

# Legislative Council Staff Brief



## Study Committee on Child Placement and Support

August 8, 2018

SB-2018-07

Wisconsin Legislative Council  
One East Main Street, Suite 401  
Madison, WI 53703-3382  
Phone: (608) 266-1304  
Fax: (608) 266-3830

[www.legis.wisconsin.gov/lc](http://www.legis.wisconsin.gov/lc)



# INTRODUCTION

---

The Joint Legislative Council Study Committee on Child Placement and Support is directed to review the standards under current law for determining periods of physical placement and child support obligations. The committee may consider alternatives to current law concerning physical placement, including a rebuttable presumption that equal placement is in the child's best interest. The committee may also consider whether the current standard for determining child support adequately and equitably provides for the support of children and alternative models for determining child support obligations.

This Staff Brief describes the general standards used by a court in determining or revising an order for legal custody, physical placement, or child support. The Staff Brief refers generally to the court processes and requirements, but the same steps and considerations are also used by parties and their attorneys when reaching an agreement for the court's approval.

- **Part I** briefly describes the statutory provisions regarding legal custody and physical placement.
- **Part II** briefly describes the statutory provisions regarding child support.

This Staff Brief was prepared by Rachel Letzing, Principal Attorney, and Margit S. Kelley, Senior Staff Attorney.



# PART I – LEGAL CUSTODY AND PHYSICAL PLACEMENT

---

When an action for divorce, legal separation, annulment, or paternity involves a minor child, a court must first determine the legal custody and physical placement arrangements for the child. “Custody” and “placement” are treated separately under Wisconsin law and involve different aspects of a child’s upbringing.

## **DETERMINING LEGAL CUSTODY**

Legal custody is the decision-making authority for major decisions about a child’s life, including consent to marry, consent to enter military service, consent to obtain a driver’s license, authorization for nonemergency health care, choice of school, and choice of religion. [s. 767.001 (2) and (2m), Stats.]

### **Presumption in Determining Legal Custody**

A court must presume that joint legal custody is in the best interests of a child, where both parents equally share the right to make major decisions, and neither parent has a superior right over the other for such decisions. [ss. 767.001 (1s) and 767.41 (2) (am), Stats.]

However, the presumption for joint legal custody may be challenged if a parent unreasonably refuses to cooperate with the other parent, a parent does not wish to have an active role in raising the child, a parent is not capable of performing parental duties and responsibilities, the parents will not be able to cooperate in the future, or conditions exist that would interfere with exercising joint authority. [s. 767.41 (2) (b) and (c), Stats.]

If the presumption for joint legal custody is challenged, a court must consider the best interests of the child using a number of specific factors that are identified in the statutes. The factors are described in the physical placement section below. [s. 767.41 (2) (a), Stats.]

### **General Considerations**

The presumption for joint legal custody is reversed if a case involves domestic abuse. If a court finds that a parent has engaged in a pattern or serious incident of interspousal battery or domestic abuse, the court must presume that joint or sole legal custody to that parent is detrimental to the child and cannot be awarded to that parent. [s. 767.41 (2) (d), Stats.]

The law includes a specific acknowledgment for a military service member who has been or may be called to active duty. Specifically, a court cannot deny legal custody based on a service member’s absence from the home for a call to active duty in the National Guard or the U.S. armed forces. [s. 767.41 (2) (e), Stats.]

## DETERMINING PHYSICAL PLACEMENT

In contrast to legal custody, which authorizes decision-making on major issues, physical placement is the actual time a child is in a parent's care. A parent must make routine daily decisions regarding the child's care while the child is physically with that parent. The routine daily decisions must be consistent with major decisions made by either or both parents having legal custody. [s. 767.001 (5), Stats.]

### General Considerations

Unless physical placement with a parent would endanger a child's physical, mental, or emotional health, a child is entitled to periods of physical placement with both parents. [s.767.41 (4) (b), Stats.]

The statutes do not provide a standard placement schedule, but, instead, specify that a court must order a physical placement schedule for a child that allows the child to have regularly occurring, meaningful periods of physical placement with each parent. A placement schedule must **maximize** the amount of time a child may spend with each parent.<sup>1</sup> The Wisconsin Supreme Court has stated that this does not require equal placement. [s.767.41 (4) (a), Stats.; *Landwehr v. Landwehr*, 2006 WI 64, ¶ 11.]

As a general principle, a court may not prefer one parent over the other on the basis of the parent's sex or race. In addition, a court may not deny physical placement for a child based on a parent's failure to provide financial support. [s. 767.41 (4) (c) and (5) (am) (intro.), Stats.]

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

Also, as with legal custody, in determining periods of physical placement, a court cannot consider whether a service member has been or will be absent from the home for a call to active duty in the National Guard or the U.S. armed forces.<sup>2</sup> [s. 767.41 (5) (c), Stats.]

### Specific Factors to Determine the Best Interests of a Child

In determining a physical placement schedule for a child, a court must consider the best interests of the child, using specific factors that are provided in the statutes. [s. 767.41 (5) (am), Stats.]

---

<sup>1</sup> The requirement to set regularly occurring, meaningful periods of physical placement that maximize the amount of time for a child with each parent was created in 1999 Wisconsin Act 9 (the Biennial Budget Act), and took effect May 1, 2000. Since that time, some legislative proposals have been introduced to revise the wording from "maximizing" placement to a presumption of "equalizing" placement; see, for example, most recently, companion bills 2017 Assembly Bill 849 and 2017 Senate Bill 736.

<sup>2</sup> The Uniform Law Commission has prepared a Uniform Deployed Parents Custody and Visitation Act to address issues of child custody and visitation that arise when parents are deployed in military or other national service. The Wisconsin Commission on Uniform State Laws, which makes recommendations on which of the model acts to pursue in Wisconsin, has recommended that this model act be advanced in the next legislative session.

The following is the full list of factors that a court must consider in determining legal custody and physical placement:

- The wishes of the parents.
- The wishes of the child.
- The interaction and interrelationship of the child with the parents, siblings, and any other person who may significantly affect the child's best interests.
- The parents' history of amount and quality of time with the child and any proposed reasonable lifestyle changes to spend time with the child in the future.
- The child's adjustment to the home, school, religion, and community.
- The child's age and developmental and educational needs.
- Whether the mental or physical health of a parent, minor child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being.
- The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.
- The availability of child care services.
- The cooperation and communication between the parents.
- Whether each parent can support the other parent's relationship with the child.
- Whether there is evidence that a parent engaged in abuse of the child.
- Whether a household member or a person in a dating relationship with a parent has a criminal record or has engaged in abuse or neglect of the child or of any other child.
- Whether there is evidence of interspousal battery or domestic abuse.
- Whether a parent has or had a significant problem with alcohol or drug abuse.
- The reports of appropriate professionals, if admitted into evidence.
- Any other relevant factors.

Each relevant factor that is considered by a court must be articulated in its findings. [*Goberville v. Goberville*, 2005 WI App 58.]

## **RESOLUTION PROCESS**

If parents have not agreed on arrangements for legal custody and physical placement, the law has developed a number of aids in that process. For example, when those matters are contested, parents are generally required to attempt mediation either at their own expense or as offered through the family court services. [s. 767.405 (5) to (10), Stats.]

If the parents do not reach an agreement after mediation, a court must refer the parents to the family court services for a family study, must order the parents to each file a proposed parenting plan with the court, and generally must appoint a guardian ad litem (GAL) to advocate for the best interests of the child. [ss. 767.405 (12) (b) and (14), 767.407, and 767.41 (1m), Stats.]

## **REVISING LEGAL CUSTODY AND PHYSICAL PLACEMENT**

State law specifies that a court may modify or deny physical placement periods for a parent at any time in two types of circumstances: (1) if the physical placement rights would endanger the child's physical, mental, or emotional health; or (2) if the parent has repeatedly and unreasonably failed to exercise the periods of physical placement. [s. 767.451 (2m) and (4), Stats.]

Outside of those serious circumstances, however, a court's authority to revise a legal custody or physical placement order is limited.

During the first two years after a legal custody or physical placement order has been entered, the statutes treat any revisions very strictly. In accordance with the state's goal of providing continuity, stability, and predictability for a child, a court cannot modify an order for legal custody or physical placement that would substantially alter a child's time with each parent within two years of the final judgment, unless custodial conditions are physically or emotionally harmful to the best interests of the child. This is sometimes called a two-year truce period or cooling off period, and circumstances must be compelling for a court to intervene during that time. [s. 767.451 (1) (a), Stats.]

After the first two years, a court may modify an order for legal custody or physical placement if: (1) there has been a substantial change in circumstances; and (2) the court has determined that the modification is in the best interests of the child. A court must presume that maintaining the status quo allocation of decision-making and physical placement is in the child's best interests, unless rebutted by the parent seeking the modification. [s. 767.451 (1) (b), Stats.]

Wisconsin courts have reviewed some common circumstances that bring changes to a family, to determine whether the situation may be considered a substantial change in circumstances that would allow a reconsideration of the prior order. For example, Wisconsin courts have stated that the fact that a child grows older does not, in and of itself, create a substantial change in circumstances. Nor does a change in economic circumstances, or a change in a parent's marital status. [s. 767.451 (1) (b) 3., Stats.; *Greene v. Hahn*, 2004 WI App 214.]

If a court finds that there has been a substantial change in circumstances since the prior order and the status quo presumption has been rebutted, a court must then consider the best interests of the child. If a change may be appropriate, a court must consider the same factors that apply in making an initial determination, as listed above. The factors remain subject to the considerations for domestic abuse and for active duty by a service member. [s. 767.451 (5m), Stats.]



Separate, specific procedures and standards apply to modification of an order for legal custody or physical placement if a parent is moving at least 100 miles from the other parent.<sup>3</sup> [s. 767.481, Stats.]

---

<sup>3</sup> The relocation provisions were recently updated and revised in 2017 Wisconsin Act 203.



## PART II – CHILD SUPPORT

---

Once a child’s physical placement schedule with the parents is determined, a court will set child support. In most cases, child support is determined from both parents’ incomes and the comparative number of overnights the child has in physical placement with each parent. [s. 49.22 (9), Stats.]

Child support is determined before determining any maintenance to a spouse, but child support and spousal maintenance may be combined into one family support obligation. [s. 767.531, Stats.; s. DCF 150.03 (6), Wis. Adm. Code.]

Income that is available for determining child support includes gross income, which may be modified for business expenses and income from assets. Income may also be imputed to a parent based on earning capacity. In determining a parent’s ability to earn, a court will consider the parent’s education, training, recent work experience, prior earnings, current physical and mental health, history of child care responsibilities, and the availability of work. [ss. DCF 150.02 (13), (14), and (15) and 150.03 (1) (intro.), Wis. Adm. Code.]

### DETERMINING CHILD SUPPORT

Under federal law,<sup>4</sup> each state is required to set guidelines for child support that are developed from economic data on the cost of raising children and analyses of case data. The guidelines must be reviewed at least once every four years.<sup>5</sup> [42 U.S.C. s. 667; 45 C.F.R. s. 302.56.]

In Wisconsin, if a child has 91 or fewer overnights per year with one parent, that parent’s support obligation is a straight percentage of the parent’s gross income, without consideration of the other parent’s income. The standard is: 17% of gross income for one child; 25% for two children; 29% for three children; 31% for four children; and 34% for five or more children.<sup>6</sup> [s. 767.511 (1j), Stats.; ss. DCF 150.02 (25m) and (28) and 150.03 (1), Wis. Adm. Code.]

More commonly, if a child has at least 92 overnights per year with each parent, a court determines each parent’s support obligation and then offsets the amount against the other parent’s obligation in a specific “shared-placement” formula. [ss. DCF 150.02 (25m) and 150.04 (2), Wis. Adm. Code.]

A court must also follow specified formulas for low-income or high-income circumstances, or circumstances where a parent already has an obligation either to a marital

---

<sup>4</sup> The federal law was enacted in P.L. 98-378 on August 16, 1984, and took effect October 1, 1987.

<sup>5</sup> The Department of Children and Families convened an advisory panel in 2015 for its quadrennial review of the child support guidelines. The panel recommended a number of refinements to certain aspects of the calculations, which were adopted in Clearinghouse Rule 16-075, and took effect July 1, 2018.

<sup>6</sup> For a table that converts the percentage standard to a dollar amount at various levels of monthly income, see ch. DCF 150 Appendix A, Wis. Adm. Code.

child in an intact family or to a child under any prior child support order.<sup>7</sup> [s. DCF 150.04 (1) and (3) to (6), Wis. Adm. Code.]

The specified formulas may be challenged only if a court finds that the standard is unfair to a child or to either of the parents. In considering whether to deviate from the standard, a court must consider specific factors, such as each parent's financial resources, the standard of living the child would have enjoyed if the family had remained intact, the cost of daycare, the child's educational needs, and the best interests of the child. However, because the formulas address most circumstances, the deviation factors are seldom used. [s. 767.511 (1m) and (1n), Stats.]

## **DETERMINING OTHER ASPECTS OF FINANCIAL SUPPORT**

Other aspects of financial support are also part of a child support order, such as health care premiums, a child's tax dependency exemption, and routine or variable expenses for a child.

A court must specifically assign responsibility for a child's health care expenses, and may require a parent to initiate or continue health insurance coverage for the child. A court may also assign a child's tax dependency exemption to the parent paying child support, which may be claimed so long as that parent has actually made the payments. [ss. 767.511 (1) (b) and (c) and 767.513, Stats.; ss. DCF 150.03 (10) and 150.05 (1), Wis. Adm. Code.]

When a child has shared placement with at least 92 overnights per year with each parent, each parent generally is assigned responsibility for the child's variable support costs in proportion to the time that the child has placement with each parent, based on a detailed list of the costs provided to the court. However, an order for variable costs may take into due consideration a disparity in the parents' incomes and transportation costs associated with the placement. [s. DCF 150.04 (2) (b) 6., Wis. Adm. Code.]

Basic support costs are the routine daily expenses for a child, including food, clothing, shelter, transportation, personal care, and incidental recreational costs. In contrast, variable costs are for expenses that may depend on the parents' standard of living, such as child care, tuition, special needs, and extracurricular activities. [s. DCF 150.02 (3) and (29), Wis. Adm. Code.]

## **CONTINUING JURISDICTION FOR CHILD SUPPORT**

Child support is required until a child reaches age 18, and must continue if a child is pursuing an accredited course of instruction leading to a high school diploma or its equivalent and the child is under age 19. This means that a court has continuing jurisdiction to enforce or modify a child support obligation throughout a child's upbringing. A court has no authority and may not order child support into adulthood. [s. 767.511 (4), Stats.]

However, parents may agree to a support obligation after a child has reached the age of majority, such as for college expenses or special needs, which a court may incorporate into its

---

<sup>7</sup> For a table that lists the child support amount at low income levels, see ch. DCF Appendix C, Wis. Adm. Code. For the percentage that applies to the portion of income that exceeds \$7,000 and \$12,500 per month, see s. DCF 150.04 (5) (c) and (d), Wis. Adm. Code.

judgment of divorce, legal separation, annulment, or paternity. Any such agreement is binding and enforceable through court action. [*Bliwas v. Bliwas*, 47 Wis. 2d 635 (1970).]

Past support may not be ordered for any period before a child's birth. In a paternity action or voluntary acknowledgment of paternity, past support generally may not be ordered for any period before a request for paternity or support is filed with a court, unless the action was delayed because of duress, threats, promises, or evasion. [ss. 767.511 (5), 767.805 (4m), and 767.89 (4), Stats.]

## REVISING CHILD SUPPORT

As in legal custody and physical placement, a court may modify an order for child support only if there has been a substantial change in circumstances. The statutes identify a few circumstances that automatically qualify as a substantial change, unless rebutted: 33 months have passed since the last child support order; a parent has begun receiving aid under the Wisconsin Works program; or a parent has failed to provide an annual financial disclosure. [s. 767.59 (1f) (a) and (b), Stats.]

Additional circumstances are identified that could, but do not automatically, qualify as a substantial change in circumstances. These primarily include a change in the payer's income or earning capacity, or a change in the child's needs. [s. 767.59 (1f) (c), Stats.]

Other circumstances, such as incarceration of a parent who is responsible for paying child support, are not explicitly identified in the statutes, but have been acknowledged by the courts as appropriate for consideration on a case-by-case basis, under an examination of the totality of the circumstances. [*Rottscheit v. Dumler*, 2003 WI 62.]

The statutes place certain limits on an order that is revising child support. In particular, a court cannot revise the amount of child support that was due before a notice of the action to revise child support was given to the other parent, except to correct any errors in the calculations. A court also may not give a credit against support that was due before a notice of the action to revise child support was given, except in limited circumstances where: payments were clearly provided directly to the other parent; a child received federal disability benefits under the payer's disability benefits; the parents resumed living together; or a child lived with the payer by agreement of the parties. [s. 767.59 (1m) and (1r), Stats.]

As a general principle, the statutes specify that a parent is not excused from a child support obligation even if the other parent has violated the child's right to physical placement with the parent. [s. 767.511 (3), Stats.]

In an action to modify a child support order, a court must apply the same formulas that apply in making an initial determination, as described above. [s. 767.59 (2), Stats.]