DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–2486/1dn
PJK:jld:jf

April 8, 2003

This bill draft is the companion you requested to LRB–1107/3. The language in s. 767.251 (2) and (4) (a) and (b) (intro.) related to overnights and equivalent overnights is problematic and will certainly result in much inconsistency among courts, but the constituent who proposed the draft insisted that the language be included in its present form. The language appears to set out a precise method for courts to use in determining the percentage of physical placement that each parent has with a child, but uses imprecise terms so that it is unclear how a court is supposed to implement the method. For example, a court is supposed to determine what percentage each parent has of precisely 365 overnights *or* equivalent overnights in a year, but it is unclear whether the court may use both overnights and equivalent overnights or only one or the other. The bill specifies what the court *may* consider as an equivalent overnight but, presumably, the court is free to come up with other measures if it chooses to use equivalent overnights. If a court uses both overnights and equivalent overnights, it is unclear how the court is supposed to reduce the total number to 365 since there is a potential for at least one overnight and one equivalent overnight each day of the year, producing a total of 730. In at least some situations it will be unclear which of s. 767.251 (4) (a) or (b) the court is supposed to use for determining the support amount. For example, if the court uses both overnights and equivalent overnights and determines that a parent has 68 overnights and 41 equivalent overnights in a year, does the court use s. 767.251 (4) (a) or (b) for determining child support? You could argue that the parent has fewer than 92 overnights *and* fewer than 92 equivalent overnights, so the court must use s. 767.251 (4) (a). On the other hand, you could argue that the parent has at least 92 overnights or equivalent overnights in total so the court must use s. 767.251 (4) (b) for determining support.

Perhaps the intent of the language is to give courts discretion within the confines of what *is* clear in the bill. If so, that has been achieved, although you will certainly end up with inconsistent support awards among similarly situated individuals. You could let the committee process work out the kinks, and it is always possible that no one else will find the language unclear or confusing, but if I am asked how a court is supposed to interpret the language I will have to say that I do not know.

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