



1996

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Recommended Citation

Jenny, Ruth and Stoner, Kelly Gaines (1996) "Domestic Violence and the North Dakota Best Interests Statute," *North Dakota Law Review*: Vol. 72 : No. 4 , Article 6.

Available at: <https://commons.und.edu/ndlr/vol72/iss4/6>

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DOMESTIC VIOLENCE AND THE NORTH DAKOTA BEST INTERESTS STATUTE

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I. INTRODUCTION

In North Dakota, the best interests of the child has traditionally governed in custody disputes.¹ Since the early 1990s, many states,

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1. N.D. CENT. CODE § 14-09-06.2 (Supp. 1995). This section, dealing with the best interests of the child factors, is as follows:

1. For the purpose of custody, the best interests and welfare of the child is determined by the court's consideration and evaluation of all factors affecting the best interests and welfare of the child. These factors include all of the following when applicable:

- a. The love, affection, and other emotional ties existing between the parents and the child.
- b. The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the education of the child.
- c. 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 medical care, and other material needs.
- d. The length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity.
- e. The performance, as a family unit, of the existing or proposed custodial home.
- f. The moral fitness of the parents.
- g. The mental and physical health of the parents.
- h. The home, school, and community record of the child.
- i. The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
- 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. 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. The court shall cite specific findings of fact to show that the custody or visitation arrangement best protects the child and the parent or other family or household member who is the victim of domestic violence. If necessary to protect the welfare of the child, custody may be awarded to a suitable third person provided that the person would not allow access to a violent parent except as ordered by the court. If the court awards custody to a third person, the court shall give priority to the child's nearest suitable adult relative. The fact that the abused parent suffers from the effects of the abuse may not be grounds for denying that parent custody. As used in this subdivision, "domestic violence" means domestic violence as defined in section 14-07.1-01.

including North Dakota, have adopted best interest statutes which consider domestic violence² as a factor in awarding custody and visitation.³ Several states have passed laws which create a presumption against awarding joint custody or sole custody to a perpetrator of domestic violence.⁴ The statutes are based on research that indicates children are affected by violence in the home.⁵ The North Dakota policy is targeted at protecting children against the adverse effects which are presumed when domestic violence is present in the household.⁶ In addition, the

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- 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.
 - l. The making of false allegations not made in good faith, by one parent against the other, of harm to a child as defined in section 50-25.1-02.
 - m. Any other factors considered by the court to be relevant to a particular child custody dispute.

Id.

2. 14-09-06.2(j). There are many terms used for incidents referred to as domestic violence such as wife-abuse, family violence, adult abuse, and wife-beating. For purposes of this article, the term domestic violence will be used. Domestic violence has been defined as "any behavior that is intended to control and subjugate another human being through the use of fear, humiliation, and verbal or physical assaults . . . it is the systematic persecution of one partner by another." DAWN BRADLEY BERRY, DOMESTIC VIOLENCE SOURCEBOOK 1 (1995) (quoting SUSAN FORWARD, MEN WHO HATE WOMEN AND THE WOMEN WHO LOVE THEM 43 (1986)).

3. The following statutes consider evidence of domestic violence as a factor to be considered when awarding custody; however, domestic violence is not given priority over the other factors: ALA. CODE § 30-3-133 (1996); ALASKA STAT. §§ 25.24.150, 25.20.090 (Michie 1994); ARIZ. REV. STAT. ANN. § 25-403 (West Supp. 1996). CAL. FAM. CODE § 3000 (West 1995); COLO. REV. STAT. ANN. §§ 14-10-124, -129 (West Supp. 1996); DEL. CODE ANN. tit. 13, § 706a (Supp. 1994); D.C. CODE ANN. § 16-49 (1994); FLA. STAT. ANN. § 61.13 (West Supp. 1996); HAW. REV. STAT. § 571-46 (1994); IDAHO CODE § 32-717 (1996); 750 ILL. COMP. STAT. ANN. 5/602(a)(6) (West 1994); IOWA CODE ANN. § 598.41 (West Supp. 1996); KAN. STAT. ANN. § 60-1610(b)(vii) (1994); KY. REV. STAT. ANN. § 403.270(1)(f) (Michie Supp. 1996); LA. REV. STAT. ANN. § 9:364 (West Supp. 1996); ME. REV. STAT. ANN. tit. 19, § 214(5)(K-1) (West Supp. 1995); MD. CODE ANN., FAM. LAW § 9-101.1(b) (Supp. 1996); MASS. GEN. LAWS ANN. ch. 208 § 31 (West Supp. 1996); MICH. COMP. LAWS ANN. § 722.23(3)(k) (West Supp. 1996); MINN. STAT. ANN. § 518.17 (West Supp. 1997); MO. ANN. STAT. § 452.375 (West Supp. 1996); MONT. CODE ANN. § 40-4-212(1)(f) (1995); NEB. REV. STAT. § 42-364(2) (1995); NEV. REV. STAT. ANN. § 125.480(4)(c) (Michie Supp. 1995); N.H. REV. STAT. ANN. § 458.17(II)(c) (1993); N.J. STAT. ANN. § 9:2-4 (West 1995); OHIO REV. CODE ANN. § 3109.04(F)(1)(h) (Anderson 1996); OKLA. STAT. ANN. tit. 43, § 112.2 (West 1995); OR. REV. STAT. § 107.137(1)(d) (1995); PA. STAT. ANN. tit. 23, § 5303(a) (West 1994); R.I. GEN. LAWS § 15-5-16(G) (Supp. 1995); TEX. FAM. CODE ANN. § 153.001 (West Supp. 1996); VT. STAT. ANN. tit. 15 § 665(b)(9) (Supp. 1996); VA. CODE ANN. § 20-124.3(8) (Michie 1995); WASH. REV. CODE ANN. § 26.09.191 (West Supp. 1996); WYO. STAT. ANN. § 20-2-113(a) (Michie 1995).

4. The following statutes provide that courts shall consider that domestic violence detrimentally affects children: ALA. CODE § 30-3-133 (Supp. 1996); DEL. CODE ANN. tit. 13, § 705A (1995); FLA. STAT. ANN. § 61.13(2) (West 1996); IDAHO CODE 32-717B (1996); LA. REV. STAT. ANN. § 9:364 (West Supp. 1996); OKLA. STAT. ANN. tit. 43, § 112.2 (West Supp. 1996); TEX. FAM. CODE ANN. § 153.004 (West Supp. 1996); WIS. STAT. ANN. § 767.24(2) (West Supp. 1996).

5. See discussion *infra* Part II.

6. Heck v. Reed, 529 N.W.2d 155, 163-164 (N.D. 1995).

North Dakota policy reflects the belief that a perpetrator of domestic violence is generally not a proper person to have custody.⁷

The North Dakota Legislature has taken a leading role regarding domestic violence by enacting several amendments to the North Dakota best interest statute. In 1989, the North Dakota Legislature amended the best interest statute and directed courts to consider evidence of domestic violence.⁸ In 1991, the North Dakota Legislature amended the statute and required the trial court to make specific findings of fact when credible evidence of domestic violence existed.⁹ The 1991 amendment resulted in a rebuttable presumption that awarding custody to the perpetrator of domestic violence was not in the child's best interest.¹⁰ The presumption continued until the fact presumed was shown not to exist by credible evidence.¹¹

However, after the North Dakota Supreme Court's interpretation of the rebuttable presumption in *Schestler v. Schestler*,¹² the North Dakota Legislature amended the statute to reflect that domestic violence was the paramount factor in determining the best interest of the child.¹³ The 1993 amendment again indicated that credible evidence of domestic violence resulted in a presumption that the perpetrator of the violence was not the appropriate parent to be awarded custody of the child.¹⁴ However, this amendment also heightened the presumption and shifted the burden of proof to the perpetrator to demonstrate by clear and convincing evidence that the best interests of the child required custody be placed with the perpetrator.¹⁵ Many North Dakota cases center around the issue of what constitutes the clear and convincing evidence necessary to rebut the presumption.¹⁶ To fully understand the need for

7. *Id.* at 166.

8. S. Res. 2398, 51st Leg., 1989 N.D. Law 547 (requiring courts to determine if domestic violence had occurred and to provide for a custody arrangement that best protects the child and the parent or other family or household member who is the victim from further harm).

9. N.D. CENT. CODE § 14-09-06.2(l)(j) (Supp. 1995).

10. *Id.*

11. *See Schestler v. Schestler*, 486 N.W.2d 509, 512 (N.D. 1992).

12. 486 N.W.2d 509 (N.D. 1992).

13. *Schestler v. Schestler*, 486 N.W.2d 509, 512 (N.D. 1992). The majority found that neither the statute nor the history of the statute provided for a priority of credible evidence of domestic violence over the other best interest factors. *Id.* at 511. The majority concluded that the presumption could be rebutted by a customary weighing of the remaining best interest factors. *Id.* at 512. Justice Levine argued in dissent that this was a misapplication of the presumption. *Id.* at 513 (Levine, J., dissenting). Justice Levine indicated that the majority opinion had undermined and controverted the legislative intent of the statute, and further pointed out that the domestic violence factor was blessed with a presumption which prevented the presumption from being overcome by a simple weighing of the remaining best interest factors. *Id.* at 514-15.

14. N.D. CENT. CODE § 14-09-06.2; *see Heck v. Reed*, 529 N.W.2d 155, 163 (N.D. 1995) (stating that "the statutory presumption against awarding custody to a perpetrator of domestic violence may be rebutted, in the case of two fit parents, only by compelling circumstances demonstrating that the best interests of the children require that custody be placed in the perpetrator").

15. N.D. CENT. CODE § 14-09-06.2(l)(j).

16. *Eng v. Jensen*, 547 N.W.2d 922, 924-25 (N.D. 1996); *Krank v. Krank*, 541 N.W.2d 714, 716

the statutes, however, it is helpful to consider the research on the effects of domestic violence on children.

II. EFFECTS OF DOMESTIC VIOLENCE ON CHILDREN

Although society has focused on the safety of children who are abused, it wasn't until the late 1980s that research began to appear that showed that children were affected by domestic violence physically, emotionally, and psychologically, even if that violence was not directed at them.¹⁷ Children suffer emotional and psychological harm when they are exposed to spousal abuse by one parent against the other.¹⁸ Children may be exposed to this violence by seeing their fathers (or another intimate partner of their mother) threaten or hit their mother or over-hearing this behavior from another part of their residence, such as a bedroom.¹⁹ Children may also be exposed to this violence without hearing or seeing the commission of any aggressive act.²⁰ For example, children may see the bruises or other injuries clearly visible on their mother, or the emotional consequences of fear, hurt, or intimidation may be very apparent to them.²¹ The degree to which children are affected by domestic violence depends on several factors, such as exposure to violent role models, experiencing the disharmony present in their families, and the fear that they or their mothers will be physically harmed.²²

A. DOMESTIC VIOLENCE STATISTICS

In order to realize how many children are affected by domestic violence, a look at the statistics on domestic abuse is warranted.²³ In 1988, the Surgeon General of the United States found domestic violence to be the number one public health risk to adult women in the United States.²⁴ A woman has a one-in-three to one-in-five chance of being physically

(N.D. 1996) [hereinafter *Krank II*]; *Bruner v. Hager*, 534 N.W.2d 825, 826 (N.D. 1995); *Smith v. Smith*, 534 N.W.2d 6, 11 n.2 (N.D. 1995); *Heck*, 529 N.W.2d at 161.

17. See also H. Cong. Res. 172, 101st Cong., 2d Sess., 136 Cong. Rec. H8280-02 (1990); MARIA ROY, CHILDREN IN THE CROSSFIRE 53-104 (1988).

18. PETER G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN 17 (1990). Eighty-seven percent of children are aware of the violence in their home. LENORE WALKER, THE BATTERED WOMEN SYNDROME 59 (1984).

19. JAFFE, *supra* note 18, at 17.

20. *Id.*

21. *Id.*

22. *Id.* at 55.

23. The nature of domestic abuse impedes the collection of statistics on this issue, thus research is based on *estimates* from data available through reported cases, surveys, and other sources. *Editor's comment* to NATIONAL BATTERED WOMEN'S LAW PROJECT, NATIONAL CENTER ON WOMEN & FAMILY LAW INC., BATTERED WOMEN: THE FACTS 3 (1996) [hereinafter THE FACTS].

24. MAJORITY STAFF OF SENATE COMM. ON THE JUDICIARY, 102S CONG., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA 3 (Comm. Print 1992). In 1992, violence was "the leading cause of injury to women ages 15-44, more common than automobile accidents, mugging, and cancer deaths combined." *Id.*

assaulted by a partner or ex-partner in her lifetime.²⁵ In one survey, the incidence of physical marital violence was estimated at fifty to sixty percent.²⁶ Recent studies show that one in ten women are abused every year and that one in fourteen suffer repeated severe violence.²⁷ While men can be victims of domestic violence, statistics show that the majority of perpetrators are men and that the abused parties are usually women.²⁸ It is estimated that in the United States, 3.3 million children between the ages of 3 and 17 are at risk of exposure to domestic violence.²⁹

B. PHYSICAL HARM TO CHILDREN

Research further reflects that in families where there is wife beating, there is also a danger of direct physical violence against children.³⁰ Both parents involved in domestic violence situations report higher incidents of being perpetrators of child abuse compared to parents who have not been affected by domestic violence.³¹ More than half of the men who abuse their partners beat their children.³² Assaults on women were accompanied by assaults on at least one child in the household.³³ Mothers who were abused were twice as likely to abuse their children.³⁴ Additionally, the victim/mother did not report the abuse to the authorities in

25. *Id.*

26. Alan Rosenbaum & K. Daniel O'Leary, *Children: The Unintended Victims of Marital Violence*, 51 AM. J. ORTHOPSYCHIATRY 692, 692 (1981).

27. JAFFE, *supra* note 18, at 19.

28. Anne L. Ganley, *Domestic Violence: The What, Why and Who, as Relevant to Civil Court Cases*, in THE FAMILY VIOLENCE PREVENTION FUND, DOMESTIC VIOLENCE IN CIVIL COURT CASES: NATIONAL MODEL FOR JUDICIAL EDUCATION 19, 41 (1992). Patsy A. Klaus & Michael R. Rand, *Family Violence*, in BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 4 (1984) (showing that 95% of crime victims nationwide are women); Richard A. Berk et al., *Mutual Combat and Other Family Violence Myths*, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 197, 199 (David Finkelhor et al. eds., 1983) (stating that while men and women sometimes use the same behaviors, effects of male violence is far more serious as measured by the frequency and severity of injuries).

29. JAFFE, *supra* note 18, at 21. Children are present in 41% of all domestic disturbances. *Id.*

30. Maria Roy, *A Current Survey of 150 Cases*, in BATTERED WOMEN 25, 33 (1977).

31. MURRAY A. STRAUS & RICHARD J. GELLES, PHYSICAL VIOLENCE IN AMERICAN FAMILIES 421 (1990). Children in homes where there is domestic violence are abused at a rate many times higher than the national average. S. REP. NO. 101-545, at 37 (1990). Children interviewed indicated that 48% of them had been physically abused by either parent with the father being primarily responsible for the abuse. Roy, *supra* note 30, at 33.

32. LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 59 (1984). More than 50% of perpetrators who batter spouses will also batter children and the pattern of spouse abuse usually precedes the abuse of the child. Lee H. Bowker et al., *On Relationship Between Wife Beating and Child Abuse*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 158, 164 (Kirst Yllo & Michele Bojrad eds., 1988) (noting that the percentage of spousal abusers who also abuse their children could be as high as 70%); Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, JUV. & FAM. CT. J., Vol. 3 1992, at 3, 33.

33. Roy, *supra* note 30, at 38. A survey of 150 battered women showed that in about 45% of the assaults on women, there was an assault on at least one child in the household. *Id.* Physical abuse was described as a serious pattern of assaults most often occurring at the same time as incidents of wife-beating, but were not exclusive to wife beating. ROY, *supra* note 17, at 57.

34. See STRAUS & GELLES, *supra* note 31, at 409. The amount of violence that the mothers inflicted upon their children rose in direct proportion to the level of violence inflicted on the women themselves. *Id.* at 421.

ninety-five percent of the cases.³⁵ Moreover, twenty-eight percent of the female children in households where spousal abuse occurred reported sexual abuse by their fathers.³⁶

The effect of domestic violence on children begins even before their birth.³⁷ Babies born to pregnant women who were battered needed extended medical attention at birth and are forty times more likely to die before they reach their first birthday.³⁸ Very young children are often hurt when their mothers hold them in an attempt to protect them from the violence.³⁹

Children are often innocent victims when they happen in on an argument and are often injured by thrown objects.⁴⁰ Because the children are not always the primary target of physical abuse, the danger to them as secondary victims is often downplayed.⁴¹

Children in violent homes may learn to assume a parental or guardianship role far beyond their age. Many try to protect their mothers from being beaten when they believe that their mother's life is in jeopardy.⁴² In one study, all of the males, fifteen years or older, attempted to intervene at least one time to protect their mothers from an assault.⁴³ Sixty-two percent of them were physically abused during their attempted intervention.⁴⁴

In cases where there is danger of homicide to the mother, the mother often leaves the house to save her own life.⁴⁵ In some of these cases, the children become the direct targets of the father's anger once the intended victim of the abuse is gone, which could lead to death of the child.⁴⁶

C. PSYCHOLOGICAL TRAUMA AND SOCIETAL IMPLICATIONS

Traumatic exposure to violence can lead to post-traumatic stress disorder (PTSD) in some children.⁴⁷ Children suffering from PTSD exhibit

35. Roy, *supra* note 30.

36. ROY, *supra* note 17, at 57. Sexual abuse was actually documented in 10% of the cases. *Id.*

37. THE FACTS, *supra* note 23, at 5.

38. *Id.*

39. JAFFE, *supra* note 18, at 27. Young children received the most serious abuse including concussions, broken shoulders, and broken ribs. *Id.*

40. ROY, *supra* note 17, at 92. The younger the child, the more likely to sustain serious injuries such as a broken shoulders, broken rib, and concussions. *Id.*

41. *Id.* at 93.

42. *Id.* at 63.

43. *Id.* at 92.

44. *Id.* at 92. In 87% of the cases, the physical altercations immediately preceded the mother's decision to leave the home. *Id.* at 58.

45. *Id.* at 92.

46. *Id.* at 92-93.

47. JAFFE, *supra* note 18, at 72. Post-traumatic stress disorder occurs when a person is exposed to a traumatic event and the following elements are present (1) the "person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a

bursts of anger and aggression, fixation on the trauma, a reduction of normal, routine activities, and somatic and emotional complaints.⁴⁸ The disorder significantly interferes with normal development in school, peer, and adult relationships.⁴⁹

Psychological effects on children who are exposed to violence in their homes often affect the community. Children from violent families often have difficulty making friends.⁵⁰ They have discipline problems in and out of the home and are often poor students.⁵¹ In addition, they are often involved in delinquent acts such as physical fights, vandalism, stealing, drinking, and drug use.⁵² Children from violent homes are twice as likely to run the risk of having these problems than children from non-violent homes.⁵³

In addition, children suffer from educational neglect.⁵⁴ In the lower grades, children often missed school due to their mother's injuries or due to their own injuries.⁵⁵ The atmosphere at home is not conducive to studying and interferes with homework.⁵⁶ Many have reading and writing disabilities and are one or two grades below their age level.⁵⁷ Children do not see education as a positive way out of their circumstances, but are more interested in immediate solutions they feel can come from drugs or alcohol.⁵⁸

Children from violent homes often develop self-destructive methods of coping with their situations.⁵⁹ Problems with anger, hostility, aggression, and violence found in many of the male children show undesirable coping mechanisms.⁶⁰ In addition, behaviors such as truancy, running away from home, and prostitution are seen as self-preserving, positive solutions to their chaotic family life.⁶¹ A large number of the children develop drug and alcohol dependency problems.⁶² Drug use is a com-

threat to the physical injury of self or others," and (2) "the person's response involved intense fear, helplessness, or horror." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 427-28 (4th ed. 1994).

48. JAFFE, *supra* note 18, at 72.

49. R. Falumaro et al., *Maternal and Child Posttraumatic Stress Disorder in Cases of Child Maltreatment*, 18 CHILD ABUSE AND NEGLECT 28 (1994).

50. RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE* 128 (1988).

51. *Id.*

52. *Id.* at 128-29. Children from violent homes are three to four times more likely to be involved in illegal activities and to be arrested than children from non-violent families. *Id.* at 129.

53. *Id.* at 128.

54. ROY, *supra* note 17, at 65.

55. *Id.*

56. *Id.*

57. *Id.* at 65-66.

58. *Id.* at 66.

59. *Id.* at 61.

60. *Id.*

61. *Id.* Sixty percent of the boys got into trouble with school authorities and chronic truancy prior to dropping out of school and running away from home. *Id.* at 60.

62. *Id.* Eighty-five percent said that they had been drinking since age 11 and two percent said they started at age nine. *Id.*

mon escape route out of the real violence in the home.⁶³ However, drugs and alcohol often do not achieve the positive effect desired; rather it may aggravate the conflict in the home and actually reduce the ability to cope with the disharmony in the family.⁶⁴

Children from abusive homes are often fearful of their own behavior, and what they could do to themselves or other family members should the circumstances become totally intolerable.⁶⁵ Females are prone to suicide, while males fear they could be driven to murder.⁶⁶ Many children who have endured a definite pattern of abuse over a period of years feel incapable of improving the circumstances at home, of alleviating the anxiety, or of attenuating the frequency and intensity of physical abuse and thus, have a feeling of utter hopelessness and frustration.⁶⁷

The frequent displacement of children and their primary caretakers caused by domestic violence provides additional external stress for children in violent homes.⁶⁸ Children must learn to deal with the uncertainty of where they will be staying and learn to cope with new surroundings.⁶⁹ Additionally, they must often leave their school, friends, and personal belongings behind and live with the lack of money that goes along with the separation.⁷⁰

Adults are often regarded with suspicion and disdain by children exposed to domestic violence.⁷¹ Adjustment problems caused by multiple moves and temporary lodging with relatives or in shelters, leads to stress and anxiety which may produce a lack of faith and trust in their parents, which can be projected to all adults.⁷² These children doubt their parents' ability to provide them with physical and emotional nurturing and a *normal* home life in which there are no conflicts.⁷³

Children from violent homes can both love and hate their parents.⁷⁴ They despise their parents and doubt that their parents love them, yet feel sorry for them.⁷⁵ The children blame the parents (usually the abu-

63. *Id.* at 77.

64. *Id.*

65. *Id.* at 67. The term auto-phobia is used to mean fear of oneself. *Id.* Totally intolerable means that circumstances "in the home either directly threatened their lives or the lives of their mothers or younger siblings." *Id.* at 67-68.

66. *Id.* at 68.

67. *Id.* at 69. This fits the description of "learned helplessness" referred to by Lenore Walker. See WALKER, *supra* note 32, at 2, 86-94.

68. ROY, *supra* note 17, at 89. Two-thirds of the children taking part in the study indicated that they had moved about twice a year. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 79.

72. *Id.* at 79-80.

73. *Id.* at 81.

74. *Id.* at 82.

75. *Id.*

sive one), yet may assume that they are the cause of the conflict between their parents.⁷⁶ Parents are seen as rigid, unreasonable, very physical, emotional, out of control, poor listeners, autocratic, and disinterested in how the children felt.⁷⁷

Parents who are wife-beaters or battered wives usually have a more extreme response to disagreements between them and their children.⁷⁸ The batterer uses violence as the principle method of discipline, while the victim does not become involved.⁷⁹ The children are caught between the two extremes and do not know which way to turn.⁸⁰ The children do not learn to verbally express their feelings or identify issues of conflict, which leads to ambivalence and the loss of their ability to settle conflicts in any situation.⁸¹

D. PERPETUATION OF THE CYCLE OF ABUSE

Children learn their value systems from their parents, society, and the adults around them. Evidence shows that young men and women in abusive homes are learning to be the next generation of batterers and victims.⁸² A great majority of abusive husbands grew up in homes where they witnessed their fathers abuse their mothers.⁸³

Children from violent homes learn the value of physical domination.⁸⁴ They learn that the bigger and stronger they become, the more control they can exert over others.⁸⁵ Children learn from example that they get results with physical violence.⁸⁶ They learn that men are strong and that children and women can be victimized.⁸⁷ Boys learn that men are cool and emotionless, and that men who express feelings are weak.⁸⁸

Many of the boys pattern themselves after the abuser and join their fathers in victimizing their mothers.⁸⁹ Conversely, the girls tend to be

76. *Id.* Over 90% of the children indicated they feel responsible in some way for some of the arguments between their parents. *Id.* at 86.

77. *Id.* at 83.

78. *Id.* at 83-84.

79. *Id.* at 84.

80. *Id.* at 85.

81. *Id.*

82. *Id.* at 99. Eighty-three percent of the males in dating relationships hit their girlfriends when they were angry with them. *Id.* Most of the boys found their behavior justified. *Id.* Fifty-two percent of the girls with boyfriends said that they argued, pushed and shoved each other, screamed and used profanity. *Id.*

83. GELLES & STRAUS, *supra* note 50, at 121. Sons of severe batterers abused their wives at a rate 10 times higher than that of sons of non-violent fathers. *Id.*

84. ROY, *supra* note 17, at 97.

85. *Id.* Children learn that there is a pecking order in which the younger and weaker are vulnerable and that children cannot win. *Id.*

86. *Id.*

87. *Id.* They learn they can get away with violence because the neighbors and authorities will not get involved. *Id.*

88. *Id.*

89. *Id.* at 64. Twenty percent of the boys, including some of the boys who had at times inter-

more passive to the violence. They become "victim-oriented, silent, withdrawn, and fearful of becoming the direct object of physical abuse."⁹⁰ Additionally, they often take over the household responsibilities when their mothers are unable to do so.⁹¹

Domestic violence is a learned, assaultive, or controlling behavior.⁹² It is learned and reinforced through witnessing family violence in the home, society, and media.⁹³ In order to stop the violence, the cycle must be broken.

E. TREATMENT

Although treatment models differ, the principle model used in batterer's treatment programs is based on the social learning theory of aggression.⁹⁴ According to this theory, behaviors are learned and are capable of being changed.⁹⁵ Thus, batterers are capable of learning nonviolent methods of coping with anger and stress.⁹⁶ In order to change, perpetrators of domestic violence need to take responsibility for their actions, learn better communication skills so that they are able to resolve personal conflicts in a nonviolent manner, and be educated about battering and anger control.⁹⁷ The current trend is to establish batterer's counseling in conjunction with alcohol treatment, psychiatric care, and child protection services.⁹⁸

Courts can become involved in the treatment process by court-ordered counseling. North Dakota statutes allow the courts to compel the perpetrators of domestic violence into treatment.⁹⁹ At the courts discretion, counseling may include drug, alcohol, or mental health treatment as well as batterer's treatment.¹⁰⁰

vened to protect their mothers, were involved in the victimization. *Id.*

90. *Id.*

91. *Id.* at 65.

92. Ganley, *supra* note 28, at 22-23, 29.

93. *Id.* at 30 (citing RUSSELL DOBASH & R. EVERSON DOBASH, *VIOLENCE AGAINST WIVES* (1979)).

94. BATTERED WOMEN AND THEIR FAMILIES: INTERVENTION STRATEGIES AND TREATMENT PROGRAMS 89 (Albert R. Roberts ed., 1984) [hereinafter *INTERVENTION STRATEGIES*].

95. *Id.*

96. *Id.*

97. *Id.*

98. Edward W. Gondolf, *Male Batterers*, in *FAMILY VIOLENCE PREVENTION AND TREATMENT* 231 (Robert L. Hampton ed., 1993).

99. N.D. CENT. CODE 14-07.1-02(4)(d) (1995). The statute provides in pertinent part:

Recommending or requiring that either or both parties undergo counseling with a domestic violence program or other agency that provides professional services that the court deems appropriate. The court may request a report from the designated agency within a time period established by the court. The costs of the court-ordered initial counseling assessment and subsequent reports must be borne by the parties or, if indigent, by the respondent's county of residence.

Id.

100. *Id.*

Many believe that to get the maximum benefit from counseling, it should be voluntary since batterers ordered to treatment may be resistant to the process.¹⁰¹ Yet, it is difficult to get batterers to attend on a voluntary basis.¹⁰² Batterers, however, may be more motivated when the court order is a part of a diversion program, deferred prosecution,¹⁰³ or when there are consequences should the batterer not complete treatment or return to the battering behavior.¹⁰⁴

The success rate of batterer's treatment programs is questionable. It is difficult to determine the effectiveness of treatment because many of the studies rely on small samples either due to design or attrition.¹⁰⁵ Some research indicates that a return to battering behavior is less among those who have been through treatment than those who have not.¹⁰⁶ Yet other studies have shown negligible results from treatment.¹⁰⁷ Counseling batterers as an intervention for domestic violence is rather new.¹⁰⁸ As such, further research and evaluation is necessary before the effectiveness of batterer's counseling can be assessed.

III. DOMESTIC VIOLENCE IN NORTH DAKOTA CUSTODY CASES

A. CONSIDERATIONS IN EVALUATING DOMESTIC VIOLENCE

North Dakota courts have struggled with an interpretation of what constitutes domestic violence. The statutory definition of domestic violence includes physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault, not committed in self-defense, on the complaining family or household members.¹⁰⁹ Although the statutory definition does not include emotional abuse, North Dakota case law indicates that emotional abuse may result in a finding of domestic abuse.¹¹⁰ It is unclear, though, whether domestic violence can be found when the damage is restricted to property.¹¹¹ W h e n

101. INTERVENTION STRATEGIES, *supra* note 94, at 105.

102. *Id.*

103. *Id.*

104. Anne Ganley, *Court-Mandated Treatment for Domestic Violence Perpetrators*, in THE FAMILY VIOLENCE PREVENTION FUND, DOMESTIC VIOLENCE IN CIVIL COURT CASES: NATIONAL MODEL FOR JUDICIAL EDUCATION 334 (1992).

105. See, e.g., Jeffrey L. Edleson & Maryann Syers, *The Effects of Group Treatment for Men Who Batter: An 18 Month Follow Up Study*, 1 RES. SOC. WORK PRAC. 227 (July 1991).

106. Barbara J. Hart, *supra* note 32, at 57.

107. THE FACTS, *supra* note 23, at 19 (citing ADELLE HARREL, THE URBAN INSTITUTE, EVALUATION OF COURT-ORDERED TREATMENT FOR DOMESTIC VIOLENCE OFFENDERS 93 (1991)).

108. Gondolf, *supra* note 98, at 231 (stating that treatment for batterers developed slowly, starting in the late 1970s and increased throughout the United States in the late 1980s).

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

110. Lucke v. Lucke, 300 N.W.2d 231, 234 (N.D. 1980).

111. Ryan v. Flemming, 533 N.W.2d 920, 923-24 (N.D. 1995); see also *id.* at 925 (Levine, J., concurring) (stating that statute is consonant with view that domestic violence includes acts directed at property if done to control or punish the victim).

allegations of domestic violence are made in a custody dispute, the court must determine if credible evidence of domestic violence exists.¹¹² Evidence of domestic violence requires paramount consideration.¹¹³ The court must focus on the intent of the perpetrator and whether the victim was in fear of imminent physical harm, bodily injury, or assault.¹¹⁴

Domestic violence is a learned, assaultive behavior aimed at controlling another.¹¹⁵ It is not caused by a victim's tendency to incite the perpetrator or stress in the perpetrator's life.¹¹⁶ Domestic violence may be exhibited through a pattern of conduct or a single act.¹¹⁷ It does not, however, require a finding of actual physical harm.¹¹⁸

Domestic violence does not include acts committed in self-defense.¹¹⁹ Self-defense includes the battered wife syndrome.¹²⁰ The fact that the abused parent suffers from the effects of the abuse is not grounds to deny that parent custody.¹²¹

In a custody dispute, the existence of domestic violence cannot be ignored.¹²² The trial court must make findings of fact regarding domestic violence¹²³ and cannot delegate this duty.¹²⁴ The trial court cannot rely on an expert's testimony as conclusive and dispositive of the issue of domestic violence.¹²⁵ Instead, it is particularly important in a case involving domestic violence, that the trial court weigh all testimony and make detailed findings of fact.¹²⁶

The trial court need not make findings on each allegation of abuse, but rather on the issue of domestic violence as a whole.¹²⁷ If the trial court finds credible evidence that one parent committed domestic violence, a rebuttable presumption exists against awarding custody to the perpetrator of domestic violence.¹²⁸ The rebuttable presumption weighs

112. N.D. CENT. CODE § 14-09-06.2 (Supp. 1995).

113. *Helbling v. Helbling*, 532 N.W.2d 650, 652 (N.D. 1995).

114. *Ryan*, 533 N.W.2d at 925 (Levine, J., concurring).

115. *Id.* (citing Anne Ganley et al., *The Impact of Domestic Violence on the Defendant and the Victim in the Courtroom*, in THE FAMILY VIOLENCE AND PREVENTION FUND, DOMESTIC VIOLENCE: THE CRUCIAL ROLE OF THE JUDGE IN CRIMINAL COURT CASES: A NATIONAL MODEL FOR JUDICIAL EDUCATION (1991)).

116. *Heck v. Reed*, 529 N.W.2d 155, 164 (N.D. 1995) (citing Ganley, *supra* note 115)).

117. *Anderson v. Hensrud*, 548 N.W.2d 410, 413 (N.D. 1996).

118. *Ryan*, 533 N.W.2d at 923. *But see id.* at 925 (Levine, J. concurring specially).

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

120. *Krank v. Krank*, 529 N.W.2d 844, 848 n.2 (N.D. 1995) [hereinafter *Krank I*] (citing *State v. Leidholm*, 334 N.W.2d 811 (N.D. 1983)).

121. *Owan v. Owan*, 541 N.W.2d 719, 721 (N.D. 1996).

122. *Helbling v. Helbling*, 532 N.W.2d 650, 653 (N.D. 1995).

123. *Owan*, 541 N.W.2d at 722.

124. *Id.*

125. *Id.* at 721.

126. *Id.* at 722.

127. *Krank II*, 541 N.W.2d 714, 716 (N.D. 1996) (stating that court must be able to understand the factual basis of the trial court's decision from its findings in order for findings to be adequately specific).

128. N.D. CENT. CODE § 14-09-06.2(j) (Supp. 1995).

heavily against the perpetrator and is a critical part of the custody analysis.

B. NORTH DAKOTA'S REBUTTABLE PRESUMPTION

Domestic violence is presumed to negatively impact the best interests of the child.¹²⁹ The presumption is based on the premise that a perpetrator of domestic violence should not be awarded custody of a child, unless the other parent is proven unfit.¹³⁰ Domestic violence does not have to be directed towards the child,¹³¹ since children suffer harm even if they are not the direct target of the violence and even if they do not witness the actual violence.¹³²

The presumption shifts the burden of proof to the perpetrator to show by clear and convincing evidence that the best interests of the child requires custody be placed with the perpetrator.¹³³ The rebuttable presumption outweighs all other factors and can only be overcome by compelling or exceptional circumstances.¹³⁴ The customary weighing of the remaining statutory best interest factors is insufficient to rebut the presumption.¹³⁵ Furthermore, lapse of time alone is not enough to overcome the presumption because domestic violence is a learned pattern of behavior.¹³⁶ It is also impermissible to consider that the cause of the violence has been eliminated since the parties no longer reside together.¹³⁷

129. *Heck v. Reed*, 529 N.W.2d 155, 164 (N.D. 1995).

130. *Id.* at 162. It is unclear exactly what "unfit parent" entails. Chief Justice VandeWalle, concurring in *Heck*, set forth that the other parent must be proven "unfit" before the perpetrator can be awarded custody. *Id.* at 166 (VandeWalle, C.J., concurring). Further, the court in *Krank I*, indicated that the practical effect of the statute is that the perpetrator of domestic violence cannot be awarded custody unless the other parent is found to be unfit. *See id.* at 851. (Meschke, J., concurring) (stating "whether parents are unfit will usually be adjudged only when the child is so deprived that the proceeding turn to termination all parental rights"). *But see Bruner v. Hager*, 534 N.W.2d 825, 829 (N.D. 1995) (Sandstrom, J., concurring) (stating that once the presumptions raised, the perpetrator may not be awarded custody unless the other parent is proven unfit is contrary to the statute).

131. *Id.* at 163.

132. *Id.*; *see also supra* Part II.B-C.

133. N.D. CENT. CODE § 14-09-06.2(j).

134. *Heck*, 529 N.W.2d at 162.

135. *Id.*

136. *Krank II*, 541 N.W.2d 714, 717 (N.D. 1996); *compare Krank I*, 529 N.W.2d 844, 849 (N.D. 1995) (stating that domestic violence occurring more than five years before trial does not overcome presumption) *with id.* at 851 (Neumann, J., concurring) (stating that the passage of five years may be convincing evidence that the violent behavior has changed) *and Heck*, 529 N.W.2d at 165 (stating that two years without domestic violence is insufficient to indicate abuse behavior has changed).

137. *Krank II*, 541 N.W.2d at 718 (finding that separation does not change the psychological characteristics of the parties). The presumption can be overcome only under exceptional circumstances. *Anderson v. Hensrud*, 548 N.W.2d 410, 412 (N.D. 1996) (finding that where a father filed motion for change of custody based on mother's continued violent relationships with other men, the presence of domestic violence could amount to a change of circumstances and invoke the presumption against awarding custody to the perpetrator). Further, the court in *Anderson*, held that a custodial parent who has a continuing relationship with a perpetrator of domestic violence should expect to have custody of that child transferred to the non-custodial parent unless there was clear and convincing evidence that the best interests of the child required the mother to retain custody. *Id.* at 414 (citing *Heck*, 529 N.W.2d at 166 (VandeWalle, C.J., concurring in result)).

To overcome the presumption, the perpetrator must demonstrate some attempts at rehabilitation.¹³⁸ Scholars suggest that without intervention by a court or treatment program, recovery is unlikely.¹³⁹ In certain circumstances, proof of treatment may support a finding that domestic violence is not likely to occur in the future.¹⁴⁰ However, without proof of prior rehabilitation through counseling and treatment, subsequent court-ordered counseling cannot adequately safeguard against the risks of placing the child in the custody of a perpetrator of domestic violence.¹⁴¹

C. BOTH PARENTS ARE PERPETRATORS

Nonetheless, the presumption weighs heavily against the perpetrator. However, if both parents are perpetrators, the amounts and severity of domestic violence committed by each parent must be measured to determine if the presumption exists.¹⁴²

North Dakota Century Code Section 14-09-06.2(1)(j) does not specifically address the procedure for analyzing custody cases that include both parents committing acts of domestic violence.¹⁴³ The court in *Krank I*,¹⁴⁴ however, interpreted the legislative intent of section 14-09-06.29(j) in a case involving two parents who had committed acts of domestic violence.¹⁴⁵ The court held that where both parents committed acts of domestic violence, the amounts and extent of domestic violence must be measured.¹⁴⁶ If the amount and extent of domestic violence committed by one parent is significantly greater, the presumption will apply to the perpetrator of the greater domestic violence.¹⁴⁷

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

139. *Id.*

140. *Id.* at 165.

141. *See Bruner v. Hager*, 534 N.W.2d 825, 828 (N.D. 1995) (citing to *Krank I*, 529 N.W.2d at 849); *see also Smith v. Smith*, 534 N.W.2d 6, 11 (N.D. 1995) (holding that where father had openly admitted his error and openly engaged in significant therapy and counseling, the presumption against unsupervised visitation had been overcome, in a case that dealt with the perpetrator of domestic violence receiving unsupervised visitation).

142. *Krank I*, 529 N.W.2d at 850.

143. *Id.*

144. 529 N.W.2d 844 (N.D. 1995).

145. *Id.* The court in *Krank I* looked to the protection order statute in Missouri for guidance. *Id.* at 850 n.3. That statute states in part:

In making an award of custody, the court shall consider all relevant factors including the presumption that the best interests of the child will be served by placing the child in the custody and care of the non-abusive parent, unless there is evidence that both parents have engaged in abusive behavior, in which case the court shall consider this presumption but may appoint a guardian ad Litem or a court appointed special advocate to represent the children in accordance with [Missouri law], and shall consider all other factors in accordance with [Missouri law].

Id. (citing MO. REV. STAT. § 455.050.5).

146. *Id.*

147. *Id.*

However, if the amount and extent of domestic violence by each parent is roughly proportional, and the parents are both found to be fit, the presumption ceases to exist.¹⁴⁸ The remaining best interest factors should then be analyzed in awarding custody.¹⁴⁹ In addition to weighing the best interest factors, the court should also consider which parent would be least likely to continue to expose the child to violence.¹⁵⁰ Further, the statute provides for placement of the child with a third party, when that placement is necessary to protect the welfare of the child.¹⁵¹ Temporary third party placement may be necessary where both parents are perpetrators and the acts of domestic violence are equal and severe.

IV. IMPACT AND SUGGESTIONS

Section 14-09-06.2(j) of the North Dakota Century Code is intended to protect household members from domestic violence. However, this statute is ambiguous regarding the amount and severity of domestic violence necessary to trigger the presumption against awarding custody to the perpetrator. North Dakota case law clearly indicates that one act of violence is enough to invoke the presumption; however, case law recognizes that domestic violence is a learned pattern of behavior, suggesting that more than one act is necessary.¹⁵² Since section 14-09-06.2(j) provides that domestic violence includes physical harm, assaults, or the fear of physical harm,¹⁵³ it does not include emotional abuse unless it results in physical harm or fear of physical harm.¹⁵⁴ However, North Dakota case law indicates that emotional abuse can result in a finding of domestic violence.¹⁵⁵

In addition, section 14-09-06.2(j) does not include damage to property. However, North Dakota case law is unclear as to whether damage to property can result in a finding of domestic violence.¹⁵⁶ Finally, the issue of whether reasonable disciplinary measures regarding children should be included is not addressed by section 14-09-06.2(j). Therefore, clarification regarding the amount and severity of violence as well as the types of acts necessary to invoke the presumption is needed in North Dakota's statute.

148. *Id.*

149. *Krank I*, 529 N.W.2d at 850 n.6 (citing section 455.050.5 of the Missouri Revised Statutes). *But see Krank II*, 541 N.W.2d 714, 719 (Sandstrom, J., dissenting).

150. *Owan v. Owan*, 541 N.W.2d 719, 722 (N.D. 1996).

151. N.D. CENT. CODE § 14-09-06.2(j) (Supp. 1995).

152. *Krank I*, 529 N.W.2d at 850.

153. N.D. CENT. CODE § 14-09-06.2(j).

154. *Id.*

155. *Lucke v. Lucke*, 300 N.W.2d 231, 234 (N.D. 1980).

156. *Ryan v. Flemming*, 533 N.W.2d 920, 923-24 (N.D. 1995).

A. AMOUNTS AND SEVERITY OF VIOLENCE

Section 14-09-06.2(j) should be amended to clarify the amounts and severity of violence necessary to result in a finding of domestic violence.¹⁵⁷ For example, Michigan's statute provides that a single act which was violent or caused fear of a violent attack is sufficient for a finding of domestic violence.¹⁵⁸ Florida's statute requires an act resulting in physical injury or death.¹⁵⁹ Oklahoma's statute focuses on ongoing domestic violence which indicates that recent violence is more indicative of domestic violence than acts which occurred in the past and have ceased to occur.¹⁶⁰ Louisiana's statute indicates that a "court may find a history of perpetrating family violence if the court finds that one incident of family violence has resulted in serious bodily injury or the court finds more than one incident of family violence."¹⁶¹ Louisiana's statute also creates a presumption that a perpetrator of domestic violence shall not be awarded sole or joint custody.¹⁶²

Amending the statute to state that one act which resulted in bodily injury would invoke the presumption would clarify the type of act that would be sufficient for a finding of domestic violence. One act which results in bodily injury should be sufficient to invoke the presumption since the statute clearly intends to prevent bodily injury. Furthermore, this clarification would help prevent abuse of the statute by excluding one non-violent act from invoking the presumption.

In addition, amending §14-09-06.2(j) to require "one act which resulted in bodily injury or more than one act" would further clarify the statute by incorporating the view that domestic violence is a learned pattern of behavior.¹⁶³ The suggested language would cover any act which resulted in bodily injury, and further, cover situations where there is a pattern of abuse regardless of whether the abuse is physical or emotional.

B. EMOTIONAL ABUSE AND DAMAGE TO PROPERTY

Section 14-09-06.2(j) of the North Dakota Century Code does not specifically include emotional abuse or damage to property. However, the North Dakota Supreme Court has indicated that domestic violence includes emotional abuse.¹⁶⁴ Section 14-09-06.2(j) could be further

157. *Id.*

158. MICH. COMP. LAWS ANN. § 400.1501(c) (West 1988).

159. FLA. STAT. ANN. § 741.28(1) (West 1996).

160. OKLA. STAT. ANN. tit. 43, § 122.2 (West 1997); *see Brown v. Brown*, 867 P.2d 477 (Okla. Ct. App. 1993) (discussing the application of Oklahoma's domestic violence statute).

161. LA. REV. STAT. ANN. § 9:364(A) (West 1996).

162. *Id.*

163. *See Heck v. Reed*, 529 N.W.2d 155, 164 (N.D. 1995) (describing domestic violence as a learned pattern of behavior).

164. *Lucke v. Lucke*, 300 N.W.2d 231, 234 (N.D. 1980).

clarified by expressly including emotional abuse in the language of the statute. For example, Puerto Rico's statute has expressly indicated that emotional abuse is included in domestic violence.¹⁶⁵ At least one state, Wyoming, has indicated that restraining personal liberty could result in a finding of domestic violence.¹⁶⁶ However, other states have limited the emotional abuse factor by placing limits on the types of verbal abuse included in domestic violence cases.¹⁶⁷

North Dakota case law also indicates that damage to personal property may result in a finding of domestic violence.¹⁶⁸ Further, section 14-09-06.2(j) could be improved by expressly providing that malicious damage to property can be found to constitute domestic violence. For example, Tennessee and Hawaii indicate that malicious damage to property is included in domestic violence.¹⁶⁹

C. CHILD DISCIPLINE

North Dakota has not yet addressed the issue of whether child discipline is included in the analysis of domestic violence. Certainly the language of the statute provides for such an application if the discipline resulted in physical violence or created a fear of physical violence.¹⁷⁰ However, Illinois has indicated that providing reasonable direction to a child is not included in domestic violence.¹⁷¹ By North Dakota standards, an act which resulted in physical injury to a child should be included in an analysis of domestic violence.¹⁷² However, it is unlikely that the intent of the statute covers an act which was a reasonable disciplinary measure. Thus, section 14-09-06.2(j) could be clarified by expressly excluding reasonable discipline of children from constituting domestic violence.

165. See P.R. LAWS ANN. tit. 8, § 602(k) (defining domestic abuse to include psychological violence).

166. WYO. STAT. ANN. § 35-21-102(a)(iii) (Michie 1994) (defining "domestic abuse" to include acts which unreasonable restrain the personal liberty of a household member).

167. CONN. GEN. STAT. ANN. § 486b-38a (West 1995) (providing that "verbal abuse or argument shall not constitute family violence unless there is present danger and likelihood physical violence will occur"); IND. CODE ANN. § 31-1-11.5-2 (Michie 1996) (providing that domestic violence does not include "negligence or defamation by one parent against another parent or the child").

168. *Ryan v. Fleming*, 533 N.W.2d 920, 925 (N.D. 1995) (Levine, J., concurring) (stating that "our statute is consonant with the expert view that domestic violence includes acts directed against property" when the perpetrator intends to control or punish the victim). *But see id.* at 924 (holding of majority is unclear whether damage to property can result in a finding of domestic violence).

169. See, e.g., TENN. CODE ANN. § 36-3-601 (1955-1996) (providing that domestic abuse includes malicious damage to personal property); HAW. REV. STAT. § 586-1 (Michie 1995) (domestic abuse includes malicious property damage between family or household members).

170. N.D. CENT. CODE §14-09-06.2(j) (Supp. 1995).

171. 725 ILL. COMP. STAT. ANN. 5/112a-3 (West 1996) (domestic violence "does not include reasonable direction of a child by a parent or person in loco parentis").

172. N.D. CENT. CODE §14-09-06.2(j).

D. BOTH PARENTS ARE PERPETRATORS

Another problematic issue is that the North Dakota statute offers no protection to the child where both parents are perpetrators of domestic violence. The North Dakota Supreme Court's analysis set forth in *Krank I*,¹⁷³ resulted in a weighing of the domestic violence of both parents.¹⁷⁴ The parent who committed significantly greater violence must overcome the presumption.¹⁷⁵ However, if both parents committed roughly proportional acts of domestic violence, no presumption exists, and the court will place the child according to the remaining statutory best interest factors.¹⁷⁶ This application of the statute results in the child being placed with a known perpetrator with no protective measures in place. Thus, section 14-09-06.2(j) should be amended to provide protection for the child in such a situation.

For example, Louisiana has enacted a statute which reflects the presumption that no parent who has a history of perpetrating domestic violence shall be awarded sole or joint custody, similar to section 14-09-06.2(j).¹⁷⁷ The Louisiana statute further provides that if both parents have a history of perpetrating domestic violence, custody shall be awarded solely to the parent who is less likely to continue to perpetrate family violence.¹⁷⁸ However, the statute goes further to require the custodial parent to complete a treatment program thereby offering some safeguards that the cycle of violence will be broken.¹⁷⁹ The Louisiana approach offers more protection to the child who has been the victim when both parents were perpetrators of domestic violence.

Additionally, a Nevada statute sets forth the factors that Nevada courts should utilize when both parents are perpetrators of domestic violence.¹⁸⁰ A finding that either parent or any other person seeking

173. 529 N.W.2d 844 (N.D. 1995).

174. *Krank I*, 529 N.W.2d 844, 850 (N.D. 1995).

175. *Id.*

176. *Id.* Also assuming that both parents are otherwise found to be fit. *Id.*

177. LA. REV. STAT. ANN. § 9:364(B) (West 1996).

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. In such a case, the court shall mandate completion of a treatment program by the custodial parent. If necessary to protect the welfare of the child, custody may be awarded to a suitable third person, provided that person would not allow access to a violent parent except as ordered by the court.

Id.

178. *Id.*

179. *Id.*

180. NEV. REV. STAT. ANN. § 125.480(6) (Michie 1995).

If after an evidentiary hearing held pursuant to subsection 5 the court determine that each party has engaged in acts of domestic violence, it shall if possible, then determine which person was the primary physical aggressor. In determining which party was the primary physical aggressor for the purposes of this section, the court shall consider:

(a) All prior acts of domestic violence involving either party;

custody has engaged in one or more acts of domestic violence results in a rebuttable presumption that it is not in the best interests of the child to be placed in the custody of the perpetrator of domestic violence.¹⁸¹ The Nevada statute offers more protection to the child because, unlike North Dakota's statute, the Nevada statute applies the presumption to both parents if equal perpetrators.¹⁸² The affect of the presumption applying to both parents would seemingly require the court to place the child with a perpetrator only under exceptional circumstances.¹⁸³ Thus, the child could be placed with a third party until such time as the parents rebutted the presumption by obtaining treatment to unlearn the behavior.¹⁸⁴ However, the Nevada statute would still allow a child to be placed with a perpetrator if the other parent was found to be the primary physical aggressor.¹⁸⁵ Thus, as in North Dakota, the child would remain vulnerable with no mandatory provisions that the custodial perpetrator receive counseling or treatment.

Another example of how section 14-09-06.2(j) could be improved can be found in a Delaware statute which requires that the case be referred to the appropriate social service agency for an investigation and findings when both parents are perpetrators of domestic violence.¹⁸⁶ Further, the Delaware statute finds that the presumption against awarding custody to the perpetrator can be overcome if there have been no further acts of domestic violence, the perpetrator of domestic violence has successfully completed counseling designed for domestic violence, successfully completed a program of alcohol or drug counseling if the court determined that type of counseling was appropriate, and demonstrated that giving custodial or residential responsibilities to the perpetrator is in the best interests of the child.¹⁸⁷

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- (b) The relative severity of the injuries, if any, inflicted upon the persons involved in those prior acts of domestic violence;
 - (c) The likelihood of future injury;
 - (d) Whether, during the prior acts, one of the parties acted in self-defense; and
 - (e) Any other factors which the court deems relevant to the determination.

In such a case, if it is not possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 5 applies to both parties. If it is possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 5 applies only to the party determine by the court to be the primary physical aggressor.

Id.

181. *Id.*

182. *Id.*

183. See *Heck v. Reed*, 529 N.W.2d 155, 156 (N.D. 1995).

184. N.D. CENT CODE § 14-09-06.2(j) (Supp. 1995).

185. NEV. REV. STAT. ANN. § 125.480 (Michie 1995).

186. DEL. CODE ANN. tit. 13, § 705A(d) (1975-1995).

187. *Id.* tit. 13, § 705A(c).

As shown above, the North Dakota statute should be amended to provide measures that protect the child from the harmful effects of domestic violence, especially when the child is placed with a known perpetrator of domestic violence. In the case where both parents are perpetrators, courts should also consider the existing statutory provision which allows courts to place the child with a suitable third party, if that placement is necessary to protect the welfare of the child. Temporarily placing the child with a third party while requiring both parents to seek treatment should protect the child from further domestic violence and allow the parents to obtain the necessary treatment to unlearn the violent behavior.

IV. CONCLUSION

North Dakota has taken a leading role in the area of domestic violence by enacting a statute to protect children from the ravages of domestic violence and its detrimental effects. However, statutory clarification is needed regarding the amount and extent of domestic violence necessary to invoke the presumption. This further clarification needs to indicate the analysis to be used when both parents are perpetrators of domestic violence. Finally, the statute needs to address appropriate safeguards, such as mandatory treatment, to protect the child who is placed with a known perpetrator of domestic violence.

Ultimately, a changed statute will put pressure on attorneys and judges. Attorneys will have to become familiar with the new statute, and case law, while becoming more aware of the effect of violence on children and victims. More specifically, attorneys must be able to present the appropriate evidence to enable the court to make adequate findings with regard to domestic violence. It is imperative that judges be willing to make the necessary findings. If the legislature does choose to amend the statute, it is critical that the primary intent of the statute—protecting children from domestic violence—be preserved.