



Effect of Domestic Abuse in Child Custody Disputes

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This issue brief summarizes the effect of a finding of interspousal battery or domestic abuse on the issues of legal custody and physical placement of a child in actions affecting the family.

LEGAL STANDARDS FOR LEGAL CUSTODY AND PHYSICAL PLACEMENT

In certain actions affecting the family, such as divorce or paternity cases, courts are required to address the issues of legal custody and physical placement in a “just and reasonable” manner. In doing so, the court must consider all facts relevant to the child’s best interest, including several factors enumerated by statute. [s. 767.41 (1) and (5), Stats.]

Legal Custody

“Legal custody” generally means the right and responsibility to make major decisions concerning a child. After considering several statutory factors and the child’s best interest, a court may award joint legal custody, in which both parents share legal custody, or sole legal custody to one parent. A court must presume that an award of joint legal custody is in the child’s best interest. The court may award sole legal custody to one parent only if doing so is in the child’s best interest and certain other circumstances apply. [s. 767.41 (2), Stats.]

Physical Placement

“Physical placement” refers to the time in which a parent has the right to have a child physically placed with that parent. The court must allocate periods of physical placement between parents in a manner that allows the child to have regularly occurring, meaningful periods of physical placement with each parent. A child is entitled to periods of physical placement with both parents unless the court finds that physical placement with a parent would endanger the child’s physical, mental, or emotional health. [s. 767.41 (4), Stats.]

EXCEPTION FOR INTERSPOUSAL BATTERY OR DOMESTIC ABUSE

The legal standards for legal custody and physical placement are subject to an exception in cases where the court has found that a parent has engaged in a pattern or serious incident of interspousal battery or domestic abuse. [s. 767.41 (2) (d) and (5) (bm), Stats.]

Acts Constituting Interspousal Battery or Domestic Abuse

The term “interspousal battery” generally includes certain forms of battery as defined in statute, as well as battery in violation of certain restraining orders. The term “domestic abuse” encompasses various acts among family or household members, former spouses or dating partners, or adults with a child in common. Examples of acts of domestic abuse include: intentional infliction of pain, injury or illness; certain sexual assaults; stalking; damage to property; or threats of such acts. [ss. 813.12 (1) (am), 940.19, and 940.20 (1m), Stats.]

Effect of Battery or Abuse on Legal Standards

If the court finds that a parent has engaged in a pattern or serious incident of interspousal battery or abuse, the safety and well-being of the child and the safety of the parent who was the victim of the battery or domestic abuse must be the paramount concerns in determining legal custody and periods of physical placement. [s. 767.41 (5) (bm), Stats.]

Legal Custody

If the court finds that a parent has engaged in a pattern or serious incident of interspousal battery or domestic abuse, the court must presume that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that parent. This presumption takes precedence over the other standards regarding the determination of legal custody, such as the presumption that joint legal custody is in the child's best interest.

The new presumption may be rebutted only if the parent who committed the battery or abuse has successfully completed certified treatment for batterers and is not abusing alcohol or any other drug, and the court determines that an award of joint or sole legal custody to that parent is in the child's best interest, based on a consideration of the statutory factors relevant to all legal custody and physical placement determinations.

If the court finds that both parents engaged in battery or abuse, the new presumption applies to the parent that the court determines was the primary physical aggressor. In making that determination, the court must consider certain factors, such as: prior acts of domestic violence between the parties; the severity of injuries, if any; the likelihood of future injuries; whether either parent acted in self-defense; and whether a pattern of coercive and abusive behavior exists between the parties. If the court determines neither parent was the primary physical aggressor, then the new presumption does not apply. [s. 767.41 (2) (d), Stats.]

Physical Placement

As with legal custody determinations, the safety and well-being of the child and the safety of the victim-parent must be the paramount concern when determining physical placement, if the court finds a parent has engaged in battery or abuse. The court's consideration of the statutory factors governing physical placement determinations is also subject to this concern. [s. 767.41 (4) (a), Stats.]

If the court awards period of physical placement to both parents in cases where battery or abuse has been found, the court must provide for the safety and well-being of the child and for the safety of the victim-parent. For that purpose, the court must impose, as appropriate, one or more of the following conditions upon the parent who committed the battery or abuse:

- Require that exchanges of the child occur in a protected setting or in the presence of an appropriate third party, who agrees to assume such responsibility.
- Require supervised placement, with the supervision performed by an appropriate third party who agrees to assume such responsibility, and paid for by the parent who committed the battery or abuse.
- Require attendance and completion, to the court's satisfaction, of certified treatment for batterers as a condition of exercising placement.
- If the parent who committed the battery or abuse has a significant problem with alcohol or drug abuse, prohibit that parent from being under the influence of alcohol or any controlled substance when exchanging the child, and from possessing or consuming alcohol or any controlled substance during the parent's periods of physical placement.
- Prohibit overnight physical placement with the child.
- Require the parent to post a bond for the return and safety of the child.

The court may also impose any condition that it determines is necessary for the safety and well-being of the child or the safety of the victim-parent. When determining the appropriate impositions, the court must consider the availability of services or programs and the ability of the parent who committed the battery or abuse to pay for those services or programs. [s. 767.41 (6), Stats.]