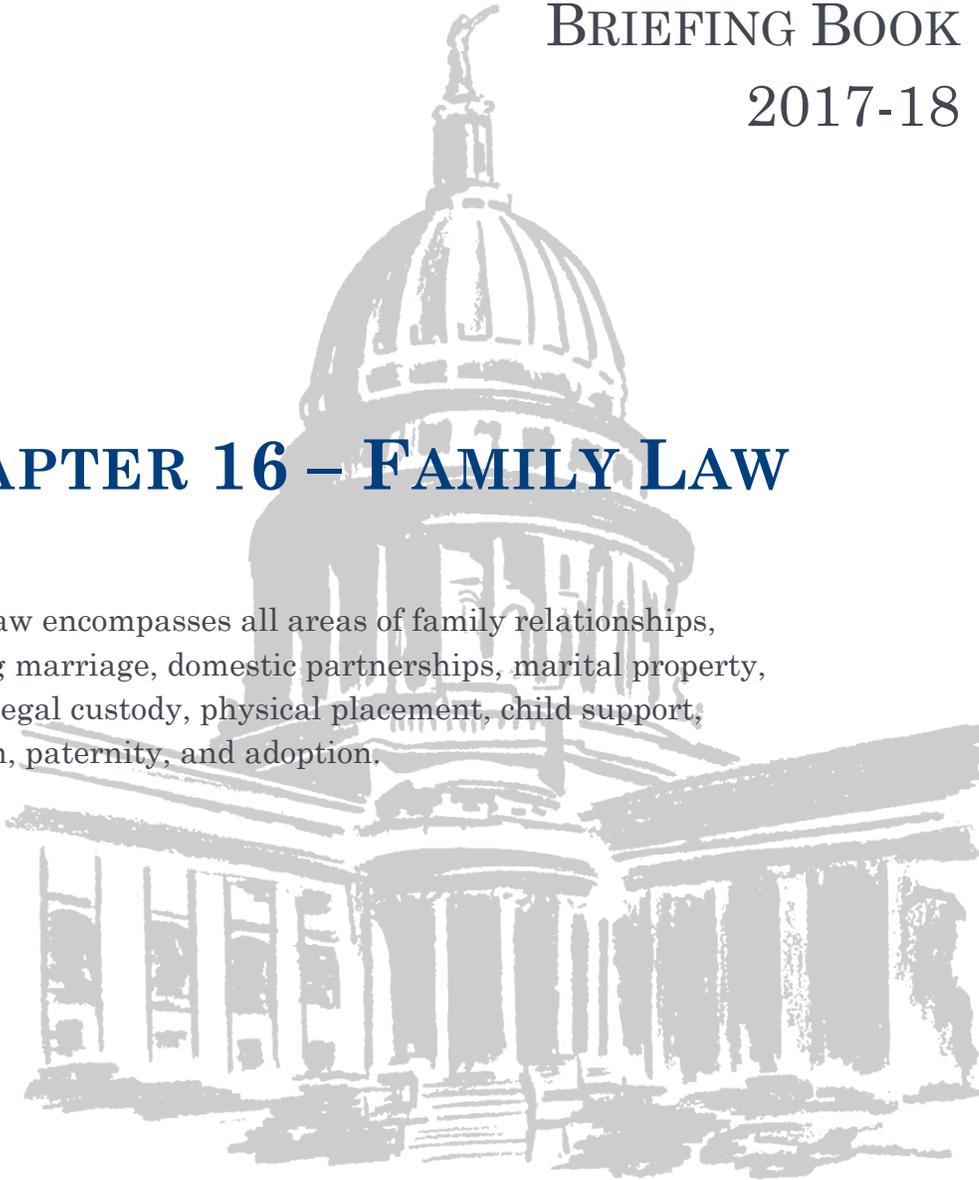


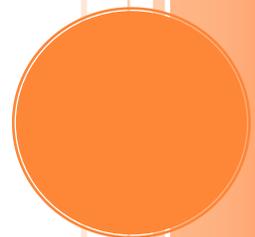
WISCONSIN LEGISLATOR  
BRIEFING BOOK  
2017-18

**CHAPTER 16 – FAMILY LAW**

Family law encompasses all areas of family relationships, including marriage, domestic partnerships, marital property, divorce, legal custody, physical placement, child support, visitation, paternity, and adoption.



Rachel E. Snyder, Staff Attorney  
Wisconsin Legislative Council



# TABLE OF CONTENTS

COUPLES .....	1
Marriage .....	1
Marital Property.....	5
Divorce or Separation.....	8
Property Division .....	9
Maintenance .....	10
CHILDREN.....	11
Legal Custody and Physical Placement.....	11
Child Support .....	15
Paternity.....	17
Adoption .....	20
Third Party Visitation.....	21
ADDITIONAL REFERENCES .....	23
GLOSSARY.....	23

## COUPLES

Wisconsin law addresses the legal rights and obligations of couples, as to each other, in the areas of marriage, domestic partnerships, marital property, divorce or separation, property division, and spousal maintenance.

### Marriage

In Wisconsin, marriage is a civil contract between spouses that also creates a legal status that governs certain rights and responsibilities to each other and to others. [s. 765.01, Stats.]

### Parties

In order to marry, a person must be at least 18 years of age. If a person is age 16 or 17, the person may marry with the written consent of a parent, guardian, or custodian. [s. 765.02, Stats.]

Some individuals are not allowed to marry under Wisconsin law. Specifically, persons who are nearer of kin than second cousins (unless sterile); a person who is already married to someone else; a person who is incapable of assenting to marriage due to a “want of understanding”; and a person who has been divorced less than six months may not marry. [s. 765.03, Stats.]

### License and Ceremony

A marriage license may be obtained in any county where at least one party has resided for 30 days before applying for the license. A license will be issued no sooner than five days after receiving the application.

However, at the county clerk’s discretion, and upon receiving an additional fee, the five-day waiting period may be waived. If both parties are nonresidents of the state, a marriage license may be obtained in the county where the marriage ceremony will be performed. [ss. 765.05 and 765.08, Stats.]

**“Common law” marriage is not recognized as a legal marital status in Wisconsin. In some states, common law marriage is a status where a couple living together in a marital-like relationship for an established period of time are treated as legally married.**

With the completed application, a couple must submit a fee, provide their birth certificates, provide documentary proof of identity and residence, submit a copy of a judgment or death certificate affecting prior marital status, and swear to and affirm the application before the county clerk. Once the license has been issued, the couple may marry in any county in the state within 30 days of its issuance. [ss. 765.09, 765.12, and 765.15, Stats.]

The statutes provide a procedure for family members, the district attorney, or a circuit court commissioner to object to a marriage. The person objecting may file a petition with the clerk of probate court explaining that the application is false or insufficient, or that the applicants are not legally allowed to marry. If the court determines the objections have merit, it must issue an order for the marriage applicants to appear, at a hearing, and show why the objections are not valid. [s. 765.11, Stats.]

The marriage ceremony must involve the mutual declarations of the two parties that they take each other as husband and wife. The declarations must be made before an authorized adult, and at least two competent adult witnesses. Authorized officiants are ordained clergy members, judges, circuit court commissioners, and municipal judges. In certain recognized religious ceremonies, the two parties themselves may mutually declare the marriage without an officiant. [s. 765.16, Stats.]

### Recognition of Valid Marriages

Generally, under the Full Faith and Credit Clause of the U.S. Constitution, a marriage contracted in another state that satisfies the legal requirements of that state will be recognized in Wisconsin. However, courts have acknowledged an exception for when a marriage violates Wisconsin's strong public policy and Wisconsin had the most significant relationship to the spouses at the time of the marriage. Additionally, state law provides that if a Wisconsin couple enters into a marriage outside of this state when the couple is ineligible or is prohibited from marrying under state law, the marriage is void, and each party is subject to a penalty of up to nine months in jail and up to a \$10,000 fine, or both. [See *Nevada v. Hall*, 440 U.S. 410, 422 (1979); ss. 765.04 and 765.30, Stats.]

### Same-Sex Marriages

The Wisconsin Constitution has a specific provision addressing same-sex marriages and civil unions in Article XIII, Section 13. This section provides that: “Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.” This provision was challenged in federal court, and on June 6, 2014, the U.S. District Court for the Western District of Wisconsin issued a decision holding the provision to be in violation of the Due Process and Equal Protection Clauses of the U.S. Constitution. The court held that the provision interferes with the right to marry, and discriminates on the basis of sexual orientation. [*Wolf v. Walker*, 986 F. Supp. 2d 982 (U.S. Dist. Ct., W.D. Wis. 2014).]

**Same-sex marriages are legal under both state and federal law. Valid same-sex marriages must be recognized in every state.**

The federal district court issued an injunction on June 13, 2014, against enforcement of the state’s same-sex marriage ban, but stayed the injunction pending the state’s appeal of the decision. [*Wolf v. Walker*, No. 14-cv-64-bbc (U.S. Dist. Ct., W.D. Wis. June 13, 2014).]

The Court of Appeals for the Seventh Circuit affirmed the decision, and on October 6, 2014, the U.S. Supreme Court denied the state’s petition for review of the Seventh Circuit decision. [*Baskin v. Bogan*, 766 F. 3d 648 (7th Cir. 2014); *Wolf v. Walker*, cert. denied, U.S. Oct. 6, 2014.)] Consequently, the appeals have been exhausted, and the district court’s decision, which held that the state’s same-sex marriage ban is unconstitutional, and the injunction prohibiting enforcement of that ban, are in effect in Wisconsin.

As a result, the state now authorizes same-sex marriages to be entered into in Wisconsin, and recognizes same-sex marriages that were validly entered into in another state. Under the court order, Wisconsin must: (1) permit same-sex couples to marry on the same terms as opposite-sex couples; and (2) treat same-sex couples the same as opposite-sex couples in determining the rights, protections, obligations, or benefits of marriage. Therefore, statutory provisions relating to marriage apply in the same manner to both opposite-sex and same-sex married couples. A statute that refers to a “husband” and “wife” applies instead to a “spouse,” regardless of whether the spouse is of the same or opposite sex, if the statute governs a right or obligation that is conferred by virtue of the marital status. However, there are still some questions about how a gender-neutral statutory interpretation would apply in specific circumstances, such as the post-marriage legitimation of a child conceived while a couple was in a relationship but born before the couple entered into a marriage. [s. 891.41 (1) (b), Stats.]

Subsequently, on June 26, 2015, the U.S. Supreme Court held in *Obergefell v. Hodges* that, under the Fourteenth Amendment to the U.S. Constitution, a state must: (1) issue marriage licenses to same-sex couples as it does to opposite-sex couples; and (2) recognize same-sex marriages that are licensed and performed in other states. [*Obergefell v. Hodges*, 576 U.S. \_\_\_ (2015) slip op. (no. 14-556).] Consequently, under the U.S. Supreme Court’s decision, all same-sex marriage prohibitions are unconstitutional, states must issue a marriage license to same-sex couples to the same extent that they are issued to opposite-sex couples, and valid same-sex marriages must be recognized in every state.

## Domestic Partnerships

Wisconsin law includes provisions for the establishment of domestic partnerships and related rights and benefits.

## Declaration of Same-Sex Domestic Partnership for Legal Rights

Same-sex couples sharing a common residence may apply for a declaration of domestic partnership with the county clerk where they have resided for at least 30 days prior to the application. Five days after the application is made, the county clerk will issue the

**County-by-county legal resources for domestic partnership forms and guides can be found at:**

<http://wilawlibrary.gov/>

declaration to the couple. The declaration may be issued sooner, in the clerk's discretion, and upon receipt of an additional fee. In order to form the legal status of domestic partners, the couple must then sign the declaration before a notary and submit it for recording with the Register of Deeds. The Register

then files the declaration with the Wisconsin Vital Records Office. The Wisconsin Supreme Court has reviewed and upheld the validity of the same-sex domestic partnership law under the Wisconsin Constitution. [*Appling v. Walker*, 2014 WI 96, July 31, 2014.]

Partners who wish to terminate their Wisconsin domestic partnership must file a notice of termination in the same county clerk's office that issued the declaration of domestic partnership, even if they no longer reside in that county. If only one party signs the notice, that partner must complete an affidavit stating that the notice was served on the other party or, if unable to serve, that an official notice was published in the area where the partners last shared a residence. The county clerk will then issue an original certificate of termination of domestic partnership, which is effective 90 days after being recorded by the Register of Deeds. Additionally, if either party enters into a valid marriage that is recognized in this state, the partnership is automatically terminated as of that date of marriage. [ch. 770, Stats.]

Same-sex domestic partners who have declared the relationship have certain benefits, such as inheritance rights and medical access, but do not have certain other rights of marriage, such as the mutual obligation for support, the comprehensive marital property system, and child custody and placement rights and obligations.

### Affidavit of Same- or Opposite-Sex Domestic Partnership for Public Employee Benefits

Both same-sex and opposite-sex couples may file an affidavit of domestic partnership with the Department of Employee Trust Funds (ETF) to enroll the partner in the employee benefit programs administered by ETF for the state, and for participating local governmental units. To qualify, the couple must share a residence and agree to be responsible for each other's basic living expenses.

**The ETF affidavit of domestic partnership can be found at:**

<http://etf.wi.gov/publications/et2371.pdf>

All benefit programs that are administered by ETF are available to a qualifying partner. Children of a qualifying domestic partner can be covered by the employee's health insurance if the family coverage option is selected and by the employee's life

insurance if spouse and dependent coverage is selected. Benefits are also available to a qualifying domestic partner of a retired employee. [s. 40.02 (20) and (21d), Stats.; ss. ETF 10.01 (2), 20.10, and 40.01, Wis. Adm. Code.]

## Marital Property

Wisconsin's marital property law took effect on January 1, 1986. The law governs spousal property interests during marriage as it relates to creditors and at death. It generally does not govern property rights at dissolution of marriage by divorce, annulment, or legal separation. [ss. 766.03 (2) and 766.75, Stats.]

The principal feature of the marital property system is that each spouse, by law, has an equal ownership interest in property acquired by either or both spouses during marriage, which gives a present, undivided, one-half interest in all property.

Under the marital property law, all property owned by spouses is presumed to be marital property. Marital property includes income earned by a spouse or income attributable to property of a spouse that accrues during marriage; property acquired in exchange for, or with, the proceeds of marital property; the substantial appreciation value of individual property that is attributable to the substantial effort of either spouse; and any property not classified as something other than marital property. [s. 766.31, Stats.]

A spouse may nevertheless have individual property that is excluded from marital rights in the following circumstances: property owned by a spouse before marriage; property obtained by gift or inheritance during the marriage; property acquired in exchange for, or with, the proceeds of individual property; market appreciation of individual property; income from third party trusts; property designated as individual property by a marital property agreement; income from nonmarital property designated as individual by a properly executed "unilateral statement"; and certain portions of personal injury awards. [s. 766.31, Stats.]

Special classification rules apply to homestead property, certain retirement, pension and deferred compensation plans, and life insurance policies. For example, a home titled in both spouses' names together is automatically classified as survivorship marital property, with all ownership passing to a surviving spouse, unless explicitly classified otherwise. [ss. 766.605, 766.61, and 766.62, Stats.]

In general, spouses must act together to manage and control marital property held in the names of both spouses in the conjunctive (e.g., John *and* Mary). Otherwise, a spouse acting

alone may manage and control the person’s own individual property and marital property held in the alternative (e.g., John *or* Mary). Special management and control rules apply in some circumstances, such as creating a mortgage interest on a home, managing business property, and making gifts. [ss. 766.51, 766.53, and 766.70 (3), Stats.]

One aspect of the marital property law is equal access to the extension of credit. In evaluating a spouse’s creditworthiness, the law requires a creditor to consider all marital property available to satisfy the obligation. If credit is extended, a creditor must give written notice to the nonapplicant spouse of the extension of credit before any payment is due. The type of obligation determines when marital property may be used to satisfy the obligation. For example, an obligation incurred prior to the marriage is generally satisfied from the incurring spouse’s individual property. An obligation incurred by a spouse during the marriage is presumed to be in the interest of the marriage and the family and may be satisfied from all marital property, as well as the individual property of the incurring spouse. [ss. 766.55 and 766.56, Stats.]

**Marital property agreements are commonly known as prenuptial agreements, or pre-nups, though in Wisconsin they may be executed either before or during marriage.**

### Marital Property Agreement

Spouses, as well as persons intending to marry, may enter into a marital property agreement regarding the classification of marital or individual property and the rights to control the property. Any agreement must be in writing and signed by both parties. An agreement cannot affect certain obligations, such as child support. Generally, an agreement may be amended or revoked only by a subsequent marital property agreement.

In order for a reclassification of property to be effective against a creditor, the creditor must be furnished with a copy of the marital property agreement prior to the granting of credit. [s. 766.55 (4m), Stats.]

The statutes include both marital property and individual property classification agreement forms, sometimes referred to as “opt-in” and “opt-out” agreements, that parties may use to easily classify all property as either individual or marital. These agreements may be terminated by one spouse unilaterally and they have no impact upon property division at divorce. [ss. 766.588 and 766.589, Stats.]

A spouse or a person intending to marry may also unilaterally classify the income generated by his or her individual property as individual property by executing a written statement to that effect. The executing spouse must provide the other spouse with a written copy of the statement within five days after it is signed. The executing spouse may revoke the statement in writing at any time, but must notify the other spouse in writing upon revocation. [s. 766.59, Stats.]

## Wills

A spouse may dispose of half of the couple’s marital property and all of the spouse’s individual property, if any, by will. The surviving spouse retains a one-half share in the marital property, and that share is not subject to probate. “Deferred marital property” rules apply to property acquired during the marriage, but prior to 1986, that would have been marital property had the marital property law applied when the property was acquired. This property is also called “unclassified property.” Under certain circumstances, a surviving spouse may elect to retain or receive a portion of the deferred marital property. [ss. 766.589, 851.055, and 861.02, Stats.]

## Taxation

Married persons in Wisconsin may file joint or separate tax returns. On joint returns, all income, deductions, and credits for both spouses are combined on the same return. [s. 71.03 (2) (d), Stats.; 26 U.S.C. s. 6103.] However, the Internal Revenue Service’s (IRS’s) innocent spouse rule relieves a spouse from tax liability if

**The married person’s tax credit is available to couples filing joint returns but not separate returns.**

the innocent spouse did not know or have reason to know that the other spouse omitted an income item or erroneously claimed a tax credit or deduction on a joint return, and it would be inequitable to impose liability on the innocent spouse. [s. 71.10 (6), Stats.; 26 U.S.C. s. 6015.]

If separate returns are filed, each spouse must report half of the total, combined, marital property income, deductions, and credits, except as provided by a marital property agreement. In order to resolve questions that might arise regarding access of a spouse to the other spouse’s tax return if separate returns are filed, Wisconsin tax law permits the spouse or former spouse to examine tax returns or claims of the other spouse if the Department of Revenue (DOR) issued an assessment or notice of claim to the spouse or former spouse, or if the spouse or former spouse is subject to a collection for a delinquency. Also, DOR may disclose whether an extension for filing a return or claim was filed. [See Rev. Rul. 87-13, 1987-1 C.B. 20; 26 C.F.R. s. 1.66-1; ss. 71.78 (4) (k) and (4m) and 766.31, Stats.]

For income tax purposes, spouses may reclassify future income by a marital property agreement or in some cases by a unilateral statement. In order to affect state tax liability, the agreement or statement must be filed with DOR before a tax assessment is issued.

For estate tax purposes, the “basis” in marital property, which is the adjusted original cost of property that is used to determine the amount of gain or loss for capital gains taxes, differs from that given to property that is jointly held with other people. Both spouses’ share of marital property receives a new basis upon the death of the first spouse to die, adjusted to the date-of-death value of the marital property. This is known as a “double

step-up” in basis, for community property states such as Wisconsin. [s. 71.05 (10) (e), Stats.; 26 U.S.C. s. 1014.]

## Divorce or Separation

In Wisconsin, actions for divorce, legal separation, or annulment each use the same procedures. For this discussion, the term “divorce” will generally be used. A judgment of legal separation differs only in allowing the parties to maintain the legal status of marriage (sometimes used to continue family coverage for health insurance, or for other personal reasons) while separating the family and financial obligations.

**Legal separation is a legal status that is distinct from physical separation. Any couple may physically separate at any time without affecting their legal marital status.**

In order to initiate a divorce action, one spouse must have been a Wisconsin resident for at least six months prior to the filing of the petition for divorce. In addition, at least one of the parties to the divorce must have been a resident of the county in which the petition is filed for at least 30 days prior to the filing of the petition. County clerks of court collect a fee when a party commences an action affecting the family. [s. 767.301, Stats.]

**Circuit court forms for family actions can be found at:**

<https://www.wicourts.gov/>

Wisconsin is a “no fault” divorce state, which means the court must find simply that the marriage is “irretrievably broken.” This is shown by both parties stating in the divorce petition that the marriage is irretrievably broken; by the parties voluntarily living apart continuously for 12 months or more immediately prior to filing the divorce petition; or, if only one party has stated that the marriage is irretrievably broken, by the court determining that there is no reasonable prospect of reconciliation. [s. 767.315, Stats.]

Wisconsin requires a waiting period before a judgment of divorce or legal separation may be granted. When the parties have filed a joint petition for divorce, 120 days must pass from the filing date before the action may be brought to trial or to a final hearing for approval of a settlement agreement. When one party has filed the petition, the 120-day waiting period begins when the other party is served with the petition. [s. 767.335, Stats.]

### Pendency of Divorce Action

A circuit court judge or court commissioner may make just and reasonable temporary orders during the pendency of a divorce action concerning legal custody and periods of physical placement of a minor child; removal of a child from the court’s jurisdiction; payment for child support and spousal maintenance; payment of debts; disposal of assets; counseling for one or both parties; and other issues. [s. 767.225, Stats.]

Reconciliation may be attempted, if stipulated by the parties in writing, during the pendency of a divorce action. A suspension of the proceedings to effect reconciliation may be granted for up to 90 days. Suspension does not affect the parties' rights in the divorce action. During the suspension period, the parties may resume living together as husband and wife and their acts: (1) do not constitute an admission that the marriage is not irretrievably broken; and (2) do not negate that the parties have voluntarily lived apart continuously for 12 months or more immediately before the commencement of the action. If the parties do not reconcile, the action will proceed as though no reconciliation period was attempted.

**Each party's financial disclosure statement in a divorce action is sealed by the court and generally cannot be disclosed to any person outside the action.**

[s. 767.323, Stats.]

During the pendency of a divorce action, parties are required to disclose information about: (1) assets owned by them individually or jointly; (2) debts and liabilities; and (3) income. There are penalties for disclosures that are not complete. All financial and asset information that is disclosed is confidential and sealed by the court. [s. 767.127, Stats.]

The statutes contain various requirements for the parties to attend counseling or educational programs. Most of the programs focus on educating parents about the effect of divorce or parental separation on children and how to lessen any detrimental effects. Specific provisions relate to child custody mediation where it appears that legal custody or physical placement is contested, as discussed below. [ss. 767.401 and 767.405, Stats.]

### Reaching a Judgment

The primary issues decided in a judgment of divorce are: property division; child support and spousal maintenance; legal custody of a child; and periods of physical placement with a child (sometimes including visitation rights of third parties).

Parties may stipulate to any of these issues in settlement of a divorce action, subject to court approval and certain limitations. For example, child support must be determined in a manner that is consistent with the state's child support standards. Also, a stipulation cannot leave one party in need of assistance from the state. [ss. 767.34 and 767.35, Stats.]

### Property Division

Property division in a divorce action is not governed by the marital property law, but, rather, by the marital dissolution laws. Generally, in a divorce, all property acquired before or during the marriage, owned by either or both spouses, is subject to division. This includes assets such as pension plans, retirement accounts, vehicles, and real estate. Property acquired by gift or inheritance by one party is generally not subject to division.

After determining all assets and debts of the parties, the court must presume that each party should be awarded an equal value of the total divisible property, but the application of certain statutory factors may alter this presumption. This includes considerations such as the length of the marriage, the property brought to the marriage by each party, and the tax consequences to each party. For example, in dissolving a marriage of short duration, where the parties had a large difference in the property brought to the marriage, a court may consider an unequal division of property, approximately back to where the parties started.

Debts incurred during the marriage are also assigned, but can be collected from either party regardless of how responsibility for debts is divided between the parties in their judgment of divorce. A divorce judgment assigning a debt is not binding on creditors, because a creditor is not a party in the divorce action. To avoid possible problems with the collection of debts after a divorce, parties may take actions such as consolidating and refinancing in the name of the spouse who is assigned those debts. [ss. 766.55 and 767.61, Stats.; *Sokaogon Gaming Enterprise Corp. v. Curda-Derickson*, 2003 WI App 167.]

## Maintenance

As part of a divorce judgment, a court may order maintenance payments (formerly known as alimony) to either party for an open or defined period of time after considering several designated statutory factors. Some of these factors include the length of the marriage; the age and physical and emotional health of the parties; the division of property made in connection with the divorce; the educational level of each party at the time of the marriage and at the time of the divorce; the earning capacity of the party seeking maintenance, including the party's educational and employment background, length of absence from the job market, and child-rearing responsibilities during the marriage; and the contribution of one party to the education, training, and earning power of the other party. [s. 767.56, Stats.]

A maintenance award must meet the dual objectives of supporting the recipient in accordance with the parties' needs and earning capacities, while ensuring a fair and equitable financial arrangement between them. There is no statutory presumption of an equal division of earnings in awarding maintenance, but the courts have stated that a reasonable starting point for a maintenance evaluation in a long-term marriage is that the dependent spouse may be entitled to one-half of the total combined earnings of both parties. [*Hefty v. Hefty*, 172 Wis. 2d 124 (1992); *Johnson v. Johnson*, 225 Wis. 2d 513 (Ct. App. 1999).]

**Maintenance payments pursuant to a judgment of divorce are taxable income to the recipient and are a tax deduction to the payer.**

If no maintenance is awarded in the judgment, maintenance is generally waived, unless specifically held open, and cannot later be ordered by a court. If maintenance is awarded, a court may consider revising the amount or duration if it first finds that there has been a

substantial change in the parties' financial circumstances. [s. 767.59, Stats.; *Grace v. Grace*, 195 Wis. 2d 153 (Ct. App. 1995).]

The IRS allows a payer to deduct the amount of maintenance payments from reported gross income on a tax return, if certain requirements are met. Additionally, the IRS allows payments made to a third party for the benefit of a former spouse to be considered as maintenance. However, the IRS disallows deductions for any portion of spousal support that is intended for child support. [26 U.S.C. ss. 71 and 215.]

## CHILDREN

Wisconsin law addresses the legal rights and obligations of parents and other caregivers towards children in the areas of legal custody and physical placement, child support, paternity, adoption, and third-party visitation.

### Legal Custody and Physical Placement

In actions for divorce, legal separation, annulment, or paternity, a court must assign legal custody and physical placement for a child. “Custody” and “placement” involve different aspects of a child’s upbringing.

“Legal custody” means the right and responsibility to make major decisions concerning a child. Major decisions include decisions regarding consent to marry, consent to enter military service, consent to obtain a driver’s license, authorization for nonemergency health care, and choice of school and religion. The court, in its order for custody, may delineate specific decisions to be made by either party.

In contrast to legal custody, which authorizes decision-making on major issues, physical placement is the actual time a child is in a parent’s care. A parent must make routine daily decisions while the child is physically with that parent, consistent with the major decisions. [ss. 767.001 (2), (2m) and (5) and 767.41 (6), Stats.]

#### Statutory Factors

In assigning legal custody and physical placement, the court must consider numerous statutory factors. Some of these include the child’s wishes; the child’s relationship with the parents; the child’s age; the family’s history of custodial roles and any reasonable lifestyle changes that are proposed; the child’s adjustment to home and school; and the need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child. [s. 767.41 (5), Stats.]

**In determining legal custody and physical placement, a court must consider all facts relevant to the best interests of the child. A court may not prefer a parent on the basis of sex or race.**

## Legal Custody

It is presumed that joint legal custody is in the best interest of the child. However, a court may award sole legal custody if the parties agree to it, and if the court finds that sole legal custody is in the child's best interest. If the parties do not agree to sole legal custody, the court may award it if the court finds that one party is not capable of performing parental duties or does not wish to be active in raising the child; that conditions exist that substantially interfere with the exercise of joint legal custody; or that the parties will not be able to cooperate in future decision-making.

If there is evidence of a pattern or serious incident of domestic abuse by one parent against the other parent, the presumption for joint legal custody does not apply, and there is a rebuttable presumption that joint legal custody is detrimental to the child and contrary to the best interest of the child and sole or joint legal custody cannot be awarded to that parent.

The "spousal abuse" presumption for sole legal custody may be rebutted only by a preponderance of evidence that the abusive party has completed treatment for batterers provided through a certified treatment program or treatment provider and is not abusing alcohol or any other drug, and that it is in the best interest of the child that the abusive party be given joint or sole legal custody after considering the specified custody and placement factors.

**A court must set a placement schedule that: (a) allows the child to have regularly occurring, meaningful periods of physical placement with each parent; and (b) maximizes the amount of time the child may spend with each parent.**

If the court finds that both parties have engaged in a pattern or serious incident of domestic abuse, for purposes of the presumption, the court must attempt to determine which party was the primary physical aggressor, considering factors such as any prior acts of abuse, relative severity of injuries, acts of self-defense, and any patterns of coercive and abusive behavior between the parties. If one, but not both, of the parties was convicted of a crime that was an act of domestic abuse with respect to the other party, the court must find the party who was convicted to be the primary physical aggressor. If the court determines that neither party was the primary physical aggressor, the presumption against a party's custody rights does not apply.

[s. 767.41 (2), Stats.]

## Physical Placement

A child is entitled to periods of physical placement with both parents unless the court finds that placement with a parent would endanger the child's physical, mental, or emotional health. In determining physical placement, a court must consider the same statutory factors that apply to legal custody determinations, for the best interest of the child.

Wisconsin statutes provide that a placement schedule should allow a child to have regularly occurring, meaningful periods of placement with each parent. The schedule must maximize the amount of time a child spends with each parent, considering geographic separation and the accommodations in the separate households. According to Wisconsin court decisions, the requirement to maximize time with both parents is not synonymous with a presumption for equal physical placement, but requires a consideration of the child's best interests and the amount of time a child has with both parents within an overall placement schedule.

A court may not deny a parent physical placement based on the parent's failure to make child support or maintenance payments. [s. 767.41 (4), Stats.; *Keller v. Keller*, 2002 WI App. 161, ¶ 12.]

### Guardian Ad Litem

When the legal custody or physical placement of a child is contested, or if there is reason for special concern regarding the welfare of the child, the court appoints a guardian ad litem (GAL) for the child. A GAL's responsibility is to represent the best interests of the child and to make recommendations to the court regarding paternity, custody, physical placement, and support. A GAL must be a licensed attorney in the State of Wisconsin who meets the GAL special training requirements. Generally, both parents are required to contribute to the payment of the GAL's fees. [s. 767.407, Stats.]

### Mediation

Mediation services may play a significant role in actions involving child custody and placement issues. Every county must make mediation services available to help the parties resolve their disputes about the best interests of a child.

With exceptions for undue hardship or endangerment to one of the parties, an initial session of mediation is required in any action where it appears that legal custody or physical placement is contested. The parties may contract with a mediator at their own expense or may use the county's family court counseling service mediators. If an agreement is reached, it must be reviewed by the parties' attorneys and the GAL and be approved by the court. If no agreement is reached, the matter must be referred for a legal custody or physical placement study and the issues are resolved through court procedures.

[s. 767.405, Stats.]

### Modification of Custody and Placement Order

A court generally may not modify an initial legal custody or physical placement order for two years unless the current custodial conditions are physically or emotionally harmful to the best interest of the child. This is meant to provide a period of finality and stability while the child is adjusting to the new family situation.

After the two-year period, the court may modify the legal custody or placement order if it first finds that: (1) it is in the best interest of the child to do so; and (2) a substantial change of circumstances has occurred that affects custody or placement. In considering a

request to modify a custody or placement order, the court presumes that continuing substantially equal periods of physical placement, or continuing greater periods with one parent, is in the best interest of the child.

If the parties have substantially equal periods of placement, the court may modify an order for physical placement at any time if it is in the best interest of the child, but only if circumstances make it impractical to continue the equal placement arrangement.

**Under the so-called “use-it-or-lose-it” provision, a court may modify a party’s rights to physical placement for failure to exercise physical placement.**

If a court granted physical placement rights to both parents and a parent later plans to move outside of Wisconsin, move within Wisconsin to a distance that is 150 miles or more from the other parent, or remove the child from Wisconsin for more than 90 days, that parent must give at least 60 days written notice, by certified mail, to the other parent. The statutes provide a procedure for the nonmoving party to object to the move, and provides standards for when a move may be allowed. The objection must be made within 15 days of receipt of the notice. The court will then refer the parents for mediation or other family court services and may appoint a GAL.

At any time, a court may deny a parent’s physical placement rights if it finds that the placement rights endanger the child’s physical, mental, or emotional health. [ss. 767.451 and 767.481, Stats.]

### Enforcement of Custody and Placement Order

Methods for enforcing rights to legal custody and physical placement include contempt of court sanctions and criminal sanctions relating to interference with the custody of a child. Additionally, statutory remedies require a court to grant periods of physical placement to replace those denied or interfered with by the other parent and to order the uncooperative parent to pay costs and attorney fees for maintaining the enforcement action. [ss. 767.471 and 948.31, Stats.]

Wisconsin courts may also enforce or modify custody and placement orders from tribal courts, other states, or other countries under the procedures set forth by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) [ch. 822, Stats.], and the Hague Convention on the Civil Aspects of International Child Abduction.

## Child Support

As part of a divorce judgment, paternity judgment, or cases where a child’s parents may live apart, the parties are responsible for supporting a child under 18, or under 19 years old if the child is pursuing an accredited course of instruction leading to the acquisition of a

**Additional information on child support in Wisconsin can be found at:**

<http://www.dcf.wisconsin.gov/bcs>

high school diploma or its equivalent. The court must determine the amount of child support to be paid using child support standards promulgated by the Department of Children and Families (DCF), unless the court finds that to do so would be unfair to the child or either parent. [s.767.511, Stats.]

The administrative code provides the child support standards that are to be applied to a person’s income in determining the appropriate level of child support. Child support amounts are based on a percentage of the parent’s gross income. The percentage-of-income standards when one parent has primary physical placement are as follows:

- 17% for one child.
- 25% for two children.
- 29% for three children.
- 31% for four children.
- 34% for five or more children.

When both parents have court-ordered periods of physical placement of a child for at least 25% of the year (92 overnights) each, the percentage standard is calculated for both parents and offset under a specific formula. [ss. DCF 150.03 and DCF 150.04 (2), Wis. Adm. Code.]

The amount of child support is determined from the obligated parent’s gross monthly income. Gross income includes all salary and wages before taxes and other deductions are taken out, income from assets, workers’ compensation, unemployment income, and Social Security disability. Income does not include public welfare assistance. [s. DCF 150.13 (2), Wis. Adm. Code.]

**In cases of teenage parents, both sets of grandparents also have a child support obligation.**

The court is also permitted to set child support based on a payer’s ability to earn, or “imputed income,” beyond actual earnings. The court may consider factors such as past earnings; current physical and mental health; history of child care responsibilities of the parent with primary placement; the parent’s education, training, and recent work experience; and local job openings. [s. 150.03 (3), Wis. Adm. Code.]

Special rules govern the application of the percentage standards to the following types of payers:

- A serial family payer, who has an existing child support obligation and incurs an additional child support obligation in a subsequent family.
- A split-custody payer, who has physical placement of at least one but not all the children.
- A low-income payer, with an income below 150% of the federal poverty level.
- A high-income payer with an income above \$84,000 per year. A further reduced percentage rate applies to income in excess of \$150,000. [s. DCF 150.04, Wis. Adm. Code.]

**In most cases, child support is automatically withheld from the income paid by an obligated parent's employer. This is known as income assignment.**

A court may set child support without using the percentage standards only in limited circumstances. Upon request of a party to the action, the court may deviate

from the standards if the court finds that the use of the applicable standard is unfair to the child or to any of the parties. Any deviation must include consideration of an extensive list of factors set forth in the statutes. [s. 767.511 (1j), (1m), and (1n), Stats.; s. DCF 150.03 (11), Wis. Adm. Code.]

Although the child support amount is calculated based on a percentage standard, current law provides that the child support order must be given as a fixed sum. The order may be expressed as a percentage only in limited circumstances. [s. 767.511 (1) (a), Stats.]

A court that issues a child support order must also assign responsibility for payment of the child's health care expenses. In assigning responsibility, the court must consider specified factors, including existing and available health insurance, the extent of coverage, and the cost of health insurance coverage for the child. The court may require a parent to initiate or continue health care insurance coverage for a child. [s. 767.513, Stats.; s. DCF 150.05, Wis. Adm. Code.]

Child support is generally required to be withheld from employment income, and is paid to the Wisconsin Support Collections Trust Fund. Child support payments are then paid out by direct deposit or added to a debit card. [s. 767.75, Stats.]

### Modification of Child Support Order

A child support order may be modified only when there has been a substantial change in circumstances of the parties or the children since the entry of the order. A court may presume that it has the authority to reconsider a child support order under the following changes in circumstance: commencement of participation in Wisconsin Works (W-2) by

either parent; expiration of 33 months after the date of entry of the last child support order; or failure of the payer to furnish a timely annual financial disclosure.

Additional factors the court may consider in determining whether or not to revisit a child support order include a change in the payer's income or earning capacity, a change in the child's needs, or any other condition the court determines is relevant in a particular case.

If a court determines that a substantial change in circumstances has occurred to give it authority to review the child support order, the court may, but is not required to, modify the order by applying the child support standards to the current circumstances. [s. 767.59, Stats.]

### Enforcement of Child Support Order

**The Wisconsin Child Support Lien Docket is a registry containing the names of any person with an obligation for past-due child support. The amount owed equals a lien against the person's real and titled personal property.**

**The searchable child support lien docket is available at:**

<http://liendocket.wisconsin.gov>

There are several tools available for enforcement of support orders. The mechanisms include mandatory employer reporting of newly hired employees to DCF; tax refund intercepts; accrual of interest on past due child support amounts; work search requirements; contempt of court proceedings with penalties of fines, imprisonment, or both; ineligibility for W-2 benefits; suspension of driver's licenses; data sharing between DCF and state financial institutions; liens on property; seizure of assets; suspension of recreational licenses and professional licenses and credentials; denial of passports; denial of college or business loans; and seizure of bank accounts. State and

federal criminal penalties may also apply. [subch. VIII, ch.767, Stats.]

Wisconsin courts may also enforce or modify child support orders from other states under the procedures set forth in ch. 769, Stats., the Uniform Interstate Family Support Act (UIFSA).

**The application form for child support case management services can be found at:**

<http://www.dcf.wisconsin.gov/bcs/applications.htm>

The local county child support offices prosecute enforcement actions on behalf of parents receiving child support, when the recipients have applied for the services. The fee for services is \$25 for each year in which \$500 or more is received in support. [s. 767.57, Stats.]

### Paternity

If parents are not married when a child is born, legal fatherhood can be established in three different ways:

- **Voluntary paternity acknowledgment.** If both the mother and the man are sure that the man is the father, the easiest way to establish fatherhood is with the Voluntary Paternity Acknowledgment form, which the father and the mother may sign together before a notary. The Acknowledgement may be signed at any time, and is commonly provided after birth, by a hospital or midwife. Local child support agencies can also help with the form. [ss. 767.805 and 891.405, Stats.; 42 U.S.C. s. 666 (a) (5) (D).]
- **Court ruling.** If a man is named as the possible father in a petition for paternity and does not agree, or, if a man states that he is the father of a child and the mother does not agree, a court will make a ruling about paternity. Both the man and the mother will be notified of the hearing and both may attend.
- **Acknowledgment of marital child (legitimation).** If a mother and the father marry after their child is born, the parents may sign a form for an Acknowledgment of Marital Child to establish paternity. Local child support agencies can help with the form, which is then filed with the state Vital Records Office. [s. 767.803, Stats.]

**A child born to a married couple is presumed, by law, to be the natural child of both spouses.**

Several persons are eligible to commence a paternity action under Wisconsin law. Eligible persons include the child, the child's mother, or the state. Likewise, a man alleging himself to be the child's father may bring an action to determine paternity. In addition, the husband of the mother, who is presumed to be the child's father, or a man legally acknowledged as the child's father at birth, may bring an action to refute paternity.

[s. 767.80, Stats.]

### Court Procedure

A paternity action is commenced by filing a summons, notice, and petition for paternity with the clerk of court for the county in which the child or the alleged father resides.

**An action to establish paternity cannot be brought after the child turns 19.**

The person filing the action must serve the petition, summons, and other documents on the other parent or alleged parent within 90 days of filing with the clerk of court. The time may be extended only for good cause. All parties to a paternity action may be represented by an attorney. A GAL is appointed for a minor parent, and may be appointed for the child in some circumstances. The alleged father has a right to counsel, and will have an attorney appointed if the alleged father is indigent and cannot afford one. [ss. 767.813, 767.815 to 767.83, 801.02 (1), and 801.11, Stats.]

The court proceeding generally has three stages: the first appearance, the pretrial hearing, and the trial. Paternity can be acknowledged at any of these stages. The alleged father is

permitted to enter one of the following three pleas relating to the paternity: admit paternity, deny paternity, or admit paternity subject to confirming tests. [ss. 767.863, 767.88 and 767.883, Stats.]

At the first appearance the court must inform the parties that a judgment of paternity grants parental and inheritance rights and establishes child support obligations; that the alleged father is entitled to an attorney, at public expense if he is indigent; that any party may request genetic tests; and that the alleged father has several defenses available to him to deny paternity, including that he was sterile or impotent at the time of conception, that he did not have intercourse with the mother during the preconceptive period, or that another man had intercourse with the mother during that period. The first appearance can be held any time after 30 days have passed from the service of the petition on the respondent. [ss. 767.86 to 767.863 and 767.813 (5g), Stats.]

At the pretrial hearing the court has an opportunity to evaluate the probability of paternity. At this point, witnesses and other evidence may be presented. The court may, at the conclusion of the evidence, dismiss the action or make a recommendation to the parties regarding settlement of the paternity action. The pretrial hearing is closed to persons other than those necessary to the action. [ss. 767.853 and 767.88, Stats.]

If no settlement is reached at the pretrial stage, a paternity trial is held. Like the pretrial hearing, the trial is closed to persons other than those necessary to the action. The paternity trial is in two parts: first, to make the determination of paternity, as shown by a clear and satisfactory preponderance of the evidence; and, second to make a determination of child support, legal custody, periods of physical placement, and any related issues. [s. 767.883, Stats.]

**Liability for past child support payments is limited to the period after filing unless the action was delayed because of duress, threats, promises, or evasion.**

### Evidence Used to Establish Paternity

Genetic tests are one form of evidence used to determine the existence of paternity. If the results of genetic testing show that the alleged father is not excluded as a possible father of the child and that the statistical probability of the alleged father's parentage is 99% or higher, the alleged father is presumed to be the father of the child.

Other evidence that may be submitted includes evidence of sexual intercourse between the mother and alleged father during the possible time of conception; evidence of a relationship between the mother and alleged father at any time; an expert's opinion concerning the statistical probability of the alleged father's paternity based upon the duration of the mother's pregnancy; and any other evidence relevant to the issue of paternity. [ss. 767.84 and 767.87, Stats.]

## Judgment of Paternity

Once the trial is completed, the court enters a judgment of paternity. The judgment contains an adjudication of the child’s paternity, an order requiring either parent to pay child support, an order for the child’s legal custody and physical placement, an order regarding which parent will have the right to claim the tax exemption for the child, and orders relating to the payment of birth expenses and all related costs and fees of the action, including GAL fees and genetic testing fees. [s. 767.89, Stats.]

## Adoption

The process for adopting a child usually involves four steps: (1) termination of parental rights; (2) petition to adopt and order for investigation; (3) agency investigation (often referred to as the home study); and (4) hearing on the adoption. State law requires that all hearings concerning termination of parental rights and adoption must be closed to the public. [s. 48.837 (2) to (8), Stats.]

**Additional information on adoption in Wisconsin can be found at:**

<http://www.dcf.wi.gov/children/adoption>

Agency adoptions involve the placement of a child with adoptive parents by a public agency, including the Bureau of Milwaukee Child Welfare or any other county department of human or social services, or by a licensed private agency. Public child welfare agencies generally place children who have become wards of the state for reasons such as orphanage, abandonment, or abuse. Private agencies are sometimes run by charities or social service organizations. [ss. 48.833 and 48.834, Stats.]

An independent adoption refers to situations where the biological and adoptive parents find each other without the help of an agency, often through friends or acquaintances. In Wisconsin, these families must still work with an agency for the home study and birth parent counseling services. [ss. 48.837 and 48.84, Stats.]

Similarly, a parent who has custody of a child may place the child for adoption in the home of a relative. This is most familiar in cases of grandparent adoptions, but could also include adoption by a brother, sister, first or second cousin, uncle, or aunt. [s. 48.835, Stats.]

**There is no statutory “open adoption” in Wisconsin. If adoptive parents have made promises of continued contact with the birth parents after the termination of parental rights, those promises are not enforceable by a court.**

It is also common for a stepparent to adopt the child of his or her spouse under the same general procedures. Wisconsin does not allow adoption by a same-sex or opposite-sex domestic partner of a birth parent, under the stepparent adoption procedures. [s. 48.82 (1) (a), Stats.]

It is lawful for the proposed adoptive parents to pay certain, limited expenses of the birth parent that relate to the adoption. These may include medical and hospital expenses, birthing classes, maternity clothes (not to exceed \$300), legal expenses, living expenses if necessary to protect the mother or child's health and welfare (not to exceed \$5,000), counseling, and a gift to the mother (not to exceed \$100 in value). [s. 48.913, Stats.]

A biological parent may sign a consent to terminate parental rights after the birth of a child, and may revoke the consent at any point up until the judge signs the order terminating parental rights. When the termination order is entered by the court, it is final, and there is no waiting period allowing the biological parent to change his or her mind. A biological parent may appeal the order within 30 days, under an expedited appeals process. [ss. 48.41, 48.46 (2), 48.63 (3) (b) 5., and 48.837 (1r) (e), Stats.]

In every adoption, the agency caseworker must determine whether the federal Indian Child Welfare Act of 1978 applies. The Act applies if the child is either a member of an Indian tribe or eligible for membership, and is the biological child of a member of an Indian tribe. Each tribe sets its own standards of eligibility for membership. Unless it is a voluntary proceeding, the tribe must be notified and given an opportunity to assert the statutory placement preference priority in favor of the child's extended family and tribe. [s. 48.028, Stats.]

## Third Party Visitation

Wisconsin statutes provide for the visitation of children by certain nonparents, including grandparents, stepparents, and domestic partners, in several situations. However, unlike a parent with physical placement or even supervised physical placement, a person granted visitation with a child does not have any other parental rights or obligations towards the child.

### In Actions Affecting the Family

A grandparent, great-grandparent, or stepparent may petition the court for visitation with a child subsequent to, or during, an action affecting the family (such as divorce, annulment, legal separation, and paternity actions). The court may grant reasonable visitation rights to the grandparent, great-grandparent, or stepparent if: (1) the parents have notice of the hearing; and (2) the court determines that visitation is in the best interest of the child. Whenever possible, in making its determination, the court must consider the wishes of the child. [s. 767.43 (1), Stats.]

In a recent decision, the Wisconsin Supreme Court clarified that grandparents, great-grandparents, and stepparents do not need to prove a parent-like relationship with a child in order to qualify for visitation. [*S.A.M. v. Meister (In re Meister)*, 2016 WI 22, ¶ 22.]

### Person With a Parent-Like Relationship

First, in the context of an existing action dissolving a marriage, persons other than grandparents, great-grandparents, and stepparents who have maintained a relationship

similar to a parental relationship with a child may request and be granted reasonable visitation rights, if the parents have notice of the hearing and the court determines that the visitation is in the best interests of the child. [s. 767.43 (1), Stats.]

Wisconsin courts also recognize an independent action for a former same-sex or opposite-sex partner who is seeking visitation rights with a minor child if the partner proves four specific elements to demonstrate a parent-like relationship with the child. These elements are: (1) the biological or adoptive parent consented to, and fostered, the person's parent-like relationship with the child; (2) the person and the child lived together in the same household; (3) the person assumed parental obligations, including contributing to the child's support, without expectation of financial compensation; and (4) the person has been in a parental role long enough to have established a bonded, dependent parent-like relationship. If there is no underlying action affecting the family, the person must show that there was a significant triggering event, such as substantial interference with the parent-like relationship. [*Custody of H.S.H.K.*, 193 Wis. 2d 649 (1995).]

### Grandparents of a Nonmarital Child

Grandparents of a child whose parents are not married may petition for, and be granted, visitation rights in an independent action for visitation or in an underlying paternity action. The child's parents must have notice of the hearing and the court must find that: (1) the parents have not married each other after the birth of the child; (2) the paternity of the child has been determined if the grandparents seeking visitation are the paternal grandparents; (3) the child has not been adopted; (4) the grandparents have maintained a relationship with the child (or have tried but have been prevented from doing so by a parent); (5) the grandparents will not act in a manner contrary to the parenting decisions of the parent; and (6) the visitation is in the best interest of the child. [s. 767.43 (3), Stats.]

### After Adoption

Other relatives may apply for visitation after adoption when: (1) a parent has remarried, the other parent's rights have been terminated, and the stepparent adopts the child; or (2) both parents have terminated their parental rights to the child and the child is adopted by another relative. In these cases, even though the parental relationship has been legally extinguished with one or both birth parents, other relatives (listed in the statutes) who have maintained a parent-like relationship with the child within the two years before the action is filed may request visitation rights. Reasonable visitation may be granted if the court determines that it would be in the best interest of the child, the relative will not undermine the legal parents' relationship with the child, and the relative will not act in a manner contrary to the parenting decisions of the legal parents. [ss. 48.02 (15) and 48.925, Stats.]

### After Death of One or Both Parents

Grandparents and stepparents of a child may request and be granted visitation with the child if one or both parents of the child are deceased and the child is in the custody of the

surviving parent or any other person. For the rights to be granted, the visitation must be in the best interest of the child. The petition may be filed in an underlying guardianship action or as an independent action. [s. 54.56, Stats.]

## ADDITIONAL REFERENCES

### 1. Legislative Council Information Memoranda (IM):

- IM- 2012-09, *Legal Custody, Physical Placement, and Child Support* (May 10, 2012).
- IM- 2016-05, *Visitation by Grandparents and Other Third Parties* (August 4, 2016).

These publications are available at: <http://www.legis.wisconsin.gov/lc>.

### 2. Wisconsin Department of Revenue:

- Publication 109, *Tax Information for Married Persons Filing Separate Returns and Persons Divorced in 2015* (December 2015).
- Publication 113, *Federal and Wisconsin Income Tax Reporting Under the Marital Property Act* (December 2015).

These publications are available at: <http://revenue.wi.gov/html/taxpubs.html#indiv>.

## GLOSSARY

**Guardian ad litem (GAL):** A guardian ad litem is an attorney admitted to practice in Wisconsin who must advocate for the best interest of a minor child as to paternity, legal custody, physical placement, and support. The GAL must consider, but is not bound by, the wishes of the minor child or the positions of others as to the best interest of the minor child. The GAL must review and comment to the court on any mediation agreement, stipulation, and parenting plan. The GAL has none of the rights or duties of a general guardian.

**Joint legal custody:** Joint legal custody means the situation in 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.

**Legal custody:** With respect to any person granted legal custody of a child, legal custody means 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.

**Major decisions:** 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.

**Mediation:** Mediation means a cooperative process involving the parties and a mediator, the purpose of which is to help the parties, by applying communication and dispute resolution skills, to define and resolve their own disagreements. In cases where a child is involved, the best interest of the child is the paramount consideration.

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

**Sole legal custody:** Sole legal custody means the situation in which only one party has legal custody.

**Termination of parental rights (TPR):** Termination of parental rights means that, pursuant to a court order, all rights, powers, privileges, immunities, duties, and obligations existing between parent and child are permanently severed.

**Wisconsin Legislative Council**

One East Main Street, Suite 401  
Madison, WI 53703-3382  
Phone: (608) 266-1304