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SPOUSAL ABUSE AND JOINT LEGAL CUSTODY

2003 Wisconsin Act 130, passed by the legislature and signed into law by Governor Jim Doyle on February 27, 2004, allows a court to refuse to award a parent sole or joint legal custody if that parent has engaged in spousal abuse. The parent may rebut the court's finding. Introduced as 2003 Assembly Bill 279 by Representative Berceau and others, the bill passed in the form of Assembly Substitute Amendment 1.

BACKGROUND

Under Wisconsin law, the courts must assume that joint legal custody of a child is in the child's best interest. Courts may only award sole legal custody with the agreement of both parties or under specified conditions. In awarding either joint or sole legal custody, the courts also determine the allocation of periods of physical placement between the parties dependent on a number of factors. The law has allowed the court to take into account evidence of spousal abuse in deciding legal custody and physical placement issues. Assembly Bill 279 was introduced to create an exception to the assumption that joint legal custody is in the child's best interest.

Advocates for domestic violence victims were among the key supporters of AB-279. Under joint legal custody, they argued, abusers gain easy access to a former spouse and, moreover, expose children to the spectacle of abuse. Some cited a recent case in which an ex-husband abducted, severely beat, and left his ex-wife in a garbage can in

a storage locker after she came to pick up their two daughters, as illustrating the need for the law. Representatives of support groups for fathers opposed the bill because, they argued, it would allow domestic abuse accusations to be used as a bargaining tool in custody and placement disputes.

PROVISIONS

Domestic Abuse Findings. If the court finds by a preponderance of the evidence a parent has engaged in a pattern or serious incident of domestic abuse, it must presume that it is not in the child's best interest to allow that parent sole or joint legal custody. The parent may rebut that finding by showing first, that he or she has completed a certified treatment program or treatment by a certified provider and is not abusing drugs or alcohol; and, second, it is in the best interests of the child to award sole or joint legal custody to the abusive party based on the statutory factors the court must consider to award custody and physical placement. If the court makes a finding of domestic abuse it must state in the custody order whether that finding was rebutted, and, if so, what evidence rebutted the finding, and why the court's findings on legal custody and physical placement are in the best interests of the child.

If the court finds that both parties have engaged in domestic abuse, it must determine which party was the primary physical aggressor. Factors in making that finding include prior acts of domestic violence, severity of injuries (if any), whether one

party acted in self-defense, and patterns of coercive and abusive behaviors. A criminal conviction for an act of domestic violence would require the court to find the convicted party to be the primary physical aggressor. When there is no primary physical aggressor, joint legal custody is presumed to be in the best interests of the child.

A court that grants periods of physical placement to a parent who has engaged in spousal abuse must provide for the safety of both the child and the other party. It could order the exchange of the child to take place in a protected setting or in the presence of a third party accountable to the court. The court may order periods of physical placement supervised by a third party accountable to the court. It could further order the abuser to pay the costs of supervised placement. It may also order an abuser to enroll in a treatment program for batterers and may prohibit the use of drugs and alcohol anytime the child is with that individual under a court ordered placement.

The findings that apply to a final custody and physical placement judgment also apply to temporary orders that award legal custody and physical placement.

Mediation and Classes. Act 130 modifies the laws governing court ordered mediation for cases where parties contest joint legal custody or physical placement. It requires the court to inform the parties that it may waive the mediation requirement if the session will cause undue hardship or endanger the health and safety of one of the parties. Intake forms required by court counseling services prior to mediation must ask each party whether either has engaged in interspousal battery or domestic abuse. Under court ordered mediation, the first session must include screening for domestic abuse.

The court may require parties to a divorce to attend a class that deals with the effects of a dissolution of a marriage on a child. Act 130 stipulates that when one or both parties have engaged in interspousal battery or domestic abuse the court may not require the parties to attend the program together or at the same time.

Other Provisions. When the court appoints a guardian ad litem to represent a child, that individual must also investigate whether either parent has engaged in interspousal battery or domestic abuse and report the findings to the court. Act 130 also requires each guardian ad litem and mediator to take training that includes the dynamics of domestic violence and its effects on victims and on children.

Act 130 took effect March 13, 2004. It first applied to actions or proceedings commenced on the effective date of the act including those to modify a judgment or order granted before its effective date.

FOR MORE INFORMATION

See especially Section 767.24, Wisconsin Statutes, "Custody and physical placement." Those interested may download sections of the statutes from www.legis.state.wi.us/rsb/stats.html, and may access 2003 Wisconsin Act 130 by going to www.legis.state.wi.us, linking to "Folio," and in Folio, linking to "03 Acts." One may find the text for AB-279 and, particularly, for Assembly Substitute Amendment 1, which includes an analysis, by using the text and history function on the legislative home page. The bill history also includes a link to a Legislative Council Staff memorandum. One may find Budget Brief 99-2, "Joint Legal Custody," at www.legis.state.wi.us/lrb/pubs/budbrief.htm.

