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Infants - Parent and Child: Applying the Rebuttal Presumption against Awarding Custody to Perpetrators of Domestic Violence

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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)

I. FACTS

In early 1989, Plaintiff-Appellee, Shane Heck [hereinafter Heck], and Defendant-Appellant, Christie Reed [hereinafter Reed], began a romantic relationship at the ages of nineteen and sixteen, respectively.[1] By the fall of 1990, Heck and Reed were living together.[2] The couple had two children out of wedlock: Shana Rae Heck, born October 20, 1991, and Steven Shane Heck, born October 14, 1992.[3]

Their tumultuous relationship included several incidents of domestic violence.[4] According to Reed, Heck pushed and threw her around on several occasions.[5] He also punched her in the face once, causing her nose and mouth to bleed and swell.[6] On another occasion, he pulled out her hair, leaving a bald spot.[7] He also tore ligaments in her leg during an argument, forcing her to seek medical treatment.[8] Furthermore, Reed stated that Heck subjected her to verbal abuse throughout the relationship, including being called names and being belabored with profanity.[9]

As a result of these episodes, Reed obtained a temporary Adult Abuse Protection Order on March 4, 1991, through the Adult Abuse Center in Grand Forks.[10] Reed allegedly violated the order herself by going to Heck's apartment and subsequently requested the temporary order be dropped.[11] Reed obtained a second Protection Order in December, 1992 after Heck retrieved Shana from Reed's residence without incident.[12] Again, Reed did not follow up with a formal judicial review of her application.[13]

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1. Brief for Appellee at 1, Heck v. Reed, 529 N.W.2d 155 (N.D. 1995) (No. 940117).
2. *Id.*
3. *Id.*
4. Brief for Appellant at 1, Heck v. Reed, 529 N.W.2d 155 (N.D. 1995) (No. 940117).
5. *Id.*
6. *Id.* at 16.
7. *Id.*
8. *Id.* Heck alleged that he acted in self-defense as Reed had attempted to kick him in the groin during a verbal confrontation. Brief for Appellee at 8, *Heck* (No. 940177).
9. Brief for Appellant at 16, *Heck* (No. 940117).
10. Brief for Appellee at 7, *Heck* (No. 940117).
11. *Id.* at 8.
12. *Id.* The apppellee's brief provides no explanation for the issuance of the second protection order. *Id.*
13. *Id.* Reed stated that she did not press formal charges as Heck promised to reform his ways. Brief for Appellant at 10, *Heck* (No. 940117).

Moreover, Heck alleged that Reed committed domestic violence.[14] Heck stated that Reed physically assaulted him by punching and shoving him on one occasion.[15] This allegation was substantiated in a letter written by Reed to Heck apologizing for the incident.[16] Despite the evidence of domestic violence between Heck and Reed, there was no evidence that any violence was ever directed toward the children.[17]

After several break-ups and reconciliations, Heck and Reed permanently separated in November of 1992.[18] Shana remained with Heck and Steven resided with Reed.[19] Heck initiated legal action, seeking sole custody of both children.[20] Reed responded by seeking sole physical and legal custody of the children.[21] The trial court granted Heck sole physical custody of both children.[22] The issue on appeal was whether the trial court properly applied the rebuttable presumption against awarding custody to the Plaintiff-Appellee, a perpetrator of domestic violence.[23] The North Dakota Supreme Court reversed and remanded the decision of the trial court, *holding* that the rebuttable presumption against awarding custody to a perpetrator of domestic violence may be overcome only by compelling circumstances.[24]

II. LEGAL HISTORY

In 1979, North Dakota enacted its first "best interests" statute which provided that an order for custody of a minor child must promote the best interests and welfare of the child.[25] The 1979 best interests statute[26] listed ten factors for trial courts to consider when awarding custody.[27] At that time, the legislature did not address whether evidence

14. Brief for Appellee at 8, *Heck* (No. 940117).

15. *Id.* Sworn testimony of a third party corroborated that Heck simply walked away after Reed punched and shoved him. *Id.*

16. *Id.* at 9.

17. Brief for Appellant at 17, *Heck* (No. 940117).

18. Brief for Appellee at 1, *Heck* (No. 940117).

19. *Id.*

20. *Id.*

21. *Id.*

22. Heck v. Reed, 529 N.W.2d 155, 158 (N.D. 1995).

23. *Id.*

24. *Id.* at 166.

25. Award of Custody, ch. 194, sec. 3, 1979 N.D. Laws 423. The 1979 best interests statute was amended to address the issue of domestic violence in 1989, 1991, and 1993. To avoid confusion, each amended version will be referred to according to the year in which it was enacted.

26. *Id.*

27. *Id.* The 1979 version of the statute listed the factors to be considered, when applicable, as:

> 1. The love, affection, and other emotional ties existing between the parents and child.
> 2. The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the education of the child.
> 3. The disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of

of domestic violence should have an impact on a determination of the best interests of the child.[28]

A. EARLY DEVELOPMENTS IN THE BEST INTERESTS STATUTE

The 1979 best interests statute was amended in 1989[29] to require courts to consider evidence of domestic violence.[30] The major premise of the 1989 amendment was that, even if not directed at the child, any abuse in the household affects the child.[31] Recognizing that evidence of domestic violence was often ignored by judges when awarding custody,[32] the 1989 amendment[33] mandated that judges consider evidence of domestic violence if presented.[34]

The 1989 best interests statute was amended in 1991[35] to require judges to cite specific findings of fact when credible evidence of domes-

medical care, and other material needs.
4. The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
5. The permanence, as a family unit, of the existing or proposed custodial home.
6. The moral fitness of the parents.
7. The mental and physical health of the parents.
8. The home, school, and community record of the child.
9. The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
10. Any other factors considered by the court to be relevant to a particular child custody dispute.

Id.

28. *Id.* Under current North Dakota law, domestic violence is defined as:

> physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault, not committed in self-defense, on the complaining family or household members.

N.D. CENT. CODE § 14-07.1-01(2) (Supp. 1995).

29. Domestic Violence in Custody Determinations, ch. 178, sec. 2, 1989 N.D. Laws 547.

30. *Id.* As amended in 1989, a court was to consider, when applicable:

> j. The existence of domestic violence. If the court finds that domestic violence has occurred, the court shall provide for a custody arrangement that best protects the child and the parent or other family or household member who is the victim of domestic violence from any further harm. . . .
> k. The interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. The court shall consider that person's history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault, on other persons.

Id.

31. *Hearing on S.B. 2398, House Comm. on Judiciary, House Standing Comm. Minutes,* 51st Leg. Sess. 1 (March 6, 1989) (statement of Bonnie Palecek, N.D. Council on Abused Women's Services).

32. *Hearing on S.B. 2398, Senate Comm. on Judiciary, Senate Standing Comm. Minutes*, 51st Leg. Sess. 1 (January 31, 1989) (statement of Bonnie Palecek, N.D. Council on Abused Women's Services).

33. Domestic Violence in Custody Determinations, ch. 178, sec. 2, 1989 N.D. Laws 547.

34. *Id. See also Hearing on S.B. 2398, House Comm. on Judiciary, House Standing Comm. Minutes*, 51st Leg. Sess. 2 (March 6, 1989) (statement of Representative Shaft).

35. Evidence in Custody Decisions, ch. 148, sec. 2, 1991 N.D. Laws 413.

tic violence was found.[36] These findings were to demonstrate that the custody arrangement best protected the child and victim from further harm.[37] As such, judges were required to show what consideration had been given to the history of violence.[38] The change was necessary because evidence of domestic violence was often not included as part of the record.[39]

In 1991, the North Dakota Legislature amended section 14-05-22 of the North Dakota Century Code[40] to create a rebuttable presumption that awarding custody to an abusive parent was not in the best interests of the child.[41] At a minimum, the abusive party's propensity for violence would be taken into account.[42] In effect, this 1991 amendment was intended to force judges to consider evidence of domestic violence when awarding custody.[43]

B. IMPACT OF THE 1991 REBUTTABLE PRESUMPTION

The North Dakota Supreme Court had its first opportunity to apply the 1991 amendment soon after its enactment. This opportunity came in *Schestler v. Schestler*,[44] where the trial court found that the father had sometimes abused the mother by hitting and pushing her.[45] The trial court applied the rebuttable presumption[46] against awarding custody to

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36. *Id.*

37. *Id.*

38. *Id. See also Hearing on S.B. 2355, House Comm. on Human Servs. & Veterans Affairs, House Standing Comm. Minutes*, 52d Leg. Sess. 2 (March 4, 1991) (statement of Bonnie Palecek, N.D. Council on Abused Women's Services) (expressing that the senate bill would require judges to demonstrate what weight was given to evidence of domestic violence).

39. *Testimony on S.B. 2355, House Human Servs. & Veterans Affairs Comm., House Standing Comm. Minutes*, 52d Leg. Sess. 2 (March 4, 1991) (statement of Bonnie Palecek, N.D. Council on Abused Women's Services); *see also Testimony on S.B. 2355 House Human Servs. & Veterans Affairs Comm., House Standing Comm. Minutes*, 52d Leg. Sess. 1 (January 29, 1991) (statement of Dena O. Filler, Executive Director of the Domestic Violence Crisis Center) (stating that judges often ignored the 1989 amendment).

40. N.D. CENT. CODE § 14-05-22(3) (1991) (amended 1993).

41. *Id.* (affecting visitation rights as well). *See also* H.R. Con. Res. 172, 101st Cong., 2d Sess. (1990) (expressing the sense of Congress that credible evidence of spousal abuse should create a statutory presumption that awarding custody to the abusive spouse is detrimental to the child).

42. *Testimony on S.B. 2355, House Human Servs. & Veterans Affairs Comm., House Standing Comm. Minutes*, 52d Leg. Sess. (March 4, 1991) (statement of Bonnie Palecek, N.D. Council on Abused Women's Services).

43. *Testimony on S.B. 2355, House Human Servs. & Veterans Affairs Comm., House Standing Comm. Minutes*, 52 Leg. Sess. 3 (March 4, 1991) (statement of Representative Svedjan). *See also id.* (statement of Representative Peterson) (stating that judges were unwilling to consider evidence of domestic violence when awarding custody unless mandated by statute).

44. 486 N.W.2d 509 (N.D. 1992).

45. Schestler v. Schestler, 486 N.W.2d 509, 512 (N.D. 1992). The trial court also found that the father had inappropriately touched two of the female children. *Id.* Both of the children were from the mother's previous relationship. *Id.* at 510.

46. N.D. CENT. CODE § 14-05-22(3) (1991) (amended 1993).

the father[47] and concluded that the presumption had been rebutted.[48] The North Dakota Supreme Court affirmed the trial court's decision,[49] holding that domestic violence has no priority over the other statutory best interest factors to be considered when awarding custody.[50]

The majority in *Schestler* recognized that the legislative history of the 1991 amendment[51] reflected the legislature's concern with domestic abuse.[52] Despite this, the majority found that neither the statute nor the legislative history indicated a priority for credible evidence of domestic violence over the other statutory factors.[53] In addition, the court indicated that the presumption against awarding custody to a perpetrator of domestic violence would continue until the fact presumed was found, from credible evidence, not to exist.[54] Under this view, the domestic violence presumption could be rebutted by a customary weighing of the best interests factors.[55]

In *Schestler*, Justice Levine dissented to what she characterized as the majority's "misapplication" of the rebuttable presumption.[56] Justice Levine also stated that the court's decision "undermined" and "controverted" the legislative intent behind the 1991 amendment by placing the domestic violence factor on equal footing with the other statutory factors to be considered.[57] Justice Levine emphasized that only the domestic violence factor was graced with a presumption and stressed that it must be given greater consideration than the other factors.[58] According to Justice Levine, "the presumption (and the legislative intent fueling it) must not be so trivialized that it can be overcome simply by evidence of other statutory factors weighed in favor of the perpetrator because if that

47. *Schestler*, 486 N.W.2d at 512.

48. *Id.* The trial court found that the father had never directed violence toward the children; that the father had "a more stable home environment;" that there was more love and affection between the father and the children than between the mother and the children; that the father's family would aid the father in caring for the children; and that there was concern for the children's safety in the mother's home. *Id.*

49. *Id.* at 513.

50. *Id.* at 511.

51. N.D. CENT. CODE § 14-09-06.2(1)(j) (1991) (amended 1993).

52. Schestler v. Schestler, 486 N.W.2d 509, 511 (N.D. 1992). The majority opinion was written by Justice Johnson who was not a member of the North Dakota Supreme Court at the time *Heck* was decided. *Id.* at 509.

53. *Id.* at 511.

54. *Id.* at 512 (citing N.D.R. EVID. 301(a) (stating that unless provided for by statute, a presumption is rebutted and ceases to operate when the fact presumed is found not to exist by credible evidence)).

55. *Id.* at 512.

56. *Id.* at 513. (Levine, J., dissenting).

57. Schestler v. Schestler, 486 N.W.2d 509, 515 (N.D. 1992) (Levine, J., dissenting).

58. *Id.*

were the case, the presumption would add nothing to the resolution of custody disputes."[59]

C. 1993 AMENDMENT TO THE BEST INTERESTS STATUTE

As a result of the *Schestler* decision, the 1991 best interests statute was again amended in 1993.[60] The 1993 amendment[61] evidenced a growing trend toward explicitly giving priority to the issue of domestic violence when raised in custody determinations.[62] This latest amend-

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59. *Id.* Justice Levine penned the majority opinion in *Heck* which expressly rejected the approach taken in *Schestler*. Heck v. Reed, 529 N.W.2d 155, 155 (N.D. 1995).

60. Letter from Bonnie Palecek, Executive Director, North Dakota Council on Abused Women's Services, to Senator Maxon (Feb. 10, 1993) (on file with author).

61. N.D. CENT. CODE § 14-09-06.2(1)(j) (1991 & Supp. 1995). The 1993 amendment altered the wording of the domestic violence factor to read, in part, as follows:

> j. Evidence of domestic violence. In awarding custody or granting rights of visitation, the court shall consider evidence of domestic violence. If the court finds credible evidence that domestic violence has occurred, this evidence creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody of a child.

Id.

62. *Id. See* ARIZ. REV. STAT. ANN. § 25-332(F) (1991 & Supp. 1994) (stating that a significant history of domestic violence will preclude an award of joint custody); COLO. REV. STAT. § 14-10-124(1.5)(l)-(m) (1987) (expressing that joint custody is not in the best interests of the child if one parent is found to have committed domestic violence unless "the parents are able to make shared decisions" without further violence); FLA. STAT. ANN. § 61.13(2)(b)(2) (West Supp. 1996) (stating that conviction for a felony involving domestic violence creates a rebuttable presumption of detriment to the child and, if not rebutted, the convicted parent shall not be granted "shared parental responsibility"); LA. REV. STAT. ANN. § 9:364(A) (West Supp. 1995) (creating a rebuttable presumption that a parent with history of domestic violence will not be given sole or joint custody unless rebutted by a preponderance of the evidence showing completed treatment and a requirement of that parent's participation as custodian); MINN. STAT. ANN. § 518.17(2)(d) (West Supp. 1996) (stating that evidence of domestic violence creates a rebuttable presumption that joint custody is not in the best interests of the child); OKLA. STAT. ANN. tit. 43, § 112.2 (West Supp. 1996) (stating clear and convincing evidence of ongoing domestic abuse creates a rebuttable presumption against awarding custody to the abusing parent); WASH. REV. CODE. ANN. §§ 26.09.191(2)(a)(iii), (d)(i) (West Supp. 1996) (stating that a court shall limit residential time or, if such limitation does not adequately protect the child, eliminate an abusive parent's contact with the child); WIS. STAT. ANN. § 767.24(2)(c) (West 1993) (expressing that a rebuttable presumption against future cooperation between the parents is created which may be rebutted by clear and convincing evidence).

In twenty-five other state jurisdictions, including the District of Columbia, evidence of domestic violence is listed as a factor to be considered when awarding custody; although it is not given priority over other factors: ALASKA STAT. § 25.24.150(c)(7) (1995); CAL. FAM. CODE § 3011(b) (West 1994); DEL. CODE ANN. tit. 13, § 722(a)(7) (1995); D.C. CODE ANN. § 16-911(a)(5)(F) (1989 & Supp. 1995); HAW. REV. STAT. § 571-46(9) (1995); IDAHO CODE § 32-717(A)(7) (1983 & Supp. 1995); ILL. ANN. STAT. ch. 750, para. 5/602(a)(6) (Smith-Hurd 1993 & Supp. 1995); KAN. STAT. ANN. § 60-1610(B)(vii) (1994); KY. REV. STAT. ANN. § 403.270(1)(f), (2) (Michie 1984 & Supp. 1994); ME. REV. STAT. ANN. TIT. 19, § 214(5)(K-1) (West 1981 & Supp. 1995); MD. FAM. LAW CODE ANN. § 9-101.1(b) (1991); MASS. GEN. LAWS ANN. ch. 208, § 31 (West 1987 & Supp. 1995); MICH. COMP. LAWS ANN. § 722.23(3)(k) (West 1993 & Supp. 1995); MONT. CODE ANN. § 40-4-212(1)(f) (1993); NEB. REV. STAT. § 42-364(2)(d) (Supp. 1994); NEV. REV. STAT. ANN. § 125.480(4)(c) (Michie 1993); N.H. REV. STAT. ANN. § 458.17(II)(c) (1992); N.J. STAT. ANN. § 9:2-4 (West 1993); OHIO REV. CODE ANN. §§ 3109.04(F)(1)(h), (F)(2)(c) (Anderson 1989 & Supp. 1993); OR. REV. STAT. § 107.137(1)(d) (1995); PA. STAT. ANN. tit. 23, § 5303(a) (1991); R.I. GEN. LAWS § 15-5-16(G) (Supp. 1995); VT. STAT. ANN. tit. 15, § 665(b)(9) (1989 & Supp. 1994); VA. CODE ANN. § 20-124.3(8) (Michie 1995); WYO. STAT. § 20-2-113(a) (1995).

ment dictated that the presumption against awarding custody to a perpetrator of domestic violence could be rebutted only by showing, by clear and convincing evidence, that the best interests of the child require the perpetrator to serve as custodian.[63] The North Dakota Legislature sought to strengthen the domestic violence factor by raising the level of proof required to rebut the presumption from credible evidence to clear and convincing evidence.[64] As such, the legislature expressly gave the domestic violence factor priority over the other statutory factors to be considered when awarding custody.[65]

III. CASE ANALYSIS

In *Heck v. Reed*,[66] the North Dakota Supreme Court addressed the rebuttable presumption against awarding custody to a perpetrator of domestic violence.[67] The court clarified the proper application of the presumption and the level of evidence necessary to rebut it.[68] On appeal, Reed argued that the trial court did not properly consider the evidence of domestic violence and therefore, the trial court's finding that the statutory presumption had been rebutted was clearly erroneous.[69]

Prior to the 1993 amendment, evidence of domestic violence was not given priority and could be overcome by one or a combination of the other factors.[70] According to the court, the legislature clearly intended this presumption not to be overcome by balancing the other factors in the perpetrator's favor.[71] Such a balancing would merely demonstrate that the perpetrator may be a fit parent in other respects.[72] Rather, the legislature intended that the presumption be defeated only by a showing that the best interests of the child "demand" that the perpetrator serve as custodial parent.[73] In order to rebut the presumption by

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63. N.D. CENT. CODE § 14-09-06.2(1)(j) (1991 & Supp. 1995).

64. *Id. See also Hearing on H.B. 1393, Senate Human Servs. Comm., Senate Standing Comm. Minutes*, 53 Leg. Sess. 2 (March 10, 1993) (statement of Bonnie Palecek, N.D. Council on Abused Women's Services).

65. *Hearing on H.B. 1393, Senate Human Servs. Comm., Senate Standing Comm. Minutes*, 53 Leg. Sess. 2 (March 10, 1993) (statement of Senator Lindgren).

66. 529 N.W.2d 155 (N.D. 1995).

67. Heck v. Reed, 529 N.W.2d 155, 159 (N.D. 1995).

68. *Id.*

69. *Id.* at 159. A trial court's findings on matters of child custody are findings of fact which will not be set aside unless clearly erroneous. *Id.* (citing N.D.R. CIV. P. 52(a) (stating that the clearly erroneous standard of review shall be employed when reviewing findings of fact)). "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been made." *Id.* (citing Dalin v. Dalin, 512 N.W.2d 685, 687 (N.D. 1994)).

70. *Id.* at 162.

71. *Id.*

72. Heck v. Reed, 529 N.W.2d 155, 163 (N.D. 1995).

73. *Id.* at 162. The majority noted that the word "'require' . . . denote[d] compulsion; . . .

clear and convincing evidence, a perpetrator would have to establish compelling or exceptional circumstances requiring he or she be awarded custody.[74]

In addition, the court interpreted the 1993 best interests statute as precluding from consideration an absence of violence against the children as one factor which may rebut the presumption.[75] The majority noted that domestic violence is defined in terms which recognize the effects of the violence on family or household members, not just the child.[76] The court opined that if the legislature intended to limit the application to harm inflicted directly to children, it would have employed a phrase such as "child abuse," to trigger the rebuttable presumption.[77]

The court relied upon research which indicated that even if children are not the direct targets of domestic violence, the abusive climate created by violence between the parents nonetheless victimizes the child.[78] The majority reasoned that the 1993 best interests statute was grounded in public policy and reflected a legislative finding that the presence of domestic violence in the home has an adverse effect on children.[79] According to the court, the North Dakota Legislature intended for courts to presume that children are negatively impacted by

mean[ing] "to 'insist upon' or 'demand.'" *Id.* (citing WEBSTER'S NEW WORLD DICTIONARY 1208 (2d College ed. 1980)).

74. *Id.* at 162-63. The court drew a parallel to custody modification cases in which sufficiently compelling reasons are required before the stability of the custodial placement will be upset. *Id.* at 162. (citing Dalin v. Dalin, 512 N.W.2d 685, 687 (N.D. 1994)). *See also* Alvarez v. Carlson, 524 N.W.2d 584, 589 (N.D. 1994) (stating that one must demonstrate a significant change of circumstances so adversely affecting the child that a change in custody is necessary before a custodial placement will be upset).

75. *Heck*, 529 N.W.2d at 163.

76. *Id.* Instead, the legislature defined family or household members to include:

> a spouse, family member, former spouse, parent, child, persons related by blood or marriage, persons who are in a dating relationship, persons who are presently residing together or who have resided together in the past, persons who have a child in common regardless of whether they are or have been married or have lived together at any time, and, for the purpose of the issuance of a domestic violence protection order, any other person with a sufficient relationship to the abusing person as determined by the court under section 14-07.1-02.

N.D. CENT. CODE § 14-07.1-01(4) (1991 & Supp. 1995).

77. *Heck*, 529 N.W.2d at 163 (citing N.D. CENT. CODE § 50-25.1-02(2) (1989 & Supp. 1995) (defining an abused child as "an individual under the age of eighteen who [suffers] from serious physical harm or traumatic abuse caused by other than accidental means by a person responsible for the child's health or welfare")).

78. *Id.* at 163 (citing LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 59 (1984) (stating that eighty-seven percent of the battered women interviewed reported an awareness by the children of the violence in the home)).

79. *Id.* at 163-64 (citing H.R. Con. Res. 172, 101st Cong., 2d Sess. (1990) (expressing a legislative finding that children suffer from impairment of self-esteem and developmental and socialization skills, among other conditions, even if they don't witness the spousal abuse firsthand)); *see also* 136 CONG. REC. H8280 (daily ed., Sept. 27, 1990) (statement of Rep. Miller) (stating that children's emotional well-beings are endangered by witnessing domestic violence inflicted against their parents even when they are not themselves physically harmed).

domestic violence.[80] Therefore, the court found it clearly erroneous for the trial court to consider that there was never any abuse of the children as a factor rebutting the presumption.[81]

The court further noted that domestic violence is a learned pattern of behavior which requires sufficient motivation for change on behalf of the perpetrator to be "unlearned."[82] As evidence of such motivation, the court looked to whether Heck had participated in domestic violence counseling and whether there had been a passage of time with no acts of domestic violence.[83] While realizing this was not a perfect solution to the domestic violence cycle, the court stated that such evidence may support a finding that future domestic violence was unlikely.[84] The court found it clearly erroneous to conclude, in the absence of such evidence, that Heck would no longer perpetrate domestic violence against his intimate partners.[85]

IV. IMPACT

By mandating trial judges to consider credible evidence of domestic violence and giving priority to this factor over the other statutory factors when such evidence is found, the North Dakota Supreme Court has altered the long-standing process of weighing the best interest factors in custody cases. Prior to the *Heck* decision, the best interests of the child were determined by a customary weighing of statutory factors which stood on equal footing. However, after *Heck*, if credible evidence of domestic violence is presented, then the remaining best interest factors take a back seat to the domestic violence issue.[86]

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80. *Heck*, 529 N.W.2d at 164.

81. *Id.*

82. *Id.* at 164-65 (citing Anne Ganley et al., *The Impact of Domestic Violence on the Defendant and the Victim in the Courtroom, in* DOMESTIC VIOLENCE: THE CRUCIAL ROLE OF THE JUDGE IN CRIMINAL COURT CASES, A NATIONAL MODEL FOR JUDICIAL EDUCATION (Family Violence Prevention Fund 1991)).

83. *Id.* at 165. Heck introduced no evidence that he had considered or participated in any form of treatment or counseling and the last incident of violence occurred within the last two years. *Id.*

84. *Id.* at 165 n.6.

85. Heck v. Reed, 529 N.W.2d 155, 165 (N.D. 1995). In addressing Reed's smoking in the presence of the children, one of which is asthmatic, the court endorsed the option of imposing a rigid visitation schedule upon the smoking parent which requires the parent not to smoke in the child's presence before terminating that parent's custodial or visitation rights. *Id.* at 165-66.

86. Some concern may be raised as to the continuing effect of *Heck* with Justice Levine's retirement effective March 1, 1996. Any such concern seems unwarranted as Justice Levine's interpretation of the rebuttable presumption has been cited by other North Dakota Supreme Court Justices since *Heck* was decided as *the* standard by which custody cases involving credible evidence of domestic violence are to be judged. *See* Helbling v. Helbling, 532 N.W.2d 650, 653 (N.D. 1995) (Meschke, J.); Krank v. Krank, 529 N.W.2d 844, 848 (N.D. 1995) (Vande Walle, C.J.); Ryan v. Flemming, 533 N.W.2d 920, 923 (N.D. 1995) (Meschke, J.); Smith v. Smith, 534 N.W.2d 6, 11 (N.D. 1995) (Sandstrom, J.).

Although the court in *Heck* recognized the priority given to the domestic violence factor, it did not address the issue of what is required to raise the presumption. Nor was the amount or extent of evidence required to trigger the statutory presumption addressed in the 1993 amendment.[87] In *Krank v. Krank*,[88] the court recognized that, given the wording, one act of domestic violence could be enough.[89] Ultimately, the court seemed to reject this interpretation.[90] In a subsequent case, the court showed an unwillingness to find the presumption raised where the alleged acts of domestic violence were remote in time and not of a significant degree.[91] Consequently, it is unclear how extensive the evidence of domestic violence must be in order to constitute credible evidence sufficient to raise the presumption.

However, once the presumption is triggered, a trial court must resolve the issue of the presence of domestic violence before the "weighing," if ever, comes into play. It will not suffice to argue that all or a majority of the other factors weigh in the perpetrator's favor. The perpetrator must go above and beyond the customary weighing of the factors and demonstrate, by clear and convincing evidence, that the best interests of the child require the perpetrator serve as custodial parent.[92]

Although the court detailed how the statutory presumption operates, it seemed to leave open the question of what exactly constitutes clear and convincing evidence in order to rebut the presumption. At a minimum, the court in *Heck* implied that proof of rehabilitation, in conjunction with a passage of time involving no acts of domestic violence, could be a start.[93] Such evidence, according to the court, may support a finding that future domestic violence was unlikely.[94] It is hard to reconcile how such a showing alone would require that the perpetrator have custody if

87. *See* N.D. CENT. CODE § 14-09-06.2(1)(j) (1991 & Supp. 1995) (stating merely that a finding of credible evidence of domestic violence will raise the rebuttable presumption).

88. 529 N.W.2d 844 (N.D. 1995).

89. Krank v. Krank, 529 N.W.2d 844, 850 (N.D. 1995).

90. *Id.* (citing Simmons v. Simmons, 649 So.2d 799, 801 (La. Ct. App. 1995) (stating that a single act of domestic violence was not sufficient to trigger the statutory presumption)).

91. Ryan v. Flemming, 533 N.W.2d 920, 923-24 (N.D. 1995) (stating that the instances of violence were limited to acts against property, a broken flower pot and a telephone torn out of a wall, which were devoid of allegations of any physical abuse).

92. *See* N.D. CENT. CODE § 14-09-06.2(1)(j) (Supp. 1995) (detailing the consideration to be given to credible evidence of domestic violence in determining the best interests of the child).

93. Heck v. Reed, 529 N.W.2d 155, 165 & n.6 (N.D. 1995). According to Ms. Bonnie Palecek of North Dakota's Council on Abused Women's Services, domestic violence counseling programs vary throughout the state in the kind of treatment available and the length of time required to complete such programs. Telephone Interview with Bonnie Palecek, Executive Director of North Dakota Council on Abused Women's Services, Bismarck, N.D. (Jan. 19, 1996). The Batterer's Treatment Forum has recently completed a first draft of proposed standards for such programs, which will eventually be distributed to judges as a guideline for determining appropriate treatment for perpetrators of domestic violence. *Id.*

94. *Heck*, 529 N.W.2d at 165 & n.6.

the victim is otherwise a fit parent. In *Krank v. Krank*,[95] the court interpreted *Heck* as stating that a victim of domestic violence must be deemed an unfit parent for the perpetrator to gain custody.[96] This seems to be a plausible interpretation as the best interests of the child undoubtedly would not require an award of custody to a perpetrator if the other parent is deemed fit. In such a situation, the perpetrator's participation as custodian hardly seems a necessity or a requirement for the best interests of the child to be met.

The trial court in *Heck* applied the rebuttable presumption solely against Heck and, as such, the North Dakota Supreme Court only addressed the application of the rebuttable presumption in a situation involving one perpetrator of domestic violence.[97] The possibility of a situation involving two parents who have perpetrated domestic violence was addressed by the court in *Krank*.[98] In so doing, the court expanded the application of the rebuttable presumption set forth in *Heck* and laid out a rather awkward process for applying, or not applying, the rebuttable presumption in such a situation.[99] If there is evidence of domestic violence by both parents, then the trial court must measure the amount and extent committed by both.[100] If the amount and extent committed by one is significantly greater, then the statutory presumption applies only to the one who inflicted greater domestic violence.[101] If it is roughly proportional and both are considered otherwise fit parents, then the presumption will apply to neither.[102] In such a situation, the trial court may consider the remaining best interest factors.[103] In essence, both parents will have to provide the trial judge with a "scorecard" comparing the domestic violence perpetrated by both in frequency and severity.[104]

In detailing the application of the rebuttable presumption in a dual perpetrator situation, the court in *Krank* did not discuss the possibility of

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95. 529 N.W.2d 844, 848 (N.D. 1995).

96. Krank v. Krank, 529 N.W.2d 844, 848 (N.D. 1995) (citing *Heck*, 529 N.W.2d at 166 (Vande Walle, C.J., concurring in the result)). *But see* Bruner v. Hager, 534 N.W.2d 825, 829 (N.D. 1995) (Sandstrom, J., concurring in the result) (stating that the suggestion in *Krank* that the non-abusing parent must be unfit in order to award custody to a perpetrator of domestic violence "is contrary to the statute").

97. *Heck*, 529 N.W.2d at 158.

98. *Krank*, 529 N.W.2d at 848-49.

99. *Id.* at 850.

100. *Id.*

101. *Id.*

102. *Id.*

103. Krank v. Krank, 529 N.W.2d 844, 850 (N.D. 1995).

104. *See* Bruner v. Hager, 534 N.W.2d 825, 829 (N.D. 1995) (Sandstrom, J., concurring in the result) (stating that the implication that "the violence of [the] relationship should be somehow scored like a boxing match, with the presumption applying only against the one scoring the most points, has no basis in the statute").

granting custody to a third party.[105] Rather, importance was placed on ultimately granting custody to one of the parents. The only possibility for third party involvement seems to be if the mutual, roughly proportional violence is so severe as to culminate in a termination of all parental rights.[106] As such, the obvious conclusion is that custody will nonetheless be given to a parent with a judicially recognized propensity for violence.

In *Heck*, the North Dakota Supreme Court clarified that only compelling or exceptional circumstances will rebut the presumption against awarding custody to a perpetrator of domestic violence.[107] In doing so, the court has ensured, to the extent judicially possible, that the health and welfare of the child will be protected, unless, of course, the child has two perpetrators for parents. In such a no-win situation, it seems unlikely that the best interests of the child will ever truly be met.

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105. *See Krank*, 529 N.W.2d at 850.

106. *See id.* at 851 (Meschke, J., concurring) (stating that both parents will be disqualified as unfit only if the roughly proportional violence defeating the statutory presumption is so severe as to render the child "so deprived that the proceedings turn to terminating all parental rights").

107. Heck v. Reed, 529 N.W.2d 155, 162 (N.D. 1995).

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