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The Honorable Paul Seaton
Chair, House Health & Social Services Committee
Alaska State Legislature
State Capitol Room 102
Juneau, Alaska 99801

RE: In Opposition to HB 334

Dear Rep. Seaton:

I am the Legal Program Director with the Alaska Network on Domestic Violence and Sexual Assault and am writing to oppose HB 334. We provide civil legal assistance – primarily in family law cases –to victims of domestic violence and sexual assault statewide. Additionally I provide legal advice and counsel to advocates at our 23 member programs and affiliates who work with victims and their children daily in legal proceedings. I have been practicing family law since 1994 and have worked with thousands of victims of domestic violence and sexual assault who are litigating through the custody process. I very well understand how the custody statutes affected victims both prior to the 2004 amendments to the law which created the rebuttable presumption and since that law was enacted. ANDVSA has grave concerns about how this proposed legislation will affect children growing up in homes with domestic violence.

The current custody law, AS 25.24.150 (g)-(k), was enacted to protect Alaska children from the harmful effects of exposure to domestic violence. ANDVSA wholeheartedly agrees with Sponsor Representative Cathy Munoz's statement that fathers are a critical part of a child's life. But what is most important for a child is having two healthy parents. In homes where there has been domestic violence, that is sadly not possible. Alaska has consistently ranked in the top rates for domestic violence and sexual assault nationwide. We know that children who grow up in homes with domestic abuse are at grave risk for being directly abused themselves. Additionally, when children witness violence in their home, they are at risk that they will be killed or injured by the violence and that their emotional, physical and mental health will be detrimentally affected. The effects of this violence include a wide range of physical, social, mental and educational deficits which take a heavy financial and emotional toll on society. Children who grow up in homes with violence are likely to repeat these patterns in future relationships leading to inter-generational cycles of abuse. And we know that violence does not end when the relationship ends. Separation is often the highest time of lethality for victims and their children as abusers struggle to maintain control. Abusers often continue their tactics of coercive control in future relationships until they learn healthier ways of interacting. Because of these grave concerns, the American Psychological Association, the American Medical Association, the American Bar Association Center on Children and the Law and numerous other organizations have recommended against granting custody to someone has perpetrated domestic violence.

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The "rebuttable presumption" against awarding a parent joint or sole custody, found in AS 25.24-150(g)-(k), and passed in 2004, was enacted to ensure that courts made consideration of domestic violence a top priority in deciding custody of children. Prior to the enactment of this law, domestic violence was one of nine "best interests" factors that the courts *could* consider in deciding whether to award custody to a parent. What attorneys, victims and victim's advocates told the Legislature in 2004 was that the system was broken for families plagued by violence. The 2004 Legislature heard testimony about victims and children who had been killed by abusers during custody cases. Given the enormity of the problem in our state, making domestic violence one of nine best interest factors was not adequate protection for Alaskan children in custody matters. Courts sometimes failed to hear evidence of domestic violence, minimized the importance of it, or failed to put in place rehabilitative programs for a parent who had committed domestic violence. HB 334 would bring us back to that statutory framework by only allowing the court to consider domestic violence as one of the nine best interest factors unless there has been a criminal conviction for domestic violence.

The 2004 rebuttable presumption law improved the system by creating a specific framework for custody cases when there has been a finding of domestic violence by a trial court. Hundreds of Alaskan's victims of domestic abuse have been able to rely upon this law to protect their children.

Changing the language to a criminal standard to invoke the rebuttable presumption will prevent many needy Alaskan parents from accessing the protections in current custody law because domestic violence is both an under-reported and under-prosecuted crime. Victims do not report crimes for myriad reasons – they are concerned about retribution from the abuser, they have not historically been supported by law enforcement, they face cultural or language barriers, they are geographically isolated and/or they rely financially on the abuser and do not want him/her incarcerated. If a victim does report, there is no guarantee of prosecution as many offenses are dismissed or pled down by an over-taxed criminal justice system. Low prosecution rates often have more to do with inadequate state resources than with whether the violence actually occurred. We anticipate that this situation will be exacerbated as the state continues to lay off prosecutors in our rural areas due to budget constraints.

Two recent cases illustrate our concerns about a "criminal conviction" standard. Our Program recently represented a client where the abuse against our client included punching, hitting, kicking, strangling with a belt or hands, pulling hair out, and throwing her down stairs. On two occasions the abuse was so severe that it caused our client to miscarry. In addition, the husband also physically abused the children, slapping them across the face, shoving them down the stairs, hitting or spanking them with a belt. Despite the high level of abuse, the client never reported the violence to the authorities or health professionals because she was afraid she would lose her children. It should be noted that the Office of Children's Services often is contacted when there is arrest for domestic violence if children were present and will interview the victim since "mental injury" to a child includes exposing your child to domestic violence and is grounds for the state to take emergency custody. *AS 47.10.011(8)(B).*

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In a second case, our client faced cultural and language barriers which prevented her from contacting the police to report the violence. Our client was in a long term abusive relationship with the father of her three children. The relationship started when she was 15 and the father would force her to have sex against her will by threatening to kill her, to hurt their children, and by placing knives up to her throat and acting like he would cut her. He punched, hit, and kicked her on a routine basis. The father also threatened the children with large knives, telling them if they didn't behave he would cut their tongues out. Our client did not speak English and, as an immigrant, was not familiar with how to make a report to police, and she feared doing so because father would take it out on her or the children later.

I also echo Andrew Harrington's grave concerns about the disparate treatment that victims in rural areas will receive in trying to protect their children if a criminal conviction triggers the presumption. One of the previous speakers in favor of HB334, Kirsten Swanson, testified that our criminal justice system responds swiftly to domestic violence because we have mandatory arrest and well-trained law enforcement. However while Juneau might have a municipal police force, that is not at all true for much of rural Alaska where we no longer have prosecutors or law enforcement, but where we have some of the highest rates of DV/SA. The criminal justice system works much differently in Juneau than it does in Fort Yukon or Kaltag. And even in Juneau I have, throughout my years of practice, heard frustration from victims who called for help and received no response from the Juneau police.

Respectfully, I would like to point out some misperceptions of the current law in written or oral testimony that has been presented to this Committee.

First, there is nothing in the legislative history of HB 385, the rebuttable presumption legislation from 2004, that indicates that its purpose was to require a criminal history of domestic violence. The current law, AS 25.24.150 (g)-(k), requires a **history of perpetrating domestic violence** to invoke the rebuttable presumption which is defined as one act which causes serious physical injury or more than one act of domestic violence, found by a preponderance of the evidence, the civil legal standard. And contrary to Fred Triem's testimony, a "history of domestic violence" is well defined in the law. *AS 25.24.150(h).*

Second, merely being "accused" of domestic violence is not enough to invoke the presumption and lose custody of your children. There has to be a finding by a trial court, after full notice and opportunity to be heard by both sides, that is "more likely than not" – again, the civil legal standard - that one incident of serious physical injury or two or more incidents of violence has occurred. This finding could not happen in an ex parte domestic violence hearing, but could occur after a long term domestic violence hearing where both parties has a chance to present evidence and testify about the domestic violence. Please note that long term protection order hearings are often mini-trials, and can take between one hour and four days, depending on the complexity of the situation. It is our experience that courts are hesitant to

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make findings of domestic violence in long term protection order cases because they understand the significance that the finding has in a custody case. And it is the custody judge who generally hears the long term protection order case when there is a custody matter pending, in part because that judge has the most complete information about the family and an understanding of the potential order on the custody case. Finally, the Alaska Supreme Court has found that a custody judge has discretion to not give weight to a finding of domestic violence made in a domestic violence protection order hearing if – in part - the respondent in that case did not understand that it could be later held against him. *Andrea C. v. Marcus P.* 355 P.3d 521 (Alaska 2015).

Third, many of the speakers in favor of the legislation have spoken about the high cost of supervised visitation or rigorous financial and substantive requirements of a certified batterer's program. However, in most locations in Alaska, supervised visitation is done for free by a family member or friend because there are no supervised visitation centers. As a statewide provider of legal services, we know that in the great majority of our cases, if the opposing party is doing supervised visitation, it is free because a friend or family member is doing it. There are only a few agencies in the state that provide supervised visitation. The largest is the Birch Center in Fairbanks which is free. Paul Grant mentioned that Catholic Community Services in Juneau charges up to $70/hour but they no longer provide this service. It is important to note also that if a parent is referred to a batterer's program, state regulation requires the programs to accept payments on a sliding scale basis and through community work service. 22 AAC 25.030(d).
Supervised visitation often ceases after a period of time. The Alaska Supreme Court held that if a court imposes supervised visitation, that they must give a parent a path to achieve unsupervised visitation. *Monette v. Hoff*, 958 P.2d 434 (Alaska 1998). And finally, many courts are incredibly "liberal" in what they consider supervised visitation. I recently spoke with a victim of domestic violence involved in a custody case in Anchorage who told me the judge ordered that the presumption applied and had not been rebutted, but the father was given three days of visits each week with overnights, on the condition that his live-in girlfriend "supervise" those visits. In that case the history of domestic violence including the abusive parent strangling the mother in front of the parties' three year old son and others, who were then also assaulted as the three year old grabbed a stick to try to fight the father off.

Fourth, the rebuttable presumption law, as currently enacted, well preserves the custody court's discretion and the presumption can fairly easily be overcome by a motivated parent. If a parent has proven that it is more likely than not that there is a history of domestic violence by the other parent, thus triggering the rebuttable presumption, than the abusive parent can overcome the presumption and get shared custody by showing that they are (1) not abusing substances, (2) that they have done some type of rehabilitative program (3) and that the child's best interests requires the abusive parent's participation as a custodial parent. The Alaska Supreme Court, in interpreting AS 25.24.150(h), has stated that the abusive parent does not have to do a certified batterer's program, but merely whatever type of program the trial court decides is appropriate based on the level of domestic violence, *Stephanie F. v. George C.*,

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270 P.3d 737 (Alaska 2012), and that a 12 week anger management program could be enough. *Weinberger v. Weinmeister*, 268 P.3d 305 (Alaska 2012). Furthermore, under the clear wording of the statute, a program is not even required unless it is "reasonably available" to the abusive parent. AS 25.24.150 (h).

AS 25.24.150(j) also provides a route for parents who have not overcome the presumption to receive **unsupervised visitation** if they can show that they are not (1) abusing substances (2) do not pose a danger of "mental or physical harm" to their child (3) and unsupervised visits are in the child's best interests. Visitation under the law would be defined as having the child up to 30% of the time.

Several of the speakers have testified about parents who have not seen their children for years due to the rebuttable presumption. However given the statutory framework, that would only be possible if there had been a finding by a judge that there was a serious enough history of domestic violence that the judge put in place the requirement of certified batterer's program and the parent failed to do it, or they were abusing substances, or for another reason the judge did not believe it was in the child's best interest to see that parent.

Fifth, in our experience parents are not using domestic violence to get an upper hand, but rather because they need safety. I would like to address the theme in some of the letters of support of HB 334 that domestic violence is used as an offensive weapon to gain an upper leg in custody or that protection orders are brought for this reason. Our Program has never counseled a victim to "game the system" for custody by filing an unnecessary protection order or making a claim of domestic violence in court. Nor have we ever advised the legal advocates at our member programs who routinely accompany victims these proceedings to give victims this information. Domestic violence is alleged often because of the enormity of the problem in our state. A 2011 UA Justice Center Study found that more than one in two women in our state had been victims of intimate partner violence in their lifetime. Victims are alleging violence because it is an enormous safety issue in their homes and they are appropriately seeking the court's protection for their children.

Sixth, HB 334 will is not a cost-savings measure. Custody cases have always been litigious. They were prior to the 2004 law and they will be no matter what the standard for finding domestic violence becomes. HB 334 could actually increase costs if a criminal conviction becomes the standard as those accused of these crimes will be less inclined to plea given the implications in a custody case.

We agree with the sponsor statement that custody judges need full discretion to make custody decisions. The law as currently written gives them that discretion. Custody courts have tools such as a custody investigator or a guardian *ad litem* to ferret out the facts of the abuse. It properly vests the judge who will be deciding custody with the task of deciding whether a history of domestic violence has occurred after hearing all the evidence regarding the family and the children, rather than vesting this

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discretion with a prosecutor with no knowledge of the effects of violence on the children. And it properly places the role of proving or disproving the violence with the individuals who have the greatest stake in their children's lives – the parents.

We thank you for your time and work on behalf of Alaskans. Please ensure that our custody courts have all the tools necessary to prevent children from growing up in violent homes and do not pass HB 334.

Yours very truly,
ANDVSA Legal Program

Christine M. Pate, ABA #9402006
Legal Program Director

Cc The Honorable Representative Cathy Muñoz
Taneeka Hansen, staff to Rep. Seaton