

FAMILY LAW: LEGAL CUSTODY AND PHYSICAL PLACEMENT ORDERS WHEN DOMESTIC ABUSE IS ALLEGED

Findings of Fact which trigger Domestic Abuse Provisions Under § 767.41(5)(bm); See also § 767.41(2)(d)2.

- Court finds, by preponderance of the evidence, one party has engaged in a pattern or serious incident of interspousal battery or domestic abuse such as:
 - Intentional infliction of physical pain, physical injury or illness
 - Causing bodily harm with intent to harm while subject to a restraining order
 - Intentional impairment of physical condition
 - 1st, 2nd or 3rd degree sexual assault per § 940.225
 - Intentional damage to property of the individual
 - Threat to engage in any of the above
- OR court finds, by preponderance of the evidence, both parties have engaged in a pattern or serious incident of the above AND one of them was the primary physical aggressor. Consider the following to determine primary aggressor:
 - Prior acts of domestic abuse between the parties
 - Relative severity of the injuries
 - Likelihood of future injury to either party from domestic abuse
 - Whether either party acted in self-defense
 - Whether there has been a pattern of coercive and abusive behavior
 - Any other factor that is relevant
- If only one of the parties has been convicted of a crime of domestic abuse against the other party, the court shall find the convicted party was the primary physical aggressor. § 767.41(2)(d)3

Upon making a Finding of Fact that one party engaged in domestic abuse or one was the primary aggressor, presumption of joint legal custody does NOT apply, and the safety and well-being of the child and the safety of the parent who was the victim of abuse shall be the paramount concern in determining physical placement. Specifically, the following apply:

Presumption Against Joint or Sole Legal Custody to the Abuser

- The safety and well-being of the child and the safety of the parent who was victim of abuse shall be the paramount concern in determining legal custody. § 767.41(5)(bm)
- It is generally detrimental to the child and contrary to the best interest of the child to award joint or sole custody to the abuser. § 767.41(2)(d)

The presumption against joint or sole legal custody to the abuser may only be overcome if the abuser shows ALL of the following: See § 767.41(2)(d)1.

- Abuser has successfully completed treatment provided through a certified treatment program or by a certified treatment provider; Providers can be located at <http://www.wcadv.org/ourwork/wbtpa>
- Abuser is not abusing alcohol or any other drug; and
- It is in the best interest of the child for the abuser to be awarded joint or sole legal custody after consideration of the factors under § 767.41(5)(am)
- When determining legal custody, the safety of the child and victim are still paramount. See § 767.41(2)(d) and (5)(bm)

Final Order

- Any final order granting joint or sole legal custody to the abuser in cases in which domestic abuse is found must state in writing whether the presumption against awarding joint or sole legal custody to that party is rebutted and, if so, what evidence rebutted the presumption and why it is in the best interest of the child. § 767.41 (6)(f)

Paramount Concerns for Physical Placement

- The safety and well-being of the child and safety of the parent who was victim of abuse shall be the paramount concern in determining periods of physical placement. § 767.41(5)(bm)
- IF the court awards periods of physical placement to the abuser, court shall provide for safety and well-being of the child and victim-parent by imposing one or more of the following:
 - Requiring supervised exchange of the child
 - Requiring supervised visits
 - Requiring the abuser to pay the costs of supervision
 - Requiring the abuser to attend and complete, to the satisfaction of the court, a certified batterer's treatment program as a condition of placement
 - Prohibiting the party from being under the influence of alcohol or controlled substances
 - Prohibiting overnight placement with the abuser
 - Requiring the abuser to post a bond to ensure the child's return or safety
 - Any other condition the court determines is necessary

Role of the Guardian Ad Litem in Cases Alleging Domestic Abuse

- The GAL must investigate whether either party has engaged in interspousal domestic abuse and report to the court on the results of the investigation. § 767.407(4)

Parental Alienation Syndrome (PAS) in cases alleging domestic abuse or sexual assault

- PAS is frequently alleged in cases in which an abusive and non-abusive parent separate. Upon separation, the child reveals to the non-abusive parent physical or sexual abuse by the abusive parent. The non-abusive parent is accused of PAS because the allegations of abuse come forward during the pendency of the case.
- PAS in this context refers to the theory that allegations of domestic abuse or sexual assault are false, are designed to gain a custody advantage, and have resulted in the child being wrongly alienated.
- Be watchful as to the motivation in cases alleging PAS or other alienation: is the parent attempting to alienate the child or protect the child from further abuse? Learn whether abuse occurred in the family.
- PAS has been discredited by the psychiatric profession, and has been routinely deemed by courts and mental health professionals as inadmissible in the courtroom in this context. See, e.g., *State v. Fortin*, 706 N.Y.S.2d 611, 614 (N.Y. Co. Ct. 2000) (finding that PAS has not been generally accepted by the professional community and, therefore, lacks the foundation for its admission at trial); *People v. Loomis*, 658 N.Y.S.2d 787, 789 (N.Y. Co. Ct. 1997) (specifically rejecting PAS evidence in criminal cases).

Upon making a finding that one party engaged in domestic abuse, presumption of joint custody does NOT apply. Rather, the safety and well-being of the child and the safety of the parent who was the victim of abuse shall be the paramount concern in determining legal custody and physical placement. It is generally detrimental to the child and contrary to the best interest of the child to award joint or sole custody to the abuser.

- See **Joan S. Meier. (January 2009) Parental Alienation Syndrome and Parental Alienation: Research Reviews.** Available online at http://www.vawnet.org/Assoc_Files_VAWnet/AR_PAS.pdf