

Monthly Legal Advocacy Updates

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Mondays with Morgan:

Custody & Placement

June 9, 2014

1:00-2:00 PM



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Custody & Placement

What does it mean? How can it be changed? How can I help?

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Definitions

Legal Custody of Children

“Legal Custody” means the right and responsibility to make major decisions concerning the child. (Wis. Stats. Sec. 767.001(2)(a))

Other factors the court uses in determining custody and physical placement are found in (Wis. Stats. Sec. 767.41(5))

“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. (Wis. Stats. Sec. 767.001(2m))

Joint Legal Custody

“Joint legal custody” means that both parents share legal custody and neither parent's legal custody rights are superior. (Wis. Stats. Sec. 767.001(1s))

It presumes that parents are able to communicate and jointly make major decisions.

“Impasse Breaking Authority”

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. (Wis. Stats. Sec. 767.41(6)(b))

In essence, this gives one parent the right to make the final decision when the parties cannot agree on a custodial decision.

Sole Legal Custody

One parent has the legal custody of the child. (Wis. Stats. Sec. 767.001(6))

The court may order sole legal custody to one parent by agreement of the parties or due to any of the following:

- ❖ One party is not capable of performing parental duties and responsibilities or does not wish to have an active role in raising the child.
- ❖ One or more conditions exist at that time that would substantially interfere with the exercise of joint legal custody (i.e. an injunction prohibiting one parent from having any contact with the other).
- ❖ The parties will not be able to cooperate in the future decision making. (Included in this is the rebuttable presumption that if either party engaged in abuse of the child, interspousal battery, or domestic abuse, the parties will not be able to cooperate in the future decision making. (Wis. Stats. Sec. 767.41(2)(b)2)).

Physical Placement

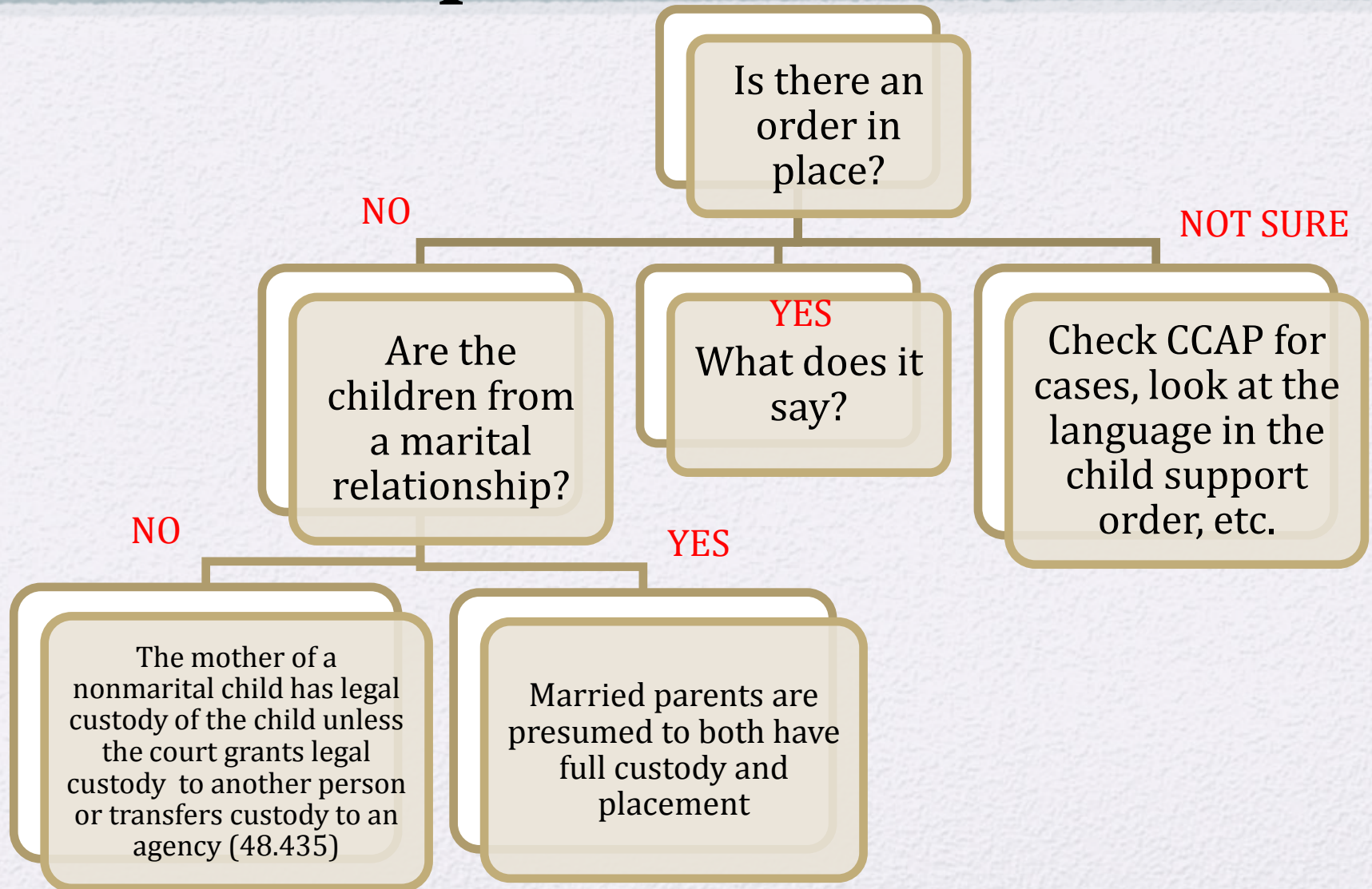
(Wis. Stats. Sec. 767.41(4))

The court may award primary physical placement of the child to one parent, with secondary physical placement to the other, or a form of shared physical placement to both parents.

Primary placement =
>75% annual overnights
with the primary
placement parent

Shared placement = 25% -
50% annual overnights
with one parent and 75% -
50% annual overnights
with the other parent

Who has custody & placement?



No order?

- Nonmarital child
 - Because mother is presumed to have sole custody, the burden generally falls to the biological father to file a paternity action to assert custody and placement rights
 - Signing a voluntary acknowledgement form does not automatically result in an order of custody and placement. A party must file a motion requesting the court to make these orders. Upon establishing paternity, a court will, make a custody and placement order.
- Marital child
 - May file for a modification of custody and placement or a divorce/legal separation/annulment

Statutory factors considered to determine custody & placement

1. The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.
2. The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
3. The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
4. The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future

5. The child's adjustment to the home, school, religion and community.
6. The age of the child and the child's developmental and educational needs at different ages.
7. Whether the mental or physical health of a party, minor child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being.
8. The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.
9. The availability of public or private child care services.
10. The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.
11. Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.

12. Whether there is evidence that a party engaged in abuse, as defined in s. [813.122 \(1\) \(a\)](#), of the child, as defined in s. [813.122 \(1\) \(b\)](#).

NOTE: Subd. 12. is shown as amended eff. 8-1-14 by [2013 Wis. Act 334](#). Prior to 8-1-14 it reads:

12. Whether there is evidence that a party engaged in abuse, as defined in s. 813.122 (1) (a), of the child, as defined in s. 48.02 (2).

12m. Whether any of the following has a criminal record and whether there is evidence that any of the following has engaged in abuse, as defined in s. [813.122 \(1\) \(a\)](#), of the child or any other child or neglected the child or any other child:

a. A person with whom a parent of the child has a dating relationship, as defined in s. [813.12 \(1\) \(ag\)](#).

b. A person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household.

13. Whether there is evidence of interspousal battery as described under s. [940.19](#) or [940.20 \(1m\)](#) or domestic abuse as defined in s. [813.12 \(1\) \(am\)](#).

14. Whether either party has or had a significant problem with alcohol or drug abuse.

15. The reports of appropriate professionals if admitted into evidence.

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

When considering orders...

- The Court shall presume that joint legal custody is in the best interest of the child. (*rebuttable*)
- Placement shall:
 - Allow the child to have regularly occurring, meaningful periods of physical placement with each parent; and
 - Maximize the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households.
 - If both parties are granted physical placement rights in a case where there is domestic abuse, the placement order must provide for the safety and well being of the child and the party who was abused.

So what if there's DV? - Custody

If the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery or domestic abuse, there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to the parent who is abusive.

Rebutting the Presumption

- However, an abusive parent may only overcome this presumption against joint/sole legal custody by proving:
 - 1.the abusive parent has completed a certified batterers' treatment program and is not abusing alcohol or any other drug, and
 - 2.it is in the best interest of the child for the abusive parent to be awarded sole or joint legal custody based upon 16 factors listed in §767.41(5)(am)

So what if there's DV? - Placement

- 767.41(5)(bm)

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

What provisions can be requested?

- Require the exchange of the child to occur in a protected setting or in the presence of a third party who has agreed to supervise the exchange
- Require the period of placement with the child to be supervised by a third party who has agreed to supervise the placement
- Require the abusive parent to pay the costs of supervised placement
- Require the abusive parent to complete a certified batterers' treatment program as a condition of exercising periods of placement

What provisions can be requested?

- Prohibit a party with a significant drug or alcohol abuse problem from being under the influence of alcohol or any controlled substance when the parties exchange the child or during the abusive parent's period of placement
- Prohibit the abusive parent from having overnight placement with the child
- Require the abusive parent to post a bond for the safety and return of the child
- Impose any other condition not listed that the court determines is necessary for the safety and well-being of the abused parent.

How do I change
an order?

He's not using his placement!

- Under §767.451(2m), a “**use it or lose it**” provision allows the court to modify an order of physical placement at any time if it finds that a parent has repeatedly and unreasonably failed to exercise periods of physical placement awarded under an order of physical placement that allocates specific times for the exercise of periods of physical placement.
 - a parent is required to file a petition with the court and prove to the court that the other parent has **repeatedly** and **unreasonably** failed to exercise periods of physical placement awarded under an order of physical placement that allocates specific times for the exercise of periods of physical placement, **or**
 - prove that the other parent’s **intentional** failure to exercise one or more allocated periods of placement has caused financial loss or expense to the petitioning parent.

She wants something different

Within 2 years of order being made (767.451(1)(a) :

The court may not modify a custody or placement order unless the party seeking the change *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

She wants something different

After 2 years:

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

She wants something different

This includes a rebuttable presumption that:

- Continuing the current allocation of decision making under a legal custody order is in the best interest of the child.
- 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.
- A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification

But the kids aren't safe with the other parent!

- If one parent chooses to not follow a placement order, both civil and criminal ramifications may occur:
 - Civil – may be found in contempt of the court order
 - Criminal – may be charged for interference of custody (948.31)
 - Affirmative Defense : the party has a legally acceptable reason for taking the action. Sec. 948.31(4)(a) provides an affirmative defense if the child is taken by a parent to protect his or her child in a situation in which the parent *reasonably believes that there is a threat of physical harm or sexual assault to the child or him or herself, or consent is given by the other parent or legal custodian, or otherwise authorized by law*

Can she relocate with her children?

- To determine what legal ramifications may result in leaving the jurisdiction with children, first ask:
 - Does a court order exist?
 - Are the parties married?

Can she relocate with her children?

- Applicable **criminal** statutes
 - 940.31 = Kidnapping
 - 948.30 = Abduction of Child
 - 948.31 = Interference with Custody
- Applicable **civil** statutes
 - 767.117 = 150 mile rule; 90 day rule, concealing a child
 - 767.43 = Visitation rights
 - 767.481 = Moving a child's residence

	No Court Order Exists	If Court Order Exists	Married	Unmarried
Wisconsin Statutes that apply: *940.31 = Kidnapping 948.30 = Abduction of Child **948.31 = Interference with Custody	948.30(1)(a) – Any person who takes a child who is not his or her own (by birth or adoption) from the child’s home or custody of legal guardian. 948.30(1)(b) – Any person who detains a child when child is away from home or custody of legal guardian. 948.30(2)(a) – Any person who, by force or threat of imminent force, takes a child from the child’s home or custody of legal guardian. 948.30(2)(b) – Any person who, by force or threat of imminent force, detains a child when child is away from home or custody of legal guardian. **948.31(2) – Anyone who causes a child to leave, takes a child away, or withholds a child for more than 12 hours from a parent or legal custodian without consent. **948.31(3)(a) – A parent, or person acting under the directions of a parent, intentionally conceals a child from the child's other parent. **948.31(3)(b) – After being served with process in an action affecting the family but prior to final or temporary court order, a parent takes a child with intent to deprive the other parent of physical custody.	** 948.31(1)(b) – Anyone who intentionally causes a child to leave, takes a child away, or withholds a child for more than 12 hours beyond the court-approved period of physical placement or visitation period from a legal custodian with intent to deprive the custodian of his or her custody rights without the consent of the custodian. **948.31(3)(a) – Parent, or person acting under the directions from the parent, intentionally conceals a child from the child's other parent. **948.31(3)(c) – Parent, or person acting under the directions of a parent, after a court order is issued, takes a child from or causes a child to leave the other parent or withholds a child for more than 12 hours beyond court appointed visitation.	948.30 – Abduction of another’s child, if the non-legal (biological or adoptive) parent leaves with the child. **948.31(2) – Anyone who takes a child away or withholds a child for more than 12 hours from a parent. **948.31(3)(a) – Parent, or person acting under the directions from the parent, who intentionally conceals a child from the child's other parent. **948.31(3)(b) – After being served with process in an action affecting the family but prior to final or temporary court order, takes a child with intent to deprive the other parent of physical custody. **948.31(3)(c) – After a temporary or final court order is issued, takes a child from or causes a child to leave the other parent or withholds a child for more than 12 hours beyond court appointed visitation.	948.30 – Abduction of another’s child, if the non-legal (biological or adoptive) parent leaves with the child. **948.31(2) – Anyone who takes a child away or withholds a child for more than 12 hours from a parent, the mother, or the father with legal custody, without consent. **948.31(3)(a) – Parent, or person acting under the directions from the parent, who intentionally conceals a child from the child's other parent. **948.31(3)(b) – After being served with process in an action affecting the family but prior to final or temporary court order, takes a child with intent to deprive the other parent of physical custody. **948.31(3)(c) – After a temporary or final court order is issued, takes a child from or causes a child to leave the other parent or withholds a child for more than 12 hours beyond court appointed visitation.
Possible Consequence Could be charged with:	948.30(1) - Class E Felony 948.30(2) – Class C Felony 948.31(2) – Class I Felony 948.31(3)(a) – Class F Felony 948.31(3)(b) – Class F Felony	948.31(3)(c) - Class F Felony Note: If a criminal action is filed, a court might also change a family law order such as custody or physical placement.	948.30 - Class E or C Felony 948.31(2) - Class I Felony 948.31(3)(b) - Class F Felony 948.31(3)(c) - Class F Felony	948.30 - Class E or C Felony 948.31(2) - Class I Felony 948.31(3)(b) - Class F Felony 948.31(3)(c) - Class F Felony

	No Court Order Exists	If Court Order Exists	Married	Unmarried
Wisconsin Statutes that apply: 767.117 = 150-mile rule; 90-day rule; Concealing a child 767.43 = Visitation Rights 767.481 = Moving Child's Residence	If an action affecting the family has been started (other than for maintenance or property division), 767.117(1)(c) prohibits (without consent or court order): 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.	If visitation rights have been granted under 767.43(1) or 767.43(3) to someone such as a grandparent, 767.43(5) prohibits interference with those visitation rights. 767.481 Requires that a parent with legal custody of and physical placement rights to a child provide the other parent (as long as that other parent has not been denied periods of physical placement) with 60 days written notice of the parent's intent move the child to another state, to move the child within this state and 150 miles or more from the other parent, or to remove the child from this state for more than 90 days.	If an action affecting the family has been started (other than for maintenance or property division), 767.117(1)(c) prohibits (without consent or court order): 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.	If an action affecting the family has been started (other than for maintenance or property division), 767.117(1)(c) prohibits (without consent or court order): 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.
Possible Consequence The following action(s) could be filed against a person:	For violation of 767.117(1)(c) - contempt of court may be ordered under 785.04(1)(a) - (e).*	For violation of 767.43(5) - contempt of court may be ordered under 785.04(1)(a) and/or (c).* Under 767.451, a court may modify a legal custody and physical placement order if there is substantial evidence that the current custodial conditions (care and control of minor child) are physically or emotionally harmful to the best interest of the child. If an action is filed under 767.481, the nonmoving parent may object in writing within 15 days of notice. To avoid the move, the nonmoving parent must show that the move is unreasonable and not in the best interest of the child.	For violation of 767.117(1)(c) - contempt of court may be ordered under 785.04(1)(a) - (e).*	For violation of 767.117(1)(c) - contempt of court may be ordered under 785.04(1)(a) - (e).*

Role of the advocate

- Help collect documentation
 - Calendars tracking violations of orders, etc.
- Provide information about statutes
- Provide information about consequences of violating an order or moving with the kids
- *Carefully* help educate systems players as appropriate (judges, GALs, mediators, etc.)
- Talk to local bar associations and find out if any local attorneys are taking cases pro bono

Questions?
