

STEP 3: EVALUATE THE IMPLICATIONS

Custody and Placement Presumptions in Wisconsin Family Law

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Wisconsin has two legal custody presumptions for actions affecting the family. Which one applies depends on if there is a finding that a party engaged in a pattern or serious incident of interspousal battery or domestic abuse.

Presumption When there is a Finding of Interspousal Battery or Domestic Abuse:

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 that party. See Wis. Stat. 767.41(2)(d).

The result of this is that if a party's past or current behavior meets the statutory definitions of interspousal battery or domestic abuse, he/she will not be awarded any legal custody rights unless they can rebut the above presumption. The presumption that awarding the abusive parent custody rights is detrimental to the child and contrary to the best interest of the child may only be rebutted if the court finds all of the following by a preponderance of the evidence:

1. 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
2. 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 Wis. Stat. 767.41(5)(am)

If both parties have engaged in a pattern or serious incident of interspousal battery, or domestic abuse, the presumption against awarding custody to an abusive party will only apply to the party that was the primary physical aggressor. For insight on how to determine the primary physical aggressor, see Wis. Stat. 767.41(2)(d)(2). However if the court finds that both parties engaged in a pattern or serious incident of interspousal battery, or domestic abuse, and neither party was the primary physical aggressor, the abuse presumption will not apply and instead you should use the joint legal custody presumption.

Presumption When there is not a Finding of Domestic Abuse or Interspousal Battery:

In these cases it is presumed that joint legal custody is in the best interest of the child. See Wis. Stat. 767.41(2)(b). However the court may still give sole custody to a party if it finds that doing so is in the child's best interests and that either of the following applies:

1. Both parties agree to sole legal custody with the same party
2. The parties do not agree to sole legal custody with same party, but at least one party requests sole legal custody and the court specifically finds any of the following:

- A.) One party is not capable of performing parental duties and responsibilities or does not wish to have an active role in raising the child
- B.) One or more conditions exist at that time that would substantially interfere with the exercise of joint legal custody
- C.) The parties will not be able to cooperate in the future decision making required under an award of joint legal custody. In making this finding the court shall consider, along with any other pertinent items, any reasons offered by a party objecting to joint legal custody. Evidence that either party engaged in abuse of the child, or evidence of interspousal battery, or domestic abuse, creates a rebuttable presumption that the parties will not be able to cooperate in the future decision making required.

Please note that while evidence of child abuse is not considered in the Wis. Stat. 767.41(2)(d) presumption, it is considered in determining whether or not the parties will be able to cooperate in future decision making. Also note that if the Wis. Stat. 767.41(2)(d) presumption does not apply because the court found that both parties engaged in a pattern or serious incident of interspousal battery or domestic abuse and that neither party was the primary aggressor, the evidence that interspousal battery or domestic abuse occurred will still be enough to grant sole legal custody to a party if the presumption that they will not be able to cooperate in future decisions making is combined with a finding that sole legal custody is in the child's best interests and is requested by one of the parties.

Also note that in making a final 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. See Wis. Stat. 767.41(6)(b).

For a complete review of Wisconsin's family law custody presumptions, please read Wis. Stat. 767.41(2).

Please refer to the charts and information below to aid in understanding how a finding of domestic violence affects custody and placement orders.

Mandatory Deviations from the Joint Legal Custody Presumption when there is a Finding of Interspousal Battery or Domestic Abuse

If . . .	And . . .	Then
<p>The court finds by a preponderance of the evidence that one party has engaged in a pattern or serious incident of interspousal battery, as described under <u>s. 940.19</u> or <u>940.20 (1m)</u>, or domestic abuse, as defined in <u>s. 813.12 (1) (am)</u></p>	<p>That party does not show by a preponderance of evidence of all of the following:</p> <p>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.</p> <p>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 <u>767.41 (5) (am)</u>.</p>	<p>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</p>
	<p>that party does show by a preponderance of evidence of all of the following:</p> <p>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.</p> <p>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 <u>767.41 (5) (am)</u>.</p>	<p>Refer to the joint legal custody presumption for further analysis under <u>s. 767.41 (2)</u></p>

If . . .	And . . .	Then
<p>The court finds by a preponderance of the evidence that both parties have engaged in a pattern or serious incident of interspousal battery, described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am)</p>	<p>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</p>	<p>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 primary physical aggressor. This presumption may only be rebutted under the conditions in 767.41(2)(d)</p>
	<p>One party is determined to be the primary physical aggressor, based on a consideration of:</p> <ul style="list-style-type: none"> 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. If there is or has been a pattern of coercive and abusive behavior between the parties. f. Any other relevant factor. 	<p>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 primary physical aggressor. This presumption may only be rebutted under the conditions in 767.41(2)(d)</p>
	<p>Neither party is determined to be the primary physical aggressor, based on a consideration of:</p> <ul style="list-style-type: none"> 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 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 e. If there is or has been a pattern of coercive and abusive behavior between the parties. f. Any other relevant factor. 	<p>Refer to the joint legal custody presumption for further analysis under s. 767.41 (2)</p>

Permissive Deviations from the Joint Legal Custody Presumption when it is in the Child's Best Interests

If . . .	And . . .	Then
The court finds that granting sole legal custody to a party is in the child's best interest based on a considerations of the factors under s. 767.41(5)(am), subject to s. 767.41(5)(bm)	Both parties agree to sole legal custody with the same party	The court may grant sole legal custody
	The parties do not agree, but one at least one party has requested sole legal custody and the court finds one party is not capable of performing parental duties and responsibilities or does not wish to have an active role in raising a child	The court may grant sole legal custody
	The parties do not agree, but one at least one party has requested sole legal custody and the court finds one or more conditions exist at that time that would substantially interfere with the exercise of joint legal custody	The court may grant sole legal custody
	The parties do not agree, but one at least one party has requested sole legal custody and the court finds the parties will not be able to cooperate in the future decision making required under an award of joint legal custody. In making this finding the court shall consider , along with any other pertinent items, any reasons offered by a party objecting to joint legal custody. Evidence that either party engaged in abuse , as defined in s. 813.122 (1) (a), of the child , as defined in s. 813.122 (1) (b), or 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), creates a rebuttable presumption that the parties will not be able to cooperate in the future decision making required	The court may grant sole legal custody

Remember, even when the court orders 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.** See *Wis. Stat. 767.41(6)(b)*. This is commonly referred to as impasse decision making authority.

When considering whether deviation from the joint legal custody presumption is proper, always consider *767.41(2)(c)*, which states "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."

Four Key Legal Custody and Physical Placement Provisions are triggered by a finding by a preponderance of the evidence that one 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). They are as follows:

767.41(2)(d), 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.

767.41(5)(bm), 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.

767.41(6)(f), 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.

767.41(6)(g), if the court awards periods of physical placement to both parties, in order to 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, 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.