

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 23-0265

SHAWNA L. JOHNSON,

Appellant / Petitioner,

v.

MALACHI JOHNSON,

Appellee / Respondent.

**APPELLANT'S OPENING
BRIEF**

On appeal from the District Court of the
Fourth Judicial District of the State of Montana,
In and for the County of Missoula,
Before the Honorable Leslie Halligan
Cause No. DR-23-44

APPEARANCES:

For Appellant:

Emily A. Lucas
Brandi R. Ries
RIES LAW GROUP, P.C.
P.O. Box 8364
Missoula, MT 59801
E-mail: emily@rieslawgrouppc.com
E-mail: brandi@rieslawgrouppc.com

For Appellee:

Ashley Hurlbert
Judnich Law Office
501 S. Russell St
Missoula, MT 59801
E-mail: ashley@judnichlaw.com

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I. STATEMENT OF THE ISSUES

The following issues are dispositive of this appeal:

1. Did the district abuse its discretion by denying Shawna an Order of Protection when the uncontested evidence established Shawna is a victim of partner family member assault, assault, and stalking perpetrated by Malachi and that Shawna's fear of Malachi is reasonable?
2. Did the district court err by denying the order of protection on behalf the children on the basis that the children could only be protected from "their abuser" when the minor children witnessed substantial physical violence perpetrated by Malachi, and were endangered by the environment of abuse Malachi created?

II. STATEMENT OF THE CASE

On January 14, 2023, the Appellant, Shawna Johnson ("Shawna") filed a *Sworn Petition for Temporary Order of Protection and Request for Hearing* with the Missoula County District Court. The court granted Shawna a *Temporary Order of Protection* on January 19, 2023, finding Shawna was in danger of harm from the Appellee, Malachi Johnson ("Malachi"). The court held a hearing on the matter on February 2, 2023 in which Shawna appeared in-person *pro se* and Malachi appeared by video conference with his counsel. The court, at the request of Malachi, continued the hearing to March 11, 2023 with the *Temporary Order of Protection* remaining

in full force and effect until further court order. Shawna obtained counsel and a *Notice of Appearance* on her behalf was entered on February 21, 2023. The March 11, 2023 hearing was continued via an unopposed *Motion* with the hearing being postponed until the following month.

A hearing on the *Petition for Temporary Order of Protection* was held on April 4, 2023 and April 11, 2023. Shawna and the parties' six-year-old son's first grade teacher testified at the hearing. Malachi, who appeared at both hearings via video conferencing, declined to testify to avoid criminal liability. D.C. Doc. 120, pg. 2. Despite Shawna testifying to significant intimate partner violence perpetrated against her by Malachi on December 23, 2022 and at different times during the parties' relationship, the court dismissed Shawna's *Petition for Order of Protection* and vacated the *Temporary Order of Protection* on May 5, 2023. On May 11, 2023 Shawna filed an *Emergency Motion for Stay Pending Appeal and Brief in Support* with district court. Malachi did not file a response to the *Emergency Motion for Stay Pending Appeal*. Accordingly, the district court reinstated the *Temporary Order of Protection* on June 6, 2023.

On May 11, 2023 Shawna timely filed her *Notice of Appeal* with this Court.

II. STATEMENT OF RELEVANT FACTS TO THE APPEAL

Shawna and Malachi married in 2017 after three years of dating. They are the parents of three minor children, ranging in ages from one to six years old. D.C. Doc.

21, pg. 2, lines 27-30 (May 5, 2023). Shawna also has a 16-year-old child from a previous relationship. Tr. Transcr. I, 44:22-24 (April 4, 2023). Shawna and the children reside in Huson, Montana in a house the parties purchased together. *Id.* at 43:1-10. Although Malachi had planned to join the family in Montana, at the time of the hearing Malachi continued to reside in Oregon. *Id.*

Malachi physically and verbally abused Shawna throughout the parties' relationship. Malachi verbally abused Shawna in front of the children by calling her names such as "fucking bitch" and "cunt." *Id.* at 43:22-44:1. Malachi threatened to kill Shawna and himself if she ever left him, specifically telling Shawna that after he killed her, he would dispose of her body in a metal drum in the middle of the ocean. *Id.* at 44:7-12. Malachi controlled and stalked Shawna by monitoring her cellphone and he would accuse her of sleeping with other men if she communicated with a phone number unknown to him. *Id.* at 44:17-20. In 2017, Malachi physically assaulted Shawna by holding her down by her arm and face and squeezing her face while on top of her, leaving red marks on her face and bruises on her arm. *Id.* at 46:3-9. The 2017 assault began as an argument with Malachi getting in Shawna's face. During such incidents, Shawna would remove herself physically from the altercation and go lay down in the parties' bed to get away from Malachi. *Id.* at 45:23-46:5.

The most recent events that qualify Shawna and the children for protection from Malachi took place on December 23, 2022. Malachi traveled from Oregon to

Huson, Montana to spend the holidays with Shawna and the children—a trip he had taken many times since the family relocated. *Id.* at 58:9-10. On the night of December 23, 2022, Malachi was irritated with Shawna. Shawna removed herself from the situation and went to lay down in bed to get away from Malachi. *Id.* at 47:21-25. Malachi followed her into the bedroom, yelled at Shawna, and grabbed Shawna’s phone from her. *Id.* Malachi then proceeded to assault Shawna by grabbing her foot and attempting to pull her off the bed while she was holding the parties’ one-year-old baby, O.J. *Id.* at 48:1-3. Shawna screamed at Malachi to stop. *Id.* Malachi responded to Shawna’s screams by squeezing her foot “really hard,” before finally letting go. *Id.* at 48:9-10. Malachi then took Shawna’s phone from her and went to another room. *Id.* at 48:9-14.

Later that evening, Shawna again returned to the bedroom to lay down, but this time Shawna positioned herself to protect the parties’ baby, O.J., in case Malachi returned to the room. *Id.* at 49:1-4. Shortly thereafter, Malachi entered the bedroom, crawled into the bed next to Shawna, and proceeded to bite Shawna’s back, causing her pain. *Id.* at 49:11-15. Malachi then undressed and laid down next to Shawna, who promptly exited the room and joined parties’ six-year-old son to watch a Christmas movie. *Id.* at 50:2-3. Malachi then followed Shawna from the room and verbally abused her in front of their son stating, “Oh, is this the fucking game you’re going to play,” causing Shawna to cry. *Id.* at 50:4-6.

Later that evening, the parties' three-year-old child, W.J., woke up with a saturated diaper which Shawna proceeded to change. *Id.* at 51:2-4. Malachi followed Shawna into the nursery. *Id.* at 51:2-5. As Shawna was changing the child's wet diaper, Malachi stood between Shawna and the clean diapers, so Shawna asked that he either hand her a diaper or move. *Id.* at 51:6-8. Malachi then picked up the saturated diaper and hit Shawna in the face with it, hard enough to cause the diaper to explode urine and diaper materials all over Shawna, W.J., and the changing table. *Id.* at 51:8-12.

Malachi then further escalated his abuse by smashing Shawna's phone against the stair railing, breaking it. *Id.* at 51:20-22. This meant that Shawna could not use the phone to call for help. Malachi then proceeded to kick the railing while telling Shawna he was not afraid of prison. *Id.* at 51:17-24. This abuse occurred in the presence of the parties' six-year-old son, who yelled at Malachi to stop. *Id.* at 52:3. Shawna then entered the bedroom of C.J., her sixteen-year-old son, who had his brothers, with the exception of the baby, O.J., who was still upstairs, in his room with him. *Id.* at 52:14-16. C.J. told Shawna he thought the sound of Malachi smashing Shawna's phone on the stair railing was Malachi smashing Shawna's head against the railing. *Id.*

The parties' six-year-old son told Shawna they needed to leave to which Shawna responded that they couldn't because baby O.J. was still asleep upstairs, and

Shawna didn't want to go upstairs because Malachi was up there. *Id.* at 52:18-21. In response, the six-year-old child went upstairs and brought baby O.J. to Shawna himself. *Id.* at 53:18-21. Shawna then heard Malachi coming down the stairs while talking on the phone to a friend, saying "Do you want to see what this stupid bitch looks like?" *Id.* at 55:1-3. Shawna then shut and locked the door of C.J.'s bedroom to try to protect herself and the children. *Id.* at 55:3-4,8. Malachi then proceed to kick down and break C.J.'s bedroom door to gain access to Shawna and the children who were inside the room. *Id.* at 55:19-22; See also Pet.'s Trial Exhibit 1. Malachi actions caused the children to scream in fear. *Id.* at 56:1-9. Malachi then held the phone to Shawna's face and stated, "Do you see this stupid bitch?"¹ *Id.* Shawna submitted a photograph of the broken door, which Malachi had attempted to repair after Shawna and the children left the home, as Pet.'s Trial Exhibit 1.

In the hopes of calming the situation, Shawna began to get the children ready for bed. However, B.J. was still "screaming and freaking out" about the door incident while Shawna attempted to tuck him into bed. *Id.* at 56:14-16; 20-22. Malachi came downstairs again and told Shawna it was time to go to bed. *Id.* Shawna refused so Malachi grabbed her arm and drug her across C.J.'s bedroom floor in front of the

¹ This information is included in the *Petition for Temporary Order of Protection*, and still Malachi did not call the person who he was on the phone with to contradict Shawna's account of what occurred.

children while she had baby O.J. in her arms. *Id.* at 56:22-25. Later that evening, Malachi told Shawna that he wanted a divorce. Shawna had already filed dissolution paperwork in Oregon on December 12, 2022, but had not served Malachi yet so she offered to get the papers for Malachi to sign. *Id.* at 58:1-3. However, Shawna was afraid to retrieve the divorce paperwork because it was upstairs and she did not want to go by herself in case Malachi followed her, so she had her oldest child go with her. *Id.* at 58:18-21. Malachi did, in fact, follow Shawna upstairs and assaulted her again while she was at her computer trying to locate the divorce paperwork. Malachi ripped her ring off her finger and threw her computer mouse across the floor. *Id.* at 58:24-25; 59:1-4. Shawna left the room and went to the kitchen where she noticed all of Malachi's guns were then laid out on the kitchen table when they had not been there prior. *Id.* at 59:5-7.

Shawna later testified that she had “no idea” why the guns were laying on the table, and further testified, contrary to the District Court's *Findings*, that she had no knowledge of any plans for Malachi and her oldest child to go shooting the next day. Tr. Transcr. II, 42:4-8 (April 11, 2023); See also D.C. Doc. 21, pg. 4. Upon seeing the firearms displayed, Shawna determined she needed to immediately get herself and her children out of the house and away from Malachi, as she was in fear for her and the children's lives. Tr. Transcr. I, 60:1-3. Shawna then grabbed the middle two boys and had her oldest son take baby O.J. to the car as they prepared to flee the

home in the middle of winter without overnight bags or even shoes for the children. *Id.* at 60:3-7. When Shawna got to the garage after grabbing her last child, Malachi was standing over her car with her vehicle hood up and a wrench in his hand—Malachi told Shawna that she and the boys were not leaving the home. *Id.* at 60:14-16; 61:3-4. Malachi later told Shawna he had the hood up because he was trying to take the battery out of her car so she couldn't leave. *Id.* at 61:7-9. When Shawna and the children returned home after Malachi was gone, Shawna noticed that Malachi had also cut the wires to the garage door opener to try to prevent her from leaving. *Id.* at 61:20-21. Fortunately, the remote-control garage opener in her vehicle still worked to open the garage door so she was able to successfully leave that night with the children to seek safety. *Id.* Shawna submitted a photograph of damage to the garage door opener as Pet.'s Trial Exhibit 2.

Shawna and her children fled the family home at night in a snowstorm without shoes or overnight bags, and Shawna was unsure of where they would go to stay safe. *Id.* at 65:22-25. As they fled, Shawna's sixteen-year-old son, C.J., was fearful that every car that drove up behind them was Malachi; that Malachi was following the family; and that Malachi would shoot them. *Id.* at 66:12-16. Once Shawna felt that she and the children had made it a safe distance from Malachi, Shawna pulled the car over and began to vomit. *Id.* at 66:19-21. Following the incident, Shawna began having nightmares and other sleeping disturbances. *Id.* at 67:1-2. Shawna's

doctor prescribed her medication to manage her Post-Traumatic Stress Disorder symptoms and to help Shawna cope with the long-term effects of Malachi's assault. *Id.* at 67:5-6.

The parties' children have also experienced long-term effects of seeing their mother assaulted by their father. The children were scared to return home even after they knew Malachi had returned to Oregon and would check the doors to make sure they were always locked so Malachi couldn't enter if he did return. *Id.* at 67:9-17. B.J.'s first grade teacher wrote Shawna an email on January 10, 2023, in which she expressed concern for B.J., stating "He seems so sad and withdrawn since returning from break." The teacher also noted the decline in B.J.'s academic success from prior to winter break. See Pet.'s Trial Ex. 3. Shawna testified at the April 4, 2023 hearing that she felt safer once the *Temporary Order of Protection* was put in place and that she wanted the *Temporary Order of Protection* to be extended in order to protect herself and her children from Malachi returning and abusing the family again like he did on the night of December 23, 2022. *Id.* at 68:5-15.

Shawna testified she filed for an order of protection on January 19, 2023 after coming to terms with the seriousness of Malachi's abuse and after Malachi was "avid" he would be returning to the family home on February 14, 2023. Tr. Transcr. II, 56:13-22. Shawna testified she needed protection from the court to ensure that the family did not experience more violence and requested that the court extend the

Temporary Order of Protection of Protection for her for a period of three years, and for the children until or unless amended by the Oregon court where the parties' dissolution and parenting case was pending. Tr. Transcr. II, 56:13-22.

IV. STANDARD OF REVIEW

This Court will overturn a district court's decision to continue, amend, or make permanent an order of protection if the district court abuses its discretion. *Lockhead v. Lockhead*, 2013 MT 368, ¶ 20, 373 Mont. 120, 314 P.3d 915 (citing *Schiller v. Schiller*, 2002 MT 103, ¶ 24, 309 Mont. 243, 272 P.3d 625). A district court abuses its discretion when it acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. *Kalispell Aircraft Co., LLC v. Patterson*, 2019 Mt 142, ¶ 12, 396 Mont. 182, 187, 443 P.3d 1100, 1105 (citing *Sullivan v. Cherewick*, 2017 MT 38, ¶ 10, 386 Mont. 350, 391, P.3d 62).

V. SUMMARY OF ARGUMENT

Malachi has perpetrated intimate partner violence on Shawna throughout the parties' relationship and in doing so exposed the parties' children to violence. Malachi's abuse of Shawna—which Shawna testified to under oath as she sought protection from Malachi—included verbal abuse, threats to kill her with a specific plan, jealousy and control, stalking and physical abuse on at least two separate occasions, once in 2017 and again throughout the evening on December 23, 2022.

During the most recent incident that involved physical violence, Malachi tried to prevent Shawna from seeking help by destroying her phone; attempted to stop her from fleeing the residence by tampering with her vehicle and cutting the wires to the garage door opener; and displayed firearms.

Despite Shawna testifying under oath to the serious abuse she experienced, evidence being admitted documenting the damage Malachi did to the family home during his abusive rampage, and Malachi electing not to testify in his own defense, the district court determined that the evidence presented did not rise to the level necessary to warrant an order of protection on behalf of Shawna and the children against Malachi. Furthermore, the district court concluded that Shawna and the children are not in danger of harm from Malachi in the absence of an order of protection against him.

Throughout its *Order*, the district court minimized Malachi's December 2022 assault on Shawna calling it "chaotic and insulting events." The court made findings and reached conclusions that are not supported by the record in its *Order*. Findings made by the district court that are not supported by the record include the court's finding that there was no physical abuse in the marriage or during the December 23, 2022 incident despite substantial credible evidence to the contrary; that Malachi had not threatened Shawna when the record reflects Malachi actually threatened to kill Shawna if she left him; and finding that Malachi had not abused the children despite

the children being witness to serious incidents of intimate partner family violence perpetrated by Malachi.

The district court abused its discretion by denying Shawna's request for an *Order of Protection* against Malachi. This abuse of discretion resulted in a substantial injustice to Shawna, who needs an order to keep herself and her children safe while she attempts to leave the abusive relationship. The undisputed evidence presented at the hearing clearly establishes that Malachi assaulted Shawna multiple times on December 23, 2022, including assaults on Shawna while she was laying with and holding the parties' one-year-old baby, and in the presence of the other children. The undisputed evidence clearly establishes that Malachi threatened to kill Shawna if she left him, which is what Shawna was attempting to do in December of 2022. Nonetheless, the district court concluded that Shawna did not demonstrate by a preponderance of the evidence that she and the children are victims of abuse by Malachi or that there is a reasonable fear for their safety.

The district court further concluded that because Malachi had not violated the *Temporary Order of Protection*, a permanent order of protection should not be granted. Requiring that a respondent subject to a temporary order of protection must violate the order before a survivor can be successful in seeking a permanent order of protection is unsupported by Montana law or policy, and unnecessarily places a survivor of violence at risk of serious injury or even death in order to qualify for the

protection they need. That Malachi stopped his abuse of the family while the *Temporary Order of Protection* was in place demonstrates that the order was working as intended and the order should have been continued to ensure Shawna and the children the protection they need to stay safe.

Based on the significant and uncontested evidence of abuse by Malachi that was presented at the hearing, it is clear that the district court abused its discretion by denying Shawna and the children continued safety in the form of an extended protective order resulting in a substantial injustice to Shawna and the children.

VI. ARGUMENT

The purpose of the chapter in which Montana’s order of protection statutes are codified is to “promote the safety and protection of all victims of partner and family member assault, victims of sexual assault, and victims of stalking.” Mont. Code Ann. § 40-15-101 (2021). Seventy-five percent of women who are murdered by their intimate partner had recently separated from their abuser. National Council of Juvenile and Family Court Judges, The Resource Center on Domestic Violence: Child Protection and Custody, <https://rcdvcpc.org/facts.html> (accessed on July 11, 2023). At the time Shawna was seeking protection from the district court, Shawna’s risk of harm by Malachi was at an all-time high as she had taken steps to end the relationship.

In recognition of the risks of abuse, Montana Code Annotated § 40-15-102(1) provides that a person is eligible for an order of protection if:

- (a) the petitioner is in reasonable apprehension of bodily injury by the petitioner's partner or family member as defined in 45-5-206; **or**
- (b) the petitioner is a victim of one of the following offenses committed by a partner or family member: (i) assault as defined in 45-5-201. . . (iv) partner or family member assault as defined in 45-5-206. . . .

In addition, Montana Code Annotated § 40-15-102(2) provides that victims of assault as defined in 45-5-201 and victims of stalking as defined in 45-5-220 are eligible to file a petition for an order of protection against the offender regardless of the individual's relationship to the offender.

“An order of protection may include restraining the respondent from any other named family member who is a minor. . . if this restriction is included, the respondent must be restrained from having contact with the minor for an appropriate time period as directed by the court or permanently if the court finds that the minor was a victim of abuse, a witness to abuse, or endangered by the environment of abuse.” Mont. Code Ann. § 40-15-204 (4). In Montana, if a petitioner is otherwise entitled to an order of protection, the length of time between the abusive incident and the petitioner's application for an order of protection is irrelevant. Mont. Code Ann. 40-15-102(7).

Here, Shawna demonstrated by a preponderance of the evidence that she qualifies for an order of protection against Malachi as a victim of partner family

member assault, assault, and stalking. Although Shawna did not have to demonstrate she is in reasonable apprehension of bodily injury because she is a victim of the enumerated statutes, the substantial credible evidence presented at the hearing also demonstrated that Shawna is fearful of Malachi causing her bodily injury and her fear is reasonable. Further, the district court erred in its application of Mont. Code Ann. 40-15-102(3) when it determined the children do not qualify for an order of protection on the basis that Malachi is not their “abuser.” Montana law clearly provides for the minor children to be named on the order of protection based on the children having witnessed the abuse perpetrated by Malachi and having been endangered by the environment of abuse. The district court’s failure to enter an order protecting Shawna and the children is an abuse of discretion.

1. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING SHAWNA’S ORDER OF PROTECTION WHEN THE PREPONDRANCE OF THE EVIDENCE SUBMITTED AT THE HEARING DEMONSTRATED THAT SHAWNA IS A VICTIM OF PARTNER FAMILY MEMBER ASSAULT, ASSAULT, AND STALKING.

The district court’s conclusion that Shawna did not demonstrate by a preponderance of the evidence that she qualifies for an order of protection as a victim of one of the crimes enumerated in Mont. Code Ann. § 40-15-102(1)(b) is not supported by the evidence presented at the hearing, the severity of the offense at issue, and Malachi’s history of violence against Shawna. Therefore, the district court

abused its discretion when it acted arbitrarily and without conscientious judgment in denying Shawna an order of protection against Malachi.

a) SUBSTANTIAL CREDIBLE EVIDENCE ESTABLISHED THAT SHAWNA IS A VICTIM OF ASSAULT AND PARTNER FAMILY MEMBER ASSAULT.

A partner family member assault occurs if an offender “(a) purposely or knowingly causes bodily injury to a partner or family member; (b) negligently causes bodily injury to a partner or family member with a weapon; or (c) purposely or knowingly causes reasonable apprehension of bodily injury in a partner or family member.” Mont. Code Ann. § 40-15-102 (1)(a); *See also* Mont. Code Ann. § 45-5-206. An assault occurs if the offender “(a) purposely or knowingly causes bodily injury to another; (b) negligently causes bodily injury to another with a weapon; (c) purposely or knowingly makes physical contact of an insulting or provoking nature with any individual; or (d) purposely or knowingly causes reasonable apprehension of bodily injury in another.” Mont. Code Ann. § 40-15-102 (1)(a); *See also* Mont. Code Ann. § 45-5-201. Bodily injury is defined as “physical pain, illness, or an impairment of physical condition and includes mental illness or impairment” while reasonable apprehension of bodily injury requires evidence that “a reasonable person would have realized that bodily injury could result.” Mont. Code Ann. § 45-2-101 (2021); *State v. Finley*, 2011 MT 89, 360 Mont. 173, 252 P.3d 199.

Following is the uncontested evidence presented at hearing in this matter that Malachi perpetrated partner family member assault by causing her reasonable apprehension of bodily injury, and assault by engaging in physical contact of an insulting or provoking nature, which qualifies Shawna for an order of protection:

- Malachi followed Shawna into the nursery where he hit Shawna in the face with the child's soiled diaper with enough force that the diaper exploded on Shawna, the parties' three-year-old son, and the changing table. *Id.* at 51:1-12.
- After Shawna heard Malachi on the phone with a friend saying "Do you want to see what this stupid bitch looks like" she shut the bedroom door of her oldest son and locked it. Malachi kicked in and broke down the door to gain entry to where Shawna and the children were hiding. *Id.* at 55:1-4 and 56:1-3.²
- Upon learning that Shawna had already filed for divorce, Malachi demanded that Shawna show him the paperwork. Malachi followed Shawna to the computer and assaulted her by ripping her ring off her

² Despite the significance of this event and the traumatizing experience of the Shawna and the children witnessing Malachi kick in the door to the bedroom where they were hiding to gain access to them, the district court entirely omitted this incident from the findings of fact.

finger and throwing her computer mouse across the room. *Id.* at 58:24-25; 59:1-4.

- Sometime during the violent incident, Shawna noticed that Malachi had taken his gun collection and laid the firearms out on the table. *Id.* at 58:1-2;18-21 and 59:2-7. The display of firearms on the family’s kitchen table during an abusive incident would cause a reasonable person apprehension of bodily injury. A female victim of domestic violence is five times more likely to be murdered by their abuser if the abuser owns a gun.³ The threat of gun violence by Malachi on December 23, 2022 caused Shawna and the parties’ children to be fear of Malachi and put the family at significant risk of harm.⁴

³ National Council of Juvenile and Family Court Judges, The Resource Center on Domestic Violence: Child Protection and Custody, <https://rcdvcpc.org/facts.html> (accessed on July 11, 2023).

⁴ The district court erroneously found that “questioning suggested that guns were to be used by Malachi and the oldest child who had planned to go shooting in the morning.” D.C. Doc., pg. 4. However, while Malachi’s counsel did conduct such questioning on cross exam, no testimony or evidence was provided to support the Court’s finding that Malachi was going to take C.J. shooting the following day. Rather, Shawna testified that C.J. was scared by the presence of the guns during the abusive incident by Malachi and that C.J. mentioned this fear to her multiple times. Tr. Transcript II, 55:1-3. It stands to reason that C.J. would not have been fearful of the presence of the firearms if the firearms were there for the proper purpose of planned recreation with C.J. the next day.

- As Shawna was attempting to flee the residence with the parties' children, she found Malachi standing over the open hood of her car with a wrench in his hand as he told Shawna he was taking the battery out of her car and that she wasn't leaving. *Id.* at 60:12-16; 61:7-9. This caused the children to cry even more at which point Malachi let them go (although he likely believed she would not be able to get the garage door open based on him having cut the cable), and Shawna and the children drove away into the snowstorm. *Id.* at 60:18-19.

The following testimony is uncontested evidence that was presented at the hearing that Malachi perpetrated assault and partner family member assault on Shawna, by causing her bodily injury:

- In 2017 Malachi assaulted Shawna by holding her down by her arm and face and squeezing her face while on top of her. This caused injuries to Shawna's face and arm. Tr. Transcr. I, 46:3-8.⁵
- On December 23, 2022, Malachi:

⁵ This event qualifies Shawna for an order of protection even without the additional events of December 23, 2022. However, the district court entirely omitted this violent incident in its *Findings* and instead erroneously concluded that Shawna did not offer evidence to support that she had experienced a pattern of abuse or that Malachi had physically hurt her during their relationship. D.C. Doc., pg 5.

- i. Grabbed Shawna's foot with force and tried to pull her off the bed while she was holding O.J. *Id.* at 47:24-25 and 48:1-14.
- ii. Bit Shawna in the back causing her pain.⁶ *Id.* at 49:1-15 and 50:2-3.
- iii. Pulled Shawna by the arm across the bedroom floor when she was holding the parties' child. *Id.* at 56:15-16; 23-24 and 57:1-4; 12-13.

b) SUBSTANTIAL CREDIBLE EVIDENCE ESTABLISHED THAT SHAWNA IS A VICTIM OF STALKING.

A person commits the offense of stalking “if the person purposely or knowingly engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person to: (a) fear for the person's own safety or the safety of a third person; or (b) suffer other substantial emotional distress.” Mont. Code Ann. § 45-5-220(1). “‘Course of conduct’ means two or more acts, including, but not limited to, acts in which the offender directly or indirectly, by any action, method, communication, or physical or electronic devices or means, follows, monitors, observes, surveils, threatens, harasses, or intimidates a person or interferes with a person's property.” Mont. Code

⁶ Shawna's undisputed testimony regarding Malachi squeezing her foot to the point she believed it was going to bruise and biting her back hard enough to cause her pain, is again contrary to the court's finding that Malachi did not physically harm Shawna and that Shawna is not a victim of crimes that make her eligible for an order of protection. D.C. Doc 21, pg. 6, line 1.

Ann. § 45-5-220(2)(a). "Reasonable person" for purposes of the statute means "a reasonable person under similar circumstances as the victim." Mont. Code Ann. § 45-5-220(2)(b).

The abuse that occurred on December 23, 2022, was a continuation of Malachi's violence against Shawna which persisted throughout their relationship. The undisputed evidence presented at the hearing demonstrated that Malachi had a pattern of using derogatory language towards Shawna, calling her names such as "fucking bitch" and "cunt" in the presence of the children. Tr. Transcr. I, 43:22-25. Malachi attempted to control Shawna by monitoring her cellphone use and he would accuse Shawna of cheating on him if he did not know the number of someone she was communicating with. The undisputed evidence presented established that Malachi has threatened Shawna that he does not care if he goes to prison and has threatened that he will kill Shawna if she leaves him. Malachi further harassed Shawna, and destroyed her property, by kicking and breaking in a door at the home she occupies, by cutting the garage door wire in an effort to stop her from leaving, and by destroying her cellphone. These actions caused Shawna to fear for her and her children's safety, caused her to pull over in the snowstorm after she had fled the residence with the children and vomit on the side of the road. Malachi's behavior has caused Shawna substantial emotional distress to the extent that she required medication to function as a result of her Post-Traumatic Stress Disorder.

Despite the significant evidence of serious abuse perpetrated by Malachi presented at the hearing (which included threats with firearms), the district court minimized Malachi's violence by stating "the reunion (of Malachi coming to Montana for the holidays) was not an entirely happy one." D.C. Doc. pg. 3. The uncontroverted evidence clearly shows that Shawna was a victim of partner family member assault, assault, and stalking by Malachi. The district court abused its discretion by acting arbitrarily and without conscientious judgment when it denied Shawna's order of protection, causing Shawna and the children risk of further serious harm. This Court should correct the district court's decision and remand the matter back to the district court with instructions for the court to grant Shawna an order of protection for a period of three years on the basis that her fear of Malachi is reasonable and because she is a victim of partner family member assault, assault, and stalking.

2. THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT THE CHILDREN COULD ONLY QUALIFY FOR AN ORDER OF PROTECTION AGAINST "THEIR ABUSER."

Montana law is clear that an order of protection may include restraining the respondent from any other named minor family member who is a minor for an appropriate time period or permanently if the court finds that the minor was a victim of abuse, a witness to abuse, or endangered by the environment of abuse. Mont. Ann. Code § 40-15-204(4). The court failed to apply this statute when determining

whether the children should be protected from Malachi pursuant to an Order of Protection. Instead, the district court erroneously applied Mont. Ann. Code § 40-15-102(3) which sets forth the qualifications for a parent to apply for an order of protection *on behalf* of a minor child, which is not the relief requested by Shawna in this case.

All three of the parties' children, as well as Shawna's son from a prior relationship, witnessed Malachi physically abuse Shawna on December 23, 2023. The children were also endangered by the environment of abuse themselves that night. As examples, the children were locked inside C.J.'s room when Malachi broke down the bedroom door and later watched Malachi drag Shawna across the bedroom floor by her arm. Tr. Transcript I, 55:19-22. The parties' one year old child, O.J., was in Shawna's arms when Malachi grabbed her by the foot and tried to pull her off the bed and when Malachi bit Shawna's back. *Id.* at 48:1-3; 56:22-25. Three-year-old, W.J., was hit by the contents of his saturated diaper when Malachi used the diaper to hit Shawna in the face with enough force that the diaper burst open. *Id.* at 51:8-12. All of the children were endangered by Malachi attempting to disable Shawna's vehicle, as well as being present in the home when Malachi used firearms as a threat to prevent Shawna from leaving the relationship. *Id.* at 58:1-2; 18-21 and 59:2-7.

The evidence presented clearly established that the exposure to violence impacted the parties' children. Six-year-old, B.J., was terrified by Malachi's actions, "screaming and freaking out" after watching Malachi kick down the bedroom door where Shawna and the children were hiding. *Id.* at 56:15-18. Sixteen-year-old C.J. cried out in fear as the parties left the home, telling Shawna that Malachi was following the family and would shoot them. *Id.* at 66:12-16. B.J.'s teacher testified that following the December 23, 2022 incident, B.J. became noticeably withdrawn at school and eventually started repeatedly disclosing what had occurred in his home that night to his teacher. *Id.* at 30:1-5.

The children witnessing Malachi (the biological father to three of the children) abuse their mother is child abuse.⁷ Even though the children were clearly exposed to Malachi committing acts of violence towards Shawna, which means that the children were victims of abuse by Malachi, the district court erroneously concluded that the children were only eligible for protection against their "abuser." Even if the court's legal analysis was correct in that the children could only be protected in an order of protection from their abuser, the children would still qualify for protection from

⁷ Montana law defines " 'psychological abuse or neglect' as severe maltreatment through acts or omissions that are injurious to the child's emotional, intellectual, or psychological capacity to function, **including the commission of acts of violence against another person residing in the child's home.**" Mont. Code Ann. § 41-3-102(24)(a). [Emphasis added].

Malachi as he abused the children on December 23, 2022. However, that is not the correct legal analysis in this case and the Court abused its discretion in determining that the children could not be protected from Malachi by an order of protection.

The children qualify to be named as protected parties under Montana Annotated Code § 40-15-204(4) as they witnessed the abuse perpetrated by Malachi and were endangered by the environment of abuse themselves. Therefore, this Court should reverse the district court's denial of an order of protection, remand the matter to the district court and order the court to include the children on the Order of Protection until or unless amended by the Oregon court in the custody proceeding.

VII. CONCLUSION

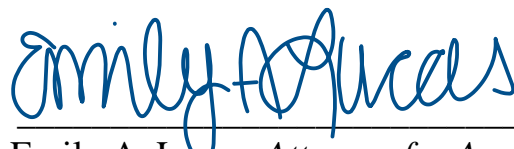
Shawna qualifies for an order of protection against Malachi as a victim of assault, partner family member assault, and stalking. Malachi has perpetrated physical violence on Shawna and his abuse has caused her reasonable apprehension of bodily injury. The children qualify for protection from Malachi under Montana law as they witnessed Malachi's violent acts and were endangered by the environment of abuse.

Malachi even conceded in his closing argument to the “*Temporary Order of Protection* being extended until the dissolution and parenting proceeding in Oregon can be resolved.” D.C. Doc. 20, pg. 3. Still, the district court denied Shawna and the children an avenue to stay safe. The district court's determination that Shawna and

the children do not need protection from Malachi, when the undisputed evidence presented at the hearing was that of substantial physical and emotional abuse, exceeds all bounds of reason. The district court abused its discretion when it denied Shawna's request for an Order of Protection. Therefore, this Court should reverse the district court's decision and remand with instructions for the district court to continue Shawna's *Order of Protection* for a period of three years for Shawna and until or unless amended by the Oregon Court for the children.

The district court also erred by misapprehending the evidence presented in many of its findings, including those crucial to determining if Shawna qualifies for an order of protection. The consequence is that Shawna suffers a substantial injustice as she is left without protection for her children and herself and is unable to prevent Malachi from returning to the family home in Huson and repeating, or even accelerating, the abuse he inflicted on December 23, 2022.

DATED this 20th day of July, 2023.




Emily A. Lucas, *Attorney for Appellant*

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rule 16 and 22 of the Montana Rules of Appellate Procedure that this Appellant's Brief is printed with a proportionally spaced roman text, typeface of 14 points, is doubled spaced, with a word count of 6800 and 31 pages.

DATED this 20th day of July, 2023.



Emily A. Lucas, *Attorney for Appellant*

CERTIFICATE OF SERVICE

I, Emily Ann Lucas, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-20-2023:

Ashley Holmes Hurlbert (Attorney)
501 S. Russel
Judnich Law
Judnich Law
Missoula MT MT 59801
Representing: Malachi Johnson
Service Method: eService

Electronically Signed By: Emily Ann Lucas
Dated: 07-20-2023