PLACEMENT OF CHILDREN IN FAMILY CASES

A court determines placement of children when the parents do not agree. The court must consider "all facts relevant to the best interests of the child," with sixteen factors specifically identified in the statute, along with "such other factors" the court determines relevant. Wis. Stat. § 767.41(5). The legislature set forth a general presumption of joint legal custody. Wis. Stat. § 767.41(2)(am). However, there is no presumption of equal placement. *Keller v. Keller*, 2002 WI App 161. If the parents cannot come to an agreement, the placement statute requires "a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent." Wis. Stat. § 767.41(4). Further, the court cannot "prefer one parent … over the other on the basis of sex or race of the parent. Wis. Stat. § 767.41(5).

Courts have the authority to order parents to attend educational programs. Wis. Stat. § 767.4011. Depending on the county, these programs may be in-person or online. Parties are also required to attend mediation if they are unable to resolve custody and placement on their own. Wis. Stat. § 767.405(5). Some counties have family court services to undertake custody and placement evaluations and to make recommendations to the court, but these counties are in the minority. Eventually, the courts must appoint attorneys to represent children's best interests if the disputes between the parents persist. Wis. Stat. § 767.407. These attorneys are called Guardians ad Litem ("GAL"). The GAL's role is to "advocate for the best interests of a minor child" and to "function independently, in the

same manner as an attorney for a party to the action." Wis. Stat. § 767.407(4). If a child is able and expresses a preference, the GAL is obligated to "communicate to the court the wishes of the child," but the GAL "shall not be bound by[] the wishes of the minor child or the positions of others as to the best interests of the minor child."

A parenting plan sets forth each parent's position regarding custody, placement, transportation, choice of school and healthcare providers, child care, communication between parent and child, housing, payment of expenses, religious upbringing and other matters. The parenting plan is to be filed with the court within sixty days of the waiver or failure of mediation. Wis. Stat. § 767.41(1m). In practice, the requirement that parties file parenting plans is routinely ignored. This is in large part a consequence of both parties having long before this deadline set forth their proposals on such issues. The matters to be addressed in the parent plan have generally been informally disclosed at temporary hearings and with the mediator months before the statutory deadline.

WHAT IS A PRESUMPTION

Actions affecting the family are generally governed by civil procedure. Wis. Stat. § 767.201. The Wisconsin Supreme Court has determined that if a civil statute "is silent" with respect to the effect of the presumption, the presumption is governed by Wis. Stat. § 903.01 and applied as follows:

> The party relying on the presumption has the burden of proving the basic facts. The term "burden" referred in the statute refers to both the burdens of production and persuasion. Once the basic facts are found to exist, i.e., the petitioner has both produced both evidence of those facts and convinced the

> [fact finder] of their existence, the burdens of persuasion and production shift to the party opposing the presumption.

In re Interest of Kyle S.-G., 194 Wis. 2d 365, 373, 533 N.W.2d 794 (1995) (internal citation omitted).

The Wisconsin Supreme Court has noted that section 903.01 implicitly imposes "a uniform quantum of proof for every presumption." *Kruse v. Horlamus Indus., Inc.*, 130 Wis. 2d 357, 365-66, 387 N.W.2d 64 (1986). That uniform standard "is equivalent to 'the greater weight of the credible evidence' required by the ordinary burden of proof." *Id.*[1]

CURRENT PRACTICE

I have undertaken an unscientific anecdotal survey with my peers throughout the state as to the starting point in placement disputes. Assuming that both parents are available, the responses have been generally uniform. The respondents have indicated that placement is most likely to be equal, unless there are demonstrated mental health, AODA, violence or similar significant concerns with a parent. One respondent indicated that a

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[1] Rule of Evidence 903.01 governs presumptions. It provides as follows:

> Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

> The uniform burden of proof is not without exception. Section 903.01's opening clause excepts those presumptions to which statutes expressly apply a higher burden of proof. Wis. Stat. § 903.01. The Wisconsin Supreme Court has echoed section 903.01, applying the uniform standard to "[a]ll presumptions at common law and all statutory presumptions which do not express a quantum of proof." *Kruse*, 130 Wis. 2d at 366 (citing *Judicial Council Committee's Note*—1973, 59 Wis. 2d at R46). No exception or higher standard applies in family cases.

preference for mothers existed for newborns for the "first year or so," and a second respondent indicated that "more" placement may also occur with one parent when the parents have demonstrated an unreasonably high level of conflict which interferes with a child's growth, development and general well-being.

HISTORICAL PRESUMPTIONS

Here are some excerpts from old cases regarding placement and a presumption for either parent:

1. *In re Goodenough*, 19 Wis. 274 (1865):

    - "That the father has a legal and paramount right to custody … will not in general be denied."
    - Where the daughter was nearly twelve, "prima facie, therefore, the father is entitled to have her delivered over to him .."
    - "If the father apply, the child should … be delivered over to him, unless there be something in his situation or conduct which renders him unfit for the trust."
    - Should the mother remarry, "the mother is considered by her subsequent marriage as having lost her right of guardianship."

2. *Welch v. Welch*, 33 Wis. 534 (1873)

    - In general, all other circumstances being equal, the paramount common law right of the father to the children will be recognized. But if the divorce has been granted for the fault or misconduct of the husband, then such right, according to the nature and circumstances of the fault or misconduct shown against him, will not be recognized.

3. *Jenkins v. Jenkins*, 173 Wis. 592 (1921).

    - For a boy of such tender years [age 3] nothing can be an adequate substitute for mother love – for that constant ministration required during the period of nurture that only a mother can give because in her alone is duty swallowed up in desire; in her alone is service expressed in terms of love. She alone has

the patience and sympathy required to mold and soothe the infant mind in its adjustment to its environment. The difference between fatherhood and motherhood in this respect is fundamental, and the law should recognize it unless offset by undesirable traits in the mother.

4. *Welker v. Welker*, 24 Wis. 2d 570 (1964)

- The rule of preference in custody cases in favor of a mother is a strong one.
- However, the aforesaid rule of preference in favor of the mother is not a rule of law but rather is one extremely important element to be considered in deciding custody; the polestar remains the welfare of the child.