

**Wisconsin Child Support
Attorney's Desk Reference
Chapter 3 Table of Contents**

Chapter 3: Support Establishment	23
Support Establishment.....	23
Independent Actions Affecting Family to Establish Child Support.....	23
Jurisdiction and Venue.....	23
Commencement of Action and Service of Process	24
Respondent's Defenses	25
Temporary Support Orders	25
First Appearance/Temporary Order	25
Pretrial Proceedings.....	26
Stipulation	26
Discovery/Financial Disclosure	27
Order for Appearance	28
Evidence	28
Setting the Child Support Amount.....	28
Annual Adjustments	30
Trusts.....	30
Final Hearing and Support Order	30
Default Judgment.....	31
Setting the Support Amount	31
The Percentage of Income Standard	31
Determining Income.....	31
Imputation of Income/Shirking.....	33
Impact of Incarceration on Order Establishment.....	34
Application of the Percentage Standard in Special Circumstances.....	34
Family Support.....	37
Daycare Expenses	37
Medical Support.....	37

Chapter 3: Support Establishment

Citations

767.001 (1)(f)
767.001(1)(j)
767.501

767.01(1)
767.001(1)

767.301(1m)
801.05(11)
Lutzke by Lutzke v Lutzke; Wis. 2d 24, 361 .W. 2d 640
Roeder v. Roeder, 03 Wis.2d 411m; 308 N.W.2d 904 (Ct. App. 1981)

801.05
801.07(5)
767.01(2)

Support Establishment

Independent Actions Affecting Family to Establish Child Support

There are two independent civil actions to establish child support, which should be used only when there has been no previous action affecting the family. There are some differences in the provisions for these two actions. For example, an action brought under § 767.001(1)(f) or (1)(j) is entitled “In re the marriage of A.B. and C.D.” while an action brought under § 767.501 is entitled “In re the maintenance and support of A.B.” In addition, § 767.501 specifically provides that no filing fee is paid at the time of filing while §§ 767.001(1)(f) and (1)(j) require an affidavit and finding of indigency to avoid a filing fee.

Jurisdiction and Venue

All Wisconsin circuit courts have subject-matter jurisdiction over all actions affecting the family, including child support actions

There is no residency requirement in support actions, but there is such a requirement in divorce, annulment, and legal separation proceedings.

Personal jurisdiction over the obligor parent may be obtained if:

- Respondent has the necessary minimum contacts with this state to exercise jurisdiction under 801.05 or 801.07(5),
- The respondent had sexual intercourse with the child’s mother in Wisconsin during the period of conception or the affected child was born in this state,
- The affected child resides in this state,
- The person resides or has resided with the child in this state,

801.05(11) ■ Or a personal claim is asserted against the respondent, the petitioner lives in the county where the action is begun, the respondent and petitioner resided in a marital relationship for at least six months within the preceding six years, and the respondent is personally served with notice.

801.54
801.50(10m) Venue is in the county designated in the petition, subject to the subject to the change of venue provisions.

Commencement of Action and Service of Process

767.205(2) An action may be commenced by the state when it is a real party in interest, either because support has been assigned or an application for services has been received..

767.215(2)(3) In any action affecting the family, the petition shall include:

- The names, dates of birth, residence, place and date of marriage, and any prior actions for divorce or annulment of the parents,
- The names and dates of birth of the children, and if the mother is pregnant,
- What relief is requested.

767.215(2m)
946.715 The summons must inform the respondent that interference with the other parent's parental rights is a felony.

767.215(2m) The summons must be accompanied by a document setting forth the percentage standard established under § 46.25(9)(a) and listing the factors which the court may consider under § 767.511(1m).

767.215(3) The respondent's response or counterclaim must be served on the petitioner and the family court commissioner within 20 days of the respondent's receipt of the petition. However, jurisdictional questions may be raised at any time prior to judgment.

767.215(5) The party filing a petition must submit a separate form, furnished by the court, containing the name, date of birth, and Social Security number of each party and each minor child of the parties and each child born to the wife during the marriage. This form is filed separately from the case file and may be disclosed only to the parties and their attorneys, a child support worker or any other person authorized by law or court order to have access to the information.

767.217 If either party is receiving W-2, MA or has a child in foster care, a copy of the motion or pleading must be served on the child support agency in the county in which the action was begun within 20 days of making service on the opposite party.

Respondent's Defenses

Denial of paternity or maternity

- Reconciliation of the parents. However, this would not be a defense against any arrearages accumulated under a temporary support order.
 - Financial inability to pay support, which could be caused by inability, unemployment, or incarceration. The respondent should be able to document any one of these.
 - Lack of personal jurisdiction
- 767.511(3) ■ It is *not* a defense to failure to pay child support that the custodial parent interfered with or denied visitation.

Temporary Support Orders

If there is no existing support order, and the respondent is legally presumed to be the parent, temporary child support should be sought. The temporary order may also include the following provisions, if necessary

- Prohibition of parents disposing of assets
 - Prohibition of parents removing the child/ren from the jurisdiction
 - Lien against specific real property for any future unpaid support
- 767.225 ■ Prohibition of parents interfering with each other's
767.77 personal liberty

First Appearance/Temporary Order

This hearing is held to set temporary child support or to stipulate to final child support.

- 767.235(2) ■ The public may be excluded from this hearing.
- 767.225(2) ■ The attorney may serve notice of a motion for temporary support, or an order to show cause why temporary support should not be set, at any time after the action is commenced.

- 767.127 ■ A fact sheet providing financial information for both parties must be filed before or at the time of the hearing.
- 767.225(1n) ■ Temporary support orders may be based on the parties' written stipulation, subject to the judge's or family court commissioner's approval.
- 767.225(1n)
767.511 The judge or family court commissioner must apply the percentage standard unless the judge or family court commissioner finds that the standard is unfair to one of the parties. In making such a finding, the judge or family court commissioner must consider the factors listed in s.767.25(1m) when setting temporary, as well as final, support orders.
- 767.225(1n) All temporary support orders made by the family court commissioner shall be reviewed by the court, on the motion of any party.
- 767.75 ■ All temporary orders shall include an order for immediate income withholding or a separate abridgment of the support order.

Pretrial Proceedings

- Purpose of these proceedings is to promote stipulations. Sometimes, the court includes a notice of a pretrial conference in the petition and summons.

Stipulation

- All agreements between the parties should be in the form of a written stipulation
 - The parties may agree on the child support amount and the payment schedule by stipulation, subject to the approval of the judge or family court commissioner. A court may not approve a stipulation for child support or family support unless the stipulation determines support consistent with the percentage standard or uses the statutory factors.
- 767.511 ■ Stipulations should include all the elements of a final support order and should be based on the same criteria.

Ondrasek v. Tenneson,
158 Wis. 2d 690, 462
N.W.2d 619 (Ct. App.
1990)

Krieman v. Goldberg,
214 Wis.2d 163, 571
N.W.2d 425 (1997)

Wood V. Propeck, 299
Wis. 2d 470,
728 N.W.2d 757 (Ct.
App 2007)

767.511(4)

Bliwas v. Bliwas, 47
Wis. 2d 635,
178 N.W.2d 35

■ Any stipulation that purports to limit a child support payee's ability to seek a modification based upon a substantial change of circumstances is void against public policy.

■ The parties may stipulate to the payment of child support past the child's reaching the age of majority, and the court may enforce that stipulation if made part of its judgment, even though the court could not otherwise order the parent to pay support after the child reached the age of majority (unless the child were pursuing a high school diploma as provided in § 767.25(4)).

Discovery/Financial Disclosure

The most important discovery issue is the disclosure of financial resources, which is critical to the setting of both temporary and final child support.

804.01, et. seq.

Generally, discovery is conducted as provided in Ch. 804.

767.127(2)

The court shall require full disclosure of all assets and debts, which must be filed with the court within 90 days after the summons is served.

767.127(1)

The court may, and on a party's request shall, require the parents to submit their state and federal income tax returns for the previous two years.

767.127(4)

Failure to make complete disclosure:

767.127(5)

- Authorizes the court to accept the other party's statements as accurate,
- Could authorize the court to create a constructive trust for the child's benefit if the other party requests it and the undisclosed property is worth at least \$500.

Order for Appearance

- 767.235(2) ■ Both parties shall appear at the trial, unless non-residence is shown; service is by publication or the court for other good cause orders.
- 767.235(2) ■ The order for appearance must be requested by the moving party and then served on the other party before trial.

Evidence

- 767.511(3) Violation of visitation rights by the custodial parent shall not constitute reason for a failure to pay child support.
- 767.127(4) ■ If a party fails to make the financial disclosure which the court requires, this authorizes the court to accept the other party's statements as accurate.

Setting the Child Support Amount

- 767.511(1)
767.511(1m) If it determines that a child-support duty is owed, the court shall order either or both parents to pay child support, by applying the percentage standard. If finding by the greater weight of the credible evidence that use of the standard would be unfair, after considering the following factors, the court may modify the amount of child support payments:
- The financial resources of the child,
 - The financial resources of both parents,
 - Maintenance received by either party,
 - The needs of each party to support themselves at a level equal to or greater than the poverty level,
 - The parent's responsibility for the support of others,
 - If the parents were married, the standard of living the child would have had if the marriage or relationship would have continued,
 - Desirability that the custodial parent remain in the home full-time,
 - Cost of day care if the custodial parent works outside the home, or the value of custodial services performed by the custodian if the custodian remains in the home,

- Award of substantial periods of physical placement to both parents,
- Extraordinary travel expenses incurred in exercising the right to periods of physical placement,
- Child's physical, mental, and emotional health needs, including costs for health insurance,
- The child's educational needs,
- Tax consequences to each party,
- The best interests of the child,
- The earning capacity of each parent, based on each parent's education, training and work experience and the availability of work in or near the parent's community.
- And any other factors the court deems relevant.
- The judge or family court commissioner must state in writing or on the record the reason for finding that the percentage standard is unfair to a party, the reasons for the amount arrived at, and the basis for the amount.

Balaam v. Balaam, 52
Wis. 2d 20, 187
N.W.2d 867 (1971)

Earning Capacity/Shirking: General rule is that an obligor's actual earnings are the best measure unless it is proven that the obligor is not working at an occupation for which s/he was suited *or* is willfully accepting less compensation to reduce his/her ability to pay support.

Wallen v. Wallen, 139
Wis. 2d 217, 407
N.W.2d 293 (Ct. App.
1987)

A voluntary change in employment is a factor to be considered in a shirking determination. However, before court can set support based on earning capacity rather than actual earnings, finding must be made based on evidence that parent was failing to work at their earning capacity because of a disregard of their support obligations.

Sellers v. Sellers, 201
Wis. 2d 578, 549
N.W.2d 481 (Ct. App
1996)

The court may consider earning capacity if it finds a parent's job choice voluntary or unreasonable.

767.553

Annual Adjustments

The child support order may also provide for annual adjustments in the amount based on a change in the obligor's earnings and/or in the cost of living if:

- The payee applies to the family court commissioner for the adjustment annually,
- The child support order specifically provides for the adjustment.

Trusts

767.511(2)

In re the Paternity of Tukker M.O 199 Wis. 2d 186, 544 N.W.2d 417 (1996)

The court may also set aside a portion of the child support to be paid in a separate trust.

767.511(4)

Behnke v. Behnke, 103 Wis. 2d 449, 309 N.W.2d 21 (1980)

Under § 767.511(4), the court shall order child support for a child less than 19 years who is pursuing a high school diploma or its equivalent.

767.511(5)

Excluding paternity actions, liability for past child support is limited to the support for the period after the birth of the child.

767.235

Final Hearing and Support Order

This may be the first appearance before the judge, but the family court commissioner's findings may be used as recommendations.

The final judgment should include:

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- An order that payer and payee notify the clerk of court of any change in employer or address,

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- An order for income withholding to take effect immediately unless the court finds that income withholding will cause the payer irreparable harm.

Moffat v. Moffat,
307 N.W.2d 337 (Mich.
1980)

- A statement of any arrearages owed under the temporary support order because courts in other jurisdictions have disallowed such arrearages when not preserved in the final judgment. This may or may not happen in Wisconsin courts, but it is best to preserve the arrearages because a separate enforcement action will not then be necessary and the income withholding order can incorporate the arrearages from the temporary order.

767.323

- The parents could reconcile, and the court may dismiss the action or suspend the child support order for a period of time. The attorney should advocate suspension if it appears that the reconciliation may be short lived, or dismissal (with preservation of the arrearages from the temporary support order) if it seems to be more permanent.

806.02

Default Judgment

If the respondent fails to appear, an *ex parte* hearing for a default judgment is available under the general civil procedure provisions. The prosecutor should put into evidence any financial information available and move the court for a support order.

Setting the Support Amount

The Percentage of Income Standard

767.511
DCF 150
Sommer v Sommer
108 Wis. 2d, 323
N.W.2d 144
(Ct. App. 1982)

The Percentage Standard is the presumptive method of setting child support in Wisconsin. Federal law requires all states to have in effect a single set of guidelines for the establishment of child support 42 CFR 302.56 which leads to a specific dollar amount of support.

Wisconsin's percentage standard was developed after review of studies on the cost of raising children. The amounts in the standard are expressed as a percentage of a parent's gross income and designed to reflect the percentage of that parent's income necessary to provide the child/ren with as close as possible to the same standard of living they would have had if the parents had remained together.

The Percentages are:

- 17% for one child
- 25% for two children
- 29% for three children
- 31% for four children
- 34% for five or more children

Determining Income

DCF 150.02(13)

Gross income is used to calculate support. Income does not have to be taxable to be considered available for calculating child support.

Public Assistance

Langlois v. Langlois
150 Wis. 2d 101, 441
N.W.2d 286 (Ct. App.
1987)

DCF 150.01(13)(a)10 b

Supplemental Security Income (SSI) is a form of public assistance and therefore not available for child support.

Undistributed Income

Weis v. Weis, 215 Wis.
2d 135 572 N.W.2d
123 (Ct. App. 1997)

DCF 150.02(13)(a)9

Undistributed earnings of a partnership may be considered as income when calculating child support only to the extent that the payer has an ownership interest in the partnership sufficient to exercise control of or access to the undistributed earnings and there is no valid business reason to retain earnings in the partnership.

Per Diem Payments

*In re the Paternity of
Ashleigh N.H* 178 Wis.
2d 466, 504 N.W.2d
422 (Ct. App. 1993)

Any *per diem* payment greater than actual expenses must be considered gross income subject to child support.

Overtime Income

Jarman v. Welter, 289
Wis. 2d 857 711
N.W.2d 705 (Ct. App.
2006)

Wisconsin law does not exclude overtime income in the calculation of the percentage standard.

Educational Grants and Loans

*Thibadeau v.
Thibadeau*, 150 Wis.
2d 109 441 N.W.2d
289 (Ct. App. 1989)

When determining gross income available for a child support obligation, educational grants and loans are excluded.

Double Counting

State v. Maly, 186 Wis. 2d 125, 519 N.W.2d 717 (Ct. App. 1994)

Whether gains from the sale of an asset counted as property in the divorce judgment can be counted as income for support purposes is a fact-sensitive question that must be resolved on a case-by-case basis. However, where the value of the property sold was less than the equity in the property at the time of divorce, the gain from the sale could not be counted.

Cook v. Cook, 208 Wis. 2d 166, 560 N.W.2d 246 (1997)

However, a military pension benefit divided equally between both parties must be considered as property for purposes of property division and may be considered as income to the recipient for purposes of calculating child support.

Social Security Disability Benefits

DCF 150.03(5)

Court may include SSDI benefits received directly by the children in the payer's gross income for purposes of calculating support and then adjust the resulting order by the amount of the SSDI benefits.

Child Support Before Maintenance

DCF 150.03(6)

If a payer will have obligations for both child support and maintenance to the same payee, the child support should be calculated first prior to the calculation of the amount owed for maintenance

Imputation of Income/Shirking

Balaam v. Balaam, 52 Wis. 2d 20 187 N.W.2d 867 (1971)

Edwards v. Edwards, 97 Wis. 2d 111 293 N.W.2d 160 (1980)

A trial court's consideration of a payer's earning capacity, rather than their actual earnings, is appropriate only when there is a basis for a finding that the payer is not fairly or diligently working at the occupation which he/she was best suited for.

DCF 150.03(3)

Van Offeren v. Van Offeren 173 Wis. 2d 482, 496 N.W.2d 680x(Ct. App. 1992)

In re R.L.M., 143 Wis. 2d 849, 422 N.W.2d 890 (Ct. App. 1988)

Sellers v. Sellers, 201 Wis. 2d 578, 549 N.W.2d 481 (Ct. App. 1996)

Shirking is established where the obligor intentionally avoids the duty to support or where the obligor unreasonably diminishes or terminates his or her income in light of the support obligation. Reasonableness must be assessed in light of the payer's support or maintenance obligations.

Shirking does not require a finding that the spouse deliberately reduced his or her earnings to avoid support obligations. It is sufficient that the court finds the employment decision both voluntary and unreasonable under the circumstances. The employment decision may be unreasonable even though well-intended.

Impact of Incarceration on Order Establishment

Modrow v. Modrow,
247 Wis. 2d 889, 634
N.W.2d 852 (Ct. App.
2001)

Incarceration is a valid factor for the court to in setting an initial level of support. In *Modrow*, 5th OWI was considered to be a voluntary and unreasonable reduction in income. Therefore, imputation of income at pre-incarceration earning capacity was proper. (See also Modification Chapter for a discussion of cases involving the impact of incarceration on motions for modification.)

Application of the Percentage Standard in Special Circumstances

Serial-Family Cases

DCF 150.04(1)
Brown v. Brown,
177 Wis. 2d 512, 503
N.W.2d 280
(Ct. App. 1993)

Payer only eligible for treatment as a serial family payer if they incur a court ordered obligation to children in a subsequent family. Payer may not use formula to seek modification of an existing order based upon a subsequently incurred obligation.

Shared-Placement Cases

DCF 150.04(2)

Both parents must have placement at least 25% of the year (92 days).

DCF 150.01(10)
Rumpff v. Rumpff
277 Wis. 2d 606, 688
n.W.2d 699 (Ct. App.
2004)

Period of placement is determined by calculating overnights or their equivalent. Providing an evening meal does not equate to an overnight.

Maritato v. Maritato,
275 Wis. 2d 252
685 N.W.2d 389 (Ct.
App. 2004)

Support calculation includes **basic support costs**:

Food, shelter, clothing, transportation, personal care, and incidental recreational costs. It is presumed that each parent shares basic support Costs in proportion to the amount of time they have placement of the child/ren

DCF 150.04(2)(b)6

In addition to determining child support, the court is required to assign responsibility for payment of the child/ren's **variable costs** in proportion to each parent's share of physical placement, with due consideration to a disparity in the parents' incomes.

DCF 150.02(29) Variable costs include reasonable costs above basic support costs including, but not limited to child care, tuition, a child's special needs and other activities that involve substantial cost.

Note: The court in *Rumpff* exercised its discretion to order full support under the percentage standard without shared time credit in exchange for eliminating payer's responsibility for variable expenses.

Randall v. Randall, 235 Wis. 2d 1, 612 N.W.2d 737 (Ct. App. 2000)

The Court of Appeals has held that the presumptive application of the percentage standard also applied to the shared-time formula.

Split-Placement Cases

DCF 150.04(3) Where each parent has placement of one or more of the children, support should be calculated for each parent by pro-rating the percentage standard, based upon the total number of children and then calculating support for each parent based on the number of children in the other parent's care. The resulting amounts should then be offset against each other.

The pro-rated percentages are:

- 2 children 12.5% for each child ($25\% \div 2$)
- 3 children 9.67% for each child ($29\% \div 3$)
- 4 children 7.75% for each child ($31\% \div 4$)
- 5 children 6.8% for each child ($34\% \div 5$)

Combination Split- and Shared-Placement

DCF 150.04(2)(b) Where each parent has primary placement of one or more of the children and shared placement of one or more of the children, support is calculated by using the pro-rated percentages to determine support for the number of children placed with each parent and then using the pro-rated percentage to determine support for the child in shared placement. The resulting amounts are added together for each parent and those amounts offset against each other.

DCF 150.04(4)

Low-Income Payers

29 USC 206(a)(1)

The administrative rule provides for a discretionary reduction in a support obligation for payers whose income is at or below 150% of the federal poverty level. The amount of support calculated using the low-income formula is not intended to provide sufficient support for a child. Rather, it strikes a balance between the payer's need to support him/herself and their obligation to support their children.

DCF 150.04(2)(b)5

If a low-income payer also has shared placement, the payer is only entitled to application of one formula for reduction of their support obligation.

The low-income formula provides for fairly dramatic reductions in a payer's support obligation and is intended for those payers who do not have the education and training to earn enough income to be able to pay support at the levels in the percentage standard. The formula should only be applied in those cases where it is determined that the payer is working at their earning capacity.

DCF 150.04(5)

High-Income Payers

The administrative rule provides for a reduction in support in cases where the payer's income exceeds \$84,000 annually. While there is some consensus that parents stop sharing income with their children at the rates in the percentage standard at some level of income, there is very little agreement on where that point is. The \$84,000 cap was the result of a legislative compromise. The reduced support represents roughly 80% of what a payer would have paid under a straight-forward application of the percentage standard. Rates for payers whose income is between \$84,000 and \$150,000 annually are:

- 14% for one child
- 20% for 2 children
- 23% for 3 children
- 25% for 4 children
- 27% for 5 or more children

The support rates for payers whose incomes exceed \$150,000 annually represent roughly 60% of what a payer would have paid under a straight-forward application of the percentage standard. Those rates are:

- 10% for one child
- 15% for 2 children
- 17% for 3 children
- 19% for 4 children
- 20% for 5 or more children

Chen v. Warner, 280 Wis. 2d 344, 695 N.W.2d 758 (2005)

There may be a separate analysis for shirking in high income cases when one parent is financially able to support the children.

Luciani v. Montemurro-Luciani 199 Wis. 2d 280, 544 N.W.2d 561 (1996)

Percentage standard applied in a case where there was a significant disparity in the incomes of the two parents and the paying parent had the lower income.

Mary L.O. v. Tommy R.B., 199 Wis. 2d 186, 544 N.W.2d 417 (1996)

A trust may be established for a minor child's higher-education costs. § 767.511(2) gives the court a means of providing for the future educational needs of children with child support that is paid while the children are under the age of majority.

Hubert v. Hubert, 163 Wis. 2d 517, 471 N.W.2d 615 (Ct. App. 1991)

Kowalski v. Obst, 267 Wis. 2d 400 671 N.W.2d 339 (Ct. App. 2003)
767.25(2)

767.531

Family Support

Vlies v. Brookman, 285 Wis. 2d 411 701 N.W.2d 642 (Ct. App. 2005)

If the court applies the percentage standard when setting child support, it must set family support at an amount that results in a net payment, after taxes are paid, of no less than the child support as calculated under the guidelines.

Daycare Expenses

McLaren v. McLaren, 665 N.W.2d 405 (Ct. App 2003)
265 Wis. 2d 529

Although a court may order a parent to contribute to daycare expenses in addition to child support, the court is required to explain its deviation from the guidelines.

767.513

Medical Support

DCF 150.05

The court shall specifically assign responsibility and direct the manner of payment for the child's health care expenses *in addition* to ordering child support.

Court may order either or both parents to enroll a child in a private health insurance plan if it is:

- Available at reasonable cost
- Accessible to the child
- Provides comprehensive coverage

Reasonable Cost

Cost does not exceed 5% of the insuring parent's monthly income available for child support.

Cost refers to cost to add the child to existing coverage or difference between self-only and family coverage.

Court may order non-insuring parent to contribute to cost in an amount not to exceed 5% of their monthly income available for child support.

Contribution may be ordered as an upward or downward adjustment to payer's child support obligation.

Court may not order a parent whose income is below 150% of poverty level to contribute to cost of private health insurance coverage.

Accessible

Service provider is within 30 minutes or 30 miles of child's home.

Comprehensive Coverage

Plan covers hospitalization and other medical costs without large out-of-pocket deductibles or co-payments.

Options When No Private Health Insurance Available

Court may order enrollment in a private health insurance plan as a deviation to the percentage standard under § 767.511(1m)

Court may order enrollment in a private health insurance plan when one becomes available to a parent in the future that is reasonable in cost, accessible to the child(ren) and comprehensive in coverage.

Court may order contribution to the cost of the other parent's premium for Badger Care Plus unless parent's income is below 150% of poverty level.

Contribution would be an upward or downward adjustment to support obligation.

If a person other than a parent has already enrolled a child in a health insurance plan that is reasonable in cost, comprehensive in coverage and accessible to the child, the court may determine whether to order a parent to enroll the child.

Court must also establish an order to address uninsured medical expenses