STATE OF WISCONSIN
SUPREME COURT

In re the marriage of:

MICHAEL J. LANDWEHR,

Petitioner-Appellant-Petitioner,

and

BERNADETTE N. LANDWEHR,

Respondent-Respondent-Respondent.

PETITION FOR REVIEW AND APPENDIX

PETITION FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV DATED JANUARY 27, 2005

Court of Appeals Case No.: 03-2555

Respectfully submitted:
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TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF CONTENTS (Cont.)

ISSUE PRESENTED FOR REVIEW

I. WHAT ROLE DOES THE LEGISLATIVE MANDATE IN SECTION 767.24(4)(A)2., STATS., STATING "THE COURT SHALL SET A PLACEMENT SCHEDULE . . . THAT MAXIMIZES THE AMOUNT OF TIME THE CHILD MAY SPEND WITH EACH PARENT, TAKING INTO ACCOUNT GEOGRAPHIC SEPARATION AND ACCOMMODATIONS FOR DIFFERENT HOUSEHOLDS," PLAY IN PLACEMENT PROCEEDINGS.

The court of appeals: implicitly answered that the statutory language plays no role.

The trial court: implicitly answered that the statutory language plays no role.

CRITERIA RELIED UPON FOR REVIEW

I. SECTION 809.62(1)(C) - A DECISION BY THIS COURT WILL HELP CLARIFY OR HARMONIZE THE LAW BY DISPOSING OF A NOVEL ISSUE WITH STATEWIDE IMPLICATIONS.

Section 767.24(4)(a)2., Stats., contains language which is a relatively recent alteration of the legal standard for resolving placement cases The new language mandates that in determining the allocation of periods of physical placement:

> **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.**

(Emphasis added). This petition presents the question of what this language actually means, which is a novel issue for this Court, and consequently, what effect it has on placement proceedings, which is an inquiry with obvious statewide implications.

This Court's intervention is needed because thus far, the appellate courts have failed to endow this new statutory language with any meaning. The statutory section was addressed by *Keller v. Keller*, 2002 WI App 161, 256 Wis. 2d 401, 647 N.W.2d 426, but only the first portion of the statute. *Keller* did not address the language which requires the courts to "maximize" placement. Moreover, while *Keller* ultimately ruled on what the first portion of that statute *does not* mean (i.e., a presumption of equal placement), it never ruled what that language *does* mean.

Unfortunately, in the wake of *Keller*, all analysis of the statutory language in question has atrophied. Additional published cases have examined the language generally, and some have more specifically noted the "maximization of placement" standard, but all have deferred to *Keller*, even though *Keller* never addressed that more specific language. *See, e.g.*, *In re the marriage of Arnold v. Arnold*, 2004 WI App 62, 270 Wis. 2d 705, 679 N.W.2d 296 and *In re the Marriage of Lofthus*, 2004 WI App 65, 270 Wis. 2d 515, 678 N.W.2d 393. Consequently, these other cases have also failed to explain what this language means in the context of a placement proceeding. The appellate court decision in this case follows this laissez faire approach.

The net result is that despite the mandatory phrasing of the language, and its prominent placement as a standard within the overall structure of the statute, the language seems

to have no meaning. Indeed, the language was never even referenced or considered by the trial court in this case, as though it did not even exist. A decision by this Court establishing the meaning of this language in placement proceedings will greatly clarify a novel issue with statewide implications.

II SECTION 809.62(1)(A) - THIS PETITION PRESENTS REAL AND SIGNIFICANT ISSUES OF CONSTITUTIONAL LAW.

Finally, such a decision would also clarify the tension inherent between sections 767.24(4)(a)2., and 767.325(2) and (5m), Stats. Section 767.24(4)(a)2. embodies the legislature's belief that maximizing placement with both parents is in a child's best interests and in a modification case, the trial court is directed to act consistent with that standard by section 767.325(5m). At the same time, a trial court is instructed by section 767.325(1)(b)2.b. to presume that where the placement schedule sought to be modified is substantially unequal, the status quo is in the child's best interests. Significant insight could have been provided by this Court's review of *Abbas v. Palmersheim*, 2004 WI App 126, 275 Wis. 2d 311, 685 N.W.2d 546. Unfortunately, the petition in that case was withdrawn before this Court issued a decision.

Because one cannot discuss the placement rights of parents without implicating the fundamental constitutional right of parents to the care, custody and management of their children, *see Barstad v Frazier*, 118 Wis. 2d 549, 348 N.W.2d 479 (1984); *Troxel v. Granville,* 530 U.S. 57, 65 (2000), this petition also presents a real and significant issue of constitutional law. The appellate court decision in *Arnold* endeavored to address the issue and ruled a parent does not

have a fundamental right to equal placement. Nevertheless, any statutory construction of this language cannot turn a blind eye to the fact that the fundamental right is implicated, and that statutes generally must be construed, *inter alia*, in a way which fosters their constitutionality. A decision by this Court would therefore also resolve the question of how the new statutory language interacts with this important Fourteenth Amendment right.

STATEMENT OF THE CASE AND FACTS

On June 20, 2000, the petitioner-appellant-petitioner, Michael Landwehr, and the respondent-respondent-respondent, Bernadette Landwehr, were divorced. (R13-1). The parties have two minor children, Natalia and Elise, who at the time of the divorce were ages seven and three respectively. (R13-2). The custody and placement issues were resolved by a Marital Settlement Agreement. (R13). Under the terms of the Agreement, the parties agreed to share joint legal custody with primary placement of the children to Bernadette. (R13-11). Michael, who had been the primary breadwinner of the family and upon whose income the parties would rely to get through the economic upheaval of the divorce, would have placement of the children at specific alternate times and at additional times upon request. (R13-11).

The placement schedule reflected the practicalities of the parties' schedules. At the time of the divorce, Natalia (seven years old) was in first grade and Elise (three years old) was not yet in school. (R45-6). At that time, Bernadette and the children resided in Brookfield. (R13-2). Bernadette worked approximately 16 hours per week as a registered nurse at Froedtert Hospital. (R42-Ex. 14). Prior to the children's births, she had worked full time.

Michael was living in an apartment in Milwaukee, (R45-126), and was employed as an operations manager for the Menasha Corporation in Mequon and Menomonee Falls, Wisconsin. (R45-26). His position required him to undertake a considerable amount of travel in and out of Wisconsin for days at a time, including overnights. (R45-7-8). Menasha expected its employers to work 45 hours per week or more. (R45-27). His hours were not flexible and the time necessary for his travel was over and above 45 hours per week. (R45-27-28).

Accordingly, the parties devised a placement schedule under which Michael would have placement with the children every Wednesday evening from approximately 6:00 p.m. until 8:30 p.m., every Thursday from 6:00 p.m. until Friday morning at 7:30 a.m. and every other weekend from Friday at 6:00 p.m. until Sunday at 5:00 p.m. (R13-11). The parties also agreed to give each other the "first right of refusal" if her or she could not care for the girls during a period of four hours or more. (R13-12).

In August of 2000, Michael was terminated from Menasha and started a new business: PackX, LLC. (R45-31). Following the change in his employment, Michael was able to set his own work schedule and had little, if any, business-related travel. (R45-11-12). Michael was also able to work from home. (R45-14). While he had been unable to leave work at 2:15 p.m. to pick up the girls following school when

he was still working at Menasha, the job change afforded him the ability to do so. (R45-28). Then, in June of 2001, Michael moved to Brookfield and purchased a home less than four minutes from his children's school and eight minutes from Bernadette's residence. (R45-14-15).

Accordingly, by the summer of 2002, the circumstances of the parties and their children had changed dramatically. Michael now lived in Brookfield near the children and their school. Natalia had just finished third grade and would be starting the fourth grade that fall when Elise would be entering kindergarten. (R45-9). Both children would be at St. John Vianney School. (R45-8-9). Most importantly, Michael's new work schedule made it possible for him to exercise meaningful and equal periods of placement with his girls and his relocation to Brookfield made such a schedule geographically practical.[1] Accordingly, on June 24, 2002, Michael filed a Notice of Motion and Motion to Modify

[1] Moreover, since the divorce, the parties had voluntarily modified the placement schedule as a result of changes in Bernadette's work schedule. (R45-9-10; R46-83-84). The voluntary changes had increased Michael's placement time with the girls. (R45-9-10).

Physical Placement seeking equal placement of his children.[2] (R30).

On September 25, 2002, the Family Court Commissioner certified the placement issue to the trial court. (R14). On February 24, 2003, and July 2, 2003, the trial court heard testimony on the issue of placement. (R45; 46). On July 11 ,2003, the trial court rendered its decision on placement, tacitly finding a substantial change in circumstances had been proven because thereafter, it proceeded to modify the placement schedule, granting Michael ten additional overnights of placement during the summer by extending the Wednesday evening placement from 8:30 p.m. to Thursday morning at 7:30 a.m. (R47-4). During the school year, however, the trial court refused to make any modification or otherwise grant the girls any additional time with their father, contrary to the recommendation of the guardian ad litem. (R47-5).

On August 21, 2003, the trial court entered a written order memorializing its decision. (R36; App. B). On September 30, 2003, Michael filed a Notice of Appeal. (R43). On January 27, 2005, the court of appeals issued a decision affirming the order of the trial court. (App. A). The

[2] Michael's motion also addressed other issues not relevant to this Petition.

reasoning of that decision is addressed in the Criteria section of this Petition.

ARGUMENT

I. THE TRIAL COURT ERRED BY NOT MAXIMIZING THE AMOUNT OF TIME THE CHILDREN SPEND WITH EACH PARENT, AS MANDATED BY SECTION 767.24(4)(A)2, STATS.

A. The Legislature Has Mandated That Trial Courts, In Establishing A Physical Placement Schedule, Maximize The Amount Of Time That Children Can Spend With Each Parent.

The provisions governing custody and placement of children are found in section 767.24, Stats. In particular, the provision which governs the "[a]llocation of physical placement is section 767.24(4). It is that provision, and more specifically section 767.24(4)(a)2., which constitutes the overarching standard the legislature has ordained must be the trial court's guide when allocating physical placement of children between parents:

> In determining the allocation of periods of physical placement, the court shall consider each case on the basis of the factors in sub. (5) (am), subject to sub. (5) (bm). **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.**

(Emphasis added).

The particular location of this standard within the structural framework of the statute was not mere happenstance. The legislature elected to embed this standard front and center in the physical placement portion of the statute. Its location, vis-a-vis the statutory factors under section 767.24(5), Stats., and the reference to those factors, reveals those factors must be considered in the placement analysis, but considered with an eye towards "maximizing" the amount of placement with both parents. In other words, the factors serve the "maximizing" standard, and not vice versa.

B. The Phrase "Maximize The Amount Of Time The Child May Spend With Each

Parent" Must Be Construed To Give That Language Some Meaningful Significance.

The meaning to be given to statutory language is a question of law this Court reviews de novo, and without deference to the lower court. *State v. Murdock*, 2000 WI App. 170, ¶ 18, 238 Wis. 2d 301, 617 N.W.2d 175. The initial inquiry on any question of statutory construction is the plain meaning of the statute. *Local 913 v. Manitowoc County*, 140 Wis. 2d 476, 480, 410 N.W.2d 641, 643 (Ct. App. 1987). The primary goal of statutory construction is to determine and effectuate legislative intent. *State v. Williams*, 190 Wis. 2d 1, 6, 527 N.W.2d 338, 340 (1994). The first step in statutory construction is to examine the statute's language, and absent ambiguity, give the language its ordinary meaning. *Id*. Only if the language is unclear should legislative intent be determined by examining the scope, history, context, subject matter and purpose of the statute. *Id*. Statutory language is considered ambiguous if reasonable minds can differ as to its meaning. *State v. T. J. Int'l, Inc.*, 2001 WI 76, ¶20, 244 Wis. 2d 481, 628 N.W.2d 774.

When determining the meaning of statutory language, the entire section and any related sections must be considered. *Local 913*, 140 Wis. 2d at 480. Statutory language should be interpreted to give harmony to related language. *State v. Szulczewski*, 216 Wis. 2d 495, 503-04, 574 N.W.2d 660 (1998). All statutes are presumed to be enacted

by the legislature with full knowledge of the existing condition of the law and with reference to it; they are therefore to be construed in connection with and in harmony with the existing law, and as part of a general and uniform system of jurisprudence, that is, they are to be construed with reference to the whole system of law of which they form a part. *Town of Madison v. City of Madison*, 269 Wis. 609, 614, 70 N.W.2d 249 (1955). Therefore, the meaning and effect of statutes are to be determined in connection, not only with the common law, and the constitution, but also with reference to other statutes, and the decisions of the courts. *Id*.

However, when it appears that two separate statutory sections are in conflict, the more recent and more specific statute controls and exists as an exception to the general statute. *Grant County Service Bureau v. Treweek*, 19 Wis. 2d 548, 552, 120 N.W.2d 634 (1963). To this end, it should be noted that the language of section 767.24(4)(a)2., Stats., which mandates the maximization of placement with each parent, is more recent and more specific.[3]

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 the limitations on power obeyed. *Groh v.*

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[3] The same is true of section 767.24(1m) (added by 1999 Wisconsin Act 9) which sets forth the requirement of a parenting plan.

Groh, 110 Wis. 2d 117, 122, 327 N.W.2d 655 (1983). For this reason, statutory language must be construed in a way which effectuates good public policy. This is true even when giving the meaning suggested by its plain terms is unreasonable. *Estate of Trojan*, 553 Wis. 2d 293, 305, 193 N.W.2d 8 (1972). As the Wisconsin Supreme Court once observed:

> In construing a statute the proper course is to start by gathering the intent from the language of the statute when that appears from the evil to be cured or the change to be accomplished, and then to follow that intent and adopt that sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the legislature.

Standard Oil Co. v. Industrial Comm., 234 Wis. 498, 501, 291 N.W. 826 (1940).

Statutes are also to be construed so as to avoid absurd results. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 305, 603 N.W.2d 541 (1999). It is a cardinal rule that when interpreting a statute a court must "attempt to give effect to every word, so as not to render any portion of the statute superfluous." *Osborn v. Board of Regents*, 2002 WI 83, ¶22, 254 Wis. 2d 266, 647 N.W.2d 158. The law prefers "a construction which gives meaning to every portion of a

statute." *Unified S.D. No. 1 of Racine County v. WERC,* 81 Wis. 2d 89, 98, 259 N.W.2d 724, 730 (1977). As will be seen, the appellate courts have thus far given no meaning to the new language of section 767.24(4)(a)2., Stats.

C. The Court of Appeals Decisions Which Have Thus Far Addressed The Issue Presented Have Failed To Endow The Statutory Language In Question With Any Meaning.

The appellate courts have had several occasions to examine the legislative mandate brought into focus by this petition. In *Keller v. Keller*, 2002 WI App 161, 256 Wis. 2d 401, 647 N.W.2d 426, the court of appeals considered whether the language constitutes a presumption of equal placement. The order on appeal in *Keller* had granted the parties equal placement. In reaching the order, the trial court interpreted the language of section 767.24(4)(a)2., Stats., in a manner which gave reasonable meaning to the verbiage:

> I think it is very clear that the statute indicates the policy, public policy of the State of Wisconsin is that children should have a mother and a father on an equal basis, that the mother and father should not one be preferred over the other unless there is some good reason to justify that. . . . And so barring some evidence that shows it is not in the

> best interest of the child, or is physically unworkable . . . the court believes that the statutory admonition that equal and full contact at least as to the extent possible should be granted.

Keller, 2002 WI App 161 at ¶10.

Keller, however, disagreed with this interpretation, vacated the equal placement order, and remanded for the trial court to exercise its discretion under "the proper standard of law." In so doing, *Keller* stated:

> These statements demonstrate that the trial court believed there is, essentially, a statutory presumption of equal placement. The trial court started with the presumption or "policy" that equal placement is in the child's best interest and then placed the burden on the party opposing equal placement to show that such an arrangement would not be in the child's best interest.
>
> Under Wis. Stat. §767.24(2)(am), there is a statutory presumption of joint legal custody. However, there is no provision establishing a presumption of joint placement. While the physical placement statute, Wis. Stat. §767.24(4)(a)2, requires the court to provide for placement that allows the child to have regularly occurring,

> meaningful periods of physical place-ment with each parent, this is not tantamount to a presumption of equal placement.

Id. at ¶¶11-12. Expressing a lack of confidence that the trial court would reach the same conclusion under the "best interests of the child standard," the appellate court remanded the matter. *Keller* instructed the trial court not to presume that equal placement was in the child's best interests, but instead, to presume those interests would be served by "[c]ontinuing the child's placement with the parent with whom the child resides for the greater period of time." *See* §§ 767.325(1)(b)1a and (1)(b)2b., Stats.

Ironically, in light of the significant disparity in placement which the petitioner in *Keller* sought to rectify with the motion to modify in the first place, *Keller*'s instructions on remand constituted a mandate that the trial court should presume that any attempt to maximize the placement of the children with both parents was *not* in the best interests of the child. This anomaly arose because *Keller* gave greater weight to the presumption in section 767.325 despite the fact that: (1) the more recent legislative mandate in section 767.24 requires courts to maximize the placement of children with both parents; and (2) section 767.325(5m) directs courts to make its determination in a manner consistent with section 767.24. This conflict in competing statutory presumptions or mandates is similar to the issues

raised in *Abbas v. Palmersheim,* 2004 WI App 126, 275 Wis. 2d 311, 685 N.W.2d 546, issues which would have been resolved following this Court's granting of a Petition for Review had the petitioner not subsequently withdrawn that case.

More recently, the court of appeals examined whether its decision in *Keller* would be altered if the statutory language in question were to be interpreted jointly with a parents' fundamental, substantive due process right to participate equally in the raising of his or her children. *In re the Marriage of Arnold v. Arnold*, 2004 WI App 62, 270 Wis. 2d 705, 679 N.W.2d 296. The appellant in *Arnold* based his challenge, in large part, on the holding in *Troxel v. Granville,* 530 U.S. 57 (2000), wherein the United States Supreme Court reaffirmed that the liberties protected by the due process clause include "the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *Troxel*, 530 U.S. at 66. *Arnold* construed the appellant's challenge as an attack on the constitutionality of Wisconsin's physical placement statutes and observed the heavy burden such a challenge presented. Noting the factual distinctions between the two cases (*Troxel* involved competing placement interests of a parent and a grand-parent), *Arnold* went on:

> Second, insofar as disputes between natural parents are concerned, while parents do have a natural right to care and custody of their children, this does

> not mean that parents have a "fundamental right" to "equal placement periods" after divorce. David has not demonstrated why, following a divorce between parents, the state does not have the right to arbitrate any dispute those parents may have over what happens to their children. We conclude that David has not met his heavy burden to show why the state should be foreclosed from allowing its courts to set placement schedules commensurate with the best interests of the children even if it means less than equal placement. His substantive due process argument fails.

Id. at ¶11, *citing LeClair v. LeClair,* 624 A.2d 1350, 1357 (N.H. 1993) ("legislature contemplated the need to have . . . heightened judicial control over divorced families because of unique problems that exist in a home that is split by divorce.").[4]

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[4] It should be noted that *LeClair* was premised on a law dissimilar to the placement laws in Wisconsin. *LeClair* concluded that because of the unique problems of divorced families, the legislature could rationally conclude that absent judicial involvement, children of divorced families may be less likely than children of intact families to receive postsecondary educational support from both parents. Interestingly, the reasoning of *LeClair* was rejected in *Curtis v. Kline*, 542 Pa. 249, 666 A.2d 265 (1995) ("we can conceive of no rational

Almost simultaneously (the day before), the court of appeals released *In re the Marriage of Lofthus*, 2004 WI App 65, 270 Wis. 2d 515, 678 N.W.2d 393. *Lofthus* addressed whether the pertinent language of section 767.24(4)(a)2., Stats., provides a statutory basis for equal placement. *Lofthus* noted that in 1997, the legislature added the language to require trial courts to set a placement schedule that: (1) allows children to have regularly occurring, meaningful periods of physical placement; and (2) maximizes the amount of time the child may spend with each parent. Revealing it did not view the new language in a manner befitting its prominent placement within the statute, *Lofthus* went on to note:

> Previously, the statute made no mention of meaningful periods or maximized time and the court was therefore not required to consider **these two factors.**

(Emphasis added). Suggesting, nevertheless, at least a willingness to view the matter differently, *Lofthus*, noted that

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reason why those similarly situated with respect to needing funds for college education should be treated unequally").

"regardless whether we agree" "with th[e] result," it was bound by the decision in *Keller*.[5]

An examination of these three cases yields some interesting observations. First, the decision in *Keller* is the pillar upon which the appellate court's view of section 767.24(4)(a)2., Stats., has been built and will remain the bedrock interpretation of that language until such time as this Court agrees to address the issue. Both *Arnold* and *Lofthus* relied heavily on *Keller*. However, given its brief and incomplete treatment of the issue, *Keller* is hardly deserving of such status. Indeed, *Keller* tells us only what a portion of section 767.24(4)(a)2. *does not* constitute: a presumption of equal placement. *Keller* does not tell us what the complete language *does* mean. Thus, we are left to guess exactly what the legislature intended to accomplish with the insertion of that language into the statute.

A careful review of *Keller* reveals it addressed only the more vague criteria found in the earlier part of section 767.24(4)(a)2., Stats., as evidenced by its statement that:

> While the physical placement statute, Wis. Stat. § 767.24(4)(a)2, requires the court to provide for

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[5] *Lofthus* also addressed whether equal placement should flow from the fundamental constitutional right to the care and custody of children.

> placement that **allows the child to have regularly occurring, meaningful periods of physical placement with each parent**, this is not tantamount to a presumption of equal placement.

Keller, at ¶12 (emphasis added). *Keller* therefore never addressed the more specific language which calls upon the courts to "maximize the amount of time the child may spend with each parent." Thus, in addressing the more specific language, the appellate courts appear to be marching lockstep with a decision (i.e., *Keller*) which never contemplated, addressed, or ruled on that language. The lower courts have simply not received any guidance as to what that language means.

Lofthus, for its part, may provide a small clue as to how the appellate court is prone to view the language, although its discussion, also brief, is largely dicta because it inexplicably viewed its hands as tied by *Keller*. Nevertheless, the reference by *Lofthus* to the new language as "these two factors" reveals that while it at least took account of that language, the appellate courts may nevertheless be inclined to view the language as constituting little more than a pair of additional "factors" for consideration, and on par with the traditional statutory factors in section 767.24(5), Stats. But by *Keller*'s own implicit logic, had the legislature intended the new language to be little more than additional "factors" for

consideration, it would have located the language, in some form or fashion, within section 767.24(5).

Unfortunately, *Arnold* does not ride to the rescue. Again, the problem is partly the blind obeisance to *Keller* which would have been required by law, *see*, *e.g.*, *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997), had *Keller* actually ruled on the issue. *Arnold* did go beyond *Keller* in one respect: it ruled the statutory scheme constitutional. While the discussion which ensued was comparatively longer, ultimately it opined only that the statutory scheme is not unconstitutional. Although significant, the holding again does not provide any guidance as to what role the new language should play in placement proceedings.

We are left, therefore, with something of a conundrum. The language must have meaning because the legislature must have intended something more than an empty platitude. Surely all of the effort that went into holding public hearings, debating the issue, drafting and revising the language, was meant to be something more than window dressing. Unfortunately, neither *Keller* nor *Lofthus* nor *Arnold* allay these concerns.

In short, a litigant in a placement proceeding can remind the trial court it is required, indeed commanded, to maximize the placement with both parents. Thus far, how-ever, such

an argument is not supposed to presume that an equalization of placement is in the child's best interests. The trial court is not even obliged to presume that maximizing placement is in the child's bests interests, an oddity which can be gleaned from the appellate courts' unwillingness to even require the courts to acknowledge the language, or otherwise explain how it views its decision as fulfilling the maximization standard. This last point betrays an irrational anomaly wrought by the failure to ascribe any meaning to the language: the legislature has mandated an approach (i.e., maximization of placement) that the courts are instructed *not* to presume is in the bests interests of the child.

D. Consistent With The Absence Of Any Meaning Accorded To Section 767.24(4)(a)2., Stats., The Lower Courts In This Case Failed To Allow That Provision To Have Any Impact On This Case.

Since *Keller*, *Lofthus* and *Arnold* all failed to imbue section 767.24(4)(a)2., Stats., with any meaning, it is not surprising that nowhere in the trial court's decision in this case can one find any reference to that language. After

finding the children were doing well in school based on the testimony and the school records (the latter of containing teachers' comments), the court went on:

> I have also taken into account the ages of the two children, and they are still what this court considers young children. Therefore, and taking into account the recommendation of the guardian ad litem, I do conclude that as to the summer schedule, the recommendation of the guardian ad litem is appropriate, and during the summer months while the girls are not in school, at least at this time until such further order of the court, that the schedule will be adopted as recommended by the guardian ad litem, and I do feel that that is in the best interests of the children.
>
> However, as to the school year and because of the age of the children and because they are doing so well, I am, however, going to order and I do find that it is in the best interests of the children to maintain the current schedule that they are on until such time or further order of the court that would modify that. I know that the guardian ad litem accepted his responsibility and tried to do what he could under the circumstances to have the parties reach an agreement that was fair yet in the bests interests of these children. I am satisfied, however,

> from the evidence in the record that at this time during the school year, to disrupt that schedule would not be in their interests, and until such time perhaps that they are older and more flexible in their schedule or certain things change at school, the court is not going to order that that placement schedule be modified. Therefore, it will remain as it has been and has been identified as the current schedule in the document that was presented to the court.

(R47-4-5). Since the trial court did modify the placement schedule, it was required, but failed, to do so consistent with section 767.24, Stats. *See* section 767.325(5m).[6]

Thus, that section 767.24(4)(a)2., Stats., appears to have no impact on placement proceedings, in the wake of *Keller*, *Lofthus*, and *Arnold*, is illustrated by the decision in this case where the standard was not even acknowledged by the trial court. No mention is made of the obligation to maximize placement. No attempt is made to explain why maximization is not in the children's best interests. This despite the fact the record establishes that equal or near equal

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[6] The modification by the trial court in this case constituted an implicit finding that there had been a substantial change of circumstances and that the petitioner had overcome the presumption that continuing the current placement allocation was in the children's best interests.

placement was eminently practical. There were no geographical limitations as Michael had moved to within minutes of Bernadette and resided in the children's school district. Michael's job situation afforded him the freedom to be available for his children as needed. No doubt this is why the guardian ad litem recommended a "year-round" increase in placement for the petitioner, as opposed to just during the summer.

The court of appeals decision similarly failed to confer any meaning upon section 767.24(4)(a)2., Stats. The appellate court merely stated the following regarding that section:

> The statute provides no definition of "maximizes." Nor does it explain how the court can maximize placement with one parent without reducing it for the other. In any event, Wis. Stat. § 767.24(4)(a)2 does not require nor presume equal placement. *Keller v. Keller*, 2002 WI App 161, ¶12, 256 Wis. 2d 401, 647 N.W.2d 426. Michael receives placement 129 days per year, and he cannot reasonably contend that he is deprived of "regularly occurring, meaningful periods of physical placement" with his children, nor that § 767.24(4)(a)2 compels a different result.

(Appendix A, p. 8).

Again we hear the echoes of a familiar theme. First, the obligatory cite to *Keller* is trotted out even though that decision never discussed the concept of maximization. Then, almost betraying a sense of bewilderment, the appellate court laments the absence of any definition of "maximize," and curiously notes that placement cannot be maximized with one parent without reducing it for the other. Why a "reduction" in placement for one parent poses such a problem for the appellate court is neither explained nor rational in the face of a legislative directive which advises the courts not to avoid a placement reduction for *one* parent, but to maximize placement for *both* parents. It is as though the appellate court has thrown up its hands because there is no definition provided for the term "maximize" and simply abdicated its responsibility to construe that language to give meaning to legislative intent.

E. Whether One Looks To The Plain Meaning Of The Word "Maximize," Or Engages In Statutory Construction To Glean Legislative Intent, The Statute Requires Equal Placement in A Case Such As This One.

Although the legislature has not expressly defined the word "maximize," that does not mean the term lacks definition. The rules of statutory construction allow the common meaning of words to be established by reference to

an accepted dictionary. *State v. Gilbert*, 115 Wis. 2d 371, 377-8, 340 N.W.2d 511 (1983). The WEBSTER'S NEW WORLD DICTIONARY provides the following definition for the word "maximize:"

> 1. to increase to the maximum; raise to the highest possible degree; enlarge, intensify, etc. as much as possible. 2 to estimate or make appear to be of the greatest possible amount, value or importance.

Another commonly accepted dictionary defines "maximize" as "to increase to a maximum . . . to make the most of." MERRIAM WEBSTER DICTIONARY (1997). Legal dictionaries define "maximum" as "The highest or greatest amount, quality, value or degree." BLACK'S LAW DICTIONARY (5th ed. 1983). Against the backdrop of these definitions, it is elementary that to give the fullest expression to the mandate to "*maximize* the amount of time the child may spend with *each* parent," the court would order equal placement. The plain meaning of the term in this regard seems obvious.

Nevertheless, it could also be argued that reasonable minds might disagree as to the meaning of the term in the context of the overall statutory framework. To that end, it appears that in the context of the overarching scheme, the statute is on something of a collision course with itself, particularly in a modification case such as this one. On the one hand, the legislature has instructed the courts to

maximize the amount of time the child can spend with each parent, a directive which must be understood to be an expression that the legislature believes that doing so is in the child's best interests. Statutes must be construed, after all, to be in harmony with the larger scheme of which they are a part. *In re Estate of Flejter*, 2001 WI App 26, ¶¶10-11, 240 Wis. 2d 401, 623 N.W.2d 552. On the other hand, the legislature also instructs courts that keeping the status quo allocation of physical placement is in the child's best interests, a mandate which, in those cases such as the present one where placement was not originally maximized, contradicts the first mandate.

It is of no small importance, however, that the mandate which calls for maximization is of more recent vintage. Under well-established rules of statutory construction, when there is a conflict between statutory directives, the more-recent and more specific statute controls and exists as an exception to the general statute. *Treweek*, *supra*, 19 Wis. 2d at 552. Moreover, the language in question has thus far been interpreted to have no real meaning. The present case constitutes a good illustration of that problem. The trial court here gave no reference, or credence, to the statutory mandate. For example, the court did not explain how, with Michael's more flexible schedule and close location to Bernadette and the children's school, maintaining the place-ment schedule during the school year maximized the time the time the children had with each parent. The court did not explain how the impact

of the children being in school full time impacted the maximized time with both parents.

Nor did the court address how the communication and pick-up and drop-off problems impacted the maximized time with each parent. Also absent is any explanation as to how rescinding the "first right of refusal" (theoretically designed to maximize time with each parent) fostered the mandate to maximize time with the parents. The court did not address how the voluntarily expanded placement schedule which existed prior to filing of the instant motion no longer assisted maximizing time between the parents. Indeed, if, as the court found, the children were doing well in school under that voluntarily expanded placement for the petitioner, what was the rationale for refusing to maximize the placement schedule consistent with that arrangement?

In short, the court did not address, or consider, how its placement schedule provided the highest or greatest amount of time, *including quality* of time, the children have with *each* parent. As noted earlier, statutory language must be construed to give meaning to every portion of a statute. *Osborne*, 2002 WI 83 at ¶22. The language in question was given no meaning in the context of this case, either by the trial court or the appellate court.

As noted earlier, statutory language should also be construed to give effect to the public policy of the state.

Standard Oil, 234 Wis. at 501. The public policy of Wisconsin is expressed in the published notes of section 1 of 1987 Wisconsin Act 355 wherein it is stated:

> The legislature declares that it is **the public policy of this state** that unless there is a specific reason to the contrary it is in the best interest of a minor child to have **frequent association and a continuing relationship with both parents.**

(Emphasis added). In section 34, the legislature added 767.24(4)(b), which established "a child is entitled to periods of physical placement with both parents." The legislature made further changes in 1999 Wisconsin Act 9, when they added the requirements that parents express their plans for raising their children in parenting plans. This Act was clearly intended to give parents a greater role in the process of establishing placement orders and, by establishing the non-discretionary expectation that the court would maximize placement periods with each parent, it was intended to discourage either parent from trying to minimize the role of the other parent.[7]

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[7] Wisconsin's public policy regarding the equality of both parents, a concept which unfortunately has historically been absent to the detriment of fathers, is not unique to this state. In his 2003 Father's Day Proclamation, President George W. Bush publicly proclaimed:

Maximizing placement with each parent is a very specific quantitative criteria, conditioned only on geographic considerations and the accommodations of the parents to assume placement of the children. When two fit parents wish to provide care for the children at least on an equal basis, and

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> The time and attention that a father gives to a child is irreplaceable – there is no substitute for the involvement and commitment of a responsible father. Not only are fathers essential to the healthy development of children, they also influence the strength of families and the stability of communities. For this reason, our Government is working to help fathers succeed in this challenging, but life-affirming role.

The United States Supreme Court has also weighed in on the primacy of a parent's rights:

> 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."

Troxel, *supra*, at 68-69.

live in the same community and can make adequate accommodations to care for the children during equal periods of placement, the only way a court can maximize the amount of time the child may spend with each parent in such a case is to order equal placement of the children. This is not only the only conceivable interpretation of what the legislature meant with this mandate, but it is fully consistent with the principles of equal protection of the fundamental rights of both parents, equal protection of the children's statutory right to placement with both parents pursuant to section 767.24(4)(b), and the very foundation of the principles of equity. While realizing that the actual placement may vary a bit and not wind up exactly 50/50, the court's order should establish equal placement as the fundamental reference point for the parents and children. *See* Walther, *Wisconsin's Custody, Placement, and Paternity Reform Legislation*, Wisconsin Lawyer (April 2000).

The foregoing analysis begs the question as to how the language in question interacts with the best interest of the child standard found in sections 767.24(4)(a)(2) and 767.24(5), Stats. The question is easily answered: the legislature has concluded that maximizing placement with both parents *is* in the child's best interests. Any parent with the devotion to his or her children displayed by Landwehr would agree with the inherent logic of, and the good public policy underlying, this answer. Equal placement of the children with both parents, in cases where both are fit, willing and able to

assume this responsibility, and live in the same community, does not conflict with the best interest of the child criteria. 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," a proposition affirmed by *Troxel*. It is also the only order, in cases such as this, that will satisfy the court's responsibility to enforce the latest requirement of 767.24(4)(a)2, to maximize placement with each parent.

Admittedly, there will be cases where the guardian ad litem or the court may conclude that what is in the best interest of the child yields a different result than equal placement. This does not present a problem, however, provided the proponent is prepared to proffer an explanation of how geographical hurdles and accommodations for different households compel a departure from the maximization mandate. Nevertheless, this newest statutory requirement is not *conditioned* on what a guardian ad litem or court may feel is in best interest of the children. Harmonizing this with section 767.24(4)(b), Stats., requires that unless the court first finds a compelling state interest (e.g., protecting the children from harm), its responsibility to enforce this most recent provision of the Wisconsin Statutes is not discretionary. [8]

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[8] To the extent these directives are viewed to be in conflict, as already noted, the most recent statute controls. The last sentence of 767.24(4)(a)(2) is more recent, and

Finally, to the extent statutory language must be construed to avoid any suggestion of unconstitutionality, *American Family Mut. Ins. Co. v. DOR*, 222 Wis. 2d 650, 667, 586 N.W.2d 872 (1998), it should be noted that equal

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certainly more specific and quantitative than the vague and subjective "best interest of the child" standard in the first sentence of sections 767.24(4)(a)(2) and 767.24(5), Stats. The harm standard, as established in 767.24(4)(b), is also more specific. Therefore the harm and maximization standards are the proper legal standards in cases such as this one.

Furthermore, while the "best interest of the child" criteria is a noble and politically correct concept, it is a vague and ambiguous standard that has allowed the courts to use this rationale as a disguise to do just about anything, and it has been embraced as the foundation of a huge profit generating divorce industry, that derives it's income from families in difficult and vulnerable situations. It allows attorneys, social workers, and psychiatrists to intrude into the family unit at great expense to the families. It allows some professionals to exploit the strong emotional attachments many parents have to their children to promote litigation, since many good parents will put their commitment to their children ahead of the financial devastation this may have on the family. This clearly fails to secure the best interest of the children.

placement is the fullest expression of parents' equal rights to the management of, and access to, their 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 U.S. 330, 343 (1972).

The fundamental responsibility and right of parents to raise their children without unnecessary governmental intrusion was addressed by this Court in *Barstad v. Frazier*, 118 Wis. 2d 549, 348 N.W.2d 479 (1984), and most recently and extensively by *Troxel, supra*, which ruled:

> 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. While the right is not absolute, it is a basic right with which the state may not interfere with without a **compelling** reason. The interest in "maintaining the integrity of [a] family unit" is sufficient to rise to the level of a fundamental right, which may not be invaded by the state on

a mere rational basis test. *Matter of A.M.K.*, 105 Wis. 2d 91, 312 N.W.2d 840, 847 (Ct. App. 1981). Statutes that directly and substantially impair fundamental rights require strict scrutiny. *Zablocki*, 434 U.S. at 387.

It is not difficult to see how the maximization standard, as defined by the petitioner, promotes this fundamental right for both parents. 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 responsi-bility and right is for each to have an unobstructed opportunity to assume equal physical placement of his or her children. Absent a compelling reason, the court cannot allow one parent, a guardian ad litem, a psychologist, a 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 without a compelling state interest.[9]

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[9] This Court has recently noted, contrary to the reasoning in *Arnold* used to distinguish *Troxel*, that the fundamental rights of parents do exist in disputes between two parents. *In re the Termination of Parental Rights to Alexander V., Steven V. v. Kelley H.*, 2004 WI 47, 271 Wis.2d 1, 678 N.W.2d 856.

CONCLUSION

For the foregoing reasons, the petitioner respectfully asks this Court to grant his Petition for Review.

Dated this 28th day of February, 2005.

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is _____ words.

Dated this 28th day of February, 2005.

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REX R. ANDEREGG