

1987 Assembly Bill 205

Date of enactment: **April 22, 1988**
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1987 Wisconsin Act **355**

AN ACT *to repeal* 767.083 (1), 767.083 (2) (title), 767.24 (1) (a) and (b), 767.24 (1) (d), 767.245 (1), (3) and (5) to (7) and 767.32 (2); *to renumber* 55.07, 343.15 (2), 767.083 (2) and 767.24 (2) (f); *to renumber and amend* 757.48 (1), 767.24 (1) (intro.), 767.24 (1) (c), 767.24 (2) (intro.) and (a) to (e), 767.24 (3), 767.245 (4), 814.61 (7),

904.08 and 905.11; to consolidate, renumber and amend 814.61 (1) (a) and (b); to amend 48.415 (4), 48.835 (1), 48.981 (2), 118.125 (2) (intro.), 767.02 (1) (i) and (k), 767.045, 767.07 (3), 767.083 (title), 767.085 (1) (e) and (2m), 767.10, 767.13 (5) (a), 767.23 (1) (a) and (am), 767.24 (title), 767.245 (title), 767.25 (1m) (em), (1r) and (3), 767.255 (7), 767.28, 767.32 (title), 767.32 (1), 767.45 (5m), 767.46 (2) (c), 767.465 (2) (intro.), 767.50, 767.51 (3), (5) (gp) and (5r), 767.51 (6), 767.52 (2), 767.65 (23), 814.61 (7) (title), 822.02 (1) and (2), 822.09 (1) (c), 822.10, 946.71 (2) to (4) and 946.715 (1) (b) and (c); to repeal and recreate 767.081, 767.245 (2) and 767.25 (1m) (ej); and to create 51.30 (5) (bm), 55.07 (2), 118.125 (2) (k), 146.835, 343.15 (2) (a), 767.001, 767.11, 767.24 (2), 767.24 (4), (5) (g) to (j), (6) and (7), 767.25 (7), 767.32 (5), 767.325, 767.327, 767.329, 814.61 (1) (b) and (c), 814.61 (7) (b) and (c), 814.615, 822.02 (6m) and (9m), 904.08 (2), 905.035 and 905.11 (2) of the statutes, relating to legal custody and periods of physical placement and visitation in an action affecting the family.

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

PREFATORY NOTE: This bill is the product of the legislative council's special committee on custody arrangements.

The special committee was directed, under the terms of 1983 Assembly Joint Resolution 106, to study, among other things: (1) existing laws relating to child custody determinations in actions affecting the family and the limitations of those laws; (2) ways to encourage shared-parenting options, including imposing joint custody without the agreement of both parties; and (3) ways to provide support services to families involved in custody matters to ensure that the best interest of the child continues to be served after a child's parents become divorced or separated.

FINDINGS:

In its study, the special committee on custody arrangements concluded that the current laws and practices relating to child custody determinations in divorce and other actions affecting the family:

1. Do not adequately stress the importance of the best interest of the child and the significance to the child, in most cases, of a continuing, meaningful relationship with both parents.
2. Often increase the anger and polarization of divorcing or separating parents by emphasizing the adversarial nature of custody determinations, instead of providing the parents with the information and dispute resolution mechanisms necessary to plan for the future care of their children.
3. Encourage the use of joint child custody as a bargaining chip by permitting one parent to veto joint custody, despite the willingness of both parents to maintain an active role in raising their children and despite the apparent ability of the parents to cooperate in the future decision making required by an award of joint custody.
4. Provide for an extremely high standard for postjudgment changes in custody by requiring that the current custodial conditions of the child be harmful to the child's best interest before a change may be ordered.
5. Fail to recognize the importance to the child of continuing contact with stepparents and persons with whom the child has lived in a relationship similar to a parent-child relationship.

The committee determined that the current child custody laws should be revised, as set out below.

PROVISIONS OF THE BILL:

Definitions

For purposes of child custody determinations under ch. 767, the bill creates definitions of "legal custody", "sole legal custody", "joint legal custody" and "physical placement". Of particular note are the definitions of "legal custody" (the right and responsibility of a person to make *major* decisions concerning the child) and "physical placement" (the right to have a child physically placed with a party and the right and responsibility to make routine daily decisions regarding the child's care during that placement).

Joint Legal Custody

Current law permits a court to order joint custody only if the parties agree to joint custody and if it is in the best interest of the child. Under the bill, the court is permitted to order joint legal custody if doing so is in the child's best interest and either of the following applies:

1. Both parties agree to joint legal custody.
2. The parties do not agree to joint legal custody, but one party requests joint legal custody and the court specifically finds that: (a) both parties are capable of performing parental duties and responsibilities and wish to have an active role in raising the child; (b) there are no existing conditions which would interfere with the exercise of joint legal custody; and (c) the parties will be able to cooperate in the future decision making required by an award of joint legal custody.

The bill permits the court to give sole power to one of the joint legal custodians to make certain major decisions concerning the child.

Periods of Physical Placement

The bill replaces the current concepts of "sole physical custody" (i.e., the physical custody rights of a parent awarded sole custody of a child) and parental "visitation rights" with a requirement that the court, in child custody actions, allocate periods of physical placement between the parents if it is in the best interest of the child. Whenever it orders sole or joint legal custody to parents, the court is required to allocate periods of physical placement between the parents unless it finds that such allocation is not in the best interest of the child. In making the allocation, the court is permitted to designate a primary physical placement for the child. However, the court may not provide for the child's primary placement to be with a parent who is not given either sole or joint legal custody.

Mediation

The bill creates comprehensive provisions for mediation in actions affecting the family. The principal elements are:

1. *Definition of "mediation"*. For purposes of ch. 767, the bill defines "mediation" as a cooperative process involving the parties and a mediator, the purpose of which is to help the parties, by applying communication and dispute resolution skills, define and resolve their own disagreements, with the best interest of the child as the paramount consideration. A "mediator" is defined as a person with special skills and training in dispute resolution.
2. *Director of counseling services*. In all counties, the circuit judges for the county (or counties, if a cooperative agreement is entered into), with the approval of the chief judge of each judicial administrative district involved, must appoint a director of family court counseling services. The director, who must be a qualified mediator, has the general administrative responsibilities for the provision of these services, including hiring staff or contracting with public or private entities to provide the services, assigning cases and managing funds.
3. *Availability of mediation in all counties*. The bill requires counties to either (a) establish a *family court counseling office* to provide mediation or (b) contract with one or more public or private entities in the county or a contiguous county to provide mediation. If the family court counseling office option is

selected, (a) 2 or more contiguous counties may enter into a cooperative agreement for a single office to provide mediation in the cooperating counties and (b) the county (or counties, if a cooperative agreement is entered into) may direct that the office also provide legal custody or physical placement studies.

5. *When referral to mediation required or permitted.* The bill requires the court or the family court commissioner, in all actions affecting the family where it appears that legal custody or physical placement is contested, to refer the parties to mediation. The parties are required to attend an *initial session* with the mediator.

The bill requires the family court commissioner, upon request, to refer persons to mediation or other appropriate counseling services when the parties wish to have joint legal custody, but need assistance in resolving problems relating to joint legal custody or physical placement, or both. The family court commissioner may, upon request, refer to the director for assistance any person with physical placement rights, any child of a person with these rights, any person with visitation rights or any person with physical custody of a child who is having problems relating to these matters.

6. *Mediation procedure.* Under the mediation procedure specified in the bill:

a. Unless the parties receive services from a private mediator at their own expense, the director of family court counseling services must assign a mediator to the case. If a private mediator is used, the parties must sign and file with the director and the court or family court commissioner a written notice to that effect.

b. Issues of property division, maintenance and child support may not be considered in mediation provided by or contracted for by the county, unless these issues are directly related to the legal custody or physical placement issues being considered and the parties agree to consider them.

c. If agreement is reached in mediation, a written agreement must be submitted to the court as a stipulation for inclusion in a court order. The court may accept or reject it. If agreement is not reached in mediation, the parties or the mediator must notify the court of that fact and a guardian ad litem must be promptly appointed to represent the interests of the minor child. The court or the family court commissioner may then refer the matter for a legal custody or physical placement study, if appropriate.

7. *Confidentiality; privilege.* The bill creates a confidentiality requirement for any materials made, used or received by a mediator during the course of mediation. These materials are not a public record under the public records law and, with certain exceptions, are not subject to discovery or admissible in any action or proceeding.

The bill also creates a "mediator-mediation parties" privilege under the evidence code permitting mediation parties to refuse to disclose and to prevent any other person from disclosing a confidential communication made in the mediation. The privilege may be claimed by either mediation party or by the mediator, but only on behalf of the mediation parties. The bill specifies certain circumstances in which there is no "mediator-mediation parties" privilege (e.g., where both mediation parties consent to waive the privilege).

9. *Funding of mediation and study services.* Under the bill, mediation services and legal custody or physical placement study services are funded by the following:

a. An increase in the filing fee in actions affecting the family.

b. An increase of \$25 in the fee for a postjudgment motion to modify a legal custody or physical placement order.

d. Alternative "user fee" structures available to a county to fund mediation services and studies. Under the first alternative, the county must collect a single flat fee of \$100 for mediation and \$300 for studies, no matter how many services are

provided. The county must determine when and how these fees are to be collected and must reduce the fees or provide the services without payment of the fees if the parties are unable to pay.

Under the 2nd alternative, the county must establish a reasonable "sliding scale" fee schedule which is based on the parties' ability to pay and which takes into account the fees the county also collects under other provisions in this bill. The fees must be based on the services actually provided. The county must provide the services even if the parties are unable to pay the fees.

Modification of Child Custody Order

Current law requires the party seeking the modification to show, by substantial evidence, that a change in custody is necessary to the best interest of the child.

The bill creates new standards for modifying a child custody order.

Moving a Child Inside or Outside the State

The bill revises current law relating to removal of a child from the state by a custodial parent. Under current law, a custodial parent must give 60 days' notice to a parent with visitation rights of the custodian's intention to establish legal residence *outside the state* or to remove the child *from the state* for more than 90 days. Upon motion by the parent with visitation rights and a finding by the court that the move is against the best interest of the child, the court may deny permission to the custodian to remove the child. Under the bill, which applies only if both parents reside in the state, if the court grants periods of physical placement to more than one parent it must order that a parent with legal custody and physical placement rights must provide the other parent and the court with 60 days' written notice before doing any of the following:

1. Establishing legal residence outside the state.
2. Removing the child from the state for a period of more than 90 days.
3. Establishing his or her legal residence *within this state* at a distance of 200 miles or more from the other parent.

Within 15 days after receipt of the notice, the other parent may object, in writing, to the change. The court or family court commissioner must then promptly refer the parents for mediation or other family court counseling services and may appoint a guardian ad litem. If the parents are unable to resolve the dispute, the court must appoint a guardian ad litem, if necessary, and hold a hearing on the matter as soon as possible. The court may then grant or deny permission for the change after considering certain statutorily specified factors (e.g., the nature and extent of the relationship of the child with the other parent).

Visitation Rights of Nonparents

The bill extends the current law permitting the court, upon petition, to grant visitation rights to a grandparent or great-grandparent to: (1) a stepparent; and (2) any person who has maintained a relationship with a child similar to a parent-child relationship. The bill also permits the court to award visitation rights to any person upon the request of a parent.

Other Changes

The bill also:

1. Creates additional factors which the court is required to consider in making a child custody determination, including whether there is evidence that a party engaged in child abuse, whether there is evidence of spousal battery which affects the best interest of the child and whether either parent has or had a significant problem with alcohol or drug abuse.

2. Creates a new provision permitting a parent who does not have legal custody of a minor child to, with certain exceptions, have access to medical, dental, school and juvenile court records pertaining to the child.

3. Repeals the current mandatory counseling provision requiring the family court commissioner, before an action can be brought to trial, to certify to the court that one of the parties has participated in counseling.

4. Requires the family court commissioner, upon the filing of an action, to: (a) inform the parties of available community resources and family court counseling services; and (b) provide to a party, upon request, written information relating to the procedures involved in the party's action or proceeding, any services available to assist the parties and the pertinent statutory provisions.

Effective Date

Although the general effective date for the bill is the day after publication, the mediation provisions in the bill are permissive for approximately the first year after the effective date. Counties which have or which develop mediation programs which comply with the requirements in the bill may implement the bill's provisions relating to mediation during this period. All other mediation-related provisions (e.g., fee changes, provisions on mediation confidentiality and privilege, custody and placement studies) would also become effective in that county as of the effective date of county implementation. All counties are required to implement the mediation provisions commencing with the first day of the 13th month beginning after publication of the bill.

[The NOTE is accurate as stated, but fails to reflect changes made in the course of legislative consideration.]

SECTION NOTES:

See the SECTION NOTES following each substantive provision of the bill for additional details.

SECTION 1. Legislative declaration. The legislature declares that it is the public policy of this state that unless there is a specific reason to the contrary it is in the best interest of a minor child to have frequent associations and a continuing relationship with both parents.

NOTE: Emphasizes the basic concept underlying many of the changes in this bill: that it is generally in the best interest of a child to have a close, continuing relationship with both parents where the parents have divorced or separated.

SECTION 4. 48.415 (4) of the statutes is amended to read:

48.415 (4) (title) CONTINUING DENIAL OF PERIODS OF PHYSICAL PLACEMENT. Continuing denial of ~~visitation rights~~ periods of physical placement may be established by a showing that:

(a) The parent has been denied ~~visitation rights~~ periods of physical placement by court order in an action affecting the family;

(b) At least 2 years have elapsed since the order denying ~~visitation rights~~ periods of physical placement was issued and the court has not subsequently modified its order so as to permit ~~visitation rights~~ periods of physical placement; and

(c) The parent would not be entitled to ~~visitation rights~~ periods of physical placement if he or she were to seek such rights at the time the petition for termination of parental rights is filed.

NOTE: Amends s. 48.415 (4), relating to continuing denial of visitation rights as grounds for termination of parental rights, to reflect the use of the concept and terminology of "periods of physical placement" instead of parental "visitation rights" in this bill.

SECTION 5. 48.835 (1) of the statutes is amended to read:

48.835 (1) DEFINITION. In this section and s. 48.837, "custody" means physical custody of a child by the child's parent not in violation of a custody order issued by a court. "Custody" does not include physical custody of a child during visitation periods subject to a court order a period of physical placement with a parent who does not have legal custody of the child.

NOTE: Amends s. 48.835 (1), defining "custody" for purposes of the adoption provisions in the children's code, to reflect the use of the concept of "periods of physical placement" instead of parental "visitation rights" in this bill.

SECTION 6. 48.981 (2) of the statutes is amended to read:

48.981 (2) PERSONS REQUIRED TO REPORT. A physician, coroner, medical examiner, nurse, dentist, chiropractor, optometrist, other medical or mental health professional, social or public assistance worker, school teacher, administrator or counselor, mediator under s. 767.11, child care worker in a day care center or child caring institution, day care provider, alcohol or other drug abuse counselor, member of the treatment staff employed by or working under contract with a county department under s. 46.23, 51.42 or 51.437, physical therapist, occupational therapist, speech therapist, emergency medical technician — advanced (paramedic), ambulance attendant or police or law enforcement officer having reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected or having reason to believe that a child seen in the course of professional duties has been threatened with abuse or neglect and that abuse or neglect of the child will occur shall report as provided in sub. (3). Any other person, including an attorney, having reason to suspect that a child has been abused or neglected or reason to believe that a child has been threatened with abuse or neglect and that abuse or neglect of the child will occur may make such a report. No person making a report under this subsection may be discharged from employment for so doing.

NOTE: Amends s. 48.981 (2), which specifies those persons required to report cases of suspected child abuse or neglect, to include mediators under new s. 767.11 as mandatory child abuse or neglect reporters.

SECTION 6g. 51.30 (5) (bm) of the statutes is created to read:

51.30 (5) (bm) *Parents denied physical placement.* A parent who has been denied periods of physical placement with a child under s. 767.24 (4) (b) or 767.325 (4) may not have the rights of a parent or guardian under pars. (a) and (b) with respect to access to that child's court or treatment records.

SECTION 6p. 55.07 of the statutes is renumbered 55.07 (1).

SECTION 6w. 55.07 (2) of the statutes is created to read:

55.07 (2) A parent who has been denied periods of physical placement under s. 767.24 (4) (b) or 767.325

(4) may not have the rights of a parent or guardian with respect to access to a child's records under this chapter.

SECTION 7. 118.125 (2) (intro.) of the statutes is amended to read:

118.125 (2) CONFIDENTIALITY. (intro.) All pupil records maintained by a public school shall be confidential, except as provided in pars. (a) to ~~(j)~~ (k). The school board shall adopt regulations to maintain the confidentiality of such records.

SECTION 8. 118.125 (2) (k) of the statutes is created to read:

118.125 (2) (k) A parent who has been denied periods of physical placement with a child under s. 767.24 (4) does not have the rights of a parent or guardian under pars. (a) to (j) with respect to that child's pupil records.

NOTE: Creates a new paragraph in s. 118.125 (2), relating to access to pupil records. The statute currently does not contain a cross-reference to current s. 767.245 (5), which prohibits a noncustodial parent who has been denied visitation rights from exercising the rights of a parent or guardian with regard to access to pupil records. New sub. (2) (k), created by this SECTION to clarify s. 118.125, is similar to new s. 767.24 (7), which replaces current s. 767.245 (5).

SECTION 8d. 146.835 of the statutes is created to read:

146.835 Parents denied physical placement rights. A parent who has been denied periods of physical placement under s. 767.24 (4) (b) or 767.325 (4) may not have the rights of a parent or guardian under this chapter with respect to access to that child's patient health care records under s. 146.82 or 146.83.

SECTION 8g. 343.15 (2) of the statutes is renumbered 343.15 (2) (b).

SECTION 8r. 343.15 (2) (a) of the statutes is created to read:

343.15 (2) (a) In this subsection, "custody" does not mean joint legal custody as defined in s. 767.001 (1).

SECTION 8s. 757.48 (1) of the statutes is renumbered 757.48 (1) (a) and amended to read:

757.48 (1) (a) Except as provided in s. 879.23 (4), in all matters in which a guardian ad litem is appointed by the court, the guardian ad litem shall be an attorney admitted to practice in this state ~~and~~. In order to be appointed as a guardian ad litem under s. 767.045, an attorney shall have completed 3 hours of approved continuing legal education relating to the functions and duties of a guardian ad litem under ch. 767.

(b) The guardian ad litem shall be allowed reasonable compensation for the his or her services, reasonable compensation to be such as is customarily charged by attorneys in this state for comparable services. If the attorney of record is also the guardian ad litem, the attorney shall be entitled only to attorney fees and shall receive no compensation for services as guardian ad litem.

SECTION 11. 767.001 of the statutes is created to read:

767.001 Definitions. In this chapter:

(1) "Joint legal custody" means the condition under which both parties share legal custody and neither party's legal custody rights are superior, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order.

(2) "Legal custody" means:

(a) With respect to any person granted legal custody of a child, other than a county agency or a licensed child welfare agency under par. (b), the right and responsibility to make major decisions concerning the child, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order.

(b) With respect to a county agency specified in s. 48.56 (1) or a licensed child welfare agency granted legal custody of a child, the rights and responsibilities specified under s. 48.02 (12).

(2m) "Major decisions" includes, but is not limited to, decisions regarding consent to marry, consent to enter military service, consent to obtain a motor vehicle operator's license, authorization for nonemergency health care and choice of school and religion.

(3) "Mediation" means a cooperative process involving the parties and a mediator, the purpose of which is to help the parties, by applying communication and dispute resolution skills, define and resolve their own disagreements, with the best interest of the child as the paramount consideration.

(4) "Mediator" means a person with special skills and training in dispute resolution.

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

(6) "Sole legal custody" means the condition under which one party has legal custody.

NOTE: Creates definitions of "legal custody", "sole legal custody", "joint legal custody" and "physical placement" for the purpose of child custody orders in actions affecting the family.

Except for child welfare agencies, which have their own definition of "legal custody" in the children's code [s. 48.02 (12)], "legal custody" means the right and responsibility of a person to make major decisions concerning the child (e.g., medical operations; schooling). "Sole legal custody" means that one party has those rights and responsibilities and "joint legal custody" means that both parties share those rights and responsibilities, with neither party's rights superior. However, "joint legal custody" does not necessarily mean that the parties will have to share in all of the major decision making. Under new s. 767.24 (6) (b), the court may give the sole responsibility for certain decisions to one party.

The term "physical placement", which replaces the concepts of "sole physical custody" and parental "visitation rights" under current law, means the right of a person to physical

placement of a child with the person and the right of that person to make routine daily decisions regarding the child's care during that placement. However, the routine daily decisions may not be inconsistent with any major decisions made by the sole legal custodian or the joint legal custodians. See the NOTE to s. 767.24 (4) for a further discussion of "physical placement".

This SECTION also defines "mediation" and "mediator". The definition of mediation emphasizes that the best interest of the child is the paramount consideration in the resolution of the parents' disagreements through the mediation process. The definition of "mediator" is intended to stress that the role of the mediator is to facilitate the resolution of the parents' disagreements and not to act as a therapist or as an advocate for either parent.

[The NOTE is accurate as stated, but fails to reflect changes made in the course of legislative consideration.]

SECTION 12. 767.02 (1) (i) and (k) of the statutes are amended to read:

767.02 (1) (i) To enforce or modify a judgment in an action affecting the family granted in this state or elsewhere. If a petition, motion or order to show cause requesting enforcement or modification of a judgment in an action affecting the family which was granted by a court of this state is filed in a county other than the county in which the judgment was rendered, the petitioner or party bringing the motion or order to show cause shall send a copy of the petition, motion or order to show cause and summons to the clerk of the court in which the judgment was rendered. The petitioner shall send a copy of any order rendered pursuant to this petition, motion or order to show cause to the clerk of the court in which the original judgment was rendered.

(k) Concerning periods of physical placement or visitation rights to children.

NOTE: Amends s. 767.02 (1) (k), which provides that an action concerning visitation rights is an action affecting the family under ch. 767, to reflect the use of the concept of "periods of physical placement" in this bill.

SECTION 13. 767.045 of the statutes is amended to read:

767.045 Guardian ad litem for minor children. (1) In any action affecting the family in which the court has reason for special concern as to the future welfare of ~~the a minor children child,~~ in which the legal custody or physical placement of such children the child is contested, ~~and in any action or~~ in which paternity is contested under s. 891.39, the court shall appoint an attorney admitted to practice in this state as guardian ad litem to represent the interests of ~~children the child~~ as to legal custody, support and visitation periods of physical placement. If legal custody or physical placement is contested, the guardian ad litem shall be appointed at the time specified in s. 767.11 (12) (b), unless upon motion by a party or on its own motion the court determines that earlier appointment is necessary. The guardian ad litem shall be an advocate for the best interests of the child ~~or children~~ and shall consider the factors under s. 767.24. Unless the child otherwise requests, the guardian ad litem may communicate to the court the wishes of the child as to his

or her legal custody or physical placement under s. 767.24 (5) (b).

(2) If a guardian ad litem is appointed, the court shall direct either or both parties to pay the fee of the guardian ad litem, ~~the.~~ In addition, upon motion by the guardian ad litem the court shall direct either or both parties to pay the fee for an expert witness used by the guardian ad litem, if the guardian ad litem shows that the use of the expert is necessary to assist the guardian ad litem in performing his or her functions or duties under this chapter. The amount of which fee the fees shall be approved by the court. If either or both parties are unable to pay, the court, in its discretion, may direct that the fee of the guardian ad litem county of venue pay the fees, in whole or in part, be paid by the county of venue, and may direct that either party to reimburse the county, in whole or in part, for the payment. The court may in its discretion grant a separate judgment for the amount of the reimbursement, in favor of the county and against the party or parties responsible for the reimbursement. The court shall order the guardian ad litem appointed in the case to prepare the judgment for the county and file it with the court.

NOTE: This SECTION:

1. Delays the appointment of a guardian ad litem, where legal custody or physical placement is contested, until mediation efforts under new s. 767.11 are completed, unless the court determines that earlier appointment is necessary.

2. Permits a guardian ad litem in an action affecting the family to move the court for an order requiring the parties or, if they cannot pay, the county, to pay for expert witnesses to assist the guardian ad litem in performing his or her duties. The guardian ad litem must show that use of experts is necessary. The costs of any experts retained is included in the guardian ad litem fees to be paid under sub. (2).

3. Permits the court, if the county has paid guardian ad litem fees, to grant a separate judgment for the amount the county seeks from the parties for reimbursement. This provision may facilitate the collection of such county-paid fees.

SECTION 14. 767.07 (3) of the statutes is amended to read:

767.07 (3) To the extent it has jurisdiction to do so, the court has considered, approved or made provision for ~~child legal~~ custody, the support of any child of the marriage entitled to support, the maintenance of either spouse, the support of the family under s. 767.261 and the disposition of property.

SECTION 15. 767.081 of the statutes is repealed and recreated to read:

767.081 Information from family court commissioner. (1) Upon the filing of an action affecting the family, the family court commissioner shall inform the parties of any services, including referral services, offered by the family court commissioner and by the director of family court counseling services under s. 767.11.

(2) Upon request of a party to an action affecting the family, including a revision of judgment or order under s. 767.32 or 767.325:

(a) The family court commissioner shall, with or without charge, provide the party with written information on the following, as appropriate to the action commenced:

1. The procedure for obtaining a judgment or order in the action.
2. The major issues usually addressed in such an action.
3. Community resources and family court counseling services available to assist the parties.
4. The procedure for setting, modifying and enforcing child support awards or modifying and enforcing legal custody or physical placement judgments or orders.

(b) The family court commissioner shall provide a party, for inspection or purchase, with a copy of the statutory provisions in this chapter generally pertinent to the action.

NOTE: Repeals the current requirements that (1) the family court commissioner inform the parties in actions for annulment, divorce and legal separation of the availability of "counseling for marriage assessment, divorce and reconciliation" (defined in the repealed statute) and refer the parties to suitable counseling services; and (2) the petitioner and, if personally served in the state, the respondent in a divorce or legal separation action participate in the counseling.

In place of the mandatory counseling requirement, new s. 767.081 (1) and (2) requires the family court commissioner to:

1. Inform the parties of services offered by the family court commissioner and by family court counseling services (e.g., mediation; studies; referrals to community agencies).
2. Provide to a party, upon request, written information on the procedures involved in the party's action or proceeding and any services available to assist the parties.
3. Provide to a party, for inspection or purchase, a copy of the statutory provisions in ch. 767 generally pertinent to the party's action.

SECTION 16. 767.083 (title) of the statutes is amended to read:

767.083 (title) Waiting period in certain actions.

SECTION 17. 767.083 (1) of the statutes is repealed.

SECTION 18. 767.083 (2) (title) of the statutes is repealed.

SECTION 19. 767.083 (2) of the statutes is renumbered 767.083.

NOTE: Repeals the current requirement, under s. 767.083 (1), that no action for divorce or legal separation may be brought to trial until the family court commissioner certifies to the court that the parties have been informed of counseling and referral services and one of the parties has met the counseling requirement. See, also, the NOTE to s. 767.081.

SECTION 20. 767.085 (1) (e) and (2m) of the statutes are amended to read:

767.085 (1) (e) Whether the parties have entered into any written agreements as to support, legal custody, and visitation physical placement of the children, maintenance of either party, and property division; and if so, the written agreement shall be attached.

(2m) SUMMONS, CONTENTS. Where (a) Except as provided in par. (b), if only one party initiates the

action and the parties have minor children, the summons served on the other party ~~shall:~~

1. Shall include notification of the availability of information under s. 767.081 (2) and of the contents of ss. 946.71 and 946.715 and.

2. Shall be accompanied by a document, provided without charge by the clerk of court, setting forth the percentage standard established by the department of health and social services under s. 46.25 (9) (a) and listing the factors which a court may consider under s. 767.25 (1m), except that if.

(b) If service is by publication, notification of the contents of regarding ss. 946.71 and 946.715 may consist of references to the statute numbers and titles, and information relating to the percentage standard and the factors need not be provided.

NOTE: This SECTION:

1. Amends s. 767.085 (1) (e), relating to the contents of a petition in an action affecting the family, to reflect the use, in this bill, of the concepts and terminology of "legal custody" and "periods of physical placement" instead of "custody" and "parental visitation rights".

2. Requires a summons in an action affecting the family, if only one party initiates the action and the parties have minor children, to include notice of the contents of s. 946.71 (criminal offenses relating to interference with a custody of a child) as well as s. 946.715 (criminal offenses relating to interference by a parent of parental rights of the other parent), notice of which is required by current law. This SECTION also provides that if a summons which must include notice of these provisions has to be published under s. 801.11 (1) (c) (i.e., the respondent cannot be served personally), the summons need include only a reference to the number and titles of these statutory sections. Publishing the entire text of these sections can be costly.

3. Requires the summons in all actions affecting the family to include notification of the availability, from the family court commissioner, of the information set forth in s. 767.081, as recreated by this bill.

SECTION 21. 767.10 of the statutes is amended to read:

767.10 Stipulation and property division. The parties in an action for an annulment, divorce or legal separation may, subject to the approval of the court, stipulate for a division of estate, for maintenance payments, for the support of children, for periodic family support payments under s. 767.261 or for legal custody and visitation physical placement, in case a divorce or legal separation is granted or a marriage annulled. A court may not approve a stipulation for child support or family support unless the stipulation provides for payment of child support, determined in a manner consistent with s. 767.25 or 767.51.

NOTE: Amends s. 767.10, permitting parties in specified actions affecting the family to stipulate to certain matters, to reflect the use, in this bill, of the concepts and terminology of "legal custody" and "periods of physical placement" instead of "custody" and "parental visitation rights".

SECTION 22. 767.11 of the statutes is created to read:

767.11 Family court counseling services. (1) DIRECTOR. (a) Except as provided in par. (b) and subject to approval by the chief judge of the judicial administra-

tive district, the circuit judge or judges in each county shall designate a person meeting the qualifications under sub. (4) as the director of family court counseling services in that county.

(b) If 2 or more contiguous counties enter into a cooperative agreement under sub. (3) (b), the circuit judges for the counties involved shall, subject to approval by the chief judge of the judicial administrative district, designate a person meeting the qualifications under sub. (4) as the director of family court counseling services for those counties.

(c) A county or counties may designate a family court commissioner as the director under par. (a) or (b).

(2) **DUTIES.** A director of family court counseling services designated under sub. (1) shall administer a family court counseling office if such an office is established under sub. (3) (a) or (b). Regardless of whether such an office is established, the director shall:

(a) Employ staff to perform mediation and to perform any legal custody and physical placement study services authorized under sub. (14), arrange and monitor staff training, and assign and monitor staff case load.

(b) Contract under sub. (3) (c) with a person or public or private entity to perform mediation and to perform any legal custody and physical placement study services authorized under sub. (14).

(c) Supervise and perform mediation and any legal custody and physical placement study services authorized under sub. (14), and evaluate the quality of any such mediation or study services.

(d) Administer and manage funding for family court counseling services.

(3) **MEDIATION PROVIDED.** Mediation shall be provided in every county in this state by any of the following means:

(a) A county may establish a family court counseling office to provide mediation in that county.

(b) Two or more contiguous counties may enter into a cooperative agreement to establish one family court counseling office to provide mediation in those counties.

(c) A director of family court counseling services designated under sub. (1) may contract with any person or public or private entity, located in a county in which the director administers family court counseling services or in a contiguous county, to provide mediation in such a county.

(4) **MEDIATOR QUALIFICATIONS.** Every mediator assigned under sub. (6) shall have not less than 25 hours of mediation training or not less than 3 years of professional experience in dispute resolution.

(5) **MEDIATION REFERRALS.** (a) In any action affecting the family, including a revision of judgment or order under s. 767.32 or 767.325, in which it appears that legal custody or physical placement is contested, the court or family court commissioner shall refer the

parties to the director of family court counseling services for possible mediation of those contested issues. The court or the family court commissioner shall inform the parties that there is no privilege of confidentiality when the mediator also conducts the legal custody or physical placement study under sub. (14).

(b) If both parties to any action affecting the family wish to have joint legal custody of a child, either party may request the court or family court commissioner to refer the parties to the director of family court counseling services for assistance in resolving any problem relating to joint legal custody and physical placement of the child. Upon request, the court shall so refer the parties.

(c) A person who is awarded periods of physical placement, a child of such a person, a person with visitation rights or a person with physical custody of a child may notify the family court commissioner of any problem he or she has relating to any of these matters. Upon notification, the family court commissioner may refer any person involved in the matter to the director of family court counseling services for assistance in resolving the problem.

(6) **ACTION UPON REFERRAL.** Whenever a court or family court commissioner refers a party to the director of family court counseling services for possible mediation, the director shall assign a mediator to the case. The mediator shall provide mediation if he or she determines it is appropriate. If the mediator determines mediation is not appropriate, he or she shall so notify the court. Whenever a court or family court commissioner refers a party to the director of family court counseling services for any other family court counseling service, the director shall take appropriate action to provide the service.

(7) **PRIVATE MEDIATOR.** The parties to any action affecting the family may, at their own expense, receive mediation services from a mediator other than one who provides services under sub. (3). Parties who receive services from such a mediator shall sign and file with the director of family court counseling services and with the court or family court commissioner a written notice stating the mediator's name and the date of the first meeting with the mediator.

(8) **INITIAL SESSION OF MEDIATION REQUIRED.** (a) Except as provided in par. (b), in any action affecting the family, including an action for revision of judgment or order under s. 767.32 or 767.325, in which it appears that legal custody or physical placement is contested, the parties shall attend at least one session with a mediator assigned under sub. (6) or contracted with under sub. (7) and, if the parties and the mediator determine that continued mediation is appropriate, no court may hold a trial of or a final hearing on legal custody or physical placement until after mediation is completed or terminated.

(b) A court may, in its discretion, hold a trial or hearing without requiring attendance at the session under par. (a) if the court finds that attending the ses-

sion will cause undue hardship or would endanger the health or safety of one of the parties. In making its determination of whether attendance at the session would endanger the health or safety of one of the parties, the court shall consider evidence of the following:

1. That a party engaged in abuse of the child, as defined in s. 48.981 (1) (a) and (b) or 813.122 (1) (a).
2. Interspousal battery as described under s. 940.19 or domestic abuse as defined in s. 813.12 (1) (a).
3. That either party has a significant problem with alcohol or drug abuse.
4. Any other evidence indicating that a party's health or safety will be endangered by attending the session.

(c) The initial session under par. (a) shall be a screening and evaluation mediation session to determine whether mediation is appropriate and whether both parties wish to continue in mediation.

(9) **PROHIBITED ISSUES IN MEDIATION.** If mediation is provided by a mediator assigned under sub. (6), no issue relating to property division, maintenance or child support may be considered during the mediation unless all of the following apply:

- (a) The property division, maintenance or child support issue is directly related to the legal custody or physical placement issue.
- (b) The parties agree in writing to consider the property division, maintenance or child support issue.

(10) **POWERS AND DUTIES OF MEDIATOR.** A mediator assigned under sub. (6) shall be guided by the best interest of the child and may do any of the following, at his or her discretion:

- (a) Include the counsel of any party or any appointed guardian ad litem in the mediation.
- (b) Interview any child of the parties, with or without a party present.
- (c) Require a party to provide written disclosure of facts relating to any legal custody or physical placement issue addressed in mediation, including any financial issue permitted to be considered.
- (d) Suspend mediation when necessary to enable a party to obtain an appropriate court order or appropriate therapy.
- (e) Terminate mediation if a party does not cooperate or if mediation is not appropriate or if any of the following facts exist:

1. There is evidence that a party engaged in abuse of the child, as defined in s. 48.981 (1) (a) and (b) or 813.122 (1) (a).
2. There is evidence of interspousal battery as described under s. 940.19 or domestic abuse as defined in s. 813.12 (1) (a).
3. Either party has a significant problem with alcohol or drug abuse.
4. Other evidence which indicates one of the parties' health or safety will be endangered if mediation is not terminated.

(11) **CONFIDENTIALITY; PRIVILEGE.** (a) The privilege for confidential communications under this section is governed by s. 905.035. Admissibility of evidence in a compromise or compromise negotiation in mediation is subject to s. 904.08.

(b) Nothing in this subsection prevents the gathering of nonidentifying information for statistical or other research purposes or educational efforts in cooperation with other states or the federal government or for other dispute resolution programs.

(12) **MEDIATION AGREEMENT.** (a) Any agreement which resolves issues of legal custody or periods of physical placement between the parties reached as a result of mediation under this section shall be prepared in writing, reviewed by the attorney, if any, for each party and by any appointed guardian ad litem, and submitted to the court to be included in the court order as a stipulation. Any reviewing attorney or guardian ad litem shall certify on the mediation agreement that he or she reviewed it and the guardian ad litem, if any, shall comment on the agreement based on the best interest of the child. The mediator shall certify that the agreement is in the best interest of the child. The court may approve or reject the agreement, based on the best interest of the child. The court shall state in writing its reasons for rejecting an agreement.

(b) If after mediation under this section the parties do not reach agreement on legal custody or periods of physical placement, the parties or the mediator shall so notify the court. The court shall promptly appoint a guardian ad litem under s. 767.045. After the appointment the court shall, if appropriate, refer the matter for a legal custody or physical placement study under sub. (14). If the parties come to agreement on legal custody or physical placement after the matter has been referred for a study, the study shall be terminated. The parties may return to mediation at any time before any trial or final hearing on legal custody or periods of physical placement. If the parties return to mediation, the county shall collect any applicable fee under s. 814.615.

(13) **POWERS OF COURT OR FAMILY COURT COMMISSIONER.** Except as provided in sub. (8), referring parties to mediation under this section does not affect the power of the court or family court commissioner to make any necessary order relating to the parties during the course of the mediation.

(14) **LEGAL CUSTODY AND PHYSICAL PLACEMENT STUDY.** (a) A county or 2 or more contiguous counties shall provide legal custody and physical placement study services. The county or counties may elect to provide these services by any of the means set forth in sub. (3) with respect to mediation. Regardless of whether a county so elects, whenever legal custody or physical placement of a minor child is contested and mediation under this section is not used or does not result in agreement between the parties, or at any other time the court considers it appropriate, the court may order a person or entity designated by the county

to investigate the following matters relating to the parties:

1. The conditions of the child's home.
2. Each party's performance of parental duties and responsibilities relating to the child.
3. Any other matter relevant to the best interest of the child.

(b) The person or entity investigating the parties under par. (a) shall complete the investigation and submit the results to the court. The court shall make the results available to both parties. The report shall be a part of the record in the action unless the court orders otherwise.

(c) No person who provided mediation to the parties under this section may investigate the parties under this subsection, unless each party personally so consents by stipulation after receiving notice from the person who provided mediation that consent waives the privilege under sub. (11) and s. 905.035.

(15) **APPLICABILITY.** Except as provided in sub. (4) (b), subs. (1) to (14) apply to each county on the date established by that county, or on the first day of the 13th month commencing after the effective date of this subsection [revisor inserts date], whichever is earlier.

NOTE: New provision requiring referral for possible mediation in actions affecting the family in which issues of legal custody or physical placement of a minor child are contested and permitting the use of court-connected mediation under other circumstances.

Subsection (1) specifies that in all counties the circuit judges for the county (or counties if a cooperative agreement is entered into), with the approval of the chief judge of each of the judicial administrative districts involved, must appoint a director of mediation and, if the county or counties so direct, study services. Under sub. (2), the director, who must be a qualified mediator, has the general administrative responsibilities for the operation of these services, including hiring staff or contracting with public or private agencies to provide mediation services, assigning cases and managing funds.

Subsection (3) requires counties to either: (a) establish a family court counseling office to provide mediation; or (b) contract with one or more public or private entities in the county or a contiguous county to provide these services. If the family court counseling office option is selected:

1. Two or more contiguous counties may enter into a cooperative agreement for a single office to provide mediation services in the cooperating counties.

2. The county (or counties if a cooperative agreement is entered into) may direct that legal custody or physical placement studies also be provided by the office.

In sub. (4), par. (a) sets forth the minimum qualifications for persons conducting mediations, other than private mediators whom the parties have retained under sub. (7). Paragraph (b) exempts from the degree requirement persons with at least 2 years of marriage or family counseling or mediation experience prior to the date the bill's mediation provisions apply in a county. These persons must complete the training requirement within approximately one year after that date. (Under s. 758.15, the mediation implementation council is required to establish *guidelines* for qualifications which directors may use in hiring new staff or evaluating current staff, including guidelines for continuing mediator education.)

Subsections (5) to (8) require parties, in all actions affecting the family where it appears that legal custody or physical placement are contested, to be referred to mediation. The bill specifies that:

1. Unless the parties receive services from a private mediator at their own expense, the director of the counseling services must assign a mediator to the case. If a private mediator is used, the parties must sign and file with the director and the court or family court commissioner, a written notice to that effect.

2. The parties are required to attend an initial session with the mediator assigned or a private mediator. The mandatory initial session is intended to provide the mediator and the parties with an opportunity to assess the possible efficacy and appropriateness of mediation in the particular case.

3. The court may waive the requirement for attendance at this initial session if a party is able to show that attendance at mediation would cause "undue hardship" (e.g., where one party has physically abused the other party).

4. If mediation is determined to be appropriate, the mediation must be completed or terminated prior to any trial or final hearing on the mediated issues.

Subsection (5) (b) requires the family court commissioner, upon request, to refer persons to mediation or other appropriate counseling services if the parties wish to have joint legal custody, but need assistance in resolving problems relating to joint legal custody or physical placement or both. Subsection (5) (c) permits the family court commissioner to refer any person with physical placement rights, any child of a person with these rights, any person with visitation rights (e.g., grandparents) or any person with actual custody of a child (e.g., a foster home) who is having problems relating to these matters.

Subsection (9) prohibits considering the issues of property division, maintenance and child support in mediation provided by or contracted for by the county. There is an exception if these issues are directly related to the legal custody or physical placement issues being considered and if the parties agree to consider these related issues.

Subsection (10) specifies the powers and duties of a mediator who is employed by or under contract with the family court counseling services.

Subsection (11) creates a confidentiality requirement for any material made, used or received by a mediator during the course of mediation. This material is not a public record under the public records law and, with certain exceptions, is not subject to discovery or admissible in any action or proceeding. The confidentiality requirement does not apply: (1) if the mediation parties consent to have the mediator conduct a legal custody or physical placement study; (2) to a report by the mediator of child abuse; and (3) in an action by a mediation party against the mediator for damages arising out of the mediation. Also, par. (d) permits the release of nonidentifying information from mediation materials for use for certain statistical, research or educational purposes. Paragraph (c) cross-references the provisions in the bill relating to the parties' privilege for confidential communications in mediation and the admissibility into evidence at trial of compromises and compromise negotiations in mediation.

Subsection (12) requires that if agreement is reached in mediation the agreement must be prepared in writing and submitted to the court as a stipulation for inclusion in a court order. The court is permitted only to approve or reject the agreement, not to modify it. If agreement is not reached in mediation: (1) the parties or the mediator must notify the court of that fact; (2) a guardian ad litem must be promptly appointed to represent the interests of the minor child or children involved; and (3) after the appointment, the court or the family court commissioner may refer the matter for a legal custody or physical placement study if appropriate.

Subsection (13) clarifies that, except for the limit on holding a trial or final hearing, the power of the court and the family

court commissioner to make necessary orders relating to the parties is not affected by the fact that the parties are in the mediation process.

Although child custody and visitation studies are conducted currently, there is no specific statutory provision authorizing these studies. Subsection (14) (a) and (b) specifically authorizes such studies where mediation is unsuccessful or whenever the court deems a study appropriate.

Subsection (14) (c) prohibits a person who has served as a mediator for parties under new s. 767.11 from being assigned to conduct a study unless both parties personally stipulate to the assignment.

Subsection (15) provides that this provision applies to each county on the date established by that county, or approximately one year (the first day of the 13th month) after the bill's effective date, whichever is earlier. Many counties may not be able to comply with new s. 767.11 and other provisions relating to mediation services. Subsection (15) provides for a period of approximately one year during which a county (or counties, if there is a cooperative agreement for a family court counseling office) may, if all requirements are met, use the mediation provisions in the bill. This will: (1) permit those counties which currently have mediation programs to take advantage of the bill's mediation provisions as soon as possible on or after the effective date; and (2) give other counties time to appoint a director of family court counseling services and either establish a family court counseling office or contract for family court counseling services. All counties must comply with the mediation provisions on and after the first day of the 13th month following publication.

[The NOTE is accurate as stated, but fails to reflect changes made in the course of legislative consideration.]

SECTION 23. 767.13 (5) (a) of the statutes is amended to read:

767.13 (5) (a) *Divorce*. On authority delegated by a judge, which may be by a standard order, and with the approval of the chief judge of the judicial administrative district, a family court commissioner may preside at any hearing held to determine whether a judgment of divorce shall be granted, if both parties state that the marriage is irretrievably broken and that all material issues, including but not limited to division of property or estate, child legal custody, visitation or physical placement, child support, spousal maintenance and family support, are resolved or if one party does not participate in the action for divorce. The family court commissioner may grant and enter judgment in any action over which he or she presides under this paragraph unless the judgment modifies an agreement between the parties on material issues. If the family court commissioner does not approve an agreement between the parties on material issues, the action shall be certified to the court for trial.

NOTE: Amends s. 767.13 (5) (a), relating to the authority of a family court commissioner to grant judgment in certain divorce actions, to reflect the use, in this bill, of the concepts and terminology of "legal custody" and "periods of physical placement" instead of "custody" and "parental visitation rights".

SECTION 24. 767.23 (1) (a) and (am) of the statutes are amended to read:

767.23 (1) (a) Granting Upon request of one party, granting legal custody of the minor children to the parties jointly, to one party solely or to a relative or agency specified under s. 767.24 (1) (e) (3). The court

or family court commissioner may order joint legal custody without the agreement of the other party and without the findings required under s. 767.24 (2) (b) 2. This order may not have a binding effect on a final custody determination.

(am) Granting visitation rights periods of physical placement to a party specified in s. ~~767.245~~ 767.24 (4).

NOTE: This SECTION:

1. Amends s. 767.23 (1) (a) to specify that at a temporary hearing the court or family court commissioner may order joint legal custody with or without the agreement of the parties and without having to make the specific findings the court must make, under revised s. 767.24, where the parties do not agree to joint custody. Reportedly, there has been some confusion among judges and family court commissioners as to whether the current law permits an award of joint custody at a temporary hearing where the parties do not agree to joint custody.

2. Amends s. 767.23 (1) (am), relating to granting periods of physical placement at a temporary hearing, to reflect the use, in this bill, of the concept and terminology of "periods of physical placement" instead of "parental visitation rights".

[The NOTE is accurate as stated, but fails to reflect changes made in the course of legislative considerations.]

SECTION 25. 767.24 (title) of the statutes is amended to read:

767.24 (title) Custody and physical placement.

SECTION 26. 767.24 (1) (intro.) of the statutes is renumbered 767.24 (1) and amended to read:

767.24 (1) (title) GENERAL PROVISIONS. In rendering a judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (1) (e), the court shall make such provisions as it deems just and reasonable concerning the ~~care, custody and education~~ legal custody and physical placement of the any minor children child of the parties, ~~if any, according to the following provisions:~~ as provided in this section.

SECTION 27. 767.24 (1) (a) and (b) of the statutes are repealed.

NOTE: Repeals s. 767.24 (1) (b), relating to the court's authority to order joint custody. See new s. 767.24 (2).

SECTION 28. 767.24 (1) (c) of the statutes is renumbered 767.24 (3) and amended to read:

767.24 (3) CUSTODY TO AGENCY OR RELATIVE. (a) If the interest of any child demands it, and if the court finds that neither ~~party parent~~ is able to care for the child adequately or that neither ~~party parent~~ is fit and proper to have the care and custody of the child, the court may declare the child to be in need of protection or services and transfer legal custody of the child to a relative of the child, as defined in s. 48.02 (15), to a county department, as defined under s. 48.02 (2g), or to a licensed child welfare agency. If the court transfers legal custody of a child under this subsection, in its order the court shall notify the parents of any applicable grounds for termination of parental rights under s. 48.415.

(b) If the legal custodian appointed under ~~subd. 1 par. (a)~~ is an agency, the agency shall report to the court on the status of the child at least once each year

until the child reaches 18 years of age, is returned to the custody of a parent or is placed under the guardianship of an agency. The agency shall file an annual report no less than 30 days before the anniversary of the date of the order. An agency may file an additional report at any time if it determines that more frequent reporting is appropriate. A report shall summarize the child's permanency plan and the recommendations of the review panel under s. 48.38 (5), if any.

(c) The court shall hold a hearing to review the permanency plan within 30 days after receiving a report under ~~subd. 2 par. (b)~~. At least 10 days before the date of the hearing, the court shall provide notice of the time, date and purpose of the hearing to the agency that prepared the report, the child's parents, the child, if he or she is 12 years of age or over, and the child's foster parent or the operator of the facility in which the child is living.

(d) Following the hearing, the court shall make all of the determinations specified under s. 48.38 (5) (c) and, if it determines that an alternative placement is in the child's best interest, may amend the order to transfer legal custody of the child to another relative, other than a parent, or to another agency specified under ~~subd. 4 par. (a)~~.

(e) The charges for care furnished to a child whose custody is transferred under this ~~paragraph subsection~~ shall be pursuant to the procedure under s. 48.36 except as provided in s. 767.29 (3).

NOTE: Restates current s. 767.24 (1) (c), relating to transfer of legal custody of a child to a 3rd party, but adds a requirement that if custody is transferred to a 3rd party the court, in its order, must notify the parents of any grounds for termination of parental rights which may be applicable.

SECTION 29. 767.24 (1) (d) of the statutes is repealed.

NOTE: Repeals s. 767.24 (1) (d), defining the rights and responsibilities of a person awarded legal custody of a child. The rights and responsibilities of legal custodians are defined in s. 767.001 (1), (2) and (6) created by this bill.

SECTION 30. 767.24 (2) (intro.) and (a) to (e) of the statutes are renumbered 767.24 (5) (intro.) and (a) to (f) and amended to read:

767.24 (5) (title) FACTORS IN CUSTODY AND PHYSICAL PLACEMENT DETERMINATIONS. (intro.) In ~~making a determining legal custody determination and periods of physical placement~~, the court shall consider all facts ~~in relevant to~~ the best interest of the child ~~and shall~~. ~~The court may not prefer one potential custodian over the other on the basis of the sex or race of the custodian.~~ The court shall consider reports of appropriate professionals ~~where if~~ admitted into evidence when legal custody or physical placement is contested. The court shall consider the following factors in making its determination:

(a) The wishes of the child's parent or parents ~~as to custody~~;

(b) ~~The wishes of the child as to his or her custody, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.~~

(c) The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest;

(d) The child's adjustment to the home, school, religion and community;

(e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household;

(f) The availability of public or private child care services; ~~and~~.

NOTE: Renumbers current s. 767.24 (2) (intro.) and amends the provision to prohibit the court, in making its legal custody and physical placement determination, from preferring one party over the other on the basis of race, as well as sex (which is prohibited by current law). In *Palmore v. Sidoti*, 104 S. Ct. 1879 (1984), the U.S. supreme court held that child custody determinations may not be made on the basis of race.

Current s. 767.24 (2) (am) is renumbered s. 767.24 (5) and amended to permit the wishes of the minor child as to his or her legal custody or physical placement to be communicated by the child, the child's guardian ad litem or another appropriate professional. Some trial courts have interpreted the current law to require the child to communicate his or her wishes to the court.

SECTION 31. 767.24 (2) (f) of the statutes is renumbered 767.24 (5) (k).

SECTION 32. 767.24 (2) of the statutes is created to read:

767.24 (2) CUSTODY TO PARTY; JOINT OR SOLE. (a) Subject to par. (b), based on the best interest of the child and after considering the factors under sub. (5), the court may give joint legal custody or sole legal custody of a minor child.

(b) The court may give joint legal custody only if it finds that doing so is in the child's best interest and that either of the following applies:

1. Both parties agree to joint legal custody.
2. The parties do not agree to joint legal custody, but one party requests joint legal custody and the court specifically finds all of the following:

a. Both parties are capable of performing parental duties and responsibilities and wish to have an active role in raising the child.

b. No conditions exist at that time which would substantially interfere with the exercise of joint legal custody.

c. The parties will be able to cooperate in the future decision making required under an award of joint legal custody. In making this finding the court shall consider, along with any other pertinent items, any reasons offered by a party objecting to joint legal custody. Evidence that either party engaged in abuse of the child as defined in s. 48.981 (1) (a) and (b) or 813.122 (1) (a) or evidence of interspousal battery as described under s. 940.19 or domestic abuse as defined

in s. 813.12 (1) (a) creates a rebuttable presumption that the parties will not be able to cooperate in the future decision making required. This presumption may be rebutted by clear and convincing evidence that the abuse will not interfere with the parties' ability to cooperate in the future decision making required.

NOTE: Under current s. 767.24 (1) (b), the court may order joint custody only if the parties agree and the court finds that joint custody would be in the best interest of the child.

Section 767.24 (2), created above, permits the court to order joint legal custody if it finds that doing so is in the best interest of the child and if either of the following applies:

1. Both parties agree to joint legal custody.
2. The parties do not agree to joint legal custody, but one party requests it and the court makes specific findings relating to the suitability of the parties for joint legal custody.

SECTION 33. 767.24 (3) of the statutes is renumbered 767.24 (8) and amended to read:

767.24 (8) (title) NOTICE IN JUDGMENT. ~~Where the A~~ judgment which determines the legal custody or physical placement rights of the parties ~~any person to their a minor children, the judgment child~~ shall include notification of the contents of ~~s.~~ ss. 946.71 and 946.715.

NOTE: Requires notice in a judgment of s. 946.71 (interference with custody of a child), as well as s. 946.715 (interference by parent with parental rights of other parent), notice of which is required by current law.

SECTION 34. 767.24 (4), (5) (g) to (j), (6) and (7) of the statutes are created to read:

767.24 (4) ALLOCATION OF PHYSICAL PLACEMENT. (a) Except as provided under par. (b), if the court orders sole or joint legal custody under sub. (2), the court shall allocate periods of physical placement between the parties in accordance with this subsection. In determining the allocation of periods of physical placement, the court shall consider each case on the basis of the factors in sub. (5).

(b) A child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health.

(c) No court may deny periods of physical placement for failure to meet, or grant periods of physical placement for meeting, any financial obligation to the child or the former spouse.

(d) If the court grants periods of physical placement to more than one parent, it shall order a parent with legal custody and physical placement rights to provide the notice required under s. 767.327 (1).

(5) (g) Whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.

(h) Whether there is evidence that a party engaged in abuse of the child, as defined in s. 48.981 (1) (a) and (b) or 813.122 (1) (a).

(i) Whether there is evidence of interspousal battery as described under s. 940.19 or domestic abuse as defined in s. 813.12 (1) (a).

(j) Whether either party has or had a significant problem with alcohol or drug abuse.

(6) FINAL ORDER. (a) If legal custody or physical placement is contested, the court shall state in writing why its findings relating to legal custody or physical placement are in the best interest of the child.

(am) In making an order of joint legal custody, upon the request of one parent the court shall specify major decisions in addition to those specified under s. 767.001 (2m).

(b) Notwithstanding s. 767.001 (1), in making an order of joint legal custody, the court may give one party sole power to make specified decisions, while both parties retain equal rights and responsibilities for other decisions.

(c) In making an order of joint legal custody and periods of physical placement, the court may specify one parent as the primary caretaker of the child and one home as the primary home of the child, for the purpose of determining eligibility for aid under s. 49.19 or for any other purpose the court considers appropriate.

(d) No party awarded joint legal custody may take any action inconsistent with any applicable physical placement order, unless the court expressly authorizes that action.

(e) In an order of physical placement, the court shall specify the right of each party to the physical control of the child in sufficient detail to enable a party deprived of that control to implement any law providing relief for interference with custody or parental rights.

(7) ACCESS TO RECORDS. (a) Except under par. (b) or unless otherwise ordered by the court, access to a child's medical, dental and school records is available to a parent regardless of whether the parent has legal custody of the child.

(b) A parent who has been denied periods of physical placement with a child under this section is subject to s. 118.125 (2) (k) with respect to that child's school records, s. 51.30 (5) (f) with respect to the child's court or treatment records, s. 55.07 with respect to the child's records relating to protective services and s. 146.835 with respect to the child's patient health care records, s. 51.30 (5) (f) with respect to the child's court or treatment records, s. 55.07 with respect to the child's records relating to protective services and s. 146.835 with respect to the child's patient health care records.

NOTE: Subsection (4) replaces the current concepts of "sole physical custody" (i.e., the physical custody rights of a parent awarded sole custody of a child) and parental "visitation rights" with a requirement that the court, in child custody actions, allocate periods of physical placement between the parents if it is in the best interest of the child.

Subsection (4) (a) and (b) requires the court, whenever it orders sole or joint legal custody to parents, to allocate periods of physical placement between the parents unless the court finds, after a hearing, that such allocation is not in the best interest of the child. The court, in making the allocation, is permitted to designate a primary physical placement for the

child. However, the court may not provide for the child's primary placement to be with a parent who is not given either sole or joint legal custody. The bill specifies that a minor child is entitled to periods of physical placement with both parents consistent with the child's best interest.

Subsection (4) (c) specifies that, as under current visitation law [s. 767.245 (3)], periods of physical placement may not be denied for failure to meet, or granted for meeting, financial obligations to the child or the former spouse.

Subsection (4) (d) revises current s. 767.245 (6), relating to removal of a child from the state by a custodial parent. Under current law, a custodial parent must give 60 days' notice to a parent with visitation rights of the custodial parent's intention to establish legal residence *outside the state* or to remove the child *from the state* for more than 90 days. Upon motion by the parent with visitation rights and a finding by the court that the move is against the best interest of the child, the court may *deny* permission to the custodial parent to remove the child. In *Groh v. Groh*, 110 Wis. 2d 117 (1983), the Wisconsin supreme court held that, under current law, a trial court has no power to dictate where the custodial parent may reside *within* the state.

Under sub. (4) (d), which applies only if both parents reside in the state, if the court grants periods of physical placement to more than one parent it must order a parent with legal custody and physical placement rights to provide the other parent and the court with 60 days' *written* notice before doing any of the following:

1. Establishing legal residence outside the state.
2. Removing the child from the state for a period of more than 90 days.
3. Establishing his or her residence *within this state* at a distance of 200 miles or more from the other parent.

The notice must be sent by certified mail and must specify that the other parent may object to the move within the statutorily specified time period.

Within 15 days after receipt of the notice, the other parent may object, in writing, to the change. A copy of the objection must be filed with the court. The court or family court commissioner must then promptly refer the parents for mediation or other family court counseling services and may appoint a guardian ad litem to represent the interest of the child. If the parents are unable to resolve the dispute, the court must appoint a guardian ad litem, if necessary, and hold a hearing on the matter as soon as possible. The court may then grant or deny permission for the change after considering:

1. Any reason for the proposed change.
2. The nature and extent of the relationship of the child with the other parent, and the disruption to that relationship which the proposed action may cause.
3. The availability of alternative arrangements to continue the child's relationship with and access to the other parent.

Subsection (5) (g) to (j) creates the following additional factors which the court is required to consider in making its legal custody or physical placement determination:

1. Whether one parent is likely to unreasonably limit the frequent and continuing contact of the child with the other parent. This is the so-called "friendly parent" or "most generous parent" provision.
2. Whether there is evidence that a party engaged in "child abuse", which, as defined in s. 48.981, means: (a) physical injury inflicted on a child by other than accidental means; (b) sexual intercourse or sexual contact under the sexual assault law; (c) sexual exploitation of a child under s. 940.203; (d) permitting or requiring a child to violate s. 944.30, relating to prostitution; or (e) emotional damage as defined in s. 48.981 (1) (cm). A child abuse conviction is not necessary.
3. Whether there is evidence of interspousal battery. The various forms of battery are described in s. 940.19. A battery conviction is not necessary.

4. Whether either parent has or had a significant problem with alcohol or drug abuse.

Subsection (6) contains new material relating to the court's final legal custody and physical placement order.

Subsection (6) (a) specifically requires the court, if legal custody or physical placement is contested, to state why its findings relating to custody or placement, or both, are in the best interest of the child.

Subsection (6) (b) gives the court flexibility in ordering joint legal custody. The court is permitted to give sole power to one of the joint legal custodians to make specific decisions concerning the child.

Subsection (6) (c) permits the court, in an order of joint legal custody, to specify one parent as the "primary caretaker" of the child and one home as the "primary home" of the child for the purpose of determining eligibility for aid to families with dependent children or for any other purpose the court considers appropriate.

Subsection (6) (d) and (e) are 2 new provisions directed at the problem of child kidnapping. Paragraph (d) prohibits a party with joint legal custody from taking any action which is inconsistent with the physical placement order applicable to the party unless the action is expressly authorized by the court. Paragraph (e) requires the court to make its orders of physical placement sufficiently specific as to each party's rights to physical control of the child to permit a party deprived of that control to seek relief under laws relating to interference with custody or parental rights [e.g., the uniform child custody jurisdiction act in ch. 822, stats., or the federal parental kidnapping act].

Subsection (7) (a) is a new provision permitting a parent who does not have legal custody of a minor child to have parental access to medical, dental, school and juvenile court records and information pertaining to the child. However, the court may order that access be denied to the parent (e.g., where the parent has a history of child or spousal abuse).

Subsection (7) (b) restates current s. 767.245 (5).

[The NOTE is accurate as stated, but fails to reflect changes made in the course of legislative consideration.]

SECTION 35. 767.245 (title) of the statutes is amended to read:

767.245 (title) Visitation rights of certain persons.

SECTION 36. 767.245 (1), (3) and (5) to (7) of the statutes are repealed.

NOTE: Repeals s. 767.245 (1), (3) and (5) to (7), relating to parental "visitation rights", because these provisions are replaced by new s. 767.24 (4), relating to physical placement rights of parents, new s. 767.24 (7), relating to rights of a parent to pupil records, and new s. 767.11 (5) (c), relating to the power of the family court commissioner to refer persons with physical placement or visitation problems to mediation or other family court counseling services.

SECTION 37. 767.245 (2) of the statutes is repealed and recreated to read:

767.245 (2) Whenever possible, in making a determination under sub. (1), the court shall consider the wishes of the child.

SECTION 38. 767.245 (4) of the statutes is renumbered 767.245 (1) and amended to read:

767.245 (1) The Upon petition by a grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child, the court may grant reasonable visitation privileges rights to a grandparent or great-grandparent of any minor child upon the grandparent's or great-grandparent's petition to the court

~~with notice to the parties that person if the parents have notice of the hearing and if the court determines that it visitation is in the best interests and welfare interest of the child and issue any necessary order to enforce the same.~~

NOTE: Extends the current law permitting the court, upon petition, to grant visitation rights to a grandparent or great-grandparent to: (1) a stepparent; and (2) any person who has maintained a relationship similar to a parent-child relationship with the child.

SECTION 38m. 767.25 (1m) (ej) of the statutes is repealed and recreated to read:

767.25 (1m) (ej) The award of substantial periods of physical placement to both parents.

SECTION 39. 767.25 (1m) (em), (1r) and (3) of the statutes are amended to read:

767.25 (1m) (em) Extraordinary travel expenses incurred in exercising ~~visitation rights~~ the right to periods of physical placement under s. ~~767.245~~ 767.24.

(1r) An order under this section shall direct the person with legal custody of a minor child to contribute an amount determined under s. 46.257 (6) (b) in the manner determined by the department of health and social services, if that person receives benefits under s. 46.257. This subsection applies between October 1, 1986 and September 30, 1994.

(3) Violation of ~~visitation~~ physical placement rights by the custodial parent ~~shall~~ does not constitute reason for failure to meet child support obligations.

NOTE: Amends several provisions relating to child support orders in actions affecting the family to reflect the use, in this bill, of the concept and terminology of "periods of physical placement" instead of "parental visitation rights".

SECTION 40. 767.25 (7) of the statutes is created to read:

767.25 (7) An order of joint legal custody under s. 767.24 does not affect the amount of child support ordered.

NOTE: New provisions in the child support statute. New sub. (7) clarifies that an order of joint legal custody should not affect the amount of child support ordered by the court.

SECTION 41. 767.255 (7) of the statutes is amended to read:

767.255 (7) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having ~~custody of any children~~ physical placement for the greater period of time.

SECTION 42. 767.28 of the statutes is amended to read:

767.28 (title) Maintenance, legal custody and support when divorce or separation denied. In a judgment in an action for divorce or legal separation, although such divorce or legal separation is denied, the court may make such order for the legal custody of and periods of physical placement with any of the minor children and for the maintenance of either spouse and support of such children by either spouse out of property or income, as the nature of the case may render just and reasonable.

NOTE: Amends s. 767.28, relating to the power of the court where a divorce or legal separation judgment is denied, to reflect the use, in this bill, of the concepts and terminology of "legal custody" and "periods of physical placement" instead of "custody" and "parental visitation rights".

SECTION 43. 767.32 (title) of the statutes is amended to read:

767.32 (title) Revision of certain judgments.

SECTION 43ac. 767.32 (1) of the statutes, as affected by 1987 Wisconsin Act 27, is amended to read:

767.32 (1) After a judgment providing for child support under s. 767.25 or 767.51, maintenance payments under s. 767.26 or family support payments under s. 767.261, or for the appointment of trustees under s. 767.31 the court may, from time to time, on the petition, motion or order to show cause of either of the parties, or upon the petition, motion or order to show cause of the department of health and social services, a county department under s. 46.215, 46.22 or 46.23 or a child support agency if an assignment has been made under s. 49.19 (4) (h) or 49.45 (19) or if either party or their minor children receives aid under ch. 49, and upon notice to the family court commissioner, revise and alter such judgment respecting the amount of such maintenance or child support and the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, and may make any judgment respecting any of the matters which such court might have made in the original action, except that a judgment which waives maintenance payments for either party shall not thereafter be revised or altered in that respect nor shall the provisions of a judgment with respect to final division of property be subject to revision or modification. Any change in child support because of alleged change in circumstances shall take into consideration each parent's earning capacity and total economic circumstances. In any action under this section, receipt of aid to families with dependent children under s. 49.19 or a substantial change in the cost of living by either party or as measured by the federal bureau of labor statistics may be sufficient to justify a revision of judgment, except that a change in an obligor's cost of living is not in itself sufficient if payments are expressed as a percentage of income.

SECTION 44. 767.32 (2) of the statutes is repealed.

NOTE: Repeals current s. 767.32 (2), relating to modifications of child custody orders, because new s. 767.325 deals with those modifications.

SECTION 45. 767.32 (5) of the statutes is created to read:

767.32 (5) A summons or petition, motion or order to show cause under this section shall include notification of the availability of information under s. 767.081 (2).

SECTION 46. 767.325 of the statutes is created to read:

767.325 Revision of Legal Custody and Physical Placement Orders. Except for matters under s.

767.327 or 767.329, the following provisions are applicable to modifications of legal custody and physical placement orders:

(1) **SUBSTANTIAL MODIFICATIONS.** (a) *Within 2 years after initial order.* Except as provided under sub. (2), a court may not modify any of the following orders before 2 years after the initial order is entered under s. 767.24, unless a party seeking the modification, upon petition, motion, or order to show cause shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child:

1. An order of legal custody.

2. An order of physical placement if the modification would substantially alter the time a parent may spend with his or her child.

(b) *After 2-year period.* 1. Except as provided under par. (a) and sub. (2), upon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:

a. The modification is in the best interest of the child.

b. There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

2. With respect to subd. 1, there is a rebuttable presumption that:

a. Continuing the current allocation of decision making under a legal custody order is in the best interest of the child.

b. Continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.

3. A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under subd. 1.

(2) **MODIFICATION OF SUBSTANTIALLY EQUAL PHYSICAL PLACEMENT ORDERS.** Notwithstanding sub. (1):

(a) If the parties have substantially equal periods of physical placement pursuant to a court order and circumstances make it impractical for the parties to continue to have substantially equal physical placement, a court, upon petition, motion or order to show cause by a party, may modify such an order if it is in the best interest of the child.

(b) In any case in which par. (a) does not apply and in which the parties have substantially equal periods of physical placement pursuant to a court order, a court, upon petition, motion or order to show cause of a party, may modify such an order based on the appropriate standard under sub. (1). However, under sub. (1) (b) 2, there is a rebuttable presumption that

having substantially equal periods of physical placement is in the best interest of the child.

(3) **MODIFICATION OF OTHER PHYSICAL PLACEMENT ORDERS.** Except as provided under subs. (1) and (2), upon petition, motion or order to show cause by a party, a court may modify an order of physical placement which does not substantially alter the amount of time a parent may spend with his or her child if the court finds that the modification is in the best interest of the child.

(4) **DENIAL OF PHYSICAL PLACEMENT.** Upon petition, motion or order to show cause by a party or on its own motion, a court may deny a parent's physical placement rights at any time if it finds that the physical placement rights would endanger the child's physical, mental or emotional health.

(5) **REASONS FOR MODIFICATION.** If either party opposes modification or termination of a legal custody or physical placement order under this section the court shall state, in writing, its reasons for the modification or termination.

(6) **NOTICE.** No court may enter an order for modification under this section until notice of the petition, motion or order to show cause requesting modification has been given to the child's parents, if they can be found, and to any relative or agency having custody of the child.

(7) **TRANSFER TO DEPARTMENT.** The court may order custody transferred to the department of health and social services only if that department agrees to accept custody.

(8) **PETITION, MOTION OR ORDER TO SHOW CAUSE.** A petition, motion or order to show cause under this section shall include notification of the availability of information under s. 767.081 (2).

NOTE: Changes the standard for modifying a child custody order.

Current s. 767.32 (2) requires the party seeking the modification to show, by substantial evidence, that a change in custody is necessary to the best interest of the child. In *Millikin v. Millikin*, 115 Wis. 2d 16, 23-24 (1983), the Wisconsin supreme court interpreted the term "necessary" to mean that "the current custodial conditions are *harmful* in some way to the best interest of the child" (emphasis added).

This bill establishes separate standards for each of the following:

1. Modifying an order of legal custody (e.g., transferring legal custody from one sole legal custodian to another or changing sole legal custody to joint legal custody) or an order of physical placement, but only to the extent that the physical placement order applies to the child's primary placement;

2. Modifying an order of joint legal custody to an order of sole legal custody; and

3. Modifying an order of physical placement which does not apply to the child's primary placement.

Subsection (1) specifies that:

1. There is a rebuttable presumption that continuing the child's current primary placement is in the best interest of the child.

2. A change in economic circumstances is not sufficient to modify a legal custody or primary physical placement order.

3. If the court ordered sole legal custody in its original custody determination under s. 767.24, the court is not permitted to modify that order for 2 years after the date of the order, unless a party shows that physical or emotional harm to the child will result if a modification is not permitted.

Subsection (3) specifies that any part of a physical placement order which does not relate to primary placement may be modified if modification is in the best interest of the child.

[The NOTE is accurate as stated, but fails to reflect changes made in the course of legislative consideration.]

SECTION 46m. 767.327 of the statutes is created to read:

767.327 moving the child's residence within or outside the state. (1) NOTICE TO OTHER PARENT. (a) If the court grants periods of physical placement to more than one parent, it shall order a parent with legal custody of and physical placement rights to a child to provide not less than 60 days written notice to the other parent, with a copy to the court, of his or her intent to:

1. Establish his or her legal residence outside the state and remove the child from this state for a period of time exceeding 90 consecutive days.

2. Establish his or her legal residence and remove the child, within this state, at a distance of 150 miles or more from the other parent.

(b) The parent shall send the notice under par. (a) by certified mail. The notice shall state the parent's proposed action and that the other parent may object within the time specified in sub. (2).

(2) OBJECTION TO MOVE; MEDIATION. Within 15 days after receiving the notice under sub. (1), the other parent may send to the parent, with a copy to the court, a written notice of objection to the proposed action. The court or family court commissioner shall promptly refer the parents for mediation or other family court counseling services under s. 767.11 and may appoint a guardian ad litem. Unless the parents agree to extend the time period, if mediation or counseling services do not resolve the dispute within 30 days after referral, the matter shall proceed under subs. (3) to (5).

(3) STANDARDS FOR MODIFICATION IF MOVE CONTESTED. (a) 1. Except as provided under par. (b), if the parent proposing the move has sole legal or joint legal custody of the child and the child resides with that parent for the greater period of time, the parent objecting to the move may file a petition, motion or order to show cause for modification of the legal custody or physical placement order affecting the child. The court may modify the legal custody or physical placement order if the court finds all of the following:

a. The modification is in the best interest of the child.

b. The move will result in a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

2. With respect to subd. 1:

a. There is a rebuttable presumption that continuing the current allocation of decision making under a

legal custody order or continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.

b. A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under that subdivision.

3. Under this paragraph, the burden of proof is on the parent objecting to the move.

(b) 1. If the parents have joint legal custody and have substantially equal periods of physical placement with a child, either parent may file a petition, motion or order to show cause for modification of the legal custody or physical placement order. The court may modify an order of legal custody or physical placement if the court finds all of the following:

a. Circumstances make it impractical for the parties to continue to have substantially equal periods of physical placement.

b. The modification is in the best interest of the child.

2. Under this paragraph, the burden of proof is on the parent filing the petition or motion.

(4) GUARDIAN AD LITEM; PROMPT HEARING. After a petition, motion or order to show cause is filed under sub. (3), the court shall appoint a guardian ad litem and hold a hearing as soon as possible.

(5) FACTORS IN COURT'S DETERMINATION. In making its determination under sub. (3), the court shall consider all of the following factors:

(a) Whether the purpose of the proposed action is reasonable.

(b) The nature and extent of the child's relationship with the other parent and the disruption to that relationship which the proposed action may cause.

(c) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent.

(6) NOTICE REQUIRED FOR OTHER REMOVALS. (a) Unless the parents agree otherwise, a parent with legal custody and physical placement rights shall notify the other parent before removing the child from his or her primary residence for a period of not less than 14 days.

(b) Notwithstanding par. (a), if notice is required under sub. (1), a parent shall comply with sub. (1).

(c) Except as provided in par. (b), subs. (1) to (5) do not apply a notice provided under par. (a).

SECTION 46w. 767.329 of the statutes is created to read:

767.329 Revisions agreed to by stipulation. If after an initial order is entered under s. 767.24, the parties agree to a modification in an order of physical placement or legal custody and file a stipulation with the court that specifies the agreed upon modification, the court shall incorporate the terms of the stipulation into a revised order of physical placement or legal custody.

SECTION 47. 767.45 (5m) of the statutes is amended to read:

767.45 (5m) Unless a man is either presumed the child's father under s. 891.41 (1) or (2) (b) or adjudicated the child's father either under s. 767.51 or by final order or judgment of a court of competent jurisdiction in another state, no order or temporary order may be entered for child support, legal custody or ~~visitation~~ physical placement until the man is adjudicated the father using the procedure set forth in ss. 767.45 to 767.60. The exclusive procedure for establishment of child support obligations, ~~child legal custody or visitation~~ physical placement rights for a man who is neither presumed the child's father under s. 891.41 (1) or (2) (b) nor adjudicated the father is by an action under ss. 767.45 to 767.60. No person may waive the use of this procedure. If a presumption under s. 891.41 exists, a party denying paternity has the burden of rebutting the presumption.

NOTE: Amends s. 767.45 (5m), relating to support and child custody orders in certain paternity actions, to reflect the use, in this bill, of the concepts and terminology of "legal custody" and "periods of physical placement" instead of "custody" and "parental visitation rights".

SECTION 48. 767.46 (2) (c) of the statutes is amended to read:

767.46 (2) (c) If the alleged father voluntarily acknowledges paternity of the child, that he agree to the duty of support, the legal custody of the child, ~~the visitation~~ periods of physical placement of the child and other matters as determined to be in the best interests of the child by the judge or family court commissioner.

NOTE: Amends s. 767.46 (2) (c), relating to recommendations for settlement in a paternity action, to reflect the use, in this bill, of the concepts of "legal custody" and "periods of physical placement" instead of "custody" and parental "visitation rights".

SECTION 49. 767.465 (2) (intro.) of the statutes is amended to read:

767.465 (2) **WHEN RESPONDENT FAILS TO APPEAR.** (intro.) If the respondent has been personally served and fails to appear on the return date specified in the summons or on the date set for the trial, the court or family court commissioner may enter judgment and appropriate orders for support ~~and~~, legal custody and physical placement, if the petitioner proves the facts alleged in the petition at a hearing, notice of which was sent to the respondent, and if either of the following applies:

NOTE: Amends s. 767.465 (2), relating to the respondent's failure to appear in a paternity case, to reflect the use, in this bill, of the concepts and terminology of "legal custody" and "periods of physical placement" instead of "custody" and parental "visitation rights".

SECTION 50. 767.50 of the statutes is amended to read:

767.50 Trial. The trial shall be divided into 2 parts. The first part shall deal with the determination of paternity and the initial establishment of support. The 2nd part shall deal with legal custody, ~~visitation~~

periods of physical placement and related issues. At the first part of the trial, the main issue shall be whether the alleged or presumed father is or is not the father of the mother's child, but if the child was born to the mother while she was the lawful wife of a specified man there shall first be determined, as provided in s. 891.39, the prior issue of whether the husband was not the father of the child. The trial shall be by jury, unless the defendant waives the right to trial by jury in writing or by statement in open court, on the record, with the approval of the court and the complainant. The court may direct, and if requested by either party, before the introduction of any testimony in the party's behalf, shall direct the jury to find a special verdict as to any of the issues specified in this section except that the court shall make all the findings enumerated in s. 767.51 (2) to (5). If the mother is dead, becomes insane, cannot be found within the jurisdiction or fails to commence or pursue the action, the proceeding does not abate if any of the persons under s. 767.45 (1) makes a motion to continue. The testimony of the mother taken at the pretrial hearing may in any such case be read in evidence if it is competent, relevant and material.

NOTE: Amends s. 767.50, relating to the trial in a paternity action, to reflect the use, in this bill, of the concepts and terminology of "legal custody" and "periods of physical placement" instead of "custody" and parental "visitation rights".

SECTION 51. 767.51 (3), (5) (gp) and (5r) of the statutes are amended to read:

767.51 (3) The judgment or order may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the legal custody and guardianship of the child, ~~visitation privileges with the child~~ periods of physical placement, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. Unless the court orders otherwise, if there is no presumption of paternity under s. 891.41 (1) the mother shall have sole legal custody of the child. The court shall order either party or both to pay for the support of any child of the parties who is less than 19 years old and is pursuing an accredited course of instruction leading to the acquisition of a high school diploma or its equivalent. The judgment or order shall specifically assign responsibility for and direct the manner of payment of the child's health care expenses. The judgment or order may direct the father to pay or contribute to the reasonable expenses of the mother's pregnancy and confinement during pregnancy and may direct either party to pay or contribute to the costs of blood tests, attorney fees and other costs. Contributions to the costs of blood tests shall be paid to the county which paid for the blood tests.

(5) (gp) Extraordinary travel expenses incurred in exercising ~~visitation privileges~~ the right to periods of physical placement.

(5r) An order under this section shall direct the person with legal custody of a minor child to contribute

an amount determined under s. 46.257 (6) (b) in the manner determined by the department of health and social services, if the person receives benefits under s. 46.257. This subsection applies between October 1, 1986 and September 30, 1994.

NOTE: Amends several provisions relating to child support orders in paternity actions, to reflect the use, in this bill, of the concept and terminology of "periods of physical placement" instead of parental "visitation rights".

SECTION 53. 767.51 (6) of the statutes is amended to read:

767.51 (6) Sections 767.24, 767.245, 767.263, 767.265, 767.29, 767.30, 767.305, 767.31 and 767.32 and 767.325, where applicable, shall apply to a judgment or order under this section.

SECTION 54. 767.52 (2) of the statutes is amended to read:

767.52 (2) Any appointed attorney appearing on behalf of a party in a paternity action shall represent that party in all issues and proceedings relating to the paternity determination and the initial establishment of support, but may not represent the party in any proceeding relating to legal custody, visitation periods of physical placement or related issues.

NOTE: Amends s. 767.52 (2), relating to representation by an appointed attorney in a paternity action, to reflect the use, in this bill, of the concepts of "legal custody" and "periods of physical placement" instead of "custody" and parental "visitation rights".

SECTION 55. 767.65 (23) of the statutes is amended to read:

767.65 (23) RULES OF EVIDENCE. In any hearing for the civil enforcement of this section the court is governed by the rules of evidence applicable in a civil court action. If the action is based on a support order issued by another court a certified copy of the order shall be received as evidence of the duty of support, subject only to any defenses available to an obligor with respect to paternity under sub. (27) or to a defendant in an action or a proceeding to enforce a foreign money judgment. The determination or enforcement of a duty of support owed to one obligee is unaffected by any interference by another obligee with rights of legal custody, periods of physical placement or visitation granted by a court.

NOTE: Amends s. 767.65 (23), relating to rules of evidence in a uniform reciprocal enforcement of support action, to reflect the use, in this bill, of the concepts of "legal custody" and "periods of physical placement" instead of "custody" and parental "visitation rights".

SECTION 56. 814.61 (1) (a) and (b) of the statutes are consolidated, renumbered 814.61 (1) (a) and amended to read:

814.61 (1) (a) At the commencement of all civil actions and special proceedings not specified in ss. 814.62 to 814.66, \$45. ~~This does not include any action to determine paternity brought by the state or its delegate under s. 767.45 (1) (g).~~ (b) Of the fees received by the clerk under this subsection paragraph, the county treasurer shall pay 50% to the state trea-

surer for deposit in the general fund and shall retain the balance for the use of the county.

SECTION 57. 814.61 (1) (b) and (c) of the statutes are created to read:

814.61 (1) (b) In addition to the fee under par. (a), at the commencement of an action affecting the family as defined in s. 767.02, a fee of \$20 to be deposited by the county treasurer in a separate account to be used by the county exclusively for the purposes specified in s. 767.11.

(c) Paragraphs (a) and (b) do not apply to any action to determine paternity brought by the state or its delegate under s. 767.45 (1) (g).

NOTE: Paragraph (b) creates an additional filing fee in actions affecting the family. The increase must be used exclusively to fund mediation and studies under new s. 767.11.

Paragraphs (a) and (c) restate current law.

[The NOTE is accurate as stated, but fails to reflect changes made in the course of legislative consideration.]

SECTION 58. 814.61 (7) (title) of the statutes is amended to read:

814.61 (7) (title) REVISION OF JUDGMENT OR ORDER IN ACTION AFFECTING THE FAMILY.

SECTION 59. 814.61 (7) of the statutes is renumbered 814.61 (7) (a) and amended to read:

814.61 (7) (a) ~~Upon~~ Except as provided in par. (b), upon the filing of any petition under s. 767.32 (1) or any motion, by either party, for the revision of a judgment in an action affecting the family, \$25. ~~This subsection does not apply to such a petition or motion filed by the state or its delegate in connection with an action to determine paternity under s. 767.45 (1) (g).~~ Of the fees received by the clerk under this ~~subsection~~ paragraph, the county treasurer shall pay 50% to the state treasurer for deposit in the general fund and shall retain the balance for the use of the county.

SECTION 60. 814.61 (7) (b) and (c) of the statutes are created to read:

814.61 (7) (b) Upon the filing of any motion by either party under s. 767.325, \$50. Of the fees received by the clerk under this paragraph, the county treasurer shall pay 25% to the state treasurer for deposit in the general fund, retain 25% for the use of the county and deposit 50% in a separate account to be used by the county exclusively for the purposes specified in s. 767.11.

(c) Paragraphs (a) and (b) do not apply to a petition or motion filed by the state or its delegate in connection with an action to determine paternity under s. 767.45 (1) (g).

NOTE: Paragraph (b) creates a separate fee for a postjudgment motion relating to custody. This fee is \$25 more than the current fee for a postjudgment motion in an action affecting the family. Fifty percent of the fee must be used exclusively for mediation and studies under new s. 767.11.

Paragraphs (a) and (c) restate current law.

SECTION 61. 814.615 of the statutes is created to read:

814.615 Fees for mediation and studies. (1) (a) Except as provided under sub. (2), for family court

counseling services provided under s. 767.11 a county shall collect the following fees:

1. For the first mediation session conducted upon referral under s. 767.11 (5), no fee.

2. For all mediation provided after the first session mediation described under subd. 1, a single fee of \$100, regardless of the number of mediation sessions held.

3. For a study under s. 767.11 (14), a fee of \$300.

(b) The county shall determine when and how to collect the fees under par. (a). Subject to sub. (3), the county shall reduce the fees in accordance with the parties' ability to pay or provide the services without payment of the fees if both parties are unable to pay.

(2) In lieu of the fees under sub. (1), a county may establish a fee schedule to recover its reasonable costs of providing family court counseling services under s. 767.11. The fee schedule shall require no fee for the first mediation session conducted upon referral under s. 767.11 (5); provide for payment for any other services based on the parties' ability to pay; and take into account the fees the county collects under s. 814.61 (1) (b) and (7) (b). Fees shall be based on services actually provided. The county may not collect a single fee applicable without regard to the number of sessions or services provided. Subject to sub. (3), the county shall provide family court counseling services to the parties even if both parties are unable to pay.

(3) The court or family court commissioner shall direct either or both parties to pay any applicable fee under this section. If either or both parties are unable to pay, the court shall grant a separate judgment for the amount of the fees in favor of the county and against the party or parties responsible for the fees.

(4) The county treasurer shall deposit fees collected under this section in a separate account for the exclusive purpose of providing mediation services and studies under s. 767.11.

NOTE: Creates alternative "user fee" structures which a county may use to fund mediation services and studies under new s. 767.11.

Under the first alternative, the county must collect a single flat fee of \$100 for mediation and \$300 for studies, no matter how many services are provided. The county must determine when and how these flat fees are to be collected. The county must reduce the fees or provide the services without payment of the fees if both parties are unable to pay.

Under the 2nd alternative, the county must establish a reasonable, sliding scale fee schedule which is based on the parties' ability to pay and takes into account the fees the county collects for these services under other provisions in this bill. The fees must be based on the services actually provided (e.g., if the fee schedule requires the parties to pay \$30 per mediation session and they attend 6 sessions, their fee would be \$180). The county must provide the services even if both parties are unable to pay the fees.

Subsection (3) requires the court or the family court commissioner to direct that either or both parties pay the applicable mediation or study fee.

SECTION 62. 822.02 (1) and (2) of the statutes are amended to read:

822.02 (1) "Contestant" means a person, including a parent, who claims a right to legal custody, physical placement or visitation ~~rights~~ with respect to a child.

(2) "Custody determination" means a court decision and court orders and instructions providing for ~~the legal custody of a child, including, physical placement or visitation rights; it.~~ It does not include a decision relating to child support or any other monetary obligation of any person.

SECTION 63. 822.02 (6m) and (9m) of the statutes are created to read:

822.02 (6m) "Legal custody" has the meaning given in s. 767.001 (2).

(9m) "Physical placement" has the meaning given in s. 767.001 (5).

SECTION 64. 822.09 (1) (c) of the statutes is amended to read:

822.09 (1) (c) The party knows of any person not a party to the proceedings who has physical custody of the child or claims to have legal custody, physical placement or visitation rights with respect to the child.

SECTION 65. 822.10 of the statutes is amended to read:

822.10 Additional parties. If the court learns from information furnished by the parties pursuant to s. 822.09 or from other sources that a person not a party to the custody proceeding has physical custody of the child or claims to have legal custody, physical placement or visitation rights with respect to the child, it shall order that person to be joined as a party and to be duly notified of the pendency of the proceeding and of the person's joinder as a party. If the person joined as a party is outside this state the person shall be served with process or otherwise notified in accordance with s. 822.05.

NOTE: Amends various provisions in ch. 822, the uniform child custody jurisdiction act, to reflect the new concepts and terminology in this bill.

SECTION 66. 904.08 of the statutes is renumbered 904.08 (1) and amended to read:

904.08 (1) Evidence of ~~(1)~~ furnishing or offering or promising to furnish, or ~~(2)~~ accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This ~~section~~ subsection does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

SECTION 67. 904.08 (2) of the statutes is created to read:

904.08 (2) With respect to an action arising out of mediation under s. 767.11, this section applies to compromises, offers to compromise and compromise negotiations which occur during that mediation.

NOTE: Expands s. 904.08 to apply it to compromises, offers to compromise and compromise negotiations made in mediation under new s. 767.11. Section 904.08 currently prohibits the introduction into evidence of compromises, offers to compromise and conduct or statements made in compromise negotiations.

SECTION 68. 905.035 of the statutes is created to read:

905.035 Communications in mediation. (1) DEFINITIONS. In this section:

(a) "Mediation party" means a person referred to mediation under s. 767.11 (5).

(b) "Mediator" means a person who conducts a mediation proceeding under s. 767.11.

(c) A communication is "confidential" if it is not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendering of mediation services or those reasonably necessary to transmit of the communication.

(2) GENERAL RULE. (a) The mediation parties have a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made in mediation under s. 767.11.

(b) In addition to any other type of communication, any material including, but not limited to, any memorandum, file, report, interview, case summary, note or work product, which is made, used or received by a mediator or a person acting on behalf of or employed by a mediator during the course of mediation under s. 767.11 is confidential. No such material is a public record under subch. II of ch. 19. No such material is subject to discovery or admissible in any action or proceeding.

(3) WHO MAY CLAIM. Either mediation party, either mediation party's guardian, either mediation party's counsel, either mediation party's personal representative if the mediation party is deceased, and the person who was the mediator at the time of the communication may claim the privilege under sub. (2), but the privilege may be claimed only on behalf of a mediation party. Authority to claim the privilege is presumed in the absence of evidence to the contrary.

(4) EXCEPTIONS. There is no privilege under this section under any of the following circumstances:

(a) If both mediation parties consent to waive the privilege.

(b) With respect to information necessary for a study under s. 767.11 (14), if both mediation parties consent under that section to have a mediator conduct the study.

(c) In an action by a mediation party against a mediator for damages arising out of mediation under s. 767.11, for the purpose of that action alone.

(d) With respect to a report by a mediator of child abuse under s. 48.981.

(e) Information which would otherwise have to be disclosed under s. 767.27.

NOTE: Creates a "mediator-mediation parties" privilege in the evidence code. This new section permits parties to a mediation proceeding under new s. 767.11 to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made during mediation. The privilege may be claimed by either mediation party, by either party's guardian or personal representative or by the mediator, but only on behalf of the mediation parties. The authority to claim the privilege is presumed in the absence of evidence to the contrary.

Subsection (4) sets forth the circumstances in which there is no "mediator-mediation parties" privilege. They are:

1. If both mediation parties consent to waive the privilege.

2. With respect to information necessary for the study, if both mediation parties consent to have the mediator conduct a legal custody or physical placement study subsequent to unsuccessful mediation.

3. In an action by a mediation party against a mediator for damages arising out of the mediation.

4. If a mediator reports child abuse under s. 48.981.

[The NOTE is accurate as stated, but fails to reflect changes made in the course of legislative consideration.]

SECTION 69. 905.11 of the statutes is renumbered 905.11 (1) and amended to read:

905.11 (1) ~~A~~ Except as provided under sub. (2), a person upon whom this chapter confers a privilege against disclosure of the confidential matter or communication waives the privilege if ~~he~~ that person or his or her predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the matter or communication. ~~This section does~~ (3) Subsections (1) and (2) do not apply if the disclosure is itself a privileged communication.

SECTION 70. 905.11 (2) of the statutes is created to read:

905.11 (2) The privilege under s. 905.035 is waived under this section if both parties voluntarily disclose or consent to disclosure of any significant part of the confidential matter or communication.

NOTE: Amends s. 905.11 to specify that the "mediator-parties" privilege in new s. 905.035 is waived if *both* parties to the mediation voluntarily disclose or consent to disclosure of any significant part of the confidential matter or communication. The amendment is necessary because the new privilege is the only privilege in ch. 905 which may be claimed by 2 parties. The new privilege would not be meaningful if one party could waive the privilege by voluntary disclosure or consent to disclosure.

SECTION 71. 946.71 (2) to (4) of the statutes are amended to read:

946.71 (2) Entices away or takes away any child under the age of 18 from the parent or other person having legal custody under an order or judgment in an action for divorce, legal separation, annulment, child custody, paternity, guardianship or habeas corpus with intent to take the child out of the state for the purpose of depriving the parent or other person of the legal custody of the child without the consent of such parent or other person, unless the court which awarded legal custody has consented that the child be taken out of the state by the person who so takes the

child. The fact that joint legal custody has been awarded to both parents by a court does not preclude a court from finding that one parent has committed a violation of this subsection.

(3) Entices away, takes away or withholds for more than 12 hours beyond the court-approved period of physical placement or visitation period any child under the age of 14 from a parent or other person having legal custody under an order or judgment in an action for divorce, legal separation, annulment, child custody, paternity, guardianship or habeas corpus without the consent of the legal custodian, unless a court has entered an order authorizing the taking or withholding. The fact that joint legal custody has been awarded to both parents by a court does not preclude a court from finding that one parent has committed a violation of this subsection.

(4) Entices away, takes away or withholds for more than 12 hours any child under the age of 14 from the parents, or the child's mother in the case of a nonmarital child where parents do not subsequently intermarry under s. 767.60, without the consent of the parents or the mother, unless legal custody has been granted by court order to the person enticing, taking or withholding the child.

NOTE: Amends s. 946.71 (2) to (4), setting forth various crimes relating to interference with custody of a child, to reflect the use, in this bill, of the concepts and terminology of "legal custody" and "periods of physical placement" instead of "custody" and parental "visitation rights".

SECTION 72. 946.715 (1) (b) and (c) of the statutes are amended to read:

946.715 (1) (b) After being served with process in an action affecting the family but prior to the issuance

of a temporary or final order determining child custody rights ~~to a minor child~~, takes or entices the child outside of this state for the purpose of depriving the other parent of physical custody as defined in s. 822.02 (9); or

(c) After issuance of a temporary or final order specifying joint legal custody rights and periods of physical placement, takes or entices a child under the age of 14 from the other parent in violation of the ~~custody~~ order.

NOTE: Amends s. 946.715 (1) (b) and (c), setting forth 2 of the crimes relating to interference by one parent with the parental rights of the other parent, to reflect the concepts and terminology in this bill.

SECTION 72m. **Nonstatutory provisions; circuit courts.** (1) CHAPTER 767 REVISIONS. Any revisions which were ordered by the court under section 767.32 of the statutes prior to the effective date of this subsection are not subject to modification or reversal on the grounds that the order or judgment was granted pursuant to a motion or order to show cause.

SECTION 73. **Initial applicability.** This act applies to any action commenced or motion or petition filed on or after the effective date of this SECTION.

SECTION 74. **Effective dates.** This act takes effect on the day after publication, except as follows:

(1) The treatment of sections 767.25 (1m) (ej) and (em) and 767.51 (5) (gp) of the statutes takes effect on July 1, 1987, or the day following publication, whichever is later.

(2) The treatment of section 757.48 (1) of the statutes takes effect on the first day of the 12th month beginning after publication.