



**WISCONSIN LEGISLATIVE COUNCIL
INFORMATION MEMORANDUM**

Legal Custody, Physical Placement, and Child Support

This memorandum describes the general standards used by a court in determining or revising an order for legal custody, physical placement, or child support. The memorandum refers generally to the *court* processes and requirements, but the same steps and considerations are also used by parties and their attorneys when reaching an agreement for the court's approval.

State law provides that, if a paternity judgment is entered for a father, or if parents of minor children separate through an action for divorce, legal separation, or annulment, the court must enter an order providing for the legal custody, physical placement, and financial support of each minor child.

LEGAL CUSTODY AND PHYSICAL PLACEMENT

When an action involves a minor child, a court must first determine the legal custody and physical placement arrangements for the child. "Custody" and "placement" are treated separately under Wisconsin law and involve different aspects of a child's upbringing.

LEGAL CUSTODY

Legal custody is the decision-making authority for major decisions about a child's life, including consent to marry, consent to enter military service, consent to obtain a driver's license, authorization for nonemergency health care, choice of school, and choice of religion.

A court presumes that joint legal custody is in the best interests of the child, where both parents equally share the right to make major decisions, and neither parent has a superior right over the other for such decisions.

The court may not deny legal custody based on a service member's absence from the home for a call to active duty in the U.S. armed forces.

The presumption for joint legal custody may be challenged, however, if a parent unreasonably refuses to cooperate with the other parent, a parent does not wish to have an active role in raising the child, a parent is not capable of performing parental duties and responsibilities, the parents will not be able to cooperate in the future, or conditions exist that would interfere with exercising joint authority.

Furthermore, if a court finds that a parent has engaged in a pattern or serious incident of interspousal battery or domestic abuse, the court must presume that joint or sole legal custody to that parent is detrimental to the child and may not be awarded to that parent.

PHYSICAL PLACEMENT

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 regarding the child's care while the child is physically with that parent. The routine daily decisions must, of course, be consistent with major decisions made by either or both parents having legal custody.

A court must order a physical placement schedule for a child that allows the child to have regularly occurring, meaningful periods of physical placement with each parent, and that maximizes the amount of time the child may spend with each parent. Unless physical placement with a parent would endanger the child's physical, mental, or emotional health, a child is entitled to periods of physical placement with both parents. A court may not prefer one parent over the other on the basis of the sex or race of the parent.

In determining a physical placement schedule for a child, the court must consider the best interests of the child, and a number of specific factors provided in the statutes, such as the parents' history of custodial roles, any proposed reasonable lifestyle changes to spend time with the child in the future, and the need to provide predictability and stability for the child.

A court may not deny physical placement for a child with a parent based on that parent's failure to provide financial support.

REVISING LEGAL CUSTODY AND PHYSICAL PLACEMENT

In line with the desire to provide continuity, stability, and predictability for a child, a court may not modify an order for legal custody and physical placement that would substantially alter a child's time with each parent within two years of the final judgment, unless custodial conditions are physically or emotionally harmful to the best interests of the child. This is sometimes called a two-year truce period or cooling off period, and circumstances must be compelling for a court to intervene during that time.

After the first two years a court may modify an order for legal custody and physical placement if there has been a substantial change in circumstances and the court determines that the modification is in the best interests of the child. A court presumes, though, that maintaining the status quo allocation of decision-making and physical placement is in the child's best interests, unless rebutted by the parent seeking the modification.

The fact that a child grows older does not, in and of itself, create a substantial change in circumstances. Nor does a change in economic circumstances or a change in a parent's marital status.

A court may modify or deny physical placement periods for a parent if the physical placement rights would endanger the child's physical, mental, or emotional health, or if the parent has repeatedly and unreasonably failed to exercise the periods of physical placement.

Specific procedures and standards apply to modification of an order for legal custody and physical placement if a parent is moving at least 150 miles from the other parent, or to any location outside of Wisconsin.

CHILD SUPPORT

Once a child's physical placement schedule with the parents is determined, the court will set child support. In most cases, child support is determined from both parents' incomes and the comparative number of overnights the child has in physical placement with each parent.

Child support is determined before determining any maintenance to a spouse, but child support and spousal maintenance may be combined into one family support obligation.

Income that is available for determining child support includes gross income, which may be modified for business expenses and income from assets. Income may also be imputed to a parent based on earning capacity. In determining the parent's ability to earn, a court will consider the parent's education, training, recent work experience, prior earnings, current physical and mental health, history of child care responsibilities, and the availability of work.

FORMULAS FOR DETERMINING THE AMOUNT OF CHILD SUPPORT

Under federal law, each state is required to use set guidelines for child support that are developed from economic data on the cost of raising children and analyses of case data. The guidelines must be reviewed at least once every four years.

In Wisconsin, if a child has 91 or fewer overnights per year with one parent, that parent's support obligation is a straight percentage of the parent's gross income, without consideration of the other parent's income. The standard is 17% of gross income for one child; 25% for two children; 29% for three children; 31% for four children; and 34% for five or more children.

More commonly, if a child has at least 92 overnights per year with each parent, the court applies a shared-placement formula where each parent's support obligation is determined and then offset against the amount of the other parent's obligation in a specific formula.

The court must also follow specified formulas for low-income or high-income circumstances, or circumstances where a parent already has an obligation either to a marital child in an intact family or to a child under any prior child support order.

The specified formulas may be challenged only if the court finds that the standard is unfair to the child or to either of the parents. In considering whether to deviate from the standard, the court must consider specific factors, such as each parent's financial resources, the standard of living the child would have enjoyed if the family had remained intact, the cost of daycare, the child's educational needs, and the best interests of the child.

DETERMINING OTHER ASPECTS OF FINANCIAL SUPPORT

Other aspects of financial support are also part of a child support order, such as health care premiums, routine or variable expenses for a child, and a child's tax dependency exemption. A court must specifically assign responsibility for a child's health care expenses, and may require a parent to initiate or continue health insurance coverage for the child. A court may also assign a child's tax dependency exemption to the parent paying child support, which may be claimed so long as that parent has actually made the payments.

When a child has shared placement with at least 92 overnights per year with each parent, each parent must assume the child's basic and variable support costs in proportion to the time that the child has placement with each parent, although an order for variable costs may be made with due consideration to a disparity in the parents' incomes.

Basic support costs are the routine daily expenses for a child, including food, clothing, shelter, transportation, personal care, and incidental recreational costs. In contrast, variable costs are for expenses that may depend on the parents' standard of living, such as child care, tuition, special needs, and extracurricular activities.

DURATION OF CHILD SUPPORT OBLIGATION

Child support is required until a child reaches age 18, and must continue if the child is pursuing an accredited course of instruction leading to a high school diploma or its equivalent and the child is under age 19. This means that a court has continuing jurisdiction to enforce or modify a child support obligation throughout a child's upbringing. A court has no authority and may not order child support beyond age 18.

However, the parents may agree to a support obligation after a child has reached the age of majority, such as for college expenses or special needs, which the court may incorporate into its judgment of divorce, legal separation, annulment, or paternity. Any such agreement would be binding and enforceable through court action.

Past support may not be ordered for any period before a child's birth, except that in a paternity action or voluntary acknowledgment of paternity past support generally may not be ordered for any period before a request for paternity or support is filed with the court unless the action was delayed because of duress, threats, promises, or evasion.

REVISING CHILD SUPPORT

As in legal custody and physical placement, a court may modify an order for child support only if there has been a substantial change in circumstances. A few circumstances automatically qualify as a substantial change, unless rebutted: 33 months have passed since the last child support order; a parent begins receiving aid under the Wisconsin Works program; or a parent fails to provide an annual financial disclosure. Other circumstances could, but do not automatically, qualify as a substantial change in circumstances, such as a change in the payer's income or earning capacity, or a change in the child's needs.

A court may not revise the amount of child support that was due before a notice of the action to revise child support was given to the other parent, except to correct any errors in the calculations. A court also may not give a credit for payments made before a notice of the action to revise child support was given, except in limited circumstances where payments were clearly provided directly to the other parent, the child received federal disability benefits under the payer's disability benefits, the parents resumed living together, or the child lived with the payer by agreement of the parties.

A parent is not excused from a child support obligation where the other parent has violated the child's right to physical placement with the parent responsible for paying child support.

RESOURCES

The laws for legal custody, physical placement, and child support are set forth in ch. 767, Stats. The administrative rules for child support are set forth in ch. DCF 150, Wis. Adm. Code. The laws and rules are available on the Internet at: <http://docs.legis.wisconsin.gov>.

Circuit court forms for these family law matters are available at: <http://wicourts.gov>.

Information on the administration of the Wisconsin child support program is available from the Department of Children and Families, Bureau of Child Support, at: <http://dcf.wisconsin.gov/bcs>.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Margit Kelley, Staff Attorney, on May 10, 2012.

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