CHAPTER 767

ACTIONS AFFECTING THE FAMILY

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NOTE: Chapter 767 was substantially renumbered and revised by 2005 Wis. Act 443. Explanatory notes are contained in the Act.

SUBCHAPTER I

DEFINITIONS, SCOPE, JURISDICTION, AND RECOGNITION OF JUDGMENTS

767.001 Definitions. In this chapter:

(1) "Action affecting the family" means any of the following actions:

(a) To affirm marriage.

(b) Annulment.

(c) Divorce.

(d) Legal separation (formerly divorce from bed and board).

(e) Custody.

(f) For child support.

(g) For maintenance payments.

(h) For property division.

(i) To enforce or modify a judgment or order in an action affecting the family granted in this state or elsewhere or an order granted under s. 48.355 (4g) (a) or 938.355 (4g) (a).

(j) For periodic family support payments.

(k) Concerning periods of physical placement or visitation rights to children, including an action to relocate and reside with a child under s. 767.481.

(L) To determine paternity.

(m) To enforce or revise an order for support entered under s. 48.355 (2) (b) 4. or (4g) (a), 48.357 (5m) (a), 48.363 (2), 938.183 (4), 938.355 (2) (b) 4. or (4g) (a), 938.357 (5m) (a), or 938.363 (2).

(1b) "Court" includes the circuit court commissioner when the circuit court commissioner has been authorized by law to exercise the authority of the court or has been delegated that authority as authorized by law.

(1d) "Department" means the department of children and families.

(1f) "Divorce" means dissolution of the marriage relationship.

(1g) "Electronic communication" means time during which a parent and his or her child communicate by using communication tools such as the telephone, electronic mail, instant messaging, video conferencing or other wired or wireless technologies via the Internet, or another medium of communication.

(1m) "Genetic test" means a test that examines genetic markers present on blood cells, skin cells, tissue cells, bodily fluid cells or cells of another body material for the purpose of determining the statistical probability of an alleged father's paternity.

(1s) "Joint legal custody" means the condition under which both parties share legal custody and neither party's legal custody rights are superior, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order.

(2) "Legal custody" means:

(a) With respect to any person granted legal custody of a child, other than a county agency or a licensed child welfare agency under par. (b), the right and responsibility to make major decisions concerning the child, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order.

(b) With respect to the department or a county agency specified in s. 48.56 (1) or a licensed child welfare agency granted legal custody of a child, the rights and responsibilities specified under s. 48.02 (12).

(2m) "Major decisions" includes, but is not limited to, decisions regarding consent to marry, consent to enter military service, consent to obtain a motor vehicle operator's license, authorization for nonemergency health care and choice of school and religion.

(5) "Physical placement" means the condition under which a party has the right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child's care, consistent with major decisions made by a person having legal custody.

(6) "Sole legal custody" means the condition under which one party has legal custody.

History: 1987 a. 355; 1995 a. 100, 279, 404; 1997 a. 3, 27, 35; 2005 a. 174; 2005 a. 443 ss. 7, 8, 15, 16; 2007 a. 20; 2015 a. 373; 2017 a. 203.

NOTE: 1987 Wis. Act 355 and 2005 Wis. Act 443, contain explanatory notes.

Sub. (2m) confers the right to choose a child's religion on the custodial parent. Lange v. Lange, 175 Wis. 2d 373, N.W.2d (Ct. App. 1993).

A custodial parent's right to make major decisions for the children does not give that parent the right to decide whether the actions of the noncustodial parent are consistent with those decisions. Wood v. DeHahn, 214 Wis. 2d 221, 571 N.W.2d 186 (Ct. App. 1997), 96–3642.

Sub. (1) (i) allows all actions to modify a judgment in an action affecting marriage to be commenced in any court having jurisdiction under s. 767.01. 68 Atty. Gen. 106.

Family Court or Not? Raising Child Abuse Allegations Against a Parent. Kornblum & Pollack. Wis. Law. Mar. 2020.

767.005 Scope. This chapter applies to actions affecting the family.

History: 2005 a. 443.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

767.01 Jurisdiction. (1) GENERALLY. The circuit courts have jurisdiction of all actions affecting the family and have authority to do all acts and things necessary and proper in those actions and to carry their orders and judgments into execution as prescribed in this chapter. Except as provided in subs. (2) and (2m), jurisdiction may be exercised as provided under ch. 801.

(2) PATERNITY AND CHILD SUPPORT. In an action to establish paternity or to establish or enforce a child support obligation, in regard to a child who is the subject of the action, a person is subject to the jurisdiction of the courts of this state as provided in s. 769.201 (1m) or 801.05.

(2m) CHILD CUSTODY. All proceedings relating to the custody of children shall comply with the requirements of ch. 822.

History: 1975 c. 39; 1977 c. 449; 1979 c. 32 s. 50; 1979 c. 196, 352; Stats. 1979 s. 767.01; 1987 a. 27; 1993 a. 326; 2005 a. 443 ss. 10 to 13; 2009 a. 321; 2015 a. 82 s. 12.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

Cross–reference: See s. 765.001 for provision as to intent and construction of this chapter.

The trial court has broad authority to enforce its family court judgments and may employ any remedy customarily available to courts of equity. It was appropriate to direct the defendant to pay the plaintiff's medical expenses when the defendant had not converted an insurance policy as ordered under a divorce decree. Rotter v. Rotter, 80 Wis. 2d 56, 257 N.W.2d 861 (1977).

When a husband complied with the original court order to make property division installment payments, the court had no authority to order the husband to pay the wife's income tax on installments. Wright v. Wright, 92 Wis. 2d 246, 284 N.W.2d 894 (1979).

When possession of the party's homestead was awarded by the divorce judgment to the wife to be sold upon her death with the proceeds divided between the parties, the family court and probate court had concurrent jurisdiction. Morrissette v. Morrissette, 99 Wis. 2d 467, 299 N.W.2d 590 (Ct. App. 1980).

A circuit court does not have subject matter jurisdiction in a divorce action to determine attorney fees between an attorney and client that the attorney continues to represent in the divorce action. Stasey v. Stasey, 168 Wis. 2d 37, 483 N.W.2d 221 (1992).

The joinder of divorce and contract actions between spouses is not required. Caulfield v. Caulfield, 183 Wis. 2d 83, 515 N.W.2d 278 (Ct. App. 1994).

When one party to a divorce dies during the action, the court loses jurisdiction, including jurisdiction to enforce prior orders. Socha v. Socha, 183 Wis. 2d 390, 515 N.W.2d 337 (Ct. App. 1994).

An injunction against a man, whose petition to establish himself as father of two children had been denied, to stay away from the children until they reach age 18 was within the court's power to enforce its judgments and orders. Paternity of C.A.S. & C.D.S., 185 Wis. 2d 468, 518 N.W.2d 285 (Ct. App. 1994).

A divorce action terminates on the death of a spouse. After the death, an order prohibiting an act in regard to marital property entered in the divorce may not be enforced under this chapter. As the parties are legally married at the time of death, the sole remedy for resolving disputes over marital property lies under s. 766.70. Socha v. Socha, 204 Wis. 2d 474, 555 N.W.2d 152 (Ct. App. 1996), 95–1641.

A family court has jurisdiction to hear equitable claims against third parties that affect the rights of parties to a divorce, such as a claim against a third–party title holder of property claimed to actually be part of the marital estate. Zabel v. Zabel, 210 Wis. 2d 336, 565 N.W.2d 240 (Ct. App. 1997), 96–3092.

There is no authority in this chapter to allow a name change for children in a divorce action. Jocius v. Jocius, 218 Wis. 2d 103, 580 N.W.2d 708 (Ct. App. 1998), 96–2746.

A cause of action under s. 766.70 requires that the complained of conduct arise as a result of the marital relationship and a breach of the good faith duty between spouses. Once a divorce is commenced, the claim must be resolved in divorce court. A cause of action between spouses arising outside the marital relationship, such as a stockbroker–client relationship, does not fall within s. 766.70 and may be maintained independent of the divorce. Knafelc v. Dain Bosworth, Inc., 224 Wis. 2d 346, 591 N.W.2d 611 (Ct. App. 1999), 98–0067.

Chapter 822, the Uniform Child Custody Jurisdiction Act, does not, in and of itself, establish a sufficient statutory basis for personal jurisdiction over a nonresident defendant in a paternity proceeding. Paula M.S. v. Neal A.R., 226 Wis. 2d 79, 593 N.W.2d 486 (Ct. App. 1999), 98–1158.

A common law action for unjust enrichment cannot be litigated in a divorce action. Dahlke v. Dahlke, 2002 WI App 282, 258 Wis. 2d 764, 654 N.W.2d 73, 02–0194.

767.041 Full faith and credit; comity. (1) ACTIONS IN COURTS OF OTHER STATES. (a) Full faith and credit shall be given in all courts of this state to a judgment in any action affecting the family, except an action relating to child custody, by a court of competent jurisdiction in another state, territory, or possession of the United States, when both spouses personally appear or when the respondent has been personally served. Full faith and credit shall also be given in all courts of this state to the amount of arrearages owed for nonpayment or late payment of a child support, family support, or maintenance payment under an order issued by a court of competent jurisdiction in another state, territory, or possession of the United States. A court in this state may not adjust the amount of arrearages owed except as provided in s. 767.59 (1m).

(b) Full faith and credit shall be given in all courts of this state to a determination of paternity made by any other state, whether established through voluntary acknowledgment or an administrative or judicial process.

(2) ACTIONS IN COURTS OF FOREIGN COUNTRIES. Any court of this state may recognize a judgment in any action affecting the family involving Wisconsin domiciliaries, except an action relating to child custody, by a court of competent jurisdiction in a foreign country, in accordance with the principles of international comity.

(3) CHILD CUSTODY ACTIONS. All matters relating to the effect of the judgment of another court concerning child custody are governed by ch. 822.

History: 1977 c. 105; 1979 c. 32 s. 50; 1979 c. 352 s. 39; Stats. 1979 s. 767.21; 1989 a. 212; 1993 a. 481; 2005 a. 443 s. 82; Stats. 2005 s. 767.041.

Full faith and credit is not applicable when a decree or judgment is obtained in a jurisdiction outside of the United States. Estate of Steffke, 65 Wis. 2d 199, 222 N.W.2d 628.

A Wisconsin court has equitable jurisdiction to decide issues of maintenance and property division when an out–of–state divorce judgment fails to address those issues. Haeuser v. Haeuser, 200 Wis. 2d 750, 548 N.W.2d 750 (Ct. App. 1996), 95–1087.

767.055 Uniform Divorce Recognition Act. (1) EFFECT OF FOREIGN DIVORCE BY STATE DOMICILIARY. A divorce obtained in another jurisdiction is of no force or effect in this state if the court in the other jurisdiction lacks subject matter jurisdiction to hear the case because both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced.

(2) PROOF. Proof that a person obtaining a divorce in another jurisdiction was domiciled in this state within 12 months prior to the commencement of the divorce proceeding and resumed residence in this state within 18 months after the date of the person's departure from this state, or that at all times after the person's departure from this state and until the person's return the person maintained a place of residence within this state, is prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

(3) CONSTRUCTION. This section shall be interpreted and construed so as to effectuate its general purpose to make uniform the law of those states that enact it.

(4) TITLE. This section may be cited as the Uniform Divorce Recognition Act.

History: 1977 c. 105; 1979 c. 32 s. 50; Stats. 1979 s. 767.22; 1993 a. 486; 2005 a. 443 s. 85; Stats. 2005 s. 767.055.

Comity cannot be accorded a Mexican decree if no domicile existed in that foreign jurisdiction. Estate of Steffke, 65 Wis. 2d 199, 222 N.W.2d 628 (1974).

SUBCHAPTER II

PROVISIONS OF GENERAL APPLICATION

767.105 Information from the office of family court commissioner. (1) INFORMATION ON AVAILABLE SERVICES. Upon the filing of an action affecting the family, the office of family court commissioner shall inform the parties of any services, including referral services, offered by the office of family court commissioner and by the director of family court services under s. 767.405.

(2) OTHER INFORMATION ON REQUEST. Upon request of a party to an action affecting the family, including a revision of judgment or order under s. 767.451 or 767.59:

(a) The office of family court commissioner shall, with or without charge, provide the party with written information on the following, as appropriate to the action commenced:

1. The procedure for obtaining a judgment or order in the action.

2. The major issues usually addressed in such an action.

3. Community resources and family court services available to assist the parties.

4. The procedure for setting, modifying and enforcing child support awards or modifying and enforcing legal custody or physical placement judgments or orders.

(b) The office of family court commissioner shall provide a party, for inspection or purchase, with a copy of the statutory provisions in this chapter generally pertinent to the action.

History: 1977 c. 105, 271, 447, 449; 1979 c. 32 s. 50; 1987 a. 355; 2001 a. 61; 2005 a. 443 s. 43; Stats. 2005 s. 767.105.

767.117 Prohibited acts during pendency of action. (1) PROHIBITIONS. In an action affecting the family, the petitioner upon filing the petition, the joint petitioners upon filing the joint petition and the respondent upon service of the petition are prohibited from doing any of the following:

(a) Harassing, intimidating, physically abusing or imposing any restraint on the personal liberty of the other party or a minor child of either of the parties.

(b) If the action is one under s. 767.001 (1) (a), (b), (c), (d), (h), or (i), encumbering, concealing, damaging, destroying, transferring, or otherwise disposing of property owned by either or both of the parties, without the consent of the other party or an order of the court, except in the usual course of business, in order to secure necessities, or in order to pay reasonable costs and expenses of the action, including attorney fees.

(c) Unless the action is one under s. 767.001 (1) (g) or (h), without the consent of the other party or an order of the court, relocating and establishing a residence with a minor child of the parties more than 100 miles from the residence of the other party, removing a minor child of the parties from the state for more than 90 consecutive days, or concealing a minor child of the parties from the other party.

(2) DURATION OF PROHIBITIONS. The prohibitions under sub. (1) shall apply until the action is dismissed, until a final judgment in the action is entered, or until the court orders otherwise.

(3) VIOLATIONS. (a) Except as provided in par. (b), a party who violates any provision of sub. (1) may be proceeded against under ch. 785 for contempt of court.

(b) An act in violation of sub. (1) (c) is not a contempt of court if the court finds that the action was taken to protect a party or a minor child of the parties from physical abuse by the other party and that there was no reasonable opportunity under the circumstances for the party to obtain an order under sub. (2) authorizing the action.

History: 1993 a. 78; 2001 a. 61; 2005 a. 443 ss. 51, 64; Stats. 2005 s. 767.117; 2017 a. 203.

767.127 Financial disclosure. (1) REQUIRED DISCLOSURE. In an action affecting the family, except an action to affirm marriage under s. 767.001 (1) (a), the court shall require each party to furnish, on standard forms required by the court, full disclosure of all assets owned in full or in part by either party separately or by the parties jointly. Disclosure may be made by each party individually or by the parties jointly. Assets required to be disclosed include, but are not limited to, real estate, savings accounts, stocks and bonds, mortgages and notes, life insurance, retirement interests, interest in a partnership, limited liability company, or corporation, tangible personal property, future interests whether vested or nonvested, and any other financial interest or source. The court shall also require each party to furnish, on the same standard form, information pertaining to all debts and liabilities of the parties. The form used shall contain a statement in conspicuous print that complete disclosure of assets and debts is required by law and deliberate failure to provide complete disclosure constitutes perjury. The court shall require each party to attach to the disclosure form a statement reflecting income earned to date for the current year and the most recent statement under s. 71.65 (1) (a) that the party has received. The court may on its own initiative and shall at the request of either party require the parties to furnish copies of all state and federal income tax returns filed by them for the past 2 years, and may require copies of those returns for prior years.

(1m) HEALTH INSURANCE INFORMATION FOR MINOR CHILD. In any action affecting the family that involves a minor child, the court shall require, in addition to the disclosure under sub. (1), that each party furnish the court with information regarding the types and costs of any health insurance policies or plans that are offered through each party's employer or other organization. This disclosure shall include a copy of any health care policy or plan that names the child as a beneficiary at the time that the disclosure is filed under sub. (2).

(2) FILING DISCLOSURE FORMS. Disclosure forms required under this section shall be filed within 90 days after the service of

summons or the filing of a joint petition or at a time ordered by the court. Information on the forms shall be updated on the record to the date of hearing.

(3) CONFIDENTIALITY OF DISCLOSED INFORMATION. (a) Except as provided in par. (b), information disclosed under this section and under s. 767.54 is confidential and may not be made available to any person for any purpose other than the adjudication, appeal, modification, or enforcement of judgment of an action affecting the family of the disclosing parties.

(b) The clerk of circuit court shall provide information from court records to the department under s. 59.40 (2) (p).

(4) FAILURE TO TIMELY FILE. If either party fails timely to file a complete disclosure statement as required by this section, the court may accept as accurate any information provided in the statement of the other party or obtained under s. 49.22 (2m) by the department or the county child support agency under s. 59.53 (5).

(5) FAILURE TO DISCLOSE; CONSTRUCTIVE TRUST. If a party intentionally or negligently fails to disclose information required by sub. (1) and as a result any asset with a fair market value of $500 or more is omitted from the final distribution of property, the party aggrieved by the nondisclosure may at any time petition the court granting the annulment, divorce, or legal separation to declare the creation of a constructive trust as to all undisclosed assets, for the benefit of the parties and their minor or dependent children, if any, with the party in whose name the assets are held declared the constructive trustee. The trust shall include such terms and conditions as the court may determine. The court shall grant the petition upon a finding of a failure to disclose assets as required under sub. (1).

History: 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; 1979 c. 352 s. 39; Stats. 1979 s. 767.27; 1985 a. 29; 1987 a. 413; 1993 a. 112, 481; 1995 a. 27 s. 9126 (19); 1995 a. 201, 404; 1997 a. 27, 35, 191; 2001 a. 16, 61, 105; 2005 a. 443 ss. 68, 121, 123; Stats. 2005 s. 767.127; 2011 a. 258.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

In the event of a property division determined by arbitration, the closing of the arbitration record does not create a categorical exception under sub. (2) to alter the general rule of valuing property at the date of divorce, although the closing of the arbitration record could serve as the date of valuation. Franke v. Franke, 2004 WI 8, 268 Wis. 2d 360, 674 N.W.2d 832, 01–3316.

While under s. 767.61 (2) (a) 1. gifted property is generally not subject to division, that is not a hard and fast rule. It was not for a party to unilaterally decide not to disclose property because he or she believed it was not subject to division. Jezeski v. Jezeski, 2009 WI App 8, 316 Wis. 2d 178, 763 N.W.2d 176, 07–2823.

In not revealing that he was a trust beneficiary, a father failed to make proper financial disclosure at the time of a divorce as was required by this section. Under both grantor and nongrantor trusts if there is an obligation to report that trust's income as one's own, there is an obligation to report the income and that obligation makes the income reachable for calculations of child support. Stevenson v. Stevenson, 2009 WI App 29, 316 Wis. 2d 442, 765 N.W.2d 811, 07–2143.

767.13 Impoundment of record. Except as provided in s. 767.127 (3), the record or evidence in an action affecting the family may not be impounded, and access to the record or evidence may not be refused, except by written order of the court for good cause shown. No person may permit a copy of any impounded record or evidence, or the substance of the record or evidence, to be taken by any person other than a party to the action or his or her attorney of record, unless a court orders otherwise.

History: 1977 c. 105, 273; 1979 c. 32 s. 50; 1979 c. 352 s. 39; Stats. s. 767.19; 2005 a. 443 s. 76; Stats. 2005 s. 767.13.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

767.14 Change of address. Within 5 business days after receiving notice of an address change by a party to an action affecting the family, the clerk of circuit court shall enter the new address in the case file for the action.

History: 2017 a. 203.

767.16 Circuit court commissioner or law partner; when interested; procedure. A circuit court commissioner assisting in matters affecting the family or a member of the commissioner's law firm may not appear in any action affecting the family in any court held in the county in which the circuit court commissioner is acting. If a circuit court commissioner or a member of the commissioner's law firm is interested in an action affecting the family and no other circuit court commissioner is available, the presiding judge shall appoint an attorney to act as circuit court commissioner in that action. The appointed attorney shall take and file the oath and receive the compensation provided by law.

History: 1979 c. 32 ss. 50, 92 (4); 1979 c. 176; 1979 c. 352 s. 39; Stats. 1979 s. 767.16; 2001 a. 61; 2005 a. 443.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

767.17 Review of circuit court commissioner decisions. A decision of a circuit court commissioner under this chapter is reviewable under s. 757.69 (8).

History: 2005 a. 443.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

767.18 Actions to affirm marriage. If the validity of a marriage is denied or doubted by either of the parties the other party may commence an action to affirm the marriage. The judgment in an action to affirm marriage shall declare the marriage valid or annul the marriage, and is conclusive upon all persons concerned.

History: 1979 c. 32 s. 50; Stats. 1979 s. 767.04; 2005 a. 443 s. 24; Stats. 2005 s. 767.18.

SUBCHAPTER III

GENERAL PROCEDURE

767.201 Civil procedure generally governs. Except as otherwise provided in the statutes, chs. 801 to 847 govern procedure and practice in an action affecting the family. Except as provided in this chapter, chs. 801 and 802 apply to the content and form of the pleadings and summons in an action affecting the family.

History: 2005 a. 443.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

Because this chapter does not prohibit civil sanctions for frivolous proceedings under s. 802.05, a motion for sanctions under s. 802.05 (2) and (3) in a divorce action under this chapter is governed by the rules of civil procedure. Wenzel v. Wenzel, 2017 WI App 75, 378 Wis. 2d 670, 904 N.W.2d 384, 16–1771.

767.205 Parties; title of actions. (1) PARTIES. The party initiating an action affecting the family is the petitioner. The party responding to the action is the respondent. All references to "plaintiff" in chs. 801 to 807 apply to the petitioner, and all references to "defendant" in chs. 801 to 807 apply to the respondent. Both parties may initiate the petition together by signing and filing a joint petition. The parties to a joint petition are joint petitioners. The parties to a joint petition shall state in the petition that both parties consent to personal jurisdiction and waive service of summons.

(2) WHEN THE STATE IS A REAL PARTY IN INTEREST. (a) The state is a real party in interest within the meaning of s. 803.01 for purposes of establishing paternity, securing reimbursement of aid paid, future support and costs as appropriate in an action affecting the family in any of the following circumstances:

1. An action to establish paternity whenever there is a completed application for legal services filed with the child support program under s. 49.22 or whenever s. 767.80 (6m) or (6r) applies.

2. An action to establish or enforce a child support or maintenance obligation whenever there is a completed application for legal services filed with the child support program under s. 49.22.

3. Whenever aid under s. 48.57 (3m) or (3n), 48.645, 49.19, or 49.45 is provided on behalf of a dependent child or benefits are provided to the child's custodial parent under ss. 49.141 to 49.161.

4. Whenever aid under s. 48.57 (3m) or (3n), 48.645, 49.19, or 49.45 has, in the past, been provided on behalf of a dependent child, or benefits have, in the past, been provided to the child's custodial parent under ss. 49.141 to 49.161, and the child's family is eligible for continuing child support services under 45 CFR 302.33.

(b) 1. Except as provided in subd. 2., in any action affecting the family under a child support enforcement program, an attorney acting under s. 49.22 or 59.53 (5), including any district attor-

ney or corporation counsel, represents only the state. Child support services provided by an attorney as specified in par. (a) do not create an attorney–client relationship with any other party.

2. Subdivision 1. does not apply to an attorney who is employed by the department under s. 49.22 or a county under s. 59.53 (5) or (6) (a) to act as the guardian ad litem of the minor child for the purpose of establishing paternity.

(3) TITLE OF ACTIONS. An action affecting the family described in s. 767.001 (1) (a) to (d) or (g) to (k) shall be entitled "In re the marriage of A.B. and C.D.", except that an independent action for visitation under s. 767.43 (3) shall be entitled "In re visitation with A. B.". An action affecting the family described in s. 767.001 (1) (f) or (m) shall be entitled "In re the support of A.B.". A child custody action shall be entitled "In re the custody of A.B.".

History: 1977 c. 418; 1979 c. 32 s. 50; 1979 c. 352 s. 39; Stats. 1979 s. 767.075; 1983 a. 27 s. 2202 (57); 1987 a. 413; 1989 a. 31; 1993 a. 326, 481; 1995 a. 27 s. 9126 (19); 1995 a. 201, 275, 289, 404; 1997 a. 35, 105; 2005 a. 443 ss. 30, 32, 37, 81; 2007 a. 20.

When parents each own a 1/2 interest in the future proceeds of real estate and the state contributes to child support, the court may not order the custodial parent to pay child support in the form of an accumulating real estate lien in favor of the state. State ex rel. v. Reible, 91 Wis. 2d 394, 283 N.W.2d 427 (Ct. App. 1979).

A mother is a necessary party in a paternity action brought by the state. Paternity of Joshua E., 171 Wis. 2d 327, 491 N.W.2d 136 (Ct. App. 1992).

A mother's and child's interests in a paternity action are not sufficiently identical to place them in privity for the purpose of res judicata. Chad M.G. v. Kenneth J.Z., 194 Wis. 2d 690, 535 N.W.2d 97 (Ct. App. 1995).

Sub. (2) (b) [now sub. (2) (b) 2.] allows a county corporation counsel to act as the guardian ad litem for a child in a paternity action so long as he or she only represents the child and does not represent the state in the action. Chad M.G. v. Kenneth J.Z., 194 Wis. 2d 690, 535 N.W.2d 97 (Ct. App. 1995).

Because a child has a right to bring an independent action for paternity under s. 767.45 [now s. 767.80], if the child was not a party to an earlier state instituted paternity action, it would be a violation of the child's due process rights to preclude the child from litigating the paternity issue. Mayonia M.M. v. Kieth N., 202 Wis. 2d 460, 551 N.W.2d 34 (Ct. App. 1996), 95–2838.

767.215 Initiating action; petition and response. **(1)** INITIATION OF ACTION. (a) Either or both of the parties to the marriage may initiate the action. The party initiating the action or his or her attorney shall sign the petition. Both parties or their respective attorneys shall sign a joint petition.

(b) The clerk of court shall provide without charge, to each person filing a petition requesting child support, a document setting forth the percentage standard established by the department under s. 49.22 (9) and listing the factors that a court may consider under s. 767.511 (1m).

(c) The clerk of court shall provide, without charge, to each person filing a petition showing that the parties have a minor child, a copy of s. 767.41 (1m) or a parenting plan form if a standard form for parenting plans is used in the county.

(2) PETITION CONTENT. Except as otherwise provided, in an action affecting the family, the petition shall state:

(a) The name and birthdate of the parties, the date and place of marriage, and the facts relating to the residence of both parties.

(b) The name and birthdate of each minor child of the parties and each other child born to the wife during the marriage, and whether the wife is pregnant.

(c) If the relief requested is a divorce or a legal separation in which the parties do not file a petition under s. 767.315 (2), that the marriage is irretrievably broken, or, alternatively, that both parties agree that the marriage is irretrievably broken.

(cm) If the relief requested is a legal separation and the parties have filed a petition under s. 767.315 (2), that both parties agree that the marital relationship is broken.

(d) Whether an action for divorce or legal separation by either of the parties has been at any time commenced, or is pending in any other court, in this state or elsewhere.

(dm) Whether either party was previously married and, if so, the manner in which the marriage was terminated, and, if terminated by court judgment, the name of the court that granted the judgment and the time and place the judgment was granted, if known.

(e) Whether the parties have entered into a written agreement as to support, legal custody, and physical placement of the children, maintenance of either party, or property division. If so, the written agreement shall be attached.

(f) The relief requested. If the relief requested is a legal separation, the petition shall state the specific reason for requesting that relief.

(h) That during the pendency of the action, the parties are prohibited from, and may be held in contempt of court for, harassing, intimidating, physically abusing or imposing any restraint on the personal liberty of the other party or a minor child of either party.

(i) If the action is one under s. 767.001 (1) (a), (b), (c), (d), (h), or (i), that during the pendency of the action, without the consent of the other party or an order of the court, the parties are prohibited from, and may be held in contempt of court for, encumbering, concealing, damaging, destroying, transferring, or otherwise disposing of property owned by either or both of the parties, except in the usual course of business, in order to secure necessities, or in order to pay reasonable costs and expenses of the action, including attorney fees.

(j) Unless the action is one under s. 767.001 (1) (g) or (h), that during the pendency of the action the parties are prohibited from, and may be held in contempt of court for, doing any of the following without the consent of the other party or an order of the court:

1. Relocating and establishing a residence with a minor child of the parties more than 100 miles from the residence of the other party.

2. Removing a minor child of the parties from the state for more than 90 consecutive days.

3. Concealing a minor child of the parties from the other party.

(2e) RELATIONSHIP OF PETITION TO COMPLAINT. All references to a "complaint" in chs. 801 to 807 apply to petitions under this section.

(2m) SUMMONS, CONTENT. (a) Except as provided in par. (b), if only one party initiates the action and the parties have minor children, the summons served on the other party:

1. Shall include notification of the availability of information under s. 767.105 (2) and of the contents of s. 948.31.

2. Shall be accompanied by a document, provided without charge by the clerk of court, setting forth the percentage standard established by the department under s. 49.22 (9) and listing the factors that a court may consider under s. 767.511 (1m).

3. Shall be accompanied by a copy of s. 767.41 (1m) or a standard parenting plan form used in the county, provided without charge by the clerk of court.

(b) If service is by publication, notification regarding s. 948.31 may consist of references to the statute numbers and titles, and information relating to the percentage standard and the factors and completing and filing parenting plans need not be provided.

(3) SERVICE. If only one party initiates the action, the other shall be served under ch. 801 and may serve a response or counterclaim within 20 days after the date of service, except that questions of jurisdiction may be raised at any time prior to judgment. Service shall be made upon the petitioner, and the original copy of the response shall be filed in court. If the parties together initiate the action with a joint petition, service of summons is not required.

(4) EXTENSION OF TIME FOR SERVICE. (a) Except as provided in par. (b) and s. 767.815, extension of time is governed by s. 801.15 (2).

(b) The court may, upon the petitioner's demonstration of good cause, and without notice, order one additional 60–day extension for service of the initial papers in the action if the extension motion is made within 90 days after filing the initial papers. If the extension motion is not made within the 90–day period, the court may grant the motion only if it finds excusable neglect for failure to act and good cause shown for granting the extension.

(5) SOCIAL SECURITY NUMBERS. (a) Except as provided in par. (am), when the petition under this section is filed with the court, the party filing the petition shall submit a separate form, furnished by the court, containing all of the following:

1. The name, date of birth, and social security number of each party.

2. The name, date of birth, and social security number of each minor child of the parties and of each child who was born to the wife during the marriage and who is a minor.

(am) In an action to determine the paternity of a child, the party who filed the petition shall submit the form under par. (a) within 5 days after paternity is adjudicated.

(b) A form submitted under this subsection shall be maintained with the confidential information required under s. 767.127 or maintained separately from the case file. The form may be disclosed only to the parties and their attorneys, a county child support enforcement agency, and any other person authorized by law or court order to have access to the information on the form.

History: 1971 c. 220; 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; 1979 c. 352 s. 39; Stats. 1979 s. 767.085; 1985 a. 29; 1987 a. 332 s. 64; 1987 a. 355, 403; 1989 a. 31, 56, 132; 1993 a. 78, 481; 1995 a. 27 s. 9126 (19); 1995 a. 201, 404; 1997 a. 191; 2001 a. 61; 2005 a. 443 ss. 31, 46 to 49, 71, 83, 84; Stats. 2005 s. 767.215; 2007 a. 187; 2011 a. 32; 2017 a. 203.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

767.217 Notice to Child Support Program. (1) NOTICE OF PLEADING OR MOTION. In an action affecting the family in which either party is a recipient of benefits under ss. 49.141 to 49.161 or aid under s. 48.645, 49.19, or 49.45, each party shall, either within 20 days after serving the opposite party with a motion or pleading requesting the court to order or to modify a previous order relating to child support, maintenance, or family support, or before filing the motion or pleading in court, serve a copy of the motion or pleading on the county child support agency under s. 59.53 (5) of the county in which the action is begun.

(2) NOTICE OF APPEAL. In an appeal of an action affecting the family in which support or maintenance of a child of any party is at issue, the person who initiates the appeal shall notify the department of the appeal by sending a copy of the notice of appeal to the department.

(3) NONCOMPLIANCE. A judgment in an action affecting the family may not be granted unless this section is complied with or a court orders otherwise.

History: 1977 c. 418; 1979 c. 32 s. 50; 1979 c. 196; 1979 c. 352 s. 39; Stats. 1979 s. 767.15; 1983 a. 27; 1987 a. 413; 1995 a. 27 s. 9126 (19); 1995 a. 201, 289, 404; 1997 a. 27, 35; 2001 a. 61; 2005 a. 443 s. 72; Stats. 2005 s. 767.217; 2007 a. 20.

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.

(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.

(b) Notwithstanding ss. 767.117 (1) (c) and 767.215 (2) (j), prohibiting the removal of minor children from the jurisdiction of the court.

(bm) Allowing a party to relocate and reside with a child pending a final hearing under s. 767.481 (3).

(c) Subject to s. 767.85, requiring either party or both parties to make payments for the support of minor children, which payment amounts must be expressed as a fixed sum unless the parties have stipulated to expressing the amount as a percentage of the payer's income and the requirements under s. 767.34 (2) (am) 1. to 3. are satisfied.

(d) Requiring either party to pay for the maintenance of the other party. Maintenance under this paragraph may include the expenses and attorney fees incurred by the other party in bringing or responding to the action affecting the family.

(e) Requiring either party to pay family support under s. 767.531.

(f) Requiring either party to execute an assignment of income under s. 767.75 or an authorization for transfer under s. 767.76.

(g) Requiring either party or both parties to pay debts or perform other actions in relation to the persons or property of the parties.

(h) Notwithstanding ss. 767.117 (1) (b) and 767.215 (2) (i), prohibiting either party from disposing of assets within the jurisdiction of the court.

(i) Requiring counseling of either party or both parties.

(k) Subject to s. 767.85, requiring either party or both parties to maintain minor children as beneficiaries on a health insurance policy or plan.

(L) Requiring either party or both parties to execute an assignment of income for payment of health care expenses of minor children.

(1n) CONSIDERATIONS; STIPULATIONS; REVIEW. (a) Before making a temporary order under sub. (1), the court shall consider those factors that the court is required by this chapter to consider before entering a final judgment on the same subject matter. In making a determination under sub. (1) (a) or (am), the court shall consider the factors under s. 767.41 (5) (am), subject to s. 767.41 (5) (bm).

(b) 1. If the court makes a temporary child support order that deviates from the amount of support that would be required by using the percentage standard established by the department under s. 49.22 (9), the court shall comply with the requirements of s. 767.511 (1n).

2. If the court finds by a preponderance of the evidence that a party 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), and makes a temporary order awarding joint or sole legal custody or periods of physical placement to the party, the court shall comply with the requirements of s. 767.41 (6) (f) and, if appropriate, s. 767.41 (6) (g).

3. If the court or circuit court commissioner requires one party to cover the child under a health insurance policy or plan under sub. (1) (k), the court or circuit court commissioner shall order the party to provide to the other party a health insurance identification card for the child. Section 767.513 (2m) (b) and (c) applies to a failure to comply with a temporary order under this subdivision.

(c) A temporary order under sub. (1) may be based upon the written stipulation of the parties, subject to the approval of the court. Temporary orders made by a circuit court commissioner may be reviewed by the court.

(2) NOTICE OF MOTION FOR ORDER. Notice of motion for an order or order to show cause under sub. (1) may be served at the time the action is commenced or at any time after commencement and shall be accompanied by an affidavit stating the basis for the request for relief.

(3m) AVAILABILITY OF DOMESTIC ABUSE RESTRAINING ORDER. If a circuit court commissioner believes that a temporary restraining order or injunction under s. 813.12 is appropriate in an action, the circuit court commissioner shall inform the parties of their right to seek the order or injunction and the procedure to follow. On a motion for such a restraining order or injunction, the circuit court commissioner shall submit the motion to the court within 5 working days.

History: 1971 c. 149; 1971 c. 211 s. 126; 1971 c. 220, 307; 1975 c. 283; Sup. Ct. Order, 73 Wis. 2d xxxi (1976); 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); 1979 c. 111, 196; 1979 c. 352 s. 39; Stats. 1979 s. 767.23; 1983 a. 27; 1983 a. 204 s. 22; 1983 a. 447; 1985 a. 29 s. 3202 (9); 1987 a. 355, 364, 413; 1989 a. 212; 1991 a. 39; 1993 a. 78, 481, 490; 1995 a. 27 ss. 7100h, 9126 (19); 1995 a. 70, 404; 1999 a. 9; 2001 a. 16, 61; 2003 a. 130, 326; 2005 a. 174, 342; 2005 a. 443 ss. 86 to 91; Stats. 2005 s. 767.225; 2007 a. 96; 2017 a. 203.

Cross–reference: See also ch. DCF 150, Wis. adm. code.

767.235 Trial or hearing on judgment. (1) BEFORE COURT. In an action affecting the family, all hearings and trials to determine whether judgment shall be granted, except hearings under s. 757.69 (1) (p) 3., shall be before the court. Testimony shall be taken by the reporter and shall be transcribed and filed with the record if so ordered by the court. Custody proceedings have priority in being set for hearing.

(2) APPEARANCE OF LITIGANTS. Unless nonresidence in the state is shown by competent evidence, service is by publication, or the court for other good cause orders otherwise, both parties in actions affecting the family shall appear upon the final hearing or trial. An order of the court to that effect shall be procured by the moving party, and shall be served upon the nonmoving party before the hearing or trial. No order is required in the case of a joint petition.

(3) EXCLUSION FROM COURTROOM. The court may on its own motion, or on motion of any party to an action affecting the family, exclude from the courtroom all persons other than the parties, their attorneys and any guardians ad litem.

History: 2005 a. 443 ss. 65, 67, 77, 93.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

767.241 Award of attorney fees and other fees and costs. (1) COURT AUTHORITY. The court, after considering the financial resources of both parties, may do the following:

(a) Order either party to pay a reasonable amount for the cost to the other party of maintaining or responding to an action affecting the family and for attorney fees to either party.

(b) If one party receives services under s. 49.22 or services provided by the state or county as a result of an assignment of income under s. 49.19, order the other party to pay any fee chargeable under s. 49.22 (6) or the cost of services rendered by the state or county under s. 49.19.

(2) PREACTION AND POSTACTION FEES. Any amount ordered under sub. (1) may include sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment.

(3) TO WHOM PAID. The court may order that the amount be paid directly to the attorney or to the state or the county providing services under s. 49.22 or 49.19, who may enforce the order in its name.

(4) PAYMENT BY STATE OR COUNTY. (a) Except as provided in par. (b), no court may order payment of costs under this section by the state or any county which may be a party to the action.

(b) The court may order payment of costs under this section by the department or its designee, whichever is appropriate, in an action in which the court finds that the record of payments and arrearages kept by the department or its designee is substantially incorrect and that the department or its designee has failed to correct the record within 30 days after having received information that the court determines is sufficient for making the correction.

History: 1977 c. 105; 1979 c. 32 s. 50; 1979 c. 352 s. 39; Stats. 1979 s. 767.262; 1983 a. 27; 1993 a. 481, 490; 1995 a. 201, 279, 404; 1997 a. 27, 35, 252; 2005 a. 443 ss. 99, 112; Stats. 2005 s. 767.241.

An allowance of $1,000 attorney fees on appeal, after the award of a generous property settlement, constituted a penalty for appealing. Molloy v. Molloy, 46 Wis. 2d 682, 176 N.W.2d 292 (1970).

Attorney fees on appeal depend on need, ability to pay, and whether there is a reasonable ground for the appeal. Klipstein v. Klipstein, 47 Wis. 2d 314, 177 N.W.2d 57 (1970).

An order for attorney fees is enforceable by contempt. The court cannot enter a judgment in favor of the attorney directly. Before a contempt order is issued, the defendant must have notice of an application by the spouse to whom the fees are payable. O'Connor v. O'Connor, 48 Wis. 2d 535, 180 N.W.2d 735 (1970).

Denial of the wife's motion for her husband to contribute to attorney fees to prosecute the wife's appeal was an abuse of discretion when the issues in the case were vigorously contested and in no way frivolous. Markham v. Markham, 65 Wis. 2d 735, 223 N.W.2d 616 (1974).

A circuit court does not have subject matter jurisdiction in a divorce action to determine attorney fees between an attorney and client who the attorney continues to represent in the divorce action. Stasey v. Stasey, 168 Wis. 2d 37, 483 N.W.2d 221 (1992).

Nonmarital assets may be considered in determining whether to order one party to contribute to the other's fees. Doerr v. Doerr, 189 Wis. 2d 112, 525 N.W.2d 745 (Ct. App. 1994).

Under *Ondrasek*, 126 Wis. 2d at 484, the overtrial doctrine may be invoked in family law cases when one party's unreasonable approach to litigation causes the other party to incur extra and unnecessary fees. The public policy that an innocent party who is the victim of overtrial should not be burdened with the payment of extra and unnecessary attorney fees occasioned by the other party is equally applicable with respect to guardian ad litem fees. Hottenroth v. Hetsko, 2006 WI App 249, 298 Wis. 2d 200, 727 N.W.2d 38, 05–1212.

767.251 Content, preparation, and approval of judgment. (1) CONTENT. In an action affecting the family, if the court orders maintenance payments or other allowances for a party or children or retains jurisdiction in those matters, the written judgment shall include a statement that disobedience of the court order is punishable under ch. 785 by commitment to the county jail or house of correction until the judgment is complied with and the costs and expenses of the proceedings are paid or until the party committed is otherwise discharged, according to law. Final written agreements and stipulations of the parties shall, unless set forth in the judgment, be appended to the judgment and incorporated by reference.

(2) PREPARATION. The findings of fact, conclusions of law, and the written judgment shall be drafted by the petitioner unless the court otherwise directs, and shall be submitted to the court and filed with the clerk of the court within 30 days after judgment is granted.

(3) APPROVAL. The draft findings, conclusions, and judgment shall be approved by all counsel appearing, including a guardian ad litem and county child support enforcement agency attorney, and any other person designated by the court or local rule. After necessary approvals are obtained, the findings of fact, conclusions of law, and judgment shall be submitted to the court.

History: 2005 a. 443 ss. 169, 170.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

767.264 Dismissal; vacation; substitution or withdrawal of attorney. (1) OPPORTUNITY TO RESPOND. An action affecting the family may not be dismissed under s. 805.04 (1) unless all the parties who have appeared in the action have been served with a copy of the notice of dismissal and have had an opportunity to file a responsive pleading or motion.

(2) ATTORNEY FEES AND OTHER AMOUNTS OWING. (a) Upon making an order for dismissal of, for substitution of attorney in, for withdrawal of attorney from, or for vacation of a judgment granted in an action affecting the family, the court shall, prior to or in its order, grant separate judgment in favor of an attorney who has appeared for a party to the action and in favor of a guardian ad litem for a party or a child for the amount of fees and disbursements to which the attorney or guardian ad litem is, in the court's judgment, entitled and against the party responsible for the fees and disbursements.

(b) Upon making an order for dismissal of an action affecting the family or for vacation of a judgment granted in the order, the court shall, prior to or in its order of dismissal or vacation, preserve the right of the state or a political subdivision of the state to collect any arrearages, by an action under this chapter or under ch.

785, owed to the state if either party in the case was a recipient of aid under ch. 49.

History: 2005 a. 443 ss. 33, 92, 114.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

Sub. (3) (a) [now sub. (2) (a)] is strictly construed to apply to those situations expressly set forth in the statute, such as orders for dismissal, substitution of attorneys, and vacation of judgments, in actions affecting families. In other cases an action to recover legal fees may be instituted. Kotecki & Radtke, S.C. v. Johnson, 192 Wis. 2d 429, 531 N.W.2d 606 (Ct. App. 1995).

The only reasonable meaning of sub. (3) (a) [now sub. (2) (a)] is that it gives the court authority to enter a judgment for the fees owed by the client to an attorney who is permitted by order of the court to withdraw, regardless when or if the client retains another attorney to replace the withdrawing attorney in that action. Kohl v. DeWitt Ross & Stevens, 2005 WI App 196, 287 Wis. 2d 289, 704 N.W.2d 586, 04–0328.

The federal tax consequences of divorce. Meldman & Ryan. 57 MLR 229.

767.273 Allowances pending appeal. In an action affecting the family pending in appellate court, an allowance for suit money, counsel fees, or disbursements in the court or for temporary maintenance or support payments to the spouse or the children during the pendency of the appeal may be made by the proper trial court upon motion made and decided after entry of the order or judgment appealed from and prior to the return of the record to appellate court. If the allowance is ordered before the appeal is taken, the order shall be conditioned upon the taking of the appeal and is not effective until the record is transmitted to appellate court.

History: 1975 c. 94; 1977 c. 105; 1977 c. 187 s. 89; 1979 c. 32 s. 50; 1979 c. 352 s. 39; Stats. 1979 s. 767.39; Sup. Ct. Order, 146 Wis. 2d xiii (1988); 2005 a. 443 s. 176.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

767.281 Filing procedures and orders for enforcement or modification of judgments or orders. (1) APPLICABILITY. This section applies to all enforcement or modification petitions, motions or orders to show cause filed for actions affecting the family under s. 767.001 (1) (i).

(1m) GENERALLY. Except as provided in sub. (2), if a petition, motion, or order to show cause requesting enforcement or modification of a judgment or order in an action affecting the family that was granted by a court of this state is filed in a county other than the county in which the judgment or order was rendered, the petitioner or party bringing the motion or order to show cause shall send a copy of the petition, motion, or order to show cause and summons to the clerk of the court in which the judgment or order was rendered. If a question arises as to which court should exercise jurisdiction, a conference involving both judges, all counsel, and guardians ad litem may be convened under s. 807.13 (3) to resolve the question. The petitioner shall send a copy of any order rendered pursuant to the petition, motion, or order to show cause to the clerk of the court in which the original judgment or order was rendered.

(2) SUPPORT OR MAINTENANCE ORDERS. (a) Except as provided in ch. 769, if the petition, motion or order to show cause is for enforcement or modification of a child support, family support or maintenance order, the petition, motion or order to show cause shall be filed in the county in which the original judgment or order was rendered or in the county where the minor children reside unless any of the following applies:

1. All parties, including the state or its delegate if support, support arrearages, costs or expenses are assigned under ch. 49, stipulate to filing in another county.

2. The court in the county which rendered the original judgment or order orders, upon good cause shown, the enforcement or modification petition, motion or order to show cause to be filed in another county.

(b) If the parties have stipulated to filing in another county under par. (a) 1., the petitioner or party bringing the motion or order to show cause shall send a copy of the petition, motion or order to show cause and the summons to the clerk of court in the county in which the original judgment or order was rendered.

(c) If the court in the county which rendered the original judgment or order orders the petition, motion or order to show cause to be filed in another county under par. (a) 2., the petitioner or party bringing the motion or order to show cause shall attach a copy of the order when filing the petition, motion or order to show cause in the other county.

(4) SUPPORT AND MAINTENANCE PAYMENTS TO DEPARTMENT. If a petition, motion or order to show cause for enforcement or modification of a child support, family support or maintenance order is filed and heard, regardless of whether it is filed and heard in a county other than the county in which the original judgment or order was rendered, any judgment or order enforcing or modifying the original judgment or order shall specify that payments of support or maintenance, and payments of arrearages in support or maintenance, if any, are payable to the department or its designee, whichever is appropriate.

History: 1989 a. 212; 1993 a. 326, 481; 1995 a. 279; 1997 a. 27; 2005 a. 443 ss. 17 to 20, 126; Stats. 2005 s. 767.281.

Venue for a petition to modify or enforce an out–of–state custody decree is the county where the judgment is filed even though the judgment may be filed in any county. Sharp v. Sharp, 185 Wis. 2d 416, 518 N.W.2d 254 (Ct. App. 1994).

SUBCHAPTER IV

ANNULMENT, DIVORCE, AND LEGAL SEPARATION

767.301 Residence requirements. No action to affirm marriage or for annulment under s. 767.001 (1) (a) or (b) may be brought unless at least one of the parties has been a bona fide resident of the county in which the action is brought for not less than 30 days next preceding the commencement of the action, or unless the marriage has been contracted within this state within one year prior to the commencement of the action. No action for divorce or legal separation under s. 767.001 (1) (c) or (d) may be brought unless at least one of the parties has been a bona fide resident of the county in which the action is brought for not less than 30 days next preceding the commencement of the action. No action for divorce under s. 767.001 (1) (c) may be brought unless at least one of the parties has been a bona fide resident of this state for not less than 6 months next preceding the commencement of the action.

History: 2005 a. 443 s. 27.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

When a divorce action was brought before the residency requirement was met, an action was never commenced and the petition could not be amended after the requirement was met. Siemering v. Siemering, 95 Wis. 2d 111, 288 N.W.2d 881 (Ct. App. 1980).

767.313 Annulment. (1) GROUNDS; WHEN SUIT MAY BE BROUGHT. A court may annul a marriage upon any of the following grounds:

(a) A party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of age, because of mental incapacity or infirmity or because of the influence of alcohol, drugs, or other incapacitating substances, or a party was induced to enter into a marriage by force or duress, or by fraud involving the essentials of marriage. Suit may be brought by either party, or by the legal representative of a party lacking the capacity to consent, no later than one year after the petitioner obtained knowledge of the described condition.

(b) A party lacks the physical capacity to consummate the marriage by sexual intercourse, and at the time the marriage was solemnized the other party did not know of the incapacity. Suit may be brought by either party no later than one year after the petitioner obtained knowledge of the incapacity.

(c) A party was 16 or 17 years of age and did not have the consent of his or her parent or guardian or judicial approval, or a party was under 16 years of age. Suit may be brought by the underaged party or a parent or guardian at any time prior to the party's attaining the age of 18 years, but a parent or guardian must bring suit within one year of obtaining knowledge of the marriage.

(d) The marriage is prohibited by the laws of this state. Suit may be brought by either party within 10 years of the marriage, except that the 10–year limitation shall not apply where the marriage is prohibited because either party has another spouse living

at the time of the marriage and the impediment has not been removed under s. 765.24.

(2) JUDICIAL PROCEEDING REQUIRED; NO ANNULMENT AFTER DEATH. A judicial proceeding is required to annul a marriage. A marriage may not be annulled after the death of a party to the marriage.

History: 1977 c. 105; 1979 c. 32 ss. 50, 92 (2); Stats. 1979 s. 767.03; 2005 a. 443 ss. 22, 23, 145; Stats. 2005 s. 767.313.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

A remarriage, although unlawful in Wisconsin and dissolved through an annulment, is sufficient to terminate maintenance under s. 767.32 (3) [now s. 767.59 (2)]. The requirement that maintenance be terminated following remarriage is unconditional. Falk v. Falk, 158 Wis. 2d 184, 462 N.W.2d 547 (Ct. App. 1990).

Although a marriage may be "void," the marriage governs the parties' legal relations unless it is annulled. Sinai Samaritan Medical Center, Inc. v. McCabe, 197 Wis. 2d 709, 541 N.W.2d 190 (Ct. App. 1995), 95–0012.

Annulment is an appropriate remedy to void a marriage when the parties to the marriage are still alive, but it is not the exclusive remedy to challenge the validity of a marriage. The common law drew a distinction between an annulment and a declaration that a marriage was void, especially a declaration after the death of one of the parties. Statutes and case law have preserved that distinction. McLeod v. Mudlaff, 2013 WI 76, 350 Wis. 2d 182, 833 N.W.2d 735, 11–1176.

767.315 Grounds for divorce and legal separation. **(1)** IRRETRIEVABLE BREAKDOWN. (a) If both of the parties to a legal separation or divorce action by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or if the parties have voluntarily lived apart continuously for 12 months or more immediately prior to commencement of the action and one party has so stated, the court, after hearing, shall make a finding that the marriage is irretrievably broken for purposes of s. 767.35 (1) (b) 1.

(b) If the parties to a legal separation or divorce action have not voluntarily lived apart for at least 12 months immediately prior to commencement of the action and if only one party has stated under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to filing the petition and the prospect of reconciliation, and proceed as follows:

1. If the court finds no reasonable prospect of reconciliation, it shall make a finding that the marriage is irretrievably broken for purposes of s. 767.35 (1) (b) 1.

2. If the court finds that there is a reasonable prospect of reconciliation, it shall continue the matter for further hearing not fewer than 30 nor more than 60 days later, or as soon thereafter as the matter may be reached on the court's calendar, and may suggest to the parties that they seek counseling. The court, at the request of either party or on its own motion, may order counseling. At the adjourned hearing, if either party states under oath or affirmation that the marriage is irretrievably broken, the court shall make a finding whether the marriage is irretrievably broken for purposes of s. 767.35 (1) (b) 1.

(2) BREAKDOWN OF MARITAL RELATIONSHIP. If both of the parties to a legal separation or divorce action by petition or otherwise have stated under oath or affirmation that the marital relationship is broken, the court, after hearing, shall make a finding that the marital relationship is broken for purposes of s. 767.35 (1) (b) 2.

History: 2005 a. 443 ss. 66, 146.

Abolition of guilt in marriage dissolution: Wisconsin's adoption of no–fault divorce. 61 MLR 672 (1978).

767.317 Defenses abolished. Previously existing defenses to divorce and legal separation, including but not limited to condonation, connivance, collusion, recrimination, insanity, and lapse of time, are abolished.

History: 2005 a. 443 s. 50.

767.323 Suspension of proceedings to effect reconciliation. During the pendency of an action for divorce or legal separation, the court may, upon written stipulation of both parties that they desire to attempt a reconciliation, enter an order suspending any and all orders and proceedings for such period, not exceeding 90 days, as the court determines advisable to permit the parties to attempt a reconciliation without prejudice to their respective rights. During the suspension period, the parties may resume living together as husband and wife and their acts and conduct do not constitute an admission that the marriage is not irretrievably broken or a waiver of the ground that the parties have voluntarily lived apart continuously for 12 months or more immediately prior to the commencement of the action. Suspension may be revoked upon the motion of either party by an order of the court. If the parties become reconciled, the court shall dismiss the action. If the parties are not reconciled after the period of suspension, the action shall proceed as though no reconciliation period was attempted.

History: 1971 c. 220; 1977 c. 105; 1979 c. 32 s. 50; Stats. 1979 s. 767.082; 2005 a. 443 s. 44; Stats. 2005 s. 767.323.

767.331 Actions for certain interspousal remedies. If a spouse has begun an action against the other spouse under s. 766.70 and either or both spouses subsequently bring an action under this chapter for divorce, annulment or legal separation, the actions may be consolidated by the court exercising jurisdiction under this chapter. If the actions are consolidated, to the extent the procedural and substantive requirements of this chapter conflict with the requirements under s. 766.70, this chapter controls. No action under s. 766.70 may be brought by a spouse against the other spouse while an action for divorce, annulment or legal separation is pending under this chapter.

History: 2005 a. 443 s. 34.

The prohibition under sub. (7) [now s. 767.331] of commencing an action under s. 766.70 while a divorce, annulment, or legal separation action is pending is constitutional. Haack v. Haack, 149 Wis. 2d 243, 440 N.W.2d 794 (Ct. App. 1989).

767.335 Waiting period for final hearing or trial. An action for divorce or legal separation may not be brought to final hearing or trial until the first of the following occurs:

(1) GENERALLY. The expiration of 120 days after service of the summons and petition upon the respondent or the expiration of 120 days after the filing of the joint petition.

(2) EMERGENCY. An order by the court, after consideration of the recommendation of a circuit court commissioner, directing an immediate hearing on the petition for the protection of the health or safety of either of the parties or of any child of the marriage or for other emergency reasons consistent with the policies of this chapter. The court shall, upon granting the order, specify the grounds for the order.

History: 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; Stats. 1979 s. 767.083; 1987 a. 355; 2001 a. 61; 2005 a. 443 s. 45; Stats. 2005 s. 767.335.

767.34 Court–approved stipulation. **(1)** AUTHORITY. The parties in an action for an annulment, divorce, or legal separation may, subject to the approval of the court, stipulate for a division of property, for maintenance payments, for the support of children, for periodic family support payments under s. 767.531, or for legal custody and physical placement, in case a divorce or legal separation is granted or a marriage annulled.

(2) LIMITATIONS ON COURT APPROVAL. (a) A court may not approve a stipulation for child support or family support unless the stipulation provides for payment of child support determined in a manner consistent with s. 767.511 or 767.89.

(am) A court may not approve a stipulation for expressing child support or family support as a percentage of the payer's income unless all of the following apply:

1. The state is not a real party in interest in the action under any of the circumstances specified in s. 767.205 (2) (a).

2. The payer is not subject to any other order, in any other action, for the payment of child or family support or maintenance.

3. All payment obligations included in the order, other than the annual receiving and disbursing fee under s. 767.57 (1e) (a), are expressed as a percentage of the payer's income.

(b) A court may not approve a stipulation for a division of property that assigns substantially all of the property to one of the parties in the action if the other party in the action is in the process of applying for medical assistance under subch. IV of ch. 49 or if the court determines that it can be reasonably anticipated that the

other party in the action will apply for medical assistance under subch. IV of ch. 49 within 30 months of the stipulation.

History: 1971 c. 220; 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); Stats. 1979 s. 767.10; 1985 a. 29; 1987 a. 355; 1993 a. 16; 1993 a. 490 s. 276; 1995 a. 27; 2001 a. 16; 2005 a. 443 ss. 54, 168; Stats. 2005 s. 767.34.

A trial court is not required to give effect to a property division agreement entered into before divorce proceedings are instituted. It should make its own determination of whether the agreement adequately provides for the parties. Ray v. Ray, 57 Wis. 2d 77, 203 N.W.2d 724 (1973).

There are two types of postnuptial agreements: 1) family settlement agreements that contemplate the continuation of the marriage; and 2) separation agreements that are made after separation or in contemplation of separation. The former are presumed binding on the parties under s. 767.255 (3) (L) [now s. 767.61 (3) (L)]. The latter are governed by s. 767.10 [now this section] and constitute a recommendation jointly made by the parties to the court regarding what the judgment should provide. Evenson v. Evenson, 228 Wis. 2d 676, 598 N.W.2d 232 (Ct. App. 1999), 98–0803. See also Van Boxtel v. Van Boxtel, 2001 WI 40, 242 Wis. 2d 474, 625 N.W.2d 284, 99–0341.

An agreement made in contemplation of divorce, entered into after the parties agreed to the divorce, was subject to s. 767.10 [now this section], not s. 767.255 [now s. 767.61]. When a party withdrew his consent before court approval, the agreement was unenforceable. Ayres v. Ayres, 230 Wis. 2d 431, 602 N.W.2d 132 (Ct. App. 1999), 98–3450.

A trial court may refuse to incorporate a stipulation in a divorce judgment when a party repudiates his or her consent. A party is free to withdraw from a stipulation until it is incorporated in a judgment, and repudiation may render the stipulation nonexistent. Van Boxtel v. Van Boxtel, 2001 WI 40, 242 Wis. 2d 474, 625 N.W.2d 284, 99–0341.

The specific language of sub. (1) controls stipulations in divorces rather than the general language of s. 807.05. All agreements entered into after a divorce is filed are stipulations subject to sub. (1) and must be approved by the court. Polakowski v. Polakowski, 2003 WI App 20, 259 Wis. 2d 765, 657 N.W.2d 102, 02–1961.

A stipulation under this section is not a contract that would be binding on the parties once entered into, but is only a recommendation to the court. The court need not accept it but has a duty to decide whether that recommendation is a fair and reasonable resolution of the issues that the court wants to adopt. When a court adopts a stipulation, it does so on its own responsibility within it's discretion, and the provisions become the court's judgment. Once the court decides to do so, the right of a party to withdraw from the stipulation comes to an end. Hottenroth v. Hetsko, 2006 WI App 249, 298 Wis. 2d 200, 727 N.W.2d 38, 05–1212.

Before approving a stipulation, the circuit court is not required to take evidence and make an investigation in essentially the same manner as if the stipulated matters were contested. Under the facts of this case, it was unnecessary to define the minimum requirements that must be met before a court approves a stipulation. Hottenroth v. Hetsko, 2006 WI App 249, 298 Wis. 2d 200, 727 N.W.2d 38, 05–1212.

767.35 Judgment of divorce or legal separation. **(1)** WHEN GRANTED. A court shall grant a judgment of divorce or legal separation if all of the following conditions are met:

(a) The requirements of this chapter as to residence and attendance at an educational program under s. 767.401 have been complied with.

(b) 1. In connection with a judgment of divorce or legal separation, the court finds that the marriage is irretrievably broken under s. 767.315 (1) (a) or (b) 1. or 2., unless subd. 2. applies.

2. In connection with a judgment of legal separation, the court finds that the marital relationship is broken under s. 767.315 (2).

(c) To the extent that it has jurisdiction to do so, the court has considered and approved or made provision for legal custody and physical placement, the support of any child of the marriage entitled to support, the maintenance of either spouse, the support of the family under s. 767.531, and the disposition of property.

(2) GRANTING DIVORCE OR LEGAL SEPARATION. When a party requests a legal separation rather than a divorce, the court shall grant a judgment of legal separation unless the other party requests a divorce, in which case the court shall hear and determine which judgment shall be granted.

(3) WHEN DIVORCE JUDGMENT EFFECTIVE. A judgment of divorce is effective when granted. A court granting a judgment of divorce shall inform the parties appearing in court that the judgment is effective when granted but that it is unlawful under s. 765.03 (2) for a party to marry again until 6 months after the judgment is granted.

(4) REVOCATION OF LEGAL SEPARATION JUDGMENT UPON RECONCILIATION. A judgment of legal separation shall provide that, if a reconciliation occurs at any time after the judgment, the parties may apply for a revocation of the judgment. Upon application for a revocation of the judgment, the court shall make such orders as may be just and reasonable.

(5) CONVERSION OF LEGAL SEPARATION TO DIVORCE. By stipulation of both parties, or upon motion of either party not earlier than one year after entry of a judgment of legal separation, the court shall convert the judgment to a judgment of divorce.

(6) VACATING OR MODIFYING DIVORCE JUDGMENT AS IT AFFECTS MARITAL STATUS. So far as a judgment of divorce affects the marital status of the parties, the court may vacate or modify the judgment for sufficient cause shown, upon its own motion, or upon the application of both parties to the action, at any time within 6 months from the granting of the judgment. If the judgment is vacated it shall restore the parties to the marital relation that existed before the granting of the judgment. If a judgment of divorce is set aside under this subsection, the court shall order the record in the action impounded without regard to s. 767.13. After the record is impounded, the record may not be offered or admitted in whole or in part into evidence in any action or proceeding except by special order of the court of jurisdiction upon good cause shown in any paternity proceedings under this chapter or by special order of a court of record upon a showing of necessity to clear title to real estate.

(7) DIVORCE JUDGMENT REVOKED ON REMARRIAGE OF PARTIES. When a judgment of divorce has been granted and the parties subsequently intermarry, the court, upon their joint application and upon satisfactory proof of the marriage, shall revoke all judgments and any orders that will not affect the right of 3rd persons. If the judgment is revoked, the court shall order the record impounded without regard to s. 767.13, and the record may not be offered or admitted, in whole or in part, into evidence in any action or proceeding except by special order of the court of jurisdiction upon good cause shown in a paternity proceeding under this chapter or by special order of a court of record upon a showing of necessity to clear title to real estate.

History: 1971 c. 220; 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); Stats. 1979 s. 767.07; 1987 a. 355; 1989 a. 132; 2005 a. 443 ss. 35, 36, 53, 172, 173, 174; Stats. 2005 s. 767.35; 2009 a. 180.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

Sub. (2) [now sub. (6)] does not authorize vacating or modifying a finding of paternity of children determined in the original divorce judgment. E. v. E., 57 Wis. 2d 436, 204 N.W.2d 503 (1973).

Sub. (2) [now sub. (6)] provides no authority for reopening a divorce judgment as it relates to a property division. Conrad v. Conrad, 92 Wis. 2d 407, 284 N.W.2d 674 (1979).

The death of a party within 6 months of a divorce judgment did not void the judgment or divest the court of jurisdiction to order property division. Roeder v. Roeder, 103 Wis. 2d 411, 308 N.W.2d 904 (Ct. App. 1981).

A divorce judgment did not bar a wife's action against her former husband for torts allegedly committed during the marriage. Stuart v. Stuart, 143 Wis. 2d 347, 421 N.W.2d 505 (1988).

If the requirements of sub. (2) [now sub. (5)] are met, conversion to a divorce decree is mandatory. Bartz v. Bartz, 153 Wis. 2d 756, 452 N.W.2d 160 (Ct. App. 1989).

767.36 Copies of judgment to parties. At the time of filing a judgment for an annulment, divorce, or legal separation, the party who prepared the judgment shall furnish to the clerk of court 2 true copies of the judgment, including any attachments to the judgment referenced in the judgment, in addition to the original judgment. Until the copies are presented, the clerk may refuse to accept the judgment for filing. After the judgment is filed, the clerk shall mail a copy promptly to each party to the action at the last–known address, and the mailing shall be shown in the court record.

History: 2005 a. 443 s. 171.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

767.375 Effect on transfers at death. **(1)** REVOCATION OF DEATH PROVISIONS IN MARITAL PROPERTY AGREEMENT. Unless the judgment provides otherwise, a judgment of annulment, divorce or legal separation revokes a provision in a marital property agreement under s. 766.58 that provides for any of the following:

(a) That, upon the death of either spouse, any of either or both spouses' property, including after–acquired property, passes without probate to a designated person, trust or other entity by nontestamentary disposition.

(b) That one or both spouses will make a particular disposition in a will or other governing instrument, as defined in s. 854.01 (2).

(2) REVOCATION OF REVOCABLE TRANSFERS AT DEATH. Unless sub. (1) applies, revocation of revocable transfers at death by a former spouse to the other former spouse, or to relatives of the other former spouse, under an instrument executed before the judgment of annulment, divorce or legal separation is governed by s. 854.15.

History: 1991 a. 301; 1997 a. 188; 2005 a. 216; 2005 a. 443 s. 119; Stats. 2005 s. 767.375.

NOTE: 1991 Wis. Act 301 contains extensive legislative council notes.

767.385 Maintenance, legal custody, and support when divorce or separation denied. If a judgment in an action for divorce or legal separation denies the divorce or legal separation, the court may make such order as the nature of the case renders just and reasonable for the legal custody of and periods of physical placement with any of the minor children, and for the maintenance of either spouse and support of the children by either spouse out of property or income. If the court orders child support under this section, the court shall determine the child support payments in a manner consistent with s. 767.511, regardless of the fact that a judgment of divorce or legal separation has not been entered.

History: 1971 c. 220; 1979 c. 32 s. 50; Stats. 1979 s. 767.28; 1987 a. 355; 1993 a. 481; 2005 a. 443 s. 125; Stats. 2005 s. 767.385.

767.395 Name of spouse. Except as provided in s. 301.47, the court, upon granting a divorce, shall allow either spouse, upon request, to resume a former legal surname, if any.

History: 1975 c. 94; 1979 c. 32 s. 50; Stats. 1979 s. 767.20; 2003 a. 52; 2005 a. 443 s. 78; Stats. 2005 s. 767.395.

Women's Names in Wisconsin: *In Re Petition of Kruzel*. MacDougall. WBB Aug. 1975.

SUBCHAPTER V

CHILD CUSTODY, PLACEMENT, AND VISITATION

767.401 Educational programs and classes. (1) PROGRAMS: EFFECTS OF DISSOLUTION ON CHILDREN; PARENTING SKILLS. (a) During the pendency of an action affecting the family in which a minor child is involved and in which the court determines that it is appropriate and in the best interest of the child, the court, on its own motion, may order the parties to attend a program specified by the court concerning the effects on a child of a dissolution of the marriage. If the court orders the parties to attend a program under this paragraph and there is evidence that one or both of the parties have engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), the court may not require the parties to attend the program together or at the same time.

(b) During the pendency of an action to determine the paternity of a child, or an action affecting the family for which the underlying action was an action to determine the paternity of a child, if the court determines that it is appropriate and in the best interest of the child, the court, on its own motion, may order either or both of the parties to attend a program specified by the court providing training in parenting or coparenting skills, or both.

(c) A program under par. (a) or (b) shall be educational rather than therapeutic in nature and may not exceed a total of 4 hours in length. The parties shall be responsible for the cost, if any, of attendance at the program. The court may specifically assign responsibility for payment of any cost. No facts or information obtained in the course of the program, and no report resulting from the program, is admissible in any action or proceeding.

(d) Notwithstanding s. 767.35 (1), the court may require the parties to an action affecting the family in which a minor child is involved to attend a program under par. (a) or (b) as a condition to the granting of a final judgment or order in the action affecting the family.

(e) A party who fails to attend a program ordered under par. (a) or (b) or pay costs specifically ordered under par. (c) may be proceeded against under ch. 785 for contempt of court.

(2) CLASSES ON PARENTING. (a) During the pendency of a divorce or paternity action, the court may order the parties to attend a class that is approved by the court and that addresses such issues as child development, family dynamics, how parental separation affects a child's development, and what parents can do to make raising a child in a separated situation less stressful for the child.

(b) The court may not require the parties to attend a class under this subsection as a condition to the granting of the final judgment or order in the divorce or paternity action, however, the court may refuse to hear a custody or physical placement motion of a party who refuses to attend a class ordered under this subsection.

(c) 1. Except as provided in subd. 2., the parties shall be responsible for any cost of attending the class.

2. If the court finds that a party is indigent, any costs that would be the responsibility of that party shall be paid by the county.

History: 1993 a. 225; 1997 a. 45; 1999 a. 9; 2001 a. 61; 2003 a. 130; 2005 a. 443 ss. 59 to 63, 180; Stats. 2005 s. 767.401.

767.405 Family court services. (1) DEFINITIONS. In this section:

(a) "Mediation" means a cooperative process involving the parties and a mediator, the purpose of which is to help the parties, by applying communication and dispute resolution skills, define and resolve their own disagreements, with the best interest of the child as the paramount consideration.

(b) "Mediator" means a person with special skills and training in dispute resolution.

(1m) DIRECTOR. (a) Except as provided in par. (b) and subject to approval by the chief judge of the judicial administrative district, the circuit judge or judges in each county shall designate a person meeting the qualifications under sub. (4) as the director of family court services in that county.

(b) If 2 or more contiguous counties enter into a cooperative agreement under sub. (3) (b), the circuit judges for the counties involved shall, subject to approval by the chief judge of the judicial administrative district, designate a person meeting the qualifications under sub. (4) as the director of family court services for those counties.

(c) A county or counties may designate the supervisor of the office of family court commissioner as the director under par. (a) or (b).

(2) DUTIES. A director of family court services designated under sub. (1m) shall administer a family court services office if such an office is established under sub. (3) (a) or (b). Regardless of whether the office is established, the director shall:

(a) Employ staff to perform mediation and to perform any legal custody and physical placement study services authorized under sub. (14), arrange and monitor staff training, and assign and monitor staff case load.

(b) Contract under sub. (3) (c) with a person or public or private entity to perform mediation and to perform any legal custody and physical placement study services authorized under sub. (14).

(c) Supervise and perform mediation and any legal custody and physical placement study services authorized under sub. (14), and evaluate the quality of the mediation or study services.

(d) Administer and manage funding for family court services.

(3) MEDIATION PROVIDED. Mediation shall be provided in every county in this state by any of the following means:

(a) A county may establish a family court services office to provide mediation in that county.

(b) Two or more contiguous counties may enter into a cooperative agreement to establish one family court services office to provide mediation in those counties.

(c) A director of family court services designated under sub. (1m) may contract with any person or public or private entity, located in a county in which the director administers family court services or in a contiguous county, to provide mediation in the county in which the person or entity is located.

(4) MEDIATOR QUALIFICATIONS. Every mediator assigned under sub. (6) (a) shall have not less than 25 hours of mediation training or not less than 3 years of professional experience in dispute resolution. Every mediator assigned under sub. (6) (a) shall have training on the dynamics of domestic violence and the effects of domestic violence on victims of domestic violence and on children.

(5) MEDIATION REFERRALS. (a) Except as provided in sub. (8) (b), in any action affecting the family, including a revision of judgment or order under s. 767.451 or 767.59, in which it appears that legal custody or physical placement is contested, the court shall refer the parties to the director of family court services for possible mediation of those contested issues. The court shall inform the parties of all of the following:

1. That the confidentiality of communications in mediation is waived if the parties stipulate under sub. (14) (c) that the person who provided mediation to the parties may also conduct the legal custody or physical placement study under sub. (14).

2. That the court may waive the requirement to attend at least one mediation session if the court determines that attending the session will cause undue hardship or would endanger the health or safety of one of the parties and the bases on which the court may make its determination.

(b) If both parties to any action affecting the family wish to have joint legal custody of a child, either party may request that the court refer the parties to the director of family court services for assistance in resolving any problem relating to joint legal custody and physical placement of the child. Upon request, the court shall so refer the parties.

(c) A person who is awarded periods of physical placement or a child of that person, a person with visitation rights, or a person with physical custody of a child may notify a circuit court commissioner of any problem he or she has relating to any of these matters. Upon notification, the circuit court commissioner may refer any person involved in the matter to the director of family court services for assistance in resolving the problem.

(6) ACTION UPON REFERRAL. (a) Whenever a court refers a party to the director of family court services for possible mediation, the director shall assign a mediator to the case. The mediator shall provide mediation if he or she determines that it is appropriate. If the mediator determines that mediation is not appropriate, he or she shall so notify the court. Whenever a court refers a party to the director of family court services for any other family court service, the director shall take appropriate action to provide the service.

(b) Any intake form that the family court services requires the parties to complete before commencement of mediation shall ask each party whether either of the parties has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am).

(7) PRIVATE MEDIATOR. The parties to any action affecting the family may, at their own expense, receive mediation services from a mediator other than one who provides services under sub. (3). Parties who receive services from a mediator under this subsection shall sign and file with the director of family court services and with the court a written notice stating the mediator's name and the date of the first meeting with the mediator.

(8) INITIAL SESSION OF MEDIATION REQUIRED. (a) Except as provided in par. (b), in any action affecting the family, including an action for revision of judgment or order under s. 767.451 or 767.59, in which it appears that legal custody or physical placement is contested, the parties shall attend at least one session with a mediator assigned under sub. (6) (a) or contracted with under sub. (7) and, if the parties and the mediator determine that continued mediation is appropriate, no court may hold a trial of or a final hearing on legal custody or physical placement until after mediation is completed or terminated.

(b) A court may, in its discretion, hold a trial or hearing without requiring attendance at the session under par. (a) if the court finds that attending the session will cause undue hardship or would endanger the health or safety of one of the parties. In making its determination of whether attendance at the session would endanger the health or safety of one of the parties, the court shall consider evidence of the following:

1. 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).

2. Interspousal battery as described under s. 940.19 or 940.20 (1m) or domestic abuse as defined in s. 813.12 (1) (am).

3. That either party has a significant problem with alcohol or drug abuse.

4. Any other evidence indicating that a party's health or safety will be endangered by attending the session.

(c) The initial session under par. (a) shall be a screening and evaluation mediation session to determine whether mediation is appropriate and whether both parties wish to continue in mediation. At the initial session, the mediator shall review with the parties the nonfinancial provisions that must be included in the parenting plan under s. 767.41 (1m).

(9) PROHIBITED ISSUES IN MEDIATION. If mediation is provided by a mediator assigned under sub. (6) (a), no issue relating to property division, maintenance, or child support may be considered during the mediation unless all of the following apply:

(a) The property division, maintenance or child support issue is directly related to the legal custody or physical placement issue.

(b) The parties agree in writing to consider the property division, maintenance or child support issue.

(10) POWERS AND DUTIES OF MEDIATOR. A mediator assigned under sub. (6) (a) shall be guided by the best interest of the child and may do any of the following, at his or her discretion:

(a) Include the counsel of any party or any appointed guardian ad litem in the mediation.

(b) Interview any child of the parties, with or without a party present.

(c) Require a party to provide written disclosure of facts relating to any legal custody or physical placement issue addressed in mediation, including any financial issue permitted to be considered.

(d) Suspend mediation when necessary to enable a party to obtain an appropriate court order or appropriate therapy.

(e) Terminate mediation if a party does not cooperate or if mediation is not appropriate or if any of the following facts exist:

1. 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).

2. 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).

3. Either party has a significant problem with alcohol or drug abuse.

4. Other evidence which indicates one of the parties' health or safety will be endangered if mediation is not terminated.

(12) MEDIATION AGREEMENT. (a) Any agreement that resolves issues of legal custody or periods of physical placement between the parties and that is reached as a result of mediation under this section shall be prepared in writing, reviewed by the attorney, if any, for each party and by any appointed guardian ad litem, and submitted to the court to be included in the court order as a stipulation. Any reviewing attorney or guardian ad litem shall certify on the mediation agreement that he or she reviewed it, and the guardian ad litem, if any, shall comment on the agreement based on the best interest of the child. The mediator shall certify that the written mediation agreement accurately reflects the agreement made between the parties. The court may approve or reject the agree-

ment, based on the best interest of the child. The court shall state in writing its reasons for rejecting an agreement.

(b) If after mediation under this section the parties do not reach agreement on legal custody or periods of physical placement, the parties or the mediator shall so notify the court. Except as provided in s. 767.407 (1) (am), the court shall promptly appoint a guardian ad litem under s. 767.407. Regardless of whether the court appoints a guardian ad litem, the court shall, if appropriate, refer the matter for a legal custody or physical placement study under sub. (14). If the parties come to agreement on legal custody or physical placement after the matter has been referred for a study, the study shall be terminated. The parties may return to mediation at any time before any trial of or final hearing on legal custody or periods of physical placement. If the parties return to mediation, the county shall collect any applicable fee under s. 814.615.

(13) POWERS OF COURT. Except as provided in sub. (8), referring parties to mediation under this section does not affect the power of the court to make any necessary order relating to the parties during the course of the mediation.

(14) LEGAL CUSTODY AND PHYSICAL PLACEMENT STUDY. (a) A county or 2 or more contiguous counties shall provide legal custody and physical placement study services. The county or counties may elect to provide these services by any of the means set forth in sub. (3) with respect to mediation. Regardless of whether a county so elects, whenever legal custody or physical placement of a minor child is contested and mediation under this section is not used or does not result in agreement between the parties, or at any other time the court considers it appropriate, the court may order a person or entity designated by the county to investigate the following matters relating to the parties:

1. The conditions of the child's home.

2. Each party's performance of parental duties and responsibilities relating to the child.

2m. Whether either party has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am).

3. Any other matter relevant to the best interest of the child.

(b) 1. The person or entity investigating the parties under par. (a) shall complete the investigation, prepare a report of the results, and, at least 10 days before the report is introduced into evidence under subd. 2., submit the report to the court and to both parties. The court may review the report, but may not rely upon it as evidence before it is properly introduced under subd. 2.

2. The report under subd. 1. shall be offered in accordance with the rules of evidence and shall be a part of the record in the action if it is so offered and admitted into evidence.

(c) No person who provided mediation to the parties under this section may investigate the parties under this subsection unless each party personally so consents by written stipulation after mediation has ended and after receiving notice from the person who provided mediation that consent waives the inadmissibility of communications in mediation under s. 904.085.

History: 1987 a. 355; 1989 a. 56; 1991 a. 269; Sup. Ct. Order No. 93–03, 179 Wis. 2d xv; 1995 a. 275, 343; 1999 a. 9; 2001 a. 61, 109; 2003 a. 130; 2005 a. 443 ss. 8, 56, 57, 181; Stats. 2005 s. 767.405; 2007 a. 187; 2009 a. 187; 2013 a. 334.

NOTE: 1987 Wis. Act 355 and 2005 Wis. Act 443 contain explanatory notes.

Judicial Council Note, 1993. Subsections (5) (a) and (14) (c) are amended because the rule of inadmissibility under s. 904.085 is not a privilege; it is waivable only if the parties stipulate that the mediator may conduct the custody investigation.

The director is an agent of the circuit court judges, and the director's statutory authority and responsibilities are to be carried out under the supervision of the circuit court judges. A collective bargaining agreement cannot trump such statutory, judicial branch authority because doing so would violate separation of powers principles. A collective bargaining agreement may not abrogate a statutory function of the judicial branch. Any such provisions in a collective bargaining agreement are invalid and unenforceable. Racine County v. International Association of Machinists and Aerospace Workers, 2008 WI 70, 310 Wis. 2d 508, 751 N.W.2d 312, 06–0964.

767.407 Guardian ad litem for minor children. **(1)** APPOINTMENT. (a) The court shall appoint a guardian ad litem for a minor child in any action affecting the family if any of the following conditions exists:

1. The court has reason for special concern as to the welfare of a minor child.

2. Except as provided in par. (am), the legal custody or physical placement of the child is contested.

(am) The court is not required to appoint a guardian ad litem under par. (a) 2. if all of the following apply:

1. Legal custody or physical placement is contested in an action to modify legal custody or physical placement under s. 767.451 or 767.481.

2. The modification sought would not substantially alter the amount of time that a parent may spend with his or her child.

3. The court determines any of the following:

a. That the appointment of a guardian ad litem will not assist the court in the determination regarding legal custody or physical placement because the facts or circumstances of the case make the likely determination clear.

b. That a party seeks the appointment of a guardian ad litem solely for a tactical purpose, or for the sole purpose of delay, and not for a purpose that is in the best interest of the child.

(b) The court may appoint a guardian ad litem for a minor child in any action affecting the family if the child's legal custody or physical placement is stipulated to be with any person or agency other than a parent of the child or, if at the time of the action, the child is in the legal custody of, or physically placed with, any person or agency other than the child's parent by prior order or by stipulation in this or any other action.

(c) The attorney responsible for support enforcement under s. 59.53 (6) (a) may request that the court appoint a guardian ad litem to bring an action or motion on behalf of a minor who is a nonmarital child whose paternity has not been conclusively determined from genetic test results under s. 767.804, acknowledged under s. 767.805 (1) or a substantially similar law of another state, or adjudicated for the purpose of determining the paternity of the child, and the court shall appoint a guardian ad litem, if any of the following applies:

1. Aid is provided under s. 48.57 (3m) or (3n), 48.645, 49.19, or 49.45 on behalf of the child, or benefits are provided to the child's custodial parent under ss. 49.141 to 49.161, but the state and its delegate under s. 49.22 (7) are barred by a statute of limitations from commencing an action under s. 767.80 on behalf of the child.

2. An application for legal services has been filed with the child support program under s. 49.22 on behalf of the child, but the state and its delegate under s. 49.22 (7) are barred by a statute of limitations from commencing an action under s. 767.80 on behalf of the child.

(d) A guardian ad litem appointed under par. (c) shall bring an action or motion for the determination of the child's paternity if the guardian ad litem determines that the determination of the child's paternity is in the child's best interest.

(e) Nothing in this subsection prohibits the court from making a temporary order under s. 767.225 that concerns the child before a guardian ad litem is appointed or before the guardian ad litem has made a recommendation to the court, if the court determines that the temporary order is in the best interest of the child.

(2) TIME FOR APPOINTMENT. The court shall appoint a guardian ad litem under sub. (1) (a) 1. or (b) whenever the court deems it appropriate. The court shall appoint a guardian ad litem under sub. (1) (a) 2. at the time specified in s. 767.405 (12) (b), unless upon motion by a party or its own motion the court determines that earlier appointment is necessary.

(3) QUALIFICATIONS. The guardian ad litem shall be an attorney admitted to practice in this state. No person who is an interested party in a proceeding, appears as counsel in a proceeding on behalf of any party or is a relative or representative of an interested party may be appointed guardian ad litem in that proceeding.

(4) RESPONSIBILITIES. The guardian ad litem shall be an advocate for the best interests of a minor child as to paternity, legal cus-

tody, physical placement, and support. The guardian ad litem shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but 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. The guardian ad litem shall consider the factors under s. 767.41 (5) (am), subject to s. 767.41 (5) (bm), and custody studies under s. 767.405 (14). The guardian ad litem shall investigate whether there is evidence that either parent has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), and shall report to the court on the results of the investigation. The guardian ad litem shall review and comment to the court on any mediation agreement and stipulation made under s. 767.405 (12) and on any parenting plan filed under s. 767.41 (1m). Unless the child otherwise requests, the guardian ad litem shall communicate to the court the wishes of the child as to the child's legal custody or physical placement under s. 767.41 (5) (am) 2. The guardian ad litem has none of the rights or duties of a general guardian.

(4m) STATUS HEARING. (a) Subject to par. (b), at any time after 120 days after a guardian ad litem is appointed under this section, a party may request that the court schedule a status hearing related to the actions taken and work performed by the guardian ad litem in the matter.

(b) A party may, not sooner than 120 days after a status hearing under this subsection is held, request that the court schedule another status hearing on the actions taken and work performed by the guardian ad litem in the matter.

(5) TERMINATION AND EXTENSION OF APPOINTMENT. The appointment of a guardian ad litem under sub. (1) terminates upon the entry of the court's final order or upon the termination of any appeal in which the guardian ad litem participates. The guardian ad litem may appeal, may participate in an appeal or may do neither. If an appeal is taken by any party and the guardian ad litem chooses not to participate in that appeal, he or she shall file with the appellate court a statement of reasons for not participating. Irrespective of the guardian ad litem's decision not to participate in an appeal, the appellate court may order the guardian ad litem to participate in the appeal. At any time, the guardian ad litem, any party or the person for whom the appointment is made may request in writing that the court extend or terminate the appointment or reappointment. The court may extend that appointment, or reappoint a guardian ad litem appointed under this section, after the final order or after the termination of the appeal, but the court shall specifically state the scope of the responsibilities of the guardian ad litem during the period of that extension or reappointment.

(6) COMPENSATION. The guardian ad litem shall be compensated at a rate that the court determines is reasonable. The court shall order either or both parties to pay all or any part of the compensation of the guardian ad litem. In addition, upon motion by the guardian ad litem, the court shall order either or both parties to pay the fee for an expert witness used by the guardian ad litem, if the guardian ad litem shows that the use of the expert is necessary to assist the guardian ad litem in performing his or her functions or duties under this chapter. If both parties are indigent, the court may direct that the county of venue pay the compensation and fees. If the court orders a county to pay the compensation of the guardian ad litem, the amount ordered may not exceed the compensation paid to private attorneys under s. 977.08 (4m) (b). The court may order a separate judgment for the amount of the reimbursement in favor of the county and against the party or parties responsible for the reimbursement. The court may enforce its orders under this subsection by means of its contempt power.

History: Sup. Ct. Order, 50Wis. 2d vii (1971); 1977 c. 105, 299; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; 1979 c. 352 s. 39; Stats. 1979 s. 767.045; 1987 a. 355; Sup. Ct. Order, 151 Wis. 2d xxv (1989); 1993 a. 16, 481; 1995 a. 27, 201, 289, 404; 1997 a. 105, 191; 1999 a. 9; 2001 a. 61; 2003 a. 130; 2005 a. 443 s. 25; Stats. 2005 s. 767.407; 2007 a. 20; 2019 a. 95.

Judicial Council Note, 1990: This section clarifies and expands s. 767.045, as it was amended by 1987 Wisconsin Act 355. It also incorporates the substance of s. 809.85 into it. Sub. (1) (a) specifies the situations in which the court is required to appoint a guardian ad litem. Sub. (1) (a) 1. reflects the desirability of broad discretion for the court to appoint a guardian ad litem. Of special note is sub. (1) (b). While the court has always had the discretion to appoint a guardian ad litem in such situations, the committee concluded that it is desirable to specifically identify these situations as requiring special attention.

Sub. (2) is the present law which takes into account the need for mediation.

Sub. (4) defines the role of the guardian ad litem. It clarifies that the responsibility is as an advocate for the best interests of the child. It emphasizes the need for the guardian ad litem to function independently, while giving broad consideration to the views of others, including the children, social workers and the like. It also specifies that the guardian ad litem shall function in the same manner as the lawyer for a party. Among other things, this means that the guardian ad litem communicates with the court and other lawyers in the same manner as a lawyer for a party, presents information on relevant issues through the presentation of evidence or in other appropriate ways and generally functions as the lawyer for a party. In this case the "party" is the best interests of the children. Sub. (4) also enumerates specific duties to emphasize their particular importance.

The discretion for the guardian ad litem to communicate the wishes of the child in sub. (4) was added in 1987 Wisconsin Act 355, as was much of sub. (6). These are unchanged.

Sub. (5) specifies that the appointment terminates at the final order or the conclusion of the appeal unless the court otherwise directs. The court may reappoint or continue the appointment of the guardian ad litem after this but is required to state the scope of the responsibilities for such period. [Re Order effective Jan. 1, 1990]

If both spouses have ability to pay, each should be required to contribute to the payment of the guardian ad litem's fee, with the percentage to be paid by each to be determined in the court's discretion. Tesch v. Tesch, 63 Wis. 2d 320, 217 N.W.2d 647 (1974).

When the guardian ad litem's report was timely disclosed to both parties, the trial court did not err in failing to introduce the report during a custody hearing. Allen v. Allen, 78 Wis. 2d 263, 254 N.W.2d 244 (1977).

An increase of visitation rights from 24 days to 75 days per year had sufficient impact upon the welfare of the children to require the appointment of a guardian ad litem. Bahr v. Galonski, 80 Wis. 2d 72, 257 N.W.2d 869 (1977).

The appointment of a guardian ad litem pursuant to sub. (1) and s. 891.39 (1) (a) is mandated when paternity is questioned and also when there are special concerns. Special concerns arise when a child's welfare is directly at issue, as is the case when an existing family is disrupted. Johnson v. Johnson, 157 Wis. 2d 490, 460 N.W.2d 166 (Ct. App. 1990).

A guardian ad litem may not be called as a witness in a custody proceeding. The guardian ad litem is to communicate with the court as a lawyer for a party and to present information by presenting evidence. Hollister v. Hollister, 173 Wis. 2d 413, 496 N.W.2d 642 (Ct. App. 1992).

A guardian ad litem could act in a separate action involving the child outside of the court of original appointment even though another guardian ad litem had been appointed by the court when the separate action was brought. Interest of Brandon S.S., 179 Wis. 2d 114, 507 N.W.2d 94 (1993).

The court's power to appropriate compensation for court–appointed counsel is necessary for the effective operation of the judicial system. In ordering compensation for court–ordered attorneys, a court should abide by the s. 977.08 (4m) rate when it can retain qualified, effective counsel at that rate, but should order compensation at the rate under SCR 81.01 or 81.02 or a higher rate when necessary to secure effective counsel. Friedrich v. Dane County Circuit Court, 192 Wis. 2d 1, 531 N.W.2d 32 (1995).

The denial of a child's request to intervene in a divorce action was correct. The guardian ad litem fulfills the requirement that a child is entitled to representation. Joshua K. v. Nancy K., 201 Wis. 2d 655, 549 N.W.2d 494 (Ct. App. 1996), 94–3420.

Quasi–judicial immunity extends to a guardian ad litem's negligent performance in a divorce proceeding. Paige K.B. v. Molepske, 219 Wis. 2d 418, 580 N.W.2d 289 (1998), 96–2620.

Under sub. (6), if only one of the parties is indigent, the court may not order the county or the indigent party to pay guardian ad litem fees. The court's only option is to order the non–indigent party to pay. Olmsted v. Circuit Court for Dane County, 2000 WI App 261, 240 Wis. 2d 197, 622 N.W.2d 29, 00–0620.

The quasi–judicial immunity of a guardian ad litem described in *Paige K.B.* applies only to liability for the negligent performance of his or her duties, not as a shield against court–imposed sanctions for failure to obey a court order. Reed v. Luebke, 2003 WI App 207, 267 Wis. 2d 596, 671 N.W.2d 304, 02–2211.

The guardian ad litem is an advocate for the child's best interest, not a fact–finder or a consultant for the court. A trial court may decide, in individual cases, to weigh the guardian's recommendation more heavily than the other statutory factors, but the court cannot rewrite the statute to create a fixed hierarchy of factors. Goberville v. Goberville, 2005 WI App 58, 280 Wis. 2d 405, 694 N.W.2d 405, 04–2440.

A circuit court may not, when the issue is contested, determine the primary placement of a child without appointing a guardian ad litem for the child. Because the interests affected by the absence of a guardian ad litem are the child's and not the parties', neither parent is empowered to waive a child's right to have its best interests represented and advocated for in a placement proceeding, and the court will decline to address the issue on the basis of either waiver or the doctrine of invited error. State v. Freymiller, 2007 WI App 6, 298 Wis. 2d 333, 727 N.W.2d 334, 05–2460.

The "why" behind appointing guardians ad litem for children in divorce proceedings. Podell. 57 MLR 103.

767.41 Custody and physical placement. (1) GENERAL PROVISIONS. (a) Subject to ch. 822, the question of a child's custody may be determined as an incident of any action affecting the family or in an independent action for custody. The effect of any determination of a child's custody is not binding personally against any parent or guardian unless the parent or guardian has been made personally subject to the jurisdiction of the court in the action as provided under ch. 801 or has been notified under s. 822.08, as provided in s. 822.06. Nothing in this chapter may be construed to foreclose a person other than a parent who has physical custody of a child from proceeding under ch. 822.

(b) In rendering a judgment of annulment, divorce, legal separation, or paternity, or in rendering a judgment in an action under s. 767.001 (1) (e), 767.501, 767.804 (2), or 767.805 (3), the court shall make such provisions as it deems just and reasonable concerning the legal custody and physical placement of any minor child of the parties, as provided in this section.

(1m) PARENTING PLAN. Unless the court orders otherwise, in an action for annulment, divorce, or legal separation, an action to determine paternity, or an action under s. 767.001 (1) (e), 767.501, 767.804 (2), or 767.805 (3), in which legal custody or physical placement is contested, a party seeking sole or joint legal custody or periods of physical placement shall file a parenting plan with the court if the court waives the requirement to attend mediation under s. 767.405 (8) (b) or if the parties attend mediation and the mediator notifies the court under s. 767.405 (12) (b) that the parties have not reached an agreement. Unless the court orders otherwise, the parenting plan shall be filed within 60 days after the court waives the mediation requirement or the mediator notifies the court that no agreement has been reached. Except for cause shown, a party required to file a parenting plan under this subsection who does not timely file a parenting plan waives the right to object to the other party's parenting plan. A parenting plan shall provide information about the following questions:

(a) What legal custody or physical placement the parent is seeking.

(b) Where the parent lives currently and where the parent intends to live during the next 2 years. If there is evidence that the other parent engaged in interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), with respect to the parent providing the parenting plan, the parent providing the parenting plan is not required to disclose the specific address but only a general description of where he or she currently lives and intends to live during the next 2 years.

(c) Where the parent works and the hours of employment. If there is evidence that the other parent engaged in interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), with respect to the parent providing the parenting plan, the parent providing the parenting plan is not required to disclose the specific address but only a general description of where he or she works.

(d) Who will provide any necessary child care when the parent cannot and who will pay for the child care.

(e) Where the child will go to school.

(f) What doctor or health care facility will provide medical care for the child.

(g) How the child's medical expenses will be paid.

(h) What the child's religious commitment will be, if any.

(i) Who will make decisions about the child's education, medical care, choice of child care providers and extracurricular activities.

(j) How the holidays will be divided.

(k) What the child's summer schedule will be.

(L) Whether and how the child will be able to contact the other parent when the child has physical placement with the parent providing the parenting plan, and what electronic communication, if any, the parent is seeking.

(Lm) Whether equipment for providing electronic communication is reasonably available to both parents.

(m) How the parent proposes to resolve disagreements related to matters over which the court orders joint decision making.

(n) What child support, family support, maintenance or other income transfer there will be.

(o) If there is evidence that either party engaged in interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), with respect to the other party, how the child will be transferred between the parties for the exercise of physical placement to ensure the safety of the child and the parties.

(2) CUSTODY TO PARTY; JOINT OR SOLE. (a) Subject to pars. (am) to (e), based on the best interest of the child and after considering the factors under sub. (5) (am), subject to sub. (5) (bm), the court may give joint legal custody or sole legal custody of a minor child.

(am) Except as provided in par. (d), the court shall presume that joint legal custody is in the best interest of the child.

(b) Except as provided in par. (d) and subject to par. (e), the court may give sole legal custody only if it finds that doing so is in the child's best interest and that either of the following applies:

1. Both parties agree to sole legal custody with the same party.

2. The parties do not agree to sole legal custody with the same party, but at least one party requests sole legal custody and the court specifically finds any of the following:

a. One party is not capable of performing parental duties and responsibilities or does not wish to have an active role in raising the child.

b. One or more conditions exist at that time that would substantially interfere with the exercise of joint legal custody.

c. The parties will not be able to cooperate in the future decision making required under an award of joint legal custody. In making this finding the court shall consider, along with any other pertinent items, any reasons offered by a party objecting to joint legal custody. Evidence that either party engaged in abuse, as defined in s. 813.122 (1) (a), of the child, as defined in s. 813.122 (1) (b), or 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), creates a rebuttable presumption that the parties will not be able to cooperate in the future decision making required.

(c) Except as provided in par. (d), the court may not give sole legal custody to a parent who refuses to cooperate with the other parent if the court finds that the refusal to cooperate is unreasonable.

(d) 1. Except as provided in subd. 4., if the court finds by a preponderance of the evidence that a party 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), pars. (am), (b), and (c) do not apply and there is a rebuttable presumption 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 party. The presumption under this subdivision may be rebutted only by a preponderance of evidence of all of the following:

a. The party 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.

b. It is in the best interest of the child for the party who committed the battery or abuse to be awarded joint or sole legal custody based on a consideration of the factors under sub. (5) (am).

2. If the court finds under subd. 1. that both parties 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 party who engaged in the battery or abuse for purposes of the presumption under subd. 1. is the party that the court determines was the primary physical aggressor. Except as provided in subd. 3., in determining which party was the primary physical aggressor, the court shall consider all of the following:

a. Prior acts of domestic violence between the parties.

b. The relative severity of the injuries, if any, inflicted upon a party by the other party in any of the prior acts of domestic violence under subd. 2. a.

c. The likelihood of future injury to either of the parties resulting from acts of domestic violence.

d. Whether either of the parties acted in self–defense in any of the prior acts of domestic violence under subd. 2. a.

e. Whether there is or has been a pattern of coercive and abusive behavior between the parties.

f. Any other factor that the court considers relevant to the determination under this subdivision.

3. If the court must determine under subd. 2. which party was the primary physical aggressor and one, but not both, of the parties has been convicted of a crime that was an act of domestic abuse, as defined in s. 813.12 (1) (am), with respect to the other party, the court shall find the party who was convicted of the crime to be the primary physical aggressor.

4. The presumption under subd. 1. does not apply if the court finds that both parties engaged in a pattern or serious incident of interspousal battery or domestic abuse but the court determines that neither party was the primary physical aggressor.

(e) 1. In this paragraph, "service member" means a member of the national guard or of a reserve unit of the U.S. armed forces.

2. If a party is a service member, 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.

(3) CUSTODY TO AGENCY OR RELATIVE. (a) If the interest of any child demands it, and if the court finds that neither parent is able to care for the child adequately or that neither parent is fit and proper to have the care and custody of the child, the court may declare the child to be in need of protection or services and transfer legal custody of the child to a relative of the child, as defined in s. 48.02 (15), to a county department, as defined under s. 48.02 (2g), to a licensed child welfare agency, or, in a county having a population of 750,000 or more, the department of children and families. If the court transfers legal custody of a child under this subsection, in its order the court shall notify the parents of any applicable grounds for termination of parental rights under s. 48.415. If the court transfers legal custody under this section to an agency, the court shall also refer the matter to the court intake worker, as defined in s. 48.02 (3), who shall conduct an inquiry under s. 48.24 to determine whether a petition should be filed under s. 48.13.

(am) If the court transfers legal custody of a child under this subsection, the order transferring custody shall include a finding that placement of the child in his or her home would be contrary to the welfare of the child and a finding that reasonable efforts have been made to prevent the removal of the child from the home, while assuring that the health and safety of the child are the paramount concerns, unless any of the circumstances specified in s. 48.355 (2d) (b) 1. to 5. applies. If the legal custodian appointed under par. (a) is a county department, the court shall order the child into the placement and care responsibility of the county department as required under 42 USC 672 (a) (2) and shall assign the county department primary responsibility for providing services to the child. The court shall make the findings specified in this paragraph on a case–by–case basis based on circumstances specific to the child and shall document or reference the specific information on which those findings are based in the court order. A court order that merely references this paragraph without documenting or referencing that specific information in the court order or an amended court order that retroactively corrects an earlier court order that does not comply with this paragraph is not sufficient to comply with this paragraph.

(b) If the legal custodian appointed under par. (a) is an agency, the agency shall report to the court on the status of the child at least once each year until the child reaches 18 years of age, is returned to the custody of a parent or is placed under the guardianship of an agency. The agency shall file an annual report no less than 30 days before the anniversary of the date of the order. An agency may file an additional report at any time if it determines that more frequent reporting is appropriate. A report shall summarize the child's permanency plan and the recommendations of the review panel under s. 48.38 (5), if any.

(c) The court shall hold a hearing to review the permanency plan within 30 days after receiving a report under par. (b). At least 10 days before the date of the hearing, the court shall provide notice of the time, place, and purpose of the hearing to the agency that prepared the report; the child; the child's parents, guardian, and legal custodian; and the child's foster parent, the operator of the facility in which the child is living, or the relative with whom the child is living.

(d) Following the hearing, the court shall make all of the determinations specified under s. 48.38 (5) (c) and, if it determines that an alternative placement is in the child's best interest, may amend the order to transfer legal custody of the child to another relative, other than a parent, or to another agency specified under par. (a).

(e) The charges for care furnished to a child whose custody is transferred under this subsection shall be pursuant to the procedure under s. 48.36 (1) or 938.36 (1) except as provided in s. 767.57 (3).

(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. 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.

(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:

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 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. 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 child's adjustment to the home, school, religion and community.

6. The age of the child and the child's developmental and educational needs at different ages.

7. 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 need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.

9. The availability of public or private child care services.

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

11. 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 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. 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. 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.

(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.

(f) If the court finds under sub. (2) (d) that a party 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 court shall 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.

(g) If the court finds under sub. (2) (d) that a party 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), and the court awards periods of physical placement to both parties, the court shall provide for the safety and well–being of the child and for the safety of the party who was the victim of the battery or abuse. For that purpose the court, giving consideration to the availability of services or programs and to the ability of the party who committed the battery or abuse to pay for those services or programs, shall impose one or more of the following, as appropriate:

1. Requiring the exchange of the child to occur in a protected setting or in the presence of an appropriate 3rd party who agrees by affidavit or other supporting evidence to assume the responsibility assigned by the court and to be accountable to the court for his or her actions with respect to the responsibility.

2. Requiring the child's periods of physical placement with the party who committed the battery or abuse to be supervised by an appropriate 3rd party who agrees by affidavit or other supporting evidence to assume the responsibility assigned by the court and to be accountable to the court for his or her actions with respect to the responsibility.

3. Requiring the party who committed the battery or abuse to pay the costs of supervised physical placement.

4. Requiring the party who committed the battery or abuse to attend and complete, to the satisfaction of the court, treatment for batterers provided through a certified treatment program or by a certified treatment provider as a condition of exercising his or her periods of physical placement.

5. If the party who committed the battery or abuse has a significant problem with alcohol or drug abuse, prohibiting that party from being under the influence of alcohol or any controlled substance when the parties exchange the child for periods of physical placement and from possessing or consuming alcohol or any controlled substance during his or her periods of physical placement.

6. Prohibiting the party who committed the battery or abuse from having overnight physical placement with the child.

7. Requiring the party who committed the battery or abuse to post a bond for the return and safety of the child.

8. Imposing any condition not specified in subds. 1. to 7. that the court determines is necessary for the safety and well–being of the child or the safety of the party who was the victim of the battery or abuse.

(h) In making an order of legal custody and periods of physical placement, the court shall in writing inform the parents, and any other person granted legal custody of the child, of all of the following:

1. That each parent must notify the other parent, the child support agency, and the clerk of court of the address at which they may be served within 10 business days of moving to that address. The address may be a street or post office address.

2. That the address provided to the court is the address on which the other parties may rely for service of any motion relating to modification of legal custody or physical placement or to relocating the child's residence.

3. That a parent granted periods of physical placement with the child must obtain a court order before relocating with the child 100 miles or more from the other parent if the other parent also has court–ordered periods of physical placement with the child.

(7) ACCESS TO RECORDS. (a) Except under par. (b) or unless otherwise ordered by the court, access to a child's medical, dental and school records is available to a parent regardless of whether the parent has legal custody of the child.

(b) A parent who has been denied periods of physical placement with a child under this section is subject to s. 118.125 (2) (m) with respect to that child's school records, s. 51.30 (5) (bm) with respect to the child's court or treatment records, s. 55.23 with respect to the child's records relating to protective services, and s. 146.835 with respect to the child's patient health care records.

(7m) MEDICAL AND MEDICAL HISTORY INFORMATION. (a) In making an order of legal custody, the court shall order a parent who is not granted legal custody of a child to provide to the court medical and medical history information that is known to the parent. The court shall send the information to the physician or other health care provider with primary responsibility for the treatment and care of the child, as designated by the parent who is granted legal custody of the child, and advise the physician or other health care provider of the identity of the child to whom the information relates. The information provided shall include all of the following:

1. The known medical history of the parent providing the information, including specific information about stillbirths or congenital anomalies in the parent's family, and the medical histories, if known, of the parents and siblings of the parent and any sibling of the child who is a child of the parent, except that medical history information need not be provided for a sibling of the child if the parent or other person who is granted legal custody of the child also has legal custody, including joint legal custody, of that sibling.

2. A report of any medical examination that the parent providing the information had within one year before the date of the order.

(am) The physician or other health care provider designated under par. (a) shall keep the information separate from other records kept by the physician or other health care provider. The information shall be assigned an identification number and maintained under the name of the parent who provided the information to the court. The patient health care records of the child that are kept by the physician or other health care provider shall include a reference to that name and identification number. If the child's patient health care records are transferred to another physician or other health care provider or another health care facility, the records containing the information provided under par. (a) shall be transferred along with the child's patient health care records. Notwithstanding s. 146.819, the information provided under par. (a) need not be maintained by a physician or other health care provider after the child reaches age 18.

(b) Notwithstanding ss. 146.81 to 146.835, the information shall be kept confidential, except only as follows:

1. The physician or other health care provider with custody of the information, or any other record custodian at the request of the physician or other health care provider, shall have access to the information if, in the professional judgment of the physician or other health care provider, the information may be relevant to the child's medical condition.

2. The physician or other health care provider may release only that portion of the information, and only to a person, that the physician or other health care provider determines is relevant to the child's medical condition.

(8) NOTICE IN JUDGMENT. A judgment which determines the legal custody or physical placement rights of any person to a minor child shall include notification of the contents of s. 948.31.

History: 1971 c. 149, 157, 211; 1975 c. 39, 122, 200, 283; 1977 c. 105, 418; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; Stats. 1979 s. 767.24; 1981 c. 391; 1985 a. 70, 176; 1987 a. 332 s. 64; 1987 a. 355, 364, 383, 403; 1989 a. 56 s. 259; 1989 a. 359; 1991 a. 32; 1993 a. 213, 446, 481; 1995 a. 77, 100, 275, 289, 343, 375; 1997 a. 35, 191; 1999 a. 9; 2001 a. 109; 2003 a. 130; 2005 a. 101, 174, 264; 2005 a. 443 ss. 29, 94 to 98; Stats. 2005 s. 767.41; 2005 a. 471 ss. 1 to 5; 2007 a. 20; 2007 a. 96 ss. 141, 142; 2007 a. 97, 187; 2009 a. 28, 79; 2013 a. 334; 2015 a. 172; 2017 a. 203; 2019 a. 95.

NOTE: 1987 Wis. Act 355 contains a "legislative declaration" in section 1 and explanatory notes and 2005 Wis. Act 443 contains explanatory notes.

It was reversible error for the court to make a custody award when the court should have recognized the rule of comity and declined to exercise its jurisdiction. Sheridan v. Sheridan, 65 Wis. 2d 504, 223 N.W.2d 557 (1974).

As a general matter, the child's best interests will be served by living with a parent. If circumstances compel a contrary conclusion, the interests of the child, not a supposed right of a parent to custody, controls. In a dispute between a father and a deceased mother's parents, the court erred in concluding that it must award custody to a natural parent unless the parent was unfit or unable to care for the children. LaChapell v. Mawhinney, 66 Wis. 2d 679, 225 N.W.2d 501 (1975).

The record of a temporary hearing may be relevant at a divorce hearing, but is not controlling, and neither party has the burden of proving a change in circumstances to warrant a change from the temporary order. Kuesel v. Kuesel, 74 Wis. 2d 636, 247 N.W.2d 72 (1976).

The trial court may not order a custodial parent to live in designated part of the state or else lose custody. Groh v. Groh, 110 Wis. 2d 117, 327 N.W.2d 655 (1983).

In a custody dispute between a parent and a 3rd party, unless the court finds that the parent is unfit or unable to care for the child, or that there are compelling reasons for denying custody to the parent, the court must grant custody to the parent. Barstad v. Frazier, 118 Wis. 2d 549, 348 N.W.2d 479 (1984).

A contract between a parent and a non–parent to transfer permanent custody is unenforceable. Interest of Z.J.H., 162 Wis. 2d 1002, 471 N.W.2d 202 (1991). But see Custody of H.S.H–K, 193 Wis. 2d 649, 533 N.W.2d 419 (1995) regarding unmarried persons contracting for visitation in a co–parenting agreement.

Revision of the statute to allow joint custody in cases in which both parties did not agree was not a "substantial change in circumstances" justifying a change to joint custody. Licary v. Licary, 168 Wis. 2d 686, 484 N.W.2d 371 (Ct. App. 1992).

Section 767.001 (2m) confers the right to choose a child's religion on the custodial parent. Reasonable restrictions on visitation to prevent subversion of this right do not violate the constitution. Lange v. Lange, 175 Wis. 2d 373, N.W.2d (Ct. App. 1993).

There is no authority to order a change of custody at an unknown time in the future upon the occurrence of some stated contingency. Koeller v. Koeller, 195 Wis. 2d 660, 536 N.W.2d 216 (Ct. App. 1995), 94–2834.

A custodial parent's right to make major decisions for the children does not give that parent the right to decide whether the actions of the noncustodial parent are consistent with those decisions. Wood v. DeHahn, 214 Wis. 2d 221, 571 N.W.2d 186 (Ct. App. 1997), 96–3642.

Neither sub. (4) (b) nor s. 767.325 (4) [now s. 767.451 (4)] permits a prospective order prohibiting a parent from requesting a change of physical placement in the future. Jocius v. Jocius, 218 Wis. 2d 103, 580 N.W.2d 708 (Ct. App. 1998), 96–2746.

Section 813.122 implicitly envisions a change of placement and custody if the trial court issues a child abuse injunction under that section against a parent who has custody or placement of a child under a divorce order or judgment. Scott M.H. v. Kathleen M.H., 218 Wis. 2d 605, 581 N.W.2d 564 (Ct. App. 1998), 97–0814.

Sub. (5) (b) [now sub. (5) (am) 2.], while requiring consideration of the child's wishes, leaves to the court's discretion whether to allow the child to testify. That the child is a competent witness under s. 906.01 does not affect the court's discretion. Hughes v. Hughes, 223 Wis. 2d 111, 588 N.W.2d 346 (Ct. App. 1998), 97–3539.

Constitutional protections of a parent's right to his or her child do not prevent the application of the best interests of the child standard as the central focus of determining where the child shall live. "Best interests" and "safety" are not synonymous. Richard D. v. Rebecca G., 228 Wis. 2d 658, 599 N.W.2d 90 (Ct. App. 1999), 99–0433.

Sub. (4) requires allocation of placement between the parents. Before a court may deny a parent all placement or contact with a child, it must find that the contact would endanger the child's physical, mental, or emotional health. A parent who seeks to deny all contact by the other parent has the burden of proving the danger to the child. Wolfe v. Wolfe, 2000 WI App 93, 234 Wis. 2d 449, 610 N.W.2d 222, 99–2201.

There is no presumption of equal placement. While sub. (4) (a) 2. requires the court to provide for placement that allows the child to have regularly occurring, meaningful periods of physical placement with each parent, that is not tantamount to a presumption of equal placement. Keller v. Keller, 2002 WI App 161, 256 Wis. 2d 401, 647 N.W.2d 426, 01–2970.

While natural parents have a natural right to care and custody of their children, they do not have a fundamental right to equal placement periods after divorce. Arnold v. Arnold, 2004 WI App 62, 270 Wis. 2d 705, 679 N.W.2d 296, 03–1547.

A trial court may consider whether a parent's particular lifestyle choices have an impact on the best interests of a specific child. Findings regarding instability in living conditions must be based upon evidence specific to the individual case, not generalizations. A court's finding that a parent's living situation was unstable based primarily upon the trial court's negative view of her unmarried status was improper. Helling v. Lambert, 2004 WI App 93, 272 Wis. 2d 796, 681 N.W.2d 552, 03–1097

The sub. (2) (am) presumption that joint legal custody is in the child's best interest applies only in initial legal custody determinations, not in modification determinations. The presumption that the current custody and physical placement arrangement is in the child's best interest under s. 767.325 (1) (b) [now s. 767.451 (1) (b)] continues to apply in modification cases. Abbas v. Palmersheim, 2004 WI App 126, 275 Wis. 2d 311, 685 N.W.2d 546, 02–3390.

An agreement approved by the court and incorporated into the judgment that gave impasse–breaking authority to the guardian ad litem and family court counselor on the issue of which school a child was to attend was consistent with the public policy favoring settlement in divorce cases. The particular decision was not reviewable by the court, but the other parent could move to modify the grant of power under s. 767.325 [now s. 767.451]. Lawrence v. Lawrence, 2004 WI App 170, 276 Wis. 2d 403, 687 N.W.2d 748, 03–1699.

The court acted properly when it ordered child support under the standard percentage guideline, without a reduction under the shared–time payer provision, for a parent with care responsibility for 36 percent of overnight placements. Placement until 7:00 p.m. including an evening meal, is not equivalent to providing overnight placement for purposes of determining the amount of placement with a parent. Rumpff v. Rumpff, 2004 WI App 197, 276 Wis. 2d 606, 688 N.W.2d 699, 03–2646.

Under sub. (1m) each parent is entitled to a copy of the other's parenting plan. The trial court should not even consider custody and placement until both parties have had the opportunity to review each other's plans. Guelig v. Guelig, 2005 WI App 212, 287 Wis. 2d 472, 704 N.W.2d 916, 05–0346.

Sub. (1m) does not relieve the court of the obligation to articulate how its decision bears on the child's best interests if one parent, who does not timely file a parenting plan, waives the right to object to the other party's plan. Sub. (5) (am) requires the court to consider the child's best interests in absolute terms. Guelig v. Guelig, 2005 WI App 212, 287 Wis. 2d 472, 704 N.W.2d 916, 05–0346.

Sub. (4) (a) 2. does not require a court to grant each parent equal placement if the court determines that the placement should be modified. In making modification determinations, the circuit court is to maximize the amount of time a child spends with his or her parents within an overall placement schedule, taking into account the best interests of the child, the presumption of the status quo under s. 767.325 (1) and (2) [now s. 767.451], the general factors listed in this section, and the particular factors listed under sub. (5) (am) when relevant to the child. With respect to the modification of legal custody and physical placement orders, maximizing the amount of time cannot be equated with the notion of equal placement. Landwehr v. Landwehr, 2006 WI 64, 291 Wis. 2d 49, 715 N.W.2d 180, 03–2555.

In a custody dispute triggered by a petition for guardianship between a birth parent and a non–parent, the threshold inquiry is whether the parent is unfit, unable to care for the child, or there are compelling reasons for awarding custody to the non–parent. Consideration of a minor's nomination of a guardian presupposes that the need for a guardian has been established. If it is determined that the birth parent is fit and able to care for the child and no compelling reasons exist to appoint a non–parent guardian, then the minor's nomination of a guardian becomes moot. Nicholas C.L. v. Julie R.L., 2006 WI App 119, 293 Wis. 2d 819, 719 N.W.2d 508, 05–1754.

Enforcement of surrogacy agreements promotes stability and permanence in family relationships because it allows the intended parents to plan for the arrival of their child, reinforces the expectations of all parties to the agreement, and reduces contentious litigation. Because the agreement in this case was a valid, enforceable contract, the circuit court's exclusion of the agreement and decision to render a custody and placement order without consideration of the agreement constituted an erroneous exercise of discretion. Rosecky v. Schissel, 2013 WI 66, 349 Wis. 2d 84, 833 N.W.2d 634, 11–2166.

Groh is still good law, subject to the expanded authority granted over intrastate moves of 150 or more miles. Accordingly, the circuit court in this case had no authority to prospectively order a parent to not move beyond 45 miles from the marital home. By its enactment of s. 767.481, the legislature has made a judgment that moves of less than 150 miles are not subject to the best interests of the children standard. Rather than providing a court authority to prohibit geographical separation, sub. (4) (a) 2. presumes such separation exists and directs the court to consider the separation when establishing a placement schedule. Derleth v. Cordova, 2013 WI App 142, 352 Wis. 2d 51, 841 N.W.2d 552, 12–2018.

Sub. (2) (d) permits, but does not mandate, an analysis of whether a party has engaged in a pattern or serious incident of domestic abuse. The legislature chose to require the parties and guardian ad litem to ask the court to consider whether there was a pattern or serious incident of domestic abuse. By not doing so at the time of the original divorce, the parties waived the right to seek application of the presumption in sub. (2) (d) based upon the facts that existed at the time they stipulated to joint custody. A party is free to seek application of the presumption in a post–divorce action if new facts support the presumption. Glidewell v. Glidewell, 2015 WI App 64, 364 Wis. 2d 588, 869 N.W.2d 796, 14–1957.

Custody — to which parent? Podell, Peck, & First. 56 MLR 51.

The best interest of the child doctrine in Wisconsin custody cases. 64 MLR 343 (1980).

In the Interest of a Child: A Comparative Look at the Treatment of Children Under Wisconsin and Minnesota Custody Statutes. Walsh. 85 MLR 929 (2002).

Recent Changes in Wisconsin's Law Regarding Child Custody and Placement. Rue. 2001 WLR 1177.

Debating the Standard in Child Custody Placement Decisions. Molvig. Wis. Law. July 1998.

Wisconsin's Custody, Placement, and Paternity Reform Legislation. Walther. Wis. Law. Apr. 2000.

Domestic Abuse: Little Impact on Child Custody and Placement. Meuer, Gibart, & Roach. Wis. Law. Dec. 2018.

767.43 Visitation rights of certain persons. (1) PETITION, WHO MAY FILE. Except as provided in subs. (1m) and (2m), upon petition by a grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent–child relationship with the child, the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child.

(1m) EXCEPTION; HOMICIDE CONVICTION. (a) Except as provided in par. (b), the court may not grant visitation rights under sub. (1) to a person who has been convicted under s. 940.01 of the first–degree intentional homicide, or under s. 940.05 of the 2nd–degree intentional homicide, of a parent of the child, and the conviction has not been reversed, set aside or vacated.

(b) Paragraph (a) does not apply if the court determines by clear and convincing evidence that the visitation would be in the best interests of the child. The court shall consider the wishes of the child in making the determination.

(2) WISHES OF THE CHILD. Whenever possible, in making a determination under sub. (1), the court shall consider the wishes of the child.

(2m) WHEN SPECIAL GRANDPARENT PROVISION APPLICABLE. Subsection (3), rather than sub. (1), applies to a grandparent requesting visitation rights under this section if sub. (3) (a) to (c) applies to the child.

(3) SPECIAL GRANDPARENT VISITATION PROVISION. The court may grant reasonable visitation rights, with respect to a child, to a grandparent of the child if the child's parents have notice of the hearing and the court determines all of the following:

(a) The child is a nonmarital child whose parents have not subsequently married each other.

(b) Except as provided in sub. (4), the paternity of the child has been determined under the laws of this state or another jurisdiction if the grandparent filing the petition is a parent of the child's father.

(c) The child has not been adopted.

(d) The grandparent has maintained a relationship with the child or has attempted to maintain a relationship with the child but has been prevented from doing so by a parent who has legal custody of the child.

(e) The grandparent is not likely to act in a manner that is contrary to decisions that are made by a parent who has legal custody of the child and that are related to the child's physical, emotional, educational or spiritual welfare.

(f) The visitation is in the best interest of the child.

(3c) ACTION IN WHICH PETITION FILED; ALTERNATIVES. A grandparent requesting visitation under sub. (3) may file a petition to commence an independent action for visitation under this chapter or may file a petition for visitation in an underlying action affecting the family under this chapter that affects the child.

(3m) PRETRIAL HEARING; RECOMMENDATION. (a) A pretrial hearing shall be held before the court in an action under sub. (3). At the pretrial hearing the parties may present and cross–examine witnesses and present other evidence relevant to the determination of visitation rights. A record or minutes of the proceeding shall be kept.

(b) On the basis of the information produced at the pretrial hearing, the court shall evaluate the probability of granting visitation rights to a grandparent in a trial and shall so advise the parties. On the basis of the evaluation, the court may make an appropriate recommendation for settlement to the parties.

(c) If a party or the guardian ad litem refuses to accept a recommendation under this subsection, the action shall be set for trial.

(d) The informal hearing under this subsection may be terminated and the action set for trial if the court finds it unlikely that all parties will accept a recommendation under this subsection.

(4) PATERNITY DETERMINATION. If the paternity of the child has not yet been determined in an action under sub. (3) that is com-

menced by a person other than a parent of the child's mother but the person filing the petition under sub. (3) has, in conjunction with that petition, filed a petition or motion under s. 767.80 (1) (k), the court shall make a determination as to paternity before determining visitation rights under sub. (3).

(5) INTERFERENCE WITH VISITATION RIGHTS. Any person who interferes with visitation rights granted under sub. (1) or (3) may be proceeded against for contempt of court under ch. 785, except that a court may impose only the remedial sanctions specified in s. 785.04 (1) (a) and (c) against that person.

(6) MODIFICATION OF ORDER IF HOMICIDE CONVICTION. (a) If a person granted visitation rights with a child under this section is convicted under s. 940.01 of the first–degree intentional homicide, or under s. 940.05 of the 2nd–degree intentional homicide, of a parent of the child, and the conviction has not been reversed, set aside or vacated, the court shall modify the visitation order by denying visitation with the child upon petition, motion or order to show cause by a parent or guardian of the child, or upon the court's own motion, and upon notice to the person granted visitation rights.

(b) Paragraph (a) does not apply if the court determines by clear and convincing evidence that the visitation would be in the best interests of the child. The court shall consider the wishes of the child in making that determination.

History: 1971 c. 220; 1977 c. 105 ss. 35, 39; 1979 c. 32 ss. 50, 92 (4); Stats. 1979 s. 767.245; 1983 a. 447, 450; 1987 a. 355; 1995 a. 68; 1999 a. 9; 2005 a. 443 ss. 101, 183; Stats. 2005 s. 767.43.

Biological grandparents had no right to visitation following termination of their son's parental rights and adoption by the child's stepfather. Soergel v. Soergel, 154 Wis. 2d 564, 453 N.W.2d 624 (1990).

The visitation petition of a custodial parent's widow did not meet the criteria of sub. (1) when, prior to the custodial parent's death, the non–custodial parent had filed a motion to revise custody. Section 880.155 [now s. 48.9795 (12)] governs visitation in the event of a parent's death. Cox v. Williams, 177 Wis. 2d 433, 502 N.W.2d 128 (1993).

A paternity case in which the court has retained postjudgment authority to enforce the judgment constitutes an underlying action under which a petition for grandparent visitation may be brought. Paternity of Nastassja L.H.–J., 181 Wis. 2d 666, 512 N.W.2d 189 (Ct. App. 1993).

An existing underlying action affecting the family does not alone provide standing to petition under this section. The underlying action must threaten the integrity of a family unit. An action under this section does not apply to intact families. Because the father figure in a household was not the biological or adoptive father of one of the children did not mean the family was not intact. Marquardt v. Hegemann–Glascock, 190 Wis. 2d 447, 526 N.W.2d 834 (Ct. App. 1994).

While this section does not apply outside the dissolution of a marriage, it does not preempt the consideration of visitation in circumstances not subject to the statute. A circuit court may consider visitation by a non–parent outside a marriage dissolution situation in the best interests of the child if the non–parent petitioner demonstrates a parent–like relationship with the child and shows a significant triggering event such as substantial interference with that relationship. Custody of H.S.H.–K., 193 Wis. 2d 649, 533 N.W.2d 419 (1995).

Public policy does not prohibit a court, relying on its equitable powers, to grant visitation outside this section on the basis of a co–parenting agreement between a biological parent and another when visitation is in the child's best interest. Custody of H.S.H.–K., 193 Wis. 2d 649, 533 N.W.2d 419 (1995).

When applying sub. (3), circuit courts must apply the presumption that a fit parent's decision regarding grandparent visitation is in the best interest of the child, but the court must still make its own assessment of the best interest of the child. Paternity of Roger D.H., 2002 WI App 35, 250 Wis. 2d 747, 641 N.W.2d 440, 00–3333. But see Michels v. Lyons, 2019 WI 57, 387 Wis. 2d 1, 927 N.W.2d 486, 17–1142.

Under *Troxel*, 530 U.S. 57 (2000), the due process clause prevents a court from starting with a clean slate when assessing whether grandparent visitation is in the best interests of the child. Within the best interests framework, the court must afford a parent's decision special weight by applying a rebuttable presumption that the fit parent's decision regarding grandparent visitation is in the best interest of the child. It is up to the party advocating for nonparental visitation to rebut the presumption by presenting evidence that the offer is not in the child's best interests. Martin L. v. Julie R.L., 2007 WI App 37, 299 Wis. 2d 768, 731 N.W.2d 288, 06–0199. But see Michels v. Lyons, 2019 WI 57, 387 Wis. 2d 1, 927 N.W.2d 486, 17–1142.

When an existing informal arrangement was sufficient to maintain the established relationship between grandparents and children, state interference in the form of court–ordered placement with the grandparents was unwarranted. The question is not whether the additional time sought by the grandparents with their grandchildren might be good for all concerned. The questions are whether, under the facts of the case, the state should intervene to dictate to the parent with primary placement, that added visitation time is warranted, and, if so, which parent should forfeit a portion of his or her placement time to accommodate the grandparent visitation. Rogers v. Rogers, 2007 WI App 50, 300 Wis. 2d 532, 731 N.W.2d 532, 06–1766. See also Lubinski v. Lubinski, 2008 WI App 151, 314 Wis. 2d 395, 761 N.W.2d 676, 07–1701.

The award of overnights and a week during the summer in a grandparent visitation order under s. 54.56 [now s. 48.9795 (12)] was not contrary to law for being akin to a physical placement award found in divorce cases. There is no difference between the quantity of "physical placement" as that term is used in s. 767.001 (5) and the quantity of "visitation" as that word is used in s. 54.56 [now s. 48.9795 (12)]. The proper amount of that time is a decision made by the family court in the best interests of the children. The quantity of time ordered does not depend on whether it is a visitation order or a physical placement order. Rick v. Opichka, 2010 WI App 23, 323 Wis. 2d 510, 780 N.W.2d 159, 09–0040.

When children visit their grandparents and stay with them as a guest, the grandparents have the responsibility to make routine daily decisions regarding the child's care but may not make any decisions inconsistent with the major decisions made by a person having legal custody. The same is true of a parent who does not have joint legal custody, but does have a right to physical placement. In both instances, the same rules apply: routine daily decisions may be made, but nothing greater. Rick v. Opichka, 2010 WI App 23, 323 Wis. 2d 510, 780 N.W.2d 159, 09–0040.

Under *Holtzman v. Knott*, 193 Wis. 2d 649 (1995), a circuit court may exercise its equitable powers to hear and grant visitation to a non–parent in circumstances when the ch. 767 non–parent visitation provisions do not apply. To apply these equitable powers a circuit court must determine that the petitioner has a "parent–like relationship" with the child and that a "significant triggering event" exists justifying state intervention in the child's relationship with a biological or adoptive parent. The triggering event required by *Holtzman* does not apply to cases brought under the special grandparent provision of sub. (3). Wohlers v. Broughton, 2011 WI App 122, 337 Wis. 2d 107, 805 N.W.2d 118, 09–0488.

Subsection (1) does not require a grandparent, great–grandparent, or stepparent who files a motion for visitation rights under sub. (1) to prove that he or she has maintained a relationship similar to a parent–child relationship with the child. Rather, the parent–child relationship element applies only to a person seeking visitation rights who is not a grandparent, great–grandparent, or stepparent. S.A.M. v. Meister, 2016 WI 22, 367 Wis. 2d 447, 876 N.W.2d 746, 14–1283.

The grandparent visitation statute under sub. (3) is facially constitutional because it is narrowly tailored to further a compelling state interest because a grandparent must overcome the presumption in favor of a fit parent's visitation decision with clear and convincing evidence that the decision is not in the child's best interest. Sub. (3) was unconstitutional as applied when there was no change in circumstances involving the child's family unit and the grandparent's desire to merely secure a more generous and predictable vacation schedule was not enough to overcome the presumption in favor of the parent's visitation decision. Michels v. Lyons, 2019 WI 57, 387 Wis. 2d 1, 927 N.W.2d 486, 17–1142.

A circuit court should consider the nature and extent of grandparent visitation only if a grandparent overcomes the presumption in favor of a fit parent's visitation decision with clear and convincing evidence that the decision is not in the child's best interest. A circuit court should not substitute its judgment for the judgment of a fit parent even if the court disagrees with the parent's decision. Michels v. Lyons, 2019 WI 57, 387 Wis. 2d 1, 927 N.W.2d 486, 17–1142.

Grandparent Visitation Rights. Rothstein. Wis. Law. Nov. 1992.

The Effect of *C.G.F.* and Section 48.925 on Grandparental Visitation Petitions. Hughes. Wis. Law. Nov. 1992.

Third–party Visitation in Wisconsin. Herman & Cooper. Wis. Law. Mar. 2001.

Surviving *Michels*: Can Third–party Visitation Be Resurrected? Krimmer. Wis. Law. Oct. 2019.

767.44 Prohibiting visitation or physical placement if a parent kills other parent. (1) WHEN PROHIBITED. Notwithstanding ss. 767.225 (1) (am), 767.41 (1), (4), and (5), 767.804 (3) (a), 767.805 (4) (a), and 767.89 (3) and except as provided in sub. (2), in an action under this chapter that affects a minor child, a court may not grant to the child's parent visitation or physical placement rights with the child if the parent has been convicted under s. 940.01 of the first–degree intentional homicide, or under s. 940.05 of the 2nd–degree intentional homicide, of the child's other parent, and the conviction has not been reversed, set aside, or vacated.

(2) WHEN NOT APPLICABLE. Subsection (1) does not apply if the court determines by clear and convincing evidence that the visitation or periods of physical placement would be in the best interests of the child. The court shall consider the wishes of the child in making the determination.

History: 1999 a. 9; 2001 a. 61; 2005 a. 443 s. 102; Stats. 2005 s. 767.44; 2019 a. 95.

767.451 Revision of legal custody and physical placement orders. Except for matters under s. 767.461 or 767.481, the following provisions are applicable to modifications of legal custody and physical placement orders:

(1) SUBSTANTIAL MODIFICATIONS. (a) *Within 2 years after final judgment.* Except as provided under sub. (2), a court may not modify any of the following orders before 2 years after the final judgment determining legal custody or physical placement is entered under s. 767.41, unless a party seeking the modification, upon petition, motion, or order to show cause, shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child:

1. An order of legal custody.

2. An order of physical placement if the modification would substantially alter the time a parent may spend with his or her child.

(b) *After 2–year period.* 1. Except as provided under par. (a) and sub. (2), upon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:

a. The modification is in the best interest of the child.

b. There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

2. With respect to subd. 1., there is a rebuttable presumption that:

a. Continuing the current allocation of decision making under a legal custody order is in the best interest of the child.

b. Continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.

3. A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under subd. 1.

(2) MODIFICATION OF SUBSTANTIALLY EQUAL PHYSICAL PLACEMENT ORDERS. Notwithstanding sub. (1):

(a) If the parties have substantially equal periods of physical placement pursuant to a court order and circumstances make it impractical for the parties to continue to have substantially equal physical placement, a court, upon petition, motion, or order to show cause by a party, may modify the order if it is in the best interest of the child.

(b) In any case in which par. (a) does not apply and in which the parties have substantially equal periods of physical placement pursuant to a court order, a court, upon petition, motion, or order to show cause of a party, may modify the order based on the appropriate standard under sub. (1). However, under sub. (1) (b) 2., there is a rebuttable presumption that having substantially equal periods of physical placement is in the best interest of the child.

(2m) MODIFICATION OF PERIODS OF PHYSICAL PLACEMENT FOR FAILURE TO EXERCISE PHYSICAL PLACEMENT. Notwithstanding subs. (1) and (2), upon petition, motion or order to show cause by a party, a court may modify an order of physical placement at any time with respect to periods of physical placement if it finds that a parent has repeatedly and unreasonably failed to exercise periods of physical placement awarded under an order of physical placement that allocates specific times for the exercise of periods of physical placement.

(3) MODIFICATION OF OTHER PHYSICAL PLACEMENT ORDERS. Except as provided under subs. (1) and (2), upon petition, motion or order to show cause by a party, a court may modify an order of physical placement which does not substantially alter the amount of time a parent may spend with his or her child if the court finds that the modification is in the best interest of the child.

(3m) REINSTATEMENT OF FORMER PHYSICAL PLACEMENT ALLOCATION AND SCHEDULE. If a party is a service member, as defined in s. 767.41 (2) (e) 1., and the court modifies an order of physical placement on the basis that the service member has been or will be called to active duty in the U.S. armed forces, notwithstanding sub. (1) the court shall require in the order that the allocation of periods of physical placement and, if applicable, the physical placement schedule that were in effect before the modification are reinstated immediately upon the service member's discharge or release from active duty.

(4) DENIAL OF PHYSICAL PLACEMENT. Upon petition, motion or order to show cause by a party or on its own motion, a court may deny a parent's physical placement rights at any time if it finds that the physical placement rights would endanger the child's physical, mental or emotional health.

(4m) DENIAL OF PHYSICAL PLACEMENT FOR KILLING OTHER PARENT. (a) Notwithstanding subs. (1) to (4), upon petition, motion or order to show cause by a party or on its own motion, a court shall modify a physical placement order by denying a parent physical placement with a child if the parent has been convicted under s. 940.01 of the first–degree intentional homicide, or under s. 940.05 of the 2nd–degree intentional homicide, of the child's other parent, and the conviction has not been reversed, set aside or vacated.

(b) Paragraph (a) does not apply if the court determines by clear and convincing evidence that physical placement with the parent would be in the best interests of the child. The court shall consider the wishes of the child in making the determination.

(5) REASONS FOR MODIFICATION. If either party opposes modification or termination of a legal custody or physical placement order under this section the court shall state, in writing, its reasons for the modification or termination.

(5m) FACTORS TO CONSIDER. (a) Subject to pars. (b) and (c), in all actions to modify legal custody or physical placement orders, the court shall consider the factors under s. 767.41 (5) (am), subject to s. 767.41 (5) (bm), and shall make its determination in a manner consistent with s. 767.41.

(b) In determining the best interest of the child under this section, in addition to the factor under s. 767.41 (5) (am) 12m., the court shall consider whether a stepparent of the child has a criminal record and whether there is evidence that a stepparent of the child 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.

(c) In an action to modify a legal custody order, if a party is a service member, as defined in s. 767.41 (2) (e) 1., the court may not consider as a factor in making a determination 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) NOTICE. No court may enter an order for modification under this section until notice of the petition, motion or order to show cause requesting modification has been given to the child's parents, if they can be found, and to any relative or agency having custody of the child.

(6m) PARENTING PLAN. In any action to modify a legal custody or physical placement order under sub. (1), the court may require the party seeking the modification to file with the court a parenting plan under s. 767.41 (1m) before any hearing is held.

(7) TRANSFER TO DEPARTMENT. The court may order custody transferred to the department only if the department agrees to accept custody. If the court orders custody transferred to the department, the order transferring custody shall include the findings and order specified in s. 767.41 (3) (am).

(8) PETITION, MOTION, OR ORDER TO SHOW CAUSE. A petition, motion, or order to show cause under this section shall include notification of the availability of information under s. 767.105 (2).

History: 1987 a. 355, 364; 1995 a. 27 s. 9126 (19); 1999 a. 9; 2003 a. 130; 2005 a. 101; 2005 a. 443 ss. 160 to 162; Stats. 2005 s. 767.451; 2005 a. 471 ss. 6 to 8; 2007 a. 20; 2007 a. 96 ss. 143 to 146.

NOTE: 1987 Wis. Act 355 and 2005 Wis. Act 443 contain explanatory notes.

"Necessary" implies that a change of custody itself is needed because custodial conditions are harmful in some way to the best interest of the child. Millikin v. Millikin, 115 Wis. 2d 16, 339 N.W.2d 573 (1983).

The revision of s. 767.24 [now s. 767.41] allowing joint custody in cases where both parties did not agree was not a "substantial change in circumstances" justifying a change to joint custody. Licary v. Licary, 168 Wis. 2d 686, 484 N.W.2d 371 (Ct. App. 1992).

Sub. (1) (a) prohibits a change of custody solely to correct a mother's unreasonable interference with physical placement of the child with the father. Sub. (1) (a) provides a two–year truce period. Judicial intervention during this period must be compelling. Paternity of Stephanie R.N., 174 Wis. 2d 745, 488 N.W.2d 235 (1993).

"Necessary" embodies at least two concepts: 1) that the modification must operate to protect the child from alleged harmful custodial conditions; and 2) that the physical or emotional harm threatened by the current custodial conditions must be severe enough to warrant modification. Paternity of Stephanie R.N., 174 Wis. 2d 745, 488 N.W.2d 235 (1993).

This section does not limit a court's authority to hold a hearing or enter an order during the two–year "truce period" with the order effective on the conclusion of the truce period. Paternity of Bradford J.B., 181 Wis. 2d 304, 510 N.W.2d 775 (Ct. App. 1993).

There is no authority to order a change of custody at an unknown time in the future upon the occurrence of some stated contingency. Koeller v. Koeller, 195 Wis. 2d 660, 536 N.W.2d 216 (Ct. App. 1995), 94–2834.

Sub. (1) (b) is inapplicable in guardianship litigation between a parent and a third–party guardian. Howard M. v. Jean R., 196 Wis. 2d 16, 539 N.W.2d 104 (Ct. App. 1995), 94–0955.

Neither sub. (4) nor s. 767.24 (4) (b) [now s. 767.41 (4) (b)] permits a prospective order prohibiting a parent from requesting a change of physical placement in the future. Jocius v. Jocius, 218 Wis. 2d 103, 580 N.W.2d 708 (Ct. App. 1998), 96–2746.

Sections 767.325 and 767.327 [now this section and s. 767.481] do not conflict. If one party files a notification of intention to move under s. 767.327, the other parent may file a motion to modify placement under s. 767.325, and the court may consider all relevant circumstances, including, but not limited to, the move. Hughes v. Hughes, 223 Wis. 2d 111, 588 N.W.2d 346 (Ct. App. 1998), 97–3539.

The sub. (1) prohibition against modification of placement orders applies to both primary placement and physical placement. Trost v. Trost, 2000 WI App 222, 239 Wis. 2d 1, 619 N.W.2d 105, 99–1236.

When a court denies a parent physical placement, it has the authority to impose conditions for regaining placement, which may include mental health treatment, anger management, individual or family counseling, and parenting training. Conditions imposed must be necessary to protect the child from the danger of physical, emotional, or mental harm if the child is placed with the parent. State v. Alice H., 2000 WI App 228, 239 Wis. 2d 194, 619 N.W.2d 151, 99–2812.

A change in amount of placement days does not, in and of itself, establish a substantial change in circumstances. State v. Beaudoin, 2001 WI App 42, 241 Wis. 2d 350, 625 N.W.2d 619, 00–0825.

By asking the trial court for what constituted a substantial modification of placement, the movant effectively conceded that there was a substantial change in circumstances to merit placement modification under sub. (1) (b) 1. and could not maintain a contrary position on appeal. Keller v. Keller, 2002 WI App 161, 256 Wis. 2d 401, 647 N.W.2d 426, 01–2970.

A divorce judgment effecting a prospective change in physical placement, contingent on an assessment of the children's needs, is invalid. A circuit court lacks authority to order a change of physical placement that is both prospective and contingent on the occurrence of an anticipated event. Custody and placement determinations must embody a sense of contemporaneity, whether in original or modification proceedings. Culligan v. Cindric, 2003 WI App 180, 266 Wis. 2d 534, 669 N.W.2d 175, 02–2275.

An order that modifies payments for child support is not an order substantially affecting physical placement as contemplated by sub. (1) (b). Parties have a right to informally agree to change their children's physical placement schedule. That a court order modifying child support acknowledges an informal agreement does not affect physical placement for purposes of this section, and the order to be considered under this section is that which set the placement schedule that was informally modified. Culligan v. Cindric, 2003 WI App 180, 266 Wis. 2d 534, 669 N.W.2d 175, 02–2275.

Sub. (1) (b) does not violate equal protection. Continuity in custody and placement circumstances is beneficial for children, which constitutes a compelling state interest, even when the mother originally acquired custody due to the sole legal custody presumption. Abbas v. Palmersheim, 2004 WI App 126, 275 Wis. 2d 311, 685 N.W.2d 546, 02–3390.

The s. 767.24 (2) (am) [now s. 767.41 (2) (am)] presumption that joint legal custody is in the child's best interest applies only in initial legal custody determinations, not in modification determinations. The presumption that the current custody and physical placement arrangement is in the child's best interest under sub. (1) (b) continues to apply in modification cases. Abbas v. Palmersheim, 2004 WI App 126, 275 Wis. 2d 311, 685 N.W.2d 546, 02–3390.

Under s. 767.24 (6) (b) [now s. 767.41 (6) (b)] the court may give one party with joint custody sole power to make specified decisions while both parties retain equal responsibility for others. Because sub. (1) permits a court to modify legal custody and physical placement, the court may modify the terms of the parties' joint custody in a manner that results in a change in the amount of time the child spends in the home of the parent having primary physical placement. The court was authorized to award one party authority to determine school enrollment and to permit that parent's choice of a boarding school although it reduced the amount of time the child spent with the other parent. Greene v. Hahn, 2004 WI App 214, 277 Wis. 2d 473, 689 N.W.2d 657, 03–3311.

That a child grows older does not, in and of itself, create a substantial change in circumstances. However, when the age change is from infant to adolescent and is accompanied by a pattern of adjustment difficulties, educational failure, and harmful or illegal behavior, and the parties are unable to agree on a major decision affecting the child's life, a substantial change in circumstances has been shown. Greene v. Hahn, 2004 WI App 214, 277 Wis. 2d 473, 689 N.W.2d 657, 03–3311.

Section 767.24 (4) (a) 2. [now s. 767.41] does not require a court to grant each parent equal placement if the court determines that the placement should be modified. In making modification determinations, the circuit court is to maximize the amount of time a child spends with his or her parents within an overall placement schedule, taking into account the best interests of the child, the presumption of the status quo under subs. (1) and (2), the general factors listed in s. 767.24, and the particular factors listed under s. 767.24(5) (am) when relevant to the child. With respect to the modification of legal custody and physical placement orders, maximizing the amount of time cannot be equated with the notion of equal placement. Landwehr v. Landwehr, 2006 WI 64, 291 Wis. 2d 49, 715 N.W.2d 180, 03–2555.

Absent a motion, petition, or order to show cause brought by a party, as required by sub. (1) (b) 1., the trial court lacked authority to amend or modify the custody order from joint custody to sole legal custody. Pero v. Lucas, 2006 WI App 112, 293 Wis. 2d 781, 718 N.W.2d 184, 05–1180.

As in sub. (1), a court is authorized to modify an order under sub. (3) only upon petition, motion, or order to show cause by a party. The statute does not authorize a court to modify a placement order on its own motion. Stumpner v. Cutting, 2010 WI App 65, 324 Wis. 2d 820, 783 N.W.2d 874, 09–0094.

767.461 Revisions agreed to by stipulation. If after an initial order is entered under s. 767.41 the parties agree to a modification in an order of physical placement or legal custody and file a stipulation with the court that specifies the agreed upon modification, the court shall incorporate the terms of the stipulation into a revised order of physical placement or legal custody unless the court finds that the modification is not in the best interest of the child.

History: 1987 a. 355; 2005 a. 443 s. 166; Stats. 2005 s. 767.461.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

Acceptance of a stipulation is not mandatory. The trial court is not prohibited from examining the best interests of the child. Paternity of S.A., 165 Wis. 2d 530, 478 N.W.2d 21 (Ct. App. 1991).

767.471 Enforcement of physical placement orders.

(1) DEFINITIONS. In this section:

(a) "Moving party" means the parent filing a motion under this section, regardless of whether that parent was the petitioner in the action in which periods of physical placement were awarded under s. 767.41.

(b) "Responding party" means the parent upon whom a motion under this section is served, regardless of whether that parent was the respondent in the action in which periods of physical placement were awarded under s. 767.41.

(2) WHO MAY FILE. A parent who has been awarded periods of physical placement under s. 767.41 may file a motion under sub. (3) if any of the following applies:

(a) The parent has had one or more periods of physical placement denied by the other parent.

(b) The parent has had one or more periods of physical placement substantially interfered with by the other parent.

(c) The parent has incurred a financial loss or expenses as a result of the other parent's intentional failure to exercise one or more periods of physical placement under an order allocating specific times for the exercise of periods of physical placement.

(3) MOTION. (a) The motion shall allege facts sufficient to show the following:

1. The name of the moving party and that the moving party has been awarded periods of physical placement.

2. The name of the responding party.

3. That one or more of the criteria in sub. (2) apply.

(b) The motion shall request the imposition of a remedy or any combination of remedies under sub. (5) (b) and (c). This paragraph does not prohibit a court from imposing a remedy under sub. (5) (b) or (c) if the remedy was not requested in the motion.

(c) A court shall accept any legible motion for an order under this section.

(d) The motion shall be filed under the principal action under which the periods of physical placement were awarded.

(e) A motion under this section is a motion for remedial sanction for purposes of s. 785.03 (1) (a).

(4) SERVICE ON RESPONDING PARTY; RESPONSE. Upon the filing of a motion under sub. (3), the moving party shall serve a copy of the motion upon the responding party by personal service in the same manner as a summons is served under s. 801.11. The responding party may respond to the motion either in writing before or at the hearing under sub. (5) (a) or orally at that hearing.

(5) HEARING; REMEDIES. (a) The court shall hold a hearing on the motion no later than 30 days after the motion has been served, unless the time is extended by mutual agreement of the parties or upon the motion of a guardian ad litem and the approval of the court. The court may, on its own motion or the motion of any party, order that a guardian ad litem be appointed for the child prior to the hearing.

(b) If at the conclusion of the hearing the court finds that the responding party has intentionally and unreasonably denied the moving party one or more periods of physical placement or that the responding party has intentionally and unreasonably interfered with one or more of the moving party's periods of physical placement, the court:

1. Shall do all of the following:

a. Issue an order granting additional periods of physical placement to replace those denied or interfered with.

b. Award the moving party a reasonable amount for the cost of maintaining an action under this section and for attorney fees.

2. May do one or more of the following:

a. If the underlying order or judgment relating to periods of physical placement does not provide for specific times for the exercise of periods of physical placement, issue an order specifying the times for the exercise of periods of physical placement.

b. Find the responding party in contempt of court under ch. 785.

c. Grant an injunction ordering the responding party to strictly comply with the judgment or order relating to the award of physical placement. In determining whether to issue an injunction, the court shall consider whether alternative remedies requested by the moving party would be as effective in obtaining compliance with the order or judgment relating to physical placement.

(c) If at the conclusion of the hearing the court finds that the moving party has incurred a financial loss or expenses as a result of the responding party's failure, intentionally and unreasonably and without adequate notice to the moving party, to exercise one or more periods of physical placement under an order allocating specific times for the exercise of periods of physical placement, the court may issue an order requiring the responding party to pay to the moving party a sum of money sufficient to compensate the moving party for the financial loss or expenses.

(d) Except as provided in par. (b) 1. a. and 2. a., the court may not modify an order of legal custody or physical placement in an action under this section.

(e) An injunction issued under par. (b) 2. c. is effective according to its terms for the period of time that the moving party requests, but not more than 2 years.

(6) ENFORCEMENT ASSISTANCE. (a) If an injunction is issued under sub. (5) (b) 2. c., upon request by the moving party the court shall order the sheriff to assist the moving party in executing or serving the injunction.

(b) Within 24 hours after a request by the moving party, the clerk of the circuit court shall send a copy of an injunction issued under sub. (5) (b) 2. c. to the sheriff or to any other local law enforcement agency that is the central repository for orders and that has jurisdiction over the responding party's residence. If the responding party does not reside in this state, the clerk shall send a copy of the injunction to the sheriff of the county in which the circuit court is located.

(c) The sheriff or other appropriate local law enforcement agency under par. (b) shall make available to other law enforcement agencies, through a verification system, information on the existence and status of any injunction issued under sub. (5) (b) 2. c. The information need not be maintained after the injunction is no longer in effect.

(8) PENALTY. Whoever intentionally violates an injunction issued under sub. (5) (b) 2. c. is guilty of a Class I felony.

History: 1999 a. 9; 2001 a. 61, 109; 2005 a. 443 s. 100; Stats. 2005 s. 767.471.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

A successful party in a proceeding under this section is entitled to recover the guardian ad litem fees attributable to him or her as part of the cost of maintaining an action under sub. (5) (b) 1. b, insuring that the full cost of enforcing physical placement rights falls on the interfering parent, not on the aggrieved parent. Under s. 767.045 (6) [now s. 767.407 (6)], a circuit court may allocate guardian ad litem fees between the parties when it makes a finding that a respondent has intentionally and unreasonably denied physical placement or interfered with the petitioner's periods of physical placement. When it makes one or both of those findings, the court must then award the petitioner whatever amount it has allocated to the petitioner. Bernier v. Bernier, 2006 WI App 2, 288 Wis. 2d 743, 709 N.W.2d 453, 04–0625.

The award "of a reasonable amount for the cost of maintaining an action under this section and for attorney fees" under sub. (5) (b) is mandatory. Sub. (5) (b) does not require that documentation of attorney fees must be received into the evidentiary record of a hearing on the merits of a petition filed under that section in order for a court to make an award of attorney fees. Other cases establish that it is common practice for parties to litigate the amount of attorney fees in proceedings that follow a court's determination of the substantive issues. Borreson v. Yunto, 2006 WI App 63, 292 Wis. 2d 231, 713 N.W.2d 656, 05–0190.

A parent cannot delegate physical placement rights to another in his or her absence. Thus a father could not seek to enforce his physical placement with his son by transferring that placement to his current spouse. Lubinski v. Lubinski, 2008 WI App 151, 314 Wis. 2d 395, 761 N.W.2d 676, 07–1701.

Wisconsin's Custody, Placement, and Paternity Reform Legislation. Walther. Wis. Law. Apr. 2000.

767.481 Relocating a child's residence. (1) MOTION; FILING AND SERVING. (a) Except as provided in par. (d), if the court grants any periods of physical placement with a child to both parents and one parent intends to relocate and reside with the child 100 miles or more from the other parent, the parent who intends to relocate and reside with the child shall file a motion with the court seeking permission for the child's relocation.

(b) The motion under par. (a) shall include all of the following:

1. A relocation plan including:

a. The date of the proposed relocation.

b. The municipality and state of the proposed new residence.

c. The reason for the relocation.

d. If applicable, a proposed new placement schedule, including placement during the school year, summers, and holidays.

e. The proposed responsibility and allocation of costs for each parent for transportation of the child between the parties under any proposed new placement schedule.

2. If applicable, a request for a change in legal custody.

3. Notice to the other parent that, if he or she objects to the relocation, he or she must file and serve, no later than 5 days before the initial hearing, an objection to the relocation and any alternate proposal, including a modification of physical placement or legal custody.

4. An attached "Objection to Relocation" form, furnished by the court, for use by the other parent if he or she objects to the relocation.

(c) The parent filing the motion shall serve a copy of the motion by mail on the other parent at his or her most recent address on file with the court. If the parent filing the motion has actual knowledge that the other parent has a different address from the one on file, the motion shall be served by mail at both addresses.

(d) The requirement to file a motion under par. (a) does not apply if the child's parents already live more than 100 miles apart when a parent proposes to relocate and reside with the child. If the parents already live more than 100 miles apart, the parent who intends to relocate with the child shall serve written notice of his or her intent to relocate on the other parent at least 60 days before relocation. Such written notice shall include the date on which the parent intends to relocate and the parent's new address.

(2) INITIAL HEARING. (a) Upon the filing of a motion under sub. (1) (a), the court shall schedule an initial hearing to be held within 30 days after the motion is filed and shall provide notice to the parents of the date of the initial hearing. The child may not be relocated pending the initial hearing.

(b) If the court finds at the initial hearing that the parent not filing the motion was properly served and does not appear at the hearing, or appears at the hearing but does not object to the proposed relocation plan, the court shall approve the proposed relocation plan submitted by the parent filing the motion unless the court finds that the proposed relocation plan is not in the best interest of the child.

(c) If the parent not filing the motion appears at the initial hearing and objects to the relocation plan, the court shall do all of the following:

1. Require the parent who objects to respond by stating in writing within 5 business days, if he or she has not already done so, the basis for the objection and his or her proposals for a new placement schedule and transportation responsibilities and costs under sub. (1) (b) 4. and 5. [sub. (1) (b) 1. d. and e.] in the event that the court grants the parent filing the motion permission to relocate with the child. The parent who objects shall file the response with the court and serve a copy of the response by mail on the other parent at his or her most recent address on file with the court. If the parent filing the response has actual knowledge that the other parent has a different address from the one on file, the response shall be served by mail to both addresses.

NOTE: The correct cross–reference is shown in brackets. Corrective legislation is pending.

2. Refer the parties to mediation, unless the court finds that attending mediation would cause undue hardship or endanger the health or safety of a party as provided in s. 767.405 (8) (b).

3. Except as provided in s. 767.407 (1) (am), appoint a guardian ad litem for the child. The court shall provide in the order for appointment, however, that if a mediator is ordered under subd. 2. the guardian ad litem is not required to commence investigation on behalf of the child unless the mediator notifies the court that the parties are unable to reach an agreement on the issue.

4. Set the matter for a further hearing to be held within 60 days.

(3) RELOCATION PENDING FINAL HEARING. (a) At the initial hearing, or at any time after the initial hearing but before the final hearing, the court may issue a temporary order under s. 767.225 (1) (bm) to allow the parent proposing the relocation to relocate with the child if the court finds that the relocation is in the child's immediate best interest. The court shall inform the parties, however, that approval of the relocation is subject to revision at the final hearing.

(b) If a court commissioner makes a determination, order, or ruling regarding relocation pending the final hearing under par. (a), either party may seek a review by hearing de novo under s. 757.69 (8). The motion requesting the de novo hearing must be filed with the court within 10 days after the court commissioner orally issues the determination, order, or ruling. The judge shall hold the de novo hearing within 30 days after the motion requesting the de novo hearing is filed, unless the court finds good cause for an extension.

(4) STANDARDS FOR DECIDING RELOCATION MOTIONS. At the final hearing, the court shall decide the matter as follows:

(a) If the proposed relocation only minimally changes or affects the current placement schedule or does not affect or change the current placement schedule, the court shall approve the proposed relocation, set a new placement schedule if appropriate, and allocate the costs of and responsibility for transportation of the child between the parties under the new placement schedule.

(b) In cases other than that specified in par. (a), the court shall, in determining whether to approve the proposed relocation and a new placement schedule, use the following factors:

1. The factors under s. 767.41 (5).

2. A presumption that the court should approve the plan of the parent proposing the relocation if the court determines that the objecting parent has not significantly exercised court–ordered physical placement.

3. A presumption that the court should approve the relocation plan if the court determines that the parent's relocation is related to abuse, as defined in s. 813.122 (1) (a), of the child, as defined in s. 813.122 (1) (b); a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m); or a pattern or serious incident of domestic abuse, as defined in s. 813.12 (1) (am).

(c) If the objecting parent files a responsive motion that seeks a substantial change in physical placement or a change in legal custody, the court shall, in deciding the motion of the objecting parent, use the following factors:

1. The factors under s. 767.41 (5).

2. A presumption against transferring legal custody or the residence of the child to a parent who the court determines has significantly failed to exercise court–ordered physical placement.

3. A presumption that the court should approve the plan of the parent proposing the relocation if the court determines that the parent's relocation is related to abuse, as defined in s. 813.122 (1) (a), of the child, as defined in s. 813.122 (1) (b); a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m); or a pattern or serious incident of domestic abuse, as defined in s. 813.12 (1) (am).

(d) The court shall decide all contested relocation motions and all related motions for modification of legal custody or physical placement in the best interest of the child. The movant bears the burden of proof in a contested relocation motion or a related motion for modification of legal custody or physical placement except in cases involving a presumption under par. (b) 2. or 3. or (c) 2. or 3. In cases involving a presumption under par. (b) 2. or 3. or (c) 2. or 3., the parent objecting to the relocation shall have the burden of proof in demonstrating the proposed relocation is not in the child's best interest.

(e) If the objecting parent files a responsive motion that seeks a substantial change in physical placement or a change in legal custody, and the parent proposing the relocation withdraws or otherwise fails to pursue his or her relocation motion or the court does not allow the relocation, the court shall proceed on the objecting parent's responsive motion under s. 767.451.

(5) STIPULATIONS. At any time after a motion is filed under sub. (1), if the parties agree that one parent may relocate more than 100 miles away from the other parent, the parties may file a stipulation with the court that specifies that neither parent has any objection to the planned relocation and that sets out any agreed upon modification to legal custody or periods of physical placement, including responsibility and costs for transportation of the child between the parties under a proposed new placement schedule. The court shall incorporate the terms of the stipulation into an order for the relocation or a revised order of legal custody or physical placement, as appropriate, unless the court finds that the modification is not in the best interest of the child.

(6) OTHER NOTICE REQUIRED FOR REMOVALS. Except as otherwise provided in an order or judgment allocating periods of physical placement with a child, a person who has legal custody of and periods of physical placement with the child shall notify any other person who has periods of physical placement with the child before removing the child from the child's residence for a period of more than 14 consecutive days.

(7) APPLICABILITY. (a) The requirements and procedures under this section apply to relocations with or removals of a child in any of the following cases:

1. Cases that are originally commenced on or after April 5, 2018.

2. Cases that were originally commenced before April 5, 2018, but in which a legal custody or physical placement order is modified on or after April 5, 2018.

(b) Except as provided in par. (a) 2., the requirements and procedures under s. 767.481, 2015 stats., apply to moves with or removals of a child in cases that were originally commenced before April 5, 2018.

History: 1987 a. 355, 364; 1991 a. 32, 269; 1995 a. 70; 1999 a. 9; 2001 a. 61; 2005 a. 174; 2005 a. 443 s. 164; Stats. 2005 s. 767.481; 2017 a. 203.

The trial court may not order a custodial parent to live in designated part of the state or else lose custody. Groh v. Groh, 110 Wis. 2d 117, 327 N.W.2d 655 (1983).

The sub. (5) factors are an addenda to the best interest of the child considerations under s. 767.24 [now s. 767.41] and are a reminder to the court to tailor the best interest of the child standard to problems unique to a removal situation. Kerkvliet v. Kerkvliet, 166 Wis. 2d 930, 480 N.W.2d 823 (Ct. App. 1992).

Sections 767.325 and 76.327 [now ss. 767.451 and 767.481] do not conflict. If one party files a notification of intent to move under s. 767.327 [now s. 767.481], the other parent may file a motion to modify placement under s. 767.325 [now s. 767.451], and the court may consider all relevant circumstances, including the move. Hughes v. Hughes, 223 Wis. 2d 111, 588 N.W.2d 346 (Ct. App. 1998), 97–3539.

There is no law prohibiting a parent with joint legal custody and physical placement from taking a child outside the state, including to a foreign country, for less than 90 days. When parents agree that one parent must move the court to prohibit the other from taking a particular trip with the children, the moving party has the burden of producing evidence and persuading the court that prohibiting the trip is in the children's best interests. Long v. Ardestani, 2001 WI App 46, 241 Wis. 2d 498, 624 N.W.2d 405, 00–1429.

Groh is still good law, subject to the expanded authority granted over intrastate moves of 150 or more miles. Accordingly, the circuit court in this case had no authority to prospectively order a parent not move beyond 45 miles from the marital home. By its enactment of this section, the legislature has made a judgment that moves of less than 150 miles are not subject to the best interests of the children standard. Rather than providing a court authority to prohibit geographical separation, s. 767.41 (4) (a) 2. presumes such separation exists and directs the court to consider the separation when establishing a placement schedule. Derleth v. Cordova, 2013 WI App 142, 352 Wis. 2d 51, 841 N.W.2d 552, 12–2018.

The circuit court's factual determination that the parent's homes were less than 150 miles apart, by considering a usual and direct route, was not clearly erroneous. Derleth v. Cordova, 2013 WI App 142, 352 Wis. 2d 51, 841 N.W.2d 552, 12–2018.

Based on the unique facts of this case, the court did not err in ordering that the children be re–enrolled in specific schools and that the mother return to that district so their enrollment could be accomplished while continuing their primary placement with her. Shulka v. Sikraji, 2014 WI App 113, 358 Wis. 2d 639, 856 N.W.2d 617, 13–2080.

Airing the Controversy: Wisconsin's Child Removal Law. Herman, Cooper, & Melli. Wis. Law. June 1993.

Dissecting the New Family Relocation Statute. Krimmer. Wis. Law. July/Aug. 2018.

SUBCHAPTER VI

SUPPORT AND MAINTENANCE

767.501 Actions to compel support. (1) DEFINITIONS. In this section:

(a) "Nonlegally responsible relative" means a relative who assumes responsibility for the care of a child without legal custody, but is not in violation of a court order. "Nonlegally responsible relative" does not include a relative who has physical custody of a child during a court–ordered visitation period.

(b) "Relative" means any person connected with a child by blood, marriage or adoption.

(2) WHO MAY COMMENCE; SUPPORT DETERMINATION. (a) If a person does not provide for the support and maintenance of his or her spouse or minor child, any of the following may commence a court action to compel the person to provide support and maintenance:

1. The person's spouse.
2. The minor child.
3. The person with legal custody of the child.
4. A nonlegally responsible relative.

(b) The court in the action shall, under s. 767.511 or 767.56, determine the amount, if any, that the person should reasonably contribute to the support and maintenance of the spouse or child and how the sum shall be paid. The amount shall be expressed as a fixed sum unless the parties have stipulated to expressing the amount as a percentage of the payer's income and the requirements under s. 767.34 (2) (am) 1. to 3. are satisfied. The amount ordered to be paid may be modified by the court under s. 767.59 upon sufficient evidence.

(c) The determination may be enforced by contempt proceedings, an account transfer under s. 767.76, or other enforcement mechanisms under s. 767.77.

(d) In an action under this section, no filing fee or other costs are taxable to the person's spouse, the minor child, the person with legal custody, or the nonlegally responsible relative, but after the action has been commenced the court may order that all or part of any fees and costs incurred be paid by either party.

(3) PUBLIC ASSISTANCE RECIPIENTS; ACTION BY STATE. If the state or any subdivision of the state furnishes public aid to a spouse or dependent child for support and maintenance and the spouse, person with legal custody, or nonlegally responsible relative does not commence an action under this chapter for support or maintenance, the person in charge of county welfare activities, the county child support agency under s. 59.53 (5), or the department is a real party in interest under s. 767.205 (2) and shall commence an action under this section. An attorney employed by the state or a subdivision of the state may commence an action under this section. The title of the action shall be "In re the support or maintenance of A.B. (Child)".

(4) LEGAL CUSTODY AND PHYSICAL PLACEMENT. Upon request of a party to an action under this section, the court may make orders concerning the legal custody and physical placement of any minor child of the parties in accordance with s. 767.41.

History: 1971 c. 220; 1971 c. 307 s. 116; 1973 c. 237; 1975 c. 82; 1977 c. 105, 271; 1979 c. 32 ss. 50, 92 (4); Stats. 1979 s. 767.08; 1981 c. 317; 1983 a. 27; 1985 a. 29, 176; 1987 a. 413; 1989 a. 212; 1993 a. 481; 1995 a. 27 s. 9126 (19); 1995 a. 201, 404; 1997 a. 27, 35; 1999 a. 162; 2001 a. 16; 2005 a. 443 ss. 42, 216, 217; Stats. 2005 s. 767.501.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

To find a party estopped from seeking a revision of a stipulation incorporated into a divorce judgment: 1) both parties must have entered into he stipulation knowingly and freely; 2) the overall settlement must be fair and equitable and not illegal or against public policy; and 3) one party subsequently seeks to be released form its terms on grounds that the court could not have entered the order it did without the parties agreement. Nichols v. Nichols, 162 Wis. 2d 96, 469 N.W.2d 619 (1991).

County child support agencies can initiate actions to compel support under this section without payment of a filing fee. 72 Atty. Gen. 72.

767.511 Child support. (1) WHEN ORDERED. When the court approves a stipulation for child support under s. 767.34, enters a judgment of annulment, divorce, or legal separation, or enters an order or a judgment in a paternity action or in an action under s. 767.001 (1) (f) or (j), 767.501, 767.804 (2), or 767.805 (3), the court shall do all of the following:

(a) Order either or both parents to pay an amount reasonable or necessary to fulfill a duty to support a child. The support amount must be expressed as a fixed sum unless the parties have stipulated to expressing the amount as a percentage of the payer's income and the requirements under s. 767.34 (2) (am) 1. to 3. are satisfied.

(b) Ensure that the parties have stipulated which party, if either is eligible, will claim each child as an exemption for federal income tax purposes under 26 USC 151 (c), or as an exemption for state income tax purposes under s. 71.07 (8) (b) or under the laws of another state. If the parties are unable to reach an agreement about the tax exemption for each child, the court shall make the decision in accordance with state and federal tax laws. In making its decision, the court shall consider whether the parent who is assigned responsibility for the child's health care expenses under s. 767.513 is covered under a health insurance policy or plan, including a self–insured plan, that is not subject to s. 632.897 (10) and that conditions coverage of a dependent child on whether the child is claimed by the insured parent as an exemption for purposes of federal or state income taxes.

(c) In addition to ordering child support for a child under par. (a), assign as a support obligation responsibility for, and direct the manner of payment of, the child's health care expenses under s. 767.513.

(1g) CONSIDERATION OF FINANCIAL INFORMATION. In determining child support payments, the court may consider all relevant financial information or other information relevant to the parent's earning capacity, including information reported under s. 49.22 (2m) to the department or the county child support agency under s. 59.53 (5).

(1j) PERCENTAGE STANDARD GENERALLY REQUIRED. Except as provided in sub. (1m), the court shall determine child support payments by using the percentage standard established by the department under s. 49.22 (9).

(1m) DEVIATION FROM STANDARD; FACTORS. Upon request by a party, the court may modify the amount of child support payments determined under sub. (1j) if, after considering the following factors, the court finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to any of the parties:

(a) The financial resources of the child.

(b) The financial resources of both parents.

(bj) Maintenance received by either party.

(bp) The needs of each party in order to support himself or herself at a level equal to or greater than that established under 42 USC 9902 (2).

(bz) The needs of any person, other than the child, whom either party is legally obligated to support.

(c) If the parties were married, the standard of living the child would have enjoyed had the marriage not ended in annulment, divorce or legal separation.

(d) The desirability that the custodian remain in the home as a full–time parent.

(e) The cost of child care if the custodian works outside the home, or the value of custodial services performed by the custodian if the custodian remains in the home.

(ej) The award of substantial periods of physical placement to both parents.

(em) Extraordinary travel expenses incurred in exercising the right to periods of physical placement under s. 767.41.

(f) The physical, mental, and emotional health needs of the child, including any costs for health insurance as provided for under s. 767.513.

(g) The child's educational needs.

(h) The tax consequences to each party.

(hm) The best interests of the child.

(hs) The earning capacity of each parent, based on each parent's education, training and work experience and the availability of work in or near the parent's community.

(i) Any other factors which the court in each case determines are relevant.

(1n) DEVIATION FROM STANDARD; RECORD. If the court finds under sub. (1m) that use of the percentage standard is unfair to the child or the requesting party, the court shall state in writing or on the record the amount of support that would be required by using the percentage standard, the amount by which the court's order deviates from that amount, its reasons for finding that use of the percentage standard is unfair to the child or the party, its reasons for the amount of the modification and the basis for the modification.

(2) SEPARATE FUND OR TRUST. The court may protect and promote the best interests of the minor children by setting aside a portion of the child support which either party is ordered to pay in a separate fund or trust for the support, education and welfare of such children.

(3) EFFECT OF PHYSICAL PLACEMENT VIOLATION. Violation of physical placement rights by the custodial parent does not constitute reason for failure to meet child support obligations.

(4) AGE OF CHILD ELIGIBLE FOR SUPPORT. The court shall order either party or both to pay for the support of any child of the parties who is less than 18 years old, or any child of the parties who is less than 19 years old if the child is pursuing an accredited course of instruction leading to the acquisition of a high school diploma or its equivalent.

(5) LIABILITY FOR PAST SUPPORT. Subject to ss. 767.804 (4), 767.805 (4m), and 767.89 (4), liability for past support is limited to the period after the birth of the child.

(6) INTEREST ON ARREARAGE. Subject to sub. (6m), a party ordered to pay child support under this section shall pay simple interest at the rate of 1 percent per month on any amount in arrears that is equal to or greater than the amount of child support due in one month. Subject to sub. (6m), if the party no longer has a current obligation to pay child support, interest at the rate of 1 percent per month shall accrue on the total amount of child support in arrears, if any. Interest under this subsection is in lieu of interest computed under s. 807.01 (4), 814.04 (4), or 815.05 (8) and is paid to the department or its designee under s. 767.57. Except as provided in s. 767.57 (1m) and except as required under federal statutes or regulations, the department or its designee shall apply all payments received for child support as follows:

(a) First, to payment of child support due within the calendar month during which the payment is received.

(b) Second, to payment of unpaid child support due before the payment is received.

(c) Third, to payment of interest accruing on unpaid child support.

(6m) PILOT PROGRAM ON INTEREST RATE. The department may conduct a pilot program under which the interest that accrues on the amounts in arrears specified in sub. (6) and in s. 767.531 shall be at the rate of 0.5 percent per month instead of 1 percent per month. If the department conducts a pilot program under this subsection, the program may begin at any time after December 31, 2013, and the new rate shall apply to interest that accrues during that time.

(7) EFFECT OF JOINT LEGAL CUSTODY. An order of joint legal custody under s. 767.41 does not affect the amount of child support ordered.

History: 1971 c. 157; 1977 c. 29, 105, 418; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; Stats. 1979 s. 767.25; 1981 c. 20; 1983 a. 27; 1985 a. 29; 1987 a. 27, 37, 355, 413; 1989 a. 31, 212; 1991 a. 39; 1993 a. 481; 1995 a. 27 ss. 7101, 7102, 9126 (19); 1995 a. 201, 279, 404; 1997 a. 27, 35, 191; 1999 a. 9, 32; 2001 a. 16, 61; 2005 a. 253, 342; 2005 a. 443 ss. 103, 105, 219; Stats. 2005 s. 767.511; 2009 a. 185; 2011 a. 32; 2013 a. 20; 2017 a. 366; 2019 a. 95.

Cross–reference: See also ch. DCF 150, Wis. adm. code.

Cross–reference: See also Wisconsin Administrative Code Citations published in the Wisconsin Administrative Code for a list of citations to cases citing chs. DCF 150, HSS 80, HFS 80, and DWD 40, the child support percentage of income standard.

Cross–reference: See also notes to s. 767.59 for decisions regarding postjudgment modifications.

A provision in a judgment as to the education of children past the age of majority, inserted pursuant to a stipulation of the parties, cannot later be challenged and can be enforced by contempt proceedings. Bliwas v. Bliwas, 47 Wis. 2d 635, 178 N.W.2d 35 (1970).

When parents each own a 1/2 interest in future proceeds of real estate and the state contributes to child support, the court may not order the custodial parent to pay child support in the form of an accumulating real estate lien in favor of the state. State ex rel. v. Reible, 91 Wis. 2d 394, 283 N.W.2d 427 (Ct. App. 1979).

The trial court abused its discretion by setting child support payments without considering the needs of the children or the payer's ability to pay. Edwards v. Edwards, 97 Wis. 2d 111, 293 N.W.2d 160 (1980).

A personal injury damage award to a noncustodial spouse can be considered as a change of circumstances justifying increased support. Sommer v. Sommer, 108 Wis. 2d 586, 323 N.W.2d 144 (Ct. App. 1982).

Sub. (6) imposes interest on arrearages existing on July 2, 1983, as well as on those accruing afterward. Greenwood v. Greenwood, 129 Wis. 2d 388, 385 N.W.2d 213 (Ct. App. 1986).

Federal Supplemental Security Income may not be considered to be an economic resource for purposes of computing a child support obligation. However, a seek–work order may be appropriate. Langlois v. Langlois, 150 Wis. 2d 101, 441 N.W.2d 286 (Ct. App. 1989).

Educational grants and loans, AFDC, and other child support are not economic resources for purposes of computing a child support obligation. Thibadeau v. Thibadeau, 150 Wis. 2d 109, 441 N.W.2d 281 (Ct. App. 1989).

Consideration of expenses incurred by a child as an adult, including education expenses, is error. Resong v. Vier, 157 Wis. 2d 382, 459 N.W.2d 591 (Ct. App. 1990).

A divorce stipulation waiving or setting a ceiling on child support and preventing modification is against public policy and will not be enforced. Ondrasek v. Tenneson, 158 Wis. 2d 690, 462 N.W.2d 915 (Ct. App. 1990).

The trial court's use of a computer program to analyze financial evidence was not error. Bisone v. Bisone, 165 Wis. 2d 114, 477 N.W.2d 59 (Ct. App. 1991).

In a joint custody situation, the parent with primary physical custody may be ordered to pay child support. Matz v. Matz, 166 Wis. 2d 326, 479 N.W.2d 245 (Ct. App. 1991).

A stepparent has no legal obligation to support a stepchild. Under appropriate circumstances the theory of equitable estoppel may apply to cases involving child support. Ulrich v. Cornell, 168 Wis. 2d 792, 484 N.W.2d 546 (1992).

The absence of a mortgage obligation is relevant to the assessment of a party's economic circumstances, but does not translate into imputed income under the applicable administrative rule. In Marriage of Zimmerman v. Zimmerman, 169 Wis. 2d 516, 485 N.W.2d 294 (Ct. App. 1992).

A support order against actual AFDC grants is prohibited by *Thibadeau*, but an order against earned income of one who also receives AFDC is not. In Support of B., L., T. & K., 171 Wis. 2d 617, 492 N.W.2d 350 (Ct. App. 1992).

No matter how corporate income is labeled, a family court may pierce the corporate shield if it is convinced the obligor's intent is to avoid financial obligations. Evjen v. Evjen, 171 Wis. 2d 677, 492 N.W.2d 360 (Ct. App. 1992).

The parties' extrajudicial agreement that child support payments be discontinued was enforceable via the doctrine of equitable estoppel. Harms v. Harms, 174 Wis. 2d 780, 498 N.W.2d 229 (1993).

The "serial family payer" rule adopted under the percentage standards referred to in sub. (1) [now sub. (1j)] is discussed. Brown v. Brown, 177 Wis. 2d 512, 503 N.W.2d 280 (Ct. App. 1993).

The mandatory percentage standards for determining support do not allow for deferred payments. Kelly v. Hougham, 178 Wis. 2d 546, 504 N.W.2d 440 (Ct. App. 1993).

An AFDC recipient assigns all rights to child support payments to the state. As such the payments may not be held in trust for the child under sub. (2). Paternity of Lachelle A.C., 180 Wis. 2d 708, 510 N.W.2d 718 (Ct. App. 1993).

A lump sum separation benefit received upon termination of employment was properly considered to be income subject to the percentage standards for support. Gohde v. Gohde, 181 Wis. 2d 770, 512 N.W.2d 199 (Ct. App. 1993).

In deciding not to apply the percentage standard, the court erred when it compared the parties available incomes after deducting the percentage amount from the payer's income, but failed to consider the assumed contribution of the same percentage by the payee. Kjelstrum v. Kjelstrum, 181 Wis. 2d 973, 512 N.W.2d 264 (Ct. App. 1994).

A trial court could not set child support at zero, convert post–divorce income to marital property and order that income to be held in trust to be distributed to the child when AFDC benefits ended. Luna v. Luna, 183 Wis. 2d 20, 515 N.W.2d 480 (Ct. App. 1994).

If the interests of the children and custodial parent are protected, parties are free to contract in a settlement agreement that the primary custodian will not have spend-

ing discretion over child support. Jacquart v. Jacquart, 183 Wis. 2d 372, 515 N.W.2d 539 (Ct. App. 1994).

An asset and its income stream may not be counted both as an asset in the property division and as part of the payer's income from which support is paid. Maley v. Maley, 186 Wis. 2d 125, 519 N.W.2d 717 (Ct. App. 1994).

A minimum fixed child support amount, rather than the percentage standard, based on the payer's "potential income" was appropriate when the court found that the payer had a substantial potential to manipulate the amount of support. Doerr v. Doerr, 189 Wis. 2d 112, 525 N.W.2d 745 (Ct. App. 1994).

Trust income that is income to the beneficiary under federal tax law is subject to a child support order regardless of whether a distribution is made to the beneficiary. Grohmann v. Grohmann, 189 Wis. 2d 532, 525 N.W.2d 261 (1995).

The trial court may consider the amount of time a child is placed with the paying parent and that parent's second family in setting support. Molstad v. Molstad, 193 Wis. 2d 602, 535 N.W.2d 63 (Ct. App. 1995).

The percentage standards may be used to generate future as well as present support. Paternity of Tukker M.O., 199 Wis. 2d 186, 544 N.W.2d 417 (1996), 93−1929.

The percentage standards presumptively apply in the case of a high income payee absent the payer's showing of unfairness by the greater weight of the credible evidence. Luciani v. Montemurro−Luciani, 199 Wis. 2d 280, 544 N.W.2d 561 (1996), 93−2899.

Sub. (6) makes interest on child support arrearages mandatory. A trial court has no discretion in awarding interest, even if it determines that to do so would be inequitable. Douglas County Child Support v. Fisher, 200 Wis. 2d 807, 547 N.W.2d 801 (Ct. App. 1996), 95−1960.

A court may consider earning capacity rather than actual earnings in determining child support and maintenance if it finds a parent's job choice voluntary and unreasonable. Sellers v. Sellers, 201 Wis. 2d 578, 549 N.W.2d 481 (Ct. App. 1996), 95−2730.

The fact that a party, by deliberate conduct, frustrates an accurate calculation of the party's income does not prevent the trial court from making the appropriate finding of fact. The court may make its findings based on the available evidence. Lellman v. Mott, 204 Wis. 2d 166, 554 N.W.2d 525 (Ct. App. 1996), 96−0618.

The court did not abuse its discretion in ruling against a request in a high income payer case for an increase in support according to the percentage standards when the court believed that the request was really a disguised claim for extra money to support the custodial parent's own lifestyle. Nelsen v. Candee, 205 Wis. 2d 632, 556 N.W.2d 789 (Ct. App. 1996), 95−2208.

In certain cases, such as with military retirement pay, an asset may be divided in the property division and its income stream considered as income in determining child support. Cook v. Cook, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), 95−1963.

When a noncustodial parent seeks to impose a trust on arrearages owed under a pre−August 1, 1987, support order, that parent must demonstrate that the trust is in the child's best interest and, when the custodial parent does not agree to the trust, that the primary custodian was unwilling to or incapable of managing the support money. Cameron v. Cameron, 209 Wis. 2d 88, 562 N.W.2d 126 (1997), 95−0311.

Income disparity resulting from applying the percentage standards is only relevant if the payer can show inability to pay or that the income disparity will adversely affect the children or payer. Equalizing lifestyles between parents is not a support objective. The amount of discretionary income either parent will have to spend on their children is a secondary consideration. Raz v. Brown, 213 Wis. 2d 296, 570 N.W.2d 605 (Ct. App. 1997), 96−1997.

The repayment to the payer spouse of a loan made by him to a company that he owned was a proper addition to the payer's income available for support. It was properly found to be deferred compensation, which is included within the applicable definition of income. Raz v. Brown, 213 Wis. 2d 296, 570 N.W.2d 605 (Ct. App. 1997), 96−1997.

A stipulation for child support with no time limit or opportunity for review was against public policy and the payer was not estopped from seeking a modification due to a material change in circumstances. Krieman v. Goldberg, 214 Wis. 2d 163, 571 N.W.2d 425 (1997), 96−3489.

Absent a finding that an individual partner has authority to unilaterally control a partnership asset, partnership assets will be imputed as available income only in accordance with the partnership agreement. Health insurance premiums paid by a partnership are included in the partners income available for child support. Weis v. Weis, 215 Wis. 2d 135, 572 N.W.2d 123 (Ct. App. 1997), 96−3576.

The trial court properly exercised its discretion under sub. (1m) (i) by excluding from the application of the percentage standards the value of nonassignable trips received by the paying spouse as employment bonuses although the trips constituted taxable income. State v. Wall, 215 Wis. 2d 595, 573 N.W.2d 862 (Ct. App. 1997), 97−0826.

In concluding that a deviation from the percentage standards is warranted, all listed factors need not be applied. State v. Alonzo R., 230 Wis. 2d 17, 601 N.W.2d 328 (Ct. App. 1999), 98−3333.

The percentage standards under sub. (1j) include the shared−time payer formula in DWD 40.04 (2) [now DCF 150.04 (2)], Wis. Adm. Code, as well as the straight percentage standards in DWD 40.03 (1) [now DCF 150.03 (1)]. The shared−time formula applies if the payer will be assuming costs in proportion to the number of days the court is ordering placement with the parent. Randall v. Randall, 2000 WI App 98, 235 Wis. 2d 1, 612 N.W.2d 737, 99−0531.

Incarceration is a valid factor for a court to consider in setting child support because of the impact it may have on the payor's employability due to what may be voluntary and unreasonable acts. It was proper to base child support on earning capacity and to provide for an offset against the payor's property division payout to provide for payment of the support obligation. Modrow v. Modrow, 2001 WI App 200, 247 Wis. 2d 889, 634 N.W.2d 852, 00−1868.

Subs. (1j), (1m), and (1n) give the court authority to determine and order some amount for child support. While that authority implicitly includes the authority to determine the amount to be zero, it does not implicitly include the authority to order the parents to divide expenses for the children among themselves in particular ways as an alternative to ordering one parent to pay child support to the other. Zawistowski v. Zawistowski, 2002 WI App 86, 253 Wis. 2d 630, 644 N.W.2d 252, 01−0655.

This section makes no provision as to splitting child care costs beyond what is provided in the child support payments. The trial court erroneously exercised its discretion when, without addressing the sub. (1m) factors, it deviated from the child support percentage standards by ordering one party to pay one−half of the daycare expenses in addition to support required by the percentage standards. McLaren v. McLaren, 2003 WI App 125, 265 Wis. 2d 529, 665 N.W.2d 405, 02−2451.

A trial court may establish a trust from funds paid for child support for the purpose of funding a child's postminority educational expenses. Because the percentage standards presume a higher standard of living commensurate with the payer's higher income, a child is entitled to the money over and above his or her needs. A trust is in the child's best interests and puts the child in the same position as if in an intact high−income family. Further, consideration of "educational needs" under sub. (1m) (g) is broad enough to encompass the higher educational needs of the child. Kowalski v. Obst, 2003 WI App 218, 267 Wis. 2d 400, 671 N.W.2d 339, 03−0573.

Sub. (6) does not limit the authority a trial court would otherwise have to consider imposing interest on unpaid maintenance arrears. Cashin v. Cashin, 2004 WI App 92, 273 Wis. 2d 754, 681 N.W.2d 255, 03−1010.

When a spouse presented a challenge to the application of the percentage standards on fairness grounds and presented a developed argument based on evidence in support of that challenge, the trial court was required to perform the analysis of the relevant statutory factors in answer to that challenge. Maritato v. Maritato, 2004 WI App 138, 275 Wis. 2d 252, 685 N.W.2d 379, 03−2074.

When information the payer spouse supplied did not permit more than an approximate determination of his true gross income, the court was not required to precisely subtract the amount the payer alleged he would have to pay to service a new debt. Derr v. Derr, 2005 WI App 63, 280 Wis. 2d 681, 696 N.W.2d 170, 03−2181.

The trial court erred when it ordered that child support be held open based upon the asset of the wife's Ph.D. in psychology and upon her imputed enhanced education income upon her expected, but as yet unattained, licensure to practice. Child support determinations are to be made upon the basis of the circumstances existing at the time of the divorce and a held−open determination indicates that an order for child support is not necessary based upon current circumstances. Weiler v. Boerner, 2005 WI App 64, 280 Wis. 2d 519, 695 N.W.2d 833, 03−2606.

When undistributed company earnings are at issue, the court must: 1) ascertain whether the child support payer has the ability to individually control or access the undistributed earnings; and 2) determine whether there is a valid business reason for the company's decision to retain the earnings. If the payer has the ability to individually control or access earnings and the company has no valid reason for retaining its earnings, the undistributed income can be considered when calculating the payer's child support obligation. Winters v. Winters, 2005 WI App 94, 281 Wis. 2d 798, 699 N.W.2d 229, 04−0747.

A lump sum payment as the result of a pension plan enhancement was gross income subject to the child support standards. There is no windfall exception to the application of child support to gross income. Absent a finding of unfairness, grounded in the specific facts of the case, and after considering all enumerated factors in sub. (1m) and any other factors relevant to the particular case, a trial court is not authorized to deviate from the percentage standards. Winkler v. Winkler, 2005 WI App 100, 282 Wis. 2d 746, 699 N.W.2d 652, 04−1231.

The circuit court erred when it upheld the court commissioner's decision to exclude overtime pay as a general policy without exception when applying the percentage standard. Overtime income clearly constitutes a portion of salary and wages, and Wisconsin law does not exclude overtime income in the application of the percentage standard. Jarman v. Welter, 2006 WI App 54, 289 Wis. 2d 857, 711 N.W.2d 705, 05−1616.

A provision providing that neither parent could request a change in the amount of child support payments for a period of at least seven years from the date of the judgment entered, except in catastrophic circumstances was unenforceable. As is implicit from *Ondrasek*: any marital settlement agreement entered into by divorcing parties that purports to limit a child support payee's ability to seek a support modification upon a substantial change in circumstances is against public policy and cannot provide a basis to estop the payee from seeking a modification. *Ondrasek* is not limited to unilateral waivers of a payee's right to obtain increased child support. Wood v. Propeck, 2007 WI App 24, 299 Wis. 2d 470, 728 N.W.2d 757, 05−2674.

In not revealing that he was a trust beneficiary, a father failed to make proper financial disclosure at the time of a divorce as was required by s. 767.127. The rationale of *Grohmann* is applicable to both grantor and nongrantor trusts if there is an obligation to report that trust's income as one's own because it is the obligation to report the income that makes the income reachable for calculations of a child support obligation. Stevenson v. Stevenson, 2009 WI App 29, 316 Wis. 2d 442, 765 N.W.2d 811, 07−2143.

There is no basis upon which a trial court can reduce that support owed to a payor spouse's marital child based on nonchild−support amounts paid to the payee spouse's nonmarital child. However, the benefit received by the non marital child for amounts received from the payor spouse would be appropriately accounted for in the maintenance award or property division. Ladwig v. Ladwig, 2010 WI App 78, 325 Wis. 2d 497, 785 N.W.2d 664, 09−1202.

Ordinarily bonus income should be considered income when setting a child support order. In this case the trial court made the necessary findings to deviate from the child support guidelines when the court awarded a percentage of a future bonus to make up for a gap in support when no order was in effect, rather than applying the bonus to current support. Tierney v. Berger, 2012 WI App 91, 343 Wis. 2d 681, 820 N.W.2d 459, 11−0565.

While the statute suggests that child support orders be expressed as a fixed sum, it does not completely prohibit percentage orders. Permitting percentage orders on unknown future bonus income is an exception to the preferred method of having percentage orders expressed as a fixed sum. Tierney v. Berger, 2012 WI App 91, 343 Wis. 2d 681, 820 N.W.2d 459, 11−0565.

Federal preemption doctrine does not prohibit states from requiring payment of child support out of veterans' disability benefits. Rose v. Rose, 481 U.S. 619 (1987).

Poor Little Rich Kids: Revising Wisconsin's Child Support System to Accommodate High−Income Payers. Dodd. 83 MLR 807.

No−Fault Divorce: Tax Consequences of Support, Maintenance and Property Settlement. Case. WBB Dec. 1977.

A practitioner's approach to child support. Bailey. WBB June 1987.

HSS 80: New Rules for Child Support Obligations. Hickey. Wis. Law. Apr. 1995.

Which Came First? The Serial Family Payer Formula. Stansbury. Wis. Law. Apr. 1995.

767.513 Child health care expenses. (1) DEFINITION. In this section, "health insurance" does not include medical assistance provided under subch. IV of ch. 49.

(2) RESPONSIBILITY AND PAYMENT. In addition to ordering child support for a child under s. 767.511 (1), the court shall specifically assign responsibility for and direct the manner of payment of the child's health care expenses. In assigning responsibility for a child's health care expenses, the court shall consider whether a child is covered under a parent's health insurance policy or plan at the time the court approves a stipulation for child support under s. 767.34, enters a judgment of annulment, divorce, or legal separation, or enters an order or a judgment in a paternity action or in an action under s. 767.001 (1) (f) or (j), 767.501, 767.804 (2), or 767.805 (3), the availability of health insurance to each parent through an employer or other organization, the extent of coverage available to a child, and the costs to the parent for the coverage of the child. A parent may be required to initiate or continue health care insurance coverage for a child under this section. If a parent is required to do so, he or she shall provide copies of necessary program or policy identification to the custodial parent and is liable for any health care costs for which he or she receives direct payment from an insurer. This section shall not be construed to limit the authority of the court to enter or modify support orders containing provisions for payment of medical expenses, medical costs, or insurance premiums that are in addition to and not inconsistent with this section.

(2m) HEALTH INSURANCE IDENTIFICATION CARD. (a) The court shall order a parent who is required to provide health insurance coverage for a child under this section to provide to the other parent a health insurance identification card evidencing the child's health insurance coverage.

(b) If the parent ordered to provide a health insurance identification card for the child fails to do so, the other parent may attempt to obtain a card for the child by presenting to the health insurance provider or to the employer through which the insurance is provided a copy of the order requiring the provision of a card.

(c) If the other parent is unable to obtain a health insurance identification card for the child in the manner provided in par. (b), the intentional failure to comply with the order to provide the card by the parent so ordered constitutes a contempt of court, punishable under ch. 785.

(3) INCOME WITHHOLDING AND ASSIGNMENT. (a) In directing the manner of payment of a child's health care expenses, the court may order that payment, including payment for health insurance premiums, be withheld from income and sent to the appropriate health care insurer, provider, or plan, as provided in s. 767.75 (3h), or sent to the department or its designee for disbursement to the person for whom the payment has been awarded if that person is not a health care insurer, provider, or plan. If the court orders income withholding and assignment for the payment of health care expenses, the court or county child support agency under s. 59.53 (5) shall send notice of assignment in the manner provided under s. 767.75 (2r) and may include the notice of assignment under this paragraph with a notice of assignment under s. 767.75. The department or its designee shall keep a record of all moneys received and disbursed for health care expenses that are directed to be paid to the department or its designee.

(b) If the court orders a parent to initiate or continue health insurance coverage for a child under a health insurance policy that is available to the parent through an employer or other organization but the court does not specify the manner in which payment of the health insurance premiums shall be made, the court or county child support agency under s. 59.53 (5) may provide notice of assignment in the manner provided under s. 767.75 (2r) for the withholding from income of the amount necessary to pay the health insurance premiums. The notice of assignment under this paragraph may be sent with or included as part of any other notice of assignment under s. 767.75. A person who receives notice of assignment under this paragraph shall send the withheld health insurance premiums to the appropriate health care insurer, provider, or plan, as provided in s. 767.75 (3h).

(4) HEALTH BENEFIT PLAN; EMPLOYER OBLIGATION. If the court orders a parent to provide coverage of the health care expenses of the parent's child and the parent is eligible for family coverage of health care expenses under a health benefit plan that is provided by an employer on an insured or on a self−insured basis, the employer shall do all of the following:

(a) Permit the parent to obtain family coverage of health care expenses for the child, if eligible for coverage, without regard to any enrollment period or waiting period restrictions that may apply.

(b) Provide family coverage of health care expenses for the child, if eligible for coverage, upon application by the parent, the child's other parent, the department, or the county child support agency under s. 59.53 (5), or upon receiving a notice under sub. (6) (a).

(bm) Notify the county child support agency under s. 59.53 (5) when coverage of the child under the health benefit plan is in effect and, upon request, provide copies of necessary program or policy identification to the child's other parent.

(c) After the child has coverage under the employer's health benefit plan, and as long as the parent is eligible for family coverage under the employer's health benefit plan, continue to provide coverage for the child unless the employer receives satisfactory written evidence that the court order is no longer in effect or that the child has coverage of health care expenses under another health insurance policy or health benefit plan that provides comparable coverage of health care expenses.

(5) RECOVERY BY STATE OF 3RD PARTY PAYMENTS. (a) If a parent who has been ordered by a court to provide coverage of the health care expenses of a child who is eligible for medical assistance under subch. IV of ch. 49 receives payment from a 3rd party for the cost of services provided to the child but does not pay the health care provider for the services or reimburse the department or any other person who paid for the services on behalf of the child, the department may obtain a judgment against the parent for the amount of the 3rd−party payment.

(b) Section 767.75 (4) applies to a garnishment based on a judgment obtained under par. (a).

(6) CHANGE OF EMPLOYMENT; NOTICE. (a) If a parent who provides coverage of the health care expenses of a child under an order under this section changes employers and that parent has a court−ordered child support obligation with respect to the child, the county child support agency under s. 59.53 (5) shall provide notice of the order to provide coverage of the child's health care expenses to the new employer and to the parent.

(b) The notice provided to the parent shall inform the parent that coverage for the child under the new employer's health benefit plan will be in effect upon the employer's receipt of the notice. The notice shall inform the parent that he or she may, within 10 business days after receiving the notice, by motion request a hearing before the court on the issue of whether the order to provide coverage of the child's health care expenses should remain in effect. A motion under this paragraph may be heard by a circuit court commissioner. If the parent requests a hearing and the court determines that the order to provide coverage of the child's health care expenses should not remain in effect, the court shall provide notice to the employer that the order is no longer in effect.

History: 2005 a. 443 ss. 104, 220; 2007 a. 96; 2019 a. 95.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

Orders assigning health care responsibility pursuant to s. 767.25 (4m) [now this section] are subject to revision under s. 767.32 [now s. 767.59]. Kuchenbecker v. Schultz, 151 Wis. 2d 868, 447 N.W.2d 80 (Ct. App. 1989).

767.521 Action by state for child support. The state or its delegate under s. 49.22 (7) shall bring an action for support of a minor child under s. 767.001 (1) (f) or for paternity determina-

tion and child support under s. 767.80 if the child's right to support is assigned to the state under s. 48.57 (3m) (b) 2. or (3n) (b) 2., 48.645 (3), 49.145 (2) (s), 49.19 (4) (h) 1. b., or 49.775 (2) (bm) and all of the following apply:

(1) The child has been deprived of parental support by reason of the continued absence of a parent from the home.

(2) A court has not issued an order under s. 767.511 requiring the parent who is absent from the home to support the child.

History: 1987 a. 27; 1995 a. 289, 404; 1997 a. 27, 105; 2005 a. 443 s. 38; Stats. 2005 s. 767.521; 2007 a. 20.

767.531 Family support. The court may make a financial order designated "family support" as a substitute for child support orders under s. 767.511 and maintenance payment orders under s. 767.56. Subject to s. 767.511 (6m), a party ordered to pay family support under this section shall pay simple interest at the rate of 1 percent per month on any amount in arrears that is equal to or greater than the amount of child support due in one month. Subject to s. 767.511 (6m), if the party no longer has a current obligation to pay child support, interest at the rate of 1 percent per month shall accrue on the total amount of child support in arrears, if any. Interest under this section is in lieu of interest computed under s. 807.01 (4), 814.04 (4), or 815.05 (8) and is paid to the department or its designee under s. 767.57. Except as provided in s. 767.57 (1m), the department or its designee shall apply all payments received for family support as follows:

(1) First, to payment of family support due within the calendar month during which the payment is received.

(2) Second, to payment of unpaid family support due before the payment is received.

(3) Third, to payment of interest accruing on unpaid family support.

History: 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); Stats. 1979 s. 767.261; 1983 a. 27; 1985 a. 29; 1993 a. 481; 1995 a. 279; 1997 a. 27, 191; 1999 a. 9, 32; 2005 a. 443 s. 111; Stats. 2005 s. 767.531; 2013 a. 20.

This section does not limit the authority a trial court would otherwise have to consider imposing interest on unpaid maintenance arrears. Cashin v. Cashin, 2004 WI App 92, 273 Wis. 2d 754, 681 N.W.2d 255, 03–1010.

The circuit court must separately calculate child support and maintenance as a condition precedent to calculating family support. If the court applies the percentage guidelines when setting child support, it must set family support at an amount that results in a net payment, after state and federal taxes are paid, of no less than the child support as calculated under the guidelines. Even if a court makes detailed findings as to all of the factors for family support, the court erroneously exercises its discretion if it neglects to provide a rational explanation of how its findings lead to the support award. Vlies v. Brookman, 2005 WI App 158, 285 Wis. 2d 411, 701 N.W.2d 642, 04–0315.

It is evident from the statutory framework and the purpose of family support that at least a portion of family support ordered in any case involving minor children is child support. With respect to child support, any provision in a marital settlement agreement that purports to limit a child support payee's ability to seek a support modification upon a substantial change in circumstances is against public policy and cannot provide a basis to estop the payee from seeking a modification. Huhn v. Stuckmann, 2009 WI App 127, 321 Wis. 2d 169, 772 N.W.2d 744, 08–3102.

767.54 Required exchange of financial information. In an action in which the court has ordered a party to pay child or family support under this chapter, including an action to revise a judgment or order under s. 767.59, the court shall require the parties annually to exchange financial information. Information disclosed under this section is subject to s. 767.127 (3). A party who fails to furnish information required by the court under this section may be proceeded against for contempt of court under ch. 785. If the court finds that a party has failed to furnish information required under this section, the court may award to the party bringing the action costs and, notwithstanding s. 814.04 (1), reasonable attorney fees.

History: 2005 a. 443 s. 122.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

767.55 Child support: employment–related orders. **(1)** GENERALLY. In an action for modification of a child support order under s. 767.59 or an action in which an order for child support is required under s. 767.511 (1), 767.804 (3), 767.805 (4), or 767.89 (3), the court may order either or both parents of the child to seek employment or participate in an employment or training program.

(2) NONCUSTODIAL PARENT. (a) In this subsection, "custodial parent" means a parent who lives with his or her child for substantial periods of time.

(am) In an action for modification of a child support order under s. 767.59, an action in which an order for child support is required under s. 767.511 (1), 767.804 (3), 767.805 (4), or 767.89 (3), or a contempt of court proceeding to enforce a child support or family support order in a county that contracts under s. 49.36 (2), the court may order a parent who is not a custodial parent to register for a work experience and job training program under s. 49.36 if all of the following conditions are met:

1. The parent is able to work full time.

1m. The parent resides in a county, or resides within a reasonable driving distance, as determined by the court, from a county, that has a work experience and job training program under s. 49.36 and that agrees to enroll the parent in the program.

2. The parent works, on average, less than 32 hours per week, and is not participating in an employment or training program which meets guidelines established by the department.

3. The parent's actual weekly gross income averages less than 40 times the federal minimum hourly wage under 29 USC 206 (a) (1) or the parent is earning less than the parent has the ability to earn, as determined by the court.

(b) Under this subsection, the parent is presumed to be able to work full time. The parent has the burden of proving that he or she is not able to work full time.

(c) If the court enters an order under par. (am), it shall order the parent to pay child support equal to the amount determined by applying the percentage standard established under s. 49.22 (9) or equal to the amount of child support that the parent was ordered to pay in the most recent determination of support under this chapter. The child support obligation ordered under this paragraph continues until the parent makes timely payment in full for 3 consecutive months or until the person participates in the program under s. 49.36 for 16 weeks, whichever occurs first. The court shall provide in its order that the parent shall make child support payments calculated under s. 767.511 (1j) or (1m) after the obligation to make payments ordered under this paragraph ceases.

(3) ABSENT PARENT. (a) In this subsection, "case involving a dependent child" means an action which meets all of the following criteria:

1. Is an action for modification of a child support order under s. 767.59 or an action in which an order for child support is required under s. 767.511 (1), 767.804 (3), 767.805 (4), or 767.89 (3).

2. The child's right to support is assigned to the state under s. 48.57 (3m) (b) 2. or (3n) (b) 2., 48.645 (3), or 49.19 (4) (h) 1. b.

3. The child has been deprived of parental support by reason of the continued absence of a parent from the home.

(b) Except as provided in par. (c), in a case involving a dependent child, if the child's parent who is absent from the home is not employed, the court shall order that parent to do one or more of the following:

1. Register for work at a public employment office established under s. 106.09.

2. Apply for jobs.

3. Participate in a job training program.

(c) An order is not required under par. (b) if the court makes written findings that there is good cause for not issuing the order.

(d) Paragraph (b) does not limit the authority of a court to issue an order, other than an order under par. (b), regarding employment of a parent in an action for modification of a child support order under s. 767.59 or an action in which an order for child support is

required under s. 767.511 (1), 767.804 (3), 767.805 (4), or 767.89 (3).

(4) UNEMPLOYED TEENAGE PARENT. (a) In this subsection, "unemployed teenage parent" means a parent who satisfies all of the following criteria:

1. Is less than 20 years of age.

2. Is unemployed.

3. Is financially unable to pay child support.

4. Would be ordered to make payments for the support of a child but for subd. 3.

(b) In an action for revision of a judgment or order providing for child support under s. 767.59 or an action in which an order for child support is required under s. 767.511 (1), 767.804 (3), 767.805 (4), or 767.89 (3), the court shall order an unemployed teenage parent to do one or more of the following:

1. Register for work at a public employment office established under s. 106.09.

2. Apply for jobs.

3. Participate in a job training program.

4. Pursue or continue to pursue an accredited course of instruction leading to the acquisition of a high school diploma or its equivalent if the unemployed teenage parent has not completed a recognized high school course of study or its equivalent, except that the court may not order the unemployed teenage parent to pursue instruction if the instruction requires the expenditure of funds by the unemployed teenage parent other than normal transportation and personal expenses.

History: 2005 a. 443 ss. 40, 41, 107, 108, 135, 136, 223; 2007 a. 20; 2015 a. 331; 2019 a. 95.

767.553 Annual adjustments in support orders. **(1)** WHEN ADJUSTMENT MAY BE ORDERED. (a) An order for child or family support under this chapter may provide for an annual adjustment in the amount to be paid based on a change in the payer's income if the amount of child or family support is expressed in the order as a fixed sum and based on the percentage standard established by the department under s. 49.22 (9). No adjustment may be made under this section unless the order provides for the adjustment.

(b) An adjustment under this section may not be made more than once in a year and shall be determined on the basis of the percentage standard established by the department under s. 49.22 (9).

(c) In the order the court shall specify what information the parties must exchange to determine whether the payer's income has changed, and shall specify the manner and timing of the information exchange.

(2) FORM FOR STIPULATING. If the court provides for an annual adjustment, the court shall make available to the parties, including the state if the state is a real party in interest under s. 767.205 (2) (a), a form approved by the court for the parties to use in stipulating to an adjustment of the amount of child or family support and to modification of any applicable income–withholding order. The form shall include an order, to be signed by the court, for approval of the stipulation of the parties.

(3) INCOME CHANGES. (a) If the payer's income changes from the amount found by the court or stipulated to by the parties for the current child or family support order, the parties may implement an adjustment under this section by stipulating, on the form under sub. (2), to the changed income amount and the adjusted child or family support amount, subject to sub. (1) (b).

(b) The stipulation form shall be signed by all parties, including the state if the state is a real party in interest under s. 767.205 (2) (a), and filed with the court. If the stipulation is approved, the order shall be signed by the court and implemented in the same manner as an order for a revision under s. 767.59. An adjustment under this subsection is effective as of the date on which the order is signed by the court.

(4) IMPLEMENTATION; WHEN EFFECTIVE. (a) Any party, including the state if the state is a real party in interest under s. 767.205 (2) (a), may file a motion, petition, or order to show cause for implementation of an annual adjustment under this section if any of the following applies:

1. A party refuses to provide the information required by the court under sub. (1) (c).

2. The payer's income changes, but a party refuses to sign the stipulation for an adjustment in the amount of child or family support.

(b) If the court determines after a hearing that an adjustment should be made, the court shall enter an order adjusting the child or family support payments by the amount determined by the court, subject to sub. (1) (b). An adjustment under this subsection may not take effect before the date on which the party responding to the motion, petition, or order to show cause received notice of the action under this subsection.

(c) Notwithstanding par. (b), the court may direct that all or part of the adjustment not take effect until such time as the court directs, if any of the following applies:

1. The payee was seeking an adjustment and the payer establishes that extraordinary circumstances beyond his or her control prevent fulfillment of the adjusted child or family support obligation.

2. The payer was seeking an adjustment and the payee establishes that the payer voluntarily and unreasonably reduced his or her income below his or her earning capacity.

3. The payer was seeking an adjustment and the payee establishes that the adjustment would be unfair to the child.

(d) If in an action under this subsection the court determines that a party has unreasonably failed to provide the information required under sub. (1) (c) or to provide the information on a timely basis, or unreasonably failed or refused to sign a stipulation for an annual adjustment, the court may award to the aggrieved party actual costs, including service costs, any costs attributable to time missed from employment, the cost of travel to and from court, and reasonable attorney fees.

(5) REVISION OR REMEDIAL SANCTIONS. (a) Nothing in this section affects a party's right to file at any time a motion, petition, or order to show cause under s. 767.59 for revision of a judgment or order with respect to an amount of child or family support.

(b) Nothing in this section affects a party's right to move the court for a finding of contempt of court or for remedial sanctions under ch. 785 if the other party unreasonably fails to provide or disclose information required under this section or unreasonably fails or refuses to sign a stipulation for an annual adjustment.

History: 1981 c. 20; 1983 a. 27; 1993 a. 481; 1995 a. 27 s. 9126 (19); 1995 a. 404; 1997 a. 27; 2001 a. 16, 61, 105; 2005 a. 443 ss. 167, 224; Stats. 2005 s. 767.553.

767.56 Maintenance. **(1c)** FACTORS TO CONSIDER FOR GRANTING. Upon a judgment of annulment, divorce, or legal separation, or in rendering a judgment in an action under s. 767.001 (1) (g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time, subject to sub. (2c), after considering all of the following:

(a) The length of the marriage.

(b) The age and physical and emotional health of the parties.

(c) The division of property made under s. 767.61.

(d) The educational level of each party at the time of marriage and at the time the action is commenced.

(e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.

(f) The feasibility that the party seeking maintenance can become self–supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.

(g) The tax consequences to each party.

(h) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, if the repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.

(i) The contribution by one party to the education, training or increased earning power of the other.

(j) Such other factors as the court may in each individual case determine to be relevant.

(2c) TERMINATES AT DEATH OF PAYEE OR PAYER. Unless already terminated for another reason, maintenance granted under this section terminates upon the death of the payee or the payer, whichever occurs first.

History: 1971 c. 220; 1973 c. 12 s. 37; 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; Stats. 1979 s. 767.26; 2005 a. 443 s. 110; Stats. 2005 s. 767.56; 2013 a. 209.

While arrearages under a temporary order for alimony and attorney fees and costs that the husband is required to pay do not constitute part of a wife's division of the estate, they are a charge against the entire estate. Tesch v. Tesch, 63 Wis. 2d 320, 217 N.W.2d 647 (1974).

An obligation to support children is a factor in determining the amount of maintenance payments. Besaw v. Besaw, 89 Wis. 2d 509, 279 N.W.2d 192 (1979).

The trial court abused its discretion by denying a mother's choice to remain at home to care for small children. Hartung v. Hartung, 102 Wis. 2d 58, 306 N.W.2d 16 (1981).

The trial court abused its discretion by terminating maintenance without sufficiently addressing the factors under this section. Vander Perren v. Vander Perren, 105 Wis. 2d 219, 313 N.W.2d 813 (1982).

Compensation for a person who supports a spouse while the spouse is in school can be achieved through both property division and maintenance payments. Lundberg v. Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918 (1982).

The trial court may begin its maintenance evaluation with the proposition that the dependent partner may be entitled to 50 percent of the total earnings of both parties. Bahr v. Bahr, 107 Wis. 2d 72, 318 N.W.2d 391 (1982).

The trial court may not consider marital misconduct as a relevant factor in granting maintenance payments. Dixon v. Dixon, 107 Wis. 2d 492, 319 N.W.2d 846 (1982).

It was improper to discontinue maintenance payments to a former wife solely upon the ground of her cohabitation with another man. Van Gorder v. Van Gorder, 110 Wis. 2d 188, 327 N.W.2d 674 (1983).

Three formulas were approved for calculating maintenance or property division awards in cases in which one spouse has contributed to the other's pursuit of an advanced degree. Haugan v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796 (1984).

An alcoholic spouse's refusal of treatment is relevant to the trial court's determination regarding a request for permanent maintenance. DeLaMatter v. DeLaMatter, 151 Wis. 2d 576, 445 N.W.2d 676 (Ct. App. 1989).

Military disability payments may be considered in assessing ability to pay maintenance. Weberg v. Weberg, 158 Wis. 2d 540, 463 N.W.2d 382 (Ct. App. 1990).

The trial court's use of a computer program to analyze financial evidence was not error. Bisone v. Bisone, 165 Wis. 2d 114, 477 N.W.2d 59 (Ct. App. 1991).

An award may be based on a percentage of the payer's income in "unusual circumstances." Unpredictable future income warrants a percentage award. Hefty v. Hefty, 172 Wis. 2d 124, 493 N.W.2d 33 (1992).

Maintenance furthers two objectives: 1) to support the recipient spouse in accordance with the needs and earning capacities of the parties; and 2) to ensure a fair and equitable financial agreement between the parties. In the interest of fairness, maintenance may exceed the recipient's budget. Hefty v. Hefty, 172 Wis. 2d 124, 493 N.W.2d 33 (1992).

Maintenance is measured by the parties' lifestyle immediately before the divorce and that they could anticipate enjoying if they were to stay married. The award may take into account income increases the parties could reasonably anticipate. Hefty v. Hefty, 172 Wis. 2d 124, 493 N.W.2d 33 (1992).

A maintenance award must account for the recipient's earning capacity and ability to be self−supporting at a level comparable to that during marriage. It is unfair to require one spouse to continue income production levels to maintain the standard of living of the other who chooses a decrease in production. Forester v. Forester, 174 Wis. 2d 78, 497 N.W.2d 78 (Ct. App. 1993).

Consideration of one spouse's solicitation to have the other murdered in denying maintenance did not violate the statutory scheme and was not an improper consideration of "marital misconduct." Brabec v. Brabec, 181 Wis. 2d 270, 510 N.W.2d 762 (1993).

A maintenance award based on equalization of income is not "self−evidently fair" and does not meet the statutory objectives of support and fairness. Olson v. Olson, 186 Wis. 2d 287, 520 N.W.2d 284 (Ct. App. 1994).

An otherwise short−term marriage should not be considered a long−term marriage because there are children. Luciani v. Montemurro−Luciani, 191 Wis. 2d 67, 528 N.W.2d 477 (Ct. App. 1995).

One spouse's contribution of child−rearing services and family support while the other spouse completed an education program was not sufficient grounds for awarding compensatory maintenance. Luciani v. Montemurro−Luciani, 191 Wis. 2d 67, 528 N.W.2d 477 (Ct. App. 1995).

Leaving maintenance open due to potential future health problems of one spouse without expert testimony was proper, but failure to limit the order accordingly was improper. Grace v. Grace, 195 Wis. 2d 153, 536 N.W.2d 109 (Ct. App. 1995), 94−2653.

Post−divorce increases in a pension fund valued in a divorce should be treated as an income stream available for maintenance. Olski v. Olski, 197 Wis. 2d 237, 540 N.W.2d 412 (1995), 93−3332.

A court may consider earning capacity rather than actual earnings in determining child support and maintenance if it finds a spouse's job choice voluntary and unreasonable. Sellers v. Sellers, 201 Wis. 2d 578, 549 N.W.2d 481 (Ct. App. 1996), 95−2730.

When parties have been married to each other more than once, a trial court can look at the total years of marriage when determining maintenance. The trial court is not bound by the terms of maintenance in the first divorce and may look to current conditions in setting maintenance. Wolski v. Wolski, 210 Wis. 2d 183, 565 N.W.2d 196 (Ct. App. 1997), 96−0136.

A stipulation incorporated into a divorce judgment is in the nature of a contract. That a stipulation appears imprudent is not grounds for construction of an unambiguous agreement. Rosplock v. Rosplock, 217 Wis. 2d 22, 577 N.W.2d 32 (Ct. App. 1998), 96−3522.

The purpose of maintenance is, at least in part, to put the recipient in a solid financial position that allows the recipient to become self−supporting by the end of the maintenance period. That the recipient becomes employed and makes productive investments of property division proceeds and maintenance payments is not a substantial change in circumstances but an expected result of receiving maintenance. Rosplock v. Rosplock, 217 Wis. 2d 22, 577 N.W.2d 32 (Ct. App. 1998), 96−3522.

The trial court's exclusion of pension payments when considering income available to a maintenance recipient was correct when the pension had been awarded to the recipient as part of the property division and had no value outside of the payments made from it. Seidlitz v. Seidlitz, 217 Wis. 2d 82, 578 N.W.2d 638 (Ct. App. 1998), 97−0824.

When a reviewing court finds that a trial court erroneously exercised its discretion in awarding maintenance, the case should be remanded for the trial court to properly exercise its discretion. It was an abuse of discretion for a trial court to assume that a spouse is legally entitled to maintenance. King v. King, 224 Wis. 2d 235, 590 N.W.2d 480 (1999), 97−0994.

Equal income division is a reasonable starting point in determining maintenance, but the goal is the standard of living enjoyed during the marriage, not 50 percent of the total predivorce earnings. Maintenance may surpass 50 percent of the couple's predivorce income, but the payee is not entitled to live a richer lifestyle than that enjoyed during the marriage. Johnson v. Johnson, 225 Wis. 2d 513, 593 N.W.2d 827 (Ct. App. 1999), 98−2141.

Maintenance is not intended to provide a permanent annuity. Generally, limited−term maintenance provides funds for training intended to enable the recipient to be self−supporting by the end of the maintenance period, and may also be used to limit the responsibility of the payer to a certain time and to avoid future litigation. Absent a substantial change of circumstances, the parties may rightfully expect no change. The law of change of circumstances should not require a paying spouse to finance unwise financial decisions of the recipient. Murray v. Murray, 231 Wis. 2d 71, 604 N.W.2d 912 (Ct. App. 1999), 99−1369.

Under sub. (9), the contribution by one party to the other's education is not limited to contributions that arose only during the marital period. The court may freely consider the total contributions. Meyer v. Meyer, 2000 WI 132, 239 Wis. 2d 731, 620 N.W.2d 382, 99−0178.

It was not error for the trial court to consider under sub. (10) evidence of the parties having lived "separate lives" for much of their marriage. By not equalizing their incomes, the court in effect implemented what the parties had already agreed to in practice. Schmitt v. Schmitt, 2001 WI App 78, 242 Wis. 2d 565, 624 N.W.2d 14, 00−0695.

When a pension is divided by a qualified domestic relations order, and no value is assigned to either spouse's interest to be offset by other property awarded in the property division, a court is not prohibited by double−counting rules from considering pension distributions when determining maintenance. Wettstaedt v. Wettstaedt, 2001 WI App 94, 242 Wis. 2d 709, 625 N.W.2d 900, 00−3061.

A court's authority to order maintenance includes authority to impose obligations on the payee to ensure compliance with the payment order if those obligations are reasonably necessary to effect compliance with the payment order. Finley v. Finley, 2002 WI App 144, 256 Wis. 2d 508, 648 N.W.2d 536, 01−1705.

Sections 767.25 (6) and 767.261 [now ss. 767.511 (6) and 767.531] regarding a fixed amount of interest on child support do not limit the trial court's authority to consider imposing interest on unpaid maintenance. A trial court has discretionary authority under s. 767.01 (1) to impose interest on maintenance arrearages. If the court decides to impose interest, it is under the trial court's discretion to determine the amount to impose. Cashin v. Cashin, 2004 WI App 92, 273 Wis. 2d 754, 681 N.W.2d 255, 03−1010.

The general rule is that maintenance decisions are based on the parties' financial circumstances at the time the determination is made. A financial benefit flowing from one spouse's cohabitation with a 3rd party at the time of divorce is an appropriate consideration in setting maintenance. Woodard v. Woodard, 2005 WI App 65, 281 Wis. 2d 217, 696 N.W.2d 221, 03−3356.

A factual finding that one spouse's cohabitation relationship with a 3rd party was likely to end in the near future, supported by evidence in the record, might be an appropriate basis for disregarding the financial benefit from the relationship if the expected duration was so short that the benefit to the cohabiting spouse would be insignificant. A court's speculation that because a relationship was new and non−marital and could terminate at any time and that the boyfriend had no legal obligation of support was insufficient to support a finding that the relationship was likely to end in the near future. Woodard v. Woodard, 2005 WI App 65, 281 Wis. 2d 217, 696 N.W.2d 221, 03−3356.

The absence of a formal finding of a substantial change in circumstances is sufficient to establish an erroneous exercise of discretion. Hacker v. Hacker, 2005 WI App 211, 287 Wis. 2d 180, 704 N.W.2d 371, 05−0223.

Alcoholism is not equated with the kind of career choice on which the opinion in *Forester* turns, but is a disease that can limit or destroy an individual's earning capacity. An alcoholic spouse's refusal to obtain recommended treatment may be a relevant factor in a maintenance decision, but unsuccessful treatment is not the same as refusing treatment. Even if the court determines that a history of failed treatment is a relevant factor, the court's award must still reflect a proper concern for both objectives

of maintenance — fairness and maintenance. Hacker v. Hacker, 2005 WI App 211, 287 Wis. 2d 180, 704 N.W.2d 371, 05−0223.

The court did not err in awarding maintenance out of the proceeds of a covenant not to compete that arose from the sale of shares determined to be a gift, and not subject to property division under s. 767.61 (2). The payments were in exchange for a service to be performed; refraining from doing business in a way that would be harmful to the purchasers. Grumbeck v. Grumbeck, 2006 WI App 215, 296 Wis. 2d 611, 723 N.W. 2d 778, 05−2512.

In setting maintenance, the trial court should have included in the calculation, income from the investments in which a spouse has a substantial ownership interest. That the entities are not producing income at the time of the divorce does not mean they should not be considered. Wright v. Wright, 2008 WI App 21, 307 Wis. 2d 156, 747 N.W.2d 690, 06−2111.

Parties with marital property agreements are not exempt from maintenance awards. Unless the agreement contains a waiver of maintenance rights as described in sub. (8), a court may conclude that a maintenance award is appropriate. Steinmann v. Steinmann, 2008 WI 43, 309 Wis. 2d 29, 749 N.W.2d 145, 05−1588.

Sub. (6) contemplates maintenance being awarded to help a former spouse maintain an opulent standard of living reasonably comparable to that enjoyed during the marriage. There is nothing requiring that such spouses first have contributed to the household or child rearing to a certain degree. Nor does the statute condition a court's order maintaining that standard of living upon it being the result of both incomes when one party received personal benefits from the use of corporate property. Steinmann v. Steinmann, 2008 WI 43, 309 Wis. 2d 29, 749 N.W.2d 145, 05−1588.

"Fairness" has a special meaning under the law of maintenance. A reasonable maintenance award is not measured by the average annual earnings over the duration of a long marriage but by the lifestyle that the parties enjoyed in the years immediately before the divorce and could anticipate enjoying if they were to stay married. When a recipient spouse can reasonably reach that lifestyle level by his or her own efforts following the expiration of limited−term maintenance, putting a time cap on the payment of maintenance may be appropriate. The payment of maintenance is not to be viewed as a permanent annuity. Heppner v. Heppner, 2009 WI App 90, 319 Wis. 2d 237, 768 N.W.2d 261, 08−2020.

Despite the trial court's recognition of the stay−at−home wife's expectations of what her lifestyle would have been after her husband retired, the trial court obliterated those expectations because it seemed to assume that it should cut off maintenance once the husband retired, as retirement would cut off his sources of income. By ending maintenance, the trial court ignored the applicable principles of fairness and erroneously exercised its discretion. If the former wife was to be able to enjoy the life she would have enjoyed if the parties had not divorced, she was entitled to maintenance even though her former husband retired. Heppner v. Heppner, 2009 WI App 90, 319 Wis. 2d 237, 768 N.W.2d 261, 08−2020.

Income received from the exercise of stock options that would be exercised after the divorce should be included in the income pool taken into consideration for the payment of maintenance. Heppner v. Heppner, 2009 WI App 90, 319 Wis. 2d 237, 768 N.W.2d 261, 08−2020.

A maintenance award in a marriage of medium duration that exceeds the length of the marriage is within the trial court's discretion. When deciding whether to limit maintenance, and for how long, the trial court must consider: 1) the ability of the recipient to become self−supporting by the end of the term at a standard of living reasonably comparable to that enjoyed before divorce; 2) the ability of the payor to continue support for an indefinite time; and 3) the need for the court to continue its jurisdiction concerning maintenance. Ladwig v. Ladwig, 2010 WI App 78, 325 Wis. 2d 497, 785 N.W.2d 664, 09−1202.

When valuing a business interest that is part of the marital estate for purposes of property division, a circuit court shall include the entire value of the salable professional goodwill attendant to the business interest. The circuit court did not double count the value of professional goodwill when it included the goodwill in the divisible marital estate, and then based a maintenance award on the professional spouse's expected future earnings. As with income from an income earning asset, income from a professional practice is separate from the value of the practice as it exists at the time of the property division and is properly considered in determining maintenance. McReath v. McReath, 2011 WI 66, 335 Wis. 2d 643, 800 N.W.2d 399, 09−0639.

Sub. (2) requires a court to consider the physical health of the parties and does not suggest that health problems that have been the subject of settlement proceeds may be ignored. There is no qualifier in s. 767.56 relieving parties of the requirement to support each other if one of the parties receives a monetary award for injuries received in an accident. Lemke v. Lemke, 2012 WI App 96, 343 Wis. 2d 748, 820 N.W.2d 470, 11−1974.

The trial court's conclusion that a payee spouse had shirked employment, requiring the termination of her family support, ignored the requirement in sub. (5) that the court consider the parties' "earning capacity." Once the court accepted an opinion regarding the payee's earning capacity, the court was required to compare the payee's earning capacity with the payor's, given the payor's actual earnings and payee's imputed earnings, to determine whether they were able to enjoy the lifestyle they enjoyed during their marriage. Lemke v. Lemke, 2012 WI App 96, 343 Wis. 2d 748, 820 N.W.2d 470, 11−1974.

Inasmuch as both parties were about 79 years old at the time of the hearing; had been divorced for 21 years; were both living solely on their investment income and social security benefits; and the payor had been paying maintenance for 10 years after retiring; the trial court properly exercised its discretion when it reduced maintenance to $0, finding that the payee had ample funds to support herself. Brin v. Brin, 2014 WI App 68, 354 Wis. 2d 510, 849 N.W.2d 900, 13−1739.

The federal tax consequences of divorce. Meldman & Ryan. 57 MLR 229 (1974).

No−Fault Divorce: Tax Consequences of Support, Maintenance and Property Settlement. Case. WBB Dec. 1977.

See also notes to s. 767.59 for decisions regarding postjudgment modifications.

767.57 Maintenance, child support, and family support payments; fees. (1) PAYMENT TO DEPARTMENT. (a) All orders or judgments providing for temporary or permanent maintenance, child support, or family support payments shall direct that the payments be made to the department or its designee for the use of the person for whom the payments have been awarded. A party obtaining an order for temporary maintenance, child support, or family support payments shall promptly file the order, together with all pleadings in the action, with the clerk of court.

(b) Upon request, after the filing of an order or judgment or the receipt of an interim disbursement order, the clerk of court shall advise the county child support agency under s. 59.53 (5) of the terms of the order or judgment within 2 business days after the filing or receipt. The county child support agency shall, within the time required by federal law, enter the terms of the order or judgment into the statewide support data system, as required by s. 59.53 (5) (b).

(c) Except as provided in sub. (1m), the department or its designee shall disburse, and take receipts for, the money received under the judgment or order in the manner required by federal regulations, unless the department or its designee is unable to disburse the moneys because the moneys were paid by check or other draft drawn upon an account containing insufficient funds. All moneys received or disbursed under this section shall be entered in a record kept by the department or its designee. The record shall be open to inspection by the parties to the action, their attorneys, and the circuit court commissioner.

(d) The department or its designee shall offer to every individual to whom child support or family support payments are disbursed under this section the option to receive a paper statement of account that will be sent to the individual whenever money is received on behalf of or disbursed to the individual under this section. The department or its designee may not charge an individual a fee for providing the statements of account.

(1e) RECEIVING AND DISBURSING FEES. (a) For receiving and disbursing maintenance, child support, or family support payments, including payments in arrears, and for maintaining the records required under sub. (1) (c), the department or its designee shall collect an annual fee of $65 from a party ordered to make payments. The court shall order each party ordered to make payments to pay the fee in each year for which payments are ordered or in which an arrearage in any of those payments is owed. In directing the manner of payment, the court shall order that the fee be withheld from income and sent to the department or its designee, as provided under s. 767.75. Fees under this paragraph shall be deposited in the appropriation account under s. 20.437 (2) (ja). At the time of ordering payment of the fee, the court shall notify each party ordered to make payments of the requirement to pay, and the amount of, the fee. If the fee under this paragraph is not paid when due, the department or its designee may not deduct the fee from any maintenance, child or family support, or arrearage payment, but may move the court for a remedial sanction under ch. 785.

(b) 1m. The department or its designee may collect any unpaid fees under s. 814.61 (12) (b), 1997 stats., that are shown on the department's automated payment and collection system on December 31, 1998, and shall deposit all fees collected under this subdivision in the appropriation account under s. 20.437 (2) (ja). The department or its designee may collect unpaid fees under this subdivision through income withholding under s. 767.75 (2m). If the department or its designee determines that income withholding is inapplicable, ineffective, or insufficient for the collection of any unpaid fees under this subdivision, the department or its designee may move the court for a remedial sanction under ch. 785. The department or its designee may contract with or employ a collection agency or other person for the collection of any unpaid fees under this subdivision and, notwithstanding s. 20.930, may contract with or employ an attorney to appear in any action in state or federal court to enforce the payment obligation. The department or its designee may not deduct the amount of unpaid fees from any maintenance, child or family support, or arrearage payment.

2m. A clerk of court may collect any unpaid fees under s. 814.61 (12) (b), 1997 stats., that are owed to the clerk of court, or to his or her predecessor, and that were not shown on the depart-

ment's automated payment and collection system on December 31, 1998, through income withholding under s. 767.75 (2m). If the clerk of court determines that income withholding is inapplicable, ineffective, or insufficient for the collection of any unpaid fees under this subdivision, the clerk of court may move the court for a remedial sanction under ch. 785.

(c) The department or its designee shall collect an annual fee of $35 from every individual receiving child support or family support payments. In applicable cases, the fee shall comply with all requirements under 42 USC 654 (6) (B). The department or its designee may deduct the fee from maintenance, child or family support, or arrearage payments. Fees collected under this paragraph shall be deposited in the appropriation account under s. 20.437 (2) (ja).

(1h) NONPAYMENT; ENFORCEMENT. If maintenance, child support, or family support payments are not paid to the department or its designee at the time provided in the judgment or order, the county child support agency under s. 59.53 (5) or a circuit court commissioner of the county shall take proceedings to secure the payment of the sum, including enforcement by contempt proceedings under ch. 785 or by other means. Copies of any order issued to compel the payment shall be mailed to the attorney, if any, who represented each party when the maintenance, child support, or family support payments were awarded. If any fees of officers in any of the proceedings, including the compensation of the circuit court commissioner at the rate of $50 per day unless the commissioner is on a salaried basis, is not collected from the person proceeded against, the fees shall be paid out of the county treasury upon the order of the presiding judge and the certificate of the department.

(1m) OVERPAYMENT. If the department or its designee receives support or maintenance money that exceeds the amount due in the month in which it is received and the department or its designee determines that the excess amount is for support or maintenance due in a succeeding month, the department or its designee may hold the amount of overpayment that does not exceed the amount due in the next month for disbursement in the next month if any of the following applies:

(a) The payee or the payer requests that the overpayment be held until the month when it is due.

(b) The court has ordered that overpayments of child support, family support, or maintenance that do not exceed the amount of support or maintenance due in the next month may be held for disbursement in the next month.

(c) The party entitled to the support or maintenance money or a minor child of the party has applied for or is receiving aid under s. 48.645 or public assistance under ch. 49 and there is an assignment to the state under s. 48.645 (3) or 49.19 (4) (h) 1. b. of the party's right to the support or maintenance money.

(cm) A kinship care relative or a long–term kinship care relative of the child who is entitled to the support money has applied for or is receiving kinship care payments or long–term kinship care payments for that child and there is an assignment to the state under s. 48.57 (3m) (b) 2. or (3n) (b) 2. of the child's right to the support money.

(d) The department or its designee determines that the overpayment should be held until the month when it is due.

(2) PROCEDURE IF RECIPIENT ON PUBLIC ASSISTANCE. If a party entitled to maintenance or support, or both, is receiving public assistance under ch. 49, the party may assign the party's right to support or maintenance to the county department under s. 46.215, 46.22, or 46.23 granting the assistance. The assignment shall be approved by order of the court granting the maintenance or support. The assignment may not be terminated if there is a delinquency in the amount to be paid to the assignee of maintenance and support previously ordered without the written consent of the assignee or upon notice to the assignee and a hearing. When an assignment of maintenance or support, or both, has been approved by the order, the assignee shall be deemed a real party in interest within s. 803.01 solely for the purpose of securing payment of unpaid maintenance or support ordered to be paid, by participating in proceedings to secure the payment of unpaid amounts. Notwithstanding assignment under this subsection, and without further order of the court, the department or its designee, upon receiving notice that a party or a minor child of the parties is receiving aid under s. 48.645 or public assistance under ch. 49 or that a kinship care relative or long–term kinship care relative of the minor child is receiving kinship care payments or long–term kinship care payments for the minor child, shall forward all support assigned under s. 48.57 (3m) (b) 2. or (3n) (b) 2., 48.645 (3), 49.19 (4) (h) 1., or 49.45 (19) to the assignee under s. 48.57 (3m) (b) 2. or (3n) (b) 2., 48.645 (3), 49.19 (4) (h) 1., or 49.45 (19).

(3) PROCEDURE IF RECIPIENT INSTITUTIONALIZED OR CONFINED. (a) If maintenance or support, or both, are ordered to be paid for the benefit of any individual who is committed by court order to an institution, who is in confinement, or whose legal custody is vested by court order under ch. 48 or 938 in an agency, department, relative, or other entity, the court may order that the maintenance or support be paid to the relative, agency, institution, welfare department, or other entity having legal or actual custody of the individual, and that it be used for the person's care and maintenance, without the appointment of a guardian in this state.

(b) If a child who is the beneficiary of support under a judgment or order is placed by court order in a residential care center for children and youth, juvenile correctional institution, or state mental institution, the right of the child to support during the period of the child's confinement, including any right to unpaid support accruing during that period, is assigned to the state. If the judgment or order providing for the support of a child who is placed in a residential care center for children and youth, juvenile correctional institution, or state mental institution includes support for one or more other children, the support that is assigned to the state shall be the proportionate share of the child placed in the center or institution, except as otherwise ordered by the court or circuit court commissioner on the motion of a party.

(4) PROCEDURE FOR CERTAIN CHILD RECIPIENTS. If an order or judgment providing for the support of one or more children not receiving aid under s. 48.57 (3m) or (3n), 48.645, or 49.19 includes support for a minor who is the beneficiary of aid under s. 48.57 (3m) or (3n), 48.645, or 49.19, any support payment made under the order or judgment is assigned to the state under s. 48.57 (3m) (b) 2. or (3n) (b) 2., 48.645 (3), or 49.19 (4) (h) 1. b. in the amount that is the proportionate share of the minor receiving aid under s. 48.57 (3m) or (3n), 48.645, or 49.19, except as otherwise ordered by the court on the motion of a party.

(5) TRUSTEE OR RECEIVER MAY BE APPOINTED. The court may appoint a receiver or trustee, as necessary, to receive any payments ordered under this chapter, to invest and pay over the income for the maintenance of the spouse or the support and education of any of the children described in s. 767.511 (4), or to pay over the principal sum in the amount and at the times that the court directs. The court may require the receiver or trustee to post bond, with or without sureties, in the amount that the court directs.

History: 1971 c. 41 s. 12; Sup. Ct. Order, 67 Wis. 2d 585, 775 (1975); 1975 c. 82, 200; 1975 c. 401 s. 4; 1977 c. 105 s. 59; 1977 c. 271, 418, 447; 1979 c. 32 ss. 50, 92 (4); 1979 c. 257 s. 17; Stats. 1979 s. 767.29; 1981 c. 20 s. 2202 (20) (m); 1983 a. 27, 302; 1985 a. 29, 176; 1991 a. 39; 1993 a. 481; 1995 a. 27 ss. 7104tm, 9126 (19), 9130 (4); 1995 a. 77, 279, 289, 404; 1997 a. 27, 35, 105, 191, 252; 1999 a. 9; 2001 a. 16, 59, 61, 105; 2005 a. 25, 387; 2005 a. 443 ss. 127 to 132, 144, 225; Stats. 2005 s. 767.57; 2007 a. 20, 96; 2009 a. 28, 180; 2013 a. 20; 2019 a. 9.

An agency assigned benefits under sub. (2) was entitled to collect unpaid alimony and support money that had accumulated prior to the effective date of the assignment and prior to the assignor's receipt of public assistance. Schiavo v. Schiavo, 71 Wis. 2d 136, 237 N.W.2d 702 (1976).

The defense of laches is not available in an action or proceeding brought to secure enforcement of a child support order in a divorce action. Paterson v. Paterson, 73 Wis. 2d 150, 242 N.W.2d 907 (1976).

767.58 Notice of change of employer, address, and ability to pay; other information. (1) SUPPORT OR MAINTENANCE ORDER; NOTICE REQUIREMENTS. (a) Each order for child support, family support, or maintenance payments shall include

an order that the payer and payee notify the county child support agency under s. 59.53 (5) of any change of address within 10 business days of the change.

(b) Each order for child support, family support, or maintenance payments shall also include an order that the payer notify the county child support agency under s. 59.53 (5) and the payee, within 10 business days, of any change of employer and of any substantial change in the amount of his or her income, including receipt of bonus compensation, affecting his or her ability to pay child support, family support, or maintenance. The order shall also include a statement that notification of any substantial change in the amount of the payer's income will not result in a change of the order unless a revision of the order under s. 767.59 or an annual adjustment of the child or family support amount under s. 767.553 is sought.

(c) Each order for family support or maintenance payments shall include an order requiring the payee to notify the court and the payer within 10 business days of the payee's remarriage.

(d) An order under this subsection is enforceable under ch. 785.

(2) INFORMATION FOR CHILD SUPPORT AGENCY. When an order is entered under sub. (1), each party shall provide to the county child support agency under s. 59.53 (5) his or her social security number, residential and mailing addresses, telephone number, operator's license number and the name, address and telephone number of his or her employer. A party shall advise the county child support agency under s. 59.53 (5) of any change in the information provided under this subsection within 10 business days after the change.

History: 1977 c. 105; 1979 c. 32 s. 50; Stats. 1979 s. 767.263; 1989 a. 212; 1995 a. 279; 1997 a. 27, 191; 2001 a. 16; 2005 a. 443 ss. 113, 226; Stats. 2005 s. 767.58; 2013 a. 209.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

767.59 Revision of support and maintenance orders.

(1) DEFINITION. In this section, "support or maintenance order" means a judgment or order providing for child support under this chapter or s. 48.355 (2) (b) 4. or (4g) (a), 48.357 (5m) (a), 48.363 (2), 938.183 (4), 938.355 (2) (b) 4. or (4g) (a), 938.357 (5m) (a), 938.363 (2), or 948.22 (7), for maintenance payments under s. 767.56, for family support payments under this chapter, or for the appointment of trustees or receivers under s. 767.57 (5).

(1c) COURT AUTHORITY. (a) On the petition, motion, or order to show cause of either of the parties, the department, a county department under s. 46.215, 46.22, or 46.23, or a county child support agency under s. 59.53 (5) if an assignment has been made under s. 48.57 (3m) (b) 2. or (3n) (b) 2., 48.645 (3), 49.19 (4) (h), or 49.45 (19) or if either party or their minor children receive aid under s. 48.57 (3m) or (3n) or 48.645 or ch. 49, a court may, except as provided in par. (b), do any of the following:

1. Revise and alter a support or maintenance order as to the amount and payment of maintenance or child support and the appropriation and payment of the principal and income of property held in trust.

2. Make any judgment or order on any matter that the court might have made in the original action.

(b) A court may not revise or modify a judgment or order that waives maintenance payments for either party or a judgment or order with respect to final division of property.

(1f) SUPPORT: SUBSTANTIAL CHANGE IN CIRCUMSTANCES. (a) Except as provided in par. (d), a revision under this section of a judgment or order as to the amount of child or family support may be made only upon a finding of a substantial change in circumstances.

(b) In an action under this section to revise a judgment or order with respect to the amount of child support, any of the following constitutes a rebuttable presumption of a substantial change in circumstances sufficient to justify a revision of the judgment or order:

1. Commencement of receipt of aid to families with dependent children under s. 49.19 or participation in Wisconsin works under ss. 49.141 to 49.161 by either parent since the entry of the last child support order, including a revision of a child support order under this section.

2. Unless the amount of child support is expressed in the judgment or order as a percentage of parental income, the expiration of 33 months after the date of the entry of the last child support order, including a revision of a child support order under this section.

3. Failure of the payer to furnish a timely disclosure under s. 767.54.

4. A difference between the amount of child support ordered by the court to be paid by the payer and the amount that the payer would have been required to pay based on the percentage standard established by the department under s. 49.22 (9) if the court did not use the percentage standard in determining the child support payments and did not provide the information required under s. 46.10 (14) (d), 49.345 (14) (d), 301.12 (14) (d), or 767.511 (1n), whichever is appropriate.

(c) In an action under this section to revise a judgment or order with respect to an amount of child support, any of the following may constitute a substantial change of circumstances sufficient to justify revision of the judgment or order:

1. Unless the amount of child support is expressed in the judgment or order as a percentage of parental income, a change in the payer's income, evidenced by information received under s. 49.22 (2m) by the department or the county child support agency under s. 59.53 (5) or by other information, from the payer's income determined by the court in its most recent judgment or order for child support, including a revision of a child support order under this section.

2. A change in the needs of the child.

3. A change in the payer's earning capacity.

4. Any other factor that the court determines is relevant.

(d) In an action under this section to revise a judgment or order with respect to child or family support, the court is not required to make a finding of a substantial change in circumstances to change to a fixed sum the manner in which the amount of child or family support is expressed in the judgment or order.

(1k) MAINTENANCE: CHANGE IN COST OF LIVING. In an action under this section to revise maintenance payments, a substantial change in the cost of living for either party or as measured by the federal bureau of labor statistics may be sufficient to support a revision of the amount of maintenance, except that a change in an obligor's cost of living is not by itself sufficient if payments are expressed as a percentage of income.

(1m) PAYMENT REVISIONS PROSPECTIVE. In an action under sub. (1c) to revise a judgment or order with respect to child support, maintenance payments, or family support payments, the court may not revise the amount of child support, maintenance payments, or family support payments due, or an amount of arrearages in child support, maintenance payments, or family support payments that has accrued, prior to the date that notice of the action is given to the respondent, except to correct previous errors in calculations.

(1r) CREDIT TO PAYER FOR CERTAIN PAYMENTS. In an action under sub. (1c) to revise a judgment or order with respect to child support or family support, the court may grant credit to the payer against support due prior to the date on which the petition, motion, or order to show cause is served for payments made by the payer other than payments made as provided in s. 767.57 or 767.75, in any of the following circumstances:

(b) The payer shows by documentary evidence that the payments were made directly to the payee by check or money order, and shows by a preponderance of the evidence that the payments were intended for support and not intended as a gift to or on behalf

of the child, or as some other voluntary expenditure, or for the payment of some other obligation to the payee.

(c) The payer proves by clear and convincing evidence, with evidence of a written agreement, that the payee expressly agreed to accept the payments in lieu of child or family support paid as provided in s. 767.57 or 767.75, not including gifts or contributions for entertainment.

(d) The payer proves by documentary evidence that, for a period during which unpaid support accrued, the child received benefits under 42 USC 402 (d) based on the payer's entitlement to federal disability insurance benefits under 42 USC 401 to 433. Any credit granted under this paragraph shall be limited to the amount of unpaid support that accrued during the period for which the benefits under 42 USC 402 (d) were paid.

(e) The payer proves by a preponderance of the evidence that the child lived with the payer, with the agreement of the payee, for more than 60 days beyond a court–ordered period of physical placement. Credit may not be granted under this paragraph if, with respect to the time that the child lived with the payer beyond the court–ordered period of physical placement, the payee sought to enforce the physical placement order through civil or criminal process or if the payee shows that the child's relocation to the payer's home was not mutually agreed to by both parents.

(f) The payer proves by a preponderance of the evidence that the payer and payee resumed living together with the child and that, during the period for which a credit is sought, the payer directly supported the family by paying amounts at least equal to the amount of unpaid court–ordered support that accrued during that period.

(2) PERCENTAGE STANDARD REQUIRED; EXCEPTIONS. (a) Except as provided in par. (b) or (c), if the court revises a judgment or order with respect to child support payments, it shall do so by using the percentage standard established by the department under s. 49.22 (9).

(b) Upon request by a party, the court may modify the amount of revised child support payments determined under par. (a) if, after considering the factors listed in s. 767.511 (1m), the court finds, by the greater weight of the credible evidence, that the use of the percentage standard is unfair to the child or to any of the parties.

(c) If the court revises a judgment or order providing for child support that was entered under s. 48.355 (2) (b) 4. or (4g) (a), 48.357 (5m) (a), 48.363 (2), 938.183 (4), 938.355 (2) (b) 4. or (4g) (a), 938.357 (5m) (a), or 938.363 (2), the court shall determine child support in the manner provided in s. 49.345 (14) or 301.12 (14), whichever is applicable.

(2s) STIPULATION FOR REVISION OF SUPPORT. In an action under sub. (1c), the court may not approve a stipulation for the revision of a judgment or order with respect to an amount of child support or family support unless the stipulation provides for payment of an amount of child support or family support that is determined in the manner required under s. 46.10 (14), 49.345 (14), 301.12 (14), 767.511, 767.804 (3), 767.805 (4), or 767.89, whichever is appropriate.

(2w) WHEN REVISION EFFECTIVE. A revision of a judgment or order with respect to child support, family support, or maintenance payments has the effect of modifying the original judgment or order with respect to the payments to the extent of the revision from the date on which the order revising the payments is effective. The child support, family support, or maintenance payments modified by the order for revision shall cease to accrue under the original judgment or order from the date on which the order revising the payments is effective.

(3) REMARRIAGE; VACATING MAINTENANCE ORDER. After a final judgment requiring maintenance payments has been rendered and the payee has remarried, the court shall, on application of the payer with notice to the payee and upon proof of the payee's remarriage, or upon receiving notice from the payee of the payee's remarriage, as required under s. 767.58 (1) (c), vacate the order requiring the maintenance payments.

(4) REVIEW WHEN THE STATE IS A REAL PARTY IN INTEREST. In any case in which the state is a real party in interest under s. 767.205 (2), the department shall review the support obligation periodically and, if appropriate, petition the court for revision of the judgment or order with respect to the support obligation.

(5) NOTICE OF CHILD SUPPORT INFORMATION. A summons or petition, motion, or order to show cause under this section shall include notification of the availability of information under s. 767.105 (2).

History: 1971 c. 220; 1977 c. 105 ss. 38, 48, 49; 1977 c. 418; 1979 c. 32 ss. 50, 92 (4); Stats. 1979 s. 767.32; 1981 c. 20 s. 2202 (20) (m); 1981 c. 314 s. 146; 1983 a. 27; 1985 a. 176; 1987 a. 27, 355, 413; 1989 a. 212; 1991 a. 39; 1993 a. 16, 481, 491; 1995 a. 27 s. 9126 (19); 1995 a. 77, 201, 225, 279, 289, 404, 417; 1997 a. 27, 35, 105, 191, 237, 273; 1999 a. 9, 103; 2001 a. 16, 61, 105; 2005 a. 443 ss. 147 to 159, 227, 228; Stats. 2005 s. 767.59; 2007 a. 20; 2013 a. 209; 2015 a. 373; 2019 a. 95.

Cross–reference: See also Wisconsin Administrative Code Citations published in the Wisconsin Administrative Code for a list of citations to cases citing chs. DCF 150, HSS 80, HFS 80, and DWD 40, Wis. Adm. Code, the child support percentage of income standard.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

NOTE: The standard for modifying child support orders was significantly changed by 1993 Wis. Act 16.

Although one parent took the children out of the state without court approval or letting the other know where the children could be visited, the court could not suspend payment of a support allowance without a hearing as to the effect on the children. Krause v. Krause, 58 Wis. 2d 499, 206 N.W.2d 589 (1973).

Even assuming the parties' agreement as to child support gave rise to contractual obligations, these obligations remained subject to modification by the court under this section. Vaccaro v. Vaccaro, 67 Wis. 2d 477, 227 N.W.2d 62 (1975).

While a divorced party owes no duty of sexual fidelity to the former spouse, cohabitation by the party can be a change of circumstances affecting the former spouse's responsibility to provide alimony, with the manner and extent of the cohabitation and surrounding circumstances to be considered in determining whether alimony payments should be modified. Taake v. Taake, 70 Wis. 2d 115, 233 N.W.2d 449 (1975).

A child support provision reducing payments proportionately as each of several minor children attains majority is not against public policy. Severson v. Severson, 71 Wis. 2d 382, 238 N.W.2d 116 (1976).

The trial court abused its discretion in denying the former husband's motion to terminate alimony by failing to consider the former wife's increased estate as the result of an inheritance. Lemm v. Lemm, 72 Wis. 2d 457, 241 N.W.2d 593 (1976).

The trial court abused its discretion by terminating maintenance without sufficiently addressing the factors under s. 767.26. Vander Perren v. Vander Perren, 105 Wis. 2d 219, 313 N.W.2d 813 (1982).

It was improper to discontinue maintenance payments to a former spouse solely upon the ground of cohabitation. Van Gorder v. Van Gorder, 110 Wis. 2d 188, 327 N.W.2d 674 (1983).

When a stipulation required maintenance payments during the wife's lifetime, the husband was estopped from requesting termination of payments under sub. (3) when the wife remarried. Rintelman v. Rintelman, 118 Wis. 2d 587, 348 N.W.2d 498 (1984).

A court may revise a judgment incorporating a stipulation regarding limited maintenance if the petition to revise is filed before expiration of a maintenance obligation. Fobes v. Fobes, 124 Wis. 2d 72, 368 N.W.2d 643 (1985).

A petition for revision filed 20 days after receipt of the final scheduled maintenance payment was properly dismissed as untimely. Lippstreu v. Lippstreu, 125 Wis. 2d 415, 373 N.W.2d 53 (Ct. App. 1985).

A state family court may modify the paying spouse's support obligation following his or her discharge in bankruptcy. Eckert v. Eckert, 144 Wis. 2d 770, 424 N.W.2d 759 (Ct. App. 1988).

Orders assigning health care responsibility pursuant to s. 767.25 (4m) are subject to revision under s. 767.32. Kuchenbecker v. Schultz, 151 Wis. 2d 868, 447 N.W.2d 80 (Ct. App. 1989).

It is within a trial court's discretion to apply the percentage standards to a child support revision. If applied to a remarried parent, gross income must be computed as if the remarried parent is still single. The trial court retains discretion to adjust the percentage calculation based on the circumstances. Abitz v. Abitz, 155 Wis. 2d 161, 455 N.W.2d 609 (1990).

A remarriage, though unlawful in Wisconsin and dissolved through annulment, is sufficient to terminate maintenance under sub. (3). The requirement that maintenance be terminated following remarriage is unconditional. Falk v. Falk, 158 Wis. 2d 184, 462 N.W.2d 547 (Ct. App. 1990).

A divorce stipulation waiving or setting a ceiling on child support and preventing modification is against public policy and will not be enforced. Ondrasek v. Tenneson, 158 Wis. 2d 690, 462 N.W.2d 915 (Ct. App. 1990).

A party is estopped from seeking a maintenance revision if the parties stipulated to permanent nonmodifiable maintenance that was part of a comprehensive settlement of all property and maintenance issues that was approved by the court and was fair and not illegal or against public policy at the time and relief is being sought on the grounds that the court did not have power to enter the order the parties had agreed to. Nichols v. Nichols, 162 Wis. 2d 96, 469 N.W.2d 619 (1991).

A divorce judgment provision waiving maintenance takes precedence over other provisions arguably reserving or awarding maintenance. Tyson v. Tyson, 162 Wis. 2d 551, 469 N.W.2d 913 (Ct. App. 1991).

In determining income for maintenance revision, investment income from property awarded in an equal property division may be included. Interest payments to the

payee spouse under the division may not to be deducted. Hommel v. Hommel, 162 Wis. 2d 782, 471 N.W.2d 1 (1991).

Lottery proceeds won after a divorce may be considered a change in financial circumstances in determining whether a change in maintenance is justified. A maintenance award is to assure the recipient spouse a standard of living comparable to that enjoyed during the marriage. Gerrits v. Gerrits, 167 Wis. 2d 429, 482 N.W.2d 134 (Ct. App. 1992).

The absence of a mortgage obligation is relevant to the assessment of a party's economic circumstances, but does not translate into imputed income under the applicable administrative rule. Zimmerman v. Zimmerman, 169 Wis. 2d 516, 485 N.W.2d 294 (Ct. App. 1992).

When a paying spouse's termination of employment is voluntary, an order may be based on the spouse's earning capacity whether or not bad faith is shown. Roberts v. Roberts, 173 Wis. 2d 406, 496 N.W.2d 210 (Ct. App. 1992).

A paying spouse should be allowed a fair choice of livelihood even though an income reduction may result, but the spouse may be found to be shirking if the choice is not reasonable in light of the payer's support obligation. Van Offeren v. Van Offeren, 173 Wis. 2d 482, 496 N.W.2d 660 (Ct. App. 1992).

The parties' extrajudicial agreement that child support payments be discontinued was enforceable via the doctrine of equitable estoppel. Harms v. Harms, 174 Wis. 2d 780, 498 N.W.2d 229 (1993). But see Monicken v. Monicken, 226 Wis. 2d 119, 593 N.W.2d 509 (Ct. App. 1999), 98–2922.

The date when a maintenance order is vacated under sub. (3) is a discretionary determination based on the specific facts and equities of the case. Hansen v. Hansen, 176 Wis. 2d 327, 500 N.W.2d 357 (Ct. App. 1993).

In the absence of a specific agreement that maintenance payments continue after the payee's remarriage, the payer was not estopped from seeking termination upon the payee's remarriage. Jacobson v. Jacobson, 177 Wis. 2d 539, 502 N.W.2d 869 (Ct. App. 1993).

An agreement that the husband would complete his education when the wife completed hers and the wife's increased income upon completion of her education were both relevant to the husband's request for a change in support upon returning to graduate school full time. Kelly v. Hougham, 178 Wis. 2d 546, 504 N.W.2d 440 (Ct. App. 1993).

When a broadly worded settlement agreement required the payer to meet the children's current and changing needs rather than to pay a set amount or percentage, a change in the children's needs, although a change in circumstances, did not require a modification of child support to impose percentage guidelines when the court found those needs were being met. Jacquart v. Jacquart, 183 Wis. 2d 372, 515 N.W.2d 539 (Ct. App. 1994).

Unlike an initial award of maintenance, a party seeking to change maintenance has the burden of proof. Haeuser v. Haeuser, 200 Wis. 2d 750, 548 N.W.2d 750 (Ct. App. 1996), 95–1087.

Under sub. (1r) a court is without discretion to grant credits against arrearages for direct payments made for child support regardless of when the order was entered. Douglas County Child Support v. Fisher, 200 Wis. 2d 807, 547 N.W.2d 801 (Ct. App. 1996), 95–1960.

A change in an administrative rule, absent a change in factual circumstances, is not grounds for modification a child support order. Beaupre v. Airriess, 208 Wis. 2d 238, 560 N.W.2d 285 (Ct. App. 1997), 96–0336.

When a support order is not based on the percentage standards, the passage of 33 months gives a party a prima facie claim under sub. (1) (b) 2. [now sub. (1f) (b) 2.] that child support should be modified, but the family court maintains its discretion whether the percentage guidelines should be applied. Zutz v. Zutz, 208 Wis. 2d 338, 559 N.W.2d 914 (Ct. App. 1997), 96–1136.

A stipulation incorporated into a divorce judgment is in the nature of a contract. That a stipulation appears imprudent is not grounds for construction of an unambiguous agreement. Rosplock v. Rosplock, 217 Wis. 2d 22, 577 N.W.2d 32 (Ct. App. 1998), 96–3522.

The purpose of maintenance is, at least in part, to put the recipient in a solid financial position that allows the recipient to become self–supporting by the end of the maintenance period. That the recipient becomes employed and makes productive investments of property division proceeds and maintenance payments is not a substantial change in circumstances, but an expected result of receiving maintenance. Rosplock v. Rosplock, 217 Wis. 2d 22, 577 N.W.2d 32 (Ct. App. 1998), 96–3522.

The limitation under sub. (1m) that a court may not revise the amount of child support due or the amount of arrearages restricts the court's authority to that of correcting mathematical errors only. State v. Jeffrie C.B., 218 Wis. 2d 145, 579 N.W.2d 69 (Ct. App. 1997), 97–2453.

Sub. (1r) modifies the common law. A court may grant credit for support payments not made in accordance with a judgment only under the circumstances enumerated under sub. (1r). Equitable estoppel does not apply. Monicken v. Monicken, 226 Wis. 2d 119, 593 N.W.2d 509 (Ct. App. 1999), 98–2922.

Once the court determined that a reduction in support was warranted, even though the reduction was based on a finding that the payment level was inequitable and not that the payer had an inability to pay, the court did not have authority to condition that reduction on payment of arrearages. Benn v. Benn, 230 Wis. 2d 301, 602 N.W.2d 65 (Ct. App. 1999), 98–2950.

If a motion seeks to clarify a court's ambiguous property division rather than revise or modify it, it is not barred by former sub. (1) (a), 1997 stats. Section 767.01 (1) [now s. 767.201] grants the power to effectuate a divorce judgment by construing an ambiguous provision of a final division of property. Washington v. Washington, 2000 WI 47, 234 Wis. 2d 689, 611 N.W.2d 261, 98–1234.

Equitable estoppel does not apply to prevent modification of a stipulation for nonmodifiable maintenance if at the time that the stipulation was entered into it violated public policy because it indefinitely burdened only one party with the entire risk of financial hardship. Patrickus v. Patrickus, 2000 WI App 255, 239 Wis. 2d 340, 620 N.W.2d 205, 99–3315.

Mere silence regarding whether interest was owed on a specified sum to be paid over time did not render a judgment ambiguous. Hutjens v. Hutjens, 2002 WI App 162, 256 Wis. 2d 255, 647 N.W.2d 448, 01–3061.

Incarceration is a change in circumstance sufficient to give a court competence to review a child support order, but should not be the sole determinative factor. Consideration of the nature of the criminal conduct is appropriate for an overall evaluation of the parent's behavior as it relates to ability and attitude toward paying child support. Rottscheit v. Dumler, 2003 WI 62, 262 Wis. 2d 292, 664 N.W.2d 525, 01–2213.

The test for a substantial change in circumstances is the same whether the issue of maintenance was originally stipulated to or contested. The correct test regarding modification considers fairness to both parties under all circumstances, not whether it is unjust or inequitable to alter the original award. A judge who reviews a request to modify a maintenance award should adhere to the findings of fact made by the circuit court. Education expenses for an adult child do not have to be considered by the modifying court when examining a party's budget, but can be. Rohde–Giovanni v. Baumgart, 2004 WI 27, 269 Wis. 2d 598, 676 N.W.2d 452, 01–3014.

A trial court's decision to deny an extension of maintenance, including deciding whether there is a substantial change in circumstances, is a discretionary decision. The trial court's decision on a substantial change in circumstances is upheld if there is a reasonable basis in the record for the trial court's decision. Cashin v. Cashin, 2004 WI App 92, 273 Wis. 2d 754, 681 N.W.2d 255, 03–1010.

During a maintenance modification proceeding, the appropriate comparison for any change in the parties' financial circumstances is to the facts that existed at the time of the most recent maintenance order, whether in the original divorce judgment or a subsequent modification. Neither issue or claims preclusion applies to a maintenance modification proceeding after a court has found the parties' financial circumstances to be substantially changed. Once a party has demonstrated a substantial change since the time of the operative maintenance award, a maintenance modification proceeding does not present the same issues or claims that were originally litigated. Kenyon v. Kenyon, 2004 WI 147, 277 Wis. 2d 47, 690 N.W.2d 251, 02–3041.

Retroactive applications of subs. (1m) and (1r) do not violate due process. Retroactive applications serve significant public purposes, while remedying general social and economic issues. Barbara B. v. Dorian H., 2005 WI 6, 277 Wis. 2d 378, 690 N.W.2d 849, 03–1877.

Generally, a final division of property is fixed for all time and is not subject to modification. Section 806.07 is applicable to divorce cases, but permits reopening of final judgments only in extraordinary circumstances. Post–divorce employer modification of a pension, years after a divorce, that was thoroughly negotiated and divided at the time of the divorce does not compel reopening the divorce judgment. Winkler v. Winkler, 2005 WI App 100, 282 Wis. 2d 746, 699 N.W.2d 652, 04–1231.

In shirking cases, when considering a spouse's conduct in voluntarily reducing his or her income, a court applies a test of reasonableness under the circumstances, balancing the needs of the parents and the needs of the child, both financial and otherwise, like child care and the ability of both parents to pay child support. Furthermore, under s. 767.25 (1m) (d) and (e) [now s. 767.511 (1m) (d) and (e)] after considering the listed economic factors, the desirability that the custodian remain in the home as a full–time parent, and the value of custodial services performed by the custodian if the custodian remains at home, the court may conclude that the percentage standard is unfair to the child or to any of the parties. Chen v. Warner, 2005 WI 55, 280 Wis. 2d 344, 695 N.W.2d 758, 03–0288.

Sub. (1r) (d) should not be construed to bar credit in a situation when a child support payor has made all requisite support payments. Paulhe v. Riley, 2006 WI App 171, 295 Wis. 2d 541, 722 N.W.2d 155, 05–2487.

A provision providing that neither parent could request a change in the amount of child support payments for a period of at least seven years from the date of the judgment entered, except in catastrophic circumstances was unenforceable. As is implicit from *Ondrasek,* 158 Wis. 2d 690: a marital settlement agreement entered into by divorcing parties that purports to limit in any way a child support payee's ability to seek a support modification upon a substantial change in circumstances is against public policy; it thus cannot provide a basis to estop the payee from seeking a modification. *Ondrasek* is not limited to unilateral waivers of a payee's right to obtain increased child support. Wood v. Propeck, 2007 WI App 24, 299 Wis. 2d 470, 728 N.W.2d 757, 05–2674.

A stipulation to make future support unmodifiable in the event of a placement change is against public policy and void. Motte v. Motte, 2007 WI App 111, 300 Wis. 2d 607, 731 N.W.2d 657, 05–2776.

While prohibiting the court from reducing arrearages, sub. (1m) does not prevent the parties from compromising or waiving them subject to court approval. Sub. (1m) applies in the case of an adversarial proceeding under this statute, and not to a court–approved joint stipulation. Motte v. Motte, 2007 WI App 111, 300 Wis. 2d 621, 731 N.W.2d 294, 05–2776.

A stipulation that sets a ceiling and bars any change in the maximum amount of child support defeats the statutory goal of providing for the child's best interests as parents are precluded from seeking a modification of an amount necessary for the child's best interests and is unenforceable and contrary to public policy. Frisch v. Henrichs, 2007 WI 102, 304 Wis. 2d 1, 736 N.W.2d 85, 05–0534.

To invoke equitable estoppel against a party seeking relief from a provision of a stipulation, the party must show: 1) that both parties entered into the stipulation freely and knowingly; 2) that the overall settlement is fair and equitable and not illegal or against public policy; and 3) that one party subsequently seeks to be released from its terms on the grounds that the court could not have entered the order it did without the parties' agreement. A four–year prohibition preventing a payer from seeking a child support review for any reason contravened public policy was unenforceable. Jalovec v. Jalovec, 2007 WI App 206, 305 Wis. 2d 467, 739 N.W.2d 834, 06–1872.

One shorthand definition for a substantial change in circumstances is that it is some unforeseen event that occurs after an agreement has been executed. Jalovec v. Jalovec, 2007 WI App 206, 305 Wis. 2d 467, 739 N.W.2d 834, 06–1872.

There is no basis upon which a trial court can reduce that support owed to a payor spouse's marital child based on nonchild–support amounts paid to the payee spouse's nonmarital child. However, the benefit received by the non marital child for amounts received from the payor spouse would be appropriately accounted for in the maintenance award or property division. Ladwig v. Ladwig, 2010 WI App 78, 325 Wis. 2d 497, 785 N.W.2d 664, 09–1202.

Maintenance may be awarded after the death of the payor if the parties expressly agree by stipulation. When the judgment provided that "maintenance shall terminate on August 25, 2014 and said maintenance payments shall not be modifiable in either

duration or amount under any circumstance, and, further, shall not be subject to revision as provided for in s. 767.32," the language was unambiguous in precluding modification in any circumstance, including death. Wagner v. Estate of Sobczak, 2011 WI App 159, 338 Wis. 2d 92, 808 N.W.2d 167, 10–0286.

There exists a framework governing child support stipulations and orders: 1) ceilings on child support payments are presumed to be invalid; 2) an unmodifiable floor on child support payments that is not limited in duration or that has an excessively long duration may violate public policy; 3) when the parties have entered into a stipulation for a limited period of time that the court has adopted, courts will attempt to give effect to the parties' intentions when the stipulation was entered into freely and knowingly, was fair and equitable when entered into, and is not illegal or violative of public policy; 4) courts retain the equitable power to consider circumstances in existence when the stipulation is challenged that were unforeseen by the parties when they entered into the stipulation if those circumstances adversely affect the best interests of the child. May v. May, 2012 WI 35, 339 Wis. 2d 626, 813 N.W.2d 179, 10–0177.

Sub. (1f) (b) 2.'s rebuttable presumption that arises at 33 months represents what the legislature has determined is a reasonable time to reconsider support. Beyond the legislature's rebuttable presumption of 33 months, case law suggests that stipulations lasting more than four years could be too lengthy. So too, stipulations that are not related to a point in time that reasonably would support a reevaluation of the parties' support obligations and needs may not meet with the approval of the circuit court. May v. May, 2012 WI 35, 339 Wis. 2d 626, 813 N.W.2d 179, 10–0177.

In shirking cases there is only one standard, based on reasonableness under the circumstances. There is not a different test where the parent was involuntarily terminated from employment. The reasonableness standard applies to all employment decisions made by a parent, regardless of the circumstances that led to the making of those decisions. In the event of involuntary termination, the focus is on the employee's employment decisions subsequent to termination and those decisions are subjected to the test of reasonableness under the circumstances. Becker v. Becker, 2014 WI App 76, 355 Wis. 2d 529, 851 N.W.2d 816, 13–1481.

SUBCHAPTER VII

PROPERTY DIVISION

767.61 Property division. (1) DIVISION REQUIRED. Upon every judgment of annulment, divorce, or legal separation, or in rendering a judgment in an action under s. 767.001 (1) (h), the court shall divide the property of the parties.

(2) PROPERTY SUBJECT TO DIVISION. (a) Except as provided in par. (b), any property shown to have been acquired by either party prior to or during the course of the marriage in any of the following ways shall remain the property of that party and is not subject to a property division under this section:

1. As a gift from a person other than the other party.

2. By reason of the death of another, including, but not limited to, life insurance proceeds; payments made under a deferred employment benefit plan, as defined in s. 766.01 (4) (a), or an individual retirement account; and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance or by a payable on death or a transfer on death arrangement under ch. 705.

3. With funds acquired in a manner provided in subd. 1. or 2.

(b) Paragraph (a) does not apply if the court finds that refusal to divide the property will create a hardship on the other party or on the children of the marriage. If the court makes such a finding, the court may divest the party of the property in a fair and equitable manner.

(3) PRESUMPTION OF EQUAL DIVISION. The court shall presume that all property not described in sub. (2) (a) is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:

(a) The length of the marriage.

(b) The property brought to the marriage by each party.

(c) Whether one of the parties has substantial assets not subject to division by the court.

(d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.

(e) The age and physical and emotional health of the parties.

(f) The contribution by one party to the education, training or increased earning power of the other.

(g) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self–supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

(h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.

(i) The amount and duration of an order under s. 767.56 granting maintenance payments to either party, any order for periodic family support payments under s. 767.531 and whether the property division is in lieu of such payments.

(j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.

(k) The tax consequences to each party.

(L) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

(m) Such other factors as the court may in each individual case determine to be relevant.

(4) SEPARATE FUND OR TRUST OPTION. In dividing the property of the parties under this section, the court may protect and promote the best interests of a child of the parties described under s. 767.511 (4) by setting aside a portion of the property in a separate fund or trust for the support, maintenance, education, and general welfare of the child.

(5) RELATED PROVISIONS OF JUDGMENT. In a judgment described under sub. (1), the court shall do all of the following:

(a) Direct that title to the property of the parties be transferred as necessary, in accordance with the division of property set forth in the judgment.

(b) Include all of the following in the judgment:

1. Notification that it may be necessary for the parties to take additional actions in order to transfer interests in their property in accordance with the division of property set forth in the judgment, including such interests as interests in real property, interests in retirement benefits, and contractual interests.

2. Notification that the judgment does not necessarily affect the ability of a creditor to proceed against a party or against that party's property even though the party is not responsible for the debt under the terms of the judgment.

3. Notification that an instrument executed by a party before the judgment naming the other party as a beneficiary is not necessarily affected by the judgment and it may be necessary to revise the instrument if a change in beneficiary is desired.

(6) RECORDING JUDGMENT AFFECTING REAL PROPERTY SUFFICIENT. A certified copy of the portion of the judgment affecting title to real property, or a deed consistent with the judgment, shall be recorded in the office of the register of deeds of the county in which the real property is located.

History: 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; Stats. 1979 s. 767.255; 1983 a. 186; 1985 a. 37; 1987 a. 355; 1993 a. 422; 2005 a. 443 ss. 109, 231, 232; Stats. 2005 s. 767.61.

NOTE: See notes in 1985 Wis. Act 37, marital property trailer bill.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

Accounts receivable of a medical clinic in which the husband was a partner were properly viewed by the trial court as salary. Johnson v. Johnson, 78 Wis. 2d 137, 254 N.W.2d 198 (1977).

A veteran disability pension is to be considered as earned income and not as an asset to be divided between the parties. Leighton v. Leighton, 81 Wis. 2d 620, 261 N.W.2d 457 (1978).

There are at least three methods for valuing pension rights. Whether the use of any method is appropriate depends upon the status of the parties and whether the result is a reasonable valuation of the marital asset. Bloomer v. Bloomer, 84 Wis. 2d 124, 267 N.W.2d 235 (1978).

Support of stepchildren is a relevant factor in dividing marital property. Fuerst v. Fuerst, 93 Wis. 2d 121, 286 N.W.2d 861 (Ct. App. 1979).

Compensation for a person who supported a spouse while the spouse was in school can be achieved through both property division and maintenance payments. Lundberg v. Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918 (1982).

A federal pension in lieu of social security must be included in a marital property division. Mack v. Mack, 108 Wis. 2d 604, 323 N.W.2d 153 (Ct. App. 1982).

Unless a divorce decree specifically terminates a spouse as the beneficiary of a life insurance policy and the insurance company is notified, the spouse's beneficiary status is not affected by the divorce decree. Bersch v. VanKleeck, 112 Wis. 2d 594, 334 N.W.2d 114 (1983).

The trial court may consider a cross−purchase formula in a partnership agreement in determining the value of the partnership interest, including professional goodwill. Lewis v. Lewis, 113 Wis. 2d 172, 336 N.W.2d 171 (Ct. App. 1983).

A lien on real estate awarded in a divorce judgment was a mortgage, not a judgment lien, even though the term "mortgage" was not used in the court order. Wozniak v. Wozniak, 121 Wis. 2d 330, 359 N.W.2d 147 (1984).

This section does not require a judge to terminate a joint tenancy. Lutzke v. Lutzke, 122 Wis. 2d 24, 361 N.W.2d 640 (1985).

The use of gift money to buy a home as joint tenants changed the character of the money from separate property to marital property. Weiss v. Weiss, 122 Wis. 2d 688, 365 N.W.2d 608 (Ct. App. 1985). See also Zirngibl v. Zirngibl, 165 Wis. 2d 130, 477 N.W.2d 637 (Ct. App. 1991).

A prenuptial agreement entered into prior to the adoption of sub. (11) [now sub. (3) (L)] was enforceable in a subsequent divorce. Hengel v. Hengel, 122 Wis. 2d 737, 365 N.W.2d 16 (Ct. App. 1985).

A premarital agreement intended to apply at death was not applicable to a divorce. Levy v. Levy, 130 Wis. 2d 523, 388 N.W.2d 170 (1986).

Whether property agreements are inequitable under sub. (11) [now sub. (3) (L)] is discussed. Button v. Button, 131 Wis. 2d 84, 388 N.W.2d 546 (1986).

A premarital agreement was inequitable because the parties did not fairly and reasonably disclose assets or have independent knowledge of one another's financial status. Schumacher v. Schumacher, 131 Wis. 2d 332, 388 N.W.2d 912 (1986).

A personal injury claim for medical malpractice is property subject to division. Richardson v. Richardson, 139 Wis. 2d 778, 407 N.W.2d 231 (1987).

The trial court may consider the former inherited status of divisible property although it has lost its exempt status through commingling. Schwartz v. Linders, 145 Wis. 2d 258, 426 N.W.2d 97 (Ct. App. 1988).

Increase in the value of inherited property attributable to the non−owning spouse's efforts is divisible property. It is not necessary for the non−owning spouse to show that a failure to divide the asset will result in a hardship to him or her. Haldemann v. Haldemann, 145 Wis. 2d 296, 426 N.W.2d 107 (Ct. App. 1988).

Chapter 766, the Marital Property Act, does not supplant the divorce property division provisions of ch. 767. Kuhlman v. Kuhlman, 146 Wis. 2d 588, 432 N.W.2d 295 (Ct. App. 1988).

Gifted and inherited property is subject to division in cases of hardship. A party seeking division bears the burden of showing that failure to divide will result in financial privation. Popp v. Popp, 146 Wis. 2d 778, 432 N.W.2d 600 (Ct. App. 1988).

A presumption exists that an injured party is entitled to all future payments under a structured settlement, but the payments are subject to the s. 767.255 [now s. 767.61] factors. Krebs v. Krebs, 148 Wis. 2d 51, 435 N.W.2d 240 (1989).

A property division may be modified under s. 806.07. However the supremacy clause prevents a division to be modified after a debt thereunder is discharged in bankruptcy. Spankowski v. Spankowski, 172 Wis. 2d 285, 493 N.W.2d 737 (Ct. App. 1992).

When gifted or inherited property has appreciated in value during the marriage due to the efforts of both spouses, the appreciation is a part of the marital estate. Schorer v. Schorer, 177 Wis. 2d 387, 501 N.W.2d 916 (Ct. App. 1993).

Determining fair market value of a closely−held corporation turns on the credibility of the experts as well as the methods and analyses employed by the witness. Schorer v. Schorer, 177 Wis. 2d 387, 501 N.W.2d 916 (Ct. App. 1993).

A buy−sell agreement may provide a method for determining the value of an interest in a partnership, but does not as a matter of law establish the value. Sharon v. Sharon, 178 Wis. 2d 481, 504 N.W.2d 415 (Ct. App. 1993).

Accounts receivable may be excluded from the marital estate if evidence indicates there is a link between the receivables and salary and that dividing the receivables would adversely affect the ability to pay support or maintain professional or personal obligations. Sharon v. Sharon, 178 Wis. 2d 481, 504 N.W.2d 415 (Ct. App. 1993).

While income from gifted property is subject to division, trust income received by a beneficiary with only a future interest in the trust corpus is a gift itself, not income from a gift, and not subject to division. Friebel v. Friebel, 181 Wis. 2d 285, 510 N.W.2d 767 (Ct. App. 1993).

A divorce decree that awarded 1/2 of the husband's pension to the wife divested the husband of that half interest. Although the husband had failed to effectuate the transfer as required by the divorce decree, the wife's half interest was not an asset in the husband's bankruptcy estate and there was no dischargeable debt to the wife. Dewey v. Dewey, 188 Wis. 2d 271, 525 N.W.2d 85 (Ct. App. 1994).

Hardship under sub. (2) (b) and "privation" under *Popp* requires something more than an inability to continue living at a predivorce standard. Fair and equitable is not the standard for including gifted and inherited property in a division. Doerr v. Doerr, 189 Wis. 2d 112, 525 N.W.2d 745 (Ct. App. 1994).

The offspring of gifted or inherited animals are not excluded from division by this section. If an asset no longer exists, a court cannot exclude it from the marital estate. Preuss v. Preuss, 195 Wis. 2d 95, 536 N.W.2d 101 (Ct. App. 1995), 94−1148.

Bonuses and fees, like regular income, are not divisible as property but are to be considered in determining a fair division or maintenance. Long v. Long, 196 Wis. 2d 691, 539 N.W.2d 134 (Ct. App. 1995), 94−2533.

The marital estate is usually valued as of the date of divorce, but when conditions over which a party has no control arise, the special circumstances may warrant deviation from the rule. Long v. Long, 196 Wis. 2d 691, 539 N.W.2d 134 (Ct. App. 1995), 94−2533.

For the character of inherited or gifted property to be changed to marital property subject to division, changes to the property as a result of the marital relationship, whether by labor or expenditures, must substantially increase its value. Spindler v. Spindler, 207 Wis. 2d 327, 558 N.W.2d 645 (Ct. App. 1996), 96−0591.

An uneven property division is not the only remedy to deal with squandering of marital assets. Equitable claims against 3rd parties that affect the rights of parties to the divorce, such as a claim against a 3rd−party title holder of property claimed to actually be part of the marital estate, may be appropriate. Zabel v. Zabel, 210 Wis. 2d 336, 565 N.W.2d 240 (Ct. App. 1997), 96−3092.

Income generated by an asset is separate and distinct from the asset itself. Income from the asset is also separate from the appreciation of the asset. As to property division, retained earnings, or the appreciation in value occasioned by the expenditure of the earnings, are a marital asset subject to division. Metz v. Keener, 215 Wis. 2d 626, 573 N.W.2d 865 (Ct. App. 1997), 97−1443.

Appellate review of a trial court's valuation of a closely−held business in a divorce action should proceed on the clearly erroneous standard. When the buyout provisions of a shareholder agreement did not replicate an arm's length transaction it was reasonable for the trial court to find that the buyout figure was not indicative of fair market value. Siker v. Siker, 225 Wis. 2d 522, 593 N.W.2d 830 (Ct. App. 1999), 98−0553.

There are 2 types of postnuptial agreements: 1) family settlement agreements that contemplate the continuation of the marriage, and 2) separation agreements that are made after separation in contemplation of a separation. The former are presumed to be binding on the parties under s. 767.255 (3) (L) [now s. 767.61 (3) (L)]. The latter are governed by s. 767.10 [now s. 767.34] and constitute a recommendation jointly made by the parties to the court regarding what the judgment should provide. Evenson v. Evenson, 228 Wis. 2d 676, 598 N.W.2d 232 (Ct. App. 1999), 98−0803. See also VanBoxtel v. VanBoxtel, 2001 WI 40, 242 Wis. 2d 474, 625 N.W.2d 284, 99−0341.

An agreement made in contemplation of divorce, entered into after the parties agreed to the divorce, was subject to s. 767.10 [now s. 767.34], not s. 767.255 [now s. 767.61]. When a party withdrew his consent before court approval, the agreement was unenforceable. Ayres v. Ayres, 230 Wis. 2d 431, 602 N.W.2d 132 (Ct. App. 1999), 98−3450.

A spouse's pension, whether or not existing before the marriage, is part of the marital estate subject to division. Award of the premarital portion of a pension to the spouse holding title was improper when there was not sufficient grounds for deviation from an equal property division. Hokin v. Hokin, 231 Wis. 2d 184, 605 N.W.2d 219 (Ct. App. 1999), 98−3680.

The fact that a property interest is contingent and not vested does not mean that it may be ignored in a property division. An insurance company deferred compensation plan for agents, although not a pension plan, was similar enough to a pension to be treated like one when dividing the marital estate. Garceau v. Garceau, 2000 WI App 7, 232 Wis. 2d 1, 606 N.W.2d 268, 98−3241.

If property has no fair market value, the court cannot place an independent value upon it, and it should not be included in the marital estate. A state employee's sick leave account has no fair market value as it has no cash value and is not transferable. Preiss v. Preiss, 2000 WI App 185, 238 Wis. 2d 368, 617 N.W.2d 514, 99−3261.

Section 40.08 (1) does not permit the division of a state employee's deferred compensation account. Preiss v. Preiss, 2000 WI App 185, 238 Wis. 2d 368, 617 N.W.2d 514, 99−3261.

When a farm that a divorcing couple did not own but had lived on for the first 13 years of their marriage was gifted to one spouse and the couple divorced shortly thereafter, the trial court erred when it determined the farm's increase in value after the gift resulted from the efforts of the marital partnership without considering whether the couple's efforts throughout the marriage served as a catalyst for the increase in value. Richmond v. Richmond, 2002 WI App 25, 250 Wis. 2d 647, 640 N.W.2d 220, 01−1064.

In agreeing to accept a percentage share of a variable asset in a property settlement, a party agrees to assume a proportionate share of any subsequent gains or losses until the asset is liquidated. Taylor v. Taylor, 2002 WI App 253, 258 Wis. 2d 290, 653 N.W.2d 524, 02−0118.

An unequal division of an asset based entirely upon an analysis of the parties' respective contributions to the marriage without addressing any of the other statutory factors applied an incorrect standard of law. Sub. (3) requires that any deviation from the presumptive equal property division be upon consideration of all statutory factors. The court may summarily conclude that certain of the factors are irrelevant, and failure to consider all the statutory factors might be harmless, particularly when the overlooked factors are only marginally relevant or not relevant at all. LeMere v. LeMere, 2003 WI 67, 262 Wis. 2d 426, 663 N.W.2d 789, 01−2204.

The circuit court's determination of inequity under sub. (3) (L), as is its property division determination under s. 767.255 [now s. 767.61], is discretionary. The record in this case supported a finding that enforcing the parties' prenuptial agreement was inequitable. Krejci v. Krejci, 2003 WI App 160, 266 Wis. 2d 284, 667 N.W.2d 780, 02−3376.

When there was no dispute that the parties intended to divide the value of pensions equally as of the time of the divorce, but were not able to identify a legal mechanism at the time to do so, the circuit court could impose a constructive trust on the pensions when the titled spouse died and the benefits were payable only to the titled spouse's subsequent spouse. Sulzer v. Diedrich, 2003 WI 90, 263 Wis. 2d 496, 664 N.W.2d 641, 02−0036.

A creditor's right to reach property subject to division in a divorce is not determined by this section but is driven solely by the classification into which the obligation falls under s. 766.55. Sokaogon Gaming Enterprise v. Curda−Derickson, 2003 WI App 167, 266 Wis. 2d 453, 668 N.W.2d 736, 02−0924.

Section 802.12 (3) (c) cannot limit a circuit court's power to consider the equity of agreements. However, circuit courts must give greater deference to an arbiter's award of a property division under s. 802.13 (3) (c) than they would to other types of agreements. Franke v. Franke, 2004 WI 8, 268 Wis. 2d 360, 674 N.W.2d 832, 01−3316.

A stock option contract, like an unvested pension, is not a mere gratuity, but an enforceable contract right. It is an economic resource, comparable to pensions and other employee benefits, and thus a form of property. The trial court did not misuse its discretion by declining to divide vested stocks options that had an exercise price in excess of the current market value of the stock or in valuing the vested portion of stock options at the difference between the market value of the stock and the exercise value. Maritato v. Maritato, 2004 WI App 138, 275 Wis. 2d 252, 685 N.W.2d 379, 685 N.W.2d 379, 03−2074

Although under *Preiss* sick leave accounts are non−divisible property because they cannot be sold or transferred and, therefore, have no fair market value, a sick leave account does have value to the owner and may be a consideration under sub. (3) (j) to justify deviation from an equal property division. Steiner v. Steiner, 2004 WI App 169, 276 Wis. 2d 290, 687 N.W.2d 740, 03−0931.

In the absence of any expert testimony or other evidence to the contrary, the court may rely on its knowledge and experience to engage in reasonable speculation regarding the anticipated tax impact on the present value of retirement assets. Rumpff v. Rumpff, 2004 WI App 197, 276 Wis. 2d 606, 688 N.W.2d 699, 03−2646.

A circuit court's decision on how to divide divisible property is discretionary. The application of sub. (2) (a) to non−divisible property is not discretionary but involves both fact finding and legal questions. The categorization of property as non−divisible under sub. (2) (a) does not necessarily dictate how that property will be treated when the court divides divisible property. Under some circumstances courts may avoid hardship or inequities that might result from according property non−divisible status. Derr v. Derr, 2005 WI App 63, 280 Wis. 2d 681, 696 N.W.2d 170, 03−2181.

When a gifted non−divisible asset was used as collateral for a loan used for the benefit of the marriage, both parties were liable for the debt, and marital funds were used to make payments on the debt, the debt was divisible. Putting property at risk by using it as collateral for a marital loan does not create a presumption that the owning spouse intended to donate part or all of the property to the marriage rendering it divisible. Derr v. Derr, 2005 WI App 63, 280 Wis. 2d 681, 696 N.W.2d 170, 03−2181.

Generally, a final division of property is fixed for all time and is not subject to modification. Section 806.07 is applicable to divorce cases, but permits reopening of final judgments only in extraordinary circumstances. Post−divorce employer modification of a pension, years after a divorce, that was thoroughly negotiated and divided at the time of the divorce does not compel reopening the divorce judgment. Winkler v. Winkler, 2005 WI App 100, 282 Wis. 2d 746, 699 N.W.2d 652, 04−1231.

The law does not require a party to a prospective divorce to take advantage of an opportunity to acquire property that would increase the value of the marital estate. Noble v. Noble, 2005 WI App 227, 287 Wis. 2d 699, 706 N.W.2d 166, 04−2933.

Since it was anticipated, based on testimony, that the payor spouse would sell or refinance real estate to make an equalization payment in the property division, there was no reason for the court to have considered the tax consequences of the payor's withdrawing the money from his IRA to make the payment. That the payor ultimately chose to raise funds through a method that resulted in significant penalties to himself was his erroneous exercise of discretion, not the trial court's. Scheuer v. Scheuer, 2006 WI App 38, 290 Wis. 2d 250, 711 N.W.2d 698, 04−3162.

To require a party to share in the debts created by a spouse's unjustified depletion of marital assets would constitute a failure to consider the total contribution of each of the parties to the marital estate. Chapter 767 makes recompense available when one spouse has mismanaged or dissipated assets. Depending on the circumstances of the case, one spouse's failure to pay tax debts can be considered the mismanagement or dissipation of assets and therefore marital waste. Covelli v. Covelli, 2006 WI App 121, 293 Wis. 2d 707, 718 N.W.2d 260, 05−1960.

Although a circuit court may consider substantial gifted assets when dividing the marital estate, it may not divide the marital estate to work a de facto splitting of those assets where there is no hardship. While substantial assets not subject to division by the court is a factor to be considered in departing from equal division of property under sub. (3), sub. (3) begins with the presumption that the marital estate should be evenly divided. Absent some special circumstances demonstrating that some unfairness would result from equal division, the presumption should stand. Grumbeck v. Grumbeck, 2006 WI App 215, 296 Wis. 2d 611, 723 N.W. 2d 778, 05−2512.

The court did not err in awarding maintenance out of the proceeds of a covenant not to compete that arose from the sale of shares already to be a gift, and not subject to property division under sub. (2). The payments were in exchange for a service to be performed; refraining from doing business in a way that would be harmful to the purchasers. Grumbeck v. Grumbeck, 2006 WI App 215, 296 Wis. 2d 611, 723 N.W. 2d 778, 05−2512.

The burden of proving that property is non−divisible lies with the party arguing that this property is exempt from division who must establish: 1) the original gifted or inherited status of the property; and 2) that the character and identity of the property has been preserved. The identity inquiry addresses whether the gifted or inherited asset has been preserved in some present identifiable form and is more a matter of tracing the asset. The character inquiry examines whether the owning spouse intended to donate non−divisible property to the marriage and is more clearly denoted as donative intent. Wright v. Wright, 2008 WI App 21, 307 Wis. 2d 156, 747 N.W.2d 690, 06−2111.

Retained earnings from a separate asset are usually considered to be a marital asset. However, in the instant case the trial court found that the current retained earnings of disputed stock were not income generated, but rather were insurance proceeds from the loss of an asset. When insurance proceeds compensate for the loss of a gifted asset, they are non−divisible. When insurance proceeds compensate for the loss of income, they are divisible. Wright v. Wright, 2008 WI App 21, 307 Wis. 2d 156, 747 N.W.2d 690, 06−2111.

Commingling of separate and marital property does not automatically taint the gifted asset. When it was undisputed that nothing has ever been withdrawn from a gifted account, it was very easy to trace the original gifted asset, despite the addition of a divisible dividend within the account, and the divisible dividend did not taint the status of the original gift. However, other unaccounted for deposits resulted in the transmutation of the account into a divisible account. Wright v. Wright, 2008 WI App 21, 307 Wis. 2d 156, 747 N.W.2d 690, 06−2111.

Tracing and transmutation principles may be applied to cases that do not involve gifted or inherited property. Tracing can identify such property as originally indivisible, but proof of donative intent can establish that the property's identity and character changed, and it was transmuted into divisible joint property. In particular, when separate property presumed to be indivisible is transmuted through a joint tenancy, it is effectively transferred to marital property, and tracing does not cause the property to revert back to its original separate property identity. Steinmann v. Steinmann, 2008 WI 43, 309 Wis. 2d 29, 749 N.W.2d 145, 05−1588.

Tracing is nothing more than the exercise of following an asset trail. If an asset, or component part of an asset, can be traced to a source, the court relies on other principles and rules to determine whether the traced asset is divisible or non−divisible. That the existence of subsequently purchased property can be traced to income generated by non−divisible property does not mean that the purchased property is non−divisible. Rather, once property is transferred from separate property to joint ownership, the property becomes part of the marital estate subject to division even if it is inherited property generally deemed indivisible. Steinmann v. Steinmann, 2008 WI 43, 309 Wis. 2d 29, 749 N.W.2d 145, 05−1588.

There were no reasonable grounds for reversing the circuit court's decision not to allocate debts based on future tax liability, the exact amount of which was a matter of speculation, based on the lower court's conclusion that the IRS is best qualified to determine what amount a divorcing couple owes the IRS. Steinmann v. Steinmann, 2008 WI 43, 309 Wis. 2d 29, 749 N.W.2d 145, 05−1588.

It was within the trial court's discretion whether to include as part of the marital estate subject to division stock options earned during the marriage that the trial court viewed as having no value at the time of divorce because the cost to exercise the options was greater than the price of the stock. The trial court erroneously exercised its discretion by excluding the options from division because it erroneously viewed their potential value as being almost solely a function of what the owner spouse would do in his business after the divorce, despite their decline in value having been caused largely by the broader economy, and largely ignored the fact that the options were earned while the parties were married. Heppner v. Heppner, 2009 WI App 90, 319 Wis. 2d 237, 768 N.W.2d 261, 08−2020.

When valuing a business interest that is part of the marital estate for purposes of property division, a circuit court shall include the entire value of the salable professional goodwill attendant to the business interest. The circuit court did not double count the value of professional goodwill when it included the goodwill in the divisible marital estate, and then based a maintenance award on the professional spouse's expected future earnings. As with income from an income earning asset, income from a professional practice is separate from the value of the practice as it exists at the time of the property division and is properly considered in determining maintenance. McReath v. McReath, 2011 WI 66, 335 Wis. 2d 643, 800 N.W.2d 399, 09−0639.

A retirement fund must be divided even if unvested at the time of divorce. When dividing an unvested fund, the rule is that the trial court must consider all the circumstances and evaluate the probability that the party who has a contingent right to a pension will eventually enjoy that pension. A court may not simply assign a value of zero to all contingent interests. Derleth v. Cordova, 2013 WI App 142, 352 Wis. 2d 51, 841 N.W.2d 552, 12−2018.

Federal law precludes a state court from dividing military nondisability retirement pay pursuant to state community property laws. McCarty v. McCarty, 453 U.S. 210 (1981).

An insured's beneficiary designation under servicemen's group life insurance policy prevailed over a constructive trust imposed by a state court. Ridgeway v. Ridgeway, 454 U.S. 46 (1981).

Federal statute provides that a state may treat as community property, and divide at divorce, a military veteran's retirement pay but exempts from this grant of permission any amount that the federal government deducts "as a result of a waiver" of retirement pay that the veteran must make "in order to receive" disability benefits. A state cannot treat as community property, and divide at divorce, the waived portion of the veteran's retirement pay, even when the waiver occurs long after the divorce order and results in reduced payments to the receiving spouse. Howell v. Howell, 581 U.S. ___, 137 S. Ct. 1400, 197 L. Ed. 2d 781 (2017). See also Mansell v. Mansell, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989).

To receive military disability benefits, federal law requires a retired veteran must give up an equivalent amount of retirement pay. In *Mansell v. Mansell,* the U.S. Supreme Court held that federal law forbade states from treating the waived portion as community property divisible at divorce. In this case a state court awarded to a veteran's spouse a portion of the veteran's total retirement pay upon their divorce. Long after the divorce, the veteran waived a share of the retirement pay in order to receive disability benefits. Under *Mansell* the state could not subsequently increase, pro rata, the amount the divorced spouse receives each month from the veteran's retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver. Howell v. Howell, 581 U.S. ___, 137 S. Ct. 1400, 197 L. Ed. 2d 781 (2017).

ERISA did not preempt a Wisconsin court order awarding a spouse 1/2 of a beneficiary's interest in a pension. Savings and Profit Sharing Fund of Sears Employees v. Gago, 717 F.2d 1038 (1983).

Dilemma v. Paradox: Valuation of an advanced degree upon dissolution of a marriage. Loeb and McCann. 66 MLR 495 (1983).

The recognition and valuation of professional goodwill in the marital estate. 66 MLR 697 (1983).

Enhanced value of a closely held corporation at the time of divorce: What role will Wisconsin's marital property act play? Podell. 69 MLR 82 (1985).

No−Fault Divorce: Tax Consequences of Support, Maintenance and Property Settlement. Case. WBB Dec. 1977.

Prenuptial and Postnuptial Agreements. Loeb. WBB Mar. 1981.

Drafting enforceable marital agreements. Garczynski. WBB Sept. 1986.

The Marital Property Act does not change Wisconsin's divorce law. Weisberger. WBB May 1987.

Transmutation: Finding Extra Property to Divide in Divorce. Kessler. Wis. Law. Aug. 1990.

Divorce Provisions in Opt−In Marital Property Agreements. Rasmussen. Wis. Law. Apr. 1994.

A Decade Post−*Button v. Button*: Drafting Prenuptial Agreements. Garczynski. Wis. Law. July 1999.

A Primer on Dividing a Military Pension. Halling & Drefahl. Wis. Law. Aug. 1999.

When Lovebirds Split: Dividing the Retirement Nest Egg at Divorce — Properly Dividing Pension Benefits. Patel. Wis. Law. Oct. 2006.

When Lovebirds Split: Dividing the Retirement Nest Egg at Divorce — Dividing Wisconsin Retirement System Benefits. Dennison. Wis. Law. Oct. 2006.

Business Owners in Divorce: A Basic Overview. Krimmer. Wis. Law. June 2008.

Valuing Retirement Benefits in Divorce. Dennison. Wis. Law. June 2012.

Valuing a Business in Divorce. Herman & Swartzberg. Wis. Law. Jan. 2014.

767.63 Disposed assets may be subject to division. In an action affecting the family, except an action to affirm marriage under s. 767.001 (1) (a), any asset with a fair market value of $500 or more that would be considered part of the estate of either or both of the parties if owned by either or both of them at the time of the action and that was transferred for inadequate consideration, wasted, given away, or otherwise unaccounted for by one of the parties within one year prior to the filing of the petition or the length of the marriage, whichever is shorter, is rebuttably presumed to be property subject to division under s. 767.61 and is subject to the disclosure requirement of s. 767.127. Transfers that resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed if those assets are otherwise identified in the statement of net worth.

History: 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); 1979 c. 352 s. 39; Stats. 1979 s. 767.275; 2005 a. 443 s. 124; Stats. 2005 s. 767.63.

Marital Waste: Within the Eye of the Beholding Court. Gehrig. Wis. Law. May 2015.

SUBCHAPTER VIII

ENFORCEMENT

767.70 Child support enforcement: notice and service of process. (1) WHEN SATISFIED. In an action under s. 767.001 (1) (i) to enforce or modify a judgment or order with respect to child support, due process requirements related to notice and service of process are satisfied if the court finds all of the following:

(a) That a diligent effort was made to ascertain the location of the respondent.

(b) That written notice of the action to the respondent has been delivered to the most recent residential address or employer address provided by the respondent under s. 767.58 (2) to the county child support agency under s. 59.53 (5).

(2) RULES ON LOCATING RESPONDENT. The department shall promulgate rules specifying the process that the department will use under sub. (1) (a) to ascertain the location of the respondent. Notwithstanding sub. (1) (b), the process specified in the rules shall utilize all reasonable means to which the department has access, including electronic means, interfaces with other programs, and information provided by the postmaster, for determining the current address of the respondent.

History: 1997 a. 191; 2005 a. 443 s. 21; Stats. 2005 s. 767.70.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

Cross–reference: See also ch. DWD 142, Wis. adm. code.

767.71 Reconciling percentage–expressed support orders. (1) REQUEST FOR DETERMINATION. (a) In this section, "support order" means an order for child support under this chapter or s. 948.22 (7), an order for family support under this chapter, or a stipulation approved by the court for child support under this chapter.

(b) If a support order is or has been expressed as a percentage of parental income, a party, including the state or a county child support agency under s. 59.53 (5) if the state is a real party in interest under s. 767.205 (2) (a), may request a determination under this section of the amount due under the order. The court may determine the amount due and, if ordered by the court, the county child support agency shall reconcile the amount due with payments actually made to determine if an arrearage exists.

(2) NOTICE AND AFFIDAVIT. (a) The party seeking the determination under this section shall file with the court a notice of reconciliation of account and a supporting affidavit. No later than 3 business days after filing, the party seeking the determination shall serve the notice and affidavit on all other parties, including the child support agency if the state is a real party in interest, by sending the notice and affidavit by regular mail to the last–known address provided under s. 767.58 (2), pursuant to s. 767.70.

(b) The notice of reconciliation of account shall include all of the following:

1. The period of time for which the reconciliation is sought.

2. A statement that, unless a party requests a hearing no later than 20 business days after the date of the notice, the court may enter an order determining the amount due under the percentage–expressed order and may enter a repayment order that applies if the reconciliation of the amount due with payments made results in an arrearage.

3. The mailing address to which the request for a hearing must be delivered or mailed to schedule a hearing under sub. (3).

(c) The supporting affidavit shall state the facts supporting a reasonable basis for determining the payer's income during the period of time for which the reconciliation is sought.

(3) IF HEARING HELD. (a) Within 10 business days after receiving a timely request for a hearing, the court shall set the matter for hearing. The court shall send notice of the date, time, and location of the hearing to the parties by regular mail at their last–known addresses.

(b) At the hearing, the court may establish the appropriate charge under the percentage order by determining the amount of the payer's income that is subject to the percentage–expressed order during the period for which reconciliation is sought and applying the ordered percentage to that amount. The court may enter a repayment order that becomes effective if the reconciliation of the amount due with payments made results in an arrearage.

(4) IF NO HEARING. If no party requests a hearing, the court shall review the supporting affidavit within 60 days of filing. If the court finds that the affidavit contains a reasonable basis for determining the payer's income during the period for which reconciliation is sought, the court may enter an order determining the amount due under the percentage–expressed order and may enter a repayment order that becomes effective if the reconciliation of the amount due with payments made results in an arrearage. The court shall send the order to the parties by regular mail to their last–known addresses.

(5) ENFORCEMENT. Any arrearage that exists as a result of the reconciliation of the amount due with payments made may be enforced under ch. 49 or this chapter.

History: 2005 a. 443.

767.73 Delinquent child or family support; suspension of operating privilege. (1) AUTHORITY TO SUSPEND. (a) In this subsection, "support payment" means a payment ordered for support under s. 767.521, support under s. 767.501, child support or family support under s. 767.225, family support under s. 767.531, revised child or family support under s. 767.59, or child support under s. 767.511, 767.804 (3), 767.805 (4), 767.85, 767.863 (3), 767.89, or 948.22 (7) or ch. 769.

(b) If a person fails to pay a support payment that is 90 or more days past due and the court finds that the person has the ability to pay the amount ordered, the court may suspend the person's operating privilege, as defined in s. 340.01 (40), until the person pays all arrearages in full or makes payment arrangements that are satisfactory to the court, except that the suspension period may not exceed 2 years. If otherwise eligible, the person is eligible for an occupational license under s. 343.10 at any time.

(2) NOTICE OF SUSPENSION TO DEPARTMENT OF TRANSPORTATION. If a court orders suspension of a person's operating privilege under sub. (1) (b), the court shall notify the department of transportation, in the form and manner prescribed by the department. The notice to the department shall include the name and last–known address of the person against whom the support order was entered, certification by the court that the person has been notified of the entry of the support order and that there are arrearages in support payments that are 90 or more days past due, and the place where the arrearages may be paid. The notice shall also state that the person's operating privilege remains suspended until the person pays all arrearages in full or makes payment arrangements that

are satisfactory to the court, except that the suspension period may not exceed 2 years.

(3) NOTICE OF PAYMENT TO DEPARTMENT. If the person subsequently pays the full amount of the arrearages or makes payment arrangements that are satisfactory to the court, the court shall immediately notify the department of transportation of the payment in the form and manner prescribed by the department.

(4) APPLICATION TO PAST ARREARAGES. This section applies to support arrearages existing on or after October 1, 1996, regardless of when the arrearages accrued or when the order or judgment requiring the payment of support was entered.

(5) RELATIONSHIP TO OTHER REMEDIES. The remedy permitted under this section is in addition to any other remedies authorized by law.

History: 1995 a. 401; 1997 a. 84, 191; 1999 a. 9, 32; 2005 a. 443 ss. 139, 140, 141, 236; Stats. 2005 s. 767.73; 2019 a. 95.

767.75 Assignment of income for payment obligations. (1) DEFINITIONS. In this section:

(a) "Employer" includes the state and its political subdivisions.

(b) "Payment order" means an order for child support under this chapter, for maintenance payments under s. 767.225 or 767.56, for family support under this chapter, for costs ordered under s. 767.804 (3), 767.805 (4), or 767.89 (3), for support by a spouse under s. 767.001 (1) (f), or for maintenance payments under s. 767.001 (1) (g); an order for or obligation to pay the annual receiving and disbursing fee under s. 767.57 (1e) (a); an order for a revision in a judgment or order with respect to child support, maintenance, or family support payments under s. 767.59; a stipulation approved by the court for child support under this chapter; and an order for child or spousal support entered under s. 948.22 (7).

(1f) PAYMENT ORDER AS ASSIGNMENT OF INCOME. A payment order constitutes an assignment of all commissions, earnings, salaries, wages, pension benefits, income continuation insurance benefits under s. 40.62, duty disability benefits under s. 40.65, benefits under ch. 102 or 108, lottery prizes that are payable in installments, and other money due or to be due in the future to the department or its designee. The assignment shall be for a fixed sum regardless of whether the court–ordered obligation on which the assignment is based is expressed in the court order as a percentage of the payer's income, and shall be for an amount sufficient to ensure payment under the order, obligation, or stipulation and to pay any arrearages due at a periodic rate not to exceed 50 percent of the amount of support due under the order, obligation, or stipulation so long as the addition of the amount toward arrearages does not leave the party at an income below the poverty line established under 42 USC 9902 (2).

(1m) OBLIGATION CONTINUING. If a party's current obligation to pay maintenance, child support, spousal support, or family support terminates but the party has an arrearage in the payment of one or more of those payments or in the payment of the annual receiving and disbursing fee, any assignment under sub. (1f) continues in effect, in an amount up to the amount of the assignment before the party's current obligation terminated, until the arrearage is paid in full.

(2h) DELAYED WITHHOLDING; FAILURE TO PAY. If a court–ordered assignment, including the assignment specified under sub. (1f) for the payment of any arrearages due, does not require immediately effective withholding and a payer fails to make a required maintenance, child support, spousal support, family support, or annual receiving and disbursing fee payment within 10 days after its due date, within 20 days after the payment's due date the court or county child support agency under s. 59.53 (5) shall cause the assignment to go into effect by providing notice of the assignment in the manner provided under sub. (2r) and shall send a notice by regular mail to the last–known address of the payer. The notice sent to the payer shall inform the payer that an assignment is in effect and that the payer may, within a 10–day period after the notice is mailed, by motion request a hearing on the issue of whether the assignment should remain in effect. The court shall hold a hearing requested under this subsection within 10 working days after the date of receipt of the request. If at the hearing the payer establishes that the assignment is not proper because of a mistake of fact, the court may direct that the assignment be withdrawn. Either party may, within 15 working days after the date of a decision by a circuit court commissioner under this subsection, seek review of the decision by the court with jurisdiction over the action.

(2m) UNPAID RECEIVING AND DISBURSING FEES; ASSIGNMENT. (a) 1. An obligation to pay unpaid fees under s. 767.57 (1e) (b) 1m. constitutes an assignment of all commissions, earnings, salaries, wages, pension benefits, income continuation insurance benefits under s. 40.62, duty disability benefits under s. 40.65, benefits under ch. 102 or 108, lottery prizes that are payable in installments, and other money due or to be due in the future to the department or its designee.

2. An obligation to pay unpaid fees under s. 767.57 (1e) (b) 2m. constitutes an assignment of all commissions, earnings, salaries, wages, pension benefits, income continuation insurance benefits under s. 40.62, duty disability benefits under s. 40.65, benefits under ch. 102 or 108, lottery prizes that are payable in installments, and other money due or to be due in the future to the clerk of court to whom the fees are owed, or to his or her successor.

(b) The county child support agency under s. 59.53 (5) may cause an assignment under par. (a) to go into effect by providing notice of the assignment in the manner provided under sub. (2r) and sending a notice by regular mail to the last–known address of the payer. The notice sent to the payer shall inform the payer that an assignment is in effect and that the payer may, within a 10–day period after the notice is mailed, by motion request a hearing on the issue of whether the assignment should remain in effect. The court shall hold a hearing requested under this paragraph within 10 working days after the date of receipt of the request. If at the hearing the payer establishes that the assignment is not proper because of a mistake of fact, the court may direct that the assignment be withdrawn. The payer or the county child support agency may, within 15 working days after the date of a decision by a circuit court commissioner under this paragraph, seek review of the decision by the court with jurisdiction over the action.

(2r) NOTICE OF ASSIGNMENT TO INCOME SOURCE. Upon entry of each order for child support, maintenance, family support, support by a spouse, or the annual receiving and disbursing fee, and upon approval of each stipulation for child support, unless the court finds that income withholding is likely to cause the payer irreparable harm or unless s. 767.76 applies, the court or county child support agency under s. 59.53 (5) shall provide notice of the assignment by regular mail or by facsimile machine, as defined in s. 134.72 (1) (a), or other electronic means to the last–known address of the person from whom the payer receives or will receive money. The notice shall provide that the amount withheld may not exceed the maximum amount that is subject to garnishment under 15 USC 1673 (b) (2). If the department or its designee does not receive the money from the person notified, the court or county child support agency under s. 59.53 (5) shall provide notice of the assignment to any other person from whom the payer receives or will receive money. Notice under this subsection may be a notice of the court, a copy of the executed assignment, or a copy of that part of the court order directing payment.

(3h) DUTIES OF PERSON RECEIVING ASSIGNMENT NOTICE. A person who receives notice of assignment under this section or s. 767.225 (1) (L) or 767.513 (3) or similar laws of another state shall withhold the amount specified in the notice from any money that person pays to the payer later than one week after receipt of notice of assignment. Within 5 days after the day the person pays money to the payer, the person shall send the amount withheld to the department or its designee or, in the case of an amount ordered withheld for health care expenses, to the appropriate health care insurer, provider, or plan. With each payment sent to the depart-

ment or its designee, the person from whom the payer receives money shall report to the department or its designee the payer's gross income or other gross amount from which the payment was withheld. Except as provided in sub. (3m), for each payment sent to the department or its designee, the person from whom the payer receives money shall receive an amount equal to the person's necessary disbursements, not to exceed $3, which shall be deducted from the money to be paid to the payer. Section 241.09 does not apply to assignments under this section.

(3m) ASSIGNMENT OF UNEMPLOYMENT COMPENSATION BENEFITS. Benefits under ch. 108 may be assigned and withheld only in the manner provided in s. 108.13 (4). Any order to withhold benefits under ch. 108 shall be for a fixed sum regardless of whether the court–ordered obligation on which the withholding order is based is expressed in the court order as a percentage of the payer's income. When money is to be withheld from these benefits, no fee may be deducted from the amount withheld and no fine may be levied for failure to withhold the money.

(4) ASSIGNMENT PRIORITY. A withholding assignment or order under this section or s. 767.225 (1) (L) or 767.513 (3) has priority over any other assignment, garnishment, or similar legal process under state law.

(6) FAILURE TO COMPLY WITH ASSIGNMENT OBLIGATIONS. (a) Except as provided in sub. (3m), if after receipt of notice of assignment the person from whom the payer receives money fails to withhold the money or send the money to the department or its designee or the appropriate health care insurer, provider, or plan as provided in this section or s. 767.225 (1) (L) or 767.513 (3), the person may be proceeded against under the principal action under ch. 785 for contempt of court or may be proceeded against under ch. 778 and be required to forfeit not less than $50 nor more than an amount, if the amount exceeds $50, that is equal to 1 percent of the amount not withheld or sent.

(b) If an employer who receives an assignment under this section or s. 767.225 (1) (L) or 767.513 (3) fails to notify the department or its designee within 10 days after an employee is terminated or otherwise temporarily or permanently leaves employment, the employer may be proceeded against under the principal action under ch. 785 for contempt of court.

(c) No employer may use an assignment under this section or s. 767.225 (1) (L) or 767.513 (3) as a basis for the denial of employment to a person, the discharge of an employee, or any disciplinary action against an employee. An employer who denies employment or discharges or disciplines an employee in violation of this paragraph may be fined not more than $500 and may be required to make full restitution to the aggrieved person, including reinstatement and back pay. Except as provided in this paragraph, restitution shall be in accordance with s. 973.20. An aggrieved person may apply to the district attorney or to the department for enforcement of this paragraph.

(6m) CONVERSION OF CERTAIN SUPPORT ORDERS TO FIXED AMOUNT. A county child support agency under s. 59.53 (5) may convert a support amount in an order for income withholding under this section that is expressed as a percentage of income to the equivalent sum certain amount for purposes of enforcing a child support order in another state under subch. V or VI of ch. 769. Nothing in this subsection authorizes a change, or may be construed to change, the support obligation specified in the underlying child support order.

(7) RECEIPT OF MORE THAN ONE NOTICE OF ASSIGNMENT. A person who receives more than one notice of assignment under sub. (3h) may send all money withheld to the department or its designee, whichever is appropriate, in a combined payment, accompanied by any information the department or its designee requires.

(7m) CHANGE IN PAYROLL PERIOD. (a) In this subsection, "payroll period" has the meaning given in s. 71.63 (5).

(b) If after an assignment is in effect the payer's employer changes its payroll period, or the payer changes employers and the new employer's payroll period is different from the former employer's payroll period, the county child support agency under s. 59.53 (5) may, unless otherwise ordered by a judge, amend the withholding assignment or order so that all of the following apply:

1. The withholding frequency corresponds to the new payroll period.

2. The amounts to be withheld reflect the adjustment to the withholding frequency.

(c) The county child support agency shall provide notice of the amended withholding assignment or order by regular mail to the payer's employer and to the payer.

History: 1971 c. 110; 1975 c. 94 s. 91 (3); 1975 c. 199; 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196, 221; Stats. 1979 s. 767.265; 1981 c. 20, 186; 1983 a. 27, 384; 1985 a. 29; 1987 a. 38 s. 136; 1987 a. 332 s. 64; 1987 a. 398, 403; 1989 a. 31, 56, 212, 336; 1991 a. 287; 1993 a. 16, 326, 389, 481; 1995 a. 27 s. 9130 (4); 1995 a. 279, 404; 1997 a. 27, 191; 1999 a. 9; 2001 a. 16, 61, 105; 2005 a. 443 ss. 116 to 118, 237; Stats. 2005 s. 767.75; 2015 a. 55, 172; 2017 a. 365; 2019 a. 95.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

The maximum amount subject to assignment to collect an arrearage is 50 percent of the support currently due. A 25 percent wage assignment for current support limits an assignment for arrearages to an additional 12.5 percent of wages. Schnetzer v. Schnetzer, 174 Wis. 2d 458, 497 N.W.2d 772 (Ct. App. 1993).

The assignment under sub. (1) [now sub. (1f)] does not require earnings to be withheld and therefore is not a garnishment subject to federal restrictions. Carpenter v. Mumaw, 230 Wis. 2d 384, 602 N.W.2d 536 (Ct. App. 1999), 98–2874.

The mandatory wage assignment provisions of this section are constitutional. 68 Atty. Gen. 106.

767.76 Account transfers. (1) AUTHORITY OF COURT TO REQUIRE. If the court determines that income withholding under s. 767.75 is inapplicable, ineffective, or insufficient to ensure payment under an order or stipulation specified in s. 767.75 (1), or that income withholding under s. 767.513 (3) is inapplicable, ineffective, or insufficient to ensure payment of a child's health care expenses, including payment of health insurance premiums, ordered under s. 767.513, the court may require the payer to identify or establish a deposit account, owned in whole or in part by the payer, that allows for periodic transfers of funds and to file with the financial institution at which the account is located an authorization for transfer from the account to the department or its designee. The authorization shall be provided on a standard form approved by the court and shall specify the frequency and the amount of transfer, sufficient to meet the payer's obligation under the order or stipulation, as required by the court. The authorization shall include the payer's consent for the financial institution or an officer, employee, or agent of the financial institution to disclose information to the court, county child support agency under s. 59.53 (5), department, or department's designee regarding the account for which the payer has executed the authorization for transfer.

(2) TRANSFER OF FUNDS BY FINANCIAL INSTITUTIONS. A financial institution that receives an authorization for transfer under sub. (1) shall transfer the amounts as specified in the authorization or shall transfer the amount available for transfer if at a time of transfer that amount is less than the amount specified in the authorization. The financial institution may accomplish the transfer by any lawful means, including payment by check, subject to the terms of the account. The financial institution may deduct from the payer's account for each transfer its usual fee for such fund transfers. If the account is closed or if no funds are available at a time of transfer, the financial institution shall notify the county child support agency under s. 59.53 (5) or the department or its designee, whichever is appropriate, within 10 days after the date on which the funds should have been transferred.

(3) PRIORITY OF TRANSFER AUTHORIZATION. An authorization for transfer under sub. (1) has priority over any other authorization for transfer and over an assignment, garnishment or similar legal process under state law or the laws of another state.

(4) REVOCATION OF TRANSFER AUTHORIZATION. An authorization for transfer under sub. (1) may not be revoked except by court order.

(5) AUTHORIZED DISCLOSURE. A financial institution or an officer, employee, or agent of a financial institution may disclose information to the court, county child support agency under s.

59.53 (5), department, or department's designee concerning an account for which a payer has executed an authorization for transfer under sub. (1).

(6) LIABILITY IMMUNITY. No financial institution or officer, employee or agent of a financial institution is liable to an account owner for any sum transferred, or for any information disclosed, in compliance with this section.

History: 1993 a. 481; 1995 a. 279; 1997 a. 27; 1999 a. 9; 2001 a. 38, 61, 105; 2005 a. 443 ss. 120, 238; Stats. 2005 s. 767.76.

767.77 Enforcement of payment obligations. (1) DEFINITION. In this section, "payment obligation" means an obligation to pay support under s. 48.355 (2) (b) 4. or (4g) (a), 48.357 (5m) (a), 48.363 (2), 938.183 (4), 938.355 (2) (b) 4. or (4g) (a), 938.357 (5m) (a), or 938.363 (2), support or maintenance under s. 767.501, child support, family support, or maintenance under s. 767.225, child support under s. 767.511, maintenance under s. 767.56, family support under s. 767.531, attorney fees under s. 767.241, child support or a child's health care expenses under s. 767.85, paternity obligations under s. 767.804 (3), 767.805 (4), 767.863 (3), or 767.89, support arrearages under s. 767.71, or child or spousal support under s. 948.22 (7).

(1m) TERMS OF PAYMENT. The court may order that a payment obligation be paid in the amounts and at the times that it considers expedient.

(2) SECURITY FOR PAYMENT. The court may impose liability for a payment obligation as a charge upon specific real estate of the obligated party or may require that party to give sufficient security for payment. No charge upon real estate is effective until the order or judgment imposing liability or a certified copy of it is recorded in the office of the register of deeds in the county in which the real estate is situated.

(3) NONCOMPLIANCE; ENFORCEMENT. If a party fails to pay a payment ordered under sub. (1m) or to give security under sub. (2), the court may by any appropriate remedy enforce the judgment, or the order as if it were a final judgment, including any past due payment and interest. Appropriate remedies include but are not limited to:

(a) Execution of the order or judgment.

(b) Contempt of court under ch. 785.

(c) Money judgment for past due payments.

(d) Satisfaction under s. 811.23 of any property attached under ch. 811.

(e) Garnishment under ch. 812.

(f) For failure to pay child support or family support, satisfaction under s. 780.10 out of the proceeds of the sale of any ship, boat or vessel attached and sold under ch. 780.

(4) INFORMATION ON BOAT OWNERSHIP. Upon the request of a county, the department of natural resources shall provide the county with a list of the names and addresses of all of the owners of boats that have a valid certificate of number or registration that has been issued by the department under s. 30.52. The department shall prepare the list annually before May 31 of each year.

History: 1971 c. 220; 1975 c. 401 s. 4; 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196, 221; 1979 c. 257 s. 17; 1979 c. 355; Stats. 1979 s. 767.30; 1983 a. 27; 1985 a. 29; 1987 a. 332 s. 64; 1993 a. 481; 1995 a. 77, 287; 1997 a. 27, 191; 1999 a. 103; 2005 a. 443 ss. 137, 239; Stats. 2005 s. 767.77; 2015 a. 373; 2019 a. 95.

A court is justified in requiring the creation of a trust to secure the payment of support money when a spouse has a record of failing to obey prior court orders. Foregger v. Foregger, 48 Wis. 2d 512, 180 N.W.2d 578 (1970).

When parents each own a 1/2 interest in future proceeds of real estate and the state contributes to child support, the court may not order the custodial parent to pay child support in the form of an accumulating real estate lien in favor of the state. State ex rel. v. Reible, 91 Wis. 2d 394, 283 N.W.2d 427 (Ct. App. 1979).

The trial court had the power to order a parent to look for additional or alternative employment or be held in contempt. Proper contempt procedures are discussed. Dennis v. Dennis, 117 Wis. 2d 249, 344 N.W.2d 128 (1984).

There is no authority under this section to grant credits against arrearages. To grant a credit requires modification of the judgment under s. 767.32 [now s. 767.59]. Under s. 767.32 (1r) [now s. 767.59 (1r)] a court is without discretion to grant credits against arrearages for direct payments made for child support regardless of when the order was entered. Douglas County Child Support v. Fisher, 200 Wis. 2d 807, 547 N.W.2d 801 (Ct. App. 1996), 95–1960.

767.78 Enforcement; contempt proceedings. (1) DEFINITION. In this section, "financial obligation" means an obligation for payment incurred under s. 48.355 (2) (b) 4. or (4g) (a), 48.357 (5m) (a), 48.363 (2), 767.225, 767.241, 767.511, 767.531, 767.56, 767.61, 767.71, 767.804 (3), 767.805 (4), 767.85, 767.863 (3), 767.89, 938.183 (4), 938.355 (2) (b) 4. or (4g) (a), 938.357 (5m) (a), or 938.363 (2).

(2) NONCOMPLIANCE; ORDER TO SHOW CAUSE. If a person has incurred a financial obligation and has failed within a reasonable time or as ordered by the court to satisfy the obligation, and the wage assignment proceeding under s. 767.75 and the account transfer under s. 767.76 are inapplicable, impractical, or unfeasible, the court may on its own initiative, and shall on the application of the receiving party, issue an order requiring the payer to show cause at a reasonable time specified in the order why he or she should not be subject to contempt of court under ch. 785.

History: 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; 1979 c. 257 s. 17; Stats. 1979 s. 767.305; 1993 a. 481; 1995 a. 77; 1997 a. 27, 191; 1999 a. 103; 2005 a. 443 ss. 142, 143; Stats. 2005 s. 767.78; 2015 a. 373; 2019 a. 95.

Contempt is an appropriate means to enforce child support arrearages after a child has reached majority. Griffin v. Reeve, 141 Wis. 2d 699, 416 N.W.2d 612 (1987).

When a contemnor's liberty interests are at risk, he or she must be given an opportunity to show the court that the failure to comply with the purge conditions was not willful and intentional. V.J.H. v. C.A.B., 163 Wis. 2d 833, 472 N.W.2d 939 (Ct. App. 1991).

SUBCHAPTER IX

PATERNITY

767.80 Determination of paternity. (1) WHO MAY BRING ACTION OR FILE MOTION. The following persons may bring an action or file a motion, including an action or motion for declaratory judgment, for the purpose of determining the paternity of a child, or for the purpose of rebutting the presumption of paternity under s. 891.405, 891.407, or 891.41 (1):

(a) The child.

(b) The child's natural mother.

(c) Unless s. 767.804 (1) or 767.805 (1) applies, a male presumed to be the child's father under s. 891.405, 891.407, or 891.41 (1).

(d) A male alleged or alleging himself to be the father of the child.

(e) The personal representative of a person specified under pars. (a) to (d) if that person has died.

(f) The legal or physical custodian of the child.

(g) This state whenever the circumstances specified in s. 767.205 (2) (a) apply, including the delegates of the state as specified in sub. (6).

(h) This state as provided under sub. (6m).

(hm) The state as provided under s. 767.804 (1) (d).

(i) A guardian ad litem appointed for the child under s. 48.235, 767.407 (1) (c), or 938.235.

(j) A parent of a person listed under par. (b), (c) or (d), if the parent is liable or is potentially liable for maintenance of a child of a dependent person under s. 49.90 (1) (a) 2.

(k) In conjunction with the filing of a petition for visitation with respect to the child under s. 767.43 (3), a parent of a person who has filed a declaration of paternal interest under s. 48.025 with respect to the child or a parent of a person who, before April 1, 1998, signed and filed a statement acknowledging paternity under s. 69.15 (3) (b) 3. with respect to the child.

(1m) VENUE. An action under this section may be brought in the county in which the child or the alleged father resides or is found or, if the father is deceased, in which proceedings for probate of his estate have been or could be commenced.

(2) CERTAIN AGREEMENTS NOT A BAR TO ACTION. Regardless of its terms, an agreement made after July 1, 1981, other than an agreement approved by the court between an alleged or presumed

father and the mother or child, does not bar an action under this section. Whenever the court approves an agreement in which one of the parties agrees not to commence an action under this section, the court shall first determine whether or not the agreement is in the best interest of the child. The court shall not approve any provision waiving the right to bring an action under this section if this provision is contrary to the best interests of the child.

(3) STAY IF ACTION BEFORE BIRTH. If an action under this section is brought before the birth of the child, all proceedings shall be stayed until after the birth, except that service of process, service and filing of pleadings, the first appearance and the taking of depositions to preserve testimony may be done before the birth of the child.

(4) CHILD AS PARTY. The child may be a party to any action under this section.

(5) PETITION. (a) In this subsection, "any alleged father" includes any male who has engaged in sexual intercourse with the child's mother during a possible time of conception of the child.

(b) An action under this section may be joined with any other action for child support and is governed by the procedures specified in s. 767.205 relating to child support, except that the title of the action shall be "In re the paternity of A.B." The petition shall state the name and date of birth of the child if born or that the mother is pregnant if the child is unborn, the name of any alleged father, whether or not an action by any of the parties to determine the paternity of the child or rebut the presumption of paternity to the child has at any time been commenced, or is pending before any court, in this state or elsewhere. If a paternity judgment has been rendered, or if a paternity action has been dismissed, the petition shall state the court that rendered the judgment or dismissed the action, and the date and the place the judgment was granted if known. The petition shall also give notice of a party's right to request a genetic test under s. 49.225 or 767.84.

(c) If a matter is referred under s. 48.299 (6) (a) or 938.299 (6) (a) to an attorney designated under sub. (6) (a), that attorney shall also include in the petition notification to the court that the matter was referred under s. 48.299 (6) (a) or 938.299 (6) (a).

(5m) APPLICABLE PROCEDURE; EXCEPTIONS. Except as provided in ss. 767.804, 767.805, 767.863 (3), 767.85, 767.893 (2) and (2m), and 769.401, unless a male is presumed the child's father under s. 891.41 (1), is adjudicated the child's father either under s. 767.89 or by final order or judgment of a court of competent jurisdiction in another state, is conclusively determined to be the child's father from genetic test results under s. 767.804, or has acknowledged himself to be the child's father under s. 767.805 (1) or a substantially similar law of another state, no order or temporary order may be entered for child support, legal custody, or physical placement until the male is adjudicated the father using the procedure set forth in this subchapter, except s. 767.804 or 767.805. Except as provided in ss. 767.804, 767.805, 767.85, and 769.401, the exclusive procedure for establishment of child support obligations, legal custody, or physical placement rights for a male who is not presumed the child's father under s. 891.41 (1), adjudicated the father, conclusively determined to be the child's father from genetic test results under s. 767.804, or acknowledged under s. 767.805 (1) or a substantially similar law of another state to be the father is by an action under this subchapter, except s. 767.804 or 767.805, or under s. 769.402. No person may waive the use of this procedure. If a presumption under s. 891.41 (1) exists, a party denying paternity has the burden of rebutting the presumption.

(6) WHICH ATTORNEY REPRESENTS STATE. (a) The attorney responsible for support enforcement under s. 59.53 (6) (a) shall provide the representation for the state as specified under s. 767.205 (2) (a) in cases brought under this section.

(b) The attorney under s. 59.53 (6) (a) is the only county attorney who may provide representation when the state delegates its authority under sub. (1) (g).

(c) The attorney under s. 59.53 (6) (a) or any state attorney acting under par. (b) may not represent the state as specified under s. 767.205 (2) (a) in an action under this section and at the same time act as guardian ad litem for the child or the alleged child of the party.

(6m) WHEN ACTION MUST BE COMMENCED. The attorney designated under sub. (6) (a) shall commence an action under this section on behalf of the state within 6 months after receiving notification under s. 69.03 (15) that no father is named on the birth record of a child who is a resident of the county if paternity has not been conclusively determined from genetic test results under s. 767.804, acknowledged under s. 767.805 (1) or a substantially similar law of another state, or adjudicated, except in situations under s. 69.14 (1) (g) and (h) and as provided by the department by rule.

(6r) RESPONSIBILITIES OF ATTORNEY UPON REFERRAL. (a) The attorney designated under sub. (6) (a) who receives a referral under s. 48.299 (6) (a) or 938.299 (6) (a) shall do all of the following:

1. Give priority to matters referred under s. 48.299 (6) (a) or 938.299 (6) (a), including priority in determining whether an action should be brought under this section and, if the determination is that such an action should be brought, priority in bringing the action and in establishing the existence or nonexistence of paternity.

2. As soon as possible, but no later than 30 days after the date on which the referral is received, notify the court that referred the matter of one of the following:

a. The date on which an action has been brought under this section or the approximate date on which such an action will be brought.

b. That a determination has been made that an action should not be brought under this section or, if such a determination has not been made, the approximate date on which a determination will be made as to whether such an action should be brought.

c. That the male designated in s. 48.299 (6) (a) or 938.299 (6) (a) has previously been excluded as the father of the child.

3. If an action is brought under this section, notify the court that referred the matter as soon as possible of a judgment or order determining the existence or nonexistence of paternity.

(b) The attorney designated under sub. (6) (a) who receives a referral under s. 48.299 (7) or 938.299 (7) may bring an action under this section on behalf of the state and may give priority to the referral and notify the referring court in the same manner as is required under par. (a) when a matter is referred under s. 48.299 (6) (a) or 938.299 (6) (a).

(7) CLERK TO PROVIDE DOCUMENT. The clerk of court shall provide without charge to each person bringing an action under this section, except to the state under sub. (1) (g) or (6m), a document setting forth the percentage standard established by the department under s. 49.22 (9) and listing the factors that a court may consider under s. 767.511 (1m).

History: 1979 c. 352; 1981 c. 20 s. 2202 (20) (m); 1983 a. 447; 1985 a. 29; 1987 a. 27, 355, 399, 413; 1989 a. 31, 212; 1993 a. 326, 481; 1995 a. 27 s. 9126 (19); 1995 a. 68, 100, 201, 275, 404; 1997 a. 191; 1999 a. 9; 2001 a. 61; 2005 a. 443 ss. 12, 184, 241; Stats. 2005 s. 767.80; 2007 a. 97; 2009 a. 321; 2015 a. 82 s. 12; 2017 a. 334; 2019 a. 95.

Cross–reference: See also ch. DCF 151, Wis. adm. code.

A paternity proceeding may not be maintained posthumously. Estate of Blumreich, 84 Wis. 2d 545, 267 N.W.2d 870 (1978). See also Paternity of N.L.B., 140 Wis. 2d 400, 411 N.W.2d 144 (Ct. App. 1987).

Under the facts of the case, the nonbiological father was not equitably estopped from denying paternity or child support. Marriage of A.J.N. & J.M.N., 141 Wis. 2d 99, 414 N.W.2d 68 (Ct. App. 1987).

A posthumous paternity action is allowable if it is brought by the putative father's personal representative. Le Fevre v. Schreiber, 167 Wis. 2d 733, 482 N.W.2d 904 (1992).

A paternity action may not be used to challenge paternity previously decided in a divorce action. That paternity was not challenged in the divorce is irrelevant if it could have been litigated. Paternity of Nathan T., 174 Wis. 2d 352, 497 N.W.2d 740 (Ct. App. 1993).

The full faith and credit clause of the U.S. Constitution did not bar a petition to determine paternity when a paternity decree of another state would have been subject

to collateral attack in that state. Paternity of R.L.L., 176 Wis. 2d 224, N.W.2d (Ct. App. 1993).

Because a child has a right to bring an independent action for paternity under sub. (1) (a), if the child was not a party to an earlier paternity action, it would be a violation of the child's due process rights to preclude the child from litigating the paternity issue. Mayonia M.M. v. Kieth N., 202 Wis. 2d 460, 551 N.W.2d 34 (Ct. App. 1996), 95–2838.

An alleged father has a statutory right to a determination of paternity. A hearing to determine whether the child's best interests would be served by a paternity proceeding is not authorized by statute. Thomas M.P. v. Kimberly J.L., 207 Wis. 2d 388, 558 N.W.2d 897 (Ct. App. 1996), 96–0697.

Section 893.88, limiting only an action for the establishment of paternity, does not preclude a motion for the purpose of determining paternity in a probate proceeding. DiBenedetto v. Jaskolski, 2003 WI App 70, 261 Wis. 2d 723, 661 N.W.2d 869, 01–2189.

Construing the discretionary authority of a personal representative under sub. (1) (e) in a way that allows preventing the definitive determination of heirs would undermine the principle that property of intestate deceased persons should descend to kindred of the blood and defeat a court's responsibility under s. 863.23 that persons who are the heirs of the decedent shall be determined by the court. DiBenedetto v. Jaskolski, 2003 WI App 70, 261 Wis. 2d 723, 661 N.W.2d 869, 01–2189.

In order for a putative biological father to have the necessary foundation for a constitutionally protected liberty interest in his putative paternity, he must have taken affirmative steps to assume his parental responsibilities for the child. Randy A.J. v. Norma I.J., 2004 WI 41, 270 Wis. 2d 384, 677 N.W.2d 630, 02–0469.

The competing interests of finality and fairness coalesce when considering sub. (1) (h) and principles of res judicata. Res judicata and collateral estoppel are founded on principles of fundamental fairness and should not deprive a party of the opportunity to have a full and fair determination of an issue. When the record demonstrated that an adjudicated father never had an opportunity for a full and fair determination of the question of paternity, res judicata should not have barred relief. Shanee Y. v. Ronnie J., 2004 WI App 58, 271 Wis. 2d 242, 677 N.W.2d 684, 03–1228.

Sub. (1) does not permit a man alleging he is the father to bring a paternity action for the sole purpose of establishing paternity of a stillborn so that he may bring a wrongful death action. The proper vehicle for determining parentage is a motion by the father under s. 885.23 for a determination of parentage within the pending wrongful death action. Shannon E.T. v. Alicia M.V.M., 2007 WI 29, 299 Wis. 2d 601, 728 N.W.2d 636, 05–0077.

Sub. (1) utilizes mandatory language requiring the state to initiate a paternity action when, as provided in sub. (6m), no father's name was listed on the birth certificate. Thus, according to the clear language of this statute, the state was obligated to commence a paternity action. A presumption of paternity under s. 891.41 does not alleviate the state of its obligations under sub. (1). State v. Robin M.W., 2008 WI App 60, 310 Wis. 2d 786, 750 N.W.2d 957, 07–1181.

The standard of review for best–interest determinations in paternity proceedings requires that the appellate court accept the circuit court's factual findings unless clearly erroneous but determine the child's best interest de novo. Douglas L. v. Arika B., 2015 WI App 80, 365 Wis. 2d 257, 872 N.W.2d 357, 14–2656.

767.803 Determination of marital children. If the father and mother of a nonmarital child enter into a lawful marriage or a marriage which appears and they believe is lawful, except where the parental rights of the mother were terminated before either of these circumstances, the child becomes a marital child, is entitled to a change in birth record under s. 69.15 (3) (b), and shall enjoy all of the rights and privileges of a marital child as if he or she had been born during the marriage of the parents. This section applies to all cases before, on, or after its effective date, but no estate already vested shall be divested by this section and ss. 765.05 to 765.24 and 852.05. The children of all marriages declared void under the law are nevertheless marital children.

History: 1979 c. 32 ss. 48, 92 (2); Stats. 1979 s. 765.25; 1979 c. 352; Stats. 1979 s. 767.60; 1981 c. 314 s. 146; 1983 a. 447; 1985 a. 315; 2005 a. 443 s. 229; Stats. 2005 s. 767.803; 2017 a. 334.

767.804 Genetic test results. (1) CONCLUSIVE DETERMINATION OF PATERNITY. (a) If genetic tests have been performed with respect to a child, the child's mother, and a male alleged, or alleging himself, to be the child's father, the test results constitute a conclusive determination of paternity, effective on the date on which the report under par. (c) is submitted to the state registrar, which has the same effect as a judgment of paternity, if all of the following apply:

1. Both the child's mother and the male are over the age of 18 years.

2. The genetic tests were required to be performed by a county child support agency under s. 59.53 (5) pursuant to s. 49.225.

3. The test results show that the male is not excluded as the father and that the statistical probability of the male's parentage is 99.0 percent or higher.

4. No other male is presumed to be the father under s. 891.405 or 891.41 (1).

(b) When the county child support agency under s. 59.53 (5) receives genetic test results described in par. (a) 3. and the requirements under par. (a) are satisfied, the county child support agency shall send notice to the mother and male by regular mail at their last–known addresses. The notice must be sent at least 15 days in advance of the date on which the county child support agency intends to file the report under par. (c) and shall advise the mother and male of all of the following:

1. The test results.

2. That the report under par. (c) will be filed with the state registrar if neither the mother nor the male timely objects under subd. 4., and the date on which the report will be filed.

3. That an action affecting the family concerning custody, child support, or physical placement rights may be brought with respect to the mother and male.

4. That the mother or the male, or both, may object to the test results by submitting an objection in writing to the county child support agency no later than the day before the date specified in subd. 2., and that, if either the mother or the male timely submits an objection, the state will commence a paternity action.

(c) 1. If neither the mother nor the male timely submits an objection under par. (b) 4., the county child support agency shall file with the state registrar a report showing the names, dates, and birth places of the child and the father, the social security numbers of the mother, father, and child, and the maiden name of the mother on a form prescribed by the state registrar, along with the fee set forth in s. 69.22 (5), if any, which the county child support agency shall collect.

2. The department shall pay, and may not require the county or county child support agency to reimburse the department, for the cost of a fee for inserting the father's name on a birth certificate under s. 69.15 (3) (a) 3. if the county child support agency is unable to collect the fee.

(d) If either the mother or the male timely submits an objection under par. (b) 4., the county child support agency shall commence an action under s. 767.80 (1) on behalf of the state. The genetic test results described in par. (a) are admissible in an action commenced under this paragraph.

(2) ACTIONS. Unless sub. (1) (d) applies, an action affecting the family concerning custody, child support, or physical placement rights may be brought under this subsection with respect to a child's mother and a male who, along with the child, were the subjects of genetic tests, the results of which constitute a conclusive determination of paternity under sub. (1). Except as provided in s. 767.407, in an action under this subsection the court may appoint a guardian ad litem for the child.

(3) ORDERS. In an action under sub. (2), if the child's custodial and noncustodial parent had notice of the hearing, the court shall make an order that contains all of the following provisions:

(a) Orders for the legal custody of and periods of physical placement with the child, determined in accordance with s. 767.41.

(b) An order requiring either or both of the parents to contribute to the support of any child of the parties who is less than 18 years old, or any child of the parties who is less than 19 years old if the child is pursuing an accredited course of instruction leading to the acquisition of a high school diploma or its equivalent, determined in accordance with s. 767.511.

(c) A determination as to which parent, if eligible, shall have the right to claim the child as an exemption for federal tax purposes under 26 USC 151 (c), or as an exemption for state tax purposes under s. 71.07 (8) (b).

(d) 1. An order establishing the amount of the father's obligation to pay or contribute to the reasonable expenses of the mother's pregnancy and the child's birth. The amount established may not exceed one–half of the total actual and reasonable pregnancy and birth expenses. The order also shall specify the court's findings as to whether the father's income is at or below the poverty

line established under 42 USC 9902 (2), and shall specify whether periodic payments are due on the obligation, based on the father's ability to pay or contribute to those expenses.

2. If the order does not require periodic payments because the father has no present ability to pay or contribute to the expenses, the court may modify the judgment or order at a later date to require periodic payments if the father has the ability to pay at that time.

(e) An order requiring either or both parties to pay or contribute to the costs of guardian ad litem fees, if any, and other costs.

(f) An order requiring either party to pay or contribute to the attorney fees of the other party.

(3m) CHANGE OF CHILD'S NAME. (a) Upon the request of both parents, the court shall include in the order under sub. (3) an order changing the name of the child to a name agreed upon by the parents.

(b) Except as provided in par. (a), the court may include an order changing the surname of the child to a surname that consists of the surnames of both parents separated by a hyphen or, if one or both parents have more than one surname, of one of the surnames of each parent separated by a hyphen, if all of the following apply:

1. Only one parent requests that the child's name be changed, or both parents request that the child's name be changed but each parent requests a different name change.

2. The court finds that such a name change is in the child's best interest.

(c) Section 786.36 does not apply to a name change under this subsection.

(4) LIABILITY FOR PAST SUPPORT. (a) Subject to par. (b), liability for past support of the child shall be limited to support for the period after the day on which the petition, motion, or order to show cause requesting support is filed in the action for support under sub. (2), unless a party shows, to the satisfaction of the court, all of the following:

1. That he or she was induced to delay commencing the action by any of the following:

a. Duress or threats.

b. Actions, promises, or representations by the other party upon which the party relied.

c. Actions taken by the other party to evade proceedings under sub. (2).

2. That, after the inducement ceased to operate, he or she did not unreasonably delay in commencing the action.

(b) In no event may liability for past support of the child be imposed for any period before the birth of the child.

History: 2019 a. 95.

767.805 Voluntary acknowledgment of paternity. **(1)** CONCLUSIVE DETERMINATION OF PATERNITY. A statement acknowledging paternity that is on file with the state registrar under s. 69.15 (3) (b) 3. after the last day on which a person may timely rescind the statement, as specified in s. 69.15 (3m), is a conclusive determination, which shall be of the same effect as a judgment, of paternity.

(1m) MINOR PARENT MAY NOT SIGN. A minor may not sign a statement acknowledging paternity.

(2) RESCISSION OF ACKNOWLEDGMENT. (a) A statement acknowledging paternity that is filed with the state registrar under s. 69.15 (3) (b) 3. may be rescinded as provided in s. 69.15 (3m) by a person who signed the statement as a parent of the child who is the subject of the statement.

(b) If a statement acknowledging paternity is timely rescinded as provided in s. 69.15 (3m), a court may not enter an order specified in sub. (4) with respect to the male who signed the statement as the father of the child unless the male is adjudicated the child's father using the procedures set forth in this subchapter, except for this section.

(3) ACTIONS WHEN PATERNITY ACKNOWLEDGED. (a) Unless the statement acknowledging paternity has been rescinded, an action affecting the family concerning custody, child support or physical placement rights may be brought with respect to persons who, with respect to a child, jointly signed and filed with the state registrar under s. 69.15 (3) (b) 3. as parents of the child a statement acknowledging paternity.

(b) Except as provided in s. 767.407, in an action specified in par. (a) the court may appoint a guardian ad litem for the child.

(4) ORDERS WHEN PATERNITY ACKNOWLEDGED. In an action under sub. (3) (a), if the persons who signed and filed the statement acknowledging paternity as parents of the child had notice of the hearing, the court shall make an order that contains all of the following provisions:

(a) Orders for the legal custody of and periods of physical placement with the child, determined in accordance with s. 767.41.

(am) The information set forth in s. 767.41 (6) (h).

(b) An order requiring either or both of the parents to contribute to the support of any child of the parties who is less than 18 years old, or any child of the parties who is less than 19 years old if the child is pursuing an accredited course of instruction leading to the acquisition of a high school diploma or its equivalent, determined in accordance with s. 767.511.

(c) A determination as to which parent, if eligible, shall have the right to claim the child as an exemption for federal tax purposes under 26 USC 151 (c), or as an exemption for state tax purposes under s. 71.07 (8) (b).

(d) 1. An order establishing the amount of the father's obligation to pay or contribute to the reasonable expenses of the mother's pregnancy and the child's birth. The amount established may not exceed one–half of the total actual and reasonable pregnancy and birth expenses. The order also shall specify the court's findings as to whether the father's income is at or below the poverty line established under 42 USC 9902 (2), and shall specify whether periodic payments are due on the obligation, based on the father's ability to pay or contribute to those expenses.

2. If the order does not require periodic payments because the father has no present ability to pay or contribute to the expenses, the court may modify the judgment or order at a later date to require periodic payments if the father has the ability to pay at that time.

(e) An order requiring either or both parties to pay or contribute to the costs of the guardian ad litem fees and other costs.

(f) An order requiring either party to pay or contribute to the attorney fees of the other party.

(4m) LIABILITY FOR PAST SUPPORT. (a) Subject to par. (b), liability for past support of the child shall be limited to support for the period after the day on which the petition, motion or order to show cause requesting support is filed in the action for support under sub. (3) (a), unless a party shows, to the satisfaction of the court, all of the following:

1. That he or she was induced to delay commencing the action by any of the following:

a. Duress or threats.

b. Actions, promises or representations by the other party upon which the party relied.

c. Actions taken by the other party to evade proceedings under sub. (3) (a).

2. That, after the inducement ceased to operate, he or she did not unreasonably delay in commencing the action.

(b) In no event may liability for past support of the child be imposed for any period before the birth of the child.

(5) VOIDING DETERMINATION. (a) A determination of paternity that arises under this section may be voided at any time upon a motion or petition stating facts that show fraud, duress or a mistake of fact. Except for good cause shown, any orders entered under sub. (4) shall remain in effect during the pendency of a proceeding under this paragraph.

(b) If a court in a proceeding under par. (a) determines that the male is not the father of the child, the court shall vacate any order entered under sub. (4) with respect to the male. The court or the county child support agency under s. 59.53 (5) shall notify the state registrar, in the manner provided in s. 69.15 (1) (b), to remove the male's name as the father of the child from the child's birth record. No paternity action may thereafter be brought against the male with respect to the child.

(6) APPLICABILITY. (a) This section does not apply unless all of the following apply to the statement acknowledging paternity:

1. The statement is made on a form prescribed by the state registrar for use beginning on April 1, 1998.

2. The statement was signed and filed on or after April 1, 1998.

3. The statement contains an attestation clause showing that both parties, before signing the statement, received oral and written notice of the legal consequences of, the rights and responsibilities arising from and the alternatives to, signing the statement.

(b) Parties who signed and filed a statement acknowledging paternity before April 1, 1998, may sign and file a new statement that fulfills the requirements under par. (a). The new statement supersedes any statement previously filed with the state registrar and has the effects specified in this section.

(c) The notice requirements under s. 69.15 (3) (b) 3. apply to this section beginning with the acknowledgements of paternity that are prescribed by the state registrar on April 1, 1998.

History: 1993 a. 481; 1995 a. 100; 1997 a. 191; 1999 a. 9; 2001 a. 16, 61; 2005 a. 304; 2005 a. 443 ss. 233, 242; Stats. 2005 s. 767.805; 2013 a. 170; 2017 a. 203, 334, 366.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

A Michigan Affidavit of Parentage was a conclusive determination of paternity in Wisconsin. The affidavit was not voided under sub. (5) (a) by a Wisconsin child support action in which tests found the signer of the affidavit not to be the biological father when there was no showing of fraud, duress, or a mistake of fact in relation to the signing of the affidavit. Sub. (5) (b) does not prevent the child from bringing a paternity action based on having been unrepresented at the original paternity proceeding. Daniel T.W. v. Joni K.W., 2009 WI App 13, 315 Wis. 2d 181, 762 N.W.2d 444, 08–0902.

A circuit court does not have the power to change the name of a child when paternity has been determined on the basis of voluntary acknowledgment under this section. Scace v. Schulte, 2018 WI App 30, 382 Wis. 2d 180, 913 N.W.2d 189, 16–2413.

Wisconsin's Custody, Placement, and Paternity Reform Legislation. Walther. Wis. Law. Apr. 2000.

767.813 Summons. (1) PURPOSE. The summons shall state the purpose of the action.

(2) SIGNING. The process shall be signed by the clerk of the court or by the petitioner's attorney.

(3) RETURN DATE. Every summons shall specify a return date and time before the court. The clerk of the court shall set the date and hour at which the summons is returnable.

(4) SERVICE. The summons and petition shall be served in the manner provided in s. 801.11 (1) (a) or (b) or, notwithstanding s. 990.001 (13), by registered or certified mail, with return receipt signed by the respondent.

(5) FORMS. The summons shall be in substantially one of the following forms:

(a) *Mother as petitioner.*

STATE OF WISCONSIN, CIRCUIT COURT: ....COUNTY

In re the Paternity of A. B.
STATE OF WISCONSIN
and
C. D. (Mother–Petitioner)
Address
City, State Zip Code File No. ...
, Petitioners
vs. S U M M O N S
E. F.
Address .... (Case Classification Type):.... (Code No.)
City, State Zip Code
, Respondent

THE STATE OF WISCONSIN, To the Respondent:

1. You have been sued. .... claims that you are the father of the child, ... born on .... (date), in .... (city) (county) (state). You must appear to answer this claim of paternity. Your court appearance is:

Date: . . . . . .
Time: . . . . . .
Room: . . . . . .
Judge or Circuit Court Commissioner: . . . . . .
Address: . . . . . .

2. If you do not appear, the court will enter a default judgment finding you to be the father.

3. If you plan to be represented by an attorney, you should contact the attorney prior to the court appearance listed above. If you are unable to afford an attorney, the court will appoint one for you only upon the genetic tests showing that you are not excluded as the father and the probability of your being the father is less than 99.0 percent.

4. You are also notified that interference with the custody of a child is punishable by a fine of up to $10,000 and imprisonment for up to 3 years and 6 months. Section 948.31, stats.

5. The .... County Clerk of Circuit Court is an equal opportunity service provider. If you need assistance to access services in the courts or need material in an alternate format, please call .....

Dated: ...., ... (year)
Signed:.... ....
G. H., Clerk of Circuit Court
or
Petitioner's Attorney
State Bar No.: ....
Address: ....
City, State Zip Code: ....
Phone No.: ....

(b) *Alleged father as petitioner.*

STATE OF WISCONSIN, CIRCUIT COURT: ....COUNTY

In re the Paternity of A. B.
C. D. (Alleged Father–Petitioner)
Address
City, State Zip Code File No. ...
, Petitioners
vs. S U M M O N S
E. F.
Address .... (Case Classification Type):.... (Code No.)
City, State Zip Code
, Respondent

THE STATE OF WISCONSIN, To the Respondent:

1. You have been sued. The petitioner .... claims that he may be the father of the child, ... born on .... (date), in .... (city) (county) (state). You must appear to answer this claim of paternity. Your court appearance is:

Date: . . . . . .
Time: . . . . . .

Room: . . . . . .

Judge or Circuit Court Commissioner: . . . . . .

Address: . . . . . .

2. If you do not appear, the court will enter a default judgment finding the petitioner .... to be the father. If you plan to be represented by an attorney, you should contact the attorney prior to the court appearance listed above.

3. The .... County Clerk of Circuit Court is an equal opportunity service provider. If you need assistance to access services in the court or need material in an alternate format, please call .... .

Dated: ...., ... (year)

Signed:.... ....

G. H., Clerk of Circuit Court

or

Petitioner's Attorney

State Bar No.: ....

Address: ....

City, State Zip Code: ....

Phone No.: ....

(c) *Nonparent as petitioner.*

STATE OF WISCONSIN, CIRCUIT COURT: ....COUNTY

In re the Paternity of A. B.

C. D. (Nonparent–Petitioner)

Address

City, State Zip Code File No. ...

, Petitioners

vs. S U M M O N S

E. F.

Address .... (Case Classification Type):.... (Code No.)

City, State Zip Code

, Respondent

THE STATE OF WISCONSIN, To the Respondent

1. You have been sued. The petitioner .... claims that .... is the mother and .... may be the father of the child, ... born on .... (date), in .... (city) (county) (state). You must appear to answer this claim of paternity. Your court appearance is:

Date: . . . . . .

Time: . . . . . .

Room: . . . . . .

Judge or Circuit Court Commissioner: . . . . . .

Address: . . . . . .

2. If you do not appear, the court may enter a default judgment finding .... to be the father. If you plan to be represented by an attorney, you should contact the attorney prior to the court appearance listed above. If you are alleged to be the father and you are unable to afford an attorney, the court will appoint one for you only upon genetic tests showing that you are not excluded as the father and the probability of your being the father is less than 99.0 percent.

3. The .... County Clerk of Circuit Court is an equal opportunity service provider. If you need assistance to access services in the court or need material in an alternate format, please call .... .

Dated: ...., ... (year)

Signed:.... ....

G. H., Clerk of Circuit Court

or

Petitioner's Attorney

State Bar No.: ....

Address: ....

City, State Zip Code: ....

Phone No.: ....

(5g) NOTICE. The notice to parties shall be attached to the summons. The notice shall be in boldface type and in substantially the following form:

NOTICE TO PARTIES

1. You are a party to a petition for paternity. A judgment of paternity legally designates the child in the case to be a child of the man found to be the father. It creates a legally recognized parent–child relationship between the man and the child. It creates the right of inheritance for the child, and obligates the man to support the child until the child reaches the age of 18, or the age of 19 if the child is enrolled full–time in high school or its equivalent. The failure by either parent to pay court–ordered support is punishable by imprisonment as a contempt of court or as a criminal violation.

2. A party to a paternity case has the right to be represented by an attorney. If you are unable to afford an attorney and you are a man who is named as the possible father of a child in a paternity case, the court will appoint an attorney for you only if the results of one or more genetic tests show that you are not excluded as the father and that the statistical probability of your being the father is less than 99.0 percent. In order to determine whether you are entitled to have an attorney appointed for you, you may call the following telephone number .... .

3. The petitioner in this case has the burden of proving by a clear and satisfactory preponderance of the evidence whether the man named as the possible father is the father. However, if genetic tests show that the man named is not excluded as the father, and show that the statistical probability that the man is the father is 99.0 percent or higher, that man is rebuttably presumed to be the father.

4. You may request genetic tests which will indicate the probability that the man named as the possible father is or is not the father of the child. The court will order genetic tests on a request by you, the state, or any other party. Any person who refuses to take court–ordered genetic tests may be punished for contempt of court.

5. The following defenses are available in a paternity case:

(a) The man named as a possible father of the child may claim that he was sterile or impotent at the time of conception.

(b) The mother may claim that she, or the man named as a possible father may claim that he, did not have sexual intercourse with the other party during the conceptive period (generally the period 8 to 10 months before the birth of the child).

(c) The mother or the man named as a possible father may claim that another man had sexual intercourse with the mother during the conceptive period.

6. You have the right to request a jury trial on the issue of whether the named man is the father.

7. If you fail to appear at any stage of the proceeding, including a scheduled court–ordered genetic test, the court may enter a default judgment finding the man claimed to be the father as the father.

8. You must keep the clerk of court and child support agency informed of your current address at all times.

(6) DOCUMENT. The summons served on the respondent shall be accompanied by a document, provided without charge by the clerk of court, setting forth the percentage standard established by the department under s. 49.22 (9) and listing the factors that a court may consider under s. 767.511 (1m).

History: 1979 c. 352; 1981 c. 314; 1983 a. 447; 1985 a. 29; 1987 a. 27, 413; Sup. Ct. Order, 171 Wis. 2d xix (1992); 1993 a. 16, 481; 1995 a. 27 ss. 7112, 7113b, 9126 (19); 1995 a. 100, 404, 417; 1997 a. 35, 191, 250; 1999 a. 9; 2001 a. 61, 105; 2005 a. 443 ss. 185, 186, 190, 243, 244; Stats. 2005 s. 767.813; 2013 a. 170.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

767.814 Names on pleadings after paternity determined. After paternity is determined by the court in an action or proceeding under this subchapter, any papers filed in, and any

records of, the court relating to the action or proceeding may identify the parties by name instead of by initials.

History: 2005 a. 443.

767.815 Enlargement of time in a paternity proceeding. The time for service of summons and petition under s. 801.02 (1) in a paternity proceeding may be extended as provided in either sub. (1) or (2):

(1) GOOD CAUSE. Upon the petitioner's demonstration of good cause, the court may without notice order one additional 60–day extension for service of the summons and petition.

(2) REASONABLE GROUNDS; DUE DILIGENCE. The time for service may be extended until the date the summons and petition are actually served, if both of the following apply:

(a) There are reasonable grounds to believe that before the time for service under s. 801.02 (1) or sub. (1) expired the respondent knew that the mother was pregnant and that the respondent may be the father.

(b) Due diligence was exercised in attempting to serve the respondent, before he was actually served.

History: 1983 a. 447; 2005 a. 443 ss. 191, 246; Stats. 2005 s. 767.815.

767.82 Paternity procedures. (1) APPOINTMENT OF GUARDIAN AD LITEM. (a) Except as provided in par. (b), the court may appoint a guardian ad litem for the child and shall appoint a guardian ad litem for a minor parent or minor who is alleged to be a parent in a paternity proceeding unless the minor parent or the minor alleged to be the parent is represented by an attorney.

(b) The court shall appoint a guardian ad litem for the child if s. 767.407 (1) (a) or (c) applies or if the court has concern that the child's best interest is not being represented.

(2) PRESUMPTION. Presumption of paternity shall be as provided in ss. 891.39, 891.405, 891.407, and 891.41 (1).

(2m) CUSTODY PENDING COURT ORDER. If there is no presumption of paternity under s. 891.41 (1) or if paternity is conclusively determined from genetic test results under s. 767.804 (1) or acknowledged under s. 767.805 (1), the mother shall have sole legal custody of the child until the court orders otherwise.

(3) TIME OF CONCEPTION; EVIDENCE. Evidence as to the time of conception may be offered as provided in s. 891.395.

(4) DISCOVERY. Discovery shall be conducted as provided in ch. 804, except that no discovery may be obtained later than 30 days before the trial. No discovery may solicit information relating to the sexual relations of the mother occurring at any time other than the probable time of conception.

(5) STATUTE OF LIMITATIONS. The statute of limitations for commencing actions concerning paternity is as provided in s. 893.88.

(6) ARREST. The respondent in a paternity action may be arrested as provided in s. 818.02 (6).

(7) APPOINTMENT OF TRUSTEE OR GUARDIAN. The court may appoint a trustee or guardian to receive and manage money paid for the support of a minor child.

(7m) WHEN ACTION HAS PRIORITY. The court shall give priority to an action brought under s. 767.80 if the petition under s. 767.80 (5) indicates that the matter was referred under s. 48.299 (6) (a) or 938.299 (6) (a) by a court assigned to exercise jurisdiction under chs. 48 and 938.

(8) PROCEDURES APPLICABLE TO OTHER MATTERS IN ACTION. In all other matters, paternity proceedings shall be governed by the procedures applicable to other actions affecting the family.

History: 1979 c. 352; 1981 c. 391; 1983 a. 447; 1989 a. 212; 1993 a. 481; 1995 a. 275; 1997 a. 191; 1999 a. 9; 2005 a. 443 ss. 208, 247; Stats. 2005 s. 767.82; 2019 a. 95.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

A trust under sub. (7) is not restricted to cases in which the custodial parent is a spendthrift. Paternity of Tukker M.O., 189 Wis. 2d 440, 525 N.W.2d 793 (Ct. App. 1994). See also Paternity of Tukker M.O., 199 Wis. 2d 186, 544 N.W.2d 417 (1996), 93–1929.

767.83 Right to counsel. (1) GENERALLY. At the pretrial hearing, at the trial, and in any other proceedings in any paternity action, any party may be represented by counsel. If the male respondent is indigent and the state is the petitioner under s. 767.80 (1) (g), the petitioner is represented by a government attorney as provided in s. 767.80 (6), or the action is commenced on behalf of the child by an attorney appointed under s. 767.407 (1) (c), counsel shall be appointed for the respondent as provided in ch. 977, subject to the limitations under sub. (2m), unless the respondent knowingly and voluntarily waives the appointment of counsel.

(2) EXTENT OF APPOINTED ATTORNEY'S REPRESENTATION. An attorney appointed under sub. (1) who is appearing on behalf of a party in a paternity action shall represent that party, subject to the limitations under sub. (2m), in all issues and proceedings relating to the paternity determination. The appointed attorney may not represent the party in any proceeding relating to child support, legal custody, periods of physical placement or related issues.

(2m) WHEN APPOINTED REPRESENTATION PROVIDED. Representation by an attorney appointed under sub. (1) shall be provided only after the results of any genetic tests have been completed and only if all of the results fail to show that the alleged father is excluded and fail to give rise to the rebuttable presumption under s. 767.84 (1m) that the alleged father is the father of the child.

(3) APPEARANCE BY STATE'S ATTORNEY NOT AFFECTED. This section does not prevent an attorney responsible for support enforcement under s. 59.53 (6) (a) or any other attorney employed under s. 49.22 or 59.53 (5) from appearing in any paternity action as provided under s. 767.80 (6).

History: 1979 c. 352; 1983 a. 27; 1987 a. 355; 1989 a. 31; 1993 a. 16, 481; 1995 a. 27, 100, 201, 404; 1997 a. 35, 191; 2005 a. 443 ss. 221, 248; Stats. 2005 s. 767.83.

A paternity respondent does not have a constitutional right to effective assistance of counsel. A paternity action is not a criminal prosecution. Paternity of P.L.S., 158 Wis. 2d 712, 463 N.W.2d 403 (Ct. App. 1990).

767.84 Genetic tests in paternity actions. (1) WHEN TEST ORDERED; REPORT. (a) Except as provided in ss. 767.855 and 767.863, and except in actions to which s. 767.893 applies, the court shall require the child, mother, any male for whom there is probable cause to believe that he had sexual intercourse with the mother during a possible time of the child's conception, or any male witness who testifies or will testify about his sexual relations with the mother at a possible time of conception to submit to genetic tests. Probable cause of sexual intercourse during a possible time of conception may be established by a sufficient petition or affidavit of the child's mother or an alleged father, filed with the court, or after an examination under oath of a party or witness, when the court determines that an examination is necessary. The court is not required to order a genetic test under this paragraph with respect to any of the following:

1. A person who has undergone a genetic test under s. 49.225, unless a party requests additional tests under sub. (2).

2. A deceased respondent if genetic material is not available without undue hardship as provided in s. 767.865 (2).

3. a. Except as provided in subd. 3. b., a male respondent who fails to appear, if genetic test results with respect to another man show that the other man is not excluded as the father and that the statistical probability of the other man's parentage is 99.0 percent or higher creating a presumption of the other man's paternity.

b. Subdivision 3. a. does not apply if the presumption of the other man's paternity is rebutted.

(b) The genetic tests shall be performed by an expert qualified as an examiner of genetic markers present on the cells of the specific body material to be used for the tests, appointed by the court. A report completed and certified by the court–appointed expert stating genetic test results and the statistical probability of the alleged father's paternity based upon the genetic tests is admissible as evidence without expert testimony and may be entered into the record at the trial or pretrial hearing if all of the following apply:

1. At least 10 days before the trial or pretrial hearing, the party offering the report files it with the court and notifies all other parties of that filing.

2. At least 10 days before the trial or pretrial hearing, the department or county child support agency under s. 59.53 (5) notifies the alleged father of the results of the genetic tests and that he may object to the test results by submitting an objection in writing to the court no later than the day before the hearing.

3. The alleged father, after receiving the notice under subd. 2., does not object to the test results in the manner provided in the notice under subd. 2.

(1m) REBUTTABLE PRESUMPTION. If genetic tests ordered under this section or s. 49.225 show that the alleged father is not excluded and that the statistical probability of the alleged father's parentage is 99.0 percent or higher, the alleged father shall be rebuttably presumed to be the child's parent.

(2) INDEPENDENT TESTS. The court, upon request by a party, shall order that independent tests be performed by other experts qualified as examiners of genetic markers present on the cells of the specific body material to be used for the tests. Additional tests performed by other experts of the same qualifications may be ordered by the court at the request of any party.

(3) NUMBER AND QUALIFICATIONS OF EXPERTS. In all cases, the court shall determine the number and qualifications of the experts.

(4) TESTS EXCLUDING PATERNITY; REFUSAL TO SUBMIT TO TEST. Genetic test results excluding an alleged father as the father of the child are conclusive evidence of nonpaternity and the court shall dismiss any paternity action with respect to that alleged father. Genetic test results excluding any male witness from possible paternity are conclusive evidence of nonpaternity of the male witness. Testimony relating to sexual intercourse or possible sexual intercourse of the mother with any person excluded as a possible father, as a result of a genetic test, is inadmissible as evidence. Refusal of a party to submit to a genetic test shall be disclosed to the fact finder. Refusal to submit to a genetic test ordered by the court is a contempt of the court for failure to produce evidence under s. 767.87 (5). If the action was brought by the child's mother but she refuses to submit herself or the child to genetic tests, the action shall be dismissed.

(5) FEES AND COSTS. The fees and costs for genetic tests performed upon any person listed under sub. (1) shall be paid for by the county except as follows:

(a) Except as provided in par. (b), at the close of the proceeding the court may order either or both parties to reimburse the county if the court finds that they have sufficient resources to pay the costs of the genetic tests.

(b) If 2 or more identical series of genetic tests are performed upon the same person, regardless of whether the tests were ordered under this section or s. 49.225 or 767.863 (2), the court shall require the person requesting the 2nd or subsequent series of tests to pay for the series in advance, unless the court finds that the person is indigent.

(6) CALLING CERTAIN WITNESSES; NOTICE. Any party calling a male witness for the purpose of testifying that he had sexual intercourse with the mother at any possible time of conception shall provide all other parties with the name and address of the witness 20 days before the trial or pretrial hearing. If a male witness is produced at the hearing for the purpose stated in this subsection but the party calling the witness failed to provide the 20–day notice, the court may adjourn the proceeding for the purpose of taking a genetic test of the witness prior to hearing the testimony of the witness if the court finds that the party calling the witness acted in good faith.

(7) NOTICE OF RIGHT TO TESTS. The court shall ensure that all parties are aware of their right to request genetic tests under this section.

History: 1979 c. 352; 1983 a. 447; 1987 a. 27; 1993 a. 481; 1995 a. 100; 1997 a. 191; 2005 a. 443 ss. 210, 211c, 212c, 249, 251; Stats. 2005 s. 767.84; 2019 a. 95.

When initial blood tests excluded the alleged father and the state moved for additional tests under sub. (2), the trial court erred in denying the motion and dismissing the action under sub. (4). Paternity of S.J.K., 132 Wis. 2d 262, 392 N.W.2d 97 (Ct. App. 1986).

The chain of custody, or authentication, must be established prior to admission of evidence under sub. (1) (b). Paternity of J.S.C., 135 Wis. 2d 820, 400 N.W.2d 48 (Ct. App. 1986).

When the respondent failed to introduce evidence regarding the test, the trial court properly barred the respondent from attacking the test during closing argument. Paternity of M.J.B., 144 Wis. 2d 638, 425 N.W.2d 404 (1988).

DNA test results are admissible when the procedures meet the requirements for blood tests under sub. (1) (b). Paternity of J.L.K., 151 Wis. 2d 566, 445 N.W.2d 673 (Ct. App. 1989).

If more than one set of blood test results are presented, the sub. (1m) presumption is inapplicable if the statistical probability of only one test reaches the 99 percent level. Paternity of J.M.K., 160 Wis. 2d 429, 465 N.W.2d 833 (Ct. App. 1991).

When only one potential father named by the mother is not excluded by blood tests, sub. (4) does not prevent showing that the mother on several occasions did not name him as a person with whom she had sex during the conceptual period. Paternity of Jeremy D.L., 177 Wis. 2d 551, 503 N.W.2d 275 (Ct. App. 1993).

That sub. (1m) applies only to children born to a woman while she is married does not violate principles of equal protection. Thomas M.P. v. Kimberly J.L., 207 Wis. 2d 388, 558 N.W.2d 897 (Ct. App. 1996), 96–0697.

A mere denial of intercourse, when access during the conceptive period is established and no other potential fathers are identified, is sufficient to rebut the presumption under sub. (1m) for purposes of preventing entry of a summary judgment of paternity. State v. Michael J.W., 210 Wis. 2d 132, 565 N.W.2d 179 (Ct. App. 1997), 95–2917.

The term "statistical probability" in sub. (1m) means the probability determined by combining the results of all the different types of tests performed. State v. Michael J.W., 210 Wis. 2d 132, 565 N.W.2d 179 (Ct. App. 1997), 95–2917.

A genetic test showing another man to be the natural father rebuts the presumption under sub. (1m) and s. 891.41 that the spouse of the child's mother is the father, but equitable estoppel may be employed to preclude rebutting the presumption. The issue is whether the actions and inactions of the parties advocating the rebuttal of the marital presumption were so unfair as to preclude them from overcoming the public's interest in the marital presumption based on the results of genetic tests. Randy A.J. v. Norma I.J., 2004 WI 41, 270 Wis. 2d 384, 677 N.W.2d 630, 02–0469.

From here to paternity: Using blood analysis to determine parentage. Haas. WBB July 1988.

767.85 Temporary orders. (1) WHEN REQUIRED. At any time during the pendency of an action to establish the paternity of a child, if genetic tests show that the alleged father is not excluded and that the statistical probability of the alleged father's parentage is 99.0 percent or higher, on the motion of a party, the court shall make an appropriate temporary order for the payment of child support and may make a temporary order assigning responsibility for and directing the manner of payment of the child's health care expenses.

(2) CONSIDERATIONS. Before making any temporary order under sub. (1), the court shall consider those factors that the court is required to consider when granting a final judgment on the same subject matter. If the court makes a temporary child support order that deviates from the amount of support that would be required by using the percentage standard established by the department under s. 49.22 (9), the court shall comply with the requirements of s. 767.511 (1n).

History: 1997 a. 191; 1999 a. 9; 2005 a. 443 ss. 209, 252; Stats. 2005 s. 767.85.

767.853 Paternity hearings and records; confidentiality. Any hearing, discovery proceeding or trial relating to paternity determination shall be closed to any person other than those necessary to the action or proceeding. Any record of pending proceedings shall be placed in a closed file, except that:

(1) PENDING PROCEEDING. Access to the record of any pending proceeding involving the paternity of the same child shall be allowed to all of the following:

(a) The child's parents.

(b) The parties to that proceeding and their attorneys or their authorized representatives.

(c) If the child is the subject of a proceeding under ch. 48 or 938, all of the following:

1. The court assigned to exercise jurisdiction under chs. 48 and 938 in which the proceeding is pending.

2. The parties to the proceeding under ch. 48 or 938 and their attorneys.

3. The person under s. 48.09 or 938.09 who represents the interests of the public in the proceeding under ch. 48 or 938.

4. A guardian ad litem for the child and a guardian ad litem for the child's parent.

5. Any governmental or social agency involved in the proceeding under ch. 48 or 938.

(2) INFORMATION ACCESS TO DEPARTMENT AND CHILD SUPPORT AGENCIES. The clerk of circuit court shall provide access to the record of any pending paternity proceeding to the department or any county child support agency under s. 59.53 (5) for purposes related to administering the child and spousal support and establishment of paternity and medical support liability program under ss. 49.22 and 59.53 (5), regardless of whether the department or county child support agency is a party to the proceeding.

(3) PAST PROCEEDINGS. Subject to s. 767.13, a record of a past proceeding is open to public inspection if all of the following apply:

(a) Paternity was established in the proceeding.

(b) The record is filed after May 1, 2000.

(c) The record relates to a post–adjudication issue.

History: 1979 c. 352; 1983 a. 447; 1985 a. 29; 1995 a. 27 s. 9126 (19); 1995 a. 201, 275, 404; 1997 a. 80, 252; 1999 a. 9; 2005 a. 443 ss. 222, 253; Stats. 2005 s. 767.853; 2007 a. 81.

767.855 Dismissal if adjudication not in child's best interest. Except as provided in s. 767.863 (1m), at any time in an action to establish the paternity of a child, upon the motion of a party or guardian ad litem, the court or supplemental court commissioner under s. 757.675 (2) (g) may, if the court or supplemental court commissioner determines that a judicial determination of whether a male is the father of the child is not in the best interest of the child, dismiss the action with respect to the male, regardless of whether genetic tests have been performed or what the results of the tests, if performed, were. Notwithstanding ss. 767.813 (5g) (form) 4., 767.84 (1) and (2), 767.863 (2), 767.865 (2), and 767.88 (4), if genetic tests have not yet been performed with respect to the male, the court or supplemental court commissioner is not required to order those genetic tests.

History: 1997 a. 191; 2001 a. 61; 2005 a. 443 s. 202; Stats. 2005 s. 767.855; 2019 a. 95.

Parental status that rises to the level of a constitutionally protected liberty interest does not rest solely on biological factors, but rather, is dependent upon an actual relationship with the child where the parent assumes responsibility for the child's emotional and financial needs. Stuart S. v. Heidi R., 2015 WI App 19, 360 Wis. 2d 388, 860 N.W.2d 538, 14–1487.

767.86 Time of first appearance. The first appearance under s. 767.863 may not be held until 30 days after service or receipt of the summons and petition unless the parties agree to an earlier date.

History: 1987 a. 27; 1991 a. 313; 2005 a. 443 s. 193.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

767.863 First appearance. (1) NOTICE TO PARTIES. If the respondent is present at a hearing prior to the determination of paternity, the court shall, at least one time at one such hearing, inform the parties of the items in s. 767.813 (5g).

(1m) PATERNITY ALLEGATION BY MALE OTHER THAN HUSBAND; WHEN DETERMINATION NOT IN BEST INTEREST OF CHILD. In an action to establish the paternity of a child who was born to a woman while she was married, if a male other than the woman's husband alleges that he, not the husband, is the child's father, a party may allege that a judicial determination that a male other than the husband is the father is not in the best interest of the child. If the court or a supplemental court commissioner under s. 757.675 (2) (g) determines that a judicial determination of whether a male other than the husband is the father is not in the best interest of the child, no genetic tests may be ordered and the action shall be dismissed.

(2) ORDER FOR TESTS. If at the first appearance it appears from a sufficient petition or affidavit of the child's mother or an alleged father or from sworn testimony of the child's mother or an alleged father that there is probable cause to believe that any of the males named has had sexual intercourse with the mother during a possible time of the child's conception, the court may, or upon the request of any party shall, order any of the named persons to submit to genetic tests. The tests shall be conducted in accordance with s. 767.84. The court is not required to order a person who has undergone a genetic test under s. 49.225 to submit to another genetic test under this subsection unless a party requests additional tests under s. 767.84 (2).

(3) ORDERS IF STATEMENT ON FILE. At the first appearance, if a statement acknowledging paternity under s. 69.15 (3) (b) 1. or 3. that was signed and filed before April 1, 1998, is on file, the court may enter an order for child support, legal custody or physical placement and, if the respondent who filed the statement does not dispute his paternity, may enter a judgment of paternity.

History: 1979 c. 352; 1983 a. 447 s. 34; Stats. 1983 s. 767.457; 1987 a. 27 ss. 2136t, 2137d, 2137e; Stats. 1987 s. 767.458; 1987 a. 403, 413; 1993 a. 16, 481; 1995 a. 100; 1997 a. 191; 2001 a. 61; 2005 a. 443 ss. 195 to 198, 254; Stats. 2005 s. 767.863.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

Before dismissing a petition without considering the merits, sub. (1m) requires the trial court to conduct a hearing to determine the child's best interests. Paternity of T.R.B., 154 Wis. 2d 637, 454 N.W.2d 561 (Ct. App. 1990).

Sub. (1m) is constitutional. The court has an obligation to refuse to allow blood tests if the tests may result in a determination that the person alleging his paternity is the natural father and that determination would not be in the best interest of the children. Paternity of C.A.S., 161 Wis. 2d 1015, 468 N.W.2d 719 (1991).

The plain language of sub. (1m) does not limit the court's authority to dismiss paternity actions to cases in which no genetic tests have been performed. The circuit court in this case correctly disregarded the genetic testing upon which a nonspouse who asserted paternity relied because the testing was not completed pursuant to court order. The court properly ruled that a judicial determination that the nonspouse was the child's father would not be in the child's best interest. Stuart S. v. Heidi R., 2015 WI App 19, 360 Wis. 2d 388, 860 N.W.2d 538, 14–1487.

Parental status that rises to the level of a constitutionally protected liberty interest does not rest solely on biological factors, but rather, is dependent upon an actual relationship with the child where the parent assumes responsibility for the child's emotional and financial needs. Stuart S. v. Heidi R., 2015 WI App 19, 360 Wis. 2d 388, 860 N.W.2d 538, 14–1487.

Circuit courts have discretion to dismiss actions without prejudice under this section. Section 767.88 expressly contemplates that circuit courts possess discretion to dismiss a paternity action with or without prejudice prior to a trial on the merits. Consequently, s. 767.88 strongly suggests the legislature intended that courts have such discretion when dismissing actions under this section when the ultimate issue of paternity is similarly not reached. Douglas L. v. Arika B., 2015 WI App 80, 365 Wis. 2d 257, 872 N.W.2d 357, 14–2656.

In re Paternity of C.A.S. and C.D.S.: The New Status of Putative Fathers' Rights in Wisconsin. 1992 WLR 1669.

767.865 Deceased respondent. (1) WHO MAY APPEAR. (a) The personal representative or, if there is no personal representative, a guardian ad litem appointed in accordance with par. (b) may appear for a deceased respondent whenever an appearance by the respondent is required. The summons and petition shall be served on the deceased respondent's personal representative or guardian ad litem, as the case may be, under s. 767.813 (4).

(b) If the court determines that it is appropriate, the court may appoint a guardian ad litem for the deceased respondent for purposes of par. (a). Section 767.407 (3) and (5) applies to the guardian ad litem. The guardian ad litem shall represent the interests of the deceased respondent. The guardian ad litem shall be compensated at a rate that the court determines is reasonable. The court shall order the compensation to be paid from the deceased respondent's estate. If the moneys in the estate are not sufficient to pay all or part of the compensation, the court may direct that the county of venue pay the compensation. If the court orders a county to pay the compensation of the guardian ad litem, the amount ordered may not exceed the compensation paid to private attorneys under s. 977.08 (4m) (b).

(2) GENETIC TESTS. If genetic material is available, without undue hardship, from a deceased respondent or a relative of the deceased respondent in an action for paternity, genetic tests shall be administered in accordance with s. 767.84. There is a rebuttable presumption that exhumation of the deceased respondent's body to obtain the genetic material for testing is an undue hardship under this subsection.

History: 1993 a. 481; 2005 a. 443 ss. 199, 200, 255 to 257; Stats. 2005 s. 767.865; 2013 a. 170.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

767.87 Testimony and evidence relating to paternity. **(1)** GENERALLY. Evidence relating to paternity, whether given at the trial or the pretrial hearing, may include, but is not limited to:

(a) Evidence of sexual intercourse between the mother and alleged father at any possible time of conception or evidence of a relationship between the mother and alleged father at any time.

(b) An expert's opinion concerning the statistical probability of the alleged father's paternity based upon the duration of the mother's pregnancy.

(c) Genetic test results under s. 49.225, 767.84, or 885.23.

(cm) Genetic test results under s. 48.299 (6) (e) or 938.299 (6) (e).

(d) The statistical probability of the alleged father's paternity based upon the genetic tests.

(e) Medical, scientific or genetic evidence relating to the alleged father's paternity of the child based on tests performed by experts.

(f) All other evidence relevant to the issue of paternity of the child, except as provided in subs. (2), (2m) and (3).

(1m) BIRTH RECORD REQUIRED. If the child was born in this state, the petitioner shall present a certified copy of the child's birth record or a printed copy of the record from the birth database of the state registrar to the court, so that the court is aware of whether a name has been inserted on the birth record as the father of the child, at the earliest possible of the following:

(a) The initial appearance.

(b) The pretrial hearing.

(c) The trial.

(d) Prior to the entry of the judgment under s. 767.89.

(2) ADMISSIBILITY OF SEXUAL RELATIONS BY MOTHER. Testimony relating to sexual relations or possible sexual relations of the mother any time other than the possible time of conception of the child is inadmissible in evidence, unless offered by the mother.

(2m) ADMISSIBILITY OF CERTAIN MEDICAL AND GENETIC INFORMATION. Medical and genetic information filed with the department or the court under s. 48.425 (1) (am) or (2) is not admissible to prove the paternity of the child.

(3) EVIDENCE OF IDENTIFIED MALE NOT UNDER JURISDICTION. Except as provided in s. 767.84 (4), in an action against an alleged father, evidence offered by him with respect to an identified male who is not subject to the jurisdiction of the court concerning that male's sexual intercourse with the mother at or about the presumptive time of conception of the child is admissible in evidence only after the alleged father has undergone genetic tests and made the results available to the court.

(4) IMMUNITY. (a) No person may be prosecuted or subjected to any penalty or forfeiture for or on account of any testimony or evidence given relating to the paternity of the child in any paternity proceeding, except for perjury committed in giving the testimony.

(b) The immunity provided under par. (a) is subject to the restrictions under s. 972.085.

(5) REFUSAL TO TESTIFY OR PRODUCE EVIDENCE. Except as provided in sub. (6), upon refusal of any witness, including a party, to testify under oath or produce evidence, the court may order the witness to testify under oath and produce evidence concerning all relevant facts. The refusal of a witness, including a witness who has immunity under sub. (4), to obey an order to testify or produce evidence is a contempt of the court.

(6) WHEN MOTHER NOT COMPELLED TO TESTIFY. (a) Whenever the state brings the action to determine paternity pursuant to an assignment under s. 48.57 (3m) (b) 2. or (3n) (b) 2., 48.645 (3), 49.19 (4) (h) 1., or 49.45 (19), or receipt of benefits under s. 49.148, 49.155, 49.157, or 49.159, the natural mother of the child may not be compelled to testify about the paternity of the child if it has been determined that the mother has good cause for refusing to cooperate in establishing paternity as provided in 42 USC 602 (a) (26) (B) and the federal regulations promulgated pursuant to this statute, as of July 1, 1981, and pursuant to any rules promulgated by the department which define good cause in accordance with the federal regulations, as authorized by 42 USC 602 (a) (26) (B) in effect on July 1, 1981.

(b) Nothing in par. (a) prevents the state from bringing an action to determine paternity pursuant to an assignment under s. 48.57 (3m) (b) 2. or (3n) (b) 2., 49.19 (4) (h) 1. or 49.45 (19), or receipt of benefits under s. 49.148, 49.155, 49.157 or 49.159, where evidence other than the testimony of the mother may establish the paternity of the child.

(7) CERTAIN TESTIMONY OF PHYSICIAN NOT PRIVILEGED. Testimony of a physician concerning the medical circumstances of the pregnancy and the condition and characteristics of the child upon birth is not privileged.

(8) BURDEN OF PROOF. The party bringing an action for the purpose of determining paternity or for the purpose of declaring the nonexistence of paternity presumed under s. 891.405, 891.407, or 891.41 (1) shall have the burden of proving the issues involved by clear and satisfactory preponderance of the evidence.

(9) ARTIFICIAL INSEMINATION; NATURAL FATHER. Where a child is conceived by artificial insemination, the husband of the mother of the child at the time of the conception of the child is the natural father of the child, as provided in s. 891.40.

(10) RECORD OF MOTHER'S TESTIMONY ADMISSIBLE. A record of the testimony of the child's mother relating to the child's paternity, made as provided under s. 48.299 (8) or 938.299 (8), is admissible in evidence on the issue of paternity.

(11) RELATED COSTS ADMISSIBLE. Bills for services or articles related to the pregnancy, childbirth or genetic testing may be admitted into evidence and are prima facie evidence of the costs incurred for such services or articles.

History: 1979 c. 352; 1981 c. 20 s. 2202 (20) (m); 1981 c. 359 ss. 13, 17; 1983 a. 447; 1987 a. 413; 1989 a. 31, 122, 212; 1993 a. 395, 481; 1995 a. 27 s. 9126 (19); 1995 a. 77, 100, 275, 289, 404; 1997 a. 27, 105, 191, 252; 1999 a. 185; 2005 a. 443 ss. 207, 258; Stats. 2005 s. 767.87; 2007 a. 20; 2017 a. 334; 2019 a. 95.

It is not necessary for an alleged father to produce evidence of who the real father is in order to sustain a verdict of non–paternity. State v. Michael J.W., 210 Wis. 2d 132, 565 N.W.2d 179 (Ct. App. 1997), 95–2917.

767.88 Pretrial paternity proceedings. **(1)** PROCEDURE; EVIDENCE. A pretrial hearing shall be held before the court or a supplemental court commissioner under s. 757.675 (2) (g). A record or minutes of the proceeding shall be kept. At the pretrial hearing the parties may present and cross–examine witnesses, request genetic tests, and present other evidence relevant to the determination of paternity.

(2) COURT EVALUATION AND RECOMMENDATION. On the basis of the information produced at the pretrial hearing, the court shall evaluate the probability of determining the existence or nonexistence of paternity in a trial and shall so advise the parties. On the basis of the evaluation, the court may make an appropriate recommendation for settlement to the parties. This recommendation may include any of the following:

(a) That the action be dismissed with or without prejudice.

(b) That the alleged father voluntarily acknowledge paternity of the child.

(c) If the alleged father voluntarily acknowledges paternity of the child, that he agree to the duty of support, the legal custody of the child, periods of physical placement of the child and other matters as determined to be in the best interests of the child by the court.

(3) ACCEPTANCE OF RECOMMENDATION; JUDGMENT. If the parties accept a recommendation made in accordance with this section, judgment shall be entered accordingly.

(4) RECOMMENDATION REFUSED AND NO TESTS TAKEN. If a party or the guardian ad litem refuses to accept a recommendation made under this section and genetic tests have not yet been taken, the court shall require the appropriate parties to submit to genetic

tests. After the genetic tests have been taken the court shall make an appropriate final recommendation.

(5) FINAL RECOMMENDATION NOT ACCEPTED; TRIAL. If the guardian ad litem or any party refuses to accept any final recommendation, the action shall be set for trial.

(6) TERMINATION OF INFORMAL HEARING. The informal hearing may be terminated and the action set for trial if the court finds it unlikely that all parties would accept a recommendation in this section.

History: 1979 c. 352; 1983 a. 447; 1987 a. 27; Sup. Ct. Order, 141 Wis. 2d xxxix (1987); 1987 a. 355; 1993 a. 481; 1995 a. 100; 2001 a. 61; 2005 a. 443 ss. 201, 259; Stats. 2005 s. 767.88.

Judicial Council Note, 1988: This section mandates pretrial hearings in paternity proceedings. Under sub. (6), the informal hearing may be terminated and set for trial if the judge or family court commissioner finds it unlikely that all parties would accept a recommendation under this section and similarly, under sub. (5), if the guardian ad litem or any party refuses to accept the final recommendation. This amends sub. (1), to emphasize that this is an informal hearing before a judge, not a court in session, or before a court commissioner and that, while the hearing may be on the record, minutes alone are sufficient. [Re Order effective Jan. 1, 1988]

The trial court may order a putative father to take a blood test only after determining at a pretrial hearing that paternity probably can be established at trial and that the establishment of paternity is in the best interests of the child. State ex rel. Scott v. Slocum, 109 Wis. 2d 397, 326 N.W.2d 118 (Ct. App. 1982).

Notwithstanding s. 804.12 (2) (a) 4., the trial court may find a party in civil contempt for refusing to submit to a blood test. Paternity of T.P.L., 120 Wis. 2d 328, 354 N.W.2d 759 (Ct. App. 1984).

Nothing in this section authorizes ordering a name change in the best interests of the child in a paternity judgement. Sub. (2) (c) only authorizes a court to make settlement recommendations in pretrial proceedings if paternity is acknowledged. Although s. 69.15 (1) (a) provides for changing a name according to an order in a paternity action, it does not provide authority to order a name change in a paternity action without complying with the procedural requirements for a name change under s. 786.36. Paternity of Noah J.M., 223 Wis. 2d 768, 590 N.W.2d 21 (Ct. App. 1998), 97–2353.

767.883 Trial. (1) TWO PARTS. The trial shall be divided into 2 parts, the first part dealing with the determination of paternity and the 2nd part dealing with child support, legal custody, periods of physical placement, and related issues. The main issue at the first part shall be whether the alleged or presumed father is or is not the father of the mother's child, but if the child was born to the mother while she was the lawful wife of a specified male the prior issue of whether the husband was not the father of the child shall be determined first, as provided under s. 891.39. The first part of the trial shall be by jury only if the defendant verbally requests a jury trial either at the initial appearance or pretrial hearing or requests a jury trial in writing prior to the pretrial hearing. The court may direct and, if requested by either party before the introduction of any testimony in the party's behalf, shall direct the jury to find a special verdict as to any of the issues specified in this section, except that the court shall make all of the findings enumerated in s. 767.89 (2) to (4). If the mother is dead, becomes insane, cannot be found within the jurisdiction, or fails to commence or pursue the action, the proceeding does not abate if any of the persons under s. 767.80 (1) makes a motion to continue. The testimony of the mother taken at the pretrial hearing may in any such case be read in evidence if it is competent, relevant, and material. The issues of child support, custody and visitation, and related issues shall be determined by the court either immediately after the first part of the trial or at a later hearing before the court.

(2) JURY SIZE; VERDICT. If a jury is requested under sub. (1), the jury shall consist of 6 persons. No verdict is valid or received unless agreed to by at least 5 of the jurors.

History: 1979 c. 352 s. 10; Stats. 1979 s. 767.50; 1983 a. 27, 447; 1987 a. 27, 355, 403; 1993 a. 481; 2001 a. 38; 2005 a. 443 ss. 214m, 260; Stats. 2005 s. 767.883.

A preponderance of the evidence standard of proof in paternity actions meets due process requirements. Rivera v. Minnich, 483 U.S. 574 (1987).

767.89 Paternity judgment. (1) EFFECT OF JUDGMENT OR ORDER. A judgment or order of the court determining the existence or nonexistence of paternity is determinative for all purposes.

(2) REPORT TO STATE REGISTRAR. (a) The clerk of court or county child support agency under s. 59.53 (5) shall file with the state registrar, within 30 days after the entry of a judgment or order determining paternity, a report showing the names, dates, and birth places of the child and the father, the social security numbers of the mother, father, and child, and the maiden name of the mother on a form designated by the state registrar, along with the fee set forth in s. 69.22 (5), which the clerk of court or county child support agency shall collect.

(b) If the clerk of court or county child support agency is unable to collect any of the following fees under par. (a), the department shall pay the fee and may not require the county or county child support agency to reimburse the department for the cost:

1. A fee for omitting the father's name on a birth record under s. 69.15 (3) (a) 1.

2. A fee for changing the father's name on a birth record under s. 69.15 (3) (a) 2.

3. A fee for inserting the father's name on a birth record under s. 69.15 (3) (a) 3.

(3) CONTENT OF JUDGMENT OR ORDER. A judgment or order determining paternity shall contain all of the following provisions:

(a) An adjudication of the paternity of the child.

(b) Orders for the legal custody of and periods of physical placement with the child, determined in accordance with s. 767.41.

(bm) The information set forth in s. 767.41 (6) (h).

(c) An order requiring either or both of the parents to contribute to the support of any child of the parties who is less than 18 years old, or any child of the parties who is less than 19 years old if the child is pursuing an accredited course of instruction leading to the acquisition of a high school diploma or its equivalent, determined in accordance with s. 767.511.

(d) A determination as to which parent, if eligible, shall have the right to claim the child as an exemption for federal tax purposes under 26 USC 151 (c), or as an exemption for state tax purposes under s. 71.07 (8) (b).

(e) 1. An order establishing the amount of the father's obligation to pay or contribute to the reasonable expenses of the mother's pregnancy and the child's birth. The amount established may not exceed one–half of the total actual and reasonable pregnancy and birth expenses. The order also shall specify the court's findings as to whether the father's income is at or below the poverty line established under 42 USC 9902 (2), and shall specify whether periodic payments are due on the obligation, based on the father's ability to pay or contribute to those expenses.

2. If the order does not require periodic payments because the father has no present ability to pay or contribute to the expenses, the court may modify the judgment or order at a later date to require periodic payments if the father has the ability to pay at that time.

(f) An order requiring either or both parties to pay or contribute to the costs of the guardian ad litem fees, genetic tests as provided in s. 767.84 (5), and other costs.

(g) An order requiring either party to pay or contribute to the attorney fees of the other party.

(3m) CHANGE OF CHILD'S NAME. (a) Upon the request of both parents, the court shall include in the judgment or order determining paternity an order changing the name of the child to a name agreed upon by the parents.

(b) Except as provided in par. (a), the court may include in the judgment or order determining paternity an order changing the surname of the child to a surname that consists of the surnames of both parents separated by a hyphen or, if one or both parents have more than one surname, of one of the surnames of each parent separated by a hyphen, if all of the following apply:

1. Only one parent requests that the child's name be changed, or both parents request that the child's name be changed but each parent requests a different name change.

2. The court finds that such a name change is in the child's best interest.

(c) Section 786.36 does not apply to a name change under this subsection.

(4) LIABILITY FOR PAST SUPPORT. (a) Subject to par. (b), liability for past support of the child is limited to support for the period after the day on which the petition in the action under s. 767.80 is filed, unless a party shows, to the satisfaction of the court, all of the following:

1. That he or she was induced to delay commencing the action by any of the following:

a. Duress or threats.

b. Actions, promises or representations by the other party upon which the party relied.

c. Actions taken by the other party to evade paternity proceedings.

2. That, after the inducement ceased to operate, he or she did not unreasonably delay in commencing the action.

(b) In no event may liability for past support of the child be imposed for any period before the birth of the child.

(6) OTHER APPLICABLE PROVISIONS. Sections 767.41, 767.43, 767.451, 767.481, 767.57, 767.58, 767.59, 767.71, 767.75, 767.76, 767.77, and 767.78, where applicable, apply to a judgment or order under this section.

(7) PREPARATION OF FINAL PAPERS. The court may order the attorney for the prevailing party to prepare findings of fact, conclusions of law and a judgment for the approval of the court.

History: 1979 c. 352; 1983 a. 27, 192, 447; 1985 a. 29; 1985 a. 315 s. 22; 1987 a. 27, 37, 355, 413; 1989 a. 212; 1991 a. 39; 1993 a. 481; 1995 a. 27 ss. 7115, 7116, 9126 (19); 1995 a. 100, 201, 279, 375, 404; 1997 a. 27, 35, 191; 1999 a. 9; 2001 a. 16; 2005 a. 304; 2005 a. 443 ss. 218, 261; Stats. 2005 s. 767.89; 2007 a. 20; 2017 a. 203, 334, 366.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

Determining a father's support obligation by applying percentage standards is inappropriate when the children live in several households. Paternity of B.W.S., 131 Wis. 2d 301, 388 N.W.2d 615 (1986).

Regardless of whether a 15 year old boy's fathering of a child resulted from sexual assault as defined in criminal law, the trial court could find that intercourse and parenthood were voluntary for purposes of imposing child support. Whether nonconsent is a defense available to a putative father in a paternity action has not been determined. Paternity of J.L.H., 149 Wis. 2d 349, 411 N.W.2d 273 (Ct. App. 1989).

There is no statutory authority for an order requiring the mother to repay lying–in expenses paid by medical assistance. Paternity of N.L.M., 166 Wis. 2d 306, 479 N.W.2d 237 (Ct. App. 1991).

An order for payment of expert witness fees under sub. (3) is not limited by s. 814.04 (2). Paternity of Tiffany B., 173 Wis. 2d 864, 496 N.W.2d 711 (Ct. App. 1993).

Summary judgment is inappropriate when the presumptive conception period under s. 891.395 does not apply and there is no evidence establishing the period or when there is an untested male whom a reasonable fact finder could conclude had intercourse with the mother during the possible conceptive period. Paternity of Taylor R.T., 199 Wis. 2d 500, 544 N.W.2d 926 (Ct. App. 1996), 95–2411.

A father's lack of knowledge of a child's existence and resulting inability to visit and provide for the child may not be considered in deviating from the percentage standards for support. Support in a paternity action must be set exclusive of any marital property law principles. Brad Michael L. v. Lee D., 210 Wis. 2d 437, 564 N.W.2d 354 (Ct. App. 1997), 94–3050.

A court does not have authority to create a child support obligation directly to an adult child who has received a high school diploma at the time that person commences an action for support. Roberta Jo W. v. Leroy W., 218 Wis. 2d 225, 578 N.W.2d 185 (1998), 96–2753.

Nothing in this section authorizes ordering a name change in the best interests of the child in a paternity judgement. Although s. 69.15 (1) (a) provides for changing a name according to an order in a paternity action, it does not provide authority to order a name change in a paternity action without complying with the procedural requirements for a name change under s. 786.36. Paternity of Noah J.M., 223 Wis. 2d 768, 590 N.W.2d 21 (Ct. App. 1998), 97–2353.

A paternity judgment determines between two parties who pays what expenses; it does not bind creditors who were not parties. Dean Medical Center, S.C. v. Conners, 2000 WI App 202, 238 Wis. 2d 636, 618 N.W.2d 194, 99–2091.

The court's ability to order payment under sub. (3) (e) is contingent on the father's ability to pay. When it is undisputed that the father has no ability to pay at the time of the hearing, the court has no authority to set his obligation to pay lying–in expenses. Rusk County Department of Health and Human Services v. Thorson, 2005 WI App 37, 278 Wis. 2d 638, 693 N.W.2d 318, 04–2267.

HSS 80: New Rules for Child Support Obligations. Hickey. Wis. Law. Apr. 1995.

Which Came First? The Serial Family Payer Formula. Stansbury. Wis. Law. Apr. 1995.

Wisconsin's Custody, Placement, and Paternity Reform Legislation. Walther. Wis. Law. Apr. 2000.

Medicaid: New Birth Cost Recovery Rules for Unmarried Parents. Lavigne. Wis. Law. Mar. 2019.

767.893 Default and stipulated judgments.

(1) JUDGMENT WHEN PETITIONER FAILS TO APPEAR OR IS UNABLE TO PROCEED. If a petitioner, other than the state, fails to appear and plead on the date set for the pretrial hearing or the date set for the trial or if the state is the petitioner and is unable to proceed on the date set for the pretrial hearing or the date set for the trial, the court may enter a judgment for the respondent dismissing the action, on the motion of the respondent or upon its own motion.

(1m) JUDGMENT WHEN MOTHER FAILS TO APPEAR. Notwithstanding sub. (1), a court may enter an order adjudicating the alleged father, or male alleging that he is the father, to be the father of the child under s. 767.89 if the mother of the child fails to appear at the first appearance, scheduled genetic test, pretrial hearing, or trial if sufficient evidence exists to establish the male as the father of the child.

(2) JUDGMENT WHEN RESPONDENT FAILS TO APPEAR. (a) Except as provided in sub. (2m), if a respondent is the alleged father and fails to appear at the first appearance, scheduled court–ordered genetic test, pretrial hearing, or trial, the court shall enter an order adjudicating the respondent to be the father and appropriate orders for support, legal custody, and physical placement. The orders shall be either served on the respondent or mailed by regular, registered, or certified mail, to the last–known address of the respondent.

(b) A default judgment may not be entered under par. (a) if there is more than one person alleged in the petition to be the father, unless any of the following applies:

1. Only one of those persons fails to appear and all of the other male respondents have been excluded as the father.

2. The alleged father who fails to appear has had genetic tests under s. 49.225 or 767.84 showing that the alleged father is not excluded and that the statistical probability of the alleged father's parentage is 99.0 percent or higher.

(2m) JUDGMENT UPON STIPULATION. (a) At any time after service of the summons and petition, a respondent who is the alleged father may, with or without appearance in court and subject to the approval of the court, in writing acknowledge that he has read and understands the notice under s. 767.813 (5g) and stipulate that he is the father of the child and for child support payments, legal custody, and physical placement. The court may not approve a stipulation for child support unless it provides for payment of child support determined in a manner consistent with s. 767.511 or 767.89.

(c) If the court approves the stipulation, the court shall enter an order adjudicating the respondent to be the father as well as appropriate orders for support, legal custody and physical placement. The orders shall either be served on the respondent or mailed by regular, registered or certified mail to the last–known address of the respondent. The orders shall take effect upon entry if the respondent has so stipulated. If the respondent has not so stipulated, the orders shall take effect 30 days after service or 30 days after the date on which the orders were mailed unless, within that time, the respondent presents to the court evidence of good cause why the orders should not take effect.

(3) MOTION TO REOPEN. A default judgment, or a judgment upon stipulation unless each party appeared personally before the court at least one time during the proceeding, that is rendered under this section and that adjudicates a person to be the father of a child may be reopened:

(a) At any time upon motion or petition for good cause shown.

(b) Upon a motion under s. 806.07.

(c) Within one year after the judgment upon motion or petition, except that a respondent may not reopen more than one default judgment or more than one such stipulated judgment on a particular case under this paragraph.

(4) APPEAL. An appeal of a denial of the petition or motion to reopen shall be to the court of appeals.

History: 1979 c. 352; 1983 a. 447; 1987 a. 27, 403, 413; 1989 a. 31, 56, 212; 1993 a. 481; 1995 a. 100; 1997 a. 191; 2001 a. 61; 2005 a. 443 ss. 203 to 205, 262; Stats. 2005 s. 767.893.

NOTE: 2005 Wis. Act 443 contains explanatory notes.

The respondent must appear personally under sub. (2) (a). An attorney's appearance is insufficient. Paternity of Tiffany B., 173 Wis. 2d 864, 496 N.W.2d 711 (Ct. App. 1993).

767.895 Motion to reopen judgment based on statement acknowledging paternity. A judgment which adjudicates a person to be the father of a child and which was based upon a statement acknowledging paternity that was signed and filed before April 1, 1998, may, if no trial was conducted, be reopened under any of the following circumstances:

(1) At any time upon motion or petition for good cause shown.

(2) Upon a motion under s. 806.07.

(3) Within one year after entry of the judgment upon motion or petition.

History: 1987 a. 413; 1997 a. 191; 2005 a. 443 s. 206; Stats. 2005 s. 767.895.