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Statutes Creating Rebuttable Presumptions against Custody to Batterers: How Effective Are They?

Nancy K. D. Lemon

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STATUTES CREATING REBUTTABLE PRESUMPTIONS AGAINST CUSTODY TO BATTERERS: HOW EFFECTIVE ARE THEY?

Nancy K. D. Lemon[†]

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[†] Lecturer in Domestic Violence Law, Boalt Hall School of Law, University of California, Berkeley; Associate Editor, Domestic Violence Report; domestic violence consultant, author of *Domestic Violence Law*, and other books, articles, and curricula. Thanks to my two volunteer research assistants, Susan Elliott and Raya Sorrells.

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I. INTRODUCTION

“Any time you go through a process of major social change, you have four stages of response. The first is anger; the second is retribution; the third is grudging acceptance. In the fourth stage, people all of a sudden get it”¹

While this quote by Donna Lopiano is related to the acceptance of women in sports and the effect of Title IX, it could apply equally to the response of legislatures and courts to domestic violence over the last twenty-five years. Given the historical condonation of such violence by the U.S. legal system, we are indeed going through a process of major social change as we advocate for the same system to take a stand against domestic violence. In the custody arena, laws first allowing, then mandating that courts consider domestic abuse, and most recently creating presumptions against batterers as custodial parents, have met with very mixed results. While some states seem to have made this transition without significant problems, other states have seen a backlash in the courts’ response to such presumptions.

This article will examine the effect of state statutes creating a rebuttable presumption against custody to batterers. Part II will trace the development of these presumption statutes, situating them within historical trends in custody law. Part III will describe the statutes, including how they vary. Part IV will examine how the presumption statutes are being implemented, including the backlash seen in some jurisdictions. Part V will propose solutions to problems with implementation of presumption statutes. These include legislative amendments; training for judges, attorneys, guardians ad litem, mediators, and evaluators; seeking clarification from appellate courts; funding for attorneys for indigent victims of

1. Bill Blum, *Fighting Over Title IX*, CAL. LAW. Feb. 2001, at 90 (quoting Donna Lopiano, Executive Director, Women’s Sports Foundation).

domestic violence; and community organizing. The conclusion, Part VI, notes that while the passage of such statutes is not a “quick fix” to the fundamental problems presented by these cases, the process of enactment and implementation of the presumption statutes is worthwhile, as another step on the long road toward the elimination of domestic violence.

II. DEVELOPMENT OF REBUTTABLE PRESUMPTION STATUTES

A. *Historical Custody Standards*

Until the 1970s and the advent of no-fault divorce, abuse by one parent of the other was considered quite relevant to custody decisions throughout the United States, as this was evidence of the abuser’s poor morals.² While the rate of divorce was low, victims of domestic violence were usually awarded custody of the parties’ children.³

A significant change in custody decisions took place in the 1970s, as most U.S. states amended their divorce laws from fault-based divorce to no-fault divorce.⁴ Under the new regime, domestic violence was no longer seen as relevant by divorce courts; judges were trained to look toward the future, not admit evidence of past misdeeds, and to consider the parents as generally equally qualified to be custodians of children.⁵ Unless the children were physically harmed, what a husband did to his wife⁶ was not seen as relevant to his ability to parent.⁷

No-fault divorce was generally hailed as a progressive move,

2. Naomi R. Cahn, *Civil Images Of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1043 (1991).

3. *Id.*

4. *Id.* See also Note, *Developments in the Law: Legal Response to Domestic Violence, VI. Battered Women and Child Custody Decisionmaking*, 106 HARV. L. REV. 1597, 1597 (1993).

5. Lynne R. Kurtz, *Protecting New York’s Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB. L. REV. 1345, 1347 (1997).

6. While domestic violence can be committed by either sex, most domestic violence is committed by men against women. The U.S. Dept. of Justice reported in 1998 that a woman is seven to fourteen times more likely to be severely injured by an intimate than a man is. Patricia Tjaden & Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey*, NATIONAL INSTITUTE OF JUSTICE, at <http://www.ncjrs.org/pdffiles/172837.pdf> (last visited Oct. 3, 2001).

7. Cahn, *supra* note 2, at 1044; Kurtz, *supra* note 5, at 1347.

both by feminists and by fathers' rights groups.⁸ Fathers' rights groups celebrated this as a move away from what they saw as gender bias, whereby mothers were allegedly awarded custody solely by virtue of their sex. However, the emphasis on no longer making findings of fault set the stage for courts refusing to consider domestic violence as a relevant factor in custody decisions. Domestic violence was not seen as affecting the best interests of the child unless the child was also physically abused.⁹ And even though the overlap between partner abuse and physical child abuse is great,¹⁰ courts often failed to acknowledge this connection in making custody decisions.¹¹

B. Move To Allow, Then Require Courts To Consider Domestic Violence In Custody Decisions

By the 1980's, the domestic violence movement had become a vocal presence, and was developing some sophistication in terms of changing entrenched policies. Advocates began to call for legislators and courts to protect children from batterers.¹² Feminists stressed the harmful effects of exposure to domestic violence on children, and stated that it is not actually possible to be a violent husband and a good father.¹³

At the same time, there was a strong trend toward trying to keep fathers close to their children. Father's rights groups pushed for, and succeeded in getting, legislation stressing the importance of joint custody.¹⁴ Families were no longer seen as "broken," but

8. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* (1985); MICHAEL WHEELER, *NO-FAULT DIVORCE* (1974); Erin R. Melnick, *Reaffirming No-Fault Divorce: Supplementing Formal Equality with Substantive Change*, 75 IND. L. J. 711, 714 (2000); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 2 (1987). See generally, Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291 (1987); Howard Krom, *California's Divorce Law Reform: A Historical Analysis*, 1 PAC. L. J. 156 (1970).

9. Charlotte Germane et al., *Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence*, 1 WOMEN'S L.J. 175, 179 (1985).

10. PETER G. JAFFE ET AL., *CHILDREN OF BATTERED WOMEN*, 20-21 (1990); see *infra* note 35 (citing social science literature about effects of domestic violence on children).

11. Germane et al., *supra* note 9.

12. *Id.*

13. *Id.*

14. Nancy K. Lemon, *Joint Custody as a Statutory Presumption: California's New Civil Code Sections 4600 and 4600.5*, 11 GOLDEN GATE U. L. REV. 485, 505, 510, 516 (1981); Germane et al., *supra* note 9, at 181-182.

instead were “in transition,” with the goal being that both parents were still involved in their children’s lives.¹⁵ In some cases, courts gave fathers more time with their children than they had generally spent with them while living with the children’s mother; in these cases the goal was not merely to continue the father/child relationship, but to try to strengthen it.

Legislatures started to respond to both these groups. Some states enacted laws stating that domestic violence could be taken into account in making custody decisions, but leaving the decision up to the judge whether or not to even admit such evidence.¹⁶ Other states went further, actually mandating that judges consider domestic violence.¹⁷

A few states passed laws stating that perpetration of domestic violence was detrimental to children.¹⁸ Others required that judges state their reasons for awarding custody to alleged or proven batterers on the record¹⁹ or make findings of fact that joint custody is not detrimental to the children despite the violence, if joint custody were granted in a domestic violence case.²⁰

Meanwhile, many states were also enacting laws allowing for or preferring joint custody of children. Some states created presumptions favoring joint custody if the parents agreed to it²¹ or required judges to state their reasons for denying joint custody.²²

In all too many cases, these two trends worked at cross-purposes. Given the high rates of domestic violence in the U.S.,²³ especially among divorcing couples,²⁴ there were many cases in

15. Germane et al., *supra* note 9, at 181-82.

16. See Barbara J. Hart, *Custody and Visitation Decision-Making When There are Allegations of Domestic Violence*, at <http://www.mincava.umn.edu/hart/telecon.htm>.

17. See, e.g., ALASKA STAT. § 25.20.090 (Michie 2000); OHIO REV. CODE ANN. § 3109.04 (West 2000).

18. The Family Violence Project of the Nat. Council of Juv. & Fam. Ct. Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L. Q. 199, 225-227 (1995) [hereinafter Family Violence Project].

19. See, e.g., CAL. FAM. CODE § 3011 (West 1994), N.H. REV. STAT. ANN. § 458:17(II)(c) (1992).

20. See, e.g., N.H. REV. STAT. ANN. § 458:17(II)(c) (1992); OHIO REV. CODE ANN. § 3109.04 (West 2000).

21. See, e.g., CONN. GEN. STAT. ANN. § 46b-56a (1995); N.H. REV. STAT. ANN. § 458:17(II)(c) (1992); see also Lemon, *supra* note 14, at 500 (discussing the legislative history of the first joint custody statute in the U.S.).

22. See, e.g., CONN. GEN. STAT. ANN. § 46b-56a (1995); N.H. REV. STAT. ANN. § 458:17(II)(c) (1992).

23. Tjaden & Thoennes, *supra* note 6.

24. Estimates of the incidence of wife-beating range from at least one in three marriages to up to one-half of all marriages. M. STRAUS ET AL., BEHIND CLOSED

which courts were presented with one parent arguing for joint custody and the other parent arguing that the history of domestic violence should preclude such a decision. Starting in 1991, some states resolved this conflict by enacting statutes creating a presumption against custody to batterers.²⁵

III. INCREASING SUPPORT FOR ENACTMENT OF REBUTTABLE PRESUMPTIONS AGAINST CUSTODY TO BATTERERS

A. Policy Statements

There were several bases for this new trend. The first U.S. national policy statement supporting a rebuttable presumption in domestic violence cases was H. R. Congressional Resolution 172: "It is the sense of Congress that, for purposes of determining child custody, credible evidence of physical abuse of a spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse."²⁶ While Congress does not have the authority to tell states how to handle custody decisions, this Resolution was intended to encourage states to pass their own statutes establishing such presumptions.

In 1994, the National Council of Juvenile and Family Court Judges released the Model Code on Domestic and Family Violence.²⁷ This Code was developed in conjunction with legislators, the American Bar Association, the American Medical Association, domestic violence experts, prosecutors, and defense counsel over a period of three years.²⁸ Section 401 of the Model Code states:

In every proceeding where there is at issue a dispute as to

DOORS: VIOLENCE IN THE AMERICAN FAMILY 31 (1980); Eisenberg & Micklow, *The Assaulted Wife: 'Catch 22' Revisited*, 3 WOMEN'S RTS. L. REP. 138 (1977); Laurie Woods, *Litigation on Behalf of Battered Women*, 7 WOMEN'S RTS. L. REP. 39, 41 (1981). See also HOFF ET AL., INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW 3-15 (1982) (scope of wife battering and the extent of underreporting).

25. Family Violence Project, *supra* note 18, at 208.

26. H.R.J. Res. 172, 101st Cong. (1994) (sponsored by Rep. Constance Morella and passed unanimously on Oct. 25, 1990).

27. NAT. COUNCIL OF JUV. AND FAM. CT. JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE (1994), [hereinafter MODEL CODE].

28. Christine L. Bailey & Maureen Sheeran, *The Model Code on Domestic and Family Violence: A Call for Legislative Action and Community Response*, NEV. PUB. AFF. REV. 24 (Legis. Issues: 1995).

the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.²⁹

The American Bar Association (ABA) passed a resolution in August 1989 that joint custody is inappropriate in cases in which spouse abuse, child abuse, or parental kidnapping is likely to occur.³⁰ In 1994, the ABA published a report to its president suggesting the adoption of statutes creating a presumption against custody to batterers.³¹ In July 2000 the ABA adopted new policy statements with respect to domestic violence and custody, and recommended that states and lawyers take action to provide for the safety of adult and child domestic violence victims during visitation and visitation exchanges.³²

In 1996, the American Psychological Association also recommended that states adopt such statutes:

In matters of custody, preference should be given to the nonviolent parent whenever possible, and unsupervised visitation should not be granted to the perpetrator until an offender-specific treatment program is successfully completed, or the offender proves that he is no longer a threat to the physical and emotional safety of the child and the other parent.³³

Similarly, the Uniform Adoption Act provides for terminating a father's rights if "the respondent has been convicted of a crime of violence or of violating a restraining or protective order, and the facts of the crime or violation and the respondent's behavior indicate that the respondent is unfit to maintain a relationship of

29. MODEL CODE, *supra* note 28, § 410, at 33.

30. A.B.A. HOUSE OF DELEGATES, APPROVED RESOLUTIONS RELATED TO DOMESTIC VIOLENCE (1989); *see also* A.B.A. Model Joint Custody Statute, 15 FAM. L. REV. 1494, 1495 (1989) (requiring courts to consider domestic violence in making joint custody awards).

31. Howard Davidson, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE A.B.A. (1994).

32. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction, and Refining Support Issues*, 34 FAM. L.Q. 607, 626 (Winter, 2001). For content of new A.B.A. policies, *see* <http://www.abanet.org> (last visited Oct. 3, 2001).

33. A.B.A., VIOLENCE AND THE FAMILY, 99 (1996).

parent and child with the minor”³⁴

1. Social Science Literature

Another reason statutes establishing a presumption against custody to batterers were enacted was the growing body of social science literature showing the often severe and long-lasting effects of domestic violence on children.³⁵ This literature also argued that joint custody was contraindicated when there has been family violence.³⁶

2. Mothers Losing Custody

Furthermore, studies and articles started to show that when fathers in general or batterers in particular fought for custody, they usually won.³⁷ There are also many cases in which mothers initially

34. UNIFORM ADOPTION ACT § 3-504 (1994).

35. ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN (E. Peled et al., eds., 1995); P.G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN (1990); D.A. Wolfe et al., *Children of Battered Women: The Relation of Child Behavior to Family Violence and Maternal Stress*, 53 J. CONSULTING & CLINICAL PSYCHOL. 657 (1985); N.Z. Hilton, *Battered Women's Concerns About their Children Witnessing Wife Assault*, 7 J. INTERPERSONAL VIOLENCE 77 (1992); J.R. Johnston & L.E.G. Campbell, *Parent-child Relationships in Domestic Violence Families Disputing Custody*, 31 FAM. & CONCILIATION CTS. REV. 282, 282-83 (1993); M. Roy, *Children in the Crossfire*, HEALTH COMM. (1988); P.G. Jaffe et al., *Child Witnesses of Woman Abuse: How Can Schools Respond?*, 14 RESPONSE TO VICTIMIZATION OF WOMEN AND CHILDREN 12 (1992); D. G. Saunders, *Child Custody Decisions in Families Experiencing Wife Abuse*, 39 SOC. WORK 51 (1994).

36. L. Crites & D. Coker, *What Therapists See That Judges May Miss: A Unique Guide to Custody Decisions When Spouse Abuse is Charged*, JUDGES J. 9-13 (Spring, 1988); Germane et al., *supra* note 9; M. D. Pagelow, *Justice for Victims of Spouse Abuse in Divorce and Child Custody Cases*, 8 VIOLENCE & VICTIMS 69 (1993); Pauline Quirion, *Increased Protection for Children from Violent Homes: The Presumption Against Awarding Child Custody to a Batterer*, 16 MASS. FAM. L. J. 67 (1998); Saunders, *supra* note 35, at 56 (citing R. E. Emery and M. M. Wyer, *Divorce Mediation*, 42 AM. PSYCHOLOGIST 472 (1987)).

37. Pagelow, *supra* note 36 (citing R. Geffner & M. Pagelow, *Victims of Spouse Abuse*, in TREATMENT OF FAMILY VIOLENCE: A SOURCEBOOK 81-97 (R. T. Ammerman & M. Hersen, eds.) (1990)); L. A. Marks, *Mandatory Mediation of Family Law and Domestic Violence Cases*, NCADV VOICE, 18-22 (Winter, 1988); M. B. Liss & G. B. Stahly, *Domestic Violence and Child Custody*, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 175 (M. Hansen & M. Harway, eds., 1993); J. Zorza, *Protecting the Children: Custody Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113 (April 1996) (citing R. I. ABRAMS AND J. M. GREANEY, REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT [OF MASSACHUSETTS] 62-63 (1989) that stated fathers won in seventy percent of contested custody cases and noting that this report also cites similar findings from California and the entire nation); M. A. Mason & A. Quirk, *Are Mothers Losing Custody? Read My Lips: Trends*

or eventually lost custody due to their inability to get along with the fathers. In some of these, in which there were no allegations of partner abuse, the court first awarded joint custody, then found after awhile that this was unworkable due to continued conflict between the parents.³⁸

In other cases, there was extensive evidence of partner abuse. The fact that a formerly battered mother and her former batterer are not able to co-parent effectively is not at all surprising. However, it is very unfortunate that many courts are still so unaware of how domestic violence dynamics enter into custody cases. One wonders why the court ever expected people in this situation to suddenly be able to cooperate.

An example of such a case is found in *In re Marriage of Devilbiss*.³⁹ In that case, the evidence included fifteen police reports, testimony by the daughter that the father used to hit the mother, and allegations that he also choked the daughter.⁴⁰ However, the court ignored this evidence in its order changing the joint custody order to “rotating custody.”⁴¹ Under this arrangement, the daughter was ordered to live with her mother for seven months each year and with her father for five months.⁴² The court noted that the parents had not been able to cooperate as required by the joint custody order.⁴³ Another example is found in

in Judicial Decision-Making in Custody Disputes—1920, 1960, 1990, and 1995, 31 FAM. L. Q. 215 (1997) (citing a study finding that fathers won in sixty-three percent of contested custody cases, Lisa Genasci, *Increasingly, Working Mothers Lose in Custody Fights*, L.A. TIMES, January 20, 1995, at D8); Mary Lynne Vellinga, *Custody Laws Under Fire: Parents Who Batter Often Allowed to Retain Joint Care*, SACRAMENTO BEE, March 23, 1997, at A1.

38. See, e.g., *In re Marriage of Cobb*, 988 P.2d 272, 273 (Kan. Ct. App. 1999) (court briefly mentions without comment allegations that father abused child, then changed joint custody award to sole custody to father due to parents’ inability to co-parent); *Brown v. Brown*, 19 S.W.3d 717, 722-23 (Mo. Ct. App. 2000) (without any allegations of abuse, the court modified the joint custody arrangement to sole custody to the father because of the mother’s unwillingness to co-parent and that the father is best suited to make decisions in the best interests of the child); *Thomas v. Thomas*, 991 P.2d 7, 10 (N.M. Ct. App. 1999) (noting no allegations of abuse, the court changed joint custody to sole to father due to parents’ inability to co-parent).

39. 719 N.E.2d 375 (Ill. App. Ct. 1999).

40. *Id.* at 378-80.

41. *Id.* at 383.

42. *Id.* at 380 (affirming the trial court’s ruling that the daughter live with the father from the first Saturday after the end of the school year to the first Saturday of November).

43. *Id.* at 385.

Canty v. Canty,⁴⁴ in which the trial court modified the joint legal and split physical custody award to sole physical custody with the father, in spite of his admitting that he had committed domestic violence on the mother.⁴⁵ The appellate court upheld this order, noting that the evidence of domestic violence was merely one factor in the best interests analysis.⁴⁶

In all too many cases, batterers are in effect using the family courts to re-victimize their victims.⁴⁷ Instead of preventing this, courts sometimes collude with this behavior by awarding the batterer joint custody, sole custody, or extensive unsupervised visitation. While examining appellate cases decided in states without such a presumption or before the enactment of the presumption is beyond the scope of this article, it is noteworthy that in many such cases judges clearly ignored extensive histories of domestic violence in making custody decisions.⁴⁸

IV. DESCRIPTION OF STATUTES ESTABLISHING PRESUMPTIONS AGAINST CUSTODY TO BATTERERS

A. Overview

In response to the growing body of policy statements, studies, articles and cases, states started to adopt statutes establishing a rebuttable presumption against custody to batterers.⁴⁹ As of January 2001, there were sixteen states plus the District of

44. 874 P.2d 1000 (Ariz. Ct. App. 1994).

45. *Id.* at 1005.

46. Arizona later amended its custody statute to provide that domestic violence created a presumption against custody to the batterer. ARIZ. REV. STAT. § 25-403 (2000).

47. This problem is described at length in Leigh Goodmark, *From Property to Personhood: What the Legal System Should do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237 (1999). See also, Quirion, *supra* note 36, at 67.

48. See cases described in Goodmark, *supra* note 47, at 254-75. See also, NANCY K. D. LEMON, DOMESTIC VIOLENCE & CHILDREN: RESOLVING CUSTODY AND VISITATION DISPUTES, FAMILY VIOLENCE PREVENTION FUND, 39-40 (1995). But see *Bruscato v. Bruscato*, 593 So. 2d 838 (La. Ct. App. 1992) (remanding case for more thorough evaluation and retrial where batterer father was awarded sole custody even though rebuttable presumption was not yet in effect).

49. For an argument in favor of the adoption of such a presumption in Massachusetts, see Pauline Quirion et al., *Commentary: Protecting Children Exposed To Domestic Violence In Contested Custody And Visitation Litigation*, 6 B.U. PUB. INT. L.J. 501 (1997). A similar argument in New York is found in Kurtz, *supra* note 6, at 1346.

Columbia which had adopted such statutes.⁵⁰ In the summer of

50. These included Alabama, Arizona, California, Delaware, District of Columbia, Florida, Hawaii, Idaho, Iowa, Louisiana, Massachusetts, Minnesota, Nevada, North Dakota, Oklahoma, Oregon, and South Dakota. In Alabama, there exists a rebuttable presumption that it is detrimental to child and not in best interest of child to be placed in sole custody, joint legal custody, or joint physical custody when court determines that domestic violence has occurred. ALA. CODE § 30-3-131 (1975). In addition, the state has a rebuttable presumption that it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic or family violence. ALA. CODE § 30-3-133 (1975). The state of Arizona makes it a rebuttable presumption that an award of custody to the parent who committed the act of domestic violence is contrary to the child's best interests, if the court determines that a parent has committed an act of domestic violence against the other parent; however, such presumption does not apply if both parents have committed an act of domestic violence. ARIZ. REV. STAT. § 25-403 (2000). California provides that a rebuttable presumption exists against sole or joint physical or legal custody if the court finds that a party perpetrated domestic violence. CAL. FAM. CODE § 3044 (West Supp. 2001). The statute allows that this presumption may be rebutted by a preponderance of the evidence. *Id.* The statute identifies factors to overcome the presumption. *Id.* In Delaware, there is a rebuttable presumption that no perpetrator of domestic violence shall be awarded sole or joint custody and a rebuttable presumption that no child shall primarily reside with perpetrator of domestic violence. DEL. CODE ANN. tit. 13 § 705A (1999). This presumption is overcome by a preponderance of the evidence. *Id.* The statute identifies factors needed to overcome presumption. *Id.* Otherwise the presumption may be overcome only if a judicial officer finds extraordinary circumstances that warrant the rejection of the presumption. *Id.* The state of Florida has a rebuttable presumption of detriment to the child and against ordering shared parental responsibility, including visitation, residence of the child, and decisions made regarding the child, if there is evidence that a parent has been convicted of a felony of the third degree or higher involving domestic violence. FLA. STAT. ANN. § 61.13 (West 1997). Hawaii's rebuttable presumption statute provides that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody if the court determines that family violence has been committed by a parent. HAW. REV. STAT. ANN. § 571-46 (Michie 1999). In Iowa, rebuttable presumption exists against joint custody if the court finds a history of domestic abuse. IOWA CODE ANN. § 598-41 (West Supp. 2001). This finding, if not rebutted, outweighs any other factor in determining the award of custody. *Id.* Louisiana has a presumption against sole or joint custody if a parent has a history of perpetrating family violence. LA. REV. STAT. ANN. § 9:364 (West 2000). The court must find that that one incident of family violence resulted in serious bodily injury or more than one incident of family violence occurred before such a presumption can be applied. *Id.* Such a presumption may be overcome by a preponderance of the evidence. *Id.* This statute also identifies factors to overcome the presumption. *Id.* Massachusetts has a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody, or shared physical custody with the abusive parent if court finds, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred, which may be overcome by a preponderance of the evidence that such custody award is in the best interests of the child. MASS. GEN. LAWS ANN. chs. 208 § 31A, 209 § 38, 209C § 10 (West Supp. 2001). In Nevada, the statute provides that a rebuttable presumption that

2001, Texas passed legislation strengthening its statute, creating a rebuttable presumption against joint custody, sole custody, or unsupervised visitation in cases of child abuse, child neglect, or

sole or joint custody with the perpetrator of domestic violence is not in the best interests of the child if court determines after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence. NEV. REV. STAT. ANN. § 125.480 (Michie Supp. 1999). The state also provides that there exists a rebuttable presumption that sole or joint custody of the child by the perpetrator of sexual assault is not in the best interest of the child if the person is convicted of sexual assault and the parties later divorce. NEV. REV. STAT. ANN. §125C.210 (Michie Supp. 1999). In addition, there exists a rebuttable presumption that sole or joint custody by the parent convicted of first degree murder of the other parent is not in the best interest of the child and also includes a rebuttable presumption that rights to visitation with the child by the parent convicted of first degree murder of the other parent are not in the best interest of the child and must not be granted if custody is not granted. NEV. REV. STAT. ANN. § 125C.220 (Michie Supp. 1999). There is a rebuttable presumption that sole or joint custody by the perpetrator of domestic violence is not in the best interest of the child, if after an evidentiary hearing the court finds by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence against the child, a parent, or any other person residing with the child. NEV. REV. STAT. ANN. § 125C.230 (Michie Supp. 1999). Nevada also provides a rebuttable presumption that custody with the perpetrator of domestic violence is not in the best interests of the child if court determines after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence. NEV. REV. STAT. ANN. § 432B.157 (Michie 2000). In North Dakota, there is a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody if the court finds credible evidence that domestic violence has occurred and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding. N.D. CENT. CODE § 14-09-06.2 (1999). This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent's participation as a custodial parent. *Id.* Oklahoma's rebuttable presumption statute provides that it is not in the best interests of the child to have custody, guardianship or unsupervised visitation granted to the abusive person if the occurrence of ongoing domestic abuse is established by clear and convincing evidence. OKLA. STAT. ANN. tit. 43 § 112.2, tit. 10 § 21.1 (West 2001). In Oregon, there exists a rebuttable presumption that it is not in the best interests and welfare of the child to award sole or joint custody to the parent who committed abuse. OR. REV. STAT. § 107.137 (1989). In South Dakota, there is a rebuttable presumption that awarding custody to the abusive parent is not in the best interests of the minor if the person has been convicted of domestic abuse or assault against a person, other than a person related by consanguinity, but not living in the same household. S.D. CODIFIED LAWS § 25-4-45.5 (Michie 1999). In addition, there is a rebuttable presumption that awarding custody or granting visitation to the parent convicted for the death of the other parent, excluding vehicular homicide, is not in the best interests of the minor. S.D. CODIFIED LAWS § 25-4-45.6 (Michie 1999).

partner abuse, including sexual abuse resulting in the birth of the child.⁵¹ Additionally, at this point, three states have adopted presumptions against joint custody in domestic violence cases or considered the perpetration of domestic violence stronger than a factor, but do not actually state a presumption against awarding custody to the abusive parent.⁵²

These twenty states plus the District of Columbia are a subgroup of the forty-eight jurisdictions that had adopted some type of legislation regarding domestic violence as a custody factor by the beginning of 2001.⁵³ The only states without any statute discussing this issue as of that date were Connecticut, Mississippi, and Utah.⁵⁴

The presumption statutes vary greatly, in terms of 1) whether the presumption applies to all types of custody or only to joint custody; 2) how domestic violence is defined, that is what type of evidence is required to trigger the presumption; 3) what evidentiary standard is required to trigger the presumption; 4) what type of evidence is required to rebut the presumption; and 5) what evidentiary standard is required to rebut the presumption. They also vary in terms of what the court is to do if both parents appear to have been abusive, and what standard should be applied if the presumption is found inapplicable.

51. See Tex. Sess. Law Serv. 586 (Vernon) (amending TEX. FAM. CODE ANN. § 153.004 (Vernon 1996)). See also Steve McGonigle, *Girls' Slayings Inspire Bill: Unsupervised Visits Would Require Judge's Approval*, THE DALLAS MORNING NEWS, May 26, 2001, available at http://www.dallasnews.com/metro/stories/377451_battaglia26me.html (last visited Sept. 7, 2001).

52. These included Colorado, Washington, and Wisconsin. In Colorado, if the court makes a finding of fact that domestic violence has occurred, then it shall not be in the best interest of the child to allocate mutual decision-making responsibility over the objection of the other party or the child's representative, unless the court finds that the parties can make shared decisions about their children without physical confrontation and that places the abused party or child in danger. See COLO. REV. STAT. ANN. § 14-10-124 (1.5)(b)(v) (West 1997). In the state of Washington, a parent's residential time with child will be limited if there exists a history of acts of domestic violence or assault/sexual assault "which causes grievous bodily harm or fear of such harm." WASH. REV. CODE ANN. § 26.09.191(2)(a)(ii)-(iii) (West 1997). In Wisconsin, a rebuttable presumption exists that the parents will not be able to cooperate in future decision-making when domestic violence is present. See WIS. STAT. ANN. § 767.24(2)(b)-(c) (West 1993). Pennsylvania also gives great weight to the perpetration of domestic violence or sexual assault by requiring successful completion of a batterer's treatment program if the abuser is convicted of certain crimes. See 23 PA. CONS. STAT. ANN. § 5303 (West 1991).

53. Elrod & Spector, *supra* note 32, at 613-14.

54. *Id.*

B. *Presumption Applicable Only to Joint Custody*

Some presumption statutes apply only to decisions regarding joint custody. In a few of these states, the presumption against joint custody to the abuser is coupled with a presumption favoring joint custody in the absence of abuse.⁵⁵ The District of Columbia Code provides that there is a rebuttable presumption that joint custody is not in the best interest of the child if the court finds by a preponderance of the evidence that an intra-family offense has occurred.⁵⁶ It also provides for a rebuttable presumption favoring joint custody unless the court finds by a preponderance of the evidence that an intra-family offense has occurred.⁵⁷ Similarly, section 32-717B of the Idaho Code states that there is a presumption that joint custody is not in the best interests of a minor child if the court finds that one of the parents is a habitual perpetrator of domestic violence.⁵⁸ It also contains a presumption that joint custody is in the best interest of the child absent a preponderance of the evidence to the contrary.⁵⁹ This type of provision is not very beneficial for victims of domestic violence, since even if the presumption against joint custody is rebutted through evidence of abuse, the victimized parent must still prove to the court that it is in the best interests of the child to be placed with him or her rather than with the abusive parent.

A particularly problematic statute is found in Minnesota, which contains a similar provision, but applicable only to joint legal custody.⁶⁰ Minnesota Statute section 518.17 includes a rebuttable presumption that joint legal custody is not in the best interests of the child if domestic abuse has occurred between the parents.⁶¹ However, the same code section states that there is also a rebuttable presumption that joint legal custody, if requested by either or both parties, is in the best interests of the child.⁶² Clearly there will be many cases in which these two policies conflict, especially when the abusive parent can trigger the presumption favoring joint legal

55. See, e.g., D.C. CODE ANN. §§ 16-119(a)(5), 16-914(a)(2) (1997); IDAHO CODE § 32-717 B (Michie 1996).

56. D.C. CODE ANN. §§ 16-119(a)(5), 16-914(a)(2) (1997).

57. *Id.*

58. See IDAHO CODE § 32-717 B (5) (Michie 1996).

59. See *id.* § 32-717 B (4).

60. See MINN. STAT. § 518.17, subd. 2(d) (2000).

61. *Id.* The statute does not state what evidence rebuts the presumption. *Id.*

62. *Id.* New Hampshire law provides a similar provision. See N.H. REV. STAT. ANN. § 458:17(II)(e)(1992) (amended by 2001 N.H. Laws 102).

custody merely by requesting it. Case law demonstrating how courts have resolved this dilemma will be discussed below. On the other hand, the Minnesota statute does state that if the court awards joint custody, it must make detailed findings of fact on each of the best interest standards.⁶³

C. *Presumption Applicable to Sole or Joint Custody*

Most of the presumption states have no contrary presumption favoring joint custody in the absence of domestic violence or when requested by a parent. Statutes stating that the presumption applies to sole or joint custody to a perpetrator are in effect in Alabama, Arizona, California, Delaware, Florida, Hawaii, Iowa, Louisiana, Massachusetts, Nevada, North Dakota, Oklahoma, Oregon, Texas, and South Dakota.⁶⁴

D. *What Triggers the Presumption?*

Statutes vary in terms in how they define domestic violence and what standard of proof is required in order to trigger the presumption against awarding custody to an abuser. Several states define domestic violence by cross-referencing other statutes, such as a state's restraining order statute.⁶⁵ It is important to take note whether these statutes include threats of physical harm, or only actual physical harm. Also note that the statutes tend to leave out other types of batterer behavior which are intended to dominate and control victims, such as emotional abuse, sexual abuse, financial abuse, and property abuse, all of which may be intended to dominate and control the victim.⁶⁶

In terms of standards of proof, in some states, the statute merely provides that there must be a "finding of domestic violence,"⁶⁷ or "credible evidence of domestic violence."⁶⁸ A few statutes specify that the standard will be the lowest possible, the

63. MINN. STAT. § 518.17 (2000).

64. For citations to the rebuttable presumption statutes, see *supra* note 51.

65. See, e.g., CAL. FAM. CODE § 3044 (West Supp. 2001); DEL. CODE ANN. tit. 13 § 705A (1999); MINN. STAT. § 518.17 (2000); WIS. STAT. ANN. § 767.24 (West 1993).

66. Amy Pincolini, *A Tool for Safety: Child Custody Presumptions*, 5 SYNERGY 6, 7 (2000) (published by Nat. Council of Juv. & Fam. Ct. Judges, Reno, NV).

67. See, e.g., LA. REV. STAT. ANN. § 9:364 (West 2000); MINN. STAT. § 518.17 (2000).

68. See, e.g., N. D. CENT. CODE § 14-09-06.2 (1)(j) (West Supp. 2001).

preponderance of the evidence.⁶⁹ Other states require the standard of “clear and convincing evidence” of domestic violence.⁷⁰ Wisconsin requires evidence of a crime of inter-spousal battery or abuse, as defined in the statute providing for civil protective orders.⁷¹ However, actual conviction is not required in this state before the presumption is triggered.

Some states require that the domestic violence have occurred more than once. For example, Idaho requires that the abuser be a “habitual perpetrator” before the presumption is triggered.⁷² Iowa requires “a history of domestic abuse,”⁷³ and Oklahoma requires “ongoing domestic abuse.”⁷⁴ In several states, there must be either a pattern or history of abuse, or at least one serious incident before the presumption is triggered. These include Louisiana, Massachusetts, and North Dakota.⁷⁵

The highest standards of proof are found in states requiring that the abuser first be convicted of a domestic violence crime.⁷⁶ As stated above, Nevada’s presumption can be triggered by clear and convincing evidence of domestic violence; alternatively, it can be triggered by a conviction of sexual assault or first-degree murder of the other parent.⁷⁷

Setting the standard for triggering the presumption high will

69. See, e.g., CAL. FAM. CODE § 3044 (West Supp. 2001); D.C. CODE ANN. §§ 16-911, 16-914 (1997); MASS. GEN. LAWS ANN. chs. 208, § 31A, 209, § 38, 209C § 10 (West Supp. 2001).

70. See NEV. REV. STAT. § 125.480(5) (1999); OKLA. STAT. ANN. tit. 43, § 112.2 (West 2001); 2001 Okla. Sess. Laws 141 (amending OKLA. STAT. tit. 10, § 21.1 (2000)).

71. WIS. STAT. ANN. §§ 767.24, 813.12 (West 1993).

72. IDAHO CODE § 32-717B(5) (Michie 2000).

73. IOWA CODE ANN. § 598-41 (West Supp. 2001).

74. OKLA. STAT. ANN. tit. 43, § 112.2 (West 2001); 2001 Okla. Sess. Laws 141.

75. Louisiana requires more than one incident or a finding that one incident of family violence resulted in serious bodily injury. LA. REV. STAT. ANN. § 9:364(A) (West 2000). Massachusetts requires either a pattern or serious incident of abuse. MASS. GEN. LAWS ANN. chs. 208, § 31A, 209, § 38, 209C § 10 (West Supp. 2001). North Dakota requires either one incident resulting in serious bodily injury or involving the use of a dangerous weapon, or a pattern of domestic violence within a reasonable time proximate to the proceeding. N. D. CENT. CODE § 14-09-06.2(i)(j) (1999).

76. Florida requires a conviction for a third degree felony or higher involving domestic violence. 2001 Fla. Laws ch. 2001-2 (amending FLA. STAT. ANN. § 61.13 (West 1997)). South Dakota requires a conviction of domestic abuse or assault, or homicide of the other parent. S.D. CODIFIED LAWS §§ 25-4-45.5, 25-4-45.6 (Michie 1999).

77. NEV. REV. STAT. ANN. §§ 125.480, 125C.210, 125C.220, 125C.230 (Michie Supp. 1999).

of course exclude many domestic violence cases, in which there has been only one incident of abuse, and no conviction. In many relationships, one incident of abuse can be sufficient to dominate and control the victim throughout the relationship. This can occur when the batterer uses the incident to warn and remind the victim of what can happen.⁷⁸ Of course, children who are aware of the abuse by one parent toward the other can also be traumatized by one incident.⁷⁹

However, in some cases the high standards enumerated here were narrowly drafted to account for the possibility that some abused parents might use violence in self-defense or to protect children, in which case the presumption was not designed to apply.⁸⁰ As will be seen in the discussion in Part IV, in states with lower standards for triggering the presumption, such actions by the abused parent may be seen as nullifying the presumption. In drafting the language of such statutes, legislators and advocates must always engage in balancing tests, weighing the benefits of a lower standard for triggering the presumption against the danger to victims who fight back.

E. Cases In Which Both Parents Have Engaged in Domestic Violence

Some of the presumption statutes address situations in which both parents appear to have engaged in abuse. In at least one state, Louisiana, the statute contains a “primary aggressor”⁸¹ provision. This directs the court to determine which of the parents is the main or dominant aggressor, and to ascertain whether one of the parents was actually acting to defend herself or himself or another person, such as the child.⁸² The North Dakota Supreme Court has developed such a concept through its decisions interpreting the presumption.⁸³ In other states, the statute provides

78. DONALD G. DUTTON AND SUSAN K. GOLANT, *THE BATTERER: A PSYCHOLOGICAL PROFILE* 13, 23, 24 (1995).

79. Janis Wolak & David Finkelhor, *Children Exposed to Partner Violence in PARTNER VIOLENCE: A COMPREHENSIVE REVIEW OF TWENTY YEARS OF RESEARCH* 90 (Janis L. Jasinski & Linda M. Williams eds., 1998).

80. The Family Violence Project, *supra* note 18, at 206.

81. This term was changed to “dominant aggressor” in CAL. PENAL CODE § 836, effective January 2001. The legislative history indicates that this change was made in order to clarify that the focus should be on which party dominates the other, rather than on who “started the fight.”

82. *See*, LA. REV. STAT. ANN. § 9:362(3) (West 2000).

83. *See, e.g.*, *Krank v. Krank*, 529 N.W.2d 844, 848 (N.D. 1995).

that if both parents are found to have committed domestic violence, the presumption against the abuser does not apply.⁸⁴

Given the likelihood that both parents will be found to be abusers in states with low standards for triggering the presumption, it would probably be advisable to amend these statutes to provide for a primary or dominant aggressor analysis. This is similar to the analysis which law enforcement uses in some states when determining which party to arrest.⁸⁵

F. Rebutting the Presumption

The statutes also vary in terms of what is necessary in order to rebut the presumption. Most states do not specify what is required for rebuttal, which does not give courts any guidance. A few states specify the evidentiary standard required, but do not list actual factors for consideration, which also leaves the court having to create its own standards from case to case.⁸⁶

Other states list specific factors that the court must consider in finding that the presumption has been rebutted.⁸⁷ For example, California states that the court must consider 1) whether the perpetrator has shown that it is in the best interest of the child to be in the custody of that parent; 2) successful completion of a batterer's program; 3) successful completion of a program for alcohol or drug abuse if found appropriate by the court; 4) compliance with court orders and with probation and parole conditions, if applicable; and 5) whether there has been any further violence.⁸⁸ The Arizona⁸⁹ and Delaware factors are virtually identical to this.⁹⁰ Louisiana requires the successful completion of a treatment program for batterers, refraining from abuse of alcohol

84. See, e.g., ARIZ. REV. STAT. ANN. § 25-403(N) (2000) (amended by 2001 Ariz. Sess. Laws 14); CAL. FAM. CODE § 3044(c) (West Supp. 2001).

85. See, e.g., CAL. PENAL CODE § 836 (West Supp. 2001). However, see the discussion in Part IV regarding the controversy surrounding whether to include such a provision.

86. For example, in Massachusetts the court must find by preponderance of evidence that custody to abuser is in best interests of child. MASS. GEN. LAWS ANN. chs. 208 § 31A, 209 § 38, 209C § 10 (1998). In North Dakota, the presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent's participation as custodial parent. N.D. CENT. CODE § 14-09-06.2(1)(j) (1999).

87. These states include: Arizona, California, Delaware, and Louisiana.

88. CAL. FAM. CODE § 3044(b) (West Supp. 2001).

89. ARIZ. REV. STAT. § 25-403 (2000) (amended by 2001 Ariz. Sess. Laws 14).

90. DEL. CODE ANN. tit. 13, § 705A (1999).

or illegal drugs, and demonstrating that the absence or incapacity of the abused parent or other circumstances are such that custody granted to the perpetrator is in the best interests of the child.⁹¹ Its statute also directs the court to give sole custody to the parent who is least likely to continue perpetration of family violence.⁹²

As noted previously, Wisconsin has a presumption only against joint legal custody in domestic violence cases.⁹³ In order to rebut this, there must be clear and convincing evidence that the perpetrator will not interfere with the abused party's ability to cooperate in future decision-making.⁹⁴

G. If the Presumption is Found Inapplicable or Rebutted

If the presumption is found inapplicable or rebutted, then the parties may still have the benefit of statutes requiring that domestic violence be considered in custody decisions.⁹⁵ Legislatures are strongly encouraged to enact such statutes, so that the issue of domestic violence does not disappear from the custody decision. In the absence of such statutes, the court applies the general best interest of the child standard and the parties are on a level playing field. This may be very problematic for the battered parent, who then still has to convince the court that the child has been adversely affected by the abuse, or that there is ongoing danger to the victim parent or child.

H. Case Study: Development of the Presumption in California

While California was not the first state to adopt a rebuttable presumption statute, the history of its legislation is a useful example of a "step by step" approach. Like many other states, California attempted several different versions of its custody statutes before passing a statute establishing a presumption against custody to batterers.

California was the fifteenth state to adopt such a presumption statute, which took effect January 2000.⁹⁶ This legislation, A.B.

91. LA. REV. STAT. ANN. § 9:364(A) (West 2000).

92. *Id.* § 9:364(B).

93. *See supra* note 52.

94. WIS. STAT. ANN. § 767.24 (West 1993).

95. *See, e.g.*, CAL. FAM. CODE § 3011 (West Supp. 2001).

96. CAL. FAM. CODE § 3044 (West 2000) (added by Stats. 1999, c. 445 (A.B. 840), §1).

840,⁹⁷ was carried by Speaker Pro Tem Sheila Kuehl, a long-time advocate for victims of domestic violence.⁹⁸ The California Alliance Against Domestic Violence (C.A.A.D.V.) sponsored the bill.⁹⁹ Supporters included medical groups, law enforcement, prosecutors, Boards of Supervisors, many women's groups, the California State PTA, and numerous domestic violence organizations.¹⁰⁰ Opposition included the California Judges Association, the Judicial Council, the Family Law Section of the State Bar, and the Coalition of Parent Support, a father's rights group.¹⁰¹ This legislation was based on the Model Code.¹⁰² Kuehl had been a member of the national task force which wrote that Code.

A.B. 840 was preceded by two bills, both of which were carried by Assemblywoman Kuehl. A.B. 800, introduced in 1996, died in the Senate Judiciary Committee, and A.B. 200, introduced in 1997, was amended in that same committee to remove the rebuttable presumption language. A.B. 200, amending Family Code sections 3011 and 3020, was effective January 1998.¹⁰³ Among other provisions, these sections now mandate that judges prioritize the child's health, safety, and welfare over the policy favoring frequent and continuing contact with each parent after separation.¹⁰⁴ They also require judges to make written findings of fact or statements on the record as to why they are awarding custody to an alleged perpetrator of domestic violence or child abuse, or to an alleged substance abuser.¹⁰⁵

97. A.B. 840/ Assembly Bill 840, 1999 Legs. (Cal. 1999).

98. Syrus Devers, AB 840 Assembly Bill, Bill Analysis 3, at http://www.leginfo.ca.gov/pub/9900/bill/asm/ab_08010850/ab_840_cfa_19990422_080416_asm_comm.html (April 20, 1999). See also, <http://democrats.sen.ca.gov/senator/kuehl> (describing Senator Kuehl's achievements). Assemblywoman Sheila Kuehl is serving her first term in the California Senate after serving six years in the State Assembly. *Id.* She was formerly the Speaker Pro Tempore of the Assembly (from 1997-98). *Id.* Kuehl is also a former Professor of Law at Loyola, U.C.L.A. and U.S.C. Schools of Law and co-founder of the California Women's Law Center. *Id.*

99. Devers, *supra* note 98, at 3.

100. *Id.* at 8-9.

101. See *id.* at 9.

102. See *id.* at 3. See also, *supra* note 27 and accompanying text (describing the ABA's Model Code).

103. CAL. FAM. CODE § 3011 (amended by stats. 1997, c.899 (A.B. 200), §2); CAL. FAM. CODE § 3020 (amended by Stats. 1997, c. 849 (A.B. 200), § 3).

104. CAL. FAM. CODE § 3020(c) (West Supp. 2001).

105. *Id.* See also, Marlene Rapkin, *The Impact of Domestic Violence on Child Custody Decisions*, 19 J. JUV. L. 404 (1998) (describing the legislative history of A.B. 200 and

A.B. 840 created a new code section, Family Code section 3044.¹⁰⁶ Subdivision (a) describes how a victim of domestic violence raises the presumption.¹⁰⁷ There are several limitations. First, the incident must have occurred within the last five years.¹⁰⁸ Second, the presumption is triggered only by incidents in which the victim was the other person seeking custody of the child, the child, or the child's siblings.¹⁰⁹ Third, the court must make a finding that domestic violence occurred, so that allegations alone do not trigger the presumption.¹¹⁰ If the court makes such a finding, the burden of proof then shifts to the perpetrator to prove why it is in the best interests of the child to be in his or her custody.¹¹¹ All types of custody are specifically included, whether legal or physical, sole or joint.¹¹² However, the new code section does not address visitation.¹¹³

Subdivision (b) of Family Code section 3044 describes how the perpetrator can rebut the presumption, clarifying that the standard of proof is a preponderance of the evidence, and listing several factors that the court is directed to consider in making this determination.¹¹⁴ According to subdivision (c) the presumption does not apply if both parents are found to have perpetrated domestic violence.¹¹⁵ This subdivision had originally provided for a "primary aggressor" analysis, cross-referencing the California Penal

arguing that it did not go far enough, that is that California needed to enact a presumption against custody to batterers).

106. CAL. FAM. CODE § 3044 (West Supp. 2001). A particularly useful document in terms of legislative history of this code section was written by Syrus Devers, legislative counsel for the California Assembly Judiciary Committee, when the bill was heard in that committee April 22, 1999. See Devers, *supra* note 98.

107. CAL. FAM. CODE § 3044(a) (West Supp. 2001) (stating "[u]pon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child's sibling within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to the person who has perpetrated the domestic violence is detrimental the best interest of the child.>").

108. *Id.*

109. *Id.*

110. *Id.*

111. CAL. FAM. CODE § 3044(b)(1) (West Supp. 2001).

112. *Id.* § 3044(a).

113. *Id.*

114. *Id.* § 3044(b)(1)-(6).

115. *Id.* § 3044(e) (stating that "[i]n most cases in which both parents are perpetrators of domestic violence, this presumption shall not be applicable.>").

Code's definition of that term,¹¹⁶ but was amended in the Senate Judiciary Committee to delete that provision. Subdivision (d) defines domestic violence, using the same standard as is used in Family Code section 6320 for obtaining a Domestic Violence Restraining Order.¹¹⁷

I. *Effects of Presumption Statutes*

1. *Overview*

How are these statutes working? Are they accomplishing the objectives of the legislators who authored them and the groups who supported them? Is implementation uniform or uneven? Do presumptions against custody to batterers mean that family courts now are giving domestic violence the weight it deserves? Is there a backlash in some jurisdictions, and if so, what does it look like? In attempting to answer these questions, this section will look at appellate cases,¹¹⁸ articles by commentators, surveys, and anecdotal comments from advocates, attorneys, judges, and academics in the presumption jurisdictions.

Appellate cases from the jurisdictions with such a presumption indicate that in general it appears to be useful.¹¹⁹ However, there

116. See CAL. PENAL CODE § 863 (e)(3) (West 2001) (defining the term "primary aggressor"). Section 836 also states the factors that a police officer should consider in identifying the primary aggressor, including "the intent of the law to protect victims of domestic violence from continuing abuse" and "the history of domestic violence between the persons involved." *Id.*

117. CAL. FAM. CODE § 3044(d) (West Supp. 2001) (stating that a person has "perpetrated domestic violence" for the purposes of section 3044 "when he or she is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person . . . for which a court may issue an ex parte order pursuant to section 1320.").

118. See generally Jack M. Dagleish, Annotation, *Construction and Effect of Statutes Mandating Consideration of, or Creating Presumptions Regarding, Domestic Violence in Awarding Custody of Children*, 51 A.L.R.5th 241 (1997) (Supp. Sept. 2000).

119. Cases decided in and anecdotal reports from the states that give domestic violence great weight but do not have an actual rebuttable presumption against awarding custody to a perpetrator will not be included here, as they are beyond the scope of this article. See, e.g., Bartholf v. Bartholf, 619 N.W.2d 308 (Wis. Ct. App. 2000). Anna Farber Conrad, Criminal Justice Advocacy Director of the Colorado Coalition Against Domestic Violence, stated that Colorado judges often do not see any correlation between partner abuse and custody issues, and may not allow domestic violence experts to testify at custody trials. E-mail from Anna Farber Conrad, Criminal Justice Advocacy Director of the Colorado Coalition Against Domestic Violence to author, Professor of Law, University of California at

are some problems with implementation found in the appellate cases. These include a lack of guidance for judges as to what factors should be considered in determining whether the presumption has been raised or overcome.

The jurisdictions will be discussed in roughly the order in which they adopted the rebuttable presumption, with the most experienced jurisdictions first, followed by those which have moderate experience with this statute, and finishing with jurisdictions where the presumption is very new. Looking at the jurisdictions in rough chronological order is useful in determining whether the initial problems presented by the enactment of such statutes, if any, are eventually resolved over time.

2. *Jurisdictions With Many Years Experience Applying the Presumption*

a. *North Dakota*

North Dakota has by far the most reported appellate decisions applying the rebuttable presumption, having enacted its first such statute in 1991.¹²⁰ Notably, the statute has been amended several times in response to some of these decisions.¹²¹ While the North Dakota Supreme Court has had to restate the basic rules many times (for example, that the trial courts must make findings as to whether domestic violence occurred), it appears that the statute is effective in ensuring that domestic violence is taken seriously in custody decisions.

The first North Dakota case decided under the new presumption was *Schestler v. Schestler*.¹²² In this case, the wife's evidence of domestic violence by the husband was found to have triggered the presumption.¹²³ However, the court then held that

Berkeley (June 18, 2001). *See also* Caven v. Caven, 966 P.2d 1247 (Wash. 1998) (relying on the plain language of the statute to conclude that the father's history of domestic violence restricted the trial court's discretion in determining whether the parents should mutually make decisions about the children).

120. North Dakota, like several other less populous states, has no intermediate appellate court, so whenever a trial court decision is appealed, it is heard by the state supreme court.

121. *See* Kathleen B. Garner, *Infants, Parent and Child: Applying the Rebuttable Presumption Against Awarding Custody to Perpetrators of Domestic Violence*, Heck v. Reed, 529 N.W.2d 155 (N.D. 1995), 72 N.D. L. REV. 155 (1996).

122. 486 N.W.2d 509 (N.D. 1992).

123. *Id.* at 511-12.

the husband had rebutted the presumption.¹²⁴ This holding was upheld by the Supreme Court, which stated that domestic violence had no priority over the other best interest factors.¹²⁵ Thus the presumption could be rebutted by the customary weighing of those factors. A strong dissent by one of the justices argued that this interpretation of the statute rendered the new law meaningless.¹²⁶ This dissent was later quoted with approval in several North Dakota Supreme Court cases.¹²⁷

As a result of this decision, the statute was amended the following year, 1993, to clarify that the presumption could be rebutted only by showing clear and convincing evidence that the best interests of the child require the perpetrator to be the custodian.¹²⁸ This raised the evidentiary standard from the previous one, which had required only "credible evidence" for rebuttal.¹²⁹ However, at no time has the statute given courts guidance in terms of what is necessary to rebut the presumption. The courts have had to determine this on a case by case basis.

The amended statute produced a great number of appellate decisions in the following few years. In 1995, the North Dakota Supreme Court decided five cases on this topic, three of which dealt with rebuttal issues¹³⁰ and two with what triggers the presumption.¹³¹

In *Heck v. Reed*,¹³² the first case decided in 1995, the court stated that the rebuttal of the presumption requires compelling or exceptional circumstances demonstrating that the best interests of the child require custody to be placed in perpetrator.¹³³ Thus, the trial court may not consider the absence of abuse directed at the children as a factor rebutting the presumption. The court discussed the negative effect of domestic violence on children even

124. *Id.* at 512.

125. *Id.*

126. *Id.* at 515 (Levine, J., dissenting). For a discussion of this case see Garner, *supra* note 121, at 158-61.

127. These include *Helbling v. Helbling*, 532 N.W.2d 650 (N.D. 1995), *Krank v. Krank*, 529 N.W.2d 844 (N.D. 1995), and *Ryan v. Fleming*, 533 N.W.2d 920 (N.D. 1995).

128. Garner, *supra* note 121, at 160-61.

129. *Id.* at 161.

130. *Heck v. Reed*, 529 N.W.2d 155 (N.D. 1995); *Helbling*, 532 N.W.2d at 650; *Bruner v. Hager*, 534 N.W.2d 825 (N.D. 1995).

131. *Krank*, 529 N.W.2d at 844; *Ryan*, 533 N.W.2d at 920.

132. 529 N.W.2d at 155.

133. *Id.* at 162.

if they are not directly abused.¹³⁴ Furthermore, there was no evidence that the father had gone to counseling or was no longer violent.¹³⁵

Next came *Krank v. Krank*,¹³⁶ in which the court addressed the issue of what level of violence is necessary to raise the presumption, with the high court holding that a single act could do this.¹³⁷ The court reversed an award of joint legal custody and sole physical custody to the batterer father.¹³⁸ It remanded the case for findings on whether the alleged domestic violence had occurred.¹³⁹ This analysis was necessary in order to respond to the allegations of mutual violence.¹⁴⁰ The court stated that if one parent were the more significant abuser, the presumption should apply only to that parent, but if both parties were equally violent, the court should apply the general best interest factors.¹⁴¹

In *Helbling v. Helbling*,¹⁴² the court found that the presumption had been raised and not rebutted.¹⁴³ The appellate court reversed the award of custody to the batterer father and remanded the case.¹⁴⁴ Since both parties had alleged violence by each other, the high court directed the trial court to determine which one was the most significant abuser.¹⁴⁵ Only in *Ryan v. Flemming*,¹⁴⁶ did the court find that the presumption had not arisen at all, even though the father admitted having broken a flower pot and tearing the phone out of the wall.¹⁴⁷ The court stated that because the incident resulted in no injury to the mother, and was isolated and remote in time, it did not trigger the presumption.¹⁴⁸ In *Bruner v. Hager*,¹⁴⁹ the

134. *Id.* at 164.

135. *Id.* at 165.

136. *Krank*, 529 N.W.2d at 844.

137. *Id.* at 850.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. 532 N.W.2d 650 (N.D. 1995).

143. *Id.* at 653.

144. *Id.*

145. *Id.*

146. 533 N.W.2d 920 (N.D. 1995).

147. *Id.* at 924. These acts would suffice to trigger the presumption in some states. See for example, the California Family Code section 3044, which includes destruction of personal property in its definition of domestic violence through a cross-reference to sections 6203 and 6320. See CAL. FAM. CODE §§ 3044(d), 6203, 6320 (West Supp. 2001).

148. *Ryan*, 533 N.W.2d at 924.

149. 534 N.W.2d 825 (N.D. 1995).

trial court's award of custody to the batterer father was reversed, with the court stating that now domestic violence is the paramount factor in a custody decision where such violence has occurred.¹⁵⁰ Similar to the holding in *Heck v. Reed*,¹⁵¹ the North Dakota Supreme Court stated that the father's cessation of substance abuse in *Bruner* and fact that he had not physically abused the children did not rebut the presumption.¹⁵²

The following year the North Dakota Supreme Court decided five more cases interpreting this statute. In the first, *Owan v. Owan*,¹⁵³ there were allegations of mutual violence; the high court directed the trial court not to rely on the father's expert witness to assess his trial testimony, but instead to make its own findings as to whether domestic violence had been perpetrated or not and by whom.¹⁵⁴ In *Engh v. Jensen*,¹⁵⁵ the high court again reversed the trial court, which had also awarded custody to the batterer father.¹⁵⁶ The high court explained that the father's mere separation from the mother was insufficient to rebut the presumption.¹⁵⁷ In *Anderson v. Hensrud*,¹⁵⁸ the court held that the presumption is not confined to situations in which a parent or child is the direct victim of the domestic violence, since the statute defines domestic violence to include any family or household member.¹⁵⁹ In *Kraft v. Kraft*,¹⁶⁰ the appellate court held that domestic violence by the mother's fiance, who lived with the mother and her children, could potentially rebut the presumption against custody to the father, who had been violent toward the mother in the past.¹⁶¹ In *Ternes v. Ternes*,¹⁶² one parent's attempt to show that the other parent was violent was not raised at the trial court level, thus was not something the high court could address.¹⁶³

150. *Id.* at 828-29.

151. 529 N.W.2d 155 (N.D. 1995).

152. *Bruner*, 534 N.W.2d at 828.

153. 541 N.W.2d 719 (N.D. 1996).

154. *Id.* at 722-23.

155. 547 N.W.2d 922 (N.D. 1996).

156. *Id.* at 923.

157. *Id.* at 926.

158. 548 N.W.2d 410 (N.D. 1996).

159. *Id.* at 413.

160. 554 N.W.2d 657 (N.D. 1996).

161. *Id.* at 661.

162. 555 N.W.2d 355 (N.D. 1996).

163. *Id.* at 358-59. While this may have been a strategy decision on the part of the victim parent's attorney, it is more likely to have been an oversight, in which case it is an example of the importance of training family law attorneys about any

The North Dakota statute was most recently amended effective April 3, 1997 as an emergency measure.¹⁶⁴ The amendment provided that the presumption could be triggered if “there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding.”¹⁶⁵

The North Dakota Supreme Court also produced five cases about the rebuttable presumption in 1997. *Kluck v. Kluck*,¹⁶⁶ the first case that year, involved allegations of mutual abuse.¹⁶⁷ The high court upheld the trial court’s assessment that one parent’s violent conduct was significantly greater than the other’s.¹⁶⁸ In *Zuger v. Zuger*,¹⁶⁹ the high court reversed a joint custody award where the presumption had been raised and had not been sufficiently rebutted.¹⁷⁰ The high court stated that the trial court’s finding that the victim parent was over-protective, that the violence would not occur again, and that the violence was not directed at the children was insufficient to rebut the presumption.¹⁷¹

In *Dinius v. Dinius*,¹⁷² the high court applied the new amendment and held that the acts of domestic violence were too remote in time and too minor to trigger the presumption.¹⁷³ In *Zimmerman v. Zimmerman*,¹⁷⁴ the high court again reversed the trial court and remanded the case because the trial court had failed to determine which parent had been the more significant abuser.¹⁷⁵ In *Huesers v. Huesers*,¹⁷⁶ the high court also reversed the trial court, which had refused to consider the new amendment.¹⁷⁷ It held that the trial court should use the new amendment as a guide to determine whether pre-amendment conduct was sufficient to

statutes involving domestic violence.

164. N.D. CENT. CODE § 14-09-06.2(1)(j) (1979) (amended 1997).

165. *Id.*

166. 561 N.W.2d 263 (N.D. 1997).

167. *Id.* at 267.

168. *Id.* at 268.

169. 563 N.W.2d 804 (N.D. 1997).

170. *Id.* at 810.

171. *Id.*

172. 564 N.W.2d 300 (N.D. 1997).

173. *Id.* at 303.

174. 569 N.W.2d 277 (N.D. 1997).

175. *Id.* at 279.

176. 574 N.W.2d 880 (N.D. 1997).

177. *Id.* at 882.

invoke the presumption.¹⁷⁸

In 1998, two cases on this topic were published. In *Kasprowicz v. Kasprowicz*,¹⁷⁹ the high court reversed the trial court, giving two reasons.¹⁸⁰ First, the high court reversed and remanded because the trial court failed to make a factual finding in support of their decision to grant rotating custody.¹⁸¹ In addition, the court also reversed and remanded the trial court to apply the amended presumption statute if applicable.¹⁸² In *Carver v. Miller*,¹⁸³ the high court upheld the trial court's finding that the presumption against the batterer father had been rebutted by the mother's drug use and exposure of the child to a drug-related atmosphere.¹⁸⁴

In 1999, the Supreme Court returned to its earlier volume of cases, issuing five rebuttable presumption decisions. In three of these, the presumption was found inapplicable because the standard for triggering it established in the 1997 statutory amendment was not met.¹⁸⁵ In the first, *Reeves v. Chepulis*,¹⁸⁶ the high court upheld the trial court's award of custody to the father.¹⁸⁷ While there was one episode of domestic violence by the father, it did not rise to the level required to trigger the presumption.¹⁸⁸ In *Green v. Green*,¹⁸⁹ the court reiterated that clear and convincing evidence was required to rebut the presumption.¹⁹⁰ In *Schumacher v. Schumacher*,¹⁹¹ there were allegations of mutual abuse.¹⁹² The court held that even though the wife had slapped the husband twice, his violence against her was worse, thus triggering the presumption against him.¹⁹³ In *Holtz v. Holtz*,¹⁹⁴ the court held that

178. *Id.* at 882-83.

179. 575 N.W.2d 921 (N.D. 1998).

180. *Id.* at 924.

181. *Id.*

182. *Id.*

183. 585 N.W.2d 139 (N.D. 1998).

184. *Id.* at 143-44. These rebuttal factors are not typical of those found in statutes which specify such factors. Given the lack of rebuttal factors in the North Dakota statute, trial courts must make this determination on a case by case basis.

185. *Reeves v. Chepulis*, 591 N.W.2d 791 (N.D. 1999); *Green v. Green*, 593 N.W.2d 398 (N.D. 1999); *Brown v. Brown*, 600 N.W.2d 869 (N.D. 1999).

186. 591 N.W.2d at 791.

187. *Id.* at 797.

188. *Id.* at 795.

189. 593 N.W.2d at 398.

190. *Id.* at 400.

191. 598 N.W.2d 131 (N.D. 1999).

192. *Id.* at 134-35.

193. *Id.* at 136.

194. 595 N.W.2d 1 (N.D. 1999).

the presumption also applied to dating relationships, cohabitants, and former cohabitants.¹⁹⁵ In *Brown v. Brown*,¹⁹⁶ the high court upheld the trial court's finding that the presumption had not been triggered where there were allegations of mutual abuse.¹⁹⁷ Neither party was seriously injured and neither party's behavior established a pattern sufficient to trigger the rebuttable presumption.¹⁹⁸ The high court further stated that "[d]omestic violence under [the] statute does not include name-calling."¹⁹⁹

In 2000, the court decided only two cases in which the presumption against custody to perpetrators was at issue. In *Cox v. Cox*,²⁰⁰ the court held that the wife's evidence of domestic violence by the husband was insufficient to trigger the presumption, in spite of evidence that he had hit her car once and bruised her in several places another time.²⁰¹ The court stated that it did not find most of her allegations credible.²⁰² In *Tulintseff v. Jacobsen*,²⁰³ the court interpreted the phrase "reasonable time proximate to the proceeding," a prerequisite to raising the presumption under current statute, if there is no evidence of use of a dangerous weapon or serious bodily injury.²⁰⁴ The trial court held that abuse which had occurred three or more years before the wife filed a request to modify joint custody to sole custody was too remote to raise the presumption.²⁰⁵ This was upheld by the Supreme Court.²⁰⁶

195. *Id.* at 9.

196. 600 N.W.2d 869 (N.D. 1999).

197. *Id.* at 873.

198. *Id.*

199. *Id.* at 874. This last comment is significant because the court is thereby excluding emotional abuse, the most frequent form of domestic violence, and according to victims, the most damaging, as unlike physical violence, it tends to be continuous, chipping away at the victim's self esteem until she feels powerless. See Pincolini, *supra* note 56, at 7; DUTTON & GOLANT, *supra* note 78, at 23, 140. Of course, including emotional abuse in the definition of domestic violence would also open the door to a backlash from perpetrators, who often say that they feel emotionally abused by their victims.

200. 613 N.W.2d 516 (N.D. 2000).

201. *Id.* at 521.

202. *Id.*

203. 615 N.W.2d 129 (N.D. 2000).

204. North Dakota's presumption statute creates a rebuttable presumption against awarding custody to the perpetrator of domestic violence under three circumstances: (1) if "there exists one incident of domestic violence which resulted in serious bodily injury," (2) if "there exists one incident of domestic violence which involved the use of a dangerous weapon," or (3) if "there exists a pattern of domestic violence within a reasonable time proximate to the preceding." N. D. CENT. CODE § 14-09-06.2(1)(j) (1999).

205. *Tulintseff*, 615 N.W.2d at 134. The trial court also stated that the

So far, the North Dakota Supreme Court has decided only one case on point in 2001, *Hurt v. Hurt*.²⁰⁷ In that case, the court upheld the custody award to the wife, based partly on the history of domestic violence.²⁰⁸ Notably, the trial court rejected the recommendation of the guardian ad litem.²⁰⁹ With no explanation, the trial court found that the presumption was not triggered even though the wife had obtained orders of protection and had taken the children with her to a domestic violence shelter twice, shortly before filing for divorce.²¹⁰ The appellate court did not reverse this finding.²¹¹ Since the presumption was not raised, the domestic violence by the husband was considered as part of the best interest analysis, along with an overall assessment of each party's parenting abilities.²¹²

Overall it is clear that the presumption statute has been taken seriously in North Dakota. It is also clear that frequent appellate review is key to actually changing trial court practices.

b. Louisiana

Louisiana adopted the rebuttable presumption in 1992, with very mixed results. In the first case to interpret the statute, *Simmons v. Simmons*,²¹³ the appellate court held that a single past act of violence is not a "history of perpetrating family violence," which would have triggered the statutory presumption against the award of custody to a perpetrator.²¹⁴ The court reasoned that this determination must be based on a review of the total circumstances of the family and involves the weighing of evidence.²¹⁵ In this case,

husband's breaking a table, two chairs, a stairway railing, and a mirror did not constitute domestic violence. *Id.* at 133 n.2. This was because, according to the trial court, there was no evidence that these actions caused the wife to feel afraid that the husband would harm her. *Id.*

206. *Id.* at 134-35. This finding, upheld by the appellate court, shows the danger of defining domestic violence too narrowly in statutes creating presumptions against custody to batterers.

207. 621 N.W.2d 326 (N.D. 2001).

208. *Id.* at 330.

209. *Id.* at 331.

210. *Id.* at 330. "The evidence of domestic violence presented to the trial court did not trigger the rebuttable presumption under N.D.C.C. § 14-09-06.2(1)(j)." *Id.*

211. *Id.*

212. *Id.* at 328-31.

213. 649 So. 2d 799 (La. Ct. App. 1995).

214. *Id.* at 801.

215. *Id.* at 802.

the appellate court agreed that the trial court did not err in refusing to apply the presumption.²¹⁶ The wife claimed that she had needed both police and medical assistance as a result of the husband's violence but could document only one incident.²¹⁷ The husband stated that the abuse had never taken place in front of the children and was provoked by the wife's adulterous affair.²¹⁸ The husband was upheld as the primary domiciliary parent, principally because he was more stable geographically.²¹⁹

In *Michelli v. Michelli*,²²⁰ decided later that same year, another circuit of the appellate court held that the family violence does not have to have been frequent or continuous before the presumption is triggered.²²¹ In that case, the trial court had held that the presumption was not triggered in spite of evidence of numerous incidents of physical abuse by the husband, some of which were documented and witnessed by third parties.²²² The trial court referred to the abuse as mutual "family fights," discounting evidence that the wife was defending herself.²²³ However, this time the appellate court disagreed, holding that it was reversible error not to allow the wife to submit a proffer of evidence concerning the criminal charges against the husband,²²⁴ and that the trial court should have found that the presumption was triggered by the evidence of the many incidents of abuse.²²⁵

Subdivision (A) of the statute was amended in 1995 to clarify that a history of perpetrating family violence means either one incident resulting in serious bodily injury or more than one incident.²²⁶ This was presumably a response to the *Simmons* holding.

Two years later, the Louisiana Court of Appeal decided *Morrison v. Morrison*.²²⁷ The court upheld the award of provisional custody to the mother, based on the presumption.²²⁸ The court

216. *Id.*

217. *Id.*

218. *Id.* at 800.

219. *Id.* at 802-03.

220. 655 So.2d 1342 (La. Ct. App. 1995).

221. *Id.* at 1349.

222. *Id.* at 1347-48.

223. *Id.* at 1348.

224. *Id.* at 1350.

225. *Id.* at 1349.

226. LA. REV. STAT. ANN. § 9:364(a) (West 2000).

227. 699 So.2d 1124 (La. Ct. App. 1997).

228. *Id.* at 1127.

found that both parents had a history of perpetrating family violence.²²⁹ However, the court additionally found that the mother was less likely to continue to do so than was the father.²³⁰ This is a statutory consideration.²³¹ However, the court remanded the case so that the trial court could order the mother to participate in and complete a treatment program, due to her history of violence toward the father, as required by statute.²³² The final decision was contingent on the mother's completing this program.²³³

The following year, the Louisiana appellate court decided *Raney v. Wren*.²³⁴ In that case, the trial court ordered that the parents have joint custody, with the father as the domiciliary parent.²³⁵ In her motion to modify the ruling, filed a year later, the wife alleged that she signed the original consent judgment only because of the husband's abusive behavior and threats.²³⁶ However, her motion was denied by the trial court.²³⁷ The trial court found that the earlier abuse was not relevant and that her allegations were not credible, thus the presumption against custody to batterers was inapplicable.²³⁸ The trial court stated that it preferred the father as custodian because he was more stable geographically.²³⁹ The appellate court upheld the custody order.²⁴⁰ A concurring judge argued that it was error to exclude evidence of the father's domestic violence, as this was relevant to his fitness as a parent regardless of whether it took place before or after the stipulated order.²⁴¹ However, even this judge felt that the exclusion was

229. *Id.* at 1126-27.

230. *Id.* at 1127.

231. Louisiana's presumptive statute provides: "If the court finds that both parents have a history of perpetrating family violence, custody shall be awarded solely to the parent who is less likely to continue to perpetrate family violence." LA. REV. STAT. ANN. § 9:364(B) (West 2000).

232. *Morrison*, 699 So. 2d at 1127. Completion of a treatment program are mandated by section 9:364(B). *Id.* at 1128. Such treatment programs are defined by section 9:362(7). *Id.*

233. *Id.* The father was ordered to complete a treatment program before he could engage in any form of visitation, as required by the statute. *Id.*

234. 722 So. 2d 54 (La. Ct. App. 1998).

235. *Id.* at 55.

236. *Id.* at 58.

237. *Id.* at 56, 58.

238. *Id.* at 58.

239. *Id.* at 60. The mother had remarried, and her new husband was in the Navy, so they had to relocate periodically. *Id.* at 61.

240. *Id.* at 62.

241. *Id.* at 62-63 (Gonzales, J., concurring).

harmless error.²⁴²

In 1999, the court of appeals decided *Hicks v. Hicks*²⁴³ and *McGee v. McGee*.²⁴⁴ In the *Hicks* case, the award of joint custody with the husband having primary custody during the school year was reversed due to the trial court's failure to comply with the presumption.²⁴⁵ In spite of uncontroverted evidence of severe domestic violence by the husband, the trial court did not apply the presumption statute, instead the court used a best interests analysis.²⁴⁶ In reversing this, the appellate court also explicitly rejected language from the *Simmons*²⁴⁷ court.²⁴⁸ The *Simmons* court had added two more factors to the statutory language: 1) whether the violence occurred in the presence of the children, and 2) whether the violence was provoked.²⁴⁹

In *McGee*,²⁵⁰ using a best interests analysis, the same court upheld the trial court's award of joint custody with the husband having primary custody.²⁵¹ The court stated that a single specific incident of family violence was insufficient to trigger the presumption.²⁵² There were allegations of mutual abuse.²⁵³ Both parties were arrested during one incident, but apparently neither was actually injured and thus not meeting the statutory requirement that there be serious bodily injury if there was only one incident.

The following year the appellate court decided *Harper v. Harper*.²⁵⁴ This time, based on a best interest analysis, the award of sole custody to the mother was upheld.²⁵⁵ The father had not abused the mother since they separated very early in the relationship.²⁵⁶ However, the father had been physically abusive to his prior wife and children.²⁵⁷ Without explanation, the appellate

242. *Id.* at 63.

243. 733 So. 2d 1261 (La. Ct. App. 1999).

244. 745 So. 2d 708 (La. Ct. App. 1999).

245. 733 So. 2d at 1262.

246. *Id.* at 1263.

247. *Simmons v. Simmons*, 649 So. 2d 799 (La. Ct. App. 1995).

248. 733 So. 2d at 1265-66.

249. *Simmons*, 649 So. 2d at 802.

250. *McGee v. McGee*, 745 So. 2d 708 (La. Ct. App. 1999).

251. *Id.* at 712.

252. *Id.*

253. *Id.* at 711-12.

254. 764 So. 2d 1186 (La. Ct. App. 2000).

255. *Id.* at 1190.

256. *Id.* at 1187, 1190.

257. *Id.* at 1191.

court did not mention the presumption against custody to perpetrators, even though it is not limited to abuse against the other parent or the child whose custody is at issue.²⁵⁸ The court considered the statutory presumption favoring joint custody, though it found that the mother had overcome this, based partly on the father's history of violence and partly on his failure to establish a relationship with the child.²⁵⁹ The fact that the court would even consider awarding joint custody to a batterer and child abuser is, of course, cause for great concern.

The most recent Louisiana case on point is *Lewis v. Lewis*.²⁶⁰ In this case the presumption was key to the holding. The trial court had found that the husband abused the wife.²⁶¹ Nonetheless, the trial court awarded the parties joint custody, with the husband as primary domiciliary parent, refusing to apply the provisions of the presumption statute.²⁶² The appellate court held that the refusal was reversible legal error, noting that the husband had admitted to having abused the wife on more than one occasion.²⁶³ The court used this fact to distinguish the case from *Simmons*²⁶⁴ and triggered the presumption.²⁶⁵ The husband had also alleged that the wife was violent towards him.²⁶⁶ However, the appellate court held that the abuse had occurred on only one occasion, did not result in serious injury and thus did not trigger the presumption.²⁶⁷ It further held that the husband had not rebutted the presumption, awarding the wife custody and the husband supervised visitation until he satisfied all the statutory requirements.²⁶⁸ Both parents were ordered to complete parenting classes.²⁶⁹

258. See LA. REV. STAT. ANN. § 9:364(A) (West 2000) (stating that "no parent who has a history of perpetrating family violence shall be awarded sole or joint custody of children," but not specifying that such family violence may be considered solely in reference to the other parent seeking custody or the child whose custody is at issue).

259. *Harper*, 764 So. 2d at 1190.

260. 771 So. 2d 856 (La. Ct. App. 2000).

261. *Id.* at 858.

262. *Id.*

263. *Id.* at 860.

264. *Id.*

265. *Id.*

266. *Id.* at 861-62.

267. *Id.* at 862.

268. *Id.*

269. *Id.*

3. *Jurisdictions With A Moderate Amount of Experience Applying the Presumption*

a. *Jurisdictions with No Appellate Cases*

In many of the jurisdictions that have had the presumption for some years, there is not yet any appellate law involving custody cases with allegations of abuse from one adult partner toward another. These jurisdictions include the District of Columbia, Hawaii, Idaho, and South Dakota. However, advocates in three of these have commented on their experience with the statutes.

(1) *District of Columbia*

The presumption in the District of Columbia applies only in cases where the court is considering an award of joint custody.²⁷⁰ One attorney specializing in domestic violence family law cases there stated that batterers are now going to court quickly to file for civil protective orders in order to benefit from this presumption.²⁷¹ She also reported that batterers are zealously opposing such orders in order to prevent the court from finding that the presumption has been triggered.²⁷² She noted that if the court finds that this presumption has not been raised, the court then applies another presumption, favoring joint custody.²⁷³

A clinical professor at Georgetown University Law School stated that while the statute²⁷⁴ requires judges to give written statements specifying factors and findings supporting custody to batterers, she believes that this section is “usually ignored.”²⁷⁵ In any event, she was not sure that an appellate decision requiring judges to make such findings would actually alter the outcomes, given the frame of mind of the trial court judges.²⁷⁶

270. D.C. CODE ANN. § 16-911(a)(5) (1997).

271. E-mail from Susana SáCouto, attorney at W.E.A.V.E. (Women Escaping A Violent Environment) in Washington D.C. to author, Professor of Law, University of California at Berkeley (June 15, 2001) (on file with author).

272. *Id.*

273. *Id.* See also D.C. CODE ANN. § 16-911(a)(5) (1997).

274. *Id.* § 16-911(a)(1).

275. E-mail from Prof. Lisa DeSanctis, clinical professor at Georgetown University Law School, to author, Lecturer, University of California at Berkeley (June 13, 2001) (on file with author).

276. *Id.*

(2) *Hawaii*

Hawaii adopted its presumption statute in 1996.²⁷⁷ A lawyer specializing in domestic violence family law cases says that the judicial response has been quite mixed.²⁷⁸ While there have been no problems regarding the issuance of restraining orders, if the batterer agrees to the order, no finding of domestic violence is made.²⁷⁹ When findings are made, the issue of the violence is usually not re-litigated in the later divorce proceeding, but the impact the violence has had on the children often is.²⁸⁰

In terms of what is required to rebut the presumption, some judges require the batterer to have had “a major turnaround,” or evidence that the victim is an active drug user or has a mental illness.²⁸¹ Other judges take the position that if the batterer has not hit anyone recently and has taken some classes for batterers he has overcome the presumption.²⁸² One of the main problems is that the guardians ad litem do not apply the new statute correctly, and often see the presumption as very easily rebutted.²⁸³ The judges tend to place great weight on the recommendation of these guardians.²⁸⁴

However, according to this attorney, victims of domestic violence who have competent counsel have a great success rate in terms of getting custody, often at the settlement stage.²⁸⁵ On the other hand, unrepresented litigants and those with attorneys who think domestic violence is not that relevant to custody do poorly.²⁸⁶

The attorney also noted that the statute used to include a provision that if the judge awarded custody to a perpetrator, he or she had to make written findings regarding how the presumption was overcome and how the safety of the adult victim and the

277. HAW. REV. STAT. ANN. § 571-46 (Michie 1999).

278. E-mail from an anonymous source in Hawaii to author, Professor of Law, University of California at (July 18, 2001) (on file with author) [hereinafter Anonymous E-mail].

279. This attorney noted that issuance of orders without findings raises the question whether there is subject matter jurisdiction. *Id.* She will be discussing this with the judiciary soon. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

children had been considered.²⁸⁷ With no notice to the public or opportunity to comment, this provision was mysteriously removed when the statute was amended for some other purpose.²⁸⁸ While the advocates have been trying to get the provision reinstated, the judges' association testified against this legislation, saying it would create too much work for them.²⁸⁹

(3) *South Dakota*

South Dakota passed its presumption statute in 1997.²⁹⁰ The Director of the South Dakota Coalition Against Domestic Violence and Sexual Assault reported that they have had better luck with the law than anticipated.²⁹¹ While there are still major problems with custody cases involving domestic violence, the situation is better than before.²⁹² Like many of the respondents around the country, this advocate reported that it is hard to get the judges to come to training on domestic violence.²⁹³ She noted that there must be a conviction before the presumption is triggered, and there are few convictions since the prosecutors tend to agree to "deferred prosecution."²⁹⁴ But overall the law is working, and the Chief Justice of the South Dakota Supreme Court has been proactive on domestic violence issues generally, setting a positive tone.²⁹⁵

b. Jurisdictions With Appellate Cases

In several of the states where the presumption has been in effect for a few years, appellate courts have interpreted the

287. Hawaii statute states that "[a] court may award visitation to a parent who committed family violence only if the court finds that adequate provisions for the physical safety and psychological well-being of the child and adequate provision for the safety of the parent who is a victim of family violence can be made." HAW. REV. STAT. ANN. § 517-46(10) (Michie 1999).

288. Anonymous E-mail, *supra* note 279.

289. *Id.*

290. S.D. CODIFIED LAWS § 25-4-45.5 (Michie 1999).

291. Telephone Conversation Verlaïne Gullickson, Director of the South Dakota Coalition Against Domestic Violence and Sexual Assault, with author (Aug. 10, 2001).

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* Ms. Gullickson also noted the biggest problem presented by these cases is the judges' refusal to order that the batterers relinquish their firearms, as mandated by 18 U.S.C. § 922(g)(8) and (9). *Id.* See 18 U.S.C. §§ 922(g)(8) & (9) (1994 & Supp. 1999) (other sections have been held unconstitutional).

presumption, with very mixed results. These include Alabama, Delaware, Florida, Iowa, Massachusetts, Minnesota, Nevada, and Oklahoma.

(1) *Alabama*

Alabama enacted a rebuttable presumption statute effective July 31, 1995.²⁹⁶ The statute appears to have had a significant effect, judging from the outcome of the appellate decisions.

Most of the cases citing the statute emphasize the need for trial courts to make written findings regarding any allegations of abuse so that the appellate courts can determine whether the presumption has been triggered, and if so, whether it has been rebutted.²⁹⁷ So far this has occurred in six cases; in all of these, the trial courts had awarded primary physical custody to the fathers, all of whom were allegedly batterers, but the appellate courts reversed and remanded the cases.²⁹⁸

However, in the most recent case on point in Alabama, *Ex parte Fann*,²⁹⁹ the Alabama Supreme Court held that it was not automatic grounds for reversal for the trial court to fail to make a finding on the record as to whether domestic abuse had in fact occurred.³⁰⁰ In the process, the high court overruled *Fesmire v. Fesmire*.³⁰¹ While the high court agreed that such a finding is useful so that the appellate court can determine whether the trial court actually applied the appropriate statute, it characterized the failure to make such a finding as harmless error.³⁰² The high court stated in its reasoning that the statute itself did not specifically require such a finding, nor

296. ALA. CODE § 30-3-151 (1995).

297. See *A.S. v. G.T.*, No. 2000264, 2001 WL 259278, at *2 (Ala. Civ. App. Mar. 16, 2001); *Nye v. Nye*, 785 So. 2d 1147, 1149 (Ala. Civ. App. 2000); *Ray v. Ray*, 782 So. 2d 797, 798 (Ala. Civ. App. 2000); *Davis v. Davis*, 743 So. 2d 486, 487 (Ala. Civ. App. 1999); *Fesmire v. Fesmire*, 738 So. 2d 1284, 1285 (Ala. Civ. App. 1999); *M.J.Y. v. J.S.Y.*, 758 So. 2d 571, 574 (Ala. Civ. App. 1999).

298. *A.S.*, 2001 WL 259278 at *2-3; *Nye*, 785 So. 2d at 1151; *Ray*, 782 So. 2d at 799; *Davis*, 743 So. 2d at 487; *Fesmire*, 738 So. 2d at 1287-88; *M.J.Y.*, 758 So. 2d at 574.

299. *Ex parte Fann*, No. 1992227, 2001 WL 793009 (Ala. July 13, 2001).

300. *Id.* at *7.

301. 738 So. 2d 1284 (Ala. Ct. App. 1999). *Fesmire* held that if allegations of domestic abuse have been made, then “the trial court must, on the basis of the evidence presented, make a finding on the record as to whether domestic abuse occurred and then . . . it must apply the remaining provisions of the Custody and Domestic or Family Abuse Act.” *Id.* at 1288.

302. *Ex parte Fann*, 2001 WL 793009, at *3.

did it actually require that the trial court state any reason for its order.³⁰³ The state supreme court also stated in dicta that there were many factors besides domestic violence committed by a parent which should be given great weight in custody determinations but which were not mentioned in the custody statute.³⁰⁴

The Alabama appellate court has also addressed other issues presented by the statute. The first case to mention the new statute was *Kent v. Green*,³⁰⁵ in which the appellate court upheld the custody award to the father in spite of his history of violence toward the mother.³⁰⁶ At one point the mother had to be hospitalized due to the father's choking her.³⁰⁷ Applying a best interests test, the majority opinion did not mention the new statute, which had become effective after the action was filed.³⁰⁸ The majority stated that the father was unlikely to be violent in the future, and that the violence had not been directed toward the child.³⁰⁹ The dissent argued that it was an abuse of discretion to award custody to the father and not to appoint a guardian ad litem.³¹⁰ Additionally, given the enactment of the new statute, which arguably could apply, it argued that the case should be remanded to the trial court.³¹¹

The following year the appellate court decided *Jackson v. Jackson*,³¹² the first Alabama case in which the presumption against custody to a batterer was applied.³¹³ The trial court awarded joint custody based on a statutory preference for this.³¹⁴ The court did not mention the new domestic violence statute and concluded that the parents were equally fit.³¹⁵ The appellate court held that because the domestic violence statute was more specific than the joint custody statute, the former controls.³¹⁶ Thus in domestic violence cases, the court may not consider joint custody unless the

303. *Id.* at *5.

304. *Id.*

305. 701 So. 2d 4 (Ala. Civ. App. 1996).

306. *Id.* at 6.

307. *Id.* at 5.

308. *See id.* at 5-6.

309. *Id.* at 5.

310. *Id.* at 6.

311. *Id.* at 9.

312. 709 So. 2d 46 (Ala. Civ. App. 1997).

313. *Id.*

314. *Id.* at 47.

315. *Id.*

316. *Id.* at 47-48.

perpetrator has rebutted the presumption against custody to him or her.³¹⁷ Since the wife's evidence had raised the presumption, the case was reversed and remanded to determine whether the husband could rebut it.³¹⁸

In 1998, the appellate court decided *Harbert v. Harbert*,³¹⁹ in which both parents sought to modify the split custody arrangement.³²⁰ Three years after their divorce, the mother was granted a restraining order based on the father's recent abuse of her.³²¹ At the subsequent custody hearing, the trial court refused to hear the children's testimony or to accept an offer of proof.³²² It then granted the father's request for joint custody.³²³ The appellate court held that this was reversible error, as was issuing the restraining order without making a finding that abuse had or had not occurred.³²⁴ It also reminded the trial court that joint custody could not be awarded in domestic violence cases until the perpetrator had rebutted the presumption against custody to him.³²⁵

The following year the court decided *E.M.C. v. K.C.Y.*,³²⁶ involving a modification of a joint custody order with primary physical custody to the father.³²⁷ The trial court granted the mother's request to modify this to sole custody to her.³²⁸ The father was not only abusive to the mother and child, but also had a violent outburst in court.³²⁹ Citing the statutory presumption against custody to batterers, the appellate court held that joint custody was not in the best interest of the child, and that the father should not even be allowed visitation until he receives "professional counseling."³³⁰

More recently the Alabama appellate court decided *Howard v.*

317. *Id.* at 48.

318. *Id.*

319. 721 So. 2d 224, 224 (Ala. Civ. App. 1998).

320. *Id.*

321. *Id.* at 226.

322. *Id.* at 225.

323. *Id.*

324. *Id.* at 226.

325. *Id.*

326. 735 So. 2d 1225 (Ala. Civ. App. 1999).

327. *Id.*

328. *Id.* at 227.

329. *Id.*

330. *Id.* at 1228, 1230.

Howard,³³¹ in which the mother was given custody and the father appealed.³³² The appellate court upheld the trial court's findings.³³³ The appellate court held that the absence of written findings of abuse was at most harmless error, as the record showed that the father had abused her and the children, and there were no allegations that the mother had committed abuse.³³⁴ The dissent argued that findings were still required in the event that the father later filed for modification and in order to determine whether the children and mother were adequately protected by the visitation order.³³⁵ The same result occurred in *Ex Parte Fann*,³³⁶ the first case in which the Alabama Supreme Court addressed the issue of the presumption statute. In that case, the court held that lack of a finding on the issue of abuse was not automatic grounds for reversal.

(2) Delaware

There appear to be only two cases interpreting the Delaware presumption statute, both quite recent, and in both of which the statute was determinative. The first is a trial court case, *J.D.E. v. C.K.W.*,³³⁷ in which the custodial mother sought to relocate to another state.³³⁸ Her new husband and their children had already moved there due to the husband's job.³³⁹ The father, who had visitation, had been convicted of assaulting the mother, thus triggering the presumption.³⁴⁰ However, he had not completed the program for perpetrators necessary to rebut it, nor had he demonstrated extraordinary circumstances that warrant the rejection of the presumption.³⁴¹ Therefore, the court held that the presumption controlled and allowed the mother to move.³⁴² The court stated that once the father had completed the batterers'

331. No. 2990803, 2001 WL 111261 (Ala. Civ. App. Feb. 9, 2001).

332. *Id.* at *1.

333. *Id.* at *2.

334. *Id.* at *1-2.

335. *Id.* at *2 (Yates, J., dissenting).

336. No. 1992227, 2001 WL 793009 (Ala. July 13, 2001).

337. No. CN94-11773, 2001 WL 493117 (Del. Fam. Ct. Jan. 25, 2001)

338. *Id.* at *1.

339. *Id.*

340. *Id.* at *2. The Delaware statute does not require a conviction, but merely that the parent be a "perpetrator of domestic violence," which is not defined by the statute or case law. DEL. CODE ANN. tit. 13, § 705A (a) & (b) (1999).

341. *J.D.E.*, 2001 WL 493117 at *2.

342. *Id.* at *3.

program, a full hearing would be scheduled.³⁴³

The other case, *Webb v. Pfusch*,³⁴⁴ was decided by the Delaware Supreme Court.³⁴⁵ In *Webb*, the father's visitation rights had been suspended by a one-year restraining order.³⁴⁶ The mother was granted sole legal custody and primary residential custody.³⁴⁷ The father had pled guilty to burglarizing the mother's residence and assaulting her, but claimed that her testimony at the custody hearing was false.³⁴⁸ In a very brief opinion, the Delaware Supreme Court upheld the trial court's decision, citing to the presumption statute, and holding that there was no merit to any of the father's contentions.³⁴⁹

(3) Florida

Florida's rebuttable presumption statute,³⁵⁰ enacted in 1995, has resulted in only four appellate decisions.³⁵¹ This statute requires evidence of a felony conviction before the presumption is raised and thus is rarely invoked.³⁵² Judging by both appellate cases and comments from attorneys practicing in the state, the statute appears to have had little effect on the day-to-day custody decisions made by trial courts.³⁵³ In fact, the Florida standard for triggering the presumption is so high that so far there is no appellate case in

343. *Id.*

344. No. 275,2000, 2001 WL 760817 (Del. Super. Ct. June 14, 2001).

345. There is no intermediate appellate court in Delaware.

346. *Webb*, 2001 WL 760817 at *1.

347. *Id.*

348. *Id.*

349. *Id.*

350. FLA. STAT. ch. 61.13 (1995) (amended by Act of April 16, 2001, ch. 2001-2, sec. 1, § 61.13, 2001 Fla. Sess. Law Serv. 2001-2 (2001)).

351. *See* *Burke v. Watterson*, 713 So. 2d 1094 (Fla. Dist. Ct. App. 1998); *Fullerton v. Fullerton*, 709 So. 2d 162 (Fla. Dist. Ct. App. 1998); *Ford v. Ford* 700 So. 2d 191 (Fla. Dist. Ct. App. 1997); *Ward v. Ward*, 742 So. 2d 250 (Fla. Dist. Ct. App. 1996).

352. *See* FLA. STAT. ch. 61.13(2)(b)(2) (West 1997).

353. E-mail from Celia Yapita, attorney in North Central Florida, to author, Professor of Law, University of California at (June 13, 2001) (on file with the author). Ms. Yapita, an attorney specializing in domestic violence civil cases, reports that the presumption rarely arises because most abusers are not arrested, much less convicted of a felony. *Id.* Most of the judges she has appeared before give very little, if any, weight to domestic violence allegations if there are no charges or convictions. *Id.* Judges do routinely grant injunctions for protection, but they also usually grant unsupervised visitation to abusers. *Id.* Unless the abuse is severe and documented, most judges in her area do not believe the violence has affected or will affect the children. *Id.*

which a mother was awarded custody as a result of it. In the only case in which the statute was found applicable, the father had killed the mother.³⁵⁴

In the first appellate case decided after the statute was enacted, *Ward v. Ward*,³⁵⁵ the appellate court upheld the trial court's transfer of primary residential custody from the mother to the father.³⁵⁶ This occurred in spite of the father's conviction and imprisonment for murdering his first wife.³⁵⁷ The trial court stated that it was concerned about the girl's inappropriate sexual comments and behavior, which the court felt came from the custodial mother's being a lesbian.³⁵⁸ The new presumption statute was not raised at trial and the mother did not argue on appeal that this was fundamental error but only reversible error.³⁵⁹ Therefore, the appellate court refused to apply the new statute.³⁶⁰ The court concluded that in any event, the father's remarriage, stable job, and ownership of property would seem to support a conclusion that he had rebutted the presumption.³⁶¹

In the second case, *In re Marriage of Ford*,³⁶² the appellate court reversed the trial court's award of custody to the father, who had admitted abusing the mother but had not been convicted.³⁶³ Thus, the presumption statute was not triggered, and the court used a best interests analysis.³⁶⁴ The trial court found both parents fit, but awarded the father custody because he was more likely to encourage contact with the mother.³⁶⁵ This followed the "friendly parent" provision found in many state statutes.³⁶⁶ The appellate

354. See *Burke v. Watterson*, 713 So. 2d 1094 (Fla. Dist. Ct. App. 1998).

355. 742 So. 2d 250 (Fla. Dist. Ct. App. 1996).

356. *Id.* at 255.

357. *Id.*

358. *Id.* at 252.

359. *Id.* at 255.

360. *Id.*

361. *Id.* This case, which received a great deal of publicity nationally, shows the lengths to which a conservative court will go in order to prevent a lesbian from raising her child. It also demonstrates the need for specific rebuttal factors to be included in statutes creating a presumption against the batterer.

362. 700 So. 2d 191 (Fla. Dist. Ct. App. 1997).

363. *Id.* at 192.

364. *Id.* at 196.

365. *Id.* at 194.

366. *Id.* The trial court followed the "friendly parent" provision found in many state statutes. See *id.* These "friendly parent presumptions" frequently penalize victims of domestic violence. See Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1122 (1995-96).

court held that the trial court had abused its discretion, because its final judgment was “devoid of all but the most minimal mention of what undoubtedly became the central focus of the testimony presented to the trial court: an established pattern of domestic violence perpetrated by the former husband upon the former wife.”³⁶⁷ The appellate court also noted that the wife might not be “friendly” to the husband due to her justifiable fear of him.³⁶⁸

The same result is found in *Fullerton v. Fullerton*,³⁶⁹ where the father’s domestic violence toward the mother was the basis for the award of custody to her.³⁷⁰ In upholding this, the presumption was not mentioned by the appellate court, probably because the father was not convicted of the abuse.³⁷¹

In *Burke v. Watterson*,³⁷² the only Florida case in which the presumption actually was found to apply, the father had been convicted of killing the mother.³⁷³ The custody battle was thus between the convicted father and the mother’s parents. The appellate court upheld the trial court’s determination that the father had not rebutted the presumption.³⁷⁴ The grandparents were awarded custody.³⁷⁵

(4)Iowa

Iowa enacted its presumption statute in 1995.³⁷⁶ This statute applies only to joint custody awards, though domestic violence is

367. *Ford*, 700 So. 2d at 195.

368. *Id.* at 196. Nina Zollo states that the Ford case was very helpful in reversing a trial court that had not follow the statute. Email from Nina Zollo, the Legal Director of the Greenberg Traurig/Florida Coalition Against Domestic Violence Alliance for Battered Women, to author, Professor of Law, University of California at (June 18, 2001) (on file with author). She said that this case may be why there do not seem to be problems with judges following the statute, or unintended consequences. *Id.*

369. 709 So. 2d 162 (Fla. Dist. Ct. App. 1998).

370. *Id.* at 163.

371. *Id.* Apparently it is rare in Florida for a batterer to be convicted, as even in the largest city in that state, diversion is used in most misdemeanor domestic violence cases. See Dana Canedy, *Officials Drop Criminal Charge Arising in Miami Mayor’s Spat*, N.Y.TIMES, August 7, 2001, at <http://www.nytimes.com/2001/08/07/national/07MIAMI.html> (quoting the Miami-Dade state attorney as saying this is the standard disposition for first time offenders charged with misdemeanor battery).

372. 713 So. 2d 1094 (Fla. Dist. Ct. App. 1998)

373. *Id.* at 1095.

374. *Id.*

375. *Id.*

376. IOWA CODE ANN. § 598.41 (West Supp. 2001).

also a best interests factor if the presumption does not apply.³⁷⁷ Iowa has only three appellate cases on point, two of which call into question the usefulness of this limited version of the presumption.³⁷⁸ However, in the most recent case, the presumption was the key factor in reversing an award of custody to the batterer.³⁷⁹

In the first case, *In re Marriage of Ford*,³⁸⁰ the trial court awarded joint custody, with the husband as primary caretaker.³⁸¹ The trial court appeared to be unaware of the new statute, as the court did not mention this in its order, nor did it discuss in any detail the evidence creating a presumption against joint custody in domestic violence cases.³⁸² In spite of this omission, the Iowa Supreme Court upheld the trial court order.³⁸³ The Iowa Supreme Court stated that the trial court “gave careful thought to the domestic abuse issue and found that it was not significant enough to be the sole factor in determining custody of the children.”³⁸⁴ The state supreme court also held that the husband had rebutted the presumption against joint custody by showing changes in his life since the last incident of abuse four years earlier.³⁸⁵ These changes included getting help from his family and church, becoming an active church member, earning his college degree, obtaining a full time job, and overcoming his substance abuse problems.³⁸⁶ Though he never went to a batterer’s program, the husband was found to be the more stable parent, since the wife had moved out to live with her boyfriend and left the children with the husband.³⁸⁷

In the second Iowa case, *In re Marriage of Forbes*,³⁸⁸ the mother and father were given joint custody and the father was awarded primary physical care even though he had pled guilty to abusing

377. *Id.* § 598.41(2)(c).

378. See *In re Ford*, 563 N.W.2d 629 (Iowa 1997); *In re Marriage of Forbes*, 570 N.W.2d 757 (Iowa 1997); *In re Sulzner*, No. 99-1400, 2000 WL 504728, *2 (Iowa Ct. App. Apr. 28, 2000).

379. *In re Sulzner*, 2000 WL 504728 at *2.

380. 563 N.W.2d 629.

381. *Id.* at 630.

382. *Id.* at 629-34.

383. *Id.* at 634. Iowa has no intermediate appellate court. Thus, both cases interpreting the statute are from the state supreme court.

384. *Id.* at 632.

385. *Id.* at 632-33.

386. *Id.* at 633.

387. *Id.* at 634. The Iowa statutes, like most presumption statutes, do not include specific rebuttal factors that the court must consider.

388. 570 N.W.2d 757 (Iowa 1997).

the wife, there were several police reports of his abuse, and the wife had obtained a protective order.³⁸⁹ The court found that the wife's discipline of the children was very abusive and that both parents had abused each other.³⁹⁰ The trial court failed to discuss the presumption statute in its order, or to find whether the presumption had been triggered or rebutted.³⁹¹ In upholding the trial court's order, the Iowa Supreme Court stated that it was not sure that the wife had shown a "history" of domestic abuse by the husband.³⁹² It further held that the husband had rebutted any presumption against him by the evidence that the wife had been abusive to him and to the children.³⁹³

In the most recent case, *In re Sulzner*,³⁹⁴ the presumption was the key factor in the trial court's decision to award custody to the mother, with supervised visitation to the father.³⁹⁵ The custody award was upheld by the appellate court, although the visitation issue was remanded, with instructions to order unsupervised visitation.³⁹⁶ The father had been convicted of domestic assault against the mother.³⁹⁷ The appellate court noted that if there was only one documented incident, that might not have triggered the presumption.³⁹⁸ However, in this case there was credible evidence that the father had repeatedly abused the mother.³⁹⁹ His attempt to rebut the presumption by citing his completion of a court-ordered batterers' education program was rejected by the trial court.⁴⁰⁰ The supreme court agreed with this holding, noting that "[the father's] post-separation hostility towards [the mother] suggests he does not understand the extent to which his abusive behavior adversely affects [the child]."⁴⁰¹

389. *Id.* at 759.

390. *Id.*

391. *Id.*

392. *Id.* at 760.

393. *Id.*

394. No. 99-1400, 2000 WL 504728, at *1 (Iowa Ct. App. Apr. 28, 2000).

395. *Id.* at *2.

396. *Id.* at *2-*3.

397. *Id.* at *1.

398. *Id.* at *2.

399. *Id.* at *1.

400. *Id.* at *2.

401. *Id.*

(5) Massachusetts

Massachusetts adopted a rebuttable presumption in 1998,⁴⁰² which is triggered by a “pattern or serious incident of abuse.”⁴⁰³ While the statute is not specifically automatically triggered by the issuance of a protective order, the underlying facts in the protective order can be grounds for a finding of abuse.⁴⁰⁴ The statute also states that the court must make written findings regarding the effects of the abuse on the child.⁴⁰⁵

While the legislation was pending, the state senate asked the state supreme court to give an opinion as to the constitutionality of such a presumption.⁴⁰⁶ The supreme court issued a formal opinion, holding that this statute would withstand constitutional scrutiny.⁴⁰⁷ The high court held that the child’s interest in being free of abuse and neglect and the state’s interest in promoting the welfare of its children outweigh any risk of erroneous deprivation of the parental right to a relationship with the child which might result from the application of the “preponderance of the evidence” standard in a custody proceeding between the parents when there is proof of a pattern of abuse or an incident of serious abuse.⁴⁰⁸

However, in the only case citing the statute to date, *In re Custody of Zia*,⁴⁰⁹ the appellate court found the statute inapplicable.⁴¹⁰ In that case, the father was awarded sole legal and physical custody, even though the mother had been the primary caretaker and the father had been convicted of a drug offense and assault and battery against someone else.⁴¹¹ The mother had also

402. MASS. GEN. LAWS ch. 209A, § 3 (2001).

403. *Id.* This is a higher standard than that needed to obtain a protective order in Massachusetts, which may be one reason there does not seem to have been any judicial reluctance to issue protective orders for fear of triggering the presumption against custody to batterers. E-mail from Doug McCormack, Mass. Attorney/advocate to author, Professor of Law at California at (June 18, 2001) (on file with author). For a discussion of the Massachusetts statute, see generally Quirion, *supra* note 36. For an argument that prior Massachusetts statutes and case law could serve as the basis for a rebuttable presumption even without a statute explicitly authorizing this, as well as an argument in favor of such a statute, see generally Pauline Quirion et al., *supra* note 49.

404. MASS. GEN. LAWS ANN. ch. 209A (West Supp. 2001).

405. *Id.*

406. Opinion of the Justices to the Senate, 691 N.E.2d 911, 917 (Mass. 1998).

407. *Id.*

408. *Id.* at 916.

409. 736 N.E.2d 449 (Mass. App. Ct. 2000).

410. *Id.* at 454.

411. *Id.* at 451.

obtained two protective orders against him, and the father faced pending assault charges, though it is unclear from the decision who the victim was.⁴¹² In spite of all this evidence of the father's abuse, the trial court used a best interests analysis, barely mentioning the presumption statute.⁴¹³ The appellate court affirmed the trial court's order, dismissing the domestic violence issue in one short paragraph.⁴¹⁴ It stated that the trial court had "considered the question of abuse and was of the opinion that the present case presented no history or pattern of domestic violence that would preclude an award of custody to the father."⁴¹⁵ The presumption against custody to batterers was mentioned only in passing, in a footnote.⁴¹⁶ The case is troubling, as it raises the question as to what triggers the presumption. If two protective orders, an assault conviction, and a pending assault charge are not "a history or pattern of domestic violence," what is?⁴¹⁷

(6) *Minnesota*

In 1990, Minnesota enacted its presumption statute, applicable only in joint custody cases.⁴¹⁸ Since then, there have been only three appellate cases decided regarding domestic violence allegations in custody battles.⁴¹⁹ Two of the three are unpublished and only one even mentions the presumption statute. Thus, the statute appears not to have been particularly effective in ensuring

412. *Id.*

413. *Id.*

414. *Id.* at 456.

415. *Id.*

416. *Id.* at 456 n.12. "The mother makes no argument that the father's conduct constitutes a pattern or serious incident of abuse that would give rise to the rebuttable presumption contained in §10(e)."

417. Given the pre-presumption decision by the Massachusetts Supreme Court, in which the court held that it was reversible error not to make findings of fact on domestic violence in a custody case where domestic violence had been an issue, *Custody of Vaughn*, 664 N.E.2d 434, 440 (Mass. 1996), *Zia* appears actually to be a step backward.

418. MINN. STAT. § 518.17 (2000). Loretta Frederick, a prominent domestic violence advocate and attorney in Minnesota, reported that there has been no backlash to the presumption statute because it is so weak. Telephone Conversation Loretta Frederick, Attorney, with author (July 16, 2001).

419. *See Schmid v. Schmid*, No. C9-99-1080, 2000 WL 108785 (Minn. Ct. App. Feb. 1, 2000); *Canning v. Wieckowski*, No. C4-98-1638, 1999 WL 118509 (Minn. Ct. App. Mar. 9, 1999); *Nazar v. Nazar*, 505 N.W.2d 628 (Minn. Ct. App. 1993) (review denied, Oct. 28, 1993) (superseded by statute as stated in *Papetti v. Papetti*, No. C2-99-563, 2000 WL 31789 (Minn. Ct. App. Jan. 18, 2000)).

that domestic violence is given great weight by custody judges.

In the first case, *Nazar v. Nazar*,⁴²⁰ the trial court had awarded custody to the father where the mother had left the state with the children and defaulted in the divorce, having had no notice of it.⁴²¹ Though the appellate court did not mention the presumption against joint custody in domestic violence cases, it did reverse the trial court's custody decision, based on a best interests analysis.⁴²² It reasoned that at the foundation of the dissolution were the allegations that the father physically, emotionally and verbally abused the mother and children. It stated that the trial court must seriously examine any allegations of *child* abuse before determining custody.⁴²³ The allegations of spousal abuse disappeared in this holding. Since the trial court had not undergone a serious examination of any of the allegations, the appellate court reversed.⁴²⁴ The appellate court also disagreed with the trial court finding that the mother had "falsely" and "maliciously" alleged that the father had been violent in order to obtain emergency custody jurisdiction from another state.⁴²⁵

In the second case, *Canning v. Wieckowski*,⁴²⁶ the appellate court affirmed the order granting custody of the child to the father in a case where both parties alleged abuse by the other.⁴²⁷ While the mother had been granted an order of protection, no findings of abuse were made at that time.⁴²⁸ The court appointed evaluator was of the opinion that the mother had fabricated the allegations of abuse, and the trial court found no substantial evidence that the alleged abuse had any effect on the child, relying on the evaluator's report.⁴²⁹ The court also found that the father was the more friendly parent, and that the mother "demonized" the father.⁴³⁰ The case does not mention the presumption, perhaps because joint custody was not being considered, and the Minnesota presumption

420. 505 N.W.2d at 628.

421. *Id.* at 638.

422. *Id.* at 633.

423. *Id.* (citing *Uhl v. Uhl*, 395 N.W.2d 106, 111 (Minn. App. Ct. 1986).

424. *Id.*.

425. *Id.* at 634.

426. No. C4-98-1638, 1999 WL 118509 (Minn. Ct. App. Mar. 9, 1999).

427. *Id.* at *1.

428. *Id.* at *5.

429. *Id.* at *4. The court stated that, "[h]ere, a thorough custody evaluation of both parties and the child was completed; the court had no need to investigate further." *Id.* at *4 n.5.

430. *Id.* at *5.

is not relevant when the court awards sole custody to either parent.

The most recent case and the only one that mentions the presumption is *Schmid v. Schmid*.⁴³¹ In this case, the trial court held that the presumption against joint custody was triggered by the mother's evidence that there were numerous instances of physical and verbal abuse by the father, and by an order of protection ordering the father to leave the household.⁴³² However, the trial court also found that the presumption was rebutted when the father produced evidence that the abuse occurred more than four years ago and had not been repeated.⁴³³ Then turning to a best interests analysis, the court awarded custody to the father.⁴³⁴ It reasoned that the abuse did not affect the parties' ability to co-parent, the children had developed a good relationship with the father, and the mother, if awarded sole physical custody, would restrict the father's access to the children, which would not be in their best interest.⁴³⁵ The father, on the other hand, was found to be the more friendly parent.⁴³⁶ The court of appeals affirmed the trial court's award of joint legal and physical custody.⁴³⁷ This case is illustrative of the need for specific factors that the court must consider in determining whether the presumption has been rebutted. The Minnesota statute contains no such factors.⁴³⁸ In their absence, courts are free to create their own standards.

(7) Case Study: An Unsuccessful Attempt to Pass Stronger Legislation

While Minnesota's statute does not seem to have much effect on the outcome of custody cases at present, it is not an easy matter to pass stronger legislation. The experience of advocates during the 2001 legislative session is an interesting case in point.

A retired Minnesota judge, Mary Louise Klas, stated that she has been intrigued for many years by the reluctance of the judiciary

431. No.C9-99-1080, 2000 WL 108785 (Minn. Ct. App. Feb. 1, 2000).

432. *Id.* at *1.

433. *Id.* at *2.

434. *Id.*

435. *Id.* at **1-2.

436. *Id.* at *2. The court noted that father acknowledged the importance of the mother in the child's life and that the mother did not reciprocate this importance of the father's role. *Id.* at *4.

437. *Id.*

438. MINN. STAT. § 518.17 (2000).

to recognize and understand domestic violence in custody cases.⁴³⁹ Since this did not improve with the appointment of more women to the bench, her conclusion was that this was not an issue of the gender of the judges, but that other factors were the cause, including very busy calendars.⁴⁴⁰ She stated that family court calendars are a “cattle call,” and that judges are pressured to keep the cases moving, giving them no time to stop and question allegations of domestic violence, or to issue the statutorily mandated findings required under the best interests statute.⁴⁴¹ She also mentioned that the attorneys are often not vigorously pursuing the arguments to make judges issue such findings.⁴⁴² Furthermore, the Minnesota statute provides that joint custody is presumed to be in the best interests of the children except in domestic violence cases.⁴⁴³ Thus in cases where domestic violence has actually taken place but the court does not believe the allegations, joint custody is often awarded.⁴⁴⁴

Even when the presumption is not applicable, Minnesota’s best interests statute requires judges to consider the effects of domestic violence on children.⁴⁴⁵ However, “this is consistently ignored” according to Cyndi Cook, the former Legislation and Public Policy Coordinator for the Minnesota Coalition for Battered Women.⁴⁴⁶ Partly in response to this, in 2001, the Minnesota State Bar,⁴⁴⁷ in conjunction with the Coalition and the Domestic Violence Legislative Alliance, sponsored legislation that would have strengthened the state’s custody laws in domestic violence cases.⁴⁴⁸ The first version would have extended the rebuttable presumption to sole custody cases, but was never introduced due to opposition

439. Telephone Conversation with Mary Louise Klas, retired judge (July 31, 2001). Judge Klas is part of a group of attorneys, advocates, and academics currently drafting Minnesota domestic violence custody legislation.

440. *Id.*

441. *Id.*

442. *Id.*

443. MINN. STAT. § 518.17 (2)(d) (2000).

444. Klas Telephone Conversation, *supra* note 439.

445. MINN. STAT. § 518.17.

446. Telephone Conversation with Cyndi Cook, former Legislation and Public Policy Coordinator, Minnesota Coalition for Battered Women (July 30, 2001).

447. This sponsorship was the result of a domestic violence expert, Loretta Frederick, working closely with the State Bar Family Law Section for several years. Frederick Telephone Conversation, *supra* note 418.

448. *Id.*; E-mail from Cyndi Cook, former Legislation and Public Policy Coordinator, Minnesota Coalition for Battered Women to author, Professor of Law, University of California at (Aug. 5, 2001) (on file with author).

from the Academy of Matrimonial Lawyers.⁴⁴⁹ In addition, domestic violence advocates heard feedback from other jurisdictions that a presumption against sole custody to batterers was sometimes problematic, especially in cases where the batterer has an attorney and the victim does not.⁴⁵⁰ Thus, they decided they were not prepared to move forward with such language at that time.⁴⁵¹

The two companion bills as introduced, S.F. 1212⁴⁵² and H.F. 1256,⁴⁵³ provided that the court must document how any award of custody or visitation to a batterer best protects the safety and emotional well being of the child and of the other party.⁴⁵⁴ Findings would be required whenever there were allegations of injury, use of a dangerous weapon, or a pattern of domestic abuse.⁴⁵⁵ Domestic abuse would be defined by the Domestic Abuse Act, which governs issuance of orders for protection.⁴⁵⁶ During legislative hearings, proponents of the bill stated that a “pattern of domestic abuse” meant two or more acts of domestic abuse, consistent with a Minnesota homicide statute.⁴⁵⁷ Thus, according to Ms. Cook, one threat of abuse, plus one incident in which the abuser interfered with the victim’s making a 911 call, could constitute a “pattern of domestic abuse,” triggering the requirement of findings.⁴⁵⁸

This standard is higher than that required by the Domestic

449. Cook Telephone Conversation, *supra* note 447; Cook E-mail, *supra* note 448.

450. Cook Telephone Conversation, *supra* note 447; Cook E-mail, *supra* note 448.

451. Cook Telephone Conversation, *supra* note 447; Cook E-mail, *supra* note 448.

452. S.F. 1212, 82nd Leg. (Minn. 2001).

453. H.F. 1256, 82nd Leg. (Minn. 2001).

454. Cook Telephone Conversation, *supra* note 446; Cook E-mail, *supra* note 448.

455. Cook Telephone Conversation, *supra* note 446; Cook E-mail, *supra* note 448.

456. Cook Telephone Conversation, *supra* note 446; Cook E-mail, *supra* note 448.

457. Cook Telephone Conversation, *supra* note 446. See MINN. STAT. § 518B.01(2)(a) (2000) (defining domestic abuse as physical harm, bodily injury, or assault, infliction of fear of one of these, terroristic threats, criminal sexual conduct). Since the statute does not require more than one of these, presumably one such act would suffice as grounds for a protective order.

458. Cook Telephone Conversation, *supra* note 446. This definition did not actually appear in the 2001 legislation, but may be included in the 2002 version. See *id.* § 518B.01(2)(a).

Abuse Act,⁴⁵⁹ which was a deliberate decision made by the proponents of the legislation.⁴⁶⁰ They were concerned about the significant numbers of victims of domestic violence who are arrested when they engage in self-defense or in non-legal violence.⁴⁶¹ If the custody statute were triggered by an arrest for the use of legal violence, that is, self-defense, it could backfire against many victims of domestic violence.⁴⁶² Their hope was that in setting the standard low for protective orders and higher for custody orders, this backlash could be minimized.⁴⁶³

However, when the legislation was considered in the state Senate, conservative Senators insisted on adding a provision defining how the court would determine whether domestic abuse had occurred.⁴⁶⁴ This amendment required that there had to be corroboration of the abuse before the court would be required to make the findings.⁴⁶⁵ The corroboration was limited to one of the following: a prior court finding of domestic abuse, the issuance of an order for protection, a criminal conviction,⁴⁶⁶ or a police report in which the officer observed domestic abuse.⁴⁶⁶ At the request of the State Bar, the legislation was withdrawn, as they could no longer support it.⁴⁶⁷ Supporters of the legislation are meeting to determine what the legislation should look like in the next session.⁴⁶⁸

The next version will probably include “predominant aggressor” language, giving the court guidance when there are allegations of abuse by both parties.⁴⁶⁹ However, this provision is

459. See *id.* § 518B.01(2)(a) (2001).

460. Cook Telephone Conversation, *supra* note 446.

461. *Id.*

462. *Id.*; Cook Email, *supra* note 448.

463. Cook Telephone Conversation, *supra* note 446. Loretta Frederick, another proponent of the legislation, stated that the definition of domestic abuse in the next version of the bill may be even more narrow, that is physical abuse alone, in order to minimize problems with backlash and inclusion of victims. Frederick Telephone Conversation, *supra* note 418.

464. Cook Telephone Conversation, *supra* note 446; Cook E-mail, *supra* note 448.

465. Cook Telephone Conversation, *supra* note 446; Cook E-mail, *supra* note 448.

466. Cook Telephone Conversation, *supra* note 446; Cook E-mail, *supra* note 448.

467. Cook Telephone Conversation, *supra* note 446; Cook E-mail, *supra* note 448.

468. Cook Telephone Conversation, *supra* note 446; Cook E-mail, *supra* note 448.

469. Cook Telephone Conversation, *supra* note 446. Minnesota does not have

controversial even among proponents of the legislation. Loretta Frederick, a prominent domestic violence advocate from Minnesota, is of the opinion that this language should not be included in a presumption statute, as this would trigger a full trial on that issue in every case, given the prevalence of batterers asserting that they are actually the victims.⁴⁷⁰

The next domestic violence custody bill in Minnesota may also address the role of guardians ad litem and child custody evaluators. This is an issue for two reasons. First, many judges give great weight, some would say undue weight, to the recommendations of these professionals.⁴⁷¹ Additionally, guardians ad litem in Minnesota are sometimes able to cause the parties to change their custody and visitation agreements, which in at least one case has had fatal results.⁴⁷²

During the pendency of the 2001 bill, several members of the legislature, as well as the matrimonial lawyers association, stated repeatedly that what a man does to his wife bears no relationship to his parenting.⁴⁷³ This viewpoint is, of course, what stands in the way of rebuttable presumption legislation or even legislation mandating that judges consider domestic violence in custody cases being passed and implemented around the country. In spite of this hurdle, it seems likely that eventually the Minnesota legislature will enact a stronger statute governing custody decisions in which domestic violence has occurred.

this type of language in its criminal statutes, thus, it would be a new concept for the entire state. *Id.* Ms. Cook also stated that during legislative hearings, proponents of the legislation argued that if there were allegations that both parties were abusive, it was imperative for courts to make findings, rather than ruling that the presumption was inapplicable. *Id.*

470. Frederick Telephone Conversation, *supra* note 418.

471. *Id.* Ms. Cook also stated that the Minnesota Supreme Court's Gender Fairness in the Courts Task Force is currently examining the role of guardians ad litem, so this may be another way to redefine this role, require training on domestic violence. Cook Telephone Conversation, *supra* note 446.

472. In one recent case described by Cook, the father convinced the guardian ad litem that he no longer required supervision during the visitation. Cook Telephone Conversation, *supra* note 446; Cook E-mail, *supra* note 448. When he refused to return the child, and the mother came to the father's house to get the child, the father killed the mother. Cook Telephone Conversation, *supra* note 446; Cook E-mail, *supra* note 448.

473. Cook Telephone Conversation, *supra* note 448.

(8) Nevada

Nevada adopted its presumption statutes on October 1, 1995.⁴⁷⁴ Since then there have been four appellate cases interpreting it.⁴⁷⁵ Overall, it appears that this statute has made a significant difference in how allegations of domestic violence are treated in custody decisions. However, it also appears that it is necessary to appeal the decisions in which the statute was ignored or given little weight, as in every appellate case so far, the trial court order was reversed and remanded.⁴⁷⁶

In *Lesley v. Lesley*,⁴⁷⁷ the first Nevada appellate case on point, the husband was initially awarded custody because the wife defaulted in the divorce.⁴⁷⁸ She had fled the state with the children and obtained temporary custody and a restraining order in the new state.⁴⁷⁹ She and witnesses later testified that there were several occasions on which the husband had struck her, leaving bruises.⁴⁸⁰ However, the Nevada trial court found that this was not a meritorius defense and refused to set the decree aside.⁴⁸¹ The Nevada Supreme Court reversed, citing the presumption statute, and citing the public policy of ensuring that children were not placed with an abusive parent.⁴⁸²

In *McDermott v. McDermott*,⁴⁸³ the initial decree ordered joint legal custody and gave the wife primary physical custody.⁴⁸⁴ The husband's motion to modify this in his favor was granted by the trial court, in spite of the fact that the husband had recently been convicted of assaulting the wife when she came to pick up the

474. NEV. REV. STAT. ANN. 125.480 (Michie Supp. 1999).

475. *Hayes v. Gallacher*, 972 P.2d 1138 (Nev. 1999); *Russo v. Gardner*, 956 P.2d 98 (Nev. 1998); *McDermott v. McDermott*, 946 P.2d 177 (Nev. 1997); *Lesley v. Lesley*, 941 P.2d 451 (Nev. 1997), *overruled by Epstein v. Epstein*, 950 P.2d 771 (Nev. 1997).

476. Nevada has no intermediate appellate court; thus all appellate cases are decided by the state supreme court.

477. 941 P.2d 451.

478. *Id.* at 452.

479. *Id.*

480. *Id.* at 453.

481. *Id.*

482. *Id.* at 455-56. The *Lesley* case was overruled in *Epstein v. Epstein* on other grounds. 950 P.2d 771 (Nev. 1997). *Epstein* held that the respondent does not need to show a meritorius defense in order to set aside a default judgment of divorce. *Id.* at 773.

483. 946 P.2d 177 (Nev. 1997).

484. *Id.* at 178.

child.⁴⁸⁵ The trial court stated that it “understands the provocation which might have existed,” suggested that the husband go to domestic violence classes, and threatened to order this unless he went voluntarily.⁴⁸⁶ It did not mention the presumption statute. This modification was reversed by the Supreme Court, holding that the trial court was required to consider the rebuttable presumption, which was triggered by the husband’s conviction.⁴⁸⁷ The dissent argued that since the presumption was not raised at the trial court level, it could not be the basis for reversal, and that the trial court’s decision appeared appropriate.⁴⁸⁸

In *Russo v. Gardner*,⁴⁸⁹ there was evidence that the father had abused the mother and two children, one of whom was not his.⁴⁹⁰ He had been convicted of abusing the mother, and there was a police report regarding his abuse of the woman who brought the children for visitation.⁴⁹¹ In spite of this abuse, the trial court found that the mother’s testimony was motivated by animus toward the father, and that the father had equitably adopted the child who was not his.⁴⁹² It granted the parents joint legal custody of both children, with primary physical custody to the mother.⁴⁹³ The state supreme court reversed the joint custody award, citing the presumption statute, which had been triggered and not rebutted, and noting that the trial court lacked jurisdiction to award custody of the non-biological child to the father.⁴⁹⁴

In the most recent Nevada case, *Hayes v. Gallacher*,⁴⁹⁵ the initial award was also joint legal custody, with primary physical custody to

485. *Id.*

486. *Id.* at 179.

487. *Id.*

488. *Id.* (Springer, J., dissenting). Contrast the holding in *McDermott* with that in *Ward v. Ward*, 742 So. 2d 250 (Fla. Dist. Ct. App. 1996), in which the mother’s failure to raise the statutory presumption in the trial court was held to preclude consideration of the statute by the appellate court. *Id.* See also *supra* note 355 and accompanying text (explaining the *Ward* case).

489. 956 P.2d 98 (Nev. 1998).

490. *Id.* at 99.

491. *Id.*

492. *Id.* at 100.

493. *Id.*

494. *Id.* at 103. A factually very similar case is found in *Barkaloff v. Woodward*, 47 Cal. App. 4th 393 (Ca. Ct. App. 1996). In *Barkaloff*, a batterer boyfriend was granted visitation of his ex-partner’s child by the trial court. *Id.* at 397. This was reversed by the appellate court due to lack of jurisdiction. *Id.* at 399.

495. 972 P.2d 1138 (Nev. 1999).

the mother.⁴⁹⁶ The mother had obtained a one year restraining order against the father based on his abuse of her, and the judge had made a finding that time that domestic violence occurred.⁴⁹⁷ Later, the mother sought permission to relocate with her new husband and the children to Japan, where the new husband had been transferred by the Air Force.⁴⁹⁸ Without an evidentiary hearing and also apparently without considering the presumption, a different judge ordered that custody be transferred from the mother to the father if the mother moved.⁴⁹⁹ The state supreme court reversed and remanded, ordering the trial court to reexamine the custody arrangement in light of the presumption statute, since the presumption had been raised by the earlier finding of domestic violence and had not been rebutted.⁵⁰⁰

(9)Oklahoma

Oklahoma adopted the rebuttable presumption against custody to batterers in 1991.⁵⁰¹ So far there are only two cases on point, with contrary holdings: *Brown v. Brown*⁵⁰² and *Smith v. Smith*.⁵⁰³

In *Brown*, the issue was what triggers the presumption.⁵⁰⁴ The trial court awarded custody to the father.⁵⁰⁵ There was evidence that the father had shoved the mother, threatened her with violence, and broken out the windows in the car of a man who the father believed was having an affair with the mother.⁵⁰⁶ The father had also acted similarly on other occasions with third parties.⁵⁰⁷ The trial court quoted the criminal definition of domestic abuse (physical harm or threat of imminent physical harm), and noted that the abuse in this case appeared to be “one or two isolated instances of prescribed behavior.”⁵⁰⁸ The trial court found that this behavior did not constitute “ongoing domestic abuse” so as to

496. *Id.* at 1139.

497. *Id.* at 1141.

498. *Id.* at 1139.

499. *Id.* at 1141.

500. *Id.* at 1142.

501. OKLA. STAT. ANN. tit. 43, § 112.2 (West 2001).

502. 867 P.2d 477 (Okla. Ct. App. 1993).

503. 963 P.2d 24 (Okla. Ct. App. 1998).

504. 867 P.2d at 477.

505. *Id.*

506. *Id.* at 479.

507. *Id.*

508. *Id.* at 480.

trigger the presumption.⁵⁰⁹ It also appeared to disapprove of the mother, mentioning that she had propositioned one of the father's co-workers and stating that she was evasive and dissembling.⁵¹⁰ The appellate court upheld the trial court order.⁵¹¹

In *Smith*, the father was also awarded custody by the trial court.⁵¹² However, in this case the court of appeals reversed and remanded, holding that there was clear and convincing evidence of ongoing domestic abuse by the father, triggering the presumption.⁵¹³ The evidence of abuse included the wife's restraining order declaration, in which she alleged that the husband had physically and verbally abused her, threatened to kill her, and threatened to kill himself, all in the presence of the child.⁵¹⁴ There were also several witnesses who testified regarding the father's abuse of the mother and child.⁵¹⁵ The Smith court held that the evidence met the test that the abuse be frequent and recent, and also held that the father had not rebutted the presumption.⁵¹⁶

c. Jurisdictions Where the Presumption is Very New

As we have seen above, implementation of presumption statutes is often uneven. However, in some states these statutes have actually resulted in a backlash towards victims of domestic violence, as will be described in this section.

In the jurisdictions where the presumption against custody to batterers is very new, there is not yet any appellate law on point. However, there are anecdotal accounts of how the law is working and a survey conducted by four law students in one state. Based on the history in other jurisdictions where the presumption has been in effect for several years, it appears that it may be necessary to ask the appellate courts to intervene before the procedure in the trial courts actually changes.

509. *Id.* at 479-80.

510. *Id.* at 479.

511. *Id.*

512. 963 P.2d 24, 25 (Okla. Ct. App. 1998).

513. *Id.* at 26.

514. *Id.* at 25.

515. *Id.*

516. *Id.* at 26.

(1) *Arizona*

Arizona adopted the presumption effective January 2001.⁵¹⁷ A lawyer with the Arizona Coalition Against Domestic Violence reported that the legal committee of the Coalition discussed how the presumption was working six months later, on June 21, 2001.⁵¹⁸ Their conclusion was that things have worsened since the enactment of the statute.⁵¹⁹ This attorney stated that there is a strong preference for joint custody on the part of the judiciary, and that sole custody is awarded almost exclusively in default cases.⁵²⁰ She estimated that the local legal advocacy center receives about six calls each week in which battered mothers are complaining that judges are refusing to hear evidence of domestic violence, in spite of the new statute.⁵²¹ For example, one judge looked at photos taken by the police and acknowledged that the violence had been significant, but then stated that because there was no evidence of a history of violence, the judge would not give any weight to it.⁵²²

The Arizona statute is internally inconsistent: when it discusses domestic violence as relevant to joint custody, it requires either “significant domestic violence” or “a significant history of domestic violence.”⁵²³ On the other hand, when it discusses custody generally, it requires only “an act of domestic violence against the other parent,” defined as intentionally causing or attempting to cause sexual assault or serious physical injury, or apprehension thereof, or engaging in a pattern of behavior which would qualify for a protective order.⁵²⁴ This inconsistency is inherently confusing; it is hoped that the legislature will amend the statute so that it is consistent.

While this lawyer said she suspected that the statute might be helping battered parents at the settlement stage, she had no actual proof of this.⁵²⁵ She also stated that Arizona has had a statute since 1986 stating that domestic violence is detrimental to children, but

517. See ARIZ. REV. STAT. §25-403(N) (2000).

518. E-mail from Dianne Post, Attorney, Arizona Coalition Against Domestic Violence, to author, Professor of Law, University of California at (June 26, 2001) (on file with author) [hereinafter Post E-mail (1)].

519. *Id.*

520. *Id.*

521. *Id.*

522. *Id.*

523. See ARIZ REV. STAT. § 25-403(E) (2000).

524. See *id.* § 25-403(N).

525. Post E-mail, *supra* note 518.

that it did not seem to make a difference, so it was predictable that the new statute might have the same lack of effect.⁵²⁶

(2) Oregon

Oregon adopted the presumption effective in 2000.⁵²⁷ Lawyers specializing in domestic violence family law cases give mixed reports at this point. An attorney working for the Oregon Coalition Against Domestic and Sexual Violence reported that some unethical attorneys now send their clients to get restraining orders regardless of whether there has been any history of domestic violence in order to bolster the custody case.⁵²⁸ She commented that such orders are fairly easy to obtain in Oregon.⁵²⁹ She also stated that the new statute does not seem to be keeping batterers from getting custody, probably because the batterers “tend to look better on paper.”⁵³⁰ She opined that the presumption is fairly easily rebutted: in cases where the father has a home and job, and does not suffer from post-traumatic stress disorder or chemical dependencies, judges are finding that these factors rebut the presumption.⁵³¹ She concluded that the new statute has not been very helpful, other than philosophically.⁵³²

A staff attorney from Oregon Legal Aid reports that in one county, the new statute has resulted in a backlash in terms of the issuance of restraining orders.⁵³³ Characterizing this as a “huge

526. E-mail from Dianne Post, attorney for Arizona Coalition Against Domestic Violence to author (July 3, 2001) (on file with author) [hereinafter Post Email 2]. This is apparently referring to Arizona Statute section 25-403(M). ARIZ. REV. STAT. § 25-403(M) (2000).

527. OR. REV. STAT. § 107.137(2) (2000).

528. E-mail from Katy Yetter, Attorney, Oregon Coalition Against Domestic and Sexual Violence, to author, Professor of Law, University of California at (June 18, 2001) (on file with author).

529. *Id.*

530. *Id.* This appears to be a reference to fact that there are no restraining order hearings in Oregon unless the respondent requests a hearing. *See* OR. REV. STAT. § 107.718 (1999). This was also mentioned by Maureen McKnight, the Regional Director for Oregon Legal Aid, who said that the fact that restraining orders are so often issued ex parte means that many judges feel that a finding of abuse in a restraining order has no effect in a subsequent family law proceeding. E-mail from Ms. McKnight, Regional Direction for Oregon Legal Aid, to author, Professor of Law, University of California at (June 18, 2001) (on file with author).

531. *Id.*

532. *Id.*

533. E-mail from Caitlin Glass, Attorney, Oregon Legal Aid, to author, Professor of Law, University of California at (June 16, 2001) (on file with author). Ms. Glass summarized comments made to her from Legal Aid attorneys in several

problem” in that county, she stated that judges are continuing orders without making findings, ordering joint custody prior to any hearing or trial, or setting up parenting plans without making custody orders.⁵³⁴ In other counties, however, there does not seem to be this backlash, though it may be harder to get a restraining order now if the respondent is represented.⁵³⁵ Legal Aid attorneys are also seeing more abusers filing for restraining orders in hopes of receiving the benefit of the new statute.⁵³⁶ In terms of orders issued in dissolution and custody cases, she reported that in some counties, judges are reluctant to apply the new presumption.⁵³⁷

Another Oregon attorney stated that the presumption works well in her county when custody is being decided in a restraining order hearing.⁵³⁸ She also stated that these judges accepted the issuance of a restraining order as preclusive on the issue of whether the presumption had been raised.⁵³⁹ However, she stated that when this issue is being decided at a custody trial, judges will easily find that the presumption has been rebutted if the judge wants to award custody to the abuser.⁵⁴⁰ She said the practice is often to hear all the evidence, but then to make the decision based on the traditional best interest factors, finding that these factors rebut the presumption.⁵⁴¹ This attorney has argued that the new statute means the court must treat domestic violence as the most important and primary factor before looking at traditional factors, and that the abuser must rebut the presumption by engaging in batterers’ treatment or otherwise demonstrating that the abuse will not impact the child.⁵⁴² However, as of yet, no judge has accepted this argument.⁵⁴³ She concluded that she would like to see a higher court interpret the new statute so that the trial courts have guidance on how it is rebutted.⁵⁴⁴

counties. *Id.*

534. *Id.*

535. *Id.*

536. *Id.*

537. *Id.*

538. E-mail correspondence from Jud Carusone, Oregon attorney, to author, Professor of Law, University of California at (June 13, 2001) (on file with author).

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.*

543. *Id.*

544. *Id.*

(3) California

In March and April of 2001, a telephone survey was conducted by four students at Boalt Hall School of Law, UC Berkeley, on how California's rebuttable presumption statute, Family Code section 3044, was working.⁵⁴⁵ This statute became effective January 1, 2000. The students interviewed twenty-four people from nine counties throughout the state, including attorneys, judicial officers, legislative aides, custody evaluators, survivors of domestic violence, domestic violence experts, and community resource people.⁵⁴⁶ The overall conclusions of the students were that the statute's passage "is a rather hollow victory for social justice,"⁵⁴⁷ but also that the new code section is "a positive addition with significant potential."⁵⁴⁸

The students found that there were major problems with section 3044 of the California Family Code, consisting of "inconsistent and often distorted implementation."⁵⁴⁹ The problems fell into four categories.⁵⁵⁰ First, there were polarized positions with regard to the purpose of the code section.⁵⁵¹ These took the form of disagreement as to whether domestic violence is relevant to the custody decision.⁵⁵² For many years, California has required that judges consider any past domestic violence in every custody decision.⁵⁵³ Respondents also disagreed with the provision in the statute that domestic violence is relevant to legal custody as well as physical custody orders.⁵⁵⁴ Finally, some respondents felt that judges already adequately considered the occurrence and effect of domestic violence without a statutory directive.⁵⁵⁵ Notably, an earlier survey conducted by the California Alliance Against Domestic Violence in 1998 found that many judges did not take domestic violence into account in custody decisions, thus ignoring both prior pieces of legislation on this topic.⁵⁵⁶ This lack of judicial

545. Debbie Warren et al., California Family Code § 3044: Passage, Implementation and Effects 22-23 (2001) (unpublished manuscript, on file with author).

546. *Id.* at 22.

547. *Id.* at 23.

548. *Id.* at 22.

549. *Id.* at 23.

550. *Id.*

551. *Id.*

552. *Id.* at 23-26.

553. CAL. FAM. CODE § 3011 (West 2000).

554. Warren et al., *supra* note 545, at 23-24.

555. *Id.* at 24-25.

556. *Id.* at 13. The unpublished C.A.A.D.V. survey results are on file with the

response to the prior legislation was one of the reasons cited to the legislature in arguing for the enactment of a rebuttable presumption.⁵⁵⁷

The second problem the students found was that many respondents saw the statutory language as ambiguous.⁵⁵⁸ Even though the California statute is much more specific than many other presumption statutes, some respondents stated that they thought the statute should more clearly define what type of finding was necessary in order to trigger the presumption.⁵⁵⁹ Additionally, though the statute contains a list of factors which the court must consider in determining whether the presumption has been overcome, as discussed in Part III, some respondents felt that this section of the statute was still too vague and should provide more direction to the court (for example, what if the batterer has complied with one or two of the factors but not with the others?).⁵⁶⁰ This request from the judiciary for more specific legislative directives is ironic, considering that the legislation was opposed by the California Judges' Association, who argued that the discretion of family law judges in making custody decisions should not be further limited.⁵⁶¹

Third, the survey found that some judges were not resistant to the presumption and appeared to have adequate resources, including enough time on court calendars to hold a timely evidentiary hearing as to whether domestic violence had occurred.⁵⁶² These judges had either always given domestic violence great weight in making custody decisions, or had recently changed their court practices and procedures to give this issue

author. One of the prior pieces of legislation was A.B. 200. *See infra* Part III (H).

557. *See Devers*, *supra* note 99, at 3-5. "Providers of services to domestic violence victims from 12 counties, ranging from Shasta to San Bernardino, responded to the [C.A.A.D.V.] survey. The result was unanimous that AB 200 is virtually ignored except in those courts that were already dealing effectively with domestic violence prior to its passage. One response from Santa Cruz County was particularly telling: 'I have never heard a judge here make a specific finding as mandated by AB 200, and one, when prompted, said he didn't have to - that was his order.'" *Id.* at 5.

558. Warren et al., *supra* note 545, at 23.

559. *Id.* at 26-27. The California presumption is triggered by the same low level of abuse required to qualify for a restraining order. Section 3044 of the California family code cross references section 6320 of the Domestic Violence Prevention Act in defining domestic violence.

560. *Id.* at 24-27.

561. *See Devers*, *supra* note 98, at 7-8.

562. Warren et al., *supra* note 545, at 29, 33-34.

greater weight.⁵⁶³

However, the survey also found that there was substantial judicial resistance in several counties, due in part to lack of such resources.⁵⁶⁴ Some judges opined that joint custody was almost always appropriate, even in domestic violence cases.⁵⁶⁵ Judicial officers also stated that they resented statutorily imposed restrictions on their discretion.⁵⁶⁶ Examples of such resistance on the part of judges took the form of ordering the litigants to repeatedly try to mediate the dispute in hopes that they would eventually come to an agreement.⁵⁶⁷ Additional examples of resistance included awarding joint custody in spite of police reports or even prior convictions for domestic violence.⁵⁶⁸

The lack of judicial resources is a very real problem in many areas. Many judges have severe time constraints on their calendars, making the presumption yet another hurdle which they have to surmount.⁵⁶⁹ In these courts, judges are faced with a dilemma regarding how to structure temporary custody and visitation, given that it may be months before the calendar is free for an actual evidentiary hearing, so the temporary order is usually based only on allegations.⁵⁷⁰

Finally, the students found that there had been an adverse impact on the issuance of restraining orders in several California counties.⁵⁷¹ In these areas, it has become increasingly difficult to obtain orders; judges are now requiring independent corroboration of the abuse in many cases,⁵⁷² and of course many victims have no such corroboration. This appears to be happening because judges are leery of triggering the presumption through the issuance of a restraining order. However, it is unclear whether the mere issuance of an order is in fact a finding triggering the presumption. In response to this concern, some judges are encouraging or requiring the parties to stipulate to the order, which thereby avoids a court finding of abuse.⁵⁷³ Other judges are

563. *Id.* at 33-34.

564. *Id.* at 29-33.

565. *Id.* at 29-30.

566. *Id.* at 29.

567. *Id.* at 33.

568. *Id.*

569. *Id.* at 30.

570. *Id.* at 29.

571. *Id.* at 34-37.

572. *Id.* at 35.

573. *Id.* at 31-32.

issuing restraining orders but stating on the record that they are making no finding of domestic violence.⁵⁷⁴ (Query whether such orders would be upheld on appeal, since there appears to be no basis for the order, and thus no subject matter jurisdiction.) Still other judges are continuing temporary orders several times rather than issuing a long-term order after hearing, again hoping to avoid the triggering of the presumption.⁵⁷⁵

The backlash in court response to restraining order requests has been great in some parts of the state. Some victims have been discouraged from even seeking judicial remedies for domestic violence.⁵⁷⁶ If the victim does seek such help, she is often forced to go to court several times, which may have serious consequences in terms of her employment,⁵⁷⁷ as well as forcing her to confront the batterer repeatedly. And ironically, the more times the court requires the victim to return to court, the more court time is spent on the case, arguably wasting this precious resource, which perhaps could be better spent holding an evidentiary hearing.

The survey concludes with several recommendations. These include greater and more consistent implementation of the statute,⁵⁷⁸ clarification from the legislature or the appellate courts as to what constitutes a “finding” of domestic violence,⁵⁷⁹ eliminating the negative effects on issuance of restraining orders,⁵⁸⁰ and increased resources for family courts.⁵⁸¹ The survey also recommended educating judges regarding the fact that the presumption is rebuttable,⁵⁸² educating attorneys regarding how to advocate for this new law and how to work with courts on changing existing practices,⁵⁸³ and educating the public as to the relevance of domestic violence to custody decisions, given that many litigants have no attorneys.⁵⁸⁴

574. *Id.* at 32.

575. *Id.* at 33, 36-37.

576. *Id.* at 37.

577. While the California Labor Code section 230 protects victims of domestic violence who take time off to go to court, many victims do not know about these provisions or how to access legal help to enforce them. CAL. LABOR CODE §230 (West 2000).

578. Warren et al., *supra* note 545, at 38.

579. *Id.* at 40-43.

580. *Id.* at 38.

581. *Id.* at 47-48.

582. *Id.* at 44-45.

583. *Id.* at 47.

584. *Id.* at 51. One way to educate the public is through each state’s Judicial

The survey also recommended the alteration of pre-existing roles in family court,⁵⁸⁵ along with educating mediators working for Family Court Services regarding how to address domestic violence cases generally and the use of this new statute in particular.⁵⁸⁶ One of the challenges which will need to be resolved in implementing this new law in California will be how mediators working for Family Court Services will deal with domestic violence cases. California mandates mediation of all disputed custody or visitation cases.⁵⁸⁷ While victims of domestic violence may bring a support person to the mediation session,⁵⁸⁸ or request a meeting separate from the perpetrator,⁵⁸⁹ they are not exempted from the mediation process. Given that mediators do not usually engage in fact-finding, but that in many counties they make recommendations to the court, their procedures may need to be changed, so that they actually investigate allegations of abuse and then apprise the court of their findings.⁵⁹⁰

Some California attorneys routinely appear in front of the same judges every week, representing or assisting numerous of clients from the local restraining order clinics. Several of these attorneys have expressed an unwillingness to “rock the boat” by insisting that the judges comply with the new domestic violence custody statutes.⁵⁹¹ They state that they are concerned that if they advocate too stridently on behalf of one client, the judge will retaliate against all the other clients coming from that same agency.⁵⁹²

Additionally, judges presiding over these dockets are aware

Council website. *See, e.g.*, Online Self Help Center, <http://www.courtinfo.ca.gov/selfhelp> (launched by the California Judicial Council). This site includes information about custody cases and domestic violence issues. *Id.*

585. Warren et al., *supra* note 545, at 48-50.

586. *Id.* at 45-46.

587. CAL. FAM. CODE § 3160 (West 2001).

588. *Id.* § 6303 (West 2000).

589. *Id.* § 3181 (West 2000).

590. A proposed California Rule of Court, R1257.2, includes changing the job description of court-based mediators to include investigation of allegations of abuse. If adopted, this will become effective Jan. 1, 2002. <http://www.courtinfo.ca.gov/invitationstocomment/prevprop.htm> (scroll down to SPR01-22).

591. Conversations between author and anonymous attorneys from the San Francisco Bay Area on various occasions in spring 2001.

592. Author's discussions with anonymous attorneys from non-profit agencies working exclusively with victims of domestic violence and practicing in the San Francisco Bay Area, spring and summer 2001.

that the likelihood that a litigant will appeal one of their decisions is highly unlikely. This is due in part to the high incidence of parties who represent themselves, in part to the high cost of an appeal, and in part to the reluctance of attorneys to anger the judge by appealing judgments. Thus, they are not actually required to follow the statutory mandates, such as making a formal finding when ordering joint custody in a case where there are allegations of domestic violence.⁵⁹³

V. POSSIBLE SOLUTIONS TO PROBLEMS WITH IMPLEMENTATION

A. Introduction

In a 1995 article examining the effectiveness of the presumption statutes in effect in eight jurisdictions at that time, the authors came to the following conclusions:⁵⁹⁴ 1) The private bar is remarkably uninformed about domestic violence, and the quality of representation afforded victims by the bar is uneven. 2) Legal Services attorneys are relatively well informed about domestic violence. 3) Few jurisdictions have court systems that are “user-friendly” to Pro Se custody litigants. 4) The judiciary is largely uninformed about domestic violence and judicial practice is inconsistent. 5) Specialized court services related to domestic violence custody cases are sorely wanting. 6) Domestic violence custody cases are not mandated to mediation in most presumption states. 7) Evaluators and guardians ad litem utilized by the courts have minimal specialized training on domestic violence. 8) The award of a protection order to an abused parent in most presumption states is not dispositive of the claim of domestic violence in custody proceedings. 9) The lack of secure supervised visitation facilities jeopardizes the protective mandates in state codes.

Additionally, these commentators found that it is not yet clear that the domestic violence presumptions have effected ameliorative and protective outcomes for children and abused parents.⁵⁹⁵ In discussing this, the authors noted that while “[e]vidence of domestic violence is more . . . readily admitted in custody proceedings now than before statutory reform made domestic

593. See CAL. FAM. CODE §§ 3011, 3020, & 3044 (West Supp. 2001).

594. Family Violence Project, *supra* note 18, at 211-222.

595. *Id.*

violence relevant,” resulting in a practice of generally awarding sole physical custody to victims, courts still were not safeguarding women and children from further abuse.⁵⁹⁶ Furthermore, they noted that the statutes were sometimes being used against women who defended themselves or their children.⁵⁹⁷ In most presumption states, however, this was not a serious problem because the standard for triggering the presumption was high enough that the victims’ actions were not found to have raised it.⁵⁹⁸

What can we learn from all these comments, cases, and surveys? How do we ensure that domestic violence is given the weight it deserves in custody disputes without creating even more problems for victims of abuse? These are complex questions, without easy solutions. Additionally, the solutions may need to vary depending on which state and local community are involved. However, some conclusions can be drawn from this inquiry, and some recommendations made.

B. Statutory Language

First, statutes of this kind should be carefully worded, giving a clear definition of what type of abuse is needed in order to trigger the presumption against custody to a batterer. Additionally, the statute should clarify what standard of proof, and possibly what type of evidence is necessary in order to raise the presumption. For example, does issuance of a restraining order after a hearing automatically trigger the presumption or not?⁵⁹⁹

In making this determination, legislatures might consider adopting a higher standard of abuse than is used for restraining or protective orders, as this may minimize judicial reluctance to issue such orders.⁶⁰⁰ In deciding how domestic violence should be

596. *Id.* at 221. This is presumably a reference to visitation provisions, a source of great and ongoing danger in many post-divorce families.

597. *Id.*

598. *Id.*

599. See W. Kathleen Baker, *Rebuttable Presumptions*, 2 SYNERGY 2 (published by Nat. Council of Juv. & Fam. Ct. Judges) (Winter/Spring 1997) and Pincolini, *supra* note 56, at 8.

600. For example, the Massachusetts presumption statutes, MASS. GEN. LAWS ANN chs. 208 § 31A, 209 § 38, and 209C § 10 (West Supp. 2001), incorporate a higher standard than is used in the protective order statute, 209A. The former requires “a pattern or serious incident of abuse,” while the latter requires only “one or more of the following acts,” and includes threats and attempted physical harm as well as actual physical harm or involuntary sexual relations.

defined in the presumption statute, legislatures must decide whether to include physical abuse only, or also threats of physical abuse and destruction of property. It is also possible to include the infliction of emotional abuse as part of the definition of domestic violence.⁶⁰¹ Of course, if emotional abuse is included, it is advisable to define this term for purposes of the statute, to prevent a finding that occasional verbal arguments or infrequent insults were sufficient to trigger the presumption. Note that there is a split among domestic violence experts regarding the inclusion of threats or emotional abuse in presumption statutes. In some cases, statutes were deliberately very narrowly drawn, in order to prevent a backlash against victims of domestic violence, who may have at times made statements which could be interpreted as threats or as emotional abuse.⁶⁰²

It is also advisable to define abuse for triggering the presumption to include abuse against current or former partners, not just abuse against the co-parent who is contesting the custody of the child.⁶⁰³

Statutes such as Minnesota's allowing either parent to trigger a presumption favoring joint custody merely by requesting this should be amended to clarify that the domestic violence presumption trumps any joint custody presumption.⁶⁰⁴

Furthermore, the statute should establish a clear procedure and standard of evidence for rebuttal of the presumption, with enumerated factors that the court must consider. This helps prevent the court from simply making a conclusory statement that the batterer's testimony showed that it was in the best interests of the child to be with him or her, as was the situation in several of the cases discussed above.

An additional recommendation is that the custody statute contain a provision requiring judges to make written findings regarding whether domestic violence has taken place, why custody or visitation with the abuser has been ordered, and how the

601. Pincolini, *supra* note 56, at 8.

602. Family Violence Project, *supra* note 18.

603. *See, e.g., Anderson v. Hensrud*, 548 N.W.2d 410, 414 (N.D. 1996) (holding that the presumption could be raised by abuse of other victims besides the co-parent).

604. *See, e.g., ALA. CODE* §§ 30-3-131, 30-3-133 (1975), as discussed in *Jackson v. Jackson*, 709 So. 2d 46, 48 (Ala. Civ. App. 1997) (holding that the joint custody preference is trumped by the rebuttable presumption against custody to batterers).

children and adult victim will be protected by the order. This could be triggered by any allegations of abuse,⁶⁰⁵ or by a judicial finding that abuse had occurred. This can both encourage judges to think carefully about any orders they make and lay a foundation for appellate review.

Statutes establishing rebuttable presumptions against custody to batterers should apply to all types of custody, sole or joint, legal or physical. These statutes need to specifically address the issue of contact between the children and the abusive parent, clarifying that the safety of everyone involved is the "bottom line." In many states, visitation statutes addressing domestic violence situations are already in place.⁶⁰⁶ In states without such provisions, the presumption statute should be amended to include language concerning visitation, or a companion statute should be enacted covering the issue of visitation in domestic violence cases.

Statutes should also provide that if the presumption is found not to apply (either because it was not raised, or because it was rebutted), domestic violence is still a factor that courts must consider when making any custody award.⁶⁰⁷ Statutes such as this will help ensure that the victim of domestic violence or the children's attorney is not starting from scratch, having to prove to the court that domestic abuse is relevant to the custody decision even when that abuse has not been sufficient to trigger the statutory presumption.

Statutes should also incorporate a dominant aggressor analysis, for the court to apply in cases where there are allegations of mutual abuse.⁶⁰⁸ This analysis should be specifically described, listing the factors for the court to consider in making its determination, and clarifying that the issue is not "who started the fight," but the history of violence between the parties, whether one party was injured more severely, and whether there is any evidence of self-defense.⁶⁰⁹

605. See, e.g., CAL. FAM. CODE § 3011 (West Supp. 2001) (containing such a requirement).

606. See, e.g., *id.* § 3100.

607. See, e.g., *id.* § 3011 (continuing to apply even if the presumption statute, CAL. FAM. CODE § 3044, does not).

608. See, e.g., LA. REV. STAT. ANN. § 9:364 (West 2000). This may be called a "primary aggressor" or "predominant aggressor" determination, as well as "dominant aggressor."

609. See, e.g., CAL. PENAL CODE § 836 (West 2000). However, as noted previously, at least one prominent domestic violence advocate is of the opinion that such a provision is not useful in a statute establishing a presumption against

C. Training

While the actual statutory provisions are important, the mere passage of the most well-written and comprehensive statute will not automatically solve the problems presented by cases in which domestic violence is an issue. One of the key aspects of implementing any statute is training for everyone involved. Participants in a 1995 survey on the effectiveness of the presumption statutes reported that “in those judicial districts and states where there has been specialized training of the bar, the ‘presumption’ has shaped judicial decision-making and has produced custody awards designed to safeguard children and abused parents. In fact, the anticipated changes in practice have been most noticeable in those jurisdictions where the courts and legal services programs developed specialized programs.”⁶¹⁰ Training needs to be provided for judges,⁶¹¹ mediators,⁶¹² custody evaluators,⁶¹³ family law attorneys,⁶¹⁴ and guardians ad litem.⁶¹⁵ The training needs to be very specific, addressing the studies leading to the passage of the state’s presumption statute, the legislative intent

custody to batterers, since its inclusion may trigger many more trials on the “primary” or “dominant” aggressor issue. Fredrick Telephone Conversation, *supra* note 418.

610. Family Violence Project, *supra* note 18, at 221-22.

611. In 1997, Minnesota passed a law mandating judicial education in the area of domestic violence and child custody. MINN. STAT. § 480.30 (2000). However, while such training is offered at the annual state judicial conference, judges are not actually required to attend. Cook Telephone Conversation, *supra* note 446. Such statutes are very rare, and are often opposed by judicial associations on the grounds that they violate the separation of powers doctrine. The Oregon Coalition Against Domestic Violence and Sexual Assault is offering statewide judicial training, focusing on the theme that one cannot be a batterer and a good parent at the same time. E-mail from Katy Yetter to author (June 19, 2001) (on file with author).

612. See, e.g., CAL. FAM. CODE §§ 1815, 1816, 3110.5 (West 2000).

613. See, e.g., *id.* § 3110.5 (West Supp. 2001); CAL. RULES OF COURT § 1257.7 (West 2001) (mandating annual training on domestic violence for custody evaluators).

614. In several of the appellate cases discussed above, the attorneys seemed to be unaware of the rebuttable presumption statute, as it was not raised at the trial court level. While some states are considering including domestic violence issues on the general bar examination, so far no state has done so. Thus, it is quite possible for family law attorneys to have had no training on domestic violence.

615. See, e.g., CAL. WELF. & INST. CODE § 16206 (West 2000) (mandating domestic violence training for court-appointed attorneys for children in juvenile court). While these attorneys do not have the same role as guardians ad litem, these are similar functions. Both groups should be mandated to have domestic violence training.

of the statute, how domestic violence is defined under the statute, how the presumption is raised, and how it is rebutted.⁶¹⁶

Time needs to be given to any concerns or disagreements on the part of the participants, as this is an important opportunity to discuss fundamental beliefs, necessary for any real attitudinal change.⁶¹⁷ After participating in this very specific and comprehensive training, it is more likely that these actors will feel a higher level of comfort with the new statutes and more willing to apply them on a daily basis, rather than resisting the statutes due to feeling unsure of how to proceed or because they do not understand the basis for the presumption.⁶¹⁸

D. Changing Roles of Family Court Services Staff, Mediators, Custody Evaluators, and Guardians ad Litem

Yet another part of the solution may be changing the role of mediators employed by Family Court Services staff. In many areas, the current job description is only to mediate between parents in contested custody cases. However, increasingly courts are changing this to provide that these workers should screen for and then investigate any allegations of abuse.⁶¹⁹ They could then report on their findings to the court. Mediators are also sometimes directed to be aware of and refer litigants to community resources such as domestic violence shelters, legal assistance, and batterers programs.⁶²⁰ This type of service is invaluable in cases where the litigants have no attorneys, which is becoming the norm rather than the exception in family law cases.⁶²¹

616. Such trainings have been provided for court-based mediators and child custody evaluators by the California Judicial Council. For more information, contact Julia Weber at the Center for Families, Children, and the Courts, Administrative Office of the Courts, San Francisco, California. They have also been provided for judges by the California Commission on Judicial Education and Research. For more information contact Bobbie Welling, CJER, Administrative Office of the Courts, San Francisco, California.

617. This is recommended in a thoughtful article discussing how to actually effect attitudinal change in the family courts on the topic of domestic violence. See Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273 (July 1999).

618. *Id.*

619. See, e.g., CAL. RULE OF COURT, R1257.2, which is due to take effect Jan. 1, 2002.

620. *Id.*

621. A 1997 study by the California Administrative Office of the Courts found that more than eighty percent of domestic violence cases are handled without attorneys. Sharon Lerman, *Litigants Without Lawyers Flood Courts*, 1 CAL. BAR J. 32

Additionally, in areas where guardians ad litem have decision-making power in custody cases, this role needs to be carefully examined and re-evaluated, as this may be an improper delegation of judicial authority.⁶²² In these jurisdictions, legislation, rules of court, or standards of judicial administration need to be enacted clarifying the judicial role as opposed to the roles of other professionals in custody cases.

E. Increased Funding for Attorneys for Low Income Victims of Domestic Violence

Due to the devastating funding cuts to the Legal Services Corporation under the twelve years of Presidents Reagan and Bush, the numbers of free or low cost attorneys available to help poor victims of domestic violence were greatly reduced.⁶²³ In custody cases involving domestic violence, victims are at a severe disadvantage if they are forced to represent themselves, but many have no choice.⁶²⁴

If presumption statutes are to be effective, money must be found for attorneys to handle these complex cases at the trial level. Additionally, a widespread pro bono project among the private bar needs to be instituted.⁶²⁵ In some areas, these attorneys can be trained by and co-counsel with attorneys employed by Legal Services or local non-profit domestic violence agencies.⁶²⁶ While Congress has earmarked funds for many attorneys to work on civil domestic violence cases around the country,⁶²⁷ this is still a huge

(2001).

622. Cook Telephone Conversation, *supra* note 446 (describing an example of what may have been the improper delegation of such authority).

623. Steve Berenson, *Politics and Plurality in a Lawyer's Choice of Clients: The Case of Stropnick v. Nathanson*, 35 SAN DIEGO L. REV. 1, 49 (1998) (noting that the "[l]egal Services Corporation has barely survived elimination, suffering deep funding reductions and draconian restrictions on the scope of its activities"); Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 FAM. L.Q. 617, 620 (1999) (observing that federal appropriations for these programs have been cut and that both government and private legal assistance meets only about 20.5 percent of the needs of the poor).

624. Lerman, *supra* note 6232.

625. For example, the Center for Domestic Violence Prevention, San Mateo, Ca., has been successfully recruiting and training attorneys from large firms to handle contested custody cases involving domestic violence at the trial level. Conversation with Kim Milligan, Attorney for C.D.V.P., Aug. 6, 2001.

626. *Id.*

627. The Violence Against Women Grants Office, part of the U.S. Dep't of Justice, has provided several million dollars in 1999, 2000 and 2001 to non-profit

and largely unmet need.

F. Using the Appellate Process

In a great many of the appellate decisions discussed above, courts overturned inappropriate trial court decisions in custody cases involving domestic violence. And in virtually all the reported appellate cases cited in this article, both parties were represented by counsel. Appellate review is how problems with trial court decisions are supposed to be resolved. Thus, our legal system is often ineffective if litigants have no access to the appellate courts.

In too many cases, poor victims of domestic violence cannot afford to file appeals when the family court awards custody to the batterer. While some Legal Aid agencies will take on such cases, many will not.⁶²⁸ Thus, funding must be found for private representation, or qualified pro bono attorneys must be recruited. Additionally, attorneys who routinely represent many victims at the trial court level must be trained to raise the presumption issue appropriately, laying the foundation for an appeal. And these attorneys could be encouraged to appeal decisions that appear to be in violation of the statute.

G. Community Organizing

In addition to the above recommendations, it is often necessary to organize members of the community before domestic violence is treated seriously in custody cases. This effort may focus specifically on the legal community, or may include the larger non-legal community.

For example, in some cases, judicial training has been attempted but has not been successful; either it is not mandated, or when it is, few judges attend.⁶²⁹ Thus, another avenue being tried in some jurisdictions is a court watch program, in order to obtain systematic information about how domestic violence custody cases

agencies around the U.S. to start meeting the civil needs of domestic violence victims, primarily focusing on family law cases.

628. Yetter E-mail, *supra* note 614. Ms. Yetter says that Oregon Legal Aid has not taken any appeals of domestic violence custody cases. *Id.* She says the priority at Legal Aid is to take on cases which will create new law. *Id.* Of course, a well reasoned appellate decision interpreting a new statute could resolve a lot of interpretation problems at the trial court level and save Legal Services trial attorneys much time and trouble.

629. Post E-mail, *supra* note 526.

are handled at the trial court level. Once this information is compiled and analyzed, the hope is that the presiding judge will be more willing to mandate training for the family law judges.⁶³⁰

Another example of community organizing on this topic comes from Minnesota, where the Duluth Abuse Intervention Project recently conducted and published an extensive report regarding judicial response to domestic violence, then met with judicial leaders to discuss the findings in the report.⁶³¹ While judges are barred by codes of ethics from discussing pending or specific cases, it is appropriate for them to examine the court's response in the aggregate. The response from the judiciary to this report and discussion has been positive.⁶³²

Another way to organize and also to conduct informal training with attorneys and judges is to work closely with them on policy committees. For example, when domestic violence attorneys join and participate in meetings with the family law section of the state bar, these "mainstream" attorneys become more knowledgeable about domestic violence issues, and may even become advocates for changing the laws.⁶³³

An example of organizing within the larger community is an ongoing project taking place in Durban, Ontario, near Toronto, in Canada. The domestic violence advocates there have used a community organizing model to address problems with custody cases involving domestic violence.⁶³⁴ They started with several focus

630. E-mail from Dianne Post, Attorney, Arizona Coalition Against Domestic Violence, to author, Professor of Law, University of California at (July 9, 2001) (on file with author) [hereinafter Post E-mail (3)]. Domestic violence court watch programs have been conducted in several states, though these usually focus on criminal cases. See, e.g., Sarah Buel, *Family Violence Court Watches: Improving Services to Victims by Documenting Practices*, THE TEXAS PROSECUTOR 16 (July/Aug. 1999). Minnesota also has a domestic violence court watch program, focusing on criminal cases; the results are used to inform the public when the judges are running for reelection. Cook Telephone Conversation, *supra* note 447. For more information about court watch programs, contact the Battered Women's Justice Project, 800-903-0111.

631. Cook Telephone Conversation, *supra* note 446.

632. *Id.*

633. Fredrick Telephone Conversation, *supra* note 418. Ms. Fredrick joined the family law section of the Minnesota State Bar and attended many of the meetings, raising domestic violence issues. *Id.* After a few years, the State Bar decided to sponsor the 2001 legislation extending the state rebuttable presumption to sole custody cases. *Id.*

634. Deborah Sinclair, et al., *In the Center of the Storm: Durham Speaks Out, A Community Response to Custody and Access Issues Affecting Woman Abuse Survivors and Their Children* (June 2000) at <http://www.durhamresponsetowomanabuse.com>

groups of mothers who were involved in such cases, led by a social worker/researcher.⁶³⁵ The findings and recommendations from these groups were then used as the basis for an ongoing working group and conferences in which survivors, advocates, judges, custody assessors, and others are participating.⁶³⁶ The results so far have been quite promising.⁶³⁷

VI. CONCLUSION

“I have always embraced the idea that the pursuit of a worthy, deep goal is never for a day or for a year, that the journey is long and hard, and no one can say how long it will take. You take in all the information you can, you decide what is right, and once you make the decision, you pursue it. You commit, with perseverance, steadfastness and faith.”⁶³⁸

Ending domestic violence is a monumental task. Effecting any fundamental changes in the legal system takes great perseverance and creativity. Enacting statutes creating presumptions against custody to batterers is not a “quick fix.” It does not solve the problems presented in these cases overnight. In some areas, it has actually produced a backlash, making it harder for victims to obtain restraining orders or limiting the effectiveness of such orders.

However, these difficulties should not discourage states from enacting statutes creating a presumption against custody to batterers. First, it appears that the courts that have been dealing with presumption statutes for the longest period of time seem to be using them most consistently. It seems that making a change this fundamental takes many years.

Second, these statutes are designed to protect victims and their children, and when applied appropriately, they accomplish this goal. While fully implementing such statutes and dealing with the backlash in some jurisdictions will take a great deal of work, the end result is well worth it. The ultimate goals include no longer enabling batterers to use the family law courts to continue to re-victimize their partners, and exposing many fewer children to ongoing abuse and inappropriate parenting. With steadfastness and ingenuity, we are slowly but surely moving in that direction.

635. *Id.*

636. *Id.*

637. *Id.*

638. CONGRESSMAN JOHN LEWIS WITH MICHAEL D'ORSO, WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT (1998).