Comments Regarding HB 334 Before the HSS Committee.
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It is critical to safety of Alaska children whose parents separate or divorce that the children remain in the primary care of a parent who has not perpetrated domestic violence against the another member of the household. Many people who are not experts in child custody, psychology or domestic violence are not aware of how violence in the home can affect children who are exposed to it, often in long-lasting ways.

A report from the U.S. Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, "Ending Violence so Children Can Thrive," p. 16, states that "Every single day, a majority of American Indian and Alaska Native . . . children are exposed to violence within the walls of their own homes. This exposure not only contradicts traditional understandings that children are to be protected and viewed as sacred, but it leaves hundreds of children traumatized and struggling to cope over the course of their lifetime."

From UAA's Institute of Social and Economic Research, a report by Vadapalli and Passini states that Alaska ranked among the top 10 states in percentage of children who suffered repeat child abuse in 2009 (4th place) through 2013 (1st place). During that period, the national median improved by 6 percent, while *Alaska got worse by 36 percent*.

The actual purpose of the child custody presumption legislation enacted in 2004 is discussed by the Alaska Supreme Court in Heber v. Heber, 330 P.3d 926, 932 (Alaska 2014) and is "to decrease the likelihood that children would be placed in the custodial household where domestic violence exists." [footnotes omitted.]

It has been known for many years that children living in homes where domestic violence occurs are 15 times (i.e., 1,500 percent) more likely to be directly abused than are children in non-violent homes. See State v. Huletz , 838 P.2d 1257, 1261, fn. 3 (Alaska App. 1992). What is extraordinarily important about that fact is what we now know happens to fully half of the children who are exposed to violence in their homes. The well-publicized Adverse Childhood Experiences Study funded by the Centers for Disease Control has shown that children exposed to four or more adverse life experiences have a greatly enhanced likelihood of developing some long-lasting physical health, mental health or behavioral problems, including shortened lives. Exposure of a child to domestic violence – the intimidation, isolation, control and physical abuse that typical victims of intimate partner violence are subjected to, is what we now call coercive control – **and is itself a form of domestic violence and is one of the adverse childhood experiences that can mark children for the rest of their lives.** One common feature among

my clients who are victims of on-going coercive control by an intimate partner is that they have developed PTSD from the abuse. What people who are not familiar with effects of trauma don't know is that a child who is exposed to repeated violent actions (or one especially severe assault) by one parent against the other can, and often does, develop post-traumatic stress disorder – even though that child has not been directly hit. Another important fact that most people don't know is that PTSD is forever, since it results from permanent changes in certain neural pathways in the brain that are repeatedly triggered by the "fight or flight" response to the parental abuse.

A recent OJJDP study by David Finkelhor for the U.S. Department of Justice has shown that children exposed to those adverse experiences such as repeated violence in the home tend to have a range of adverse health consequences throughout their lives, including shorter lives, at a higher rate than those not exposed to the violence and traumatic events.

Psychologists and psychiatrists tell us that children who are exposed to domestic violence and abuse of alcohol and other drugs in their homes can even develop long-lasting mental health problems such as PTSD and other anxiety-based disorders, as well as a tendency to have personality disorders, such as antisocial, histrionic, narcissistic and borderline personality disorders, all of which can adversely affect the course of their lives adversely. These results of exposure to abuse are essentially hard-wired, we are told.

The Alaska Supreme Court has even recognized that exposing a child to repeated violent episodes, but not violence directed at the child, can endanger the child's physical well-being. One such case was In the Matter of J.A., 962 P.2d 173, 178 (Alaska 1998). More recently, the Supreme Court in Winston J. v. State, 134 P.3d 343, 348 (Alaska 2006), upheld a trial court's statement that "the domestic violence . . . placed the children in risk of exposure that we know causes mental harm, that could cause physical harm."

So, the question is why the Legislature would enact changes to child custody legislation that has been directed at the safety of children whose parents are separating or divorcing, when our Supreme Court has been extremely helpful in directing trial courts in their application of AS 25.24.150 to the real families who have legitimate safety issues concerning their children. If the committee would like a list of those Alaska cases, I can provide that. The children of Alaska would actually be well served if this body were to enact legislation like that in the State of Colorado that became effective in 2013: children in Colorado whose parents are separating now have a right to live primarily in safe homes, with a parent who has not exposed them to violence in their home.

Below are my comments on the Sponsor Statement and two letters you received from Juneau attorneys Paul Grant and Kirsten Swanson.

SPONSOR STATEMENT

The sponsor states that HB334 was introduced to give judges more discretion in determining the best interests of children. The discretion historically given to family court judges in child custody cases was root of some tragic child custody awards I have seen in my

career and the reason that I co-authored the custody presumption bill in 2004. Then-representative Lesil McGuire understood the issues and worked hard to achieve passage of the legislation. The basis for that bill was the harm that befalls fully half of children who are exposed to domestic violence in their homes.

The sponsor stated before the committee that a "friend" who seemed very nice told her of being unjustly accused of committing domestic violence, on the basis of which accusation an ex parte order was obtained. The sponsor's friend then violated the domestic violence **protective** order and a long-term order was then granted, causing him to be restricted in contacts with his children. I would remind the committee that the sponsor presented one anecdote involving a personal friend but never presented the other side of that story. The recidivism of men who control, coerce and abuse their partners (described below) is why this legislature made the violation of an order of protection a class A misdemeanor crime – and the sponsor's friend **violated the court order**, a crime under AS 11.56.740. You never heard the rest of that story.

The sponsor errs in line 2, stating that a mere accusation of domestic violence has any ability to affect a child's custody. The presumption is only invoked if the judge makes findings, by a preponderance of the evidence, that a parent has committed more than one crime of domestic violence or one crime of DV that causes serious physical injury. That appears to filter out the true one-time angry shove or slap during a heated exchange. More than 20 other states have similar presumptions.

It is not required that the perpetrating parent complete a "year-long" intervention program, although I believe victims would be safer if there were more programs of that length. The Alaska Supreme Court's Stephanie F. v. George C. case held that any significant course of treatment dealing with domestic violence offenders, if there are no other treatment resources available, will meet the requirement and can rebut the presumption. The recidivism of men who have been controlling and abusing their partners is very high. The Alaska Supreme Court acknowledged that tendency to repeat intimate partner abuse with either the current victim or against a subsequent partner. Lana C. v. Cameron P., 108 P.3d 896, 901-902, fn. 11 (Alaska 2005). The Alaska court in that case also discussed its rationale for allowing evidence of past domestic violence to be heard by a court asked to find that a parent has committed new acts of domestic abuse.

The sponsor's comments about "fatherless children" are not relevant here because our child custody statutes, including the presumption provisions, do not contemplate ending a father's contacts with his children unless his risk to them is sufficient to justify a child in need of aid action by the state under AS 47.10.011 and aimed at terminating his parental rights. Our judges in serious cases involving continued physically or psychologically abusive conduct simply order supervised visitation. On the other hand, men who are abusive toward their children or intimate partners object to being part-time parents because that reduces their ability to continue to control a former partner; if the abuse was verified in the court's findings of fact, the non-abusive parent will usually have the children more than half of the time, but there will always be provisions for visitation.

Professionals who have worked with domestic violence victims (I have, as both a prosecutor and family lawyer) are aware that most acts of domestic violence are never reported to police agencies because victims are afraid that the abuse will get worse if a criminal charge is brought. Many of those fears are correct. According to studies by David Adams, Jacquelyn C. Campbell and others, the highest risk for homicide in DV cases is within two years of separation, after victims have attempted to escape their battering partners. When these women finally take the step of separating from their abusers and the court process begins, many unreported crimes are discussed and many of them are found by a court to have actually occurred. In many of these cases, in my experience, the abuse goes far beyond pushing the victim, throwing small objects and slamming doors hard enough to break them – some of the often-used means of controlling their partners are non-fatal strangulations, marital rape and threats to kill the victims. My clients who have PTSD from the abuse of their partners usually withstood that abuse for years before leaving in fear.

Domestic violence crimes are designated in AS 18.66.990(3), which refers to a number of different crimes defined in AS Title 11. Those crimes do not include issuance of an ex parte protective order or "allegations of abuse." Violation of a no-contact order, however, is a crime of domestic violence, and a very important one. (An ex parte order can be issued on only a reasonable belief that a DV crime was committed and the petitioner has reason to fear the respondent; that does not involve a finding by a preponderance of the evidence, so it is not a basis for a long-term order to issue without more.)

The second paragraph of the Sponsor Statement asserts that a purpose of the presumption legislation, HB385 later known as ch. 111 SLA 2004, was to ensure that persons with a criminal history of domestic violence were held accountable and that the children in question were protected. Actually, as I state below, the purpose of the law was, and is, "to decrease the likelihood that children would be placed in the custodial household where domestic violence exists." Heber v. Heber. The sponsor states that the provisions of AS 25.24.150 are used for "custodial advantage." As a matter of fact, *all nine subsections of 25.24.150(c) are used by lawyers and others to argue that one parent or the other can best meet the best interests of the child at issue*. Only one of those subsections, no. 7, is about domestic violence itself – and that subsection has been there since about 1989. The presumption legislation may limit judges' discretion in some ways, but they have all learned how to avoid making findings of fact that result in decisions they don't believe to be wise; I don't always agree with their decisions, but when the presumption is used, it helps them to do an even better job, in my opinion.

LETTER FROM PAUL GRANT, ESQ.

The letter from my Juneau colleague Paul Grant describes an incident about which – like the sponsor's friend's incident – you were not told the rest of the story. We were not told about the victim's account of Mr. Grant's client's incident. Just think about the amount of force that would be required to break a door frame in most cases. His wife obtained a protective order, saying that the door was damaged and that the event caused her to fear harm. We weren't told whether the order the wife obtained was an ex parte order based on reasonable cause or a long-term protective order based on findings of two crimes of domestic violence by a

preponderance of the evidence. (That can make a difference.) In any event, the man **violated a court order**. If he placed his wife in fear of harm, you can bet there was a history of other kinds of coercive and controlling actions by the husband. If a child was in the home, that child was exposed to domestic violence and may have been seriously affected. Again, this committee only heard part of one side of the story – but we do know that there was some violent behavior, the mother was placed in fear, the father **violated a court order** and a visitation schedule was ordered by the court. Without knowing the rest of the story, from the mother and from the child, and seeing the court's record, this committee must rely on Mr. Grant's stated assumptions. This committee should not change this valuable statutory policy based on that kind of assumptions.

Another important issue that Mr. Grant addresses in his letter is that this body should insert limits on a domestic abuse victim's safety and ability to establish the truth about violent events in her family. Because abusive relationships can continue for many years, depending on the victim's ability to support herself and the children after separation, her fear of violent retribution by her abuser, her reluctance to break up a relationship that she believes her children rely upon (despite the possibility that the children want the conflict to end), and other common reasons why people who once loved each other may stay together, it is not "reasonable" to limit the period of prior abuse evidence the court may hear. Our Supreme Court agrees. In Heber v. Heber, 330 P.3d 926, 932 (Alaska 2014), the court explained that "in custody matters involving domestic violence," the superior court must "look back to events that occurred before the initial custody order if [they were] not adequately addressed at the initial custody determination or subsequent proceedings." This ruling recognizes that a court considering the presumption against a custody award to a parent with a history of domestic violence can consider prior acts in order to prove that the perpetrator acted intentionally and that his actions now are similar to those he perpetrated in the past. It would be inconsistent with Alaska Evidence Rule 404(b)(4), which permits a criminal court to consider prior acts of domestic violence in deciding whether or not a defendant has committed the ones he is charged with perpetrating – and no criminal conviction is necessary. It would also be unnecessarily restrictive as a limit on the rule established by the Supreme Court in the case of Lana C. v. Cameron P. that I cited above. One of the jobs our judges have to do is to decide on the credibility of witnesses before it and the intent of those accused of abuse, and they should not have inappropriate limits on the evidence they need to do that job.

Finally, Mr. Grant takes his objection to an absurd level (page 3 of his letter) by asking that a victim parent whose children are in the home when domestic violence occurs be required to "demonstrate a direct impact on the well-being of the actual children involved." There are no tests in existence that can reliably detect such impacts, especially in the conflicted times surrounding the end of parents' relationships. The evidence that tells us why such a five-year limit is incorrect is in the research I discussed earlier in this letter.

KIRSTEN SWANSON

Kirsten Swanson's letter states in paragraph 1 that "no one should be the victim of violence from a domestic partner" but then makes the following assertions that are absolutely untrue: "but the current statutes are encouraging unnecessary litigation."

"Unnecessary litigation." In the real world, it would seem that legislative bodies would be better served by listening to those who give them information based on research instead of anecdotal accounts or fact-free generalizations. Reliable research done by world experts over the past 20 years has shown that 67 to 75 percent of child custody cases in the U.S. and Canada that go to trial (i.e., that must be resolved by a judge after hearing evidence) involve allegations of abuse, most of which are substantiated. Peter G. Jaffe, Ph.D., a psychology professor at the University of Western Ontario, conducted the research on Canadian cases and Janet R. Johnston, Ph.D., a professor emeritus at San Jose State University, conducted the research in the U.S. Johnston discusses her results in Johnston, Kuehnle and Roseby, In the Name of the Child; A Developmental Approach to Understanding and Helping Children of Conflicted Divorce, 2nd Ed., Springer Publishing (2009), at p. 308. The conclusion to be drawn from those facts, together with my own 42 years of working with violence victims, is that men who batter their female partners refuse to agree to voluntary settlements that have the children spending most of their time with a non-abusing parent. Men who batter do not want to give up their ability to control their now-former partners. And, contrary to Swanson's uninformed statement, children are not "hurt" by being placed in the primary physical custody of a parent who does not expose them to violence in the home.

Swanson's second paragraph illustrates that a criminal defense attorney does not really have a great deal of expertise in ways of protecting children from violence in their homes. The burden of persuasion needed to achieve a long-term domestic violence protective order is not "minimal", but is the preponderance of the evidence as in the vast majority of civil court cases. At the beginning of the process, when a victim may feel unsafe because of recent serious violence or threats, she may actually be unsafe because separation and the two years afterward are the most dangerous times for a victim of intimate partner abuse. A knowledgeable attorney or advocate for DV victims will tell her the facts and urge her to apply for a protective order; the first step in that process, the ex parte order, does have a low burden – a *reasonable cause to believe an act of domestic violence has occurred* and reason to fear there will be more violence – and a slightly elevated likelihood that an order will issue. But that first order will only be there until a hearing within 20 days is held at which the burden of persuasion goes up and the respondent has an opportunity to convince the court that he did not abuse his partner. And the respondent (the alleged abuser) can at any time file a request to change or dissolve the order if there is a genuine emergency reason to do so. That is a process designed to protect the due process right of accused abusers and give safety to the person who says he or she is a victim.

Swanson outdid herself in that paragraph, as she also claims that a court can "freeze the bank accounts" in a domestic violence protective order action; that is not one of the forms of relief available to a petitioner under AS 18.66.100(c)(2). It is indeed important to the safety of children from homes where there has been abuse, for them to be safe and with a non-abusive parent, at least until a court can intervene and make determinations about abuse; because the DV statutes are directed at child safety, rather than the "best interests of the child" factors found in AS 25.24.150, that is what happens.

Swanson's objections to even "allegations" of domestic violence in paragraph 3are some of the reasons why the provisions of AS 18.66 and of AS 25.24.150(c)(7) were enacted by the

Legislature in the first place. Parents who are victims of domestic abuse need the protection of the law to keep both themselves and their children safe. I have provided the committee with a copy of my article arguing that safety of the child should be the deciding criterion. It is Bailey, "Prioritizing Child Safety as the Prime Best-Interest Factor," 47 Family Law Quarterly (Spring 2013), at p 35.

In the paragraphs on her second page, Swanson shows a lack of knowledge of just how domestic violence works in intimate relationships and in our courts. Our judges generally make fairly good decisions in child custody cases; their primary failings have been findings in too many cases that domestic violence did not occur and in not following the statutory presumption. This can occur even in cases in which the alleged abuser did not even deny the allegations. All in all, our judiciary is now better educated about family violence and they understand that it is an important part of custody cases when it has occurred.

As a former career prosecutor, I am well qualified to tell you that we cannot rely on prosecution of criminal DV charges to solve this societal problem for a number of reasons. In fact, prosecutors may be not well educated; not very insightful into traumatic victimization; too lazy to file charges that may have to go to trial in order to obtain convictions; and they may come out of a plea-bargain negotiation having "given away the farm" by obtaining convictions on offenses not considered crimes of domestic violence. In times of tight budgets, prosecutors may have to relieve their overwork conditions by declining to prosecute many of these unpleasant cases. An entirely different weak point in the belief that criminal prosecutions will cure this ill is that most crimes of DV are never reported by their victims out of fear of the abuser, concern for the unified home environment, fear of losing their children, fear of not being able to financially maintain themselves and their children – or that terror than many victims of these crimes feel, an abject fear stemming from their traumatic experiences as abuse victims.

The final point in the second paragraph is something our Supreme Court has overruled many times. In fact, in 21 separate published opinions over the past 25 years, the court has held that parents who cannot communicate effectively, or in whose relationships domestic violence has occurred, should not have to share legal custody.

Swanson's last paragraph is also wrong: HB334 will only actually protect parents who abuse their partners.

I have been an attorney in Alaska for 42 years, more than ten of them as the last Anchorage Borough prosecutor and the first Anchorage municipal prosecutor after unification. For the past 26 and a half years, I have devoted my practice entirely to family law – divorce, child custody and domestic violence cases. The very first family law case I handled, back in 1974, before there were domestic violence protective orders or women's shelters or even crimes called domestic violence, involved an attempted murder, the prospect of an international kidnaping and a criminal charge against my client's husband. I have worked with intimate partner violence victims regularly for my entire legal career.

Currently, the majority of my clients are domestic violence victims, mostly women, and daily reminders that about one eighth of relationships in this country involve a dynamic of coercive control by an abuser. I have taken the opportunities during the past 25 years to learn all I could about intimate partner violence and to keep current in research that has been done on it across the world. I am a former member of the American Bar Association's Commission on Domestic and Sexual Violence; chair of the ABA Family Law Section's domestic violence committee; and a working member of the board of directors of the AWAIC Shelter in Anchorage, the largest domestic violence shelter in our state (which also serves men who are victims of family violence). I have received state and national awards for my work in behalf of men and women who are domestic violence survivors.

– Allen M. Bailey