

**2001 DRAFTING REQUEST**

**Bill**

Received: 04/10/2001

Received By: kahlepj

Wanted: As time permits

Identical to LRB:

For: Terese Berceau (608) 266-3784

By/Representing: Her office

This file may be shown to any legislator: NO

Drafter: kahlepj

May Contact:

Addl. Drafters:

Subject: Dom. Rel. - cust. and plac.

Extra Copies:

Submit via email: NO

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**Pre Topic:**

No specific pre topic given

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**Topic:**

Creating a rebuttable presumption against sole or joint legal custody based on a pattern or serious incident of abuse

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**Instructions:**

See Attached

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**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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*none needed*

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**WISCONSIN LEGISLATIVE COUNCIL  
STAFF MEMORANDUM**

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**TO:** REPRESENTATIVE TERESE BERCEAU

**FROM:** Robert J. Conlin, Senior Staff Attorney *RJC*

**RE:** Abuse as a Factor in Custody and Placement Determinations

**DATE:** April 4, 2001

You recently indicated that you were interested in introducing legislation based on a Massachusetts statute that creates a presumption that legal custody or physical placement with an abusive parent is not in the best interest of the child. This memorandum will discuss current Wisconsin law with respect to custody and physical placement decisions in cases of abuse and will briefly describe the Massachusetts law.

**WISCONSIN LAW**

In Wisconsin, when rendering a judgment of annulment, divorce, legal separation or paternity, the court is required to make such provisions as it deems just and reasonable concerning the legal custody and physical placement of any minor child of the parties. [s. 767.24 (1), Stats.]

**Legal Custody**

Based upon the best interests of the child, and after considering certain statutory factors, the court may give joint legal custody or sole legal custody of a minor child. Among the factors a court is to consider is whether any party engaged in abuse of the child, interspousal battery or domestic abuse. Generally, the court must presume that joint legal custody is in the best interest of the child. [s. 767.24 (2) (am), Stats.] The court may grant sole legal custody only if it finds that doing so is in the child's best interest and that either: (1) the parties agree to sole legal custody; or (2) the parties do not agree, but at least one party requests sole legal custody and the court finds that: (a) one party is not capable of performing parental duties and responsibilities; (b) one or more conditions exist at the time that would substantially interfere with the exercise of joint legal custody; or (c) the parties will not be able to cooperate in future decision-making required under an award of joint legal custody. [s. 767.24 (2) (b), Stats.] Evidence that either party engaged in abuse of the child or of the other spouse creates a rebuttable presumption that the parties will not be able to cooperate in the future decision-making required. [s. 767.24 (2) (b) 2. c., Stats.]

# GENERAL LAWS OF MASSACHUSETTS

## PART II. REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS.

### TITLE III. DOMESTIC RELATIONS.

#### CHAPTER 209. HUSBAND AND WIFE.

##### **Chapter 209: Section 38. Custody orders; abuse as factor contrary to best interest of child; rebuttable presumption; visitation.**

Section 38. In issuing any temporary or permanent custody order, the probate and family court shall consider evidence of past or present abuse toward a parent or child as a factor contrary to the best interest of the child. For the purposes of this section, "abuse" shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing bodily injury; or (b) placing another in reasonable fear of imminent bodily injury. "Serious incident of abuse" shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing serious bodily injury; (b) placing another in reasonable fear of imminent serious bodily injury; or (c) causing another to engage involuntarily in sexual relations by force, threat or duress. For purposes of this section, "bodily injury" and "serious bodily injury" shall have the same meanings as provided in section 13K of chapter 265.

A probate and family court's finding, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody, or shared physical custody with the abusive parent. Such presumption may be rebutted by a preponderance of the evidence that such custody award is in the best interests of the child. For the purposes of this section, an "abusive parent" shall mean a parent who has committed a pattern of abuse or a serious incident of abuse.

For the purposes of this section, the issuance of an order or orders under chapter 209A shall not in and of itself constitute a pattern or serious incident of abuse; nor shall an order or orders entered ex parte under said chapter 209A be admissible to show whether a pattern or serious incident of abuse has in fact occurred; provided, however, that an order or orders entered ex parte under said chapter 209A may be admissible for other purposes as the court may determine, other than showing whether a pattern or serious incident of abuse has in fact occurred; provided further, that the underlying facts upon which an order or orders under said chapter 209A was based may also form the basis for a finding by the probate and family court that a pattern or serious incident of abuse has occurred.

If the court finds that a pattern or serious incident of abuse has occurred and issues a temporary or permanent custody order, the court shall within 90 days enter written findings of fact as to the effects of the abuse on the child, which findings demonstrate that such order is in the furtherance of the child's best interests and provides for the safety and well-being of the child.

If ordering visitation to the abusive parent, the court shall provide for the safety and well-being of the child and the safety of the abused parent. The court may consider:



PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

D. note  
SOON  
(5-8)

that the parent  
has engaged in

awarding a  
parent

Generate

1

AN ACT ...; relating to: creating a rebuttable presumption against joint or sole legal custody if the court finds a pattern or serious incident of abuse.

2

**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: 1) that 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 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 evidence of child or spousal abuse.

2

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 child or spousal abuse, there



is a rebuttable presumption that it is 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. If the court ~~finds~~ <sup>was</sup> a party ~~found~~ <sup>was</sup> engaged in a pattern or serious incident of child or spousal abuse, the court must state in writing in the custody order the effect that the abuse had on the child, whether the presumption against awarding custody to the abusive party was rebutted and 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 also provides that, if the court grants periods of physical placement to a parent ~~that~~ <sup>who</sup> the court finds has engaged in a pattern or serious incident of child or 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 provides for a number of actions that the court may consider 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, 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 24 hours before his or her periods of physical placement.

The requirements in the bill apply to both temporary and permanent orders.

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

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

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

(b) 1. If the court or family court commissioner makes a temporary child support order that deviates from the amount of support that would be required by using the percentage standard established by the department under s. 49.22 (9), the

finds that

if so,

in all actions affecting the family

1 court or family court commissioner shall comply with the requirements of s. 767.25  
 2 (1n).

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

History: 1971 c. 149; 1971 c. 211 s. 126; 1971 c. 220, 307; 1975 c. 283; Sup. Ct. Order, 73 Wis. 2d xxxi (1976); 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); 1979 c. 111, 196; 1979 c. 352 s. 39; Stats. 1979 s. 767.23; 1983 a. 27; 1983 a. 204 s. 22; 1983 a. 447; 1985 a. 29 s. 3202 (9); 1987 a. 355, 364, 413; 1989 a. 212; 1991 a. 39; 1993 a. 78, 481, 490; 1995 a. 27 ss. 7100h, 9126 (19); 1995 a. 70, 404; 1999 a. 9.

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

8 767.23 (1n) (b) 2. If the court or family court commissioner finds by a  
 9 preponderance of the evidence that a party has engaged in a pattern or serious  
 10 incident of abuse, as defined in s. 813.122 (1) (a), of the child, interspousal battery,  
 11 as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12  
 12 (1) (a), and makes a temporary order awarding joint or sole legal custody or periods  
 13 of physical placement to the party, the court or family court commissioner shall  
 14 comply with the requirements of s. 767.24 (6) (f) or (g), as appropriate.

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

16 767.24 (2) (a) Subject to pars. (am), (b) and (c) and (d), based on the best  
 17 interest of the child and after considering the factors under sub. (5), the court may  
 18 give joint legal custody or sole legal custody of a minor child.

cr. 767.24 (2) (d)  
 19 767.24 (2) (d) Notwithstanding pars. (am), (b), and (c), if the court finds by a  
 20 preponderance of the evidence that a party has engaged in a pattern or serious  
 21 incident of abuse, as defined in s. 813.122 (1) (a), of the child, interspousal battery,  
 22 as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12  
 23 (1) (a), there is a rebuttable presumption that it is not in the best interest of the child

1 to award joint or sole legal custody to that party. The presumption may be rebutted  
2 by a preponderance of the evidence that such a custody award to that party is in the  
3 best interest of the child.

4 **SECTION 4.** 767.24 (6) (f) of the statutes is created to read:

5 767.24 (6) (f) If the court found, under sub. (2) (d), that a party had engaged  
6 in a pattern or serious incident of abuse, as defined in s. 813.122 (1) (a), of the child,  
7 interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse,  
8 as defined in s. 813.12 (1) (a), the court shall state in writing the effects of such abuse,  
9 interspousal battery, or domestic abuse on the child, whether the presumption  
10 against joint or sole legal custody was rebutted and, if so, what evidence rebutted the  
11 presumption, and why its findings relating to legal custody and physical placement  
12 are in the best interest of the child.

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

14 767.24 (6) (g) If the court found, under sub. (2) (d), that a party had engaged  
15 in a pattern or serious incident of abuse, as defined in s. 813.122 (1) (a), of the child,  
16 interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse,  
17 as defined in s. 813.12 (1) (a), and the court awarded periods of physical placement  
18 to both parties, the court shall provide for the safety and well-being of the child and  
19 for the safety of the other party. For that purpose, the court may consider any of the  
20 following:

21 1. Requiring the exchange of the child to occur in a protected setting or in the  
22 presence of an appropriate 3rd party.

23 2. Requiring the child's periods of physical placement with that party to be  
24 supervised by an appropriate 3rd party.

25 3. Requiring that party to pay the costs of supervised physical placement.



**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-3064/dn  
PJK...

*Date*

1. As you know, current law requires the court to consider evidence of child or spousal abuse as a factor in determining both legal custody and physical placement. Therefore, there is some overlap between current law and this bill. Since current law allows a court to order sole legal custody if the court finds that the parties will not be able to cooperate in future decision making, and evidence of child or spousal abuse creates a rebuttable presumption that the parties will not be able to cooperate, this bill is consistent with and reinforces current law. As drafted, however, the presumption in this bill takes precedence over all other "rules" related to custody determinations, including the presumption in current law that joint custody is in the child's best interest. In other words, if the court finds a pattern or serious incident of abuse, the court must order sole custody with the other party if the presumption is not rebutted.
2. The presumption in this bill applies only to custody. It does not change a physical placement determination except for specifically listing what the court may require the abusive parent to do in order to provide protections for the child and other spouse. Although current law does not specify what the court may require the abusive parent to do, courts can and do impose requirements on abusive parents. Providing specific authorization is helpful, though. Under current law, the court may deny physical placement to a parent only if the physical placement would endanger the child's physical, mental, or emotional health. The bill does not change this. Undoubtedly, certain patterns or serious incidents of abuse would lead a court to decide that physical placement with the abuser would endanger the child's physical, mental, or emotional health.
3. Do you want anything different for the initial applicability?

Pamela J. Kahler  
Senior Legislative Attorney  
Phone: (608) 266-2682  
E-mail: pam.kahler@legis.state.wi.us

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-3064/1dn  
PJK:hmh:pg

May 9, 2001

1. As you know, current law requires the court to consider evidence of child or spousal abuse as a factor in determining both legal custody and physical placement. Therefore, there is some overlap between current law and this bill. Since current law allows a court to order sole legal custody if the court finds that the parties will not be able to cooperate in future decision making, and evidence of child or spousal abuse creates a rebuttable presumption that the parties will not be able to cooperate, this bill is consistent with and reinforces current law. As drafted, however, the presumption in this bill takes precedence over all other "rules" related to custody determinations, including the presumption in current law that joint custody is in the child's best interest. In other words, if the court finds a pattern or serious incident of abuse, the court must order sole custody with the other party if the presumption is not rebutted.
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Pamela J. Kahler  
Senior Legislative Attorney  
Phone: (608) 266-2682  
E-mail: pam.kahler@legis.state.wi.us

Tom from  
Berean

3064

take out "child abuse" in new stuff (everywhere)  
- but not current law

"that it is detrimental to the child" ~~and~~  
on p. 4, l 2

probably on p 4 l 5



(Or whoever it  
gets best)

NWS the provisions  
refer to the sub prov,  
the judge must also take  
into account what offer  
if any ~~offer~~  
the law abuse  
law on the child



Other  
**State of Wisconsin**  
**2001 - 2002 LEGISLATURE**

LRB-3064/2

PJK:hmh:pg

*run with  
stacy*

## 2001 BILL

*D-note*

*Regenerate* ↙

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.**

### ***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: 1) that 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



**BILL**

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 evidence of child or spousal abuse.

whether there is

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 ~~abuse~~ spousal abuse, there is a rebuttable presumption that it is 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. If the court finds that a party has engaged in a pattern or serious incident of ~~abuse~~ spousal abuse, the court must state in writing in the custody order the effect that the abuse had on the child, 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 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 ~~abuse~~ 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 provides for a number of actions that the court may consider 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, 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 24 hours before his or her periods of physical placement.

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

detrimental to the child and

insert 2-A

*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).

**BILL**

1           **(b) 1.** If the court or family court commissioner makes a temporary child  
2 support order that deviates from the amount of support that would be required by  
3 using the percentage standard established by the department under s. 49.22 (9), the  
4 court or family court commissioner shall comply with the requirements of s. 767.25  
5 (1n).

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

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

11           767.23 (1n) (b) 2. If the court or family court commissioner finds by a  
12 preponderance of the evidence that a party has engaged in a pattern or serious  
13 incident of ~~abuse, as defined in s. 813.122 (1) (a), of the child,~~ interspousal battery,  
14 as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12  
15 (1) (a), and makes a temporary order awarding joint or sole legal custody or periods  
16 of physical placement to the party, the court or family court commissioner shall  
17 comply with the requirements of s. 767.24 (6) (f) or (g), as appropriate.

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

19           767.24 (2) (a) Subject to pars. (am), (b) ~~and~~, (c), and (d), based on the best  
20 interest of the child and after considering the factors under sub. (5), the court may  
21 give joint legal custody or sole legal custody of a minor child.

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

23           767.24 (2) (d) Notwithstanding pars. (am), (b), and (c), if the court finds by a  
24 preponderance of the evidence that a party has engaged in a pattern or serious  
25 incident of ~~abuse, as defined in s. 813.122 (1) (a), of the child,~~ interspousal battery,

**BILL**

*detrimental to the child and*

1 as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12  
2 (1) (a), there is a rebuttable presumption that it is not in the best interest of the child  
3 to award joint or sole legal custody to that party. The presumption may be rebutted  
4 by a preponderance of the evidence that such a custody award to that party is in the  
5 best interest of the child.

*Insert 4-5*

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

7 767.24 (6) (f) If the court found, under sub. (2) (d), that a party had engaged  
8 in a pattern or serious incident of ~~abuse as defined in s. 813.122 (1)(a), of the child,~~  
9 interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse,  
10 as defined in s. 813.12 (1) (a), the court shall state in writing the effects of such ~~abuse~~  
11 interspousal battery *or* domestic abuse ~~whether~~ whether the presumption  
12 against joint or sole legal custody was rebutted and, if so, what evidence rebutted the  
13 presumption, and why its findings relating to legal custody and physical placement  
14 are in the best interest of the child.

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

16 767.24 (6) (g) If the court found, under sub. (2) (d), that a party had engaged  
17 in a pattern or serious incident of ~~abuse, as defined in s. 813.122 (1) (a), of the child,~~  
18 interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse,  
19 as defined in s. 813.12 (1) (a), and the court awarded periods of physical placement  
20 to both parties, the court shall provide for the safety and well-being of the child and  
21 for the safety of the other party. For that purpose, the court may consider any of the  
22 following:

- 23 1. Requiring the exchange of the child to occur in a protected setting or in the  
24 presence of an appropriate 3rd party.

*not detrimental to the child and is*

**BILL**

1           2. Requiring the child's periods of physical placement with that party to be  
2 supervised by an appropriate 3rd party.

3           3. Requiring that party to pay the costs of supervised physical placement.

4           4. Requiring that party to attend and complete, to the satisfaction of the court,  
5 a certified treatment program for batterers as a condition of exercising his or her  
6 periods of physical placement.

7           5. Requiring that party to abstain from possessing or consuming alcohol or any  
8 controlled substance during, and for 24 hours preceding, his or her periods of  
9 physical placement.

10           6. Prohibiting that party from having overnight physical placement with the  
11 child.

12           7. Requiring that party to post a bond for the return and safety of the child.

13           8. Requiring the appointment of an attorney for the child or, notwithstanding  
14 s. 767.045 (5), the continued appointment of a guardian ad litem for the child, or  
15 requiring an investigation by an attorney or guardian ad litem for the child.

16           9. Imposing any other condition that the court determines is necessary for the  
17 safety and well-being of the child or the safety of the other party.

18           **SECTION 7. Initial applicability.**

19           (1) This act first applies to actions or proceedings that are commenced on the  
20 effective date of this subsection, including actions or proceedings to modify a  
21 judgment or order granted before the effective date of this subsection.

22

(END)

*Δ - note*

2001-2002 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-3064/2ins  
PJK/abp

INSERT 2-A

<sup>C</sup> The bill requires the court to consider, as one of the factors that the court must consider in every case when awarding legal custody and periods of physical placement, the effect, if any, on the child of spousal abuse, if the court finds evidence of such abuse.

(END OF INSERT 2-A)

INSERT 4-5

- 1           SECTION 1. 767.24 (5) (i) <sup>4</sup> of the statutes is amended to read:
- 2           767.24 (5) (i) Whether there is evidence of interspousal battery, as described
- 3           under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (a), and
- 4           if so what effect, if any, the interspousal battery or domestic abuse had on the child.

History: 1971 c. 149, 157, 211; 1975 c. 39, 122, 200, 283; 1977 c. 105, 418; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; Stats. 1979 s. 767.24; 1981 c. 391; 1985 a. 70, 176; 1987 a. 332 s. 64; 1987 a. 335, 364, 383, 403; 1989 a. 56 s. 259; 1989 a. 359; 1991 a. 32; 1993 a. 213, 446, 481; 1995 a. 77, 100, 275, 289, 343, 375; 1997 a. 35, 191; 1999 a. 9.

(END OF INSERT 4-5)

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-3064/2dn

PJK: ~~mlc~~ ~~ps~~  
hmb

*Das*

Tom:

✓  
Instead of adding at the end of s. 767.24 (2) (d) the language about the court taking into account the effect on the child of interspousal battery or domestic abuse, I amended s. 767.24 (5) (i), since the court must consider all of the factors under s. 767.24 (5) in every case. I assume the court's consideration of the factors would have a positive or negative effect on rebutting the presumption.

Pamela J. Kahler  
Senior Legislative Attorney  
Phone: (608) 266-2682  
E-mail: pam.kahler@legis.state.wi.us

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-3064/2dn  
PJK:hmh:pg

June 10, 2001

Tom:

Instead of adding at the end of s. 767.24 (2) (d) the language about the court taking into account the effect on the child of interspousal battery or domestic abuse, I amended s. 767.24 (5) (i), since the court must consider all of the factors under s. 767.24 (5) in every case. I assume the court's consideration of the factors would have a positive or negative effect on rebutting the presumption.

Pamela J. Kahler  
Senior Legislative Attorney  
Phone: (608) 266-2682  
E-mail: [pam.kahler@legis.state.wi.us](mailto:pam.kahler@legis.state.wi.us)

Tom Powell

take out part about judge  
considering effect on child

worry about SECTION 6 (in Minn. law)

Patti Segr will call me

yes - take it out, plus

change 24 hours to 8

and require 3rd party to

agree & be accountable (by  
affidavit)





State of Wisconsin  
2001 - 2002 LEGISLATURE

LRB-3064/3  
PJK:hmh:pg

*revision stays*

2001 BILL

*Friday*

*Regenerak*

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.

***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: 1) that 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

**BILL**

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. 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.~~ *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 requires the court to consider, as one of the factors that the court must consider in every case when awarding legal custody and periods of physical placement, the effect, if any, on the child of spousal abuse, if the court finds evidence of such abuse.*

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 provides for a number of actions that the court may consider 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, 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 ~~2~~ *8* hours before his or her periods of physical placement.

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

***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

*who agrees to assume that responsibility*

**BILL**

1 matter. In making a determination under sub. (1) (a) or (am), the court or family  
2 court commissioner shall consider the factors under s. 767.24 (5).

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

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

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

13 767.23 (1n) (b) 2. If the court or family court commissioner finds by a  
14 preponderance of the evidence that a party has engaged in a pattern or serious  
15 incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or  
16 domestic abuse, as defined in s. 813.12 (1) (a), and makes a temporary order  
17 awarding joint or sole legal custody or periods of physical placement to the party, the  
18 court or family court commissioner shall comply with the requirements of s. 767.24  
19 (6) (f) or (g), as appropriate.

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

21 767.24 (2) (a) Subject to pars. (am), (b) and, (c), and (d), based on the best  
22 interest of the child and after considering the factors under sub. (5), the court may  
23 give joint legal custody or sole legal custody of a minor child.

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

## BILL

1           767.24 (2) (d) Notwithstanding pars. (am), (b), and (c), if the court finds by a  
2           preponderance of the evidence that a party has engaged in a pattern or serious  
3           incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or  
4           domestic abuse, as defined in s. 813.12 (1) (a), there is a rebuttable presumption that  
5           it is detrimental to the child and not in the best interest of the child to award joint  
6           or sole legal custody to that party. The presumption may be rebutted by a  
7           preponderance of the evidence that such a custody award to that party is not  
8           detrimental to the child and is in the best interest of the child.

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

10          767.24 (5) (i) Whether there is evidence of interspousal battery, as described  
11          under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (a), and  
12          if so what effect, if any, the interspousal battery or domestic abuse had on the child.

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

14          767.24 (6) (f) If the court found, under sub. (2) (d), that a party had engaged  
15          in a pattern or serious incident of interspousal battery, as described under s. 940.19  
16          or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (a), the court shall state  
17          in writing ~~whether the presumption against joint or sole legal custody was rebutted and, if so,~~  
18          whether the presumption against joint or sole legal custody was rebutted and, if so,  
19          what evidence rebutted the presumption, and why its findings relating to legal  
20          custody and physical placement are in the best interest of the child.

21          **SECTION 7.** 767.24 (6) (g) of the statutes is created to read:

22          767.24 (6) (g) If the court found, under sub. (2) (d), that a party had engaged  
23          in a pattern or serious incident of interspousal battery, as described under s. 940.19  
24          or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (a), and the court  
25          awarded periods of physical placement to both parties, the court shall provide for the

**BILL**

1 safety and well-being of the child and for the safety of the other party. For that  
2 purpose, the court may consider any of the following:

3 1. Requiring the exchange of the child to occur in a protected setting or in the  
4 presence of an appropriate 3rd party. *→ insert 5-4*

5 2. Requiring the child's periods of physical placement with that party to be  
6 supervised by an appropriate 3rd party. *→ insert 5-4*

7 3. Requiring that party to pay the costs of supervised physical placement.

8 4. Requiring that party to attend and complete, to the satisfaction of the court,  
9 a certified treatment program for batterers as a condition of exercising his or her  
10 periods of physical placement.

11 5. Requiring that party to abstain from possessing or consuming alcohol or any  
12 controlled substance during, and for ~~24~~ *8* hours preceding, his or her periods of  
13 physical placement.

14 6. Prohibiting that party from having overnight physical placement with the  
15 child.

16 7. Requiring that party to post a bond for the return and safety of the child.

17 8. Requiring the appointment of an attorney for the child or, notwithstanding  
18 s. 767.045 (5), the continued appointment of a guardian ad litem for the child, or  
19 requiring an investigation by an attorney or guardian ad litem for the child.

20 9. Imposing any other condition that the court determines is necessary for the  
21 safety and well-being of the child or the safety of the other party.

22 **SECTION 8. Initial applicability.**



2001-2002 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-3064/3ins  
PJK:hmh:pg

INSERT 5-4

- 1 no *ft* who agrees by affidavit or other supporting evidence to assume the
- 2 responsibility assigned by the court and to be accountable to the court for his or her
- 3 actions with respect to the responsibility

(END OF INSERT 5-4)



# State of Wisconsin

## LEGISLATIVE REFERENCE BUREAU

100 NORTH HAMILTON STREET  
5TH FLOOR  
MADISON, WI 53701-2037

STEPHEN R. MILLER  
CHIEF

LEGAL SECTION: (608) 266-3561  
LEGAL FAX: (608) 264-6948

June 11, 2001

### MEMORANDUM

To: Representative Berceau

From: Pamela J. Kahler, Senior Legislative Attorney

Re: LRB-3064/2 Creating a rebuttable presumption against sole or joint legal custody based on a pattern or serious incident of abuse

The attached draft was prepared at your request. Please review it carefully to ensure that it is accurate and satisfies your intent. If it does and you would like it jacketed for introduction, please indicate below for which house you would like the draft jacketed and return this memorandum to our office. If you have any questions about jacketing, please call our program assistants at 266-3561. Please allow one day for jacketing.

JACKET FOR ASSEMBLY  JACKET FOR SENATE

If you have any questions concerning the attached draft, or would like to have it redrafted, please contact me at (608) 266-2682 or at the address indicated at the top of this memorandum.

If the last paragraph of the analysis states that a fiscal estimate will be prepared, the LRB will request that it be prepared after the draft is introduced. You may obtain a fiscal estimate on the attached draft before it is introduced by calling our program assistants at 266-3561. Please note that if you have previously requested that a fiscal estimate be prepared on an earlier version of this draft, you will need to call our program assistants in order to obtain a fiscal estimate on this version before it is introduced.

Please call our program assistants at 266-3561 if you have any questions regarding this memorandum.



**Kahler, Pam**

---

**From:** Powell, Thomas  
**Sent:** Tuesday, July 24, 2001 10:37 AM  
**To:** Kahler, Pam  
**Subject:** RE: LRB-3064/3

Hi Pam,

Thanks for all of your good work on LRB3064/3 (creating a rebuttable presumption in cases of child custody with domestic abuse present)

After having it reviewed by many folks, we have six changes we would like to incorporate in a fourth and final version. They are listed on the attached Word doc.

Thank you so much,

Tom Powell

Research Assistant for Rep. Terese Berceau



LRB3064-3  
changes.doc

## Proposed Changes to LRB – 3064/3

*D-note*

### 1) Definition of "pattern" of abuse:

"A pattern of domestic violence exists when there has been one incident of domestic violence that has resulted in serious bodily injury or if there has been more than one incident of domestic violence." *not necessary + problematic (unless they want to drop entirely the but + dom abuse currently in the draft)*

### 2) Stipulations as to what is required to rebut the presumption:

"The presumption shall be overcome only by clear and convincing evidence that the perpetrating parent has successfully completed a certified batterer's treatment program, is not abusing alcohol or drugs, and that the best interest of the child or children requires that parent's participation as a custodial parent because of the other parent's absence, mental illness, or substance abuse, or such other circumstances which affect the best interest of the child or children. (The fact that the abused parent suffers from the effects of the abuse shall not be grounds for denying that parent custody.)" *how does this fit in?*

### 3) Protection for victims who fight back:

"If the court determines that more than one party has engaged in acts of domestic violence, it shall, if possible, determine which person was the primary physical aggressor. In determining which party was the primary physical aggressor for the purposes of this section, the court shall consider:

- (a) All prior acts of domestic violence involving any of the parties; *by*
- (b) The relative severity of the injuries, if any, inflicted upon the persons involved in those prior acts of domestic violence; *parties*
- (c) The likelihood of future injury;
- (d) Whether, during the prior acts, one of the parties acted in self-defense;
- (e) Whether there is or has been a pattern of coercive and abusive behavior; and
- (f) Any other factors that the court deems relevant to the determination.

The presumption created pursuant to ? applies only to the party determined by the court to be the primary physical aggressor."

*D-note*

### 4) Change the "or" at the end of lines 12 and 25 on Page 3 of LRB 3064/3 to "and/or." Also on Page 4 at lines 9 and 16. *no*

✓ 5) Clarify the word "party" throughout Section 6 to mean "party who committed the abuse," or a similar phrase.

✓ 6) Change sub 8 of Section 6 to read: "Requiring the appointment or continued appointment of a guardian ad litem for the child, or requiring an investigation by an attorney or guardian ad litem for the child."

**Kahler, Pam**

---

**From:** Powell, Thomas  
**Sent:** Tuesday, July 24, 2001 12:41 PM  
**To:** Kahler, Pam  
**Subject:** RE: LRB-3064/3

Pam,

I sent back the bill jacket.

There is one addition I accidentally left out of my list of six changes. It is for Page 4, line 19:

...the court SHALL consider any of the following AND SHALL IMPOSE AT LEAST ONE OF THE FOLLOWING:

Thanks again. I promise this is the last change.

Tom Powell

**Kahler, Pam**

---

**From:** Powell, Thomas  
**Sent:** Tuesday, July 24, 2001 3:01 PM  
**To:** Kahler, Pam  
**Subject:** RE: Redraft of LRB-3064

Pam,

In response to your observations:

- 1) yes, forget the definition
- 2) Patti Seger from Wisconsin Coalition Against Domestic Violence suggests the change:

**Stipulations as to what is required to rebut the presumption:**

"The presumption shall be overcome only by clear and convincing evidence that the party who committed the abuse has successfully completed a certified batterer's treatment program, is not abusing alcohol or drugs, and that the best interest of the child or children requires that parent's participation as a custodial parent because of the other parent's absence, mental illness, or substance abuse, or such other circumstances which affect the best interest of the child or children. The presumption is not overcome because the abused party suffers from the effects of the abuse."

- 4) yes, forget the "and/or" changes

Thanks,  
Tom P.

-----Original Message-----

**From:** Kahler, Pam  
**Sent:** Tuesday, July 24, 2001 1:05 PM  
**To:** Powell, Thomas  
**Subject:** Redraft of LRB-3064

Tom:

I have some comments and a question about the following redraft instructions:

1. I wouldn't use the proposed definition. For one thing, it neglects "spousal battery" and only addresses "domestic violence" (which is not even used in the draft). The draft currently creates a presumption if the court finds a "pattern or serious incident of spousal battery or domestic abuse," both of which have definitions in the statutes. The common meaning of the word "pattern" is "more than one," so we shouldn't have to define "pattern." "Serious incident" is also self-explanatory. The proposed definition appears to define "pattern" to include a "serious incident." In the draft, both "pattern" and "serious incident" modify both "spousal battery" and "domestic abuse." The only way I would include this definition is if you want to replace "spousal battery or domestic abuse" throughout the draft with "pattern of domestic violence." And then you might also have to define "domestic violence" because it has no definition in the statutes.

2. I'm not sure what the last sentence of this instruction is supposed to do. Where does it fit in? The presumption created in the bill is against giving the abusive parent sole or joint custody. It has nothing to do with whether the victim is given any form of custody. The language proposed for overcoming the presumption requires that the court find that, because of certain characteristics of the parent who was the victim of the battery or abuse, it is in the child's best interest that the abusive parent be given sole or joint legal custody. The basis for overcoming the presumption does not in any way reflect on whether the other parent be given custody. Do you want a whole new concept added to ch. 767 that prohibits a court from denying custody to a parent who is the victim of abuse if the reason for the denial relates to the effects of the abuse? If so, I will need more information.

4. We do not ever use "and/or" in the statutes. "And" would be used if the court *must* find *both*; "or" is used if the court *must* find one or the other. If the court finds both, the court has found one or the other.

I have no problem with number 5, number 6, or the first part of number 2. I don't think I have a problem with number 3, but I need to look at it further.

I got your latest e-mail and have no problem with that instruction.

Pam



State of Wisconsin  
2001 - 2002 LEGISLATURE

LRB-3064/A

PJK:hmh:pg

ref is run  
stays

2001 BILL

rejuvenate ↓

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.

*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: 1) ~~that~~ 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

that

**BILL**

*Insert A-1*

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. 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 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 ~~provides~~ a number of actions that the court ~~may~~ consider 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 8 hours before his or her periods of physical placement.

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

*, and at least one of which the court must impose,*

*Insert A-2*

*Specifies*

*term*

*at least*

***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).

**BILL**

1           **(b) 1.** If the court or family court commissioner makes a temporary child  
2 support order that deviates from the amount of support that would be required by  
3 using the percentage standard established by the department under s. 49.22 (9), the  
4 court or family court commissioner shall comply with the requirements of s. 767.25  
5 (1n).

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

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

11           767.23 (1n) (b) 2. If the court or family court commissioner finds by a  
12 preponderance of the evidence that a party has engaged in a pattern or serious  
13 incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or  
14 domestic abuse, as defined in s. 813.12 (1) (a), and makes a temporary order  
15 awarding joint or sole legal custody or periods of physical placement to the party, the  
16 court or family court commissioner shall comply with the requirements of s. 767.24

17 (6) (f) ~~Notwithstanding pars. (am), (b), and (c),~~ and, if appropriate, (g)

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

19           767.24 (2) (a) Subject to pars. (am), (b) and, (c), and (d), based on the best  
20 interest of the child and after considering the factors under sub. (5), the court may  
21 give joint legal custody or sole legal custody of a minor child.

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

23           767.24 (2) (d) <sup>1.</sup> Notwithstanding pars. (am), (b), and (c), if the court finds by a  
24 preponderance of the evidence that a party has engaged in a pattern or serious  
25 incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or

and subject to subd. 2.)

**BILL**

Insert 4-3

1 domestic abuse, as defined in s. 813.12 (1) (a), there is a rebuttable presumption that  
 2 it is detrimental to the child and not in the best interest of the child to award joint  
 3 or sole legal custody to that party. The presumption may be rebutted by a  
 4 preponderance of the evidence that such a custody award to that party is not  
 5 detrimental to the child and is in the best interest of the child.

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

7 767.24 (6) (f) If the court found, under sub. (2) (d), that a party had engaged  
 8 in a pattern or serious incident of interspousal battery, as described under s. 940.19  
 9 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (a), the court shall state  
 10 in writing whether the presumption against joint or sole legal custody was rebutted  
 11 and, if so, what evidence rebutted the presumption, and why its findings relating to  
 12 legal custody and physical placement are in the best interest of the child.

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

14 767.24 (6) (g) If the court found, under sub. (2) (d), that a party had engaged  
 15 in a pattern or serious incident of interspousal battery, as described under s. 940.19  
 16 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (a), and the court  
 17 awarded periods of physical placement to both parties, the court shall provide for the  
 18 safety and well-being of the child and for the safety of the ~~party~~ party. For that  
 19 purpose, the court ~~may~~ <sup>shall</sup> consider ~~any~~ of the following:

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

24 2. Requiring the child's periods of physical placement with ~~any party~~ to be  
 25 supervised by an appropriate 3rd party who agrees by affidavit or other supporting

Insert 4-24

who was the victim of the battery or abuse

Insert 4-19



**BILL**

1 evidence to assume the responsibility assigned by the court and to be accountable to  
2 the court for his or her actions with respect to the responsibility.

3 3. Requiring ~~the party~~ to pay the costs of supervised physical placement.

4 4. Requiring ~~the party~~ to attend and complete, to the satisfaction of the court,  
5 a certified treatment program for batterers as a condition of exercising his or her  
6 periods of physical placement.

7 5. Requiring ~~the party~~ to abstain from possessing or consuming alcohol or any  
8 controlled substance during, and for <sup>at least</sup> 8 hours preceding, his or her periods of physical  
9 placement.

10 6. Prohibiting ~~the party~~ from having overnight physical placement with the  
11 child.

12 7. Requiring ~~the party~~ to post a bond for the return and safety of the child.

13 8. ~~Requiring the appointment of an attorney for the child or~~  
14 s. 767.045 (5), the continued appointment of a guardian ad litem for the child, or  
15 requiring an investigation by an attorney or guardian ad litem for the child.

16 9. Imposing any other condition that the court determines is necessary for the  
17 safety and well-being of the child or the safety of the ~~party~~ party.

**SECTION 7. Initial applicability.**

18 (1) This act first applies to actions or proceedings that are commenced on the  
19 effective date of this subsection, including actions or proceedings to modify a  
20 judgment or order granted before the effective date of this subsection.  
21

22 (END)

Subsect 4-24

Requiring

who was the victim of  
the battery or abuse

2001-2002 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-3064/4ins  
PJK:hmh:pg

INSERT A-1

no H \*  
by  
, 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

(END OF INSERT A-1)

INSERT A-2

H 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.

(END OF INSERT A-2)

INSERT 4-3

no H  
1 The presumption may be rebutted only by clear and convincing evidence of all of the  
2 following:

3 H a. The party who committed the battery or abuse has successfully completed  
4 a certified treatment program for batterers and is not abusing alcohol or any other  
5 drug.

6 H b. It is in the best interest of the child for the party who committed the battery  
7 or abuse to be awarded joint or sole legal custody because of the absence, mental  
8 illness, or substance abuse of the party who was the victim of the battery or abuse,  
9 or such other circumstances that affect the best interest of the child, but only if the  
10 absence, mental illness, or substance abuse of the party who was the victim of the  
11 battery or abuse, or such other circumstances that affect the best interest of the child,  
12 are not a result of the battery or abuse.

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 ~~this~~ 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 ~~this~~ 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.

(END OF INSERT 4-3)

INSERT 4-19

18 ~~not~~ all, and shall impose at least one,

(END OF INSERT 4-19)

INSERT 4-24

19 ~~not~~ the party who committed the battery or abuse

(END OF INSERT 4-24)

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-3064/4dn  
PJK.lmhl:pg

*Date*

Tom:

- 1. The proposed language for determining which party was the primary physical aggressor was more generic than the language I have drafted. I limited the prior acts of domestic violence to such acts between the parties to the action. If the language is not limited to the parties to the action, the court may be considering incidents that are not relevant to its determination in the case. For example, in the proposed language, the court must consider all prior acts of domestic violence "involving any of the parties," which could mean acts of domestic violence inflicted upon one of the parties in childhood by a parent.

Pamela J. Kahler  
Senior Legislative Attorney  
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2. I have asked that this draft not be jacketed again until you have signed off on the changes.

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-3064/4dn  
PJK:hmh:rs

August 2, 2001

Tom:

1. The proposed language for determining which party was the primary physical aggressor was more generic than the language I have drafted. I limited the prior acts of domestic violence to such acts between the parties to the action. If the language is not limited to the parties to the action, the court may be considering incidents that are not relevant to its determination in the case. For example, in the proposed language, the court must consider all prior acts of domestic violence "involving any of the parties," which could mean acts of domestic violence inflicted upon one of the parties in childhood by a parent.
2. I have asked that this draft not be jacketed again until you have signed off on the changes.

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