

## 2001 ASSEMBLY BILL 651

November 27, 2001 – Introduced by Representatives BERCEAU, LIPPERT, STARZYK, POCAN, RYBA, McCORMICK, WASSERMAN, J. LEHMAN, MEYERHOFER, LASSA, KREIBICH, SUDER, KRAWCZYK, BIES, COGGS, WIECKERT, LADWIG, SERATTI, SHILLING, SHERMAN, ALBERS and WALKER, cosponsored by Senators BURKE, ERPENBACH, HUELSMAN, ROSENZWEIG, HANSEN, WIRCH, ROBSON, RISSER, ROESSLER, MOORE and COWLES. Referred to Committee on Family Law.

1     **AN ACT** *to amend* 767.23 (1n) and 767.24 (2) (a); and *to create* 767.23 (1n) (b)  
2             2., 767.24 (2) (d), 767.24 (6) (f) and 767.24 (6) (g) of the statutes; **relating to:**  
3             creating a rebuttable presumption against awarding a parent joint or sole legal  
4             custody if the court finds that the parent has engaged in a pattern or serious  
5             incident of abuse.

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### ***Analysis by the Legislative Reference Bureau***

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 child based on the best interest of the child. Although the court may grant sole legal custody to one parent or joint legal custody to both parents, the court must presume that joint legal custody is in the child's best interest. The court may grant sole legal custody only if both parents agree to sole legal custody with the same parent or if at least one parent requests sole legal custody and the court finds that: 1) one parent is not capable of performing parental duties or does not wish to have an active role in raising the child; 2) one or more conditions exist that would substantially interfere with the exercise of joint legal custody; or 3) the parties will not be able to cooperate in future decision making. Evidence of child or spousal abuse creates a rebuttable presumption that the parties will not be able to cooperate in future decision making. Current law requires the court to allocate periods of physical placement between the parties if the court orders sole or joint legal custody. The court may deny periods of physical placement with a parent only if the court finds that the physical placement would

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endanger the child's physical, mental, or emotional health. The statutes list a number of factors that the court must consider in awarding both legal custody and periods of physical placement. Among those factors is whether there is evidence of child or spousal abuse.

This bill provides that, if a court finds by a preponderance of the evidence that a parent has engaged in a pattern or serious incident of spousal abuse, there is a rebuttable presumption that it is detrimental to the child and not in the child's best interest for that parent to have either sole or joint legal custody of the child. This presumption takes precedence over the other rules regarding the determination of legal custody, such as the presumption that joint legal custody is in the child's best interest, and may be rebutted only by clear and convincing evidence that: 1) the abusive party has completed a certified treatment program for batterers and is not abusing alcohol or any other drug, and 2) it is in the best interest of the child that the abusive party be given joint or sole legal custody because of the absence, mental illness, or substance abuse of the party who was abused, or because of such other circumstances that affect the best interest of the child, but only if the absence, mental illness, substance abuse, or other circumstances are not a result of the abuse. If the court finds that a party has engaged in a pattern or serious incident of spousal abuse, the court must state in writing in the custody order whether the presumption against awarding custody to the abusive party was rebutted and, if so, what evidence rebutted the presumption, and why its findings related to legal custody and physical placement are in the best interest of the child.

The bill provides that, if the court finds that both parties have engaged in a pattern or serious incident of spousal abuse, for purposes of the presumption the court must attempt to determine which party was the primary physical aggressor. In order to do that, the court must consider a number of specified factors, such as all prior acts of domestic violence between the parties, the relative severity of injuries, if any, whether one of the parties acted in self-defense, and whether there has been pattern of coercive and abusive behavior.

The bill also provides that, if the court grants periods of physical placement to a parent who the court finds has engaged in a pattern or serious incident of spousal abuse, the court must provide for the safety and well-being of the child and for the safety of the other party. The bill specifies a number of actions that the court must consider, and at least one of which the court must impose, for accomplishing this, such as requiring supervised periods of physical placement for the abusive parent, requiring the exchange of the child in a protected setting or in the presence of an appropriate third party who agrees to assume that responsibility, requiring the abusive parent to attend and complete a certified treatment program for batterers as a condition of exercising his or her physical placement, and requiring the abusive parent to abstain from consuming alcohol during and for at least 8 hours before his or her periods of physical placement.

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The requirements in the bill apply to both temporary and permanent orders in all actions affecting the family.

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

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

2           767.23 **(1n)** (a) Before making any temporary order under sub. (1), the court  
3 or family court commissioner shall consider those factors that the court is required  
4 by this chapter to consider before entering a final judgment on the same subject  
5 matter. In making a determination under sub. (1) (a) or (am), the court or family  
6 court commissioner shall consider the factors under s. 767.24 (5).

7           (b) 1. If the court or family court commissioner makes a temporary child  
8 support order that deviates from the amount of support that would be required by  
9 using the percentage standard established by the department under s. 49.22 (9), the  
10 court or family court commissioner shall comply with the requirements of s. 767.25  
11 (1n).

12           (c) A temporary order under sub. (1) may be based upon the written stipulation  
13 of the parties, subject to the approval of the court or the family court commissioner.  
14 Temporary orders made by the family court commissioner may be reviewed by the  
15 court as provided in s. 767.13 (6).

16           **SECTION 2.** 767.23 (1n) (b) 2. of the statutes is created to read:

17           767.23 **(1n)** (b) 2. If the court or family court commissioner finds by a  
18 preponderance of the evidence that a party has engaged in a pattern or serious  
19 incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or  
20 domestic abuse, as defined in s. 813.12 (1) (a), and makes a temporary order  
21 awarding joint or sole legal custody or periods of physical placement to the party, the

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1 court or family court commissioner shall comply with the requirements of s. 767.24  
2 (6) (f) and, if appropriate, (g).

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

4 767.24 (2) (a) Subject to pars. (am), (b) ~~and~~ (c), and (d), based on the best  
5 interest of the child and after considering the factors under sub. (5), the court may  
6 give joint legal custody or sole legal custody of a minor child.

7 **SECTION 4.** 767.24 (2) (d) of the statutes is created to read:

8 767.24 (2) (d) 1. Notwithstanding pars. (am), (b), and (c), and subject to subd.  
9 2., if the court finds by a preponderance of the evidence that a party has engaged in  
10 a pattern or serious incident of interspousal battery, as described under s. 940.19 or  
11 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (a), there is a rebuttable  
12 presumption that it is detrimental to the child and not in the best interest of the child  
13 to award joint or sole legal custody to that party. The presumption may be rebutted  
14 only by clear and convincing evidence of all of the following:

15 a. The party who committed the battery or abuse has successfully completed  
16 a certified treatment program for batterers and is not abusing alcohol or any other  
17 drug.

18 b. It is in the best interest of the child for the party who committed the battery  
19 or abuse to be awarded joint or sole legal custody because of the absence, mental  
20 illness, or substance abuse of the party who was the victim of the battery or abuse,  
21 or such other circumstances that affect the best interest of the child, but only if the  
22 absence, mental illness, or substance abuse of the party who was the victim of the  
23 battery or abuse, or such other circumstances that affect the best interest of the child,  
24 are not a result of the battery or abuse.

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1           2. If the court finds under subd. 1. that both parties engaged in a pattern or  
2 serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m),  
3 or domestic abuse, as defined in s. 813.12 (1) (a), the party who engaged in the battery  
4 or abuse for purposes of the presumption under subd. 1. is the party that the court  
5 determines was the primary physical aggressor. In determining which party was the  
6 primary physical aggressor, the court shall consider all of the following:

7           a. All prior acts of domestic violence between the parties.

8           b. The relative severity of the injuries, if any, inflicted upon a party by the other  
9 party in any of the prior acts of domestic violence under subd. 2. a.

10          c. The likelihood of future injury to either of the parties resulting from acts of  
11 domestic violence between the parties.

12          d. Whether either of the parties acted in self-defense in any of the prior acts  
13 of domestic violence under subd. 2. a.

14          e. Whether there is or has been a pattern of coercive and abusive behavior  
15 between the parties.

16          f. Any other factor that the court considers relevant to the determination under  
17 this subdivision.

18           **SECTION 5.** 767.24 (6) (f) of the statutes is created to read:

19           767.24 **(6)** (f) If the court found, under sub. (2) (d), that a party had engaged  
20 in a pattern or serious incident of interspousal battery, as described under s. 940.19  
21 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (a), the court shall state  
22 in writing whether the presumption against joint or sole legal custody was rebutted  
23 and, if so, what evidence rebutted the presumption, and why its findings relating to  
24 legal custody and physical placement are in the best interest of the child.

25           **SECTION 6.** 767.24 (6) (g) of the statutes is created to read:

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1           767.24 (6) (g) If the court found, under sub. (2) (d), that a party had engaged  
2 in a pattern or serious incident of interspousal battery, as described under s. 940.19  
3 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (a), and the court  
4 awarded periods of physical placement to both parties, the court shall provide for the  
5 safety and well-being of the child and for the safety of the party who was the victim  
6 of the battery or abuse. For that purpose, the court shall consider all, and shall  
7 impose at least one, of the following:

8           1. Requiring the exchange of the child to occur in a protected setting or in the  
9 presence of an appropriate 3rd party who agrees by affidavit or other supporting  
10 evidence to assume the responsibility assigned by the court and to be accountable to  
11 the court for his or her actions with respect to the responsibility.

12           2. Requiring the child's periods of physical placement with the party who  
13 committed the battery or abuse to be supervised by an appropriate 3rd party who  
14 agrees by affidavit or other supporting evidence to assume the responsibility  
15 assigned by the court and to be accountable to the court for his or her actions with  
16 respect to the responsibility.

17           3. Requiring the party who committed the battery or abuse to pay the costs of  
18 supervised physical placement.

19           4. Requiring the party who committed the battery or abuse to attend and  
20 complete, to the satisfaction of the court, a certified treatment program for batterers  
21 as a condition of exercising his or her periods of physical placement.

22           5. Requiring the party who committed the battery or abuse to abstain from  
23 possessing or consuming alcohol or any controlled substance during, and for at least  
24 8 hours preceding, his or her periods of physical placement.

