STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2017-AP-002132

In re the Paternity of B.J.M.

Timothy W. Miller,

Joint-Petitioner-Appellant,

v.

Angela L. Carroll,

Joint-Petitioner-Respondent,

ON APPEAL FROM THE CIRCUIT COURT OF BARRON COUNTY

THE HONORABLE J. MICHAEL BITNEY, PRESIDING

BRIEF OF RESPONDENT

SCHWARTZ LAW FIRM
Brandon M. Schwartz (#1084533)
Michael D. Schwartz (#1018933)
600 Inwood Avenue N., Suite 130
Oakdale, Minnesota 55128
Telephone: 651-528-6800
Facsimile: 651-528-6450
Email: brandon@mdspalaw.com
Email: michael@mdspalaw.com

Dated: March 29, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii-iv

I. STATEMENT OF THE ISSUES PRESENTED 1-2

II. STATEMENT ON ORAL ARGUMENT AND PUBLICATION. 2

III. STATEMENT OF THE CASE 2-3

a. Procedural History 2-3

IV. STATEMENT OF THE FACTS 3-25

V. STANDARD OF REVIEW 25-26

VI. ARGUMENT 26-43

A. THE INNOCUOUS FACEBOOK "FRIENDSHIP" IS NOT A BASIS FOR DISQUALIFICATION OR RELIEF 26-35

1. Judge Bitney's determination on the subjective portion of the test in binding 27

2. Mr. Miller has failed to establish that a reasonable person could question Judge Bitney's impartiality 27-35

B. MR. MILLER'S PATTERN OF AND SERIOUS INCIDENTS OF DOMESTIC ABUSE, THE SAFETY OF B.J.M., THE SAFETY OF MS. CARROLL, AND THE BEST INTERESTS FACTORS SUPPORT THE COURT'S *DECISION REGARDING CUSTODY, PLACEMENT AND CHILD SUPPORT* 35-43

1. The presumption set forth in Wis. Stat. § 767.41(2)(d)(1) required an award of sole legal custody of Ms. Carroll 38-42

2. **The paramount concerns of the safety and well-being of B.J.M. and Ms. Carroll in determining physical placement required the Circuit Court to grant Ms. Carroll's Motion 42-43**

Conclusion 43-44

Form and Length Certification 46

Certificate of Compliance with Wis. Stat. § 809.19(12) 47

Certificate of Service 48

TABLE OF AUTHORITIES

CASES:

Adams v. Adams, 190 N.W. 359 (Wis. 1922) 36

Gehr v. Sheboygan, 260 N.W.2d 30 (Wis. 1977) 36

Glidewell v. Glidewell, 869 N.W.2d 796 (Wis. Ct. App. 2015) 41

Greene v. Hahn, 689 N.W.2d 657 (Wis. Ct. App. 2004)..... 36, 37

Hartung v. Hartung, 306 N.W.2d 16 (Wis. 1981)..... 26

In re Adoption of R., 297 N.W.2d 833 (Wis. 1980)..... 26, 36

Koeller v. Koeller, 536 N.W.2d 216 (Wis. Ct. App. 1995) 35-36

Law Offices of Herssein v. United Servs. Auto Ass'n, 2017 Fla. App. LEXIS 12056 (Fl. Ct. App. Aug. 23, 2017) 31

Licary v. Licary, 484 N.W.2d 371 (Wis. Ct. App. 1992) 26, 37

Murray v. Murray, 383 N.W.2d 904 (Wis. Ct. App. 1986).....25-26

Pollock v. Pollock, 77 N.W.2d 485 (Wis. 1956)..... 43

Sluss v. Commonwealth, 381 S.W.3d 215 (Ky. 2012)..... 32

State v. Carpure, 683 N.W.2d 31 (Wis. 2004)..... 27

State v. Forguson, 2014 WL 631246 (Tenn. Crim. App. 2014)..... 33

State v. Gudgeon, 720 N.W.2d 114 (Wis. Ct. App. 2006)..... 26

State v. Madden, No. M2012-02473-CCA-R3-CD, Tenn. Crim. App. LEXIS 208, 2014 WL 931031 (Tenn. Crim. App. Mar. 11, 2014) 33

State v. McBride, 523 N.W.2d 106 (Wis. Ct. App. 1994) 26, 27

State v. Pirtle, 799 N.W.2d 492 (Wis. Ct. App. 2011) 26, 27

STATUTES:

Wis. Stat. § 67.451(1)(b) 36

Wis. Stat. § 767.41(5)(am) 37

Wis. Stat. § 767.41(5)(bm) 1, 37, 42

Wis. Stat. § 767.41(2)(d)(1) 38, 39, 40, 41

Wis. Stat. § 767.41(2)(d)(1)(a) 38

Wis. Stat. § 809.22 2

Wis. Stat. § 809.23(1)(a)(2) 2

Wis. Stat. § 813.12(1)(am) 38, 42

Wis. Stat. § 940.19 42

Wis. Stat. § 940.20 ..... 38, 42

I. STATEMENT OF THE ISSUES PRESENTED.

a. Does being a "friend" on Facebook overcome the presumption that judges are fair, impartial, and capable of ignoring any biasing influences?

CIRCUIT COURT HOLDING:

No. The Circuit Court denied Timothy Miller's post-order Motion holding that the Facebook "friendship" did not satisfy either the subjective or objective prong of the bias inquiry. (Record ("R") 120, Miller App. 15)

b. Does "liking" a Facebook post constitute an ex parte communication between a party and a judge?

CIRCUIT COURT HOLDING:

No. The Circuit Court held that Judge Bitney did not "like" any Facebook posts, respond to any Facebook posts, or conduct any communication, ex parte or otherwise, with Angela Carroll. (R120; App. 210-211).

c. Due to Timothy Miller's pattern of serious incidents of interspousal battery, did the Circuit Court properly consider the safety of Angela Carroll as the paramount concern pursuant to Wis. Stat. § 767.41(5)(bm) in determining periods of physical placement?

CIRCUIT COURT HOLDING:

Yes. The Circuit Court considered the relevant facts, applied the proper standard of law and, using a demonstrated rational process, reached

a conclusion that a reasonable judge could reach in granting Angela Carroll's Motion to Modify Legal Custody and Placement. (R92, Miller App. 8-14).

II. STATEMENT ON ORAL ARGUMENT AND PUBLICATION.

Angela Carroll ("Carroll") would welcome the opportunity to answer during oral argument any questions the Court may have arising from the parties' respective briefs, particularly as it relates to the attempt to disqualify Judge Bitney by Timothy Miller ("Miller"). Carroll concurs that the issue of disqualifying a judge based upon an innocuous electronic social media ("ESM") connection presents a novel issue in which established rules of law are applied to modern factual situations warranting oral argument pursuant to Wis. Stat. § 809.22 and publication pursuant to Wis. Stat. § 809.23(1)(a)(2).

Carroll also concurs that the Circuit Court's findings and decisions to modify custody and placement do not meet the standard for publication and that the issue should be adequately addressed by the parties' respective briefs.

III. STATEMENT OF THE CASE.

a. Procedural History.

On August 30, 2017, Carroll filed her Motion to Modify Legal Custody, Physical Placement and Child Support. (R1). The Circuit Court appointed a Guardian ad Litem ("GAL") on November 1, 2016. (R23).

The Circuit Court conducted the hearing on Carroll's Motion on June 7-8, 2017. (R128; R129). On July 14, 2017, the Circuit Court granted Carroll's Motion to Modify Legal Custody and Physical Placement. (R92). On August 1, 2017, the Circuit Court entered its Order memorializing the findings, conclusions and orders set forth in the July 14, 2017, Decision Regarding Custody, Placement and Child Support. (R97).

On August 21, 2017, Miller filed his Motion for Reconsideration. (R103). On August 31, 2017, the Circuit Court entered the Stipulation for Order on Child Support. (R112).

The Circuit Court, after briefing from the parties, heard oral argument on October 6, 2017 with regards to Miller's Motion for Reconsideration. (R130). Miller's Motion was denied from the bench (*Id.*), and the Circuit Court subsequently entered its Order Denying Motion for Reconsideration on October 10, 2017. (R120). On October 26, 2017, Miller filed his Notice of Appeal. (R121). The Supplemental Order to October 10, 2017 Order Denying Motion for Reconsideration was entered on December 19, 2017. (R133).

IV. STATEMENT OF THE FACTS.[1]

Miller has a long criminal history. In 2003, he pled no contest to bail jumping-misdemeanor. (App. 167 – App. 168). Miller pled no contest

[1] References to the Appendix filed by Carroll will be cited as "App." References to the Appendix filed by Miller will be cited as "Miller App."

to disorderly conduct in 2006. (App. 169 – App. 170). He was also found guilty due to a no contest plea to battery in 2006. (App. 171 – App. 172). In 2008, Miller pled no contest to THC and drug paraphernalia possession. (App. 173 – App. 174). In 2010, Miller pled guilty to disorderly conduct. (App. 175 – App. 177). Miller pled guilty to criminal damage to property and disorderly conduct in 2011 (which involved Carroll and B.J.M.) (App. 124).

Carroll's Motion to Modify Legal Custody, Physical Placement and Child Support was filed on August 30, 2016, (R4), just twelve (12) days after the Circuit Court issued a 10-year Domestic Abuse Injunction against Miller, in favor of Carroll, finding:

> There is a substantial risk the respondent may commit 1st degree intentional homicide under §940.01, Wis. Stats., 2nd degree intentional homicide under §940.05, Wis. Stats., 1st, 2nd, or 3rd degree sexual assault under §§940.225(1), (2) or (3), Wis. Stats., or 1st or 2nd degree sexual assault under §§948.02(1) or (2), Wis. Stats., against the petitioner resulting in an injunction order for not more than 10 years.

(R11, App. 149-150).

With that background, and for ease of this Court's review of the record, the following facts are presented chronologically in the same manner as they were admitted into evidence during the two-day evidentiary hearing on Carroll's Motion.

SHANNON STEINBUCH:

Ms. Steinbuch has known Miller for five years and has no ill will against Miller. (App. 1-2). Ms. Steinbauch and Carroll live near each other and Ms. Steinbach typically spends time with Carroll and B.J.M. two to four times per week during the years leading up to the evidentiary hearing. (App. 2).

Ms. Steinbuch testified that Carroll is a wonderful mom, she is strict in that she makes B.J.M. follow through on his behaviors, she seeks to instill in B.J.M. what is appropriate and what is not and what is acceptable and what is not. (App. 2-3). Ms. Steinbuch would trust her child in Carroll's care. (App. 3). Additionally, the relationship between L.W, E.W. and B.J.M. is strong and Carroll's older two sons (L.W. and E.W.) are good role models for B.J.M. (App. 7).

Further, Ms. Steinbuch could definitely recognize a difference in B.J.M. when he returned from Miller's care; B.J.M. would be upset, aggravated, emotionally distraught and at times physical with Carroll. (App. 3-4). Ms. Steinbuch has even seen B.J.M. grab Carroll's throat and swing at her after returning from Miller's care and call Carroll names. (App. 4-5).

Ms. Steinbuch also saw Carroll after Miller's threats to end her life on August 9, 2016. (App. 5). Carroll feared for her life, was crying and shaking. (App. 5-6). Ms. Steinbuch found Carroll's fear of Miller credible;

Carroll installed a security system and is constantly looking over her shoulder. (App. 6).

Although Ms. Steinbuch provided a letter to the GAL (App. p. 7, 105), the GAL never contacted Ms. Steinbuch. (App. p. 14).

JESSICA MEYERS:

Ms. Meyers testified that Carroll is very gentle and loving with B.J.M., she makes B.J.M. respect others and mind his manners. Carroll requires B.J.M. to complete his homework and chores and enforces a routine bedtime for B.J.M. (App. 8).

On occasion Ms. Meyers has seen B.J.M. very defiant and stutters and stammers a lot more when he comes back from Miller's care, who she has known for 20 years. (App. 9). Ms. Meyers, who is a bar manager, has also seen Miller with B.J.M. in her bar, during which time, Miller would be more interested in the bar conversations he was having and alcohol he was consuming than B.J.M. (App. 9-10). Ms. Meyers has even witnessed Miller, after consuming alcohol at a prior bar, consume four Bombay Sapphires and tonics before picking B.J.M. up from CCD. (App. 11). Ms. Meyers also has firsthand knowledge of Miller getting very angry at individuals in a bar or tavern and either punch them or shove them. (App. 13).

Ms. Meyers also submitted a letter to the GAL (App. 106 – 108), but was not contacted by the GAL. (App. 14).

MICHAEL CARROLL:

Mr. Carroll (Carroll's brother) has worked at the Barron County Sheriff's Department for two years on patrol duty and previously was a Police Officer for the City of Rice Lake. (App. 15).

Mr. Carroll has never seen Carroll intoxicated when she had or was supposed to have B.J.M. in her custody. Mr. Carroll, who sees Carroll and her children one to two times per week, testified that Carroll is a phenomenal mother, takes care of her boys, is responsible, has a good job, provides anything and everything for the boys (who all get along very well). (App. 16). Carroll treats B.J.M. the same as her other two children, each of whom are well-behaved and respectful boys. (App. 16-17). The routine with Carroll is structured and stable. (App. 17).

When B.J.M. comes back from Miller's care, he is a little wild and hard to control. After a couple days back with Carroll, B.J.M. is back to being calm and well-behaved. (App. 18).

Mr. Carroll testified that the stress of the relationship battles have been hard on B.J.M. and caused him to act out, not listen, and be disrespectful, however, when B.J.M. got into counseling he appeared happier and almost refreshed. (App. 19).

Mr. Carroll testified that Carroll is afraid Miller is going to kill her. (App. 20). Based on the threats, Mr. Carroll believes it is in the best interest for B.J.M. to move with Carroll. Carroll provides stability and

B.J.M. being around Carroll and his half-brothers full-time would be extremely beneficial. (App. 21). Mr. Carroll also testified that the move would be best for Carroll due to the level of stress and fear she has had with Miller and the further she can get away from Miller the better. (App. 21-22).

Mr. Carroll also provided a letter to the GAL (App. 109) and was never contacted by her. (App. 22).

KRISTY MORAN:

Miller's counsel stipulated, and the Circuit Court qualified, Ms. Moran as an expert in domestic abuse. (App. 23). In any given year, Ms. Moran works with between 323 and 420 victims of domestic abuse. (App. 24-25). Ms. Moran met Carroll in 2011 when Carroll was the victim of Miller's abuse. (App. 23).

Ms. Moran credibly testified regarding victim-centered behaviors from victims of domestic violence and how they learn to cope with the abuse and control that the offender is perpetuating against them. Victims will often take back statements they made to law enforcement and statements they made regarding restraining orders. (App. 25). Domestic abuse victims typically recoil or recant their statement out of fear or intimidation of what is going to come from the abuser. Ms. Moran witnessed this from Carroll in 2011. (App. 26). After the injunction hearing, Carroll became extremely fearful and began to withdraw her

statements in person and telephone against Miller; consistent with the victim-centered behaviors or victimology. (App. 29). And while Carroll ultimately dropped her injunction request in 2011, Miller was convicted of counts three and four, which were disorderly conduct and criminal damage to property. (App. 27-28).

Ms. Moran also has experience with battered woman's syndrome as well as an underlying minor in women's studies which focuses on the dynamics of gender and abuse within vulnerable populations. Ms. Moran's continuing education affords her training opportunities to gain further education in battered woman's syndrome. "Battered woman's syndrome" is a term that professionals use to identify a female victim who has entered a lengthy period of domestic abuse by an intimate partner and therefore has certain characteristics and traits that they now operate under because of the abuse. The victims typically have a diagnosis of some type of depression, anxiety, or PTSD. A victim who has endured any type of abuse for a period of time would understand and know nonverbal cues that are provided by their abuser. (App. 30-31). Factors that make it hard for a battered woman to leave their abuser are fear, concerns of going out in the community, fear of going to a joint child's activities and running into the individual, or fear of retaliation down the road. A victim of battered woman's syndrome is an individual who fears daily activities. (App. 32-33). Further, it is difficult leaving an abuser when a joint child is involved

because it is usually the hardest for the victim – the victim fears that the threats and the intimidation of the abusive parent will increase and that the child will be the next target of the abuse. (App. 33). It typically takes a battered woman seven times before she is finally able to leave her abuser. (App. 34).

Based upon her education, training and experience in domestic abuse and battered women's syndrome, Ms. Moran provided recommendations to help ensure the safety of Carroll and B.J.M. (App. 121 – 123, 151 – 154).

In her 14-year career, the letter she provided to the GAL in this case was the first time she had ever written on behalf of a victim. (App. 36). Ms. Moran wrote the letter to the GAL because the abuse by Miller against Carroll was probably the worst case she had ever dealt with aside from homicides. (App. 37).

In her 14-year career, Ms. Moran had never had an issue with enforcing a restraining order. Ms. Moran had never spent as much time drafting letters, visiting law enforcement agencies and asking why the injunction had not been enforced as she did here. Ms. Moran fears that if Carroll is still in this community that the injunction would not be enforced based on previous decisions the District Attorney's Office had made. As a result, Ms. Moran felt a move out of the community by Carroll and B.J.M. was appropriate as Rice Lake is too small of a community. It would be

safer for all parties involved if Carroll were allowed to move out of Barron County. (App. 38-39).

Ms. Moran had worked with GALs in previous custody disputes and domestic abuse cases. (App. 24). Ms. Moran even provided the Domestic Abuse Guide Book for Wisconsin Guardian ad Litems to the GAL in this matter. (App. 40). Notwithstanding, the GAL never contacted Ms. Moran about her letter or the case. (App. 24).

RITA CARROLL:

Carroll and B.J.M. have lived with Rita Carroll (Angela Carroll's Mother) since February 2017, and prior to living together, lived within a half a mile of each other. Rita Carroll sees Carroll on a daily basis and has seen B.J.M. with Carroll. (App. 42). Rita Carroll has never had the opportunity to witness Miller parent B.J.M. (App. 41, 43).

Rita Carroll makes cookies, does chores, goes for walks and bike rides, builds things, watches movies and plays with B.J.M. (App. 43). Rita Carroll has also witnessed B.J.M. with his two older brothers and it is a typical brother relationship. (App. 44).

Carroll is a very fair mother, very calm, responsible, and conscientious. Carroll makes sure B.J.M. has a regular bedtime. Carroll likes to make sure that B.J.M. gets his reading completed and helps him with his school work – a high priority to Carroll. (App. 44-46).

Carroll does not speak negatively about Miller to B.J.M. or in front of B.J.M. and neither does Rita Carroll. (App. 45-46).

Rita Carroll planned to move with Carroll to Durand. (App. 47).

Rita Carroll notices a difference with B.J.M. after he has been with Carroll for a period of time versus coming back from Miller's home. After returning from Miller's care, B.J.M.'s stuttering is more profound. (App. 47-48). When B.J.M. returns from Miller's care he is very combative and extremely disrespectful. (App. 49).

Rita Carroll testified that she believes a move to Durand is in the best interest of B.J.M. (App. 50). She believes time away from Miller with the stability that Carroll and Rita Carroll provide on a continual basis would be very beneficial. (App. 50). Rita Carroll's plan is to stay with Carroll and B.J.M. for the foreseeable future to help protect them from Miller. (App. 52-53).

Rita Carroll's contact with the Guardian ad Litem was a total of 16 minutes. (App. 51).

KARL ADER:

Counsel for Miller stipulated that Mr. Ader was qualified as an expert to testify regarding PTSD and treatments for PTSD. (App. 54; *see also* App. 156 – 157).

Mr. Ader has treated Carroll for PTSD since August of 2016. (App. 55, 158). Mr. Ader testified that the adjustment issues, coping with

anxiety, depression, and then the post-traumatic stress disorder Carroll was treating for were part of her PTSD. (App. 55).

Mr. Ader found Carroll to be honest when she was talking to him about her fears and that she was trying to manipulate his opinion to gain an advantage from the court system. (App. 56-57).

The Guardian ad Litem did not contact Mr. Ader. (App. 57).

ANGELA CARROLL:

Carroll has three boys – L.W. who was 16 years-old at the time of the hearing, E.W. who was 12 years-old and B.J.M. who was 6 years-old. Carroll has placement on a week on/week off schedule of L.W. and E.W. (App. 59).

Carroll has an associate's and bachelor's degree in marketing and was halfway through her master's in business management. (App. 60). Carroll was employed by United Health Care as a project manager for almost 14-years and was working remotely and would be able to in Durand (if the move was granted). (App. 61).

Carroll credibly testified regarding Miller's abuse getting progressively worse after B.J.M. was born. (App. 62). B.J.M.'s birthday was August 19, 2010. (App. 62-63). Carroll and Miller were not living together when B.J.M. was born and Carroll was the primary caretaker for B.J.M. (App. 63). Carroll was the individual that would always take B.J.M. to his doctor's appointments and who would feed and dress B.J.M.

(App. 63). From the time of B.J.M.'s birth until he was two years-old there was no consist schedule. (App. 64).

In 2011, Carroll had been home feeding B.J.M. on a Sunday night when B.J.M. was just six months-old and Miller came into her house like a "freight train". Carroll remembers her hair being pulled and being spit on and Miller screaming at her. B.J.M. was sitting in his high chair crying during the abuse. (App. 65-66). Carroll testified that there was pushing, shoving and at some point she ended up in the hallway and Miller had her by the throat. She remembers B.J.M. screaming and before Miller left her house, he slapped Carroll in the face, again. (App. 67). During the abuse in 2011, Carroll was afraid for her life. (App. 68).

Carroll testified that after speaking with Miller's mother in 2011, she was scared. Carroll understood that because Miller's charges were very heavy she was the only one that "could get him out of it". Ultimately, Carroll agreed to drop the restraining order against Miller. (App. 69).

From 2011 through 2016, Miller continued to threaten Carroll. (App. 70-71).

In 2016, Miller threatened Carroll that he was going to end up in prison for killing Carroll. (App. 71 – App. 72). Carroll testified that Miller sent her text messages, consistent with the following, from 2011 until the August 2016 abuse:

> Do your shit some where else. I will beat the both of you. That's a promise. Don't care about the law.
> ...
> Stay out of my neighborhood. Could care less who You see. I beat people for fun. I will beat a motherfucker just for thinking he can come in my hood. You been warned
> ...
> Like I said I can't stand you
> You are the enemy. Every day I get up. It's a war. You wanna come to my battle field.
> Better be ready
> You will feel the rath
> ...
> You want to fight
> That's my specialty
> I will attack every fuckin angle I can. I will make it my job
> Lets fuckin go
> ...
> You and whoever will go down hard. Its commin. You don't Evan know.
> Talk some shit. I will be there now!!!! You fuckin bitch. Can't stand you

(App. 73 – 75; App. 178 – 180).

Carroll received threats from Miller from 2011 through 2016 consistent with the text messages marked as Exhibit 25 at the hearing. (App. 73). Carroll testified that the text messages from Exhibit 25 were consistent with her level of communication with Miller when he was upset. (App. 74 – 75).

A few days prior to August 9, 2016, Carroll had five missed calls and seven messages all of which were angry from Miller. Carroll mentioned that she would be home shortly after 7:00 p.m. and if Miller wanted her to take B.J.M. she would do that. (App. 75 – 76). Carroll

contacted Miller the next day via text message to ask if she could get B.J.M. on that Wednesday, during his placement time, because it was her 12 year-old son's birthday and he wanted B.J.M. at his birthday party. (App. 77).

On August 9, 2016, a day Miller had placement of B.J.M., he came over to Carroll's home while she and her son, E.W., were home. Carroll and E.W. hid in the house because Carroll did not want any incidents with Miller, especially with her son in the house. Carroll intentionally tried to avoid Miller. (App. 78 – 80). When Miller came back to her home, Carroll was unfortunately at her home office desk which was surrounded by windows and big glass patio doors. Miller saw Carroll at her desk while she was on a work conference call. E.W., eleven years-old at the time, was still home with Carroll when Miller came back to her home. *Id.*

Carroll testified that Miller made threats to her stating he was going to prison and that he was going to kill her. Miller also threatened Carroll that he would hire someone to kill her if he had to, but that he was going to end up in prison. Carroll stated she was afraid for her life. Carroll believed Miller when he stated he was going to prison and he was going to make sure it was worth it. (App. 80). Ultimately, a 10-year Restraining Order was entered against Miller in Carroll's favor. (R11, App. 149-150)

Carroll is familiar with the Durand School District, teachers and the area due to her two older kids. The Durand District has a very good IEP

program. B.J.M. has had IEP for speech, reading and math. The public school system teachers are very receptive to IEP plans. (App. 82). Rita Carroll would be moving and living with her in Durand. (App. 82).

Carroll up through August 2016 to June of 2017 highlighted the days that she had placement of B.J.M. and the days that Miller had placement of B.J.M. (App. 164 – 165). She also highlighted the dates she was aware that Miller had B.J.M., however, he would go out to the bars or on vacation. (*Id.*; App. 83).

Carroll's job allocates more home time than Miller's job permits. Carroll has consistency in her daily life during the week to ensure schoolwork is completed, bed times are consistent, and B.J.M.'s overall health is cared for. (App. 84).

B.J.M. is currently not in counseling because Miller contacted his therapist and stated that he did not consent to have services for B.J.M. (App. 85).

Carroll stated there is a transitional adjustment for a six year-old boy when the households are very different. Carroll runs a fairly tight ship and has expectations of B.J.M. She expects her children to do their chores, clean up and help and be respectful. (App. 86).

B.J.M. is extremely physically aggressive when he returns from Miller's care. (App. 87).

Carroll does not speak negatively about Miller to B.J.M. and has tried to facilitate the relationship between B.J.M. and Miller. (App. 87).

Carroll testified that since the restraining order had been issued, she and Miller have been in the same place on three occasions. One was a Christmas concert for B.J.M. during Carroll's placement time that Carroll asked Miller not attend because she would be present. Miller showed up anyways. Miller also violated the restraining order in February or March for a wrestling tournament during Carroll's placement. (App. 88-89).

RILEY KUMMET:

Mr. Kummet testified that Carroll is a good mom and he has no concerns of her parenting. (App. 90-91).

JODY KUMMET:

Ms. Kummet also testified that Caroll is a great mom and has no concerns with B.J.M. being in her care. (App. 93).

AMANDA DELAWYER:

Ms. DeLawyer is a social worker. She testified that if a child sees a parent figure abusing someone, the child will think that behavior is acceptable and agreed that it would be concerning for a child to witness that type of abusive behavior. (App. 94).

Ms. DeLawyer testified that if there is domestic abuse, that the battered person should seek safety and ensure that they are safe and then do whatever is necessary to ensure the safety of the child. (App. 95-97).

Ms. DeLawyer testified that moving would be the last appropriate option if an abuser disregarded a restraining order. (App. 98).

TIM MILLER:

Miller testified that he thinks Carroll is a good mom and, in fact, had nothing negative to say about Carroll. (App. 99).

Miller testified that he did not actually mean he was going to kill anybody and that he would never actually beat Carroll up. He testified that Carroll has never threatened to kill him or beat him up. (App. 100).

Miller acknowledged, as he must, that Judge Babler made a determination, by a preponderance of the evidence, that there was a substantial risk that Miller may commit first-degree intentional homicide or second-degree intentional homicide against Carroll. Miller, a represented party at the time, further acknowledged that he did not appeal this determination. (App. 101).

Miller testified that in 2011, he pushed Carroll to get away from him and on the same day punched a hole in the wall/door while B.J.M. was just six months-old and in the other room. (App. 102). Miller testified that he has seen photocopies of bruising around Carroll's neck from the 2011 incident. (App. 103).

Miller acknowledged that Carroll's son was home when he threatened to kill her, although he alleges he never threatened to kill her and just used profanity at her. (App. 103).

Miller testified that he does not deny sending a text message to Carroll stating "you really fucked yourself again. I'm not kidding about the exchange student. I will stir the pot. You remember this? This will bite you in the ass?" (App. 104).

THE CIRCUIT COURT'S REASONED RATIONALE ON THE CUSTODY DECISION:

Following the two-day evidentiary hearing, the Circuit Court issued the *Decision Regarding Custody, Placement and Child Support.* (Miller App. 8 – Miller App. 14). The Circuit Court found, in pertinent part, as follows:

> The Court finds by the greater weight of credible evidence that Miller has engaged in a pattern of domestic abuse against the child's mother, Angela Carroll.
> ...
> The domestic abuse perpetrated by Miller against Carroll is not an isolated incident, but rather, includes a long-standing pattern of domestic violence that involved manipulation, intimidation, verbal abuse (in person and by text messaging) and physical abuse directed at Carroll in an effort to control her life.
> ...
> The Court is well aware of the potential negative impacts on [B.J.M.] by moving his residence from Rice Lake to Durand, Wisconsin, which will likely decrease the amount of time the child gets to spend with his father and his father's family, his friends, the current educational services being provided to him, religious services, etc. [B.J.M.], however, is a resilient 6-year old child and he will likely adapt to his new surroundings fairly quickly. In addition, [B.J.M.] will have available the same or similar educational, religious, and extracurricular services in Durand, WI that he received in Rice Lake, WI.

> Furthermore, the potential setbacks of such a move are clearly outweighed by the ongoing danger that Miller poses to Carroll and the adverse and traumatic impact that domestic abuse has had and will continue to have on her and [B.J.M.] should the parties continue to reside near each other and share legal custody and physical placement of their son.
> ...
> Miller did not provide the Court with any credible evidence to rebut the statutory presumption against awarding joint legal custody in cases involving domestic abuse, such as this one.

(Miller App. 10, 11, 12, 13).

The Circuit Court further found, in pertinent part, as follows when denying Miller's Motion for reconsideration:

> I agree with Mr. Schwartz that had there not been testimony or evidence submitted regarding ongoing issues regarding a pattern of domestic violence by way of either threats, or intimidation, or either verbal abuse or physical abuse, if none of that had occurred since the parties entered their original stipulation back in 2011, it would have been inappropriate for the Court to consider that evidence as being a primary or paramount, as the statute puts it, factor in deciding custody and placement, but that wasn't the case here.
>
> And again, in this case, the allegations, the testimony and evidence that I found credible and weighty was the domestic abuse was not isolated but that it was a long-standing pattern that had been going on for most of their relationship that Angela and Tim had.
> ...
> And as I think I made it clear in my decision, the Court found not only by the preponderance of the evidence but the Court found by what I would characterize as clear, satisfactory, and convincing evidence that there has been a pattern of such abuse between Miller and Carroll and that had a significant impact on the Court's decision to award her sole primary custody/primary physical placement, which leads to the next analysis or issue about whether or not the Court put that much emphasis on that; even if I could consider that, did the Court

> gave that too much weight to the exclusion of all the other factors set forth.
>
> ...
>
> I did reference in my decision that granting Angela sole legal custody and primary physical placement would impact other important aspects of [B.J.M.'s] life, including Miller's extended family connections, [B.J.M.'s] schooling and education, and [B.J.M.'s] sports that he had been participating in, and Blaze's religious upbringing at St. Joseph's Church in Rice Lake. I referenced all that in my decision, perhaps not at great length but I think it's referenced enough to make it clear that this Court didn't consider the issue of domestic violence to the exclusion of all other factors. I didn't do that. If I had, I wouldn't have mentioned any of that. I would have simply said this case is about domestic violence and that's it. I didn't' do that in my decision. I referenced that I was mindful of those other facts and circumstances and how that would impact [B.J.M.], but I also indicated in my decision that, as it was testified to, [B.J.M.] would continue to be able to have time with his father and his family because the move wasn't to Nevada or wasn't across the country. It was simply a little further south. That the types of services that [B.J.M.] enjoyed up here in Rice Lake were not unique. That he would have similar educational services, opportunities, similar religious opportunities, similar counseling opportunities in Durand as he had been enjoying, and taking advantage of, and getting the benefit of up here in Rice Lake but that I believe I struck the -- this Court struck the appropriate balance in weighing all of that and all of those other statutory factors against the issue of domestic violence and the patter of domestic violence that had been proven to this Court's satisfaction that involved Miller, Carroll, and the impact on their son.

(App. 215 – 222).

FACEBOOK:

Following the two-day evidentiary hearing and the Circuit Court's Orders granting Carroll's Motion, Miller sought to disqualify Judge Bitney based upon a Facebook "friendship" between Judge Bitney and Carroll.

Judge Bitney and Carroll did not become Facebook "friends" until June 19, 2017, after the close of evidence and the two-day evidentiary hearing. (App. 181-202). In this regard, Carroll was one of Judge Bitney's 2,000 plus Facebook "friends". As of September 14, 2017, Judge Bitney had 2,045 Facebook "friends", including the GAL, Riley Kummet (who testified on behalf of Miller), and Amanda Delawyer (who testified on behalf of Miller). (App. 203-205)

Carroll "liked" 18 of Judge Bitney's posts, 12 of which were Bible verses, three related to Judge Bitney's knee surgery, one related to a restaurant, one related to advice for kids and grandkids, and one of which was a picture of the American flag. (App. 181-202). None of these "likes" were regarding this matter or any of the witnesses involved in this matter or any of the subjects of this matter (domestic abuse). (*Id.*). Further, Judge Bitney did no "like" any of Carroll's posts. (*Id.*).

Additionally, on only two occasions, both after the hearing in this matter, did Carroll comment on Judge Bitney's Facebook page – both times related to Judge Bitney's knee surgery (information which all parties were made aware of following the two-day evidentiary hearing). (*Id.*). Judge Bitney did not comment on any of Carroll's posts or respond to Carroll's well-wishes regarding his surgery. (*Id.*). There was absolutely no evidence submitted that Carroll and Judge Bitney engaged in any ex-parte

communications or that Judge Bitney ever even viewed Carroll's Facebook page or posts.

In denying Miller's Motion for Reconsideration, Judge Bitney held as follows:

> THE COURT: The first of which is whether or not this Court was obligated to advise counsel and the parties that a friend request had been received and accepted from Miss Carroll and whether or not that created either a subjective or objective bias on the part of the Court in rendering its decision on the issues of custody and placement.
> ...
> I don't know that there's been anything stated on the record or indicated by me, and I will certainly confirm that again this morning, to indicate that I have a subjective bias in favor of Miss Carroll. I don't.
> ...
> And while it's un – while it's certainly uncontradicted or not contested that the Court accepted Carroll's Facebook friend request, Mr. Schwartz presented accurately the substance of the interaction between Miss Carroll and the Court on Facebook. **None of it had anything to do with this case**. The **Court did not respond**, other than to accept the Facebook friendship request to any of the posts made by Carroll. The **Court did not like any posts, respond to any posts, or conduct any communication ex parte or otherwise with Carroll, other than simply accepting the Facebook friendship request**. And that was done long after the custody hearing was concluded.
>
> And the reason I say that is because in this case, although the decision hadn't come down from the Court yet, **a decision on whether to award Miss Carroll full custody was made long before the friendship request was ever tendered**.
> ...
> I can also tell counsel, I think most of you know this, and if you don't, it's going to be clear now, **I'm friends with a lot of people**. I'm friends with a lot of people connected to this case. If people don't know this, there were six people involved in this case that were friends of mine on Facebook.

> They included the GAL, whose recommendation I disagreed with. They included witnesses on behalf of Miller, including Mr. Kummet and Ms. DeLawyer. I think there was even a reference to the fact that I may have been a friend at some point in time to Miller's sister before I was unfriended, so if there's a running tally of the six people that I knew in this courtroom while this case was pending, four of them were on Miller's side of the tally or ledge, and two were on Carroll's. One was Carroll that came in after the hearing and one was Ms. Moran who testified as a witness on her behalf.
>
> I can assure counsel and I can assure, most importantly, Miller that **none of these Facebook friendships that I have had, among the thousands that I have, had anything to do with my decision in this case**. My **decision was based upon the evidence and testimony** that I heard from the witness stand and in this courtroom during the two days of the custody hearing and on that alone. I don't think it can be fairly said, then, that a reasonable person in the circumstances of Miller or others, knowing all these facts and circumstances, would seriously call into question the Court's objectivity or impartiality because **the Court simply accepted a friendship request without more**.

(App. 206 – 214).

V. STANDARD OF REVIEW.

Miller has asserted two principal appeal issues. The first issue is with regards to Miller's request to disqualify Judge Bitney following the two-day evidentiary hearing and subsequent to Judge Bitney granting Carroll's Motion to Modify Legal Custody and Physical Placement. This issue has two separate standards of review for the respective prongs of the disqualification analysis. As to the objective portion of the test, "[w]hether the judge has evidenced a lack of impartiality is a question of law; therefore [this Court's] review is *de novo*." *Murray v. Murray*, 383 N.W.2d 904, 907

(Wis. Ct. App. 1986); *State v. Pirtle*, 799 N.W.2d 492, 504 (Wis. Ct. App. 2011). On the subjective portion of the disqualification analysis, however, the Circuit Court's determination is "binding." *Pirtle*, 799 N.W.2d at 504 *citing State v. McBride*, 523 N.W.2d 106, 110 (Wis. Ct. App. 1994).

Miller's second issue questions the Circuit Court's decision to grant Carroll's Motion to Modify Legal Custody and Physical Custody. The Circuit Court's decision to modify custody is reviewed for an erroneous exercise of discretion. *Licary v. Licary*, 484 N.W.2d 371, 374 (Wis. Ct. App. 1992). This Court "must sustain the decision if the court exercised its discretion on the basis of facts of record, employed a logical rationale and committed no error of law." *Id. citing Hartung v. Hartung*, 306 N.W.2d 16, 20 (Wis. 1981). As the reviewing court, this Court is to "look for reasons to sustain the trial court when the order rests on legal discretion." *In re Adoption of R.*, 297 N.W.2d 833, 836 (Wis. 1980).

VI. ARGUMENT.

A. THE INNOCUOUS FACEBOOK "FRIENDSHIP" IS NOT A BASIS FOR DISQUALIFICATION OR RELIEF.

"When analyzing a judicial bias claim, we always presume that the judge was fair, impartial, and capable of ignoring any biasing influences." *State v. Gudgeon*, 720 N.W.2d 114, 121 (Wis. Ct. App. 2006). Further, there is a presumption that "circuit court judges try to be fair and impartial in their conduct of trials, and this presumption must be overcome by proof

except in extreme cases of structural error." *State v. Carpure*, 683 N.W.2d 31, 41 (Wis. 2004). "The test for bias comprises two inquiries, one subjective and one objective." *Id.* "Judges must disqualify themselves based on subjective bias whenever they have any personal doubts as to whether they can avoid partiality to one side." *Id.* "The second component, the objective test, asks whether a reasonable person could question the judge's impartiality." *Id.*

1. Judge Bitney's determination on the subjective portion of the test is binding.

Judge Bitney unequivocally held that he had no subjective bias requiring his recusal. Because this determination is "binding", this prong of the test will not be further addressed. *See Pirtle*, 799 N.W.2d at 504 *citing McBride*, 523 N.W.2d at 110.

2. Miller has failed to establish that a reasonable person could question Judge Bitney's impartiality.

Miller goes to great lengths to trump up the Facebook "friendship" between Judge Bitney and Carroll and the alleged ex parte communcations. This "friendship" is the primary basis for his request to disqualify Judge Bitney and re-try the two-day evidentiary hearing. However, the "friendship", which did not begin until after the evidentiary hearing was concluded and after Judge Bitney made his decision (but before he memorialized his decision in writing), was harmless (at worst) and could

not reasonably be viewed to have biased the Circuit Court. Carroll was one of Judge Bitney's over 2,000 Facebook "friends." Miller presented no evidence of any ex parte communications, Judge Bitney confirmed he had no ex parte communications with Carroll, and Miller presented no evidence from a neutral and reasonable individual that viewed the Facebook "friendship" as biasing Judge Bitney. Further, the various ethics opinions rendered on the subject, as well as recent case law, establish no impropriety by Judge Bitney, no basis for disqualification, and no reason to re-try the matter.

It is important to put into context what a Facebook "friend" truly constitutes:

> As previously discussed, **the use of the word "friend" on social media is different from the traditional meaning of the word**. The same is true for the word "like." In the social media context, "friending" and "liking" are methods of exchanging, both by sending and receiving, information.
> ...
> **Merely "friending" a person on Facebook** or "liking" a particular page, **does not necessarily mean the two are friends in the traditional sense** or that anyone actually likes, in the traditional way, the user's posts. In this manner, "friending," "liking," or subscribing to a particular page or posting may not be seen as an endorsement.

(App. 223-251) (emphasis added).

Miller offered no evidence from a neutral and reasonable individual proffering that they believed the Facebook "friendship" biased Judge Bitney. Miller offered the Affidavit of the GAL in support of his Motion to

Disqualify, however, the GAL's Affidavit is notably barren of any opinion by the GAL questioning Judge Bitney's impartiality based on the Facebook "friendship". (Miller App. 24-27). Even Miller's attorney during the two-day evidentiary hearing, Ms. Pauls, who did not argue the disqualification issue, does not state in her Affidavit that she believed the Facebook "friendship" biased Judge Bitney. (Miller App. 24-27). Miller only offered speculation and conjecture, no evidence, that a reasonable individual may have questioned Judge Bitney's partiality due to the Facebook "friendship".

While Wisconsin has not issued an ethics opinion on the subject[2], the various ethics opinions issued throughout the Country and by the American Bar Association establish that no reasonable person could question Judge Bitney's impartiality based upon the Facebook "friendship" in question:

> **Simple designation as an ESM connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person.** ***Because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection.***

(App. 255-258) (emphasis added); *see also* (App. 259-266)

> The JEAC concludes that the Arizona Code of Judicial Conduct does not impose a per se disqualification requirement in cases where a litigant or lawyer is a "friend" or has a similar status with a judge through a social or electronic networks.
> ...

[2] (App. 252-254).

(App. 263-277); *see also* (App. 282-283) ("Accordingly, it is the Committee's position that "the mere fact of a social connection" does not create a conflict."); (App. 284-286) ("The Committee cannot discern anything inherently inappropriate about a judge joining and making use of a social network.

> And most importantly:
>
> > While the nomenclature of a social networking site may designate certain participants as "friends," the view of the Committee is that such a listing, by itself, ***does not reasonably*** convey to others an impression that such persons are in a special position to influence the judge.
> > ...
> > While social networking sites may create a more public means of indicting a connection, the Committee's view is that the **designation of a "friend" on a social networking site does not, in and of itself, indicate the degree or intensity of a judge's relationship with the person who is the "friend"**. The Committee conceives such terms as "friend," "fan" and "follower" to be terms of art used by the site, not the ordinary sense of those words.
> > ...
> > The consensus of this Committee is that participation and listing alone do not violate the Kentucky Code of Judicial Conduct, and specifically do not "convey or permit others to convey the impression that they are in a special position to influence the judge."
> > ...
> > In the final analysis, the reality that Kentucky judges are elected and should not be isolated from the community in which they serve tipped the Committee's decision.

(App. 291-296)(emphasis added).

> The Committee believes that the mere status of being a "Facebook friend," without more, is an insufficient basis to require recusal. **Nor does the Committee believe that a judge's impartiality may reasonably be questioned** (*see* 22

> NYCRR 100.3[E][1]) or that there is an **appearance of impropriety** (*see* 22 NYCRR 100.2[A]) based solely on having previously "friended" certain individuals who are now involved in some manner in a pending action.

(App. 297-298)(emphasis added).

As set forth in the various ethics opinions cited above, it is entirely unsupported for Miller to take the position that any reasonable person would or could question the impartiality of Judge Bitney based on the Facebook "friendship" with Carroll. Recent cases addressing social media connections also support the denial of Miller's Motion.

The Florida Court of Appeals recently issued a well-reasoned decision regarding an analogous petition to disqualify a judge. In *Law Offices of Herssein v. United Servs. Auto. Ass'n*, 2017 Fla. App. LEXIS 12056 (Fl. Ct. App. Aug. 23, 2017)[3] the disqualification was based on the judge being a Facebook "friend" with a lawyer representing a potential witness and potential party to the litigation. In support of the petition, an affidavit was submitted, similar to the affidavits submitted on behalf of Miller, stating:

> [b]ecause [the trial judge] is Facebook friends with Reyes, [the executive's] personal attorney, I have a well-grounded fear of not receiving a fair and impartial trial. Further, based on [the trial judge] being Facebook friends with Reyes, I...believe that Reyes, [the executive's] lawyer has influenced [the trial judge].

Id. at *2.

[3] (R116, App. 299-303).

The Florida Court of Appeals reviewed the request under a reasonably prudent person standard similar to Wisconsin's second prong. *Id.*. In rejecting the request for disqualification, the Court held as follows:

> We agree with the Fifth District that **"[a] Facebook friendship does not necessarily signify the existence of a close relationship."** We do so for three reasons. First, as the Kentucky Supreme Court noted, **"some people have thousands of Facebook 'friends.'"** *Sluss v. Commonwealth*, 381 S.W.3d 215, 222 (Ky. 2012).
>
> ...
>
> Second, **Facebook members often cannot recall every person they have accepted as "friends" or who have accepted them as "friends."**
>
> ...
>
> Third, **many Facebook "friends" are selected based upon Facebook's data-mining technology rather than personal interactions**.
>
> ...
>
> The use of **data mining and networking algorithms**, which are also revolutionizing modern marketing and national security systems, reflects an astounding development in applied mathematics; it constitutes a powerful tool to build personal and professional networks; and it has **nothing to do with close or intimate friendships of the sort that would require recusal**. This common method of selecting Facebook "friends" undermines the rationale of *Domville* and the 2009 Ethics Opinion that a judge's selection of Facebook "friends" necessarily "conveys or permits others to convey the impression that they are in a special position to influence the judge."
>
> A random name drawn from a list of Facebook "friends" probably belongs to casual friend; an acquaintance; an old classmate; a person with whom the member shares a common hobby; a "friend of a friend;" or even a local celebrity like a coach[4]. ***An assumption that all Facebook "friends" rise to the level of a close relationship that warrants***

[4] Or a publically elected official such as a judge.

> ***disqualification simply does not reflect the current nature of this type of electronic social networking.***
> ...
> **Because a "friend" on a social networking website is not necessarily a friend in the traditional sense of the word, we hold that the mere fact that a judge is a Facebook "friend" with a lawyer for a potential party or witness, without more, does not provide a basis for a well-grounded fear that the judge cannot be impartial or that the judge is under the influence of the Facebook "friend."**

(App. 301-302) (emphasis added). *See also State v. Forguson*, 2014 WL 631246 (Tenn. Crim. App. 2014) (App. 304-316) (holding that there was not a sufficient showing of proof that trial judge could not be impartial as "thirteenth juror" when trial judge was Facebook "friend" of confidential informant and the record did not show the length of the Facebook relationship or the extent or nature of the interactions); *State v. Madden*, 2014 WL 931031 (Tenn. Crim. App. 2014) (App. 317-328) (holding that criminal defendant failed to establish bias of trial court judge although judge had numerous community ties and a Facebook connection with one of the State's witnesses)

There is no basis to allege that any Facebook "friendship" biased Judge Bitney in this matter. Proof positive of this point, Judge Bitney is a Facebook "friend" with the GAL, however, rejected the GAL's recommendations.

With regards to Miller's allegations of ex parte communications, the allegations are drastically overstated. The record is barren of any support to

Miller's argument that, other than accepting the Facebook "friend" request, Judge Bitney ever saw Carroll's comments regarding his knee surgery, or knew that she "liked" any of his posts about the Bible or food, or that he ever viewed Carroll's "News Feed." To the contrary, Judge Bitney did not respond to Carroll's well-wishes on his surgery, did not comment on any of Carroll's own posts, and did not "like" any of Carroll's Facebook posts. Most importantly, there were no communications, posts, "likes" or discussion regarding the custody case; none. Further, there were no internal messages on Facebook exchanged between Carroll and Judge Bitney.

Judges are people too. Whereas here, a Facebook "friendship" request was sent after an evidentiary hearing and after the Judge had reached their decision, and where there were no communications between the Judge and the litigant regarding the case, or any evidence whatsoever that the Judge even viewed any of the "likes" or posts, there is no legitimate concern that the Judge was objectively biased. To the contrary, the evidence overwhelmingly supports the conclusion reached here by Judge Bitney. Unlike the matters relied upon by Miller in which a judge takes retribution for a failed ESM connection, *see e.g. Chace v. Louisel*, 170 So.3d 802 (Dist. Ct. App. 2014) ("attributing most of the marital debt to Petitioner and providing Respondent with a disproportionately excessive alimony award" after Petitioner did not respond to the Judge's "friend"

request), Judge Bitney's orders in this matter were precisely in accordance with the law of this case and the facts admitted into evidence. While Miller may not agree with the highly discretionary decision by Judge Bitney to grant Carroll's Motion, there is no support that such a decision was made due to the Facebook "friendship". As such, Carroll respectfully requests that the Circuit Court be affirmed on all matters.

B. MILLER'S PATTERN OF AND SERIOUS INCIDENTS OF DOMESTIC ABUSE, THE SAFETY OF B.J.M., THE SAFETY OF CARROLL, AND THE BEST INTERESTS FACTORS SUPPORT THE COURT'S DECISION REGARDING CUSTODY, PLACEMENT AND CHILD SUPPORT.

The Court of Appeals is highly deferential to the Circuit Court regarding the sufficiency of the evidence, an overwhelming preponderance of which supported Carroll's Motion and the Circuit Court's *Decision Regarding Custody, Placement and Child Support* (R92) and subsequent *Order* (R97). In light of the pattern of and serious incidents of domestic abuse perpetrated by Miller against Carroll, the Circuit Court properly applied the rebuttable presumption necessitating the award of sole legal custody and sole physical custody to Carroll. There is no legal basis and no factual basis upon which to reverse the Circuit Court's ruling in this regard and Carroll respectfully requests that the Circuit Court be affirmed.

Custody and placement decisions are discretionary determinations of the Circuit Court. *Koeller v. Koeller,* 536 N.W.2d 216, 218 (Wis. Ct. App.

1995). "As has been repeatedly held by this court, the matter of the custody of children in divorce actions is a matter peculiarly within the jurisdiction of the trial court, who has seen the parties, had an opportunity to observe their conduct, and is in much better position to determine where the best interests of the child lie than is an appellate court." *In re Adoption of R.*, 297 N.W.2d 833, 836 (Wis. 1980) *quoting Adams v. Adams*, 190 N.W. 359, 360 (Wis. 1922). "[T]he trial judge is the ultimate arbiter of the credibility of the witnesses…Further, when more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn of the trier of fact." *Gehr v. Sheboygan,* 260 N.W.2d 30, 33 (Wis. 1977).

Applicable here, Wis. Stat. § 67.451(1)(b) governs substantial modifications to physical placement orders that may be sought by a parent after two years have passed from the date of the final judgment. Consistent with para. (b), the Circuit Court considered such modification request using a two-step process. *Greene v. Hahn*, 689 N.W.2d 657, 664 (Wis. Ct. App. 2004). First, "whenever a requested modification 'would substantially alter the time a parent may spend with his or her child,' the moving party must show that there has been 'a substantial change of circumstances since the entry of the last order ... substantially affecting physical placement.'" *Id.* (citation omitted). A substantial change of circumstances "requires that the facts on which the prior order was based differ from the present facts, and

the difference is enough to justify the court's considering whether to modify the order." *Licary v. Licary*, 484 N.W.2d 371, 374 (Wis. Ct. App. 1992). If the Circuit Court finds that there has been a substantial change in circumstances, it then moves to the second step: considering whether modification would be "in the best interest of the child." *Greene*, 689 N.W.2d at 665 (citation omitted). In making this determination and subject to Wis. Stat. § 767.41(5)(bm), the Circuit Court properly considered the factors set forth in Wis. Stat. § 767.41(5)(am).

There should be no legitimate dispute that the entry of the ten-year restraining order in Case Number 16-CV-253 constituted a substantial change in circumstances since entry of the last order in 2011 – in fact, Miller's Brief does not argue otherwise. Judge Babler found, by a preponderance of the evidence, there was/is a substantial risk that Miller may commit first-degree intentional homicide, second-degree intentional homicide or sexual assault against Carroll. The 2016 ten-year injunction was not in place in 2011 when the last order regarding placement was issued. A substantial change in circumstances had occurred, and the Circuit Court properly addressed the issues of legal custody and physical placement.

1. The presumption set forth in Wis. Stat. § 767.41(2)(d)(1) required an award of sole legal custody to Carroll.

With regards to legal custody, Wis. Stat. § 767.41(2)(d)(1), which relates to legal custody, provides:

> Except as provided in subd. 4., if the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery, as described under § 940.19 or 940.20 (1m), or domestic abuse, as defined in § 813.12(1)(am), pars. (am), (b) and (c) do not apply and there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party. The presumption under this subdivision **may be rebutted only by a preponderance of the evidence of all of the following**:
>
> a. The party who committed the battery or abuse has successfully completed treatment for batterers provided through a certified treatment program or by a certified treatment provider and is not abusing alcohol or any other drug.
> b. It is in the best interest of the child for the party who committed the battery or abuse to be awarded joint or sole legal custody based on a consideration of the factors under sub. (5) (am).

(emphasis added).

Unfortunately, Miller's Brief does not provide the requirements codified in Wis. Stat. § 767.41(2)(d)(1)(a) when arguing for reversal of the Circuit Court. *See Brief of Appellant*, p. 40. What is crystal clear is that there was no evidence offered during the two-day evidentiary hearing that Miller had successfully completed treatment for batterers provided by a certified treatment program and there was no evidence that Miller was not

abusing alcohol. To the contrary, there was substantial evidence that Miller continued to heavily consume alcohol, even with B.J.M. in his care. As a result, Miller did not overcome the rebuttable presumption codified in Wis. Stat. § 767.41(2)(d)(1).

As found by a preponderance of the evidence by Judge Babler in Case Number 16-CV-253, as testified by the witnesses throughout the two-day hearing, as set forth in the exhibits properly received by the Court, and as even begrudgingly acknowledged by Miller during his cross-examination, Miller had engaged in a pattern of and serious incidents of domestic abuse against Carroll. Contrary to Miller's appellate argument, this pattern of domestic abuse did not end in 2011 and begin anew in 2016. Carroll credibly testified that she regularly received threatening text messages after the 2011 incident and up until the 2016 injunction. Miller's attempts to ignore his domestic abuse from and after the withdrawal of the injunction in 2011 until 2016 is rebuffed by the substantial and credible evidence.[5]

Moreover, the best interests factors also support the Circuit Court's order to modify legal custody. The testimony considered by the Circuit

[5] In this regard, the GAL's failure to properly take into consideration the serious domestic abuse by Miller, the rebuttable presumption set forth in Wis. Stat. § 767.41(2)(d)(1), and Miller's inability to offer any evidence to rebut the presumption in issuing her Recommendations (unfortunately) left the Circuit Court with little option but to properly disregard the GAL's Recommendation.

Court was undisputed that Carroll is a great mother, provides structure, routine, and guidance to B.J.M., attended all of B.J.M.'s school conferences and doctor's appointments, and provided the loving and nurturing environment necessary for B.J.M. to succeed. Carroll also had flexibility in her job and was able to work remotely without the need for any child care for B.J.M. Further, Rita Carroll testified she would (and did in fact) move with B.J.M. and Carroll to Durand. B.J.M.'s two half-brothers are in Durand and, with a 50-50 placement agreement with Mr. Weiss (Carroll's ex-husband), has made a significant and positive impact on B.J.M.'s life.

The Court also heard and considered that Miller's large Italian family meals could continue on weekends, Miller could continue to be involved in B.J.M.'s sporting events and school activities, and Miller would continue to have regular telephone and web camera contact with B.J.M.

Additionally, the Court heard and considered the opinions of Ms. Moran, Mr. Adler and even Ms. Delawyer regarding the need to remove B.J.M. and Carroll from Rice Lake and the abusive environment; which opinions were clear and persuasive. Protecting B.J.M. and Carroll from additional abuse and threats, in light of the intentional violations of the restraining order, could only be accomplished by approving the move to Durand.

The Circuit Court considered the best interests of B.J.M., (Miller App. 12; App. 220-221). The Circuit Court correctly applied the rebuttal

presumption codified in Wis. Stat. § 767.41(2)(d)(1) that it would be detrimental to B.J.M. and contrary to the best interests of B.J.M. for Carroll and Miller to share joint legal custody.

Miller's reliance upon *Glidewell v. Glidewell*, 869 N.W.2d 796 (Wis. Ct. App. 2015) for the proposition that Miller's domestic abuse should not have been considered is misplaced. In *Glidewell*, all of the domestic abuse occurred prior to the original divorce sought to be modified. *Id.* at 798. The *Glidewell* Court held, directly contrary to Miller's argument, as follows:

> We note, however, that Jill's decision to stipulate to joint custody at the time of the divorce **does not mean that she is barred from ever again seeking application of Wis. Stat. § 767.41(2)(d)**; rather, she has waived her right to seek application of the presumption based upon the *facts that existed as the time* she stipulated to joint custody. Jill is free to seek application of the presumption in the future if she has **new facts, occurring since she stipulated to joint custody, that support the presumption**.

Id. at 803 (emphasis added) (italics in original).

Miller's pattern of threats of violence against Carroll continued from after the stipulation in 2011 through 2016, culminating in the death threat in 2016. Quite simply, the Court properly relied upon the domestic abuse presumption and Miller's reliance upon *Glidewell* misses the mark.

2. The paramount concerns of the safety and well-being of B.J.M. and Carroll in determining physical placement required the Circuit Court to grant Carroll's Motion.

Wis. Stat. § 767.41(5)(bm), applicable here, provides:

> If the court finds under sub. (2) (d) that a parent has engaged in a pattern or serious incident of interspousal battery, as described under § 940.19 or 940.20 (1m), or domestic abuse, as defined in § 813.12 (1) (am), the safety and well-being of the child and the safety of the parent who was the victim of the battery or abuse shall be the paramount concerns in determining legal custody ***and periods of physical placement.***

(emphasis added).

Miller engaged in a pattern of and serious incidents of domestic abuse against Carroll from 2011 through 2016. As such, Wis. Stat. § 767.41(5)(bm) was and remains applicable.

Thus, the paramount concern, as required by Statute, in granting Carroll's Motion was the safety of B.J.M. and the safety of Carroll. In light of the domestic abuse and as a result of Miller's two intentional and knowing violations of the 10-year restraining order from the time Carroll's Motion was filed until the recent hearing, Carroll's requested move to Durand with B.J.M. was required to ensure the safety of both. The domestic abuse had been extensive and prolonged. The threats had been severe. The 10-year restraining order had unfortunately not deterred Miller. While the GAL's Preliminary Recommendation blatantly disregarded Wis. Stat. § 767.41(5)(bm) and glossed over the past egregious domestic abuse,

the Circuit Court properly considered the pattern with the benefit of substantial and credible expert testimony. In determining where the best interests of the child lie, it is within the province of the trial court to say what weight should be attributed to expert testimony. *Pollock v. Pollock,* 77 N.W.2d 485, 493 (Wis. 1956).

Further and as set forth *supra*, the Circuit Court gave significant consideration to the best interest factors – factors which not only support, but necessitated, granting Carroll's Motion.

Quite simply, Miller has not offered any evidence that the Circuit Court abused the significant discretion afforded in deciding custody matters. The Circuit Court weighed the evidence, conducted a rational mental process considering Miller's extensive pattern of domestic abuse, gave proper weight to the paramount concerns in protecting Carroll, considered B.J.M.'s best interests, and applied the proper legal standard. There is no basis upon which to reverse the Circuit Court's decision to award Carroll sole legal and physical custody of B.J.M.

CONCLUSION

The Circuit Court's determination that Judge Bitney was not subjectively bias is conclusive. There is nothing in this record to support a determination that Judge Bitney was objectively bias. In fact, the ESM "friendship", commenced after the conclusion of the evidentiary hearing and after the Circuit Court had come to a decision, was innocuous. Judge

Bitney did not "like" any of Carroll's Facebook posts, did not comment on any of Carroll's Facebook posts, and the record is glaringly barren of any facts to support any argument by Miller that Judge Bitney ever looked at Carroll's Facebook page, let alone read any of her posts. Quite simply, there is no basis for the request to disqualify Judge Bitney.

As to the merits of this matter, there was a mountain of evidence to support the need to grant Carroll's Motion. The 10-year injunction, the threats to kill Carroll, and the violence, in addition to the best interests of B.J.M., all required the granting of Carroll's Motion. Miller not only failed to overcome the rebuttable presumption in this matter, offering no evidence that he successfully completed a batterer's program and abstained from alcohol, he acknowledged his continuing alcohol use and tried to minimize the frequent and threatening death threats. There is no support, factually or legally, to Miller's request to overturn the Circuit Court's highly discretionary decision.

Carroll respectfully requests that the Circuit Court be affirmed on all matters.

Dated: March 29, 2018

Respectfully Submitted
SCHWARTZ LAW FIRM

Brandon M. Schwartz (#1084533)
Michael D. Schwartz (#1018933)
600 Inwood Avenue N.
Suite 130
Oakdale, Minnesota 55128
Telephone: (651) 528-6800
Facsimile: 651-528-6450
Email: brandon@mdspalaw.com
Email: michael@mdspalaw.com
Attorneys for Joint-Petitioner-Respondent

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of this brief is 10,668 words.

Dated: March 29, 2018

Brandon M. Schwartz

.....

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Respectfully Submitted
SCHWARTZ LAW FIRM

Dated: March 29, 2018

Brandon M. Schwartz (#1084533)
Michael D. Schwartz (#1018933)
600 Inwood Avenue N.
Suite 130
Oakdale, Minnesota 55128
Telephone: (651) 528-6800
Facsimile: 651-528-6450
Email: brandon@mdspalaw.com
Email: michael@mdspalaw.com
Attorneys for Joint-Petitioner-Respondent

RE: In Re the Paternity of B.J.M.
District III Court of Appeals Case No.: 17-AP-2132
Barron County Case No.: 11-PA-46PJ

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

CERTIFICATE OF SERVICE

Jessie J. Revalee, of the City of Somerset, County of St. Croix, in the State of Wisconsin, being duly sworn, says that on the 29th day of March, 2018, she filed the following:

BRIEF OF RESPONDENT

Upon:

Wisconsin Court of Appeals
110 E. Main Street
Tenney Building, Suite 215
Madison, WI 53702

Stephanie L. Finn
David J. Rice
Herrick & Hart, S.C.
116 W. Grand Ave
Eau Claire, WI 54703

Laura Ann Sutton
2247 20 1/4 Street
Rice Lake, WI 54868

By delivery to a third-party commercial carrier for delivery to the above directed person within three (3) calendar days on March 29, 2018.

Jessie J. Revalee

Jessie J. Revalee

Subscribed and sworn to before me
this 29th day of March, 2018.

Katherine Grenell
Notary Public

KATHERINE ROSE GRENELL
NOTARY PUBLIC - MINNESOTA
My Commission Expires Jan. 31, 2021