

## CHAPTER 767

## ACTIONS AFFECTING THE FAMILY

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**767.001 Definitions.** In this chapter:

(1) "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 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.

(3) "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.

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

(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

NOTE: 1987 Wis. Act 355, which created this section, contains explanatory notes.

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

**767.01 Jurisdiction.** (1) The circuit courts have jurisdiction of all actions affecting the family and have authority to do all acts and things necessary and proper in such actions and to carry their orders and judgments into execution as prescribed in this chapter. All actions affecting the family shall be commenced and conducted and the orders and judgments enforced according to these statutes in respect to actions in circuit court, as far as applicable, except as provided in this chapter.

(2) 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 or 801.05.

(3) An action under s. 767.45 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.

**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.

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

Court had authority to direct defendant to pay plaintiff's medical expenses which would have been covered under insurance policy had defendant properly converted policy pursuant to divorce decree. *Rotter v. Rotter*, 80 W (2d) 56, 257 NW (2d) 861.

Where husband complied with original court order to make property division instalment payments, court had no authority to order husband to pay wife's income tax on instalments. *Wright v. Wright*, 92 W (2d) 246, 284 NW (2d) 894 (1979).

Where disposition of homestead was ordered in divorce judgment, family court and probate court had concurrent jurisdiction. *Morrisette v. Morrisette*, 99 W (2d) 467, 299 NW (2d) 590 (Ct. App. 1980).

Court's order to arbitrate custody and visitation was not proper exercise of authority. Court's order to mediate under s. 767.081, 1981 stats., was abuse of discretion. *In re Marriage of Biel v. Biel*, 114 W (2d) 191, 336 NW (2d) 404 (Ct. App. 1983).

Joinder of divorce and contract actions between spouses is not required. *Caulfield v. Caulfield*, 183 W (2d) 83, 515 NW (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 W (2d) 390, 515 NW (2d) 337 (Ct. App. 1994).

An injunction against a man, whose petition to establish himself as father of 2 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. *In re Paternity of C. A. S. & C.D.S.* 185 W (2d) 468, 518 NW (2d) 285 (Ct. App. 1994).

**767.015 Child custody jurisdiction.** All proceedings relating to the custody of children shall comply with the requirements of ch. 822.

**History:** 1975 c. 283; 1979 c. 32 s. 50; Stats 1979 s. 767.015.

**767.02 Actions affecting the family.** (1) Actions affecting the family are:

- (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.
- (j) For periodic family support payments.
- (k) Concerning periods of physical placement or visitation rights to children.
- (L) To determine paternity.
- (m) To enforce or revise an order for support entered under s. 48.355 (2) (b) 4., 48.357 (5m) or 48.363 (2).

(2) "Divorce" means divorce from the bonds of matrimony or absolute divorce, when used in this chapter.

(3) Commencement of an action affecting the family which affects a minor child constitutes an application to the department of health and social services for services on behalf of the minor child under s. 46.25. This application does not authorize intervention as a party in any action, by the department of health and social services.

**History:** 1977 c. 105, 418; 1979 c. 32 s. 50; 1979 c. 196; 1979 c. 352 ss. 22, 39; 1979 c. 355, 357; Stats. 1979 s. 767.02; 1985 a. 29; Sup. Ct. Order, 141 W (2d) xvii (1987); 1987 a. 355, 403, 413; 1989 a. 212; 1993 a. 326, 481.

A circuit court does not have subject matter jurisdiction in a divorce action to determine attorney's fees between an attorney and client whom the attorney continues to represent in the divorce action. *In re Marriage of Stasey v. Stasey*, 168 W (2d) 37, 483 NW (2d) 221 (1992).

Section 767.02 (1) (i) allows all actions to modify a judgment in an action affecting marriage to be commenced in any court having jurisdiction under 767.01. 68 Atty. Gen. 106.

Post-divorce judgment venue in multicounty situations. *Whipple*. WBB Oct. 1987.

The 1977 amendments to the Wisconsin Family Code. *Perkins*, 1978 WLR 882.

**767.025 Filing procedures and orders for enforcement or modification of judgments or orders in actions affecting the family.** The following filing procedures shall apply to all enforcement or modification petitions, motions or orders to show cause filed for actions affecting the family under s. 767.02 (1) (i):

(1) 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 which was granted by a court of this state is filed in a county other than the county in which the judgment 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 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 this petition, motion or order to show cause to the clerk of the court in which the original judgment or order was rendered.

(2) (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.

(3) Except as provided in s. 769.316 (3), if an enforcement or modification petition, motion or order to show cause is filed in a county other than the county in which the original judgment or order was rendered under sub. (2) (a), the clerk of court from the court that rendered the original judgment or order shall send a copy of any payment records associated with the original judgment or order of child support, family support or maintenance to the clerk of court in the county in which the petition, motion or order to show cause is filed.

(4) 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 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 the clerk of circuit court to whom payments of support or maintenance are payable and the clerk of circuit court to whom payments of arrearages in support or maintenance, if any, are payable.

**History:** 1989 a. 212; 1993 a. 326, 481.

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 W (2d) 416, 518 NW (2d) 254 (Ct. App. 1994).

**767.03 Annulment.** No marriage may be annulled or held void except pursuant to judicial proceedings. No marriage may be annulled after the death of either party to the marriage. A court

may annul a marriage entered into under the following circumstances:

(1) 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.

(2) 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.

(3) 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.

(4) 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.

**History:** 1977 c. 105; 1979 c. 32 ss. 50, 92 (2); Stats. 1979 s. 767.03.

See note to 767.32, citing *In re Marriage of Falk v. Falk*, 158 W (2d) 184, 462 NW (2d) 547 (Ct. App. 1990).

**767.04 Actions to affirm marriage.** When the validity of any marriage shall be denied or doubted by either of the parties the other party may commence an action to affirm the marriage, and the judgment in such action shall declare such marriage valid or annul the same, and be conclusive upon all persons concerned.

**History:** 1979 c. 32 s. 50; Stats. 1979 s. 767.04.

#### **767.045 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. The legal custody or physical placement of the child is contested.

(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. 59.458 (1) may request that the court or family court commissioner 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 adjudicated for the purpose of determining the paternity of the child, and the court or family court commissioner shall appoint a guardian ad litem, if any of the following applies:

1. Aid is provided under s. 49.19 or 49.45 on behalf of the child, but the state and its delegate under s. 46.25 (7) are barred by a statute of limitations from commencing an action under s. 767.45 on behalf of the child.

2. An application for legal services has been filed with the child support program under s. 46.25 on behalf of the child, but the state and its delegate under s. 46.25 (7) are barred by a statute of limitations from commencing an action under s. 767.45 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.

(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. 767.11 (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 custody, 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. 767.24 (5) and custody studies under s. 767.11 (14). The guardian ad litem shall review and comment to the court on any mediation agreement and stipulation made under s. 767.11 (12). 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. 767.24 (5) (b). The guardian ad litem has none of the rights or duties of a general guardian.

(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 either or both parties are unable to pay, the court may direct that the county of venue pay the compensation and fees, in whole or in part, and may direct that any or all parties reimburse the county, in whole or in part, for the payment. 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). 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, 50W (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 W (2d) xxv (1989); 1993 a. 16, 481.

**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]

Trial court direction that the husband pay the entire fee of the guardian ad litem is held to be an abuse of discretion, requiring modification, so as to charge the wife with 50%. *Tesch v. Tesch*, 63 W (2d) 320, 217 NW (2d) 647.

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

Increase of visitation rights from 24 days to 75 days per year had sufficient impact upon welfare of children so as to require appointment of guardian ad litem. *Bahr v. Galonski*, 80 W (2d) 72, 257 NW (2d) 869.

Discussion of requirement of appointment of guardian ad litem pursuant to (1) and 1989 (1) (a). *In re Marriage of Johnson v. Johnson*, 157 W (2d) 490, 460 NW (2d) 166 (Ct. App. 1990).

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

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

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

**767.05 Procedures. (1) JURISDICTION.** A court of this state having jurisdiction to hear actions affecting the family may exercise jurisdiction as provided under ch. 769 or 801.

**(1m) RESIDENCE.** No action under s. 767.02 (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 under s. 767.02 (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 under s. 767.02 (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.

**(2) ACTIONS FOR CUSTODY OF CHILDREN.** 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 shall not be 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. 822.05 as provided in s. 822.12. Nothing in this section may be construed to foreclose a person other than a parent who has physical custody of a child from proceeding under ch. 822.

**(3) PARTIES.** The party initiating an action affecting the family shall be denominated the petitioner. The party responding to the action shall be denominated the respondent. All references to "plaintiff" in chs. 801 to 807 shall apply to the petitioner, and all references to "defendant" in chs. 801 to 807 shall apply to the respondent. Both parties together may initiate the petition by signing and filing a joint petition. The parties to a joint petition shall be called joint petitioners. The parties to a joint petition shall state within the joint petition that both parties consent to personal jurisdiction and waive service of summons.

**(4) PETITION.** All references to a "complaint" in chs. 801 to 807 shall apply to petitions under s. 767.085.

**(5) TITLE OF ACTIONS.** An action affecting the family under s. 767.02 (1) (a) to (d) or (g) to (k) shall be entitled "In re the marriage of A.B. and C.D.". An action affecting the family under s. 767.02 (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.". In all other respects, the general provisions of chs. 801 and 802 respecting the content and form of the summons and pleadings shall apply.

**(6) DISMISSAL.** 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.

**(7) 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:** 1977 c. 105, 418, 447; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; 1979 c. 352 s. 39; Stats. 1979 s. 767.05; 1983 a. 326; 1983 a. 447 s. 67; 1985 a. 37; 1993 a. 326, 481.

In a child custody dispute between the children's father, who was divorced by his wife, and the wife's parents, subsequent to her death, the trial court erred in concluding that it had no choice but to award custody to the surviving natural parent unless it found him unfit or unable to care for the children. *LaChapell v. Mawhinney*, 66 W (2d) 679, 225 NW (2d) 501.

Where divorce action was brought before meeting residency requirement, action was never commenced and petition could not be amended after requirement was met. *Siemering v. Siemering*, 95 W (2d) 111, 288 NW (2d) 881 (Ct. App. 1980).

Sub. (7) prohibition on commencement of action under 766.70 while divorce, annulment or legal separation action is pending does not violate equal protection and is constitutional. *In re Marriage of Haack v. Haack*, 149 W (2d) 243, 440 NW (2d) 794 (Ct. App. 1989).

See note to 801.05, citing *In re Marriage of McAleavy v. McAleavy*, 150 W (2d) 26, 440 NW (2d) 566 (1989).

**767.07 Judgment of divorce or legal separation.** A court of competent jurisdiction shall grant a judgment of divorce or legal separation if:

**(1)** The requirements of this chapter as to residence and marriage assessment counseling have been complied with;

**(2) (a)** In connection with a judgment of divorce or legal separation, the court finds that the marriage is irretrievably broken under s. 767.12 (2), unless par. (b) applies.

**(b)** In connection with a judgment of legal separation, the court finds that the marital relationship is broken under s. 767.12 (3); and

**(3)** To the extent it has jurisdiction to do so, the court has considered, approved or made provision for legal custody, the support of any child of the marriage entitled to support, the maintenance of either spouse, the support of the family under s. 767.261 and the disposition of property.

**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.

Divorce judgment didn't bar wife's action against husband for torts allegedly committed during marriage. *Stuart v. Stuart*, 143 W (2d) 347, 421 NW (2d) 505 (1988).

**767.075 State is real party in interest. (1)** 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:

(a) An action to establish paternity whenever there is a completed application for legal services filed with the child support program under s. 46.25 or whenever s. 767.45 (6m) applies.

(b) 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. 46.25.

(c) Whenever aid under s. 49.19 or 49.45 is provided to a dependent child.

**(2)** (a) Except as provided in par. (b), in any action affecting the family under a child support enforcement program, an attorney acting under s. 46.25 or 59.07 (97), including any district attorney or corporation counsel, represents only the state. Child support services provided by an attorney as specified in sub. (1) do not create an attorney-client relationship with any other party.

(b) Paragraph (a) does not apply to an attorney who is employed by the department of health and social services under s. 46.25 or a county under s. 59.07 (97) or 59.458 (1) to act as the guardian ad litem of the minor child for the purpose of establishing paternity.

**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

See note to 767.25, citing *State ex rel. v. Reible*, 91 W (2d) 394, 283 NW (2d) 427 (Ct. App. 1979).

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

**767.077 Support for dependent child.** The state or its delegate under s. 46.25 (7) shall bring an action for support of a minor child under s. 767.02 (1) (f) or, if appropriate, for paternity determination and child support under s. 767.45 whenever the child's right to support is assigned to the state under s. 49.19 (4) (h) 1. b. if 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. 767.25 requiring the parent who is absent from the home to support the child.

**History:** 1987 a. 27

**767.078 Order in case involving dependent child.**

**(1)** (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. 767.32 or an action in which an order for child support is required under s. 767.25 (1) or 767.51 (3).

2. The child's right to support is assigned to the state under s. 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) or (d), 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. 101.23.

2. Apply for jobs.

3. Participate in a job training program.

(c) An order is not required under par. (b) or (d) if the court makes written findings that there is good cause for not issuing the order.

(d) 1. Except as provided in par. (c), in a case involving a dependent child whose custodial parent is subject, under s. 49.25 (1), to the program under s. 49.25, if the child's parent who is absent from the home lives in a pilot county under s. 49.25, the court may order the parent who is absent from the home to report to the agency providing services under s. 49.193 in that pilot

county and to participate in employment training and education activities under s. 49.25 (7), if all of the following conditions are satisfied:

a. The parent who is absent from the home lives in a pilot county.

b. The parent who is absent from the home is able to work full time.

c. The parent who is absent from the home works, on average, less than 32 hours per week and is not participating in an employment training program that meets criteria established by the department.

d. The actual weekly gross income of the parent who is absent from the home 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.

2. The agency to which a parent is required to report under subd. 1. shall report to the court on the services plan that is developed for the parent under s. 49.25 (7) (b) and on the parent's progress in following the plan. The agency may recommend to the court modifications in the order under subd. 1. based on the parent's employment or progress in following the plan or on the agency's evaluation of the parent's needs.

3. Subdivisions 1. and 2. only apply while the department of health and social services conducts the program under s. 49.25.

**(2)** Subsection (1) does not limit the authority of a court to issue an order, other than an order under sub. (1), regarding employment of a parent in an action for modification of a child support order under s. 767.32 or an action in which an order for child support is required under s. 767.25 (1) or 767.51 (3).

**History:** 1987 a. 27; 1991 a. 39; 1993 a. 16

**767.08 Actions to compel support. (1)** 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 consanguinity or direct affinity.

**(2)** (a) If a person fails or refuses to provide for the support and maintenance of his or her spouse or minor child, any of the following may commence an action in any court having jurisdiction in actions affecting the family to compel the person to provide any legally required 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, as provided under s. 767.25 or 767.26, determine and adjudge the amount, if any, the person should reasonably contribute to the support and maintenance of the spouse or child and how the sum should be paid. This amount may be expressed as a percentage of the person's income or as a fixed sum, or as a combination of both in the alternative by requiring payment of the greater or lesser of either a percentage of the person's income or a fixed sum. The amount so ordered to be paid may be changed or modified by the court upon notice of motion or order to show cause by either party upon sufficient evidence.

(c) The determination may be enforced by contempt proceedings, an account transfer under s. 767.267 or other enforcement mechanisms as provided under s. 767.30.

(d) In any such support action there shall be no filing fee or other costs 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 and filed the court may direct that any part of or all fees and costs incurred shall be paid by either party.

(3) If the state or any subdivision thereof furnishes public aid to a spouse or dependent child for support and maintenance and the spouse, person with legal custody or nonlegally responsible relative fails or refuses to institute an appropriate court action under this chapter to provide for the same, the person in charge of county welfare activities, the county child support program designee under s. 59.07 (97) or the state department of health and social services is a real party in interest under s. 767.075 and shall initiate an action under this section, for the purpose of obtaining support and maintenance. Any attorney employed by the state or any subdivision thereof may initiate an action under this section. The title of the action shall be "In re the support or maintenance of A.B. (Child)".

**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.

Husband incurs primary liability for necessities procured for his family's sustenance. *Sharpe Furniture, Inc. v. Buckstaff*, 99 W (2d) 114, 299 NW (2d) 219 (1980).

See note to Art. I, sec. 1, citing *Marshfield Clinic v. Discher*, 105 W (2d) 506, 314 NW (2d) 326 (1982).

See note to 767.32 citing *In re Marriage of Nichols v. Nichols*, 162 W (2d) 96, 469 NW (2d) 619 (1991).

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

**767.081 Information from family court commissioner.** (1) Upon the filing of an action affecting the family, the family court commissioner shall inform the parties of any services, including referral services, offered by the family court commissioner and by the director of family court counseling services under s. 767.11.

(2) Upon request of a party to an action affecting the family, including a revision of judgment or order under s. 767.32 or 767.325:

(a) The 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 counseling 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 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.

**767.082 Suspension of proceedings to effect reconciliation.** During the pendency of any 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 so as to permit the parties to attempt a reconciliation without prejudice to their respective rights. During the period of suspension the parties may resume living together as husband and wife and their acts and conduct shall 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 if such is the case. Suspension may be revoked upon motion of either party by 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.

**767.083 Waiting period in certain actions.** No petition for divorce or legal separation may be brought to trial until the happening of whichever of the following events occurs first:

(1) 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; or

(2) An order by the court, after consideration of the recommendation of the family 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 such order specify the grounds therefor.

**History:** 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; Stats. 1979 s. 767.083; 1987 a. 355.

**767.085 Petition and response.** (1) PETITION, CONTENTS. Except as otherwise provided, in any action affecting the family, the petition shall state:

(a) The name and birthdate of the parties, the social security numbers of the husband and wife and their occupations, 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. 767.12 (3), 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. 767.12 (3), that both parties agree that the marital relationship is broken.

(d) Whether or not an action for divorce or legal separation by either of the parties was or has been at any time commenced, or is pending in any other court or before any judge thereof, in this state or elsewhere, and if either party was previously married, and if so the manner in which such marriage was terminated, and if terminated by court judgment, the name of the court in which the judgment was granted and the time and place the judgment was granted, if known.

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

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

(g) Whenever the petitioner requests an order or judgment affecting a minor child, that the petitioner requests the department of health and social services to provide services on behalf of the minor child under s. 46.25, except that this application does not authorize representation under s. 46.25 or 59.458 (2), or intervention as a party in any action, by the department of health and social services.

(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. 767.02 (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 or family court commissioner, 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. 767.02 (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 or family court commissioner:

1. Establishing a residence with a minor child of the parties outside the state or more than 150 miles from the residence of the other party within the state.

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.

(2) **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 of health and social services under s. 46.25 (9) and listing the factors which a court may consider under s. 767.25 (1m).

(2m) **SUMMONS, CONTENTS.** (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. 767.081 (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 of health and social services under s. 46.25 (9) and listing the factors which a court may consider under s. 767.25 (1m).

(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 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 upon the family court commissioner as provided in s. 767.14, 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) **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.

(5) **RESPONSE, CONTENTS.** Whenever the respondent requests an order or judgment affecting a minor child, the response shall state that the respondent requests the department of health and social services to provide services on behalf of the minor child under s. 46.25, except that this application does not authorize representation under s. 46.25 or 59.458 (2), or intervention as a party in any action, by the department of health and social services.

**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.

Pre-nuptial and post-nuptial agreements. Loeb, WBB March 1981.

### 767.087 Prohibited acts during pendency of action.

(1) 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. 767.02 (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 or family court commissioner, 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. 767.02 (1) (g) or (h), without the consent of the other party or an order of the court or family court commissioner, establishing a residence with a minor child of the parties outside the state or more than 150 miles from the residence of the other party within the state, 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) 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 or family court commissioner orders otherwise.

(3) (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.

### 767.09 Power of court in divorce and legal separation actions.

(1) When a party requests a legal separation rather than a decree of divorce, the court shall grant the decree in that form unless the other party requests a divorce, in which case the court shall hear and determine which decree shall be granted. A decree of separation shall provide that in case of a reconciliation at any time thereafter, the parties may apply for a revocation of the judgment. Upon such application the court shall make such orders as may be just and reasonable.

(2) By stipulation of both parties, or upon motion of either party not earlier than one year after entry of a decree of legal separation, the court shall convert the decree to a decree of divorce.

**History:** 1977 c. 105; 1979 c. 32 s. 50; Stats. 1979 s. 767.09.

Factors to be considered in ordering a divorce where plaintiff has asked for only a separation discussed *Husting v. Husting*, 54 W (2d) 87, 194 NW (2d) 801.

If requirements of (2) are met, conversion to divorce decree is mandatory. *Bartz v. Bartz*, 153 W (2d) 756, 452 NW (2d) 160 (Ct. App. 1989).

(1) **767.10 Stipulation and property division.** (1) 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. 767.261 or for legal custody and physical placement, in case a divorce or legal separation is granted or a marriage annulled.

(2) (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. 767.25 or 767.51.

(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 ss. 49.45 to 49.47 or if the court determines that it can be reasonably anticipated that the other party in the action will apply for medical assistance under ss. 49.45 to 49.47 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.

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 as to whether the agreement adequately provides for the parties. *Ray v. Ray*, 57 W (2d) 77, 203 NW (2d) 724.

Legislative reduction of the age of majority to 18 years in effect emancipated children of the divorced father who had reached that age and terminated both his parental rights and his legal obligation to provide support under the divorce judgment, since parental support past the age of majority is not a concept accepted in Wisconsin. *Schmitz v. Schmitz*, 70 W (2d) 882, 236 NW (2d) 657.

### 767.11 Family court counseling services.

(1) **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 counseling 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 counseling services for those counties.

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

**(2) DUTIES.** A director of family court counseling services designated under sub. (1) shall administer a family court counseling office if such an office is established under sub. (3) (a) or (b). Regardless of whether such an 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 any such mediation or study services.

(d) Administer and manage funding for family court counseling 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 counseling office to provide mediation in that county.

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

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

**(4) MEDIATOR QUALIFICATIONS.** Every mediator assigned under sub. (6) shall have not less than 25 hours of mediation training or not less than 3 years of professional experience in dispute resolution.

**(5) MEDIATION REFERRALS.** (a) In any action affecting the family, including a revision of judgment or order under s. 767.32 or 767.325, in which it appears that legal custody or physical placement is contested, the court or family court commissioner shall refer the parties to the director of family court counseling services for possible mediation of those contested issues. The court or the family court commissioner shall inform the parties 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).

(b) If both parties to any action affecting the family wish to have joint legal custody of a child, either party may request the court or family court commissioner to refer the parties to the director of family court counseling 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, a child of such a person, a person with visitation rights or a person with physical custody of a child may notify the family court commissioner of any problem he or she has relating to any of these matters. Upon notification, the family court commissioner may refer any person involved in the matter to the director of family court counseling services for assistance in resolving the problem.

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

**(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 such a mediator shall sign and file with the director of family court counseling services and with the court or family court commissioner 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. 767.32 or 767.325, 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) 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 of the child, as defined in s. 48.981 (1) (a) and (b) or 813.122 (1) (a).
2. Interspousal battery as described under s. 940.19 or domestic abuse as defined in s. 813.12 (1) (a).
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.

**(9) PROHIBITED ISSUES IN MEDIATION.** If mediation is provided by a mediator assigned under sub. (6), 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) 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 of the child, as defined in s. 48.981 (1) (a) and (b) or 813.122 (1) (a).

2. There is evidence of interspousal battery as described under s. 940.19 or domestic abuse as defined in s. 813.12 (1) (a).

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 which resolves issues of legal custody or periods of physical placement between the parties 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 is in the best interest of the child based on the information presented to the mediator and accurately reflects the agreement made between the parties. The court may approve or reject the agreement, 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. The court shall promptly appoint a guardian ad litem under s. 767.045. After the appointment 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 OR FAMILY COURT COMMISSIONER** Except as provided in sub. (8), referring parties to mediation under this section does not affect the power of the court or family court commissioner 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.

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

(b) The person or entity investigating the parties under par. (a) shall complete the investigation and submit the results to the court. The court shall make the results available to both parties. The report shall be a part of the record in the action unless the court orders otherwise.

(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.

**(15) APPLICABILITY** This section applies to each county on the date established by that county, or on June 1, 1989, whichever is earlier.

**History:** 1987 a. 355; 1989 a. 56; 1991 a. 269; Sup. Ct. Order No. 93-03, 179 W (2d) xv.

**NOTE:** 1987 Wis. Act 355, which created this section, contains 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

**767.115 Educational program on the effects of divorce on children.** (1) At any time during the pendency of an action affecting the family in which a minor child is involved and in which the court or family court commissioner determines that it is appropriate and in the best interest of the child, the court or family court commissioner, on its own motion, may order the parties to attend a program specified by the court or family court commissioner concerning the effects on a child of a dissolution of the marriage. A program under this subsection 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 or family court commissioner 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.

(2) Notwithstanding s. 767.07, the court or family court commissioner may require the parties to attend a program under sub. (1) as a condition to the granting of a final judgment or order in the action affecting the family that is pending before the court or family court commissioner.

**History:** 1993 a. 225

**767.12 Trial procedure.** (1) **PROCEEDINGS** In actions affecting the family, all hearings and trials to determine whether judgment shall be granted, except hearings under s. 767.13 (5), shall be before the court. The testimony shall be taken by the reporter and shall be written out and filed with the record if so ordered by the court. Custody proceedings shall receive priority in being set for hearing.

(2) **IRRETRIEVABLE BREAKDOWN** (a) If both of the parties 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.

(b) If the parties 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.

1. If the court finds no reasonable prospect of reconciliation, it shall make a finding that the marriage is irretrievably broken; or

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.

(3) **BREAKDOWN OF MARITAL RELATIONSHIP** If both of the parties 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.

**History:** Sup. Ct. Order, 67 W (2d) 585, 756 (1975); 1977 c. 105; 1979 c. 32 s. 50; 1979 c. 352 s. 39; Stats. 1979 s. 767.12; 1983 a. 436; 1989 a. 132.

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

**767.125 Order for appearance of litigants.** Unless nonresidence in the state is shown by competent evidence, service is by publication, or the court shall for other good cause otherwise order, both parties in actions affecting the family shall be required to appear upon the trial. An order of the court or family court commissioner to that effect shall accordingly be procured by the moving party, and shall be served upon the nonmoving party before the trial. In the case of a joint petition the order is not required.

**History:** 1977 c. 105; 1979 c. 32 s. 50; 1979 c. 196; 1979 c. 352 s. 39; Stats. 1979 s. 767.125.

**767.13 Family court commissioner; appointment; powers; oaths; assistants.** (1) COUNTRIES OTHER THAN MILWAUKEE (a) *Appointment.* In each county, except in a county having a population of 500,000 or more, the circuit judges for the county, subject to the approval of the chief judge of the judicial administrative district, shall, by order filed in the office of the clerk of the circuit court on or before the first Monday of July of each year, appoint some reputable attorney of recognized ability and standing at the bar as the family court commissioner for the county.

(b) *Powers; civil service; oath; temporary appointment; assistants.* The family court commissioner, by virtue of the office and to the extent required for the performance of the duties, has the powers of a court commissioner. The family court commissioner is in addition to the maximum number of court commissioners permitted by s. 757.68. The office of the family court commissioner, or any assistant commissioner, may be placed under a county civil service system by resolution of the county board. Before entering upon the discharge of the duties the family court commissioner shall take and file the official oath. The person appointed shall continue to act until a successor is appointed and qualified; except that in the event of disability or extended absence the judges may appoint another reputable attorney to act as temporary family court commissioner. The county board may provide that one or more assistant family court commissioners shall be appointed by the circuit judges for the county, subject to the approval of the chief judge of the judicial administrative district. An assistant family court commissioner shall have the same qualifications as the commissioner and shall take and file the official oath.

(2) MILWAUKEE COUNTY (a) *Appointment; assistants; civil service.* In counties having a population of 500,000 or more, there is created in the classified civil service the office of family court commissioner and such additional assistant family court commissioners as the county board shall determine and authorize, who shall be appointed from the membership of the bar residing in the county by the chief judge of the judicial administrative district under ss. 63.01 to 63.17.

(b) *Oath; powers; salary; unavailability; duties.* Before entering upon the performance of their duties, the family court commissioner and assistant family court commissioners shall take and file the official oath. The family court commissioner and assistant family court commissioners shall, by virtue of their respective positions and to the extent required for the performance of their duties, each have the powers of a court commissioner. They shall receive such salary as may be fixed by the county board, shall perform their duties under the direction of the chief judge of the judicial administrative district or a designee and shall be furnished with quarters and necessary office furnishings and supplies. The county board shall provide them their necessary stenographic and investigational service. When the family court commissioner is unavailable, any assistant family court commissioner shall perform all the duties and have all the powers of the family court commissioner as directed by the commissioner or by the chief judge

of the judicial administrative district or other judge as the chief judge may designate. In addition to the duties of the family court commissioner under this chapter, the family court commissioner shall perform other duties as the chief judge of the judicial administrative district, or other judge as the chief judge may designate, directs.

(3) MENOMINEE COUNTY Menominee county shall be attached to Shawano county to the extent of office and functions of the family court commissioner, and the duly appointed family court commissioner of Shawano county shall serve as family court commissioner for Menominee county with all the duties, rights and power of the family court commissioner therein; and no family court commissioner shall be appointed in Menominee county, the county not being organized for that purpose.

(4) RETIRED JUDGES In any county one or more retired or former judges or retired family court commissioners may be appointed as temporary or temporary assistant family court commissioners by a majority of the judges of the county subject to the approval of the chief judge of the judicial administrative district. The temporary or temporary assistant family court commissioners shall be compensated by the county.

(5) JUDGMENTS IN CERTAIN ACTIONS AFFECTING THE FAMILY (a) *Divorce.* On authority delegated by a judge, which may be by a standard order, and with the approval of the chief judge of the judicial administrative district, a family court commissioner may preside at any hearing held to determine whether a judgment of divorce shall be granted, if both parties state that the marriage is irretrievably broken and that all material issues, including but not limited to division of property or estate, legal custody, physical placement, child support, spousal maintenance and family support, are resolved or if one party does not participate in the action for divorce. The family court commissioner may grant and enter judgment in any action over which he or she presides under this paragraph unless the judgment modifies an agreement between the parties on material issues. If the family court commissioner does not approve an agreement between the parties on material issues, the action shall be certified to the court for trial.

(b) *Enforcement or revision; maintenance, custody, physical placement and visitation.* On authority delegated by a judge, which may be by a standard order, a family court commissioner may conduct hearings and enter judgments in actions for enforcement of, or revision of judgment for, maintenance, custody, physical placement or visitation.

(c) *Establishment, enforcement or revision; paternity and support.* Except when otherwise ordered by a judge, a family court commissioner may conduct hearings and enter orders and judgments in actions to establish paternity, in actions to establish or enforce a child support or a family support obligation and in actions to revise orders or judgments for child support or family support.

(6) REVIEW OF THE DECISIONS OF THE FAMILY COURT COMMISSIONER Upon the motion of any party any decision of the family court commissioner shall be reviewed by the judge of the branch of the court to which the case has been assigned. Upon the motion of any party any such review shall include a new hearing on the subject of the decision, order or ruling.

(7) COOPERATION Each family court commissioner shall cooperate with the county and the department of health and social services to ensure that all dependent children receive reasonable and necessary child support.

**History:** 1975 c. 39; 199; 1977 c. 187 s. 135; 1977 c. 273; 1977 c. 323 s. 16; 1977 c. 449; 1979 c. 32 s. 50; 1979 c. 96, 196; Stats. 1979 s. 767.13; 1983 a. 436; 1985 a. 29; 1987 a. 27, 355; Sup. Ct. Order, 158 W (2d) xxv (1990); 1993 a. 481.

Family court commissioners, except those appointed under (4), are county employees and subject to mandatory retirement. State ex rel. Sheets v. Fay, 54 W (2d) 642, 196 NW (2d) 651.

Party may record proceedings, but commissioner may limit recording to extent it interferes with achievement of reasonable settlement. Forsythe v. Family Court Com'r, 131 W (2d) 322, 388 NW (2d) 580 (1986).

Upon motion under (6), trial court must hold new hearing and may not rely upon proceedings before court commissioner. Marriage of Long v. Wasielewski, 147 W (2d) 57, 432 NW (2d) 615 (Ct. App. 1988).

Family court commissioner is without authority to charge \$15 fee to hear order to show cause in domestic relations case 61 Atty. Gen. 358.

**767.14 Service on and appearance by family court commissioner.** In any action affecting the family, each party shall, either within 20 days after making service on the opposite party of any petition or pleading or before filing such petition or pleading in court, serve a copy of the same upon the family court commissioner of the county in which the action is begun, whether such action is contested or not. No judgment in any such action shall be granted unless this section is complied with except when otherwise ordered by the court. Such commissioner may appear in an action under this chapter when appropriate; and shall appear when requested by the court.

History: 1977 c. 105; 1979 c. 32 s. 50; 1979 c. 352 s. 39; Stats. 1979 s. 767.14

**767.145 Enlargement of time. (1)** After the expiration of the period specified by the statute, the court may in its discretion, upon petition and without notice, extend the time within which service shall be made upon the family court commissioner.

**(2)** Except as provided in s. 767.456, extension of time under any other circumstances shall be governed by s. 801.15 (2), except that 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.

History: Sup. Ct. Order, 67 W (2d) 585, 775 (1975); 1979 c. 32 s. 50; 1979 c. 196; Stats. 1979 s. 767.145; 1983 a. 447.

**767.15 Service on child support program. (1)** In any action affecting the family in which either party is a recipient of aid under s. 49.19 or 49.45, each party shall, either within 20 days after making service on the opposite party of any motion or pleading requesting the court or family court commissioner 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 upon the child support program designee under s. 59.07 (97) of the county in which the action is begun.

**(2)** In any appeal of any 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 health and social services of the appeal by sending a copy of the notice of appeal to the department.

**(3)** No judgment in any action affecting the family may 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.

**767.16 Family court commissioner or law partner; when interested; procedure.** Neither a family court commissioner nor a partner may appear in any action affecting the family in any court held in the county in which the family court commissioner is acting, except when authorized to appear by s. 767.14. In case the commissioner or a partner shall be in any way interested in such action, the presiding judge shall appoint some reputable attorney to perform the services enjoined upon such family court commissioner and such attorney, so appointed, 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

**767.17 Family court commissioner; salary.** In counties having a population of less than 500,000, the county board shall by resolution provide an annual salary for the family court commissioner whether on a full or part-time basis and may furnish an office with necessary office furnishings, supplies and stenographic services and may also by resolution prescribe other duties not in conflict with the duties as family court commissioner.

History: 1979 c. 32 s. 50; 1979 c. 176; Stats. 1979 s. 767.17

See note to 59.47, citing 61 Atty. Gen. 443.

**767.19 Record; impounding. (1)** No record or evidence in any case shall be impounded, or access thereto refused,

except by special written order of the court made in its discretion in the interests of public morals. And when impounded no officer or other person shall permit a copy of any of the testimony or pleadings, or the substance thereof, to be taken by any person other than a party to the action, or his or her attorney of record, without the special order of the court.

**(2)** 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: 1977 c. 105, 273; 1979 c. 32 s. 50; 1979 c. 352 s. 39; Stats. s. 767.19

**767.20 Name of spouse.** 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

Women's names in Wisconsin: In Re Petition of Kruzal MacDougall, 1975 WBB No. 4.

**767.21 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. 767.32 (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 shall be 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.

Full faith and credit is not applicable where a decree or judgment is obtained in a jurisdiction outside of the U.S. Estate of Steffke, 65 W (2d) 199, 222 NW (2d) 628.

**767.22 Uniform divorce recognition act. (1)** A divorce obtained in another jurisdiction shall be of no force or effect in this state, if the court in such 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 that a person obtaining a divorce in another jurisdiction was (a) domiciled in this state within 12 months prior to the commencement of the proceeding therefor, and resumed residence in this state within 18 months after the date of the person's departure therefrom, or (b) at all times after the person's departure from this state, and until the person's return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

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

**(4)** 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.

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

**767.23 Temporary orders for support of spouse and children; suit money; attorney fees.** (1) Except as provided in ch. 822, in every action affecting the family, the court or family court commissioner may, during the pendency thereof, 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. 767.24 (3). The court or family court commissioner may order joint legal custody without the agreement of the other party and without the findings required under s. 767.24 (2) (b) 2. This order may not have a binding effect on a final custody determination.

(am) Granting periods of physical placement to a party specified in s. 767.24 (4).

(b) Notwithstanding ss. 767.085 (1) (j) and 767.087 (1) (c), prohibiting the removal of minor children from the jurisdiction of the court.

(c) Requiring either party or both parties to make payments for the support of minor children, which payment amounts may be expressed as a percentage of parental income or as a fixed sum, or as a combination of both in the alternative by requiring payment of the greater or lesser of either a percentage of parental income or a fixed sum.

(d) Requiring either party to pay for the maintenance of the other party. This maintenance 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. 767.261.

(f) Requiring either party to execute an assignment of income under s. 767.265 or an authorization for transfer under s. 767.267.

(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. 767.085 (1) (i) and 767.087 (1) (b), prohibiting either party from disposing of assets within the jurisdiction of the court.

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

(k) 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.

NOTE: Par. (L) is created eff. 1-1-96 by 1993 Wis. Act 481.

(1g) Notwithstanding 1987 Wisconsin Act 355, section 73, as affected by 1987 Wisconsin Act 364, the parties may agree to the adjudication of a temporary order under this section in an action affecting the family that is pending on May 3, 1988.

(1m) If a family court commissioner believes that a temporary restraining order or injunction under s. 813.12 is appropriate in an action, the 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 family court commissioner shall submit the motion to the court within 5 working days.

(1n) Before making any temporary order under sub. (1), the court or family court commissioner shall consider those factors which the court is required by this chapter to consider before entering a final judgment on the same subject matter. If the court or family court commissioner 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 of health and social services under s. 46.25 (9), the court or family court commissioner shall comply with the requirements of s. 767.25 (1n). A temporary order under sub. (1) may be

based upon the written stipulation of the parties, subject to the approval of the court or the family court commissioner. Temporary orders made by the family court commissioner may be reviewed by the court as provided in s. 767.13 (6).

(2) 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 thereafter and shall be accompanied by an affidavit stating the basis for the request for relief.

(3) (a) Upon making any order for dismissal of an action affecting the family or for substitution of attorneys in an action affecting the family or for vacation of a judgment theretofore granted in any such action, the court shall prior to or in its order render and grant separate judgment in favor of any attorney who has appeared for a party to the action and in favor of any 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 therefor.

(b) Upon making any order for dismissal of an action affecting the family or for vacation of a judgment granted in any such order, the court shall, prior to or in its order of dismissal or vacation, also 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: 1971 c. 149; 1971 c. 211 s. 126; 1971 c. 220, 307; 1975 c. 283; Sup. Ct. Order, 73 W (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.

Where a guardian ad litem is appointed where the issue of custody of a child is disputed, his fee should be divided between both parties when their ability to pay is equal. Lacey v. Lacey, 45 W (2d) 378, 173 NW (2d) 142.

An order for attorney's fees is enforceable by contempt; if the judgment only refers to a stipulation for attorney's fees, it is not so enforceable. The court cannot enter a judgment in favor of the attorneys directly. Before a contempt order is issued the defendant must have notice of an application for it which must be made by the wife to whom the fees are payable. O'Connor v. O'Connor, 48 W (2d) 535, 180 NW (2d) 735.

Order directing the husband to contribute \$2,000 to the wife's attorney's fees is not an abuse of discretion. Tesch v. Tesch, 63 W (2d) 320, 217 NW (2d) 647.

Denial of the wife's motion for attorneys' fees to prosecute the wife's appeal is held to constitute an abuse of discretion, since the issues in the case were vigorously contested and in no way frivolous. Markham v. Markham, 65 W (2d) 735, 223 NW (2d) 616.

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

**767.24 Custody and physical placement.** (1) GENERAL PROVISIONS. In rendering a judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (1) (e), 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.

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

(b) The court may give joint 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 joint legal custody.

2. The parties do not agree to joint legal custody, but one party requests joint legal custody and the court specifically finds all of the following:

a. Both parties are capable of performing parental duties and responsibilities and wish to have an active role in raising the child.

b. No conditions exist at that time which would substantially interfere with the exercise of joint legal custody.

c. The parties will 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 of the child as defined in s. 48.981 (1) (a) and (b) or 813.122 (1) (a) or evidence

of interspousal battery as described under s. 940.19 or domestic abuse as defined in s. 813.12 (1) (a) creates a rebuttable presumption that the parties will not be able to cooperate in the future decision making required. This presumption may be rebutted by clear and convincing evidence that the abuse will not interfere with the parties' ability to cooperate in the future decision making required.

**(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), or to a licensed child welfare agency. 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.

(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, date and purpose of the hearing to the agency that prepared the report, the child's parents, the child, if he or she is 12 years of age or over, and the child's foster parent, treatment foster parent or the operator of the facility in which 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) except as provided in s. 767.29 (3).

**(4) ALLOCATION OF PHYSICAL PLACEMENT** (a) 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. In determining the allocation of periods of physical placement, the court shall consider each case on the basis of the factors in sub. (5).

(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 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.

(d) If the court grants periods of physical placement to more than one parent, it shall order a parent with legal custody and physical placement rights to provide the notice required under s. 767.327 (1).

**(5) FACTORS IN CUSTODY AND PHYSICAL PLACEMENT DETERMINATIONS.** 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 potential custodian over the other on the basis of the sex or race of the custodian.

The court shall consider reports of appropriate professionals if admitted into evidence when legal custody or physical placement is contested. The court shall consider the following factors in making its determination:

(a) The wishes of the child's parent or parents.

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

(c) 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.

(d) The child's adjustment to the home, school, religion and community.

(e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.

(f) The availability of public or private child care services.

(g) Whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.

(h) Whether there is evidence that a party engaged in abuse of the child, as defined in s. 48.981 (1) (a) and (b) or 813.122 (1) (a).

(i) Whether there is evidence of interspousal battery as described under s. 940.19 or domestic abuse as defined in s. 813.12 (1) (a).

(j) Whether either party has or had a significant problem with alcohol or drug abuse.

(k) Such other factors as the court may in each individual case determine to be relevant.

**(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 (1), 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 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.

**(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. 55.07 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.

**(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.

**(9) APPLICABILITY** Notwithstanding 1987 Wisconsin Act 355, section 73, as affected by 1987 Wisconsin Act 364, the parties may agree to the adjudication of a custody or physical placement order

under this section in an action affecting the family that is pending on May 3, 1988

**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.

**NOTE:** 1987 Wis. Act 355, which made many changes in this section, contains a "legislative declaration" in section 1 and explanatory notes.

Impropriety of the award of custody of the child to the mother cannot be predicated on the guardian ad litem's contrary recommendation *Heiting v. Heiting*, 64 W (2d) 110, 218 NW (2d) 334.

The award of custody to the father was reversible error where the trial court should have recognized the rule of comity and declined to exercise its jurisdiction *Sheridan v. Sheridan*, 65 W (2d) 504, 223 NW (2d) 557.

See note to 767.05, citing *LaChapell v. Mawhinney*, 66 W (2d) 679, 225 NW (2d) 501.

Res judicata is not to be applied to custody matters with same strictness as to other matters. *Kuesel v. Kuesel*, 74 W (2d) 636, 247 NW (2d) 72.

See note to 767.045, citing *Allen v. Allen*, 78 W (2d) 263, 254 NW (2d) 244.

See note to 767.245, citing *Bahr v. Galonski*, 80 W (2d) 72, 257 NW (2d) 869.

Consideration of evidence concerning mother's attempts to frustrate father's visitation privileges was proper in awarding custody. *Marotz v. Marotz*, 80 W (2d) 477, 259 NW (2d) 524.

In contesting child custody where the award was by stipulation, full-scale hearing is necessary *Haugen v. Haugen*, 82 W (2d) 411, 262 NW (2d) 769.

Court may not order custodial parent to live in designated part of state or else lose custody of children. In re Marriage of Groh v. Groh, 110 W (2d) 117, 327 NW (2d) 655 (1983).

See note to 767.01, citing In re Marriage of Biel v. Biel, 114 W (2d) 191, 336 NW (2d) 404 (Ct. App. 1983).

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

Custody and visitation are controlled by statute and case law and cannot be contracted away; co-parenting contract between parent and non-parent unenforceable. In re Interest of Z.J.H., 162 W (2d) 1002, 471 NW (2d) 202 (1991).

Revision of 767.24 allowing joint custody in cases where both parties did not agree was not a "substantial change in circumstances" justifying change to joint custody *Licary v. Licary*, 168 W (2d) 686, 484 NW (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 W (2d) 373, NW (2d) (Ct. App. 1993).

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).

### 767.245 Visitation rights of certain persons.

(1) 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.

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

**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.

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

Non-parent may not seek visitation absent underlying action affecting family. In re Interest of Z.J.H., 162 W (2d) 1002, 471 NW (2d) 202 (1991). But see also Grandparental Visitation of C.G.F., 168 W (2d) 62, NW (2d) 803 (1992) regarding grandparent rights.

The visitation petition of a custodial parent's widow did not meet the criteria of sub. (1) where, prior to the custodial parent's death the non-custodial parent had filed a motion to revise custody; s. 880.155 governs visitation in the event of a parent's death. In re Marriage of Cox v. Williams, 177 W (2d) 433, 502 NW (2d) 128 (1993).

A paternity case where 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 W (2d) 666, 512 NW (2d) 189 (Ct. App. 1993).

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.

**767.25 Child support.** (1) Whenever the court approves a stipulation for child support under s. 767.10, enters a judgment of annulment, divorce or legal separation, or enters an order or a judgment in an action under s. 767.02 (1) (f) or (j) or 767.08, 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 may be expressed as a percentage of parental income or

as a fixed sum, or as a combination of both in the alternative by requiring payment of the greater or lesser of either a percentage of parental income or a fixed sum.

(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) (1) (B), 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 sub. (4m) 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.

(1g) 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 to the department of health and social services, or the county child and spousal support agency, under s. 46.25 (2m).

(1j) Except as provided in sub. (1m), the court shall determine child support payments by using the percentage standard established by the department of health and social services under s. 46.25 (9).

(1m) 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 as determined under s. 767.255.

(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) 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 day 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. 767.24.

(f) The physical, mental and emotional health needs of the child, including any costs for health insurance as provided for under sub. (4m).

(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) 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) 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) Violation of physical placement rights by the custodial parent does not constitute reason for failure to meet child support obligations.

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

(4m) (a) In this subsection, "health insurance" does not include medical assistance provided under ch. 49.

(b) In addition to ordering child support for a child under sub. (1), the court shall specifically assign responsibility for and direct the manner of payment of the child's health care expenses. In making this assignment, the court shall consider whether or not 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. 767.10, enters a judgment of annulment, divorce or legal separation, or enters an order or a judgment in an action under s. 767.02 (1) (f) or (j) or 767.08, 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 paragraph. 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 paragraph 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 which are in addition to and not inconsistent with this paragraph.

NOTE: Par. (b) is amended eff. 1-1-96 by 1993 Wis. Act 481 to read:

(b) In addition to ordering child support for a child under sub. (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. 767.10, enters a judgment of annulment, divorce or legal separation, or enters an order or a judgment in an action under s. 767.02 (1) (f) or (j) or 767.08, 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 subsection. 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 subsection 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 which are in addition to and not inconsistent with this subsection.

(c) 1. 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. 767.265 (3h), or sent to the clerk of court 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 shall send notice of assignment in the manner provided under s. 767.265 (2r) and may include the notice of assignment under this subdivision with a notice of assignment under s. 767.265. The clerk of court shall keep a record of all moneys received and disbursed by the clerk for health care expenses that are directed to be paid to the clerk.

2. 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 clerk of court may provide notice of assignment in the manner provided under s. 767.265 (2r) for the withholding from income of the amount necessary to pay the health insurance premiums. The notice of assignment under this subdivision may be sent with or included as part of any other notice of assignment under s. 767.265, if appropriate. A person who receives notice of assignment under this subdivision shall send the withheld health insurance premiums to the appropriate health care insurer, provider or plan, as provided in s. 767.265 (3h).

NOTE: Par. (c) is created eff. 1-1-96 by 1993 Wis. Act 481.

(d) 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:

1. 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.

2. 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 of health and social services or the county designee under s. 59.07 (97).

3. 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.

(e) 1. 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 ss. 49.45 to 49.47 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 of health and social services or any other person who paid for the services on behalf of the child, the department of health and social services may obtain a judgment against the parent for the amount of the 3rd party payment.

2. Section 767.265 (4) applies to a garnishment based on a judgment obtained under subd. 1.

(5) Liability for past support shall be limited to the period after the birth of the child.

(6) A party ordered to pay child support under this section shall pay simple interest at the rate of 1.5% per month on any amount unpaid, commencing the first day of the 2nd month after the month in which the amount was due. 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 clerk of court under s. 767.29. Except as provided in s. 767.29 (1m), the clerk of court 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 withheld from income under s. 767.265 or under similar laws of another state. If payment is not made through income withholding, the clerk shall first apply child support payments received 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.

(7) An order of joint legal custody under s. 767.24 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.

A provision in a judgment as to education of children past the age of majority, inserted pursuant to stipulation of the parties, cannot later be challenged and can be

enforced by contempt proceedings. *Bliwas v. Bliwas*, 47 W (2d) 635, 178 NW (2d) 35.

Where parents each own 1/2 interest in future proceeds of real estate and state contributes to child support, court may order only noncustodial parent to pay child support in form of accumulating real estate lien in favor of state. *State ex rel. v. Reible*, 91 W (2d) 394, 283 NW (2d) 427 (Ct. App. 1979).

Trial court abused its discretion by setting child support payments without considering needs of the children or father's ability to pay. *Edwards v. Edwards*, 97 W (2d) 111, 293 NW (2d) 160 (1980).

Sub. (4) has retroactive effect. *Behnke v. Behnke*, 103 W (2d) 449, 309 NW (2d) 21 (Ct. App. 1981).

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

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

Federal Supplemental Security Income may not be considered economic resource for purposes of computing child support obligation; however, seek-work order may be appropriate. *Marriage of Langlois v. Langlois*, 150 W (2d) 101, 441 NW (2d) 286 (Ct. App. 1989).

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

See note to 767.32, citing *Marriage of Kuchenbecker v. Schultz*, 151 W (2d) 868, 447 NW (2d) 80 (Ct. App. 1989).

On request for modification under (1m), it was error for trial court to consider post-high school educational expenses in setting support; consideration of expenses incurred by child as adult is error. In re *Marriage of Resong v. Vier*, 157 W (2d) 382, 459 NW (2d) 591 (Ct. App. 1990).

Divorce stipulation waiving or setting ceiling on child support and preventing modification is against public policy and will not be enforced. In re *Marriage of Ondrasek v. Tenneson*, 158 W (2d) 690, 462 NW (2d) 915 (Ct. App. 1990).

Trial court's use of computer program to analyze financial evidence approved. In re *Marriage of Bisone v. Bisone*, 165 W (2d) 114, 477 NW (2d) 59 (Ct. App. 1991).

Stepparent has no legal obligation to support a stepchild; under appropriate circumstances the theory of equitable estoppel may apply to cases involving child support. In re *Marriage of Ulrich v. Cornell*, 168 W (2d) 792, 484 NW (2d) 546 (1992).

In joint legal custody situation the parent with primary physical custody may be ordered to pay child support. In re *Marriage of Matz v. Matz*, 166 W (2d) 326, 479 NW (2d) 245 (Ct. App. 1991).

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 W (2d) 516, 485 NW (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 W (2d) 617, 492 NW (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. In re *Marriage of Evjen v. Evjen*, 171 W (2d) 677, 492 NW (2d) 360 (Ct. App. 1992).

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

Discussion of the "serial family payer" rule adopted under the percentage standards referred to in sub. (1). *Brown v. Brown*, 177 W (2d) 512, 503 NW (2d) 280 (Ct. App. 1993).

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

Where trust distributions are discretionary, neither s. 701.06 (4) (b) or (6) authorizes a court to order a trustee to make distributions for support for a beneficiary's child absent the violation of a court order or judgment by the trust or beneficiary. However, trust income imputed to the beneficiary is subject to a support order regardless of whether a distribution is made to the beneficiary. *Grohmann v. Grohmann*, 180 W (2d) 690, 511 NW (2d) 312 (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 W (2d) 708, 510 NW (2d) 718 (Ct. App. 1993).

A lump sum separation benefit received upon termination of employment was properly considered income subject to the percentage standards for support. *Gohde v. Gohde*, 181 W (2d) 770, 512 NW (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 payor's income but failing to consider the assumed contribution of the same percentage by the payee. *Kjelstrum v. Kjelstrum*, 181 W (2d) 973, 512 NW (2d) 264 (Ct. App. 1994).

A trial court could may 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 W (2d) 20, 515 NW (2d) 480 (Ct. App. 1994).

Parties are free to contract in a settlement agreement that the primary custodian will not have spending discretion over child support if the interests of the children and custodial parent are protected. *Jacquart v. Jacquart*, 183 W (2d) 372, 515 NW (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 payor's income from which support is paid. *Maley v. Maley*, 186 W (2d) 125, 519 NW (2d) 717 (Ct. App. 1994).

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

No-fault divorce: Tax consequences of support, maintenance and property settlement. *Case*, 1977 WBB 11.

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

See also notes to s. 767.32 for decisions regarding postjudgment modifications.

See also Wisconsin Administrative Code Citations published in the Wisconsin Administrative Code for a list of citations to cases citing ch. HSS 80, the percentage standards developed by the Department of Health and Social Services.

**767.253 Seek-work orders.** In an action for modification of a child support order under s. 767.32 or an action in which an order for child support is required under s. 767.25 (1) or 767.51 (3), the court may order either or both parents of the child to seek employment or participate in an employment or training program.

History: 1989 a 212.

**767.254 Unemployed teenage parent. (1)** In this section, "unemployed teenage parent" means a parent who satisfies all of the following criteria:

- (a) Is less than 20 years of age.
- (b) Is unemployed.
- (c) Is financially unable to pay child support.
- (d) Would be ordered to make payments for the support of a child but for par. (c).

**(2)** In an action for revision of a judgment or order providing for child support under s. 767.32 or an action in which an order for child support is required under s. 767.25 (1) or 767.51 (3), the court shall order an unemployed teenage parent to do one or more of the following:

- (a) Register for work at a public employment office established under s. 101.23.
- (b) Apply for jobs.
- (c) Participate in a job training program.

(d) 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: 1991 a 313.

**767.255 Property division. (1)** Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (1) (h), the court shall divide the property of the parties and divest and transfer the title of any such property accordingly. A certified copy of the portion of the judgment that affects title to real estate shall be recorded in the office of the register of deeds of the county in which the lands so affected are situated. The court may protect and promote the best interests of the children by setting aside a portion of the property of the parties in a separate fund or trust for the support, maintenance, education and general welfare of any minor children of the parties.

**(2)** (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) 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 home-making 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. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s. 767.261 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.

**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.

**NOTE: See notes in 1985 Wis. Act 37, marital property trailer bill.**

Accounts receivable of medical clinic in which defendant husband was partner, were properly viewed by trial court as salary of defendant. *Johnson v. Johnson*, 78 W (2d) 137, 254 NW (2d) 198.

Service-connected disability pension is to be considered as earned income and not as an asset to be divided between the parties. *Leighton v. Leighton*, 81 W (2d) 620, 261 NW (2d) 457.

Methods of valuing pension rights discussed. *Bloomer v. Bloomer*, 84 W (2d) 124, 267 NW (2d) 235 (1978).

Support of stepchildren is relevant factor in dividing marital property. *Fuerst v. Fuerst*, 93 W (2d) 121, 286 NW (2d) 861 (Ct. App. 1979).

Trial court did not exercise required discretion in valuing pension fund. *Heatwole v. Heatwole*, 103 W (2d) 613, 309 NW (2d) 380 (Ct. App. 1980).

See note to 767.26, citing *In re Marriage of Lundberg*, 107 W (2d) 1, 318 NW (2d) 918 (1982).

Federal pension in lieu of social security must be included in marital property division. *In re Marriage of Mack v. Mack*, 108 W (2d) 604, 323 NW (2d) 153 (Ct. App. 1982).

Unless divorce decree specifically terminates spouse as beneficiary of life insurance policy and insurance company is notified, spouse's beneficiary status is not affected by divorce decree. *Bersch v. VanKleeck*, 112 W (2d) 594, 334 NW (2d) 114 (1983).

Court may consider cross-purchase formula in partnership agreement in determining value of marital estate, including professional goodwill. *In re Marriage of Lewis v. Lewis*, 113 W (2d) 172, 336 NW (2d) 171 (Ct. App. 1983).

Lien on real estate awarded in divorce judgment was mortgage, not judgment lien, even though term "mortgage" was not used in court order. *Wozniak v. Wozniak*, 121 W (2d) 330, 359 NW (2d) 147 (1984).

This section does not mandatorily require judge to terminate joint tenancy. *In re Marriage of Lutzke v. Lutzke*, 122 W (2d) 24, 361 NW (2d) 640 (1985).

Use of gift money to buy home as joint tenants changed character of money from separate property to marital property. *In re Marriage of Weiss v. Weiss*, 122 W (2d) 688, 365 NW (2d) 608 (Ct. App. 1985). But see *In re Marriage of Zirnigbl*, 165 W (2d) 130, 477 NW (2d) 637 (Ct. App. 1991).

Preuptial agreement entered in 1973 was enforceable and equitable at divorce in 1982. *Hengel v. Hengel*, 122 W (2d) 737, 365 NW (2d) 16 (Ct. App. 1985).

Premarital agreement intended to apply at death was not applicable under (11). *In re Marriage of Levy v. Levy*, 130 W (2d) 523, 388 NW (2d) 170 (1986).

Test adopted to determine whether agreement under (11) is inequitable. *In re Marriage of Button v. Button*, 131 W (2d) 84, 388 NW (2d) 546 (1986).

Premarital agreement was inequitable because parties did not fairly and reasonably disclose assets nor did they have independent knowledge of one another's financial status. *Schumacher v. Schumacher*, 131 W (2d) 332, 388 NW (2d) 912 (1986).

Personal injury claim for medical malpractice is property subject to division. *Marriage of Richardson v. Richardson*, 139 W (2d) 778, 407 NW (2d) 231 (1987).

Trial court permitted to consider former inherited status of divisible property though it has lost exempt status through commingling. *Marriage of Schwartz v. Linders*, 145 W (2d) 258, 426 NW (2d) 97 (Ct. App. 1988).

Increase in value of inherited property attributable to non-owning spouse's efforts is divisible property not subject to non-owning spouse's showing that failure to divide will result in hardship. *In re Marriage of Haldemann*, 145 W (2d) 296, 426 NW (2d) 107 (Ct. App. 1988).

Chapter 766, Marital Property Act, does not supplant divorce property division provisions. *In re Marriage of Kuhlman v. Kuhlman*, 146 W (2d) 588, 432 NW (2d) 295 (Ct. App. 1988).

Gifted and inherited property are subject to division in cases of hardship; party seeking division bears burden of showing that failure to divide will result in financial privation. *In re Marriage of Popp v. Popp*, 146 W (2d) 778, 432 NW (2d) 600 (Ct. App. 1988).

Presumption exists that injured party is entitled to all future payments under structured settlement, but they are subject to 767.255 factors. *In re Marriage of Krebs v. Krebs*, 148 W (2d) 51, 435 NW (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 W (2d) 285, 493 NW (2d) 737 (Ct. App. 1992).

Where gifted or inherited property has appreciated in value during the marriage due to the efforts of the spouses, the appreciation is a part of the marital estate. *Schorer v. Schorer*, 177 W (2d) 387, 501 NW (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 W (2d) 387, 501 NW (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 W (2d) 481, 504 NW (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 W (2d) 481, 504 NW (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 W (2d) 285, 510 NW (2d) 767 (Ct. App. 1993).

Federal law precludes state court from dividing military nondisability retired pay pursuant to state community property laws. *McCarty v. McCarty*, 453 US 210 (1981).

Insured's beneficiary designation under servicemen's group life insurance policy prevailed over constructive trust imposed by state court. *Ridgeway v. Ridgeway*, 454 US 46 (1981).

ERISA did not preempt Wisconsin court order awarding spouse 1/2 of beneficiary's interest in pension. *Sav & Profit Sharing Fund of Sears Emp 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).

No-fault divorce: Tax consequences of support, maintenance and property settlement. Case, 1977 WBB 11.

Preuptial and postnuptial agreements. *Loeb, WBB March 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-out Marital Property Agreements. *Rasmussen, Wis. Law. April, 1994*.

**767.26 Maintenance payments.** Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (1) (g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

- (1) The length of the marriage.
- (2) The age and physical and emotional health of the parties.
- (3) The division of property made under s. 767.255.
- (4) The educational level of each party at the time of marriage and at the time the action is commenced.
- (5) 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.

(6) 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.

(7) The tax consequences to each party.

(8) 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, where such 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.

(9) The contribution by one party to the education, training or increased earning power of the other.

(10) Such other factors as the court may in each individual case determine to be relevant.

**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.

While arrearages under a temporary order for alimony and attorney fees and costs which the husband is required to pay do not constitute part of a wife's division of the estate, they are, nevertheless, a charge against the entire estate. *Tesch v. Tesch*, 63 W (2d) 320, 217 NW (2d) 647.

Obligation to support children is factor in determining amount of maintenance payments. *Besaw v. Besaw*, 89 W (2d) 509, 279 NW (2d) 192 (1979).

Trial court abused discretion by denying mother's choice to remain at home to care for small children. *Hartung v. Hartung*, 102 W (2d) 58, 306 NW (2d) 16 (1981).

Trial court abused discretion by terminating maintenance without sufficiently addressing factors under this section. *Vander Perren v. Vander Perren*, 105 W (2d) 219, 313 NW (2d) 813 (1982).

Compensation for person who supports spouse while spouse is in school can be achieved through both property division and maintenance payments. In re *Marriage of Lundberg*, 107 W (2d) 1, 318 NW (2d) 918 (1982).

Support award was inadequate and, consequently, an abuse of discretion. In *Matter of Marriage of Jasper v. Jasper*, 107 W (2d) 59, 318 NW (2d) 792 (1982).

Trial court may begin maintenance evaluation with proposition that dependent partner may be entitled to 50% of total earnings of both parties. *Bahr v. Bahr*, 107 W (2d) 72, 318 NW (2d) 391 (1982).

Trial court may not consider marital misconduct as relevant factor in granting maintenance payments. *Dixon v. Dixon*, 107 W (2d) 492, 319 NW (2d) 846 (1982).

Maintenance payments to former wife were improperly discontinued solely upon ground of cohabitation with another man. *Van Gorder v. Van Gorder*, 110 W (2d) 188, 327 NW (2d) 674 (1983).

Three formulas approved for calculating maintenance or property division award in cases where one spouse has contributed to other spouse's pursuit of advanced educational degree. *Marriage of Haugan v. Haugan*, 117 W (2d) 200, 343 NW (2d) 796 (1984).

Alcoholic spouse's refusal of treatment is relevant to trial court's determination regarding request for permanent maintenance. *Marriage of DeLaMatter v. DeLaMatter*, 151 W (2d) 576, 445 NW (2d) 676 (Ct. App. 1989).

Military disability payments may be considered in assessing spouse's ability to pay maintenance. In re *Marriage of Weberg v. Weberg*, 158 W (2d) 540, 463 NW (2d) 382 (Ct. App. 1990).

Trial court's use of computer program to analyze financial evidence approved. In re *Marriage of Bisone*, 165 W (2d) 114, 477 NW (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. In re *Marriage of Hefty v. Hefty*, 172 W (2d) 124, 493 NW (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. In re *Marriage of Hefty v. Hefty*, 172 W (2d) 124, 493 NW (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. In re *Marriage of Hefty v. Hefty*, 172 W (2d) 124, 493 NW (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. *Marriage of Forester v. Forester*, 174 W (2d) 78, 497 NW (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 W (2d) 270, 510 NW (2d) 762 (Ct. App. 1993) (Ct. App. 1994).

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 W (2d) 287, 520 NW (2d) 284 (Ct. App. 1994).

The federal tax consequences of divorce. *Meldman, Ryan*, 57 MLR 229.  
No-fault divorce: Tax consequences of support, maintenance and property settlement. *Case*, 1977 WBB 11.

See also notes to s. 767.32 for decisions regarding postjudgment modifications.

**767.261 Family support.** The court may make a financial order designated "family support" as a substitute for child support

orders under s. 767.25 and maintenance payment orders under s. 767.26. A party ordered to pay family support under this section shall pay simple interest at the rate of 1.5% per month on any amount unpaid, commencing the first day of the 2nd month after the month in which the amount was due. 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 clerk of court under s. 767.29. Except as provided in s. 767.29 (1m), the clerk of court 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 withheld from income under s. 767.265 or under similar laws of another state. If payment is not made through income withholding, the clerk shall first apply family support payments received 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.

Offset of excess child support payments against arrears in alimony may be permissible. *Anderson v. Anderson*, 82 W (2d) 115, 261 NW (2d) 817.

**767.262 Award of attorney fees.** (1) 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. 46.25 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. 46.25 (6) or the cost of services rendered by the state or county under s. 49.19.

(2) 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) The court may order that the amount be paid directly to the attorney or to the state or the county providing services under s. 46.25 or 49.19, who may enforce the order in its name.

(4) (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 a county in an action in which the court finds that the record of payments and arrearages kept by the clerk of court under s. 59.39 (9m) is substantially incorrect and that the clerk of court 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.

Allowance of \$2,300 as a contribution to the wife's attorney's fees incurred in the litigation is not deemed excessive where it was obvious that the trial court reasonably believed that a considerable portion of the attorney-fee liability was attributable to the husband who, represented by 4 successive attorneys or firms, caused a needlessly protracted trial, made numerous defense motions, and prosecuted a meritless appeal—an element which, together with others, constituted a firm basis for fixing such contribution. *Martin v. Martin*, 46 W (2d) 218, 174 NW (2d) 468.

An allowance of \$1,000 attorneys fees on appeal, after the award of a generous property settlement, constitutes a penalty for appealing. *Molloy v. Molloy*, 46 W (2d) 682, 176 NW (2d) 292.

Attorney fees on appeal depend on the wife's need, the husband's ability to pay and whether there is reasonable ground for the appeal. *Klipstein v. Klipstein*, 47 W (2d) 314, 177 NW (2d) 57.

A circuit court does not have subject matter jurisdiction in a divorce action to determine attorney's fees between an attorney and client whom the attorney continues to represent in the divorce action. In re *Marriage of Stasey v. Stasey*, 168 W (2d) 37, 483 NW (2d) 221 (1992).

**767.263 Notice of change of employer; change of address; change in ability to pay.** Each order for child support, family support or maintenance payments shall include an order that the payer and payee notify the clerk of court of any

change of address within 10 days of such change. Each order for child support, family support or maintenance payments shall also include an order that the payer notify the clerk of court, within 10 days, of any change of employer and of any substantial change in the amount of his or her income such that his or her ability to pay child support, family support or maintenance is affected. The order shall also include a statement that clarifies 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 is sought.

History: 1977 c. 105; 1979 c. 32 s. 50; Stats. 1979 s. 767.263; 1989 a. 212.

**767.265 Income withholding.** (1) Each order for child support under this chapter, for maintenance payments under s. 767.23 or 767.26, for family support under this chapter, for costs ordered under s. 767.51 (3), for support by a spouse under s. 767.02 (1) (f) or for maintenance payments under s. 767.02 (1) (g), each order for a revision in a judgment or order with respect to child support, maintenance or family support payments under s. 767.32, each stipulation approved by the court or the family court commissioner for child support under this chapter and each order for child or spousal support entered under s. 948.22 (7) constitutes an assignment of all commissions, earnings, salaries, wages, pension benefits, benefits under ch. 102 or 108, lottery prizes that are payable in instalments and other money due or to be due in the future to the clerk of the court where the action is filed. The assignment shall be for an amount sufficient to ensure payment under the order or stipulation and to pay any arrearages due at a periodic rate not to exceed 50% of the amount of support due under the order 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).

(2h) If a court-ordered assignment does not require immediately effective withholding and a payer fails to make a required maintenance, child support, spousal support or family support payment within 10 days after its due date, within 20 days after the payment's due date the court or family court commissioner shall cause the assignment to go into effect and shall send a notice by regular mail to the last-known address of the payer. The notice shall inform the payer that an assignment is in effect and that the payer may, within a 10-day period, by motion request a hearing on the issue of whether the assignment should remain in effect. The court or family court commissioner shall hold a hearing requested under this section within 10 working days after the date of the request. If at the hearing the payer establishes that the assignment is not proper because of a mistake of fact, the court or family court commissioner may direct that the assignment be withdrawn. If the payer does not request a hearing, the court or family court commissioner shall send notice of the assignment to the person from whom the payer receives or will receive money. Either party may, within 15 working days after the date of the decision by a family court commissioner under this section, seek review of the decision by the court with jurisdiction over the action.

(2r) Upon entry of each order for child support, maintenance, family support or support by a spouse 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. 767.267 applies, the court shall provide notice of the assignment by regular mail to the last-known address of the person from whom the payer receives or will receive money. If the clerk of court does not receive the money from the person notified, the court 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) A person who receives notice of assignment under this section 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 clerk of court of the jurisdiction providing notice or, in the case of an amount ordered withheld for health care expenses, to the appropriate health care insurer, provider or plan. Except as provided in sub. (3m), for each payment 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.

NOTE: Sub. (3h) is amended eff. 1-1-96 by 1993 Wis. Act 481 to read:

(3h) A person who receives notice of assignment under this section or s. 767.23 (1) (L), 767.25 (4m) (c) or 767.51 (3m) (c) 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 clerk of court of the jurisdiction providing notice or, in the case of an amount ordered withheld for health care expenses, to the appropriate health care insurer, provider or plan. Except as provided in sub. (3m), for each payment sent to the clerk of court, 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) 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 an amount certain. 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) A withholding assignment or order under this section has priority over any other assignment, garnishment or similar legal process under state law.

NOTE: Sub. (4) is amended eff. 1-1-96 by 1993 Wis. Act 481 to read:

(4) A withholding assignment or order under this section or s. 767.23 (1) (L), 767.25 (4m) (c) or 767.51 (3m) (c) has priority over any other assignment, garnishment or similar legal process under state law.

(6) (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 clerk of court as provided in this section, 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% of the amount not withheld or sent.

NOTE: Par. (a) is amended eff. 1-1-96 by 1993 Wis. Act 481 to read:

(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 clerk of court or the appropriate health care insurer, provider or plan as provided in this section or s. 767.23 (1) (L), 767.25 (4m) (c) or 767.51 (3m) (c), 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% of the amount not withheld or sent.

(b) If an employer who receives an assignment under this section fails to notify the clerk of court within 10 days after an employe 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.

NOTE: Par. (b) is amended eff. 1-1-96 by 1993 Wis. Act 481 to read:

(b) If an employer who receives an assignment under this section or s. 767.23 (1) (L), 767.25 (4m) (c) or 767.51 (3m) (c) fails to notify the clerk of court within 10 days after an employe 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 as a basis for the denial of employment to a person, the discharge of an employe or any disciplinary action against an employe. An employer who denies employment or discharges or disciplines an employe 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 of industry, labor and human relations for enforcement of this paragraph.

NOTE: Par. (c) is amended eff. 1-1-96 by 1993 Wis. Act 481 to read:

(c) No employer may use an assignment under this section or s. 767.23 (1) (L), 767.25 (4m) (c) or 767.51 (3m) (c) as a basis for the denial of employment to a person, the discharge of an employe or any disciplinary action against an employe. An employer who denies employment or discharges or disciplines an employe 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 of industry, labor and human relations for enforcement of this paragraph.

(d) Compliance by the person from whom the payer receives money with the order operates as a discharge of the person's liability to the payer as to that portion of the payer's commission, earnings, salaries, wages, benefits or other money so affected.

(7) A person who receives more than one notice of assignment under sub. (3h) may send all money withheld to the clerk of court in a combined payment, accompanied by any information the clerk of court requires.

(7m) (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 clerk of court 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 clerk of court shall provide notice of the amended withholding assignment or order by regular mail to the payer's employer and to the payer.

(8) In this section, "employer" includes the state and its political subdivisions.

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.

The maximum amount subject to assignment to collect an arrearage is 50% of the support currently due. A 25% wage assignment for current support limits an assignment for arrearages to an additional 12.5% of wages. *Marriage of Schnetzer v. Schnetzer*, 174 W (2d) 458, 497 NW (2d) 772 (Ct. App. 1993).

Mandatory wage assignment provisions of this section are constitutional. 68 *Atty. Gen.* 106.

**767.266 Revocation of nontestamentary disposition provision 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 which provides 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.

History: 1991 a. 301.

NOTE: 1991 Wis. Act 301, which affected this section, contains extensive legislative council notes.

**767.267 Account transfers.** (1) If the court or the family court commissioner determines that income withholding under s. 767.265 is inapplicable, ineffective or insufficient to ensure payment under an order or stipulation specified in s. 767.265 (1), the court or family court commissioner 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 clerk of court. 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 or family court commissioner. The authorization shall include the payer's consent for the financial institution or an officer, employe or agent of the financial institution to disclose information to the court, family court commissioner or clerk of court regarding the account for which the payer has executed the authorization for transfer.

missioner or clerk of court regarding the account for which the payer has executed the authorization for transfer.

NOTE: Sub. (1) is amended eff. 1-1-96 by 1993 Wis. Act 481 to read:

(1) If the court or the family court commissioner determines that income withholding under s. 767.265 is inapplicable, ineffective or insufficient to ensure payment under an order or stipulation specified in s. 767.265 (1), or that income withholding under s. 767.25 (4m) (c) or 767.51 (3m) (c) is inapplicable, ineffective or insufficient to ensure payment of a child's health care expenses, including payment of health insurance premiums, ordered under s. 767.25 (4m) or 767.51 (3m), the court or family court commissioner 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 clerk of court. 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 or family court commissioner. The authorization shall include the payer's consent for the financial institution or an officer, employe or agent of the financial institution to disclose information to the court, family court commissioner or clerk of court regarding the account for which the payer has executed the authorization for transfer.

(2) 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 clerk of court within 10 days after the date on which the funds should have been transferred.

(3) 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) An authorization for transfer under sub. (1) may not be revoked except by court order.

(5) A financial institution or an officer, employe or agent of a financial institution may disclose information to the court, family court commissioner or clerk of court concerning an account for which a payer has executed an authorization for transfer under sub. (1).

(6) No financial institution or officer, employe 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.

**767.27 Disclosure of assets required.** (1) In any action affecting the family, except an action to affirm marriage under s. 767.02 (1) (a), the court shall require each party to furnish, on such standard forms as the court may require, full disclosure of all assets owned in full or in part by either party separately or by the parties jointly. Such disclosure may be made by each party individually or by the parties jointly. Assets required to be disclosed shall include, but shall not be limited to, real estate, savings accounts, stocks and bonds, mortgages and notes, life insurance, interest in a partnership, limited liability company or corporation, tangible personal property, income from employment, 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 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 such returns for prior years.

(1m) In any action affecting the family which 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 which are offered through each party's employer or other organization. This disclosure shall include a copy of any health care policy or plan which names the child as a beneficiary at the time that the disclosure is filed under sub. (2).

(2) Except as provided in sub. (2m), 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 such other time as ordered by the court or family court commissioner. Information contained on such forms shall be updated on the record to the date of hearing.

(2m) In every action in which the court has ordered a party to pay child support under s. 767.25 or 767.51 or family support under s. 767.261 and the circumstances specified in s. 767.075 (1) apply, the court shall require the party who is ordered to pay the support to annually furnish the disclosure form required under this section and may require that party to annually furnish a copy of his or her most recently filed state and federal income tax returns to the designee under s. 59.07 (97) for the county in which the order was entered. In any action in which the court has ordered a party to pay child support under s. 767.25 or 767.51 or family support under s. 767.261, the court may require the party who is ordered to pay the support to annually furnish the disclosure form required under this section and a copy of his or her most recently filed state and federal income tax returns to the party for whom the support has been awarded. A party who fails to furnish the information as required by the court under this subsection may be proceeded against for contempt of court under ch. 785.

(3) (a) Except as provided in par. (b), information disclosed under this section shall be 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 of health and social services under s. 59.395 (7).

(4) Failure by either party timely to file a complete disclosure statement as required by this section shall authorize the court to accept as accurate any information provided in the statement of the other party or obtained under s. 46.25 (2m) by the department of health and social services or the county child and spousal support agency.

(5) If any party deliberately or negligently fails to disclose information required by sub. (1) and in consequence thereof any asset or assets with a fair market value of \$500 or more is omitted from the final distribution of property, the party aggrieved by such 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, said trust to include such terms and conditions as the court may determine. The court shall grant the petition upon a finding of a failure to disclose such 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

**767.275 Disposition of assets prior to action.** In any action affecting the family, except an action to affirm marriage under s. 767.02 (1) (a), any asset with a fair market value of \$500 or more which 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, but which 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, shall be rebuttably presumed to be part of the estate for the purposes of s. 767.255 and shall be subject to the disclosure requirement of s. 767.27. Transfers which resulted in an exchange of assets of substantially equiv-

alent value need not be specifically disclosed where such 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

**767.28 Maintenance, legal custody and support when divorce or separation denied.** In a judgment in an action for divorce or legal separation, although such divorce or legal separation is denied, the court may make such order 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 such children by either spouse out of property or income, as the nature of the case may render just and reasonable. If the court orders child support under this section, the court shall determine the child support payments in a manner consistent with s. 767.25, regardless of the fact that the court has not entered a judgment of divorce or legal separation.

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

**767.29 Maintenance, child support and family support payments, clerk of court, family court commissioner, fees and compensation.** (1) All orders or judgments providing for temporary or permanent maintenance, child support or family support payments shall direct the payment of all such sums to the clerk of the court for the use of the person for whom the same has been awarded. A party securing an order for temporary maintenance, child support or family support payments shall forthwith file the order, together with all pleadings in the action, with the clerk of the court. Except as provided in sub. (1m), the clerk shall disburse the money so received under the judgment or order within 15 days and take receipts therefor, unless the clerk is unable to disburse the moneys because they 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 clerk, which shall be open to inspection by the department of health and social services for the administration of the child and spousal support and establishment of paternity program under s. 46.25, the parties to the action and their attorneys, and the family court commissioner. If the maintenance, child support or family support payments adjudged or ordered to be paid shall not be paid to the clerk at the time provided in the judgment or order, the clerk or the family court commissioner of the county shall take such proceedings as either of them deems advisable 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 counsel who represented each party when the maintenance, child support or family support payments were awarded. In case any fees of officers in any of the proceedings, including the compensation of the family 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 clerk of the court.

(1m) Notwithstanding ss. 767.25 (6), 767.261 and 767.51 (5p), if the clerk of court receives support or maintenance money that exceeds the amount due in the month in which it is received and that the clerk determines is for support or maintenance due in a succeeding month, the clerk 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 or the family court commissioner 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 has applied for or is receiving aid to families with dependent children

and there is an assignment to the state under s. 49.19 (4) (h) 1. b. of the party's right to the support or maintenance money.

(d) The clerk determines that the overpayment should be held until the month when it is due.

(2) If any party entitled to maintenance payments or support money, or both, is receiving public assistance under ch. 49, the party may assign the party's right thereto to the county department under s. 46.215, 46.22 or 46.23 granting such assistance. Such assignment shall be approved by order of the court granting the maintenance payments or support money, and may be terminated in like manner; except that it shall not be terminated in cases where there is any delinquency in the amount of maintenance payments and support money previously ordered or adjudged to be paid to the assignee without the written consent of the assignee or upon notice to the assignee and hearing. When an assignment of maintenance payments or support money, or both, has been approved by the order, the assignee shall be deemed a real party in interest within s. 803.01 but solely for the purpose of securing payment of unpaid maintenance payments or support money adjudged or ordered to be paid, by participating in proceedings to secure the payment thereof. Notwithstanding assignment under this subsection, and without further order of the court, the clerk of court, upon receiving notice that a party or a minor child of the parties is receiving aid under s. 49.19, shall forward all support assigned under s. 49.19 (4) (h) 1. or 49.45 (19) to the department.

(3) If maintenance payments or support money, or both, is ordered to be paid for the benefit of any person, who is committed by court order to an institution or is in confinement, or whose legal custody is vested by court order under ch. 48 in an agency, department or relative, the court or family court commissioner may order such maintenance payments or support money to be paid to the relative or agency, institution, welfare department or other entity having the legal or actual custody of said person, and to be used for the latter's care and maintenance, without the appointment of a guardian under ch. 880.

(4) If an order or judgment providing for the support of one or more children not receiving aid under s. 49.19 includes support for a minor who is the beneficiary of aid under s. 49.19, any support payment made under the order or judgment is assigned to the state under s. 49.19 (4) (h) 1. b. in the amount that is the proportionate share of the minor receiving aid under s. 49.19, except as otherwise ordered by the court on the motion of a party.

**History:** 1971 c. 41 s. 12; Sup. Ct. Order, 67 W (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

Public welfare agency is entitled to collect unpaid alimony and support money which had accumulated prior to the effective date of assignment under (2) and prior to assignor's receipt of welfare assistance. *Schiavo v. Schiavo*, 71 W (2d) 136, 237 NW (2d) 702.

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 W (2d) 150, 242 NW (2d) 907

See note to 785.03, citing *In re Marriage of Biel v. Biel*, 130 W (2d) 335, 387 NW (2d) 295 (Ct. App. 1986)

Sub (1) specifically authorizes family court commissioner to initiate contempt action to enforce child support orders pursuant to 785.06. *State ex rel. Stedman v. Rohner*, 149 W (2d) 146, 438 NW (2d) 585 (1989)

Commissioner acts in public interest, not as private advocate, when bringing remedial contempt proceeding to enforce existing order or judgment under (1). 76 Atty. Gen. 21

**767.293 Affidavit for certain arrearages.** (1) If 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 or the family court commissioner for child support under this chapter requires a payer to pay child or family support in an amount that is expressed as a percentage of parental income, the payee, including the state or its designee under s. 59.07 (97) if the state is a real party in interest under s. 767.075 (1), may establish an arrearage by filing an affidavit in the action in which the order for the payment of support was entered or the stipulation for support was approved. The affidavit shall state the amount of the arrearage and the facts supporting a reasonable basis on which the arrearage was determined and may state the payer's current

income and the facts supporting a reasonable basis on which the payer's current income was determined. Not later than 60 days after filing the affidavit, the payee shall serve the affidavit on the payer in the manner provided in s. 801.11 (1) (a) or (b) or by sending the affidavit by registered or certified mail to the last-known address of the payer. After the payee files a proof of service on the payer, the court shall send a notice to the payer by regular, registered or certified mail to the payer's last-known address. The notice shall provide that, unless the payer requests a hearing to dispute the arrearage or the amount of the arrearage not later than 20 days after the date of the notice, the court or family court commissioner may enter an order against the payer in the amount stated in the affidavit and may provide notice of assignment under s. 767.265. The notice shall include the mailing address to which the request for hearing must be mailed or delivered in order to schedule a hearing under sub. (2).

(2) If the payer makes a timely request for a hearing, the court or family court commissioner shall hold a hearing on the issue of the amount of the arrearage, if any. If the court or family court commissioner determines after hearing that an arrearage exists, the court or family court commissioner shall enter an order establishing an arrearage in the amount determined by the court or family court commissioner and may send notice of assignment under s. 767.265.

(3) If the court or family court commissioner sends the notice under sub. (1) and the payer fails to make a timely request for a hearing, the court or family court commissioner, if the affidavit demonstrates to the satisfaction of the court or family court commissioner that an arrearage exists, shall enter an order establishing an arrearage in the amount determined by the court or family court commissioner and may send notice of assignment under s. 767.265. The court or family court commissioner shall send the order to the payer's last-known address and shall inform the payer whether an assignment is in effect and that the payer may, within a 10-day period, by motion request a hearing on the issue of whether the order should be vacated or the assignment should be withdrawn.

(4) An assignment under sub. (2) or (3) shall replace any assignment in effect for the order or stipulation on which the arrearage is based. An assignment under sub. (2) or (3) shall be for an amount sufficient to ensure payment under the order or stipulation on which the arrearage is based and to pay the arrearage determined under sub. (2) or (3), together with any arrearages due before the proceeding under this section, at a periodic rate not to exceed 50% of the amount of support due under the order or stipulation on which the arrearage determined under sub. (2) or (3) is based, except that the total amount withheld under the assignment may not leave the payer at an income below the poverty line established under 42 USC 9902 (2).

(5) The determination of an arrearage under this section may be enforced under s. 767.30 or 767.305.

(6) Section 814.025 applies to the filing of an affidavit under this section.

**History:** 1993 a. 481

**767.295 Work experience and job training orders and child support orders in certain cases.** (1) In this section, "custodial parent" means a parent who lives with his or her child for substantial periods of time.

(2) (a) In an action for modification of a child support order under s. 767.32, an action in which an order for child support is required under s. 767.25 (1) or 767.51 (3) or a contempt of court proceeding to enforce a child support or family support order in a county that contracts under s. 46.253 (2), the court may order a parent who lives in that county and who is not a custodial parent to register for a work experience and job training program under s. 46.253, if all of the following conditions are met:

1. The parent is able to work full time.
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 of health and social services.

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. (a), it shall order the parent to pay child support equal to the amount determined by applying the percentage standard established under s. 46.25 (9) to the income a person would earn by working 40 hours per week for the federal minimum hourly wage under 29 USC 206 (a) (1) 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. 46.253 for 16 weeks, whichever comes first. The court shall provide in its order that the parent must make child support payments calculated under s. 767.25 (1j) or (1m) or 767.51 (4m) or (5) after the obligation to make payments ordered under this paragraph ceases.

History: 1987 a 413; 1993 a 16, 481.

**767.30 Enforcement of payments ordered.** (1) If the court orders any payment for support under s. 48.355 (2) (b) 4., 48.357 (5m) or 48.363 (2), support or maintenance under s. 767.08, child support, family support or maintenance under s. 767.23, child support under s. 767.25, maintenance under s. 767.26, family support under s. 767.261, attorney fees under s. 767.262, paternity obligations under s. 767.51, support arrearages under s. 767.293 or child or spousal support under s. 948.22 (7), the court may provide that any payment be paid in the amounts and at the times as it considers expedient.

(2) The court may impose liability for any payment listed under sub. (1) as a charge upon any specific real estate of the party liable or may require that party to give sufficient security for payment. However, no such charge upon real estate may become effectual 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) If the party fails to pay a payment ordered under sub. (1) 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.

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.

A court is justified in requiring the creation of a trust to secure the payment of support money where the husband has a record of failing to obey prior court orders. *Foregger v. Foregger*, 48 W (2d) 512, 180 NW (2d) 578.

See note to 767.25, citing *State ex rel. v. Reible*, 91 W (2d) 394, 283 NW (2d) 427 (Ct. App. 1979).

Court had power to order father to look for additional or alternative employment or be held in contempt. Proper contempt procedures discussed. *Marriage of Dennis*, 117 W (2d) 249, 344 NW (2d) 128 (1984).

**767.305 Enforcement; contempt proceedings.** In all cases where a party has incurred a financial obligation under s. 48.355 (2) (b) 4., 48.357 (5m), 48.363 (2), 767.23, 767.25, 767.255, 767.26, 767.261, 767.262 or 767.293 and has failed within a reasonable time or as ordered by the court to satisfy such obligation, and where the wage assignment proceeding under s.

767.265 and the account transfer under s. 767.267 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 some reasonable time therein specified why he or she should not be punished for such misconduct as provided in 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.

Contempt is appropriate means to enforce child support arrears after child has reached majority. *Marriage of Griffin v. Reeve*, 141 W (2d) 699, 416 NW (2d) 612 (1987).

**767.31 Trustee may be appointed.** The court may appoint a trustee, when deemed expedient, to receive any payments ordered, to invest and pay over the income for the maintenance of the spouse entitled thereto or the support and education of any of the minor children, or to pay over the principal sum in such proportions and at such times as the court directs. The trustee shall give such bond, with such sureties as the court requires, for the faithful performance of his or her trust.

History: 1971 c. 220; 1979 c. 32 s. 50; 1979 c. 196; Stats. 1979 s. 767.31.

**767.32 Revision of certain judgments.** (1) (a) After a judgment or order providing for child support under this chapter or s. 48.355 (2) (b) 4., 48.357 (5m), 48.363 (2) or 948.22 (7), maintenance payments under s. 767.26 or family support payments under this chapter, or for the appointment of trustees under s. 767.31, the court may, from time to time, on the petition, motion or order to show cause of either of the parties, or upon the petition, motion or order to show cause of the department of health and social services, a county department under s. 46.215, 46.22 or 46.23 or a child support program designee under s. 59.07 (97) if an assignment has been made under s. 49.19 (4) (h) or 49.45 (19) or if either party or their minor children receive aid under ch. 49, and upon notice to the family court commissioner, revise and alter such judgment or order respecting the amount of such maintenance or child support and the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, and may make any judgment or order respecting any of the matters that such court might have made in the original action, except that a judgment or order that waives maintenance payments for either party shall not thereafter be revised or altered in that respect nor shall the provisions of a judgment or order with respect to final division of property be subject to revision or modification. A revision, under this section, of a judgment or order with respect to an amount of child or family support may be made only upon a finding of a substantial change in circumstances. In any action under this section to revise a judgment or order with respect to maintenance payments, a substantial change in the cost of living by either party or as measured by the federal bureau of labor statistics may be sufficient to justify a revision of judgment or order with respect to the amount of maintenance, except that a change in an obligor's cost of living is not in itself sufficient if payments are expressed as a percentage of income.

(b) In any action under this section to revise a judgment or order with respect to an amount of child support, any of the following shall constitute 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 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.

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 of health and social services under s. 46.25 (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), 767.25 (1n) or 767.51 (5d), whichever is appropriate.

(c) In any 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 by the department of health and social services, or the county child and spousal support agency, under s. 46.25 (2m) 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.

(1m) In an action under sub. (1) 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) In an action under sub. (1) to revise a judgment or order with respect to child support or family support, the court may not grant credit to the payer against support due prior to the date on which the action is commenced for payments made by the payer on behalf of the child other than payments made to the clerk of court under s. 767.265 or 767.29 or as otherwise ordered by the court.

(2) Except as provided in sub. (2m) or (2r), 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 of health and social services under s. 46.25 (9).

(2m) Upon request by a party, the court may modify the amount of revised child support payments determined under sub. (2) if, after considering the factors listed in s. 767.25 (1m) or 767.51 (5), as appropriate, 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.

(2r) If the court revises a judgment or order providing for child support that was entered under s. 48.355 (2) (b) 4., 48.357 (5m) or 48.363 (2), the court shall determine child support in the manner provided in s. 46.10 (14).

(2s) In an action under sub. (1), 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), 767.25 or 767.51, whichever is appropriate.

(2w) 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 such payments to the extent of the revision from the date on which the order revising such 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 such payments is effective.

(3) 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 remarriage, vacate the order requiring such payments.

(4) In any case in which the state is a real party in interest under s. 767.075, the department of health and social services shall review the support obligation periodically and whenever circumstances so warrant, petition the court for revision of the judgment or order with respect to the support obligation.

(5) A summons or petition, motion or order to show cause under this section shall include notification of the availability of information under s. 767.081 (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

The fact that a child needs more support at 6 than at 2 is sufficient to justify an increase in payments if the father is able to make them. Klipstein v. Klipstein, 47 W (2d) 314, 177 NW (2d) 57.

Even though the mother took the children out of the state without court approval or letting the father know where he could visit them, the court may not suspend payment of a support allowance without a hearing as to the effect on the children. Krause v. Krause, 58 W (2d) 499, 206 NW (2d) 589.

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 W (2d) 477, 227 NW (2d) 62.

While a divorced party owes no duty of sexual fidelity to the former spouse, cohabitation by the party can be acknowledged as 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 such alimony payments should be modified. Taake v. Taake, 70 W (2d) 115, 233 NW (2d) 449.

Child support provision reducing payments proportionately as each of several minor children attains majority is not against public policy. Severson v. Severson, 71 W (2d) 382, 238 NW (2d) 116.

Trial court abused discretion in denying former husband's motion to terminate alimony, where court failed to consider former wife's increased estate as result of inheritance. Lemm v. Lemm, 72 W (2d) 457, 241 NW (2d) 593.

Judgment's prohibition against modification of amount or term of limited maintenance violated this section. Dixon v. Dixon, 107 W (2d) 492, 319 NW (2d) 846 (1982).

See note to 767.24, citing *In re Marriage of Groh v. Groh*, 110 W (2d) 117, 327 NW (2d) 655 (1983).

See note to 767.26, citing *Van Gorder v. Van Gorder*, 110 W (2d) 188, 327 NW (2d) 674 (1983).

Criteria for change of custody discussed. *In re Marriage of Millikin v. Millikin*, 115 W (2d) 16, 339 NW (2d) 573 (1983).

Where stipulation required maintenance payments during wife's lifetime, husband was estopped from requesting termination of payments under (3) when wife remarried. *Marriage of Rintelman v. Rintelman*, 118 W (2d) 587, 348 NW (2d) 498 (1984).

Court may revise judgment incorporating stipulation regarding limited maintenance if petition to revise is filed before expiration of maintenance obligation. *Fobes v. Fobes*, 124 W (2d) 72, 368 NW (2d) 643 (1985).

Petition for revision filed 20 days after receipt of final scheduled maintenance payment was properly dismissed as untimely. *In re Marriage of Lippstreu v. Lippstreu*, 125 W (2d) 415, 373 NW (2d) 53 (Ct. App. 1985).

"Millikin standard" did not apply to transfer of physical placement of child under existing joint custody arrangement. *In re Marriage of Abel v. Johnson*, 135 W (2d) 219, 400 NW (2d) 22 (Ct. App. 1986).

State family court may modify payor spouse's support obligation following payor's discharge in bankruptcy. *In re Marriage of Eckert v. Eckert*, 144 W (2d) 770, 424 NW (2d) 759 (Ct. App. 1988).

Orders assigning health care responsibility pursuant to 767.25 (4m) are subject to revision under 767.32. *Marriage of Kuchenbecker v. Schultz*, 151 W (2d) 868, 447 NW (2d) 80 (Ct. App. 1989).

It is within trial court's discretion to apply WAC sec. HSS 80 percentage standards to child support revision; if applied to remarried parent, gross income for purposes of base must be computed as if remarried parent is still single. Trial court retains discretion to adjust percentage calculation based on circumstances. *In re Marriage of Abitz v. Abitz*, 155 W (2d) 161, 455 NW (2d) 609 (1990).

Sub. (1m) applies prospectively only and arrearages accruing under support order entered before August 1, 1987, may be modified, reduced or eliminated; trial court may grant credit against arrearages for expenditures made for child in manner other than that prescribed in support order under some circumstances. *In re Marriage of Schulz v. Ystad*, 155 W (2d) 574, 456 NW (2d) 312 (1990).

Remarriage, though unlawful in Wisconsin and dissolved through annulment, is sufficient to terminate maintenance under (3); requirement that maintenance be terminated following remarriage is unconditional. *In re Marriage of Falk v. Falk*, 158 W (2d) 184, 462 NW (2d) 547 (Ct. App. 1990).

Discussion of factors required to find party estopped from seeking maintenance revision. *In re Marriage of Nichols v. Nichols*, 162 W (2d) 96, 469 NW (2d) 619 (1991).

Divorce judgment provisions waiving maintenance take precedence over other provisions arguably reserving or awarding maintenance. *In re Marriage of Tyson v. Tyson*, 162 W (2d) 551, 469 NW (2d) 913 (Ct. App. 1991).

In determining income for maintenance revision, investment income from property awarded in equal property division may be included; interest payments to payee spouse under division may not be deducted. *In re Marriage of Hommel v. Hommel*, 162 W (2d) 782, 471 NW (2d) 1 (1991).

Where, pursuant to Schultz, equitable credit for direct expenditures for support in a manner other than included in the divorce order or judgment is justified, it may be reimbursed as well as set-off against an arrearage. *In re Marriage of Rummel v. Karlin*, 167 W (2d) 400, 481 NW (2d) 695 (Ct. App. 1992).

Lottery proceeds won after divorce may be considered a change in financial circumstances in determining whether change in maintenance is justified; maintenance award is to assure recipient spouse a standard of living comparable to that enjoyed prior to marriage. In re Marriage of Gerrits v. Gerrits, 167 W (2d) 429, 482 NW (2d) 134 (Ct. App. 1992).

Revision of 767.24 allowing joint custody in cases where both parties did not agree was not a "substantial change in circumstances" justifying change to joint custody Licary v. Licary, 168 W (2d) 686, 484 NW (2d) 371 (Ct. App. 1992).

See note to 767.25 citing In Marriage of Zimmerman v. Zimmerman, 169 W (2d) 516, 485 NW (2d) 294 (Ct. App. 1992).

Even though incarceration results from intentional criminal conduct, it is a change in circumstance under sub. (1). In re Marriage of Voecks v. Voecks, 171 W (2d) 184, 491 NW (2d) 107 (Ct. App. 1992).

Where a payor 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. In re Marriage of Roberts v. Roberts, 173 W (2d) 406, 496 NW (2d) 210 (Ct. App. 1992).

A payor 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 where the choice is not reasonable in light of the payor's support obligation. Marriage of Van Offeren v. Van Offeren, 173 W (2d) 482, 496 NW (2d) 660 (Ct. App. 1992).

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

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 W (2d) 327, 500 NW (2d) 357 (Ct. App. 1993).

In the absence of a specific agreement that maintenance payments continue after the payee's remarriage, the payor was not estopped from seeking termination upon the payee's remarriage. Jacobson v. Jacobson, 177 W (2d) 539, 502 NW (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 W (2d) 546, 504 NW (2d) 440 (Ct. App. 1993).

Where a broadly worded settlement agreement required the payor 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 where the court found those needs were being met. Jacquart v. Jacquart 183 W (2d) 372, 515 NW (2d) 539 (Ct. App. 1994).

See also Wisconsin Administrative Code Citations published in the Wisconsin Administrative Code for a list of citations to cases citing ch. HSS 80, the percentage standards developed by the Department of Health and Social Services.

**767.325 Revision of legal custody and physical placement orders.** Except for matters under s. 767.327 or 767.329, the following provisions are applicable to modifications of legal custody and physical placement orders:

(1) **SUBSTANTIAL MODIFICATIONS.** (a) *Within 2 years after initial order.* Except as provided under sub. (2), a court may not modify any of the following orders before 2 years after the initial order is entered under s. 767.24, 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 such an 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 such an 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.

(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.

(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.

(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.

(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.

(7) **TRANSFER TO DEPARTMENT.** The court may order custody transferred to the department of health and social services only if that department agrees to accept custody.

(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. 767.081 (2).

(9) **APPLICABILITY.** Notwithstanding 1987 Wisconsin Act 355, section 73, as affected by 1987 Wisconsin Act 364, the parties may agree to the adjudication of a modification of a legal custody or physical placement order under this section in an action affecting the family that is pending on May 3, 1988.

**History:** 1987 a. 355, 364.

**NOTE:** 1987 Wis. Act 355, which created this section, contains explanatory notes.

Sub. (1) (a) prohibits change of custody solely to correct 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 W (2d) 745, 488 NW (2d) 235 (1993).

Section 767.325 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 W (2d) 304, 510 NW (2d) 775 (Ct. App. 1993).

**767.327 Moving the child's residence within or outside the state.** (1) **NOTICE TO OTHER PARENT.** (a) If the court grants periods of physical placement to more than one parent, it shall order a parent with legal custody of and physical placement rights to a child to provide not less than 60 days written notice to the other parent, with a copy to the court, of his or her intent to:

1. Establish his or her legal residence outside the state and remove the child from this state for a period of time exceeding 90 consecutive days.

2. Establish his or her legal residence and remove the child, within this state, at a distance of 150 miles or more from the other parent.

(b) The parent shall send the notice under par. (a) by certified mail. The notice shall state the parent's proposed action and that the other parent may object within the time specified in sub. (2).

**(2) OBJECTION TO MOVE; MEDIATION** Within 15 days after receiving the notice under sub. (1), the other parent may send to the parent, with a copy to the court, a written notice of objection to the proposed action. The court or family court commissioner shall promptly refer the parents for mediation or other family court counseling services under s. 767.11 and may appoint a guardian ad litem. Unless the parents agree to extend the time period, if mediation or counseling services do not resolve the dispute within 30 days after referral, the matter shall proceed under subs. (3) to (5).

**(3) STANDARDS FOR MODIFICATION IF MOVE CONTESTED.** (a) 1. Except as provided under par. (b), if the parent proposing the move has sole legal or joint legal custody of the child and the child resides with that parent for the greater period of time, the parent objecting to the move may file a petition, motion or order to show cause for modification of the legal custody or physical placement order affecting the child. The court may modify the legal custody or physical placement order if the court finds all of the following:

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

b. The move will result in 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.:

a. There is a rebuttable presumption that continuing the current allocation of decision making under a legal custody order or 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.

b. A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under that subdivision.

3. Under this paragraph, the burden of proof is on the parent objecting to the move.

(b) 1. If the parents have joint legal custody and have substantially equal periods of physical placement with a child, either parent may file a petition, motion or order to show cause for modification of the legal custody or physical placement order. The court may modify an order of legal custody or physical placement if the court finds all of the following:

a. Circumstances make it impractical for the parties to continue to have substantially equal periods of physical placement.

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

2. Under this paragraph, the burden of proof is on the parent filing the petition, motion or order to show cause.

**(4) GUARDIAN AD LITEM; PROMPT HEARING.** After a petition, motion or order to show cause is filed under sub. (3), the court shall appoint a guardian ad litem and hold a hearing as soon as possible.

**(5) FACTORS IN COURT'S DETERMINATION.** In making its determination under sub. (3), the court shall consider all of the following factors:

(a) Whether the purpose of the proposed action is reasonable.

(b) The nature and extent of the child's relationship with the other parent and the disruption to that relationship which the proposed action may cause.

(c) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent.

**(6) NOTICE REQUIRED FOR OTHER REMOVALS.** (a) Unless the parents agree otherwise, a parent with legal custody and physical placement rights shall notify the other parent before removing the child from his or her primary residence for a period of not less than 14 days.

(b) Notwithstanding par. (a), if notice is required under sub. (1), a parent shall comply with sub. (1).

(c) Except as provided in par. (b), subs. (1) to (5) do not apply to a notice provided under par. (a).

**(7) APPLICABILITY** Notwithstanding 1987 Wisconsin Act 355, section 73, as affected by 1987 Wisconsin Act 364, the parties may agree to the adjudication of a modification of a legal custody or physical placement order under this section in an action affecting the family that is pending on May 3, 1988.

History: 1987 a 355, 364; 1991 a 32, 269

Discussion of application of (5) factors to determination of best interests of child In re Marriage of Kerkvliet v. Kerkvliet, 166 W (2d) 930, 480 NW (2d) 823 (Ct. App 1992).

Wisconsin's Child Removal Law Wis Law. June 1993.

**767.329 Revisions agreed to by stipulation.** If after an initial order is entered under s. 767.24, 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.

History: 1987 a 355.

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

**767.33 Annual adjustments in child support order.**

**(1)** An order for child support under s. 767.23 or 767.25 may provide for an adjustment in the amount to be paid based on a change in the obligor's income, as reported on the disclosure form under s. 767.27 (2m) or as disclosed to the department of health and social services or county child and spousal support agency under s. 46.25 (2m). The order may specify the date on which the annual adjustment becomes effective. No adjustment may be made unless the order so provides and the party receiving payments applies for an adjustment as provided in sub. (2). An adjustment under this section may be made only once in any year.

**(1m)** (a) Except as provided in par. (b), this section applies only to an order under s. 767.23 or 767.25 in which payment is expressed as a fixed sum. It does not apply to such an order in which payment is expressed as a percentage of parental income.

(b) If payment is expressed in an order under s. 767.23 or 767.25 in the alternative as the greater or lesser of either a percentage of parental income or a fixed sum, this section applies only to the fixed sum alternative under the order.

**(2)** An adjustment under sub. (1) may be made only if the party receiving payments applies to the family court commissioner for the adjustment. If the order specifies the date on which the annual adjustment becomes effective, the application to the family court commissioner must be made at least 20 days before the effective date of the adjustment. The family court commissioner, upon application by the party receiving payments, shall send a notice by certified mail to the last-known address of the obligor. The notice shall be postmarked no later than 10 days after the date on which the application was filed and shall inform the obligor that an adjustment in payments will become effective on the date specified in the order or, if no date is specified in the order, 10 days after the date on which the notice is sent. The obligor may, after receipt of notice and before the effective date of the adjustment, request a hearing on the issue of whether the adjustment should take effect, in which case the adjustment shall be held in abeyance pending the outcome of the hearing. The family court commissioner shall hold a hearing requested under this subsection within 10 working days after the request. If at the hearing the obligor establishes that extraordinary circumstances beyond his or her control prevent fulfillment of the adjusted child support obligation, the family court commissioner may direct that all or part of

the adjustment not take effect until the obligor is able to fulfill the adjusted obligation. If at the hearing the obligor does not establish that extraordinary circumstances beyond his or her control prevent fulfillment of the adjusted obligation, the adjustment shall take effect as of the date it would have become effective had no hearing been requested. Either party may, within 15 working days of the date of the decision by the family court commissioner under this subsection, seek review of the decision by the court with jurisdiction over the action.

History: 1981 c. 20; 1983 a. 27; 1993 a. 481

**767.37 Effect of judgment.** (1) (a) In any action affecting the family, if the court orders maintenance payments or other allowances for a party or children or retains jurisdiction in such matters, the written judgment shall include a provision that disobedience of the court order with respect to the same is punishable under ch. 785 by commitment to the county jail or house of correction until such 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. The findings of fact and conclusions of law and the written judgment shall be drafted by the attorney for the moving party, and shall be submitted to the court and filed with the clerk of the court within 30 days after judgment is granted; but if the respondent has been represented by counsel, the findings, conclusions and judgment shall first be submitted to respondent's counsel for approval and if the family court commissioner has appeared at the trial of the action, such papers shall also be sent to the family court commissioner for approval. After any necessary approvals are obtained, the findings of fact, conclusions of law and judgment shall be submitted to the court. Final stipulations of the parties may be appended to the judgment and incorporated by reference therein.

(c) At the time of filing any judgment for an annulment, divorce or legal separation, the attorney for the moving party shall present to the clerk of court 2 true copies thereof in addition to the original judgment, and until such copies are presented the clerk may refuse to accept such judgment for filing. After the judgment is filed, the clerk shall mail a copy forthwith to each party to the action at the last-known address, and the court record shall show such mailing.

(2) So far as a judgment of divorce affects the marital status of the parties the court has the power to 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 such judgment. No such judgment shall be vacated or modified without service of notice of motion on the family court commissioner. The court may direct the family court commissioner or appoint some other attorney, to bring appropriate proceedings for the vacation of the judgment. The compensation of the family court commissioner when not on a salaried basis or other attorney for performing such services shall be at the rate of \$50 per day, which shall be paid out of the county treasury upon order of the presiding judge and the certificate of the clerk of the court. If the judgment is vacated it shall restore the parties to the marital relation that existed before the granting of such judgment. If after vacation of the judgment either of the parties brings an action in this state for divorce against the other the court may order the petitioner in such action to reimburse the county the amount paid by it to the family court commissioner or other attorney in connection with such vacation proceedings. Whenever a judgment of divorce is set aside under this subsection, the court shall order the record in the action impounded without regard to s. 767.19; and thereafter neither the record nor any part of the record shall be offered or admitted 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 any court of record upon a showing of necessity to clear title to real estate.

(3) When a judgment of divorce is granted it shall be effective immediately except as provided in s. 765.03 (2). Every judge who

grants a judgment of divorce shall inform the parties appearing in court that the judgment is effective immediately except as provided in s. 765.03 (2).

History: 1971 c. 220; 1975 c. 41, 199, 200; 1975 c. 401 s. 4; 1975 c. 421; 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); 1979 c. 175 ss. 41, 53; 1979 c. 196; 1979 c. 257 s. 17; 1979 c. 352 ss. 23, 39; 1979 c. 355 s. 241; Stats. 1979 s. 767.37.

Sub (2) does not authorize vacating or modifying a judgment as to paternity of children determined in the original judgment *E. v. E.*, 57 W (2d) 436, 204 NW (2d) 503.

Sub (2) provides no authority for reopening divorce judgment as it relates to property division. *Conrad v. Conrad*, 92 W (2d) 407, 284 NW (2d) 674 (1979).

Death of party within 6 months of divorce judgment did not void judgment or divest court of jurisdiction to order property division. *In re Marriage of Roeder v. Roeder*, 103 W (2d) 411, 308 NW (2d) 904 (Ct. App. 1981).

**767.38 Judgment revoked on remarriage.** When a judgment of divorce has been granted and the parties shall afterwards intermarry, the court, upon their joint application and upon satisfactory proof of such marriage, shall revoke all judgments and any orders which will not affect the right of 3rd persons and order the record impounded without regard to s. 767.19 and neither the record nor any part of the record shall be offered or admitted 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 any court of record upon a showing of necessity to clear title to real estate.

History: 1977 c. 105; 1979 c. 32 ss. 50, 92 (4); 1979 c. 352; Stats. 1979 s. 767.38.

**767.39 Maintenance payments or other allowances pending appeal.** (1) In actions affecting the family pending in an appellate court, no allowance for suit money, counsel fees or disbursements in the court, nor for temporary maintenance payments to the spouse or the children during the pendency of the appeal will be made in the court.

(2) Allowances specified in sub. (1), if made at all, shall be made by the proper trial court upon motion made and decided after the entry of the order or judgment appealed from and prior to the return of the record to an appellate court, provided, that if the allowance is ordered before the appeal is taken the order shall be conditioned upon the taking of the appeal and shall be without effect unless and until the record is transmitted to the court of appeals.

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 W (2d) xiii (1988).

**767.40 Contempt proceedings.** All contempt orders in which confinement is imposed shall be issued by a judge.

History: 1977 c. 323; 1979 c. 32 s. 50; Stats. 1979 s. 767.40.

**767.42 Abandonment; seizure of property.** (1) If a person absconds or is about to abscond from his or her children or spouse, or is about to remove permanently from the municipality in which he or she resides leaving a spouse or children, or both, chargeable or likely to become chargeable upon the public for support or neglects or refuses to support or provide for the spouse or children, the county where the spouse or children may be, by the official or agency designated to administer public assistance, may apply to the circuit court for any county in which any real or personal property of the parent or spouse is situated for a warrant to seize the property.

(2) Upon due proof of the facts the court shall issue a warrant authorizing the county to seize the property of that person wherever found in the county; and they shall, respectively, be vested with all the rights and title, as limited in this section, to that property which the person had at the time of his or her departure. They shall immediately make an inventory of the property and return it with the warrant and their proceedings thereon to the circuit court. All sales and transfers of any real or personal property left in that county made by the person after the issuing of the warrant is void.

(3) Upon the return the circuit court may inquire into the facts and circumstances and may confirm the seizure or discharge the same. If the seizure is confirmed, the court shall from time to time direct what part of the personal property shall be sold and how

much of the proceeds of the sales and the rents and profits of the real estate shall be applied toward the maintenance of the spouse or children of the person. All such sales shall be at public auction in accordance with the laws relating to execution sales of personalty and realty as provided in ss. 815.29 and 815.31.

(4) The county shall receive the proceeds of all property so sold and the rents and profits of the real estate of such person and apply the same to the maintenance and support of the spouse or children of such person; and it shall account to the court for the moneys so received and for the application thereof from time to time.

(5) If the person whose property has been seized under this section returns and supports the abandoned spouse or children or gives security to the county, with its approval, that the spouse or children shall not thereafter be chargeable to the county, the court shall discharge the warrant and order the restoration of the property seized and remaining unappropriated, or the unappropriated proceeds, after deducting the expenses of the proceedings.

**History:** Sup. Ct. Order, 67 W (2d) 585, 773 (1975); 1977 c. 449; 1979 c. 352; 1985 a. 29 ss. 1115, 3200 (23); 1985 a. 332

**767.45 Determination of paternity.** (1) The following persons may bring an action or 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 or 891.41:

- (a) The child.
- (b) The child's natural mother.
- (c) A man presumed to be the child's father under s. 891.405 or 891.41.
- (d) A man 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. 767.075 (1) apply, including the delegates of the state as specified in sub. (6).
- (h) This state as provided under sub. (6m).
- (i) A guardian ad litem appointed under s. 767.045 (1) (c).
- (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.

(2) 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) 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) The child may be a party to any action under this section.

(5) (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 shall be governed by the procedures specified in s. 767.05 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 judge or court commissioner, 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 which 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 blood test under s. 767.48.

(5m) Except as provided in ss. 767.458 (3), 767.465 (2) and (2m), 767.62 and 769.401, unless a man is either presumed the child's father under s. 891.41 or adjudicated the child's father either under s. 767.51 or by final order or judgment of a court of competent jurisdiction in another state, no order or temporary order may be entered for child support, legal custody or physical placement until the man is adjudicated the father using the procedure set forth in ss. 767.45 to 767.60. Except as provided in ss. 767.62 and 769.401, the exclusive procedure for establishment of child support obligations, legal custody or physical placement rights for a man who is neither presumed the child's father under s. 891.41 nor adjudicated the father is by an action under ss. 767.45 to 767.60 or under s. 769.701. No person may waive the use of this procedure. If a presumption under s. 891.41 exists, a party denying paternity has the burden of rebutting the presumption.

(6) (a) The attorney responsible for support enforcement under s. 59.458 (1) shall provide the representation for the state as specified under s. 767.075 (1) in cases brought under this section.

(b) The attorney under s. 59.458 (1) is the only county attorney who may provide representation when the state delegates its authority under sub. (1) (g).

(c) The attorney under s. 59.458 (1) or any state attorney acting under par. (b) may not represent the state as specified under s. 767.075 (1) 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) 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 certificate of a child who is a resident of the county if paternity has not been adjudicated, except in situations under s. 69.14 (1) (g) and (h) and as provided by the department of health and social services by rule.

(6p) The attorney designated under sub. (6) (a) shall give priority to those cases brought under this section in which the attorney has good reason to believe that a man presumed to be the father of the child has acknowledged paternity under s. 69.15 (3) (b) 1. or 3.

(7) 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 of health and social services under s. 46.25 (9) and listing the factors which a court may consider under s. 767.51 (5).

**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.

Paternity proceeding may not be maintained posthumously. In re Estate of Blumreich, 84 W (2d) 545, 267 NW (2d) 870 (1978).

See note to Art I, sec. 9, citing In re Paternity of R.W.L. 116 W (2d) 150, 341 NW (2d) 682 (1984).

Paternity action may not be brought against deceased putative father. Paternity of N.L.B., 140 W (2d) 400, 411 NW (2d) 144 (Ct. App. 1987).

Under facts of case, nonbiological father wasn't equitably estopped from denying paternity or child support. Marriage of A.J.N. & J.M.N., 141 W (2d) 99, 414 NW (2d) 68 (Ct. App. 1987).

Posthumous paternity action is allowable where it is brought by personal representative of the deceased putative father. LeFevre v. Schreiber, 167 W (2d) 733, 482 NW (2d) 904 (1992).

Paternity action may not be used to challenge paternity previously decided in divorce action; that paternity was not challenged in divorce is irrelevant where it could have been litigated. In re Paternity of Nathan T., 174 W (2d) 352, 497 NW (2d) 740 (Ct. App. 1993).

Full-faith-and-credit clause of U.S. Constitution did not bar petition to determine paternity where paternity decree of another state would have been subject to collateral

attack in that state. In Re Paternity of R.L.L. 176 W (2d) 224, NW (2d) (Ct. App 1993)

767.455 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) FORM. The summons shall be in substantially the following form:

STATE OF WISCONSIN, CIRCUIT COURT: COUNTY

In re the Paternity of A. B.
STATE OF WISCONSIN
and
C. D.

Address
City, State Zip Code
, Petitioners

File No.

vs. SUMMONS

E. F.
Address (Case Classification Type): (Code No.)
City, State Zip Code
, Respondent

THE STATE OF WISCONSIN, To the Respondent:

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 Family Court Commissioner:
Address:

If you do not appear, the court will enter a default judgment finding you to be the father. A default judgment will take effect 30 days after it is served on or mailed to you, unless within those 30 days you present to the court evidence of good cause for failure to appear. 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 subject to certain limitations. Appearance is not required if you complete the attached waiver of first appearance statement and send it to the court at least 10 days prior to the date of your scheduled appearance in this summons.

Dated: , 19

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 respondent shall be attached to the summons. The notice shall be in boldface type and substantially the following form:

NOTICE TO RESPONDENT

1. You have been named in a petition alleging paternity. A judgment of paternity would legally designate the child as your child, grant parental rights to you, create the right of inheritance for the child, obligate you to pay child support until the child reaches the age of 18, or the age 19 if the child is enrolled full-time

in high school or its equivalent, and make your failure to pay child support punishable by imprisonment as a contempt of court or as a criminal violation.

2. You have the right to be represented by an attorney. If you are unable to afford an attorney, the court will appoint one for you subject to certain limitations. One limitation is that representation by the appointed attorney will end if during the proceedings all of the blood tests show that you are excluded as the father or that the statistical probability of your being the father is 99.0% or higher. In order to determine whether you are entitled to have an attorney appointed for you, you may call the following telephone number

3. You may request blood tests which will indicate the probability that you are or are not the father of the child. The court will order blood tests on request by you, the state or any other party. Any person who refuses to take court-ordered blood tests may be punished for contempt of court.

4. The petitioner has the burden of proving by clear and satisfactory preponderance of the evidence that you are the father. However, if blood tests show that you are not excluded as the father and that the statistical probability of your being the father is 99.0% or higher, you are rebuttably presumed to be the father.

5. The following defenses are available to you:

- (a) That you were sterile or impotent at the time of conception.
(b) That you did not have sexual intercourse with the mother of the child during the conceptive period as provided in s. 891.395.
(c) That another man did have sexual intercourse with the mother of the child during the conceptive period.

6. You have the right to request a jury trial.

7. If you fail to appear at any stage of the proceeding, including a scheduled blood test, the court will enter a default judgment finding you to be the father. A default judgment will take effect 30 days after it is served on or mailed to you at your address on file with the court, unless within those 30 days you present to the court evidence of good cause for your failure to appear or your failure to have undergone a blood test. You need not appear at the time and place specified in the summons if you complete the attached waiver of first appearance statement and deliver it to the court by the date specified in the waiver of first appearance statement.

8. You must keep the clerk of court informed of your current address at all times.

(5r) WAIVER OF FIRST APPEARANCE. The waiver of first appearance statement shall be attached to the summons. The waiver of first appearance statement shall be in boldface type and substantially the following form:

WAIVER OF FIRST APPEARANCE

1. I understand that by signing this waiver and agreeing to its terms I am not required to appear at the time and place specified in the summons. If I do not sign this statement, I am required to appear at the time and place specified in the summons.

2. I understand that I will be notified by the court of all future stages in the proceeding and agree to appear at those stages. If I fail to appear at any stage, including a scheduled blood test, the court will enter a default judgment finding me to be the father. A default judgment will take effect 30 days after it is served on or mailed to me, unless within those 30 days I present to the court evidence of good cause for my failure to appear or my failure to have undergone a blood test.

3. I enter the following plea (check only one):

I agree that I am the child's father.

I deny that I am the child's father.

I agree that I am the child's father, subject to confirmation by a blood test.

If I enter a plea agreeing that I am the child's father, a judgment of paternity will be entered against me. If I enter a plea denying that I am the child's father or a plea agreeing that I am the child's father, subject to a blood test, I agree to undergo a blood test.

4. I have read the summons and the notice or have had them read to me.

5. This waiver of first appearance statement is valid only if it is delivered to the court on or before .....

6. I will keep the clerk of court informed of my address at all times. The following is my current address:

Street address and apartment number

City State Zip Code

Date Signature of Respondent

**(5w) EXCEPTION** Subsections (5) to (5r) do not apply in an action brought by a man alleging himself to be the father of the child.

**(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 of health and social services under s. 46.25 (9) and listing the factors which a court may consider under s. 767.51 (5).

**History:** 1979 c. 352; 1981 c. 314; 1983 a. 447; 1985 a. 29; 1987 a. 27, 413; Sup. Ct. Order, 171 W (2d) xix (1992); 1993 a. 16, 481

Failure to object to personal jurisdiction prior to returning completed "Waiver of First Appearance" form under (5r) constituted a submission to the court's jurisdiction and waiver of objection. In re Paternity of K J E. 168 W (2d) 209, 483 NW (2d) 588 (Ct. App. 1992)

**767.456 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) 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) 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.

**767.457 Time of first appearance.** (1) The first appearance under s. 767.458 may not be held any sooner than 30 days after service or receipt of the summons and petition unless the parties agree that the first appearance may be held sooner.

(2) A first appearance of a respondent is not required if, at least 10 days prior to the scheduled appearance, the respondent waives his first appearance by filing a completed waiver of first appearance statement under s. 767.455 (5r).

**History:** 1987 a. 27; 1991 a. 313.

**767.458 First appearance.** (1) At the first court appearance where the respondent is present, the court shall inform the parties of the following:

(a) A judgment of paternity lawfully designates the child as the child of the respondent, granting parental rights to the respondent, creating the right of inheritance for the child, obligating the respondent to pay support until the child reaches the age of 18, and making failure to pay support punishable by imprisonment as a contempt of the court;

(b) If the respondent is unable to afford counsel due to indigency, and the petitioner is represented by a government attorney under s. 767.45 (1) (g) or (6) or the action is commenced on behalf of the child by an attorney appointed under s. 767.045 (1) (c), counsel shall be appointed for the respondent as provided in s. 767.52 and ch. 977, unless the respondent knowingly and voluntarily waives the appointment of counsel;

(c) Except as provided under sub. (1m), the respondent may request the administration of blood tests which either demonstrate that he is not the father of the child or which demonstrate the probability that he is or is not the father of the child;

(d) Except as provided under sub. (1m), the court will order blood tests upon the request of any party; and

(e) The respondent has the defenses that he was sterile or impotent at the time of conception, he did not have sexual intercourse with the mother during a period 8 to 10 months prior to the birth of the child, or that another man did have sexual intercourse with the mother during that period of time.

**(1m)** In an action to establish the paternity of a child who was born to a woman while she was married, where a man 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 man other than the husband is the father is not in the best interest of the child. If the court or court commissioner under s. 757.69 (3) (g) determines that a judicial determination of whether a man other than the husband is the father is not in the best interest of the child, no blood tests may be ordered and the action shall be dismissed.

(2) At the first appearance, if it appears from a sufficient petition or affidavit of the child's mother 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 blood tests. The tests shall be conducted in accordance with s. 767.48.

(3) At the first appearance, if a statement acknowledging paternity under s. 69.15 (3) (b) 1. or 3. 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.

Before dismissing petition without considering merits, trial court must conduct hearing to determine child's best interests pursuant to (1m). In re Paternity of T.R.B. 154 W (2d) 637, 454 NW (2d) 561 (Ct. App. 1990)

Constitutionality of (1m) upheld. Application of best interests standard discussed. In re Paternity of C.A.S. 161 W (2d) 1015, 468 NW (2d) 719 (1991)

In re Paternity of C.A.S. and C.D.S.: The New Status of Putative Fathers' Rights in Wisconsin. 1992 WLR 1669.

**767.459 Appearance on behalf of deceased respondent.** The personal representative or an attorney may appear for a deceased respondent who is the alleged father whenever an appearance by the respondent is required.

**History:** 1993 a. 81.

**767.46 Pretrial paternity proceedings.** (1) A pretrial hearing shall be held before the court or a court commissioner under s. 757.69 (3) (g). A record or minutes of the proceeding shall be kept. At the pretrial hearing the parties may present and cross-examine witnesses, request blood tests and present other evidence relevant to the determination of paternity.

(2) 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) If the parties accept a recommendation made in accordance with this section, judgment shall be entered accordingly.

(4) If a party or the guardian ad litem refuses to accept a recommendation made under this section and blood tests have not yet been taken, the court shall require the appropriate parties to submit to blood tests. After the blood tests have been taken the court shall make an appropriate final recommendation.

(5) If the guardian ad litem or any party refuses to accept any final recommendation, the action shall be set for trial.

(6) 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 W (2d) xxxix (1987); 1987 a. 355; 1993 a. 481.

**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]

Court may order putative father to take blood test only after determining at pretrial hearing that paternity probably can be established at trial and that establishment of paternity is in best interests of child. State ex rel. Scott v. Slocum, 109 W (2d) 397, 326 NW (2d) 118 (Ct. App. 1982).

Notwithstanding 804.12 (2) (a) 4, court may find party in civil contempt for refusing to submit to blood test. Contempt Finding: In re Paternity of T.P.L. 120 W (2d) 328, 354 NW (2d) 759 (Ct. App. 1984).

#### 767.465 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.

(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, unless the first appearance is not required under s. 767.457 (2), scheduled blood 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. 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 or court commissioner under s. 757.69 (3) (g) evidence of good cause for failure to appear or failure to have undergone a blood test.

(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 only one of those persons fails to appear and all of the other male respondents have been excluded as the father.

(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. 767.455 (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. 767.25 or 767.51.

(b) If the respondent timely files a completed waiver of first appearance statement under s. 767.455 (5r), as provided in s. 767.457 (2), and files the acknowledgment and stipulation in conjunction with the waiver of first appearance statement or before the scheduled pretrial hearing, the respondent need not appear in court in the proceeding unless required to do so by the court.

(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.

Respondent must appear personally under sub. (2) (a); an attorney's appearance is insufficient. In re Paternity of Tiffany B. 173 W (2d) 864, 496 NW (2d) 711 (Ct. App. 1993).

**767.466 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 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.

**767.47 Testimony and evidence relating to paternity.** (1) 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) Blood test results under ss. 767.48 and 885.23.

(d) The statistical probability of the alleged father's paternity based upon the blood 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) If the child was born in this state, the petitioner shall present a certified copy of the child's birth certificate or a printed copy of the record from the birth data base of the state registrar to the court, so that the court is aware of whether a name has been inserted on the birth certificate 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. 767.51.

(2) 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) Medical and genetic information filed with the department of health and social services or the court under s. 48.425 (1) (am) or (2) is not admissible to prove the paternity of the child.

(3) In an action against an alleged father, evidence offered by him with respect to an identified man who is not subject to the jurisdiction of the court concerning that man'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 and made available to the court blood tests as provided in s. 767.48.

(4) (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) 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) (a) Whenever the state brings the action to determine paternity pursuant to an assignment under s. 49.19 (4) (h) 1. or 49.45 (19), 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 of health and social services 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. 49.19 (4) (h) 1. or 49.45 (19) where evidence other than the testimony of the mother may establish the paternity of the child.

(7) 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) 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 or 891.41 shall have the burden of proving the issues involved by clear and satisfactory preponderance of the evidence.

(9) 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) A record of the testimony of the child's mother relating to the child's paternity, made as provided under s. 48.299 (6), is admissible in evidence on the issue of paternity.

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.

**767.475 Paternity procedures.** (1) Except as provided in s. 767.045 (1) (c), 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.

(2) Presumption of paternity shall be as provided in ss. 891.39, 891.405 and 891.41.

(3) Evidence as to the time of conception may be offered as provided in s. 891.395.

(4) 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) The statute of limitations for commencing actions concerning paternity is as provided in s. 893.88.

(6) The respondent in a paternity action may be arrested as provided in s. 818.02 (6).

(7) The court may appoint a trustee or guardian to receive and manage money paid for the support of a minor child.

(8) 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.

**767.48 Blood tests in paternity actions.** (1) (a) The court may, and upon request of a party 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 blood 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 filed with the court, or after an examination under oath of a complainant or witness, when the court determines such an examination is necessary.

(b) The blood tests shall be performed by an expert qualified as an examiner of genetic markers present on blood cells and components, appointed by the court. A report completed and certified by the court-appointed expert stating blood test results and the statistical probability of the alleged father's paternity based upon the blood tests is admissible as evidence without expert testimony and may be entered into the record at the trial or pretrial hearing if, 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.

(1m) Under sub. (1), if the blood tests show that the alleged father is not excluded and that the statistical probability of the alleged father's parentage is 99.0% or higher, the alleged father shall be rebuttably presumed to be the child's parent.

(2) 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 blood cells and components. Additional tests performed by other experts of the same qualifications may be ordered by the court at the request of any party.

(3) In all cases, the court shall determine the number and qualifications of the experts.

(4) Whenever the results of the blood tests exclude the alleged father as the father of the child, this evidence shall be conclusive evidence of nonpaternity and the court shall dismiss the action. Whenever the results of the tests exclude any male witness from possible paternity, the tests shall be 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 blood test, is inadmissible as evidence. If any party refuses to submit to the blood test, this fact shall be disclosed to the fact finder. This refusal is a contempt of the court for failure to produce evidence under s. 767.47 (5). If the action was brought by the child's mother but she refuses to submit herself or the child to blood tests, the action shall be dismissed.

(5) The fees and costs for blood tests performed upon any person listed under sub. (1) shall be paid for by the county except as follows:

(a) 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 blood tests.

(b) If 2 or more identical series of blood tests are performed upon the same person, the court may require the person requesting the 2nd or subsequent series of tests to pay for it in advance.

(6) 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 blood 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) The court shall ensure that all parties are aware of their right to request blood tests under this section.

**History:** 1979 c. 352; 1983 a. 447; 1987 a. 27; 1993 a. 481.

Where initial blood tests excluded alleged father and state moved for additional tests under (2), court erred in denying motion and dismissing action under (4). In re Paternity of S. J. K. 132 W (2d) 262, 392 NW (2d) 97 (Ct. App. 1986).

Chain of custody, or authentication, must be established prior to admission of evidence under (1) (b). In re Paternity of J. S. C. 135 W (2d) 820, 400 NW (2d) 48 (Ct. App. 1986).

Where respondent failed to introduce evidence regarding test, trial court properly barred respondent from attacking test during closing argument. In re Paternity of M. J. B. 144 W (2d) 638, 425 NW (2d) 404 (1988).

See note to 904.01, citing State v. Hartman, 145 W (2d) 1, 426 NW (2d) 320 (1988).

DNA test results are admissible when procedures meet requirements for blood tests under (1) (b). In re Paternity of J. L. K. 151 W (2d) 566, 445 NW (2d) 673 (Ct. App. 1989).

Where more than one set of blood test results are presented, sub. (1m) presumption is inapplicable where only one reached 99%. In re Paternity of J. M. K. 160 W (2d) 429, 465 NW (2d) 833 (Ct. App. 1991).

Where 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 W (2d) 551, 503 NW (2d) 275 (Ct. App. 1993).

From here to paternity: Using blood analysis to determine parentage. Haas WBB July 1988.

**767.50 Trial.** (1) The trial shall be divided into 2 parts. The first part shall deal with the determination of paternity. The 2nd part shall deal with child support, legal custody, periods of physical placement and related issues. At the first part of the trial, the main issue 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 man there shall first be determined, as provided in s. 891.39, the prior issue of whether the husband was not the father of the child. 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, in cases where there is a jury, to find a special verdict as to any of the issues specified in this section except that the court shall make all the findings enumerated in s. 767.51 (2) to (5). 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. 767.45 (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) 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.

Preponderance of the evidence standard of proof in paternity actions meets due process requirement. Rivera v. Minnich, 483 US 574 (1987).

**767.51 Paternity judgment.** (1) The judgment or order of the court determining the existence or nonexistence of paternity is determinative for all purposes.

(2) The clerk of court shall file with the state registrar, within 30 days after the entry of the order or judgment, a report showing the names, dates and birth places of the child and the father 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 shall collect.

(3) The judgment or order may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the legal custody and guardianship of the child, periods of physical placement, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. Unless the court orders otherwise, if there is no presumption of paternity under s. 891.41 the mother shall have sole legal custody of the child. The court shall order either party or both to pay for the support of any child of the parties who is less than 19 years old and is pursuing an accredited course of instruction leading to the acquisition of a high school diploma or its equivalent. The judgment or order may direct the father to pay or contribute to the reasonable expenses of the mother's pregnancy and confinement during pregnancy and may direct either party to pay or contribute to the costs of blood tests, attorney fees and other costs. Contributions to the costs of blood tests shall be paid to the county which paid for the blood tests.

(3m) (a) In this subsection, "health insurance" does not include medical assistance provided under ch. 49.

(b) In addition to ordering child support for a child under sub. (3), the court shall specifically assign responsibility for and direct the manner of payment of the child's health care expenses. In making this assignment, the court shall consider whether or not a child is covered under a parent's health insurance policy or plan at the time the court enters a paternity judgment under this paragraph, 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 paragraph. 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 paragraph 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 which are in addition to and not inconsistent with this paragraph.

**NOTE:** Par. (b) is amended eff. 1-1-96 by 1993 Wis. Act 481 to read:

(b) In addition to ordering child support for a child under sub. (3), 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 enters a paternity judgment under this subsection, 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 paragraph. 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 subsection 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 which are in addition to and not inconsistent with this subsection.

(c) 1: 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. 767.265 (3h), or sent to the clerk of court for dis-

bursement 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 shall send notice of assignment in the manner provided under s. 767.265 (2r) and may include the notice of assignment under this subdivision with a notice of assignment under s. 767.265. The clerk of court shall keep a record of all moneys received and disbursed by the clerk for health care expenses that are directed to be paid to the clerk.

2. 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 clerk of court may provide notice of assignment in the manner provided under s. 767.265 (2r) for the withholding from income of the amount necessary to pay the health insurance premiums. The notice of assignment under this subdivision may be sent with or included as part of any other notice of assignment under s. 767.265, if appropriate. A person who receives notice of assignment under this subdivision shall send the withheld health insurance premiums to the appropriate health care insurer, provider or plan, as provided in s. 767.265 (3h).

NOTE: Par. (c) is created eff. 1-1-96 by 1993 Wis. Act 481.

(d) 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:

1. 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.

2. 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 of health and social services or the county designee under s. 59.07 (97).

3. 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.

(e) 1. 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 ss. 49.45 to 49.47 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 of health and social services or any other person who paid for the services on behalf of the child, the department of health and social services may obtain a judgment against the parent for the amount of the 3rd party payment.

2. Section 767.265 (4) applies to a garnishment based on a judgment obtained under subd. 1.

(4) Support judgments or orders ordinarily shall be for periodic payments which may vary in amount if appropriate. The payment amount may be expressed as a percentage of the parent's income or as a fixed sum, or as a combination of both in the alternative by requiring payment of the greater or lesser of either a percentage of the parent's income or a fixed sum. The father's liability for past support of the child shall be limited to support for the period after the birth of the child.

(4g) 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 to the department of health and social services, or the county child and spousal support agency, under s. 46.25 (2m).

(4m) Except as provided in sub. (5), the court shall determine child support payments by using the percentage standard established by the department of health and social services under s. 46.25 (9).

(5) Upon request by a party, the court may modify the amount of child support payments determined under sub. (4m) 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 the requesting party:

(a) The needs of the child.

(am) The physical, mental and emotional health needs of the child, including any costs for health insurance as provided for under sub. (3m).

(b) The standard of living and circumstances of the parents, including whether a parent receives maintenance payments under s. 767.26 and 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).

(c) The relative financial means of the parents.

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

(e) The need and capacity of the child for education, including higher education.

(f) The age of the child.

(g) The financial resources and the earning ability of the child.

(gm) Any physical custody arrangement ordered or decided upon.

(gp) Extraordinary travel expenses incurred in exercising the right to periods of physical placement.

(h) The responsibility of the parents for the support of others.

(i) The value of services contributed by the custodial parent.

(im) The best interests of the child.

(j) Any other factors which the court in each case determines are relevant to the best interests of the child.

(5d) If the court finds under sub. (5) 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.

(5p) A party ordered to pay child support under this section shall pay simple interest at the rate of 1.5% per month on any amount unpaid, commencing the first day of the 2nd month after the month in which the amount was due. 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 clerk of court under s. 767.29. Except as provided in s. 767.29 (1m), the clerk of court 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 withheld from income under s. 767.265 or under similar laws of another state. If payment is not made through income withholding, the clerk shall first apply child support payments received 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.

(6) Sections 767.24, 767.245, 767.263, 767.265, 767.267, 767.29, 767.293, 767.30, 767.305, 767.31, 767.32 and 767.325,

where applicable, shall apply to a judgment or order under this section.

(7) 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.

Determining father's support obligation by applying percentage standards is inappropriate where children live in several households. In re Paternity of B. W. S., 131 W (2d) 301, 388 NW (2d) 615 (1986).

Regardless of whether fifteen-year-old boy's parenthood resulted from sexual assault as defined in criminal law, court could find intercourse and parenthood voluntary for purposes of child support. In re Paternity of J. L. H., 149 W (2d) 349, 411 NW (2d) 273 (Ct. App. 1989).

Is no statutory authority for order requiring mother to repay lying-in expenses paid by medical assistance. In re Paternity of N. L. M., 166 W (2d) 306, 479 NW (2d) 237 (Ct. App. 1991).

An order for payment of expert witness fees under sub. (3) is not limited to \$100 by s. 814.04 (2). In re Paternity of Tiffany B., 173 W (2d) 864, 496 NW (2d) 711 (Ct. App. 1993).

Sub. (4m) applies to back and future support, subject to the court's discretion. A discount in back support based on the father's assertion of paternity and lack of contact with the child was improper. Paternity of Ashleigh N. H., 178 W (2d) 478, 504 NW (2d) 422 (Ct. App. 1993).

The assignment to the state of child support by AFDC recipients under s. 49.19 (5) does not prevent a trial court acting under s. 767.51 (5) from giving the father credit for amounts actually contributed for support prior to the entry of an order even though the credit results in there being no payments owing from the father from which AFDC payments can be recovered. Paternity of Cheyenne D. L., 181 W (2d) 868, 112 NW (2d) 522 (Ct. App. 1994).

See also Wisconsin Administrative Code Citations published in the Wisconsin Administrative Code for a list of citations to cases citing ch. HSS 80, the percentage standards developed by the Department of Health and Social Services.

**767.52 Right to counsel.** (1) At the pretrial hearing, at the trial and in any further proceedings in any paternity action, any party may be represented by counsel. If the respondent is indigent and the state is the petitioner under s. 767.45 (1) (g), the petitioner is represented by a government attorney as provided in s. 767.45 (6) or the action is commenced on behalf of the child by an attorney appointed under s. 767.045 (1) (c), counsel shall be appointed for the respondent as provided in ch. 977, unless the respondent knowingly and voluntarily waives the appointment of counsel.

(2) 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 and the initial establishment of support. The appointed attorney may not represent the party in any proceeding relating to legal custody, periods of physical placement or related issues.

(2m) Representation by an attorney appointed under sub. (1) shall be provided beginning at the pretrial hearing unless, as of the date of the hearing, the results of any blood tests that were ordered by the court show that the alleged father is excluded or give rise to the rebuttable presumption under s. 767.48 (1m) that the alleged father is the father of the child. Representation by an attorney appointed under sub. (1) shall terminate during the paternity proceeding if the results of all of the blood tests ordered by the court show that the alleged father is excluded or give rise to the rebuttable presumption under s. 767.48 (1m) that the alleged father is the father of the child.

(3) This section does not prevent an attorney responsible for support enforcement under s. 59.458 (1) or any other attorney

employed under s. 46.25 or 59.07 (97) from appearing in any paternity action as provided under s. 767.45 (6).

**History:** 1979 c. 352; 1983 a. 27; 1987 a. 355; 1989 a. 31; 1993 a. 16, 481.

Paternity respondent does not have constitutional right to effective assistance of counsel; paternity action is not a criminal prosecution. In re Paternity of P. L. S., 158 W (2d) 712, 463 NW (2d) 403 (Ct. App. 1990).

**767.53 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 the proceedings shall be placed in a closed file, except that:

(1) Access to the record of any pending or past proceeding involving the paternity of the same child shall be allowed to the child's parents, the parties and their attorneys or their authorized representatives.

(2) The clerk of circuit court shall provide information from court records to the department of health and social services under s. 59.395 (7).

**History:** 1979 c. 352; 1983 a. 447; 1985 a. 29.

**767.60 Determination of marital children.** In any case where the father and mother of any nonmarital child shall 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 prior thereto, that child shall thereby become a marital child, shall be entitled to a change in birth certificate under s. 69.15 (3) (b) and shall enjoy all the rights and privileges of a marital child as if he or she had been born during the marriage of the parents; and this section shall be taken to apply to all cases prior to its date, as well as those subsequent thereto but no estate already vested shall be divested by this section and ss. 765.05 to 765.24 and 852.05. The issue of all marriages declared void under the law shall, nevertheless, be marital issue.

**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.

**767.62 Orders when paternity acknowledged.**

(1) In an action affecting the family that seeks to establish an obligation for the support of a child, the court or family court commissioner may enter a child support order against a man who has signed and filed with the state registrar under s. 69.15 (3) (b) 3. a statement acknowledging paternity that includes notice of the provisions of this section and who has notice of the hearing. The court shall determine child support under this subsection in the manner provided in s. 767.51 (4m) to (5d).

(3) Within one year after signing the statement or one year after attaining the age of 18, whichever is later, a person who has signed a statement acknowledging paternity that is filed as specified in sub. (1) may request that the court or family court commissioner order blood tests. Upon such a request, the court or family court commissioner shall require the appropriate parties to submit to blood tests. If the results of the blood tests exclude as the father of the child the man who signed the statement, the court shall dismiss any action for child support under this section, or shall vacate any order for child support entered under this section, with respect to the man. This subsection does not apply if, before a request for blood tests under this subsection, the man who signed the statement acknowledging paternity is determined to be the father of the child after the performance of blood tests.

**History:** 1993 a. 481.