



2003 ASSEMBLY BILL 279

April 18, 2003 - Introduced by Representatives BERCEAU, FRISKE, AINSWORTH, SUDER, LOEFFELHOLZ, MILLER, BOYLE, J. LEHMAN, SINICKI, WASSERMAN, SHILLING, MONTGOMERY, HINES, J. FITZGERALD, VAN ROY, OTT, BIES, JENSEN, SERATTI, VRUWINK and RICHARDS, cosponsored by Senators ROESSLER, RISSER, STEPP, WIRCH, A. LASEE, BRESKE, MOORE and ROBSON. Referred to Committee on Family Law.

1 **AN ACT** *to repeal* 767.24 (5) (e); *to renumber* 767.24 (5) (a), 767.24 (5) (b), 767.24
2 (5) (c), 767.24 (5) (cm), 767.24 (5) (d), 767.24 (5) (dm), 767.24 (5) (em), 767.24 (5)
3 (f), 767.24 (5) (fm), 767.24 (5) (g), 767.24 (5) (h), 767.24 (5) (i), 767.24 (5) (j),
4 767.24 (5) (jm) and 767.24 (5) (k); *to renumber and amend* 767.11 (5) (a),
5 767.23 (1n) and 767.24 (5) (intro.); *to amend* 757.48 (1) (a), 767.045 (4), 767.11
6 (4), 767.11 (8) (c), 767.115 (1) (a), 767.24 (2) (a), 767.24 (2) (am), 767.24 (2) (b)
7 (intro.), 767.24 (2) (c), 767.24 (4) (a) 2. and 767.325 (5m); and *to create* 767.11
8 (5) (a) 2., 767.11 (14) (a) 2m., 767.23 (1n) (b) 2., 767.24 (2) (d), 767.24 (5) (am)
9 7., 767.24 (5) (bm), 767.24 (6) (f) and 767.24 (6) (g) of the statutes; **relating to:**
10 creating a rebuttable presumption against awarding a parent joint or sole legal
11 custody if the court finds that the parent has engaged in a pattern or serious
12 incident of abuse, requiring a guardian ad litem and a mediator to have training
13 related to domestic violence, and requiring a guardian ad litem to investigate

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1 and a mediator to inquire whether a party in an action affecting the family
2 engaged in domestic violence.

Analysis by the Legislative Reference Bureau

Under current law, in an action affecting the family, such as a divorce or a paternity action, a court must determine the legal custody of a child based on the best interest of the child. Although the court may grant sole legal custody to one parent or joint legal custody to both parents, the court must presume that joint legal custody is in the child's best interest. The court may grant sole legal custody only if both parents agree to sole legal custody with the same parent or if at least one parent requests sole legal custody and the court finds that: 1) one parent is not capable of performing parental duties or does not wish to have an active role in raising the child; 2) one or more conditions exist that would substantially interfere with the exercise of joint legal custody; or 3) the parties will not be able to cooperate in future decision making. Evidence of child or spousal abuse creates a rebuttable presumption that the parties will not be able to cooperate in future decision making. Current law requires the court to allocate periods of physical placement between the parties if the court orders sole or joint legal custody. The court may deny periods of physical placement with a parent only if the court finds that the physical placement would endanger the child's physical, mental, or emotional health. The statutes list a number of factors that the court must consider in awarding both legal custody and periods of physical placement. Among those factors is whether there is evidence of child or spousal abuse.

This bill provides that, if a court finds by a preponderance of the evidence that a parent has engaged in a pattern or serious incident of spousal abuse, there is a rebuttable presumption that it is detrimental to the child and contrary to the child's best interest for that parent to have either sole or joint legal custody of the child. This presumption takes precedence over the other rules regarding the determination of legal custody, such as the presumption that joint legal custody is in the child's best interest, and may be rebutted only by a preponderance of evidence that: 1) the abusive party has completed treatment for batterers provided through a certified treatment program or by a certified treatment provider and is not abusing alcohol or any other drug, and 2) it is in the best interest of the child that the abusive party be given joint or sole legal custody based on the statutory factors that the court must consider in awarding custody and physical placement. If the court finds that a party has engaged in a pattern or serious incident of spousal abuse, the court must state in writing in the custody order whether the presumption against awarding custody to the abusive party was rebutted and, if so, what evidence rebutted the presumption and why its findings related to legal custody and physical placement are in the best interest of the child.

The bill provides that, if the court finds that both parties have engaged in a pattern or serious incident of spousal abuse, for purposes of the presumption the court must attempt to determine which party was the primary physical aggressor.

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In order to do that, the court must consider a number of specified factors, such as all prior acts of domestic violence between the parties, the relative severity of injuries, if any, whether one of the parties acted in self-defense, and whether there has been a pattern of coercive and abusive behavior.

The bill provides that, if the court grants periods of physical placement to a parent who the court finds has engaged in a pattern or serious incident of spousal abuse, the court must provide for the safety and well-being of the child and for the safety of the other party. The bill specifies a number of actions that the court must consider, and one or more of which the court must impose, for ensuring the safety of the child and the other party, such as requiring supervised periods of physical placement for the abusive parent, requiring the exchange of the child in a protected setting or in the presence of an appropriate third party who agrees to assume that responsibility, requiring the abusive parent to attend and complete treatment for batterers as a condition of exercising his or her physical placement, and prohibiting an abusive parent with an alcohol or drug abuse problem from consuming alcohol during his or her periods of physical placement and from being under the influence of alcohol or another drug when the parties exchange the child for periods of physical placement.

Under current law, a guardian ad litem (GAL) in an action affecting the family must be an attorney and must have completed three hours of approved continuing legal education relating to a GAL's functions. The bill requires the continuing legal education to include training on the dynamics of domestic violence and its effects on victims of domestic violence and on children. The bill requires a GAL in an action affecting the family to investigate whether there is evidence of interspousal battery or domestic abuse, to report to the court on the results of the investigation, and, if there is such evidence, to recommend to the court ways in which the safety and well-being of the child and the victim of the battery or abuse may be addressed.

Under current law, unless the court waives the requirement, at least one session of mediation is required in an action affecting the family if legal custody or physical placement is contested. The bill requires the court or circuit court commissioner to inform the parties that the court may waive the mediation requirement if the court determines that attending a session will cause undue hardship or endanger the health or safety of one of the parties and the bases on which the court may make its determination, including evidence of interspousal battery or domestic abuse. The bill also requires every mediator to have training on the dynamics of domestic violence and its effects on victims of domestic violence and on children. Under current law, a mediator may terminate mediation if there is evidence that a party has engaged in interspousal battery or domestic violence. The bill requires a mediator, before the initial session, to inquire of each party outside the presence of the other party whether either of them has engaged in interspousal battery or domestic violence.

The bill adds to the factors under current law that a court must consider when awarding legal custody and physical placement consideration of whether a parent or other person living in a proposed custodial household has a mental or physical impairment that negatively affects the child's intellectual, physical, or emotional

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well-being. In addition, the bill provides that, if the court finds that a parent has engaged in interspousal battery or domestic violence, when the court is awarding legal custody and physical placement the child's safety and well-being and the safety of the other parent are the paramount concerns.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 757.48 (1) (a) of the statutes is amended to read:

2 757.48 (1) (a) Except as provided in s. 879.23 (4), in all matters in which a
3 guardian ad litem is appointed by the court, the guardian ad litem shall be an
4 attorney admitted to practice in this state. In order to be appointed as a guardian
5 ad litem under s. 767.045, an attorney shall have completed 3 hours of approved
6 continuing legal education relating that relates to the functions and duties of a
7 guardian ad litem under ch. 767 and that includes training on the dynamics of
8 domestic violence and the effects of domestic violence on victims of domestic violence
9 and on children.

10 **SECTION 2.** 767.045 (4) of the statutes is amended to read:

11 767.045 (4) RESPONSIBILITIES. The guardian ad litem shall be an advocate for
12 the best interests of a minor child as to paternity, legal custody, physical placement,
13 and support. The guardian ad litem shall function independently, in the same
14 manner as an attorney for a party to the action, and shall consider, but shall not be
15 bound by, the wishes of the minor child or the positions of others as to the best
16 interests of the minor child. The guardian ad litem shall consider the factors under
17 s. 767.24 (5) (am), subject to s. 767.24 (5) (bm), and custody studies under s. 767.11
18 (14). The guardian ad litem shall investigate whether there is evidence that either
19 parent has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m),
20 or domestic abuse, as defined in s. 813.12 (1) (am), and shall report to the court on

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1 the results of the investigation. If the guardian ad litem finds evidence of
2 interspousal battery or domestic abuse, the guardian ad litem shall make
3 recommendations to the court addressing the safety and well-being of the child and
4 the victim of the interspousal battery or domestic abuse. The guardian ad litem shall
5 review and comment to the court on any mediation agreement and stipulation made
6 under s. 767.11 (12) and on any parenting plan filed under s. 767.24 (1m). Unless
7 the child otherwise requests, the guardian ad litem shall communicate to the court
8 the wishes of the child as to the child's legal custody or physical placement under s.
9 767.24 (5) ~~(b)~~ (am) 2. The guardian ad litem has none of the rights or duties of a
10 general guardian.

11 **SECTION 3.** 767.11 (4) of the statutes is amended to read:

12 767.11 (4) MEDIATOR QUALIFICATIONS. Every mediator assigned under sub. (6)
13 shall have not less than 25 hours of mediation training or not less than 3 years of
14 professional experience in dispute resolution. Every mediator assigned under sub.
15 (6) shall have training on the dynamics of domestic violence and the effects of
16 domestic violence on victims of domestic violence and on children.

17 **SECTION 4.** 767.11 (5) (a) of the statutes is renumbered 767.11 (5) (a) (intro.) and
18 amended to read:

19 767.11 (5) (a) (intro.) ~~In~~ Except as provided in sub. (8) (b), in any action affecting
20 the family, including a revision of judgment or order under s. 767.32 or 767.325, in
21 which it appears that legal custody or physical placement is contested, the court or
22 circuit court commissioner shall refer the parties to the director of family court
23 counseling services for possible mediation of those contested issues. The court or
24 circuit court commissioner shall inform the parties ~~that~~ of all of the following:

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1 1. That the confidentiality of communications in mediation is waived if the
2 parties stipulate under sub. (14) (c) that the person who provided mediation to the
3 parties may also conduct the legal custody or physical placement study under sub.
4 (14).

5 **SECTION 5.** 767.11 (5) (a) 2. of the statutes is created to read:

6 767.11 (5) (a) 2. That the court may waive the requirement to attend at least
7 one mediation session if the court determines that attending the session will cause
8 undue hardship or would endanger the health or safety of one of the parties and the
9 bases on which the court may make its determination.

10 **SECTION 6.** 767.11 (8) (c) of the statutes is amended to read:

11 767.11 (8) (c) The initial session under par. (a) shall be a screening and
12 evaluation mediation session to determine whether mediation is appropriate and
13 whether both parties wish to continue in mediation. Before the initial session, for
14 purposes of determining whether mediation should be terminated under sub. (10) (e)
15 1., 2., or 4., the mediator shall inquire of each party, outside the presence of the other
16 party, whether either of the parties has engaged in interspousal battery, as described
17 in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am).

18 **SECTION 7.** 767.11 (14) (a) 2m. of the statutes is created to read:

19 767.11 (14) (a) 2m. Whether either party has engaged in interspousal battery,
20 as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12
21 (1) (am).

22 **SECTION 8.** 767.115 (1) (a) of the statutes is amended to read:

23 767.115 (1) (a) At any time during the pendency of an action affecting the family
24 in which a minor child is involved and in which the court or circuit court
25 commissioner determines that it is appropriate and in the best interest of the child,

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1 the court or circuit court commissioner, on its own motion, may order the parties to
2 attend a program specified by the court or circuit court commissioner concerning the
3 effects on a child of a dissolution of the marriage. If the court or circuit court
4 commissioner orders the parties to attend a program under this paragraph and there
5 is evidence that one or both of the parties have engaged in interspousal battery, as
6 described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1)
7 (am), the court or circuit court commissioner may not require the parties to attend
8 the program together or at the same time.

9 **SECTION 9.** 767.23 (1n) of the statutes is renumbered 767.23 (1n) (a) and
10 amended to read:

11 767.23 (1n) (a) Before making any temporary order under sub. (1), the court
12 or circuit court commissioner shall consider those factors that the court is required
13 by this chapter to consider before entering a final judgment on the same subject
14 matter. In making a determination under sub. (1) (a) or (am), the court or circuit
15 court commissioner shall consider the factors under s. 767.24 (5) (am), subject to s.
16 767.24 (5) (bm).

17 (b) 1. If the court or circuit court commissioner makes a temporary child
18 support order that deviates from the amount of support that would be required by
19 using the percentage standard established by the department under s. 49.22 (9), the
20 court or circuit court commissioner shall comply with the requirements of s. 767.25
21 (1n).

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

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1 **SECTION 10.** 767.23 (1n) (b) 2. of the statutes is created to read:

2 767.23 **(1n)** (b) 2. If the court or circuit court commissioner finds by a
3 preponderance of the evidence that a party has engaged in a pattern or serious
4 incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or
5 domestic abuse, as defined in s. 813.12 (1) (am), and makes a temporary order
6 awarding joint or sole legal custody or periods of physical placement to the party, the
7 court or circuit court commissioner shall comply with the requirements of s. 767.24
8 (6) (f) and, if appropriate, (g).

9 **SECTION 11.** 767.24 (2) (a) of the statutes is amended to read:

10 767.24 **(2)** (a) Subject to pars. (am), (b) ~~and~~, (c), and (d), based on the best
11 interest of the child and after considering the factors under sub. (5) (am), subject to
12 sub. (5) (bm), the court may give joint legal custody or sole legal custody of a minor
13 child.

14 **SECTION 12.** 767.24 (2) (am) of the statutes is amended to read:

15 767.24 **(2)** (am) The Except as provided in par. (d), the court shall presume that
16 joint legal custody is in the best interest of the child.

17 **SECTION 13.** 767.24 (2) (b) (intro.) of the statutes is amended to read:

18 767.24 **(2)** (b) (intro.) The Except as provided in par. (d), the court may give sole
19 legal custody only if it finds that doing so is in the child's best interest and that either
20 of the following applies:

21 **SECTION 14.** 767.24 (2) (c) of the statutes is amended to read:

22 767.24 **(2)** (c) The Except as provided in par. (d), the court may not give sole
23 legal custody to a parent who refuses to cooperate with the other parent if the court
24 finds that the refusal to cooperate is unreasonable.

25 **SECTION 15.** 767.24 (2) (d) of the statutes is created to read:

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1 767.24 (2) (d) 1. If the court finds by a preponderance of the evidence that a
2 party has engaged in a pattern or serious incident of interspousal battery, as
3 described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12
4 (1) (am), pars. (am), (b), and (c) do not apply and there is a rebuttable presumption
5 that it is detrimental to the child and contrary to the best interest of the child to
6 award joint or sole legal custody to that party. The presumption may be rebutted only
7 by a preponderance of evidence of all of the following:

8 a. The party who committed the battery or abuse has successfully completed
9 treatment for batterers provided through a certified treatment program or by a
10 certified treatment provider and is not abusing alcohol or any other drug.

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

14 2. If the court finds under subd. 1. that both parties engaged in a pattern or
15 serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m),
16 or domestic abuse, as defined in s. 813.12 (1) (am), the party who engaged in the
17 battery or abuse for purposes of the presumption under subd. 1. is the party that the
18 court determines was the primary physical aggressor. In determining which party
19 was the primary physical aggressor, the court shall consider all of the following:

20 a. All prior acts of domestic violence between the parties.

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

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

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

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

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

7 **SECTION 16.** 767.24 (4) (a) 2. of the statutes is amended to read:

8 767.24 (4) (a) 2. In determining the allocation of periods of physical placement,
9 the court shall consider each case on the basis of the factors in sub. (5) (am), subject
10 to sub. (5) (bm). The court shall set a placement schedule that allows the child to have
11 regularly occurring, meaningful periods of physical placement with each parent and
12 that maximizes the amount of time the child may spend with each parent, taking into
13 account geographic separation and accommodations for different households.

14 **SECTION 17.** 767.24 (5) (intro.) of the statutes is renumbered 767.24 (5) (am)
15 (intro.) and amended to read:

16 767.24 (5) (am) (intro.) In Subject to par. (bm), in determining legal custody and
17 periods of physical placement, the court shall consider all facts relevant to the best
18 interest of the child. The court may not prefer one parent or potential custodian over
19 the other on the basis of the sex or race of the parent or potential custodian. The
20 Subject to par. (bm), the court shall consider the following factors in making its
21 determination:

22 **SECTION 18.** 767.24 (5) (a) of the statutes is renumbered 767.24 (5) (am) 1.

23 **SECTION 19.** 767.24 (5) (am) 7. of the statutes is created to read:

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1 767.24 (5) (am) 7. Whether a party or other person living in a proposed
2 custodial household has a mental or physical impairment that negatively affects the
3 child's intellectual, physical, or emotional well-being.

4 **SECTION 20.** 767.24 (5) (b) of the statutes is renumbered 767.24 (5) (am) 2.

5 **SECTION 21.** 767.24 (5) (bm) of the statutes is created to read:

6 767.24 (5) (bm) If the court finds under sub. (2) (d) that a parent has engaged
7 in a pattern or serious incident of interspousal battery, as described under s. 940.19
8 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), the safety and
9 well-being of the child and the safety of the parent who was the victim of the battery
10 or abuse shall be the paramount concerns in determining legal custody and periods
11 of physical placement.

12 **SECTION 22.** 767.24 (5) (c) of the statutes is renumbered 767.24 (5) (am) 3.

13 **SECTION 23.** 767.24 (5) (cm) of the statutes is renumbered 767.24 (5) (am) 4.

14 **SECTION 24.** 767.24 (5) (d) of the statutes is renumbered 767.24 (5) (am) 5.

15 **SECTION 25.** 767.24 (5) (dm) of the statutes is renumbered 767.24 (5) (am) 6.

16 **SECTION 26.** 767.24 (5) (e) of the statutes is repealed.

17 **SECTION 27.** 767.24 (5) (em) of the statutes is renumbered 767.24 (5) (am) 8.

18 **SECTION 28.** 767.24 (5) (f) of the statutes is renumbered 767.24 (5) (am) 9.

19 **SECTION 29.** 767.24 (5) (fm) of the statutes is renumbered 767.24 (5) (am) 10.

20 **SECTION 30.** 767.24 (5) (g) of the statutes is renumbered 767.24 (5) (am) 11.

21 **SECTION 31.** 767.24 (5) (h) of the statutes is renumbered 767.24 (5) (am) 12.

22 **SECTION 32.** 767.24 (5) (i) of the statutes is renumbered 767.24 (5) (am) 13.

23 **SECTION 33.** 767.24 (5) (j) of the statutes is renumbered 767.24 (5) (am) 14.

24 **SECTION 34.** 767.24 (5) (jm) of the statutes is renumbered 767.24 (5) (am) 15.

25 **SECTION 35.** 767.24 (5) (k) of the statutes is renumbered 767.24 (5) (am) 16.

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1 **SECTION 36.** 767.24 (6) (f) of the statutes is created to read:

2 767.24 (6) (f) If the court finds under sub. (2) (d) that a party has engaged in
3 a pattern or serious incident of interspousal battery, as described under s. 940.19 or
4 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), the court shall state
5 in writing whether the presumption against awarding joint or sole legal custody to
6 that party is rebutted and, if so, what evidence rebutted the presumption, and why
7 its findings relating to legal custody and physical placement are in the best interest
8 of the child.

9 **SECTION 37.** 767.24 (6) (g) of the statutes is created to read:

10 767.24 (6) (g) If the court finds under sub. (2) (d) that a party has engaged in
11 a pattern or serious incident of interspousal battery, as described under s. 940.19 or
12 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), and the court awards
13 periods of physical placement to both parties, the court shall provide for the safety
14 and well-being of the child and for the safety of the party who was the victim of the
15 battery or abuse. For that purpose the court, giving consideration to the availability
16 of services or programs and to the ability of the party who committed the battery or
17 abuse to pay for those services or programs, shall impose one or more of the following,
18 as appropriate:

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

23 2. Requiring the child's periods of physical placement with the party who
24 committed the battery or abuse to be supervised by an appropriate 3rd party who
25 agrees by affidavit or other supporting evidence to assume the responsibility

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1 assigned by the court and to be accountable to the court for his or her actions with
2 respect to the responsibility.

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

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

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

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

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

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

21 **SECTION 38.** 767.325 (5m) of the statutes is amended to read:

22 767.325 (5m) FACTORS TO CONSIDER. In all actions to modify legal custody or
23 physical placement orders, the court shall consider the factors under s. 767.24 (5)
24 (am), subject to s. 767.24 (5) (bm), and shall make its determination in a manner
25 consistent with s. 767.24.

