

2003 Assembly Bill 279

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2003 WISCONSIN ACT

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

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

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

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

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

767.045 (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) (am), subject to s. 767.24 (5) (bm), and custody studies under s. 767.11 (14). The guardian ad litem shall investigate whether there is evidence that either parent has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), and shall report to the court on the results of the investigation. The guardian ad litem shall review and comment to the court on any mediation agreement and stipulation made under s. 767.11 (12) and on any parenting plan filed under s. 767.24 (1m). Unless the child otherwise

* Section 991.11, WISCONSIN STATUTES 2001-02 : Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

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) (am) 2. The guardian ad litem has none of the rights or duties of a general guardian.

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

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

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

767.11 (5) (a) (intro.) ~~In~~ Except as provided in sub. (8) (b), 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 circuit court commissioner shall refer the parties to the director of family court counseling services for possible mediation of those contested issues. The court or circuit court commissioner shall inform the parties ~~that of all of the following:~~

1. 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).

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

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

SECTION 6. 767.11 (6) of the statutes is renumbered 767.11 (6) (a).

SECTION 7. 767.11 (6) (b) of the statutes is created to read:

767.11 (6) (b) Any intake form that the family court counseling services requires the parties to complete before commencement of mediation shall ask each party whether either of the parties has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am).

SECTION 8. 767.11 (8) (a) of the statutes is amended to read:

767.11 (8) (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) (a) 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.

SECTION 9. 767.11 (8) (c) of the statutes is amended to read:

767.11 (8) (c) The initial session under par. (a) shall be a screening and evaluation mediation session, including screening for domestic abuse, to determine whether mediation is appropriate and whether both parties wish to continue in mediation.

SECTION 10. 767.11 (9) (intro.) of the statutes is amended to read:

767.11 (9) **PROHIBITED ISSUES IN MEDIATION.** (intro.) If mediation is provided by a mediator assigned under sub. (6) (a), no issue relating to property division, maintenance, or child support may be considered during the mediation unless all of the following apply:

SECTION 11. 767.11 (10) (intro.) of the statutes is amended to read:

767.11 (10) **POWERS AND DUTIES OF MEDIATOR.** (intro.) A mediator assigned under sub. (6) (a) shall be guided by the best interest of the child and may do any of the following, at his or her discretion:

SECTION 12. 767.11 (14) (a) 2m. of the statutes is created to read:

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

SECTION 13. 767.115 (1) (a) of the statutes is amended to read:

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

SECTION 14. 767.23 (1n) of the statutes is renumbered 767.23 (1n) (a) and amended to read:

767.23 (1n) (a) Before making any temporary order under sub. (1), the court or circuit court commissioner shall consider those factors that the court is required by this chapter to consider before entering a final judgment on the same subject matter. In making a determination

under sub. (1) (a) or (am), the court or circuit court commissioner shall consider the factors under s. 767.24 (5) (am), subject to s. 767.24 (5) (bm).

(b) 1. If the court or circuit 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 under s. 49.22 (9), the court or circuit court commissioner shall comply with the requirements of s. 767.25 (1n).

(c) 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 circuit court commissioner. Temporary orders made by a circuit court commissioner may be reviewed by the court.

SECTION 15. 767.23 (1n) (b) 2. of the statutes is created to read:

767.23 (1n) (b) 2. If the court or circuit court commissioner finds by a preponderance of the evidence that a party 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), and makes a temporary order awarding joint or sole legal custody or periods of physical placement to the party, the court or circuit court commissioner shall comply with the requirements of s. 767.24 (6) (f) and, if appropriate, (g).

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

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

SECTION 17. 767.24 (2) (am) of the statutes is amended to read:

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

SECTION 18. 767.24 (2) (b) (intro.) of the statutes is amended to read:

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

SECTION 19. 767.24 (2) (c) of the statutes is amended to read:

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

SECTION 20. 767.24 (2) (d) of the statutes is created to read:

767.24 (2) (d) 1. Except as provided in subd. 4., if the court finds by a preponderance of the evidence that a party 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), pars. (am), (b), and (c) do not apply and 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 that party. The presumption under this subdivision may be rebutted only by a preponderance of evidence of all of the following:

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

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

2. If the court finds under subd. 1. that both parties 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 party who engaged in the battery or abuse for purposes of the presumption under subd. 1. is the party that the court determines was the primary physical aggressor. Except as provided in subd. 3., in determining which party was the primary physical aggressor, the court shall consider all of the following:

a. Prior acts of domestic violence between the parties.

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

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

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

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

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

3. If the court must determine under subd. 2. which party was the primary physical aggressor and one, but not both, of the parties has been convicted of a crime that was an act of domestic abuse, as defined in s. 813.12 (1) (am), with respect to the other party, the court shall find the party who was convicted of the crime to be the primary physical aggressor.

4. The presumption under subd. 1. does not apply if the court finds that both parties engaged in a pattern or serious incident of interspousal battery or domestic abuse but the court determines that neither party was the primary physical aggressor.

SECTION 21. 767.24 (4) (a) 2. of the statutes is amended to read:

767.24 (4) (a) 2. In determining the allocation of periods of physical placement, the court shall consider each

case on the basis of the factors in sub. (5) (am), subject to sub. (5) (bm). The court shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households.

SECTION 22. 767.24 (5) (intro.) of the statutes is renumbered 767.24 (5) (am) (intro.) and amended to read:

767.24 (5) (am) (intro.) ~~In~~ Subject to par. (bm), 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 parent or potential custodian over the other on the basis of the sex or race of the parent or potential custodian. ~~The Subject to par. (bm), the~~ court shall consider the following factors in making its determination:

SECTION 23. 767.24 (5) (a) of the statutes is renumbered 767.24 (5) (am) 1.

SECTION 24. 767.24 (5) (b) of the statutes is renumbered 767.24 (5) (am) 2.

SECTION 25. 767.24 (5) (bm) of the statutes is created to read:

767.24 (5) (bm) If the court finds under sub. (2) (d) that a party 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.

SECTION 26. 767.24 (5) (c) of the statutes is renumbered 767.24 (5) (am) 3.

SECTION 27. 767.24 (5) (cm) of the statutes is renumbered 767.24 (5) (am) 4.

SECTION 28. 767.24 (5) (d) of the statutes is renumbered 767.24 (5) (am) 5.

SECTION 29. 767.24 (5) (dm) of the statutes is renumbered 767.24 (5) (am) 6.

SECTION 30. 767.24 (5) (e) of the statutes is renumbered 767.24 (5) (am) 7. and amended to read:

767.24 (5) (am) 7. ~~The Whether the mental and or physical health of the parties, the minor children and other persons a party, minor child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being.~~

SECTION 31. 767.24 (5) (em) of the statutes is renumbered 767.24 (5) (am) 8.

SECTION 32. 767.24 (5) (f) of the statutes is renumbered 767.24 (5) (am) 9.

SECTION 33. 767.24 (5) (fm) of the statutes is renumbered 767.24 (5) (am) 10.

SECTION 34. 767.24 (5) (g) of the statutes is renumbered 767.24 (5) (am) 11.

SECTION 35. 767.24 (5) (h) of the statutes is renumbered 767.24 (5) (am) 12.

SECTION 36. 767.24 (5) (i) of the statutes is renumbered 767.24 (5) (am) 13.

SECTION 37. 767.24 (5) (j) of the statutes is renumbered 767.24 (5) (am) 14.

SECTION 38. 767.24 (5) (jm) of the statutes is renumbered 767.24 (5) (am) 15.

SECTION 39. 767.24 (5) (k) of the statutes is renumbered 767.24 (5) (am) 16.

SECTION 40. 767.24 (6) (f) of the statutes is created to read:

767.24 (6) (f) If the court finds under sub. (2) (d) that a party 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 court shall 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 its findings relating to legal custody and physical placement are in the best interest of the child.

SECTION 41. 767.24 (6) (g) of the statutes is created to read:

767.24 (6) (g) If the court finds under sub. (2) (d) that a party 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), and the court awards periods of physical placement to both parties, the court shall provide for the safety and well-being of the child and for the safety of the party who was the victim of the battery or abuse. For that purpose the court, giving consideration to the availability of services or programs and to the ability of the party who committed the battery or abuse to pay for those services or programs, shall impose one or more of the following, as appropriate:

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

2. Requiring the child's periods of physical placement with the party who committed the battery or abuse to be supervised by an appropriate 3rd party who agrees by affidavit or other supporting evidence to assume the responsibility assigned by the court and to be accountable to the court for his or her actions with respect to the responsibility.

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

4. Requiring the party who committed the battery or abuse to attend and complete, to the satisfaction of the court, treatment for batterers provided through a certified treatment program or by a certified treatment provider as

a condition of exercising his or her periods of physical placement.

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

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

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

8. Imposing any condition not specified in subds. 1.

to 7. that the court determines is necessary for the safety and well-being of the child or the safety of the party who was the victim of the battery or abuse.

SECTION 42. 767.325 (5m) of the statutes is amended to read:

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

SECTION 43. Initial applicability.

(1) This act first applies to actions or proceedings that are commenced on the effective date of this subsection, including actions or proceedings to modify a judgment or order granted before the effective date of this subsection.