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Narcissistic Abuse: A Hidden Epidemic

By Erika Nelson

Narcissistic abuse is a devastating, mind-bending form of mental, emotional, and sometimes physical abuse that can occur with a parent, friend, boss, sibling, or in any other relationship where a power differential is present. In this article, I will be addressing this form of abuse in the context of an intimate relationship.

Narcissistic abuse is domestic abuse, which is defined by the U. S. Department of Justice as:

> a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, psychological, or technological actions or threats of actions or other patterns of coercive behavior that influence another person within an intimate partner relationship. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.[1]

A Predictable Cycle

Narcissistic abuse has a well-defined and predictable cycle that relationships follow.

Phase 1: Idealization. In the initial phase of the narcissistic abuse cycle, better known as "the love bombing phase," the narcissist is like a predator in the wild looking for prey, possessing keen, well-honed skills to get their needs met.

Masterful at reading the victim's cues, they attune carefully to their words and body language. They look for weaknesses and test the victim's boundaries to determine how malleable they are.

The narcissist asks many questions to gain information, making the victim feel seen and heard. This validation gives the victim a false sense of safety and trust, compelling them to share private, intimate things about themselves, such as their past traumas, weaknesses, needs, and desires – all of which will likely be used against them in further stages of abuse.

The narcissist uses the information they've gained to make the victim believe they are a dream come true. They appear to offer a greater love than the victim has ever imagined possible, allowing the narcissist to easily slip into the victim's life, cementing them to the narcissist.

The abuser's actions in the idealization phase are particularly egregious in that they groom the victim into an open, vulnerable state, in preparation for the pain and manipulation they will inflict in the next phase.

The idealization phase can sound like:

- I've never loved anyone like I love you.
- We're soulmates.
- Our love is like lightening in a bottle. You won't find a love like this again.

The victim may think:

- They see something in me that no one else ever has.
- I feel truly seen and heard for the first time ever.
- I'll do whatever I can to make this relationship work.

Phase 2: Devaluation. In the second phase of the narcissistic abuse cycle, the relationship gradually changes. The flowers and gifts stop coming as often or altogether, the exciting moments are few and far between, the narcissist may even speak to the victim in a different tone of voice, while displaying far less affection or attention than they did during the idealization phase. The shift is often so subtle that it leaves the victim wondering if they are imagining things.

During this phase, the narcissist's desire and attempts to change the victim are no longer masked. The better the victim looks or acts, the more attention and approval the narcissist will receive from others, quelling the narcissist's addictive need for external validation.

As the abuse intensifies, the narcissist becomes cruel and disrespectful, using the intimate details the victim previously shared against them. The victim's pain and hurt that follows provides the narcissist the fix of power they crave desperately enough to destroy another human being for.

Intermittently, the narcissist offers the victim crumbs of "love" and affection to ensure they don't leave. As a result, the victim believes that somehow, the person they fell in love with still exists, so they may try to improve themselves, help the narcissist be a better person, or give the relationship more time as the narcissist further breaks them down.

The devaluation phase can sound like:

- You're wearing that?
- I'm sick of dealing with your issues. You're crazy.
- My friends don't understand what I see in you, but I love you and that's all that matters.

Phase 3: Discard. Once a narcissist has drained the victim of their energy and physical, emotional, and mental health, they are ready to move on to their next source of *narcissistic supply* (power, control, validation, affirmation).

They may discard their partner permanently or escalate the abuse so profoundly that the victim has no choice but to leave, making the narcissist appear as the victim. The narcissist may also end the relationship but attempt to keep the victim as a "friend," feeding them crumbs of attention and affection so they remain available as a backup source of supply if the narcissist's new supply is running low. Or the narcissist may discard and *Hoover* them (like the vacuum cleaner) back in while still in the relationship. Watching the victim's often strong and sometimes desperate reaction gives the narcissist a sense of power and control.

People who have been through narcissistic abuse are often referred to as "survivors" because tragically, not everyone makes it out alive. This may be due to lethal physical abuse, disease resulting from the breakdown of their physical body and immune system, or by their own hand when the pressure or pain of the abuse is too much.

Abuse Tactics

The abuse tactics that narcissists use to gain narcissistic supply are also quite predictable. The following definitions and examples are taken from this author's book, *Brave Love 365: Daily Inspiration, Validation, and Support for Survivors of Narcissistic Abuse and Toxic Relationships*.[2]

Gaslighting is a covert, insidious form of psychological manipulation used by the narcissist to control and disempower the victim, making them doubt their perception of reality and question their mental health. Over time the narcissist creates a false version of reality, presenting what the victim knows to be true as false and withholding information that misleads.

Victims feel confused and overwhelmed, questioning not only their sanity, but their very identity, as their dependence on their abuser grows. In a position of constantly having to defend their thoughts, feelings, recollections, and judgments, victims often shut down, becoming voiceless and easily able to manipulate.

Here are examples of what gaslighting sounds like, illustrating what an abuser might say, as well as what the abuser means when using these phrases:

- You're imagining things. (I'm denying what's true, so you'll doubt yourself and I'll have more power over you.)
- Calm down. You're too sensitive. (I'll criticize you for having a healthy reaction to my abusive

behavior.)

- Here we go again. (You're calling out my inappropriate behavior and I won't be accountable for it.)
- I never said or did that. (If I make you question yourself, you won't look at what I'm doing to you.)

Triangulation is a form of manipulation used by the narcissist in which they intertwine a third person into the relationship between themselves and their victim – physically, emotionally, or mentally – threatening the victim with exclusion or abandonment while triggering their insecurity.

Triangulation creates drama in the relationship, leaving the victim off balance and questioning their worth. Narcissists will often use other people's good qualities against the victim, pointing out where the victim doesn't quite measure up. The victim's reaction to the narcissist's inappropriate behavior can be explosive at times, which makes the victim look crazy, as the narcissist judges them with a calm, cool demeanor.

Here are examples of what triangulation might sound like:

- My co-worker looks so hot after losing weight.
- My ex thought what you said was ridiculous, too.
- I got another sexy text from my old girlfriend.
- I saw your friend today and she was all over me.

Stonewalling involves shutting down or refusing to communicate – something that can happen to anyone during an argument or heated conversation when we feel overwhelmed or emotionally flooded. However, the narcissist uses stonewalling intentionally to upset the victim by refusing to acknowledge their needs or the issues they may be attempting to discuss. A narcissist will often use stonewalling when being confronted about their inappropriate behavior.

When stonewalling is used, the victim often feels like they don't matter and what they have to say is meaningless. They come to believe they are unworthy of others' attention and validation, causing them to feel invisible, humiliated, betrayed, and abandoned, causing feelings of fear, anxiety, and doubt to increase.

Stonewalling might sound like:

- I'm not discussing this *again!*
- This is your issue, not mine. Deal with it.
- Stop. You're just being dramatic.
- Here we go again!
- Sometimes the dialogue stops altogether, even for days.

Results of Abuse

The results of narcissistic abuse can be devastating.

During the abusive relationship, many victims develop a *trauma bond*. This is a relentless connection to the abuser that lives in the victim's brain and is caused by the addictive cocktail of chemicals released during the highs and lows of narcissistic abuse. The pain of abuse is as addictive as the exhilarating relief when the narcissist doles out crumbs of affection afterwards. Victims who are separated from their abusers believe they are missing their partner, when in fact, their brain is craving the chemicals of the highs and lows of abuse.

Gripped by the effects of the trauma bond, it is common for the victim to feel and behave like an addict coming off hard drugs after their relationship with a narcissist. In fact, there are recovering drug addicts who have stated it was easier to get off drugs than it was to get away from the narcissist.

This is *aftershock* – an unexpected and sometimes disabling phenomenon that happens when the exhaustion and depletion from the abuse finally hits the victim. With this information in mind, it's easy to understand why it's tricky for a victim to act in their best interests when facing their abuser in the legal process.

Another thing that many victims experience after narcissistic abuse is *Complex Post-Traumatic Stress Disorder* (C-PTSD). Arielle Schwartz defines C-PTSD as

> another kind of post-traumatic stress which occurs as a result of long-term exposure to traumatic stress, rather than in response to a single incident.[3]

C-PTSD can include:

- mental health symptoms – dissociation, hypervigilance, intrusive thoughts, anxiety, depression, feeling suicidal, self-harming behaviors, social anxiety, agoraphobia, and panic attacks;
- emotional health symptoms – overwhelming fear, sorrow, anger, shame, helplessness, hopelessness, a decrease in self-esteem and sense of self-worth, and frustration with the continued effects of the trauma bond; and
- physical health symptoms – fibromyalgia and chronic fatigue syndrome, adrenal fatigue, asthma, stomach aches, headaches, and exhaustion. (2)

Resources

The book written by this author, *Brave Love 365: Daily Inspiration, Validation, and Support*

for Survivors of Narcissistic Abuse and Toxic Relationships is a valuable resource for victims as they walk the often-challenging journey of finding legal resolution with their abuser. It has also been helpful for the people who support victims – family, friends, and professionals. It can be found on Amazon, Barnes and Noble, or ordered via your local bookstore.

Reliable support can be found online on social media platforms such as Facebook and Instagram. Many narcissistic abuse educators offer supportive educational content, as well as online classes and coaching. In addition to this author's platform, @authorerikanelson, other helpful narcissistic abuse specialists include Lea (@love.leaxo); Annie Kaszina (@dr_anniephd); Kim Saeed (@kim.saeed); and Ramani Durvasula (@doctorramani).

National Hotlines:

- Domestic Violence Hotline: 800-799-7233 (800-799-SAFE)
- Suicide and Crisis Lifeline: 988
- Sexual Assault Hotline: 800-656-4673
- Substance Abuse & Mental Health Services Administration (SAMHSA) Hotline: 800-662-4357 (800-662-HELP)

It can be helpful to encourage victims to seek support from qualified counseling professionals who have experience with narcissistic abuse. A resource for finding the right therapist can be found at psychologytoday.com.

Awareness and Knowledge Are Key

Understanding narcissistic abuse is important. Through gaining awareness, we can better recognize the subtle, often overlooked power and control dynamics of the abuser. In addition, we can provide supportive options to the victims as they traverse the often-triggering, sometimes terrifying steps of the legal process in their traumatized state.

About the Author

Erika Nelson is a trauma therapist, author, and educator in Sturgeon Bay. She can be reached at erika@erikanelson.com

Endnotes

1 *See* justice.gov/ovw/domestic-violence.

2 Erika Nelson, *Brave Love 365: Daily Inspiration, Validation, and Support for Survivors of Narcissistic Abuse and Toxic Relationships*. Sturgeon Bay: Inward Press, 2022.

3 Arielle Schwartz, *The Complex PTSD Workbook: A Mind-Body Approach to Regaining Emotional Control & Becoming Whole*. Berkeley, Calif.: Althea Press, 2016.

Ten Things My Clients Taught Me About Domestic Violence

By Christina M. Tenuta

Throughout the course of my legal training, I've benefited from many high-quality CLE sessions on domestic violence in family law matters. I have learned a great deal from these trainings – one of the key examples being "listen to your clients." This advice is some of the most valuable I've received, because those who are experiencing domestic violence know their situation best. Even though we have legal training, our clients can often tell us what will succeed and what will not.

As a result, I've started to complement my formal legal training in domestic violence matters with the practical lessons I've learned from another valuable resource – my clients.

While my legal solutions may be successful on paper, they are not always applicable to real life, typically because of safety concerns – in other words, my client does not feel safe following my legal advice. This usually plays out in one of two ways: either the client feels comfortable voicing their opposition, or they agree with me in conversation but then in practice pursue a completely different course of action. This situation can be confusing for attorneys – but can be avoided by remembering to check in with the client to see if our legal solutions seem realistic and safe.

Here are 10 important things I've learned from my clients:

1) Hiring An Attorney Can Be Fraught with Safety Concerns

There are many options now for communicating with clients, post-COVID-19. However, an in-person intake with a potential client may be the safest.

Out of fear of retribution, many clients need to make sure their spouse has no idea they are speaking with a family law attorney. For these reasons, I always

determine first what method of communication is safest, make bold notes about this in my file, and tell my paralegal right away.

For example, some potential clients cannot receive incoming phone calls from a law firm if their partner has control over their phone. The client may ask to be the one who initiates contact with me or may borrow someone else's phone entirely. This can be tough, because it means not calling my client if I have a question or update, and merely waiting, while working to ensure the client is "reasonably informed" about their case, per Supreme Court Rule, SCR 20:1.4(a)(3).

It also means that, for certain clients, I must be very flexible and make myself available when they are, in keeping with the Supreme Court Rule that obligates attorneys to promptly reply to information requests from clients. SCR 20:1.4(a)(4).

2) Remain Undetected – Evade Tech Monitoring while Drafting the Pleadings

At the first client meeting after you are hired, ask how the client wants to review the pleadings. For the same reasons stated above, simply emailing the initial pleadings for review may not be safe. Many clients rightfully suspect that their spouses have gained access to their email accounts, calendar, or hacked into their phone.

If there is suspicion that your client is monitored, the Madison Tech Clinic (housed at UW-Madison) offers a clinic in which tech experts will scan phones and online accounts to identify any nonconsensual tracking. Right now, the tech clinic operates in Dane County via in-person appointments, but is actively working to expand throughout the state with remote consultations.

If monitoring concerns persist beyond the pleadings stage (for example with smart devices in the home), Wis. Stat. section 767.117 can be employed to prohibit harassment actions during the pendency of the case. Also, under Wis. Stat. section 767.225(3m) during a temporary order hearing, the commissioner can raise the issue of safety and privacy with the parties and inform them of their rights to a restraining order, and require parties to submit any motion for an injunction to the judge within 5 days.

3) Include Safety Planning when Preparing to File Divorce Papers

The information required by Wis. Stat. section 767.215 for the initial petition (i.e., Social Security numbers, date and location of marriage, and previous marriage) and the full financial disclosure required under Wis. Stat. section 767.127 are typically not information many of us readily have on hand.

When asking clients for this data, I've learned that locating and retaining this information can be complicated, especially if someone is packing a bag in preparation for a sudden emergency departure from the home. It would be ideal to keep copies of documents in a couple of locations so that when the time comes to fill out the confidential petition addendum, the required information is not packed up at a secret location outside of the house.

4) In Drafting the Affidavit, Strike a Balance Between Privacy and Legal Relevancy

In making decisions about custody and placement during the divorce process, courts are required to look for a preponderance of the evidence when determining if there is a pattern or serious incident of battery or abuse, according to Wis. Stat. section 767.225(1n)(b)2.

The best way to do this in an affidavit is to start with the most recent incident of violence and then go backward in time, while including specific descriptions of the act. For example, who saw what, the time of day, how loud, where in the house, specific body parts used etc., can be especially impactful information in an affidavit. However, many clients do not wish to disclose or include such information, because it may jeopardize their safety when their spouse reads the pleading.

This is a delicate conversation for attorneys to have with our clients. While we may understand the strength of including this extremely legally relevant information in the initial pleadings, we may not have our clients' trust or permission to do so. Remember, many of our clients have spent a great deal of time and energy keeping the violence a secret or minimizing its harm. To ask them to abruptly shift course and put the details down in a document that is technically available to the public under Wis. Stat. section 19.31 may be too alarming or counter instinctual.

In these situations, it may be helpful to discuss with clients what documents can be kept confidential or sealed in order to respect their right to privacy under Wis. Stat. sections 801.19 and 801.20.

5) Aim for Personal Service Without Escalation – Especially with Firearms in the Home

Wis. Stat. section 767.215(3) requires personal service under Wis. Stat. chapter 801 when one spouse initiates a divorce action. As such, personal service is often the first time the opposing party will learn of the lawsuit. Nevertheless, some clients require discretion even before personal service is effectuated if they suspect their spouse of regularly checking CCAP to search for their name and watch for a new divorce case.

I always defer to my clients when deciding how to serve the other party. We discuss the merits of choosing between public law enforcement or a private process server based on safety. I have found that the benefit to hiring a private process server, if violence is a concern, is that a private server can usually give the case more personal attention than law enforcement.

I start by asking the private process server if they are experienced in and willing to work with situations involving the threat of violence. Then I ask the private process service to focus on the best time and location to attempt personal service, the possibility of starting with a phone call and inviting the opposing party to meet in a public neutral location, and the willingness of a private process server to communicate with my office about when service has been accomplished in real time, especially over the weekend.

The point at which a person leaves a violent home is often the most dangerous moment according to the National Coalition Against Domestic Violence.[1] As such, it is really important to consider how to best de-escalate violence at the time of service to reduce the high risk of danger that accompanies the commencement of a divorce.

When there are firearms in the home or recent threats of suicide, law enforcement is usually the safest for personal service. This is because studies have identified access to guns as a strong indicator of lethality in domestic violence situations.[2]

6) Child Care Considerations

Financial resources are an obvious barrier to leaving intimate partner violence, and an important subset of that is access to day care. Leaving a two-parent household with children often requires significant child-care support.

However, child care can be tied to family members who may not be helpful, safe, or aware of the violent situation. Using children to maintain power and control and especially threats to keep children away from the non-abusing parent as a punishment for taking legal action is common. Studies show that violent partners often intentionally sabotage child care arrangements to limit their victims' access to education, employment, and finances.[3]

It is key, therefore, when discussing a client's new post-separation financial future that they have a solid understanding of these legal concepts: placement, child support, variable expenses, and the relationship among all three.

First, when discussing placement schedules with a new client, explain the difference between child support and variable expenses. Child support is intended to cover a child's basic support costs (food, shelter, clothing etc.) under DCF 150.02(3). In contrast, variable expenses are defined as expenses above basic support costs, including but not limited to child care under DCF 150.02(29).

Next, the placement schedule has implications for sharing variable expenses, but not child support. Parents with primary placement (more than 75% placement) are typically responsible for all variable expenses. In contrast, parents with a shared placement schedule (both parents have at least 25% placement) are required to share variable costs, under DCF 150.035(1). In a shared placement arrangement, each parent pays for day care costs relative to their percentage of placement under DCF 150.035(1)(b)6.

Helping your client understand the difference between child support and variable expenses as well as the link between placement and variable expenses can hopefully shift more financial resources toward the child and ideally relieve the financial burden of the parent establishing a new household.

7) Pets Matter

While pets are considered property under Wisconsin law,[4] they can still play a significant role in the timing of a divorce action. It is not uncommon for parties to stay in a violent home to ensure the safety of their pets. While many of us may be familiar with this scenario when it involves children, it is important that we do not judge or ignore the reality that many people know their partner will harm (or kill) a beloved pet if they leave.

As such, it can be productive to talk to your clients about whether they have pets in the home and what they would like to see happen to their pet when they leave. Is there a friend or neighbor that can take the pet?

The national Animal Welfare Institute maintains a website of Safe Haven Shelters for pets for this very reason, and many county humane societies offer to temporarily house a pet while long term and safe housing is obtained.

8) Seek a Court Order Asking the Other Party to Vacate the Marital Home

At a temporary order hearing, it is rare that a judge or commissioner will grant a request to order the other spouse to vacate the marital residence – unless the parties agree. When new clients inquire about obtaining an order to remove their spouse from the marital home at the onset of a divorce, they can be surprised at how hard this can be to accomplish, even when there is violence in the home.

We often must talk about alternatives, like seeking a temporary living arrangement for themselves or

filing for a domestic violence injunction. Even with very strong allegations in the affidavit, such as recent incidents of violence, a new criminal charge with a no contact order, or an injunction, it may still be hard to persuade a commissioner to order one party to vacate the home. This is because the court may consider other factors such as who can afford the mortgage or rent payment, whose name is on the mortgage or the lease, and how the kids will get to and from school.

It is important to have frank discussions with clients about what is realistic to expect at the temporary order hearing and what they can do if their spouse is allowed to remain in the home.

9) Expect Reconciliation

Reconciliation or suspension of a divorce is allowed under Wis. Stat. section 767.323 and may be something you encounter when handling a divorce with elements of violence. This is because the cycle of power and control is hard to identify and extremely difficult to exit. As such, it is actually normal for a client experiencing violence to seek a reconciliation as a measure of self-protection (physically or otherwise).

A number of studies have shown that it takes multiple attempts for survivors of domestic abuse to completely end a relationship with an abusive partner, which means it is very common for people to return to a violent relationship on several occasions during the process of separating.[5]

This can be frustrating for the attorney, but our job is to do as directed by our client regarding settlement, according to Supreme Court Rule, SCR 20:1.2(a). It is also important to maintain open lines of communication so that if the client needs to resume their legal action in the future, they feel comfortable enough to contact you again safely and, without embarrassment, to proceed.

10) Make Referrals to Services and Delegate Support

While I write this article to remind attorneys that our clients can be the foremost expert on their case, they are not the only experts – and neither are we. A key component of representing people experiencing violence is knowing when outside help is necessary for both us and our clients.

There are many experts available to support victims of domestic violence, such as legal advocates, mental health support, crises hotlines, law enforcement, medical practitioners, and support groups. All of these resources can and should be offered to clients so that we can ensure our focus remains on the legal issues, while delegating to others the areas in which they are professionally trained.

For additional education, I recommend the website for the National Coalition against Domestic Violence. For local resources in every county, visit End Domestic Abuse Wisconsin, and for legal issues specific to children, the *Domestic Abuse Guidebook for GALs* is an excellent publication.

About the Author

Christina M. Tenuta is an associate attorney with Shuster Family Law, LLC, Madison. She can be reached at christina@schusterfamilylaw.net.

Endnotes

1 National Coalition Against Domestic Violence, Domestic Violence (2020) at assets.speakcdn.com/assets/2497/domestic_violence-20200807093508 55.pdf; citing Campbell, J.C., Webster, D., Koziol-McLain, J., Block, C., Campbell, D., Curry, M. A., Gary, F., Glass, N., McFarlane, J., Sachs, C., Sharps, P., Ulrich, Y., Wilt, S., Manganello, J., Xu, X., Schollenberger, J., Frye, V. and Lauphon, K., "Risk factors for femicide in abusive relationships: Results from a multisite case control study," *American Journal of Public Health*, 93(7), 1089-97, 2003.

2 *Id.*

3 R. J. Voth Schrag, T. Edmond, and A. Nordberg, "Understanding School Sabotage Among Survivors of Intimate Partner Violence from Diverse Populations," *Violence Against Women*, 2019.

4 *Hagenau v. Millard*, 182 Wis. 544, 195 N.W. 718 (1923).

5 D. K. Anderson and D. G. Saunders, "Leaving an abusive partner," *Trauma Violence Abuse* 4 163–191, 2003.

Late Filings: Let's Agree on Some Consequences

By Jennifer Van Kirk

Judges, I am going to paraphrase Tom Cruise in *Jerry McGuire*: "help me help you" with late exhibit and document filings before court hearings. Late filings are difficult for everyone, *except* for the person running late.

Like other lawyers I know, I have learned of electronic filings while already in a video hearing or an in-person court hearing. Judges can help lawyers, which in turn help judges, through requirements with respect to eFiling in advance to a contested hearing.

Manners and EFiling

I admit a personal bias: I struggle with both personal and professional time sensitive matters sent by email or eFile, with the *expectation* of immediate review of anything emailed or eFiled by virtue of the person clicking of "send."

As a parent, my most recent frustrating email was after 5 p.m. on Friday about a Saturday morning volleyball tryout, stating that the tryout was starting an hour earlier. We did not get the email until after tryouts and, as a result, my daughter was late.

As a lawyer, my most recent example is multiple exhibits filed after 3 p.m. on the day before an 8:30 a.m. hearing – which I never saw, much less printed or reviewed, before the hearing.

While eFiling has benefits, part of the detriment to parties and lawyers is the ease of procrastination and late-filing of voluminous documents. The court is in no better position to review late eFilings than the opposing party, which is why helping the parties can help the court.

Lawyers need help from the court with specific deadlines or expectations with respect to eFiling exhibits and documents prior to hearing, whether the hearings are by video or in person.[1]

I recognize that this presumes individuals follow court rules. I also recognize that there may be consequences that the court must consider when making rulings regarding the exclusion of exhibits or documents, such as a de novo hearing for a family court commissioner's ruling or additional court time.[2]

Notifications Are Not Instantaneous

A related issue is regarding the eFiling system. When a document is filed, it is deemed filed with the court.[3] When a document alert is provided to the opposing party, it is deemed as served upon other electronic parties.

However, for reasons outside the court's control, documents are not immediately pulled through upon filing and disseminated to the other party. As a result, again, documents that are deemed "filed" by eFiling have not been served, because the notice has not yet been generated.

Additionally, with the new exhibit system on Wisconsin's eFiling system, exhibits that are eFiled are not available to or shared with the other party in the eFiling system. They are available to the clerk, but not the court official.

By providing opposing parties with electronic copies or requiring paper copies to be brought to court with late filings, it avoids the sole reliance on eFile as the method of transmittal.[4]

Respectfully, Here Are Some Suggestions

Recognizing that there is no perfect solution, I suggest these options for courts with respect to pretrial or exhibit orders. Some options are:

- If exhibits are ordered to be eFiled, exhibits are filed at least several business days or a week prior to a contested hearing, with a copy to the opposing party by email upon filing. If a party will not be complying with the deadline, they shall notify opposing counsel or party in writing at least 24 hours prior to the deadline.
- If the parties prefer not to exchange exhibits before a hearing and the court agrees, the parties provide paper exhibits to everyone *during* court as we did prior to eFiling.
- If the moving party files late exhibits, possible consequences could be not allowing the exhibit's entry, an adjournment, time for review outside of court, or a dismissal without prejudice, if requested by either the court or the opposing party.
- If the nonmoving party files late exhibits, possible consequences are declining the document's entry or providing time for review outside of court, because an adjournment or dismissal may not be an effective deterrent.

- All filed exhibits or documents must be sent to the opposing party by *email* upon filing.
- Any exhibits or documents filed within 72 business hours (or after the exhibit deadline set by a court) of an in-person hearing must also be provided in paper copy for both the opposing counsel and party before or at the hearing, based on opposing counsel's preference.
- Pro se individuals are held to the same timing and procedural rules, or in the alternative, *no one* exchanges exhibits before the hearing. It provides an unintentional advantage to pro se individuals over their spouses if they see counsel exhibits, but we do not see theirs.

We Will Learn and Adjust

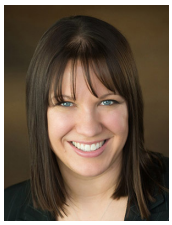
Every lawyer who appears in court graduated from law school, indicating their capability to do things on time and in the manner required by a court. Lawyers are deadline-driven and familiar with firm deadlines.

I recall when eFiling was starting when one court official required everything to be eFiled – no paper in his courtroom. If there was a paper marital settlement agreement to file, we had to take it to our office to scan it. The court would not scan it for us or accept paper. Guess what? Anyone in that court quickly learned this rule and adjusted accordingly. Lawyers can similarly adjust to court rules regarding exhibits and late pre-court filings.

The incentive theory of motivation, in a rough summary, is that people take actions that are successful and produce the results they want. Therefore, if late filings are successful and accepted, late filings will continue.

Lawyers can inform our clients when exhibit and document deadlines may impact their case. Help us help you by setting requirements or local rules with respect to filings prior to contested court hearings, which benefits the parties, lawyers, the court staff, and the court.

About the Author



Jennifer Van Kirk, U.W. 2002, is with Peckerman, Klein & Van Kirk LLP, Milwaukee. She can be reached at jvk@pkvlaw.com.

Endnotes

1 I will suggest one notable exception: agreements. Agreements, by implication, are with both parties' consent and it benefits the parties and the court's long-term calendar, when possible, to finalize the matter. We know it is a pain when agreements are filed last minute, but it can be difficult to avoid.

2 My sincere thanks to Comm. Barry Boline for his time discussing this issue and his insight.

3 Wis. Stat. § 801.18(4)(C) states, "[i]f the clerk of court accepts a document for filing, it shall be considered filed with the court at the date and time of the original submission, as recorded by the electronic filing system. The electronic filing system shall issue a notice of activity to serve as proof of filing. When personal service is not required, the notice of activity shall constitute proof of service on the other users in the case." See also Wis. Stat. § 801.18(6)(A)(2023).

4 Wis. Stat. § 801.18(9)(K) states, "[d]ocuments may be submitted during a court proceeding by traditional methods. Documents submitted in court shall be imaged and the imaged copy entered into the court record by the clerk of court. Wis. Stat. § 801.18(9)(L) states, "[f]or documentary exhibits, parties shall submit a copy of the exhibit and not the original. The clerk of court shall image each documentary exhibit and enter the imaged document into the court record. Copies of documentary exhibits so imaged may be discarded as provided in SCR 72.03(3). If inspection of the original document is necessary to the court proceeding, the court may order that the original document be produced. Any original document so produced shall be retained as an exhibit as provided in SCR 72.03(4).

Chapter 767 and the Realities of Family Court

By Donna Ginzl

Parental disputes regarding custody and physical placement are among the most complex disagreements family courts decide. The decisions not only affect the parents, but impact children in ways that may not be clear until months or years later.

The legislature established several guidelines, factors, and services to assist parents and help family courts in deciding legal custody and physical placement disputes when parents cannot agree.

This article is the first in a two-part series. It examines the tools available under Wis. Stat. chapter 767 that help families in family court and explores the reality of employing those tools throughout the state.

Part two examines the varied availability of these tools around the state, and suggests alternatives when these services are not available.

A Mandate: Best Interest of the Child

The overarching mandate of the legislature regarding custody and physical placement is what is in the best interest of the child. Per Wis. Stat. section 767.41(2)(a):

> 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.

And Wis. Stat. section 767.41(2)(am) states: "The court shall presume that joint legal custody is in the best interest of the child."

Legal Custody: Statutory References

Pursuant to Wis. Stat. section 767.41(2)(b)2.a-c, the court is allowed to 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:

1. Both parties agree to sole legal custody with the same party.
2. The parties do not agree to sole legal custody with the 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."

Section 767.41(2)(b)2.a-c sets forth scenarios under which a court *may* give one party sole legal custody, but subsequent provisions mandate situations in which a court may not give a parent sole custody and circumstances under which there is a rebuttable presumption in favor of sole legal custody.

Section 767.41(2)(c) prohibits a court from giving "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."

The legislation goes on in section 767.41(2)(b)2.c., however, to state that

> 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 (emphasis added).

The statute in Wis. Stat. section 767.41(2)(d)1. continues that:

> 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* (emphasis added).

The presumption under this subdivision may be rebutted under Wis. Stat. section 767.41(2)(d)1.a.&b. *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). (Emphasis added).

The difficulty for many family courts and litigants around the state is the scarcity of certified treatment programs or certified treatment providers in some areas. For a deeper dive into the history of section 767.41(2)(d) and the impact of *Valadez v. Valadez*, see *"Domestic Violence and Legal Custody: Another Look at 767.41(2)(d),"* in the July 2022 issue of this journal, written by the editor-in-chief, Judge Thomas Walsh. In his article, Judge Walsh notes that

> while the 2021 list contains a number of providers, those providers are disproportionately located in Wisconsin's urban centers. That list contains no such providers north of Highway 29 and mentions only four west of Interstate 39. . . . That makes sense because that is where most of the people are. However, domestic violence is not simply a problem in urban areas – it is a problem everywhere. Asserting that rural areas don't need this service is simply a denial of the problem.

It is also important to note that the List of Certified Providers that are available on the Wisconsin Batterers Treatment Providers Association has not been updated since 2021.[1]

Family Court Services Under Section 767.405

Beyond the issue of domestic violence, there is – along with the rebuttable presumption of sole legal custody created by the legislature and the inconsistency of treatment programs and providers available around the state to allow litigants to complete the program required by the legislation to overcome the statutory presumption of sole legal custody – additional legislation meant to assist the court in making critical decisions regarding legal custody and physical placement of minor children in family court disputes.

These are well-conceived in theory, but vary greatly in their practical application around the state.

First, some history. On April 22, 1988, 1987 Wisconsin Act 355 was enacted. This legislation:

- dramatically changed custody presumptions (from presumptions of sole legal custody to joint legal custody);
- revised concepts of sole physical custody to one parent and visitation rights to the other parent; and
- raised best interest of the child as the paramount consideration for judicial determinations regarding custody and placement.

The legislation also established support services to assist families and family courts to "ensure that the best interest of the child continues to be served after a child's parents become divorced or separated."

These services included comprehensive services for mediation in family law matters and requires the circuit judges in each county (or counties, if a cooperative agreement is entered into), with the approval of the chief judge of the respective judicial administrative district, to appoint a director of family court counseling services to assist parents to "define and resolve disagreements regarding custody and placement with the best interest of the child as the paramount consideration."

Today, the codification of 1987 Wisconsin Act 355 is Wis. Stat. section 767.405, titled "Family Court Services."

Section 767.405: Mediation as a Service to Families

In section 767.405(1)(a), mediation is defined as

> a cooperative process involving the parties and a mediator, the purpose of which is to help the parties, by applying communication and dispute resolution skills, define and resolve their own disagreements, with the best interest of the child as the paramount consideration."

The statute under section 767.405(1m)(a) requires:

> except as provided in par. (b) and subject to approval by the chief judge of the judicial administrative district, the circuit judge or judges in each county shall designate a person meeting the qualifications under sub. (4) as the director of family court services in that county.

The exception noted above is if, pursuant to section 767.405(1m)(b):

> 2 or more contiguous counties enter into a cooperative agreement under sub. (3)(b), the circuit judges for the counties involved shall, subject to approval by the chief judge of the judicial administrative district, designate a person meeting the qualifications under sub. (4) as the director of family court services for those counties."

The statute in section 767.405(2)(a)-(d) goes on to require that the director shall:

(a) Employ staff to perform mediation and to perform any legal custody and physical placement study services authorized under sub. (14), arrange and monitor staff training, and assign and monitor staff case load.
(b) Contract under sub. (3)(c) with a person or public or private entity to perform mediation and to perform any legal custody and physical placement study services authorized under sub. (14).
(c) Supervise and perform mediation and any legal custody and physical placement study services authorized under sub. (14), and evaluate the quality of the mediation or study services.
(d) Administer and manage funding for family court services.

In regard to mediation services, the statute in section 767.405(3) mandates that "mediation shall be provided in every county in this state by any of the following means: ...

(c) A director of family court services designated under sub. (1m) may contract with any person or public or private entity, located in a county in which the director administers family court services or in a contiguous county, to provide mediation in the county in which the person or entity is located.

In addition, the statute in section 767.405(4) sets forth the required qualifications of the mediator(s) by noting that:

> every mediator assigned ... 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."

The statute in sections 767.405(8)(a)&(b) goes on to require an initial mediation session:

> in any action affecting the family, including an action for revision of judgment or order under s. 767.451 or 767.59, in which it appears that legal custody or physical placement is contested ...

and prohibits a court from holding a trial of or a final hearing on legal custody or physical placement until after mediation is completed or terminated, unless the court finds that attending the session will cause undue hardship or would endanger the health or safety of one of the parties.

The statute in section 767.405(8)(b)1.-4. further requires that:

> in making its determination of whether attendance at the session would endanger the health or safety of one of the parties, the court shall consider evidence of the following:
>
> 1. That a party engaged in abuse, as defined in s. 813.122(1)(a), of the child, as defined in s. 813.122(1)(b).
>
> 2. Interspousal battery as described under s. 940.19 or 940.20(1m) or domestic abuse as defined in s. 813.12(1)(am).
>
> 3. That either party has a significant problem with alcohol or drug abuse.
>
> 4. Any other evidence indicating that a party's health or safety will be endangered by attending the session.

Because the overarching purpose of mediation under section 767.405 is the best interest of a child in family law matters where legal custody and physical placement is in dispute, the statute under 767.405(10) states that, if mediation is provided (under 767.405(6)(a)):

> no issue relating to property division, maintenance, or child support may be considered during the mediation unless all of the following apply:
>
> (a) The property division, maintenance or child support issue is directly related to the legal custody or physical placement issue.
> (b) The parties agree in writing to consider the property division, maintenance or child support issue.

Section 767.405(10)(a)-(e) also sets forth the powers and duties of the mediator and states:

> "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:
>
> (a) Include the counsel of any party or any appointed guardian ad litem in the mediation.

(b) Interview any child of the parties, with or without a party present.

(c) Require a party to provide written disclosure of facts relating to any legal custody or physical placement issue addressed in mediation, including any financial issue permitted to be considered.

(d) Suspend mediation when necessary to enable a party to obtain an appropriate court order or appropriate therapy.

(e) Terminate mediation if a party does not cooperate or if mediation is not appropriate or if any of the following facts exist:

1. There is evidence that a party engaged in abuse, as defined in s. 813.122(1)(a), of the child, as defined in s. 813.122(1)(b).

2. There is evidence of interspousal battery as described under s. 940.19 or 940.20(1m) or domestic abuse as defined in s. 813.12(1)(am).

3. Either party has a significant problem with alcohol or drug abuse.

4. Other evidence which indicates one of the parties' health or safety will be endangered if mediation is not terminated.

Although my experience is limited to the counties that I practice in, I have never had a mediator ask that I attend mediation that is ordered pursuant to section 767.405, whether I was an advocate attorney for a party or a guardian ad litem for the minor child.

Further, I have never heard of a mediator interviewing a child of the parties. If any Wisconsin family law practitioner has a different experience, I invite them to contact me.

Upon completion of a successful mediation, the mediator shall complete a written document setting forth the parties' agreement. The statute under 767.405(12)(a) requires that the written agreement be:

> reviewed by the attorney, if any, for each party and by any appointed guardian ad litem, and submitted to the court to be included in the court order as a stipulation. Any reviewing attorney or guardian ad litem shall certify on the mediation agreement that he or she reviewed it, and the guardian ad litem, if any, shall comment on the agreement based on the best interest of the child. The mediator shall certify that the written mediation agreement accurately reflects the agreement made between the parties. The court may approve or reject the agreement, based on the best interest of the child. The court shall state in writing its reasons for rejecting an agreement.

If the parties do not reach an agreement on legal custody or periods of physical placement, pursuant to section 767.405(12)(b):

> the court shall promptly appoint a guardian ad litem under s. 767.407. Regardless of whether the court appoints a guardian ad litem, the court shall, if appropriate, refer the matter for a legal custody or physical placement study under sub. (14). If the parties come to agreement on legal custody or physical placement after the matter has been referred for a study, the study shall be terminated. The parties may return to mediation at any time before any trial of or final hearing on legal custody or periods of physical placement. If the parties return to mediation, the county shall collect any applicable fee under s. 814.615.

Section 767.405: Physical Placement Studies as a Service to Families

Moving on to the issue of legal custody and physical placement studies, section 767.405(14), *requires* that "a county or 2 or more contiguous counties *shall* provide legal custody and physical placement study services."

The statute goes on to state, under 767.405(14)(a)1-3:

> The county or counties may elect to provide these services by any of the means set forth in sub. (3) with respect to mediation. Regardless of whether a county so elects, whenever legal custody or physical placement of a minor child is contested and mediation under this section is not used or does not result in agreement between the parties, or at any other time the court considers it appropriate, the court may order a person or entity designated by the county to investigate the following matters relating to the parties:
>
> 1. The conditions of the child's home.
>
> 2. Each party's performance of parental duties and responsibilities relating to the child.
>
> 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).
>
> 3. Any other matter relevant to the best interest of the child.

While all of the counties where I practice – generally in central and north central Wisconsin – have mediation services available through the county, none

of them have legal custody and physical placement studies available on a county level.

Parents (usually through counsel) or guardians ad litem may ask the court to enter an order for a study, but in my experience this always requires that the parties use evaluators from around the state – many coming significant distance from where the family lives – with the parties bearing the cost (often $5,000 minimum).

Sadly, this makes legal custody and physical placement studies unavailable to many families in a significant number of Wisconsin counties. In addition, although there are recommendations for best practices or model standards for custody and placement evaluations set forth by organizations such as the American Psychological Association, the Association of Family and Conciliation Courts, and the American Academy of Matrimonial Lawyers, there is no guidance in the Wisconsin statutes regarding evaluation standards for such a study. This lack of standards can impact the usefulness of some studies in family court.

In addition, even if there is a written recommendation for legal custody and physical placement in a contested case, it is possible that the court may not be allowed to rely upon it or use the recommendations when making a legal custody and physical placement determination. Under section 767.405(14)(b)1., the person or entity conducting the study is required to:

> at least 10 days before the report is introduced into evidence under subd. 2., submit the report to the court and to both parties. The court may review the report, but may not rely upon it as evidence before it is properly introduced under subd. 2.

Section 767.405(14)(b)2, referenced above, states:

> the report under subd. 1. shall be offered in accordance with the rules of evidence and shall be a part of the record in the action if it is so offered and admitted into evidence.

In most of the cases I have been involved in, as either a guardian ad litem or advocate counsel for a party, where a custody study has been ordered, the original retainer fee charged by the private evaluator is used up before the completed work can be brought before the court. Sometimes the money runs out before the study is completed and the written report is submitted, and sometimes the report is submitted, but the evaluator requires additional funds in order to testify at trial.

In some cases, the parent who wants the study admitted into evidence does not have the funds to pay the evaluator to testify in court and the other parent is unwilling to pay the evaluator because the report is unfavorable to them. The guardian ad litem is working at a reduced rate with the county likely footing the bill, and the court is unwilling to order the county to pay (or reimburse the guardian ad litem) for the evaluator to testify.

Without the testimony of the evaluator, the report cannot be offered and admitted into evidence, and without the report being admitted, the court cannot rely on it or base it's decision on the recommendations made in the written report prepared by the evaluator.

Section 767.407: Guardians ad Litem in Family Court

The last statute to review regarding services in the family law code to assist family court commissioners, judges, and parents in determining whether legal custody and physical placement arrangements are in the best interest of a child is Wis. Stat. section 767.407, "Guardian ad litem for minor children."

Pursuant to section 767.407(1)(a), the court is required to

> appoint a guardian ad litem for a minor child in any action affecting the family if any of the following conditions exists:
>
> 1. The court has reason for special concern as to the welfare of a minor child.
>
> 2. Except as provided in par. (am), the legal custody or physical placement of the child is not contested.

Under section 767.407(1)(am), the court is not required to appoint a guardian ad litem under (a)2. if all of the following apply:

1. Legal custody or physical placement is contested in an action to modify legal custody or physical placement under s. 767.451 or 767.481.
2. The modification sought would not substantially alter the amount of time that a parent may spend with his or her child.
3. The court determines any of the following:
   a. That the appointment of a guardian ad litem will not assist the court in the determination regarding legal custody or physical placement because the facts or circumstances of the case make the likely determination clear.
   b. That a party seeks the appointment of a guardian ad litem solely for a tactical purpose, or for the sole purpose of delay, and not for a purpose that is in the best interest of the child.

According to section 767.407(4), the guardian ad litem is to be an advocate for the best interests of a minor child,

> "as to paternity, legal custody, physical placement, and support ... and they 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. ... They shall consider the factors under s. 767.41(5)(am), subject to s. 767.41(5)(bm), and custody studies under s. 767.405(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. 767.405(12) and on any parenting plan filed under s. 767.41(1m). Unless the child otherwise 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. 767.41(5)(am)2. The guardian ad litem has none of the rights or duties of a general guardian.

The last provision in section 767.407(6) regarding guardian ad litem compensation warrants noting:

> The guardian ad litem shall be compensated at a rate that the court determines is reasonable. The court shall order either or both parties to pay all or any part of the compensation of the guardian ad litem. In addition, upon motion by the guardian ad litem, the court shall order either or both parties to pay the fee for an expert witness used by the guardian ad litem, if the guardian ad litem shows that the use of the expert is necessary to assist the guardian ad litem in performing his or her functions or duties under this chapter. If both parties are indigent, the court may direct that the county of venue pay the compensation and fees. If the court orders a county to pay the compensation of the guardian ad litem, the amount ordered may not exceed the compensation paid to private attorneys under s. 977.08(4m)(b). The court may order a separate judgment for the amount of the reimbursement in favor of the county and against the party or parties responsible for the reimbursement. The court may enforce its orders under this subsection by means of its contempt power.

Note that section 767.407(6) indicates the court may direct the county of venue to pay the compensation and fees, but they are not required to. Although many counties in the state have indigency evaluations to determine whether or not a parent is able to pay the guardian ad litem fees, many do not.

In the counties where there are no provisions for county payment for guardian ad litem fees of indigent parents, parents may feel compelled to agree to legal custody and physical placement orders even in cases where they do not believe the agreement is in their child's best interest – because they cannot afford to pay the fees.

This raises the question as to whether or not the efforts of the legislature to make best interests of children in legal custody and physical placement disputes as the paramount consideration, is as evenly applied to children whose parents have limited means as it is to parents who can afford to pay for a custody study or a guardian ad litem.

Conclusion: Ideals versus Reality

As stated in the introduction, this article is part one of two articles intended to compare the legislative ideals relating to family court services available to assist families, family law practitioners, and family courts in deciding disputed issues of custody and physical placement of minor children.

Part two will examine the variation of how these services are delivered (and the degree to which the statute is not strictly followed), as well as the unavailability of some of the services in different areas of the state. It will also review how different counties, courts, and practitioners seek to honor the best interest of the minor child as the paramount consideration in custody and physical placement disputes without the resources envisioned by the legislature in the statutes set forth in this article.

As part of my research for the second part of this article, I will be sending out questionnaires to various court commissioners, family court services directors, mediators, judges, and family law practitioners (both advocate counsel and guardians ad litem) around the state. I will also interview mental, emotional and behavioral health providers who are involved in the family court system, either as custody study evaluators or as therapists counseling children and or parents, where the family is embroiled in custody or physical placement litigation.

I invite any reader of this article who has input or a perspective they would like me to consider in part two to contact me at the email address below.

About the Author

Donna L. Ginzl is a partner with Anderson, O'Brien, Bertz, Skrenes & Golla, LLP, in Stevens Point. She can be reached at dlg@andlaw.com.

Endnote

1 *See* thewbtpa.wpcomstaging.com/certified-providers/.

A View from the Bench: Judge Ryan Hetzel

By Judge Thomas Walsh

Washington County Circuit Court Judge Ryan Hetzel shares some of this thoughts about family law and his experiences on the Washington County bench with family law matters. Included in the interview are some of his views on custody and placement of children as well as financial issues.

About Judge Hetzel

- Undergraduate: U.W. Stevens Point, major in political science
- Law School: Marquette University
- Years as a judge: 1.5
- Prior practice: I was a general practice litigation attorney. As a younger attorney, I handled a significant number of criminal law and family law cases, including all of the potential offshoots from that work including restraining orders, CHIPS, JIPS, delinquency matters, etc. I served as a GAL for approximately 15 years.

What kind of work did you do before law school?

Grocery utility clerk; West Bend Parks Department as a seasonal employee, which included obtaining a CDL and operating heavy equipment and dump trucks; gas station attendant; intramural referee; factory work at a coffee filter factory.

What career would you have chosen if you had not become a lawyer?

I would like to have been a professional baseball player, but I do not think it would have worked out.

Who had the most influence on your career?

Attorneys Joseph Doherty and Larry Brueggeman were huge influences on my career and practice. Both had very different leadership styles, but both taught me the value of work ethic, organization, and preparation.

Are you assigned primarily to the family law area?

I am not primarily assigned to the family law area. In Washington County, all four of us are general jurisdiction judges, and family law is one of the areas we routinely handle.

How often are you asked to review the family court commissioner's decisions?

We are fortunate to have excellent family court commissioners. That being said I have had to conduct a number of de novo hearings. Less than ten so far.

How frequently do you find yourself differing from the family court commissioner's decisions?

Rarely, but it does happen. We are able to listen to the FFC proceedings if we choose to. I find that oftentimes, the substantive decision will be the same or similar, but there might be variances in the details of the order. This answer goes back to the previous question in that we have excellent family court commissioners who know their stuff.

What does the phrase "regularly occurring, meaningful periods of 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" mean to you? What do you find that most parents who appear before you believe this phrase means?

It means simply that, all factors being equal, the court should try to provide both parents with as much time as they can realistically have with the children. There is no question that parents who read that phrase interpret it as 50/50 placement, and that is not an incorrect reading under some circumstances.

Do you require parents to file parenting plans? Do you find parenting plans helpful?

I do not. As a private practice attorney, we filed parenting plans regularly. I do believe they are helpful because it requires the parents to think about and spell out the logistics of the placement. Who will do the transportation? Will child care be necessary?

At what age do you believe a child is capable of expressing preference about placement?

I believe children can express a preference around age 10, but I do not think it is a good idea to put much weight behind it except in extreme cases such as abuse and neglect. Once a child has a driver's license, I do think more weight should be given to the child's preferences.

How do you go about getting a child's preference?

It should come in through the report of the GAL.

How do you see the mediation process for custody and placement disputes working in your county?

Washington County has mandatory court-ordered mediation in all custody and placement disputes, which the county runs. We have several retained mediators. The process is excellent and results in full or partial agreements in the majority of cases. Party's attorneys are not involved in the custody and mediation placement process.

What can attorneys do to make the mediation process more productive?

We do not allow attorneys to participate in custody and placement mediation. The only thing they can assist with is ensuring their clients are participating in the process.

What role do you find extramarital relations and cohabitation playing on making placement decisions?

It is usually the single biggest factor affecting physical placement disputes. I expect a GAL will conduct an investigation to determine the best interests of the children in those situations, to assist the court in determining whether contact between the children and the significant other is appropriate during the pendency of the action.

How useful is the opinion of an independent psychologist in a custody case?

It can be very useful in explaining the source of issues that exist during custody and placement disputes. I find these opinions particularly helpful where there are allegations of parental alienation.

Do you allow a psychologist or other professional to express an ultimate fact conclusion with respect to custody and placement?

No.

Do you think the historical preference in favor of the mother in placement cases exists anymore?

No. However, I do think many couples still adhere to traditional gender roles, and that can factor into their decisions on physical placement of the children.

Do you consider placement problems as a reason for changing custody?

Not usually unless there are very clear communication issues and it is apparent that the large portion of responsibility for the problems falls on one party.

How often do you find yourself deviating from the child support percentage standards, if at all?

I will approve deviations that are agreed upon most of the time. It is rare that I would independently agree to deviate. It would more likely happen in circumstances of low-income payers who have significant expenses and are working at full earning capacity.

How do you approach disputes regarding variable costs?

I would look at the communication between the parties, the expectations, and the needs of the children. If the kids have taken dance classes for the three years preceding the divorce, there would be an expectation that would continue. Nevertheless, the parties need to communicate regarding those decisions. They should not be unilateral.

How do you think the child support "special circumstances" formulas are working?

Generally they work fine. It can become more of an issue in cases with very high-income payers that result in the child support payments becoming de facto maintenance payments. At some point, child support is no longer based upon the realistic "needs" of the children.

Do you consider the parties' assets and debts in setting or modifying child support?

It can be a factor as indicated in my responses above.

Do you consider inflation alone as a factor to justify support revisions?

I have not yet.

What factors do you consider in a shirking determination?

I look at past work history. Any limitations on the part of the parent (injuries, mental health, etc., paying particular attention to timing). If someone walks away from a job at the beginning of a divorce proceeding without a good explanation, it certainly appears to be shirking.

Do you find vocational experts to be helpful in determining earning capacity?

Yes. However, as with all retained experts, you need to evaluate the testimony from the perspective of who retained the expert and for what purpose? Is this testimony realistic?

Have you ever sentenced anyone to jail for nonpayment of child support?

Yes. Usually the individual is under a seek work order, is held in contempt by the family court commissioner, and then fails to comply with a stipulation reached at the contempt hearing. Under those circumstances, jail is usually the last alternative.

Do you have a general formula for setting maintenance?

Not an exact formula. I will use the tax calculator program, along with the length of the marriage and other maintenance factors, including the historical earnings of the parties.

Do you have any benchmarks in determining whether a marriage is short-term or long-term?

For maintenance purposes, a 7-8 year marriage is where I typically would consider a short term of transitional maintenance, depending on all the other factors. At 25 years, long-term or "permanent" maintenance may be on the table, again depending on the other factors and in particular, historical earnings.

If a maintenance candidate has never worked during the marriage, but gets a job during the divorce, will the maintenance award be affected?

Possibly. The purpose of nonpermanent maintenance is to bridge a gap toward an individual being self-supportive to a standard of living comparable to during the marriage. By obtaining employment, the individual has started down that path.

Is there an age for children at which a homemaker should be working outside of the home?

This is entirely dependent upon how the parties have chosen to conduct themselves. If the couple are empty nesters at the time of the divorce, and one spouse has never worked, I would not be in a great rush to order that party to obtain employment. If, on the other hand, one party is receiving transitional maintenance, and the children are reaching the age where child care is no longer a consideration, I would expect that person to be looking for work. I would also expect that if a child were sick, the parent with placement would make arrangements for the care of that child.

At what point do you feel that a maintenance award is affected by the extent of the property awarded to the parties?

When the prospective maintenance recipient can live in a standard comparable to that of the marriage, based upon the money or assets received in the property division.

Have you ever awarded maintenance to a man?

Yes.

When one spouse has put the other spouse through professional school, would you consider that as a factor in awarding maintenance?

Yes.

What problems do you see with the laws on maintenance at the present time?

I do not see any specific problems with the law regarding maintenance. I do find maintenance to be one of the large driving issues that tend to prolong divorce proceedings, but it is not an issue with the law itself.

Do you let a parent with minor children stay in a house for a number of years before selling it, if the house has to be sold, or do you normally order it sold immediately? What sort of factors do you consider in making this determination?

It most circumstances, I would order the home sold. While there is certainly an interest in maintaining childhood homes, if the family cannot afford to retain the home, it should be sold. That would also likely prevent the vacating spouse from obtaining a new home.

When you have to diverge from the 50/50 presumption, what is the basis for the divergence in most of these cases?

Usually it is ether when the parties reach that decision on their own, or the logistics of placement will not allow it. This could be distance from school due to relocation, work schedules, etc.

Have you ever issued any sanctions for the failure of a party to timely file a financial statement?

I have not had to rule on this yet. I have however, refused to default parties who have a signed MSA but have not filed a FDS timely.

Have you ever set up a constructive trust because of nondisclosure of assets pursuant to Wis. Stat. section 767.27(5)?

No.

What has been your experience in dealing with the exemption of inherited and gifted property from equitable distribution?

This issue comes up with some regularity. It often involves a parent "donating" money, as a down payment on a house. These "donations" frequently do not have any documentation and when commingled are often relabeled "loans" after the fact. When it is truly inherited money and kept in a separate account, I have rarely seen it disputed.

Do you have any policy with respect to the appreciation of nondivisble property during the marriage?

I do not have a set policy. In the absence of a prenuptial agreement, if there is an asset in which the marital appreciation can be determined, it should be divisible.

Do you ever award a contribution by one party to the attorney fees of the other? What do you base it on?

Yes. I have ordered one party to pay a full retainer fee for another in a circumstance of disparate incomes, where the MSA included a prenuptial agreement and a maintenance waiver. I would not allow that case to go to final hearing without the nonearning spouse being represented.

How do you approach discovery disputes? Have you ordered the appointment of a special master to resolve those disputes?

I have not personally appointed a special master. I did inherit a case with a special master, and would not hesitate to use one in high-conflict prolonged family court cases.

What is the average waiting time past the statutory period for trial dates in your courts, as to both contested and uncontested matters?

I have not been able to obtain this data. I suspect that most simple divorce actions are resolving within 60-90 days of the statutory waiting period. The majority of divorces are resolved within one year of filing. I currently have three divorces more than 720 days old.

What is the ratio of cases assigned to you that are paternity actions versus divorce actions?

Currently 86% divorce, 14% paternity.

What is the ratio of cases assigned to you that involve one party acting pro se? Both parties?

I do not have these specific numbers. A larger and larger number of people are proceeding pro se. I suspect half of all divorce litigants are pro se. More than half of the paternity litigants are pro se.

How satisfying do you find the hearing of family law matters as compared with other kinds of cases?

I do not find a great deal of satisfaction or reward in family law matters. There is a never a party that "wins" in family law cases, while quite often there is a large amount of conflict. These are cases of no greater or lesser import than others in my caseload.

What statutes or concepts would you liked changed in the area of family law?

I do think the child support statute should be revisited, particularly in high-income cases. There should be some relationship between need and support. There is no "standard of living" provision in the child support guidelines.

What do you see lawyers doing that bothers you the most?

My biggest pet peeve is when it is obvious the lawyers have done nothing between court dates and "just spoke this morning." I also dislike discovery disputes when it is clear the lawyer is not adequately controlling the client's behavior in responding to the discovery.

What do you think lawyers could do to help make it easier for the litigants when they appear in court?

The biggest thing is to make sure the cases are being worked on, and that the lawyer is communicating with the client regarding the status of the matter and the outstanding issues.

What do you think lawyers could do to help make it easier for the court in hearing family law cases?

At the risk of sounding redundant, come to court prepared, having worked the file, so that you can

tell the court what the outstanding issues are and if any portion of the case is settled. It is very helpful for the judge to know if the only issue is the premarital value of the house, as opposed to "Judge, we don't have an agreement." It is my policy that, before I will give trial dates to the parties, the parties have made a good faith attempt to resolve the issues, usually with the assistance of a mediator.

What words of wisdom do you have for parties appearing before you?

One always has the opportunity to recover from the financial damage from a divorce. There may not be an opportunity to repair emotional damage to the children. I would encourage litigants to keep that in mind.

What words of wisdom do you have for family law attorneys appearing before you?

You are serving an important role in the lives of your client. As a career choice, keep working to become a better attorney for your clients. The impact that your advocacy has on the lives of your client and their children can be profound. It is important not to lose that idea when going through the daily activities of the practice of law.

What are your hobbies?

Presently, I try to play basketball regularly when my knees will let me. I love to travel and see new places. When not traveling, I like to cook or try new dining experiences with my wife. When time allows, I enjoy board games with the family.

What type of music do you listen to?

My music choices have changed over the years. I now gravitate toward lighter alternative and pop/rock: David Gray, James, etc. However, when I mow the lawn I will still turn on 80s hair band rock.

What is your favorite movie?

If I am in a serious mood, *Three Days of the Condor*. If I am in a not so serious mood, *Notting Hill*.

What is your favorite book?

If I had to pick one, *A Bridge Too Far* by Cornelius Ryan.

Tell us about your family.

I am remarried (third marriage). My wife Allison and I have been married since 2016. We have six children. Each of us brought three children into the marriage. We have three girls and three boys. Only two still live at home.

Grants Available from the Family Law Section

The Family Law Section Board considers grant requests from outside organizations whose purpose is related to the practice of family law, child and families involved in the family court system in Wisconsin, or other services related to family law.

To apply: Requests must be submitted with a brief but detailed summary of the purpose of the grants request, along with a contact name, address, phone number, and email address.

Applications may be submitted at any time to State Bar Section Coordinator Kara Olson at kolson@wisbar.org. Requests are considered at the next scheduled Board meeting (with the application process not to exceed six months). Applicants may need to discuss their applications before the Board to provide additional support for the request.

For more information, contact Section Coordinator Kara Olson at kolson@wisbar.org.

Chair's Column

Putting Diversity Into Action

By David Kowalski

The State Bar, rightly so, has placed a greater focus on diversity in recent years. Diversity covers many categories, including race, religion, culture, gender, sexual orientation, financial, nationality, ethnicity, etc.

The State Bar and our Family Law Section are taking concrete steps to address the issue. For example, all State Bar sections are required to complete an annual Diversity and Inclusion Action Plan. The Family Law Section Board will participate in diversity training next month. A recent State Bar Section Leaders Council meeting included speakers alerting members to a wide range of viewpoints, which led to a very lively discussion. There are many other initiatives.

Still, when I attend family court hearings, seminars, social events, etc., it is painfully obvious that sustained and effective diversity efforts remain necessary. Besides participating in State Bar initiatives, it is vital that each of us explore what we can do, individually or as a firm, to further this goal.

Here are some ideas:

Make deliberate efforts to expand your network of family attorneys, experts, and witnesses. Case preparation is difficult, and there is a natural tendency to rely on the same referral base, professionals and expert witnesses that we've used countless times. While understandable, this approach creates barriers to those trying to break into this circle.

I recently arranged an annual family law seminar, and deliberately sought out nontypical presenters. It was surprisingly difficult – it took a substantial amount of phone calls, internet searches, etc., but the end result was a more diverse group of speakers and an expanded professional referral network.

The next time you refer a client, or seek a professional or expert, explore whether you can offer an opportunity to someone from a minority community. A good place to look is on the State Bar's specialty bars webpage at wisbar.org/Directories/LawRelatedOrgs/Pages/WI-Specialty-Bars.aspx.

Participate in the **State Bar's Diversity Clerkship program**. Our firm worked with an excellent summer clerk from the Program, and it was a rewarding experience. Check it out at wisbar.org/aboutus/forlawstudents/Pages/Diversity-Program.aspx.

Join a relevant State Bar committee, such as Diversity and Inclusion Oversight Committee, Bar Relations, or Leadership Development. Find the list at wisbar.org/committees.

Complete the Bar Diversity and Inclusion Action Plan for your workplace. It is comprehensive and well-written. Completing the plan also requires frank consideration of your workplace environment, and a concrete plan to address diversity questions. Find it at wisbar.org/diversity.

Recognize the diversity that already exists in your workplace. Make an extra effort to seek out and listen to thoughts and ideas of all your co-workers. Consider giving paid holidays for non-Christian or other holidays (for example, Chinese New Year, Eid-al-Fitr or Eid-al-Adha, Juneteenth, Yom Kippur, etc.) Such holidays need not just be offered to the employee who would celebrate them. Give everyone the day off, thereby sending a message about the importance of the day. Perhaps use the opportunity to learn a bit about the holiday, particularly if the employee is willing to participate in the process. I speak from experience, as our firm has successfully done both of the above.

Toward a Greater Goal

Perhaps these are small steps, but many small steps, by each firm, make the journey. The State Bar is working on a macro level. I will focus, as I begin my year as section chair, on helping the Family Law Section to play its part. However, each of us could have a daily, immediate effect by considering the above options, or any others that make sense, toward a greater goal.

About the Author

David S. Kowalski is with Kowalski Wilson & Vang LLC, Madison, and is chair of the State Bar of Wisconsin Family Law Section. He can be reached at david@kwvfamilylaw.com.

Join Us for the 42nd Annual Family Law Workshop

By Lindsey Cobbe

The State Bar of Wisconsin's Family Law Section is hosting its annual Family Law Workshop Aug. 10-12, 2023, at the Stone Harbor Resort in Sturgeon Bay.

As always, the conference provides an opportunity to receive CLE credits in family law-focused programming, along with an opportunity to socialize with family law practitioners and experts from around the state.

This year's conference features a wide range of programs relevant to practitioners, commissioners, judges, and experts.

Programming on the first day features presentations with a panel of mental health experts sharing their knowledge and experience before concluding with a presentation on compassion fatigue and burnout in the legal profession.

The second day features two tracks: the 101 Track provides information about child support, mediation skills, and electronic surveillance and technology issues in family law cases, while the 201 Track includes presentations on cross-examining experts, contempt in family law cases, and navigating issues related to small businesses in divorce.

During the third and final morning of presentations, attendees will hear the annual case law and legislative update, receive updated information on property division worksheets and TaxCalc, and hear from the Office of Lawyer Regulation about their process for disciplinary complaints.

Social events include a poolside cocktail hour and reception and trolley tour. Programming lasts for half a day, allowing attendees to spend the rest of the day exploring beautiful Door County with their fellow attendees, family, and friends.

How to Register

Conference registrations may be made online through the WisBar Marketplace (search "Family Law Workshop"), by calling the State Bar at (800) 728-7788, or via mailing in the registration form, which is also available online at Wisbar.org.

Rooms are available at the Stone Harbor Resort in Sturgeon Bay. Please book early to reserve a spot: contact the Stone Harbor Resort directly at (877) 746-0700 or (920) 746-0700 and indicate you are part of a group room block under the State Bar of Wisconsin – Family Law Section.

The Workshop Planning Committee and the Family Law Section Board hope to see many of you there!

Meet Your Board Member: Joyce Gosnell

I have been practicing law for 24 years, primarily in the area of family law litigation representing survivors of domestic violence in Milwaukee and Waukesha counties. My practice is steadfast in protecting the rights of indigent clients to obtain legal representation and access to the courts. I am committed to educating the judiciary and legislature on the needs of Wisconsin's most vulnerable and deserving populations. After many years of direct client services, my values are now leading me toward a more policy-oriented career path.

I am a graduate of U.W. Milwaukee cum laude with a B.A. in communications, a minor in African-American Studies, and a certificate in Peace Studies.

I am a graduate of Marquette University Law School. During my time at Marquette, I had the privilege of working with Dean Howard Eisenberg in growing the Public Interest Law Society. Upon my graduation, I served on the Eisenberg Fund: Loan Repayment Assistance Program committee, advocating for financial assistance to law school graduates who choose careers in public service.

In my private life, I have volunteered my time as a Scouts BSA Leader and member of Elm Grove Junior Guild. I am an advocate volunteer in my community for safe spaces and free speech. I have been married for 25 years and have three teenage sons. I love to spend time outdoors gardening, hiking, camping, and riding my motorcycle. I look forward to my time serving on the Family Law Section board of directors.

Meet Your Board Member: Jill Mueller

After graduating from UW-Madison with a B.A. in English and Spanish, Jill worked at Wisconsin's Department of Children and Families (DCF) in the Bureau of Early Care and Education before attending Marquette University Law School.

Jill started her legal career in private practice in Milwaukee County, where she focused on paternity, divorce, and post-judgment cases. Early in her career, Judge Marshall Murray appointed Jill as guardian ad litem on several pro-se paternity cases on the child support agency's calendar. It was here where she started to understand the child support program and how relevant are the programs administered by her former employer (e.g., child care, W-2, child welfare, and child support) to the practice of family law.

After a few years in private practice, Jill had the opportunity to work as an assistant corporation counsel in Rock County, where she was assigned to work with the county's child support agency.

In 2018, Jill began working at DCF again, initially as an attorney for child welfare with an emphasis on regulation of out-of-home care facilities. She has since transitioned over to her current position as the attorney for the Bureau of Child Support, the Bureau of Working Families, and the Bureau of Refugee Programs. In her role, she advises on all legal matters, including compliance with federal laws and regulations, and she assists in drafting administrative rules.

Jill hopes that, by being on the Family Law Section Board, she can help eliminate some of the administrative mystery and help foster even greater collaboration between DCF and the private bar.

Jill lives in Monona with her husband and two children. She sits on the City of Monona's License Review Committee and the Police and Fire Commission. In her free time, she loves reading and watching the Great British Bake Off.

Meet Your Board Member: Brian J. Bushaw

Brian J. Bushaw has served as Outagamie County family court commissioner since May 2021. He earned his B.A. in English from Purdue University in 1999. He enrolled in the U.W. Law School in fall 2001, but spent much of his time managing a local wine shop.

After graduating in 2004, Brian continued to explore career options in the wine industry, but ultimately began his family law practice with a small firm in Madison that fall. He practiced in Madison and the surrounding counties until fall 2013, when he and his wife relocated to the Fox Valley for her to assume her role as assistant professor of Art History, curator of the Wriston Art Center Galleries, and Museum Studies Interdisciplinary Area program director at Lawrence University.

Brian worked in private practice in Appleton from 2014 until 2021, when he was appointed to the family court bench. In 17 years of private practice, he worked in at least 26 different counties.

Brian is returning to the Family Law Section Board. He completed the term of a prior member beginning in 2006 and served through 2017. He served as chair 2015-16. Since becoming commissioner, Brian has joined the board of directors for WIPCOD and continues to provide volunteer services for Harbor House Domestic Abuse Programs in Appleton.

Brian and his wife, Beth, met in Madison while working in the aforementioned wine shop. They have been married for 14 years. They've poorly raised two terriers together and do not brag about the behavior of same. A pathological home chef, Brian likes to cook, eat, and talk about what he'll be eating tomorrow. During the pandemic he really stepped up his cocktail game. You might catch him giggling to himself while workshopping a joke he'll never tell anyone.

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Individuals interested in joining the Family Law Section should contact the State Bar of Wisconsin at (608) 257-3838 or (800) 728-7788.