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 PETITIONER-APPELLANT-CROSS-RESPONDENT BELVA BOWDEN, JOINED IN PART BY GUARDIAN AD LITEM

Appeal from the circuit court for Wood County, Hon. Gregory J. Potter, Judge.

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TABLE OF CONTENTS—REPLY BRIEF

CASES CITED

ARGUMENT

I. Korslin concedes the court erred in ordering child support, and that all support paid must be repaid.

In her brief in chief, Bowden developed three arguments regarding the circuit court's child support order. First, she pointed out that child support is a creature of statute, and that it cannot be ordered except pursuant to statute. (Br. 7-11). This included a specific discussion of why the law grants an equitable parent placement rights, but not child support obligations or other rights and obligations under the family code. (Br. 9-11). Second, Bowden relied on contract law to show that the court did not have a contract basis for the award of child support. (Br. 11-12). Finally, Bowden argued that the remedy on remand should include repayment of all child support paid pursuant to the erroneously entered order. (Br. 14-16).

Korslin did not develop any arguments in response to any of these issues. Her three-page argument cites no authority whatsoever showing that the court had statutory or other authority for ordering child support. (Br. 5-6). Instead, she asserts—in a single sentence, without any citation to authority—that the child support should be upheld if placement is upheld. (Br. 6).

The court of appeals, in the interests of judicial economy, does not consider arguments not supported by citation to authority. ***M.C.I., Inc. v. Elbin***, 146 Wis.2d 239, 244–45, 430 N.W.2d 366 (Ct.App.1988). Similarly, arguments not refuted are deemed admitted. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct.App.1979).

In this case, Korslin never addresses Bowden's explanation of why placement can be ordered without ordering support. That

is, Bowden pointed out that under ***Holtzman v. Knott (in re H.S.H.-K.)***, 193 Wis.2d 649, 533 N.W.2d 419 (1995), an equitable parent has only certain specified placement rights, and does not have other rights under the family code, such as the right to request joint legal custody or an equal opportunity to obtain shared or primary placement, nor rights under other law, such as the right to the child's tax exemption. Bowden pointed out that addition of any additional rights or obligations should come from the Wisconsin supreme court. (Br. 13-14). Korslin does not respond to this argument, or so much as attempt to address authority Bowden cited in support.

Similarly, Korslin never addresses Bowden's argument that child support must be repaid if the child support order is reversed, or cites any authority suggesting repayment should not be ordered. In her conclusion, she does not even request that the child support order be affirmed or that she be permitted to retain support paid pending appeal.

Under both ***Elbin*** and ***Charolais Breeding Ranches***, Korslin's response is a concession that Bowden's position on child support is the correct one. Bowden respectfully requests that the court honor that concession.

II. The guardian ad litem takes no position on child support.

By order dated April 4, 2012, the court ordered Atty. Gary Kryshak substituted as guardian ad litem for Alissa K. in this appeal. The guardian ad litem takes no position on whether the court of appeals should affirm the circuit court's child support order, and therefore does not join in the reply portion of this combined brief.

CONCLUSION

For the reasons given above, Belva Bowden respectfully requests that the child support order be reversed and the case remanded with directions to the circuit court to order repayment of all support paid pursuant to that order.

Dated this 16th day of April, 2012.

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RESPONSE BRIEF OF BELVA BOWDEN AND GUARDIAN AD LITEM

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant requests both publication and oral argument. The issues presented in this case are of statewide importance, and publication will clarify this area of the law and give guidance to future litigants.

ISSUES PRESENTED

1. Was the circuit court required to apply the standard set out in WIS. STAT. § 767.43 in determining the correct placement schedule?

The circuit court answered: The circuit court did not address this issue.

2. Did the circuit court give "special weight" to the biological parent's offer of placement, as required by ***Troxel v. Granville***, 530 U.S. 57, 70, 120 S.Ct. 2054 (2000)?

The circuit court answered: Yes.

3. Were the circuit court's findings of fact clearly erroneous?

The circuit court answered: No.

BACKGROUND

The appeal arises out of a placement dispute between the parties. Alissa was born in April 1998 and is Korslin's biological child. (R. 56:06). Bowden was present at Alissa's birth, and the parties lived together and raised Alissa together as a family from her birth until 2006, when she was eight years old. (R. 56:06). When Bowden and Korslin ended their relationship in 2006, they entered into a written agreement stating they would equally share custody and placement of Alissa. (R. 48: Ex. 2). From 2006 until 2008, they shared placement on a week on, week off schedule.

In 2008, Korslin informed Bowden that she would no longer be following their agreement, and limited Bowden's placement to every other weekend. (R. 56:20). Bowden commenced this action, seeking equal shared placement pursuant to the parties' agreement and the equitable parent doctrine set forth in ***Holtzman v. Knott (in re H.S.H.-K.)***, 193 Wis. 2d 649, 533 N.W.2d 419 (1995). Bowden did not request joint legal custody or any rights under the family code, WIS. STAT. CH. 767.

Placement of Alissa was litigated in a series of three hearings in October 2009, March 2010, and April 2010. (R. 49, 56, 58). At those hearings, Korslin testified to many of the things set out in her brief. This included testimony that the parties had engaged in disputes on various issues after they separated in 2006. The primary areas of contention were Bowden's purchases of various items for Alissa, most notably basketball shoes, and whether Bowden gave Korslin adequate notice of several trips she took with Alissa. (R. 56:13-15).

For her part, Bowden presented evidence that when disputes arose, Korslin would use placement as a lever. When Bowden filed this action, Korslin refused to permit Bowden any placement whatsoever until ordered to do so as part of a temporary order. (58:41). In 2009, Korslin asked the court to terminate the

temporary order entirely after a dispute over Bowden's decision to allow Alissa to camp outside overnight with several other children. (56:80-83). Korslin explained her reasons for doing so as follows:

> Q: So you ask the court in the summer of 2009 to actually terminate the whole temporary order?
>
> A: Yeah.
>
> Q: Wouldn't you say that's an interference with Belva's relationship with Alissa[1]?
>
> A: I was trying to teach her a lesson.
>
> Q: Teach who a lesson?
>
> A: Belva for her behavior.
>
> (R. 56:83).

Korslin also admitted she had, on various occasions, told Bowden that "if you don't treat me better, you'll never see Alissa again" when the parties disagreed on various issues. (R. 49:16). Korslin also told Bowden that "when I win this court case, I will never have to deal with your fucking bullshit again." (R. 49:16,49).

When asked her position on what placement should be ordered, Korslin testified as follows:

> Q: … [W]hat is your offer of placement, if any, at this point between Alissa [K.] and Belva Bowden?
>
> A: I don't want a schedule. I don't want to have to work around a schedule for every other weekend. I

[1] Alissa's name is misspelled throughout in several of the transcripts. In this brief, the correct spelling has been used throughout, including in quotations from the transcripts.

> just—it's my choice when Alissa sees whoever she sees.
>
> (R. 49:13-14).

In response to further questions from the guardian ad litem, Korslin admitted that this could result in significant reductions in Bowden's time with Alissa:

> Q: But it [Korslin's proposal] would cut down on Ms. Bowden's time with Alissa, is that right?
>
> A: Maybe.
>
> Q: So there could be times, for instance, that Ms. Bowden might not see Alissa for, let's say, a month because your schedule didn't allow it?
>
> A: If I have plans with my daughter, yes.
>
> (R. 49:15).

However, both parties kept Alissa out of the middle of their disputes, and were usually able to discuss matters related to Alissa in a "businesslike" manner. (R. 58:150-152). Dr. Nelson, who performed an attachment study for purposes of this case, also agreed that Alissa had generally adjusted well to the various placement schedules followed after the parties split. (R. 49:38-47).

Nelson also testified that Alissa would suffer if placement were reduced:

> [T]he underlying concern is the impact of family dissolution and loss on Alissa's long-term well-being. Loss of a primary attachment figure through break up of family increases the risk for dysfunction in children. Such risks can be limited through maintaining healthy relationships with both parents who for Alissa are

> primary attachment figures. Total disruption of her contact with Ms. Bowden, her social mother, would be expected to result in additional grief, compromised functioning in later life and perhaps resentment toward her biological mother, Ms. Korslin. Significantly limiting contact would be expected to result in similar, though lesser, harm.
>
> (R. 49:32).

At the close of testimony, the guardian ad litem made the following recommendation:

> I think it's a sad case. I think that the personal relationships of [Bowden and Korslin] have interfered with the parenting relationships that these two women took great pains to establish. I think that's sad and a disservice to Alissa. That being said, as I've said many other times in this court and to both of these women, they're two of the finest parents that I've met in this area. … I've paid them both the greatest compliment that I know, which is that I'd gladly leave my two children with either one of these women for any period of time and I know those children would be well taken care of and provided for. They're both great parents and I truly believe that.
>
> The allegations that we've heard… are beneath these people; but I think we're [sic] the result of a emotional and unpleasant break up where the custody of a child is in dispute. I think we see that normal reaction all the time and I think if you were to consider this case in the context of other cases that you see what's happened here, if you take all of the allegations as absolutely true, you don't have [a] very serious set of allegations here. Nobody has behaved so heinously that I have any worry about Alissa. I think that these really are small things.
>
> …

> Alissa… is one of the most intelligent, well-grounded children that I've ever met for her age or actually just about any age of a child that I've had to deal with as guardian ad litem. She gets great grades. She's well spoken. She's extremely well raised. … And she's a young lady who although young, is capable of talking about some of these issues. Capable but doesn't enjoy it; and so one of my jobs, Your Honor, is to relate her wishes to you.
>
> ...
>
> If it were up to [Alissa], she said … I'd go back to this week to week arrangement. I don't know why I'm not doing that. She had seen some arguing but nothing significant between [Bowden and Korslin].
>
> …
>
> [W]ith regard to placement, I've given this a lot of thought and I've gone through a lot of pads of paper here trying to come up with different things and thinking I was clever or not and I keep coming back to one thing over and over again and I've discussed it with my partner at length and I don't see how there's any doubt in my mind that the best interests of Alissa are served by shared equal placement between these two women.
>
> (R. 58:89-94).

The court made an oral ruling on all placement issues in October 2010. In making its ruling, the court stated:

> I will begin by reviewing what's taken place up to this point. As the parties will recall, on January 7 of 2010, I found that [Bowden] had established that two requirements set forth in Holtzman had been met, in that she had a parent-like relationship with Alissa which had been encouraged and supported by [Korslin].

> And that, number two a triggering even had occurred when [Korslin] reduced and ultimately terminated [Bowden's] placement schedule with Alissa in 2008. I then turned to Traxel [sic] and Roger D.H. Both of these cases dictate that a court in custody decisions must give special weight to a biological parent's decision by first presuming that those decisions are in the child's best interest.
>
> In applying this presumption, the first issue that had to be addressed was what is the starting point for visitation and placement. … [The] real starting point was defined by Amy's testimony and statements which indicated, quote, I don't want a schedule. I don't want to have to work around a schedule for every other weekend. I just—it's my choice when Alissa see whoever she sees, unquote.
>
> Based upon the evidence presented up to that point, I found that [Bowden] had overcome the presumption. I also found that [Korslin] could reestablish that presumption. That led to the hearings on March 17 of 2010 and April 28 of 2010. … In reviewing [Korslin's] comments, I find that her starting point essentially is not changed.
>
> (R. 63:2-3).

The court then reiterated the reasons that placement at Korslin's discretion was not appropriate, finding that the disputes leading to Korslin's decision to stop placement did not "rise to the level to terminate or modify placement" and that although both sides had engaged in "game playing," this was "not uncommon in divorce cases or custody and placement hearings," and therefore was not a reason to grant placement solely at one party's discretion. (R. 63:5-10). The court concluded that:

> Based on these facts, I find that [Korslin] has not reestablished the presumption that [Korslin's] decision

> regarding nonparental visitation with Alissa is in Alissa's best interests.
>
> According to in re Nicholas L, I am now to have my own assessment of what is in the best interests of the child taking into consideration the factors set forth in Wisconsin Statute Section 767.41 paren five.
>
> (R. 63:11).

The court then reviewed each of the factors. The court particularly discussed Dr. Nelson's testimony, noting that Nelson had testified that total disruption of Alissa's contact with Bowden would have significant negative consequences for Alissa, and that significant limits on that contact would cause "similar, although lesser, harm." (R. 63:14-15). The court also discussed the parties' difficulty in maintaining a positive personal relationship:

> In the past, the parties were able to put their personal problems aside and communicate with each other. However, their ability to coorperate and communicate has diminished. With that being said, their inability to communicate with each other has not had a negative effect on Alissa.
>
> It is obvious that the parties must improve in this area, ad they should realize that even if they don't want to do this for themselves, that they should do this for the good of their child. I am confident that this issue will improve with the aid of parenting classes and the passage of time.
>
> (R. 63:15).

The court also addressed Korslin's conduct in the context of whether Alissa's parents supported her relationship with the other:

> We have gone from the parties raising Alissa together to a week on, week off placement, to the present placement schedule. [Korslin] testified that she has

> fostered the relationship between [Bowden] and Alissa. That she recognizes the importance of maintaining that relationship. And that she feels that the relationship is in Alissa's best interests.
>
> Even though she says those things, [Korslin] has reduced placement and threatened to terminate it if certain things don't happen. Now [Korslin] does not want to schedule but rather leave it to her sole discretion when and for how long [Bowden's] placement with Alissa will be. This behavior reverts back to the game playing I referred to before.
>
> If [Bowden] plays by [Korslin's] rules, [Bowden] will get to see Alissa more. If she doesn't, she may not get to see her at all. Again, Alissa is being used as the pawn to dictate [Bowden's] behavior.
>
> (R. 63:16).

After reviewing the factors, the court gave the parties two weeks to attempt to reach an agreement. When that failed, the court ordered that Bowden have placement every other weekend during the school year, with one non-overnight placement on alternate weeks, every other week during the summer, and certain holidays. (R. 67:9). Korslin timely cross-appealed from that portion of the court's order. (R. 87).

STANDARD OF REVIEW

The court of appeals will sustain a discretionary decision if the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***Liddle v. Liddle***, 140 Wis.2d 132, 136, 410 N.W.2d 196 (Ct.App.1987). Findings of fact will be upheld unless clearly erroneous. WIS. STAT. § 805.17(2). The court will generally look for reasons to sustain the circuit court's discretionary decision. ***Loomans v. Milwaukee Mut. Ins.***

Co., 38 Wis.2d 656, 662, 158 N.W.2d 318 (1968). When a party contends that the circuit court erroneously exercised its discretion because it applied an incorrect legal standard, that issue is reviewed without deference. ***F.R. v. T.B.***, 225 Wis.2d 628, 637, 593 N.W.2d 840 (Ct.App.1999).

ARGUMENT

I. The court applied the correct legal standard in making its ruling.

A. The court correctly followed *Holtzman*, *Troxel*, and *Nicholas L.* in making its ruling.

The legal standard in this matter requires three steps:

1. As a threshold requirement, the equitable parent must show that he has a parent-like relationship with the child and a significant triggering event justifies state intervention in the child's relationship with the biological parent; *see* ***Holtzman v. Knott (in re H.S.H.-K.)***, 193 Wis. 2d 649, 533 N.W.2d 419 (1995).

2. If the threshold elements are met, the court applies a rebuttable presumption that the biological parent's offer of placement is in the child's best interests; *see* ***Martin L. v. Julie R.L. (in re Nicholas L.)***, 2007 WI App 37, ¶4, 299 Wis.2d 768, 731 N.W.2d 288.

3. If the equitable parent is able to rebut the presumption, the court may fashion a placement order based on its own assessment of the child's best interests; *see* ***id.***

The second step is required in order to comply with the due process requirement that:

> [I]f a fit parent's decision [on placement] becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.
>
> ***Troxel v. Granville***, 530 U.S. 57, 70, 120 S.Ct. 2054 (2000).

Wisconsin courts have an established method of applying this "special weight" requirement:

> Pursuant to ***Troxel*** and ***Roger D.H. [v. Virginia O.,*** 2002 WI App 35, ¶9, 250 Wis.2d 747, 641 N.W.2d 440], the court accords special weight by applying a rebuttable presumption that the fit parent's decision regarding grandparent visitation is in the best interest of the child. In other words… the rebuttable presumption is the legal means of giving the parent's decision special weight. Thus, the court is to tip the scales in the parent's favor by making that parent's offer of visitation the starting point for the analysis and presuming it is in the child's best interests. It is up to the party advocating for nonparental visitation to rebut the presumption by presenting evidence that the offer is not in the child's best interests. The court is then to make its own assessment of the best interests of the child.
>
> ***In re Nicholas L.***, ¶12 (citations and punctuation omitted)

This is precisely the standard the court applied here. The court began by finding that Bowden had shown she has a parent-like relationship with Alissa and a significant triggering event justifies state intervention in the Alissa's relationship with Korslin. (R. 63:2-3). The court then required Bowden to show—at a

separate hearing set out for that purpose—that Korslin's offer of placement was not in Alissa's best interest. (R. 49, 63:2-3).

The court then applied the second step set out above:

> I then turned to Traxel [sic] and Roger D.H. Both of these cases dictate that a court in custody decisions must give special weight to a biological parent's decision by first presuming that those decisions are in the child's best interest.
>
> (R. 63:2-3).

The court also noted that because there had been three separate hearings on placement, Korslin had had an opportunity to make a different offer, but that her offer "essentially is not changed." (R. 63:3). The court then explained why Korslin's offer was not in Alissa's best interest. (R. 63:5-10.) Only at the conclusion of that discussion did the court make its own assessment of Alissa's best interests:

> Based on these facts, I find that [Korslin] has not reestablished the presumption that [Korslin's] decision regarding nonparental visitation with Alissa is in Alissa's best interests.
>
> According to in re Nicholas L., I am now to have my own assessment of what is in the best interests of the child taking into consideration the factors set forth in Wisconsin Statute Section 767.41 paren five.
>
> (R. 63:11).

The court's ruling shows it applied the proper legal standard by following ***Holtzman***, ***Troxel***, and ***Nicholas L***. to the letter. Any challenges to the legal standard applied by the court should be rejected.

B. Nothing in WIS. STAT. § 767.43 provides a basis to challenge the court's order.

In her challenge to the court's ruling, Korslin raises an argument that was never raised to the circuit court: whether the court should have applied WIS. STAT. § 767.43 in determining what placement schedule would be in Alissa's best interests. That is, Korslin argues that when the court made its final assessment of Alissa's best interests, it should have applied granted Bowden "reasonable visitation rights" under § 767.43(1) rather than determining what placement would be in Alissa's best interests based on the factors set out in WIS. STAT. § 767.41(4). (Br. 19).

This issue was raised for the first time on appeal. In her post-trial brief, Korslin never cited WIS. STAT. § 767.43 or argued it should apply in any way to the court's ruling. (R.59). Korslin's motion for reconsideration—after filed after the court made the ruling Korslin is challenging on appeal—never cited § 767.43. (R. 74). At oral argument on the reconsideration motions, Korslin never cited § 767.43, much less argued it should apply. (R. 76:14-24).

A party who appeals must be able to show "by reference to the court record, that the issue was raised before the circuit court." ***State v. Caban***, 210 Wis.2d 597, 604, 563 N.W.2d 501 (1997) (citation omitted). In cases in which the appellant does not do so, the court of appeals will not "blindside trial courts with reversals based on theories which did not originate in their forum." ***State v. Rogers***, 196 Wis.2d 817, 827, 829, 539 N.W.2d 897 (Ct.App.1995). Put another way, the appellant must "articulate each of its theories to the trial court to preserve its right to appeal." ***Id.*** at 828-29. By failing to raise the application of § 767.43 to the trial court, Korslin has failed to preserve this issue for review.

In any event, Korslin's challenge fails. In ***F.R. v. T.B. (in re Visitation of Z.E.R.)***, 225 Wis.2d 628, 640-641, 593 N.W.2d 840,

845 (Ct. App. 1999), the court concluded that when granting grandparent visitation under WIS. STAT. § 880.155—a guardianship statute that uses the identical relevant language to 767.43—the court would determine "reasonable visitation rights" by reference to the predecessor to 767.41(5), 767.24(5) (1997-98). The court reasoned that the family code placement factors are "the most extensive explanation of what a trial court should consider when determining the best interests of the child" in the third-party visitation context. ***Id.***

While this is not an action under § 767.43, the same reasoning applies here. Nothing in ***Holtzman*** lists any factors that must, may, or may not be considered in determining the best interest of the child. In this case, the court chose to apply the factors set out in WIS. STAT. § 767.41(5), focusing particularly on the child's and parents' wishes, the need for the child to have adequate time with both parents, the testimony of Dr. Nelson, and Korslin's use of placement as leverage. (R. 63:16). All of these factors are entirely relevant to what placement was in Alissa's best interest.

And while Korslin objects to application of "the equivalent of a family law placement Order," (Br. 19), she does not explain how any of the factors relied on by the court are inapplicable. For example, is it an error for the court to consider the wishes of the child in fashioning an order under ***Holtzman***? Is it an error to consider the reports of experts? Is it an error to consider the child's need for meaningful periods of placement with both parents? Is it error to consider the level of cooperation and communication between the parties?

All of these factors apply. They apply not because this case was brought under the family code—it wasn't—but because § 767.41(5) lists generally applicable factors to consider whenever the best interests of a child are at issue. They also apply because Alissa is bonded to both Bowden and Korslin as her parents. It is

only natural, then, that the court would compare this to a divorce case, and determine Alissa's best interests by reference to the same considerations in divorces and other types of family cases.

C. The court gave "special weight" to Korslin's offer of placement.

Korslin next complains that the court did not give her offer of placement that "special weight" required under ***Troxel v. Granville***, 530 U.S. 57, 70, 120 S.Ct. 2054 (2000). In ***Troxel***, the Supreme Court reviewed a Washington circuit court's decision to grant grandparent visitation. ***Id.*** at 67. The statute in question permitted "any person" to petition for visitation "at any time" and permitted the court to grant visitation whenever it was in the best interest of the child. ***Id.*** The court held this violated the parent's substantive due process rights to determine the care and custody of their child:

> The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption.
>
> …
>
> In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.
>
> ***Id.*** at 69-70.

Wisconsin courts have interpreted this requirement to mean that the court must make the parent's offer of visitation the starting point and presuming it is in the child's best interest. If the party advocating for visitation rebuts the presumption, then the court will make its own assessment of the child's best interests. ***In re Nicholas L.***, 299 Wis.2d 768, ¶12.

As explained above, that is exactly what happened here. The court placed the burden on Bowden to rebut the presumption that Korslin's offer was in Alissa's best interest. Then, during further hearings, the court permitted Korslin to make a more reasonable offer that would also be entitled to the presumption. Korslin declined to do so. It was only at that point that the court proceeded to make its own assessment of Alissa's best interests. (R. 63:2-11).

Korslin does not articulate any specific objections to this procedure. Instead, she recites the evidence in her favor, and apparently argues the court did not grant her "special weight" because its reasoning and fact findings were not always consistent with her position. She also seems to argue that "special weight" means that the court cannot base its decision on expert testimony from Dr. Nelson and must accept her assertion that she has no desire to cut off placement as true.

This is simply not the law. As the court in ***Nicholas L.*** concluded:

> [T]he court applied the proper standard and its findings are supported by the evidence presented. While due process prevented the court from interfering with [the mother's] decision… simply because it disagreed with it, it did not require the court to impose an irrebuttable presumption in [the mother's] favor. The court was well within its rights to make its own assessment of the situation and conclude that [the petitioners] had presented evidence rebutting the presumption that [the

> mother's] offer of supervised visitation was in [the children's] best interests.
>
> ***Id.***, ¶16.

The court of appeals' reasoning in ***Nicholas L.*** is equally applicable here. In this case, the sheer unreasonableness of Korslin's offer—no legally enforceable placement at all, for a person who had been a de facto parent for 12 years at the time the court made its ruling—made rebutting the presumption relatively easy. Simply because the court ruled against Korslin does not mean her offer did not receive special weight.

II. The court's reasoning and fact findings were supported by credible and substantial evidence.

As set out above, the court stated in detail its findings and reason for making the order it did. Those findings are set out in full in the background section above, and need not be repeated here. While Korslin's argument is phrased as whether the court properly followed ***Troxel***, in many places it appears to challenge the court's findings of fact.

The key reasoning or fact finding underlying the court's ruling was simple: the placement schedule ordered was necessary to preserve Alissa's relationship with Bowden. Or, put another way, giving Korslin unilateral decision-making authority would create an unacceptable risk that, in Dr. Nelson's words, Alissa would experience "additional grief, compromised functioning in later life and perhaps resentment toward [Korslin]." (R. 49:32).

This is not only reasonable, it is common sense. This case is not a unique one—it is a situation with two very good parents who have serious difficulties communicating. The solution to that problem is not to give one parent all the power and decision-making authority and hope she uses it appropriately. The solution

is to set a placement schedule that allows both parents time with the child, allow them to settle in, and have confidence that in most cases "the issue will improve with… the passage of time." (R. 63:15).

Korslin's challenges to the court's findings are devoted almost entirely to a recitation of the evidence and testimony she presented, often without acknowledging where contrary evidence was presented and never acknowledging the standard of review. Korslin even seems to dispute the authority of the court to make the findings in the first place, complaining that the court "injected his personal opinions as to who was exaggerating the facts." (Br. 55). Rather than responding to every omission or misstatement, Bowden will refer the court to the arguments set out above, which show the factual basis for the court's order. However, several statements in Korslin's brief bear mention.

First, Korslin insists that there is "no testimony" that Korslin "had used the child as a pawn on even a single occasion." (Br. 56). This, of course, ignores Korslin's own testimony that she used placement to "teach [Bowden] a lesson," and that Korslin cut off placement entirely in retaliation for Bowden's decision to file this action. (R. 56:83, 58:41, Br. 56).

Similarly, Korslin argues that the court "refused to recognize" that "[Bowden] is the reason [Bowden's] placement has been limited, not [Korslin]." However, as set forth above, the court had ample evidence showing that Korslin had limited placement for reasons unrelated to Alissa's best interests. (R. 63:13).

Finally, Korslin takes the court to task for having "placed blame upon [Korslin] for… allowing [Bowden] to be a part of the child's life." (Br. 56). This misreads the court's ruling. Korslin chose to involve Bowden in Alissa's life as a parent. That decision had consequences for Alissa: Alissa became bonded to Bowden as a parent. That decision also had legal consequences: Korslin gave

up her right to unilaterally determine "when Alissa sees whoever she sees," at least as far as Bowden is concerned. (R. 49:13-14). The court is not blaming Korslin for anything; it is simply enforcing the legal consequences of a decision Korslin made.

Korslin's challenges to the court's fact findings are puzzling, to say the least, in the face of Korslin's repeated acknowledgements that placement with Bowden is in Alissa's best interests. Korslin states she "firmly believes that maintaining the relationship between [Bowden] and the child is in the child's best interests." (Br. 46). She repeatedly asserts that she does not intend to cut off contact between Bowden and Alissa if given unilateral authority to set a schedule. (Br. 25, 27, 31, 34). She also admits that Bowden would be entitled to "a remedy" if placement were cut off. (Br. 35). Yet she insists that no enforceable placement schedule be entered.

The bottom line is that Alissa wants placement with Bowden. Bowden, of course, wants placement with Alissa. Korslin acknowledges that Alissa should have placement with Bowden. **If Alissa should have placement with Bowden—and all parties seem to agree she should—then the court should order placement. Period, end of sentence.** Korslin's insistence that no placement whatsoever should be ordered in the face of such an obvious need for it is perhaps the most telling sign that a placement schedule is necessary. The court's findings underlying that schedule are not clearly erroneous.

CONCLUSION

For the reasons given above, Appellant-Cross-Respondent Belva Bowden and the Guardian ad Litem respectfully request the court affirm the order granting Bowden placement.

Dated this 16th day of April, 2012.

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FORM & LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(6)(c) and (8)(b)-(c), Stats., for a brief produced with a proportional serif font. The length of the reply portion of this brief is 695 words. The response portion of this brief is 5,521 words.

MAILING CERTIFICATION

I certify that this brief was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on April 16, 2012. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

ELECTRONIC FILING CERTIFICATION

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of WIS. STAT. RULE 809.19(12). I further certify that the electronic copy of this brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certification is included as part of the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of April, 2012.

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