



2005 ASSEMBLY BILL 897

December 29, 2005 - Introduced by Representatives PRIDEMORE, GRONEMUS, GUNDERSON, GUNDRUM, HAHN, HINES, KESTELL, KRAWCZYK, KREIBICH, F. LASEE, MUSSER, NASS, OTT, VAN ROY, WOOD, STRACHOTA and VOS, cosponsored by Senators PLALE, REYNOLDS, A. LASEE and LAZICH. Referred to Committee on Family Law.

1 **AN ACT to repeal** 767.325 (1) (title), 767.325 (1) (b), 767.325 (2) and 767.325 (5m)
2 (title); **to renumber and amend** 767.325 (1) (a), 767.325 (5m) and 767.325
3 (5m) (b); **to amend** 767.001 (3), 767.045 (4), 767.11 (10) (intro.), 767.11 (12) (a),
4 767.23 (1n) (a), 767.24 (1m) (intro.), 767.24 (4) (a) 2., 767.24 (4) (b), 767.24 (5)
5 (am) (intro.), 767.24 (6) (a), 767.325 (2m), 767.325 (3) and 767.325 (6m); and **to**
6 **create** 767.325 (2c) (title) of the statutes; **relating to:** preparing and filing
7 parenting plans, equalizing periods of physical placement to the highest degree
8 possible, using parenting plans to determine periods of physical placement, and
9 modifying physical placement and custody orders.

Analysis by the Legislative Reference Bureau

Equalizing physical placement; parenting plans

Under current law, in an action affecting the family, such as a divorce or a paternity action, a court must determine the legal custody of a minor child based on the best interest of the child. In current law, there is a presumption that joint legal custody is in the child's best interest. The court also must allocate periods of physical placement between the parties. The court is required to set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical

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placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into consideration geographic separation and accommodations for different households. The court may deny periods of physical placement with a parent only if the court finds that the physical placement would endanger the child's physical, mental, or emotional health. When determining custody and periods of physical placement, the court is required, under current law, to consider a number of factors (custody and placement factors), such as the wishes of the child and of the parties, the interaction and interrelationship of the child with his or her parents, the amount and quality of time that each party has spent with the child in the past, the mental and physical health of the parties and the child, the child's adjustment to the home, school, and community, the child's age, the child's developmental and educational needs, and the cooperation and communication between the parties.

Also under current law, in an action affecting the family in which legal custody of, or physical placement with, a child is contested, a party seeking physical placement or sole or joint legal custody is required to file a parenting plan with the court before any pretrial conference. In a parenting plan, a parent provides information about his or her residence and employment and about how he or she intends to address various issues relating to the child, such as where the child will go to school, who will provide any necessary child care, who will provide medical services to the child and how they will be paid, how the holidays will be divided, what the summer schedule will be, and how disagreements between the parties over matters relating to the child will be resolved.

Under the bill, a parenting plan must be filed before or when a party makes his or her first appearance before a judge or circuit court commissioner. The bill requires a party, when preparing a parenting plan, to consider all facts relevant to the best interest of the child and the custody and placement factors that the court considers under current law.

The bill generally changes what the court considers when determining physical placement. Instead of considering the custody and placement factors, the court must consider the parenting plans that are filed by the parties. In addition, instead of maximizing the amount of time a child may spend with each parent, as under current law, the court must set a placement schedule that equalizes to the highest degree possible the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households. However, if the court finds by clear and convincing evidence that equalizing the amount of time a child may spend with each parent would endanger the child's physical, mental, or emotional health, then the court must consider the custody and placement factors and set a placement schedule that protects and promotes the general welfare and best interests of the child, which may include denying periods of physical placement to a parent.

Under current law, if legal custody or physical placement is contested, the court must state in writing why its findings relating to legal custody or physical placement are in the best interest of the child. Under the bill, if legal custody or physical placement is contested and the court orders sole legal custody or a placement

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schedule that does not equalize placement to the highest degree possible, the court must state in writing the reasons for its decision.

Modifications to legal custody and physical placement

Under current law, within two years after making an initial order of legal custody or physical placement a court may not revise legal custody or physical placement in a manner that substantially alters the time a parent may spend with his or her child unless the party seeking the modification shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child. After two years, however, the court may make such a modification if the court finds that the modification is in the best interest of the child and that there has been a substantial change in circumstances since the last order was made. There is a rebuttable presumption that continuing the current allocation of decision making concerning the child and continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.

Current law addresses other situations involving modifications to physical placement: if the parties have substantially equal periods of physical placement with the child but circumstances make it impractical for this to continue, the court may modify physical placement if it is in the best interest of the child; the court may modify physical placement at any time if the court finds that a parent has repeatedly and unreasonably failed to exercise specifically allocated periods of physical placement; the court may modify periods of physical placement in a manner that does not substantially alter the amount of time each parent spends with the child if it is in the child's best interest; the court may modify physical placement by denying it if the court finds that physical placement with a parent would endanger the child's physical, mental, or emotional health; and the court must modify physical placement by denying it if a parent has been convicted of the first-degree intentional homicide of the child's other parent.

Current law also provides that in all cases in which modification of legal custody or physical placement is sought, the court must consider the custody and placement factors that the court considers when making initial custody and physical placement orders and must make its determination in a manner consistent with the requirements for making its initial determinations on legal custody and physical placement.

This bill retains the following provisions in current law that apply to modifications: the provision related to the limited circumstances under which a court may modify legal custody or physical placement within two years after the initial order; the provision related to modifying physical placement at any time if the court finds that a parent has repeatedly and unreasonably failed to exercise specifically allocated periods of physical placement; the provision related to modifying periods of physical placement in a manner that does not substantially alter the amount of time each parent spends with the child if it is in the child's best interest; the provision related to modifying physical placement by denying it if the court finds that physical placement with a parent would endanger the child's physical, mental, or emotional health; and the provision related to modifying

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physical placement by denying it if a parent has been convicted of the first-degree intentional homicide of the child's other parent.

The bill eliminates the following provisions in current law: the provision that allows the court to modify legal custody or physical placement after two years after the initial determination if the court finds that the modification is in the best interest of the child and that there has been a substantial change in circumstances since the last order was made and the rebuttable presumption that continuing the current allocation of decision making concerning the child and continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child; the provision that allows the court to modify physical placement if it is in the best interest of the child if the parties have substantially equal periods of physical placement with the child but circumstances make it impractical for that to continue; and the requirement that the court consider the custody and placement factors that the court considers under current law when making initial custody or physical placement orders. However, the bill retains the requirement that the court make modification determinations in a manner consistent with the requirements for making its initial determinations on legal custody and physical placement.

As a result of these changes in the statutes, the primary changes that the bill makes to legal custody and physical placement modifications are the following: the court will not use the custody and placement factors when determining modifications to legal custody and physical placement; a substantial change in circumstances will not be required for modifying a legal custody or physical placement order more than two years after the initial order and there will be no presumption in favor of continuing the current allocation of decision making or time spent with each parent; for physical placement modifications after two years after the initial determination, except for those specific situations related to modifying physical placement that are retained from current law, the court will be required to set a physical placement schedule that equalizes to the highest degree possible the time each parent spends with his or her child; and for modifications of legal custody after two years after the initial order, there will be a presumption that joint legal custody is in the child's best interest.

In *Abbas v. Palmersheim*, 2004 WI App 126, a case related to modifying legal custody and physical placement, one issue was how to harmonize the rebuttable presumption in modification actions in favor of continuing the current allocation of decision making and time spent with each parent with the requirement that the court make modification determinations in a manner consistent with the requirements for making its initial determinations on legal custody and physical placement, including the presumption that joint legal custody is in the child's best interest. The two provisions taken together would require two different presumptions in cases to modify legal custody in which the parties did not already have joint legal custody. The Wisconsin Court of Appeals determined that the presumption in favor of continuity applied in modification actions and the presumption in favor of joint legal custody applied only in initial custody determinations. By eliminating the presumption in favor of continuity in

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modification actions, this bill overrules the way in which the court harmonized the statutes.

Mediation and guardians ad litem

Finally, under current law, mediation in actions affecting the family is defined in terms of the parties resolving their own disagreements with the best interest of the child as the paramount consideration. This bill changes that definition so that the parties' disagreements are resolved in a manner consistent with the requirements that apply to a court in making its initial determinations on legal custody and physical placement. Under current law, a mediator is to be guided by the best interest of the child in executing his or her responsibilities and must certify to the court that any mediation agreement is in the best interest of the child. The court may approve or reject a mediation agreement based on the best interest of the child. Under the bill, a mediator is guided by, and must certify that any mediation agreement is consistent with, the requirements that apply to a court in making its initial determinations on legal custody and physical placement and the court may approve or reject a mediation agreement based on whether it is consistent with those requirements.

Also under current law, a guardian ad litem in an action affecting the family is to be an advocate for the best interests of the child and must consider the positions of others as to the best interest of the child. The bill modifies this so that a guardian ad litem's advocacy for the best interests of the child must be consistent with the requirements that apply to a court in making its initial determinations on legal custody and physical placement and a guardian ad litem is no longer required to consider the positions of others as to the best interest of the child.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 767.001 (3) of the statutes is amended to read:

2 767.001 (3) "Mediation" means a cooperative process involving the parties and
3 a mediator, the purpose of which is to help the parties, by applying communication
4 and dispute resolution skills, define and resolve their own disagreements, ~~with the~~
5 ~~best interest of the child as the paramount consideration~~ in a manner consistent with
6 s. 767.24.

7 **SECTION 2.** 767.045 (4) of the statutes is amended to read:

8 767.045 (4) RESPONSIBILITIES. The guardian ad litem shall be an advocate for
9 protecting the welfare of a minor child and for the best interests of a ~~the~~ minor child

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1 as to paternity, legal custody, and physical placement, consistent with s. 767.24; and
2 support. The guardian ad litem shall function independently, in the same manner
3 as an attorney for a party to the action, and shall consider, but shall not be bound by,
4 the wishes of the minor child ~~or the positions of others as to the best interests of the~~
5 ~~minor child.~~ The guardian ad litem shall consider the factors under s. 767.24 (5)
6 (am), subject to s. 767.24 (5) (bm), and custody studies under s. 767.11 (14). The
7 guardian ad litem shall investigate whether there is evidence that either parent has
8 engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic
9 abuse, as defined in s. 813.12 (1) (am), and shall report to the court on the results of
10 the investigation. The guardian ad litem shall review and comment to the court on
11 any mediation agreement and stipulation made under s. 767.11 (12) and on any
12 parenting plan filed under s. 767.24 (1m). Unless the child otherwise requests, the
13 guardian ad litem shall communicate to the court the wishes of the child as to the
14 child's legal custody or physical placement under s. 767.24 (5) (am) 2. The guardian
15 ad litem has none of the rights or duties of a general guardian.

16 **SECTION 3.** 767.11 (10) (intro.) of the statutes is amended to read:

17 767.11 (10) POWERS AND DUTIES OF MEDIATOR. (intro.) A mediator assigned
18 under sub. (6) (a) shall be guided by the best interest of the child s. 767.24 and may
19 do any of the following, at his or her discretion:

20 **SECTION 4.** 767.11 (12) (a) of the statutes is amended to read:

21 767.11 (12) (a) Any agreement which resolves issues of legal custody or periods
22 of physical placement between the parties reached as a result of mediation under this
23 section shall be prepared in writing, reviewed by the attorney, if any, for each party,
24 and by any appointed guardian ad litem, and submitted to the court to be included
25 in the court order as a stipulation. Any reviewing attorney or guardian ad litem shall

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1 certify on the mediation agreement that he or she reviewed it and the guardian ad
2 litem, if any, shall comment on the agreement based on the best interest of the child.
3 The mediator shall certify that the written mediation agreement is ~~in the best~~
4 ~~interest of the child~~ consistent with s. 767.24 based on the information presented to
5 the mediator and accurately reflects the agreement made between the parties. The
6 court may approve or reject the agreement, based on ~~the best interest of the child~~
7 whether the agreement is consistent with s. 767.24. The court shall state in writing
8 its reasons for rejecting an agreement.

9 **SECTION 5.** 767.23 (1n) (a) of the statutes is amended to read:

10 767.23 **(1n)** (a) Before making any temporary order under sub. (1), the court
11 or circuit court commissioner shall consider those factors and other information that
12 the court is required by this chapter to consider before entering a final judgment on
13 the same subject matter. ~~In making a determination under sub. (1) (a) or (am), the~~
14 ~~court or circuit court commissioner shall consider the factors under s. 767.24 (5) (am),~~
15 ~~subject to s. 767.24 (5) (bm).~~

16 **SECTION 6.** 767.24 (1m) (intro.) of the statutes is amended to read:

17 767.24 **(1m)** PARENTING PLAN. (intro.) In an action for annulment, divorce, or
18 legal separation, an action to determine paternity, or an action under s. 767.02 (1)
19 (e) or 767.62 (3) in which legal custody or physical placement is contested, a party
20 seeking sole or joint legal custody or periods of physical placement shall file a
21 parenting plan with the court at or before any pretrial conference the party's first
22 appearance before the court or circuit court commissioner. Except for cause shown,
23 a party required to file a parenting plan under this subsection who does not timely
24 file a parenting plan waives the right to object to the other party's parenting plan.
25 In preparing a parenting plan, a party shall consider all facts relevant to the best

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1 interest of the child and the factors under sub. (5) (am) 1. to 15., subject to sub. (5)
2 (bm). A parenting plan shall provide information about the following questions:

3 **SECTION 7.** 767.24 (4) (a) 2. of the statutes is amended to read:

4 767.24 (4) (a) 2. ~~In~~ Except as provided in par. (b), in determining the allocation
5 of periods of physical placement, the court shall consider each case on the basis of the
6 factors in sub. (5) (am), subject to sub. (5) (bm). The parenting plan or plans filed with
7 the court under sub. (1m). Except as provided in par. (b), the court shall set a
8 placement schedule that allows the child to have regularly occurring, meaningful
9 periods of physical placement with each parent and that ~~maximizes~~ equalizes to the
10 highest degree possible the amount of time the child may spend with each parent,
11 taking into account geographic separation and accommodations for different
12 households.

13 **SECTION 8.** 767.24 (4) (b) of the statutes is amended to read:

14 767.24 (4) (b) A child is entitled to periods of physical placement with both
15 parents as provided in par. (a) 2., unless, after a hearing, the court finds that physical
16 placement with a parent would endanger the child's physical, mental, or emotional
17 health. If the court finds by clear and convincing evidence that a placement schedule
18 determined as provided in par. (a) 2. would endanger the child's physical, mental, or
19 emotional health, the court shall consider the factors under sub. (5) (am), subject to
20 sub. (5) (bm), and set a placement schedule that protects and promotes the general
21 welfare and best interests of the child, which may include denying a parent periods
22 of physical placement.

23 **SECTION 9.** 767.24 (5) (am) (intro.) of the statutes is amended to read:

24 767.24 (5) (am) (intro.) Subject to par. (bm), in determining legal custody and
25 periods of physical placement, the court shall consider all facts relevant to the best

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1 interest of the child. ~~The In determining legal custody and periods of physical~~
2 ~~placement, the~~ court may not prefer one parent or potential custodian over the other
3 on the basis of the sex or race of the parent or potential custodian. Subject to par.
4 (bm), ~~in determining legal custody and, if sub. (4) (b) applies, periods of physical~~
5 ~~placement,~~ the court shall consider the following factors in making its
6 determination:

7 **SECTION 10.** 767.24 (6) (a) of the statutes is amended to read:

8 767.24 (6) (a) If legal custody or physical placement is contested ~~and the court~~
9 ~~orders sole legal custody or a placement schedule that does not equalize to the~~
10 ~~highest degree possible the amount of time that the child may spend with each~~
11 ~~parent,~~ the court shall state in writing ~~why its findings~~ ~~the reasons for its decision~~
12 relating to legal custody or physical placement ~~are in the best interest of the child.~~

13 **SECTION 11.** 767.325 (1) (title) of the statutes is repealed.

14 **SECTION 12.** 767.325 (1) (a) of the statutes is renumbered 767.325 (1), and
15 767.325 (1) (intro.), as renumbered, is amended to read:

16 767.325 (1) ~~WITHIN~~ MODIFICATION WITHIN 2 YEARS AFTER INITIAL ORDER. (intro.)
17 ~~Except as provided under sub. (2), a~~ A court may not modify any of the following
18 orders before 2 years after the initial order is entered under s. 767.24, unless a party
19 seeking the modification, upon petition, motion, or order to show cause shows by
20 substantial evidence that the modification is necessary because the current custodial
21 conditions are physically or emotionally harmful to the best interest of the child:

22 **SECTION 13.** 767.325 (1) (b) of the statutes is repealed.

23 **SECTION 14.** 767.325 (2) of the statutes is repealed.

24 **SECTION 15.** 767.325 (2c) (title) of the statutes is created to read:

25 767.325 (2c) (title) MODIFICATION AFTER 2-YEAR PERIOD.

ASSEMBLY BILL 897**SECTION 16**

1 **SECTION 16.** 767.325 (2m) of the statutes is amended to read:

2 767.325 **(2m)** MODIFICATION OF PERIODS OF PHYSICAL PLACEMENT FOR FAILURE TO
3 EXERCISE PHYSICAL PLACEMENT. Notwithstanding ~~subs. sub. (1) and (2)~~, upon petition,
4 motion, or order to show cause by a party, a court may modify an order of physical
5 placement at any time with respect to periods of physical placement if it finds that
6 a parent has repeatedly and unreasonably failed to exercise periods of physical
7 placement awarded under an order of physical placement that allocates specific
8 times for the exercise of periods of physical placement. Subsection (2c) does not apply
9 to a modification under this subsection.

10 **SECTION 17.** 767.325 (3) of the statutes is amended to read:

11 767.325 **(3)** MODIFICATION OF OTHER PHYSICAL PLACEMENT ORDERS. Except as
12 provided under ~~subs. (1) and (2)~~ sub. (1), upon petition, motion, or order to show cause
13 by a party, a court may modify an order of physical placement which in a manner that
14 does not substantially alter the amount of time that a parent may spend with his or
15 her child if the court finds that the modification is in the best interest of the child.
16 Subsection (2c) does not apply to a modification under this subsection.

17 **SECTION 18.** 767.325 (5m) (title) of the statutes is repealed.

18 **SECTION 19.** 767.325 (5m) of the statutes, as affected by 2005 Wisconsin Act ...
19 (Assembly Bill 522), is renumbered 767.325 (2c) (a) and amended to read:

20 767.325 **(2c)** (a) Subject to par. (b), except as provided in subs. (1), (2m), and
21 (3), in all actions to modify legal custody or physical placement orders, the court shall
22 ~~consider the factors under s. 767.24 (5) (am), subject to s. 767.24 (5) (bm), and shall~~
23 make its determination in a manner consistent with s. 767.24.

24 **SECTION 20.** 767.325 (5m) (b) of the statutes, as created by 2005 Wisconsin Act
25 (Assembly Bill 522), is renumbered 767.325 (2c) (b) and amended to read:

