

**COURT FILE NOS. A06-882 & 1417**

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***STATE OF MINNESOTA  
IN COURT OF APPEALS***

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**Thomas John Szarzynski, *Appellant*,**

**v.**

**Therese Elizabeth Szarzynski, *Respondent***

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**APPELLANT THOMAS JOHN SZARZYNSKI'S BRIEF AND APPENDIX**

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## ***STATEMENT OF THE CASE***

This is a dissolution of marriage action. Appellant Thomas Szarzynski (hereinafter "Tom") and Respondent Therese Elizabeth Szarzynski (hereinafter "Therese"), were married on July 22, 1989. They have two minor children, namely, Jacob ("Jake") Szarzynski, born December 19, 1994; and, Izabella (Bella) Szarzynski, born October 4, 1997. The case was venued in Hennepin County, Fourth Judicial District Court in front of Referee Thomas Haeg.

On January 12, 2002, the trial court issued a temporary order that granted Therese temporary custody and Tom unsupervised parental access. On April 24, 2003, the Honorable Patricia Karasov, Hennepin County District Court, issued a harassment order in Court File No, HA 03-004440 in favor of Therese. The order restricted the parental access Tom had been granted in the dissolution file, even though the issue had not been litigated. Trial was held on June 25, 2003, June 26, 2003, September 29, 2003, November 21, 2003, November 24, 2003, November 25, 2003, and January 9, 2004. A judgment and decree was filed on April 21, 2004. On August 26, 2004, the trial court issued an order on the parties' respective motions for amended findings and/or new trial. On October 11, 2004, the trial court issued an order that dealt with financial asset divisions arising out of the judgment and decree. On March 7, 2005, the trial court issued an order to show cause to find Tom in contempt of court. On April 6, 2005, the trial court issued an order that appointed Mary Davidson as parenting consultant; deemed the Lisne parenting time plan implemented as of April 1, 2005; denied Tom's request for compensatory time; and, denied Tom's request for attorney's fees. On (not dated) the Court issued an order that appointed Andrea Niemi as parenting consultant. On June 14, 2005, the trial court issued an order that determined that Therese converted \$26,574.07 of Tom's company monies; ordered Therese to return personal

property belonging to Tom; denied Tom's motion for attorney's fees; reserved a motion by Therese to find Tom a "nuisance litigant;" reserved Therese's motion for attorney's fees; re-scheduled a contempt hearing; and, denied Therese's motion for a receiver. On June 21, 2005, the Court issued an order that named Janey Nelson as parenting consultant. On August 26, 2005, the trial court issued an order that continued contempt proceedings that were commenced on August 25, 2005, to September 12, 2005. On September 12, 2005, the trial court issued an order that arose from a stipulation of the parties. The order required Tom to immediately pay \$35,000 toward back spousal maintenance; indefinitely continued Therese's motion for contempt; and, ordered the parties to agree on the amount of spousal maintenance arrearages. On November 14, 2005, the trial court issued an order that appointed Dr. Monica Flynn to act as parenting consultant. She was appointed for two years to make binding decisions regarding scheduling and parenting time. There was no mention in the order of the Court having the authority to dismiss her for "good cause shown." On February 8, 2006, the trial court appointed a guardian ad litem to investigate allegations by Tom of abuse of the children. On March 6, 2006, the trial court issued an order that denied Tom's request to change custody; enforce the parenting plan ordered to commence April 1, 2005; and, implemented immediate parenting time. The Court granted Therese's motion to discharge Dr. Monica Flynn as parenting consultant; discharged the GAL; ordered Tom to pay conduct-based attorney's fees; and, found Tom to be a "nuisance litigant;" The attorney's fees were "conduct-based" due to "needless litigation." On May 15, 2006, the trial court issued an order finding Tom in contempt of court for failing to pay an alleged \$145,158.80 in spousal maintenance arrears. The Court gave Tom until June 8, 2006, to come up with that money. The Court also set a "rolling purge condition," ordered Tom to pay \$344 in therapy costs, restrained Tom from *all* unsupervised access with the minor children, appointed a receiver

for Tom's company and ordered Tom to pay \$8,712.50 in conduct-based fees. The Court denied Tom's request to reconsider the prior March 6, 2006, order. The attorney's fees ordered were based on a finding that Tom had refused to pay his spousal maintenance obligation. On July 11, 2006, the trial court issued an order referring the file back to Family Court Services to, "*assist the parties in arranging supervised interim parenting time.*" On July 12, 2006, the trial court issued an Order to Show for Tom to appear and show cause why he should not be incarcerated. On July 28, 2006, the trial court issued an order that concluded that Tom had not provided an excuse for failing to purge contempt conditions as set forth in the May 2006 Order. Tom was ordered incarcerated until he paid \$145,158.80 and stayed appointment of a receiver for Tom's company.<sup>1</sup>

### ***STATEMENT OF FACTS***

There have been two ongoing components to this file. The first involves Tom's chronic lack of parental access to the parties' children, dating back to April 2003, access that has been repeatedly impeded by Therese. The second involves Tom's inability (from the issuance of the judgment and decree) to financially comply with court-imposed spousal maintenance, and the resultant contempt of court proceedings, ultimately leading to his incarceration.<sup>2</sup> In order to give proper perspective to each of these issues, it is important to detail the procedural history of the process from the standpoint of parental access.

Pursuant to ¶4 of the judgment and decree dated April 21, 2004, Tom's access to the children was to be supervised,

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<sup>1</sup> Tom was incarcerated and only released after liquidating his 401k.

<sup>2</sup> Tied into the problem is a decision by the Court to deem Tom a "nuisance litigant" and deprive him of access to the Court to bring a motion to reduce his maintenance obligation.

*“\* \* \* until he has followed all of the recommendations of the children’s therapist for unsupervised visitation to the satisfaction of the children’s therapist. However, petitioner may visit the children at the school provided it is in conjunction with a school activity and a teacher or staff official is present. Petitioner shall inform the respondent at least three days in advance if he intends to visit the children at school.”* (Emp. added).

The children’s therapist was Theresa Boatman. In the Fall of 2004, Ms Boatman handed off the duty of deciding when Tom was in compliance to the point where supervised visits were no longer necessary.<sup>3</sup> [A 221] Ms Boatman assigned that duty to the parenting time consultant, Kristin Lisne. Ms Lisne issued a report that effective November 15, 2004, Tom would be able to participate in one class each week at the children’s school. [A 219] The recommendation did not require that a teacher or staff member be present. ¶5 of the dissolution decree (under the heading, *“Participation in Children’s Events*), provides,

*“Both parents may participate in school activities and other events for each child, to the extent authorized by the Parenting Consultant and the children’s therapist.”*

Subsequent to Ms Lisne issuing her decision, Ms Boatman sent the parties an *e-mail*, wherein she indicated that she believed that the plan was reasonable, stating,

*The [11/11/04] letter I got from Kirsten outlined a clear plan of movement which seemed reasonable to me.”* (**See, Exhibit “G”**). [A 219]

Since the Court left the relaxation of supervision to the therapist, there was no longer a requirement of the presence of a teacher or other staff; although, such an individual would likely be present in any event.

Ms Lisne withdrew as parenting consultant subsequent to her issuance of her report. While she would not state her reasons for withdrawal, Tom asserted that she quit due to an

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<sup>3</sup> At this point in time there was no dispute that Tom had not done everything asked of him by the children’s therapist. Since that time the therapist has imposed no new conditions.

inability to deal with Therese.<sup>4</sup> The trial court did not appoint a new consultant. After Therese's insistence that the children's private school not allow Tom on the premises,<sup>5</sup> Tom consulted with custody expert Dr. Susan Phipps-Yonas, and requested that she review the entire situation. Ms Phipps-Yonas spoke with Ms Boatman, Ms Lisne, a parenting coach whom Tom client was involved with, and she reviewed the court file. It was Ms Phipps-Yonas' professional opinion that there was no reason why Tom's access to his children should continue to be supervised. [A 231]

Since the parenting time consultant had withdrawn, Tom had no means to enforce his ability to see his children, or to move forward toward unsupervised visitation. Furthermore, Therese's lack of legal representation made negotiations impossible. Tom (who was not represented either) had an employee of his send Therese a message pertaining to the enforcement of his right to see his children. Since the restraining order was still in effect, Therese contacted the police and asserted that Tom had violated the restraining order by having a third-party contact her. Therese also contacted the school and told them that Tom was not allowed to be there; which was clearly contrary to the dissolution decree, the recommendations of the former parenting time consultant, and the opinion of the children's therapist. Not wanting to get involved, the school totally refused Tom access without express direction from the court. [A 227]

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<sup>4</sup> Contemporaneous with the withdrawal of Ms Lisne, Therese's attorney withdrew from representation.

<sup>5</sup> *See*, [A 311-15] consisting of a series of correspondences between Tom's counsel and the school's counsel, as well as copies of documents in the school's file from Therese

Tom retained new counsel to represent him pertaining to his access issues.<sup>6</sup> Tom's new counsel learned that a motion date had been scheduled for March 24, 2005, to deal primarily with post-trial property motions. On February 18, 2005, Tom's new counsel wrote a letter to the trial court and spelled out the parenting issues and the problems, and requested a conference call, to in the very least, immediately have a new consultant appointed. Therese's former counsel once again resumed representation<sup>7</sup>. In a February 22, 2005, letter to the Court, she objected to the conference call. The trial court refused to hold the call.<sup>8</sup>

When Tom's counsel contacted the court to verify the time for the March 24<sup>th</sup> motion, he was told that there was, "not enough time" to hear Tom's motion to appoint a new consultant and deal with the school issues. Tom's counsel nonetheless sent a letter on March 9, 2005, and stated,

*"Enclosed herein please find courtesy copies of our Notice of Appearance, the motion and affidavit that we have filed with the Court. I have been advised by your clerk that there may not be sufficient time to hear all matters on the 24<sup>th</sup>. I am nonetheless filing these pleadings to place the matter before the court, in light of the exigent circumstances involving my client parental access rights. Thank you for your consideration in advance."*

Tom also filed an affidavit on March 8, 2005, that laid out the problems encountered with

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<sup>6</sup> Tom continued to be represented by attorney Robert Zalk pertaining to property and maintenance issues.

<sup>7</sup> Throughout this matter Therese has repeatedly discharged and rehired legal counsel. This has made it extremely difficult to maintain any consistency and continuity as Therese would not deal with counsel and there was no one to convince her to comply.

<sup>8</sup> Tom's counsel was told that the trial court did not do conference calls; however, the trial court repeatedly scheduled conference calls at the request of Therese's subsequent counsel after refusing to schedule one to simply appoint a new consultant.

his parental access. Tom noted that the case was commenced by him on August 30, 2001. Tom initially had a liberal schedule of unsupervised parental access. In March 2003 Therese obtained an *ex parte* harassment restraining order against him in a separate Hennepin County court file. [A 125] It is important to note that the harassment file was not brought in the names of, or on behalf of, the minor children.

On April 8, 2003, Tom and Therese entered into a partial agreement in the harassment file that allowed contact for business purposes, and issues involving the children. The matter proceeded to hearing on April 22, 2003. During the course of the proceeding Therese testified that Tom had left one of the children with a woman and her children at the beach while he drove home ten minutes to retrieve some of the children's belongings. She also claimed that Tom had left their then five-year-old daughter alone in the house while he was in the yard (for a short period of time). Even though the purpose of the harassment hearing was to deal with Therese's issues against Tom, the trial court issued an order that excluded Tom from the children's schools and all their extracurricular activities, until further order of the Court.<sup>9</sup> [A 125] Of even greater concern, the Court restricted Tom's visitation by requiring that it be supervised, even though there was never any determination of endangerment; and, even though access was not litigated at the hearing.<sup>10</sup> Unfortunately,

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<sup>9</sup> Tom was never given any notice that my parenting access rights were in issue.

<sup>10</sup> This was a clear denial of Tom's due process rights. *Due process* requires that a hearing be "*fair, practicable, and reasonable.*" *Saturnini v. Saturnini*, 260 Minn. 494, 498, 110 N.W.2d 480, 483 (1961). Notice and hearing are the fundamental aspects of due process. *Baker v. Baker*, 481 N.W.2d 871, 873 (Minn.App.), *rev'd on other grounds*, 494 N.W.2d 282 (Minn.1992). That is especially true when a litigant is not given notice that more than one issue will be dealt with at a hearing and the two issues involve two distinct burdens of proof. *Haefele v. Haefele*, 621 N.W.2d 758, 765 (Minn.App. 2001) The

Tom's attorney at the time failed to appeal the order and it stood.<sup>11</sup>

On September 8, 2003, Tom's new counsel brought a motion to re-instate unsupervised access to his children and for the appointment of a parenting expeditor. Tom alleged in an affidavit bearing the same date that without immediate intervention by the trial court, Therese would systematically remove him from the children's lives. Tom recounted how he had seen the children daily until the harassment order in April 2003. Tom also related how custody evaluator Mindy Mitnick had opined that there was no need for supervised access (in an April 25, 2003 letter). Tom also recounted how he was unable to see his children for three months due to a backlog at the visitation center.

Therese filed responsive pleadings, objecting to the relief sought by Tom. The trial court issued an order on September 9, 2003 denying Tom's motion to lift the supervision,

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district court's mid-hearing decision to take evidence on parenting issues confused the standards and, ended up with a decision that was patently unfair. There is a vast difference in standards between what needs to be demonstrated to obtain a restraining order and what is needed to restrict one's parental access to children who are not even parties to the proceeding. Tom was clearly prejudiced by not having prior notice that parental access would be in issue.

<sup>11</sup>Case law is clear cut – in order to restrict a parent's access to his/her children, there *must* be a showing of endangerment, which requires a showing of a *significant* degree of danger. *See, Matson v. Matson*, 638 N.W.2d 462, 466 (Minn.App. 2002)(the district court *cannot* restrict parental access unless it first schedules an evidentiary hearing for the earliest possible time, and then finds that parenting time is likely to endanger a child's physical or emotional health, or impair the child's emotional development; or that the noncustodial parent has chronically and unreasonably failed to comply with court-ordered parenting time). An order that restricts parenting time without a hearing is not valid. *Courey v. Courey*, 524 N.W.2d 469, 472 (Minn.App. 1994). Tom was not given notice that his parenting time was in issue; there was no finding of significant endangerment; and, no subsequent hearing was held *at the earliest possible time*. The findings were simply that he had left the children with a third-party at the beach for ten minutes while he ran home and got some things that he had forgotten.

again without finding endangerment to the children. The dissolution case proceeded through various orders and ultimately went to trial beginning in June 2003 and ended in January 2004. A judgment and decree was entered on April 21, 2004. Pursuant to ¶4 of the judgment and decree the Court ordered,

*“[Tom’s] visitation with the minor children shall continue to be supervised until he has followed all of the recommendations of the children’s therapist for unsupervised visitation, to the satisfaction of the children’s therapist. However, [Tom] may visit the children at school provided it is in conjunction with a school activity and a teacher or staff official is present. [Tom] shall inform [Therese] at least three days in advance if he intends to visit the children’s school.”<sup>12</sup>*

Furthermore, ¶5 indicated,

*“Both parents may participate in school activities and other events for each child, to the extent authorized by the Parenting Consultant and children’s therapist.”*

In his affidavit to the court, Tom did not deny that he had made some bad choices and decisions pertaining to the children; however, he also pointed out that the children were not in danger around him. The dissolution decree set certain parameters for Tom to regain his access. Tom did everything that the court has asked him to do. He complied with custody evaluator Mindy Mitnick’s recommendation that he complete an anger management course; he complied with therapist Theresa Boatman’s recommendations; and, he complied with parenting time consultant Kirsten Lisne’s recommendations. He completed a full anger management course; he voluntarily attended and had meetings with a parenting coach; and, independent of the court order he read many books on parenting. He also provided Ms Boatman and Ms Lisne with all documentation requested by them, and complied with each

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<sup>12</sup> By the time that the decision was issued, I had already addressed many of the concerns regarding my parenting skills.

and every directive that they gave him. While the trial court clearly contemplated in the April 2004 dissolution decree that his parenting time would be restored once Tom complied with all requirements, it did not happen, largely due to obstructionist actions taken by Therese, and the lack of a parenting time consultant.

The November 11, 2004, conditions and schedule that Ms Lisne issued for re-implementing Tom's unsupervised access with the children called for phasing it in, commencing November 15, 2004, including unsupervised access on Christmas 2004. Commencing April 2, 2005, Tom was to begin having regular unsupervised access time with the children. The following is a condensed version of the recommended schedule:<sup>13</sup>

<i>Beginning on:</i>	
<i>November 15, 2004</i>	<p><i>Tom will establish a consistent weekly schedule to participate in one class with each child as "classroom help" (e.g. Partners in Art, Computer Lab, Bravo Music). Tom will notify the Parenting Consultant via fax what the consistent schedule of these events will be, and the Parenting Consultant will notify Therese.</i></p> <p><i>Tom will sign in at the school office before this activity (noting the time), attend the classroom time as established, and sign out in the school office after the activity (noting the time) He will leave the school grounds immediately after signing out.</i></p>
<i>December 10, 2004</i>	<p><i>In addition to the parenting time listed above, Tom will have lunch with each child once each week. He will establish a schedule of a regular day each week that he joins each child for lunch. Tom will sign in at the front office having lunch, have lunch with the child, then say goodbye before the child goes out to recess. Tom will sign out at the front office after the lunch period, and leave the school grounds immediately.</i></p>

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<sup>13</sup> The schedule is re-created verbatim as it appeared in Ms Lisne's recommendation letter.

<i>Christmas Eve, 2004</i>	<p><i>Tom will spend Christmas Eve with the children from 9:00 a.m.-10:00 p.m. He will arrange to have a substantial portion of this day spent with his family, and inform the Parenting Consultant of his plans for the day by December 14, 2004. These plans and activities are subject to approval by the Parenting Consultant.</i></p> <p><i>With the assistance of the Parenting Consultant, Tom and Therese will arrange for family members to transition the children between the parents' homes.</i></p>
<i>January 15, 2005</i>	<p><i>In addition to the parenting time listed above, Tom will have _____ hours of individual parenting time with each child each week. With assistance from the Parenting Consultant, a consistent schedule of parenting time will be established for each child. The parenting time will be spent in a public place. Therese will transport the children to and from this parenting time.</i></p> <p><i>The children will work with their therapist to establish a menu of activities and locations they would like to choose from for this parenting time. Activities and locations will be limited to those included on this list. The children's therapist is asked to consider whether other paternal relatives might also be invited to participate in any of these activities.</i></p>
<i>March 1, 2005</i>	<p><i>In addition to the parenting time listed above, Tom will transport each child to one of their activities each week. Depending on the activity selected, Tom may simply drop the child off at the activity, or may stay with the child through the activity and drop them off afterward.</i></p> <p><i>With assistance from the Parenting Consultant, a consistent schedule for this will be developed, as well as having pick-up and drop-off locations established that meet the needs of both children and parents.</i></p>
<i>April 2, 2005</i>	<p><i>In addition to the parenting time listed above, Tom will have unsupervised care of the children every other Saturday from 12 noon to 5:00 p.m. April 2 will be the first Saturday on which this will occur, followed by April 16, April 30, etc.</i></p> <p><i>Pick up and drop off locations will be established with the assistance of the Parenting Consultant.</i></p>
<i>April 22, 2005</i>	<i>Harassment Restraining Order expires.</i>
<i>May 1, 2005</i>	<p><i>Individual parenting time (as outlined under January 15, above) will be discontinued. This will be replaced with parenting time for both children with Tom on Tuesday and Thursday evenings from 3:30-6:30 p.m. A drop off location will be established with the assistance of the Parenting Consultant.</i></p>
<i>June 11, 2005</i>	<i>The parenting time that the children spend with Tom every other Saturday will be extended to 10:00 a.m.-5:00 p.m.</i>

July 1, 2005

The Parenting Consultant will confer with the children's therapist about their readiness for beginning overnights with Tom.

As of the date of the appeal, for reasons stated in greater detail herein, nothing has changed and the schedule has not even begun to be implemented. As of the date of the March 24, 2005 motion, Tom's access to the children was non-existent, placing him in a worse position than before the Lisne recommendations when he was allowed by the school to visit the children.<sup>14</sup>

Tom identified (in his March 8, 2005, supporting affidavit), the problems and reasons why the schedule was not in place, which included Ms Lisne quitting as parenting time consultant. Therese had strenuously objected to her bill. It was Tom's belief that as a direct result of Therese's confrontations with Ms Lisne, she withdrew from the case. [A 222] Tom argued that it was imperative that the court immediately appoint a replacement for Ms Lisne. He suggested Monica Flynn, of *Alternative Family Help*, or Dr. Susan Phipps-Yonas.<sup>15</sup> Tom noted that Hennepin County Judge Bruce Peterson referred parents to classes conducted by Monica Flynn in most of his cases. [A 223]

Another problem cited by Tom was Therese keeping him from the children's school. The interference commenced right after Ms Lisne withdrew from the case and Therese cut her attorney loose. Since there was no one to monitor and enforce his parenting time, Therese

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<sup>14</sup> As noted above, after the Lisne report was issued, Therese contacted the school and advised them that Tom was not allowed there under any circumstances. The school, not wanting to get in the middle of the dispute, has refused Tom all access. Ms Lisne has never suggested Tom should be precluded from the school.

<sup>15</sup> Tom consulted with Dr. Phipps-Yonas in December 2004 after things began to fall apart in order to present the court with an independent evaluation of the situation.

contacted the school and told them that Tom could not be involved as a classroom helper, and that he could not visit the children during their lunch hours. She advised the principal that these were not, "school functions," as contemplated by the court; however, they were clearly contemplated by Ms Lisne, and approved by both her and Ms Boatman. In fact, Ms Boatman had been calling Tom to find out when he would be seeing the children there.

Tom appended e-mails to his affidavit that demonstrated that the school was anxious for him to have involvement with the children. [A 288] He also attached e-mails that memorialize Therese's interference at school. [A 290-91]. Her interference led the school to consult with their attorney, who took the position that it would not be placed in the middle.

As part of his March 24, 2005 parenting time motion, Tom requested that the court award him compensatory parenting time as a result of Therese's refusal to abide by Kirsten Lisne's recommendations, and her interference with his time with the children at the school. Tom also requested that the court award him his attorneys fees, which were incurred as a result of having to bring a motion to enforce his rights. Tom capsulized his by position by stating,

*"All I am asking is that I be granted the ability to see my children at the school, the same as any other parent; and, that I have my restrictions lifted. \* \* \* As a result of [Therese's] actions, I can't go to the school to assist and be with my children, I had no Christmas with the children, no birthday party with our son Jake, and I have not been able to call the children."*

Therese filed a response to Tom's motion. In her response she opposed the appointment of Monica Flynn as the new consultant, asserting,

*"[Monica] Flynn's skills are [not] especially tailored to our particular situation."*

Therese then suggested alternative parenting time consultants. Therese also claimed that she had no objection to implementing the schedule suggested by Dr. Lysne; however, she wanted

the implementation to begin April 1, 2005. Tom pointed out this was another example of her disengenuous behavior as the *Lisne* directive could have been implemented five months before.

The fact is, another 21 months have gone by and Tom is no closer to implementation of the schedule than he was in March 2005.

After arguing the motions, the trial court indicated that it would appoint a new consultant from lists to be provided by the parties. Tom's counsel served a subpoena on the children's school and noted a deposition. The subpoena sought copies of all correspondences sent to the school by Therese. The purpose was to demonstrate that Therese had lied in her affidavit when she claimed that she had not interfered with Tom's access. Therese's attorney objected to the subpoena, arguing that the record was closed on March 24, 2005. Tom argued that since a new consultant was being appointed, he had the right to demonstrate to the consultant that Therese had indeed impeded his access to the school. Therese's counsel wrote the court and requested a telephone conference call to "*discuss the propriety of [Tom's] deposition.*"<sup>16</sup> Tom's counsel responded that the subpoenaed documents were relevant since Therese had asserted in her affidavit that she had allegedly told the school's attorney that she had no problem with Tom being at the school; and related that he had contacted the school's attorney and learned that Therese's affidavit testimony was not true.

The trial court issued an order on April 4, 2005, in which it appointed former Judge Mary Davidson as the new parenting consultant. Ms Davidson was selected from Therese's list. While Tom had alleged in his affidavit that Therese caused Ms Lisne to withdraw over

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<sup>16</sup> This scenario is repeated over and over and over again. Therese's counsel would object to any request by Tom's counsel for a conference call, would assert that Tom's communications to the court were *ex parte*, and would then engage in *ex parte* communications and request her own conference call.

fee disputes, the Court ignored that uncontradicted evidence and held that there was, “*no factual support for [the] claim.*” In response to his allegation that Therese was interfering with his school access, the Court found that access to the school was *permissive*, which was contrary to Referee Haeg’s own April 2004 judgment. That finding was clearly erroneous. ¶4 of the judgment and decree allowed Tom to go to the school. Furthermore, Ms Lisne’s recommendations clearly contemplated it. The Court found that Therese had merely, “*communicated to the school to remind them of the access parameters.*” The Court further condoned her conduct by stating that, “*there is no harm if one parent, especially the parent with sole legal custody, exercises custodial responsibility \* \* \*.*” (Emp. added) The Court went on to hold that there was “*no convincing showing that [Therese] unreasonably interfered with [Tom’s] parenting time.*”<sup>17</sup>

In the same April 4, 2005 Order, the Court directed that the Lisne’s schedule (that was to have taken effect on November 11, 2004), was “*deemed to be the parenting time schedule effective April 1, 2005.*” In other words, Tom was to have been allowed to participate in one class each week with each of his children. By the end of April 2005, he was to have been allowed to have lunch with his children. By early May 2005 he was to have had unsupervised access with the children, etc. None of this has *ever* been implemented, despite Tom’s willingness to do so.

Subsequent thereto, the school provided the documents requested pursuant to subpoena. The documents reflected that Therese was in fact interfering with Tom’s school

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<sup>17</sup> The letter from the School’s attorney confirms that my former spouse has told the school that since she has legal custody I am not allowed there. I don’t know what other evidence would be needed.

access. [A 223] Tom's counsel notified the school's attorney that the Lisne schedule was to be implemented effective April 1, 2005, including the school access identified in her schedule. Because of continued interference by Therese, the school has refused to provide the access.

A month went by before Mary Davidson declined to act as parenting consultant since she was part of a consortium with Ms Lisne and wanted no part of the case. Tom's counsel again wrote Referee Haeg, and requested that he immediately appoint someone else in her stead. [A 223] Nine days went by without any response from the trial court. Tom's counsel again wrote on May 12, 2005, and again requested appointment of a new consultant. Tom's counsel noted that it had been another six weeks since the schedule was to have been implemented and once again nothing happened. Tom's counsel also noted that Therese continued to interfere with Tom's school access, by again threatening to call the police if he showed up at school. Another week went by and Therese's counsel wrote the court, asking that the Court appoint Andrea Niemi (who was *another* choice from her list). In light of the inordinate amount of time that the trial court was taking in addressing the issue, Tom's counsel took the liberty of drafting an order, and again implored the court to appoint another consultant. [A 326]

Once again the trial court inexplicably sided with Therese and again appointed a new consultant from her list. The Court appointed Andrea Niemi, as requested by Therese's counsel. [A 223] Tom's counsel responded, and requested that the trial court rescind the appointment. Tom's counsel argued that Ms Niemi required a \$2,500 retainer and \$300 an hour; and, that she was part of the same consortium as Ms Lisne and Judge Davidson. On the other hand, Tom's counsel pointed out that Dr. Flynn only charged \$75 an hour. In light of the problems with Andrea Niemi, a conference call was scheduled for June 16, 2005, to

appoint yet another consultant. During the conference call Therese's counsel falsely represented that she had spoken with Monica Flynn and then misrepresented to the court the contents of a conversation that never occurred. The trial court selected Janey Nelson, yet another parenting consultant from Therese's list. Again time went by without a written order. Tom's counsel wrote the court on June 23, 2005, asking about the status of the appointment since nothing could be done without a written order. The trial court finally issued an order in late June 2005. [A 42]

Therese's counsel once again withdrew from the case on July 21, 2005. On August 26, 2005, Janey Nelson withdrew, still without any implementation of the November 2004 *Lisne* schedule.

On August 31, 2005, Tom's counsel again requested the appointment of another parenting time consultant, and again suggested Monica Flynn. [A 327] Therese's counsel Grandchamp once again reappeared in the file as her counsel. Therese's counsel *claimed* that Tom was the reason for the most recent departure of an expeditor and *again* asked for a conference call. Tom's counsel responded, and disputed the truth of her assertions.<sup>18</sup> Tom's counsel pointed out that Therese's attorney was lacking in credibility due to her lie to the Court about having previously spoken with Dr. Flynn. Tom's counsel also pointed out that by once again withdrawing from the case, he was left to deal with Therese directly, which was impossible since she would not respond. In the interim, the school's attorney again indicated that Therese was interfering with Tom's access and that there would be no access until the

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<sup>18</sup> Ms Nelson later sent a letter on October 9, 2005, and declined to state the reasons why she withdrew from the case.

issue was resolved.<sup>19</sup>

After nearly a full month had gone by the trial court finally allowed a conference call to deal with Tom's counsel's August 29, 2005, letter requesting appointment of another consultant. It was agreed during the conference call that Tom could file a motion seeking the lifting of his supervised status and that the matter could be heard on affidavits. The parties had until October 18, 2005, to exchange affidavits, and a week to respond. The trial court requested yet additional lists of potential parenting consultants and indicated that it would choose from the *new* lists by October 3, 2005.

Tom submitted his affidavit to the trial court on October 18, 2005. Instead of following the trial court's directive for simultaneous submissions, Therese submitted hers on October 24, 2005. Another two weeks went by without an appointment by the trial court. Therese's counsel requested input from the children's therapist, Ms Boatman. Tom's counsel objected to another delay and again *implored* the court to immediately appoint a new consultant.

In his October 18, 2005, affidavit, Tom recounted his frustration with the lengthy procedural history of this file. He advised the trial court that while in retrospect he should not have left his child unattended with a third-person at the beach, a prison convict had more access rights than he did.<sup>20</sup> The rare occasions when he saw the children were when he would

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<sup>19</sup> *See*, letter dated October 5, 2005, from the school's attorney wherein he confirmed that on September 1, 2005, Therese had told him that Tom had no right to visit the school and that the school was not authorized to allow Tom *any* access to the school.  
[A ]

<sup>20</sup>At that time he had not seen his children for a regular visit since March 2003.

run into them in public. The last time that had occurred the children were very excited to see Tom. [A 224] He appended a copy of a sworn statement from a witness as well as a police report that Therese and her live-in boyfriend castigated him in front of the children about being a *deadbeat dad*. They made such a commotion that it drew the attention of other patrons in the restaurant. [A 224] Tom also recounted how he had recently sent an acquaintance to the school to deliver flowers for his daughter's birthday. Therese happened to be present and told the person delivering the flowers to immediately leave the school and not leave the flowers. Tom appended a copy of sworn statement from her memorializing those events as well. [A 224] Tom also reported that even though he was supposed to have telephone access with the children, none of his messages were ever returned. He further reported that Therese continued to threaten the school if he was allowed on the premises. This was very distressing to Tom since school officials (other than legal counsel) had encouraged him to volunteer at the school, as he had done so regularly, before the restrictions were imposed. He appended a copy of a letter from one such school employee. [A 288]

Tom identified for the court the requirements he had to meet for him to be able to resume full access with the children. He recounted that he was directed to complete anger management, meet with a parenting coach, and attend and have meetings with a parenting coach. He recounted that he had done all of the above. He recounted how he had provided Ms Boatman and Ms Lisne with all documentation requested by them, and complied with each and every directive that they gave him. He recounted that the one and only reason that he had not had his time restored was Therese's obstructionist acts. He recounted that while there never was a finding or determination (as required by the law) that he posed a significant danger to the children, there most certainly was no evidence of any present danger.

Tom completed his affidavit by asserting that unless the Court determined that he posed a significant danger to the children, there was no basis for him not to have unsupervised access. If the Court was unwilling to do so, Tom requested an evidentiary hearing (which he had been denied in the past) on the subject of endangerment.

After another two and a half months went by without any action by the trial court, (again despite repeated requests). The trial court finally appointed another parenting consultant. By order dated November 14, 2006, the trial court appointed Monica Flynn. [A 32 ] Without explanation, the trial court denied Tom's request for unsupervised access. The only comment (without any elaboration on the subject) was that,

*"[Tom] has not evinced consistency in the (Lisne) plan and unsupervised access at this time is not in the children's best interests pursuant to Minn.Stat. Sec. 518.17."*<sup>21</sup>

Almost immediately, Dr. Flynn reported that Therese was not cooperating. Running deep into debt with attorney's fees, Tom elected to proceed *pro se*. On February 7, 2006, Tom served and filed a motion (*pro se*) that sought the following relief:

- a) Immediate reversal of custody of the children to protect their safety and welfare;
- b) Appointment of a guardian ad litem;
- c) That the GAL meet with and interview the children and advocate for them; and
- d) For such other and further relief as to the Court is fair and just. [A ]

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<sup>21</sup> That comment begged the question since the court failed to address the fact that Therese had interfered with and impeded any and all attempts by Tom to implement the schedule. In particular, Tom had not even been to the children's school since December 2004 since Therese told the school (contrary to Lisne's report) that he was not allowed there. It was impossible for there to be "consistency" when Therese was preventing any implementation of the schedule and the Court was providing no assistance.

In support of that motion Tom asserted that Therese's father had been accused by her siblings and in-laws of having sexually abused her nieces. Tom attached a letter from one niece who (in graphic terms) lambasted Therese's father for the abuse. He also appended a statement from Therese's sister wherein she had documented the abuse and lack of action by Therese. The lack of action included Therese allowing her father to be left alone with the parties' minor children, even *after* she had been informed of the abuse. Tom also appended a copy of an investigatory letter from Todd County Social Services, which confirmed a finding of abuse. [A 48] Tom also filed (contemporaneous with the motion to change custody) an affidavit in support of a request to again enforce the *Lisne* parenting plan (that was to have taken effect on April 1, 2005, pursuant to prior court order). Tom alleged that Therese had denied him parenting time and phone access and had subjected the children to witness verbal attacks against him by both Therese and her male live-in companion.

In response, Therese brought a motion to deny Tom's request, remove Monica Flynn, appoint Jeanne Savoie as new consultant, order Tom to pay attorney's fees for *conduct-based* acts and find that Tom was a "nuisance litigant." Even though nothing had been accomplished in the prior three months of involvement by Dr. Flynn since Therese had again not cooperated, Therese obtained an affidavit from Ms Boatman, who opined (with little knowledge of the situation) that in her opinion the children had not been abused by their grandfather and that Dr. Flynn had not contacted her for input.<sup>22</sup>

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<sup>22</sup> This allegation would form part of Therese's request for removal of Dr. Flynn for "cause." What the affidavit failed to mention is that Dr. Flynn did not contact Ms Boatman since she previously handed off the duties to the appointed parenting consultant (Lisne). Dr. Flynn would later opine that she was waiting to meet with Therese *before*

Therese provided an affidavit wherein she claimed that Hennepin County had done their own investigation and did not find any abuse by her father against the parties' daughter. Therese requested removal of Dr. Flynn as parenting consultant. In support of that request Therese *alleged* that Dr. Flynn had *refused* to work with Ms Boatman. She also *alleged* that Dr. Flynn "*demonstrated poor judgment*" by asking that the parties meet her in her office in Edina (which was her standard initial practice in any such case). Therese alleged that her brother's funeral was scheduled for the same day as her initial meeting (three weeks after Dr. Flynn attempted to schedule a meeting); however, it was later learned that Therese lied in her affidavit about the date of the funeral and it was not on the date they were to meet (December 9, 2005). Therese attached a letter from her attorney complaining about Dr. Flynn; however, she neglected to attach a copy of Tom's attorney's responsive letter. While Therese's attorney accused Dr. Flynn of failing to consider Therese's brother's funeral, Tom's attorney's responsive letter set the record straight, and notified Dr. Flynn that the funeral had been cancelled and was not held as alleged on December 9, 2005. She concluded by alleging that Dr. Flynn was *biased* against her.<sup>23</sup> Thereafter, the Court removed Dr. Flynn for "good cause shown."

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speaking with Boatman.

<sup>23</sup> Dr. Flynn sent the parties' attorneys a letter on January 24, 2006, and advised them that Therese was not cooperating.

## *ISSUES*

1. DID THE TRIAL COURT ERR BY FAILING TO IMPLEMENT REUNIFICATION? No reunification has occurred.

2. DID THE TRIAL COURT ERR BY DENYING THE APPELLANT AN EVIDENTIARY HEARING ON THE ISSUE OF CHANGING CUSTODY? The trial court denied the request for an evidentiary hearing.

3. DID THE TRIAL COURT IMPROPERLY REMOVE DR. MONICA FLYNN AS PARENTING CONSULTANT? The trial court removed her “for good cause shown.”

4. DID THE TRIAL COURT IMPROPERLY LABEL TOM A “NUISANCE LITIGANT?” The trial court will not allow Tom to bring a motion without permission.

5. DID THE TRIAL COURT IMPROPERLY AWARDED THESE ATTORNEY’S FEES? The trial court awarded Therese conduct-based fees.

6. DID THE TRIAL COURT IMPROPERLY REQUIRE TOM TO PROCEED WITH THE CONTEMPT HEARING ON MARCH 22, 2006? The trial court would not grant Tom a continuance.

7. DID THE TRIAL COURT IMPROPERLY FIND TOM IN CONTEMPT OF COURT FOR FAILING TO PAY HIS COURT-IMPOSED MAINTENANCE OBLIGATION? The trial court held that Tom could pay his maintenance from his assets.

## *ARGUMENT*

1. THE FAILURE OF THE TRIAL COURT TO IMPLEMENT TOM’S REUNIFICATION WITH HIS CHILDREN IS REVERSIBLE ERROR. It would take many more pages of briefing (which is not

available due to page limitations) to adequately lay out the history of Tom’s lack of parental access, as well as Therese’s wilful and wonton interference with his access. There are far too many documents in the trial court file that support Tom’s contentions that cannot be referenced due to the limitations. Tom takes the position that the trial court has been remiss in seeing to it that statutory mandates are met, i.e., Minn.Stat. §518.175, Subd. 1, which provides in relevant part,

*"In all proceedings for dissolution \* \* \* subsequent to the commencement of the proceeding and continuing thereafter during the minority of the child, the court shall, upon the request of either parent, grant such parenting time on behalf of the child and a parent as will enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child."*<sup>24</sup>

Tom will not deal much on the history of his access to his children as noted above. Suffice it to say that the Court has not seen to it that Tom and his children are able to maintain *any* relationship with his children. The inexplicable fact is that in the trial court's April 5, 2005, Order, it ordered that Kirsten Lisne's parenting time schedule, with the reunification goal of unsupervised access, has *never* even been started, much less implemented. Since Tom has complied with all of the conditions imposed upon him in the judgment and decree to regain his parental access, it is not hard to determine which party is at fault.

As noted, Tom's access to his children was originally restricted in a harassment proceeding in April 2003, that was not even brought on behalf of the children. Furthermore, Tom was given no notice that parental access was even being litigated. The allegations in support of the restricted access were subsequently carried forward into the judgment and decree in April 2004. Specifically, the reasons given in the judgment and decree for restricting Tom's access were: 1) Tom left Bella alone in the house while he was outside playing with Jack; 2) Tom left Jake alone with a "stranger" at the lake while he ran home for ten minutes with Bella;<sup>25</sup> and Tom left the children alone while he went to use a pay phone.<sup>26</sup>

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<sup>24</sup> On page 8 of the Judgment and Decree, the Court found that Tom was capable of providing guidance to the children.

<sup>25</sup> Tom testified at trial that he knew the woman from prior encounters at the lake, she lived close by, and she had children around his children's age. Therefore, the term "stranger" is inappropriate.

<sup>26</sup> See, ¶¶ XV, XVI, and XVII of Judgment and Decree.

The Court also asserted that Tom had inappropriately probed Jake about his mother and used Bella to carry a note. The conclusion of the evaluator (whose recommendations were largely adopted by the Court) was that Tom's actions were emotionally damaging to the children. That finding, as well as the alleged facts in support of it, did not reach the level of "endangerment" as contemplated by the legislature. "Endangerment" implies a *significant* degree of danger or likely harm to the child's physical or emotional state. *Johnson-Smolak v. Fink*, 703 N.W.2d 588 (Minn.App. 2005). While Tom's omissions (which were largely disputed by him)<sup>27</sup> may have been irresponsible, they did not rise to the level of significant danger or likely harm. In fact, Tom satisfied all of the requirements of the Judgment and Decree to get his access back, to no avail.

That being said, this appeal is not intended to re-litigate the dissolution or custody. There is a valid, enforceable court order that required implementation of the Lisne parenting plan as of April 1, 2005.

**2. THE TRIAL COURT ERRED IN DENYING THE APPELLANT AN EVIDENTIARY HEARING ON THE ISSUE OF CHANGING CUSTODY.**

On February 27, 2006, *pro se* Tom brought a motion to change custody, alleging that Therese had endangered the parties' children by allowing her father, (whom had been determined to have molested the children's cousins), to be alone with the children. Tom also alleged that Therese was guilty of chronic interference with his access to the children. The Court issued an order on March 8, 2006, which denied his request for

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<sup>27</sup> An independent witness testified that Therese engaged in a public argument with one of the children's coaches. She was described as "angry, unreasonable and verbally abusive." Jake witness the conduct and was impacted by the public display. The Court dismissed Therese's actions by finding that, there is no other convincing evidence that this behavior was symptomatic of her overall parenting or that the child was *unduly* traumatized. ¶XVIe.

an evidentiary hearing.

A trial court's decision to deny a request for an evidentiary hearing to modify custody is reviewed under an abuse of discretion standard. *Geibe v. Geibe*, 571 N.W.2d 774, 777 (Minn.App. 1997). In order to obtain an evidentiary hearing, the moving party must submit evidence asserting sufficient justification for the modification, including an affidavit in support of the modification. Minn.Stat. §518.185; *In Re Weber*, 653 N.W.2d 804, 809 (Minn.App. 2002). In order to obtain an evidentiary hearing, the moving party must establish the following four elements of a prima facie case: (1) a change in the circumstances of the child or custodian, (2) that a modification would serve the best interests of the child, (3) that the child's present environment endangers his physical or emotional health or emotional development, and (4) that the harm to the child likely to be caused by the change of environment is outweighed by the advantage of change. *In Re Weber*, 653 N.W.2d 804, 807 (Minn.App. 2002)(*citing*, *Geibe*, at 777-78).

In determining whether the moving party has established a prima facie case, the district court must accept the facts in the moving party's affidavit as true. *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn.1981). If the moving party's affidavit does not allege facts that, if true, would provide sufficient grounds for modification, the court need not grant an evidentiary hearing. *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 690 (Minn.App.1989), *review denied* (Minn. June 21, 1989). But if some dispute exists as to whether the present environment endangers the child's emotional development, an evidentiary hearing would be helpful and is justified. *Harkema v. Harkema*, 474 N.W.2d 10, 14 (Minn.App.1991).

The second requirement is a prima facie showing that the modification would be in the best interests of the child. A child's best interests are determined according to the factors listed in Minn.Stat. § 518.17. *Geibe*, 571 N.W.2d at 778. Since the trial court did not

evaluate those factors, the trial court did not conduct a proper analysis.

The third requirement is (in the absence of integration by consent, or consent) a showing of endangerment and/or impairment. Tom's averments had to be taken as true at the motion stage. Among the averments was the allegation that Therese had allowed the parties' children to be left in the sole care of Therese's father, who had been accused by Therese's own sister of molesting the children's cousins. There was also evidence that a Todd County investigation had determined that the molestation had occurred. While did not specifically allege that Therese's father had molested the children, he did allege that placing the children in a position to *be* molested constituted endangerment. Furthermore, Tom has alleged repeatedly throughout these proceedings that Therese was denying him access to the children and refusing to cooperate in implementing the reunification plan, resulting in a calculated denial of parenting time. Chronic denial or interference with parenting time is grounds in and of itself to justify an evidentiary hearing. Minn.Stat. §518.175, Subd. 5(2).

The final requirement is that the moving party must show that the advantage of modifying custody outweighs the harm likely to be caused by the change. *Roehrdanz*, 438 N.W.2d at 690. Minnesota law presumes that stability in custody is in a child's best interests. *Westphal v. Westphal*, 457 N.W.2d 226, 229 (Minn.App.1990). All of the experts in this case agree that having Tom actively involved in the children's lives is in their best interests. Furthermore, the Court is required to grant parenting time that will enable a child and parent to maintain a child to parent relationship that is in their best interests. Minn.Stat. §518.175, Subd. 1. Due to Therese's chronic interference with his regaining such access, the children are clearly being harmed. Furthermore, it is not in the children's best interests to be placed into a situation where they could be subjected to abuse.

In the Court's order dated February 27, 2006, it made the following findings:

*“There is no showing that [Therese] put the parties’ children at risk or in harms way by leaving them with [her father]. Hennepin County Social Worker Sandra Slowiak conducted an investigation. She initially closed the file and determined that the children were not sexually abused by [Therese’s father] and there was no need for protective services. Todd County Social Services then conducted an investigation. At [Tom’s] request [the file] was reopened \* \* \* and again closed \* \* \*. Therefore, after considering all affidavits submitted by both parties, [Tom] has failed to show a prima facie case of endangerment to warrant an evidentiary hearing on the custody modification issue.” (Finding of Fact No. 2) [A ]*

The problem with the Court’s finding in conjunction with the law is two-fold: (1) at the first stage of a custody-change motion the moving parties’ allegations are to be accepted as true. Here, the Court improperly weighed the evidence by *considering* the affidavits from both parties; *Nice-Petersen, Id.* and, (2) the finding by Hennepin County Social Services is not relevant at this stage of the proceeding for the same reason. *See, Hoffman v. LaMar*, WL 1557938 (Minn.App. 2004)(reliance on a social worker’s conclusion is contrary to the rule that the Court must accept the movant’s allegations as true without regard to disputed facts).

Therefore, the Court utilized an improper standard in denying Tom’s request for an evidentiary hearing. Any factual disagreements, by law, had to be determined in a subsequent evidentiary hearing.

**3. THE TRIAL COURT IMPROPERLY REMOVED DR. MONICA FLYNN AS PARENTING CONSULTANT.** As noted above, the parties stipulated to the appointment of a parenting consultant. Pursuant to that stipulation the Court initially appointed Kristin Lisne in 2004. Ms Lisne developed a parenting plan in November 2004, with the blessing of the children’s therapist, Theresa Boatman. The plan called for gradually increases in Tom’s parenting time, and ultimate unsupervised, standard access with the children. Ms Lisne withdrew shortly thereafter. Despite attempts to appointment of a new consultant, the trial court refused to entertain a conference call and did not make another appointment until March 2005, when it appointed former Judge Mary

Davidson The Court had requested that the parties submit names of potential consultants. Therese suggested four individuals and Tom two. The Court found all to be highly qualified. A month later, without taking any actions, Ms Davidson declined to act as consultant. Another month went by without action by the Court. The Court then appointed another consultant from Therese's list. Due to her fee schedule, the parties agreed to have the Court appoint another consultant. Once again, the Court appointed a consultant from Therese's list. She withdrew from the case at the end of August 2005. Finally, after another two months, the Court appointed Dr. Monica Flynn from Tom's list.

In February 2006, Therese brought a motion seeking to remove Dr. Flynn for cause. Her allegations were that: 1) she was unable to work with Dr. Flynn; 2) Dr. Flynn wanted to initially meet the parties together as part of her procedure; 3) that Dr. Flynn allegedly refused to confer with the children's therapist, Dr. Boatman. Without bothering to contact Dr. Flynn to respond to the allegations, the Court simply accepted them as true and issued an order that she be dismissed for "good cause."<sup>28</sup>

Subsequent to the issuance of the order Dr. Flynn took great umbrage with the Court's order and wrote to the Court. [A 341-43] To summarize her profound disagreement with Therese's affidavit, and the Court's decision, Dr. Flynn reminded the Court that the parenting schedule developed by Kirsten Lisne was, by the Court's prior Order, to have been implemented April 1, 2005. Dr. Flynn described how her program begins with a four hour co-parenting session. Her curriculum is the one developed by the Minnesota Supreme Court, *A Parental Guide to Making Child Focused Decisions*. Dr. Flynn went on to note that she had repeatedly made accommodations for Therese, agreeing to meet with her alone when she

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<sup>28</sup> *See*, ¶5 of Findings dated February 27, 2006, and ¶6 of Order.

refused to be in the same room as Tom. Therese then failed to make either herself or the children available for a meeting. Dr. Flynn went on to note that there was *increasing evidence* that alienation was taking place and the goal of reunification was not occurring due to Therese's refusal to cooperate. Dr. Flynn further noted that she had not been appointed to fashion a new plan with Dr. Boatman and that the reason she had not *consulted* with her was she wanted to meet with the parties first. Furthermore, her review of the file demonstrated the Dr. Boatman had handed off parenting decisions to the parenting consultant. Finally, Dr. Flynn advised the Court of her conclusion that Therese had misrepresented court orders to school officials to prevent Tom from going there.

On the basis of Dr. Flynn's correspondence to the Court, Tom sought the right to bring a request for reconsideration on March 23, 2006. [A 335] Therese responded, and incorrectly stated the law regarding reconsideration requests. Tom responded to her letter, and requested that the Court allow Tom to bring a motion to vacate on the basis of Therese and her attorney's fraud, and newly discovered evidence, to-wit: Dr. Flynn's input into the issue. After receiving no response, in an April 3, 2006, letter, Tom again requested that the Court address the prior requests.<sup>29</sup> The Court never did respond to the request to bring a motion, completely depriving Tom of access to the Court. It is now nine months later and again there is no consultant on the case.

In the Court's Finding of Fact in ¶5, it falsely stated that, "*in the past, [Tom] did not work with other [consultants]*". There is no basis in the record for that claim. Kirsten Lisne resigned (according to Tom over billing disputes and harassment). Mary Davidson declined

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<sup>29</sup> Due to the Court's finding that Tom was a nuisance litigant, he needed Court permission to bring any motions. *See*, ¶6 of Findings dated March 8, 2005, and ¶9 of Order.

to act. Andrea Niemi charged too much. Janie Nelson resigned as well. There is no evidence in the Court file that any one of those individuals ever attributed their not serving to Tom; and, more importantly from a legal standpoint, Dr. Flynn was the only consultant removed by the Court.

The trial court held that Dr. Flynn was removed for "good cause." However, while that standard applies to a *parenting time expeditor* under Minn.Stat. §518.1751, it does not apply to a *parenting consultant*. There is no provision in the statutes for the appointment of a parenting consultant.

Under *LaBelle v. LaBelle*, 302 Minn. 98, 115-16, 223 N.W.2d 400, 410 (1974) and its progeny, parties may stipulate to something the district court cannot order. *See, e.g., Gatfield v. Gatfield*, 682 N.W.2d 632, 637 (Minn.App.2004) (In a stipulation, parties are free to bind themselves to obligations that a court could not impose.)(citing *Labelle*)), *review denied* (Minn. Sept. 29, 2004); *Plath v. Plath*, 393 N.W.2d 401, 403 (Minn.App.1986) (Parties to a marriage dissolution may bind themselves to a level of performance higher than that which the courts could require of them" (citing *LaBelle*)).

In family law cases, a district court's jurisdiction is statutory, and the district court has no power not delegated to it by statute. *Kiesow v. Kiesow*, 270 Minn. 374, 379, 133 N.W.2d 652, 657 (1965). Similarly, in family law matters over which it has jurisdiction, the district court's powers are limited to that provided for by statute. *Melamed v. Melamed*, 286 N.W.2d 716, 717 (Minn.1979); *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 758 (Minn.1981). *See, also, Moylan v. Moylan*, 384 N.W.2d 859, 864 (Minn.1986) (district court's discretion must be exercised within the limits set by the legislature). Therefore, the parties agreement to have a parenting consultant appointed does not confer on the trial court any authority other than that granted by statute, or contractually agreed to by the parties.

The issue of the appointment of a parenting consultant in this case is addressed in ¶XVII of the judgment and decree wherein the Court recognized that the parties had agreed to the appointment of a *parenting consultant*, as opposed to a *parenting expeditor*. Under ¶5, entitled "*Parenting Plan*," the Court indicated that disputes were to be resolved by a parenting consultant. There is no provision in the judgment and decree (or any subsequent appointments) that grants the Court the authority to remove a parenting consultant for "good cause," the standard identified in Minn.Stat. §518.1751, Subd. 5a, that allows removal for "*good cause shown*." Since the provision in the judgment and decree does not specify that the Court can remove the consultant for "*good cause shown*," and, since there is no statutory authority pertaining to *parenting consultants*, the Court in this case could not remove Dr. Flynn for "good cause shown."

That is not to say that a parenting consultant cannot be removed. Obviously, the Court is always to act in the best interests of the children; however, the order removing Dr. Flynn was not based upon the best interests of the children. The Court therefore lacked jurisdiction to act as it did.

Even if Minn.Stat. §518.1751, Subd. 5a, applied to the removal of a parenting consultant, the Court nonetheless erred in removing Dr. Flynn. A judge should not discharge an expeditor merely because a party disagrees with her. *Honass v. Koosman*, WL 756852 (Minn.App. 1995). However, precedent holds that a district court should use its discretion to remove an expeditor only when continuing the services is no longer in the child's best interests. *In re Guardianship of Kowalski*, 392 N.W.2d 310, 314 (Minn.App. 1986). The bottom line is that the removal of an "expeditor" is not warranted to serve a parent's interests (i.e., These would not cooperate and get along with Dr. Flynn), it is to serve a child's best interests. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995).

The conclusion is clear: Dr. Flynn was improperly removed by the trial court. In light of her comment in her letter to the Court that, "*I will not resign from this assignment as others have done. Unless the Court relieves me of the responsibility, I will work to reunify these children with their father.*"

**4. THE TRIAL COURT IMPROPERLY LABELED TOM A "NUISANCE LITIGANT."** Therese's motion to restrict Tom's access to the Court, incorrectly labeled Tom as a "nuisance litigant." The term "nuisance litigant" technically is not correct. The appropriate term of art refers to "vexatious litigation or "frivolous litigant."

A number of cases have defined what is meant by the term "vexatious" in the context of the sanction that was imposed here. A suit may be labeled as "vexatious" when it lacks *colorable* merit. In rare cases even if there is merit an action may be labeled as "vexatious" if it is needlessly duplicative of fully litigated prior proceedings involving the same issues. *Pike v. Gunyou*, 488 N.W.2d 298, 305 (Minn.App. 1992).

In a proper case, the trial court may impose the type of relief granted here by limiting or precluding the initiation of vexatious litigation. *See, e.g., State ex rel Ryan v. Cahill*, 253 Minn. 131, 134, 91 N.W.2d 144, 147 (1958) ("[i]t is well settled that the courts of this state will act to enjoin vexatious litigation"); *Love v. Amsler*, 441 N.W.2d 555, 560 (Minn.App.1989) (requiring a party to obtain judicial permission to file future lawsuits was "a reasonable way to curb [the party's] \* \* \* abuse of the system without unduly restricting his right of access to the courts"), *pet. for rev. denied* (Minn. Aug. 15, 1989); *Liedtke v. Fillenworth*, 372 N.W.2d 50, 52 (Minn.App.1985) ("trial court acted within its discretion by enjoining appellant from continuing this series of vexatious lawsuits"), *pet. for rev. denied* (Minn. Sept. 13, 1985). However, while the trial court is given broad discretion to issue orders, due process requires full notice of the allegations and full notice to be heard on them.

*Kellar v. Gross Von Holtum*, 605 N.W.2d 696, 702 (Minn. 2000)

The general authority for imposing such restrictions may be found in both Minn.R. Civ.P. 11 and Minn.R.Gen.Pract. 9. Rule 11.02 governs any "attorney or unrepresented party" who files papers with the court. Similarly, Rule 9 allows the district court to sanction a "frivolous litigant." *See*, Minn. R. Gen. Pract. 9.01.

Under Rule 11, a litigant who presents pleadings, motions, or other papers to the court certifies that claims and contentions reflected in the materials have proper legal and factual bases and are not made for an improper purpose. The district court may impose sanctions on a litigant who violates the rule. *See*, Minn. R. Civ. P. 11.03.

On the other hand, Rule 9 defines "frivolous litigant" to include a person who repeatedly attempts to litigate finally-determined matters and who maintains claims not well grounded in fact or warranted by existing law. *See*, Minn.R.Gen. Pract. 9.06(b)(1)(3).

Minn.R.Gen.P. 9.01, provides in relevant part as follows:

*"Upon the motion of any party or on its own initiative and after notice and hearing, the court may, \* \* \* enter an order: \* \* \* (b) imposing preconditions on a frivolous litigant's service or filing of any new claims, motions or requests. All motions under this rule shall be made separately from other motions or requests, and shall be served as provided in the Rules of Civil Procedure, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged claim, motion, or request is not withdrawn or appropriately corrected."*

Pursuant to Rule 9.02, the factors that the Court must consider are the following:

- (1) the frequency and number of claims pursued by the frivolous litigant with an adverse result;*
- (2) whether there is a reasonable probability that the frivolous litigant will prevail on the claim, motion, or request;*
- (3) whether the claim, motion, or request was made for purposes of harassment, delay, or vexatiousness, or otherwise in bad faith;*
- (4) injury incurred by other litigants prevailing against the frivolous litigant and to the efficient administration of justice as a result of the claim, motion, or request in*

question;

(5) effectiveness of prior sanctions in deterring the frivolous litigant from pursuing frivolous claims;

(6) the likelihood that requiring security or imposing sanctions will ensure adequate safeguards and provide means to compensate the adverse party;

(7) whether less severe sanctions will sufficiently protect the rights of other litigants, the public, or the courts.

The Rule also specifies the extent of findings that are required, stating in relevant part,

*“If the court determines that a party is a frivolous litigant and that security or sanctions are appropriate, it shall state on the record its reasons supporting that determination. \* \* \* An order imposing preconditions on serving or filing new claims, motions, or requests shall only be entered with an express determination that no less severe sanction will sufficiently protect the rights of other litigants, the public, or the courts.”*

Further direction is provided in *The Advisory Committee Comment* to Rule 9.07, which makes four points clear: (1) the rule is to be applied only in the most egregious circumstances of abuse of process; (2) notice of the alleged abuse and an opportunity to be heard are paramount; and, (3) the Court is required to make specific findings; and, (4) the sanction should be applied only in the rarest of circumstances.

As noted above, before sanctions may be imposed under either rule, certain procedural requirements must be satisfied. Both rules require a separate motion for sanctions. Rule 11.03(a)(1) states in relevant part:

*“A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate Rule 11.02.”*

and, Rule 9.01 of the General Rules of Practice provides in relevant part,

*“All motions under this rule shall be made separately from other motions or requests, and shall be served as provided in the Rules of Civil Procedure \* \* \*.”*

Rule 11 requires the court to issue an order to show cause why the party to be sanctioned has not violated the rule, and Rule 9 requires separate notice and hearing before sanctions may

be imposed. *Id.* The separate notice is different than the motion itself. There is a requirement that a 21-day notice of intent to seek sanctions be given before a party can even bring a *separate*, stand-alone motion, which specifies the precise acts that constitute the alleged “vexatious” litigation.<sup>30</sup>

There were numerous procedural flaws with the Court’s order: (1) there was no 21-day notice; (2) Therese’s motion did not identify with specificity the facts that supported the requested relief; (3) the trial court did not make specific findings that would support the relief granted (as required in Rule 9.02); (4) there was no separate motion for either Rule 11 or Rule 9 sanctions here; and, (5) the basis given for the Court’s order was not supported by the evidence.<sup>31</sup>

There is a presumption that when a prospective restriction on litigation is imposed, the restriction will be “reasonably applied.” *Love*, 441 N.W.2d at 560. As noted above, by imposing the “death penalty” on Tom, the Court not only violated his due process by allowing non-compliance with notice requirements, it shut off all access to the Court. The Court file is replete with examples of requests to bring a motion either to reduce maintenance, reinstate

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<sup>30</sup> The failure to provide the 21-day notice prior to bringing the separate motion for the imposition of sanctions is fatal. Referred to as the “*Safe Harbor Rule*,” without the prior specific notice, a motion cannot be deemed proper and any order issuing therefrom is void. *Gibson v. Trustees of Minnesota State Basic Building Trades Fringe Benefits Funds*, 703 N.W.2d 864, 867 (Minn.App. 2005).

<sup>31</sup> The Court found that the file consisted of 12 volumes that evidenced, “*protracted litigation*.” The Court concluded (without specifics) that the litigation was the result of Tom’s alleged “passive-resistant posture on issue, frivolous motions, failure to mediate, etc.” The Court did not identify any of the “frivolous motions,” and did not expound on when he “failed to mediate” (which is not a basis for finding a party a nuisance litigant).

Dr. Flynn, enforce the parenting plan, hold Therese in contempt of Court, etc. In each case the Court either ignored the request without response, or waited extended periods of time without granting the ability to bring a motion.

**5. THE TRIAL COURT IMPROPERLY AWARDED THERSE ATTORNEY'S FEES.** *A. Authority for an Award of Attorney's Fees.* Tom

challenges the Court's decision to award conduct-based attorney's fees in each of the orders subject to this appeal. This is a dissolution of marriage action. The basis for an award of fees is addressed in Minn.Stat. §518.14, which reads in relevant part as follows:

*"Except as provided in subdivision 2, in a proceeding under this chapter, the court shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding, provided it finds \* \* \* Nothing in this section precludes the court from awarding, in its discretion, additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding."* (Emp. Added).

***B. There is no Legal or Factual Basis for an Award of Conduct Based***

***Fees.*** The trial court awarded attorney's fees against Tom in both the March 8, 2006, order and the May 15, 2006, order, purportedly for conduct in each case. The following provisions appear in the March 8, 2006, order pertaining to fees:

*Finding No. 12 and Order No. 9:*

*"{Therese} requests conduct-based attorney's fees in the amount of \$7,712.50 for the expense of this motion. \* \* \* The fees would not have been incurred except for the [Tom's] refusal to pay spousal maintenance in a timely manner. \* \* \*"*

*"\* \* \* [Tom] to pay the sum of \$8,712.50 in conduct-based attorney's fees \* \* \*."*

The following provisions appear in the May 15, 2006, order pertaining to fees:

*Finding No. 7 and Order No. 8:*

*“ [Tom’s] motions amount to needless litigation. There is no showing that Mr. Sonsalla maltreated the parties’ children, \* \* \* [Therese] is entitled to conduct-based attorney fees.”*

*“[Tom] shall pay to [Therese] the sum of \$2,000.00 as and for conduct-based attorney’s fees.*

Initially, the Court’s March 8, 2006, order is contradictory. While there is a finding that \$7,712.50 in fees were reasonable, the Court awarded \$8,712.50. The order is not supported by the finding.

As argued herein, the basis for the awards is not consistent with the record. While the Court found that Tom had *refused* to pay his spousal maintenance, the evidence was obviously to the contrary. In fact, in order to ultimately purge his contempt, Tom had to liquidate the retirement interests. There was no *refusal* to pay.

A party seeking conduct-based fees has the burden of proving that the other party unreasonably contributed to the length and expense of the proceedings. *Geske v. Marcolina*, 624 N.W.2d 813, 816 (Minn.App. 2002). The key words are “*unreasonably contributed.*” While the statute does not delineate what constitutes “*unreasonably contributing to the length and expense of a proceeding,*” there is some guidance in case law. In *Redmond v. Redmond*, 594 N.W.2d 272, 278 (Minn.App. 1999) the Court defined it as taking positions that are duplicitous and disingenuous which cause delays, and which have the effect of lengthening the proceedings and increasing their expense. In *Gales v. Gales*, 553 N.W.2d 416, 423 (Minn. 1996), the Court denied such fees where they were neither “frivolous” or “in bad faith.” More often than not, the fees are tied to conduct such as failing to comply with discovery, violating the law or asserting unfounded legal positions. *See, i.e., Korfv. Korf*, 553 N.W.2d 706, 711 (Minn.App. 1996)(fees are appropriate for taking non-cooperative and obstinate positions, and for breaking into marital homestead); *Rask v. Rask*, 445 N.W.2d 849,

852 (Minn.App. 1989)(failure to comply with discovery can lead to an award of conduct-based fees); and, *Roehrdanz v. Roehrdanz*, 410 N.W.2d 359, 363 (Minn.App. 1989)(scheduling unnecessary hearings and failing to comply with discovery, with intent to cause delay and hardship, can lead to award of attorney's. Tom was not accused of doing anything illegal nor was he ever accused of failing to comply with discovery. Most importantly, none of the positions taken by him could remotely be considered to be frivolous (although the Court incorrectly determined that Tom's motion to change custody was without merit).

An award of conduct-based fees has to bear a relationship to the costs actually incurred as a result of the alleged conduct. An award of conduct-based fees is not appropriate when a party fails to document or state the amount of fees that were incurred as a result of the alleged conduct. *Kitchar v. Kitchar*, 553 N.W.2d 97, 104 (Minn.App. 1996). Even if any of the allegations pertaining to Tom raised to the level justifying an award of fees, there were numerous other issues before the Court in each of the motions. Instead of apportioning fees according to the issues complained of, the Court simply awarded *all* of Therese's fees.

Finally, an award of conduct-based fees is not appropriate where both parties have contributed to the length and expense of the proceedings. (*See, i.e., Kahn v. Tronnier*, 547 N.W.2d 425, 431 (Minn.App. 1996). Much of the litigation here has been the result of Therese's interference with Tom's attempts to implement the access schedule and with his attempt to exercise his time at the school.

**6. THE TRIAL COURT IMPROPERLY REQUIRED TOM TO PROCEED WITH THE CONTEMPT HEARING ON MARCH 22, 2006.** Tom appeared in Court on March 22, 2006. Appearing with him was counsel Mark Anderson, who was of the understanding that the hearing was simply a motion to set an

evidentiary hearing. A review of the record leading to that point reveals that the parties appeared in Court on August 25, 2006, for an evidentiary hearing on the issue of contempt. Tom was represented by attorney Robert Zalk. After Therese testified, the Court concluded the hearing for the day and directed that the parties come back on September 12, 2006. The parties appeared in Court on September 12, 2006. Prior to the commencement of the evidentiary hearing the parties' counsel asked leave of the Court to continue discussions of settlement. [T 21] After going back on the record the parties read an agreement into the record.[T 22- 36] The agreement resulted in the Court's order dated September 12, 2006. The order required Tom to pay \$35,000 immediately toward past due maintenance and to remain current on his obligation. Pursuant to ¶1, the contempt proceedings were, "*indefinitely continued until either party moves the Court to reinstate it on the calendar with good cause shown.*"

In the interim, attorney Robert Zalk withdrew from the case due to health reasons. After being served with a motion by Therese to "*reinstate contempt proceedings*" attorney Mark Olson, whom had been handling parenting time issues only to that point, was asked by Tom to take over the entire case. Since he was unavailable on March 22, 2006, attorney Mark Anderson filed in with what was thought simply to be a "motion." It was not until appearing at the court that it was learned that Therese intended to proceed with the evidentiary hearing that day. Tom's attorney asked for a continuance since he and Tom were not prepared to trial the case that day. While the Court conceded that its September 12, 2005, order was not entirely clear, it nonetheless required Tom to proceed, totally unprepared.

Due process protections include, '*notice, a timely opportunity for a hearing, the right to be represented by counsel, an opportunity to present evidence and argument, the right to an impartial decision maker, and the right to a reasonable decision based solely on the*

record.’ *In re Marriage of Sammons*, 642 N.W.2d 450 (Minn.App. 2002), *citing*, *Humenansky v. Minnesota Bd. of Med. Exam’rs*, 525 N.W.2d 559, 565 (Minn.App.1994) (*citing*, *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970)), *review denied* (Minn. Feb. 14, 1995).

Here, the issue of *joint legal custody* was not even litigated – it was stipulated prior to the trial that the parties would share *joint legal custody*. Tom was given no notice that the trial court was considering something other than *joint legal custody*. Since Tom was not provided with sufficient notice, he was deprived of an opportunity to present evidence on the issue. As noted in the *Matter of Grafstrom*, 490 N.W.2d 692, 696 (Minn.App. 1992),

*“It is fundamental that a party must have notice of a claim and the opportunity to oppose the claim before a binding adverse judgment may be entered.”*

In the absence of such notice, a party can nonetheless consent to having an issue litigated; however, it stands to reason that the trial court *must* base its decision on issues that were either pled, or litigated by consent. *Id.*

This is not a case where the issue was litigated by consent. (*See*, i.e., Minn.R.Civ.P. 15.02). Since an order or judgment rendered without proper notice or consent is absolutely void, the trial court’s decision to find Tom in contempt of court is void as a matter of law. *Matters of Bowers*, 456 N.W.2d 734, 737 (Minn.App. 1990).

**7. THE TRIAL COURT IMPROPERLY FOUND TOM IN CONTEMPT OF COURT FOR FAILING TO PAY HIS COURT-IMPOSED MAINTENANCE OBLIGATION.** In the parties’ judgment and decree dated April 21, 2004, the trial court ordered Tom to pay \$12,500 a month for 24

months, \$10,500 for 24 months, and \$8,500 for 24 months.<sup>32</sup> The Court determined that Tom had the ability to pay those monies from his business income in *Zar Corporation* on the basis of a cash flow analysis done by an expert. The expert reasoned that since Therese was no longer working there, her income (\$120,000 salary) would largely go to Tom. Another expert opined that Tom would have \$378,000 of gross income each year to pay the maintenance, and that it could be expected that his income would rise to \$430,000 a year.<sup>33</sup> The Court adopted those projections as the basis for the maintenance award. The Court also found that the parties had combined income of \$429,884 for 2002 and \$525,356 for 2001.

During testimony, Tom indicated that none of the projections had come to fruition. As testified to in court, and supported by tax returns, Tom's 2005 gross income was only \$252,972. He also testified that they would be done in 2006 due to the fact that he needs inventory to generate income and his inventory had been depleted. In any event, the facts and basis for the spousal maintenance (as ordered in the judgment and decree) did not happen. In fact, the \$252,972 was a reduction in income of 42% from what the maintenance obligation was supposed to be based upon, which is a \$177,000 annual shortfall. The \$12,500 a month in maintenance that Tom was unable to pay corresponded directly with \$177,000 shortfall in the Court's projection of his income. In reviewing a district court's decision whether to hold a party in contempt, the factual findings made by the trial court are subject to reversal only if they are clearly erroneous, while the district court's decision to invoke its contempt powers is subject to reversal only for an abuse of discretion. *Mower County Human Servs. v. Swancutt*, 551 N.W.2d 219, 222 (Minn.1996).

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<sup>32</sup> *See*, ¶11 of judgment and decree.

<sup>33</sup> *See*, ¶XXIII of the judgment and decree.

The Minnesota Supreme Court has stated that the purpose of contempt can either be remedial or punitive. *State v. Tatum*, 556 N.W.2d 541, 544 (Minn.1996). Civil contempt orders are remedial and are designed to induce future performance of a valid court order, as opposed to punishing for a past failure to perform." *Mahady v. Mahady*, 448 N.W.2d 888, 890 (Minn.App.1989). On the other hand, criminal contempt orders are punitive. *Tatum*, 556 N.W.2d at 544. Trial courts should determine at their earliest convenience whether the purpose of the contempt proceeding is remedial or punitive." *Id.*

Procedurally, the district court must take specific steps before it may hold an individual in constructive civil contempt. Minn.Stat. §588.04, states in relevant part as follows:

*"[i]n cases of constructive contempt, an affidavit of the facts constituting the contempt shall be presented to the court \* \* \* who may either issue a warrant of arrest to bring the person charged to answer or, \* \* \* upon notice, or upon an order to show cause \* \* \* may commit the person to jail, impose a fine, or both \* \* \*."*

Furthermore,

*"[w]hen the contempt consists in the omission to perform an act which is yet in the power of the person to perform, the person may be imprisoned until the person performs it \* \* \*."*

Minn.Stat. §588.12.

The Minnesota Supreme Court has outlined the minimum requirements that a civil-contempt proceeding must meet. They are as follows:

- "(1) the court has jurisdiction over the subject matter and the person;*
- (2) a clear definition of the acts to be performed;*
- (3) notice of the acts to be performed and a reasonable time within which to comply;*
- (4) an application by the party seeking enforcement giving specific grounds for complaint;*
- (5) a hearing, after due notice, to give the nonperforming party an opportunity to show compliance or the reasons for failure;*
- (6) a formal determination by the court of failure to comply and, if so, whether conditional confinement will aid compliance;*
- (7) an opportunity for the nonperforming party to show inability to comply despite a good faith effort; and*

(8) *the contemnor's ability to gain release through compliance or a good faith effort to comply.*

*Mower County Human Servs.*, 551 N.W.2d at 223 (quoting *Hopp v. Hopp*, 279 Minn. 170, 174-75, 156 N.W.2d 212, 216-17 (1968)).

There are two stages to a contempt proceeding. In the first stage, the court must determine whether the obligor has the ability to comply with the court-ordered obligation. In the second stage, the court must set purge conditions and determine whether the contemnor has the ability to meet those conditions. *Mahady*, 448 N.W.2d at 890. Civil contempt is said to give the contemnor the "keys to the jail cell," because compliance with the order allows him to purge himself and end the sanction." *Id.*

This action has been complicated by two key factors: (1) as noted, Tom was not given adequate notice and time to prepare for the contempt hearing,<sup>34</sup> and (2) Tom was prevented (by virtue of the label of his being a vexatious litigator) from bringing a motion to reduce the obligation that he was accused of failing to meet<sup>35</sup>.

In evaluating the above factors, Tom takes specific issue with factors (5), (6) and (7). Tom also specifically challenges the sufficiency of the evidence as to whether he was able to comply with the Court's order. A review of the Court's order for incarceration dated July 28, 2006, is instructive. In ¶6 of the order, the trial court noted that Tom had an IRA with \$200,000 in it and that he could liquidate it to pay his maintenance. That clearly was not what

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<sup>34</sup> As noted previously, Tom (as well as his recently retained attorney) was unaware that the matter was scheduled for an actual evidentiary hearing. The record is clear that the trial court even conceded that fact.

<sup>35</sup> Tom could not bring a motion without prior consent of the Court. No such consent was granted. In fact, the trial court continues to make Tom jump through hoops.

the Court contemplated when it issued its judgment and decree. The contemplation was Tom would have \$430,000 in gross income, not the \$252,972 that his income had fallen to in 2005.

Tom did not have the ability to pay the maintenance (absent his liquidating his assets). The Court should not have found him in contempt. Retirement benefits awarded as part of a property settlement cannot be included in income when determining a party's maintenance obligation. *Walker v. Walker*, 553 N.W.2d 90, 94 (Minn.App. 1996). Despite that fact, Tom had to liquidate his retirement benefits from the property settlement to obtain his release from jail and purge his contempt.

### ***CONCLUSION***

The trial court erred in failing to implement and enforce the parenting time plan, in removing Dr. Flynn as parenting consultant, in finding Tom in contempt of court, in requiring him to liquidate his assets to pay maintenance and in awarding conduct-based attorney's fees. Its decision should be reversed.

Respectfully submitted,

Dated: December 14, 2006

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).