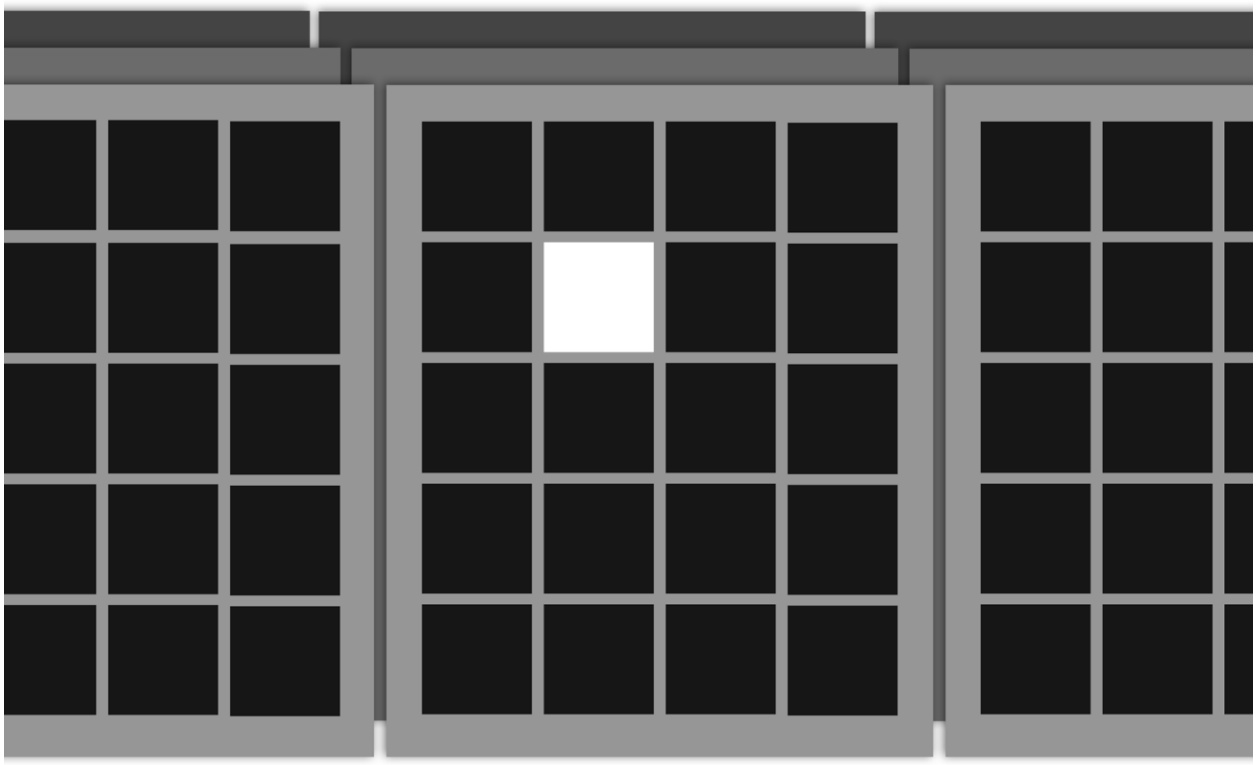
2022
11TH EDITION

Wisconsin Attorney's Desk Reference

Volume II



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First edition 1986. Second edition 1999.
Third edition 2006. Fourth edition 2011.
Fifth edition 2014. Sixth edition 2017.
Seventh edition 2018. Eighth edition 2019.
Ninth edition 2020. Tenth edition 2021.
Eleventh edition 2022.
Printed in the United States of America

25 24 23 22 5 4 3 2 1
ISBN 978-1-57862-637-3
Library of Congress Control Number: 2022910542
Product Code AK0003E22
Also available online

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Chapter 21
Independent Adoption: Representing Adoptive Parents

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NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 159; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Feb. 2022, No. 794; all references to Wisconsin Supreme Court Rules (SCR) are current through orders dated Mar. 3, 2022; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-97 (Mar. 14, 2022); and all references to Wisconsin circuit court forms are current through revisions dated Feb. 13, 2022.

NOTE: In this chapter, *department*, as defined by Wis. Stat. § 48.02(4), means the Department of Children and Families (DCF).

I. INTRODUCTION [§ 21.1]

A. In General [§ 21.2]

1. Independent adoption, also known as a private adoption, is an option that is arranged initially without the assistance of a licensed child-placing agency. Wis. Stat. § 48.837.

   a. Birth mother or birth parents, together, select a specific couple or person to adopt their child.

   b. Persons other than a licensed child welfare agency, such as physicians, counselors, friends, or relatives, may provide the informational link between proposed adoptive parents and potential birth parents, provided the person connecting the parties is not compensated for matching the parties. Wis. Stat. § 948.24(1)(b).

c. "[A] lawyer may not ethically represent or act as an intermediary for both the adoptive and biological parents in a private adoption proceeding because of inherent conflicts that cannot be reconciled." State Bar Comm. on Ethics, Formal Op. E-88-4 (1988) (citing ABA Comm. on Ethics & Pro. Resp., Informal Op. 87-1523 (Jan. 14, 1987)).

CAUTION: *Extreme caution* is advised if the attorney is facilitating the informational link between the birth mother and the prospective adoptive parents. *See infra* Practice Tip.

d. In an independent adoption, the same attorney must not represent both the adoptive parents and the birth parents. Wis. Stat. § 48.837(8).

PRACTICE TIP: If the birth mother does not have prospective adoptive parent(s) in mind, birth mother's attorney should *not* make referrals to adoptive parent(s) or provide "résumés" or "profiles" for the birth mother to review; instead, the attorney should refer the birth mother to a licensed child welfare agency for assistance in locating acceptable adoptive parent(s). Some counties have refused to grant an adoption in which an attorney has acted as an intermediary.

e. If this is a first adoption, there *must* be preadoption preparation under Wis. Stat. § 48.84. Wis. Stat. § 48.84(1).

f. In-state placement: Proposed adoptive parent(s) and parent(s) having custody of the child may petition the court for placement in the home of a nonrelative if the home is licensed as a foster home under Wis. Stat. § 48.62; in Wisconsin, foster licensing occurs when a home study is completed and the prospective adoptive family is approved by a licensed child-placing agency. Wis. Stat. §§ 48.837(1), 48.62.

g. Direct placement

(1) *Direct placement* procedures allow a child's placement in the proposed adoptive home before the filing of a Wis. Stat. § 48.837(2) petition for placement or petition to terminate parental rights. The birth parent with custody of the child or the proposed adoptive parent(s) may request that the DCF, a county department that takes guardianship of children, or a licensed child welfare agency place the child in the home of the proposed adoptive parents *before* the filing of the Wis. Stat. § 48.837(2) petition for placement if the home is licensed as a foster home or meets the requirements of a preadoptive home in their home state. Wis. Stat. § 48.837(1r).

NOTE: This type of placement is sometimes referred to as an *at-risk placement* of the child because the child is not yet free for adoption as the result of a completed termination of parental rights (TPR) proceeding and the parents could change their minds about placing the child for adoption.

Direct placement can apply to interstate adoptions, provided both the sending and receiving states give approval for such a placement through their respective Interstate Compact on the Placement of Children (ICPC) offices. Care should be taken by counsel or the child-placing agency in the sending state to ensure that all ICPC requirements (including the specific number of adoption education training hours that the prospective adoptive family must complete) are complied with to obtain ICPC approval in a timely manner. Wis. Stat. § 48.837(1r)(b), (c).

(2) The placing department or child welfare agency *must* enter into a written agreement that specifies who is financially responsible for the cost of providing care for the child before finalization of the adoption and for the cost of returning the child to the custodial parent if the adoption is not finalized. Birth parents are *not* financially responsible for these costs. Wis. Stat. § 48.837(1r)(d).

(3) At the hearing on the Wis. Stat. § 48.837(2) petition for placement, the court must determine whether any person has coerced a birth parent in violation of Wis. Stat. § 48.837(1r)(e). Wis. Stat. § 48.837(6)(br), (1r)(e).

h. Out-of-state placement: Subject to Wis. Stat. §§ 48.98 and 48.988 (the ICPC), when proposed nonrelative adoptive parent(s) reside outside Wisconsin, a parent having custody and the proposed adoptive parent(s) may petition for placement if the home meets the criteria established by the laws of the other state for a preadoptive placement in the home of a nonrelative. Wis. Stat. §§ 48.685, 48.837(1m).

CAUTION: If a prospective adoptive parent has been convicted of a *serious crime*, *see* Wis. Stat. § 48.685(1)(c), the home cannot be licensed as a foster home; thus, adoptive placement in that home may be precluded because prospective adoptive parents in Wisconsin must be so licensed and, if the prospective adoptive parent's state of residence so requires, the prospective adoptive parent must also be licensed as foster parent.

i. Court must hold a hearing within 30 days after petition for placement is filed. Wis. Stat. § 48.837(4)(a).

j. In the case of a child not placed under Wis. Stat. § 48.837(1r), the court may, at the request of a petitioning parent (or on its own motion for taking the child into custody under Wis. Stat. § 48.19(1)(c)), place the child in any home in this state that is a foster home licensed under Wis. Stat. § 48.62, pending the hearing on the Wis. Stat. § 48.837(2) petition for placement. Wis. Stat. § 48.837(4)(d).

k. Pending the hearing on petition for placement, court may continue the Wis. Stat. § 48.837(1r) placement in a licensed foster home, *including* the home of the prospective adoptive parents. The court may also *remove* the child from the home of the proposed adoptive parents. Wis. Stat. § 48.837(4)(dm).

2. Termination of parental rights

a. Birth parents' TPR underlies adoption proceeding.

b. Child is not available for adoption until the parental rights of both birth parents are terminated.

c. If birth parent is a resident of another state, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is implicated; TPR proceedings thus become custody determinations and are governed by UCCJEA. Wis. Stat. ch. 822; *P.C. v. C.C. (In the Int. of A.E.H.)*, 161 Wis. 2d 277 (1991).

d. Grandparents with court-ordered visitation rights are entitled to notice of the TPR action under the UCCJEA. *Brus C. v. Shawn D. (In re TPR of Steven C.)*, 169 Wis. 2d 727 (Ct. App. 1992).

e. Birth father of a child conceived as a result of sexual assault is not entitled to notice of proceedings and does not have standing to contest TPR, but Wis. Stat. § 48.42(2m) is not applicable *if* the assault was in violation of Wis. Stat. § 948.02(1) or (2) *and* the father was under age 18. Wis. Stat. § 48.42(2m); *Ann M.M. v. Rob S. (In re TPR to SueAnn A.M.)*, 176 Wis. 2d 673 (1993).

CAUTION: Adoption involves complicated procedures with a great deal at risk; extreme care should be taken to follow all procedures exactly.

3. *Qualified* adoption expenses paid for the adoption of *each* eligible child may qualify for federal income tax credit. The maximum credit for adoptions finalized in calendar year 2022 is $14,890. The full credit is available to taxpayers with a modified adjusted gross income of $223,410 or less, and the credit phases out completely when the adoptive parents' modified adjusted gross income is greater than $263,410. In some cases, IRS regulations might permit adoptive parents to carry their federal tax credit forward from one year into the next. IRS Form 8839; IRS Instructions for Form 8839 (2021), https://www.irs.gov/pub/irs-pdf/i8839.pdf.

CAUTION: It is best practice to advise clients to consult with a tax professional on this issue. The federal tax credit rules are complex. Many adoptive families have been audited by the IRS on this issue. Attorneys should advise clients to be prepared to produce itemized receipts, cancelled checks, and credit card documentation for all adoption expenses, including travel, birth parent counseling, permissible living expenses, and legal fees.

4. Up to $5,000 expended during taxable year (and two taxable years prior) paid for adoption expenses are deductible from Wisconsin income tax. Wis. Stat. § 71.05(6)(b)22.

PRACTICE TIP: The federal tax credit is available even if the adoption effort fails. This is in contrast to the state exemption, which is available only if an order of adoption is entered (i.e., the adoption is successful).

NOTE: Unless stated otherwise, this chapter assumes that the petitioners, including birth parents, are residents of Wisconsin and that there are no interstate complications. This chapter is not a complete primer on TPR proceedings. For more in-depth discussion, see chapter 23, *infra*, discussing TPR. *See generally* Wis. Stat. § 48.98 (interstate placement of children), Wis. Stat. § 48.988 (ICPC).

B. Additional Source [§ 21.3]

Matthew W. Giesfeldt, *Termination of Parental Rights and Adoption: A Practical Handbook for Judges, Lawyers, and Human Services Providers* (State Bar of Wis. 3d ed. 2017 & Supp.) [hereinafter *TPR*].

II. JURISDICTION AND VENUE [§ 21.4]

A. Jurisdiction [§ 21.5]

1. Exclusive jurisdiction with juvenile court unless the federal Indian Child Welfare Act (ICWA) or the Wisconsin Indian Child Welfare Act (WICWA) applies. Wis. Stat. §§ 48.14(1), (3), 48.028.

2. UCCJEA provisions (Wis. Stat. ch. 822) do *not* apply to purely intrastate TPR proceeding. *David S. v. Geraldine S. (In the Int. of Brandon S.S.)*, 179 Wis. 2d 114 (1993).

B. Venue [§ 21.6]

See Wis. Stat. §§ 48.185(2), 48.83(1). *But see* Wis. Stat. § 48.028(3)(b).

1. In an independent adoption, both a TPR proceeding and an adoptive placement proceeding are filed. Thus, venue can be in county where any of the following resides when the petition is filed:

   a. The proposed adoptive parent(s),

   b. The child, or

   c. The birth parent.

2. Court *may* transfer case to a court in county where proposed adoptive parent(s) reside(s).

PRACTICE TIP: Counsel should consider all venue options and take into account the transportation needs of the placing parent(s) and ease of scheduling.

III. REPRESENTATION OF PARTIES [§ 21.7]

A. In General [§ 21.8]

1. Attorney for adoptive parent(s) *cannot* also represent the birth mother or birth father. Wis. Stat. § 48.837(8); State Bar Comm. on Ethics, Formal Op. E-88-4 (1988); *In re Disciplinary Proceedings Against Stocking*, 164 Wis. 2d 797 (1991).

2. While not advisable, it may be possible for one attorney to represent both birth parents (such as when birth parents are married and, in that case, only when the birth parents are in absolute agreement about the adoption plan).

3. *Advertising* is severely limited. Wis. Stat. § 48.825.

   a. No person may

      (1) Advertise for purpose of finding a child to adopt unless the person has received a favorable recommendation regarding the person's fitness to be an adoptive parent in this state from DCF or county department or child welfare agency licensed under Wis. Stat. § 48.60 or in another jurisdiction from any entity authorized to conduct studies of potential adoptive homes, Wis. Stat. § 48.825(2), (3)(d); or

      (2) Advertise that the person will place child for adoption, find adoptive home, or arrange for or assist in adoption or adoptive placement, Wis. Stat. § 48.825(2).

   b. Violation of this prohibition on advertising is Class A misdemeanor. Wis. Stat. §§ 48.825(5), 939.51(3)(a).

c. Exception to this prohibition exists for county departments, licensed child welfare agencies, foster care and adoption resource centers, postadoption resource centers, and certain individuals (e.g., officially approved prospective adoptive parents or parent seeking to place his or her own child for adoption). Wis. Stat. § 48.825(3).

d. Attorneys may advertise their "availability to practice or provide services relating to the adoption of children." Wis. Stat. § 48.825(4).

B. Birth Mother [§ 21.9]

1. Minor

a. Must have guardian ad litem (GAL), as is required for informed consent of a minor. Wis. Stat. § 48.23(2)(a).

b. GAL may be paid by the proposed adoptive parents in uncontested TPR and adoption proceedings under Wis. Stat. § 48.837, unless the proposed adoptive parents are indigent. Wis. Stat. § 48.235(8)(c)2.

c. If the proposed adoptive parents are indigent, court may direct county to pay; compensation may be limited to public defender rates. Wis. Stat. § 48.235(8); SCR 81.02.

NOTE: Hourly rates for court-appointed attorneys, including GALs, are $70 and $25 (travel time), unless appointed at the supreme court rate of $100. In private pay cases, however, GALs are generally allowed to bill at their prevailing hourly rate, and many counties treat TPR and independent adoptive placement matters as private pay. Wis. Stat. § 977.08(4m)(d); SCR 81.02.

2. Competent adult

a. Parent 18 years old or older may waive right to have own attorney. Wis. Stat. § 48.23(2).

PRACTICE TIP: The birth mother's representation may help ensure secure and timely placement of the child.

b. Birth mother is entitled to attorney of her own choosing; adoptive parent(s) will normally pay birth mother's attorney fees. Wis. Stat. §§ 48.23(5), 48.913(1)(h).

PRACTICE TIP: Attorney for adoptive parent(s) may provide the birth mother with a list of attorneys, help secure competent counsel, or request that the court appoint an attorney on the birth mother's request.

CAUTION: *Contingent fees in TPR and adoption proceedings are forbidden*. No fee arrangement should be entered into that has even the *appearance* of being contingent. SCR 20:1.5(d).

c. Parent is entitled to *effective* assistance of counsel. *A.S. v. State (In the Int. of M.D.(S.))*, 168 Wis. 2d 995 (1992); *see Rhonda R.D. v. Franklin R.D. (In the Int. of Christopher D.)*, 191 Wis. 2d 680, 696 (Ct. App. 1995).

d. Unauthorized placement for adoption is a Class H felony. Wis. Stat. § 948.24.

CAUTION: Payment in excess of the actual cost of items listed in Wis. Stat. § 48.913(1)(a)–(m) or (2) constitutes unauthorized placement for adoption. Wis. Stat. §§ 48.913(1), (2), (4), 948.24(1)(a).

NOTE: Wis. Stat. § 948.24 applies to interstate adoptions as well as to adoptions within Wisconsin.

C. Birth Father [§ 21.10]

1. Minor

a. GAL is required for minor birth father only if he petitions for voluntary termination of his parental rights. Wis. Stat. § 48.235(1)(b).

NOTE: Typically, the birth mother petitions for the termination of both her and the birth father's parental rights.

b. Usual practice is to appoint GAL even if minor birth father is not petitioner. *See* Wis. Stat. § 48.235(1)(a) (permitting appointment "in any appropriate matter" under Wis. Stat. ch. 48).

c. GAL compensation is usually paid by proposed adoptive parents in uncontested TPR and adoption proceedings under Wis. Stat. § 48.837, unless proposed adoptive parents are indigent. Wis. Stat. § 48.235(8).

d. If proposed adoptive parents are indigent, court may direct county to pay; compensation may be limited to public defender rates. Wis. Stat. § 48.235(8); SCR 81.02.

2. Competent adult

a. Putative father may consent to TPR voluntarily with notarized written statement. Wis. Stat. § 48.41(2)(c).

PRACTICE TIP: It may be advisable to have an attorney review the putative father's voluntary statement; the proposed adoptive parents may pay this cost. Wis. Stat. § 48.913(1)(h).

b. If birth father does not waive counsel and appears unable to afford an attorney, court will refer him to the state public defender for an indigency determination. Wis. Stat. § 48.23(4).

c. If birth father's cooperation cannot be obtained, proceedings for *involuntary* TPR must be followed, *see infra* § 21.27, and summons and petition must be served (or other statutory notice provisions followed). Wis. Stat. § 48.42(1g), (2), (2g), (2m), (3). *See generally* Wis. Stat. § 48.42.

d. If birth father is presumed based on his marriage to the birth mother (*see* Wis. Stat. § 891.41), the filing of a paternity acknowledgment for the child (*see* Wis. Stat. § 891.405), or a conclusive determination from genetic test results (see Wis. Stat.

§ 891.407), his testimony is required for a voluntary placement. That testimony can be by telephone or live audiovisual means unless good cause to the contrary is shown. Wis. Stat. § 48.41(2)(a), (b)2.

D. Child [§ 21.11]

1. GAL is required for child subject to independent adoption because parental rights are being terminated. Wis. Stat. § 48.235(1)(c).

2. At any time, on request *or* on its own motion, court may appoint counsel for child or any party. Wis. Stat. § 48.23(3).

3. GAL compensation is generally paid by proposed adoptive parents in uncontested TPR and adoption proceedings under Wis. Stat. § 48.837, unless proposed adoptive parents are indigent or county has another arrangement for payment of GAL (which generally requires a deposit be made when filing the initial pleadings). In contested matters, if the TPR occurs, courts generally order the adoptive family to pay the GAL fees; if the trial does not result in a TPR, some courts require the parents or county to pay depending on the facts of the case. Wis. Stat. § 48.235(8).

4. Suggested minimum responsibilities for child's GAL:

   a. Interview birth mother and birth father, if possible and necessary.

   b. Confirm that birth mother's consent to terminate is, *in fact*, voluntary and with complete knowledge of her rights and options, including right to an independent attorney of her choosing.

   c. Review agency investigator's report (especially home study) and discuss case with assigned worker.

   d. Investigate all financial arrangements, *see infra* § 21.20.

   e. Appear at hearing and ensure that record is appropriate and adequate.

   f. Participate in any appeal or provide appellate court with a statement of reasons why GAL is not participating. Wis. Stat. § 809.107(6)(d).

IV. CONTACTING BIRTH PARENTS OR THEIR ATTORNEY(S) [§ 21.12]

A. Birth Mother [§ 21.13]

Gather information on

1. Name (full legal);

2. Age and date of birth;

3. Education;

4. Family situation and marital status;

5. Medical, genetic, and health profile, including learning disabilities or other disabling conditions and any mental health concerns;

6. Racial and ethnic background;

   NOTE: If either birth parent has American Indian heritage, a determination whether compliance with ICWA and WICWA is required must be completed by the attorney or social worker providing birth parent counseling. The provisions of WICWA mandate additional protections for an Indian child, and additional testimony in both a voluntary and involuntary proceeding will be required (including—even when the parent defaults in an involuntary TPR—a likely need for an expert witness from the tribe in which the child is eligible for enrollment) to support the findings the court must make that (1) continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child; (2) active efforts were made to provide remedial services designed to prevent the breakup of the Indian family and those remedial efforts have proved unsuccessful; and (3) placement has either been made in accordance with the order of preference for placement of an Indian child or there is good cause to depart from the order of preference in ICWA. *See generally* 25 U.S.C. §§ 1901–1963; Wis. Stat. § 48.028.

7. Military service, *see* Servicemembers Civil Relief Act (SCRA), 50 U.S.C. §§ 3901–4043 (protections to service members regarding notice and stays of proceedings);

8. Financial situation;

9. Status of pregnancy, including

   a. Conceptive period or due date,

   b. Medical care, and

   c. Names of primary physician, clinic, and hospital of expected delivery; and

10. Birth father or possible birth fathers, including

    a. Identification, name, and location of birth father,

    b. Birth mother's current and past relationship with birth father,

    c. Whether birth father is aware of pregnancy, and

    d. Whether birth father will cooperate in termination of his parental rights in order for the child to be adopted.

B. Birth Father [§ 21.14]

Gather information on

1. Name (full legal);

2. Age;

3. Education;

4. Family situation;

5. Medical, genetic, and health profile, including learning disabilities or other disabling conditions and any mental health concerns;

6. Racial and ethnic background;

   NOTE: If either birth parent has any American Indian background, review ICWA and WICWA. 25 U.S.C. §§ 1901–1963; Wis. Stat. § 48.028; *see also supra* § 21.13 Note.

7. Relationship with birth mother;

8. Interest in parenting child or terminating parental rights;

9. Military service, SCRA, 50 U.S.C. §§ 3901–4043; and

10. Financial situation.

    NOTE: In some situations, the birth father is not entitled to notice of the TPR proceedings, *see* Wis. Stat. §§ 48.42(2m), 48.422(6)(b); however, obtaining a medical and genetic profile from the birth father is generally in the child's best interest. *But see supra* § 21.2, para. 2.e.

V. AGENCY INVESTIGATION AND REPORT [§ 21.15]

A. Investigation of Proposed Adoptive Placement [§ 21.16]

See Wis. Stat. § 48.837(4)(c).

1. Investigation generally consists of

   a. Home study of adoptive parents (to determine appropriateness of placement) including background data, criminal and child-abuse clearances, health certification, and financial solvency;

   b. Education or counseling on adoption risks and benefits; and

   c. Review of personal references.

2. Required investigation by one of following:

   a. DCF,

   b. Milwaukee County agency under Wis. Stat. § 48.57(1)(e),

c. County agency licensed under Wis. Stat. § 48.57(1)(hm),

d. Private licensed child welfare agency (this is the investigating agency in most Wis. Stat. § 48.837 adoptive placements), or

e. Tribal child welfare department of an Indian child's tribe.

3. Select agency before drafting petitions to commence proceedings.

a. Fees vary; generally $4,000 or more.

NOTE: It is advisable to have clients check with several agencies and negotiate the fee, *see infra* para. b.

b. Adoptive parent(s) may already have a valid home study and may be able to have it updated at a reduced fee.

B. Report [§ 21.17]

Agency must submit report to court at least five days before hearing on petition. Wis. Stat. § 48.837(4)(c).

VI. FILING DOCUMENTS TO COMMENCE PROCEEDINGS [§ 21.18]

PRACTICE TIP: Court forms are available on the Wisconsin Court System's website, at https://www.wicourts.gov/forms1/circuit/ccform.jsp?FormName=&FormNumber=&beg_date=&end_date=&StatuteCite=&Category=3&SubCat=Adoption%20and%20Adoptive%20Placements (last updated Feb. 13, 2022). The attorney should select and download the desired forms and prepare them for mandatory electronic filing. If the attorney believes the information required on the form is inadequate, attachments can be added to the forms.

A. Petition for Adoptive Placement [§ 21.19]

NOTE: Filing fees are not charged for TPR and adoption proceedings. Some counties, however, have form filing fees or GAL fee deposits that must be paid when filing the initial pleadings. Wis. Stat. § 814.61(1)(c)4., 5.

1. Captioned: "In the Interest of (*child's name*)." and requires the child's date of birth. Wis. Cir. Ct. Form JC-1640.

2. Per Wis. Stat. § 48.837(2), the petition must be verified and allege

a. Name of child;

b. Address and age of child, or expected birth date of child;

c. Names of birth parents;

d. Address(es) of birth parents;

e. Ages of birth parents;

f. Name(s) of proposed adoptive parent(s);

g. Address of proposed adoptive parent(s);

h. Age(s) of proposed adoptive parent(s);

i. If an American Indian child, names and addresses of the child's American Indian custodian, if any, and tribe, if known; and

j. Identity of any persons or agencies that solicited, negotiated, or arranged placement with proposed adoptive parent(s).

3. Petition should give as much information as possible to assist judge and investigating agency and alert them to special circumstances, such as

a. Applicability of federal or state ICWA provisions, and

b. Parties' desire for confidentiality.

B. Financial Report [§ 21.20]

Under Wis. Stat. § 48.913(6) and (7), a report of all transfers of anything of value from the proposed adoptive parents to the birth parent(s) or other relevant parties must be provided to the court at the time of the hearing on the petition. Wis. Stat. § 48.913(6), (7).

COMMENT and PRACTICE TIP: Although former Wis. Stat. § 48.837(1m) (1995–96) had required that a financial report be filed as part of the petition for adoptive placement, that timing requirement is no longer part of the Children's Code. Nevertheless, paragraph 7 of Wisconsin Circuit Court Form JC-1640, titled "Petition for Adoptive Placement," still states that the financial report "is attached" to the petition. When completing Form JC-1640, the petitioner should either (1) strike paragraph 7 and list all transfers of value in an attachment; or (2) attach an estimated report of financial, medical, and legal arrangements and update the facts on the record at the time of the hearing. *See* Wis. Stat. § 48.837(1m) (1995–96) (requiring that written agreement concerning expenses be "made part of the petition"), *repealed by* 1997 Wis. Act 104 (eff. Apr. 29, 1998).

C. Petition for Voluntary TPR [§ 21.21]

NOTE: No filing fee is required for either the termination proceeding or the adoptive placement. Some counties, however, have form filing fees or GAL fee deposits that must be paid at the time of filing. Wis. Stat. § 814.61(1)(c)4., 5.

1. Must be filed with petition for adoptive placement. Wis. Stat. §§ 48.837(3), 48.42(1).

2. In most cases, birth father is not co-petitioner, *see supra* § 21.10.

3. Caption as "In the Interest of (*child's name*), a person under the age of 18." Wis. Stat. § 48.42(1).

4. For contents of petition, see Wis. Stat. § 48.42.

D. Scheduling Hearing [§ 21.22]

1. Court must hold the hearing within 30 days after filing. Wis. Stat. § 48.837(4)(a).

2. Hearing *cannot* be held before the birth of the child. *Id.*

3. Court should allow at least 45 minutes for an uncontested hearing.

4. Reschedule, if necessary, after good-cause finding. Wis. Stat. § 48.315(2).

VII. HEARINGS [§ 21.23]

A. In General [§ 21.24]

1. Statute requires each petitioner to be present. Wis. Stat. § 48.837(5).

   PRACTICE TIP: Consider requesting permission for out-of-state adoptive parents or parents who live a significant distance from courthouse to appear by telephone or videoconference.

2. Birth mother usually is the only petitioner on TPR petition; if so, only she needs to be present.

B. Order of Proceedings [§ 21.25]

1. Ascertainment of service of process and paternity. Wis. Stat. § 48.837(4)(e).

2. Hearing on TPR petition for nonpetitioning birth parent(s). Wis. Stat. § 48.837(4)(e); *see also infra* § 21.27.

3. Hearing on petition for approval of adoptive placement. Wis. Stat. § 48.837(6)(a); *see also infra* § 21.28.

4. Hearing on TPR petition for petitioning birth parent(s). Wis. Stat. § 48.837(6)(d); *see also infra* § 21.29.

C. Ascertainment of Paternity [§ 21.26]

See Wis. Stat. § 48.837(4)(e).

1. Before hearings, check for declaration of paternal interest on the Wisconsin Paternal Interest Registry at the DCF; requests can be made via mail or fax, at (608) 422-7157. The fax should be sent with enough time to receive a response, but not too far in advance. Checking the registry close to the hearing date is important to ensure accuracy. Wis. Stat. § 48.025.

   PRACTICE TIP: Given the short timelines for TPR proceedings, the fax method of checking the Paternal Interest Registry is recommended.

2. Appearances

a. Per Wis. Stat. § 48.837(5), required attendees include

(1) Petitioning birth parent(s);

(2) GAL(s) for petitioning birth parent(s), if appropriate, per Wis. Stat. § 48.235(3);

(3) GAL(s) for nonpetitioning birth parent(s), if appointed, per Wis. Stat. § 48.235(3);

(4) Child, if 12 years of age or older, unless attendance is waived for good cause by court; and

(5) GAL for child, per Wis. Stat. § 48.235(3).

COMMENT: Ascertainment of paternity is rarely a separate proceeding. It is usually addressed at the initial appearance on the petition and is essential in assessing whether proper notice to any interested parties has been achieved. Wis. Stat. § 48.235(3).

b. Recommended attendees include

(1) Nonpetitioning birth parent(s), if available and willing to appear;

(2) Attorney(s) for petitioning birth parent(s);

(3) Attorney for nonpetitioning birth parent;

(4) Attorney for petitioning adoptive parent(s); and

(5) Representative of child welfare agency.

D. Hearing on Petition for TPR of Nonpetitioning Birth Parent(s) [§ 21.27]

NOTE: The court cannot proceed with hearings on the remaining petitions until the parental rights of the nonpetitioning birth parent(s) have been terminated. Wis. Stat. § 48.837(4)(e).

1. Parental rights of all nonpetitioning birth parents who have not consented to voluntary termination of their parental rights must be terminated involuntarily. Wis. Stat. §§ 48.415–.43; *L.K. v. B.B. (In the Int. of Baby Girl K.)*, 113 Wis. 2d 429 (1983); *see also A.S. v. State (In the Int. of M.D.(S))*, 168 Wis. 2d 995 (1992); *T.M.F. v. Children's Serv. Soc'y of Wis. (In the Int. of D.L.S.)*, 112 Wis. 2d 180 (1983); *Minguey v. Brookens (In re TPR to T.R.M.)*, 100 Wis. 2d 681 (1981).

NOTE: Relinquishment as ground for TPR exists only for use in relation to a safe-harbor anonymous relinquishment following the procedures outlined in Wis. Stat. § 48.195. Wis. Stat. §§ 48.415(1m), 48.195(1).

2. Appearances

a. Per Wis. Stat. § 48.837(5), required attendees include

(1) Petitioning birth parent(s);

(2) GAL(s) for petitioning birth parent(s), if appointed; and

(3) Child, if 12 years of age or older, unless attendance is waived for good cause by court.

b. Recommended attendees include

(1) Attorney(s) for petitioning birth parent(s);

(2) Nonpetitioning birth parent(s), if available and willing to appear;

(3) GAL(s) for nonpetitioning birth parent(s), if appointed;

(4) Attorney(s) for nonpetitioning birth parent(s);

(5) Attorney for petitioning adoptive parent(s);

(6) GAL for child;

(7) Representative of child welfare agency; and

(8) Other witnesses, including

(a) Witnesses with knowledge of intention of nonpetitioning birth parent(s) to terminate parental rights, and

(b) Witnesses with knowledge of attempts to serve nonpetitioning birth parent(s).

3. Questions asked parents must be open-ended and not leading. *T.M.F.*, 112 Wis. 2d 180.

PRACTICE TIP: Questions should be asked by the court or by an attorney for one of the parties, including the GAL. *See* Wis. Stat. § 48.41(2)(a); *Crystal L.S. v. Lutheran Soc. Servs. (In re TPR to Jacob D.W.)*, No. 2009AP383, 2009 WL 1457977 (Wis. Ct. App. May 27, 2009) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

It should not be necessary for all the attorneys to ask all questions. It becomes a grueling event for the birth parent(s). Questions on "cross-examination" should be used to fill in any necessary gaps in the testimony. If a birth parent is contesting the TPR at the dispositional phase but is conceding that grounds exist to terminate parental rights, the court must establish that the no-contest plea to the grounds phase is entered knowingly and intelligently, including knowledge that the court will find the parent "unfit" as a result of the plea and the two possible dispositions—dismissing the petition or terminating parental rights. *See Brown Cnty. Dep't of Hum. Servs. v. Brenda B. (In re TPR to Desmond F.)*, 2011 WI 6, ¶ 56, 331 Wis. 2d 310. The attorney must ensure that the proper questioning is done during the colloquy. *See Oneida Cnty. Dep't of Soc. Servs. v. Therese S. (In re TPR to Yasmine B.)*, 2008 WI App 159, 314 Wis. 2d 493.

4. Final document: Order Concerning Termination of Parental Rights. Wis. Cir. Ct. Form JC-1638 (voluntary TPR); Wis. Cir. Ct. Form JC-1639 (involuntary TPR).

NOTE: These specific forms now list "parent" and "parent" rather than "mother" and "father". This change happened after the marriage equality cases were decided both in Wisconsin and by the U.S. Supreme Court.

a. Draft order using the mandatory state court forms should already be prepared and presented to the court for consideration at the close of testimony.

NOTE: Specific findings as to the facts established at the hearing are required, and Wis. Stat. § 48.426 standards and factors must be considered. *T.R.M.*, 100 Wis. 2d 681.

b. Factors for determining child's best interests should be considered after report of GAL is heard by court. *Gerald O. v. Cindy R. (In re TPR of Michael I.O.)*, 203 Wis. 2d 148 (Ct. App. 1996).

E. Hearing on Petition for Adoptive Placement [§ 21.28]

See Wis. Stat. § 48.837(2), (5), (6).

1. Appearances

a. Per Wis. Stat. § 48.837(5), required attendees include

(1) Child, if 12 years of age or older, unless waived by court for good cause; and

(2) Each petitioner.

b. Recommended attendees include

(1) Attorney or GAL(s) for petitioning birth parent(s),

(2) Attorney for proposed adoptive parent(s),

(3) GAL for child, and

(4) Agency representative.

2. Emphasis at this hearing is on suitability of placement and financial matters. Wis. Stat. § 48.913.

a. Testimony related to costs and fees should be presented along with a report submitted under Wis. Stat. § 48.913(6) to determine whether coercion exists. Wis. Stat. § 48.837(6)(b).

CAUTION: If payment of any of the birth parents' expenses is conditional in any part on the transfer or surrender of the child or TPR, a *rebuttable* presumption of coercion is created. If coercion is found, the court must dismiss the petition or amend the agreement to delete the coercive conditions.

CAUTION: The court may refer the case to the district attorney for prosecution under

Wis. Stat. § 948.24(1).

b. Per Wis. Stat. § 48.913(7), the contents of report must include

(1) List of transfers of anything of value made or agreed to be made

(a) From proposed adoptive parents or by any person acting on their behalf to

(i) Birth parent,

(ii) Alleged or presumed father, or

(iii) Child,

(b) In connection with

(i) Pregnancy,

(ii) Child's birth,

(iii) Child's placement with proposed adoptive parents, or

(iv) Adoption of child.

(2) Report must be itemized and include all transfers of value, including

(a) Goods or services for which payment was made or agreed to be made, including reasonable and necessary living expenses of birth parent, limited to $5,000, gift to birth mother of not more than $100 value, maternity clothing not to exceed $300, and other statutorily authorized expenses, Wis. Stat. § 48.913(1);

PRACTICE TIP: Carefully review the statute on payment of expenses, advise all parties of the limitations, and disclose everything to the court.

(b) Dates of each payment; and

(c) Name and address of each of the following who received payment from the proposed adoptive parents or anyone acting on their behalf:

(i) Attorney,

(ii) Physician,

(iii) Hospital,

(iv) Agency,

(v) Organization, and

(vi) Any other person.

c. Statutory requirements and prohibitions regarding transfers or payments in connection with adoption.

(1) Payments must be made directly to provider of goods or services, except they may be made to birth parent or alleged or presumed father as reimbursement for amounts that parent or father paid previously. Wis. Stat. § 48.913(3).

(2) No payments by adoptive parents other than as authorized. Wis. Stat. § 48.913(4).

(3) Payments may be made after the adoption is finalized if authorized under Wis. Stat. § 48.913(1) or (2) and payment is included in Wis. Stat. § 48.913(6) report or amendment to report is filed with court. Wis. Stat. § 48.913(5).

PRACTICE TIP: Counsel should inquire of birth parents, prospective adoptive parents, and agency staff to estimate needs and other expected expenses (i.e., hospital bills related to child's birth) before the hearing.

(4) Per Wis. Stat. § 48.913(2), adoptive parents or person acting on their behalf may pay expenses of birth parent or of alleged or presumed birth father residing in another state if all the following conditions apply:

(a) Child was placed for adoption in Wisconsin in accordance with Wis. Stat. § 48.988 or 48.99. Wis. Stat. § 48.913(2)(a).

(b) State of residence of birth parent or alleged or presumed father permits such payments. Wis. Stat. § 48.913(2)(b).

(c) Listing of payments and other required documents are submitted to the court in accordance with Wis. Stat. § 48.913(2)(c).

3. Courts may allow confidentiality by starting hearing with the birth mother in chambers, taking a short recess, and reconvening in courtroom where proposed adoptive parent(s) are waiting.

4. Final document: Order for Adoptive Placement pursuant to Wis. Stat. § 48.837. Wis. Cir. Ct. Form JC-1642.

a. Draft document should be prepared ahead of time and presented at the close of testimony.

b. Findings should be specific.

c. If the child has not been placed with the proposed adoptive parents pursuant to Wis. Stat. § 48.837(1r) or (4)(d), the court must order the child placed with the proposed adoptive parents. If the child has been placed with the proposed adoptive parents, the court must order the child maintained in that placement. Wis. Stat. § 48.837(6)(d).

F. Hearing on Petition for TPR of Petitioning Birth Parent(s) [§ 21.29]

1. Appearances. Wis. Stat. § 48.837(5).

a. Required attendees include

(1) Petitioning birth parent(s);

(2) GAL(s) for petitioning birth parent(s), if appointed;

(3) Child, if 12 years of age or older, unless attendance waived for good cause by court; and

(4) GAL for child.

b. Recommended attendees include

(1) Attorney(s) for petitioning birth parent(s);

(2) Attorney(s) for petitioning adoptive parent(s);

(3) Representative of child welfare agency; and

(4) Proposed adoptive parent(s) may be present, if parent who has custody of the child consents and the court approves.

2. Questions asked parents must be open ended and not leading. *T.M.F. v. Children's Serv. Soc'y of Wis. (In the Int. of D.L.S.)*, 112 Wis. 2d 180 (1983); *see also TPR*, *supra* § 21.3.

3. Final document: Order Concerning Termination of Parental Rights

a. Findings should be specific. Wis. Stat. § 48.426; *Minguey v. Brookens (In re TPR to T.R.M.)*, 100 Wis. 2d 681 (1981).

b. Standards and factors should be noted.

NOTE: Often there is one TPR order for both parents (usually a voluntary order) and one order for adoptive placement. In some cases, two separate TPR orders are necessary, when one parent gives voluntary consent and the other parent's rights are terminated involuntarily (which includes default).

VIII. CONCLUSION OF PROCEEDINGS [§ 21.30]

A. Information Required by Wis. Stat. § 48.427(6) [§ 21.31]

1. If TPR order is *entered*, *see* Wis. Stat. § 806.06(1)(b), court must inform each birth parent about the following per Wis. Stat. § 48.427(6)(a):

a. Access to medical information. Wis. Stat. § 48.432.

b. Access to identifying information about parents and grandparents. Wis. Stat. § 48.433; Wis. Admin. Code ch. DCF 53.

c. Release of identifying information by an agency when authorization is granted. Wis. Stat. § 48.434.

NOTE: The DCF may delegate authority to an agency to administer adoption searches. Wis. Admin. Code § DCF 53.04(1)(b).

2. Provide written proof of compliance with Wis. Stat. § 48.427(6) for file (i.e., affidavit of mailing, admission of service, duplicate original).

B. Appeal [§ 21.32]

1. TPR judgments are final and appealable under Wis. Stat. § 808.03(1) according to procedure specified in Wis. Stat. § 809.107. Wis. Stat. §§ 48.43(6), 809.107.

2. Commence appeal within 30 days after entry of judgment. Wis. Stat. § 808.04(7m).

NOTE: The state is also bound by the 30-day limit on initiating its appeal. Wis. Stat. § 808.04(4).

PRACTICE TIP: The birth parent's attorney or GAL has continuing obligations to the client at least through this 30-day period. *See* Wis. Stat. §§ 48.43(6), 48.235(7), 809.30(2)(a) (does not apply to TPR under Wis. Stat. § 48.43). *But see generally* Wis. Stat. § 809.107.

3. Appeal from judgment terminating or denying TPR has shortened time periods compared with other civil matters. Wis. Stat. § 809.107(6)(e).

4. In Wis. Stat. ch. 48 case, *postdisposition relief* means appeal *or* motion for relief by circuit court of its final judgment or order.

5. Rehearing under Wis. Stat. § 48.46

a. Parent whose rights are terminated may petition for rehearing within one year after entry of court's order on grounds that new evidence has been discovered affecting advisability of court's original adjudication. Wis. Stat. § 48.46(1).

b. On showing that such evidence does exist, court *must* order new hearing. Wis. Stat. § 48.46(1).

c. If TPR is by consent or not contested, terminated parent may move court for relief on grounds specified in Wis. Stat. § 806.07(1)(a), (b), (c), (d), or (f). Wis. Stat. §§ 48.46(2), 809.107(5).

(1) Motion must be filed within 30 days after entry of TPR judgment or order.

(2) If terminated parent filed notice of intent to pursue relief from judgment under Wis. Stat. § 808.04(7m), motion must be filed within 30 days after service of the transcript.

C. Adoption [§ 21.33]

NOTE: A filing fee may be required. Check with the clerk of court's office in the county where the adoption petition will be filed.

1. Investigating agency has guardianship of child after TPR hearing; agency monitors placement and counsels and assists as necessary. Wis. Stat. § 48.837(6)(d).

2. Petition for adoption filed after child is in potential adoptive home at least six months, unless agency approves early filing. Wis. Stat. § 48.90(1)(c), (2).

3. Six-month preadoptive placement has no bearing on the rights of birth parents.

4. On filing of petition for adoption and service of order of hearing, agency (guardian) prepares final report for court entering final order for adoption. Wis. Stat. §§ 48.841, 48.85, 48.871.

   PRACTICE TIP: The petitioner should file with the adoption court certified copies of the TPR order(s) and any other pleadings that related to the child's custody or guardianship.

5. Hearing is generally held in chambers, unless an interested person objects or unless courthouse security prevents hearings in chambers; petitioner and child (if 14 years or older) attend. Wis. Stat. § 48.91.

6. If court is satisfied that necessary consents or recommendations have been filed and adoption is in child's best interests, court makes order granting adoption; order may change child's name to that requested by petitioner and change child's birth certificate. Wis. Stat. § 48.91(3).

   NOTE: Additional factors may apply if ICWA or WICWA is implicated.

   PRACTICE TIP: If the agency will not be preparing the Report of Adoption (Form HCF 5022), the form can be obtained from DCF by calling the department directly. The Report of Adoption is necessary to obtain a revised birth certificate for the child. *See* DCF, Report of Adoption (Form HCF 5022).

7. Appeal by party (other than the state) from judgment or order granting adoption must be initiated within 40 days after entry of judgment or order appealed from (notwithstanding Wis. Stat. § 809.82(2)(a), this time cannot be enlarged). Wis. Stat. § 808.04(7).

8. Appeal from judgment denying adoption must be initiated within 20 days. Wis. Stat. § 809.30(1), (2)(b).

   NOTE: The state has 45 days to initiate an appeal from judgment in a case under Wis. Stat. ch. 48, except a TPR judgment. Wis. Stat. § 808.04(4), (7m); *see also supra* § 21.32.

9. Appeal from judgment granting or denying adoption will be given preference. Wis. Stat. § 48.915.

Chapter 22
Divorce and Actions Affecting the Family

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NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 252; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Mar. 2022, No. 795; all references to Wisconsin Supreme Court Rules (SCR) are to the rules as amended by supreme court orders through Apr. 1, 2022; all references to the United States Code (U.S.C.) and Internal Revenue Code (I.R.C.) are current through Pub. L. No. 117-108 (Apr. 6, 2022); and all references to Treasury regulations (Treas. Reg.) are current through 87 Fed. Reg. 20,350 (Apr. 7, 2022).

I. INTRODUCTION [§ 22.34]

A. In General [§ 22.35]

1. Per Wis. Stat. § 767.001, actions affecting the family are

   a. Affirmation of marriage;

   b. Annulment;

   c. Divorce;

   d. Legal separation;

   e. Custody;

   f. For child support;

   g. For maintenance payments;

   h. For property division;

   i. To enforce or modify judgment or order in action affecting family in Wisconsin or elsewhere, or an order granted under Wis. Stat. § 48.355(4g)(a) or 938.355(4g)(a);

   j. For periodic family support payments;

   k. Concerning periods of physical placement or visitation rights to children, including action to relocate a child's residence under Wis. Stat. § 767.481;

   l. To determine paternity; and

m. To enforce or revise certain orders for support entered under Wis. Stat. §§ 48.355(2)(b)4. or (4g)(a), 48.357(5m)(a), 48.363(2), 938.183(4), 938.355(2)(b)4. or (4g)(a), 938.357(5m)(a), or 938.363(2).

2. Domestic abuse restraining orders and injunctions are a related subject. Wis. Stat. § 813.12; *see infra* §§ 22.52–.61.

3. Tax consequences of divorce decrees must be considered by court in determining

a. Child support. Wis. Stat. § 767.511(1m)(h).

b. Property division. Wis. Stat. § 767.61(3)(k).

c. Maintenance. Wis. Stat. § 767.56(1c)(g).

4. A helpful resource is Gregg M. Herman, *Family Law in Wisconsin: A Forms and Procedures Handbook* (State Bar of Wis. 10th ed. 2021 & Supp.).

B. Rules of Civil Procedure [§ 22.36]

Except as specifically provided in Wis. Stat. ch. 767, all provisions of civil procedure in Wis. Stat. chs. 801–807 apply to actions affecting the family.

II. DIVORCE PROCEDURE [§ 22.37]

NOTE: Wisconsin circuit courts have been authorized to accept electronic filings (e-filing) for civil, family, and small claims cases since July 1, 2008. However, the rules for e-filing vary by county. E-filing is now mandatory for family law cases in all counties. Temporary restraining orders (TROs) and injunctions cannot be e-filed. For instructions on how to use the e-filing system, see Wis. Stat. § 801.17 and SCR 70.42 (authorizing use of electronic signatures). For information on e-filing on the Wisconsin Court System's website, see Wis. Court Sys., *Circuit Court e-Filing*, https://www.wicourts.gov/ecourts/efilecircuit/index.jsp (last updated Feb. 13, 2022).

A. Jurisdiction, Venue, and Service of Process [§ 22.38]

1. Subject-matter jurisdiction. Wis. Stat. § 767.01(1).

a. Circuit courts have jurisdiction over all actions affecting the family.

"While the final division of property in a divorce judgment is indeed final, the jurisdiction of the court 'continue[s] until the property [is] disposed of pursuant to the provisions of the division contained in the judgment of divorce.'" Circuit courts have "the authority to do all things 'necessary and proper' in actions affecting the family 'to carry [the courts'] orders and judgments into execution.'"

Dickau v. Dickau, 2012 WI App 111, ¶ 13, 344 Wis. 2d 308 (citation omitted).

b. Property division for unmarried cohabitants is not subject to Wis. Stat. ch. 767, but other contract, property, or equitable claims may be available. *Watts v. Watts*, 137 Wis. 2d 506 (1987).

c. Residency requirements. Wis. Stat. § 767.301.

(1) For annulment, legal separation, or to affirm marriage, one party must reside in county of venue for 30 days before bringing action; exception for annulment and affirmation-of-marriage actions if marriage contracted in state within one year before bringing action.

(2) For divorce, one party must reside in county of venue for 30 days and in state for 6 months before bringing action.

d. Divorce action is terminated by death of one spouse; therefore, parties remain married at death of either party. *Socha v. Socha*, 204 Wis. 2d 474 (Ct. App. 1996).

2. Personal jurisdiction. Wis. Stat. § 767.01.

a. Wis. Stat. ch. 801 applies to actions affecting the family.

b. Sexual intercourse in Wisconsin that results in conception of a child confers jurisdiction for actions involving that child (paternity, custody, physical placement, visitation, and support). Wis. Stat. § 767.01(2).

c. For custody, personal jurisdiction is determined under Wis. Stat. ch. 801 or Wis. Stat. ch. 822. Wis. Stat. § 767.41(1)(a).

d. Presence in the state confers jurisdiction. Wis. Stat. §§ 801.05(1), (11), 801.06.

e. Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (successor to the Uniform Child Custody Jurisdiction Act (UCCJA)) applies to custody cases. Wis. Stat. §§ 822.06, 822.08.

f. Visitation in Wisconsin must be periodic and ongoing to confer personal jurisdiction in action affecting family. *Bushelman v. Bushelman*, 2001 WI App 124, 246 Wis. 2d 317; *McCarthy v. McCarthy*, 146 Wis. 2d 510 (Ct. App. 1988).

NOTE: Physical presence or absence in a forum state is not determinative; voluntariness of such contact is essential. *Stayart v. Hance*, 2007 WI App 204, 305 Wis. 2d 380.

3. Venue

a. For divorce, determined by residence. Wis. Stat. § 767.301.

b. For paternity, in county where child or alleged father resides. Wis. Stat. § 767.80(1m).

4. Action commenced by filing summons and petition, provided that authenticated copy is served within 90 days after filing. Wis. Stat. § 801.02(1).

a. Summons and petition must be filed together. Wis. Stat. § 801.02(3).

b. Summons must be personally served on respondent or served by publication if respondent cannot be personally served through petitioner's exercise of reasonable diligence. Wis. Stat. § 801.11; *Emery v. Emery*, 124 Wis. 2d 613 (1985) (note dissent to understand case).

c. Summons may be served by any nonparty adult resident of state where service is made. Wis. Stat. § 801.10.

d. If either party received benefits under Wisconsin Works (W-2) or aid through Aid to Families with Dependent Children (AFDC), foster care, or medical assistance programs, then summons and petition must be served on child support agency of county where the action began. Wis. Stat. § 767.217.

e. Per Wis. Stat. § 801.095(1), regular civil summons form is used for actions affecting family, except

(1) When parties have minor children, summons must include notification of criminal law regarding interference with custody rights, percentage standards for child support, factors to consider in adjusting support, and a copy of Wis. Stat. § 767.41(1m) or the standard proposed parenting plan form used in that county, Wis. Stat. § 767.215(2m); or

(2) For paternity cases, Wis. Stat. § 767.813.

f. Summons unnecessary for joint petitioners. Wis. Stat. § 767.215(3).

g. Personal jurisdiction in fact, in addition to statutorily acceptable service, is required for the court to exercise jurisdiction over a property. *Montalvo v. U.S. Title & Closing Servs., LLC*, 2013 WI App 8, ¶ 24, 345 Wis. 2d 653.

B. Parties [§ 22.39]

1. Parties are denominated *petitioner* and *respondent* instead of *plaintiff* and *defendant*; if parties file joint petition, then they are called *joint petitioners*. Wis. Stat. § 767.205(1).

2. Wisconsin recognizes heterosexual and same-sex marriages performed in Wisconsin as well as lawful marriages performed in other states. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

3. State is real party in interest when benefits through AFDC, foster care, medical assistance, W-2, or certain child welfare services programs are involved. Wis. Stat. § 767.205(2).

C. Title [§ 22.40]

1. Actions for paternity are titled as provided in Wis. Stat. chs. 801 and 802. Wis. Stat. § 767.813.

2. Actions for custody are titled "In re the Custody of A.B." Wis. Stat. § 767.205(3).

3. Actions involving the marriage are titled "In re the Marriage of A.B. and C.D."

4. Actions for visitation are entitled "In re Visitation with A.B."

5. Actions concerning child support are titled "In re the Support of A.B."

D. Petition [§ 22.41]

See Wis. Stat. § 767.215(2).

1. Contents

a. Names, addresses, and birth dates;

b. Date and place of marriage and facts relating to residence of both parties;

c. Name and birth date of each minor child of parties and of any other child born to wife during marriage, and statement whether wife is pregnant;

d. Statement that marriage is irretrievably broken (divorce) or broken (legal separation);

e. Details of prior marriages and divorces of parties;

f. Whether there are written agreements regarding issues of support, legal custody, and physical placement of children; maintenance of either party; or property division;

g. Statement of relief requested (if legal separation, then specific reason for this relief must be stated);

h. Statement that parties are prohibited from, and may be held in contempt for, harassing, intimidating, physically abusing, or imposing any restraint on personal liberty of other party or of minor children;

i. Statement that, during pendency of action, parties are prohibited from, and may be held in contempt for, transferring, encumbering, concealing, damaging, destroying, or disposing of property owned by either or both of the parties;

j. Statement that, during pendency of action, parties are prohibited from, and may be held in contempt for, relocating and establishing a residence with minor children of the parties more than 100 miles from the residence of the other party, removing minor child from state for more than 90 consecutive days, or concealing parties' minor child from other party; and

k. Per Wis. Stat. § 767.215(5), the party filing the petition must also file a separate form containing

(1) Name, date of birth, and Social Security number of each party; and

(2) Name, date of birth, and Social Security number of each minor child of the parties and of each child who was born to the wife during the marriage and who is a minor.

NOTE: Such form must be kept confidential in the court file.

2. Per Wis. Stat. § 822.29(1), if minor children are involved, additional information required by UCCJEA must be presented under oath by verified petition (normally petition is not verified) or by separate affidavit, including

   a. Child's present address, places where child has lived within past five years, and names and present addresses of persons with whom child has lived during that time;

   b. Whether party has participated in other litigation concerning custody of or physical placement or visitation with the same child;

   c. Information party has about proceedings pending in any other court or state that "could affect" the current proceeding; and

   d. Name of any person, not a party, who has physical custody or claims to have legal custody, physical placement, or visitation rights.

3. Automatic stay provisions and prohibited acts during pendency of action. Wis. Stat. § 767.117.

E. Response and Counterclaim [§ 22.42]

1. Response or counterclaim may be filed within 20 days after date of service. Wis. Stat. § 767.215(3).

2. Previous defenses to divorce or legal separation, including condonation, connivance, collusion, recrimination, insanity, and lapse of time, are abolished. Wis. Stat. § 767.317.

F. Temporary Orders [§ 22.43]

1. Hearing may be scheduled either by motion or order to show cause; notice of motion or order must be accompanied by affidavit stating basis for request. Wis. Stat. § 767.225(2).

2. Temporary orders by a circuit court commissioner may be reviewed by court. Wis. Stat. § 767.225(1n)(c).

   If a party requests a de novo hearing, then the circuit court must afford the party the opportunity to present testimony at the hearing. *Stuligross v. Stuligross*, 2009 WI App 25, 316 Wis. 2d 344.

3. Per Wis. Stat. § 767.225(1), court or circuit court commissioner may make just and reasonable temporary orders regarding

   a. Legal custody;

   b. Physical placement, including granting periods of electronic communication to one parent during periods of child's physical placement with the other parent;

   c. Prohibiting removal of children from state;

   d. Allowing party to move with child over notice of objection;

e. Child support;

f. Maintenance;

g. Family support;

h. Assignment of income;

i. Payment of debts;

j. Prohibiting disposition of assets or removal from jurisdiction;

k. Counseling;

l. Health insurance for minor children; and

m. Assignment of income for children's health care.

4. Courts and circuit court commissioner regularly exercise power (inherent, not statutory) to assign temporary use of house, furniture, cars, and other assets.

5. In making temporary orders, court or circuit court commissioner must consider the same factors court must consider before entering final judgment. Wis. Stat. § 767.225(1n)(a).

6. Under Wis. Stat. § 767.225(3), a circuit court commissioner may issue temporary (ex parte) orders upon motion of a party if the circuit court commissioner believes an injunction under Wis. Stat. § 813.12 is appropriate because of alleged domestic abuse. The circuit court commissioner must inform the party of the procedure to follow to obtain an order or injunction under Wis. Stat. § 813.12 and must submit the motion to the court within five working days after receipt of the motion. Wis. Stat. §§ 813.12, 767.225(3m).

7. A judge or circuit court commissioner may, upon issuing an injunction or granting an extension of an injunction issued under Wis. Stat. § 813.12(4)(d)1. (intro.), order that the injunction is in effect for not more than 10 years, if the court finds, by a preponderance of the evidence stated on the record, that any of the following are true:

   a. There is a substantial risk that the respondent may commit first-degree intentional homicide under Wis. Stat. § 940.01, or second-degree intentional homicide under Wis. Stat. § 940.05, against the petitioner, Wis. Stat. § 813.12(4)(d)1.a.; or

   b. There is a substantial risk that the respondent may commit sexual assault under Wis. Stat. § 940.225(1), (2), or (3) or 948.02(1) or (2) against the petitioner, Wis. Stat. § 813.12(4)(d)1.b.

8. If a court issues a domestic abuse injunction, the court must prohibit the respondent's firearm possession for the length of the injunction unless the respondent is a peace officer who must possess a firearm as a condition of employment. Wis. Stat. §§ 813.12(4m), 813.1285.

9. Circuit court commissioner may evict spouse in absence of actual or threatened physical violence if order is issued after notice and hearing. *Sandy v. Sandy*, 109 Wis. 2d 564 (1982).

10. Temporary hearings are normally informal and not on record; a party may record proceedings at that party's own cost, subject to discretion of circuit court commissioner to limit recording. *Forsythe v. Family Court Comm'r*, 131 Wis. 2d 322 (1986).

G. Waiting Period and Reconciliation [§ 22.44]

1. Per Wis. Stat. § 767.335, no trial may be held until earlier of

   a. 120 days after service of summons or 120 days after the filing of the joint petition, or

   b. A court order directing an immediate hearing.

2. Parties may stipulate that they want to try reconciliation. Wis. Stat. § 767.323.

   a. Court may suspend proceedings for up to 90 days.

   b. Either party may move to revoke suspension.

   c. If reconciliation is unsuccessful after 90 days, action proceeds as if no reconciliation were attempted.

H. Financial Disclosure and Asset Preservation [§ 22.45]

See Wis. Stat. § 767.127.

1. Parties must fully disclose assets on standard forms as court may require within 90 days after service of summons or filing of joint petition, unless otherwise notified by court.

2. Information must be current as of the date of hearing; update may be done on the record.

3. Court may declare constructive trust if it later finds that assets of $500 or more have been omitted from property division. Wis. Stat. § 767.127(5).

4. Parties are prohibited from encumbering, concealing, damaging, destroying, transferring, or otherwise disposing of property owned by either or both of the parties. Wis. Stat. § 767.117(1)(b).

I. Discovery [§ 22.46]

NOTE: Discovery rules of Wis. Stat. ch. 804 apply to divorce actions.

1. Depositions. Wis. Stat. §§ 804.02, 804.05, 804.06.

2. Written interrogatories. Wis. Stat. § 804.08.

3. Production of documents. Wis. Stat. § 804.09.

4. Physical and mental examination and inspection of medical documents. Wis. Stat. § 804.10.

5. Requests for admission. Wis. Stat. § 804.11.

6. Statutory sanctions for failure to make discovery. Wis. Stat. § 804.12.

J. Trial [§ 22.47]

1. No jury trial for actions affecting family. Wis. Stat. § 767.235(1).

2. Common-law claim for unjust enrichment cannot be litigated in a divorce action, but an unmarried cohabitant may bring a civil action against former cohabitant to recover property based on unjust enrichment. *Compare Dahlke v. Dahlke*, 2002 WI App 282, 258 Wis. 2d 764, *with Watts v. Watts*, 137 Wis. 2d 506 (1987).

3. An action for divorce will be before the court, except that uncontested matters may be heard by a circuit court commissioner; see local court rules for postjudgment hearings. Wis. Stat. §§ 767.235(1), 757.69(1)(p).

4. Per Wis. Stat. § 767.235(2), moving party must obtain order requiring appearance of other party, except when

   a. Other party is nonresident of this state,

   b. Service is by publication, or

   c. Court orders otherwise for other good cause.

5. Per Wis. Stat. § 767.35, court must grant divorce if it finds that

   a. Both parties agree marriage is irretrievably broken;

   b. One party states that marriage is irretrievably broken, and it is shown that the parties have voluntarily lived apart continuously for at least 12 months before action was started; or

   c. One party states that marriage is irretrievably broken, and court so finds after considering relevant factors.

6. Ground for legal separation is that marriage is broken (not irretrievably). Wis. Stat. § 767.215(2)(cm).

7. Trial court must exercise discretion by applying appropriate law to relevant facts and must set forth its rational mental process in determining award. *Steinke v. Steinke*, 126 Wis. 2d 372 (1985).

K. Judgment [§ 22.48]

1. Judgment must be drafted and approved as provided in statutes, which also specify effect of judgment. Wis. Stat. § 767.251.

2. Certified copy of portion of judgment that affects title to real estate must be recorded in register of deeds' office of county where real estate is situated. Wis. Stat. § 767.61(6).

3. If judgment determines custody, judgment must contain notification of criminal law relating to interference with parental rights. Wis. Stat. §§ 767.41(8), 948.31.

4. Court must allow spouse to resume use of a former name, unless spouse previously deemed a sex offender pursuant to Wis. Stat. § 301.47. Wis. Stat. § 767.395.

5. Judgment must include restrictions on removing child from state.

6. Judgment entered after death of spouse is void. *Pettygrove v. Pettygrove*, 132 Wis. 2d 456 (Ct. App. 1986).

7. If the court orders maintenance or other allowances for party or child or retains jurisdiction in those matters, the written judgment must include a provision stating that failure to comply with the court order is punishable under Wis. Stat. ch. 785.

8. Any final written agreements and stipulations of the parties must be appended to the judgment and incorporated by reference unless the judgment sets forth the terms of the agreement. Wis. Stat. § 767.251(1).

9. Petitioner drafts findings of fact, conclusions of law, and the written judgment within 30 days after the judgment unless otherwise directed by the court. Wis. Stat. § 767.251(2).

L. Modification or Relief from Judgment or Order [§ 22.49]

1. Court may relieve party from judgment or order under normal rules of civil procedure. Wis. Stat. § 806.07; *Conrad v. Conrad*, 92 Wis. 2d 407 (1979).

2. Judgment of divorce must be revoked upon remarriage of parties to each other. Wis. Stat. § 767.35(7).

3. Court may revise judgment for child support, family support, or maintenance, based on a substantial change of circumstances. Under Wis. Stat. § 767.59(1f), any of the following constitute a rebuttable presumption of a substantial change in circumstances:

   a. Commencement of receipt of AFDC or participation in W-2 by either parent since entry of last child support order;

   b. Unless support is expressed as a percentage of income, the expiration of 33 months after the date of entry of the last child support order;

   c. Failure of payer to furnish a timely disclosure of income, Wis. Stat. § 767.54; or

   d. If court did not provide information required when deviating from standards, difference between amount of child support ordered by court and amount that payer would have paid under percentage standards.

4. No substantial change of circumstances necessary to simply change percentage support order to fixed sum of support. Wis. Stat. § 767.59(1f)(d).

5. Court cannot revise support, maintenance, or arrearages in child support retroactive to time before motion served, except that court may retroactively amend orders issued before August 1, 1987, and may correct previous errors in calculations in orders issued after that date. Wis. Stat. § 767.59(1m); *Schulz v. Ystad*, 155 Wis. 2d 574 (1990).

6. Court must apply the percentage standard on revision of child support unless it would be unfair to the child or to any parties. Wis. Stat. § 767.59(2)(a), (b).

7. Revision of legal custody or physical placement order. Wis. Stat. § 767.451.

    a. Within two years, requires showing by substantial evidence that current conditions are physically or emotionally harmful to best interest of the child.

    b. After two years, requires showing of substantial change of circumstances and that modification is in best interest of the child.

    c. If parties have substantially equal physical placement and circumstances make it impractical for such placement to continue, court may modify only based on best interest of the child, notwithstanding paras. a. and b., *supra*.

    d. Court may modify periods of physical placement if it finds that parent has repeatedly and unreasonably failed to exercise periods of physical placement awarded under order of physical placement. Wis. Stat. § 767.451(2m).

    e. Court must modify physical placement by denying parent physical placement with child if parent has been convicted under Wis. Stat. § 940.01 or Wis. Stat. § 940.05 of intentional homicide of child's other parent and that conviction has not been reversed, set aside, or vacated. Wis. Stat. § 767.451(4m). This provision does not apply if court finds by clear and convincing evidence that placement with parent would be in the best interests of child.

    f. In any action to modify legal custody or physical placement, court may require party seeking modification to file a proposed parenting plan with court under Wis. Stat. § 767.41(1m) before any hearing is held. Wis. Stat. § 767.451(6m).

8. Stipulations for modification of placement based on specified future events. Wis. Stat. § 767.34(3).

    a. A *future event* "means a life event of a party or of the child or a change in the developmental or education needs of the child."

    b. The specified event must be reasonably certain to occur within two years of entering into the stipulation. Wis. Stat. § 767.34(3)(b).

    c. The specified event may not be an anticipated behavior modification of a party, including the completion of:

        (1) Anger management course or therapy. Wis. Stat. § 767.461(1).

(2) Batterers intervention program. Wis. Stat. § 767.461(2).

(3) Drug or alcohol treatment or therapy. Wis. Stat. § 767.461(3).

(4) Term of incarceration, extended supervision, parole, or probation. Wis. Stat. § 767.461(4).

9. Motion required with opportunity to object if parent with physical placement intends to move and reside more than 100 miles from other parent. Wis. Stat. § 767.481.

M. Appeal [§ 22.50]

Before record is provided to appellate court, circuit court must make any allowance for maintenance, support, or attorney fees pending appeal. Wis. Stat. § 767.273.

III. PROPERTY DIVISION [§ 22.51]

A. Property Division [§ 22.52]

1. Under Wis. Stat. § 767.61, court must presume that all property except gifts or inheritances, or property paid for by funds so acquired, is divided equally between parties, but court may alter that division after considering the following factors:

a. Length of marriage. Wis. Stat. § 767.61(3)(a).

b. Property brought to marriage. Wis. Stat. § 767.61(3)(b); *Arneson v. Arneson*, 120 Wis. 2d 236 (Ct. App. 1984).

c. Whether one party has substantial assets not subject to division. Wis. Stat. § 767.61(3)(c).

d. Contribution to marriage, "giving appropriate economic value to each party's contribution in homemaking and child care services." Wis. Stat. § 767.61(3)(d).

e. Age and physical and emotional health of parties. Wis. Stat. § 767.61(3)(e).

f. Contribution by one party to education, training, or increased earning capacity of other. Wis. Stat. § 767.61(3)(f); *Haugan v. Haugan*, 117 Wis. 2d 200 (1984).

NOTE: Educational debt belongs to the party who received the education. Enhanced educational value and income are imputed to the newly educated party for purposes of property division and maintenance. *Weiler v. Boerner*, 2005 WI App 64, 280 Wis. 2d 519.

g. Earning capacity of each party. Wis. Stat. § 767.61(3)(g).

h. Desirability of awarding family home to party having physical placement of minor children for the greater period of time. Wis. Stat. § 767.61(3)(h).

i. Amount and duration of any maintenance order. Wis. Stat. § 767.61(3)(i).

j. Other economic circumstances including pension benefits, vested and unvested. Wis. Stat. § 767.61(3)(j); *Bloomer v. Bloomer*, 84 Wis. 2d 124 (1978).

k. Tax consequences—court should consider only taxes caused by order or judgment and not speculate about future taxes; *see infra* §§ 22.65–.72. Wis. Stat. § 767.61(3)(k); *Ondrasek v. Ondrasek*, 126 Wis. 2d 469 (Ct. App. 1985).

l. Any written agreement made between the parties before or during the marriage concerning an arrangement for property distribution is binding unless court finds it inequitable for either party. Wis. Stat. § 767.61(3)(L); *Hengel v. Hengel*, 122 Wis. 2d 737 (Ct. App. 1985).

(1) Agreement must meet tests of both procedural and substantive fairness. *Button v. Button*, 131 Wis. 2d 84 (1986).

(2) Agreement not presumed substantively unfair solely because it provides less than 50% or less than court could award. *Greenwald v. Greenwald*, 154 Wis. 2d 767 (Ct. App. 1990).

(3) Stipulation (as opposed to agreement) not binding until approved by court. *Van Boxtel v. Van Boxtel*, 2001 WI 40, 242 Wis. 2d 474; *Norman v. Norman*, 117 Wis. 2d 80 (Ct. App. 1983).

NOTE: Any agreement regarding the division of property entered into between spouses after divorce proceedings have commenced is a stipulation under Wis. Stat. § 767.34 and is therefore subject to court approval.

m. Such other factors as court may deem relevant. Wis. Stat. § 767.61(3)(m); *Dudas v. Dudas*, No. 2016AP326, 2017 WL 1086263 (Wis. Ct. App. Mar. 21, 2017) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

2. Bonuses and fees received and spent by one party after separation, but before divorce, are not marital assets subject to division, but may be considered in determining fair division of property or maintenance. *Long v. Long*, 196 Wis. 2d 691 (Ct. App. 1995).

3. Court may divide property in kind or award property to one and award other property or cash to other. *Jost v. Jost*, 89 Wis. 2d 533 (1979).

4. Wisconsin Marital Property Act (Wis. Stat. ch. 766) does not control division. *Kuhlman v. Kuhlman*, 146 Wis. 2d 588 (Ct. App. 1988).

5. Court must consider the lengthy list of factors in Wis. Stat. § 767.61(3) before deviating from the presumption of equal property division. *LeMere v. LeMere*, 2003 WI 67, ¶ 16, 262 Wis. 2d 426 (discussing Wis. Stat. § 767.255, the predecessor to Wis. Stat. § 767.61).

6. Federal law provides for qualified domestic relations order (QDRO) that allows court to order pension benefits to be paid directly to an ex-spouse. I.R.C. § 401(a)(13); I.R.C. § 414(p).

7. Wisconsin Retirement System benefit may be divided by QDRO. Wis. Stat. § 40.08(1m).

NOTE: Preprinted forms, available at no cost from the Wisconsin Retirement System, must be

used for this. *See* Wis. Dep't of Employee Trust Funds, *How Divorce Can Affect Your WRS Benefits* (Sept. 21, 2021), https://etf.wi.gov/publications/et4925pdf/download?inline=.

8. Court should award interest on ordered equalizing property division payments to be made in future unless it explains why interest is not appropriate. *Jasper v. Jasper*, 107 Wis. 2d 59 (1982).

9. Interest is not awarded on lump-sum payment of future monthly installments. *Kunz v. Kunz*, 2017 WI App 21, ¶ 15, 374 Wis. 2d 436.

10. When dividing assets such as pension plans, 401(k) plans, or related plans, parties should consider the potential ramifications of requesting a fixed sum from each account versus a percentage of each account. *Taylor v. Taylor*, 2002 WI App 253, 258 Wis. 2d 290; *Schinner v. Schinner*, 143 Wis. 2d 81 (Ct. App. 1988).

11. Whether an asset is characterized as vested, unvested, or future interest is a factor to be considered in property division. A stock option contract is a form of property for equitable distribution purposes, even if the option is not exercisable until after the time of divorce. *Heppner v. Heppner*, 2009 WI App 90, ¶¶ 20–24, 319 Wis. 2d 237; *Maritato v. Maritato*, 2004 WI App 138, 275 Wis. 2d 252.

    NOTE: While a stock option cannot be included in the marital estate (and thus is not subject to property division) because it holds no current value, a court nevertheless must include the income a party may receive from the stock option in the income pool in determining a maintenance award. *Heppner v. Heppner*, 2009 WI App 90, ¶¶ 16–19, 319 Wis. 2d 237.

12. Unless expressly included as provision in property division, clauses requiring children as beneficiaries of life insurance policies apply only while children are minors. *McDonah v. McDonah*, No. 2014AP712, 2014 WL 7271598, ¶ 15 (Wis. Ct. App. Dec. 23, 2014) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

B. Property Included or Excluded [§ 22.53]

1. All property except gifts or inheritances, or property paid for by funds so acquired, is divisible between parties. Wis. Stat. § 767.61.

    a. If court finds that excluding gifts or inheritances would create a hardship on the non-recipient spouse, then the court may divide even gifted or inherited property if it does so in a fair and equitable manner. Wis. Stat. § 767.61(2)(b).

    b. If the court deems an inheritance commingled and includes it in the marital estate, the court nevertheless may exercise its discretion in making an unequal, but fair, division of the marital estate by considering the amount of the commingled inheritance. *Wallock v. Wallock*, No. 2011AP896, 2012 WL 1020195 (Wis. Ct. App. Mar. 28, 2012) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

2. Property owned on date of marriage not excluded from division. *Lang v. Lang*, 161 Wis. 2d 210 (1991).

3. Salable goodwill of business is divisible asset; salable professional goodwill is divisible regardless of whether it is characterized as personal or enterprise goodwill; nonsalable

goodwill is not divisible. *McReath v. McReath*, 2011 WI 66, ¶¶ 37–41, 335 Wis. 2d 643; *Sommerfield v. Sommerfield*, 154 Wis. 2d 840 (Ct. App. 1990); *Peerenboom v. Peerenboom*, 147 Wis. 2d 547 (Ct. App. 1988); *Lewis v. Lewis*, 113 Wis. 2d 172 (Ct. App. 1983); *Holbrook v. Holbrook*, 103 Wis. 2d 327 (Ct. App. 1981).

4. Accounts receivable are eligible for inclusion.

   a. Accounts receivable and unbilled work in progress may be asset or future income, but not both. *Johnson v. Johnson*, 78 Wis. 2d 137, 142–43 (1977).

   b. Accounts receivable of a service corporation will normally be assets. *Ondrasek v. Ondrasek*, 126 Wis. 2d 469 (Ct. App. 1985).

5. Payment due upon withdrawal from partnership is an asset. *Weiss v. Weiss*, 122 Wis. 2d 688 (Ct. App. 1985).

6. Personal injury or worker's compensation settlement is subject to division, but presumption of equal division does not apply; it is presumed that injured party is entitled to compensation for injury and loss. *Krebs v. Krebs*, 148 Wis. 2d 51 (1989); *Weberg v. Weberg*, 158 Wis. 2d 540 (Ct. App. 1990).

7. Pensions

   NOTE: Military pensions are subject to special rules. 10 U.S.C. § 1408(c)(1); *Howell v. Howell*, 137 S. Ct. 1400, 1405 (2017); *Loveland v. Loveland*, 147 Wis. 2d 605 (Ct. App. 1988).

   a. When property division in marital settlement agreement entitled wife to future monthly payments of husband's "pension" and "retirement" benefits, but husband began receiving "disability pension" benefits before he reached eligibility age for unreduced "early" or "normal" pension, his disability pension effectively supplanted and became a substitute for an early or normal "pension" (within the meaning of the parties' agreement) once he reached early retirement age. *Topolski v. Topolski*, 2011 WI 59, ¶¶ 70–72, 335 Wis. 2d 327.

   b. Pension in pay status is property, not income. *Steinke v. Steinke*, 126 Wis. 2d 372 (1985).

   c. Portion of pension attributable to premarital employment is divisible. *Hokin v. Hokin*, 231 Wis. 2d 184 (Ct. App. 1999); *Rodak v. Rodak*, 150 Wis. 2d 624 (Ct. App. 1989).

   d. Property brought to the marriage is a factor for consideration in deviating from the presumed equal division of the marital estate. A coverture fraction may be used to divide a pension depending on specific case facts. *Rigsby v. Rigsby*, No. 2014AP1546, 2015 WL 2192991, ¶¶ 19–30 (Wis. Ct. App. May 12, 2015) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

   e. If part of pension is not vested, court must evaluate probability that it will actually be received. Wis. Stat. § 767.61(3)(j); *Heatwole v. Heatwole*, 103 Wis. 2d 613 (Ct. App. 1981).

   f. Pension plans may be divided by several methods. *Bloomer v. Bloomer*, 84 Wis. 2d 124 (1978); *Hokin*, 231 Wis. 2d 184; *Ably v. Ably*, 155 Wis. 2d 286 (Ct. App. 1990).

(1) Federal law provides for QDRO that allows court to order pension benefits to be paid directly to an ex-spouse. I.R.C. § 401(a)(13); I.R.C. § 414(p).

(2) Wisconsin Retirement System benefit may be divided by QDRO. Wis. Stat. § 40.08(1m).

NOTE: Preprinted forms, available at no cost from the Wisconsin Retirement System, must be used for this. *See* Wis. Dep't of Employee Trust Funds, *How Divorce Can Affect Your WRS Benefits* (Sept. 21, 2022), https://etf.wi.gov/publications/et4925pdf/download?inline=.

8. A circuit court decision on how to divide divisible property is discretionary. Two distinct inquiries—namely, tracing and donative intent—must be made to address whether property is subject to division under Wis. Stat. § 767.61(2). *Derr v. Derr*, 2005 WI App 63, ¶ 14, 280 Wis. 2d 681.

NOTE: *Derr* was distinguished on other grounds by *Strunsee v. La Bri*, No. 2018AP1855, 2019 WL 4667672 (Wis. Ct. App. Sept. 25, 2019) (unpublished opinion not citable per Wis. Stat. § 809.23(3)), which confirmed that a request for modification is addressed to the court's discretion.

a. Per *Derr*, 2005 WI App 63, 280 Wis. 2d 681, tracing is the job of determining the value and source of an asset or the value and source of a part of an asset; tracing does not, by itself, resolve whether an item is divisible under Wis. Stat. § 767.61(2), unless

(1) Tracing is the only disputed issue, or

(2) The party asking the court to declare an asset nondivisible is unable to provide evidence that permits the tracing of an identifiable part of the asset to an original nondivisible asset.

b. Donative intent involves "no more and no less than determining whether the owning spouse intended to donate nondivisible property to the marriage." Thus, Wis. Stat. § 767.61(2) is directed at determining the owning party's subjective donative intent. *Derr*, 2005 WI App 63, 280 Wis. 2d 681.

(1) All the following create rebuttable presumptions of donative intent:

(a) Transferring nondivisible property to joint tenancy. *Trattles v. Trattles*, 126 Wis. 2d 219, 223–24 (Ct. App. 1985).

(b) Depositing nondivisible funds into a joint bank account. *Finley v. Finley*, 2002 WI App 144, 256 Wis. 2d 508.

(c) Using nondivisible funds to make purchases for the family. *Trattles*, 126 Wis. 2d at 224.

(d) Using nondivisible funds to make payments on a mortgage debt that was incurred to acquire jointly owned real estate. *Trattles*, 126 Wis. 2d at 224.

(2) When facts create a presumption of donative intent, rebuttal evidence may nonetheless show that the spouse did not intend to make a gift. *Derr*, 2005 WI App 63, 280 Wis. 2d 681.

9. Transmutation principles apply to all nondivisible property, whether that property is nondivisible because of being a gift, an inheritance, or classified as individual property under a marital property agreement. *Steinmann v. Steinmann*, 2008 WI 43, 309 Wis. 2d 29.

10. Gifts and inheritances

a. Property acquired as a gift (from a person other than the other party) or by reason of death of another is not subject to division unless failure to divide will create hardship on the other party or children of the marriage. Wis. Stat. § 767.61(2).

b. Property paid for with funds acquired by gift or inheritance is not subject to division unless failure to divide will create hardship on other party or children of the marriage. Wis. Stat. § 767.61(2); *Hughes v. Hughes*, 148 Wis. 2d 167 (Ct. App. 1988).

c. Retained earnings of gifted or inherited corporation are divisible; hardship involves financial privation and requires something more than an inability to maintain a predivorce standard of living. *Grumbeck v. Grumbeck*, 2006 WI App 215, ¶ 6, 296 Wis. 2d 611; *Metz v. Keener*, 215 Wis. 2d 626 (Ct. App. 1997).

d. Appreciated value of gift or inheritance is not subject to division unless active efforts of either spouse contributed to appreciation. Wis. Stat. § 767.61; *Schorer v. Schorer*, 177 Wis. 2d 387 (Ct. App. 1993).

11. An asset may be included for property division or considered future income for support and maintenance, but not both. *Schinner v. Schinner*, 143 Wis. 2d 81 (Ct. App. 1988).

12. A rebuttable presumption exists that an asset is part of marital estate to be divided if transferred for inadequate consideration, wasted, or unaccounted for within one year before divorce. Wis. Stat. § 767.63.

13. Absent a contrary provision in a valid marital property agreement, property acquired during marriage and before January 1, 1986, and which would have been marital property had it been acquired after enactment of the Wisconsin Marital Property Act on that date, is not individual property but is treated as if it were acquired during marriage. Wis. Stat. § 851.055.

14. Real estate tax payments on nonmarital property with marital funds do not compel finding that "mixing" of property had occurred. *Krueger v. Rodenberg*, 190 Wis. 2d 367, 373–76 (Ct. App. 1994).

15. Termination benefits and extended earnings plans, although not pension plans, may be marital assets subject to division. *Garceau v. Garceau*, 2000 WI App 7, 232 Wis. 2d 1.

16. Appreciation of stock purchased with inherited funds is marital if attributable to shareholder's efforts. *Lendman v. Lendman*, 157 Wis. 2d 606 (Ct. App. 1990).

NOTE: *Lendman* was distinguished on other grounds by *Skodowski v. Skodowski*, No. 2017AP2425, 2019 WL 1035816 (Wis. Ct. App. Mar. 5, 2019) (unpublished opinion citable for

persuasive value per Wis. Stat § 809.23(3)(b)), which concluded that trial court properly ordered indefinite maintenance by determining earning capacity and considering support and fairness objective.

C. Property Valuation [§ 22.54]

1. Fair market value rather than replacement value should be used. *Arneson v. Arneson*, 120 Wis. 2d 236 (Ct. App. 1984).

2. Owners are competent to testify to value of their property. *Wilberscheid v. Wilberscheid*, 77 Wis. 2d 40 (1977).

3. Date for valuing assets is date of divorce; special circumstances may require deviation from this rule. *Schinner v. Schinner*, 143 Wis. 2d 81, 98 (Ct. App. 1988); *Holbrook v. Holbrook*, 103 Wis. 2d 327 (Ct. App. 1981).

   NOTE: Division of checking accounts between parties as of date of separation warranted the valuation of the accounts as of date of separation as opposed to date of divorce. *Long v. Long*, 196 Wis. 2d 691 (Ct. App. 1995).

4. To determine character of ex-wife's interest in former husband's pension, court had to construe judgment of divorce as of time it was entered; fact that husband did not file QDRO did not affect ex-wife's rights to pension. *Dewey v. Dewey*, 188 Wis. 2d 271 (Ct. App. 1994) (construing former Wis. Stat. § 767.255 (renumbered as Wis. Stat. § 767.61)).

   COMMENT: The Wisconsin Supreme Court distinguished *Dewey* in *Johnson v. Masters*, stating that the "timing of the execution of the QDRO" in *Dewey* refers to the significance of the timing before or after a bankruptcy action. *Dewey* did not discuss the statute of repose (Wis. Stat. § 893.40), and *Dewey*'s language cannot be construed to mean that the timing of an enforcement action regarding QDROs is of no consequence whatsoever. *Johnson v. Masters*, 2013 WI 43, ¶ 15 n.10, 347 Wis. 2d 238.

5. In splitting pensions, retirement accounts, and other marital property subject to a final court order, Wis. Stat. § 893.40 does not apply when enforcement of the division of such assets is impossible to perform within the statutory period. *Schwab v. Schwab*, 2021 WI 67, 397 Wis. 2d 820.

6. In valuing pension plan, court may reduce current value of plan to reflect income taxes that will be paid when benefits are distributed. *Corliss v. Corliss*, 107 Wis. 2d 338 (Ct. App. 1982).

7. Court must consider present value of a future award. *Jasper v. Jasper*, 107 Wis. 2d 59 (1982).

D. Related Rules [§ 22.55]

1. Court must make specific findings of fact and discuss factors it considered in exercising its discretion. *Thorpe v. Thorpe*, 108 Wis. 2d 189 (1982).

2. While court may direct one spouse to make reasonable efforts to remove ex-spouse's name from mortgage, court is powerless to mandate the removal. *Torgerson v. Torgerson*, 128 Wis. 2d 465 (Ct. App. 1986); *cf. Wilke v. Wilke*, 212 Wis. 2d 271, 282 (Ct. App. 1997)

("[N]either a court nor an agreement of the parties can unilaterally extinguish a non-party's interest.").

3. Premarital contributions may be considered for property division or maintenance. *Meyer v. Meyer*, 2000 WI 132, 239 Wis. 2d 731.

4. Support of children from spouse's prior marriage may be considered. *Fuerst v. Fuerst*, 93 Wis. 2d 121 (Ct. App. 1979).

5. The Wisconsin Supreme Court has suggested several methods for valuing spouse's contribution to education of other in awarding maintenance and determining property division. *Haugan v. Haugan*, 117 Wis. 2d 200, 211–15 (1984).

6. Constructive trust may be imposed on replacement life insurance proceeds when life insurance naming minor as beneficiary is required by divorce decree. *Singer v. Jones*, 173 Wis. 2d 191 (Ct. App. 1992).

7. Imposition of constructive trust is warranted to accomplish intent of parties in division of assets. *Sulzer v. Diedrich*, 2003 WI 90, 263 Wis. 2d 496.

8. When husband has consented to release of all property awarded to wife as part of marital settlement agreement, court may deny husband's postdivorce motion to exercise option to purchase stock awarded to wife, even though stock agreement provided that husband could exercise stock option in event of divorce. *Wilke v. Wilke*, 212 Wis. 2d 271 (Ct. App. 1997).

9. Third-party intervention

    a. Third-party joinder will be allowed when third party obtained property that may be marital. *Zabel v. Zabel*, 210 Wis. 2d 336 (Ct. App. 1997).

    b. For a third party to intervene in an action, the relationship between the third party's interest and the subject of the action must not be too remote or too speculative to support a right of intervention. *Helgeland v. Wisconsin Muns.*, 2008 WI 9, 307 Wis. 2d 1.

    c. There must be a balance between allowing original parties to conclude their own lawsuit and allowing persons to join a lawsuit, which, in some cases, may be speedier and more economical than not allowing intervention. *Friends of Scott Walker v. Brennan*, No. 2012AP32–AC, 2012 WL 336142, ¶ 31 (Wis. Ct. App. Feb. 3, 2012) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

10. Injured party's spouse has no action for wrongful divorce if injury caused divorce. *Prill v. Hampton*, 154 Wis. 2d 667 (Ct. App. 1990).

11. One spouse may maintain separate action against the other spouse for judgment on loan note during pendency of divorce. *Caulfield v. Caulfield*, 183 Wis. 2d 83 (Ct. App. 1994).

12. Murderer is not deprived of property lawfully acquired but is prevented from acquiring beneficial interest in property through murderer's unlawful act. *Krueger v. Rodenberg*, 190 Wis. 2d 367, 379–80 (Ct. App. 1994).

13. When spouses have joint interest in property and interest of one spouse is enlarged by that spouse's murder of other spouse, constructive trust is created for estate of deceased spouse, to extent that surviving spouse's interest is enlarged; this equitable principle will trump Wis. Stat. §§ 766.31(3) and 766.62(5), which generally provide that nonemployee spouse's interest in employee spouse's deferred employment benefit plan terminates upon nonemployee spouse's death. *Hackl v. Hackl (In re Est. of Hackl)*, 231 Wis. 2d 43 (Ct. App. 1999).

14. A contract entered into to hide assets from a spouse and the family court during a divorce is not enforceable. *Jezeski v. Jezeski*, 2009 WI App 8, 316 Wis. 2d 178.

15. A circuit court may relieve a party from property division provisions of a divorce judgment under Wis. Stat. § 806.07 even though the divorce judgment incorporates a confirmed arbitral award. *Franke v. Franke*, 2004 WI 8, ¶¶ 3, 50–51, 268 Wis. 2d 360.

IV. LEGAL CUSTODY AND PHYSICAL PLACEMENT [§ 22.56]

A. Factors in Granting Legal Custody and Physical Placement [§ 22.57]

1. Wisconsin's public policy is that it is in minor child's best interest to have frequent associations and continuing relationship with both parents unless there is specific reason to the contrary. 1987 Wis. Act 355, § 1.

   NOTE: This policy, however, is not to be construed as a statutory presumption that equal placement is in the child's best interest. Wis. Stat. § 767.41(4) simply requires that the court provide for placement that allows the child to have regularly occurring, meaningful periods of physical placement with each parent. This is not tantamount to a presumption of equal placement. *Keller v. Keller*, 2002 WI App 161, 256 Wis. 2d 401.

2. Court must make just and reasonable provisions for legal custody and physical placement of any minor child. Wis. Stat. § 767.41(1)(b).

   NOTE: In any action affecting the family in which legal custody or physical placement is contested, a party seeking sole legal custody, joint legal custody, or periods of physical placement must file a proposed parenting plan with the court if the court waives the requirement to attend mediation or if the parties attend mediation and the mediator notifies the court that the parties have not reached an agreement. Such a proposed parenting plan must be filed within 60 days after waiver or notification unless the court orders otherwise. Wis. Stat. § 767.41(1m).

3. Court may give sole legal custody to one party or may give joint legal custody; but joint legal custody is presumed to be in best interests of child, and sole custody may be given only if parties agree or court finds facts required by statute. Wis. Stat. § 767.41(2).

   a. Court must presume that joint legal custody is in best interest of child except when court finds by preponderance of evidence that one party has engaged in pattern or serious incident of interspousal battery or domestic abuse. That finding creates a rebuttable presumption that it is detrimental to child and contrary to child's best interest to award joint or sole legal custody to that party. Wis. Stat. § 767.41(2)(am), (d); *see also* Wis. Stat. § 767.41(5)(am) 11. (listing evidence of *abuse*, defined in Wis. Stat. § 813.122(1)(a), of a *child*, as defined in Wis. Stat. § 813.122(1)(b), as factor to consider in making custody and physical placement determination).

b. Presumption may be overcome by stipulation of the parties that joint legal custody is in the best interests of the child. By entering into such a stipulation, the parties waive application of the presumption. *Glidewell v. Glidewell*, 2015 WI App 64, ¶¶ 4, 20, 364 Wis. 2d 588.

c. Presumption under Wis. Stat. § 767.41(2)(d)1. may be rebutted if abusive party has completed treatment or it is in best interest of child. Wis. Stat. § 767.41(2)(d)1.

d. If both parties have engaged in a pattern or serious incident of interspousal battery or abuse, the party that engaged in the battery or abuse is the party that the court determines was the primary physical aggressor. Wis. Stat. § 767.41(2)(d)2.

e. Court may not give sole legal custody to parent who refuses to cooperate with other parent if court finds that refusal is unreasonable. Wis. Stat. § 767.41(2)(c).

4. Court must allocate periods of physical placement between parties. Wis. Stat. § 767.41(4)(a).

5. Child is entitled to periods of physical placement with both parents unless court finds that physical placement with parent would endanger child's physical, mental, or emotional health. Wis. Stat. § 767.41(4)(b).

6. Court cannot grant visitation or physical placement to parent convicted of intentional homicide of other parent under Wis. Stat. § 940.01 or Wis. Stat. § 940.05 unless conviction has been reversed, set aside, or vacated, or unless court finds by clear and convincing evidence that visitation is in best interest of child. Wis. Stat. § 767.44.

7. Definitions are statutory.

a. *Legal custody* means the right and responsibility to make major decisions concerning child. Wis. Stat. § 767.001(2).

b. *Physical placement* means the right to have child placed physically with party who has right and responsibility to make routine daily decisions regarding child's care during period of physical placement. Wis. Stat. § 767.001(5).

c. *Major decisions* include but are not limited to decisions regarding choice of school and religion; consent to marry, enter military service, and obtain driver's license; and authorization of nonemergency health care. Wis. Stat. § 767.001(2m).

d. *Joint legal custody* means both parties share legal custody, and neither party's legal rights are superior except as court may specifically order. Wis. Stat. § 767.001(1s).

8. In determining legal custody and periods of physical placement, the court must consider the factors set out in Wis. Stat. § 767.41(5)(am)1.–14. The court must set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent, and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households. Wis. Stat. § 767.41(4)(a)2.

"Maximizing" does not mean equal placement or equal time. *Landwehr v. Landwehr*, 2006 WI

64, 291 Wis. 2d 49.

NOTE: Wis. Stat. § 767.41(4)(e) permits a parent who has been granted periods of physical placement to "supplement" those periods with a "reasonable amount of electronic communication." Wis. Stat. § 767.001(1g) defines *electronic communication* to include, but not be limited to, communication by telephone, email and other internet communications, video conferencing, and any other medium of communication.

9. In determining custody and physical placement, court must consider all facts relevant to best interests of child. Wis. Stat. § 767.41(4), (5).

   a. Court may not prefer one parent on basis of sex or race.

   b. Court must consider the following factors:

      (1) Wishes of parents. Wis. Stat. § 767.41(5)(am)1.

      (2) Wishes of child. Wis. Stat. § 767.41(5)(am)2.

      (3) Cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party. Wis. Stat. § 767.41(5)(am)3.

      (4) The parties' ability to support the other's relationship with the child or whether a party is likely to interfere with the child's continuing a relationship with the other party. Wis. Stat. § 767.41(5)(am)4.

      (5) Interaction and interrelationship of child with siblings and others. Wis. Stat. § 767.41(5)(am)5.

      (6) Amount and quality of time that each parent has spent with child in past, any necessary changes to parents' custodial roles, and any reasonable lifestyle changes that parent proposes to make to maximize placement with child in future. Wis. Stat. § 767.41(5)(am)6.

      (7) Whether a party, significant other of a party, or co-resident with a party, whether regularly or intermittently, in a custodial household has or had a significant problem with alcohol or drug abuse. Wis. Stat. § 767.41(5)(am)7.

      (8) Child's adjustment to home, school, religion, and community. Wis. Stat. § 767.41(5)(am)8.

      (9) Age of child and child's developmental and educational needs at different ages. Wis. Stat. § 767.41(5)(am)9.

      (10) Mental and physical health of child, parents, and others living in proposed custodial household. Wis. Stat. § 767.41(5)(am)10.

      (11) Whether a party, significant other of a party, or co-resident with a party, whether regularly or intermittently, in a custodial household has a criminal record or whether

there is evidence that any of the above persons engaged in abuse of children, as defined by Wis. Stat. § 813.122(1)(a), or child neglect. Wis. Stat. § 767.41(5)(am)11.

(12) 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). Wis. Stat. § 767.41(5)(am)12; *Dudas v. Dudas*, No. 2016AP326, 2017 WL 1086263 (Wis. Ct. App. Mar. 21, 2017) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

(13) Reports of appropriate professionals, if admitted into evidence. Wis. Stat. § 767.41(5)(am)13.

10. Mediation attempt required before court hearing on issues of custody or physical placement. Wis. Stat. § 767.405(8)(a).

11. Any agreement resolving child custody or physical placement as a result of mediation shall be prepared in writing, reviewed by the parties' attorneys and GAL, if any, and shall be certified as reviewed by the parties' attorneys and GAL, if any, and GAL shall comment on whether the agreement is in the best interest of the child. The mediator shall certify that the written agreement accurately reflects the agreement between the parties. Wis. Stat. § 767.405(12)(a).

12. Regardless of whether or not mediation of placement and custody was successful, the parties may return to mediation at any time before trial or final hearing. Wis. Stat. § 767.405(12)(b).

13. Court may waive mediation if it determines that attending session will cause undue hardship or endanger one of the parties. In determining any potential danger, the court "shall consider" abuse of the other party or the parties' child, as defined by Wis. Stat. § 813.122(1)(b). Wis. Stat. § 767.405(8)(b).

14. Court cannot order arbitration of custody issues. *Biel v. Biel*, 114 Wis. 2d 191 (Ct. App. 1983).

    NOTE: Parties may stipulate to mediation or arbitration in a divorce judgment even if the court would not otherwise have authority to do so. *Lawrence v. Lawrence*, 2004 WI App 170, 276 Wis. 2d 403.

15. Guardian ad litem (GAL)

    a. Per Wis. Stat. § 767.407, GAL must be appointed when

        (1) There is reason for special concern regarding welfare of minor child, or

        (2) Legal custody or physical placement is contested.

    b. Under Wis. Stat. § 767.407(1)(am), the court need not appoint a GAL under para. a. above if all the following apply:

        (1) Legal custody or physical placement is contested in an action to modify legal custody or placement under Wis. Stat. § 767.451 or Wis. Stat. § 767.481.

        (2) Modification sought would not substantially alter amount of time that parent may spend with child.

(3) Court determines that appointment of GAL will not assist court in determining custody or placement, or party seeks appointment of GAL solely for tactical purpose, for delay, or for purpose that is not in best interest of child.

16. Third-party visitation and placement

a. Court cannot award custody to nonparent unless court finds both parents unfit or unable to care for child or that the parents have abdicated their responsibilities to care for the child. *Barstad v. Frazier*, 118 Wis. 2d 549 (1984); *Richard D. v. Rebecca G. (In the Int. of Caryn A.-G.)*, 228 Wis. 2d 658 (Ct. App. 1999).

b. Court's decision on guardianship and placement involves determination of child's best interest. Court must consider nomination of guardian from any interested person. *Anna S. v. Diana M. (In re Guardianship of Keisha M.S.)*, 2004 WI App 45, 270 Wis. 2d 411.

c. In a child in need of protection or services (CHIPS) proceeding, custody may be granted to a third party, rather than to a parent, without a finding the parent is unfit or unable to care for a child. The *best interest of the child standard* applies. *Winnebago Cnty. v. Kurt J.K. (In the Int. of Jennifer N.K.)*, No. 01-0434, 2001 WL 943170 (Wis. Ct. App. Aug. 15, 2001) (unpublished opinion not citable per Wis. Stat. § 809.23(3)); *see also Winnebago Cnty. v. Kurt J.K.*, No. 02-0817, 2002 WL 1974291 (Wis. Ct. App. Aug. 28, 2002) (unpublished opinion not citable per Wis. Stat. § 809.23(3)) (related proceeding).

d. Court is limited to statutory authority and has no authority to grant custody or visitation rights to nonbiological or adoptive *equitable parent*. *Sporleder v. Hermes (In the Int. of Z.J.H.)*, 162 Wis. 2d 1002 (1991).

NOTE: Any language in *Sporleder* that would "prohibit a court from relying on its equitable powers to grant visitation apart from Wis. Stat. § [767.43] on the basis of a co-parenting agreement between a biological parent and another when visitation is in a child's best interest" was overruled by *Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 193 Wis. 2d 649, 691 (1995).

e. Aside from any provision terminating parental rights, parentage (surrogacy) agreements are not contrary to public policy and are valid, enforceable contracts unless enforcement is contrary to the best interests of the child. *Rosecky v. Schissel (In re Paternity of F.T.R.)*, 2013 WI 66, 349 Wis. 2d 84.

f. Paternity action regarding child born to intact marriage "shall be dismissed" if court or supplemental court commissioner determines that judicial determination of paternity not in best interest of the child. Wis. Stat. § 767.863(1m); *J.F. v. R.B. (In re Paternity of T.R.B.)*, 160 Wis. 2d 840 (Ct. App. 1991).

g. In determining the best interest of the child, the circuit court must set forth the findings of facts relied on in reaching its decision, which will be upheld unless determined clearly erroneous in a de novo review. *Douglas L. v. Arika B. (In re Paternity of W.B.)*, 2015 WI App 80, 365 Wis. 2d 257.

h. Putative father has no constitutional or statutory right to blood test to help establish paternity of child born to intact marriage. *W.W.W. v. M.C.S. (In re Paternity of C.A.S.)*, 161 Wis. 2d 1015 (1991).

i. Putative father cannot circumvent court's "best interest" determination by obtaining genetic testing without court approval, even by agreement with the other party, to establish paternity of child who was born during a lawful marriage of the child's mother to another man. *Stuart S. v. Heidi R. (In re Paternity of A.R.R.)*, 2015 WI App 19, ¶¶ 37–39, 360 Wis. 2d 388.

j. Absent showing that biological parent was unfit or unable to care for her child, mother's former partner could not bring action to obtain custody. Wis. Stat. § 767.41; *Holtzman*, 193 Wis. 2d 649.

k. Best interest of child may dictate that equitable father be awarded custody of minor child over biological father. *Randy A.J. v. Norma I.J.*, 2002 WI App 307, 259 Wis. 2d 120, *aff'd*, 2004 WI 41, 270 Wis. 2d 384.

l. When custody contest is between parent and nonparent third party, standard for interference in parent-child relationship is higher than best interest of child test because of constitutionally protected right of parent to custody of child; thus, as between parent and third party, parent is entitled to custody absent unfitness or compelling circumstances. *Howard M. v. Jean R. (In re Guardianship of Janae K.S.)*, 196 Wis. 2d 16 (Ct. App. 1995).

NOTE: The U.S. Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), appears to call into question the constitutionality of Wis. Stat. §§ 767.43 and 54.56. According to *Troxel*, third-party visitation statutes that accord no deference to a fit parent's wishes may violate the Due Process Clause. The Wisconsin Supreme Court addressed this issue in *C.M. v. K.L. (In re Grandparental Visitation of A.A.L.)*, 2019 WI 57, 387 Wis. 2d 1, and modified the holding of *Roger D.H. v. Virginia O. (In re Paternity of Roger D.H.)*, 2002 WI App 35, 250 Wis. 2d 747.

In *Roger D.H.*, the court of appeals recognized that due process requires a presumption that a fit parent's decision regarding third-party or grandparent visitation is in the best interest of that child. However, the court noted that it was only a presumption, and the circuit court is obligated to make its own assessment of the best interests of the child. *Roger D.H.*, 2002 WI App 35, ¶ 19, 250 Wis. 2d 747. In A.A.L., the court modified *Roger D.H.* to require a grandparent to overcome the presumption in favor of a fit parent's visitation decision with clear and convincing evidence that the decision is not in the child's best interest. The court determined that a circuit court should consider the nature and extent of grandparent visitation only if a grandparent overcomes the presumption in favor of a fit parent's visitation decision with clear and convincing evidence that the decision is not in the child's best interest. The court further noted that a circuit court should not substitute its judgment for the judgment of a fit parent even if it disagrees with the parent's decision. *In re Grandparental Visitation of A.A.L.*, 2019 WI 57, ¶ 37, 387 Wis. 2d 1.

m. The circuit court must give special weight to a parent's determination of what third-party visitation is in the best interest of the child or there must be a sufficient basis for state or court intervention into the parent's decision. *Lubinski v. Lubinski*, 2008 WI App 151, 314

Wis. 2d 395 (citing *Troxel*, 530 U.S. 57, and *Rogers v. Rogers (In re Grandparental Visitation of David R.)*, 2007 WI App 50, 300 Wis. 2d 532).

n. The special weight that a court must give to a parent's decision, before the court may grant a petition for grandparental visitation, is not a separate element, but is achieved by applying the rebuttable presumption that a fit parent's decision regarding visitation is in the best interest of the child. *Martin L. v. Julie R.L. (In re Int. of Nicholas L.)*, 2007 WI App 37, ¶ 12, 299 Wis. 2d 768. In *A.A.L.*, the court clarified that *Martin L.* requires a petitioning grandparent to overcome the presumption in favor of a fit parent's visitation decision with clear and convincing evidence that the decision is not in the child's best interest. The court further emphasized that a circuit court assesses the nature and extent of visitation only after that burden has been met. *In re Grandparental Visitation of A.A.L.*, 2019 WI 57, ¶ 38, 387 Wis. 2d 1.

o. Intact family exists when stepparent adopts child after death of child's biological parent; therefore, child's aunt has no cause of action for visitation. *Bybee v. Noonan (In re Custody of Noonan)*, 171 Wis. 2d 706 (Ct. App. 1992).

p. Grandparents, great-grandparents, stepparents, or person who has maintained a parent-like relationship with child may be awarded visitation rights. Wis. Stat. § 767.43.

NOTE: Grandparents, great-grandparents, and stepparents need not prove they maintained a parent-like relationship with a child to be awarded visitation rights. Only an otherwise undefined "person" who petitions for visitation rights is required to prove person maintained a parent-like relationship. *S.A.M. v. Meister*, 2016 WI 22, ¶ 22, 367 Wis. 2d 447.

(1) Court may award visitation rights to a grandparent if the court determines that visitation is in the child's best interests. Wis. Stat. § 767.43(1); *S.A.M.*, 2016 WI 22, 367 Wis. 2d 447.

(2) Court cannot grant visitation or physical placement to person convicted of intentional homicide of parent under Wis. Stat. § 940.01 or Wis. Stat. § 940.05 unless conviction has been reversed, set aside, or vacated, or unless court finds by clear and convincing evidence that visitation is in best interest of child. Wis. Stat. § 767.43(1m).

(3) Court must modify visitation or physical placement of person convicted of intentional homicide of parent under Wis. Stat. § 940.01 or Wis. Stat. § 940.05 unless conviction has been reversed, set aside, or vacated, or unless court finds by clear and convincing evidence that visitation is in best interest of child. Wis. Stat. § 767.43(6).

q. Termination of parental rights also terminates grandparent's relationship; therefore, visitation by grandparent not automatically allowed. *Soergel v. Raufman*, 154 Wis. 2d 564 (1990).

r. Death of parent and subsequent adoption by stepparent does not destroy paternal grandparents' visitation rights. *H.F. v. T.F. (In re Grandparental Visitation of C.G.F.)*, 168 Wis. 2d 62 (1992).

s. Public policy considerations do not prohibit court from relying on its equitable powers to grant visitation apart from dissolution of marriage based on coparenting agreement

between biological parent and another when visitation is in child's best interest. *Sporleder*, 162 Wis. 2d 1002.

t. Circuit court has equitable power to hear petition for visitation when it determines that petitioner has parent-like relationship with child and that a significant triggering event justifies intervention in child's relationship with adoptive or biological parent. *Holtzman*, 193 Wis. 2d 649.

NOTE: A "significant triggering event," required in *Holtzman*, is not required when grandparents seek visitation under Wis. Stat. § 767.43(3). *Wohlers v. Broughton (In re Paternity of E.M.B.)*, 2011 WI App 122, ¶¶ 2, 19, 337 Wis. 2d 107.

u. To demonstrate existence of parent-like relationship with child, as would support assertion by circuit court of equitable power to hear petition for visitation, petitioner must prove that biological or adoptive parent consented to, and fostered, petitioner's formation and establishment of parent-like relationship with child; petitioner and child lived together in same household; petitioner assumed obligations of parenthood by taking significant responsibility for child's care, education, and development, including contributing toward child's support, without expectation of financial compensation; and petitioner has been in parental role for length of time sufficient to have established bonded, dependent relationship, parental in nature, with child. *Holtzman*, 193 Wis. 2d 649.

17. Geographic rules

a. Court has no power to restrict location within state as condition of custody. *Groh v. Groh*, 110 Wis. 2d 117 (1983).

b. Court has power to order parent to return to Wisconsin if decision to allow out-of-state move was premised on false information to the court or conditions that were not fulfilled. *Shulka v. Sikraji*, 2014 WI App 113, ¶¶ 39–42, 358 Wis. 2d 639 (distinguishing *Groh*, 110 Wis. 2d 117).

c. During the pendency of an action, without consent of the other party or an order from the court, a parent cannot move more than 100 miles from other parent, remove child from Wisconsin for more than 90 consecutive days, or conceal a minor child of the parties from the other parent. Wis. Stat. § 767.117(1)(c).

d. After a final placement order, without consent of the other party or an order from the court, parent cannot move more than 100 miles from other parent, or remove child from state for more than 14 consecutive days except on 60 days' written notice to other parent; upon a parties' filing a motion to relocate a child, the court must schedule an initial hearing within 30 days. Wis. Stat. § 767.481.

18. Court must consider spousal abuse when determining placement and custody. If court finds that parent has engaged in domestic abuse, safety and well-being of child and of abused parent must be the paramount concerns in determining legal custody and physical placement. Court may order restrictions on exchanges, supervised visitation, or other limitations if court finds by preponderance of evidence that one party has engaged in pattern of interspousal battery. Wis. Stat. § 767.41(5)(bm); *Bertram v. Kilian*, 133 Wis. 2d 202 (Ct. App. 1986).

19. Parent's religion or lack of one is not proper factor to consider in custody or physical placement determination. *Gould v. Gould*, 116 Wis. 2d 493 (1984).

    NOTE: A noncustodial parent may take a child to that parent's church. *Wood v. DeHahn*, 214 Wis. 2d 221 (Ct. App. 1997).

20. Custody award cannot be conditioned on requirement that custodian terminate relationship with another person absent specific showing that relationship has adverse effect on child. *Schwantes v. Schwantes*, 121 Wis. 2d 607 (Ct. App. 1984).

    NOTE: A significant adverse effect on the child is a prerequisite to any adverse consideration based on a parent's third-party relationship. *Helling v. Lambert (In re Custody & Support of Neven D.H.)*, 2004 WI App 93, 272 Wis. 2d 796.

21. All circuit court proceedings must be recorded, including conferences with minor children. SCR 71.01; *see also Haugen v. Haugen*, 82 Wis. 2d 411 (1978).

B. Related Rules [§ 22.58]

1. Unless there are compelling reasons for awarding custody to nonparent or unless parent is shown to be unfit or unable to care for biological child, person who is not biological or adoptive parent cannot bring custody action. Wis. Stat. § 767.41; *Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 193 Wis. 2d 649 (1995).

   NOTE: Military service member's deployment does not allow for a stand-in parent (e.g., a stepparent) to assume placement rights in service member's absence. *Lubinski v. Lubinski*, 2008 WI App 151, 314 Wis. 2d 395.

2. Custody determinations cannot be prospective and contingent. *Koeller v. Koeller*, 195 Wis. 2d 660 (Ct. App. 1995).

3. If sole legal custody is awarded to one parent, the noncustodial parent must be ordered to furnish noncustodial parent's medical and medical history information to the court. Wis. Stat. § 767.41(7m).

4. At any time during pendency of divorce or paternity action, court or court commissioner may order parties to attend class addressing parenting issues. Wis. Stat. § 767.401(2).

5. Parent who has had physical placement denied or substantially interfered with by other parent, or who has incurred financial loss or expense because of other parent's intentional failure to exercise physical placement, may file motion requesting relief from court. Wis. Stat. § 767.471.

   a. If respondent has intentionally and unreasonably denied or interfered with placement, then court must grant additional periods of placement to compensate moving party for lost time and award that party reasonable amount for cost to maintain action. Wis. Stat. § 767.471(5)(b)1.

   b. Interference with custody of a child is punishable by a fine of up to $10,000 and imprisonment of up to 3 years and 6 months. Wis. Stat. §§ 767.215(2m), 767.41(8), 767.813(5)(a), 948.31, 939.50(3)(i).

c. Court may also find respondent in contempt and grant injunction ordering respondent to strictly comply with judgment or order relating to physical placement. Wis. Stat. § 767.471(5)(b)2.

d. If court finds that moving party has incurred financial loss or expenses as result of respondent's intentional and unreasonable failure to exercise physical placement, then court may order respondent to compensate moving party for such loss or expenses. Wis. Stat. § 767.471(5)(c).

6. Court cannot grant visitation or physical placement to parent convicted of intentional homicide of parent under Wis. Stat. § 940.01 or Wis. Stat. § 940.05, unless conviction has been reversed, set aside, or vacated, or unless the court finds by clear and convincing evidence that granting visitation or physical placement is in the best interest of the child. Wis. Stat. § 767.44.

C. Modification [§ 22.59]

1. Order for legal custody or physical placement (except order for substantially equal physical placement) will not be modified within two years after order unless court finds substantial evidence that modification is necessary because current conditions are physically or emotionally harmful to best interests of child. Wis. Stat. § 767.451.

   NOTE: Unreasonable interference with visitation, by itself, is not sufficient to support change of custody within two years; the court erred in using a general best-interests standard within two years. *Stephanie R.N. v. Wendy L.D. (In re Paternity of S.R.N.)*, 174 Wis. 2d 745 (1993).

2. After two years, court may modify legal custody or physical placement if there has been substantial change in circumstances and modification is in best interests of child. Wis. Stat. § 767.451(1)(b).

   NOTE: A finding of a substantial change of circumstances must be based on facts; a change in the law is not sufficient. *Licary v. Licary*, 168 Wis. 2d 686 (Ct. App. 1992).

3. Orders awarding substantially equal periods of physical placement are not subject to the increased burden provided in Wis. Stat. § 767.451(1), provided that circumstances make it impractical for the parties to continue to have substantially equal periods of placement. Wis. Stat. § 767.451(2).

4. Court cannot set conditions, the violation of which will automatically trigger change of custody. *Schwantes v. Schwantes*, 121 Wis. 2d 607 (Ct. App. 1984).

5. Court may transfer custody if custodian moves child from state and does not appear at hearing to determine whether move was to be allowed. *Pamperin v. Pamperin*, 112 Wis. 2d 70 (Ct. App. 1983).

6. Rules for changing custody initially determined by stipulation are same as if custody had been initially determined by contested hearing. *Millikin v. Millikin*, 115 Wis. 2d 16 (1983).

7. Court may properly deny change of physical placement requested by parent as "cure" for so-called parental alienation syndrome. *Wiederholt v. Fischer*, 169 Wis. 2d 524 (Ct. App. 1992).

8. Court must examine best interests before approving stipulated change of custody. *Racine Fam. Ct. Comm'r v. M.E. (In re Paternity of S.A.)*, 165 Wis. 2d 530 (Ct. App. 1991).

9. Court may modify periods of physical placement if it finds that parent has repeatedly and unreasonably failed to exercise periods of physical placement specifically awarded under order of physical placement. Wis. Stat. § 767.451(2m).

10. Court must modify physical placement by denying parent physical placement with child if parent has been convicted under Wis. Stat. § 940.01 or Wis. Stat. § 940.05 of intentional homicide of child's other parent, and conviction has not been reversed, set aside, or vacated. Wis. Stat. § 767.451(4m).

    NOTE: Wis. Stat. § 767.451(4m) does not apply if court finds by clear and convincing evidence that placement with parent would be in best interests of child.

11. Military deployment is not a factor to be considered in a motion to modify legal custody. 767.451(5m)(c). *But see Lubinski*, 2008 WI App 151, 314 Wis. 2d 395.

12. In any action to modify legal custody or physical placement under Wis. Stat. § 767.451(1), court may require party seeking modification to file a proposed parenting plan with court under Wis. Stat. § 767.41(1m) before any hearing is held. Wis. Stat. § 767.451(6m).

D. Interstate Disputes [§ 22.60]

1. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) determines the forum and jurisdiction of interstate child custody disputes. Wis. Stat. ch. 822.

   NOTE: Some of the following cases deal with the Uniform Child Custody Jurisdiction Act (UCCJA), the predecessor to the UCCJEA. As of March 25, 2006, the UCCJEA is in effect, but the UCCJA points of law below remain persuasive under the UCCJEA.

2. Under UCCJA, child and at least one contestant must have significant connection to state to establish jurisdiction; if another state has exercised jurisdiction, Wisconsin cannot modify unless first state declines or has lost jurisdiction. *P.C. v. C.C. (In re A.E.H.)*, 161 Wis. 2d 277 (1991).

3. Under the UCCJEA, the state that makes an initial custody or placement determination retains exclusive continuing jurisdiction over subsequent custody and placement decision unless and until: (1) "neither the child, nor the child and one parent … have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships"; or (2) neither the child nor either parent still reside in this state. *Jackson v. Jackson*, 2017 WI App 50, ¶ 25, 377 Wis. 2d 335; *see* Wis. Stat. § 822.22(1)(a), (b).

4. Federal Parental Kidnapping Prevention Act (PKPA) of 1980 reserves to the state initially entering a valid custody order the sole prerogative to modify that order under many circumstances; PKPA preempts conflicting provisions of UCCJA. 28 U.S.C. § 1738A; *Michalik v. Michalik*, 172 Wis. 2d 640 (1993).

5. One parent's unilateral move of children to another state does not forfeit that parent's UCCJA rights. *Davidson v. Davidson*, 169 Wis. 2d 546 (Ct. App. 1992).

6. Attorney's failure to use UCCJA judgment registry provision was negligence. *Soderlund v. Alton*, 160 Wis. 2d 825 (Ct. App. 1991).

7. UCCJEA does not pertain to an Indian child as defined by the Indian Child Welfare Act. Wis. Stat. § 822.04.

E. Parent's Right to Move Child After Divorce [§ 22.61]

1. Action to prohibit relocation and residence of child greater than 100 miles from the other parent is action affecting family. Wis. Stat. § 767.001(1)(k).

2. During pendency of action, court may grant temporary order to allow parent to relocate and reside with child pending a final hearing under Wis. Stat. § 767.481(3). Wis. Stat. § 767.225(1)(bm).

3. Under Wis. Stat. § 767.481, if court grants any periods of placement to both parents and one parent intends to relocate and reside more than 100 miles from the other parent, the parent that wishes to relocate and reside with the child must file a motion with the court seeking permission for the child's relocation.

   a. The motion must include

      (1) A relocation plan including

         (a) The date of the proposed relocation;

         (b) The municipality and state of the proposed new residence;

         (c) The reason for the relocation;

         (d) If applicable, a proposed new placement schedule, including placement during the school year, summers, and holidays; and

         (e) Proposed responsibility and allocation of costs for each parent for transportation of the child between the parties under the new placement plan.

      (2) A request for a change in legal custody, if applicable.

      (3) Notice to the other parent that, if the parent objects to the relocation, that parent must file and serve, no later than 5 days before the initial hearing, an objection to the relocation and any alternate proposal, including a modification of physical placement or custody.

      (4) A form titled "Objection to Relocation," furnished by the court, must also be attached.

   b. If the other parent objects to the relocation, that parent must file and serve an objection to the relocation, and any alternate proposal, including a modification of physical placement or custody, no later than 5 days before the initial hearing.

c. The court must schedule an initial hearing on a motion for relocation within 30 days after the motion is filed and must provide notice to the parties.

d. The child may not be relocated pending the initial hearing.

4. The requirement to file a motion does not apply if the child's parents already live more than 100 miles apart when a parent proposes to relocate and reside with the child. The parent who desires to relocate must serve written notice of intent to relocate on the other parent at least 60 days before relocation. Notice must include date and location of proposed relocation. Wis. Stat. § 767.481(1)(d).

V. MAINTENANCE [§ 22.62]

A. Factors in Granting Maintenance [§ 22.63]

1. No Wisconsin law entitles spouse to maintenance; however, the court may grant maintenance for limited or indefinite time after considering the following factors. Wis. Stat. § 767.56; *see also King v. King*, 224 Wis. 2d 235, 250–51 (1999).

a. Length of marriage. Wis. Stat. § 767.56(1c)(a).

b. Age and physical and emotional health of parties. Wis. Stat. § 767.56(1c)(b).

NOTE: Wis. Stat. § 767.56(1c)(b) requires a court to consider the physical health of the parties and does not suggest that health problems that have been the subject of settlement proceeds may be ignored. There is no qualifier in Wis. Stat. § 767.56 relieving parties of the requirement to support each other if one receives a monetary award for injuries received in an accident. *Lemke v. Lemke*, 2012 WI App 96, 343 Wis. 2d 748.

c. Property division. Wis. Stat. § 767.56(1c)(c).

d. Education of each party at marriage and at divorce. Wis. Stat. § 767.56(1c)(d).

e. Earning capacity of each party and time and expense necessary for party to acquire training or education to find appropriate employment. Wis. Stat. § 767.56(1c)(e).

f. Feasibility that party seeking maintenance can become self-supporting at standard of living comparable to that enjoyed during marriage. Wis. Stat. § 767.56(1c)(f).

g. Tax consequences, *see infra* § 22.69. Wis. Stat. § 767.56(1c)(g).

NOTE: In any order for maintenance signed after December 31, 2018, maintenance is no longer deductible from income for payer and the payee no longer claims maintenance received as income. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11051(b)(1), 131 Stat. 2054, 2089 (repealing I.R.C. § 71 and I.R.C. § 215) (2017).

NOTE: Parties who have an order for maintenance before December 31, 2018, may retain their tax deduction when modifying an order for maintenance after December 31, 2018.

h. Mutual agreements of parties. Wis. Stat. § 767.56(1c)(h).

i. Contribution by one party to education, training, or increased earning capacity of other. Wis. Stat. § 767.56(1c)(i).

j. Such other factors as court may deem relevant. Wis. Stat. § 767.56(1c)(j).

2. Investment income from assets awarded in property division and interest on deferred property settlement should be included in maintenance determination. *Hommel v. Hommel*, 162 Wis. 2d 782 (1991).

3. Although the law prohibits double counting an asset for both property division and maintenance, that principle does not apply to *income* from assets awarded in a property division, which is generally included in calculating that spouse's income for maintenance. *Wright v. Wright*, 2008 WI App 21, ¶ 42, 307 Wis. 2d 156.

4. Interest and dividend income may be considered when determining maintenance. *Dahlke v. Dahlke*, 2002 WI App 282, 258 Wis. 2d 764.

5. Property division and maintenance are interrelated—if there is error in property division, maintenance will also be reconsidered. Wis. Stat. §§ 767.61(3)(i), 767.56(1c)(c); *Steinke v. Steinke*, 126 Wis. 2d 372 (1985); *Ondrasek v. Ondrasek*, 126 Wis. 2d 469 (Ct. App. 1985); *Arneson v. Arneson*, 120 Wis. 2d 236 (Ct. App. 1984).

6. Determination of amount and duration of maintenance entrusted to discretion of the court, and reviewing court will not disturb it on appeal absent an erroneous exercise of that discretion. *Wolski v. Wolski*, 210 Wis. 2d 183 (Ct. App. 1997).

7. Retained earnings in corporation may be attributed to shareholder as income for maintenance purposes, but specific circumstances will control. *Lendman v. Lendman*, 157 Wis. 2d 606 (Ct. App. 1990).

8. Court has articulated standards for limited maintenance. *Bentz v. Bentz*, 148 Wis. 2d 400 (Ct. App. 1988).

9. Maintenance objective is to preserve standard of living enjoyed during marriage, not necessarily standard that might have been reached if marriage had continued. *Gerrits v. Gerrits*, 167 Wis. 2d 429 (Ct. App. 1992).

10. The increased expenses of separate households may prevent the parties from continuing at their predivorce standard of living, but both parties may have to bear the sacrifices that the cost of an additional household imposes. A court must not reduce the recipient spouse to subsistence level while the payer spouse preserves the predivorce standard of living. *In re Marriage of LaRocque*, 139 Wis. 2d 23, 35 (1987).

11. Standard of living is unique to each situation. *Hubert v. Hubert*, 159 Wis. 2d 803 (Ct. App. 1990) (high-income case).

12. If the couple could have reasonably anticipated a marked increase in the payer spouse's income and such an increase does occur, then the recipient spouse is entitled to enjoy life at the

standard that recipient spouse "could anticipate enjoying" but for the divorce. *Hefty v. Hefty*, 172 Wis. 2d 124, 134–35 (1992).

13. Starting point in determining maintenance is to divide parties' total income equally between them, but equity of result, not starting point, is determinative. *LaRocque*, 139 Wis. 2d 23; *Bahr v. Bahr*, 107 Wis. 2d 72 (1982).

14. Mechanistic equalization of postdivorce income is erroneous exercise of discretion in setting maintenance. *Kennedy v. Kennedy*, 145 Wis. 2d 219 (Ct. App. 1988).

15. If present value of pension is included in property division, then pension payments are not counted as income for purposes of determining maintenance; if present value of pension is not included in property division, then pension payments may be counted as income for purposes of determining maintenance. *Wettstaedt v. Wettstaedt*, 2001 WI App 94, 242 Wis. 2d 709; *Pelot v. Pelot*, 116 Wis. 2d 339 (Ct. App. 1983).

16. A court must include stock-option income in a maintenance award even if the correct value of the stock option is zero. *Heppner v. Heppner*, 2009 WI App 90, ¶¶ 16–19, 319 Wis. 2d 237.

17. Objectives of maintenance award are support of spouse and fairness. *LaRocque*, 139 Wis. 2d 23; *Hokin v. Hokin*, 231 Wis. 2d 184 (Ct. App. 1999).

    a. Fundamental fairness does not require a circuit court to consider continued maintenance when payee spouse is living at or above marital standard. *Rohde-Giovanni v. Baumgart*, 2003 WI App 136, 266 Wis. 2d 339, *aff'd*, 2004 WI 27, 269 Wis. 2d 598.

    b. Dual objectives of fairness and support should be applied equally to support order. *Brabec v. Brabec*, 181 Wis. 2d 270 (Ct. App. 1993).

    c. To fairly determine maintenance when both parties are living solely off investment income from individual assets rather than earned income, the payer should not have to deplete the payer's assets to provide funds so that the payee need not deplete payee's assets. *Brin v. Brin*, 2014 WI App 68, ¶ 23, 354 Wis. 2d 510.

18. Denial of maintenance to spouse not erroneous exercise of discretion if income disparity was not caused by marriage, payer has insufficient income to meet needs, and there is a failure to show need by recipient spouse. *Gerth v. Gerth*, 159 Wis. 2d 678 (Ct. App. 1990); *Briggs v. Briggs*, No. 03-0373-FT, 2003 WL 21448438 (Wis. Ct. App. June 24, 2003) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

19. Marital misconduct

    a. Marital misconduct not relevant in determining maintenance, but separate action may be maintained against spouse or former spouse for tort based on spousal abuse. *Stuart v. Stuart*, 143 Wis. 2d 347 (1988); *Dixon v. Dixon*, 107 Wis. 2d 492 (1982).

    b. Criminal conduct occurring after divorce is filed is not "marital misconduct" prohibited from consideration in property division. *Wheeler v. Wheeler*, No. 2012AP889, 2013 WL 3064135, ¶ 12 (Wis. Ct. App. June 20, 2013) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

c. Court must consider all relevant factors in determining maintenance; in cases in which refusal of treatment for alcoholism or unsuccessful treatment for alcoholism is relevant, court must consider that refusal or unsuccessful treatment in setting maintenance. *Hacker v. Hacker*, 2005 WI App 211, 287 Wis. 2d 180; *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576 (Ct. App. 1989).

d. Although marital misconduct is not to be considered, evidence that wife attempted to have her former husband murdered was relevant. *Brabec*, 181 Wis. 2d 270.

20. Maintenance, if any, should be set according to payer's ability to pay. *Eckert v. Eckert*, 144 Wis. 2d 770 (Ct. App. 1988).

21. Maintenance may be a percentage of payer's income. *Hefty v. Hefty*, 172 Wis. 2d 124 (1992); *Poindexter v. Poindexter*, 142 Wis. 2d 517 (1988).

22. Circuit court did not erroneously exercise discretion by using computer program to analyze tax effect of parties' situation. *Bisone v. Bisone*, 165 Wis. 2d 114 (Ct. App. 1991).

23. Military disability and Social Security disability payments should be considered in determining maintenance. *Weberg v. Weberg*, 158 Wis. 2d 540 (Ct. App. 1990).

24. Pension pay may be considered for property division and income for determining child support, but not for determination of maintenance, because that would constitute double counting. *Baxter v. Baxter*, No. 2013AP1168, 2014 WL 1242334, ¶ 19 & n.4 (Wis. Ct. App. Mar. 27, 2014) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

25. Veteran's disability payment is income, not asset. *Leighton v. Leighton*, 81 Wis. 2d 620 (1978).

26. Earning capacity

a. Earning capacity, as opposed to actual earnings, may be considered in a determination of maintenance. *Sellers v. Sellers*, 201 Wis. 2d 578 (Ct. App. 1996).

b. Under *earning capacity test*, maintenance is based on potential earnings if obligor is earning less than capacity. *Daniel R.C. v. Waukesha Cnty. (In the Int. of Kevin C.)*, 181 Wis. 2d 146 (Ct. App. 1993).

27. Spouse's contribution of child care and economic support to family unit during marriage represents nothing more than what spouse is legally and morally required to do and does not entitle spouse to compensatory maintenance. Wis. Stat. § 767.56; *Luciani v. Montemurro-Luciani*, 191 Wis. 2d 67 (Ct. App. 1995), *aff'd in part, rev'd in part*, 199 Wis. 2d 280 (1996).

28. Husband's employment bonus and consulting fees, which he received and spent during parties' separation before divorce, were not marital assets subject to division upon divorce, but could be considered in determining fair division of property or maintenance. *Long v. Long*, 196 Wis. 2d 691 (Ct. App. 1995).

29. Premarital contributions may be considered in awarding maintenance. *Meyer v. Meyer*, 2000 WI 132, ¶ 43, 239 Wis. 2d 731.

30. Consideration of fact that parties, although married, essentially lived separate lives was appropriate in determining maintenance amount and duration under catchall provision of Wis. Stat. § 767.56. *Schmitt v. Schmitt*, 2001 WI App 78, 242 Wis. 2d 565.

B. Modification or Termination [§ 22.64]

1. Maintenance terminates upon death of either the payer or payee, whichever occurs first. Wis. Stat. § 767.56(2c).

   a. However, if payer agreed to continue maintenance after payee's remarriage, and that agreement was incorporated into the judgment of divorce, then the agreement will be enforced and the payer estopped from requesting termination of the obligation. *Rintelman v. Rintelman*, 118 Wis. 2d 587 (1984).

   b. Equitable estoppel applies to a party seeking to modify agreed-to nonmodifiable maintenance provisions because such provisions do not violate public policy. *Cf. Huhn v. Stuckmann*, 2009 WI App 127, ¶ 8, 321 Wis. 2d 169 (ruling that child support component of family support order would violate public policy); *Jalovec v. Jalovec*, 2007 WI App 206, 305 Wis. 2d 467 (holding restrictive child support provisions against public policy); *see also May v. May*, 2012 WI 35, ¶ 31, 339 Wis. 2d 626 (discussing *Jalovec*); *infra* § 22.37 (modification of child support).

2. Each order for maintenance must include an order requiring the payee to notify the court within 10 business days after the payee's remarriage. Wis. Stat. § 767.58(1)(c).

3. The court must vacate an order for maintenance by application of the payer with proof of the payee's remarriage or upon receiving notice of the payee's remarriage from the payee as required by Wis. Stat. § 767.58(1)(c). Wis. Stat. § 767.59(3).

4. Void or voidable remarriage terminates maintenance from prior marriage. *Falk v. Falk*, 158 Wis. 2d 184 (Ct. App. 1990).

5. Maintenance should not be automatically terminated upon recipient's cohabitation, but court should consider all financial circumstances. *Haeuser v. Haeuser*, 200 Wis. 2d 750 (Ct. App. 1996); *Popp v. Popp*, 146 Wis. 2d 778 (Ct. App. 1988).

6. Maintenance may be modified if there is a substantial change of circumstances. Wis. Stat. § 767.59; *Pelot v. Pelot*, 116 Wis. 2d 339 (Ct. App. 1983).

7. Each order for maintenance must also include an order that the payer must notify the child support agency and the payee within 10 business days after any substantial change in income, including the receipt of a bonus that affects ability to pay. This notification will not result in a change in maintenance unless a revision is sought under Wis. Stat. § 767.59 or pursuant to an annual adjustment under Wis. Stat. § 767.553. Wis. Stat. § 767.58(1)(b).

   a. Imprudent financial decisions of the recipient spouse do not constitute a substantial change in circumstances. *Murray v. Murray*, 231 Wis. 2d 71 (Ct. App. 1999).

   b. Lack of hardship on the part of the payer is not a factor in extending maintenance. *Jantzen v. Jantzen*, 2007 WI App 171, ¶ 18, 304 Wis. 2d 449.

8. To modify a spousal maintenance award, the party seeking modification must demonstrate that there has been a substantial change in circumstances. Wis. Stat. § 767.59(1f); *Rohde-Giovanni v. Baumgart*, 2003 WI App 136, 266 Wis. 2d 339, *aff'd*, 2004 WI 27, 269 Wis. 2d 598.

9. During a second maintenance modification proceeding, determining whether there has been a change in a party's financial circumstances requires the court to compare the facts at the time of the most recent maintenance order, whether such order is contained in the original divorce judgment or was entered as part of a subsequent maintenance modification proceeding, with the facts at the time of the second maintenance modification proceeding. *Kenyon v. Kenyon*, 2004 WI 147, ¶ 2, 277 Wis. 2d 47.

10. If a substantial change in circumstances has occurred, a court reviewing a previous maintenance award must consider both the support objective and fairness objective with respect to both parties. *Baumgart*, 2003 WI App 136, 266 Wis. 2d 339.

    NOTE: A petition to revise limited maintenance is not timely if it is filed after the last payment is made. *Lippstreu v. Lippstreu*, 125 Wis. 2d 415 (Ct. App. 1985).

11. Maintenance may be waived in lieu of nonmodifiable spousal support judgment. *Ross v. Ross*, 149 Wis. 2d 713 (Ct. App. 1989).

12. Per *Nichols v. Nichols*, 162 Wis. 2d 96 (1991), stipulation providing nonmodifiable maintenance estops party from seeking increase if

    a. Parties freely and knowingly agreed,

    b. Agreement was part of overall settlement approved by the court,

    c. Agreement was fair, and

    d. Applicant seeks release from provision on grounds court lacked power to limit modification in absence of agreement.

13. Divorce judgment provisions waiving maintenance take precedence over provisions that arguably reserve maintenance payments. *Tyson v. Tyson*, 162 Wis. 2d 551, 554 (Ct. App. 1991).

14. Maintenance payments may be vacated retroactively to date on which payee spouse remarried. *Hansen v. Hansen*, 176 Wis. 2d 327 (Ct. App. 1993).

15. Income from pension that was divided in property division may be considered in review of maintenance; former spouse's pension benefits earned after divorce were income to spouse. *Olski v. Olski*, 197 Wis. 2d 237 (1995); *Dowd v. Dowd*, 167 Wis. 2d 409 (Ct. App. 1992).

    NOTE: In *Olski*, court noted that amount of pension benefits received before motion for termination of maintenance exceeded value given to pension at time of divorce.

16. When property division was equal at divorce and both parties comfortably lived on funds from property division, one party's more successful investment of those funds resulting in a larger current estate does not obligate that party to pay maintenance to the other party. *Brin v. Brin*, 2014 WI App 68, 354 Wis. 2d 510.

17. Reduction in maintenance cannot be conditioned on payer becoming current on arrears. *Benn v. Benn*, 230 Wis. 2d 301 (Ct. App. 1999).

18. Payments for education of adult child, when not agreed upon or paid during marriage, are not appropriate to consider in setting maintenance. *Baumgart*, 2003 WI App 136, 266 Wis. 2d 339.

C. Tax Considerations [§ 22.65]

NOTE: The 2017 tax reform act substantially changed tax considerations for maintenance payments. In any order for maintenance signed after December 31, 2018, maintenance is no longer deductible from income for payer, and recipient no longer claims maintenance received as income. Parties who have an order for maintenance before December 31, 2018, may retain their tax deduction when modifying an order for maintenance after December 31, 2018. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11051(a), (b)(1), 131 Stat. 2054, 2089 (repealing I.R.C. § 71 and I.R.C. § 215) (2017).

1. On orders for maintenance signed before December 31, 2018, payer may deduct maintenance, and recipient must declare it for tax purposes, if maintenance meets IRS definition of alimony and is not excluded under other rules. I.R.C. § 71; I.R.C. § 215.

2. A "fixed" award of family support operates for tax purposes like maintenance. Both the child support and the maintenance components of family support are taxable to the payee. In this way, family support shifts the taxable income from the payer to the payee. *Vlies v. Brookman*, 2005 WI App 158, ¶ 10, 285 Wis. 2d 411; *see* I.R.C. § 215 (maintenance is deductible to the payer and taxable to the recipient).

3. Same tax results can be reached by using a periodic payment (section 71 payment) in lieu of maintenance and child support, *see infra* § 22.70. *Fessler v. Fessler*, 147 Wis. 2d 1 (Ct. App. 1988).

4. Nonmodifiable family support payment provisions in a marital settlement agreement violate public policy because a portion of the payments is child support, and nonmodifiable child support provisions are prohibited by *Ondrasek v. Tenneson*, 158 Wis. 2d 690 (Ct. App. 1990). *Huhn v. Stuckmann*, 2009 WI App 127, ¶ 12, 321 Wis. 2d 169.

   NOTE: A nonmodifiable agreement that set a *minimum* amount of child support for 33 months (the presumptive maximum period under Wis. Stat. § 767.59(1f)(b)2.) was enforceable and not contrary to public policy because the court could modify the amount if subsequent circumstances adversely affected the best interests of the child. *May v. May*, 2012 WI 35, ¶ 45, 339 Wis. 2d 626 (distinguishing *Ondrasek*); *see also infra* § 22.37.

D. Related Rules [§ 22.66]

1. Maintenance is not dischargeable in bankruptcy. 11 U.S.C. § 523(a)(5); *see also* 11 U.S.C. § 101(14A) (defining "domestic support obligation").

2. Increase in maintenance will not be stayed pending appeal unless requisite factors for staying execution of money judgment are met. *Scullion v. Wisconsin Power & Light Co.*, 2000 WI App 120, 237 Wis. 2d 498; *Faust v. Faust*, 178 Wis. 2d 599 (Ct. App. 1993), *overruled on other grounds by State v. Gudenschwager*, 191 Wis. 2d 431 (1995).

VI. CHILD SUPPORT [§ 22.67]

A. Setting Child Support [§ 22.68]

1. Court must order either or both parties to pay an amount reasonable or necessary to support a child. Wis. Stat. § 767.511(1); *Matz v. Matz*, 166 Wis. 2d 326 (Ct. App. 1991).

    a. Order for child support must be expressed as a fixed amount unless parties stipulate to using a percentage of payer's income and requirements of Wis. Stat. § 767.34(2)(am)1.–3. are satisfied. Wis. Stat. § 767.511(1)(a).

    b. Percentage order on unknown future bonus income is another exception to the preferred method of having percentage orders expressed as a fixed sum. *Tierney v. Berger*, 2012 WI App 91, ¶ 33, 343 Wis. 2d 681.

2. As part of support order, court must ensure that parties stipulate as to which party may claim each child dependency exemption for income tax purposes; if the parties cannot agree, the court must decide. Wis. Stat. § 767.511(1)(b); *see also Fowler v. Fowler*, 158 Wis. 2d 508, 526–28 (Ct. App. 1990).

3. Court must assign responsibility for the cost of child's health insurance and other health-care expenses. Wis. Stat. § 767.513.

    a. The National Medical Support Notice is provided by the U.S. Department of Health & Human Services Office of Child Support Enforcement and serves as legal notice that the identified employee is obligated by a court or administrative child support order to provide health care coverage for the child(ren) identified on the Notice. The National Medical Support Notice replaces any Medical Support Notice that the Issuing [Child Support] Agency has previously served with respect to the employee and the children listed on the Notice. U.S. Dep't of Health & Human Servs. Off. of Child Support Enf't, *National Medical Support Notice Forms & Instructions*, https://acf.hhs.gov/css/form/national-medical-support-notice-forms-instructions (published Mar. 5, 2020, last reviewed Feb. 23, 2021).

    b. The Notice has two parts:

        (1) Part A acts as the Notice to Withhold for Health Care Coverage [Form OMB 0970-0222], *National Medical Support Notice – Part A, Notice to Withhold for Health Care Coverage*, https://acf.hhs.gov/sites/default/files/documents/ocse/omb_0970_0222_a.pdf (last visited Apr. 8, 2022).

        (2) Part B acts as the Medical Support Notice to the Plan Administrator [Form OMB 1210-0113], *National Medical Support Notice – Part B, National Support Notice to Plan Administrator*, https://acf.hhs.gov/sites/default/files/documents/ocse/omb_1210_0113_b.pdf (last visited Apr. 8, 2022).

4. Support must be ordered for any child who is less than 18 years old, regardless of educational circumstance, and for any child who is less than 19 years old and is pursuing a high school diploma. Wis. Stat. § 767.511(4).

5. Violation of physical placement rights by custodial parent does not constitute reason for failure to pay support. Wis. Stat. § 767.511(3).

6. Court may set aside portion of child support in separate fund or trust for support, education, and welfare of children. Wis. Stat. § 767.511(2).

   NOTE: Payments to such a fund or trust must be made from child support paid while child is a minor. *Kowalski v. Obst (In re Paternity of Andrew K.)*, 2003 WI App 218, 267 Wis. 2d 400.

7. Liability for support is limited to period after birth of child. Wis. Stat. § 767.511(5).

8. Party may bring action for support or family support independent of any divorce action. Wis. Stat. § 767.001(1)(f), (j).

9. State is real party in interest whenever children receive AFDC or other state aid; when state is real party in interest, child support agency must be served with pleadings. Wis. Stat. §§ 767.205, 767.217; *State v. Halverson*, 162 Wis. 2d 453 (Ct. App. 1991).

10. Every order for child support must provide that payer notify child support agency within 10 days after changing employer or address and of any substantial change in amount of payer's income, including receipt of bonus compensation; payer must also notify payee within 10 days after change of employer or amount of income; when order entered under Wis. Stat. § 767.58(1), parties must provide to child support agency their Social Security numbers, residential and mailing addresses, telephone numbers, operator's license numbers, employer's name, address, and phone number; parties must notify child support agency of any change in information within 10 business days after change. Wis. Stat. § 767.58.

11. Each order for family support must include an order requiring the payee to notify the court and the payer within 10 business days after the payee's remarriage. Wis. Stat. § 767.58(1)(c).

12. Even if divorce is denied, court may still order custody and support. Wis. Stat. § 767.385.

13. In Wisconsin, there is an expectation that primary custodian shares income directly with children. *Cameron v. Cameron*, 209 Wis. 2d 88 (1997).

14. A court may order the primary custodian to pay support to the other parent. *Matz v. Matz*, 166 Wis. 2d 326 (Ct. App. 1991).

15. A parent must pay an annual $35 fee on each of the parent's court cases in which the parent receives $550 or more in yearly support. Wis. Dep't of Child. & Fams., *Fees and Costs for Child Support Services*, https://dcf.wisconsin.gov/cs/fees (last visited Apr. 8, 2022).

16. Child support is based on payer's gross income, which includes all income, whether taxable or not, except public assistance and child support received. Items counted in the gross income calculation include military allowances and veterans' benefits. *Cook v. Cook*, 208 Wis. 2d 166 (1997).

17. A circuit court is authorized to pierce the corporate shield if it is convinced the obligor's intent is to avoid financial obligation arising from the dissolution of the marital relationship. It is for the circuit court to determine whether retained earnings are a business necessity or a pretext to

avoid a marital obligation. Courts are to monitor and control deceptive corporate arrangements that affect financial obligations arising from the dissolution of a marriage. *Evjen v. Evjen*, 171 Wis. 2d 677, 685 (Ct. App. 1992).

18. Trust income reported on a parent's tax return is available for child support regardless of whether that income was distributed. *Stevenson v. Stevenson*, 2009 WI App 29, 316 Wis. 2d 442.

19. Settlement proceeds from a wrongful-termination lawsuit are income for child support purposes. *Lyman v. Lyman*, 2011 WI App 24, ¶¶ 13–17, 331 Wis. 2d 650.

20. Stipulated support agreement that deprives principal custodian of spending discretion concerning children is valid when all needs of children met by former spouse. *Jacquart v. Jacquart*, 183 Wis. 2d 372 (Ct. App. 1994).

21. When determining child support, two factors must be considered when undistributed company earnings are at issue. First, the court must ascertain whether the child support payer has the ability to individually control or access the undistributed earnings. Second, the court must determine whether there is a valid business reason for a company decision to retain the earnings. *Weis v. Weis*, 215 Wis. 2d 135, 141–42 (Ct. App. 1997).

22. Earning capacity, as opposed to actual earnings, may be considered in determination of support. *Sellers v. Sellers*, 201 Wis. 2d 578 (Ct. App. 1996).

23. To conclude in a child support modification action that a parent is *shirking*, a circuit court need only find that the parent's decision to reduce or forgo income is voluntary and unreasonable under the circumstances; it is not necessary for the court to find that the parent deliberately reduced earnings to avoid support obligations or to gain some advantage over the other party. *Chen v. Warner*, 2005 WI 55, 280 Wis. 2d 344.

24. Inability to pay support obligations because of payer's own actions or misconduct leading to loss of employment is contemptuous. *State v. Bauer (In re Contempt in Bauer v. Bauer)*, No. 2012AP885-FT, 2012 WL 3764384 (Wis. Ct. App. Aug. 30, 2012) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

25. When party's intentional conduct precludes precise determination of annual income, income for purposes of child support may be determined based on available information, including lack of records, evidence of substantial assets, and evidence of deliberate manipulation of finances to minimize child support. *Lellman v. Mott*, 204 Wis. 2d 166 (Ct. App. 1996).

26. Incarceration is valid factor for court to consider in arriving at initial determination of child support. *Modrow v. Modrow*, 2001 WI App 200, 247 Wis. 2d 889.

B. Percentage Standards [§ 22.69]

1. A change in the Wisconsin administrative code does not constitute a substantial change of circumstances sufficient to justify a revision of a support or maintenance order under Wis. Stat. § 767.59. Wis. Admin. Code § DCF 150.01(3).

2. Court must determine child support by using percentage standard established by DCF unless court finds by greater weight of credible evidence that percentage standard is unfair to child or to any parties. Wis. Stat. § 767.511(1j), (1m).

   a. Use of statutory standards for determination of child support is discretionary with circuit court. *Molstad v. Molstad*, 193 Wis. 2d 602 (Ct. App. 1995).

   b. Unless unfair to child, court must determine child support by use of the percentage standards. *Cook v. Cook*, 208 Wis. 2d 166 (1997).

3. High-income payers

   a. Percentage guidelines appropriate when father was professional football player whose income was high but likely to substantially decline in future. *Mary L.O. v. Tommy R.B. (In re Paternity of Tukker M.O.)*, 199 Wis. 2d 186 (1996).

   b. DCF has also adopted special formulas for high-income payers and for low-income payers. Wis. Admin. Code § DCF 150.04(4)–(5).

4. DCF has adopted percentage standards for divorcing parties and has special formulas for shared-placement, split-placement, and serial-family situations. Wis. Admin. Code §§ DCF 150.03–.04.

5. Per Wis. Admin. Code § DCF 150.03(1), the percentage of the parent's monthly income available for child support or adjusted monthly income available for child support that constitutes the child support obligation is as follows:

One child	17%
Two children	25%
Three children	29%
Four children	31%
Five or more children	34%

6. Percentage standard applies to all income whether taxable or not, and income may be imputed to nonproductive assets or imputed based on earning capacity. Wis. Admin. Code § DCF 150.02(13), (14), (15).

7. SSI and public assistance not considered income. *Langlois v. Langlois*, 150 Wis. 2d 101 (Ct. App. 1989).

8. Court has discretion to exclude some items (e.g., employer-paid vacations; employer-provided health, disability, and life insurance; reimbursement for business-related auto expenses and uncovered medical expenses) from gross income for purpose of support calculation if they do not enhance payer's net worth or financial means to pay support. *Wall v. Wall*, 215 Wis. 2d 595 (Ct. App. 1997); *Thomas v. Thomas*, No. 99-2154, 2000 WL 1810070 (Wis. Ct. App. Dec. 12, 2000) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

   NOTE: A sick-leave account that has no cash value is not includible in the marital estate, but may be considered in determining child support if the obligor's health insurance premiums are paid through the account. In such a case, the sick-leave account may be considered in determining the obligor's living expenses and ability to pay support. *Preiss v. Preiss*, 2000 WI

App 185, 238 Wis. 2d 368.

9. Rental value of farm partnership home not imputed for support unless payer has authority to manage partnership unilaterally. *Weis v. Weis*, 215 Wis. 2d 135 (Ct. App. 1997).

10. If court determines percentage standard is unfair, court must state its reasons for finding unfairness, its reasons for amount of modification, and basis for modification. Wis. Stat. § 767.511(1n).

11. Under Wis. Stat. § 767.511(1m), if court finds percentage standard unfair, it may modify amount of support determined by standard after considering:

    a. Child's financial resources;

    b. Both parents' financial resources;

    c. Maintenance;

    d. Party's needs to support himself or herself at or above poverty level;

    e. Needs of others whom payer is legally obligated to support;

    f. Standard of living that child would have in absence of divorce, annulment, or legal separation;

    g. Desirability that custodian remain in the house as full-time parent;

    h. Cost of child care;

    i. Award of substantial physical placement to both parents;

    j. Value of custodial services performed by custodian who does not work outside home;

    k. Extraordinary travel expenses incurred for physical placement periods;

    l. Physical, mental, and emotional health needs of child, including cost of medical insurance and uninsured health care;

    m. Child's educational needs;

    n. Tax consequences;

    o. Best interests of child;

    p. Earning capacity of each parent (disparity of parties' income does not automatically trigger deviation from child support percentage standards; disparity in income is but one factor to consider), *Luciani v. Montemurro-Luciani*, 199 Wis. 2d 280 (1996); and

    q. Any other factor court determines to be relevant.

12. Child support payment formula provided for serial-family parent (payer who has existing child support obligation and incurs additional obligation by court order for children from subsequent family or subsequent paternity judgment or acknowledgment). Wis. Admin. Code § DCF 150.04(1).

13. Formula provided for child support for shared-placement payers when both parents have court-ordered periods of placement (overnights or equivalent care) of at least 25% or 92 days per year. Wis. Admin. Code § DCF 150.035.

14. *Equivalent care* is a period of time during which a parent cares for the child that is not overnight, but is determined by court to require the parent to assume the basic support costs that are substantially equivalent to what the parent would spend to care for the child overnight. Blocks of time with the child of at least 6 hours may be considered the equivalent of a half-day if a meal is provided during that time period. Two half-day blocks may be considered the equivalent of an overnight. Wis. Admin. Code § DCF 150.02(10).

15. Variable costs

    a. A court must assign responsibility for the payment of the child's variable costs in proportion to each parent's share of physical placement if the children are in a shared-placement arrangement, with due consideration to disparity in the parents' incomes. Challenge to parent's failure to pay share of variable costs must be made in family court, not through small claims action. *Kreger-Mueller v. Flores*, No. 2015AP2280, 2016 WL 4016068 (Wis. Ct. App. July 28, 2016) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)); Wis. Admin. Code § DCF 150.04(2).

    b. Payee's income is relevant factor to consider in child support issue; amount of child support to be paid to parent under shared-placement provisions of child support guidelines is not influenced by that parent's income. *Luciani*, 191 Wis. 2d at 77; Wis. Admin. Code § DCF 150.04(2).

16. Determination of child support is committed to discretion of family court. *Luciani*, 199 Wis. 2d at 294.

17. Fact that payer has not assumed proportional variable costs in past (i.e., during parties' predivorce period of separation) does not, in itself, mean that payer cannot be considered a shared-placement payer under Wis. Admin. Code § DCF 150.04(2). *Randall v. Randall*, 2000 WI App 98, 235 Wis. 2d 1.

18. The court will determine the payer's child support obligation under Wis. Admin. Code ch. DCF 150 before determining the payer's maintenance obligation under Wis. Stat. § 767.56. Wis. Admin. Code § DCF 150.03(6).

C. Modification [§ 22.70]

1. Court has authority to modify support after final judgment.

2. Court cannot retroactively modify support or arrearages except to correct errors in calculations, but orders entered before August 1, 1987, may be retroactively modified. Wis. Stat. § 767.59(1m); *Schulz v. Ystad*, 155 Wis. 2d 574 (1990); *Woodmansee v. Woodmansee*, 151 Wis. 2d 242 (Ct. App. 1989).

NOTE: An exception to the rule against nonretroactive modification may apply when the trial court makes a judgment to avoid "unnecessary hardship." *See Stevenson v. Stevenson*, 2009 WI App 29, ¶ 35, 316 Wis. 2d 442 (Brown, J., concurring) (citing *Overson v. Overson*, 140 Wis. 2d 752, 759 (Ct. App. 1987)).

3. Substantial change in circumstances

   a. To modify support, a substantial change of circumstances (either payee's or payer's) must be established. Wis. Stat. § 767.59(1f); *Abitz v. Abitz*, 155 Wis. 2d 161 (1990).

   b. The court need not find a substantial change of circumstances to simply change a percentage order for support to a fixed sum of support. Wis. Stat. § 767.59(1f)(d).

   c. Statute establishes rebuttable presumption that specified events constitute a substantial change in circumstances. Substantial change in circumstances may be shown by additional factors. Wis. Stat. § 767.59(1f).

   d. A substantial change in circumstances may be shown when the payer, who did not originally have primary placement, is awarded primary placement of a child. *Jalovec v. Jalovec*, 2007 WI App 206, 305 Wis. 2d 467.

   e. Nonmodifiable agreements that set a minimum, but not maximum, amount of child support for up to 33 months (presumptive maximum period under Wis. Stat. § 767.59(1f)(b)2.) are enforceable and not contrary to public policy because they can be modified by the court if a substantial change in circumstances, unforeseen by parties when the agreement was entered, adversely affects the best interests of the child. *May v. May*, 2012 WI 35, 339 Wis. 2d 626.

   f. In revising support judgment because of alleged change of circumstances, court "shall take into consideration each parent's earning capacity." *Abitz*, 155 Wis. 2d at 173.

   g. Change in administrative regulations alone does not constitute substantial change in circumstances. *Beaupre v. Airriess*, 208 Wis. 2d 238 (Ct. App. 1997); *see also* Wis. Admin. Code § DCF 150.01(3).

   h. Stipulation on income that is incorporated into court order for child support is binding in absence of proof of substantial change in circumstances. *Michael J.M. v. Sheila M.S. (In re Paternity of Hunter A.T.S.)*, No. 01-1005, 2002 WL 1474786 (Wis. Ct. App. Nov. 21, 2001) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

   i. When parties stipulate to child support, change in circumstances necessary to justify modification must be something unforeseen at the time divorce judgment was entered; however, written stipulation on support must give way to best interest of the children. *Kolstad v. Kolstad*, No. 00-2485, 2001 WL 488078 (Wis. Ct. App. May 9, 2001) (unpublished opinion not citable per Wis. Stat. § 809.23(3)); *Krieman v. Goldberg*, 214 Wis. 2d 163 (Ct. App. 1997); *Ondrasek v. Tenneson*, 158 Wis. 2d 690 (Ct. App. 1990).

   j. Parties may stipulate to a limited-duration (33 months is presumptive maximum period under Wis. Stat. § 767.59(1f)(b)2.), nonmodifiable child support floor that is subject to

court modification for unforeseen and substantial change in circumstances when in the best interests of the child. *May v. May*, 2012 WI 35, 339 Wis. 2d 626.

k. If stipulation is serving needs of children and accommodating changes in their circumstances, there is no justification to modify support. *Zutz v. Zutz*, 208 Wis. 2d 338 (Ct. App. 1997); *Jacquart v. Jacquart*, 183 Wis. 2d 372 (Ct. App. 1994).

4. Earning capacity

a. Support may be ordered based on payee's earning capacity rather than actual earnings. *Roberts v. Roberts*, 173 Wis. 2d 406 (Ct. App. 1992).

b. Actual earnings rather than earning capacity is used to determine child support when decision to forgo full-time employment is reasonable. *Brecke v. Bielen*, No. 2011AP2289, 2012 WL 695075, at *3–5 (Wis. Ct. App. Mar. 6, 2012) (unpublished opinion not citable per Wis. Stat. § 809.23(3)) (distinguishing *Roberts*).

c. Support may be based on earning capacity if change of jobs was unreasonable or voluntary. *Smith v. Smith*, 177 Wis. 2d 128 (Ct. App. 1993); *see Flath v. Flath*, No. 2008AP51, 2009 WL 80246 (Wis. Ct. App. Jan. 14, 2009) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

d. To conclude that a parent is "shirking," a circuit court need not find that a former spouse deliberately reduced earnings to avoid support obligations or to gain some advantage over the other party but only that a party's employment decision to reduce or forgo income is voluntary and unreasonable under the circumstances. *Chen v. Warner*, 2005 WI 55, 280 Wis. 2d 344.

e. Inability to pay support obligations because of payer's own actions or misconduct leading to loss of employment is contemptuous. *State v. Bauer (In re Contempt in Bauer v. Bauer)*, No. 2012AP885-FT, 2012 WL 3764384 (Wis. Ct. App. Aug. 30, 2012) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

5. Serial-family parent guidelines may be used to modify support only when subsequent support obligation is incurred as result of court order and only for support order for children from subsequent family or subsequent paternity judgment or acknowledgment. *Brown v. Brown*, 177 Wis. 2d 512 (Ct. App. 1993); Wis. Admin. Code § DCF 150.04(1).

6. Percentage standard

a. Court need not apply percentage standard if it suspects that recipient spouse's request for modified child support is a disguised claim for maintenance to support recipient's lifestyle of not working outside the home, and if such a lifestyle was not planned at the time of parties' original marital agreement that set child support below percentage standard. *Nelsen v. Candee*, 205 Wis. 2d 632 (Ct. App. 1996).

b. Court is not obligated to apply percentage guidelines when it chooses not to modify support. *Jacquart*, 183 Wis. 2d 372.

7. Father's quitting work to go back to school was change in circumstances; mother's income to be considered on motion to modify. *Kelly v. Hougham*, 178 Wis. 2d 546 (Ct. App. 1993).

8. Incarceration

   a. Incarceration of payee is change in circumstances that justifies reducing support in some circumstances. *Voecks v. Voecks*, 171 Wis. 2d 184 (Ct. App. 1992); *see also Parker v. Parker*, 152 Wis. 2d 1 (Ct. App. 1989).

   b. Incarceration, by itself, neither mandates nor prevents modification of support. *Rottscheit v. Dumler*, 2003 WI 62, 262 Wis. 2d 292.

9. Percentage standards are mandatory on modification unless court finds they are unfair. Wis. Stat. § 767.59(2).

10. Subsequent remarriage

    a. If percentage standard is used, that percentage does not apply to marital property share of new spouse's income; support obligation may be satisfied only from parent's income, but income of new spouse may be considered. *Abitz*, 155 Wis. 2d 161.

    b. Successor spouse's income in family business is not subject to percentage standard. *Miller v. Miller*, 171 Wis. 2d 131 (Ct. App. 1993).

    c. Salaries paid to successor spouse from closely held corporation above previous amounts paid to others may be subject to percentage standards. *Evjen v. Evjen*, 171 Wis. 2d 677 (Ct. App. 1992).

    d. Wages paid by father to current wife not part of father's gross income without showing of misconduct or asset burying. *Steven J.S. v. Steven M.S. (In re Paternity of Steven J.S.)*, 183 Wis. 2d 347 (Ct. App. 1994).

11. Allocation of child's health-care expenses is modifiable. *Kuchenbecker v. Schultz*, 151 Wis. 2d 868 (Ct. App. 1989).

12. Order for fixed sum of child support may provide for adjusting amount based on payer's income; this adjustment cannot occur more than once a year. Wis. Stat. § 767.553(1)(a), (b).

    NOTE: Nothing in Wis. Stat. § 767.553 affects a party's right to file at any time a motion, petition, or order to show cause under Wis. Stat. § 767.59 for revision of a judgment or order with respect to an amount of child or family support. Wis. Stat. § 767.553(5).

13. Parties' agreement making a child support ceiling nonmodifiable is against public policy and will not be enforced. *Ondrasek v. Tenneson*, 158 Wis. 2d 690 (Ct. App. 1990).

    NOTE: Parties' agreement setting minimum amount of child support for 33 months (presumptive maximum duration under Wis. Stat. § 767.59(1f)(b)2.) is enforceable but can be modified when in best interests of the child. *May v. May*, 2012 WI 35, 339 Wis. 2d 626 (distinguishing *Ondrasek*, 158 Wis. 2d 690).

14. A stipulation that sets a *floor* on child support is not against public policy because it ensures that a certain amount of money is received, which is in the child's best interest. *Frisch v. Henrichs*, 2007 WI 102, ¶ 74 n.23, 304 Wis. 2d 1.

15. Court will enforce agreement to maintain support level even if payer's income decreases, but only if agreement has time-limiting language to permit modification in future. *Krieman*, 214 Wis. 2d 163; *Honore v. Honore*, 149 Wis. 2d 512 (Ct. App. 1989).

16. Equitable credit may be available when parent has paid child's costs directly. *Rummel v. Karlin*, 167 Wis. 2d 400 (Ct. App. 1992).

17. Two-tier approach to child support order whereby full-time student ordered to pay $40 per week child support, but required to pay only $12 per week to avoid being held in contempt, the remaining $28 accruing as arrearages, held within circuit court's discretion. *State v. T.J.W. (In re Paternity of R.L.M.)*, 143 Wis. 2d 849 (Ct. App. 1988).

18. Depreciation may be deducted before support determination. *Steven J.S.*, 183 Wis. 2d 347.

19. Court cannot defeat state's right to reimbursement for AFDC by manipulating support payments. *Luna v. Luna*, 183 Wis. 2d 20 (Ct. App. 1994).

20. Party's short lapse in exercising placement or visitation, standing alone, does not constitute a change in circumstances necessary to modify child support; evidence must be presented regarding the financial consequences of the party's failure to exercise placement or visitation. *Beaudoin v. Beaudoin*, 2001 WI App 42, 241 Wis. 2d 350; *Peters v. Peters*, 145 Wis. 2d 490 (Ct. App. 1988).

21. Failure to exercise placement and visitation may constitute a substantial change in circumstances necessary to modify child support where the failure is more than a short lapse and the resources expended caring for the children increase. *Maasch v. Anderson*, 2018 WI App 39, ¶¶ 17–19, 382 Wis. 2d 831.

D. Nonpayment of Support [§ 22.71]

1. Per Wis. Stat. § 767.501, in any action to compel support, amount must be expressed as fixed sum rather than as percentage of payer's income unless parties have stipulated to use percentage of payer's income and the following requirements under Wis. Stat. § 767.34(2)(am)1.–3. are satisfied:

   a. State is not real party in interest in action under any circumstances specified in Wis. Stat. § 767.205(2)(a).

   b. Payer is not subject to any other order, in any other action, for payment of child or family support or maintenance.

   c. All payment obligations included in the order, other than annual receiving and disbursing fee under Wis. Stat. § 767.57(1e)(a), are expressed as percentage of payer's income.

      NOTE: Order for child support, temporary or otherwise, must be expressed as fixed sum rather than as percentage of payer's income unless parties have stipulated to use percentage of payer's income and requirements under Wis. Stat. § 767.34(2)(am)1.–3. are satisfied. Wis. Stat. §§ 767.225(1)(c), 767.511(1)(a).

2. As security for collection of support, court may require party to give security for payment or may impose charge upon specific parcel of real estate. Wis. Stat. § 767.77(2).

3. If party fails to pay support, court may enforce order as if it were final judgment; appropriate remedies include but are not limited to execution, contempt, money judgment, attachment, and garnishment; *see infra* §§ 22.44, .45. Wis. Stat. § 767.77(3).

   NOTE: The U.S. Department of Health & Human Services Office of Child Support Enforcement provides forms and instructions on how to process Income Withholdings for Support (IWO) to employers, https://www.acf.hhs.gov/css/resource/income-withholding-for-support-form (last visited Apr. 8, 2022). Child support can be withheld from wages, salaries, commissions, bonuses, workers' compensation, disability, pensions, retirement, and other types of payments. Employers must honor IWOs before other garnishments, except an IRS tax levy entered before the underlying child support order.

4. Person who continuously fails to pay court-ordered child support may be charged with one count of felony nonsupport for each 120-day term even if failures occurred over continuous period. Wis. Stat. § 948.22(2); *State v. Grayson*, 172 Wis. 2d 156 (1992).

5. Arrearages wage assignment cannot exceed 50% of amount of support due under support order. Wis. Stat. § 767.75(1f); *Schnetzer v. Schnetzer*, 174 Wis. 2d 458 (Ct. App. 1993), *overruled on other grounds by Luciani v. Montemurro-Luciani*, 199 Wis. 2d 280 (1996).

6. Court may appoint trustee to collect, invest, and pay over support as court directs. Wis. Stat. § 767.57(5).

7. Court-ordered life insurance beneficiary designation will be enforced by constructive trust. *Duhame v. Duhame*, 154 Wis. 2d 258 (Ct. App. 1989).

8. Order for support constitutes assignment of income that takes effect immediately; assignment covers all income, including lottery winnings payable in installments. Wis. Stat. § 767.75(1f).

   a. If obligation to pay child support, maintenance, or family support terminates, but obligor has arrearage in the payment of any one of these obligations, or the payment of the annual receiving and disbursing fee, then assignment of income will continue in effect until arrearage is paid in full. Wis. Stat. § 767.75(1m).

   b. Obligation to pay unpaid fees under Wis. Stat. § 767.57(1e)(b) constitutes an assignment of income, benefits, etc. Wis. Stat. § 767.75(2m).

9. DCF must collect annual fee of $65 for receiving and disbursing maintenance, child support, or family support payments, including arrears in any of these payments. Wis. Stat. § 767.57(1e)(a).

10. Past-due support bears interest at 0.5% per month. Wis. Stat. § 767.511(6), (6m); Wis. Dep't of Child. & Fams., *Collecting Past-Due Child Support*, https://dcf.wisconsin.gov/cs/enforce/collect (last visited Apr. 8, 2022).

11. Circuit court may impose trust funded by child support arrearages upon finding that such trust is necessary for child's best interest. *Cameron v. Cameron*, 197 Wis. 2d 618 (Ct. App. 1995), *rev'd on other grounds*, 209 Wis. 2d 88 (1997).

12. Child support obligations are not dischargeable in bankruptcy. 11 U.S.C. § 523(a)(5); *see also* 11 U.S.C. § 101(14A).

13. Although the equitable estoppel doctrine did not apply to prevent spouse from denying support responsibility for stepchild in *Ulrich v. Cornell*, the court stated that the doctrine may apply in some stepchild-support cases. *Ulrich v. Cornell*, 168 Wis. 2d 792 (1992).

14. Equitable estoppel may not apply to nonjudicial agreement concerning support; retroactive application of Wis. Stat. § 767.59(1m) and (1r) does not violate a payer's right to due process. *Barbara B. v. Dorian H. (In re Paternity of John R.D.)*, 2005 WI 6, 277 Wis. 2d 378.

15. In contempt sanctions against a party for nonpayment of support, the court must provide means for nonpayer to purge self of contempt. *Diane K.J. v. James L.J. (In re Paternity of Cy C.J.)*, 196 Wis. 2d 964 (Ct. App. 1995).

16. In specific, limited circumstances, court has authority to grant credit for payments not made in accordance with Wis. Stat. § 767.57 or 767.75. Wis. Stat. § 767.59(1r).

    NOTE: The general rule, however, is that a parent ordered to pay child support is not entitled to credit for voluntary expenditures for the child not made in the manner specifically ordered. *See Hirschfield v. Hirschfield*, 118 Wis. 2d 468, 470–71 (Ct. App. 1984).

17. Based on public policy, constitutional, and equitable grounds, Wis. Stat. § 767.59, which allows for credit in unpaid support, does not bar credit in a case in which the child support payer has made all the required support payments. A child support payer is entitled to credit against a child support obligation for the amount of Social Security disability benefits the child receives on the payer's earning record and disability. *Paulhe v. Riley*, 2006 WI App 171, 295 Wis. 2d 541.

18. When placement in a residential treatment facility was based on mental illness and not for educational purposes under Individuals with Disabilities Education Act (IDEA), IDEA did not relieve father's child support obligation from CHIPS order. *Calumet Cnty. Dep't of Hum. Servs. v. Randall H.*, 2002 WI 126, 257 Wis. 2d 57.

19. Action to collect child or family support owed under a judgment or order must be commenced within 20 years after the youngest child for whom support was ordered under judgment or order reaches 18, or 19 if enrolled full-time in high school or equivalent. Wis. Stat. § 893.415(2).

20. Child support can be awarded retroactively, after the parties' children have become adults, if it is replacement income for the time when the child support obligations were in force. *Lyman v. Lyman*, 2011 WI App 24, ¶ 26, 331 Wis. 2d 650.

E. Related Rules [§ 22.72]

1. Moneys received as AFDC and child support are excluded from DCF definition of gross income adjusted for child support. *Thibadeau v. Thibadeau*, 150 Wis. 2d 109 (Ct. App. 1989).

2. Income earned while receiving AFDC may be included in DCF definition of gross income adjusted for child support. *State v. Rose (In re B.)*, 171 Wis. 2d 617 (Ct. App. 1992).

3. Child support is neither taxable income for recipient nor deductible expense for payer. I.R.C. § 71(c); I.R.C. § 215 (repealed 2017, *see supra* § 22.32).

4. If overpayment of child support is received, the recipient may hold an amount not to exceed the next month's support payment if one of the conditions in Wis. Stat. § 767.57(1m)(a)–(d) applies. Wis. Stat. § 767.57(1m).

VII. ATTORNEY FEES AND COSTS [§ 22.73]

A. Shifting Fees [§ 22.74]

1. Court may order either party to pay reasonable amount for other party's costs and attorney fees. Wis. Stat. § 767.241(1)(a).

2. Order may provide for payment direct to attorney, state, or county, all of which may enforce payment in their own names. Wis. Stat. § 767.241(3).

3. If a GAL is appointed, court must approve "reasonable" fee and direct either or both parties to pay fee. Wis. Stat. § 767.407(6).

4. Under *Johnson v. Johnson*, 199 Wis. 2d 367 (Ct. App. 1996) and *Holbrook v. Holbrook*, 103 Wis. 2d 327 (Ct. App. 1981), before awarding attorney fees, court must determine

   a. Recipient has a need,

   b. Payer has ability to pay, and

   c. Fees are reasonable.

5. Court need not award fees if spouse's current financial situation is a result of conscious decision not to seek employment or if spouse retained attorney out of desire to litigate instead of striving for compromise. *Nelsen v. Candee*, 205 Wis. 2d 632 (Ct. App. 1996).

6. Overtrial

   a. Court may award punitive attorney fees to innocent victim of overtrial by opponent. *Ondrasek v. Ondrasek*, 126 Wis. 2d 469 (Ct. App. 1985).

   b. Overtrial of case may be considered in award of attorney fees. *Johnson*, 199 Wis. 2d 367.

   c. Circuit court has authority to award a reasonable contribution toward appellate attorney fees when other party continues to engage in overtrial. *In re Att'ys Fees in Yu v. Zhang*, 2001 WI App 267, 248 Wis. 2d 913.

7. Court may impose costs against attorney as sanction for irresponsible arguments. *Fowler v. Fowler*, 158 Wis. 2d 508 (Ct. App. 1990).

8. Circuit court has authority to enter judgment awarding fees in favor of client's former counsel and against client. *Kohl v. Ross & Stevens (In re Att'ys Fees in Kohl v. Zeitlin)*, 2005 WI App 196, 287 Wis. 2d 289.

B. Related Rules [§ 22.75]

1. Court-ordered contribution to attorney fees is not dischargeable in bankruptcy if it is in nature of maintenance. 11 U.S.C. § 523(a)(5); *see also* 11 U.S.C. § 101(14A).

2. General rules and procedures for civil appeal apply to appeals in divorce cases. Wis. Stat. chs. 808, 809.

3. Action to recover attorney fees is within plenary jurisdiction of circuit court, and all circuit courts may hear these actions. *Kotecki & Radtke, S.C. v. Johnson*, 192 Wis. 2d 429 (Ct. App. 1995).

VIII. ENFORCEMENT OF ORDERS AND JUDGMENTS [§ 22.76]

A. Court Orders [§ 22.77]

See Wis. Stat. § 767.77.

1. Court may order payments at specific times in specific amounts. Wis. Stat. § 767.77(1m).

2. Court may order payment of child support or maintenance by income assignment. Wis. Stat. § 767.75.

3. Court may impose lien on real estate. Wis. Stat. § 767.77(2).

4. Per Wis. Stat. § 767.77(3), court may enforce past-due amounts as if enforcing final judgment by appropriate remedies, including but not limited to

   a. Execution;

   b. Contempt;

   c. Money judgment;

   d. Attachment;

   e. Garnishment; and

   f. Satisfaction out of proceeds of sale of any ship, boat, or vessel attached and sold under Wis. Stat. ch. 780 (for failure to pay child support or family support).

B. Contempt Proceedings [§ 22.78]

See Wis. Stat. § 767.78.

1. Court may on its own initiative, and must on application of receiving party, issue order for delinquent party to show cause why delinquent party should not be punished for contempt as provided in Wis. Stat. ch. 785.

2. Remedial contempt distinguished from punitive contempt. *State v. G.S.*, 156 Wis. 2d 338 (Ct. App. 1990).

3. The court may impose a remedial sanction for the purpose of terminating a continuing contempt of court but cannot impose a punitive sanction. Wis. Stat. §§ 785.01(3), 785.04(1)(a); *Kearns v. Kearns*, No. 2016AP1407, 2017 WL 1113328 (Wis. Ct. App. Mar. 22, 2017) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)); *Calo v. Calo*, No. 2014AP2267, 2015 WL 2214646, at *1, *2 (Wis. Ct. App. May 13, 2015) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

4. U.S. Supreme Court has addressed the right to counsel in civil contempt proceedings. *Turner v. Rogers*, 564 U.S. 431 (2011).

IX. OTHER ACTIONS AFFECTING THE FAMILY [§ 22.79]

A. Annulment [§ 22.80]

See Wis. Stat. § 767.313.

1. Marriage may be annulled under the following circumstances:

   a. A party lacked capacity to consent to marriage, Wis. Stat. § 767.313(1)(a);

   b. Marriage was induced by force, duress, or fraud, *id.*;

   c. A party lacks physical capacity to consummate marriage, and this was unknown to other party at time of marriage, Wis. Stat. § 767.313(1)(b);

   d. A party was under 16 at time of marriage, or was 16 or 17 and lacked parental consent, Wis. Stat. § 767.313(1)(c); or

   e. Marriage is prohibited by the laws of Wisconsin, Wis. Stat. § 767.313(1)(d).

2. No marriage may be annulled after the death of a party to the marriage. Wis. Stat. § 767.313(2).

B. Void Marriages [§ 22.81]

1. All marriages contracted in violation of Wis. Stat. §§ 765.02, 765.03, 765.04, and 765.16 will be void unless void because of immaterial irregularities under Wis. Stat. §§ 765.22 and 765.23. Wis. Stat. § 765.21.

2. The court upheld *Ellis v. Estate of Toutant (In re Est. of Toutant)*, 2001 WI App 181, 247 Wis. 2d 400, in finding a distinction between an annulment and a declaration that a marriage was void and in concluding that the court has the authority to declare a marriage void after the death of one of the parties. *McLeod v. Mudlaff (In re Est. of Laubenheimer)*, 2013 WI 76, 350 Wis. 2d 182; *see* Wis. Stat. § 806.04.

C. Legal Separation [§ 22.82]

1. Legal separation is identical to divorce except that parties cannot remarry.

2. Ground for legal separation is that marriage is broken (not irretrievably). Wis. Stat. § 767.35(1)(b)2.

3. Judgment of legal separation must be converted to divorce after not less than one year if either party requests. Wis. Stat. § 767.35(5); *Bartz v. Bartz*, 153 Wis. 2d 756 (Ct. App. 1989).

4. If a party requests legal separation, court must grant legal separation unless the other party requests a divorce; then the court must decide which to grant. Wis. Stat. § 767.35(2).

D. Abandonment [§ 22.83]

Burden of proof in termination of parental rights (TPR) hearing shifts once abandonment of child has been established, and it is the parent's duty to show by preponderance of evidence that disassociation from or relinquishment of responsibility for well-being of child has not occurred. *Odd S.-G. v. Carolyn S.-G. (In re Int. of Kyle S.-G.)*, 194 Wis. 2d 365 (1995).

E. Paternity [§ 22.84]

1. Paternity action may be brought by child; mother; presumed or alleged father; personal representative of estate of child, mother, or presumed or alleged father; custodian; state; GAL; or, under some circumstances, parent of mother, alleged father, or presumed father. Wis. Stat. § 767.80(1); *Shannon E.T. v. Alicia M.V.M. (In re Paternity of C.A.V.M.)*, 2006 WI App 104, 294 Wis. 2d 531, *aff'd*, 2007 WI 29, 299 Wis. 2d 601.

2. Wis. Stat. § 767.80(1) does not permit a man alleging he is the father to bring a paternity action for the sole purpose of establishing paternity of a stillborn child so that he may bring a wrongful death action. *Shannon E.T.*, 2006 WI App 104, 294 Wis. 2d 531, *aff'd*, 2007 WI 29, 299 Wis. 2d 601.

3. All paternity proceedings are stayed until birth of child, but exceptions exist for service of process, service and filing of pleadings, first appearance, and taking of depositions to preserve testimony. Wis. Stat. § 767.80(3).

4. Form of summons provided in statute. Wis. Stat. § 767.813.

5. Best interests of child may deter court from determining biological paternity, even if parties agree to genetic testing. *W.W.W. v. M.C.S. (In re Paternity of C.A.S.)*, 161 Wis. 2d 1015 (1991); *Stuart S. v. Heidi R. (In re Paternity of A.R.R.)*, 2015 WI App 19, ¶¶ 37–39, 360 Wis. 2d 388; *Randy A.J. v. Norma I.J.*, 2002 WI App 307, 259 Wis. 2d 120, *aff'd*, 2004 WI 41, 270 Wis. 2d 384.

6. Paternity action must be brought within 19 years after child's birth. Wis. Stat. § 893.88; *James A.O. v. George C.B. (In re Paternity of James A.O.)*, 182 Wis. 2d 166 (Ct. App. 1994).

   NOTE: Paternity action not barred by statutory time limit (then 5 years, now within 19 years

after child's birth) if alleged father conducted himself fraudulently during the limitation period, causing the petitioner to rely on his assertions and actions that he would continue to support the child as father, and "[a]fter the inducement for delay has ceased to operate," the plaintiff has not unreasonably delayed bringing the action. *State ex rel. Susedik v. Knutson*, 52 Wis. 2d 593 (1971).

7. Father of child conceived as result of sexual assault may object to termination of his parental rights pursuant to Wis. Stat. § 48.427(1). *Ann M.M. v. Rob S. (In re TPR to SueAnn A.M.)*, 176 Wis. 2d 673 (1993).

8. By bringing paternity action in Wisconsin, putative father may collaterally attack divorce decree from another state that statutorily presumes paternity. *R.D.P. v. R.L.B. (In re Paternity of C.L.L.)*, 176 Wis. 2d 224 (Ct. App. 1993).

9. Divorce judgment bars collateral attack on paternity by father who was a party to the original divorce judgment. *Max T. v. Carol O. (In re Paternity of Nathan T.)*, 174 Wis. 2d 352 (Ct. App. 1993).

   NOTE: Father could not void voluntary acknowledgment of paternity based on fraud or mistake when he knew at time of acknowledgment that he was not the father. *Daniel T.W. v. Joni K.W.*, 2009 WI App 13, 315 Wis. 2d 181.

10. Children's Code (Wis. Stat. ch. 48) is exclusive source of discovery rights in action to terminate parental rights. *State v. Tammy F. (In the Int. of Zachary F.)*, 196 Wis. 2d 981 (Ct. App. 1995); *see also State v. Bausch*, 2014 WI App 12, ¶ 14 n.4, 352 Wis. 2d 500.

11. Summary judgment is erroneous against putative father in paternity action without evidence of conceptive period and of intercourse during conceptive period, regardless of blood-test results. *State v. Randy J.G. (In re Paternity of Taylor R.T.)*, 199 Wis. 2d 500 (Ct. App. 1996).

12. Voluntary termination of father's parental rights contingent on father making lump-sum payment of child support arrearages was not in child's best interest without compelling evidence that father had negative impact on child. *Gerald O. v. Cindy R. (In re TPR of Michael I.O.)*, 203 Wis. 2d 148 (Ct. App. 1996).

13. Factors of abandonment and failure to pay child support not sufficient to make voluntary termination in child's best interest. *Gerald O.*, 203 Wis. 2d 148.

14. A father once acquitted of a paternity charge by state on behalf of mother can be subject to separate action brought against him by the child. Wis. Stat. § 767.80(1)(a), (5); *Mayonia M.M. v. Keith N. (In re Paternity of Mayonia M.M.)*, 202 Wis. 2d 460 (Ct. App. 1996).

15. A father is responsible for a child's support for all years following the child's birth, whether or not the father knew of the child's birth. However, under Wis. Stat. § 767.89(4), a court can deviate from the percentage standards when establishing both back and future support if, after considering the factors set forth in Wis. Stat. § 767.89(4), the court finds by the greater weight of the credible evidence that use of the percentage standards is unfair to either the child or the requesting party. *State v. Patrick G.B. (In re Paternity of Brenton T.C.)*, 2001 WI App 85, 242 Wis. 2d 550.

16. Equitable father may be awarded custody of minor child over biological father. *Randy A.J.*, 2002 WI App 307, 259 Wis. 2d 120, *aff'd*, 2004 WI 41, 270 Wis. 2d 384.

17. Doctrine of equitable estoppel did not bar paternity action against biological father of child born when mother was married to another man, even though mother and husband held themselves out as the child's biological parents for a time so as to induce father's reliance on escaping financial obligation to support the child. *Hendrick v. Hendrick*, 2009 WI App 33, 316 Wis. 2d 479.

X. DOMESTIC ABUSE [§ 22.85]

A. Definitions [§ 22.86]

See Wis. Stat. §§ 813.12, 813.122(1)(a)–(b).

1. The definition of *domestic abuse* has a relationship requirement and an action requirement. Both must be met to label a given situation domestic abuse.

   a. The following relationships qualify:

      (1) An adult family member or household member against another adult family member or household member;

      (2) An adult caregiver against an adult who is under the caregiver's care;

      (3) An adult against former spouse;

      (4) An adult against an adult with whom the individual has or had a dating relationship; and

      (5) An adult against an adult with whom the person has a child in common.

   b. The following actions qualify:

      (1) Intentional infliction of physical pain, physical injury, or illness;

      (2) Intentional impairment of physical condition;

      (3) Violation of Wis. Stat. § 940.255(1), (2), or (3) (sexual assault);

      (4) Violation of Wis. Stat. § 943.01 (damage to property), involving property that belongs to the individual; and

      (5) Threat to engage in conduct described in paras. (1), (2), (3), or (4), *supra*.

2. *Family member* means spouse, parent, child, or person related by blood or adoption to another person.

   NOTE: Stepchild also has protection under Wis. Stat. § 813.12. *Johnson v. Miller*, 157 Wis. 2d 482 (Ct. App. 1990).

B. Commencement of Action [§ 22.87]

See Wis. Stat. § 813.12(2).

1. Action is commenced by the filing of a petition.

   NOTE: No action for domestic abuse may be commenced by summons and complaint.

2. Petition may be filed in conjunction with action affecting family, but underlying action is not required.

3. Respondent may reply to petition either in writing or orally at injunction hearing.

4. Statutory requirements affect the content of the petition. Wis. Stat. § 813.12(5).

C. Two-Part Procedure [§ 22.88]

See Wis. Stat. § 813.12(2m).

1. First, determine whether to issue temporary restraining order.

2. Second, schedule hearing to determine whether to issue an injunction, which is final relief.

D. Other Actions [§ 22.89]

Victim of domestic abuse may maintain separate action for damages for tort of domestic abuse. *Stuart v. Stuart*, 143 Wis. 2d 347 (1988).

E. Temporary Restraining Order (TRO) [§ 22.90]

1. Per Wis. Stat. § 813.12(3)(a), judge or circuit court commissioner must issue TRO directing respondent to avoid petitioner's residence, to avoid contacting petitioner, or to refrain from removing, hiding, damaging, harming, mistreating, or disposing of a household pet, if

   a. There is proper petition, and

   b. There is finding of reasonable grounds to believe that respondent has engaged in or may engage in domestic abuse of petitioner.

2. TRO may be issued without notice to respondent. Wis. Stat. § 813.12(3)(b).

3. The court may extend the time for an injunction hearing after issuance of a TRO (a) with written consent of the parties; (b) in cases involving judicial substitution under Wis. Stat. § 801.58(2m); or (c) once upon finding that respondent was not served with a copy of the TRO even though petitioner has exercised due diligence. The court cannot extend a TRO in lieu of ruling on the issuance of the injunction. Wis. Stat. §§ 813.12(3)(c), 813.122(4)(c).

4. If respondent owns premises where petitioner resides, court may order respondent to avoid premises for reasonable time to give petitioner time to relocate. Wis. Stat. § 813.12(3)(am).

F. Injunction [§ 22.91]

See Wis. Stat. § 813.12(4).

1. Under Wis. Stat. §§ 813.12, 813.122, and 813.125, judge or circuit court commissioner may grant injunction ordering respondent to avoid petitioner's residence, avoid contacting petitioner, and, if relevant, to refrain from removing, hiding, damaging, harming, mistreating, or disposing of a household pet, if all the following occur:

   a. Proper petition is filed;

   b. Notice of hearing is served on respondent; and

   c. After hearing, court finds reasonable grounds to believe that respondent has engaged in or may engage in domestic abuse, abuse of a child, or harassment.

2. The petitioner must supply the petitioner's address to the clerk of circuit court, who must maintain the address in confidence. Wis. Stat. §§ 786.37(4), 813.12(5m); *see also* Wis. Stat. § 813.122(5g).

3. Injunction is effective for period of time petitioner requests, not to exceed four years, except as provided in Wis. Stat. § 813.12(4)(d). Wis. Stat. § 813.12(4)(c)1.; *Hayen v. Hayen*, 2000 WI App 29, 232 Wis. 2d 447; *Laluzerne v. Stange*, 200 Wis. 2d 179 (Ct. App. 1996).

4. Under Wis. Stat. § 813.12(4)(d)1.(intro.), a judge or circuit court commissioner may, upon issuing an injunction or granting an extension of an injunction issued under this subsection, order that the injunction is in effect for not more than 10 years, if the court finds, by a preponderance of the evidence stated on the record, that any of the following is true:

   a. There is a substantial risk that the respondent may commit first-degree intentional homicide under Wis. Stat. § 940.01 or second-degree intentional homicide under Wis. Stat. § 940.05 against the petitioner, Wis. Stat. § 813.12(4)(d)1.a.; or

   b. There is a substantial risk that the respondent may commit sexual assault under Wis. Stat. § 940.225(1), (2), or (3) or 948.02(1) or (2) against the petitioner, Wis. Stat. § 813.12(4)(d)1.b.

5. When injunction granted expires, court must extend injunction if petitioner states that extension is necessary for protection; extension may remain in effect for four years after court first entered injunction, except as provided in Wis. Stat. § 813.12(4)(d), *see* para. 4., *supra*. Wis. Stat. § 813.12(4)(c)2.

6. If a court issues a domestic abuse injunction, the court must prohibit the respondent's firearm possession for the length of the injunction unless the respondent is a peace officer who must possess a firearm as a condition of employment. Wis. Stat. §§ 813.12(4m), 813.1285.

7. If respondent owns premises where petitioner resides, court may order respondent to avoid premises for reasonable time to allow petitioner to relocate. Wis. Stat. § 813.12(4)(am).

G. Enforcement Assistance [§ 22.92]

Court must order sheriff to assist petitioner in executing or serving TRO or injunction. Wis. Stat. § 813.12(6); *Hayen v. Hayen*, 2000 WI App 29, 232 Wis. 2d 447.

H. Criminal Penalties [§ 22.93]

1. Law provides for criminal arrest, fine, or imprisonment for violating TRO or injunction. Wis. Stat. § 813.12(7), (8).

2. Whoever violates an injunction or TRO under Wis. Stat. § 813.125(7) will be fined not more than $10,000, imprisoned not more than 9 months, or both. Wis. Stat. § 813.125(7).

3. If person knowingly violates a temporary restraining order under Wis. Stat. § 813.12 or 813.125, in addition to other penalties provided in those sections, the court may report the violation to the Department of Corrections immediately upon conviction and may order global positioning system tracking under Wis. Stat. § 301.49. Wis. Stat. § 813.129.

I. Harassment [§ 22.94]

Court may enjoin harassment under Wis. Stat. § 813.125 even if harassment does not meet Wis. Stat. § 813.12's definition of domestic abuse; injunction may include an order to avoid contacting the petitioner without the petitioner's written consent; to avoid the harassment of another person; to avoid that person's residence or any premises temporarily occupied by the person; to refrain from removing, hiding, damaging, harming, mistreating, or disposing of a household pet; to allow the petitioner or a family member or household member of the petitioner acting on petitioner's behalf to retrieve a household pet; or any combination of these remedies. Wis. Stat. § 813.125.

XI. BANKRUPTCY [§ 22.95]

A. United States Bankruptcy Code [§ 22.96]

1. Bankruptcy Code's definition of a *domestic support obligation* includes obligations for child support and maintenance. 11 U.S.C. § 101(14A).

2. Domestic support obligations are not dischargeable under 11 U.S.C. ch. 7. 11 U.S.C. § 523(a)(5).

3. Debts to a former spouse that are not included in the definition of domestic support obligations (apparently including property division obligations) are not dischargeable under 11 U.S.C. ch. 7. 11 U.S.C. § 523(a)(15).

4. Property division obligations, but not domestic support obligations, may be discharged under 11 U.S.C. ch. 13. 11 U.S.C. § 1328.

B. Effect of Community Property [§ 22.97]

If any community property could be liable for child support debt under state law, and such community property would also be property of estate, that creditor has community claim. 11 U.S.C.

§ 501(a); *In re Pfalzgraf*, 236 B.R. 390, 391 (E.D. Wis. 1999).

XII. TAX CONSEQUENCES [§ 22.98]

A. In General [§ 22.99]

Statutes require consideration of tax consequences of the following:

1. Property division. Wis. Stat. § 767.61(3)(k).

   a. Court should consider only tax consequences caused by its rulings and any proposed divisions of property and should not speculate about future taxes or the tax consequences of hypothetical or theoretical dispositions of marital property. *Ondrasek v. Ondrasek*, 126 Wis. 2d 469, 480 (Ct. App. 1985).

   b. Court may use *reasonable speculation* to assess future capital gains tax. *Liddle v. Liddle*, 140 Wis. 2d 132 (Ct. App. 1987).

2. Child support. Wis. Stat. § 767.511(1m)(h).

3. Maintenance. Wis. Stat. § 767.56(1c)(g).

B. Property Division [§ 22.100]

1. Before July 18, 1984, transfers of property incident to divorce were taxable events resulting in recognition of gain or loss. *See United States v. Davis*, 370 U.S. 65 (1962).

2. Transfers after July 18, 1984, do not trigger recognition of gain or loss but are treated as gifts under Tax Reform Act of 1984. I.R.C. § 1041.

3. Parties elect I.R.C. § 1041 treatment for some special situations. I.R.C. § 1041.

C. Child Support [§ 22.101]

1. Child support is not deductible by payer and not taxable to recipient. I.R.C. § 71(c)(1); I.R.C. § 215(b) (repealed 2017, *see supra* § 22.32).

2. Per I.R.C. § 152(e), dependency exemption goes to parent having custody for greater portion of year, unless

   a. Custodial parent files consent to allow other parent to take deduction,

   b. Other parent has paid at least $600 for support of child during calendar year, and

   c. Custodial parent completes IRS Form 8332 to allow for noncustodial parent to take exemption.

3. Court may order custodian to waive dependency deduction to other spouse. *Pergolski v. Pergolski*, 143 Wis. 2d 166 (Ct. App. 1988).

D. Maintenance [§ 22.102]

NOTE: The 2017 tax reform act substantially changed tax considerations for maintenance payments. In any order for maintenance signed after December 31, 2018, maintenance is no longer deductible from income for payer, and recipient no longer claims maintenance received as income. Parties who have an order for maintenance before December 31, 2018, may retain their tax deduction when modifying an order for maintenance after December 31, 2018. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11051(a), (b)(1), 131 Stat. 2054, 2089 (repealing I.R.C. § 71 and I.R.C. § 215) (2017).

1. On orders signed before December 31, 2018, maintenance (*alimony* for purposes of federal tax law) is deductible by payer and taxable to recipient if rules and definitions of IRS are met. I.R.C. § 71; I.R.C. § 215.

    a. Payment must be under divorce or separation instrument, which may be temporary order. I.R.C. § 71(b)(1).

    b. Payment must be in cash. I.R.C. § 71(b)(1).

    c. Instrument does not designate payment as not includible in recipient's income. I.R.C. § 71(b)(1)(B).

    d. Payer and payee are not residents of same household. I.R.C. § 71(b)(1)(C).

    e. No payment or substitute payment is required after payee's death. I.R.C. § 71(b)(1)(D).

2. Payment to third party on behalf of spouse may qualify as alimony. I.R.C. § 71(b)(1)(A).

3. Voluntary payments not mandated by instrument do not qualify. *Wondsel v. Commissioner*, 350 F.2d 339 (2d Cir. 1965); *Joslyn v. Commissioner*, 23 T.C. 126 (1954), *aff'd in part, rev'd in part on other issues*, 230 F.2d 871 (7th Cir. 1956).

4. Payments may be child support if there are specified reductions associated with contingency relating to child. Treas. Reg. § 1.71-1T(c), Q&A 18.

5. Special *front-loading* and recapture rules apply to payments in excess of $10,000 per year. I.R.C. § 71(f); Treas. Reg. § 1.71-1T(c), Q&A 19.

E. Section 71 Payments [§ 22.103]

Careful drafting will permit application of alimony rules for tax purposes to family support payment, but bar modifiability of Wisconsin maintenance. *See* I.R.C. § 71; Wis. Stat. §§ 767.56, 767.59.

F. Family Support [§ 22.104]

See Wis. Stat. § 767.531.

1. Court may no longer order family support as substitute for child support and maintenance.

2. Orders for family support prior to the 2019 amendment of Wis. Stat. § 767.531 must pay interest at the rate of 1 percent per month on the total amount of child support in arrears, if any.

3. Traditionally, family support treated like maintenance for income tax purposes unless it met criteria for designation as child support, but IRS has not ruled directly on taxability of family support. *See* IRS Pub. 504.

4. Wisconsin Supreme Court found that family support payments are deductible by payer and includible by payee. *Jasper v. Jasper*, 107 Wis. 2d 59 (1982).

5. Arrears accrue at 0.5% per month. Wis. Stat. § 767.511(6m); Wis. Dep't of Child. & Fams., *Collecting Past-Due Child Support*, https://dcf.wisconsin.gov/cs/enforce/collect (last visited Apr. 8, 2022).

6. If overpayment of support is received, the recipient may hold an amount not to exceed the next month's support payment if one of the conditions in Wis. Stat. § 767.57(1m)(a)–(d) applies. Wis. Stat. § 767.57(1m).

G. Attorney Fees [§ 22.105]

1. General rule is that legal expenses of divorce are not deductible as

   a. Ordinary and necessary business expense, I.R.C. § 162; or

   b. Expense for management, conservation, or maintenance of income-producing property. *See* I.R.C. § 212(2).

2. Legal expense incurred in securing or collecting income, including alimony, is deductible. I.R.C. § 212(1).

3. Legal expense incurred for advice on tax consequences of divorce matters is deductible. I.R.C. § 212(3).

4. Payment of attorney fees of the other party may be deductible as alimony if alimony rules are otherwise met. I.R.C. § 71(b) (repealed 2017, *see supra* § 22.32).

XIII. ETHICS [§ 22.106]

A. Supreme Court Rules [§ 22.107]

1. Rules of Professional Responsibility apply to family law practice. SCR 20:1.1–SCR 20:8.5.

2. Some rules apply more specifically to family law.

   a. Fees must be reasonable and should be communicated to the client in writing. If the total cost of representation is more than $1,000, the fee must be communicated in writing. SCR 20:1.5(a), (b).

   b. Contingent fee is not permitted in divorce case. SCR 20:1.5(d).

c. Attorney cannot represent both parties to a divorce. SCR 20:1.7.

d. Attorney must deposit all client funds, including unearned fee deposits, in trust account. SCR 20:1.15.

3. The Wisconsin Supreme Court issued Wis. Sup. Ct. Order 16-04, 2017 WI 14, dated February 21, 2017, creating SCR 20:2.4(c). SCR 20:2.4(c) became effective July 1, 2017, and reads as follows:

> (1) A lawyer serving as mediator in a case arising under Wis. Stat. ch. 767, stats., in which the parties have resolved one or more issues being mediated may draft, select, complete, modify, or file documents confirming, memorializing, or implementing such resolution, as long as the lawyer maintains his or her neutrality throughout the process and both parties give their informed consent, confirmed in a writing signed by the parties to the mediation. For purposes of this subsection, informed consent requires, at a minimum, the lawyer to disclose to each party any interest or relationship that is likely to affect the lawyer's impartiality in the case or to create an appearance of partiality or bias and that the lawyer explain all of the following to each of the parties:
>
> a. The limits of the lawyer's role;
> b. That the lawyer does not represent either party to the mediation;
> c. That the lawyer cannot give legal advice or advocate on behalf of either party to the mediation; and
> d. The desirability of seeking independent legal advice before executing any documents prepared by the lawyer-mediator.
>
> (2) The drafting, selection, completion, modification, and filing of documents pursuant to par. (1) does not create a client-lawyer relationship between the lawyer and a party.
>
> (3) Notwithstanding par. (2), in drafting, selecting, completing or modifying the documents referred to in par. (1), a lawyer serving as mediator shall exercise the same degree of competence and shall act with the same degree of diligence as SCR 20:1.1 and SCR 20:1.3 would require if the lawyer were representing the parties to the mediation.
>
> (4) A lawyer serving as mediator who has prepared documents pursuant to par. (1) may, with the informed consent of all parties to the mediation, file such documents with the court. However, a lawyer who has served as a mediator may not appear in court on behalf of either or both of the parties in mediation.
>
> (5) Any document prepared pursuant to this subsection that is filed with the court shall clearly indicate on the document that it was "prepared with the assistance of a lawyer acting as mediator."

4. While the Wisconsin Supreme Court did not adopt the comment to SCR 20:2.4(c), the court ordered the comment published and noted that it may be consulted for guidance in interpreting and applying this rule. SCR 20:2.4(c) cmt.

B. Ethics Opinions and Cases [§ 22.108]

1. Attorney cannot serve in adjudicative (e.g., circuit court commissioner) and representative or advocacy (e.g., GAL) roles in the same matter, whether the attorney serves in those roles concurrently or not. State Bar Comm. on Professional Ethics Formal Op. E-09-04.

2. Attorney cannot communicate with child of the parties if GAL has been appointed unless GAL gives consent. State Bar Comm. on Professional Ethics Formal Op. E-89-15.

3. Contingent fee agreement is not proper on divorce appeal. State Bar Comm. on Professional Ethics Formal Op. E-89-2.

4. Attorney must report client's abuse of child to authorities under some circumstances. State Bar Comm. on Professional Ethics Formal Op. E-88-11.

5. Nonrefundable retainers may be deposited in general account, but refundable retainers must be held in trust until earned. State Bar Comm. on Professional Ethics Formal Op. E-86-9.

6. Attorney fees in divorce actions. State Bar Comm. on Professional Ethics Formal Op. E-85-13.

    a. Attorney cannot withhold filing of final divorce papers until paid or postpone final hearing until paid. State Bar Comm. on Professional Ethics Formal Op. E-95-4.

    b. Fee arrangement should be in writing; however, if over $1,000, it must be in writing.

7. Attorney cannot represent both parties to a divorce. State Bar Comm. on Professional Ethics Formal Op. E-84-3.

8. Attorney may contact opposing party's expert witness without permission. State Bar Comm. on Professional Ethics Formal Op. E-91-4.

9. Attorney may mediate divorce case if the requirements of SCR 20:2.4 are met. State Bar Comm. on Professional Ethics Formal Op. E-97-3; *see also* SCR 20:2.4.

10. Lawyer may prepare and circulate divorce handbook for domestic relations clients only. State Bar Comm. on Professional Ethics Informal Op. 2/73.

11. Under Wis. Stat. § 767.205(2) (formerly Wis. Stat. § 767.075(2)), corporation counsel, district attorneys, and other attorneys appointed to provide representation in child support actions have a duty to make certain disclosures to any person for whom child support services are provided regarding the nature of the appointed attorney's representation. State Bar Comm. on Professional Ethics Formal Op. E-92-5.

12. Attorney must not make sexual advances to client. *In re Disciplinary Proc. Against Gibson*, 124 Wis. 2d 466 (1985); *State v. Heilprin*, 59 Wis. 2d 312 (1973).

13. Sexually explicit and suggestive comments to client may result in revocation of license to practice law. *In re Disciplinary Proc. Against Heilprin*, 168 Wis. 2d 1 (1992).

XIV. THE GUARDIAN AD LITEM IN FAMILY LAW CASES [§ 22.109]

A. Role of GAL is to advocate best interests of child. "The guardian ad litem shall function

independently, in the same manner as an attorney for a party to the action." Wis. Stat. § 767.407(4).

B. GAL is entitled to immunity from suit brought by children alleging GAL negligently performed duties in divorce proceedings, in which GAL and court have same responsibility to promote best interests of children. *Berndt v. Molepske*, 211 Wis. 2d 572 (Ct. App. 1997), *aff'd sub nom. Paige K.B. v. Molepske*, 219 Wis. 2d 418 (1998).

C. GAL may bring an action on behalf of a minor. *Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312 (1997).

D. Indigent party cannot be ordered to pay GAL fees at the inception or during the pendency of an action, but may be ordered to do so once the matter is concluded. Wis. Stat. § 767.407; *Salim v. Salim*, No. 2012AP70, 2013 WL 5525721, at *3–4 (Wis. Ct. App. Oct. 8, 2013) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (distinguishing *Olmsted v. Circuit Ct.*, 2000 WI App 261, 240 Wis. 2d 197).

1. GAL must be attorney who has completed three hours of approved continuing legal education that relates to functions and duties of a GAL and includes training on dynamics of domestic violence and effects of domestic violence on victims and children. Wis. Stat. § 757.48(1).

2. SCR 35.015 provides that lawyer cannot accept a GAL appointment in a Wis. Stat. ch. 767 matter unless one of *two* conditions is met:

   a. Lawyer has attended six hours of approved GAL education during the combined current reporting period and immediately past reporting period, with at least three of those hours in "family court guardian ad litem education approved under SCR 35.03(1m)"; or

   b. Appointing court makes a finding in writing or on the record that the case presents "exceptional or unusual circumstances" for which the lawyer is otherwise qualified by experience or expertise.

3. GAL must investigate whether there is evidence that other party has engaged in interspousal battery and must report to court results of that investigation. Wis. Stat. § 767.407(4).

4. At any time after 120 days after GAL is appointed, party may request that court schedule status hearing related to actions taken and work performed by GAL. Wis. Stat. § 767.407(4m).

5. GAL must advocate best interests of the child, which may be different than child's wishes. *Wiederholt v. Fischer*, 169 Wis. 2d 524 (Ct. App. 1992).

6. Separate GAL may be required for each child if children's legal interests are too diverse to be represented by one. *Riemer v. Riemer*, 85 Wis. 2d 375 (Ct. App. 1978).

Chapter 23
Termination of Parental Rights

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NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 252; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-108 (Apr. 6, 2022).

NOTE: The authors would like to thank Abby Moe, Office of Dane County Corporation Counsel legal intern, for her assistance with the 2022 update to this chapter.

I. INTRODUCTION [§ 23.110]

A. Legislative Purpose [§ 23.111]

See Wis. Stat. § 48.01.

1. All provisions of Wis. Stat. ch. 48 (the Children's Code) must be liberally construed to effectuate the purposes of the chapter, including the following:

   a. Child protection, care, health, and safety;

   b. Preservation of family unity when this is safe and appropriate, through assisting parents in fulfilling their parental responsibilities and changing circumstances that might harm the child but also recognition that instability and impermanence in family relationships are contrary to children's welfare;

   c. Elimination of the need for children to wait unreasonable periods of time for parents to correct conditions preventing safe return to family;

   d. Fair hearings and recognition and enforcement of the rights of children and interested parties;

   e. Provision of children's basic needs for

      (1) Adequate food, clothing, shelter;

      (2) Freedom from physical, sexual, or emotional injury or exploitation;

(3) Physical, mental, and emotional development;

(4) A safe and permanent family; and

(5) Removal from parents if removal is in the best interest to meet above needs;

f. Children's adoption into safe and stable families rather than allowing continued impermanence of foster care; and

g. Termination of parental rights (TPR) at the earliest possible time after rehabilitation and reunification efforts are discontinued and if TPR is in children's best interests.

2. Best interests of child must always be of paramount consideration—consistent with the federal Indian Child Welfare Act (ICWA) and Wis. Stat. § 48.01(2).

B. Definitions [§ 23.112]

1. Parental rights

a. *Parent* means biological parent, husband who has consented to the artificial insemination of his wife, or a parent by adoption. If the child is a nonmarital child who is not adopted and whose parents subsequently intermarry, *parent* includes a person conclusively determined from genetic tests under Wis. Stat. § 767.804 or an acknowledged father of nonmarital child under Wis. Stat. § 767.805 or substantially similar law of another state or the adjudicated father of nonmarital child; *parent* does not include a person whose parental rights have been terminated. Wis. Stat. §§ 48.02(13), 48.40(1r).

b. *Parent* is also defined for purposes of the application of Wis. Stat. § 48.028 and ICWA.

c. For purposes of (1) filing an involuntary TPR under Wis. Stat. § 48.415 to a nonmarital child who is not adopted or whose parents do not later intermarry and whose paternity has not been established, (2) finding grounds under Wis. Stat. § 48.415 for the involuntary TPR to such a child, and (3) terminating the parental rights to such a child on a ground specified in Wis. Stat. § 48.415, *parent* includes a person who may be the parent of such a child. Wis. Stat. § 48.40(1r).

d. Rights of parents may also depend on particular facts and circumstances—primarily, the parent's level of acceptance and exercise of parental responsibilities; significant relationship with child required for full due-process protection. *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Tammy W-G. v. Jacob T. (In re TPR to Gwenevere T.)*, 2011 WI 30, 333 Wis. 2d 273; *Ann M.M. v. Rob S. (In re TPR to SueAnn A.M.)*, 176 Wis. 2d 673, 686 (1993); *L.K. v. B.B. (Int. of Baby Girl K.)*, 113 Wis. 2d 429 (1983); *State ex rel. Lewis v. Lutheran Soc. Servs.*, 47 Wis. 2d 420 (1970), *vacated*, 405 U.S. 1051 (1972), *on remand*, 59 Wis. 2d 1 (1973), *appeal after remand*, 68 Wis. 2d 36 (1975); *see also* Wis. Stat. § 48.423 (rights of persons alleging paternity).

NOTE: A biological father who is adjudicated *after* a period of abandonment satisfies the definition of parent for purposes of termination. *State v. James P. (In re TPR to Chezron M.)*, 2005 WI 80, 281 Wis. 2d 685; *Monroe Cnty. Dep't of Hum. Servs. v. Kelli B. (In re*

TPR to Zachary B.), 2004 WI 48, 271 Wis. 2d 51.

e. Person claiming to be father of a nonmarital child may file a declaration of paternal interest with the Wisconsin Department of Children and Families (DCF) but that filing does not confer parental rights. Wis. Stat. § 48.025.

f. Person may establish paternity by filing a Voluntary Paternity Acknowledgement form with the state registrar. Wis. Stat. §§ 69.15(3)(b)3., 767.805.

g. Person may establish paternity for a child born before marriage by signing an Acknowledgement of Marital Child and filing it with the state registrar. Wis. Stat. § 767.803.

h. Parental rights, although not explicitly defined, include rights and responsibilities of care, custody, management, and protection of the child (see also statutes defining guardianship and custody, Wis. Stat. §§ 48.02(12), 48.023); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *T.M.F. v. Children's Serv. Soc. (In re Int. of D.L.S.)*, 112 Wis. 2d 180, 184 (1983); *Mrs. R. v. Mr. B. (In re Int. of J.L.W.)*, 102 Wis. 2d 118, 132 (1981).

2. Child

a. *Child* means person under age 18 but does not include a viable fetus. Wis. Stat. § 48.02(2).

b. In determining whether the ICWA applies, *Indian child* means an unmarried person under age 18 who is a member of an Indian tribe or is a biological child of a member of an Indian tribe and is eligible for membership. 25 U.S.C. § 1903(4).

(1) Wis. Stat. § 48.02(8d) defines *Indian* as any person who is a member of an Indian tribe or who is an Alaska native and a member of a regional corporation as defined in 43 U.S.C. § 1606.

(2) See also Wis. Stat. § 48.02(8m) (defining *Indian child's tribe*) and Wis. Stat. § 48.02(8r) (defining *Indian tribe*).

c. *Unborn child* means a human being from fertilization to birth. Wis. Stat. § 48.02(19).

3. TPR

a. TPR is the permanent severance by court order of all rights, powers, privileges, immunities, duties, and obligations existing between parent and child. Wis. Stat. § 48.40(2); *see Vargo v. Buban (In re Estate of Komarr)*, 68 Wis. 2d 473, 481 (1975) (adoption); *Black v. Pamanet (In re Estate of Pamanet)*, 46 Wis. 2d 514, 516 (1970).

b. Denial or termination of visitation between child and parent is not TPR but may form the basis for TPR if continued for one year or more. Wis. Stat. § 48.415(4); *Dane Cnty. Dep't of Hum. Servs. v. Ponn P. (In re TPR to Diana P.)*, 2005 WI 32, 279 Wis. 2d 169.

c. Parent's death severs parental rights. *H.F. v. T.F. (In re Grandparental Visitation of C.G.F.)*, 168 Wis. 2d 62 (1992).

d. TPR procedure is bifurcated as follows:

(1) Grounds phase (fact-finding). Wis. Stat. §§ 48.415, 48.424.

(2) Disposition in child's best interests. Wis. Stat. §§ 48.426, 48.427.

C. Practice Tips [§ 23.113]

1. Attorney must carefully examine specific statutes and research case law when pleading, giving notice, etc., because *TPR statutes and case law are subject to significant changes.*

2. Attorney also must review nonstatutory provisions of enabling acts regarding effective dates and limits on ability to start TPR actions under amended statutes.

3. Wis. Stat. §§ 48.424(3) and 48.42(1)(e) establish additional elements that must be proved in cases involving involuntary TPR to an Indian child.

4. Parents have a constitutionally protected liberty interest in the care, custody, and management of their children; therefore, the state must provide parents in TPR cases with fundamentally fair procedures. *Santosky v. Kramer*, 455 U.S. 745 (1982); *Monroe Cnty. v. Jennifer V. (In re Int. of Kody D.V.)*, 200 Wis. 2d 678, 686 (Ct. App. 1996); *Winnebago Cnty. Dep't of Soc. Servs. v. Darrell A. (In re Int. of Amanda A.)*, 194 Wis. 2d 627, 639 (Ct. App. 1995); *see also supra* § 23.3 (nonadjudicated fathers). The court declined to extend this fundamental liberty interest to a vested right. *Eau Claire Cnty. Dep't of Hum. Servs. v. S.E. (In re TPR to T.L.E.-C.)*, 2020 WI App 39, 392 Wis. 2d 726, *aff'd*, *Eau Claire Cnty. Dep't of Hum. Servs. v. S.E. (In re T.L.E.-C.)*, 2021 WI 56, 397 Wis. 2d 462.

   Due process requires that the parent be able to proffer predictive expert testimony on the ultimate question in TPR. *Brown Cnty. v. Shannon R. (In re TPR to Daniel R.S.)*, 2005 WI 160, 286 Wis. 2d 278; *Dane Cnty. Dep't of Hum. Servs. v. J.B. (In re TPR to J.B.-A.)*, No. 2016AP2422, 2017 WL 663203 (Wis. Ct. App. Feb. 16, 2017) (unpublished opinion citable for persuasive value per section Wis. Stat. § 809.23(3)(b)) (discussion of qualifying a social worker as an expert for purposes of proffering predictive expert testimony).

5. Attorneys must give due attention to procedural and substantive quality of record. *M.W. v. Monroe Cnty. Dep't of Hum. Servs. (In re TPR to M.A.M.)*, 116 Wis. 2d 432, 436–37 (1984) ("[T]he power of the state to terminate the parental relationship is an awesome one, which can only be exercised under proved facts and procedures which assure that the power is justly exercised."); *see also Mrs. R.*, 102 Wis. 2d 118.

6. Nature of TPR proceedings

   a. Although serious human rights are implicated in TPR proceedings, proceedings are civil in nature. *M.W.*, 116 Wis. 2d 432, 442; *D.B. v. Waukesha Cnty. Hum. Servs. Dep't (In re Int. of J.A.B.)*, 153 Wis. 2d 761, 765 (Ct. App. 1989).

   b. Wis. Stat. chs. 801–847 govern TPR when different procedure is not prescribed in Wis. Stat. ch. 48. *Waukesha Cnty. Dep't of Soc. Servs. v. C.E.W. (In re Int. of C.E.W.)*, 124 Wis. 2d 47, 53 (1985). *But see infra* § 23.45.

c. Partial summary judgment may be granted, when appropriate, in grounds (fact-finding) phase. *Steven V. v. Kelley H. (In re TPR to Alexander V.)*, 2004 WI 47, ¶ 5, 271 Wis. 2d 1.

d. Default judgment is also available, but sufficient testimony must be taken to support the facts underlying the default. *Evelyn C.R. v. Tykila S. (In re TPR to Jayton S.)*, 2001 WI 110, 246 Wis. 2d 1.

e. Directed verdict is permitted. *Door Cnty. v. Scott S. (In re TPR to Kristeena A.M.S.)*, 230 Wis. 2d 460 (Ct. App. 1999). However, directed verdict denying parent the opportunity to present case in chief was structural error. *State v. C.L.K. (In re TPR to S.M.H.)*, 2019 WI 14, 385 Wis. 2d 418 (preventing parent from presenting case in chief, based on prosecutor's adverse examination of parent, was structural constitutional error requiring reversal).

f. The court of appeals held that a judge who conducted TPR dispositional proceedings by video, with the judge in a different location than the parties and witnesses, violated Wis. Stat. § 885.60(2), and this "structural error" necessitated automatic reversal of the TPR order. *Adams Cnty. Health & Hum. Servs. Dep't v. D.J.S. (In re TPR to E.W.D.)*, No. 2019AP506, 2019 WL 2535646 (Wis. Ct. App. June 20, 2019) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

7. For more information on TPR and juvenile court proceedings, see Henry J. Plum & Frank J. Crisafi, *Wisconsin Juvenile Court Practice and Procedure* (2d ed. 1993), and Milton Childs et al., *Wisconsin Juvenile Law Handbook* (State Bar of Wis. 4th ed. 2017 & Supp.).

a. Office of Judicial Education, *Wisconsin Judicial Benchbooks, Volume IV: Juvenile* (State Bar of Wis. 6th ed. 2019 & Supp.); *Volume V: Probate, Guardianship & Mental Health* (State Bar of Wis. 5th ed. 2016 & Supp.).

b. 3 Joan H. Hollinger, *Adoption Law and Practice* ch. 15 (Matthew Bender 1988 & Supp. 2016).

c. Matthew W. Giesfeldt, *Termination of Parental Rights and Adoption* (State Bar of Wis. 3d ed. 2017 & Supp.).

8. ICWA and the Wisconsin Indian Child Welfare Act (WICWA) provide additional procedures and protections for parents of Indian children, including other elements and a higher burden of proof; these actions are not thoroughly covered here, and counsel should refer to ICWA, WICWA, and the following sources: 25 U.S.C. §§ 1901–1963; Wis. Stat. § 48.01(2); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *Brown Cnty. v. Shannon R. (In re TPR to Daniel R.S.)*, 2005 WI 160, 286 Wis. 2d 278; *I.P. v. State (In re D.S.P.)*, 166 Wis. 2d 464 (1992); *Monroe Cnty. Dep't of Hum. Servs. v. Luis R. (In re TPR to Vaughn R.)*, 2009 WI App 109, 320 Wis. 2d 652.

9. Voluntary Paternity Acknowledgement and Acknowledgement of Marital Child forms on file may be requested from the Wisconsin Department of Health Services Vital Records Services. *See* https://www.dhs.wisconsin.gov/vitalrecords/record.htm (last revised Apr. 8, 2022). An inquiry of the Paternity Interest Registry in Wisconsin can be submitted to the Wisconsin Department of Children and Families Division of Safety and Permanence. *See* https://dcf.wisconsin.gov/paternalinterest/court (last visited Apr. 14, 2022).

II. JURISDICTION AND VENUE [§ 23.114]

A. Jurisdiction [§ 23.115]

1. Children's court has exclusive jurisdiction over TPR proceedings. Wis. Stat. §§ 48.14(1), 48.15. *But see* Wis. Stat. § 48.028(3).

2. Failure to observe statutory time limits deprives children's court of competency to exercise jurisdiction, *see infra* § 23.37. *Sheboygan Cnty. v. Matthew S. (In re TPR to Joshua S.)*, 2005 WI 84, 282 Wis. 2d 150; *B.F. v. G.D.J. (In re TPR of J.L.F.)*, 168 Wis. 2d 634 (Ct. App. 1992).

3. UCCJEA applies to settle jurisdictional conflicts between states. Wis. Stat. § 48.027; Wis. Stat. ch. 822; *P.C. v. C.C. (In the Int. of A.E.H.)*, 161 Wis. 2d 277 (1991); *Brus C. v. Shawn D. (In re Steven C.)*, 169 Wis. 2d 727 (Ct. App. 1992).

   a. Wisconsin court has jurisdiction *only* if

      (1) Wisconsin is child's home state either presently or within six months before the proceedings and the child is absent because of removal by the parent claiming custody, if a parent or acting parent lives in Wisconsin (Wis. Stat. § 822.21(1)(a)); or

      (2) No other state court has jurisdiction or another state court has declined to exercise jurisdiction on ground that Wisconsin is more appropriate forum and both of the following apply (Wis. Stat. § 822.21(1)(b)):

         (a) Child and parents (or child and at least one parent or the person acting as parent) have significant connection with state beyond physical presence; and

         (b) Substantial evidence exists in Wisconsin about the child's care, protection, training, and personal relationships.

      (3) All courts having jurisdiction have declined to exercise on the ground that Wisconsin is more appropriate forum. Wis. Stat. § 822.21(1)(c).

      (4) No other state court would have jurisdiction under the criteria of Wis. Stat. § 822.21(1)(a), (b), or (c). Wis. Stat. § 822.21(1)(d).

   b. UCCJEA imposes requirements on TPR petition; *see* Wisconsin Circuit Court Form GF-150 (includes instructions); *see also infra* § 23.44.

   c. Court must consider whether notice provisions apply to facts of each case. *David S. v. Laura S. (In re Int. of Brandon S.S.)*, 179 Wis. 2d 114, 141 (1993) (analyzing UCCJA, the predecessor to UCCJEA).

B. Venue [§ 23.116]

1. If children's court previously placed the child out of child's home, designating the child as a child in need of protection or services (CHIPS), then:

a. Venue will be in county where CHIPS dispositional order was issued, unless the child's county of residence has changed or parent of the child has resided in a different county for six months. Wis. Stat. § 48.185(2).

b. Court may, on motion and for good cause, transfer the case and all appropriate records to the county of child's or parent's residence.

2. In action under Wis. Stat. § 48.41 (voluntary consent to TPR), venue will be in the county where birth parent or child resides at the time petition is filed. Wis. Stat. § 48.185(2).

NOTE: 2015 Wis. Act 373 modified the venue statute but did not address venue in an involuntary TPR case in which there is no CHIPS dispositional order.

III. LEGAL REPRESENTATION [§ 23.117]

A. Effective Assistance of Counsel [§ 23.118]

Statutory right to be represented by an attorney under Wis. Stat. § 48.23(2) and (4) includes right to effective assistance of counsel, applying the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). *A.S. v. State (In re Int. of M.D.(S.))*, 168 Wis. 2d 995 (1992).

B. Representation of Child [§ 23.119]

1. Guardian ad litem (GAL) must be appointed, regardless of child's age. Wis. Stat. § 48.235(1)(c).

2. GAL cannot be an interested party or counsel, court-appointed special advocate, relative, or representative of any interested party. Wis. Stat. § 48.235(2).

3. Jury may be told that GAL represents the interests of child. Wis. Stat. § 48.235(6); *D.B. v. Waukesha Cnty. Hum. Servs. Dep't (In re Int. of J.A.B.)*, 153 Wis. 2d 761 (Ct. App. 1989).

4. Court has discretion to appoint advocate counsel for child in TPR. Wis. Stat. § 48.23; *Joni B. v. State*, 202 Wis. 2d 1 (1996).

C. Duties of Guardian ad Litem Representing Child [§ 23.120]

1. Court must appoint GAL for any child who is the subject of a voluntary or involuntary TPR, a contested adoption, or a Wis. Stat. ch. 48 guardianship under Wis. Stat. § 48.977, 48.978, or 48.9795. Wis. Stat. § 48.235(1)(c).

2. Court has duty to oversee GAL's performance of obligations (if court determines that GAL is violating statutorily mandated duties, court must remove GAL and appoint another). *D.S.L. v. T.L.S. (In re Paternity of D.S.L.)*, 159 Wis. 2d 747 (Ct. App. 1990).

a. GAL is to represent the best interests of the child (function is same in family and children's court and may include taking necessary action in other cases as an advocate for child's best interests). GAL cannot argue best interests to jury at fact-finding hearing. Wis. Stat. § 48.235(3); *David S. v. Laura S. (In re Int. of Brandon S.S.)*, 179 Wis. 2d 114 (1993); *Waukesha Cnty. Dep't of Soc. Servs. v. C.E.W.*, 124 Wis. 2d 47, 70 (1985).

NOTE: A GAL's duties under Wis. Stat. § 48.235(3)(b) in a CHIPS proceeding are likely to continue in a TPR action.

NOTE: *See Jeffrey J. v. David D. (In re TPR to Jonathan D.)*, No. 2010AP001717, 2010 WL 3745902, ¶ 22 (Wis. Ct. App. Sept. 28, 2010) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (holding that having children under subpoena talk to judge in camera was harmless error).

D. Representation of Parent [§ 23.121]

1. Minor parent in involuntary TPR or contested adoption must have counsel and cannot waive counsel. Wis. Stat. § 48.23(2)(b)2.; *T.M.F. v. Children's Serv. Soc'y of Wis. (In re Int. of D.L.S.)*, 112 Wis. 2d 180 (1983).

2. Minor parent petitioning for voluntary TPR must have GAL; *see infra* § 23.13. Wis. Stat. §§ 48.23(2), 48.235(1)(b).

3. Adult parent has a right to counsel but may waive counsel if court is satisfied that the waiver is knowing and voluntary. Wis. Stat. § 48.23(2); *M.W. v. Monroe Cnty. Dep't of Hum. Servs. (In re TPR to M.A.M.)*, 116 Wis. 2d 432 (1984); *Kenosha Cnty. Dep't of Hum. Servs. v. V.J.G. (In re TPR to N.V.G.)*, Nos. 2017AP1150, 2017AP1151, 2017 WL 6601483 (Wis. Ct. App. Dec. 27, 2017) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)); *Dane Cnty. Dep't of Hum. Servs. v. Susan P.S. (In re TPR to Sophia S.)*, 2006 WI App 100, ¶¶ 9–23, 293 Wis. 2d 279 (discussing self-representation competency standards); *see also Lassiter v. Department of Soc. Servs.*, 452 U.S. 18 (1981); *S.Y. v. Eau Claire Cnty. (In re Condition of S.Y.)*, 162 Wis. 2d 320 (1991); *Rhonda R.D. v. Franklin R.D. (In re Int. of Christopher D.)*, 191 Wis. 2d 680, 696 (Ct. App. 1995) (regarding constitutional right to counsel).

4. Wis. Stat. § 48.23(2)(b)3. allows for the presumption that an adult parent has waived right to counsel and to appear by counsel when (1) parent was ordered to appear in person at any or all subsequent hearings; (2) parent fails to appear in person, as ordered; and (3) court finds that the parent's failure to appear in person was egregious and without clear and justifiable excuse.

   The failure of an adult parent to appear in person at consecutive hearings as ordered is presumed to be egregious conduct without clear and justifiable excuse. If the court finds that the parent waived counsel by this conduct, the court cannot hold a dispositional hearing on a contested adoption or involuntary TPR matter until at least two days have elapsed from the date of that finding.

   In a proceeding to vacate or reconsider a default judgment granted in an involuntary TPR, a parent who has waived counsel voluntarily or presumptively in the involuntary TPR proceeding must be represented by counsel, unless, in the proceeding to vacate or reconsider the default judgment, the parent voluntarily or presumptively waives counsel. Wis. Stat. § 48.23(2)(c).

   In any situation in which counsel is knowingly and voluntarily waived or in which a parent is presumed to have waived right to counsel, the court may discharge counsel. Wis. Stat. § 48.23(4m).

5. Indian child's parent or Indian custodian "shall have the right" to counsel. Wis. Stat. § 48.23(2g).

6. Failure to appoint GAL for parent was ruled harmless error in a case in which adversary counsel vigorously and competently contested TPR. *I.P. v. State (In re Int. of D.S.P.)*, 157 Wis. 2d 106, 116 (Ct. App. 1990), *aff'd on other grounds*, 166 Wis. 2d 464 (1992).

7. Circuit court's dismissal of mother's trial counsel from proceeding was error even though mother had been ordered to appear and failed to do so. Circuit court found mother in default for failure to follow court orders to appear personally; it was error to dismiss mother's counsel and not allow counsel to participate in the proceeding. *State v. Shirley E. (In re TPR to Torrance P., Jr.)*, 2006 WI 129, 298 Wis. 2d 1.

   NOTE: In *Kevin G. v. Jennifer M.S. (In re Dakota L.G.)*, No. 2009AP1377, 2011 WL 3587414, ¶¶ 45–47 (Wis. Ct. App. Aug. 17, 2011) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)), the court distinguished *Shirley E.* by holding that the deprivation of counsel applies at fact-finding and dispositional phases but not during the return of the jury verdict.

8. Before a court may enter a default on the ground that a party failed to comply with a court order, the party's conduct must be egregious or without clear and justifiable excuse. *Evelyn C.R. v. Tykila S. (In re TPR to Jayton S.)*, 2001 WI 110, 246 Wis. 2d 1; *see, e.g.*, *Sentry Ins. v. Davis*, 2001 WI App 203, 247 Wis. 2d 501.

   NOTE: *See supra* para. 4 (discussing waiver of right to counsel).

   NOTE: In *State v. K.P. (In re A.P.)*, Nos. 2017AP612, 2017AP613, 2017 WL 2954725 (Wis. Ct. App. July 11, 2017) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)), the circuit court found the parent in default for failure to follow court orders to appear personally. The court of appeals held the circuit court could make a reasonable determination under the existing facts and circumstances to support egregiousness.

E. Duties of Guardian ad Litem Representing Parent [§ 23.122]

1. Court must appoint GAL for minor parent petitioning for voluntary TPR or parent who is the subject of TPR if assessment under Wis. Stat. § 48.295 shows parent is not competent to participate in proceeding or to assist counsel or court in protecting parent's rights. Wis. Stat. § 48.235(1)(b), (g), (5m).

2. When GAL represents minor parent in voluntary TPR, GAL must interview minor parent, investigate reason for TPR, assess voluntariness of consent, and inform minor parent of rights and the effect of and alternatives to TPR. Wis. Stat. § 48.235(5).

3. GAL must advocate for best interests of person for whom GAL is appointed (ward). Wis. Stat. § 48.235(3)(a).

4. GAL must consider, but not be bound by, wishes of ward or others as to best interests of ward.

5. If GAL determines that best interests of ward are substantially inconsistent with wishes of ward, GAL must inform court, and court may appoint advocate counsel.

6. GAL has no duties of general guardian.

7. When parent has both counsel and GAL, counsel's duty to provide zealous, competent, and independent representation is not diminished, and counsel should not defer to GAL's waiver of fact-finding in CHIPS. *E.H. v. Milwaukee Cnty. (In re Int. of T.L.)*, 151 Wis. 2d 725 (Ct. App. 1989). The same holding and reasoning likely apply in TPR.

F. Duties of Representative of Public Interest [§ 23.123]

1. Public interest is represented by person designated by county board of supervisors (usually district attorney or corporation counsel). Wis. Stat. §§ 48.09, 978.05(6)(a).

2. Mandatory filing requirements for representative of public interest

   a. Agency, district attorney, corporation counsel, or official designated under Wis. Stat. § 48.09 must file TPR petition or join petition already filed if any of following apply (Wis. Stat. § 48.417(1)):

      (1) Child has been placed outside home in a foster home, group home, nonsecured residential care center for children and youth, or shelter care facility for 15 of the most recent 22 months.

      NOTE: This timeframe does not include a period during which the child was residing in a trial reunification home or was a runaway. Wis. Stat. § 48.417(1)(a).

      (2) A court has found that child was abandoned under Wis. Stat. § 48.13(2) or 948.20, or comparable other state or federal law, when child was under age one year.

      (3) A court has found that parent has committed, aided or abetted the commission of, solicited, conspired, or attempted to commit any of the following crimes or comparable crimes under other state or federal law against that parent's child:

         (a) First-degree intentional homicide. Wis. Stat. § 940.01.

         (b) First-degree reckless homicide. Wis. Stat. § 940.02.

         (c) Felony murder. Wis. Stat. § 940.03.

         (d) Second-degree intentional homicide. Wis. Stat. § 940.05.

      (4) A court has found that parent has committed any of the following crimes or comparable crimes under other state or federal law against that parent's child, resulting in great or substantial bodily harm (*see also* Wis. Stat. § 939.22(14), (38) (defining *great bodily harm* and *substantial bodily harm*)):

         (a) Felony battery. Wis. Stat. § 940.19(3) (1999–2000); *see* Wis. Stat. § 940.19(2), (4), (5).

         (b) Human trafficking for the purposes of a commercial sex act. Wis. Stat. § 940.302(2)(a)1.b.

(c) First- or second-degree sexual assault. Wis. Stat. § 940.225(1), (2).

(d) First- or second-degree sexual assault of child. Wis. Stat. § 948.02(1), (2).

(e) Repeated acts of sexual assault of same child. Wis. Stat. § 948.025.

(f) Trafficking of a child. Wis. Stat. § 948.051.

(g) Intentionally or recklessly causing great bodily harm to a child. Wis. Stat. § 948.03(2)(a), (3)(a), (5)(a)1., 2., 3.

(h) Sexual assault by a foster parent. Wis. Stat. § 948.085.

NOTE: Wis. Stat. § 48.415(9m) includes additional grounds for TPR other than those listed here (Wis. Stat. §§ 948.05, 948.06, 948.08, 948.081, and 948.21 (if death of victim)) and does *not* include Wis. Stat. § 948.085 listed above.

(5) Under Wis. Stat. § 48.417(2), TPR petition need not be filed in above given circumstances if any of following apply:

(a) Child is being cared for by a fit and willing relative.

(b) Permanency plan indicates TPR is not in child's best interests. *See* Wis. Stat. § 48.38 (discussing permanency planning).

(c) Agency responsible for providing services to family under Wis. Stat. § 48.355(2)(b)6. has not made reasonable efforts to provide services necessary for child's safe return home.

(d) In the case of an Indian child, the agency has not provided the services necessary to prevent the breakup of the Indian child's family.

(e) Grounds for an involuntary TPR do not exist.

IV. GROUNDS FOR VOLUNTARY TERMINATION OF PARENTAL RIGHTS (TPR) [§ 23.124]

A. Voluntary Consent in General [§ 23.125]

1. Parent's consent must be voluntary and informed. Wis. Stat. § 48.41(1), (2).

2. Procedure for giving voluntary consent is statutorily prescribed. Wis. Stat. § 48.41(2).

3. An involuntary petition to terminate parental rights may be amended to a voluntary petition.

B. Consent by Personal Appearance in Court [§ 23.126]

See Wis. Stat. § 48.41(2).

1. Judge must explain effect of TPR.

2. Judge must question parent or permit attorney (for any party to the proceedings) to question parent. Wis. Stat. § 48.41(2)(a).

   NOTE: See Wis. Stat. § 48.41(2)(e), which refers to Wis. Stat. § 48.028(5)(b) with regard to Indian children.

   a. Judge must be satisfied that parent's consent is voluntary and informed; judge must ensure parent has adequately considered the decision to terminate. *T.M.F. v. Children's Serv. Soc'y of Wis. (In re Int. of D.L.S.)*, 112 Wis. 2d 180, 186–87 (1983).

   b. Inquiry on voluntariness must be searching and penetrating, particularly regarding alternatives to termination; questioning must not be leading. *Roberts v. P.B. (In re Int. of A.B.)*, 151 Wis. 2d 312, 319 (Ct. App. 1989).

   c. For examples of questions, see *infra* section 23.19.

3. At a minimum, under *T.M.F.*, 112 Wis. 2d at 196–97, judge must determine the following:

   a. Extent of parent's education and level of general comprehension;

   b. Parent's understanding of nature of proceedings and consequences of TPR, including finality of decision or order;

   c. Parent's awareness of rights and responsibilities being given up;

   d. Parent's understanding of GAL's role and right to counsel;

   e. Extent and nature of parent's communication with GAL, social worker, and other advisor(s);

   f. Promises or threats made to parent; and

   g. Parent's awareness of alternatives to TPR.

4. Parental rights cannot be terminated merely to advance parents' convenience and interests, either emotional or financial. *Roberts*, 151 Wis. 2d at 322.

5. Under Wis. Stat. § 48.41(3), when GAL doubts parent's capacity to consent:

   a. GAL must inform court;

   b. Court must inquire into parent's capacity; and

   c. If court finds parent incapable of giving knowing and voluntary consent, court must dismiss voluntary TPR proceedings without prejudice.

   PRACTICE TIP: See Wisconsin Circuit Court Form JC-1637 (Consent to Termination of Parental Rights (Judicial)) (May 2020), https://www.wicourts.gov/formdisplay/JC-

1637.pdf?formNumber=JC-1637&formType=Form&formatId=2&language=en.

C. Consent Without Personal Appearance [§ 23.127]

1. If court finds parent's appearance difficult or impossible, court may accept parent's written consent taken by embassy or consul official, military judge, or judge of any court of record in another county or state or foreign jurisdiction who follows statutory procedure and makes sufficient written findings. Wis. Stat. § 48.41(2)(b).

2. For nonmarital child, a sufficient written, notarized statement from alleged but nonadjudicated father may be accepted. Wis. Stat. § 48.41(2)(c).

3. In stepparent or foreign adoptions, sufficient and witnessed affidavit may be accepted from either parent. Wis. Stat. § 48.41(2)(d).

4. TPR consent by phone may be allowed. Wis. Stat. § 48.41(2)(b)2.

   PRACTICE TIP: See Wisconsin Circuit Court Form JC-1636 (Consent to Termination of Parental Rights (Affidavit)) (May 2020), https://www.wicourts.gov/formdisplay/JC-1636.pdf?formNumber=JC-1636&formType=Form&formatId=2&language=en.

D. Questions for Voluntary Termination of Parental Rights [§ 23.128]

NOTE: See sections 23.52–23.59, *infra*, for additional discussion of TPR proceedings.

1. Please state and spell your name.

2. What is your date of birth? How old are you?

3. How far have you gone in school? Can you read and write English?

4. Are you the parent or alleged parent of the child involved in this petition? Do you have any reason to believe that the child is a member of or eligible for membership in an Indian tribe?

5. Are you currently taking any medication?

6. What do you take that medication for?

7. Are you taking your medication as directed by your doctor?

8. Do you believe this medication is causing you any trouble in understanding anything that is happening today?

9. Are you being treated for any mental illness at this time?

10. Do you believe that you are able to think clearly today and understand what is happening today?

11. Are you presently under the influence of any illegal drugs or alcohol?

12. Do you know why we are in court today? Why?

13. Do you understand that this court hearing is to give consent for the termination of your parental rights to your child? And you understand that if you do not want to do that today, that you do not have to do that?

14. Do you understand that you could have a different judge assigned to the case than the one now assigned?

    NOTE: If petition is filed under Wis. Stat. § 48.41, ask questions set forth in Nos. 15 and 16, and skip questions 17–24.

15. Do you understand that, if you are not willing to voluntarily terminate your rights, the County would dismiss the Petition? Do you understand that, if the County dismisses the Petition, the County could potentially file a petition to involuntarily terminate your rights if legal grounds exist?

16. Do you understand that once your rights are terminated, you cannot change your mind later? That this hearing is a final hearing?

17. Do you understand that you have a right to have a trial on the involuntary petition to terminate your rights that was filed?

18. Are you giving up your right to a trial today?

19. Do you understand that, if you decide to have a trial, you would have the right to have an attorney? That if you couldn't afford an attorney one could be appointed for you?

20. Do you understand that at a trial you would have a right to a jury of twelve people to hear your case?

21. Do you understand that Petitioner would have to prove at least one of the grounds alleged in the petition? That Petitioner would have to prove that [INSERT ELEMENTS OF LEGAL GROUND(S)].

22. Do you understand that Petitioner would have to prove the allegations in the petition by clear and convincing evidence? Do you understand that ten of twelve jurors would have to be convinced that grounds exist to terminate your rights before that could happen?

23. Do you understand that at a trial you would have the right to call witnesses on your own behalf and to cross examine witnesses that the Petitioner would call? Do you understand that you could testify at the trial?

24. Understanding all of those rights, you are giving up your right to a trial?

25. Do you understand that if the court terminates your rights, you lose the following rights (question as to each individually)?

    a. You will no longer have the right to have visitation or contact with the child.

b. You will no longer have the right to receive any information concerning the whereabouts, activities, health, or well-being of the child.

c. You will no longer be able to make any decisions regarding the religion, health, or education of the child.

d. You will no longer have the right to make any decision for the child.

e. You will no longer have the right to inherit from the child nor shall the child have the right to inherit from you.

f. You will no longer be financially responsible for the child.

g. You will no longer have the right to custody of the child.

26. Did you have the chance to talk with your attorney? How many times? Did you understand everything that was said? Do you want more time to talk with your attorney?

27. Have you talked with your child's guardian ad litem? How often? Did you understand everything that was said? Do you want more time to talk with the guardian ad litem?

28. Do you understand that your child's guardian ad litem will recommend what the guardian ad litem believes is best for your child?

29. Do you understand that your child's guardian ad litem does not represent you?

30. Have you talked with any social worker regarding this termination? How often? Did you understand everything that was said? Do you want more time to talk with the social worker?

31. Have you talked with any family members or friends regarding this termination? How often? Did you understand everything that was said? Do you want more time to talk to any family members or friends?

32. Have any promises or threats been made to you to influence your decision to terminate your rights?

33. Have you received any gifts, money or valuables to influence you to terminate your rights? (If so, explain in detail.)

34. Do you understand that the plan is for Adoptive Parent to adopt your child?

35. Do you also understand that plan is not a guarantee?

a. That if something happens and Adoptive Parent cannot adopt, that the State would find another adoptive home for the child?

b. And that you could not change your mind about consenting to this termination because of the change in the adoption plan?

36. You know the Adoptive Parent, correct? And it is your understanding that the Adoptive Parent intends to allow you some continued contact with your child?

37. Do you also understand that you do not have a right to contact with your child? That it is entirely up to the Adoptive Parent? And if they say No contact, you cannot come back to court to force the Adoptive Parent to allow contact between you and the child?

38. Did you discuss with anyone the alternatives to terminating your parental rights (question the parent specifically as to each alternative available, if applicable):

    a. Custody with the department of health and social services;

    b. Foster home placement;

    c. Residential care;

    d. Institutionalization;

    e. Aid for dependent children or related financial support programs (Food stamps, and so on); or

    f. Placement with a relative.

39. Do you understand these services may be available if you do not terminate your rights? Why did you decide not to use these alternative services?

40. Do you understand that, if the court accepts your voluntary consent, the court will hold a dispositional hearing?

    a. Do you understand that the standard that applies in the dispositional hearing is the best interests of the child?

    b. Do you understand that, at the dispositional hearing, the court may terminate your parental rights, dismiss the petition, or grant any of the alternatives available in Wis. Stat. § 48.428 (including appointing a guardian and transferring custody to the guardian, and placing the child in sustaining care).

41. Do you understand that if you wish to appeal the court's decision, you have to let me know within 30 days of the judge's order that terminates your rights?

42. Do you understand that 30 days to appeal is not 30 more days to think about this decision?

43. Do you understand that only if there is a legal mistake may something change due to an appeal?

44. Have you felt pressured by anyone to terminate your rights?

45. Do you understand that you can still change your mind right now?

46. Do you wish any more time to talk with anyone about this decision?

47. Can you explain in your own words why you are voluntarily consenting to the termination of your parental rights?

V. GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS (TPR) [§ 23.129]

A. In General [§ 23.130]

Legislature is free, subject to constitutional limitations, to prescribe grounds for involuntary TPR and may vary procedure used when TPR sought for various reasons. See Wis. Stat. § 48.415 (intro.) regarding elements of TPR for WICWA. *Rock Cnty. Dep't of Soc. Servs. v. K.K. (In re Int. of K.K.)*, 162 Wis. 2d 431, 439 (Ct. App. 1991).

B. Abandonment [§ 23.131]

1. Established by proving any of following alternative grounds:

   a. Child left without provision for care or support, and petitioner has investigated circumstances and is unable to find either parent for 60 days. Wis. Stat. § 48.415(1)(a)1.

   b. Child left by parent without provision for care or support in place or manner exposing child to substantial risk of great bodily harm, as defined in Wis. Stat. § 939.22(14), or death. Wis. Stat. § 48.415(1)(a)1m.

   c. Court of competent jurisdiction has found, pursuant to Wis. Stat. § 48.13(2) or comparable other state or federal law, that child was abandoned when under age one *or* has found that parent abandoned child under age one, in violation of Wis. Stat. § 948.20 or comparable other state or federal law. Wis. Stat. § 48.415(1)(a)1r.

   d. Child has been placed or continued in placement outside parent's home by court order containing notice under Wis. Stat. §§ 48.356(2) or 938.356(2), and parent has failed to visit or communicate with child for at least three months. Wis. Stat. § 48.415(1)(a)2.

      NOTE: See section 23.23, *infra*, regarding sufficiency of notice in court order for proof of grounds under Wis. Stat. § 48.415(2), which may be applicable by analogy to proof of grounds under Wis. Stat. § 48.415(1)(a)2.

   e. Child has been left by parent with any person, and parent knows or could discover child's whereabouts but has failed to visit or communicate with child for at least six months. Wis. Stat. § 48.415(1)(a)3.

2. Under Wis. Stat. § 48.415(1)(c), abandonment is *not* established under Wis. Stat. § 48.415(1)(a)2. or 3., if parent proves all of following by preponderance of evidence:

   a. Parent had good cause for failing to visit with child during applicable time period;

   b. Parent had good cause for failing to communicate with child throughout applicable time period; and

c. If good cause for failing to communicate with child relies on evidence that child's age or condition would have rendered any communication with child meaningless, one of following occurred:

(1) Parent communicated about child with person(s) having physical custody or, if abandonment of three months or longer is alleged, with agency responsible for child's care during applicable time period; or

(2) Parent had good cause for failing to communicate about child with person(s) having physical custody or with agency responsible for child's care during applicable time period.

NOTE: Burden of proof shifts to parent to rebut presumption of abandonment by preponderance of evidence. *Odd S.-G. v. Carolyn S.-G. (In re Int. of Kyle S.-G.)*, 194 Wis. 2d 365 (1995).

3. Additional provisions

a. Incidental contact between parent and child does not preclude finding that parent has failed to visit or communicate with the child under Wis. Stat. § 48.425(1)(a)2. or 3. (*incidental contact* is unambiguous enough not to offend due process). Wis. Stat. § 48.415(1)(b); *Rock Cnty. Dep't of Soc. Servs. v. K.K. (In re Int. of K.K.)*, 162 Wis. 2d 431, 444 (Ct. App. 1991).

b. Time periods relied on for grounds in Wis. Stat. § 48.415(1)(a)2. and 3. do not include any periods during which parent has been prohibited from visiting or communicating with child by a court order. Wis. Stat. § 48.415(1)(b); *K.K.*, 162 Wis. 2d at 440.

c. When more than one order places or continues child's placement outside parental home, it is sufficient if only one order contains notice required by Wis. Stat. § 48.356(2) or 938.356(2). Wis. Stat. § 48.415(1)(a)2.; *St. Croix Cnty. Dep't of Health & Hum. Servs. v. Michael D. (In re TPR to Matthew D.)*, 2016 WI 35, 368 Wis. 2d 170; *K.K.*, 162 Wis. 2d at 440.

d. Time period required in Wis. Stat. § 48.415(1)(a)3. need not immediately precede filing of TPR petition. *P.S. v. G.O. (In re Int. of T.P.S.)*, 168 Wis. 2d 259 (Ct. App. 1992).

e. Language "left by the parent with a relative or other person" in Wis. Stat. § 48.415(1)(a)3. includes a situation in which child is actively placed by parent or remains with relative or other person as result of a court order. *Rhonda R.D. v. Franklin R.D. (In re Int. of Christopher D.)*, 191 Wis. 2d 680, 696, 706–07 (Ct. App. 1995).

f. Parent's failure to visit or communicate with child during applicable time period establishes presumption of abandonment, which is governed by Wis. Stat. § 903.01. *Odd S.-G.*, 194 Wis. 2d at 373–74; *T.P.S.*, 168 Wis. 2d at 266.

g. Abandonment may be proved even though paternity adjudication follows abandonment period. *State v. James P. (In re TPR to Chezron M.)*, 2005 WI 80, 281 Wis. 2d 685.

C. Relinquishment [§ 23.132]

See Wis. Stat. § 48.415(1m).

Relinquishment under Wis. Stat. § 48.195(1) of a child 72 hours old or younger as found by a court as a basis for CHIPS under Wis. Stat. § 48.13.

D. Continuing Need of Protection or Services (CHIPS) [§ 23.133]

See Wis. Stat. § 48.415(2).

Continuing CHIPS is established by proving all the following:

1. That child was adjudged a child or unborn child in need of protection or services and placed or continued in placement outside of the home by a court order under Wis. Stat. §§ 48.345 or 938.345, disposition of unborn child or adult expectant mother adjudged in need of protection or services under Wis. Stat. § 48.347, change of placement under Wis. Stat. §§ 48.357 or 938.357, revision of dispositional order under Wis. Stat. §§ 48.363 or 938.363, or extension under Wis. Stat. §§ 48.365 or 938.365 (not consent decree under Wis. Stat. §§ 48.32 or 938.32 or temporary custody under Wis. Stat. §§ 48.205 or 938.205). Wis. Stat. § 48.415(2)(a)1.; *see also* Wis. Stat. §§ 48.13 (CHIPS jurisdiction), 938.13 (juveniles in need of protection or services (JIPS)); *Marinette Cnty. Dep't of Hum. Servs. v. Tammy C. (In re TPR of Anthony C.)*, 219 Wis. 2d 206 (1998).

   The Wisconsin Supreme Court decided *Andrea L.O.* on its facts by holding that the circuit court was not required to engage in a personal colloquy to ascertain that the withdrawal of a statutory jury right was knowing and voluntary because there was a stipulation in place that had been made in open court in the presence of the affected parent and with an adequate evidentiary basis. *Walworth Cnty. Dep't of Hum. Servs. v. Andrea L.O. (In re TPR to Lyle D.E.)*, 2008 WI 46, 309 Wis. 2d 161. *But see Manitowoc Cnty. Dep't of Hum. Servs. v. Allen J. (In re TPR to Brandon J.)*, 2008 WI App 137, 314 Wis. 2d 100 (holding that colloquy was required when stipulation was not reached in open court with presence and assent of affected parent and when there was not adequate evidentiary basis in record); *State v. Stacee P. (In re Enisha H.)*, Nos. 2012AP167, 2012AP168, 2012AP169, 2012AP444, 2012AP445, 2012AP446, 2012 WL 2094390, ¶ 17 (Wis. Ct. App. June 12, 2012) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (holding that law permits directed verdicts in TPR cases when evidence is undisputed, and that court can take judicial notice of its own records).

2. That one or more court order(s) contain(s) notice required by Wis. Stat. §§ 48.356(2) or 938.356(2), meeting the following requirements (Wis. Stat. § 48.415(2)(a)1.):

   a. Written order must notify parent of any applicable TPR grounds. Wis. Stat. §§ 48.356(2), 938.356(2).

   b. Written order must notify parent of the conditions necessary for child to return home. Wis. Stat. §§ 48.356(2), 938.356(2).

   c. Additional provisions regarding warnings:

      (1) Complete compliance with the warnings requirements of Wis. Stat. § 48.356(2) is mandated and cannot constitute harmless error; oral warnings in lieu of written warnings contained in court order do not satisfy requirements of Wis. Stat. § 48.356(2). *D.F.R. v. Juneau Cnty. Dep't of Soc. Servs. (In re D.F.)*, 147 Wis. 2d

486, 495, 498–99 (Ct. App. 1988), *overruled in part by Cynthia E. v. La Crosse Cnty. Hum. Servs. Dep't (In re Jamie L.)*, 172 Wis. 2d 218, 229–30 (1992); *Dane Cnty. Dep't of Hum. Servs. v. Lee H. (In re Isaiah H.)*, No. 2011AP1138, 2011 WL 6090112, ¶ 21 n.8 (Wis. Ct. App. Dec. 8, 2011) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (stating that *D.F.R.* does not directly address whether petitioner must prove, to satisfy abandonment ground, that parent received order with warnings attached).

(2) Purpose of warnings is to give parents every opportunity to remedy and rehabilitate family unit. *Winnebago Cnty. Dep't of Soc. Servs. v. Darrell A. (In re Int. of Amanda A.)*, 194 Wis. 2d 627, 644 (Ct. App. 1995).

(3) Application of Wis. Stat. § 48.356(2) warnings requirement in Wis. Stat. § 48.415(2)(a)1. is limited to orders placing child outside parental home or denying parental visitation after CHIPS adjudication under Wis. Stat. §§ 48.345, 48.357, 48.363, or 48.365. *Tammy C.*, 219 Wis. 2d 206.

(4) Written order notifying parent of all TPR grounds is sufficient (order need not be limited only to specific grounds apparently applicable to case). *Cynthia E. v. La Crosse Cnty. Hum. Servs. Dep't (In re Int. of Jamie L.)*, 172 Wis. 2d 218 (1992).

(5) Judicial notice of standard court practice of attaching TPR warnings referenced in order is permitted, but inference that orders therefore had those warnings attached is inappropriate when parent claims inability to recollect receipt of warnings. *D.B. v. Waukesha Cnty. Hum. Servs. Dep't (In re Int. of J.A.B.)*, 153 Wis. 2d 761, 768 (Ct. App. 1989).

(6) A TPR petition need not be dismissed if one or more of the orders placing the child outside the home does not contain the warnings required by Wis. Stat. § 48.356(2). Wis. Stat. §§ 48.356(2) and 48.415(2) are intended to ensure that parents have adequate notice of both the conditions for the safe return of a child and the fact that their parental rights are in jeopardy. Pursuant to *Michael D.*, only a single written warning is required. *Waukesha Cnty. v. Steven H. (In re TPR of Brittany Ann H.)*, 2000 WI 28, ¶ 3, 233 Wis. 2d 344, *withdrawn in part by St. Croix Cnty. Dep't of Health & Hum. Servs. v. Michael D. (In re TPR to Matthew D.)*, 2016 WI 35, 368 Wis. 2d 170; *Waushara Cnty. v. Lisa K. (In re Katherine N.)*, 2000 WI App 145, 237 Wis. 2d 830.

(7) Parental rights to written TPR warnings appear to have been significantly limited in *Michael D.*, in which the court held, pursuant to strict statutory interpretation, that provision of written warnings one time (regardless of whether it is the last dispositional order) is sufficient to meet statutory requirements and clarified that despite certain language in *Steven H.*, it is not necessary for a prosecutor or representative of the public to wait six months from the provision of written TPR warnings to file a TPR petition. *Michael D.*, 2016 WI 35, 368 Wis. 2d 170.

d. Effect of statutory changes on warnings:

(1) Parent was unfairly tried when previously warned of requirements under Wis. Stat. § 48.415(2)(c) (1991–92) and case was tried under proof requirements of same statute, as amended by 1993 Wis. Act 395, because petitioner's burden of proof

decreased. *State v. Patricia A.P. (In re Int. of Jason P.S.)*, 195 Wis. 2d 855 (Ct. App. 1995).

NOTE: In *Eau Claire County Department of Human Services v. S.E. (In re TPR to T.L.E.-C.)*, 2021 WI 56, ¶ 20, 397 Wis. 2d 462, the Wisconsin Supreme Court distinguished *Patricia A.P.* by holding that Wis. Stat. § 48.415(2)(a)(3), as amended, did not substantially change or alter the type of conduct that could lead to termination of parental rights.

(2) Parent's due process rights were not violated when parent was warned of requirements under Wis. Stat. § 48.415(2)(a)(3) (2015-2016) and case was tried under statutory timeline as amended by 2017 Wis. Act 256, because the statutory amendment did not substantially change the type of conduct required under TPR. *Eau Claire Cnty. Dep't of Hum. Servs. v. S.E. (In re TPR to T.L.E.-C.)*, 2020 WI App 39, ¶ 23, 392 Wis. 2d 726, *aff'd*, *Eau Claire Cnty. Dep't of Hum. Servs. v. S.E. (In re T.L.E.-C.)*, 2021 WI 56, 397 Wis. 2d 462 (amended statute did not create new legal obligation or consequence and therefore did not violate parent's due process right as impermissible retroactive application).

3. That child has been outside the home under such court order(s) for a total cumulative period of six months or longer, excluding time as an unborn child. Wis. Stat. § 48.415(2)(a)3.

TPR petition pursuant to Wis. Stat. § 48.415(2) may be filed before six months elapse from the entry of the latest CHIPS order if parent has received adequate notice of the conditions of return and TPR warnings. *Michael D.*, 2016 WI 35, 368 Wis. 2d 170; *Lisa K.*, 2000 WI App 145, ¶¶ 11–14, 237 Wis. 2d 830.

4. That agency responsible for care of child and family has made reasonable effort to provide court-ordered services. Wis. Stat. § 48.415(2)(a)2.b.

a. *Reasonable effort* means an earnest and conscientious effort to take good-faith steps to provide services ordered by court; takes into consideration characteristics of parent, expectant mother, or child, level of cooperation of parent or expectant mother, and other relevant circumstances. Wis. Stat. § 48.415(2)(a)2.a.

b. Whether county has made reasonable effort to provide court-ordered services is a fact-sensitive inquiry that must consider the totality of circumstances as they exist in each case; fact that Americans with Disabilities Act may impose additional obligations on county does not change the nature of inquiry or change the burden of proof. *State v. Raymond C. (In re Int. of Torrance P.)*, 187 Wis. 2d 10, 15 (Ct. App. 1994).

NOTE: A list of court-ordered services, while advisable, is not always required for this type of TPR, as long as court-ordered services can be inferred from the conditions parents must meet before their children will be returned. *Sheboygan Cnty. Dep't of Health & Hum. Servs. v. Tonya M.B. (In re Elijah W.L.)*, 2010 WI 55, ¶ 33, 325 Wis. 2d 524.

c. Unpublished decision appears to be consistent with statute and jury instructions in concluding that evaluation of agency reasonable efforts includes period of time after CHIPS petition has been filed. *Stacee P.*, 2012 WL 2094390.

5. Failure to include conditions of return in every order does not preclude filing for TPR. Wis. Stat. § 48.415(2)(a)3.; *Michael D.*, 2016 WI 35, 368 Wis. 2d 170; *Lisa K.*, 2000 WI App 145, 237 Wis. 2d 830.

6. If child has been placed outside the home for less than 15 of the most recent 22 months, that there is a substantial likelihood that parent will not meet conditions established for child's return as of the date on which child will have been placed outside the home for 15 of the most recent 22 months. Wis. Stat. § 48.415(2)(a)3.

NOTE: 2017 Wis. Act 256, § 1 (eff. April 4, 2018), significantly reduced application of the projection element (formerly a 9-month projection) in continuing CHIPS cases under Wis. Stat. § 48.415(2)(a)3. The projection element no longer applies in cases in which the child has been placed outside a parental home for more than 15 of the preceding 22 months. TPR petitions filed after April 4, 2018, are properly resolved even when the underlying CHIPS case for the same child was filed before April 4, 2018 (as long as supported by legally current written warnings in the CHIPS case). The TPR and CHIPS cases are separate actions pursuant to Wisconsin law, so a timely TPR petition filed after April 4, 2018, is not a retroactive application of law and is consistent with due process. *Dane Cnty. Dep't of Hum. Servs. v. J.R. (In re TPR to J.T.)*, 2020 WI App 5, ¶¶ 38, 50, 390 Wis. 2d 326.

In *Eau Claire County Department of Human Services v. S.E. (In re TPR to T.L.E—C)*, 2020 WI App 39, 392 Wis. 2d 726, the court of appeals rejected several arguments by a parent that were similar to those made in *J.R.*, including the parent's statutory retroactivity contention. The court also rejected the parent's argument that application of the amended statute violated her right to procedural due process under *State v. Patricia A.P. (In re Interest of Jason P.S.)*, 195 Wis. 2d 855, 863 (Ct. App. 1995), finding that the amended statute's elimination of the need for a prospective determination of whether a parent was likely to meet the conditions for return of the child within the nine months following the fact-finding hearing was not a substantive change in TPR grounds that might raise procedural-due-process concerns. *S.E.*, 2020 WI App 39, ¶¶ 20–23, 392 Wis. 2d 726.

The Wisconsin Supreme Court upheld the appellate court's holding. *Eau Claire Cnty. Dep't of Hum. Servs. v. S.E. (In re TPR to T.L.E.-C.)*, 2021 WI 56, 397 Wis. 2d 462. The court held that the amendment did not have retroactive effect because it did not create new legal consequences or obligations. *Id.* ¶ 15. In addition, the court rejected the parent's fair-notice argument, which relied on *Patricia A.P.*, finding that the amendment did not substantially change or alter the quality of conduct leading to the termination of parental rights. *Id.* ¶ 20. Since the conduct triggering TPR remained the same—that the parent failed to meet the conditions established for safe return of the child to the home—the parent's right to fair notice was not violated. *Id.* ¶ 23.

CAUTION: Items a.–c., *infra*, may be read for context, but they have been modified by this and other statutory changes and should only be relied on for specific principles that remain legally valid after careful consideration.

a. Evidence of events that occurred before CHIPS dispositional orders were entered was admissible in TPR proceeding as it tended to show that parent was unlikely to meet conditions within next 12 months. *La Crosse Cnty. Dep't of Hum. Servs. v. Tara P. (In re Deantye P.-B.)*, 2002 WI App 84, 252 Wis. 2d 179.

b. Evidence of events occurring after filing of petition should be permitted if relevant to *substantial likelihood* element under Wis. Stat. § 48.415(2). *S.D.S. v. Rock Cnty. Dep't of Soc. Servs. (In re Int. of T.M.S.)*, 152 Wis. 2d 345, 359 (Ct. App. 1989).

NOTE: In *Brown County Human Services v. T.F. (In re TPR to A.P.)*, No. 2020AP793, 2020 WL 5637005 (Wis. Ct. App. Sept. 22, 2022) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)), the court rejected an argument that postfiling events are always irrelevant and therefore inadmissible for a petition under Wis. Stat. § 48.415(1), and distinguished *S.D.S.*, finding the fact that evidence is required in one type of TPR case does not preclude that evidence from being relevant in a different type. *Id.* ¶¶ 28–30. The court relied on additional supreme court precedent, *State v. Bobby G.*, 2007 WI 77, 301 Wis. 2d 531, to hold that the relevancy of postfiling events should be evaluated on a case-by-case basis and that post-filing evidence may be admissible in an abandonment case. 2020 WI App 70, ¶¶ 28–30.

c. The Wisconsin Supreme Court has ruled as a matter of substantive due process that incarceration in and of itself cannot be the sole basis for a finding of grounds for TPR pursuant to Wis. Stat. § 48.415(2). *Kenosha Cnty. Dep't of Hum. Servs. v. Jodie W. (In re TPR to Max G.W.)*, 2006 WI 93, ¶ 49, 293 Wis. 2d 530; *see Ozaukee Cnty. Dep't of Hum. Servs. v. Callen D.M. (In re TPR to Carson E.B.)*, No. 2013AP1157, 2013 WL 5338508 (Wis. Ct. App. Sept. 25, 2013) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (distinguishing *Jodie W.* because conditions for return were not impossible to meet when parent incarcerated for only the last few months of dispositional order); *State v. Ebony D. (In re Ka'Dejah P.)*, Nos. 2013AP619, 2013AP620, 2013AP621, 2013 WL 3186417, ¶¶ 27–29 (Wis. Ct. App. June 25, 2013) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (distinguishing *Jodie W.* because conditions for return were narrowly tailored to children's safety needs as well as parent's cognitive limitations, thus compliance not impossible); *State of Wisconsin v. D.Q. (In re TPR to K.C.)*, No. 2020AP1109, 2020 WL 5638950, ¶¶ 28–29 (Wis. Ct. App. Sept. 22, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (distinguishing *Jodie W.* because conditions for return were not impossible to meet when parent was aware of child's existence but absent from child's life and failure to satisfy conditions was parent's own doing).

7. Additional considerations

a. Findings of fact made in CHIPS proceedings do not preclude litigation on same issues at the TPR trial, because the burden of proof is greater at the TPR trial. *S.D.S.*, 152 Wis. 2d at 354–57.

b. Prior defects in CHIPS extensions cannot be collaterally attacked in TPR proceedings. *L.M.C. v. M.C. (In re Int. of L.M.C.)*, 146 Wis. 2d 377, 396 (Ct. App. 1988).

c. Preclusion doctrines (both claim or issue) may apply to prior TPR attempts. *Brown Cnty. v. Terrance M. (In re TPR to Genesis M.)*, 2005 WI App 57, 280 Wis. 2d 396.

d. Parent's failure to seek change of placement in underlying CHIPS case does not tend to support TPR in a separate TPR action. *Dane Cnty. Dep't of Hum. Servs. v. C.B. (In re TPR to Z.B.)*, Nos. 2018AP38, 2018AP39, 2018 WL 1726242 (Wis. Ct. App. Apr. 9, 2018) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

8. Under Wis. Stat. § 48.415(2)(am), alternative continuing CHIPS ground established by proving all the following:

a. On at least three occasions, child was adjudged in need of protection or services under Wis. Stat. § 48.13(3), (3m), (10), or (10m). Wis. Stat. § 48.415(2)(am)1.

b. In connection with each adjudication, child was placed outside the home by a court order under Wis. Stat. § 48.345, containing notice required by Wis. Stat. § 48.356(2). Wis. Stat. § 48.415(2)(am)1.

c. Parent caused the conditions leading to placement outside home under each order. Wis. Stat. § 48.415(2)(am)2.

E. Continuing Parental Disability [§ 23.134]

See Wis. Stat. § 48.415(3).

Continuing parental disability is established by proving all the following:

1. That as a result of mental illness or developmental disability, parent is now, and for at least two cumulative years of past five years has been, inpatient at hospital, as defined in Wis. Stat. § 50.33(2)(a), (b), or (c); licensed treatment facility, as defined in Wis. Stat. § 51.01(2); or state treatment facility, as defined in Wis. Stat. § 51.01(15). Wis. Stat. § 48.415(3)(a); *see also* Wis. Stat. §§ 51.01(13)(a), (b) (defining *mental illness*), 55.01(2), (5) (defining *developmental disability*);

2. That parent's condition is likely to continue indefinitely. Wis. Stat. § 48.415(3)(b).

3. That child is not being given adequate care by parent, guardian, or relative with legal custody. Wis. Stat. § 48.415(3)(c).

F. Continuing Denial of Periods of Physical Placement or Visitation [§ 23.135]

See Wis. Stat. § 48.415(4).

Continuing denial of periods of physical placement or visitation is established by proving both the following:

1. That parent was denied periods of physical placement by family court or visitation by court order, under Wis. Stat. §§ 48.345, 48.363, 48.365, 938.345, 938.363, or 938.365, containing notice required by Wis. Stat. §§ 48.356(2) or 938.356(2) in juvenile cases. Notice not required in family court cases. Wis. Stat. § 48.415(4)(a); *see also* Wis. Stat. § 767.41(4); *Kimberly S.S. v. Sebastian X.L. (In re TPR to Jillian K.L.)*, 2005 WI App 83, 281 Wis. 2d 261.

2. That one year has elapsed since order was issued, without change of conditions that must be met to permit periods of physical placement or visitation. Wis. Stat. § 48.415(4)(b).

   NOTE: Constitutionality of ground upheld by supreme court against substantive due-process challenge. *Dane Cnty. DHS v. Ponn P. (In re TPR to Diana P.)*, 2005 WI 32, 279 Wis. 2d 169.

G. Child Abuse [§ 23.136]

See Wis. Stat. § 48.415(5).

1. Child abuse is established by proving pattern of physically or sexually abusive behavior by parent that is substantial threat to the child's health, and that either

   a. Parent has caused child's death or injury resulting in felony conviction, or

   b. Child was removed from parent's home by court order under Wis. Stat. § 48.345 and a finding that the child is CHIPS under Wis. Stat. § 48.13(3) or (3m).

2. The language "abusive behavior which is a substantial threat" to health of child in Wis. Stat. § 48.415(5) refers back to phrase "has exhibited a pattern." Therefore, when parent has committed a pattern of abuse ending in a felony conviction and there is extended separation from child because of incarceration, "substantial threat" refers to behavior occurring in past that was threat to child's welfare, not an assessment of present and future events. *Jerry M. v. Dennis L.M. (In re Int. of Guenther D.M.)*, 198 Wis. 2d 10, 18 (Ct. App. 1995).

3. The term *conviction* in Wis. Stat. § 48.415(5)(a) means conviction after right of appeal to court of appeals has been exhausted. Conviction may be used if appeal does not raise issues challenging guilt. *Monroe Cnty. v. Jennifer V. (In re Int. of Kody D.V.)*, 200 Wis. 2d 678, 686, 690–91 (Ct. App. 1996), *clarified by Reynaldo F. v. Christal M. (In re TPR to Reynaldo F.)*, 2004 WI App 106, 272 Wis. 2d 816.

H. Failure to Assume Parental Responsibility [§ 23.137]

See Wis. Stat. § 48.415(6).

1. Failure to assume parental responsibility is established by proving parent (or person who may be parent) has not had substantial parental relationship with child. Wis. Stat. § 48.415(6)(a).

2. *Substantial parental relationship* means acceptance and exercise of significant responsibility for daily supervision, education, protection, and care of child. Wis. Stat. § 48.415(6)(b); *L.K. v. B.B. (In re Int. of Baby Girl K.)*, 113 Wis. 2d 429 (1983).

3. In evaluating whether a substantial parental relationship exists, court may consider whether person has expressed concern for or interest in the support, care, or well-being of child; whether person has neglected or refused to provide care or support for child; and whether father or alleged father has expressed concern for or interest in the support, care, or well-being of mother during pregnancy. Wis. Stat. § 48.415(6)(b).

4. The Wisconsin Supreme Court had held that proof of opportunity or ability to establish substantial parental relationship is not required, and elimination of such proof requirement does not violate due process or equal protection. *Ann M.M. v. Rob S. (In re TPR to SueAnn A.M.)*, 176 Wis. 2d 673 (1993).

   NOTE: This holding is implicitly limited by *State v. Bobby G. (In re TPR to Marquette S.)*, 2007 WI 77, ¶¶ 5, 49, 301 Wis. 2d 531, which held that a court must consider a father's efforts to assume parental responsibility for a child if he learns he is the father only after a TPR is filed but before the court adjudicates the grounds for termination.

5. The Wisconsin Supreme Court adopted a totality-of-the-circumstances test related to Wis. Stat. § 48.415(6). One factor adverse to parents that can be considered in appropriate cases is

whether a parent has exposed the child to a "hazardous living environment," which may include certain criminal conduct (including illegal drug-related conduct) by the parent. *Tammy W-G. v. Jacob T. (In re TPR to Gwenevere T.)*, 2011 WI 30, ¶¶ 22, 37–38, 333 Wis. 2d 273.

6. The Wisconsin Court of Appeals held that reasonable efforts to deliver court-ordered services are not required in TPR cases in which the issue is failure to assume parental responsibility. *State v. N.J. (In re TPR to G.H.)*, Nos. 2015AP1477, 2015AP1478, 2015 WL 7290830 (Wis. Ct. App. Nov. 12, 2015) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

7. The court of appeals held, in an unpublished case, that it is constitutionally permissible to require a parent to meet "daily" parenting requirements of Wis. Stat. § 48.415(6) even when child is placed outside a parental home pursuant to CHIPS court order, because the parent can remedy situation by meeting court-ordered conditions of return. *Dane Cnty. Dep't of Hum. Servs. v. D.M. (In re the TPR to D.L.)*, No. 2014AP2291, 2015 WL 4557257 (Wis. Ct. App. July 30, 2015) (unpublished opinion not citable per Wis. Stat. § 809.23(3)). Similarly, in *State v. J.A. (In re TPR to H.V.A.)*, No. 2018AP1257, 2018 WL 6333624 (Wis. Ct. App. Dec. 4, 2019) (unpublished opinion not citable per Wis. Stat. § 809.23(3)), the court of appeals held that a court-ordered out-of-home placement does not prevent a substantial parental relationship via parental financial support for the child, involvement in the child's school activities, and other types of interaction with the child.

I. Incestuous Parenthood [§ 23.138]

See Wis. Stat. § 48.415(7).

1. Incestuous parenthood is established by proving that person whose parental rights are sought to be terminated is related by blood or adoption to child's other parent in degree of kinship closer than second cousin.

2. Wis. Stat. § 48.415(7), viewed together with dispositional protections in Wis. Stat. §§ 48.426 and 48.427, does not violate rights to due process or equal protection when parents intend to subject child to incestuous environment. *State v. Allen M. (In re Int. of Tiffany Nicole M.)*, 214 Wis. 2d 302 (Ct. App. 1997).

3. Ground is unconstitutional pursuant to substantive due process when applied to victim of crime who was a minor when incest began. *Monroe Cnty. Dep't of Hum. Servs. v. Kelli B. (In re TPR to Zachary B.)*, 2004 WI 48, 271 Wis. 2d 51.

J. Homicide or Solicitation to Commit Homicide of Parent [§ 23.139]

See Wis. Stat. § 48.415(8).

1. Homicide or solicitation to commit homicide of parent is established by proving that person whose parental rights are sought to be terminated has committed first-degree or second-degree intentional homicide or first-degree reckless homicide of child's other parent, in violation of Wis. Stat. §§ 940.01, 940.02, or 940.05, or has solicited another to commit first-degree intentional homicide of child's other parent, in violation of Wis. Stat. § 939.30, or has committed comparable crime under other state or federal law, as evidenced by final judgment of conviction. Wis. Stat. §§ 939.30, 940.01, 940.02, 940.05.

2. Statute does not create an ex post facto law nor does it violate due process, equal protection, or double jeopardy. *Winnebago Cnty. Dep't of Soc. Servs. v. Darrell A. (In re Int. of Amanda A.)*, 194 Wis. 2d 627, 636–42 (Ct. App. 1995).

3. Notice under Wis. Stat. § 48.356(2) is not required. *Darrell A.*, 194 Wis. 2d at 645.

K. Parenthood as Result of Sexual Assault [§ 23.140]

See Wis. Stat. § 48.415(9).

1. Parenthood as result of sexual assault is established by proving that child was conceived as a result of sexual assault in violation of Wis. Stat. §§ 940.225(1), (2), or (3), 948.02(1) or (2), 948.025, or 948.085.

2. Conception resulting from sexual assault may be proved by evidence indicating that person who may be father committed sexual assault against mother during a possible time of conception.

3. Proof by judgment of sexual assault conviction is authorized.

L. Commission of Serious Felony Against One of the Person's Children [§ 23.141]

See Wis. Stat. § 48.415(9m).

1. Commission of serious felony against one of the person's children is established by proving

   a. Parent committed a serious felony against that parent's child, and

   b. Parent was convicted, as evidenced by final judgment of conviction.

2. *Serious felony* means any of the following:

   a. The commission of, aiding or abetting of, solicitation, conspiracy, or attempt to commit any of the following crimes or comparable crimes under other state or federal law:

      (1) First-degree intentional homicide. Wis. Stat. § 940.01.

      (2) First-degree reckless homicide. Wis. Stat. § 940.02.

      (3) Felony murder. Wis. Stat. § 940.03.

      (4) Second-degree intentional homicide. Wis. Stat. § 940.05.

   b. The commission of any of the following crimes or comparable crimes under other state or federal law:

      (1) Felony battery. Wis. Stat. §§ 940.19(3) (2001–02), 940.19(2), (4), (5).

      (2) First- or second-degree sexual assault. Wis. Stat. § 940.225(1), (2).

(3) First- or second-degree sexual assault of a child. Wis. Stat. § 948.02(1), (2).

(4) Repeated acts of sexual assault of same child. Wis. Stat. § 948.025.

(5) Intentional or reckless physical abuse of a child causing great bodily harm. Wis. Stat. § 948.03(2)(a), (3)(a), (5)(a)1., 2., 3.

(6) Sexual exploitation of a child. Wis. Stat. § 948.05.

(7) Trafficking of a child. Wis. Stat. § 948.051.

(8) Incest with a child. Wis. Stat. § 948.06.

(9) Solicitation of a child for prostitution. Wis. Stat. § 948.08.

(10) Patronizing a child. Wis. Stat. § 948.081.

(11) Sexual assault of a child in substitute care. Wis. Stat. § 948.085.

c. The commission of a violation of Wis. Stat. § 948.21 (child neglect) or comparable crime under other state or federal law.

NOTE: A conviction that has been appealed based on challenges to guilt cannot be used as a basis or ground. This applies to petitions filed after July 1, 1996, and precludes consideration of crimes committed before that date. 1995 Wis. Act 275, § 9310(5)(F); *Reynaldo F. v. Christal M. (In re TPR to Reynaldo F.)*, 2004 WI App 106, 272 Wis. 2d 816.

M. Prior Involuntary TPR to Another Child [§ 23.142]

See Wis. Stat. § 48.415(10).

1. Prior involuntary TPR to another child is established by proving all the following:

a. Child who is subject of TPR has been found in need of protection or services under Wis. Stat. § 48.13(2), (3), or (10), or child born after filing of TPR under this subsection on sibling; and

b. Within three years before CHIPS adjudication, a court ordered involuntary TPR of another child of the person.

2. Wis. Stat. § 48.415(10) does not preclude use of TPR orders entered before effective date of statute (July 1, 1996) as grounds. 1995 Wis. Act 275, § 9310(5); 2005 Wis. Act 293.

Under this ground, it is unnecessary to prove what TPR ground was the basis for the earlier TPR. The earlier TPR judgment cannot be collaterally attacked in the second proceeding. *Oneida Cnty. Dep't of Soc. Servs. v. Nicole W. (In re TPR to Brianca M.W.)*, 2007 WI 30, ¶ 36, 299 Wis. 2d 637.

VI. PARENTAL UNFITNESS [§ 23.143]

A. When Parent Must Be Found Unfit [§ 23.144]

1. Absent unusual circumstances, due process prohibits involuntary TPR without a finding of unfitness. *Mrs. R. v. Mr. B. (In re Int. of J.L.W.)*, 102 Wis. 2d 118 (1981); *see also Walworth Cnty. Dep't of Hum. Servs. v. Elizabeth W. (In re Int. of Philip W.)*, 189 Wis. 2d 432 (Ct. App. 1994), *overruled on other grounds by Steven V. v. Kelley H. (In re TPR to Alexander V.)*, 2004 WI 47, 271 Wis. 2d 1.

2. Court must find parent unfit if court or jury finds grounds for TPR before proceeding to disposition, but petition may be dismissed at disposition despite finding of unfitness if court determines that TPR is not in the child's best interest. Wis. Stat. §§ 48.424(4), 48.427(2); *Sheboygan Cnty. Dep't of Health & Hum. Servs. v. Julie A.B. (In re TPR to Prestin T.B.)*, 2002 WI 95, 255 Wis. 2d 170 (modifying *B.L.J. v. Polk Cnty. Dep't of Soc. Servs. (In re Int. of K.D.J.)*, 163 Wis. 2d 90 (1991) and overruling *State v. Kelli S.*, 2001 WI App 193, 247 Wis. 2d 144); *Mrs. R.*, 102 Wis. 2d at 131; *State v. Allen M. (In re Int. of Tiffany Nicole M.)*, 214 Wis. 2d 302 (Ct. App. 1997); *Jerry M. v. Dennis L.M. (In re Int. of Guenther D.M.)*, 198 Wis. 2d 10, 20 (Ct. App. 1995); *P.S. v. G.O. (In re Int. of T.P.S.)*, 168 Wis. 2d 259, 267 (Ct. App. 1992); *Rock Cnty. Dep't of Soc. Servs. v. K.K. (In re Int. of K.K.)*, 162 Wis. 2d 431, 441 (Ct. App. 1991).

3. Finding of unfitness is not required to terminate father's parental rights under Wis. Stat. § 48.415(6). *L.K. v. B.B. (In re Int. of Baby Girl K.)*, 113 Wis. 2d 429 (1983).

4. Court need not find parent unfit for reasonably foreseeable future in TPR actions under grounds of abandonment. *Rhonda R.D. v. Franklin R.D. (In re Int. of Christopher D.)*, 191 Wis. 2d 680, 696, 708–09 (Ct. App. 1995); *see* Wis. Stat. § 48.415(1).

B. What Is Unfitness [§ 23.145]

1. If a jury or court determines that grounds for TPR have not been proved, the court must dismiss the petition. Conversely, if grounds for TPR are found by a court or a jury, the court must find parent unfit. There is no intermediate step to evaluate level of unfitness under most circumstances. Wis. Stat. § 48.424(4); *Sheboygan Cnty. Dep't of Health & Hum. Servs. v. Julie A.B. (In re TPR to Prestin T.B.)*, 2002 WI 95, 255 Wis. 2d 170.

2. However, in TPR cases involving incarcerated parents pursuant to Wis. Stat. § 48.415(2), the circuit court should give consideration to a range of factors before disposition, including the nature of the crime, the sentence imposed, the parent's relationship with the child before and during incarceration, and the best interests of the child. *Kenosha Cnty. Dep't of Hum. Servs. v. Jodie W.*, 2006 WI 93, ¶ 50, 293 Wis. 2d 530.

3. "To condemn this child to go from foster home to foster home, waiting for a parental relationship to come into existence for which the mother seems unwilling to take steps to make possible, is, it seems to us, 'seriously detrimental to the child.'" *B.L.J. v. Polk Cnty. Dep't of Soc. Servs. (In re Int. of K.D.J.)*, 163 Wis. 2d 90, 113 (1991); *see also Kegel v. Oneida Cnty. Dep't of Soc. Servs. (In re TPR to Kegel)*, 85 Wis. 2d 574 (1978).

4. In custody disputes between parent and third parties, parent is entitled to custody unless parent is unfit or unable, or unless compelling reasons exist such as abandonment, persistent neglect, extended disruption of custody, or similar circumstances that drastically affect child's welfare.

Barstad v. Frazier, 118 Wis. 2d 549 (1984); *Howard M. v. Jean R. (In re Guardianship of Jenae K.S.)*, 196 Wis. 2d 16 (Ct. App. 1995); *see also Sallie T. v. Milwaukee Cnty. Dep't of Health & Hum. Servs. (In re Int. of Nadia S.)*, 212 Wis. 2d 694 (Ct. App. 1997), *aff'd*, 219 Wis. 2d 296 (1998).

VII. TIME PERIODS [§ 23.146]

A. In General [§ 23.147]

Prior to 2007, most time limits established in the Children's Code were mandatory without the need for a record objection. Now, however, Wis. Stat. § 48.315(3) provides that a circuit court does not lose personal jurisdiction, subject-matter jurisdiction, or competency to act regarding any time period unless a timely objection is raised. *Compare* Wis. Stat. § 48.315(3), *as affected by* 2007 Wis. Act 199, *with Green Cnty. Dep't of Hum. Servs. v. H.N. (In re Int. of B.J.N.)*, 162 Wis. 2d 635, 657 (1991), *and Waukesha Cnty. v. Darlene R. (In re Int. of Victoria R.)*, 201 Wis. 2d 633, 639–40 (Ct. App. 1996).

B. From Filing of Petition to Initial Hearing [§ 23.148]

Initial hearing must be held within 30 days after filing TPR petition, assuming timely objection is made pursuant to Wis. Stat. § 48.315(3). See Wis. Stat. § 48.42(2g) regarding notice to foster parents. Wis. Stat. § 48.422(1).

C. From Initial Hearing to Fact-Finding Hearing [§ 23.149]

Fact-finding hearing must be held within 45 days after initial hearing, unless all necessary parties agree to immediate hearing, or there is no timely objection pursuant to Wis. Stat. § 48.315(3). See Wis. Stat. § 48.42(2g) regarding notice to foster parents. Wis. Stat. § 48.422(2).

D. From Fact-Finding Hearing to Disposition [§ 23.150]

Disposition immediately follows finding of grounds, unless parties stipulate to set over or because dispositional report is needed, in which case hearing must be held within 45 days after fact-finding absent a timely objection pursuant to Wis. Stat. § 48.315(3). See Wis. Stat. § 48.42(2g) regarding notice to foster parents. Wis. Stat. § 48.424(4).

However, 10-day deadline in Wis. Stat. § 48.427(1) for entry of TPR order is not a critical stage of the adjudication implicating circuit court's competence. *Dane Cnty. Dep't of Hum. Servs. v. Dyanne M. (In re TPR to Artavia B.)*, 2007 WI App 129, ¶ 15, 301 Wis. 2d 731.

E. Exclusions from Time Periods [§ 23.151]

1. Under Wis. Stat. § 48.315(1) and *M.G. v. La Crosse County Human Services Department (In the Interest of G.H.)*, 150 Wis. 2d 407, 418 (1989), the following periods of delay are excluded in computing time requirements that control all extensions of time deadlines in Wis. Stat. ch. 48:

    a. Delay resulting from other legal action concerning a child, including examination under Wis. Stat. § 48.295, prehearing motions, and hearings on other matters per Wis. Stat. § 48.315(1)(a);

b. Delay resulting from continuance granted at the request of, or with the consent of, child and counsel per Wis. Stat. § 48.315(1)(b); and

c. Other delays such as the disqualification of judge, a continuance requested by the representative of the public, the absence of the child, a delay resulting from imposition of a consent decree, the need for an interpreter, or the need to join the hearing with that of another child. Wis. Stat. § 48.315(1)(c)–(j); *State v. Joshua M.W. (In re Int. of Joshua M.W.)*, 179 Wis. 2d 335, 343 (Ct. App. 1993).

NOTE: See Wis. Stat. § 48.315(1)(j) for authorized delay in WICWA cases.

2. Time periods will not deprive a circuit court of personal jurisdiction, subject-matter jurisdiction, or competence in the absence of a timely objection. Wis. Stat. § 48.315(3).

3. Continuance granted only by court on the record or during a telephone conference for good cause and only for as long as necessary. Wis. Stat. § 48.315(2).

a. *On the record* requirement under Wis. Stat. § 48.315(2) is satisfied by clerk's minutes. *Waukesha Cnty. v. Darlene R. (In re Int. of Victoria R.)*, 201 Wis. 2d 633, 642 (Ct. App. 1996).

b. Finding of good cause to extend time limits must be made on the record before limits have expired. *State v. April O. (In re TPR to Everett W.O.)*, 2000 WI App 70, 233 Wis. 2d 663. But see Wis. Stat. § 48.365(6) in the absence of a timely objection.

c. Factors in evaluating good cause: (1) good faith of moving party, (2) prejudice to opposing party, (3) prompt remedial action by dilatory party, and (4) best interest of the child. *State v. Robert K. (In re TPR to Moriah K.)*, 2005 WI 152, ¶ 35, 286 Wis. 2d 143.

NOTE: Although the enumerated circumstances of Wis. Stat. § 48.315(1) are governed by Wis. Stat. § 48.315(2), the enumerated list does not proscribe other grounds for extending time deadlines that may be granted under Wis. Stat. § 48.315(2).

4. Timely continuance of fact-finding by court because of court congestion was proper in delinquency case. *J.R. v. State (In re J.R.)*, 152 Wis. 2d 598 (Ct. App. 1989).

5. If record contains evidence to support finding of good cause, "judicial incantation" of statutory phrase (good cause) not necessary. *I.P. v. State (In re Int. of D.S.P.)*, 157 Wis. 2d 106, 113 (Ct. App. 1990), *aff'd on other grounds*, 166 Wis. 2d 464 (1992); *see also Robert K.*, 2005 WI 152, ¶ 33, 286 Wis. 2d 143.

PRACTICE TIP: It is important that litigants make a clear record about reasons for deviation from the time periods, just as it is important for the court to make a good-cause finding on the record.

Scheduling conflicts of court or litigants *will not always* constitute good cause. *Robert K.*, 2005 WI 152, 286 Wis. 2d 143.

VIII. TPR PETITION [§ 23.152]

A. Who May File [§ 23.153]

1. Parent. Wis. Stat. § 48.42(1).

2. Agency or person authorized under Wis. Stat. § 48.25. Wis. Stat. § 48.42(1).

3. Counsel or GAL for parent, relative, guardian, or child.

4. District attorney, corporation counsel, or other appropriate person designated by court. Wis. Stat. §§ 48.42(1), 48.09(6).

5. Relative with whom child was placed by parent for adoption, if TPR petition is accompanied by an adoption petition. Wis. Stat. §§ 48.835(3)(a), 48.02(15).

6. Stepparent, when the purpose is to terminate parental rights of noncustodial parent. Wis. Stat. § 48.835(3)(b).

7. Custodial parent, when the purpose is to consent to TPR (may petition with nonrelative proposed adoptive parents for TPR and adoptive placement). Wis. Stat. § 48.837.

8. Guardian of child brought into this state for purpose of adoption. Wis. Stat. § 48.839.

B. Contents of Petition [§ 23.154]

1. Petition must include all the following:

   a. Title: "In the interest of (child's name), a person under the age of 18." Wis. Stat. §§ 48.42(1), 48.255(1).

   b. Child's name, birth date, and address. Wis. Stat. §§ 48.42(1)(a), 48.255(1)(a).

   c. Name and address of parent(s), guardian, legal custodian, or spouse, if any. Wis. Stat. §§ 48.42(1)(b), 48.255(1)(b).

   d. Grounds. Wis. Stat. § 48.42(1)(c).

      (1) Consent to be given, or facts and circumstances establishing grounds for involuntary TPR.

      (2) Reliable and credible information that forms the basis of allegations necessary to invoke jurisdiction and provide reasonable notice of conduct or circumstances to be considered by court. Wis. Stat. § 48.255(1)(e).

      (3) Principles that govern sufficiency of criminal complaint also govern sufficiency of petition in juvenile proceeding; these require recitation of "essential facts" constituting the basis for action; "encyclopedic" listing of all evidentiary facts is not required; reasonable inferences may be drawn from allegations in petition. *Monroe Cnty. v. Jennifer V. (In re Int. of Kody D.V.)*, 200 Wis. 2d 678, 683 (Ct. App. 1996); *Sheboygan Cnty. v. D.T. (In re Int. of L.A.T.)*, 167 Wis. 2d 276, 283 (Ct. App. 1992).

e. Statement of whether child may be subject to ICWA, and, if so, names of Indian custodian and tribe, as applicable. Relevant standard for WICWA case must be shown in pleading based on reliable and credible information. Wis. Stat. § 48.42(1)(d), (e); *see also* 25 U.S.C. §§ 1901–1963.

f. Statement of whether child has been adopted. Wis. Stat. § 48.42(1)(a).

g. Child's residence and names and addresses of persons with whom child has lived for past five years. Wis. Stat. § 822.29(1).

h. Other existing custody litigation, if any, and all parties having claims for custody or visitation. Wis. Stat. § 822.29(1)(a), (b), (c).

2. Petition filed by person other than district attorney or corporation counsel may include an affidavit of alleged paternity if the mother voluntarily terminates her rights to a nonmarital child. Wis. Stat. § 48.42(1g).

3. Compliance with Wis. Stat. ch. 822 in pleadings allows court to consider whether UCCJEA applies: whether case involves other persons out-of-state, whether additional persons must be joined, or whether other jurisdiction(s) must be notified. Wis. Stat. ch. 822 mainly applies to interstate disputes. *David S. v. Laura S. (In re Int. of Brandon S.S.)*, 179 Wis. 2d 114, 141–42 (1993) (analyzing UCCJA, the predecessor to UCCJEA).

4. Court may order amendment to cure defect in petition. Wis. Stat. § 48.263.

PRACTICE TIP: Relevant standard court forms must be used and supplemented, as needed, for petition and UCCJEA statement. Court forms can be found at https://www.wicourts.gov/forms1/circuit/index.htm (click on "Juvenile" and then click on "Termination of Parental Rights (Voluntary or Involuntary)") (last updated Feb. 13, 2022).

C. Visitation Injunction [§ 23.155]

See Wis. Stat. § 48.42(1m).

1. When TPR petition is filed, petitioner may also petition court for temporary order and injunction prohibiting parent(s) from visiting or contacting child. Petition must allege facts sufficient to show that prohibiting visitation or contact is in child's best interest. Wis. Stat. § 48.42(1m)(a); *see State v. F.J.R. (In re B.M.R.)*, Nos. 2017AP558, 2017AP559, 2017 WL 2555732 (Wis. Ct. App. June 13, 2017) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (discussing effect of visitation injunction on reasonable efforts and meeting conditions).

2. Court may order injunction ex parte or hold hearing. Hearing must take place *before* the initial hearing on termination petition. Wis. Stat. § 48.42(1m)(b).

3. Injunction cannot remain in effect beyond the date when rights are terminated or TPR petition is dismissed. Wis. Stat. § 48.42(1m)(c).

4. Injunction suspends visitation portion of any other orders under Wis. Stat. chs. 48 and 938. Wis. Stat. § 48.42(1m)(d).

5. Court must order injunction if parent was convicted of first-degree or second-degree intentional homicide of other parent and conviction was not reversed, set aside, or vacated, unless court determines by clear and convincing evidence that visitation or contact would be in best interests of child. Must consider wishes of child in this determination. Wis. Stat. § 48.42(1m)(e).

IX. NOTICE [§ 23.156]

A. Who Must Be Summoned (Noticed) [§ 23.157]

1. Parent(s), unless right to notice is waived under Wis. Stat. § 48.41(2)(d). Wis. Stat. § 48.42(2)(a).

2. For nonmarital child, if paternity is not established (Wis. Stat. §§ 48.42(2)(b), 48.27):

   a. Person who has filed an unrevoked declaration of paternal interest under Wis. Stat. § 48.025, before the birth of the child or within 14 days after the birth of the child. Wis. Stat. §§ 48.42(2)(b)1., 48.025.

   b. Any person conclusively determined from genetic test results to be the father under Wis. Stat. § 767.804(1) (administrative determination of paternity).

   c. Person(s) alleged to court to be father or who may, based on mother's statements or other information presented to court, be father, unless person(s) waived right to notice. Wis. Stat. §§ 48.42(2)(b)2., 48.41(2)(c).

   d. Person who may be father who has lived in familial relationship with child. Wis. Stat. § 48.42(2)(b)3.

3. For nonmarital child under one year of age, for whom paternity is not established, but affidavit under Wis. Stat. § 48.42(1g) is filed (Wis. Stat. § 48.42(2)(bm)):

   a. Person who has filed under Wis. Stat. § 48.025 before birth or within 14 days after birth or within 21 days after notice under Wis. Stat. § 48.42(1g)(b).

   b. Person who may be father who has lived in familial relationship with child.

4. GAL. Wis. Stat. § 48.42(2)(c); *David S. v. Laura S. (In re Int. of Brandon S.S.)*, 179 Wis. 2d 114 (1993).

   NOTE: Child must have a GAL appointed in TPR (even if child is 12 years old or older). Wis. Stat. § 48.235(1)(c); *see supra* § 23.10.

   NOTE: Parent may have a GAL appointed under certain circumstances. *See* Wis. Stat. § 48.41(3); *supra* § 23.17.

5. Guardian. Wis. Stat. §§ 48.42(2)(c), 48.02(8).

6. Legal custodian. Wis. Stat. §§ 48.42(2)(c), 48.02(11), (12).

NOTE: As to WICWA cases, see Wis. Stat. § 48.42(2)(c) regarding Indian custodian, as defined in Wis. Stat. § 48.02(8p).

7. Child, if 12 or older. Court may appoint advocacy counsel, although the court is not required to do so. Wis. Stat. §§ 48.42(2)(e), 48.255(4).

8. Person having physical custody of child. Wis. Stat. §§ 48.42(2)(d), 48.02(14).

9. Person to whom notice is required by Wis. Stat. ch. 822 (UCCJEA). Wis. Stat. §§ 822.01, 822.25; *see also* Wis. Stat. §§ 48.42(2)(d), 48.02(14); *David S.*, 179 Wis. 2d 114; *Brus C. v. Shawn D. (In re T.P.R. of Steven C.)*, 169 Wis. 2d 727 (Ct. App. 1992).

10. If child is an Indian child, tribe or band with which child is affiliated. Wis. Stat. § 48.255(4).

    NOTE: Refer to ICWA (25 U.S.C. §§ 1901–1963) and WICWA (Wis. Stat. § 48.028) for special requirements for proceedings involving Indian children.

11. Foster parents, although not parties, are entitled to summons, notice of all hearings, and petition (first notice must be in writing and served by mail; later notice may be given by telephone). Wis. Stat. §§ 48.42(2)(d), (2g), 48.27(6); *see also Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977).

12. Putative father of child conceived as a result of sexual assault in violation of Wis. Stat. §§ 940.225(1), (2) or (3), 948.02(1) or (2), 948.025, or 948.085 need not be summoned and has no standing to contest petition, unless putative father was under 18 years of age at time of sexual assault in violation of Wis. Stat. § 948.02(1) or (2). Wis. Stat. § 48.42(2m)(a); *Ann M.M. v. Rob S. (In re TPR to SueAnn A.M.)*, 176 Wis. 2d 673 (1993); *Duane N. v. Natalie T. (In re Paternity of Michael A.T.)*, 182 Wis. 2d 395 (Ct. App. 1994).

    NOTE: Avoidance of notice under Wis. Stat. § 48.42(2m) requires

    a. Physician's attestation as to belief sexual assault occurred, or

    b. Proof of putative father's conviction of sexual assault that may have led to child's conception.

13. Putative father of nonmarital child considered "on notice" of potential child by virtue of sexual intercourse. Notice not required unless Wis. Stat. § 48.42(2)(b) or (2)(bm) applies. No standing to appear or contest petition or argue disposition unless (2)(b) or (2)(bm) applies. Wis. Stat. § 48.42(2m)(b).

14. Under Wis. Stat. § 48.417(4), notice should be sent to appropriate address below:

    For Milwaukee:

    Division of Milwaukee Child Protective Services
    635 N. 26th St.
    Milwaukee, WI 53233

    For the rest of Wisconsin:

Department of Children and Families
201 E. Washington Ave.
P.O. Box 8916
Madison, WI 53703-8916

B. Contents of Summons [§ 23.158]

See Wis. Stat. § 48.42(3), (4)(c); *see also Barron Cnty. v. M. B.-T. (In re TPR to C.K.)*, Nos. 2016AP1378, 2016AP1379, 2016AP1380, 2017 WL 1325568 (Wis. Ct. App. Apr. 11, 2017) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (discussing sufficiency of default notice in summons).

Summons must contain all the following:

1. Child's name and birth date or anticipated birth date;

2. Nature, location, time, and date of hearing;

3. Notice of right to attorney and ability to contact state public defender;

4. Notice that failure to appear or respond may result in TPR by default; and

5. Notice that, if court terminates parental rights, party must file notice of intent to pursue relief from judgment in trial court within 30 days after judgment is entered to preserve right to pursue such relief. Wis. Stat. § 48.42(3)(d), (4)(c)3.

C. Method of Service of Summons [§ 23.159]

See Wis. Stat. § 48.27(6).

1. Summons and petition must be personally served at least seven days before hearing, unless party submits to court's jurisdiction. Wis. Stat. § 48.42(4)(a); *see also* Wis. Stat. §§ 801.15 (computing time), 990.001(4) (same).

2. For persons under disability, serve all the following persons (Wis. Stat. §§ 48.42(4), 801.11):

   a. Person under a disability, as required by Wis. Stat. § 801.11(2);

   b. Parent or guardian of person under a disability who is a minor under age 14 or other person having care and control of person under a disability who is a minor under age 14; if no such person, serve child;

   c. GAL (when appointed) for person under disability; and

   d. Guardian, if person is known to be under guardianship as required by Wis. Stat. § 801.11.

3. Publication—constructive notice. Wis. Stat. § 48.42(4)(b).

a. If, with reasonable diligence, party cannot be served personally, including unknown or alleged parents. Wis. Stat. § 48.42(4)(b)1., 2.

b. Class 1 notice (one insertion). Wis. Stat. ch. 985.

c. Under Wis. Stat. § 48.42(4)(b)4., considerations of choice of newspaper include the following:

(1) Residence, if known;

(2) Residence of relatives, if known; and

(3) Last-known location.

d. At or before publication, mail summons and petition if party's post office address is known or can be ascertained with due diligence (may omit mailing with showing that address cannot be obtained).

PRACTICE TIP: Because the proceeding is confidential, obtaining a court order for publication is prudent.

4. Wis. Stat. § 48.42(4)(b)4. directs that notice of publication must contain the following:

a. Date, place, and circuit court branch for hearing;

b. Case number;

c. Name, address, and phone number of petitioner's attorney;

d. Information that court determines is necessary to give effective notice, including the following information if known:

(1) Name of party being served;

(2) Description of party;

(3) Former address of party;

(4) Approximate date and place of child's conception;

(5) Date and place of child's birth;

(6) Birth mother's name, only if she consents; and

(7) Child's name, only if court finds it essential to give effective notice to father;

e. Notice that failure to appear may result in TPR, Wis. Stat. § 48.42(4)(c);

f. Notice of right to attorney and ability to contact state public defender, Wis. Stat. § 48.42(4)(c); and

g. Notice that, if court terminates parental rights, party must file notice of intent to pursue relief from judgment or order in trial court within 30 days after judgment is entered to preserve right to pursue such relief, Wis. Stat. § 48.42(4)(c).

5. Publication may be waived, by court order, to unknown putative father. Request may be made at time of filing petition or at initial hearing. Wis. Stat. §§ 48.42(4)(b)3., 48.422(6)(b).

D. Penalty [§ 23.160]

Persons making knowing and willful false statements or representations of material fact may be fined up to $10,000 or imprisoned for up to nine months. Wis. Stat. § 48.42(5).

X. PROCEEDINGS [§ 23.161]

A. Appearance and Opportunity to Be Heard at Hearings [§ 23.162]

1. Court may exclude child from fact-finding hearing. Wis. Stat. § 48.424(2)(a).

2. Public is excluded. Wis. Stat. §§ 48.299(1)(a), 48.424(2)(b).

3. Father as result of sexual assault does not have standing to appear and contest petition for involuntary TPR under Wis. Stat. § 48.42(2m); *see supra* § 23.48.

4. Due process requires that parents have opportunity to be heard at a meaningful time and place, but parent's physical presence is not always required.

   NOTE: When a parent appeared by phone, was able to converse with counsel, and heard the judge, jury, witnesses, and counsel, and when a delay of the trial until the parent was released from incarceration would have been 15 months, the parent's due-process rights were not violated. *Rhonda R.D. v. Franklin R.D. (In re Int. of Christopher D.)*, 191 Wis. 2d 680, 696, 700–03 (Ct. App. 1995); *see also Waukesha Cnty. Dep't of Hum. Servs. v. Teodoro E. (In re the TPR to Adrianna A.E.)*, 2008 WI App 16, 307 Wis. 2d 372 (father who participated in termination proceeding via a webcam system was able to meaningfully participate in the proceeding). *But see Jamie P.B. v. Lawrence J.B. (In re Patrick J.)*, No. 2008AP822, 2008 WL 2497699 (Wis. Ct. App. June 24, 2008) (unpublished opinion not citable per Wis. Stat. § 809.23(3)); *State v. Lavelle W. (In re TPR to Idella W.)*, 2005 WI App 266, 288 Wis. 2d 504.

5. Failure to appear. *See* Wis. Stat. § 48.28.

   a. Any person summoned who fails to appear without reasonable cause may be subject to contempt of court.

   b. Court may issue capias (writ of attachment or arrest) for party who fails to obey summons, or for whom service will be ineffectual, but Wis. Stat. § 48.28 is not on its face a substitute for the notice requirements of Wis. Stat. § 48.42.

      Court's ability to find parent in default is implied in structure of statutes; however, court must first take testimony and hear sufficient evidence to support allegations in petition, such that court may make a finding that all elements have been met. Wis. Stat.

§§ 48.42(3)(c), (4)(c)1., 48.422(3); *see* Wis. Stat. § 806.02; *Evelyn C.R. v. Tykila S. (In re TPR to Jayton S.)*, 2001 WI 110, 246 Wis. 2d 1; *see also State v. Bobby G. (In re TPR to Marquette S.)*, 2007 WI 77, 301 Wis. 2d 531; *Kenosha Cnty. Dep't of Hum. Servs. v. V.J.G (In re N.V.G)*, Nos. 2017AP1150, 2017AP1151, 2017 WL 6601483 (Wis. Ct. App. Dec. 27, 2017) (unpublished decision citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (discussing and applying "egregious" and without "clear and justifiable excuse"); *supra* §§ 23.4, 23.12.

PRACTICE TIP: Authority to enter default pursuant to Wis. Stat. § 48.23(2)(b)3. is distinct from court's authority to enter default pursuant to Wis. Stat. §§ 806.02(1) and 48.422(3).

6. Court may order petitioner to pay costs of securing indigent respondent's physical attendance at hearing. *R.G. v. F.C. (In re Int. of A.A.L.)*, 152 Wis. 2d 159 (Ct. App. 1989).

7. Opportunity to be heard may be required by persons other than parties to action.

   a. In determining child's best interest, court may be required to provide opportunity to be heard to persons who have substantial relationship with child. *David S. v. Laura S. (In re Int. of Brandon S.S.)*, 179 Wis. 2d 114, 148–49 (1993).

   b. Foster parent or physical custodian entitled to opportunity to be heard on issues relevant to hearing by written or oral statement at dispositional hearing and may be present during hearings, unless excluded by court. Wis. Stat. §§ 48.299(1)(ag), 48.427(1m), 48.42(2g).

B. Intervention and Parties [§ 23.163]

1. UCCJEA provisions regarding joinder of parties apply only to interstate disputes. *David S. v. Laura S. (In re Int. of Brandon S.S.)*, 179 Wis. 2d 114 (1993) (analyzing UCCJA, the predecessor to UCCJEA).

2. Bringing in additional parties in Wis. Stat. ch. 48 proceedings through intervenor statute (Wis. Stat. § 803.09) is inconsistent with Wis. Stat. ch. 48's purpose and policies that limit persons who must be notified of proceedings.

C. Initial Hearing [§ 23.164]

1. Under Wis. Stat. § 48.422(1), (4), rights of parties include the following:

   a. Right to have attorney present and available unless the right to attorney is appropriately waived. Wis. Stat. § 48.23; *State v. Shirley E. (In re TPR to Torrance E.)*, 2006 WI 129, 298 Wis. 2d 1; *M.W. v. Monroe Cnty. Dep't of Hum. Servs. (In re TPR to M.A.M.)*, 116 Wis. 2d 432 (1984).

   b. Right to continuance to consult with attorney. Wis. Stat. § 48.422(5).

   c. Right to jury trial, which must be exercised before the end of plea hearing. Wis. Stat. §§ 48.422(4), 48.31(2).

   d. Right to substitution of judge, which right must be exercised before the end of plea hearing. Wis. Stat. §§ 48.422(5), 48.29.

e. Right of nonadjudicated alleged father to pursue paternity; court may set hearing on paternity, at which the man claiming paternity must prove paternity by clear and convincing evidence. Wis. Stat. § 48.423.

2. Court must advise parents of right to jury trial and right to counsel. Specific provision for Indian child's parent or custodian to have counsel pursuant to Wis. Stat. § 48.23(2g). Wis. Stat. §§ 48.23, 48.422(1); *Steven V. v. Kelley H. (In re TPR to Alexander V.)*, 2004 WI 47, 271 Wis. 2d 1; *see also State v. Bobby G. (In re TPR to Marquette S.)*, 2007 WI 77, 301 Wis. 2d 531.

NOTE: It is good practice to make a record advising parents of the above rights by including them in the summons and noting them in court on the record.

3. Judge must determine whether any party wishes to contest petition. Wis. Stat. § 48.422(1).

a. If contested, fact-finding is scheduled within 45 days. Wis. Stat. § 48.422(2); *see* Wis. Stat. § 48.42(2g).

b. If either the petition is uncontested or a default finding is made, court must take testimony supporting petition. *Evelyn C.R. v. Tykila S. (In re TPR to Jayton S.)*, 2001 WI 110, 246 Wis. 2d 1.

c. Before accepting admission of facts alleged in petition, court must, under Wis. Stat. § 48.422(7), do the following:

(1) Address parties and determine whether admission is voluntary and knowing.

(2) Ask parties whether promises or threats were made to induce parties' admission.

(3) Explain benefit of an attorney for parties who are unrepresented.

(4) Establish satisfactory factual basis for admission.

(5) If petition for adoptive placement under Wis. Stat. § 48.837(2) is not filed, determine whether a proposed adoptive parent has been identified. If so, and proposed adoptive parent is not child's relative, then court must, under Wis. Stat. §§ 48.422(7)(bm), (br), 48.913, do the following:

(a) Order report under Wis. Stat. § 48.913(7) listing payments or agreements to make payments by proposed adoptive parent to birth parent, child, alleged birth father, or any other person in connection with pregnancy, birth of child, placement of child with proposed adoptive parent, or adoption of child by proposed adoptive parent.

(b) Determine whether any payments are impermissible under Wis. Stat. § 48.913(4).

(c) Determine whether any payments are coercive to birth parent or alleged father; conditioning payments to or on behalf of birth parent, alleged father, or child

upon transfer or surrender of child, TPR, or finalization of adoption creates a rebuttable presumption of coercion.

(d) If coercion found, court must delete coercive provisions upon agreement of the parties or dismiss petition.

(e) If impermissible payments found, court may dismiss petition and refer to district attorney for possible prosecution under Wis. Stat. § 948.24(1).

d. The court should ensure that a parent's waiver permitting the removal of an element of a TPR from the jury's consideration is made voluntarily and with adequate understanding. *Compare Manitowoc Cnty. Dep't of Hum. Servs. v. Allen J.*, 2008 WI App 137, 314 Wis. 2d 100, *with Walworth Cnty. Dep't of Hum. Servs. v. Andrea L.O.*, 2008 WI 46, 309 Wis. 2d 161; *see also Barron Cnty. Dep't of Health & Hum. Servs. v. C.K. (In re TPR to C.K.)*, Nos. 2016AP1378, 2016AP1379, 2016AP1380, 2017 WL 1325568 (Wis. Ct. App. Apr. 11, 2017) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (applying both *Allen J.* and *Andrea L.O.* to facts).

(1) Establish whether any person has coerced a birth parent or any alleged or presumed father in violation of Wis. Stat. § 48.63(3)(b)5.

(2) Upon a finding of coercion, the court must dismiss the petition. Wis. Stat. § 48.422(7)(br).

4. On accepting admission(s), court orders court report if petitioner is agency under Wis. Stat. § 48.069(1) or (2). Wis. Stat. §§ 48.422(8), 48.425.

5. On accepting admission(s), if report is waived or petition filed by person other than agency under Wis. Stat. § 48.069(1) or (2), court orders parent to provide medical and genetic information; if parent does not provide information, court orders release of medical information by health-care provider. Wis. Stat. §§ 48.422(9), 48.425(1)(am).

D. Paternity [§ 23.165]

1. If child is nonmarital child, court must hear testimony on paternity. Wis. Stat. § 48.422(6)(a); *see also* Wis. Stat. § 48.299(6)–(8) (regarding genetic testing, referral to support enforcement, possible stay of proceedings, and record of mother's testimony).

2. Based on paternity testimony, judge determines whether all parties are known and have received notice. Wis. Stat. § 48.422(6)(a).

3. Hearing will be adjourned if necessary so court can order appropriate notice be given. Wis. Stat. § 48.422(6)(a).

4. Person who appears and alleges paternity and wants to contest TPR has burden of proving paternity by clear and convincing evidence. Wis. Stat. § 48.423.

5. Alleged fathers who live out of state may contest TPR under certain circumstances. Wis. Stat. § 48.423(2).

E. Temporary Orders Regarding Visitation or Contact with Child [§ 23.166]

See discussion in section 23.46, *supra*.

F. Pretrial Motions and Discovery [§ 23.167]

1. Motions

   a. Motions based on defects in institution of proceedings, lack of probable cause on the face of petition, insufficiency of petition, or invalidity of statute(s) upon which petition is founded must be made within 10 days after plea hearing or are waived. Wis. Stat. § 48.297(2).

   b. Motions to suppress evidence illegally obtained, if known, must be made before trial. Wis. Stat. § 48.297(3).

   c. Other motions capable of pretrial determination may be made before trial. Wis. Stat. § 48.297(1).

   d. Considering the higher burden of proof, use of summary judgment is appropriate in contested TPR proceedings if it is established that there is no genuine issue of material fact. *Steven V. v. Kelley H. (In re TPR to Alexander V.)*, 2004 WI 47, 271 Wis. 2d 1.

2. Physical, psychological, mental, developmental, or alcohol and other drug abuse evaluations may be ordered for child, parent, guardian, or legal custodian. Wis. Stat. § 48.295

3. Discovery

   a. Law enforcement officer reports are available upon request through public representative to counsel, GAL, or court-appointed special advocate. Wis. Stat. § 48.293(1).

   b. Relevant records relating to child are open to GAL, counsel, or court-appointed special advocate upon demand with necessary release (court may make protective order preventing disclosure of materials harmful to child's interests). Wis. Stat. § 48.293(2); *Courtney F. v. Ramiro M.C. (In re TPR to Caleb J.F.)*, 2004 WI App 36, 269 Wis. 2d 709.

   c. The court must first conduct an in camera examination to determine the relevance, if any, of juvenile records to the TPR proceeding.

   d. Child's counsel or GAL to be notified of any audiovisually-recorded statements of child. Wis. Stat. §§ 48.293(3), 908.08.

   e. Discovery procedures permitted under Wis. Stat. ch. 804 apply. Wis. Stat. § 48.293(4).

   NOTE: Authority to use discovery under Wis. Stat. ch. 804 does not affect time periods under Wis. Stat. § 48.422; careful study of Wis. Stat. ch. 804 discovery procedures is required to appropriately adapt them to TPR proceedings; obtaining court order structuring permitted discovery at beginning of action is advisable.

G. Fact-Finding Hearing [§ 23.168]

1. Purpose is to determine whether grounds exist for TPR (*best interests* standard applies at disposition). Wis. Stat. § 48.424(1); *Waukesha Cnty. Dep't of Soc. Servs. v. C.E.W. (In re Int. of C.E.W.)*, 124 Wis. 2d 47 (1985); *I.P. v. State (In re Int. of D.S.P.)*, 157 Wis. 2d 106 (Ct. App. 1990), *aff'd on other grounds*, 166 Wis. 2d 464 (1992).

2. Jury determines only whether any grounds exist; judge decides disposition. Wis. Stat. § 48.424(3); *C.E.W.*, 124 Wis. 2d 47.

3. Burden of proof is on petitioner to prove grounds by clear and convincing evidence (although burden of proof is on respondent to prove affirmative defense under Wis. Stat. § 48.415(1)(c) by preponderance of evidence, *see supra* § 23.21). Jury may determine whether allegations were proved in WICWA case pursuant to Wis. Stat. § 48.42(1)(e). Wis. Stat. §§ 48.31(1), 48.415(1)(c); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Odd S.-G. v. Carolyn S.-G. (In re Int. of Kyle S.-G.)*, 194 Wis. 2d 365, 375 (1995); *R.D.K. v. Sheboygan Cnty. Soc. Servs. Dep't (In re TPR to A.M.K.)*, 105 Wis. 2d 91 (Ct. App. 1981).

4. Higher burden and elements of proof required by ICWA if Indian child involved. *See* 25 U.S.C. § 1911; 25 U.S.C. § 1912.

5. Juror selection

   a. Wis. Stat. chs. 756 and 805 govern juror selection. Wis. Stat. § 48.31(2); *C.E.W.*, 124 Wis. 2d 47.

   b. GAL may participate in voir dire and share in challenges if aligned with petitioner. *C.E.W.*, 124 Wis. 2d 47.

   c. Dismissal of juror for cause rests with circuit court's discretion. *M.P. v. Dane Cnty. Dep't of Hum. Servs. (In Int. of D.P.)*, 170 Wis. 2d 313, 333 (Ct. App. 1992).

6. Procedure for taking depositions by audiovisual means is available for child witness. Wis. Stat. §§ 48.31(2), 967.04(7), 971.105.

7. GAL is entitled to argue and to elicit testimony. *C.E.W.*, 124 Wis. 2d 47.

8. Jury may be told that GAL represents the interest of person for whom GAL was appointed. Wis. Stat. § 48.235(6); *D.B. v. Waukesha Cnty. Hum. Servs. Dep't (In re Int. of J.A.B.)*, 153 Wis. 2d 761, 770 (Ct. App. 1989).

9. Rules of evidence apply (Wis. Stat. chs. 901–911). Wis. Stat. § 48.299(4)(a); *see, e.g., State v. Joshua P. (In re Int. of Joy P.)*, 200 Wis. 2d 227 (Ct. App. 1996).

10. Directed verdict is permissible on undisputed issues. *D.B.*, 153 Wis. 2d at 765.

11. Absent prejudice, TPR against mother and father may be tried together in the interest of judicial economy. *I.P.*, 157 Wis. 2d at 121; *S.D.S. v. Rock Cnty. Dep't of Soc. Servs. (In re Int. of T.M.S.)*, 152 Wis. 2d 345, 360–62 (Ct. App. 1989).

    NOTE: Admonitory, curative jury instructions, and separate verdicts are advisable.

12. Single verdict for several jurisdictional grounds alleged in a CHIPS proceeding was found to violate parent's right to five-sixths decision; same likely holds for grounds in TPR case. *State v. Aimee M. (In re Int. of Lauran F.)*, 194 Wis. 2d 282 (1995) (citing *C.E.W.*, 124 Wis. 2d 47 (1985)).

13. At the close of fact-finding hearing:

    a. If grounds are found, court finds parent(s) unfit and proceeds to disposition or, if disposition is delayed (no later than 45 days after fact-finding hearing), court may transfer temporary custody of child to agency for placement. See Wis. Stat. § 48.42(2g) regarding foster parents. Wis. Stat. § 48.424(4), (5).

    b. If grounds are not found, court will dismiss. Wis. Stat. § 48.31(2).

    c. If voluntary consent to TPR is taken under Wis. Stat. § 48.41, court will proceed to disposition and determine if facts warrant TPR. Wis. Stat. § 48.41(1); *Roberts v. P.B. (In re Int. of A.B.)*, 151 Wis. 2d 312 (Ct. App. 1989).

XI. DISPOSITION [§ 23.169]

A. Court Report [§ 23.170]

Court report by agency is required if agency petitions for TPR or if court orders report and, under Wis. Stat. § 48.425(1), must include all the following information:

1. Child's social history, Wis. Stat. § 48.425(1)(a);

2. Child's medical record and history, Wis. Stat. § 48.425(1)(am);

3. Birth parents' and child's medical and genetic history and other relevant information, Wis. Stat. § 48.425(1)(am);

4. Report of any medical exam of either birth parent within last year, Wis. Stat. § 48.425(1)(am);

5. Child's prenatal care and medical condition at birth, Wis. Stat. § 48.425(1)(am);

6. Facts supporting need for TPR, Wis. Stat. § 48.425(1)(b);

7. If there was a prior CHIPS finding, agency's steps to remedy conditions responsible for court intervention and parental response to, and cooperation with, agency's services, Wis. Stat. § 48.425(1)(c);

8. If child was removed from home, agency's steps to effect return and reasons why child cannot be safely returned, Wis. Stat. § 48.425(1)(c);

   NOTE: Specific information is required in WICWA cases pursuant to Wis. Stat. § 48.425(1m). Wis. Stat. § 48.425(1)(d).

9. Appropriate services, if any, that might allow child's safe return home;

10. Under Wis. Stat. § 48.425(1)(f); *see also* Wis. Stat. § 48.426(3), if report recommends TPR of all living parents, report must state:

    a. Likelihood of adoption;

    b. Factors facilitating or preventing adoption, if reporter is guardian, licensed child welfare agency, or state DCF; and

    c. Agency to be responsible for adoption;

11. Under Wis. Stat. § 48.425(1)(g), if agency determines adoption is unlikely or if adoption is not in child's best interests, report must include:

    a. Plan for placing child in permanent family setting, and

    b. Recommendation that agency be named guardian or that person appointed as guardian under Wis. Stat. § 48.977(2) continue in that role; and

12. Under Wis. Stat. §§ 48.425(1)(e), 48.426(3)(a); *Sheboygan Cnty. Dep't of Health & Hum. Servs. v. Julie A.B. (In re TPR to Prestin T.B.)*, 2002 WI 95, ¶ 4, 255 Wis. 2d 170, statement that applies the *best interests of the child* standard, which the court terms the "polestar," and that considers the following factors:

    a. The likelihood of the child's adoption after termination, Wis. Stat. § 48.426(3)(a);

    b. Child's age and health when report was prepared and on removal from home, if applicable, Wis. Stat. § 48.426(3)(b);

    c. Whether child has substantial relationships with parents or other family members, and whether child would be harmed by severing those relationships, Wis. Stat. § 48.426(3)(c);

    d. Child's wishes, Wis. Stat. § 48.426(3)(d);

    e. Duration of parent-child separation, Wis. Stat. § 48.426(3)(e); and

    f. Whether child will be able to enter into more stable and permanent family, considering past, current, and future placements, Wis. Stat. § 48.426(3)(f).

    NOTE: Court may waive report if parent consents, but court will order parent(s) to provide medical information. Wis. Stat. § 48.425(2).

B. Dispositional Hearing [§ 23.171]

1. Procedure

    a. Any party may present relevant evidence, including expert testimony, and make recommendations. If petition was filed by an agency, report described in section 23.61, *supra*, must be considered. Wis. Stat. § 48.427(1).

b. Court must consider six factors in Wis. Stat. § 48.426(3) and may consider other factors favorable to parent. *Sheboygan Cnty. Dep't of Health & Hum. Servs. v. Julie A.B. (In re TPR to Prestin T.B.)*, 2002 WI 95, ¶ 4, 255 Wis. 2d 170.

c. Foster parent or physical custodian of child must be permitted to make a written or oral statement relevant to issue of disposition. Wis. Stat. § 48.427(1m).

d. Trial judge may call and examine witnesses to obtain relevant testimony (reasoned decision requires inclusion of important and available relevant testimony, including testimony from grandparents who have substantial relationship with child). *David S. v. Laura S. (In re Int. of Brandon S.S.)*, 179 Wis. 2d 114 (1993); *see also Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977).

e. Neither common-law nor statutory rules of evidence are binding. Wis. Stat. § 48.299(4)(b).

f. Court must admit evidence that has reasonable probative value and that is not immaterial, irrelevant, or unduly repetitious. Wis. Stat. § 48.299(4)(b).

g. Hearsay is admissible if trustworthy. Wis. Stat. § 48.299(4)(b).

h. Rules of privilege apply. Wis. Stat. § 48.299(4)(b).

i. Court considers standards and factors under Wis. Stat. § 48.426. *See also State v. Joshua P. (In re Int. of Joy P.)*, 200 Wis. 2d 227 (Ct. App. 1996).

(1) Parental rights cannot be terminated merely to advance parents' interests. *Gerald O. v. Cindy R. (In re TPR of Michael I.O.)*, 203 Wis. 2d 148, 156 (Ct. App. 1996); *Roberts v. P.B. (In re Interest of A.B.)*, 151 Wis. 2d 312, 322 (Ct. App. 1989).

(2) "Substantial relationship" considerations include emotional and psychological connections; court may afford due weight to adoptive parent's stated intent to continue visitation with family members, although it is not bound by this legally unenforceable promise. *State v. Margaret H. (In re TPR to Darryl T.-H.)*, 2000 WI 42, 234 Wis. 2d 606.

(3) There is no requirement that children communicate their wishes personally at the dispositional hearing. *Jerry M. v. Dennis L.M. (In re Int. of Guenther D.M.)*, 198 Wis. 2d 10, 22 n.5 (Ct. App. 1995).

j. Court must enter one of the permissible dispositions within 10 days after receiving evidence. Wis. Stat. § 48.427(1).

NOTE: Court does *not* have the authority to stay an order for TPR. *State v. D.P.V. (In re TPR to T.A.V.)*, No. 2016AP2037, 2017 WL 659883 (Wis. Ct. App. Feb. 14, 2017) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

2. Prevailing standard for making dispositional choice is best interest of child; alternatives to TPR must be explored, but least-restrictive-alternative criteria not pertinent to TPR action, *see supra* §§ 23.34–.36. Wis. Stat. § 48.426; *Minguey v. Brookens (In re TPR to T.R.M.)*, 100 Wis. 2d 681 (1981); *Kegel v. Oneida Cnty. Dep't of Soc. Servs. (In re TPR to Kegel)*, 85 Wis. 2d 574

(1978); *P.S. v. G.O. (In re Int. of T.P.S.)*, 168 Wis. 2d 259, 267 (Ct. App. 1992); *Rock Cnty. Dep't of Soc. Servs. v. K.K. (In re Int. of K.K.)*, 162 Wis. 2d 431 (Ct. App. 1991); *Roberts*, 151 Wis. 2d at 322; *R.D.K. v. Sheboygan Cnty. Soc. Servs. Dep't (In re TPR to A.M.K.)*, 105 Wis. 2d 91 (Ct. App. 1981).

3. Permissible dispositions

a. Dismiss petition if evidence does not warrant TPR or does not sustain jury's findings. Wis. Stat. §§ 48.427(2), 48.424(4); *B.L.J. v. Polk Cnty. Dep't of Soc. Servs. (In re Int. of K.D.J.)*, 163 Wis. 2d 90 (1991).

b. Grant TPR for one or both parents. Wis. Stat. §§ 48.43(3), 48.427(3).

c. If TPR is granted as to both parents, court may, pursuant to Wis. Stat. § 48.427(3), (3m), do any of the following:

(1) Transfer guardianship and custody pending adoptive placement to a county department authorized to accept guardianship, an agency licensed to accept guardianship, or the DCF, *see* Wis. Stat. §§ 48.57(1)(e), (hm), 48.61(5);

(2) Transfer guardianship and custody pending adoption to a relative with whom child lives, if adoption petition is filed or if relative is *kinship care relative* who receives payment under Wis. Stat. § 48.57(3m)(am) for providing care and maintenance for a child, see Wis. Stat. §§ 48.40(1m), 48.57(3m);

(3) Transfer guardianship and custody pending adoptive placement to an individual appointed guardian by court of foreign jurisdiction;

(4) Transfer guardianship to appropriate agency and custody to an individual with whom child has resided for at least 12 consecutive months immediately before TPR;

(5) Transfer guardianship to appropriate agency and custody to relative; or

(6) Appoint guardian under Wis. Stat. § 48.977 and transfer guardianship and custody of child to the guardian.

NOTE: Court may orally inform parent(s) who appear of grounds for TPR under Wis. Stat. § 48.415(10) as set forth in court order. Wis. Stat. § 48.427(7).

C. Dispositional Order or Judgment Terminating Parental Rights [§ 23.172]

1. Dispositional order or judgment terminating parental rights does all the following:

a. Contains reasons for dismissal, if ordered under Wis. Stat. § 48.427(2), or adequate and specific findings as to standards and factors under Wis. Stat. § 48.426 and disposition under Wis. Stat. § 48.427, *see* Wis. Stat. § 48.43(1); *Minguey v. Brookens (In re TPR to T.R.M.)*, 100 Wis. 2d 681 (1981), including:

(1) Consideration and determination of disputed facts; and

(2) Formal determination that TPR is in child's best interests, Wis. Stat. § 48.43(1)(d).

b. Identifies guardian and custodian. Wis. Stat. § 48.43(1)(a), (am).

c. Identifies agency responsible for adoption or permanent placement. Wis. Stat. § 48.43(1)(a), (am). This agency may be the DCF or a county department. *Id.*

d. Identifies persons and agency responsible for any continued care or treatment. Wis. Stat. § 48.43(1)(b).

e. Orders that certified copy of order be given to agency (with birth certificate and transcript, if requested) and to person appointed as guardian under Wis. Stat. § 48.977(2). Wis. Stat. § 48.43(4).

f. Informs birth parents of Wis. Stat. §§ 48.432–.434 (access to medical and identifying information). Wis. Stat. § 48.427(6)(a).

g. Orders that identifying medical and genetic information be forwarded to the DCF. Wis. Stat. § 48.427(6)(b).

h. Orders permanent severance of birth parent's rights and duties. Wis. Stat. § 48.43(2).

2. If agency receives custody, permanency plan is prepared under Wis. Stat. § 48.38 by agency; if no permanency plan, or if order is inconsistent with permanency plan, agency is to revise plan to conform to order (must be filed within 60 days). Wis. Stat. § 48.43(1)(c).

3. Court may orally inform parent(s) of TPR grounds under Wis. Stat. § 48.415(10); order may also notify parents of the information. Wis. Stat. § 48.427(7).

4. If parent whose rights are terminated is present in court when the court grants the order, written notification of appellate time period must be signed by the parent and filed with the court. Wis. Stat. § 48.43(6m).

5. Order dismissing TPR must contain reasons for dismissal. Wis. Stat. § 48.43(1).

NOTE: When guardianship and custody are transferred to the DCF, to ensure Title IV eligibility, the orders should contain the following information:

a. *Nunc pro tunc* phrase clarifying the date the order is effective,

b. A finding that the child's continued presence in the parent's home is contrary to the child's welfare, and

c. A finding that reasonable efforts have been made to prevent removal of the child from the home or to make it possible for the child to return home.

NOTE: A TPR ends the relationship between the child and members of the parent's family, as well as between the child and the parent. Certain relationships are not severed at the time of the TPR order but at the time of an eventual adoption order. Wis. Stat. § 48.43(2); *Elgin W. v. DHFS (In re Custody of Jeffrey A.W.)*, 221 Wis. 2d 36 (Ct. App. 1998).

XII. POSTDISPOSITION [§ 23.173]

A. In General [§ 23.174]

1. Permanency plan requirements for court and agency review hearings and for filing of annual report by agency custodian continue until child reaches age 18 or is adopted. Wis. Stat. §§ 48.43(5), 48.38.

2. At age 18, child may seek information about birth parents. Wis. Stat. § 48.433.

3. Child at age 18, adoptive parent, guardian, custodian, adult offspring of child, agency, or social worker may obtain available medical information. Wis. Stat. § 48.432.

4. The parent, guardian, or legal custodian of an offspring of a deceased individual or adoptee, if the offspring is under 18 years of age, may obtain medical information. Wis. Stat. § 48.432.

5. Under certain circumstances, information can be shared between birth parents whose rights have been terminated and any person 18 years of age or over whose rights have been terminated or who has been adopted. Wis. Stat. § 48.433(8r).

6. Custody may be transferred to county agency from the DCF if no adoptive placement or subsidized guardianship placement is found within two years of dispositional order. Wis. Stat. § 48.43(7)(b).

B. Appeals [§ 23.175]

1. TPR is final and appealable under Wis. Stat. § 808.03(1) according to the procedure specified in Wis. Stat. § 809.107. Wis. Stat. § 48.43(6).

2. Pursuant to Wis. Stat. § 48.028(6), enacted in 2009, a TPR to an Indian child may be invalidated because ordered in violation of 25 U.S.C. § 1911, 25 U.S.C. § 1912, or 25 U.S.C. § 1913. Wis. Stat. § 48.028(6).

3. Appeal is initiated by filing notice of intent to appeal required by Wis. Stat. § 809.107(2) within 30 days after date of entry of judgment. An appellant other than the state must sign the notice of appeal; appellant's counsel must also sign the notice but may not sign in place of the appellant. Wis. Stat. § 809.107(5).

4. GAL may appeal, participate in appeal, or do nothing; appellate court may order GAL to participate in appeal. If GAL chooses not to participate in an appeal, GAL *must* file with the court a statement of reasons for not participating under Wis. Stat. § 48.235(7) within 15 days after the filing of the notice of appeal. Wis. Stat. § 809.107(6)(d).

5. Under Wis. Stat. § 809.107 (*see also* Wis. Stat. §§ 801.15 (computing time), 990.001(4)), time limits in court of appeals are as follows:

    a. Clerk of court must send defense counsel a copy of judgment or order and list of court reporters for each proceeding in action within five days after receiving notice of intent to appeal.

b. Request for transcripts and record must be made within 15 days after filing notice of intent to appeal, unless public defender appointed, then 15 days after receiving the materials from the clerk.

c. Transcripts must be filed and served within 30 days after request for transcripts.

d. Notice of appeal or notice of abandonment of appeal must be filed within 30 days after the later of the service of the transcript or service of the record. An appellant other than the state must sign the notice of appeal; appellant's counsel must also sign the notice but may not sign in place of the appellant. Wis. Stat. § 809.107(5).

e. Clerk of court must transmit record to court of appeals within 15 days after filing of notice of appeal.

f. If appellate case may require postjudgment fact-finding, the appellant must file a motion in the court of appeals within 15 days after the filing of the record on appeal.

g. Appellant's brief is due within 15 days after clerk's filing of record with court of appeals.

h. Respondent's brief is due within 10 days after the later of (1) service of the appellant's brief; or (2) service of the guardian ad litem's brief, if the guardian ad litem takes a position of the appellant.

i. Appellant's reply brief (or statement that reply brief will not be filed) is due within 10 days after the later of (1) service of the respondent's brief; or (2) service of the guardian ad litem's brief, if the guardian ad litem takes a position of the respondent.

j. Decision of court of appeals is issued within 30 days after appellant's reply brief or statement that reply brief will not be filed.

k. Petition for review must be filed within 30 days after date of court of appeals' decision and given preference.

NOTE: Attorneys should keep in mind that appellate briefing deadlines in TPR cases are shorter than in other cases.

6. Time limits for briefing and for issuing appellate court's decision may be extended as provided in Wis. Stat. § 809.82(2). *Gloria A. v. State (In re Int. of Estel A.)*, 195 Wis. 2d 268 (Ct. App. 1995); *Rhonda R.D. v. Franklin R.D. (In re Int. of Christopher D.)*, 191 Wis. 2d 680, 694–95, 697 (Ct. App. 1995).

7. Time limit for filing of notice of appeal under Wis. Stat. § 809.107(5) cannot be extended.

8. Shortened time limits in court of appeals do not violate rights to due process, equal protection, or effective assistance of counsel. *Gloria A.*, 195 Wis. 2d 268; *Rhonda R.D.*, 191 Wis. 2d at 694–95, 697.

9. A no-merit report may be filed within time set for filing of appellant's brief. Parent then has 10 days to respond to no-merit report. *Brown Cnty. v. Edward C.T. (In re TPR of Ashley A.T.)*, 218 Wis. 2d 160, 161–62 (Ct. App. 1998); *see also* Wis. Stat. § 809.107; *Gloria A.*, 195 Wis. 2d 268; *Rhonda R.D.*, 191 Wis. 2d at 695–96.

C. New Evidence [§ 23.176]

Parent, guardian, or legal custodian of child or child whose status is adjudicated may petition for rehearing within one year on ground that new evidence has been discovered affecting advisability of original adjudication (court must order new hearing upon showing such evidence exists), *see* Wis. Stat. § 48.46(1); *Schroud v. Milwaukee Cnty. Dep't of Pub. Welfare (In re Int. of Schroud)*, 53 Wis. 2d 650 (1972), except that:

1. If adoption order is entered within one year of TPR order, petition for rehearing of TPR order or paternity adjudication in TPR proceeding must be filed before date adoption order is filed or within 30 days after entry of TPR or paternity order, whichever is later, Wis. Stat. § 48.46(1m); and

2. Parent consenting to or not contesting TPR may bring motion for relief from judgment, under Wis. Stat. § 806.07(1)(a), (b), (c), (d), or (f), within 30 days after entry of judgment unless timely notice of intent to pursue relief under Wis. Stat. § 808.04(7m) filed, Wis. Stat. § 48.46(2).

   NOTE: A parent who has consented to the termination of parental rights to an Indian child under Wis. Stat. § 48.41(2)(e) may also move for relief from judgment under Wis. Stat. § 48.028(5)(c) or (6).

D. Status of Prior Orders [§ 23.177]

See Wis. Stat. § 48.368(1).

1. Dispositional and extension orders under Wis. Stat. §§ 48.355 and 48.365, voluntary placement agreement under Wis. Stat. § 48.63, or guardianship order remains in effect until all proceedings on TPR petition, including appeal, are concluded.

2. A TPR to an Indian child may be invalidated because ordered in violation of 25 U.S.C. § 1911, 25 U.S.C. § 1912, or 25 U.S.C. § 1913. Wis. Stat. § 48.028(6).

Chapter 24
Domestic Abuse

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NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 191; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Feb. 2022, No. 794; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-102 (Mar. 15, 2022); all references to the Code of Federal Regulations (C.F.R.) are current through 87 Fed. Reg. 16,092 (Mar. 21, 2022); and all references to the Wisconsin Supreme Court Rules (SCR) are to the rules as amended by supreme court orders through Feb. 15, 2022.

NOTE: The authors have chosen to use gender neutral pronouns (e.g., "they," "them," "their") in the writing of this chapter. Domestic abuse is a societal problem that impacts people regardless of sex or gender identity.

ALERT: As this chapter was being finalized, the governor signed 2021 Wis. S.B. 516 into law as 2021 Wis. Act 256 on April 15, 2022. As such, the provisions of Act 256 are not reflected in this chapter. Under Act 256, a court is authorized to enter a permanent injunction if requested by the petitioner in a case involving domestic abuse, an individual-at-risk, harassment, or child abuse and the court finds that the respondent has been convicted of first-, second-, or third-degree sexual assault and the petitioner was the crime victim.

I. IN GENERAL [§ 24.178]

This chapter begins with a discussion of general protections for victims of domestic or other types of abuse, particularly civil protections, including restraining orders; next turns to the firearms surrender procedure; and then moves to a discussion of domestic abuse in the specific areas of divorce, adults at risk, public benefits, remote hearings, and tribal jurisdiction. A final section discusses issues relating to advocacy for domestic abuse victims.

II. GENERAL PROTECTIONS FOR ADULT VICTIMS OF DOMESTIC ABUSE [§ 24.179]

A. Civil Laws Affecting Domestic Abuse Victims [§ 24.180]

1. Safe at Home Act: Address Confidentiality Program (ACP). *See* Wis. Stat. § 165.68.

   a. Creates address confidentiality program, administered by the Wisconsin Department of Justice (DOJ), for victims of child abuse, domestic abuse, sexual abuse, stalking, and human trafficking.

   b. Under this law, a person is eligible to participate in the program if they are a Wisconsin resident and either:

      (1) Are a victim of abuse, a parent or guardian of a person who is a victim of abuse, or a resident of a household in which a victim of abuse also resides; or

      (2) Fear for their physical safety or for the physical safety of their child or ward.

   c. A person who intentionally releases information in violation of this section is guilty of a misdemeanor.

   d. The ACP provides certain people with an assigned substituted address. Mail sent to this address will be received by the DOJ and forwarded to the actual address of the ACP participant.

e. A person is eligible regardless of whether any criminal charges have been brought relating to any act or threat against the person, whether the person has sought any restraining order or injunction relating to any act or threat against the person, or whether the person has reported any act or threat against them to a law enforcement officer or agency.

f. A person is enrolled in the ACP for five years unless the person cancels earlier. To be an ACP participant, one must develop a safety plan with a DOJ-designated program assistant.

g. The confidentiality provisions of the ACP include any part of a program participant's address. The following provisions also apply:

(1) A program participant may use the assigned address provided to them under the ACP for all purposes.

(2) The ACP requires state and local governments to use the confidential address unless there is a specific statutory duty requiring the use of the participant's actual address.

(3) No one who received a notification form from the ACP participant may refuse to use the assigned address or require disclosure of the actual address.

(4) A municipal clerk may require the participant to provide the actual address for voter registration and voter verification and to enroll the participant in the confidential voter program. If the participant is enrolled in the confidential voter program, the municipal clerk shall keep the participant's actual address confidential.

h. The DOJ is authorized to act as registered agent or office for a single-member LLC if the member is enrolled in the ACP.

i. The DOJ may promulgate rules governing a program participant's consent to disclosure of their actual address by the DOJ or another entity if disclosure is required for public assistance programs or real property transactions.

j. The DOJ may disenroll a program participant at any time that the DOJ determines that the program participant no longer meets eligibility criteria.

NOTE: Purchasing a home may require disclosure of the address in certain public documents, such as deeds and property tax documents. The DOJ recommends contacting Safe at Home directly before enrollment to discuss safety planning.

2. Voter Registration: Confidentiality of information relating to victims of domestic abuse, sexual assault, or stalking. *See* Wis. Stat. § 6.47.

a. Individuals who are eligible can submit a request to the commissioner, municipal clerk, agent, or election official to withhold the individual's name and address from poll or registration lists if:

(1) The individual has been granted a protective order that is in effect;

(2) The individual files an affidavit or other permitted documentation verifying that a person has been charged with or convicted of an offense related to domestic abuse,

sexual assault, or stalking in which the individual is a victim and reasonably continues to be threatened by that person;

(3) The individual resides in a shelter;

(4) The individual submits a dated statement to the municipal clerk signed by an authorized representative of a domestic abuse victim service provider or a sexual assault victim service provider that indicates that the individual received services from the provider within the 24-month period ending on the date of the statement; or

(5) The individual is a participant in the ACP program through Wis. Stat. § 165.68.

b. A valid request for voter registration confidentiality includes:

(1) A copy of a protective order in effect when the request is made,

(2) An affidavit dated within 30 days of the request;

(3) Confirmation from the DOJ that the person is a participant in the ACP;

(4) A statement dated within 30 days of the date of request from the operator of a shelter that the individual making the request resides in the shelter;

(5) A statement signed by an authorized representative of a domestic abuse or sexual assault victim service provider dated within 30 days of the date of the request; or

(6) A physically disabled individual personally appearing at the office of the municipal clerk to designate that the elector of Wisconsin accompanying them may make a request on their behalf.

c. When an individual submits a valid request, the municipal clerk shall provide the elector a voting identification card valid for no more than 24 months.

3. Insurance nondiscrimination. *See* Wis. Stat. § 631.95.

a. Wisconsin law generally prohibits insurance companies from discriminating against victims of domestic abuse and their relatives.

(1) Insurers may not refuse to cover, cancel coverage, adjust rates, or deny claims because they believe covered person or family member of covered person is or was victim of domestic abuse.

(2) Actuaries are not prohibited from considering medical conditions resulting from domestic abuse in determining premiums.

(3) Insurers are prohibited from disclosing information that they discover about domestic abuse of those they insure.

(4) Limited service health organizations, preferred provider plans, and managed care plans are subject to this section. Wis. Stat. § 609.90.

b. Insurance companies may discriminate against persons they believe to be perpetrators of domestic violence.

(1) In disability or life insurance, insurance company can refuse to insure, deny or limit benefits, or not allow as beneficiary anyone who has engaged in domestic abuse.

(2) Insurance company's basis for determining person's status as abuser can be medical or legal records or applicant's own statements.

(3) Applies to group and individual coverage plans.

4. Unemployment compensation. *See* Wis. Stat. § 108.04.

a. Under Wis. Stat. § 108.04(7)(s), the following circumstances prohibit unemployment benefits being withheld from domestic abuse victims for voluntarily terminating work:

(1) Victim quits work because of domestic abuse; or

(2) Victim quits work because of concerns regarding personal safety or harassment; or

(3) Employee quits work because of concerns regarding safety or harassment of any of employee's family or household members; and

(4) Before quitting work, the victim provides:

(a) A protective order, including a temporary restraining order (TRO) or injunction under Wis. Stat. §§ 813.12, 813.122, 813.123, 813.125 or 813.127 or a foreign protection order (FPO); or

(b) A report by a law enforcement agency documenting the domestic abuse or concern; or

(c) Evidence of the domestic abuse or concern provided by a health-care professional or an employee of a domestic violence shelter; and

(5) Is still eligible for benefits, and

(6) Demonstrates that order has been or is reasonably likely to be violated.

5. Housing discrimination. *See* Wis. Stat. § 106.50.

a. Landlords may refuse to rent to a person whose tenancy would constitute a direct threat to safety of other tenants or persons employed on property, or whose tenancy would result in substantial physical damage to property of others. But landlord may not base this claim on status of potential tenant as victim of domestic abuse, sexual assault, or stalking.

b. It is not discrimination for landlord to bring action for eviction of tenant based on violation of rental agreement.

c. Tenant has defense to eviction if tenant shows landlord knew or should have known that tenant was victim of domestic abuse, sexual abuse, or stalking and basis for eviction is conduct by uninvited guest of tenant that was related to commission of domestic abuse, sexual abuse, or stalking.

d. If basis for eviction was conduct by invited guest of tenant related to commission of domestic abuse, sexual abuse, or stalking, tenant may have defense to eviction if tenant had sought injunction against that individual or provided a written statement to the landlord indicating that the person will no longer be an invited guest and the tenant has not subsequently invited the person to be a guest of the tenant.

6. Safe Housing Act. *See* Wis. Stat. § 704.16.

a. Termination of tenancy for imminent threat of serious physical harm. *See* Wis. Stat. §§ 704.16(1), (2), 704.21.

(1) Tenant may be released from tenancy for imminent threat of serious physical harm if tenant or child faces imminent threat of serious physical harm from another person if tenant remains on premises.

(2) Tenant must provide landlord with notice in manner provided under Wis. Stat. § 704.21 and with certified copy of domestic abuse injunction, child abuse TRO or injunction, harassment injunction, no-contact bail condition, criminal complaint alleging that person sexually assaulted or stalked tenant or child of tenant, or criminal complaint filed against person as result of their arrest for domestic abuse against tenant.

(3) Tenant may terminate tenancy because of imminent threat of physical harm to self or child and is not liable for rent after end of month in which tenant provides notice of existence of domestic abuse injunction; tenant can also use existence of domestic abuse injunction to require landlord to change locks. Wis. Stat. § 704.16; *see also infra* § 24.3, A.6.c. (Safe Housing Act).

b. Termination of tenancy by landlord. Wis. Stat. § 704.16(3).

(1) Landlord may terminate rental agreement of offending tenant if tenant causes another tenant or child of another tenant to face imminent threat of serious physical harm if offending tenant remains on premises.

(2) Offending tenant must be named offender in domestic abuse injunction, child abuse TRO or injunction, harassment injunction, no-contact bail condition, criminal complaint alleging that person sexually assaulted or stalked tenant or child of tenant, or criminal complaint filed against person as a result of their arrest for domestic abuse against tenant.

c. Changing locks. Wis. Stat. § 704.16(4).

(1) At tenant's request, landlord must change locks to tenant's premises once tenant provides landlord with certified copy of domestic abuse injunction, child abuse TRO or injunction, harassment injunction, no-contact bail condition, criminal complaint alleging that person sexually assaulted or stalked tenant or child of tenant, or criminal

complaint filed against person as result of their arrest for domestic abuse against tenant.

(2) Landlord must either change locks or give permission for tenant to do so within 48 hours after request.

(3) Tenant will be responsible for any costs associated with changing locks.

(4) If person who is restricted by injunction, no-contact order, or criminal complaint is also named tenant at specific premises of tenant requesting changed locks, landlord cannot be required to change locks.

(5) Based on document provided as a reason for changing locks, landlord is only required to change locks if tenant was specifically directed to avoid residence based on domestic abuse, child abuse, or harassment injunction, or if no-contact bail condition specifically orders restricted tenant not to contact tenant requesting changed locks.

d. Rental agreement that restricts access to certain services is void. Wis. Stat. § 704.44.

Rental agreement is void and unenforceable if it allows landlord in residential tenancy to do the following: increase rent, decrease services, bring action for possession of premises, refuse to renew rental agreement, or threaten any of these, because tenant has contacted entity for law enforcement services, health services, or safety services.

e. Fees for call for assistance. Wis. Stat. § 66.0627.

No political subdivision may enact or enforce an ordinance that imposes a fee on the owner or occupant of a property for calls for assistance by the owner or occupant for law enforcement services related to domestic abuse, sexual assault, or stalking.

7. Confidential name change. Wis. Stat. §§ 786.36, 786.37.

a. Kinds of name change are:

(1) Common-law name change,

(2) Adult standard name change (age 14 or older),

(3) Minor standard name change, and

(4) Confidential name change.

b. Who can obtain a confidential name change:

(1) Any Wisconsin resident over age 14 may petition for confidential name change.

(2) Minors under age 14 may not petition for confidential name change.

c. Name change process:

(1) Must fill out three forms: Petition for Confidential Name Change, Notice and Order for Confidential Name Change Hearing, and Order for Confidential Name Change.

(2) After forms are filed, case may be sealed or unsealed pending the hearing.

(3) If case is sealed: Clerk of court collects filing fee and assigns date and time for confidential hearing.

(4) If case is not sealed: Clerk of court asks petitioner if willing to proceed, and clerk of court collects filing fee and assigns date and time for nonconfidential hearing.

(5) If confidential name change is granted, judge signs Order for Confidential Name Change and case is sealed (even if was unsealed before hearing); name change is effective immediately.

(6) If name change is denied, judge signs Order Denying Confidential Name Change and decides if case is sealed; even if case was sealed before hearing, judge may unseal case if name change was denied.

8. Resources for Civil Laws Affecting Victims of Domestic Abuse

a. Amanda Rabe & Megan L. Sprecher, *Representing Domestic Abuse Survivors*, Wis. Law., Jan. 2018, at 24–29, https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=26085.

b. Wis. Dep't of Just., *Safe at Home*, https://www.doj.state.wi.us/ocvs/safe-home (last visited May 5, 2022).

c. Joe Forward, *Confidentiality Program Helps Survivors of Domestic Abuse Stay Safe at Home*, Inside Trace (Dec. 4, 2019), https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=11&Issue=21&ArticleID=27355.

d. Korey C. Lundin, Legal Action of Wis., *Tenant Sourcebook* (Revised Jan. 2020), https://www.legalaction.org/data/cms/Tenant%20Sourcebook%20-%20revised%202020.pdf.

e. Jeffrey T. Raymond, *What Family Law Attorneys Should Know About Wisconsin's Confidential Address Program*, State Bar of Wis. Fam. L. Sec. Blog (Nov. 18, 2020), https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=28054.

f. Chad Daniel Post, *101: How to Combat Revenge Porn*, Wis. Law., Feb. 2020, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=2&ArticleID=27466.

B. Domestic Abuse Restraining Orders [§ 24.181]

See Wis. Stat. § 813.12.

1. Definitions

   a. Under Wis. Stat. §§ 813.12(1)(am), 940.225(1), (2), (3), 940.32, and 943.01, *domestic abuse* means any of following conduct, engaged in by an: (1) adult family or household member against another such adult member, (2) adult against their adult former spouse, (3) adult against another adult with whom adult has child, (4) adult caregiver against adult who is under caregiver's care, or (5) adult against adult with whom the individual has or had a dating relationship:

      (1) Intentional infliction of physical pain, physical injury, or illness;

      (2) Intentional impairment of physical condition;

      (3) First-, second-, or third-degree sexual assault;

      (4) Stalking;

      (5) Damage to the property of the individual; or

      (6) Threat to engage in conduct listed in (1)–(5).

      NOTE: A petition may be prepared and filed by the guardian of an individual adjudicated incompetent in Wisconsin who has been the subject of domestic abuse. Wis. Stat. §§ 813.12(5)(d), 54.01(10).

      NOTE: Unlike in many other states, in Wisconsin a parent or legal guardian cannot include a minor child in the parent's petition. The child or the child's parent, stepparent, or legal guardian must file a separate petition for a harassment temporary restraining order or injunction for the child under Wis. Stat. § 813.125 or a child abuse restraining order or injunction for the child under Wis. Stat. § 813.122.

   b. *Dating relationship* means a romantic or intimate social relationship between two adults but does not include a casual relationship or an ordinary fraternization between two adults in business or social context. Wis. Stat. § 813.12(1)(ag).

   c. *Caregiver* means an individual who is a provider of in-home or community care to an individual through regular and direct contact. Wis. Stat. § 813.12(1)(ad).

   d. *Family member* means a spouse, a parent, a child, or a person related by blood or adoption to another person. Wis. Stat. § 813.12(1)(b).

   e. *Household pet* means a domestic animal that is not a farm animal, as defined in Wis. Stat. § 951.01(3), that is kept, owned, or cared for by the petitioner or by a family member or a household member of the petitioner or by the individual at risk. Wis. Stat. §§ 813.12(1)(ce), 813.122(1)(e), 813.123(1)(ek), 813.125(1)(bm).

   f. *Household member* means a person currently or formerly residing in a place of abode with another person. Wis. Stat. § 813.12(1)(c).

g. *Resides* means to dwell permanently or continuously and, for purposes of this section, to be in a continuous living arrangement sufficient to establish that parties are or were household members. *Petrowsky v. Krause*, 223 Wis. 2d 32 (Ct. App. 1998).

2. Filing and hearing procedure

a. Action for TRO or injunction is commenced by filing and serving petition; no action is commenced by filing summons and complaint. Wis. Stat. § 813.12(2)(a).

NOTE: Petition does not require petitioner's notarized signature.

b. Judge or court commissioner may not extend the TRO in lieu of ruling on issuance of an injunction. Wis. Stat. §§ 813.12(3)(c), 813.122(4)(c).

c. When filing petition, if petitioner knows of other current court proceedings that restrict contact between petitioner and respondent, petitioner must provide that information to court. Wis. Stat. § 813.12(5)(a)4.

d. Court may grant TRO, injunction, or both. Wis. Stat. § 813.12(2m).

e. Before granting TRO, court must find petitioner in imminent danger of harm. *Blazel v. Bradley*, 698 F. Supp. 756 (W.D. Wis. 1988).

f. When granting TRO, court can order only remedies requested or approved by petitioner; when granting injunction, court can grant only remedies requested by petitioner. Wis. Stat. § 813.12(3)(aj), (4)(aj); *Laluzerne v. Stange*, 200 Wis. 2d 179 (Ct. App. 1996).

g. Court must find any threats against the petitioner to be "true threats" that a listener would reasonably interpret as serious expressions of a purpose to inflict bodily harm. *State v. Perkins*, 2001 WI 46, 243 Wis. 2d 141; *Wittig v. Hoffart*, 2005 WI App 198, ¶¶ 16–17, 287 Wis. 2d 353.

h. Court must inform petitioner of right to serve respondent by publication in certain circumstances. Wis. Stat. § 813.12(2)(a), (3)(d).

i. If service by publication is sent to wrong address when the correct address is known, petitioner failed to provide notice and court does not have jurisdiction to hear case. *O'Donnell v. Kaye*, 2015 WI App 7, 359 Wis. 2d 511.

j. Standard for granting TRO or injunction is reasonable grounds. Wis. Stat. § 813.12(3)(a)2., (4)(a)3., (1)(cg).

3. Jurisdiction

a. Action for domestic abuse restraining order can be commenced in county where abuse occurred, where petitioner or respondent resides, or where petitioner temporarily lives. Wis. Stat. § 801.50(5r).

b. Court must have jurisdiction to hear case; court has personal jurisdiction over select cases in which abuse crosses state lines. Wis. Stat. §§ 801.04, 801.05(11m), 813.015.

c. In addition to venue in county in which action arose, where petitioner or respondent resides, or where petitioner temporarily lives, court also has venue over Wis. Stat. § 813.12 petitioners when petitioner lives within 100 miles of county seat of county in which petitioner resides or is temporarily living if petitioner is victim advocate; employee of county court system; legal professional practicing law; current or former law enforcement officer; or spouse of or in dating relationship with victim advocate, employee of county court system, legal professional practicing law, or current or former law enforcement officer. Wis. Stat. §§ 801.50(5r), 102.475(8)(c), 813.12, 905.045(1); SCR 23.01.

d. No fees can be collected from petitioner for costs of filing action, process of service, or travel; such fees may be collected from respondent upon conviction for violating order. Wis. Stat. § 814.61(1)(d), 814.70(1).

4. Under Wis. Stat. § 813.12(3)(a), (4)(a), and *Laluzerne*, 200 Wis. 2d 179, remedies available are:

a. Order restraining respondent from committing further acts of domestic violence against petitioner (*no-hit order*);

b. Order directing respondent to avoid petitioner's residence or any other location temporarily occupied by petitioner (*no-contact order*), Wis. Stat. § 813.12(3)(a), (am), (4)(a), (g); *Johnson v. Miller*, 157 Wis. 2d 482 (Ct. App. 1990);

NOTE: If petitioner and respondent are not married, and petitioner has no legal interest in the premises, the court may order respondent to avoid the premises for a reasonable length of time until petitioner can relocate.

c. Order directing respondent to avoid contacting or causing any person other than party's attorney or law enforcement officer to contact petitioner unless petitioner consents in writing (*no-contact order*);

d. Order directing respondent to refrain from removing, hiding, damaging, harming, mistreating, or disposing of a household pet, and to allow the petitioner or family member, or household member of the petitioner acting on their behalf, to retrieve a household pet, Wis. Stat. § 813.12(4)(a);

e. Order to allow petitioner out of family wireless phone service contract plan; petitioner may continue using wireless telephone number, Wis. Stat. § 813.12(4g);

f. Any combination of these remedies; or

g. Any other appropriate remedy consistent with remedies requested in petition.

5. Additional information

a. If court issues injunction, court must require respondent to surrender any firearms owned or in their possession. Wis. Stat. §§ 813.12(4m)(a)2., 813.1285.

b. Judge's on-the-record oral modifications of injunction modify the order. *State v. O'Dell*, 193 Wis. 2d 333 (1995).

c. Injunction is not voided if respondent is admitted into dwelling that injunction directs respondent to avoid, or if petitioner allows or initiates contact with respondent. Wis. Stat. § 813.12(4)(c)1.

d. TRO or injunction must include statement that it may be accorded full faith and credit in every civil and criminal court in United States and in tribal courts having jurisdiction. Wis. Stat. § 813.12(9).

e. Wisconsin courts must recognize and enforce civil domestic violence protection orders issued by Canadian courts. Wis. Stat. § 813.1283.

f. If court issues injunction, must grant for the period of time requested by petitioner, up to four years or for period of time order is granted; this petitioner right does not violate equal protection clause or substantive due process under Wisconsin Constitution. Wis. Stat. § 813.12(4)(c), (d), (5)(d); *Hayen v. Hayen*, 2000 WI App 29, 232 Wis. 2d 447.

g. Expired domestic abuse injunction that had been initially granted for less than four years can be extended, but total amount of time cannot exceed the statutorily prescribed time of four years. *Switzer v. Switzer*, 2006 WI App 10, 289 Wis. 2d 83; *State v. Jankowski*, 173 Wis. 2d 522 (Ct. App. 1992).

h. Court can grant an extension for no more than 10 years if, by preponderance of evidence, court finds substantial risk respondent may commit either first- or second-degree intentional homicide or may commit sexual assault against the petitioner. Wis. Stat. § 813.12(4)(c), (d), (5)(d).

i. Party may seek hearing de novo for denial of TRO or injunction by circuit court commissioner. Motion must be filed within 30 days after issuance of decision; court must hold hearing de novo within 30 days after motion filed, unless good cause to extend. Determination, order, or ruling entered by court commissioner remains in effect until judge in de novo hearing issues a final determination, order, or ruling. Wis. Stat. §§ 757.69(8), 813.126.

j. Respondent has constructive knowledge of injunction even if does not appear at injunction hearing, if served with notice. Wis. Stat. § 813.12(7)(c).

C. Harassment Restraining Orders [§ 24.182]

See Wis. Stat. § 813.125.

1. Definitions

a. Wis. Stat. § 813.125(1) provides that *harassment* means:

(1) Striking, shoving, kicking, or otherwise subjecting another person to physical contact;

(2) Engaging in an act that would constitute child abuse under Wis. Stat. § 48.02(1);

(3) Sexual assault under Wis. Stat. § 940.225;

(4) Stalking under Wis. Stat. § 940.32;

(5) Attempting or threatening to do (1), (2), (3), or (4); or

(6) Engaging in a course of conduct or repeatedly committing acts that harass or intimidate another person and that serve no legitimate purpose.

NOTE: Criminal stalking includes intentional behavior that actor knows or should know will make recipient fear bodily harm or death to recipient or recipient's family or household, and behavior is series of two or more acts carried out over time, however short or long, that shows continuity of purpose. Wis. Stat. § 940.32. See *State v. Eichorn*, 2010 WI App 70, 325 Wis. 2d 241, which contains overview of elements of stalking.

NOTE: Conduct is not legitimate if done, even in part, to harass. *Board of Regents–UW Sys. v. Decker*, 2014 WI 68, 355 Wis. 2d 800.

NOTE: See *Welytok v. Ziolkowski*, 2008 WI App 67, 312 Wis. 2d 435, and *Wagner v. Washington County*, No. 2006AP532-FT, 2006 WL 2547388 (Wis. Ct. App. Sept. 6, 2006) (unpublished opinion not citable per Wis. Stat. § 809.23(3)), for information on what does or does not serve as legitimate purpose under Wis. Stat. § 813.125(1). *See Herlitzka v. Zernia*, No. 2016AP2408, 2017 WL 4862076 (Wis. Ct. App. Oct. 26, 2017) (unpublished opinion not citable per Wis. Stat. § 809.23(3)), which clarifies that going to plaintiff's home and placing disparaging flyers about plaintiff on multiple cars does not serve as legitimate purpose under Wis. Stat. § 813.125(1).

NOTE: 2021 Wis. Act 28 updated the definition of *stalking* in Wis. Stat. § 940.32(1)(a) to specifically include contact by text message, electronic message, or other means of electronic communication.

b. Under Wis. Stat. §§ 813.125(2)(b), (3)(a), (4)(a), 48.235(4)(a)6., 48.25(6), petitioner may be a minor or an adult, as follows:

(1) Child victim, or parent, stepparent, or legal guardian of child victim;

(2) Any person who alleges harassment.

NOTE: *Person* includes "all partnerships, associations and bodies politic or corporate." *Decker*, 2014 WI 68.

Person includes municipal corporation. *Village of Tigerton v. Minniecheske*, 211 Wis. 2d 777 (Ct. App. 1997).

NOTE: Unlike in many other states, in Wisconsin a parent or legal guardian may not include a minor child in the parent's petition. The child or the child's parent, stepparent, or legal guardian must file a separate petition for the child under the harassment or child abuse restraining order and injunction statutes. Wis. Stat. §§ 813.122, 813.125.

(3) Guardian ad litem (GAL) if child victim is in child in need of protection or services (CHIPS) proceeding; or

(4) Any party or governmental or social agency involved in CHIPS proceeding if child victim is in CHIPS proceeding.

2. Filing and hearing procedure

a. If petition is filed by or on behalf of minor, following items apply:

(1) Must file in juvenile court if child victim is involved in CHIPS proceeding or if respondent is child. Wis. Stat. § 803.01(3).

(2) If minor petitions, court may appoint GAL but need not appoint GAL before minor files petition. Wis. Stat. §§ 803.01(3), 813.125(2g).

(3) Court, on own motion or motion of any party, may appoint GAL for child petitioner or child respondent. Court cannot order child victim or any parent, stepparent, or legal guardian of child victim who is not party to action to pay any part of GAL fees. Wis. Stat. § 48.235(8)(c)3.

b. Respondent can be adult or child who engages in harassing behavior. Wis. Stat. §§ 813.125, 757.69(1)(g)7.

c. Action can be commenced in county where incident occurred, where petitioner resides, or where respondent resides. Wis. Stat. § 801.50(5s).

d. When filing petition, if petitioner knows of other current court proceedings that restrict contact between petitioner and respondent, petitioner must provide that information to court. Wis. Stat. § 813.125(5)(a)4.

e. In harassment restraining order action, no fees can be collected if action is brought as CHIPS action and respondent is a minor; also, no fees or surcharges can be collected for costs of filing, serving petition, or travel for service when petition alleges conduct prohibited by Wis. Stat. § 940.32 (criminal stalking) or Wis. Stat. § 813.12(1)(am) (domestic abuse); petitioner must pay these costs if petition is filed that does not allege behavior under Wis. Stat. § 940.32 or 813.12(1)(am). If no fees are collected from petitioner, certain fees shall be collected from respondent in situations in which respondent is convicted of violating a temporary restraining order or injunction under Wis. State. § 813.125(3) or (4). Wis. Stat. §§ 814.61(1)(e), 814.85, 814.86(1), 814.70(1), (3), 48.25(6).

NOTE: Petition does not require petitioner's notarized signature.

NOTE: Petitioner who qualifies for fee waiver is also eligible to request injunction hearing if TRO denied. Wis. Stat. § 813.125(2m).

f. Under Wis. Stat. § 813.125(3)(a), (4)(a), to grant TRO or injunction, court must find reasonable grounds to believe that respondent "engaged in harassment with intent to harass or intimidate the petitioner."

(1) TRO or injunction cannot be dismissed or denied because of existence of pending action or any other order barring contact between parties or because of necessity of verifying terms of existing order. Wis. Stat. § 813.125(3)(e), (4)(aj).

(2) Court must have proof of service to conduct injunction hearing. Court must inform petitioner of right to serve respondent by publication in certain circumstances. If service by publication is sent to wrong address when the correct address is known, petitioner failed to provide notice and court lacks jurisdiction. Wis. Stat. § 813.125(2), (3)(d), (4)(a); *O'Donnell v. Kaye*, 2015 WI App 7, 359 Wis. 2d 511.

3. Jurisdiction: Court must have jurisdiction to hear case; court has personal jurisdiction over select cases in which abuse crosses state lines. Wis. Stat. §§ 801.04, 801.05(11m), 813.015.

4. In addition to venue in county in which action arose, where petitioner or respondent resides, or where petitioner temporarily lives, court has venue over Wis. Stat. § 813.125 petitioners when petitioner lives within 100 miles of county seat of county in which petitioner resides or is temporarily living if petitioner is any of the following: victim advocate; employee of county court system; legal professional practicing law; current or former law enforcement officer; or spouse of or in dating relationship with victim advocate, employee of county court system, legal professional practicing law, or current or former law enforcement officer. Wis. Stat. §§ 801.50(5s), 813.125, 813.12(1)(ag), 102.475(8)(c), 813.12, 905.045(1)(e); SCR 23.01.

5. Remedies. *See* Wis. Stat. §§ 813.125(3)(a), (c), (4)(a).

a. Court may order respondent to avoid contacting or causing any person other than party's attorney or law enforcement to contact petitioner without petitioner's written consent.

b. Court may order respondent to cease or avoid harassment of another person.

c. Court may order respondent to avoid petitioner's residence or any premises temporarily occupied by petitioner or both.

NOTE: If petitioner and respondent are not married and respondent owns premises where petitioner resides and petitioner has no legal interest in premises, court may order respondent to avoid premises for reasonable time until petitioner relocates.

d. Court may order respondent to refrain from removing, hiding, damaging, harming, mistreating, or disposing of a household pet and/or to allow petitioner, or petitioner's family or household member, to retrieve a household pet.

e. Court may not extend TRO in lieu of ruling on issuance of injunction. Wis. Stat. § 813.125(3)(c).

f. If court finds respondent not served with copy of TRO before injunction hearing, TRO can be extended *only once for 14 days* unless both parties consent in writing or pursuant to Wis. Stat. § 801.58(2m) (judicial substitution). Wis. Stat. § 813.125(3)(c), *Hill v. D.C.*, 2014 WI App 99, 357 Wis. 2d 463.

6. Additional information

a. Neither petition nor court can disclose alleged victim's address; petitioner must provide clerk of court petitioner's address, which clerk must maintain in confidential file. Wis. Stat. § 813.125(5m).

b. Party can seek hearing de novo for any denial of TRO or injunction by circuit court commissioner. Motion must be filed within 30 days after issuance of court commissioner's decision; court must hold de novo hearing within 30 days after motion filed, unless good cause to extend. Any determination, order or ruling entered by court commissioner remains in effect until judge in de novo hearing issues final determination, order or ruling. Wis. Stat. §§ 757.69(8), 813.126(2).

NOTE: Clerk of court must provide notice of a motion to nonmoving party, but this does not apply to motion to review a denial of a TRO.

c. Respondent has constructive knowledge of injunction if served with notice, even if they do not appear at injunction hearing. Wis. Stat. § 813.125(6)(c).

d. TRO or injunction must include statement that order may be accorded full faith and credit in every civil and criminal court of United States and Tribal courts having jurisdiction. Wis. Stat. § 813.125(8).

e. Wisconsin courts are also required to recognize and enforce civil domestic violence protection (accord full faith and credit to) orders issued by Canadian courts. Wis. Stat. § 813.1283.

f. Tenant may terminate tenancy because of imminent threat of physical harm to self or child and is not liable for rent after end of month in which tenant provides notice of existence of harassment injunction; existence of harassment injunction is also grounds to request landlord change locks. Wis. Stat. § 704.16.

7. Domestic abuse restraining order or injunction may, in some circumstances, offer advantages over harassment restraining order or injunction.

a. No fee for domestic abuse restraining order unless petitioner chooses to use private process server or to publish petition in newspaper if respondent cannot be served; in harassment restraining order action, no fees can be collected if action is brought as CHIPS action and respondent is a minor; also, no fees can be collected in harassment order for costs of filing, serving petition, or travel for service when petition alleges conduct prohibited by Wis. Stat. § 940.32 (criminal stalking) or Wis. Stat. § 813.12(1)(am) (domestic abuse); if harassment petition is filed that does not allege behavior under Wis. Stat. § 940.32 or 813.12(1)(am), petitioner must pay costs of filing, serving petition, and travel for service. Wis. Stat. §§ 813.12(2), 814.61(1)(d), (e), 814.70(1), (3), 48.25(6).

NOTE: Criminal stalking includes intentional behavior actor knows or should know will make the recipient fear bodily harm or death to the recipient or the recipient's family or household, and the behavior is a series of two or more acts carried out over time, however short or long, that shows continuity of purpose. Wis. Stat. § 940.32.

b. Petitioner can file petition for domestic abuse restraining order in any county where they temporarily reside (venue). Wis. Stat. § 801.50(5r).

c. If court does not grant domestic abuse TRO, either party can request injunction hearing. In harassment TRO, only a petitioner eligible for a fee waiver can request an injunction hearing. Wis. Stat. § 813.12(2m).

d. With domestic abuse restraining order, if court grants injunction, court may grant only remedies requested by petitioner, for requested length of time up to 4 years (or up to 10 years in select cases); while court may grant harassment order for up to 4 years (or up to 10 years in select cases): remedies and duration of order are at court's discretion. Wis. Stat. §§ 813.12(4)(c), 813.125(4)(c); *Hayen v. Hayen*, 2000 WI App 29, 232 Wis. 2d 447; *Laluzerne v. Stange*, 200 Wis. 2d 179 (Ct. App. 1996).

e. In granting domestic abuse injunction, court must order surrender of any firearms owned by or in possession of respondent; in harassment injunction, court can only order firearms surrender if it determines by clear and convincing evidence that respondent may use firearm to cause physical harm to another or to endanger public safety. For detailed discussion of the firearms surrender procedure, *see infra* § 24.7. For discussion of the federal firearms prohibitions, *see infra* § 24.12. *See also* Wis. Stat. §§ 813.12(4m), 813.125(4m)(a).

f. Court must accept any legible petition for domestic abuse TRO or injunction. Wis. Stat. § 813.12(5)(c).

g. On request, court must record domestic abuse TRO or injunction hearing. Wis. Stat. § 813.12(7m).

h. Expired injunction granted for less than four years can be extended; no provision to extend a harassment order unless there is a threat of homicide or sexual abuse to petitioner. Wis. Stat. § 813.125(4)(c)–(d); *Switzer v. Switzer*, 2006 WI App 10, ¶¶ 15–20, 289 Wis. 2d 83.

D. Individuals at Risk Restraining Orders [§ 24.183]

1. Definitions

a. *Individual-at-risk* means an elder adult at risk or an adult at risk. Wis. Stat. § 813.123(1)(ep).

b. *Elder adult at risk* means any person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation. Wis. Stat. §§ 46.90(1)(br), 813.123(1)(cg).

c. *Adult at risk* means any adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation. Wis. Stat. §§ 55.01(1e), 813.123(1)(ae).

d. Under Wis. Stat. §§ 46.90(1)(a), 55.01(1) and 813.123(1)(a), *abuse*, for purposes of individual-at-risk, means any of the following:

(1) *Physical abuse:* intentional or reckless infliction of bodily harm. Wis. Stat. § 46.90(1)(a)1., (fg).

(2) *Emotional abuse:* language or behavior that serves no legitimate purpose and is intended to be intimidating, humiliating, threatening, frightening, or otherwise harassing, and that does or reasonably could intimidate, humiliate, threaten, frighten, or otherwise harass the individual to whom the conduct or language is directed. Wis. Stat. § 46.90(1)(a)2., (cm).

(3) *Sexual abuse:* violation of Wis. Stat. § 940.225(1), (2), (3a), or (3m) (criminal sexual assault law). Wis. Stat. § 46.90(1)(a)3., (gd).

e. *Treatment without consent:* the administration of medication to an individual who has not provided informed consent, or the performance of psychosurgery, electroconvulsive therapy, or experimental research on an individual who has not provided informed consent, with the knowledge that no lawful authority exists for the administration or performance. Wis. Stat. § 46.90(1)(a)4., (h).

f. *Unreasonable confinement or restraint:* includes the intentional and unreasonable confinement of an individual in a locked room, involuntary separation of an individual from their living area, use on an individual of physical restraining devices, or the provision of unnecessary or excessive medication to an individual, but does not include the use of these methods or devices in entities regulated by the Department of Health Services (DHS) if the methods or devices are employed in conformance with state and federal standards governing confinement and restraint. Wis. Stat. § 46.90(1)(a)5., (i).

g. Additional definitions (related to grounds to obtain an order) include the following:

(1) Under Wis. Stat. § 46.90(1)(ed), *financial exploitation* means any of the following:

(a) Obtaining an individual's money or property by deceiving or enticing the individual, or by forcing, compelling, or coercing the individual to give, sell at less than fair market value, or in other ways convey money or property against their will without their informed consent.

(b) Theft, as prohibited in Wis. Stat. § 943.20.

(c) The substantial failure or neglect of a fiscal agent to fulfill their responsibilities.

(d) Unauthorized use of an individual's personal identifying information or documents, as prohibited in Wis. Stat. § 943.201.

(e) Unauthorized use of an entity's identifying information or documents, as prohibited in Wis. Stat. § 943.203.

(f) Forgery, as prohibited in Wis. Stat. § 943.38.

(g) Financial transaction card crimes, as prohibited in Wis. Stat. § 943.41.

(2) *Neglect* means failure of a caregiver, as evidenced by an act, omission, or course of conduct, to endeavor to secure or maintain adequate care, services, or supervision for an individual, including food, clothing, shelter, or physical or mental health care, and creating significant risk or danger to the individual's physical or mental health. Neglect does not include a decision not to seek medical care for an individual, if that

decision is consistent with the individual's previously executed declaration or do-not-resuscitate order under Wis. Stat. ch. 154, a power of attorney for health care under Wis. Stat. ch. 155, or as otherwise authorized by law. Wis. Stat. §§ 46.90(1)(f), 55.01(4r).

(3) *Self-neglect* means a significant danger to an individual's physical or mental health because the individual is responsible for their own care but fails to obtain adequate care, including food, shelter, clothing, or medical or dental care. Wis. Stat. §§ 46.90(1)(g), 55.01(6).

(4) Under Wis. Stat. § 813.125(1), *harassment* means any of the following:

(a) Striking, shoving, kicking, or otherwise subjecting another person to physical contact; engaging in an act that would constitute abuse under Wis. Stat. § 48.02(1), sexual assault under Wis. Stat. § 940.225, or stalking under Wis. Stat. § 940.32; or attempting or threatening to do the same.

(b) Engaging in a course of conduct or repeatedly committing acts that harass or intimidate another person and that serve no legitimate purpose.

(5) Under Wis. Stat. § 940.32(1)(a), *stalking* means engaging in a course of conduct—two or more acts carried out over time, however short or long, that show a continuity of purpose—including any of the following:

(a) Maintaining a visual or physical proximity to the victim.

(b) Approaching or confronting the victim.

(c) Appearing at the victim's workplace or contacting the victim's employer or coworkers.

(d) Appearing at the victim's home or contacting the victim's neighbors.

(e) Entering property owned, leased, or occupied by the victim.

(f) Contacting the victim by telephone or causing the victim's telephone or any other person's telephone to ring repeatedly or continuously, regardless of whether a conversation ensues.

(g) Photographing, videotaping, audiotaping, or, through any other electronic means, monitoring or recording the activities of the victim. This applies regardless of where the act occurs.

(h) Sending material by any means to the victim or to a member of the victim's family or household, employer, coworker, or friend, for the purpose of obtaining information about, disseminating information about, or communicating with the victim.

(i) Placing an object on or delivering an object to property owned, leased, or occupied by the victim.

(j) Delivering an object to a member of the victim's family or household or an employer, coworker, or friend of the victim or placing an object on, or delivering an object to, property owned, leased, or occupied by such a person with the intent that the object be delivered to the victim.

(k) Causing a person to engage in any of the acts described in (a)–(j), *supra*.

(6) *Mistreatment of an animal* means cruel treatment of any animal owned by or in service to an individual-at-risk. Wis. Stat. § 813.123(1)(fm).

2. Filing and hearing procedure

a. Under Wis. Stat. §§ 46.90(5m), 813.123(4)(a)2.a., b., and ch. 55, to obtain the TRO or injunction, one of the following types of behavior must be alleged in the petition:

(1) Respondent has interfered with, or based on prior conduct of the respondent may interfere with, an investigation of the individual-at-risk, the delivery of protective services or a protective placement under Wis. Stat. ch. 55, or delivery of services to an elder adult at risk under Wis. Stat. § 46.90(5m); *and* the interference complained of, if continued, would make it difficult to determine whether physical abuse, emotional abuse, sexual abuse, treatment without consent, unreasonable confinement or restraint, financial exploitation, neglect, or self-neglect has occurred, is occurring, or may recur; or

NOTE: This provision is used largely by county workers who experience interference when attempting to investigate an allegation of abuse or when attempting to deliver protective services or protective placement to an individual-at-risk. This is not a restraining order but is a noninterference provision. This provision was formerly titled the "Vulnerable Adult Restraining Order."

(2) Respondent engaged in or threatened to engage in abuse, financial exploitation, neglect, harassment, or stalking of an individual-at-risk or the mistreatment of an animal.

b. Action for TRO or injunction is commenced by filing and serving petition; no action is commenced by filing summons and complaint. Wis. Stat. § 813.123(2).

c. A TRO is an ex parte hearing, but petition and notice of hearing must be properly served; if service by publication is sent to wrong address when correct address is known, petitioner failed to provide notice, and court lacks jurisdiction. Wis. Stat. § 813.123(2), (4); *O'Donnell v. Kaye*, 2015 WI App 7, 359 Wis. 2d 511.

d. Under Wis. Stat. § 813.123(2)(a), the following persons or entities may file a petition:

(1) The individual-at-risk (adult at risk or elder adult at risk),

(2) Any person acting on behalf of an individual-at-risk,

(3) An elder-adult-at-risk agency, or

(4) An adult-at-risk agency.

NOTE: Petition does not require petitioner's notarized signature.

e. Under Wis. Stat. § 813.123(2)(a), if anyone other than the individual-at-risk files the petition, the following must happen:

(1) The person or agency must serve copy of the petition on the individual-at-risk, and

(2) The court must appoint a GAL to independently investigate and report to the court on whether issuance of the order is in the individual's best interests. Wis. Stat. § 813.123(3)(b).

NOTE: Consent of the individual-at-risk or their guardian, if any, is not required. Wis. Stat. § 813.123(2)(b).

3. Jurisdiction

a. Wis. Stat. § 801.50(2)(a), (c) provides that the petition may be filed (venue) in the county

(1) Where the behavior occurred, or

(2) Where the respondent resides.

b. Court must have jurisdiction to hear case; court has personal jurisdiction over select cases in which abuse crosses state lines. Wis. Stat. §§ 801.04, 801.05(11m), 813.015.

c. Under Wis. Stat. § 813.123(4)(a), (b), to obtain a TRO, court must find reasonable cause to believe allegations in petition are true.

d. Notice need not be given to the respondent before issuing the TRO.

e. TRO remains in effect until issuance of injunction, which is up to 14 days later. Court cannot extend a TRO in lieu of ruling on the injunction. Wis. Stat. § 813.123(4)(c).

f. If TRO not granted, hearing can be set upon motion of either party. Wis. Stat. § 813.123(3)(a).

g. When filing petition, if petitioner knows of other current court proceedings that restrict contact between petitioner and respondent, petitioner must provide that information to court. Wis. Stat. § 813.123(6)(d).

h. Neither petitioner's nor individual-at-risk's address may be disclosed on petition, TRO, or injunction. Petitioner must provide clerk these addresses and clerk must maintain them in confidential manner. Wis. Stat. § 813.123(5g).

4. Under Wis. Stat. § 813.123(5)(ar) and (5c), injunction can contain one or more of the following remedies:

a. Order respondent to avoid interference with an investigation of the elder adult at risk or adult at risk, the delivery of protective services or protective placement to the individual-at-risk, or the delivery of services to the elder adult at risk.

b. Order respondent to cease engaging in or threatening to engage in the abuse, financial exploitation, neglect, harassment, or stalking of an individual-at-risk or mistreatment of an animal.

c. Order respondent to avoid the residence of the individual-at-risk or any other location temporarily occupied by the individual-at-risk, or both.

d. Order respondent to avoid contacting or causing any person other than a party's attorney or a law enforcement officer to contact the individual-at-risk.

e. Order respondent to refrain from removing, hiding, damaging, harming, mistreating, or disposing of household pet; allow petitioner, family member, or household member to retrieve household pet; or both.

f. Allow petitioner out of family wireless phone service contract plan; petitioner may continue to use wireless telephone number.

g. Any other appropriate remedy not inconsistent with those requested in the petition.

5. Court may grant an order for up to 10 years if it finds by preponderance of evidence there is substantial risk respondent may commit first- or second-degree intentional homicide or sexual assault against the person at risk. Wis. Stat. §§ 813.123(5)(c), (d), 940.01, 940.05, 940.225(1)–(3), 948.02(1), (2).

6. Court may issue firearm surrender if it determines, based on clear and convincing evidence, that respondent may use firearm to cause physical harm to another or endanger public safety. If court orders firearm surrender, respondent must be informed of procedures for firearm surrender and given firearm possession form with instructions for completion and return of form. For detailed discussion of the firearm surrender procedure, *see* section 24.7, *infra*. Wis. Stat. § 813.123(5m)(a), (5)(a).

7. Additional information

a. Court must prohibit respondent from intentionally preventing a representative or employee of the county agency from meeting, communicating, or being in visual or audio contact with the adult at risk, except as provided in the order. Wis. Stat. § 813.123(7).

b. No fees can be collected from petitioner for costs of filing actions, service of process, or travel; such fees may be collected from respondent upon conviction for violating order. Wis. Stat. §§ 814.61(1)(d), 814.70(1).

c. An injunction is effective according to its terms, but for not more than four years. Wis. Stat. § 813.123(5)(c)1.

d. Extension of TRO and injunction. Wis. Stat. §§ 813.123(4)(c), 813.123(5)(c).

(1) Hearing on a TRO must be held within 14 days after it issued, unless the time is extended. Respondent need not be notified before an injunction is extended and clerk of court must notify respondent. Court can also extend TRO if there is a substitution of judge.

(2) When an injunction that has been in effect for less than six months expires, if the petitioner states that an extension is necessary to protect the individual-at-risk, court must extend the injunction. This extension will remain in effect until six months after the date on which the court first entered the injunction. Wis. Stat. § 813.123(5)(c)2.

(3) Court may extend the injunction for not more than two years, if the petitioner states that an extension is necessary to protect the individual at risk. Wis. Stat. § 813.123(5)(c)3.

e. Respondent has constructive knowledge of injunction if served with notice, even if they do not appear at injunction hearing. Wis. Stat. § 813.123(9)(c).

f. TRO or injunction must include statement that order may be accorded full faith and credit in every civil and criminal court of United States and Tribal courts having jurisdiction. Wis. Stat. § 813.123(12).

g. Wisconsin courts are also required to recognize and enforce civil domestic violence protection (accord full faith and credit to) orders issued by Canadian courts. Wis. Stat. § 813.1283.

h. Party may seek hearing de novo for any denial of TRO or injunction by circuit court commissioner. Motion must be filed within 30 days after issuance of court commissioner's decision; court must hold hearing de novo within 30 days after motion filed, unless good cause to extend. Any determination, order, or ruling entered by court commissioner remains in effect until judge in de novo hearing issues a final determination, order, or ruling. Wis. Stat. §§ 757.69(8), 813.126(2).

NOTE: Clerk of court must provide notice of motion to the nonmoving party. This does not apply to motion to review a denial of TRO.

i. Tenant may terminate tenancy because of imminent threat of physical harm to self or child and is not liable for rent after end of month in which tenant provides notice of existence of individual-at-risk injunction; existence of such injunction also provides grounds to request landlord to change locks. Wis. Stat. § 704.16.

E. Firearms Surrender Procedure [§ 24.184]

See Wis. Stat. § 813.1285.

1. Duties of court

a. Court must verify that respondents surrendered any firearms and must conduct a second hearing to ensure compliance, if needed.

b. If respondent is present at hearing:

(1) Court procedure:

(a) Court stays the injunction for no longer than 48 hours and extends the TRO for 48 hours for the purpose of firearm surrender only,

(b) Respondent provides the court a completed firearm possession form,

(c) Court verifies the information on the firearm possession form, and

(d) Court inquires on the record as to the contents of the firearm possession form.

(2) If the firearm possession form indicates the respondent does not own a firearm and the court is satisfied the respondent does not own a firearm, the court

(a) Files the firearm possession form,

(b) Lifts the stay of the injunction, and

(c) Dismisses the extended TRO.

(3) The court schedules a hearing within one week after the injunction hearing for the respondent to surrender firearms if

(a) The firearm possession form indicates the respondent owns a firearm and it has not been surrendered,

(b) Petitioner indicates respondent possesses a firearm and court is satisfied the respondent does possess a firearm,

(c) Court is not satisfied as to whether the respondent possesses a firearm, or

(d) For any other relevant reason.

(4) Dependent on situation, court may

(a) Determine if respondent complied with the surrender order, stay the injunction and extend TRO for no more than 48 hours to allow surrender of firearms; or

(b) Issue a surrender and extend order.

c. If respondent is not present at the injunction hearing:

(1) Court must

(a) Provide petitioner with opportunity to inform the court, orally or in writing, whether petitioner believes respondent owns a firearm; and

(b) Ask the petitioner how many firearms the respondent owns, the make and model of any firearm, and the location of any firearm.

(2) After taking testimony from petitioner, court does one of the following:

(a) Schedules firearm surrender hearing within one week after the injunction hearing, continues the stay of the injunction and extension of the TRO, and issues a surrender and extend order.

(b) Schedules firearm surrender hearing within one week after the injunction hearing, lifts the stay of the injunction, and sends the respondent notice of the hearing.

(3) If satisfied respondent does not possess a firearm, court files any firearm possession form, lifts the stay of the injunction, and dismisses the TRO, and no firearm surrender hearing is scheduled.

2. Grounds for dismissal

a. Respondent surrenders their firearms to a third party and

(1) Both respondent and the third party appear at the initial injunction hearing;

(2) At injunction hearing, the third party testifies under oath that they received the firearm(s) listed on firearm possession form;

(3) At injunction hearing, court determines (via verification from sheriff's office) that third party is not prohibited from possessing firearms;

(4) Court informs third party of requirements and penalties under Wis. Stat. § 941.2905; and

(5) Court, after considering all relevant factors and any input from petitioner, approves surrender of the firearms; or

b. Respondent surrenders their firearm(s) to a sheriff no later than 48 hours after the injunction hearing and provides a copy of the receipt to the clerk of court to allow clerk to cancel hearing.

c. Under Wis. Stat. § 813.1285(4)(a), unless court dismisses the firearm hearing, the respondent must attend. Failure to attend must result in the court issuing an arrest warrant for respondent.

3. Hearing procedure

See Wis. Stat. § 813.1285(4)(b).

a. Court must

(1) Stay the injunction for no more than 48 hours;

(2) Extend the TRO for 48 hours; and

(3) Verify, on the record, that the respondent has accurately completed a firearm possession form.

b. If the respondent offers to surrender firearm(s) to a third party who is not the sheriff, the third party must appear at the hearing to receive firearm(s). The court must

(1) Consider all relevant factors and input from the petitioner;

(2) Approve or deny request to allow third party to accept firearm(s); and

(3) If court approves, inform the third party of the requirements and penalties under Wis. Stat. § 941.2905 and order respondent to surrender firearm(s):

(a) Directly to third party, after determining that third party is not prohibited from possessing a firearm; or

(b) To the sheriff, who will transfer firearm(s) to third party after determining that third party is not prohibited from possessing a firearm.

c. At conclusion of hearing, the court orders the respondent to surrender any firearm listed on the firearm possession form to a sheriff or third party within 48 hours. The court issues the surrender order, stays the injunction for no more than 48 hours for purposes of firearm surrender only, and extends the TRO.

d. If respondent claims to have already surrendered firearm(s) to a third party:

(1) The third party testifies under oath that they received the firearm(s) listed on the respondent's firearm possession form,

(2) Court determines the third party is not prohibited from possessing a firearm, and

(3) Court lifts any stay of the injunction and dismisses the TRO.

e. If respondent claims to have surrendered firearm(s) to the sheriff, the court

(1) Verifies that respondent has surrendered all such firearms by receipt showing the surrender of all firearms subject to the order,

(2) Lifts the stay of the injunction, and

(3) Dismisses the TRO.

f. If the firearm possession form states respondent does not possess firearms:

(1) Court verifies that respondent does not possess a firearm, and

(2) Court files the firearm possession form, lifts any stay of the injunction, and dismisses the TRO.

g. If respondent does not attend the hearing to surrender firearms as ordered, court issues an arrest warrant for the respondent. Wis. Stat. § 813.1285(4)(a).

h. If respondent does not provide to the court, within 48 hours after the firearm hearing, a receipt showing the surrender of all firearms subject to the order, court must presume respondent is violating the order and the injunction and may do any of the following (Wis. Stat. § 813.1285(4)(b)2.):

(1) Notify the sheriff of the violation for investigation and appropriate action;

(2) Schedule another hearing to surrender firearm(s); or

(3) Issue a warrant to the sheriff ordering the respondent be brought before the court to show why respondent should not be held in contempt.

ALERT: Some Wisconsin counties have issued nonbinding resolutions declaring themselves "second amendment sanctuary counties." When practicing in these counties, attorneys should obtain and review these resolutions, which generally state that the county sheriff will not enforce "unconstitutional" firearms laws. These resolutions generally do not state that the sheriff will refuse to take firearms away from convicted felons or domestic abuse perpetrators when required to do so by state or federal law.

F. Restraining Order Resources [§ 24.185]

1. Morgan Kathleen Stippel, *Domestic Abuse Injunctions: 7 Steps to Protecting Survivors and Their Pets*, Wis. Law., May 2019, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=92&Issue=5&ArticleID=27019.

2. End Domestic Abuse Wis.—Wis. Coalition Against Domestic Violence, *Restraining Orders in Wisconsin*, http://s3-us-east-2.amazonaws.com/edaw-webinars/wp-content/uploads/2018/11/14175257/II-C_1Restraining_Order_Grid-June2016aynXEV.pdf (last updated June 2018).

3. Nat'l Ctr. on Prot. Orders and Full Faith and Credit, https://www.bwjp.org/resource-center.html (last visited May 5, 2022).

4. Am. Bar Ass'n, The Commission on Domestic and Sexual Violence, https://www.americanbar.org/groups/domestic_violence/ (last visited May 5, 2022).

5. Nat'l Clearinghouse on Abuse in Later Life [NCALL] https://www.ncall.us/ (last visited May 5, 2022).

6. Minn. Ctr. Against Violence and Abuse, https://experts.umn.edu/en/organisations/minnesota-center-against-violence-and-abuse (last visited May 5, 2022).

7. Tribal Court Clearinghouse, https://www.tribal-institute.org/ (last visited May 5, 2022).

8. U.S. Dep't of Just., Office on Violence Against Women (OVW), https://www.justice.gov/ovw (last visited May 5, 2022).

9. Nat'l Council of Juv. and Fam. Ct. Judges, *Family Violence and Domestic Relations*, https://www.ncjfcj.org/family-violence-and-domestic-relations/ (last visited May 5, 2022).

10. Nat'l Ctr. for State Cts., *Domestic Violence Resource Guide*, https://cdm16501.contentdm.oclc.org/digital/collection/famct/id/1610 (last visited May 5, 2022).

11. Wis. Dep't of Just., *Restraining Orders*, https://www.doj.state.wi.us/ocvs/victim-rights/restraining-orders (last visited May 5, 2022).

12. Brian Kuhl, Comment, *Long-Arm to Protect the Unarmed From Harm by the Armed: Why Wisconsin Needs a New Statute to Ensure its Residents Can Obtain Restraining Orders Against Foreign Residents Who Threaten Them*, 2012 Wis. L. Rev. 1041.

13. FindLaw, *Domestic Violence: Orders of Protection and Restraining Orders*, https://family.findlaw.com/domestic-violence/domestic-violence-orders-of-protection-and-restraining-orders.html (last visited Mar. 8, 2021).

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15. Andrew Klein et al., *An Exploratory Study of Juvenile Orders of Protection as a Remedy for Dating Violence* (2013), https://www.ncjrs.gov/pdffiles1/nij/grants/242131.pdf.

16. Ann E. Laatsch & Juanita Davis, *An Overview: Older Clients & Elder Abuse*, Wis. Law., Jan. 2020, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=1&ArticleID=27399.

G. Uniform Interstate Enforcement of Domestic Violence Protection Orders [§ 24.186]

See Wis. Stat. § 813.128.

1. Under Wis. Stat. § 813.128(2g)(a), full faith and credit is given a foreign protection order (FPO) by tribunals of the state if:

   a. FPO is obtained after providing respondent reasonable notice and opportunity to be heard, sufficient to protect due process;

   b. Issuing tribunal had jurisdiction over parties and over subject matter;

   c. FPO identifies protected individual and respondent; and

   d. FPO is currently in effect.

2. A FPO or modification of FPO has the same effect as an order issued under Wis. Stat. § 813.12, 813.122, 813.123, or 813.125, except that FPO or modification must be enforced according to its own terms. Wis. Stat. § 813.128(2g)(b).

3. Under Wis. Stat. § 813.128(2g)(c), full faith and credit is *not* given FPO by tribunal if:

   a. No written pleading was filed with tribunal, or

   b. Cross- or counter-petition was filed but court did not make specific finding that each party was entitled to FPO.

4. Wisconsin Indian Tribal order is FPO given full faith and credit. Wis. Stat. §§ 806.245(6), 813.128(1g), (2g), (3g).

5. Although FPO need not be on file to be enforced, copy of FPO *may be filed* with clerk of any circuit court; clerk may not charge fee and must treat filed FPO as judgment of circuit court. Wis. Stat. § 813.128(3g)(a)1.

6. FPO must be enforced according to its terms. Wis. Stat. § 813.128(2g)(b).

7. Wis. Stat. § 813.128(3g)(b) provides that officer must arrest and take person into custody if:

   a. Officer is presented with copy of FPO or is able to determine FPO exists, and

   b. Officer has probable cause to believe person violated FPO.

8. Under Wis. Stat. § 813.128(7), full faith and credit of FPO applies to:

   a. A request made on or after April 13, 2016, for enforcement of FPO for a violation of the order, regardless of when the order was issued or when the violation occurred; or

   b. A continuing action for enforcement of FPO, regardless of when the order was issued or when the action was commenced.

H. Uniform Recognition and Enforcement of Canadian Domestic Violence Protection Orders Act [§ 24.187]

1. Wisconsin courts are required to recognize and enforce civil domestic violence protection orders issued by Canadian courts. Wis. Stat. § 813.1283.

2. Definition of "domestic abuse" is broader than the Wisconsin definition and includes additional behavior than that required for Wisconsin domestic abuse restraining orders. Wis. Stat. § 813.1283.

I. Other No-Contact Orders [§ 24.188]

1. Other no-contact orders generally do not offer as much protection for adult victims of domestic abuse as do orders under Wis. Stat. ch. 813.

2. Other no-contact orders include the following:

   a. Boilerplate language in actions affecting the family, stating that neither party is to harass, intimidate, or abuse other party. Wis. Stat. § 767.117(1).

(1) Prohibitions remain in effect until action is dismissed, final judgment is entered, or court orders otherwise, which is usually less than two years. Wis. Stat. § 767.117(2).

(2) Violation of prohibition is not criminal act; remedy is civil action for contempt of court, and police will not arrest for violation. Wis. Stat. §§ 767.117(3), 785.04.

(3) Counsel for victim should urge consideration of whether boilerplate prohibition offers sufficient protection to abuse victim and should be aware of the following:

(a) Consequences for violations are not immediate, whereas consequence of violating domestic abuse, harassment, or individuals-at-risk restraining orders is mandated arrest. Wis. Stat. §§ 813.12(7)(am)1., 813.123(9)(am)1., 813.125(6)(am)1.

(b) If party ordered to refrain from harassing or physically abusing other spouse violates this order, abused party must file motion with family court to have hearing on violation, which takes time and is expensive.

(c) Penalties for contempt of court cannot be as severe as those for violating domestic abuse or harassment restraining order.

b. Contact prohibition of mandatory arrest law, under which person arrested and taken into custody is prohibited, for 72 hours after arrest, from having contact with person whom they abused. Wis. Stat. § 968.075(5)(a).

(1) Order offers immediate consequences and mandated arrest for violation. Wis. Stat. § 968.075(5)(a).

(2) Order is in effect for only 72 hours.

(3) Contact prohibition can be waived by victim at any time during these 72 hours. Wis. Stat. § 968.075(5)(c).

c. Conditions of bond that prohibit contact between victim and perpetrator. Wis. Stat. § 969.09.

(1) Violation of condition of bond is usually charged as bail jumping.

(2) Police officer may have to verify existence of condition of bond before making arrest and can usually verify only during business hours.

(3) Conditions of bond are in effect only for duration of case, usually less than two years. Wis. Stat. § 969.09(1).

(4) Conditions of bond are set at prosecutor's discretion and might not reflect victim's wishes. Wis. Stat. §§ 969.08, 969.09.

d. Conditions of probation, ordered by judge or established by probation agent as part of probation regulation. Wis. Stat. §§ 973.09(1)(a), 973.10(1).

(1) Police officer may need to verify existence of order and condition before making arrest.

(2) If officer can verify order and condition, officer may need to contact probation agent to determine if agent wants person taken into custody.

(3) Under some circumstances, probation agent may choose not to have offender taken into custody when offender breaks no-contact condition of probation but does not physically harm victim.

(4) Counsel for victim should consider that probation agent may be more likely to have offender picked up for violating no-contact condition of probation if victim also has domestic abuse or harassment restraining order.

(5) Violation of domestic abuse or harassment restraining order or injunction results in offender's probation set at no less than six months but no longer than length of order. Wis. Stat. §§ 973.09(2), 973.09(2)(ar).

(6) Conditions of probation are set at discretion of judge or probation agent and might not reflect victim's wishes.

e. Conditions of sentencing or probation, ordered by judge or established as part of probation regulation, exist that prohibit perpetrator from contacting victims of or witnesses to crime. Wis. Stat. § 973.049(2).

(1) Court determines who is victim of, or witness to crime, which may not include all who want court to issue no-contact order. Wis. Stat. § 973.049(2).

(2) Police officer may need to verify existence of order and condition before making arrest.

(3) Conditions are in effect only during individual's sentence or period of probation and only if the court determines that the conditions are "in the interest of public protection." Wis. Stat. § 973.049(2).

(4) Conditions are set at discretion of judge and might not reflect victim's wishes.

f. Injunction to enforce physical placement order. Wis. Stat. § 767.471(2)(a), (3)(d).

(1) Parent who has been denied one or more periods of physical placement may request, under principal action under which physical placement was awarded, petition for injunction.

(2) Court may grant injunction ordering respondent to strictly comply with physical placement order and may find respondent in contempt of court. Wis. Stat. § 767.471(5)(b)2.b., c.

3. Court cannot dismiss or deny Wis. Stat. § 813.12 TRO or injunction because of pending court action or any other no-contact order. Wis. Stat. § 813.12(3)(aj), (4)(aj), (6)(d).

J. Federal Protections [§ 24.189]

1. Firearms prohibitions. *See* 18 U.S.C. § 921.

   a. Federal law prohibits persons subject to final protective orders from receiving, shipping, transporting, or possessing firearms or ammunition; applies to orders that restrain a person from harassing, stalking, threatening, or engaging in other conduct that would place an intimate partner or child of intimate partner in reasonable fear of bodily injury. 18 U.S.C. § 922(g)(8).

      CAUTION: The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has ordered a firearm prohibition under 18 U.S.C. § 922(g)(8) in at least one case in which respondent was subject to a Wisconsin harassment injunction without a firearm restriction based on the underlying facts of the case. *See* ATF, *Protection Orders and Federal Firearms Prohibitions* (Sept. 2011), https://www.atf.gov/resource-center/docs/guide/protection-orders-and-federal-firearms-prohibitions-atf-i-33102/download.

      (1) *Intimate partner* means the spouse, former spouse, parent of the child of the person, or an individual who currently or formerly cohabited with the person for whose benefit the restraining order was obtained. 18 U.S.C. § 921(a)(32).

      (2) Dating relationships in which partners neither reside nor have resided together are not included.

      (3) Exception applies to firearms issued for use on behalf of federal, state, or local governmental units, presumably such as police departments and the military. *See* 18 U.S.C. § 925(a)(1).

         NOTE: The ATF interprets this exception to include law enforcement officers subject to restraining orders if such individuals' official duties require the possession of firearms or ammunition. However, this exemption seems to apply only to service weapons, not to personal weapons, and only at times when the exempted individual is on duty, unless the off-duty possession of firearms is required by the individual's employer. *See* https://www.atf.gov/firearms/qa/do-law-enforcement-officers-who-are-subject-restraining-orders-and-who-receive-and reviewed Jan. 30, 2020).

   b. Federal law prohibits persons who have been convicted of a felony from receiving, shipping, transporting, or possessing firearms or ammunition. 18 U.S.C. § 922(g)(1); *see also* 18 U.S.C. § 922(d)(1); 18 U.S.C. § 3559(a).

   c. Federal law (known as Domestic Violence Offender Gun Ban) makes it unlawful to sell or give any firearm or ammunition to persons convicted of misdemeanor crimes of domestic violence, and it prohibits persons convicted of misdemeanor crimes of domestic violence from receiving, shipping, transporting, or possessing firearms or ammunition. 18 U.S.C. § 921(a)(33); 18 U.S.C. § 922(d)(9), (g)(9).

2. Misdemeanor crime of domestic violence

a. *Misdemeanor crime of domestic violence* is a misdemeanor under federal, state, or Tribal law that includes as an element the use or attempted use of physical force or threatened use of deadly weapon committed by victim's current or former spouse, parent, or guardian; by person with whom victim shares a child in common; by person who is cohabitating with or has cohabitated with victim as spouse, parent, or guardian; or by a person similarly situated to a spouse, parent, or guardian of victim. 18 U.S.C. § 921(a)(33)(A). *See* ATF, *Misdemeanor Crimes of Domestic Violence and Federal Firearms Prohibitions* (Sept. 2011), https://www.atf.gov/resource-center/docs/guide/misdemeanor-crimes-domestic-violence-and-federal-firearms-prohibitions/download.

b. Defendant argued 18 U.S.C. § 922(g)(9) is unconstitutional. Court held disqualification-on-conviction statute such as 18 U.S.C. § 922(g)(9) is generally proper. Court noted that "misdemeanor crime of domestic violence" is a defined term and those elements were met in this case scenario. *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010).

c. Although a domestic relationship must be established in 18 U.S.C. § 922(g)(9) firearms possession prosecution, it is not a defining element of the predicate offense. Definition of *misdemeanor crime of domestic violence* imposes the following two requirements: (1) the crime must have "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," and (2) the crime must be committed by a person who has a specified domestic relationship with the victim. The definition does not require the predicate-offense statute to include, as an element, the existence of that domestic relationship. Government can charge and prove a prior conviction for "an offense … committed by" the defendant against a spouse or other domestic victim. *United States v. Hayes*, 555 U.S. 415, 420–21 (2009).

d. Circuit courts are not empowered to label crimes in an attempt to help party avoid collateral consequences. The legislature is to decide if different types of disorderly conduct are treated differently. The case involved a defendant originally charged with two counts, disorderly conduct and battery, within 72 hours after an arrest for domestic abuse. Both counts were amended to "disorderly conduct (non-domestic in nature)," and judgment of conviction reflected conviction of two counts of "disorderly conduct (non-domestic)." Court of appeals noted judgment of conviction reflects two counts under Wis. Stat. § 947.01, which does not differentiate between non-domestic and domestic disorderly conduct and found that charging documents describing domestic relationship between Koll and victim were sufficient to make him subject to 18 U.S.C. § 921(a)(33). *Koll v. DOJ*, 2009 WI App 74, 317 Wis. 2d 753.

e. The government must establish a reasonable fit between 18 U.S.C. § 922(g)(9), the federal firearm prohibition for misdemeanor crimes of domestic violence, and the government's important interest in preventing domestic violence injury and homicide. The defendant in *Skoien* challenged his conviction under 18 U.S.C. § 922(g)(9) as a violation of his Second Amendment rights, as explicated in *District of Columbia v. Heller*, 554 U.S. 570 (2008). The court held that gun restrictions not implicating the Second Amendment right to self-defense are subject to intermediate scrutiny. The case was remanded to the district court for further proceedings to allow the government to show the reasonableness of the relationship between the statute and the prevention of domestic violence injury and homicide. *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009), *aff'd*, 614 F.3d 638 (7th Cir. 2010).

f. The Supreme Court has held that a defendant's conviction for misdemeanor domestic assault by intentionally or knowingly causing bodily injury to the mother of his child qualifies as a conviction for a *misdemeanor crime of domestic violence* under 18 U.S.C. § 922(g)(9). The court broadened "physical force" to include activity such as "offensive touching." *United States v. Castleman*, 572 U.S. 157, 163 (2014).

3. Federal law prohibits interstate travel to commit domestic violence. 18 U.S.C. § 2261.

a. It is a federal crime for a person to cross a state line (or enter or leave Indian country or within the special maritime and territorial jurisdiction of the United States) with intent to kill, injure, harass, or intimidate that person's spouse, intimate partner, or dating partner, if, in course of or as result of such travel, the person commits or attempts to commit a crime of violence against their spouse, intimate partner, or dating partner. 18 U.S.C. § 2261(a)(1).

b. It is a federal crime for a person to cause their spouse, intimate partner, or dating partner to cross a state line (or to enter or leave Indian country) by force, coercion, duress, or fraud, if, in course of or result of such conduct, the person commits or attempts to commit a crime of violence against the person's spouse, intimate partner, or dating partner. 18 U.S.C. § 2261(a)(2).

4. Federal law prohibits interstate stalking. 18 U.S.C. § 2261A.

a. It is a federal crime for a person to travel in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States, or enter or leave Indian country, with the intent to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel places that other person in reasonable fear of the death of, or serious bodily injury to, or causes substantial emotional distress to that person, a member of the immediate family of that person, or the spouse or intimate partner of that person. 18 U.S.C. § 2261A(1).

b. It is a federal crime for the spouse or intimate partner of the person from para. 4.a., *supra*, to use mail, any interactive computer service, or any facility of interstate or foreign commerce to engage in a course of conduct that causes substantial emotional distress to that other person from para. 4.a., *supra*, or places that other person in reasonable fear of the death of, or serious bodily injury to, that person, a member of the immediate family of that person, or the spouse or intimate partner of that person. 18 U.S.C. § 2261A(2).

c. The federal criminal criminal definition of stalking includes causing a person to experience a reasonable fear of death or serious bodily injury to their pet, service animal, emotional support animal, or horse. 18 U.S.C. § 2261A(1)(A)(iv); Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4982.

5. Federal law prohibits interstate travel to violate protection order. 18 U.S.C. § 2262.

a. It is a federal crime for a person against whom a protection order has been issued to cross state line (or enter or leave Indian country or within the special maritime and territorial jurisdiction of the United States) with intent to violate protection order that prohibits or provides protection against violence, threats, harassment, contact or communication with, or physical proximity to another person, or the pet, service animal, emotional support

animal, or horse of that person if such violation is subsequently committed. 18 U.S.C. § 2262(a)(1).

NOTE: This provision does not require an intimate partner relationship, nor does it require an act of bodily injury.

b. It is a federal crime for a person against whom a protection order has been issued to cause another person to cross state line (or enter or leave Indian country or within the special maritime and territorial jurisdiction of the United States) by force, coercion, duress, or fraud or facilitate such conduct or travel, if, in course of or as result of travel, the person violates portion of protection order that prohibits or provides protection against violence, threats, harassment, contact or communication with, or physical proximity to another person or the pet, service animal, emotional support animal, or horse of that person. 18 U.S.C. § 2262(a)(2).

6. Federal law provides full faith and credit to protection orders.

a. In any state, Indian tribe, or territory, a protection order issued by a court of another state or tribe must be accorded full faith and credit and enforced as if it were the order of the enforcing state, tribe, government, or territory. 18 U.S.C. § 2265(a).

b. Full faith and credit is only possible if (1) court issuing order has jurisdiction over parties and matter under state or Indian tribe or territorial court; (2) reasonable notice and opportunity to be heard have been given to person against whom the order is sought; and (3) state, tribal, or territorial court makes specific findings that each party is entitled to an order if a cross- or counter-petition has been filed. 18 U.S.C. § 2265(b), (c).

c. Protection order includes any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts, harassment, or sexual violence against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a *pendente lite* order in another proceeding, so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection. 18 U.S.C. § 2266(5)(A).

d. Protection order also includes any support, child custody, or visitation provisions, orders, remedies, or relief issued as part of a protection order, restraining order, or injunction pursuant to state, tribal, territorial, or local law authorizing issuance of such orders for the protection of victims of domestic violence, sexual assault, dating violence, or stalking. 18 U.S.C. § 2266(5)(B).

e. *Spouse or intimate partner* includes a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as spouse with the abuser; a person who is or has been in social relationship of a romantic or intimate nature with abuser, as determined by length and type of relationship and frequency of interaction between persons involved in relationship; a spouse or former spouse of the target of the stalking, a person who shares a child in common with the target of the stalking, and a person who cohabits or has cohabited as a spouse with the target of the stalking; and any other person similarly situated to a spouse who is protected by the domestic or family laws of the state or tribal jurisdiction in which injury occurred or where victim resides. 18 U.S.C. § 2266(7)(A), (B).

f. Wisconsin's corresponding provision is Wis. Stat. § 806.247. *See supra* §§ 24.4, .6, .9. Wis. Stat. § 806.247; *see also* Wis. Stat. § 813.128.

7. Federal law providing civil rights remedy for victims of gender-motivated violence has been held unconstitutional. *United States v. Morrison*, 529 U.S. 598 (2000) (striking down 42 U.S.C. § 13981, now found in 34 U.S.C. § 12361).

U.S. Supreme Court held that Congress lacked authority, under Commerce Clause or 14th Amendment, to enact 42 U.S.C. § 13981 (now found in 34 U.S.C. § 12361), because this statute does not regulate activity that substantially concerns interstate commerce nor does it redress harm caused by state action. *Morrison*, 529 U.S. 598.

8. Federal Immigration Protections

a. Federal law provides Violence Against Women Act (VAWA) self-petition remedy for abused immigrants.

(1) Immigrants may self-petition U.S. Citizenship and Immigration Services (USCIS) under the VAWA for deferred action, employment authorization, and permanent residency. This relief is available for spouses or unmarried children under age 21 of citizens and lawful permanent residents or abused parents of citizens. 8 U.S.C. § 1154(a)(1)(A)(iii), (iv), (v).

(2) For a parent to qualify to self-petition, abuser must be a U.S. citizen and at least 21 years of age; parent of an abusive legal permanent resident does not qualify for a VAWA self-petition.

(3) An unmarried abused child may file a VAWA self-petition up until age 21, or until age 25 if they can show that qualifying abuse was a central reason for the delay in filing.

(4) Petition for abused spouse must be filed before or within two years after divorce finalized; abuse does not have to be alleged in divorce.

(5) In case of bigamy of abusive spouse, petitioner may still file if petitioner believed marriage was legal when entering it and acted in good faith. 8 U.S.C. § 1154(a)(1)(A)(iii)(I); 8 U.S.C. § 1154(a)(1)(B)(ii).

b. Federal law provides for cancellation of removal for abused immigrants.

(1) Abused spouse, child or parent of abused child of U.S. citizen or lawful permanent resident who is in removal proceedings can petition to cancel grounds offered by government for removal. 8 U.S.C. § 1229b(b)(2).

(2) If court grants, petitioner becomes lawful permanent resident.

(3) Petitioner must show they have been subjected to battery or extreme cruelty in United States by their spouse or parent who is a citizen or legal permanent resident or their child was abused by a citizen or legal permanent resident parent.

(4) Petitioner must have continuously lived in United States for three years, not including any time since the removal proceedings began.

c. Federal law provides for abused conditional permanent residents to remove the conditions of their residency through a battered spouse or child waiver.

(1) Abused spouse or child may petition to have the conditions removed from their lawful permanent residency without the assistance of the abuser. 8 U.S.C. § 1186a(c)(4)(C).

(2) A successful petition results in the removal of conditions and the individual obtains regular lawful permanent resident status.

d. Federal law provides for asylum relief for certain victims of domestic abuse.

(1) Abused intimate partner or child may apply for asylum status based on seeking protection because they have suffered persecution or fear future persecution based on membership in a particular social group. 8 U.S.C. § 1158(b)(1)(B)(i).

(2) If asylum office or court grants asylum, applicant becomes asylee and may apply for lawful permanent residency after one year with asylum status.

NOTE: On June 16, 2021, U.S. Attorney General Merrick Garland vacated prior A.G. decisions in *Matter of L-E-A*, 27 I&N Dec. 5811 (A.G. 2019), *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), and *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021). Memorandum from Off. of Assoc. Att'y Gen., U.S. Dep't of Just., on Impact of Attorney General Decisions in *Matter of L-E--A* and *Matter of A-B-* (Jun. 16, 2021), https://www.justice.gov/asg/page/file/1404826/download. Consequently, these prior decisions, which somewhat limited asylum claims alleging harm by non-state actors, are no longer in effect.

e. Federal law provides for U nonimmigrant status ("U Visa") for immigrant victims of serious crime.

(1) Immigrant victims of a qualifying criminal activity, including domestic violence, may petition for U nonimmigrant status if they have been, are being, or are likely to be helpful in the investigation and/or prosecution of the case. 8 C.F.R. § 214.14(b).

(2) Petitions must include an executed Form I-918, Supplement B, U Nonimmigrant Status Certification, signed by an authorized official of the law enforcement agency investigating or prosecuting the case certifying petitioner's helpfulness.

(3) Petitioners under 21 years of age may include as derivatives a spouse, unmarried children who are under 21 years old, parents, and unmarried siblings under age 18.

(4) Petitioners 21 years of age or older may include as derivatives a spouse and unmarried children who are under 21 years old.

If USCIS grants, petitioner obtains four-year work authorization.

NOTE: On June 14, 2021, USCIS announced a new bona fide determination process that allows certain petitioners and derivatives to apply for four-year work authorization and deferred action while awaiting the final determination of their petition. *See* USCIS, *U Nonimmigrant Status Bona Fide Determination Process FAQs*, https://www.uscis.gov/records/electronic-reading-room/u-nonimmigrant-status-bona-fide-determination-process-faqs (last reviewed/updated Sept. 23, 2021).

(5) There is a cap of 10,000 visas that may be granted to petitioners each year. There is no yearly cap for derivatives. The USCIS has a waiting list for eligible principal and derivative petitioners who are waiting for additional visas to become available. Petitioners on the waiting list may apply for work authorization while they wait.

NOTE: The current estimated wait time for obtaining U nonimmigrant status is several years.

(6) After three years in U nonimmigrant status, petitioner and derivatives may apply for lawful permanent resident status.

f. Federal law provides for T nonimmigrant status and/or continued presence for immigrant victims of human trafficking.

(1) T nonimmigrant status

(a) Immigrant victims of a severe form of human trafficking, including sex or labor trafficking, may apply for T nonimmigrant status if they comply with any reasonable request from law enforcement in the investigation or prosecution of such human trafficking. 8 C.F.R. § 214.11(b).

(b) Petitions may, but are not required to, include an executed Form I-914, Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, demonstrating applicant's compliance with any reasonable request to assist law enforcement.

(c) Applicants under 21 years of age may include as derivatives a spouse, unmarried children who are under 21 years old, parents, and unmarried siblings who are under 18 years old.

(d) Applicants 21 years and older may include as derivatives a spouse and unmarried children who are under 21 years old.

(e) If USCIS grants, applicant obtains four-year work authorization and is eligible for the same public benefits for which refugees qualify.

(f) The number of visa grants is capped at 5,000 per year. There is no yearly cap for derivatives.

(g) Applicant and derivatives may apply for lawful permanent resident status after three years of T nonimmigrant status or once investigation or prosecution is complete, whichever is sooner.

(2) Continued presence

(a) Federal, state, or local law enforcement agency may apply to U.S. Immigration and Customs Enforcement's Homeland Security Investigations (HSI) for continued presence in United States for immigrant victim of severe form of human trafficking, including sex or labor trafficking. Submissions by state or local law enforcement must be sponsored by a federal agency, such as the U.S. Attorney's Office or the Federal Bureau of Investigation. 28 C.F.R. pt. 1100.

(b) If HSI grants, HSI:

(i) notifies U.S. Department of Health and Human Services, which issues certification letter confirming victim's eligibility for federal benefits and services; and

(ii) notifies USCIS to produce documentation indicating victim's immigration designation and Employment Authorization Document.

NOTE: Continued presence is a temporary status and not a path to lawful permanent residency. Victim with continued presence may also apply for another type of immigration relief with path to lawful permanent residency such as U or T nonimmigrant status.

g. Federal law provides for special immigrant juvenile status for certain immigrant youth.

(1) Unmarried immigrant under 21 years of age dependent may petition USCIS for special immigrant juvenile status if they have a state court order finding:

(a) They are dependent on court or in custody of state agency; or

(b) They cannot be reunited with one or both parents due to abuse, abandonment, neglect, or similar basis under state law; and

(c) It is not in youth's best interest to return to country of nationality or last habitual residence. 8 C.F.R. § 204.11(c).

(2) If USCIS grants status, petitioner may apply for lawful permanent resident status when a visa is available in the employment-based fourth preference (EB-4) immigrant visa category for special immigrants.

(3) A youth granted status through special immigrant juvenile status may not petition for their parents in the future.

h. Federal law provides for employment authorization for abused spouses of certain nonimmigrants. *See* U.S. Citizenship and Immigration Services Policy Memorandum Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants, PM-602-0130 (Mar. 8, 2016).

(1) Spouses who accompanied or followed to join a nonimmigrant spouse admitted to the United States in A (diplomatic), E-3 (Australian specialty occupation worker), G (foreign government or international organization representative), or H (specialty occupation worker, temporary non-agricultural worker, or trainee) nonimmigrant

status who were, or whose children were, battered or subjected to extreme cruelty by the nonimmigrant spouse during the marriage and after admission to the United States may be eligible for employment authorization.

(2) Application may be filed within two years of spouse's death.

(3) Application may be filed within two years of spouse's loss of qualifying nonimmigrant status due to an incident of domestic violence.

(4) Application may be filed within two years of termination of marriage if connection exists between termination of marriage and domestic abuse or extreme cruelty.

(5) Employment authorization may be renewed in certain circumstances.

i. Confidentiality. 8 U.S.C. § 1367.

(1) VAWA victim confidentiality protections apply to all victims abused by a spouse or parent including, and in addition to, those filing for:

(a) VAWA self-petition, VAWA cancelation, VAWA suspension;

(b) Battered spouse or child waiver;

(c) U Nonimmigrant Status;

(d) T Nonimmigrant Status; or

(e) Abused spouses of work visa holders who file for VAWA employment authorization;

(2) Protections include:

(a) Barring Department of Homeland Security, DOJ, and Department of State (DOS) from taking action against victim solely based on information provided by abuser, perpetrator of crime, or their family member or associate;

(b) Barring immigration enforcement at sensitive locations unless the Department of Homeland Security follows statutory requirements; and

(c) Barring the Department of Homeland Security, the DOJ, and the DOS from disclosing protected information from protected individuals/cases to anyone through discovery or other means.

(3) Violations may result in disciplinary action and/or fine.

j. Resources:

(1) ASISTA, https://asistahelp.org/ (last visited May 5, 2022).

(2) Immigrant Legal Resource Center, *U VISA/T VISA/VAWA*, https://www.ilrc.org/u-visa-t-visa-vawa (last visited May 5, 2022).

(3) Am. Univ. Nat'l Coll. of L, Nat'l Immigrant Women's Advocacy Project, https://www.wcl.american.edu/impact/initiatives-programs/niwap/ (last visited May 5, 2022).

(4) State Just. Inst., et al., *Comparing Forms of Immigration Relief for Immigrant Victims of Crime*, (Sept. 2017), http://library.niwap.org/wp-content/uploads/2015/IMM-Chart-ImmReliefFormsComparison-06.19.12.pdf.

(5) Deborah Anker, *The History and Future of Gender Asylum Law and Recognition of Domestic Violence as a Basis for Protection in the United States*, 45 ABA Hum.R. Mag., no. 2, Apr. 2020, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/immigration/the-history-and-future-of-gender-asylum-law/.

9. International Child Abduction Remedies, 22 U.S.C. §§ 9001–9011; 42 U.S.C. §§ 11601–11610.

a. The U.S. is signatory to the Hague Convention on the Civil Aspects of International Child Abduction (Hague Abduction Convention), the international treaty providing a framework for countries to work together in specific ways to resolve international abduction cases and return children to their countries of habitual residence. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 24, 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99-11.

b. If one parent unilaterally takes child from one treaty partner country (Contracting State) to another, other parent may ask for child's return through Hague Abduction Convention or International Child Abduction Remedies Act (ICARA).

c. The U.S. currently has 86 Hague Abduction Convention treaty partners. U.S. Dep't of State, *U.S. Hague Convention Treaty Partners*, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/hague-abduction-country-list.html (last visited May 5, 2022).

d. Domestic abuse context

(1) If domestic abuse survivor removes child from country of habitual residence, survivor might be a Hague Abduction Convention respondent.

(a) Unlike International Parental Kidnapping Crime Act, neither Hague Abduction Convention nor ICARA mentions domestic abuse or includes it as affirmative defense to removing child from habitual residence.

(b) Hague Abduction Convention does not include a best-interests-of-the-child analysis.

(2) If domestic abuser removes child from country of habitual residence, domestic abuse survivor might be a Hague Convention petitioner.

e. Specialized knowledge of the Hague Abduction Convention and other federal laws is necessary when representing a survivor whose case could involve removal of child from country of habitual residence.

f. Resources

(1) Jessica S. Goldberg & Sudha Shetty, Berkeley Goldman School of Public Policy, Representing Battered Respondents Under the Hague Convention on the Civil Aspects of International Child Abduction: A Practice Guide for Attorneys and Domestic Violence Victim Advocates (2015), https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/the-hague-domestic-violence-project/attorneys-practice-guide-preview-2-15.pdf.

(2) Am. Bar Ass'n, *The Hague Domestic Violence Project*, https://www.americanbar.org/groups/domestic_violence/our-projects/hague-dvproject/ (last visited May 5, 2022).

III. SPECIAL CONTEXTS [§ 24.190]

A. Divorce [§ 24.191]

See Wis. Stat. § 767.35.

1. Jurisdiction

a. Court need not have grounds for personal jurisdiction under Wis. Stat. § 801.05 to make determination of status of marriage. Wis. Stat. § 801.07(5) (supersedes holding of *Mendez v. Hernandez-Mendez*, 213 Wis. 2d 217 (Ct. App. 1997)); *see also Njai v. Lang*, No. 01-1101, 2002 WL 356744 (Wis. Ct. App. Mar. 7, 2002) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

NOTE: This provision affects domestic abuse victims fleeing to Wisconsin from an abusive spouse who resides in another state or country.

b. Circuit court may exercise "divorce jurisdiction" to modify child custody and physical placement under Wis. Stat. § 767.451 in proceeding initiated under child abuse injunction, because Wis. Stat. § 812.122 "envisions the possibility of a custodial or placement change when the respondent … is the custodial parent." *Scott M.H. v. Kathleen M.H. (In the Int. of Richard J.H.)*, 218 Wis. 2d 605, 608 (Ct. App. 1998).

2. Preparation for filing for divorce. Wis. Stat. § 767.401(1)(a).

a. During the pendency of an action affecting the family with a minor child involved, the court may order parties to attend a program concerning the effects dissolution of the marriage may have on the child. If the court orders the parties to attend such a program and there is evidence that one or both parties engaged in interspousal battery under Wis. Stat. §§ 940.19 or 940.20(1m), or domestic abuse under Wis. Stat. § 813.12(1)(am), the court cannot require parties to attend the program together or at the same time.

b. Neither party may harass, intimidate, physically abuse, or impose any restraint on personal liberty of party or party's minor child. Wis. Stat. § 767.117(1)(a).

c. Disqualification of law firm. *Batchelor v. Batchelor*, 213 Wis. 2d 251 (Ct. App. 1997).

Party seeking to disqualify spouse's law firm in divorce and domestic abuse proceedings must raise timely objection to avoid waiver (in *Batchelor*, wife waived objection by not raising it until three months after service of pleadings that identified firm representing husband as one that she claimed to have earlier consulted; during that interval, firm engaged in substantial preparation on husband's behalf, and wife apparently acquiesced in firm's representation of husband by appearing at hearings that attorneys from firm attended and by filing contempt motion against firm).

d. Failure to disclose intentional tort claim for domestic abuse at time of divorce does not bar later tort claim. *Stuart v. Stuart*, 143 Wis. 2d 347 (1988).

3. Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Wis. Stat. ch. 822.

a. UCCJEA provides protections to domestic violence victims, including

(1) Authorizing court of one state to communicate with court of another state concerning a child custody proceeding in one of those states and request the court holding an evidentiary hearing to forward a transcript of the hearing;

(2) Authorizing temporary emergency jurisdiction to make a child custody determination whether child is present in the state and has been abandoned or is being subjected to or threatened with mistreatment or abuse; and

(3) Specifying circumstances under which court that made a child custody determination has jurisdiction to modify that determination and circumstances under which court has jurisdiction to modify a child custody determination made by court of another state.

(4) UCCJEA provides basis for jurisdiction over out-of-state parents in child custody cases. Wis. Stat. § 801.05(11), which references UCCJEA, provides sufficient due-process protection to out-of-state parents based on notice and opportunity to be heard. *Tammie J.C. v. Robert T.R. (In re Termination of Parental Rts. to Thomas J.R.)*, 2003 WI 61, 262 Wis. 2d 217.

4. Mediation

a. Victims of domestic abuse can be waived out of mandated mediation session.

(1) When legal custody or physical placement is contested, parties must attend at least one session with mediator. Wis. Stat. § 767.405(8)(a).

(2) Any intake form that family court services requires the parties to complete before commencement of mediation must ask each party whether either of the parties has engaged in interspousal battery or domestic abuse. Wis. Stat. § 767.405(6)(b).

(3) The initial session is a screening and evaluation mediation session, including screening for domestic abuse, to determine whether mediation is appropriate and whether both parties wish to continue in mediation. Wis. Stat. § 767.405(8)(c).

(4) Court may waive the mediation session if, after considering evidence of interspousal battery, domestic abuse, abuse of a child, or a party's significant problem with drug or alcohol abuse, court finds that attending session would cause undue hardship or endanger health or safety of a party. Wis. Stat. § 767.405(8)(b), (5)(a)2.

(5) If court waives mediation, parties must submit a parenting plan unless court orders otherwise. Wis. Stat. § 767.41(1m)(intro.).

b. Wis. Stat. § 767.405(10)(e) provides that mediator can terminate mediation under any of following circumstances:

(1) A party does not cooperate, or mediation is not appropriate;

(2) There is evidence of interspousal battery, domestic abuse, or child abuse;

(3) Either party has significant problem with alcohol or drug abuse; or

(4) Other evidence indicates that a party's health or safety will be endangered if mediation is not terminated.

c. Mediator must have training on dynamics of domestic violence and effects of domestic violence on victims and their children. Wis. Stat. § 767.405(4).

d. Lawyer-mediator may draft and file settlement documents in family law cases if both participants give consent after lawyer informs the parties about limits of lawyer's role, that lawyer does not represent either party, that lawyer cannot give advice to either party, and of desirability for parties to seek legal advice before executing documents prepared by lawyer-mediator. SCR 20:2.4.

e. When a lawyer has personally and substantially participated in a matter as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator, or other third-party neutral, the lawyer cannot thereafter represent anyone in connection with the matter, and this prohibition includes acting as a GAL in the same matter. A lawyer participates "personally and substantially" in a matter when the lawyer's involvement rises above remote and incidental involvement and directly affects the rights of the parties or the merits. State Bar Comm. on Prof'l Ethics, Formal Op. E-09-04: Conflicts from Dual Roles as Family Court Commissioner and GAL.

5. Guardian ad litem (GAL)

a. GAL serves as advocate for the best interests of a child for paternity, legal custody, physical placement, and support. Wis. Stat. § 767.407(4).

b. GAL must obtain nine hours of GAL-approved education during the combined current reporting period and immediately preceding reporting period. At least three of the nine hours must be family court GAL-approved education, and at least three of the nine hours must be approved education on the topic of family violence. The Wisconsin Board of Bar Examiners will approve information on the dynamics and impact of family violence. Wis. Stat. § 757.48; SCR 35.015; SCR 35.03(1m)(a)4.; Wis. Sup. Order 19-13, 2020 WI 72 (eff. Jan. 1, 2021).

c. Attorneys are encouraged to receive at least three hours of training on dynamics of domestic violence and the effects of domestic violence on victims and children. Wis. Stat. § 757.48(1)(a).

NOTE: Although the law says attorneys "shall" receive three hours of training on these issues to be eligible for GAL appointments, only the Wisconsin Supreme Court Rules can issue such a mandate.

d. GAL functions as an independent party to the action. GAL must consider, but is not bound by, the wishes of the minor child or the positions of others as to the best interests of the minor child. Wis. Stat. § 767.407(4).

e. GAL must investigate whether there is evidence either party has engaged in interspousal battery or domestic abuse and report to court on results of investigation. Wis. Stat. §§ 767.407(4), 767.41(5)(am); *see also* Jesse R. Dill et al., *Domestic Violence and Act 130: Guardians ad Litem Play a Crucial Role*, 31 Wis. J. Fam. L. 35 (Aug. 2011).

f. Circuit court may allocate GAL fees between the parties when it makes a finding that a respondent has intentionally and unreasonably denied physical placement or interfered with the petitioner's periods of physical placement; however, when the court makes one or both findings, the court *must* award the petitioner whatever amount of the GAL fees it has allocated to the petitioner from the respondent. *Bernier v. Bernier*, 2006 WI App 2, 288 Wis. 2d 743.

NOTE: Wis. Stat. § 48.235(8)(c)3. provides that "[i]n a proceeding under [Wis. Stat. §] 813.122 or 813.125, the court may not order the child victim or any parent, stepparent, or legal guardian of the child victim who is not a party to the action, to pay any part of the compensation of the [GAL]."

6. Child custody and placement

a. Wisconsin law provides protection for victims of domestic abuse at time of temporary hearing.

(1) Before making a temporary order, court must consider same factors as must be considered before entering final judgment, including factors relating to domestic abuse. Wis. Stat. §§ 767.225(1n)(a), 767.41(5)(am)13.

(2) If circuit court commissioner believes domestic abuse TRO or injunction is appropriate, commissioner must inform parties of their right to seek such order and must explain procedure; on motion for domestic abuse TRO or injunction, commissioner must submit motion within five working days. Wis. Stat. §§ 767.225(3m), 813.12.

(3) Although court may issue temporary order granting sole legal custody without other party's agreement and without findings, temporary order cannot have binding effect on final custody determination. Wis. Stat. §§ 767.225(1)(a), 767.41(2)(b)2.

(4) In determining sole or joint custody or periods of physical placement, court or circuit court commissioner must consider factors under Wis. Stat. § 767.41(5). Wis. Stat. § 767.225(1n)(a).

(5) Court may make temporary order concerning child before GAL is appointed or before GAL has made recommendation to court, if court determines doing so is in best interest of child. Wis. Stat. § 767.407(1)(e).

(6) Person not biological or adoptive parent of child is third party who cannot become the child's guardian over the biological or adoptive parent's objection absent compelling reasons, such as the unfitness of the biological or adoptive parent. This standard applies to same-sex partners who terminate their relationship and only one partner is the adoptive parent. Further, the adoptive parent is not equitably stopped from asserting that the third party is not a parent. *Barstad v. Frazier*, 118 Wis. 2d 549 (1984); *Wendy M. v. Helen E.K. (In re Guardianship of O.G. M-K.)*, 2010 WI App 90, 327 Wis. 2d 749.

b. Court presumes joint legal custody is in best interest of the child, unless the court finds one party engaged in pattern or serious incident of interspousal abuse or domestic abuse. Wis. Stat. § 767.41(2)(am).

c. State law creates rebuttable presumption awarding sole legal custody if domestic abuse, interspousal battery, or child abuse has occurred. Wis. Stat. §§ 767.41(2)(b)2.c., 813.122(1)(a), 48.02(2), 940.19, 940.20(1m), 813.12(1)(am).

(1) Parties presumed to be unable to cooperate in future decision making.

(2) Based on presumption, court *may* give sole legal custody.

d. Under Wis. Stat. § 767.41(2)(d)1., the presumption that it is contrary to the best interest of a child to award joint or sole legal custody to a party who has engaged in interspousal abuse or domestic abuse may be rebutted by a preponderance of evidence of the following:

(1) Party who committed the battery or abuse has successfully completed a certified treatment program for batterers *and* the party is not abusing alcohol or any other controlled substance.

(2) It is in the best interest of the child for party who committed battery or abuse to be awarded joint or sole custody based on a consideration of factors under Wis. Stat. § 767.41(5)(am).

e. Court must state in writing whether presumption against awarding joint or sole custody to parent found to engage in interspousal battery or domestic abuse is rebutted. If rebutted, court must state which evidence rebutted the presumption and why its findings are in the best interest of the child. Wis. Stat. § 767.41(6)(f).

f. If both parties engaged in interspousal battery or domestic abuse, rebuttable presumption exists against the primary physical aggressor. To determine the primary physical aggressor, the court must, under Wis. Stat. § 767.41(2)(d)2., consider the following:

(1) Prior acts of domestic violence between parties,

(2) Severity of injuries inflicted upon one party by the other in any prior domestic violence acts,

(3) Likelihood of future injury to either party resulting from domestic violence,

(4) Whether either party acted in self-defense in any prior acts of domestic violence,

(5) Whether there is or has been pattern of coercive and abusive behavior between the parties, and

(6) Any other fact court considers relevant.

NOTE: If both parties have engaged in pattern or serious incidents of interspousal battery, primary physical aggressor is the party convicted of a crime against the other. Wis. Stat. § 767.41(2)(d)3.

NOTE: If court determines neither party is primary physical aggressor, rebuttable presumption does not apply. Wis. Stat. § 767.41(2)(d)4.

g. If court finds party to be the primary physical aggressor, court cannot give sole custody to that party because other party refuses to cooperate with primary physical aggressor. Wis. Stat. § 767.41(2)(c).

h. Child is entitled to no periods of physical placement with a parent if such placement would endanger child. Wis. Stat. § 767.41(4)(b).

Child is entitled to periods of physical placement with both parents unless court finds such placement would endanger child's physical, mental, or emotional health; party seeking to prevent contact with child has burden of proof. *Long v. Ardestani*, 2001 WI App 46, 241 Wis. 2d 498; *Wolfe v. Wolfe*, 2000 WI App 93, 234 Wis. 2d 449.

NOTE: Although this right belongs to child, courts often treat right as if it belongs to parent (e.g., courts are unlikely to find parent in contempt for failure to see child when order says parent is to do so).

i. Court must set placement schedule that allows regular, meaningful periods of placement with each parent and maximizes amount of time spent with each parent. Wis. Stat. § 767.41(4)(a)2.

(1) Court may grant either or both parents reasonable electronic communication during the other parent's periods of physical placement with the child. Electronic communication may only be a supplement to physical placement and not a replacement or substitute for periods of physical placement. Wis. Stat. § 767.41(4)(e).

(2) If electronic communication is allowed for a parent with supervised placement with the child, that parent's electronic communication with the child shall also be supervised. Wis. Stat. § 767.41(4)(e).

j. In determining custody or placement, court must consider following statutory factors relating to domestic abuse:

(1) Interaction and interrelationship of child with parent or parents, siblings, and any other person who may significantly affect child's best interest. Wis. Stat. § 767.41(5)(am)5.; *Bertram v. Kilian*, 133 Wis. 2d 202 (Ct. App. 1986).

NOTE: This case was superseded by statute because it was decided before the legislature included evidence of spousal abuse as a factor to be considered under former Wis. Stat. § 767.24(5) (since renumbered and amended as Wis. Stat. § 767.41(5)), but is still good on the point cited below.

(2) Amount and quality of time each parent has spent with child in past, necessary changes to parents' custodial roles, and any reasonable lifestyle changes parent proposes to spend time with child in future. Wis. Stat. § 767.41(5)(am)6.

(3) Whether the mental or physical health of a party, child, or other person living in a proposed custodial household negatively affects child's intellectual, physical, or emotional well-being. Wis. Stat. § 767.41(5)(am)10.; *Bertram*, 133 Wis. 2d 202.

(4) Cooperation and communication between parties and whether either party unreasonably refuses to cooperate or communicate with other party. Wis. Stat. § 767.41(5)(am)3.

(5) Whether each party can support other party's relationship with child, including encouraging and facilitating frequent and continuing contact with child, or whether one party is likely to unreasonably interfere with child's relationship with other party. Wis. Stat. § 767.41(5)(am)4.

(6) Evidence of interspousal battery or domestic abuse. Wis. Stat. §§ 767.41(5)(am)12., 940.19, 940.20(1m), 813.12(1)(am).

(7) Whether any of the following has a criminal record and whether there is evidence that any of the following has engaged in abuse, as defined in Wis. Stat. § 813.122(1)(a), of the child or any other child or neglected the child or any other child. *See* Wis. Stat. § 767.41(5)(am)11.

(a) A person with whom the parent of the child has a dating relationship, as defined in Wis. Stat. § 813.12(1)(ag).

(b) A person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household.

(8) Such other factors as court finds relevant (e.g., court might find history of abuse and fear relevant). Wis. Stat. § 767.41(5)(am)14.

k. Courts presume that joint legal custody is in best interest of child. However, if court finds that a party has engaged in interspousal battery or domestic abuse, rebuttable presumption exists that awarding joint or sole legal custody to that party is detrimental to, and not in the best interest of, the child. Wis. Stat. § 767.41(2)(am), (d).

l. If court finds a party engaged in interspousal battery or domestic abuse and the court awards periods of physical placement to both parties, court must provide for the safety of the child and victim party. Under Wis. Stat. § 767.41(6)(g), court must do one or more of the following, as appropriate:

(1) Require exchange of child to occur in protected setting or in presence of third party who agrees by affidavit or other evidence to assume responsibility and be accountable to court for his or her actions.

(2) Require that child's physical placement with party who committed interspousal battery or domestic abuse be supervised by third party who agrees by affidavit or other evidence to assume responsibility assigned by court.

(3) Require that party who committed interspousal battery or domestic abuse pay costs of supervised placement.

(4) Require that party who committed interspousal battery or domestic abuse attend and complete certified treatment program for batterers.

(5) Prohibit a party who committed battery or domestic abuse and who has an alcohol or drug abuse problem from being under the influence of alcohol or controlled substances during physical placement *and* from possessing or consuming such substances during physical placement.

(6) Prohibit a party who committed battery or domestic abuse from having overnight physical placement with child.

(7) Require that party who committed battery or domestic abuse post bond for return and safety of child.

NOTE: Court may impose any other condition not listed above if court determines it is necessary for safety and well-being of child or victim party. Wis. Stat. § 767.41(6)(g)8.

m. In final order, if legal custody or physical placement is contested, court must state in writing why its findings are in child's best interest. Wis. Stat. § 767.41(6)(a).

n. If custody study occurs, person or entity investigating parties must complete investigation and prepare report of results at least 10 days before report is submitted into evidence. Court may review report but cannot rely on it as evidence until properly introduced under rules of evidence. Wis. Stat. § 767.405(14)(b)1., 2.

o. Court may deny petition for child abuse injunction under Wis. Stat. § 813.122, even when sufficient evidence of abuse has been presented, and instead address custody and physical placement issues as they become pertinent to action. *Scott M.H.*, 218 Wis. 2d 605.

p. Court cannot grant visitation or physical placement rights to parent who has been convicted of first-degree or second-degree intentional homicide of the child's other parent, unless conviction has been set aside, reversed, or vacated, or court finds by clear and convincing evidence that such visitation or periods of physical placement are in best interests of child, taking into account child's wishes. Wis. Stat. § 767.44(1), (2).

q. Paternity action under Wis. Stat. § 767.863(1m) properly dismissed when court disregarded genetic testing completed pursuant to court order; circuit court also properly held that finding plaintiff to be child's father would not be in child's best interest and that dismissal did not violate putative father's constitutional rights when his relationship with child was "too insubstantial" to give rise to constitutionally protected liberty interest. *Stuart S. v. Heidi R. (In re Paternity of A.R.R.)*, 2015 WI App 19, 360 Wis. 2d 388.

7. Parenting plan

a. If legal custody or physical placement is contested, the party seeking sole or joint legal custody or periods of physical placement must file a proposed parenting plan with court. Wis. Stat. § 767.41(1m).

b. If court waives mediation, parties must submit a proposed parenting plan unless court orders otherwise. Wis. Stat. § 767.41(1m)(intro.).

c. If evidence of interspousal battery or domestic abuse:

(1) Parent presenting proposed plan not required to disclose specific address but only general description of where they currently live and intend to live in next two years. Wis. Stat. § 767.41(1m)(b).

(2) Parent presenting proposed plan not required to disclose specific work address, but only general description of where they work. Wis. Stat. § 767.41(1m)(c).

(3) Parenting plan must provide information about how child will be transferred between parties for exercise of physical placement to ensure safety of child and parties. Wis. Stat. § 767.41(1m)(o).

8. Settlement negotiations

a. Beware of partial final settlement agreements on custody or physical placement. Such stipulations are binding and preclude subsequent revision other than under Wis. Stat. § 767.451; parties who enter partial final settlement lose ability to request court to terminate custody or physical placement under Wis. Stat. § 767.41 as part of final divorce. *Keller v. Keller*, 214 Wis. 2d 32 (Ct. App. 1997).

b. Some victims of domestic violence may give away property rights in exchange for favorable custody or physical placement arrangements; attorney should ensure that client understands that custody and physical placement arrangements can be modified but that property rights are final. *Id.*

c. Parties' partial final stipulation regarding custody and physical placement during pendency of divorce and court's order approving it are the final resolution of these issues—not an interlocutory order—and cannot be revised during pendency of divorce unless relief is sought under Wis. Stat. § 806.07 or 767.451.

d. Court may alter presumptive equal property division after considering several factors. *Steinmann v. Steinmann*, 2008 WI 43, 309 Wis. 2d 29.

e. Parties with marital property agreements are not, as a matter of law, exempt from maintenance awards. Unless the agreement contains waiver of maintenance rights court may conclude that maintenance award is appropriate. Wis. Stat. § 767.61; *Steinmann*, 2008 WI 43, 309 Wis. 2d 29.

f. Stipulation between parties is not final without court order. *Polakowski v. Polakowski*, 2003 WI App 20, 259 Wis. 2d 765.

g. In making unequal division of marital estate, court may properly consider spouse's waste of marital estate in using marital assets to defend themselves against criminal charges arising from behavior toward family members. *Koeppen v. Koeppen*, No. 01-2311, 2002 WL 31180867 (Wis. Ct. App. Oct. 2, 2002) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

h. Court cannot grant visitation or physical placement rights to parent who has been convicted of first-degree or second-degree intentional homicide of the child's other parent, unless conviction has been set aside, reversed, or vacated, or court finds by clear and convincing evidence that such visitation or periods of physical placement are in best interests of child, taking into account child's wishes. Wis. Stat. § 767.44.

9. Modification. Wis. Stat. § 767.451(5m); *see* Wis. Stat. § 767.41(5)(am)12m.

a. In all actions to modify legal custody or physical placement orders, the court must consider the factors listed under Wis. Stat. § 767.41(5)(am), subject to Wis. Stat. § 767.41(5)(bm), and must make its determination in a manner consistent with Wis. Stat. § 767.41.

b. A court may deny family court authority to decide whether incarcerated parent, convicted of domestic abuse, may receive modification to have contact with children and leave that authority with the parent and the Wisconsin Department of Corrections. *State v. Goodpaster*, No. 2016AP1648-CR, 2017 WL 2438704, ¶ 1 (Wis. Ct. App. June 6, 2017) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

c. A court cannot sua sponte modify a placement order. There must be a petition, motion, or order to show cause by a party to modify such an order. *Stumpner v. Cutting*, 2010 WI App 65, 324 Wis. 2d 820.

d. "Minor modifications and clarifications to" a previous oral ruling do not constitute "modification" requiring request by a party. *State v. Durand*, No. 2014AP2704, 2015 WL 3949121 (Wis. Ct. App. June 30, 2015) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

e. Court must modify physical placement order by denying physical placement to parent who has been convicted of first-degree or second-degree intentional homicide of child's other parent, unless conviction has been set aside, reversed, or vacated or court finds by clear and convincing evidence that such visitation or periods of physical placement are in best interests of child, taking into account child's wishes. Wis. Stat. § 767.451(4m).

f. Courts may not make orders for legal custody or physical placement that are contingent upon the occurrence of specified future event. *Jocius v. Jocius*, 218 Wis. 2d 103 (Ct. App. 1998); *Koeller v. Koeller*, 195 Wis. 2d 660 (Ct. App. 1995).

10. Post-judgment issues

    a. Circuit court lacks authority to accept a postverdict motion if it is filed later than official end of business day on which it is due. *Northern Air Servs., Inc. v. Link*, 2011 WI 75, 336 Wis. 2d 1.

    b. Parties' partial final stipulation regarding custody and physical placement during pendency of divorce and court's order approving it are final resolution of these issues—not an interlocutory order—and cannot be revised during pendency of divorce unless relief is sought under Wis. Stat. § 806.07 or 767.451. *Keller*, 214 Wis. 2d 32.

    c. Stipulation incorporated into divorce judgment is in nature of contract; words in contract are given their common or ordinary meaning. *Keller*, 214 Wis. 2d at 37.

    d. Court may deny petition for child abuse injunction under Wis. Stat. § 813.122, even when sufficient evidence of abuse has been presented, and instead address custody and physical placement issues as they become pertinent to action. *Scott M.H.*, 218 Wis. 2d 605.

    e. Wisconsin's child abuse injunction statute, Wis. Stat. § 813.122, envisions change of custody or placement if trial court issues child abuse injunction against parent who has custody or placement of child under a divorce judgment or order. *Scott M.H.*, 218 Wis. 2d 605.

    f. Stipulations governing child support should be upheld unless upholding would threaten the best interest of the child. Stipulation requiring party to pay child support over unlimited period of time with no opportunity to seek modification may be void as against public policy and thus unenforceable. Ceilings on child support are presumed invalid because they violate public policy and unmodifiable floors on child support might be invalid depending on duration. Stipulation preventing modification of child support order over four years might be voided by court as against public policy. *May v. May*, 2012 WI 35, 339 Wis. 2d 626; *Krieman v. Goldberg*, 214 Wis. 2d 163 (Ct. App. 1997); *see also Frisch v. Henrichs*, 2007 WI 102, 304 Wis. 2d 1.

    g. Trial court lacks authority in post-divorce proceeding to make permanent an order—made at children's request—to deny physical placement of children with one parent. *Jocius*, 218 Wis. 2d 103.

    h. Statute permitting trial court to deny parent physical placement does not permit court to prohibit parent from requesting change of placement in future. *Jocius*, 218 Wis. 2d 103.

    i. Domestic abuse presumption under Wis. Stat. § 767.41(2)(d) waived in postjudgment motion when parties had stipulated to joint custody absent new facts to support the court applying the presumption. *Glidewell v. Glidewell*, 2015 WI App 64, 364 Wis. 2d 588.

11. Relocation-removal or interference with child custody

    a. Party may not establish residence with parties' minor child more than 100 miles from other party's residence. Wis. Stat. § 767.117(1)(c).

b. Party may not remove parties' minor child from state for more than 90 consecutive days or conceal minor child from other party. Wis. Stat. § 767.117(1)(c).

c. Party who violates prohibitions of Wis. Stat. § 767.117(1)(c) may be found in contempt of court, unless party removed or concealed minor child to protect party or minor child from physical abuse and party had no reasonable opportunity to obtain order allowing this action. Wis. Stat. § 767.117(3)(b).

d. Parent may be charged with felony for interfering with custody rights of other parent or of person having legal custody of child. Wis. Stat. § 948.31(1)(a)1., (b).

(1) Person must not intentionally cause child to leave, take child away, or withhold child for more than 12 hours beyond period of physical placement or visitation. Wis. Stat. § 948.31(1)(b).

(2) Interference does not occur if court has entered order allowing person to take or withhold child. Wis. Stat. § 948.31(1)(b).

(3) Joint legal custody does not preclude court from finding interference with custody. Wis. Stat. § 948.31(1)(b).

(4) Affirmative defense exists, per Wis. Stat. § 948.31(4)(a), if action:

(a) Is taken by parent or person authorized by parent to protect their child, in situation in which parent or authorized person reasonably believes that child faces threat of physical harm or sexual assault, Wis. Stat. § 948.31(4)(a)1.;

(b) Is taken by parent fleeing, in situation in which parent reasonably believe they face threat of physical harm or sexual assault, Wis. Stat. § 948.31(4)(a)2.;

(c) Is consented to by the other parent or any other person or agency having legal custody of the child, Wis. Stat. § 948.31(4)(a)3.; or

(d) Is otherwise authorized by law, Wis. Stat. § 948.31(4)(a)4.

e. Within a divorce, relocation of child more than 100 miles from other parent if both parents have periods of physical placement; notice of relocation does not apply to paternity actions under Wis. Stat. § 767.89.

f. If a parent intends to relocate and reside with the child 100 miles or more from the other parent, the parent who intends to relocate and reside with the child must file a motion with the court seeking permission for the child's relocation. Wis. Stat. § 767.481(1)(a). The motion must include all of the following under Wis. Stat. § 767.481(1)(b)1.–4.:

(1) A relocation plan including

(a) The date of the proposed relocation;

(b) The municipality and state of the proposed new residence;

(c) The reason for the relocation;

(d) If applicable, a proposed new placement schedule, including placement during the school year, summers, and holidays; and

(e) The proposed responsibility and allocation of costs for each parent for transportation of the child between the parties under any proposed new placement schedule.

(2) If applicable, a request for a change in legal custody.

(3) Notice to the other parent that, if they object to the relocation, they must file and serve, no later than five days before the initial hearing, an objection to the relocation and any alternate proposal, including a modification of physical placement or legal custody.

(4) An "Objection to Relocation" form, furnished by the court, for use by the other parent if they object to the relocation.

(5) Requirement to file motion does not apply if child's parents already live more than 100 miles apart when parent plans to relocate and reside with child. Wis. Stat. § 767.481(1)(d).

(a) If parents already live more than 100 miles apart, parent who intends to relocate with child must serve written notice of their intent to relocate on other parent at least 60 days before relocation.

(b) Such written notice must include the date on which parent intends to relocate and parent's new address.

g. Process for service of motion

(1) Parent filing motion must serve copy of motion by mail on other parent at their most recent address on file with court.

(2) If parent filing has actual knowledge that other parent has different address from one on file, motion must be served by mail at both addresses.

h. Court hearing on motion to relocate. Wis. Stat. § 767.481(2)(a), (b).

(1) Upon filing motion under Wis. Stat. § 767.481(1)(a), court must schedule initial hearing to be held within 30 days after motion is filed and must provide notice to parents of date of initial hearing; child may not be relocated pending initial hearing.

(2) If court finds at initial hearing that parent not filing motion was properly served and does not appear at hearing or appears but does not object to proposed relocation plan, court must approve proposed relocation plan submitted by parent filing motion unless court finds that proposed relocation plan is not in best interest of child.

(a) If parent not filing motion appears at initial hearing and objects to relocation plan, court must take following actions:

(i) Require parent who objects to respond by stating in writing within five business days, if they have not already done so, basis for objection and their proposals for new placement schedule and transportation responsibilities and costs under Wis. Stat. § 767.481(1)(b)41.d., e., if court grants parent filing motion permission to relocate with child.

(ii) Refer parties to mediation unless court finds that attending mediation would cause undue hardship or endanger health or safety of a party as provided in Wis. Stat. § 767.405(8)(b).

(iii) Except as provided in Wis. Stat. § 767.407(1)(am), appoint guardian ad litem for child.

(iv) If mediator is ordered under Wis. Stat. § 767.407(2), guardian ad litem is not required to commence investigation on behalf of child unless mediator notifies court that parties are unable to reach agreement on the issue.

(v) Set matter for further hearing to be held within 60 days.

i. Other removals

(1) Parent with legal custody and physical placement rights must notify other parent before removing child from primary residence for 14 or more days. Wis. Stat. § 767.481(6).

(2) Parents can agree to waive required notice or establish their own limitation requirements. Wis. Stat. § 767.481(6).

(3) Special issues for victims of domestic abuse

(a) Abused parent may have to obtain temporary order allowing move or removal unless they know stay will be no more than 90 days; planning and safety issues may arise.

(b) Abusive parent may be likely to object to move or removal.

(c) If abuse was not discussed or documented during divorce, depending on circumstances, client might not look credible later alleging abuse.

(d) Attorney requesting court to grant order allowing move or removal should consider citing research on effects on children of witnessing parental violence.

12. Resources for assisting abuse victims in divorce context

a. Wis. Governor's Council on Domestic Abuse & End Domestic Abuse Wis., *Domestic Abuse Guidebook for Wisconsin Guardians ad Litem: Addressing Custody, Placement, and Safety Issues* (Mar. 2017); https://www.wicourts.gov/publications/guides/docs/galguidebook.pdf.

b. Battered Women's Just. Project, *Child Custody*, https://www.bwjp.org/our-work/topics/child-custody-and-family-court.html (last visited May 5, 2022).

c. Megan O'Matz, *He Beat Her Repeatedly. Family Court Tried to Give Him Joint Custody of Their Children.*, ProPublica (Sept. 16, 2021), https://www.propublica.org/article/he-beat-her-repeatedly-family-court-tried-to-give-him-joint-custody-of-their-children.

d. Michael J. Dwyer & Amber Peterson, *Mediation: Does It Belong in Family Law Cases Involving Domestic Abuse?*, 38 Wis. J. Fam. L. 4 (Oct. 2021).

e. Oindrila Chattopadhyay et al., *Addressing Domestic Abuse in Family Court Cases Involving Guardians ad Litem in Wisconsin*, Univ. of Wis.-Madison Robert M. La Follette Sch. of Pub. Aff. (Spring 2021), https://lafollette.wisc.edu/images/publications/workshops/2021_Legal_Action_Report.pdf.

f. Joan S. Meier et al., *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations*, GWU L. Sch. Pub. L. Rsch. Paper No. 2019-56, GWU Legal Studies Rsch. Paper No. 2019-56, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3448062 (last visited May 5, 2022).

g. Lori S. Kornblum & Daniel Pollack, *Family Court or Not? Raising Child Abuse Allegations Against a Parent*, Wis. Law., Mar. 2020, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=3&ArticleID=27527.

h. Kelsey L. Stefka, *Trauma-Informed Care and the Role of Guardian ad Litem*, InsideTrack, Jul. 2019, https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=11&Issue=12&ArticleID=27107.

i. Teresa E. Meuer et al., *Domestic Abuse: Little Impact on Child Custody and Placement*, Wis. Law., Dec. 2018, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=91&Issue=11&ArticleID=26737.

j. Lauren Wu, The Interplay Between Domestic Violence Victim Dynamics and Utilization of 2003 Act 130, 30 Wis. J. Fam. L. 65 (Fall 2010).

k. Jesse R. Dill et al., *Application of Act 130 for Family Law Attorneys*, 31 Wis. J. Fam. L. 17 (May 2011).

l. Jesse R. Dill et al., Domestic Violence and Act 130: Guardians ad Litem Play a Crucial Role, 31 Wis. J. Fam. L. 35 (Aug. 2011).

m. Andrew R. Klein, Special Report, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges*, Nat'l Inst. Just. (June 2009), https://www.ojp.gov/pdffiles1/nij/225722.pdf.

n. Daniel G. Saunders et al., *Child Custody Evaluators' Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic*

Violence Knowledge and Custody-Visitation Recommendations (2012), https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf.

o. Lundy Bancroft & Jay G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2002).

p. American Bar Ass'n, Comm'n on Domestic & Sexual Violence, *The Impact of Domestic Violence on Your Legal Practice* (Margaret B. Drew et al. eds., 2d ed. 2004).

q. American Bar Ass'n, Family Law Section, Special Issue on Domestic Violence, 29 Fam. L.Q. (Roberta L. Valente ed. 1995).

r. Civil Rsch. Inst., *Domestic Violence Report* (published six times annually).

s. Legal Res. Ctr. on Violence Against Women, technical assistance provider on interstate custody issues for domestic abuse survivors, (301) 270-1550, http://www.lrcvaw.org/techassist.html (last visited May 5, 2022).

t. National Council of Juvenile & Family Court Judges, *Family Violence and Domestic Relations*, http://www.ncjfcj.org/family-violence-and-domestic-relations/ (last visited Mar. 8, 2021).

u. End Domestic Abuse Wisconsin: The Wisconsin Coalition Against Domestic Violence, 1400 E. Washington Ave., Suite 227, Madison, WI 53703, (608) 255-0539, https://www.endabusewi.org/ (last visited Mar. 8, 2021).

v. Nat'l Indigenous Women's Res. Ctr., Am. Indians Against Abuse, Hayward, WI, (715) 634-9980, https://www.niwrc.org/content/american-indians-against-abuse (last visited May 5, 2022).

w. Gretchen G. Viney, *101: GAL Appointments: Am I Eligible?*, Wis. Law., Sept. 2020, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=8&ArticleID=27936.

B. Elder Adults at Risk (Age 60+) or Adults at Risk (Age 18+) [§ 24.192]

1. Key Definitions. Wis. Stat. §§ 46.90(1), 55.01(1).

a. *Elder adult at risk* means any person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation. Wis. Stat. § 46.90(1)(br).

b. *Adult at risk* means any adult who has a physical or mental condition that substantially impairs their ability to care for their needs who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, or financial exploitation. Wis. Stat. § 55.01(1e).

c. *Abuse*, for purposes of individual-at-risk, means any of the following (Wis. Stat. §§ 46.90(1)(a), 55.01(1)):

(1) *Physical abuse:* intentional or reckless infliction of bodily harm. Wis. Stat. § 46.90(1)(a)1., (fg).

(2) *Emotional abuse:* language or behavior that serves no legitimate purpose and is intended to be intimidating, humiliating, threatening, frightening, or otherwise harassing, and that does or reasonably could intimidate, humiliate, threaten, frighten, or otherwise harass the individual to whom the conduct or language is directed. Wis. Stat. § 46.90(1)(a)2., (cm).

(3) *Sexual abuse:* violation of Wis. Stat. § 940.225(1), (2), (3), or (3m) (criminal sexual assault law). Wis. Stat. § 46.90(1)(a)3., (gd).

(4) *Treatment without consent:* the administration of medication to an individual who has not provided informed consent, or the performance of psychosurgery, electroconvulsive therapy, or experimental research on an individual who has not provided informed consent, with the knowledge that no lawful authority exists for the administration or performance. Wis. Stat. § 46.90(1)(a)4., (h).

(5) *Unreasonable confinement or restraint:* includes the intentional and unreasonable confinement of an individual in a locked room, the involuntary separation of an individual from their living area, the use on an individual of a physical restraining device, or the provision of unnecessary or excessive medication to an individual; but does not include the use of these methods or devices in entities regulated by the DHS if the methods or devices are employed in conformance with state and federal standards governing confinement and restraint. Wis. Stat. § 46.90(1)(a)5., (i).

d. *Financial exploitation* means any of the following (Wis. Stat. § 46.90(1)(ed)):

(1) Obtaining an individual's money or property by deceiving or enticing the individual, or by forcing, compelling, or coercing the individual to give, sell at less than fair market value, or in other ways convey money or property against their will without their informed consent.

(2) Theft, as prohibited in Wis. Stat. § 943.20.

(3) The substantial failure or neglect of a fiscal agent to fulfill their responsibilities.

(4) Unauthorized use of an individual's personal identifying information or documents, as prohibited in Wis. Stat. § 943.201.

(5) Unauthorized use of an entity's identifying information or documents, as prohibited in Wis. Stat. § 943.203.

(6) Forgery, as prohibited in Wis. Stat. § 943.38.

(7) Financial transaction card crimes, as prohibited in Wis. Stat. § 943.41.

e. *Neglect* means the failure of a caregiver, as evidenced by an act, omission, or course of conduct, to endeavor to secure or maintain adequate care, services, or supervision for an individual, including food, clothing, shelter, or physical or mental health care, and creating significant risk or danger to the individual's physical or mental health. Neglect

does not include a decision that is made to not seek medical care for an individual, if that decision is consistent with the individual's previously executed declaration or do-not-resuscitate order under Wis. Stat. ch. 154, a power of attorney for health care under Wis. Stat. ch. 155, or as otherwise authorized by law. Wis. Stat. §§ 46.90(1)(f), 55.01(4r).

f. *Self-neglect* means a significant danger to an individual's physical or mental health because the individual is responsible for their own care but fails to obtain adequate care, including food, shelter, clothing, or medical or dental care. Wis. Stat. § 46.90(1)(g).

2. Elder abuse agency and other authorities

a. Each Wisconsin county is required to designate a lead agency to which any person *can* report suspected abuse or neglect against an elder adult at risk or adult at risk. Wis. Stat. §§ 46.90(2)–(3), 55.043(1d)–(1g).

b. Upon receiving a report of alleged abuse, financial exploitation, neglect, or self-neglect of an (elder) adult at risk residing in community-based residential facility or nursing home, or report of abuse or neglect of elderly person by employee of home health agency, the county lead agency must refer any report to the DHS (Division of Quality Assurance) for investigation. Wis. Stat. §§ 46.90(5)(a), 55.043(1r).

c. Upon receiving a report of alleged abuse, financial exploitation, neglect, or self-neglect of an (elder) adult at risk not residing in institutional setting, (elder-) adult-at-risk agency must respond to the report within 24 hours after receipt of report, excluding weekends and legal holidays. A response may consist of referral or investigation. Wis. Stat. §§ 46.90(5)(a), 55.043(1r).

(1) Scope of investigation is at agency's discretion but must include at least one of the following: visit to residence of (elder) adult at risk; observation of (elder) adult at risk; private interview with (elder) adult at risk, to extent practicable; interview with guardian or agent, if any, and with caregiver; review of treatment and patient health-care records; review of any financial records of (elder) adult at risk maintained by certain institutions, by caregiver, or by immediate family of (elder) adult at risk or of caregiver. Wis. Stat. §§ 46.90(5)(b), 55.043(1r)(b).

(2) Agency may transport the (elder) adult at risk for a medical examination under certain circumstances. Wis. Stat. §§ 46.90(5)(br), 55.043(1r)(c).

(3) If investigator requests, sheriff or police officer must accompany investigator or worker during visits to (elder) adult at risk's residence. Wis. Stat. § 46.90(5)(c).

(4) If any person other than the (elder) adult at risk interferes with investigation, investigator or worker may apply for order under Wis. Stat. § 813.123 to prohibit interference. Wis. Stat. § 46.90(5)(d).

d. Under mandatory arrest law, Wis. Stat. § 968.075(2), law enforcement officer must arrest alleged abuser and take them into custody if officer has reasonable grounds to believe they are committing or have committed domestic abuse and that alleged abuser's actions constitute crime, and

(1) Officer has reasonable basis for believing that continued domestic abuse is likely against alleged victim,

(2) There is evidence of physical injury, or

(3) Alleged abuser is predominant aggressor.

e. *Domestic abuse* means any of following conduct, engaged in by adult family or household member against another such adult member, by adult against their adult former spouse, by adult against another adult with whom adult has child, by an adult caregiver against adult who is under caregiver's care, or by adult against adult with whom the individual has or had a dating relationship (Wis. Stat. §§ 813.12(1)(am), 940.225(1), (2), (3), 943.01):

(1) Intentional infliction of physical pain, physical injury, or illness;

(2) Intentional impairment of physical condition;

(3) First-, second-, or third-degree sexual assault;

(4) Stalking;

(5) Damage to the property of the individual; or

(6) Threat to engage in conduct listed in (1), (2), (3), (4), or (5).

NOTE: The guardian of an individual who has been adjudicated incompetent in this state and who has been the subject of domestic abuse may prepare and file a petition for a domestic abuse restraining order. See description of individual-at-risk restraining order at section 24.6, *supra*. Wis. Stat. §§ 813.12(5)(d), 54.01(10).

3. Civil actions and remedies available

a. Denial of access to investigator: civil actions and remedies

(1) Elder-adults-at-risk abuse reporting and investigation. Wis. Stat. § 55.043.

(2) Individual-at-risk restraining order. Wis. Stat. § 813.123; *see also* Wis. Stat. §§ 55.01, 55.043(3), 55.05, 55.06.

(3) If competency of victim or abuser is at issue, possible guardianship, protective services, or protective placement. Wis. Stat. chs. 54, 55.

(4) County agency investigation. Wis. Stat. § 51.03.

(5) Detention or commitment of perpetrator if they have mental illness or incapacity. Wis. Stat. ch. 51.

b. Physical abuse: civil actions and remedies

(1) Domestic abuse restraining order. Wis. Stat. § 813.12.

(2) Individual-at-risk restraining order. Wis. Stat. § 813.123; *see also* Wis. Stat. §§ 55.01, 55.043(3), 55.05, 55.06.

(3) Harassment restraining order. Wis. Stat. § 813.125.

(4) Tort for damages: intentional or negligent infliction of harm.

(5) If competency of victim or abuser is at issue, possible guardianship, protective services, or protective placement. Wis. Stat. chs. 54, 55.

(6) Detention or commitment of perpetrator if they have mental illness or incapacity. Wis. Stat. ch. 51.

(7) If injury or death occur as a result of human trafficking, may bring a civil tort action. Wis. Stat. § 940.302(3).

c. Sexual abuse: civil actions and remedies

(1) Domestic abuse restraining order. Wis. Stat. § 813.12.

(2) Individual-at-risk restraining order. Wis. Stat. § 813.123; *see also* Wis. Stat. §§ 55.01, 55.043(3), 55.05, 55.06.

(3) Harassment restraining order. Wis. Stat. § 813.125.

(4) Tort for damages: intentional or negligent infliction of harm.

(5) If competency of victim or abuser is at issue, possible guardianship, protective services, or protective placement. Wis. Stat. chs. 54, 55.

(6) Detention or commitment of perpetrator if they have mental illness or incapacity. Wis. Stat. ch. 51.

(7) If injury or death occur as a result of human trafficking, may bring a civil tort action. Wis. Stat. § 940.302(3).

d. Confinement: civil actions and remedies

(1) Domestic abuse restraining order. Wis. Stat. § 813.12.

(2) Individual-at-risk restraining order. Wis. Stat. § 813.123; *see also* Wis. Stat. §§ 55.01, 55.043(3), 55.05, 55.06.

(3) Harassment restraining order. Wis. Stat. § 813.125.

(4) Tort for damages: intentional or negligent infliction of harm.

(5) Tort for false imprisonment.

(6) If competency of victim or abuser is at issue, possible guardianship, protective services, or protective placement. Wis. Stat. chs. 54, 55.

(7) Detention or commitment of perpetrator if they have mental illness or incapacity. Wis. Stat. ch. 51.

(8) If injury or death occurs as a result of human trafficking, may bring a civil tort action. Wis. Stat. § 940.302(3).

e. Stalking: civil actions and remedies

(1) Domestic abuse restraining order, if stalking involved physical abuse or threats of physical abuse. Wis. Stat. § 813.12(1)(am).

(2) Harassment restraining order for repeatedly engaging in harassing or intimidating behavior that serves no legitimate purpose. Wis. Stat. § 813.125(1)(am)2.

(3) Tort for damages: intentional or negligent infliction of harm.

(4) Tort for false imprisonment.

(5) If competency of victim or abuser is at issue, possible guardianship, protective services, or protective placement. Wis. Stat. chs. 54, 55.

(6) Detention or commitment of perpetrator if they have mental illness or incapacity. Wis. Stat. ch. 51.

f. Emotional abuse: civil actions and remedies

(1) Domestic abuse restraining order for threats of physical abuse, impairment of physical condition, sexual assault, stalking, or property damage. Wis. Stat. § 813.12(1)(am)6.

(2) Individual-at-risk restraining order for emotional abuse. Wis. Stat. § 813.123.

(3) Harassment restraining order for repeatedly engaging in harassing or intimidating behavior that serves no legitimate purpose. Wis. Stat. § 813.125(1)(am)2.

(4) If competency of victim or abuser is at issue, possible guardianship, protective services, or protective placement. Wis. Stat. chs. 54, 55.

(5) Detention or commitment of perpetrator if they have mental illness or incapacity. Wis. Stat. ch. 51.

g. Neglect: civil actions and remedies

(1) Tort for breach of fiduciary responsibility by conservatorship.

(2) If competency of victim or abuser is at issue, possible guardianship, protective services, or protective placement. Wis. Stat. chs. 54, 55; *see Gorenstein v.*

Gorenstein, No. 97-0942, 1998 WL 203069 (Wis. Ct. App. Apr. 28, 1998) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

(3) Detention or commitment of perpetrator if they have mental illness or incapacity. Wis. Stat. ch. 51.

h. Financial exploitation: civil actions and remedies

(1) Civil action for damages

(a) Conversion

(b) Misrepresentation

(c) Fraud

(d) Breach of contract

(e) Action for accounting

(2) Civil action for return of property

(a) Conversion

(b) Constructive trust. *See Johnson v. Johnson*, No. 96-1104, 1997 WL 534340 (Wis. Ct. App. Sept. 2, 1997) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

(c) Fraud

(d) Misrepresentation

(e) Action for accounting

(3) Civil action for protection

(a) Voluntary request for conservator. Wis. Stat. § 54.76.

(b) Guardianship: If court appoints a guardian of the person under Wis. Stat. § 54.10, court must determine whether, under 18 U.S.C. § 922(g)(4), the individual is prohibited from possessing a firearm. If the individual is prohibited, the court must order the individual not to possess a firearm, order the seizure of any firearm owned by the individual, and inform the individual of the requirements and penalties under Wis. Stat. § 941.29. Wis. Stat. §§ 54.10, 54.12.

(c) Execution of new power of attorney. Wis. Stat. § 244.05.

(d) Bonding.

(e) Petition to review agent's performance. Wis. Stat. § 244.16.

(f) Harassment restraining order. Wis. Stat. § 813.125.

(g) Individual-at-risk restraining order. Wis. Stat. § 813.123.

(4) Civil action involving family law issues

(a) Action for spousal maintenance or family support. Wis. Stat. §§ 767.56, 767.531.

(b) Divorce. Wis. Stat. ch. 767.

(c) Action relating to classification of marital property. Wis. Stat. ch. 766.

(5) Civil action involving post-death issues

(a) Action relating to marital property rights. Wis. Stat. chs. 766, 861.

(b) Will contest. Wis. Stat. ch. 879.

(c) Election of augmented deferred marital property. Wis. Stat. §§ 861.018–.11; *see also* Wis. Stat. §§ 853.15(1), 815.56, 857.01.

(6) If injury or death occur as a result of human trafficking, may bring a civil tort action. Wis. Stat. § 940.302(3).

4. Resources for assisting elderly victims of abuse

a. Elder Rights Project (Abuse in Later Life Victims): Statewide legal resource for victims of elder abuse sponsored by Legal Action of Wisconsin and Wisconsin Judicare, https://www.legalaction.org/services/elder-rights-project-elder-abuse-victims (last visited May 5, 2022).

b. Alice K. Page, *Adult Protective Services: On the Front Line Against Elder Abuse*, Wis. Law., June 2020, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=6&ArticleID=27785.

c. Justice in Aging: National advocacy group with written resources and webinars for aging and disability attorneys, advocates, and service providers, http://www.justiceinaging.org (last visited May 5, 2022).

d. Mark Todd Johnson et al., *The Face of Elder Financial Exploitation*, Wis. Law., Mar. 2020, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=3&ArticleID=27525.

e. Carol J. Wessels, *Financial Elder Abuse: Returning Control to Victims*, Wis. Law., Mar. 2020, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=3&ArticleID=27526.

f. Ann E. Laatsch & Juanita Davis, *An Overview: Older Clients & Elder Abuse*, Wis. Law., Jan. 2020, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=1&ArticleID=27399.

g. Jessica Ann Liebau, *Screening for Elder Fraud and Abuse*, Wis. Law., Jan. 2020, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=1&ArticleID=27400.

h. Betsy J. Abramson et al., *Isolation as a Domestic Violence Tactic in Later Life Cases: What Attorneys Need to Know*, 3 Nat'l. Acad. Elder L. Attys. 47, 49–50 (2007).

i. Clearinghouse on Abuse in Later Life (NCALL), a project of End Domestic Abuse Wis.: The Wis. Coal. Against Domestic Violence, 1400 E. Washington Ave, Suite 227, Madison, WI 53703, (608) 255-0539, http://www.ncall.us/ (last visited May 5, 2022).

j. Wisconsin Dep't. of Health Serv., Bureau of Aging & Disability Res., 1 W. Wilson Street, Room 551, Madison, WI 53703, https://www.dhs.wisconsin.gov/dph/badr.htm (last revised Oct. 31, 2018).

k. Greater Wisconsin Agency on Aging Res., Inc., Guardianship Support Center, 1414 MacArthur Road, Madison, WI 53714, (608) 243-5670, (855) 409-9410 (toll-free helpline), https://gwaar.org/guardianship-resources (last visited May 5, 2022).

C. Public Benefits [§ 24.193]

1. Wisconsin Works (W-2) for victims of domestic abuse

a. Low-income families with a custodial parent and at least one dependent child may qualify for W-2 employment preparation services, case management, and cash assistance. Wis. Admin. Code § DCF 101.09(2).

b. For W-2 purposes, domestic abuse has the meaning given in Wis. Stat. § 968.075(1) or 812.12(1)(am) and includes the following acts that affect the individual and are engaged in by a spouse or former spouse, an adult with whom the individual has or had a dating relationship, an adult with whom the person has a child in common, an adult or minor family member, or an adult or minor with whom the person resides or formerly resided:

(1) Physical acts that result in pain, illness, or injury;

(2) Sexual abuse or sexual assault;

(3) Threats of, or attempts at, physical or sexual abuse;

(4) Emotional or mental abuse;

(5) Verbal abuse;

(6) Deprivation or destruction of physical or economic resources;

(7) Neglect or deprivation of medical care;

(8) Forced isolation; or

(9) Stalking or harassment. Wis. Admin. Code §§ DCF 101.03(11), DCF 101.15(3)(a).

c. Information relating to domestic abuse is considered confidential for purposes of W-2 program. Wis. Admin. Code § DCF 101.08(2).

d. Income maintenance agency must train staff on domestic abuse and screen applicants for domestic abuse in confidential manner. Wis. Stat. § 49.1473, Wis. Admin. Code § DCF 101.15(3)(b).

e. If any W-2 agency employee identifies a participant, or a participant self-identifies, as a past or present victim of sexual assault or domestic abuse or as being at risk of domestic abuse, the employee must (1) make participant's case confidential in CARES Worker Web, the agency's computer system; and (2) talk to the participant about and offer to provide written information on culturally appropriate community based sexual assault and domestic abuse services. If the participant wishes, the W-2 agency employee must make a referral to the appropriate local agency. Wis. Admin. Code § DCF 101.15(3)(b), Wis. Dep't of Child. & Fam., *Wisconsin Works (W-2) Manual*, § 4.5.2.

f. Evidence sufficient to establish individual is or has been victim of domestic abuse or is at risk of further domestic abuse shall be a positive identification on department-provided screening instrument or voluntary disclosure of information by participant. Wis. Admin. Code § DCF 101.15(3)(c)(2).

g. Participant attending a required court appearance, including appearance as victim of domestic abuse, satisfies good cause for not complying with W-2 participation requirements. Wis. Admin. Code § DCF 101.20(1)(a).

h. Victim of domestic abuse may apply at any W-2 agency. *See W-2 Manual* at 1.4.1.

i. Employability Plan

(1) Financial and Employment Planner must take into consideration results of the Domestic Abuse Screen and any follow-up assessment information to ensure participant is not at risk of violence by partner while participant is engaging in assigned W-2 activities. Consideration should be given to time of day, location, and on-sight supervision for each activity. *See W-2 Manual* at 5.6.3.

(2) Employability Plan for victim of *domestic abuse* can include activities like going to counseling and support groups, looking for safe place to live, getting legal support and advocacy, and safety planning with domestic violence advocate.

j. Participants may be able to extend W-2 after 60 months if losing W-2 would (1) put participant or children in danger of domestic violence; or (2) make it harder for participant to get away from domestic violence. *See* W-2 Manual at 2.10.6.

2. Emergency Assistance for victims of domestic abuse

a. Low-income families with at least one dependent child and one caretaker relative of dependent child may qualify for Emergency Assistance payments once every 12 months in cases of fire, flood, natural disaster, homelessness (including for reasons of domestic abuse), impending homelessness (including for reasons of domestic abuse), or energy crisis. Wis. Stat. § 49.138; Wis. Admin. Code § DCF 120.05.

b. For Emergency Assistance purposes, domestic abuse has the meaning given in Wis. Stat. § 968.075(1)(a) and includes the following acts that affect the individual and are engaged in by a spouse or former spouse, an adult with whom the individual resides or formerly resided, or someone with whom the person has a child in common:

(1) Intentional infliction of physical pain, physical injury, or illness;

(2) Intentional impairment of physical condition;

(3) Sexual assault under Wis. Stat. § 940.225(1), (2), or (3); or

(4) Physical act that may cause person to reasonably fear (i), (i), or (iii) above. Wis. Admin. Code § DCF 120.05(2)(e).

c. Maximum Emergency Assistance payment per group member is $516 for group with 2, 3, or 4 members; $645 for group with 5 members; and $110 per group member when group is 6 or more members. *See* Wis. Dep't of Child. & Fams., *Emergency Assistance Manual* § 5.2.1, https://dcf.wisconsin.gov/manuals/ea-manual/History/HistoryTopics/21-01/5.2_Determining_EA_Payment_Amount.htm (last updated in Rel. # 12-01).

d. Emergency Assistance payments for impending homelessness because of domestic abuse may be used to retain current housing or obtain new housing in the following ways:

(1) Unpaid rent or mortgage;

(2) Late fees for past rent or mortgage;

(3) First month's rent;

(4) Security deposit; or

(5) Court costs for eviction proceedings. *See* Wis. Dep't of Child. & Fams., *Emergency Assistance Manual* § 5.2.

NOTE: DCF updated the *Emergency Assistance Manual* in 2021 to adopt the confidentiality provisions in the W-2 Manual. *See* Wis. Dep't of Child. & Fams., *Emergency Assistance Manual* § 4.5.

NOTE: DCF revised the EA application in 2020 to clarify that domestic abuse may be a basis for qualifying for the benefit and to include information about confidentiality.

3. *Good cause* for victims of domestic abuse

a. Each parent in a W-2 program must generally cooperate with efforts directed at establishing paternity and obtaining support payments unless the parent has *good cause* (including domestic abuse) for failing to cooperate. Wis. Admin. Code § DCF 102.01.

b. For *good cause* purposes, *Wisconsin Works* or *W-2* means assistance programs for families with dependent children administered under Wis. Stat. §§ 49.141 to 49.161, including W-2, work programs, job access loans, Wisconsin Shares childcare subsidy, and transportation assistance. Wis. Admin. Code § DCF 102.02(11).

c. For *good cause* purposes, *domestic abuse* means subjecting an individual or child to any of the following:

(1) Physical acts that result in pain, illness, or injury;

(2) Sexual abuse or sexual assault, including a caretaker relative of a dependent child, (such as a guardian, custodian, or parent) being forced to engage in nonconsensual sexual acts or any sexual activity involving a dependent child;

(3) Threats of, or attempts at, physical or sexual abuse;

(4) Emotional or mental abuse;

(5) Verbal abuse;

(6) Deprivation or destruction of physical or economic resources;

(7) Neglect or deprivation of medical care;

(8) Forced isolation; or

(9) Stalking or harassment. Wis. Admin. Code § DCF 102.02(4).

d. Custodial or noncustodial parent is eligible for exemption from cooperation requirements in Wis. Admin. Code § DCF 102.03 when W-2 agency determines any of the following applies:

(1) Cooperation is reasonably anticipated to result in either physical or emotional harm to child, including threats of domestic abuse or child kidnapping;

(2) Cooperation is reasonably anticipated to result in either physical or emotional harm to parent, including domestic abuse;

(3) Cooperation with child support agency would make it more difficult for individual to escape domestic abuse or unfairly penalize individual victimized by abuse or individual at risk of further domestic abuse;

(4) Child was conceived as result of incest or sexual assault;

(5) Parent is considering whether to terminate parental rights and sought assistance of public or licensed private social services agency not more than three months ago; or

(6) Petition for adoption of child has been filed with court, except this does not apply as good cause exemption from responsibility to make payments under existing court order. Wis. Admin. Code § DCF 102.05.

e. Applicant or participant may file good cause claim with W-2 agency at any time and must specify circumstances that provide sufficient good cause for not cooperating and corroborative evidence. Wis. Admin. Code § DCF 102.06(1)–(4). The performance of genetic testing does not bar an applicant or participant from filing a good-cause claim, nor does it bar a court from dismissing an action to establish paternity if establishing paternity would not be in the best interest of the child. Wis. Stat. § 767.855.

4. Immigrant Eligibility

a. Immigrants, especially those without permanent residency, generally have very limited eligibility for public benefits.

b. Immigrant survivors may qualify for benefits based on their survivor status.

c. Immigrant survivors with certain types of humanitarian statuses may not be subject to a public charge assessment when applying for, renewing, or changing their status.

5. Periodic Benefits

a. Benefits specific to domestic abuse survivors may become available periodically.

b. In fall 2021, DCF used American Rescue Plan Act of 2021 Pandemic Emergency Assistance Fund money to create the time-limited Living Independently through Financial Empowerment (LIFE) program.

c. LIFE offered qualifying domestic abuse victims with time-limited financial assistance. The program stopped accepting applications earlier than planned in December 2021 because of overwhelming interest. Wis. Dep't of Child. & Fams., *Living Independently Through Financial Empowerment (LIFE) Program and Policy Guide* (eff. Nov. 17, 2021), https://dcf.wisconsin.gov/files/w2/help-desk/life/life-program-and-policy-guide.pdf.

6. Resources

a. Erik Gartland et al., *Increasing Access to Emergency Assistance Grants for Domestic Violence Survivors in Wisconsin*, Robert M. La Follette School of Public Affairs, University of Wisconsin-Madison (Spring 2020), https://lafollette.wisc.edu/images/publications/workshops/2020-End-Domestic-Abuse-Report.pdf.

b. Shaina Goodman, *The Difference Between Surviving and Not Surviving: Public Benefits Programs and Domestic and Sexual Violence Victims' Economic Security*, National Resource Center on Domestic Violence, Georgetown Law Center on Poverty and Inequality & Economic Security and Opportunity Initiative (Jan. 2018),

https://vawnet.org/sites/default/files/assets/files/2018-05/TheDifferenceBetweenSurvivingandNotSurviving_Jan2018.pdf.

c. Monica Bates & Leslye E. Orloff, *Access to State-Funded Public Benefits in Wisconsin for Survivors, Based on Immigration Status*, National Immigrant Women's Advocacy Project, American University, Washington College of Law (May 2019), https://niwaplibrary.wcl.american.edu/wp-content/uploads/Wisconsin-Benefits.pdf.

d. Wisconsin Collaboration on Immigrants and Public Benefits, https://www.immigrantbenefitswi.org/ (last visited Jan. 15, 2022).

D. Remote Hearings and Live Streaming Court Proceedings [§ 24.194]

In response to the COVID-19 pandemic, the Wisconsin court system issued Zoom online video \conferencing accounts to each of the state's circuit court branches and encouraged courts to livestream their proceedings.

1. Many survivors prefer remote hearings because they:

   a. Do not have to be in courtroom or house with abuser;

   b. Do not need to safety plan traveling to and from courthouse;

   c. Can have comfort items and support persons present more easily.

2. There are disadvantages to remote hearings:

   a. Even a blocked phone number will appear unless court manually changes it;

   b. Abuser may gather clues about survivor's whereabouts by looking at video background;

   c. It is more difficult for attorney and client to have private conversation if not participating from same location.

   PRACTICE TIP: Domestic abuse and sexual assault agencies that receive Victims of Crime Act (VOCA) funding through the Wisconsin DOJ are allowed to modify their budget to purchase mobile or stationary technology units to better assist survivors with remote hearings and e-filing. Survivors without technology access may wish to reach out to local program to ask for help appearing.

3. Resources

   a. Kristin Marie Slonski et al, *101: Remote Hearings: How to Prepare Survivors of Violence*, Wis. Law., Oct. 2020, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=9&ArticleID=27986

   b. Wis. Off. of Ct. Operations, *HOST Instructions on Zoom's Simultaneous Interpretation Function for Hearings with Limited English Proficient (LEP) Individuals* (June 2020).

c. Wis. Off. of Ct. Operations, *Options for Victim Participation in Zoom-Based Court Proceedings*, https://pceinc.org/wp-content/uploads/2020/05/20200413-Options-for-Victim-Participation-Using-Zoom-Office-of-Court-Operations-.pdf (last updated Apr. 13, 2020).

d. Am. Bar Ass'n, The Comm'n on Domestic & Sexual Violence, *Preparing for Virtual Hearings: Client and Attorney Tip Sheets*, https://www.americanbar.org/groups/domestic_violence/ (last visited May 6, 2022).

E. Tribal Jurisdiction [§ 24.195]

1. Public Law 280 was enacted in 1953 to transfer federal jurisdiction over offenses involving Indians in "Indian country" to six states (Alaska, California, Minnesota, Nebraska, Oregon, Wisconsin) and give several other states the option of assuming such jurisdiction. Pub. L. No. 83-280; 18 U.S.C. § 1162, 28 U.S.C. § 1360.

   a. Wisconsin subsequently retroceded jurisdiction over Menominee Reservation. Menominee Restoration Act, Pub. L. No. 93-197.

   b. Public Law 280 did not require tribal consent for transfer of jurisdiction and did not eliminate concurrent tribal jurisdiction.

   c. Lack of federal financial support made Public Law 280 an unfunded mandate. Carole Goldberg & Heather Valdez Singleton, *Research Priorities: Law Enforcement in Public Law 280 States*, July 2008, https://www.ojp.gov/pdffiles1/nij/grants/209926.pdf.

   d. Public Law 280 can complicate jurisdiction and funding issues for domestic abuse and restraining order cases. *Id.*

2. Title IX of the Violence Against Women Reauthorization Act of 2013—Safety for Indian Women—recognizes tribes' sovereign power to exercise "special domestic violence criminal jurisdiction" (SDVCJ) over certain defendants, regardless of Indian or non-Indian status, who commit acts of domestic or dating violence or violate certain protection orders in Indian country. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified at 42 U.S.C. §13701).

   a. Tribes can exercise sovereign power to investigate, prosecute, convict, and sentence Indians and non-Indians who assault Indian spouses or dating partners or violate a protection order in Indian country.

   b. Tribes can exercise sovereign power to issue and enforce civil protection orders against Indians and non-Indians.

   c. Tribal court, code, and practice differ among 11 federally recognized tribes in Wisconsin.

3. Resources

   a. Nat'l Indigenous Women's Res. Ctr., https://www.niwrc.org/ (last visited May 6, 2022).

b. American Indians Against Abuse, serves 11 federally recognized tribes in Wisconsin, https://www.niwrc.org/tribal-coalitions/american-indians-against-abuse (last visited May 6, 2022).

c. Wis. Dep't of Just., Missing and Murdered Indigenous Women Task Force. See https://www.doj.state.wi.us/missing-and-murdered-indigenous-women-task-force (last visited May 6, 2022) for public meeting notices, agendas, and task force members.

d. Wis. First Nations, American Indian Studies in Wisconsin. See https://wisconsinfirstnations.org/ (last visited May 6, 2022) for educational resources and links to official websites for American Indian Nations of Wisconsin.

e. End Domestic Abuse Wisconsin, *2020 Wisconsin Domestic Violence Homicide Report*, (Sept. 2021), https://edaw-webinars.s3.us-east-2.amazonaws.com/wp-content/uploads/2021/09/22120937/2020-End-Domestic-Abuse-WI-Annual-Domestic-Violence-Homicide-Report.pdf.

IV. DOMESTIC ABUSE ADVOCATES [§ 24.196]

A. Nondisclosure [§ 24.197]

1. No employee or agent of domestic abuse services organization who provides domestic abuse services may intentionally disclose location of any of following persons without service recipient's informed, written consent:

   a. Service recipient. Wis. Stat. § 995.67(2)(a)1.

   b. Service recipient's minor child. Wis. Stat. § 995.67(2)(a)2.

   c. Minor child in care or custody of service recipient. Wis. Stat. § 995.67(2)(a)3.

   d. Minor child who accompanies service recipient when service recipient receives domestic abuse services. Wis. Stat. § 995.67(2)(a)4.

2. *Domestic abuse services organization* means nonprofit organization or public agency that provides *any* of the following services for victims of domestic abuse:

   a. Shelter facilities or private home shelter care. Wis. Stat. § 995.67(1)(b)1.

   b. Advocacy and counseling. Wis. Stat. § 995.67(1)(b)2.

   c. 24-hour telephone service. Wis. Stat. § 995.67(1)(b)3.

B. Role as Service Representatives for Adult Abusive Conduct Complainants [§ 24.198]

1. Under Wis. Stat. § 895.45(2), complainant alleging they were victim of domestic abuse has right to select service representative to attend

   a. Hearings,

b. Depositions,

c. Court proceedings, and

d. Interviews and meetings related to hearings, depositions, and court proceedings.

2. Right exists when there is allegation of abuse, or when conduct is factor under Wis. Stat. § 767.41 or is factor in complainant's ability to represent their interest at hearing, deposition, or court proceeding. Wis. Stat. § 895.45(2).

3. It is unclear whether presence of service representative waives confidentiality between mediator and mediation parties. Wis. Stat. § 904.085.

4. Service representative may be involved in civil and criminal proceedings. Wis. Stat. § 895.45(2).

5. Complainant must notify court, orally or in writing, of service representative selection. Wis. Stat. § 895.45(2).

6. Under Wis. Stat. § 895.45(2), service representative may

a. Sit next to complainant and confer orally and in writing with complainant during hearings, depositions, court proceedings, and related interviews and meetings, except when complainant is testifying or is represented by private counsel; and

b. Address court if court permits.

7. Service representative may not sit at counsel table during jury trial. Wis. Stat. § 895.45(2).

C. Victim of Sexual Assault Accompaniment Law [§ 24.199]

See 2015 Wis. Act 351; WCASA Summary of Victim Accompaniment Law; Wis. Stat. §§ 50.378(2)(b)1., (2)(b)2., (c), (d), (g), 950.045(1), (2); *see also* Wis. Stat. § 950.045.

1. Victim Accompaniment Law gives victims of sexual assault, human trafficking, and child sexual abuse right to be accompanied by sexual assault victim advocate, if they so choose, throughout criminal justice process.

2. Victim Accompaniment Law varies depending on age, whether the victim is a minor and whether a minor victim is over or under the age of 10.

3. A victim-survivor may be accompanied at law enforcement interviews, other proceedings, child forensic interviews, and hospitals.

4. An advocate may be excluded from the hospital if the advocate's presence obstructs the provision of necessary medical care to the victim or if the advocate fails to comply with hospital policies.

5. An advocate may be excluded from a child forensic interview if the advocate obstructs or delays the interview or does not comply with instructions, requests, or any rule, policy, or requirement of the child advocacy center.

6. An advocate may be excluded from a law enforcement interview if the advocate obstructs or delays the interview or does not comply with instructions, requests, or any rule, policy, or requirement established by the law enforcement agency regarding the confidentiality of information related to an investigation. The victim may request that a different victim advocate accompany them.

D. Services to Victims Regardless of Sex [§ 24.200]

1. *Domestic abuse services organization*, as defined in Wis. Stat. § 995.67(1)(b), is not prohibited from providing separate facilities, counseling, treatment, or services for persons of different sexes. Wis. Stat. § 106.52(3)(d); 34 U.S.C. § 12291(b)(13)(A).

2. This provision clarifies that domestic abuse services organizations are not subject to public accommodations law prohibitions against sex-based discrimination.

3. Recipients of VAWA funds are subject to condition of grant nondiscrimination law.

   a. No person in the United States may, on the basis of actual or perceived race, color, religion, national origin, sex, gender identity, sexual orientation, or disability, be excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity funded in whole or in part with funds made available under the VAWA, and any other program or activity funded in whole or in part with funds appropriated for grants, cooperative agreements, and other assistance administered by the Office on Violence Against Women.

   b. The VAWA nondiscrimination grant condition also states an exception to the prohibition on sex discrimination in certain instances, *if* sex segregation or sex-specific programming is necessary to a program's essential operation.

E. Domestic Violence or Sexual Assault Advocate–Victim Privilege [§ 24.201]

See Wis. Stat. § 905.045.

1. Victim has privilege to refuse to disclose and to prevent others from disclosing confidential communications or information obtained or disseminated among the victim, an advocate, and persons under direction of advocate. Wis. Stat. § 905.045(2).

2. No privilege exists if advocate is a mandated child abuse reporter under Wis. Stat. § 48.981(2). Wis. Stat. § 905.045(4); *State v. Denis L.R.*, 2005 WI 110, 283 Wis. 2d 358.

   a. Domestic violence advocate may be mandated to report abuse under Wis. Stat. § 48.981(2) if the advocate is a social worker, professional counselor, or other designated professional. Wis. Stat. § 48.981(2).

   b. Reporter must examine child and find reasonable ground to believe child was abused by means other than by accident. *Denis L.R.*, 2005 WI 110, 283 Wis. 2d 358.

3. Privilege may be claimed by victim, victim's guardian or conservator, or victim's personal representative if victim is deceased; advocate may claim privilege on behalf of victim. Wis. Stat. § 905.045(3).

   NOTE: The court of appeals has concluded that the 2020 "Marsy's Law" amendment to the Wisconsin Constitution grants a crime victim standing, including retroactively, to oppose a defendant's motion for in camera review of victim's health-care records, asserting and protecting their rights under Wis. Const. article 1, section 9m in criminal proceedings. *State v. Johnson*, 2020 WI App 73, 394 Wis. 2d 807. The case has been accepted for review by the Wisconsin Supreme Court.

F. Admitting Minors to Shelter [§ 24.202]

See Wis. Stat. § 48.9875.

1. Shelter facility, defined as "temporary place of lodging for individuals or families," may contract with minor to enter shelter if minor is

   a. 17 years of age;

   b. Not under supervision of county department, child welfare agency, department of children and families, or department of corrections, or under jurisdiction of court; and

   c. An unaccompanied youth under McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11434a(6)), as confirmed by

      (1) Local educational agency liaison who has minor's consent to disclose minor's status as unaccompanied youth; or

      (2) If local educational agency liaison is not available, employee of shelter facility or transitional living program who conducts intake.

2. Defense of infancy does not apply to any contract entered into under Wis. Stat. § 48.9875.

3. Wisconsin Department of Public Instruction maintains Homeless Liaison Directory, listing school district and charter school staff members designated to ensure homeless children and youth receive needed services, at https://dpi.wi.gov/homeless/liaisons (last visited May 6, 2022).

4. Statute does not address how shelter facility would confirm that minor is not under supervision of county department, child welfare agency, department of children and families, or department of corrections, or under jurisdiction of court. Statute does not address whether these agencies would accept release signed by 17-year-old.

5. Pursuant to 34 C.F.R. § 99.5(b), the federal Family Educational Rights and Privacy Act (FERPA) "does not specifically afford minors who are separated from their parents the rights that are afforded to parents and eligible students under the law. However, schools may use their judgment in determining whether an unaccompanied minor is responsible enough to exercise certain privileges, such as inspecting and reviewing education records and providing consent for disclosure." U.S. Dep't of Educ., *Protecting Student Privacy*, https://studentprivacy.ed.gov/frequently-asked-questions (last visited Mar. 8, 2021).

Chapter 25
Copyright

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NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 159; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-102 (Mar. 15, 2022); and all references to the Code of Federal Regulations (C.F.R.) are current through 87 Fed. Reg. 15,147 (Mar. 17, 2022).

I. INTRODUCTION [§ 25.203]

A. In General [§ 25.204]

1. Congress has the power to enact laws that secure, for a limited time and to authors and inventors, the exclusive right to their respective writings and discoveries. U.S. Const. art. I.

2. Acts of Congress that currently affect authors' rights are

   a. Copyright Act of 1909, as amended, effective through 1977 but continues to govern certain works under the current act;

   b. Copyright Act of 1976, comprehensive revision effective January 1, 1978;

   c. Berne Convention Implementation Act of 1988, an amendment to Copyright Act of 1976, intended to bring U.S. copyright law into compliance with Berne Convention (multilateral treaty for international copyright protection), effective March 1, 1989; and

   d. Other amendments to 1976 Act: Computer Software Rental Amendments Act of 1990, effective December 1, 1990; Architectural Works Copyright Protection Act, effective December 1, 1990; Visual Artists Rights Act of 1990, effective June 1, 1991; Copyright Amendments Act of 1992, effective June 29, 1992; Audio Home Recording Act of 1992, effective October 28, 1992; Copyright Term Extension Act, effective October 27, 1998; and Copyright Alternative in Small-Claims Enforcement Act, effective December 27, 2020. 17 U.S.C. §§ 101–1511; 37 C.F.R. ch. II.

3. Effective January 1, 1978, federal copyright law preempts common law or state statutes that apply to works within the scope of federal law and that create rights equivalent to exclusive rights specified in 17 U.S.C. § 106; Wisconsin has no statutes and no developed common law

that apply to works within the scope of federal law. 17 U.S.C. § 301; *National Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc.*, 991 F.2d 426 (8th Cir. 1993); *Butler v. Target Corp.*, 323 F. Supp. 2d 1052 (C.D. Cal. 2004).

4. Effective January 1, 1996, Uruguay Round Agreements Act implemented certain provisions of latest General Agreement on Tariffs and Trade (GATT), which, among other things, allows certain works now in the public domain to have their copyrights restored, *see infra* § 25.28. 17 U.S.C. § 104A.

5. Numerous provisions of Digital Millennium Copyright Act went into effect in 1998, including limitation on liability for online service providers who innocently transmit infringing material that originates from another source; provisions prohibiting circumvention of copyright protection devices were effective as of October 28, 1998. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998); 17 U.S.C. § 512 (circumvention of copyright protection devices); 17 U.S.C. §§ 1201–1205 (limitation of liability).

6. Effective November 2, 2002, the TEACH Act facilitates distance education by amending sections 110(2) and 112(f) of the Copyright Act to allow for certain uses of copyrighted works in online course materials. Technology, Education, and Copyright Harmonization (TEACH) Act, Pub. L. No. 107-273, 116 Stat. 1758, 1910 (2002).

B. Resources [§ 25.205]

1. Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (Matthew Bender rev. ed. 1978 & Supp. 2021).

2. William S. Strong, *The Copyright Book: A Practical Guide* (MIT 6th ed. 2014).

3. Bernard C. Dietz & James E. Hawes, *Copyright Registration Practice* (Thomson Reuters 2d ed. 1999 & Supp. 2021).

4. Publications of U.S. Copyright Office, Library of Congress, Washington, DC 20559.

5. Home page of U.S. Copyright Office: https://www.copyright.gov (last visited Mar. 18, 2022).

6. William F. Patry, *Patry on Copyright* (Thomas West 2007 & Supp. 2022).

II. SUBJECT MATTER OF COPYRIGHT [§ 25.206]

A. Works Protected by Copyright [§ 25.207]

1. Federal copyright law protects original works of authorship fixed in any tangible medium of expression from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of machine or device. 17 U.S.C. § 102(a); 17 U.S.C. § 301; *see, e.g.*, *Google, LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021) (*see infra* §§ 25.17–.18).

2. Works of authorship include the following categories: literary works (whether expressed in words, numbers, or other verbal or numerical symbols or indicia, including computer software whether written in source code or object code); musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other

audiovisual works; sound recordings; and architectural works created on or after December 1, 1990. 17 U.S.C. § 102(a).

3. Downloading copyrighted songs from the internet without authorization from the copyright owner is a direct violation of copyright law and not a fair use. *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005).

   EXAMPLE: A software distributor that distributed a device with the object of facilitating copyright infringement, as shown by clear, affirmative steps taken to foster infringement, was liable to the copyright owner on the basis of the inducement doctrine. *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

B. Not Protected [§ 25.208]

1. Copyright protects the way ideas are expressed (e.g., through words, computer code, plot, and symbol), but it does not protect the underlying ideas, procedures, processes, and concepts. 17 U.S.C. § 102(b); *see also Schoolhouse, Inc. v. Anderson*, 275 F.3d 726 (8th Cir. 2002) (holding that, because copyright law protects only expression, and not ideas, copyright protection for a factual compilation is "thin"); *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807 (1st Cir.), *aff'd mem.*, 516 U.S. 233 (1996); *Woods v. Resnick*, 725 F. Supp. 2d 809, 820–22 (W.D. Wis. 2010) (holding finance formulas may not be copyrighted).

2. Facts, as opposed to their literal expression, are not protected by copyright, even if one expends effort and time in discovering those facts; however, particular *compilation* of facts may be protected by copyright if there is sufficient originality in selection, coordination, and arrangement of facts. 17 U.S.C. § 103; 17 U.S.C. § 101; *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *BUC Int'l Corp. v. International Yacht Council Ltd.*, 489 F.3d 1129, 1141 (11th Cir. 2007); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), *rev'g* 908 F. Supp. 640 (W.D. Wis. 1996); *Mid Am. Title Co. v. Kirk*, 991 F.2d 417 (7th Cir. 1993); *Illinois Bell Tel. Co. v. Haines & Co.*, 932 F.2d 610 (7th Cir. 1991).

   NOTE: In light of *Feist*, owners of electronic databases may rely more on restrictive licensing agreements, technological devices, and unfair trade practices law to protect their databases.

3. Copyright does not protect purely utilitarian articles, although physically or conceptually separable ornamental elements of functional articles may be copyrighted when such elements can be perceived as a separable work of art from the utilitarian article, copyrightable on its own or in a different form of tangible medium; copyright does not protect purely functional elements of computer programs or architectural works. 17 U.S.C. § 101; 17 U.S.C. § 102(b); 17 U.S.C. § 113(b); *see, e.g.*, *Whimsicality, Inc. v. Maison Joseph Battat*, 27 F. Supp. 2d 456 (S.D.N.Y. 1998) (holding costume elements, such as colors and facial detail, are not separable from utilitarian purpose, hence not copyrightable). *But see Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1012 (2017) (holding arrangements of lines, chevrons, and colorful shapes appearing on the surface of cheerleading uniforms are copyrightable as separable features); *Celebration Int'l, Inc. v. Chosun Int'l, Inc.*, 234 F. Supp. 2d 905, 913–14 (S.D. Ind. 2002) (holding sculptured head of tiger costume was physically separable from functional aspects of costume).

4. Copyright does not protect names, titles, or short phrases (trademark protection may be available).

5. Annotations in state statutory code publications are ineligible for copyright protection under the government edicts doctrine, which holds that works created by officials empowered to speak with the force of the law in the course of their official duties—for example, judicial opinions and legislative codes—are not subject to copyright protection. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1501 (2020) ("Because legislators, like judges, have the authority to make law, it follows that they, too, cannot be 'authors.' And, as with judges, the [government edicts] doctrine applies to whatever work legislators perform in their capacity as legislators, including explanatory and procedural materials they create in the discharge of their legislative duties.").

C. Protection Uncertain [§ 25.209]

1. Extent of protection for computer interfaces (e.g., WINDOWS) remains unclear because the U.S. Supreme Court declined to review a lower court decision denying protection. *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994).

2. Copyrightability of computer commands remains in dispute because the U.S. Supreme Court affirmed without decision a lower court decision denying protection (Supreme Court decision was not accompanied by an opinion and has no binding effect on other cases). *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807 (1st Cir. 1995), *aff'd mem.*, 516 U.S. 233 (1996).

D. Derivative Works, Compilations, and Collective Works [§ 25.210]

See 17 U.S.C. § 101; 17 U.S.C. § 103; *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410 (7th Cir. 1992).

1. *Derivative works*. Work that transforms, adapts, or recasts original work into new and different work may be separately copyrightable as derivative work.

   NOTE: A separate copyright covers only those original elements added and does not extend to the preexisting work.

   NOTE: If the preexisting work is in the public domain, it remains so; if the copyright in the preexisting work is owned by another, that copyright is not affected.

2. *Compilations*. Compilation of uncopyrightable facts or data may be itself copyrightable if the compilation involves creativity in selection and arrangement of the facts or data.

3. *Collective works*. Collection of independently copyrighted works, such as magazine, newspaper, or collection of essays, may be copyrighted independent of component works.

   NOTE: Copyright in a collective work does not extend to component works. *See infra* § 25.13.

III. COPYRIGHT OWNER'S RIGHTS [§ 25.211]

A. In General [§ 25.212]

Copyright owner has the exclusive right to exercise, and to authorize others to exercise, any of five rights listed at sections 25.11–.15, *infra*, except as limited in 17 U.S.C. §§ 107–122. 17 U.S.C. § 106 (see 17 U.S.C. § 114 for scope of exclusive rights in sound recordings).

B. Reproduction [§ 25.213]

1. Right to reproduce work in copies or phonorecords. 17 U.S.C. § 106(1); 17 U.S.C. § 101.

2. Rightful owner of copy of computer program may, under certain conditions, make one copy or adaptation for archival purposes or as essential step in utilization of program in computer itself. 17 U.S.C. § 117.

3. Librarian may, under certain conditions, reproduce whole works to replace damaged, deteriorating, lost, or stolen copies and reproduce articles or other contributions to collection or periodical at request of library patrons for their private study, scholarship, or research. 17 U.S.C. § 108.

4. Further exceptions address particular issues relating to reproduction of works by broadcasters and by producers of music records, and by consumers of digital audio and analog recording devices and media for noncommercial uses. 17 U.S.C. § 112; 17 U.S.C. § 114; 17 U.S.C. § 115; 17 U.S.C. §§ 1001–1010.

5. Certain nonprofit and governmental agencies may reproduce and distribute copyrighted works in specialized formats for use by persons who are blind or disabled without the permission of copyright owner. 17 U.S.C. § 121.

C. Adaptation [§ 25.214]

1. Right to prepare derivative works based upon original work. 17 U.S.C. § 106(2); *Liu v. Price Waterhouse LLP*, 302 F.3d 749 (7th Cir. 2002).

2. Derivative works include translations, musical arrangements, dramatizations, fictionalizations, motion picture versions, sound recordings, art reproductions, abridgements, condensations, or any other forms that are based on preexisting work and in which preexisting work is recast, transformed, or adapted. 17 U.S.C. § 101; *see, e.g.*, *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94 (2d Cir. 2002) (holding translation of Hebrew prayer book has sufficient originality to merit copyright protection).

   NOTE: Audiovisual displays created by a computer game add-on device have been held not to be derivative works. *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992).

D. Publication [§ 25.215]

1. Definition: Right to distribute copies or phonorecords of work to the public by sale or other transfer of ownership or by rental, lease, or lending. 17 U.S.C. § 106(3); 17 U.S.C. § 101.

2. Although the copyright owner has the exclusive right to *initially* distribute each copy of the work to the public, the owner does not have the right to control *subsequent* transfers of each such copy after the initial sale or other distribution to public, except with respect to phonorecords and copies of computer programs; known as *first sale* doctrine. 17 U.S.C. § 109(a); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013).

3. The first sale doctrine, codified in 17 U.S.C. § 109, allows a person to resell, rent, lend, or otherwise dispose of a lawfully acquired copy of a copyrighted work without the authorization of the copyright owner (subject to certain exceptions for sound recordings and computer programs). Under 17 U.S.C. § 602, the unauthorized importation of a copy acquired outside the United States is actionable as infringement. 17 U.S.C. § 109; 17 U.S.C. § 602; *Kirtsaeng*, 568 U.S. 519.

   The potential conflict between 17 U.S.C. § 109 and 17 U.S.C. § 602 was resolved in *Kirtsaeng*, 568 U.S. 519 (reversing 654 F.3d 210 (2d Cir. 2011)). In *Kirtsaeng*, the defendant lawfully purchased textbooks abroad and resold them at a profit in the United States. The publisher sued for infringement, relying on 17 U.S.C. § 602(a)(1), which prohibits the unauthorized importation of copies acquired abroad. The Supreme Court rejected the publisher's theory, holding that the first sale doctrine in 17 U.S.C. § 109 applies worldwide to all authorized copies, including those acquired outside the United States.

4. However, the owner of a phonorecord acquired on or after October 4, 1984, and the owner of a copy of a computer program (including any tape, disk, or other medium embodying such program) acquired on or after December 1, 1990, may not, for purposes of direct or indirect commercial advantage, rent, lease, or lend the phonorecord or copy of computer program without the copyright owner's authorization, except for certain computer programs embodied in a machine or product or embodied in or used in conjunction with a computer designed for playing video games. 17 U.S.C. § 109(b).

5. Section 201(c), pertaining to collective works, does not allow publishers to republish freelance-written articles in searchable online databases without authorization. However, creation of a searchable online database that displays only "snippets" of copyrighted works is a fair use. *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015). See also the discussion of fair use, in sections 25.16–.18, *infra* (fair use exception). *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

6. District courts are divided on whether posting a work on the internet constitutes "publication." *Compare Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398 (S.D.N.Y. 2002) (holding that a website is published because its users acquire the ability to make copies of the webpage that are indistinguishable from the original), *with Rogers v. Better Bus. Bureau of Metro. Houston, Inc.*, 887 F. Supp. 2d 722 (S.D. Tex. 2012) (holding that "the court is not inclined to negate the presumption of validity by finding, as a matter of law, that Plaintiff distributed copies of the websites when he uploaded them to the internet").

E. Public Performance [§ 25.216]

1. Right to perform work publicly. 17 U.S.C. § 106(4).

2. *Perform* means to recite, render, play, dance, or act work, either directly or by means of any device or process, including showing a motion picture, playing a videotape, and broadcasting recorded music. 17 U.S.C. § 101; *see Cass Cnty. Music Co. v. Muedini*, 55 F.3d 263 (7th Cir. 1995) (discussing public performance of music by small businesses).

3. *To perform or display a work "publicly"* means to perform or display it at a place open to the public or at any place in which a substantial number of persons outside of the normal circle of a family and its social acquaintances are gathered; or to transmit or otherwise communicate a performance or display of the work to such place or to the general public. 17 U.S.C. § 101.

For example, Aereo operated a system that relayed local broadcast-television programming to its subscribers. Each subscriber was assigned an individual micro-antenna that received a station's over-the-air signal, which the subscriber could access anywhere through Aereo's internet-based service. The Court, interpreting the transmit clause in the definition of public performance in the Copyright Act, held that Aereo's transmission was a public performance and thus an infringement. *American Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431 (2014).

4. Specific limitations apply to public performances of sound recordings by means of digital audio transmissions. 17 U.S.C. § 106(6); 17 U.S.C. § 114(d) (limitations on exclusive right under 17 U.S.C. § 106(6)).

5. Exemptions

   a. Teachers in nonprofit educational institutions may perform or display copyrighted works in face-to-face teaching activities in a classroom or similar place devoted to instruction without the copyright owner's consent; same exception exists for performance of certain types of works of religious nature in course of religious services and for performance of certain works under circumstances stated in sections cited. 17 U.S.C. § 110.

   b. Limited exceptions allowing eating and drinking establishments to play musical works via television or radio broadcasts. 17 U.S.C. § 110(5).

F. Public Display [§ 25.217]

1. Right to display work publicly. 17 U.S.C. § 106(5).

2. *Display* means to show a copy of a work, either directly or by means of film, slide, television image, or other device or process, or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially. 17 U.S.C. § 101.

3. Definition of publicly is the same for display as for performance. 17 U.S.C. § 101.

4. However, owner of a lawfully made copy may publicly display that copy either directly or by projection of no more than one image at a time to viewers present at the place where the copy is located; thus, the owner of work of art may loan it to a museum to be shown in exhibition without violating copyright. 17 U.S.C. § 109(c).

IV. FAIR USE EXCEPTION [§ 25.218]

A. In General [§ 25.219]

Under 17 U.S.C. § 107, any person may make *fair use* of copyrighted work without obtaining the copyright owner's permission; fair use is defined on a case-by-case basis after consideration of following four factors:

1. Purpose and character of use

   a. Purposes of criticism, comment, news reporting, scholarship, research, and certain limited uses for teaching are favored.

b. Nonprofit educational uses are more likely fair than commercial uses.

c. Parody, like other forms of comment and criticism directed at copyrighted works, may claim fair use. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1267–76 (11th Cir. 2001) (holding *The Wind Done Gone* entitled to fair use defense against owner of the novel *Gone with the Wind*); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) (applying *Campbell* analysis); *Mattel, Inc. v. Pitt*, 229 F. Supp. 2d 315 (S.D.N.Y. 2002) (holding erotic version of "Barbie" doll is fair use parody).

d. Transformative uses that serve an entirely different function than original work are more likely to be considered fair use. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (holding that display of thumbnail versions of copyrighted photographs by internet search engine was transformative fair use); *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 41 (2d Cir. 2021) (clarifying holding from *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), by emphasizing that in order for secondary work to be transformative "the secondary work itself must reasonably be perceived as embodying a distinct artistic purpose, one that conveys a new meaning or message separate from its source material."), *cert. granted*, 142 S. Ct. 1412 (2022); *see also TCA Television Corp. v. McCollum*, 839 F.3d 168 (2d Cir. 2016) (holding that nearly verbatim delivery of Abbott and Costello's famous comedy skit "Who's on First?" in theatrical play was not fair use); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013) (holding that use of copyrighted image, without authorization and without significant modification, as backdrop to commercial musical performance was transformative fair use).

e. The Seventh Circuit has questioned the utility of the "transformative use" concept. Judge Posner has proposed an alternative conception of the first-fair-use factor, which considers whether the purported fair use is a "complement" or a "substitute" for the original work. *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002); *see also Kienitz v. Sconnie Nation, LLC*, 766 F.3d 756 (7th Cir. 2014) (holding that unauthorized use of copyrighted photograph on t-shirt was fair use).

f. The Second Circuit has held "that the creation of a full-text searchable database is a quintessentially transformative use … [as] the result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn." *See Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98 (2d Cir. 2014) (holding that digital copying for purpose of permitting searchers to determine whether original employs certain words was transformative fair use); *see also Authors Guild v. Google, Inc.*, 804 F.3d 202, 217 (2d Cir. 2015) (concluding that defendant search engine was entitled to fair use defense for its Google Library and Google Books projects, which made digital copies of books submitted by major libraries and allowed public to search texts of digitally copied books and to see displays of snippets of text).

2. Nature of work

a. Reproduction of factual works (e.g., medical treatise) will more likely be considered fair use than reproduction of fiction; but the copying of whole articles from scientific journals for use by a company's scientists is not fair use. *Stewart v. Abend*, 495 U.S. 207, 237 (1990); *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992), *aff'd*, 37 F.3d 881 (2d Cir. 1994), *reprinted as amended*, 60 F.3d 913 (2d Cir. 1994).

b. However, even a "small amount of copying may fall outside of the scope of fair use where the excerpt copied consists of the heart of the original work's creative expression." *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1205 (2021). For instance, one court found that copying only 300 words out of 200,000 was *not* fair use when the portion quoted was "essentially the heart of the book." *Harper & Row Publishers*, 471 U.S. at 565.

3. Amount and substantiality of the portion used in relation to the work as whole

a. Reproduction of a small portion of a work (a paragraph or short chapter of a book, for example) is easier to justify as fair use than the reproduction of an entire book. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016) (holding that Madonna's use of a 0.23 second "horn hit" from a 1977 disco song was *de minimis* use—use of portion of copyrighted work that is so small that it does not rise to level of infringement).

b. One court found that copying only 300 words out of 200,000 was *not* fair use when the portion quoted was "essentially the heart of the book." *Harper & Row Publishers*, 471 U.S. at 565.

4. Effect of use on potential market for or value of copyrighted work (reproduction and distribution of work that injures its market for copyright owner is hard to justify on fair use grounds, and this includes reproduction in different medium that harms market for derivative works or licensing market for original work); however, Seventh Circuit explicitly forbids creation of a monopoly for secondary market of work. *Ringgold v. Black Ent. Television, Inc.*, 126 F.3d 70 (2d Cir. 1997); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409, 414 (S.D.N.Y. 1997), *aff'd on other grounds*, 147 F.3d 215 (2d Cir. 1998). *But see Ty, Inc. v. Publications Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002) (holding fair use was justified when work created secondary "Beanie Babies" collector's market and use of photos was required for defendant to compile collector's guide).

B. Specific Examples [§ 25.220]

1. Television programs copied off the air without the copyright owner's permission for private, noncommercial, time-shifting purposes is fair use. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (use of VCR for time-shifting was fair use); *see also Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060 (9th Cir. 2013) (affirming denial of request for preliminary injunction in part because commercial-skipping DVR was likely a fair use). *But see* Digital Copyright Millennium Act, 17 U.S.C. § 1201(a), (b) (anticircumvention and antitrafficking provisions); *see also Realnetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913 (N.D. Cal. 2009) (issuing preliminary injunction against company manufacturing DVD player that permitted users to save DVD's content on computer hard drive; finding no fair use).

2. Consumer's use of add-on device to improve performance of a video game was fair use, and the manufacturer of the add-on device was not liable for contributory infringement. *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992).

3. Parody may be fair use, even if it copies "heart" of the original, if the parody transforms the original to comment on the original work; work of satire that uses copyrighted work to comment on general social attitudes, rather than on the original work itself, is probably not fair use if it copies a substantial part of original work. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114–16 (2d Cir. 1998);

Rogers, 960 F.2d 301, 311 (2d Cir. 1992); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440 (N.D. Ill. 1991); *Kane v. Comedy Partners*, No. 00-158, 2003 WL 22383387 (S.D.N.Y. Oct. 16, 2003) (unpublished), *aff'd*, 98 F. App'x 73 (2d Cir. 2004).

4. Generally, the reproduction of copyrighted material without permission for use in university course packets is not fair use. *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996), *abrogated on other grounds as stated in Bell v. Eagle Mountain Saginaw Indep. Sch. Dist.*, 27 F.4th 313, 324 n.4 (5th Cir. 2022); *see also Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991); H.R. Rep. No. 94-1476 (1976); 127 Cong. Rec. E4750 (daily ed. Oct. 14, 1981) (detailed fair use guidelines addressing reproduction and distribution of multiple copies of materials for classroom use and off-air recording of broadcast programs for educational purposes).

5. Use of a copyrighted poster as a significant element of decor in the background of a television program was not fair use. *Ringgold v. Black Ent. Television, Inc.*, 126 F.3d 70 (2d Cir. 1997).

6. Providing access to streaming movie clips that lacked "transformative" character was not fair use. *Video Pipeline, Inc. v. Buena Vista Home Ent., Inc.*, 210 F. Supp. 2d 552 (D.N.J. 2002).

7. Replacing some characters and elements of a copyrighted work with new characters and elements to create a mash-up work, without altering the purpose or character of the original copyrighted expression, was not fair use. *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020) (holding use of elements from Dr. Seuss's *Go!* in Star Trek mash-up comic, in which elements plucked from *Go!* were used for same purpose and with same character as in original expression, was not fair use), *cert. denied*, 141 S. Ct. 2803 (2021).

V. COPYRIGHT OWNERSHIP AND TRANSFER [§ 25.221]

A. Initial Ownership [§ 25.222]

1. For works first created on or after January 1, 1978, copyright automatically vests in author(s) of work (limited exception for works created earlier). 17 U.S.C. § 201(a).

2. Joint works

   a. *Joint work* is created when multiple authors intend that their contributions be merged into inseparable or interdependent parts of a unitary whole. 17 U.S.C. § 101; *Janky v. Lake Cnty. Convention & Visitors Bureau*, 576 F.3d 356 (7th Cir. 2009); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir. 1994); *Woods v. Resnick*, 725 F. Supp. 2d 809, 818–19 (W.D. Wis. 2010); *Respect, Inc. v. Committee on Status of Women*, 815 F. Supp. 1112 (N.D. Ill. 1993).

   b. Each author of joint work owns an undivided interest in the whole work and has the right to use or license the work, despite differences in each author's contributions. 17 U.S.C. § 201(a); *Erickson*, 13 F.3d at 1068.

B. Works Made for Hire [§ 25.223]

1. Work created by an employee is considered a work made for hire if the employee created the work within the scope of his or her employment; the employer is then considered the author

and owns the copyright unless the parties expressly agree otherwise in a written agreement. 17 U.S.C. § 201(b); 17 U.S.C. § 101.

2. Work ordered or commissioned from an independent contractor

   a. Certain works specially ordered or commissioned are considered works made for hire if the parties expressly agree in a writing that precedes creation of work; commissioning party is considered the author and owns the copyright. 17 U.S.C. § 101, *as amended by* Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444 (removing sound recordings from list of works eligible to be works for hire by deleting amendment made by Pub. L. No. 106-113, 113 Stat. 1501 (1999)); *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 423 (7th Cir. 1992); *Woods v. Resnick*, 725 F. Supp. 2d 809, 822–26 (W.D. Wis. 2010).

   b. Otherwise, the independent contractor is considered the author and owns the copyright; the commissioning party only obtains ownership of the object in which the work is embodied and perhaps license for certain purposes, unless the author transfers the copyright to the commissioning party, *see infra* § 25.22.

3. State common-law principles determine employment status for copyright-ownership purposes with respect to post-1977 works. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

4. For works subject to the Copyright Act of 1909, whether a work created by an independent contractor is a work made for hire is determined by the "instance-and-expense" test. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119 (2d Cir. 2013).

C. Transfer of Ownership [§ 25.224]

1. Copyright ownership may be transferred in whole or part and any of the copyright's exclusive rights may be transferred and owned separately. 17 U.S.C. § 201(d).

2. Transfer of copyright ownership, including assignments, mortgages, and exclusive licenses, must be in writing signed by the owner of the rights conveyed. 17 U.S.C. § 204; *see, e.g.*, *Radio Television Espanola S.A. v. New World Ent., Ltd.*, 183 F.3d 922, 927–28 (9th Cir. 1999) (discussing requirements for writing to effect transfer of copyright).

   a. Notarization is not required but may provide additional protection.

   b. Nonexclusive licenses may be granted orally.

3. Recordation in the U.S. Copyright Office of transfers or other documents relating to a copyright is permissive but does provide certain advantages. 17 U.S.C. § 205.

4. Ownership of material object in which the work is embodied is not ownership of a copyright in the work; thus, one may become the owner of a computer disk or work of art, but the purchase of a tangible copy does not transfer the copyright, absent a written instrument signed by the owner to this effect. 17 U.S.C. § 202.

5. The author (or certain specified heirs if the author is deceased) may elect to terminate transfers or licenses of rights to the work under certain conditions. For transfers or licenses made after

January 1, 1978, the termination must be effectuated during a 5-year window that begins 35 years after execution of the grant; or, if the grant covers the right of publication, 35 years after publication or 40 years after execution of the grant, which ever term ends earlier. Notice is required, and additional conditions apply. The timing of the termination window will vary for grants made before January 1, 1978. 17 U.S.C. § 203; 17 U.S.C. § 304(c), (d).

VI. DURATION OF COPYRIGHT [§ 25.225]

A. Works Created on or After January 1, 1978 [§ 25.226]

1. Copyright exists from the creation of the work and endures for the author's life, plus 70 years after the author's death; after that time, the work is no longer protected by copyright and enters the public domain. 17 U.S.C. § 302(a).

2. For anonymous works, pseudonymous works, and works made for hire, the copyright lasts for 95 years from the year of first publication or for 120 years from the year of creation, whichever expires first. 17 U.S.C. § 302(c).

B. Copyrights Existing Before January 1, 1964 [§ 25.227]

1. For a work protected by statutory copyright before January 1, 1964, under then-existing law, the copyright, with certain exceptions, continues for 28 years from the date that the work was first published.

2. If the copyright owner renews the copyright with the U.S. Copyright Office within one year before expiration of the original term of the copyright, the copyright continues for another 47 years, for total of 75 years from the date the copyright was first secured. 17 U.S.C. § 304(a).

   NOTE: Effective October 27, 1998, the renewal period increased from 47 to 67 years, permitting a total term of 95 years. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1999); *Eldred v. Reno*, 239 F.3d 372 (D.D.C. 2001), *aff'd sub nom. Eldred v. Ashcroft*, 537 U.S. 186 (2003) (upholding constitutionality of the extension of terms for existing works).

C. Copyrights Secured Between January 1, 1964, and December 31, 1977 [§ 25.228]

Copyright continues for 75 years; copyright holder need not make renewal filing to extend original 28-year term, but there may be certain benefits to doing so. 17 U.S.C. § 304(a).

NOTE: Effective October 27, 1998, the renewal period increased from 47 to 67 years, permitting a total term of 95 years. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1999).

D. Works Created but Not Copyrighted Before January 1, 1978 [§ 25.229]

Copyright in works created before January 1, 1978, but not thereafter, either in the public domain or copyrighted, exists from January 1, 1978, and continues for the term described in 17 U.S.C. § 302 with certain exceptions. 17 U.S.C. § 303.

E. Copyright Restoration [§ 25.230]

Under the Uruguay Round Agreements Act, certain works that have fallen into the public domain in the United States, but that are still protected by copyright in the country of original publication, may be eligible for copyright restoration. 17 U.S.C. § 104A; *see Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007) (ordering First Amendment scrutiny of provision that restored copyright protection to certain foreign works that had fallen into the public domain).

VII. COPYRIGHT NOTICE [§ 25.231]

A. In General [§ 25.232]

1. Copyright notice consists of

   a. Symbol ©, or word *Copyright* or abbreviation *Copr.*;

   b. Year of first publication of work; and

   c. Name of copyright owner. 17 U.S.C. § 401(b).

2. Should be placed in location designed to give reasonable notice of claim of copyright. 17 U.S.C. § 401(c).

3. For copyright in sound recordings, symbol "p" within circle is substituted for ©. 17 U.S.C. § 402.

B. Works First Published Before January 1, 1978 [§ 25.233]

See 17 U.S.C. § 303(a); *Societe Civile Succession Guino v. Renoir*, 549 F.3d 1182 (9th Cir. 2008).

1. Prior copyright law (1909 Act) applies to works.

2. Copyright notice required on each copy or phonorecord publicly distributed (in general, omission of notice results in loss of copyright protection).

3. Distribution of a phonorecord without copyright notice before January 1, 1978, does not constitute publication of the underlying musical work. 17 U.S.C. § 303.

C. Works First Published Between January 1, 1978, and March 1, 1989 [§ 25.234]

1. Omission of copyright notice on publicly distributed copies or phonorecords of works results in a loss of copyright protection, unless

   a. Notice has been omitted from only a relatively small number of copies;

   b. Copyright owner registers the work with U.S. Copyright Office within five years after the work's first publication, and a reasonable effort is made to add notice to all copies distributed after the omission is discovered;

   c. Publication is limited to a selected group for a limited purpose, without right of distribution, reproduction, or sale of work attaching, *Estate of Martin Luther King, Jr.*,

Inc. v. CBS, Inc., 194 F.3d 1211 (11th Cir. 1999) (distinguishing between general publication, which falls into public domain, and "limited publication," which does not); or

d. Notice has been omitted in violation of express requirement in writing. 17 U.S.C. § 405(a).

2. Any person who innocently infringes a copyright in reliance on an authorized copy or phonorecord that does not have copyright notice incurs no liability for damages, but the copyright owner may still obtain an injunction against continued infringement and recover profits attributable to infringement. 17 U.S.C. § 405(b).

D. Works First Published on or After March 1, 1989 [§ 25.235]

Omitting copyright notice on publicly distributed copies or phonorecords does *not* result in a loss of copyright protection; however, notice is advisable because it

1. Alerts others to claim of copyright; and

2. In most cases, prevents claim of innocent infringement.

VIII. REGISTRATION [§ 25.236]

A. In General [§ 25.237]

1. Copyright owner may register the copyright at any time before it expires, whether before or after publication.

2. Registration is not currently a condition of copyright protection unless notice has been omitted from copies published between January 1, 1978, and March 1, 1989, *see supra* § 25.32. 17 U.S.C. § 408.

3. Copyright registration or preregistration is a prerequisite to infringement suits except for actions brought for violation of visual artists' rights under 17 U.S.C. § 106A(a), *see infra* § 25.50; however, a copyright holder's failure to comply with the registration requirement does not restrict a federal court's subject-matter jurisdiction over infringement claims involving unregistered works. 17 U.S.C. § 411; *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).

4. Statutory damages and attorney fees may only be awarded for infringements occurring after the effective registration date, unless registration occurred within three months after first publication or the work was preregistered under 17 U.S.C. § 408(f) before the commencement of the infringement and the registration was effective no later than one month after the copyright owner learned of the infringement. 17 U.S.C. § 412; *see Data Gen. Corp. v. Grumman Sys. Support Corp.*, 795 F. Supp. 501 (D. Mass. 1992) (discussing effect of this provision on infringement of derivative works), *aff'd*, 36 F.3d 1147 (1st Cir. 1994) (abrogated on other grounds by *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010)).

5. The district court has discretion to award attorney fees to a prevailing party and should give "substantial weight" to whether the losing party's position was objectively unreasonable. *Kirtsaeng v. John Wiley & Sons*, 579 U.S. 197 (2016).

6. Other advantages to registration include presumption of validity of a copyright registered before or within five years after the first publication. 17 U.S.C. § 410(c).

B. Procedure [§ 25.238]

1. Application for copyright registration is prepared online at https://copyright.gov/registration/ (last visited Mar. 18, 2022) or on forms provided by U.S. Copyright Office. 17 U.S.C. § 409; 17 U.S.C. § 410; 37 C.F.R. pt. 202.

   Forms must be accompanied by one copy of an unpublished work or two copies of work in published form, together with a registration fee (generally $45–65 for online applications or $125 for paper applications). 37 C.F.R. § 201.3(c). A link to the U.S. Copyright Office's fee structure is available at https://www.copyright.gov/about/fees.html (last visited Mar. 18, 2022).

   a. Forms with instructions may be obtained by writing

      U.S. Copyright Office
      Library of Congress
      101 Independence Avenue SE
      Washington, DC 20559
      (877) 476-0778 (General Information)

      or may be downloaded from https://www.copyright.gov/forms (last visited Mar. 18, 2022).

   b. A certification of registration is valid even if it contains inaccurate information, so long as the copyright holder lacked knowledge that the information was inaccurate. *Unicolors, Inc. v. H&M Hennes & Mauritz, L. P.*, 142 S. Ct. 941, 945 (2022) (citing 17 U.S.C. § 411(b)(1)).

2. Primary registration forms

   a. TX (for nondramatic literary works, including computer programs, databases, textbooks, reference works, and fiction).

   b. SE and SE/Group (for serials, including weekly and monthly magazines and newspapers).

   c. PA (for performing arts, including musical works, dramatic works, and motion pictures).

   d. VA (for works of visual art, including pictorial, graphic, and sculptural works, photographs, prints, maps, charts, technical drawings, and advertisements).

   e. SR (for sound recordings).

   f. GDN (since September 1, 1992; group registration for daily newspapers).

3. Special provisions apply to registration of computer software. U.S. Copyright Office, Copyright Registration of Computer Programs (Circular 61).

IX. REMEDIES [§ 25.239]

A. Infringement [§ 25.240]

Owner of copyrighted work can bring infringement action for violation of exclusive rights in 17 U.S.C. § 106. *But see Righthaven LLC v. Hoehn*, 716 F.3d 1166 (9th Cir. 2013) (holding that holder of title to copyrighted work who had transferred the rights to reproduce, distribute, or exploit any other exclusive right under the Copyright Act lacked standing to sue for infringement). 17 U.S.C. § 501(b).

1. Registration or preregistration of a copyright is a prerequisite to an infringement action (exceptions exist for works originating outside the United States). 17 U.S.C. § 411; *see also Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019).

2. Owner of copyright must establish (1) ownership of a valid copyright, and (2)the copying of the protected elements of the work. *Softel, Inc. v. Dragon Med. & Sci. Commc'ns, Inc.*, 118 F.3d 955, 963 (2d Cir. 1997); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 701 (2d Cir. 1992).

    a. *Copying.* Copying can be shown by direct evidence or by showing that the infringer had access to the copyrighted work and that the infringing work is sufficiently similar to the copyrighted work. *Susan Wakeen Doll Co. v. Ashton Drake Galleries*, 272 F.3d 441, 453 (7th Cir. 2001) (holding access may be inferred when two works are entirely similar); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167 (7th Cir. 1997) (discussing test for determining copying in Beanie Babies knock-off case).

    b. *Improper appropriation.* Elements of the infringing work must be substantially similar to protected expression in the copyrighted work; similarity to unprotected elements of the copyrighted work is not infringement.

3. Inducement to infringe copyright:

    a. The classic instance of inducement to commit copyright infringement is by advertisement or solicitation that communicates a message designed to stimulate others to commit violations. Evidence of active steps taken to encourage direct infringement, such as advertising an infringing use or instructing how to engage in an infringing use, shows an affirmative intent that a product be used to infringe, and a showing that infringement was encouraged overcomes the law's reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use. In addition to intent to bring about infringement and distribution of a device suitable for infringing use, the inducement theory also requires evidence of actual infringement by recipients of the device. *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

4. The Seventh Circuit strongly suggested that the affirmative defense of fair use is more properly decided on a motion for summary judgment than on a motion for judgment on the pleadings. *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 692 (7th Cir. 2012).

B. Injunctions [§ 25.241]

1. Court may award temporary and final injunctions to prevent or restrain infringement of copyright. 17 U.S.C. § 502.

2. Court may also impound all infringing copies and may order their destruction. 17 U.S.C. § 503; *Paramount Pictures Corp. v. Doe*, 821 F. Supp. 82 (E.D.N.Y. 1993).

3. Irreparable harm is no longer presumed once a plaintiff establishes a likelihood of success on the merits of a copyright claim; the grant of a motion for a preliminary injunction in a copyright case must be based on a consideration of the traditional injunction factors. *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 755 (7th Cir. 2012).

C. Damages [§ 25.242]

1. Jury may award actual damages and any additional profits of the infringer. 17 U.S.C. § 504.

   a. In establishing the infringer's profits, the copyright owner need only present proof of the infringer's gross revenue.

   b. Infringer's indirect profits are recoverable only if the copyright owner establishes a link between the infringement and the profit revenue. *Mackie v. Rieser*, 296 F.3d 909 (9th Cir. 2002).

   c. Infringer has the burden of proving deductible expenses and elements of profit attributable to factors other than the work infringed.

2. In lieu of actual damages and profits, jury may award statutory damages (at copyright owner's election at any time before final judgment is rendered) for all infringements of any one work, in an amount from $750 to $30,000 as the court considers just. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998); *Columbia Pictures Indus. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186 (9th Cir. 2001); *see also Stevens v. Aeonian Press, Inc.*, No. 00-6330, 2002 WL 31387224 (S.D.N.Y. Oct. 23, 2002) (unpublished) (holding statutory damages may be awarded in excess of actual damages in attempt to deter future infringing acts).

   a. If the infringement was willfully committed, the jury in its discretion may increase the award of statutory damages to as much as $150,000.

   b. If the infringer proves that he or she was not aware and had no reason to believe that his or her acts constituted infringement, jury may reduce award of statutory damages to as little as $200.

3. In cases in which statutory damages are either not available or not sought, punitive damages may also be available, although this issue is not completely settled. *TVT Recs. v. Island Def Jam Music Grp.*, 262 F. Supp. 2d 185 (S.D.N.Y 2003). *But see Viacom Int'l Inc. v. Youtube, Inc.*, 540 F. Supp. 2d 461 (S.D.N.Y. 2008).

D. Costs and Attorney Fees [§ 25.243]

Court may allow costs and reasonable attorney fees to prevailing party; prevailing plaintiffs and prevailing defendants must be treated alike in determining whether attorney fees should be awarded. 17 U.S.C. § 505; *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994); *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 140 F.3d 70 (1st Cir. 1998) (discussing factors courts should consider in awarding attorney fees and costs); *Mag Jewelry Co. v. Cherokee, Inc.*, 496 F.3d 108 (1st Cir. 2007) (holding plaintiff's litigation tactics and tenuousness of claim justified award of attorney fees to defendant).

Furthermore, the Supreme Court has clarified that an award of "costs" in copyright litigation pursuant to 17 U.S.C. § 505 is limited to the six categories specified in the general costs statute, codified at 28 U.S.C. § 1821 and 28 U.S.C. § 1920. *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873 (2019).

E. Criminal Penalties [§ 25.244]

Fines and imprisonment are provided for persons who infringe copyrights willfully and do so (1) for purposes of a commercial advantage or private gain; (2) for a retail value of more than $1,000 in any 180-day period; or (3) by making material available to the public on a computer network that the infringer knows, or should have known, was intended for public distribution. 17 U.S.C. § 506; 18 U.S.C. § 2319; *United States v. Larracuente*, 952 F.2d 672 (2d Cir. 1992).

No Electronic Theft (NET) Act amends U.S.C. titles 17 and 18 to enhance criminal penalties for willful infringement. NET Act expands definition of *financial gain*, under 17 U.S.C. § 101, to include receipt of anything of value, including copies of copyrighted works; thus, trading unauthorized copies of copyrighted works could result in criminal penalties; collective value of unauthorized copies aids court's calculation of appropriate penalty. No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997); *United States v. Rothberg*, 222 F. Supp. 2d 1009 (N.D. Ill. 2002).

F. Limitation on Actions [§ 25.245]

1. Civil actions must be brought within three years after the claim accrues. 17 U.S.C. § 507(b); *Taylor v. Meirick*, 712 F.2d 1112, 1117–18 (7th Cir. 1983) (Copyright Act statute of limitation is tolled until plaintiff learned, or by reasonable diligence could have learned, of cause of action); *see also EMI Ent. World, Inc. v. Karen Recs., Inc.*, 603 F. Supp. 2d 759 (S.D.N.Y. 2009).

2. Criminal proceedings must be commenced within five years after the cause of action arises. 17 U.S.C. § 507(b).

3. Federal courts of appeals are split on whether the statute of limitation may be extended under a theory of continuing tort. *Makedwde Publ'g Co. v. Johnson*, 37 F.3d 180 (5th Cir. 1994) (rejecting continuing tort theory for Copyright Act claims); *Taylor*, 712 F.2d at 1118–19. *But see Wechsberg v. United States*, 54 Fed. Cl. 158 (2002) (holding that cause of action against the government accrues from time of last infringing act).

4. Under Copyright Act's three-year look-back provision, an infringement is actionable within three years, and only three years, of its occurrence. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014) (holding that author's heir who filed copyright infringement claim 18 years after copyright renewal was not barred by doctrine of laches for claim for damages within 3-year window established in 17 U.S.C. § 507(b)).

G. Jury Trials [§ 25.246]

U.S. Supreme Court has held that the plaintiff in an infringement action who is seeking statutory damages is entitled to a jury trial on the issue of damages. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

H. State Immunity from Infringement Actions [§ 25.247]

States are immune, under the 11th Amendment, from suits in federal court for damages for copyright infringement. *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020) ("Article I's Intellectual Property Clause could not provide the basis for an abrogation of sovereign immunity. And … Section 5 of the Fourteenth Amendment could not support an abrogation on a legislative record like the one here."). However, Congress could pass a valid copyright abrogation law in the future. *Id.* ("[G]oing forward, Congress will know those rules. And under them, if it detects violations of due process, then it may enact a proportionate response. That kind of tailored statute can effectively stop States from behaving as copyright pirates. Even while respecting constitutional limits, it can bring digital Blackbeards to justice.").

I. Federal Preemption [§ 25.248]

Copyright Act preempts state common law and statutes for those rights that are equivalent to those conferred by Act. 17 U.S.C. § 301(a); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (holding that enforcement of shrink-wrap license did not create rights equivalent to copyright and was therefore not preempted); *Higher Gear Grp., Inc. v. Rockenbach Chevrolet Sales, Inc.*, 223 F. Supp. 2d 953 (N.D. Ill. 2002) (holding state tortious interference with contract and civil conspiracy claims are preempted); *see also Toney v. L'Oreal USA, Inc.*, 406 F.3d 905 (7th Cir. 2005); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003) (finding contract claims are not preempted).

NOTE: Federal courts are divided on when a claim for violation of the right of publicity is preempted by the Copyright Act. *See Downing v. Abercrombie & Fitch*, 265 F.3d 994, 999–1000 (9th Cir. 2001) (holding that right-of-publicity claim brought by surfers whose images were used by clothing company in catalogue was not preempted by the Copyright Act because "it is not the publication of the photograph itself, as a creative work of authorship, that is the basis for [the] claims, but rather, it is the use of the [surfers'] likenesses and their names," *id*. at 1003); *compare with Laws v. Sony Music Ent.*, 448 F.3d 1134, 1136 (9th Cir. 2006) (holding that singer's right-of-publicity claim was preempted by copyright law when two other singers obtained copyright license to use a segment of singer's song and incorporated it into another song that became popular; claim was not based on singer's "personal" identity but, instead, derived from use of her copyrighted work).

J. Federal Jurisdiction [§ 25.249]

Federal courts have exclusive jurisdiction over cases arising under the Copyright Act. 28 U.S.C. § 1338.

Copyright counterclaims and contract disputes involving copyright issues do not *arise under* the Copyright Act for purposes of federal jurisdiction. *See Holmes Grp. v. Vornado Air Circulation Sys.*, 535 U.S. 826 (2002) (finding U.S. Court of Appeals for Federal Circuit did not have jurisdiction over case involving patent infringement counterclaim based on interpretation of the "arising under" language in 28 U.S.C. § 1338, which covers both patents and copyrights), *superseded by statute on other grounds as stated in Hiatt v. Tesla Inc.*, No. CV 21-00198 LEK-KJM, 2021 WL 4313083 (D. Haw. Sept. 22, 2021) (slip copy); *Scholastic Ent., Inc., v. Fox Ent. Grp., Inc.*, 336 F.3d 982 (9th Cir. 2003); *Green v. Hendrickson Publishers*, 770 N.E.2d 784 (Ind. 2002).

X. VISUAL ARTISTS' RIGHTS [§ 25.250]

A. In General [§ 25.251]

Independent of copyright, authors of certain types of visual art works have rights to attribution of their work and the right, within certain limitations, to prevent intentional distortion, mutilation, and certain other types of modification or destruction of their works; transfer of copyright ownership does not end or waive these rights. 17 U.S.C. § 106A; 17 U.S.C. § 101.

B. Defenses and Remedies [§ 25.252]

Visual artists' rights are subject to fair use defense, *see supra* § 25.17, and to remedies available for copyright infringement, *see supra* § 25.38; however, there is no requirement that the copyright in the work be registered before suit for violation of rights or to obtain statutory damages and attorney fees.

C. Effective Date [§ 25.253]

Visual Artists Rights Act of 1990 became effective June 1, 1991, and applies to works created on or after that date and to eligible works created before that date if title (to material object embodying work) has not, as of that date, been transferred from author. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, § 610, 104 Stat. 5089, 5132 (1991).

D. Federal Preemption [§ 25.254]

Visual Artists Rights Act preempts state common law and statutes for rights equivalent to those conferred by it. 17 U.S.C. § 301(f).

XI. DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 [§ 25.255]

A. In General [§ 25.256]

Digital Millennium Copyright Act (DMCA) applies to works in digital form, such as tangible copies of works in digital format, including CDs or DVDs, and intangible copies of downloaded works and online works. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

B. Anticircumvention Provision [§ 25.257]

1. DMCA DMCA protects against violations related to circumvention of technological measures (e.g., tampering with encryption and copyright-protection codes). 17 U.S.C. § 1201(a); *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000) (finding that promulgation of DeCSS decryption software violated DMCA).

2. Civil and criminal remedies are available.

3. Circumvention is permitted under limited circumstances for nonprofit libraries, archives, and educational institutions to gain access to commercially exploited copyrighted work. 17 U.S.C. § 1201(d).

4. Circumvention is permitted under limited circumstances when protection of personally identifying information is necessary, and for other law-enforcement, intelligence, and

governmental activities. Under narrow circumstances, reverse engineering is also permissible. 17 U.S.C. § 1201(e)–(f).

C. Copyright Management Information [§ 25.258]

1. DMCA prohibits interfering with the integrity of copyright management information, which includes information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, such as title, author, copyright owner, and terms and conditions for use. Limited statutory exceptions exist. 17 U.S.C. § 1202(a)–(c).

D. Online Copyright Infringement Liability Limitation [§ 25.259]

1. Online service provider is not liable for infringement of copyright on the basis of routing, transmitting, or providing connections for materials through its system or when intermediate or transient storage of material is made to its system. 17 U.S.C. § 512(a); *see Recording Indus. Ass'n of Am. v. Verizon Internet Servs.*, 351 F.3d 1229 (D.C. Cir. 2003) (finding DMCA subpoena power did not apply to online service provider that was routing infringing material to or from individual subscribers' computers).

2. To avoid contributory infringement, online service provider must follow the guidelines established in DMCA, including reasonable steps to prevent and terminate infringement. 17 U.S.C. § 512(a)–(c).

E. Safe-Harbor Provision [§ 25.260]

17 U.S.C. § 512; *Capitol Recs., LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500 (S.D.N.Y. 2013), *aff'd in part, vacated in part, remanded for further proceedings*, 826 F.3d 78 (2d Cir. 2016).

1. Title II of the DMCA establishes a series of four safe harbors that allow qualifying service providers to limit their liability for claims of copyright infringement. A finding of safe-harbor application necessarily protects a defendant from affirmative claims for monetary relief. But because the DMCA safe harbors are affirmative defenses, a defendant has the burden of establishing that he or she meets the statutory requirements.

2. To qualify for protection under any of the safe harbors, a party must first establish that it meets three threshold criteria. The party "(1) must be a 'service provider' as defined by the statute; (2) must have adopted and reasonably implemented a policy for the termination in appropriate circumstances of users who are repeat infringers; and (3) must not interfere with standard technical measures used by copyright owners to identify or protect copyrighted works." *Viacom, Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27 (2d Cir. 2012); *Wolk v. Kodak Imaging Network*, 840 F. Supp. 2d 724, 743 (S.D.N.Y.2012); *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293 (4th Cir. 2018) (declining to apply safe-harbor protection when service provider failed to implement its repeat infringer policy in a consistent or meaningful way).

3. If a party establishes the threshold criteria, it must then establish that it falls under one of the four safe harbors: (1) protecting online service providers that act as conduits for transmission of material, 17 U.S.C. § 512(a); (2) protecting service providers that provide temporary storage, 17 U.S.C. § 512(b); (3) protecting service providers against infringement by reason of the storage at the direction of a user of material that resides on a system if certain requirements

are met, 17 U.S.C. § 512(c); and (4) protecting service providers that link users to online locations, 17 U.S.C. § 512(d).

XII. COPYRIGHT ALTERNATIVE IN SMALL-CLAIMS ENFORCEMENT ACT OF 2020 [§ 25.261]

A. In General [§ 25.262]

The Copyright Alternative in Small-Claims Enforcement Act of 2020 (CASE Act), enacted on December 27, 2020, amends the Copyright Act, title 17 of the U.S. Code. Namely, it provides an alternative forum to the federal court system for resolving copyright infringement disputes. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. Q, tit. II, §§ 212–220, 134 Stat. 1182, 2176–200 (2020) (codified at 17 U.S.C. §§ 1501–1511).

B. Copyright Claims Board [§ 25.263]

The CASE Act establishes a Copyright Claims Board, a forum in which parties may voluntarily bring their copyright infringement disputes without having to file a claim in federal district court. 17 U.S.C. § 1502(a); 17 U.S.C. § 1504(a), (c). It is expected that the Copyright Claims Board will begin hearing claims in spring 2022. *See* U.S. Copyright Office, *Copyright Small Claims and the Copyright Claims Board*, https://www.copyright.gov/about/small-claims/ (last visited Mar. 18, 2022).

C. Choice of Law [§ 25.264]

1. Although the Copyright Claims Board will sit within the U.S. Copyright Office, it will apply the law of the federal jurisdiction in which the action could have been brought if filed in U.S. district court. 17 U.S.C. § 1502(b)(9); 17 U.S.C. § 1503(b)(1); 17 U.S.C. § 1506(a)(1), (2).

2. If the action could have been brought in multiple federal jurisdictions, the Copyright Claims Board will determine which federal jurisdiction has the most significant ties to the parties and conduct at issue. 17 U.S.C. § 1506(a)(2).

D. Remedies [§ 25.265]

1. As in federal court, parties may seek actual or statutory damages. 17 U.S.C. § 504; 17 U.S.C. § 1504(e)(1). However, statutory damages are capped at $15,000 per work, and total damages (exclusive of attorney fees) are capped at $30,000 per proceeding, regardless of the number of claims asserted. 17 U.S.C. § 1504(e)(1).

2. Attorney fees are recoverable, but only in cases involving bad-faith conduct. 17 U.S.C. § 1504(e)(3); 17 U.S.C. § 1506(y)(2). When recoverable, such fees are capped at $5,000, absent extraordinary circumstances. 17 U.S.C. § 1506(y)(2).

XIII. PRE-1972 SOUND RECORDINGS UNDER WISCONSIN LAW [§ 25.266]

1. Federal copyright law did not protect sound recordings until 1972. The Copyright Act of 1976 expressly left protection for pre-1972 sound recordings in the exclusive domain of the states until February 15, 2067 (the year when the last copyrights for pre-1972 sound recordings will expire due to the 95-year duration of copyright). 17 U.S.C. § 301(c).

2. In 1974, the Wisconsin Supreme Court held that states may provide copyright protection by common law in *Mercury Records Productions, Inc. v. Economic Consultants, Inc.*, 64 Wis. 2d 163 (1974). In *Mercury Records*, the court held that the common-law theory of misappropriation prohibits the copying and re-releasing of recordings. In 1975, the Wisconsin Legislature enacted Wis. Stat. § 943.207, which criminalized the unauthorized copying of sound recordings made before 1972. When *Mercury Records* was filed, federal copyright law did not provide protection for sound recordings.

3. Wisconsin law provides for criminal liability for anyone who "[i]ntentionally transfers, without the consent of the owner, any sounds first embodied in or on a recording before February 15, 1972, with intent to sell or rent the recording into or onto which such sounds are transferred for commercial advantage or private financial gain." Wis. Stat. § 943.207(1)(a). The statute also bars the advertisement, offer for sale or rent, sale, rental, or possession of a recording, or its transportation within the state for either commercial advantage or private financial gain and with knowledge that the content of the recording has been transferred into or onto a recording in violation of the statute. Wis. Stat. § 943.207(1).

4. Wisconsin law exempts "transfer by a cable television operator or radio or television broadcaster of any recorded sounds, other than from the sound track of a motion picture, intended for, or in connection with, broadcast or other transmission or related uses, or for archival purposes" as well as "transfer of any video or nonvideo audio tape intended for possible use in a civil or criminal action or special proceeding in a court of record." Wis. Stat. § 943.207(4). The penalty for violation of Wis. Stat. § 943.207 varies depending on the number of recordings implicated and the value of such recordings. The statute provides that a violator may be charged with a Class A misdemeanor, or a Class I or H felony. Wis. Stat. § 943.207(3m).

5. Federal copyright law protects sound recordings fixed on or after February 15, 1972, while state law applies to recordings fixed before this date. Federal law will preempt any state protections, such as those described above, on February 15, 2067. On October 11, 2018, Congress enacted the Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (hereinafter Music Works Modernization Act). That Act replaced 17 U.S.C. § 301(c) with a new section preempting certain state-law claims for digital transmissions of pre-1972 sound recordings that occur after the effective date of the Act. *See* Music Works Modernization Act, Pub. L. No. 115-264, § 202(a)(1), 132 Stat. at 3728. The new legislation also makes the remedies in the federal copyright statute available to owners of rights in pre-1972 sound recordings. It clarifies the availability of statutory licenses for these recordings in certain streaming contexts and establishes exceptions for good-faith, noncommercial uses of pre-1972 sound recordings that are not currently being commercially exploited.

Chapter 26
Patent Law

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NOTE: Unless otherwise indicated, all references in this chapter to the United States Code (U.S.C.) are current through Pub. L. No. 117-107 (Mar. 29, 2022); and all references to the Code of Federal Regulations (C.F.R.) are current through 87 Fed. Reg. 18,739 (Mar. 31, 2022).

I. INTRODUCTION [§ 26.267]

A. In General [§ 26.268]

1. A patent is one of a series of rights known collectively as *intellectual property*.

2. Other intellectual property rights

   a. Trademarks and service marks

   b. Trade secrets

   c. Copyrights

   d. Trade dress

   e. Rights of publicity

3. Constitutional basis and statutory and administrative guidelines

   a. "The Congress shall have power … [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. Const. art. 1, § 8, cl. 8.

   b. Patent laws. 35 U.S.C. §§ 1–376; *see also* Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

   c. Rules of Practice in Patent Cases. 37 C.F.R. §§ 1.1–.1071; 37 C.F.R. §§ 41.1–.208.

4. Reasons for patent system

   a. Business asset: Provides economic incentive to inventors and potential investors in invention.

   b. Technology disclosure: Publicly exposes latest technology on which to build new inventions.

   c. The patent system lies at the core of the United States' economy with many competing interests that drive policy.

5. Patent law jurisdiction is exclusive to the federal courts, and the states are preempted from enacting patent laws. 28 U.S.C. § 1338(a).

B. Resources [§ 26.269]

1. References available from the Superintendent of Documents, U.S. Government Printing Office (GPO), Washington, DC 20402 (or through the GPO's online bookstore, at https://bookstore.gpo.gov (last visited Apr. 4, 2022)).

   a. USPTO, *Manual of Patent Examining Procedure* (*MPEP*) (9th ed. Rev. 10.2019), https://www.uspto.gov/web/offices/pac/mpep/index.html (last revised June 2020) [hereinafter USPTO, *MPEP*].

   b. USPTO, *Patent and Trademark Practitioners*, https://www.uspto.gov/learning-and-resources/patent-and-trademark-practitioners (last modified July 3, 2019).

   c. USPTO, *Patent Office Gazette* (short description of all patents issued during previous week), https://www.uspto.gov/learning-and-resources/official-gazette (last modified Mar. 29, 2022).

2. Patent law cases reported in BNA's *United States Patent Quarterly* (U.S.P.Q. and U.S.P.Q.2d), the Supreme Court Reporters, Federal Supplement (F. Supp., F. Supp. 2d and F. Supp. 3d), and Federal Reporters (F., F.2d, F.3d, F.4th).

3. Patent, Trademark & Copyright Journal (BNA).

4. Patent depository libraries

   a. Public Search Facility of the U.S. Patent and Trademark Office (USPTO), Alexandria, VA, (571) 272-3275.

   b. In Wisconsin

      (1) Kurt F. Wendt Engineering Library, University of Wisconsin-Madison, (608) 265-9802.

      (2) Milwaukee Public Library, (414) 286-3051.

5. Internet sites

   a. USPTO: https://www.uspto.gov/ (last visited Apr. 4, 2022).

   b. World Intellectual Property Organization: https://www.wipo.int/ (last visited Apr. 4, 2022).

   c. Federal statutes governing intellectual property: https://www.govinfo.gov/app/collection/uscode/ (last visited Apr. 4, 2022).

   d. European Patent Office (EPO): https://www.epo.org/ (last visited Apr. 4, 2022).

e. Other commercial databases also provide access to patent documents.

(1) Google Patents: https://patents.google.com/ (last visited Apr. 4, 2022).

(2) Derwent Innovation: https://clarivate.com (last visited Apr. 4, 2022).

(3) Free Patents Online: http://www.freepatentsonline.com/ (last visited Apr. 4, 2022).

II. OVERVIEW OF PATENT [§ 26.270]

A. Definition of Patent [§ 26.271]

1. Confers on its owner the right to exclude others from making, using, offering for sale, or selling the patented invention within the United States, its territories, and its possessions, or importing the invention into the same areas for the life of the patent.

2. Can be obtained only in exchange for full disclosure of the invention to the public.

3. *Not* a right to use or commercialize patented technology, but a right to exclude others from making, using, and selling technology.

B. Patentable Inventions [§ 26.272]

See 35 U.S.C. § 101; 35 U.S.C. § 161; 35 U.S.C. § 171; USPTO, *Subject Matter Eligibility*, https://www.uspto.gov/patent/laws-and-regulations/examination-policy/subject-matter-eligibility (last visited Apr. 4, 2022).

1. Process

2. Machine

3. Article of manufacture

4. Composition of matter

5. Microorganisms. *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

6. Non-naturally occurring polypeptides and nucleic acids (e.g., complementary DNA (cDNA) but not isolated genomic DNA). *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013).

7. Methods of medical treatment. *Vanda Pharm. Inc. v. West-Ward Pharm. Int'l Ltd.*, 887 F.3d 1117 (Fed. Cir. 2018).

8. Plants and animals. *In re Roslin Inst. (Edinburgh)*, 750 F.3d 1333 (Fed. Cir. 2014); *Ex parte Allen*, 2 U.S.P.Q.2d (BNA) 1425 (BPAI 1987); *Ex parte Hibberd*, 227 U.S.P.Q. (BNA) 443 (BPAI 1985).

9. Seeds and seed-grown plants. *Pioneer Hi-Bred Int'l, Inc. v. J.E.M. Ag Supply, Inc.*, 200 F.3d 1374 (Fed. Cir. 2000), *aff'd*, 534 U.S. 124 (2001).

10. Computer software. Smart Sys. Innovations, LLC v. Chicago Transit Auth., 873 F.3d 1364 (Fed. Cir. 2017); DDR Holdings, LLC v. Hotels.com, L.P., 773 F.3d 1245 (Fed. Cir. 2014). But see Alice Corp. v. CLS Bank Int'l, 573 U.S. 208 (2014); Ultramercial, Inc. v. Hulu, LLC, 772 F.3d 709 (Fed. Cir. 2014); buySAFE, Inc. v. Google, Inc., 765 F.3d 1350 (Fed. Cir. 2014).

11. Business methods. *SAP Am., Inc. v. Investpic, LLC*, 898 F.3d 1161 (Fed. Cir. 2018); *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299 (Fed. Cir. 2016); *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016); *In re Comiskey*, 554 F.3d 967 (Fed. Cir. 2009); *State Street Bank & Tr. Co. v. Signature Fin. Grp, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998), *abrogated by In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008), *aff'd but criticized by Bilski v. Kappos*, 561 U.S. 593 (2010). *But see Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014).

12. Improvement of any of the above

13. Ornamental designs (Design Patent)

14. Patentable subject matter includes "anything under the sun that is made by man." *Diamond*, 447 U.S. at 309.

    NOTE: Court decisions pertaining to patent-eligible and patent-ineligible subject matter reviewed by the USPTO can be found at USPTO, *Subject Matter Eligibility Court Decisions*, https://www.uspto.gov/sites/default/files/documents/ieg-sme_crt_dec.xlsx (last updated Oct. 17, 2019).

C. Nonpatentable Inventions [§ 26.273]

See USPTO, *Subject Matter Eligibility*, https://www.uspto.gov/patent/laws-and-regulations/examination-policy/subject-matter-eligibility (last visited Apr. 4, 2022).

1. Judicial exceptions to statutorily defined patent-eligible subject matter: laws of nature, natural phenomena, and abstract ideas. *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012); *Bilski v. Kappos*, 561 U.S. 593 (2010); *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299 (Fed. Cir. 2016); *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016); *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371 (Fed. Cir. 2015).

2. An invention must amount to "significantly more" than a judicial exception or must integrate a judicial exception into a practical application to constitute patent-eligible subject matter. *See* 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019).

3. Invention depending entirely on printed matter.

4. Naturally occurring products per se (e.g., ores, insects, isolated genomic DNA). *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013).

5. Diagnostic methods. *Mayo Collaborative Servs. v. Prometheus Labs., Inc*., 566 U.S. 66 (2012); *Athena Diagnostics, Inc. v. Mayo Collaborative Servs.*, LLC, 915 F.3d 743 (Fed. Cir. 2019); *Ariosa Diagnostics, Inc. v. Sequenom, Inc*., 788 F.3d 1371 (Fed. Cir. 2015); *In re BRCA1- & BRCA2-Based Hereditary Cancer Test Patent Litig.*, 774 F.3d 755 (Fed. Cir. 2014).

6. Mental processes. *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 689 F.3d 1303 (Fed. Cir.), *aff'd in part, rev'd in part*, 569 U.S. 576 (2013); *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366 (Fed. Cir. 2011).

D. Conception and Inventorship [§ 26.274]

1. Conception: Formation in inventor's mind of definite and permanent idea of complete and operative invention. The basic test for conception is whether the inventor's idea was definite and permanent enough for a skilled person to understand it; the skilled person need not know that the invention would work for conception to be complete. *University of Pittsburgh v. Hedrick*, 573 F.3d 1290 (Fed. Cir. 2009); *Coleman v. Dines*, 754 F.2d 353 (Fed. Cir. 1985).

   NOTE: Conception is a requirement before a patent application can be prepared and filed.

2. The USPTO *requires* the patent application to list true inventor(s), i.e., only those who assisted in the *conception* of the invention (very important), as applicant. 35 U.S.C. § 111(a)(1).

3. Joint invention occurs when two or more persons, working together, each contribute to the conception of the invention. The statute does not spell out the minimum threshold level of contribution that is required of an inventor, 35 U.S.C. § 116, but the Federal Circuit has held that a joint inventor must have contributed "to the conception of the claimed invention." *Nartron Corp. v. Schukra U.S.A., Inc.*, 558 F.3d 1352 (Fed. Cir. 2009) (contributing ordinary skill and marginal insight does not give rise to coinventor status).

4. An inventor that contributes to the substantive matter of only one claim has rights in the entire patent, including all claims. 35 U.S.C. § 116; *Vanderbilt Univ. v. ICOS Corp.*, 601 F.3d 1297 (Fed. Cir. 2010); *Ethicon, Inc. v. U.S. Surgical Corp.*, 135 F.3d 1456, 1465–66 (Fed. Cir. 1998).

5. Each joint inventor may exploit the patent without consent from, or accountability to, the other joint inventor. 35 U.S.C. § 262.

E. Types of Patents [§ 26.275]

1. Utility: Functional aspects of products and processes. 35 U.S.C. § 101.

2. Design: Ornamental design of useful objects. 35 U.S.C. § 171.

3. Plant Patent Act of 1930 grants exclusive rights in certain asexually reproduced living plants. 35 U.S.C. § 161; *see also J.E.M. Ag Supply Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001).

4. Plant Variety Protection Act of 1970 grants exclusive rights in certain sexually reproduced plants. *See* 7 U.S.C. §§ 2321–2331; 7 U.S.C. §§ 2351–2357; *see also J.E.M.*, 534 U.S. 124.

F. Requirements for Awarding Patent: The Invention Must Be Useful, Novel, and Nonobvious [§ 26.276]

1. Useful. 35 U.S.C. § 101; *Brenner v. Manson*, 383 U.S. 519 (1966). *But see* "Nonpatentable Inventions," *supra* § 26.7.

2. Novel: No patent awarded if every element of claimed invention is disclosed in prior art reference. 35 U.S.C. § 102; Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011); *In re Gleave*, 560 F.3d 1331 (Fed. Cir. 2009); *Akzo N.V. v. U.S. Int'l Trade Comm'n*, 808 F.2d 1471 (Fed. Cir. 1986); *Jones v. Hardy*, 727 F.2d 1524, 1528 (Fed. Cir. 1984); *see Glaxo, Inc. v. Novopharm Ltd.*, 52 F.3d 1043 (Fed. Cir. 1995). *But see In re Crish*, 393 F.3d 1253 (Fed. Cir. 2004).

   NOTE: To anticipate a claim means that a single reference teaches every limitation of the claim. *In re Nature's Remedies*, 315 F. App'x 300 (Fed. Cir. 2009).

3. Nonobvious: No patent awarded if it would have been obvious to combine already developed inventions or their disclosures to end up with invention. 35 U.S.C. § 103; *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007); *Graham v. John Deere Co.*, 383 U.S. 1 (1966); *In re Kubin*, 561 F.3d 1351 (Fed. Cir. 2009); *Wang Labs., Inc. v. Toshiba Corp.*, 993 F.2d 858 (Fed. Cir. 1993).

   a. A claimed invention is obvious if it would be contemplated by an ordinary artisan who had no knowledge of the claimed invention. USPTO, *MPEP*, *supra* § 26.3, § 2142.

   b. To reach a proper determination under 35 U.S.C. § 103,

      > [T]he examiner must step backward in time and into the shoes worn by the hypothetical "person of ordinary skill in the art" when the invention was unknown and just before it was made. In view of all factual information, the examiner must then make a determination whether the claimed invention "as a whole" would have been obvious at that time to that person. Knowledge of applicant's disclosure must be put aside in reaching this determination, yet kept in mind in order to determine the "differences," conduct the search and evaluate the "subject matter as a whole" of the invention. The tendency to resort to "hindsight" based upon applicant's disclosure is often difficult to avoid due to the very nature of the examination process. However, impermissible hindsight must be avoided and the legal conclusion must be reached on the basis of the facts gleaned from the prior art.

      USPTO, *MPEP*, *supra* § 26.3, § 2142.

   c. A reference qualifies as prior art for a determination under 35 U.S.C. § 103 when it is analogous to the claimed invention. *In re Clay*, 966 F.2d 656, 658 (Fed. Cir. 1992).

      (1) Two separate tests define the scope of analogous art:

         (a) Whether the art is from the same field of endeavor, regardless of the problem addressed; and

         (b) If the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved. *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004).

(2) "A reference is reasonably pertinent if … it is one which, because of the matter with which it deals, logically would have commended itself to an inventor's attention in considering his problem." *Clay*, 966 F.2d at 659.

(3) A reference disclosure with the same purpose as the claimed invention relates to the same problem, supporting use of that reference in an obviousness rejection.

G. Term of Patent [§ 26.277]

1. Utility or plant patent: Application filed after June 8, 1995: 20 years from *filing date* of patent application. 35 U.S.C. § 154.

2. 14 years from issuance for design patent. 35 U.S.C. § 173.

3. Term may be extended when extreme delays are encountered during prosecution of the patent application, and for pharmaceutical patents whose terms may be extended to make up for time lost through government-required regulatory review. 35 U.S.C. § 154(b); 35 U.S.C. § 156.

4. The U.S. Food and Drug Administration can award extended market exclusivity after expiration of a patent to compensate for government-required testing. 21 U.S.C. § 355.

H. Statutory Bars in United States [§ 26.278]

Patent rights are lost if the invention is

1. Publicly disclosed by the inventor more than one year before the application is filed in the USPTO. 35 U.S.C. § 102(b); Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

2. Used in public or otherwise available to the public before the application is filed in the USPTO.

3. Offered for sale before the application is filed in the USPTO.

I. Patent Must Be Reduced to Practice Before Application Can Be Filed [§ 26.279]

1. Two ways

   a. Constructive reduction to practice—Filing patent application. *See Weil v. Fritz*, 572 F.2d 856 (C.C.P.A. 1978).

   b. Actual reduction to practice—Physically constructing the actual invention. *See Great N. Corp. v. Davis Core & Pad Co.*, 782 F.2d 159 (Fed. Cir. 1986).

III. PROCESS FOR OBTAINING PATENT [§ 26.280]

A. Keeping Records of Invention [§ 26.281]

1. Very important in determining issues of inventorship.

2. Types of records

   a. Laboratory notebooks or diaries

   b. Ancillary records

      (1) Invoices for materials and equipment used to develop invention

      (2) Correspondence with outsiders

      (3) Shop and machinist records

      (4) Timecards relating to work performed in connection with development of invention

3. Suggested methods and media

   a. Bound laboratory notebook or diary

   b. Numbered pages

   c. Witnessed on page-by-page basis

   d. Pen or indelible pencil

B. The Patent Search [§ 26.282]

1. Preliminary search to locate prior art; prior art is anything (article, patent, scientific publication, etc.) that would provide teaching of invention being claimed in patent application; teaching must be *before* application filing date.

2. Not a requirement, but very useful. American Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1362 (Fed. Cir. 1984), abrogated on other grounds as stated in Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1288–90 (Fed. Cir. 2011).

3. Relatively inexpensive way to determine prospects of obtaining patent on invention.

4. Searching facilities include Public Search Facility of the USPTO, state patent depositories, public libraries, computer database searching facilities, internet database sites, *see supra* § 26.3. Searches are currently conducted online using the online search interface provided by the USPTO (USPTO, *Search for Patents*, https://www.uspto.gov/patents/search (last visited Apr. 4, 2022)) or using other third-party searching tools.

C. Provisional Patent Application (PPA) [§ 26.283]

1. For a relatively low cost, PPA can be filed, and applicant has up to one year to perform product testing, seek financial backing, perform patent search, etc., before deciding whether to incur the additional expense of filing a nonprovisional patent application.

2. Nonprovisional U.S. patent application and any desired foreign patent applications must be filed within one year after filing PPA.

3. Requirements for filing PPA include adequate written description, drawings, and filing fee; claims or declaration not necessary. 35 U.S.C. § 111(b).

4. PPA cannot issue as patent and does not carry any patent rights.

5. Advantage is that if a nonprovisional patent application is filed on time in the USPTO, applicant will be able to get priority date for the nonprovisional patent application that is same as date on which PPA was filed. 35 U.S.C. § 119.

6. Marketing and licensing benefit of labeling product "patent pending."

D. Utility Patent Application [§ 26.284]

1. Application is a detailed disclosure of the invention that shows how the structure or process produces desired advantages over similar, known inventions.

2. Who may apply on behalf of inventor:

   a. Registered patent attorney, *see* 35 U.S.C. § 33;

   b. Registered patent agent;

   c. Inventor, 35 U.S.C. § 111; or

   d. Assignee.

3. Contents

   a. Petition or request for patent. 35 U.S.C. § 111.

   b. Specification: Adequate written description of invention is required; description must be sufficient to show that inventor possessed the invention at the time of the application filing; disclosure must be sufficient to enable anyone skilled in the art to practice the invention. 35 U.S.C. § 112(a).

   c. Claims: Series of one-sentence descriptions at the end of patent or patent application reciting what inventor deems as invention; claims define invention; most important part of a patent; claims are different from specification; while specification also contains description of invention, specification description typically includes far greater description than claims; claims are most important part of specification; patent claims define the invention to which the patentee is entitled the right to exclude. 35 U.S.C. § 112(b)–(f).

   d. Drawings: Specification typically includes drawings; if drawings are present, then specification must contain description of drawings. 35 U.S.C. § 113.

   e. Oath or declaration. 35 U.S.C. § 115.

f. Filing fee: Fees listed on the USPTO website, USPTO, *Fees and Payment*, https://www.uspto.gov/learning-and-resources/fees-and-payment (last visited Apr. 4, 2022). 35 U.S.C. § 41(a).

g. Information Disclosure Statement (IDS): Statement of any prior art that inventor would like to bring to attention of patent examiner.

NOTE: The inventor must notify the patent examiner of any prior art of which the inventor is aware and that may be material to the invention, i.e., could cause the invention to be rejected.

4. Filing date

a. Application is considered *Patent Pending*, *see infra* § 26.19, upon proper filing in the USPTO.

b. Proper (timely) filing is made by electronically filing the application with the USPTO.

NOTE: The filing date is the date the application is *received* on the USPTO server.

c. Application may also be filed at the USPTO via express mail.

(1) Certificate of mailing required.

(2) Filing date is the date application is *mailed*, not received by the USPTO.

d. Application may also be filed by hand-carrying or delivering via first-class mail to the USPTO.

NOTE: The filing date is the date the application is *received* by the USPTO.

5. The USPTO has a fast-track process for examination of patent applications, USPTO, *USPTO's Prioritized Patent Examination Program*, https://www.uspto.gov/patent/initiatives/usptos-prioritized-patent-examination-program (last visited Apr. 4, 2022). 76 Fed. Reg. 59,050 (Sept. 23, 2011).

6. USPTO prosecution. *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576 (Fed. Cir. 1996).

a. Administrative procedure conducted in the USPTO before granting patent is called *prosecution*.

b. Written record of prosecution is termed variously *file wrapper*, *file history*, or *prosecution history* of application.

c. Prosecution history contains complete record of proceedings before the USPTO, including any representations made by applicant regarding scope of claims.

7. Correspondence from the USPTO

a. USPTO will *not* correspond with anyone other than applicant, assignee, or designated attorney of record in the USPTO.

b. Information relating to nonpublished, pending patent applications cannot be obtained by third parties from the USPTO without authorization of applicant or owner. 35 U.S.C. § 122.

E. Marking the Invention [§ 26.285]

1. Patent Pending

a. Patent application (PPA or nonprovisional) must be on file in the USPTO to claim *Patent Pending.*

b. No legal right to sue for infringement exists until the patent issues.

c. Intended to warn potential infringers that patent may issue.

d. Mismarking

(1) False use of *Patent Pending* is specifically prohibited, with penalties; however, only the United States may sue for penalties. 35 U.S.C. § 292(a); Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

(2) A person who has suffered a competitive injury as a result of false use of *Patent Pending* may file a civil action in a district court of the United States for recovery of damages to compensate for the injury. 35 U.S.C. § 292(b); Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

2. *Patent* (or *Pat.*) on article, along with patent number or address of internet posting associating article with patent number. 35 U.S.C. § 287; *Soverain Software, LLC v. Amazon.com, Inc.*, 383 F. Supp. 2d 904 (E.D. Tex. 2005).

a. Issued patent

b. Important for recovery of damages from infringers. *Amsted Indus., Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 184–85 (Fed. Cir. 1994); *American Med. Sys., Inc. v. Medical Eng'g Corp.*, 6 F.3d 1523 (Fed. Cir. 1993).

c. Mismarking

(1) False use of *Patent* on unpatented article is specifically prohibited, with penalties; however, only the United States may sue for penalties. 35 U.S.C. § 292(a); Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

(2) A person who has suffered a competitive injury as a result of false use of *Patent* may file a civil action in a district court of the United States for recovery of damages to compensate for the injury. 35 U.S.C. § 292(b); Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

d. "Virtual marking" is permitted: specific numbers can be listed on a website that is identified on the item covered by the patent. 35 U.S.C. § 287(a).

F. Examining the Application [§ 26.286]

1. Application forwarded to the USPTO examiner, who conducts own search and issues one or more actions on merits of the application. 35 U.S.C. §§ 131–133.

   a. The USPTO has the initial burden of presenting a *prima facie* case of invalidity.

   b. A *prima facie* case is adequately articulated by notifying the applicant of the reasons for its rejection so long as the explanation is not "so uninformative that it prevents the applicant from recognizing and seeking to counter the grounds for rejection." *Chester v. Miller*, 906 F.2d 1574, 1578 (Fed. Cir. 1990).

   c. Once a prima facie case is presented, burden shifts to the applicant for rebuttal.

2. Applicant required to respond to action three to six months after the action is mailed from the USPTO.

3. After the second rejection of the same claim, applicant may appeal to Patent Trial and Appeal Board (PTAB). 35 U.S.C. § 134.

4. Average pendency in the USPTO: 9–15 months; depending on the complexity of the application, the pendency can be substantially shorter or longer.

5. Third parties may submit to the USPTO, within certain time periods, prior art for consideration by the USPTO in the examination of a patent application. 35 U.S.C. § 122(e); Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

G. Publication of Patent Applications [§ 26.287]

1. Patent applications are published 18 months after the earliest claimed priority date. 35 U.S.C. § 122(b); American Inventors Protection Act of 1999 (AIPA), Pub. L. No. 106-113, 113 Stat. 1501.

   EXAMPLE: If a provisional patent application is filed on January 1, 2021, and a nonprovisional application is filed on or before January 1, 2022, the nonprovisional application will be published on or about July 1, 2022 (i.e., 18 months after the filing date of the provisional application).

2. Publication can be prevented under limited circumstances.

   a. Application is no longer pending in the USPTO (withdrawn or abandoned). 35 U.S.C. § 122(b)(2)(A)(i).

   b. Application is subject to secrecy order. 35 U.S.C. § 122(b)(2)(A)(ii).

   c. Application is for a PPA or design patent. 35 U.S.C. § 122(b)(2)(A)(iii), (iv).

d. Application will not be filed in another country. 35 U.S.C. § 122(b)(2)(B)(i).

NOTE: If nonpublication is initially requested, rescission must be filed in a timely manner to avoid abandonment of the application if a foreign filing later takes place.

3. Establishment of provisional rights. 35 U.S.C. § 154.

a. Publication enables applicant to obtain *provisional rights*.

b. Provisional rights enable applicant to obtain reasonable royalty from any person who makes, uses, offers for sale, or sells an invention as claimed in published patent application or imports such an invention in United States during the period beginning on the date of publication of application until the date the patent has issued. 35 U.S.C. § 154(d)(1)(A)(i), (ii).

c. Provisional rights are not available unless the invention as claimed in issued patent is substantially identical to the invention claimed in published patent application. 35 U.S.C. § 154(d)(2).

d. To obtain reasonable royalty, party must prove that allegedly infringing party had notice of published patent application. 35 U.S.C. § 154(d)(1)(B).

e. Provisional rights do not arise until patent issues, and the right to obtain reasonable royalty is available only in action brought not later than six years after patent has issued. 35 U.S.C. § 154(d)(3).

f. Published patent application is a publication qualifying as potential prior art. 35 U.S.C. § 102(e).

g. Public can submit patents or publications relevant to a pending published application for consideration by the USPTO examiner. 37 C.F.R. § 1.290.

h. Relevant dates

(1) Patent application is published 18 months after the earliest filing date for which a benefit is sought.

(2) Replacement drawings can be submitted within the later of 1 month after mailing date of the first office communication that includes a confirmation number for the application or 14 months after earliest filing date from which a benefit is sought. Petition fee must be submitted. 37 C.F.R. § 1.215(c).

(3) Application must be expressly abandoned at least 4 weeks before the projected publication date to avoid publication.

H. Receiving the Notice of Allowance and Paying the Issue Fee [§ 26.288]

1. Notice of allowance is issued when patent application is approved. 35 U.S.C. § 151.

2. Issue fee is required by the USPTO.

I. Paying Maintenance Fees [§ 26.289]

1. Required three times during the life of the utility patent to keep the patent in force.

2. Unavoidable delay: The USPTO requires *due care* in docketing the relevant dates and a showing that the applicant treated payment of the maintenance fee as applicant's most important business; in addition, the USPTO requires a showing that the *entire delay* be unavoidable and that, despite all precautions, the patentee was prevented from making the payment. There are some situations in which ignorance of the requirements to pay maintenance fees may support a finding of unavoidable delay. *FemSpec L.L.C. v. Dudas*, No. C-06-2719 JCS, 2007 WL 216493 (N.D. Cal. Jan. 26, 2007) (unpublished).

J. Challenges to Issued Patents within the USPTO [§ 26.290]

1. Post-grant review: The validity of a patent may be challenged within 9 months after issuance or reissuance of the patent by requesting a post-grant review by the PTAB. 35 U.S.C. §§ 321–329; Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

2. *Inter partes* review: The validity of a patent may be challenged later than 9 months after issuance or reissuance of the patent by requesting *inter partes* review before the PTAB. 35 U.S.C. §§ 311–319; Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

3. *Ex parte* reexamination: The validity of a patent may be challenged during the entire pendency of a patent by raising a "substantial new question of patentability" and requesting reexamination by a patent examiner.

IV. FOREIGN PATENTS [§ 26.291]

A. Extent of U.S. Patent Protection [§ 26.292]

Only in United States and U.S. territories.

B. Foreign Patent Applications [§ 26.293]

1. Must eventually be filed in each country where protection is sought.

2. Foreign application bars

   a. No invention publicly disclosed or offered for sale before the filing date of the first patent application for invention can be patented.

   b. Grace period for filing a patent application after prior public disclosure of invention exists in certain countries, including Canada, Australia, and Japan.

   c. U.S. inventor must obtain foreign filing license from the USPTO before foreign filing.

3. Three options for foreign patent applications:

a. Individual national applications filed in each country.

b. Patent Cooperation Treaty (PCT)

(1) Multilateral treaty that allows a single patent application to be filed for one or several PCT countries.

(2) Patent prosecution and issuance occurs in each PCT nation that inventor designates.

(3) Eliminates or reduces some duplication and expense connected with obtaining patent protection in different nations.

c. European Patent Convention (EPC)

(1) Provides regional protection for some European countries.

(2) One application is filed with EPO.

(3) One patent is issued, but it is amendable in each country and is subject to each country's laws under EPO guidelines.

V. TECHNOLOGY TRANSFER [§ 26.294]

A. Assignment [§ 26.295]

All or part of an invention may be sold or transferred outright. The term *assignee* refers to owner of a patent; an inventor is not necessarily owner of patent. For example, if an inventor works for A Corporation, A Corporation likely owns inventor's work; thus, A Corporation would be assignee of the patent. Assignments of patents must be in writing. 35 U.S.C. § 261.

B. License [§ 26.296]

1. May be exclusive or nonexclusive.

2. Must comply with antitrust laws. *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (Fed. Cir. 1992), *abrogated by Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523 (2017); *Windsurfing Int'l, Inc. v. AMF, Inc.*, 782 F.2d 995 (Fed. Cir. 1986); U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* (Jan. 12, 2017), https://www.justice.gov/atr/IPguidelines/download.

VI. PATENT INFRINGEMENT [§ 26.297]

A. Issued Patent [§ 26.298]

1. Only issued patents, *not* patent applications, are capable of being infringed.

2. Issued patents are presumed valid. 35 U.S.C. § 282; *Rosebud LMS Inc. v. Adobe Sys. Inc.*, 812 F.3d 1070, 1073 (Fed. Cir. 2016).

NOTE: Evidence not considered by the USPTO during the prosecution of the patent may "carry more weight" than evidence before the USPTO. *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91 (2011).

3. Each claim in the patent is presumed valid independent of the validity of the patent's other claims.

4. Accuser bears the burden of proving infringement by a preponderance of the evidence. *Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533, 1535 (Fed. Cir. 1991).

5. Party attacking the patent's validity has the burden of proving invalidity by clear and convincing evidence. *Creative Compounds, LLC v. Starmark Labs.*, 651 F.3d 1303, 1314 (Fed. Cir. 2011); *Beckson Marine, Inc. v. NFM, Inc.*, 292 F.3d 718, 725 (Fed. Cir. 2002).

6. Failure to disclose best mode is no longer a basis on which a claim may be held invalid or otherwise unenforceable. 35 U.S.C. § 282; Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

7. Defense against allegation of infringement may be based on prior commercial use. 35 U.S.C. § 273; Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

B. Declaratory-Judgment Action [§ 26.299]

1. Action seeking ruling that a patent is invalid, unenforceable, or not infringed.

2. The legal standard for declaratory judgment looks to the totality of the circumstances in assessing whether a court could exercise declaratory-judgment jurisdiction; the fundamental inquiry is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007); *Wisconsin Cent., Ltd. v. Shannon*, 539 F.3d 751 (7th Cir. 2008); *see SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372, 1378 (Fed. Cir. 2007); *Cingular Wireless LLC v. Freedom Wireless, Inc.*, No. CV06-1935 PHX JAT, 2007 WL 1876377, at *2 (D. Ariz. June 27, 2007) (unpublished).

   a. Patent owner must have acted in a manner to cause prospective declaratory-judgment plaintiff to have reasonable belief that he or she will be charged with infringement.

   b. Declaratory-judgment plaintiff could reasonably assume it infringed patent.

3. In certain circumstances, sending a cease-and-desist letter to a suspected patent infringer can create jurisdiction to support a declaratory-judgment action by the suspected infringer. *SanDisk Corp. v. STMicroelectronics*, 480 F.3d 1372, 1381–82 (Fed. Cir. 2007).

C. Types of Infringement [§ 26.300]

1. Direct infringement (unauthorized). 35 U.S.C. § 271(a); *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 572 U.S. 915, 926 (2014); *Texas Instruments Inc. v. U.S. Int'l Trade Comm'n*, 988 F.2d 1165 (Fed. Cir. 1993).

   a. Use of patented process.

b. Making, using, or selling patented machine, article of manufacture, or composition of matter.

c. Asexually reproducing patented plant or selling plant so produced. 35 U.S.C. § 163.

d. Making, using, selling, and offering to sell article of manufacture incorporating patented design. 35 U.S.C. § 171; *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665 (Fed. Cir. 2008).

2. Active inducement of infringement; aiding and abetting infringement. 35 U.S.C. § 271(b), (f); *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 572 U.S. 915 (2014); *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011); *Enplas Display Device Corp. v. Seoul Semiconductor Co.*, 909 F.3d 398, 407–08 (Fed. Cir. 2018); *Mirror Worlds, LLC v. Apple Inc.*, 692 F.3d 1351 (Fed. Cir. 2012); *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683 (Fed. Cir. 2008); *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1305 (Fed. Cir. 2006); *Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus.*, 145 F.3d 1303 (Fed. Cir. 1998); *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544 (Fed. Cir. 1990); *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 909 F.2d 1464 (Fed. Cir. 1990); *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, 576 F.3d 1348 (Fed. Cir. 2009), *overruling Union Carbide Chems. & Plastics Tech. Corp. v. Shell Oil Co.*, 425 F.3d 1366 (Fed. Cir. 2005); *Electromotive Div. of Gen. Motors Corp. v. Transportation Sys. Div. of Gen. Elec. Co.*, 417 F.3d 1203 (Fed. Cir. 2005); *Chimie v. PPG Indus.*, 402 F.3d 1371 (Fed. Cir. 2005).

a. Three requirements for finding liability for inducement:

(1) Direct infringement.

(2) Actively advising, encouraging, or otherwise inducing others to engage in infringing conduct.

(3) Inducer must know or should know that his or her actions would induce infringement.

b. Inducement requires knowledge that third party's conduct constitutes infringement. This is separate from any intent required to perform the infringing acts themselves (i.e., making, using, offering to sell, selling, or importing a patented invention).

3. Contributory infringement. 35 U.S.C. § 271(c); *Commil USA, LLC v. Cisco Sys., Inc.*, 575 U.S. 632, 639–40 (2015); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336 (1961); *Fina Rsch., S.A. v. Baroid Ltd.*, 141 F.3d 1479, 1481–82 (Fed. Cir. 1998); *Pennwalt Corp. v. Durand-Wayland, Inc.*, 833 F.2d 931 (Fed. Cir. 1987).

a. "Whoever offers to sell or sells … a component of a patented [invention], constituting a material part of the invention, knowing the same to be especially adapted for use in an infringement … shall be liable as a contributory infringer." 35 U.S.C. § 271(c).

b. Selling component of patented machine, manufacture, combination, or composition on material for use in practicing a patented process.

c. No contributory infringement absent direct infringement.

d. Doctrine of permissible repair: Purchase of patented product carries with it a license to use the product, including the right to preserve its fitness for use.

4. Divided infringement

a. Direct infringement of a method patent claim only occurs where all steps of the method claim are (1) performed by a single entity or (2) attributable to single entity. *Akamai Tech., Inc. v. Limelight Networks, Inc.*, 572 U.S. 915 (2014); *Travel Sentry, Inc. v. David Tropp*, 877 F.3d 1370, 1378 (Fed. Cir. 2017); *Akamai Tech., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022 (Fed. Cir. 2015).

b. When more than one actor is involved in practicing the steps, a court must determine whether the acts of one are attributable to the other such that a single entity is responsible for the infringement. *Akamai Tech., Inc.*, 572 U.S. at 926; *Travel Sentry, Inc.*, 877 F.3d at 1378; *Akamai Tech., Inc.*, 797 F.3d at 1022. Courts "will hold an entity responsible for others' performance of the method steps in two sets of circumstances: (1) where that entity directs or controls others' performance, and (2) where the actors form a join enterprise." *Akamai Tech.*, 797 F.3d at 1022.

5. Willful infringement

a. Court has discretion to find "willful" infringement when infringer has acted egregiously.

b. Burden of proof is preponderance of the evidence.

c. Court's finding of willful infringement is reviewed for an abuse of discretion. *See generally Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1934–35 (2016), *overruling In re Seagate Tech., LLC*, 497 F.3d 1360 (Fed. Cir. 2007) (en banc).

D. Doctrine of Patent Exhaustion [§ 26.301]

1. The initial authorized sale of a patented item terminates all patent rights to that item. *Quanta Comput., Inc. v. LG Elec., Inc.*, 553 U.S. 617, 625 (2008).

2. However, patent exhaustion does not extend to patented seeds reproduced through unauthorized planting and harvesting. *Bowman v. Monsanto Co.*, 569 U.S. 278 (2013).

E. Claim Construction [§ 26.302]

1. Each patent claim must be construed in light of claim language, other claims, specification, prior art, prosecution history, and expert testimony. *Texas Instruments v. U.S. Int'l Trade Comm'n*, 988 F.2d 1165, 1171 (Fed. Cir. 1993); *Laitram Corp. v. NEC Corp.*, 952 F.2d 1357 (Fed. Cir. 1991); *SRI Int'l v. Matsushita Elec. Corp*, 775 F.2d 1107, 1118 (Fed. Cir. 1985).

2. Words in the claim are given their ordinary and customary meaning unless it appears from the description of the invention given in the patent specification that the inventors used such terms differently. *Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570 (Fed. Cir. 1995); *Electro Med. Sys., S.A. v. Cooper Life Sci., Inc.*, 34 F.3d 1048 (Fed. Cir. 1994); *Genentech, Inc. v. Wellcome Found. Ltd.*, 29 F.3d 1555 (Fed. Cir. 1994); *North Am. Vaccine, Inc. v. American*

Cyanamid Co., 7 F.3d 1571 (Fed. Cir. 1993). *But see Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005).

3. If there is ambiguity about the ordinary and customary meaning of a claim term, resorting to the specification is preferred as "the single best guide to the meaning of a disputed term." *Thorner v. Sony Comput. Entm't Am., LLC*, No. 2011-1114, 2012 WL 280657 (Fed. Cir. Feb. 1, 2012) (unpublished); *Phillips*, 415 F.3d at 1315.

4. Means-plus-function claims cover "the structure, materials, or acts described in the specification as corresponding to the claimed function and equivalents thereof."

5. Construction of patent, including terms of art within its claim, is exclusively within the province of court. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), *aff'g* 52 F.3d 967 (Fed. Cir. 1995); *Kahn v. General Motors Corp.*, 135 F.3d 1472 (Fed. Cir. 1998).

F. Test of Infringement [§ 26.303]

1. Literal infringement. *Lantech, Inc. v. Keip Mach. Co.*, 32 F.3d 542 (Fed. Cir. 1994); *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 797 (Fed. Cir. 1989).

   a. Each claim element must literally read on accused article, device, or process. *Amhil Enters. Ltd. v. Wawa, Inc.*, 81 F.3d 1554 (Fed. Cir. 1996); *Morton Int'l, Inc., v. Cardinal Chem. Co.*, 5 F.3d 1464 (Fed. Cir. 1993). *But see SmithKline Beecham Corp. v. Apotex Corp.*, 403 F.3d 1331 (Fed. Cir. 2005).

      NOTE: To be liable for direct infringement, a single defendant must either perform all steps of a combined claim or be in control of other defendants who perform those steps. *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 572 U.S. 915 (2014), *cited in Ultratec, Inc. v. Sorenson Commc'ns, Inc.*, 45 F. Supp. 3d 881 (W.D. Wis. 2014).

   b. Two-step process:

      (1) Determine as a matter of law the meaning and scope of claims. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

      (2) Determine whether properly construed claim covers accused device or process.

2. Doctrine of equivalents. *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512 (Fed. Cir. 1995), *rev'd on other grounds*, 520 U.S. 17 (1997); *see Dawn Equip. Co. v. Kentucky Farms Inc.*, 140 F.3d 1009 (Fed. Cir. 1998).

   a. No literal infringement.

   b. Accused device performs the substantially same function in substantially the same way to achieve the same result as claimed invention or is insubstantially different.

   c. Insubstantial-differences inquiry may be guided by determining whether element in accused device "performs substantially the same function in substantially the same way to obtain the same result" as the claim limitation. *Graver Tank v. Linde Air Prods. Co.*, 339 U.S. 605 (1950); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 344 F.3d 1359 (Fed. Cir. 2003).

d. The doctrine of equivalents cannot be used on parts of a claim that have been revised in the course of prosecution. *Pacific Coast Marine Windshields Ltd. v. Malibu Boats, LLC*, 739 F.3d 694, 700 (Fed. Cir. 2014); *see also Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp.*, 320 F.3d 1339, 1351 (Fed. Cir. 2003).

e. The doctrine of equivalents is applied to individual elements of claims, not to the invention as a whole. *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17 (1997).

G. Remedy [§ 26.304]

1. Injunction. *See* 35 U.S.C. § 283.

a. Preliminary. *Altana Pharma AG v. Teva Pharms. USA, Inc.*, 566 F.3d 999 (Fed. Cir. 2009); *Intel Corp. v. USLI Sys. Tech., Inc.*, 995 F.2d 1566, 1568 (Fed. Cir. 1993).

b. Permanent. *Apple Inc. v. Samsung Elec. Co.*, 735 F.3d 135 (Fed. Cir. 2013); *Acumed LLC v. Stryker Corp.*, 551 F.3d 1323 (Fed. Cir. 2009); *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 986 F.2d 476 (Fed. Cir. 1993).

(1) *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006), and *Texas Instruments Inc. v. Tessera, Inc.*, 231 F.3d 1325, 1329 (Fed. Cir. 2000), provide that permanent injunctions are limited by the burden of a four-factor test:

(a) Whether there is irreparable injury.

(b) Whether remedies at law (i.e., monetary) are inadequate.

(c) Whether, based on hardships of plaintiff and defendant, an equitable remedy is justified.

(d) Whether a permanent injunction is in the public's interest.

2. Damages. *See* 35 U.S.C. § 284.

a. Lost profits, including profits on lost sales of device not covered by patent in suit but covered by other patents held by patentee. *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc. (DePuy Spine II)*, 567 F.3d 1314 (Fed. Cir. 2009); *Rite Hite Corp. v. Kelley Co.*, 56 F.3d 1538 (Fed. Cir. 1995) (en banc); *Douglas Dynamics, LLC v. Buyers Prods. Co.*, 76 F. Supp. 3d 806 (W.D. Wis. 2014); *BIC Leisure Prods., Inc. v. Windsurfing Int'l, Inc.*, 1 F.3d 1214, 1217 (Fed. Cir. 1993). *But see Juicy Whip, Inc. v. Orange Bang, Inc.*, 382 F.3d 1367 (Fed. Cir. 2004).

b. Reasonable royalty. *Virnetx, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308 (Fed. Cir. 2014); *Lucent Techs. Inc. v. Gateway, Inc.*, 580 F.3d 1301 (Fed. Cir. 2009); *BIC Leisure Prods.*, 1 F.3d at 1219.

NOTE: Reasonable royalties may be available for time between publication of patent application and issuance of patent, if invention as claimed in patent is substantially

identical to invention as claimed in published patent application, and if action is brought no later than six years after the patent issues. Alleged infringer must have had actual notice or actual knowledge of published patent application. 35 U.S.C. § 154(d); *Rosebud LMS Inc. v. Adobe Sys. Inc.*, 812 F.3d 1070 (Fed. Cir. 2016).

c. Interest. *See Allen Archery, Inc. v. Browning Mfg. Co.*, 898 F.2d 787 (Fed. Cir. 1990).

d. Willful infringer faces risk of treble damages and assessment of attorney fees based on finding of willful infringement. *Stryker Corp. v. Zimmer, Inc.*, 782 F.3d 649 (Fed. Cir. 2015), *vacated and remanded on other grounds sub nom. Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016); *Delta-X Corp. v. Baker Hughes Prod. Tools, Inc.*, 984 F.2d 410 (Fed. Cir. 1993); *Modine Mfg. Co. v. Allen Grp., Inc.*, 917 F.2d 538 (Fed. Cir. 1990); *Milwaukee Elec. Tool Corp. v. Hitachi Koki, Ltd.*, No. 09-C-948, 2011 WL 665439 (E.D. Wis. Feb. 14, 2011) (unpublished).

e. No recovery for infringement that occurred more than six years before the filing of complaint. 35 U.S.C. § 286.

3. District courts are authorized to award attorney fees to prevailing parties in "exceptional cases." 35 U.S.C. § 285; *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014); *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559 (2014).

Chapter 27
Trade Secrets

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NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 252; all references to the Wisconsin Statutes Annotated are to the Wisconsin Statutes Annotated, West, Westlaw, through 2021 Wis. Act 155; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-108 (Apr. 6, 2022); and all references to the Uniform Trade Secrets Act are to the act on Westlaw (amended 1985, current through 2020 Annual Meeting of the Nat'l Conference of Comm'rs on Uniform State Laws).

I. INTRODUCTION [§ 27.305]

A. Trade Secret Law in General [§ 27.306]

1. The Wisconsin statute applies to actual or threatened misappropriation of trade secrets and to continuing misappropriation of trade secrets regardless of when misappropriation began. 1985

Wis. Act 236, §§ 14, 16; Wis. Stat. § 134.90(6); *B.C. Ziegler & Co. v. Ehren*, 141 Wis. 2d 19, 24 (Ct. App. 1987).

a. In cases in which Wis. Stat. § 134.90 applies, it displaces the prior Wisconsin common law of trade secrets. *Minuteman, Inc. v. Alexander*, 147 Wis. 2d 842, 849 (1989).

b. Wis. Stat. § 134.90 does not affect contractual remedies based on trade secret misappropriation. Wis. Stat. § 134.90(6)(b); *North Highland Inc. v. Jefferson Mach. & Tool Inc.*, 2017 WI 75, ¶ 75, 377 Wis. 2d 496.

c. Wisconsin law does not provide a separate tort of misappropriation of confidential business information that applies to non-trade-secret information. As the U.S. District Court for the Eastern District of Wisconsin has reasoned, finding a tort of misappropriation of confidential information separate from misappropriation of trade secrets would make Wis. Stat. § 134.90(1)(c) redundant. *Marine Travelift, Inc. v. Marine Lift Sys., Inc.*, No. 10-C-1046, 2013 WL 6255689, at *7 (E.D. Wis. Dec. 4, 2013) (unpublished). The Wisconsin Uniform Trade Secrets Act (WUTSA) does not preclude other civil claims, such as breach of duty of loyalty and interference with business relationships, or damages resulting from the disclosure or misuse of confidential business information. *Id.* at *6–8 (distinguishing *Mercury Rec. Prod., Inc. v. Economic Consultants, Inc.*, 64 Wis. 2d 163 (1974)).

2. Wisconsin law is based on the Uniform Trade Secrets Act (UTSA). Decisions of other jurisdictions on questions involving UTSA should be given "careful consideration" by Wisconsin courts, *Minuteman*, 147 Wis. 2d at 858, but do not substitute for construction of Wisconsin statute, *Burbank Grease Servs., LLC v. Sokolowski*, 2006 WI 103, ¶ 32, 294 Wis. 2d 274.

3. *Trade secret* has the same definition for civil liability and criminal liability, as well as in other Wisconsin statutes discussed below. Wis. Stat. §§ 134.90(1)(c), 943.205(2)(e).

B. Federal Defend Trade Secrets Act of 2016 [§ 27.307]

1. The law of trade secrets had been primarily limited to state law until enactment of the Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (codified at 18 U.S.C. §§ 1831–1839) [hereinafter DTSA], effective May 11, 2016. Civil liability under Wisconsin law is governed by Wis. Stat. § 134.90 (WUTSA). Civil liability under federal law is governed by 18 U.S.C. § 1836(b)(1) and related sections, as affected by the DTSA. For detailed discussion of the DTSA, see section VI., *infra*.

2. Before enactment of the DTSA, misappropriation claims had to be brought in state court, absent diversity jurisdiction or the inclusion of another claim that triggered federal question jurisdiction. Because the DTSA expressly creates federal question jurisdiction, plaintiffs with misappropriation claims may now bring those claims in federal court by invoking the DTSA if the federal statute's interstate or foreign commerce requirement is met. A claim filed in state court under the DTSA also will be subject to removal to federal court based on federal-question jurisdiction.

C. State-Versus-Federal Forum Considerations [§ 27.308]

1. The DTSA expressly does not preempt state law, so a plaintiff may plead a claim for misappropriation under both state and federal law in the same action. Counsel should consider whether there are advantages to choosing between state law and federal law or to invoking both.

   EXAMPLE: If a case involves potential out-of-state parties and witnesses, parties may prefer the standardized nationwide subpoena power under the federal rules as opposed to varying state-law discovery rules. Parties should also note that the provisions of the DTSA and Wis. Stat. § 134.90 are similar, but not identical, so parties should evaluate these differences when evaluating a claim or defense. *See also PTP OneClick, LLC v. Avalara, Inc.*, No. 18-C-1671, 2019 WL 1924872, at *4–5 (E.D. Wis. Apr. 30, 2019) (unpublished) (granting motion to transfer venue from Wisconsin because Wis. Stat. § 134.90 has no extraterritorial effect and most of the alleged misappropriation occurred in another state).

2. The DTSA also makes available additional remedies, in particular, the ability to obtain an ex parte seizure order when "necessary to prevent the propagation or dissemination of the trade secret." 18 U.S.C. § 1836(a)(1). The DTSA gives the plaintiff the option of choosing a reasonable royalty as the measure of damages. 18 U.S.C. § 1836(b)(3)(B)(ii). Wis. Stat. § 134.90 appears to be more restrictive, permitting damages to be measured by a reasonable royalty "if the complainant cannot by any other method of measurement prove an amount of damages which exceeds the reasonable royalty." Wis. Stat. § 134.90(4)(a).

3. The DTSA includes certain whistleblower protections not expressly recognized in Wis. Stat. § 134.90. 18 U.S.C. § 1833(a)(2), (b). It also requires that employment agreements include notice of the whistleblower protections. 18 U.S.C. § 1833(b)(3). Failure to provide the notice will prevent the employer from recovering attorney fees or punitive damages in an action against the employee.

4. Parties should consider protective orders and the more permissive state standard versus the federal standard. *See infra* § 27.12 (Court Proceedings to Preserve Secrecy).

5. Wisconsin law offers authority to support the premise that the determination whether particular information constitutes a trade secret is a question of law for the court. *See infra* § 27.7 (Definition of Trade Secrets Under Wisconsin Law).

6. The DTSA gives the plaintiff the option of choosing a "reasonable royalty" as the measure of damages. 18 U.S.C. § 1836(b)(3)(B)(ii). The Wisconsin statute permits damages to be measured by a reasonable royalty "if the complainant cannot by any other method of measurement prove an amount of damages which exceeds the reasonable royalty." Wis. Stat. § 134.90(4); *see infra* § 27.33 (Remedies for Misappropriation Under DTSA).

7. The UTSA standard for awarding fees is willful and *malicious* misappropriation, *see* 18 U.S.C. § 1836(b)(3)(D), while the WUTSA standard is "willful and *deliberate*," Wis. Stat. § 134.90(4)(c) (emphasis added), which is an ambiguously lower standard. *See infra* § 27.19 (Damages).

D. Resources [§ 27.309]

1. Wisconsin Statutes. Wis. Stat. §§ 134.90, 943.205.

2. Notes to 1985 Wis. Act 236.

3. Treatises and handbooks

   a. *Corporate Counsel's Guide to Protecting Trade Secrets* (2006 & Supp. 2021).

   b. 4 D. Dobbs et al., *Dobbs' Law of Torts* § 739 (2d ed. 2011 & Supp. 2021).

   c. M. Evans, *Establishing Liability for Misappropriation of Trade Secrets*, 91 Am. Jur. Proof of Facts 3d 95 (2006 & Supp. Feb. 2022).

   d. D. Lucey, *Postemployment Competition, in* 3 P.L. Albrecht et al., *Wisconsin Employment Law* ch. 15 (State Bar of Wis. Wis. 8th ed. 2022).

   e. M. Jager, *Trade Secrets Law* (1985 & Supp. 2021).

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   g. 2 *Internet Law & Practice* ch. 18 (Nov. 2021 Update).

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   f. R.A. Klitzke, *The Uniform Trade Secrets Act*, 64 Marq. L. Rev. 277 (1980).

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j. J. Piper, Comment, *I Have a Secret?: Applying the Uniform Trade Secrets Act to Confidential Information That Does Not Rise to the Level of Trade Secret Status*, 12 Marq. Intell. Prop. L. Rev. 359 (2008).

k. M. Risch, *Why Do We Have Trade Secrets?*, 11 Marq. Intell. Prop. L. Rev. 1 (2007).

l. P. Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, 58 Hastings L.J. 777 (2007).

m. P. Toren, *The Defend Trade Secrets Act*, 28 No. 7 Intell. Prop. & Tech. L.J. 3 (2016).

n. R.V. Whitesel & R. Sklansky, *Revisions to the Law of Trade Secrets*, Wis. Bar Bull., Aug. 1986, at 15.

5. Legislative History

a. R. Sklansky & R. Whitesel, Rev*isions to the Law of Trade Secrets: 1985 Wisconsin Act 236* (Wis. Leg. Council 1986).

b. R. Whitesel & R. Sklansky, *Uniform Trade Secrets Act* (Wis. Leg. Council 1984).

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II. SCOPE OF TRADE SECRETS [§ 27.310]

A. Definition of Trade Secrets Under Wisconsin Law [§ 27.311]

1. Material must be "information, including a formula, pattern, compilation, program, device, method, technique or process." Definition includes, but is not limited to, the items specifically mentioned. Wis. Stat. § 134.90(1)(c).

   Includes biological materials and materials embodying information. Wis. Stat. § 134.90(1); 1985 Wis. Act 236.

   NOTE: The definition of *trade secret* under the DTSA, *see* 18 U.S.C. § 1839(3), is substantially similar but not identical to the Wisconsin definition, so parties should consider these differences when evaluating a claim and defenses. *See infra* § 27.32 (DTSA Definitions).

2. Whether information is a trade secret is a mixed question of law and fact, but whether *particular* information is a trade secret is a question of law for the court, inappropriate for a jury determination and reviewable on appeal without special deference to the trial court (it remains unsettled what questions should be included in jury verdict). *B.C. Ziegler & Co. v. Ehren*, 141 Wis. 2d 19, 24, 26 (Ct. App. 1987); *M. Bryce & Assocs., Inc. v. Gladstone*, 107 Wis. 2d 241, 249 (Ct. App. 1982); *cf. In re Innovative Constr. Sys., Inc.*, 793 F.2d 875 (7th Cir. 1986); *see also North Highland Inc. v. Jefferson Mach. & Tool Inc.*, 2017 WI 75, ¶ 92, 377 Wis. 2d 496 (Roggensack, C.J., dissenting); *North Highland Inc.*, 2017 WI 75, ¶¶ 129–133, 377 Wis. 2d 496 (Bradley, R.G., J., dissenting).

In a more recent opinion, however, a federal district court stated that determining what constitutes a trade secret requires an evaluation of numerous factors, so the existence of a trade secret is ordinarily a question of fact inappropriate for summary judgment. *Weather Shield Mfg., Inc. v. Drost*, No. 17-cv-294-jdp, 2018 WL 3824150, at *1 (W.D. Wis. Aug. 10, 2018) (unpublished) (denying plaintiff's motion for summary judgment for failure to satisfy its burden of showing a trade secret).

NOTE: For this proposition, *Weather Shield* cited a Seventh Circuit case arising under Illinois law before the passage of the DTSA, *see Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 723 (7th Cir. 2003), and Chief Justice Roggensack's dissent in *North Highland Inc.*, 2017 WI 75, ¶ 67, 377 Wis. 2d 496 (Roggensack, C.J., dissenting).

3. Information must derive "independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use." Wis. Stat. § 134.90(1)(c)1.; *cf.* Restatement (Third) of Unfair Competition § 39 (Am. L. Inst. 1995).

   a. If the principal persons who can obtain economic benefit are aware of the information, the information is not a trade secret. UTSA § 1 cmt.

   b. Information is not a trade secret if it is readily known in the relevant industry, even though unknown to general public. UTSA § 1 cmt.

   c. Information with commercial value from a negative standpoint, for example, the results of lengthy and expensive research that proves that a certain process will *not* work can be a trade secret. UTSA § 1 cmt.

   d. Matters of public knowledge *or* general knowledge in an industry are not trade secrets. *RTE Corp. v. Coatings, Inc.*, 84 Wis. 2d 105, 116 (1978); *Abbott Labs. v. Norse Chem. Corp.*, 33 Wis. 2d 445, 457 (1967).

   e. To be considered a trade secret under Wisconsin law, a pattern, technique, or process need not reach the level of invention necessary to warrant patent protection. Even if the individual components are within the public domain, the combination of components and a unique process can create a competitive advantage and a protectable trade secret under Wis. Stat. § 134.90(1)(c). *Centrifugal Acquisition Corp., v. Moon*, 849 F. Supp. 2d 814, 832 (E.D. Wis. 2012).

   f. A marketing plan, even if disclosed in a confidential information memorandum, cannot serve as basis for a trade-secrets claim once it has been implemented or when the memorandum discloses very general information about a particular market and only touts the advantages of a particular product. *Encap, LLC v. Scotts Co.*, No. 11-C-685, 2014 WL 4273302, at *1 (E.D. Wis. Aug. 28, 2014) (unpublished) (distinguishing *Centrifugal Acquisition Corp.* when granting summary judgment and dismissing trade-secrets claim).

   g. To survive a motion to dismiss, plaintiff must plead facts sufficient to show that the information would have economic value to a person or business other than the plaintiff. *Sean Morrison Entm't, LLC v. O'Flaherty Heim Egan & Birnbaum, Ltd.*, No. 13-CV-753-BBC, 2014 WL 896616, at *3 (W.D. Wis. Mar. 6, 2014) (unpublished) (dismissing complaint as insufficient).

h. Disclosure in a patent destroys a trade secret; disclosure in a published patent application ordinarily destroys a trade secret; disclosure to a prospective licensee does not destroy a trade secret. *BondPro Corp. v. Siemens Power Generation, Inc.*, 463 F.3d 702, 706–08 (7th Cir. 2006).

i. Pending bids, internal pricing information, and vendor pricing information are not entitled to trade secret protection. *MQS Inspection, Inc. v. Bielecki*, 963 F. Supp. 771, 774 (E.D. Wis. 1995); *Square D Co. v. Van Handel*, No. 04-C-775, 2005 WL 2076720, at *8 (E.D. Wis. Aug. 25, 2005) (unpublished); *Financial Equip. Co. v. Silva*, No. 10-C-794, 2010 WL 4782786, at *9 (E.D. Wis. Nov. 17, 2010) (unpublished). *But see North Highland Inc. v. Jefferson Mach. & Tool Inc.*, 2017 WI 75, ¶ 4 n.4, 377 Wis. 2d 496 (declining to decide whether bid constituted trade secret) (4–3 decision); *id.* ¶ 125 (Roggensack, C.J., dissenting) (finding bid could constitute "information" protected by Wis. Stat. § 134.90); *id.* ¶ 128 (Bradley, R.G., J., dissenting) (same).

B. Identification [§ 27.312]

1. In deciding whether materials are trade secrets, "helpful guidance" is still provided by the following six elements enumerated in Restatement (First) of Torts, although plaintiff is no longer required to prove each element:

   a. Extent to which information is known outside plaintiff's business,

   b. Extent to which information is known by employees and others involved in plaintiff's business,

   c. Extent of measures taken to guard secrecy of information,

   d. Value of information to plaintiff and plaintiff's competitors,

   e. Amount of effort or money expended by plaintiff in developing information, and

   f. Ease or difficulty with which information could be properly acquired or duplicated by others. Restatement of Torts § 757 (Am. L. Inst. 1939); *Nalco Chem. Co. v. Hydro Techs., Inc.*, 148 F.R.D. 608, 616 (E.D. Wis. 1993); *Minuteman, Inc. v. Alexander*, 147 Wis. 2d 844, 851–53 (1989).

   NOTE: Elements in paragraphs a. and f. above relate to the statutory requirement that information be not generally known or readily ascertainable. Elements in paragraphs d. and e. above relate to the statutory requirement of economic value. Elements in paragraphs b. and c. above relate to the statutory requirement of reasonable efforts to maintain secrecy.

2. Extent to which information is known by employees is relevant (e.g., insurance agency's information about policyholder was not a trade secret under Wis. Stat. § 134.90 when sales representative had access to information and there was no agreement restricting access or use). *Pope v. Business & Contractors Ins. Ctr., Inc.*, No. 90-0203, 1990 WL 198088 (Wis. Ct. App. Oct. 31, 1990) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

3. Obtaining trade secret by reverse engineering is lawful; possibility of reverse engineering is not decisive in determining whether an item is a trade secret, but is a factor in determining how

long injunctive relief should last. *ConFold Pac., Inc. v. Polaris Indus., Inc.*, 433 F.3d 952, 959 (7th Cir. 2006); *Minuteman*, 147 Wis. 2d at 855.

4. Plaintiff must identify the specific trade secret with particularity. *Kuryakyn Holdings, LLC v. Ciro, LLC*, 242 F. Supp. 3d 789, 800 (W.D. Wis. 2017) ("Many plaintiffs allege trade secret misappropriation, but few provide it. '[I]t is hard to prove that particular information qualifies as a trade secret.'") (citations omitted); *ECT Int'l, Inc., v. Zwerlein*, 228 Wis. 2d 343, 345 (Ct. App. 1999).

   a. General allegations of the existence of trade secrets will not suffice, but the complaint is not required to state trade secrets in detail. *BondPro Corp. v. Siemens Power Generation, Inc.*, 463 F.3d 702, 710 (7th Cir. 2006); *Edgenet, Inc. v. GS1 AISBL*, 742 F. Supp. 2d 997, 1027–28 (E.D. Wis. 2010); *IDX Sys. Corp. v. Epic Sys. Corp.*, 165 F. Supp. 2d 812, 816 (W.D. Wis. 2001), *rev'd in part on other grounds*, 285 F.3d 581 (7th Cir. 2002).

   b. Trade secret allegations at the pleadings stage require only particularities sufficient "to enable the defendant to delineate that which he is accused of misappropriating." *Edgenet, Inc.*, 742 F. Supp. 2d at 1028 n.24; *Share Corp. v. Momar Inc.*, No. 10-CV-109, 2011 WL 284273, at *8 (E.D. Wis. Jan. 26, 2011) (unpublished).

   c. At the pleading stage, the plaintiff need only allege enough facts to make its claim for relief plausible and to put the defendant on notice of the secrets allegedly misappropriated. *Servicios Technologicos de Guatemala, S.A. v. WOCCU Servs. Grp., Inc.*, No. 13-CV-601-WMC, 2014 WL 3845854, at *4 (W.D. Wis. Aug. 5, 2014) (unpublished).

   d. Once protective orders maintain the necessary secrecy, plaintiff must come forward with particularized trade secrets. *IDX Sys. Corp.*, 165 F. Supp. 2d at 816–17; *see also North Highland Inc. v. Jefferson Mach. & Tool Inc.*, 2017 WI 75, ¶¶ 21–22, 128, 377 Wis. 2d 496 ("It is not enough to rely upon unsubstantiated conclusory remarks, speculation, or testimony that is not based upon personal knowledge.") (citations omitted).

   e. Motion to compel is not a vehicle for determining whether the disputed information constitutes a trade secret as a matter of law. *Encap, LLC v. Scotts Co.*, No. 11-C-685, 2014 WL 4072111, at *3 (E.D. Wis. Aug. 14, 2014) (unpublished).

   f. By summary-judgment and trial stages, trade secrets must be described in sufficient detail that a reasonable jury could find that the plaintiff established each statutory element of trade secret. *IDX Sys. Corp.*, 165 F. Supp. 2d at 817.

   g. General descriptions of types of information that the plaintiff believes to be trade secrets will not suffice at the summary-judgment stage, because if a plaintiff cannot identify the information the defendant disclosed and cannot offer evidence from which the jury could conclude the information constitutes a trade secret, there is no need for a trial. It is unreasonable and unfair to force a defendant to trial without knowing specifically which information the plaintiff claims constitutes the trade secret that the defendant allegedly misappropriated. *Kuryakyn Holdings, LLC*, 242 F. Supp. 3d at 800; *see also Danaher Corp. v. Lean Focus, LLC*, No. 19-CV-750-WMC, 2021 WL 3190389, at *14–15 (W.D. Wis. July 28, 2021) (slip copy); *Land's End, Inc. v. Genesys Software Sys., Inc.*, No. 13-CV-38-BBC, 2014 WL 266630, at *4–5 (W.D. Wis. Jan. 24, 2014) (unpublished); *Marine Travelift, Inc. v. Marine Lift Sys., Inc.*, No. 10-C-1046, 2013 WL 6255689, at *6–8 (E.D. Wis. Dec. 4, 2013) (unpublished).

h. Description must be specific enough to allow a meaningful comparison of claimed trade secret with information generally known and ascertainable in the relevant field or industry. *IDX Sys. Corp.*, 165 F. Supp. 2d at 817. Although identifying its company software *in its entirety* might not be sufficient to meet the definition of trade secret, if a party identifies specific documents containing closely guarded trade secrets that cost hundreds of millions to develop the software, then such an allegation and a corresponding finding are sufficient for purposes of supporting a WUTSA claim. *See Epic Sys. Corp. v. Tata Consultancy Servs. Ltd.*, No. 14-CV-748-WMC, 2019 WL 1320297, at *5 (W.D. Wis. Mar. 22, 2019) (unpublished).

i. Trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design, and operation, in unique combination, affords competitive advantage. *Minnesota Mining & Mfg. Co. v. Pribyl*, 259 F.3d 587, 595–96 (7th Cir. 2001).

(1) A business's trade-secret-misappropriation claim against a former employee may overcome a motion to dismiss by adequately alleging on its face the identity of the specific aspects or components of the alleged trade secret. *Danaher Corp. v. Lean Focus, LLC*, No. 19-CV-750-wmc, 2020 WL 4260487, at *10 (W.D. Wis. July 24, 2020) (slip copy) (determining that plaintiff's complaint had adequately alleged that "Danaher Business System" was entitled to trade-secret protection). *But see Danaher Corp. v. Gardner Denver, Inc.*, No. 19-CV-1794-jps, 2020 WL 5770760, at *2 (E.D. Wis. Sept. 28, 2020) (slip copy) (holding, in different court, that same plaintiff-business's complaint against separate defendant, asserting infringement of Danaher's "Growth Room Tool" meeting template, did not allege a "secret" method of success any different from attending a business school lecture; "consistency and organization are important—but that is no secret").

(2) Conclusory statements that "everything" is a trade secret without specificity are insufficient to protect information as a trade secret (or survive summary judgment). *DF Inst., LLC v. Dalton Educ., LLC*, No. 19-CV-452-jdp, 2020 WL 4597122, at *4–5 (W.D. Wis. Aug. 11, 2020) (slip copy).

C. Common Case Disputes [§ 27.313]

1. Customer lists

a. Customer lists may or may not be trade secrets, depending on the circumstances. *Nalco Chem. Co. v. Hydro Techs., Inc.*, 984 F.2d 801 (7th Cir. 1993); *Minuteman, Inc. v. Alexander*, 147 Wis. 2d 842, 845 (1989); *Burbank Grease Servs., LLC v. Sokolowski*, 2005 WI App 28, ¶ 22, 278 Wis. 2d 698, *aff'd in part & rev'd in part on other grounds*, 2006 WI 103, 294 Wis. 2d 274.

b. Basic customer information that is readily ascertainable by simply calling the customers and asking them for the information is not a trade secret. *American Fam. Mut. Ins. Co. v. Roth*, 485 F.3d 930, 932 (7th Cir. 2007); *Jarosch v. American Fam. Mut. Ins. Co.*, No. 07-C-0212, 2011 WL 4356346, at *24–32 (E.D. Wis. Sept. 16, 2011) (unpublished); *Share Corp. v. Momar Inc.*, No. 10-CV-109, 2011 WL 284273, at *9 (E.D. Wis. Jan. 26, 2011) (unpublished); *Duggan v. American Fam. Mut. Ins. Co.*, No. 07-C-212, 2010 WL 1268175, at *14 (E.D. Wis. Mar. 30, 2010) (unpublished).

c. Cases applying the prior Restatement test have held that whether particular customer lists involved were trade secrets depends on the circumstances. *See also* Restatement of Torts § 757 (Am. L. Inst. 1939); *Gary Van Zeeland Talent, Inc. v. Sandas*, 84 Wis. 2d 202, 216 (1978); *American Welding & Eng'g Co. v. Luebke*, 37 Wis. 2d 697 (1968); *Abbott Labs. v. Norse Chem. Corp.*, 33 Wis. 2d 445, 465–68 (1967); *B.C. Ziegler & Co. v. Ehren*, 141 Wis. 2d 19 (Ct. App. 1987).

d. Customer lists are less likely to be trade secrets if they consist of only names and addresses or if potential customers are readily ascertainable from public records and sources; more likely if the lists contain complicated marketing data or are protected by extensive secrecy measures, or if competing products or services are identical or nearly identical and sold to a small, fixed group of purchasers. *Aon Risk Servs., Inc. v. Liebenstein*, 2006 WI App 4, 289 Wis. 2d 127, *abrogated on other grounds by Burbank Grease Servs., LLC v. Sokolowski*, 2006 WI 103, 294 Wis. 2d 274 (abrogating *Aon* on grounds that Wis. Stat. § 134.90 did not preclude all civil law remedies based on misappropriation of confidential information outside the statutory definition of trade secret); *ECT Int'l v. Zwerlein*, 228 Wis. 2d 343, 353 (Ct. App. 1999); *B.C. Ziegler*, 141 Wis. 2d at 27–28; *see also Charles Schwab & Co. v. LaGrant*, 483 F. Supp. 3d 625, 630 (E.D. Wis. 2020) (finding that "compiling a list of high net worth individuals' *names* is not difficult, and that, alone, is insufficient to warrant trade secret protection"), *appeal dismissed*, No. 20-2878, 2020 WL 9156935 (7th Cir. Oct. 9, 2020).

e. Contract may provide that customer information entered by independent agent in database of insurance company becomes insurance company's property. *American Fam. Mut. Ins. Co. v. Roth*, 485 F.3d at 932.

f. "Customer lists or databases are conceptually distinct from general information about customers that employees acquire during the normal course of their work relationship with those customers. Customer lists or databases that are the product of a deliberate employer effort to compile economically useful information are often protected as trade secrets. Factors that determine whether information contained in a customer list or database is a trade secret include whether the employer made reasonable efforts to keep the information secret, whether the information is difficult to develop by proper means, and whether the information derives economic value from being kept secret." Restatement of Employment Law § 8.02 cmt. f (Am. L. Inst. 2015).

2. Pricing information

a. Pricing information is a trade secret when prices are based on complicated or unique formulas that customers do not know about.

b. Pricing information is not a trade secret when prices are not based on such formulas and can be readily ascertained from customers by proper means without violating any contracts with customers. *Burbank Grease Servs., LLC*, 2005 WI App 28, ¶¶ 22–23, 278 Wis. 2d 698; *see also Weather Shield Mfg., Inc. v. Drost*, No. 17-cv-294-jdp, 2018 WL 3824150, at *2 (W.D. Wis. Aug. 10, 2018) (unpublished) (denying plaintiff's motion for summary judgment at least in part because, although "Weather Shield mentions a 'discount conversion formula' related to its prices, Weather Shield does not provide the formula nor does Weather Shield describe it in detail").

3. A trade secret need not be continuously used in the plaintiff's business. Protection extends to a plaintiff who has not yet had the opportunity or acquired the means to put the trade secret to use. *Minuteman, Inc.*, 147 Wis. 2d at 852–53; *see* Wis. Stat. Ann. § 134.90 cmt.; UTSA § 1 cmt.

4. Different independent developers can acquire rights in the same trade secret. UTSA § 1 cmt.

5. An insurer had a duty to defend under commercial general liability policy against allegations of advertising injury based on use of another's "advertising idea." *Air Eng'g, Inc. v. Industrial Air Power, LLC*, 2013 WI App 18, 346 Wis. 2d 9.

III. PRESERVATION OF SECRECY [§ 27.314]

A. Protection Programs [§ 27.315]

1. To be a trade secret under Wis. Stat. § 134.90(1)(c), information must be the "subject of efforts to maintain its secrecy that are reasonable under the circumstances." Whether a party took sufficient measures to protect the confidentiality of an alleged trade secret is generally a question of fact for the jury and only in an "extreme case" can the court determine as a matter of law whether a "reasonable" precaution was taken. *Starsurgical Inc. v. Aperta, LLC*, No. 10-CV-01156, 2014 WL 4072117, at *9 (E.D. Wis. Aug. 14, 2014) (unpublished) (denying motion for summary judgment); *see also Danaher Corp. v. Lean Focus, LLC*, No. 19-CV-750-WMC, 2021 WL 3190389, at *14–17 (W.D. Wis. July 28, 2021) (slip copy) (denying motion for summary judgment).

2. Information must be "subject of efforts to maintain its secrecy that are reasonable under the circumstances." Wis. Stat. § 134.90(1)(c)2.; *see also BondPro Corp. v. Siemens Power Generation, Inc.*, 463 F.3d 702, 708 (7th Cir. 2006); *Maxpower Corp. v. Abraham*, 557 F. Supp. 2d 955, 961–62 (W.D. Wis. 2008) (holding plaintiff failed to show reasonable efforts to maintain secrecy); *Rustic Retreats Log Homes, Inc. v. Pioneer Log Homes of Brit. Columbia Inc.*, No. 19-CV-1614, 2021 WL 2474112, at *18 (E.D. Wis. June 17, 2021) (slip copy) (denying motion for summary judgment because a reasonable jury could conclude that the trade-secret owner took reasonable efforts to maintain secrecy).

   a. Extreme and unduly expensive procedures are not required to protect against flagrant industrial espionage. UTSA § 1 cmt.

   b. Reasonable use of a trade secret, including controlled disclosure to employees and licensees, is consistent with the requirement of relative secrecy.

3. Accidental or negligent disclosure does not necessarily negate trade secret protection. *B.C. Ziegler & Co. v. Ehren*, 141 Wis. 2d 19, 29–31 (Ct. App. 1987).

4. As part of daily operating procedures, businesses may need to undertake specific secrecy measures. *In re Innovative Constr. Sys., Inc.*, 793 F.2d 875 (7th Cir. 1986). These may include the following:

   a. Guards,

   b. Locks,

c. Passes,

d. Limited disclosures on a need-to-know basis,

e. Visitor restrictions,

f. Notification to employees of secrecy, and

g. Use of confidentiality agreements.

5. Employers commonly use covenants not to compete to maintain the secrecy of key information. *Gary Van Zeeland Talent, Inc. v. Sandas*, 84 Wis. 2d 202, 216–18 (1978); *RTE Corp. v. Coatings, Inc.*, 84 Wis. 2d 105, 119 (1978).

a. Contractual acknowledgment that item is a trade secret may be of some weight but is not conclusive.

b. Covenant with employee must adhere to the reasonableness standards of Wis. Stat. § 103.465.

c. Covenant with employee that does not comply with these standards is void.

d. Nondisclosure provisions could be exempt from Wis. Stat. § 103.465 if they restrict only disclosure of trade secret information, without also restricting disclosure of information that is not a trade secret. *Metso Mins. Indus., Inc. v. FLSmidth-Excel LLC*, 733 F. Supp. 2d 980, 985 (E.D. Wis. 2010).

e. To be reasonable, nondisclosure covenant with employee may have to be limited to reasonable time, but not necessarily to specific territory. *Rollins Burdick Hunter, Inc. v. Hamilton*, 101 Wis. 2d 460, 467 (1981); *Gary Van Zeeland Talent*, 84 Wis. 2d at 218.

f. Contractual covenant not to disclose customer information after termination must be limited to reasonable time unless information is a trade secret under Wis. Stat. § 134.90. *Nalco Chem. Co. v. Hydro Techs., Inc.*, 984 F.2d 801 (7th Cir. 1993), *on remand*, 148 F.R.D. 608 (E.D. Wis. 1993); *cf. Farmers Ins. Exch. v. Sorenson*, 99 F. Supp. 2d 1000 (E.D. Wis. 2000); *Priority Int'l Animal Concepts, Inc. v. Bryk*, No. 12-C-0150, 2012 WL 1854121 (E.D. Wis. May 21, 2012) (unpublished).

g. Whether nondisclosure covenant without reasonable time or place restriction is construed as a valid confidentiality provision (under Wis. Stat. § 134.90) or an invalid trade constraint (under Wis. Stat. § 103.465) depends on whether the covenant has as its purpose the protection of trade secrets. *Priority Int'l Animal Concepts, Inc. v. Bryk*, No. 12-C-150, 2012 WL 1995113, at *9–10 (E.D. Wis. June 1, 2012) (unpublished).

h. Contractual covenant not to disclose trade secret for specified period after termination of employment shows intent to remove restriction after that period ends. *ECT Int'l v. Zwerlein*, 228 Wis. 2d 343, 355 (Ct. App. 1999).

6. Confidentiality agreements that protect trade secrets are inherently reasonable and need not include geographic or time limits. *IDX Sys. Corp. v. Epic Sys. Corp.*, 165 F. Supp. 2d 812 (W.D. Wis. 2001), *rev'd in part on other grounds*, 285 F.3d 581 (7th Cir. 2002).

7. Claims for breach of a nondisclosure agreement and theft of trade secrets may be subject to forum-selection clauses (even if related causes of action are not). *Wisconsin Freeze Dried LLC v. Redline Chambers, Inc.*, 375 F. Supp. 3d 1038 (E.D. Wis. 2019) (remanding claims covered by forum-selection clause but retaining noncovered claims).

8. Trade secret is protectable by statute even if nondisclosure agreement in contract is invalid for failure to include time limit. *American Fam. Mut. Ins. Co. v. Roth*, 485 F.3d 930, 933 (7th Cir. 2007); *Centrifugal Acquisition Corp. v. Moon*, 849 F. Supp. 2d 814 (E.D. Wis. 2012).

B. Court Proceedings to Preserve Secrecy [§ 27.316]

1. Wisconsin courts must use reasonable means to preserve secrecy of alleged trade secret. Under Wis. Stat. § 134.90(5), reasonable means may include the following:

   a. Protective order,

   b. In camera hearing,

   c. Sealing of record, and

   d. Prohibition on disclosing the alleged trade secret without prior court approval.

2. Before closing the courtroom to the public, a state court should hold a hearing and state its reasons for closing the courtroom and explain why those reasons override the presumptive value of public trial; the hearing may be brief when the nature of the problem—the revelation of trade secrets if the trial were open—is self-evident. *State ex rel. La Crosse Trib. v. La Crosse Cnty. Circuit Ct.*, 115 Wis. 2d 220, 236, 242 (1983).

3. The Wisconsin Supreme Court, applying prior common law, recognized that a public trial of a trade-secret claim would destroy the very right sought to be vindicated. *State ex rel. Ampco Metal Inc. v. O'Neill*, 273 Wis. 530 (1956).

4. A protective order may provide that trade secret sought in discovery should not be disclosed or be disclosed only in designated way; however, Wis. Stat. § 804.01(3)(a) relates solely to discovery and does not govern sealing exhibits annexed to pleadings. Wis. Stat. § 804.01(3)(a); *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 554 (1983).

5. An owner of a trade secret has the privilege to refuse to disclose the secret and to prevent others from disclosing the secret. Wis. Stat. § 905.08; *see also* Fed. R. Civ. P. 26(c)(1)(G).

   a. Privilege may be claimed by the owner or the owner's agent or employee.

   b. Privilege is unavailable if it would tend to conceal fraud or otherwise work injustice.

   c. When disclosure is directed, judge must take protective measures reflecting interests of the owner and parties and furtherance of justice.

6. By comparison, in federal court, the Seventh Circuit Court of Appeals recognizes only three classes of material subject to seal: (1) trade secrets, (2) information covered by a recognized

privilege, and (3) information required by statute to be maintained in confidence. If the material in question falls into one of these three categories, then the court must weigh the moving party's interest in privacy against the public's interest in transparency. *See, e.g.*, *University Acct. Servs. LLC v. ScholarChip Card LLC*, No. 17-CV-901-JPS, 2017 WL 2982995, at *1 (E.D. Wis. July 11, 2017) (unpublished) (citing *Baxter, Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 546 (7th Cir. 2002)). In *Baxter*, the Seventh Circuit made clear that it will deny any motion to maintain documents under seal unless the motion analyzes in detail, document by document, the propriety of secrecy, providing—among other information—reasons and legal citations supporting the motion. *Baxter Int'l Inc.*, 297 F.3d at 548; *see also In re C2R Glob. Mfg., Inc.*, No. 18-30182-beh, 2020 WL 7265867, at *7 (Bankr. E.D. Wis. Dec. 10, 2020) (slip copy) (adopting *Baxter* standard when reviewing motion to seal under 11 U.S.C. § 107(b) and Fed. R. Bankr. P. 9018).

7. In a federal petition pursuant to 28 U.S.C. § 1782, seeking discovery for use in a foreign proceeding, discovery orders are "final" judgments and immediately appealable because the litigation on the merits occurs in the foreign tribunal. *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 881 F.3d 550 (7th Cir. 2018) (rejecting as untimely appeals from multiple orders regarding series of protective orders).

8. It is necessary to show good cause to file trade secret information under seal. *University Acct. Servs.*, 2017 WL 2982995, at *1; E.D. Wis. Gen. L. R. 79(d)(3). If seeking to seal a document because of a trade secret, the proponents "are reminded that it is *their* burden to show good cause." *Bruzek v. Husky Oil Operations Ltd.*, 520 F. Supp. 3d 1079, 1101 (W.D. Wis. 2021) (citing Fed. R. Civ. P. 26(c)).

9. The court, on a timely motion, will quash or modify a subpoena that requires the disclosure of a trade secret. Fed. R. Civ. P. 45(d)(3)(B)(i); *see Luiken v. Runzheimer Int'l, Ltd.*, No. 11-MC-34, 2011 WL 3423335 (E.D. Wis. Aug. 3, 2011) (unpublished).

10. Other federal court rulings regarding preserving trade secrets in litigation include the following:

    a. Decision modifying proposed order that had required sealing, in whole or in part, all confidential documents, and instead requiring redaction of documents containing only small amounts of confidential information and allowing members of the public to challenge the confidentiality of documents filed in the case. *Design Basics, LLC v. Homes*, No. 16-CV-352-jps, 2016 WL 7053229, at *1–2 (E.D. Wis. Dec. 5, 2016) (unpublished) (also preemptively warning parties that court would not enter any decision under seal).

    b. Decisions granting motion to seal. *See, e.g.*, *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 960 (W.D. Wis. 2015) (granting motion to seal documents containing excerpts of manuals outlining protocols for operation because court was persuaded they contained trade secrets under Wisconsin law); *Anderson v. Bard Peripheral Vascular Inc.*, No. 15-C-574, 2021 WL 82499, at *1–2 (E.D. Wis. Jan. 11, 2021) (slip copy) (granting defendants' motion to seal trade secret and confidential commercial information previously filed under seal and in redacted form in a multidistrict litigation court); *Wisconsin Alumni Res. Found. v. Apple, Inc.*, No. 14-cv-062-wmc, 2015 WL 6453837, at *1–3 (W.D. Wis. Oct. 26, 2015) (unpublished) (granting motion to seal trial exhibits dealing with highly sensitive financial information; manufacturing agreements with third parties; documents containing technical information, including technical guides, manuals, specifications, and other product-development updates; consumer research and survey information; and documents produced by third parties containing source code and sales information).

c. Decisions denying motion to seal. *See, e.g.*, *Kohler Co. v. Kopietzki*, No.13-CV-1170, 2016 WL 1048036, at *6 (E.D. Wis. Mar. 11, 2016) (unpublished) (denying motion to maintain documents under seal absent any attempt to show that information constituted trade secrets and absent showing of how any documents, which discussed historical negotiations, could cause competitive disadvantage if made public); *Marine Travelift, Inc. v. Marine Lift Sys., Inc.*, No. 10-C-1046, 2013 WL 4087555, at *3 (E.D. Wis. Aug. 13, 2013) (unpublished) (denying motion to maintain documents filed with court under seal); *see also ABS Glob., Inc. v. Inguran, LLC*, Nos. 14-CV-503-wmc, 17-CV-446-wmc, 2020 WL 2405380, at *3 (W.D. Wis. May 12, 2020) (unpublished) (addressing numerous posttrial motions to seal exhibits and transcripts and denying the motion to seal, among other things, identities of plaintiff's suppliers); *see also Medline Indus., Inc. v. Diversey, Inc.*, No. 20-CV-1579-PP, 2021 WL 4428212, at *2 (E.D. Wis. Sept. 27, 2021) (slip copy) (denying various motions to seal or restrict sensitive financial information that was subject to confidentiality order in Illinois court).

C. Preserving Secrecy with Administrative Agencies [§ 27.317]

1. A determination of the U.S. International Trade Commission concerning trade-secret misappropriation can be given preclusive effect. *Manitowoc Cranes LLC v. Sany Am. Inc.*, No. 13-C-677, 2017 WL 6327551, at *2–5 (E.D. Wis. Dec. 11, 2017) (unpublished).

2. All materials filed with the state of Wisconsin are generally available to the public, but an "authority" may withhold access to a record or a portion of a record qualifying as a trade secret. Wis. Stat. § 19.36; *see also* Wis. Stat. § 19.32(1).

3. Hearing examiner at a contested case hearing may order those protective measures necessary to protect a party's trade secrets. Wis. Stat. § 227.46(7)(a).

4. Securities

   a. Records filed in connection with a registration statement under Wis. Stat. § 551.301 or Wis. Stat. §§ 551.303–.305 or a record under Wis. Stat. § 551.411(4) that contains trade secrets, if the person filing the registration statement or record has asserted a claim of confidentiality or privilege authorized by law, are not public records and are not available for public examination. Wis. Stat. § 551.607(2)(b).

   b. Interrogatories

      (1) Corporation answering interrogatories related to antitrust investigation may designate information provided as a trade secret.

      (2) Department of Justice must then give 15 days' notice before disclosing designated information.

      (3) Corporation may seek court order limiting or prohibiting disclosure.

      (4) Court weighs need for confidentiality against public interest in disclosure.

      (5) Confidentiality will be waived if corporation consents to disclosure or court authorizes disclosure. Wis. Stat. § 133.13(2).

5. Wisconsin Department of Natural Resources (DNR)

   a. Trade secrets (except emission data or air pollution control permits) provided to Wisconsin Department of Natural Resources (DNR) in administration of the pollution-discharge statute may be treated as confidential on showing to DNR of entitlement to protection; DNR must grant confidential status to records or information (except emission data) certified by owner or operator of solid-waste facility or materials-recovery facility or by licensed hauler as relating to production, sales figures, unique processes, or production or tending to adversely affect competitive position if made public. Wis. Stat. §§ 283.55(2)(c), 285.70(2), 289.09(2), 291.15(2); *Midwest Steel Co. v. DNR*, 167 Wis. 2d 160 (Ct. App. 1992); *see also* Wis. Stat. § 323.60(5)(e).

   b. DNR is to maintain confidentiality of trade secrets obtained in the administration of electronic waste recycling statute, Wis. Stat. § 287.17, upon application and satisfactory showing that method or process is entitled to trade secret protection under Wis. Stat. § 134.90(1)(c). Wis. Stat. § 287.17(10)(bm)1.

   c. DNR and state geologist must protect as confidential any information entitled to protection as a trade secret under Wis. Stat. § 134.90(1)(c), other than effluent data, in an application for an exploration license. Wis. Stat. § 295.44(2m).

   d. DNR must keep confidential trade secrets obtained in the administration of the Environmental Cooperation Pilot Program, the Green Tier program (other than emission data, discharge data, or information contained in a cooperative agreement), and the Environmental Compliance Audit Program, upon satisfactory showing that the information is entitled to protection as a trade secret under Wis. Stat. § 134.90(1)(c). Wis. Stat. §§ 299.80(15)(b), 299.83(7s)(c), 299.85(9)(c).

   e. DNR may treat as confidential trade secrets obtained by or provided to the DNR regarding a proposal for an interbasin transfer under Wis. Stat. § 281.344(4). Wis. Stat. § 281.344(9)(e).

6. Interstate commission for adult offender supervision and any of its committees may close a meeting to the public if it determines by two-thirds vote that open meeting would likely disclose a trade secret or commercial or financial information that is privileged or confidential. Wis. Stat. § 304.16(7)(f)3.

7. Small employer health insurer need not disclose to small employer proprietary or trade secret information as part of required disclosures. Wis. Stat. § 635.11(3m).

8. Licensed pesticide manufacturer may designate as a trade secret any information it is required to submit by Wisconsin Department of Agriculture, Trade and Consumer Protection; trade secret information about pesticide formulas acquired in the administration of pesticide regulatory statutes may not be revealed or used for personal advantage, except to or by federal or state agencies, courts, physicians, pharmacists, or others requiring information for performance of duties. Wis. Stat. §§ 94.68(6), 94.70(3)(b).

9. Licensed motor vehicle dealer or applicant for license may designate as a trade secret the financial information it is required to furnish to Department of Transportation. Wis. Stat. §§ 218.0114(20)(c), 218.0152(2)(c).

10. Public Service Commission may protect, as if it were a trade secret, business information obtained from a holding company if disclosure to the public would put any nonutility affiliate in the holding company system at a competitive disadvantage and the information is not subject to Wis. Stat. § 19.35. Wis. Stat. § 196.795(9).

11. Trade secrets in a computer program should be protected when depositing copy or "identifying material" in connection with registration under Copyright Act. Copyright Office, *Copyright Registration of Computer Programs (Circular 61)* (revised Mar. 2021), https://www.copyright.gov/circs/circ61.pdf.

IV. CIVIL LIABILITY: WISCONSIN LAW [§ 27.318]

A. In General [§ 27.319]

Per *Minuteman, Inc. v. Alexander*, 147 Wis. 2d 842, 853–54 (1989), when examining alleged violation of Wis. Stat. § 134.90, three questions arise:

(1) Is the material complained about a trade secret?

(2) Has misappropriation occurred?

(3) What type of relief is appropriate?

B. Assessment of Material Complained About [§ 27.320]

1. See sections 27.6–.9, *supra*, on the definition of trade secret.

2. On motion for summary judgment, nonmoving party has the burden of proof to demonstrate that a genuine issue of material fact remains. *North Highland Inc. v. Jefferson Mach. & Tool Inc.*, 2017 WI 75, ¶ 22, 377 Wis. 2d 496 ("It is not enough to rely on unsubstantiated conclusory remarks, speculation, or testimony that is not based upon personal knowledge.").

3. On a motion to dismiss, the defense of conclusory language will not defeat a claim of trade-secret misappropriation because the court cannot decide the issue in a factual vacuum. *Encap, LLC v. Scotts Co.*, No. 11-C-685, 2012 WL 4104835 (E.D. Wis. Sept. 17, 2012) (unpublished).

4. If a party opposing trade secret-status fails to create any genuine issues of material fact, a court should not hesitate to enter summary judgment in favor of the moving party. *Centrifugal Acquisition Corp. v. Moon*, 849 F. Supp. 2d 814, 832 (E.D. Wis. 2012).

C. Misappropriation [§ 27.321]

1. Includes acquiring a trade secret by improper means. Wis. Stat. § 134.90(2).

2. Also includes disclosing or using a trade secret (without owner's consent) if the trade secret was acquired by improper means, by breach of duty to maintain secrecy or limit its use, or by accident or mistake. *Minuteman, Inc. v. Alexander*, 147 Wis. 2d 842, 844 (1989); *B.C. Ziegler & Co. v. Ehren*, 141 Wis. 2d 19 (Ct. App. 1987); *see* Restatement (Third) of Unfair Competition §§ 40–43 (Am. L. Inst. 1995).

3. Protection is not limited to owner of the trade secret, and a licensee has standing to sue. *Metso Mins. Indus., Inc. v. FLSmidth-Excel LLC*, 733 F. Supp. 2d 969 (E.D. Wis. 2010).

4. Improper acquisition of a trade secret is enough to constitute misappropriation, even if the trade secret is not used. *Minuteman*, 147 Wis. 2d at 844.

5. The doctrine of respondeat superior can apply in connection with trade-secret misappropriation to create vicarious liability. *Manitowoc Cranes LLC v. Sany Am. Inc.*, No. 13-C-677, 2017 WL 6327551, at *2–5 (E.D. Wis. Dec. 11, 2017) (unpublished).

6. Taking a video and screen shots of information compiled using a database did not qualify as "acquiring" the database program under the Uniform Trade Secret Act, which Wisconsin has adopted, requiring court to grant motion to dismiss. Plaintiff's claim rested on protection of the database, not the data. *Poblocki Paving Corp. v. Johnson & Sons Paving, LLC*, No. 15-CV-1515-JPS, 2016 WL 1700390, at *4 n.1 (E.D. Wis. Apr. 27, 2016) (unpublished).

7. Person acquiring a trade secret legitimately, without duty of confidentiality, is free to use it; proper means to discover trade secret include the following:

   a. Independent discovery. Wis. Stat. Ann. § 134.90(1) cmt.; Restatement (Third) of Unfair Competition § 43 (Am. L. Inst. 1995).

   b. Reverse engineering (starting with known product and working backward).

   c. License from owner.

   d. Observation of item in public use or on public display.

   e. Published literature. *See RTE Corp. v. Coatings, Inc.*, 84 Wis. 2d 105, 115 (1978).

8. To state a claim for misappropriation, plaintiff must allege that defendant used or disclosed the confidential information with knowledge that defendant acquired the information under circumstances giving rise to a duty to maintain its secrecy. Wis. Stat. § 134.90(2)(b)2.b.; *see Minitube of Am., Inc. v. Reproduction Provisions, LLC*, No. 13-CV-685-JPS, 2014 WL 1761317, at *27 (E.D. Wis. May 1, 2014) (unpublished); *DeVere Co. v. McColley*, No. 14-CV-534-WMC, 2014 WL 6473513, at *7–8 (W.D. Wis. Nov. 18, 2014) (unpublished) (denying preliminary injunction because defendant was not under continuing duty to maintain secrecy after his noncompetition agreement expired); *North Highland Inc. v. Jefferson Mach. & Tool Inc.*, 2017 WI 75, ¶ 43, 377 Wis. 2d 496 (affirming grant of summary judgment, dismissing WUTSA claim, because plaintiff failed to provide sufficient evidence of misappropriation when "unrebutted" testimony supported that defendant was unaware that plaintiff's former employee formulated competing bids for both parties). *But see Starsurgical Inc. v. Aperta, LLC*, No. 10-CV-01156, 2014 WL 4072117, at *9 (E.D. Wis. Aug. 14, 2014) (unpublished) (denying motion for summary judgment because a reasonable jury could find an implicit agreement for former shareholder to maintain the confidentiality of the alleged trade secrets).

   Trade secret cases "often rely exclusively on circumstantial evidence," and a lack of direct evidence is not fatal to proving a WUTSA claim. *Cargill Inc. v. Bingenheimer*, No. 17-CV-300, 2020 WL 1309970, at *5 (E.D. Wis. Mar. 19, 2020) (unpublished).

9. Based on the circumstances, if a recipient of information knew or should have known that information was a trade secret, Wisconsin law recognizes that an implied obligation of confidentiality can arise if the disclosure was intended to be confidential. *Centrifugal Acquisition Corp., v. Moon*, 849 F. Supp. 2d 814, 833 (E.D. Wis. 2012).

10. No statutory or common-law claim for misappropriation of "confidential" information if information is not a trade secret; there must be some independent basis, such as a contract, upon which to bring such a claim. *Dental Health Prods., Inc. v. Ringo*, No. 08-C-1039, 2011 WL 3793961, at *5 (E.D. Wis. Aug. 25, 2011) (unpublished); *see also Rustic Retreats Log Homes, Inc. v. Pioneer Log Homes of Brit. Columbia Inc.*, No. 19-CV-1614, 2021 WL 2474112, at *18 (E.D. Wis. June 17, 2021) (slip copy) (holding that common-law claim for misappropriation of information that did not meet the statutory definition of a trade secret failed as matter of law).

D. Injunctions [§ 27.322]

1. Statute authorizes permanent injunction, temporary injunction, and ex parte restraining order. Wis. Stat. § 134.90(3)(a)1.; *see* Restatement (Third) of Unfair Competition § 44 (Am. L. Inst. 1995).

2. Court may issue injunction to "prevent any actual or threatened misappropriation." 18 U.S.C. § 1836(a)(3)(A)(i). That being said, a defendant may avoid preliminary injunction by proposing an adequate remedial plan. *See DF Inst., LLC v. Dalton Educ., LLC*, No. 19-CV-452-JDP, 2019 WL 3253196, at *2 (W.D. Wis. July 19, 2019) (denying motion for preliminary injunction based on defendants' proposed remedial plan, which included sharing of independent forensic investigation regarding dissemination of alleged trade secrets).

3. Usual procedure for temporary injunctions and restraining orders applies; public interest favors protection of trade secrets. Wis. Stat. §§ 813.01–813.11; *see Nalco Chem. Co. v. Hydro Techs., Inc.*, 984 F.2d 801 (7th Cir. 1993).

4. Application accompanying motion or restraining order must include "description of each alleged trade secret in sufficient detail" to inform defendant of nature of complaint or, if court so orders, must include written disclosure of trade secret. *See* Wis. Stat. Ann. § 134.90(3) cmt.; *ECT Int'l v. Zwerlein*, 228 Wis. 2d 343 (Ct. App. 1999).

   a. Description need not be complete.

   b. Defendant, through discovery, should promptly seek description of each alleged trade secret.

5. Court may enjoin use of trade secret for period of time and condition future use after that time on payment of reasonable royalty in exceptional circumstances. Wis. Stat. § 134.90(3)(b).

   a. Existence of an overriding public interest requiring denial of injunction against future damaging use. UTSA § 2 cmt.

   b. Defendant's reasonable reliance on acquisition of misappropriated trade secret in good faith and without reason to know of prior misappropriation.

      NOTE: A royalty order injunction is different than a reasonable royalty alternative

measure of damages, *see infra* § 27.19 (Damages).

6. Possibility of reverse engineering does not prevent temporary injunction but should be considered when determining length of temporary injunction. *Minuteman, Inc. v. Alexander*, 147 Wis. 2d 842, 845, 855–57 (1989).

7. Injunction should last for as long as necessary, but no longer than necessary, to eliminate commercial advantage or "lead time" of defendant who misappropriated trade secret. Subject to the additional period necessary to negate lead time, injunction should terminate when the trade secret becomes generally known to good-faith competitors or generally knowable through reverse engineering of lawfully available products. *See* UTSA § 2 cmt.; *BondPro Corp. v. Siemens Power Generation, Inc.*, 463 F.3d 702, 708 (7th Cir. 2006); *see Dorel Juvenile Grp., Inc., v. DiMartinis*, 495 F.3d 500, 504 (7th Cir. 2007).

8. Injunction will not issue absent proof that person who misappropriated trade secrets is presently deriving a "commercial advantage" from the misappropriation. *Jarosch v. American Fam. Mut. Ins. Co.*, No. 07-C-0212, 2011 WL 4356346, at *32 (E.D. Wis. Sept. 16, 2011) (unpublished).

9. Court entered four-year permanent injunction prohibiting use, possession, or retention of confidential information; prohibiting defendants from accessing or attempting to access nonpublic servers; and prohibiting defendants' employees who had access to confidential information from working on defendants' own products. *See Epic Sys. Corp. v. Tata Consultancy Servs., Ltd.*, No. 14-CV-748-WMC, 2016 WL 1696912, at *2 (W.D. Wis. Apr. 27, 2016) (unpublished).

10. Threat of misappropriation is sufficient for a preliminary injunction when disclosure by defendant in new employment is inevitable. *PepsiCo v. Redmond*, 54 F.3d 1262, 1268–69 (7th Cir. 1995).

E. Damages [§ 27.323]

1. Actual damages may include

   a. Actual loss to plaintiff,

   b. Unjust enrichment, or

   c. Reasonable royalty (if damages exceeding reasonable royalty cannot be proved). Wis. Stat. § 134.90(4)(a); *see* Restatement (Third) of Unfair Competition § 45 (Am. L. Inst. 1995).

2. Appropriate only for the period during which information is entitled to protection as a trade secret, plus any additional period during which misappropriator retains advantage over good-faith competitors. UTSA § 3 cmt.

   a. Double counting of same item as both loss and unjust enrichment is not permitted.

   b. Reasonable royalty alternative requires competent evidence of amount of reasonable royalties (unlike royalty injunction, reasonable royalty measure of damages does not require exceptional circumstances; reasonable royalty is for past misappropriation).

c. Plaintiff is not entitled to recover on both a breach-of-contract theory and a tort theory absent a showing that the separate tort violation "resulted in a separate and distinct injury for which [the plaintiff] has not been compensated." *Jarosch v. American Fam. Mut. Ins. Co.*, No. 07-C-0212, 2011 WL 4356346, at *35 (E.D. Wis. Sept. 16, 2011) (unpublished); *1st Rate Mortg. Corp. v. Vision Mortg. Servs. Corp.*, No. 09-C-471, 2011 WL 666088, at *5 (E.D. Wis. Feb. 15, 2011) (unpublished).

d. In cases in which misappropriation only gives competitor a "head start" in developing product, damages should be limited to injury suffered during the head-start period. *Sokol Crystal Prods., Inc. v. DSC Commc'ns Corp.*, 15 F.3d 1427, 1433 (7th Cir. 1994).

3. Trade secret never used could have market value, enabling award of damages. *BondPro Corp. v. Siemens Power Generation, Inc.*, 463 F.3d 702, 707 (7th Cir. 2006). In fact, an expert witness testifying as to damages can use a defendant's future profit projections for the purposes of offering an opinion on the fair market value of the trade secret *at the time* of the misappropriation (regardless of whether any profits were actually earned). *Grove US LLC v. Sany Am. Inc.*, Nos. 13-C-677, 15-C-647, 2019 WL 969814, at *3 (E.D. Wis. Feb. 28, 2019) (unpublished).

4. Consequential damages may be awarded for lost profits allegedly caused by defendant's sale of defective products incorporating plaintiff's claimed trade secrets. *World Wide Prosthetic Supply, Inc. v. Mikulsky*, 2002 WI 26, 251 Wis. 2d 45.

5. An unjust-enrichment claim cannot be maintained based on the use of information that is not a trade secret. *Fail-Safe, LLC v. A.O. Smith Corp.*, 762 F. Supp. 2d 1126, 1130 (E.D. Wis. 2011), *aff'd*, 674 F.3d 889 (7th Cir. 2012). Furthermore, a plaintiff must prove that the defendant benefited from the trade secrets to recover damages for unjust enrichment. *DF Inst., LLC v. Dalton Educ., LLC*, No. 19-CV-452-jdp, 2020 WL 4597122, at *6 (W.D. Wis. Aug. 11, 2020) (slip copy).

6. Punitive damages up to twice amount of actual damages may be awarded for willful and malicious misappropriation (award is by judge, not jury). Wis. Stat. § 134.90(4)(b); *see* UTSA § 3(b); *see also Epic Sys. Corp. v. Tata Consultancy Servs. Ltd.*, 980 F.3d 1117, 1145 (7th Cir. 2020) (finding that $280 million punitive-damages award was unconstitutionally excessive in view of $140 million compensatory-damages award), *cert. denied*, 142 S. Ct. 1400 (2022); *Rob's Auto, LLC v. Lazarz (In re Lazarz)*, No. 19-13756-13, 2021 WL 186987, at *7–8 (Bankr. W.D. Wis. Jan. 13, 2021) (slip copy) (denying plaintiff's motion for summary judgment for punitive damages pursuant to Wis. Stat. § 134.90(4)(b) absent evidence that defendant suffered any actual damages).

7. Proceeds from settlement of trade-secret misappropriation claim were properly treated as ordinary income, not long-term capital gain, under facts presented. *Freda v. Commissioner*, 656 F.3d 570, 574–76 (7th Cir. 2011).

8. Attorney fees may be awarded to the prevailing party if the misappropriation is willful and deliberate, if the claim of misappropriation is made in bad faith, or if the motion to terminate an injunction is made or resisted in bad faith. Wis. Stat. § 134.90(4)(c). The Wisconsin Court of Appeals has held that the party seeking fees under Wis. Stat. § 134.90(4)(c) must demonstrate that (1) the trade-secrets claim was objectively specious, and (2) there was subjective bad faith (i.e., an improper purpose) in bringing or maintaining the claim. *Sanimax LLC v. Blue Honey Bio-Fuels, Inc.*, No. 2019AP166, 2020 WL 2529225, ¶ 24 (Wis. Ct. App. May 19, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b))

(upholding sanctions because record provided ample support for finding plaintiff's purpose in pursuing its claim was "basically retribution" for favored employee leaving company).

a. Judge, not jury, awards attorney fees; if attorney fees are based on willful and deliberate misappropriation, judge should consider the extent to which plaintiff will recover punitive damages. *See* UTSA § 4 cmt.

b. The UTSA standard for awarding fees is "willful and *malicious*" misappropriation, while the WUTSA standard is "willful and *deliberate*." Wis. Stat. § 134.90(4)(c) (emphasis added). Although there is not a precise standard set forth distinguishing "malicious" and "deliberate," the U.S. District Court for the Western District of Wisconsin has held that "deliberate" misappropriation standard requires "some elevated degree of intentional wrongdoing … even if the misappropriation need not be malicious." *ABS Glob., Inc. v. Inguran, LLC*, No. 14-cv-503-wmc, 2018 WL 4658214, at *8 (W.D. Wis. Sept. 27, 2018) (unpublished) (denying motion for attorney fees by rejecting argument that intentional misappropriation was sufficient), *vacated and remanded*, 771 F. App'x 672 (7th Cir. 2019) (vacating as premature district court's attorney-fee award on antitrust claims).

c. Defendants who prevail on motion for preliminary injunction have been held entitled to reasonable attorney fees incurred in defense of motion brought in bad faith. *Automated Packaging Sys. Inc. v. Sharp Packaging, Inc.*, No. 88-C-656, 1989 WL 223755 (E.D. Wis. Mar. 17, 1989) (unpublished), *aff'd on other grounds*, No. 89-1419, 1989 WL 148287 (Fed. Cir. Dec. 11, 1989) (unpublished).

d. Order dismissing trade secret claims is appealable even though claim for attorney fees is pending. *Leske v. Leske*, 185 Wis. 2d 628 (Ct. App. 1994).

F. Statute of Limitation [§ 27.324]

1. The statute of limitation is three years after the initial misappropriation of a trade secret is discovered or should have been discovered by the exercise of reasonable diligence. Continuing misappropriation constitutes a single claim. Wis. Stat. § 893.51(2); *see Fail-Safe LLC v. A.O. Smith Corp.*, 744 F. Supp. 2d 831, 851 (E.D. Wis. 2010); UTSA § 6 cmt; *see also Status Sols., LLC v. JNL Techs., Inc.*, No. 20-CV-01119-WMC, 2021 WL 2860481, at *2–3 (W.D. Wis. July 8, 2021) (slip copy) (denying motion to dismiss on statute-of-limitation grounds).

2. Reasonable diligence in discovering misappropriation does not require "superhuman effort," but a plaintiff may not close his or her eyes to means of information reasonably accessible and must in good faith apply his or her attention to those particulars that may be inferred to be within his or her reach. *Joyce v. Pepsico, Inc.*, Nos. 2010AP2148, 2010AP2149, 2010AP2150, 2011AP117, 2012 WL 1033468, ¶ 20 (Wis. Ct. App. Mar. 29, 2012) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

3. Plaintiff was not required to sue when it merely suspected defendant was misappropriating trade secret. *Sokol Crystal Prods., Inc. v. DSC Commc'ns Corp.*, 15 F.3d 1427, 1430 (7th Cir. 1994).

4. When employment agreement required employee to maintain confidentiality of trade secrets for one year after his employment terminated, plaintiff's claims under Wis. Stat. § 134.90 were similarly limited to a one-year period following termination of employment. *DeVere Co. v.*

McColley, No. 14-CV-534-WMC, 2014 WL 6473513, at *8 (W.D. Wis. Nov. 18, 2014) (unpublished).

G. Federal Preemption [§ 27.325]

1. DTSA does *not* preempt state law. 18 U.S.C. § 1838.

2. State trade secret law is not preempted by federal patent law. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974).

3. State contract law authorizing license agreements is also not preempted by federal patent law. *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979).

   Wisconsin Court of Appeals has held that in hybrid license of patents and trade secrets, federal patent law supersedes state contract law, making unenforceable continuing royalty obligations after patents expire, unless royalties are allocated between patents and trade secrets. *Industrial Promotion Co. v. Versa Prods., Inc.*, 160 Wis. 2d 916 (Ct. App. 1991).

4. Under Copyright Act, state trade secret law is preempted if

   a. Subject matter of protection is fixed in a tangible medium of expression,

   b. Subject matter comes within subject matter of copyright, or

   c. Right granted is equivalent to one or more rights granted by Copyright Act. 17 U.S.C. § 301.

5. Wisconsin Court of Appeals held that Wisconsin common law of trade secrets was not preempted by Copyright Act; note that Wisconsin common law has now been replaced by Wis. Stat. § 134.90. *M. Bryce & Assocs., Inc. v. Gladstone*, 107 Wis. 2d 241, 264 (Ct. App. 1982).

H. Statutory Preemption of Common-Law Claims [§ 27.326]

1. Wis. Stat. § 134.90(6) replaces all preexisting definitions of *trade secret* and remedies for tort claims dependent solely on the existence of specific class of information statutorily defined as "trade secrets"; it leaves available all other types of civil actions that do not depend on information that meets the statutory definition of a "trade secret." *Burbank Grease Servs., LLC v. Sokolowski*, 2006 WI 103, ¶ 33, 294 Wis. 2d 274; *see also Rustic Retreats Log Homes, Inc. v. Pioneer Log Homes of Brit. Columbia Inc.*, No. 19-CV-1614, 2021 WL 2474112, at *18 (E.D. Wis. June 17, 2021) (slip copy) (granting summary judgment and holding that Wis. Stat. § 134.90(6) preempted the common-law misappropriation claim).

2. Wis. Stat. § 134.90(6) does not preempt a contractual remedy, whether or not based on misappropriation of a trade secret. *See* M. Ahrens, Note, *Wisconsin Confidential: The Mystery of the Wisconsin Supreme Court's Decision in* Burbank Grease Services v. Sokolowski *and Its Effect Upon the Uniform Trade Secrets Act, Litigation, and Employee Mobility*, 2007 Wis. L. Rev. 1271.

V. CRIMINAL LIABILITY: WISCONSIN LAW [§ 27.327]

A. Elements of Liability [§ 27.328]

1. Theft of a trade secret is a Class I felony, punishable by a fine of up to $10,000, up to three years and six months of imprisonment, or both. Wis. Stat. §§ 939.50(1)(i), (3)(i), 943.205.

2. Criminal liability requires intent and an act without owner's authority.

3. Intent must be to

   a. Deprive or withhold from owner control of trade secret, or

   b. Appropriate trade secret for own use or use of third party without owner's authority. Wis. Stat. § 943.205(1).

4. Act must be to

   a. Take, use, transfer, conceal, exhibit, or retain possession of owner's trade secret;

   b. Make copy of owner's trade secret or cause copy to be made; or

   c. Obtain title to trade secret (or copy of trade secret) by intentionally deceiving owner with false representation that

      (1) Is known to be false,

      (2) Is made with intent to defraud, and

      (3) Does defraud person to whom the representation is made. Wis. Stat. § 943.205(1).

B. Special Cases [§ 27.329]

Any person who knowingly and willfully releases a trade secret entitled to protection under 42 U.S.C. § 11042 (relating to emergency planning and community right-to-know), as applied under Wis. Stat. § 323.60(5)(e) (relating to hazardous substances information and emergency planning), will be fined not less than $100 nor more than $20,000, imprisoned for not more than one year in the county jail, or both. Wis. Stat. § 323.60(11)(d).

C. Definitions [§ 27.330]

1. Trade secret has same meaning as for civil liability but is strictly construed in criminal prosecution. Wis. Stat. § 943.205(2)(e); *Wisconsin Elec. Power Co. v. Public Serv. Comm'n*, 110 Wis. 2d 530 (1983) (requiring strict construction).

2. *Copy* means facsimile, replica, photograph, or other reproduction, and any notation, drawing, or sketch. Wis. Stat. § 943.205(2)(a).

3. *Owner* includes co-owner and partnership, unless defendant and victim are spouses. Wis. Stat. § 943.205(2)(b).

D. Defenses [§ 27.331]

1. Defendant's return of or intent to return property involved or the destruction of all copies is no defense. Wis. Stat. § 943.205(4).

2. It is lawful for former employee to use general skills and knowledge gained while employed. Wis. Stat. § 943.205(5).

VI. FEDERAL DEFEND TRADE SECRETS ACT OF 2016 [§ 27.332]

A. Effective Date [§ 27.333]

See generally DTSA, 18 U.S.C. §§ 1831–1839, Pub. L. No. 114-153, 130 Stat. 376.

1. Applies to misappropriation occurring on or after date of enactment (May 11, 2016). *See Inguran, LLC v. ABS Glob. Inc.*, No. 17-cv-446-wmc, 2018 WL 4689600, at *5 (W.D. Wis. Sept. 28, 2018) (unpublished) (dismissing DTSA claim because alleged misappropriation occurred in 2015 (i.e., before DTSA's enactment)).

2. Notice requirements apply to employee agreements entered into or updated after the effective date. 18 U.S.C. § 1833(b)(3)(D).

B. Overview of DTSA [§ 27.334]

1. Substantively, UTSA, adopted by Wisconsin under Wis. Stat. § 134.90, and DTSA are essentially the same, and courts may look to the state UTSA when interpreting DTSA. *Kuryakyn Holdings, LLC v. Ciro, LLC*, 242 F. Supp. 3d 789, 797 (W.D. Wis. 2017).

2. Provides a federal civil cause of action for misappropriation of trade secrets.

3. Creates federal question jurisdiction for trade-secret claims. 18 U.S.C. § 1836(c).

4. Three-year statute of limitation—same as Wisconsin. *See* Wis. Stat. § 893.51(2); 18 U.S.C. § 1836(d).

5. Expressly does not preempt state laws. 18 U.S.C. § 1838.

6. Authorizes ex parte seizure orders when "necessary to prevent the propagation or dissemination of the trade secret." 18 U.S.C. § 1836(b)(2).

7. Permits limited disclosure of trade secrets by whistleblowers. 18 U.S.C. § 1833(a)(2), (b).

8. Purports to reject the inevitable disclosure doctrine; cannot enjoin a person from entering into an employment relationship.

C. Scope of Coverage [§ 27.335]

DTSA applies "if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce." 18 U.S.C. § 1836(b)(1).

D. DTSA Definitions [§ 27.336]

1. Trade secret

[T]he term "trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by another person who can obtain economic value from the disclosure or use of the information. 18 U.S.C. § 1839(3).

NOTE: The definition of *trade secret* under Wis. Stat. § 134.90 is substantially similar but not identical to the DTSA definition, so parties should review these definitions when considering or defending against a claim. *See supra* § 27.7 (Definition of Trade Secrets Under Wisconsin Law).

2. Misappropriation

Per 18 U.S.C. § 1839(5), *misappropriation* means

(A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(B) disclosure or use of a trade secret of another without express or implied consent by a person who:

(i) used improper means to acquire knowledge of the trade secret;

(ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was—

(I) derived from or through a person who had used improper means to acquire the trade secret;

(II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret, or

(iii) before a material change of the position of the person, knew or had reason to know that—

(I) the trade secret was a trade secret; and

(II) knowledge of the trade secret had been acquired by accident or mistake.

3. Improper means

"[T]he term 'improper means' includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means," but "*does not include reverse engineering, independent derivation, or any other lawful means of acquisition.*" 18 U.S.C. § 1839(6) (emphasis added).

E. Remedies for Misappropriation Under DTSA [§ 27.337]

Pursuant to 18 U.S.C. § 1836(b)(3), remedies for trade secret misappropriation include

1. Injunctive relief;

2. Damages for actual loss;

3. Damages for unjust enrichment not addressed in computing actual loss;

4. In lieu of those damages, damages measured by a reasonable royalty for the unauthorized use or disclosure;

   NOTE: The DTSA gives the plaintiff the option of choosing reasonable royalty as the measure of damages. 18 U.S.C. § 1836(b)(3)(B)(ii). Wisconsin statute permits damages to be measured by a reasonable royalty "if the complainant cannot by any other method of measurement prove an amount of damages which exceeds the reasonable royalty." Wis. Stat. § 134.90.

5. Punitive damages; and

   NOTE: The DTSA and Wisconsin law permit an award of up to double damages if the violation is willful and malicious. 18 U.S.C. § 1836(b)(3)(C); Wis. Stat. § 134.90(4)(b).

6. Attorney fees.

   NOTE: The DTSA provides for attorney fees if there is a bad-faith claim of misappropriation or bad-faith motion to terminate injunction, or if the trade secret is "willfully and *maliciously* misappropriated." 18 U.S.C. § 1836(b)(3) (emphasis added). Wisconsin permits an award of reasonable attorney fees if the violation is "willful and *deliberate*." Wis. Stat. § 134.90(4)(c) (emphasis added).

F. Injunctive Relief and Employment Relationships [§ 27.338]

1. Court may issue injunction to "prevent any actual or threatened misappropriation." 18 U.S.C. § 1836(b)(3)(A)(i).

2. DTSA prohibits courts from issuing injunctions that "prevent a person from entering into an employment relationship." In addition, "conditions placed on such employment shall be based

on evidence of threatened misappropriation and not merely on the information the person knows." 18 U.S.C. § 1836(b)(3)(A)(i)(I).

3. This provision was apparently included to preclude application of the "inevitable disclosure" doctrine. *See PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995).

4. Permits courts to place conditions on employment "based on evidence of threatened misappropriation." 18 U.S.C. § 1836(b)(3)(A)(i)(I).

G. Ex Parte Seizure Orders [§ 27.339]

1. Court may issue an ex parte order, based on an affidavit or verified complaint, "providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action." 18 U.S.C. § 1836(b)(2)(A)(i).

2. Ex parte seizure orders are granted only in "extraordinary circumstances." 18 U.S.C. § 1836(b)(2)(A)(i). *Compare* Wis. Stat. § 134.90(3) (providing for ex parte restraining orders but does not expressly address seizures).

3. Seizures are conducted by federal law enforcement officers. 18 U.S.C. § 1836(b)(2)(E).

   a. Court may grant an ex parte application only if the following "clearly" appear from the facts:

      (1) An ordinary TRO or other equitable relief would be inadequate "because the party to which the order would be issued would evade, avoid, or otherwise not comply with such an order."

      (2) "[An] immediate and irreparable injury will occur if such seizure is not ordered."

      (3) Harm to the applicant outweighs the harm to interests of the person subject to the seizure and *substantially* outweighs harm to any third person.

      (4) Likelihood of success on the merits.

      (5) Person against whom application is made has actual possession of the trade secret.

      (6) The matter to be seized must be identified with reasonable particularity.

      (7) "[T]he person against whom seizure would be ordered, or persons acting in concert with such person, would destroy, move, hide, or otherwise make such matter inaccessible to the court, if the applicant were to proceed on notice to such person."

      (8) The applicant has not publicized the seizure. 18 U.S.C. § 1836(b)(2)(A)(ii).

   b. Order must, among other things:

      (1) "[P]rovide for the narrowest seizure of property necessary to achieve the purpose" of the seizure remedy;

(2) "[D]irect that the seizure be conducted in a manner that minimizes any interruption of the business operations of third parties and, to the extent possible, does not interrupt the legitimate business operations of the person accused of misappropriating the trade secrets;" and

(3) "[P]rovide guidance to law enforcement officials executing the seizure that clearly delineates the scope of authority of the officials," "the hours during which the seizure may be executed," and "whether force may be used to access locked areas." 18 U.S.C. § 1836(b)(2)(B)(ii), (iv).

c. Court must set a date for hearing within seven days after issuing the order. 18 U.S.C. § 1836(b)(2)(B)(v).

d. Person obtaining the order must provide security in the event of wrongful seizure. 18 U.S.C. § 1836(b)(2)(B)(vi).

e. Court can award damages for wrongful or excessive seizure. 18 U.S.C. § 1836(b)(2)(G).

f. Court can appoint a special master to "locate and isolate" the misappropriated trade secrets and "facilitate the return of unrelated property and data." 18 U.S.C. § 1836(b)(2)(D)(iv).

g. Seized items shall be taken into the custody of the court, not the party. 18 U.S.C. § 1836(b)(2)(D)(i).

H. Whistleblower Protections [§ 27.340]

1. Individuals are immune from criminal and civil liability if the disclosure of the trade secret is made

   a. In confidence to a federal, state, or local government official or to an attorney;

   b. Solely for the purpose of reporting or investigating a suspected violation of law; or

   c. In a complaint or other document filed under seal in a lawsuit. 18 U.S.C. § 1833(b)(1).

2. Whistleblower may disclose trade secret(s) to attorney in anti-retaliation lawsuit (file under seal; no disclosure without court order). 18 U.S.C. § 1833(b)(2).

3. Employment contracts must contain notice of whistleblower protections.

   a. Notice of DTSA's immunity provisions must be "in any contract or agreement with an employee that governs the use of a trade secret or other confidential information." 18 U.S.C. § 1833(b)(3)(A).

   b. Employer also can comply by providing "a cross-reference to a policy document provided to the employee that sets forth the employer's reporting policy for suspected violation of law." 18 U.S.C. § 1833(b)(3)(B).

4. "Employee" includes contractors and consultants for an employer. 18 U.S.C. § 1833(b)(4).

5. Noncompliance means no attorney fees or punitive damages may be awarded in action against employee. 18 U.S.C. § 1833(b)(3)(C).

I. Criminal Liability Under DTSA [§ 27.341]

1. Theft of trade secrets related to a product or service used in or intended for use in interstate or foreign commerce is a federal crime punishable (1) for individuals, by fine, imprisonment up to 10 years, or both; or (2) for organizations, by fine of not more than the greater of up to $5 million or 3 times the value of the stolen trade secret to the organization, including expenses for research and design and other costs of reproducing the trade secret that the organization has thereby avoided. 18 U.S.C. § 1832 (theft of trade secrets).

   Economic loss to victims is not an element of the crime of unlawful possession and transmission of trade secrets under 18 U.S.C. § 1832(a). *United States v. Yihao Pu*, 814 F.3d 818 (7th Cir. 2006).

   The government need not prove that the owner of the secret actually lost money as a result of the theft. The "independent economic value" attributable to the information's remaining secret need only be "potential," as distinct from "actual". 18 U.S.C. § 1839(3)(B); *United States v. Hanjuan Jin*, 733 F.3d 718, 721 (7th Cir. 2013).

2. Theft of trade secrets with the intent or knowledge that the offense will benefit a foreign government, foreign instrumentality, or foreign agent is a federal crime punishable (1) for individuals, by fine up to $5 million, imprisonment up to 15 years, or both; or (2) for organizations, by fine up to $10 million or three times the value of the stolen trade secret to the organization, including expenses for research and design and other costs of reproducing the trade secret that the organization has thereby avoided. 18 U.S.C. § 1831 (economic espionage).

3. Definition of a trade secret in federal criminal statutes differs from the Wisconsin definition in Wis. Stat. § 134.90.

   > [T]he term "trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—
   >
   > (A) the owner thereof has taken reasonable measures to keep such information secret; and
   >
   > (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information. 18 U.S.C. § 1839(3).

VII. BANKRUPTCY [§ 27.342]

A. Licensee of trade secrets is protected under Bankruptcy Code when licensor is the subject of bankruptcy proceedings. 11 U.S.C. § 365(n); *see* 2 Joan N. Feeney et al., *Bankruptcy Law Manual* § 16:21 (5th ed. 2020).

B. If trustee rejects executory license agreement, licensee may elect to treat contract as terminated if rejection would be breach entitling licensee to terminate.

C. Alternatively, licensee may elect to retain contract rights to trade secrets and continue paying any royalties.

D. Trade secrets are subject to the Bankruptcy Code while trademarks are not. 11 U.S.C. § 101(35A); *Sunbeam Prods., Inc. v. Chicago Am. Mfg.*, 686 F.3d 372, 375 (7th Cir. 2012).

E. When a debtor agrees to a settlement involving the protection of the creditor's trade secrets, these nonmonetary obligations are not dischargeable under the Bankruptcy Code. *In re Gacharna*, 480 B.R. 909 (Bankr. N.D. Ill. 2012).

VIII. LICENSING [§ 27.343]

License agreements for trade secrets should take into account Antitrust Guidelines for the Licensing of Intellectual Property, issued by U.S. Department of Justice and Federal Trade Commission. U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* (2017), https://www.justice.gov/atr/IPguidelines/download.

Chapter 28
Trademark Law

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NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 252; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-108 (Apr. 6, 2022); and all references to the Code of Federal Regulations (C.F.R.) are current through 87 Fed. Reg. 20,350 (Apr. 7, 2022).

I. INTRODUCTION [§ 28.344]

A. In General [§ 28.345]

NOTE: This outline covers only basic procedures under federal and state trademark law and provides an overview of substantive legal issues. The broader area of unfair competition law is mentioned only briefly. For more information on unfair competition, consult the treatises listed in section 28.3, *infra*.

1. Legal protection of trademarks arose under the common law of unfair competition; today, federal and state statutes provide for registration and enforcement of trademark rights. *Dunn v. Gull*, 990 F.2d 348 (7th Cir. 1993).

2. Federal statutes and rules

   a. Trademark (Lanham) Act of 1946, Pub. L. No. 79-489, 60 Stat. 427 (codified as amended at 15 U.S.C. §§ 1051–1141n); Rules of Practice in Trademark Cases (Rules), 37 C.F.R. pt. 2.

   b. Trademark Law Revision Act of 1988 (TLRA), effective Nov. 16, 1989. Pub. L. No. 100-667, 102 Stat. 3935 (1988).

   c. Trademark Law Treaty Implementation Act (TLTIA), effective October 30, 1999, makes procedural requirements of different national trademark offices more consistent and simplifies and clarifies procedures for registering trademarks, and for maintaining and renewing trademark registrations. Pub. L. No. 105-330, 112 Stat. 3064 (1998).

   d. Madrid Protocol Implementation Act, effective November 2, 2003, provides that (1) owner of U.S. application or registration may seek protection of its mark in any country party to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid Protocol) by submitting a single international application to the International Bureau of the World Intellectual Property Organization (IB) through the U.S. Patent and Trademark Office (PTO); and (2) owner of application or registration in a country party to Madrid Protocol may obtain international registration from the IB and request an extension of protection of the international registration to the United States. Pub. L. No. 107-273, §§ 13401–13403, 116 Stat. 1758, 1913–21 (2002) (codified at 15 U.S.C. §§ 1141–1141n); 37 C.F.R. pt. 7.

   e. Trademark Modernization Act of 2020 (TM Act of 2020), for which most implementing regulations became effective December 18, 2021, provides for reexamination and expungement of trademark registrations, and creates shortened but extendable examination response deadlines. Pub. L. No. 116-260, div. Q, tit. II, subtit. B, §§ 221–228, 134 Stat. 1182, 2200–10; Changes to Implement Provisions of the Trademark Modernization Act of 2020, 86 Fed. Reg. 64,300 (Nov. 17, 2021) (to be codified at 37 C.F.R. pt. 2 and 37 C.F.R. pt. 7).

3. Wisconsin Statutes. Wis. Stat. ch. 132.

4. Definitions

   NOTE: Because the legal requirements for trademarks and service marks are generally the same, both are referred to in this chapter as *trademarks* unless different rules apply to each.

   a. *Trademark* includes any word, name, symbol, or device, or any combination thereof either used by a person, or for which a person both has a bona fide intention to use in commerce and applies to register on principal register, in order to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of goods, even if that source is unknown. 15 U.S.C. § 1127.

b. *Service mark* is similar to trademark, but used in sale or advertising of services rather than goods. 15 U.S.C. § 1127.

c. *Trade name* means name used to identify a business or vocation (registrable under Wisconsin law, but not federal law). 15 U.S.C. § 1127; Wis. Stat. § 132.001(2).

d. *Trade dress* refers to the total image of a product or packaging, including size, shape, color or color combinations, graphics, texture, or sales techniques. 15 U.S.C. § 1125(a); *Vaughan Mfg. Co. v. Brikam Int'l, Inc.*, 814 F.2d 346 (7th Cir. 1987).

5. Functions of trademarks

a. Identify and distinguish goods from those manufactured by others, and indicate source of goods.

b. Serve as guarantee of quality and consistency.

c. Provide means for advertising goods and creating and maintaining demand for goods.

B. Resources [§ 28.346]

1. Handbooks

a. U.S. Patent & Trademark Office, *Trademark Manual of Examining Procedure* (July 2021) (TMEP), https://tmep.uspto.gov/RDMS/TMEP/current/.

b. U.S. Patent & Trademark Office, *Acceptable Identification of Goods and Services Manual* (reflects Nice Agreement 11th ed. 2022), https://idm-tmng.uspto.gov/id-master-list-public.html (searchable) (last visited May 9, 2022).

c. U.S. Patent & Trademark Office, *United States Trademark Law: Rules of Practice & Federal Statutes* (Jan. 1, 2022), https://www.uspto.gov/sites/default/files/documents/tmlaw.pdf.

2. Trademark cases reported in *United States Patent Quarterly*, *Federal Reporter* system, and state reporters.

3. Treatises and forms

a. Thomas P. Arden, *Trademark Law Guide* (2003 & Supp. 2018).

b. Louis Altman & Malla Pollack, *Callmann on Unfair Competition, Trademarks, and Monopolies* (4th ed. 1981 & Supp. 2021).

c. Anne Gilson Lalonde, *Gilson on Trademarks* (2007 & Supp. 2019).

d. Amanda V. Dwight & James Hawes, *Trademark Registration Practice* (2d ed. 2003 & Supp. 2021).

e. Kathleen E. McCarthy, *Kane on Trademark Law: A Practitioner's Guide* (7th ed. 2020 & Supp. 2021).

f. Barry Kramer & Allen D. Brufsky, *Trademark Law Practice Forms: Rules, Annotations, Commentary* (2d ed. 2002 & Supp. 2021).

g. J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition (5th ed. 2017 & Supp. 2020) [hereinafter McCarthy on Trademarks].

h. Charles E. McKenney & George F. Long, III, *Federal Unfair Competition: Lanham Act § 43(a)* (1989 & Supp. 2021).

i. Forms for federal registration available from PTO, *see infra* para. 4.a.(2).

j. Forms for state registration available from Wisconsin Department of Financial Institutions and are available online at *Wisconsin Trademark/Tradename Forms*, https://www.wdfi.org/Apostilles_Notary_Public_and_Trademarks/forms_trademark.htm (last visited May 9, 2022) (see information on filing application in section 28.24, *infra*).

4. Useful telephone numbers and websites

a. Federal

(1) PTO general information line (automated): (571) 272-9250 or (800) 786-9199; https://www.uspto.gov.

(2) PTO forms

(a) Complete online and file electronically using the Trademark Electronic Application System (TEAS): https://www.uspto.gov/trademarks/apply/index-all-teas-forms (last modified Jan. 29, 2022).

(b) By phone: (571) 272-9250 or (800) 786-9199.

(3) PTO status of applications and registrations via automated voice system: (571) 272-9250 or (800) 786-9199; or online through Trademark Status & Document Retrieval (TSDR), https://tsdr.uspto.gov (last visited May 9, 2022).

(4) PTO post-registration information: (571) 272-9500; https://tsdr.uspto.gov (last visited May 9, 2022).

(5) Trademark Assistance Center: (800) 786-9199 or (571) 272-9250; via e-mail: trademarkassistancecenter@uspto.gov.

(6) Trademark Trial and Appeal Board (TTAB): (571) 272-8500; https://www.uspto.gov/trademarks/ttab (last modified Jan. 6, 2022).

(7) Madrid Protocol

(a) Electronic forms for international registration: https://www.uspto.gov/trademarks/apply/trademark-electronic-application-system-teasi-online (last modified Dec. 9, 2021).

(b) General information, forms, fee calculator: https://www.wipo.int/madrid/en/ (last visited Mar. 8, 2021).

b. Wisconsin Department of Financial Institutions (Division of Corporate and Consumer Services): (608) 266-8915; *Trademarks and Tradenames*, https://www.wdfi.org/Apostilles_Notary_Public_and_Trademarks/defaultTrademark.htm (last visited May 9, 2022).

II. OVERVIEW OF TRADEMARK LAW [§ 28.347]

A. Selecting Trademarks [§ 28.348]

1. Client's objective should be to select a strong, registrable, and easily protected mark.

2. Distinctiveness of mark affects its strength, registrability, and degree of available legal protection.

   a. Strongest marks are coined or fanciful marks that are invented for the express purpose of functioning as trademarks (e.g., KODAK cameras, XEROX copiers). *Tisch Hotels, Inc. v. Americana Inn, Inc.*, 350 F.2d 609 (7th Cir. 1965).

   b. Second strongest marks are arbitrary marks—words in common use but applied to goods unrelated to their meaning (e.g., APPLE computers, V-8 vegetable juice).

   c. Third strongest marks are suggestive marks—suggest characteristic or quality of goods, but require imagination, thought, and perception to reach conclusion as to nature of goods (e.g., ROACH MOTEL insect trap, HANDI-WIPES dusting cloths). *Forum Corp. of N. Am. v. Forum, Ltd.*, 903 F.2d 434 (7th Cir. 1990).

   d. Weakest marks are descriptive marks—merely describe feature, quality, characteristic, or function of goods and require little thought or imagination to determine connection between mark and product; registration on principal register generally permitted only after mark has acquired distinctiveness or *secondary meaning* (e.g., LA beer, RAISIN-BRAN cereal), *see infra* § 28.15. *G. Heileman Brewing Co. v. Anheuser-Busch, Inc.*, 873 F.2d 985 (7th Cir. 1989).

   e. Color mark is registrable if it has obtained a secondary meaning and is nonfunctional (i.e., is not essential to purpose or use of goods and does not affect cost and quality of goods). *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995).

3. Generic terms are words in common use as names for particular kinds of goods and are not capable of receiving trademark protection because they identify the product, rather than the product's source (e.g., CORN FLAKES corn flakes). *Door Sys., Inc. v. Pro-Line Door Sys., Inc.*, 83 F.3d 169 (7th Cir. 1996); *Liquid Controls Corp. v. Liquid Control Corp.*, 802 F.2d 934 (7th Cir. 1986).

4. Prospective trademark owner should avoid selecting a mark likely to be confused or mistaken with another's mark, *see infra* § 28.9. 15 U.S.C. § 1052(d); *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357 (C.C.P.A. 1973).

B. Clearing Trademarks for Use and Registration [§ 28.349]

See generally Gilson, *supra* § 28.3, § 3.01.

1. Before adoption, thorough trademark investigation is critical to minimize the chance of trademark infringement. *Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947 (7th Cir. 1992).

2. At minimum, preliminary trademark screening search should include PTO records.

   a. Internet search of U.S. Trademark Electronic Search System (TESS), including full bibliographic text of pending, registered, and inactive marks, may be conducted. https://www.uspto.gov/trademarks/search (last modified Nov. 18, 2021).

   b. Online search may be conducted by lawyer, searching firm, or other qualified person.

   c. Alternatively, manual search at PTO in Alexandria, Virginia, may be conducted.

3. Trademark searches may also include the following:

   a. State trademark registrations in all 50 states,

   b. State incorporation records,

   c. Telephone and trade directories,

   d. Internet domain name registrations, or

   e. Internet search engines such as "www.google.com."

C. Acquiring Trademark Rights [§ 28.350]

1. Under common law, trademark rights are acquired by use.

2. Application for federal registration can be filed before use, with registration contingent upon "use in commerce." 15 U.S.C. § 1051(b), (d).

   a. *Use in commerce* means bona fide use of mark in ordinary course of trade, and not made merely to reserve right in mark. 15 U.S.C. § 1127.

   b. *Token use* is no longer permitted.

   c. Wisconsin law permits registration before use. Wis. Stat. § 132.01(1).

3. Filing application for federal registration (whether based on use or intent to use) serves as nationwide constructive use (contingent on issuance of registration on principal register),

defeating later users of or filers of applications for confusingly similar marks. 15 U.S.C. § 1057(c).

D. Abandoning Trademark Rights [§ 28.351]

1. Trademark is deemed abandoned if use is discontinued with intent not to resume such use. 15 U.S.C. § 1127. *See generally Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 955 (7th Cir. 1992); John H. Derrick, Annotation, *What Constitutes Abandonment of Trademark by Discontinuance of Use with Intent Not to Resume It, Under § 45 of Lanham Act (15* U.S.C.*A. § 1127)*, 83 A.L.R. Fed. 295 (1987).

    a. Intent inferred from circumstances.

    b. Nonuse for three consecutive years is prima facie evidence of abandonment.

2. Results from any course of conduct, including acts of omission as well as commission, causing mark to become generic or to otherwise lose significance as mark. 15 U.S.C. § 1127. *See generally* John H. Derrick, Annotation, *What Constitutes Abandonment of Trademark by Conduct Causing Mark to Lose Significance as Indication of Origin, Under § 45 of Lanham Act (15* U.S.C.*A. § 1127(b))*, 81 A.L.R. Fed. 677 (1987).

    a. Improper use of trademark as noun or verb (rather than proper adjective) can destroy owner's exclusive rights. *Donald F. Duncan, Inc. v. Royal Tops Mfg. Co.*, 343 F.2d 655 (7th Cir. 1965).

    b. Examples of once-valuable trademarks lost in this way include aspirin, escalator, shredded wheat, thermos, cellophane, yo-yo, brassiere. *See Ty Inc. v. Perryman*, 306 F.3d 509, 513 (7th Cir. 2002); *King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 321 F.2d 577 (2d Cir. 1963).

E. Infringement of Trademarks [§ 28.352]

1. Test is *likelihood of confusion*—whether accused infringing mark is "likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1114(1); *Bliss Salon Day Spa v. Bliss World LLC*, 268 F.3d 494, 496 (7th Cir. 2001); *Helene Curtis Indus., Inc. v. Church & Dwight Co.*, 560 F.2d 1325, 1330 (7th Cir. 1977).

    a. Evidence of *actual* confusion is *not* required to prove infringement. *Tisch Hotels, Inc. v. Americana Inn, Inc.*, 350 F.2d 609, 611 (7th Cir. 1965).

    b. *Sound, sight, and meaning* test is often used in determining likelihood of confusion. *See generally McCarthy on Trademarks, supra* § 28.3, § 23:21; Restatement of Torts § 729 (1938); Restatement (Third) of Unfair Competition §§ 21–23 (1995). Marks are compared for:

        (1) Phonetic similarity (e.g., TAS-TEE salad dressing vs. TASTY salad dressing). *Henri's Food Prods. Co. v. Tasty Snacks, Inc.*, 817 F.2d 1303 (7th Cir. 1987).

        (2) Similarity of appearance, e.g., *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423 (7th Cir. 1985).

(3) Similarity of meaning (e.g., MANPOWER temporary help services vs. WOMENPOWER temporary help services). *Manpower, Inc. v. Womenpower, Inc.*, 288 F. Supp. 132 (D.P.R. 1968).

c. Seventh Circuit considers the following factors to be important in determining a likelihood of confusion; not all factors are of equal importance or applicable in every case:

(1) Degree of similarity between marks in appearance and suggestion;

(2) Similarity of products for which names are used;

(3) Area and manner of concurrent use;

(4) Degree of care likely to be exercised by consumers;

(5) Strength of complainant's mark;

(6) Actual confusion;

(7) Intent on part of alleged infringer to palm off products as those of another; and

(8) Parody—if defendant employs successful parody, consumer would not be confused, but amused. *CAE, Inc. v. Clean Air Eng'g, Inc.*, 267 F.3d 660, 677–78 (7th Cir. 2001); *Helene Curtis*, 560 F.2d at 1330; *Nike, Inc. v. "Just Did It" Enters.*, 6 F.3d 1225 (7th Cir. 1993).

2. Causes of action for infringement

a. Federal

(1) If mark federally registered, suit may be brought under Lanham Act § 32(1). 15 U.S.C. § 1114(1).

(2) Lanham Act § 43(a) protects *both* unregistered and federally registered marks. 15 U.S.C. § 1125(a); *Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604 (7th Cir. 1986).

(3) Anyone harmed can sue with concurrent state and federal jurisdiction.

b. Wisconsin

(1) If mark registered in Wisconsin, suit may be brought to enjoin use of *counterfeit mark* as defined under Wis. Stat. § 132.001(1). Wis. Stat. § 132.033.

(2) Common-law remedies for unfair competition and trademark infringement are available for registered and unregistered marks. 15 U.S.C. § 1125(a); *First Wis. Nat'l Bank of Milwaukee v. Wichman*, 85 Wis. 2d 54 (1978).

3. Other causes of action—Lanham Act § 43(a), 15 U.S.C. § 1125(a), establishes federal *sui generis* tort of unfair competition covering:

a. Trade dress infringement for trade dress not registered on principal register; see section 28.2, *supra*, for definition of trade dress.

(1) *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992) provides that for infringement of product-packaging trade dress, plaintiff must establish the following:

(a) Product packaging is nonfunctional (i.e., design feature is not essential to product's use or purpose; does not affect product's cost or quality; alternative designs are available to competitors). 15 U.S.C. § 1125(a)(3).

(b) Product packaging is inherently distinctive or has acquired secondary meaning, *see infra* § 28.15.

(c) There is likelihood of confusion, *see supra*, between plaintiff's and defendant's product packaging. 15 U.S.C. § 1125(a)(1)(A).

(2) For infringement of product-design trade dress, *see, e.g., Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205 (2000), plaintiff must establish all the following:

(a) Product design is nonfunctional (i.e., it is not essential to the use or purpose of the article and does not affect the cost or quality of the article). 15 U.S.C. § 1125(a)(3); *TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23 (2001) (citing *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995)).

(b) A showing of secondary meaning in the product design.

(c) A likelihood of confusion between plaintiff's and defendant's product design.

b. False designation of origin, sponsorship, or affiliation. *See, e.g., Wesley-Jessen Div. of Schering Corp. v. Bausch & Lomb, Inc.*, 698 F.2d 862 (7th Cir. 1983).

(1) Plaintiff must establish

(a) Valid trademark exists,

(b) Plaintiff has been or is likely to be harmed because of defendant's affirmative misrepresentation, and

(c) A likelihood of confusion exists.

However, goods or services need not be substantially similar; the wrongful conduct is the misrepresentation of common source.

(2) False designation of origin includes, but is not limited to, passing off one's goods and services as those of another. *Warner Bros. v. American Broad. Cos.*, 720 F.2d 231 (2d Cir. 1983).

(3) False designation of sponsorship creates the impression that goods or services are authorized or endorsed by another. *Processed Plastic Co. v. Warner Commc'ns, Inc.*, 675 F.2d 852 (7th Cir. 1982).

(4) False designation of affiliation creates the impression that goods or services are related to another's line of goods or services.

c. False or misleading description or representation. *Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939 (3d Cir. 1993).

(1) Includes *false advertising*—misrepresentation made by defendant about defendant's *own* product.

(2) Includes *product disparagement*—misrepresentation made by defendant about another person's goods, services, or commercial activities. *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914 (3d Cir. 1990).

(3) *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6 (7th Cir. 1992), provides that statements must be characterized as

(a) Literally false, or

(b) Literally true, but misleading.

(i) Plaintiff must demonstrate that a statistically significant part of the commercial audience has been misled. *Coors Brewing Co. v. Anheuser-Busch Cos.*, 802 F. Supp. 965 (S.D.N.Y. 1992).

(ii) Innuendo, indirect intimations, and ambiguous suggestions are prohibited.

(iii) *Puffing* (i.e., vague or grossly exaggerated advertising claim upon which no reasonable consumer would rely) is not actionable. *Castrol*, 987 F.2d at 945–46.

(4) Plaintiff must establish all the following:

(a) Defendant made false or misleading statement. *U.S. Healthcare*, 898 F.2d at 922–23.

(b) Actual deception or at least a tendency to deceive a substantial portion of intended audience.

(c) Deception is material and likely to influence purchasing decisions.

(d) Goods traveled in interstate commerce.

(e) There is likelihood of injury to plaintiff in terms of declining sales, loss of goodwill, etc.

d. Dilution of famous marks. 15 U.S.C. § 1125(c), *as amended by* Trademark Dilution Revision Act of 2006 (TDRA), Pub. L. No. 109-312, 120 Stat. 1730.

(1) Owner of a famous mark that is distinctive, either inherently or through acquired distinctiveness, is entitled to an injunction against another who uses a mark or trade name that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, competition, or actual economic injury. 15 U.S.C. § 1125(c)(1).

(a) *Dilution by blurring* is defined as "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark." 15 U.S.C. § 1125(c)(2)(B).

(b) *Dilution by tarnishment* is defined as "association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark." 15 U.S.C. § 1125(c)(2)(C).

(2) A mark is considered *famous* if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner. 15 U.S.C. § 1125(c)(2)(A).

(a) Recognition of a mark only within a niche market of the United States is no longer sufficient to assert a claim of dilution.

(b) In determining whether a mark is famous, the court may consider all relevant factors, including:

(i) Duration, extent, and geographic reach of advertising and publicity of the mark. 15 U.S.C. § 1125(c)(2)(A)(i).

(ii) Amount, volume, and geographic extent of sales of goods or services offered under the mark. 15 U.S.C. § 1125(c)(2)(A)(ii).

(iii) Extent of actual recognition of the mark. 15 U.S.C. § 1125(c)(2)(A)(iii).

(iv) Whether the mark was registered under the Trademark Act of March 3, 1881, or the Trademark Act of February 20, 1905, or on the principal register, *see infra* §§ 28.12, 28.13. 15 U.S.C. § 1125(c)(2)(A)(iv).

(3) Pursuant to 15 U.S.C. § 1125(c)(2)(C)(3), the following conduct is not actionable under the TDRA:

(a) Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person's own goods or services, including use in connection with either of the following:

(i) Comparative advertising. 15 U.S.C. § 1125(c)(2)(C)(3)(A)(i).

(ii) Parody or criticism of, or commentary on, the owner of the famous mark or the owner's goods or services. 15 U.S.C. § 1125(c)(2)(C)(3)(A)(ii).

(b) News reporting and news commentary. 15 U.S.C. § 1125(c)(3)(B).

(c) Noncommercial use of a mark. 15 U.S.C. § 1125(c)(3)(C).

(4) Under the TDRA, injunctive relief is the sole remedy, unless willful intent to cause dilution by blurring or tarnishment is proved and the mark that is likely to cause dilution was first used after October 6, 2006; if so, damages, defendant's profits, costs of the action, and destruction of offending articles are also available remedies. In exceptional cases, reasonable attorney fees may be awarded to the prevailing party. 15 U.S.C. § 1125(c)(1); 15 U.S.C. § 1117(a); 15 U.S.C. § 1118.

4. Forum

a. State and federal courts have concurrent jurisdiction over claims arising under Lanham Act, and suit may be brought in either state or federal court.

b. Federal courts may also adjudicate state and common-law claims, providing there is diversity or pendent jurisdiction.

5. Remedies for infringement include:

a. Injunctive relief. 15 U.S.C. § 1116.

b. Award of defendant's profits, damages sustained by plaintiff, and costs. 15 U.S.C. § 1117.

c. Multiple damages (up to three times actual damages). 15 U.S.C. § 1117.

d. Attorney fees to prevailing party in "exceptional cases." 15 U.S.C. § 1117.

e. Destruction of infringing articles. 15 U.S.C. § 1118.

f. Prejudgment interest. *Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 963 (7th Cir. 1992); *Gorenstein Enters. v. Quality Care-USA*, 874 F.2d 431, 436 (7th Cir. 1989).

g. Corrective advertising. *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499 (7th Cir. 1992).

6. Remedies at paras. 5.a.–e., *supra*, may be available under Lanham Act § 43(a). 15 U.S.C. §§ 1116–1118.

F. Infringement Defenses and Defects [§ 28.353]

1. Legal defenses and defects

a. Fraud in procurement of registered trademark or incontestable right to use the mark is ground for cancellation; however, even if registration is cancelled, mark may still be

protected under common law or Lanham Act § 43(a), 15 U.S.C. § 1125(a). 15 U.S.C. § 1115(b)(1); *Money Store v. Harriscorp Fin., Inc.*, 689 F.2d 666 (7th Cir. 1982).

b. Registration of mark may be expunged or reexamined ex parte on grounds that mark not used in commerce in connection with some or all of the goods or services in the registration, 15 U.S.C. §§ 1066a–1066b; however, even if registration is expunged, mark may still be protected under common law or Lanham Act § 43(a), 15 U.S.C. § 1125(a). 15 U.S.C. § 1115(b)(1).

c. Abandonment of mark, *see supra* § 28.8. 15 U.S.C. § 1115(b)(2).

d. Use of registered mark by or with permission of registrant or person in privity with registrant, so as to misrepresent the source of the goods or services. 15 U.S.C. § 1115(b)(3).

e. Fair use of mark may be a defense to claim of infringement; defense is based, in part, on principle that no one should be able to appropriate descriptive language through trademark registration.

(1) *Classic* or statutory fair use under Lanham Act permits use of another's mark in its descriptive sense, and in good faith, merely to describe one's own goods or services or their geographic origin; defendant has no independent burden to negate the likelihood of confusion. 15 U.S.C. § 1115(b)(4); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004).

(2) *Nominative* fair use, a judicially created doctrine, permits one to use another's mark merely to identify that other party's goods or services, such as in comparative advertising. *Playboy Enters., Inc. v. Welles*, 279 F.3d 796 (9th Cir. 2002); *World Impressions, Inc. v. McDonald's Corp.*, 235 F. Supp. 2d 831 (N.D. Ill. 2002).

f. Prior innocent use—allegedly infringing mark was adopted without knowledge of registrant's prior use and had been used continuously from date before plaintiff's application or registration; however, defense applies only to territorial area in which such continuous prior use is proved. 15 U.S.C. § 1115(b)(5); *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90 (1918).

g. Violation of antitrust laws may provide grounds to deny enforcement of trademark owner's rights. 15 U.S.C. § 1115(b)(7); *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366 (7th Cir. 1976).

h. Mark is functional. 15 U.S.C. § 1115(b)(8).

2. Equitable defenses. 15 U.S.C. § 1115(b)(9).

a. Laches bars relief if plaintiff's unreasonable delay in filing infringement suit causes injury or prejudice to defendant. *Chattanoga Mfg., Inc. v. Nike, Inc.*, 301 F.3d 789, 792–93 (7th Cir. 2002); *Money Store*, 689 F.2d at 674.

b. Acquiescence bars relief if trademark owner's acts or words convey consent to use owner's mark. *TMT N. Am., Inc. v. Magic Touch GmbH*, 124 F.3d 876 (7th Cir. 1997).

c. Estoppel bars relief when defendant relies to its detriment on plaintiff's actions with respect to mark in question. *MWS Wire Indus., Inc. v. California Fine Wire Co.*, 797 F.2d 799 (9th Cir. 1986).

d. Doctrine of *unclean hands* bars relief when plaintiff has engaged in unjust, inequitable, illegal, or deceitful conduct with regard to the subject matter in litigation. *United States Jaycees v. Cedar Rapids Jaycees*, 614 F. Supp. 515 (N.D. Iowa 1985), *aff'd*, 794 F.2d 379 (8th Cir. 1986).

III. FEDERAL REGISTRATION OF TRADEMARKS [§ 28.354]

A. Principal Register and Supplemental Register [§ 28.355]

1. In general, coined, arbitrary, and suggestive marks are placed on principal register. 15 U.S.C. § 1052.

2. Marks capable of distinguishing goods but not registrable on principal register (e.g., merely descriptive marks) are placed on supplemental register. 15 U.S.C. § 1091.

   a. Registration on supplemental register does not preclude later registration on principal register upon proof of distinctiveness. 15 U.S.C. § 1095.

   b. Supplemental register affords fewer advantages. 15 U.S.C. § 1094.

B. Benefits of Registration on Principal Register [§ 28.356]

1. Prima facie evidence (and sometimes conclusive evidence) of validity of registration and registered mark and registrant's ownership of mark and exclusive right to use mark. 15 U.S.C. § 1057(b); 15 U.S.C. § 1115(a), (b).

2. Constructive notice of registrant's claim of ownership (eliminates good-faith defense by subsequent user). 15 U.S.C. § 1072.

3. Permits use of ® symbol or other statutory designations of registration. 15 U.S.C. § 1111.

4. Federal jurisdiction without regard to diversity or amount in controversy for infringement actions. 15 U.S.C. § 1121(a).

5. Right to record registration with U.S. Customs and Border Protection to stop importation of goods bearing infringing mark. 15 U.S.C. § 1124.

6. Possibility of "incontestable" status after five years of registration. 15 U.S.C. § 1065; *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189 (1985).

7. May furnish basis for foreign registration. 15 U.S.C. § 1126.

C. Overview of Registration Process [§ 28.357]

1. Most applications must be completed and filed electronically using TEAS (https://www.uspto.gov/trademark/apply (last modified Mar. 25, 2022)). In limited

circumstances, a paper application may be mailed or hand delivered to the PTO. The mailing address is Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451. Applications delivered by hand, private courier, or other delivery service should be taken to Trademark Assistance Center, James Madison Building–East Wing, Concourse Level, 600 Dulany St., Alexandria, VA 22314. 37 C.F.R. § 2.190(a), (b).

2. PTO reviews application to determine whether all filing requirements have been met. 37 C.F.R. § 2.21 (listing application requirements).

3. If satisfactory, application assigned serial number and filing receipt mailed or emailed to applicant. TMEP § 401; *see also* 37 C.F.R. § 2.23.

4. Examining attorney performs search for conflicting marks and reviews application for compliance with statute and rules; makes an initial determination of registrability listing any statutory grounds for refusal or procedural informalities; if any problem exists, initial "Office Action" issued, *see infra* § 28.15. 37 C.F.R. § 2.61.

5. Applicant must timely respond to all objections or the application will be deemed abandoned in whole or in part. 37 C.F.R. § 2.62; 37 C.F.R. § 2.65. Before December 1, 2022, an applicant has six months to timely respond. As of December 1, 2022, applicants will have three months to respond, with an option to request a three-month extension of time for a fee. *See* 37 C.F.R. § 2.6(a)(28), *created by* 86 Fed. Reg. 64,300, 64,325 (eff. Dec. 1, 2022)).

   a. Response may be written argument, amendment of application, or both.

   b. Telephone or personal interview with examining attorney is permitted.

   c. Examining attorney may make correction on own initiative by examiner's amendment.

6. After response by applicant, application reexamined or reconsidered. 37 C.F.R. § 2.63.

7. If final refusal is issued by examining attorney, within six months applicant must do one of the following:

   a. Comply with requirements of examining attorney,

   b. Appeal to TTAB, or

   c. File petition to Director if permitted by 37 C.F.R. § 2.63(b). 37 C.F.R. § 2.64.

8. If mark is approved for registration, application will pass to publication and notice of publication will issue. 37 C.F.R. § 2.80.

9. Mark published in *Official Gazette*. 37 C.F.R. § 2.80.

   a. Third parties have 30 days from date of publication either to file notice of opposition and required fee or to request extension of time within which to oppose. 37 C.F.R. § 2.101(a), (c).

b. Initial 30-day extension of time granted upon request; 90-day extension may be granted by TTAB for good cause shown. 37 C.F.R. § 2.102(c)(1).

c. Time for filing opposition will not be extended beyond 180 days from date of publication. 37 C.F.R. § 2.102(c).

10. If no opposition is filed or all oppositions filed are dismissed, a notice of allowance or certificate of registration is issued. 37 C.F.R. § 2.81(a), (b).

11. To avoid cancellation of registration, owner must file affidavit or declaration of continued use or excusable nonuse and prescribed fee within the following time periods:

a. Between 5th and 6th year after date of registration, or within a 6-month grace period upon payment of surcharge; and

b. Within the year before end of every 10-year period after date of registration, or within a 6-month grace period upon payment of surcharge. 15 U.S.C. § 1058; 37 C.F.R. §§ 2.160–.161.

12. Term of registration is 10 years; renewable for additional 10-year terms upon filing of renewal application and prescribed fee. 15 U.S.C. § 1058; 15 U.S.C. § 1059; 37 C.F.R. §§ 2.181–.183.

D. Statutory Grounds for Refusal of Registration [§ 28.358]

1. Most common substantive grounds for refusal include:

a. Mark so resembles registered mark as to be likely to cause confusion, to cause mistake, or to deceive. 15 U.S.C. § 1052(d).

b. Mark is merely descriptive or deceptively misdescriptive of goods. 15 U.S.C. § 1052(e)(1).

c. Mark is primarily geographically descriptive of goods. 15 U.S.C. § 1052(e)(2).

d. Mark is primarily geographically deceptively misdescriptive of goods. 15 U.S.C. § 1052(e)(3).

e. Mark is primarily merely a surname. 15 U.S.C. § 1052(e)(4).

f. Mark comprises any matter that, as a whole, is functional. 15 U.S.C. § 1052(e)(5).

g. Mark consists of name, portrait, or signature of living individual, unless written consent is given. 15 U.S.C. § 1052(c).

2. Statutory ground for refusal based on immoral, deceptive, or scandalous matter or on disparaging matter, *see* 15 U.S.C. § 1052(a), held unconstitutional under First Amendment. *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) (invalidating 15 U.S.C. § 1052(a)'s bar against "immoral … or scandalous" matter); *Matal v. Tam*, 137 S. Ct. 1744 (2017) (striking down 15 U.S.C. § 1052(a)'s "disparagement clause").

3. Registration of mark refused on grounds listed in paras. 1.b., 1.c., 1.d., or 1.e., *supra*, is still possible if mark has acquired *secondary meaning* (i.e., has become distinctive of applicant's goods). 15 U.S.C. § 1052(f).

    a. Five years of substantially exclusive and continuous use of mark may be accepted as evidence of secondary meaning. 15 U.S.C. § 1052(f).

    b. Extensive advertising, sales, or survey evidence may also be used to show secondary meaning. *Platinum Home Mortg. Corp. v. Platinum Fin. Grp.*, 149 F.3d 722 (7th Cir. 1998); *Echo Travel, Inc. v. Travel Assocs., Inc.*, 870 F.2d 1264 (7th Cir. 1989).

E. Bases for Filing Application for Federal Registration [§ 28.359]

1. Mark is in use in commerce. 15 U.S.C. § 1051(a); 37 C.F.R. § 2.34(a)(1).

2. Bona fide intention to use mark in commerce. 15 U.S.C. § 1051(b); 37 C.F.R. § 2.34(a)(2).

3. Registration of mark in a foreign applicant's country of origin. 15 U.S.C. § 1126(e); 37 C.F.R. § 2.34(a)(3).

4. Claim of priority based on an earlier-filed foreign application. 15 U.S.C. § 1126(d); 37 C.F.R. § 2.34(a)(4).

5. Extension of protection of an international registration. 15 U.S.C. § 1141f; 37 C.F.R. § 2.34(a)(5).

F. How to File Application for Federal Registration [§ 28.360]

1. Requirements for a complete application. *See* 15 U.S.C. § 1051(a); 37 C.F.R. § 2.32.

    a. Prepare application in English.

    b. Make a request for registration.

    c. Identify applicant:

        (1) If individual, specify applicant's name, domicile address, email address, and citizenship.

        (2) If corporation, specify corporate name, state or nation of incorporation, domicile address, and email address.

        (3) If partnership, specify name and citizenship of each general partner, laws under which partnership organized, domicile address of partnership, and email address.

    d. Identify mark.

    e. State one or more bases for filing, *see supra* § 28.16. 37 C.F.R. § 2.34(a).

    f. List goods and services.

g. Specify international classes of goods and services, if known. 37 C.F.R. § 6.1.

h. Include signed verification or declaration by person properly authorized to sign on behalf of applicant. 37 C.F.R. § 2.33.

i. Include drawing depicting a substantially exact representation of mark. 37 C.F.R. §§ 2.51–.52.

(1) Standard character (typed) drawing. 37 C.F.R. § 2.52(a).

(a) Use for marks consisting of words, letters, numbers, or any combination of these. 37 C.F.R. § 2.52(a).

(b) Include following statement in application: "The mark is in standard characters and no claim is made to any particular font style, size, or color." 37 C.F.R. § 2.52(a)(1).

(2) Special form drawing. 37 C.F.R. § 2.52(b).

(a) Use for marks consisting of a two- or three-dimensional design; color; or words, letters, or numbers, or any combination of these in a particular font style or size. 37 C.F.R. § 2.52(b).

(b) If mark includes color, show mark in color, name the color(s), describe where color(s) appear on mark, and submit claim that color is or colors are a feature of the mark. 37 C.F.R. § 2.52(b)(1).

(c) If mark is not in standard characters, a description of mark. 37 C.F.R. § 2.32(a)(8).

j. Pay filing fee of $350 for at least one class of goods or services if filing electronically for a TEAS Standard application; $250 for each class of goods or services if meeting filing requirements for a TEAS Plus application; $750 for each class of goods or services if submitted on paper. 37 C.F.R. § 2.6.

k. If applicant is represented by a qualified practitioner, *see* 37 C.F.R. § 11.14, the practitioner's name, postal address, and email address. 37 C.F.R. § 2.21.

2. Additional requirements for a TEAS Plus application

a. Filing fees for each class of goods or services;

b. List of goods and services must be correctly classified and identical to PTO's *Acceptable Identification of Goods and Services Manual*; and

c. Cannot be for registration of certification mark, collective mark, or collective membership mark, or for registration on Supplemental Register. 37 C.F.R. § 2.22.

3. Requirements for applications based on *use in commerce*

a. Include trademark owner's verified statement that mark is in use in commerce on or in connection with goods and services listed in application. 37 C.F.R. § 2.34(a)(1)(i).

b. State date of applicant's first use of mark *anywhere*. 37 C.F.R. § 2.34(a)(1)(ii).

c. State date of applicant's first use of mark *in commerce*. 37 C.F.R. § 2.34(a)(1)(iii).

d. Submit one specimen (sample) for each class of goods and services showing how applicant actually uses mark in commerce. 37 C.F.R. § 2.34(a)(1)(iv).

4. Applications based on *intent to use*, registration in foreign applicant's country of origin, or earlier-filed foreign application must include applicant's verified statement that it has a bona fide intention to use mark in commerce on or in connection with the goods and services listed in application. 15 U.S.C. § 1051(b)(3); 37 C.F.R. § 2.34(a)(2)–(4).

5. Applications based on request for extension of protection of an international registration must attach a declaration of bona fide intention to use mark in commerce verified by applicant for, or holder of, international registration. 15 U.S.C. § 1141f; 37 C.F.R. § 2.34(a)(5).

6. Special procedures for intent-to-use applications

a. *Amendment to Allege Use* is filed during initial examination of application verifying that mark is in use in commerce. It must be filed before approval of mark for publication, and may be filed before expiration of six-month response period after issuance of final action, or after commencement of an appeal (requires filing fee of $100 per class if filed electronically, and filing fee of $200 per class if filed on paper). 37 C.F.R. § 2.76; 37 C.F.R. § 2.6(a)(2); 37 C.F.R. § 2.142.

b. *Statement of Use* is filed after notice of allowance verifying mark is in use in commerce. Must be filed within six months after mailing of notice of allowance or within extension of time granted for filing statement of use to avoid abandonment (requires filing fee of $100 per class if filed electronically, and filing fee of $200 per class if filed on paper). 37 C.F.R. § 2.88; 37 C.F.R. § 2.6(a)(3).

c. *Notice of Allowance* is mailed by PTO after expiration of 30-day opposition period (assuming no opposition filed). Mailing date establishes due date for applicant to file statement of use or request for extension of time to file statement of use. 37 C.F.R. § 2.81(b).

IV. FEDERAL TRADEMARK REGISTRATION OF INTERNET DOMAIN NAMES [§ 28.361]

A. Examination of Domain Names by PTO [§ 28.362]

See generally TMEP § 1215.

1. Internet domain names are registrable as trademarks or service marks only if they function as source identifiers.

a. Use of internet domain name as a mere directional reference, similar to use of telephone number or business address on stationery, business cards, or advertisements, is not use of name as source identifier.

b. Term that serves only to identify applicant's domain name or the location on internet where applicant's website appears, and that does not separately identify applicant's services, does not function as service mark. *In re Eilberg*, 49 U.S.P.Q.2d (BNA) 1955 (TTAB 1998).

2. Advertising one's own products or services on internet does not constitute a service. TMEP § 1215.02(b).

V. STATE REGISTRATION OF TRADEMARKS [§ 28.363]

A. Definitions [§ 28.364]

1. *Mark* means label, trademark, trade name, term, design, pattern, model, device, shopmark, drawing, specification, designation, or form of advertisement that is adopted or used by any person to designate, make known, or distinguish any goods or service as having been made, prepared, or provided by that person and registered under Wis. Stat. § 132.01. Wis. Stat. § 132.001(2).

2. Wisconsin has adopted rule and rationale of Restatement (Second) of Torts, Tentative Draft No. 8 § 715 (1963), as common law of Wisconsin, which is similar to statutory definition of mark. Wis. Stat. § 132.001(2); *First Wis. Nat'l Bank of Milwaukee v. First Wis. Bankshares Corp.*, 85 Wis. 2d 54, 63 (1978).

3. *Counterfeit mark* generally means spurious mark that is identical or substantially identical to genuine mark and that is used or intended to be used on or in connection with goods or services for which genuine mark is registered and in use. Wis. Stat. § 132.001(1).

B. Benefits of Registration [§ 28.365]

1. Registration is public record that shows date party began using mark.

2. Prima facie evidence of adoption of mark and facts prerequisite to registration. Wis. Stat. § 132.031.

3. Suit may be brought to enjoin use of any counterfeit mark identical or substantially identical to registered mark. Wis. Stat. § 132.033(1).

a. Counterfeit mark must be exact copy of registered mark or substantially indistinguishable from it. *Madison Reprographics, Inc. v. Cook's Reprographics, Inc.*, 203 Wis. 2d 226 (1996).

b. Wisconsin's definition closely tracks definition of counterfeit mark in federal counterfeit trafficking statute, 18 U.S.C. § 2320(e)(1).

4. Court may grant injunctive relief if irreparable injury shown. Wis. Stat. § 132.033(2)(a); *Spheeris Sporting Goods, Inc. v. Spheeris on Capitol*, 157 Wis. 2d 298 (Ct. App. 1990). A

plaintiff seeking an injunction will be entitled to a rebuttable presumption of irreparable injury upon finding a violation of the Lanham Act in the case of a motion for a permanent injunction or upon a finding of likelihood of success on the merits for a violation of the Lanham Act in the case of a motion for a preliminary injunction or temporary restraining order. 15 U.S.C. § 1116(a), *as amended by* TM Act of 2020, Pub. L. No. 116-260, div. Q, tit. II, § 226(a), 134 Stat. 1182, 2208.

5. Court may award actual damages or amount not exceeding three times defendant's profits. Wis. Stat. § 132.033(2)(b).

6. Court may award reasonable investigator and attorney fees. Wis. Stat. § 132.033(2)(d).

7. If willfulness is proved, court will award the greater of the actual damages or an amount equal to three times defendant's profits. Wis. Stat. § 132.033(2)(c).

8. Registration or renewal of trademark is effective for 10 years. Wis. Stat. § 132.01(6)(b).

C. Limitations of Registration [§ 28.366]

1. Does not give registrant the exclusive right to registered mark; unlike federal registration, does *not* expand owner's rights beyond scope of common-law rights; hence, registration is principally evidentiary only.

2. Does *not* entitle registrant to use any statutory registration notice, such as ®; however, use of notation ™ or *Trademark* is always permissible, even without registration, but such notation simply directs attention of public to possible trademark rights and has no legal effect.

3. Search for similar marks is not performed, unless requested.

4. Department of Financial Institutions has no discretion to refuse registration of trademark or trade name even if identical to previously registered trademark or trade name or if proposed mark is generic.

D. How to File Application [§ 28.367]

1. Any person, firm, partnership, corporation, association, or union that has or will adopt or use trademark may apply. Wis. Stat. § 132.01.

2. Requirements for application

   a. Forms with instructions available from Department of Financial Institutions or online at *Wisconsin Trademark/Tradename Forms*, https://www.wdfi.org/Apostilles_Notary_Public_and_Trademarks/forms_trademark.htm (last visited May 9, 2022). Forms must be submitted online or via walk-in.

   b. Two samples of mark required if mark "consists of words, symbols, pictures, or a combination, with a distinctive appearance."

   c. Filing fee is $15 for original or renewal registration. Wis. Stat. § 132.01(3).

3. Apply to Wisconsin Department of Financial Institutions

a. Office location

4822 Madison Yards Way, North Tower
Madison, WI 53705

b. Mailing address

Wisconsin Department of Financial Institutions
Notary Public and Trademarks
P.O. Box 7847
Madison, WI 53707-7847

c. Telephone: (608) 266-8915

d. Fax: (608) 264-7965

e. Internet: https://www.wdfi.org/ (last visited May 9, 2022)

Chapter 29
Construction Lien Law

Steven W. Martin
Waukesha

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; and all references to the United States Code are current through Pub. L. No. 117-118 (May 9, 2022).

I. INTRODUCTION [§ 29.368]

A. In General [§ 29.369]

1. Construction lien is a lien against real estate or against contract funds. Wis. Stat. §§ 779.01(3), 779.035, 779.15.

2. Purpose of construction lien is to protect persons who improve the real estate of another with labor or materials.

3. Construction liens are the creation of Wis. Stat. ch. 779.

4. Perfection of construction lien rights requires all the following:

a. Proper classification of lien claimant, *see infra* §§ 29.4–.7, who can be

(1) Prime contractor,

(2) Subcontractor, or

(3) Supplier or service provider.

b. Proper classification of project, *see infra* §§ 29.8–.10, which can be

(1) Private project, including

(a) Small,

(b) Large, or

(c) Bonded; or

(2) Public project.

c. Proper classification of labor and materials used in project, *see infra* §§ 29.11–.13.

d. Proper and timely submission and filing of notices, *see infra* §§ 29.14–.18.

B. Sources [§ 29.370]

For a comprehensive form and procedure handbook, see Steven W. Martin & Bridget M. Hubing, *Wisconsin Construction Lien Law Handbook* (State Bar of Wis. 4th ed. 2014 & Supp.).

II. CLASSIFICATION OF LIEN CLAIMANT [§ 29.371]

A. Prime Contractor [§ 29.372]

1. *Prime contractor* is a person who enters into a construction contract with an owner of land to improve land, a person who takes over an uncompleted contract for a prime contractor, or an owner who personally acts as a prime contractor in improving land. Wis. Stat. § 779.01(2)(d)1., 2.

2. Person who contracts directly with an owner who is acting as a prime contractor is *not* a prime contractor. Wis. Stat. § 779.01(2)(d)1.

3. Prime contractor can be an architect, professional engineer, construction manager, surveyor, or other service provider, but a laborer working on project is *not* a prime contractor. Wis. Stat. § 779.01(2)(d)1.

B. Subcontractor [§ 29.373]

Person who supplies material or labor and does not deal directly with the owner. *Farmer v. St. Croix Power Co.*, 117 Wis. 76, 85 (1903).

C. Supplier or Service Provider [§ 29.374]

Person who supplies building materials to a prime contractor or subcontractor and does not deal directly with the owner. Wis. Stat. § 779.02(2)(b); *Warnke v. Braasch*, 233 Wis. 398, 403 (1940).

III. CLASSIFICATION OF PROJECT [§ 29.375]

A. Private Projects [§ 29.376]

1. Private projects do not involve public improvements or public works, *see infra* § 29.10.

2. Under Wis. Stat. § 779.02(1)(c), private large projects include;

   a. Wholly residential improvements in which *more than* four family living units are to be provided or added. *Riverwood Park, Inc. v. Central Ready-Mixed Concrete, Inc.*, 195 Wis. 2d 821 (Ct. App. 1995).

   b. Improvements that are partly or wholly nonresidential.

3. Private small projects include wholly residential improvements in which four or fewer family living units are to be provided or added. Wis. Stat. § 779.02(1)(c).

4. Private bonded projects eliminate construction lien rights provided under Wis. Stat. § 779.01 for all persons *except prime contractors* and require, under Wis. Stat. § 779.03(2), the following:

   a. Contract between prime contractor and owner providing that prime contractor will pay for all claims for labor, materials, plans, or specifications furnished, used, or consumed in making improvement. Wis. Stat. § 779.035(1).

      NOTE: Excluded from payment are plans or specifications furnished by an architect, professional engineer, or surveyor employed directly by the owner.

   b. Prime contractor's bond issued by surety company licensed to do business in Wisconsin. Wis. Stat. § 779.035(1).

B. Public Projects [§ 29.377]

1. Public projects involve construction improvement contracts in excess of $10,000 for public works or public improvements. Wis. Stat. § 779.14(1e)(a).

2. Construction lien rights provided under Wis. Stat. § 779.01 are eliminated in public works projects. *Druml Co. v. City of New Berlin*, 78 Wis. 2d 305, 310 (1977).

3. Wis. Stat. § 779.14(1m)(c) applies to state contracts.

   a. Contracts with a contract price in excess of $16,000 but not exceeding $148,000 allow state to make direct payment to subcontractors or pay by joint check to subcontractors; contract must also include criteria for determining whether the contract requires payment or performance assurances and, if so, what payment or performance assurances are required.

b. State contracts with price exceeding $148,000 but not exceeding $369,000 allow state to make direct payment to subcontractors or pay by joint check; contract must require prime contractor to provide payment and performance bond unless Department of Administration allows prime contractor to substitute a different payment assurance such as irrevocable letter of credit or escrow account.

c. Contracts exceeding $369,000 require prime contractor to obtain payment and performance bond.

d. Note exceptions for transportation-related work.

4. Wis. Stat. § 779.14(1m)(d) applies to local government contracts.

a. Local government contracts with price exceeding $16,000 but not $74,000 may provide for direct payment to subcontractors or payment by joint check.

b. Contracts with price exceeding $74,000 but not exceeding $148,000 may provide for direct payment to subcontractors or payment by joint check; in addition, contract must provide for payment and performance bond unless local government allows prime contractor to substitute different payment assurance such as irrevocable letter of credit or escrow account.

c. Contracts with contract price in excess of $148,000 require payment and performance bond.

d. Contracts for construction of professional football stadiums are exempt from bonding requirements. Wis. Stat. § 779.14(4).

e. Note exceptions for transportation-related work.

5. Under Wis. Stat. § 779.14(1e)(b), (1m)(e)3., contract for public works projects are not to be made unless

a. Prime contractor gives bond issued by surety company licensed to do business in Wisconsin,

b. Prime contractor agrees to maintain list of subcontractors and suppliers, and

c. Bond is approved by proper public board or authority.

6. Claims of second-tier subcontractors are now payable out of contract funds and by surety; however, second-tier subcontractors on state highway projects are not covered. Wis. Stat. § 779.14(1)(a), (b), (1m)(c)2.

CAUTION: It is extremely important for the contractor to check with the governmental body to see whether a bond does in fact exist or whether other payment assurances are being used. The public entity is required to ensure that a bond has been acquired. *Holmen Concrete Prods. Co. v. Hardy Constr. Co.*, 2004 WI App 165, 276 Wis. 2d 126.

IV. CLASSIFICATION OF LABOR AND MATERIALS [§ 29.378]

A. Lienable Items [§ 29.379]

1. *Lienable items* for unbonded projects include

   a. Lienable items if used for *improvement*. Definition of *improvement* includes repair and remodeling, and the improvement need not be permanent. Wis. Stat. § 779.01(2)(a).

   b. *Labor* includes wages, contributions for state employment taxes, worker's compensation, unemployment insurance, and other fringe benefits. Wis. Stat. § 779.01(2)(am).

   c. Plans

   d. *Materials* includes supplies, tools, fixtures, equipment, machinery, vehicles, fuel, construction materials, and energy. Wis. Stat. § 779.01(2)(bm).

      (1) Delivery to owner or agent for use on project is requisite. *Kilgust Heating v. Kemp*, 70 Wis. 2d 544, 548 (1975).

      (2) For specific examples of *lienable materials*, see *Wisconsin Construction Lien Law Handbook*, *supra* § 29.3, ch. 1.

   e. Services

   f. Specifications

2. Bonded projects

   a. Private bonded projects

      Under Wis. Stat. § 779.035(1), items for which claims can be made are

      (1) Labor

      (2) Plans

      (3) Materials

      (4) Services

      (5) Specifications

      (6) Other nonlienable items included in bond. *Knuth v. Fidelity & Cas. Co. of N.Y.*, 275 Wis. 603, 609 (1957).

   b. Public bonded projects

      (1) Lienable items if used or consumed *and* supplied directly to prime contractor; legislation only applies to highway projects. Wis. Stat. § 779.14(1)(b).

(2) Under Wis. Stat. § 779.14(1)(a), on other public works projects, materials supplied to subcontractor would be lienable. Claims can be made for

(a) Labor

(b) Building materials

(c) Services

(d) Plans

(e) Specifications

(3) Bonding requirement does not apply to materials purchased directly by owner.

B. Nonlienable Items [§ 29.380]

1. Labor, materials, and plans that are inseparably mixed with nonlienable items. *Muller v. S.J. Groves & Sons*, 203 Wis. 203, 210 (1930); *Rinzel v. Stumpf*, 116 Wis. 287, 292–94 (1903).

2. Items supplied to inventory are generally not lienable. *Ozaukee Sand & Gravel Co. v. City of Milwaukee*, 243 Wis. 38 (1943); *Esslinger v. Huebner*, 22 Wis. 602 (*632) (1868).

3. Plans or specifications provided by architect, engineer, or surveyor employed by owner are not covered by bond on private project. Wis. Stat. § 779.035(1).

4. Prejudgment interest. *Torke/Wirth/Pujara, Ltd. v. Lakeshore Towers of Racine*, 192 Wis. 2d 481 (Ct. App. 1995).

5. See *Wisconsin Construction Lien Law Handbook*, *supra* § 29.3, for additional discussion.

V. NECESSARY NOTICES AND DEADLINES [§ 29.381]

A. In General [§ 29.382]

Generally, person may proceed to perfect construction lien rights by filing necessary notices after

1. Lien claimant has been classified, *see supra* §§ 29.4–.7;

2. Project has been classified, *see supra* §§ 29.8–.10; or

3. Labor and materials have been classified, *see supra* §§ 29.11–.13.

B. Prime Contractors [§ 29.383]

1. Private small projects

a. Ten-day notice. Wis. Stat. § 779.02(2)(a).

(1) Purpose of notice is to give owners early and effective notice of existing lien law, and to warn owners that they may receive notices from potential lien claimants.

(2) Deadline for notice is within 10 days after first labor or materials are furnished.

(3) Contents—see Wis. Stat. § 779.02(2)(a) for exact wording of notice. Wis. Stat. § 779.02(2)(a).

(4) Form. Wis. Stat. § 779.02(2)(a).

(a) Eight-point bold type if printed.

(b) Capital letters if typed.

(5) Wis. Stat. § 779.02(2)(a) provides for methods of notification.

(a) In construction contract if written contract. *See generally Murphy v. Droessler*, 188 Wis. 2d 420, 425–26 (Ct. App. 1994) (discussing notification before enactment of 2005 Wis. Act 204).

(b) If no written contract, serve owner with notice in one of the following ways. Wis. Stat. § 779.01(2)(e).

(i) By personal delivery;

(ii) Through registered mail or certified mail;

(iii) In the same manner as service of summons and complaint, *see* Wis. Stat. § 801.14; or

(iv) By other delivery in which recipient makes written confirmation of delivery.

(6) Savings clause. Wis. Stat. § 779.02(2)(c).

Prime contractor who fails to give 10-day notice does not have lien rights unless the prime contractor pays all obligations to its subcontractors, and either none of the subcontractors gives notice as lien claimants or all the subcontractors provide lien waivers.

b. Thirty-day notice of intent to file. Wis. Stat. § 779.06(2).

(1) Purpose of notice is to give owner 30 days' warning before lien claim is filed so owner can avoid adverse effects on title to land and credit rating.

(2) Under Wis. Stat. § 779.06(1), (2), deadline for notice is

(a) Thirty days before claim is filed, and

(b) Within five months after furnishing last labor or materials.

(3) Contents of notice. Wis. Stat. § 779.06(2).

(a) Description of nature of claim

(b) Amount of claim

(c) Description of land and improvement to which lien claim relates

c. Claim for lien. Wis. Stat. § 779.06(1).

(1) Purpose is to create encumbrance against specific parcel of real estate for which labor or materials have been supplied but not paid for.

(2) Deadline on claim for lien is six months from date lien claimant last furnished labor or materials on project. Wis. Stat. § 779.06(1).

(3) Under Wis. Stat. § 779.06(3), contents of claim for lien include

(a) Statement of contract or demand upon which it is founded,

(b) Name of person against whom claim is made,

(c) Name of claimant and any assignee,

(d) Last date of performance of labor or supply of materials,

(e) Legal description of property subject to claim,

(f) Amount claimed,

(g) All other material facts, and

(h) Copies of notices given.

(4) Lien claimant must serve a copy of lien claim on owner within 30 days after date of filing. Wis. Stat. § 779.06(1).

d. Under Wis. Stat. § 779.06(1), summons and complaint must be filed with clerk of court within two years from date of filing lien claim; filing commences legal action to foreclose construction lien against owner.

2. Private large project

a. *No* 10-day notice requirement. Wis. Stat. § 779.02(2).

b. Thirty-day notice requirement, *see supra* para. 1.b. Wis. Stat. § 779.06.

c. Claim for lien, *see supra* para. 1.c. Wis. Stat. § 779.06.

d. Summons and complaint, *see supra* para. 1.d. Wis. Stat. § 779.06.

3. Private bonded project

a. Prime contractor maintains lien rights under Wis. Stat. § 779.01 and must comply with notice requirements and deadlines to perfect lien claim. Wis. Stat. § 779.03(2).

b. Follow notice requirements in paragraphs 1. and 2., *supra*, depending on size of project.

4. Public works

a. Prime contractor has no lien rights under Wis. Stat. § 779.01 and must proceed against a governmental body by bringing contract action on claim. Wis. Stat. §§ 779.14(2), 779.15(1); *Druml Co. v. City of New Berlin*, 78 Wis. 2d 305 (1977).

b. Subcontractor must commence against prime contractor and surety no later than one year after completion of work under contract.

C. Subcontractors [§ 29.384]

1. Private small project

a. Sixty-day notice requirement. Wis. Stat. § 779.02(2)(b).

(1) Deadline for notice is 60 days after furnishing first labor or materials.

(2) See statute for exact contents.

(3) Two signed copies of notice must be given. Wis. Stat. § 779.02(2)(b).

(4) Under Wis. Stat. § 779.01(2)(e), *see generally Murphy v. Droessler*, 188 Wis. 2d 420, 425–26 (Ct. App. 1994), owner may be notified by:

(a) Personal service;

(b) Registered or certified mail;

(c) Service in same manner as service of summons and complaint, *see* Wis. Stat. § 801.14; or

(d) Other delivery in which recipient makes written confirmation of delivery.

(5) This notice is not required from

(a) Laborers or mechanics employed by contractor or subcontractor. Wis. Stat. § 779.02(1)(a).

(b) Lien claimants who are not prime contractors and who have directly contracted with owner. Wis. Stat. § 779.02(1)(b).

(c) Prime contractors who personally or corporately own or control any portion of the land. Wis. Stat. § 779.02(1)(d).

(d) Lien claimants who are not prime contractors and who furnish labor or materials for a project that does not require giving notice. Wis. Stat. § 779.02(1)(e).

b. Thirty-day notice of intent to file, *see supra* § 29.16, 1.b. Wis. Stat. § 779.06(2).

c. Claim for lien, *see supra* § 29.16, 1.c. Wis. Stat. § 779.06(1).

d. Summons and complaint, *see supra* § 29.16, 1.d. Wis. Stat. § 779.06(1).

2. Private large project

a. No 60-day notice required. Wis. Stat. § 779.02(1).

b. Thirty-day notice, *see supra* § 29.16, 1.b. Wis. Stat. § 779.06(2).

c. Claim for lien, *see supra* § 29.16, 1.c. Wis. Stat. § 779.06(1).

d. Summons and complaint, *see supra* § 29.16, 1.d. Wis. Stat. § 779.06(1).

3. Private bonded project

a. Notice to owner of lien on proceeds. Wis. Stat. § 779.036.

(1) Purpose

(a) Ensure that owner properly allocates funds to entitled parties, and

(b) Protect parties from any ill-founded claims by others.

(2) Deadline for filing notice is *before* owner or lender pays contractor or subcontractor. Wis. Stat. § 779.036(1).

(3) Copies of notice to owner or lender must also be served on prime contractor within seven days after service on owner. Wis. Stat. § 779.036(2).

(4) Under Wis. Stat. § 779.036(2), notice may be served

(a) Personally, Wis. Stat. § 779.01(2)(e);

(b) By registered mail or certified mail, *see generally Murphy*, 188 Wis. 2d at 428;

(c) In same manner as service of summons and complaint, *see* Wis. Stat. § 801.14; or

(d) By other delivery in which recipient makes written confirmation of delivery.

b. Commence action on claim to proceeds. Wis. Stat. § 779.036(3).

(1) Prime contractor or subcontractor must dispute claim by serving notice on owner and lien claimant. Wis. Stat. § 779.036(3).

(2) Notice not disputed by prime contractor or subcontractor within 30 days allows claimant to recover proceeds designated in notice from prime contractor or subcontractor.

(3) Disputed claim requires claimant to commence action within three months from time notice is given; otherwise lien rights are barred.

c. Action to dispute proportional distribution of money owed by owner. Wis. Stat. § 779.036(4).

(1) Generally, if undisputed claim amount exceeds sum due prime contractor or subcontractor, owner or lender must notify claimants of deficiency and plan of proportional distribution. Wis. Stat. § 779.036(4)(a).

(2) If claimants dispute distribution plan, they must commence action within earlier of

(a) Twenty days after mailing of owner's notice. Wis. Stat. § 779.036(4)(a).

(b) Six months after completion of improvement. Wis. Stat. § 779.036(4)(b).

d. Action against surety. Wis. Stat. § 779.035(2)(a).

(1) To maintain an action, subcontractor or supplier must have notified prime contractor, no later than 60 days after first providing labor or materials, that it was providing labor and materials. Wis. Stat. § 779.035(2)(b)1.

(2) Wis. Stat. § 779.035(2)(b)2. provides that notice is not required under following circumstances:

(a) Contract for provision of labor or materials does not exceed $5,000.

(b) Action is brought by an employee of prime contractor, of subcontractor, or of supplier.

(c) Subcontractor or supplier is listed in a written contract, or in a document appended to a written contract, between subcontractor or supplier and prime contractor.

(3) Notice of nonpayment to surety *not* required by statute but may be required by terms of bond. *R.C. Mahon Co. v. Hedrich Constr. Co.*, 69 Wis. 2d 456 (1975).

(4) Actions against surety must be commenced not later than one year after completion of contract. Wis. Stat. § 779.035(2)(a).

4. Public works project

   a. Notice to governmental body of lien on proceeds. Wis. Stat. § 779.15(1).

      (1) Purposes

         (a) Ensure that governmental body properly allocates funds due to claimants.

         (b) Allow prime contractor to dispute any claims it believes are ill-founded.

      (2) Deadline for notice is *before* governmental body pays prime contractor. Wis. Stat. § 779.15(1).

      (3) Under Wis. Stat. § 779.15(2), written notices served in the manner provided in Wis. Stat. § 779.01(2)(e):

         (a) Upon clerk or treasurer of municipality, or

         (b) If state is involved, to state department, board, or commission having jurisdiction over project.

            NOTE: Service on the state may be accomplished only by registered or certified mail. Wis. Stat. § 779.01(2)(e).

      (4) Copies of notice must be served concurrently on prime contractor. Wis. Stat. § 779.15(2).

   b. Commence action on claim to proceeds. Wis. Stat. § 779.15(3).

      (1) Prime contractor or subcontractor must dispute claim by serving notice on owner and lien claimant.

      (2) If prime contractor does not dispute claim within 30 days, then amount claimed must be paid to claimant and charged to contractor.

      (3) If prime contractor disputes claim within 30 days, lien claimant must commence action within three months from service of notice; otherwise rights are barred.

   c. Action to dispute distribution of money owed by governmental body. Wis. Stat. § 779.15(4)(a).

      (1) Generally, if undisputed claim exceeds the sum due to the prime contractor, then governmental body will notify claimants of distribution plan.

      (2) If claimants dispute distribution plan, they must commence action within 20 days after mailing of notice.

   d. Action against surety

(1) To maintain an action, subcontractor or supplier must have notified prime contractor, no later than 60 days after first providing labor or materials, that it was providing labor and materials. Wis. Stat. § 779.14(2)(am)1.

(2) Wis. Stat. § 779.14(2)(am)2. provides that notice is not required under following circumstances:

(a) Contract for provision of labor or materials does not exceed $5,000.

(b) Action is brought by an employee of prime contractor, of subcontractor, or of supplier.

(c) Subcontractor or supplier is named in list prime contractor is required to maintain or in a written contract—or a document appended to a written contract—between subcontractor or supplier and prime contractor.

(3) Notice of nonpayment to surety *not* required by statute but may be required by terms of bond. *R.C. Mahon Co.*, 69 Wis. 2d 456.

(4) Actions against surety must be commenced not later than one year after completion of contract. Wis. Stat. § 779.14(2)(a).

D. Material Suppliers or Service Providers [§ 29.385]

1. Private small projects

a. May be exempt from filing 60-day notice under Wis. Stat. § 779.02(1)(b), *see supra* § 29.17, 1.a. Wis. Stat. § 779.02(2)(b).

b. Thirty-day notice of intent to file, *see supra* § 29.16, 1.b. Wis. Stat. § 779.06(2).

c. Claim for lien, *see supra* § 29.16, 1.c. Wis. Stat. § 779.06(1).

d. Summons and complaint, *see supra* § 29.16, 1.d. Wis. Stat. § 779.06(1).

2. Private large projects

a. No 60-day notice required. Wis. Stat. § 779.02(1).

b. Thirty-day notice, *see supra* § 29.16, 1.b. Wis. Stat. § 779.06(2).

c. Claim for lien, *see supra* § 29.16, 1.c. Wis. Stat. § 779.06(1).

d. Summons and complaint, *see supra* § 29.16, 1.d. Wis. Stat. § 779.06(1).

3. Private bonded projects

a. Notice to owner of lien on proceeds, *see supra* § 29.17, 3.a. Wis. Stat. § 779.036.

b. Commence action on claim to proceeds, *see supra* § 29.17, 3.b. Wis. Stat. § 779.036(3).

c. Action to dispute proportional distribution of money, *see supra* § 29.17, 3.c. Wis. Stat. § 779.036(4).

d. Action against surety, *see supra* § 29.17, 3.d. Wis. Stat. § 779.035(2)(a).

4. Public works projects

a. Notice to governmental body of lien on proceeds, *see supra* § 29.17, 4.a. Wis. Stat. § 779.15(1).

b. Commence action on claim to proceeds, *see supra* § 29.17, 4.b. Wis. Stat. § 779.15(3).

c. Action to dispute distribution of money owed by governmental body, *see supra* § 29.17, 4.c. Wis. Stat. § 779.15(4)(a).

d. Action against surety, *see supra* § 29.17, 4.d. Wis. Stat. § 779.14(2)(am)1.

VI. VOID PROVISIONS IN CONSTRUCTION CONTRACTS [§ 29.386]

A. Waiver of Lien Rights [§ 29.387]

No contract may provide for the waiver of lien rights before payment. Wis. Stat. § 779.135(1); *Tri-State Mech., Inc. v. Northland Coll.*, 2004 WI App 100, 273 Wis. 2d 471.

B. Jurisdiction and Forum [§ 29.388]

1. No contract may require another state's laws to be used in interpreting contract. Wis. Stat. § 779.135(2).

2. No contract may require that claim be litigated or arbitrated in another state.

C. Conditions of Payment [§ 29.389]

No contract may condition payment to subcontractor or material supplier on receipt of payment to general contractor by owner.

VII. OTHER PROVISIONS [§ 29.390]

A. Release of Lien; Undertaking [§ 29.391]

See Wis. Stat. § 779.08; *Hunzinger Constr. Co. v. SCS of Wis., Inc.*, 2005 WI App 47, 280 Wis. 2d 230.

An interested party may file with the clerk of courts a bond or other security equal to 125% of the lien claim to discharge the lien on the property. After notice to the lien claimant, the clerk of courts will satisfy the claim for lien of record. Thereafter, the lien attaches only to the bond or security filed and not the real estate. Any lien foreclosure then proceeds against the bond or security only and not the real estate previously subject to the lien.

B. Theft by Contractor [§ 29.392]

See Wis. Stat. §§ 779.02(5), 779.16.

1. A trust fund is created in the hands of a prime contractor or subcontractor for funds received from an owner for payment of improvements on a project.

2. Under *Paulsen Lumber, Inc. v. Anderson*, 91 Wis. 2d 692, 695 (1979), elements of claim include

   a. Purchase of work or materials,

   b. Receipt of work or materials,

   c. Payment for work or materials by owner or mortgagee, and

   d. Contractor's use of funds for another purpose.

3. Creation of trust fund requires direct or indirect payment by owner. *Wisconsin Dairies Coop. v. Citizens Bank & Tr.*, 160 Wis. 2d 758 (1991); *Kraemer Bros. v. Pulaski State Bank*, 138 Wis. 2d 395, 403 (1987).

4. Theft by contractor provisions of statute do not necessarily prevent prime contractor from receiving profit before paying other subcontractors. *State v. Keyes*, 2008 WI 54, 309 Wis. 2d 516.

   CAUTION: However, if salaries are paid, or profit distributions are made, to officers, the funds must be restored to trust fund for benefit of subcontractors. *Starfire, Inc. v. Dolata (In re Dolata)*, No. 08-32866, 2010 WL 3860481, at *11–12 (Bankr. E.D. Wis. Oct. 1, 2010) (unpublished).

5. Treble damages may be available. *Tri-Tech Corp. of Am. v. Americomp Servs., Inc.*, 2002 WI 88, 254 Wis. 2d 418.

6. For adversary proceedings in bankruptcy to determine whether a debt is nondischargeable in bankruptcy based on committing fraud or defalcation in a fiduciary capacity under 11 U.S.C. § 523(a)(4):

   a. The standard for determining whether a defalcation has occurred has been enhanced. *Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013).

   b. To prove fraud or defalcation was committed by an individual, plaintiffs must prove that the individual had actual knowledge of the violation of duties under the trust fund statute. *Milwaukee Builders Supply, Inc. v. St. Antoine (In re St. Antoine)*, 533 B.R. 743, 749 (Bankr. E.D. Wis. 2015); *see also* Wis. Stat. § 779.02.

   c. When actual knowledge of duties under the trust fund statute are found to be lacking, the individual cannot avoid liability through "willful blindness" to obligations under the trust

fund statute. *Stoughton Lumber Co. v. Sveum*, 787 F.3d 1174, 1177 (7th Cir. 2015); *see also* Wis. Stat. § 779.02.

C. Waivers of Lien [§ 29.393]

See Wis. Stat. § 779.05(1).

1. A lien claimant may waive or relinquish the claimant's construction lien rights by providing a construction lien waiver. Wis. Stat. § 779.05(1).

2. Wis. Stat. § 779.05 governs waivers of lien for both private and public projects. *Druml Co. v City of New Berlin*, 78 Wis. 2d 305, 254 N.W. 265 (1977).

3. As the statute indicates, a waiver of lien "shall be deemed to waive all lien rights" and "[a]ny ambiguity in such document shall be construed against the person signing it." Wis. Stat. § 779.05(1). In order to limit the scope of a lien waiver, a document must specifically and expressly limit the waiver to apply to a particular portion of the labor, services, materials, plans, or specifications. Wis. Stat. § 779.05(1); *See Great Lakes Excavating, Inc., v. Dollar Tree Stores, Inc.*, 2021 WI App 23, 397 Wis. 2d 210. On April 7, 2022, the Wisconsin Supreme Court heard oral arguments in *Great Lakes Excavating, Inc.*, and the supreme court's decision is currently pending.

4. A lien claimant may refuse to provide a lien waiver until the claimant has been paid. *Tri-State Mech., Inc. v. Northland Coll.*, 2004 WI App 100, ¶ 9, 273 Wis. 2d 471; *see also* Wis. Stat. § 779.05(1).

Chapter 30
Foreclosing a Land Contract

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NOTE: The authors gratefully appreciate the assistance of John R. Misey, a second-year law student at Vanderbilt University, for his work on this chapter and chapter 31 (Foreclosing a Mortgage on Real Estate), *infra*.

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 252; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-108 (Apr. 6, 2022).

I. INTRODUCTION [§ 30.394]

A. Nature of Land Contract [§ 30.395]

1. A land contract is a written executory contract whereby the vendor agrees, for consideration to be paid, to convey to the vendee the described real estate.

2. State Bar of Wisconsin Form 11 (Land Contract) is used in most non-Consumer Act transactions. *See generally* Wis. Stat. chs. 421–428.

B. Equitable Conversion [§ 30.396]

1. The vendee becomes the owner in equity of the real estate; the vendor holds legal title to secure payment of the unpaid purchase price but is not the owner for purposes of liability to the local municipality. *City of Milwaukee v. Greenberg*, 163 Wis. 2d 28 (1991); *Krakow v. Wille*, 125 Wis. 284 (1905); *see also In re Guerrero*, 536 B.R. 817, 827 (E.D. Bankr. Wis. 2015); *cf. In re Greenpoint Tactical Income Fund LLC*, 612 B.R. 591, 594 (E.D. Bankr. Wis. 2020) (declining to extend equitable-conversion doctrine to case not involving real property, and holding that settlement agreement at issue was not comparable to land-sale contract).

2. The vendee has an equitable interest in real property from commencement of the land contract, while the vendor has legal title to the real property. *Prince Corp. v. Vandenberg*, 2016 WI 49, ¶ 45, 369 Wis. 2d 387.

3. Equitable title provides the vendee full rights to sell, lease, or encumber the property subject to the vendor's rights unless the contract states otherwise. *Prince Corp. v. Vandenberg*, 2016 WI 49, ¶ 45, 369 Wis. 2d 387.

C. Additional Resources [§ 30.397]

1. 8 Jay E. Grenig, *Wisconsin Pleading and Practice Forms* § 74.23 (5th ed.), Westlaw (database updated June 2021) (form of complaint for foreclosure of vendor's lien—judgment in action to foreclose).

2. 18 American Jurisprudence Pleading and Practice Forms Annotated (mortgages), Westlaw (database updated Sept. 2021).

3. 24A *American Jurisprudence Pleading and Practice Forms Annotated* (vendor & purchaser), Westlaw (database updated Sept. 2021).

II. REMEDIES OF VENDOR ON DEFAULT [§ 30.398]

A. In General [§ 30.399]

1. No specific statutory provisions for enforcing a land contract.

2. The proceedings are equitable.

3. The election of one remedy waives other remedies. *Oconto Co. v. Bacon*, 181 Wis. 538, 543 (1923).

B. Voluntary Termination [§ 30.400]

The vendor can accept a quitclaim deed from the vendee, if

1. No intervening liens attach to the vendee's interest, and

2. The affidavit in recordable form is obtained from the vendee, establishing the following elements, under *Young v. Miner*, 141 Wis. 501 (1910):

    a. Adequate consideration,

    b. Voluntary transfer,

    c. The vendor did not take advantage of the vendee, and

    d. The transaction is not tainted with fraud.

C. Action at Law for Unpaid Installments [§ 30.401]

See Madden v. Barnes, 45 Wis. 135 (1878); *Paulson v. Lisowy*, 152 Wis. 2d 41 (Ct. App. 1989).

1. The vendor seeks a money judgment for amount due after default.

2. In doing so, the vendor abandons security interest.

3. This remedy is rarely used.

D. Declare Contract at End [§ 30.402]

1. Serve written notice on the vendee declaring the contract at end and demanding that the vendee surrender possession.

2. In cases of extreme and inexcusable default by the vendee, action of ejectment was proper after the vendor elected to declare the contract at end. *Britt v. Bauman*, 199 Wis. 514 (1929).

3. If the equitable interest of the vendee is insignificant, the equitable right under the contract may be removed in a quiet-title action, as a cloud on title of the vendor. *Oconto Co. v. Bacon*, 181 Wis. 538 (1923).

4. To avoid future title problems, the judgment should recite that the equities of the vendee are foreclosed.

E. Specific Performance [§ 30.403]

See Kallenbach v. Lake Publ'ns, Inc., 30 Wis. 2d 647, 656 (1966).

1. The contract must contain an acceleration clause that has been exercised.

2. Because the vendor elects to affirm the contract, the vendor must be in a position to tender the deed to the vendee or deposit the deed with the court.

3. Proceedings analogous to foreclosure of real estate mortgage, *see, e.g.*, *Harris v. Halverson*, 192 Wis. 71 (1927):

   a. The vendee must pay the balance of the purchase price within a reasonable time as fixed by the court.

   b. If property is not redeemed, the court will order a sale of the real estate.

      (1) If the sale proceeds exceed the judgment for principal, interest, attorney fees, and costs, the vendee is entitled to the surplus.

      (2) If the sale proceeds are insufficient, the vendor is entitled to a deficiency judgment against the vendee.

F. Strict Foreclosure [§ 30.404]

1. Most frequently used. *Kallenbach v. Lake Publ'ns, Inc.*, 30 Wis. 2d 647 (1966).

2. Terminates the existing rights of the vendee and persons claiming under the vendee.

3. Confirms legal title in the vendor by foreclosing the rights of the vendee and other persons with rights attaching to the vendee's equitable interest in the land.

4. Preliminary considerations

   a. Order title insurance to determine encumbrances on the vendee's interest.

      (1) Judgments against vendor after execution of a land contract are not liens on the real estate and can be safely overlooked. *Mueller v. Novelty Dye Works*, 273 Wis. 501 (1956).

      (2) Because after January 1, 1986, judgment against one spouse who is not in title could be a lien on real estate held by other spouse, pursue a judgment and lien search against both spouses. Wis. Stat. § 766.55.

   b. Action must be brought in the county of the real estate's situs. Wis. Stat. § 801.50(2)(b).

   c. Defendants

      (1) Vendee

      (2) Vendee's spouse, if any

         (a) If the spouse is not on the title, to eliminate an interest in homestead, or

         (b) To foreclose interest in marital property. Wis. Stat. § 766.31.

(3) All other parties having an interest attaching to the vendee's equitable interest in the real estate

d. Necessary forms

(1) Summons. Wis. Stat. §§ 801.09, 801.095.

(2) Complaint

(a) Name the parties and describe their interests.

(b) Describe the land contract.

(c) Allege default.

(d) Demonstrate that the plaintiff is entitled to the relief demanded.

(e) Demand a judgment foreclosing the vendee's interest and interests of all persons claiming under the vendee, if the balance due on the land contract (with costs and attorney fees) is not paid within the redemption period.

(3) Lis pendens. Wis. Stat. § 840.10(1)(a).

(a) The vendor must file a notice of the lawsuit in the office of the register of deeds after an action has commenced.

(b) From the time of the filing, every purchaser or encumbrancer whose conveyance or encumbrance is not recorded or filed is bound by the foreclosure proceedings as if he or she were party to the action.

(c) No foreclosure judgment can be entered until 20 days after lis pendens filing. Wis. Stat. § 846.01(2).

5. Procedure

a. File the summons and the complaint with the clerk of circuit court and obtain authenticated copies. Wis. Stat. § 801.02.

b. File lis pendens with the register of deeds and obtain a certified copy. Wis. Stat. § 840.10(1)(a).

c. File a certified copy of lis pendens with the clerk of circuit court. Wis. Stat. § 840.10(1)(a).

d. Serve authenticated copies of the summons and complaint on each defendant within 90 days after filing the summons and complaint. Wis. Stat. § 801.02.

e. Order an amended title commitment current up to the filing of lis pendens.

f. If the amended title commitment indicates new encumbrances between the effective date of commitment and the filing of lis pendens, amend the summons and complaint to join those encumbrancers.

6. Obtaining judgment of foreclosure

a. Default judgment is possible, but often disfavored.

(1) Set the date for the hearing after the pleading time expires. Wis. Stat. § 806.02(1).

(2) Serve a notice of motion and a motion for judgment on all parties who have answered or who have served a notice of appearance. Wis. Stat. § 806.02(1).

b. Contested

(1) Move for summary judgment. Wis. Stat. § 802.08.

(2) Move for costs for a frivolous answer. Wis. Stat. § 802.05.

7. Contents of judgment

a. Vendee found in default under terms of the land contract.

b. Amount due on the land contract plus costs and attorney fees.

c. Attorney fees

(1) Five percent of amount owed by vendee is the benchmark standard of reasonableness, which may be adjusted as the individual facts demand. Wis. Stat. § 428.103(1)(e)2.; *Harvest Sav. Bank v. ROI Invs.*, 209 Wis. 2d 586 (Ct. App. 1997); *Fellenz v. Gonring*, 113 Wis. 2d 228 (Ct. App. 1983).

(2) The vendee can be made personally liable for attorney fees and costs even if the vendor acquires the premises.

d. Redemption period established and provides that upon failure of the vendee to redeem within that period, title will be confirmed in the vendor and the vendee's rights will be foreclosed. *Henry Uihlein Realty Co. v. Downtown Dev. Corp.*, 9 Wis. 2d 620 (1960).

(1) The purpose of the redemption period is to give the vendee the opportunity to pay the balance due on the land contract within a specified period and prevent the foreclosure of the vendee's rights under the land contract. Title passes at the end of the redemption period, once the circuit court enters a final order confirming the vendee's nonredemption. *Steiner v. Wisconsin Am. Mut. Ins. Co.*, 2005 WI 72, ¶ 4, 281 Wis. 2d 395; *see also Dells Land & Cattle Co. II v. Krus (In re Krus)*, No. 17-12413-13, 2020 WL 2300409, at *4 (Bankr. W.D. Wis. Apr. 24, 2020) (slip copy).

(2) Setting the duration of the redemption period is within discretion of the court and must not be less than seven working days. Wis. Stat. § 846.30; *Steiner*, 2005 WI 72, ¶¶ 27–28, 281 Wis. 2d 395.

(3) Factors considered. *See Kallenbach v. Lake Publ'ns, Inc.*, 30 Wis. 2d 647 (1966).

(a) The ability of the vendee to redeem

(b) The vendee's "state of solvency"

(c) The value of the real estate

(d) The size of the vendee's equity

(e) The length of default

(f) The materiality of time

(g) The provision for issuance of writ of assistance

(4) A redemption period cannot be extended by a court unless reserved in the judgment. *Exchange Corp. v. Kuntz*, 56 Wis. 2d 555 (1972), *superseded by statute*, Wis. Stat. § 846.30, *as recognized in Steiner v. Wisconsin Am. Mut. Ins. Co.*, 2005 WI 72, 281 Wis. 2d 395.

8. Equitable title remains with the vendee until the court enters a final order finding no redemption has occurred. Wis. Stat. § 846.30; *Steiner v. Wisconsin Am. Mut. Ins. Co.*, 2005 WI 72, 281 Wis. 2d 395.

9. Record the judgment

III. BANKRUPTCY PROCEEDINGS [§ 30.405]

A. Effect of Filing Bankruptcy Petition [§ 30.406]

1. All proceedings by the vendor to collect the debt or obtain possession of collateral are automatically stayed when the vendee files a petition for relief. 11 U.S.C. § 362(a).

2. In a strict foreclosure action, filing a bankruptcy petition stays all foreclosure proceedings and prevents application for both a judgment and a redemption period.

3. If an individual debtor files a case under 11 U.S.C. ch. 7, 11 U.S.C. ch. 11, or 11 U.S.C. ch. 13, and had one prior case pending but dismissed within the preceding one-year period, the automatic stay "shall terminate … on the 30th day after filing of the later case." But if two or more cases were so pending and dismissed, there is no automatic stay on filing the later case. 11 U.S.C. § 362(c)(3)(A), (4)(A)(i).

B. Relief from Automatic Stay [§ 30.407]

1. Automatic stay terminates under 11 U.S.C. § 362(c)(2) when either

a. The bankruptcy case is closed or dismissed, or

b. The discharge of an individual is granted or denied.

2. Per 11 U.S.C. § 362(d), at the request of an interested party and after notice and hearing, the bankruptcy court may grant relief from the automatic stay for any of the following reasons:

a. For cause

b. The debtor has no equity in the property that is not necessary for effective reorganization.

c. Ninety days have elapsed after entry of an order for relief on a single-asset real estate, and the debtor, within that 90-day period (or within 30 days after the court determines that the debtor is subject to 11 U.S.C. § 362(d)(3) (whichever is later)), either

(1) Has not filed a plan of reorganization that has a reasonable possibility of being confirmed, or

(2) Has not commenced monthly payments. 11 U.S.C. § 362(d)(3).

d. The court finds that the filing of a bankruptcy petition affecting the real property was part of a scheme to delay, hinder, or defraud creditors that involved either

(1) The transfer of all or part ownership of, or other interest in, the property without the consent of the secured creditor or court approval, or

(2) Multiple bankruptcy filings affecting the property. 11 U.S.C. § 362(d)(4).

3. When the automatic stay is lifted, the vendor can proceed with the foreclosure.

Chapter 31
Foreclosing a Mortgage on Real Estate

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NOTE: The authors gratefully appreciate the assistance of John R. Misey, a second-year law student at Vanderbilt University, for his work on this chapter and chapter 30 (Foreclosing a Land Contract), *supra*.

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 252; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-108 (Apr. 6, 2022).

I. INTRODUCTION [§ 31.408]

A. Purpose of Foreclosure [§ 31.409]

1. To sell mortgaged property that is in default and to apply the sale proceeds to the mortgage debt and accrued interest and costs.

2. Proceeds left after satisfaction of the mortgage are distributed among lienors, with any remaining amount paid to real estate owners whose interests are being foreclosed.

B. Foreclosure Principles [§ 31.410]

1. Proceeding quasi in rem. *Security Nat'l Bank v. Cohen*, 31 Wis. 2d 656 (1966).

2. Equitable. *Saric v. Brlos*, 247 Wis. 400 (1945).

3. Statutory. Wis. Stat. ch. 846.

4. Time-share estates can be foreclosed judicially, as outlined in this chapter (ch. 31), *or* nonjudicially under Wis. Stat. § 707.28.

5. Marshaling assets will not be applied if application diminishes the position of the senior encumbrancer in its relation with the junior encumbrancer. *Briarwood Club, LLC v. Vespera, LLC*, 2013 WI App 119, 351 Wis. 2d 62.

6. Transfer of a note automatically transfers the mortgage, without the need for a written agreement. *Dow Fam., LLC v. PHH Mortg. Corp.*, 2014 WI 56, 354 Wis. 2d 796.

C. Additional Resources [§ 31.411]

1. 4 Jay E. Grenig & Nathan A. Fishbach, *Wisconsin Practice Series—Civil Procedure Forms* § 35:101 (3d ed.), Westlaw (database updated June 2021) (complaints—action to foreclose on real property).

2. 8 Jay E. Grenig, *Wisconsin Pleading and Practice Forms* ch. 69 (5th ed.), Westlaw (database updated June 2021) (foreclosure of mortgages).

II. DEFAULT AND RIGHT TO CURE [§ 31.412]

A. Default [§ 31.413]

1. Failure to pay.

2. Violation of terms.

3. Breach of covenants.

4. Statutory definition of *default* in consumer transactions. Wis. Stat. § 425.103.

B. Right to Cure Before Foreclosure [§ 31.414]

1. Consumer credit transactions require a statutory 15-day notice to cure before acceleration of the mortgage. Wis. Stat. § 425.105.

2. Mortgages and notes must be drafted and read carefully—some require giving notice of right to cure default before proceeding.

3. Unless required by statute or terms of the note or the mortgage, an opportunity to cure a default or notice of acceleration are not conditions precedent to beginning an action.

III. TITLE AND PRIORITY CONSIDERATIONS [§ 31.415]

A. Title Insurance Commitment [§ 31.416]

1. Should be ordered to insure purchaser at sheriff's sale for minimum amount.

2. Judgment against one spouse who is not in the title could be a lien on the real estate held by the other spouse; request judgment search against both spouses. Wis. Stat. § 766.55.

3. Necessary for drafting a complaint.

B. Senior Encumbrances [§ 31.417]

1. Real estate taxes, easements, judgments, mortgages, income tax liens, and other encumbrances docketed, recorded, or filed before recording the mortgage being foreclosed are superior and cannot be affected by a foreclosure action. *Hekla Fire Ins. Co. v. Morrison*, 56 Wis. 133 (1882).

2. Purchaser at a foreclosure action acquires premises subject to senior encumbrances. *DeKeyser v. State Bank of Maplewood*, 194 Wis. 61 (1927).

C. Junior Encumbrances [§ 31.418]

1. Mortgages, judgments, tax liens (both Wisconsin and federal), and other encumbrances recorded or docketed after recording of the mortgage being foreclosed are subject and subordinate to the mortgage. 51 Am. Jur. 2d *Liens* §§ 69–70 (2011); *see Bank of New Glarus v. Swartwood*, 2006 WI App 224, 297 Wis. 2d 458.

2. Failure to join the junior encumbrancer in a foreclosure action leaves the encumbrancer with a valid lien on the property unaffected by the foreclosure. *Carolina Builders Corp. v. Dietzman*, 2007 WI App 201, 304 Wis. 2d 773.

IV. NECESSARY AND PROPER DEFENDANT PARTIES [§ 31.419]

A. Mortgagor [§ 31.420]

See Wis. Stat. §§ 706.02(1)(f), 766.31; *Baker v. Hawkins*, 29 Wis. 576 (1872).

1. Unless the mortgagor has parted with the title, he or she must be joined as a defendant; if the mortgagor has a spouse, the spouse must be joined to eliminate any homestead or marital property interest.

2. A mortgagor who has parted with title need not be made a party, but the record owner and the record owner's spouse, if any, must be joined to eliminate any homestead or marital property interest. *Delaplaine v. Lewis*, 19 Wis. 500 (*476) (1865).

3. A mortgagor who does not have title is joined if the mortgagee seeks a deficiency judgment.

4. Mortgages signed by a husband but not by his wife during their marriage were invalid. *U.S. Bank Nat'l Ass'n v. Stehno*, 2017 WI App 57, 378 Wis. 2d 179.

B. Other Defendants [§ 31.421]

1. All other persons with an interest in premises subject to a mortgage must be joined either to foreclose or extinguish their rights to redeem the premises from a mortgage lien. *Green v. Dixon*, 9 Wis. 532 (1859).

2. Include all junior lienors and encumbrancers, guarantors (if deficiency is desired), lessees or tenants, income tax lienors, and others.

V. COMMENCEMENT OF ACTION [§ 31.422]

A. Venue [§ 31.423]

Action must be brought in county where at least part of mortgaged premises is situated. Wis. Stat. § 801.50(2)(b).

B. Summons [§ 31.424]

Follow Wis. Stat. §§ 801.08, 801.095.

C. Complaint [§ 31.425]

1. Name parties, describe their interests, and allege that their interests are subordinate to the plaintiff's mortgage lien.

2. Describe the mortgage loan.

3. Allege default and the amount owed. *Bank One, NA v. Ofojebe*, 2005 WI App 151, 284 Wis. 2d 510 (in complaint foreclosing consumer credit transaction, in addition to the foregoing, complaint must contain all amounts necessary, including payments on transaction, to enable one to compute amount alleged to be due).

4. Demonstrate that the plaintiff is entitled to the relief demanded.

5. Demand a foreclosure judgment and sale after the specified redemption period.

6. Either demand a deficiency judgment (if the sale proceeds are insufficient) or elect to waive the deficiency. Wis. Stat. §§ 846.04(1), 846.101.

7. Attach a copy of the note and the mortgage to the complaint and incorporate them.

8. Request appointment of a receiver.

D. Receiver [§ 31.426]

1. Appointed when property or rents are in danger of being lost or materially impaired. Wis. Stat. § 813.16(1).

2. Failure to pay interest and taxes constitutes waste and is ground for appointing a receiver. *Dick & Reuteman Co. v. Jem Realty Co.*, 225 Wis. 428 (1937).

3. Procedure. *Davelaar v. Blue Mound Inv. Co.*, 110 Wis. 470 (1901).

   a. Give notice of the motion and file the motion with the supporting affidavit.

   b. Schedule the hearing any time after beginning the action.

   c. Ex parte orders are seldom granted.

E. Redemption Periods [§ 31.427]

NOTE: The mortgagor may redeem any time before the sale by paying the county clerk the amount of the judgment. *Bank of Am., N.A. v. Prissel*, 2015 WI App 10, 359 Wis. 2d 561. There are a number of redemption periods, which are typically shorter when the mortgagee does not seek a deficiency.

1. If the mortgage was executed before April 27, 2016:

   a. Twelve-month redemption period with deficiency available. Wis. Stat. § 846.10(2)(a)1.

      (1) Premises must not be abandoned.

      (2) If no deficiency is sought, the time is reduced to six months. Wis. Stat. § 846.101(2)(b). The deficiency must be expressly waived in the complaint. Wis. Stat. § 846.101(1).

2. If the mortgage was executed on or after April 27, 2016:

   a. Six-month redemption period with deficiency available. Wis. Stat. § 846.10(2)(a).

      (1) Premises must not be abandoned.

      (2) If no deficiency is sought, the time is reduced to three months. Wis. Stat. § 846.101(2)(c)1. The deficiency must be expressly waived in the complaint. Wis. Stat. § 846.101(1).

b. Eight months if the mortgagor shows an attempt to sell the property, in good faith, by entering a listing agreement with a licensed broker. Wis. Stat. § 846.10(2)(a)2.b.

(1) The property must not be abandoned.

(2) If no deficiency is sought, the time is reduced to five months. Wis. Stat. § 846.101(2)(c)2. The deficiency must be expressly waived in the complaint. Wis. Stat. § 846.101(1).

3. Time periods for abandoned property governed by Wis. Stat. § 846.102. Wis. Stat. § 846.102; *see infra* § 31.26.

a. The court must enter judgment under Wis. Stat. § 846.10, except the plaintiff must, within 12 months after entry of judgment, do one of the following:

(1) Hold a sale at any time after expiration of 5 weeks after entry of judgment and have sale confirmed, or

(2) Release or satisfy the mortgage lien and vacate foreclosure judgment.

b. If, 12 months after entry of the judgment, the plaintiff has not complied with Wis. Stat. § 846.102(3)(a), any party or municipality where mortgaged premises are located may petition the court for an order compelling sale.

F. Lis Pendens [§ 31.428]

1. The plaintiff must file a written notice of the lawsuit with the register of deeds after the action begins. Wis. Stat. § 840.10(1)(a).

2. From the time of filing, purchasers or encumbrancers whose conveyances or encumbrances are not recorded or filed are bound by foreclosure proceedings as if they were parties to the action.

3. No foreclosure judgment can be entered until 20 days after filing lis pendens. Wis. Stat. § 846.01(2).

4. Required contents of lis pendens described in Wis. Stat. § 840.10(1)(a).

5. Debtor must not have interest in property. *Selenske v. Selenske*, No. 2016AP1079, 2017 WL 1017358 (Wis. Ct. App. Mar. 14, 2017) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

G. Summary of Steps [§ 31.429]

1. File the summons and the complaint with the clerk of the circuit court; obtain authenticated copies.

2. File lis pendens with the register of deeds; obtain a certified copy.

3. File the certified copy of lis pendens with the clerk of circuit court.

4. Serve authenticated copies of the summons and complaint on each defendant.

5. Order amended copy of title commitment up to the filing of lis pendens.

6. If amended title commitment indicates new encumbrances between the effective date of the commitment and the filing of lis pendens, the summons and the complaint should be amended to join those encumbrancers.

VI. OBTAINING JUDGMENT OF FORECLOSURE [§ 31.430]

A. Default Judgment [§ 31.431]

1. Set the date for the hearing after the pleading time expires. Wis. Stat. § 806.02(1).

2. Serve a notice of motion and a motion for judgment on all parties who have answered or served a notice of appearance. Wis. Stat. § 806.02(1).

3. Proof of facts

   a. Through testimony at court hearing.

   b. By affidavit. Wis. Stat. § 806.02(2), (5).

4. The circuit court has broad discretion to stay the execution of a judgment. *Weber v. White*, 2004 WI 63, ¶ 34, 272 Wis. 2d 121.

B. Contested [§ 31.432]

1. Move for summary judgment. Wis. Stat. § 802.08.

2. Request costs and attorney fees for frivolous answer. Wis. Stat. § 802.05; *First Federated Sav. Bank v. McDonah*, 143 Wis. 2d 429 (Ct. App. 1988).

VII. CONTENTS OF JUDGMENT: GENERAL PROVISIONS [§ 31.433]

1. Name and residence of each party. Wis. Stat. § 806.01(1).

2. Amount due on mortgage and costs.

3. Description of the mortgaged premises.

4. Statement of whether the mortgaged premises are a homestead.

5. Statement of whether the mortgaged premises can be sold in parcels.

6. Period of redemption.

7. Interest on adjudged amount at rate specified in note, not to exceed the minimum rate prevailing before default. Wis. Stat. § 846.12.

8. Provision for adding to the judgment the sums advanced by a plaintiff for insurance, repairs, and taxes. Wis. Stat. § 846.10(4).

9. Provision enjoining the defendants from committing waste on the premises. Wis. Stat. § 846.12.

10. A finding that the premises are abandoned.

    a. Only the plaintiff or the city, town, village, or county where the premises are located can move for a finding of abandonment. Wis. Stat. § 846.102(1).

        (1) Between 5 weeks and 12 months after entry of the judgment, the plaintiff must either (a) sell the mortgaged real estate and have the sale confirmed or (b) request that the court vacate the foreclosure judgment while the plaintiff releases or satisfies the mortgage lien. Wis. Stat. § 846.102(3).

        (2) Otherwise, if 12 months have passed after entry of judgment and the plaintiff has not taken action under Wis. Stat. § 846.102(3)(a), any party can petition the court to order sale of the real estate.

    b. The court should look at the totality of the circumstances in ordering a sale. *Bank of N.Y. Mellon v. Carson*, 2015 WI 15, 361 Wis. 2d 23.

11. Provision that mortgaged premises be sold to pay amount judged due.

12. Provision for deficiency, if desired, against all persons liable.

13. Provision that premises will be sold free of all claims, rights, or equity of redemption of all parties to the action, their heirs, successors, and assigns, and all persons claiming under them after notice of pendency of action was filed; and that defendants be forever barred and foreclosed of any right, title, or interest in and to the premises.

14. If an outstanding senior lien exists, a provision that premises to be sold will be subject to that lien. *DeKeyser v. State Bank of Maplewood*, 194 Wis. 61 (1927).

15. If the United States is a party because of docketed tax liens, include a provision describing its right to redeem the premises within 120 days after the foreclosure sale. 28 U.S.C. § 2410(c).

16. Provision that purchaser be let into possession upon production of sheriff's deed.

17. Attorney fees

    a. Costs not to exceed $100 if not provided for in either the note or the mortgage. Wis. Stat. § 814.02(2).

    b. When either the note or the mortgage provides for attorney fees, the court will allow attorney fees if reasonable. Wis. Stat. § 814.02(2).

        NOTE: The court of appeals has stated that Wis. Stat. § 428.103(1)(e)2. constitutes the

"benchmark standard of reasonableness." *Fellenz v. Gonring*, 113 Wis. 2d 228, 231 (Ct. App. 1983).

c. Limited to five percent of amount adjudged due if amount financed is $25,000 or less and the amount is secured by a first lien real estate mortgage. Wis. Stat. §§ 428.101, 428.103(1)(e)2.

d. If the mortgage secures more than $25,000, the attorney fees can be more than five percent, if reasonable. *Harvest Sav. Bank v. ROI Invs.*, 209 Wis. 2d 586 (Ct. App. 1997).

e. For consumer credit transactions under the Wisconsin Consumer Act, the only fee allowable is 5% of the judgment when the annual percentage rate is 12% or less; in all other cases, no contractual fees are permitted. Wis. Stat. § 422.411.

VIII. REDEMPTION [§ 31.434]

A. By the Mortgagor [§ 31.435]

1. The mortgagor or the mortgagor's heirs, personal representatives, or assigns can redeem the mortgaged property before sale by paying judgment, interest, and costs. Wis. Stat. § 846.13.

2. The redemption period extends to the confirmation of the sale. *Gerhardt v. Ellis*, 134 Wis. 191 (1908); *Osterberg v. Lincoln State Bank (In re Foreclosure Action in Lincoln State Bank v. Carrillo)*, 2006 WI App 237, 297 Wis. 2d 30.

B. By the Junior Lienors [§ 31.436]

1. Junior lienors may redeem before sale by paying the judgment, taxes, interest, and costs. Wis. Stat. § 846.15.

2. The redemption period extends to the confirmation of the sale. *Gerhardt v. Ellis*, 134 Wis. 191 (1908); *Osterberg v. Lincoln State Bank (In re Foreclosure Action in Lincoln State Bank v. Carrillo)*, 2006 WI App 237, 297 Wis. 2d 30.

IX. FORECLOSURE SALE [§ 31.437]

A. Scheduling a Sale [§ 31.438]

1. Contact the sheriff to schedule a sale.

2. The sale date must be after the redemption period expires.

3. Parties may consent to an earlier sale by stipulation. Wis. Stat. § 846.10(2)(b).

B. Notice of Sale [§ 31.439]

NOTE: For procedures on giving notice of an internet-based sale, see Wis. Stat. § 846.16(1)(bm).

See Wis. Stat. § 846.16(1).

1. Notice required. Wis. Stat. § 846.16(1).

2. Prepare notice of the sale. Wis. Stat. § 815.31.

3. If the Department of Veterans Affairs is a party, give notice by registered mail, return receipt requested, at least three weeks before sale. Wis. Stat. § 846.16(1)(cm).

4. Deliver sufficient copies to the sheriff for posting.

   a. Post one notice in a public place in the town or municipality where the sale will take place and on the website, if available, of the county where the sale will take place at least three weeks before sale; and

   b. Post another notice in a public place in the town or municipality where the real estate is located, if it differs from the sale location, and then on the website, if available, of the county where the real estate is located. Wis. Stat. § 815.31(1).

5. Arrange to publish a notice.

   a. In a newspaper published in the venue county, and

   b. Each week for three successive weeks before sale. Wis. Stat. § 815.31(2).

   c. The first publication should not occur earlier than 2 months before the sale, except that farm sale with 12-month redemption period cannot be advertised until one year after the court entered the judgment, if mortgage was executed before April 27, 2016. See section 31.20, *supra*, for procedure under Wis. Stat. § 846.10(2)(a)2. when mortgage executed on or after April 27, 2016. Wis. Stat. § 846.10(2)(a)1.

C. Conduct of Sale [§ 31.440]

1. By auction. Wis. Stat. § 815.31(6).

2. Between 9:00 a.m. and 5:00 p.m. Wis. Stat. § 815.31(6).

3. Subject to all outstanding encumbrances.

4. Terms of sale

   a. Statutory minimum deposit of $100. Wis. Stat. § 846.16(1g)(a)1.

   b. Sheriff has discretion to require a larger deposit at time of sale. *See* Wis. Stat. § 846.16(1g)(a)1.; *Hales Corners Sav. & Loan Ass'n v. Kohlmetz*, 36 Wis. 2d 627 (1967).

X. CONFIRMATION [§ 31.441]

A. Preliminaries [§ 31.442]

1. Prepare a report of the sale and the deed. Wis. Stat. § 846.16(1r).

2. Deliver the report of the sale and the deed to sheriff for execution with instruction to file with clerk of court.

3. If a receiver has been appointed, prepare a receiver's account and petition to accompany the motion for confirmation.

4. Schedule the hearing date.

5. Serving notice

   a. Provide five days' notice to all parties who appeared in the action. Wis. Stat. § 846.165; *Wells Fargo Bank, N.A. v. Biba*, 2010 WI App 140, 329 Wis. 2d 787.

   b. Provide five days' notice to the purchaser. *First Banking Ctr. v. Twelfth St. Invs. LLC*, 2011 WI App 103, ¶ 14, 336 Wis. 2d 150.

   c. If an attorney appeared for a party, serve the notice on the attorney. If the party can show that service on the attorney was deficient in a manner that prejudiced the party, the court may find the service inadequate. Wis. Stat. § 801.14(2). With respect to prejudice, see *Marathon County v. R.J.O. (In re Mental Commitment of R.J.O.)*, 2020 WI App 20, ¶ 44, 392 Wis. 2d 157 (review denied), *overruled in part on other grounds by Waukesha County. v. E.J.W. (In re Mental Commitment of E.J.W.)*, 2021 WI 85, ¶ 38 & n.9, 399 Wis. 2d 471.

   d. Serve by personal service or by registered mail, Wis. Stat. § 846.165, but,

   e. If an address is unknown, the mailing of notice is not required, but an affidavit must be filed with the court. Serving the party's attorney may also suffice per Wis. Stat. § 846.165.

B. Standards Used in Confirming Sale [§ 31.443]

1. When property is sold for an amount due on judgment and costs of the sale, and no deficiency is requested, presume that the property was sold for fair value. Wis. Stat. § 846.16(2m)(ae).

2. In deficiency judgments, a court will not confirm a requested sale until the court is satisfied that the property was sold for fair value. Wis. Stat. § 846.16(2m)(ae).

   a. Fair value is not market value. *Bank of N.Y. v. Mills*, 2004 WI App 60, 270 Wis. 2d 790.

   b. Fair value is value not so inadequate as to shock the conscience of the court. *Welfare Bldg. & Loan Ass'n v. Gearhard*, 235 Wis. 229 (1940); *JP Morgan Chase Bank, NA v. Green*, 2008 WI App 78, ¶ 33, 311 Wis. 2d 715.

      (1) A sale at 19% below market value was confirmed. *Bihlmire v. Hahn*, 31 Wis. 2d 537 (1966).

      (2) A sale at 35% below market value was disallowed. *Northwestern Loan & Tr. Co. v. Bidinger*, 226 Wis. 239 (1937).

3. A sale will not be set aside merely because the price obtained was inadequate.

4. A sale will be set aside if the price received was inadequate, and

   a. There is a showing of mistake, misapprehension, or inadvertence on part of interested parties or prospective bidders, *see Mueller v. Mizia*, 33 Wis. 2d 311 (1967); or

   b. The price is so inadequate as to shock the conscience of the court, *Gumz v. Chickering*, 19 Wis. 2d 625 (1963).

C. Sale for Less Than Fair Value [§ 31.444]

The court can

1. Order resale. Northwestern Loan & Tr. Co. v. Bidinger, 226 Wis. 239 (1937).

2. Set a minimum upset price for resale.

3. Confirm a sale if what the court considers fair value is credited to the judgment.

4. There is no presumption that premises were sold for fair value when the mortgaged premises are sold for less than the mortgaged debt. Wis. Stat. § 846.16(2m)(ae); *Horizon Bank, Nat'l Ass'n v. Marshalls Point Retreat LLC*, 2018 WI 19, ¶ 32, 380 Wis. 2d 60.

D. Order of Confirmation [§ 31.445]

1. Confirms both the sheriff's report of the sale and the sale.

2. Allows the receiver's account and discharges the receiver.

3. If a confirmation order is appealed, the purchaser, on remand, is entitled to notice from the circuit court as to when the 10-day period begins to run. *First Banking Ctr. v. Twelfth St. Investors LLC*, 2011 WI App 103, ¶ 16, 336 Wis. 2d 150.

4. Directs the clerk of court to deliver the deed either to the purchaser upon compliance with terms of sale or to the plaintiff if the plaintiff is the successful bidder.

5. Directs the clerk of court to pay the plaintiff sale proceeds and to hold the surplus, if any, subject to further order of court. *First Wis. Tr. Co. v. Rosen*, 143 Wis. 2d 468 (Ct. App. 1988).

6. Provides for issuance of a writ of assistance to obtain possession of the premises.

7. Orders a deficiency judgment that should be docketed similar to any other money judgment.

   a. Deficiency judgment on property primarily devoted to agricultural use is designated as an agriculture judgment. Wis. Stat. § 846.04(1).

   b. Time to commence an action to satisfy or enforce an agriculture judgment is limited. Wis. Stat. § 846.04(2), (3).

8. Is a final order that

   a. Is amenable to relief, Wis. Stat. § 806.07, or

   b. Can be appealed, Wis. Stat. § 808.03(1).

E. Deficiency Judgments [§ 31.446]

1. The plaintiff can demand a deficiency judgment against anyone personally liable for the debt secured by the mortgage. Wis. Stat. § 846.04.

2. Exceptions apply to several types of mortgages on real estate parcels less than 20 acres in size. Wis. Stat. § 846.101.

XI. BANKRUPTCY PROCEEDINGS [§ 31.447]

A. Effect of Filing Bankruptcy Petition [§ 31.448]

1. All proceedings by mortgagee to collect debts or obtain possession of collateral are automatically stayed when the mortgagor files a petition for relief. 11 U.S.C. § 362(a).

2. In foreclosure actions, filing a bankruptcy petition stops all foreclosure proceedings and prevents applying for a judgment, scheduling the sale, conducting the sale, or confirming the sale.

3. If an individual debtor files a case under 11 U.S.C. ch. 7, 11 U.S.C. ch. 11, or 11 U.S.C. ch. 13, and had one prior case pending but dismissed within the preceding one-year period, the automatic stay "shall terminate … on the 30th day after filing of the later case." But if two or more cases were so pending and dismissed, there is no automatic stay on filing the later case. 11 U.S.C. § 362(c)(3)(A), (4)(A)(i).

B. Relief from Automatic Stay [§ 31.449]

1. Automatic stay terminates under 11 U.S.C. § 362(c)(2) when either

   a. The bankruptcy case is closed or dismissed, or

   b. The discharge of an individual is granted or denied.

2. Per 11 U.S.C. § 362(d), at the request of an interested party, and after notice and hearing, the bankruptcy court may grant relief from automatic stay for any of the following reasons:

   a. For cause.

   b. The debtor has no equity in the property that is not necessary for effective reorganization.

   c. Ninety days have elapsed after entry of the order for relief on single-asset real estate, and the debtor, within that 90-day period (or within 30 days after the court determines that the debtor is subject to 11 U.S.C. § 362(d)(3) (whichever is later)), either

(1) Has not filed a plan of reorganization that has a reasonable possibility of being confirmed, or

(2) Has not commenced monthly payments. 11 U.S.C. § 362(d)(3).

d. The court finds that the filing of a bankruptcy petition affecting the real property was part of a scheme to delay, hinder, or defraud creditors that involved either

(1) The transfer of all or part ownership of, or other interest in, the property without the consent of the secured creditor or court approval, or

(2) Multiple bankruptcy filings affecting the property. 11 U.S.C. § 362(d)(4).

3. When the automatic stay is lifted, the mortgagee can proceed with foreclosure.

Chapter 32
Landlord-Tenant Law

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NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Apr. 2022, No. 796; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-107 (Mar. 29, 2022); and all references to form numbers are to mandatory Wisconsin circuit court forms, as updated through Jan. 29, 2021.

I. INTRODUCTION [§ 32.450]

A. In General [§ 32.451]

1. Legal perspective has evolved from conveyance to contract. *Pines v. Perssion*, 14 Wis. 2d 590 (1961).

2. Best advice to landlords and tenants is "get it in writing," whether "it" is a lease, promise to repair, or check-in sheet.

3. Subject to limitations of Wis. Admin. Code ch. ATCP 134 and Wis. Stat. §§ 704.07(1) and 704.44, one can negotiate almost any term (exception is notice procedure of Wis. Stat. § 704.17, which cannot be altered in writing unless done in a lease for longer than one year, Wis. Stat. § 704.17(5)).

PRACTICE TIP: For leases longer than one year, landlords are advised to modify the statutory 30-day curable notice period under Wis. Stat. § 704.17(3) to the standard 5- or 14-day notice period. Wis. Stat. § 704.17(1p), (2). This prevents a landlord from having to give 30-day curable notices each time there is a breach.

4. Substantive law is Wis. Stat. ch. 704 and Wis. Admin. Code ch. ATCP 134; procedural law is Wis. Stat. ch. 799.

5. Most tenants hold possession under a rental agreement. A rental agreement is "an oral or written agreement between a landlord and tenant, for the rental or lease of a specific dwelling unit or premises, in which the landlord and tenant agree on the essential terms of the tenancy, such as rent. 'Rental agreement' includes a lease." Wis. Stat. § 704.01(3m). Therefore, a lease is always a rental agreement but a rental agreement, is not always a lease.

6. In general, Wis. Stat. ch. 704 applies to all types of rental arrangements, including commercial and residential tenancies. Wis. Admin. Code ch. ATCP 134 is not as broad. First, Wis. Admin. Code ch. ATCP 134 only applies to dwelling units, and it does not apply to commercial tenancies. Wis. Admin. Code § ATCP 134.01. Even the types of dwelling units are limited. Wis. Admin. Code ch. ATCP 134 does not apply to the following:

   a. "A dwelling unit operated by a public or private institution if occupancy is incidental to detention or the provision of medical, geriatric, educational, counseling, religious or similar services." Wis. Admin. Code § ATCP 134.01(1).

   b. "A dwelling unit occupied by a member of a fraternal or social organization which operates that dwelling unit." Wis. Admin. Code § ATCP 134.01(2).

   c. "A dwelling unit occupied, under a contract of sale, by the purchaser of the dwelling unit or the purchaser's successor in interest." Wis. Admin. Code § ATCP 134.01(3).

   d. "A dwelling unit, such as a dwelling unit in a hotel, motel or boarding house, that is being rented only by tourist or transient occupants." Wis. Admin. Code § ATCP 134.01(4).

   e. "A dwelling unit which the landlord provides free of charge to any person, or which the landlord provides as consideration to a person whom the landlord currently employs to operate or maintain the premises." Wis. Admin. Code § ATCP 134.01(5).

   f. "A dwelling unit occupied by a tenant who is engaged in commercial agricultural operations on the premises." Wis. Admin. Code § ATCP 134.01(6).

   g. "A dwelling unit owned and operated by government, or a subdivision or agency of government." Wis. Admin. Code § ATCP 134.01(7).

B. Types of Tenancy and Duration of Lease [§ 32.452]

1. Three principal types of tenancies

   a. Lease—Written or oral agreement for transfer of real or real and personal property for a definite period of time. Wis. Stat. § 704.01(1). "A lease is for a definite period of time if it has a fixed commencement date and a fixed expiration date or if the commencement and

expiration can be ascertained by reference to some event, such as completion of a building." Wis. Stat. § 704.01(1).

b. Periodic tenancy—No valid lease and tenant pays rent on a periodic basis (recurring interval of time). Period determined by the intent of the parties with rent-interval normally evidencing that intent. Wis. Stat. § 704.01(2). Continues indefinitely until one party terminates. Can be, and often is, in writing.

c. Tenancy at will—No valid lease and no periodic payment of rent of rent. Usually friends or family. Less common. Wis. Stat. § 704.01(5).

2. Safe Housing Act (Wis. Stat. § 704.16)

a. Either tenant or landlord may terminate a tenancy when there is an imminent threat of serious physical harm.

(1) Termination by tenant

(a) Tenant or tenant's child must face imminent threat of serious physical harm from another person if tenant remains on premises, Wis. Stat. § 704.16(1)(a), and

(b) Tenant must serve landlord with notice and certified copy of injunction order, no-contact condition of release on bail under Wis. Stat. ch. 969, or criminal complaint. Wis. Stat. §§ 704.16(1)(b), 704.21; *see also infra* § 32.7 (notice).

(c) If tenant follows procedure, tenant not liable for rent after the end of the month following the month in which the tenant provides the notice or removes from the premises, whichever is later. Landlord still must mitigate damages and credit tenant for money received from replacement tenant. Wis. Stat. § 704.16(2).

(2) Termination by landlord—of "offending tenant"

(a) Offending tenant must commit one or more acts that cause another tenant, or a child of that other tenant, to face imminent threat of serious physical harm if tenancy is not terminated. Wis. Stat. § 704.16(3)(b)1.;

(b) Offending tenant must be named offender in any of the following: injunction order, no-contact condition of release on bail, or criminal complaint, as specified in Wis. Stat. § 704.16(3)(b)2.a.–g.; and

(c) Landlord must give offending tenant at least five days' written notice to vacate with certain information included. If tenant contests, the landlord must prove allegations by greater weight of credible evidence. Wis. Stat. §§ 704.16(3)(b)3., 704.21; *see also infra* § 32.7 (notice).

b. Changing locks—Landlord must change a victim-tenant's locks or give the victim-tenant permission to change locks within 48 hours after receiving a request from the tenant and a certified copy of injunction, no-contact condition of release on bail, or court order specified in Wis. Stat. § 704.16(1)(b)1.–7. Wis. Stat. § 704.16(4).

(1) Tenant is responsible for the cost. Wis. Stat. § 704.16(4)(b).

(2) If landlord permits tenant to change locks, tenant must provide landlord with a key for the changed lock. *Id.*

(3) Landlord need not change locks if offending tenant is also a tenant of the same premises unless notice provided by tenant meets certain requirements. Offending tenant not released from obligations under lease or liability. Wis. Stat. § 704.16(4)(c).

(4) Landlord will not be liable for civil damages for any action taken to comply with Wis. Stat. § 704.16(4). Wis. Stat. § 704.16(4)(d).

(5) But a landlord who changes locks without a court document required under Wis. Stat. § 704.16(1)(b) is not in compliance with Wis. Stat. § 704.16(4) and may be subject to damages. *Thon v. Hamilton*, No. 2013AP2063, 2014 WL 625289 (Wis. Ct. App. Feb. 19, 2014) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

3. Termination of tenancy at death of tenant. *See generally* Wis. Stat. § 704.165.

a. If residential tenant dies, the tenancy is terminated the earlier of 60 days after the landlord becomes aware of the death or the rental agreement expires. Wis. Stat. § 704.165(1)(a).

b. If residential tenant dies and was a periodic tenant or tenant at will, tenancy is terminated 60 days after landlord receives notice, is advised, or otherwise becomes aware of the death. Wis. Stat. § 704.165(1)(b).

c. Deceased tenant or estate not liable for rent after termination of tenancy. Wis. Stat. § 704.165(2). Landlord still must mitigate under Wis. Stat. § 704.29.

d. Another adult tenant who resides at the rental property is not relieved from any obligation under the rental agreement after a co-tenant's death. Wis. Stat. § 704.165(3).

e. Landlord must not contact or communicate with deceased tenant's family members to obtain rent for which family members have no liability. Wis. Stat. § 704.165(4).

PRACTICE TIP: Because of probate-law issues, if the sole renter of a unit dies, the attorney should advise the landlord to not open the unit or give a replacement key to family members or others asking for access absent a court order.

II. EVICTIONS [§ 32.453]

A. In General [§ 32.454]

1. Notice, *see infra* § 32.7.

a. In most circumstances, must serve notice before starting suit.

b. Type of notice required varies according to the type of tenancy and the type of breach.

c. Once complaint is prepared, landlord can typically expect to obtain a writ of restitution after about 30 days (unless there are service problems or there is a triable issue).

NOTE: The COVID pandemic has slowed the process considerably, especially in larger counties. The average time to obtain a writ of restitution in larger counties is more than 50 days on a contested matter.

2. Purpose

a. Plaintiff-landlord tries to obtain obtain writ of restitution, and perhaps money judgment, at the initial appearance.

NOTE: Typically, the landlord is only seeking the eviction order and writ at the first court date. This is commonly referred to as the "first cause of action." The money part of the case, commonly referred to as the "second and third causes of action," is usually addressed at a later court date after the landlord has retaken the property and finalized an itemization of damages (a list of unpaid rent, late fees, utilities, physical damage beyond ordinary wear and tear, etc.).

b. Defendant-tenant may raise a defense or counterclaim requiring a trial.

c. Obtaining a stipulation (main types are pay-and-stay, pay-and-move, and move-out) is often the most practical approach because it can

(1) Save landlord cost of executing writ,

(2) Resolve the case without need for further litigation (i.e., an eviction trial),

(3) Allow tenant time to relocate, and

(4) Prevent a judgment of eviction from going on the tenant's record.

B. Jurisdiction [§ 32.455]

1. All evictions, regardless of the amount of rent in controversy, are exclusively governed by small claims procedure. Wis. Stat. § 799.01(1). Usually, they are heard in small claims court. However, in smaller counties the cases might be heard by regular circuit court judges. In larger counties they start by being heard by commissioners, and if contested, they are transferred to the small claims judge or another civil judge if a substitution is filed.

2. Evictions and other actions are transferred to circuit court if an *allowable* counterclaim is filed and the prescribed fee is paid. Wis. Stat. § 799.02(1).

3. In an unpublished decision, *Olmanson v. Weits*, No. 2021AP438, 2021 WL 6012822 (Wis. Ct. App. Dec. 16, 2021) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (review denied), the court of appeals upheld a Dane County Circuit Court's determination that a squatter or trespasser (one who holds possession without the landowner's permission) cannot be "evicted" under Wis. Stat § 799.40(1). The court concluded that eviction actions under Wis. Stat. ch. 799 are only allowed when there exists a landlord-tenant

relationship. Instead, an action for trespassing is required in cases in which a squatter or trespasser holds possession.

a. This recent decision presents potential concerns for landlords' attorneys. The single-judge court of appeals decision recognized that under Wis. Stat. § 799.40(1), "[a] civil action of eviction may be commenced by a person entitled to the possession of real property, or by that person's agent authorized in writing, to remove therefrom any person who is not entitled to either the possession or occupancy of such real property." *Olmanson*, 2021 WL 6012822, ¶ 11. However, the judge concluded that the Wisconsin Supreme Court held in *State v. Whitrock*, 161 Wis. 2d 960 (1991), a criminal matter, that Wis. Stat. § 799.40(1) does not apply to a criminal trespass situation. In *Whitrock*, the defendant, a trespasser or squatter, was attempting to quash evidence found during a search of the rental unit on constitutional grounds, claiming the right to privacy in his domicile, and asserting that possession of the rental was a civil landlord-tenant matter. The supreme court stated:

> While [§§799.40-.45] apply to landlord-tenant disputes generally, they do not apply to this case. [The property owner] in this case was not evicting a party to the lease, but rather was acting on his concern that the legal tenant had vacated the premises and the duplex had since been occupied by non-tenants.

Whitlock, 161 Wis. 2d at 975. Applying this statement to *Olmanson*, the court of appeals concluded that Wis. Stat. § 799.40(1) would not allow a landlord to evict a squatter or trespasser under the chapter. *Olmanson*, 2021 WL 6012822, ¶¶ 10–15.

b. The court of appeals did not explain the binary rationale of its decision in *Olmanson*. There are many statutory provisions that allow a separate civil remedy for criminal conduct and that coexist in the statutory scheme (e.g., civil and criminal remedies for theft). It is likely that other courts will conclude that the civil protections afforded to landowners under Wis. Stat. § 799.40(1) to remove anyone claiming possession against a person entitled to possession can survive simultaneously with the supreme court's decision in *Whitlock*, which limits the privacy rights of trespassers and squatters.

c. If courts begin applying the *Olmanson* decision to squatter and trespasser situations and concluding that "eviction" is not the proper removal method, then landlords who elect to extra-judicially remove trespassers or squatters should be protected from counterclaims of illegal or self-help eviction.

C. Notice [§ 32.456]

1. Because most eviction actions must be preceded by service of a notice, it is important to determine the type of tenancy, duration of tenancy, and type of breach to prepare a proper notice.

2. In general, notice is "given" on the date of personal service or on the second day after mailing (in state); date notice is given becomes the first day of notice. Wis. Stat. § 704.19(7).

   NOTE: In Milwaukee County, the day of delivery does not count as the first day for 5-day and 14-day notices, regardless of how served. Milwaukee Cnty. Cir. Ct. R. 3.84.

3. Types of notice

NOTE: For rental agreements that are entered into on or after April 18, 2018, *rent* "includes any rent that is past due and any late fees owed for rent that is past due." Wis. Stat. § 704.17(1g). Note that written rental agreements may also expand the definition of "rent" to include any amounts owed by tenant to landlord.

a. 5-day notice

(1) Allowable for any month-to-month or week-to-week tenancy for failure to pay rent or for breach of any other condition. Wis. Stat. § 704.17(1p)(a), (b).

NOTE: For month-to-month tenancies, a landlord can usually give a 14-day notice without giving a 5-day notice first.

(2) Generally required for any tenancy under a lease for one year or less and year-to-year tenancies for failure to pay rent or for breach of any other condition. Wis. Stat. § 704.17(2)(a), (b).

NOTE: There is an exception. Per Wis. Stat. § 704.17(2), for a tenancy under a lease for one year or less, a landlord can "graduate" to a 14-day notice if the landlord had previously issued a valid 5-day notice within the preceding 12 calendar months.

(3) The tenant may remain if the breach is cured within 5 days after notice being given.

NOTE: The right to cure is the crucial difference between the 5-day notice and the 14-day notice.

b. 14-day notice

(1) Allowable for month-to-month tenancy for failure to pay rent if the tenant is in default of rent when the notice is issued. Wis. Stat. § 704.17(1p)(a).

(2) Allowable for month-to-month tenancy for any other breach. Wis. Stat. § 704.17(1p)(b).

(3) Allowable for tenancies of 1 year or less for second violation within 12 months after previous 5-day notice. Wis. Stat. § 704.17(2)(a), (b).

PRACTICE TIP: When evaluating the sufficiency of a 14-day notice under this section, attorney should also evaluate the sufficiency of the 5-day notice previously served because if the 5-day notice was defective, the right to "graduate" to a 14-day notice could be called into question.

NOTE: A landlord can elect to use a 5-day notice instead.

(4) No right to cure—the tenant must vacate even if the breach is cured.

c. 30-day notice required to non-renew a lease of more than 1 year for any breach (uncommon in residential leases). Wis. Stat. § 704.17(3).

PRACTICE TIP: When drafting leases for more than one year, consider shortening this

period or incorporating the 5- or 14-day notice provisions for shorter leases.

d. 28-day notice required for any month-to-month tenancy; landlord needs *no* reason whatsoever to terminate lease. Wis. Stat. § 704.19(3); *Scalzo v. Anderson*, 87 Wis. 2d 834 (1979).

NOTE: A landlord cannot terminate for any illegal purpose (e.g., discrimination, sexual harassment, retaliatory eviction). *Chomicki v. Wittekind*, 128 Wis. 2d 188 (Ct. App. 1985).

e. 90-day notice required for year-to-year agricultural tenancies. Wis. Stat. § 704.19(3).

f. If periodic payment is less than monthly, notice must be at least equal to the payment period. Wis. Stat. § 704.19(3).

g. 5-day notice with no right to cure may be used when owner has received drug-related nuisance or criminal-gang-house notice from a law enforcement agency. Wis. Stat. § 704.17(1p)(c), (3)(b).

(1) 5-day notice with no right to cure—criminal activity. Wis. Stat. § 704.17(3m).

(a) Tenant, member of household, or guest or other invitee must have engaged in criminal activity.

(b) Applies to criminal activity that threatens the health or safety of, or right to peaceful enjoyment of, premises by other tenants, persons residing in the immediate vicinity, or landlord's agents or employees.

(c) Also applies to drug-related criminal activity on or near the premises.

(d) Arrest or conviction is not necessary.

(e) Termination notices under Wis. Stat. § 704.17(3m) require more content than other termination notices.

(f) If contested, landlord must prove by "greater preponderance of the credible evidence of the allegation in the notice." Wis. Stat. § 704.17(3m)(b)1.

4. Effect of notice

a. Terminates tenancy (tenant is no longer entitled to possession after specified date). Wis. Stat. §§ 704.17(4), 704.19(8).

b. Fulfills condition precedent to begin eviction. Wis. Stat. § 704.23.

c. Begins double-damages provision of Wis. Stat. § 704.27.

d. Does not terminate tenant's responsibility for past-due rent or for rent due through end of original lease term, subject to successful mitigation. Wis. Stat. § 704.29(1); *Kersten v. H.C. Prange Co.*, 186 Wis. 2d 49 (Ct. App. 1994).

5. Time periods of notice

   a. Serve 5-day, 14-day, or 30-day notice after breach or default has occurred.

   b. Serve 28-day notice at least 28 days before end of rent-paying period (e.g., to terminate month-to-month for December 31, personally serve notice no later than December 4). Wis. Stat. § 704.19(2), (3).

   c. Notice is given on the date of personal service or on the second day after the date of mailing; either constitutes the first day of notice. Wis. Stat. § 704.19(7).

      PRACTICE TIP: If drafting a notice, unless required by the lease or another regulation (e.g., by the Department of Housing and Urban Development (HUD)), avoid putting the exact termination date in the 5-, 14-, 28-, or 30-day notice because that date will fluctuate based on how the notice is served (e.g., personally versus by posting and mail versus certified mail).

      NOTE: By local rule established by the chief judge, Milwaukee County modifies the Wisconsin Statutes and requires one additional day for all 5- and 14-day notices. Milwaukee Cnty. Cir. Ct. R. 3.84.

6. Giving notice. *See generally* Wis. Stat. § 704.21(1), (2).

   a. Methods

      (1) Give copy personally to tenant or leave a copy in a tenant's usual place of abode in the presence of a competent family member at least 14 years old who is informed of the notice's contents. Wis. Stat. § 704.21(1)(a).

      (2) Leave with "competent person apparently in charge" or occupying part or all of the premises *and* mail a copy by regular or other mail to tenant's last-known address. Wis. Stat. § 704.21(1)(b).

      (3) Conspicuously affix notice on the premises where it can be conveniently read and send a copy by ordinary mail to tenant's last-known address if unable to give notice under methods (1) and (2) with "reasonable diligence." Wis. Stat. § 704.21(1)(c).

      (4) Send copy by registered or certified mail to tenant's last-known address. Wis. Stat. § 704.21(1)(d).

         NOTE: It is a common misconception that the tenant must actually receive a mailed notice. The statute does not require actual receipt, only mailing.

      (5) Serve tenant using procedures for service of summons under Wis. Stat. § 801.11. Wis. Stat. § 704.21(1)(e).

   b. Actual receipt

      (1) Notice given by methods not approved in statutes may be deemed properly given if it actually is received. Wis. Stat. § 704.21(5).

(2) Burden is on party alleging actual receipt by clear and convincing evidence. Wis. Stat. § 704.21(5).

c. If there are multiple tenants or landlords, notice served on one is notice served on all. Wis. Stat. § 704.21(4).

7. CARES ACT considerations

a. On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (CARES Act) into law. Section 4024 (codified at 15 U.S.C. § 9058) of the CARES Act imposed a temporary moratorium on evictions. This moratorium went into effect immediately upon the enactment of the CARES Act and lasted for 120 days (through July 24, 2020). Section 4024(c) of the CARES Act requires a 30-day notice to vacate be sent to any resident who is behind in their payment of rent before a landlord can evict a tenant. Section 4024(c) remains in effect even though the eviction moratorium has ended.

b. The 30-day notice rule applies to any property covered under the CARES Act. A *covered property* is defined as

> [A]ny property that (A) participates in (i) a covered housing program (as defined in section 12491(a) of title 34 [section 41411(a) of the Violence Against Women Act of 1994]); or (ii) the rural housing voucher program under section 1490r of title 42 [section 542 of the Housing Act of 1949]; or (B) has a: (i) Federally backed mortgage loan; or (ii) Federally backed multifamily mortgage loan.

15 U.S.C. § 9058(c). Because a "covered property" includes rental properties that have a federally backed mortgage, the 30-day notice rule covers many more properties than one would expect.

c. The remaining provision of the CARES Act that requires a 30-day notice reads: "The lessor of a covered dwelling unit … may not require the tenant to vacate the covered dwelling unit before the date that is 30 days after the date on which the lessor provides the tenant with a notice to vacate."

d. The phrase "require the tenant to vacate" in section 4024(c) is not further defined. 15 U.S.C. § 9058(c).

(1) Some management companies, landlords, and landlords' attorneys are operating as if the "require … to vacate" date is the day the sheriff would execute the writ, meaning that so long as the tenant is not removed by the sheriff until after 30 days have elapsed from the date of the notice, the CARES Act requirement has been satisfied.

(2) Other management companies, landlords, and landlords' attorneys are taking a more cautious approach and are not filing an eviction action until after the 30-day period has expired.

e. There is some dispute over whether the 30-day notice rule applies only to rent-related evictions or applies to all types of evictions. HUD has repeatedly stated it only applies to rent-related evictions. However, others suggest the 30-day notice rule may apply to all

types of evictions. The Congressional Research Service publication *CARES Act Eviction Moratorium* (Apr. 7, 2020), https://crsreports.congress.gov/product/pdf/IN/IN11320, states,

> Section 4024(c) requires landlords of the same properties to provide tenants at least 30 days-notice before they must vacate the property. It also bars those landlords from issuing a notice to vacate during the 120-day period. In contrast to the eviction and late fee protections of Section 4024(b), which are expressly limited to nonpayment, Section 4024(c) does not expressly tie the notice to vacate requirement to a particular cause. Thus, Section 4024(c) arguably prohibits landlords from being able to force a tenant to vacate a covered dwelling for nonpayment or any other reason until after August 24, 2020 (i.e., 120 days after enactment, plus 30 days after notice is provided).

f. HUD published an interim final rule in the Federal Register on October 7, 2021, that applies when there is a national emergency, such as the current pandemic, and when federal funding is available to assist tenants in public housing (administered by a public housing authority (PHA)) and properties with project-based rental assistance (PBRA) who are facing eviction for nonpayment of rent. Extension of Time and Required Disclosures for Notification of Nonpayment of Rent, 86 Fed. Reg. 55,693 (Oct. 7, 2021) (eff. Nov. 8, 2021). The interim final rule will allow HUD to require providers of public and PBRA housing to give tenants facing eviction for nonpayment of rent at least 30 days' notice before a tenant must vacate a unit. That notice must give tenants information about the availability of federal emergency funding intended to prevent evictions. In addition, PHAs must provide all public housing tenants with information about the availability of federal emergency rental assistance. HUD strongly encourages (but does not require) PHAs and owners of PBRA properties to work with tenants who are eligible for federal Emergency Rental Assistance (ERA) funding and to delay lease terminations for any tenants whose application for ERA assistance is still pending after a 30-day period.

PRACTICE TIP: Most of the time, management companies, landlords, and landlords' attorneys are issuing CARES Act notices on rent-related matters. Therefore, the additional time to vacate is only applicable with either a 5- or 14-day notice. Often the notice reads "Your tenancy expires in 5 (or 14) days, but you will not be required to vacate until 30 days after the issuance of this notice." The CARES Act notice requirement does not require an extension of the right to cure or the tenancy; it only requires additional time to vacate.

D. Summons and Complaint [§ 32.457]

1. In general

a. Form SC-500 (Summons and Complaint—Small Claims) is a mandatory circuit court form, available on the Wisconsin Court System's website, https://www.wicourts.gov/forms1/circuit/index.htm (last updated Feb. 13, 2022). Wis. Stat. §§ 799.05(2), 799.06(3)(a), 799.41.

(1) Form also may be purchased from clerk of court's office or, in some counties, at least authenticated there.

(2) Check with your county for local requirements. Some counties, such as Milwaukee, require additional forms. Larger counties, such as Milwaukee, require the Spanish-English version of the form.

b. Plaintiff must pay filing fee and file form with clerk of court. Wis. Stat. § 814.62(3).

c. Attorneys and high-volume filing agents (entities filing 10 or more actions per year) must electronically file (e-file)all small claims actions. Wis. Stat. § 801.18. For others (e.g., self-represented litigants), e-filing remains voluntary. *Id.*

NOTE: When e-filing and using Wisconsin's Form SC-500, note that there is a signature box on the first page titled "Clerk/Attorney Signature." Some tenants' attorneys have challenged the sufficiency of the pleadings if this box is left blank. A simple way for counsel to remove this challenge is to sign in this box as an "Attorney," as well as to sign the area at the end of form SC-500. However, even if this box is blank, the pleading is "signed" electronically by the clerk on the top of the first page of the form that is generated by the e-filing process.

d. Return date of summons varies from county to county but must comply with requirements of Wis. Stat. § 799.05(3) and local court schedule. Wis. Stat. § 799.05(4).

(1) Minimum is 5 days, and

(2) Maximum is 25 days (was lowered from 30 days, which is still the maximum for non-eviction small claims). Wis. Stat. § 799.05(3)(b).

NOTE: These deadlines are from the "date of issue" and not necessarily from the date of filing. However, the filing and "issue" dates should align unless the action was e-filed outside the normal business hours of the clerk of court, in which case the "issue" day might be the following business day.

NOTE: The COVID-19 pandemic has resulted in delays in court dates and hearings.

e. The complaint form provides for pleading two causes—eviction and money judgment. Wis. Stat. §§ 799.06(3)(a), 799.41; *see also* Form SC-500.

f. If the eviction seeks to remove a tenant whose tenancy is terminated as the result of a foreclosure judgment under Wis. Stat. § 708.02, the complaint must identify the action as an eviction of the tenant caused by a foreclosure action. Wis. Stat. § 799.41(2).

2. Service

a. Serve not less than five days before return date. Wis. Stat. § 799.05(3)(b).

b. In general, comply with the usual rules of civil procedure; some counties require service by local sheriff. Wis. Stat. § 799.12(1).

c. If not served by personal service or mailed service, action for money judgment will be dismissed or case will be adjourned until service by publication made (unless the defendant shows up to court and does not contest jurisdiction). Wis. Stat. § 799.12(2)–(4).

Court "shall require the use of certified mail with return receipt requested" for all eviction cases in which service by mail is authorized under Wis. Stat. § 799.12(2). Wis. Stat. § 799.12(3).

d. If personal service is not feasible, a plaintiff may obtain, under Wis. Stat. § 799.16(3)(a), in rem jurisdiction for writ only (no money judgment) and must:

(1) Post pleadings on premises at least seven days before return date, and

(2) Send copy by ordinary mail at least five days before return date.

NOTE: is possible that reasonable diligence is required *before* using Wis. Stat. § 799.16. *Compare Beneficial Fin. Co. of Wis. v. Lee*, 37 Wis. 2d 263 (1967) (determining lack of reasonable diligence when process server had access to residence and could have returned to serve defendant, but instead served the defendant's wife and made a "not found" return), *with Culver v. Kaza*, 2021 WI App 57, 399 Wis. 2d 131 (finding reasonable diligence when the process server left the summons and complaint with the guard of a gated community who denied the process server entry to the premises).

e. Private process, when available and allowed, is often quicker; speed is particularly important because damages of lost rent will probably never be recovered.

E. Initial Appearance of Plaintiff [§ 32.458]

1. File documents listed below:

a. Termination notice;

b. Affidavit of service of termination notice;

NOTE: If service by certified mail, proof of certified mailing from the U.S. post office will be sufficient to establish proper notice, "and an affidavit of service may not be requested." Wis. Stat. § 799.40(1g).

c. Original summons and complaint (usually already filed);

d. Affidavit of service of the summons and complaint; and

e. Declaration/Affidavit of nonmilitary service, if appropriate (i.e., default judgment upon personal service).

NOTE: The above documents may need to be filed with the court ahead of time; please check with the clerk of court. With e-filing, most courts require any documents to be filed at the initial return date to be e-filed at least 24 hours in advance of the court date.

2. Ask for immediate writ of restitution if tenant is still occupying property and no stipulation has been reached, *see infra* § 32.12.

3. Ask for money damages.

a. Courts usually defer money judgment to give time to determine all costs, moving fees, holdover damages, physical damages, etc.

b. However, in some jurisdictions a plaintiff can ask for a judgment for only the amount due as of the summons and complaint or court date.

c. Remind court that double damages are mandatory. Wis. Stat. § 704.27; *Vincenti v. Stewart*, 107 Wis. 2d 651 (Ct. App. 1982).

(1) Landlord is entitled to full amount of damages caused by failure of tenant to "vacate" within required time for each day tenant remains in possession after termination of tenancy. Wis. Stat. § 704.27; *Hanson v. Thorud*, No. 2013AP2129, 2014 WL 625265 (Wis. Ct. App. Feb. 19, 2014) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (modifying circuit court's damages award).

(2) Court of appeals, dismissing landlord's Wis. Stat. § 704.27 counterclaim, rejected landlord's suggestion that *vacate* means anything more than the conventional definition: "to move out or leave." *Ganta v. Peterson*, No. 2014AP1922, 2015 WL 2401010, ¶ 10 (Wis. Ct. App. May 21, 2015) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

(3) The COVID pandemic does not relieve a former tenant of paying the mandatory double damages.

4. No adjournments except by plaintiff consent, or for good cause shown and on terms deemed just by court. Wis. Stat. § 799.27.

5. If eviction is contested and all parties are present, matter must be scheduled for a hearing as soon as possible before a judge, and not more than 30 days after the return date. Wis. Stat. § 799.206(3).

NOTE: A party must raise valid legal grounds for a contest. Wis. Stat. § 799.206(3).

NOTE: Many contested eviction hearings are being held outside the statutorily prescribed timeframe because of the COVID-19 pandemic.

6. In residential tenancies, parties are entitled to a hearing within 30 days unless stipulated otherwise or the action is immediately dismissed at the initial return date. Wis. Stat. § 799.20.

7. Eviction proceedings are supposed to be as summary as possible because there is seldom an issue for trial. *Scalzo v. Anderson*, 87 Wis. 2d 834 (1979).

8. Bottom line: insist on immediate writ unless the tenant has vacated, a settlement has been reached (stipulation), or a genuine trial issue exists.

F. Initial Appearance of Defendant [§ 32.459]

1. In general

a. Defendant may plead orally unless plaintiff's title is put into issue. Wis. Stat. §§ 799.20(1), 799.43; *see also* Wis. Stat. § 799.06(1).

b. Allowable counterclaims must arise out of the same transaction. *Scalzo v. Anderson*, 87 Wis. 2d 834 (1979).

c. If legitimate defense or joinable counterclaim, matter will be set for further hearing, motion, pleading, or trial.

d. Court must make "sufficient inquiry" to determine whether defendant claims a defense, but statute raises certain problems. Wis. Stat. § 799.20(4).

(1) How can court serve as both independent adjudicator and perceiver of latent defenses?

(2) How overt must a claim be?

e. If no defense, defendant's best option might be to get a stipulation that writ will be stayed for *x* days to find new place or upon payment of *y* dollars.

PRACTICE TIP: More commonly, this is done via a stipulation to dismiss (pay-and-stay, pay-and-move, and move-out). That results in some or all of the cases being dismissed subject to compliance with the stipulation. The defendant and the defense attorney greatly prefer dismissal stipulations because they do not result in an eviction judgment being entered unless and until the defendant violates the terms of the stipulation.

f. *Hardship stay* is possible, but requirements must be met. Wis. Stat. § 799.44(3).

CAUTION: Judges and commissioners regularly ignore these requirements and stay writs anyway. It is a source of great frustration for landlords' attorneys.

2. Defenses

a. Under *Scalzo v. Anderson*, 87 Wis. 2d 834 (1979), there are, in general, five triable issues:

(1) Whether landlord-tenant relationship exists (look to parties' intent);

(2) Whether tenant is holding over;

(3) Whether proper notice was given;

(a) Correct notice given as to number of days and right to cure. Wis. Stat. § 704.17.

(i) Landlord's failure to give the statutorily required five-day notice to cure deprives the circuit court of competency to order an eviction judgment. *Milwaukee City Hous. Auth. v. Cobb*, 2014 WI App 70, ¶ 2, 353 Wis. 2d 603, *rev'd*, 2015 WI 27, 361 Wis. 2d 359.

(ii) The right-to-cure provision in Wis. Stat. § 704.17(2)(b) may be preempted by federal law in certain circumstances. *Cobb*, 2015 WI 27, ¶ 4 & n.6, 361 Wis. 2d 359.

NOTE: In *Cobb*, the supreme court limited its holding on federal preemption to a public housing tenant evicted for engaging in "drug-related criminal activity." The court explicitly stated that it did "*not* hold that [Wis. Stat. §] 704.17(2)(b)'s right to remedy is preempted under all circumstances." *Cobb*, 2015 WI 27, ¶ 4 n.6, 361 Wis. 2d 359.

(b) Proper method of service employed. Wis. Stat. § 704.21.

(c) Essential elements stated. Wis. Stat. § 704.19(4).

For rental agreements entered into or renewed after April 18, 2018, notice for failure to pay rent or any amount due under rental agreement that includes incorrect statement of amount due is valid unless landlord's statement of amount due is intentionally incorrect *or* tenant paid or tendered amount that tenant believes due. Wis. Stat. § 704.17(4m).

(4) Whether landlord has proper title (including when a renter with a superior leasehold is evicting an occupant that holds possession under the superior leaseholder); and

(5) Whether landlord is attempting a retaliatory eviction, *see* Wis. Stat. § 704.45.

b. Retaliatory eviction. Wis. Stat. § 704.45; *see also* Wis. Stat. § 704.44; Wis. Admin. Code § ATCP 134.09(5).

(1) Wis. Stat. § 704.45 significantly expanded on the old concept in *Dickhut v. Norton*, 45 Wis. 2d 389 (1970), which sought only to protect tenants who complained to building inspector and then were evicted.

(2) Protected acts of tenant per Wis. Admin. Code § ATCP 134.09(5):

(a) Making a good-faith complaint about a defect in the premises to an elected public official;

(b) Making a good-faith complaint about a defect in the premises to a local housing code enforcement agency;

(c) Complaining to landlord about violation of Wis. Stat. § 704.07;

(d) Complaining to landlord about violation of local housing code;

(e) Reporting a violation of Wis. Admin. Code ch. ATCP 134 or a building or housing code to any governmental authority or filing suit alleging such violation;

(f) Joining or attempting to organize a tenants' union or association;

(g) Asserting, or attempting to assert, any right specifically accorded to tenants under state or local law; or

(h) Exercising legal right relating to residential tenancies.

(3) Per Wis. Stat. § 704.45 and Wis. Admin. Code § ATCP 134.09(5), landlord cannot, in response to protected tenant action, do any of the following:

(a) Terminate tenancy or give notice preventing the automatic renewal of a lease;

(b) Constructively evict a tenant by any means including the termination or substantial reduction of heat, water, or electricity;

(c) Increase rent;

(d) Decrease services;

(e) Evict;

(f) Refuse to renew lease; or

(g) Threaten any of above.

(4) Per Wis. Stat. § 704.95, the Department of Agriculture, Trade and Consumer Protection, which administers Wis. Admin. Code ch. ATCP 134, may not issue an order or promulgate a rule that changes any right or duty arising under Wis. Stat. ch. 704. Therefore, to the extent there is a conflict between Wis. Admin. Code ch. ATCP 134 and Wis. Stat. ch. 704, the statutory chapter governs. Additionally, Wis. Admin. Code ch. ATCP 134 only applies to residential tenancies.

(5) Must show causal relationship that landlord's action would not have occurred but for tenant's action.

(6) Must show by preponderance of evidence.

(7) Defense might not be available if rent is delinquent.

c. Improper service or notice

(1) Improper notice. Wis. Stat. §§ 704.17, 704.19(2), (4), (5).

(2) Improper service of notice or summons.

(3) Inadequate time before initial appearance. Wis. Stat. § 799.05(3).

(4) Improper service by plaintiff. Wis. Stat. § 801.10.

(5) Improper posting *and* mailing. Wis. Stat. § 799.16(3).

(6) Not reasonably diligent in attempt to serve. Wis. Stat. § 801.11(1).

(7) Appearance waives defective personal jurisdiction unless tenant challenges jurisdiction at the initial appearance.

d. Defense to nonpayment

(1) Actual payment.

CAUTION: Wis. Stat. § 799.40(1m) provides that an eviction action cannot be dismissed because the landlord accepts past-due rent or any other payment from the tenant after serving notice of default or after commencing the action. Wis. Stat. § 799.40(1m).

(2) Rent abatement under Wis. Stat. § 704.07(4) because premises:

(a) Are untenantable, *or*

(b) Pose health hazard, *or*

(c) Substantially violate Wis. Stat. § 704.07(2), materially affecting tenant's health or safety.

NOTE: Rent abatement has been and will continue to be a source of litigation as courts struggle with issues of definition and extent.

NOTE: Wis. Stat. § 704.07(4) specifically states that it "does not authorize rent to be withheld in full, if the tenant remains in possession." Permissible rent abatement is measured by "the extent the tenant is deprived of the full normal use of the premises." *Id.* Rent abatement caused by untenantability does not apply if "damage or condition is caused by negligence or improper use by the tenant."

(3) Implied warranty of habitability. *Pines v. Perssion*, 14 Wis. 2d 590 (1961).

(a) Available in majority of states.

(b) Arguably, this and other such defenses are limited. *Bullen v. Fellner*, 86 Wis. 2d 116 (1978).

(4) Statutory obligation. Wis. Stat. § 704.07(2).

(5) Express warranty by landlord.

(6) Amount due tendered during notice timeframe.

(7) Waiver or estoppel.

NOTE: To avoid this defense, state in the lease and on any relevant receipts that any money paid after notice does not waive any rights, including the landlord's right to evict. *See also* Wis. Stat. § 799.40(1m).

NOTE: It is not a defense that the landlord has previously waived any violation or breach. Wis. Stat. § 799.40(1s).

(8) Time is of the essence (not usually, unless lease or practice makes it so).

(9) Accord and satisfaction.

(10) Right to cure. Wis. Stat. § 704.17.

(11) Improper mitigation does not defeat eviction, only money judgment. Wis. Stat. § 704.29.

e. Other breaches

(1) Denial of the factual allegations stated in the notice of termination.

(2) Denial of right to cure. Wis. Stat. § 704.17(2)(b).

(3) Retaliatory conduct. Wis. Stat. § 704.45.

(4) Breach of material term.

f. Defenses to eviction action

(1) Violations of Open Housing Law. Wis. Stat. § 106.50.

(2) Improper appearance. Wis. Stat. § 799.06(2).

(3) Insufficient pleading of elements. Wis. Stat. § 799.41.

(4) Constructive eviction. *First Wis. Tr. Co. v. L. Wiemann Co.*, 93 Wis. 2d 258 (1980).

(a) Breach of covenant of quiet enjoyment.

(b) Tenant must be deprived of full use for material period.

(c) Landlord must be notified and given chance to correct.

(d) Tenant must leave within reasonable time.

(5) Improper party (that is, lawsuit was not brought by person "entitled to the possession of real property, or by that person's agent authorized in writing"). Wis. Stat. § 799.40(1).

(6) Stay of eviction pending application for emergency assistance (EA). Wis. Stat. § 799.40(4)(a); *see also* Wis. Stat. § 49.138; Wis. Admin. Code ch. DCF 120.

(a) If tenant raises issue, case treated as contested and typically transferred to circuit court judge.

(b) The court "shall" stay the proceedings if the tenant applies for EA.

(c) EA extended to cover homelessness.

(d) If eligible, tenant can receive assistance for applicant plus each child under 18 years of age.

(e) Landlord need not accept EA payment.

(f) If landlord accepts, eviction action dismissed. Wis. Admin. Code § DCF 120.08(5)(b).

(g) Court will conduct review hearing on efforts to locate new place.

(h) No stay may be granted after a writ of restitution has been issued. Wis. Stat. § 799.40(4)(a).

(i) Stay must not remain in effect for more than 10 working days, as defined by Wis. Stat. § 277.01(14). Wis. Stat. § 799.40(4)(a).

G. Trial [§ 32.460]

See generally Wis. Stat. § 799.21.

1. "[T]here is … seldom an issue for trial" in an eviction case. *Scalzo v. Anderson*, 87 Wis. 2d 834, 847 (1979).

2. May be appropriate for summary judgment if time allows.

3. Otherwise based on particular facts in dispute.

4. Procedure. *See* Wis. Stat. § 799.209.

   a. Proceedings conducted informally.

   b. Is not governed by common-law or statutory rules of evidence *except* privilege and Wis. Stat. § 901.05 (admissibility of HIV test results).

   c. Must admit all evidence of "reasonable probative value."

   d. Oral hearsay cannot be sole basis of an essential finding of fact. Because it is not specifically excluded, written hearsay can be used to establish an essential finding of fact.

H. Writ of Restitution [§ 32.461]

1. In general

   a. Ordered immediately by court but purchased from clerk of court. Wis. Stat. § 799.44(2).

b. Good for 30 days. Wis. Stat. § 799.44(2). (Writ will not be executed if received by the sheriff more than 30 days after the date it was issued. If the writ is stayed, arguably the 30 days runs from the stay date.)

NOTE: During the COVID-19 pandemic, some county courts have been placing holds on the execution of issued writs as part of efforts to comply with various orders issued by governmental or other regulatory bodies. Unfortunately, courts have not resolved the effect of these holds on when and how sheriffs handle execution of writs issued more than 30 days before, but that were held in accordance with a superseding order.

c. Some counties have attorney draft and submit writ. *Cf.* Form SC-512.

NOTE: Milwaukee County uses a "writ authorization order." The plaintiff then buys a writ from the clerk of courts and brings both documents to the sheriff.

2. Form and contents described in Wis. Stat. § 799.44(4).

3. May only be stayed, and for no more than 30 days, if very specific conditions are met. Wis. Stat. § 799.44(3). The conditions are as follows:

a. The defendant, at the time the writ is ordered, applies for the stay and provides notice to the plaintiff.

b. If the court determines a hardship exists, a stay for a period not to exceed 30 days from the date of the order for judgment can be granted, but the stay "shall be conditioned upon the defendant paying all rent or other charges due and unpaid at the entry of judgment and upon the defendant paying the reasonable value of the occupancy of the premises, including reasonable charges, during the period of the stay upon such terms and at such times as the court directs."

The court, if it elects to stay enforcement of a writ, should issue a written or oral ruling addressing the mandatory conditions applicable to the stay. For example: "Upon the failure of the defendant to perform any of the conditions of the stay, the plaintiff may file an affidavit executed by the plaintiff or attorney, stating the facts of such default, and the writ of restitution may forthwith be issued."

c. The court may require the defendant to give a bond.

4. Execution of writ (varies widely among counties)

NOTE: Wis. Stat. § 799.45(3m) provides an alternative procedure for disposal of property left behind if abandoned or after the sheriff comes through in accordance with Wis. Stat. § 704.05(5).

a. Present writ to sheriff.

b. Pay sheriff's fees. Wis. Stat. § 59.32(1).

c. It may be necessary to make preliminary arrangements with moving company *before* sheriff will execute writ (unless Wis. Stat. § 799.45(3m) applies and the plaintiff elects to forgo hiring a moving company).

d. Sheriff *may* give 24–48-hour warning—varies by county.

e. If plaintiff does not notify sheriff that plaintiff will remove property using the alternative-disposition procedure under Wis. Stat. § 799.45(3m), mover, under sheriff's supervision, moves person and property within 10 days after receipt of writ. Wis. Stat. § 799.45(2), (5).

f. Property is taken to a warehouse for storage (or to a place for disposal of refuse, if sheriff determines that property has no monetary value). Wis. Stat. § 799.45(3).

g. Tenant may redeem by paying storage cost (need not pay landlord's moving costs, which are only taxed as cost of suit). Wis. Stat. § 799.45(3)(b).

NOTE: The landlord should consider inducing the tenant to *voluntarily* vacate to avoid incurring substantial costs that are unlikely to be recovered. *See* Wis. Stat. § 704.05(5).

I. Appeal [§ 32.462]

See generally Wis. Stat. § 799.445.

1. Appeal within 15 days after entry of judgment or order.

2. Must file undertaking to obtain appellate stay; different from hardship stay of Wis. Stat. § 799.44(3).

J. Disclosure of Assets [§ 32.463]

See generally Wis. Stat. § 799.26.

1. All small claims judgment debtors must complete a statement disclosing certain information and mail this to the creditor within 15 days after the entry of judgment. Wis. Stat. § 799.26(1).

2. Exact procedure will vary among counties.

3. Failure to comply with order for disclosure is punishable by contempt. Wis. Stat. § 799.26(3).

III. LANDLORD DUTIES UNDER WIS. STAT. CH. 704 AND WIS. ADMIN. CODE CH. ATCP 134 [§ 32.464]

A. In General [§ 32.465]

1. Wisconsin Administrative Code: "Residential Rental Practices" chapter. Wis. Stat. § 100.20(2); Wis. Admin. Code ch. ATCP 134.

a. Wis. Admin. Code ch. ATCP 134 was amended effective November 1, 2015, to align with Wis. Stat. ch. 704.

b. Enacted under general rulemaking authority to regulate business; thus, only landlord obligations, not tenant obligations, are covered.

c. Provides specific requirements and prohibited practices.

2. Wisconsin Statutes: "Landlord and Tenant" chapter. Wis. Stat. ch. 704.

Several provisions from Wis. Admin. Code ch. ATCP 134 have been incorporated into Wis. Stat. ch. 704.

B. Disclosure Requirements [§ 32.466]

See generally Wis. Admin. Code §§ ATCP 134.03, ATCP 134.04.

1. Before rental agreement is entered into or earnest money or security deposit is accepted, landlord must do the following:

a. Furnish prospective tenant with copies of any written rental agreements, rules, etc. Wis. Admin. Code § ATCP 134.03(1). A rental agreement may include a provision that permits the landlord to provide a copy of the rental agreement and related documentation by electronic means. Wis. Stat. § 704.10(1).

b. Disclose uncorrected code violations and conditions that affect habitability per Wis. Admin. Code § ATCP 134.04(2). Disclosure is required for building or housing code violations to which all the following apply:

(1) Landlord has actual knowledge of the violation. Wis. Stat. § 704.07(2)(bm)1.

(2) Violation affects the dwelling unit that is the subject of the prospective rental agreement or a common area of the premises. Wis. Stat. § 704.07(2)(bm)2.

(3) Violation presents a significant threat to the prospective tenant's health or safety. Wis. Stat. § 704.07(2)(bm)3.

(4) Violation has not been corrected. Wis. Stat. § 704.07(2)(bm)1.

c. Per Wis. Admin. Code § ATCP 134.04(3), reveal status of utility charges:

(1) If not included in rent, and

(2) How charges not included in rent and not separately metered will be allocated.

d. Per Wis. Admin. Code § ATCP 134.06(1), inform tenant of tenant's right to inspect and request list of damages.

2. Per Wis. Admin. Code § ATCP 134.04(1), at or before the rental agreement is entered into, landlord must reveal in writing the name(s) and address(es) of person(s) authorized to:

a. Collect rent,

b. Manage and maintain premises, and

c. Accept service of notice or legal process.

NOTE: Wis. Admin. Code § ATCP 134.04(1)(b) requires information to be updated within 10 business days after the change, and Wis. Admin. Code § ATCP 134.04(1)(c) exempts owner-occupied structures of no more than 4 units.

3. Check-in sheet. Wis. Stat. § 704.08.

a. Landlord must provide check-in sheet to new residential tenant when occupancy commences.

b. Tenant may use to make comments, if any, about the condition of the premises.

c. Tenant must have seven days to complete the check-in sheet and return to landlord.

d. No sheet required upon renewal of a rental agreement or for plot of mobile home.

4. Notice of domestic abuse protections. Wis. Stat. § 704.14.

A residential rental agreement must include the following notice in the agreement or in an addendum to the agreement:

NOTICE OF DOMESTIC ABUSE PROTECTIONS

(1) As provided in section 106.50(5m)(dm) of the Wisconsin statutes, a tenant has a defense to an eviction action if the tenant can prove that the landlord knew, or should have known, the tenant is a victim of domestic abuse, sexual assault, or stalking and that the eviction action is based on conduct related to domestic abuse, sexual assault, or stalking committed by either of the following:

(a) A person who was not the tenant's invited guest.

(b) A person who was the tenant's invited guest, but the tenant has done either of the following:

1. Sought an injunction barring the person from the premises.

2. Provided a written statement to the landlord stating that the person will no longer be an invited guest of the tenant and the tenant has not subsequently invited the person to be the tenant's guest.

(2) A tenant who is a victim of domestic abuse, sexual assault, or stalking may have the right to terminate the rental agreement in certain limited situations, as provided in Wis. Stat. § 704.16 of the Wisconsin statutes. If the tenant has safety concerns, the tenant should contact a local victim service provider or law enforcement agency.

(3) A tenant is advised that this notice is only a summary of the tenant's rights and the specific language of the statutes governs in all instances.

C. Earnest Money Requirements [§ 32.467]

See generally Wis. Admin. Code § ATCP 134.05.

1. Landlord cannot accept earnest money without identifying to applicant the specific dwelling unit for which applicant is being considered.

2. If landlord rejects application or fails to approve it by the specified deadline, or if applicant withdraws application before it is accepted, landlord must return all earnest money.

3. If landlord enters into rental agreement with applicant, earnest money must either be returned to applicant (tenant) or applied to tenant's security deposit or rent.

4. If landlord accepts application, oral or written contract is created, and tenant can be held responsible for lost rent subject to general mitigation rules of Wis. Stat. § 704.29.

5. A landlord can require a prospective tenant to pay the landlord's actual cost, up to the amount specified in Wis. Stat. § 704.085(1)(a)—$25—"to obtain a consumer credit report on the prospective tenant from a consumer credit reporting agency that compiles and maintains files on consumers on a nationwide basis. The landlord shall notify the prospective tenant of the charge before requesting the consumer credit report, and shall provide the prospective tenant with a copy of the report."

D. Withholding from and Return of Security Deposits [§ 32.468]

See generally Wis. Stat. § 704.28; Wis. Admin. Code § ATCP 134.06.

1. Area probably accounts for greatest number of lawsuits. *M&I First Nat'l Bank v. Episcopal Homes Mgmt.*, 195 Wis. 2d 485 (Ct. App. 1995).

2. A landlord may be held criminally liable for failing to return or properly account for a security deposit. See *State v. Lasecki*, 2020 WI App 36, ¶ 14, 392 Wis. 2d 807, in which the court of appeals affirmed the statutory scheme by which Wisconsin law makes the failure to return or mail a security-deposit-withholding statement an unfair trade practice subject to criminal penalties. However, the underlying criminal conviction in *Lasecki* was overturned on other grounds. *Id.* ¶ 53.

3. Timing for return under Wis. Stat. § 704.28(4):

   a. Landlord must deliver or mail security deposit reconciliation; however, a rental agreement may include a provision that permits the landlord to provide the security deposit and related documentation by electronic means. Wis. Stat. § 704.10(2).

   b. Delivery or mailing must occur within 21 days after any of the following:

      (1) The date on which the rental agreement terminates, if the tenant vacates the premises on the termination date of the rental agreement, Wis. Stat. § 704.28(4)(a); Wis. Admin. Code § ATCP 134.06(2)(a);

(2) The date on which the tenant's rental agreement terminates, if the tenant vacates the premises or is evicted before the termination date of the rental agreement; or, the date on which the new tenant's tenancy begins, if the landlord rerents the premises before the tenant's rental agreement terminates, Wis. Stat. § 704.28(4)(b); Wis. Admin. Code § ATCP 134.06(2)(b); or

(3) The date on which the landlord learns that the tenant has vacated the premises or has been removed from the premises under Wis. Stat. § 799.45(2), if the tenant vacates the premises or is evicted after the termination date of the rental agreement, Wis. Stat. § 704.28(4)(c); Wis. Admin. Code § ATCP 134.06(2)(c).

4. Wis. Stat. § 704.28 applies only to residential tenancies. Wis. Stat. § 704.28(5).

5. Standard withholding restrictions. Wis. Stat. § 704.28(1); Wis. Admin. Code § ATCP 134.06(3).

a. Landlord may withhold from a security deposit only for the following:

(1) Tenant damage, waste, or neglect of the premises. Wis. Stat. § 704.28(1)(a); Wis. Admin. Code § ATCP 134.06(3)(a)1.

(a) Damage—Wis. Stat. § 704.07(3)(a) provides that if premises are damaged, including by an infestation of insects or other pests caused by the acts or inaction of the tenant, the landlord may allow the tenant to remediate or repair and redecorate, or the landlord may elect to do so; in the latter case, the tenant must reimburse the landlord for the reasonable costs of remediation, repair, or redecoration; costs presumed reasonable unless proved otherwise by the tenant. Wis. Stat. § 704.07(3)(a).

(i) Although Wis. Stat. § 704.07(3)(a) presumes costs are reasonable, tenant nevertheless may challenge the charge, and landlord then must identify actual costs; if landlord fails to do so, tenant entitled to double damages plus costs and attorney fees for the improper withholding of excessive charge from the security deposit. *Boelter v. Tschantz*, 2010 WI App 18, ¶ 10, 323 Wis. 2d 208 (excessive plumbing charge); *see also* Wis. Stat. § 100.20(5); *infra* § 32.23.

(ii) Landlord need not make repairs by the trial date to incur "actual costs." *Ngaboh-Smart v. Thompson*, No. 2012AP2674, 2014 WL 642059, ¶¶ 61–62 (Wis. Ct. App. Feb. 20, 2014) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (distinguishing *Boelter*).

(iii) *Reasonable costs* include materials provided or labor performed by the landlord and the time the landlord spends purchasing or providing materials, supervising an agent, or hiring a third-party contractor. Wis. Stat. § 704.07(3)(a).

(b) In *Maryland Arms*, the Wisconsin Supreme Court declined to address "whether any lease provision that assigned liability to a tenant for damages not caused by negligent acts or misuse would contravene the public policy set forth in [Wis. Stat. §] 704.07." Instead, the supreme court concluded that the terms of the

lease in that case did not unambiguously provide that the tenant was liable for fire damage caused by tenant's act of bringing a hair dryer into the leased apartment and plugging it in. *Maryland Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶¶ 48–49, 326 Wis. 2d 300.

(2) Unpaid rent for which the tenant is legally responsible subject to Wis. Stat. § 704.29 (mitigation). Wis. Stat. § 704.28(1)(b); Wis. Admin. Code § ATCP 134.06(3)(a)2.

NOTE: Mitigation is required when "a tenant unjustifiably removes from the premises before the effective date for termination of the tenant's tenancy and defaults in payment of rent, or if the tenant is removed for failure to pay rent or any other breach of a lease." Wis. Stat. § 704.29(1). Therefore, mitigation duties do not start (1) before the tenant removes himself or herself from the unit, or (2) before the tenant stops paying rent. If a tenant claims they will move, the landlord does not need to start mitigation until after the unit is surrendered. Additionally, if a tenant moves but continues to pay rent, the landlord does not need to commence mitigation.

(3) Payment that the tenant owes under the rental agreement for utility service provided by the landlord but not included in the rent. Wis. Stat. § 704.28(1)(c); Wis. Admin. Code § ATCP 134.06(3)(a)3.

(4) Payment that the tenant owes for direct utility service provided by a government-owned utility to the extent that landlord becomes liable for the tenant's nonpayment. Wis. Stat. § 704.28(1)(d); Wis. Admin. Code § ATCP 134.06(3)(a)4.

It is unreasonable for a landlord to withhold funds from the security deposit and not then pay the tenant's utility bill before its due date. *Boelter v. Tschantz*, 2010 WI App 18, ¶¶ 7–8, 323 Wis. 2d 208.

(5) Unpaid municipal permit (mobile-home parking) fees. Wis. Stat. § 704.28(1)(e); Wis. Admin. Code § ATCP 134.06(3)(a)5.

(6) Other reasons authorized in a nonstandard rental provision according to Wis. Stat. § 704.28(2) and ATCP 134.06(3)(b). Wis. Stat. § 704.28(1)(f); Wis. Admin. Code § ATCP 134.06(3)(a)6.

6. Nonstandard rental provisions. Wis. Stat. § 704.28(2); Wis. Admin. Code § ATCP 134.06(3)(b).

a. Must be provided in a separate written document titled "NONSTANDARD RENTAL PROVISIONS."

b. Landlord must identify each nonstandard provision with the tenant before the tenant enters into the rental agreement.

c. If tenant signs name or writes initials by nonstandard provision, it is rebuttable presumption that tenant has read the provision, the provision was explained to the tenant, and the tenant agreed to it.

7. Landlord cannot under any circumstances (including by using a nonstandard provision) withhold any amount from security deposit for "normal wear and tear" or other damages or

losses for which the tenant cannot reasonably be held responsible under applicable law. Wis. Stat. § 704.28(3); Wis. Admin. Code § ATCP 134.06(3)(c).

NOTE: Definition of "normal wear and tear" will likely arise on a case-by-case basis. This area of law has few definite answers, and even fewer cases on point. *See, e.g.*, *Howells v. Grosso Inv. Props., LLC*, No. 2009AP911, 2009 WL 3127925, ¶¶ 10–18 (Wis. Ct. App. Oct. 1, 2009) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (declining to adopt tenants' asserted extension of *Maryland Arms Ltd. Partnership* to impose landlord liability for all cleaning charges not caused by tenants' negligence or improper use of premises). A note to Wis. Admin. Code § ATCP 134.06(3)(c) gives the example that a landlord should not deduct for "routine painting or carpet cleaning" absent a showing of unusual damage caused by tenant abuse.

8. Attorney general has issued an opinion stating that Wisconsin law does not prohibit lease provisions requiring tenant to pay for routine carpet cleaning, but the opinion also stated that routine-carpet-cleaning charges cannot be deducted from the security deposit. Wis. Op. Att'y Gen. OAG-04-13 (July 30, 2013), https://docs.legis.wisconsin.gov/misc/oag/recent/oag_4_13.pdf.

9. Enforcement, *see infra* § 32.23.

10. Tenant entitled to a list of deductions from prior tenant's security deposit. Wis. Admin. Code § ATCP 134.06(1)(a)2.

11. Tenant allowed seven days to inspect unit and inform landlord of needed repairs. Wis. Admin. Code § ATCP 134.06(1)(a); *see also* Wis. Stat. § 704.08 (providing seven days for tenant to complete check-in sheet).

12. Practice tips

    a. All parties benefit from *signed* check-in sheet.

    b. Before and after pictures are always helpful.

    c. Landlord should keep a copy of dated letter detailing deductions.

    d. If there is a nonstandard rental provision that allows for recovery of the costs of routine cleaning, a landlord can recover those amounts from the tenant but cannot take the amount from the security deposit. The fact that the statute prohibits taking from the security deposit amounts related to normal wear and tear does not make the nonstandard rental provision invalid. *See* Wis. Stat. § 704.28. Instead, other collection efforts or a noneviction small claims action for breach of contract should be considered.

13. In suit for damages, burden of proof on landlord to show by preponderance of evidence that deductions were necessary and reasonable. *Rivera v. Eisenberg*, 95 Wis. 2d 384 (Ct. App. 1980).

14. If any portion of a security deposit is withheld, the landlord must deliver or mail a written statement accounting for all amounts withheld. Wis. Admin. Code § ATCP 134.06(4).

    NOTE: Wis. Admin. Code § ATCP 134.06(4) requires only that the landlord provide a written

statement accounting for all amounts withheld. It does not require that the landlord provide a bill. *Hroscikoski v. Czys*, No. 2009AP684, 2010 WL 268009, ¶ 7 (Wis. Ct. App. July 8, 2010) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

E. Promises to Repair [§ 32.469]

See generally Wis. Admin. Code § ATCP 134.07.

1. All promises to clean, repair, or improve must specify completion date. Wis. Admin. Code § ATCP 134.07(1).

2. All such promises made before initial rental agreement must be in writing. Wis. Admin. Code § ATCP 134.07(2). Rental agreements entered into on or after April 18, 2018, may include a provision that permits the landlord to provide by electronic means a promise made before the initial rental agreement to clean, repair, or improve the premises. Wis. Stat. § 704.10(3).

3. All delays must be accounted for in a timely written fashion and are permitted only for reason of labor stoppage, unavailability of supplies or materials, unavoidable casualties, or other causes beyond the landlord's control. Wis. Admin. Code § ATCP 134.07(3).

   PRACTICE TIP: If such delays occur, retain documentation of the delay.

F. Prohibited Lease Provisions and Practices [§ 32.470]

1. A residential rental agreement is void and unenforceable if it does any of the following:

   a. Allows a landlord to do any of the following identified by Wis. Stat. § 704.44(1m), *see also* Wis. Admin. Code § ATCP 134.08(1), because a tenant has contacted an entity for law enforcement services, health services, or safety services:

      (1) Increase rent;

      (2) Decrease services;

      (3) Bring an action for possession of the premises;

      (4) Refuse to renew a rental agreement; or

      (5) Threaten to take any action under paras. (1)–(4), *supra*.

   b. Allows eviction other than by Wis. Stat. ch. 799. Wis. Stat. § 704.44(2m); Wis. Admin. Code § ATCP 134.08(2).

   c. Provides for acceleration of rent payments in event of tenant default or breach, or otherwise purports to waive landlord's obligation to mitigate damages under Wis. Stat. § 704.29. Wis. Stat. § 704.44(3m); Wis. Admin. Code § ATCP 134.08(3).

   d. Requires tenant to pay landlord's attorney fees. Wis. Stat. § 704.44(4m); Wis. Admin. Code § ATCP 134.08(4); *see, e.g.*, *Baierl v. McTaggart*, 2001 WI 107, 245 Wis. 2d 632.

e. Authorizes landlord to confess judgment against tenant. Wis. Stat. § 704.44(5m); Wis. Admin. Code § ATCP 134.08(5).

f. Exculpates landlord for own negligent acts. Wis. Stat. § 704.44(6); Wis. Admin. Code § ATCP 134.08(6).

g. Makes tenant liable for personal injury from causes beyond tenant's control or for property damage caused by natural disaster or by people other than tenant or tenant's guests. Wis. Stat. § 704.44(7); Wis. Admin. Code § ATCP 134.08(7).

h. Waives landlord's legal obligation to deliver and maintain premises in habitable condition. Wis. Stat. § 704.44(8); Wis. Admin. Code § ATCP 134.08(8).

i. Allows landlord to terminate the tenancy based solely on the commission of a crime in or on the rental property if the tenant or someone who lawfully resides with the tenant is the *victim*, as defined by Wis. Stat. § 950.02(4), of that crime. Wis. Stat. § 704.44(9); Wis. Admin. Code § ATCP 134.08(9).

j. Allows the landlord to terminate the tenancy of a tenant for a crime committed in relation to the rental property, and the rental agreement does not include the notice required under Wis. Stat. § 704.14. Wis. Stat. § 704.44(10); Wis. Admin. Code § ATCP 134.08(10).

2. Landlord cannot:

a. Enter dwelling unit except with 12-hour advance notice and for certain specified reasons. Wis. Admin. Code § ATCP 134.09(2); *see also* Wis. Stat. § 704.05.

NOTE: A rental agreement may include a "NONSTANDARD RENTAL PROVISION" authorizing a landlord to enter a tenant's dwelling unit at reasonable times under other circumstances. Wis. Admin. Code § ATCP 134.09(2)(c). A rental agreement may include a provision that permits the landlord to provide by electronic means advance notice of entry. Wis. Stat. § 704.10(4).

b. Enforce automatic lease renewal that does not comply with Wis. Stat. § 704.15. Wis. Admin. Code § ATCP 134.09(3).

(1) Must warn tenant within certain timeframe that lease will renew.

(2) If no warning, no automatic renewal.

c. Seize tenant's property except as authorized under Wis. Stat. § 704.05(5), *see infra* § 32.22, or a written agreement between the landlord and tenant. Wis. Admin. Code § ATCP 134.09(4); *see also* Wis. Stat. § 704.11.

3. For other prohibitions, see Wis. Admin. Code ch. ATCP 134 and local ordinances.

G. Disposition of Tenant's Personal Property [§ 32.471]

See generally Wis. Stat. § 704.05(5).

1. Presumed abandoned: If a tenant "removes from or is evicted from" the premises and leaves personal property, the landlord may presume the tenant has abandoned the property in the absence of a written agreement to the contrary. Wis. Stat. § 704.05(5)(a).

   NOTE: Absent oral or written affirmation from the tenant, it is difficult to determine if a tenant "removes from" the premises. *See id.*

2. Landlord may dispose of the abandoned personal property in any manner that the landlord in its sole discretion determines is appropriate. Wis. Stat. § 704.05(5)(a).

   CAUTION: Before disposal, landlord must determine which type of notice applies under Wis. Stat. § 704.05(5)(bf).

3. Exception for medical items (prescription medication or prescription medical equipment)—landlord must hold the property for 7 days (or 30 days if 30 days' written notice is required) from date landlord discovers it and must promptly return it to tenant if landlord receives request for its return before disposing of it. Wis. Stat. § 704.05(5)(am).

4. Written notice by landlord must inform tenant that landlord will not store personal property that tenant leaves behind or if the tenant is evicted from the premises. Wis. Stat. § 704.05(5)(bf).

   a. Landlord must provide written notice when tenant enters into or renews the rental agreement.

   b. If prior written notice not provided, the landlord must comply with Wis. Stat. § 704.05 (2009–10), which requires 30 days' written notice to tenant before landlord can dispose of tenant's personal property.

      PRACTICE TIP: Landlords should update their leases to include the notice required by Wis. Stat. § 704.05(5)(bf).

5. Per Wis. Stat. § 704.05(5)(b), separate notice requirement applies to manufactured homes, mobile homes, or titled vehicles. Landlord must provide written notice to tenant and lienholder of intent to dispose of property. Wis. Stat. § 704.05(5)(b)2.

6. Trespasser property

   a. Trespasser is a person who is not a tenant and enters or remains on the property without consent of the landlord or another person lawfully on the property. Wis. Stat. § 704.055(1).

   b. If trespasser is removed and leaves personal property, landlord must hold for seven days from date of discovery. Wis. Stat. § 704.055(2)(a).

   c. Landlord may then presume property is abandoned and dispose of it. Wis. Stat. § 704.055(2)(a).

H. Enforcement [§ 32.472]

1. Wis. Admin. Code ch. ATCP 134, like all other such rules enforced by Wis. Stat. §§ 100.20 and 100.26,

a. Allows tenant to sue for violations and recover double *pecuniary loss* plus costs and reasonable attorney fees (i.e., private attorney-general actions).

(1) A circuit court does not have discretion to deny awarding tenant double damages under Wis. Stat. § 100.20(5) when a landlord wrongfully withholds a security deposit. However, the amount of attorney fees that is reasonable in a given case is a discretionary determination of the circuit court and will be upheld unless the court erroneously exercised its discretion. *Tomten v. Merry*, No. 2014AP1387, 2015 WL 3403468, ¶¶ 12, 16 (Wis. Ct. App. May 28, 2015) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

(2) The court must presume that reasonable fees are no more than three times any monetary award, but the court can award more after considering statutory factors. Wis. Stat. § 814.045.

b. Provides other possibilities including fine and injunction.

c. Allows for the award of attorney fees, which are:

(1) Recoverable for trial work *and* appeal. *Shands v. Castrovinci*, 115 Wis. 2d 352 (1983).

(2) Recoverable even if a person is represented by agencies that do not charge the client. *Id.* at 361.

(3) Mandatory on successful claims. Wis. Stat. § 100.20(5); *Boelter v. Tschantz*, 2010 WI App 18, ¶ 28, 323 Wis. 2d 208 (citing *Shands*, 115 Wis. 2d at 357).

d. Allows for pecuniary loss, which has been held to be the amount of security deposit. *Moonlight v. Boyce*, 125 Wis. 2d 298 (Ct. App. 1985); *see also Three & One Co. v. Geilfuss*, 178 Wis. 2d 400 (Ct. App. 1993); *Paulik v. Coombs*, 120 Wis. 2d 431 (Ct. App. 1984).

(1) But see *Pierce v. Norwick*, in which court doubled only that part of deposit for which tenant was not found liable. *Pierce v. Norwick*, 202 Wis. 2d 587 (Ct. App. 1996).

2. In *Paulik*, court held that Wis. Admin. Code § Ag 134.06 (now Wis. Admin. Code § ATCP 134.06) was violated even though landlord had a counterclaim for rent and damages in excess of the deposit. *Paulik*, 120 Wis. 2d 431.

a. Arguably, tenants' pecuniary loss was zero, not amount of deposit; court doubled security deposit nevertheless.

b. Tenants failed to give 28-day notice and admitted owing landlord rent and reimbursement for physical damage.

c. Landlord admitted not returning the security deposit or sending the 21-day letter.

3. *Moonlight* says court must determine reasonable amount of fees, not including fees for defending counterclaim. *Moonlight*, 125 Wis. 2d 298.

4. In *Armour v. Klecker*, court held that withholding the deposit for nonallowable claims was a Wis. Admin. Code ch. ATCP 134 violation. *Armour v. Klecker*, 169 Wis. 2d 692 (Ct. App. 1992).

    a. Tenant with lease that promised to give landlord 60-day notice and not to vacate from November to April gave notice on January 3, 1991, to vacate January 31, 1991. Tenant claimed that there was mold (and implicitly that premises were uninhabitable). Landlord claimed deposit plus utilities, late fee, lost rent, advertising, rental fee, and fee for rehanging curtain rods. Rent held to be nonallowable because termination was valid.

    b. Rationale of Wis. Stat. § 100.20(5) "is to discourage the retention of security deposits except in the clearest of cases." *Armour*, 169 Wis. 2d at 701.

        (1) No clear authority for above rationale.

        (2) Policy makes landlord guess at his or her peril, creates additional lawsuits by landlords, and increases likelihood that landlord will not be repaid (and will pass costs on to future tenants).

    c. Costs of reletting are not allowable claims under Wis. Admin. Code § ATCP 134.06(3) because costs are not specifically enumerated in Wis. Admin. Code § ATCP 134.06(3) or in lease. *Armour*, 169 Wis. 2d at 701.

        (1) Not clear whether *costs of reletting* include sewer and water charges, late fees, rerental fees, or advertising costs.

        (2) Except for a finding of uninhabitability, these costs are generally provided for in law and particularly in Wis. Stat. § 704.29.

5. In *Keyes v. Waldbillig*, court of appeals stated that landlord could not keep security deposit for costs of advertising to rerent apartment after tenants' early termination of lease because lease had no nonstandard rental provisions to allow for advertising costs. *Keyes v. Waldbillig*, No. 2012AP1180, 2013 WL 1908643 (Wis. Ct. App. May 9, 2013) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

6. In *Harris v. Turenske*, court held that failure to provide tenant with lease or rules regarding tenancy was a Wis. Admin. Code § ATCP 134.03(1) violation. *Harris v. Turenske*, No. 95-2486, 1996 WL 653658 (Wis. Ct. App. Nov. 12, 1996) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

    a. Lease void as matter of law.

    b. Tenant entitled to double damages for landlord's retention of security deposit in violation of Wis. Admin. Code § ATCP 134.06.

    c. Tenant also entitled to reasonable attorney fees of $5,821.90.

7. In *Baierl v. McTaggart*, court found inclusion of attorney fees clause in lease was an unfair trade practice and violated Wis. Admin. Code § ATCP 134.08(3). Wis. Stat. § 704.02; *Baierl v. McTaggart*, 2001 WI 107, 245 Wis. 2d 632. *But see* Wis. Stat. § 704.44.

NOTE: Under *Baierl*, the controlling analysis in determining whether the administrative code violation rendered the entire lease unenforceable focused on the intent of the underlying provision being violated. The Wisconsin Legislature later enacted Wis. Stat. § 704.02 to provide that "provisions of a rental agreement are severable." *See* 2011 Wis. Act 143.

CAUTION: Wis. Stat. § 704.44 states that "[n]otwithstanding [Wis. Stat. §] 704.02, a residential rental agreement is void and unenforceable if it" contains certain prohibited provisions. *See supra* § 32.21.

IV. RENT ABSCONDING [§ 32.473]

A. Elements [§ 32.474]

See Wis. Stat. § 943.215(1).

1. Must be tenancy as defined in Wis. Stat. § 704.01(4).

2. Must intentionally ("have the purpose or be aware or practically certain to cause result") abscond without paying all current and past-due rent.

3. Cannot be a good-faith dispute as to money owed.

NOTE: Wis. Stat. § 943.215 is rarely, if ever, enforced, but landlords frequently cite it in 5-, 14-, and 28-day notices as a deterrent.

B. Defenses [§ 32.475]

1. Tenant has provided landlord with security deposit equal to or greater than the amount owed. Wis. Stat. § 943.215(2).

2. Within five days after vacating premises, tenant pays all current and past rent due or provides forwarding address. Wis. Stat. § 943.215(3).

3. Wis. Stat. § 943.215(1) does not apply to tenant against whom civil judgment has been entered for *punitive* damages because tenant left premises with unpaid rent. Wis. Stat. § 943.215(5).

C. Deterrence [§ 32.476]

The potential for possible criminal prosecution may be enough to compel rent payment. However, there is no civil cause of action by a landlord against a tenant for rent absconding. Wis. Stat. § 895.446(1) (criminal rent absconding not included as a civil cause for recovery among list of recoverable crimes).

D. Constitutionality [§ 32.477]

The constitutionality of the rent-absconding statute has been upheld in circuit court only. *State v. Goodell*, No. 91-CM-151 (Wis. Cir. Ct. Sauk Cnty. Nov. 19, 1991).

V. MANUFACTURED ("MOBILE") HOUSING LAW [§ 32.478]

See generally Wis. Admin. Code ch. ATCP 125.

A. In General [§ 32.479]

1. Manufactured (mobile) homes have been substantially upgraded since the 1976 federal uniform standards.

2. DATCP has acknowledged the inequity of tenants' bargaining power caused by scarcity of sites caused by discriminatory zoning.

3. Mobile-home park statutes were enacted in 1986. Wis. Stat. § 710.15.

   NOTE: 2007 Wis. Act 11, effective January, 1, 2008, amended Wis. Stat. § 710.15 to change terminology throughout the section from "park" to "community."

B. Rental Agreements [§ 32.480]

1. Tie-in sales—Illegal to tie in rental of site to any other specific conditions, most commonly purchase of home from a mobile-home community operator. Wis. Admin. Code § ATCP 125.02; *State v. Flood*, 195 Wis. 2d 515 (Ct. App. 1995).

2. Per Wis. Stat. § 710.15(1m) and Wis. Admin. Code § ATCP 125.03, requirements of rental agreement:

   a. Must be in writing with copy furnished to tenant at signing.

   b. Terms set forth in Wis. Admin. Code § ATCP 125.03.

   c. Guaranteed one-year lease unless tenant wants a shorter term and the operator agrees.

      NOTE: Otherwise, there is no such general requirement in landlord-tenant law.

   d. All community rules that substantially affect residents are part of the lease. Wis. Stat. § 710.15(2); Wis. Admin. Code § ATCP 125.03.

   e. Include emergency-shelter disclosure. Wis. Stat. § 710.15(2m); Wis. Admin. Code § ATCP 125.03.

3. Per Wis. Admin. Code § ATCP 125.04, limitations of rental agreement include:

   a. No community fee for moving home in or out.

   b. Vendor restrictions with exceptions.

   c. Restrictions on utility charges.

   d. Security deposit cannot exceed two months' rent or $750, whichever is less.

(1) Otherwise no such general limit in landlord-tenant law.

(2) While one month's rent is the typical deposit, many landlords now charge first and last month's rent in advance.

4. Sale of home. Wis. Admin. Code § ATCP 125.06.

a. General prohibition against "unreasonable restrictions" on sale or transfer. *State v. Fonk's Mobile Home Park & Sales, Inc.*, 133 Wis. 2d 287 (Ct. App. 1986); *State v. Fonk's Mobile Home Park & Sales, Inc.*, 117 Wis. 2d 94 (Ct. App. 1983).

b. Many leases flatly prohibit allowing new purchaser or sublessee to assume lease.

c. Restrictions on sale of mobile home are permitted if based on

(1) Home's physical appearance,

(2) New party's creditworthiness,

(3) Conformance with lease and rules, or

(4) Grounds identified by Wis. Stat. § 710.15(5m).

d. Statutory prohibition against any due-on-sale clause being triggered by home exceeding any age limit or upon change of occupancy. Wis. Stat. § 710.15(3), (4), (5m).

5. Termination of tenancy. Wis. Stat. § 710.15(5m); Wis. Admin. Code § ATCP 125.08.

a. Must give 5-day or 14-day notice. Wis. Stat. § 710.15(5r).

b. *Scalzo v. Anderson*'s 28-day notice requirement is overruled by implication by Wis. Stat. § 710.15(5m). *Scalzo v. Anderson*, 87 Wis. 2d 834 (1979).

COMMENT: *Scalzo* is a very good case for a number of rules of law in this area but is partially invalidated by Wis. Stat. § 710.15 and Wis. Admin. Code ch. ATCP 125.

c. Unlike general landlord-tenant law, termination and nonrenewal are limited to the 12 general reasons listed in the statute. Wis. Stat. § 710.15(5m).

NOTE: There is a prohibition against retaliatory eviction.

d. Tenancy may also be terminated because of imminent threat of serious physical harm, as provided in Wis. Stat. § 704.16. Wis. Stat. § 710.15(5t); *see also supra* § 32.3 (Safe Housing Act).

6. Enforcement is the same as in Wis. Admin. Code ch. ATCP 134, *see supra* § 32.23. Wis. Stat. § 100.20.

C. Eviction [§ 32.481]

1. Similar to apartment eviction, *see supra* §§ 32.4–.14, except reasons are limited to those found in Wis. Stat. § 710.15(5m).

2. Tenant also has obligation to pay lot fee (unless a specified exemption applies (e.g., for recreational mobile homes)). Wis. Stat. § 66.0435(3)(c)1.

3. Mobile-home community operator entitled to two-percent fee for collecting for municipality. Wis. Stat. § 66.0435(3m).

D. Lease [§ 32.482]

Requirements and limitations in Wis. Admin. Code §§ ATCP 125.03, ATCP 125.04, and Wis. Stat. § 710.15.

Chapter 33
Purchase and Sale of Real Property

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NOTE: This chapter was originally prepared by John L. Horwich.

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Apr. 2022, No. 796; all references to the United States Code (U.S.C.) and Internal Revenue Code (I.R.C.) are current through Pub. L. No. 117-129 (May 21, 2022); and all references to the Code of Federal Regulations (C.F.R.) are current through 87 Fed. Reg. 31,742 (May 25, 2022).

I. INTRODUCTION [§ 33.483]

A. Scope [§ 33.484]

1. Purchase and sale of real property.

2. Because real estate transactions are negotiated, and tailored to the particular property and parties involved, attorney must exercise care in using general checklists and outlines.

B. Resources [§ 33.485]

1. For a comprehensive form and procedure handbook, see John L. Horwich et al., *Real Estate Transactions System* (State Bar of Wis. 8th ed. 2020 & Supp.).

2. For background on general issues concerning real property law in Wisconsin, see Scott C. Minter & Debra Peterson Conrad, *Wisconsin Real Estate Law* (2017).

3. Some forms cited in this chapter can be obtained from Wis. Dep't of Safety & Pro. Servs., *Real Estate Contractual Forms Library*, https://dsps.wi.gov/Pages/BoardsCouncils/RealEstate/ContractualForms/Forms.aspx (last updated May 2, 2022); the State Bar of Wisconsin's online Real Estate Enhanced Forms Library, https://marketplace.wisbar.org/; the section member file cabinet for members of the State Bar's Real Property, Probate and Trust Law Section; or Wisconsin Legal Blank Co., https://wilegalblank.com/.

II. BROKERAGE AGREEMENTS [§ 33.486]

A. Listing Contract—Exclusive Right to Sell [§ 33.487]

1. Under Wis. Stat. § 240.10 and Wis. Admin. Code § REEB 24.08, seller wishing to retain a real estate agent, broker, licensee, or any other person (hereinafter broker) and a broker desiring to collect a commission must enter into a written agreement, signed by the person agreeing to pay the commission, setting forth the following:

   a. Description of real estate (unless contract to pay a commission to a person for locating a type of property),

   b. Price for which property may be sold,

   c. Amount of commission to be paid, and

   d. Term of agency relationship.

2. A firm must provide a client with the statutory "Disclosure to Clients" form before entering into a listing contract. Wis. Stat. § 452.135(2).

3. Different listing contracts used for different properties.

   a. Residential Listing Contract—Exclusive Right to Sell. Form WB-1.

   b. Farm Listing Contract—Exclusive Right to Sell. Form WB-2.

   c. Vacant Land Listing Contract—Exclusive Right to Sell. Form WB-3.

   d. Residential Condominium Listing Contract—Exclusive Right to Sell. Form WB-4.

   e. Commercial Listing Contract—Exclusive Right to Sell. Form WB-5.

   f. Business Listing Contract—Exclusive Right to Sell. Form WB-6.

B. Commission Contracts Between Buyer and Broker [§ 33.488]

1. Under Wis. Stat. § 240.10 and Wis. Admin. Code § REEB 24.08, buyer wishing to retain a real estate broker to assist in locating and purchasing property and a broker desiring to collect a commission from a buyer must enter into a written agreement, signed by the buyer, setting forth the following:

    a. Type of property,

    b. Price for which property may be purchased,

    c. Amount of commission to be paid, and

    d. Term of agency relationship.

2. Exclusive Buyer Agency/Tenant Representation Agreement. Form WB-36.

III. OFFER TO PURCHASE [§ 33.489]

A. Preparing Offer on Behalf of Buyer [§ 33.490]

1. Use different forms for different properties to satisfy the statute of frauds, which requires a written contract, signed and delivered by each grantor, or all parties if a lease or contract to convey, that identifies the parties, land, interest being conveyed, and any material terms. Wis. Stat. § 706.02.

    a. Residential Offer to Purchase. Form WB-11.

    b. Farm Offer to Purchase. Form WB-12.

    c. Vacant Land Offer to Purchase. Form WB-13.

    d. Residential Condominium Offer to Purchase. Form WB-14.

    e. Commercial Offer to Purchase. Form WB-15.

    f. Offer to Purchase—Business with Real Estate. Form WB-16.

    g. Offer to Purchase—Business Without Real Estate. Form WB-17.

2. Simultaneous Exchange Agreement: Use the standard form for "1031 Exchanges." Form WB-35; *see* I.R.C. § 1031(a).

3. For seller financing (land contract or note and mortgage back, *see* State Bar Form 11), determine the following:

    a. Terms of payment

        (1) Down payment

        (2) Interest rate

(3) Amortization (balloon payment)

(4) Prepayment rights

(5) Payment schedule

b. Rights and obligations regarding property

c. Remedies on default

d. Title insurance and protection against liens, mortgages, and other encumbrances

4. For residential transactions, determine whether the buyer is entitled to receive a real estate condition report, and counsel the buyer on the effect of receiving such a report. Wis. Stat. ch. 709; Form No. WRA-CR (generic); Form WRA-SCR (detailed).

5. In a report, seller discloses any notice or knowledge of specified defects and whether seller will provide an explanation of any disclosed defects. Wis. Stat. § 709.03.

a. Seller of condominium unit must include, as an addendum to the report, additional detailed information pertaining to the unit and the condominium association. Wis. Stat. § 709.02(2).

b. Seller must furnish the report no later than 10 days after the offer is accepted; a report is considered complete if seller answers, and supplies all information under Wis. Stat. § 709.035 for, each item requested under the report. Wis. Stat. §§ 709.02(1), 709.05.

c. A buyer who does not receive the report within 10 days after acceptance may rescind the offer, and may be entitled to the return of any deposits or option fees, by delivering a written notice to seller within two business days after expiration of seller's 10-day period to deliver report. Wis. Stat. § 709.02(1).

d. If buyer receives report after submitting offer, buyer may rescind offer within two business days after receipt of report, based on defect disclosed. Wis. Stat. § 709.05.

e. Buyer may, in writing, waive rights to rescind the offer because of defects under Wis. Stat. § 709.05 and may also waive rights to receive the report. Wis. Stat. § 709.08.

f. Sellers of unimproved property also must provide buyers with a vacant-land disclosure report. Wis. Stat. §§ 709.02, 709.033.

6. For residential transactions, determine whether buyer is entitled to receive information regarding lead-based paint on property. 42 U.S.C. § 4852d; 24 C.F.R. § 35.80.

7. When appropriate, insert conditions regarding buyer's obligation to conclude transaction.

a. For any transaction, when appropriate, include contingencies for

(1) Financing

(2) Sale of existing property

(3) Home inspection or appraisal

(4) Survey (ALTA-ACSM Land Title Survey)

(5) Environmental inspection; if appropriate, retain environmental consultant to

(a) Conduct Phase I environmental assessment, or

(b) Conduct necessary sampling and analysis (Phase II environmental assessment)

(6) Review of easements, covenants, restrictions, liens, encumbrances, etc., affecting title

(7) Rezoning

(8) Receipt of necessary licenses, permits, or approvals (e.g., occupancy certificate of compliance with municipal codes)

(9) Applicable safe well, well water, or private sanitary-system code compliance

(10) Use restrictions (e.g., deed restrictions, subdivision regulations)

(11) Regulations or restrictions on floodplains, shorelands, or wetlands

(12) Radon inspection

(13) Mold survey

b. For a vacant residential parcel, include contingencies from para. a., *supra*, and, when appropriate, include contingencies for the following:

(1) Satisfactory subsoil conditions

(2) Availability of utilities

(3) Approval for on-site private sanitary system

(4) Adequate percolation

(5) Availability of safe well water

(6) Approval by architectural committee

(7) Joinder or division of lot(s)

(8) Acquisition of easements

(9) Zoning limitations and rezoning

(10) Subdivision or plat approval

(11) Approval of subdivision by Department of Transportation. Wis. Admin. Code § Trans 233.03; *see Wisconsin Builders Ass'n v. Wisconsin Dep't of Transp.*, 2005 WI App 160, 285 Wis. 2d 472.

c. For condominium, include applicable contingencies from para. a., *supra*, and, when appropriate, include contingencies for the following:

(1) Approval or other action by condominium association, if necessary

(2) Approval of condominium documents, annual budget, current annual operating statement, and level of reserves. Wis. Stat. § 703.33.

(3) Receipt of statement from condominium association showing no past-due charges and no pending or contemplated assessments or litigation

(4) Commencement or substantial completion of construction (new project)

(5) Compliance with notice to tenants (conversions). Wis. Stat. § 703.08.

d. For vacant commercial property, include applicable contingencies from para. a. and para. b., *supra*, and, when appropriate, include contingencies for the following:

(1) Annexation or incorporation

(2) Rezoning or planned development approval

(3) Other necessary municipal approvals

(4) Acquisition of adjoining parcels or easements, if applicable

e. For improved commercial property, include applicable contingencies from para. a., *supra*, and, when appropriate, include contingencies for the following:

(1) Reviewing, assigning, or terminating existing leases affecting property

(2) Reviewing, acquiring, or terminating existing contracts affecting property

(3) Acquiring adjoining parcels or easements

(4) Rezoning and other municipal approvals

(5) Securing the availability of necessary licenses and permits (e.g., operating and building permits)

(6) Preserving the condition of the property

(7) Securing adequate utilities services

8. Insert appropriate seller's warranties and representations.

NOTE: Warranties can be used to replace or supplement the contingencies listed above.

a. For any transaction, when appropriate, include assurances concerning the following:

(1) No code violations

(2) Compliance with laws (including environmental regulations)

(3) Property in same condition at closing

(4) No defects in property, improvements, or personal property being transferred

(5) Nonforeign status—consider whether entity is a disregarded entity for tax purposes. Foreign Investment in Real Property Tax Act (FIRPTA), I.R.C. § 1445.

(6) Safe well and safe septic system operation

(7) Property not in floodplain, wetland, or shoreland area

(8) Absence of underground storage tanks

(9) No planned public improvements, special assessments, reassessments, or other governmental actions

(10) Availability of licenses and permits

(11) Condition of property

(12) Specific environmental conditions

(13) Seller's exclusive fee ownership of property

(14) If seller is a corporation, partnership, limited liability company (LLC), or limited liability partnership, that seller was duly organized and is validly existing, seller has full power and authority to consummate transactions contemplated, and all documents required have been duly authorized, executed, and delivered.

(15) Affirmation of statements in seller's real estate condition report and lead-based paint disclosure information

(16) Waiver of liens

b. For a vacant residential parcel, include applicable assurances from para. a., *supra*, and, when appropriate, include assurances of the following:

(1) Availability of utility services

(2) Satisfactory subsoil conditions (separate from environmental investigation)

(3) Percolation

(4) Well water availability

(5) On-site sanitary-disposal-facility approval

(6) Satisfactory zoning to permit intended use

(7) Plan or architectural approval

c. For condominiums, include applicable assurances from para. a. and para. b., *supra*, and, when appropriate, include assurances concerning the following:

(1) Compliance with tenant protection laws (conversions only). Wis. Stat. § 703.08.

(2) Restrictions in condominium documentation to allow buyer's intended use

(3) No past-due charges and no pending or contemplated special assessments or litigation

d. For vacant commercial property, include applicable assurances from para. a. and para. b., *supra*, and, when appropriate, include assurances concerning the following:

(1) Access to adjoining property or public streets

(2) Subdivision or plat approval

(3) Site and design-plan approval

e. For improved commercial property, include applicable assurances from para. a., *supra*, and, when appropriate, include confirmation of the following:

(1) Terms of existing leases (to be confirmed by tenant estoppel letters)

(2) Tenant compliance with existing leases. *Kailin v. Armstrong*, 2002 WI App 70, 252 Wis. 2d 676.

(3) Terms of service and maintenance contracts

(4) Employees and employment contracts

(5) Insurance

(6) Operating statements

(7) Outstanding financing

(8) Building code compliance

(9) Satisfactory zoning to permit intended use

(10) Outstanding or potential claims against the property

(11) Historic status

B. Reviewing Offer on Behalf of Seller [§ 33.491]

1. Confirm property description (best to use survey map).

2. Evaluate basic terms of buyer's offer, such as purchase price, down payment, contingencies, time of closing.

3. Determine condition of title and whether existing easements and restrictions conflict with warranties.

4. Negotiate procedure for handling any objection to title and the seller's right to cure.

5. Evaluate the tax consequences to seller. I.R.C. § 121; I.R.C. § 1001.

6. Review or discuss possibility of seller financing (land contract or note and mortgage back), including the following considerations:

   a. If underlying mortgage will not be satisfied before closing:

      (1) Alienation restrictions

      (2) Mortgagee's consent

   b. Terms of payment, including

      (1) Down payment,

      (2) Interest rate,

      (3) Amortization (balloon payment),

      (4) Prepayment limitations (tax considerations), and

      (5) Payment schedule.

   c. Rights and obligations regarding property

   d. Remedies on default

   e. Limitation on assignability by buyer

f. Buyer's creditworthiness

g. Possibility of obtaining personal guaranty from one or more corporate or partnership principals

7. Derive method of proration for taxes.

8. For residential transactions, counsel seller on need to provide real estate condition report and effect of such report, *see supra* § 33.8, para. 4. Wis. Stat. ch. 709; Form No. WRA-CR; Form WRA-SCR.

9. For residential transactions, counsel seller on need to provide lead-based paint disclosure information and effect of such report. 42 U.S.C. § 4852d; 24 C.F.R. pt. 35.

10. For commercial transactions, derive method of proration for income, rents, and other charges.

11. If appropriate, prepare counteroffer, *see*, *e.g.*, Form WB-44, as follows:

a. Counter basic terms of offer or any other counteroffers (best practice is to reference specific line numbers from original offer, counteroffers, or both).

b. Review conditions and contingencies and decide whether to accept, reject, or modify them.

c. Review warranties and representations and decide whether to accept, reject, or modify them.

d. Insert conditions to acceptance, including

(1) Limitation on buyer's conditions (if seller receives another acceptable offer before buyer has satisfied buyer's conditions, buyer must waive outstanding conditions or seller may accept other offer);

(2) No reliance on oral representations or warranties by seller or seller's agents;

(3) Buyer to purchase property "as is" (for environmental conditions, draft as-is language to address specific condition and relevant law) and waive right to receive real estate condition report, Wis. Stat. § 709.08; and

(4) Buyer to perform necessary tests and investigations at buyer's expense.

IV. OPTION TO PURCHASE [§ 33.492]

A. Purpose [§ 33.493]

1. If buyer would require significant conditions before closing, consider whether exclusive option to purchase for fixed price would better protect buyer and seller.

2. If buyer is attempting to assemble several parcels, option provides buyer needed flexibility.

B. Terms [§ 33.494]

1. Under Wis. Stat. § 706.02, option agreement, *see, e.g.*, Form WB-24, must do the following:

    a. Identify the parties;

    b. Identify the property;

    c. Identify the interest to be conveyed and any material term, condition, reservation, exception, or contingency to that interest;

    d. Be signed and delivered by or on behalf of seller; and

    e. If a lease or contract to convey, be signed by or on behalf of all parties.

2. Establish whether option fee will apply to purchase price if option is exercised.

V. PREPARATION FOR CLOSING [§ 33.495]

A. Preparing for Closing on Behalf of Buyer [§ 33.496]

1. For all transactions, buyer's attorney should

    a. Notify seller when conditions and contingencies are satisfied or waived (including providing copy of lender commitment that satisfies any financing contingency within applicable deadline).

    b. If offer to purchase indicated that the property is occupied by tenants, obtain estoppel certificates and rent roll; have leases, security deposits, and prepaid rents assigned; ensure that proper termination notice is given to tenants. Wis. Stat. § 704.19.

    c. Determine how buyer will take title (e.g., joint tenancy or tenancy in common for nonspouses, or marital property or survivorship marital property for spouses, including married same-sex couples) and notify seller's attorney or broker.

    d. If there is a potential for zoning, permitting, or approval problems, contact municipality to verify current zoning, permitting, and approvals; inquire into proposed zoning changes or variances; and inquire into new permits, licenses, and approvals.

    e. Pursue any special matters, such as certificate of compliance requirements or drafting agreements relating to environmental conditions.

    f. Check whether property is in a floodplain, and, if so, whether municipality has qualified for federal flood insurance.

    g. Ask municipality for information regarding previous years' taxes, outstanding special assessments, and planned public improvements, or ask title company to order such information from municipality.

h. Write sewer and water utility companies (or responsible municipal body) to verify that payments are current, obtain proration information, and check on deferred sewer or water charges, or ask title company to order such information.

i. Check for building orders or code violations, if appropriate.

j. Obtain Uniform Commercial Code (UCC) search for personal property security interests against seller, if appropriate.

k. Remind buyer to contact appropriate utility companies to begin service in buyer's name.

l. Remind buyer to arrange for property insurance at minimum in amounts satisfactory to lender to begin day before closing; forward proper evidence of coverage to lender.

m. Review title insurance commitment.

(1) Ensure good title in seller in conformity with warranties in offer to purchase.

(2) Ensure that any encumbrances not excepted in offer to purchase will be removed before or at closing.

(3) Prepare request for copy of mortgage satisfaction or lien waiver, if appropriate.

(4) Inform buyer of unusual easements, private covenants, or restrictions.

n. Arrange to obtain copies of note, mortgage, and other forms to be used by lender.

o. Set time and place for closing and notify buyer, lender, seller, and seller's attorney and broker.

p. Review land survey and Phase I environmental report, if available.

q. Review lender's note, mortgage, and other forms, and negotiate changes, if appropriate.

r. Under Wis. Stat. § 706.02, review copy of deed to be given at closing, *see infra* § 33.15, para. 1.r. The deed, which should be in recordable form, *see* Wis. Stat. § 59.43(2m), (5), should include the following:

(1) Names of parties

(2) Manner of taking title

(3) Legal description

(4) Warranties and encumbrances

s. Review Bill of Sale for personal property, *see, e.g.*, Form WB-25, if appropriate.

t. Request corporate, LLC, or partnership documentation from seller's attorney authorizing officer, member, or partner to sign conveyance documents on behalf of selling entity, if applicable.

u. Prepare pro forma closing statement.

v. Prepare escrow agreement, if appropriate, a few days before closing and forward copy to lender, third-party escrow agent, or seller's attorney for review.

w. Instruct buyer about closing approximately one week before closing.

(1) Both buyer and spouse must attend closing if loan is to both, if both have management and control of property being mortgaged, or if property being mortgaged is a homestead.

(2) Buyer should bring certified or cashier's check.

(3) Buyer should bring evidence of insurance.

x. Check seller's closing statement against pro forma.

y. *Down date* title insurance to the date and time of recording of the deed (i.e., check with title company to determine whether any additional matters have shown up in records since date of initial title commitment) and obtain recording-gap endorsement.

z. Obtain FIRPTA (non-foreign-status) affidavit (determine whether entity is disregarded for tax purposes).

aa. Prepare Request for Taxpayer Identification Number and Certification, IRS Form W-9.

2. For land-contract closing, use basic transaction checklist in para. 1., *supra*, and review terms of land contract. State Bar Form 11; State Bar Form 18 (Condominium).

3. For condominiums, use basic transaction checklist in para. 1., *supra*, and

a. If not previously reviewed, review condominium disclosure materials.

Ensure disclosure materials include information required to be included by 2017 Wis. Act 303, including amount of reserve held by condominium association for maintenance and repairs (if applicable), whether condominium association has right to purchase the unit, whether condominium association charges fee in connection with transfer of ownership of a unit, and whether condominium association charges fee for provision of payoff statement to unit owners (and the fee amount, if applicable). Wis. Stat. § 703.33.

Further, ensure condominium association fees charged to provide disclosure materials comply with statutory limits: the lesser of actual costs of providing the disclosure material items required under Wis. Stat. § 703.33(1), (1m), and (2) or $50; and the lesser of the actual costs of providing the disclosure material items required under § 703.33(3m) or $15. Wis. Stat. § 703.33(2m). Further, ensure the condominium association fees charged to produce a payoff statement required under Wis. Stat. § 703.335(4)(b) comply with the limits that require a condominium association to provide one payoff statement per two-

month period free of charge to a unit owner and, if additional payoff statements are requested in a given two-month period by a unit owner, limit the fee to $25.

b. If necessary, exercise buyer's right to rescind offer to purchase within five business days after receipt of condominium disclosure materials. Wis. Stat. § 703.33(4).

c. If not previously reviewed, review condominium association budget and assessment data.

d. Request and review statement from condominium association setting forth amount of unpaid assessments against grantor. Wis. Stat. § 703.165(4).

e. Ensure that any rights of condominium association (e.g., rights of first refusal) have been waived.

4. For commercial closing, use basic transaction checklist in para. 1., *supra*, and review drafts of additional documents as necessary.

a. Bill of Sale. Form WB-25.

b. Leases, including the following:

(1) Estoppel letters

(2) Assignment of rents, leases, and security deposits

(3) Notice to tenants

c. UCC fixture filing releases or amendments

d. Assignment of service contracts

e. Assignment of guarantees and warranties

f. Other assignments (e.g., licenses and permits, accounts receivable)

g. Insurance

h. Commercial brokers' lien affidavits. Wis. Stat. § 779.32.

B. Preparing for Closing on Behalf of Seller [§ 33.497]

1. For all transactions, seller's attorney should do the following:

a. Order land survey, if applicable.

b. Order Phase I environmental assessment, if applicable.

c. Order title insurance commitment with copies sent to buyer's attorney and lender.

d. Ask seller whether work has been performed or materials furnished to premises in last six months, so that lien waivers can be obtained in compliance with owner's affidavit.

e. Write municipality regarding previous years' taxes, outstanding special assessments, and planned public improvements or ask title company to order such information.

f. Obtain copy of previous year's paid tax bill.

g. Write seller's mortgagee for payout statement, with copies sent to buyer's attorney and lender.

h. Comply with any local regulations, such as inspections and certificates required for occupancy changes.

i. Review land survey, if available, and forward copy to buyer's attorney.

j. Review Phase I environmental report, if available, and forward copy to buyer's attorney.

k. Forward copy of municipality's response regarding taxes and special assessments to buyer's attorney.

l. Review title insurance commitment:

(1) Ensure that seller has good title to convey and that seller is in conformity with warranties in offer to purchase.

(2) Ensure that any encumbrances not excepted in offer to purchase will be removed before or at closing.

(3) Prepare request for copy of mortgage satisfaction or lien waiver, if appropriate.

m. Remind seller to have all utilities read and service discontinued in seller's name on the date of closing and to have heating oil measured two or three days before closing.

n. Write sewer and water utility companies (or responsible municipal body) to verify that payments are current and to obtain proration information or ask title company to obtain such information.

o. Remind seller to discontinue property insurance on premises a few days after closing.

p. Instruct seller about closing approximately one week before closing; both seller and spouse must attend closing if both have management and control or if property is homestead and deed has not been executed before closing.

q. If there is more than one buyer, establish how buyers will take title to the property (e.g., joint tenancy, tenancy in common, marital property, or survivorship marital property).

r. Under Wis. Stat. §§ 706.02 and 59.43(2m), (5), prepare appropriate deed in recordable form and forward copy to buyer's attorney and title company for review before closing:

(1) General Warranty Deed, State Bar Form 1 or 2;

(2) Special Warranty Deed, State Bar Form 6;

(3) Quitclaim Deed, State Bar Form 3;

(4) Guardian's Deed, State Bar Form 4;

(5) Personal Representative's Deed, State Bar Form 5;

(6) Trustee's Deed, State Bar Form 7; or

(7) Condominium Deed, State Bar Form 8.

s. Prepare Bill of Sale for personal property, Form WB-25, if appropriate, and forward copy to buyer's attorney.

t. Prepare corporate resolution authorizing officer to sign conveyance documents on behalf of selling entity or provide LLC or partnership organizing documents to buyer or title insurer, if applicable.

u. Prepare Escrow Agreement, if appropriate, a few days before closing and forward copies to buyer's attorney, lender, and third-party escrow agent.

v. Prepare Closing Statement a few days before closing and forward copies to buyer's attorney and lender.

w. Prepare Real Estate Transfer Return electronically. *See* Wisconsin Dep't of Revenue website, https://www.revenue.wi.gov/Pages/RETr/Home.aspx (last visited Apr. 26, 2022); Wis. Stat. §§ 77.21–.30, 706.25.

x. Prepare Owner's Affidavit (and obtain original lien waivers, if appropriate).

y. Remind seller to comply with environmental conditions of termination of operation (i.e., permit transfer, closure requirements).

z. Prepare Request for Taxpayer Identification Number and Certification, IRS Form W-9.

2. For condominiums, use basic transaction checklist in para. 1., *supra*, and also do the following:

a. Obtain and submit to buyer or buyer's attorney, within 10 days after acceptance of the offer, but no later than 15 days before closing pursuant to Wisconsin statutes, copies of condominium disclosure materials. Ensure disclosure materials and fees charged to provide certain disclosure materials meet requirements imposed on condominium associations by 2017 Wis. Act 303. See section 33.14, *supra*, for additional information.

b. Obtain and submit to buyer or buyer's attorney, within 10 days after acceptance of the offer but no later than 15 days before closing, statement from condominium association of unpaid condominium assessments. Wis. Stat. § 703.165(4).

c. If appropriate, have seller endorse to buyer condominium association membership certificate and certificate of insurance.

d. Confirm that proposed insurance coverage for unit complies with condominium association's insurance requirements.

e. Prepare deed in accordance with Wis. Stat. § 703.12.

3. For commercial closing, use basic transaction checklist in para. 1., *supra*, and prepare or review additional documents as necessary:

a. Bill of Sale, Form WB-25

b. Leases, including the following:

(1) Estoppel letters

(2) Assignment and assumption of rents, leases, and security deposits

(3) Notice to tenants

c. UCC fixture filing releases or amendments

d. Assignment and assumption of service contracts

e. Assignment and assumption of guarantees and warranties

f. Other assignments (e.g., general assignments, licenses and permits, accounts receivable)

g. Insurance

h. Commercial brokers' lien affidavits. *See* Wis. Stat. § 779.32.

4. For seller financing, use appropriate checklist(s) above, and prepare applicable combination of

a. Promissory note, mortgage note, or business note. Form WBA 451; Form WBA 458.

b. Mortgage. Form WBA 428.

c. Land contract (transfer-fee return required by Wis. Stat. § 77.22, and fee due when land contract is recorded). State Bar Form 11; State Bar Form 14 (condominium).

d. Personal guaranty. Form WBA 151; Form WBA 152.

e. Assignment and assumption of leases and rents.

f. Selective or general business security agreement.

g. UCC Financing Statements. Form UCC-1; Form UCC-3.

VI. CLOSING [§ 33.498]

A. Closing on Behalf of Buyer [§ 33.499]

1. For all transactions, buyer's attorney should review the following:

    a. Loan closing documents if lender financing:

        (1) Governmental disclosure forms (e.g., truth in lending)

        (2) Lender's settlement statement (HUD settlement statement)

        (3) Note

        (4) Mortgage

        (5) Assignment of rents

        (6) Mortgage satisfaction or lien waiver (send letter requesting copy, if appropriate)

        (7) Certified or cashier's check (or wire instructions, if applicable) for balance of purchase price

        (8) Request copy of appraisal from lender.

    b. Purchase from seller—conveyance of real property documents:

        (1) Closing statement with seller

        (2) Encumbrances to be cleared at closing

        (3) Verification letter from municipality regarding previous years' taxes, special assessments, etc.

        (4) Receipted tax bill for previous year

        (5) Owner's Affidavit of Construction Liens and Possession and original lien waivers, if appropriate

        (6) Payoff letters, if not previously received

        (7) Deed

            (a) Check spelling of names against title commitment.

            (b) Confirm manner of grantee(s) taking title.

            (c) Check legal description against title commitment and survey, if available.

(d) Check warranties against offer to purchase.

(e) Verify that form is recordable. Wis. Stat. § 59.43(2m), (5).

(8) Bill of Sale for personal property, if appropriate

(9) Escrow Agreement, if appropriate

(10) Electronic transfer-fee return

(11) Certificates of code compliance or occupancy

(12) IRS Form W-9, if appropriate

(13) FIRPTA (non-foreign-status) statement

(14) Disbursements (verify proper payees and amounts)

(15) Delivery of keys

(16) Documents to be recorded by lender; otherwise, take steps to record

(17) Title insurance policy to be ordered after recording of deed, if policy not automatically issued after closing

2. For commercial closing, buyer's attorney should review items in para. 1., *supra*, and also

a. Bill of Sale

b. Leases, including the following:

(1) Estoppel letters

(2) Assignment and assumption of rents, leases, and security deposits

(3) Notice to tenants

c. UCC fixture filing releases or amendments

d. Assignment and assumption of service contracts

e. Assignment and assumption of guarantees and warranties

f. Other assignments (e.g., general assignments, licenses and permits, accounts receivable)

g. Insurance

h. Commercial brokers' lien affidavits. Wis. Stat. § 779.32.

3. If seller financing, buyer's attorney should review items in para. 1., *supra*, and also

    a. Promissory note and mortgage or land contract

    b. Personal guaranty

    c. Assignment and assumption of rents and leases

    d. Personal property security agreements

    e. UCC Financing Statements

B. Closing on Behalf of Seller [§ 33.500]

1. For all transactions, seller's attorney should review

    a. Verification letter from municipality regarding previous years' taxes, special assessments, etc.

    b. Receipted tax bill for previous year

    c. Owner's Affidavit of Construction Liens and Possession, and original lien waivers, if appropriate

    d. Closing Statement signed by buyer and seller

    e. Mortgage satisfaction or lien waiver (send letter requesting copy, if appropriate)

    f. Deed

    g. Escrow agreement, if appropriate

    h. Electronic transfer-fee return

    i. Certificate of code compliance or occupancy

    j. Bill of Sale for personal property, if appropriate

    k. Disbursements (verify proper payees and amounts)

    l. Delivery of keys

    m. IRS Form W-9, if appropriate

2. For commercial closing, seller's attorney should review items in para. 1., *supra*, and also the following:

    a. Bill of Sale

b. Leases, including the following:

(1) Estoppel letters

(2) Assignment of rents, leases, and security deposits

(3) Notice to tenants

c. UCC fixture filing releases or amendments

d. Assignment of service contracts

e. Assignment of guarantees and warranties

f. Other assignments (e.g., licenses and permits, accounts receivable)

g. Insurance

h. Commercial brokers' lien affidavits. Wis. Stat. § 779.32.

3. For seller financing, seller's attorney should review items in para. 1., *supra*, and also the following:

a. Promissory note and mortgage or land contract

b. Personal guaranty

c. Assignment of rents and leases

d. Personal property security agreement

e. UCC Financing Statements

f. Insurance

VII. POSTCLOSING MATTERS [§ 33.501]

A. Postclosing Matters for Buyer [§ 33.502]

1. Ensure that appropriate documents will be recorded by lender or title insurer, or take steps to record them.

2. Obtain signed "markup" of title commitment from title company and ensure that title insurance policy is issued consistent with markup.

3. Prepare document clip (i.e., closing book) for buyer.

4. Prepare letter to buyer regarding income tax consequences.

5. Review local ordinances for any required code-compliance inspections, real estate transfer forms, or transfer fees.

B. Postclosing Matters for Seller [§ 33.503]

1. Ensure that satisfaction for outstanding mortgage is recorded.

2. Obtain copy of satisfaction of mortgage from mortgagee.

3. Prepare document clip for seller.

4. Prepare letter to seller regarding income tax consequences of sale.

Chapter 34
Mental Health Act

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NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 191.

I. INTRODUCTION [§ 34.504]

A. Policy of Mental Health Act [§ 34.505]

See Wis. Stat. § 51.001(1).

1. To ensure a full range of treatment and rehabilitation services for

   a. Mental disorders,

   b. Developmental disabilities,

   c. Mental illnesses,

   d. Alcoholism, and

   e. Other drug abuse.

2. To create a unified system of prevention and services that will ensure access to the least restrictive treatment appropriate.

3. To guarantee a person's movement through all treatment components.

4. To ensure continuity of care.

5. To protect personal liberties. Wis. Stat. § 51.001(2).

6. To operate within the limits of available state and federal funds and of county funds required to be appropriated to match state funds (*shield law* for counties).

7. To ensure that no person who can be treated adequately outside a hospital, institution, or other inpatient facility is involuntarily treated in such setting.

B. Practical Considerations [§ 34.506]

NOTE: Because the shield law limits rights by the availability of certain funding sources, the lawyer *must* determine whether the county is in fact meeting the limits. Many counties return community options and integration money to the state each year. Discovery of county financial information may now be an integral part of representing a client under Wis. Stat. chs. 51 and 55.

NOTE: In *Waukesha County v. J.W.J. (In re Mental Commitment of J.W.J.)*, 2017 WI 57, 375 Wis. 2d 542, the court discussed the purposes of Wis. Stat. ch. 51, including the use of outpatient treatment where it was the least restrictive alternative necessary to promote the statute, citing *Fond du Lac County v. Helen E.F. (In re Helen E.F.)*, 2012 WI 50, 340 Wis. 2d 500.

II. MENTAL HEALTH COMMITMENTS (NON-ALCOHOLISM RELATED) [§ 34.507]

A. Definitions [§ 34.508]

1. Mental illness. Wis. Stat. § 51.01(13).

   a. General definition: Mental disease such that afflicted person requires care and treatment for welfare of

      (1) Self,

      (2) Others, or

      (3) Community.

      NOTE: This definition of "mental illness" suffices for voluntary treatment and may also be useful for establishing other entitlements (e.g., insurance coverage, worker's compensation, disability).

   b. Definition for purpose of involuntary commitment: Substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet ordinary demands of life.

NOTE: This definition of "mental illness" is more stringent and must be met (along with standards, *see infra* § 34.11) for commitment to ensue.

c. Alcoholism is excluded from both definitions of "mental illness."

2. Developmental disability. Wis. Stat. § 51.01(5)(a), (b).

a. Disability attributable to

(1) Intellectual disability,

(2) Cerebral palsy,

(3) Epilepsy,

(4) Autism,

(5) Brain damage,

(6) Neurological condition closely related to intellectual disability, or

(7) Prader-Willi syndrome;

b. Disability that has continued or can be expected to continue indefinitely; and

c. Disability that constitutes a substantial handicap to the afflicted person.

d. Dementia caused by degenerative brain disorder is not included. *See* Wis. Stat. § 55.01(1v).

COMMENT: In *Fond du Lac County v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, 2012 WI 50, ¶ 2, 340 Wis. 2d 500, *aff'g* 2011 WI App 72, 333 Wis. 2d 740, the supreme court affirmed the court of appeals decision, stating that in this case an individual with a diagnosis of Alzheimer's disease, which was manageable by long-term care, should not be the subject of a Wis. Stat. ch. 51 involuntary commitment because this condition could not be rehabilitated. The court specifically declined to answer whether a diagnosis of Alzheimer's disease coupled with another condition subject to Wis. Stat. ch. 51 could permit a petitioner to ask for treatment of the Alzheimer's disease in the Wis. Stat. ch. 51 context. *Id.* ¶ 40.

e. Cerebral palsy and epilepsy are excluded for purposes of involuntary commitment. *See* Wis. Stat. § 51.01(5)(b).

3. *Residence* has the definition given in Wis. Stat. § 49.001(6): "voluntary concurrence of physical presence with intent to remain in a place of fixed habitation." Wis. Stat. § 51.01(14).

4. Wis. Stat. § 51.01(17) defines *treatment* as psychological, educational, social, chemical, medical, or somatic techniques to rehabilitate mentally ill, alcoholic, drug dependent, or developmentally disabled person.

NOTE: Treatment, which is designed to bring about rehabilitation, is not to be equated with

"cure," because a person's prior level of functioning might not be attainable. Nor does it include habilitation, which is more closely related to daily living needs and skills than to treatment of a particular disorder. *C.J. v. State (In re Mental Condition of C.J.)*, 120 Wis. 2d 355 (Ct. App. 1984); *Milwaukee Cnty. Cmty. Servs. Bd. v. Athans (In re Athans)*, 107 Wis. 2d 331 (Ct. App. 1982); *see also Waukesha Cnty. v. J.W.J. (In re Mental Commitment of J.W.J.)*, 2017 WI 57, 375 Wis. 2d 542; *Helen E.F.*, 2012 WI 50, ¶ 30, 340 Wis. 2d 500.

NOTE: The court in *Zachary W.* addressed whether a person is "drug dependent" if the person reaches an altered state by inhaling gasoline. The court determined that there was no statutory definition of "drug" for purposes of drug dependency but ruled that the person met the definition of "drug dependency." *Marathon Cnty. v. Zachary W. (In re Mental Commitment of Zachary W.)*, No. 2014AP955, 2014 WL 6755242 (Wis. Ct. App. Dec. 2, 2014) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

B. Voluntary Admissions—Adult [§ 34.509]

See Wis. Stat. § 51.10.

1. Voluntary admission requires approval of treatment director or director's designee.

2. If at a state institution, voluntary admission also requires approval of the appropriate county department established under Wis. Stat. § 51.42 or 51.437.

3. Per Wis. Stat. § 51.10(4), criteria for admission must be based on evaluation finding that applicant

   a. Is mentally ill, developmentally disabled, alcoholic, or drug dependent; and

   b. Has the potential to benefit from inpatient care, treatment, or therapy.

      NOTE: For guidance on competency and consent issues, see *Zinermon v. Burch*, 494 U.S. 113 (1990).

4. A finding of dangerousness, as established under Wis. Stat. § 51.20(1)(a), is not required.

5. Person against whom petition for involuntary commitment has been filed may apply for voluntary admission. Wis. Stat. § 51.10(6).

6. Person voluntarily admitted may discharge self at any time.

   a. At admission, person must be informed orally and in writing of his or her right to leave on written request.

   b. Exception if treatment director believes person is dangerous and files a Statement of Emergency Detention, *see infra* § 34.10, by the end of court's next business day after discharge is requested. Wis. Stat. § 51.10(5)(c).

   c. A person for whom a guardian has been appointed because of incompetency may be admitted to an inpatient facility if both the guardian and the ward agree or if the guardian alone consents *and* the admitting physician asserts before at least two witnesses that the

patient has been informed, orally and in writing, of treatment rights, risks, and benefits. Wis. Stat. § 51.10(8), (4m)(a)1.

COMMENT: One wonders about the value of the assent or the information provided to the ward if the ward is indeed incompetent.

EXCEPTION: Different procedures apply if the voluntary admission is the result of a settlement agreement that has been reached pursuant to Wis. Stat. § 51.20(8)(bg) or (bm), *see infra* § 34.11.

C. Admissions—Minors [§ 34.510]

See Wis. Stat. § 51.13.

1. Application for admission

   a. Minors under 14 years of age

      (1) May be admitted to inpatient facilities for the treatment of mental illness, developmental disabilities, alcoholism, or drug abuse, pursuant to application by the parent who has legal custody *or* the minor's guardian. Wis. Stat. § 51.13(1)(a).

      (2) May seek admission on his or her own if the parent who has legal custody or minor's guardian is unavailable and court approves admission. Wis. Stat. § 51.13(1)(c).

   b. Minors 14 years of age or older

      (1) May seek admission on his or her own if the parent who has legal custody or minor's guardian is unavailable or unwilling and court approves admission. Wis. Stat. § 51.13(1)(c).

      (2) May be admitted pursuant to an application by the parent who has custody or minor's guardian for treatment for alcoholism or drug abuse. Wis. Stat. § 51.13(1)(bm).

      (3) May be admitted pursuant to an application executed by custodial parent or guardian *and* the minor for treatment of mental illness or developmental disability. Wis. Stat. § 51.13(1)(b).

         (a) If the minor refuses to execute the application, the parent with legal custody or guardian may execute it on the minor's behalf.

   c. A petition for involuntary commitment, emergency commitment, or emergency detention of a minor may also be converted to admission under Wis. Stat. § 51.13(1). Wis. Stat. § 51.13(1)(d); *see* Wis. Stat. §§ 51.15, 51.20, 51.45(12), (13).

2. Application approval process

   a. Under Wis. Stat. § 51.13(1)(e), (em), immediate admission may occur based on informed professional opinion that

(1) The minor is in need of the sought services,

(2) The treatment facility offers inpatient therapy or treatment appropriate for the minor's needs, and

(3) The facility is the least restrictive therapy or treatment consistent with the minor's needs.

b. In case of admission for appropriate alcohol or other drug abuse (AODA) treatment, admission approval should also be based on results of an AODA assessment.

3. Safeguards

a. Per Wis. Stat. § 51.13(3)(am), before admission or soon thereafter, the minor and his or her parent or guardian must be given, both orally and in easily understandable writing, notice of rights, including:

(1) The review procedure in Wis. Stat. § 51.13(4), describing

(a) The standards to be applied by the court, and

(b) Possible dispositions.

(2) The right to independent evaluation, if appropriate.

(3) Information about how to contact the state protection and advocacy agency. Wis. Stat. § 51.62(2)(a).

(4) A hearing and counsel, if appropriate, under Wis. Stat. § 51.13(4)(d).

(5) Possible discharge. Wis. Stat. § 51.13(7)(b).

(6) A hearing to determine continued appropriateness of admission under Wis. Stat. § 51.13(7)(c).

b. Petition for review of admission. Wis. Stat. § 51.13(4).

(1) Within three days after admission or application, whichever comes first, the director or designee of the facility or center must file the petition with the court designated to exercise jurisdiction under Wis. Stat. chs. 48 and 938. This also applies when the minor is 14 years of age or older and refuses to join in the application; the minor wants treatment and the minor's parent with legal custody or guardian refuses to join in the application; there is no parent with legal custody or guardian; or the parent with legal custody or guardian cannot be found.

(2) Per Wis. Stat. § 51.13(4)(a), the petition must include

(a) The minor's name, address, and birthdate;

(b) The names and addresses of parent(s) or guardian;

(c) The facts substantiating the petitioner's belief that the minor needs services;

(d) The facts substantiating the appropriateness of inpatient treatment;

(e) The basis for the petitioner's opinion that inpatient care is the least restrictive treatment consistent with the minor's needs; and

(f) Notation of any refusal of the minor 14 years of age or older to join in the application.

(3) Attach copy of application for admission and relevant professional evaluations. Wis. Stat. § 51.13(4)(a).

(4) Petitioner must provide a copy of petition to minor and parent(s) or guardian within five days after admission. Wis. Stat. § 51.13(4)(c).

c. Court review determinations. Wis. Stat. § 51.13(4)(d).

(1) Whether prima facie showing of need for services is made

(2) Whether the facility offers appropriate treatment

(3) Whether admission constitutes the least restrictive treatment possible

(4) In the case of a minor 14 years of age or older, whether the minor *and* the parent or guardian executed the application

d. Court review options. Wis. Stat. § 51.13(4)(d).

(1) If the requisites in paragraphs II.C.3.c.(1)–(4), *supra*, are met, the court must approve the application. If, however, the court is unable to make the required determinations, the court may then

(a) Dismiss the petition,

(b) Order additional information produced and make the necessary determinations within seven days (exclusive of weekends or holidays) after admission or application, or

(c) Hold a hearing within seven days (exclusive of weekends or holidays) after admission or application.

(2) If the petition shows a notation of the minor's unwillingness to be admitted, if admission was made on a parent's or guardian's application despite the minor's refusal, or if the minor, minor's counsel, parent, or legal guardian requests a hearing, the court must

(a) Order an independent evaluation, and

(b) Hold a hearing to review the admission within seven days (exclusive of weekends or holidays) after admission or application.

e. Court hearing

(1) Under Wis. Stat. § 51.13(4)(g), if the court holds a hearing on the application and admission, it may approve the admission if it finds

(a) The minor is in need of services,

(b) The inpatient facility is appropriate, and

(c) The facility is the least restrictive treatment consistent with the minor's needs.

(2) The court may also transfer the minor to a less restrictive facility if it finds that the existing facility is not appropriate or not the least restrictive consistent with the minor's needs.

(3) Per Wis. Stat. § 51.13(4)(h), if the court does not permit admission, it must

(a) Dismiss the petition, order application for admission denied and the minor released;

(b) Order the petition to be treated as a petition for involuntary admission and refer to an appropriate court, Wis. Stat. §§ 51.13(4)(a), 51.20, 51.45(13); or

(c) For a minor age 14 or older and possibly developmentally disabled, determine whether the minor is in need of protective placement or services.

f. Appeal: Court determination may be appealed to court of appeals under Wis. Stat. § 809.30. Wis. Stat. § 51.13(5).

g. Short-term admissions. Wis. Stat. § 51.13(6).

(1) Minor may be admitted to an inpatient facility without court review for diagnosis and evaluation or for dental, medical, or psychiatric services for up to 12 days. Application to be submitted by minor's parent with legal custody or minor's guardian unless unavailable under Wis. Stat. § 51.13(1)(c).

(2) Admission must be approved by treatment director only if least restrictive means of obtaining adequate diagnosis or evaluation, or adequate provision of services.

h. Discharge

(1) Minor age 14 or older admitted for treatment of mental illness or developmental disability and parent or guardian may request discharge in writing at any time. If the parent or guardian refuses to request discharge and the criteria are still met for admission, the minor may not be discharged under Wis. Stat. § 51.13(7)(b)3. Wis. Stat. § 51.13(7)(b).

(2) Minor younger than 14 years of age who has been admitted when parent or guardian was unavailable and minor age 14 or older who has been admitted when parent or guardian was unavailable or unwilling to consent to admission may request discharge in writing without agreement of parent or guardian. Wis. Stat. § 51.13(7)(b)1.; *see also* Wis. Stat. § 51.13(1)(c).

(3) Minor's parent or guardian may request discharge in writing for minor age 14 or older who has been admitted for treatment for alcoholism or drug abuse or for a minor younger than 14 years of age who has been admitted for treatment for mental illness, developmental disability, alcoholism, or drug abuse. Wis. Stat. § 51.13(7)(b).

NOTE: For the procedure when a voluntarily committed minor in a treatment facility reaches 14 years of age, see Wis. Stat. § 51.13(7)(a).

(4) A minor described in paras. (1)–(3), *supra*, must be discharged within 48 hours (excluding weekends and holidays) unless a petition is filed for emergency detention, emergency commitment, involuntary commitment, or protective placement. Wis. Stat. § 51.13(7)(b)5.

(5) If a minor is not discharged, the minor may submit a written request for the court to determine the continued appropriateness of the admission, and a hearing may be held within the confines of Wis. Stat. § 51.13(7)(c). Wis. Stat. § 51.13(7)(c).

D. Emergency Outpatient Treatment for Minors [§ 34.511]

1. Established by 2017 Wis. Act 204 and codified at Wis. Stat. § 51.138.

2. Establishes ability to perform outpatient treatment for up to 30 days without informed consent.

3. Efforts are to be made to contact parents or guardians.

4. Approved by outpatient provider director.

5. If more than 30 days of treatment are needed, file court petition under Wis. Stat. § 51.14.

E. Review of Outpatient Mental Health Treatment of Minors Age 14 or Older [§ 34.512]

1. Definition of *outpatient mental health treatment*: Treatment and social services for mental illness, except 24-hour care, treatment, and custody provided by a treatment facility. Wis. Stat. § 51.14(1).

2. Court having jurisdiction under Wis. Stat. chs. 48 and 938 must designate mental health review officer who is responsible to review petitions filed under Wis. Stat. § 51.14(3). Wis. Stat. § 51.14(2).

3. If a minor age 14 years or older is unable to get parental consent or if a minor has refused to give informed consent for outpatient treatment, a petition can be filed for review with the mental health review officer and a hearing held within 21 days. Wis. Stat. § 51.14(3).

4. Petition can be filed by a minor age 14 years or older or a person acting on behalf of the minor and must contain the following:

a. Name, address, and birthdate of minor. Wis. Stat. § 51.14(3)(b).

b. Name and address of parent or guardian.

c. Information and facts that substantiate need or lack of need for outpatient treatment and appropriateness of treatment and that treatment meets the least restrictive test.

d. Available professional evaluations must be attached. Wis. Stat. § 51.14(3)(c).

NOTE: The court will ensure that assistance is available for preparing the petition, and the review officer will inform the county department under Wis. Stat. § 51.42 or 51.437 of any petition. The county department may make recommendations regarding need, appropriateness, and availability of treatment. Wis. Stat. § 51.14(3)(d), (e).

5. Hearings and standards. Wis. Stat. § 51.14(3)(f).

a. Review officer must hold hearing within 21 days after filing of petition. Wis. Stat. § 51.14(3)(g).

(1) Notice to minor and minor's parent or guardian required 96 hours before the hearing.

(2) Per Wis. Stat. § 51.14(3)(h), (i), review officer must find in writing that written, informed consent is not required for outpatient mental health treatment because

(a) Informed consent is unreasonably withheld,

(b) Minor is in need of treatment,

(c) Treatment sought is appropriate for the minor and is the least restrictive available, and

(d) Proposed treatment is in minor's best interests.

(3) Must inform minor and minor's parent or guardian of right to judicial review. Wis. Stat. § 51.14(3)(j).

b. If in minor's best interest, and upon request, can skip review officer hearing and go to judicial review under Wis. Stat. § 51.14(4).

6. Judicial review. Wis. Stat. § 51.14(4).

a. The minor or a person acting on the minor's behalf has 21 days to request review after mental health review officer's order.

b. The minor or a person acting on the minor's behalf may petition if consent continues to be withheld or is granted by the parent or guardian despite the minor's refusal.

c. Petition must conform to requirements of Wis. Stat. § 51.14(3)(b).

d. If minor refuses to provide consent, court will appoint counsel; if parent or guardian refuses to provide consent, court will appoint counsel if minor requests or best interests require it. Wis. Stat. § 51.14(4)(c).

e. Hearing within 21 days after filing of the petition; notice given 96 hours before the hearing. Wis. Stat. § 51.14(4)(d), (e).

f. Evidentiary rules of civil actions apply, record of proceedings will be kept, and findings must be based on clear, satisfactory, and convincing evidence. Wis. Stat. § 51.14(4)(f).

g. Court will issue written order (standards the same as those in paragraph 5.a., *supra*) and specifically override the "informed consent" provision of Wis. Stat. § 51.61(6) if the standards are met. Wis. Stat. § 51.14(4)(g).

h. Right to appeal under Wis. Stat. § 809.30. Wis. Stat. § 51.14(5).

F. Emergency Detention [§ 34.513]

1. Basis. Wis. Stat. § 51.15.

a. Personal observation by law enforcement officer or person authorized under Wis. Stat. ch. 48 or 938,

b. Reliable reports made to law enforcement officer or person authorized under Wis. Stat. ch. 48 or 938, or

c. The standards for emergency detention found in Wis. Stat. § 51.20, *see infra* § 34.11, 1.c.

d. No liability for actions taken in good faith (good faith is presumed); immunity extends to evaluation, diagnosis, or treatment pursuant to emergency detention statute or a court order. Wis. Stat. § 51.15(11).

e. The county department of community programs must approve the need for detention. Wis. Stat. § 51.15(2).

NOTE: Approval must be pursuant to a crisis assessment of the individual by a physician having at least a psychiatric residency, a licensed psychologist under Wis. Stat. ch. 455, or a mental health professional as determined by the department. This assessment can be made in person, by phone, or through telemedicine or video conferencing technology.

COMMENT: The city of Madison objected to the Wisconsin Department of Health Services (DHS) designating the Winnebago Mental Health Institute in Oshkosh as the receiving state institution for emergency commitments instead of the Mendota Mental Health Institute in Madison. In *City of Madison v. Wisconsin Department of Health Services*, 2017 WI App 25, 375 Wis. 2d 203, the court ruled that state law permitted the DHS to have Madison residents sent to the Oshkosh facility over city objections of inefficiency and undue expense. Wis. Stat. § 51.15(4).

2. Milwaukee County's procedure

a. Law officer signs Statement of Emergency Detention, listing dangerous behavior, *see infra* § 34.11, 1.c.

b. Officer delivers statement and person to detention facility.

c. Within 24 hours, treatment director or director's designee must determine whether the person is to be

(1) Released;

(2) Allowed to become a voluntary patient to an inpatient facility, Wis. Stat. § 51.10(6); or

(3) Detained pending a court hearing.

NOTE: The facility has 24 hours to determine whether detention will occur. The demonstrated evaluation or stabilizing treatment of nonpsychiatric medical conditions does not count toward the 24-hour evaluation period. Wis. Stat. § 51.15(4)(c).

d. Statement must designate whether person is believed to be mentally ill, drug dependent, or developmentally disabled.

e. Original statement plus any supplement must be filed with court exercising probate jurisdiction in county where person taken into custody.

f. Filing statement has same effect as filing petition for involuntary commitment under Wis. Stat. § 51.20, *see infra* § 34.11.

3. Procedures in other counties. Wis. Stat. § 51.15(5).

a. Law enforcement officer signs Statement of Emergency Detention, listing dangerous behavior, *see infra* § 34.11, 1.c.

b. Statement must say officer has cause to believe subject is evidencing mental illness, drug dependency, or developmental disability.

NOTE: The statement must provide detailed, specific information on the act or omission involved under Wis. Stat. § 51.15(1) and the names of persons observing or reporting it.

c. Officer delivers the person and a copy of the statement to detention facility.

d. Officer files original statement with the court immediately after detention.

e. Filing of the statement has the same effect as filing a petition for involuntary commitment under Wis. Stat. § 51.20, *see infra* § 34.11.

f. Director of the treatment facility may discharge or detain. The person is discharged when the director determines that grounds for detention no longer exist; however, unless a

probable cause hearing is held, *see infra* § 34.10, sub. 5., the person may not be detained for more than 72 hours, excluding Saturdays, Sundays, and holidays.

4. Notice of rights if detained. Wis. Stat. § 51.15(9).

   a. At the time of detention, person must be informed orally and in writing of his or her rights to

      (1) Contact attorney and family member;

      (2) Have attorney at public expense, Wis. Stat. §§ 51.15(9), 51.60; and

      (3) Remain silent (that any statement may be used as basis for commitment).

   b. Person must receive a copy of statement.

5. Prehearing treatment if detained. Wis. Stat. § 51.20(8)(c).

   a. Medication and treatment may be administered

      (1) If person consents in writing, or

      (2) Without person's consent if a treatment professional determines it necessary to prevent serious physical harm to person or others, Wis. Stat. § 51.61(1)(g)1.

   b. Person must be informed at time of detention, orally and in writing, of right to refuse treatment.

   c. Person must be given copy of any Statement of Emergency Treatment.

G. Involuntary Commitment for Treatment [§ 34.514]

1. Petition for Examination. Wis. Stat. § 51.20.

   a. Must be filed by authorized person; court must refuse to accept petitions drafted by persons not authorized under statute. Wis. Stat. § 51.20(4); *D.S. v. Racine Cnty. (In re D.S.)*, 142 Wis. 2d 129 (1987); *State v. S.P.B. (In re S.P.B.)*, 159 Wis. 2d 393 (Ct. App. 1990).

   b. Per Wis. Stat. § 51.20(1)(a)1., must state that person is

      (1) Mentally ill, drug dependent, or developmentally disabled; and

      (2) Appropriate for treatment.

      COMMENT: Being *appropriate for treatment* means that the underlying disorder can be improved or symptoms alleviated even if the underlying illness is not cured. *Fond du Lac Cnty. v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, 2012 WI 50, ¶ 36, 340 Wis. 2d 590; *see also Waukesha Cnty. v. J.W.J. (In re Mental Commitment of J.W.J.)*, 2017 WI 57, 375 Wis. 2d 542; *Milwaukee Cnty. v. Kent F.*

(In re Mental Commitment of Kent F.), No. 2015AP388, 2015 WL 4887014 (Wis. Ct. App. Aug. 18, 2015) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

c. Per Wis. Stat. § 51.20(1)(a)2., must state that person is dangerous.

(1) Evidences substantial probability of physical harm to self as manifested by recent threats of or attempts at suicide or serious bodily harm.

NOTE: This language has been interpreted in *Marathon County v. D.K. (In re Condition of D.K.)*, 2020 WI 8, 390 Wis. 2d 50, to mean that dangerousness must be much more likely than not, and one person having a reasonable fear of violent behavior through an act, attempt, or threat is enough. In *Outagamie County v. Michael H. (In re Mental Commitment of Michael H.)*, 2014 WI 127, ¶¶ 4–6, 359 Wis. 2d 272, the Wisconsin Supreme Court determined that the word *threat* in this statute was not defined but does not require an articulated plan for a finding of suicidal threat and that a jury's determination of the facts involving the threat is to be given substantial deference by a reviewing court. This rationale has been followed in *Rock County v. S.J.M. (In re Mental Commitment of S.J.M.)*, No. 2016AP255-FT, 2016 WL 2905055 (Wis. Ct. App. May 19, 2016) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)), and *Outagamie County v. Adam B. (In re Mental Commitment of Adam B.)*, No. 2015AP718-FT, 2016 WL 1424121 (Wis. Ct. App. April 12, 2016) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

(2) Evidences substantial probability of causing physical harm to others as manifested by

(a) Recent homicidal or violent behavior; or

(b) Other persons placed in reasonable fear of violent behavior and serious physical harm because of recent overt act, attempt, or threat.

NOTE: In a creative reading of the statute, the court in *R.J.* determined that the threat need not be made in the presence of the person threatened and the person need not know about it. *R.J. v. Winnebago Cnty. (In re R.J.)*, 146 Wis. 2d 516 (Ct. App. 1988).

COMMENT: The court in *Milwaukee County v. Cheri V. (In re Mental Commitment of Cheri V.)*, No. 2012AP1737, 2012 WL 6571724, at *4 (Wis. Ct. App. Dec. 8, 2012) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)), noted that "yelling at and pointing a finger at another person, irrespective of how dangerous that other person might be, does not [meet the statutory prerequisites], unless there is evidence that the subject of a potential commitment order is trying to goad that other person *in order to* have that person kill him or harm the subject (as in 'suicide by cop')." Because there was no evidence of intent to harm others, the court reversed a circuit court commitment order. But see *Marathon County v. D.K. (In re Condition of D.K.)*, No. 2017AP2217, 2018 WL 3758247 (Wis. Ct. App. Aug. 7, 2018) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)), *aff'd*, 2020 WI 8, 390 Wis. 2d 50, in which the court of appeals ruled that dangerousness can be established by a nexus between the mental illness or disorder and the threats made by the subject, even if the targets of the threats did

not testify as to their concerns of harm. A plan and stated threats can establish the reasonable fear.

(3) Evidences such impaired judgment, manifested by pattern of recent acts or omissions, that there is substantial probability of physical impairment or injury to self.

NOTE: Probability is not substantial if there is reasonable provision for the person available in the community and a reasonable probability that the person will take advantage of these services, if the person may be provided protective placement or protective services under Wis. Stat. ch. 55, or, in the case of a minor, if the person is appropriate for services under Wis. Stat. § 48.13(4) or (11) or 938.13(4). Reasonable provision does not include food and shelter provided by others to one incapable of providing for himself or herself. Wis. Stat. § 51.20(1)(a)2.c.

COMMENT: In *Dane County v. Kelly M. (In re Mental Commitment of Kelly M.)*, 2011 WI App 69, ¶ 17, 333 Wis. 2d 719, the court found medication to be a "service" in the community that, if not used, can buttress a finding of dangerousness. The court also held that a person could be protectively placed under Wis. Stat. ch. 55 and yet still be considered a proper party to be committed if the Wis. Stat. ch. 51 commitment could improve the subject's condition. *Id.*, ¶ 32.

NOTE: In *Ozaukee County v. R.T.H. (In re Mental Commitment of R.T.H.)*, No. 2018AP1317, 2019 WL 947631 (Wis. Ct. App. Feb. 27, 2019) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)), the court affirmed a commitment without overt acts where there was a combination of activities and statements that led family members and examining psychiatrists to consider the subject dangerous to himself and others. In *Marathon County v. C.M.L. (In re Mental Commitment of C.M.L.)*, No. 2017AP2220, 2019 WL 921875 (Wis. Ct. App. Feb. 26, 2019) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)), the court affirmed a commitment without overt acts or threats where there was testimony of fear of impending harm to others. *Cheri V.*, cited above, was distinguished.

(4) Evidences behavior, manifested by recent acts or omissions, that because of mental illness the person is unable to satisfy basic needs; without prompt treatment, substantial probability of imminent death or serious physical injury, debilitation, or disease. Wis. Stat. § 51.20(1)(a)2.d.

(5) Per Wis. Stat. § 51.20(1)(a)2.e., evidences the following:

(a) Incapability, because of mental illness, of *expressing* understanding of treatment alternatives and advantages and disadvantages of accepting medication after having them explained; or

(b) Substantial incapability, because of mental illness, of *applying* understanding of alternatives and advantages and disadvantages, after having them explained, in order to make informed choice about refusing or accepting treatment; and

(c) Substantial probability, as demonstrated both by treatment history and by recent acts or omissions, of being in need of care or treatment to prevent further deterioration; and

(d) Substantial probability that, if left untreated,

(i) Person will lack services necessary for health or safety, and will suffer severe mental, emotional, or physical harm; and

(ii) Harm will result in the loss of the person's ability to function independently in the community or in the loss of the person's cognitive or volitional control over his or her own thoughts or actions.

(iii) Defendant being considered unstable and unpredictable with a threatening and menacing demeanor in expert testimony can satisfy the dangerous standard without an overt violent act. *Barron Cnty. v. Dennis H. (In re Mental Commitment of Dennis H.)*, No. 2010AP1026, 2010 WL 4151984 (Wis. Ct. App. Oct. 19, 2010) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)); *see also Rock Cnty. v. B.A.G. (In re Mental Commitment of B.A.G.)*, No. 2018AP782, 2018 WL 3602221 (Wis. Ct. App. July 26, 2018) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

NOTE: Fifth standard held constitutional despite no requirement of physical danger; heightened standard of mental impairment and substantial probability of a threat to health or safety adequate to overcome vagueness and overbreadth challenge. *State v. Dennis H. (In re Commitment of Dennis H.)*, 2002 WI 104, 255 Wis. 2d 359; *State v. Dennis H. (In re Commitment of Dennis H.)*, No. 04-2037, 2005 WL 524951 (Wis. Ct. App. Mar. 8, 2005) (unpublished opinion not citable per Wis. Stat. § 809.23(3)) (extension order of original commitment proceeding).

NOTE: The probabilities described in (4) and (5) are *not* substantial (1) if there is reasonable provision for the person available in the community and a reasonable probability that the person will take advantage of these services; (2) if the person may be provided protective placement or protective services under Wis. Stat. ch. 55; or (3) in the case of a minor, if the person is appropriate for services under Wis. Stat. § 48.13(4) or (11) or Wis. Stat. § 938.13(4). Reasonable provision does not include food and shelter provided by others to one incapable of providing for himself or herself. Wis. Stat. § 51.20(1)(a)2.d., e.; *see also Dane Cnty. v. Kelly M. (In re Mental Commitment of Kelly M.)*, 2011 WI App 69, 333 Wis. 2d 719.

COMMENT. In *Marathon County v. D.K.*, 2020 WI 8, 390 Wis. 2d 50, the supreme court determined that a reasonable fear of a violent act can meet the dangerousness standard. However, mere speculation or vague generalizations regarding dangerousness after a withdrawal of treatment are insufficient to prove dangerousness. *Portage Cnty. v. E.R.R. (In re Mental Commitment of E.R.R.)*, No. 2019AP2033, 2020 WL 2563746 (Wis. Ct. App. May 21, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)), *aff'd per curiam*, 2021 WI 22, 396 Wis. 2d 12; *Jackson Cnty. v. W.G. (In re Condition of W.G.)*, No. 2020AP961, 2020 WL 6498568 (Wis. Ct. App. Nov. 5, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

NOTE: In *Langlade County v. D.J.W. (In re Mental Commitment of D.J.W.)*, 2020 WI 41

¶¶ 53–54, 391 Wis. 2d 231, the Wisconsin Supreme Court ruled that the standard of dangerousness for recommitment was not met, explaining that generalized statements about the consequences of withdrawing treatment do not meet the dangerousness standard because there were not factual findings related to the actual commitment. The fact that the withdrawal of treatment would cause the subject to be unable to work and to have to rely on disability benefits and family for support does not establish dangerousness.

The court of appeals has reversed numerous commitments for violating the requirement articulated in *D.J.W.* to show one of the five statutory standards of dangerousness. *See, e.g.*, *Ozaukee Cnty. v. J.D.A. (In re Mental Commitment of J.D.A.)*, No. 2021AP1148, 2021 WL 5917605 (Wis. Ct. App. Dec. 15, 2021) (unpublished opinion not citable per Wis. Stat. § 809.23(3)). In *Waupaca County v. G.T.H. (In re Commitment of G.T.H.)*, No. 2021AP1410, 2021 WL 6069727 (Wis. Ct. App. Dec. 23, 2021) (unpublished opinion not citable per Wis. Stat. § 809.23(3)), the county conceded that the circuit court erred because it did not make factual findings on the statutory basis for its determination of dangerousness as required under *D.J.W.* At least one court has applied the *D.J.W.* standards to the initial commitment context directly. *Shawano Cnty. v. S.L.V. (In re Mental Commitment of S.L.V.)*, No. 2021AP223, 2021 WL 3625880 (Wis. Ct. App. Aug. 17, 2021) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

d. Special considerations

(1) If the person has received inpatient treatment for mental illness, developmental disability, or drug dependency or has received outpatient treatment for any such condition immediately before the petition is filed, dangerousness may be evidenced by treatment record. Wis. Stat. § 51.20(1)(am).

(2) Per Wis. Stat. § 51.20(1)(ar), if the person is incarcerated, petition must allege

(a) Person is mentally ill;

(b) Person needs treatment;

(c) Person is appropriate for treatment;

(d) Appropriate, less restrictive forms of treatment have been tried and were unsuccessful (unsuccessful treatments must be described); and

(e) Person has been informed of treatment needs, available services, and rights, and has had the opportunity to discuss them with a physician or psychologist.

2. Detention before probable cause hearing optional. Wis. Stat. § 51.20(2), (7)(a).

a. If no detention, a probable cause hearing must be held within a reasonable time.

b. If the person is detained (including under Wis. Stat. § 51.15 Statement of Emergency Detention), a probable cause hearing must be held within 72 hours after the initial detention, excluding Saturdays, Sundays, and holidays; 72 hours is literal, does not mean three calendar days, and does not exclude the first day of detention. *Milwaukee Cnty. v. Delores M. (In re Delores M.)*, 217 Wis. 2d 69 (Ct. App. 1998); *see also Dodge Cnty. v. Ryan E.M. (In re Mental Commitment of Ryan E.M.)*, 2002 WI App 71, 252 Wis. 2d 490.

COMMENT: In *Outagamie County v. Paul S. (In re Mental Commitment of Paul S.)*, No. 2011AP920, 2011 WL 4445705, at *2 (Wis. Ct. App. Sept. 27, 2011) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)), the court held that the act of the police taking the subject to a facility against his will started the 72-hour clock. The court rejected the county's argument that the date the matter was considered an emergency detention starts the 72-hour time limit. *In re Mental Commitment of Paul S.*, 2011 WL 4445705, at *2. In *Ozaukee County v. Mark T.J. (In re Mental Commitment of Mark T.J.)*, No. 2014AP479, 2014 WL 4211111, at *5 (Wis. Ct. App. Aug. 27, 2014) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)), the court stated that the 72-hour clock began when the subject was taken to a hospital emergency room with placement in a mental health facility 3 hours later. The court would not have competency to hold a probable cause hearing 72 hours after the placement in the mental health facility when the subject was involuntarily taken to a different hospital unit 3 hours earlier. However, the subject stipulated to recommitment, so this issue was waived. *In re Mental Commitment of Mark T.J.*, 2014 WL 4211111, at *5. *But see Columbia Cnty. v. J.M.C., Jr. (In re Commitment of J.M.C., Jr.)*, No. 2020AP1001, 2020 WL 6193646 (Wis. Ct. App. Oct. 22, 2020) (unpublished opinion not citable per Wis. Stat. § 809.23(3)) (holding that previous time in custody on unrelated proceeding does not count toward the Wis. Stat. ch. 51 probable-cause-hearing deadline).

c. Postponement up to maximum of one week at the request of person or person's counsel if the person is detained.

d. If the probable cause hearing is not timely held, subsequent requests for emergency detention by the treatment director do not cure that defect. *Dane Cnty. v. Stevenson L.J. (In re Mental Commitment of Stevenson L.J.)*, 2009 WI App 84, 320 Wis. 2d 194.

3. Notice of allegations and probable cause hearing. Wis. Stat. § 51.20(2).

a. Notice must be served orally and in writing, and

b. Person must receive copy of all documents.

4. Legal counsel. Wis. Stat. § 51.20(3).

a. On filing of the petition, court must ensure that the person is represented by counsel (mandatory counsel provision can be construed to mean that the person can represent himself or herself). Wis. Const. art. I, § 21(2); *S.Y. v. Eau Claire Cnty. (In re Condition of S.Y.)*, 162 Wis. 2d 320 (1991). *But see Fond du Lac Cnty. v. S.R.H. (In re Mental Commitment of S.R.H.)*, No. 2018AP1088, 2018 WL 5084868 (Wis. Ct. App. Aug. 17, 2018) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

b. Court will refer to public defender without making a determination of indigency as provided in Wis. Stat. § 51.60. Wis. Stat. § 51.20(3).

c. Petitioners assisted by corporation counsel, *see also supra* para. 1. Wis. Stat. §§ 51.20(4), 55.02(3); *S.P.B.*, 159 Wis. 2d 393. *But see* Opinion of Wis. Att'y Gen. to Robin J. Stowe, Corp. Counsel, Langlade County, OAG 4-10 (Aug. 2, 2010), http://docs.legis.wisconsin.gov/misc/oag/recent/oag4_10.pdf (advising that corporation counsel may in their discretion refuse to file commitment petitions if, in their view, it is not in the public interest to file the petition).

NOTE: Corporation counsel may inform the person seeking the petition that the petition does not have merit and can withdraw the petition or agree to make a limited appearance. The limited appearance includes a statement to the court that the petitioner believes there is probable cause while counsel does not support the petition. Notice of the limited appearance must be given to the person seeking the petition. Wis. Stat. § 51.20(4)(b).

5. Probable cause hearing

a. Venue. Wis. Stat. § 51.20(1)(c).

(1) County where person is, or

(2) County of person's legal residence.

b. Under Wis. Stat. § 51.20(5), due process requires

(1) Open hearing unless person requests it closed,

(2) Right to counsel,

NOTE: This right does not extend to unconditional substitution of counsel. *See Fond du Lac Cnty. v. S.R.H. (In re Mental Commitment of S.R.H.)*, No. 2018AP1088, 2018 WL 5084868 (Wis. Ct. App. Aug. 17, 2018) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

(3) Right to present and cross-examine witnesses,

(4) Right to remain silent, and

NOTE: Constitutional protection of the right to remain silent was discussed in *Crawford County v. E.K. (In re Mental Commitment & Involuntary Medication of E.K.)*, No. 2016AP2063, 2017 WL 2199181 (Wis. Ct. App. May 18, 2017) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)), in which the court concluded that the admission of the subject's incriminating testimony was harmless error.

(5) Right to jury trial.

COMMENT: Due process does not require a verbatim record of a probable cause hearing before a court commissioner because there is de novo review. *Dane Cnty. v. T.B.* (*In re the Mental Commitment of T.B.*), No. 2015AP799, 2015 WL 5737083 (Wis. Ct. App. Oct. 1, 2015) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)); *see* Wis. Stat. § 51.20(10)(c).

NOTE: The Wisconsin Supreme Court has ruled that defense counsel must meet the effective assistance of counsel standards laid out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Winnebago Cnty. v. J.M. (In re Mental Commitment of J.M.)*, 2018 WI 37, 381 Wis. 2d 28. This includes an examination of whether counsel's actions affected the outcome of the proceeding, a standard that will often eliminate the issue of effective assistance. *Id.*

c. Rules of evidence in civil proceedings apply.

d. Determination

(1) If no probable cause exists to believe the allegations in the petition, the proceedings will be dismissed by the court commissioner; a hearing de novo by circuit court is then appropriate. *Dane Cnty. v. C.M.B. (In re C.M.B.)*, 165 Wis. 2d 703 (1992); *see Milwaukee Cnty. v. Louise M. (In re Commitment of Louise M.)*, 205 Wis. 2d 162 (1996).

(2) Person fit for guardianship and protective placement or services. Wis. Stat. § 51.20(7)(d), Wis. Stat. chs. 54, 55.

(a) Court may appoint temporary guardian and order temporary protective placement or services (if court orders only temporary protective services, person will be provided care only on an outpatient basis). Wis. Stat. § 51.20(7)(d).

(b) Period of temporary guardianship and protective placement not to exceed 30 days.

(c) Proceed as if petition for guardianship and protective placement or services has been made.

(d) Court may order involuntary administration of psychotropic medication as a temporary protective service only under requirements of Wis. Stat. § 55.14. Wis. Stat. §§ 51.20(7), 55.14; *see infra* § 34.13.

NOTE: *But see State ex rel. Roberta S. v. Waukesha Cnty. Hum. Servs. Dep't*, 171 Wis. 2d 266 (Ct. App. 1992) (limiting forcible administration of medication under limited guardianships); *cf. Marathon Cnty. v. P.X. (In re Condition of P.X.)*, No. 2017AP1497, 2018 WL 3155825 (Wis. Ct. App. June 26, 2018) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (concluding that ch. 51 probable cause and commitment standards were met even if involuntary administration of psychotropic medication under ch. 55 only could reduce symptoms of the underlying disorder).

(3) Probable cause to believe allegations of petition

(a) Schedule final hearing. Wis. Stat. § 51.20(7).

(i) If person is detained pending the final hearing, the hearing must be scheduled within 14 days after the initial detention.

(ii) If person not detained, the hearing must be scheduled within 30 days after a finding of probable cause. Wis. Stat. § 51.20(8).

(b) Schedule examination.

(c) If court finds probable cause, it may order involuntary psychotropic medication only under Wis. Stat. § 55.14. Wis. Stat. § 51.20(7)(d); *see infra* § 34.13.

(d) Appeal of finding of probable cause is by de novo review in circuit court, not court of appeals, and is discretionary. *Louise M.*, 205 Wis. 2d 162.

6. Examination. Wis. Stat. § 51.20(9).

a. Who must examine:

(1) Two licensed physicians specializing in psychiatry (if available),

(2) One licensed physician and one licensed psychologist (if available),

(3) Two licensed physicians, including one specially trained in psychiatry (if available), or

(4) Two physicians.

b. Examination must be in person.

c. Person may, within 24 hours after finding of probable cause, select one of the examiners, subject to court approval.

d. Person must be told before each examination that he or she need not speak to examiners.

e. Examiners' independent written reports must be filed with court.

f. Examiners' reports and testimony must be based on reasonable degree of medical or professional certainty, and if not possible, so state.

g. Counsel must have access to reports at least 48 hours before the final hearing. Wis. Stat. § 51.20(10)(b). *But see Fond du Lac Cnty. v. S.N.W. (In re Mental Commitment of S.N.W.)*, No. 2019AP2073, 2020 WL 3260732 (Wis. Ct. App. June 17, 2020) (unpublished opinion not citable per Wis. Stat. § 809.23(3)) (holding that, under harmless-error principle, failure to timely supply reports does not deprive court of competency to proceed).

7. Final hearing. Wis. Stat. § 51.20(10).

a. Notice of time and place of hearing and notice of witnesses and substance of their proposed testimony must be served within a reasonable time before hearing. Wis. Stat. § 51.20(10)(a).

b. Due process requirements under Wis. Stat. § 51.20(5):

(1) Same as for probable cause hearing, *see supra* para. 5.b.

(2) Right to final hearing (civil commitment cannot be decided on summary judgment). *Shirley J.C. v. Walworth Cnty.*, 172 Wis. 2d 371 (Ct. App. 1992).

(3) State cannot continuously extend detentions by refiling detention statements and petitions without releasing person, even in different venue or with additional information, if the underlying grounds for detention remain the same. *Stevenson L.J.*, 2009 WI App 84, ¶ 12, 320 Wis. 2d 194.

(4) Right to jury trial, Wis. Stat. § 51.20(11), subject to the following:

(a) Waived if not demanded at least 48 hours before the date for which the final hearing is scheduled.

(b) If demand is filed within 5 days after detention, trial must be within 14 days after initial detention.

(c) If demand is filed later than 5 days after detention, trial must be within 14 days after filing of demand.

(d) Can be demanded by *either* counsel or person. *Shirley J.C.*, 172 Wis. 2d 371.

(e) Withdrawal of jury demand must be knowing and voluntary. *S.B. v. Racine Cnty. (In re S.B.)*, 138 Wis. 2d 409 (1987).

NOTE: *Sauk County v. R.A.S. (In re Mental Commitment of R.A.S.)*, No. 2018AP2253, 2019 WL 5607800 (Wis. Ct. App. Oct. 31, 2019) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)), held that the respondent's due process rights were not violated by the special verdict form allowing the jury to find the respondent dangerous without having to specify which of two statutory grounds of dangerousness was applicable.

COMMENT: In the recommitment context, the Wisconsin Supreme Court has determined that when a final hearing is rescheduled, Wis. Stat. § 51.20(11)(a) allows a jury demand to be filed up until 48 hours prior to a rescheduled final hearing. *See Waukesha Cnty. v. E.J.W. (In re Mental Commitment of E.J.W.)*, 2021 WI 85, ¶39, 399 Wis. 2d 471 (2021).

(5) Right to confidentiality of civil commitment court records is not absolute; confidentiality must be requested. Wis. Stat. § 51.20(12).

(6) Court records can be released under Wis. Stat. § 51.30(3) when there is sufficient nexus between civil commitment proceeding and violent felony. *Billy Jo W. v. Metro (In re Mental Condition of Billy Jo W.)*, 182 Wis. 2d 616 (1994).

(7) Subject does not have an absolute right to be physically present at the hearing. When a petition subject appears by video hearing and does not object to that procedure, the subsequent commitment order will not be reversed on that ground. *Price Cnty. Dep't of Health & Hum. Servs. v. Sondra F. (In re Mental Commitment of Sandra F.)*, No. 2013AP2790, 2014 WL 2197943 (Wis. Ct. App. May 28, 2014) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

c. Person may waive time periods for hearing on probable cause or final hearing and enter into settlement agreement under Wis. Stat. § 51.20(8)(bg), (bm), (br), which must

(1) Be in writing;

(2) Be approved by the court;

(3) Include a treatment plan (least restrictive), Wis. Stat. § 51.20(10)(cm) (for veterans); and

(4) Be monitored for noncompliance.

NOTE: The agreement is subject to modification through the court, and the agreement has a 90-day limit. Wis. Stat. § 51.20(8)(bg).

d. Noncompliance and hearing. Wis. Stat. § 51.20(8)(bm), (br).

(1) If there is noncompliance, the corporation counsel or district attorney may file statement with court.

(2) Procedures for scheduling either probable cause or final hearing will be initiated.

(3) Original facts sufficient for findings, if proven.

(4) Individual can request hearing, to be held within 72 hours, on the issue of noncompliance.

(5) Statement of district attorney or corporation counsel will be prima facie evidence of violation.

NOTE: If the settlement agreement is reached without a probable cause hearing, the noncompliance hearing requires returning to the probable cause stage for the court to retain competency over the proceeding. *Ozaukee Cnty. v. R.CJ.Y. (In re Mental Commitment of R.CJ.Y.)*, No. 2019AP297, 2019 WL 3675154 (Wis. Ct. App. Aug. 7, 2019) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

e. Procedure

(1) Court considers recommendations from evaluations by examiners. Wis. Stat. § 51.20(9).

(2) Rules of evidence in civil proceedings apply. Wis. Stat. § 51.20(10).

(3) Burden of proof is clear and convincing evidence. Wis. Stat. § 51.20(13)(e).

NOTE: The Wisconsin Court of Appeals has held that the practice of doctors testifying by telephone does not infringe on the due process right to confront witnesses. However, perhaps because of doubt about this decision, some circuit courts will entertain motions to ensure presence of doctors. *W.J.C. v. Vilas Cnty. (In re W.J.C.)*, 124 Wis. 2d 238 (Ct. App. 1985).

f. Determination

(1) If allegations are not proven, petition is dismissed. *See, e.g.*, *Chippewa Cnty. v. M.M. (In re Mental Commitment of M.M.)*, No. 2017AP1325, 2018 WL 2046954 (Wis. Ct. App. May 1, 2018) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

(2) If allegations are proven, person is committed to care and custody of appropriate county department, *see* Wis. Stat. §§ 51.42, 51.437, with maximum term of commitment six months; recommitments for up to one year. Wis. Stat. § 51.20(13)(a), (g).

NOTE: If the person is a veteran of the U.S. armed forces, the county department must contact the U.S. Department of Veterans Affairs (DVA) to see if the person is eligible for treatment in a DVA facility. If the person is eligible, that information must be contained in the treatment plan. Wis. Stat. § 51.20(10)(cm).

NOTE: *Lessard v. Schmidt*, 379 F. Supp. 1376 (E.D. Wis. 1974), requires the commitment to be the least restrictive alternative; under *Lessard*, this issue is to be decided by the court. Therefore, counsel representing persons subject to commitment should always explore whether alternative commitments were considered and why they were deemed unsuitable, as essential issues in representing the client. Wis. Stat. § 51.20(13)(c), (dm); *see* Wis. Stat. Ann. § 51.20 Legis. Council notes—1976 (West 2020); *see also J.R.R. v. State (In re J.R.R.)*, 145 Wis. 2d 431 (Ct. App. 1988).

NOTE: Despite *Lessard*, courts have ordered a maximum placement option, leaving the determination of the least restrictive environment for the treatment to the county board. *See, e.g.*, *Dodge Cnty. v. Ashley O.P. (In re Mental Commitment of Ashley O.P.)*, No. 2009AP2908-FT, 2010 WL 958033 (Wis. Ct. App. Mar. 18, 2010) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)).

8. Postcommitment procedures

a. Appellate rights pursuant to Wis. Stat. §§ 808.04(3) and 809.30. Wis. Stat. § 51.20(15).

b. Involuntarily committed persons may request reexamination. Wis. Stat. § 51.20(16).

(1) Time periods

(a) If hearing is held within 30 days before request, there is no need to review.

(b) If hearing is held more than 30 but less than 120 days before this request, court must appoint examiner, within 24 hours after request, to conduct evaluation within seven days and report to court; *review hearing then optional*.

(c) If no hearing is held within 120 days before this request, *review hearing must be held within 30 days after request*.

(d) For persons criminally committed, 30-day time limit is directory and violation will not result in release. *State ex rel. Marberry v. Macht*, 2003 WI 79, 262 Wis. 2d 720 (holding that six-month time limit is mandatory for reexamination,

but habeas corpus release will not lie as a remedy in Wis. Stat. ch. 980 cases); *State v. R.R.E.*, 162 Wis. 2d 698 (1991).

(2) Petition filed in court exercising probate jurisdiction in county of commitment or county of detention.

(3) No right to a jury trial for a conditionally released insanity acquittee on petition for recommitment. *State v. M.S.*, 159 Wis. 2d 206 (Ct. App. 1990).

c. Extension

(1) Hearing must be held before the expiration of commitment.

NOTE: Wis. Stat. § 51.20(13)(g)2r. requires that the petition be filed at least 21 days prior to the expiration of the commitment. However, in *Waupaca County v. K.E.K. (In re Mental Commitment of K.E.K.)*, No. 2018AP1887, 2019 WL 4677402 (Wis. Ct. App. Sept. 26, 2019) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)), *aff'd*, 2021 WI 9, 395 Wis. 2d 460 (2021), *cert. denied*, 142 S. Ct. 594 (2021), the court affirmed a recommitment when the petition was filed 17 days prior to the expiration of the commitment in which competency to proceed was found.

(2) Person has a right to a jury trial if he or she properly demands one. *G.O.T. v. Rock Cnty. (In re G.O.T.)*, 151 Wis. 2d 629 (Ct. App. 1989).

(3) Jurisdiction and requirement of actual appearance to extend

The original commitment confers jurisdiction on the circuit court in the extension context and the extension hearing can go forward in absentia, and the court can find the respondent in default, when the extension petition was served on the respondent's attorney. *Waukesha Cnty. v. S.L.L. (In re Mental Commitment of S.L.L.)*, 2019 WI 66, 387 Wis. 2d 333.

(4) Settlement agreements for extension without a hearing

It is acceptable for the court to accept a stipulation for extension of a commitment without engaging in a colloquy with the respondent prior to acceptance. *Dane Cnty. v. N.W. (In re Mental Commitment of N.W.)*, No. 2019AP48, 2019 WL 4062544 (Wis. Ct. App. Aug. 29, 2019) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

(5) Statute offering two methods of establishing present dangerousness for extension held constitutional.

In *Waupaca County v. K.E.K. (In re Mental Commitment of K.E.K.)*, 2021 WI 9, 395 Wis. 2d 460, *cert. denied*, 142 S. Ct. 594 (2021), the court upheld the constitutionality of the extension statute, Wis. Stat. § 51.20(13)(g)3., stating that the statute either requires a finding of current dangerousness or that such a finding could be made if treatment were withdrawn.

d. Interface of appeal and mootness issues

(1) Increasingly, courts are grappling with the issue of the underlying commitment being appealed and an extension granted prior to the appellate court deciding the direct appeal. The direct appeal of the commitment is mooted by the commitment's expiration. *Winnebago Cnty. v. Christopher S. (In re Mental Commitment of Christopher S.)*, 2016 WI 1, ¶¶ 30–31, 366 Wis. 2d 1. Unless an exception to mootness is found, a subsequent extension of the commitment will lead to an appeal of the initial commitment being dismissed as moot. *Portage Cnty. v. J.W.K. (In re Mental Commitment of J.W.K.)*, 2019 WI 54, 386 Wis. 2d 672. But see *Marathon County v. D.K. (In re Condition of D.K.)*, 2020 WI 8, 390 Wis. 2d 50, in which court held that even with expiration of commitment, appeal is not moot if subject still has a firearms ban, a collateral consequence of the commitment, following *Christopher S.*

(2) In a case in which the subject of the petition was not served with the petition for extension but the subject's attorney was served, the court in *Waukesha County v. S.L.L. (In re Mental Commitment of S.L.L.)*, 2019 WI 66, 387 Wis. 2d 333, held that the case was moot but met the exception for being of great public importance and was likely to evade appellate review if not decided.

(3) In *D.J.W.*, 2020 WI 41, 391 Wis. 2d 231, despite the death of the subject during the pendency of the appeal, the Wisconsin Supreme Court ruled that the importance of the issue of factual findings tracking the statute on recommitment rendered the matter ripe for review. Moreover, "*going forward* circuit courts in recommitment proceedings are to make specific factual findings with reference to the subdivision paragraph of § 51.20(1)(a)2. on which the recommitment is based." *Id.* ¶ 40 (emphasis added). Thus, the requirement does not apply to cases held prior to the ruling. See *Winnebago Cnty. v. D.D.A. (In re Mental Commitment of D.D.A.)*, No. 2020AP1351, 2020 WL 7636632 (Wis. Ct. App. Dec. 23, 2020) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

NOTE. The court of appeals has reversed numerous commitments for violating the requirement articulated in *D.J.W.* to show one of the five statutory standards of dangerousness. *See, e.g.*, *Ozaukee Cnty. v. J.D.A. (In re Mental Commitment of J.D.A.)*, No. 2021AP1148, 2021 WL 5917605 (Wis. Ct. App. Dec. 15, 2021) (unpublished opinion not citable per Wis. Stat. § 809.23(3)). In *Waupaca County v. G.T.H. (In re Commitment of G.T.H.)*, No. 2021AP1410, 2021 WL 6069727 (Wis. Ct. App. Dec. 23, 2021) (unpublished opinion not citable per Wis. Stat. § 809.23(3)), the county conceded that the circuit court erred because it did not make factual findings on the statutory basis for its determination of dangerousness as required under *D.J.W.* At least one court has applied the *D.J.W.* standards to the initial commitment context directly. *Shawano Cnty. v. S.L.V. (In re Mental Commitment of S.L.V.)*, No. 2021AP223, 2021 WL 3625880 (Wis. Ct. App. Aug. 17, 2021) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

(4) The Wisconsin Court of Appeals decided several other fact-specific cases in 2020. *See, e.g.*, *Portage Cnty. v. E.R.R. (In re Mental Commitment of E.R.R.)*, No. 2019AP2033, 2020 WL 2563746 (Wis. Ct. App. May 21, 2020) (unpublished opinion citable for persuasive value per Wis. Stat § 809.23(3)(b)) (appeal mooted by subsequent commitment extension), *aff'd per curiam*, 2021 WI 22, __ Wis. 2d __; *Waukesha Cnty. v. H.M.B. (In re Mental Commitment of H.M.B.)*, No. 2020AP570, 2020 WL 5542100 (Wis. Ct. App. Sept. 16, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (holding that when commitment order

expired during appeal, collateral consequences of commitment do not prevent mootness unless consequences themselves continue after commitment expires); *Sauk Cnty. v. S.A.M. (In re Mental Commitment of S.A.M.)*, No. 2019AP1033, 2020 WL 5240605 (Wis. Ct. App. Sept. 3, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (same). *But see Fond du Lac Cnty. v. R.O.V. (In re Mental Commitment of R.O.V.)*, Nos. 2019AP1228, 2020AP853, 2020 WL 7380327 (Wis. Ct. App. Dec. 16, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (in consolidated appeal of original commitment and recommitment, case not mooted when additional recommitments in the past rendered the case easily evadable from review) (citing *Waukesha Cnty. v. L.J.M. (In re Mental Commitment of L.J.M.)*, No. 2020AP820-FT, 2020 WL 6478390 (Wis. Ct. App. Nov. 4, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b) (review denied).

(5) In extension hearings, in addition to meeting the dangerousness standard, the county may also allege that there is a substantial likelihood of a resumption of dangerous behavior, acts, or omissions even without a showing of recent actions. *See Winnebago Cnty. v. S.H. (In re Mental Commitment of S.H.)*, 2020 WI App 46, ¶¶ 9, 16, 393 Wis. 2d 511, *cited in Outagamie Cnty. v. R.W. (In re Mental Commitment of R.W.)*, No. 2020AP1171-FT, 2020 WL 7391944, ¶¶ 16–17 (Wis. Ct. App. Dec. 17, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b) (holding that cycle of past dangerous behavior may be sufficient to extend commitment).

e. Due process concerns in extension hearings

In *Waukesha County v. S.L.L. (In re Mental Commitment of S.L.L.)*, 2019 WI 66, ¶¶ 22–24, 397 Wis. 2d 333, the court held that the procedure for extending a person's commitment is governed by Wis. Stat. § 51.20(10)–(13), which incorporates Wis. Stat. § 801.14, such that the county must serve the extension petition itself and, within a reasonable time before the hearing, serve notice of the hearing time and place and the witnesses to be called.

9. Mental disease or defect commitment. *State v. Randall*, 192 Wis. 2d 800 (1995).

a. Defendant who is found not responsible because of mental disease or defect may be confined even when he or she is no longer mentally ill, solely on the ground that he or she presents a danger to self or others.

b. Confinement can continue as long as danger exists, but no longer than maximum period for offense charged.

c. DHS is responsible for funding conditions for release from commitment under Wis. Stat. § 971.17 of persons found not guilty of crimes by reason of mental disease or defect. *Rolo v. Goers*, 174 Wis. 2d 709 (1993).

NOTE: Regarding proceedings for commitment/recommitment, in *D.J.W.*, 2020 WI 41, ¶ 40, 391 Wis. 2d 231, the supreme court held that "going forward circuit courts are to make specific factual findings with reference to the subdivision paragraph of Wis. Stat. § 51.20(1)(a)2. on which the recommitment is based." *See also* NOTE, *supra*, at 8.d.(3).

10. Contempt

    a. Court may order jail for contempt with inpatient treatment as purge condition. *State ex rel. Larsen v. Larsen*, 165 Wis. 2d 679 (1992).

    b. Court may not commit directly to treatment for contempt. *C.S. v. Racine Cnty. (Finding of Contempt in re J.S.)*, 137 Wis. 2d 217 (Ct. App. 1987).

H. Right to Consent to and Refuse Treatment [§ 34.515]

1. Commitment is not synonymous with incompetency; right to refuse medication and treatment can be overridden only if probable cause exists to believe that the person is incompetent to refuse them. Wis. Stat. §§ 51.61(6), 51.67; *Outagamie Cnty. v. Melanie L. (In re Mental Commitment of Melanie L.)*, 2013 WI 67, 349 Wis. 2d 148; *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710 (1987).

    a. Applies to medication and treatment. Wis. Stat. § 51.61(1)(g).

    b. Advantages and disadvantages of and alternatives to medication or treatment must be explained to person.

    NOTE: In *Winnebago County v. C.S. (In re Mental Commitment of C.S.)*, 2020 WI 33, 391 Wis. 2d 35, the Wisconsin Supreme Court ruled that involuntary medication of inmates committed under Wis. Stat. ch. 51 requires a finding of dangerousness, distinguishing cases such as *State v. Fitzgerald*, 2019 WI 69, 387 Wis. 2d 384, and *Winnebago County v. Christopher S. (In re Mental Commitment of Christopher S.)*, 2016 WI 1, 366 Wis. 2d 1, which allowed involuntary medication to restore competency to stand trial, and mental commitment for a prison inmate without such a finding.

2. A person is not competent to refuse medication or treatment if he or she is incapable of expressing *or* substantially incapable of applying understanding of advantages, disadvantages, and alternatives to accepting particular medication or treatment after having them explained, in order to make informed choice. Wis. Stat. § 51.61(1)(g)4.

    COMMENT: The plain meaning of the above paragraph was analyzed in *Melanie L.*, 2013 WI 67, ¶¶ 57–71, 349 Wis. 2d 148. Courts construing this language have determined that commitment and involuntary medication orders cannot be allowed absent a showing of an explanation of the advantages and disadvantages of medication and treatment and their alternatives. *See, e.g.*, *Waukesha Cnty. v. Kathleen H. (In re Mental Commitment of Kathleen H.)*, No. 2014AP90, 2014 WL 2871274, at *4 (Wis. Ct. App. June 14, 2014) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)); *Eau Claire Cnty. v. Mary S. (In re Mental Commitment of Mary S.)*, No. 2013AP2098, 2014 WL 292433, at *5 (Wis. Ct. App. Jan. 28, 2014) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)). Although the record must show evidence that the explanation has been given, there need not be a certain date when the explanation must be given. *Winnebago Cnty. v. B.C. (In re Mental Commitment of B.C.)*, No. 2015AP1192, 2015 WL 5943467 (Wis. Ct. App. Oct. 14, 2015) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)). Subsequently, courts have held that cursory testimony on this subject is permissible. *Christopher S.*, 2016 WI 1, 366 Wis. 2d 1; *see also Outagamie Cnty. v. J.J. (In re Mental Commitment of J.J.)*, No. 2016AP43-FT, 2016 WL 5923039 (Wis. Ct. App. Oct. 12, 2016) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)); *Marquette*

Cnty. v. T.F.W. (In re Mental Commitment of T.F.W.), No. 2015AP2603-FT, 2016 WL 1138430 (Wis. Ct. App. Mar. 24, 2016) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)). In addition, if a subject denies a finding of mental illness, that may be enough to render the person incompetent to make a decision on the advantages or disadvantages of medication and treatment. *Winnebago Cnty. v. M.O.S. (In re Mental Commitment of M.O.S.)*, No. 2015AP2619, 2016 WL 3263946 (Wis. Ct. App. June 15, 2016) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (citing *Outagamie Cnty. v. Melanie L.*, 2013 WI 67, 349 Wis. 2d 148).

COMMENT: An interesting case to consider is *Waukesha County v. M.J.S. (In re Mental Commitment of M.J.S.)*, No. 2017AP1843, 2018 WL 3656152 (Wis. Ct. App. Aug. 1, 2018) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)). This opinion was first published with a reversal of the circuit court ruling that reasonable efforts were made to provide the subject with the explanation. This opinion was withdrawn and was reissued with a lengthy discussion of the concepts of relinquishment and waiver. The court determined that the explanation must be explicitly waived to avoid the requirement that it must be provided. 2018 WL 3656152, at *4–5.

3. Until the probable cause hearing, person must consent in writing to receive medication or treatment. Wis. Stat. § 51.20(8)(c).

4. Per Wis. Stat. § 51.61(1)(g)2., 4., at or after the probable cause hearing and before final commitment hearing, court must find

   a. Probable cause that person is incompetent to refuse medication or treatment,

   b. Medication or treatment will have therapeutic value, and

   c. Medication or treatment will not unreasonably impair person's ability to prepare for later legal proceedings on his or her behalf.

5. At or after the final commitment hearing, court must find person not competent to refuse medication or treatment. Wis. Stat. § 51.61(1)(g)3., 4.

6. If the person was committed pursuant to the "fifth standard" under Wis. Stat. § 51.20(1)(a)2.e., the court has already made the findings necessary for administering treatment and medication and must issue an order permitting medication or treatment, regardless of person's consent. Wis. Stat. § 51.61(1)(g)3m.

7. Postcommitment hearing regarding treatment and informed consent. Wis. Stat. § 51.61(1)(g)2., 3.

   a. Must be held on court's own motion or interested person's motion.

   b. Physician's statement must be included with any report filed with motion to determine competency to refuse treatment.

      COMMENT: A doctor's statement is more likely to be accepted if it tracks the statutory language. When doctor's testimony did not do so, the burden of proof might not be met. *Melanie L.*, 2013 WI 67, ¶ 91, 349 Wis. 2d 148. A reviewing court can determine if evidence supports finding of competency to refuse treatment even when the county has

concerns about the extent of its own evidence. *Ozaukee Cnty. v. C.Y.K. (In re Mental Commitment of C.Y.K.)*, No. 2015AP1080, 2015 WL 7161201 (Wis. Ct. App. Sept. 9, 2015) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

c. Notice of motion and hearing must be given to person and his or her counsel, if any, and counsel under Wis. Stat. § 51.20(4).

d. Due process rights apply, except for jury trial. Wis. Stat. § 51.20.

NOTE: Telephone testimony is often used. The attorney must be extremely well prepared. Experts are key to challenging the state's position and to preventing pro forma hearings. *W.J.C.*, 124 Wis. 2d 238.

NOTE: In *Dodge County. v. L.A.S. (In re Mental Commitment of L.A.S.)*, No. 2017AP802, 2017 WL 3535391 (Wis. Ct. App. Aug. 17, 2017) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)), the court allowed a nonphysician to testify as an expert without the need for a physician or psychiatrist in the context of an extension hearing.

e. Probate commissioner can order person who has been committed to take medication. *Carol J.R. v. Milwaukee Cnty. (In re Carol J.R.)*, 196 Wis. 2d 882 (Ct. App. 1995).

f. Hearing must be held within 10 days after motion; may be extended to 20 days on request of counsel.

g. Burden of proof

(1) Precommitment: Probable cause.

(2) Postcommitment: Clear and convincing evidence. Wis. Stat. §§ 51.20(13)(e), 971.14(4), 971.17(3)(b), (c); *Melanie L.*, 2013 WI 67, 349 Wis. 2d 148; *Virgil D.*, 189 Wis. 2d 1.

NOTE: A court has ruled that a subject's denial of a mental illness diagnosis can be proof of incompetence to refuse medication. *Winnebago Cnty. v. B.C. (In re Mental Commitment of B.C.)*, No. 2018AP846-FT, 2018 WL 4224381 (Wis. Ct. App. Sept. 5, 2018) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23 (3)(b)).

h. No guardian appointed—if person found incompetent, treatment decisions become vested in his or her physician.

8. Prohibition against giving electroconvulsive treatment (ECT) without patient's consent can be abrogated if patient's life may be at stake. *Professional Guardianships, Inc. v. Ruth E.J. (In re Guardianship of Ruth E.J.)*, 196 Wis. 2d 794 (Ct. App. 1995).

I. Procedure for Nonconsensual Administration of Psychotropic Medication Under Wis. Stat. Ch. 55 [§ 34.516]

1. The procedure for involuntary administration of psychotropic medication might apply to individuals with developmental disabilities, degenerative brain disorder, serious and persistent

mental illness, or other like incapacities who are determined not competent to refuse medications if, after having the advantages and disadvantages of and alternatives to accepting a particular medication explained, one of the following is true, *see* Wis. Stat. § 55.14(1)(b):

a. The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting treatment; or

b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages, and alternatives so as to make an informed decision with regard to the medication.

2. Per Wis. Stat. § 55.14(3), the person is subject to nonconsensual administration of psychotropic medication if a physician has prescribed the medication, and the person

a. Is incompetent for this purpose;

b. Has refused to take the medication voluntarily, or attempting to administer the medications voluntarily is not feasible or not in the individual's best interests;

c. Is likely to respond positively to medication; and

d. Will, if not medicated, incur a substantial probability of harm, impairment, injury, or debilitation or present a substantial probability of physical harm to others; and either

(1) Has a history of such harm, impairment, injury, or threats, with at least two episodes (one of which occurred in the preceding 24 months) meeting the criteria of Wis. Stat. § 55.14(3)(e)1.; or

(2) Meets one of the criteria under the five commitment standards for dangerousness, *see* Wis. Stat. § 51.20(1)(a)2.a.–.e.

3. Per Wis. Stat. § 55.10(4), if a petition is filed under Wis. Stat. § 55.14, a hearing will be held pursuant to Wis. Stat. § 55.10(4) and includes

a. The right to an independent examination, paid for by the county;

b. Notice;

c. Right to counsel;

d. Guardian ad litem;

e. Right to jury trial and cross-examination of witnesses; and

f. Proof by clear and convincing evidence.

4. If the standards are met by clear and convincing evidence, the court may issue an order authorizing a person's guardian to consent to psychotropic medication and

a. Direct the development of an appropriate treatment plan, Wis. Stat. § 55.14(8); and

b. Order the individual to comply with the treatment plan and specify the methods to implement the order.

NOTE: The supreme court has addressed the standard of having to show the potential of improvement of an acute condition. *See Waukesha Cnty. v. J.W.J. (In re Mental Commitment of J.W.J.)*, 2017 WI 57, 375 Wis. 2d 542; *Fond du Lac Cnty. v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, 2012 WI 50, 340 Wis. 2d 500. Both cases should be examined carefully to determine the extent of the petitioner's need to show that treatment would result in significant improvement of the subject's underlying mental illness.

III. ALCOHOLISM COMMITMENTS [§ 34.517]

A. Definitions [§ 34.518]

1. *Alcoholic*. Wis. Stat. § 51.01(1), (1m). Person suffering from alcoholism, a disease characterized by dependency on the drug alcohol, to extent that the person's

   a. Health is substantially impaired or endangered, or

   b. Social or economic functioning is substantially disrupted.

2. *Designated person*. Wis. Stat. § 51.45(2)(cr).

   a. Performs, in part, protective custody functions of a law enforcement officer;

   b. Operates under agreement between the county department and the appropriate law enforcement agency; and

   c. Has qualifications established by the community board.

3. *Incapacitated by alcohol*. Wis. Stat. § 51.45(2)(d).

   a. Means that as a result of the use of or withdrawal from alcohol, person

      (1) Is unconscious, or

      (2) Has judgment so impaired that he or she is incapable of rational decision-making; and

   b. Is evidenced objectively by such indicators as extreme physical debilitation, physical harm, or threats of harm to self, others, or property.

4. *Intoxicated person*. Wis. Stat. § 51.45(2)(f). Person whose mental or physical functioning is substantially impaired from use of alcohol.

5. *Treatment*. Wis. Stat. § 51.45(2)(g).

   a. Broad range of emergency, outpatient, intermediate, and inpatient services and care that may be extended to alcoholic and intoxicated persons.

(1) Includes diagnostic evaluation; medical, surgical, psychiatric, psychological, and social service care; vocational rehabilitation; career counseling.

(2) May include, but may not be replaced by, physical detention of persons involuntarily committed or detained in an approved treatment facility.

b. Psychiatric, psychological, and social service care that may be extended to person's family.

B. Voluntary Treatment [§ 34.519]

1. Adult. Wis. Stat. § 51.45(10)(a).

a. May apply to any approved treatment facility.

b. Superintendent of facility determines whether person is appropriate for admission.

2. Minor

NOTE: There are several confusing aspects to these statutes as they relate to minors: Wis. Stat. § 51.45(2m) applies equally to adults and minors; however, Wis. Stat. § 51.13 governs the admission of minors to inpatient facilities, and Wis. Stat. § 51.47 governs the ability of minors to obtain preventive, diagnostic, assessment, evaluation, or treatment services without consent.

a. Per Wis. Stat. § 51.47(1), (2), a minor 12 years of age or older may receive a wide variety of services without parental consent, except

(1) Surgical procedures (unless necessary to preserve the minor's health or life and consent is not readily obtainable),

(2) Controlled substances for detoxification,

(3) Admission for inpatient treatment (except for detoxification), and

(4) Admission beyond 72 hours.

b. Per Wis. Stat. § 51.47(1), a minor under 12 may receive preventive, diagnostic, assessment, evaluation, or treatment services for AODA without parental consent if a parent or guardian cannot be found.

c. Per Wis. Stat. § 51.13, inpatient admission of a minor beyond 72 hours for detoxification is governed by Wis. Stat. § 51.13. *See supra* § 34.7.

d. Per Wis. Stat. § 51.45(7)(b), (10), outpatient, preventive, and intervention services may be received by minor, subject to the notification provisions in Wis. Stat. § 51.47.

3. Treatment and services. Wis. Stat. § 51.45(11).

a. Person may seek treatment on his or her own or may request aid from law enforcement personnel.

b. If person appears incapacitated, a law officer must place person under protective custody and transport him or her to an approved public treatment facility.

c. Whether person arrives voluntarily or is brought in by an officer, treatment staff must immediately examine; staff may then admit or transfer to approved facility.

d. Person incapacitated upon or after arrival may be detained for up to 72 hours, excluding Saturdays, Sundays, and holidays. He or she

(1) Must then be released unless he or she agrees to remain voluntarily, and

(2) May be held longer only if a petition for commitment is filed.

C. Emergency Commitment [§ 34.520]

See Wis. Stat. § 51.45(12).

1. Grounds. Wis. Stat. § 51.45(12)(a).

a. Intoxication

(1) Must be intoxicated.

(2) Must be dangerous.

(a) Has threatened, attempted, or inflicted physical harm on self or other person.

(b) Is likely to inflict physical harm unless committed.

b. Incapacitation. *See supra* § 34.15.

2. May be temporarily committed by the county department and brought to an approved facility for emergency treatment. Wis. Stat. § 51.45(12)(a).

3. Petition for commitment. Wis. Stat. § 51.45(12)(b).

a. Petition must be filed in the circuit court of the county where person resides or is present.

b. Petitioner may be

(1) Physician,

(2) Spouse,

(3) Guardian,

(4) Relative, or

(5) Any responsible person.

c. Contents

(1) Facts to support the need for emergency treatment (i.e., alcoholic condition and dangerousness), and

(2) One or more affidavits that aver with particularity the factual basis for petition's allegations.

4. Court determines whether petition and affidavits sustain grounds for commitment. Wis. Stat. § 51.45(12)(c).

a. Dismissed if grounds do not exist.

b. Temporary commitment order issued pending probable cause hearing, if grounds exist.

(1) Court ensures appointment of defense counsel.

(2) Court orders person taken into protective custody and brought to approved public treatment facility.

(3) Probable cause hearing scheduled.

(a) Within 48 hours after receipt of petition, excluding Saturdays, Sundays, and holidays. Wis. Stat. § 51.45(11)(d).

(b) If at that time person is unable to assist in his or her defense because he or she is incapacitated by alcohol, person or attorney may move for extension of 48 hours (excluding weekends and holidays).

5. Per Wis. Stat. § 51.45(12)(d), if detained, due process requires the following:

a. On arrival at the facility, person must receive oral and written notice of his or her right to

(1) Counsel,

NOTE: Under 2009 Wis. Act 180, it is clear that the person has a right to counsel from the State Public Defender's Office without regard to indigency.

(2) Consult with counsel before requesting voluntary treatment,

(3) Not converse with treatment staff,

(4) Remain silent,

(5) Refuse medication that would render person unable to adequately prepare defense,

(6) Notice of exact time and place of the probable cause hearing, and

(7) Notice of reason for detention and standards for commitment.

b. If possible, notice of rights must also be given to person's immediate family.

c. Copy of written application and supporting affidavits must be given to person.

6. Probable cause hearing. *See infra* § 34.18 (preliminary hearing).

D. Involuntary Commitment [§ 34.521]

See Wis. Stat. § 51.45(13).

1. Petition

a. Must be made by three adults, at least one of whom has personal knowledge of person's conduct and condition. Wis. Stat. § 51.45(13)(a).

b. Per Wis. Stat. § 51.45(13)(a)1.–5., petition must

(1) Contain allegations that

(a) Person habitually lacks self-control in his or her use of alcohol beverages,

(b) Person uses alcohol to an extent that his or her health is substantially impaired or endangered,

(c) Person's economic or social functioning is substantially disrupted, and

(d) Person's condition is evidenced by pattern of conduct that is dangerous to person and others.

(2) State facts sufficient to form indigency determination or that person is a child. Wis. Stat. § 51.45(13)(a)3.

(3) Be supported with affidavit of each petitioner who has personal knowledge that avers with particularity the factual basis for the allegations. Wis. Stat. § 51.45(13)(a)4.

(4) Contain statement from each petitioner who does not have personal knowledge as to the basis for his or her belief. Wis. Stat. § 51.45(13)(a)5.

c. Per Wis. Stat. § 51.45(13)(dg), the court must treat a petition for involuntary alcohol commitment as a petition for mental illness commitment if certain conditions are met:

(1) Petitioner's counsel notifies all parties, including court, within a reasonable time before hearing, of intent to ask court to proceed under Wis. Stat. § 51.20(1); and

(2) At hearing, court determines probable cause to believe person fit for petition under Wis. Stat. § 51.20(1).

2. Court review. Wis. Stat. § 51.45(13)(b).

    a. Court determines whether petition and affidavits sustain grounds for commitment.

        (1) Dismissed if grounds do not exist.

        (2) If grounds exist:

            (a) If person is not already detained (e.g., under emergency commitment, *see supra* § 34.16), order may be issued for temporary commitment at approved treatment facility pending preliminary hearing; and

            (b) Court ensures appointment of defense counsel.

    b. Preliminary hearing scheduled. Wis. Stat. § 51.45(13)(b)4.

        (1) If person is not in custody, hearing must be within a reasonable time.

        (2) If person is taken into custody, hearing must be within 72 hours after the time person arrives at treatment facility.

        (3) Extension of 48 hours may be granted if person is incapacitated and cannot assist in his or her defense.

            (a) On motion of defense counsel only.

            (b) Excludes Saturdays, Sundays, and holidays.

3. Preliminary hearing. Wis. Stat. § 51.45(13)(c).

    a. Due process

        (1) Person not taken into custody must receive effective and timely written notice of preliminary hearing and supporting documents; copies to guardian, person's counsel, and petitioners; include notice of

            (a) Right to an attorney,

            (b) Right to a jury trial,

            (c) Right to be examined by a physician, and

            (d) Standards under which commitment may occur.

        (2) If person is taken into custody, oral and written notice (and written notice to immediate family) must include

            (a) Same rights as detailed in paras. (1)(a)–(d), *supra*;

(b) Right to consult with an attorney before request for voluntary treatment;

(c) Right not to converse with examiners;

(d) Fact that anything said to examiners or treatment personnel may be used as evidence against person at hearing;

(e) Right to refuse medication that would render person unable to prepare defense; and

(f) Time and place of preliminary hearing.

(3) Copy of petition and any supporting affidavits must be given to person with notice. Wis. Stat. § 51.45(12)(f).

b. Probable cause: Regardless of how action commenced, purpose of preliminary hearing is to determine whether probable cause exists to believe allegations of petition. Wis. Stat. § 51.45(13)(d).

c. Person *must* be represented by counsel at preliminary hearing. Wis. Stat. § 51.45(13)(d).

d. Person must be present at hearing. Wis. Stat. § 51.45(13)(d).

e. Findings. Wis. Stat. § 51.45(13)(e).

(1) No probable cause: petition dismissed

(2) Probable cause

(a) Schedule full hearing within 14 days after probable cause finding.

(b) Extension of 14 days at request of person for good cause shown.

f. Court appoints examiners to evaluate subject—if possible, at least one examiner must be licensed physician. Wis. Stat. § 51.45(13)(f).

g. All reports must be made available to counsel at least 96 hours before trial. Wis. Stat. § 51.45(13)(e).

NOTE: Counsel is to have "access" to reports. This does not mean, however, that reports must be filed with the court or otherwise affirmatively provided. *Dodge Cnty. v. Michael J.K. (In re Michael J.K.)*, 209 Wis. 2d 499 (Ct. App. 1997).

4. Full hearing

a. Under Wis. Stat. § 51.45(13)(n), venue is

(1) County where person resides, or

(2) County where person is found.

b. Open unless person requests it closed. Wis. Stat. § 51.45(13)(f).

c. Ordinary rules of evidence apply. Wis. Stat. § 51.45(13)(f).

d. If person has refused examination and the court finds sufficient evidence to believe the allegations, or court believes more medical evidence is necessary, person may be detained up to five days longer for diagnostic evaluation.

e. Per Wis. Stat. § 51.45(13)(g), trier of fact may commit if all the following are true:

(1) Allegations of petition are established by clear and convincing evidence.

(2) Relationship found between alcoholic condition and pattern of conduct during immediately preceding 12 months.

(a) Conduct dangerous to person or others.

(b) Conduct established with reasonable certainty.

(3) Extreme likelihood that pattern of conduct will continue or repeat without intervention of involuntary commitment or institutionalization.

(4) Clear and convincing evidence to prove no suitable alternative in community for person, and that county department able to provide effective and appropriate treatment for person.

NOTE: Wis. Stat. ch. 51 provides the exclusive commitment procedure. An attempt to commit a parent to a drug treatment center under the Children's Code (Wis. Stat. ch. 48) was found unconstitutional. *C.S. v. Racine Cnty. (Finding of Contempt in re J.S.)*, 137 Wis. 2d 217 (Ct. App. 1987).

5. Disposition

a. Release. Wis. Stat. § 51.45(13)(h).

b. Commitment to county department. Wis. Stat. § 51.45(13)(h), (j).

(1) Initial commitment for up to 90 days.

(2) Recommitment for up to six months.

NOTE: Wis. Stat. § 51.45(9) requires that the patient be *initially* assigned or transferred to outpatient or intermediate treatment unless inpatient treatment is required; this section precedes both voluntary and involuntary portions of Wis. Stat. § 51.45 and presumably applies to both. Wis. Stat. § 51.45(9).

NOTE: If the person is a veteran of the U.S. armed forces, the county department must contact the DVA to see if the person is eligible for treatment in a DVA facility. If the person is eligible, the department may transfer the person to that facility if

DVA approves. Wis. Stat. § 51.45(13)(h).

Chapter 35
Animal Law

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NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 232; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Apr. 2022, No.796; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-114 (Apr. 29, 2022); all references to the Code of Federal Regulations (C.F.R.) are current through 87 Fed. Reg. 25,568 (Apr. 29, 2022); and all references to Wis. JI—Civil are to the 2022 supplement.

I. INTRODUCTION [§ 35.522]

A. Scope of Chapter: What Is Animal Law? [§ 35.523]

This chapter is designed to provide attorneys with an introduction to and an overview of the practice of animal law. Describing what constitutes animal law is almost as complicated as describing what constitutes *human law*, because of the complexities of life and the interrelation of issues, both of which, by necessity, encompass many different substantive areas of law. This chapter gives a brief introduction to many of those areas of law, including constitutional, criminal, tort, and contract law. Because federal and state statutes and regulations, as well as local ordinances, affect the law as it pertains to animals, it is important to remember that this chapter is but a starting point. This chapter focuses on Wisconsin cases and statutes, mentioning federal laws and trends among state laws when appropriate.

B. Animal Law Versus Animal Rights and Animal Welfare [§ 35.524]

1. *Animal law* is a body of statutes, administrative regulations, and cases addressing the treatment of animals and the human beings who interact with them.

2. *Animal rights* is the philosophy that animals should have basic legal rights.

3. *Animal welfare* is the philosophy that animals should be treated humanely.

4. Animal law is not synonymous with either animal rights or animal welfare, although much of animal law has developed because of organizations or individuals advocating for greater protections for animals.

5. The study and practice of animal law create opportunities for considering the ethical implications of how animals are treated and used in society.

C. Additional Sources [§ 35.525]

For more comprehensive treatment of specific areas of animal law, and for additional references to related materials, consult the following sources.

1. Sonia S. Waisman et al., *Animal Law: Cases and Materials* (5th ed. 2014).

2. Dale D. Goble & Eric T. Freyfogle, *Wildlife Law: Cases & Materials* (3d ed. 2017).

3. Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 Pepp. L. Rev. 273 (2006).

4. Animal Legal & Hist. Ctr., Michigan State Univ. Coll. of Law, https://www.animallaw.info (last visited May 3, 2022).

5. Gerry W. Beyer, *Estate Planning for Non-Human Family Members*, http://www.professorbeyer.com/Articles/Pet_Trusts_06-02-2014.pdf (last updated June 2, 2014).

6. Litigating Animal Law Disputes: A Complete Guide for Lawyers (Joan Schaffner & Julie Fershtman eds., 2009).

7. Pamela D. Frasch et al., *Animal Law in a Nutshell* (3d ed. 2021).

8. Robert Brammer, *An Introduction to Animal Law*, Law Librarians of Congress: In Custodia Legis (July 25, 2014), https://blogs.loc.gov/law/2014/07/an-introduction-to-animal-law/.

9. Wis. State Law Library, *Legal Topics—Animal Law*, http://wilawlibrary.gov/topics/animal.php (last updated May 3, 2021).

II. DEFINITION OF ANIMAL [§ 35.526]

A. Domestic and Wild Animals [§ 35.527]

1. The statutory definition of *animal* varies by jurisdiction and according to the intent and purpose of the specific statute in which the definition is located. Definitions of *animal* in Wisconsin include the following:

   a. Wisconsin's Crimes Against Animals statute, Wis. Stat. § 951.01(1), defines an animal as every living

      (1) Warm-blooded creature, except a human being;

      (2) Reptile; or

      (3) Amphibian.

b. Wisconsin's Animal Health statute, Wis. Stat. § 95.001(1)(ad), defines a *domestic animal* as any of the following:

(1) A member of a species that has been domesticated by humans;

(2) A farm-raised deer, farm-raised game bird, or farm-raised fish; or

(3) An animal that is listed as a domestic animal by rule by the Department of Agriculture, Trade and Consumer Protection (DATCP), *see* Wis. Admin. Code § ATCP 10.02 (listing domestic animals).

c. Wisconsin's Wild Animals and Plants statute defines a *wild animal* generally as "any mammal, bird, fish, or other creature of a wild nature endowed with sensation and the power of voluntary motion." Wis. Stat. § 29.001(90).

d. Some sections of Wis. Stat. ch. 29 also provide more specific definitions of *wild animal* for particular contexts. *See, e.g.*, Wis. Stat. §§ 29.604(2)(c) (endangered and threatened species), 29.885(1)(f) (removal of wild animals).

2. Wisconsin courts have further interpreted statutory definitions. The following cases illustrate the difficulty in determining whether an animal is wild or domesticated:

a. A captive buck deer was determined to have been wild, under Wisconsin's recreational immunity statute, Wis. Stat. § 895.52(2)(b), regardless of the deer's captivity in a fenced-in "deer display." *Hudson v. Janesville Conservation Club*, 168 Wis. 2d 436 (1992).

b. A rabbit could be either a domesticated or wild animal, under Wis. Stat. § 895.52(2)(b), regardless of whether the rabbit was treated as a pet. *Zinter v. Oswskey*, No. 00-2643, 2001 WL 800460, ¶ 38 (Wis. Ct. App. July 17, 2001) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

B. Commonalities Among State and Federal Definitions [§ 35.528]

1. Throughout the nation, state definitions of *animal*, both domestic and wild, vary greatly in complexity.

a. Illinois's Humane Care for Animals Act simply defines a *companion animal* as "an animal commonly considered to be … a pet" and "includes, but is not limited to, canines, felines, and equines." 510 Ill. Comp. Stat. Ann. 70/2.01a (West, Westlaw current through Pub. Act 102-699).

b. Conversely, the definition of a *domestic animal* in Pennsylvania's cruelty to animals statute is more specific and covers "[a] dog, cat, equine animal, bovine animal, sheep, goat or porcine animal." 18 Pa. Cons. Stat. Ann. § 5531 (West, Westlaw current through 2022 Reg. Sess. Act 20).

c. *Wild animal* definitions also vary significantly, from Connecticut's rabies control statute's reference to "any mammal which is ferae naturae or wild by nature" to California's listing of eight animal classes "not normally domesticated in this state." Cal. Fish & Game Code § 2116 (West, Westlaw current through Ch. 16 of 2022 Reg. Sess.); Conn. Gen. Stat. Ann.

§ 22-359(d) (West, Westlaw current through 2022 Reg. Sess. enrolled and approved by Governor on or before Apr. 8, 2022, and effective on or before Apr. 8, 2022).

2. Federal definitions of *domestic animals* and *wild animals* can be found in various federal laws, such as the Animal Welfare Act (AWA), 7 U.S.C. §§ 2131–2159, and the National Wildlife Refuge System Administration Act, 16 U.S.C. §§ 668dd–668ee, and are tailored to the specific purposes of the acts.

C. When Isn't an Animal an Animal? (Exclusions from Definitions) [§ 35.529]

1. In several federal statutes, the definition of animal deliberately excludes or is interpreted to exclude significant species or classes of species.

   a. The AWA's definition of *animal*, as amended, expressly excludes "birds, rats of the genus Rattus, and mice of the genus Mus, bred for use in research." 7 U.S.C. § 2132(g).

   b. The Humane Methods of Slaughter Act, as interpreted by the USDA, does not recognize chickens, turkeys, and other birds as *livestock*. Consequently, approximately 95% of animals slaughtered for food are not covered. 7 U.S.C. §§ 1901–1907; 9 C.F.R. pt. 313; 9 C.F.R. § 301.2; *see also* USDA, *Economics, Statistics and Market Information System*, https://usda.library.cornell.edu (last visited May 3, 2022); Elizabeth Williamson, *Humane Society to Sue over Poultry Slaughtering; Suit Demands That Birds Be Killed or Rendered Unconscious Before Butchering*, Wash. Post, Nov. 21, 2005, at B2.

2. Wisconsin's prior criminal statute barring sexual gratification with animals, Wis. Stat. § 944.17(2)(c) (repealed in 2020), did not explicitly exclude "dead animals" from the meaning of *animal*. At least one circuit court rejected a defendant's motion to dismiss charges against him based on the theory that the animal he allegedly had intercourse with was dead and, therefore, no longer an animal under the statute such that it was no longer protected against human acts of sexual gratification. The court ruled that upholding sexual morality was the primary focus of Wis. Stat. § 944.17 (2005–06), not protecting animals, thus rendering it irrelevant whether the animal was alive or dead, because the unacceptable human behavior was the same regardless of the condition of the animal. *State v. Hathaway*, No. 06CM504 (Wis. Cir. Ct. Douglas Cnty. Nov. 22, 2006) (mem.), *aff'd*, No. 2007AP2022-CR, 2008 WL 426231, at *1 (Wis. Ct. App. Feb. 19, 2008) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

3. 2019 Wis. Act 162, effective March 5, 2020, repealed the crime of sexual gratification involving animals by repealing Wis. Stat. § 944.17(2)(a), (c), and (d). The law also created current Wis. Stat. § 944.18 to criminalize bestiality and prohibit engaging in sexual contact and related acts with an animal. *Animal* is now defined to mean "any creature, either alive or dead, except a human being." Wis. Stat. § 944.18(1)(a). Violations of the new law are penalized as Class H to Class D felonies. Wis. Stat. § 944.18(3).

III. LEGAL STATUS OF ANIMALS [§ 35.530]

A. General Rule: Personal Property [§ 35.531]

Wisconsin, like the other 49 states, characterizes animals as the legal property of their human owners. Once a person owns an animal, the requirements of due process must be met to deprive the person of that animal. *Rabideau v. City of Racine*, 2001 WI 57, ¶ 3, 243 Wis. 2d 486; *Godlewski v.*

Schultz, No. 2010AP182, 2010 WL 3389888, at *4 (Wis. Ct. App. Aug. 25, 2010) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (reiterating *Rabideau*'s classification of dogs as property and stating that, in calculating damages for loss of a dog, it is enough if "evidence shows the extent of damages as a matter of just and reasonable inference, although the result be only approximate"); *see Campenni v. Walrath*, 180 Wis. 2d 548 (1994) (interpreting Wis. Stat. § 174.02); *Hagenau v. Millard*, 182 Wis. 544, 548 (1923) (holding that dogs "are now considered property, and the owners are protected in their property rights by law"); *see also Kitzmann v. Payton*, No. 2012AP1793, 2013 WL 4555835 (Wis. Ct. App. Aug. 29, 2013) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (noting that pets are not "real property" and holding that there is no statutory authority for a quiet-title action for pets).

B. Limitations to Classification of Animals as Personal Property [§ 35.532]

1. In *Rabideau v. City of Racine*, 2001 WI 57, ¶¶ 3, 5, 243 Wis. 2d 486, the Wisconsin Supreme Court expressed, in dicta, its discomfort with the characterization of animals as property. The court stated:

> At the outset, we note that we are uncomfortable with the law's cold characterization of a dog … as mere "property." Labeling a dog "property" fails to describe the value human beings place upon the companionship that they enjoy with a dog. A companion dog is not a fungible item, equivalent to other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog.
>
> …
>
> Nevertheless, the law categorizes the dog as personal property despite the long relationship between dogs and humans. To the extent this opinion uses the term "property" in describing how humans value the dog they live with, it is done only as a means of applying established legal doctrine to the facts of this case.

2. In practice, animals occupy an uneasy middle category between inanimate property and human beings. The problematic nature of this categorization is illustrated, for instance, in the following context. Inanimate property, at one end of the spectrum, generally enjoys no protections from damage, destruction, or experimentation. Human beings, at the other end, cannot be legally subjected to cruel treatment, even during important scientific experiments. Animals, however, possess only an intermediate degree of protection: For example, *because they are property*, animals may be subject to experimentation. However, *because of the recognition that animals are sentient creatures*, animal experimentation is subject to applicable local, state, or federal limitations.

   NOTE: Although Oregon statutes provide that dogs are personal property, the Oregon Supreme Court has recognized that animals are sentient beings entitled to basic minimum care under that state's animal welfare statutes. The court further held that if the state has lawfully seized an animal on probable cause to believe that the animal has been neglected or otherwise abused, then the animal's owner loses any claimed Fourth Amendment privacy interest in that animal (including an interest in preventing that animal's blood from being drawn for the purpose of medical treatment). Or. Rev. Stat. § 609.020 (West, Westlaw, current through ch. 1 enacted in 2022 Reg. Sess. of 81st Leg. Assemb., which convened Feb. 1, 2022); *Oregon v. Newcomb*, 375 P.3d 434 (Or. 2016).

C. Shift Away from Property Terminology [§ 35.533]

1. Menomonee Falls is the first community in Wisconsin to enact an ordinance using the term *guardian* as an alternative to the more traditional term *owner* to describe "a person owning, harboring, sheltering, keeping or taking care of an animal." Menomonee Falls, Wis., Code of Ordinances § 14-1, https://www.municode.com/library/wi/menomonee_falls/codes/code_of_ordinances (current through Sept. 7, 2021).

   COMMENT: While this terminology does not alter the legal status of animals as property in Menomonee Falls, certain commentators believe that shifting from proprietary terms such as *owner* toward language that imparts more of a caretaking relationship between humans and animals is an important first step toward ending the characterization of animals as property. Other stakeholders are concerned that the shift in terminology may adversely affect the right of an owner to care for an animal in the way that person deems best, by allowing the possibility that a third party could interfere (similar to the way parents and other guardians of minors can be subject to third-party interventions). A further discussion of the legal problems that might be engendered by such a shift is beyond the scope of this chapter. *See, e.g.*, R. Scott Nolen, *Pet Owners in San Francisco Become "Pet Guardians"*, JAVMA News, Feb. 15, 2003, https://www.avma.org/News/JAVMANews/Pages/030301d.aspx.

2. The state of Rhode Island and the communities of Sherwood, Arkansas; Boulder, Colorado; Amherst, Massachusetts; Albany, Berkeley, Beverly Hills, Imperial Beach, Richmond, San Francisco, San Jose, Sebastopol, West Hollywood, and Marin and Santa Clara Counties, California; Bloomington, Indiana; St. Louis, Missouri; Wanaque, New Jersey; Woodstock, New York; and Parma, Ohio, also employ the term guardian in their laws. *See* In Defense of Animals, *Guardians*, https://www.idausa.org/campaign/guardian/ (last visited May 3, 2022).

IV. RELEVANT FEDERAL LAWS [§ 35.534]

A. Animal Welfare Act (AWA) [§ 35.535]

1. The AWA was adopted in 1966 because of public concern about the use of animals in science, research, and testing. Congress has amended the AWA various times to include other activities. 7 U.S.C. §§ 2131–2159; *see also* 9 C.F.R. §§ 1.1–12.10.

   For example, the 2008 farm bill added a new section to the AWA to prohibit the importation of dogs into the United States for resale unless they are in good health, have received all necessary vaccinations, and are at least six months old. Exceptions to the prohibition may apply for dogs (1) imported for research purposes or veterinary treatment; or (2) lawfully imported into Hawaii from the British Isles, Australia, Guam, or New Zealand and not transported out of Hawaii for resale at less than six months old. 7 U.S.C. § 2148, *as created by* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14210, 122 Stat. 1651, 2226.

2. The AWA has a limited scope, covering the following types of animals, individuals, businesses, and activities involving animals:

   a. Exhibitors of animals covered under the statute (e.g., zoos, circuses, traveling exhibitors, carnivals). 7 U.S.C. § 2132(h).

   b. Animal dealers (who buy, sell, or deliver animals for use in a covered activity), with several exceptions (such as retail pet stores). 7 U.S.C. § 2132(f).

The definition of *retail pet store* in regulations under the AWA is intended to ensure that internet-based businesses and other businesses that sell animals sight unseen must be licensed and inspected by APHIS (Animal and Plant Health Inspection Service, an agency within the USDA), enabling the pets sold to the public to receive humane care and treatment. 9 C.F.R. § 1.1; 9 C.F.R. § 2.1.

c. Animal fighting (dogs and cocks primarily). 7 U.S.C. § 2156.

(1) AWA's animal-fighting provisions, *see* 7 U.S.C. § 2156(a), (b); Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14207, 122 Stat. at 2223; Agricultural Act of 2014, Pub. L. No. 113-79, § 12308, 128 Stat. 649, 990–91, make it unlawful to

(a) Knowingly sponsor or exhibit an animal in an animal-fighting venture;

(b) Knowingly sell, buy, possess, train, transport, deliver, or receive any dog or other animal for purposes of participation in an animal-fighting venture, *see* 7 U.S.C. § 2156(g) (defining *animal fighting venture*);

(c) Attend an animal fight, with fines or prison terms of up to one year if convicted, 7 U.S.C. § 2156(a); 18 U.S.C. § 49; or

(d) Knowingly cause a minor under age 16 to attend an animal fight, with fines or prison terms of up to three years if convicted, 7 U.S.C. § 2156(a); 18 U.S.C. § 49.

(2) Costs incurred for the care of seized or forfeited animals are recoverable under the AWA from the owner. 7 U.S.C. § 2156(f).

(3) Penalty for violations can include up to a maximum of five years' imprisonment. 18 U.S.C. § 49.

d. Warm-blooded animals in research labs (universities and private industry), except purpose-bred rats, mice, and birds. *See generally* 7 U.S.C. § 2132(e), (g); 7 U.S.C. § 2136; 7 U.S.C. § 2137; 7 U.S.C. § 2140; 7 U.S.C. § 2143(b); *see also supra* § 35.8.

e. Carriers of animals such as airlines, railroads, shipping lines, and motor carriers. 7 U.S.C. § 2132(j).

f. Intermediate handlers of animals in transportation. 7 U.S.C. § 2132(i).

NOTE: The AWA's "Protection of pets" provision requires shelters, research facilities, and other entities to hold animals for a "period of not less than five days to enable such dog or cat to be recovered by its original owner or adopted by other individuals" before the animal is sold to a dealer. 7 U.S.C. § 2158.

3. Provisions of the AWA are further interpreted by the USDA in 9 C.F.R. §§ 1.1–4.11.

4. Animals covered under the AWA include any live or dead dogs, cats, nonhuman primates, guinea pigs, hamsters, rabbits, or any other warm-blooded animals that are being used, or are

intended for use, for research, teaching, testing, experimentation, or exhibition purposes, or as pets. Exclusions include purpose-bred mice, rats, and birds and warm-blooded animals used in commercial agricultural enterprises. 7 U.S.C. § 2132(g); *see also* 9 C.F.R. § 1.1.

5. The AWA specifically excludes from protection use of some animals, including livestock, farm animals used or intended for use as food or fiber, and horses not used for research purposes. Additionally, Congress excluded rats, mice, and birds, bred for use in research, from the definition of animal. The excluded groups comprise approximately 99% of the animals used in research. 7 U.S.C. § 2132(g); 9 C.F.R. § 1.1 (superseding *Alternatives Rsch. & Dev. Found. (ARDF) v. Glickman*, 101 F. Supp. 2d 7 (D.D.C. 2000)); Henry Cohen, *The Legality of the Agriculture Department's Exclusion of Rats and Mice from Coverage Under the Animal Welfare Act*, 31 St. Louis U. L.J. 543 (1987).

6. The AWA requires the USDA Secretary to establish humane treatment standards in handling, care, treatment, and transportation of covered animals, including exercise requirements for dogs and environment enhancement for the psychological well-being of nonhuman primates. 7 U.S.C. § 2143(a); 9 C.F.R. § 3.8; 9 C.F.R. § 3.81. *See generally* 9 C.F.R. pt. 3.

7. There are specific provisions regarding animals used in experimentation, including requirements that pain and distress be minimized and that alternatives to painful or distressing procedures be considered. 7 U.S.C. § 2143(a)(3).

8. An important aspect of the AWA includes the requirement for research facilities to establish Institutional Animal Committees, commonly known as Institutional Animal Care and Use Committees (IACUCs) or Animal Care and Use Committees (ACUCs), to review and vote on protocols for animal research before it is conducted and to review painful practices. 7 U.S.C. § 2143(b).

9. Inspection of research facilities using covered species is required by the USDA once per year and allowed when deemed necessary. 7 U.S.C. § 2146(a).

10. Although the AWA includes criminal provisions for violating the AWA, violations are almost always civilly enforced by inspections and fines. 7 U.S.C. § 2149.

    NOTE: Fines can be as high as $10,000 per violation. 7 U.S.C. § 2149.

    NOTE: Difficulty enforcing provisions of the AWA has largely been caused by the inability of plaintiffs to establish standing to sue. In *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496 (D.C. Cir. 1994), plaintiffs had successfully challenged, in the district court, the USDA's regulation exempting rats, mice, and birds from the AWA, but the D.C. Circuit Court of Appeals directed the district court to dismiss the case when the court of appeals determined that the plaintiffs lacked standing. See section 35.17, *infra*, for more information about standing. *See* Office of Inspector Gen., W. Region, USDA, Audit Report No. 33002-3-SF, *APHIS Animal Care Program Inspection and Enforcement Activities* (Sept. 2005), https://www.animallaw.info/sites/default/files/awa_enforcement_2005.pdf.

11. Inspections are carried out by APHIS.

12. Several states have litigated the effect of the AWA on state laws and regulations.

a. There have been challenges in several states involving the acquisition of records from institutions conducting research on animals and the accessibility of IACUC meetings under state open records and meetings laws. Court decisions vary according to the specific provisions in each state's law. *See Citizens for Alts. to Animal Labs, Inc. v. Board of Trs.*, 703 N.E.2d 1218 (N.Y. 1998) (holding that research facility records are subject to disclosure under New York's Freedom of Information Law); *see also Medlock v. Board of Trs. of Univ. of Mass.*, 580 N.E.2d 387 (Mass. App. Ct. 1991) (holding that University of Massachusetts IACUCs need not convene in public and are not subject to the state's open meetings law).

b. Several states have struggled with determining whether the AWA preempts local and state regulation. Finding a state statute inapplicable in *Taub v. State*, the Court of Appeals of Maryland reasoned that the state "legislature recognized that there are certain normal human activities to which the infliction of pain to an animal is purely incidental and unavoidable" and that the AWA "provides a comprehensive plan for the protection of animals used in research facilities." *See Taub v. State*, 463 A.2d 819, 821 (Md. 1983) (holding that Maryland's animal cruelty statute was not applicable to experiment involving monkeys at research institution, as part of federal program, when it was alleged that necessary veterinary care was not provided). *But see DeHart v. Town of Austin*, 39 F.3d 718 (7th Cir. 1994) (concluding that AWA does not preempt state ordinances relating to treatment of certain animals and that it "expressly contemplates state and local regulation of animals," thus allowing town to require local exotic animal dealer to comply with local ordinance banning possession of such animals).

B. Freedom of Information Act (FOIA) and Open Meetings Laws [§ 35.536]

1. FOIA

a. The federal FOIA establishes the public's right to obtain information from federal government agencies through the disclosure of records requested in writing by any person. 5 U.S.C. § 552.

b. Animal protection groups use FOIA requests to discover how animals are being used by federal agencies. Requests follow a simple format. FOIA requires agencies to maintain information about how to make a FOIA request, including the publication of handbooks and reference guides (typically found on agency websites). 5 U.S.C. § 552(a)(1), (g).

CAUTION: FOIA applies only to federal agencies and does not create a right of access to records held by Congress, the courts, or state or local governmental agencies. Counsel should refer to the Wisconsin Public Records Law for information on requesting records from state and local agencies. Wis. Stat. §§ 19.31–.39; *see also* 5 U.S.C. § 551(1) (defining *agency*).

c. Agencies may withhold information pursuant to exemptions and exclusions contained in the statute. 5 U.S.C. § 552(b), (c).

d. Fees for FOIA request processing vary according to the type of organization or individual requester, with some provisions for fee reductions and waivers. 5 U.S.C. § 552(a)(4)(A)(i).

e. An agency has 20 days (excepting Saturdays, Sundays, and legal public holidays) after receipt to determine whether to comply with a request. The agency must immediately notify the person making the request of such determination; 5 U.S.C. § 552(a)(6)(B)(iii) lists exceptions for unusual circumstances. 5 U.S.C. § 552(a)(6)(A).

f. If the records are reasonably described and the request is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, records will be "promptly" made available to any person. 5 U.S.C. § 552(a)(3)(A), (6)(C)(i).

g. If the government can show unusual or exceptional circumstances exist, a longer time frame will be allowed to process requests (some FOIA requests can take years to complete). *See* 5 U.S.C. § 552(a)(6)(B)(i), (C)(i).

h. Appeals can be made to agencies and may be based on excessive processing delays, fee waiver denials, expedited processing determinations, or adverse determinations resulting in a withholding of records. 5 U.S.C. § 552(a)(6)(A), (E)(ii).

2. Federal Open Meetings Laws

Two federal statutes govern the public's accessibility to meetings held by the federal government: the Government in the Sunshine Act (Sunshine Act), 5 U.S.C. § 552b, and the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2 §§ 1–15.

a. The Sunshine Act was enacted to enable the public to obtain "the fullest practicable information regarding the decision-making processes of the Federal Government." 5 U.S.C. § 552b note; Pub. L. No. 94-409, § 2, 90 Stat. 1241 (1976).

(1) This act applies only to agencies covered under FOIA that are headed by multi-member boards. 5 U.S.C. § 552b(a)(1).

(2) The Sunshine Act includes a definition of the term *meeting* and regulates notice and closure of meetings and disclosure of transcripts, recordings, and minutes taken. 5 U.S.C. § 552b(a)(2) (defining *meeting*). *See generally* 5 U.S.C. § 552b.

b. FACA requires all advisory committee meetings to be "open to the public." 5 U.S.C. app. 2 § 10(a)(1).

(1) Advisory committees include entities such as councils, panels, committees, subcommittees, and similar groups established by statute, or established or used by the President or an agency, with several notable exceptions. 5 U.S.C. app. 2 § 3; 5 U.S.C. app. 2 § 4.

(2) Public meetings, timely notice, and detailed minutes at meetings are required. 5 U.S.C. app. 2 § 10.

NOTE: See Peter J. Block, *The Wisconsin Public Records and Open Meetings Handbook* (State Bar of Wis. 7th ed. 2022), for a full discussion of the Wisconsin Public Records Law and the Wisconsin Open Meetings Law. *See generally* Wis. Stat. §§ 19.81–.98.

C. Other Federal Requirements Pertaining to Animals [§ 35.537]

NOTE: Many other federal statutes and requirements deal with animals. A comprehensive discussion of each is beyond the scope of this chapter; however, for ease in identification and research, selected statutes and requirements are listed below.

1. Endangered Species Act, 16 U.S.C. §§ 1531–1544.

2. Humane Methods of Slaughter Act, 7 U.S.C. §§ 1901–1907.

3. National Wildlife Refuge System Administration Act and the Refuge Recreation Act, 16 U.S.C. §§ 668dd–668ee; 16 U.S.C. §§ 460k–460k-4.

4. Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1421h.

5. Migratory Bird Conservation Act, 16 U.S.C. §§ 715–715s.

6. Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331–1340.

7. Animal Damage Control Act, 7 U.S.C. §§ 8351–8353.

8. National Environmental Policy Act, 42 U.S.C. §§ 4321–4370h.

9. Fish and Wildlife Conservation Act, 16 U.S.C. §§ 2901–2912.

10. Wild Bird Conservation Act of 1992, 16 U.S.C. §§ 4901–4916.

11. African Elephant Conservation Act, 16 U.S.C. §§ 4201–4245.

12. Animal Enterprise Terrorism Act (AETA), 18 U.S.C. § 43; Pub. L. No. 109-374, 120 Stat. 2652 (2006).

    NOTE: The Seventh Circuit has held that AETA is not overbroad, does not conflict with the First Amendment, and is not void for vagueness, and that Congress had a rational basis for using the word "terrorism," such that having that word in the statute title does not violate substantive due-process rights. *United States v. Johnson*, 875 F.3d 360 (7th Cir. 2017).

13. Horse Protection Act, 15 U.S.C. §§ 1821–1831.

14. Animal Health Protection Act, 7 U.S.C. §§ 8301–8322.

15. Animal Crush Video Prohibition Act of 2010, 18 U.S.C. § 48. *See* Pub. L. No. 111-294 (2010), updated by means of the Preventing Animal Cruelty and Torture Act, Pub. L. 116-72, 133 Stat. 1151 (2019).

16. Fur Products Labeling Act, 15 U.S.C. §§ 69–69j.

17. Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552 (2011).

NOTE: Authorizes funding for inspections of horse slaughterhouses (in effect, legalizing horse slaughter).

18. Amid concerns about failure of importers to properly vet their dogs, the Centers for Disease Control and Prevention (CDC) announced a temporary suspension, effective July 14, 2021, of the importation of dogs from countries considered high risk for canine rabies virus. 86 Fed. Reg. 32,041 (June 16, 2021); CDC, *Notice of Temporary Suspension of Dogs Entering the United States from Countries Classified as High Risk for Dog Rabies*, https://www.cdc.gov/importation/bringing-an-animal-into-the-united-states/high-risk-dog-ban-frn.html (last reviewed Jan. 7, 2022). This follows an earlier suspension of dog imports from Egypt, after at least three dogs imported from Egypt tested positive for the rabies virus. 84 Fed. Reg. 20,628 (May 10, 2019).

D. Constitutional Law [§ 35.538]

NOTE: The U.S. Supreme Court and the lower federal appellate courts have heard several cases that pertain to animal law. Analysis of these decisions is beyond the scope of this chapter because its focus is on Wisconsin state law. That said, any overview of animal law requires mention of the following, which are among the most frequently litigated topics that have constitutional law implications. Counsel should also consider due-process challenges.

1. Legal standing. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998); *Animal Legal Def. Fund v. Espy*, 23 F.3d 496 (D.C. Cir. 1994); *see also* U.S. Const. art. III, § 2; *cf. MainStreet Org. of Realtors v. Calumet City*, 505 F.3d 742, 745–46 (7th Cir. 2007) (distinguishing article III standing from prudential standing—an "entirely judge-made" doctrine of standing that, with limited exceptions, prevents one from suing in federal court to enforce someone else's legal rights).

    a. To satisfy constitutional standing, all three of the following prongs must be met:

        (1) Injury-in-fact: an aesthetic injury may be enough (*Sierra Club*), yet the injury must be particularized, concrete, and imminent;

        (2) Causation: the injury must be fairly traceable to the defendant; and

        (3) Redressability: there must be some likely way either to make the injured party whole or to fix the injury.

    b. In *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998), one of the individual plaintiffs, Marc Jurnove, alleged that the AWA required the USDA to adopt specific minimum standards to protect primates' psychological well-being and that the USDA failed to do this. The complaint also stated that the USDA had inadequately enforced its existing regulations.

        (1) Jurnove satisfied the standing requirements in the following ways:

            (a) Injury-in-fact: Jurnove alleged an aesthetic interest in seeing primates living in humane conditions. In support of this allegation, Jurnove cited his long history of observing primates, his *repeated* visits to the location at issue, and his interest in *continuing to visit*.

NOTE: In many ways, Jurnove was a model plaintiff in that his plans to return to the location at a specific point in time constituted an injury-in-fact.

(b) Causation: The court found direct causation in that the activities observed by Jurnove were legal under USDA regulations, meaning that the USDA was not complying with the AWA.

(c) Redressability: Jurnove's injury could be redressed by the USDA drafting and issuing improved rules.

(2) Jurnove also fell within the zone of interests protected under the AWA provisions on animal exhibitions. The zone-of-interests test is also known as prudential standing requirements. Prudential standing requirements are judge-made standing requirements—created by judges individually.

NOTE: Jurnove ultimately lost on the merits. *Animal Legal Def. Fund v. Glickman*, 204 F.3d 229 (D.C. Cir. 2000).

2. First Amendment issues: freedom of speech

a. Extent of inquiry depends on whether the speech is content based or content neutral. *See generally United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Dorman v. Satti*, 678 F. Supp. 375 (D. Conn. 1988), *aff'd*, 862 F.2d 432 (2d Cir. 1988); *People v. Voelker*, 658 N.Y.S.2d 180 (Crim. Ct. 1997).

b. Strict scrutiny will apply to content-based law.

Court will uphold statute if it is narrowly tailored to serve a compelling state interest.

c. Intermediate scrutiny will apply to content-neutral statute.

Court will uphold statute if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377.

NOTE: In *United States v. Stevens*, 559 U.S. 460 (2010), the U.S. Supreme Court affirmed a decision by the Third Circuit, holding that 18 U.S.C. § 48 (2000), which broadly banned depictions of animal cruelty, was a facially unconstitutional violation of the First Amendment. The case stemmed from a 2004 conviction for a violation of 18 U.S.C. § 48 (2000) by knowingly selling depictions of animal cruelty, with the intention of placing them in interstate commerce for commercial gain. After the Court issued the *Stevens* opinion, Congress amended 18 U.S.C. § 48 to narrow the statute's prohibition to specified conduct relating to so-called animal crush videos that are "obscene." *See* Animal Crush Video Prohibition Act of 2010, Pub. L. No. 111-294, 124 Stat. 3177.

3. Fourth Amendment issues: due process

a. General rule: Seizures within the meaning of the Fourth Amendment must be reasonable to be constitutional. *Viilo v. Eyre*, 547 F.3d 707, 710 (7th Cir. 2008) (citing *United States v. Place*, 462 U.S. 696, 703 (1983)).

b. The Seventh Circuit has held that removal of horses constituted seizures under the Fourth Amendment. *Siebert v. Severino*, 256 F.3d 648, 656, 659 (7th Cir. 2001) (finding that due process requires that a person not be deprived of property without notice and opportunity for hearing and that horses were removed without notice and an opportunity for hearing); compare with *Dragonwood Conservancy, Inc. v. Felician*, No. 16-CV-534, 2019 WL 318400, at *6 (E.D. Wis. Jan. 24, 2019) (unpublished) (ruling on summary-judgment motion, court found that defendants had provided plaintiffs with an opportunity to "tell their side of the story before their animals were seized"), and *Hestiken v. Belay*, 371 F. Supp. 3d 548 (W.D. Wis. 2019) (holding that kennel owner who brought suit under 42 U.S.C. § 1983 did not establish violation of Fourth Amendment rights with respect to execution of search warrant).

c. "Every circuit [including the Seventh Circuit in *Viilo*] that has considered the issue has held that the killing of a companion dog constitutes a 'seizure' within the meaning of the Fourth Amendment." *Viilo*, 547 F.3d at 710 (citing *Altman v. City of High Point*, 330 F.3d 194, 204–05 (4th Cir. 2003); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210–11 (3d Cir. 2001); *Lesher v. Reed*, 12 F.3d 148, 150 (8th Cir. 1994); *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994), *overruled on other grounds by Robinson v. Solano Cnty.*, 278 F.3d 1007, 1013 (9th Cir. 2002)).

On remand in *Viilo*, a jury in Milwaukee found that two officers who shot and killed a pet labrador–springer spaniel–mix dog acted reasonably when they shot that dog in the course of entering the dog's owner's property after an anonymous informant told police that a wanted felon was on the premises with a pit bull. John Diedrich, *Dog Owner Loses Civil Rights Case in Police Shooting of Pooch*, Milwaukee J. Sentinel, Dec. 5, 2008, http://archive.jsonline.com/news/milwaukee/35641019.html.

V. WIS. STAT. CH. 951—CRIMES AGAINST ANIMALS [§ 35.539]

A. In General [§ 35.540]

1. Under Wis. Stat. § 951.01(1), for purposes of Wis. Stat. ch. 951, *animal* means any living

   a. Warm-blooded creature, except human beings;

   b. Reptile; and

   c. Amphibian.

2. *Farm animal* is a subset of the term animal and applies only to those warm-blooded animals normally raised on farms in the United States *and* "used or intended for use as food or fiber." Wis. Stat. § 951.01(3).

3. The existence of these definitions, however, does not mean that all the crimes against animals listed in Wis. Stat. ch. 951 apply equally to the species described here. On the contrary, many of Wis. Stat. ch. 951's provisions explicitly exclude certain categories of animal from protection. The protections under Wis. Stat. ch. 951 also do not apply to teaching, research, or

experimentation "conducted pursuant to a protocol or procedure approved by an educational or research institution, and related incidental animal care activities, at facilities that are regulated under" 7 U.S.C. §§ 2131–2159 (AWA) or 42 U.S.C. § 289d (Public Health Service Act), or to bona fide scientific research on species unregulated by federal law. Wis. Stat. § 951.015(3).

PRACTICE TIP: The exceptions under specific sections of Wis. Stat. ch. 951 are generally based either on the species of animal or on whether the animal is involved in "normal and accepted veterinary practices." Counsel should, therefore, take care to ensure that the relevant statute does not exempt from protection the type of animal at issue in a particular case. *See, e.g.*, Wis. Stat. §§ 951.02, 951.09(3).

B. Cruelty to Animals [§ 35.541]

1. No person may treat *any* animal in a cruel manner. Wis. Stat. § 951.02.

   a. This prohibition from cruelty applies to all animals, even noncaptive wild animals that are being hunted. *State v. Kuenzi*, 2011 WI App 30, 332 Wis. 2d 297 (holding that defendants who used snowmobiles to kill deer by running over and ramming into them could not hide behind Wis. Stat. ch. 29, which regulates the taking of noncaptive wild animals, to escape criminal prosecution under Wis. Stat. § 951.02).

   b. Cruel mistreatment of wild animals must be assessed based on the backdrop of common hunting practices and, in that context, the question is whether the alleged acts caused "unnecessary and excessive pain or suffering or unjustifiable injury or death" under Wis. Stat. § 951.02. *Kuenzi*, 2011 WI App 30, ¶ 34, 332 Wis. 2d 297.

2. *Cruel* means "causing unnecessary and excessive pain or suffering or unjustifiable injury or death." Wis. Stat. § 951.01(2).

3. Exception: "[N]ormal and accepted veterinary practices" do not constitute cruel treatment. Wis. Stat. § 951.02.

   NOTE: The applicability of Wis. Stat. § 951.02 is no longer limited by provisions in other statutes, such as a provision in Wis. Stat. § 174.10(1) (repealed in 1980) that prevented any criminal or civil action from ensuing if a dog was unlicensed at the time that he or she was killed. 26 Wis. Op. Att'y Gen. 434 (1937).

4. The prohibition against cruel behavior:

   a. Requires *neither* intent *nor* negligence on the part of the defendant. *See State v. Stanfield*, 105 Wis. 2d 553 (1982), *overruled on other grounds by State v. Poellinger*, 153 Wis. 2d 493 (1990).

   b. Provides that a person cannot subject "any animal" to cruel behavior, Wis. Stat. § 951.02, meaning that criminal conduct does not depend on ownership of the animal.

   c. Explicitly applies to the vehicular transport of animals. Wis. Stat. § 951.05.

5. Examples:

a. Evidence that the operator of a canine training school made a dog wear a spiked collar, threw a piece of chain at a dog, threw a stick with a piece of chain at a dog, struck a dog with a stick, advised his trainers to strike a dog with a stick, and advocated that his trainers use electric cattle prods to shock dogs who did not respond to the other methods was sufficient to convict the operator of being a party to the crime of mistreating animals. *Stanfield*, 105 Wis. 2d at 556.

NOTE: Because Stanfield was convicted of *being a party* to the crime of mistreating animals, the evidence presented had to meet the requirements of Wis. Stat. § 939.05, "Parties to a crime." Subsection (2)(b) of that statute explicitly requires that the person "[i]ntentionally aids or abets the commission" of the underlying crime. The *Stanfield* court detailed at length the difference between the predecessor to Wis. Stat. § 951.02, which the legislature expressly noted was drafted not to require intent, and Wis. Stat. § 939.05. Thus, intent is only relevant if the defendant is charged as a party to the underlying crime of cruelty to animals.

b. Evidence, shown through testimony that horses were not provided feed, their feet needed trimming, and they were standing in solid horse manure without any bedding in any of the pens, was sufficient to convict the defendants of violating predecessor statutes to Wis. Stat. §§ 951.02, 951.13, and 951.14, after the horses died and veterinarian determined their deaths were caused by starvation. *State v. Bauer*, 127 Wis. 2d 401 (Ct. App. 1985).

c. Testimony from a humane officer that there were six dead cows in the defendant's barn, the decaying corpse of a dead steer in the upstairs portion of the barn, the legs of dead cattle protruding from a manure pile, the corpse of a dead cow in the yard under a water trough, and piles of fresh manure in the barn was sufficient to convict the owner, when coupled with the testimony of two veterinarians that starvation either caused or was a contributing factor to the cows' deaths. *Wildman v. State*, 69 Wis. 2d 610 (1975).

d. Evidence that a dog died after the defendants subjected him to numerous abusive acts, including tying a can filled with stones to his tail, tying the dog to the back of their car and then driving at speeds of 10–15 miles per hour, and placing the dog in a ditch after the dog, unable to continue running while tied to the car, had been dragged over approximately 15 acres of land, was sufficient to convict. *State v. Surma*, 263 Wis. 388 (1953).

6. Although neither intent nor negligence is an element of Wis. Stat. § 951.02, both, as well as the degree of harm suffered by the animal, increase criminal penalties. Wis. Stat. § 951.18.

C. Animal Fighting [§ 35.542]

1. In general

a. Federal criminal statutes provide felony penalties for the AWA's prohibitions against animal-fighting activities, such as transport of animals for fighting and commerce in cockfighting weapons. For more information about the AWA, see section 35.14, *supra*. 7 U.S.C. § 2156(a), (b), (c), (e); *see also* 18 U.S.C. § 49.

b. Wis. Stat. § 951.08 makes it a crime to:

(1) "[I]ntentionally instigate, promote, aid or abet as a principal, agent or employee, or participate in the earnings from, or intentionally maintain or allow any place to be used for a cockfight, dog fight, bullfight or other fight between the same or different kinds of animals or between an animal and a person," Wis. Stat. § 951.08(1);

NOTE: The statute specifically exempts "events or exhibitions commonly featured at rodeos or bloodless bullfights."

(2) Have or train an animal for the purposes of using the animal in any fight prohibited under subsection (1) of this list, Wis. Stat. § 951.08(2); or

(3) Intentionally be a spectator at any fight prohibited under subsection (1) of this list, Wis. Stat. § 951.08(3).

c. A person convicted under Wis. Stat. § 951.08(1) or (2) cannot own, possess, keep, or train any animal for five years after the conviction. For additional penalties, see section 35.23, *infra*. Wis. Stat. § 951.08(2m).

NOTE: The court, upon application by the convicted person, may waive the five-year prohibition described above as to animals other than the species involved in the offense. No court may authorize the convicted person to own, possess, keep, or train animals of the species involved in the offense during the five-year period. Wis. Stat. § 951.08(2m).

2. Repeat violations

A person who violates Wis. Stat. § 951.08(1) or (2) more than once is guilty of a Class H felony for the second or subsequent violation. Wis. Stat. §§ 951.18(2), 951.08(1), (2).

3. Veterinarian reporting requirements

A veterinarian who suspects that an animal has been in a fight in violation of Wis. Stat. § 951.08 has an affirmative duty to report this to a local humane or law enforcement officer. The veterinarian himself or herself cannot, however, seize the animal. Wis. Stat. § 173.12.

D. Additional Acts Prohibited [§ 35.543]

Wis. Stat. ch. 951 prohibits the following actions specifically, even though the definition of cruel behavior likely encompasses most, if not all, of the actions listed:

1. Killing animals by decompression, Wis. Stat. § 951.025;

2. Abandoning animals, Wis. Stat. § 951.15;

3. Shooting at caged or staked animals, Wis. Stat. § 951.09;

COMMENT: This prohibition permits exceptions for certain animals killed in accordance with cited statutes, such as farm-raised deer and animals "treated in accordance with normally acceptable husbandry practices." Counsel should review the statute carefully.

4. Exposing another person's animals to poisonous substances and certain controlled substances, subject to exceptions for pest extermination and accepted veterinary practices, Wis. Stat. § 951.06;

5. Selling, displaying, giving, raffling, or using for advertisement purposes any living fowl or rabbits that have been artificially colored, Wis. Stat. § 951.11;

6. Failing to provide shelter, space, and sanitation that meet the minimum standards specified by statute for indoor and outdoor animals, Wis. Stat. § 951.14;

7. Failing to provide adequate food and water to confined or impounded animals, Wis. Stat. § 951.13;

8. Taking a dog or cat that belongs to another to a new location without the owner's consent (otherwise known as dognapping or catnapping), Wis. Stat. § 951.03;

9. Harassing or physically abusing a police or fire animal, Wis. Stat. § 951.095;

10. Harassing, injuring, killing, or stealing a service dog, Wis. Stat. § 951.097; or

    NOTE: A *service dog* is a "dog that is trained for the purpose of assisting a person with a sensory, mental, or physical disability or accommodating such a disability." Wis. Stat. § 951.01(5).

11. Committing any other crime enumerated in Wis. Stat. ch. 951.

    NOTE: Wis. Stat. ch. 951 is not the only part of the Wisconsin Statutes that criminalizes certain acts against animals. Wis. Stat. § 944.18, for example, makes it a Class H to Class D felony to engage in sexual contact, and related acts, with an animal.

E. Penalties for Violations of Wis. Stat. § 951.02 and "Additional Acts Prohibited" [§ 35.544]

1. In general. *See* Wis. Stat. § 951.18.

   a. A person found guilty under Wis. Stat. § 951.02, 951.025, 951.03, 951.04, 951.05, 951.06, 951.07, 951.09, 951.10, 951.11, 951.13, 951.14, or 951.15 is subject to a Class C forfeiture.

   b. If a person violates a provision of Wis. Stat. ch. 951 within three years after having a humane officer issue an abatement order under Wis. Stat. § 173.11 that prohibits violations of that same provision, that person is subject to a Class A forfeiture. See section 35.26, *infra*, for a discussion of abatement orders.

   c. A person who violates Wis. Stat. § 951.08(2m) or (3) is guilty of a Class A misdemeanor, while a person who violates Wis. Stat. § 951.08(1) or (2) is guilty of a Class I felony for the first violation and of a Class H felony for any additional violations.

      COMMENT: Wis. Stat. § 951.18(3) permits a district attorney to apply to the court for a temporary or permanent injunction preventing any person from violating Wis. Stat. ch. 951. As such, the district attorney arguably does not have to wait until the chapter is

violated; he or she may appeal to the court for an injunction upon evidence that the chapter will be violated. Persons with knowledge that a violation is imminent should therefore contact the office of the district attorney.

2. Penalty enhancers. *See* Wis. Stat. § 951.18(1).

   a. If it is proved that the violation of Wis. Stat. § 951.02, 951.025, 951.03, 951.04, 951.05, 951.06, 951.07, 951.09, 951.10, 951.11, 951.13, 951.14, or 951.15 was intentional or negligent, the person is guilty of a Class A misdemeanor.

      NOTE: A person is guilty of a Class I felony if he or she intentionally violates Wis. Stat. § 951.02 or Wis. Stat. § 951.06 and causes injury to an animal, knowing "that the animal that is the victim is used by a law enforcement agency to perform agency functions or duties."

   b. If it is proved both that the person intentionally violated Wis. Stat. § 951.02, and that the violation resulted in an animal's death, disfigurement, or mutilation, then the person is guilty of a Class I felony. *See, e.g.*, *State v. Sedlmeier*, No. 2003CF236 (Wis. Cir. Ct. Washington Cnty. Jan. 1, 2004), *aff'd*, No. 2005AP1458-CR, 2006 WL 2422800 (Wis. Ct. App. Aug. 23, 2006) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

   c. To be guilty of a Class I felony, for intentionally mistreating an animal, defendants need not know that their actions will cause an animal's death; rather, they must know that their actions would be treating an animal in a cruel manner. *See, e.g.*, *State v. Klingelhoets*, 2012 WI App 55, ¶ 15, 341 Wis. 2d 432.

3. Additional penalties

   In addition to the penalties listed above, a person found guilty under Wis. Stat. ch. 951:

   a. Is subject to a temporary or permanent injunction preventing him or her from violating this section, provided that the district attorney of the jurisdiction in which the crime was committed applies for such an order. Wis. Stat. § 951.18(3).

   b. Must pay restitution to the owner of the animal victim, whether the owner is a private citizen or a humane society, pound, or humane or law enforcement officer, for any *pecuniary loss* suffered as a result of the crime. Wis. Stat. § 951.18(4)(a)2.; *see also* Wis. Stat. § 951.18(4)(a)1. (defining *pecuniary loss*).

      NOTE: If any interested party applies for a determination of the value of any pecuniary loss, the court will hold an evidentiary hearing on this subject. Wis. Stat. § 951.18(4)(a)2.

   c. Is subject to having the animal removed from his or her care and placed into the care of the local humane society or officer, pound, or law enforcement officer, or, if the animal is a wild animal, into the care of the Department of Natural Resources (DNR). Wis. Stat. § 951.18(4)(b)1.

      NOTE: Such a removal may take place only if

      (1) The guilty person is the owner of the victim animal, and

(2) The court deems such a removal to be "reasonable and appropriate." Wis. Stat. § 951.18(4)(b)1.

NOTE: The humane society or officer, pound, law enforcement officer, or DNR may release the animal to a person other than the original owner or may euthanize the animal in a "proper and humane manner." The statutes authorize these officers and entities to charge a fee for such a release, if the animal is not a dog, but provide no guidance as to the amount of the fee. Wis. Stat. § 951.18(4)(b)1.

d. Is subject to a court order that specifies that he or she cannot own, possess, or train any animal for a court-determined period, which may never exceed five years and must exclude any time that the person spent in custody as a result of this crime. Wis. Stat. § 951.18(4)(c).

e. May be subject to the requirements of Wis. Stat. ch. 173, *see infra* §§ 35.24–.27.

VI. WIS. STAT. CH. 173—ANIMALS GENERALLY AND THE POWERS OF HUMANE OFFICERS [§ 35.545]

A. Humane Officers [§ 35.546]

1. Humane officers are appointed under Wis. Stat. § 173.03. Unless the applicant is a licensed veterinarian or already certified as a humane officer by another state, an applicant seeking an appointment as a humane officer first must complete an approved course of study and be certified by the DATCP. Wis. Stat. § 173.05.

2. A humane officer is empowered to investigate violations of and enforce the following laws governing the care and control of animals that are located within the jurisdiction of the officer's appointment:

   a. Wis. Stat. ch. 173 (animals, humane officers);

   b. Wis. Stat. ch. 951 (crimes against animals);

   c. Wis. Stat. ch. 174 (dogs); and

   d. Wis. Stat. § 95.21 (rabies control program).

3. The humane officer has authority to do the following:

   a. Issue citations for violations of ordinances relating to animals, if the body that appointed the officer authorizes him or her to do so. Wis. Stat. § 173.07(4).

   b. Issue abatement orders, if the municipality has provided a review process for such orders. Wis. Stat. § 173.11.

   c. Take protective custody of animals. Wis. Stat § 173.13; *see infra* § 35.27.

   d. Enter any building, vehicle, or place where animals may be present, for the purposes of inspection, examination, or gathering of evidence, if the officer has reason to suspect there

is a violation of any statute or ordinance governing the care, treatment, or control of an animal. Wis. Stat. § 173.09.

NOTE: If the building, vehicle, or place is not public property, and the owner refuses entry, the officer may apply to the court for

(1) A special inspection warrant under Wis. Stat. § 66.0119, or

(2) A search warrant if the humane officer has reason to believe that a violation of Wis. Stat. ch. 951 has occurred or is currently taking place.

NOTE: A search warrant must be executed with the assistance of a law enforcement officer. If the court grants the warrant, the warrant must specify that the humane officer accompany the law enforcement officer selected to conduct the search. Wis. Stat. § 173.10.

e. Request that the district attorney issue subpoenas to compel testimony and produce documents. Wis. Stat. § 173.07(3).

f. Request prosecutions for violations of Wisconsin law that pertain to animals. Wis. Stat. § 173.07(4m).

4. A humane officer who is not also a law enforcement officer cannot

a. Remove any animal from another person's custody through the use of force, Wis. Stat. § 173.07(5)(f);

b. Enter onto private property by force or without the property owner's permission, unless the humane officer first obtains a special inspection or search warrant or the entry is necessary to save an animal, or person, from imminent death or injury, Wis. Stat. § 173.07(5)(e);

NOTE: *Property* includes both places and vehicles.

c. Stop or arrest people, Wis. Stat. § 173.07(5)(c);

d. Stop, search, or detain vehicles, unless the humane officer has a special inspection or search warrant issued pursuant to Wis. Stat. § 66.0119, Wis. Stat. § 173.07(5)(d); *see also* Wis. Stat. § 173.09;

e. Carry firearms, Wis. Stat. § 173.07(5)(b);

f. Carry out a search warrant without the assistance of a law enforcement officer, Wis. Stat. § 173.07(5)(a); or

g. Sell or otherwise transfer ownership of any animal that the humane officer obtained during the course of his or her duties, Wis. Stat. § 173.07(6).

B. Abatement Orders [§ 35.547]

1. A humane officer may issue and serve an abatement order if, after investigation, the officer has "reasonable grounds to believe that a violation of a statute or ordinance is occurring and the violation is causing or has the potential to cause injury to an animal." Wis. Stat. § 173.11(1). Under Wis. Stat. § 173.11(1m), the abatement order must contain the following:

   a. The name and address of the violator;

   b. The specific statute or ordinance violated;

   c. A statement prohibiting additional violations;

   d. A description of the corrective measures that must be taken; and

   e. Notice of the relevant hearing and appeal procedures, which are as follows:

      (1) Within 10 days after being served with the abatement order, the alleged violator must mail or deliver a request for a hearing to the official designated by the appropriate jurisdiction to preside at the hearing. That person's name, title, and contact information should appear on the abatement order. Wis. Stat. § 173.11(2).

      (2) Unless the party requesting the hearing agrees otherwise, the hearing must be held within 10 days after the date on which the request was made. Wis. Stat. § 173.11(2).

      (3) Within 10 days after the abatement order hearing, the presiding official must affirm the order, modify and affirm the order, or withdraw the order. Wis. Stat. § 173.11(3).

      (4) Within 30 days after the decision, "[a]ny person adversely affected by" the decision may file a suit for judicial review in circuit court. Wis. Stat. § 173.11(4).

      NOTE: Municipalities must adopt a review process before municipal humane officers may issue abatement orders. If no process is adopted, then no abatement orders may be issued.

C. Taking Animals into Custody [§ 35.548]

1. A humane officer or law enforcement officer may take an animal into custody if the officer has reasonable grounds to believe that the animal is one of the following:

   a. Abandoned or stray, Wis. Stat. § 173.13(1)(a)1.;

      NOTE: Such an animal may include one delivered to the humane or law enforcement officer by any person who claims the animal is abandoned or stray.

   b. Unwanted, as evidenced by the animal's delivery to the humane or law enforcement officer, Wis. Stat. § 173.13(1)(a)2.;

   c. Not tagged in accordance with Wis. Stat. ch. 174, if the animal is a dog, Wis. Stat. § 173.13(1)(a)3.;

   d. Unlicensed in violation of any ordinance, Wis. Stat. § 173.13(1)(a)4.;

e. In violation of a quarantine imposed to control animal disease, Wis. Stat. § 173.13(1)(a)5.;

f. The perpetrator of damage to persons or property, Wis. Stat. § 173.13(1)(a)6.;

g. Used in any crime under Wis. Stat. § 944.18 or ch. 951 or constitutes evidence of a crime under Wis. Stat. § 944.18 or ch. 951, *see* Wis. Stat. § 173.13(1)(a)8.; or

h. Delivered by a veterinarian, if the owner of the animal failed to pick the animal up from the veterinarian's office, and the veterinarian engaged in certain actions to contact the owner as specified by statute, Wis. Stat. § 173.13(1)(a)9., (2).

2. A humane officer must accept into custody any animal:

a. Delivered by a law enforcement officer, Wis. Stat. § 173.13(1)(b); or

b. Delivered under court order, Wis. Stat. § 173.13(1)(b).

3. If a humane or law enforcement officer takes custody of an animal, the officer must provide the owner with notice of the procedure by which the owner can recover the animal, including the owner's right to petition the court and the procedure to follow if the animal is not returned to the owner. Wis. Stat. § 173.13(3); *see also* Wis. Stat. § 173.22(4) (holding animal involved in crime).

a. If the officer takes the animal into custody without the owner's knowledge, the officer must promptly notify the owner in writing, if the owner can be identified and located with reasonable effort. The notice must also inform the owner that he or she must notify any person with a lien on the animal that the animal has been taken into custody.

b. Animals taken into protective custody by a humane or law enforcement officer because they are abandoned or stray, not tagged as required by Wis. Stat. ch. 174 (dogs), not licensed as required by the applicable ordinance, or delivered by a veterinarian may be considered to be *unclaimed animals*. The animal also will be considered unclaimed if the owner voluntarily relinquishes the animal, in writing, to the humane or law enforcement officer. Wis. Stat. §§ 173.13(3)(c), 173.19.

(1) An animal taken into custody because it was abandoned or stray must be claimed by and returned to the owner within four days or it may be subject to any of the actions enumerated in Wis. Stat. § 173.23(1m).

(2) An animal taken into custody because it was delivered to a humane officer by a veterinarian will be considered unclaimed if it is not claimed by and returned to its owner within seven days.

(3) An animal taken into custody because it does not have the proper license or tag will be considered unclaimed unless the owner obtains the proper tags or license or the owner files a petition with the court within seven days after the date upon which the animal was taken into custody.

4. After the applicable waiting period, animals considered unclaimed may be

a. Released to someone who is not the original owner, provided licensing and other requirements are met, Wis. Stat. § 173.23(1m)(a);

b. Sold at public auction, if the animal is not a dog or a cat, Wis. Stat. § 173.23(1m)(b);

c. Euthanized, Wis. Stat. § 173.23(1m)(c); or

d. Released to a lab for scientific research or for "educational purposes" according to the requirements of Wis. Stat. § 174.13, if the animal is stray or abandoned, Wis. Stat. § 173.23(1m)(d).

NOTE: The owner may also need to pay for any costs of care, treatment, and custody provided to the animal before the humane officer must return the animal to the owner. If an animal is sold, the owner may file a claim and proof of ownership within 30 days after the sale, and the proceeds of the sale, minus the costs for the care, custody, treatment, and sale of the animal, will be returned to the owner. Wis. Stat. § 173.23(1s).

5. An animal may be seized or held *for cause* under Wis. Stat. § 173.21(1), even though the animal has a valid owner, if

a. A court order so requires; or

b. There are reasonable grounds to believe one of the following:

(1) The owner has used the animal in a crime under Wis. Stat. § 944.18 or ch. 951 or the animal constitutes evidence of a crime under Wis. Stat. § 944.18 or ch. 951, or

(2) The animal poses a "significant threat to public health, safety or welfare."

NOTE: The owner may have a veterinarian of his or her choice examine the animal while the animal is held, and the owner is not responsible for the costs of maintaining the animal in custody, unless a court order provides otherwise. Wis. Stat. § 173.21(2), (3).

6. The animal's owner has the right to judicial review of the seizure and holding for cause. Wis. Stat. § 173.22(1).

a. If the animal's owner believes that the animal was improperly seized and withheld by the humane or law enforcement officer, the owner may petition for return of the animal to the circuit court of either the county that took the animal into custody or the county where the animal is held. Wis. Stat. § 173.22(1).

(1) Upon the filing of such a petition, the circuit court will notify the humane or law enforcement officer that took the animal into custody and will hold a hearing on whether the animal is being held properly. Wis. Stat. § 173.22(2).

PRACTICE TIP: Although the statutes do not provide a time limit within which a petition must be filed, it is recommended that the owner petition the court within 30 days after receipt of notice of the seizure and withholding of the animal.

(2) The court must order the animal returned *unless* the evidence presented satisfies one of the following findings under Wis. Stat. § 173.22(3)(a):

(a) A court has ordered the animal withheld for any reason, Wis. Stat. § 173.22(3)(a)4., or

(b) Reasonable grounds exist to believe that the animal poses a "significant threat to public health, safety or welfare," Wis. Stat. § 173.22(3)(a)2.

(3) If the animal was taken into custody under Wis. Stat. § 173.13(1)(a)3.–6. (pertaining to dog tags, animal licenses, the quarantine of certain animals, and animals that have caused damages to a person or property), and the court determines that the section was inapplicable to that animal after all, then the court must order the release of that animal. Wis. Stat. § 173.22(3)(b)–(e).

b. If the animal has not been returned to the owner by, or at the direction of, the humane officer and the owner has not filed a petition in court for return of the animal, the political subdivision or person contracting under Wis. Stat. § 173.15(1) may petition the court for an order to do any of the following under Wis. Stat. § 173.23(3)(a):

(1) Require the owner to pay for the care, custody, and treatment of the animal;

(2) Require the owner to post bond for the costs of the care, custody, and treatment of the animal pending the outcome of any other proceeding regarding the animal; or

(3) Authorize the sale, destruction, treatment as unclaimed under Wis. Stat. § 173.23(1m), or other disposal of the animal.

c. The political subdivision must serve a copy of its petition on the owner of the animal as provided in Wis. Stat. § 801.11. Wis. Stat. § 173.23(3)(c).

NOTE: The political subdivision may petition the court for an order described above at any time after the animal was seized and withheld.

7. If the owner is found not guilty of animal cruelty after a criminal prosecution under Wis. Stat. § 944.18 or ch. 951, the county treasurer must pay the expenses out of the county's general fund. If the owner is found guilty, the court must assess the following expenses under Wis. Stat. § 173.24 against the owner of the animal, minus any amounts paid under Wis. Stat. § 173.22(4)(f):

a. Investigative expenses and the expenses of any search under Wis. Stat. § 173.10 or seizure;

b. Expenses necessary and reasonably incident to taking the animal into custody; and

c. Expenses for the care, custody, treatment, and disposal of the animal, including veterinary expenses.

NOTE: Wis. Stat. ch. 173 specifies the procedures for holding and disposing of animals taken into custody under the chapter. The chapter also specifies certain protections applicable to humane and law enforcement officers. Of particular note, Wis. Stat. § 173.25 grants immunity

to a humane or law enforcement officer who had reasonable grounds to believe that the officer was properly euthanizing an animal.

D. Regulation of Dog Sellers and Operators of Animal Shelters and Animal Control Facilities [§ 35.549]

1. Wis. Stat. § 173.41 provides for regulation of dog breeders, dog dealers (including out-of-state dog dealers), and operators of dog breeding facilities, animal shelters, and animal control facilities, including:

   a. Licensing and inspection requirements.

      (1) Anyone who operates an animal shelter, animal control facility, or dog breeding facility, or who operates as a dog breeder, dog dealer, or out-of-state dog dealer, must obtain a license to do so. Wis. Stat. § 173.41(2); *see also* Wis. Admin. Code ch. ATCP 16 (Dog Sellers and Dog Facility Operators).

      NOTE: The terms *animal shelter*, *animal control facility*, *dog breeding facility*, *dog breeder*, *dog dealer*, and *out-of-state dog dealer* are defined terms in Wis. Admin. Code § ATCP 16.01, so a license is only required if a person or facility meets the applicable definition.

      Annual fees for these licenses are set according to the number of dogs the licensee sells each year, except that animal shelter and animal control facilities pay the set fee of $125. Wis. Stat. § 173.41(3).

      (2) The DATCP may summarily suspend a license if it finds "any condition that imminently threatens the health, safety, or welfare of any animal on the licensed premises or [if] there is evidence that an act of animal cruelty in violation of Wis. Stat. ch. 951 has been committed by the licensee or has occurred on the licensed premises." Wis. Stat. § 173.41(5)(a).

      Licensees have the right to a hearing to appeal such summary suspensions. Wis. Stat. § 173.41(5)(d).

      (3) The DATCP must inspect the premises of all licensees at least once every two years after the year the license is granted. The DATCP may charge a fee of $150 for such an inspection. Wis. Stat. § 173.41(6).

   b. Health and age requirements for selling dogs.

      (1) Sellers of dogs must provide certain information to each dog purchaser, and no dog may be transferred until the dog reaches seven weeks of age. Wis. Stat. § 173.41(8), (9).

      (2) Licensees must follow specified "standards of care" for each dog. Wis. Stat. § 173.41(10).

      (3) Licensees must keep a record of each dog that includes specified information about the dog. Wis. Stat. § 173.41(11).

c. Penalties. Wis. Stat. § 173.41(15).

(1) A person operating without a license may be fined up to $10,000, imprisoned for up to nine months, or both.

(2) A licensee in violation of any of the other provisions in Wis. Stat. § 173.41 (or related administrative rules) may be fined up to $1,000 for the first offense and fined an amount between $200 and $2,000 for any subsequent offense within five years.

(3) Each animal "with respect to which the statute or rule is violated *constitutes a separate violation*." Wis. Stat. § 173.41(15)(b)2. (emphasis added).

2. Wis. Stat. § 173.41 also provides that if DATCP has reasonable grounds to believe that a dog in possession of a person required to be licensed under this section is being mistreated in violation of Wis. Stat. § 944.18 or ch. 951, DATCP must report the information supporting its beliefs to a humane officer or law enforcement agency with jurisdiction over the relevant area. Wis. Stat. § 173.41(13).

VII. THE INTERSECTION OF TORT LAW AND ANIMAL LAW IN WISCONSIN [§ 35.550]

A. Veterinary Malpractice Versus General Negligence [§ 35.551]

1. National trends

a. Throughout the United States, the concept of veterinary malpractice is evolving. Katie J.L. Scott, Note, *Bailment and Veterinary Malpractice: Doctrinal Exclusivity, or Not?*, 55 Hastings L.J. 1009, 1020 (2004).

"Malpractice" is a term used for "negligence" when the negligent conduct involves professional services. Under common law, "malpractice" principles apply only to physicians and attorneys. In some jurisdictions, veterinarians are considered "professionals" for the purposes of distinguishing whether malpractice or negligence principles apply, and in some they are not. The primary differences between malpractice and negligence are evidentiary requirements for proving the standard of care and varying statutes of limitation.

b. Courts in other jurisdictions have held veterinarians to a malpractice standard of care. *See, e.g.*, *Loman v. Freeman*, 890 N.E.2d 446 (Ill. 2008); *Spilotro v. Hugi*, 417 N.E.2d 1066, 1070 (Ill. App. Ct. 1981); *Bekkemo v. Erickson*, 242 N.W. 617, 618 (Minn. 1932); *Price v. Brown*, 680 A.2d 1149 (Pa. 1996).

2. Wisconsin case law on veterinary negligence

a. No published Wisconsin decision specifically establishes the standard of care to be exercised by a veterinarian if professional negligence concepts extend to veterinary medicine. Several older Wisconsin cases do, however, discuss general negligence committed by veterinarians. *See, e.g.*, *Acherman v. Robertson*, 240 Wis. 421 (1942); *Prahl v. Gerhard*, 25 Wis. 466 (1870).

b. Overview of plaintiff's burden of proof in such cases:

(1) Negligence: breach of professional standard of care. *Prahl*, 25 Wis. 466.

(a) The veterinarian had a duty to live up to a certain standard of care, and

(b) The veterinarian's conduct did not conform to this standard.

(2) Proximate cause.

The veterinarian's negligence must have caused the animal's injury or death.

(3) Actual injury or damages.

3. Proving standard of care for veterinary malpractice

As articulated in other jurisdictions, expert testimony is typically required to prove that the veterinarian failed to exercise the requisite standard of care. 32 Am. Jur. Proof of Facts 3d 351 (2005) (veterinary malpractice). *But see Mathew v. Klinger*, 686 N.Y.S.2d 549, 550 (App. Term 1998) (no expert testimony required to explain that a veterinarian should take radiographs of a dog's throat, esophagus, and stomach if the veterinarian suspects that the dog has swallowed something because "the 'very nature of the acts complained of bespeaks improper treatment and malpractice'").

4. Damages

a. Compensatory damages: Because of the legal status of animals as property, the measure of compensatory damage to animals has historically followed the structure of damages awardable for damage or destruction of inanimate property.

(1) If the animal dies, damages are the cost to replace the animal, minus any reductions for salvage value. *See Schrubbe v. Peninsula Veterinary Serv., Inc.*, 204 Wis. 2d 37, 42 (Ct. App. 1996).

(2) If the animal is injured, damages are the difference between the animal's market value before the injury and its market value after the injury. *Rosche v. Wayne Feed Div. Cont'l Grain Co.*, 152 Wis. 2d 78, 83 (Ct. App. 1989).

The market value remedy has been applied to different kinds of animals, including destroyed minks and injured horses. *Brunette v. Slezewski*, 34 Wis. 2d 313 (1967); *Gould v. Merrill Ry. & Lighting Co.*, 139 Wis. 433 (1909).

(3) If the animal is an income-producing animal, additional elements of damages may apply. *See* 2 *The Law of Damages in Wisconsin* ch. 17 (Russell M. Ware ed., State Bar of Wis. 8th ed. 2020 & Supp.).

COMMENT: The lack of consideration historically afforded the emotional attachment between humans and animals may strike clients as particularly harsh; this is generally considered an artifact of animals' legal status as property. Some jurisdictions are reevaluating the measure of damages for loss of an animal, either in the courts or through the legislature. For example, Tennessee law provides for up to $5,000 in noneconomic damages in certain circumstances when the death of a pet is caused by the unlawful and intentional or negligent act of another person or by the

animal of another person. Tenn. Code Ann. § 44-17-403 (West, Westlaw current through 2022 Second Reg. Sess. of 112th Tenn. Gen. Assembly, eff. through Apr. 7, 2022). If counsel is representing a plaintiff, then counsel should be prepared to discuss this aspect of the law with the client.

b. Nonmarketable items—reasonable special value

(1) When valuing damages for loss of personal property caused by negligence, courts typically use the fair market value of the item. In Wisconsin and in courts throughout the country, however, fair market value is not the standard by which nonmarketable items are valued.

(2) Two Wisconsin cases illustrate that items of personal property whose chief value is not market price should be assessed according to the value of the item to the owner.

(a) In *Harvey v. Wheeler Transfer & Storage Co.*, 227 Wis. 36, 38, 42 (1938), the Wisconsin Supreme Court ruled that the valuation of the plaintiff's personal property, consisting of furniture, clothing, and keepsake items, should be based not on the "market value" of the items but instead on the "actual value to her." Thus, the property "should be valued with reasonable consideration of, and sympathy with, the feelings of the owner."

(b) Likewise, in *Town of Fifield v. State Farm Mutual Automobile Insurance Co.*, 119 Wis. 2d 220, 231, 233, 223 (1984), the Wisconsin Supreme Court again allowed damages of "nonmarketable property," in this case a bridge owned by the town, to be evaluated based on "value to the owner." The court determined that noneconomic factors, such as the bridge's "social" and "recreational" value and "unique value and use" to the town, could be considered in its analysis of damages.

COMMENT: It is reasonable to argue that pets are in the category of nonmarketable property and thus, like furniture, clothing, keepsake items, and a unique bridge, are not amenable to traditional means of damages calculations. *See generally* Janice M. Pintar, Comment, *Negligent Infliction of Emotional Distress and the Fair Market Value Approach in Wisconsin: The Case for Extending Tort Protection to Companion Animals and Their Owners*, 2002 Wis. L. Rev. 735.

NOTE: While most courts hold that "sentimental value" cannot be considered when determining value, reasonable special value, in addition to the social and recreational value of an item of personal property, can be included in a damages award. *See Harvey*, 227 Wis. at 42. This could provide guidance when evaluating the value, for damages purposes, of an animal that has received special training, such as for service or specialized hunting.

c. Punitive damages

d. Courts in other jurisdictions have awarded additional forms of damages in animal law cases. Counsel may wish to consider damages for the following:

(1) Loss of companionship,

(2) Special value of training an animal, and

(3) Lost wages suffered by a human owner who missed work to care for a sick or dying animal.

B. Alternative Causes of Action [§ 35.552]

1. A 19th-century Wisconsin case held a veterinarian liable for breach of contract or warranty. *See Kuehn v. Wilson*, 13 Wis. 116 (*104) (1860).

2. Some courts have held that bailment, not malpractice, should be applied to veterinary negligence. *See Price v. Brown*, 680 A.2d 1149 (Pa. 1996); *see infra* § 35.45 (Bailments).

C. Injuries and Damage Caused by Animals [§ 35.553]

1. Dogs

a. Wisconsin makes owners of dogs strictly liable for the injuries or damages caused by their dogs. See paragraph VII.C.1.e., *infra*, for further clarification of the definition of *owner*. Wis. Stat. § 174.02; *Cole v. Hubanks*, 2004 WI 74, 272 Wis. 2d 539; *see also* Wis. Stat. § 174.001(5) (defining *owner*). *See generally* Peter F. Mullaney, *Unleashed: Wisconsin's Dog Statute*, Wis. Law., June 2006, at 6.

(1) The only defense explicitly available to owners under Wis. Stat. § 174.02 is comparative negligence. According to the comment to Wis. JI—Civil 1390, although the statute imposes strict liability, it "does not impose absolute liability. Issues regarding causation and comparative negligence still must be examined." *See also Armstrong v. Milwaukee Mut. Ins. Co.*, 191 Wis. 2d 562, 570 (Ct. App. 1995), *aff'd*, 202 Wis. 2d 258 (1996). *See generally* Wis. Stat. § 895.045. *But see Kelly v. Berg*, 2015 WI App 69, 365 Wis. 2d 83 (holding, in a case of a woman injured while trying to protect her dog from an attacking pit bull, that the circuit court erred when it gave a jury instruction on the "emergency doctrine," which can relieve a person from contributory negligence liability if responding to an emergency).

PRACTICE TIP: Owners may also offer affirmative defenses, such as expiration of the statute of limitation, improper service of process, or the like.

(2) Injuries resulting from so-called innocent acts of the dog may also be subject to strict liability. For example, the court of appeals held that Wis. Stat. § 174.02 applied to an owner whose guest was injured when she tripped over the owner's sleeping dog, although public policy grounds ultimately precluded liability. *Alwin v. State Farm Fire & Cas. Co.*, 2000 WI App 92, 234 Wis. 2d 441.

NOTE: Public policy considerations may prevent the imposition of liability on the owner of a dog. In *Fandrey*, the owners left their door unlocked and their dog loose in the house while they were at a movie. While they were gone, the owner's best friend and the friend's child entered the house without permission, and the dog bit the child. The Wisconsin Supreme Court determined that it would be poor public policy to hold the dog owner strictly liable under these facts. *Fandrey v. American Fam. Mut. Ins. Co.*, 2004 WI 62, 272 Wis. 2d 46; *Erdmann v. Progressive N. Ins. Co.*, 2011 WI App 33, 332 Wis. 2d 147 (imposing liability on the owner of a dog

based on the facts; liability hinged on an affirmative act of the dog, and the injured party was a welcome guest in the alleged tortfeasor's home).

(3) If two people jointly own a dog, one cannot hold the other liable under Wis. Stat. § 174.02 if the second is not negligent. *Armstrong*, 202 Wis. 2d at 272.

b. Dog owners who know or have notice that the dog "had previously, without provocation, bitten a person, with sufficient force to break the skin and cause permanent physical scarring or disfigurement" are liable for increased damages. Wis. Stat. § 174.02(1)(b).

NOTE: 2015 Wis. Act 112 added the qualifier "without provocation" to the description of actions that constitute notice such that owners would be liable for double damages. The act further limited double damages to dogs that had previously and without provocation "bitten a person with sufficient force to break the skin and cause permanent physical scarring or disfigurement." It is anticipated that litigation will define what constitutes provocation.

(1) If the owner is without notice, he or she is liable for the full amount of damages caused by the injury. Wis. Stat. § 174.02(1)(a).

(2) If the owner knew or had notice, he or she is liable for double damages, meaning twice the full amount of damages caused by the injury. Wis. Stat. § 174.02(1)(b).

An owner's knowledge that her dog, as a teething puppy, had chewed on household items was insufficient to constitute notice under Wis. Stat. § 174.02(1)(b) (1991–92), although the court stated that incidents that take place while a dog is a puppy can, under the right circumstances, put the owner on notice. *Gasper v. Parbs*, 2001 WI App 259, 249 Wis. 2d 106.

c. In addition to monetary damages, the owner of the dog is subject to additional penalties, among which is a court order to kill the offending dog. The court may order the dog killed under Wis. Stat. § 174.02(3) only if it determines that both the following are true:

(1) The dog caused serious injury to a person or domestic animal on two separate occasions off the owner's property, without reasonable cause. Wis. Stat. § 174.02(3)(a)1.; and

(2) The dog's owner had notice that the dog caused the first injury *before* the dog caused the second injury. Wis. Stat. § 174.02(3)(a)2.

d. A dog's behavior may also subject an owner to criminal liability. Under Wis. Stat. § 940.24, a dog may be considered a *dangerous weapon*, subjecting the owner to charges of criminal negligence. There must be evidence, however, that the owner intended the dog to be used as a dangerous weapon. *State v. Bodoh*, 220 Wis. 2d 102 (Ct. App. 1998), *aff'd*, 226 Wis. 2d 718 (1999).

e. In Wisconsin, there is little difference from a liability standpoint whether one is a dog's *legal owner* or a dog's *owner* or *keeper*, because it is settled that the term *keeper* is included within the definition of the term *owner*. *Armstrong*, 202 Wis. 2d at 260 (citing Wis. Stat. § 174.001(5)).

(1) The statutory definition of *owner* explicitly "includes any person who owns, harbors or keeps a dog." Wis. Stat. § 174.001(5).

(2) The Wisconsin Supreme Court stated, in *Armstrong*, 202 Wis. 2d at 268, that

> [t]here is no evidence that the legislature intended to treat keepers or harborers differently than legal owners. We conclude that the purpose of the statute is to protect those people who are not in a position to control the dog, and not to protect those persons who are statutorily defined as owners. An owner injured while in control of the dog cannot use the statute to hold another owner liable.

(3) If the keeper is injured, and the legal owner is neither negligent nor exercising control over the dog at the time of the injury, the keeper cannot collect damages from the owner under Wis. Stat. § 174.02. *Armstrong*, 202 Wis. 2d at 268.

NOTE: According to the comment to Wis. JI—Civil 1390:

> An owner injured while in control of the dog may not use the statute to hold another owner liable. Where there is negligence by the owner, a keeper may pursue a common-law negligence claim against the owner.

(4) A person becomes a dog's owner or keeper if the person exercises "some measure of custody, care or control over the dog." *Armstrong*, 202 Wis. 2d at 267.

(a) A dog kennel employee who cared for a dog placed in that kennel was considered the owner or keeper of that dog. *Armstrong*, 202 Wis. 2d at 267–68; *see Pawlowski v. American Fam. Mut. Ins. Co.*, 2009 WI 105, 322 Wis. 2d 21.

(b) An owner of a home was not considered the owner or keeper of a dog simply because the dog was briefly at her home and she told the dog's owner where to put the dog during that visit. *Pattermann v. Pattermann*, 173 Wis. 2d 143 (Ct. App. 1992), *overruled on other grounds by Smaxwell v. Bayard*, 2004 WI 101, 274 Wis. 2d 278.

(c) A homeowner who permitted a dog owner and his two dogs to reside at her home for more than four months, and who provided the dogs with both shelter and protection on an ongoing basis, was a keeper of a dog that ran out the front door of the home and bit someone; moreover, the homeowner remained a keeper of the dog, even though the owner of the dog was exercising control of the dog at the time of the injury, because neither the homeowner nor the dog's owner had expressly terminated her authority. When "a homeowner has become a statutory owner by virtue of the dog's living in her residence for several months, that status does not vary on a minute-to-minute basis, depending on which person happens to open the door to let the dog run free." *Pawlowski*, 2009 WI 105, ¶ 50, 322 Wis. 2d 21.

(d) A homeowner who sheltered, maintained, and protected a dog in her home, even though the dog belonged to her adult daughter, both kept and harbored the dog, making the homeowner an owner for the purpose of Wis. Stat. § 174.02. *Erdmann v. Progressive N. Ins. Co.*, 2011 WI App 33, 332 Wis. 2d 147.

(e) Mere ownership of property on which a dog resides is insufficient to establish ownership under Wis. Stat. § 174.02. Whether a property owner "harbors" a dog depends on whether the property owner "has exercised the requisite control over the property" based on the totality of the circumstances. *Augsburger v. Homestead Mut. Ins. Co.*, 2014 WI 133, ¶ 48, 359 Wis. 2d 385.

(5) Whether a person is a dog's owner or keeper is a determination based on the person's relationship to the dog at the time that the dog inflicted the injury. *Armstrong*, 202 Wis. 2d at 267.

(6) Once a person is designated as a dog's owner or keeper, he or she is liable for the injuries that dog inflicts, even if a third party was controlling the dog at the exact time that the dog caused the injuries. *Koetting v. Conroy*, 223 Wis. 550 (1936).

2. Strict-liability and common-law negligence claims

a. Wisconsin shields property owners from liability for death or injuries caused by wild animals to those who entered the property for recreational activities. Wis. Stat. § 895.52(2)(b); *see, e.g., Hudson v. Janesville Conservation Club*, 168 Wis. 2d 436 (1992).

b. Wisconsin does not hold the owners of all wild animals strictly liable for the acts of those animals. Instead, Wisconsin has established strict liability only for stallions, bulls, boars, rams, and billy goats that have attained statutorily prescribed ages and that are, at the time that they inflict the damage, running at large. An animal not mentioned by statute as warranting strict liability will not be held to a strict-liability standard. Wis. Stat. § 172.01; *Ollhoff v. Peck*, 177 Wis. 2d 719, 723 (Ct. App. 1993) (holding that a muskellunge (musky) fish is not subject to strict liability).

NOTE: Wisconsin also holds the owners of certain dogs strictly liable for the acts of their dogs. Wis. Stat. § 174.02; *see supra* para. VII.C.1.

c. In the absence of statutorily created strict liability, a common-law negligence claim is the proper claim against an owner or keeper of animal that inflicted injury to a person or damage to property.

(1) The Wisconsin Court of Appeals has adopted Wis. JI—Civil 1391 as the proper statement of the law applied to such common-law negligence claims. This instruction, the court stated, "correctly does not distinguish between domesticated and wild animals, but rather instructs the jury to hold owners of animals to the appropriate standard of care given the nature of the animal involved." *Ollhoff*, 177 Wis. 2d at 724.

(2) Wis. JI—Civil 1391 states the standard of care as follows:

> An owner (keeper) of a(n) (note: insert name of animal) is deemed to be aware of the natural traits and habits which are usual to a(n) (animal) and must use ordinary care to restrain and control the animal so that it will not in the exercise of its natural traits and habits cause injury or damage to the person or property of another.

In addition, if an owner (keeper) is aware or in the exercise of ordinary care should be aware that the animal possesses any unusual traits or habits that would be likely to result in injury or damage, then the owner (keeper) must use ordinary care to restrain the animal as necessary to prevent the injury or damage.

(3) A 1983 court of appeals case concluded that a German shepherd mix, kept as a watchdog, had "teeth capable of making puncture wounds two and one-half inches deep," and had previously chased a car, chased and knocked people down from their bicycles, nipped at a person's heels after chasing that person, and barked and growled at people, thereby exhibiting unusual traits or habits that would be likely to result in injury; the court held that those facts were sufficient to put the dog's owners on notice that they needed to use reasonable care to prevent this dog from causing injury. *Denil v. Coppersmith*, 117 Wis. 2d 90, 93 (Ct. App. 1983).

NOTE: An action under Wis. Stat. § 174.02, discussed in paragraph VII.C.1., *supra*, and a common-law negligence claim are "neither incompatible nor interdependent." *Denil*, 117 Wis. 2d at 92–93; *see, e.g.*, *Cole*, 2004 WI 74, 272 Wis. 2d 539.

(4) Common-law negligence claims also apply to both legal owners and owner/keepers. In this context, a person is an animal's owner/keeper if "even though not owning the animal, the person has possession and control of it or if the person permits another person who is a member of his or her family or household to maintain the animal on his or her premises." Wis. JI—Civil 1391.

D. Emotional Distress Claims [§ 35.554]

1. In general

The seminal Wisconsin case for emotional distress claims involving injury to a companion animal is *Rabideau v. City of Racine*, 2001 WI 57, 243 Wis. 2d 486. In *Rabideau*, a police officer shot and killed his neighbor's dog in front of that neighbor. The neighbor-owner sought to recover for intentional infliction of emotional distress, negligent infliction of emotional distress, and loss of property. The following section reviews each of these potential torts separately, incorporating the analysis from *Rabideau*.

2. Intentional infliction of emotional distress (IIED)

a. The test for recovery for IIED for witnessing the death of a companion animal is the same as for the tort generally. To recover, a plaintiff must demonstrate the following:

(1) The defendant's conduct was intended to cause emotional distress. *Rabideau*, 2001 WI 57, ¶ 33, 243 Wis. 2d 486 (citing *Alsteen v. Gehl*, 21 Wis. 2d 349, 359–60 (1963)).

(2) The defendant's conduct was extreme and outrageous.

(3) The defendant's conduct was a cause-in-fact of the plaintiff's emotional distress.

(4) The plaintiff suffered an extreme disabling emotional response to the defendant's conduct.

b. The court held that, while a pet owner can appropriately bring a claim for IIED, the facts in *Rabideau* failed to meet the first part of the four-part test. Specifically, the court stated that although the officer obviously intended to fire his gun at the dog, there was "no evidence to indicate he did so to cause emotional distress to [the plaintiff]. Certainly that was a by-product, but that is insufficient standing alone. This is a limitation upon the cause of action for the intentional infliction of emotional distress." *Rabideau*, 2001 WI 57, ¶ 36, 243 Wis. 2d 486.

COMMENT: Other states have case law permitting recovery for IIED claims involving animals. A Kentucky court, for example, upheld an award of $50,000 compensatory damages and $75,000 punitive damages for an IIED claim involving horses. *Burgess v. Taylor*, 44 S.W.3d 806 (Ky. Ct. App. 2001).

3. Negligent infliction of emotional distress (NIED)

a. The *Rabideau* court, although sensitive to the bonds between humans and companion animals, did not allow the plaintiff to pursue a claim for NIED because of public policy considerations.

b. The court carefully considered the various factors that a given situation must meet to be eligible for recovery. *Rabideau*, 2001 WI 57, ¶ 23, 243 Wis. 2d 486.

(1) Precedent dictates the consideration of three factors:

(a) The victim must have been killed or seriously injured.

(b) The plaintiff and the victim must be related as spouses, parent and child, grandparent and grandchild, or siblings.

(c) The event that the plaintiff witnessed must have been extraordinary—"namely the incident and injury or the scene soon after the incident with the injured victim at the scene."

(2) Because the plaintiff and her dog did not have the familial relationships required by the second element, the court stated that recovery was impossible.

(a) The NIED ruling in *Rabideau* is an extension of the reasoning employed in *Kleinke*, a negligent-damage-to-property case in which the court explicitly noted the unlikeliness of a plaintiff ever recovering for emotional distress caused by negligent damage to property. *Kleinke v. Farmers Coop. Supply & Shipping*, 202 Wis. 2d 138, 145 (1996).

(b) Both *Rabideau* and *Kleinke* cited the six public policy factors, from *Bowen v. Lumbermens Mutual Casualty Co.*, 183 Wis. 2d 627, 655 (1994), that Wisconsin courts must review when analyzing the fairness and authenticity of an NIED claim:

(i) Whether the injury is too remote from the negligence,

(ii) Whether the injury is wholly out of proportion to the culpability of the negligent tortfeasor,

(iii) Whether, in retrospect, it appears too extraordinary that the negligence should have brought about the harm,

(iv) Whether allowance of recovery would place an unreasonable burden on the negligent tortfeasor,

(v) Whether allowance of recovery would be too likely to open the way to fraudulent claims, and

(vi) Whether allowance of recovery would enter a field that has no sensible or just stopping point.

(c) The *Rabideau* court focused on the sixth factor and concluded that a sensible stopping point would be impossible to achieve. Humans, the court explained, have an "enormous capacity to form bonds with dogs, cats, birds and an infinite number of other beings that are non-human. Were we to recognize a claim for damages for the negligent loss of a dog, we can find little basis for rationally distinguishing other categories of animal companion." *Rabideau*, 2001 WI 57, ¶ 7, 243 Wis. 2d 486.

CAUTION: The court stated that "even if" the situation in *Rabideau* had met the test, the court nevertheless might have precluded an NIED claim for public policy reasons. *Rabideau*, 2001 WI 57, ¶ 21, 243 Wis. 2d 486.

c. The Wisconsin Court of Appeals held that a four-year-old boy who asserted a bystander claim, after witnessing another minor inflict injuries to the boy's dog of such severity that the dog had to be euthanized, could not recover under a NIED theory because *Rabideau* bars companion animals from inclusion in the list of familial relationships for which recovery is permitted. *Camp v. Anderson*, 2006 WI App 170, ¶¶ 20–21, 295 Wis. 2d 714.

4. Loss of property

The *Rabideau* court said that a loss of property claim was the most conventional claim able to be brought for the death of an animal and that the plaintiff's claim, "liberally construed," encompassed this claim as well. *Rabideau*, 2001 WI 57, ¶ 37, 243 Wis. 2d 486.

VIII. ADDITIONAL WISCONSIN STATE LAWS AND LOCAL ORDINANCES [§ 35.555]

A. Wildlife Management and Endangered Species [§ 35.556]

1. Many states have enacted endangered and threatened species legislation to further protect local and regional wild animals and plants. Wisconsin's endangered species legislation is found at Wis. Stat. § 29.604 and is administered by the DNR.

a. Legislative intent, as stated in Wis. Stat. § 29.604(1), is to restrict the taking, possession, or marketing of endangered species in Wisconsin by establishing a program for conservation and restoration of endangered or threatened species. Both individual and governmental activities are within the scope of the statute. *But see Robinson v. Kunach*, 76

Wis. 2d 436, 448–49 (1977) (holding that precursor to Wis. Stat. § 29.604 was not a basis for seeking injunctive relief against the proposed relocation of a county highway).

b. *Endangered species* is defined as "any species whose continued existence as a viable component of this state's wild animals or wild plants is determined by the [DNR] to be in jeopardy on the basis of scientific evidence." Wis. Stat. § 29.604(2)(a).

c. *Threatened species* means "any species of wild animals or wild plants which appears likely, within the foreseeable future, on the basis of scientific evidence to become endangered." Wis. Stat. § 29.604(2)(b); *see* 68 Wis. Op. Att'y Gen. 9 (1979) (discussing constitutionality and effect of the precursor to Wis. Stat. § 29.604(2)(b)).

d. The DNR has established a list of endangered and threatened species. Wis. Stat. § 29.604(3).

(1) This list can be found on the DNR's website (https://dnr.wi.gov/files/PDF/pubs/er/ER001.pdf (revised June 2015)) and in administrative regulations. The list is reviewed and updated periodically. Wis. Admin. Code § NR 27.03.

(2) The supreme court has held that inconclusive scientific evidence regarding bobcat population does not compel the DNR to engage in a rulemaking process to add bobcats to the state's list of threatened species. *Barnes v. DNR*, 184 Wis. 2d 645 (1994).

e. The enforcement provisions of the statute include, but are not limited to, the following:

(1) A prohibition on taking, transporting, selling, possessing, and other actions involving covered species. Wis. Stat. § 29.604(4).

(2) Fines and imprisonment for violation of the law. Wis. Stat. § 29.604(5).

(3) Regulation of the incidental taking of covered species. Wis. Stat. § 29.604(6m).

(4) Regulation of state agency actions involving covered species. Wis. Stat. § 29.604(6r).

(5) A statutory requirement that the DNR conduct conservation research and implement programs to protect covered species. Wis. Stat. § 29.604(7)(a).

2. Wis. Stat. ch. 29 also regulates fishing, hunting, and trapping. Licensing, fees, commercial activities, education, and enforcement are covered in the chapter. Notable provisions are as follows:

a. Legal title to wild animals is vested in the state for the purposes of regulating the enjoyment, use, disposition, and conservation of these wild animals. Wis. Stat. § 29.011(1).

b. Interference or attempted interference with hunting, fishing, or trapping with the intent to prevent the taking of a wild animal is prohibited, as is interference or intentional interference with an activity associated with lawful hunting, fishing, or trapping (with exemption for wardens and law enforcement; civil actions allowed). Wis. Stat. § 29.083;

see State v. Bagley, 164 Wis. 2d 255 (Ct. App. 1991) (holding that comparable provisions in the precursor to Wis. Stat. § 29.083 prohibited only physical interference, not verbal).

NOTE: Protection under the First Amendment, or the comparable free speech provisions of the Wisconsin Constitution, is an affirmative defense. Wis. Stat. § 29.083(3m).

c. Hunting or trapping in a wildlife refuge is prohibited; taking of predatory game birds and animals must be done as the DNR directs. Wis. Stat. § 29.091.

d. The DNR may issue wolf-harvesting licenses and wolf carcass tags for residents and nonresidents to participate in wolf-hunting and wolf-trapping activities. This controversial legislation allows hunting with several types of weapons, dogs, electronic calls, and bait. Wis. Stat. § 29.185; *see Wisconsin Federated Humane Soc'ys, Inc. v. Stepp*, No. 2013AP902, 2014 WL 3359323 (Wis. Ct. App. July 10, 2014) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (denying declarative and injunctive relief that would have invalidated portions of DNR rules that authorize training and use of dogs to hunt wolves).

NOTE: The de-listing of wolves under the Endangered Species Act and subsequent wolf hunts have been the subject of much controversy over the last several years. Most recently, a federal court vacated the November 3, 2020 rule of the U.S. Fish and Wildlife Service de-listing the gray wolf. *Defenders of Wildlife v. U.S. Fish & Wildlife Serv.*, Nos. 21-cv-00344-JSW, 21-cv-00349-JSW, 21-cv-00561-JSW, 2022 WL 499838 (N.D. Cal. Feb. 10, 2022) (vacating and remanding "[t]he 'Endangered and Threatened Wildlife and Plants; Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife,' 85 Fed. Reg. 69,778 (Nov. 3, 2020)"), *appeals filed*, Nos. 22-15529, 22-15532, 22-15534–15537 (9th Cir. Apr. 12, 2022), 22-15626–15628 (9th Cir. Apr. 27, 2022). Thus wolves, other than the Northern Rocky Mountain population, are once again protected, and Wisconsin's ability to hold an annual wolf hunt is restricted.

NOTE: Wis. Stat. ch. 29 is not the only statutory chapter under which the state may regulate the taking of wild animals. *See State v. Kuenzi*, 2011 WI App 30, ¶¶ 26–38, 332 Wis. 2d 297 (holding that defendants who used snowmobiles to kill deer by running over and ramming into them could not hide behind Wis. Stat. ch. 29 to escape criminal prosecution under Wis. Stat. § 951.02).

3. The Wisconsin Constitution includes the following provision: "The people have the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law." Wis. Const. art. I, § 26.

4. Other statutory provisions regarding wild animals include the following:

a. Wis. Stat. § 167.31(4)(fm) provides an exception to firearm safety requirements that allows the DNR and authorized agents, under Wis. Stat. § 29.885, to discharge a firearm within 50 feet of the center of a roadway to dispose of a beaver or muskrat that is causing damage to a highway if the discharge does not pose a risk to public safety.

b. Wis. Stat. § 169.39 requires the DNR to promulgate rules regarding the humane care and housing of native wild animals that are held in captivity. *See generally* Wis. Admin. Code ch. NR 16.

c. Wis. Stat. §§ 29.885–.889 deal with the removal of wild animals that are causing damage to private and public property (including depredation programs for double-crested cormorants (Wis. Stat. § 29.866) and wolves (Wis. Stat. § 29.888), and abatement and claim programs for damage caused by seven animals listed under Wis. Stat. § 29.889(1)).

d. Wis. Stat. § 23.27(3) requires the DNR, with the advice of the Natural Areas Preservation Council, to conduct a natural heritage inventory program. Among other things, the program must establish a system for determining the existence and location of native plant and animal communities and endangered, threatened, and critical species. *See generally* DNR, Wisconsin's Natural Heritage Inventory (NHI), https://dnr.wisconsin.gov/topic/NHI (last visited May 3, 2022).

e. The DNR promulgates administrative rules regarding fish and game management. These rules are identified as "NR" and can be found through the Wisconsin Legislature's website (https://docs.legis.wisconsin.gov/). *See* Wis. Admin. Code chs. NR 1–80.

B. Farmed Animals [§ 35.557]

Wisconsin regulates animals in agriculture and livestock in various statutory provisions. Wis. Stat. ch. 95, "Animal Health," includes many of the farming provisions.

1. Definitions of *livestock* vary.

   a. Livestock branding: Livestock means cattle and horses. Wis. Stat. § 95.11(1)(b).

   b. Livestock premises registration: Livestock means bovine animals, equine animals, goats, poultry, sheep, swine, farm-raised deer, and any other kind of animal that the DATCP identifies by rule for the purposes of Wis. Stat. § 95.51. Wis. Stat. § 95.51(1); *see also* Wis. Admin. Code § ATCP 17.01(23).

   c. Humane slaughtering: Livestock means cattle, horses, swine, sheep, goats, farm-raised deer, and other species of animals susceptible of use in the production of meat and meat products. Wis. Stat. § 95.80(1)(b).

2. Transportation of livestock is regulated, and the following provisions are examples of humane considerations given to farmed animals in transport:

   a. Downer animals (animals that are too sick or injured to stand) must not be dragged or pulled by the neck or any extremity or subjected to any other mistreatment or abuse. They must be confined in separate holding pens and segregated from healthy animals or separated by a rigid barrier when transported. Downer animals must not be held for more than 24 hours by any animal market operator, animal dealer, or animal trucker before they are sent for rendering or euthanized in a humane manner. Wis. Stat. § 95.72(10); Wis. Admin. Code § ATCP 12.07.

   b. Chickens must not be overcrowded, and the shipping container must be at least 13 inches high on the inside and covered at the top in a way that prevents the chickens from getting caught in the top. Wis. Stat. § 134.52.

c. Animals must not be transported for more than 12 hours without the transporter providing potable water, and equine animals must not be transported in a vehicle that is not of "adequate size." Wis. Admin. Code § ATCP 12.08(17), (18).

3. Like other states, Wisconsin has codified a response to public concern about the way farmed animals are slaughtered. The "humane slaughtering" statute includes the following provisions. Wis. Stat. § 95.80.

a. A definition of *livestock* (see above). Wis. Stat. § 95.80(1)(b).

b. A requirement that no slaughterer may slaughter livestock except by a humane method. Wis. Stat. § 95.80(2). Humane methods include:

(1) Methods normally causing animals to be rendered insensible to pain before being shackled, hoisted, thrown, cast, or cut. Wis. Stat. § 95.80(1)(a)1.

(2) Methods required by or used in connection with the ritual of any religious faith whereby the animal suffers loss of consciousness by instantaneous severance of the carotid arteries with a sharp instrument. Wis. Stat. § 95.80(1)(a)2.

4. Controlling contagious or infectious diseases is an ever-evolving topic of concern for the livestock industry. *See* Wis. Stat. §§ 95.19, 95.195.

a. In Wis. Admin. Code ch. ATCP 10, the DATCP regulates the movement, testing, reporting, sales, identification, and vaccination of animals with infectious diseases in order to protect the livestock industry.

b. The DATCP currently imposes strict liability on an individual who moves or sells animals with any of 19 diseases listed in Wis. Admin. Code § ATCP 10.08, which include rabies, foot and mouth disease, and chronic wasting disease. A number of the listed diseases, such as rabies and brucellosis, are zoonotic (i.e., capable of being transmitted from animals to humans), so this type of provision is also an important public-health-control mechanism.

c. In *Wilson v. Tuxen*, 2008 WI App 94, 312 Wis. 2d 705, involving the transmission of infectious disease (Johne's disease) from one dairy herd to another, the court of appeals held:

(1) Economic loss doctrine barred recovery in tort for losses in the value of purchased cattle.

(2) Statutory claims involving importation, sale, transport, or exhibition of diseased livestock are not subject to the economic loss doctrine. *See* Wis. Stat. § 95.19(2).

(3) Johne's disease is not a basis for strict liability under such statutory claims but can create liability for knowingly engaging in certain conduct with respect to such animals. Wis. Stat. § 95.19(2)(c)–(e); *see also* Wis. Admin. Code § ATCP 10.08(2).

(4) Buyers' 10-month delay in notifying seller that cattle were infected resulted in notification being not within a reasonable time and thus precluded recovery for breach of contract.

(5) Wis. Stat. § 95.195, relating to implied warranty that an animal is not infected with a covered disease, is subject to the requirement of giving notice of breach within a reasonable time.

C. Animals in Experimentation [§ 35.558]

Animals in scientific research and experimentation are mostly regulated by federal law (see Animal Welfare Act, section 35.14, *supra*). However, the following uses of animals in research are governed by state statutes:

1. Use of animals for research purposes

   NOTE: The Board of Regents of the University of Wisconsin (UW) System must adopt criteria for researchers to follow regarding humane treatment of animals for scientific research purposes. Wis. Stat. § 36.40. The UW has adopted criteria from the *Guide for the Care and Use of Laboratory Animals*. Univ. of Wis. Sys. Regent Policy Documents § 4.3 (adopted Apr. 6, 1984), https://policy.wisc.edu/library/UW-4110; *see* Inst. of Laboratory Animal Res., *Guide for the Care and Use of Laboratory Animals* (1996), https://www.nap.edu/read/5140/chapter/1; *see also* Office of Laboratory Animal Welfare, Nat'l Insts. of Health, https://olaw.nih.gov (last updated May 7, 2022).

2. Humane use of dogs for scientific or educational purposes. Wis. Stat. § 174.13.

   a. Wis. Stat. § 174.13(2) allows pounds to release unclaimed dogs to educational institutions of higher learning (UW System or Medical College of Wisconsin) for research and entitles pounds operated by counties, cities, villages, or towns $1 per dog requisitioned.

      COMMENT: Eighteen states and the District of Columbia do not allow this activity, commonly known as *pound seizure*. *See* Am. Anti-Vivisection Soc'y, *Pound Seizure Laws*, https://aavs.org/animals-science/laws/pound-seizure-laws/ (last visited May 3, 2022). Because of its controversial nature, some shelters and humane societies in Wisconsin have implemented policies prohibiting the seizure of animals for research purposes.

   b. Wis. Stat. § 174.13(4) makes it unlawful for any person to take or send outside the state any living cat or dog to be used for any medical, surgical, or chemical investigation, experiment, or demonstration.

3. Uses of animals specified under Wis. Stat. § 951.015(3), which exempts the following from the provisions of Wis. Stat. ch. 951 (crimes against animals):

   a. Teaching, research, or experimentation conducted pursuant to a protocol or procedure approved by an educational or research institution, and related incidental animal care activities, at facilities that are regulated under 7 U.S.C. §§ 2131–2159 (AWA) or 42 U.S.C. § 289d (Public Health Service Act); and

   b. Bona fide scientific research involving species unregulated by federal law.

D. Racing and On-Track Pari-mutuel Wagering [§ 35.559]

Wisconsin allows both horse and dog racing. The following are selected provisions of the pari-

mutuel wagering statute, Wis. Stat. ch. 562:

1. Dogs or horses used in races with pari-mutuel wagering and bred and trained in Wisconsin for racing "shall be treated humanely, both on and off racetracks, throughout the lives of the animals." Wis. Stat. § 562.001.

2. The state gaming agency must promulgate rules ensuring the humane treatment of animals in this industry. Wis. Stat. § 562.02(1)(b); *see* Wis. Admin. Code ch. Game 15.

3. Medication or tampering with race animals is prohibited within 48 hours before racing, with certain exceptions. Wis. Stat. § 562.09.

4. No live lures or bait are allowed in dog racing or training for racing. Wis. Stat. § 562.10.

5. Humane killing methods are required for dogs. Wis. Stat. § 562.105.

E. Civil Liability for Equine Activities [§ 35.560]

Wis. Stat. § 895.481 immunizes a person from civil liability for acts and omissions related to the person's participation in equine activities where a person is injured or killed due to the "inherent risk" of equine activities, unless a statutory exception applies. The Seventh Circuit interpreted two of the exceptions in a consolidated opinion, finding that neither exception applied. *Dilley v. Holiday Acres Prop., Inc.*, 905 F.3d 508 (7th Cir. 2018). In the case of an *equine professional*, as defined within Wis. Stat. § 895.481(1)(d), the statute also contains a specific notice requirement in order for immunity to apply.

F. Additional Statutes [§ 35.561]

Counsel should be aware of the following Wisconsin laws, all of which pertain to animals:

1. Wis. Stat. ch. 169, which deals with captive wildlife.

2. Wis. Stat. ch. 170, which deals with strays and lost chattels.

3. Wis. Stat. ch. 172, which deals with animals distrained or doing damage.

4. Wis. Stat. ch. 174, which specifically deals with dogs.

5. Wis. Stat. § 895.484, which creates a civil-liability exemption for liability for property damage or injury that results from a person's forcible entry into a vehicle to rescue a person or domestic animal believed to be in imminent danger, if specified conditions are met.

G. Local Ordinances [§ 35.562]

1. Municipal regulation of animals is based on police powers.

2. A municipality may regulate the number of particular animals kept in that jurisdiction. *State v. Mueller*, 220 Wis. 435 (1936).

3. No Wisconsin statute regulates particular breeds of dogs differently than other breeds of dogs, although some municipalities have passed breed-specific legislation (BSL). Several states prohibit this controversial type of legislation.

   a. BSL is typically directed at American pit bull terriers, Staffordshire bull terriers, American Staffordshire terriers, or dogs that are mixed breed with or exhibit the characteristics of one of the breeds on the above list (colloquially known together as "pit bulls").

   b. Example: Restrictions on actions of people owning certain breeds.

      The city of Milwaukee requires that pit bulls and Rottweilers be leashed whenever in public and that the leash be held by someone 16 years old or older, unless the department of neighborhood services gives written approval for someone under 16 to hold the leash; trained; and kept in an area with a fence of adequate height. Milwaukee, Wis., Code of Ordinances § 78-22 (Mar. 28, 2017).

4. At least two municipalities in Wisconsin restrict the chaining and tethering of dogs:

   a. Town of Linn. Linn, Wis., Municipal Code § 7-9 (amended May 10, 2004).

   b. City of Racine. Racine, Wis., Municipal Code § 10-101, https://www.municode.com/library/wi/racine/codes/code_of_ordinances (codified through Ord. of Mar. 15, 2022).

IX. CONTRACT LAW [§ 35.563]

A. Contractual Disagreements Regarding Purchase of Animals [§ 35.564]

1. Wisconsin has adopted the Uniform Commercial Code (UCC) to govern the sale of goods. Wis. Stat. ch. 402.

2. *Goods* means all things that are movable at the time of identification to the contract for sale and includes the unborn young of animals. Wis. Stat. § 402.105(1)(c).

3. Animals are considered goods, and, therefore, Wis. Stat. ch. 402 governs the sale of animals from merchants. *Embryo Progeny Assocs. v. Lovana Farms, Inc.*, 416 S.E.2d 883 (Ga. Ct. App. 1992); *Young & Cooper, Inc. v. Vestring*, 521 P.2d 281 (Kan. 1994); *see also* John Alan Cohan, *The Uniform Commercial Code as Applied to Implied Warranties of "Merchantability" and "Fitness" in the Sale of Horses*, 73 Ky. L.J. 665 (1985); Daniel A. Harvey, *The Applicability of Strict Products Liability to Sales of Live Animals*, 67 Iowa L. Rev. 803 (1982).

   NOTE: A *merchant* is a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill. Wis. Stat. § 402.104(3).

   NOTE: Courts have varied on the issue of whether animals are *products* under state product-liability statutes. *Compare Anderson v. Farmers Hybrid Cos.*, 408 N.E.2d 1194, 1199 (Ill. App. Ct. 1980) (holding that pigs were not products), *with Sease v. Taylor's Pets, Inc.*, 700 P.2d

1054 (Or. Ct. App. 1985) (holding that pet skunk was a product).

4. The statute of frauds states that a contract for the sale of goods for the price of $500 or more is not enforceable unless in writing. Wis. Stat. § 402.201(1).

5. Breach of express or implied warranties, such as the warranty that a pet is in good health, can result in breach of a contract involving the sale or purchase of animals.

6. No particular language is required to create an express warranty, and such warranties can be disclaimed. Wis. Stat. § 402.316.

7. Implied warranties of merchantability and fitness for a particular purpose apply unless excluded. Wis. Stat. §§ 402.314, 402.315.

8. No implied warranty exists for cattle, hogs, sheep, or horses if the seller complied with all state and federal regulations pertaining to animal health, unless the seller had knowledge of disease. Wis. Stat. § 402.316(3)(c); *see also Wilson v. Tuxen*, 2008 WI App 94, 312 Wis. 2d 705 (discussed in section 35.36, *supra*).

9. Remedies for breach of warranty by the seller of an animal can include cancellation of contract, recovery of damages, specific performance, and replevin. Wis. Stat. §§ 402.711–.716.

10. Remedies for breach of warranty by the buyer of an animal can include the withholding of delivery, salvage of goods, recovery of damages, and cancellation of the contract. Wis. Stat. §§ 402.701–.710.

B. Landlord-Tenant Disputes and Condominium Law [§ 35.565]

1. Several federal laws give tenants the right to keep companion animals in rental housing. Disability and fair housing laws permit persons with disabilities to have companion animals in their housing. Additionally, companion animals are allowed in federally assisted rental housing for the elderly. *See* 42 U.S.C. § 1437z-3; 12 U.S.C. § 1701r-1.

   NOTE: Section 504 of the Rehabilitation Act of 1973, the Fair Housing Amendments Act of 1988, and Title II of the Americans with Disabilities Act protect individuals with mental disabilities from housing discrimination. In 1981, the Fifth Circuit ruled that a waiver of a no-pets policy may be a reasonable accommodation under section 504 of the Rehabilitation Act. 29 U.S.C. § 794; 42 U.S.C. § 3604; 42 U.S.C. § 12132; *see Majors v. Housing Auth.*, 652 F.2d 454 (5th Cir. 1981); *see also Green v. Housing Auth.*, 994 F. Supp. 1253 (D. Or. 1998); Judge David L. Bazelon Ctr. for Mental Health Law, *Right to Emotional Support Animals in "No Pet" Housing*, http://www.bazelon.org/wp-content/uploads/2017/04/2017-06-16-Emotional-Support-Animal-Fact-Sheet-for-Website-final.pdf (last updated June 16, 2017).

2. Wisconsin law prevents housing discrimination (rental or sale) against individuals with service animals. An exception exists for rental or owner-occupied housing if the owner or a member of the owner's family is allergic to the type of animal the individual possesses. This statute also applies to condominium ownership. *See* Wis. Stat. §§ 106.50(2r)(bm), 703.10(2m).

3. If no lease provision to the contrary exists, a tenant has the right to have a companion animal in rental housing because the animal is considered personal property of the tenant. *See generally supra* § 35.10 (discussing legal status of animals as personal property).

PRACTICE TIP: If a tenant can prove that a landlord knew there was an animal in the rental housing but did nothing to indicate that it was a breach of the lease (or somehow affirmed the existence of the animal), a common-law argument may be made that a modification of contract terms has occurred over time (the longer the length of time, the stronger the argument).

PRACTICE TIP: If ownership or management is changed, the new landlord can change the terms of the rental agreement to ban animals. However, the terms apply only on renewal of the lease—not in the middle of existing leases. Month-to-month lessees are entitled to one month's notice.

4. Nuisance and public health regulations apply to the possession of animals in rental housing. *See, e.g.*, Madison, Wis., General Ordinances § 7.322 (amended Feb. 16, 2018) (animal defecation on public or private property regulated).

5. If violation of a lease provision occurs, a landlord's remedies can include recovery of damages, eviction, or lease termination under Wis. Stat. § 704.17. A landlord can only make a claim for damages above and beyond reasonable wear and tear. *See* Wis. Admin. Code § ATCP 134.06(3)(c).

6. A tenant's defenses can include unlawful discrimination based on a disability under federal and state law (e.g., animals assisting individuals with vision problems or animals assisting individuals with mental illness) and waiver of enforceability of a lease's no-animal provision.

7. Common-law liability of landowners and landlords for negligence associated with injuries caused by dogs is limited to situations in which the landowner or landlord is also the owner or keeper of the dog causing injury. *See Smaxwell v. Bayard*, 2004 WI 101, 274 Wis. 2d 278; *see also Ladewig v. Tremmel*, 2011 WI App 111, 336 Wis. 2d 216 (holding that public policy prevented liability against landlords who included a provision against vicious dogs in their tenants' lease).

8. Condominium owners are bound by the condominium's declaration, bylaws, and association rules. Wis. Stat. §§ 703.09, 703.10.

9. Failure to comply with any of the above documents is grounds for action to recover sums due, for damages, injunctive relief, or both maintainable by the association or, in a proper case, by an aggrieved unit owner. Wis. Stat. §§ 703.10(1), 703.24(2).

10. Wisconsin courts have determined that a restriction on the use of real estate, including condominiums, must be reasonable under all the facts and circumstances. *See, e.g.*, *McKinnon v. Benedict*, 38 Wis. 2d 607, 618 (1968).

C. Bailments [§ 35.566]

1. "A bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to an express or implied contract to fulfill that trust." 8A Am. Jur. 2d *Bailments* § 1 (2021).

2. There are two requirements to a valid bailment: delivery by the bailor and intent to possess by the bailee. Ray Andrews Brown, *The Law of Personal Property* 209–23 (3d ed. 1975).

3. Examples of bailments involving animals include animal boarding (such as overnight kenneling or daycare), veterinary treatment without guardian presence, or the rental of animals such as horses.

4. The bailor's duty in commercial arrangements is to provide the animal agreed upon (express or implied warranty of fitness) and to abide by the duty of disclosure regarding peculiar characteristics, such as viciousness.

5. The bailee's duty is to return the animal at the stated time or on demand in at least as good condition as when received.

6. The rights of parties in a bailment may be modified by contract.

7. Recovery theories for breach of bailment (loss or injury of animal; injury to bailee or third party by animal) arise in both contract and tort.

8. When an injury results from veterinary treatment, some courts have used a veterinary malpractice standard rather than the bailment doctrine to determine damages. *See Price v. Brown*, 680 A.2d 1149 (Pa. 1996); *see also* Katie J.L. Scott, *Bailment and Veterinary Malpractice: Doctrinal Exclusivity, or Not?*, 55 Hastings L.J. 1009 (2004). See also section 35.30, *supra*, for a discussion of legal theories used in veterinary malpractice litigation.

9. A specialized form of bailment recognized in Wisconsin is an *agistment contract*, a contract for the taking and feeding of another's livestock on one's own land at a certain rate of compensation. *See Wiegel v. Sentry Indem. Co.*, 94 Wis. 2d 172 (1980) (citing *Black's Law Dictionary* 88 (4th ed. rev. 1968)).

X. ANIMALS IN FAMILY LAW CASES [§ 35.567]

A. Divorce and Legal Custody Actions [§ 35.568]

1. No Wisconsin statute specifically governs placement or custody determinations involving animals in actions affecting the family, such as divorce or legal separation.

2. Because Wisconsin characterizes animals as the personal property of their owners, determinations of who retains possession of an animal are typically made pursuant to the property division statute, Wis. Stat. § 767.61.

3. Although published Wisconsin decisions address the award of livestock in an action affecting the family, no published case addresses the award of a pet in a family action.

4. Other states have taken varying positions on the award of pets in a family action.

   a. An appellate court in Iowa held that "a dog is personal property and while courts should not put a family pet in a position of being abused or uncared for, we do not have to determine the best interests of a pet." *In re Marriage of Stewart*, 356 N.W.2d 611, 613 (Iowa Ct. App. 1984). *But see Raymond v. Lachmann*, 695 N.Y.S.2d 308 (App. Div. 1999) (deciding, in an action to determine ownership of a cat, that it was in the best interests of a 10-year-old cat to remain with the party who would be living in the home in which the cat had always resided).

b. Some courts have explicitly discussed an animal's safety and welfare when awarding a pet in a family court action. *See, e.g.*, *Juelfs v. Gough*, 41 P.3d 593, 594–95 (Alaska 2002); *Pratt v. Pratt*, No. C4-88-124, 1988 WL 120251 (Minn. Ct. App. Nov. 15, 1988) (unpublished).

An Alaska statute expressly provides that, in a divorce action or postjudgment proceeding, the court may provide for an animal's ownership or joint ownership, taking into consideration the well-being of the animal. Alaska Stat. Ann. § 25.24.160(a)(5) (West, Westlaw current through Ch. 3 of 2022 Second Reg. Sess. of 32nd Leg.).

c. A Texas court affirmed an arrangement that made one party the "managing conservator" of a dog and gave the other party visitation rights. *Arrington v. Arrington*, 613 S.W.2d 565 (Tex. Civ. App. 1981).

d. In contrast, a Florida court found that the party who is not awarded the animal cannot receive visitation rights because enforcement of such rights would unduly burden a judiciary already overburdened with child custody and visitation cases. *Bennett v. Bennett*, 655 So. 2d 109, 110–11 (Fla. Dist. Ct. App. 1995).

B. Domestic Abuse [§ 35.569]

1. The link between animal cruelty and domestic abuse is widely accepted.

a. The Pet and Women Safety Act of 2017, introduced as H.R. 909, 115th Cong. (2018), was passed as part of the Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490. It expanded federal domestic violence protections by

(1) Establishing a grant program to help provide pet-friendly domestic violence shelters and access to housing for domestic violence victims with pets;

(2) Amending the federal criminal definition of stalking to include causing a person to "experience a reasonable fear of death or serious bodily injury to his or her pet";

(3) Creating a criminal penalty for crossing state lines to violate a protection order against a pet; and

(4) Including the cost of veterinary services as part of mandatory restitution for victims.

b. Thirty-five states, in addition to Washington, DC, and Puerto Rico, include companion animals in some form in their domestic-abuse-protection-order statutes. These statutes take different forms in various states. Rebecca F. Wisch, Animal Legal & Historical Web Ctr., Michigan State Univ. Coll. of Law, *Domestic Violence and Pets: List of States that Include Pets in Protection Orders* (2022), https://www.animallaw.info/article/domestic-violence-and-pets-list-states-include-pets-protection-orders.

(1) In 2006, Maine became the first U.S. state to specifically amend its domestic relations law to permit judges to include protections for animals in domestic abuse injunctions. Me. Rev. Stat. Ann. tit. 19-A, § 4007, sub. § 1, ¶ E-1 1 (West, Westlaw current with emergency legis. through Ch. 652 of 2022 Second Reg. Sess. of 130th Leg.).

(2) Wisconsin includes specific protections for *household pets* in the domestic abuse and child abuse injunction statutes. Wis. Stat. §§ 813.12, 813.122.

NOTE: The inclusion of household pets in these injunction statutes significantly expands protections both for victims of domestic and child abuse and for their companion animals.

(a) A household pet is defined as "a domestic animal that is not a farm animal … that is kept, owned, or cared for by the petitioner or by a family member or household member of the petitioner." Wis. Stat. § 813.12(1)(ce); *see also* Wis. Stat. §§ 813.122(1)(e), 813.125(1)(bm).

(b) The protections enable the court to order that the respondent "refrain from removing, hiding, damaging, harming, or mistreating, or disposing of, a household pet." Wis. Stat. §§ 813.12(4)(a)(intro.), 813.122(4)(a)(intro.).

(c) The court may also specifically order that the petitioner, or a family member or household member of the petitioner, "retrieve a household pet" from the respondent. Wis. Stat. §§ 813.12(4)(a)(intro.), 813.122(4)(a)(intro.).

(3) The injunction for individuals at risk includes *mistreatment of an animal*, defined as "cruel treatment of any animal owned by or in service to an individual at risk," as one of the grounds on which an individual at risk may get an injunction. Any resulting restraining order can require the respondent to cease threatening or mistreating the animal. Wis. Stat. § 813.123(1)(fm), (5)(ar)2.

To qualify as an *individual at risk*, one must be either an elder adult at risk or an adult who "has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation." Wis. Stat. §§ 46.90(1)(br), 55.01(1e), 813.123(1)(ae), (cg), (ep).

(4) New York allows enjoining a respondent from "intentionally injuring or killing, *without justification*, any companion animal the respondent knows to be owned, possessed, leased, kept or held by the petitioner or a minor child residing in the household." N.Y. Fam. Ct. Act § 842(i) (West, Westlaw current through L. 2022 chs. 1 to 49, 55, 57, 60 to 177) (emphasis added).

(5) Vermont permits a court to craft an order "concerning the possession, care and control of any animal owned, possessed, leased, kept, or held as a pet by either party or a minor child residing in the household" if the court finds that the defendant has abused the plaintiff, the children, or both, and that (1) there is a danger of further abuse or (2) the defendant is incarcerated and has been convicted of a specified crime (e.g., murder, sexual assault, etc.). Vt. Stat. Ann. tit. 15, § 1103(c)(1), (c)(2)(G) (West, Westlaw current through Acts 1 through 87 and 89, 91, 94, 95, and M-1 through M-9 of Adjourned Sess. of 2021–22 Vt. Gen. Assemb.).

(6) A Massachusetts statute allows the court, whenever it issues specified no-contact or restraining orders, to order the possession, care, and control of any domesticated animal owned, possessed, leased, kept, or held by either party or a minor child residing in the household to the plaintiff or petitioner in a no-contact or restraining

order. The court may order the defendant to refrain from abusing, threatening, taking, interfering with, transferring, encumbering, concealing, harming, or otherwise disposing of the animal. Mass. Gen. Laws Ann. ch. 209A, § 11 (West, Westlaw current through ch. 41 of 2022 2d Ann. Sess.); *see, e.g.*, Frances R. Catanio, *The Massachusetts Dog Who Won a Restraining Order Against Its Owner's Violent Boyfriend*, The Week, Jan. 10, 2015, https://theweek.com/articles/469968/the-massachusetts-dog-that-won-a-restraining-order-against-owners-violent-boyfriend.

2. If counsel is involved in a case in which animal cruelty is present, counsel may wish to consider whether any of the dynamics of domestic abuse likewise are present and vice versa. Wis. Stat. ch. 767 contains explicit protections for victims of domestic abuse in matters affecting the family. *See, e.g.*, Wis. Stat. § 767.41; *see also* Gregg M. Herman et al., *Family Law in Wisconsin: A Forms and Procedures Handbook* chs. 2, 14D (State Bar of Wis. 10th ed. 2021 & Supp.).

   EXAMPLE: In a 1999 Washington County case, a Wisconsin man was charged with and pleaded guilty/no contest to charges of stabbing and decapitating eight of his wife's companion animals to punish her for having an abortion. *State v. Kritz*, No. 99CF000152 (Wis. Cir. Ct. Washington Cnty.).

3. For more information about the link between domestic abuse and animal abuse, see Diana J. Gentry, *Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence*, 13 Yale J.L. & Feminism 97 (2001). *See also* Michelle Lerner, *From Safety to Healing: Representing Battered Women with Companion Animals*, Domestic Violence Report, Vol. 4, No. 2 (Dec./Jan. 1999).

XI. ESTATE PLANNING FOR ANIMALS [§ 35.570]

A. Wills and Trusts [§ 35.571]

1. Studies have shown that between 12% and 27% of people with companion animals include them in their wills. Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 Santa Clara L. Rev. 617, 618 & n.12 (2000); *see also* Rachel Hirschfeld, *PETRIARCH: The Complete Guide to Financial and Legal Planning for a Pet's Continued Care* (2010); Jennifer R. Taylor, *A "Pet" Project for State Legislatures: The Movement Toward Enforceable Pet Trusts in the Twenty-First Century*, 13 Quinnipiac Prob. L.J. 419 (1999); Anne R. Carey & Marcy E. Mullins, *USA Snapshots: Man's Best Friend?*, USA Today, Dec. 2, 1999, at 1B (12%); Elys A. McLean, *USA Snapshots: Fat Cats—and Dogs*, USA Today, June 28, 1993, at D1 (27% of dog owners and 21% of cat owners); Gerry W. Beyer, *Estate Planning for Non-Human Family Members*, http://www.professorbeyer.com/Articles/Pet_Trusts_06-02-2014.pdf (last updated June 2, 2014); Alex De Grand, *Including Pets in Estate Planning Benefits Human—and Nonhuman—Survivors*, Inside Track (State Bar of Wis.), July 15, 2009, https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=1&Issue=12&ArticleID=5552.

2. After death, individuals can provide for an animal in a variety of ways, such as a cash bequest to be used for an animal's care or leaving the animal to a friend in a will. *Pet trust* allows the grantor (usually the pet owner) to designate a trustee to administer an instrument to which money or property is bequeathed.

   PRACTICE TIP: Including pets in estate planning, through a will provision or the use of a

trust, provides evidence of the decedent's wishes for the animal, thereby decreasing the likelihood of litigation regarding which person the decedent wished to care for the animal. *See, e.g.*, *Hollander v. Wegman*, No. 2012AP2642, 2013 WL 3884148 (Wis. Ct. App. July 30, 2013) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (deciding case based on parties' testimony, in absence of documents demonstrating decedent's intent). Such planning may also decrease the likelihood that the decedent's pet(s) will be surrendered to a rescue organization or shelter. Informal planning, while common, is not legally binding on those administering the decedent's estate.

3. Wis. Stat. § 701.0408, "Trust for care of animal," permits the creation of a trust "to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal."

4. Wis. Stat. § 701.0408(3) provides an enforceable tool for Wisconsin residents wishing to plan for the care of their animals after they die insofar as it expressly states that a trustee under this section can only use the funds for the intended use—namely, care of the settlor's pet or pets—unless a court determines that the property included in the trust exceeds the amount needed for this purpose

5. Pet trusts can be very complicated. See generally David Congalton & Charlotte Alexander, When Your Pet Outlives You: Protecting Animal Companions After You Die (June 2002); Peggy R. Hoyt, All My Children Wear Fur Coats: How to Leave a Legacy for Your Pet (2d ed. 2009); Barry Seltzer & Gerry W. Beyer, Fat Cats & Lucky Dogs: How to Leave (Some of) Your Estate to Your Pet (2010). When drafting such documents, attorneys should consult the numerous resources available. Generally speaking, careful consideration should be given to the following items when drafting a trust for an animal:

   a. Designation and notification of the animal caregiver, because this person will ultimately receive funds from the trust created and will need to immediately care for the animal once the settlor is deceased.

      PRACTICE TIP: Be sure to name several alternative caregivers so that the pet does not end up homeless if none of the caregivers is able or willing to accept the animal.

   b. Designation of a trustee who will administer the trust and amount of trust fees. *See* Gerry W. Beyer, *Estate Planning for Non-Human Family Members*, http://www.professorbeyer.com/Articles/Pet_Trusts_06-02-2014.pdf (last updated June 2, 2014) (providing detailed information on pet trusts).

      PRACTICE TIP: Be sure to name alternative trustees in case the named trustee is unable to continue serving until the termination of the trust. Additionally, a stipend for the trustee may be appropriate if funds allow.

   c. Amount needed to support an animal or animals for expected lifespan(s).

   d. Detailed description of care to be given animal(s).

   e. Method of distribution of funds to the caregiver.

f. Designation of remainder beneficiary (can be charitable organization) upon the death of the animal or the termination of the trust.

g. Prevention of fraud—clear identification of animal (include file with identifying documents) and provision for accountability of caregiver to trustee.

6. If start-up funds are available, inter vivos (living) trusts can be used and may, in fact, be a better option because living trusts do not have to go through probate (allowing a caretaker to have immediate access to funds for the animal(s)) and the terms of the trusts can be modified while the owner is alive.

NOTE: Also consider an outright gift of the animal along with a sufficient financial bequest for the animal's care that is conditional on the caregiver or beneficiary properly caring for the animal. Use this type of arrangement carefully, because there is no individual charged with oversight to ensure the gift is used as intended.

B. Powers of Attorney [§ 35.572]

It is possible to include language in a financial power of attorney that permits an agent to make decisions about pets. Sample language may be as simple as the following:

> It may be necessary from time to time for me to leave my pet(s) in the care and custody of a caregiver. My agent shall have the authority to serve as the caregiver of my pet, to designate another caregiver for my pet, and to authorize veterinary care and treatment, including euthanasia if necessary because of my pet's medical condition. My agent may board my pet and may make a permanent placement, transfer, gift, or sale of my pet if I become permanently incapacitated and unable to care for my pet. My agent may use funds for the care, placement, and maintenance of my pets and for reasonable compensation for my pet's caregiver.

C. Tax Implications [§ 35.573]

For a detailed analysis of how various types of pet trusts might be taxed, see Gerry W. Beyer & Jonathan P. Wilkerson, *Max's Taxes: A Tax-Based Analysis of Pet Trusts*, 43 U. Rich. L. Rev. 1219 (2009), https://scholarship.richmond.edu/lawreview/vol43/iss4/4.

Chapter 36
How to Cite

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; and all references to *The Bluebook* are to the 21st edition.

I. INTRODUCTION [§ 36.574]

A. Citation Form Prescribed [§ 36.575]

1. The Wisconsin Supreme Court has power to set citation form for state court system as part of rules of pleading and practice. Wis. Stat. § 751.12; SCR ch. 80.

2. The court has adopted the citation formats recommended in *The Bluebook: A Uniform System of Citation* for citations in briefs and memoranda filed with the court. SCR 80.02 sets forth the requirements for proper citation of cases in documents filed with the supreme court or court of appeals. *Notice to Members of the Bar*, 74 Wis. 2d xxxix (1976); Wis. Stat. § 809.19(1)(e).

   SCR 80.02 Proper citation.
   (1) The citation of any published opinion of the court of appeals or the supreme court in the table of cases in a brief and the initial citation in a memorandum or other document filed with the court of appeals or the supreme court shall include, in the order set forth, a reference to each of the following:
   (a) the public domain citation, if it exists;
   (b) the volume and page number of the Wisconsin Reports in which the opinion is published;
   (c) the volume and page number of the North Western Reporter in which the opinion is published
   (2) Subsequent citations shall include at least one of the references in sub. (1) and shall be internally consistent.
   (3) (a) Citation to specific portions of an opinion issued or ordered to be published prior to January 1, 2000, shall be by reference to page numbers, in the following form:
   Smith v. Jones, 214 Wis. 2d 408, 412.
   Doe v. Roe, 595 N.W.2d 346, 352.
   (b) Citation to specific portions of an opinion issued on or after January 1, 2000, shall be by reference to paragraph numbers, in the following form:
   Smith v. Jones, 2000 WI 14, ¶6
   Smith v. Jones, 214 Wis. 2d 408, ¶12
   Doe v. Roe, 2001 WI App 9, ¶17
   Doe v. Roe, 595 N.W.2d 346, ¶27
   (c) Citation to specific portions of an opinion issued prior to January 1, 2000, and ordered to be published after January 1, 2000, shall be by reference to paragraph numbers if they exist or to page numbers if paragraph numbers do not exist.

   CAUTION: Although the citation format used in this publication conforms to most rules in *The Bluebook*, readers should be aware that the Wisconsin Supreme Court, the Wisconsin Court of Appeals, and the State Bar of Wisconsin's Professional Development Department, Books Division, all use their own citation formats. Although these formats are similar in most respects, each has features distinct from the others and from *The Bluebook*. In communicating with Wisconsin courts, attorneys *must* follow Wis. Stat. § 809.19(1)(e), which states, in pertinent part, that parties must provide "citations to the authorities, statutes and parts of the record relied on as set forth in the Uniform System of Citation and SCR 80.02."

B. Resources [§ 36.576]

1. *The Bluebook: A Uniform System of Citation* (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020).

2. Theodore A. Potter et al., *Legal Research in Wisconsin* (2d ed. 2008).

3. Patricia A. Cervenka & Leslie Behroozi, *Wisconsin Legal Research* (2011).

4. Citation of Unpublished Opinions Committee, *Final Report to Wisconsin Supreme Court* (Mar. 2012), https://wicourts.gov/publications/reports/docs/unpublishedopinionsfinal.pdf.

5. Chicago Manual of Style (17th ed. 2017).

6. Bryan A. Garner, Garner's Dictionary of Legal Usage (3d ed. 2011).

7. William Sabin, *Gregg Reference Manual* (11th ed. 2010).

II. GENERAL RULES ON CITATION [§ 36.577]

CAUTION: The following is an overview of *The Bluebook*, highlighting common issues. It is important to review the rules in their entirety to ensure that no exceptions apply.

A. Introduction to *The Bluebook* [§ 36.578]

1. Overview

The Bluebook is both a citation manual and a style guide. It is divided into three sections: the Bluepages (light blue pages at the beginning of the book), the Whitepages (white pages in the middle), and the tables (white pages edged in dark blue at the end). Use the table of contents and the index to locate the rules for a specific citation format. *The Bluebook* also includes a quick reference guide to court documents and legal memoranda inside the back cover.

NOTE: To comply with ethics and professional standards when creating legal documents, a writer must add a supporting citation when asserting a legal principle, referring to a case (including the case facts), or quoting from a legal source. Simply put, a citation is required any time a writer refers to a primary or secondary legal source. A *primary source* is the law: a constitution, a case, a statute, or an administrative regulation. A *secondary source* is a commentary on the law such as a law review article, legal encyclopedia, or treatise.

2. Bluepages

The Bluepages are the light blue pages in the front of *The Bluebook*. The rules in the Bluepages govern citation and style conventions used by lawyers who write documents for filing with a court and for internal office use.

3. Whitepages

The general rules of citation and style are found in the white pages after the Bluepages. Rules 1–9 prescribe conventions in legal writing such as capitalization, spacing, short citation forms, quotations, and abbreviations. Rules 10–21 prescribe formats for citations to primary and secondary sources. Those rules refer to each other, as well as to the rules in the Bluepages on how to convert law-review-format-like typeface into the proper format for court documents and legal memoranda.

4. Tables

The tables are the pages with dark blue edges at the end of *The Bluebook*. Table T1 identifies citation formats for U.S. federal and state law. Tables T6–T16 identify abbreviations used within citations.

NOTE: The examples in the Whitepages use the typeface appropriate for law-review writing. Attorneys must adapt the typefaces found in the rules to conform to the conventions of practice by referring to rule B2 in the Bluepages. Large and small caps are not used in court documents and memoranda. Only the following types of words and phrases are underscored or italicized in court documents and memoranda: case names; book and article titles; titles of certain legislative materials (but not statute citations); introductory signals; explanatory phrases; *id.*, *supra*, and other cross-references; and words or phrases introducing related authority. Refer to internal office style guides as well as local court rules when deciding how to show emphasis. For example, the new appellate e-filing rules (effective July 1, 2021) also provide that, in addition to italics, "bold may be used … for citations." Wis. Stat. § 809.19(8)(b)3.c. Be consistent throughout the document: either italicize all references or underscore all references.

B. Cases [§ 36.579]

1. Public Domain Citation Format

See SCR 80.001, SCR 80.01; *Bluebook* tbl.T1.3. *See generally* Margie DeWind, *Legal Writing: Using the New Public Domain Citation System*, Wis. Law., Dec. 1999, at 26.

a. Wisconsin Supreme Court Opinions

NOTE: All Wisconsin Supreme Court opinions are published in the two official reporters, *Callaghan's Official Wisconsin Reports* and the *Wisconsin Reporter* edition of the *North Western Reporter*, both published by Thomson Reuters. Before an opinion is published in the official reporters, the supreme court will post the opinion on its website. Commercial electronic legal databases such as Westlaw and LEXIS also provide access to supreme court opinions before they officially appear in the reporters.

All Wisconsin Supreme Court opinions issued on or after January 1, 2000, also include a public domain citation. A public domain citation is a state court's own citation form that can be used by any publisher without requiring reference to the proprietary products of any publisher and can apply to either paper or electronic format. The Wisconsin public domain citation consists of the year the opinion is issued (note that the Wisconsin Court of Appeals uses the date the opinion is ordered published), the abbreviation "WI" for the issuing court, and the opinion's sequential number. For example, opinion 2015 WI 15 was the 15th Wisconsin Supreme Court decision issued in 2015.

Initial citation to a supreme court opinion must include the public domain citation, the *Wisconsin Reports* citation, and the *North Western Reporter* citation, in that order. Later references to an opinion may be to any of these citations, as long as the references within the document are internally consistent. SCR 80.02(1), (2).

NOTE: Citations containing the public domain citation do not contain a court and date parenthetical because the public domain citation contains that information.

- *Crown Castle USA, Inc. v. Orion Constr. Grp., LLC*, 2012 WI 29, ¶ 49, 339 Wis. 2d 252, 811 N.W.2d 332.

- *Crown Castle USA, Inc.*, 2012 WI 29, ¶ 3.
- *State v. Felix*, 2012 WI 36, ¶ 4, 339 Wis. 2d 670, 811 N.W.2d 775.
- *Felix*, 339 Wis. 2d 670, ¶ 51.

b. Wisconsin Court of Appeals Opinions

All Wisconsin Court of Appeals opinions ordered published on or after January 1, 2000, include a public domain citation. The public domain citation consists of the year in which the court of appeals orders the opinion to be published (in contrast to the supreme court's use of the date on which the opinion is published), the abbreviation "WI App" for the issuing court, and the opinion's sequential number. The Clerk of the Wisconsin Supreme Court and Court of Appeals assigns public domain citations for published court of appeals opinions based on the sequential order in which the opinions are ordered published each year.

The first reference to a court of appeals opinion must include the public domain citation, the *Wisconsin Reports* citation, and the *North Western Reporter* citation. Later references to an opinion may be to any of these citations, as long as the references within the document are internally consistent. SCR 80.02(1), (2).

- *Richards v. Graham*, 2011 WI App 100, ¶ 37, 336 Wis. 2d 175, 801 N.W.2d 821.
- *Richards*, 2011 WI App 100, ¶ 21.
- *City of Appleton Police Dep't v. Lab. & Indus. Rev. Comm'n*, 2012 WI App 50, ¶ 35, 340 Wis. 2d 720, 813 N.W.2d 237.
- *City of Appleton Police Dep't*, 340 Wis. 2d 720, ¶ 24.

NOTE: *Bluebook* table T1.3 also gives some examples of Wisconsin cases in public domain citation format.

NOTE: As noted above, the year cited in the public domain citation for Wisconsin Court of Appeals decisions is the year in which the decision is ordered to be published; for Wisconsin Supreme Court decisions, it is the year in which the opinion is issued. Thus, for court of appeals decisions issued at the end of one year and ordered to be published in the following year, the year-of-decision information is lost in the citation.

2. Parallel citation form

a. Wisconsin

When citing to a Wisconsin Supreme Court or Court of Appeals decision, cite to (1) the public domain citation (for cases issued or ordered to be published on or after January 1, 2000), (2) the official reporter (*Wisconsin Reports*), and (3) the regional reporter (*North Western Reporter*). SCR 80.02(1); *Bluebook* Rs. 10.3.1, 10.5, tbl.T1.3.

NOTE: Citations containing the public domain citation do not contain a court and date parenthetical because the public domain citation contains that information.

- *Admiral Ins. Co. v. Paper Converting Mach. Co.*, 2012 WI 30, 339 Wis. 2d 291, 811 N.W.2d 351.

- *Cottonwood Fin., Ltd. v. Estes*, 2012 WI App 12, 339 Wis. 2d 472, 810 N.W.2d 852.

b. Other states

When citing a case decided in another state, cite only the relevant regional reporter; do not provide a parallel citation to the official state reporter. *Bluebook* rule 10.3.1(b) says that if an official public domain citation is available for an out-of-state decision, that citation must be provided; a parallel citation to the regional reporter must also be provided, if available.

NOTE: *The Bluebook* includes some information about which states have adopted a public domain citation format. *See Bluebook* tbl.T1.3 (listing Arkansas, Colorado, Illinois, Louisiana, Maine, Mississippi, Montana, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Vermont, Wisconsin, and Wyoming); *supra* (discussing public domain citation).

- *Snyder v. Heidelberger*, 2011 IL 111052, 953 N.E.2d 415.

- *State v. Moore*, 2010 ND 229, ¶ 7, 791 N.W.2d 376.

3. Case names

a. Procedural phrases

The Bluebook says to omit all procedural phrases except *ex rel.* when adversary parties are named. *Bluebook* R. 10.2.1(b).

- *In the Interest of R.H., III: T.H. v. La Crosse Cnty.* would be *T.H. v. La Crosse Cnty.*

- *State ex rel. Ampco Metal v. O'Neill*, 273 Wis. 530, 78 N.W.2d 921 (1956).

Include a procedural phrase such as "*ex rel.*" or "*In re*" before the nonadversary name, then a descriptive name, if any. *Bluebook* R. 10.2.1(a). *In re* is an abbreviation for "petition of," "in the matter of," and similar phrases; *ex rel.* is an abbreviation for "on behalf of," "on the relation of," and similar phrases. Procedural phrases are always italicized. *Bluebook* R. 10.2.1(b).

- *Custodian of Records v. State (In re John Doe Proc.)*, 2004 WI 65, 272 Wis. 2d 208, 680 N.W.2d 792.

- *In re Lisse*, 565 B.R. 903 (Bankr. W.D. Wis. 2017).

NOTE: For cases having both an adversary and a nonadversary name, *The Bluebook* requires that the adversary name be cited first. The nonadversary name should follow in parentheses, preceded by any procedural phrase and descriptive or introductory language.

Bluebook R. 10.2.1(a).

- *Sheboygan Cnty. Dep't of Health & Hum. Servs. v. Tanya M.B. (In re Termination of Parental Rts. to Elijah W.L.)*, 2010 WI 55, 325 Wis. 2d 524, 785 N.W.2d 369.

- *State v. Brown (In re Commitment of Brown)*, 215 Wis. 2d 716, 573 N.W.2d 884 (Ct. App. 1997).

b. Abbreviations

The Bluebook says that, in textual sentences, only widely known acronyms and the following eight abbreviations can be used: &, Ass'n, Bros., Co., Corp., Inc., Ltd., and No. Do not use these abbreviations in textual sentences if the word begins the party's name. *Bluebook* Rs. 10.2.1(c), 6.1(b).

c. "The"

Generally omit the word "The" if it begins a party's name. *Bluebook* R. 10.2.1(d).

- *Manitowoc Co. v. Lanning*, 2018 WI 6, 379 Wis. 2d 189, 906 N.W.2d 130.

d. Descriptive terms

Omit words that describe a party already named, such as "administrator," "executor," "trustee," etc. If the word begins the party name, however, do not omit the word. *Bluebook* R. 10.2.1(e).

e. Geographical terms

Omit "of America" after United States. Omit "State of" (or like phrases) except when citing decisions of the court of that state, in which case only "State" (or "Commonwealth" or "People") should be retained. *Bluebook* Rs. 10.2.1(f), 10.2.2.

CAUTION: Do not follow running headers in reporters or on Westlaw, which sometimes invert the elements in the geographical name.

- *Cnty. of La Crosse v. WERC* [not *La Crosse Cnty. v. WERC*]

- *Macaluso v. Dane Cnty.* [not *Macaluso v. Cnty. of Dane*]

- *State v. Beloit Concrete Stone Co.*, 103 Wis. 2d 506, 309 N.W.2d 28 (Ct. App. 1981).

- *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

NOTE: Per *Bluebook* rule 10.2.1(f), "[o]mit all prepositional phrases of location not following 'City,' or like expressions, unless the omission would leave only one word in the name of a party or the location is part of the full name of a business or similar entity." Include designations of national or larger geographical areas except in union names. Keep all geographical designations not introduced by a preposition, but omit those that follow a comma.

COMMENT: "Similar entity" seems to include nonprofit organizations (such as the State Bar of Wisconsin or United Way of Dane County), but not governmental entities, such as courts or school districts.

f. Given names or initials

Generally, omit individuals' first names, unless they are part of a business's name. *Bluebook* R. 10.2.1(g).

- *Anthony Gagliano & Co. v. Openfirst, LLC*, 2014 WI 65, 355 Wis. 2d 258, 850 N.W.2d 845.

g. Business firm designations

The Bluebook says to "[o]mit 'Inc.,' 'Ltd.,' 'L.L.C.,' 'N.A.,' 'F.S.B.,' and similar terms if the name also contains a word such as 'Ass'n,' 'Bros.,' 'Co.,' 'Corp.,' 'Ins.,' or 'R.R.,' clearly indicating that the party is a business firm." If in doubt, retain the term. *Bluebook* R. 10.2.1(h).

- *Winebow, Inc. v. Capitol-Husting Co.*, 2018 WI 60, 381 Wis. 2d 732, 914 N.W.2d 631.

- *Carl v. Spickler Enters., Ltd.*, 165 Wis. 2d 611, 478 N.W.2d 48 (Ct. App. 1991).

h. Case names in citations

Follow the rules in *Bluebook* rule 10.2.1, but abbreviate further according to *Bluebook* tables T6 and T10. *Bluebook* R. 10.2.2.

NOTE: *Bluebook* table T6 (as of the 21st edition) has incorporated the rules for abbreviating periodicals from the former table T13.

4. Parentheticals

See generally Bluebook Rs. B1.3, B5.1, 1.5, 1.6, 10.6.1, 10.6.2, 10.6.3, 10.6.4.

a. In general

Information may be enclosed in parentheses and added to the basic citation. *The Bluebook* recommends a parenthetical "when the relevance of a cited authority might not otherwise be clear to the reader." *Bluebook* R. 1.5(a). Begin the parenthetical with a space after the end of the citation, then add a parenthesis and generally use a lower case present participle (word ending in "ing"). *See Bluebook* R. B1.3. Follow with the parenthetical information, another parenthesis, and a period. A parenthetical can also contain a quoted sentence or a short statement that is appropriate in context. *Bluebook* R. 1.5(a).

- *See Chevron Chem. Co. v. Deloitte & Touche*, 176 Wis. 2d 935, 946, 501 N.W.2d 15 (1993) (holding that default judgment was appropriate for discovery and trial abuses).

- The Wisconsin Court of Appeals cited the determining-factor test with approval in

Kovalic v. DEC International, Inc., 161 Wis. 2d 863, 874, 469 N.W.2d 224 (Ct. App. 1991) (ADEA), and *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 177, 376 N.W.2d 372 (Ct. App. 1985) (WFEA).

b. Quotation

When using a parenthetical with a quotation of one or more sentences, begin with a capital letter and include terminal punctuation in the parenthetical. *Bluebook* R. 1.5(a)(ii).

- *Eirhart v. Libbey-Owens Ford Co.*, 996 F.2d 846, 849 (7th Cir. 1993) ("We review the district court's interpretation of the letter agreement as we would any contract, under a de novo standard.").

- *Baltzer v. City of Sun Prairie Police Dep't*, 725 F. Supp. 1008, 1029 (W.D. Wis. 1989) ("Title VII and the equal protection clause prohibit employment discrimination on the basis of sex. They do not prohibit discrimination on the basis of personal favoritism, grudges, or other arguably unfair or improper motives.").

c. Weight of authority

After the date of the decision, add information regarding the weight of the authority. *Bluebook* Rs. 1.5(b), 10.6.1. The following are examples of phrases that may be used to state the weight of the authority: "en banc," "2–1 decision," "per curiam," "unpublished."

- *Braxton v. Mays*, 59 Wis. 2d 23, 24, 10 N.W.2d 13 (Ct. App. 1995) (unpublished table decision).

- *Am. Fam. Mut. Ins. Co. v. Am. Girl, Inc.*, 2004 WI 2, 268 Wis. 2d 16, 673 N.W.2d 65 (3–2 decision).

d. Nonmajority opinion

When citing a part of a case other than the majority decision, indicate that fact in parentheses. *Bluebook* R. B10.1.5.

- *Beidel v. Sideline Software, Inc.*, 2013 WI 56, ¶¶ 59–62, 348 Wis. 2d 360, 842 N.W.2d 240 (Ziegler, J., concurring).

NOTE: One issue is how to cite decisions of the Wisconsin Supreme Court written by Justice Ann Walsh Bradley or Justice Rebecca Grassl Bradley. "First names are not used for judges, unless a court has two individuals with the same last name, in which case the first name should be included on first reference." *Bluebook* R. 9(a).

- *Water Well Sols. Serv. Grp. Inc. v. Consol. Ins. Co.*, 2016 WI 54, ¶ 47, 369 Wis. 2d 607, 881 N.W.2d 285 (Ann Walsh Bradley, J., dissenting).

NOTE: When using *id.* to cite different opinions within the same case, indicate which one is being cited and add a new parenthetical when switching to another opinion, even if it is the majority opinion. *Bluebook* R. 10.9(b)(i).

NOTE: Information about a case regarding related authority or prior or subsequent history

is not provided parenthetically. *Bluebook* R. B10.1.6, tbl.T8; *see infra* § 36.6 (discussing prior and subsequent history).

e. Order of parentheticals

Parenthetical phrases indicating the weight of authority should precede explanatory parentheticals. *Bluebook* Rs. 1.5(b), 10.6.4.

- *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam) (holding that defendant not prejudiced by counsel's facially inadequate mitigation investigation).

NOTE: "Explanatory parenthetical information about a case should immediately precede information about subsequent case history." *Bluebook* R. B10.1.6.

5. Prior and subsequent history

See generally Bluebook Rs. B10.1.6, 10.7, 10.7.1, 10.7.2, 1.5(b), 1.6(b), tbl.T8.

Add a subsequent history reference to a citation when the primary reference is to the decision by an intermediate court (such as a court of appeals), but the case has been further reviewed by a discretionary court (the Wisconsin Supreme Court or the U.S. Supreme Court). However, in general, omit denials of certiorari or of a petition for review "unless the decision is less than two years old or the denial is particularly relevant." *Bluebook* R. 10.7. In general, do not give the prior history or history on remand, unless it is important to explain the reason for the citation. *Bluebook* Rs. B10.1.6, 10.7, 10.7.1, 10.7.2, tbl.T8.

To form the citation, state the citation (from the appellate court) followed by a comma, the explanatory phrase describing the subsequent history in italics (typically followed by a comma), and the citation to the subsequent history. See *Bluebook* table T8 for explanatory phrases commonly used to indicate prior or subsequent history and weight of authority of judicial decisions. Note that the commas are not italicized.

- *Currie v. Schwalbach*, 132 Wis. 2d 29, 36, 390 N.W.2d 575 (Ct. App. 1986), *aff'd*, 139 Wis. 2d 544, 407 N.W.2d 862 (1987).

- *Haroco, Inc. v. Am. Nat'l Bank & Tr. Co. of Chi.*, 747 F.2d 384 (7th Cir. 1958), *aff'd per curiam*, 473 U.S. 606 (1985).

- *Maurin v. Hall*, 2004 WI 100, 274 Wis. 2d 28, 682 N.W.2d 866, *overruled by Bartholomew v. Wis. Patients Comp. Fund*, 2006 WI 91, ¶ 18, 293 Wis. 2d 38, 717 N.W.2d 216.

- *Kucharek v. Hanaway*, 714 F. Supp. 1499 (E.D. Wis. 1989), *rev'd on other grounds*, 902 F.2d 513 (7th Cir. 1990).

- *Heikkinen v. United Servs. Auto. Ass'n*, 2006 WI App 207, ¶ 59, 296 Wis. 2d 438, 724 N.W.2d 243, *aff'd by an equally divided court*, 2007 WI 124, 305 Wis. 2d 68, 739 N.W.2d 489.

- *City of Cedarburg Light & Water Comm'n v. Allis-Chalmers Mfg. Co.*, 33 Wis. 2d 560, 568a–68b, 149 N.W.2d 661, *modifying* 33 Wis. 2d 560, 148 N.W.2d 13 (1967).

6. Pinpoint citations for cases

For Wisconsin appellate cases not requiring a public domain citation (i.e., issued or ordered to be published before January 1, 2000), give page-number pinpoints to the *Wisconsin Reports* or the *North Western Reporter*. When referring to more than one page, use an en dash or a hyphen to show consecutive page numbers and commas to separate nonconsecutive page numbers. *See* SCR 80.02(3); *Bluebook* Rs. 3.2, 10.3.1(a), tbl.T1.3. "Always retain the last two digits, but drop other repetitious digits." *Bluebook* R. 3.2(a).

- *Cnty. of Dane v. Norman*, 174 Wis. 2d 683, 685, 497 N.W.2d 714 (1993).
- *State v. Blalock*, 150 Wis. 2d 688, 707–08, 442 N.W.2d 514 (Ct. App. 1989).
- *Barrett v. Ill. Dep't of Corr.*, 803 F.3d 893, 896 n.1 (7th Cir. 2015).

All supreme court opinions and published court of appeals opinions issued with a public domain citation contain consecutively numbered paragraphs. A pinpoint reference to a supreme court opinion issued on or after January 1, 2000, or a court of appeals opinion ordered to be published on or after January 1, 2000, must be to the appropriate paragraph number of the opinion, not page numbers from the *Wisconsin Reports* or the *North Western Reporters*. When referring to more than one paragraph in a public domain citation, use an en dash or a hyphen to show consecutive paragraph numbers and commas to separate nonconsecutive paragraph numbers. SCR 80.02; *Bluebook* Rs. 3.2, 10.3.3, 10.8.1.

- *Stumpner v. Cutting*, 2010 WI App 65, ¶ 11, 324 Wis. 2d 820, 783 N.W.2d 874.
- *Berger v. Town of New Denmark*, 2012 WI App 26, ¶ 2, 339 Wis. 2d 336, 810 N.W.2d 833.
- *Wis. Realtors Ass'n v. Pub. Serv. Comm'n of Wis.*, 2015 WI 63, ¶¶ 7–9, 363 Wis. 2d 430, 867 N.W.2d 364.
- *Seifert v. Balink*, 2017 WI 2, ¶ 85 n.43, 372 Wis. 2d 525, 888 N.W.2d 816.

NOTE: For short form citations with pinpoint references to cases published after January 1, 2000, the Wisconsin Supreme Court has demonstrated a preference for using a shortened citation to the *Wisconsin Reports* with a pinpoint reference to the relevant paragraph number, as shown in the example below (as cited in *State v. Dowdy*, 2012 WI 12, ¶ 36, 338 Wis. 2d 565, 808 N.W.2d 691). SCR 80.02(3)(c); *The Wisconsin Supreme Court Style and Procedures Manual* R. 11.11 (2020); *see infra* § 36.6 (discussing short form citation).

- *See Kalal*, 271 Wis. 2d 633, ¶ 46.

NOTE: Pinpoint citations are sometimes referred to as pincites.

7. Short form for cases

See generally Bluebook R. 10.9.

a. In general

Generally, the short citation form is used when the case has already been cited in full. A short form for citing cases usually includes one party name (or a shortened version of one party), the volume number and reporter name (usually the first reporter listed), the first page of the opinion if no pinpoint citation, and the word "at" and the specific page(s) referenced if there is a pinpoint citation. If the pincite is to a paragraph number, the word "at" is not used.

b. Party name

The Bluebook states that "[u]se of only one party's name (or a readily identifiable shorter version of one party's name) in a short form citation is permissible if the reference is unambiguous." *Bluebook* R. 10.9(a)(i). Such a reference might be ambiguous if more than one *Jones* case is cited, for example. If so, use the full case name.

c. With no pinpoints

When there are no pinpoints for a citation to a case that has already been cited, give the short form citation in later references:

First citation:

- *Jenkins v. Sabourin*, 104 Wis. 2d 309, 311 N.W.2d 600 (1981).
- *Winnebago Cnty. v. S.H. (In re Mental Commitment of S.H.)*, 2020 WI App 46, 393 Wis. 2d 511, 947 N.W.2d 761.

Later citation:

- *Jenkins*, 104 Wis. 2d 309.
- *Id.*
- *Webb*, 2000 WI App 25.
- *Id.*

d. With pinpoints

When there are pinpoints for a *Wisconsin Reports* citation (for pre-2000 cases) or for a public domain citation, use short forms and *id.*, as appropriate, omitting any reference to the *North Western Reporter*. *See supra* (discussing pinpoint citations).

First citation:

- *Jenkins v. Sabourin*, 104 Wis. 2d 309, 311 N.W.2d 600 (1981).
- *Webb v. Ocularra Holding, Inc.*, 2000 WI App 25, 232 Wis. 2d 495, 606 N.W.2d 495.

Later citation (if no pinpoint in first citation):

Generally:

- *Webb*, 2000 WI App 25, ¶ 25.
- *Id.* ¶ 29.
- *United States v. Moore*, No. 16-1991, slip op. at 10 (7th Cir. Mar. 15, 2017).
- *Moore*, slip op. at 15.
- *Id.* at 1.

e. Id.

The term *id.* can be used if the case being cited is the same as the citation immediately before it. If there is more than one source cited in the immediately preceding citation, *id.* cannot be used. *Bluebook* Rs. B4, 4.1.

NOTE: Italicize the period in *id.*

NOTE: For purposes of using *id.*, citations included in parentheticals or as prior or subsequent history are ignored. *Bluebook* R. 4.1.

C. Generally Applicable Rules of Citation [§ 36.580]

See generally Bluebook Rs. B1.2, 1.2–.4.

1. Signals

a. In general

Introductory signals indicate the type of support the authority provides. *Bluebook* Rs. B1.2, 1.2.

b. Order of signals

When more than one signal is used, follow the order of signals listed in *Bluebook* rule 1.2: signals that indicate support (*Bluebook* R. 1.2(a), such as [no signal], *see*, and *see also*); signals that indicate comparison, such as *compare . . ., with*; signals that indicate contradiction (*Bluebook* R. 1.2(c), such as *but see*); and signals that indicate background material (*Bluebook* R. 1.2(d), such as *see generally*). *Bluebook* Rs. B1.2, 1.3.

c. String citations (two or more authorities to support the same point)

A semicolon separates authorities after each signal. The most persuasive or helpful authority should precede other authorities in a string citation. String citations should be avoided in briefs unless necessary to show a contrast in authorities or to demonstrate which jurisdictions have adopted a particular rule.

NOTE: As of the 21st edition of *The Bluebook*, rule 1.4 "no longer dictates an order of authorities within a signal." For guidance on the past practice of ordering citations within each signal (e.g., from primary sources, such as constitutions, statutes, cases, and administrative materials, to secondary materials and internal cross-references), see *The Bluebook: A Uniform System of Citation* R. 1.4, at 61–63 (Columbia L. Rev. Ass'n et al. eds., 20th ed. 2015). For historical purposes, the examples below illustrate the prior practice for ordering string citations based on the 20th edition of *The Bluebook.*

- *Raymond v. United States*, 355 F.3d 107 (2d Cir. 2004); *Campbell v. Comm'r*, 274 F.3d 1312 (10th Cir. 2001); *Young v. Comm'r*, 240 F.3d 369 (4th Cir. 2001); *Benci-Woodward v. Comm'r*, 219 F.3d 941 (9th Cir. 2000); *see also Coady v. Comm'r*, 213 F.3d 1187 (9th Cir. 2000); *Baylin v. United States*, 43 F.3d 1451 (Fed. Cir. 1995).

- *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis. 2d 496, 536, 385 N.W.2d 171 (1986); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 575, 335 N.W.2d 834 (1983); *Foss v. Heineman*, 144 Wis. 146, 149, 128 N.W. 881 (1910); *Kriegl v. Stammen*, No. 2010AP221, 2011 WL 240452, ¶ 9 (Wis. Ct. App. Jan. 27, 2011) (unpublished opinion); *Hale v. Stoughton Hosp. Ass'n*, 126 Wis. 2d 267, 277–78, 376 N.W.2d 89 (Ct. App. 1985), *abrogation on other grounds recognized by Fittshur v. Vill. of Menomonee Falls*, 31 F.3d 1401, 1405 (7th Cir. 1994); *Reiman Assocs., Inc. v. R/A Advert., Inc.*, 102 Wis. 2d 305, 320, 306 N.W.2d 292 (Ct. App. 1981).

2. Sections and paragraphs

See generally Bluebook R. 3.3.

a. In general

Use a paragraph symbol (¶) when the original source subdivides with paragraph symbols. Use a section symbol (§) when the original source subdivides with a section symbol. Do not use the word "at" with a paragraph or section symbol. Include a space between the symbol and the numeral following the symbol. Unless referring to the U.S. Code or federal regulations, when using a paragraph or section symbol, write out the words section and paragraph in text. *Bluebook* Rs. 3.3, 6.2(c), 12.10(c).

b. Original punctuation

Use the original punctuation in the source when separating sections and subsections. *Bluebook* R. 3.3(a).

- 5 William B. Rubenstein, *Newberg on Class Actions* § 15:10 (5th ed. 2015 & Supp. 2019).

- 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1431, at 275–76 (4th ed. 2010 & Supp. 2020).

- 8A Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3d* § 118:36 (2005 & Supp. 2019).

NOTE: If the source uses hyphens, use hyphens; if it uses parentheses, use parentheses.

c. Multiple sections

Use two section symbols without spaces between the symbols (§§) when citing multiple sections and subsections. Add a space before and after the two section symbols. Omit "[i]dentical digits or letters preceding a punctuation mark . . . unless doing so would create confusion. Otherwise retain all digits." *Bluebook* R. 3.3(b). Rule 3.3(b) provides helpful examples of several types of formats for multiple statutory sections and subsections. Use one section symbol to refer to multiple subsections in a single section, but when referring to multiple subsections within different sections, use two section symbols. *Id.*

- Wis. Stat. § 802.06(2)(a)1.–3. (referring to multiple subsections).

- Wis. Stat. §§ 802.06, .08 (referring to multiple sections).

d. Multiple paragraphs

Use two paragraph symbols without spaces between the symbols (¶¶) when citing multiple paragraphs. Add a space before and after the two paragraph symbols. *Bluebook* R. 3.3(c). Digits should not be dropped when citing multiple paragraphs (for example, ¶¶ 115–125, not ¶¶ 115–25). *See id.*

- *Peterson v. Cornerstone Prop. Dev., LLC*, 2006 WI App 132, ¶¶ 41–52, 294 Wis. 2d 800, 720 N.W.2d 716.

3. Quotations

See generally Bluebook Rs. B5, 5.

The format of quotations generally depends on the quotation's length. When quoting 50 or more words, create a block quotation by indenting both sides of the quotation by approximately one inch (*The Bluebook* does not specify the amount to indent). Justify the quotation on both right and left to create the appearance of a rectangle. Single space the block quotation. Use a line space before the block quotation and after the block quotation. Do not use quotation marks at the beginning and end of the quotation. If the quoted material originally quoted another source, use double quotation marks to identify that quoted material. Citation of the source should follow the quotation at the left-hand margin (that is, it should not be indented). As noted by Professor Mary Beth Beazley in her textbook, *A Practical Guide to Appellate Advocacy* 135–36 (4th ed. 2014), a good practice is to add a sentence explaining the block quotation before and after the quotation. *See Bluebook* Rs. B5.2, 5.1(a).

When quoting 49 or fewer words, use double quotation marks before and after the quotation and place the quotation into the text of the preexisting paragraph. *Bluebook* Rs. B5.1, 5.1(b)(i).

- The court recognized that this was an "issue of first impression." *Paynter v. ProAssurance Wis. Ins. Co.*, 2019 WI 65, 387 Wis. 2d 278, 929 N.W.2d 113.

When the original source has quoted language from another source, use a quoting parenthetical to identify the other source. *Bluebook* Rs. B5.1, 2.1(e), 5.2(e), 10.6.3, 10.6.4.

- *Teff v. Unity Health Plans Ins. Corp.*, 2003 WI App 115, ¶ 14, 265 Wis. 2d 703, 666 N.W.2d 38 (quoting *Hudson Diesel, Inc. v. Kenall*, 194 Wis. 2d 531, 543, 535 N.W.2d 65 (Ct. App. 1995)).

- *Welty v. Heggy*, 145 Wis. 2d 828, 835, 429 N.W.2d 546 (Ct. App. 1988) (quoting *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 302, 294 N.W.2d 437 (1980)).

- *Est. of Sustache v. Am. Fam. Mut. Ins. Co.*, 2008 WI 87, ¶ 22 n.7, 311 Wis. 2d 548, 751 N.W.2d 845 ("Once the circuit court resolves the question of indemnity in the insurer's favor . . . coverage is no longer open to debate. An insurer need not defend a suit in which it has no economic interest.") (quoting *Baumann v. Elliott*, 2005 WI App 186, ¶ 10, 286 Wis. 2d 667, 704 N.W.2d 361).

NOTE: Use single quotation marks to indicate material that was quoted in the original source. If the entire quotation is quoted from another source, do not use single quotation marks, but attribute the quote to the original source. *Bluebook* R. 5.2(e), (f)(i).

In a quotation of 49 or fewer words, periods and commas go inside the quotation marks, but other punctuation, like question marks and semicolons, go outside the quotation marks unless they were part of the original source. *Bluebook* Rs. B5.1, 5.1(b)(iv).

- The court stated that it "must first look to the constitution."

In any quotation, use brackets to show a change in capitalization of a letter, or a change in letters or a word. *Bluebook* R. 5.2(a).

- In its decision, the court noted that "[t]he statute is to [be] interpreted narrowly."

Use empty brackets to show omission of letters. *Bluebook* R. 5.2(b).

- The jury will "determine[] when the original was signed."

Use [sic] to show a significant mistake in the original. *Bluebook* R. 5.2(c).

- The transcript stated, "we wented [sic] to the store."

Do not include internal quotation marks if the opening mark begins the quotation and the ending mark ends the quotation. Include multiple levels of internal quotation marks if they appear in the quotation. *Bluebook* R. 5.2(f).

- The stated purpose of additur or remittitur is "to avoid unnecessary second trials and to seek an earlier determination of the litigation at a figure which is within the range of fairness." *Powers v. Allstate Ins. Co.*, 10 Wis. 2d 78, 88, 102 N.W.2d 393 (1960) (quoting *Gennrich v. Schrank*, 6 Wis. 2d 87, 94, 93 N.W.2d 876 (1959) (Fairchild, J., dissenting)).

- The exhaustion requirement recognizes that state courts play an equal role in enforcing constitutional rights, *United States ex rel. Hoover v. Franzen*, 669 F.2d 433, 444 (7th Cir. 1982), and "allows [those] courts to 'become increasingly familiar with and hospitable toward federal constitutional issues.'" *United States ex rel. Johnson v. McGinnis*, 734 F.2d 1193, 1196 (7th Cir. 1984) (quoting *Rose v. Lundy*, 455 U.S. 509,

519 (1982)).

Add spaces before, between, and after an ellipsis. An ellipsis is a set of three periods indicating an omission of a word or words from a quotation. Do not use an ellipsis at the beginning of a quotation. *Bluebook* R. 5.3.

- The court stated that "[a] trial court . . . is best prepared to address evidentiary matters."

Add a fourth period to an ellipsis to indicate omission of material at the end of the quotation when using quoted language as a full sentence.

- The appellate court noted that "the trial record leaves much to the imagination . . . ."

NOTE: Following *Bluebook* rule 5.2(d)(iii), do not indicate that emphasis in a quotation appears in the original. Do, however, indicate that any emphasis inserted by the author was added. Use the comment "(emphasis added)"; do not use "(emphasis supplied)." *Bluebook* R. 5.2(d).

4. Abbreviations

See generally Bluebook R. 6.1.

a. Spacing

When spacing abbreviations, do not use spaces between single, adjacent capital letters or between numerals or ordinals used with single adjacent capital letters. *Bluebook* R. 6.1(a).

- N.W.2d
- F.3d
- A.L.R.4th

Do use a space with a combination of single adjacent capital letters and abbreviations of two or more letters.

NOTE: A numeral or ordinal is considered a single, adjacent capital letter. *Bluebook* R. 6.1(a).

- Wis. 2d
- F. Supp. 2d
- Am. Jur. 2d

NOTE: As of the 21st edition of *The Bluebook*, Bluepages rule B6 provides that certain abbreviations can now be closed up in citations, if needed to conserve space in court filings. Specifically, the rule states:

Because many court systems impose word limits on briefs and other documents submitted to the court, abbreviations in reporter names may optionally be closed to conserve space, even if they would normally be separated under this rule. For example, "S. Ct." would become "S.Ct." and "F. Supp. 2d" would become "F.Supp.2d."

b. Periods

When placing periods in an abbreviation, follow every abbreviation, whether a single capital letter or a series of upper- and lower-case letters, with a period, "except those in which the last letter of the original word is set off from the rest of the abbreviation by an apostrophe." This rule does *not* apply to the postal code identifier used in public domain citations. *Bluebook* R. 6.1(b); *cf. supra* 36.6 (discussing public domain citation).

- Wis. 2d
- Dep't
- WI
- WI App

NOTE: Use abbreviations without periods when referring to widely known entities in a case name or in text.

- EPA
- FBI

5. Numerals and symbols

See generally Bluebook R. 6.2.

a. In general

Generally spell out numbers zero to ninety-nine in text. For numbers 100 and above, use numerals. *Bluebook* R. 6.2(a).

b. Number beginning a sentence

A number that begins a sentence must not be reflected in numerals but must be spelled out in text. *Bluebook* R. 6.2(a)(i).

c. Series of numbers

When a series of numbers includes numbers both less than 100 and greater than or equal to 100, use numerals for the entire series. *Bluebook* R. 6.2(a)(iii).

d. Percentages or dollar amounts

Use numerals when repeatedly referring to percentages or dollar figures. *Bluebook* R.

6.2(a)(v).

6. Italicization

Use italics for non-English words, unless a word or phrase is commonly used in English. *See generally Bluebook* R. 7. Refer to the list in *The Bluebook* for examples of words that do not need to be italicized, such as e.g., i.e., res judicata, mens rea, en banc, and amicus curiae. *Bluebook* R. 7(b); *see also* Garner, *supra* § 36.3.

7. Capitalization

See generally Bluebook Rs. B8, 8.

a. In general

See generally Bluebook Rs. B8, 8(c)(ii).

Capitalize references to a court when

(1) Referring to the U.S. Supreme Court, whether by full name or the generic "Supreme Court" or "the Court";

(2) Referring to a court by its full proper name; and

(3) Referring to the court reading the brief and deciding the case at hand.

- Previously in this case, this Court denied a motion to extend the time for answering the requests for admission or, alternatively, to withdraw the admissions.

But do *not* capitalize a reference to a court when referring to a precedent decision (as in the first example below), unless it is a U.S. Supreme Court decision (as in the second example below).

- Applying the *Anderson* test, the *Brown* court affirmed LIRC's decision that the insurance carrier's suspension of temporary disability benefits was not in bad faith.

- In 1958, the Supreme Court in *Cicenia* refused to extend a New Jersey procedural rule concerning guilty pleas to pleas of *non vult*.

b. Court documents

Capitalize the specific titles of court documents when the title is specific, but do not capitalize generic references to court documents. "Only capitalize party designations . . . when referring to parties in the matter that is the subject of your document." *Bluebook* R. B8.

- The argument is in the Plaintiff's Brief in Support of the Plaintiff's Motion for Summary Judgment.

- The plaintiff's brief was filed electronically.

c. Constitutions

Capitalize all references to the U.S. Constitution and when referring to another constitution (such as the Wisconsin Constitution) by its full name. "[N]ouns that identify specific parts of the U.S. Constitution" should also be capitalized when they are being referred to in textual sentences; do not capitalize parts of state constitutions. *Bluebook* R. 8(c)(ii).

- The equal protection clause of the Wisconsin Constitution requires that the state treat all people who are similarly situated similarly, but it does not oblige the state to treat all people identically.

- While early cases state or imply that the 21st Amendment trumps other constitutional concerns, particularly the Commerce Clause and the Equal Protection Clause, cases since the early 1970s demonstrate an evolution to the Court's jurisprudence regarding the 21st Amendment and now clearly reject any "supremacy" of the 21st Amendment over other constitutional provisions.

NOTE: When referring generically to the Wisconsin Constitution as "the constitution," do not capitalize the reference. However, in a generic reference to the U.S. Constitution, continue to capitalize "the Constitution." Capitalize the word "federal" when the word it modifies is capitalized. *Id.*

- In Wisconsin, certain rights afforded by the state constitution are more expansive than similar rights provided by the Federal Constitution.

- The act has been read to authorize only fee awards by courts created under the authority of Article III of the U.S. Constitution.

d. State

See generally Bluebook R. 8(c)(ii).

Capitalize the word "state" when

(1) Referring to the state as a party to litigation or as a governmental actor;

- The State brought this action.

(2) Referring to the full title of a state; and

- The State of Wisconsin brought this action.

(3) Modifying a word that is capitalized.

e. Other nouns

See generally Bluebook R. 8(c).

Capitalize certain nouns when

(1) Referring to "specific persons, officials, groups, government offices, or government bodies";

- The Department of Homeland Security

- Congress

(2) Referring to a specific act by name;

- The Wisconsin Environmental Policy Act

(3) Referring to specific codes; and

- The 1973 Code

(4) Referring to a numbered or named federal circuit.

- The Seventh Circuit

D. Electronic Databases and Other Online Sources [§ 36.581]

1. Cases available in a commercial electronic database

When an unreported case is available in an electronic database, it may be cited in the following format: case name, docket number, database identifier, court name, and full date. Include a unique database identification number, if the database uses one. If citing to a pinpoint page number assigned by the database (not a reporter page or a paragraph number of the case), precede the page number with an asterisk before the court and date parenthetical. This is called star paging. *Bluebook* Rs. 3.2(a), 10.5(b), 10.8.1(a), 18.1, 18.3.

- *United Concrete & Constr., Inc. v. Red-D-Mix Concrete, Inc.*, No. 2011AP1566, 2012 Wisc. App. LEXIS 481 (June 13, 2012) (unpublished).

- *State v. Helmbrecht*, No. 2015AP2300-CR, 2016 WL 7402908, ¶ 12 (Wis. Ct. App. Dec. 20, 2016) (publication recommended).

- *Patricia L. v. Oregon Sch. Dist.*, No. 2013AP293, 2014 WL 1386872, ¶ 16 (Wis. Ct. App. Apr. 10, 2014) (unpublished).

- *KDC Foods, Inc. v. Gray, Plant, Mooty, Mooty & Bennett, PA*, No. 12-cv-636-bbc, 2013 WL 5777289, at *18 (W.D. Wis. Oct. 25, 2013).

NOTE: Parenthetical information concerning the publication status of the opinion is information concerning the weight of authority and may be added consistent with rule 10.6.1 of *The Bluebook.*

2. Internet sources

a. In general

See generally Bluebook Rs. 18.2, 18.2.1, 18.2.2.

NOTE: *The Bluebook* "requires the use and citation of traditional printed sources when available, unless there is a digital copy of the source available that is authenticated, official, or an exact copy of the printed source." *Bluebook* R. 18.2. *The Bluebook* further states that "[w]hen an authenticated, official, or exact copy of a source is available online, citation can be made as if to the original print source (without any URL information appended)." *Bluebook* R. 18.2.1(a). Furthermore, "[i]f the cited information is available in a traditional source but such source is so obscure as to be practically unavailable, or if a parallel citation to an internet source will substantially improve access to the source cited, citation should be made both to the traditional source and to the internet source by appending the URL directly to the end of the citation." *Bluebook* R. 18.2.1(b)(i).

- Ethan Lauer, Wis. Legis. Council Info. Memo., *Private, Special, and Local Laws: Constitutional Restraints*, IM-2019-02 (2019), https://docs.legis.wisconsin.gov/misc/lc/information_memos/2019/im_2019_02.

- Off. of Pub. & Intergovernmental Affs., U.S. Dep't of Veterans Affs., *Federal Benefits for Veterans, Dependents and Survivors* (2019), https://www.va.gov/opa/publications/benefits_book.asp.

- Wis. Dep't of Nat. Res., *Endangered Resources: Bureau of Natural Heritage Conservation*, https://dnr.wi.gov/topic/endangeredresources/ (last visited May 2, 2022).

- Wis. Dep't of Health Servs., *Medicaid Eligibility Handbook*, http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm (current through Release No. 22-01, Apr. 4, 2022).

- Wis. Dep't of Revenue, *2021 Wisconsin Property Assessment Manual*, https://www.revenue.wi.gov/documents/wpam21.pdf.

- Wis. Dep't of Health Servs., *SeniorCare Annual Income Limits*, https://www.dhs.wisconsin.gov/seniorcare/fpl.htm (last revised Jan. 31, 2022).

When citing to internet sources, follow the guidelines in *Bluebook* rule 18.2. Abbreviate institutional authors according to *Bluebook* tables T6 and T10.

b. Author

When available, begin the citation with the author's name. If not available, omit an author name unless there is a clear institutional author. *Bluebook* R. 18.2.2(a).

c. Titles

Include a title of the webpage. *The Bluebook* includes different rules for stating the title of a main page as opposed to pages other than the main page. Also, if there is no clear title available, use a "descriptive title." *Bluebook* R. 18.2.2(b)(iv).

- Joe Forward, *Judge Created Serious Risk of Actual Bias by Facebook "Friending" Litigant* (June 25, 2020), https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=27825.

- U.S. Court of Appeals for the Seventh Circuit, *Forms, Fees and Guides*, https://www.ca7.uscourts.gov/forms/forms7.htm (last visited May 2, 2022).

d. Dates

Include the date as it appears on the webpage after the main page title and any pinpoint citation. If there is no date specific to the material cited, include after the URL a parenthetical indicating when it was last updated or last modified. If the site does not otherwise include a date, include a parenthetical stating when the site was last visited. Do not use "last updated" or "last modified" dates or copyright designations that refer to a site as a whole and are not updated regularly. In such instances, use a parenthetical indicating the date on which the site was last visited. *Bluebook* R. 18.2.2(c).

- Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health & Hum. Servs., *Internet-Only Manuals (IOMs)*, https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs.html (last modified Dec. 1, 2012, 7:02 AM).

e. The URL

Use the full URL if it is straightforward or use the root URL followed by a parenthetical explaining how to access the information. *Bluebook* R. 18.2.2(d). Sometimes, URLs do not function as hyperlinks because of the presence of certain symbols. If this is a concern, use the root URL followed by a parenthetical instead of the full URL.

- Wis. Ct. Sys., *Circuit Court Forms*, https://www.wicourts.gov/forms1/circuit/index.htm (last updated Feb. 13, 2022) (follow "Guardianship" hyperlink; then follow "all guardianship forms" hyperlink).

NOTE: The following is an example of a URL used in a textual sentence:

- The web address for the UI Division's homepage is https://dwd.wisconsin.gov/ui/.

NOTE: It is a common problem that links to websites become broken (also known as link rot) because the webpage has been moved or no longer exists. For that reason, citations to "archived" links are encouraged "when a reliable archival tool is available." *Bluebook* R. 18.2.1(d). *The Bluebook* provides examples from https://archive.org/web/ and https://perma.cc. Add the archive URL to end of the citation in brackets. If the citation uses an archival tool that indicates when a source was archived, it is not necessary to include a "last visited" parenthetical after the URL. *Bluebook* Rs. 1.5(b), 18.2.1(d), 18.2.2(c).

- Sen. Elizabeth Warren, *Coming to a Post Office Near You: Loans You Can Trust?*, Huffington Post (Feb. 1, 2014, 2:50 PM), https://www.huffpost.com/entry/coming-to-a-post-office-n_b_4709485 [https://perma.cc/4RH7-999Q].

f. Document format

Always cite the portable document format (PDF) version instead of an HTML document if a PDF version is available. *Bluebook* Rs. 18.2.1(b)(ii), 18.2.2(f).

III. PRIMARY WISCONSIN AUTHORITIES [§ 36.582]

A. Wisconsin Supreme Court Opinions [§ 36.583]

See generally Bluebook Rs. B10, 10; *supra* § 36.6 (discussing public domain citations).

1. Published in official reporters. SCR 80.02; *Bluebook* Rs. B10.1.2, 10.3, 10.4(b), 10.5(a), tbl.T1.3.

- *Konneker v. Romano*, 2010 WI 65, 326 Wis. 2d 268, 785 N.W.2d 432.

- *Sharp ex rel. Gordon v. Case Corp.*, 227 Wis. 2d 1, 595 N.W.2d 380 (1999).

NOTE: The first 22 volumes of the *Wisconsin Reports* are republications of the original volumes, which are out of print or for which the printing plates were destroyed. The reprints have page numbers in brackets scattered throughout the text; these page numbers refer to the pages of the original volumes. When citing to a case from one of these volumes, indicate both the republication page and the original page; the original page should be placed in parentheses and preceded with an asterisk (*).

- *Harbeck v. Southwell*, 18 Wis. 439 (*418), 448 (*427) (1864).

- *Loop v. Chamberlain*, 20 Wis. 142 (*135) (1865).

2. Not yet published in official reporters

See generally Bluebook Rs. 10.3.1, 10.3.3, 10.5(b), 10.8.1.

a. Available in electronic media. *Bluebook* Rs. 10.3.1(b), 10.8.1(a), 18.3; *see also supra* § 36.8 (discussing cases available in a commercial electronic database).

NOTE: *Bluebook* rule 10.3.1(b) explains as follows:

If the decision is not found in a regional reporter or available as a public domain citation, cite the other sources indicated in table T1. . . . . If a case is not available in an official or preferred unofficial reporter or as a public domain citation, cite another unofficial reporter, a widely used computer database (rule 18.3), a service (rule 19), a slip opinion (rule 10.8.1(b)), an internet source (rule 18.2.2), or a newspaper (rule 16.6), in that order of preference . . . .

When citing a Wisconsin Supreme Court decision before the *Wisconsin Reports* and the *North Western Reporter* citations are available, the public domain citation should be sufficient.

- *State v. Talley*, 2017 WI 21.

b. Available on the internet

See generally Bluebook Rs. 18.2, 18.2.1, 18.2.2; *see supra* § 36.8 (discussing internet sources).

- *State v. Christen*, 2021 WI 39, https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=363657.

3. Pinpoint citations

See generally SCR 80.02; *Bluebook* Rs. 10.3.1(a), 10.3.3; *supra* § 36.6 (discussing pinpoint citations).

- *Md. Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶ 4, 326 Wis. 2d 300, 786 N.W.2d 15.

- *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 614 (1976).

4. Short form citations

See generally SCR 80.02; *Bluebook* Rs. B10.2, 10.9.

- *Md. Arms*, 2010 WI 64, ¶ 49.

- *Sharp*, 227 Wis. 2d at 5.

5. Certification

See Bluebook Rs. B10.1.6, 10.7, tbl.T8. Cite to the supreme court's grant of a certification request as follows:

- *United Food & Com. Workers Union, Local 1473 v. Hormel Foods Corp.*, No. 2014AP1880 (Wis. May 12, 2015), *granting certification requested by* No. 2014AP1880, 2014 WL 7334335 (Wis. Ct. App. Dec. 23, 2014).

- *Finder v. Am. Heartland Ins. Co.*, No. 2006AP918 (Wis. Oct. 10, 2007), *granting certification requested by* No. 2006AP918, 2007 WL 2390677 (Wis. Ct. App. Aug. 23, 2007) (petition for certification).

B. Wisconsin Court of Appeals Opinions [§ 36.584]

See generally Bluebook Rs. B10, 10.

NOTE: On April 4, 2005, the Wisconsin Supreme Court and Court of Appeals converted their case management system, which included a change to the docket number format for appellate court cases. The format uses a four-digit prefix for the year, followed by the letters "AP" and the case number. A search for a case by its docket number on the Wisconsin Court System's website (https://www.wicourts.gov) using this format will retrieve *all* appellate court cases, even though the official captions for opinions issued before April 4, 2005, may still reflect docket numbers using the

old format. Certain electronic databases (such as Westlaw or LEXIS), however, may not recognize the format for cases decided before April 4, 2005, and may require users to continue to use the old format (a two-digit prefix for the year, followed by a dash and the case number) to locate older cases by their docket numbers. SCR 80.02; *supra* § 36.6 (discussing public domain citations).

1. Published in official reporters

See generally SCR 80.02; *Bluebook* Rs. B10.1.2, 10.3, 10.4(b), 10.5(a), tbl.T1.3.

- *Ladwig v. Ladwig*, 2010 WI App 78, 325 Wis. 2d 497, 785 N.W.2d 664.
- *Rite-Hite Corp. v. Bd. of Rev.*, 216 Wis. 2d 189, 575 N.W.2d 721 (Ct. App. 1997).

2. Not yet published in official reporters; unpublished opinions

See generally Wis. Stat. § 809.23(3); *Bluebook* Rs. 10.3.1, 10.5(b), 10.8.1.

NOTE: Not all court of appeals opinions are recommended for publication in the official reporters. Wis. Stat. § 809.23(3) provides as follows:

> Citation of unpublished opinions.
>
> (a) An unpublished opinion may not be cited in any court of this state as precedent or authority, except to support a claim of claim preclusion, issue preclusion, or the law of the case, and except as provided in par. (b).
>
> (b) In addition to the purposes specified in par. (a), an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31 (2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not an authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.
>
> (c) A party citing an unpublished opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.

Under Wis. Stat. § 809.23(3)(b), certain unpublished opinions issued on or after July 1, 2009, may be cited for their persuasive value but not as precedent. The rule applies to authored cases decided by a three-judge panel or by a single judge acting under Wis. Stat. § 752.31(2). Per curiam opinions, memorandum opinions, summary disposition orders, and other orders are *not* authored opinions and cannot be cited for their persuasive value.

Opinions recommended for publication and opinions about which no publication decision has been made are considered unpublished and therefore are subject to Wis. Stat. § 809.23(3). Opinions ordered published may be cited as precedent as of the date that publication is ordered.

a. Available in commercial electronic database

See generally Bluebook Rs. 10.5(b), 10.8.1(a), 18.1, 18.3; *supra* § 36.8 (discussing cases

available in electronic databases).

- *State v. Rodebaugh*, No. 2011AP2659-CR, 2012 WL 1130084 (Wis. Ct. App. Apr. 5, 2012) (unpublished).

b. Available in slip opinion

When a case is not reported but available in a separately printed slip opinion, provide the docket number, the court, and the full date of the decision cited. *Bluebook* R. 10.8.1(b).

- *Growchowski v. Hofacker*, No. 2009AP2769, unpublished slip op. (Wis. Ct. App. Aug. 24, 2010).

c. Available on internet. *Bluebook* Rs. 18.2, 18.2.1, 18.2.2; *supra* § 36.8 (discussing internet sources).

- *State v. Schultz*, 2010 WI App 124, https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=53280.

- *Leonard v. Lynn*, No. 2009AP2026, unpublished slip op. (Wis. Ct. App. Sept. 2, 2010), https://www.wisbar.org/formembers/legalresearch/Caselaw/capp/2010p/2009ap002026.pdf.

3. Pinpoint citations

See generally SCR 80.02; *Bluebook* Rs. 10.3.3, 10.8.1; *see supra* § 36.6 (discussing pinpoint citations).

- *Stumpner v. Cutting*, 2010 WI App 65, ¶ 11, 324 Wis. 2d 820, 783 N.W.2d 874.

- *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

NOTE: Citations to unpublished opinions citable under Wis. Stat. § 809.23(3) should also provide pinpoint references. *See* Citation of Unpublished Opinions Committee, *Interim Report to Wisconsin Supreme Court* (May 2009), https://www.wicourts.gov/publications/reports/docs/unpublishedopinions.pdf.

- *Olson v. Olson*, No. 2009AP3129, 2010 WL 3389875, ¶ 9 (Wis. Ct. App. Aug. 19, 2010) (unpublished).

- *Young v. Landstar Invs. LLC*, No. 2014AP2507, unpublished slip op., ¶ 18 (Wis. Ct. App. Dec. 3, 2015), https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=156464.

4. Short form citations

See generally SCR 80.02; *Bluebook* Rs. B10.2, 10.9; *The Wisconsin Supreme Court Style and Procedures Manual* R. 11.11 (2020); *supra* § 36.6 (discussing short form case citations and pinpoint citations).

- *Schultz*, 2010 WI App 124, ¶ 1.
- *Ladwig*, 325 Wis. 2d 497, ¶ 32.
- *Rite-Hite*, 216 Wis. 2d at 192.
- *Rodebaugh*, 2012 WL 1130084, ¶ 12.

5. Certification

See generally Bluebook Rs. B10.1.6, 10.7, tbl.T8.

Cite a certification petition by the Wisconsin Court of Appeals to the Wisconsin Supreme Court as follows:

- *Finder v. Am. Heartland Ins. Co.*, No. 2006AP918, 2007 WL 2390677 (Wis. Ct. App. Aug. 23, 2007) (petition for certification), *certification granted*, No. 2006AP918 (Wis. Oct. 10, 2007).
- *State v. Valadez*, Nos. 2014AP678, 2014AP679, 2014AP680, 2015 WL 248040 (Wis. Ct. App. Jan. 21, 2015) (petition for certification), *certification granted*, Nos. 2014AP678, 2014AP679, 2014AP680 (Wis. Mar. 16, 2015).

C. Wisconsin Circuit Court Opinions [§ 36.585]

NOTE: The rule regarding the citation of unpublished opinions, Wis. Stat. § 809.23(3), does *not* govern circuit court opinions. Copies of circuit court opinions are available from the issuing court. *See* Wis. Stat. § 809.23; *Brandt v. LIRC*, 160 Wis. 2d 353, 361–65, 466 N.W.2d 673 (Ct. App. 1991), *aff'd*, 166 Wis.2d 623, 480 N.W.2d 494 (1992).

- *Hartung v. ABS Glob., Inc.*, No. 01-CV-3271 (Wis. Cir. Ct. Dane Cnty. Mar. 17, 2004).

D. Wisconsin Court and Litigation Documents [§ 36.586]

Citation to the appellate court record is specifically required by Wis. Stat. § 809.19(1)(d). Always abbreviate "Record" to "R." When citing the record, be sure to follow the pagination supplied by the clerk of circuit court. When citing items in an appendix, cite to both the record and the appendix. Wis. Stat. § 809.19(1)(d); *Bluebook* R. B17.

- R. 10 at 13. [This cites to page 13 of the document designated as document number 10 in the appellate court record.]

PRACTICE TIP: A statement of facts supported by adequate citation to specific pages in the record is a significant timesaver for appellate judges. A statement of facts with inadequate record citations causes more work for the court, is a nuisance and an irritant, and casts doubt on the factual assertions. Assertions of fact not found in the record are prohibited and will not be considered by the court. *Nelson v. Schreiner*, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991). Failure to provide record citations to factual statements is a rule violation that may warrant sanctions against the offending party's attorney. *State v. Bergwin*, 2010 WI App 137, ¶ 18, 329 Wis. 2d 737, 793

N.W.2d 72. The court may refuse to consider an argument depending on facts when the brief fails to cite to the record allegedly containing those facts. *See Stuart v. Weisflog's Showroom Gallery, Inc.*, 2006 WI App 109, ¶ 36, 293 Wis. 2d 668, 721 N.W.2d 127, *aff'd on other grounds*, 2008 WI 22, 308 Wis. 2d 103, 746 N.W.2d 762. Substantial violations of the briefing rules, including failure to cite to authority and to the record, may warrant striking the brief and dismissing the appeal under Wis. Stat. § 809.83(2). *Mogged v. Mogged*, 2000 WI App 39, ¶ 24, 233 Wis. 2d 90, 607 N.W.2d 662 (imposing sanctions against cross-appellant).

NOTE: *The Bluebook* allows but does not require a writer to enclose the citation in parentheses. *Bluebook* R. B17.1.1.

A full citation to a court or litigation document includes the document's name, the pinpoint citation, a date when needed (*see Bluebook* R. B17.1.3), and the electronic case filing (ECF) number found on PACER when applicable (*see Bluebook* R. B17.1.4). Unless it would be unclear, abbreviate references to the document title according to *Bluebook* table BT1 and omit all articles and prepositions from any abbreviated title. Words of more than six letters may also be abbreviated, even if the words do not appear in the list. Use a page, paragraph, or line as a pinpoint citation. Use as precise a reference as possible. Separate line and page references with a colon. *Bluebook* R. B17.1.2. Use a date to emphasize a significant date or when documents are otherwise indistinguishable, such as when the same person has provided multiple affidavits. *Bluebook* R. B17.1.3. A short form citation (including *id.*) can be given after the full citation, if clear. *Bluebook* R. B17.2. Do not abbreviate document titles in textual sentences. *Bluebook* R. B17, tbl.BT1 (list of abbreviations for court documents); *see also supra* § 36.7 (discussing capitalization of court documents).

- Johnson Aff. Ex. C, at 3.
- Resp't's Br. 4.
- Pl.'s Interrog. No. 4.
- Pet'r's Resp. Br. 10.
- TRO Hr'g Tr. 2:26–3:4.
- Def.'s Br. Opp'n to Pls.' Mot. Summ. J.
- Trial Ct.'s Order Den. Resp't's Mot. to Dismiss 1.
- Compl. ¶¶ 5, 10.
- Pls.' Mot. in Lim. ¶ 2.
- Def.'s Req. for Admis. 2.
- Prelim. Inj. Hr'g Tr. 15:2–13.
- Pl.'s Am. Answer to Cross-cl. ¶ 10, ECF No. 12.
- Manning Dep. 45:17–46:5, Mar. 30, 2015.

- Oswald Dep. 3:5–4:10, Mar. 31, 2014.

E. Wisconsin Administrative Agency Adjudications [§ 36.587]

See generally Bluebook R. 14.3.

NOTE: The citation formats below for selected state agency decisions conform generally to *Bluebook* rules for decisions of administrative agencies. The agencies have been consulted about the recommended formats, although in their internal memoranda and decisions the agencies may use citations that differ somewhat from these examples.

Attorneys should note that some agencies' decision-numbering systems have changed over the years. Attorneys should use the number as it appears on the decision.

Some agencies prepare decision digests, which are generally available through the agency and at law libraries. Full-text copies of decisions are available from the issuing agency; the Wisconsin State Law Library also maintains a limited collection of administrative decisions. Some administrative decisions are reported in services; increasingly, others are available in electronic databases and on the internet.

1. Labor and Industry Review Commission (LIRC)

   See generally Bluebook Rs. 18.2, 18.2.1, 18.2.2, 14.3.

   Information on obtaining copies of LIRC decisions:
   Tel.: (608) 266-9850
   Fax: (608) 267-4409

   LIRC internet homepage:
   https://lirc.wisconsin.gov/

   NOTE: LIRC is an independent state unit associated for administrative purposes with the Department of Workforce Development (DWD). LIRC is a quasi-judicial body that reviews DWD decisions relating to worker's compensation, unemployment insurance, and equal rights. In citations to decisions issued by LIRC, if the suggested parenthetical reference to "LIRC" might not be recognized by all readers (e.g., readers outside Wisconsin), consider substituting "Wis. Lab. & Indus. Rev. Comm'n." *Bluebook* Rs. 6.1(b), 14.3.3, 15.1(d), 18.2.2, tbl.T6.

   NOTE: Under 2015 Wis. Act 55, effective January 1, 2016, adjudication functions formerly with the DWD's Worker's Compensation (WC) Division were transferred to the Department of Administration (DOA), Division of Hearings and Appeals (DHA). *See infra*. LIRC currently continues to issue WC decisions. *See* Lab. & Indus. Rev. Comm'n, *LIRC Worker's Compensations Decisions*, https://lirc.wisconsin.gov/wc_decisions.htm (last visited May 2, 2022).

   a. Equal Rights Division (ERD)

      Information on obtaining copies of LIRC equal rights decisions from LIRC:
      Tel.: (608) 266-9850
      Fax: (608) 267-4409

Information on obtaining copies of LIRC equal rights decisions from the State Law Library:
Tel.: (800) 322-9755
Tel.: (608) 267-9696
TTY: (800) 967-6644
Fax: (608) 267-2319

Information on obtaining copies of equal rights decisions from the ERD:
Tel.: (608) 266-6860 (Madison)
Tel.: (414) 227-4384 (Milwaukee)

LIRC equal rights legal resources on the internet (including selected full-text decisions):
https://lirc.wisconsin.gov/er_research.htm

ERD internet homepage:
https://lirc.wisconsin.gov/equal_rights.htm

- *Weaver v. Milwaukee Repertory Theater*, ERD Case No. 95-52240 (LIRC Jan. 16, 1997).

- *Marrero v. Bullseye Inc.*, ERD Case No. CR201402243 (LIRC Aug. 31, 2015), https://lirc.wisconsin.gov/erdecsns/1473.htm.

- *Acosta v. Waste Mgmt. of Madison*, ERD Case No. 199803258 (LIRC Nov. 3, 2000), https://lirc.wisconsin.gov/erdecsns/303.htm.

NOTE: Because the ERD organizes and retrieves cases by date of decision, not case number, the date is the crucial identifying information in obtaining copies of decisions from the ERD (rather than from LIRC). The ERD's *Equal Rights Decision Digest* also does not include any reference to case numbers. Therefore, although *Bluebook* practice is to include case numbers whenever available, it is common practice to cite ERD cases without the case number.

- *Kayler v. Stoughton Trailers* (LIRC Oct. 27, 1997).

Note that LIRC does not decide all types of contested equal rights cases. Contested cases under Wisconsin's Family or Medical Leave Act, for example, are heard by circuit courts.

b. Unemployment Insurance Division (formerly Division of Unemployment Compensation)

Information on obtaining copies of LIRC unemployment insurance decisions from LIRC:
Tel.: (608) 266-9850
Fax: (608) 267-4409

LIRC unemployment insurance legal resources on the internet (including selected full-text decisions):
https://lirc.wisconsin.gov/ui_research.htm

Unemployment Insurance Division internet homepage:
https://lirc.wisconsin.gov/unemployment_insurance.htm

- *Clyde v. Univ. of Wis.*, UC Dec. Hearing No. 15602683MW (LIRC Aug. 6, 2015).

- *Woolridge v. Dairyland Buses Inc.*, UC Dec. Hearing No. 92-3456 (LIRC Dec. 4, 1992), https://lirc.wisconsin.gov/ucdecsns/4108.htm.

- *Erby v. Emmpak Foods, Inc.*, UI Dec. Hearing No. 00603853MW (LIRC Jan. 2, 2001), https://lirc.wisconsin.gov/ucdecsns/1033.htm.

NOTE: Recent volumes of LIRC's *Wisconsin Unemployment Insurance Decision Digest* contain only court decisions, not administrative decisions, on grounds that most noteworthy issues reach the courts, so that parties generally should not have to cite administrative decisions. However, selected full-text LIRC decisions in unemployment insurance cases are available on LIRC's website.

2. Wisconsin Employment Relations Commission (WERC)

See generally Bluebook R. 14.3.

Information on obtaining copies of WERC decisions from the WERC:
Tel.: (608) 243-2424
Fax: (608) 243-2433
werc@werc.state.wi.us
http://werc.wi.gov/decisionaward-updates/

Information on obtaining copies of WERC decisions from the State Law Library:
Tel.: (800) 322-9755
Tel.: (608) 266-9696
Fax: (608) 267-2319

WERC legal resources on the internet
http://werc.wi.gov/other-resources/
WERC internet homepage:
http://werc.wi.gov

WERC decisions (through 2020) on the State Bar of Wisconsin's website:
https://www.wisbar.org/forPublic/INeedInformation/Pages/Wisconsin-WERC-Decisions.aspx

WERC grievance arbitration awards (through 2020) on the State Bar of Wisconsin's website:
https://www.wisbar.org/forPublic/INeedInformation/Pages/Wisconsin-WERC-Grievance-Awards.aspx

WERC digest (available on CD-ROM at certain libraries):
https://search.library.wisc.edu/catalog/999858060902121 (University of Wisconsin Law Library catalog listing)

Wisconsin Employment Peace Act (WEPA) digest:
http://werc.wi.gov/combined-wepa-digests/

a. Labor relations cases

NOTE: The WERC is an independent state agency that processes various types of labor relations cases. In citations to decisions issued by the WERC, if the suggested parenthetical reference to "WERC" might not be recognized by all readers (e.g., readers outside Wisconsin), consider substituting "Wis. Emp. Relations Comm'n" for "WERC." *Bluebook* Rs. 14.3.3, tbls.T6, T10.

- *Milwaukee Cnty.*, Dec. No. 28951-A (WERC Dec. 17, 1996).

- *Racine Educ. Ass'n*, Dec. No. 35149-A (WERC Mar. 2, 2015), https://www.wisbar.org/forpublic/ineedinformation/werc%20decisions/2015/35149-A.htm.

- *City of Milwaukee*, Dec. No. 29896-A (WERC Nov. 20, 2000), https://www.wisbar.org/forpublic/ineedinformation/werc%20decisions/2000/29896-a.pdf.

NOTE: The WERC identifies decisions using the employer's name; also, because the WERC dates decisions by month and year only, it is common practice to omit the day in citations to WERC cases.

b. Grievance arbitration awards

NOTE: The WERC also handles grievance arbitrations. Decisions through 2020 are available on the State Bar of Wisconsin's website, https://www.wisbar.org/forPublic/INeedInformation/Pages/Wisconsin-WERC-Grievance-Awards.aspx. Decisions also are available via links on this page: http://werc.wi.gov/grievance-awards-linked-lists/.

NOTE: The citation consists of the name of the company, the award number, the last name of the arbitrator in the case and the date of the decision in parentheses, followed by a period.

Private sector:

- *Promotions Unlimited Corp.*, WERC A-5638 (Houlihan, Mar. 6, 1998), https://www.wisbar.org/forpublic/ineedinformation/werc%20grievance%20awards/1998/5644.pdf.

- *Milk Specialties Glob.*, WERC 7915 (Houlihan, Sept. 11, 2015), https://www.wisbar.org/forPublic/INeedInformation/WERC%20Grievance%20Awards/2015/7915.HTM.

Municipal sector:

- *City of Racine*, WERC SA-65 (Houlihan, Mar. 22, 2002).

- *City of Madison*, WERC 7909 (Houlihan, Mar. 24, 2015).

State sector:

- *State (Sch. for the Deaf)*, WERC SA-65 (Nielsen, Aug. 21, 1996).

c. Personnel appeals decisions

NOTE: The WERC is now responsible for personnel appeals decisions, formerly the province of the Personnel Commission. These decisions are available on the WERC website.

- *Kruger v. UW Sys.*, Dec. No. 31104 (WERC Sept. 6, 2004).

- *Phillips v. Wis. Dep't of Just.*, Dec. No. 35735 (WERC Sept. 22, 2015), http://werc.wi.gov/personnel_appeals/werc_2003_on/pa35735.pdf.

d. Interest awards

NOTE: The WERC publishes nonconsent interest awards resolving municipal-sector contract-negotiation impasses.

- *Dane Cnty. (Attorneys)*, Dec. No. 19731-A (Kerkman, Jan. 17, 1983).

- *City of Milwaukee (Supervisory L. Enf't)*, Dec. No. 35076-B (McLaughlin, Apr. 29, 2015), http://werc.wi.gov/interest_awards/mia35076.pdf.

3. Division of Hearings and Appeals (DHA)

See generally Bluebook R. 14.3.

Information on obtaining copies of DHA decisions from the DHA:
Tel.: (608) 266-7709
Fax: (608) 264-9885
DHAMail@wisconsin.gov

DHA internet homepage:
https://doa.wi.gov/Pages/AboutDOA/HearingsAndAppeals.aspx

NOTE: The DHA, an independent unit associated with the Wisconsin Department of Administration, conducts contested case hearings for the Department of Administration, and presides over certain cases, contested proceedings, appeals, and hearings for certain other state agencies. *See* Wis. Dep't of Admin., *Departments*, https://doa.wi.gov/Pages/LicensesHearings/DHAGENGOVDepts.aspx (last visited May 2, 2022) (list of agencies for which the DHA conducts hearings). In citations to DHA cases, it may be helpful to indicate the agency in which the case originated. Often, a prefix appended to the decision number helps identify the relevant program (e.g., "WIC-123" would be the number for a decision involving the Department of Health Services' Special Supplemental Nutritional Program for Women, Infants and Children (WIC)).

a. Office of Worker's Compensation Hearings

NOTE: Under 2015 Wis. Act 55, effective January 1, 2016, the former DWD WC Division duties are split, with claims administration functions remaining with the DWD WC Division. Adjudication functions formerly with the WC Division have been transferred to the DOA DHA.

Information on obtaining copies of LIRC worker's compensation decisions from LIRC:
Tel.: (608) 266-9850
Fax: (608) 267-4409
LIRC@wisconsin.gov

LIRC worker's compensation legal resources on the internet (including selected full-text decisions):
https://lirc.wisconsin.gov/wc_research.htm

DWD worker's compensation internet home page:
https://lirc.wisconsin.gov/workers_compensation.htm

DHA Office of Worker's Compensation Hearings:
Tel.: (608) 266-7709 (Madison)/(414) 227-4381 (Milwaukee)/(920) 832-5450 (Appleton)
Fax: (608) 266-0018 (Madison)/(414) 227-4012 (Milwaukee)/(920) 832-5355 (Appleton)
Internet home page:
https://doa.wi.gov/Pages/LicensesHearings/DHAWorkersCompensation.aspx

- *Slaughter v. Wis. Serv. & Mgmt.*, WC Claim No. 95007930 (LIRC Oct. 30, 1996).

- *Mallum v. Wis. Laborers Health Fund*, WC Claim Nos. 2011-017470, 2010-004584, 2012-016327 (LIRC Sept. 16, 2015), https://lirc.wisconsin.gov/wcdecsns/1629.htm.

- *Clark v. Quality Heating & Sheet Metal*, WC Claim No. 91055201, 1996 WL 748140 (LIRC Dec. 30, 1996).

- *Prochaska v. Jormac Co.*, WC Claim No. 1991023161 (LIRC Nov. 29, 2000), https://lirc.wisconsin.gov/wcdecsns/497.htm.

- *Kucan v. WFH Lab–Elmbrook Mem'l*, WC Claim No. 2014-013792 (LIRC Mar. 16, 2018), https://lirc.wisconsin.gov/wcdecsns/1784.htm.

b. Department of Children and Families (DCF)/Department of Health Services (DHS)/Department of Health and Family Services (DHFS)

- *In re*, DHA Case No. CCO/160967 (Wis. Div. Hearings & Appeals Feb. 27, 2015) (DCF) (DHFS).

- DHA Case No. FCP/158706 (Wis. Div. Hearings & Appeals Feb. 13, 2015) (DHS), https://doa-dha.wisconsin.gov/Shared%20Documents/2015/158706.pdf.

- DHA Case No. MED-20/39901 (Wis. Div. Hearings & Appeals Aug. 9, 1999) (DHFS).

NOTE: Some public benefits cases—such as the Medical Assistance (Medicaid) and W-2 cases in the above examples—cannot be identified by party name, for reasons relating to the benefit recipients' right to confidentiality.

NOTE: 2007 Wis. Act 20 split the DHFS into two agencies, the Department of Children and Families (DCF) and the Department of Health Services (DHS). The DHA continues to

handle appeals for these successor agencies. See the DHA's homepage for details. Wis. Dep't of Admin., *Work and Family Services Unit*, https://doa.wi.gov/Pages/LicensesHearings/DHAWorkandFamilyServicesUnit.aspx (last visited May 2, 2022).

c. Department of Natural Resources (DNR)

- *In re Wis. Pollution Discharge Elimination Sys. Permit No. WI-0061514-03-0 (WPDES Permit) Issued to United Liquid Waste Recycling, Inc., Clyman, Dodge Cnty., WI*, No. DNR-14-061 (Wis. Div. Hearings & Appeals July 21, 2016) (DNR), https://doa-dha.wisconsin.gov/Corrections%20Redacted%20Decisions/2016/DNR14061.pdf.

- *In re Application of Trenton Island Marina to Amend DNR Permit # IP-WC-1988-48-17105, to Extend an Existing Pier Finger Thirty Feet to Accommodate a Larger Boat on the Bed of the Mississippi River - Pool No. 4, Town of Trenton, Pierce Cnty.*, No. IP-WC-1988-48-17105 (Wis. Div. Hearings & Appeals Sept. 5, 2012) (DNR).

d. Department of Corrections (DOC)

- *In re Probation Revocation of Jones*, DHA Case No. 020498-169684-A (Wis. Div. Hearings & Appeals Mar. 11, 1998) (DOC).

e. Department of Justice (DOJ)

- *In re Crime Victim Comp. Application of (applicant)*, DHA Case No. CV-00-0001 (Wis. Div. Hearings & Appeals Oct. 16, 2000) (DOJ).

f. Department of Transportation (DOT)

- *In re Claims Against Dealer Bond of 414 Motor Cars, LLC*, (Wis. Div. Hearings & Appeals Aug. 18, 2017) (DOT), https://doa-dha.wisconsin.gov/DOT%20Decisions/2017/DOT170005.pdf.

- *In re Claims Against Dealer Bond of Donald Driver Motors, LLC*, DHA Case No. DOT-15-0007 (Wis. Div. Hearings & Appeals June 29, 2015) (DOT), https://doa-dha.wisconsin.gov/DOT%20Decisions/2015/DOT150007.pdf.

g. Department of Public Instruction (DPI)

- *J.J. v. Appleton Area Sch. Dist.*, DHA Case No. LEA-97-024 (Wis. Div. Hearings & Appeals Mar. 11, 1998) (DPI).

h. Department of Employee Trust Funds (ETF)

Website: https://etf.wi.gov/

- *In re Appeal of Smith*, 1999-099-ETF (2003).

4. Public Service Commission of Wisconsin (PSC)

NOTE: The PSC is an independent state agency that oversees Wisconsin's public utility providers. The PSC's electronic regulatory filing system (ERF) provides for the electronic submission of documents filed with the PSC and grants online access to documents submitted in formal cases before the PSC.

PSC internet homepage:
https://psc.wi.gov/Pages/Home.aspx

ERF internet homepage:
https://apps.psc.wi.gov/ERF/ERF/ERFhome.aspx

- *Application of Wis. Pub. Serv. Corp.*, No. 6690-CE-187 (Wis. PSC Oct. 7, 2004), https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=22652.

F. Wisconsin Attorney General Opinions [§ 36.588]

See generally Bluebook R. 14.

1. Bound opinion

   - 81 Wis. Op. Att'y Gen. 156 (1994) (OAG 9-94).

2. Opinion available on internet

   See generally Bluebook Rs. 18.2, 18.2.1, 18.2.2.

   NOTE: The Wisconsin DOJ has not issued bound volumes of attorney general opinions since 1994; instead, the DOJ posts the opinions on the internet. All formal opinions (1911–present) are available at the attorney general's website, https://www.doj.state.wi.us/dls/ag-opinion-archive.

   - Wis. Op. Att'y Gen. OAG-12-14 (2014), https://www.doj.state.wi.us/sites/default/files/formal/OAG-12-30.pdf.

   - 66 Wis. Op. Att'y Gen. 310 (1977), https://www.doj.state.wi.us/sites/default/files/dls/ag-opinion-archive/1977/Volume%2066_1977.pdf.

3. Opinion available in electronic database

   See generally Bluebook R. 14.4.

   - Wis. Op. Att'y Gen. OAG 2-03 (2003), 2003 WL 22391472.

   - Wis. Op. Att'y Gen. OAG 01-96 (1996), 1996 WL 101641.

   - 66 Wis. Op. Att'y Gen. 310 (1977), 1977 WL 36172.

G. Wisconsin Constitution [§ 36.589]

See generally Bluebook Rs. 11, 18.3.

1. Current constitutional provision

   - Wis. Const. art. V, § 1.
   - Wis. Const. art. X, §§ 1, 6.
   - Wis. Const. art. I, § 1 (West, Westlaw through July 1, 2018 amendments).
   - Wis. Const. art. XIII, § 13 (West, Westlaw through July 1, 2018 amendments) (validity).
   - Wis. Const. art. I, § 9m (amended 2020).
   - Wis. Const. art. VII, § 4, *amended by* 2013 Wis. S.J. Res. 57, 2015 Wis. S.J. Res. 2, vote Apr. 2015.

   NOTE: The only short form allowed to be used with constitutions is *id.*

2. Former constitutional provision

   - Wis. Const. art. III, § 6 (repealed 1986).

H. Wisconsin Statutes [§ 36.590]

See generally Bluebook Rs. B12.1.2, 12, tbl.T1.3.

NOTE: The Wisconsin Supreme Court has officially adopted *Bluebook* style for citations to statutes. Wis. Stat. § 809.19(1)(e). *But see Notice to Members of the Bar*, 74 Wis. 2d xxxix (1976) (stating that Wisconsin Supreme Court adopted *Bluebook* style, except for citation to Wisconsin statutes). The examples below therefore generally conform to *Bluebook* style. One exception concerns *The Bluebook*'s recommended citation of session laws as "20xx Wis. Sess. Laws xxx." The examples below instead follow prevailing practice in Wisconsin in citing session laws as "20xx Wis. Act xxx."

1. Current official statutory compilation

   See generally Bluebook Rs. B12.1.2, 12.2.1(a), 12.3, 18.2.1(a), tbl.T1.3.

   - Wis. Stat. § 767.41 (2019–20).
   - Wis. Stat. ch. 938 (2019–20).

2. Current unofficial statutory compilation

   See generally Bluebook Rs. B12.1.2, 3.4, 12.2.1(a), 12.3, tbl.T1.3.

   - Wis. Stat. Ann. § 135.01 (West 2020).
   - Wis. Stat. Ann. § 802.06 Judicial Council committee's note to 1976 amendment (West 2020).

3. Current unofficial statutory compilation in electronic database

   See generally Bluebook Rs. 12.2.1(a), 12.3, 12.5(a), 18.3.

   - Wis. Stat. Ann. § 125.33(10) (West, Westlaw through 2021 Wis. Act 19).

4. Current official statutory compilation on internet

   See generally Bluebook Rs. 12.5(b), 18.2, 18.2.1, 18.2.2.

   NOTE: The Wisconsin Legislative Reference Bureau publishes and certifies the Wisconsin Statutes electronically under Wis. Stat. § 35.18.

   - Wis. Stat. § 704.11 (2019–20).

5. Prior statutory compilation

   See generally Bluebook R. 12.2.1(b).

   - Wis. Stat. § 137.06 (2001–02) (repealed 2003).

   - Wis. Stat. ch. 55 (1985–86).

6. Official session law

   See generally Wis. Stat. § 35.15; *Bluebook* Rs. 12.2.1(a), 12.4, tbl.T1.3.

   NOTE: When a law is enacted, it is assigned a sequential act number and printed in slip form (called a slip law). After the legislative session ends, acts passed during that session are printed chronologically in the session laws. In Wisconsin, the session laws are called the Laws of Wisconsin. The Wisconsin Statutes, by contrast, are the official code of statutes currently in force in Wisconsin.

   - 2011 Wis. Act 10.

   - 1997 Wis. Act 15.

   - 1969 Wis. Laws, ch. 284, § 26.

   - 1865 Wis. Priv. & Loc. Laws, ch. 205.

7. Unofficial session law in printed source

   See generally Bluebook Rs. 12.2.1(a), 12.4, tbl.T1.3.

   - 1999 Wis. Act 70, 2000 Wis. Legis. Serv. Act 70 (West).

8. Unofficial session law in electronic database

See generally Bluebook Rs. 12.2.1(a), 12.4, 12.5(a), 18.1, 18.3.

- 2015 Wis. Act 89, 2015–2016 Wis. Legis. Serv. Act 89 (Westlaw).

9. Session law on internet

See generally Bluebook R. 18.2.2.

- 2021 Wis. Act 267, https://docs.legis.wisconsin.gov/2021/related/acts/267.pdf.

10. Amended version when statute in current official compilation has been amended

See generally Bluebook Rs. 12.2.2(b), 12.7.3.

- Wis. Stat. § 19.43 (2019–20), *as amended by* 2021 Wis. Act 267.

- Wis. Stat. § 804.03 (2019–20), *as amended by* Wis. Sup. Ct. Order 21-05, 2022 WI 24 (eff. July 1, 2022).

11. Unamended version when statute in current official compilation has been amended

See generally Bluebook Rs. 12.2.2(b), 12.7.3.

- Wis. Stat. § 802.05(2m) (2015–16), *amended by* 2017 Wis. Act 317.

- Wis. Stat. § 809.19(1)(g) (2013–14), *amended by* Wis. Sup. Ct. Order 14-01, 2015 WI 21.

12. When statute in current official compilation has been repealed

See generally Bluebook Rs. 12.2.2(b), 12.7.2.

- Wis. Stat. § 569.02(5) (2019–20), *repealed by* 2021 Wis. Act 127.

- Wis. Stat. § 753.26 (2019–20), *repealed by* Wis. Sup. Ct. Order 21-03, 2022 WI 23 (eff. July 1, 2022).

13. When statute has been created since current official compilation was published

See generally Bluebook R. 12.2.2(b).

- Wis. Stat. § 175.44, *as created by* 2021 Wis. Act 75 (eff. Jan. 1, 2022).

- Wis. Stat. § 753.24(2m), *as created by* Wis. Sup. Ct. Order 21-02, 2022 WI 23 (eff. July 1, 2022).

14. Textual reference

See generally Bluebook R. 12.10(b), tbl.T1.3.

- The court held that section xxx.xx of the Wisconsin Statutes did not apply.

- The Wisconsin Legislature enacted section xxx.xx in 2011.

15. Short-form citation

See generally Bluebook R. 12.10(b), tbl.T1.3.

- Wis. Stat. § xxx.xx

- § xxx.xx

- *Id.*

- § xxx.xx (Westlaw).

I. Other Wisconsin Legislative Citations [§ 36.591]

1. In General

Note. *Bluebook* table T9 suggests abbreviations (or nonabbreviations) of terms related to legislative documents.

2. Drafting files

- Drafting file for 2005 Wis. Act 431, Wis. Legis. Reference Bureau, Madison, Wis., https://docs.legis.wisconsin.gov/2005/related/drafting_files/wisconsin_acts/2005_act_431_ab_591.

- Memorandum from Lennie Weber, Racine Cnty. Dist. Att'y, to Sen. Barbara Ulichny (Feb. 24, 1992) (available in drafting file for 1991 S.J. Res. 41, Wis. Legis. Reference Bureau, Madison, Wis.).

- Email from Don Valdez, Recording Indus. Ass'n of Am., to Michael Dsida, Wis. Legis. Reference Bureau (Sept. 27, 1999, 10:14 CST) (available in drafting file for 1999 Wis. Act 51, Wis. Legis. Reference Bureau, Madison, Wis.).

3. Bills — amendments

- Wis. S. Amendment 1, to S. Substitute Amendment 1, to 2017 Wis. S.B. 525, https://docs.legis.wisconsin.gov/2017/related/amendments/sb525/ssa1_sb525.pdf. The bill failed to pass. 2017 Wis. S.J. Res. 1, *State of Wis. S.J.*, Mar. 28, 2018, at 881, https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180328.pdf.

4. Bill — histories on legislature's website

- Bill history of 2017 Wis. Assemb. B. 58, https://docs.legis.wisconsin.gov/2017/proposals/reg/asm/bill/ab58.

5. Legislative journals

   - Governor's Veto Message, *State of Wis. Assemb. J.*, Sept. 21, 2017, at 421, https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20170921.pdf.

6. Reports by legislative agencies

   - Emily Hicks, Wis. Legis. Council Info. Memo., *Overview of State and Federal Special Education Laws*, IM-2021-12 (2021), https://docs.legis.wisconsin.gov/misc/lc/information_memos/2021/im_2021_12.

   - *See* Wis. Legis. Reference Bureau, Analysis of 2009 Wis. Assemb. B. 80, at 2, https://docs.legis.wisconsin.gov/2009/related/proposals/ab80.pdf.

   - Analysis by Wis. Legis. Reference Bureau of 1985 S.B. 419 (available in drafting file for 1985 Wis. Act 245, Wis. Legis. Reference Bureau, Madison, Wis.).

   - Wis. Legis. Fiscal Bureau, *Expunging Record of Conviction (Circuit Courts)*, Paper No. 245 to J. Comm. on Fin., at 2 (Apr. 21, 2009), https://docs.legis.wisconsin.gov/misc/lfb/budget/2009_11_biennial_budget/103_budget_papers/245_circuit_courts_expunging_record_of_conviction.pdf.

   - Wis. Legis. Fiscal Bureau, 2019–21 Wis. State Budget, *Comparative Summary of Budget Recommendations* (Aug. 2019), https://docs.legis.wisconsin.gov/misc/lfb/budget/2019_21_biennial_budget/202_comparative_summary_of_provisions_2019_act_9_august_2019_entire_document.pdf.

   - Wis. Legis. Council, Act Memo, *2013 Wis. Act 224: OWI Penalties and Testing* (Apr. 14, 2014), https://docs.legis.wisconsin.gov/2013/related/lcactmemo/act224.

   - Wis. Dep't of Pub. Instruction, *Fiscal Estimate — 2017 Session for 2017 Wis. Assemb. B. 1036*, LRB No. 17-2660/1 (Apr. 4, 2018), https://docs.legis.wisconsin.gov/2017/related/fe/ab1036/ab1036_DPI_c.pdf.

   - Wis. Spec. Comm. on Review of Records Access of Circuit Court Docs., *Wis. Legis. Council Proposed Rep. to the Legis.*, No. PRL 2011-09 (May 19, 2011), https://legis.wisconsin.gov/lc/media/1194/prl_2011_09.pdf.

7. Records of legislative committee proceedings

   - 2017 Wis. Assemb. B. 551, Rec. of Comm. Proc. for Comm. on Child. & Fams. (Nov. 15, 2017), https://docs.legis.wisconsin.gov/2017/related/records/assembly/children_and_families/1414384.

8. Hearing materials

   - Wis. Legis. Council, Hearing Materials for 2017 A.B. 551, Testimony of State Rep. Jessie Rodriguez, Assemb. Comm. on Children & Fams., *AB 551: Updating State Law Regarding the Process for Relocating with a Child* (Nov. 15, 2017), https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2017/ab551/ab0

551_2017_11_15.pdf.

NOTE: The Wisconsin Legislature notes the following on its website: "The Legislative Council collects material during the public hearing of a bill or joint resolution. The materials are not the official committee record, but generally represent items distributed to the committee. Some documents may not be scanned due to volume or copyright." Wis. State Legis., LC Hearing Materials for AB551 on 11/15/2017, https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2017/ab551.

J. Wisconsin Administrative Code [§ 36.592]

See generally Bluebook R. 14, tbl.T1.3.

NOTE: When citing to the Wisconsin Administrative Code, include the chapter abbreviation (e.g., NR, Trans) as it appears on the chapter's first page. Include the month and year of the most recent amendment to the chapter (found at the bottom of the page of the PDF version).

NOTE: *The Bluebook* recommends including only the year; however, because the Wisconsin Administrative Code is updated monthly, it is useful to include the month as well.

NOTE: As of January 1, 2015, the Wisconsin Administrative Code and the Wisconsin Administrative Register are electronic-only publications. *See* Wis. Stat. §§ 35.93, 889.01. The electronic version is now the official compilation. The Wisconsin Administrative Code continues to be updated on the first day of each month to reflect changes published in the most recent end-of-month register.

1. Current official compilation

   Cite to the Wisconsin Administrative Code by stating "Wis. Admin. Code," then the abbreviated name of the chapter, followed by a section symbol or chapter and number, ending with a parenthetical including the abbreviated name of the month and the year. *See generally Bluebook* R. 18.2.1, tbl.T1.3; *see supra* § 36.8.

   - Wis. Admin. Code ATCP § 134.06 (Feb. 2019).
   - Wis. Admin. Code DCF ch. 251 (Mar. 2020).

2. Current unofficial compilation in electronic database

   - Wis. Admin. Code Ins § 1.01 (West, Westlaw through 783B Wis. Admin. Reg. (Mar. 29, 2021)).

3. Current register

   NOTE: Current volumes of the Wisconsin Administrative Register are not available in print or PDF and are not paginated. Older versions of the register might be available in print or PDF and would have page numbers.

   - 770 Wis. Admin. Reg. (Feb. 24, 2020).

- 486 Wis. Admin. Reg. 15 (June 30, 1996).

K. Wisconsin Jury Instructions [§ 36.593]

NOTE: The Wisconsin Jury Instructions are available on the Wisconsin State Law Library website. See Wis. State L. Libr., *Wisconsin Jury Instructions*, https://wilawlibrary.gov/jury/ (last visited May 2, 2022); *Further Info on WI Jury Instructions Availability–Fastcase, Print, and Superseded/Withdrawn Instructions*, Wisblawg (Feb. 3, 2021), https://wisblawg.law.wisc.edu/2021/02/03/further-info-on-wi-jury-instructions-availability-fastcase-print-and-superseded-withdrawn-instructions/.

NOTE: The date for Wisconsin jury instructions is the year shown on the lower left-hand corner of the page. When citing to a jury instruction for which "interim" updates have been released, the month and year should be used.

- Wis. JI–Criminal 2661 (2017).
- Wis. JI–Civil 265 (2011).
- Wis. JI–Children 110 (2018), https://wilawlibrary.gov/jury/.
- Wis. JI–Civil 1922 (Fastcase 2020).

L. Wisconsin Rules of Professional Responsibility [§ 36.594]

See SCR 99.03(2) (must cite as "SCR ____ (volume date)"); *Bluebook* tbls.BT2, BT2.2.

- SCR 20:7.3 (2015–16).

NOTE: "SCR" stands for "Supreme Court Rule."

NOTE: SCR 99.03(2) states that the "volume date" should be added to the end of the citation, but *Bluebook* rule 12.9.3 states that procedural rules can be cited "without any date." The State Bar of Wisconsin's attorney editors advise including the date.

M. Wisconsin Court Rules [§ 36.595]

See generally SCR 99.03(2); *Bluebook* R. 12.9.3, tbls.BT2, BT2.2.

- SCR 81.01 (2019–20).
- Milwaukee Cnty. Cir. Ct. R. 3.15.

NOTE: *Bluebook* rule 12.9.3 indicates that a procedural rule can be cited "without any date" if citing to the current version of the rule.

N. Wisconsin Municipal and County Ordinances [§ 36.596]

See generally Bluebook Rs. 12.9.2, 12.5(b), 18.2.

- Madison, Wis., Gen. Ordinances § 32.07 (2022), https://library.municode.com/wi/madison/codes/code_of_ordinances?nodeId=COORMAWIVOIVCH32--45_CH32LATE_32.07SEDEREPR.

- Milwaukee, Wis., Code of Ordinances ch. 5 (2016), https://city.milwaukee.gov/ImageLibrary/Groups/ccClerk/Ordinances/CH5.pdf.

- Dane Cnty., Wis., *Code of Ordinances* § 32.03 (2015), https://www.countyofdane.com/documents/pdf/ordinances/ord032.pdf.

- Waukesha Cnty., Wis., *Code of Ordinances* ch. 2 (2010).

IV. PRIMARY FEDERAL AUTHORITIES [§ 36.597]

A. U.S. Supreme Court Opinions [§ 36.598]

See generally Bluebook Rs. B10, 10.

NOTE: Supreme Court opinions are generally available on the internet and many electronic databases on the same day that they are issued. Opinions are published by services within a few days after the date of opinion; within one month or so, the case may be published in the unofficial *Supreme Court Reporter*. More than a few years can elapse from the date of the opinion to its publication in the official *U.S. Reports*. Once the case is published in the official *U.S. Reports*, citation need only refer to the *U.S. Reports*.

1. Published in official reporter (U.S.)

   See generally Bluebook Rs. B10.1.2, 10.3, 10.4(a), 10.5(a), tbl.T1.1.

   - *Obergefell v. Hodges*, 576 U.S. 644 (2015).

2. Not yet published in official reporter

   See generally Bluebook R. 10.3, tbl.T1.

   a. Available in unofficial reporters (S. Ct., L. Ed.)

      - *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474 (2020).

      - *Bostock v. Clayton Cnty.*, 207 L. Ed. 2d 218 (2020).

   b. Reported by service

      See generally Bluebook Rs. 10.1, 10.3.1, 10.4(a), 19.

      - *BP P.L.C. v. Mayor & City Council of Baltimore*, No. 19-1189, 21 Cal. Daily Op. Serv. 4450 (U.S. May 17, 2021).

   c. Available on electronic database

- *Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219, 2022 WL 1243658 (U.S. Apr. 28, 2022).

d. Available on internet

See generally Bluebook Rs. 18.1(a), 18.2, 18.2.1, 18.2.2.

- *Shurtleff v. City of Boston*, No. 20-1800 (U.S. May 2, 2022), https://www.supremecourt.gov/opinions/21pdf/20-1800_7lho.pdf.

B. Federal Court of Appeals Opinions [§ 36.599]

See generally Bluebook Rs. B10, 10.1–10.9.

1. Published in official reporter

See generally Bluebook Rs. B10.1.2, 10.3, tbl.T1.1.

- *Adams v. City of Chi.*, 798 F.3d 539 (7th Cir. 2015).

2. Not yet published in official reporter; unpublished opinions

See generally Bluebook Rs. 10.3.1, 10.6.1.

NOTE: Wis. Stat. § 809.23(3) does not bar citation to *all* unpublished federal cases as persuasive authority in Wisconsin courts. Under Federal Rule of Appellate Procedure 32.1(a), a court cannot prohibit a party from citing an unpublished opinion of a federal court or otherwise restrict citation of unpublished opinions issued on or after January 1, 2007. Unpublished cases from the Seventh Circuit Court of Appeals issued before January 1, 2007, cannot be cited as precedent or authority in any federal court. Using a parenthetical, identify the status of such opinions as "unpublished" or "publication pending." Wis. Stat. § 809.23(3); Fed. R. App. P. 32.1(a); 7th Cir. R. 32.1.

a. Available on electronic database

See generally Bluebook Rs. 10.5(b), 18.3.

- *File v. Martin*, No. 20-2387, 2022 WL 1281393 (7th Cir. Apr. 29, 2022).

b. Available in slip opinion

See generally Bluebook R. 10.8.1(b).

- *Silha v. ACT, Inc.*, No. 15-1083 (7th Cir. Nov. 18, 2015).

c. Available on internet

See generally Bluebook Rs. 10.8.1(c), 18.2, 18.2.1, 18.2.2.

- *Nowlin v. Pritzker*, No. 21-1479 (7th Cir. May 20, 2022), https://cases.justia.com/federal/appellate-courts/ca7/21-1479/21-1479-2022-05-20.pdf?ts=1653075024.

C. Federal District Court Opinions [§ 36.600]

See generally Bluebook Rs. B10.1.1–B10.1.3, 10.

1. Published in official reporter

   See generally Bluebook Rs. B10.1.2, 10.3, tbl.T1.1.

   - *Fields v. Smith*, 712 F. Supp. 2d 830 (E.D. Wis. 2010).

2. Not published in official reporter

   See generally Bluebook R. 10.3.1.

   a. Available in electronic database

      See Bluebook Rs. 10.5(b), 18.3.

      - *Schultz v. Pugh*, No. 10-CV-581-BBC, 2010 WL 4363567 (W.D. Wis. Oct. 27, 2010) (unpublished).

   b. Available in slip opinion

      See Bluebook R. 10.8.1(b).

      - *Rustic Retreats Log Homes, Inc. v. Pioneer Log Homes of B.C. Inc.*, No. 19-CV-1614, 2021 WL 2474112 (E.D. Wis. June 17, 2021).

D. U.S. Constitution [§ 36.601]

See generally Bluebook Rs. 11, 18.3; *supra* § 36.7 (discussing capitalization).

1. Current constitutional provision

   - U.S. Const. amend. XIV, § 1.

   - U.S. Const. amends. I–X.

   NOTE: The only short form allowed to be used with constitutions is *id.*

2. Former constitutional provision

   - U.S. Const. amend. XVIII (repealed 1933).

   - U.S. Const. amend. XVIII, *repealed by* U.S. Const. amend. XXI.

E. Federal Statutes and Regulations [§ 36.602]

1. Statutes

See generally Bluebook Rs. B12.1.1, 12.2.1, 12.3, 18.2, 18.2.1, 18.2.2, tbl.T1.1.

NOTE: Generally cite to the official code (U.S.C.). Main editions of the U.S.C. have been published every six years since 1934. Supplements to the official code usually are issued each year during the intervening years. *See, e.g.*, U.S. House of Reps., Off. of L. Revision Couns., *United States Code*, https://uscode.house.gov/download/download.shtml (last visited May 2, 2022); govinfo, *United States Code*, https://www.govinfo.gov/app/collection/USCODE (last visited May 2, 2022). If citing to an annotation or section that has not yet been codified in the U.S.C., cite to an unofficial code, such as U.S.C.A. or U.S.C.S.

NOTE: The *Bluebook* rules for citing federal statutes seem to have changed in the 21st edition. According to the Preface, "Rule 12.3.2 no longer requires a date in citations to the federal code." In addition, rule 12.1 says, "Citing official codes is preferable, but not required." But rule 12.2.1 says to cite the official code "[i]f available."

a. Current official code

- 42 U.S.C. § 1983.

NOTE: "Citations to the federal code, whether official or unofficial, do not require a date." *Bluebook* R. 12.3.2. If included, the year should appear parenthetically at the end of the citation.

b. Current unofficial code

See Bluebook Rs. B12.1, 12.3.1(d).

- 45 U.S.C.A. § 747 (West 2021).
- 5 U.S.C.A. § 552 (West).

c. Current unofficial code and supplement

See Bluebook Rs. B12.1.1, 3.1(c), 12.3.1(e).

- 42 U.S.C.A. § 1983 (West 2012 & Supp. 2020).

d. Current unofficial code in electronic database

See Bluebook Rs. 12.5(a), 18.3.

- 29 U.S.C.A. § 651 (West, Westlaw through Pub. L. No. 117-102).

e. Official session law

See Bluebook Rs. B12.1.1, 12.4.

- Suicide Training and Awareness Nationally Delivered for Universal Prevention Act of 2021, Pub. L. No. 117-100, 136 Stat. 44.
- Ghost Army Congressional Gold Medal Act, Pub. L. No. 117-85, 136 Stat. 11 (2022).
- Terrorism Risk Insurance Program Reauthorization Act of 2015, Pub. L. No. 114-1, § 102, 129 Stat. 3, 4.
- GAO Mandates Revision Act of 2016, Pub. L. No. 114-301, 130 Stat. 1514.

f. Unofficial session law in electronic database

See Bluebook Rs. B12.1, 12.5(a), 18.3.

- FISA Sunsets Extension Act of 2011, Pub. L. No. 112-3, 125 Stat. 5 (Westlaw).
- National Windstorm Impact Reduction Act Reauthorization of 2015, Pub. L. No. 114-52, 129 Stat. 496 (Westlaw).

g. Unofficial session law on internet

See Bluebook Rs. 18.2, 18.2.1, 18.2.2.

- Airport and Airway Extension Act of 2011, Pub. L. No. 112-7, 125 Stat. 31, https://www.gpo.gov/fdsys/pkg/PLAW-112publ7/pdf/PLAW-112publ7.pdf.
- Equity in Government Compensation Act of 2015, Pub. L. No. 114-93, 129 Stat. 1310, https://www.gpo.gov/fdsys/pkg/BILLS-114s2036enr/pdf/BILLS-114s2036enr.pdf.

2. Federal rule or regulation

See generally Bluebook R. 14.2.

a. Codified regulation

See Bluebook R. 14.2(a).

- 12 C.F.R. § 226.5(a) (2020).
- 12 C.F.R. pt. 226 (2020).

b. Final rule

See Bluebook R. 14.2(a).

- National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,106 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115).

- Definition of Solid Waste, 80 Fed. Reg. 1694 (Jan. 13, 2015) (to be codified at 40 C.F.R. pts. 260, 261).

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c. Proposed rules and other notices

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d. Rules and regulations in electronic databases

See Bluebook Rs. 14.4, 18.3.

- Regulation SHO, 75 Fed. Reg. 68,702 (Nov. 9, 2010), 2010 WL 4412043.

e. Rules and regulations on internet

NOTE: *The Bluebook* "requires the use and citation of traditional printed sources when available, unless there is a digital copy of the source available that is authenticated, official, or an exact copy of the printed source." *Bluebook* R. 18.2. *The Bluebook* further states that "[w]hen an authenticated, official, or exact copy of a source is available online, citation can be made as if to the original print source (without any URL information appended)." *Bluebook* R. 18.2.1(a). Furthermore, "[i]f the cited information is available in a traditional source but such source is so obscure as to be practically unavailable, or if a parallel citation to an internet source will substantially improve access to the source cited, citation should be made both to the traditional source and to the internet source by appending the URL directly to the end of the citation." *Bluebook* R. 18.2.1(b)(i); *see Bluebook* Rs. 18.2, 18.2.1, 18.2.2.

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F. Federal Court Rules [§ 36.603]

See generally Bluebook Rs. 3.4, 12.9.3.

1. U.S. Supreme Court rules

- Sup. Ct. R. 28.

2. Evidence and procedure rules

   - Fed. R. App. P. 28(b)(4).
   - Fed. R. Civ. P. 17 advisory committee's note to 1966 amendment.
   - Fed. R. Evid. 701, 702, 703.
   - Fed. R. Crim. P. 38(a).
   - Fed. R. Bankr. P. 4002(b)(5).

3. Seventh Circuit rules

   - 7th Cir. R. 33.

4. District court rules

   See Bluebook R. BT2.1.

   - E.D. Wis. Gen. R. 47(c).
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V. SECONDARY AUTHORITIES [§ 36.604]

A. American Law Reports [§ 36.605]

See generally Bluebook R. 16.7.6.

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B. Legal Encyclopedias and Dictionaries [§ 36.606]

See generally Bluebook Rs. B15.1, 15.8(a).

- 7A Am. Jur. 2d *Automobiles and Highway Traffic* § 332 (2007 & Supp. 2019).
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CAUTION: *The Bluebook* appears to recommend italicizing both the word being cited and the title of the dictionary. The State Bar of Wisconsin's attorney editors recommend italicizing only the defined term.

C. Uniform Acts, Sentencing Guidelines, Model Codes, Standards, and Restatements [§ 36.607]

See generally Bluebook R. 12.9.4.

- Unif. Mediation Act § 2 (Unif. L. Comm'n 2003).
- U.S. Sentencing Guidelines Manual § 3B1.2 (U.S. Sentencing Comm'n 2016), https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-3#NaN.
- Model Business Corporation Act § 8.02 (Am. Bar Ass'n 2016).
- Standards for Criminal Justice: Prosecution and Defense Functions (Am. Bar Ass'n 2015).
- Restatement (Second) of Torts § 549 (Am. L. Inst. 1977).
- Restatement (Third) of Prop.: Servitudes § 1.3 cmt. e (Am. L. Inst. 2000).

D. Wisconsin Ethics Opinions [§ 36.608]

See generally Bluebook R. 12.9.5.

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E. Books and Treatises [§ 36.609]

See generally Bluebook Rs. B15, 15, 18.2.2.

- 2 Ronald J. Cooke, *ERISA Practice and Procedure* § 7.33, at 7-134 (2d ed. 1996).
- 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1431, at 275–76 (4th ed. 2010 & Supp. 2020).
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- 3 *The Law of Damages in Wisconsin* § 31.10 (Russell M. Ware ed., 8th ed. 2020 & Supp. 2021).
- 8 Jay E. Grenig & Jeffrey S. Kinsler, *Wisconsin Practice Series: Civil Discovery* § 10:18 (2d ed. 2005).
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NOTE: "*The Bluebook* requires the use and citation of traditional printed sources when available, unless there is a digital copy of the source available that is authenticated, official, or an exact copy of the printed source . . . ." *Bluebook* R. 18.2. Because books published in online Books UnBound differ in format from their print counterparts, the print versions of State Bar of Wisconsin PINNACLE books could be cited in official filings. *See id.* R. 15.9(c) ("Print versions are authoritative . . . ."). However, *Bluebook* rule 15.9(c) notes that "ebooks should be cited only if they are the sole media through which the book is available." Thus the ebook version could also be cited. The citation could be adapted by omitting the volume number (if there is one).

F. Articles in Periodicals [§ 36.610]

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- Michael David Leffel et al., *A Primer: Wisconsin's New Class Action Statute*, Wis. Law., Apr. 2018, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=91&Issue=4&ArticleID=26277.

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G. Articles in Newsletters [§ 36.611]

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H. Blog Posts [§ 36.612]

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I. Social Media Posts [§ 36.613]

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