LC Abstract

Child Custody and Physical Placement in Wisconsin

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This **LC Abstract** describes a particular aspect of Wisconsin law in effect as of the date printed on the document cover. The abstract is a general discussion and should not be used as legal advice for fact-specific situations. This LC Abstract was written by Laura Rose, Deputy Director. The document is available on-line at www.legis.state.wi.us/lc/reports_by_topic.htm. Additional paper copies are available by contacting the Legislative Council office and requesting document LCA 02-1.

Child Custody and Physical Placement in Wisconsin

Actions affecting the family are generally governed by ch. 767, Stats. As an element of many actions affecting the family specified in ch. 767, Stats., the legal custody and physical placement of any minor children of the parties to an action affecting the family is awarded. This document describes Wisconsin law relating to child custody and physical placement. It is divided into three sections. The first section describes legal procedures and standards governing the allocation of child custody and physical placement in actions affecting the family. The description includes changes made through the 2001-2003 Legislative Session. The next section describes post-judgment modification of legal custody and physical placement orders, and the final section describes enforcement.

LEGAL PROCEDURES AND STANDARDS GOVERNING CHILD CUSTODY AND PHYSICAL PLACEMENT

Definitions

The following definitions relating to child custody and physical placement apply in actions affecting the family under ch. 767, Stats.:

- "**Guardian ad litem**," in an action affecting the family, is an attorney who acts as an advocate for the best interests of a minor child as to paternity, legal custody, physical placement, and support. The term is not specifically defined, but s. 767.045, Stats., outlines qualifications and duties.

- "**Legal custody**" means, with respect to any person granted legal custody of a child, other than a county agency or licensed child welfare agency, the right and responsibility to make major decisions concerning the child, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order [s. 767.001 (2) (a), Stats.]. "Major decisions" include, but are not limited to, decisions regarding consent to marry, consent to enter military service, consent to obtain a motor vehicle operator's license, authorization for nonemergency health care and choice of school and religion [s. 767.001 (2m), Stats.].

- "**Joint legal custody**" means the condition under which both parties share legal custody and neither party's legal custody rights are superior, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order [s. 767.001 (1s), Stats.].

- "**Sole legal custody**" means the condition under which one party has legal custody [s. 767.001 (6), Stats.].

- "**Physical placement**" means a condition under which a party has the right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child's care, consistent with major decisions made by a person having legal custody [s. 767.001 (5), Stats.].

Jurisdiction

General Jurisdictional Provisions

Subject to the provisions of the Uniform Child Custody Jurisdiction Act (UCCJA) [ch. 822, Stats., discussed below], the question of a child's custody may be determined:

- As an incident of any action affecting the family; or
- In an independent action for custody.

For questions of child custody which arise as a result of a divorce action, certain residency requirements must be met before a divorce petition may be filed.

In order to initiate an action to obtain a divorce in Wisconsin, at least one of the spouses must have been a resident of Wisconsin for not less than six months before the action is commenced [s. 767.05 (1m), Stats.]. Further, at least one spouse must have been a resident of the county in which the action is brought for at least 30 days before commencement of the action [ss. 767.05 (3) and (4) and 767.085, Stats.]. Either or both spouses may, by petition, initiate a divorce action. If only one spouse initiates the action, the other spouse must be served with the divorce petition [s. 767.085 (2) to (3), Stats.].

A child custody determination is not binding personally against any parent or guardian of the child unless the parent or guardian:

- Has been made personally subject to the jurisdiction of the court by service of a summons on the parent or guardian.
- If the parent or guardian lives outside the state, he or she is notified of the custody action. Notice must be given in a manner "reasonably calculated to give actual notice" of the action. The types of permissible notice are specified in s. 822.05 (1), Stats. (e.g., personal delivery of the notice; mailing the notice with return receipt requested). Notice is not required if the parent or guardian submits to the jurisdiction of the court (e.g., appears in the action and waives lack of personal jurisdiction) [s. 767.05 (2), Stats.].

Uniform Child Custody Jurisdiction Act

In general, except in cases of neglect or dependency, the UCCJA limits child custody jurisdiction to: (1) the child's "home state"; or (2) the state with maximum "significant connection" with the child **and** with at least one of the persons claiming a right to custody of or visitation with the child. "Home state" is defined to mean the state in which the child, immediately preceding the time involved, lived with the child's parent or parents, or a person acting as a parent, for at least six consecutive months and, in the case of a child less than six months old, the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month period or other period.

Some of the general purposes of the UCCJA are:

- To avoid jurisdictional competition between states.
- To assure that the custody determination occurs in the forum best able to determine the issues.
- To discourage continuing litigation over custody and visitation rights.
- To deter abductions and unilateral removals of children by not requiring the physical presence of a child for the custody determination.

- To facilitate the enforcement of custody decrees of other states.
- To promote the exchange of information and mutual assistance among the courts of those states concerned with the same child [ch. 822, Stats.].

Petition

Actions affecting the family are initiated by the filing of a petition with the appropriate court. Terminology in actions affecting the family differs from that used in other civil actions under ch. 801, Stats. The term "petition" is used instead of the word "complaint." The party initiating the action affecting the family is named the "petitioner" instead of the "plaintiff." The person responding to the action is named the "respondent," instead of referring to that person as the "defendant." Further, both parties together may initiate a petition by signing and filing a joint petition, whereby they would be referred to as "joint petitioners" [s. 767.05 (3), Stats.].

Petition requirements for petitions in actions affecting the family are governed by s. 767.085, Stats. If the parties to the action have minor children, the petition must specify the name and birth date of each minor child of the parties and each other child born to the wife during the marriage and whether the wife is pregnant [s. 767.085 (1) (b), Stats.].

The petition must also state whether the parties have entered into any written agreements as to support, legal custody and physical placement of children, maintenance of either party and property division. If so, the written agreement must be attached to the petition [s. 767.085 (1) (e), Stats.]. The petition must specifically state what relief is requested from the court [s. 767.085 (1f), Stats.].

If the petitioner requests an order or judgment affecting a minor child, the petition must request that the Department of Workforce Development (DWD) provide services on behalf of the child under s. 49.22, Stats., which creates the child and spousal support and establishment of paternity and medical liability support program in DWD. Upon filing of a petition, the clerk of court must provide, without charge, a document setting forth the percentage standard for child support established by DWD under s. 49.22 (9), Stats., and listing factors which a court may consider in establishing child support under s. 767.25 (1m), Stats.

Appointment of Guardian Ad Litem

Appointment Required

In the following actions affecting the family, the court is required to appoint an attorney as guardian ad litem to represent the interests of any minor children as to custody, physical placement, support and visitation:

- Any action in which the court has reason for special concern as to the future welfare of the children.
- The legal custody or physical placement of the children is contested [s. 767.045, Stats.].

Appointment Not Required

A court is not required to appoint a guardian ad litem when the legal custody or physical placement of a child is contested if all of the following apply:

- Legal custody or physical placement is contested in an action to modify legal custody or physical placement.
- The modification sought would not substantially alter the amount of time that a parent may spend with the child.
- The court determines any of the following:

1. That the appointment of a guardian ad litem will not assist the court in the determination regarding legal custody or physical placement because the facts or circumstances of the case make the likely determination clear.

2. That a party seeks the appointment of a guardian ad litem solely for a tactical purpose, or for the sole purpose of delay, and not for a purpose that is in the best interest of the child.

[See s. 767.045 (1) (am), Stats.]

Timing of Appointment

In cases where legal custody or physical placement is contested and the parties have been referred to family court counseling services for mediation (see *Mediation of Legal Custody and Physical Placement Disputes; Counseling* on page 5) and the mediation failed to produce an agreement between the parties on the issues, the court is required to "promptly" appoint a guardian ad litem [s. 767.11 (12) (b), Stats.]. The court may, however, on its own motion or upon a motion by a party, appoint a guardian ad litem at an earlier time if it determines this is necessary [s. 767.045 (2), Stats.].

Any time after 120 days following the appointment of a guardian ad litem for a minor child in any action affecting the family, a party may request that the court schedule a status hearing regarding the activities of the guardian ad litem. Also, a party may make additional requests for a status hearing if a request is made at least 120 days following the most previous status hearing [s. 767.045 (4m), Stats.].

The Wisconsin Supreme Court has held that it is reversible error (i.e., grounds for the appellate court to reverse the trial court's judgment) for the trial court to fail, on its own motion, to appoint a guardian ad litem before deciding contested custody issues, even if neither party has requested the appointment [*Bahr v. Bahr*, 72 Wis. 2d 145, 148-49, 240 N.W. 2d 162, 164 (1976)].

Current law requires that the guardian ad litem must be an advocate for the best interests of the child he or she represents and must, as part of that representation, consider the factors listed in s. 767.24 (5), Stats., and custody studies under s. 767.11 (14), Stats., relating to child custody. The Wisconsin Supreme Court has noted that:

> . . . a guardian ad litem appointed to represent children is more than a nominal representative appointed to counsel and consult with the trial judge. Rather, he [or she] has all the duties, powers and responsibilities of counsel who represents a party to litigation [*de Montigny v. de Montigny*, 70 Wis. 2d 131, 138, 233 N.W. 2d 463, 467 (1975)].

Payment

If a guardian ad litem is appointed, the court must require either or both of the parties to pay the fee of the guardian ad litem. If both parties are indigent, the court, in its discretion, may direct that the fee be paid by the county in which the action is brought. In all cases, the court must approve the amount of the guardian ad litem's fees [s. 767.045 (6), Stats.].

If a guardian ad litem is permitted to move the court for an order requiring the parties or, if they cannot pay, the county to pay for expert witnesses to assist the guardian ad litem in performing his or her duties. The guardian ad litem must show that the use of experts is necessary.

Guardian ad Litem Education

The Wisconsin Supreme Court issued Order 01-12, effective July 1, 2003, that affects guardian ad litem eligibility in actions affecting the family. The order does the following:

- Requires attorneys who accept appointments as a guardian ad litem in actions affecting the family to have received six hours of approved guardian ad litem education during the combined current biennial continuing legal education reporting period and the immediately preceding reporting period. Three of the required six hours would be in family court guardian ad litem education. In addition, a court could appoint an attorney who has not met this requirement if the court finds that the action or proceeding presents exceptional or unusual circumstances for which the attorney is otherwise qualified by experience or expertise.

- Specifies that family court guardian ad litem education must be on the subjects of: actions affecting the family; child development and the effects of conflict and divorce on children; mental health issues in divorcing families; the dynamics and impact of family violence; and sensitivity to various religious backgrounds, racial and ethnic heritages and issues of cultural and socioeconomic diversity.

Mediation of Legal Custody and Physical Placement Disputes; Counseling

Definition of "Mediation"

"Mediation" is defined as a cooperative process involving the parties and a mediator, the purpose of which is to aid the parties, by application of communication and dispute resolution skills, in defining and resolving their own disagreements, with the best interests of the child as the paramount consideration [s. 767.001 (3), Stats.].

All counties are required to make mediation services available either by: (a) establishing a family court counseling office to provide mediation services; or (b) contracting with one or more public or private agencies in the county or a contiguous county to provide these services.

If the family court counseling office option is selected: (a) two or more contiguous counties are permitted to enter into a cooperative agreement for a single office to provide mediation services in the cooperating counties; and (b) the county (or counties, if a cooperative agreement is entered into) is permitted to direct that legal custody or physical placement studies also be provided by the office [s. 767.11 (3), Stats.].

The circuit judges for each county (or counties, if a cooperative agreement is entered into), with the approval of the child judge of the judicial administrative district, are required to designate a director of family court counseling services. The director must be a qualified mediator and has general administrative responsibilities for the operation of the counseling office, if any, and provision of mediation and related services. A county may designate a family court commissioner (FCC) as the director of family court counseling services [s. 767.11 (1), Stats.].

Qualifications of Mediators

Persons conducting mediation who are assigned by a director of family court counseling services under a county program are required to have not less than 25 hours of mediation training or at least three years of professional experience in dispute resolution [s. 767.11 (4), Stats.].

A mediator must be guided by the best interests of the child in performing mediation duties. A mediator under a county program may, among other things: (a) include the attorney for any party or any appointed guardian ad litem in the mediation; (b) interview any child of the parties, with or without a party present; and (c) suspend mediation when necessary to enable a party to obtain an appropriate court order or appropriate therapy [s. 767.11 (10), Stats.].

Referral to Mediation

The court or the FCC is required to refer the parties to mediation in all actions affecting the family where it appears that legal custody or physical placement is contested. The parties are required to attend an initial session with the mediator. This mandatory initial session, for which no fee is to be charged [s. 814.615 (1) (a) 1, Stats.], is a screening and evaluation session to determine whether mediation is appropriate and whether both parties wish to continue in mediation.

The FCC is permitted to refer persons to mediation or other appropriate counseling service if: (a) the parties wish to have joint legal custody, but need assistance in resolving problems relating to joint legal custody or physical placement, or both; or (b) a person with physical placement rights, a child of such a person, a person with visitation rights or any person with physical custody of a child is experiencing difficulty in the exercise of these rights [s. 767.11 (5) (b) and (c), Stats.].

Parties are permitted, at their own expense, to receive mediation services from a private mediator [s. 767.11 (7), Stats.].

Attendance at an initial mediation session is not required if the court finds that attending the session would cause "undue hardship" or would endanger the health or safety of one of the parties. In making its determination of whether attendance at the session would endanger the health or safety of one of the parties, the court is required to consider evidence of child abuse, domestic abuse or significant current problems with alcohol or drug abuse or any other evidence indicating that a party's health or safety will be endangered by attending the session [s. 767.11 (8), Stats.].

A mediator may terminate mediation if a party does not cooperate or if mediation is not appropriate. In addition to these grounds for termination, the mediator may terminate mediation, if there is evidence of child abuse, domestic abuse or significant current problems with alcohol or drug abuse or any other evidence which indicates one of the parties' health or safety will be endangered if mediation is not terminated [s. 767.11 (10) (e), Stats.].

Mediation Procedure

The statutes set out the following mediation procedure:

- Unless the parties contract with a private mediator at their own expense, the director of the counseling service must assign a mediator to the case. If a private mediator is used, the parties must sign and file with the director and the court or FCC a written notice to that effect.

- Issues of property division, maintenance and child support may not be considered in county-provided mediation unless: (1) such issues are directly related to the legal custody or physical placement issues being considered; and (2) the parties agree, in writing, to consider them [s. 767.11 (9), Stats.].

- Subject to the item below, if agreement is reached in mediation, the agreement must be prepared in writing and submitted to the court as a stipulation for inclusion in a court order. The court may only approve or reject the agreement, not modify it. The court must state in writing its reasons for rejecting an agreement [s. 767.11 (12) (a), Stats.].

- Prior to submitting the agreement to the court: (1) the agreement must be reviewed by the attorney, if any, for each party and by the guardian ad litem, if one has been appointed; (2) the reviewing attorney or attorneys and the guardian ad litem must certify in writing on the agreement that they have reviewed the agreement and the guardian ad litem must comment on the agreement based on the best interests of the child; and (3) the mediator must certify that the agreement is in the best interests of the child [s. 767.11 (12) (a), Stats.].

- If agreement is not reached in mediation, the court must be notified, a guardian ad litem must be promptly appointed, the matter must be referred for a legal custody or physical placement study, if appropriate, and the issues must be resolved by usual judicial procedures [s. 767.11 (12) (b), Stats.].

Confidentiality; Privilege

Section 905.035, Stats., governs confidentiality requirements for any materials made, used or received by a mediator during the course of mediation. Such material is not a public record and, with certain exceptions, is not subject to discovery or admission in any action.

A privilege is created under s. 905.035, Stats., permitting, with certain exceptions [e.g., if both mediation parties consent to waive the privilege; if a mediator reports child abuse under s. 48.981, Stats.], parties to mediation to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made in the mediation.

A person who provided mediation to the parties is not permitted to investigate the parties in a subsequent legal custody or physical placement study unless each party personally consents, by stipulation, to that activity. If the parties do consent, the privilege for confidential communications in the mediation is waived [s. 767.11 (14) (c), Stats.]. The law specifies that:

- The court or the FCC must inform the parties that there is no privilege of confidentiality when the mediator also conducts the legal custody or physical placement study [s. 767.11 (5) (a), Stats.].

- The parties, before consenting to this activity by the mediator, must receive notice from the mediator that consent waives the privilege of confidentiality [s. 767.11 (14) (c), Stats.].

Legal Custody and Physical Placement Studies

Current law requires a county, or two or more contiguous counties, to provide legal custody and physical placement study services. Whenever legal custody or physical placement of a minor child is contested and mediation is not used or does not result in agreement between the parties, or at any other time the court considers it appropriate, the court may order a person or entity designated by the county to investigate: (1) the conditions of the child's home; (2) each party's performance of parental duties and responsibilities relating to the child; and (3) any other matter relevant to the best interest of the child.

The person or entity investigating the parties must make the results available to both parties. The report is a part of the record in the action unless the court orders otherwise.

No person who provided mediation to the parties may investigate the parties under this provision, unless each party personally so consents by stipulation [s. 767.11 (14), Stats.].

Educational Programs

In addition to the court's or FCC's authority to order counseling of the parties in a divorce action through its temporary order authority [s. 767.23 (1) (i), Stats.], the court or FCC may also order the parties, when a minor child is involved in the divorce action, and the court or FCC determines that it is appropriate and in the best interests of the child, to attend a program concerning the effects of divorce on children [s. 767.115, Stats.]. Parties to a paternity action may be ordered to attend training in parenting, coparenting, or both. The program must be educational rather than therapeutic in nature, and may not exceed a total of four hours in length. The parties to the action are responsible for the cost,

if any, of attending the program and the court or FCC may specifically assign responsibility for payment of the cost.

During the pendency of a divorce action, the court or FCC may also order attendance at a class on such issues as child development, family dynamics, the impacts of parental separation on the child, and what parents can do to make raising a child in a separated situation less stressful for the child. Parties may not be required to attend such a program as a condition of being granted a final order. However, the court or FCC can refuse to hear a party's custody or physical placement motion if the party refuses to attend. Parties are responsible for the costs of attending, unless indigency is found.

Alternative Dispute Resolution

Under s. 802.12, Stats., a judge may, with or without a motion having been filed, order the parties to select an alternative dispute resolution settlement alternative as a means to attempt settlement of a case. The parties may select among several settlement alternatives outlined in the statutes. If the parties cannot agree on a settlement alternative, a judge is required to specify the least costly settlement alternative that the judge believes is likely to bring the parties together in settlement. However, except where all parties consent, a judge may not order the parties to attempt settlement through binding arbitration, nonbinding arbitration or summary jury trial, since this would impinge upon the party's right to a jury trial. Further, a judge may not order the parties to attempt settlement through more than one of the following: binding arbitration, early neutral evaluation, focus group, mediation, minitrial, moderated settlement conference, nonbinding arbitration or summary jury trial.

The statute provides special rules regarding alternative dispute resolution in actions affecting the family.

Temporary Orders

Scope of Temporary Orders

During the pendency of a divorce action, the FCC may make "just and reasonable" temporary orders concerning the following matters:

- Upon request of a party to the divorce action, granting legal custody of minor children to the parties jointly, to one party solely or to a relative or child welfare agency. A temporary order for joint legal custody may be made without the agreement of the other party and without the necessary statutory findings.
- Granting periods of physical placement of a minor child to the parties.
- Prohibiting the removal of minor children from the jurisdiction of the court.
- Requiring either or both parties to make payments for the support of minor children.
- Requiring either party to pay for the maintenance of the other party (the maintenance may include expenses and attorney fees incurred by the other party in bringing or responding to the action).
- Requiring either party to execute an assignment of income.
- Requiring either or both parties to pay debts or to perform other actions in relation to the persons or property of the parties.
- Prohibiting either party from disposing of assets within the jurisdiction of the court.
- Requiring counseling of either or both parties.

- Requiring either or both parties to maintain minor children as beneficiaries on a health insurance policy or plan [s. 767.23 (1), Stats.].

In addition, if the FCC believes that a temporary restraining order or injunction in connection with domestic abuse is appropriate, the FCC is required to inform the parties of their right to seek the order or injunction and the procedure to follow [s. 767.23 (1m), Stats.].

Factors Considered

In making temporary orders, the court or FCC is required to consider those factors which the court is required by statute to consider before entering a final judgment on the same subject matter [s. 767.23 (1n), Stats.]. A temporary order regarding custody or physical placement must be consistent with the statutory factors for final custody and physical placement determinations.

Parenting Plan

When Parenting Plan Required

In certain actions affecting the family in which legal custody or physical placement is contested, a party seeking sole or joint legal custody or periods of physical placement must file a parenting plan before any pretrial conference. Except for cause shown, a party failing to timely file such a plan waives the right to object to the other party's parenting plan.

Contents of Plan

The plan must address many issues including current living and working conditions, child care, schooling, medical care, religion, division of holidays and summer schedules, methods to resolve disagreements and child support, family support, maintenance or other income transfers. If there is evidence that the other parent has engaged in interspousal battery or domestic abuse with respect to the parent providing the parenting plan, the parent providing the parenting plan is not required to disclose any specific addresses, but need only provide a general description of where he or she currently lives, intends to live during the next two years or works. If there is evidence that either party has engaged in interspousal battery or domestic abuse with respect to the other party, a parenting plan must describe how a child will be transferred between the parties for the exercise of physical placement to ensure the safety of the child and the parties. [See s. 767.24 (1m), Stats.]

Final Custody and Physical Placement Orders

Custody; Joint or Sole

There is a presumption that joint legal custody is in the best interest of the child. The court may award sole legal custody only if it finds it is in the child's best interest, and that either of the following apply:

- Both parties agree to sole legal custody with the same party.
- The parties do not agree to sole legal custody with the same party, but at least one party requests it, and the court specifically finds any of the following:

  1. One party is not capable of performing parental duties or does not wish to actively participate in raising the child.
  2. Conditions exist that would substantially interfere with the exercise of joint legal custody.
  3. The parties will not be able to cooperate in future decision-making involved in joint legal custody. Evidence of child abuse, interspousal battery, or domestic

abuse raises a rebuttable presumption that the parties will not be able to cooperate in future decision-making.

The court may not give sole legal custody to a parent who the court finds unreasonably refuses to cooperate with the other parent.

Factors Considered

The court is required to consider the following factors in determining legal custody and physical placement:

- The wishes of the child's parent or parents.
- The wishes of the child.
- The interaction and interrelationship of the child with his or her parent or parents, siblings, and other persons who may significantly affect the child's best interests.
- The amount and quality of time a parent has spent with the child, any necessary changes to the parents' custodial roles, and lifestyle changes the parent proposes to make to be able to spend time with the child in the future.
- The child's adjustment to home, school, religion, and community.
- The child's age, and the child's developmental or educational needs at different ages.
- The mental and physical health of the parties, the minor children, and others living in the proposed custodial household.
- The need for regular periods of physical placement to provide for predictability and stability.
- Child care availability.
- Cooperation and communication between the parties, and whether any party unreasonably refuses to cooperate or communicate.
- Whether each party can support the other party's relationship with the child, including encouraging frequent contact, and whether it is likely that there will be interference with the child's relationship with the other party.
- Whether there is evidence that a party has engaged in child abuse.
- Whether there is evidence that a party has engaged in interspousal battery or domestic abuse.
- Whether either party has a past or current problem with drugs or alcohol.
- Reports of appropriate professionals, if admitted into evidence.
- Such other factors as the court may determine to be relevant.

In joint legal custody situations, the court may specify one of the parties as the primary caretaker of the child and one home as the primary home [s. 767.24 (6) (c), Stats.]. The court may also grant to one party the right to make specified decisions for the child; other legal custody decisions concerning the child would be made by both parties [s. 767.24 (6) (b), Stats.].

Allocation of Physical Placement

In awarding sole or joint legal custody, the court is also required to allocate periods of physical placement of the child between the parties. In determining periods of physical placement, the court is required to consider the same factors, listed above, that are considered in determining legal custody [s. 767.24 (5) (intro.), Stats.]. The placement schedule must allow a child to have regularly occurring, meaningful periods of physical placement with each parent and must maximize the time spent with each parent, taking into account geographic distance and accommodations for different households. A child is entitled to periods of physical placement with both parents unless the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health [s. 767.24 (4) (c), Stats.]. Periods of physical placement may not be denied or granted for failing to meet or for meeting any financial obligation to the child or former spouse [s. 767.24 (4) (c), Stats.]. A court may not make a prospective order prohibiting a parent from requesting a change in physical placement in the future. [*Jocius v. Jocius*, 218 Wis. 2d 103, 580 N.W.2d 708, 715 (Ct. App. 1998).]

For purposes of both legal custody and physical placement, the court may not prefer one party over the other on the basis of gender or race [s. 767.24 (5) (intro.), Stats.]. If legal custody or physical placement is contested, the court is required to consider reports of appropriate professionals, such as social workers and court-appointed guardians.

A parent who has been convicted of first- or second-degree intentional homicide of the child's other parent may not be granted periods of physical placement with his or her child. This restriction does not apply if the conviction is reversed, set aside, or vacated, or if a court determines, by clear and convincing evidence, that physical placement would be in the child's best interest. [s. 767.247, Stats.] The court must consider the child's wishes in making such a determination.

POST-JUDGMENT MODIFICATION OF LEGAL CUSTODY AND PHYSICAL PLACEMENT ORDERS

This section describes the standards for modifications of legal custody and physical placement orders which may take place after a final judgment in an action affecting the family has been entered. It includes a discussion of current law regarding legal custody and physical placement when a custodial parent wants to change residence with the child.

Contested Legal Custody Modifications

Within Two Years of Initial Order

Within two years after the initial legal custody order, a court is not permitted to modify the order, when modification is objected to by the other party, unless the party seeking the modification shows by substantial evidence that modification is **necessary** because the current custodial conditions are physically or emotionally harmful to the best interests of the child [s. 767.325 (1) (a), Stats.]. The purpose of this standard is to provide a two-year period of finality during which legal custody and physical placement may not be modified except under limited circumstances, to provide time for the child and parents to adjust to the new family situation [*In re Paternity of S.R.N.*, 174 Wis. 2d 745, 498 N.W. 2d 235 (S. Ct. 1993)].

After Two Years

After the two-year period, a court may modify a legal custody order if: (1) modification is in the best interests of the child; and (2) a substantial change of circumstances has occurred [s. 767.325 (1) (b), Stats.]. There is a rebuttable presumption that continuing

the current allocation of decision-making under a legal custody order is in the best interests of the child. It is expressly provided in the statutes that a change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification of a legal custody order.

Contested Physical Placement Modifications

Substantial Modification Within Two Years

Within the two-year period following the initial order for physical placement of a minor child, a substantial modification of the order that is opposed by a party may not be made unless the standard, described above, for modifying a legal custody order within the initial two-year period is met [s. 767.325 (1), Stats.]. A substantial physical placement modification is a modification which would substantially alter the time a parent may spend with his or her child. However, if the parties have substantially equal periods of physical placement and circumstances make it impractical for the parties to continue that placement, a court may order a substantial physical placement modification within the initial two-year period if it is in the best interests of the child [s. 767.325 (2) (a), Stats.].

Substantial Modification After Two Years

After the initial two-year period following a divorce judgment, a court may modify an order for physical placement, where the modification substantially alters the time a parent may spend with the child, if the court finds: (1) the modification is in the best interests of the child; and (2) there has been a substantial change of circumstances [s. 767.325 (1) (b), Stats.]. There is a rebuttable presumption that continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interests of the child. Again, a change in economic circumstances or marital status of either party is not sufficient to meet the standard for physical placement modification.

If the parties have substantially equal periods of physical placement and circumstances make it impractical for the parties to continue to have substantially equal physical placement, the court may order a physical placement modification if it is in the best interests of the child [s. 767.325 (2) (a), Stats.]. If no such circumstances exist, the court may order a physical placement modification only if the standard, described above, that applies for substantial modifications after the two-year period is met [s. 767.325 (2) (b), Stats.]. Note that the rebuttable presumption applicable in the latter case is that having substantially equal periods of physical placement is in the best interests of the child.

The court at any time may order a modification of physical placement that does not substantially alter the amount of time a parent may spend with his or her child if the court finds that the modification is in the best interests of the child [s. 767.325 (3), Stats.].

A court may deny a parent's physical placement rights at any time if it finds that the physical placement rights would endanger the child's physical, mental or emotional health [s. 767.327 (4), Stats.].

A court may modify an order of physical placement at any time with respect to periods of physical placement if it finds that a parent has repeatedly and unreasonably failed to exercise periods of physical placement awarded under an order of physical placement that allocates specific times for the exercise of periods of physical placement. Further, in all actions to modify legal custody or physical placement orders, the court must act consistently with s. 767.24, Stats., relating to custody and physical placement judgments. A court may require a party seeking modification to file a parenting plan as described in *Parenting Plan* on page 9. [See s. 767.325 (2m), (5m) and (6m), Stats.]

Finally, upon a party's petition, motion or order to show cause, or on the court's own motion, a court must modify a physical placement order by denying a parent physical placement with a child if the parent has been convicted of first- or second-degree intentional homicide of the child's other parent.

Stipulated Legal Custody and Physical Placement Modifications

If, after a divorce judgment, the parties agree to a modification of an order of physical placement or legal custody and file a stipulation for modification with the court, the court is required to incorporate the terms of the stipulation into a revised order of physical custody or physical placement if the court determines it is in the best interests of the child [s. 767.329, Stats.; and *In re Paternity of S.A.*, 165 Wis. 2d 530, 478 N.W. 2d 21 (Ct. App. 1991)].

Change of Residence of Legal Custodian and Child

Notice to Other Parent

If a court grants periods of physical placement of a child to more than one parent, the court must order a parent with legal custody of and physical placement rights to the child to provide not less than 60 days' written notice to the other parent (with a copy to the court) of his or her intent to do any of the following:

- Establish his or her legal residence with the child at any location outside the State of Wisconsin.
- Establish his or her legal residence with the child, at any location within the State of Wisconsin, that is a distance of 150 miles or more from the other parent.
- Remove the child from this state for more than 90 consecutive days [s. 767.327 (1), Stats.].

Within 15 days after receiving the notice, the other party may send to the parent (with a copy to the court) a written notice of objection. The court or FCC is then required to promptly refer the parents for mediation or other family court counseling services and may appoint a guardian for the child. If mediation or counseling services do not resolve the dispute within 30 days after referral, the matter proceeds as described below unless the parents agree to extend the 30-day period [s. 767.327 (2), Stats.].

If the parent who is proposing the move or removal receives a notice of objection within 20 days after sending the notice regarding the proposed move, the parent may not move with or remove the child pending resolution of the dispute or a final court order, unless the parent obtains a temporary order to do so.

If the parent **proposing** the move or removal has **sole legal or joint legal custody** of the child and the child resides with that parent for the greater period of time, the objecting parent may request a modification of the legal custody or physical placement order [s. 767.327 (3) (a), Stats.]. If the parents have **joint legal custody** and have **substantially equal periods of physical placement**, either parent may request a modification of the legal custody or physical placement order [s. 767.327 (3) (b), Stats.].

Standards for Modification When Move Proposed

If the parent **proposing** the move or removal has **sole legal or joint legal custody** of the child and the child resides with that parent for the greater period of time, the court may modify the legal custody or physical placement order if the court finds all of the following:

- The modification is in the best interests of the child.

- The move or removal will result in a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

There is a rebuttable presumption that continuing the current allocation of decision-making under a legal custody order or continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interests of the child. This presumption may be overcome by a showing that the move or removal is unreasonable and not in the best interest of the child. Further, a change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification. Further, the burden of proof regarding these issues is on the parent objecting to the move or removal.

If the parents have **joint** legal **custody** and **substantially equal periods of physical placement** with the child, the court may modify an order of legal custody or physical placement if, after considering the factors in s. 767.327 (5), Stats. (described below), the court finds all of the following:

- Circumstances make it impractical for the parties to continue to have substantially equal periods of physical placement.

- The modification is in the best interests of the child.

In this case, the burden of proof is on the parent requesting the modification.

Order Prohibiting Move or Removal

If the parent proposing the move or removal has sole legal or joint legal custody of the child and the child resides with that parent for the greater period of time or the parents have substantially equal periods of physical placement with the child, the objecting parent may, as an alternative to the request for modification of the legal custody or physical placement order, request an order prohibiting the move or removal. The court may prohibit the move or removal if, after considering the factors in s. 767.327 (5), Stats. (described below), the court finds the prohibition is in the best interests of the child. In this case, the burden of proof is on the parent objecting to the move or removal.

Section 767.325 (5), Stats., provides that, in making its determination regarding a modification of legal custody or physical placement when a move is proposed, the court shall consider all of the following factors:

- Whether the purpose of the proposed action is reasonable.

- The nature and extent of the child's relationship with the other parent and the disruption to that relationship which the proposed action may cause.

- The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent.

In addition, in making this determination, the court may consider the child's adjustment to home, school, religion, and community.

Unless the parents agree otherwise, a parent with legal custody and physical placement rights is required to notify the other parent before removing the child from his or her "primary residence" for a period of not less than 14 days [s. 767.327 (6), Stats.]. Note that this simple notice requirement does not suffice if the move otherwise falls within the requirements of the moves described above.

ENFORCEMENT OF LEGAL CUSTODY AND PHYSICAL PLACEMENT ORDERS

This section describes available methods under current Wisconsin law for enforcing legal custody and physical placement orders. Interference with child custody or physical placement orders may be enforced under s. 767.242, Stats., and by a finding of contempt of court; through criminal laws regarding interference with the custody of a child; and by referral to family court counseling services.

Section 767.242, Stats.

Petition for Enforcement

Under s. 767.242, Stats., a parent who has been awarded periods of physical placement may petition a court under any of the following circumstances:

- The parent has had one or more periods of physical placement denied by the other parent.
- The parent has had one or more periods of physical placement substantially interfered with by the other parent.
- The parent has incurred a financial loss or expenses as a result of the other parent's intentional failure to exercise one or more periods of physical placement under an order allocating specific times for the exercise of periods of physical placement.

Remedies

Following a hearing on the petition for enforcement, if the judge or family court commissioner finds that a parent has intentionally and unreasonably denied the other parent one or more periods of physical placement or that a parent has intentionally and unreasonably interfered with one or more of the other parent's periods of physical placement, the court or family court commissioner:

- Shall do all of the following:
    1. Issue an order granting additional periods of physical placement to replace those denied or interfered with.
    2. Award the petitioner a reasonable amount for the cost of maintaining the action and for attorney fees.
- May do one or more of the following:
    1. Issue an order specifying the times for the exercise of periods of physical placement.
    2. Find the uncooperating party in contempt.
    3. Grant an injunction ordering the uncooperative party to strictly comply with a physical placement judgment or order.

If, at the conclusion of a hearing, it is found that the petitioner has incurred a financial loss or expenses as a result of the other party's failure, intentionally and unreasonably and without adequate notice, to exercise one or more specific periods of physical

placement, an order may be issued requiring the uncooperative party to pay to the petitioner a sum of money sufficient to compensate the petitioner for the financial loss or expenses.

Violation of an injunction may result in a fine of not more than $10,000 or imprisonment for not more than two years, or both.

Contempt of Court

With reference to child custody and physical placement, "contempt of court" means intentional disobedience, resistance or obstruction of the court's custody or physical placement order. Under ch. 785, Stats., for contempt of court, the court may impose:

Remedial Sanctions

Remedial sanctions, for the purpose of terminating and continuing contempt of court [s. 785.01 (3), Stats.]. Among the remedial sanctions authorized by statute are:

- Payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as a result of a contempt of court.
- Imprisonment, which may extend only so long as the person is committing the contempt of court or six months, whichever is shorter.
- A forfeiture not to exceed $2,000 for each day the contempt of court continues.
- An order designed to ensure compliance with a prior order of the court.
- A sanction, other than the sanctions specified in items a through d, if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court [s. 785.04 (1), Stats.].

Punitive Sanctions

Punitive sanctions, to punish a past contempt of court [s. 785.01 (2), Stats.]. The court may impose, for each separate contempt:

- A fine of not more than $5,000 or imprisonment in the county jail for not more than one year, or both, after a finding of contempt of court in a nonsummary procedure (imposed after notice and a hearing on the contempt issue).
- A fine of not more than $500 or imprisonment in the county jail for not more than 30 days or both, after finding of a contempt of court in a summary procedure (imposed immediately after a contempt of court occurs in the actual presence of the court).

Interference With the Custody of a Child

Under s. 948.31, Stats., relating to interference with custody by a parent or others, whoever does any of the following is guilty of a Class E felony (a fine not to exceed $10,000 or imprisonment not to exceed two years, or both):

Offenses

- Intentionally causes a child to leave, takes a child away or withholds a child for more than 12 hours beyond a court-approved period of physical placement or visitation period from a legal custodian, with intent to deprive the custodian of his or her custody rights without the consent of the custodian. However, if the court has entered an order authorizing the person to take or withhold the child, the penalties would not apply. The fact that joint legal custody has been awarded to

both parents by a court does not preclude a court from finding that one parent has committed a violation of this provision.

- Causes a child to leave, takes a child away or withholds a child for more than 12 hours from the child's parents, or in the case of a nonmarital child where the parents do not subsequently intermarry, from the child's mother, or if he has been granted legal custody, the child's father, without the consent of the parents, the mother, or the father with legal custody. This provision does not apply if legal custody has been granted by a court order to the person taking or withholding the child.

- Does any of the following:

  1. Intentionally conceals a child from the child's other parent, if done by a parent or a person acting upon directions of a parent.

  2. After being served with process and an action affecting the family, but prior to the issuance of a temporary or final order determining child custody rights, takes the child or causes a child to leave with intent to deprive the other parent of physical custody.

  3. After issuance of a temporary or final order specifying joint legal custody rights and periods of physical placement, takes a child from or causes a child to leave with the other parent in violation of the order or withholds the child for more than 12 hours beyond the court-approved period of physical placement or visitation.

Affirmative Defenses

The statute provides an affirmative defense to prosecution for violations of s. 948.31, Stats., if the action:

1. Is taken by a parent or by a person authorized by a parent to protect his or her child from imminent physical harm or sexual assault;

2. Is taken by a parent fleeing from imminent physical harm to himself or herself;

3. Is consented to by the other parent or any other person or agency having legal custody of the child; or

4. Is otherwise authorized by law.

Other Remedies

A court is also empowered to order a violator to pay restitution and to provide reimbursement for any reasonable expenses incurred by any person or any governmental entity in locating and returning the child. The restitution or reimbursement is paid by the violator to the person or governmental entity which incurred the expenses.

Referral to Family Court Counseling Services

Section 767.11 (5) (c), Stats., provides that a person who is awarded periods of physical placement, a child of such a person, a person with visitation rights or a person with physical custody of a child may notify the FCC of any problem that he or she has relating to any of these matters. The FCC may refer any person involved in the matter to the director of family court counseling services for assistance in resolving the problem. Referral to the director of the family court counseling services requires the director to assign a mediator to the case who shall provide mediation if it is determined appropriate.

LR:jal:ksm;ksm;wu