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STATE OF MINNESOTA
IN COURT OF APPEALS

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

v.

Therese Elizabeth Szarzynski, ***Respondent***

APPELLANT THOMAS JOHN SZARZYNSKI'S REPLY BRIEF AND APPENDIX

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STATEMENT OF THE FACTS

In Therese's *Statement of Facts,* as well in her arguments, she takes great liberty with the truth and Tom's arguments on appeal, either portraying partial truths, making allegations without any factual support in the record, or outright misrepresenting both Tom's arguments and the facts.

Parental Access. Therese argues that Tom is attempting to appeal the trial court's custody and parenting time decision from the April 21, 2004, judgment and decree by attacking the need for supervised visitation. *Nowhere* in Tom's argument does he seek review of that decision. In fact, it is the April 21, 2004 decision, as well as the amended decision issued on August 26, 2004, upon which Tom bases this appeal.

Therese points to Finding of Fact XVIII in the judgment and decree wherein the trial court discussed Tom's access to the children, and argues that Tom has: (1) failed to complete the requirements of that provision; and (2) failed to follow the parenting time plan that was created by the first parenting consultant in November 2005. The alleged failures do not exist. Tom has not argued that he should be entitled to unsupervised parenting time since he has completed the progression identified in the parenting time plan – rather, Tom has argued that the plan has not been implemented due to Therese's refusal to cooperate with it and her blatant interference with any attempts Tom has made toward reconciliation of his children. Tom has also argued that the existing limited access provided for him in the judgment and decree has been blatantly interfered with by Therese as well.[1]

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[1] As noted in the prior brief, Tom was to be afforded access to the children's school to attend and participate in school events. Therese has sabotaged his ability to do so by contacting

The following are the relevant points of Finding of Fact XVIII:

a) The children's therapist (Theresa Boatman) has recommended steps for [Tom] to take in order for the children to be safe in his care; and

b) Until he follows all of the therapist's recommendations, supervision will not be lifted.

Therese also points to ¶5 of the judgment and decree, wherein the trial court appointed a parenting consultant, (by agreement of the parties). The parties stipulated that the consultant would be able to, *"make binding decisions re [sic] schedule and the children's activities as they impact the schedule."* In an attempt to fortify her arguments pertaining to the removal of consultant Monica Flynn, Therese asserts that, *"Kirsten Lisne worked closely with Dr. Theresa Boatman, the children's therapist, to develop a detailed parenting plan, which incorporated the recommendations of Dr. Boatman."* Therese cites page 250 of her appendix in support of that assertion; however, page 250 is merely part of Therese's October 24, 2005, affidavit. The statement is entirely self-serving and implies that the ultimate plan was a joint effort of the two. The truth of the matter is that Theresa Boatman handed off the duties of deciding when Tom was to have unsupervised access to the children to the consultant, Kirsten Lisne. [RA 221]("RA" refers to Respondent's appendix). They were not *working together* on the plan and the lifting of supervision. While Tom concedes that Ms Lisne consulted with Dr. Boatman from time to time, it was ultimately up to Ms Lisne

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the school and advising staff that under no circumstances is Tom to be allowed on the premises.

to craft the plan. In fact, she had binding authority to do so.

While Therese correctly states that the goal of the parenting plan was to gradually increase Tom's time with the children to the point where it would become entirely unsupervised, she falsely asserts that it is Tom who has not complied with the terms of the parenting plan or schedule contained therein.

If this Court reviews the plan it will note that Tom was to be immediately accorded the following access:

a) Tom was to immediately (November 15, 2004) start volunteering as a "classroom helper" in each of the children's classes;

b) Tom was to be able to participate with his father and the children in "Grand Friend's Day" at school on November 24, 2004;

c) Tom was to start having lunch three weeks into the schedule (December 10, 2004) with each child once each week;

d) Tom was to be able to plan and have a birthday party for Jake at his aunt's home on December 19, 2004; and

e) Tom was to spend Christmas Eve from 9:00 a.m. to 10:00 p.m. with the children.

From Christmas Eve going forward, Tom's time would gradually expand and become unsupervised entirely by April 1, 2005. By July 1, 2005, the consultant was going to confer with the therapist and determine if it were time to begin overnights.

According to the express terms of the parenting plan, it was to be implemented

automatically unless one of the following occurred:

i) The consultant verifies that Tom has not been following the guidelines and boundaries regarding the time and content of activities;

ii) The consultant verifies that Therese has substantially interfered with, restricted or prevented access with the children; or

iii) The consultant learns from the therapist that the children are having adverse reactions or lack of adjustment to the plan.

The point is that Tom was not accorded the access set forth in a) - e) above. More importantly, the consultant did not verify any of the conditions set forth in I) to iii) above. [2] Therefore, the schedule *should have* proceeded automatically. Tom's argument on appeal is that Therese has substantially interfered with the process, *and*, the trial court has failed and refused to do *anything* to implement the schedule. His argument on appeal isn't that the trial

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[2] Therese argues in her brief that Tom has not complied with the terms of the parenting plan and schedule. She cites pages 250-251 of her appendix in alleged support for that contention; however, those pages merely contain her own self-serving affidavit testimony from October 2005, not a determination of failure by a consultant, as is required in the plan. Therese claims that Tom failed to sign in, attend the classroom time, and immediately sign out; however, she fails to identify how and when this occurred. Therese claims that Tom failed to leave the school by "hanging around" after acting as a computer class volunteer. Once again, she fails to identify when this occurred. More importantly, as with all of the *allegations*, there is no corroboration from the school nor are there any documented complaints from the school about these particular allegations. Therese claims that Tom violated the plan by allegedly taking Jake to lunch in a separate part of the school. This allegation is not corroborated. Furthermore, the plan did not specify where Tom was to eat the lunch even if the allegation were true, which it is not. Finally, Therese states that she allegedly saw Tom at the school in December 2004, when he was not supposed to be there. The problem with that *allegation* is that Tom was not prohibited from going to the school. Since she did not speak to him, she did not know why he was there or how long he had been there. As with the other *allegations*, they were not corroborated or supported by the school. Furthermore, it was not Therese's right to unilaterally terminate the plan. That right was reserved for the parenting consultant.

court erred in implementing a supervised schedule in first instance, nor is it that the parenting time plan was created in error.[3]

Therese alleges that at the February 27, 2006, hearing (acting *pro se*) Tom requested that the court grant him unsupervised parenting time, despite not having completed the parenting plan. While that point is true, a read of the entirety of that portion of the transcript cited by Therese reveals that Tom's argument was he had done everything asked of him by the Court, as well as required by Theresa Boatman. His frustration was with not having the schedule implemented at all, due to Therese's interference. [RA 296] Therese points to the March 8, 2006, order wherein Tom was allegedly granted supervised time, *"until he successfully complies with the parenting plan designed by Ms Lisne and Dr. Boatman."*[4] That misstates the record. There are no such conditions attached in the order. Furthermore, the plan was not designed by Dr. Boatman – it was designed by the consultant, Kirsten Lisne.

Contempt. Therese is correct when she asserts that Tom never appealed the original or amended judgment and decree.[5] To be clear, Tom was represented other different counsel at that time. In the Fall of 2005, Tom's counsel, who had been handling his financial issues, withdrew from the case due to a terminal illness. Being without funds, Tom terminated the

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[3] Therese continues to this day to direct the school not to allow Tom there.

[4] See, page 8 of brief.

[5] Tom's then attorney, who was suffering from a terminal illness, did not appeal from the orders resulting from the motions for amended findings and/or new trial.

attorney who had been handling his parental access issues and decided to proceed *pro se* on all issues. It was only after Tom was served with Respondent's March 8, 2006, motion, seeking "reinstatement" of contempt that he decided to once again retain counsel. Tom requested that the attorney who had handled his parental access issues for the prior year to thereafter handle all of his issues, even though said counsel had no familiarity with the financial issues and prior proceedings involving the same.

There was no notice sent out from the trial court that set March 22, 2006, as a date for an evidentiary hearing on the issue of contempt. The only notification given was in Respondent's motion. The applicable provision sought the following relief:

> "1. ***Contempt.*** *Pursuant to paragraph 1 of the Court's Order, filed September 19, 2005, reinstating the constructive civil contempt proceeding to hold Petitioner in Contempt of Court for failing to comply with paragraph 11 of this Court's Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree, filed April 21, 2004, which was thereafter amended on or about August 26, 2004."*

Therese states in her brief that it was unfortunate that Tom's counsel was unprepared for an evidentiary hearing. The correct word would be "uniformed."

There was no mention in the relief request about actually holding an evidentiary hearing on March 22, 2006. Understandably, Tom and his fill-in counsel[6] were unaware that the matter was scheduled for an evidentiary hearing on that date. [T 3 - 7] Tom's stand-in counsel requested a continuance of the hearing. After the request, the trial court even

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[6] Tom's other attorney had a conflict with the hearing date and asked attorney Mark Anderson to appear and deny the allegation of contempt, anticipating that a date would be set for an evidentiary hearing.

conceded that the motion did not refer to a "continuation" of the proceedings as opposed to the notation in Therese's motion of a "reinstatement." [T 7] Despite the acknowledgment by the Court that the pleadings were not clear, and despite the fact that Tom and his counsel were completely unprepared for a trial that date, the court ordered the contempt to proceed.[7]

In Therese's brief, she falsely asserts that Tom had never moved to modify his maintenance obligation. That statement is blatantly false. There was a prior motion that was to be heard on September 12, 2005, that was withdrawn at the same time as the contempt proceedings were, *"indefinitely continued."*[8] What is deeply troubling is the fact that Therese's counsel handling the appeal is the same attorney who appeared at the hearing involving the maintenance modification. Furthermore, the reason why Tom did not *"move"* for a modification of maintenance after that point in time was he was prohibited by the trial court from bringing a motion, and the trial court chose to ignore his multiple requests to bring such a motion. For example, prior to the time that the trial court even found Tom in contempt (in its subsequent May 15, 2006, order), Tom's counsel made requests on March 23, 2006, March 24, 2006, April 3, 2006, and May 17, 2006 to bring motions. [RPA 1 - 5]

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[7] At pages 9 - 10 of her brief, Therese concedes Tom's point regarding the lack of clarity about the March 22, 2006, date by noting, *"[Therese] renewed her **request for an evidentiary hearing** regarding the contempt matter on March 8, 2006, by motion."* (Emp. added). Clearly, the motion to be heard on March 22, 2006, was to *request* an evidentiary hearing, not hold one.

[8] See, ¶¶1a and b in order dated September 19, 2005.

Excerpts from those letters are as follows:[9]

> *"We are also requesting permission (as is required in the existing order) to bring a motion for reduction in maintenance based upon the rather extreme reduction in [Tom's] income. I will await your response. Thank you."* (March 23, 2006);
>
> *"* * * we are asking that the court grant permission to bring a motion to vacate the prior order on the basis of fraud * * * "* (March 24, 2006);
>
> *"We made a request over a week ago to have this matter reconsidered. * * * I implore you to immediately issue a decision on my request. * * * In light of the complete lack of progress I am asking for an immediate response to our March 24, 2006, request."* (April 3, 2006); and
>
> *"I wrote you on March 23, 2006, asking for permission to bring a motion to modify maintenance (as is required by your finding that [Tom} is a nuisance litigant. Your failure and/or refusal to response (in seven weeks) is a denial of his constitutionally protected due process rights."* (May 17, 2006)

On August 4, 2006, Tom was sitting in jail for contempt. Attorney Mark Anderson sent the trial court another letter after another two months went by without a response. In the letter he reiterated,

> *"[Tom] has grounds to have his spousal maintenance and child support modified. In fact, he requested the court allow him to bring a motion as such in March 2006. The court will recall that it previously ordered that [Tom] cannot bring any motions without permission of the court. The permission was asked for in March 2006, and the court has never responded. On behalf of [Tom] I again request permission to bring a motion to modify maintenance and child support based on a substantial change in circumstances. This request is made retroactive to March 26, 2006, when the request was first made."* (August 4, 2006) [RPA 8]

Three more months went by without a response from the trial court. Attorney Mark Anderson again sent another letter. In the preamble he noted,

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[9] The letters go into detail about how Tom's access to his children had been interfered with by Therese for at least 18 months.

> *"A prior order dated March 6, 2006, and filed March 8, 2006, Order that [Tom] must request permission to bring a motion before the court. A request was made to the court by a letter dated March 23, 2006, from attorney Mark A. Olson. This request has not been ruled on yet. A copy of that letter is attached. [Tom] requests retroactive modification to the date of that letter.* (November 17, 2006)[RPA 10]

Finally, the trial court responded in a letter dated November 30, 2006. In that letter the trial court indicated that prior to bringing a motion pertaining to maintenance, the parties needed to participate in a Financial Early Neutral Evaluation (FENE) process. However, after the trial court failed to refer the matter out for a FENE,[10] Tom's counsel wrote yet another letter on December 28, 2006. In that letter he noted,

> *"We have attempted to schedule a session as per your order; however, we have been told that you need to issue a directive to FENE. * * * Could you please issue a referral to FENE?* (December 28, 2006) [RPA 13]

Once again, there was no response. Yet another letter was sent to the Court. In that letter Tom's counsel indicated,

> *"I am growing concerned over the fact that I have not received a response pertaining to my request that you send out the referral to FENE. * * * I would therefore appreciate a prompt response. Thank you for your consideration in advance."* (January 10, 2007) [RPA 14]

A referral was finally made to FENE within the last week. In the interim, Tom is still prevented from bringing a motion to deal with the issue of a maintenance reduction. The above series of requests and lack of response amply demonstrates why Tom has not been able to bring a motion to reduce maintenance, which is a far cry from Therese's claim in her brief that Tom never moved to modify his spousal maintenance. Furthermore, the assertion that

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[10] Hennepin County requires a referral to FENE by a judicial officer. The parties cannot schedule one without it.

Tom never voluntarily paid his spousal maintenance is another glaring misrepresentation.

REPLY ARGUMENT

1. <u>PARENTAL ACCESS</u>. Therese incorrectly identifies this issue as whether or not the trial court erred in enforcing the parenting plan and ordering supervised parenting until Tom had complied. The fact is the trial court has yet to hold Therese's feet to the fire and require *her* to abide with the parenting plan. Tom's argument on appeal is not that the trial court is enforcing the plan – the argument is the trial court is *not* enforcing the plan.

As noted above, the parenting consultant was given binding authority to create a parenting plan and decide when Tom's access would return to normal. The consultant was the only party granted the authority to stop the plan from being implemented. No consultant has directed that the plan not be implemented. In fact, the trial court recognized that the plan was still to be implemented in ¶2 of its April 4, 2005, order wherein it held,

> *"The schedule and conditions for parenting time as drafted by Ms Lisne in her letter dated November 11, 2004, shall be deemed the parenting time schedule effective April 1, 2005."*

As noted, Tom's issue with the trial court is that it has yet to do anything to insure that the plan is carried out. The court could have appointed a special master to ensure compliance. It could have scheduled periodic reviews to ensure compliance. It could have allowed Tom to be heard on a contempt motion pertaining to Therese's interference. It did none of the above and nearly two more years have gone by without any action. Tom's request on appeal is that the Court of Appeals should deem the trial court's lack of action to be an abuse of

discretion and remand the issue with a directive that the trial court shall ensure future compliance with its far reaching powers, including contempt.

Therese asserts that Tom has argued that the court's March 8, 2006, order does not comply with Minn.Stat. §518.175, subd. 1. No such argument is found in Tom's brief. Tom argued that the court failed to *implement* the schedule. There is no criticism by Tom of the plan itself. Tom cited §518.175, subd. 1 for the proposition that the trial court is *required* to grant parenting time on behalf of children and a parent as will enable them to maintain a child/parent relationship that will be in their best interests. Tom has been willing to follow the plan. Therese has not. Since it is in the best interests of the children to maintain a relationship with their father, as already determined by the trial court, the abuse of discretion is the failure to force compliance.[11]

Therese argues that there is no need to look to the *best interests* of the children since the trial court has already held that Tom's access must be supervised until he has complied with the recommendations of Dr. Boatman. The argument is rather odd considering Tom has complied with *all* of Dr. Boatman's recommendations. That fact is borne out by her handing the decision off to former consultant Kirsten Lisne.

Therese argues that Tom has been unable to follow any of the guidelines and boundaries regarding the times and content of the activities outlined in the plan. As noted

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[11] While Tom has been found in contempt of court for failure to pay maintenance, Therese has been given a free pass and has yet to be called on the carpet. The only one willing to do so, Dr. Monica Flynn, was summarily dismissed by the court without any notice to her.

above, the consultant was given authority to make binding determinations. One of her determinations was that it was up to the consultant to decide if Tom had failed to follow the guidelines and boundaries. Therese's subjective belief that Tom has failed is irrelevant. Therese did not appeal. Therese was not empowered to decide whether or not Tom is in compliance. There has been no such determination by any consultant; although Dr. Monica Flynn opined that Therese was likely engaging in parental alienation. [A 351-353] Nor has there been a determination by the trial court that Tom failed to follow the guidelines and boundaries set by Kirsten Lisne. Instead of following the plan and allowing a consultant to make the call, Therese has taken matters into her own hands, unilaterally contacted the school, and advised them that under no circumstances is Tom to be there. Therese claims that the school principal called her and asked if Tom was supposed to be at the school;[12] however, the claim is pure hearsay. The fact is the school's attorney noted *Therese's* interference, not Tom's lack of compliance. [A 225, 290 - 91, 311 -15] Therese has produced not one iota of documentation from the school that Tom was a problem. On the other hand, Dr. Monica Flynn found evidence of interference at school by Therese and Tom produced e-mails that the school was anxious for his participation. [A 288][13]

Finally, Therese improperly goes outside of the record by falsely asserting that to the

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[12] See, p. 14 of Therese's brief.

[13] Therese tries to tie Ms Lisne's withdrawal from the case to her imagined violations at school by Tom by claiming that she resigned about the same time as the school barred Tom from access. (See, page 14 of her brief). The events actually occurred more than a month apart.
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best of her knowledge, Tom never contacted Leah Albersheim, who was appointed to do reunification therapy. Therese knows that statement is false. The fact is, Ms Albersheim indicated that she was unable to do what the court had directed. In a letter to Tom confirming that fact (dated June 5, 2006), she specifically noted,

> *"As we discussed * * *"*

The letter was copied to Therese, who obviously was aware of the fact that Tom had contacted Dr. Albersheim. [RPA 16]

2. <u>EVIDENTIARY HEARING</u>. Tom's *pro se* request for a change of custody was deemed by the trial court to be moot, since Therese's father was dying of cancer and would not have solo access to the children.[14] That determination aped Therese's arguments in court; however, the "moot" argument misses the point. Tom argued that Therese had endangered the children by allowing her father, an accused child molester, to watch their children alone and that fact called into issue Therese's ability to properly care for the children and protect them.

Therese argues that Tom failed to allege that there had been a change in circumstance; however, there is no requirement that a movant specifically categorize his claim nor does Therese cite any authority for that position. It can certainly be deduced from the facts that Therese exposing the children to a molester was a "changed circumstance" that was not previously known or addressed.

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[14] This was supposedly a basis for an award of conduct-based attorney's fees.

Therese also argues that Tom did not address the *best interest* criteria in his motion; however, that determination is for the trial court, not the litigants.

Therese argues that Hennepin County had closed its investigation and found no maltreatment; however, as argued in Tom's brief in chief, the trial court must accept the movant's allegations as true and contrary assertions, even by a county authority, are to be disregarded.[15]

Therese cites, *Englund v. Englund,* 352 N.W.2d 800, 802 (Minn.Ct.App. 1984) for the proposition that the trial court properly denied the request for an evidentiary hearing.[16] However, that case involved allegations of integration by consent, not endangerment.

3. <u>REMOVAL OF MONICA FLYNN</u>. Therese argues that the Court of Appeals should not consider Dr. Flynn's letter to the trial court that was issued after her dismissal since it was submitted after the motion. [A 341 - 343] What Therese fails to mention is that she did not serve Dr. Flynn with her motion. Dr. Flynn was not consulted by the trial court about the allegations and Dr. Flynn was not given the right to be present and defend herself. Since Tom was *pro se* at the time, it can be assumed that Therese intended for the trial court to only hear her complaints, which were vigorously disputed after the fact by the neutral consultant, Dr. Flynn. Since the letter is part of the record on appeal, it is perfectly acceptable to consider it in the context of Tom's arguments.

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[15] <u>*See*</u>, p. 28, ¶1 of Appellant's Brief and Appendix. Therese ignores the holding in the *Hoffman* decision in her argument.

[16] Therese improperly cited the case as being in volume #353.

Therese argues that removal was appropriate since Dr. Flynn failed to consult with the children's therapist, Dr. Boatman; however, Dr. Flynn disputed that assertion and advised the trial court that she planned on consulting with her *after* meeting with both parties. The problem was Therese would not cooperate and meet with Dr. Flynn. There was no *refusal* to contact Dr. Boatman. Therese second guesses Dr. Flynn by arguing that she should have consulted with Dr. Boatman first. That argument ignores the fact that the consultant was given binding authority to make decisions, and that Dr. Boatman had deferred the decision making process to the consultant. Finally, Dr. Flynn disputed the balance of Therese's complaints, as stated on page 22.

Therese falsely argues in her brief that it is Tom's position that the trial court does not have the authority to alter a provision to which the parties agreed.[17] That misstates Tom's argument. Tom conceded that the trial court *always* has the right to act in the best interests of the children; however, the trial court did not make any findings that the removal of Dr. Flynn was in the children's best interests.[18] Rather, the trial court attributed its decision to *good cause*, which is not the correct standard.

Therese argues that the removal standard pertaining to expeditors should apply to consultants, to-wit: *"good cause,"* citing Minn.Stat. §518.1751. Therese cites no authority

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[17] See, page 23 of Therese's brief.

[18] Therese falsely asserts that Tom provided no "best interest" analysis, implying he did not address the issue. Tom argued the converse, that the trial court failed to discuss the "best interests" of the children.

for that position and ignores the precedent cited in Tom's brief,

Therese argues that the parenting plan required Dr. Boatman to determine when unsupervised access was permissible; however, that ignores the fact that Dr. Boatman handed off that chore to the consultant. Furthermore, it was Dr. Flynn's job to implement the schedule, not change it. (*See*, Order dated April 4, 2005). The parameters for when Tom could have unsupervised access were already laid out in Dr. Lisne's plan.

4. NUISANCE LITIGANT. Suffice it to say, Therese fails to specifically challenge or address any of the authority cited by Tom for the proposition that labeling him a "nuisance litigant" was improper.

5. ATTORNEY'S FEES. A litigant cannot be deemed to act in bad faith if his arguments are warranted by existing law or a non-frivolous argument for an extension or modification of a legal position. *See*, i.e., Minn.Stat. §549.211, subd. 2(2). Tom's concerns were legitimate. The denial of an evidentiary hearing, in and of itself, is not the basis for conduct-based fees. Furthermore, Therese's argument that she had to incur additional attorney's fees and costs as Tom needed to call another witness, who was not present on the first day, is equally without merit. Tom and his counsel's belief that the March 22nd hearing was not an evidentiary hearing is certainly understandable under the circumstance. Why would he bring a witness if he didn't know there was going to be a trial?

6. CONTEMPT HEARING.[19] The facts pertaining to this issues were already addressed above. It certainly was not clear that the matter was set for an evidentiary hearing on March 22, 2006, a point noted by the trial court itself. Therese's motion for the 22nd was to, *"reinstate the civil contempt proceeding."* It was not to proceed with an evidentiary hearing on that date.

Therese argues that Tom did not submit a responsive pleading objecting to the *"recommencement"* of the constructive civil contempt proceeding. That misses the point. The argument is Tom's due process rights were violated when he was not given sufficient advance notice that an evidentiary hearing was going to take place. Therese also argues that Tom had a full month to prepare for a second day of trial; however, the second day was limited to Tom calling another witness. His testimony was already completed on the first day.

7. CONTEMPT DETERMINATION. The best evidence of Tom's ability to comply with the spousal maintenance award was borne out after he was incarcerated. In order to pay the maintenance current, Tom had to liquidate his marital 401k interests. The payment did not come from savings, liquidation of post-dissolution holdings, or elsewhere. They was no evidence that Tom had inappropriately diluted personal funds obtained from his employment nor was there evidence that Tom had unreasonably increased his personal expenses, especially when the opposite was true. Tom simply did not have the money to pay

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[19] There is a typographic error in Tom's brief on page 41 of his primary brief. The discussion about "joint legal custody" should not bear there.

the maintenance!

Appellant's position pertaining to his inability to pay was precisely stated in attorney Mark Anderson's letter to the Court dated November 17, 2006, wherein he noted,

> *"I have reviewed documents that conclusively prove that Mr. Szarzynski's income is not anywhere near the amount that was used as a benchmark to establish his maintenance. Mr. Szarzynski has not had the ability to make his payments and had to liquidate most of his property in order to pay his maintenance. The original Judgment and Decree setting the amount of maintenance used a benchmark of the parties' past earnings. The court found that the parties had a combined adjusted income of $429,884.00 in 2002 and $525,356.00 in 2001. The court also apparently adopted the report of expert witnesses: Mr. Stoner estimated owners compensation of $378,300.00 and Mr. Kaminsky predicted that owner's compensation would be $410,000.00 for 2003. The predictions were $430,000.00 for 2004. The court also ruled in the original judgment and decree that the money formerly paid to Respondent as employee and owner would be available to Petitioner. None of this has come about. After an initial review of Petitioner's banking records and speaking to Petitioner's CPA, Petitioner does not earn anything close to the predictions. Petitioner's adjusted gross income for 2005 was only $252,972.00 on sales of $2,551.175. Petitioner's year-to date gross sales through September 15, 2006 are approximately $992,937.89. I believe Petitioner will make a conclusive case that he is entitled to modification due to a substantial change of circumstances. The original Judgment and Decree bases the maintenance on income of more than $400,000.00 per year and Petitioner has earned far less than that. He has run out of property to pay Respondent and he is currently past due, due to inability to pay."* [RPA 10]

In Therese's arguments on the subject she makes rudimentary mistakes in analysis. For example, she emphasizes the fact that Tom's "*gross receipts*" had increased from $1,309,259 in 2004 to $2,551,175 in 2005. "Gross receipts" are not the measure. The measure is "net income." The fact that the gross receipts had increased was irrelevant since Tom's costs of goods sold increased at even a higher rate. The fact that Tom continued to have what Therese referred to as "in-kind benefits" was also irrelevant. They were factored in to the original judgment and decree. This was nothing new. Therese then engages in an extreme

case of fuzzy math when she mixes distributions and salary in the same breath.[20] What she fails to address is the fact that in the judgment and decree the trial court assumed that the $100,000 salary that was being paid to Therese would go to Tom after the divorce. It never happened. The judgment and decree identified Tom's income as $400,000, and the trial court based the maintenance award on that number. It has never come close to that projection

Equally disturbing are the numerous false statements contained in Therese's argument. For example, while she argues that Tom can now afford to have his website expanded and enhanced, Tom testified that he had to take on that additional expense in an attempt to keep afloat. The same can be said of advertising on *E-Bay*. Due to low revenues, which were the result of having no capital to work with and no longer a line-of-credit, Tom had to engage in a practice that is routinely utilized by car dealers. An ad is placed in the paper, offering for sale a particular motor vehicle, even though the dealer doesn't have the car. If someone calls about the vehicle, the prospective buyer is told by the dealer that he will obtain it for him. That saves the dealer the holding costs. The same can be said of Tom. He would advertise certain printers. If someone called about purchasing one, Tom would buy one and sell it to the prospective buyer. There is nothing illegal or unethical about the practice. In fact, the practice is disclosed up front. It is not a "bait and switch" since there is full disclosure up front.

Therese asserts that Tom's credibility was impeached with evidence (that Tom offered) of the practice described above. It is unclear how that is the case since the practice is widespread and legal. Therese also asserts that Tom's credibility was impeached since he

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[20] Therese also repeatedly uses gross taxable income in her analysis instead of net income.

listed $75,000 in spousal maintenance for 2005; however, that issue was never explored in any detail at the hearing. Tom did not prepare his returns, his accountant did. Furthermore, his accountant signed the returns, not Tom. Without delving into the issue, it is not appropriate to call it impeachment after the fact.

Therese claims the Tom's company has international sales, in addition to consultants in four other states. That fact is irrelevant. Many companies operate in that fashion. Furthermore, Tom testified that the only "international" client was a single client in Mexico.

Therese claims that Tom's bookkeeper testified that Tom had traveled out of the country in the prior year; however, what Therese fails to mention is that the witness indicated that Tom is generally *always* at work, and puts in long hours. There was no indication that any of the "trips" were anything other than business related.

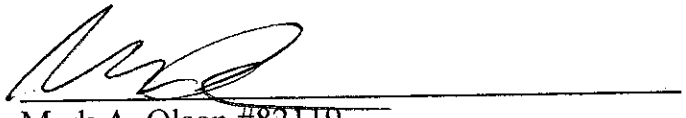
CONCLUSION

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: February 2, 2007

OLSON LAW OFFICE



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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).