COURT OF APPEALS OF WISCONSIN
DISTRICT IV

Case No. 2011AP2660

In re the placement of: A.M.K.

BELVA M. BOWDEN

Petitioner-Appellant-Cross Respondent

v.

AMY S. KORSLIN

Respondent-Respondent-Cross Appellant

COMBINED BRIEF OF RESPONDENT AND CROSS APPELLANT

An appeal from the Circuit Court for Wood County, Hon. Gregory J. Potter, Judge.

BERKOS LAW OFFICE

Daniel M. Berkos
Atty. for Respondent / Cross Appellant
State Bar #01002814
104 W. State St.
Mauston, WI. 53948
608-847-7903

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STATEMENT ON ORAL ARGUMENT

Respondent-Cross Appellant believes that oral argument could be of benefit to the Court and would assist in the full understanding of the case.

STATEMENT ON PUBLICATION

Respondent-Cross Appellant does recommend publication based upon the fact that the issues raised in this case are of Statewide concern, are not fully addressed by current law and are highly likely to recur.

AUTHORITIES CITED

STATUTES CITED:

Sec. 767.41 Wis Stats.

Sec. 767.41(5) Wis. Stats.

Sec. 767.43 Wis. Stats.

Sec. 767.511(1) Wis. Stats

RESPONDENT'S BRIEF

ARGUMENT

Amy agrees that there is no statute that specifically provides a basis for the trial court to enter an Order for Child Support any more than there is statutory authority for the trial court to enter a visitation Order as was done in this case.

That being said, the trial Court decided in it's decision-making process, that this case should be evaluated on the same basis as a family law matter both in terms of the positions of the parties and the factors to be utilized in fashioning a visitation Order.(R.63;7;R.67;12-13).

Belva also argues that as a designated "equitable parent", she is not an equal parent under the law and cannot be considered to be in the same role as a parent. Ironically, Belva had been seeking a visitation schedule that would have provided her with 50% placement of the child (R.49;99), but now argues that she does not have the same rights as a natural parent and a child support order is not appropriate. There is even a further irony that Belva, while willing to share uninsured medical expenses and other minor expenses in the same fashion as a natural parent in a family law matter, was not willing to pay

child support in the same manner as a family law matter. (R.67;13-14).

The trial court created this dilemma by entering an Order that was based upon sec. 767.41 Wis. Stats. when there was no authority to do so. The facts and basis for this action do not meet the requirements of sec. 767.511(1) Wis. Stats., and sec. 767.43 Wis. Stats. is silent as to the issue of child support or other costs related to the child. However, if the Court is prohibited from ordering child support in this action because of a lack of statutory authority, it is also prohibited from entering a placement order determined by the provisions of sec. 767.41(5) Wis. Stats. which includes holidays and extended summer placement.

Amy agrees that the Court did not base the support decision on any statutory authority and clearly stated he was acting under the theory of the "best interests of the child" in entering the placement order and, presumably the support order. (R.67;12-13). If the order for support was erroneously entered, it would manifestly unfair to Amy to require her to be penalized for the error of the court, especially since she had never requested any support until the court made this a family law case by it's decision. Amy's request for support was only made after the Court

placed this case in the realm of a family law placement dispute by establishing an extensive and detailed placement order including school year, holiday, vacation, and summer placement for Belva. It was at that time that the decision was made to fully enforce her rights under the family law and best interests theory being applied by the Court to the case.

Under the theory applied by the Court the order for child support is consistent and enforceable under the Court's powers to make decisions related to the best interest of the child. Assuming that logic is upheld, the child support should also be upheld.

CONCLUSION

For the reasons set forth herein, Amy requests that the consider the issue of child support in conjunction with the authority of the trial court to establish a placement order as it did under the authority claimed.

Dated this _____ day of March 2012

Daniel M. Berkos
Attorney for Respondent/
Cross Appellant
State Bar #01002814
104 W. State St.
Mauston, WI. 53948

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19 (8)(b) and (c) for a Respondent's Brief With a monospaced font. The length of this brief is 3 pages.

_____

Daniel M. Berkos
Attorney for Respondent/
Cross Appellant
State Bar #01002814
104 W. State St.
Mauston, WI. 53948
608-847-7903

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AUTHORITIES CITED

CASE LAW CITED:

In Interest of Martin L. v. Julie R. L., 2007 WI App 37, 299 Wis.2d 768, 731 N.W. 2d 288

In re the custody of H.S.H.-K., 193 Wis. 2d 649; 533 N.W.2d. 419 (1995).

In re the Paternity of Roger D.H. 2002 WI App.35, 200 Wis. 2d 747, 641 N.W.2d 440.

Rick v. Opichka 2010 WI App.23,¶14, 780 N.W. 2d 159:

Rogers v. Rogers, 2007 WI App. 50, 300 Wis. 2d 532, 731 N.W. 2d 347.

Troxell v. Granville 530 U.S. 57 (2000).

STATUTES CITED:

Sec. 767.41 Wis Stats.

Sec. 767.41(4)(a) Wis. Stats.

Sec. 767.41(5) Wis. Stats.

Sec. 767.43 Wis. Stats.

Sec. 767.511(1) Wis. Stats

ISSUES PRESENTED

I. Does the Trial Court have the authority to enter an Order for Third Party Placement that is substantially an Order under sec. 767.41 Wis. Stats. and not under sec.767.43 Wis. Stats.

The Trial Court answered yes.

II. Did the Trial Court properly consider and apply the mandates of *Troxell v. Granville* 530 U.S. 57 (2000) in determining the rights of Amy in placement decisions regarding her child and the special weight to be given to Amy's decisions?

The trial Court answered yes.

STATEMENT OF THE CASE

Belva presented her case on October 27, 2009 and the underlying facts are generally undisputed. Belva and Amy were partners from the time before the child was born and, when the parties separated, they verbally agreed upon an equal sharing of placement of the child. At some point Belva demanded that the agreement be reduced to writing under threat that if Amy did not agree, she would inform the child as to who her biological father was. (R.56;10-11). To avoid that issue Amy agreed to sign the document.

After the signing of the agreement, while there were no issues with the actual placement of the child, there were several major issues and occurrences related to Belva refusing to comply with Amy's request to be informed of where the child would be when in the placement of Belva. After Belva's repeated refusal to cooperate with Amy to keep her informed as to the whereabouts of her daughter, Amy informed Belva that, because of her lack of cooperaton and consideration of Amy's wishes, the placement time with the child and Belva would be modified to every other weekend, but would still permit placement for holidays and would revisit the placement schedule a later time. Amy stated that the reason for her making this decision was to

cause Belva to make a change, show more respect for Amy, and start responding to some of the requests that Amy had made in regards to the child. (R.56; 21). In addition Amy expressed concern about the anger and bitterness that Belva still harbored, the types of information that Belva was telling the child about Amy, and the way in which Belva was spoiling the child. (R.56; 22). When Belva received this notice she contacted Amy and Amy informed her that the reason for this change was because Belva had refused to cooperate with Amy.(R.56;24-25).

After the Temporary Order issued in this case Belva was Ordered to advise Amy of any plans to take the child out of town overnight by the Wednesday preceding her weekend. Despite this Order, there were issues in regards to that notice and more disputes between the parties which will be addressed in Amy's argument. Amy also testified to several other matters where Belva took it upon herself to make decisions for the child without speaking with Amy or getting any input from her including Belva's decision to secretly purchase a cell phone for the child, buy expensive clothing and other items for the child after Amy already informed her that she thought that was spoiling the child and requested she not do that. (R.56;32-34). The disagreements continued between the parties with an

incident involving a sleep-over with the child and the purchase of basketball shoes against Amy's wishes.

In addition to these specific events related by Amy, she also testified to the ongoing problems between herself and Belva related to communications such as matters related to Belva not sharing the child's homework materials with Amy (R.56;39), the lack of respect that Belva gave to Amy, and Belva's refusal to cooperate with the requests or concerns of Amy. (R.56;42). Despite this lack of cooperation, at no time did Amy cut off contact between Belva and the child, continued to have Belva attend all of the child's school events.(R.56;54).

Amy further testified that she believed that contact between the child and Belva continues to be in the best interests of the child, and that she has no intentions of terminating the relationship between Belva and the child, even if Belva continues to refuse to cooperate with Amy. (R.56;51,56). Amy proposed that Belva have essentially same amount of time she currently had with the child, four (4) overnights per month, but it not be set on a rigid every other weekend schedule. In the event that Belva were to begin to cooperate in a better manner, Amy was also willing to agree to additional placement.(R.56;49-50).

In her testimony, Belva acknowledged that that there is nothing that Amy has said or done that would be denigrating to her or make her look bad in the child's eyes, nor has Amy done anything negative to impact the child's relationship with Belva or make the child not want to spend time with Belva. (R.58;131-132). In fact, Belva admitted that, despite personal problems between her and Amy, they are able to communicate in matters related to the child, and deal with those communications in a "businesslike" manner. (R.58;150-152). At the trial Belva presented Dr. Michael Nelson, an expert witness, who acknowledged that at no time did Amy indicate a desire or plan to completely terminate contact between the child and Belva and that, despite personal problems between them, the parties had been able to reach agreements pertaining to the child, without the need for Court intervention. (R.49;34-36). Dr. Nelson also stated that since the change in the placement schedule there had been no evidence of any effect upon the child as to academics, social issues, behavioral issues, distress, or depression. (R.49;38-47).

Amy requested dismissal of the action after the testimony of Belva which was denied by the Court. In that denial, the Court made specific findings which included that the Petitioner had overcome the presumption that the

decision of Amy was in the best interests of the child. (R.55;21). This was done prior to Amy presenting her case to the Court. In addition, the Court then shifted the burden of proof to Amy and required her to then present her case and "re-establish her presumption of what is in the child's best interests". (R.55;21-24).

Following that ruling, Amy presented her case to the Court on March 17, 2010 with additional testimony presented on April 28, 2010 with briefing submitted by both parties at the conclusion of the testimony. On October 27, 2010 the Court made an oral ruling on the "best interests of the child", and on November 18, 2010 the Court issued it's final determination as set forth in the Final Order, which included a placement schedule for the school year, non-school times and holidays. (R67;9-10). In addition, the Court laid out numerous other Orders related to the purchasing of goods for the child and vacations, including a requirement that Amy notify Belva of vacations Amy intends to take with her daughter, which he later withdrew. It is from this final Order that Amy appeals.

CROSS-APPELLANT BRIEF

ARGUMENT

I) Does the Trial Court have the authority to enter an Order for Third Party Placement that is substantially an Order under sec. 767.41 Wis. Stats. and not under sec. 767.43 Wis. Stats.

It is undisputed that there is no statutory provision within sec. 767 Wis. Stats. other than sec. 767.43 Wis. Stats. that provides Belva with standing to file this cause of action due to the fact that there is no underlying family action in this case. It is further undisputed that there is no other statutory provision that provides a basis for Belva's cause of action that is controlling in this action. Visitation rights for third parties is exclusively controlled by sec. 767.43 Wis. Stats. In order to meet the requirements of that statute, a party must establish a relationship with the child that is similar to a parent-child relationship. In this case that requirement is conceded by Amy. In addition to that requirement, the Wisconsin Supreme Court established other criteria *In re the custody of H.S.H.-K.,* 193 Wis. 2d 649. (1995). In that case, the Court, while specifically finding that the Wisconsin Statutes do not provide a remedy to a non-parent under circumstances as are present in this action, reached

the conclusion that the Court did have "equitable powers" and the authority to "exercise their powers for the best interests of a child when a triggering event justifies state intervention". *Supra, p. 689.* The Court went on to rule that public policy considerations do not prohibit a court from relying upon these undefined and unwritten powers to permit visitation by the non-parent when such visitation is in the best interest of the child. This 4-3 decision by the Court gave no special consideration or weight to a parent's decision as to placement with non-parents and required only that there be a parent-like relationship with the child and a significant triggering event. *Supra, p. 699*. Subsequent to *H.S.H.-K.* Wisconsin Courts addressed similar non-parent visitation actions in *In re the Paternity of Roger D.H.* 2002 WI App.35, 200 Wis. 2d 747, *In Interest of Martin L. v. Julie R. L.*, 2007 WI App 37, 731 N.W. 2d 288, and *Rogers v. Rogers*, 2007 WI App. 50, 300 Wis. 2d 532, 731 N.W. 2d 347. Each of these actions was brought under the same statute as this case.

Under sec. 767.43 and current case law, if the Petitioner meets the criteria required, the only matters left for the Court to consider are the best interests of the child and "reasonable visitation rights" for the third party. There is no statutory or other authority to allow

the Court establish visitation based upon the full placement criteria that is utilized in family actions and set forth in sec. 767.41 Wis. Stats.

In the decision rendered by the Court in this action, the Court made it very clear that it was fashioning an Order based upon the same criteria and factors that are applied to a family action.(R.63;11). In fact, as the Court was reciting his oral decision, he specifically stated that he believed his authority to enter what was the equivalent of a family law placement Order, was based upon his ability to decide "the best interests of the child", (R.67;12-13) and even made reference to seeing these "same issues" in "hundreds of divorce cases". (R.63;19-20 The Court cited no statutory authority nor any case law that would permit an Order that went beyond the statutory standard of "reasonable" visitation rights for a third party. Sec. 767.43 Wis. Stats is not intended to be utilized in the same manner as sec. 767.41 Wis. Stats. and it does not authorize the Court to create an quasi-divorce placement Order as it would in a family matter. Had the legislature intended that the Court to be empowered to enter an Order for visitation in the same manner as it would for a family action there would be no need for a distinct statute specifically designed to create a statutory right for a

third party non-parent to have some limited amount of visitation if they meet the underlying threshold requirements. Under sec. 767.41 Wis. Stats. the Legislature established restrictions and mandates upon what a Court may or may not do in making determinations related to physical placement. Specifically, sec 767.41(4)(a) Wis. Stats. states:

> ***(4)*** *ALLOCATION OF PHYSICAL PLACEMENT.*
> ***(a)***
> ***1****. Except as provided under par. (b), if the court orders sole or joint legal custody under sub. (2),the court shall allocate periods of physical placement between the parties in accordance with this subsection.*
> ***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) (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.*

No such language is found nor referenced under sec. 767.43 Wis Stats, and instead it permits nothing more than "reasonable visitation rights". There is no language referring to "allocation of periods of physical placement", and no language that refers to "regularly occurring" or "meaningful" periods of placement. Finally there is no suggestion or mention of an intent to allow an Order that "maximizes the amount of time" that a third party should have for visitation. Had the Legislature intended to permit third party non-parents to be legally situated in the same

position as a divorced parent, this same language would have been included in sec. 767.43 Wis. Stats. as it is in 767.41 Wis. Stats. rather than replacing those mandates with the term "reasonable visitation rights". No such provisions were included in the statute and no such authority is granted by any other provision of law. As stated by the Court in *Rick v. Opichka* 2010 WI App.23,¶14, 780 N.W. 2d 159:

> *"As our statutory history indicates, whenever a court orders sole or joint legal custody to parents, the court is required to allocate periods of physical placement between the parties unless it finds that such allocation is not in the best interests of the child..... In other words, the presumption is that the spouse without primary placement shall have periods of physical placement. On the other hand, as we have already discussed, the grandparents are afforded no such presumption. In fact, the presumption is the opposite – grandparents get what the natural parent gives them unless they can show the children's best interests is for the court to order otherwise".*

In Ordering Amy to give up substantial time with her child, including holidays and summer vacation, so as to allow Belva to be an alternate parent is not permissible under the law and severely infringes upon the parental rights of Amy. The Court exceeded it's authority by entering what can only be viewed objectively as a family law physical placement Order which is well beyond the scope of intent of sec. 767.43 Wis. Stats.

II) Did the Trial Court properly consider and apply the mandates of *Troxell v. Granville* 530 U.S. 57 (2000) in determining the rights of Amy in placement decisions regarding her child and the special weight to be given to Amy's decisions?

This matter was tried to the Court on several dates from October 27, 2009 through April 2010. In her case in chief, other than the Amy, Belva called two witness in support of the Petition. In her opening statement, Belva acknowledged that there is no statutory provision that provides her with standing to seek relief in this action. Belva's claim lies solely in the belief that the case law of Wisconsin provides an avenue for relief that is consistent with the holding in *Troxell v. Granville* 530 U.S. 57 (2000). Amy does not dispute that Belva had a parent-like relationship with the child and, while that had decreased substantially at the time of trial, she still retains a very close relationship with the child. In addition, Amy does not deny that the breakup of Belva and Amy was a significant event to Belva, however, the Amy does not agree that this event is a "triggering" event that justifies intervention by the State in decision-making as it pertains to her child.

The basic premise of *Troxell* was that a parent's right of "care, custody and control of their children" is "the oldest of the fundamental liberty interest recognized by this Court" and, "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id. at 65.* The Court declared that parents are protected by the Due Process Clause and defined a "constitutional dimension to the right of parents to direct the upbringing of their children" that the "State can neither supply or hinder". *Id* at pp. 65-66. The Court extended that concept to state 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. Under the mandates of *Troxell*, there is a presumption that the parent's decision as to what is the appropriate placement for the non-parent is in the best interests of the child, and the non-parent has the burden of establishing that the parent's decision "is not in the child's best interest". *Troxell* goes even further than that and states clearly that a fit parent acts in the best interests of their children and "so long as a parent adequately cares for his or her children, 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 the best decisions concerning the rearing of that parent's children". *Id* at pp. 68-69. And, finally, the *Troxell* Court made it very clear that, "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made". *Id* at pp. 72-73.

A. Dr. Michael Nelson Testimony

Dr. Nelson was retained by Belva to conduct an attachment study and testified as to his findings. Under direct examination Dr. Nelson indicated that an attachment study addresses the "linkage between typically a child and a parent, the quality of their relationship. It's a qualitative term more so than a quantitative term" (R.49; 22,23). In addition, Dr. Nelson indicated that decreased contact "has all kinds of predominantly negative effects on children...". (R.49;26). Nelson went on to say that children who have loss of contact "tend to have more difficulties in social relationships as they get older. They tend to have more academic issues. They tend to have more emotional issues. They ...tend to have more externalizing issues later in life, that they're just generally more distressed." (R.49;27). Dr. Nelson opined

that "*total* disruption of contact with Belva... would be expected to result in emotional grief, compromised functioning in later life and perhaps resentment toward her biological mother...". (emphasis added). (R.49;32). However, Dr. Nelson also acknowledges that all of these risks can be "limited through maintaining healthy relationships with both parents who... are primary attachment figures". (R.49;32).

Under cross-examination Dr. Nelson acknowledged that at no time did Amy indicate a desire or plan to completely terminate contact between the child and Belva. He further acknowledged that, despite personal problems between them, they have been able to reach agreements pertaining to Belva spending time with the child, without the need for Court intervention. (R.49;34-36). Dr. Nelson also stated that a reduction in time with the Belva does not necessarily have a negative impact upon the relationship because of many external factors including " the quality of the relationship" and "the quality of the dynamics between the parties". (R.49;38). As for the "negative impact" Dr. Nelson again refers to problems with academics, social issues, behavioral issues, distress, and depression, (R.49; 38-39), and acknowledges that the "quality" of the contact seems to be "more important" and a "bigger factor" than

the quantity. (R.49;39). Dr. Nelson then went on to state that another factor that would have a positive effect on the relationship would be if Amy fostered the relationship between Belva and the child, (R.49;40), and he was not aware of anything that Amy has done to terminate the relationship or interfere with it other than her decision to reduce the amount of time the child would spend with Belva.(R. 49;41,42).

Dr. Nelson was questioned also extensively on the academic history of the child over the past three years and his review of her school records. He acknowledged that he observed nothing in those records that would indicate any issues or concerns related to her academic history, (R.49;42), and agreed that she "excels" in reading and math. (R.49;43). In addition, Dr. Nelson further acknowledged that the change in placement from when the parties resided together to the current placement of every other weekend has had no detrimental effect upon the child's academic achievements and agreed that this would be a factor in assessing whether or not the decisions of Amy as to the appropriate level of contact between the child and Belva was detrimental to the child . (R.49;43-45).

Dr. Nelson then testified as to whether or not he was aware of any behavioral or social problems that the child

has had since the change from living together in one household to every other weekend or if he was aware of any such issues that were brought to his attention by either Belva, Amy, or any other party he spoke to during this evaluation. Dr. Nelson was not aware of any such issues from his own observations or from any other source. (R.49; 44-46). In addition to this, in his discussions with the child, the child expressed no impressions that the current schedule was unfair, that Amy was interfering with her relationship with Belva and she felt comfortable with the amount of time she was currently spending with Belva (R.49; 46-48). Dr. Nelson readily acknowledged that, based upon his involvement with the case, he could find no social, academic or behavioral issues that are having a detrimental effect upon the child. (R.49;47-48).

Finally, there was further questioning about the prediction in Dr. Nelson's report concerning what could occur if all contact with Belva were terminated. In that questioning Dr. Nelson acknowledged that he was not aware of any plans or threats by Amy to totally cut off placement with Belva and specifically that he had no indication that this was her intent. (R.49;49). In discussing what was referred to as a "tipping point", Dr. Nelson again acknowledged that there has been no detrimental effect on

the child in going from every day contact with Belva to every other weekend. (R.49;50). Furthermore, while Dr. Nelson initially believed that the parties were at or past the "tipping point" based upon "the literature" (R.49;51), he also acknowledged that under the actual facts of this case, he did not "know the answer to that", and admitted once again that he observed no detrimental effects of the current allocation of time upon the child, and other than the "possibility" of something coming out over the next several years. However, he also acknowledged that there was nothing to show any such problems at the present time. (R.49;51–53). In questioning by the Guardian ad Litem Dr. Nelson stressed the importance of maintaining the relationship between the child and Belva, (R.49;59), and also recognized that the actions of Amy by agreeing to extended summer placement without the need for court intervention would indicate that Amy is concerned about maintaining contact between the child and Belva. (R.49;63).

B. BELVA BOWDEN TESTIMONY

Belva testified about her relationship and history with the child. During that testimony Belva acknowledged that not only is the child an excellent student, but that she is continuing to improve and advance in her schooling (R.49;106). Belva, a teacher herself, also noted that the

child had no signs of any decrease in proficiency, adjustments, social problems or behavioral issues, and other than the fact that she believed the child has gotten "clingier", she has observed no other changes in her. (R.49;106-107).

In addition to this, Belva acknowledged that she is not aware of anything that Amy has said or done that would be denigrating to her or make her look bad in the child's eyes, nor has Amy done anything negative to break up her relationship with Belva or make the child not want to spend time with Belva. (R.49;131-132). In fact, Belva admitted that, despite personal problems between her and Amy, they are able to communicate in matters related to the child, and deal with those communications in a "businesslike" manner. (R.49;150-152).

In *Troxell*, as in the present action, the mother of the children had not denied visitation, but simply restricted the visitation to a level less than what the grandparents desired. Also, as in this case, there was no attempt to completely terminate contact between the child and the non-parent. Finally, as in this case, there was no evidence to show that the child had suffered any detrimental effect as a result of the decision of the parent.

In reaching it's conclusion, the *Troxell* court stated that the denial of the grandparents request was appropriate because, "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made". *Id* at pp. 72-73. Also under the principles of *Troxell*, Belva must overcome the "special weight" to be given to the parent's decision. In Wisconsin, the court has stated that the a court must "tip the scales in the parent's favor and use the parent's offer as the "starting point for the analysis" and presume that is in the best interests of the child. (*In Interest of Martin L. v. Julie R. L.*, 2007 WI App 37, 299,Wis.2d 768, 731 N.W. 2d 288). As stated by the court in *Martin L.* "it is up to the party advocating for non-parental visitation to rebut by *presenting evidence that the offer is not in the child's best interests.". Martin L., id.* (emphasis added).

In this case, neither Dr. Nelson nor Belva can point to any detrimental effect the current allocation of placement has had upon the child. At best, Dr. Nelson can only say that there is a "possibility" that some problems may occur in the future based upon the "literature", but again can not identify a single fact in this case to

provide a basis or likelihood of that occurring. While Dr. Nelson believes that a "total disruption" of contact could have detrimental effects upon the child, once again, neither he nor Belva can identify anything that Amy has said or done to indicate any intention of terminating or interfere with the contact as it exists today. In fact, Belva admits that other than the reduction of time, there has been no attempt by Amy to damage or interfere with Belva's relationship with the child. In fact, she admits that they are very capable of communicating as necessary in all aspects when it comes to issues related to the child. Consistent with that is the statement of Dr. Nelson that while he cannot predict the future, he found no evidence that Amy had done anything to interfere with or poison the relationship between the child and Belva and the fact that the parties were able to work out some extended summer placement showed him that Amy was concerned about maintaining the relationship between the child and Belva. Ideas or predictions of what could or may occur in the future that are not supported by any facts in the record cannot be the basis for overcoming the "special weight" afforded to the parent's decision as to what is best for her child.

Again, while none of the Wisconsin cases are directly on point with the facts of this case, they do restate the teachings of *Troxell* in affirming the constitutional liberty interest and fundamental right of a parent to "direct the care, custody and control of their children", and the Due Process limits on the State the restricts the authority of the court to "intervene in the child-rearing decision of a fit, custodial parent simply because a court believes there is a better decision". *Martin L., supra*. at ¶11. There is not another reported case in Wisconsin that provides any additional instructions or other guidance to the Court in determining disputes involving non-parental child placement rights, especially those that fall outside of sec. 767.245(3) or grandparent rights actions.

While the report of Dr. Nelson and the testimony of he and Belva shows a relationship between her and the child, the record does not contain a single reason for the Court to find any basis to infringe upon the constitutional right of the Amy to make decisions concerning the child. There was no allegation that the Amy is unfit, no allegation that the child has suffered any harm or detrimental effects due to the decision of Amy to limit the time the child spends with Belva, and no allegation that would or could provide any basis to overcome the "special

weight" and "fundamental right" of the Amy to direct the care, custody and control of her child. In fact , the record shows the child is excelling in all aspects of her education, has no emotional, behavioral or social issues, has not been made to feel uncomfortable or had any interference by Amy in any manner with her continued relationship with Belva, and has not expressed any dissatisfaction with the current allocation of time. Under the clear mandates of *Troxell* and the relevant decisions in Wisconsin, the opinion of the court or expert cannot supplant that of the parent absent a finding that the parent has provided less than adequate care for the child to the extent that it creates a basis for intervention by the State into the decision-making of the parent. A "better" idea is not justification for Court intervention and nothing in the record provides any support to show that the current schedule has caused any level of distress, harm or difficulties for the child to date and is not in the best interest of the child. Any attempt by Dr. Nelson to interject his opinion on the ideal placement or what the "literature" says, is not sufficient to show the current placement and Amy's decision as to what that placement should be, is not in the best interests of the child and the "literature" upon which he bases his opinions of the

"tipping point" are clearly not consistent with the facts, history and record in this case. In fact, Dr. Nelson does not directly address whether the current placement is appropriate or, if not, how much more placement is necessary to make it appropriate, Instead, he opined only in terms of what would happen if there were a total disruption of contact which is clearly not the case here.

The most overpowering and undisputed factor in this case is that since the parties separated in 2006 the child has continued to excel in every aspect of her life, including her relationship with Belva. The change in her contact with Belva from every day to every other week to every other weekend, has had no detrimental effect on any aspect of her life for the past three years. Any assumption or prediction that there is some realistic possibility of some drastic impact upon this child at some unknown and undefined point in the future is, at best, sheer speculation, and more likely, pure fantasy. While there can always be a fear that Amy could terminate all placement with Belva, history, Dr. Nelson, and Belva herself tells us otherwise. Amy has maintained the child's relationship with Belva in a very positive manner for the benefit of the child since they separated, and the child has adjusted remarkably to the changes that her mother made over this

three year period. There is not one fact presented to support any other conclusion than the current placement is in the best interests of the child, and the fact that Belva feels that more placement would be better is not relevant to the issue.

The issue that was before the Court was whether or not Belva had presented facts to overcome the presumption of validity of the mother's decision and the special weight to be given to the mother's decision as to the allocation of placement. The issue cannot be decided upon what might happen in the future or upon something that Amy may do in the future when there are no facts to support anything other than a desire to foster the relationship between the child and Belva in a manner that is benefical to the child. If Amy were to do something to change these facts in the future, Belva has the option of pursuing a remedy upon those facts as they then exist. However, she cannot predict or presume facts not currently in evidence and use those to show that some potential future acts form a basis for a remedy in the present. Even looking at the evidence presented in a light most favorable to the Belva, at the present time there is no evidence to show that Amy's decision is not in the child's best interests and, in fact, based upon the successes, improvements and general well-

being of the child, the total opposite appears to be the case. It cannot be denied that the interests of the child are being served quite well under the current arrangement and the child is thriving in every aspect of her life. Absent a finding that the decision of the parent is not in the child's best interests based upon the record presented to the Court, the Court has no authority or basis to intervene in the decision-making of Amy or substitute the judgment of the Court for that of the parent.

In addition, at the conclusion of the case-in-chief of Belva, and prior Amy's case being presented, Amy moved for dismissal of the Petition. In denying the Motion, the trial Court made a factual determination that, despite the fact that no evidence had been presented by Amy up to that point, Belva had rebutted the "special weight" presumption afforded to the mother and Amy was then required "to re-establish her presumption of what is in the best interests of the child".(R.55;20-21). Specifically the Court found that Amy had taken steps to minimize Belva's involvement with the child's schooling and unreasonably refused to cooperate with Belva. (R.55;16). In addition, the Court intimated that it appeared as though Amy was using placement of the child as a "bargaining chip to get certain things".(R.55;17). Finally, and what appeared to be the

most important factor for the Court, the Court found, in referring to Amy, that "the level of her anger position undermines the quality of her judgment." (R.55;19). The Court went further to state "[S]he has taken steps to minimize Ms. Bowden's involvement with [the child] and …..a decision motivated by anger, frustration, or spite, whether justified or not, completely ignores the interest of the child and is highly relevant to rebutting the presumption [afforded] (sic) to a biological parent's decision" (R.55;20) emphasis added). These conclusions were reached before Amy had presented any testimony as to the reasons for the decision-making in deciding the visitation time of Belva. In essence, the trial Court shifted the burden of proof to Amy, before she presented any evidence, to carry the burden of proving to the Court that her decisions were in the best interests of the child which directly negates the "special weight" she is entitled to start with. Rather than proceeding with the remainder of the case to evaluate the testimony and evidence that Amy had to offer the Court as to the basis for her decision related to visitation time with Belva, the court made a conclusion of fact before Amy had the chance to present her case. By making that determination before Amy was permitted to present her case, not only did the Court strip Amy of the "special weight" to

be afforded to her decision-making but it placed her in the position of having to reverse and overcome the decision already made by the Court and also overcome the presumption now afforded to Belva. The Court reconfirmed this shift of burden in the Order of October 27, 2010 when he explained why Amy had not "re-established" her presumption. (R.63;4). This is entirely contradictory to the mandates of *Troxell* as well as all Wisconsin case law that followed *Troxell.* The law does not permit the Court to reach that conclusion before the entire case is presented and has no authority to shift the burden of proof to the mother. As previously stated, "It is up to the party advocating for non-parental visitation to rebut by presenting evidence that the offer is not in the child's best interests.". *Martin L.* ¶12. The Court could not logically nor legally make a determination that Amy's offer was not in the best interests of the child until he had the opportunity to hear the reasons for her decision. In doing so he violated the mandates of *Troxell* and the "fundamental right of parents to make decisions concerning the care, custody and control of their children".

When Amy did present her case to the Court, she described in detail the numerous issues had had related to Belva's unwillingness to respect Amy's wishes in regards to

the raising of the child. In her testimony, Amy agreed that when the parties originally split up, there was an unwritten agreement to share placement week to week and to share the costs related to the child and her activities. (R.56;9). She further stated that at some point after the separation, the Petitioner requested a written document be signed setting forth the terms of the unwritten agreement. Amy also testified that although she did not want to sign the papers presented by the Belva, the Belva had threatened to reveal to the child who her biological father was if Amy did not sign. (R.56;10-11).

According to Amy, after the signing of the agreement, while there were no issues with the actual placement of the child, there were several issues related to Belva refusing to comply with Amy's request to be informed of where the child would be when in the placement of Belva. Specifically, the first incident involved Belva taking the child on a trip to South Dakota in the summer of 2006. (R.56;13). Amy first learned of this trip when she called her child and the child told that she was in South Dakota. Upon her return, Amy confronted Belva about this and requested that she be advised of future travel plans that involved her child. According to Amy, Belva essentially told her that she was an adult, other people knew where she

was and that she could take care of the child, and she would not agree to provide Amy with the requested information. (R.56;13-14). Belva did not deny or refute these facts.

The second incident involved a trip to California by Belva with the minor child in the summer of 2007. On that occasion, Belva first informed Amy of the planned trip when they exchanged the child on the night before she was leaving. Belva did not provide any information on the flights or where they would be staying while in California. (R.56;14-15). Amy testified that while she considered just taking the child back home and refusing to allow her to go to California, she did not do that. Instead she confronted Belva with the same concerns expressed the previous summer only to be told that what she, Belva "did with the child on her time was her business and it's none of your concern". (R.56;14). During that trip, Belva permitted the child, who was then 8 years old, to participate in parasailing without discussing it with Amy or even asking her if that would be allowable. While Amy would not have allowed that to occur, she was never given the opportunity to prevent it because Amy did not inform her about the parasailing before it occurred. (R.56;15).

When Belva and the child returned from California, Amy again confronted Belva about being told of her plans with the child during her placement times. Once again Belva told Amy it was none of her business. (R.56;16). As with the South Dakota trip, Belva did not dispute these facts.

The next incident involved a trip that Amy took with the child to Niagra Falls. While there is a dispute as to these allegations, according to Amy, Belva informed her that she and the child were traveling to Illinois for a horse race, however, they ended up in Niagra Falls. Amy claims that she first found out about this from the child and Belva never informed of that prior to leaving. (R; p. 17). Once again, upon their return, Amy attempted to discuss this issue with Belva, and Belva claimed that she had told Amy about the trip prior to leaving, which Amy denies. (R.56;17).

The next incident occurred in 2008 when Belva told Amy that she was taking the child to a pumpkin festival in Nekoosa and ended up in Minoqua, WI. Once again Amy had no knowledge of this trip until she was told about it by the child. (R.56;18).

Amy further indicated that there were numerous other incidents where Belva refused to provide any information as to the plans for the minor child for the weekend and,

despite repeated requests by Amy, until required to do so by Court Order, Belva ignored the requests of Amy. (R.56; 18-19).

Finally, after Belva's repeated refusal to cooperate with Amy to keep her informed as to the whereabouts of her daughter, Amy contacted Belva by telephone and in writing to inform her that, because of her lack of cooperaton and consideration of Amy's wishes, the placement time with the child and Belva would be modified. (R.57;Ex.#10). In that written document, among other complaints, Amy told Petitioner that starting September 7th of 2008 the placement schedule would change to every other weekend. Amy also told Belva that the placement would still be permitted for holidays and the regular schedule would be revisited at a later time. According to Amy, the reason for her making this decision was to cause Belva to make a change, show more respect for Amy, and start responding to some of the requests that Amy had made in regards to the child. (R; p. 21). In addition to that issue, Amy was concerned about the anger and bitterness that Belva still harbored, the types of information that Belva was telling the child about Amy, and the way in which Belva was spoiling the child. (R.56; 22). In that same written document Amy made it clear that the change in the schedule was not permanent, and that she

would still be permitted to take the child for holidays and vacations, (R.56;23), and, that Amy would no longer be responsible for sharing the costs related to the child. When Belva received this notice she contacted Amy and Amy informed her that the reason for this change was because Belva has refused to cooperate with Amy.(R.56;24-25).

Subsequent to the filing of this action, a Temporary Order was entered requiring Belva to advise Amy of any plans to take the child out of town overnight by the Wednesday preceding her weekend. Despite this requirement, Belva continued to refuse to provide the advance notice. (R.56;26). On at least one of those occasions, Belva called Amy from her vehicle when the child was with her, and proceeded to yell and scream at Amy about the notice requirement, using abusive and profane language in front of the child. (R.56;27) This incident was overheard by several other witnesses who were with Amy at the time of the phone call. Despite the lack of prior notice as required by the Court Order, and despite the angry and profane telephone call from Belva, Amy permitted Belva and the child to go to Marshfield and spend overnight. (R.56;28).

Amy also testified to several other matters when the Petitioner took it upon herself to make decisions for the child without speaking with Amy or getting any input from

her. One of those incidents involved Belva's decision to purchase a cell phone for the child without ever asking Amy if that was agreeable to her. While there is some dispute over the facts, Amy testified that the child actually hid the phone from Amy and Amy only found out about the phone during a court proceeding. (R.56;34). On other occasions Belva would buy clothing and other items for the child and Amy informed her that she thought that was spoiling the child and she did not want her to do that. (R.56;32-34). Again, her concerns were ignored by Belva. (R.56;33).

On another occasion, Belva permitted the child to spend overnight in a cabin with a teenager and a preteen child, without direct parental supervision. The cabin was located about 100 feet from the residence where Belva stayed, however Belva did not go to the cabin during the night to check on the children and found nothing wrong in permitting this activity. Amy testified that she was upset when she found out about this event and confronted Belva about it. (R.56;36-37). Despite her obvious disagreement with this activity, Belva ignored the concerns and principles of Amy entirely and felt it was "no big deal". (R.56;37).

Perhaps the most perplexing incident for Amy involved Belva's unilateral decision to purchase basketball shoes

for the child despite the fact that she had knowledge Amy wanted to wait until the child was certain she wanted to continue to play basketball. According to Amy, she and the child had discussed this and Belva was aware of her position on purchasing the shoes for the child, however, once again, Belva ignored the wishes of Amy and made a unilateral decision to purchase basketball shoes for the child knowing full well that Amy did not want the child to have the new shoes at that time. Amy discovered the shoes where the child was hiding them from Amy and when Amy confronted Belva on that issue, Belva's had no concern for Amy's position on the shoes and told her that she bought them because the child wanted some and everyone else has them and felt no reason to apologize to Amy. (R.56;32).

In addition to these specific events related by Amy, she also testified to the ongoing problems between herself and Belva related to communications. She testified to matters related to Belva not sharing the child's homework materials with her (R.56;39), the lack of respect that Belva gave to Amy, and Belva's refusal to cooperate with the requests or concerns of Amy. (R.56;42). According to Amy, Belva continually took the position that what she does with the child on "her" time is none of Amy's business. (R.56;42). Despite this complete lack of cooperation with

Amy, at no time did Amy cut off contact between Belva and the child, and she has continued to have Belva attend all of the child's school events and has not interfered with that. (R.56;54). In fact, it is Amy's desire that she, Belva and the child could communicate at the child's activities for the benefit of the child, despite the fact that Belva has told Amy that she "does not want to be her friend" and does not want "to talk to her". (R.56;55).

As for Amy's opinion as to what she believes to be in the best interests of the child, she made it very clear that she has no intentions of terminating the relationship between Belva and the child, even if Belva continues to refuse to cooperate with Amy. (R.56;51;56). Amy firmly believes that maintaining the relationship between Belva and the child is in the child's best interests, (R.56;51), and is just asking Belva to comply with some very limited rules and guidelines. (R.56;58). Amy proposed that Belva have essentially same amount of time she currently has with the child, four (4) overnights per month, but it not be set on a rigid every other weekend schedule. In the event that Belva were to begin to cooperate in a better manner, Amy is also willing to permit additional placement for the summer and holidays.(R.56;49-50).

The Court also heard testimony from Tina Wallner, a person who is a good friend of Belva and who Belva acknowledges is a good friend. Ms. Wallner related numerous repeated incidents of Belva saying angry things about Amy, wishing she would die, and expressing her anger over the breakup, Amy's new relationship, and other issues to the point that Tina found the conversations painful and she did not want to speak with Belva anymore. Belva would tell Ms. Wallner how much she hated Amy and how the breakup was all Amy's fault. (R.56;200-201). According to Ms. Wallner, these conversations were occurring when the parties were sharing placement of the child in 2006, and on at least a few of these occasions, the child was present. (R.56;202-203). Ms. Wallner also testified that at some point after the summer of 2006, her contact with Belva became less because of these negative conversations. In late 2007 or early 2008, she contacted Belva again in reference to a job opening at Belva's school, and, according to Ms. Wallner, that part of the conversation lasted only a short time before Belva again got back to complaining about Amy and making negative statements about her. (R.56;203-204). Ironically, in all of the complaining that Belva did about Amy in her discussions with Ms. Wallner, at no time did she

complain about Amy interfering with her relationship with the child. (R.56;203;205).

At the same that Ms. Wallner was having contact with Belva, she was also having contact with Amy. According to Ms. Wallner, at no time did she ever hear Amy express any anger or bitterness towards Belva, and Ms. Wallner even expressed surprise that Amy was not mad about things that had occurred. (R.56;200;214). Most importantly, according to Ms. Wallner, she has seen no action by Amy that would lead her to believe that Amy intends to interfere with Belva being a part of the child's life and stated that Amy has told her she would never prevent that relationship because it would hurt the child. (R.56;215-217).

While there is some denial of Amy's claims by Belva, perhaps the most telling portion of this trial was Belva's own words on cross-examination at the hearing of April 28, 2010. While Belva claims that she told Amy about the South Dakota trip several weeks in advance, she acknowledged that she did not tell her about the California trip until the night before they were leaving because she "was afraid [Amy would] say you can't go or you can't do that" (R.58;22). This, despite the fact that Belva acknowledges that Amy has never told her she could not go somewhere with the child.

(R.58;46). Belva also acknowledged that Amy had informed her that she wanted to know where she was going with the child on her placement time and that this was a sensitive issue for Amy. (R.58;43). When questioned specifically about the California trip as to why she waited until the last minute to inform Amy after knowing that Amy had these concerns, Belva's response was "before we left she knew where we were going" (R.58;44). When further pressed and asked if she ever thought that it might have been nice to give Amy advance notice or discuss the California trip with Amy, Belva responded with a firm and direct "no" that she had never considered that despite the prior discussions that Amy and Belva had had, and further stated "the 50/50 agreement said half and half and so that's what I was going to do" (R.58;45). When asked about who would have been hurt had Amy said no to the trip when she was told about it, Belva's response was that it would have hurt her, and only mentioned it would have also hurt the child after that was pointed out by counsel. (R.58;46). Finally, when confronted with the concept that her actions had put Amy in a position that either forced her to agree to the trip or risk hurting the child's feelings and that was unfair to Amy, Belva's response was, "all is not fair in love" and that "it doesn't matter". (R.58;47).

Belva was also asked about the circumstances that led to Amy's decision to modify the placement schedule as stated in the written document Amy presented as Exhibit #10. Belva acknowledged that these were all things that they had discussed before and they had been discussed "over a lengthy period of time". (R.58;62-64).

In reference to the incident involving the basketball shoes for the child, Belva admitted that the child had told her that Amy wanted to wait to buy shoes until she knew the child wanted to continue playing basketball. (R.58;65). Despite having this knowledge, Belva admitted that despite Amy's position on the shoes, she told the child that if she did not have new basketball shoes by the next time she was with Belva, she would buy them for her. (R.58;65,66). Even knowing and acknowledging Amy's feelings on this issue, Belva would do nothing to try to clear it up or discuss it with Amy and elected to take steps that were directly opposite of Amy's decision. Finally, and perhaps the most telling evidence as to why Amy has taken the position she has, Belva was asked if she thought that some of her own actions had something to do with the discord between Amy and herself. In response to that Belva acknowledged that "yes". (R.58;80-81). In addition Belva acknowledged that

Amy wanting to know where she was taking the child when they went out of town was not unreasonable. (R.58;81). Despite these responses, Belva then went on to say that Amy's concerns about the parasailing were unreasonable, as well as her concerns about the sleepover in the cabin. (R.58;81-82). When asked if she could understand why Amy may have found these things upsetting she stated she did however, she refused to change anything she is doing and "just followed the agreement". (R.58;82). In fact, Belva admitted that she has never asked Amy for permission or consent for anything, has never asked her to share her ideas or opinions and all she does is "stick to the agreement". (R.58;83). In addition, while Belva claims that she believes Amy has the superior right to make decisions concerning the child, (R.58;84-85), her actions related to failing to providing advance notice to Amy for planned trips, which she knew was important to Amy, or making a decision on the basketball shoes which she knew to be contrary to Amy, are clearly contradictory to that claimed belief.

Based upon the entire record before the Court, it is evident that the decision that Amy made to modify the original placement agreement was not motivated by her anger or bitterness but was motivated by the anger and bitterness

that Belva was displaying, much of which occurred in the presence of the child. Amy repeatedly asked Belva to cooperate with her and provide simple basic information about where the child would be if they are taking a trip or going out of town. Belva not only acknowledged that she and Amy had several discussions about these issues, but she also acknowledged that she knew these were sensitive issues with Amy. Despite this knowledge, her actions, statements and even her testimony to the Court make it clear that even though she agrees that Amy should have the final say in matters because she is the mother, Amy's concerns do not matter and Belva will continue to do things the way she wants.

The record contains no evidence that Amy's decision was made for any other purpose than the best interests of the child. She tried to discuss things with Belva that she found to be poor decisions concerning the child, some of which she believed put the child at risk, but Belva refused to listen. Whether it was notice of trips, parasailing or staying in an unsupervised cabin overnight, Belva would not concede any control to satisfy or even address the concerns of Amy. Despite this, Amy did not terminate the placement but simply reduced it to limit the opportunity for Belva to place the child in situations that Amy did not approve of.

Even with that she told Belva that this reduction of time was not permanent and she was willing to discuss it if Belva would make some changes in the manner in which she treated Amy and the child. Rather than try to do that, Belva commenced this action without ever addressing the reasons for the change with Amy.

Without question, the testimony of the various witnesses, the reasons set forth by Amy in her testimony, as well as the acknowledgments and admissions of Belva, are more than sufficient to show that Amy's decisions as to placement matters were reasonable, rational and done in the interests of the child and not out of anger or bitterness towards Belva. She made numerous attempts to explain to Belva what her concerns were from notification to discussing their relationship matters with or in front of the child, and Belva refused to listen or change her actions in any manner. Belva's actions are not based in the best interests of the child, but are based in what she wants and her interests, and the only manner in which Amy could minimize that was to lessen the opportunity for Belva to negatively impact the child. Since Belva refused to take any steps to do this, Amy was left with no other option but to do what she believed best for the child while still

maintaining a relationship with Belva and the child which she believes to be beneficial for the child.

The Court not only shifted the burden of proof to Amy contrary to the rule of *Troxell, b*ut reached numerous conclusions based upon his belief as to what was or was not important, or justified Amy's decision to "terminate or modify placement" as opposed to using the facts from the record. (R. 63;7). Once again, the issue to be decided by the Court was if the decisions of Amy in regards to visitation with Belva were in the best interests of the child and not whether her reasons "rise to the level" to justify something in the mind of the Court. (R.63;7). The fact is that she had not "terminated" visitation with Belva despite, as the Court noted, she could have "easily terminated" it at any time. (R.63;11). In fact, Amy had that opportunity in the past and chose not to take that route. Not only is there no evidence that Amy has that intent now, but even Belva admits that, other than the modification Amy made, she has never denied any of Belva's requests or trips and never prevented or interfered with the relationship between Belva and the child. Not a single witness provided any testimony to establish any basis to believe Amy would ever terminate the child's relationship with Belva, that the child was harmed or adversely affected

in any manner, or that Amy made decisions that were contrary to the best interests of the child. The Court was therefore limited to making a determination as to whether or not Amy's decision as to the amount of visitation being offered was adverse to the child's interests and not if it was "enough" for Belva. *Troxell* specifically prohibits the Court from substituting his idea of what would be "better" for that of the parent. (*Troxell,* pp. 72-73).

What Belva and the Court refused to recognize was that Belva is the reason her placement has been limited, not Amy. Her refusal to consider Amy's parenting goals for her child is what has created the disagreements and ultimate decision to reduce Belva's time. Because of the anger, bitterness and lack of respect Belva has shown to Amy, she has put Amy into a corner. Despite this, Amy has continued to encourage the relationship with Belva and the child because she truly believes that continuing that relationship is beneficial to the child. She has set aside her own feelings solely for the sake of her child while Belva continues to harbor anger and stubbornness and insistence that she have her way only.

Not only did the Court view this case in the context of a divorce action, but he injected his personal opinions as to who was exaggerating the facts, the right of Belva to

make various purchases for the child, jealousy and "competing against" one or the other, using the child as a "pawn" and even accused Amy of "game playing" . (R.63;8-10). The Court then went further and placed blame upon Amy for entering into a relationship with Belva and allowing her to be a part of the child's life. (R.63;10-11). All of this was concluded by the Court without a single supporting fact. There was no testimony from anyone that Amy was jealous, competing against Belva or had used the child as a pawn on even a single occasion. In fact, the testimony was the precise opposite and was undisputed that Amy had never done anything but avoid placing the child in the middle of the problems, (R.56;14-15), and had never expressed any anger or bitterness towards Belva. (R. 56;200;214) After reaching all of these unsupported conclusions the Court then went on to state the he was then going to make his "own assessment of what is in the best interests of the child". (R.63;11). He then proceeded to address all of the applicable factors in sec. 767.41(5) Wis. Stats. in making his decision.

CONCLUSION

Based upon the ruling in *Troxell,* Belva failed to overcome the presumption that Amy's decisions were in the best interests of the child and the Court failed to give Amy's decision the special weight as mandated by *Troxell.* It is undisputed that the child is thriving and has been thriving all along under the primary influence and guidance of Amy. But for the negative actions of Belva, we would not be before the Court at this time. Belva's true personality and underlying problems were evident in her testimony and made it clear as to why Amy made the decisions she has. Belva continues to deny that her actions caused the problem and continue to cause the problem that face the parties today. Unless and until she realizes that, she will continue to be a negative influence on the child and contrary to her best interests.

It is not the duty nor within the authority of the Court to render judgment as to the parenting style of Amy or to agree or disagree with Amy's child rearing methods. It is the obligation of the Court to determine if the decisions made by Amy were based upon rational thinking and were in the best interests of the child, and starting with the special weight assumption that her decisions are in the

best interest of the child unless proven to be otherwise. Based upon all of the evidence presented, the Court could not rationally or reasonably find that the actions of Amy were anything less than intended to be in the best interests of this child and that Belva's actions were directly contrary to Amy's child rearing goals. Any changes in placement made by Amy were the direct result of Belva's insistence on ignoring the wishes of Amy despite knowing what those wishes were.

Not only was the evidence showing the anger and resentment that Belva bore and continues to bear towards Amy not disputed, but there was not a single witness presented to show that Amy harbored or expressed any such anger or resentment that Belva claims she has or that any such feelings affected her decision-making. In fact, the undisputed evidence clearly shows that Amy did everything she could to get Belva to be more cooperative before she resorted to the only tool left which was to limit her contact with the child. This limiting of placement was not using the child as a weapon as Belva believes, but was the only option left for Amy to protect the child from what Amy believes to be improper decision-making that was in contradiction to the beliefs of Amy as to what was in the best interests of the child. Even after imposing those

limits, Amy informed Belva that this change was not permanent and would be reconsidered if Belva would make changes in her behavior. (R.57;Ex. # 10).

Troxell requires the Court to give special weight to the decision making of the parent and starts with the presumption that the decision made by that parent is in the best interests of the child. It also requires the party seeking visitation carries the full burden of proving that the decision making of the parent as to visitation is not in the best interest of the child. There is no law that permits the Court to shift the burden of proof to the parent at any point. Not only did Belva fail to provide a single witness or fact to show that the decision making of Amy was harmful, dangerous, emotionally damaging or in any way not in the best interests of the child, the overwhelming evidence shows that Amy tried everything she could to accommodate substantial visitation for Belva only to have her wishes be continually ignored and contradicted by Belva. The determination of the Court both as to the evidence presented as well as the shifting of the burden of proof to Amy are contrary to law and contrary to the mandates of *Troxell* and the case law of Wisconsin. Belva failed to present evidence sufficient for the Court to find a basis to infringe upon the fundamental Due Process rights

of Amy to make childrearing decisions and did nothing more than substitute his beliefs for Amy's which is strictly prohibited by *Troxell*. The Court has no authority to impose his moral or personal values as to how much visitation Belva should have, simply because he believes a 'better' decision could be made. The trial court must first find that Amy's decisions are not in the best interests of the child and there is no such evidence in the record presented to the trial Court.

Nowhere in the decision of October 27, 2010 (R.63)is there a mention of the special-weight presumption afforded Amy by law in her decision-making, and nowhere did the Court reference any fact that was presented in evidence to show that the decision by Amy was not in the best interests of the child as is required in order for Belva to prevail. His decision was clearly based upon a belief that Amy failed to "re-establish" a presumption that he had removed from her prior to receiving any testimony as to the basis for her decisions. In essence the Court stripped Amy of the presumption based solely upon Belva's desire to have more visitation time with the child without any showing that the current visitation was not in the child's best interests and before Amy could explain why she believed 4 days a month was appropriate. The ruling of the Court was clearly

focused on what he believed was fair or appropriate and he substituted his vision for Amy's. The decision of the Court was an erroneous exercise of discretion and beyond the scope of the Court's authority, and for these reasons Amy requests that the decision of the trial Court be reversed with an order to dismiss the Petition on the merits.

Dated this _____ day of _____2012.

BERKOS LAW OFFICE

Daniel M. Berkos
Attorney for Respondent/
Cross Appellant
State Bar #01002814
104 W. State St.
608-847-7903

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19 (8)(b) and (c) for an Appellant's Brief with a monospaced font. The length of this combined brief is 50 pages.

ELECTRONIC CERTIFICATION

I have submitted an electronic copy of this combined brief, excluding the appendix, if any, which complies with the requirements of §809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the combined brief filed as of this date, and a copy of this certificate has been served with the paper copies of this brief filed with the Court and served upon all opposing parties.

Dated this ___ day of March 2012.

_____

Daniel M. Berkos
Attorney for Respondent/
Cross Appellant
State Bar #01002814
104 W. State St.
Mauston, WI. 53948
608-847-7903