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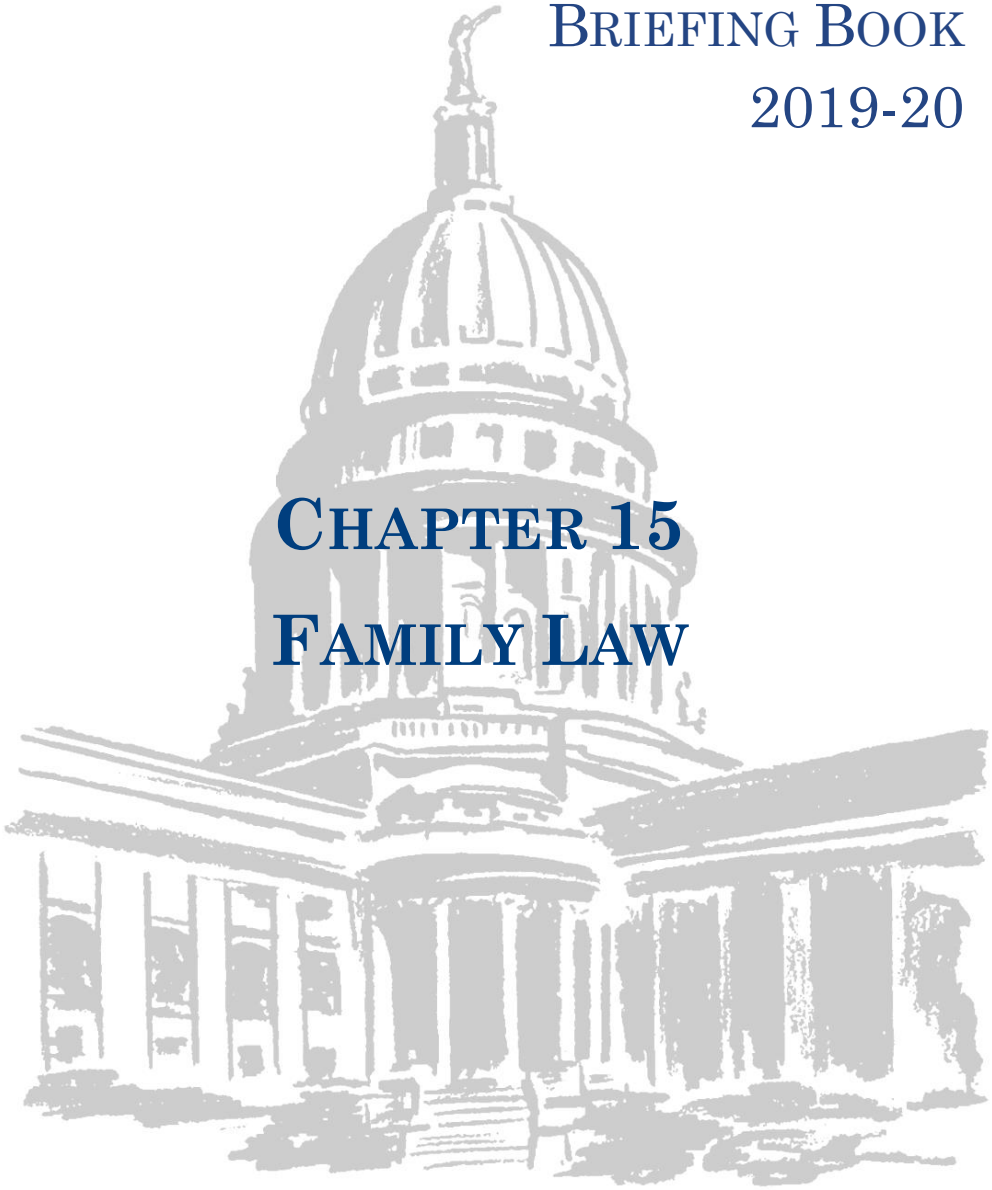

CHAPTER 15

FAMILY LAW

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Table of Contents

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Introduction

Family law encompasses all areas of family relationships, including marriage, domestic partnerships, marital property, divorce, legal custody, physical placement, child support, third-party visitation, paternity, and adoption.

The legal rights and obligations of couples, as to each other, are addressed in the areas of marriage, domestic partnerships, marital property, divorce, legal separation, property division, and spousal maintenance.

Wisconsin law addresses the legal rights and obligations of parents and other caregivers toward children in the areas of legal custody, physical placement, child support, paternity, adoption, and third-party visitation. Note that the issues of custody, placement, and child support are decided in any type of family law proceeding in which minor children are involved. If the parents were married, then such issues would be decided in a divorce or legal separation proceeding; if the parents were not married, generally those issues would be resolved in the context of a paternity case.

Marriage

In Wisconsin, marriage is a civil contract between spouses that creates a legal status governing certain rights and responsibilities to each other and to others. [s. 765.01, Stats.]

Parties

In order to marry without parent or guardian consent, a person must be at least 18 years of age. If a person is age 16 or 17, the person may marry with the written consent of a parent, guardian, or custodian. [s. 765.02, Stats.]

"Common law" marriage is not recognized as a legal marital status in Wisconsin. In some states, common law marriage is a status where a couple living together in a marital-like relationship for an established period of time are treated as legally married.

Some individuals are not allowed to marry under Wisconsin law. Specifically, persons who are nearer of kin than second cousins (unless sterile); a person who is already married to someone else; a person who is incapable of assenting to marriage due to a "want of understanding"; and a person who has been divorced less than six months may not marry. [s. 765.03, Stats.]

License and Ceremony

A marriage license may be obtained in any county where at least one party has resided for 30 days before applying for the license. If both parties are nonresidents of the state, a

marriage license may be obtained in the county where the marriage ceremony will be performed. Generally, a county clerk may not issue a license within five days of the parties' application. However, at the county clerk's discretion, and upon receiving an additional fee, the five-day waiting period may be waived. [ss. 765.05 and 765.08, Stats.]

With the completed application, a couple must submit a fee, exhibit certified copies of their birth certificates, provide documentary proof of identity and residence, submit a copy of a judgment or death certificate affecting prior marital status, and swear to or affirm the application before the county clerk. Once the license has been issued, the couple may marry in any county in the state within 30 days of its issuance, except, when both parties are nonresidents of the state, the ceremony must be performed in the county in which the marriage license was issued. [ss. 765.09, 765.12, and 765.15, Stats.]

The statutes provide a procedure for family members, the district attorney, or a circuit court commissioner to object to a marriage. The person objecting may file a petition with the clerk of probate court explaining that the application is false or insufficient, or that the applicants are not legally allowed to marry. If the court determines the objections have merit, it must order the marriage applicants to appear at a hearing, and show why the objections are not valid. [s. 765.11, Stats.]

The marriage ceremony must involve the mutual declarations of the two parties that they take each other as spouses. The declarations must be made before an authorized efficient, and at least two competent adult witnesses. Authorized officiants include ordained clergy members, judges, circuit court commissioners, and municipal judges. In certain recognized religious ceremonies, the two parties themselves may mutually declare the marriage without an officiant. The officiant, or for ceremonies without an officiant, one of the parties, must return a completed marriage document (which consists of the license and a license worksheet) to the Register of Deeds of the county in which the marriage was performed within three days after the marriage date. [ss. 765.16 and 767.19, Stats.]

Recognition of Valid Marriages

Generally, under the Full Faith and Credit Clause of the U.S. Constitution, a marriage contracted in another state that satisfies the legal requirements of that state will be recognized in Wisconsin. However, courts have acknowledged an exception for when a marriage violates Wisconsin's strong public policy and Wisconsin had the most significant relationship to the spouses at the time of the marriage. Additionally, state law provides that if a Wisconsin couple enters into a marriage outside of this state when the couple is ineligible or is prohibited from marrying under state law, the marriage is void, and each party is subject to a penalty of up to nine months in jail and up to a $10,000 fine, or both. [See *Nevada v. Hall*, 440 U.S. 410, 422 (1979); ss. 765.04 and 765.30, Stats.]

Same-Sex Marriages

Same-sex marriages are legal under both state and federal law. Valid same-sex marriages must be recognized in every state, and any same-sex marriage prohibitions have been deemed unconstitutional. Thus, states must issue a marriage license to same-sex couples to the same extent that they are issued to opposite-sex couples. Wisconsin statutes that refer to a "husband" and "wife" apply instead to a "spouse," regardless of whether the spouse is of the same or opposite sex, if the statute governs a right or obligation that is conferred by virtue of the marital status. [*Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Wolf v. Walker, cert. denied,* U.S. Oct. 6, 2014).]

Wisconsin law recognizes domestic partnerships and related rights and benefits in limited circumstances. 2017 Wisconsin Act 59 closed the domestic partnership registry under ch. 770, Stats., in that no new declarations of domestic partnerships are being issued after April 1, 2018. Also, Act 59 generally discontinued certain benefits for domestic partners of public employees of the state and local governmental units.

Marital Property

Wisconsin's marital property law took effect on January 1, 1986, making Wisconsin what is commonly referred to as a "community property" state. The law governs spousal property interests during marriage as it relates to creditors and at death. It generally does not govern property rights at dissolution of marriage by divorce, annulment, or legal separation. [ss. 766.001 (2), 766.03 (2), and 766.75, Stats.]

The principal feature of the marital property system is that each spouse, by law, has an equal ownership interest in property acquired by either or both spouses during marriage, which gives a present, undivided, one-half interest in all property.

Under the marital property law, all property owned by spouses is presumed to be marital property. Marital property includes: income earned by a spouse or income attributable to property of a spouse that accrues during marriage; property acquired in exchange for, or with, the proceeds of marital property; the substantial appreciation value of individual property that is attributable to the substantial effort of either spouse; and any property not classified as something other than marital property. [ss. 766.31 and 766.63, Stats.]

A spouse may nevertheless have individual property that is excluded from marital rights in the following circumstances: property owned by a spouse before marriage; property obtained by gift or inheritance during the marriage; property acquired in exchange for, or with, the proceeds of individual property; market appreciation of individual property; income from third party trusts; property designated as individual property by a marital property agreement; income from nonmarital property designated as individual by a

properly executed "unilateral statement"; and certain portions of personal injury awards. [s. 766.31, Stats.]

Special classification rules apply to homestead property, certain retirement, pension and deferred compensation plans, and life insurance policies. For example, a home titled in both spouses' names together is automatically classified as survivorship marital property, with all ownership passing to a surviving spouse, unless explicitly classified otherwise. [ss. 766.605, 766.61, and 766.62, Stats.]

In general, spouses must act together to manage and control marital property held in the names of both spouses in the conjunctive (e.g., John *and* Mary). Otherwise, a spouse acting alone may manage and control the person's own individual property and marital property held in the alternative (e.g., John *or* Mary). Special management and control rules apply in some circumstances, such as creating a mortgage interest on a home, managing business property, and making gifts. [ss. 766.51, 766.53, and 766.70 (3), Stats.]

Marital property agreements are commonly known as prenuptial agreements, or pre-nups, though in Wisconsin such agreements may be executed either before or during marriage.

One aspect of the marital property law is equal access to the extension of credit. In evaluating a spouse's creditworthiness, the law requires a creditor to consider all marital property available to satisfy the obligation. If credit is extended, a creditor must give written notice to the nonapplicant spouse of the extension of credit before any payment is due. The type of obligation determines when marital property may be used to satisfy the obligation. For example, an obligation incurred prior to the marriage is generally satisfied from the incurring spouse's individual property. An obligation incurred by a spouse during the marriage is presumed to be in the interest of the marriage and the family and may be satisfied from all marital property, as well as the individual property of the incurring spouse. [ss. 766.55, 766.555, 766.56, and 766.565, Stats.]

Marital Property Agreement

Spouses may enter into a marital property agreement regarding the classification of marital or individual property and the rights to control the property. Persons intending to marry may enter into a marital property agreement, but the agreement becomes effective only upon their marriage. Any agreement must be in writing and signed by both parties. To be enforceable, spouses must enter into the agreement voluntarily and after receiving notice and disclosure of the other spouse's property and financial obligations. An agreement cannot affect certain obligations, such as child support. Generally, an agreement may be amended or revoked only by a subsequent marital property agreement. [s. 766.58, Stats.]

In order for a reclassification of property to be effective against a creditor, the creditor must have actual knowledge of the relevant provision in the marital property agreement prior to the granting of credit. [s. 766.55 (4m), Stats.]

The statutes include both marital property and individual property classification agreement forms, sometimes referred to as "opt-in" and "opt-out" agreements, that parties may use to classify all property as either individual or marital. These agreements may be terminated by one spouse unilaterally and they have no impact upon property division at divorce. [ss. 766.588 and 766.589, Stats.]

A spouse or a person intending to marry may also unilaterally classify the income generated by his or her individual property as individual property by executing a written statement to that effect. The executing spouse must provide the other spouse with a written copy of the statement within five days after it is signed. The executing spouse may revoke the statement in writing at any time, but must notify the other spouse in writing upon revocation. [s. 766.59, Stats.]

Wills

A spouse may dispose of half of the couple's marital property and all of the spouse's individual property, if any, by will. The surviving spouse retains a one-half share in the marital property, and that share is not subject to probate. "Deferred marital property" rules apply to property acquired during the marriage, but prior to 1986, would have been marital property had the marital property law applied when the property was acquired. This property is also called "unclassified property." Under certain circumstances, a surviving spouse may elect to retain or receive a portion of the deferred marital property. [ss. 766.589, 851.055, and 861.02, Stats.]

Taxation

Certain tax credits are available only to couples filing joint returns, not those married filing separately.

Married persons in Wisconsin may file joint or separate tax returns. On joint returns, all income, deductions, and credits for both spouses are combined on the same return. [s. 71.03 (2) (d), Stats.; 26 U.S.C. s. 6103.] However, the Internal Revenue Service's (IRS's) innocent spouse rule relieves a spouse from tax liability if the innocent spouse did not know or have reason to know that the other spouse omitted an income item or erroneously claimed a tax credit or deduction on a joint return, and it would be inequitable to impose liability on the innocent spouse. [s. 71.10 (6), Stats.; 26 U.S.C. s. 6015.]

If separate returns are filed, each spouse must report half of the total, combined, marital property income, deductions, and credits, except as provided by a marital property agreement. In order to resolve questions that might arise regarding access of a spouse to the other spouse's tax return if separate returns are filed, Wisconsin tax law permits the

spouse or former spouse to examine tax returns or claims of the other spouse in the following circumstances: (1) the spouse or former spouse may be liable; (2) the Department of Revenue (DOR) issued an assessment or notice of claim to the spouse or former spouse; or (3) the spouse or former spouse is subject to a collection for a delinquency. Also, DOR may disclose whether an extension for filing a return or claim was obtained, the extended due date, and the date on which the return or claim was filed. [See Rev. Rul. 87-13, 1987-1 C.B. 20; 26 C.F.R. s. 1.66-1; ss. 71.78 (4) (k) and (4m) and 766.31, Stats.]

Legal separation is a legal status that is distinct from physical separation. Any couple may physically separate at any time without affecting their legal marital status.

DIVORCE

In Wisconsin, actions for divorce and legal separation generally use the same procedures. A judgment of legal separation differs in that it allows the parties to maintain the legal status of marriage (sometimes used to continue family coverage for health insurance, or for other personal reasons), though the judgment must still addres all financial and child-related matters, similar to divorce. This discussion generally focuses on divorce proceedings.

Circuit court forms for family actions can be found at:

https://www.wicourts.gov/

General Requirements and Procedures

In order to initiate a divorce action, one spouse must have been a Wisconsin resident for at least six months prior to the filing of the petition for divorce. In addition, at least one of the parties to the divorce must have been a resident of the county in which the petition is filed for at least 30 days prior to the filing of the petition. County clerks of court collect a fee when a party commences a divorce or any other action affecting the family. [ss. 767.301, 814.61, and 814.75, Stats.]

Wisconsin is a "no fault" divorce state, which means the court must find simply that the marriage is "irretrievably broken." This is shown by both parties stating in the divorce petition or otherwise under oath that the marriage is irretrievably broken, or by the parties voluntarily living apart continuously for 12 months or more immediately prior to filing the divorce petition and one party has stated that the marriage is irretrievably broken. If only one party has stated that the marriage is irretrievably broken and the parties have not voluntarily lived apart for 12 months, the court may find that the marriage is irretrievably broken by determining that there is no reasonable prospect of reconciliation. [s. 767.315, Stats.]

Wisconsin requires a waiting period before a judgment of divorce may be granted. When the parties have filed a joint petition for divorce, 120 days must pass from the filing date before the action may be brought to trial or to a final hearing for approval of a settlement

agreement. When one party has filed the petition, the 120-day waiting period begins when the other party is served with the petition. [s. 767.335, Stats.]

Pendency of Divorce Action

A circuit court judge or court commissioner may make just and reasonable temporary orders during the pendency of an action. Temporary orders may concern legal custody and periods of physical placement of a minor child, removal of a child from the court's jurisdiction, payment for child support and spousal maintenance, payment of debts, disposal of assets, and counseling for one or both parties, among other issues. [s. 767.225, Stats.]

Each party's financial disclosure statement in a divorce action is sealed by the court and generally cannot be disclosed to any person outside the action.

Reconciliation may be attempted, if stipulated by the parties in writing, during the pendency of a divorce action. A suspension of the proceedings to effect reconciliation may be granted for up to 90 days. Suspension does not affect the parties' rights in the divorce action. During the suspension period, the parties' acts: (1) do not constitute an admission that the marriage is not irretrievably broken; and (2) do not negate that the parties have voluntarily lived apart continuously for 12 months or more immediately before the commencement of the action. If the parties do not reconcile, the action will proceed as though no reconciliation period was attempted. [s. 767.323, Stats.]

During the pendency of a divorce action, parties are required to disclose information about: (1) assets owned by them individually or jointly; (2) debts and liabilities; and (3) income. There are penalties and other procedural consequences for incomplete disclosures. All financial and asset information that is disclosed is confidential and sealed by the court. [s. 767.127, Stats.]

The statutes contain various requirements for the parties to attend counseling or educational programs. Most of the programs focus on educating parents about the effect of divorce or parental separation on children and how to lessen any detrimental effects. Specific provisions relate to child custody mediation where it appears that legal custody or physical placement is contested, as discussed later in this chapter. [ss. 767.401 and 767.405, Stats.]

Reaching a Judgment

The primary issues decided in a judgment of divorce are: property division; child support and spousal maintenance; legal custody of a child; and periods of physical placement with a child (sometimes including visitation rights of third parties).

Parties may stipulate to any of these issues in settlement of a divorce action, subject to court approval and certain limitations. For example, child support must be determined in a

manner that is consistent with the state's child support standards. Also, a stipulation cannot leave one party in need of assistance from the state. [ss. 767.34 and 767.35, Stats.]

Property Division

Property division in a divorce action is not governed by the marital property law, but, rather, by the marital dissolution laws. Generally, in a divorce, all property acquired before or during the marriage, owned by either or both spouses, is subject to division. This includes assets such as pension plans, retirement accounts, vehicles, and real estate. Property acquired by gift or inheritance by one party is generally not subject to division, unless the court finds that refusal to divide the property would result in a hardship on the other spouse or the children, if any. [s. 767.61 (2) and (3), Stats.]

After determining all assets and debts of the parties, the court must presume that each party should be awarded an equal value of the total divisible property, but the application of several statutory factors may alter this presumption. One factor for consideration is the existence of a written agreement by the parties concerning any arrangement for property distribution, which is binding on the court if equitable. Other factors include the length of the marriage, the property brought to the marriage by each party, and the tax consequences to each party. For example, in dissolving a marriage of short duration, where the parties had a large difference in the property brought to the marriage, a court may consider an unequal division of property. [s. 767.61 (3), Stats.]

Debts incurred during the marriage are also assigned, but can be collected from either party regardless of how responsibility for debts is divided between the parties in their judgment of divorce. A divorce judgment assigning a debt is not binding on creditors, because a creditor is not a party in the divorce action. To avoid possible problems with the collection of debts after a divorce, parties may take actions such as consolidating and refinancing in the name of the spouse who is assigned those debts. [ss. 766.55 and 767.61, Stats.; *Sokaogon Gaming Enterprise Corp. v. Curda-Derickson*, 2003 WI App 167.]

Maintenance

As part of a divorce judgment, a court may order maintenance payments (formerly known as alimony) to either party for a limited or indefinite period of time, after considering several designated statutory factors. Some of these factors include the length of the marriage; the age and physical and emotional health of the parties; the division of property made in connection with the divorce; the educational level of each party at the time of the marriage and at the time of the divorce; the earning capacity of the party seeking maintenance, including the party's educational and employment background, length of absence from the job market, and child-rearing responsibilities during the marriage; and the contribution of one party to the education, training, and earning power of the other party. [s. 767.56, Stats.]

A maintenance award must meet the dual objectives of supporting the recipient in accordance with the parties' needs and earning capacities, while ensuring a fair and

equitable financial arrangement between them. There is no statutory presumption of an equal division of earnings in awarding maintenance, but courts have stated that a reasonable starting point for a maintenance evaluation in a long-term marriage is that the dependent spouse may be entitled to one-half of the total combined earnings of both parties. [*Hefty v. Hefty*, 172 Wis. 2d 124 (1992); *Johnson v. Johnson*, 225 Wis. 2d 513 (Ct. App. 1999).]

The application form for child support case management services can be found at: https://dcf.wisconsin.gov/cs/apply

If no maintenance is awarded in the judgment, maintenance is generally waived, unless specifically held open, and cannot later be ordered by a court. If maintenance is awarded, a court may consider revising the amount or duration if it first finds that there has been a substantial change in the parties' financial circumstances. [s. 767.59, Stats.; *Grace v. Grace*, 195 Wis. 2d 153 (Ct. App. 1995).]

For judgments entered before January 1, 2019, the IRS allows a payer to deduct the amount of maintenance payments from reported gross income on a tax return, if certain requirements are met. However, the IRS disallows deductions for any portion of spousal support that is intended for child support. [26 U.S.C. ss. 71 and 215.]

Under the new federal tax law, maintenance payments are no longer deductible for the payer, nor are such payments considered taxable income to the recipient. These new rules apply to any judgment of divorce or legal separation entered after December 31, 2018, and to any judgment of divorce or legal separation entered before that date, but modified after December 31, 2018, if the modification expressly provides that the new law applies to the modification. [Tax Cuts and Jobs Act, Pub. L. No. 115-97, s. 11051, 131 Stat. 2054 (2017).]

PATERNITY

A child born to a married couple is generally presumed by law, to be the child of both spouses. Paternity issues arise when unmarried couples have children. Depending on the circumstances, a paternity action may be filed, in which the court addresses not only paternity, but issues related to the child, similar to the way these issues are addressed in a divorce.

A child born to a married couple is generally presumed, by law, to be the child of both spouses.

Ways to Establish Paternity

If parents are not married when a child is born, legal fatherhood can be established in three different ways:

- **Voluntary paternity acknowledgment.** If both the mother and the man are certain that the man is the father, the easiest way to establish fatherhood is with the Voluntary

Paternity Acknowledgment form, which the father and the mother may sign together before a notary. The Acknowledgement may be signed at any time, and is commonly provided after birth, by a hospital or midwife. Local child support agencies can also help with the form. [ss. 767.805 and 891.405, Stats.; 42 U.S.C. s. 666 (a) (5) (D).]

- **Court ruling.** If a man is named as the possible father in a petition for paternity and does not agree, or, if a man states that he is the father of a child and the mother does not agree, a court will make a ruling about paternity. Both the man and the mother will be notified of the hearing and both may attend. These procedures are explained in more detail below.
- **Acknowledgment of marital child (legitimation).** If a mother and the father marry after their child is born, the parents may sign a form for an Acknowledgment of Marital Child to establish paternity. Local child support agencies can help with the form, which is then filed with the state Vital Records Office. [s. 767.803, Stats.]

An action to establish paternity cannot be brought after the child turns 19.

Several persons are eligible to commence a paternity action under Wisconsin law. Eligible persons include the child, the child's mother, or the state. Likewise, a man alleging himself to be the child's father may bring an action to determine paternity. In addition, the husband of the mother, who is presumed to be the child's father, or a man legally acknowledged as the child's father at birth, may bring an action to refute paternity. [s. 767.80, Stats.]

Court Procedure

A paternity action is commenced by filing a summons, notice, and petition for paternity with the clerk of court for the county in which the child or the alleged father resides.

The person filing the action must generally serve the filed documents on the other parent or alleged parent within 90 days of filing with the clerk of court. A guardian ad litem (GAL) is appointed for a minor parent, and may be appointed for the child in some circumstances. The alleged father has a right to counsel, and will have an attorney appointed if the alleged father is deemed indigent. [ss. 767.813, 767.815 to 767.83, 801.02 (1), and 801.11, Stats.]

The court proceeding generally has three stages: the first appearance, the pretrial hearing, and the trial. All three stages are closed to the public. Paternity can be acknowledged at any of these stages. The alleged father is permitted to enter one of the following three pleas relating to the paternity: admit paternity, deny paternity, or

Liability for past child support payments is limited to the period after filing unless the action was delayed because of duress, threats, promises, or evasion.

admit paternity subject to confirming tests. [ss. 767.853, 767.863, 767.88, and 767.883, Stats.]

At the first appearance, the court must inform the parties of several things, including the rights and obligations established by a paternity judgment; that any party may request genetic tests; and that defenses to paternity include sterility or impotence at the time of conception, lack of intercourse with the mother during the preconceptive period, or that another man had intercourse with the mother during that period. [ss. 767.86 to 767.863 and 767.813 (5g), Stats.]

At the pretrial hearing, the court must evaluate the probability of determining paternity at trial. At this point, witnesses and other evidence may be presented. The court may, at the conclusion of the evidence, make a recommendation to the parties regarding the paternity action including dismissal or settlement. [ss. 767.853 and 767.88, Stats.]

If no settlement is reached at the pretrial stage, a paternity trial is held in two parts: first, to make the determination of paternity and second, to make a determination of child support, legal custody, periods of physical placement, and any related issues, if necessary. [s. 767.883, Stats.]

Evidence Used to Establish Paternity

Genetic tests are one form of evidence used to determine the existence of paternity. If the results of genetic testing show that the alleged father is not excluded as a possible father of the child and that the statistical probability of the alleged father's parentage is 99% or higher, the alleged father is rebuttably presumed to be the father of the child.

Other evidence that may be submitted includes evidence of sexual intercourse between the mother and alleged father during the possible time of conception; evidence of a relationship between the mother and alleged father at any time; an expert's opinion concerning the statistical probability of the alleged father's paternity based upon the duration of the mother's pregnancy; and, any other evidence relevant to the issue of paternity. [ss. 767.84 and 767.87, Stats.]

Judgment of Paternity

Once the trial is completed, the court enters a judgment of paternity. The judgment contains an adjudication of the child's paternity, an order requiring either parent to pay child support, an order for the child's legal custody and physical placement, an order regarding which parent will have the right to claim the tax exemption for the child, and orders relating to the payment of birth expenses and all related costs and fees of the action, including GAL fees and genetic testing fees. [s. 767.89, Stats.]

Legal Custody and Physical Placement

In actions for divorce, legal separation, annulment, or paternity, a court must assign legal custody and physical placement for a child. Custody and placement involve different aspects of a child's upbringing.

"Legal custody" means the right and responsibility to make major decisions concerning a child. Major decisions include consent to marry, consent to enter military service, consent to obtain a driver's license, authorization for nonemergency health care, and choice of school and religion. The court, in its order for custody, may delineate specific decisions to be made by either party.

"Physical placement" is the time a child is physically placed in a parent's care. A parent must make routine daily decisions while the child is physically with that parent, consistent with the major decisions made by either or both parents having legal custody. [ss. 767.001 (2), (2m) and (5) and 767.41 (6), Stats.]

In determining legal custody and physical placement, a court must consider all facts relevant to the best interest of the child. A court may not prefer a parent on the basis of sex or race.

Statutory Factors

In assigning legal custody and physical placement, the court must consider numerous statutory factors. Some of these include the child's wishes; the child's relationship with the parents; the child's age; the family's history of custodial roles and any reasonable lifestyle changes that are proposed; the child's adjustment to home and school; and the need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child. [s. 767.41 (5), Stats.]

Legal Custody

The court must presume that joint legal custody is in the child's best interest. However, a court may award sole legal custody if the parties agree to it and the court finds that sole legal custody is in the child's best interest. Absent party agreement, the court may award sole legal custody if the court finds that: (1) one party is not capable of performing parental duties or does not wish to be active in raising the child; (2) conditions exist that substantially interfere with the exercise of joint legal custody; or (3) the parties will not be able to cooperate in future decision-making.

If there is evidence of a pattern or serious incident of domestic abuse by one parent against the other parent, the presumption for joint legal custody does not apply. Rather, under such circumstances, the court presumes that joint legal custody is detrimental to the child and contrary to the child's best interest.

However, the "spousal abuse" presumption may be rebutted by a preponderance of evidence that the abusive party has completed treatment for batterers provided through a certified

treatment program or treatment provider and is not abusing alcohol or any other drug, and that it is in the best interest of the child that the abusive party be given joint or sole legal custody after considering the specified custody and placement factors.

If both parties have engaged in a pattern or serious incident of domestic abuse, for purposes of the presumption, the court must attempt to determine which party was the primary physical aggressor, considering factors such as any prior acts of abuse, relative severity of injuries, acts of self-defense, and any patterns of coercive and abusive behavior between the parties. If one, but not both, of the parties was convicted of a crime that was an act of domestic abuse with respect to the other party, the court must find the party who was convicted to be the primary physical aggressor. If the court determines that neither party was the primary physical aggressor, the presumption against a party's custody rights does not apply. [s. 767.41 (2), Stats.]

Physical Placement

A child is entitled to periods of physical placement with both parents unless the court finds that placement with a parent would endanger the child's physical, mental, or emotional health. In determining physical placement, a court must consider all facts relevant to the child's best interest, including the same statutory factors that apply to legal custody determinations.

Wisconsin statutes provide that a placement schedule should allow a child to have regularly occurring, meaningful periods of physical placement with each parent. The schedule must maximize the amount of time a child spends with each parent, considering geographic separation and accommodations for different households. According to Wisconsin court decisions, the requirement to maximize time with both parents is not synonymous with a presumption for equal physical placement, but requires a consideration of the child's best interest and the amount of time a child has with both parents within an overall placement schedule.

A court must set a placement schedule that: (a) allows the child to have regularly occurring, meaningful periods of physical placement with each parent; and (b) maximizes the amount of time the child may spend with each parent.

A court may not deny a parent physical placement based on the parent's failure to make child support or maintenance payments. [s. 767.41 (4), Stats.; *Keller v. Keller*, 2002 WI App. 161, ¶ 12.]

Guardian Ad Litem

When the legal custody or physical placement of a child is contested, or if there is reason for special concern regarding the welfare of the child, the court appoints a GAL for the child. A GAL's responsibility is to advocate for the best interest of the child and to make

recommendations to the court regarding paternity, custody, physical placement, and support. A GAL must consider, but is not bound by, a child's wishes. A GAL must be a licensed attorney in the State of Wisconsin who meets the GAL special training requirements. Generally, both parents are required to contribute to the payment of the GAL's fees. [s. 767.407, Stats.; SCR 35.015 (2015-16).]

Mediation

Every county must make mediation services available to help the parties resolve their disputes about the best interests of a child. With exceptions for undue hardship or endangerment to one of the parties, an initial session of mediation is required in any action where it appears that legal custody or physical placement is contested. The parties may contract with a mediator at their own expense or may use the county's family court service mediators. If an agreement is reached, it must be reviewed by the parties' attorneys and the GAL and be approved by the court. If no agreement is reached, the matter must be referred for a legal custody or physical placement study and the issues are resolved through court procedures. [s. 767.405, Stats.]

Modification of Custody and Placement Order

A court generally may not modify an initial legal custody or physical placement order for two years unless the current custodial conditions are physically or emotionally harmful to the best interest of the child. This is meant to provide a period of finality and stability while the child is adjusting to the new family situation.

Under the so-called "use-it-or-lose-it" provision, a court may modify a party's rights to physical placement for failure to exercise physical placement.

After the two-year period, the court may modify the legal custody or placement order if it first finds that: (1) it is in the best interest of the child to do so; and (2) a substantial change of circumstances has occurred that affects custody or placement. In considering a request to modify a custody or placement order, the court presumes that continuing the underlying physical placement arrangement is in the best interest of the child.

If the parties have substantially equal periods of placement, the court may modify an order for physical placement at any time if it is in the best interest of the child, but only if circumstances make it impractical to continue the equal placement arrangement.

2017 Wisconsin Act 263 created a new procedure that applies when a parent seeks to relocate a child. Generally, under the new law, if a court granted physical placement rights to both parents and a parent later plans to relocate and reside with the child 100 miles or more from the other parent, the moving parent must file a motion with the court seeking permission to relocate, except in circumstances in which the parents already live more than 100 miles apart. The motion must contain specific information, including notice to the

nonmoving parent regarding how to object to the relocation, and must be served on the nonmoving parent by mail. The statutes provide a procedure for the nonmoving party to object and provides standards for when relocation must or may be allowed. A court must hold an initial hearing on the motion to relocate within 30 days after the motion is filed. If there is an objection, the court will generally refer the parties to mediation, appoint a GAL if mediation fails, and set a final hearing to be held within 60 days.

Additional information on child support in Wisconsin can be found at:

https://dcf.wisconsin.gov/cs/home

At any time, a court may deny a parent's physical placement rights if it finds that the placement rights endanger the child's physical, mental, or emotional health. [ss. 767.451 and 767.481, Stats.]

Enforcement of Custody and Placement Order

Methods for enforcing rights to legal custody and physical placement include contempt of court sanctions and criminal sanctions relating to interference with the custody of a child. Additionally, statutory remedies require a court to grant periods of physical placement to replace those denied or interfered with by the other parent and to order the uncooperative parent to pay costs and attorney fees for maintaining the enforcement action. [ss. 767.471 and 948.31, Stats.]

Wisconsin courts may also enforce or modify custody and placement orders from tribal courts, other states, or other countries under the procedures set forth by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and the Hague Convention on the Civil Aspects of International Child Abduction. [ch. 822, Stats.]

Child Support

As part of a divorce judgment, paternity judgment, or cases where a child's parents may live apart, the parties are responsible for supporting a child under 18, or under 19 years old if the child is pursuing an accredited course of instruction leading to the acquisition of a high school diploma or its equivalent. The court must determine the amount of child support to be paid using child support standards promulgated by the Department of Children and Families (DCF). [s. 767.511, Stats.]

The administrative code provides the child support standards that are to be applied to a person's income in determining the appropriate level of child support. Child support amounts are based on a percentage of the parent's gross income. The percentage-of-income standards when one parent has primary physical placement are as follows:

- 17% for one child.
- 25% for two children.
- 29% for three children.

- 31% for four children.
- 34% for five or more children.

When both parents have court-ordered periods of physical placement of a child for at least 25% of the year (92 overnights) each, the percentage standard is calculated for both parents and offset under a specific formula.

[ss. DCF 150.03 and 150.04 (2), Wis. Adm. Code.]

The amount of child support is determined from the obligated parent's gross monthly income. Gross income includes all salary and wages before taxes and other deductions are taken out, income from assets, workers' compensation, unemployment income, and Social Security disability benefits. Income does not include public welfare assistance. [s. DCF 150.02 (13), Wis. Adm. Code.]

In most cases, child support is automatically withheld from the income paid by an obligated parent's employer. This is known as income assignment.

The court is also permitted to set child support based on a payer's ability to earn, or "imputed income," beyond actual earnings in situations where a parent's income is less than the parent's earning capacity or is unknown. The court may consider factors such as past earnings; current physical and mental health; history of child care responsibilities of the parent with primary placement; the parent's education, training, and recent work experience; and local job openings. [s. 150.03 (3), Wis. Adm. Code.]

Special rules govern the application of the percentage standards to the following types of payers:

- A serial family payer, who has an existing child support obligation and incurs an additional child support obligation in a subsequent family.
- A split-placement payer, who has physical placement of at least one but not all of the children.

In cases of teenage parents, both sets of grandparents also have a child support obligation.

- A low-income payer, who has an income below 150% of the federal poverty level.
- A high-income payer who has an income above $84,000 per year. A further reduced percentage rate applies to income in excess of $150,000. [s. DCF 150.04, Wis. Adm. Code.]

A court may deviate from the standards only if the court finds that the use of the applicable standard is unfair to the child or to any of the parties. Any deviation must include

consideration of an extensive list of factors set forth in the statutes and the reasons for deviation must be written or stated on the record. [s. 767.511 (1j), (1m), and (1n), Stats.; s. DCF 150.03 (11), Wis. Adm. Code.]

Although the child support amount is calculated based on a percentage standard, current law provides that the child support order must be given as a fixed sum. The order may be expressed as a percentage only in limited circumstances. [s. 767.511 (1) (a), Stats.]

A court that issues a child support order must also assign responsibility for payment of the child's health care expenses. In assigning responsibility, the court must consider specified factors, including existing and available health insurance, the extent of coverage, and the cost of health insurance coverage for the child. The court may require a parent to initiate or continue health care insurance coverage for a child. [s. 767.513, Stats.; s. DCF 150.05, Wis. Adm. Code.]

The Wisconsin Child Support Lien Docket is a registry containing the names of any person with an obligation for past-due child support. The amount owed equals a lien against the person's real and titled personal property.

The searchable child support lien docket is available at:

https://liendocket.wisconsin.gov

Child support must generally be withheld from employment income and is paid to the Wisconsin Support Collection Trust Fund. Child support payments are then paid out by direct deposit or added to a debit card. [s. 767.75, Stats.]

Modification of Child Support Order

Generally, a court may not modify a child support order except when there has been a substantial change in the circumstances of the parties or the children since the entry of the order. A court may presume that there has been a substantial change in circumstances in response to certain events, including: commencement of participation in Wisconsin Works (W-2) by either parent; expiration of 33 months after the date of entry of the last child support order; or failure of the payer to furnish a timely annual financial disclosure. A court may also find that any of the following constitute a substantial change in circumstances: a change in the payer's income or earning capacity; a change in the child's needs; or any other condition the court determines is relevant in a particular case. If a court determines that there has been a substantial change in circumstances, then the court may, but is not required to, modify the order by applying the child support standards to the current circumstances. [s. 767.59, Stats.]

Enforcement of Child Support Order

There are several tools available for enforcement of support orders. The mechanisms include mandatory employer reporting of newly hired employees to DCF; tax refund intercepts; accrual of interest on past due child support amounts; work search requirements; contempt of court proceedings with penalties or fines, imprisonment, or both; ineligibility for W-2 benefits; suspension of driver's licenses; data sharing between DCF and

state financial institutions; liens on property; seizure of assets; suspension of recreational licenses and professional licenses and credentials; denial of passports; denial of college or business loans; and seizure of bank accounts. State and federal criminal penalties may also apply. [subch. VIII, ch.767, Stats.]

Wisconsin courts may also enforce or modify child support orders from other states under the procedures set forth in ch. 769, Stats., the Uniform Interstate Family Support Act (UIFSA).

Local county child support offices prosecute enforcement actions on behalf of parents receiving child support, when the recipients have applied for the services. The fee for services is $25 for each year in which $500 or more is received in support. [s. 767.57, Stats.; 42 U.S.C. s. 654 (6) (B).]

Additional information on adoption in Wisconsin can be found at:

https://dcf.wisconsin.gov/adoption

ADOPTION

The process for adopting a child usually involves four steps: (1) termination of parental rights; (2) petition to adopt and order for investigation; (3) agency investigation (often referred to as the home study); and (4) hearing on the adoption. All hearings concerning termination of parental rights and adoption must be closed to the public. [s. 48.837 (2) to (8), Stats.]

Agency adoptions involve the placement of a child with adoptive parents by a public agency, including the Bureau of Milwaukee Child Welfare or any other county department of human or social services, or by a licensed private agency. Public child welfare agencies generally place children who have become wards of the state for reasons such as orphanage, abandonment, or abuse. Private agencies are sometimes run by charities or social service organizations. [ss. 48.833 and 48.834, Stats.]

An independent adoption refers to situations where the biological and adoptive parents find each other without the help of an agency, often through friends or acquaintances. In Wisconsin, these families must still work with an agency for the home study and birth parent counseling services. [ss. 48.837 and 48.84, Stats.]

There is no statutory "open adoption" in Wisconsin. If adoptive parents have made promises of continued contact with the birth parents after the termination of parental rights, those promises are not enforceable by a court.

Similarly, a parent who has custody of a child may place the child for adoption in the home of a relative. This is most familiar in cases of grandparent adoptions, but could also include adoption by a brother, sister, first or second cousin, uncle, or aunt. [s. 48.835, Stats.]

It is also common for a stepparent to adopt the child of his or her spouse under the same general procedures. Wisconsin does not allow adoption by the domestic partner of a birth parent under the stepparent adoption procedures. [s. 48.82 (1) (a), Stats.]

It is lawful for the proposed adoptive parents to pay certain, limited expenses of the birth parent that relate to the adoption. These may include medical and hospital expenses, birthing classes, maternity clothes (not to exceed $300), legal expenses, living expenses if necessary to protect the mother or child's health and welfare (not to exceed $5,000), counseling, and a gift to the mother (not to exceed $100 in value). [s. 48.913, Stats.]

A biological parent may sign a consent to terminate parental rights after the birth of a child, and may revoke the consent at any point up until the judge signs the order terminating parental rights. When the termination order is entered by the court, it is final, and there is no waiting period allowing the biological parent to change his or her mind. A biological parent may appeal the order within 30 days, under an expedited appeals process. [ss. 48.41, 48.46 (2), 48.63 (3) (b) 5., and 48.837 (1r) (e), Stats.]

In every adoption, the agency caseworker must determine whether the federal Indian Child Welfare Act of 1978 applies. The Act applies if the child is either a member of an Indian tribe or eligible for membership, and is the biological child of a member of an Indian tribe. Each tribe sets its own standards of eligibility for membership. Unless it is a voluntary proceeding, the tribe must be notified and given an opportunity to assert the statutory placement preference priority in favor of the child's extended family and tribe. [s. 48.028, Stats.]

Third Party Visitation

Wisconsin statutes provide for the visitation of children by certain nonparents, including grandparents, stepparents, and domestic partners, in several situations. However, unlike a parent with physical placement, a person granted visitation with a child does not have any other parental rights or obligations towards the child.

In Actions Affecting the Family

A grandparent, great-grandparent, or stepparent may petition the court for visitation with a child subsequent to, or during, an action affecting the family (such as divorce, annulment, and legal separation actions). The court may grant reasonable visitation rights to the grandparent, great-grandparent, or stepparent if: (1) the parents have notice of the hearing; and (2) the court determines that visitation is in the best interest of the child. As part of its best interest determination, the court must first find that the child's family is not intact. Whenever possible, in making its determination, the court must also consider the wishes of the child. [s. 767.43 (1) and (2), Stats.; *Cox v. Williams*, 177 Wis. 2d 433 (1993).]

In a recent decision, the Wisconsin Supreme Court clarified that grandparents, great-grandparents, and stepparents do not need to prove a parent-like relationship with a child in order to qualify for visitation. [*S.A.M. v. Meister (In re Meister)*, 2016 WI 22, ¶ 22.]

Person With a Parent-Like Relationship

First, in the context of an existing action affecting the family, persons other than grandparents, great-grandparents, and stepparents who have maintained a relationship similar to a parental relationship with a child may request and be granted reasonable visitation rights, if the parents have notice of the hearing and the court determines that the visitation is in the best interests of the child. [s. 767.43 (1), Stats.]

Wisconsin courts also recognize an independent action for a third party petitioner, other than a grandparent, who is seeking visitation rights with a minor child if the petitioner proves four specific elements to demonstrate a parent-like relationship with the child. These elements are: (1) the biological or adoptive parent consented to, and fostered, the petitioner's parent-like relationship with the child; (2) the petitioner and the child lived together in the same household; (3) the petitioner assumed parental obligations, including contributing to the child's support, without expectation of financial compensation; and (4) the petitioner has been in a parental role long enough to have established a bonded, dependent parent-like relationship. If there is no underlying action affecting the family, the petitioner must show that there was a significant triggering event, such as substantial interference with the parent-like relationship. [*Custody of H.S.H.-K.*, 193 Wis. 2d 649 (1995).]

Grandparents of a Nonmarital Child

Grandparents of a child whose parents are not married may petition for, and be granted, visitation rights in an independent action for visitation or in an underlying action affecting the family that affects the child. The child's parents must have notice of the hearing and the court must find that: (1) the parents have not married each other after the birth of the child; (2) the paternity of the child has been determined if the grandparents seeking visitation are the paternal grandparents; (3) the child has not been adopted; (4) the grandparents have maintained a relationship with the child (or have tried but have been prevented from doing so by a parent); (5) the grandparents will not act in a manner contrary to the parenting decisions of the parent; and (6) the visitation is in the best interest of the child. [s. 767.43 (3), Stats.]

After Adoption

Other relatives may apply for visitation after adoption when the child has been adopted by a stepparent or by another relative. In these cases, even though the parental relationship has been legally extinguished with one or both birth parents, other relatives (listed in the statutes) may petition for visitation if they have maintained parent-like relationships with the child within the two years before filing the petition. Reasonable visitation may be granted if the court determines that it would be in the best interest of the child, the relative will not undermine the legal parents' relationship with the child, and the relative will not act in a manner contrary to the parenting decisions of the legal parents. [ss. 48.02 (15) and 48.925, Stats.]

After Death of One or Both Parents

Grandparents and stepparents of a child may request and be granted visitation with the child if one or both parents of the child are deceased and the child is in the custody of the surviving parent or any other person. Visitation may be granted if the person with custody of the child has notice of the hearing and if the court determines that visitation is in the child's best interest. The petition may be filed in an underlying guardianship action or as an independent action. [s. 54.56, Stats.]

Additional References

1. Legislative Council Information Memoranda (IM), available at http://www.legis.wisconsin.gov/lc:
    - IM-2012-09, *Legal Custody, Physical Placement, and Child Support*.
    - IM-2016-05, *Visitation by Grandparents and Other Third Parties*.
2. Wisconsin Department of Revenue publications, available at https://revenue.wi.gov/pages/HTML/taxpubs.aspx:
    - Publication 109, *Tax Information for Married Persons Filing Separate Returns and Persons Divorced in 2017* (March 2018).
    - Publication 113, *Federal and Wisconsin Income Tax Reporting Under the Marital Property Act* (January 2018).
3. Wisconsin State Law Library:
    - A compilation of various court forms is available at: http://wilawlibrary.gov/topics/wiforms.php.
    - Information about specific legal topics—such as marriage, marital property, divorce, child custody, child support, domestic partnerships, and grandparent rights—is available at: http://wilawlibrary.gov/topics/witopicindex.html.

Glossary

Guardian ad litem (GAL): A guardian ad litem is an attorney admitted to practice in Wisconsin who must advocate for the best interest of a minor child as to paternity, legal custody, physical placement, and support. The GAL has none of the rights or duties of a general guardian.

Joint legal custody: Joint legal custody means the situation in 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.

Legal custody: With respect to any person granted legal custody of a child, legal custody means 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.

Maintenance: Maintenance is a payment from one spouse to another spouse that a court may order as part of a judgment of divorce, legal separation or annulment. Referred to in other jurisdictions as "alimony" or "spousal support," the goal of maintenance is to allow the parties to maintain a standard of living reasonably comparable to that experienced during the marriage. The amount and duration of maintenance, if any, varies based on the application of several statutory factors.

Major decisions: Major decisions include, but are 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.

Mediation: 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, to define and resolve their own disagreements. In cases where a child is involved, the best interest of the child is the paramount consideration.

Physical placement: 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, during that placement, to make routine daily decisions regarding the child's care, consistent with major decisions made by a person having legal custody.

Sole legal custody: Sole legal custody means the situation in which only one party has legal custody.

Termination of parental rights (TPR): Termination of parental rights means that, pursuant to a court order, all rights, powers, privileges, immunities, duties, and obligations existing between parent and child are permanently severed.

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