



# Effect of Domestic Abuse in Child Custody Cases

Prepared by: Amber Otis, Senior Staff Attorney

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 must 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.<sup>1</sup>

“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, meaning both parents share legal custody, or sole legal custody to one parent. The court must presume that joint legal custody is in the child’s best interest and may award sole legal custody to one parent only if doing so is in the child’s best interest and certain other circumstances apply.<sup>2</sup>

“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.<sup>3</sup>

## EXCEPTION FOR INTERSPOUSAL BATTERY OR DOMESTIC ABUSE

The legal standards for legal custody and physical placement contain an exception for when a court finds that a parent has engaged in a pattern or serious incident of 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.<sup>4</sup>

If the court finds that a parent has engaged in a pattern or serious incident of interspousal battery or abuse, the child’s safety and well-being, 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 physical placement.<sup>5</sup>

## Legal Custody Determinations After Finding of Battery or Abuse

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, 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 legal standards for determining legal custody, including 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 treatment for batterers provided through a certified treatment program or by a certified treatment provider 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, after considering the statutory factors relevant to all legal custody and physical placement determinations. In its order, the court must state in writing whether the presumption against awarding joint or sole legal custody to that

party is rebutted and, if so, what evidence rebutted the presumption, and why its findings relating to legal custody and physical placement are in the best interest of the child.<sup>6</sup>

If the court finds that both parents engaged in battery or abuse, the new presumption applies to the parent whom 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 parents; 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 parents. If one, but not both, of the parents has been convicted of a crime that was an act of domestic abuse with respect to the other parent, the court must find the parent convicted of the crime to be the primary physical aggressor.<sup>7</sup>

## Physical Placement Determinations After Finding of Battery or Abuse

As with legal custody determinations, if the court finds a parent has engaged in battery or abuse, the safety and well-being of the child and the safety of the victim-parent must be the paramount concerns when determining physical placement. The court's consideration of the statutory factors governing physical placement determinations is also subject to this concern.<sup>8</sup>

If the court awards periods of physical placement to both parents in cases where battery or abuse has been found, the court must provide for the child's safety and well-being and the victim-parent's safety. 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 child's safety and well-being or victim-parent's safety. 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.<sup>9</sup>

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<sup>1</sup> s. 767.41 (1) (b) and (5), Stats. See, Wisconsin Legislative Council, [Coparenting: State Law Standards for Legal Custody and Physical Placement](#), Issue Brief (Jan. 2023).

<sup>2</sup> s. 767.41 (2), Stats.

<sup>3</sup> s. 767.41 (4), Stats.

<sup>4</sup> ss. 767.41 (2) (d) and (5) (bm), 813.12 (1) (am), 940.19, and 940.20 (1m), Stats.

<sup>5</sup> s. 767.41 (5) (bm), Stats.

<sup>6</sup> s. 767.41 (2) (d) 1. and (6) (f), Stats. See, *Valadez v. Valadez*, 2022 WI App 2 (holding that a parent may only overcome the presumption against sole or joint custody by successfully completing treatment designed for batterers and provided by a certified program or provider, and reasoning that a "certified treatment provider" for batterers means a treatment provider who has met certain requirements to justify granting a "certificate" indicating that he or she has been "endorsed authoritatively" as qualified and fit to treat batterers).

<sup>7</sup> s. 767.41 (2) (d) 2. and 3., Stats. However, under s. 767.41 (2) (d) 4., Stats., the new presumption does not apply if the court determines neither parent was the primary physical aggressor.

<sup>8</sup> s. 767.41 (5) (am) and (bm), Stats.

<sup>9</sup> s. 767.41 (6) (g), Stats.