

CASE NOS. A06-882 and 1417

State of Minnesota
In Court of Appeals

In Re The Marriage of:

THOMAS JOHN SZARZYNSKI,

Appellant,

vs.

THERESE ELIZABETH SZARZYNSKI,

Respondent.

RESPONDENT'S BRIEF

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LEGAL ISSUES

1. Did the trial court abuse its discretion by the ordering the implementation of the parenting time plan?

The trial court held: The trial court properly ordered that the parties' parenting plan shall remain in full force and effect and both parties shall cooperate and make reasonable efforts in implementing said plan.

2. Did the trial court abuse its discretion by not ordering an evidentiary hearing in response to Appellant's request to modify custody?

The trial court held: The trial court properly denied Appellant an evidentiary hearing as Appellant did not made a prima facie case for the modification of custody.

3. Did the trial court abuse its discretion by removing the parties' parenting consultant, Monica Flynn?

The trial court held: The trial court properly removed Monica Flynn as the parties' parenting consultant for good cause shown and because it found said removal to be in the children's best interests as set forth in the parties' Judgment and Decree.

4. Did the trial court abuse its discretion when it found Appellant to be a nuisance litigant?

The trial court held: The trial court properly found Appellant to be a nuisance litigant.

5. Did the trial court abuse its discretion by awarding Respondent conduct-based attorney's fees pursuant to Minn. Stat. § 518.14?

The trial court held: The trial court properly awarded Respondent conduct-based attorney's fees on two separate occasions pursuant to Minn. Stat. § 518.14.

6. Did the trial court abuse its discretion in proceeding with the contempt hearing on March 22, 2006?

The trial court held: The trial court properly proceeded with the contempt hearing.

7. Did the trial court abuse its discretion by finding Appellant in contempt of court for failing to pay in excess of \$100,000.00 in spousal maintenance arrears?

The trial court held: The trial court properly held Appellant in contempt of court for failing to pay over \$100,000.00 in spousal maintenance arrears when Appellant clearly had the ability to pay his spousal maintenance obligation.

STATEMENT OF FACTS

The parties were divorced on April 21, 2004. (A101) Thereafter, the trial court amended the parties' judgment and decree on August 26, 2004. (A61)

For the past two years, the parties have continued to litigate issues arising out of their judgment and decree. Presently, two specific orders are at issue. The first order, dated March 8, 2006, dismissed Appellant's request for a modification of custody and enforced the parties' parenting time plan. (A29-30) The second order, dated May 15, 2006, found Appellant in contempt of court for failing to pay his court-ordered spousal maintenance obligation. (A19-21) For organizational purposes, the facts relevant to each order are stated separately.

Custody and Parenting Time

In the parties' judgment and decree, Respondent was granted sole physical custody and sole legal custody of the parties' two children, namely Jacob Ray Szarzynski, presently age twelve, and Izabella Rose-Mary Szarzynski, presently age nine. (A101) Finding of Fact XVIII in the parties' judgment and decree provides:

There has already been a finding that Petitioner's conduct is emotionally harmful to his children. As a result of Petitioner's conduct the children are in therapy. The children's therapist has recommended steps for Petitioner to take in order for the children to be safe in his care. Petitioner is either unwilling or reluctant to follow the therapist's recommendations. While this court believes he wants to love his children to the best of his ability, the court is still concerned that he is unwilling to do everything asked of him in order to spend unsupervised time with his children. His refusal to follow the therapist's recommendations is consistent with his inability to place the children's needs before his own. Petitioner also

does not appear to comprehend basic child safety consideration such as children's need to be constantly supervised, not to be left alone with strangers, wearing seat belts in cars, and not to be involved in adult matters, especially their parents' divorce. Until he follows all of the therapist's recommendations for unsupervised visits, the children will continue to be in potential danger in his care. (A101)

As a result, Appellant was granted supervised parenting time until he followed all the recommendations of the children's therapist to the therapist's satisfaction. Once Appellant satisfied this requirement, his parenting time was to be unsupervised in accordance with paragraph 5 of the judgment and decree. (A101) Further, the trial court also appointed a parenting consultant in paragraph 5 of the judgment and decree. The parenting consultant's role was to resolve "disputes between the parents, other than child support disputes," and "make binding decisions re [sic] schedule and the children's activities as they impact the schedule." (A101)

Subsequent to the filing of the judgment and decree, Appellant's parenting time remained supervised, while the parties' parenting consultant, Kirsten Lysne, worked closely with Dr. Theresa Boatman, the children's therapist, to develop a detailed parenting plan, which incorporated the recommendations of Dr. Boatman. (A250) The parenting plan set out specific dates and activities for the Appellant and the parties' children. (A308-312) The goal of the parenting plan was to graduate Appellant's parenting time from supervised to unsupervised, provided Appellant complied with each of the stages, or tiers, of the parenting plan. (A308-

312) Appellant has not complied with the terms of the parenting plan or the schedule outlined therein. (A250-251)

Shortly after designing the parenting plan, Ms. Lysne resigned as the parties' parenting consultant. (A252) Since Ms. Lysne's resignation, the court has appointed four (4) subsequent parenting consultants. (A225) Each parenting consultant was charged with implementing the parenting plan. At the time of the hearing on February 27, 2006, the parties' then parenting consultant, Monica Flynn, was working to implement the parenting plan. (A143)

At the hearing on February 27, 2006, however, Appellant requested that the court grant him unsupervised parenting time, despite the fact that he had not completed the parenting plan. (A297) Appellant now appeals the trial court's order filed March 8, 2006, which grants Appellant interim supervised parenting time until he successfully complies with the parenting plan designed by Ms. Lysne and Dr. Boatman, and further orders Appellant and the minor children to participate in reunification therapy with Leah Albersheim. (A27-28)

Contempt

The parties' amended judgment and decree requires, in pertinent part, Appellant to pay, as and for temporary spousal maintenance, the sum of \$12,500.00 per month, commencing October 1, 2004, and continuing through September 30, 2006. (A68) Thereafter, Appellant is ordered to pay additional temporary spousal maintenance for a period of forty-eight (48) months, at varying rates. (A68)

Appellant never appealed the original or amended judgment and decree, including the terms of his spousal maintenance obligation. Additionally, Appellant has never moved to modify his spousal maintenance obligation. Appellant also never voluntarily paid his spousal maintenance obligation, which began in October, 2004.

In February, 2005, Respondent brought a contempt motion to induce Appellant's compliance with the amended judgment and decree. (A237) The trial court held a hearing in this matter on March 24, 2005, and issued an Order, dated June 14, 2005, which scheduled an evidentiary hearing relating to the issue of contempt. (A46)

The Court issued another Order, filed July 14, 2005, which scheduled the evidentiary hearing for August 25, 2005. (A42) The evidentiary hearing was continued to September 12, 2005, pursuant to the trial court's Order, filed August 26, 2005. (A40)

At the evidentiary hearing on September 12, 2005, the parties entered into a stipulation, the terms of which were designed to get Appellant current in his spousal maintenance obligation. (A36) Based on the parties' agreements, the trial court, in its order, dated September 19, 2005, "indefinitely continued" the constructive civil contempt matter, "until either party moves the court to reinstate the same with good cause shown." (A36)

Appellant did not get himself current with his spousal maintenance obligation, and arrears continued to accrue. Thus, Respondent renewed her

request for an evidentiary hearing regarding the contempt matter on March 8, 2006, by motion. (A233)

The trial court held a two-day evidentiary hearing, which commenced on March 22, 2006, and which was completed on April 14, 2006. Subsequent to the hearing, the trial court filed an order, dated May 15, 2006. (A12) This order found Appellant to be in contempt of court, and required him to purge the finding of contempt by paying his arrears (calculated to be \$145,158.80) on or before July 11, 2006. (A20)

Appellant did not purge the contempt condition. Additionally, Appellant did not attend the review hearing scheduled for this matter on July 11, 2006. The Court rescheduled the review hearing for July 28, 2006. (A11)

Thereafter, on or about July 12, 2006, Respondent served Appellant with additional contempt motion paperwork, including an Order to Show Cause, requiring Appellant's personal appearance at the hearing on July 28, 2006, to explain his failure to purge and his failure to attend the July 11, 2006, hearing. (A9-11)

On July 28, 2006, the trial court held the review hearing. Said hearing was evidentiary in nature, and Appellant was given a chance to testify as to why he did not purge or attend the July 11, 2006, hearing. Appellant admitted that he did not purge the finding of contempt, and the trial court held that Appellant had not provided an excuse for his failure to

meet the purge conditions. (A3) As a result of this hearing, the trial court ordered Appellant's incarceration. (A4-5)

Appellant's attorney argued that the incarceration should be stayed, as he had filed an appeal of the trial court's Order, dated May 15, 2006. The trial court denied the requested stay.

Thereafter, Appellant sought an emergency stay from the Court of Appeals on July 28, 2006. The Court of Appeals denied Appellant's request, in its Order, filed August 8, 2006. Thereafter, on August 11, 2006, Appellant paid his spousal maintenance arrears, and was released from the workhouse. (A1-2) Appellant now appeals the finding of contempt from the trial court's order filed May 15, 2006, and the trial court's decision to proceed with the contempt hearing on March 22, 2006.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ENFORCING THE PARENTING PLAN AND ORDERING SUPERVISED PARENTING TIME UNTIL APPELLANT COMPLIED WITH SAID PARENTING PLAN.

The trial court has extensive discretion in deciding parenting time issues and cannot be reversed on appeal except for an abuse of discretion. Olson v. Olson, 534 N.W.2d 547, 550 (Minn.1995); Manthei v. Manthei, 268 N.W.2d 45, 45 (Minn. Ct. App. 1978).

Appellant claims that the trial court's March 8, 2006 order does not comply with Minn. Stat. § 518.175, subd. 1. This statute makes clear that parenting time

rights are not absolute and are to be exercised only when in the best interests of the child and the extent their exercise will be beneficial to the child. Id.

There is no need to go through a best interest analysis at this juncture. The trial court already determined in the parties' judgment and decree that the children's best interests merited supervised parenting time until Appellant complied with the recommendations of Dr. Boatman. Appellant did not appeal this determination.

Rather, Appellant now attempts to appeal the parties' judgment and decree through the trial court's March 8, 2006 order by arguing that supervised parenting time is not in the children's best interest. This is improper. Thus, the issue at hand is really whether the trial court correctly ordered the implementation of the parties' current parenting plan, as developed by Dr. Boatman and Ms. Lysne.

It is important that this Court understand that the parenting plan developed by Dr. Boatman and Ms. Lysne gave Appellant the keys to unsupervised parenting time. Specifically, the plan's aim is to graduate Appellant to unsupervised parenting time with the children, *provided* Appellant demonstrates appropriate boundaries by following the terms of the plan, with its tiered schedule, which were designed to put the children's needs first. If Appellant "has not followed guidelines and boundaries regarding the times or content of the activities," the parenting plan provides that its implementation will be impacted, i.e., that Appellant will not graduate to the higher tiers of the plan (including, ultimately,

unsupervised parenting time), until he complies with each of the provisions of the plan in due course. (A311)

Appellant has been *unable* to follow *any* of the guidelines and boundaries regarding the times and content of the activities outlined in the plan. For example, the first activity outlined in the plan was for Appellant to “establish a consistent weekly schedule to participate in one class with each child as ‘classroom help’.” (A309) The reunification plan outlined a very straightforward procedure for this activity. “[Appellant] 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.” (*Id.*) Appellant, however, did not to comply with these very specific guidelines.

Appellant initially volunteered in the parties’ daughter’s computer class. While Appellant would sign himself in and out of the activity in the school office, Appellant would not leave the school after class. (A251) He would hang around the class and the school long after the computer class had finished. (A251) Appellant then started having lunch at school before he demonstrated appropriate compliance with attending the children’s computer classes. (A251)

Appellant was to begin to have lunch with each child one time per week, commencing December 10, 2004. Appellant again showed an inability to comply with the reunification plan. First, Appellant began to have lunches with the children prior to December 10, 2004. Additionally, Appellant would pull the

parties' son, Jake, out of the lunch line, away from the lunchroom and Jake's classmates, and take Jake into a separate part of the school while his classmates were getting lunch. Jake would then need to persuade Appellant to release him so that Jake could go have lunch with his classmates. Also, Appellant would promise to visit the children at lunch or for computer class, and then not show up. (A251)

In addition, Respondent observed Appellant at the school on a day when he was not supposed to be there. Appellant was not supposed to be at the school, having already participated in computer class and lunches that week with the kids. But, Appellant was at the school, waiting in the hall, at an unscheduled time. (A251)

Thereafter, Respondent received a call from Laurie Acker, the principal of St. Therese (the children's school). She inquired whether Respondent thought Appellant was supposed to be at the school as often as he was. Respondent said no. (A252)

It was about this time that Appellant unilaterally decided to expand the parameters of the detailed plan developed by Ms. Lysne and Dr. Boatman, including: 1) being present for "recess everyday," 2) hanging around the school when he was not supposed to be there, and 3) being a regular assistant in the children's gym class. (A252) Eventually, the children's school prohibited Appellant from visiting the children at school and the implementation of the parenting plan came to a standstill. (A252) At approximately the same time, Ms. Lysne resigned as the parenting consultant. (A252)

The trial court then appointed Janey Nelson as the parenting consultant. (A44) Once assigned to the case, Ms. Nelson reviewed the reunification plan developed by Dr. Lysne and Ms. Boatman and made recommendations on how and when to recommence the plan.

Ms. Nelson successfully planned a meeting between Appellant and the children for August 29, 2005, at 11:00 a.m. Appellant was to bring lunch to the meeting; Respondent was to bring the children to the meeting. Unfortunately, on the morning of Sunday, August 28, 2005, Respondent received a message from Ms. Nelson stating that she had no choice but to resign as our parenting consultant. Ms. Nelson canceled the meeting scheduled for the following morning. (A253) Again the parenting plan came to a standstill.

After appointing various other consultants, the trial court, in its order dated November 14, 2005, appointed Monica Flynn as the parties' fifth (5th) parenting consultant. (A34) Ms. Flynn was charged with implementing the parenting plan developed by Dr. Boatman and Ms. Lysne. (A34)

Thereafter, at the hearing before the trial court on February 27, 2006, Appellant moved the trial court for immediate implementation of unsupervised parenting time. (A297) When the court inquired as to whether Ms. Flynn had authorized unsupervised parenting time, Appellant admitted that Ms. Flynn had not. (A298)

Additionally, it is important for this Court to know that in conjunction with Appellant's parenting time motion, Appellant also brought an emergency motion

to change custody. Due to the nature of Appellant's allegations, the trial court appointed a Guardian Ad Litem, namely Jane Jarosch. (A29) Ms. Jarosch interviewed the children, the parties, and submitted written recommendations to the trial court. She also attended the hearing on February 27, 2006. Ms. Jarosch recommended that the children and Appellant work with a reunification therapist. (A314) When the court asked Appellant whether he was agreeable to a reunification therapist and Appellant responded that he was not. (A292).

In its March 8, 2006 order, the trial court held that the parenting plan remained in "full force and effect" and, despite Appellant's objection, the court appointed Leah Albersheim to act as a reconciliation therapist, per the Guardian Ad Litem's recommendation. (A314)

Appellant has not, to the best of the Respondent's knowledge and belief, ever contacted Ms. Albersheim, or in anyway proceeded with reunification therapy.

Instead, Appellant appeals the March 8, 2006 order, and alleges that it does not comply with Minn. Stat. § 518.175, subd. 1. Appellant, however, makes no showing that unsupervised parenting time is in the children's best interest, given Appellant's numerous violations of the parenting plan, and failure to participate in reunification therapy. Thus, Respondent contends that the trial court did not abuse its discretion requiring Appellant's parenting time to be supervised in accordance with the parties' judgment and decree until the terms of the parenting plan, as

designed by Dr. Boatman and Ms. Lysne, are successfully implemented by Appellant.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT AN EVIDENTIARY HEARING SUBSEQUENT TO HIS REQUEST TO MODIFY CUSTODY.

- A. Appellant's claim that Respondent endangered the parties' children is rendered moot by the death of Respondent's father.

It is well-settled law that appellate courts hear only live controversies and will not rule on a question merely to set a precedent. In re Inspection of Minn. Auto Spec., Inc., 346 N.W.2d 657, 658 (Minn. 1984); Weigel v. Miller, 574 N.W.2d 759, 760 (Minn. Ct. App. 1998). "If, while an appeal is pending, an event occurs that renders a decision on the merits unnecessary or an award of effective relief impossible, the appeal must be dismissed as moot." Weigel, 574 N.W.2d at 760.

The basis of Appellant's argument is that the trial court should have granted Appellant an evidentiary hearing to consider whether Respondent endangered the parties' daughter, Izabella, by exposing her to Respondent's father, Roy Sonsalla. Since the filing of the appeal, Mr. Sonsalla has died.

Even assuming Appellant's allegations were true, the issue is now moot. Mr. Sonsalla is deceased and, therefore, is not a present threat to anyone, including the parties' daughter.

- B. The trial court is not required to grant an evidentiary hearing if the moving party fails to make a prima facie case at the initial hearing.

Appellant moved for modification of custody and a hearing was scheduled for February 27, 2006. In order to establish a prima facie case for modification, the moving party must establish that (1) there is a change of circumstances; (2) it is in the best interests of the child to modify custody; (3) the current environment endangers the child's physical or emotional well-being; and (4) the advantages of modifying custody outweighs the harm likely to be caused by the change in environment. Minn. Stat. § 518.18 (d); Abbott v. Abbott, 481 N.W. 2d 864, 868 (Minn. App. Ct. 1992). If a party successively makes a prima facie case for modification, the trial court must then order an evidentiary hearing.

The trial court's decision to dismiss a custody modification motion without an evidentiary hearing is reviewed under the abuse of discretion standard. Geibe v. Geibe, 571 N.W. 2d 774, 777 (Minn. Ct. App. 1997)

The law requires Appellant to provide sufficient facts in his affidavit to establish all four factors. Appellant did not allege the first factor, namely that there had been a substantial change in circumstances since the previous order. Further, Appellant does not address the best interest factors in his affidavit. Moreover, Appellant did not provide the trial court with sworn statements, which established Respondent endangered Izabella in any way. Indeed, Appellant even admitted in open court that he "made no personal allegations against Mr. Sonsalla" and that he "didn't say that [Izabella] was sexually molested by Roy Sonsalla." (A284) Additionally, Appellant omitted from his motion the fact that he received a letter

from Hennepin County stating that they had concluded their investigation and found that there had been no maltreatment. Finally, Appellant did not weigh the advantages of modification versus the harm of the changed environment. For all of these reasons, the trial court properly held that Appellant failed to establish a prima facie case for modification.

Minnesota law supports the trial court's ruling. For example, in Englund the court held that if the affidavits accompanying the motion for modification do not allege sufficient facts to allow the court to reach the findings required by Minn. Stat. § 518.18, the trial court is required to deny the motion. Englund v. Englund, 353 N.W.2d 800, 802 (Minn. Ct. App. 1984). Based on Appellant's deficient affidavit, the trial court properly applied the holding in Englund, and denied Appellant's motion.

Appellant argues that the trial court improperly weighed the evidence by considering Respondent's affidavits and the investigations by Hennepin County Social Services, as opposed to simply assuming the contents of Appellant's affidavit to be true. The Geibe court held that a court may consider evidence from sources other than the moving party's affidavits in making its determination. Geibe v. Geibe, 571 N.W. 2d 774, 777 (Minn. Ct. App. 1997). Specifically, the court may take note of statements in the opposing parties' affidavit to explain the circumstances surrounding the accusations. Id. at 779. The Geibe court considered the opposing party's consistent account of an argument on which the

endangerment change was based, and determined that the incident did not rise to the level of endangerment needed to modify custody. Id.

In this case, the trial court properly considered Respondent's affidavits and the results of the investigations by Hennepin County Social Services. From these sources, the trial court learned of additional circumstances surrounding the accusations, namely, that the matter had been investigated, on two separate occasions, and that neither investigation had resulted in a finding of endangerment by Respondent. Appellant failed to disclose these important facts in his pleadings, which were pivotal to properly understand the circumstances surrounding Appellant's accusations.

The trial court did not improperly consider Respondent's affidavits and the results of the investigations by Hennepin County Social Services. Further, Appellant's affidavit did not allege sufficient facts to make a prima facie case for modification. Thus, the trial court did not abuse its discretion when it dismissed Appellant's motion to modify custody without an evidentiary hearing.

III. MONICA FLYNN WAS PROPERLY REMOVED FOR GOOD CAUSE SHOWN AND BECAUSE HER REMOVAL CORRESPONDED TO THE CHILDREN'S BEST INTERESTS, AS OUTLINED IN THE PARTIES' JUDGMENT AND DECREE.

The Olson court stated that the trial court has extensive discretion in deciding visitation-related questions and will not be reversed absent an abuse of discretion. Olson v. Olson, 534 N.W.2d 547, 550 (Minn. 1995).

The trial court appointed Ms. Flynn as the parenting time consultant in an order filed November 14, 2005. (A34) On February 17, 2006, Respondent, in her

responsive motion, requested the removal of the parties' parenting consultant.

(A137) Respondent asked that Ms. Flynn be removed for two reasons.

First, Respondent asked that Ms. Flynn be removed as she refused to follow the terms of the judgment and decree. The parties' judgment and decree specifically states that it is in the children's best interests for Dr. Boatman to determine whether Appellant had followed all the recommendations for unsupervised parenting time. In contrast, Appellant argues that Dr. Boatman's role is limited to the development of a parenting time schedule, and that Ms. Flynn did not need to consult with Dr. Boatman.

The judgment and decree, however, clearly states that it is Dr. Boatman who determines whether Appellant graduates to unsupervised parenting time. Further, Dr. Boatman and Ms. Lysne designed a parenting plan that gave Appellant the ability to transition to unsupervised parenting time. Given this, Ms. Flynn should first have contacted Dr. Boatman to determine whether or not Appellant had complied with Dr. Boatman's recommendations (i.e., the parenting plan) to Dr. Boatman's satisfaction. Respondent repeatedly requested Ms. Flynn to contact Dr. Boatman. Ms. Flynn refused to do so, thereby ignoring the terms of the judgment and decree and the best interests of the children.

Respondent also requested Ms. Flynn's removal was because Respondent felt Ms. Flynn exhibited poor judgment. Ms. Flynn insisted that Appellant and Respondent meet in the same room despite the fact that Respondent had a recently

expired harassment restraining order against Appellant. After much discussion, Ms. Flynn agreed to allow Respondent to meet with her separately. (A143)

Respondent agreed to meet with Ms. Flynn on Friday, December 9, 2005. That same day, the parties' children were to have their first supervised parenting time session with Appellant and Ms. Flynn at her office. (A144) Before the meeting, however, Respondent's brother, Brian Sonsalla, died unexpectedly. (Id.) His funeral was scheduled for Friday, December 9, 2005. Respondent informed Ms. Flynn of death and the scheduling conflict. Ms. Flynn suggested one of her staff (who was a stranger to the children and to Respondent) pick up the children after the funeral, so that they could attend supervised parenting time. (Id.) Ms. Flynn refused to tell Respondent where the supervised session would occur, but did say it would not be held at her office in Edina. (Id.) When asked, Ms. Flynn was not even sure who would conduct the supervised parenting time. (Id.) Respondent then cancelled the meeting because children would be attending their uncle's funeral and because she did not feel comfortable putting the children into a car with a complete stranger to have parenting time at an unknown location with Appellant and another stranger who would supervise the parenting time. (Id.) Ms. Flynn then complained to Respondent's attorney Respondent was not being cooperative in facilitating parenting time between Appellant and the children. (A202)

Appellant argues that the court used the incorrect standard in removing Ms. Flynn. Appellant also argues that the court does not have the authority to alter a

provision to which the parties agreed.

While it is true that in the judgment and decree the parties agreed to use the services of a parenting consultant, the judgment and decree does not provide a standard for the appointment or removal of a parenting consultant. The parties requested that the trial court appoint a parenting consultant five (5) times. Neither party objected to the trial court's authority to remove the old parenting consultants who were unwilling to continue or to the trial court's appointment of new parenting consultants in their stead.

While there appears to be no prescribed statutory or case law standard for the removal of a parenting consultant, it is reasonable, in this case, to use the same standard to remove a parenting consultant as one would use to remove a parenting time expeditor. Minn. Stat. § 518.1751 states that the standard for removing a parenting time expeditor is "good cause shown". The rationale for using the same standard is that the parenting consultant's role, at least in the case at bar, is very similar to the role of a parenting time expeditor.

In this case, the parties' judgment and decree charged the parenting consultant with resolving "disputes between the parties, other than child support disputes," in addition to the authority to "make binding decisions re [sic] the schedule and the children's activities as they impact the schedule." (A106) In comparison, Minn. Stat. § 518.1751 states the purpose of a parenting time expeditor is to "resolve parenting time disputes." The statute defines a parenting time dispute as "a disagreement among parties about the parenting time with a

child, including a dispute about an anticipated denial of future scheduled parenting time.” Respondent contends that the parties’ parenting time consultant was given the same authority as a parenting time expeditor and should be held to the same standard.

Appellant also argues that the trial court may act if it is acting in the children’s best interest. Appellant alleges Ms. Flynn’s removal was not in the children’s best interest but does not provide any analysis to support this assertion.

Respondent contends that the parties’ custody arrangement was made using the best interest factors. The parenting plan stated that Dr. Boatman would evaluate Appellant’s commencement from supervised parenting time to unsupervised parenting time. Ms. Flynn’s complete failure even to contact Dr. Boatman is violative of the parties’ judgment and decree, in which the trial court held the best interests of the children merited Dr. Boatman’s involvement.

Finally, Ms. Flynn’s subsequent letter to the court, referenced in Appellant’s brief, should not be accepted in the record, as it was not presented as a part of the Appellant’s motion to modify custody. Ms. Flynn’s letter was written to the trial court after the hearing and it should not be included as a part of the transcript. Respondent was not given an opportunity to examine Ms. Flynn’s assertions for their veracity. Additionally, Appellant received Respondent’s responsive motion requesting Ms. Flynn’s removal ten (10) days prior to the hearing. Prior to the hearing, Appellant did not respond or seek an affidavit from Ms. Flynn to support his allegations. Appellant had an opportunity to seek Ms.

Flynn's affidavit and/or request that she be given an opportunity to testify.

Appellant simply failed to seek Ms. Flynn's opinion at the time of the hearing, thus Appellant should not now be given the opportunity to introduce new evidence.

If, however, the Court agrees that Ms. Flynn's letter should become a part of this record, Respondent contends that the letter demonstrates further evidence of Ms. Flynn's bias against Respondent. For example, while Ms. Flynn asserts that she has never spoken with Respondent, she stated in her letters to the court that Respondent has "misrepresented the Orders of this Court to the school officials and other parties, including me." (A316) Certainly, Respondent could not have misrepresented court orders to someone with whom she never spoke.

The trial court did not abuse its discretion when it removed Ms. Flynn as the parties' parenting time consultant for good cause shown.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING APPELLANT TO BE A NUISANCE LITIGANT.

In Respondent's February 17, 2006, responsive motion, Respondent asked the Court to find Appellant to be a "nuisance litigant," and to require Appellant to obtain written permission, from either the trial court, or the Chief Family Court Judge of Hennepin County, prior to bringing any future motion, pursuant to Mower County Human Services v. Swancutt, 551 N.W.2d 219 (Minn. 1996), Liedtke v. Fillenworth, 372 N.W.2d 50, 52 (Minn. Ct. App. 1985), and State ex rel. Ryan v. Cahill, 253 Minn. 131, 134, 91 N.W.2d 144, 147 (1958).

The trial court has equitable power to bar a person from engaging in nuisance litigation, especially when that person engages in deceptive or abusive practices. State ex rel. Ryan v. Cahill, 253 Minn. 131, 134, 91 N.W.2d 144, 147 (1958), Liedtke v. Fillenworth, 372 N.W.2d 50, 52 (Minn. Ct. App. 1985). The court in Love approved the practice of requiring a nuisance litigant to obtain permission from the chief judge before bringing any action. Love v. Amlser, 441 N.W. 2d 555, 560 (Minn. Ct. App. 1989). The Love court concluded that requiring a nuisance litigant to obtain written permission reduced abusive practices and protected the nuisance litigant's access to the court. Id.

This issue should be reviewed using the abuse of discretion standard as ruling that a person is a nuisance litigant is an exercise of inherent judicial power. Mower County Human Services v. Swancutt, 551 N.W.2d 219 (Minn. 1996); Carl Bolander & Sons Co. v. City of Minneapolis, 502 N.W. 2d 203, 209 (Minn. 1993).

Respondent initially asked that Appellant be found a nuisance litigant in her March 3, 2005 motion for contempt and other relief. Respondent also requested conduct-based attorney's fees and attached an affidavit from her attorney as to the amount requested and work performed as required by Minn. Gen. R. Prac. 119. In Respondent's affidavit she alleged:

Appellant took part in deceptive and abusive practices throughout our dissolution proceeding. Specifically, this Court found, in Finding XXXVI of our judgment and decree, that "Appellant brought numerous motions which had no basis in law or fact." These motions included:

Appellant brought a motion to compel discovery just before this trial commenced alleging respondent's failure to comply with discovery.

In response, Respondent's attorney prepared an extensive report summarizing respondent's response to each alleged deficiency. At that hearing, Appellant failed to prove that respondent had not complied with discovery requests. On the eve of the first day of trial, Appellant brought a motion for a continuance. The motion was predicated on a change of counsel. The motion was summarily denied. Later, while the trial was pending, Appellant brought an "emergency" motion making general allegations about respondent's failure to properly perform her duties for Zar Corporation and asking for relief such as unsupervised parenting time and a parenting consultant, which were the subject of the ongoing trial.

Once again, respondent incurred thousands of dollars in fees having to provide a detailed response to Appellant's claim with exhibits supporting her position on each issue. Appellant's motion was especially troubling because, while arguing that respondent was not properly managing the business, Appellant and/or his attorney had failed to forward corporate revenues to respondent's attorney for deposit in the company checking account, sometimes holding checks for several months. And, then, after bringing that emergency motion in September to appoint a Parenting Consultant, Appellant did not take the steps necessary to retain the Parenting Consultant until early January, 2004, even though a specific Parenting Consultant was agreed to by the time Appellant's emergency motion was heard.

Most recently, Appellant has scheduled a motion for March 24, 2005, at 10:30 a.m. While I have not yet received his motion paperwork, I believe Appellant is going to resurrect his allegation that I mismanaged our former business, Zar Corporation, which he argued at length at trial. I suspect that Appellant will request an offset from me in an amount close or equal to his spousal maintenance arrearage. I will spend hours upon hours of my time, in addition to thousands of dollars in attorney's fees, preparing for and attending this motion.

Despite Respondent's allegations, the trial court reserved the issue of finding Appellant a nuisance litigant in its June 14, 2005 order. (A51)

Thereafter, Respondent renewed her request that Appellant be found a nuisance litigant at an evidentiary hearing on September 12, 2005. In the court's order, filed September 19, 2005, the court again reserved the issue.

Respondent subsequently made a third request to find Appellant a nuisance litigant in her Responsive Motion, dated February 17, 2006. Respondent asked that:

Appellant be sanctioned with attorney's fees and by being declared a nuisance litigant. I ask the Court for these sanctions because I believe he has unreasonably contributed to both the delay and expense of this proceeding, and has acted in bad faith. Specifically, I contend that Appellant's emergency motion for change of custody was filed in bad faith. In this motion, Appellant asserts that I am endangering our children's physical and emotional well-being by giving my father "access to" Izabella and Jake. In his attendant affidavit, Appellant fails to disclose the "CHIPS" assessment conducted by Hennepin County. He fails to disclose that Ms. Sandra Slowiak considered these allegations on two separate occasions in July, 2005, and again in September, 2005. He also fails to disclose that Ms. Slowiak concluded that no maltreatment had occurred. Rather, Appellant relies on dated, tangential information to make his arguments appear stalwart.

It is this "smoke and mirrors" approach to the truth that leads me to allege that Appellant has acted in bad faith. Appellant plays a "bait and switch" game with respect to the truth. He baits the Court into thinking that there are serious issues concerning the safety and well-being of our children, which merit an emergency hearing. The "switch" is what Appellant fails to disclose. The "switch" is the truth – the actual objective investigation by Hennepin County into this circumstance, and its result – i.e., the finding that no maltreatment occurred. I believe that Appellant's failure to disclose this information constitutes his bad faith in this matter.

I ask that Appellant be sanctioned with attorney's fees, which are substantiated in my attorney's affidavit. I ask the Court to remember that I would not have had to incur attorney's fees but for Appellant's decision to file his emergency motion to change custody. (A145)

In the trial court's March 8, 2006 order the court found the following:

By prior Order of the Court, the Court reserved for determination whether Appellant is a "nuisance litigant". The Respondent renews this motion. The

Court has reviewed the entire matter up to this date. In the interests of brevity, this court file consists of some 12 volumes evidencing protracted litigation. In summary, most of the litigation arises from the Appellant's passive-resistant posture on issues, attorney changes, frivolous motions, failure to mediate, etc. Most importantly, the Court deems that Appellant's current motions for emergency relief are without merit or defense. The court accommodated Appellant's motion for emergency relief and scheduled an emergency hearing based on his affidavit. However, he failed to adequately disclose the true status of the investigations by Ms. Slowiak and he failed to prove the children were ever left alone with Mr. Sonsalla. This amounts to needless litigation and demands a swift response from the court to prevent future needless litigation. (A26)

Based upon this finding of fact, the court found that Appellant was a nuisance litigant and ordered him to first obtain permission from the trial court, or the Chief Family Court Judge of Hennepin County, before filing further motions in the case. (A27)

Appellant appeals this ruling on the basis of alleged procedural flaws in the court's order. Appellant alleges that Appellant was entitled to twenty-one (21) days notice, there were not specific facts that support the requested relief, there was not a separate motion, and the order was unsupported by evidence.

Appellant states that he was not given the required notice. Over the last year, Respondent made three different motions requesting that Appellant be found a nuisance litigant. The court finally granted her request on March 8, 2006. Certainly, Appellant was provided ample notice of Respondent's request.

Appellant specifically contends that Respondent should have waited twenty-one days before filing her request with the court. Appellant argues that this twenty-one day period would have provided Appellant an opportunity to correct his motion. In this specific instance, Appellant's emergency motion was dated

February 7, 2006, twenty days prior to the February 27, 2006 hearing date. Respondent would have had to wait until after the hearing to file her request. Respondent did not have the opportunity to wait the twenty-one day period. Further, there was no reversible error because the trial court denied Respondent's first two requests. Respondent had to request this relief two more times before the trial court granted this relief. The trial court waited and carefully considered this relief before finally ordering it in the March 8, 2006 order. (A27)

Further, Appellant alleges that there were no facts or evidence that supported his request. The court specifically stated the facts that supported its decision to grant Respondent's request, namely Appellant's failure to adequately disclose the facts of the investigation.

The trial court did not abuse its discretion in labeling Appellant a nuisance litigant as Appellant had sufficient notice of her request and the facts and evidence sufficiently supported her request.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING RESPONDENT ATTORNEY'S FEES.

In a dissolution Minn. Stat. § 518.14 governs the award of attorney's fees. Minn. Stat. § 518.14 subd. (3) provides the court with the authority to award conduct-based attorney's fees, if a party unreasonably contributes to either the length or the expense of the proceeding. If appealed, an award of attorney's fees is reviewed using the abuse of discretion standard. Gully v. Gully, 599 N.W. 2d 814, 825 (Minn. 1999).

Appellant argues that the amount awarded in the court's March 8, 2006 order, was not supported by the findings. This is inaccurate. The court's March 8, 2006 order specifically stated the following:

Respondent incurred attorney's fees in defending against Petitioner's motions and vindicating her rights on behalf of the children the fees are in excess of \$2,000.00....Petitioner's motions amount to needless litigation. There is no showing that Mr. Sonsalla maltreated the parties' children, the Respondent was aware of the maltreatment of the other grandchildren, and she was ready, willing and able to deal with this situation by not allowing the children to have unsupervised access with him. Respondent is entitled to conduct based attorney fees. (A26)

Based on this finding, the court awarded Respondent \$2,000.00 in attorney fees.

By Appellant's own statement "I didn't say that [Izabella] was sexually molested by Roy Sonsalla," it is clear that Appellant's motion was without merit. Appellant's frivolous litigation led to Respondent's expense of attorney's fees.

In an order filed, May 15, 2006, the court again awarded Respondent conduct based attorney's fees. Respondent initially requested the sum of \$7,712.50 in attorney's fees. Respondent then requested an additional \$1,000.00 in fees because Appellant asked that the evidentiary hearing be continued another day to allow Appellant to call a witness to testify in his behalf. Appellant's witness was not present for the hearing. The court continued the hearing to accommodate Appellant. As a result, Respondent incurred additional attorney's fees.

Appellant argues that conduct based fees are inappropriate. The court found Appellant in contempt of court for not paying his spousal maintenance obligation. The court found that Appellant has the ability to pay. Appellant's refusal to pay this obligation necessitated Respondent's contempt motion and, in turn, the award of fees against Appellant.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PROCEEDING WITH THE CONTEMPT HEARING ON MARCH 22, 2006.

In February, 2005, Respondent brought a contempt motion to induce Appellant's compliance with the trial court's amended judgment and decree. The trial court held a hearing in this matter on March 24, 2005, and issued an Order, dated June 14, 2005, which scheduled an evidentiary hearing relating to the issue of contempt.

The trial court issued another Order, filed July 14, 2005, which scheduled the evidentiary hearing for August 25, 2005. The evidentiary hearing was continued to September 12, 2005, pursuant to the trial court's Order, filed August 26, 2005.

At the evidentiary hearing on September 12, 2005, the parties entered into a stipulation, the terms of which were designed to get Appellant current in his spousal maintenance obligation. Based on the parties' agreements, the trial court, in its Order, dated September 19, 2005, "indefinitely continued" the constructive civil contempt matter, "until either party moves the court to reinstate the same with good cause shown." (A36)

Appellant did not get himself current with his spousal maintenance obligation, and arrears continued to accrue. Respondent renewed her request on March 8, 2006, for an evidentiary hearing regarding the contempt matter. The matter was scheduled for March 22, 2006.

In her motion, Respondent specifically requested that the Court reinstate the constructive civil contempt proceeding, as Appellant had not become current in his spousal maintenance obligation. It should be noted that Appellant did not submit a responsive pleading objecting to the recommencement of the constructive civil contempt proceeding. Additionally, Appellant's attorney did not announce his presence on the case or contact Respondent's counsel about rescheduling the motion to a new date when he was available. The trial court recommenced the evidentiary hearing on March 22, 2006.

First, Appellant argues that he was unprepared and should have been granted a continuance so he could prepare. While it is unfortunate that counsel was unprepared, counsel had proper notice (Appellant was served in a timely manner) and an opportunity to respond in writing to the motion. Further, it must be pointed out that Appellant did not rest his case on March 22, 2006, and was given almost a month to prepare for a second day of hearing in this matter, which occurred on April 14, 2006.

Second, Appellant argues that he was unaware that the court was considering joint legal custody issues. The issue of joint legal custody was never at

issue at any part of the contempt process and the court never ruled on this issue. (A19-21).

Appellant had sufficient notice of the recommencement of the contempt process. The trial court did not err in recommencing the evidentiary hearing, despite that Appellant's claim that he was ill-prepared to continue.

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING APPELLANT IN CONTEMPT OF COURT FOR FAILING TO PAY HIS COURT-ORDERED SPOUSAL MAINTENANCE OBLIGATION.

The trial court's decision to invoke contempt powers should be reviewed under an abuse of discretion standard. Mower County Human Services v. Swancutt, 551 N.W.2d 219 (Minn. 1996).

The parties' amended judgment and decree provides that Appellant is to pay Respondent temporary spousal maintenance in the sum of \$12,500.00 per month, for twenty-four months, commencing October 1, 2004. Beginning October 1, 2006, Appellant is ordered to pay Respondent the sum of \$10,400.00 per month for twenty-four months. Beginning October 1, 2008, Appellant is ordered to pay Respondent the sum of \$8,500.00 per month for twenty-four months, or until either party's death, or Respondent's remarriage, whichever occurs first.

Appellant claims that he was unable to pay these amounts due. Yet, Appellant has never attempted to appeal or modify the spousal maintenance award as set forth in the amended judgment and decree.

Appellant arrears totaled \$145,158.80 through April, 2006. Appellant did not dispute the amount of the arrearages. Rather, Appellant testified that he has

been unable, since the entry of the amended judgment and decree on August 27, 2004, to pay his spousal maintenance obligation to Respondent.

Appellant is self-employed through Zar Corporation. Zar Corporation buys and sells “pre-owed certified high speed production printing systems & more”, according to its website. Appellant claims that Zar Corporation has performed poorly since the parties’ divorce in 2004, thereby making it impossible for Appellant to pay his court-ordered spousal maintenance obligation to Respondent.

(A14-20) The objective evidence ascertained from the two-day evidentiary hearing, however, contradicts Appellant’s assertion, and, in addition, calls into serious question Appellant’s credibility.

As a part of the evidentiary hearing, Appellant and Zar Corporation’s income tax returns for 2004 and 2005 were introduced into evidence. Zar Corporation’s gross receipts in 2004 totaled \$1,309,259.00. In 2005, Zar Corporation’s gross receipts almost doubled, and grew to \$2,551,175.00. Additionally, Zar Corporation paid for many in-kind expenses on Appellant’s behalf, including his automobile (a 2003 BMW 540), health insurance, internet, legal and professional fees, telephone (including cell phone), meals and entertainment, and travel. In 2004, these in-kind benefits totaled \$64,811.00, excluding Appellant’s legal expenses which were also paid for by the company. In 2005, these in-kind benefits totaled \$56,634.00, including the legal fees paid for by the company. Zar Corporation also paid Appellant rent for the use of a portion of his home in both years. (A14-20)

In addition to the \$64,811 in in-kind benefits paid for by the company, Zar Corporation paid Appellant a salary of \$90,000.00, and distributions of \$86,858.00 in 2004. In 2005, Appellant's yearly salary increased to \$120,000.00, and he received distributions totaling \$129,635.00. Combining his salary and distributions with the in-kind benefits of \$56,634.00, Appellant's income totaled approximately \$300,000.00. (A14-20)

In 2004, Appellant's total income from salary, distributions, and in-kind benefits totaled \$241,853.00. His admitted annual personal expenses were \$54,000.00. (A14-20)

Based on this evidence, the trial court found that Appellant had the financial ability to pay Respondent the sum of \$37,500.00, from the commencement of Appellant's spousal maintenance obligation in October, 2004, through December, 2004.

In 2005, Appellant's total income from salary, distributions, and in-kind benefits totaled almost \$300,000.00. His admitted annual personal expenses were \$54,000.00. (A14-20) Again, the Court found that Appellant had the financial ability to pay Respondent the sum of \$150,000.00 in spousal maintenance for 2005.

Appellant submitted no income information for 2006, such as pay check stubs, financial statements, etc. While Appellant contended that Zar Corporation is fairing poorly, he provided no objective evidence to substantiate his claims.

Rather, the objective evidence introduced at the contempt hearing led the

court to believe that Zar Corporation is a flourishing business. The company's gross receipts almost doubled from 2004 to 2005. The business has several employees, and pays them bonuses. (The business used to be operated only by Appellant and Respondent prior to their divorce.) In addition, the business could afford to have its website presence expanded and enhanced. Further, Zar Corporation now advertises on Ebay. Moreover, the company now has international sales, in addition to sales consultants and/or storage facilities in South Carolina, New York, Massachusetts, and Missouri.

Further, Appellant's credibility was impeached on several occasions throughout the evidentiary hearing. Of particular note is the \$74,899.00 deduction for "alimony paid" that Appellant took from his 2005 U.S. Individual Income Tax Return. Nowhere in the record is there any evidence that Appellant paid Respondent nearly \$75,000.00 in spousal maintenance in 2005. Further, Appellant's own employee, Michael Mosher (Zar Corporation's full-time office administrator) impeached Appellant's credibility. Mr. Mosher, who was Appellant's witness, testified (after witnessing Appellant's testimony) that Appellant had traveled extensively, to places such as Costa Rica, Puerto Rico and Florida, over the last year. Appellant, in contrast, had previously testified that he had traveled only traveled to Mexico City in the last year (approximately six times) to visit a client. Mr. Mosher recalled no such trips to Mexico City. Finally, Appellant impeached his own credibility by admitting to a "bait and switch" type business practice, wherein he advertises products for sale on the internet that he

does not currently have in stock.

The Court found that Zar Corporation has maintained its profitability. There was no credible evidence that Zar Corporation is less successful than it was at the time of the dissolution. Rather, the Court finds that Zar Corporation has continued to thrive and is likely more successful than it was at this time of the dissolution. The business has produced an excellent income, as well as in-kind benefits, for Appellant, and from which Appellant could have met his spousal maintenance obligation to Respondent in 2004, 2005, and in 2006.

Appellant argues that he did not have the ability to pay the spousal maintenance obligation, yet he presents no evidence to support this assertion. All objective evidence presented at the evidentiary hearing supported Appellant's ability to pay. The trial court did not abuse its discretion when it found Appellant in contempt.

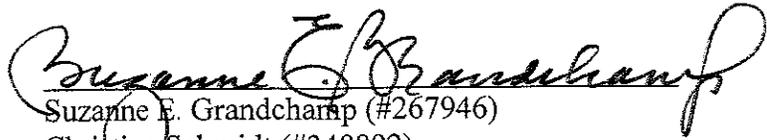
CONCLUSION

The trial court did not abuse its discretion when it enforced the parties' parenting plan, denied Appellant's motion to modify custody, removed parenting consultant Monica Flynn, found Appellant to be a nuisance litigant, awarded Respondent attorney's fees and found Appellant in contempt of court for failing to pay his court-ordered spousal maintenance obligation. Additionally, the trial court properly proceeded with the contempt hearing on March 22, 2006.

Respectfully submitted,

GRANDCHAMP, GUYETTE & CRONIN, PLLC

Dated: 1/17/2007

A handwritten signature in cursive script, reading "Suzanne E. Grandchamp". The signature is written in black ink and is positioned above the typed name.

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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).