

Chapter H

Family Law

Family law encompasses such topics as marriage; domestic partnerships; marital property; divorce; child support and child custody; visitation of children by third parties; paternity; and adoption.

Generally, family law issues in Wisconsin are handled at the county level. For example, marriage licenses are issued at the county clerk's office. Family law actions, such as divorce and paternity actions, are filed with county circuit courts.

In the 2009-10 Legislative Session, the following major issues were addressed by the Legislature:

- 2009 Wisconsin Act 28 created provisions for the establishment of domestic partnerships and related rights and benefits.
- 2009 Wisconsin Act 79 made changes to the Children's Code and the Juvenile Justice Code (chs. 48 and 938, Stats.), to bring them into compliance with several federal acts, including the Fostering Connections to Success and Increasing Adoptions Act of 2008.
- 2009 Wisconsin Act 94 incorporated the Indian Child Welfare Act's jurisdictional provisions and minimum standards for Indian child custody proceedings into the Children's Code and Juvenile Justice Code for a child or juvenile in need of protection or services (CHIPS or JIPS), termination of parental rights, and adoption.
- 2009 Wisconsin Act 187 requires legal custody and physical placement studies to be submitted to both the court and the parties and to be offered in accordance with the rules of evidence.

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- 2009 Wisconsin Act 321 updated the Uniform Interstate Family Support Act (UIFSA, ch. 769, Stats.). The Uniform Act regulates jurisdiction of Wisconsin courts in actions to establish or enforce spousal or child support obligations, to modify child support obligations, or to determine paternity, when parties reside in different states or when orders have been issued in different states.
- 2009 Wisconsin Act 339 incorporated the Interstate Compact for the Placement of Children into the Children's Code and Juvenile Justice Code. The Act will become effective when 35 states enact the compact. It appears that, as of May 24, 2010, 10 other states have also enacted the compact.

Marriage

In Wisconsin, marriage is a civil contract. Marriage creates the legal status of husband and wife.

There is no "common law" marriage in Wisconsin. Common law marriage is a status recognized in some states where a couple living together in a marital-like relationship for an established period of time are treated as legally married.

Wisconsin Constitution

The Wisconsin Constitution, Article XIII, Section 13, states: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."

A person must be at least 18 years of age to marry in Wisconsin. If a person is age 16 or 17, the person may marry with the written consent of his or her parent, guardian, or custodian.

In Wisconsin, persons who cannot marry are: persons who are nearer of kin than second cousins (unless sterile); persons who are already married to someone else; persons who are incapable of assenting to marriage due to a "want of understanding"; and persons who have been divorced less than six months.

One party must have resided within his or her current county of residence for 30 days in order to apply for a marriage license. A license will be issued five or more days after application. At the county clerk's discretion, and upon receiving an additional fee, the waiting period may be waived. Once the person has obtained a license from the county clerk's office, the person may marry in any county in the state within 30 days of its issuance. If both parties are nonresidents of the state, a marriage license may be obtained in the county where the marriage ceremony will be performed.

County clerks collect a fee for each marriage license granted. The couple must complete an application, provide their Social Security numbers, provide their birth certificates, provide documentary proof of identity and residence, and swear to and affirm the application before the county clerk.

The statutes provide a procedure for family members, the district attorney, or circuit court commissioner to object to the marriage. The person may file a petition with the clerk of probate court setting forth his or her belief that the application is false or insufficient, or that the applicants are not legally allowed to marry. If the court determines the objections are valid, it must issue an order for the marriage applicants to show cause, at a hearing, why the objections are not valid. This could ultimately result in a court order that a marriage license not be issued.

The marriage ceremony must involve the mutual declarations of the two parties that they take each other as husband and wife. The declarations must be made before an authorized officiating person, and at least two competent adult witnesses. Authorized officiants are 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.

Generally, a marriage contracted in another state that satisfies the legal requirements of that state will be recognized if the married couple moves to the State of Wisconsin, unless the marriage violates the strong public policy of another state that had the most significant relationship to the spouses at the time of the marriage. However, marriages that are entered into outside of this state in order to circumvent the laws of Wisconsin are void, and are subject to misdemeanor charges with a penalty of up to nine months in jail and up to a \$10,000 fine, or both.

Same-sex marriages are not recognized in Wisconsin, though some domestic partnerships are, for limited purposes.

Domestic Partnerships

The biennial budget for the 2009-10 Session, 2009 Wisconsin Act 28, included provisions for the establishment of domestic partnerships and related rights and benefits under Wisconsin law. Domestic partners have certain benefits, such as inheritance rights and medical access, but do not have the legal rights of marriage, such as the mutual obligation for support, the comprehensive marital property system, and child custody and placement rights and obligations.

Some benefits conferred by filing a declaration of domestic partnership include: inheritance from a domestic partner who dies without a will; award of home and vehicles titled in a deceased partner's name; workplace death benefits; standing to sue for wrongful death; coverage by the state Family Medical Leave Act to take up to two weeks off per year to care for a domestic partner with a serious medical condition; and visitation and access rights at hospitals and residential care facilities.

Some areas of the law not affected by the domestic partnership provisions include: marital property laws; legal custody and physical placement of children; child support; spousal support; property division upon dissolution; discrimination in education, housing, employment, credit, and insurance; advance directives relating to health care ("living will"); adoption; and social services.

Same-sex couples that share a common residence may apply for a declaration of domestic partnership with the county clerk where they have resided for at least 30 days prior to the application. Five days after the application is made, the county clerk will issue the declaration to the couple. The couple can then sign the declaration before a notary, and submit it to the Register of Deeds for filing with the Wisconsin Vital Records Office.

Partners who wish to terminate their Wisconsin domestic partnership must file a notice of termination in the same county clerk's office that issued the declaration of domestic partnership, even if no longer residing in that county. Both parties may sign and submit the notice. If only one party signs the notice, that partner must complete an affidavit stating that he or she either served the other party with a summons or that an official public notice was published in the area where the partner was last known to be living. The county clerk will then issue an original certificate of termination of domestic partnership.

For purposes of the Wisconsin Retirement System and state employee benefits, both same-sex and opposite-sex couples may file an affidavit of domestic partnership with the Department of Employee Trust Funds (ETF) to enroll the partner in state benefit programs.

All benefit programs that are administered by ETF are available to a qualifying partner of a state employee.

Children of a qualifying domestic partner can be covered by the state employee's health insurance if the family coverage option is selected.

Benefits are available to a qualifying domestic partner of a retired state employee.

Marital Property

Classification of Property

On January 1, 1986, Wisconsin's separate property system defining the property rights of married persons was replaced by the marital property law. The law governs spousal property interests during marriage, for example: as it relates to creditors and at death. It does not govern property rights at dissolution of marriage by divorce, annulment, or legal separation.

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. Under the previous separate property system, property acquired during marriage generally belonged to the spouse who acquired the property.

Under the marital property law, all property owned by spouses is presumed to be marital property, in which each spouse has a present, undivided one-half interest.

Under the marital property law, all property owned by spouses is presumed to be marital property. Each spouse has a present, undivided one-half interest in all 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; substantial appreciation of marital property attributable to the substantial effort of either spouse; and any property not classified as something other than marital property.

Individual property generally includes 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; 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 "unilateral statement"; and certain portions of personal injury awards.

Special classification rules apply to homestead property, certain retirement, pension and deferred compensation plans, and life insurance policies.

Spouses have the right to manage and control marital property held in the names of both spouses in the conjunctive (e.g., John *and* Mary) only by acting together with respect to the property. Otherwise, a spouse acting alone may manage and control his or her individual property and certain marital property. Special management and control rules apply to certain property, such as business property and making gifts of marital property.

The marital property law seeks to ensure that each spouse has access to the extension of credit. In evaluating a spouse's creditworthiness, the marital property law requires a creditor to consider all marital property available to satisfy the obligation. If credit is extended, a creditor must give written notice of the extension to the non-applicant spouse when the extension of credit results in an obligation of marital

property. The type of obligation determines when marital property may be used to satisfy the obligation. For example, obligations incurred prior to the marriage are generally satisfied from the obligating spouse's individual property. Obligations incurred by a spouse during the marriage are 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.

Marital Property Agreement

Spouses, as well as persons intending to marry, may enter into marital property agreements regarding the classification of marital or individual property and the rights to control the property. Such agreements are commonly known as pre-nups, though Wisconsin allows them to be executed during marriage. Any agreement must be in writing and signed by both parties. An agreement may not abrogate certain obligations, such as child support.

A creditor must be furnished a copy of a marital property agreement prior to the granting of credit in order for any reclassification of property to be effective against the creditor.

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. These forms are found in ss. 766.588 and 766.589, Stats. An agreement may be amended or revoked only by a subsequent marital property agreement.

A spouse may dispose of his or her share of marital property by will. The surviving spouse retains his or her one-half share in the property, and the share is not subject to probate. "Deferred marital property" rules apply to property acquired during the marriage, but prior to 1986, that would have been marital property had the marital property law applied when the property was acquired.

Taxation

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. 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 or unilateral statement, or by the innocent spouse rule. 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.

The married person's tax credit is available to couples filing joint returns but not separate returns.

The basis, which is the adjusted original cost of property that is used to determine the amount of gain or loss for capital gains tax purposes, for inherited marital property differs from that given to property held in joint tenancy or tenancy in common. Both spouses' share of marital property receives a new basis upon the death of the first spouse to die, adjusted to the date-of-death value of the marital property. This is known as a double step-up in basis, for community property states such as Wisconsin.

For income tax purposes, spouses may prospectively reclassify income by agreement or unilateral statement. In order to affect state tax liability, the agreement or statement must be filed with the Department of Revenue (DOR) before the income is earned.

In order to resolve questions that might arise regarding access of a spouse to another spouse's tax return if single returns are filed, Wisconsin tax law permits the spouse or former spouse to examine tax returns or claims of the other spouse if DOR issued an assessment or notice of claim to the spouse or former spouse, or if 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 filed.

Divorce, Property Division, and Maintenance

Divorce; Separation

In Wisconsin, the same procedures apply in actions for divorce, legal separation, or annulment. For this discussion, the term "divorce" will generally be used. A judgment of legal separation differs only in allowing the parties to maintain the legal status of marriage (sometimes used to continue family coverage for health insurance) while separating the family and financial obligations. Legal separation is distinct from physical separation, which anyone can do at any time without affecting their legal marital status.

In order to initiate a divorce action, one of the spouses 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 collect a fee when a party commences an action affecting the family.

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 that the marriage is irretrievably broken; by the parties voluntarily living apart continuously for 12 months or more immediately prior to filing the divorce petition; or if only one party has stated that the marriage is irretrievably broken, by the court determining that there is no reasonable prospect of reconciliation.

Wisconsin requires a waiting period before a judgment of divorce or legal separation may be granted. When the parties have filed a joint petition for divorce, 120 days must elapse from the filing date before the action may be brought to trial. When one party has filed the petition, the 120-day waiting period begins when the other party is served with the petition.

Pendency of Divorce Action

A court or circuit court commissioner may make just and reasonable temporary orders during the pendency of a divorce action concerning the following: legal custody and periods of physical placement of a minor child; prohibiting removal of a child from the court's jurisdiction; requiring payment for child support and spousal maintenance; requiring payment of debts and prohibiting disposal of assets; requiring counseling for either one or both parties; allowing a party to move with a child after notice of objection has been filed; and other issues.

Reconciliation may be attempted, if the parties so stipulate in writing, during the pendency of a divorce action. The suspension of proceedings to effect reconciliation may be for a period of time not to exceed 90 days. Suspension does not affect the parties' rights in the divorce action. During the suspension period, the parties may resume living together as husband and wife and their 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 are not reconciled, the action shall proceed as though no reconciliation period was attempted.

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 for disclosures that are not complete. Information disclosed is confidential and sealed by the court.

The statutes contain various requirements for the parties to attend counseling or educational programs. Most of the programs focus on educating parents about the affect of divorce or parental separation on children and how to lessen the detrimental effects. There are specific provisions relating to child custody mediation where it appears that legal custody or physical placement is contested (discussed below).

The primary issues decided in a judgment of divorce are: property division; child support and spousal maintenance; legal custody rights with reference to 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 subject to certain conditions. For example, child support may be stipulated to in a manner that is consistent with the statutory requirements for its determination. Likewise, a stipulation cannot leave one party in need of assistance from the state.

**Property
Division**

Generally, all property acquired during the marriage, owned by either or both spouses, is subject to division upon divorce. This includes assets such as pension plans, retirement accounts, vehicles, and real estate. Property acquired by gift or inheritance by one of the parties is generally not subject to division.

The court must presume that the divisible property is to be divided equally between the parties upon divorce, but the application of certain statutory factors may alter this presumption. This includes factors such as the length of the marriage; property brought to the marriage by each party; and the tax consequences to each party.

Debts incurred during the marriage can be collected from either of the parties regardless of how responsibility for the debts was divided between the parties in their judgment of divorce. The divorce judgment assigning a debt is not binding on third-party creditors. To avoid possible problems with the collection of debts after a divorce, parties may take actions such as consolidating debts assigned to a spouse and having that spouse refinance those obligations in his or her name only.

Maintenance

As part of the 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.

There is no statutory presumption of an equal division of earnings in awarding maintenance, but the courts have stated that a reasonable starting point for a maintenance evaluation of a long-term marriage is that the dependent spouse may be entitled to one-half of the total combined earnings of both parties.

Maintenance payments pursuant to a judgment of divorce are taxable income to the recipient and are a tax deduction to the payer. The IRS considers payments made

to third parties for the benefit of a former spouse to be maintenance. The IRS will disallow deductions for any portion of spousal support that is intended for child support.

Child Custody and Physical Placement

Legal Custody

In actions affecting the family, “**legal custody**” means the right and responsibility to make major decisions concerning a child. Major decisions include decisions regarding 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 each party.

Other key definitions related to child custody are:

- **Joint legal custody** means both parties share legal custody and neither party’s legal custody rights are superior (except as to specified decisions set forth by the court or the parties in the final judgment).
- **Sole legal custody** means one party has full legal custody of a child.
- **Physical placement** means a party has the right to have a child physically placed with the party. During that placement, the party has the right and responsibility to make routine daily decisions regarding the child’s care, as long as those decisions are consistent with major decisions made by a person having legal custody.

In actions affecting the family 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 guardian ad litem (GAL) for the child. A GAL’s responsibility is to represent the best interests of the child in the action regarding paternity, custody, physical placement, and support. A GAL must be a licensed attorney in the State of Wisconsin, who meets the GAL special training requirements.

Mediation services may play a significant role in actions affecting the family involving child custody issues. Mediation services must be made available in every county. “Mediation” is defined as a cooperative process involving the parties and a mediator, the purpose of which is to aid the parties, by application of communication and dispute resolution skills, in defining and resolving their own disagreements, with the interests of the child as the paramount consideration.

With exceptions for undue hardship or endangerment to one of the parties, an initial session of mediation is required in any action affecting the family 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 family court counseling 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.

In awarding 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.

There is a presumption that joint legal custody is in the best interest of the child. The court may award sole legal custody if it finds it is in the child's best interest and the parties agree to it. If the parties fail to agree to sole legal custody, the court may award it if the court finds that one party is not capable of performing parental duties or does not wish to be active in raising the child; that conditions exist that substantially interfere with the exercise of joint legal custody; or that the parties will not be able to cooperate in future decision-making.

If there is evidence of child or spousal abuse, the presumption for joint legal custody does not apply, and there is a rebuttable presumption that joint legal custody is detrimental to the child and contrary to the best interest of the child.

The "spousal abuse" presumption for sole legal custody may be rebutted only 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 it is in the best interest of the child that the abusive party be given joint or sole legal custody based on the statutory factors that the court must consider in awarding custody and physical placement.

If the court finds that both parties have engaged in a pattern or serious incident of spousal 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.

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. The court must set a placement schedule that: (1) allows the child to have regularly occurring, meaningful periods of physical placement with each parent; and (2) maximizes the amount of time the child may spend with each parent.

Wisconsin courts have held that maximizing time with both parents is not synonymous with a presumption for equal physical placement. In determining physical placement, a court must consider the same statutory factors that apply to legal custody determinations.

A court may not deny a parent physical placement based on the parent's failure to pay child support or maintenance payments.

Modification of Custody and Physical Placement Orders

A court 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. The purpose of this is to provide a period of finality and stability while the child is adjusting to the new family situation.

After the two-year period, the court may modify the legal custody order if it finds both that: (1) it is in the best interest of the child; and (2) a substantial change of circumstances has occurred that warrants modification. If the parties have substantially equal periods of placement, the court may modify an order for physical placement if

it is in the best interest of the child and if circumstances make it impractical for the parties to continue having substantially equal placement.

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. Also, a court may deny a parent’s physical placement rights at any time if it finds that the placement rights endanger the child’s physical, mental, or emotional health.

If a court grants physical placement rights to both parents and a parent intends to move outside of Wisconsin, move within Wisconsin to a distance that is 150 miles or more from the other parent, or remove the child from Wisconsin for more than 90 days, that parent must give at least 60 days written notice, by certified mail, to the other parent.

The statutes set forth a procedure for the nonmoving party to object to the move or removal of the child. The objection must be made within 15 days of receipt of the notice. The court will then refer the parents for mediation or other family court services and may appoint a GAL.

To guide the process, the statutes give standards for when a move may be allowed, which generally favor continuing the child’s physical placement with the parent with whom the child resides for the greater period of time. If physical placement is substantially equal, the court must consider whether circumstances make it impractical to continue equal placement, whether modification is in the best interest of the child, whether the proposed action is reasonable, any disruption to the nature and extent of the child’s relationship with the other parent, and the availability of other arrangements to foster and continue that relationship.

Enforcement

Methods for enforcing rights to legal custody and physical placement include contempt of court sanctions under ch. 785, Stats.; and criminal sanctions relating to interference with the custody of a child under s. 948.31, Stats. Remedies under s. 767.471, Stats., require a court to grant periods of physical placement to replace those denied or interfered with by the parent and order the uncooperative parent to pay costs and attorney fees for maintaining the enforcement action.

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

Third Party Visitation

Wisconsin statutes provide for the visitation of children by certain nonparents, including grandparents, in several situations.

Actions Affecting the Family. First, in the context of an existing action affecting the family, grandparents, great-grandparents, stepparents, or other persons who have maintained a relationship similar to a parent-child relationship with the 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 interest of the child.

Grandparents of Nonmarital Child. Second, grandparents of a nonmarital child may petition for, and be granted, visitation rights to a nonmarital child in an independent action for visitation or in an underlying action affecting the family if: (1) the parents have not subsequently intermarried; (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.

Third Parties With Parent-Like Relationship. Third, Wisconsin courts recognize that certain third parties seeking visitation rights with a minor child absent an underlying action affecting the family may be granted visitation rights if the third party 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 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.

After Adoption. The fourth situation applies in two cases: (1) when a parent has remarried and the stepparent adopts the child; or (2) when both parents have terminated their parental rights to the child and the child is adopted. In these cases, even though the parent-child relationship may have been legally extinguished with one or both birth parents, other relatives (listed in the statutes) who have maintained a parent-child relationship with the child who has been adopted may request and be granted visitation rights in certain situations. The visitation must be in the best interest of the child, the relative must not undermine the parents’ relationship with the child, and the relative must not act contrary to parenting decisions of the parents.

Death of One or Both of a Minor Child’s Parents. In the final situation, grandparents and stepparents of a child may request and be granted visitation with a child if one or both parents of a child are deceased and the child is in the custody of the surviving parent or any other person. For the rights to be granted, the visitation must be in the best interest of the child. The petition may be filed in an underlying guardianship action, or as an independent action.

Child Support

As part of a divorce judgment, paternity judgment, or cases where a child’s parents may live apart, the court is required to order either or both parents to pay child support for their minor children or for any child under 19 years old who is pursuing an accredited course of instruction leading to the acquisition of a high school diploma or its equivalent. In cases of teenage parents, both sets of grandparents also have a child support obligation. 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), unless the court finds that to do so would be unfair to the child or any of the parties.

Percentage of Income Standard

Chapter DCF 150, Wis. Adm. Code, establishes the child support standards that are to be applied to a person’s income to determine the appropriate level of child support. Child support amounts are based on a percentage of the parent’s gross income. The percentage standards 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.

Although the child support amount is calculated based on the percentage standard, current law provides that the child support order must be expressed as a fixed sum. The order may be expressed as a percentage only in limited circumstances.

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

The percentage standard is applied to the obligated parent's gross monthly income. The gross income includes all salary and wages before taxes and other deductions are taken out, any imputed income based on earning capacity, income from assets, workers' compensation, unemployment income, and Social Security disability. Income does not include public welfare assistance.

The court is also permitted to set child support based on a payer's ability to earn, or "imputed income," beyond actual earnings. 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.

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

- A serial family payer, which is a payer with an existing child support obligation who incurs an additional child support obligation in a subsequent family.
- A split-custody payer, which is a payer who has physical placement of at least one but not all the children.
- Low-income payers, with an income below 150% of the federal poverty level. The court may use given reduced percentage rates if the payer's income is below 150% of the federal poverty level. If a payer's monthly income is below 75% of the federal poverty level, the court may set an order at an amount appropriate for the payer's total economic circumstances.
- High-income payers earning more than \$84,000 per year. The court may use given reduced percentage rates for the portion of gross income in excess of \$84,000. A further reduced percentage rate applies to income in excess of \$150,000.

A court may set child support without using the percentage standards only in limited circumstances. Upon request of a party to the action, the court may deviate from the percentage standard if the court finds that the use of the percentage 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.

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.

Child support is paid to DCF or its designee. Child support payments are then paid out by direct deposit or added to a Visa debit card. In most cases, child support is automatically withheld from the income of an obligated payer by the payer's employer. This is known as income assignment. An alternative method of collecting child support when income assignment has been ineffective is identifying a bank deposit account from which the child support can periodically be transferred to DCF's designee.

Modification of Child Support Orders

A child support order may be modified only when there has been a substantial change in circumstances of the parties or the children since the entry of the order. A substantial change in circumstances is presumed from 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.

Additional factors the court may consider include a change in the payer's income or earning capacity, change in the child's needs, or any other condition the court determines is relevant in a particular case.

Enforcement

There are several tools available for enforcement of support orders. Civil and administrative 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 of fines, imprisonment, or both, under ch. 785, Stats.; suspension of driver's licenses; data sharing between DCF and state financial institutions; liens on property of delinquent payers and administrative seizure of assets; suspension of recreational licenses and professional licenses and credentials; assignment of income; a DCF "most wanted" campaign to publicize information about delinquent payers; and other tools. State and federal criminal penalties may also apply.

Wisconsin courts may also enforce or modify child support orders from other states under the procedures set forth by UIFSA, ch. 769, Stats.

The 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 that \$500 or more is received in support. The application form can be found at:
http://www.dcf.wisconsin.gov/bcs/services_case.htm.

Paternity

In Wisconsin, legal fatherhood can be established three different ways, if the child is not marital:

1. **Voluntary Paternity Acknowledgment.** If both the mother and the man are sure that the man is the father, the easiest way to establish fatherhood is with the Voluntary Paternity Acknowledgment form. The father and the mother may sign a Voluntary Paternity Acknowledgment form after their baby is born.

2. **Court Ruling.** If a man is named as the possible father and does not agree - OR - if a man states 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 should attend.

3. ***Acknowledgment of Marital Child (Legitimation)***. If the mother and the father get married after their child is born, the parents may sign an Acknowledgment of Marital Child form to establish paternity.

Several persons are eligible to commence a paternity action under Wisconsin law. Eligible persons include the child; the child's mother; the male presumed to be the child's father; the alleged father; and the state. The purpose of the paternity action is to determine who is the biological father of a child born in cases where the parents are not married at the time of the child's birth.

A child born to married parents is presumed, under law, to be the natural child of the husband and wife.

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.

An action to establish paternity must be commenced within 19 years of the child's birth. **Note:** Liability for past child support payments is limited to the period after filing unless the action was delayed by threats or promises.

The petition, summons, and other documents must be served on the alleged father within 90 days of filing with the clerk of court. The time may be extended only for good cause. All parties to a paternity action may be represented by an attorney. A GAL is appointed for a minor parent and 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 indigent and cannot afford one.

The court proceeding generally has three stages: the first appearance, the pretrial, and the trial. 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 admit paternity subject to confirming tests.

At the first appearance, the court must inform the parties that a judgment of paternity grants parental and inheritance rights and establishes child support obligations; that the alleged father is entitled to an attorney, at public expense if he is indigent; that any party may request genetic tests if testing is in the best interest of the child; and that the alleged father has several defenses available to him to deny paternity, including that he was sterile or impotent at the time of conception, that he did not have intercourse with the mother during the preconceptive period, or that another male did have intercourse with the mother during that period. The first appearance can be held anytime after 30 days of service of the petition on the respondent.

At the pretrial hearing, the court has an opportunity to make an evaluation of the probability of determining the existence or nonexistence of paternity at trial. At this point, witnesses and other evidence may be presented. The court may, at the conclusion of the evidence, dismiss the action, or make a recommendation to the parties regarding settlement of the paternity action. The pretrial hearing is closed to persons other than those necessary to the action.

If no settlement is reached at the pretrial stage, a paternity trial is held. Like the pretrial hearing, the trial is closed to persons other than those necessary to the action. The paternity trial is in two parts: (1) the first part is to make the determination of paternity, as shown by a clear and satisfactory preponderance of the

evidence; and (2) the second part is to make a determination of support, legal custody, periods of physical placement, and any related issues.

Genetic Testing

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 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.

Judgment

Once the trial is completed, the court enters a judgment of paternity. The judgment contains an adjudication of the child's paternity, order requiring either or both parents to pay child support, order for the legal custody and physical placement with the child, order for 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.

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) the hearing on the adoption. State law requires that all hearings concerning termination of parental rights and adoption must be closed to the public.

Agency adoptions involve the placement of a child with adoptive parents by a public agency, or by a private agency licensed or regulated by the state. Public 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.

An independent adoption refers to situations where the biological and adoptive parents find each other, often through friends or acquaintances. In Wisconsin, these families must still work with an agency for the home study and birth parent counseling services.

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 stepparent or grandparent adoptions, but could also include adoption by a brother, sister, first cousin, uncle, or aunt.

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. Adoptive parents can change their mind at any point and birth parents would have no recourse.

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, 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), and a gift to the mother (not to exceed \$100).

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, only on the basis of legal error.

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.

Additional References

DCF, <http://dcf.wisconsin.gov/bcs>.

IM 2006-02, *2005 Wisconsin Act 443: Reorganization and Revision of Ch. 767, Actions Affecting the Family*, Wisconsin Legislative Council (June 21, 2006), <http://www.legis.state.wi.us/lc>.

LCA 04-1, *Child Support Law in Wisconsin*, Wisconsin Legislative Council (January 22, 2004), <http://www.legis.state.wi.us/lc>.

SB 04-1, *Adoption and Termination of Parental Rights Law* (August 17, 2004), <http://www.legis.state.wi.us/lc>.

LCA 02-1, *Child Custody and Physical Placement in Wisconsin*, Wisconsin Legislative Council (June 21, 2002), <http://www.legis.state.wi.us/lc>.

IM 2010-06, *Visitation by Grandparents and Other Third Parties*, Wisconsin Legislative Council (June 30, 2010), <http://www.legis.state.wi.us/lc>.

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