

WHEN PARENTS FIGHT: ALASKA'S PRESUMPTION AGAINST AWARDING CUSTODY TO PERPETRATORS OF DOMESTIC VIOLENCE

LISA BOLOTIN*

ABSTRACT

Because of the negative effects domestic violence has on a child's development, many states, including Alaska, have adopted a rebuttable presumption that awarding custody to a parent who has committed domestic violence is not in the child's best interests. Once the presumption is triggered, the parent who perpetrated domestic violence cannot be awarded any form of custody. To invoke the presumption, a certain level of domestic violence has to have been committed, the victim must be a domestic living partner, and the violence must be proved by a preponderance of the evidence. The presumption may be rebutted by demonstrating rehabilitation, lack of substance abuse, and that the best interests of the child require custody. The presumption is effective because it encourages victims to leave their abusers, ensures that courts consider domestic violence in their custody determinations, nullifies other considerations that disfavor the abused parent, and simplifies custody cases. The Alaska statute could be improved, however, by clarifying key terms, allowing children to raise the presumption, and providing judges less discretion in undoing the presumption's effects.

Copyright © 2008 by Lisa Bolotin.

* The author is a member of the Class of 2009 at Duke University School of Law and earned a B.A. and B.S. from the University of Pennsylvania in 2004. The author would like to thank the staff of the *ALR* for all their hard work.

TABLE OF CONTENTS

INTRODUCTION.....	264
I. THE RELEVENCE OF DOMESTIC VIOLENCE IN DETERMINING CHILD CUSTODY	265
A. Presumption of Joint Custody	265
B. When Joint Custody Is Not in the Child’s Best Interests: Evidence of Abuse	268
1. <i>Potential Physical Harm</i>	269
2. <i>Detriment to Child’s Development</i>	270
3. <i>Inability to Co-Parent</i>	272
II. THE POLITICAL AND HISTORICAL CONTEXT OF REBUTTABLE PRESUMPTIONS.....	272
III. OPERATION OF THE ALASKA AMENDMENT.....	273
A. Effect of Presumption.....	275
B. Presumption and the Friendly Parent Provision.....	278
C. Invoking the Presumption.....	280
1. <i>Requirement that Level of Violence Amount to a History of Perpetrating Violence</i>	280
2. <i>Requirement that Victim Be a Domestic Living Partner</i>	281
3. <i>Requirement that Violence Be Proved by a Preponderance of the Evidence</i>	284
4. <i>Rebutting the Presumption</i>	285
IV. THE ALASKA STATUTE SUCCESSFULLY ADDRESSES SOME CONCERNS OVER THE EFFECTS OF PARENTING BY PERPETRATORS OF DOMESTIC VIOLENCE	287
A. Existence of a Rebuttable Presumption	287
B. Ease of Invoking the Presumption	292
C. Effect of Presumption on Visitation Benefits Children.....	296
V. IMPROVING THE ALASKA CUSTODY STATUTES	296
A. Allow the Child to Raise the Presumption.....	297
B. Clarify the Meaning of “Domestic Living Partner”	298
C. Limit Judicial Discretion to Allow Unsupervised Visitation with a Perpetrator of Domestic Violence.....	299
CONCLUSION	301

INTRODUCTION

Changes in child custody laws are commonplace in the United States, as legislatures continually search to serve the best interests of the child. The high stakes and high emotions of contested custody cases

present the greatest challenges. In these cases, the existence of domestic violence further compounds the complexity of making a decision that actually serves the child's best interests. Following a litany of social science research revealing the negative effects domestic violence may have on a child's development, states began strengthening the language in their child custody statutes to ensure that the existence of domestic violence is appropriately considered in custody decisions. One approach has been to create a rebuttable presumption that awarding custody to a parent who has perpetrated a certain level of domestic violence is not in a child's best interests. Alaska adopted such a presumption in 2004.

This Note will explain and critique Alaska's presumption and its possible effects on child custody decisions. Part I of this Note explains the theory behind two custody presumptions. Part II explores the historical context of rebuttable presumptions. Part III explains the operation of the Alaska rebuttable presumption: its effect on custody decisions, how it may be invoked, and when it may be rebutted. Finally, Parts IV and V explore the strengths and weaknesses of the statute and argue that while the presumption may ultimately protect victims of domestic violence, either the courts or the legislature must further define key terms of the statute. Throughout this Note, frequent comparisons with custody laws in other states will help highlight the strengths, weaknesses, and underlying policy of the Alaska rebuttable presumption and will provide the basis for interpreting and critiquing the Alaska law.

I. THE RELEVANCE OF DOMESTIC VIOLENCE IN DETERMINING CHILD CUSTODY

A. Presumption of Joint Custody

Courts attempt to serve the child's best interests when making custody decisions.¹ Legislatures are free to enumerate factors for courts to consider when deciding what arrangements will be most beneficial to a child. Although today nearly every state requires courts to consider evidence of domestic violence as relevant to custody decisions, many legislatures also express a preference for joint physical custody.² With

1. See 24 AM. JUR. 2D *Divorce and Separation* § 931 (2008) ("In divorce proceedings, the 'best interests' of a child is a proper and feasible criterion for making a decision as to which of the two parents will be accorded custody of the child.") (internal citations omitted).

2. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 732 ("[D]ivorce is now described as a process that, through mediation, restructures and

the advent of no-fault divorce in the 1970s, courts shifted away from examining the relationship between parents when making child custody decisions and instead looked toward the future to determine their ability to parent.³ Unless a court foresaw that a past history of abuse would affect the child's best interests—which it generally did not—domestic violence was not considered in making custody decisions.⁴ The preference for joint custody is rooted not only in the belief that co-parenting is beneficial to a child of divorce, but also in the desire to protect parents' rights to maintain relationships with their children.⁵

First, joint physical and legal custody arrangements may be in a child's best interests. Studies show that children adjust better to divorce and exhibit fewer behavioral problems when both parents share social and financial responsibility for the child than when only one parent bears those responsibilities.⁶ Social scientists also suggest educational and social benefits: children who interact with their fathers post-divorce have higher IQs, greater success in school, and lower drop-out and truancy rates than children who do not.⁷ Further, absence of the non-

reformulates the spouses' relationship, conferring equal or shared parental rights on both parents although one, in practice, usually assumes the primary responsibility.”).

3. See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1043 (1991) (discussing the decline in applying fault-based divorce principles to determine custody); DONNA S. HERSHKOWITZ & DREW R. LIEBERT, ASSEMBLY JUDICIARY COMM., DIVORCE REFORM IN CALIFORNIA: FROM FAULT TO NO-FAULT... AND BACK AGAIN? (Cal. 1997) (describing the rise of no-fault divorce in California and the United States); Thomas R. Trenkner, Annotation, *Modern Status of Maternal Preference Rule or Presumption in Child Custody Cases*, 70 A.L.R. 3d 262 (1976) (discussing court cases in which the court considered whether there is a preference or presumption favoring custody with the mother).

4. See *infra* Part V.A.

5. Elton H. v. Naomi R., 119 P.3d 969, 977 n.31 (Alaska 2005) (“A parent cannot be deprived of custody based solely on the best interest of the child.”) (citing *Turner v. Pannick*, 540 P.2d 1051, 1054–55 (Alaska 1975)); Irwin Garfinkel & Sarah McLanahan, *The Effects of the Child Support Provisions of the Family Support Act of 1988 on Child Well-Being*, 9 POPULATION RES. & POL'Y REV. 205, 212 (1990) (reviewing the disadvantages children from single-parent families face).

6. Paul R. Amato & Joan G. Gilbreth, *Nonresident Fathers and Children's Well-being: A Meta-Analysis*, 61 J. MARRIAGE & FAM. 557, 564 (1999) (finding that children's academic success was positively related to father's payment of child support); Judith A. Seltzer, *Relationships Between Fathers and Children Who Live Apart: The Father's Role After Separation*, 53 J. MARRIAGE & FAM. 79, 87–93 (1991) (finding that nonresident fathers' involvement in their children's social life and in making decisions about the child is positively correlated with paying child support); Garfinkel & McLanahan, *supra* note 5, at 224 (finding that “[i]ncreases in child support payments affect child well-being”).

7. See Chadwick L. Menning, *Absent Parents Are More Than Money: The Joint Effect of Activities and Financial Support on Youths' Educational Attainment*, 23 J.

custodial parent may negatively affect the psychological and emotional development of children.⁸ However, when parents are unable to cooperate with each other after a divorce, the benefits children receive from co-parenting may cease to exist.⁹

Second, joint custody protects both parents' rights to maintain a parental relationship with their children. In the mid-1970s, child custody laws favored the mother: tender-years presumptions awarded custody of young children to mothers, absent a showing that she was unfit.¹⁰ Following a vocal fathers' rights movement, those presumptions were abolished in favor of those providing for joint custody.¹¹ By 1990, the maternal preference had ceased to exist in all but five states.¹²

FAM. ISSUES 648, 661-63 (2002) (finding that participating in activities with a nonresident parent increases a child's chance of obtaining a high school diploma and attending a post-secondary institution); Douglas B. Downey, *When Bigger is not Better: Family Size, Resources, and Children's Educational Performance*, 60 AM. SOC. REV. 746, 756 (1995) (finding that as parents contribute fewer economic and interpersonal resources, their children's academic achievement declines; finding that frequency of discussion has the biggest effect on academic performance).

8. See Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 701-20 (1985) (discussing the effects of divorce on children and the value of co-parenting).

9. See *infra* note 15.

10. JOHN E. B. MYERS, LEGAL ISSUES IN CHILD ABUSE AND NEGLECT PRACTICE 73 (1998); DEBORAH L. RHODE, JUSTICE AND GENDER 155 (1989); see Trenkner, *supra* note 3, § 9(a); see, e.g., *Wetzler v. Wetzler*, 570 P.2d 741, 742 (Alaska 1977) ("Under the 'tender years' doctrine, a mother will generally be given preference for custody if the other factors are evenly balanced."); *Clark v. Bayer*, 32 Ohio St. 299, 310 (Ohio 1877) (holding that where the father "is a suitable person, able and willing to support and care for [his children], his right [to custody] is paramount to that of all other persons, except that of the mother in cases where the infant child is of such tender years as to require her present care . . .") (emphasis added); *Weaver v. Weaver*, 261 S.W.2d 145, 148 (Tenn. Ct. App. 1953) ("A mother, except in extraordinary circumstances, should be with her child of tender years. The courts have repeatedly recognized this as a primary doctrine.").

11. RHODE, *supra* note 10, at 156; see, e.g., *King v. Vancil*, 341 N.E.2d 65 (Ill. App. Ct. 1975) (holding that the Illinois tender years presumption violated the state's equal protection clause).

12. See Stephen J. Bahr et al., *Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?*, 28 FAM. L.Q. 247, 249 (1994).

B. When Joint Custody Is Not in the Child's Best Interests: Evidence of Abuse¹³

When domestic violence is present in a household, physical contact with the abusive parent may not be in the best interests of the child, even when abuse was never directed at the child.¹⁴ The presumption that joint custody is in a child's best interests assumes co-parenting produces benefits that are not present when one parent acts as the sole decision-maker. Those benefits—both those to the child and those to the parents—are not present where the parents have been in an abusive relationship.¹⁵ First, the possibility of future physical harm indicates that custody with a perpetrator of domestic violence is not in a child's best interests. Second, ongoing contact with the abusive parent may be

13. Some argue that the benefits of co-parenting exist only in unique families. See, e.g., Daniel G. Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations* (1998), http://new.vawnet.org/category/Main_Doc.php?docid=371 ("Enthusiasm for joint custody in the early 1980s was fueled by studies of couples who were highly motivated to make it work.") (internal quotation marks omitted). Further, many surveys and studies assert that joint custody presumptions are almost never in the child's best interests. See, e.g., Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L.Q. 201, 207 (1998) ("The criticisms are valid. It is extremely difficult in one sense to design a research tool sufficient to measure something as complex as 'joint custody.'"); Thomas J. Reidy et al., *Child Custody Decisions: A Survey of Judges*, 23 FAM. L.Q. 75, 80 (1989) ("The most frequently cited reasons [for failure of joint custody] included poor cooperation (30.5 percent), instability created by shifting from home to home (29.8 percent), distance between homes (25.5 percent), and acrimony and revenge between the parents (19.1 percent)."); Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 507 (1988) ("The limited number of studies relied upon by joint custody proponents have other serious methodological shortcomings."). Whether such statements are true is outside the scope of this Note, though the assertion that joint custody is never in a child's best interests does not contradict the thesis of this Note.

14. See H.R. Con. Res. 172, 101st Cong. § 1 (1990) ("[F]or purposes of determining child custody, credible evidence of physical abuse of a spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse.").

15. See Judith A. Seltzer, *Relationships Between Fathers and Children Who Live Apart: The Father's Role After Separation*, 53 J. MARRIAGE & FAM. 79, 81 (1991); Paul R. Amato, *The Consequence of Divorce for Adults and Children*, 62 J. MARRIAGE & FAM. 1269, 1280 ("Interparental hostility and lack of cooperation between parents following divorce is a consistent predictor of poor outcomes among offspring. . . . Conflict was especially aversive if it involved physical violence or made children feel as if they were caught in the middle.") (internal citations omitted); Amato & Gilbreth, *supra* note 6, at 564 (finding only a small correlation between contact with a nonresident father and children's academic success and ability to internalize problems); Alan Booth & Paul R. Amato, *Parental Predivorce Relations and Offspring Postdivorce Well-Being*, 63 J. MARRIAGE & FAM. 197, 211 (concluding that dissolution of high-conflict families benefits children).

detrimental to the child's development. Third, requiring hostile parents to remain in contact can harm the parents and negate the positive effects of co-parenting.

1. *Potential Physical Harm.* Custody with a perpetrator of domestic violence is not in a child's best interests because it is more likely to result in physical harm to the child. Perpetrators of domestic violence are more likely than non-perpetrators to abuse their children. A review of more than thirty studies shows that child abuse and violence toward another household member are linked between 30% and 60% of the time.¹⁶ Another study suggests that the presence of domestic violence indicates a 40% to 70% probability that the child is also being physically abused.¹⁷

A child in a family where domestic violence is present is likely to be physically harmed even when violence has previously been directed only at the abuser's partners. Physical harm to a previously unharmed child may occur because the abused parent takes out her stress on the child, because the abuser redirects his attention, or because the child gets in the way of the abuse. For example, in a study of 146 children ages eleven to seventeen from violent homes, all sons over the age of fourteen had attempted to protect their mothers from abuse; 62% of those children were injured in the process.¹⁸ Even if the abuser is with a new partner, the child may not be safe from physical harm. One research study found that 58% of male offenders perpetrated violence against their new partners after the dissolution of a previously abusive relationship.¹⁹

In fact, incidents of violence are likely to continue when a domestic violence survivor leaves a partner who has been abusing her. In one study, more than one third of battered women were re-assaulted after they had separated from their abusive partners.²⁰ In Canada, 39% of abused women reported that violence began only after separation; 24%

16. JEFFREY L. EDLESON ET AL., PARENTING IN THE CONTEXT OF DOMESTIC VIOLENCE 9 (2003), available at <http://www.courtinfo.ca.gov/programs/cfcc/pdf/files/fullReport.pdf>.

17. Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 VIOLENCE AGAINST WOMEN 134 (1999); accord DAVID ROBINSON & JO-ANNE TAYLOR, THE INCIDENCE OF FAMILY VIOLENCE PERPETRATED BY FEDERAL OFFENDERS: A FILE REVIEW STUDY (Correctional Service of Canada No. FV-03, 1995) available at <http://www.csc-scc.gc.ca/text/pblct/fv/fv03/toce-eng.shtml>.

18. Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421, 424 (1991).

19. Sharon Woffordt et al., *Continuities in Marital Violence*, 9 J. FAM. VIOLENCE 195, 215 (1994).

20. Mary A. Kernic et al., *Children in the Crossfire*, 11 VIOLENCE AGAINST WOMEN 991, 992 (2005) (reviewing literature on post-separation violence).

reported that pre-existing violent behavior escalated post-separation.²¹ A study of 235 Canadian women revealed that 25% were threatened by their abuser during child visitations.²² These studies demonstrate that putting the perpetrator and the victim in a position where they are likely to have future contact, as when they share physical or legal custody of their child, only heightens the risk to the victim.²³ When a parent is at risk of violence, so are those around her, including her children.

2. *Detriment to Child's Development.* Merely observing domestic violence may have the same effect on a child as actually being abused. Children who witness domestic abuse experience increased health problems as well as impaired behavioral and emotional functioning, even when they are not abused themselves.²⁴

First, children who grow up in households with domestic violence experience short-term health problems, including asthma, insomnia, and ulcers, at a higher rate than children who do not witness abuse.²⁵ Second, these children are at a higher risk for mental health problems, including depression, aggression, anxiety, and post-traumatic stress disorder.²⁶ Third, witnessing domestic violence may impair children's cognitive functioning.²⁷ Fourth, long-term behavioral and emotional problems, like depression in adulthood and difficulties with social adjustment, are more common among children who witness domestic violence.²⁸

21. Canadian Ctr. for Justice Statistics, FAMILY VIOLENCE IN CANADA: A STATISTICAL PROFILE 31 (2001).

22. B. LEIGHTON, SPOUSAL ABUSE IN METROPOLITAN TORONTO: RESEARCH REPORT ON THE RESPONSE OF THE CRIMINAL JUSTICE SYSTEM (Solicitor General of Canada No. 1989-02, 1989).

23. See Ruth E. Fleury et al., *When Ending the Relationship Does Not End the Violence: Women's Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 1315, 1376 (2000) (finding that proximity to victim is a key factor in post-separation assault).

24. Jeffrey L. Edelson, *Children's Witnessing of Adult Domestic Violence*, 14 J. INTERPERSONAL VIOLENCE 839, 845 (1999) (reviewing thirty-one studies of children who witnessed domestic violence between their parents but who were not abused themselves).

25. Leigh Goodmark, *From Property to Personhood*, 102 W. VA. L. REV. 237, 246; Marjory D. Fields, *The Impact of Spouse Abuse on Children and its Relevance in Custody and Visitation Decisions in New York State*, 3 CORNELL J. L. & PUB. POL'Y 221, 230 (1994).

26. Edelson, *Children's Witnessing Domestic Violence*, *supra* note 24, at 846; Goodmark, *supra* note 25, at 258; Fields, *supra* note 25, at 230; Alan J. Tomkins et al., *Plight of Children who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 LAW AND PSYCHOL. REV. 137, 145-49 (1994).

27. Edelson, *Children's Witnessing Domestic Violence*, *supra* note 24, at 860.

28. *Id.* at 860-61; Goodmark, *supra* note 25, at 250; Tomkins et al., *supra* note 26, at 149-52.

Perhaps most disturbingly, children who grow up in homes where domestic violence is present tend to imitate the violent behavior—or become victims of domestic violence—later in life.²⁹ A study conducted by the Office of Juvenile Justice and Delinquency Prevention found that 70% of adolescents who lived in families with parental conflicts reported violent delinquency, compared to 49% of adolescents from households without conflict.³⁰ Another study revealed that male juveniles who committed violent offenses were 50% more likely to have witnessed domestic violence than were juveniles who committed non-violent offenses.³¹ On the other hand, some children who witness spousal abuse become more passive and are thus more likely to be victims of abuse themselves.³²

Congress noted that domestic violence negatively impacts children's development:

[E]ven children who do not directly witness spousal abuse are affected by the climate of violence in their homes and experience shock, fear, guilt, long lasting impairment of self-esteem, and impairment of developmental and socialization skills . . . tendencies may be passed on from one generation to the next . . . [and] witnessing an aggressive parent as a role model may communicate to children that violence is an acceptable tool for resolving marital conflict[.]³³

29. Joel S. Milner et al., *Childhood History of Abuse and Adult Child Abuse Potential*, 5 J. OF FAM. VIOLENCE 15 (finding that a childhood history of physical abuse was significantly related to adult physical child abuse potential and that more severe abuse in childhood increased abuse potential); DAVID ROBINSON & JO-ANNE TAYLOR, *THE INCIDENCE OF FAMILY VIOLENCE PERPETRATED BY FEDERAL OFFENDERS: A FILE REVIEW STUDY* (Correctional Service of Canada No. FV-03 1995) (finding that one quarter of male inmates in federal prison studies had witnessed abuse of siblings or parents), available at <http://www.csc-scc.gc.ca/text/pblct/fv/fv03/toce-eng.shtml>; Edelson, *Children's Witnessing Domestic Violence*, *supra* note 24, at 861 (finding that several studies of domestic violence report a link between childhood victimization and criminal behavior in adulthood).

30. TERRENCE P. THORNBURY, *FACT SHEET #21: VIOLENT FAMILIES AND YOUTH VIOLENCE* (1994), available at <http://www.ncjrs.gov/txtfiles/fs-9421.txt>.

31. Steve Spacarelli et al., *Exposure to Serious Family Violence Among Incarcerated Boys*, 10 VIOLENCE & VICTIMS 163, 171 (1995).

32. See Elaine Hilberman & Kit Munson, *Sixty Battered Women*, 2 VICTIMOLOGY 460, 463 (1978) (noting that girls who observed domestic violence "were likely to become withdrawn, passive, clinging, and anxious"); Tomkins et al., *supra* note 26, at 151 ("Girls may learn that victimization is inevitable and that no one can help change this pattern.") (internal citations omitted).

33. H.R. Rep. No. 101-737, at 3 (1990).

3. *Inability to Co-Parent.* Requiring hostile parents to remain in contact with each other can harm the parents and negate the positive effects of co-parenting. "Domestic violence or battering is a means of establishing control over another person through fear and intimidation. [Battering] includes emotional, economic, and sexual abuse, and the kind of isolation that is experienced by hostages or prisoners of war . . ." ³⁴ A person who has abused his spouse only once may use the fear evoked by memory of the abuse to continue to control his former partner. ³⁵ In such situations, joint legal custody is inappropriate because the abusive ex-spouse can still manipulate the victim ex-spouse, effectively maintaining sole decision-making power for their child. ³⁶

Even if the abusive parent is not using fear to further control his victim, it may be impossible to reap the benefits of co-parenting where there is a history of violence between parents. The relationship between the parents lacks the trust, communication, respect, and equality necessary for making decisions together and maintaining regular contact. A study by the State of Washington concluded that joint physical custody in high-conflict families is detrimental to children and does not foster better communication or cooperation between parents. ³⁷ Since allowing the perpetrator to have contact with the child creates a risk that the perpetrator will continue to undermine the victim's parenting and victim's relationship with the child, custody with the perpetrator is not in a child's best interest. ³⁸

II. THE POLITICAL AND HISTORICAL CONTEXT OF REBUTTABLE PRESUMPTIONS

In 2004, Alaska passed House Bill 385, amending its child custody statute to read:

34. *Battered Women and Child Custody Litigation: Hearing on H.R. 1252, H.R. 1253 and H. Con. Res. 89 Before the Subcomm. on Intellectual Property & Judicial Administration of the H. Comm. on the Judiciary, 102nd Cong. 22 (1992)* (statement of Rep. Constance A. Morella).

35. *See id.*

36. *Id.* at 71-73 (statement of Melanie S. Griffin, Executive Director, New Jersey Commission on Sex Discrimination in the Statutes).

37. DIANE N. LYE, WASHINGTON STATE PARENTING ACT STUDY (1999), <http://www.courts.wa.gov/newsinfo/index.cfm> (follow "Washington State Parenting Act Study" hyperlink; then follow "Chapter 4: What the Experts Say" hyperlink).

38. LUNDY BANCROFT & JAY G. SILVERMAN, ASSESSING RISK TO CHILDREN FROM BATTERERS 2 (2002), available at http://new.vawnet.org/Assoc_Files_VAWnet/RisktoChildren.pdf.

There is a rebuttable presumption that a parent who has a history of perpetrating domestic violence against the other parent, a child, or a domestic living partner may not be awarded sole legal custody, sole physical custody, joint legal custody, or joint physical custody of a child.³⁹

House Bill 385 is consistent with national trends. Beginning in the 1990's, state and federal governments began to take note of the detrimental effect joint custody assumptions might have on children. The United States Congress passed a concurrent resolution expressing the sense of the Congress that evidence of physical abuse creates "a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse."⁴⁰ The National Council of Juvenile and Family Court Judges agreed; in 1994, the Council released the Model Code on Domestic and Family Violence, which states:

In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.⁴¹

The presumption is also supported by the American Bar Association⁴² and the American Psychological Association.⁴³

State legislatures have taken two approaches to incorporating evidence of domestic violence in child custody decisions. Some states have enacted laws requiring that a history of domestic violence be considered when determining a child's best interests while allowing the judge to maintain discretion in weighing such evidence. Others, including Alaska, have gone further, creating a rebuttable presumption against awarding custody to a parent who has perpetrated domestic violence in the past.

III. OPERATION OF THE ALASKA AMENDMENT

To understand the effect of House Bill 385, Alaska's child custody laws must be examined as a whole. Alaska law does not presume joint

39. H.B. 385, 23d Leg., 2d Sess. (Alaska 2004).

40. H.R. Con. Res. 172, 101st Cong. § 1 (1990).

41. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 401 (1994).

42. See A.B.A. House of Delegates, Approved Resolutions Related to Domestic Violence (1989) ("Joint custody is inappropriate in cases in which spouse abuse, child abuse, or parental kidnapping is likely to occur.").

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

or sole custody; rather, the court determines custody in accordance with the best interests of the child.⁴⁴ Section 25.24.150 of the Alaska Statutes enumerates a list of non-exhaustive factors that judges shall consider in determining the child's best interests:

- (1) the physical, emotional, mental, religious, and social needs of the child;
- (2) the capability and desire of each parent to meet these needs;
- (3) the child's preference if the child is of sufficient age and capacity to form a preference;
- (4) the love and affection existing between the child and each parent;
- (5) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
- (6) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child, except that the court may not consider this willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child;
- (7) any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents;
- (8) evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child;
- (9) other factors that the court considers pertinent.⁴⁵

Before House Bill 385 was enacted, judges had discretion to weigh those factors as they saw fit. Therefore, a judge could determine that it was not in a child's best interests to award legal or physical custody to a parent who had perpetrated domestic violence.⁴⁶ A judge could also determine that a history of domestic violence against a spouse did not make a person unfit to parent, and thus award physical or legal custody to a parent with a history of perpetrating abuse.⁴⁷

44. ALASKA STAT. § 25.24.150(a) (2006).

45. ALASKA STAT. § 25.24.150(c) (2006).

46. *See, e.g.,* Farrell v. Farrell, 819 P.2d 896 (Alaska 1991) (awarding sole custody to mother after considering history of domestic violence perpetrated by father).

47. *See* Carstens v. Carstens, 867 P.2d 805 (Alaska 1994) (upholding custody award to father who had a history of perpetrating domestic violence where there was no showing that the abuse affected or would affect the child).

Since section 25.24.150 of the Alaska Statutes was amended in 2004, few appellate cases have addressed the presumption.⁴⁸ In 2005, roundtable discussions in Bethel and Fairbanks revealed that practitioners and domestic violence advocates were still concerned with how House Bill 385 would operate.⁴⁹ Roundtable participants in Bethel noted that they were unsure of how the bill would be implemented; those in Fairbanks were concerned that difficulties in deciding whether domestic violence occurred would complicate custody proceedings and that the presumption would “lead to a ‘run’ on [domestic violence] courts,” stretching already limited resources.⁵⁰ Despite initial concerns over implementation, the language of the statute and operation of presumptions in other states clarifies how House Bill 385 was intended to operate. First, House Bill 385 is equivalent to a legislative statement that placement with a parent who has perpetrated domestic violence is not in a child’s best interests. Second, House Bill 385 requires that a parent perpetrate a certain level of violence against other household members before the presumption takes effect. Third, the presumption against custody may be rebutted by enumerated showings.

A. Effect of Presumption

The most important aspect of section 25.24.150 of the Alaska Statutes is that it creates a presumption against custody when one parent has committed a certain level of violence against another parent or other household member.⁵¹ Considering domestic violence in custody decisions is not unique: statutes in forty-nine states and the District of Columbia include domestic violence as a factor that courts must or may consider in custody disputes.⁵² Twenty-two of those states apply a rebuttable presumption that awarding custody to the perpetrator of domestic violence is not in the child’s best interests.⁵³

48. See, e.g., *Van Sickle v. McGraw*, 134 P.3d 338 (Alaska 2006) (holding that section 25.24.150 of the Alaska Statutes did not apply because case had concluded by the effective date of amendments).

49. BARBARA HOOD, ALASKA COURT SYSTEM, CHILDREN IN ALASKA’S COURTS: REPORT ON REGIONAL RECOMMENDATIONS 58 (2005), available at <http://www.state.ak.us/courts/outreach/children.pdf>.

50. *Id.* at 59.

51. See ALASKA STAT. § 25.24.150(g) (2006).

52. See Annette M. Gonzalez & Linda M. Rio Reichmann, *Representing Children in Civil Cases Involving Domestic Violence*, 39 FAM. L.Q. 197 app. A (2005) (listing custody statutes in all fifty states, the District of Columbia, and U.S. territories).

53. See *id.* at 198 n.5 (listing the twenty-four states and territories that have a rebuttable presumption against awarding custody to the perpetrator of domestic violence).

Alaska's presumption operates such that once a court has recognized that a parent has committed a certain level of domestic violence against a domestic partner, that parent cannot be awarded custody.⁵⁴ The presumption does not allow the perpetrator to be awarded sole legal custody, sole physical custody, joint legal custody, or joint physical custody of a child.⁵⁵ Some state presumption statutes apply only to joint custody.⁵⁶ For example, Idaho's custody laws contain a presumption that joint custody is not in a child's best interests if one of the parents is a habitual perpetrator of domestic violence.⁵⁷ Unlike Alaska, Idaho has a statutory presumption that joint custody is in a minor's best interests.⁵⁸ Therefore, the Idaho presumption against joint custody where domestic violence is present is necessary to offset a statute that would otherwise favor it.⁵⁹ The Alaska statute is stronger than those in states like Idaho, because it is not necessary to overcome a conflicting presumption, and it bars a perpetrator of domestic violence from maintaining any type of custody.

Further, Alaska juries are required to apply subsections 150(h)-(i) whenever one party presents credible evidence of domestic violence. In *Puddicombe v. Dreka*,⁶⁰ one of the few Alaska cases to apply section 25.24.150(g) of the Alaska Statutes, the Alaska Supreme Court held that anytime the record shows that domestic violence has occurred, the court must address whether it amounted to a history of perpetrating domestic violence.⁶¹ The *Puddicombe* court found plain error where the trial court recognized that both parents had perpetrated domestic violence, but the trial court failed to consider section 25.24.150(g) of the Alaska Statutes.⁶² Less than a year later, the Alaska Supreme Court affirmed this holding in *Michele M. v. Richard R.*⁶³ There, Michele M. presented un rebutted evidence that Richard R. abused his first wife.⁶⁴ The superior court awarded custody to Richard, applying the best interest factors in section

54. ALASKA STAT. § 25.24.150(g) (2006).

55. *Id.*

56. *See, e.g.*, IDAHO CODE ANN. § 32-717B(5) (2008) ("There shall be a presumption that joint custody is not in the best interests of a minor child if one of the parents is found by the court to be a habitual perpetrator of domestic violence as defined in section 39-6303, Idaho Code.").

57. *Id.*

58. *See King v. King*, 50 P.3d 453, 460 (Idaho 2002).

59. Act of April 1, 1994, ch. 340, 1994 Idaho Sess. Laws 1075.

60. 167 P.3d 73 (Alaska 2007).

61. *Id.* at 77.

62. *Id.*

63. 177 P.3d 830, 837-38 (Alaska 2008).

64. *Id.* at 837.

150(c).⁶⁵ Although the Alaska Supreme Court acknowledged that Richard's behavior might not have amounted to a "history of perpetrating domestic violence," the court reversed and remanded the custody decision since the superior court failed to explicitly make such a finding.⁶⁶ These cases demonstrate the strength of the rebuttable presumption: once the issue of domestic violence is properly raised, the court must address the question, and if it finds that domestic violence is present, it must decide against awarding custody to the perpetrator.

An alternative approach is to consider domestic violence as one of many factors in making custody decisions. For example, New York's custody statute states:

Where either party to an action concerning custody of or a right to visitation with a child alleges . . . that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party . . . and such allegations are proven by a preponderance of the evidence, the court *must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section.*⁶⁷

The New York statute thus requires that a court consider how the existence of domestic violence impacts the child's best interests, but still leaves the door open for a judge to award joint or sole custody to a perpetrator of domestic violence. New York considered the factors that often encourage states to adopt presumptions like section 25.24.150(g) of the Alaska Statutes, but New York deliberately chose for the issue to be non-determinative in custody proceedings.⁶⁸

Finally, under the Alaska statute, if the court finds that both parents have a history of perpetrating domestic violence under section 25.24.150(g), then the court has discretion to award custody to one of the two parents or to neither parent. Under section 25.24.150(i) of the Alaska Statutes, the court must either:

65. *Id.* at 833.

66. *Id.* at 837-38.

67. N.Y. DOM. REL. LAW § 240(1)(a) (2007) (emphasis added).

68. A.2446-c/S.7403-b, Laws of 1996, Ch. 85, § 1 (N.Y. 1996) (effective May 21) ("Rather than imposing a presumption, the legislature hereby establishes domestic violence as a factor for the court to consider in child custody and visitation proceedings, regardless of whether the child has witnessed or has been a direct victim of the violence.").

- (1) award sole legal and physical custody to the parent who is less likely to continue to perpetrate the violence and require that the custodial parent complete a treatment program; or
- (2) if necessary to protect the welfare of the child, award sole legal or physical custody, or both, to a suitable third person if the person would not allow access to a violent parent except as ordered by the court.⁶⁹

Thus, when both parents are perpetrators of domestic violence, the court must exercise some discretion to determine how likely the parents are to continue abusive behavior. In some cases, the court must conduct the same best interests analysis that is explicitly outside the court's discretion when only one parent has a history of perpetrating domestic violence.

B. Presumption and the Friendly Parent Provision

Absent evidence of domestic violence, one factor that Alaska judges must consider in determining custody is "the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child . . ."⁷⁰ This so-called "friendly parent provision" is an attempt to foster the relationship a child has with both parents. Assuming that co-parenting is in a child's best interests, it is also in a child's best interests to be placed with a parent who will be receptive to the non-custodial parent's requests to see the child and who will consider the other parent's wishes when making decisions for the child. Though the friendly parent provision is only one of a number of factors that judges are to consider in determining a child's best interests, it was frequently the deciding factor prior to enactment of House Bill 385, despite evidence that the "friendly parent" was abusive.⁷¹ If the benefits of co-parenting outweigh the detriments of allowing an abusive parent to have physical and legal custody of a child, then this outcome was correct.

Alaska courts were not unique in allowing the friendly parent provision to trump evidence of domestic violence. For example, in the

69. ALASKA STAT. § 25.24.150(i) (2006).

70. ALASKA STAT. § 25.24.150(c)(6) (2006).

71. See Transcript of Audio Cassettes of Committee Minutes on House Bill No. 385, at 0747, 0995, 1170 (Mar. 1, 2004), http://www.legis.state.ak.us/basis/get_single_minute.asp?session=23&beg_line=01301&end_line=0228&time=1310&date=20040301&comm=JUD&house=H (statements of Tracy Gould, Kimberlee Vanderhoof, Gigi Pilcher) (detailing three custody disputes where the Alaska courts awarded custody to a male perpetrator of domestic violence because of the friendly parent provision).

Missouri case of *Gant v. Gant*,⁷² a mother provided un rebutted testimony that the father physically abused her.⁷³ However, because the mother had moved out of the state and did not have a car to transport their children, the court found that the father was more likely to allow “frequent and meaningful” contact with the other parent.⁷⁴ Therefore, the court affirmed the trial court’s decision to award primary physical custody to the abusive father.⁷⁵ Similarly, in *In re Marriage of Cobb*,⁷⁶ the Kansas Court of Appeals affirmed amending a joint custody award to an award of sole custody to the father, despite the mother’s allegations of child abuse, due to the parents’ inability to co-parent.⁷⁷

This precise outcome was a motivating factor behind adopting the rebuttable presumption in Alaska.⁷⁸ During public hearings on House Bill 385, the Program Director for Careline Crisis Intervention told the story of a woman who was killed by her abuser because she did not obtain a protective order against him out of fear of acting out of compliance with the friendly parent provision.⁷⁹ Another speaker noted that four women in Fairbanks alone were fatalities of the friendly parent provision during the course of a single custody hearing.⁸⁰ Because of situations like those reported in the public hearings, Alaska courts do not consider the friendly parent provision where one parent has a history of perpetrating domestic violence; the presumption against

72. 923 S.W.2d 527 (Mo. Ct. App. 1996). Missouri did not have a rebuttable presumption against awarding custody to perpetrators of domestic violence at the time *Gant* was decided. *Id.* at 530.

73. *Id.* at 528–29. The husband admitted to grabbing his wife by the face and pushing her over the couch; poking her in the eye; stating that he wanted to kill her; fighting with other men; and smashing watches, radios, and a television. *Id.* at 529.

74. *Id.* at 530–31.

75. *Id.* at 531.

76. 988 P.2d 272 (Kan. Ct. App. 1999).

77. *Id.* at 274–75.

78. Rep. Lesil McGuire, Sponsor Statement for H.B. 385, Mar. 15, 2004, available at http://www.akrepublicans.org/mcguire/23/spst/mcgu_hb385.php. (“The bill also modifies our statutes ‘friendly parent’ provision that inadvertently harms children, particularly in circumstances involving domestic violence, child abuse/sexual abuse and neglect.”). The American Bar Association also notes that applying the friendly parent provision is inappropriate where one parent has abused either the other parent or his or her children. ABA CENTER ON CHILDREN AND THE LAW, A JUDGE’S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES 134 (2d ed. 2008), available at http://www.abanet.org/legalservices/probono/childcustody/judges_guide.pdf.

79. Transcript of Audio Cassettes of Committee Minutes on House Bill No. 385, *supra* note 71, at 0995 (statement of Kimberlee Vanderhoof, Program Director of Careline Crisis Intervention).

80. *Id.* at 0747 (statement of Tracy Gould).

custody prevents the best interests analysis of which the friendly parent provision is a part.⁸¹ By prohibiting courts from finding that abused parents are poor co-parents and using that finding against the abused parent, Alaska's custody statute may now encourage victims to report abuse in custody proceedings.⁸²

C. Invoking the Presumption

The presumption in the Alaska statute is inherently limited. The Alaska statute explicitly provides that domestic violence must rise to a certain level before the presumption against custody is invoked. Further, the presumption in section 25.24.150(g) only applies when violence has been perpetrated against the abuser's domestic living partner. Finally, the party raising the issue of abuse must prove abuse by a preponderance of the evidence.

1. *Requirement that Level of Violence Amount to a History of Perpetrating Violence.* The first requirement for the presumption to be raised is that one of the parents has a history of "perpetrating domestic violence."⁸³ Section 25.90.010 of the Alaska Statutes provides that in Title 25, "domestic violence" has the meaning given in section 18.66.990 of the Alaska Statutes,⁸⁴ which defines "domestic violence" to include crimes against the person, burglary, criminal trespass, arson, criminal mischief, terrorist threats, violating a protective order, and harassment.⁸⁵ Psychological and emotional abuse, absent commission of a crime or infliction of physical harm, do not constitute domestic violence, and therefore do not raise the presumption against custody.⁸⁶ Psychological and emotional abuse may still be considered when a judge makes his custody determination if the abuse affects the child's well-being, but evidence of psychological and emotional abuse will be balanced against other factors enumerated in section 150 to decide what custody arrangement is in the child's best interests.⁸⁷

81. ALASKA STAT. § 25.24.150(g) (2006).

82. *See infra* Part IV.B. Further protecting children and victimized parents, the Alaska Statute prohibits courts from denying custody to a parent based solely on the fact that the victimized parent is suffering from the effects of abuse, unless the effects are so severe they prevent the parent from safely caring for the child. ALASKA STAT. § 25.24.150(k) (2006).

83. ALASKA STAT. § 25.24.150(g) (2006).

84. ALASKA STAT. § 25.90.010 (2006).

85. ALASKA STAT. § 18.66.990(3) (2006).

86. *See id.*

87. *See* ALASKA STAT. § 25.24.150(c) (2006).

For the purposes of the child custody statute, a “perpetrator” of domestic violence has either committed one incident of domestic violence that leads to serious bodily injury or has committed multiple incidents of domestic violence.⁸⁸ Alaska, unlike many other states, does not require multiple incidents of abuse to invoke its presumption.⁸⁹ Idaho, on the other hand, requires a parent be a “habitual perpetrator” of domestic violence before its presumption against custody arises.⁹⁰ Requiring ongoing abuse is designed to protect a parent whose violent episode is not characteristic of his ability to parent. However, labeling a single incident of abuse as an anomaly carries dangers as well: an abuser may be able to use just one incident of abuse to control the other parent, effectively maintaining sole decision-making power if he is awarded joint custody because he can still manipulate the victim.⁹¹ Therefore, awarding joint legal custody to such a parent is not in the child’s best interests. Further, a child can be traumatized by just one incident of abuse if he is aware of it.⁹² Giving physical custody to such a parent would not be in a child’s best interests.

2. *Requirement that Victim Be a Domestic Living Partner.* The second requirement to raise the presumption is that the offenses be perpetrated against the child, the other parent, or a “domestic living partner.”⁹³ “Domestic living partner” is not defined in the statute.⁹⁴ However, the term at least includes married and unmarried parents petitioning for custody.⁹⁵

One possible interpretation of “domestic living partner” is that it has the same meaning as “household member,” as defined in Alaska’s

88. ALASKA STAT. § 25.24.150(h) (2006).

89. *See id.*

90. IDAHO CODE ANN. § 32-717B(5) (2008).

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

92. *Id.*

93. ALASKA STAT. § 25.24.150(g) (2006); *see also* ALASKA STAT. § 18.66.990(3) (requiring that an offense be committed against a “household member” in order to meet the definition of domestic violence); § 18.66.990(5) (defining “household member”).

94. *See* ALASKA STAT. § 25.24.150 (2006).

95. *See* *Puddicombe v. Dreka*, 167 P.3d 73, 75 n.3 (Alaska 2007) (“AS 25.24.150 establishes how the court should determine custody when the parents are divorcing. Unmarried parents may petition for custody under AS 25.20.060, which requires the court to consider the factors enumerated in AS 25.24.150(c) . . .”).

domestic violence statutes.⁹⁶ There, Alaska defines “household member” to include:

- (A) adults or minors who are current or former spouses;
- (B) adults or minors who live together or who have lived together;
- (C) adults or minors who are dating or who have dated;
- (D) adults or minors who are engaged in or who have engaged in a sexual relationship;
- (E) adults or minors who are related to each other up to the fourth degree of consanguinity, whether of the whole or half blood or by adoption, computed under the rules of civil law;
- (F) adults or minors who are related or formerly related by marriage;
- (G) persons who have a child of the relationship; and
- (H) minor children of a person in a relationship that is described in (A)-(G) of this paragraph.⁹⁷

Assuming that “domestic living partner” has the same meaning as “household member” may be appropriate since Alaska intended to adopt the approach of the Model Code of the Family Violence Project of the National Council of Juvenile and Family Court Judges.⁹⁸ The Model Code is written to raise the presumption wherever “domestic or family violence” has occurred.⁹⁹ The Model Code describes “domestic or family violence” as occurring between “family or household member[s]”;¹⁰⁰ the definition of “family or household members” in the Model Code is identical to the definition of “household members” in the Alaska Code.¹⁰¹ Therefore, the only way section 25.24.150 of the Alaska Statutes could adopt the Model Code approach would be to use the terms “household member” and “domestic living partner” interchangeably.

On the other hand, “domestic living partner” may be more limited. Until recently, all appellate cases that applied section 25.24.150(g) of the Alaska Statutes concerned violence between parents of the child whose

96. See ALASKA STAT. § 18.66.990(5) (2006).

97. *Id.*

98. See Transcript of Audio Cassettes of Committee Minutes on House Bill No. 385, *supra* note 71, at 0622 (statement of Lesil McGuire, Chair of the H. Judiciary Standing Comm. and Sponsor of H.B. 385) (explaining that the legislation would adopt the Model Code).

99. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 401 (1994).

100. *Id.* at § 102(1).

101. Compare ALASKA STAT. § 18.66.990(5) (2006) (defining “household member”), with MODEL CODE ON DOMESTIC & FAMILY VIOLENCE, § 102(2) (1994) (defining “family or household member”).

custody was in dispute.¹⁰² However, a 2008 Alaska Supreme Court case clarifies that a spouse who is not the parent of the child also qualifies as a “domestic living partner.”¹⁰³ In *Michele M. v. Richard R.*, Michele M. and Richard R. had a child, Charles, out of wedlock.¹⁰⁴ In 2006, Richard filed for sole legal and primary physical custody of Charles.¹⁰⁵ At the hearing, Michele presented un rebutted testimony from Richard’s ex-wife, whom he married after Charles’ birth, that Richard physically abused her on several occasions.¹⁰⁶ The Alaska Supreme Court held that Richard’s record of violence against his ex-wife triggered the analysis in sections 25.24.150(g)–(i), requiring the court to determine whether this record amounted to a history of violence under section 150(h).¹⁰⁷ It is unclear from the decision whether Richard’s ex-wife qualified as a “domestic living partner” merely because she had been married to Richard, or because she had lived with him after Charles’ birth.

The *Michele M.* decision does not define the outer limits of “domestic living partner” but may suggest that only victims who actually lived with the perpetrator, the victim, or the child while the child was alive are considered “domestic living partners.” Such a definition makes sense, given that the purpose of the Alaska presumption is to protect children from the detrimental effects of domestic violence.¹⁰⁸ The broader interpretation—“household member”—would include any past casual relationships, where a history of violence may not be indicative of a parent’s propensity to become violent against or to manipulate members of his family.¹⁰⁹ Moreover, a

102. See *Puddicombe v. Dreka*, 167 P.3d 73 (Alaska 2007) (considering domestic violence between unmarried parents of a child whose custody was in dispute); *O’Dell v. O’Dell*, No. S-12097, 2007 WL 1378153 (Alaska May 9, 2007) (determining whether ex-husband had committed multiple acts of domestic violence against his ex-wife in deciding custody of their son).

103. See *Michele M. v. Richard R.*, 177 P.3d 830, 837–38 (Alaska 2008).

104. *Id.* at 831.

105. *Id.* at 832.

106. *Id.* at 833.

107. *Id.* at 837–38.

108. Transcript of Audio Cassettes of Committee Minutes on House Bill No. 385, *supra* note 71, at 0622 (statement of Lesil McGuire, Chair of H. Judiciary Standing Comm. and Sponsor of H.B. 385).

109. See Transcript of Audio Cassettes of Hearing on House Bill No. 314 Before the Senate Committee on the Judiciary, at 548 (Apr. 6, 1996), available at http://www.legis.state.ak.us/cgi-bin/folioisa.dll/cm19/query=*/doc/%7B@7296%7D? (statement of Lauree Hugonin, member, Alaska Network on Domestic Violence and Sexual Assault) (noting that perpetrators of domestic violence sometimes carry weapons to mediation as an intimidation technique); Beth Goldstein Lewis Trimmer, *A Sexual Relationship, Did We Have One?*, 24 ALASKA L. REV. 237, 238–239 (2007) (explaining the potentially broad scope of “household member” under section 18.66.990(5) of the Alaska Statutes).

narrow interpretation is consistent with the Louisiana Post-Separation Family Violence Relief Act,¹¹⁰ upon which the Alaska statute was based.¹¹¹ In 2002, a Louisiana appellate court refused to apply the presumption against custody where the father's abusive actions towards the mother occurred prior to their marriage and the birth of their child.¹¹² Since the Alaska Legislature adopted the Louisiana language after this decision, it may have intended to adopt the position that the domestic violence must have somehow negatively affected the child in order to raise the presumption. Further, the Louisiana interpretation is consistent with all Alaska cases that have considered section 150(g) to date.¹¹³

3. *Requirement that Violence Be Proved by a Preponderance of the Evidence.* The final requirement to invoke the presumption in section 25.24.150(g) is that domestic violence be proved by a preponderance of the evidence. Since the preponderance of the evidence standard does not require a prior trial or conviction, domestic violence may be raised for the first time at the custody hearing. The Alaska statute is virtually identical to the California,¹¹⁴ Louisiana,¹¹⁵ Massachusetts,¹¹⁶ Minnesota,¹¹⁷ North Dakota,¹¹⁸ and Washington, D.C.¹¹⁹ standards in this regard. Other states place a higher burden of proof on the parent seeking to invoke presumptions against custody.¹²⁰ For example, both

110. LA. REV. STAT. ANN. § 9:361-69 (2008).

111. Transcript of Audio Cassettes of Committee Minutes on H.B. No. 385, *supra* note 71, at 0420 (statement of Allen M. Bailey, family law attorney).

112. *Martin v. Martin*, 833 So. 2d 1216, 1220-21 (La. Ct. App. 2002).

113. *See, e.g., Puddicombe v. Dreka*, 167 P.3d 73 (Alaska 2007) (considering domestic violence between unmarried parents of a child whose custody was in dispute); *O'Dell v. O'Dell*, No. S-12097, 2007 WL 1378153 (Alaska May 9, 2007) (determining whether ex-husband had committed multiple acts of domestic violence against his ex-wife in deciding custody of their son).

114. CAL. FAM. CODE § 3044 (West 2004) (applying a preponderance of the evidence standard).

115. LA. REV. STAT. ANN. § 9:364 (2008) (requiring a finding of "family violence").

116. MASS. GEN. LAWS ch. 208, § 31A, 209 (2001) (applying a preponderance of evidence standard); ch. 209, § 38; ch. 209C, § 10.

117. MINN. STAT. § 518.17 (2006) (requiring a "finding of domestic abuse").

118. N.D. CENT. CODE § 14-09-06.2(1)(j) (2004) (requiring "credible evidence [of] domestic violence").

119. D.C. CODE §§ 16-911, 16-914 (2001) (applying a preponderance of the evidence standard).

120. Although a presumption against custody is not invoked when there is little evidence of domestic violence, these courts may consider the evidence of domestic violence when determining which custody arrangement is in the child's best interests.

Oklahoma¹²¹ and Nevada¹²² require a parent to show clear and convincing evidence of domestic violence; South Dakota requires a conviction of domestic abuse or assault, homicide of the other parent, or a history of domestic abuse proved by “greater convincing force of the evidence;”¹²³ and Florida requires a conviction for a third-degree felony or higher involving domestic violence.¹²⁴ Because Florida law otherwise favors shared custody,¹²⁵ a parent who has been convicted of attempted murder,¹²⁶ manslaughter,¹²⁷ kidnapping,¹²⁸ or aggravated child abuse¹²⁹ will likely be awarded joint custody. In Alaska, if these crimes are directed against a domestic living partner, the perpetrator will not be awarded joint or sole custody.¹³⁰

Raising the presumption upon a lower standard of proof is consistent with the standard required in other civil trials. Alaska courts have demonstrated that a low standard does not mean a parent will be rewarded for falsely accusing the other parent of abuse. In *O'Dell v. O'Dell*,¹³¹ for example, although the husband accused his wife of domestic violence, the superior court found that her behavior did not rise to the level of perpetrating domestic violence and awarded custody rights to both parents.

4. *Rebutting the Presumption.* The final important aspect of the Alaska presumption is that it is rebuttable. A parent found to be a perpetrator of domestic violence may rebut the presumption by showing that (1) he has successfully completed an intervention program for batterers; (2) he does not engage in substance abuse; and (3) the best interests of the child require that parent be awarded custody because the other parent is absent, suffers from a mental illness that affects ability to parent, or engages in substance abuse that affects his ability to parent.¹³² Alternatively, he can prove that the child’s best interests require he be awarded custody.¹³³ Alaska’s prescribed means of rebutting the presumption is a compromise between those states that list specific

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

122. NEV. REV. STAT. § 125.480(5) (2004).

123. S.D. CODIFIED LAWS §§ 25-4-45.5, 25-4-45.6 (2004).

124. FLA. STAT. § 61.13(2)(c)(2) (2008).

125. *Id.*

126. FLA. STAT. § 782.051(3) (2006).

127. FLA. STAT. § 782.07(1) (2006).

128. FLA. STAT. § 787.01(2) (2006).

129. FLA. STAT. § 827.03(2) (2006).

130. *See* ALASKA STAT. § 18.66.990(3) (2006) (defining domestic violence).

131. No. S-12097, 2007 WL 1378153 (Alaska May 9, 2007).

132. ALASKA STAT. § 25.24.150(h).

133. *Id.*

factors for overcoming the presumption and those that leave it up to the judge to determine if the child's best interests require custody with the abusive parent.

On one end of the spectrum are states that require a perpetrator of domestic violence to take certain steps before a judge has discretion to look at the child's best interests. Wisconsin's presumption against custody is only rebutted if the perpetrator has successfully completed a program for batterers and the best interests of the child require custody with the previously abusive parent.¹³⁴

California is an example of a state that requires judges to consider multiple factors in determining whether the presumption has been rebutted. California judges must take into account:

- (1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child
- (2) Whether the perpetrator has satisfactorily completed a batterer's treatment program
- (3) Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate.
- (4) Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate.
- (5) Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole.
- (6) Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions.
- (7) Whether the perpetrator of domestic violence has committed any further acts of domestic violence.¹³⁵

In California, since none of these factors is determinative, the judge has a large amount of discretion to determine whether or not the abusive parent may be granted custody. Even more lenient standards for rebutting the presumption exist in states like Minnesota, where the code provides no explanation of how the presumption may be rebutted.¹³⁶

134. WIS. STAT. § 767.41(2)(d)(1) (2007).

135. CAL. FAM. CODE § 3044 (West 2008).

136. See MINN. STAT. § 518.17(2) (2008) (stating that "the court shall use a rebuttable presumption that joint legal or physical custody is not in the best interests of the child if domestic abuse, as defined in section 518B.01, has

The rebuttable presumption merely shifts the burden to the abusive parent to show that he is fit to parent, rather than placing the burden on the victimized parent to show that the abuser is unfit. Although the Alaska statute outlines one way to overcome the presumption, requirements for rebuttal appear to be on the more lenient side: in an unpublished case, the Alaska Supreme Court held that a perpetrator of domestic violence had overcome the presumption, but did not explain why.¹³⁷

IV. THE ALASKA STATUTE SUCCESSFULLY ADDRESSES SOME CONCERNS OVER THE EFFECTS OF PARENTING BY PERPETRATORS OF DOMESTIC VIOLENCE

A. Existence of a Rebuttable Presumption

The existence of a rebuttable presumption in Alaska law is beneficial to children involved in custody disputes. First, the presumption may encourage abused parents to leave their violent partner. Second, the presumption ensures that courts consider the existence of domestic violence in making custody decisions. Third, the presumption nullifies other considerations in Alaska custody law that disfavor an abused parent. Fourth, the presumption simplifies custody cases by treating divorcing perpetrators of domestic violence like perpetrators who remain married.

First, section 25.24.150(g) of the Alaska Statutes may encourage a parent to leave an abusive relationship. As the United States Congress noted, “[a]bused spouses . . . often have difficulty in separating from their abuser because of the tremendous insecurity that such abuse fosters and a lack of financial resources to leave the family home. Moreover, many women fear that if they seek a divorce, they will lose custody of their children.”¹³⁸ Victims of domestic violence often make decisions to stay with or leave the perpetrator based on their sense of the best interests of their children.¹³⁹ Therefore, if a victim of domestic violence believes she will lose access to her children, it is unlikely that

occurred between the parents,” but failing to explain how the presumption may be rebutted).

137. *O'Dell v. O'Dell*, No. S-12097, 2007 WL 1378153, at *5 (Alaska May 9, 2007).

138. 136 CONG. REC. H8282 (1990).

139. EDLESON ET AL., *supra* note 16, at 15.

she will leave the abusive relationship.¹⁴⁰ By removing this fear, the presumption encourages the victimized parent to leave, ending a situation that is detrimental to the child.¹⁴¹

Second, the presumption in section 25.24.150(g) of the Alaska Statutes ensures that courts give adequate weight to the existence of domestic violence in determining the child's best interests. Though Alaska courts were required to consider domestic violence prior to the 2004 amendments, abusive fathers still won custody cases up to 70% of the time.¹⁴² At least one study shows that allegations of domestic violence have no demonstrated effect on the rate at which fathers obtain custody of their children.¹⁴³ Another shows that female victims of domestic violence are actually less likely to be awarded sole legal custody of their children than are non-victims.¹⁴⁴ Given the impact that domestic violence has on a child's development, these figures suggest that courts emphasized other factors in making custody decisions. Section 25.24.150(g) of the Alaska Statutes may remedy this problem by requiring courts to address domestic violence when it is credibly raised.¹⁴⁵ In fact, one study of rebuttable presumptions in fifteen states revealed that the presumption does have a palpable effect on custody awards: the victimized mother obtained sole custody at a rate of fifty-two percent in states with a rebuttable presumption.¹⁴⁶ In contrast, in states without a rebuttable presumption, victimized mothers obtained sole custody only thirty-one percent of the time.¹⁴⁷

140. Transcript of Audio Cassettes of Committee Minutes on House Bill No. 385, *supra* note 71, at 2049 (statement of Christine McLeod Pate, Mentoring Attorney, Alaska Network on Domestic Violence and Sexual Assault).

141. See Julie Kuncie Field & Karen Gulberg Cook, "But He Never Hit the Kids": Domestic Violence as Family Abuse, 73 MICH. BAR J. 922, 922 (1994) (arguing that domestic violence against a spouse is child abuse).

142. Transcript of Audio Cassettes of Committee Minutes on House Bill No. 385, *supra* note 71, at 0179 (statement of Lesil McGuire, Chair of H. Judiciary Standing Comm. and Sponsor of H.B. 385).

143. Kernic et al., *supra* note 20, at 1006, 1014 (finding that mothers who were victims of a history of domestic violence were no more likely to be awarded custody than mothers who were not victims).

144. Nancy E. Johnson et al., *Child Custody Mediation in Cases of Domestic Violence: Empirical Evidence of a Failure to Protect*, 11 VIOLENCE AGAINST WOMEN 1022, 1035 (2005).

145. See Puddicombe v. Dreka, 167 P.3d 73, 77 (Alaska 2007) (finding plain error where the trial court does not make findings as to a history of perpetuating domestic violence when the record shows that domestic violence has occurred).

146. Allison C. Morrill et al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1093 (2005).

147. *Id.*

While the presumption in section 25.24.150(g) of the Alaska Statutes may not be necessary in all cases for a court to appropriately consider domestic violence in child custody disputes,¹⁴⁸ it is the best way to ensure that domestic violence is *always* appropriately considered. In many custody cases, the judges, child custody investigators, and guardians ad litem that effectively decide the custody question have little to no training in domestic violence.¹⁴⁹ As the legislative history of House Bill 385 reveals, the child custody investigators charged with making expert recommendations on a child's best interests are not required to have any training in domestic violence or sexual abuse.¹⁵⁰ Lack of familiarity with domestic violence may be worse in rural areas where the magistrate's legal experience is limited.¹⁵¹ Many studies assert that the judicial and social workers involved in custody cases tend to dismiss charges of spousal abuse or consider spousal abuse irrelevant to child custody.¹⁵² *Carstens v. Carstens*,¹⁵³ wherein the Alaska Supreme Court confirmed a custody award to the allegedly violent parent, provides a good example.¹⁵⁴ There, "the trial judge made specific findings that there was no showing that the alleged abuse affected or would affect" the child.¹⁵⁵ Since the trial court actually considered the history of abuse, the appellate court would not reverse its determination that placement with the abusive parent was in the best interests of the child.¹⁵⁶ Other inappropriate outcomes in custody proceedings where domestic violence was a factor were cited in a public hearing on House Bill 385, indicating just how widespread the problem was before section 25.24.150(g) of the Alaska Statutes was adopted.¹⁵⁷

148. See, e.g., *Farrell v. Farrell*, 819 P.2d 896, 899 (Alaska 1991) (reasoning that since joint legal custody is appropriate only when parents can cooperate and communicate in the child's best interests, joint legal custody was inappropriate).

149. Transcript of Audio Cassettes of Committee Minutes on House Bill No. 385, *supra* note 71, at 1947 (statement of Christine McLeod Pate, Mentoring Attorney, Alaska Network on Domestic Violence and Sexual Assault).

150. *Id.*

151. *Id.* at tape 04-31, side A, No. 1491 (statement of Dennis L. McCarty, Attorney at Law).

152. See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1072 (1991) (citing studies in Nevada, Maryland, and Florida).

153. 867 P.2d 805 (Alaska 1994).

154. *Id.* at 808.

155. *Id.*

156. *Id.*

157. Transcript of Audio Cassettes of Committee Minutes on House Bill No. 385, *supra* note 71, at 0747, 0995, 1170 (statements of Tracy Gould, Kimberlee Vanderhoof, Gigi Pilcher).

Third, even where courts do recognize that domestic violence is significant to a child's best interests, abusers may still have an advantage in custody disputes where domestic violence is merely a factor in custody determinations. Batterers may present themselves well in court because of the characteristics that are common among abusive spouses: confidence, ability to manipulate, and denial of abusive behavior. Frequently, the key witness for a previously abusive father is his new partner; her testimony that the father is not violent implies that his past abuse related directly to his interactions with the mother, effectively shifting blame to her.¹⁵⁸ In contrast to domestic violence perpetrators, victims may appear weak in court. Not only will a victim be afraid to confront her abuser in court,¹⁵⁹ but she may suffer from psychological effects such as post-traumatic disorder,¹⁶⁰ anxiety,¹⁶¹ depression,¹⁶² and suicidality.¹⁶³ Victims are often noted as "irrational, over-emotional, spiteful, and vindictive."¹⁶⁴

Further, the presumption takes on extra significance in a state like Alaska where child custody laws contain a friendly parent provision.

158. See PETER G. JAFFE ET AL., *CHILD CUSTODY & DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY* 32 (2002).

159. See Demie Kurz, *Separation, Divorce, and Woman Abuse*, 2 *VIOLENCE AGAINST WOMEN* 63, 72 (1996) (finding that fear following separation from an abusive spouse may prevent women from fighting for their rights in custody proceedings).

160. See Jacqueline M. Golding, *Intimate Partner Violence as a Risk Factor for Mental Disorders: A Meta-Analysis*, 14 *J. FAM. VIOLENCE* 99, 116-17 (1999) (comparing eleven studies of women who experienced intimate partner violence to find that the mean prevalence of post-traumatic stress disorder among battered women was 63.8 percent, compared to 1.3-12.3% in the general population); Millie C. Astin et al., *Posttraumatic Stress Disorder and Childhood Abuse in Battered Women: Comparisons with Maritally Distressed Women*, 63 *J. CONSULTING AND CLINICAL PSYCHOL.* 308, 310 (1995) (finding that battered women exhibited significantly higher rates of post-traumatic stress disorder than maritally distressed women—58% compared to 18.9%).

161. See Mary N. Russell et al., *Psychological Profiles of Violent and Nonviolent Maritally Distressed Couples*, 26 *PSYCHOTHERAPY* 81, 82 (1989).

162. See LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 111 (2d ed. 1999); GOLDING, *supra* note 160, at 106 (comparing eighteen studies of women who experienced intimate partner violence to find that the mean prevalence of depression among battered women was 47.6%, compared to somewhere between 10.2%-21.3% in the general population of women).

163. See Golding, *supra* note 160, at 112-13 (comparing thirteen studies of women who experienced intimate partner violence to find that the mean prevalence of suicidality among battered women was 17.9%, compared to 6.6% in the general population of women). "Suicidality" includes thoughts of attempts at suicide. *Id.* at 112.

164. Transcript of Audio Cassettes of Committee Minutes on House Bill No. 385, *supra* note 71, at 1947 (statement of Christine McLeod Pate, Mentoring Attorney, Alaska Network on Domestic Violence and Sexual Assault).

Absent the presumption in section 25.24.150(g) of the Alaska Statutes, Alaska courts often favored the parent who was most likely to foster a friendly relationship under section 25.24.150(c)(6) of the Alaska Statutes: abusive parents were awarded custody where the victimized parent was unwilling to cooperate with the other parent—her former abuser.¹⁶⁵ Merely raising the issue that the other parent is unfit could count against the victimized parent.¹⁶⁶ Similarly, minimizing contact with the abuser—a natural reaction for a victim of domestic violence—may count against the victimized parent.¹⁶⁷ The result is that friendly parent provisions “reinforce learned helplessness in the victimized parent by encouraging her to suppress her complaints for fear that she will lose custody if she flees, denies her abuser visitation, or complains about his abusiveness in court.”¹⁶⁸ Even more striking is that the friendly parent provision is more commonly applied against the mother—the parent more likely to be the victim of abuse—than the father.¹⁶⁹ However, House Bill 385 amended section 25.24.150(c)(6) of the Alaska Statutes so that domestic violence effectively trumps the friendly parent provision:

Once the trial court makes an evidence-based finding that domestic violence occurred, however, it should explicitly address whether or not the parent is a continuing threat to the health and safety of the other parent of the children prior to relying on the parent’s willingness to foster a relationship under AS 25.24.150(c)(6).¹⁷⁰

Therefore, Alaska’s rebuttable presumption is necessary to nullify the friendly parent provision—a custody consideration that would otherwise favor custody with the abusive parent.

165. *Id.* at 0179 (statement of Lesil McGuire, Chair of the House Judiciary Standing Committee) (“‘Friendly parent’ statutes are often used by abusive parents against the protective parent.”); *see, e.g.,* Van Sickle v. McGraw, 134 P.3d 338, 341 (Alaska 2006) (affirming award of custody to father, who perpetrated domestic violence, because he was better at achieving an “open and loving frequent relationship” with the other parent).

166. *See* Transcript of Audio Cassettes of Committee Minutes on House Bill No. 385, *supra* note 71, at 0995 (statement of Kimberlee Vanderhoof, Program Director, Careline Crisis Intervention) (telling the story of domestic violence victim who was admonished by the court for disputing custody with her abuser).

167. *See* ABA CENTER ON CHILDREN AND THE LAW, *supra* note 78, at 134 (“Domestic violence victims, often for the safety of their children and themselves, take active steps to minimize contact and relationships with the abuser.”).

168. Joan Zorza, *Friendly Parent Provisions in Custody Determinations*, 26 CLEARINGHOUSE REV. 924, 925 (1992).

169. *Id.* at 924.

170. Puddicombe v. Dreka, 167 P.3d 73, 77 (Alaska 2007).

Fourth, a presumption against a perpetrator of domestic violence is consistent with the treatment of abusive parents in households where custody is not at issue. The Alaska child welfare agency is authorized to remove a perpetrator of domestic violence from the household and to prevent removal of the child from the non-offending parent.¹⁷¹

It is important to note that a rebuttable presumption may not be as necessary in Alaska as it is in states that presume joint custody is in a child's best interests. For example, section 518.17(2) of the Minnesota Statutes provides that joint custody is presumed to be in the best interests of a child.¹⁷² Absent a presumption overriding section 518.17(2)(d) of the Minnesota statutes, a parent with a history of perpetrating domestic violence must be given joint custody if he so requests it.¹⁷³ The presumption in Minnesota is therefore indispensable to ensuring a child's best interests, because even a judge's discretion could not prevent placement with the abusive parent. Further, if a judge in a state that presumes joint custody is in a child's best interests does not believe a parent's allegations of domestic violence, he must award joint custody.¹⁷⁴ Therefore, in states like Minnesota, it is crucial that the level of proof and abuse required to invoke the presumption be low.

B. Ease of Invoking the Presumption

Requiring only a preponderance of the evidence to invoke the presumption against custody benefits the victimized parent and the child. Higher standards—for instance, requiring a criminal conviction—would not serve Alaska's policy goal of protecting children and victimized parents from their abusers. It is highly likely that a custody trial will be the first time that victimized parents raise the issue of abuse: while they are still living with abusive partners, victims of domestic violence may believe that reporting the violence to police or filing for a protective order will only encourage retaliation.¹⁷⁵ Moreover, a documented, substantiated history of domestic violence surfaces in fewer than twenty-five percent of the cases where a police report or protection order exists.¹⁷⁶ Since Alaska courts must apply the presumption against custody based on a preponderance of the evidence,

171. ALASKA STAT. § 47.17.035 (2006).

172. MINN. STAT. § 518.17(2)(d) (2006).

173. *Id.*

174. *Id.*

175. Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, 36 JUDGES J. 38, 39 (1997).

176. Kernic et al., *supra* note 20, at 1005.

the victimized parent and child are not disadvantaged if they have failed to institute an action against the abusive parent in the past or if the victimized parent fails to present evidence of such an action at the custody hearing.

Proponents of higher standards of proof—like those in Florida and Nevada¹⁷⁷—take the position that a parent accused of perpetrating domestic violence may have used violence as a way of protecting himself.¹⁷⁸ Thus, the presumption against the victim of domestic violence is detrimental to the child because it discourages a victim-parent from leaving an abusive relationship if she used violence to defend herself or her children in the past.¹⁷⁹ Further, if the level of abuse required to invoke the presumption is low, then a judge may apply the presumption against the victimized parent and award custody to the abusive parent.¹⁸⁰ Finally, supporters contend that finding a presumption against custody with minimal evidence is inconsistent with the strength of a parent's interest in his relationship with his child.¹⁸¹ These arguments are unfounded. First, courts can and do consider which parent is the dominant aggressor, largely eliminating the possibility that the presumption will be invoked against a victimized

177. See FLA. STAT. § 61.13(2)(c)(2) (2006) (requiring “[e]vidence that a parent has been convicted of a felony of the third degree or higher involving domestic violence” in order to invoke a rebuttable presumption against “shared parental responsibility” with the perpetrator); NEV. REV. STAT. § 125C.230(1) (2007) (requiring the court to conduct an evidentiary hearing and find clear and convincing evidence of domestic violence to invoke the presumption against custody).

178. See Nancy Ver Steegh & Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. R. 454, 457 (2008) (proposing that applying rebuttable presumptions against custody for a single incidence of violence would be inappropriate where the perpetrator is, in fact, a victim of domestic violence).

179. See Cheryl Terrance et al., *Maternal Blame: Battered Women and Abused Children*, 14 VIOLENCE AGAINST WOMEN 870, 873 (2008) (“Women may also remain [in abusive relationships] because of fear of losing custody or not being believed.”).

180. See Ver Steegh & Dalton, *supra* note 176 at 457; *Castle v. Simmons*, 86 P.3d 1042, 1045 (Nev. 2004) (“[B]y requiring the court . . . to conduct a hearing and to find by clear and convincing evidence that domestic violence occurred, the Legislature has protected innocent parents from unfounded allegations.”).

181. See, e.g., UNIFORM PARENTAL RIGHTS ENFORCEMENT AND PROTECTION ACT §§ 102(c), 103, 109(2) (recommending laws that create unalienable parental rights which can only be abridged due to abuse proved beyond a reasonable doubt), available at <http://www.childrensjustice.org/uprepa.htm>; see also Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining Solutions*, 11 J. GENDER, SOCIAL POLICY, & LAW 657, 710–12 (discussing judicial reluctance to terminate a parent's relationships with his children, despite evidence of that parent's abuse).

parent. Second, a high burden of proof is not necessary to protect a parent's right to a relationship with his child, since it is highly unlikely that a parent will fabricate allegations of abuse to obtain custody.

First, the potential for invoking the presumption against a victimized parent who is merely protecting herself is easily mitigated by a "dominant aggressor" clause, a requirement that the court determine which parent instigated the domestic violence. Such clauses are common in state penal codes that direct police officers to ascertain which party is primarily responsible for an incident of domestic violence and to arrest that party only.¹⁸² Some state custody statutes, including the Alaska statute, contain a dominant aggressor clause or a similar consideration.¹⁸³ For example, Delaware's custody statutes require that, if both parents have a history of perpetrating domestic violence, courts must consider whether one parent was the dominant aggressor when making a custody determination.¹⁸⁴ However, the statute does not prohibit the court from placing children with the dominant aggressor.¹⁸⁵ Similarly, the Alaska custody statutes include a clause which requires

182. See, e.g., ALA. CODE § 13A-6-134 (2005); ARK. CODE ANN. § 16-81-113(a)(1) (2005); CAL. PENAL CODE § 13701(b) (West 2000); FLA. STAT. § 741.29(4)(b) (2006); GA. CODE ANN. § 17-4-20.1(b) (2008); IOWA CODE § 236.12(3) (2008); LA. REV. STAT. ANN. § 46:2140(1) (1999); MD. CODE ANN., CRIM. PROC. § 2-204(b) (West 2001); MO. REV. STAT. § 455.085(3) (2003); MONT. CODE ANN. § 46-6-311(2)(b) (2007); NEB. REV. STAT. § 29-439(1) (2007); NEV. REV. STAT. § 171.137(2) (2007); N.H. REV. STAT. ANN. § 173-B:10(II) (2001); N.Y. CRIM. PROC. LAW § 140.10(4)(c) (McKinney 2004); N.D. CENT. CODE § 14-07.1-10(2) (2004); OKLA. STAT. tit. 22 § 60.16(B) (2003); R.I. GEN. LAWS § 12-29-3(c)(2) (2002); S.C. CODE ANN. § 16-25-70(D) (2003); S.D. CODIFIED LAWS § 25-10-35 (2004); TENN. CODE ANN. § 36-3-619(b) (2005); UTAH CODE ANN. § 77-36-2.2(3) (2003); VA. CODE ANN. § 19.2-81.3(B) (2004); WASH. REV. CODE § 10.31.100(2)(c) (2002); WIS. STAT. § 968.075(2)(1)(c)(am) (2007); *but see* OHIO REV. CODE ANN. § 2935.03(B)(3)(b) (West 2006) (explicitly providing that an officer may arrest any family member in violation of domestic violence statute even if he was not the primary aggressor).

183. See, e.g., ALASKA STAT. § 25.24.150(i)(1) (2006); DEL CODE ANN. tit. 13 § 705A (2008) (requiring courts to consider whether one parent was the primary aggressor in making custody determinations if both parents have a history of perpetrating domestic violence); LA. REV. STAT. ANN. 9:364(B) (2000) ("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."); NEV. REV. STAT. § 125.480(6) (2006) (requiring courts to determine who the dominant aggressor is and to apply the presumption against custody to that parent only; listing factors to consider in determining the dominant aggressor); WIS. STAT. §§ 767.41(2)(d)(b)(2)-(4); *Krank v. Krank*, 529 N.W.2d 844, 848 n.2 (N.D. 1995) (excluding conduct that is part of battered spouse syndrome from domestic violence); *see generally* *State v. Marr*, 765 A.2d 645, 651 n.1 (Md. 2001) (discussing various states' interpretations of whether conduct amounts to self defense or domestic violence).

184. DEL CODE ANN. tit. 13 § 705A (2008).

185. *Id.*

courts to place children with the parent who is “less likely to continue to perpetrate the violence” if both parents have a history of perpetrating domestic violence.¹⁸⁶ Though Alaska’s custody statute is not equivalent to a dominant aggressor clause, it can easily be applied to require courts to determine who the dominant aggressor is: if one parent is merely reacting to violence perpetrated by the other, she is clearly less likely to continue the violent behavior than the parent who is instigating the abuse.¹⁸⁷

Second, requiring a high standard of proof of abuse is unnecessary to alleviate fears that one parent will falsely accuse another of domestic violence in custody disputes.¹⁸⁸ One study found that only 1.3% of female-initiated allegations of abuse against the father were intentionally false.¹⁸⁹ Further, parents in the midst of custody disputes are no more likely to make false accusations of abuse than are members of the general population.¹⁹⁰ A National Center on Child Abuse and Neglect study of 9000 custody disputes where sexual abuse was alleged “found no evidence to support the belief that these cases typically involved mothers falsely accusing fathers to gain or maintain custody of the children.”¹⁹¹ This study also reported that allegations of abuse were more likely to be valid in families with older children, most likely because the child can provide a check on a parent who might otherwise

186. ALASKA STAT. § 25.24.150(i)(1) (2006).

187. See FOURTH BATTERED MOTHERS CUSTODY CONFERENCE, TESTIMONY TO THE TRUTH COMMISSION 7 (2007), <http://stopfamilyviolence.org/media/Truth%20Commission%20Final%2007.pdf> (listing reasons that explain why the dominant abuser is responsible for violence).

188. See generally RICHARD A. GARDNER, PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS (2d ed. 1998) (blaming one parent—usually a woman—for vilifying the other parent, frequently in the context of custody disputes; arguing that allegations of abuse are a symptom of a psychological problem called Parental Alienation Syndrome and should not be taken seriously in most cases). The American Psychological Association has noted that no data support the existence of Parental Alienation Syndrome. Press Release, Am. Psychological Ass’n, Statement on Parental Alienation Syndrome (Oct. 28, 2005), available at <http://www.apa.org/releases/passyndrome.html>.

189. Nicholas Bala & John Schuman, *Allegations of Sexual Abuse when Parents Have Separated*, 17 CAN. FAM. LAW Q. 191, 196 (2000).

190. Thea Brown et al., *Revealing the Existence of Child Abuse in the Context of Marital Breakdown and Custody and Access Disputes*, 24 CHILD ABUSE & NEGLECT 849, 852 (2000) (finding that false child abuse allegations occurred no more frequently in custody proceedings than in other circumstances).

191. Nancy Thoennes & Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE & NEGLECT 151, 161 (1990). In fact, fathers are far more likely to make intentionally false accusations of abuse than mothers are. Nico Trocme & Nicholas Bala, *False Allegations of Abuse and Neglect when Parents Separate*, 29 CHILD ABUSE & NEGLECT 1333, 1341 (2005).

make a false accusation of abuse.¹⁹² Since false allegations of abuse are so infrequent and since falsity can be easily verified by simple testimony from a child, a low burden for producing evidence of domestic violence is sufficient for invoking presumptions against custody.

C. Effect of Presumption on Visitation Benefits Children

Allowing a domestic violence perpetrator to have only supervised visitation with a child protects the child's best interests. Growing up in a household where domestic violence is present may have devastating effects on a child's psychological and emotional development and may also result in physical harm to the child.¹⁹³ Limiting physical access to the child prevents further harm and may also allow the child to heal.

First, continuing contact with a perpetrator of domestic violence may cause ongoing harm to a child. Bancroft and Silverman drew on their clinical experience to enumerate a number of those risks: (1) risk of continued undermining of the mother's parenting and the mother-child relationship; (2) risk of continued exposure to authoritarian or neglectful parenting; (3) risk of exposure to new threats of violence, psychological maltreatment, or direct victimization by the batterer; (4) risk of learning violence-supportive beliefs and attitudes; (5) risk of being abducted or otherwise used as a tool of the perpetrator; and (6) risk of the child's exposure to violence in the father's subsequent relationship with other women.¹⁹⁴ Since the purpose of Alaska's statutory presumption is to protect children, limiting contact is desirable.

Second, keeping a child away from a batterer may reduce the harmful effects of living in an abusive family. Children appear to exhibit fewer problems as time elapses from their last exposure to a violent event.¹⁹⁵ Therefore, ensuring that children are not re-exposed to violence is beneficial to them.

V. IMPROVING THE ALASKA CUSTODY STATUTES

Although the existence of a rebuttable presumption is preferable to a more general "best interests of the child" standard, the Alaska Statutes would benefit from further clarifications and expansions. First, a child

192. Thoennes & Tjaden, *supra* note 191, at 161.

193. *See supra* Part I.B.2.

194. BANCROFT & SILVERMAN, *supra* note 38, at 2-4.

195. Jeffrey L. Edleson et al., *How Children are Involved in Adult Domestic Violence: Results from a Four City Telephone Survey*, 18 J. INTERPERSONAL VIOLENCE 18, 27-28 (2003) (finding that children in secure environments are less likely to intervene in domestic violence between adults).

whose parent has perpetrated domestic violence should be able to raise the presumption. Second, the Alaska Legislature should clarify the term “domestic living partner.” Third, judges should not have such wide discretion to allow for unsupervised visitation with a parent who has perpetrated domestic violence.

A. Allow the Child to Raise the Presumption

Alaska should allow a child who is the subject of a custody proceeding to present evidence of domestic violence in order to raise the presumption in section 25.24.150(g) of the Alaska Statutes. Alaska courts already consider a child’s preference, if he is old enough to state one, when making custody decisions.¹⁹⁶ However, if a parent does not raise the issue of domestic violence and ask for the rebuttable presumption, the presumption may be waived in a custody hearing.¹⁹⁷ For example, in *Thomas v. Thomas*,¹⁹⁸ a victimized mother presented uncontroverted evidence of her ex-husband’s history of domestic violence at trial.¹⁹⁹ Since the mother did not ask to raise the presumption in section 25.24.150(g) of the Alaska Statutes, the court was merely required to weigh evidence of the abuse under section 25.24.150(c) of the Alaska Statutes’ best interests analysis.²⁰⁰ Similarly, in *Ginn-Williams v. Williams*,²⁰¹ the Alaska Supreme Court held that where neither party had brought up domestic violence until after entering a final and binding agreement, the court could not address the issue on appeal.²⁰²

Thomas and *Ginn-Williams* are not merely anecdotal: a 2005 study conducted in Washington revealed that in 246 families where police incident reports or court orders indicated a preexisting history of male-perpetrated domestic violence, domestic violence was mentioned in fewer than 53% of custody hearings.²⁰³ This study and others

196. ALASKA STAT. § 25.24.150(c)(3) (2006).

197. See, e.g., *Ginn-Williams v. Williams*, 143 P.3d 949, 951–52 (Alaska 2006) (holding that raising concerns over domestic violence is not permissible where parties had not brought up domestic violence before reaching a final and binding custody agreement).

198. 171 P.3d 98 (Alaska 2007).

199. *Id.* at 106.

200. *Id.* at 106 n.26.

201. 143 P.3d 949 (Alaska 2006).

202. *Id.* at 952–53.

203. Mary A. Kernic et. al., *Children in the Crossfire: Child Custody Determinations Among Couples with a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991, 1005 (2005).

demonstrate that mothers frequently fail to report abuse to the courts even where substantial proof of abuse exists.²⁰⁴

This outcome is inconsistent with the purpose of section 25.24.150(g) of the Alaska Statutes: the parents' failure to raise domestic violence should not waive a child's interest in being placed in a safe and stable household. The problem is somewhat mitigated in Alaska since children may be issued protective orders against an abusive parent.²⁰⁵ Still, a "lack of evidence . . . along with the shame and denial that often accompanies [domestic violence]" means that abusive parents often win custody cases.²⁰⁶ Allowing a child to present evidence of domestic violence creates one more potential source of evidence, further protecting the integrity of the judicial process.

Allowing a child to raise the issue of domestic violence is consistent with Alaska law and the law in other states. Alaska law provides that a guardian ad litem may be appointed in civil cases where the child is not the actual petitioner.²⁰⁷ Further, a third party may initiate a suit for a protective order against a parent on behalf of the child.²⁰⁸ These provisions do not apply to custody hearings; custody, however, may be decided during hearings for protective orders.²⁰⁹ Given that children and their representatives may actually initiate or participate in proceedings that *may* affect custody, allowing children to have a role in hearings that will *certainly* affect custody makes sense.

B. Clarify the Meaning of "Domestic Living Partner"

By stating that the presumption in section 25.24.150(g) of the Alaska Statutes is raised whenever domestic violence is committed against a "domestic living partner," the Alaska Statutes add a layer of

204. See Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Women Battering*, 5 VIOLENCE AGAINST WOMEN 134 (1999) (reviewing studies that show inconsistencies in reports of domestic violence to courts, counties, and shelters).

205. See ALASKA STAT. § 18.66.100(a) (2006) (providing that a parent, guardian, or other representative may file a petition on a minor's behalf for a protective order against a household member when the minor has been a victim of domestic violence). The Alaska statute does not allow the minor to file a petition for a protective order if he has not been a "victim" of domestic violence, though the statute does not define the word "victim" to require that abuse be directed at the minor. *Id.*

206. Transcript of Audio Cassettes of Committee Minutes on House Bill No. 385, *supra* note 71, at 1947 (statement of Christine McLeod Pate, Mentoring Attorney, Alaska Network on Domestic Violence and Sexual Assault).

207. ALASKA STAT. § 18.66.100(a) (2006).

208. *Id.*

209. ALASKA STAT. § 18.66.100(c)(9) (2006).

confusion to an already difficult issue for the courts.²¹⁰ “Domestic living partner” is not defined in the Alaska Statutes, nor has the Alaska Supreme Court clarified what the term means.²¹¹ Both a broad and a narrow interpretation are consistent with the legislative history.²¹² This ambiguity may interfere with the purpose of the presumption in section 25.24.150(g) of the Alaska Statutes.

If a court applies a narrow interpretation of the statute and uses the presumption only when an abusive parent directed violence against a person with whom a child had contact, then the court overlooks the risk that the parent will abuse the child. Since studies demonstrate that parents who abuse partners are more likely to abuse their children, this danger is grave.²¹³ Moreover, the narrow interpretation of “domestic living partner” ignores that an abusive parent could use his past history of violence to scare the other parent, even when violence was never directed at that parent. In such a situation, co-parenting would be detrimental to the child.

If a court applies a broad interpretation of the statute and uses the presumption when a parent has been violent toward a former partner, then it may lose sight entirely of the purpose of section 25.24.150(g) of the Alaska Statutes. Under the broader interpretation of “domestic living partner,” whether a parent has perpetrated domestic violence may become the central issue of a custody hearing. Since judges may not be well-equipped to consider the importance of domestic violence, this outcome would be exactly what section 25.24.150(g) of the Alaska Statutes attempted to avoid.

The Alaska Legislature or the Alaska courts must either clarify the meaning of “domestic living partner” or risk that custody disputes devolve into a trial on all past parental conduct, regardless of its relevance to the child’s best interests.

C. Limit Judicial Discretion to Allow Unsupervised Visitation with a Perpetrator of Domestic Violence

That a judge may allow unsupervised visitation if an abusive parent fulfills certain requirements somewhat diminishes the benefit of the presumption against custody.²¹⁴ As a Louisiana case noted, the

210. See *supra* Part III.C.2.

211. See *supra* Part III.C.2.

212. See *supra* Part III.C.2.

213. See EDLESON ET AL., *supra* note 16, at 9.

214. See ALASKA STAT. § 25.24.150(j) (2006) (“[C]ourt may allow unsupervised visitation if . . . the violent parent has completed a substance abuse treatment program if the court considers it appropriate, is not abusing alcohol or

purpose of prohibiting contact between an abusive parent and his child until the court finds that the parent has successfully completed a treatment program is to “remove even the possibility of further abuse of the child at the hands of the parent due to perceived failures of existing laws.”²¹⁵ Unless a judge finds that the perpetrator of domestic violence no longer poses a danger to the child, both Alaska and Louisiana law prohibit even supervised visitation between an abusive parent and a child until the parent has completed a program for perpetrators of domestic violence.²¹⁶ If a judge finds that an abusive parent is no longer a threat, he is authorized to allow unsupervised visitation.²¹⁷ However, the Legislature does not define how a judge should determine whether the perpetrator poses a danger to the child; nor does it delineate factors for determining whether a child’s best interests requires unsupervised visitation.²¹⁸

Though section 25.24.150(j) of the Alaska Statutes requires that an abusive parent make *some* showing that he should be allowed to have unsupervised visitation,²¹⁹ giving a judge discretion to allow unsupervised visitation ignores the main purpose for creating a rebuttable presumption: judges may still place too little emphasis on the likelihood of future harm to the child and the abused parent. Assessing the ongoing risks to children from households with domestic violence is complex. Bancroft and Silverman outlined nine factors that should be considered in assessing the risks described above, including attention to: (1) the perpetrator’s history of physical or sexual abuse and neglect of his children, (2) the level of continued danger to the non-abusive parent, (3) a history of abuse of the children and other parent, (4) a history of using children in or exposing them to violent events, (5) the level of coercive control that the perpetrator has exercised in the past, (6) the degree to which the perpetrator feels entitled to access and other family privileges, (7) a history of substance abuse and mental illness, (8) a willingness to accept the decisions of the victim and of social institutions such as law enforcement and the courts, and (9) the risk of child abduction.²²⁰ Given that judges are not necessarily trained to understand

psychoactive drugs, does not pose a danger of mental or physical harm to the child, and unsupervised visitation is in the child’s best interests.”).

215. *State in re A.C.*, 643 So.2d 719, 731 (La. 1994).

216. *See* ALASKA STAT. § 25.24.150(j) (2006); LA. REV. STAT. ANN. § 9:364(B) (2000).

217. ALASKA STAT. § 25.24.150(j) (2006).

218. *See id.*

219. *Id.*

220. BANCROFT & SILVERMAN, *supra* note 38, at 2–4.

or even to be aware of these factors,²²¹ allowing them such discretion to provide for unsupervised visitation is inappropriate.

CONCLUSION

House Bill 385 intended to serve the best interests of the child by presuming that custody with a perpetrator of domestic violence is not in a child's best interests. The existence of a rebuttable presumption is beneficial to children and victims of domestic violence. Further, the effect that the presumption has on an abusive parent's contact with the child may not only protect the child from further harm, but also help the child recover from the detrimental effects of living in a household where domestic violence was present. However, the Alaska Statutes could be strengthened with greater opportunity for children to raise the presumption, clarification of key terms, and less judicial discretion in undoing the effect of the presumption.

221. *See supra* notes 149-56 and accompanying text.