IN THE APPELLATE COURT
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD NATION, PABLO, MONTANA

JAMES LOZEAU, Petitioner/Appellant, vs. CASSIDY JOHNSON, Respondent/Appellee.	Appeals Cause No. AP-16-146-DVCV **OPINION**

Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes, Honorable Bradley A. Pluff, presiding.

Appearances:

For Petitioner/Appellant, Jamie J. McKittrick, Esq., Thomas Stanton, Esq., Wells and McKittrick, P.C.

For Respondent, Cassidy Johnson, *pro se*

Before: TAYLOR, TENENBAUM, AND MCDONALD

Opinion by Justice Taylor, concurred by Justices Tenenbaum and McDonald

Appellant James Lozeau appeals the Tribal Court's April 12, 2022 Order denying his second attempt to modify the parenting plan, and imposing sanctions against him. The questions presented here are whether the Tribal Court should have denied the second motion to amend or should have allowed the Appellant an opportunity for a hearing on his second motion, and whether the

Appellant was properly sanctioned by the Tribal Court. We affirm the Tribal Court's order in accordance with the following.

BACKGROUND

The Appellant filed a *pro se* petition for dissolution and a proposed parenting plan on March 3, 2016. Respondent Johnson filed her response on April 14, 2016. The parties then reconciled. The case was never dismissed.

On November 11, 2020, the Appellant, through counsel, filed an Amended Petition for Dissolution and Proposed Parenting Plan. Appellee Johnson filed a Response, through counsel, on November 20, 2020. The Appellant then added a second attorney to his legal team on March 9, 2021. One of Appellant's attorneys withdrew as attorney of record on July 14, 2021, but the other continued to represent him.

The case was set for trial in September of 2021. Prior to trial the parties agreed to a stipulated final parenting plan. Notably the parenting plan included stipulated language allowing Appellee Johnson to request that Appellant Lozeau undergo drug or alcohol testing if she "suspects" he has been using. In addition to the parenting plan, the parties executed a stipulated marital property settlement agreement. In that agreement, among other things, Appellee Johsnon is allowed to take the tax exemptions for all four children they were parenting. The Court adopted the stipulated plan in its Findings of Facts, Conclusions of Law, and Decree of Dissolution by Order dated September 1, 2021. On September 30, 2021, the Appellant's remaining attorney also withdrew as his attorney of record. On December 7, 2021, Molly Stammers of SafeHarbor was substituted as attorney of record for Appellee Johnson.

On February 1, 2022, only five months after the Court adopted the stipulated parenting plan of the parties, Appellant filed a motion to amend the parenting plan. This document was served on Appellee Johnson, but not on Appellee Johnson's attorney of record. On February 15, 2021, Appellant Lozeau, continuing to act *pro se*, filed a request for default. There is no procedure for entry of default under the Tribal Court rules for failing to respond to a Motion. Appellee Johnson's Motion does not appear to have been supported by a brief as required by Rule 14(3) of the Tribal Court rules of Procedure. In any event, defaults can only be entered in response to pleadings, and not to motions.

On February 21, 2022, Appellee Johnson filed an Objection to the request for default, and on February 22, 2022, Appellee Johnson filed a detailed response to Appellant's Motion, accompanied by a Declaration of the Respondent. Throughout the proceedings Appellee Johnson has continued to raise concerns about Appellant's drug and alcohol use.

On March 2, 2022, the Tribal Court, Hon. Bradley Pluff presiding, entered an Order denying the Motion to Amend Parenting Plan. The Court noted that Appellant had failed to serve the Motion on Appellee Johnson's counsel of record, and that the Motion failed to allege circumstances that would allow the Court to reconsider the Stipulated Parenting Plan. A copy of Judge Pluff's Order was hand delivered to Appellant on March 7, 2022.

On March 17, 2022, still acting *pro se*, Appellant filed a second motion to modify the parenting plan. The amended motion also requested that the marital property settlement be modified in that it requested Appellant to be awarded one of the tax exemptions for the four children. Appellee Johnson filed her Response on March 30, 2022, along with another detailed Declaration. Appellee Johnson asked the Court to deny the second motion the parenting plan,

and also requested attorney fees as a sanction. On April 12, 2022, Appellant Lozeau filed a request for hearing on his amended motion. On April 14, 2022, Appellee Johnson filed a Response to Appellant Lozeau's request for hearing. On April 20, 2022, the Tribal Court issued an Order denying the Amended Motion to Amend the Parenting Plan, and further awarded Appellee Johnson her attorney fees for having to respond to the Amended Motion. The Tribal Court ruled that Appellant Lozeau had again failed to raise a sufficient basis to amend the parenting plan, that he was a vexatious litigant and his filings constituted harassment. The Court awarded Appellee costs and attorney fees.

Appellee Johnson filed a Bill of Costs on April 28, 2022. Appellant Lozeau filed his Notice of Appeal and Request for Ex Parte Stay of Order on May 3, 2022. After filing his Notice of Appeal, Appellant Johnson then filed an Objection to Appellee Johnson's Bill of Costs along with a supporting brief. Appellee Johnson filed a reply to the Objection. Appellant Lozeau objected to the costs, not because they were excessive, but primarily because he was a *pro se* litigant. He claimed to be following the advice of unnamed personnel in the office of the Clerk of Court, and also advice from an attorney in the Tribal Defenders Office.

This appeal followed. On appeal Appellant Lozeau is now represented by counsel. The case was argued before this Court on April 12, 2023. Appellee Johnson was represented by counsel during the briefing of the appeal but appeared *pro se* during the oral argument of the case before this Court.

DISCUSSION

The issues before this Court are whether the Tribal Court committed reversible error by denying Appellant's second motion to amend the parenting plan and refusing to allow the

Appellant a hearing on that motion, and whether the Tribal Court committed reversible error by sanctioning the Appellant. The issues will be addressed in that order.

1. Dismissal of the Appellant's Second Verified Motion to Amend Parenting Plan

In this case the Appellant has acknowledged in his brief and through Counsel at oral argument that both his initial motion to amend the parenting plan, and his amended one, were insufficient as a matter of law. Not only did the Appellant fail to follow proper procedure, but more importantly the issue he was raising is not a legal basis on which to modify the parenting plan. It is true that as a *pro se* litigant he is to be given greater latitude when the Court reviews his filings. This is especially true on procedural matters where a *pro se* litigant may be lacking the necessary expertise to comply with the local procedural rules.

"While… *pro se* litigants are given wider latitude in their presentation of the evidence and their pleadings are considered more liberally in their favor, *Northwest Collection v. Pichette*, CSKT Cause No. AP-93-077-AP (1995), this does not shift the trial court's role from that of neutral arbiter to that of an advocate for the unrepresented part." *In the Marriage of Adamson and Adamson*, CSKT Cause No. AP-00-317-DV (2003).

This relaxed standard does not relieve a *pro se* litigant from at a minimum alleging a sufficient legal basis for their claim. In this case the Appellant acknowledged that he was receiving all the visitation he was entitled to under the agreement he had reached with the Appellee. He entered into that agreement at a time when he was represented by Counsel. He asked the Court to approve the agreement of the parties. The Court approved the agreement and entered an Order to that effect. Five months later the Appellant moved to modify the same parenting plan because Appellant believed he was receiving less discretionary time with his

children than what he had hoped to receive. Getting what you bargained for is not a legally sufficient basis to amend the parenting plan.[1] The Court informed the Appellant in the Order of March 2nd, 2022, that he had failed to demonstrate a change in circumstances that would justify modifying the parenting plan. A copy of the Court's March 2nd Order was personally served on the Appellant. He filed his second motion to amend the parenting plan on March 17, 2022, essentially raising the same issues again and also requesting a change in the allocation of tax exemptions for the children.

There is very little Tribal law on the issue of dissolution of marriage. What exists can be found at CSKT Laws Codified § 3-1-101, et seq. §3-1-103 provides:

> Divorce or separation. (1) A marriage may be dissolved by divorce or legal separation in the Tribal Court of the Confederated Salish and Kootenai Tribes for incompatibility of the parties for whatever reason using the guidelines of the Uniform Marriage and Divorce Act set forth in the Montana Code Annotated.[2]

Montana law provides that a parenting plan can be modified only if it finds "on the basis of facts that have arisen since the prior plan or that were unknown to the court at the time of entry of the prior plan, that a change has occurred in the circumstances of the child and that the amendment is necessary to serve the best interests of the child. MCA §40-4-219. The Court is required to deny the motion without a hearing unless adequate cause for the motion is demonstrated by affidavits filed with the motion. MCA §40-4-220. Under Montana law, the person seeking to modify a parenting plan carries a heavy burden of proof. *In Re the Parenting of CMR*, 2016 MT 120, 383 Mont. 398, 372 P.2d 1276. We think this is an appropriate standard for this Court to use in

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[1] The Court also notes that this issue was disputed at the trial level, as Appellee asserted that she had been providing Appellant with discretionary visitation.
[2] See also CSKT Laws Codified, §4-1-104

reviewing changes in a parenting plan, especially in this case where only a few months had passed between the entry of the agreed parenting plan and the Appellant's attempts to modify that plan. In this case, not only did the Appellant fail to file the necessary affidavits both times he requested modification, his basis for attempting to modify the parenting plan (that he was dissatisfied with what he had just bargained for) is not a legally sufficient basis for such a modification.

In addition to his attempt to change the parenting plan, in Appellant's second attempt to modify the Court's Order of September 1, 2021, he also requested a change in the tax exemptions for the children. The tax exemptions are covered by the property settlement portion of the September 1 Order. There is no Tribal law that directly addresses modifying property settlements that have been approved by the Court. Montana law provides in MCA 40-4-208(3):

> The provisions as to property disposition may not be revoked or modified by a court except:
> (a) upon written consent of the parties; or
> (b) if the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

During oral argument Counsel for Appellant abandoned the request to modify the property settlement agreement and change the tax exemptions so that issue is no longer before this Court.

In reviewing the Tribal Court's decision to deny the second attempt to modify the parenting plan we are mindful of the appropriate standards of review. "We review the trial court's conduct in providing assistance, or not providing assistance, to a *pro se* litigant for an abuse of discretion. *In re Estate of Burland*, CSKT Cause No.AP-00-174-P, 2002." *In the Marriage of Adamson and Adamson*, CSKT Cause No. AP-00-317-DV (2003). Absent an abuse of discretion concerning the actions of a *pro se* litigant we cannot reverse the determination of the trial court.

In addition, the decision of the trial court concerning custody matters will be given significant weight by this Court. "This Court will follow the rule that unless there is a clear abuse of discretion by the trial court, a custody decision will not be overruled on appeal." *King v. King*, CSKT Cause No. AP-01-92 (1992). The person seeking to modify a parenting plan carries a heavy burden of proof. *In Re the Parenting of CMR*, 2016 MT 120, 383 Mont. 398, 372 P.2d 1276.[3]

Both parties to this proceeding, and especially the Appellant, made arguments and appended matters to their appeal briefs that are not supported by the trial court record. As the Court informed the parties during argument, this Court will not consider such matters. Rule 3 of the Rules of Appellate procedure requires that our review and inquiry is based only on the record before us.

Applying these standards to the record before us we find no error in the decision of the Tribal Court to deny Appellant's second motion to amend the parenting plan. As mentioned, the Appellant did not file the affidavits required by MCA §40-4-220. Unless such affidavits are filed demonstrating the need for modification no hearing is required. Although as a *pro se* litigant he is entitled to greater latitude in procedural matters, the basis on which he sought modification of the parenting plan (that he was dissatisfied with what he had bargained for only five months earlier) is not a legally sufficient basis. If this were the standard then every parenting plan approved by the Court would be constantly subject to reexamination. The Court acted properly in denying the second motion to amend the parenting plan.

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[3] In support of Appellant's assertion that he should not be sanctioned he cites to the Montana Constitution, Article II, Section 16. This provision of Montana law does not apply to tribal court proceedings.

2. *Appropriateness of Sanctions on the Appellant*

Appellant asks this Court to reverse the decision of the Tribal Court to impose sanctions on him as a vexatious litigant. The relevant portion of Montana law on the issue of sanctions in a custody proceeding is MCA 40-4-219 (5) which provides:

> Attorney fees and costs **must be assessed** against a party seeking frivolous or repeated amendment if the court finds that the amendment action is vexatious and constitutes harassment. (emphasis added)

Under this statute sanctions automatically apply if the attempted amendment is frivolous or repeated, and if the attempted amendment is vexatious or constitutes harassment. In the case at bar the element of a repeated filing is met as the Appellant filed what is essentially the same motion twice in less than three weeks. The remaining issue is whether the Appellant's conduct is vexatious or constitutes harassment. Appellant asks us to adopt the five part test for determining who is a vexatious litigant announced in the federal court system by *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1058 (9th Cir. 2007).[4] We are unaware of any authority that requires this Court to adopt such a test. At this time we leave the matter to the sound discretion of the Tribal Court. As we have previously noted, the Tribal Court should give *pro se* litigants greater latitude for making procedural mistakes.

The Appellant also appears to be acting under the impression that being designated a vexatious litigant automatically disqualifies him from permanently filing any further documents in the case. While the Tribal Court may have that authority (an issue we do not decide at this

[4] The Ninth Circuit adopted but did not develop the five part test. It was initially discussed by the Second Circuit Court of Appeals in *Safir v. United States Lines, Inc.*, 792 F.2d 19 (2nd Cir. 1986), and cases cited therein.

time) such is not the case here. The Tribal Court imposed a sanction on the Appellant of $932.05 in attorney fees and costs for having to respond to Appellant's Second Verified Motion to Amend Parenting Plan, but did not foreclose him from further filings.[5]

In reviewing the imposition of sanctions on a *pro se* litigant this Court reviews the actions of the Tribal Court for an abuse of discretion. *In re Estate of Burland*, CSKT Cause No. AP-00-174-P (2002). *In the Marriage of Adamson and Adamson*, CSKT Cause No. AP-00-317-DV (1992). See also *In re Marriage of West*, 233 Mont. 47, 52, 758 P.2d 282, 286, 1988.

In this case the Appellant filed two motions to amend the parenting plan in a period of less than three weeks. Neither motion complied with the procedural requirements that are a precondition for obtaining a hearing on such a motion. The Court had just informed the Appellant in its Order of March 7, 2022, that his pleading did not meet the legal requirements for amending a parenting plan, yet Appellant basically refiled the same motion only a few days later. Appellee was required to retain Counsel to respond to both Motions. There is evidence in the record of an improper motive by the Appellant in filing these motions to amend the parenting plan. In addition, these Motions came only a few months after the parenting plan he had agreed to had been put in place. At the time the parenting plan was adopted Appellant was represented by Counsel and is presumed to understand the contents of that plan. The grounds for both motions to amend were that Appellant thought he was not receiving as much discretionary visitation as he hoped to received. Appellant advanced this same argument on appeal. We have stated before and we restate now that this is <u>not</u> a basis to modify a parenting plan. Appellant

[5] A designation as a vexatious litigant will however no doubt bring additional scrutiny to any future filings of the Appellant.

understood that any additional visitation beyond that required by the parenting plan was discretionary with Appellee Johnson. Rather than work cooperatively with her for the betterment of the children, he has adopted a confrontational posture about additional visitation. We find no abuse of discretion in the Tribal Court's decision to impose $932.05 in attorney fees and costs for responding to Appellant's motions.

CONCLUSION

The trial court's decision to deny the Second Verified Motion to Amend Parenting plan is affirmed. The trial court's decision to impose sanctions on Appellant in the amount of $932.05 for fees and costs is affirmed.

Dated this 6th day of July, 2023.

CONFEDERATED SALISH & KOOTENAI TRIBES COURT SEAL OF APPEALS FLATHEAD RESERVATION

Justice James Park Taylor

CERTIFICATE OF MAILING

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed a true and correct copy of the Opinion to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, MT, this 10th day of July, 2023.

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