To: Members, Legislative Study Committee on Child Placement and Support
From: Family Law Section, State Bar of Wisconsin
Date: September 7, 2018
Re: Chapter 767, physical placement

The State Bar of Wisconsin's Family Law Section appreciates the study committee's interest and dedication to the issue of child placement, and is grateful for the opportunity to submit feedback not only on current law related to physical placement, but provide information on the Board's past involvement with legislative efforts to modify current statute and provide suggestions for moving forward.

Current Law

Currently, Wis. Stat. § 767.41 sets forth provisions for custody and physical placement in family court actions. Specifically, sections (4) and (5) outline how to allocate and determine physical placement. They focus on maximizing placement to the highest degree possible taking into account the geographic separation and accommodation for different households. The statute mandates the primary means for determining placement must be what is in the best interest of the child(ren). The factors outlined in section (5) represent many predictors indicative of positive child adjustment when the parents are living in separate households. The Board believes these sections adequately address the difficult decision of determining a placement schedule, but the Board is open to some adjustments as stated below.

Background

For over 20 years, various groups have introduced legislation that would mandate equal placement for children in all cases. In each instance the Family Law Board has taken positions against such legislation that would have a "cookie cutter" approach to placement. Courts need discretion to address the needs of children in different situations and a "one-size-fits-all" approach is not in children's best interest. The Legislative Study Committee on child support and placement in 1994 studied the placement statutes and recommended the change in language that is part of the current statute to "maximize" placement for children with both parents. This is not, however, an automatic 50/50 division of children as if they were property.

In recent years, the Board has opposed efforts to modify how physical placement decisions are reached by the courts where such modifications would deny courts discretion needed to make decisions that are suited to individual children in their unique family. As previously discussed, current law mandates that best interests of the child(ren) is the standard by which physical placement decisions should be made. Wis. Stat. § 767.41(5) outlines factors judges and court commissioners must follow when determining physical placement schedules. Over the years, legislation has been brought forward to shift the focus from protecting and promoting the best

STATE BAR OF WISCONSIN

P.O. Box 7158 | Madison, WI 53707-7158 5302 Eastpark Blvd. | Madison, WI 53718-2101
(800) 728-7788 (608) 257-3838 Fax (608) 257-5502 www.wisbar.org ldavis@wisbar.org

interests of the child(ren) to creating a presumption that a schedule equalizing placement for the parents to the highest degree possible should be automatic, regardless of the child's age or needs.

The Board opposes this legislation for several reasons:

1. Equal placement presumptions place the parents' interests, including financial interests, above that of the child(ren). Public policy requires that there must be a special "child focus" when the courts decide custody and physical placement matters. Equal placement rejects that focus by placing parents' rights ahead of the child(ren).
2. Presumption of equal placement will place victims of domestic abuse and their child(ren) at risk unless they are willing to participate in the significant costs related to, and the emotional toll created by, full litigation against their abuser—including a trial—or they will have to give in to an abusive partner's demands.
3. Pro se litigants, which currently constitute well over 60% of all divorces, (80% in some areas) will have very little likelihood of knowing how to present a case to overcome the presumption, even in cases where equal placement is undeniably not in the children's best interests (e.g., absentee parent, abusive parent, parent with AODA problems).
4. Equal placement presumptions may significantly increase litigation, not only at the trial level, but in the Wisconsin Court of Appeals as well, and result in more people hiring attorneys to fight custody and placement disputes rather than consider alternative forms of dispute resolution, such as mediation.

Shared Placement Working Group

While the Board believes that current law is an effective means for determining placement, the Board also recognizes that other interest groups do not share this assessment and have routinely made efforts to work with representatives from father's advocacy groups in an effort to make the legal system more effective, more efficient, and more affordable. In 2017, several members of both organizations met informally to discuss a proposed presumed equal placement bill. Prior to the end of the legislative session in the spring of 2018, the groups came together again to form a working group at an effort to discuss legislation regarding placement and a potential compromise approach. This informal working group, consisting of members of the Family Law Board and representatives from various father's rights groups, centered the discussion on modifications to Wis. Stat. § 767.41 sections (4), (5), and (6), focusing on maximizing time each parent has with their child while modifying the factors by which physical placement is determined by a judge or court commissioner. The Family Law Board then reviewed the working group's proposal and voted to support those changes at their August board meeting.

Proposal Description

The proposal does not change the presumption that the best interest of the child is the means by which physical placement should be determined, as previous legislation has done. Rather, it amends Wis. Stat. § 767.225 (1)(am) and 767.41 (4), (5), and (6) to modify the factors by which physical placement should be considered, while emphasizing that maximizing the amount of time a child spends with each parent, to the highest degree possible, is in the child(ren)'s best interest. The proposal also requires a judge or court commissioner to explain why they found

shared physical placement not to be in the best interest of the child(ren) if an order for shared physical placement is not granted.

When the law was changed to provide for placement that "maximizes the amount of time a child spends with each parent," that high standard of placement was fairly unique in the United States. Only four other states have such a high standard (Alaska, Arizona, Illinois and South Dakota (which requires placement to be in proportion with what is in the best interests of the child). At that time, the most frequent language as to placement in most states was language that suggests no preference, laws that simply encourage shared placement, and laws that require "frequent and continuing" or "reasonable" periods of placement (including, Alabama, Colorado, Hawaii, Kansas, Maine, Michigan, Missouri, Montana, Nevada, New Hampshire, New Jersey, and Pennsylvania).

Despite some representations to the contrary, presumed equal placement is available in three jurisdictions at this time: The District of Columbia, Kentucky (so long as there is no evidence of domestic violence in the last three years) and Utah (which has established that 30% placement is presumed to be the minimum placement so long as other criteria are met, including consideration of the morals of the parents). Approximately eight states have been reviewing similar legislation, in addition eight states bills either died in committee or did not have a companion Senate bill, Virginia passed legislation with no presumptions, and a presumptive equal placement bill was vetoed by the Governor of Florida.

Although the members of the section do not believe that a bill that presumes equal placement is in the best interest of the child, the section members agree that the current language as to placement, in the statutes, can be modified to better achieve the intended goal of maximizing placement. The purpose in this proposal is to emphasize the high standard of "maximizing" placement, encourage the courts to focus on the most important factors in the statute as to placement, and require the courts to make specific findings not only as to the basis of the placement but as to why shared placement was not considered to be in the best interests of the child.

Rationale for Proposed Changes

In the initial workgroup meeting, the focus of all participants quickly steered toward Ch. 767.41 (5), involving the factors and then proceeded to evaluate not only the language contained in each of the factors, but discuss how courts throughout Wisconsin apply them differently. Some members indicated that judges and court commissioners applied each of the factors with equal consideration, while others would give more weight to factors listed first in the list. The working group analyzed the necessity and wording of each past factor, then reorganized and clarified the past factors. Some past factors were eliminated completely.

In addition, there was much discussion about the term "maximize" specifically, what it means, and how it can be interpreted in various ways. In Wis. Stat. § 767.41(4)(a)(2), members believed that reversing the order of the sentences would put the focus on setting a placement schedule maximizing time with each parent to the highest degree possible, while also requiring the court to consider the factors for determining placement. Again, while both maximizing placement and

weighing the factors for placement are supposed to be given equal consideration, practitioners expressed that judges and court commissioners can be inconsistent in doing so and often apply the factors first as that was the first sentence in that section, so the order was reversed in an attempt to give maximizing placement greater consideration.

Language was also added to clarify that any allocation presumes that maximum involvement of both parents is in the best interest of the child. The greatest distance between the father's advocate groups and the State Bar Family Law Section has been the perception that any changes that require presumed equal placement ignores the best interests of the child. In spite of significant effort at narrowing that gap, the working group was not able to bridge it entirely. The State Bar Family Law Section believes strongly that the best interests of the child must be first and foremost, but that the best interests standard can be complimented with orders that start with a consideration of shared physical placement. The proposed changes attempts to emphasize the importance of considering shared placement in all circumstances that warrant such a finding while recognizing that the most important determination is to always make findings that support the best interests of the child. All three changes focus on these dual concerns, including the requirement that judges and court commissioner explain his or her reasoning for not ordering shared physical placement.

Wisconsin is currently in the vanguard of states that recognize the importance of maximizing the placement time between children and their parents. The Family Law Section consistently supports the best interests of children, the protection of victims of domestic abuse, the recognition of the increased cost to litigation by such proposed legislation, and the concerns over how pro se litigants, who represent the vast majority of persons involved in family law disputes, will be able to adequately and fairly address such presumptions. The proposed changes above maintain Wisconsin's high regard for physical placement that is best for children of this state. The Family Law Section and those bar members who participated in this working group support this proposal as a viable and reasonable modification to current law. The State Bar Family Law Section respectfully requests the Legislative Study Committee on Child Placement and Support give consideration to this proposal.

For more information, please do not hesitate to contact the State Bar lobbyist, Lynne Davis, ldavis@wisbar.org or (608)852-3603.

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.

767.225 Orders during pendency of action.

(1) TEMPORARY ORDERS. Except as provided in ch. 822, in an action affecting the family the court may, during the pendency of the action, make just and reasonable temporary orders concerning the following matters:

(a) 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. 767.41 (3), in a manner consistent with s. 767.41, except that the court may order sole legal custody without the agreement of the other party and without the findings required under s. 767.41 (2) (b) 2. An order under this paragraph is not binding on a final custody determination.

(am) Upon the request of a party, granting periods of physical placement to a party in a manner consistent with s. 767.41. The court shall make a determination under this paragraph within 30 days after the request for a temporary order regarding periods of physical placement is filed. **If the Court does not grant an order for shared physical placement, the Court must enter specific findings of fact as to the reason(s) shared physical placement would be contrary to the best interests of the child.**

(ap) Upon the request of a party, granting periods of electronic communication to a party in a manner consistent with s. 767.41. The court or circuit court commissioner shall make a determination under this paragraph within 30 days after the request for a temporary order regarding periods of electronic communication is filed.

Sec. 767.41 (4), (5) and (6): Proposed Modified Statute

(4) ALLOCATION OF PHYSICAL PLACEMENT.

(a)

1. 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.

2. The court shall set 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, taking into account geographic separation and accommodations for different households. In determining the allocation of periods of physical placement, the court shall consider each case on the basis of the factors in sub. (5) (am), subject to sub. (5) (bm). ~~The court shall set 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, taking into account geographic separation and accommodations for different households.~~

3. Any allocation of physical placement presumes that the maximum involvement and cooperation of both parents regarding the physical, mental, and emotional well-being of their child is in the best interest of that child.

(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, if the parties were married, to the former spouse.

(cm) If a court denies periods of physical placement under this section, the court shall give the parent that was denied periods of physical placement the warning provided under s. 48.356.

(e) If the court grants periods of physical placement to more than one parent, the court may grant to either or both parents a reasonable amount of electronic communication at reasonable hours during the other parent's periods of physical placement with the child. Electronic communication with the child may be used only to supplement a parent's periods of physical placement with the child. Electronic communication may not be used as a replacement or as a substitute for a parent's periods of physical placement with the child. Granting a parent electronic communication with the child during the other parent's periods of physical placement shall be based on whether it is in the child's best interest and whether equipment for providing electronic communication is reasonably available to both parents. If the court grants electronic communication to a parent whose physical placement with the child is supervised, the court shall also require that the parent's electronic communication with the child be supervised.

(5) FACTORS IN CUSTODY AND PHYSICAL PLACEMENT DETERMINATIONS.

(am) Subject to pars. (bm) and (c), in determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one parent or potential custodian over the other on the basis of the sex or race of the parent or potential custodian. Subject to pars. (bm) and (c), the court shall consider the following factors in making its determination **of maximizing the amount of time the child spends with each parent**:

1. The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.

2. The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.

3. The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party. ~~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.~~

4. Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party. ~~The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any~~

~~reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future.~~

5. The interaction and interrelationship of the child with his or her siblings, and any other person who may significantly affect the child's best interest. ~~The child's adjustment to the home, school, religion and community.~~

6. The interaction and interrelationship of the child with his or her parent or parents and the amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to maximize the placement with the child. ~~The age of the child and the child's developmental and educational needs at different ages.~~

7. Whether any of the following has or had a significant problem with alcohol or drug abuse:

a. A party;

b. A person with whom a parent of the child has a dating relationship, as defined in s. 813.12 (1) (ag).

c. A person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household.

~~Whether the mental or physical health of a party, minor child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being.~~

8. The child's adjustment to the home, school, religion and community. ~~The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.~~

9. The age of the child and the child's developmental and educational needs at different ages. ~~The availability of public or private child care services.~~

10. Whether the mental or physical health of a party, minor child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being. ~~The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.~~

11~~m~~. Whether any of the following has a criminal record ~~and~~ *or* whether there is evidence that any of the following has engaged in abuse, as defined in s. 813.122 (1) (a), of the child *as* defined in s. 813.122 (1) (b) or any other child or neglected the child or any other child:

a. A party;

b. A person with whom a parent of the child has a dating relationship, as defined in s. 813.12 (1) (ag).

c. A person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household.

~~Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.~~

12. Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20 (1m) or domestic abuse as defined in s. 813.12 (1) (am). ~~Whether there is evidence that a party engaged in abuse, as defined in s. 813.122 (1) (a), of the child, as defined in s. 813.122 (1) (b).~~

~~**12m.** Whether any of the following has a criminal record and whether there is evidence that any of the following has engaged in abuse, as defined in s. 813.122 (1) (a), of the child or any other child or neglected the child or any other child:~~

~~**a.** A person with whom a parent of the child has a dating relationship, as defined in s. 813.12 (1) (ag).~~

~~**b.** A person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household.~~

13. The reports of appropriate professionals if admitted into evidence. ~~Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20 (1m) or domestic abuse as defined in s. 813.12 (1) (am)~~

14. Such other factors as the court may in each individual case determine to be relevant. ~~Whether either party has or had a significant problem with alcohol or drug abuse.~~

~~**15.** The reports of appropriate professionals if admitted into evidence.~~

~~**16.** Such other factors as the court may in each individual case determine to be relevant.~~

(bm) If the court finds under sub. (2) (d) that a parent has engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), the safety and well-being of the child and the safety of the parent who was the victim of the battery or abuse shall be the paramount concerns in determining legal custody and periods of physical placement.

(c) If a parent is a service member, as defined in sub. (2) (e) 1., the court may not consider as a factor in determining the legal custody of a child whether the service member has been or may be called to active duty in the U.S. armed forces and consequently is, or in the future will be or may be, absent from the service member's home.

(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. **If the Court does not grant an order for shared physical placement, the Court must enter specific findings of fact as to the reason(s) shared physical placement would be contrary to the best interests 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 (1s), 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 benefits under ss. 49.141 to 49.161 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.