in all respects*. *See Patel*, 380 S.W.3d 625 at 628. That equitable distribution was principally entered pursuant to a stipulated agreement between the parties, but the Trial Court's Final Judgment includes detailed instructions as to division of real property, household goods and furnishings,

retirement interests, life insurance, cash accounts and investments, automobiles, and debts. Nguyen App. at 16-20. This we believe is an adjudication of contractual marital rights which required *in personam* jurisdiction over both parties to the marriage which, as we discuss below, we believe the Trial Court possessed. But the dissolution of the marriage itself, which was entered by order on May 21, 2018, bifurcated from the other issues in the dissolution proceeding, Nguyen App. at 9, and the Trial Court's re-articulation of that decision in its Final Judgment, *id.* at 22, was an exercise of *in rem* jurisdiction over the marriage, and not over Nguyen, as a matter of Community law. *See North Carolina*, 317 U.S. at 297-99.

Similarly, the Trial Court's exercise of jurisdiction over the custody and welfare of the parties' child, who the Trial Court noted "is an enrolled member of the [Community]," who "resides equal periods of time with each parent" and "remains a ward of the court", Nguyen App. at 12, did not require the exercise of personal jurisdiction over Nguyen. It was squarely within the contemplation of the Indian Child Welfare Act, 25 U.S.C. 1911(a) (ICWA), which provides that "Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child". 25 U.S.C. § 1911(a). This exclusive-jurisdiction provision in ICWA recognizes inherent tribal jurisdiction in a particular context, but it does not limit tribes' inherent jurisdiction outside of the specific "child custody proceedings" governed by ICWA. *Holyfield*, 490 U.S. at 42 (Congress did not delegate jurisdiction through ICWA's exclusive-jurisdiction provision, but "*confirmed* that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States" (emphasis added)). Here, the Trial Court's adjudication of custody and parenting time in the Final Judgment was rendered in the context of a dissolution proceeding, but it cannot be separated from the Community Courts' ongoing jurisdiction over the child, given her history before the Children's Court and the continuing duty to ensure her protection as a ward. The award of custody and parenting time stems from the Trial Court's inherent jurisdiction to protect its minor wards, even in proceedings outside the scope of ICWA, and that jurisdiction is not dependent on personal jurisdiction over Nguyen. *See also Garcia v. Gutierrez*, 217 P.3d 591, 607 (N.M. 2009) ("Other states have also recognized concurrent state-tribal jurisdiction involving child-custody disputes where at least one of the parties does not reside on reservation land").

C. Personal Jurisdiction.

Nguyen argues here that "extensive contacts" with the Community would be required in order for the Trial Court to properly have maintained personal jurisdiction over him. The Trial Court disagreed, citing *International Shoe v. Washington*, 326 U.S. 310 (1945), and holding that what was required in the proceedings before it was not "extensive contacts" but instead "minimum contacts." It stated:

> In his motion, Respondent asserts lack of personal jurisdiction because "he has not had extensive contacts with the Shakopee Mdewakanton Sioux Community." The law, as set

> out in *International Shoe* and applied by this Court does not require "extensive contacts" but "minimum contacts." Respondent's argument, that there needs to be proof of "continuous and systematic" contacts with the Community, *see* Respondent's Reply at 3, might apply only if the Petitioner was seeking to establish that this Court had "general" personal jurisdiction over him. *See Toomey v. Dahl*, 63 F. Supp. 3d 982, 989–90 (D. Minn. 2014).

Nguyen App. at 79-80. The Trial Court then concluded that, because the record included sufficient evidence of minimum contacts to establish specific personal jurisdiction, there was no need to assess whether the court maintained general jurisdiction over Nguyen. *Id.*

We concur. Nguyen stresses that he is not a Community member, that he and Gustafson were not married in the Community, that they never lived together on Community lands while married, and that his participation in other Community Court hearings "were not directly related to issues of dissolution." *Id.* But, as the Trial Court noted, the minimum contacts necessary to establish personal jurisdiction do not require physical presence or Community membership. *Id.* at 80. The minimum-contacts test specifically contemplates that personal jurisdiction can be established for non-residents of the forum jurisdiction through other actions. *Id.* (citing *Toomey v. Dahl*, 63 F. Supp. 3d 982 (D. Minn. 2014)); *see Walden v. Fiore*, 571 U.S. 277, 283 (2014) (stating that "a nonresident's physical presence within the territorial jurisdiction of the court is not required").

Under Community law, "the court may consider . . . whether the Respondent is alleged to have purposely availed himself of the benefits of the tribal community" in assessing minimum contacts, *Crooks-Bathel*, 6 Shak. T.C. at 6, and the Trial Court determined that Nguyen had purposely availed himself to the services and benefits of the Community in the course of his marriage to Gustafson and the dissolution proceeding. Nguyen App. at 80. The significant Community benefits Nguyen accessed by virtue of his marriage to Gustafson are by themselves sufficient to establish minimum contacts necessary under *International Shoe*. *See Crooks-Bathel*, 6 Shak. T.C. at 6. In the California Proceeding, Nguyen testified that he had relied on an on-reservation address for tax advantages, explaining that a truck, purchased for him by Gustafson, which he took with him to California, was registered to Gustafson at her Reservation address "to avoid sales tax." Nguyen App. at 81. (quoting Tr. of Cal. Proceeding, at 71-72 (July 27, 2017)). Nguyen was subsequently awarded that truck in the final divorce decree. *Id.* at 19. Also during his testimony in the California Proceeding, Nguyen testified that the per capita payments which Gustafson receives because of her Community membership were the principal source of funding during their marriage. *Id.* at 81-82. In response to a question about where he was employed, Nguyen testified that "I wasn't employed. My - - my wife makes plenty of money." *Id.* at 82 (quoting Tr.of Cal. Proceeding, at 59). In Nguyen's petition for dissolution filed in the Minnesota District Court for the

Fourth Judicial District, Nguyen stated that he and Gustafson are unemployed, described her per capita payments as the family's primary source of income, and affirmatively sought spousal support from her. *Id.* The Trial Court therefore correctly concluded that Nguyen "has availed himself of resources provided by the Community by benefitting from the per capita payments that the Community distributes to Community members from the Community's tribal resources." *Id.* And Nguyen apparently seeks to continue to purposely avail himself of the Community's financial benefits, since in that Minnesota District Court dissolution proceeding he asks for spousal maintenance from Gustafson, whose sole income, he acknowledges, derives from the per capita payments she receives from the Community. *Id.*

But Nguyen's contacts with the Community and its people and government and programs were not limited to benefits derived from the Community's resources. He participated in, and affirmatively supported, the Community Court's conservatorship proceedings for Gustafson's person and estate. *Id.* at 53. He participated in, and was present during, the Children's Court proceedings involving his child—proceedings that lasted seven months. *Id.* at 54–55. The Children's Court order dismissing those proceedings stated that both Gustafson and Nguyen had satisfied the conditions imposed by the Court -- working with a Community Child Welfare Officer and the Court-appointed Guardian *ad litem*. *Id.* at 54. The custody of the child who was the subject of that file was directly at issue before the Trial Court in this proceeding.

The record also makes it clear that Nguyen frequently was present, and occasionally resided on Community lands. In his Answer to Gustafson's petition for dissolution, he conceded that he entered the Reservation to visit Gustafson while she was staying with her father or their mutual friend (also a Community member). *Id.* at 48. During Gustafson's first Tribal Court dissolution proceeding the Court was provided with records from a Minnesota District Court criminal proceeding, which included an agreement to the terms of the dismissal of the criminal complaint against Nguyen, signed by him, declaring his address to be 2285 Redwing Drive in Shakopee, Minnesota, which is on the Community's Reservation. *Id.* at 81.

Nguyen's Answer to Gustafson's Petition for Dissolution also stated that for three years he was a caretaker for a disabled Community member who was domiciled on the Reservation and that he first met Gustafson in the course of his duties in caretaking for that Community member. *Id.* at 46.

The Community's strong interest in providing a forum for Gustafson's petition also supports personal jurisdiction over Nguyen. *See Downing v. Goldman Phipps, PLLC*, 764 F.3d 906, 912 (8th Cir. 2014) (weighing "the interests of the forum state in providing a forum for its residents" for purposes of assessing personal jurisdiction). The Community has a strong interest in "govern[ing] domestic relations of its members." *Crooks-Bathel*, 6 Shak. T.C. at 10. "Divorce, like marriage, is a concern not only to the immediate parties. Both the state and the tribe have interests to be protected." *Lightfoot*, 6 Shak. T.C. at

85 (citing *Jacobs v. Jacobs*, 405 N.W.2d 668, 672 (Wis. 1987)). In adopting its Domestic Relations Code, the Community expressed a clear purpose: "providing for the health, safety and welfare of members by preserving Tribal heritage and enabling Community members to use their own Tribal forum for the resolution for domestic relations issues." SMSC Domestic Relations Code, Introduction at 1 (2017). And the Community's interest in adjudicating a dissolution of a marriage involving a member is undoubtedly heightened where, as here, the proceeding will touch on custody and parenting time for a minor who is a ward of the Community Court.

In short, the nature, quality, and quantity of Nguyen's contacts with the Community are substantial and are sufficient to support personal jurisdiction over him in these proceedings.

D. The Community's Inherent Authority to Regulate Domestic Relations.

Nguyen argues that neither of the exceptions which, under *Montana v. United States*, 450 U.S. 544 (1981), permit an Indian tribal government to exercise jurisdiction over non-Indians, operates in the context of this litigation. But in our view, the Trial Court's decision was an exercise of inherent, retained jurisdiction to regulate the domestic affairs of its members that did not depend on the satisfaction of either of those exceptions, even though the judgment affected Nguyen.

It is well-settled that "Indian tribes retain those fundamental attributes of sovereignty . . . which have not been divested by Congress or by necessary implication . . . ." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982). This retained power does not depend on a grant of authority from the federal government; rather, it exists by virtue of tribes being "self-governing sovereign political communities" that exercised such powers prior to the founding of the United States. *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978). As a result, "an Indian tribe need not wait for an affirmative grant of authority from Congress in order to exercise dominion over its members." *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 556 (9th Cir. 1991). Accordingly, "when a question of tribal power arises, the relevant inquiry is whether any limitation exists to *prevent* the tribe from acting, not whether any authority exists to *permit* the tribe to act." *Id.* (internal quotation marks and citation omitted) (emphasis in original).

The "power of a tribe to regulate the domestic relations of its members" is "[a]mong those powers retained." *Conroy v. Conroy*, 575 F.2d 175, 181-82 (8th Cir. 1978); *see Montana*, 450 U.S. at 564. Indeed, "the Supreme Court has articulated a core set of sovereign powers that remain intact even though Indian nations are [domestic dependent sovereigns] under federal law; in particular, internal functions involving . . . domestic affairs lie within a tribe's retained inherent sovereign powers." *John v. Baker*, 982 P.2d 738, 751 (Alaska 1999) (citing *Wheeler*, 435 U.S. at 326; *Montana*, 450 U.S. at 564). The regulation of domestic relations is among the issues "inherently reserved for resolution through purely tribal mechanisms due to the privilege and responsibility of sovereigns to regulate their own, purely internal

affairs (and due to the concomitant impropriety of the federal courts dictating answers to such questions)." *Miccosukee Tribe of Indians of Fla. v. Cypress*, 814 F.3d 1202, 1208 (11th Cir. 2015).

The Trial Court issued its Order on Jurisdiction and Final Judgment pursuant to the Community's Domestic Relations Code, which provides that the Community has "the inherent sovereign power to protect and govern the domestic relations of its members and shall have original jurisdiction over such matters and matters affecting the health, safety, and welfare of the Community." SMSC Domestic Relations Code, Authority and Jurisdiction (2017). Gustafson initiated the instant dissolution action based on her right, as a Community member residing on the Reservation, to utilize the Community Court to seek dissolution of her marriage on proper grounds. *See* SMSC Domestic Relations Code, Chapter II, § 3 (2017); *Fisher v. Dist. Ct.*, 424 U.S. 382, 388-89 (1976) (affirming the principle that tribal court subject-matter jurisdiction over tribal members is first and foremost a matter of internal tribal law). In our view, no source of federal law divests the Community of its authority to exercise jurisdiction over the marital status of a Community member who seeks adjudication of that status. *See Merrion*, 455 U.S. at 146.

Although Nguyen argues that several aspects of the dissolution touched on off-Reservation conduct, the internal nature of the Tribal Court's Final Judgment is evident in several respects. *See Baker*, 982 P.2d at 751. First, Gustafson is not only a member of the Community, but was also a Reservation resident at the time her Petition was filed, as required by the Domestic Relations Code, such that the regulation of her domestic affairs is an "internal function" for which the Community's inherent jurisdiction has not been divested. Second, the marital relationship that is the subject of the dissolution proceeding produced a minor child, [redacted] for which the Trial Court was required to make determinations of custody as part of the dissolution. *See* SMSC Domestic Relations Code, Chapter III, § 2.a. (2017) ("The Tribal Court shall determine custody, including physical custody and decisionmaking responsibilities in accordance with the best interests of the child."). And because [redacted] is a ward of the Community Court over whom the Community exercises continuing protective jurisdiction, Trial Court's adjudication of custody and parenting time was a particularly internal function. *See* Nguyen App. at 12; 25 U.S.C. § 1911(a). Finally, as noted by the Trial Court, per capita payments that the Community provides to its members constitutes a "significant substantive issue" in decisions regarding division of marital and non-marital property in this case because both parties acknowledge that Gustafson's per capita distributions and the fruits therefrom comprise most, if not all, of the assets addressed in the Final Judgment. Nguyen App. at 65. This further confirms the internal nature of the proceeding at issue. *See In re Barth*, 485 B.R. 919, 922 (Bankr. D. Minn. 2013) (explaining that a federally recognized Indian tribe has the authority to define property rights as to per capita payments of tribal funds because that property is "within its jurisdiction and . . . subject to its law").

Tribal courts maintain jurisdiction over matters "involving nonmembers" when, as here, "the civil actions involve essential self-governance matters . . . where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination." *John*, 982 P.2d at 756 (internal quotation marks and footnotes omitted). Thus, even when "the rights of [a] non-member . . . are affected," the tribe maintains jurisdiction where, as here, that jurisdiction is focused on a tribal member. *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008). The divestiture of tribal jurisdiction over non-members is limited to *active* exercises of jurisdiction or authority over non-members—not to every instance in which a Tribal Court's adjudication merely *affects* a non-member. *See Montana*, 540.U.S. at 565.

This principle is borne out in the context of tribal child protection matters. Through 25 U.S.C. § 1911(a), Congress "confirmed" Indian tribes' retained, inherent sovereignty over child custody proceedings. *Holyfield*, 490 U.S. at 42. When Indian tribes exercise this jurisdiction (as the Trial Court did in part here by making determinations of custody for a ward of the court), they do so pursuant to inherent authority over domestic affairs notwithstanding non-Indian parents being affected or involved. *See Simmonds v. Parks*, 329 P.3d 995, 1021–22 (Alaska 2014) (explaining that the state could not cite "a single federal or state case in which the *Montana* framework has been applied" to suggest a tribal court lacks jurisdiction "in an ICWA-defined child custody proceeding because one of the parents was a non-tribal member"); *Atwood*, 513 F.3d at 948 (concluding that a tribal court had colorable jurisdiction over a custody dispute involving an Indian child even though the father was a non-Indian); *Kaltag Tribal Council v. Jackson*, No. 3:06-cv-211 TMB, 2008 WL 9434481, at *6 (D. Alaska Feb. 22, 2008) (noting that, in the context of tribal court jurisdiction over ICWA proceedings, "it is the membership of the child that is controlling, not the membership of the individual parents"), *aff'd* 344 Fed. App'x 324 (9th Cir. 2009); *Johnson v. Jones*, No. 605CV1256ORL22KRS, 2005 WL 8159765, at *2 (M.D. Fla. Nov. 3, 2005) (holding that the Prairie Island Indian Community Tribal Court had jurisdiction over a child custody proceeding involving a non-Indian mother and Indian children domiciled off-reservation).

In sum, we believe that the Trial Court exercised the Community's inherent, retained jurisdiction to regulate the domestic affairs of its members in issuing the Final Judgment, and therefore that its jurisdiction was not predicated on satisfaction of either of the *Montana* exceptions.

E. *Montana v. United States.*

In *Montana*, the Supreme Court held that, although tribes' sovereign powers generally do not extend to the activities of nonmembers, tribes retain regulatory and adjudicatory jurisdiction over: (1) "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" and (2) the "conduct of non-Indians on fee

lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 540 U.S. at 565–66.

Under the first of these exceptions, a tribal court has jurisdiction over a nonmember where the jurisdiction has a nexus to a consensual relationship between the nonmember and the tribe, where the regulation " 'stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.' " *Kodiak Oil & Gas, Inc. v. Burr*, 932 F.3d 1125, 1138 (9th Cir. 2019) (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 336 (2008)). Here, Nguyen's consensual relationship with the Community within the meaning of *Montana* arises from his voluntary decision to marry a Community member, his voluntary receipt of Community benefits by virtue of his marriage, his relationship as father to a minor Community member, and his participation in his wife's conservatorship proceedings and his daughter's child welfare proceedings.

Under the second *Montana* exception, tribes may exercise jurisdiction over the conduct of non-Indians within their reservations "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-66. Here, in our view that exception is satisfied because the dissolution proceeding necessarily adjudicate issues pertaining to the custody, care, and financial support of the parties' enrolled minor child. We agree with the Alaska Supreme Court which said, in *State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255 (Alaska 2016):

> "[W]e have no difficulty holding that the adjudication of child support obligations owed to tribal children falls within the second *Montana* exception. Congress has explicitly found 'that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.' And as the superior court correctly recognized, '[e]nsuring that tribal children are supported by their noncustodial parents may be the same thing as ensuring that those children are fed, clothed, and sheltered. The future of a tribe—like that of any society—requires no less.' In light of federal precedent that recognizes that serious damage to territorial resources fits within the second *Montana* exception when a tribe's inherent sovereignty is based on territory, the serious potential for damage to the next generation of tribal members posed by a tribe's inability to administer parental financial support of member or member-eligible children brings the power to set nonmember parents' child support obligations within the retained powers of membership-based inherent tribal sovereignty."

Id. at 273. While the Trial Court here ultimately reserved any award of child support, Nguyen App. 15, the adjudication of custody, care, and parenting time over the child as a ward of the Community Court seems to us to fall squarely within *Montana*'s second exception for the same reasons described in *Haida Indian Tribes of Alaska*. The direct relationship between a tribe's protection of Indian children and the tribe's political integrity, health, and welfare is undeniable. The House of Representatives Report that

accompanied the passage of ICWA concluded that "there can be no greater threat to 'essential tribal relations' and no greater infringement on the right of the . . . tribe to govern themselves than to interfere with tribal control over the custody of their children." H.R. Rep. No. 1386 (1978), *reprinted at* 1978 U.S.C.C.A.N. 7530, 7537 (*quoting Wakefield v. Little Light,* 347 A.2d 228 (Md. App. 1975)). The Trial Court's jurisdiction over this proceeding—one that involves issues of custody and care of a minor child over whom the Community Court maintains exclusive jurisdiction—is directly tied to preserving the political integrity, the economic security, and the health and welfare of the Community. For these reasons, we conclude that the Trial Court was correct in holding that if *Montana v. United States* is applicable here, then each of its two exceptions permitted the Trial Court's exercise of jurisdiction.

F. Parenting Time and the Tet Holiday.

In its February 13, 2019 Partial Judgment and Decree, the Trial Court denied Nguyen's request for parenting time every year for the Vietnamese New Year (Tet). Nguyen objected to that aspect of the Partial Judgment and Decree, asserting that he "should receive time for the Vietnamese New Year (Tet) every year, which would offset [Gustafson] receiving parenting time for the SMSC Pow Wow every year." Nguyen App. 129. In response, the Trial Court in its Final Judgment concluded that Nguyen had "fail[ed] to inform the court through evidence of the importance of celebrating the Vietnamese New Year" and that after consideration of the matter, the Court "found it fair and, in the child's best interest to alternate years regarding this schedule, objection denied." *Id.* at 5. But in his appeal, Nguyen correctly points out that Gustafson also did not present evidence supporting her contention that the Community's pow-wow had unique importance that made it appropriate for the parties' child to be in attendance each year, and that his claim with respect to Tet should stand on the same footing as her claim with respect to the annual pow-wow. In this regard, we think Nguyen is correct.

"District courts have broad discretion on matters of custody and parenting time." *Hansen v. Todnem*, 908 N.W.2d 592, 596 (Minn. 2018). Review of decisions on parenting time is typically "limited to whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002). An abuse of discretion occurs "if a relevant factor that should have been given significant weight is not considered, if an irrelevant or improper factor is considered and given significant weight, or if a court commits a clear error of judgment in the course of weighing proper factors." *Aaron v. Target Corp.,* 357 F.3d 768, 774 (8th Cir. 2004).Here, we think that the Trial Court either should have required Gustafson to provide evidence supporting the annual importance of the Community's pow-wow for the parties' child, or should have accepted Nguyen's contention that the Tet holiday is of particular importance to him and to his child's culture.

We, therefore, reverse the Trial Court's decision on parenting time for the Tet holiday and remand this matter to the Trial Court for appropriate action with respect to this issue.

Conclusion.

For the foregoing reasons, we affirm the Trial Court's decision with respect to its jurisdiction in this matter, reverse the Trial Court's decision on parenting time for the Tet holiday, and remand the file to the Trial Court for reconsideration of the parenting time schedule that it ordered.

Dated: January 23, 2020

Chief Judge John E. Jacobson

Judge Perry Mason Moore

Judge Jill E. Tompkins

COURT OF APPEALS OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION **STATE OF MINNESOTA**

James Van Nguyen,

Appellant,

vs.

File No. Ct. App. 046-19

Amanda Gustafson,

Respondent.

ORDER

On Friday, February 7, 2020, counsel for the Appellant moved to withdraw from his representation in this matter. The timing of the motion is troubling. Appellant's initial memorandum is due on February 24, 2020. No reason has been given for counsel's motion, no new counsel has substituted in, and no representation has been made that the Appellant has consented to the motion. The Court of Appeals therefore will not consider counsel's motion until and unless it is satisfied that the Appellant will not be prejudiced if the motion is granted.

THEREFORE, IT IS ORDERED THAT absent further filings as aforesaid the Court of Appeals will not permit Appellant's counsel to withdraw from this matter.

February 10, 2020 *Per Curiam*

Filed on June 12, 2020

COURT OF APPEALS

OF THE

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION STATE OF MINNESOTA

Daniel Edwin Jones,

Appellant,

vs.

File No. CT. APP. 491-02
CTAPP050-20

ORDER DISMISSING APPEAL

Michelle Marie Steinhoff,

Respondent.

On May 28, 2020, Jones filed a Notice of Appeal of Judge Jacobson's Order dated May 4, 2020. Jones requests that this Court review the Trial Court's statement on emancipation, arguing that he no longer is required to make child-support payments because the minor turned 18 and is therefore emancipated. While Appellant contends that Judge Jacobson's Order "is believed and understood to be a final determination by the trial court," he acknowledges that trial-court proceedings are ongoing.[1]

Rule 31(a) of our Rules of Civil Procedure provides that "[i]n any action before the Tribal Court where a three-Judge panel has not heard the matter, 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." Appealability of federal district-court orders is governed by 28 U.S.C. §§ 1291 and 1292. Section 191 permits appeals from "all final decisions of the district

[1] Jones Notice of Appeal at 2.

courts," and Section 1292 permits appeal of interlocutory orders in certain limited circumstances not applicable here.

As Jones acknowledges, Judge Jacobson's decision is not final. In paragraph 3 of the Order, Judge Jacobson states that he is taking Steinhoff's request to direct Jones to continue making child-support payments under advisement. Jones contends that interlocutory appeal is warranted because

> (1) the outcome of the case would be conclusively determined by the issue appealed, (2) the matter appealed is collateral to the merits; (3) and the matter would be effectively unreviewable if immediate appeal were not allowed.[2]

Although Jones cites no authority for this test, we have used it before in *Little Six Inc. v. Prescott*, 1 Shak. A.C. 77, 78 (Sept. 9, 1997). Known as the collateral-order doctrine, it permits appeal of orders conclusively deciding issues separate from the merits that would be unreviewable after final judgment. Here, however, Judge Jacobson is still considering the child-support issue, so Jones cannot meet even the first of the three criteria for appeal of a collateral order.

ORDER

The Notice of Appeal is DISMISSED as the Order appealed is not appealable under Rule 31(a) of this Court's Rules of Civil Procedure.

Date: June 12, 2020 *Per Curiam.*

[2] Jones Notice of Appeal at 2.

COURT OF APPEALS
OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION STATE OF MINNESOTA

Great Northern Insurance Company,

Appellant,

Court File No. Ct. App. 048-20

vs.

Michael Hamilton, in his capacity as Conservator for the Estate of Amanda Brewer-Ross.

Order Dismissing Appeal

On April 17, 2020, Great Northern Insurance Company appealed from a Tribal Court order denying its motion to dismiss based on "duplicity, and. . . . lack of personal and subject-matter jurisdiction." Because Great Northern's notice did not address the appealability of the order, we asked the parties to brief that threshold issue. We have considered the parties' arguments and now dismiss the appeal.

Analysis

"In any action before the Tribal Court where a three-Judge panel has not heard the matter, 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."

SMSC R. Civ. P. 31(a). Appealability of federal district court orders is governed by 28 U.S.C. §§ 1291 and 1292.

Under Section 1291, appellate courts "have jurisdiction of appeals from all final decisions of the district courts." Generally, this requires "a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988) (quotation omitted).

Here, Great Northern recognizes that the Tribal Court order has not ended the litigation and that "the case has not been determined on its merits." App. Memo. at 2. Instead, Great Northern argues that the Tribal Court order falls within a "'narrow exception to the normal application of the final judgment rule'" for orders that determine collateral claims of right. *Id.* (quoting *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989)). This so-called "collateral order doctrine" applies to "orders which (1) conclusively determine disputed questions, (2) are separate from the merits of the action, and (3) . . . would be effectively unreviewable on appeal from a final judgment." *Little Six Inc. v. Prescott*, 1 Shak. A.C. 77, 78 (Sept. 9, 1997). Though the parties dispute the presence of all three conditions, we choose to dispose of the matter based on the first and third.

Turning to the first condition, Great Northern appears to argue that the Tribal Court order conclusively determines the question of its jurisdiction and "duplicity" of the action. App. Memo. at 3. We disagree.

The Tribal Court decided that Hamilton had made a *prima facie* case that subject-matter jurisdiction existed under Community law and the consensual-relationship exception under *Montana v. United States*, 450 U.S. 544, 565-66 (1981), and that personal jurisdiction existed under Community law and the minimum-contacts test under In *re the Marriage of Nguyen and Gustafson*, ___ Shak. A.C. ___, No. Ct. App. 045-19, Slip Op. at 10-12 (Jan. 21, 2020), and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Order at 2, 17, 22, 33-35, 47.[1] In order for the Tribal Court to reach its decision, it analyzed the following jurisdiction limits:

- The Tribal Court has "original jurisdiction over all civil causes of action arising on lands subject to the jurisdiction of the . . . Community." SMSC Resolution 11-14-95-003, § I.
- "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationship with the tribe or its members, through commercial dealing, contract, leases, or other arrangements." *Montana*, 450 U.S. at 565-66; *see Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997) (applying *Montana* in the context of tribal-court jurisdiction).
- The Tribal Court has personal jurisdiction over "all persons whose actions involve or affect the . . . Community or its members, or where the person in question enters into consensual relationships with the Community or its

[1] The Tribal Court declined to address Hamilton's argument below that *Montana* does not apply because of the land status at issue of that *Montana*'s self-government exception applies. Order at 18, 24. We do not opine on those issues here.

members through commercial dealings, contract, leases, or other arrangements." SMSC Resolution 11-14-95-003, § II.

- The Tribal Court has personal jurisdiction over persons who "have certain minimum contacts with [the Community] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co.*, 326 U.S. at 316 (quotation omitted).

As Hamilton intimates, these are fact-intensive inquiries. *See* Resp. Memo. at 4-5. And further proceedings may bring the Tribal Court to a different conclusion. A decision to deny a motion to dismiss does not preclude the Tribal Court from revisiting the question of its jurisdiction in a motion for summary judgment—a motion that will require a greater showing by Hamilton. *See Wilderness Society v. Griles*, 824 F.2d 4, 16 (D.C. Cir. 1987). Similarly, as the case proceeds, Great Northern can reassert its concerns regarding the status of the parallel federal-court action. Thus, the Tribal Court order is, by its nature, a tentative determination of the question of jurisdiction and "duplicity." *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

Turning to the third condition, Great Northern argues that "[i]f the case proceeds to a conclusion on the merits, the jurisdiction issue *effectively* becomes unreviewable because the time, expense and efforts of the court and both parties will have already been incurred." App. Memo. at 3 (emphasis in original). We are unpersuaded by this argument. Great Northern does not contend that it will be unable to seek review of its arguments on appeal from a final judgment, nor is there "reason to suspect that [Great Northern] will be unable to obtain effective review." *Petroleos Mexicanos Refinancion v.*

M/T King A (EX-TBILISI), 377 F.3d 329, 334 (3d Cir. 2004). "Cases abound where a victorious plaintiff's judgment evaporates on appeal after final judgment when the court of appeals holds that the district court lacked . . . jurisdiction." *Id.* And although we agree that continued proceedings will result in increased time and expense for the parties and the Tribal Court, an "argument that the court's order may be burdensome in 'ways that are only imperfectly reparable by appellate reversal of a final . . . judgment . . . has never sufficed' to satisfy the third condition" of the collateral-order doctrine. *Nice v. L-3 Communications Vertex Aerospace LLC*, 885 F.3d 1308, 1312 (11th Cir. 2018) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009)). It will not suffice here.

Because the first and third conditions of the collateral-order doctrine are not met in this case, we hold that the Tribal Court order may not be treated as a final decision under Rule 31(a).

Finally, the Company notes that interlocutory decisions—such as the Tribal Court order—are immediately appealable under Section 1292(b) if "(1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) certification will materially advance the ultimate termination of the litigation." App. Memo. at 3 (quoting *White v. Nix*, 43 F.3d 374, 377 (8th Cir. 1994)) (internal quotations omitted). While the Company correctly recites the test set out by Section 1292(b) and *White*, it does not explain how the Tribal Court order satisfies that

test. Like other courts, "[w]hen a party includes no developed argumentation on a point, as is the case here, we treat the argument as waived." *Anderson v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004); *see also United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). Thus, we decline to consider this argument.

Order

For the foregoing reasons, the appeal is dismissed and the case is remanded to the Tribal Court for further proceedings.

Dated June 15, 2020 *Per Curiam*

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

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[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

COURT OF APPEALS OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION **STATE OF MINNESOTA**

James Van Nguyen,

Appellant.

vs.

File No. Ct. App. 049-20

Amanda Gustafson,

Appellee.

OPINION AND ORDER

PER CURIAM

On May 4, 2020, the Appellant, James Van Nguyen, appealed portions of the Order that the Tribal Court of the Shakopee Mdewakanton Sioux Community ("Trial Court") entered on April 3, 2020, in Court File No. 867-1 ("the April 3 Order") setting forth the parties' vacation parenting times, clarifying the dates for the Tet New Year of 2021, adopting an exchange location, and requiring the Appellant to provide the physical address of his home to the Appellee, Amanda Gustafson, and the Trial Court. Appellant appeals from the portions of the Order setting the vacation schedule and requiring him to disclose his physical address.

For the reasons set forth below, we reverse and remand.

I. PROCEDURAL HISTORY

This matter was initiated by the Appellee's petition for dissolution of the parties' marriage and determination of custody of the parties' minor child filed on July 20, 2017. In this fifth appeal to us, the Appellant seeks resolution of two issues: (1) whether the Trial Court erred in awarding to the Appellant as one of his vacation weeks a week that was already awarded to him as a regular visitation week, and (2) whether the Trial Court abused its discretion in ordering the Appellant, a participant in the State Minnesota Data Protection for Victims of Violence program, to disclose the address of the physical location of his home.

The majority of the history of the prior litigation between the parties before the Shakopee Mdewakanton Sioux Courts and in other jurisdictions is detailed in our opinion in *James Van Nguyen v. Amanda Gustafson,* File No. Ct. App. 045-19 (Jan. 21, 2020). The limited procedural record pertinent to the present appeal is as follows. On May 3, 2019, the Trial Court issued its *Findings of Fact, Conclusions of Law, Order for Final Judgment, Judgment and Decree* ("May 3rd Judgment"). A regular visitation schedule rotating parenting time between the parties on a four days on four days off schedule, and a holiday and school release schedule was ordered. The vacation schedule was to be determined as follows: "Each party is granted three non-consecutive weeks of vacation time with the minor child, which shall supersede the four-day rotation schedule, and which shall not disrupt the . . . 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."

Following the issuance of the May 3rd Judgment, the parties continued to have disagreements on a range of issues. The details of the conflicts and proceedings that followed the judgment are set forth in this Court's recent opinion, *James Van Nguyen v. Amanda Gustafson*, File No. Ct. App. 047-20 (July 10, 2020). On October 21, 2019, the Appellee moved the Trial Court to modify

its earlier judgment to grant her sole legal and physical custody of the minor child and to limit the Appellant's visitation to alternating weekends, vacations, holidays, and extended time during the summer months. After carefully considering the relevant factors detailed in the Shakopee Mdewakanton Sioux (Dakota) Community Domestic Relations Code, Chapter III, Section 2 a., the Trial Court found that it was in the minor's child best interest that the Appellee be the child's sole custodian. Memorandum Opinion and Order, Court File 867-17, Jan. 6, 2020, Buffalo, J. at 24. Consequently, the Trial Court modified the provisions of the May 3rd Judgment concerning placement and visitation. In its Memorandum Opinion and Order issued on January 6, 2020, the Trial Court adopted the following modifications, in pertinent part:

> **6. Petitioner's Motion Seeking to Modify Custody and Placement of the Parties' Minor Child.** The Petitioner's Motion (Docket #208) seeking to modify custody and placement of the parties' minor child and to provide reasonable visitation rights is granted as follows.
>
> **a. Custody and Placement.** The Petitioner Amanda Gail Gustafson shall have sole legal custody and sole physical custody of the parties' minor child . . . Sole physical custody means that the minor child shall reside with the Petitioner at all times except when the Respondent may exercise visitation rights as provided in this order.
>
> . . .
>
> **e. Parenting Time/Father's Visitation Rights.** Consistent with the Petitioner's sole legal custody and physical custody rights, the Petitioner shall have placement of the parties' minor child at all times not specifically awarded to the Respondent as visitation rights as provided in the following schedule:
>
> . . .
>
> **1) Every Other Weekend.** The Respondent shall have visitation every other weekend from no later that 5:00 p.m. on Friday until no later than 5:00 p.m. on Sunday. . . .

3) **Summer Break.** Starting the first Friday after the school year ends, the Respondent shall have visitation every third week during the summer from Friday at 5:30 p.m. until the following Friday at 5:30 p.m. . . .

4) **Extended Vacation Schedule.** Each party shall have three non-consecutive weeks of vacation time with the minor child, which shall supersede the alternating weekend visitation schedule but shall not disrupt the above holiday schedule. Said vacation time shall be selected and mutually agreed upon no later than April 1 of each year for the following 12 months until March 31 of the following year. . . .

. . .

6) **Logistics and Arrangements for Visitation.** Unless the parties agree in advance, all exchanges for visitation shall take place at a neutral site. . . .

Id. at 28-29.

Under the modification, the Appellant's summer break visitation commences on the Friday before the first week following the end of the school year, and thereafter occurs every three weeks.

II. VACATION TIME

The Appellee filed a motion seeking expedited review without a hearing on February 12, 2020, seeking an order sealing the court file records, prohibiting the Appellant from taking a fourth week of vacation and approving the third week of her vacation time for the year. The resulting Order issued on February 28, 2020, approved the Appellee's requested third week of vacation, reserved its ruling on the outstanding issues, and ordered that "The parties shall provide to the Court the dates for the 3 non-consecutive weeks of vacation by close of business on April 1, 2020." Order, Court File 867-17, Feb. 28, 2020, Buffalo, J. By email dated March 31, 2020, the Appellee's counsel wrote to the Court Clerk and set forth the three vacation weeks that the Appellee was requesting for the period from April 1, 2020 through March 31, 2021. A Declaration from the

Appellant was filed with the Trial Court in which he makes numerous vague and unclear requests for vacation weeks. In paragraph 3, he requests that he be allowed to exercise vacation time during both the winter and spring breaks of the school year. Under the original May 3rd Judgment parenting time provisions, spring break and winter break are under the "Holiday and School Release Schedule" and those days are specifically allocated to each parent in the Year 2020 in accordance with the regular parenting schedule, and alternate between the parents in subsequent years. The May 3rd Judgment visitation provisions were left undisturbed in the Court's January 6th Order, with the exception that the holiday and school release schedule would supersede the Appellant's every-other-weekend visitation schedule. Given the specific assignment of the spring and winter breaks to each parent annually, it would be reasonable to conclude that those weeks are not available as vacation weeks to the parent that is not designated to receive parenting time.

In Paragraph 4, of the Appellant's Declaration, under the section titled "Vacation Schedule," he states that his first week of "Summer Break" visitation (under the January 6th Order) is June 12, 2020 through June 19, 2020. This is a week to which he is entitled to regular visitation during the summer months. He then requests to elect, as a vacation week, the following week of June 19, 2020 to June 26, 2020, as his first vacation week. In Paragraph 5 of his Declaration, under the heading "Vacation," he states that he would like to take the minor child to a wedding on October 3, 2020. At the time that the parties were directed by the Trial Court to submit their vacation dates, the International School of Minnesota had not posted yet the 2020-2021 school calendar. The School has since posted its start dates.[1] This Court takes judicial notice of the fact that for students in grades 1 through 12, which includes the parties' minor child, school starts on

[1] *See* http://www.internationalschoolmn.com/blog/back-to-school-2020?utm_campaign=COVID%2019&utm_content=135310945&utm_medium=social&utm_source=facebook&hss_channel=fbp-313001204840&fbclid=IwAR0Ehs1dCd9YcRtqhFcyHQB6-l_Bf4YrttAhmxyIPNNW7cL2WxGfrKrr-hg (last visited August 9, 2020).

August 25, 2020. Appellant's regular school year visitation starts with every weekend after the start of school, which would September 5-6, 2020, September 19-20, 2020, and October 2-3, 2020. October 3, 2020 already falls within his regular visitation weekend. Thus, it appears that Appellant only explicitly requested one vacation week, June 19, 2020 to June 26, 2020.

The April 3rd Order reflects that the Trial Court construed the Appellant's request to be for a vacation week in the spring and a vacation week in the winter. Given the confusing presentation of his Declaration, this is not an unreasonable interpretation by the Trial Court. The Trial Court granted the Appellant vacation weeks of June 12, 2020, through June 19, 2020, and June 19, 2020 through June 26, 2020, and December 19, 2020, through December 26, 2020. The Trial Court also granted the Appellant visitation on the weekend of October 3, 2020, to October 4, 2020, to facilitate his and the minor child's attendance at the wedding if it occurs.

On May 4, 2020, the Appellant commenced this appeal by filing a Memorandum of Law in Support of Appeal of April 3, 2020, Order. In his Memorandum, concerning the vacation weeks, the Appellant states, "As I am seeking to exercise my vacation times during the winter and spring breaks .... [t]he dates I can provide are an estimate of this and would reflect the same December and March dates Ms. Gustafson has requested in her notice to the court yesterday." Id. at 5. He objects to the January 6th Order because "[He] was provided two of the three weeks [he] requested at the cost of a week of vacation parenting time." We agree that the Appellant was already entitled to the week of June 12, 2020, to June 19, 2020, as his regular summer break visitation, and it, therefore, was an abuse of discretion to designate that week as a vacation week. The Appellant is entitled to one more week of vacation time. This Court recently opined in *James Van Nguyen v. Amanda Gustafson,* File No. Ct. App. 045-19 (Jan. 21, 2020) that,

> "District courts have broad discretion on matters of custody and parenting time." *Hansen v. Todnem*, 908 N.W.2d 592, 596 (Minn.

> 2018). Review of decisions on parenting time is typically "limited to whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002). An abuse of discretion occurs "if a relevant factor that should have been given significant weight is not considered, if an irrelevant or improper factor is considered and given significant weight, or if a court commits a clear error of judgment in the course of weighing proper factors." *Aaron v. Target Corp.*, 357 F.3d 768, 774 (8th Cir. 2004)."

Id. at 16-17.

It was relevant to the allocation and designation of the vacation time that June 12, 2020 to June 19, 2020 was previously designated as one of Appellant's regular summer visitation weeks. Accordingly, we reverse the portion of the April 3 Order that set the vacation schedule and remand to the Trial Court for reconsideration of the decision regarding the Appellant's vacation weeks.

III. DISCLOSURE OF PHYSICAL ADDRESS

During the proceedings below, the Appellant provided the Trial Court with documentation establishing that he is a participant in Minnesota's "Safe at Home" program, under which Minnesota law bars persons or government officials from requiring program participants to provide their actual physical addresses. The provisions creating this bar appear at Minnesota Statutes §5B.05(a):

> When a program participant presents the address designated by the secretary of state to any person, that address must be accepted as the address of the program participant. The person may not require the program participant to submit any address that could be used to physically locate the participant either as a substitute or in addition to the designated address, or as a condition of receiving a service or benefit, unless the service or benefit would be impossible to provide without knowledge of the program participant's physical location. Notwithstanding a person's or entity's knowledge of a program participant's physical location, the person or entity must use the program participant's designated address for all mail correspondence with the program participant.

Notwithstanding the breadth and clarity of this provision, the Trial Court in its April 3rd Order directed the Appellant to "provide the physical address of the location of his home where he engages in his parenting time to the Court and the Petitioner in case of emergency", and to "notify the Court and the Petitioner of any changes of the physical address of where [he] engages in his parenting time at least 30 days prior to any change". In doing so, the Trial Court did not identify any exception to the requirements of Minnesota Statutes §5B.05(a) that would authorize its mandate; in the materials she has filed with us, the Appellee has cited none to us; and in our view there is none.

This is an instance where Public Law 280, 28 U.S.C. §1360(a), applies – where "the laws of [Minnesota] that are of general application to private persons or private property shall have the same force and effect" within the Shakopee Mdewakanton Sioux Community, and for members of the Community, "as they have elsewhere within the State." When the Community adopted its Domestic Relations Code, it did not expressly or implicitly modify the effect of Minnesota Statutes §5B.05(a), and the effect of the provision, here and generally, is not such that any fundamental interest of the Community is damaged. Given the digital resources that now exist, there are ample ways for the Appellee and her counsel to communicate with the Appellant, and vice versa, to ensure that the interests of the parties' child, and of the Appellee, are protected; and should the Appellant fail to honor his obligations to the Appellee or to the child, the Trial Court clearly has the power to sanction him by, *inter alia,* reducing or suspending his visitation with the parties' child pending his compliance.

IV. CONCLUSION

For the foregoing reasons, the appeal is granted. Accordingly, we reverse and remand for reconsideration the Trial Court's decision on the Appellant's parental visitation vacation weeks, and we reverse and vacate the portion of the April 3rd Order that mandated the Appellant's disclosure of his physical address.

Dated: August 10, 2020

Chief Judge John E. Jacobson

Judge Terry Mason Moore

Judge Jill E. Tompkins

COURT OF APPEALS OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION **STATE OF MINNESOTA**

James Van Nguyen,

Appellant,

vs. File No. Ct. App. 046-19

Amanda Gustafson,

Appellee.

OPINION AND ORDER

PER CURIAM

This matter was commenced on July 20, 2017, when the Appellee petitioned for dissolution of the parties' marriage and for determination of custody of the parties' minor child. The parties ultimately were divorced by order of the Trial Court on May 3, 2019, and as we noted in our opinion in *James Van Nguyen v. Amanda Gustafson*, File No. Ct. App. 045-19 (August 10, 2020), most of the history of the litigation between the parties, before the Shakopee Mdewakanton Sioux Courts and in other jurisdictions, was detailed in our opinion in *James Van Nguyen v. Amanda Gustafson*, File No. Ct. App. 045-19 (Jan. 21, 2020).

The particular proceedings that are pertinent to this appeal began after the filing of the Trial Court's divorce decree when the Appellee filed a motion for sanctions and a change of custody. In response to that motion, the Trial Court conducted three days of evidentiary hearings. The third of those hearings took place on November 26, 2019, and seventeen days after that hearing the Appellant sent the following email to the Clerk of Court:

From: James Nguyen [mailto:jamesisgolden@gmail.com]
Sent: Friday, December 13, 219 1019 a.m.
To Lynn McDonald; Jonathan D. Miller
Subject: Re: Rule 34

Lynn,

I'm hoping we can move forward here with a better understanding of one another. On the last day of trial we recently had in court file 867-17 you made me feel very uncomfortable. When Ms. Gustafson was on the stand and Mr. Miller was playing the video where I was being assaulted by strangulation and with a weapon, you kept staring at me with a creepy smile. My attorney noticed this as well. I found this to be profoundly inappropriate, unprofessional, and outside your official duties of a court clerk. Perhaps you are attracted to me and somehow a video of me being beaten created some sick pleasure in you which is interesting as I'm guessing you're in your 70s. This would make you as old as my mother and I am just going to have to stop the buck right here and let you know I am in no way attracted to you and please don't be sad or mad that you and I will never be anything more than pals at best. Please know whether your behavior was in an effort to be a sexual advance or simply that of a bully, both circumstances are upsetting, disgusting and repulsive and I hope you can exercise better judgement in the future. I ask that you please keep your behavior professional in nature. That being said, can you explain to me why Rule 34 states a filing fee of $100 but you want me to pay $200? You made your position clear that you won't advise me as the court clerk if a form is approved by the tribal court or not and that I must pay @200 contrary to the Rules of Civil Procedure. I will pay the $200 and I will address the matter with the judge.

In response to that e-mail, on December 18, 2019, the Trial Court issued a summons for a show cause hearing, to take place on December 23, 2019, to determine if Appellant should be held in contempt of court. Appellant and his counsel filed affidavits on December 20, 2019, describing scheduling conflicts that would prevent their presence on December 23rd. The Trial Court nonetheless held a hearing on December 23rd, at which Ms. Gustafson and her attorney were present and Appellant and his attorney were not. On December 30, 2019, the Trial Court issued the following order, holding Appellant in contempt:

1. The Court finds the Respondent in Contempt of Court for his communication to the Clerk of Court on December 13, 2019.

2. The Respondent is prohibited from sending or engaging in any communication to the Court or to any court personnel regarding the same or similar matters addressed in his December 13, 2019, email to the Clerk of Court other than through the proper process and procedures of this Court and then only in a manner that is lawful and respectful of both the [sic] judicial process and judicial officials.

3. The Respondent shall submit a letter of apology delivered to the Clerk of Court no later than the close of business on January 2, 2020.

4. The Respondent is fined in the amount of $500.00 to be paid to the court within 30 days of the date of this order.

In issuing its order, the Trial Court concluded that it had the inherent power to require the respect and decorum that is necessary to the orderly and expeditious disposition of cases and proceedings, and it concluded that the Appellant's email was not a good faith effort to resolve a complaint about a court employee, but instead was designed to humiliate and harass a court official, personally and professionally. With respect to the timing of its hearing, the Trial Court stated it was acting to protect the integrity of the judicial process and judicial personnel from unfounded and unwarranted allegations and to deter further actions that disrespect the Court.

In this appeal, Appellant contends: (i) that Chapter IV, Section 4(m) of the Domestic Relations Code of the Shakopee Mdewakanton Sioux Community, which the Trial Court cited in its December 18, 2019 Contempt of Court Summons, relates to a party's actions that disregard "lawful orders", and that his actions violated no order; (ii) that his actions did not threaten the Trial Court's "immediate ability to conduct its proceedings" and therefore, there was no justification for the compressed timeframe established by the Trial Court's Contempt of Court Summons; (iii) that, given the fact that his actions did not take place in open court, the Trial Court did not afford him appropriate procedural safeguards by way of an opportunity to call witnesses and present evidence in his defense; (iv) that the Trial Court improperly invoked its inherent authority to impose contempt of court sanctions, because the Appellant's conduct did not take place "within a court proceeding"; (v) that the Trial Court did not find that the Appellant's action defamed the Court or its personnel because there was no evidence that he had "published" a statement that was false and that had damaged the Court's reputation, and (vi) that the $500.00 penalty imposed by the Trial Court was a criminal penalty, because the Appellant had not opportunity to purge himself of it. We address these contentions seriatim.

1. The Court's Inherent Authority. Although Chapter IV, Section 4(m) of the Domestic Relations Code of the Shakopee Mdewakanton Sioux Community was cited by the Trial Court in its Contempt of Court Summons as a potential source of authority for a contempt order, it is not the only source the Community's judiciary has to ensure that its processes and its personnel are

protected. The Trial Court correctly noted, in its Summons and in its December 30, 2019 Order, that inherent authority exists, beyond the terms of the Community's ordinances, for such protection, and it was that authority which the Trial Court ultimately invoked. Given the nature of the Appellant's actions, and his failure to deny them or to ameliorate them in any way, the exercise of that authority was entirely appropriate.

2. The Direct and Immediate Threat to the Court's Processes. The Appellant's actions – which, again, he does not deny – could very properly be regarded as a direct and immediate threat to the Court and to its personnel. The fact that the Appellant's message was delivered to the Court's offices digitally rather than during an in-court proceeding is immaterial to its potential effect. As the United States District Court for the Western District of Virginia noted, in *United States v. Henry*, 2008 WL 2625359 (W.D. Va. 2008), where an e-mail was sent by a litigant to the Court's law clerk and was held to be an appropriate ground for a contempt proceeding:

> While the invective in the email is not directed at the court, it was communicated directly to the court's law clerk. Plainly, such statements would be contemptuous if uttered in open court. The court sees no difference in making such statements in an email sent to the court's law clerk as they are plainly disrespectful and constitute an insult to the dignity of the court and an affront to our system of justice.

Here, in its December 30, 2019 Order, the Trial Court reached a similar conclusion –

> Here the Court finds the Respondent's communication to be backhanded allegations and improper personal attacks on a court official in this proceeding. Further, [Appellant's] communication was nothing more than a thinly veiled effort to vent his anger, to disparage this Court, and to harass and humiliate the Clerk both as an official of this Court and personally. It was not an effort to lodge a good-faith complaint in the appropriate manner about any particular way in which this case has been handled or about the conduct of a judicial official. This Court is the proper forum for raising, through a motion or other filing, any complaint or allegation about how this matter is proceeding or about the conduct of a judicial official in this courtroom. The Court will not countenance self-help efforts, especially those involving rude and disrespectful comments directed toward court officials personally.

We agree. The Appellant's direct communication to the Court's clerk was an affront to the Court and its processes, to which prompt and decisive response was appropriate.

3. The Timing of the Trial Court's Actions. We also conclude that the timing of the Trial Court's response was appropriate. The Appellant was given notice, a show cause order, and a chance to respond to the contempt charges. He was represented by counsel. In the materials Appellant and his counsel filed on December 20th, describing scheduling conflicts, no request was made for the Trial Court to permit participation by telephone conference. Had he chosen to participate on December 23rd, the Appellant could have sought to persuade the Trial Court that sanctions were not warranted, and/or that his behavior would not be repeated, and/or that he recognized the inappropriateness of what he had done, thus potentially purging his contempt. Under these circumstances, the requirements that attend the imposition of a civil contempt order – simple notice and an opportunity to be heard – were met. *Hicks v. Feiock,* 485 U.S. 624 (1988).

4. Inherent Authority for Actions Outside of Court Proceedings. As we note above, the fact that the Appellant was not present in a courtroom when he did what he did and said what he said on December 13, 2019 is immaterial to the damage that his actions could work if they were left unaddressed. Therefore, that fact also is immaterial to the ability of the Trial Court to address them. The judiciary of the Shakopee Mdewakanton Sioux Community has a profound obligation to protect its personnel from harassment, and to ensure that court processes – administrative and judicial – are respected. Therefore, again, what the Trial Court did in response to the Appellant's actions was appropriate.

5. Immateriality of the Definition of Defamation. Simply put, there is no legal basis for the Appellant's contention that the Trial Court was obliged to find that his actions would support a civil judgment of defamation – that he had "published a statement of fact" concerning the Court which "damaged [its] reputation and lowered its estimation in the community" – as a precondition to the Trial Court's finding him in contempt of court. In considering the Appellant's e-mail to the clerk, the Trial Court said –

> Here the Court finds Respondent's communication to be back-handed allegations and improper personal attacks on a court official in this proceeding. Further, the Respondent's communication was nothing more than a thinly veiled effort to vent his anger, to disparage this Court, and to harass and humiliate the Clerk both as an official of this Court and personally.

These findings certainly are sufficient to support an exercise of the Trial Court's inherent authority to protect its personnel and its processes by contempt of court proceedings.

6. Nature of the Penalty Imposed. The Trial Court did not specify, in its Contempt of Court Summons or in its December 30, 2019 Order, whether its proceedings were in the nature of civil contempt or criminal contempt, but in its December 30 Order the Trial Court explicitly said –

> Had they appeared and participated in the Show Cause hearing Respondent and his counsel would have had the opportunity to rebut information calling into question the veracity of their allegations.
>
> . . .
>
> The Respondent and his counsel chose their course of action regarding a possible contempt finding. They disregarded a lawful order of this Court at their own peril. No one other than the Respondent himself is responsible for why the hearing was necessary.

(Emphasis added.)

From this we conclude that the Trial Court's proceedings were civil. The Appellant had the opportunity to purge himself of contempt, and to thus avoid the penalty. So, given the Appellant's failure to purge, or even attempt to purge, the offensive conduct, we conclude that imposing the $500.00 penalty was, and continues to be, appropriate.

For the foregoing reasons, the appeal is dismissed and the Trial Court's decision is affirmed.

Dated: September 1, 2020

Chief Judge John E. Jacobson

Judge Terry Mason Moore

Judge Jill E. Tompkins

COURT OF APPEALS OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

In Re the Welfare of ,
Children in Need of Assistance:

,

App. Court File No. 053-23

Appellant,

v.

Family and Children Services Department
of the Shakopee Mdewakanton Sioux
Community,

Appellee

Opinion and Order

Before ADAMS, MASON MOORE, and SIXKILLER, Appellate Judges.

On May 3, 2023, the Appellant timely filed a Notice of Appeal from a Children's Court order issued by Judge Hogen on April 3, 2023 establishing permanency of the Appellant's children with their respective fathers. This Court issued a Scheduling Order on May 23, 2023 ordering the Appellant to file her opening brief by June 13, 2023. The Appellant filed her opening brief on June 14, 2023. The Appellee timely filed a brief on July 13, 2023. The Appellant has not filed a reply brief. This

Court issued an Order Regarding Oral Argument on October 6, 2023 deeming the case fully submitted on the briefs as of August 3, 2023 and determining that oral argument in this matter is not necessary.

The Notice of Appeal indicated that the basis for the appeal is that "the trial court erred in applying the legal standard of the laws of the SMSC."[1] The Appellant's opening brief was in the form of a letter to this Court, requesting a retrial or a new trial (which terms are used interchangeably in the Appellant's brief and herein), a different visitation schedule, and to have the courts help create a plan for the Appellant to regain shared custody of her children.[2]

Analysis

This Court has jurisdiction over this matter,[3] reviews matters of law *de novo*,[4] and uses a standard of review of whether the trial court's findings of fact were clearly erroneous and whether the trial court erred in its conclusions of law.[5] In this matter, the Court must consider the Appellant's three requests in her brief as framed by her assertion that the trial court erred as the basis for her appeal: whether the Appellant has the right to a new trial, whether the Children's Court erred in its determination regarding the Appellant's visitation with her children, and whether the Children's

[1] *See* Notice of Appeal.
[2] *See* Appellant's Brief at 1, 2.
[3] SMSC R. Civ. P. 31.
[4] *Stopp v. Little Six*, 1 Shak. A.C. 23 (Jan. 29, 1996).
[5] *Kostelnik v. LSI*, 1 Shak. A.C. 92 (Mar. 17, 1998).

Court erred in its determination of how the Appellant can regain custody of her children.

1. The Appellant has no right to a new trial.

A motion for a new trial must be filed no later than 28 days after the entry of judgment,[6] and a party may file a motion to enlarge the time thereof.[7] The Appellant had the opportunity to request the Children's Court to grant her a new trial but did not timely make a motion to do so. Consequently, the Appellant has no right to a new trial in the Children's Court.

The Appellant has supplied the Court with no basis on which she would be afforded a new trial on appeal. The Appellee contends that a party is not entitled to pursue a new trial on appeal unless that party makes an appropriate post-verdict motion in the lower court.[8] The Court concurs with the Appellee, and, consequently, the Appellant has no right to a new trial on appeal.

2. The Children's Court did not err in its determination regarding visitation.

As the standard of review is whether the trial court's findings of fact were clearly erroneous and whether the trial court erred in its conclusions of law, the Appellant

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[6] SMSC R. Civ. P. 28; Fed. R. Civ. P. 59(b).
[7] SMSC R. Civ. P. 7(b).
[8] *See* Appellee's Brief at 7-8, citing *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 403 (2006).

must indicate how the Children's Court erred in its determination regarding visitation. The Children's Court determined that the Appellant shall have supervised visitation with the children, but the Appellant would like a different visitation arrangement. However, the Appellant has neither asserted how the Children's Court erred in its determination nor provided any support for a different arrangement. The Appellee has provided the Court with ample background and information to support the Children's Court's consideration and determination regarding visitation.[9] Therefore, the Court finds no error in the Children's Court's determination regarding visitation.

3. The Children's Court did not err in its determination regarding how the Appellant can regain custody of her children.

As the standard of review is whether the trial court's findings of fact were clearly erroneous and whether the trial court erred in its conclusions of law, the Appellant must indicate how the Children's Court erred in its determination regarding how she can regain custody of her children. The Children's Court's permanency order created a plan by establishing conditions that the Appellant can fulfill before petitioning the Children's Court to reopen the case and regain custody of her children.[10] However, the Appellant has neither asserted how the Children's Court erred in its determination nor provided any support for a different arrangement. The Appellee has provided the

[9] *See* Appellee's Brief at 13-14.

[10] *See* Appellee's Brief at 15, citing *In re* , Shak. C.C. 140, 19-20 (Apr. 3, 2023); *In re* , Shak. C.C. 130, 19-20 (Apr. 3, 2023).

Court with ample background and information to support the Children's Court's consideration and determination regarding this issue.[11] Therefore, the Court finds no error in the Children's Court's determination regarding how the Appellant can regain custody of her children.

Order

For the foregoing reasons, the Children's Court order is affirmed.

Dated: October 16, 2023 *Per Curiam*

[11] *See* Appellee's Brief at 15.

COURT OF APPEALS OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION STATE OF MINNESOTA

In Re the Marriage of:

Leif Kenneth Johnson,

Appellant/Respondent, Court File No. APP052-23

and

Danielle Marie Brooks-Johnson,

Appellee/Petitioner.

Opinion and Order

Before BUFFALO, HOGEN, and MASON MOORE, Appellate Judges.

Opinion of BUFFALO and MASON MOORE (Majority).

I. Introduction

This appeal is taken from a trial court order on the parties' motions to interpret and enforce a property award within the parties' dissolution judgment and decree. There is a single issue before this Court: whether the trial court abused its discretion in determining that the respondent satisfied her obligation under the decree to buy appellant a home. We discern no abuse of discretion because the trial court's findings of fact were not clearly erroneous, and it did not err as a matter of law. Therefore, we

affirm the trial court's order.

II. Background

Appellant Leif Kenneth Johnson and respondent Danielle Marie Brooks were married in July 2009 and divorced in January 2018 pursuant to a Stipulated Judgment and Decree (the "Decree").[1] Brooks is an enrolled member of the Shakopee Mdewakanton Sioux (Dakota) Community (the "Community").[2] Johnson is not a member of the Community or another Tribe.[3]

During the marriage, the parties resided in Brooks's home on Community land.[4] The Decree awarded Brooks the marital home and required her to purchase a house for Johnson in the following provision:

> Wife shall pay Husband's rent on a home for a period of up to eighteen (18) months commencing on the first month following the date of entry of this Stipulated Divorce Decree in an amount not to exceed $2,250.00 per month. Within that eighteen (18) month time frame, Husband shall locate and find a home to purchase for no more than $400,000 which Wife shall purchase for Husband. Wife shall enter into whatever financial arrangements she deems appropriate for the purchase of this property, and Husband shall cooperate fully in whatever is needed from him to secure this financing . . . .[5]

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[1] Stipulated Judgment and Decree (Jan. 24, 2018) at 3, ¶ 9, and 22.
[2] *Id.* at 3, ¶ 13.
[3] *Id.*
[4] *Id.* at 3, ¶ 13, and 8, ¶ 33.
[5] *Id.* at 18, ¶ 17.

Johnson moved out of the marital home in March 2018.[6] He eventually remarried and purchased a home with his wife in July 2022 for $495,900.[7]

In October 2022, Brooks filed a pro se motion requesting that the trial court "negate the agreement to buy [Johnson] a house . . . due to new circumstances in [Johnson's] marital situation."[8] Brooks later retained counsel and filed an amended motion to clarify that she sought a "[f]inding that [Brooks] has met her obligation under the parties' Judgment and Decree . . . related to the purchase of a home for [Johnson]."[9] Johnson filed a responsive motion requesting that the trial court deny Brooks's motion and enforce the property-award provision in the Decree by requiring Brooks to pay $400,000 toward the purchase price of his home or the monthly mortgage principal and interest payments.[10]

The parties alleged conflicting versions of events in the affidavits accompanying their motions. Johnson alleged that Brooks "asked if [he] would agree to stay in a rental longer than 18 months, and she would continue to pay the rent, so that she could work to improve her credit" before purchasing a home for him.[11] He stated that Brooks paid his rent until approximately December 2020 or January 2021, but she refused to

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[6] Brooks Affidavit (Jan. 27, 2023) at 5, ¶ 15.
[7] Johnson Affidavit (Nov. 3, 2022) at 8, ¶ 20.
[8] Petitioner's Notice of Motion and Motion (Oct. 11, 2022) at 1, ¶ 3.
[9] Petitioner's Amended Notice of Motion and Motion (Jan. 27, 2023) at 2, ¶ 9.
[10] Respondent's Notice of Motion and Motion (Nov. 3, 2022), p. 2 ¶¶ 1(f), 2.
[11] Johnson Aff. at 8, ¶ 19.

purchase or finance a home for him.[12]

Brooks conceded that she and Johnson discussed improving her credit before financing a mortgage. However, she alleged that this conversation occurred after the 18-month timeframe contemplated by the Decree.[13] According to Brooks, she and Johnson looked at houses together, but Johnson "never pursued financing or . . . asked [her] to finance a specific house."[14] She stated that she continued to pay Johnson's rent through September 2021 and paid some of Johnson's bills and debts in lieu of purchasing a home for him.[15]

In February 2023, the trial court held a hearing on the motions.[16] In March 2023, it issued an order granting Brooks's motion to find that she met her obligation under the Decree and denying Johnson's motion to enforce the property-award provision.[17] Johnson now appeals from the trial court's order.

III. Discussion and Order

A. Standard of Review

This case is unique in that we are reviewing a trial court's order interpreting a dissolution decree, rather than reviewing the dissolution decree itself. However, our

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[12] *Id.*
[13] Brooks Aff. at 7, ¶ 17.
[14] *Id.* at 4, ¶ 11.
[15] *Id.* at 5, ¶ 14, and 6, ¶ 16.
[16] Transcript (Feb. 9, 2023) at 1.
[17] Trial Court Order on the Motions (Mar. 10, 2023) at 8, ¶ 7.

standard of review remains the same. "A trial court enjoys 'broad discretion in evaluating and dividing property in a marital dissolution'" and we will not reverse its decision absent an abuse of that discretion.[18] Under the abuse-of-discretion standard, we review the trial court's findings of fact for clear error.[19] A finding of fact "is clearly erroneous only if it is manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole."[20] We defer to the trial court's findings of fact unless "we are left with the definite and firm conviction that a mistake has been made."[21] Conversely, we review the trial court's legal conclusions de novo.[22]

B. Analysis

The Community's Amended and Restated Domestic Relations Code (the "Domestic Relations Code") controls dissolution proceedings in our Court. The property-division and spousal-maintenance sections of the Domestic Relations Code were intended "to enable the Tribal Court to provide for the financial needs of the spouses by property division rather than an award of maintenance when possible."[23] The property-division section further provides that "[a]ll divisions of real and personal

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[18] *Stade-Lieske v. Lieske*, 3 Shak. A.C. 10, 14 (June 8, 2015) (quoting *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002)).
[19] *Id.*; *accord Welch v. Welch*, 2 Shak. A.C. 11, 17 (Apr. 15, 2009); *Brooks v. Corwin*, 2 Shak. A.C. 5, 6 (Aug. 4, 2008).
[20] *Brooks*, 2 Shak. A.C. at 6 (quotation omitted).
[21] *Id.* (quotation omitted).
[22] *Stade-Lieske*, 3 Shak. A.C. at 14; *accord Welch*, 2 Shak. A.C. at 17.
[23] Amended and Restated Domestic Relations Code, Ch. II, § 5(a).

property provided by this Section shall be final."[24]

With these principles in mind, the trial court considered the parties' motions regarding interpretation and enforcement of the property-award provision of the Decree. It interpreted the provision to create a condition precedent to Brooks's obligation to buy Johnson a home:

> Conclusion of Law 17 of the Decree provides that "Within that eighteen (18) month time frame, . . . Husband shall locate and find a home to purchase for no more than $400,000 which Wife shall purchase for Husband." The interpretation of this clause is the crux of the issue at hand. . . . The plain language of the clause governing this issue is clear. [Johnson] clearly agreed to find a home for [Brooks] to purchase for him by July 24, 2019.[25]

The trial court reasoned that the condition precedent did not occur because Johnson failed to identify a home for purchase within the 18-month timeframe, and therefore, it determined that Brooks fulfilled her obligation under the Decree. Johnson argues that we must reverse the trial court's decision because the trial court abused its discretion in interpreting the property-award provision.

1. The trial court did not abuse its discretion because its findings of fact were not clearly erroneous.

The trial court reached its decision after finding that Johnson "offered no evidence that he did indeed find a home during [the 18-month] timeframe, let alone any

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[24] *Id.* at § 5(j).

[25] Trial Court Order at 6 (quoting Stipulated Judgment and Decree at 18, ¶ 17).

evidence that he found a home during that timeframe but that [Brooks] refused to purchase it for him."[26] Johnson argues that the trial court abused its discretion because these findings of fact were clearly erroneous.[27] We disagree.

Johnson first challenges the finding that he did not identify a home to purchase within the 18-month timeframe.[28] He contends that this finding was not supported by the record and contradicted another finding in which the trial court stated that "the parties discussed the obligation that [Brooks] would purchase such a home and looked at possible homes to purchase" within 18 months of entry of the Decree.[29]

The parties both presented evidence that they searched for houses pursuant to the Decree. Johnson stated in his affidavit, "We would get together from time to time to look for homes . . . ."[30] Brooks similarly stated, "[Johnson] and I did look at houses."[31] Thus, the record supports a finding that the parties *looked for homes* within the 18-month timeframe, as the trial court noted in its findings of fact. However, there is no evidence in the record that Johnson *identified a specific home* within 18 months and requested that Brooks purchase or finance a mortgage for the home. Brooks claimed in her affidavit that Johnson "never found a house within years of entry of the Decree."[32] Indeed, the

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[26] *Id.*
[27] Appellant's Brief at 14-18.
[28] *Id.* at 14.
[29] *Id.* (quoting Trial Court Order at 4, ¶ 15).
[30] Johnson Aff. at 8, ¶ 19.
[31] Brooks Aff. at 4, ¶ 11.
[32] *Id.* at ¶ 12.

only home to which Johnson refers in the record is the home he purchased in July 2022, three years after the 18-month timeframe expired.

As we noted previously, we will not set aside the trial court's findings of fact unless they were clearly erroneous.[33] This is a deferential standard that requires us to "give due regard to the trial court's opportunity to judge the witnesses' credibility."[34] Here, the trial court was in the best position to assess the parties' credibility and weigh their evidence. It credited Brooks's version of events by finding that Johnson failed to identify a home for purchase within the 18-month timeframe. This finding is reasonably supported by the record, and therefore, it is not clearly erroneous.

Johnson also challenges the trial court's finding that he offered no evidence of Brooks's refusal to purchase a home for him within the 18-month timeframe.[35] Again, he argues that this finding was not supported by the record.

Johnson stated in his affidavit that Brooks "would come up with excuses for why she couldn't or wouldn't" purchase a home for him whenever he brought up the subject, and most recently, her excuse was that Johnson remarried.[36] It is unclear from Johnson's affidavit when these discussions occurred. One conversation occurred

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[33] *Stade-Lieske*, 3 Shak. A.C. at 14; *accord Welch*, 2 Shak. A.C. at 17; *Brooks*, 2 Shak. A.C. at 6.
[34] Fed. R. Civ. P. 52(a)(6); *see* Shakopee Mdewakanton Sioux Community Tribal Court R. Civ. P. 28 (applying the provisions of Fed. R. Civ. P. 52 to findings by the Tribal Court); *see also Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise v. Prescott*, 2 Shak. A.C. 1, 2 (Aug. 9, 2006) ("[R]eweighing the evidence or credibility of witnesses is not our role on appeal.").
[35] A. Br. at 15.
[36] Johnson Aff. at 8, ¶ 18.

sometime after January 2021, when Johnson found his current home and "reminded [Brooks] of her obligation."[37] He alleged that Brooks refused to finance or purchase the home for him, so he purchased it himself in 2022.[38]

In her affidavit, Brooks denied that she refused to provide financing for a home within the 18-month timeframe and claimed that Johnson never asked her to do so.[39] Brooks also denied that Johnson asked her to finance the home he purchased with his wife in 2022.[40] She alleged that Johnson "specifically told [her] that he wanted to buy a house for his wife, and he did not want [Brooks] to be a part of the financing."[41] Thus, Brooks "did not agree [to] the interest rate or any aspect of [the] financing" for the home.[42]

In sum, Brooks averred that Johnson did not ask her—and she did not refuse—to finance or purchase a home within 18 months of entry of the Decree. And Johnson provided no evidence of a specific conversation or instance that occurred during that timeframe to contradict Brooks's claim. We conclude that the trial court properly assessed the parties' credibility and evidence regarding this claim and the record reasonably supported its finding. Thus, the trial court's findings of fact were not clearly

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[37] *Id.* at ¶ 19.
[38] *Id.* at ¶¶ 19, 20.
[39] Brooks Aff. at 7, ¶ 17, and 4, ¶ 11.
[40] *Id.* at 4, ¶ 11. .
[41] *Id.*
[42] *Id.* at ¶ 13.

erroneous.

2. The trial court did not abuse its discretion because it did not err in its conclusions of law.

Next, Johnson argues that the trial court erred as a matter of law in determining that Brooks fulfilled her obligation under the property-award provision of the Decree.[43] We are not persuaded. Rather, our de novo review leads us to conclude that the trial court did not err in its conclusions of law.

a. The trial court correctly interpreted the terms of the property-award provision by determining that Brooks's obligation under the Decree was subject to a condition precedent.

Johnson contends that the trial court erred in determining that Brooks's obligation was subject to a condition precedent. At the hearing on the parties' motions, Johnson's counsel argued, "[J]ust because Mr. Johnson didn't secure a home within 18 months in no way means that that provision is no longer applicable or enforceable. It doesn't say failure to obtain a home waives this provision."[44] Similarly, Johnson argues on appeal that "there is no language in the Judgment and Decree indicating, suggesting, or otherwise implying that [Johnson] was not entitled to have [Brooks] secure financing for a home with a value less than $400,000 in the event the parties were unable to make the transaction happen within eighteen months."[45]

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[43] A. Br. at 15-25.
[44] Tr. at 32.
[45] A. Reply Br. at 4.

Johnson's argument requires us to interpret the terms of the property-award provision to determine whether it contained a condition precedent that affected the parties' obligations under the Decree. The Domestic Relations Code does not explicitly address how the Tribal Court must interpret property awards in dissolution decrees. And neither party argues that a tradition or custom of the Community addresses the interpretation of property awards. When neither the written laws nor the traditions and customs of the Community provide guidance on the matter at issue, we look to our Tribal Court precedent.[46] To the extent that none of these sources resolve the issue before us, we may rely on "general principles of common law applied by other jurisdictions."[47]

Minnesota courts use contract-law principles to interpret stipulated marriage-dissolution judgments.[48] And our trial court has previously applied Minnesota contract-law principles to Tribal Court disputes.[49] We therefore apply these principles to the terms of the Decree in the instant case.

One such contract-law principle is the concept of the condition precedent. "A

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[46] Resolution 11-14-95-003 Jurisdictional Amendment, § V.

[47] *Id.*

[48] *See Pooley v. Pooley*, 979 N.W.2d 867, 873 (Minn. 2022) ("Courts treat stipulated marriage-dissolution judgments as contracts for purposes of construction.").

[49] *See, e.g., Florez v. Jordan Constr.*, 4 Shak. T.C. 124, 128 (Jan. 15, 2002) (applying Minnesota contract law to a Tribal Court breach-of-contract dispute); *In Re Conservatorship of Brooks*, 4 Shak. T.C. 173, 183 (Apr. 30, 2003) (applying Minnesota contract law to a Tribal Court settlement-agreement dispute).

condition precedent is one which is to be performed before the agreement of the parties becomes operative."[50] It requires "the performance of some act or the happening of some event after the contract is entered into, and upon performance or happening of which its obligation is made to depend."[51] When a party's rights are subject to a condition precedent, the party "does not acquire any rights under the contract unless the condition occurs."[52]

The first step of our contract-interpretation analysis is to determine whether the terms of the Decree are ambiguous.[53] A term "is ambiguous if it is 'reasonably susceptible to more than one interpretation.'"[54] "In interpreting a contract, the language is to be given its plain and ordinary meaning."[55] If no ambiguity exists in the terms of the Decree, its interpretation is a question of law that we review de novo.[56]

The relevant terms of the property-award provision require that:

> Wife shall pay Husband's rent on a home for a period of up to eighteen (18) months commencing on the first month following the date of entry of this Stipulated Divorce Decree . . . . Within that eighteen (18) month time frame, Husband shall locate and find a home to purchase for no more than $400,000 which Wife shall purchase for

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[50] *Crossroads Church v. County of Dakota*, 800 N.W.2d 608, 615 (Minn. 2011) (quotation omitted).
[51] *In Re Brooks*, 4 Shak. T.C. at 183 (quoting *Lake Co. v. Molan*, 131 N.W.2d 734, 740 (Minn. 1964)).
[52] *Id.* at 184.
[53] *Pooley*, 979 N.W.2d at 874.
[54] *Nelson v. Nelson*, 806 N.W.2d 870, 872 (Minn. Ct. App. 2011) (quoting *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998)).
[55] *Id.* (quoting *Brookfield*, 584 N.W.2d at 394).
[56] *Id.*; *Blonigen v. Blonigen*, 621 N.W.2d 276, 281 (Minn. Ct. App. 2001).

Husband.[57]

Use of the word "shall" in contractual language "reflects a mandatory imposition."[58] Thus, the plain and ordinary meaning of these terms is clear. Brooks had a mandatory obligation to pay Johnson's rent for a specified maximum period, and Johnson had a mandatory obligation to identify a home for purchase for no more than $400,000 within that period. The Decree provided that Brooks shall purchase that home—located within the 18-month timeframe and costing no more than $400,000—for Johnson. Brooks's performance of this obligation would be impossible if Johnson did not identify a particular home that met those requirements. In other words, Brooks's obligation depended upon Johnson's performance. We therefore conclude that the terms of the Decree were unambiguous and created a condition precedent to Brooks's obligation to purchase a home for Johnson.

At the motion hearing, Johnson's counsel further argued that it would be "absurd[,] . . . unfair[,] and unequitable" to interpret the Decree to contain a condition precedent because Johnson "was not the one that was in control of whether financing was secured."[59] Johnson argues that Brooks "did not make an effort to secure financing for [his] home," and "[w]ithout securing the financing required . . . it was impossible for

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[57] Stipulated Judgment and Decree at 18, ¶ 17.
[58] *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 272 (Minn. 2004).
[59] Tr. at 32.

[him] to obtain a home within 18 months of entry of the Judgment and Decree."[60] He claims that he "did not have the independent ability to require [Brooks] to secure financing for his new home…[s]hort of filing a motion to enforce the terms of the Stipulated Judgment and Decree."[61]

Here, Johnson correctly identifies the remedy he could have pursued had Brooks refused to purchase or finance a home after he fulfilled the condition precedent. At the conclusion of the 18-month timeframe, he could have filed a motion to enforce the terms of the Decree and presented evidence that he identified a home and requested that Brooks purchase it for him. He did not file a motion or present such evidence. This matter came before the Tribal Court on Brooks's motion after Johnson failed to identify a home to purchase for several years after the parties' divorce. Therefore, Johnson's argument is unavailing. We conclude that the district court did not err in determining that the property-award provision contained a condition precedent requiring Johnson to identify a home for purchase for no more than $400,000 within 18 months of entry of the Decree.

b. Johnson's alternative arguments regarding the condition precedent do not merit relief.

In the alternative to Johnson's primary argument that the property-award provision did not contain a condition precedent, Johnson makes several arguments as to

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[60] A. Br. at 16, 22.
[61] *Id.*

why we should relieve him from performance of the condition precedent and require Brooks to fulfill her obligation under the Decree.[62] First, he argues that he had the unilateral right to waive the condition precedent because it was intended solely for his benefit.[63]

Minnesota contract law recognizes that "[a] party may unilaterally waive a condition precedent that is intended solely for that party's benefit and protection."[64] This party may also "compel performance by the other party who has no interest in the performance or nonperformance of such condition."[65]

Here, Johnson argues that the 18-month timeframe in which he was to locate a home was solely for his benefit, "so that he could start living in a comparable home to what he had been enjoying during the parties' marriage."[66] His argument fails because the condition precedent in the Decree also protected Brooks. First, it limited the amount of time she was required to pay Johnson's rent. Second, it put her on notice to be prepared to purchase or finance a home for Johnson within that timeframe and prevented Johnson from waiting years after the divorce to select a home. Therefore, Brooks benefited from the condition precedent because it eliminated uncertainty

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[62] A. Reply Br. at 3-11.
[63] *Id.* at 4.
[64] *Exner v. Minneapolis Public Schs.*, 849 N.W.2d 437, 441 (Minn. Ct. App. 2014) (citing *Dolder v. Griffin*, 323 N.W.2d 773, 778 (Minn. 1982)).
[65] *Miracle Const. Co. v. Miller*, 87 N.W.2d 665, 670 (Minn. 1958).
[66] Appellant's Reply Brief at 4.

regarding her obligation under the Decree, and Johnson was not able to waive the condition unilaterally.

Next, Johnson argues that we should relieve him of the condition precedent because Brooks interfered with execution of the Decree and induced him to breach its terms.[67] Interference with contract and inducing breach of contract are distinct causes of action, but they share similar elements:

> (1) Existence of a contract;
>
> (2) Alleged wrongdoer's knowledge of the contract;
>
> (3) His intentional procurement of its breach;
>
> (4) Without justification; and
>
> (5) Damages resulting therefrom.[68]

Here, Johnson claims that a text-message exchange between him and Brooks provides evidence of the third element: Brooks's intentional procurement of a breach.[69] In the exchange, Brooks wrote, "We need to talk about the house stuff more. I have been trying but it's not working. It's made my credit worse now too," to which Johnson responded, "[Y]es we definitely need to [talk,] and I'm willing to forego the decree . . . ."[70] Johnson argues that Brooks's messages "were intentional (yet friendly at

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[67] *Id.* at 5.
[68] *Aslakson v. Home Sav. Ass'n*, 416 N.W.2d 786, 788 (Minn. Ct. App. 1987) (citing *Royal Realty Co. v. Levin*, 69 N.W.2d 667, 671 (Minn. 1955).
[69] A. Reply Br. at 5-6.
[70] Brooks Aff. Ex. C.

the time) and were meant to extend the timeframe for securing the home beyond the eighteen-month period."[71]

However, this exchange occurred in October 2019, after the 18-month timeframe of the condition precedent had already expired.[72] Johnson does not point to any evidence in the record demonstrating that Brooks induced him to breach the 18-month timeframe before it expired. As such, Johnson fails to establish the third element of his interference-with-contract and inducing-breach-of-contract claims.

Finally, Johnson makes three similar arguments based on his claim that the parties agreed to extend the timeframe during which Brooks would purchase a home for Johnson.[73] He argues that (1) Brooks waived her right to assert the condition precedent; (2) she is estopped from enforcing the condition precedent based on her oral waiver; and (3) she suspended or excused Johnson's performance of the condition precedent.[74]

Again, Johnson does not cite to the record or provide any evidence in support of his claim that Brooks agreed to extend the timeframe for locating and purchasing a home. And furthermore, the trial court did not include this claim in its findings of fact. We are therefore unpersuaded by Johnson's alternative arguments.

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[71] A. Reply Br. at 6.
[72] Brooks Aff. at 6, ¶ 16, and Ex. C.
[73] A. Reply Br. at 7-11.
[74] *Id.*

c. *The trial court did not modify the terms of the property award by issuing an order interpreting the terms.*

Johnson next argues that the trial court erred because it impermissibly modified the terms of the property award.[75] He contends that the trial court's order "substantially increase[d] the value of the property awarded to [Brooks], and substantially decrease[d] the value of the property awarded to [Johnson]."[76] Furthermore, he claims that the trial court's order affected his substantive rights because it "foreclosed his ability to enforce the equitable division of marital property set forth in the Stipulated Judgment and Decree."[77]

Under the property-division section of the Domestic Relations Code, property awards are final and may not be revoked or modified unless the Tribal Court finds that one of the following exceptions exist:

> (1) mistake, inadvertence, surprise, or excusable neglect.
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under this Code's Rules of Civil Procedure.
>
> (3) fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party.
>
> (4) the judgment and decree or order is void; or
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment and decree or order upon which it is

[75] A. Br. at 23-25.
[76] *Id.* at 23.
[77] *Id.*

> based has been reversed or otherwise vacated, or it is no longer equitable that the judgment and decree or order should have prospective application.[78]

A motion for modification of a property award "must be made within a reasonable time, and for a reason under clause (1), (2), or (3), not more than one year after the judgment and decree, order, or proceeding was entered or taken."[79]

Minnesota law similarly provides that property awards are final and allows modification in the same limited circumstances as the Community's Domestic Relations Code.[80] Minnesota courts have held that a trial court "may not modify a final property division," but it may "issue orders to implement, enforce, or clarify the provisions of a decree, so long as it does not change the parties' substantive rights."[81] "An order implementing or enforcing a dissolution decree does not affect the parties' substantive rights when it does not increase or decrease the original division of marital property."[82]

Contrary to what Johnson claims, the trial court's order was not an impermissible modification to the property award. Rather, the trial court's order was meant to clarify the parties' obligations under the Decree, given that Johnson had not complied with a portion of the property-award provision. Clarification of the terms of a decree "does not constitute an amendment to the judgment" because it "does not result

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[78] Amended and Restated Domestic Relations Code, Ch. II, § 5(j).
[79] *Id.*
[80] Minn. Stat. §§ 518A.39, subd. 2(g); 518.145, subd. 2.
[81] *Nelson*, 806 N.W.2d at 871.
[82] *Id.*

in a judgment different from that originally ordered, but serves only to express accurately the thoughts which the original judgment intended to convey."[83] Here, the trial court determined that the Decree intended to limit the property award by imposing time and cost restraints in the form of a condition precedent to Brooks's obligation to buy Johnson a home. The trial court's order did not change Johnson's substantive rights; it merely expressed that his rights were subject to a condition precedent to which he did not adhere.

On the other hand, Johnson's interpretation of the property-award provision would change the parties' substantive rights because he ignores the plain language that he must locate a home for no more than $400,000 within 18 months of entry of the Decree. He urges us to disregard this language and require Brooks to contribute $400,000 toward the purchase price or financing of a home he purchased for almost $500,000, three years after the 18-month timeframe expired. Thus, we agree with the trial court that his responsive motion is better characterized "as a request to modify the property award in the Decree rather than as a request to enforce it."[84]

We also disagree with Johnson's assertion that the trial court "foreclosed his ability to enforce the equitable division of marital property."[85] As the trial court pointed out, "[h]ad [Johnson] found a $400,000 home within the 18-month timeframe but had

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[83] *Hanson v. Hanson*, 379 N.W.2d 230, 232 (Minn. 1985).
[84] Trial Court Order at 6.
[85] A. Br. at 23.

[Brooks] refused to abide by her agreement to purchase such a home, [Johnson] could have then petitioned the Court to enforce the Decree."[86] Furthermore, Johnson "acknowledged his understanding of the terms of [the property-award provision] in the Decree and thus the possible outcomes if he failed to find a home in a timely manner, and he had ample opportunity to either fulfill his part of the agreement or ask the court to modify the agreement for good cause."[87] Johnson foreclosed his own ability to enforce the property award, because he did not fulfill his part of the agreement or timely move to modify it for good cause. We conclude that the trial court did not modify the terms of the original decree and did not err as a matter of law. Therefore, the trial court did not abuse its discretion.

In closing, we acknowledge the importance of fair and equitable property division under the Domestic Relations Code. An equally important principle, however, is the finality of property awards. Both parties benefit from knowing that the terms of a property-award provision will be duly enforced and generally may not be modified. Where, as here, a dissolution judgment and decree contain clear language that requires a party's performance within a fixed timeframe, we must adhere to that requirement. To do otherwise would burden parties in Brooks's position with unclear financial obligations for indefinite periods of time.

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[86] Trial Court Order at 6.
[87] *Id.* at 7.

IT THEREFORE IS ORDERED that the decision of the trial court is affirmed.

Dated: 10/17/2023

Henry M Buffalo Jr (Oct 17, 2023 09:13 CDT)

Chief Judge Henry M. Buffalo, Jr.

Terry Mason Moore
Terry Mason Moore (Oct 17, 2023 11:31 CDT)

Pro Tem Judge Terry Mason Moore

Judge Hogen, dissenting.

Because I find that the parties' stipulated dissolution decree did not contain a condition precedent, I dissent. In my view, the majority decision misapplies the law of conditions precedent, discourages cooperation among ex-spouses, and disregards our obligation to pursue equity in dissolution matters.

Background

The parties to this appeal were married in July 2009, and remained so for nearly nine years. At the end, rather than air their grievances to the trial court and raise all manner of disputes over the deconstruction of their shared life, the parties showed remarkable cooperation and presented a comprehensive stipulation regarding all matters of the dissolution, which the trial court eventually approved and entered as a stipulated decree.[1] Among other things, the stipulated decree provided mutual waivers of spousal maintenance.[2] In connection with Johnson's waiver, the stipulation provided for the division of real property as follows:

> Real Property and Rental Payments for Husband. [Brooks] is awarded, free and clear of any claim of [Johnson], full right, title, and interest to the real property of the parties, located at 2895 Dakota Trail South, in the City of Prior Lake, County of Scott, Minnesota . . . .

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[1] Stipulated Findings of Fact[,] Conclusions of Law, Order for Judgment & Judgment & Decree, *Brooks v. Johnson*, No. 877-18 (Jan. 24, 2018) (hereafter, "Stipulated Decree," "Stipulated Finding," or "Stipulated Conclusion").

[2] Stipulated Finding 27; Stipulated Conclusion 13.

. . . .

> Title passes upon entry of this Judgment and Decree. To prove the transfer, a Summary Real Estate Disposition Judgment shall be prepared by the attorney for [Brooks] and submitted to the court for approval within (10) days of the entry of the Judgment and Decree. . . .
>
> [Brooks] shall pay [Johnson's] rent on a home for a period of up to eighteen (18) months commencing on the first month following the date of entry of this Stipulated Divorce Decree in an amount not to exceed $2,250.00 per month. Within that eighteen (18) month time frame, [Johnson] shall locate and find a home to purchase for no more than $400,000 which [Brooks] shall purchase for [Johnson]. [Brooks] shall enter into whatever financial arrangements she deems appropriate for the purchase of this property, and [Johnson] shall cooperate fully in whatever is needed from him to secure this financing, including sharing title to the property with [Brooks] if that is needed for [Brooks] to secure financing. . . . Upon satisfaction of the underlying mortgage or other financing instrument used to purchase this property, title to such property shall be exclusively with [Johnson].[3]

Unfortunately, the parties did not complete the stipulation that Brooks purchase a home for Johnson. Of course, there are competing accounts of why this happened. Johnson says it was because Brooks couldn't secure financing for a home.[4] Brooks says it was because Johnson didn't select a home and ask her to buy it.[5]

Either way, there is no question that the parties continued under their own modified understanding of how they would effectuate the spirit of this stipulation. For instance, Brooks paid Johnson's rent for more than 18 months.[6] The parties also

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[3] Stipulated Conclusion 17.

[4] *See* Johnson Aff. (Nov. 3, 2022) at ¶ 20.

[5] *See* Brooks Aff. (Jan. 27, 2023) at ¶ 11.

[6] *See* Johnson Aff. at ¶ 20; Brooks Aff. at ¶¶ 14, 16.

exchanged text messages evidencing their mutual understanding that they would continue their efforts to effectuate the stipulation that Brooks buy a home for Johnson beyond the 18-month timeframe. For instance, more than 18 months after entry of the stipulated decree, Brooks sent Johnson a text message stating that the parties "will need to talk about the house stuff more."[7] She indicated that she had "been trying but it's not working," that it had worsened her credit, and that she had "started seeing someone to help build" up her credit.[8] Johnson responded that the parties "definitely need to" discuss the home purchase and that he was "willing to forgo the decree like [they] both [had] to help" each other because there was "no [hate] or disdain."[9]

Eventually, though, something changed. In October 2022, Brooks sought relief from the stipulation that she buy Johnson an up-to-$400,000 home.[10] Johnson countered with a request that the trial court enforce the stipulation.[11] The trial court ultimately granted Brooks relief, concluding that she had "met her obligation under [the stipulation] to purchase a home" for Johnson.[12] The trial court reasoned that the plain terms of the stipulation gave Johnson 18 months to find a home and that "[h]ad he found a $400,000 home within the 18-month timeframe but had [Brooks] refused to

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[7] Brooks Aff. at Ex. C.

[8] *Id.*

[9] *Id.*

[10] Petitioner's Notice of Motion & Motion to Amend Parenting Time & Issues Regarding Children & Agreement Regarding Housing, *Brooks v. Johnson*, No. 877-18 (Oct. 11, 2022).

[11] Respondent's Notice of Motion & Motion, *Brooks v. Johnson*, No. 877-18 (Nov. 3, 2022).

[12] Order on the Motions, *Brooks v. Johnson*, No. 877-18, 8 (Mar. 10, 2023) ("Trial Court Order").

abide by her agreement to purchase such a home, [he] could have then petitioned the Court to enforce the Decree."[13] It characterized Johnson's request instead as a request to modify the property award and concluded that none of the bases for modification were present or were time-barred.[14]

Thus, Johnson lost the $400,000 property interest that he bargained for in the stipulated decree. Brooks lodges numerous, ultimately unpersuasive, arguments in support of this outcome.

I.

First, Brooks argues that this dispute is only about the real-property division, and not spousal maintenance.[15] But the Domestic Relations Code contemplates the intermingling considerations of spousal maintenance and property division:

> The dual intent of this Section and Section 6 of this Chapter is to enable the Tribal Court to provide for the financial needs of the spouses by property division rather than an award of maintenance when possible.[16]

In this case, the stipulated decree specifically states that Johnson waived his right to spousal maintenance in part for the benefit of Brooks's purchase of his home, consistent with the intent of the Domestic Relations Code.[17] Moreover, the parties submitted a comprehensive stipulation to resolve all matters relevant to their marriage dissolution:

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[13] Trial Court Order at 6.

[14] *Id.* at 6-7.

[15] Resp. Br. at 13.

[16] Domestic Relations Code Ch. II, § 5(a).

[17] Stipulated Finding 27; Stipulated Conclusion 13.

"Considering all circumstances relative to the dissolution proceedings, the Stipulated Judgment and Decree into which the parties entered is fair and reasonable."[18] This is further demonstrated by the fact that another consideration for Johnson's waiver of spousal maintenance was increased child support.[19] To read the provision regarding division of real property without reference to other terms of the stipulated decree would be improper.

II.

Second, and relatedly, Brooks argues that "the dispute is not about the fairness of the property settlement."[20] The Domestic Relations Code requires the trial court to equitably divide property, however:

> Absent a valid prenuptial or postnuptial agreement to the contrary, the marital property of the spouses is to be divided equitably upon dissolution. The Tribal Court shall consider the length of the marriage; the age, health and occupation of the parties; the earning capacity of the parties, including their educational backgrounds, training, employment skills and work experience; any contribution the spouse made to the education or earning power of the other spouse; the value of the property at the time of division; and whether a party has unreasonably depleted marital assets. The Tribal Court shall not consider the misconduct of either spouse except misconduct related to the unreasonable depletion of marital assets.[21]

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[18] Stipulated Finding 50.

[19] Stipulated Finding 27.

[20] Resp. Br. at 14.

[21] Domestic Relations Code Ch. II, § 5(c).

Originally, Brooks and Johnson agreed to divide their property—and other rights—in a manner that they believed was "fair and reasonable."[22] But the trial court's order substantially upset the equitable division the parties agreed upon. Given the minimal other property that Johnson received and absence of any spousal maintenance, it's difficult to conclude that the stipulated decree, as applied by the trial court, is fair, reasonable, or equitable. Rather, the trial court's order left Johnson with several hundred thousand dollars less than the parties agreed he should receive as part of their "fair and reasonable" settlement.

III.

Third, Brooks argues that Johnson selecting a home within 18 months was a condition precedent to her obligation to buy the home. The language of the decree does not contain the unequivocal language required for a condition precedent, however, so the trial court erred as a matter of law in finding that Johnson's promise to find a home within 18 months was a condition precedent to Brooks's obligation to buy a home for Johnson.

In another case examining contractual rights, this Court held that "[w]hen a contract contains a condition precedent, a party to the contract does not acquire any

[22] Stipulated Finding 50.

rights under the contract unless the condition occurs."[23] There, the Court found that a provision in a settlement agreement stating that the agreement "is contingent upon approval of the Community and approval of the District Court,"[24] was a condition precedent and that absent the requisite approval, it was ineffective.[25]

This case is quite different. There is no language of contingency in the stipulated decree, and obviously, both Brooks and Johnson obtained rights under it. For example, Brooks received her home on the Reservation[26] and Johnson received rent and child support.[27]

The question is whether Johnson was only entitled to have a home of up to $400,000 purchased for him by Brooks *if* he selected the home within 18 months. In *Comprehensive Care Corp. v. Rehab Corp.*, the Eighth Circuit explained the difference between a promise and a condition:

> A promise is an assurance from one party that performance will be rendered in the future, given in a manner that the other party could rely on it. A condition, by contrast, creates no rights or duties in and of itself, but only limits or modifies rights or duties.[28]

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[23] *In re Conservatorship of Dean Brooks*, 4 Shak. T.C. 173, 184 (2003); *see also* Restatement (Second) of Contracts § 224 ("A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.").
[24] *Id.* (quoting agreement).
[25] *Id.* at 190.
[26] Stipulated Conclusion 17.
[27] Stipulated Conclusion 7.
[28] *Comprehensive Care Corp. v. Rehab Corp.*, 98 F.3d 1063, 1066 (8th Cir. 1996) (internal citations omitted).

In *Comprehensive Care Corp.*, one company had agreed to pay the other an additional sum "'if within 12 months of the closing date there occurs a 'Change of Control Event.'"[29] The Court found that the language created a condition precedent and that because no "Change of Control Event" had occurred, no additional sums were due.[30]

Generally, the language of a contract must "unequivocally express an intent of the parties to establish a condition precedent" before a court will construe the contract to contain such a condition.[31] While no special terms or code words are necessary to create a condition precedent, they are typically created using phrases such as "'if,' 'provided that,' 'when,' 'after,' 'as soon as,' and 'subject to.'"[32]

The stipulated decree contains none of these typical phrases regarding Brooks's obligation to purchase a home for Johnson. Moreover, there is *no language* stating that Brooks's obligation to buy a home rests on Johnson's selection of the home within 18 months. And the stipulated decree doesn't say that Johnson will forego his right to the $400,000 property interest if he doesn't select a home within 18 months. Indeed, in an

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[29] *Id.* (quoting agreement).

[30] *Id.*

[31] *Mrozik Const., Inc. v. Lovering Assocs., Inc.*, 461 N.W.2d 49, 52 (Minn. Ct. App. 1990) (holding that subcontract providing that subcontractor would be paid "'to the extent that the contractor has been paid on the subcontractor's account'" did not establish condition precedent that contractor be paid before it owed payment obligation to subcontractor).

[32] *Comprehensive Care Corp.*, 98 F.3d at 1066 (quoting *Standefer v. Thompson*, 939 F.2d 161, 164 (4th Cir. 1991).

earlier provision of the decree, there appears to be no relationship between Johnson selecting a home within 18 months and Brooks's purchase of the home:

> The parties further agree, and the Court finds ixxat appropriate, that Wife's obligation to pay Husband spousal maintenance is hereby waived. The parties have agreed to, and the Court finds it appropriate and in the children's best interests, that Wife shall pay Husband a child support award as more fully set forth below that is a substantial upward deviation from the Community's current child support guidelines. In addition, the Wife has agreed to pay certain debts incurred by the Husband, to assist for a limited time with the payment of the monthly rent obligations Husband will need in order to obtain his own housing, and to eventually assist in the purchase of a home for the Husband.[33]

Instead, the requirement that Johnson select a home within 18 months appears to be a promise, an assurance to Brooks that he will perform. Most notably, it uses the word "shall," indicating a promise that he will perform. To interpret Johnson selecting a home within 18 months as a condition precedent to Brooks's purchase of a home for Johnson would necessitate rewriting or adding language to the stipulated decree. And courts "should not rewrite, modify, or limit the effect of a contract provision by a strained construction when the contractual provision is clear and unambiguous."[34] Thus, Johnson selecting a home within 18 months was a promise, not a condition.

Similarly, Brooks's obligation to purchase the home was a promise. It is evident that neither party fulfilled its promise regarding the purchase of a home.[35] Rather than

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[33] Stipulated Finding 27.

[34] *Am. Nat'l Bank of Minn. v. Hous. & Redevelopment Auth. for the City of Brainerd*, 773 N.W.2d 333, 337 (Minn. Ct. App. 2009).

[35] *E.g.*, Trial Court Order at 4, Findings 15-16.

analyzing the parties' breached promises as such and determining an appropriate remedy, the trial court "view[ed] [Johnson's] motion as a request to modify the property award in the Decree rather than as a request to enforce it," and analyzed it under the modification provisions in the Code.[36] Doing so was an error of law. I would therefore remand the matter to the trial court with instructions to analyze the parties' allegations as being for breach of contract, and to determine remedies accordingly.

IV.

Lastly, Brooks argues that the parties' discussions about buying a home more than 18 months after the stipulated decree amounted to a "side agreement" the court shouldn't enforce.[37] But the cases relied on by Brooks don't match the circumstances here. For instance, in *Pooley v. Pooley*, the issue was the "proper procedure for considering the division of omitted assets from joint petitions for marriage dissolution."[38] That case involved a purported side agreement that existed at the time that the parties filed the joint petition.[39] And the issue was whether the district court needed to review the omitted property "to execute its necessary function of determining

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[3636] *Id.* at 6.

[37] Resp. Br. at 23.

[38] *Pooley v. Pooley*, 979 N.W.2d 867, 870 (Minn. 2022).

[39] *Id.* 870-71.

that the settlement was equitable."[40] It did not, as Brooks suggests, deal with "after-the-fact inequitable asset divisions."[41]

This case does not involve a dispute over assets omitted from the stipulated decree. Nor does it involve a side agreement that existed at the time that the parties entered into the stipulation. This case involves discussions *subsequent* to entry of the stipulated decree to cooperatively resolve a problem completing one of its provisions. There is no question that the trial court was able to "execute its necessary function of determining that the settlement was equitable" when it entered the stipulated decree.[42]

V.

Setting aside Brooks's arguments, I'm concerned by the implications of the majority's decision. The parties agree that they visited multiple homes in the 18-month timeframe set out in the stipulated decree.[43] But the record is also clear that Brooks was not in a financial position to purchase a home within that timeframe.[44] To address this, Johnson opted to show patience and work with Brooks.[45] Under the majority's view, Johnson should have instead rushed to the trial court to enforce the stipulated decree. That means Johnson had no option to work cooperatively with Brooks without risking

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[40] *Id.* at 871.

[41] Resp. Br. at 26.

[42] *Pooley*, 979 N.W.2d at 871. The other cases relied on by Brooks involve child-support obligations and are therefore not relevant to the dispute here.

[43] *See* Brooks Aff. at ¶ 11.

[44] *See* Brooks Aff. at Ex. C.

[45] *Id.*

the loss of a $400,000 property interest. Under the trial court's ruling and the majority's view, Johnson had no option to exercise patience and restraint while Brooks resolved her financial issues.

I fear the majority's outcome—in addition to misapplying the law of conditions precedent—will discourage former spouses from cooperating with one another. Moreover, it may well prompt them to rush back to court with every disagreement or problem that arises under a dissolution decree for fear of inadvertently waiving their rights.

Conclusion

I hope I'm wrong about the implications of the majority's decision. Time will tell. Regardless, I remain of the view that Johnson has been incorrectly and inequitably denied a substantial, non-contingent property interest that he bargained for—and that Brooks agreed to. I would reverse and remand.

Vanya Hogen

Judge Vanya S. Hogen

COURT OF APPEALS
OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION STATE OF MINNESOTA

In re the Marriage of:

Morgan A. Crooks,

Appellant,

vs.

Morgan N. Crooks,

Respondent.

Trial Court File No. 975-22
Court of Appeals File No. CTAPP056-23

Opinion and Order

Before HOGEN, MASON MOORE, and ADAMS, Appellate Judges.

Introduction

In this appeal from a dissolution judgment and decree, Appellant-Husband argues that the trial court (1) abused its discretion by awarding sole legal and physical custody of the parties' minor child to Respondent-Wife, (2) abused its discretion by requiring Appellant-Husband's parenting time to be supervised, (3) erred in calculating Appellant-Husband's child-support obligation, (4) abused its discretion in dividing property between the parties, (5) made clearly erroneous findings of fact regarding a witness's testimony, and (6) abused its discretion by excluding video and text-message

evidence that Appellant-Husband offered at trial.

We agree in part with Appellant-Husband's arguments on the issues of custody and parenting time, and therefore, we reverse and remand for the trial court to issue further findings of fact. We affirm the trial court's decision in all other respects.

Background

Appellant Morgan A. Crooks ("Husband") is a member of the Shakopee Mdewakanton Sioux Community (the "Community").[1] Respondent Morgan N. Crooks ("Wife") has no Tribal affiliation.[2] They married in August 2018.[3]

Husband and Wife separated in May 2022.[4] On July 4, 2022, Wife gave birth to the parties' joint child, [redacted] Later that month, Husband filed petitions for dissolution and a hearing on paternity, custody, visitation, and support for the joint child in the Community's trial court.[6] The trial court consolidated the two case files into one action.[7]

As relevant to the issues on appeal, the parties filed several pretrial motions. In September 2022, Husband filed an emergency motion requesting temporary parenting time with the joint child for two overnights every weekend.[8] Wife opposed Husband's

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[1] Pet. for Dissolution at 1 (July 29, 2022).
[2] *Id.*
[3] *Id.*
[4] Tr. at 39:10-12; 178:4-5 (Apr. 20, 2023).
[5] *Id.* at 35:12-13.
[6] Pet. for Hearing at 1 (July 20, 2022); Pet. for Dissolution at 1.
[7] Order Consolidating Cases at 1 (Aug. 31, 2022).
[8] Emergency Mot. at 1 (Sept. 27, 2022).

motion and requested that he be awarded supervised parenting time for two hours twice per week.[9] Wife also requested that she be awarded $2,000 per month in child support from Husband.[10] In November 2022, the Trial Court issued an order denying Husband's emergency motion in its entirety, granting Wife's motion for supervised parenting time, and reserving the issue of child support.[11] In February 2023, both parties filed further motions regarding parenting time, child support, and property division.[12] The court denied these motions.[13]

The trial court held a dissolution trial on April 20, 2023.[14] It then issued a dissolution judgment and decree dissolving the parties' marriage, granting Wife sole physical and legal custody of [redacted] and granting Husband twice-weekly supervised parenting time.[15] The trial court ordered Husband to pay Wife $26,256.06 in child support for July 2022 through June 2023 and $2,110.65 per month in ongoing child support beginning in July 2023.[16]

The trial court awarded to Wife half the proceeds from the sale of a 2018 Jeep

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[9] R.'s Counter Mot. at 1 (Oct. 5, 2022).
[10] *Id.* at 2.
[11] Order at 4-5 (Nov. 4, 2022).
[12] *See* R.'s Mot. at 1 (Feb. 8, 2023); Pet.'s Mot. and Responsive Mot. at 1-2 (Feb. 28, 2023).
[13] Order at 4 (Mar. 8, 2023).
[14] Tr. at 1.
[15] Dissolution Judgment & Decree at 11-12 (June 9, 2023).
[16] *Id.* at 12.

Grand Cherokee that Wife used during the marriage.[17] It further ordered an equal division of the tax refund from the parties' 2022 joint tax return.[18] Finally, the trial court made findings allocating the parties' separate and marital debts and ordered that the marital debt be shared equally between the parties.[19]

Husband filed a timely appeal from the judgment and decree.[20]

Discussion

I. The trial court abused its discretion by awarding sole legal and physical custody of the minor child to Wife without addressing all relevant best-interest factors under Chapter III, Section 2(a) of the Community's Domestic Relations Code.

Husband first argues that we must reverse the trial court's custody award because the trial court based its decision on clearly erroneous findings of fact and erred as a matter of law by failing to analyze all relevant best-interest factors under Chapter III, Section 2(a) of the Community's Domestic Relations Code.[21]

The trial court has broad discretion in determining custody and parenting-time awards, and we review its determinations for an abuse of discretion.[22] In this context, the trial court abuses its discretion if it does not consider a relevant factor that should

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[17] *Id.* at 13.
[18] *Id.*
[19] *Id.* at 11, 14.
[20] Notice of Appeal at 1 (July 3, 2023).
[21] A. Br. at 12-29.
[22] *Nguyen v. Gustafson*, 4 Shak A.C. 1, 16 (Jan. 23, 2020).

have been given significant weight, if it considers and gives significant weight to an irrelevant or improper factor, or if it commits a clear error of judgment in weighing the factors that contribute to its decision.[23]

Chapter III, Section 2(a) of the Community's Domestic Relations Code states that the trial court "shall determine custody . . . in accordance with the best interests of the child," and it provides that the trial court "shall consider all relevant factors including, but not limited to," the 16 factors enumerated within the section:

> (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;
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> (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

[23] *Id.*

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

The trial court stated in its findings of fact that "some of the factors were neutral as between the parties," but "several factors were paramount" to its decision.[24] It went on to discuss the parties' capacity and willingness to provide adequate care to the joint child, to follow visitation and custody orders, and to provide love and affection to the joint child; the parties' maturity and ability to avoid conflict; the parties' physical, mental, and emotional fitness; the length of time the joint child had lived in a stable home environment; and the permanence, as a family unit, of the custodial home.[25] It is clear from the trial court's language that its findings corresponded to best-interest factors 1, 3, 4, 6, 10, 13, and 14.[26]

Husband argues that the phrase "shall consider all relevant factors" in the Domestic Relations Code requires the trial court to analyze every best-interest factor explicitly, and as such, it erred as a matter of law by failing to address every factor in its judgment and decree.[27] Conversely, Wife argues that the trial court must acknowledge that it considered all relevant best-interest factors but need not make individualized

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[24] Judgment & Decree at 4, ¶ 18.
[25] *Id.* at 4-6, ¶ 18(a)-(g).
[26] *See* SMS(D)C Domestic Relations Code Ch. III, § 2(a)(1), (3), (4), (6), (10), (13), (14).
[27] A. Br. at 14.

findings on each factor.[28]

The Domestic Relations Code is silent as to whether the trial court must articulate its findings on every factor. Neither party argues that a tradition or custom of the Community addresses this issue, and we are not aware of any past decision from the Tribal Court that would control the outcome here. Thus, we must decide an issue of first impression: whether Chapter III, Section 2(a) requires the trial court to make explicit factual findings for each of the best-interest factors in an initial custody determination. In doing so, we may look to Minnesota state law for persuasive authority.[29]

Following a trial, the court's findings of fact "make definite and certain what the issues were and how they were decided."[30] Detailed factual findings are important to appellate review because they provide the appellate court with "a clear understanding of the basis for the [trial court's] decision."[31] Thus, appellate courts generally will remand a case when the trial court's findings of fact are insufficient.[32] Although there

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[28] R. Br. at 11.

[29] *See* Resolution 11-14-95-003 Jurisdictional Amendment, § V.

[30] *Midway Mobile Home Mart, Inc. v. City of Fridley*, 135 N.W.2d 199, 202 (Minn. 1965).

[31] *Id.*

[32] *See, e.g., Moylan v. Moylan*, 384 N.W.2d 859, 865 (Minn. 1986) (reversing and remanding a child-support modification order where the trial court failed to make express findings of fact on all appropriate factors); *Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989) (reversing and remanding a spousal-maintenance award where the trial court failed to make detailed findings of fact on all relevant factors); *Rogge v. Rogge*,

are some circumstances in which an appellate court may conduct an independent review of the record to find support for a trial court's decision, "such action is improper where . . . it is unclear whether the trial court considered factors expressly mandated by the legislature."[33]

Here, the trial court did not indicate how several relevant best-interest factors weighed into its analysis. We agree with Husband that this was an abuse of discretion.[34] We are particularly concerned about the omission of best-interest factor 9, the interaction and interrelationship of the child with his siblings, and best-interest factor 11, the child and parents' Tribal background.[35]

The record reflects that [redacted] has two siblings who temporarily live in Husband's home with their mother.[36] [redacted] has met and spent time with them during Husband's parenting time.[37] Husband testified that [redacted] and his siblings love each other, and Wife testified that she supported [redacted] continuing a relationship with his siblings.[38]

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509 N.W.2d 163, 166-67 (Minn. Ct. App. 1993) (remanding a custody-modification order where the trial court failed to address several mandatory factors).

[33] *Moylan*, 384 N.W.2d at 865.
[34] *See Nguyen*, 4 Shak A.C. at 16 (Jan. 23, 2020) ("An abuse of discretion occurs if a relevant factor that should have been given significant weight is not considered . . . .").
[35] *See* SMS(D)C Domestic Relations Code Ch. III, § 2(a)(9), (11).
[36] Tr. at 90:25-91:22; 144:18-145:1.
[37] *Id.* at 92:19-23; 150:14-24.
[38] *Id.* at 93:9; 229:25-230:2.

Furthermore, Husband and [redacted] siblings are all Community members.[39] [redacted] is eligible for enrollment as well.[40] Husband and Wife both indicated it was important to them to teach [redacted] about his culture.[41] Yet the trial court did not discuss this evidence in its findings of fact. It only noted:

> The Code emphasizes the tribal identity and familial relationships for a child's best interest, and the Court believes that the Petitioner values these considerations for the joint minor child. However, the other factors weigh heavily in favor of the Respondent's sole physical custody and sole legal custody of the joint minor child.[42]

Without a more complete analysis of each best-interest factor the trial court considered, we cannot conduct a meaningful review of its decision. We therefore reverse the trial court's custody decision and remand the case for the trial court to issue further findings on all relevant best-interest factors. In doing so, the trial court may rely on the record as it stands; we see no need for it to conduct another evidentiary hearing.

Husband and Wife raise certain issues we wish to address to provide the trial court with guidance on remand. First, Husband argues that the trial court failed to properly analyze the parties' history of domestic abuse under best-interest factor 2.[43] We are not persuaded.

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[39] *Id.* at 124:3-5, 19-21.
[40] *Id.* at 230:3-6.
[41] *Id.* at 124:9-18, 22-24; 230:7-16.
[42] Judgment & Decree at 6, ¶ 19.
[43] A. Br. at 17; *see* SMS(D)C Domestic Relations Code Ch. III, § 2(a)(2).

The trial court's analysis of best-interest factor 1 included a finding that "[t]here exists a history of documented domestic abuse by [Husband] against [Wife] . . . ."[44] This finding applies equally to best-interest factors 1 and 2. We note that it is best practice for the trial court to articulate and analyze each relevant best-interest factor individually. Nevertheless, we are unlikely to conclude that the trial court abused its discretion where, as in this instance, a finding of fact makes clear that the trial court considered one relevant best-interest factor in conjunction with another. If the record shows that the trial court considered all relevant best-interest factors, the failure to separately articulate each best-interest factor would not warrant reversal.

Second, Husband suggests that the trial court must make findings on every best-interest factor enumerated in Chapter III, Section 2(a), regardless of their relevance to the case at hand. This is apparent in his arguments regarding best-interest factor 8, the child's developmental or special needs; best-interest factor 12, the parties' capacity and willingness to encourage school attendance; and best-interest factor 15, the reasonable preferences of the child.[45] There is no evidence in the record that [redacted] has special needs, and [redacted]s not old enough to attend school or express a preference as to custody. Husband acknowledges as much but argues that the trial court abused its

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[44] Judgment & Decree at 5, ¶ 18(a)(iii); *see* SMS(D)C Domestic Relations Code Ch. III, § 2(a)(1).

[45] A. Br. at 21-22, 25, 28; *see* SMS(D)C Domestic Relations Code Ch. III, § 2(a)(8), (12), (15).

discretion by failing to address these factors. We disagree.

The Code requires the trial court to consider all *relevant* factors in its analysis of the child's best interest.[46] Thus, the trial court's omission of irrelevant factors is not contrary to the Code's express language. Again, we note that it is best practice for the trial court to state that it found a best-interest factor to be irrelevant. But failure to do so is not an abuse of discretion where, as here, a factor clearly does not apply to the child's present circumstances.

Third, Wife's arguments suggest that the trial court need not specify which best-interest factors it found to be neutral. For example, regarding the parties' wishes as to custody, Wife asserts, "The tribal court did not make specific findings on this factor, however, it logically follows that after the tribal court began its analysis by stating that 'some of the factors were neutral,' . . . it likely found this factor to be neutral at minimum."[47] As an error-correcting court, we cannot make this assumption. It is not appropriate for an appellate court to speculate as to the weight the trial court gave to each factor.

Although the trial court does not abuse its discretion by declining to analyze irrelevant factors, it does abuse its discretion by failing to address relevant factors it found to be neutral. Custody decisions have a significant impact on the parties' lives,

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[46] SMS(D)C Domestic Relations Code Ch. III, § 2(a).
[47] R. Br. at 34; *see* SMS(D)C Domestic Relations Code Ch. III, § 2(a)(16).

and the trial court's best-interest findings help the parties to understand how it reached its decision. The findings also aid appellate courts in reviewing the weight given to each factor. Therefore, the trial court must explicitly state that it found a factor to be neutral.

II. The trial court abused its discretion by requiring Husband's parenting time to be supervised without making a finding of endangerment under Chapter III, Section 3(a) of the Community's Domestic Relations Code.

Next, Husband challenges the trial court's decision to grant him supervised parenting time. He argues that the trial court abused its discretion by failing to make a finding of endangerment in support of its decision to restrict his parenting time.[48]

The trial court stated in its findings of fact on this issue, "[Wife] proposed supervised visitation twice per week. The Court will honor the proposal of [Wife], as the sole custodian of the joint minor child."[49] It awarded Husband two supervised parenting-time visits per week for two hours per visit, allowing less restrictive visitation at Wife's discretion.[50] A review of the trial court's previous orders reveals that it relied on similar reasoning to require supervised parenting time before trial. It first granted supervised parenting time to Husband in November 2022 after he moved for temporary, unsupervised parenting time. There, the trial court stated:

> [T]he Court has received no compelling evidence that it would be in the best interest of the Child to issue an order that the Child should suddenly live with [Husband] for 48 hours per week while

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[48] A. Br. at 29-32.
[49] Judgment & Decree at 7, ¶ 20.
[50] *Id.* at 12, ¶ 4.

> this action proceeds and a final custody determination is made. [Wife] has offered [Husband] supervised visits with the Child that will allow [Husband] and the Child to meet and get to know one another gradually, perhaps building up to the relationship and the custody determination that [Husband] desires.[51]

Husband moved for unsupervised parenting time again in February 2023. The trial court denied the motion because it was filed after the deadline provided in the scheduling order.[52]

As we previously noted, we apply the abuse-of-discretion standard to the trial court's parenting-time decisions.[53] Under this standard, we review the trial court's findings of fact for clear error and its conclusions of law *de novo*.[54]

Chapter III, Section 3(a) of the Community's Domestic Relations Code governs the restriction of a noncustodial parent's visitation:

> 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.

Husband contends that this section requires the court to make a finding of endangerment before it imposes supervision or other restrictions on parenting time.[55]

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[51] Order at 4 (Nov. 4, 2022).
[52] Order at 4 (Mar. 8, 2023).
[53] *Nguyen*, 4 Shak A.C. at 16.
[54] *Johnson v. Brooks-Johnson*, 4 Shak. A.C. 62, 66 (Oct. 16, 2023).
[55] A. Br. at 29-30.

He argues that the trial court's decision must be reversed because the trial court did not make an endangerment finding and the record does not support such a finding.[56] Wife disagrees, arguing that the trial court's analysis of several best-interest factors in its custody findings were sufficient to establish endangerment.[57]

We conclude that Husband's argument merits relief. The trial court never found that unsupervised parenting time would endanger K.J.C.; rather, it explicitly based its parenting-time award on Wife's proposed schedule. While Wife is correct that several of the trial court's custody findings would be relevant to the issues of parenting time and endangerment, the trial court did not state that these findings established endangerment, incorporate the custody findings into its parenting-time analysis, or indicate that it considered the custody findings when determining the parenting-time award. We cannot reweigh the evidence ourselves, nor can we assume that the trial court found endangerment where it does not explicitly state so. We therefore reverse the trial court's parenting-time award and remand the case for the trial court to issue findings on the issue of endangerment.[58]

III. The trial court did not err in determining Husband's child-support obligation.

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[56] *Id.* at 30-32.

[57] R. Br. at 35-36.

[58] We do not disturb the existing parent-time schedule, but urge the trial court to quickly address the endangerment issue so that if there is no finding of endangerment, Husband's parenting time can be adjusted.

Next, Husband argues that the trial court erred by failing to impute income to Wife in its guidelines child-support calculation, by awarding retroactive child support to Wife, and by adjusting the child-support award for inflation.[59] We address each argument in turn.

A. The trial court did not err by failing to impute income to Wife.

Husband first argues that the trial court erred by failing to impute income to Wife for the purposes of its guidelines child-support calculation.[60] He contends that this error requires us to reverse and remand for the trial court to impute potential income to Wife and recalculate its child-support award.[61] We disagree.

A trial court's determination of income is a finding of fact that appellate courts review for clear error.[62] Findings of fact are clearly erroneous if they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a

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[59] A. Br. at 32-37.
[60] *Id.* at 32-34.
[61] *Id.* at 34.
[62] *Newstrand v. Arend*, 869 N.W.2d 681, 685 (Minn. Ct. App. 2015).

whole."[63] We will defer to the trial court's findings of fact unless we have a "definite and firm conviction that a mistake has been made."[64]

The Community's Domestic Relations Code contains a rebuttable presumption that a parent can be employed full-time for the purposes of calculating child support.[65] Furthermore, this provision requires the court to impute potential income to a custodial parent who is "voluntarily unemployed, underemployed, or employed less than full time."[66] The court must not, however, impute income to a parent who stays at home to provide for the joint child.[67]

Here, the trial court found that Wife's net income for July 2022 to June 2023 was $0 per month.[68] Wife testified that she was not working, was a stay-at-home mother to [redacted] and relied on SNAP, WIC, and help from her mother to meet her living expenses during the divorce proceedings.[69] The evidence reasonably supports the trial court's finding on Wife's income, and therefore, it was not clearly erroneous. The record also reflects that Wife was a stay-at-home parent during this period, so the trial court

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[63] *Brooks v. Corwin*, 2 Shak. A.C. 5, 6 (Aug. 4, 2008).
[64] *Id.* (quotation omitted).
[65] SMS(D)C Domestic Relations Code Ch. II, § 7(c)(1).
[66] *Id.*
[67] *Id.* at § 7(c)(1)(iv).
[68] Judgment & Decree at 8.
[69] Tr. at 237:13-15, 240:21-24.

complied with the Domestic Relations Code by declining to impute potential income to her.[70]

The trial court found that Wife's projected net income for July 2023 onward was $1,245 per month.[71] This finding was based on Wife's testimony regarding a Certified Peer Recovery Specialist position that would begin after the dissolution trial.[72] Again, this finding was supported by the record and was not clearly erroneous.

Wife testified that the part-time, remote position would allow her to avoid the cost of childcare.[73] For all practical purposes, this means that Wife will remain a full-time stay-at-home mother while also earning income through part-time employment. As such, the Code precludes the trial court from imputing potential income to Wife until the circumstances change.

B. The trial court did not err by awarding retroactive child support to Wife.

Husband claims that the Community's Domestic Relations Code does not provide for retroactive awards of child support.[74] He relies on the Code's child-support modification provision to argue that child support may only be awarded from the date the petitioning party serves notice on the other party, and thus, the trial court erred by

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[70] *See* SMS(D)C Domestic Relations Code Ch. II, § 7(c)(1)(iv).
[71] Judgment & Decree at 8.
[72] Tr. at 237:18-240:3.
[73] *Id.* at 239:19, 240:5-14.
[74] A. Br. at 34.

awarding child support prior to October 5, 2022, the date of Wife's first request for child support.[75] We are not persuaded.

The Community's Domestic Relations Code does not address whether an initial award of child support may be made retroactive to the date of the child's birth. But Minnesota law provides persuasive authority on this issue. The Minnesota Supreme Court affirmed that "a parent's obligation to support his child commences with the child's birth."[76] Subsequent caselaw has established that courts may award retroactive child support as part of a final dissolution order, and courts may order child support retroactive to the date of the parents' separation.[77] Husband does not provide any authority from the Community or the State that contradicts these principles. We therefore conclude that the trial court did not err in awarding child support retroactive to the child's birth.

C. The trial court did not err by adjusting the child-support award for inflation.

The trial court noted its past practice to adjust the guidelines child-support amounts for inflation, and it did so in this case.[78] Husband argues that the trial court erred because the Domestic Relations Code does not authorize this adjustment as an

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[75] *Id.* at 34-35; *see* SMS(D)C Domestic Relations Code Ch. II, § 7(l)(3).
[76] *Jacobs v. Jacobs*, 309 N.W.2d 303, 305 (Minn. 1981).
[77] *See In re Support of J.M.K.*, 507 N.W.2d 459, 461 (Minn. Ct. App. 1993); *Korf v. Korf*, 553 N.W.2d 706, 710-11 (Minn. Ct. App. 1996).
[78] Judgment & Decree at 8, 12.

upward departure or as a cost-of-living adjustment.[79] We disagree; the trial court's practice of adjusting for inflation does not constitute an upward departure and is in line with the principles of equity and fairness that underlie cost-of-living adjustments.

Child-support awards are calculated using the guidelines matrix in Chapter II of the Code.[80] The Code provides for biennial, compounded cost-of-living adjustments to be applied to the non-custodial parent's adjusted child-support obligation.[81] These adjustments are based on a change in the cost of living as determined by the Bureau of Labor Statistics.[82] The cost-of-living provision does not explicitly state whether the court may apply such adjustments to an initial child-support award, so we turn to the canons of statutory interpretation to resolve this issue.

Statutory interpretation is a question of law we review *de novo*.[83] "The object of all statutory interpretation is to ascertain and effectuate the intention of the Legislature."[84] In doing so, we first examine whether the statutory language is "clear and free from all ambiguity."[85] If the statute is unambiguous, we "decline to explore its spirit or

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[79] A. Br. at 35-37; *see* SMS(D)C Domestic Relations Code Ch. II, § 7(i)-(k).
[80] SMS(D)C Domestic Relations Code Ch. II, § 7(d).
[81] *Id.* at § 7(k).
[82] *Id.*
[83] *See Stopp v. LSI*, 1 Shak. A.C. 29, 30 (Jan. 29, 1996) (reviewing the trial court's interpretation of law *de novo*).
[84] *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016).
[85] *Id.*

purpose" and instead apply its plain language.[86] Conversely, we must look beyond the plain language of the statute when its meaning is ambiguous and a literal interpretation "leads to absurd results or unreasonable results which utterly depart from the purpose of the statute."[87]

The last time the General Council amended the child-support matrix was in February 2016.[88] Since then, the cost of living has continued to rise dramatically without further amendment to the guidelines matrix. Children who are subject to child-support proceedings in 2023 should receive a comparable level of support to children who were subject to child-support proceedings in previous years that are automatically adjusted for inflation biennially. The only way for the trial court to ensure this level of support is to continue its practice of adjusting the guidelines child-support amount for inflation.

Although this practice is not explicitly contemplated in the cost-of-living provision, a strict interpretation of its terms would lead to an unreasonable result that deviates from the General Council's clear intent to ensure that child-support awards remain reasonable and fair as the cost of living increases over time. Therefore, we conclude that the Code must be interpreted to allow the trial court to account for cost-of-living adjustments from the guidelines matrix in its initial child-support awards.

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[86] *Id.*

[87] *Wegener v. Comm'r of Revenue*, 505 N.W.2d 612, 617 (Minn. 1993).

[88] *See* General Council Resolution No. 11-10-15-002.

Such adjustments are not upward departures of the type the Code prohibits and are consistent with the best interests of the children under our jurisdiction.

IV. The trial court did not abuse its discretion in dividing the parties' property.

Next, Husband challenges the trial court's decisions regarding the division of property between Husband and Wife. He first argues that the trial court abused its discretion by dividing two sums equally between the parties: the proceeds from the sale of a Jeep Grand Cherokee and the refund from the parties' 2022 joint tax return.[89] Husband primarily relies on Chapter II, Section 5 of the Domestic Relations Code, which governs the division of property in dissolution proceedings. This section provides that per-capita payments are the separate property of a Tribal Member and are not marital property.[90] Husband appears to argue that the vehicle-sale proceeds and tax refund should be considered his separate property because he purchased the vehicle and paid taxes with his per-capita income.[91]

The trial court has "broad discretion in evaluating and dividing property in a marital dissolution," and we review its decision for an abuse of that discretion.[92] We

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[89] A. Br. at 37-39; *see* Judgment & Decree at 10, ¶ 36, 11, ¶ 40, 13, ¶¶ 10, 15.
[90] SMS(D)C Domestic Relations Code Ch. II, § 5(b), (h).
[91] A. Br. at 37-39.
[92] *Stade-Lieske v. Lieske*, 3 Shak. A.C. 10, 14 (June 8, 2015) (quotation omitted).

conclude that our past precedent is dispositive of this issue and hold that the trial court did not abuse its discretion.

In *Stade-Lieske v. Lieske,* the trial court awarded several vehicles to a Community-member spouse because she purchased the vehicles with her per-capita income.[93] There, we concluded that this award was not an abuse of the trial court's discretion, but we stated in our holding:

> Although the Trial Court is correct that per-capita payments are the separate property of the member under the Code and *Welch* [*v. Welch,* 2 Shak. A.C. 11, 19 (Apr. 15, 2009)], that does not mean that anything purchased with per-capita payments during the marriage is separate property. Just as we held in *Welch* that maintenance could be awarded out of per-capita payments, we hold that property purchased with a member's per-capita payments is marital property and can be awarded to the non-member spouse.[94]

We apply the same reasoning here—the fact that Husband purchased the Jeep and paid taxes with his per-capita income does not mean that the proceeds from the Jeep sale or the refund from the parties' joint tax return are Husband's separate property. Therefore, the trial court did not abuse its discretion by finding that these amounts were marital property and awarding half of each sum to Wife.

Husband also challenges the trial court's decision to allocate certain debts to him. He argues that the debts allocated to him as separate debts were actually marital debts

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[93] *Id.* at 27.
[94] *Id.* at 28.

that should have been divided between the parties.[95] He further contends that the trial court did not make appropriate findings to support its allocation of half the marital debt to Husband.[96]

The Domestic Relations Code provides that the parties' marital property is liable for the debts contracted during the marriage by either spouse.[97] The trial court must divide marital property, including debts, equitably upon dissolution.[98] Equitable division of property "provide[s] for a fair, but not necessarily equal, allocation of the property between the spouses" in a dissolution proceeding.[99]

Here, the trial court effectuated an equitable division of the parties' debts by allocating most of the debts to Husband. Husband testified that these debts were the result of a personal judgment against him and personal loans that he took out and paid with his per-capita income.[100] As an initial matter, the trial court correctly identified that the personal judgment against Husband was separate debt. The judgment was entered in June 2017, before the parties' marriage.[101] As for the personal loans, Wife testified that she was not involved in Husband's decision to take out these loans and her income was

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[95] A. Br. at 40-41.
[96] *Id.* at 41-42.
[97] SMS(D)C Domestic Relations Code Ch. II, § 5(b).
[98] *Id.* at § 5(c).
[99] *Equitable distribution*, Black's Law Dictionary (11th ed. 2019).
[100] Tr. at 46:13-16, 47:3-5, 48:3-5.
[101] *See* Pet. Ex. 13.

not considered in the loan applications.[102] Although the parties were married at the time that Husband accrued this debt, it would be unfair for Wife to take on an equal amount of these debts because she did not participate in the decision-making process, earned little to no income at the time the loans were taken out, and still earns significantly less than Husband at present. As such, we conclude that the trial court did not abuse its discretion in allocating these debts to Husband.

Conversely, Wife's mother K.A. testified that she loaned money to both parties during their marriage.[103] She testified that Husband and Wife owed her $6,000 before [redacted] birth.[104] In this situation, it is clear that both parties were involved in borrowing money from K.A., and both parties should be responsible for paying back this amount. The record supports the trial court's finding as to the amount of this debt and the parties' equal responsibility for it, and thus, the trial court did not abuse its discretion in allocating this debt between the parties.

V. Any error in the trial court's findings of fact regarding witness B.F.'s testimony was harmless.

Next, Husband argues that the trial court's finding of fact regarding witness B.F.'s testimony was clearly erroneous.[105] B.F. is the mother of Husband's nonjoint

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[102] Tr. at 246:2-11.
[103] *Id.* at 293:25-294:5.
[104] *Id.* at 298:17-18.
[105] A.Br. at 42-43.

children, and most of her testimony related to her coparenting relationship with Husband, Husband's parenting abilities, and her opinions regarding Husband's visitation with [redacted].[106] B.F. described her current relationship with Husband to be "a healthy co-parenting relationship," but she testified that she and Husband "had a domestic incident" while she was pregnant with one of their children in which she "physically attacked" Husband.[107]

In its analysis of the best-interest factors, the trial court found that "[t]here exists a history of documented domestic abuse by [Husband] against [Wife] and by [Husband] against the mother of his other children."[108] Husband argues that this finding is clearly erroneous because it is contrary to B.F.'s testimony. Husband is correct; it appears that the trial court misunderstood B.F.'s testimony on this point because B.F. stated that she attacked Husband and faced legal consequences for it.[109]

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[106] *See generally* Tr. at 144-157.
[107] Tr. at 144:23, 146:19-24.
[108] Judgment & Decree at 5, ¶ 18(a)(iii).
[109] Tr. at 146:24-147:1.

B.F. further stated that there were no other incidents of domestic abuse between her and Husband.[110]

Although the trial court's finding of fact was clearly erroneous, we conclude that this error was harmless.[111] The trial court noted ample evidence in the record that Husband committed acts of domestic abuse against Wife, which is more relevant to the issue of [redacted] custody than any acts of domestic abuse in Husband and B.F.'s relationship history. Even if the trial court's finding of fact regarding B.F.'s testimony was omitted from its analysis, it is unlikely that its custody determination would change.

VI. The trial court did not abuse its discretion by excluding Husband's evidence.

Finally, Husband challenges the trial court's decision to exclude certain video recordings and text-message exchanges he offered at trial.[112] He explains that the video recordings depict Wife using heroin, admitting to having a drinking problem, and expressing suicidal ideation.[113] He argues that the trial court abused its discretion by excluding these recordings because they were probative of Wife's chemical and mental health and relevant to the trial court's determination of custody and parenting time.[114]

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[110] *Id.* at 147:2-4.
[111] *See Clark v. Clark*, 642 N.W.2d 459, 465 (Minn. Ct. App. 2002) (applying the principle that harmless error may be ignored to dissolution proceedings).
[112] A. Br. at 43-47.
[113] *Id.* at 45.
[114] *Id.* at 45-46.

Husband does not specify which text-message exchanges the court erroneously excluded, but he alleges that they involve Wife making sexual advances toward Husband.[115] He argues that trial court abused its discretion by excluding this evidence because it rebuts Wife's claims of domestic violence and proves that the parties can communicate and co-parent.[116]

We review the trial court's evidentiary rulings for an abuse of discretion.[117] Even if the trial court abused its discretion in excluding evidence, we will reverse its decision only if the evidence "might have reasonably changed the result of the trial."[118]

The Community's Rules of Civil Procedure establish that the Federal Rules of Evidence apply to Tribal Court actions.[119] The Federal Rules of Evidence provide that relevant evidence is generally admissible, but courts may exclude evidence when its probative value is substantially outweighed by the danger of unfair prejudice or needlessly presenting cumulative evidence, among other dangers.[120]

We conclude that the probative value of Husband's video recordings was minimal and was substantially outweighed by its prejudicial and cumulative nature. The testimony given at trial was more than sufficient to establish that both parties

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[115] *Id.* at 46.
[116] *Id.* at 46-47.
[117] *Kostelnik v. Little Six, Inc.*, 1 Shak. A.C. 92, 100 (Mar. 17, 1998).
[118] *Id.*
[119] SMS(D)C R. Civ. P. 27.
[120] Fed. R. Evid. 402, 403.

previously struggled with substance-abuse and mental-health issues. Furthermore, we conclude that Husband's text-message evidence does not meet the baseline threshold of relevance.[121] Wife's consent to and pursuit of a sexual relationship with Husband does not negate the possibility that Wife also experienced domestic abuse in the relationship and is wholly irrelevant to the issues of custody and parenting time. In sum, the trial court did not abuse its discretion in excluding Husband's evidence.

It therefore is ordered that the decision of the trial court is affirmed in part, reversed in part, and remanded for further findings consistent with this opinion.

Dated: December 28, 2023

Judge Vanya S. Hogen

Pro Tem Judge Terry Mason Moore

Pro Tem Judge Andrew Adams III

[121] *See* Fed. R. Evid. 401 ("Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action.").