

In re the Marriage of:

Petitioner,

Case No.

v.

Respondent.

**BRIEF IN SUPPORT OF MOTION FOR EQUAL PLACEMENT AND FOR
MISCELLANEOUS RELIEF**

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This brief is intended to provide the legal basis to bring about a fair and efficient resolution of the child placement and support issues in this case, without the need of lengthy and costly litigation of these issues, consistent with the following:

1. Wis Stat. 767.24(4)(b) establishes a child’s and the corresponding parents’ right to placement and a burden of proof before this right can be denied as:

“A child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child’s physical, mental or emotional health”.

2. 1999 Wisconsin Act 9 also added the provision in Wis Stat. 767.24(4)(a)(2)

“THE COURT SHALL SET A PLACEMENT SCHEDULE that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and THAT MAXIMIZES THE AMOUNT OF TIME THE CHILD MAY SPEND WITH EACH PARENT, taking into account geographic separation and accommodations for different households.”

In cases where two fit parents live in the same community, both have adequate

accommodations for the children and both want to be fully involved in their care, the only way a court can maximize placement with both parents is to order equal placement.

The court's responsibility to enforce these provisions of Wisconsin Statutes is not conditional on the recommendations of the guardian ad litem, family court counseling services or a psychologist. The court must only take into account the geographic separations and accommodations for the different households. Thus there is no benefit for the court to appoint a guardian ad litem, unless after a hearing the court would first find that geographic separations and accommodations for the different households would make equal placement unworkable or that this would be harmful to the child.

3. The court's responsibility to enforce these statutory provisions is defined in *Groh v Groh*, 110 Wis. 2d 117, 122, 327 N.W.2d 655,658 (1983).

“Where the legislature has set forth a plan or scheme as to the manner and limitations of the court’s exercise of its jurisdiction, that expression of the legislative will must be carried out and power limitations adhered to.”

4. United States Supreme Court in *Troxel v. Granville*, 530 U.S. 57, 65 (2000) , ruled.

“ the interest of parents in the care, custody, and control of their children - is perhaps the oldest of the fundamental liberty interests recognized by this court.”

"In light of this extensive precedent, it cannot now be doubted that the due process clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children." Id. at p.66

"So long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make decisions concerning the rearing of that parent's children." Id. at p.68, 69

(there is a) “traditional presumption that a fit parent will act in the best interest of his or her child."Id. at p.68.

"the Due Process Clause does not permit a state to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a 'better' decision could be made." Id. at p.72, 73.

5. The court's authority and responsibility to equally support this statutory and fundamental right and responsibility of both parents is derived from the Fourteenth Amendment of the United States Constitution which simply states,

"no State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

6. While *Troxel* involved a placement dispute between a parent and a grandparent, the United States Supreme Court made no distinction between mothers vs fathers, black parents vs white parents or parents in intact families vs non-intact families. Thus this decision is equally applicable in disputes between two fit parents. The due process and equal protection provisions of the 14th amendment of the United States Constitution protect the responsibilities and rights of all parents regardless of their gender, race or marital status.

7. Since a parent's ability to make personal choices regarding the care and nurture of his or her children is directly proportional to that parent's physical access to his or her children, the only way two parents living separately can equally exercise this statutory and fundamental responsibility and right is if each is afforded the same opportunity to assume equal physical placement of his or her children. The court must therefore merely support each parent's decision as to what each parent believes to be in the best interest of the children in satisfying their responsibility and right to provide for their child during equal periods of placement. Absent a compelling reason, the court cannot allow one parent, a guardian ad litem, a psychologist, placement study evaluator, a court

commissioner or the court's own personal feelings to obstruct the equal role of either parent to make this decision on behalf of the children.

8. The court's **paramount responsibility** to equally support the fundamental rights of both parents is further established by Article VI, Clause 2 of the United States Constitution which points out:

“This constitution, and the laws of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.”

9. The directive in the first sentence of Wisc. Stats 767.24(4)(a)(2) *“In determining the allocation of periods of physical placement, the court shall consider each case on the basis of the factors in sub. (5)”* and in 767.24(5) *“In determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child.”* conflicts with the court's responsibility to equally support the children's and the parent's corresponding right to placement per 767.24(4)(b) and the more recent directive in the last sentence of 767.24(4)(a)(2).

Grant County Service Bureau v. Treweek, 19 Wis. 2d 548, 552 (1963) clarifies which directive the courts must use when there is a conflict between statutory directives:

Under well-established rules of statutory construction, the more- recent and more specific statute controls and exists as an exception to the general statute.

The provisions of 767.24(1m) (added by 1999 Wisconsin Act 9) which sets forth the requirements of a parenting plan, and the last sentence of 767.24(4)(a)(2) which mandates maximizing placement with both parents, are more recent and specific than the vague “best interest of the child” standard mandated in Wisc. Stat. 767.045(1)(a) 2, 767.045(4) , 767.11(10), 767.11(14), first sentence of 767.24(4)(a)(2), and 767.24(5). The harm standard, as established in 767.24(4)(b), is also more specific than the best

interest of the child standard. Thus the court is obligated to enforce the latest and more specific provisions as defined in items 1 and 2 of this brief.

10. While the Wisconsin Court of Appeals ruled in *Keller v. Keller*, 647 N.W. 2d . 426 (2002), that there is no statutory presumption for equal placement, this decision did not address the court's responsibility, established by *Groh*, to enforce the statutory requirement (not presumption) in Wis. Stat. 767.24(4)(a)(2) that "*The court shall set a placement schedule ... that maximizes the amount of time the child may spend with each parent.*" The decision in *Keller* also did not address **the court's paramount responsibility**, established by Article VI, Clause 2 and the Fourteenth Amendment of the United States Constitution, and the United States Supreme Court ruling in *Troxel*, to equally support the fundamental rights of both parents to decide what is in their child's best interest. Since the issues noted in this brief were not addressed and resolved in *Keller*, the court is not bound by the holding in *Keller*.
11. The best interests of these children will be advanced by assuring each child an unobstructed relationship with both parents by establishing the equal importance of their mother and father in their upbringing and allowing both parents an equal opportunity to participate in the raising of the children. This will assure that the children receive the maximum emotional and financial support of both parents and will improve the likelihood of the children developing a strong and positive relationship with both parents.
12. Ordering equal placement of the children with both parents, that are both fit and willing to assume this responsibility, is not contrary to the best interest of the child. It secures the best interest of the child since it fully supports the presumption "*that a fit parent will act in the best interest of his or her child*", which was affirmed by the United

States Supreme Court in *Troxel*. It is also the only order that will satisfy the court's responsibility to enforce the latest requirement of 767.24(4)(a), and will most likely minimize future legal conflicts between the parents over this issue.

13. The “*substantial change of circumstances*” criteria to modify an existing order in Wis. Stat. 767.325 (1) unnecessarily burdens and restricts constitutionally protected activity and obstructs a fit parent from exercising his or her full fundamental responsibility and right to participate in the upbringing of their children. It is therefore unconstitutional and should not be applied to deny a fit parents equal placement of his or her children.

“The State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with “precision,” and “If there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose ‘less drastic means.’” Dunn v. Blumstein, 405 US 330, 342-43(United States Supreme Court 1972)

Similarly, any other court rule or procedural statute that unnecessarily burdens and restricts constitutionally protected activity and obstructs a fit parent from exercising his or her full fundamental responsibility and right to participate in the upbringing of their children can not be applied to deny a fit parents equal placement of his or her children.

14. To burden a parent with the costs of and delays associated with the appointment of a guardian ad litem or placement study, without a compelling reason, further violates the rights of that parent protected by Article 1 SECTION 9 of the Wisconsin Constitution which states, “*Every person . . . ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay . . .*”
15. To exercise the fundamental right to make decisions regarding the child, each

parent must have sufficient funds to provide for the children's economic needs during their respective placement periods. Therefore the court should also assure that a child support order (if any) will allow both parents sufficient funds to provide for the children during each parent's placement period.

16. The court's authority and responsibility to award attorney fees and damages against a parent or his or her attorney that attempts to deprive or obstruct the other parent's equal fundamental and civil right without a compelling reason, is found in:

a. 42 USC 1983 provides for

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

And Wis Stat 767.262 Award of attorney fees

The court, after considering the financial resources of both parties, may do the following: (a) Order either party to pay a reasonable amount for the cost to the other party of maintaining or responding to an action affecting the family and for attorney fees to either party.

And the over-trial doctrine as established in paragraph 13 in *Zhang v. Yu* 248 Wis. 2d 913 at 924:

*Overtrial is a doctrine developed in family law cases that may be invoked when one party's unreasonable approach to litigation causes the other party to incur extra and unnecessary fees. **Ondrasek**, 126 Wis. 2d at 484, 377 N.W.2d at 196. It may also involve abuse of judicial resources through the unnecessary over-utilization of those resources. **Id.** A party's approach to litigation is unreasonable if it results in unnecessary proceedings or unnecessarily protracted proceedings, together with attendant preparation time. **Id.** at 483-84, 377 N.W.2d at 196. A circuit court may sanction a party who has engaged in overtrial by ordering that party to pay the opposing party's attorney fees. **Id.** at 483, 377 N.W.2d at 195-96.*

In keeping with the legal standards discussed above, without first holding a hearing, and making a preliminary finding that there is some evidence to raise a concern that equal physical placement with a parent would endanger the child's physical, mental or emotional health for the welfare of the child, the court may not allow an intrusion into this family by the appointment of a guardian ad litem or placement study or impose its own personal feeling about what is the best interest of the child. The application of Wisconsin Statutes 767.045(1)(a)2, 767.045(4), 767.11(10), 767.11(14), first sentence of 767.24(4)(a)(2), and 767.24(5), in cases involving two fit parents that want to be fully involved in the raising of the children, where the child and placement is merely contested, is unconstitutional.

If there is no evidence to support a finding to raise a concern for the welfare of the child, the court must merely support each parents' fundamental right to decide what is in the child's best interest in satisfying their equal placement responsibility and order equal placement of the children with both parents. The court cannot burden the parents with the costs of a guardian ad litem or placement study.

This is fully consistent with the provision in Wisconsin Supreme Court Rule 60.04(1)h which reads:

“In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs.”

Respectfully submitted

this day of month , 2003 .

Name:

Address:

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The statutes who's constitutionality is challenged in this brief are as follows:

767.045 (1)(a) The court **shall** appoint a guardian ad litem for a minor child in any action affecting the family if any of the following conditions exists:
(2)Legal custody or physical placement of the child is contested.

767.045(4) Responsibilities. The guardian ad litem shall be an advocate for **the best interests of a minor child** as to paternity, legal custody, physical placement and support

767.11(10) POWERS AND DUTIES OF MEDIATOR. A mediator assigned under sub. (6) shall be guided by **the best interest of the child** and may do any of the following, at his or her discretion.

767.11(14) LEGAL CUSTODY AND PHYSICAL PLACEMENT STUDY
... the court may order a person or entity designated to the county to investigate the following matters relating to the parties:
3. Any other matter relevant to **the best interest of the child.**

Wisc. Stats 767.24(4) Allocation of physical placement.
(a)(2) ...**(first sentence reads)**.. In determining the allocation of periods of physical placement, the court shall consider each case on the basis of the factors in sub. (5).

(5) FACTORS IN CUSTODY AND PHYSICAL PLACEMENT DETERMINATIONS.

In determining legal custody and periods of physical placement, the court shall consider all facts relevant to **the best interest of the child**. The court may not prefer one parent or potential custodian over the other on the basis of the sex or race of the parent or potential custodian. The court shall consider the following factors in making its determination:

- (a) The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.
- (b) The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
- (c) The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.

- (cm) The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future.
- (d) The child's adjustment to the home, school, religion and community.
- (dm) The age of the child and the child's developmental and educational needs at different ages.
- (e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.
- (em) The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.
- (f) The availability of public or private child care services.
- (fm) The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.
- (g) Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.
- (h) Whether there is evidence that a party engaged in abuse, as defined in s. 813.122 (1) (a), of the child, as defined in s. 48.02(2).
- (i) Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20 (1m) or domestic abuse as defined in s. 813.12 (1) (am).
- (j) Whether either party has or had a significant problem with alcohol or drug abuse.
- (jm) The reports of appropriate professionals if admitted into evidence.
- (k) Such other factors as the court may in each individual case determine to be relevant.

767.325 Revisions of legal custody and physical placement orders.

(1)(b) After 2-year period.

1. Except as provided under par. (a) and sub. (2), upon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:

a. The modification is **in the best interest of the child**.

b. There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

2. With respect to subd. 1., there is a rebuttable presumption that:

a. Continuing the current allocation of decision making under a legal custody order is in the best interest of the child.

b. Continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.

3. A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under subd. 1.