

HB

334

<TARGET><BILL>HB 334</BILL><SUBJECT>HB
334</SUBJECT><COMM>HHSS29</COMM></TARGET>



REPRESENTATIVE CATHY MUÑOZ

SPONSOR STATEMENT HOUSE BILL 334

"AN ACT RELATING TO VISITATION AND CHILD CUSTODY."

HB 334 was introduced to give judges more discretion in determining the best interest of the child in custody cases. Currently, AS 25.24.150 includes a provision that if a parent has been *accused* of domestic violence that parent may not be awarded sole or joint physical or legal custody of the child. Although there is a rebuttable presumption in place to overcome this provision, it is a lengthy process involving the requirement to complete a one year batterer's intervention program. Domestic violence is broadly defined to include an ex-parte domestic violence order, a violation of an order, misdemeanor assault, or allegations of abuse.

In 2004, HB 385 was signed into law which established the rebuttable presumption. The intent of this legislation was to ensure those with a criminal history of domestic violence were held accountable for their actions and that the children in question were protected. At times the provisions of AS 25.24.150 are used for custodial advantage. In these instances, the discretion of the court is limited and the best interest of the child is affected.

The U.S. Department of Health and Human Services states, "Fatherless children are at a dramatically greater risk of drug and alcohol abuse." Additionally, they state "Fatherless children living in homes without contact with their biological father are twice as likely to drop out of school."

HB 334 seeks to give flexibility to judges, while maintaining the presumption for those with criminal domestic violence convictions while ensuring that the well-being of children remains our primary priority.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 18, 2016

SUBJECT: HB 334 sectional summary
(Work Order No. 29-LS1409\H)

TO: Representative Cathy Muñoz
Attn: Crystal Koeneman

FROM: Linda M. Bruce
Legislative Counsel



FOR LMB

You have requested a sectional summary of the above-described bill. As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

Section 1. Changes the phrase "has committed a crime involving domestic violence" to "has been convicted of a crime involving domestic violence" for purposes of the court's authority to set certain conditions for visitation in proceedings involving domestic violence.

Section 2. Changes the phrase "a history of perpetrating domestic violence" to "has been convicted of a crime involving domestic violence" for purposes of the rebuttable presumption against delegating a deployed parent's visitation rights to certain family members in a custody or visitation proceeding.

Section 3. Changes the phrase "a history of perpetrating domestic violence" to "has been convicted of a crime involving domestic violence" for purposes of the rebuttable presumption against delegating a deployed parent's visitation rights to certain family members in a proceeding for the modification of a custody or visitation order.

Section 4. Changes the phrase "if one parent shows that the other parent has sexually assaulted or engaged in domestic violence" to "if one parent has been convicted of a crime involving sexual assault or domestic violence" relating to the factors that a court may consider in determining the best interests of the child for custody. Adds evidence of sexual abuse in the proposed custodial household to the list of factors a court may consider in determining custody.

Section 5. Changes the phrase "a history of perpetrating domestic violence" to "has been convicted of a crime involving domestic violence" relating to a rebuttable presumption in custody judgments.

Section 6. Deletes the reference to the rebuttable presumption against granting custody to a parent who has a history of perpetrating domestic violence.

Section 7. Changes the phrase "a history of perpetrating domestic violence" to "has been convicted of a crime involving domestic violence" for purposes of custody

Representative Cathy Muñoz
March 18, 2016
Page 2

determinations in cases where the court finds that both parents have been convicted of a crime involving domestic violence.

Section 8. Changes the phrase "a history of perpetrating domestic violence" to "has been convicted of a crime involving domestic violence" for purposes of the conditions a court may set before allowing supervised visitation.

Section 9. Limits the applicability of the changes made by the bill to visitation and custody orders issued on or after the bill's effective date.

If I may be of further assistance, please advise.

LBB:dla
16-306.dla

29-LS1409\N
Bruce
4/5/16

CS FOR HOUSE BILL NO. 334()

IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-NINTH LEGISLATURE - SECOND SESSION

BY

**Offered:
Referred:**

Sponsor(s): REPRESENTATIVES MUÑOZ, Vazquez, LeDoux, Millett

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5 superior court for resolution of the matter under AS 25.20.060 - 25.20.130. The court
6 shall award custody on the basis of the best interests of the child. In determining the
7 best interests of the child, the court shall consider all relevant factors, including those
8 factors enumerated in AS 25.24.150(c) [, AND THE PRESUMPTION
9 ESTABLISHED IN AS 25.24.150(g)]. In a custody determination under this section,
10 the court shall provide for visitation by a grandparent or other person if that is in the
11 best interests of the child.

12 *** Sec. 2.** AS 25.20.061 is amended to read:

13 **Sec. 25.20.061. Visitation in proceedings involving domestic violence.** If
14 visitation is awarded to a parent who the court finds by clear and convincing
15 evidence has a history of perpetrating [COMMITTED A CRIME INVOLVING]

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2 the other parent or a child of the two parents, within the five years preceding the award
3 of visitation, the court may set conditions for the visitation, including

4 (1) the transfer of the child for visitation must occur in a protected
5 setting;

6 (2) visitation shall be supervised by another person or agency and
7 under specified conditions as ordered by the court;

8 (3) the perpetrator shall attend and complete, to the satisfaction of the
9 court, a program for the rehabilitation of perpetrators of domestic violence that meets
10 the standards set by the Department of Corrections under AS 44.28.020(b), or other
11 counseling; the perpetrator shall be required to pay the costs of the program or other
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13 (4) the perpetrator shall abstain from possession or consumption of
14 alcohol or controlled substances during the visitation and for 24 hours before
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16 (5) the perpetrator shall pay costs of supervised visitation as set by the
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18 (6) the prohibition of overnight visitation;

19 (7) the perpetrator shall post a bond to the court for the return and
20 safety of the child; and

21 (8) any other condition necessary for the safety of the child, the other
22 parent, or other household member.

23 * **Sec. 3.** AS 25.20.070 is amended to read:

24 **Sec. 25.20.070. Temporary custody of the child.** Unless it is shown to be
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26 OR UNLESS THE PRESUMPTION UNDER AS 25.24.150(g) IS PRESENT], the
27 child shall have, to the greatest degree practical, equal access to both parents during
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29 * **Sec. 4.** AS 25.20.095(g) is amended to read:

30 (g) In making a determination of the best interests of the child, the court shall
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1 PRESUMPTION UNDER AS 25.24.150(g) TO VISITATION, DELEGATION, AND
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16 (2) termination of the temporary order and resumption of the
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22 (3) a hearing if a child of a deployed parent has been moved out of
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25 child [OR THAT THE PRESUMPTION UNDER AS 25.24.150(g) EXISTS];

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30 (5) immediate notification by each parent of a change of address or
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21 child;

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23 (3) the child's preference if the child is of sufficient age and capacity to
24 form a preference;

25 (4) the love and affection existing between the child and each parent;

26 (5) the length of time the child has lived in a stable, satisfactory
27 environment and the desirability of maintaining continuity;

28 (6) **clear and convincing** [THE WILLINGNESS AND ABILITY OF
29 EACH PARENT TO FACILITATE AND ENCOURAGE A CLOSE AND
30 CONTINUING RELATIONSHIP BETWEEN THE OTHER PARENT AND THE
31 CHILD, EXCEPT THAT THE COURT MAY NOT CONSIDER THIS

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2 PARENT HAS SEXUALLY ASSAULTED OR ENGAGED IN DOMESTIC
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4 CONTINUING RELATIONSHIP WITH THE OTHER PARENT WILL
5 ENDANGER THE HEALTH OR SAFETY OF EITHER THE PARENT OR THE
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7 (7) ANY] evidence of domestic violence, child abuse, or child neglect
8 in the proposed custodial household or a history of violence between the parents;

9 (7) [(8)] evidence that substance abuse by either parent or other
10 members of the household directly affects the emotional or physical well-being of the
11 child;

12 (8) [(9)] other factors that the court considers pertinent.

13 * **Sec. 8.** AS 25.24.150 is amended by adding new subsections to read:

14 (m) If the court finds by clear and convincing evidence that a parent has a
15 history of perpetrating domestic violence or, if a parent has been convicted of a crime
16 of domestic violence against the other parent or a child of the two parents, within the
17 five years preceding the award of visitation, the court may set conditions for the
18 visitation under AS 25.20.061.

19 (n) If the court finds that both parents have committed a crime involving
20 domestic violence against the other parent or a child of the two parents, within the five
21 years preceding the award of custody, the court shall determine custody to minimize
22 the risk that either parent will perpetrate further domestic violence. In determining
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24 (1) award legal and physical custody to the parent who is less likely to
25 continue to perpetrate the violence and require that the custodial parent complete a
26 program under AS 25.20.061(3); or

27 (2) if necessary to protect the welfare of the child, award sole legal or
28 physical custody, or both, to a suitable third person if the person would not allow
29 access to a violent parent except as ordered by the court.

30 * **Sec. 9.** AS 25.24.150(g), 25.24.150(h), 25.24.150(i), and 25.24.150(j) are repealed.

31 * **Sec. 10.** The uncodified law of the State of Alaska is amended by adding a new section to

1 read:

2 APPLICABILITY. This Act applies to visitation and custody orders issued on or after
3 the effective date of this Act.

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 3 is in effect that requires that the address or contact information of the parent be kept
 4 confidential, the notification shall be made to the court only, and a copy of the order
 5 shall be included in the notification.

6 * **Sec. 6.** AS 25.20.110(g) is amended to read:

7 (g) In making a determination of the best interests of the child, the court shall
 8 consider the factors under AS 25.24.150(c) [AND APPLY THE REBUTTABLE
 9 PRESUMPTION UNDER AS 25.24.150(g) TO VISITATION, DELEGATION, AND
 10 CUSTODY ORDERS ISSUED UNDER THIS SECTION]. In addition, there is a
 11 rebuttable presumption that a deployed parent's visitation rights may not be delegated
 12 to a family member who the court finds by clear and convincing evidence has a
 13 history of perpetrating domestic violence against a spouse, a child, or a domestic
 14 living partner, or to a family member with an individual in the family member's
 15 household who the court finds by clear and convincing evidence has a history of
 16 perpetrating domestic violence against a spouse, a child, or a domestic living partner.

17 * **Sec. 7.** AS 25.24.150(c) is amended to read:

18 (c) The court shall determine custody in accordance with the best interests of
 19 the child under AS 25.20.060 - 25.20.130. In determining the best interests of the child
 20 the court shall consider

21 (1) the physical, emotional, mental, religious, and social needs of the
 22 child;

23 (2) the capability and desire of each parent to meet these needs;

24 (3) the child's preference if the child is of sufficient age and capacity to
 25 form a preference;

26 (4) the love and affection existing between the child and each parent;

27 (5) the length of time the child has lived in a stable, satisfactory
 28 environment and the desirability of maintaining continuity;

29 (6) the willingness and ability of each parent to facilitate and
 30 encourage a close and continuing relationship between the other parent and the child [,
 31 EXCEPT THAT THE COURT MAY NOT CONSIDER THIS WILLINGNESS AND

1 ABILITY IF ONE PARENT SHOWS THAT THE OTHER PARENT HAS
 2 SEXUALLY ASSAULTED OR ENGAGED IN DOMESTIC VIOLENCE AGAINST
 3 THE PARENT OR A CHILD, AND THAT A CONTINUING RELATIONSHIP
 4 WITH THE OTHER PARENT WILL ENDANGER THE HEALTH OR SAFETY OF
 5 EITHER THE PARENT OR THE CHILD];

6 (7) clear and convincing [ANY] evidence of domestic violence, child
 7 abuse, or child neglect in the proposed custodial household or a history of violence
 8 between the parents;

9 (8) evidence that substance abuse by either parent or other members of
 10 the household directly affects the emotional or physical well-being of the child;

11 (9) other factors that the court considers pertinent.

12 * **Sec. 8.** AS 25.24.150 is amended by adding new subsections to read:

13 (m) If the court finds by clear and convincing evidence that a parent has a
 14 history of perpetrating domestic violence or has been convicted of a crime of domestic
 15 violence against the other parent, a child, or a domestic living partner, within the five
 16 years preceding the award of visitation, the court may set conditions for the visitation
 17 under AS 25.20.061.

18 (n) If the court finds that both parents have committed a crime involving
 19 domestic violence against the other parent, a child, or a domestic living partner, within
 20 the five years preceding the award of custody, the court shall determine custody to
 21 minimize the risk that either parent will perpetrate further domestic violence. In
 22 determining custody, the court may

23 (1) award legal and physical custody to the parent who is less likely to
 24 continue to perpetrate the violence and require that the custodial parent complete a
 25 program under AS 25.20.061(3); or

26 (2) if necessary to protect the welfare of the child, award sole legal or
 27 physical custody, or both, to a suitable third person if the person would not allow
 28 access to a violent parent except as ordered by the court.

29 * **Sec. 9.** AS 25.24.150(g), 25.24.150(h), 25.24.150(i), and 25.24.150(j) are repealed.

30 * **Sec. 10.** The uncodified law of the State of Alaska is amended by adding a new section to
 31 read:

1 APPLICABILITY. This Act applies to visitation and custody orders issued on or after
2 the effective date of this Act.

Fiscal Note

State of Alaska
2016 Legislative Session

Bill Version: HB 334
Fiscal Note Number: _____
() Publish Date: _____

Identifier: HB334-ACS-TRC-04-05-16
Title: CHILD CUSTODY;DOM. VIOLENCE;CHILD ABUSE
Sponsor: MUNOZ
Requester: House HSS Committee

Department: Judiciary
Appropriation: Alaska Court System
Allocation: Trial Courts
OMB Component Number: 768

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2017 Appropriation Requested	Included in Governor's FY2017 Request	Out-Year Cost Estimates				
			FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
OPERATING EXPENDITURES	FY 2017	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2016) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2017) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Initial version.

Prepared By: <u>Nancy Meade, General Counsel</u>	Phone: <u>(907)463-4736</u>
Division: <u>Alaska Court System</u>	Date: <u>04/05/2016 10:00 AM</u>
Approved By: <u>Nancy Meade for Christine Johnson, Administrative Director</u>	Date: <u>04/05/16</u>
Agency: <u>Alaska Court System</u>	

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2016 LEGISLATIVE SESSION

BILL NO. HB334

Analysis

House Bill 334 (version H) would alter the presumption in AS 25.24.150(g) to change how it operates in child custody determinations. Section 5 of the bill would establish the rebuttable presumption of domestic violence based on a conviction or convictions for a "crime involving domestic violence," rather than on "a history of domestic violence."

This change to the operation of the presumption will not have a fiscal impact on the court system. The judicial officers will apply the statutes as revised in the normal course of its hearings in making custody determinations. The actual issues and facts considered in the court hearings would be altered under the provisions of this bill, but the court system does not anticipate that this change will have a material impact on its operations or a fiscal impact.

The court system therefore submits this zero fiscal note.

Alaska State Legislature

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HOUSE HEALTH AND SOCIAL SERVICES COMMITTEE

Representative Paul Seaton, Chairman

To: Representative Gabrielle LeDoux
Chair, House Judiciary
CC: House Judiciary Committee
Re: HB 334
Date: April 9, 2016

To the House Judiciary Committee,

As members of the House Health and Social Services Committee, we recognize that domestic violence is a serious health concern in our state and in our nation. The rate of domestic violence in Alaska is staggering. Children who experience or are exposed to domestic violence often struggle with behavioral issues and health concerns later in life. The majority of domestic violence cases do not result in a conviction even when there is evidence.

We also recognize that maintaining relationships with both parents is often in the best interest of the child, which is the issue HB 334 strives to address. How a custody statute is applied depends greatly on judicial details such as the various evidentiary burden of proof. As the members of the House committee most familiar with judicial proceedings, we ask you to consider the following questions as you examine HB 334.

1. How often is the rebuttable presumption asked for? How often is it applied?
2. What part do short term protective orders have in these statutes?
 - ❖ How easy are these orders to obtain? Do they require a court finding of evidence first?
 - ❖ How often are short term protective orders approved and how often are they denied?
 - ❖ Could a short term order be considered as a part of the 'history of violence' required under the current AS 25.24.150(g)?
 - ❖ Do judges or attorneys need more training on the appropriate use of protective orders?
3. How available are the batterers intervention programs mentioned in AS 25.24.150?
4. How many supervised visitation programs are there available for parents who cannot find a friend or family member to supervise visitations for free? Where are they located and how much would such a program cost? How often do parents not see their children because they can't agree to a person to supervise visits?

5. It is unclear how these statutes might apply to a blended family. For example, a family with children from prior relationships on both sides. These relationships and their custody standing should be better understood.

- ❖ How does custody apply to the non-biological parent who has been involved in the child's life for a long time?
- ❖ How does setting a five year time limit on domestic violence history affect these families?

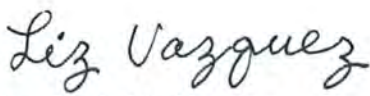
6. Perhaps most importantly, we ask the committee to consider whether the rebuttable presumption under AS 25.24.150(g) should be kept in some form or should it be modified or narrowed?

- ❖ Under the current statute 25.24.150(c)(7) a judge shall consider, in their own judgement, any evidence of domestic violence. The rebuttable presumption is triggered by a 'history of perpetrating domestic violence.'
- ❖ HB 334 as introduced left the rebuttable presumption in place, but changed 'history of perpetrating' to 'convicted of a crime involving' domestic violence. Many members considered a conviction to be much too high a standard. However, 25.24.150(c)(7) remained under consideration for any evidence of domestic violence.
- ❖ CSHB 334 version I replaces the requirement for a conviction with a standard of 'clear and convincing evidence.' The rebuttal presumption under AS 25.14.150(g) is repealed in full and replaced with new, permissive language. AS 25.24.150(c)(7) now requires clear and convincing evidence in order for domestic violence to be considered.
- ❖ The House Health and Social Services Committee received testimony that the rebuttable presumption is being abused to gain advantages in custody disputes. However, it is not clear whether the rebuttable presumption should be repealed entirely or amended with a different evidence standard and whether the requirements of the presumption might be narrowed or refined while maintaining some of its force to protect domestic violence victims and their children.


The members of the House Health and Social Services Committee send these questions to the Judiciary Committee with the deepest concern for the seriousness of domestic violence in our communities and with the desire to promote healthy parent-child relationships wherever possible. This is a complex and sensitive subject which deserves close scrutiny and discussion. Thank you in advance for considering the above issues and questions.

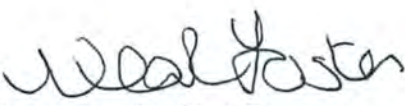
Sincerely,

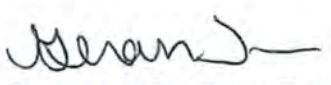

Representative Paul Seaton, Chair

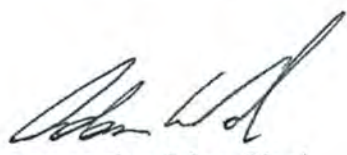

Vice Chair Liz Vazquez


Representative David Talerico


Representative Louis Stutes


Representative Neal Foster


Representative Geran Tarr


Representative Adam Wool

ALASKA STATE LEGISLATURE



*Serving Midtown,
University, and
East Anchorage
neighborhoods*

Committees:

- Resources
-
- Labor and Commerce
-
- Legislative Budget
and Audit*
-
- Ethics*

REPRESENTATIVE ANDY JOSEPHSON

April 3, 2016

Members of the House Health & Social Services Committee

Attn: Chair Paul Seaton

State Capitol

Juneau, Alaska 99801

Re: House Bill 334 (An Act Relating to Visitation and Child Custody)

Dear Chairman Seaton:

I write today out of concern with House Bill 334 (An Act Relating to Visitation and Child Custody).

I have not written a letter of this kind since my service in the Legislature began in January, 2013. Nor have I appeared before any committee as a testifying witness during that time frame.

I write this letter because my legal career from 2003-2012 was enveloped in child custody cases at every level. This includes evidentiary hearings, trials, appeals, and Title 18 restraining order applications. As private counsel, I represented both clients accused of domestic violence and clients alleging that they, or others, were victims of domestic violence. It was an all-consuming part of my professional life for nine (9) years without interruption.

While I haven't considered every nuance of the bill before you, it is self-evident that the intent of the legislation is to raise the bar as to a claim of domestic violence in custody situations, requiring proof of conviction rather than mere "evidence".

Although there were times when I found the interplay between allegations of domestic violence and Title 25 (Family Law Code) frustrating, I believe that overall, previous legislatures were wise to place heightened scrutiny and attention on domestic violence in family situations. Further, they were equally wise to make a policy decision that there was no place for domestic violence within the family and that certain rebuttal presumptions might be created that reflected that policy decision. Do note, however, that AS 25.24.150(h) requires a finding that there have been two (2) such acts before a "history of perpetrating domestic violence" can be made, and a rebuttable presumption comes into play and is activated.

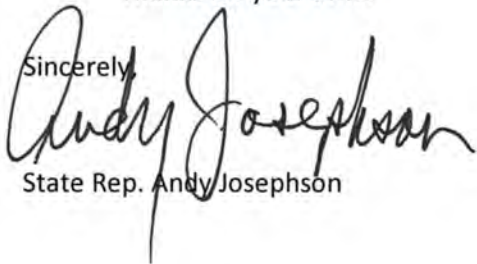
* Alternate

Here is my larger concern: by requiring actual evidence of conviction, this bill would put powerless women (frightened by their economic dependence as well as their psychological and social dependence, and out of a false belief that they did something wrong and deserved physical punishment or physical threat as a consequence) at a greater disadvantage. I saw countless examples of battered and threatened women (with incidents frequently observed by shared children), who did not seek convictions of their spouses out of fear of them or, alternatively, out of a disingenuous promise that it would never occur again. Do know, further, that in each evidentiary custody dispute, trial judges are quick to ensure that due process is afforded and that evidence be put before the trier-of-fact, ensuring that, by a preponderance of the evidence, the report of domestic violence is justifiable and proven.

In summary, please approach your work with great caution. We lead the nation in domestic violence. Much of it is un-convicted domestic violence. Should a showing of conviction really be a requirement?

Thanks for your time.

Sincerely,

A handwritten signature in black ink that reads "Andy Josephson". The signature is written in a cursive, flowing style. The first name "Andy" is written in a larger, more prominent script than the last name "Josephson".

State Rep. Andy Josephson

JOHN HOAG

Attorney at Law

March 22, 2016

Members of the House Health & Social Services Committee
Juneau, Alaska

Re: House Bill 334

Dear Committee Members,

I will testify in opposition to most of the proposed amendments in HB 334.

Allow me to briefly introduce myself. I have been licensed to practice law since 1974 and licensed in Alaska since 1992. I have been an Alaska resident for 10 years as I moved to Petersburg to ease into retirement, although the retirement part has not been totally successful. My full biography is on my website.

Since 2007 I have been working through ANDVSA to represent victims of domestic and have represented about 10 a year since then.

It is my experience that a person who commits domestic violence is not a good parent. The same attitude that lets them justify the domestic violence allows them to badmouth the parent who left the abusive relationship to the children as being the one that destroyed their family. The parent who was the victim of domestic violence is continuously blamed for leaving and in many cases this blame game will continue for years. The children will be quizzed about the parent who left and should that parent ever enter into a new relationship, then the badmouthing will intensify. Usually, the problem is not any ongoing physical violence, but what is said to the children that can leave life time scars that are not readily visible.

The domestic violence that occurred in the relationship rarely ends with a conviction. This fact is the primary reason that I oppose most of the amendments to HB 334. There are many reasons for this. They can include the fact that the victim did not report it to the police, that the violence, if reported, was not prosecuted, or that it occurred so many years ago that it will not be investigated or prosecuted at a later date. Sadly, there are still places around the country where domestic violence is not taken seriously by law enforcement, especially if the police are called to a residence multiple times. I have spent time trying to find police reports in a number of different states, as Alaska has quite a transient population, and have experienced a mixed success in tracking down both reports and evidence of a conviction.

Given the recent budget cuts that have occurred in Alaska, Petersburg has been subject to various assigned prosecutors, some of who were very ineffective. While today a Sitka based prosecutor seems to be handling Petersburg's cases well, given expected budget cuts that may not occur tomorrow. In summary in many cases there are multiple instances of domestic violence where the police are not even

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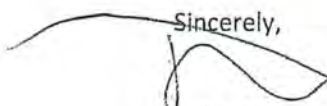
called, let alone having a case be presented to a prosecutor for consideration in charging the perpetrator. In the last case I tried there were five admitted instances of domestic violence and a number which were contested, but the police were never called until a daughter was assaulted. One reason is that the victim was not even aware that physical violence which resulted in property damage was domestic violence. The second was the guilt of staying in such a relationship. Many victims either do not report the violence or stay in an abusive relationship for years because of the guilt of having to publicly admit that such a relationship existed.

The purpose of the statutes that HB 334 seeks to amend is to set out the criteria for the Judges to consider is making custody determinations. The overriding issue is: what custody determination is in the child's best interests? It is not in the child's best interest to be placed with an abusive parent. That fact should not be effected by whether the other parent who was a victim of domestic violence had called the police or whether a prosecutor decided to file charges. What is important is whether the abuse occurred.

In summary, while adding sexual abuse to the relevant statutes is a good idea, requiring a conviction for either domestic violence or sexual assault is not.

Thank you for considering my input on the proposed legislation. I will be glad to expound on this or answer any questions that you may have.

Sincerely,



John Hoag

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March 22, 2016

The Honorable Cathy Muñoz
Representative
Alaska State Legislature
State Capitol Room 501
Juneau, Alaska 99801

Dear Representative Muñoz;

I write to you today on behalf of the 23 members and affiliated members who constitute this network of agencies working on the response and prevention of domestic violence and sexual assault. As you may know, ANDVSA has a Legal Program and has worked with thousands of victims of violence involved in custodial litigation. We would like to share with you our grave concerns with the language included in HB 334 that changes the original language in AS 25.24.150(g)-(k) from requiring a history of perpetrating domestic violence to invoke the presumption, to requiring a conviction for a crime of domestic violence.

The “rebuttable presumption” against awarding a parent joint or sole custody, found in AS 25.24-150(g)-(k) and passed in 2004, has been successfully used to protect Alaska children in households where there is domestic violence. The Legislature wisely passed this law to ensure that courts made consideration of domestic violence a top priority in deciding custody of children. Hundreds of Alaskan’s victims of domestic abuse have relied upon this law to protect their children, and have only supervised visitation awarded to the abuser. The Network respectfully opposes changes to the standard because we believe it would have devastating consequences for Alaskan families.

The rebuttable presumption law was passed by the Legislature to curb the effects of domestic abuse on Alaskan children. For the past several years Alaska has ranked in the top rates for domestic violence and sexual assault nationwide. Children who grow up in homes with domestic violence 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.

Member Programs

Anchorage **AWAIC, STAR** Barrow **AWIC** Bethel **TWC** Cordova **CFRC** Dillingham **SAFE** Fairbanks **IAC** Homer **SPHH**
Juneau **AWARE** Kenai **LeeShore Center** Ketchikan **WISH** Kodiak **KWRCC** Kotzebue **MFCC** Nome **BSWG**
Seward **SeaView Community Services** Sitka **SAFV** Unalaska **USAFV** Valdez **AVV**

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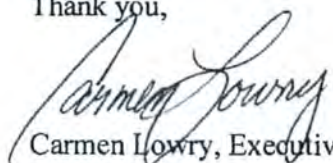
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The current law, AS 25.24.150 (g)-(k), requires a history of perpetrating domestic violence to invoke the rebuttable presumption which is defined as one act which causes serious physical injury or more than one act of domestic violence, found by a preponderance of the evidence. We are concerned that changing the language to a criminal standard will prevent many needy Alaskan parents from accessing the protections in this 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. The reasons for this often have more to do with 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.

In order to best protect Alaska children, civil courts need to have full discretion to make custody decisions. The law as currently written gives them that discretion. 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. Custody courts have tools such as a custody investigator or a guardian *ad litem* to ferret out the facts of the abuse. The current law allows the court to award unsupervised visitation if the abuser does pose a risk of harm to the children or to overcome the presumption by completing a rehabilitative program if it is reasonably available. And it properly places the role of proving or disproving the violence with these individuals who have the greatest stake in their children's lives – the parents.

We welcome the opportunity to talk more with you about our concerns and to provide you cases where the presumption has been appropriately used and would not have been available if a conviction had been required. Please let us know how we may assist.

Thank you,

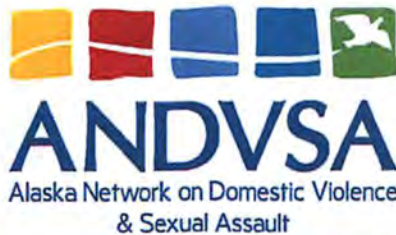


Carmen Lowry, Executive Director

Member Programs

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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:

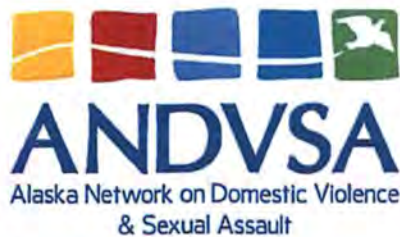
I am the Legal Program Director with the Alaska Network on Domestic Violence and Sexual Assault and am writing to oppose HB 334. We provide civil legal assistance – primarily in family law cases – to victims of domestic violence and sexual assault statewide. Additionally I provide legal advice and counsel 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 who has perpetrated domestic violence.

Member Programs

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Juneau AWARE Kenai LeeShore Center Ketchikan WISH Kodiak KWRCC Kotzebue MFCC Nome BSWG
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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).

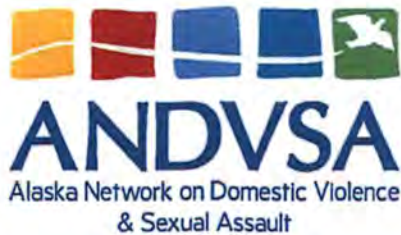
Supervised visitation often ceases after a period of time. The Alaska Supreme Court held that if a court imposes supervised visitation, that they must give a parent a path to achieve unsupervised visitation. *Monette v. Hoff*, 958 P.2d 434 (Alaska 1998). And finally, many courts are incredibly "liberal" 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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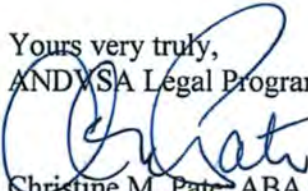


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discretion with a prosecutor with no knowledge of the effects of violence on the children. And it properly places the role of proving or disproving the violence with the individuals who have the greatest stake in their children's lives – the parents.

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

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March 17, 2016

To whom it May Concern:

I am writing this letter in support of HB 334. This bill will address some of the unintended consequences in the domestic violence statutes. No one should be the victim of violence from a domestic partner, but the current statutes are encouraging unnecessary litigation and hurting children.

Domestic violence restraining orders are civil cases, not criminal cases so the burden of proof is minimal. This makes it much easier for someone to now use the court system as a weapon against the other parent. Frequently, people will file a restraining order before they file for divorce or custody of their children. This allows the person who makes the allegation to kick the other parent out of the home, restrict all access to the children, freeze the bank accounts and change the locks.

Once the parties are involved in the custody case any allegations of domestic violence have a tendency to severely curtail access of the parent being accused of abuse to their children. It also makes the case more litigious and hostile so that it is unlikely that the parents will be able to mediate their differences and successfully co-parent their children.

The presumption in custody cases is that the non-abuser is the better parent. Therefore, a person who can convince the court that they are victims of past domestic violence will get full custody of the children. Unfortunately, the presumption advantage has encouraged people to exaggerate and make up stories to get the other parent labeled as a perpetrator of domestic violence.

Even if the domestic violence allegation is more than ten years ago, has nothing to do with the children, does not include violence and was never previously reported to anyone the allegation is enough to immediately deny access of the other parent to the children. Children are then left confused and hurt as to why a parent they love has suddenly and without warning disappeared from their life.

The increase in domestic violence restraining order hearings and domestic violence allegations in custody cases clogs the court system with unnecessary litigation. It costs the judicial system resources better used in prosecuting criminal cases of domestic violence. It encourages custody hearings to be contentious, winner take all affairs that make it difficult for parents to put aside their differences, put the best interests of their children first and learn to co-parent their children.

HB 334 will actually protect victims of domestic violence and children in custody cases by removing the impetus for exaggerating and lying about prior arguments and disagreements. When the court system is inundated with questionable claims of domestic violence it has an impact of making domestic violence seem less serious. This hurts people who truly are victims in need of help as their cases end up delayed due to an over burdened court system.

If you have any questions please feel free to contact me.

Kirsten Swanson

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March 17, 2016

Representative Cathy Munoz
Alaska State Capitol, Room 501
Juneau, Alaska 99801

Re: Support for HB 334

Dear Representative Munoz:

I write in strong support of HB 334. As a private practice lawyer with extensive experience in custody litigation, it has been my observation that the domestic violence provisions of AS 25.24.150 (g) *et seq.* are often used not for their intended purpose, the protection of children from harm, but rather to gain a tactical advantage in custody disputes. It has been my further observation that “the presumption” is very often applied in cases in which there has been absolutely no documented harm to the child, but only situational or technical violations of the law having no possible bearing on the safety or best interests of the child.

As an example, let me cite a hypothetical case – but one that is very similar to cases in which I have been involved.¹ The father, during an argument with mother, slammed a door, causing damage to the door frame. The father was never charged with a crime. Their child was in the house but there is no evidence the child actually witnessed the incident (he may have heard the argument). The mother obtained a domestic violence restraining order, claiming that the door slam was an assault, and

¹ I have used hypotheticals to protect the privacy of clients. The examples are very close to the facts of actual cases.

also that the door damage was malicious destruction of property (both “crimes of domestic violence” within the meaning of AS 24.25.150). Subsequently, the father inadvertently violated the protective order by attempting to speak with the mother when he encountered her in the grocery store. Since no conviction of a crime is required under the statute, the father was now guilty of two incidents of domestic violence, and in the ensuing custody case, the court had no option but to apply the presumption of domestic violence. The father was reduced to minimal supervised visits with his son. Unfortunately, the only visitation supervisors he could find charged \$75 per hour for supervision services. Because he was paying full child support, he simply could not afford to see his son, and consequently that relationship has been largely destroyed.

What is remarkable about this very common scenario is that there was absolutely no demonstrated harm to the child caused by the supposed two acts of domestic violence. There was no physical violence directed at any person involved. There was no nexus between the acts of the father and the best interests of the child. Yet, on this flimsy showing, the strong relationship between the father and his son has been functionally destroyed. The provisions of HB 334 requiring actual conviction of crimes of domestic violence, rather than just “preponderance of evidence” allegations, will go a long way toward remedying these abuses.

Another admirable feature of the bill is that it confines consideration of convictions to a reasonable 5 year period under AS 25.20.061. However, I would suggest that the 5 year limitation set out in AS 25.20.061 be included also in AS 25.24.150. This would clarify the legislature’s intent to limit consideration of domestic violence allegations to a reasonable time period.

As interpreted currently by the Supreme Court, because there is no time limitation imposed under AS 25.24.150, the courts are required to consider allegations of domestic violence that have not been actively litigated, no matter how old, and no matter if the parties settled their custody dispute. Here is an example

that shows the unjust results that can flow from this rule. I recently completed a six day trial in a custody modification case that was largely based on allegations of domestic violence that were 8 to 10 years old. The parties had settled their case without litigating the DV allegations in 2009. The mother now sought to have the court impose the DV presumption even though the parties had shared physical and legal custody since their separation in 2008. As you can imagine, the difficulty of disproving allegations that are ten years old is tremendous. Fortunately the mother was found not to be credible and the motion was denied; however, the parties spent six days of the court's valuable time getting to that result. Had there been a statute of limitations on allegations which might trigger the presumption in AS 25.24.150, the case would never have been brought.

A final thought on the bill is this, and I recognize that it may be controversial. It seems to me that the current legislation conflates protection of the child with protection of the former spouse. In theory, there is no reason that the former spouse needs protection; to the extent that it is used that way without considering the negative impact on the relationship of the child to the alleged perpetrator, it can actually do harm to the child. I believe that there should be some consideration given to narrowing the list of triggering crimes of domestic violence to ones in which the petitioner/plaintiff can demonstrate a direct impact on the well-being of the actual children involved (rather than a hypothetical or theoretical impact on children in general, or an impact on the other parent). I would like to see the bill amended to require both conviction and a showing that harm occurred or is likely to occur to the child involved in the actual case before the court.

With these minor qualifications, I heartily applaud the legislation. This is a set of statutes that has been misused for far too long. Many parental relationships (usually, though not always of fathers to their children) have been destroyed based on completely hypothetical and theoretical harms that simply do not exist in the

particular case before the court. HB 334 is a great step toward remedying the situation.

Best regards,

Paul H. Grant



Generations

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What Makes HB 334 a Bad Bill

I am a therapist in private practice in Anchorage. I work with children and families. A significant part of my work involves families going through divorce. A number of my clients (children and adults) are struggling with either getting free of an abusive situation or recovering from the effects of abuse. I do custody investigations, expert witness testimony and court ordered therapy. I have been involved in various ways with addressing domestic violence and its effects for nearly 30 years. I consider myself to be on the front lines and deep in the trenches of the fight against domestic violence. If HB 334 passes it will roll back the clock 30 years in terms of protecting children and victim parents to a time when there was little recourse for victims and children; where one State Custody Investigator actually recommend that children be placed with a batterer because the mother “acted like a victim” and he did not want the children to learn that dynamic from her. Children and victim parents have a right to live free of abuse and the threat of violence. They deserve safety. This bill would throw them to the wolves.

HB 334 WILL COST TOO MUCH MONEY AT A TIME WHEN WE CAN LEAST AFFORD IT!

If passed, HB 334 will dramatically increase costs to the State of Alaska at a time when it can ill afford to do so. Raising the bar from a finding of domestic violence by a preponderance of the

evidence to a conviction of a crime of domestic violence (beyond a reasonable doubt) will lead to increased demands on the State Attorney General as well as municipal prosecutors to prosecute every case of domestic violence. There will also be increased demands on the Public Defenders office, the Office of Public Advocacy and the Office of Children's Services. State Troopers and local police departments will see increased costs due to needing to respond, report, file charges and ultimately testify in criminal proceedings. There will be increased demands on the courts to hear DV cases that previously could have been handled as a civil matter but now must be dealt with as a criminal matter – with all the attendant complications and costs.

THE “REBUTTABLE PRESUMPTION” WORKS

The law as currently written is doing a good job of protecting vulnerable children and victim parents. Yes, there may have been some cases in which a judge erred and “found” domestic violence when none had occurred; but these cases are *the exception not the rule!* In my experience I have seen far more instances in which the battering and domestic violence was real; but there was not enough evidence to prove by a preponderance of the evidence (the current civil standard) that domestic violence had happened. The result was the abusers' position was strengthened and the children and victim parents became even more trapped and helpless against the abuse.

The “rebuttable presumption” requires a judge *find* domestic violence. Nobody lost their children because they were “accused”. Due process rights are observed. Parents facing accusations of domestic violence are afforded the opportunity to face their accuser, hear and see the evidence, offer their own evidence and arguments. This bill is not ~~guaranteeing~~ ^{restoring} some lost rights to accused parents it is denying the right to safety to vulnerable children and victim

parents. Raising the standard to a criminal conviction beyond a reasonable doubt is unreasonable and unrealistic to the victims of domestic violence.

EDUCATION AND TRAINING ARE NEEDED – NOT DENIAL OF PROTECTION

For those few cases in which a parent may have lost custody of their children due to an erroneous finding by a judge, the remedy is better training of judges, custody investigators, attorneys, OCS Social Workers and other interested parties about domestic violence. Such “false positives” of course are tragic to the parents and children, but far more tragic will be the countless “false negatives”, the failure to prove beyond a reasonable doubt that will trap and ultimately destroy too many victims of domestic violence. We do not need to take away safety, we need to increase safety by increasing knowledge, accuracy and understanding about domestic violence.

SAFETY IS THE HIGHEST PRIORITY – NOT PARENTS’ RIGHTS

The timing of this bill is interesting in that I am the co-author of a proposed bill that would have improved the rebuttable presumption by requiring judges to make the safety of children and victim parents a higher priority than a parents’ right to possess their child. Domestic violence is real. It happens far too often and gets far too little appropriate attention. The things that happen to seemingly normal healthy families behind closed doors out of sight of witnesses and objective fact finders can be shocking and unbelievable. So shocking and unbelievable in fact that all too often people do not believe the victims when they finally speak out. It is easier for the ill-informed, the untrained and the biased to believe that a parent is trying to gain the upper hand in divorce by making false allegations than to accept that this otherwise charming and appealing individual is a wolf in sheep’s clothing committing monstrous acts. Too many lawyers who represent these wolves somehow believe that there is a magic door in their office through which

only the righteous pass. In doing their job of zealously representing the interests of their wolf clients they create the false narrative of a poor parent victimized by a false accusation. Please do not be swayed by this false narrative. The story that needs telling and to be heeded is the unbelievable and shocking tale of innocent children and victim parents who have been controlled, terrorized, abused and worse.

Allen Levy CPA

Social Services Committee

Good Afternoon House Health and ~~Education Committee Members.~~

Thank you for listening to my testimony today.

My name is Joseph Coulter-Khan. I am fourteen years old.

HB

I am here to tell you why I think ~~House Bill~~ 334 is a step in the wrong direction.

My father has not been convicted of domestic violence, but I am legitimately terrified of him. When I lived with him, I saw him yell constantly. I saw him beat up my sister and shove her down the stairs. I saw him constantly threaten my mother, my sisters, and me. He embarrasses me in public with his yelling and anger. I'm afraid of being with him. Every time I get a phone call my stomach drops, I start to sweat, to panic, pace, and go into a whole anxiety attack, I start hyperventilating.

and

I don't want to live with that kind of pressure and anxiety. It is a negative energy and distracts me from my schoolwork and from doing the things that I love.

Because my father has not been convicted of domestic violence, if HB 334 passes I would have to go with someone who has abused me for 10-12 years. Why should I be with him? Why should he have the right to me when he is the one who abused me? If he has a say in everything I do, he may make decisions that are not the best for me. He told me that if he gets full custody he will take me to Arizona and not let me contact my mother at all. He says bad things to me about my mother.

Some mothers are too afraid to call the police because they are afraid of what the abusers will do to them when they get out. So then there are abusers who get custody because they aren't held accountable for their abuse.

My childhood was stressful and now that I'm away from my father I'm feeling better. If I have to spend more time with him, it will waste the rest of the childhood that I have. I won't have a regular childhood.

You don't know my father. You don't know what he's done. But there is no conviction of domestic violence.

HB 334 violates my rights as a minor to safety from my abusive father.

Taneeka Hansen

From: Andy Harrington <aharrington13@hotmail.com>
Sent: Tuesday, March 22, 2016 9:55 PM
To: Rep. Adam Wool; Rep. Liz Vazquez; Rep. Geran Tarr; Rep. Neal Foster; Rep. Paul Seaton;
Rep. Louise Stutes; Rep. David Talerico
Subject: HB 334
Categories: Taneeka

Good evening Rep. Wool, xc Reps. Seaton, Vazquez, Foster, Stutes, Tarr, and Talerico,

Thank you again for your consideration of the testimony on HB 334 this afternoon. I did take note of Rep. Wool's last comment following my testimony and, although I understand that the number of witnesses precluded an opportunity to respond, I did want to offer my observations on your comment that restricting access to one's child may not be the appropriate punishment for violating a restraining order.

I agree that a judge in a divorce or custody case shouldn't ever, and wouldn't ever, restrict access to a parent's child as "punishment," and I do not believe that this was the purpose underlying the insertion of the domestic violence presumptions into the custody statutes years ago. Punishments are the province of a criminal case. Restrictions in a child custody case on a domestic violence perpetrator's time with the children are not imposed to punish that person, but because, as the Alaska Supreme Court noted in a 1997 case, "It is well-documented that witnessing domestic violence . . . has a profound impact on children. There are significant reported psychological problems in children who witness domestic violence, especially during important developmental stages." Children who observe a parent acting in an abusive or threatening manner towards the other parent (or indeed towards anyone else) get the mistaken, but all too often indelible, misapprehension that this is how adult relationships are supposed to work. This harms, not only the children, but the grandchildren as well, as the inter-generational role-modeling keeps cycling.

It's been my observation, when I've advised parents who face these restrictions on visitation, that some take the attitude "I'm willing to go through whatever hoops, whatever inconveniences, whatever hurdles are being put in my way for the sake of my kids," and these parents by and large succeed in getting restrictions lifted soon, with or without a lawyer, and in the long run are apt to wind up enjoying a constructive and positive relationship with their children. There are others that take the attitude "no effing judge and no effing ex-spouse is going to tell me that I can't see my kids," treating their relationship with their kids as an entitlement of which they are being deprived, rather than as an important element of their children's lives which they should be striving to fulfill. When I am able to persuade a parent to resign from the second group and join the first, I feel like those kids are better off.

Anyway, thank you again for your time, and that of the other committee members, this afternoon. These domestic violence issues have got to remain high priority items for the legislature, and notwithstanding the fact that I think passage of this bill would be a negative, I appreciate the fact that legislators' attention is being drawn to this issue, as I think DV remains of paramount importance in our state.

I hope the rest of the session goes well.

Kind Regards,
Andy Harrington

Taneeka Hansen

From: Allen Bailey <allen@lawofficeamb.com>
Sent: Thursday, March 24, 2016 9:46 AM
To: Rep. Paul Seaton
Subject: House Bill 334
Attachments: Bailey final CLE.bio.docx; FLQ final DV-custody.art.pdf

Categories: Taneeka

Representative Seaton,

I plan to testify this afternoon on HB334 at the LIO in Anchorage; I was not able to testify on Tuesday because the HSS Committee had a long schedule and I was the last person in the room before the committee had to switch to a different bill.

Attached are a brief CV from me and a copy of the article I wrote for the 2013 Summer Edition of the Family Law Quarterly, a peer-reviewed journal that has in the past been cited by the Alaska Supreme Court.

Thank you for the time you are giving to issues of child custody and domestic violence. For reasons I will explain in more detail this afternoon, I oppose the bill.

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Allen M. Bailey, J.D., is a family law practitioner and former municipal prosecutor in Anchorage, Alaska. He is a member of the ABA Family Law Section Council and Publications Development Board. He is chair of the section's Domestic Violence Committee and a past chair of the Child Custody Committee. Bailey co-authored Alaska's statute establishing a presumption against awarding custody of a child to a batterer. Bailey is a member and past president of the Abused Women's Aid In Crisis, Inc., Board of Directors and is a member of the Anchorage DV Caucus. He is on the Executive Committee of the Alaska Bar Association's Family Law Section and in 2011 received the Alaska Attorney General's Pro Bono Award. Bailey is a member of the Association of Family and Conciliation Courts. Bailey was on the ABA Commission on Domestic and Sexual Violence 2006-09 and since then has served as a section liaison to the commission. In 2015, he received a 20-20 Vision Award from the ABA Commission on Domestic and Sexual Violence. He authored *"Prioritizing Child Safety as the Prime Best-Interest Factor,"* in 47 Family Law Quarterly 35 (July 2013); a chapter in *The Impact of Domestic Violence on Your Legal Practice; A Lawyer's Handbook, 2d Ed.*, ABA (2004); and *"Restricting Contact with Toxic Fathers,"* 2 Family & Intimate Partner Violence Quarterly, p. 225 (2010).

Prioritizing Child Safety as the Prime Best-Interest Factor

ALLEN M. BAILEY*

I. Introduction

In making child custody decisions, family court judges must apply their jurisdiction's "best interests of the child" criteria. Most states have lists of factors that judges should consider. Courts are expected to issue custody orders that are safe for children, but they often have difficulties reconciling competing factors. Child safety (or victim-parent safety) is not listed as a top priority. After Congress adopted a resolution stating that children should not be placed in the custody of parents who have committed domestic violence,¹ all states enacted laws allowing consideration of domestic violence.² While almost half of the states contain a presumption against custody to the abuser, most do not offer any guidance as to what triggers the presumption and how the existence of domestic violence is to affect the child custody decision.³ In addition, domestic violence is almost always defined in terms of physical abuse, rather than psychological.

* Practices family law in Anchorage, Alaska. His expertise is abuse in families, and he has litigated abuse issues in criminal and civil cases. He thanks Margaret Drew for her substantial contributions to introductory material and Linda D. Elrod for her editorial contribution.

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

2. See Leslie Joan Harris, *Failure to Protect from Exposure to Domestic Violence in Private Custody Contests*, 44 FAM. L. Q. 169 (2010) (noting that twenty-eight states use domestic violence as a factor); Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2011–2012: "DOMA" Challenges Hit Federal Courts and Abduction Cases Increase*, Chart Two, Child Custody Criteria, 46 FAM. L. Q. 471, 526 (2013). See, e.g., *Boswell v. Boswell*, 721 A.2d 662, 668–69 (Md. Ct. Spec. App. 1998).

3. See Harris, *supra* note 2, at 171 (noting twenty-two states have presumptions against custody to the abusive parent). See, e.g., ALASKA STAT. § 25.24.150(h) (one severe incident or two minor ones triggers presumption). Others require a pattern of abuse—ARK. CODE ANN. § 9-13-101(c)(2). Still others require a criminal conviction. FLA. STAT. ANN. § 61.13. Presumptions can be overcome. See *Stephanie F. v. George C.*, 270 P.3d 737 (Alaska 2012). But see *Nichols v. Nichols*, 74 So. 3d 919 (Miss. Ct. App. 2011) (finding mother did not overcome the presumption against custody to an abuser).

Many family court judges have too little knowledge about the harmful effects on children who are exposed to violence in their homes. While judges usually do not award custody to a parent where evidence shows actual physical abuse of the child, a judge may award sole or joint custody or parenting time to a parent who has abused a spouse. Family court judges often fail to understand that a parent who abuses the child's other parent cannot at the same time be a good parent.⁴ The American Judges Association noted that "Studies show that batterers have been able to convince authorities that the victim is unfit or undeserving of sole custody in approximately 70% of challenged cases."⁵ Without an understanding of the potential harm to children from witnessing or being in the same home when it occurs, a judge may dismiss the concerns of a hesitant, traumatized, and often nervous parent-victim of abuse. The judge may be more impressed with the perceived better parenting qualities of the often glib, articulate, and manipulative abuser. When safety is compromised, children often suffer profound and long-lasting harm.

This article will explore the issue of domestic violence in the context of child custody proceedings and discuss abusers, victims, and the problems with joint custody. Next it will discuss recent research on the effects of domestic violence on children, including new brain studies. The article will discuss a 2007 Wingspread Conference, which offers a new paradigm of weighting safety above other child custody factors. The article concludes that courts should consider safety as the most important factor in determining best interests of the child and with whom the child will live.

II. Domestic Violence and Child Custody

Domestic violence is an unfortunate reality. Social science shows that a significant number of all relationships includes violent behavior by one or both partners against the other. Recent studies indicate that one in three women (35.6%) have experienced rape, physical violence, and/or stalking by an intimate partner.⁶ While men also are victims of abuse, the rate of sexual assault by male intimate partners is twenty-five times the rate of

4. See, e.g., *Knock v. Knock*, 621 A.2d 267 (Conn. 1993); Evan Stark, *Rethinking Custody Evaluation in Cases Involving Domestic Violence*, 6 J. CHILD CUSTODY 287, 317 (2009).

5. Mike Brigner, *Why Do Judges Do That?*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY, 13-6, 13-7 (Therese Hannah & Barry Goldstein eds. 2010) (citing <http://aja.ncsc.dni.us/domviol/page5>).

6. See NATIONAL CENTER FOR INJURY PREVENTION & CONTROL, CENTERS FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 SUMMARY REPORT. See also PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (2000) (earlier studies showed 22% of women have been physically abused and even more have been sexually assaulted).

assault by female intimates.⁷

Child custody litigation is a minefield for family violence victims because of long-term societal assumptions and religious and legal foundations on which people rely in making decisions about interpersonal relationships. Women who are subject to abuse in their relationships often find it difficult to end the relationship. Societal pressures to maintain an intact family combined with lack of financial and legal support result in an average of five to seven attempts to leave before a woman is finally able to end the relationship.⁸ Meanwhile, the danger steadily increases.

A child custody action occurs in one of the most dangerous times for abused women and their children: the two years following separation from the abuser.⁹ During that period, the abuser is most likely to abuse, stalk, and harass his former partner and her children. More women victims are murdered by their former partners within two years of separation than at other times; the risk to their attorneys is elevated during this time period as well.¹⁰

The victim's attorney must conduct an early screening of the client for a history of abuse. In addition, the attorney must screen for current and potential future risk to the client and the likelihood of potentially lethal actions by the abuser.¹¹ Appropriate and safe results require that every professional involved in the case be educated, trained, and motivated to protect the victim and the children. The attorney seeking a safe result for an abuse victim and her child must know how to interview the client to

7. LUNDY BANCROFT, JAY G. SILVERMAN, & DANIEL RITCHIE, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 98, 123 (2d ed. 2012). See also SHANNON CATALANO ET AL., BUREAU OF CRIMINAL STATISTICS, *FEMALE VICTIMS OF VIOLENCE 2-3* (2009) (indicating that 70% of victims killed by an intimate partner in 2007 were women, a number unchanged since 1993); NISVS 2010, *supra* note 6 (showing that one in three women experience multiple forms of rape, stalking, and physical violence; 92.1% of male victims experience only physical violence; 10.7% of women, and only 2.1% of men have been stalked).

8. Kathleen Ferraro, *Battered Women: Strategies for Survival*, in *PUBLIC AND PRIVATE FAMILIES: A READER* 243 (Andrew J. Cherlin ed., 1998).

9. Peter G. Jaffe, Janet Johnston et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 *FAM. CT. REV.* 500, 501-02 (2008) (noting that abuse often escalates after separation). Sometimes the period of danger can last for many years postseparation. See also Daniel G. Saunders & Angela Browne, *Intimate Partner Homicide*, 2 *CASE STUDIES IN FAMILY VIOLENCE* 424 (Ammerman & Hersen eds., 2000); J.L. Hardesty & G.H. Chung, *Intimate Partner Violence, Parental Divorce, and Child Custody: Directions for Intervention and Future Research*, 55 *FAMILY RELATIONS* 200 (2006).

10. Saunders & Browne, *supra* note 9.

11. Pauline Quirion, *Why Attorneys Should Routinely Screen Clients for Domestic Violence*, 42 *BOSTON B.J.* 12 (1998). See also Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing our Clients?*, 39 *FAM. L. Q.* 7 (2005) (suggesting ways lawyers can protect victims of domestic violence).

draw out her history of intimidation, isolation, control, and violence. The attorney must convey those facts to a court that often has little insight into the dynamics of family violence. The lawyer must then convince the judge that neither the victim client nor her children will be safe without the relief the attorney requests.

Social science researchers in the past several years have published results of studies showing that abusive parents drive the majority of contested child-custody cases in the courts of the United States and Canada.¹² Janet Johnston states:

In our studies of custody-litigating families, domestic violence was alleged in the large majority of cases (two thirds to three fourths), and parental abuse of drugs and alcohol was alleged on average in about one half of cases. . . . To date, findings indicate that the majority of domestic violence and substance abuse allegations (one half to three fourths) and a large minority of child neglect and abuse allegations (one fourth to one half) in family law matters can be subsequently substantiated in some manner.¹³

Male batterers are more likely than nonabusive men to seek custody of their children.¹⁴ Because men have controlled most significant segments of societies in which they live, from government to religion and family structures, abusive men have a significant cultural advantage in litigating issues surrounding divorce and child custody, simply by virtue of their maleness. The legal system grants parents rights to custody of their children¹⁵ that often appear to be superior to their children's right to be safe. Abusive

12. Janet R. Johnston et al., *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283 (2005); Peter G. Jaffe, Samantha E. Poisson, & Alison Cunningham, *Domestic Violence and High-Conflict Divorce: Developing a New Generation of Research for Children*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION, AND SOCIAL POLICY 192 (Jeffrey L. Edleson & Sandra A. Graham-Bermann eds., 2001) [hereinafter DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN] (finding domestic violence allegations arose in 75% of contested custody cases). See also AMERICAN PSYCHOLOGICAL ASSOCIATION, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASKFORCE ON VIOLENCE AND THE FAMILY 100 (1996) [hereinafter APA FAMILY VIOLENCE REPORT] (noting that child custody and visitation disputes must be understood in the context of family violence and abuse because allegations appear to occur more frequently when there is a history of domestic violence).

13. JANET JOHNSTON, VIVIENNE ROSEBY, & KATHRYN KUEHNLE, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE 308 (2d ed. 2009).

14. BANCROFT, SILVERMAN, & RITCHIE, *supra*, note 7, at 5. See also Susan L. Miller & Nicole L. Smolter, *Paper Abuse: Documenting New Abuse Tactics*, 17 DOM. VIOL. REP. 65 (2012) (discussing how abusers use legal proceedings to harass their victims, force contact, exert control, and financially burden them); Mary Przekop, Note, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. SOC. JUST. 1053 (2011).

15. See *Troxel v. Granville*, 530 U.S. 57, 65 (1997) (stating that "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court").

men, who are often articulate, manipulative, and persuasive, often prevail over their abuse victims in custody disputes, despite a lack of evidence that the women had parenting faults.¹⁶ More concerning is that some abusive men succeed in obtaining physical custody, even when there is credible evidence of the father's abuse of the mother and the children.¹⁷

A. Characteristics of Batterers

Domestic violence research has changed. Early writers on family violence did not even attempt to differentiate the *nature* of violence in relationships,¹⁸ but talked about a "cycle of violence."¹⁹ Later researchers, Johnston and Campbell, came up with several "typologies" of relationship violence.²⁰ A recent characterization categorizes interpersonal violence in relationships: coercive controlling violence, violent resistance, situational couple violence, and separation-instigated violence.²¹ The most serious is the coercive controlling violence. One out of eight relationships includes efforts by violent men to control their partners. Recently recast as "coercive control," the long-term battering process involves intimidation, isolation, control, and physical abuse.²²

. . . Coercive control entails a malevolent course of conduct that subordinates women to an alien will by violating their physical integrity (domestic violence), denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation), and appropriating or denying them access to the resources required for personhood and citizenship (control). . . .²³

A primary feature of abusive men is their sense of entitlement to control, coerce, denigrate, and abuse their female partners by virtue of the

16. *Borchgrevink v. Borchgrevink*, 941 P.2d 132 (Alaska 1997).

17. BANCROFT, SILVERMAN, & RITCHIE, *supra*, note 7, at 142.

18. Murray A. Strauss, *Measuring Intrafamily Conflict and Violence*, 41 J. MARRIAGE & FAM. 75 (1979).

19. LENORE WALKER, *THE BATTERED WOMAN* (1979) (describing the "cycle" of violence as a three-phase process that began with a build-up of tension in the relationship followed by an episode of physical abuse, and then followed by a "honeymoon" phase in which the abuser (or batterer) was apologetic and regretful concerning his conduct. And then the cycle would begin again with a buildup of tension).

20. Janet R. Johnston & Linda E. Campbell, *A Clinical Typology of Interparental Violence in Disputed-Custody Divorces*, 63 AM. J. ORTHOPSYCHIATRY 190 (1993).

21. Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 (3) FAM. CT. REV. 476 (2008).

22. EVAN STARK, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE* 228 (2007) (stating that "woman battering from the standpoint of its survivors is a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation, and control. . . .").

23. *Id.* at 15. See also Kelly & Johnson, *supra* note 21, at 480.

fact that they are men.²⁴ This dynamic is characterized by some writers as *intimate terrorism*:

In *intimate terrorism* relationships, the perpetrator engages in a general pattern of coercion and control over his partner—over her finances, social contacts, everyday activities, employment, parenting practices, even the clothes she wears—and uses violence as one means to that end. Even nonviolent control tactics take on a violent meaning through their implicit connection with potential physical harm.²⁵

An integral part of the coercive control dynamic is the process by which the batterer makes the rules by which his victim partner must live—and then he changes the rules so that the victim partner can never succeed in following “the rules.” It leaves the partner—usually the woman—not knowing what will happen next or how to do whatever is necessary to keep the abuser from hitting or choking her again. The uncertainty and denigration leave her isolated in her world. The batterer does not make all of the decisions in his relationship, but he *decides who makes the decisions*:

. . . The hyper-regulation of everyday routines typical of coercive control *works* because the normative constraints already embedded in women’s performance of everyday chores merge with their fear of not doing what is demanded. . . .

. . . What marks control is not who decides, but who decides who decides; who decides what, whether, and how delegated decisions are monitored; and the consequences of making “mistakes.”²⁶

Physical violence, sexual assault, and coercion are the most obvious signs of coercive control, but those behaviors do not have to be frequent or severe in order for the battering male to continue the abusive relationship. As some researchers note:

. . . the fear generated in the victim is sufficient. The pattern of abusive behavior tends to escalate over time, especially in response to threat of loss of control of or abandonment by the partner. This may explain why the abuser is more likely to use custody litigation to harass and punish and becomes particularly dangerous during the aftermath of the separation, at which time he may stalk, harass or take the victim hostage. [citations omitted.]²⁷

Battering partners nearly always have control over the couple’s finances. They are more likely to use the courts to continue to control their partners

24. Evan Stark, *Representing Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALBANY L. REV. 973 (1995). See also, Mary Ann Dutton & Lisa Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 (11/12) SEX ROLES 743 (2005).

25. LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 9 (2008).

26. STARK, *supra* note 22, at 230.

27. JOHNSTON ET AL., IN THE NAME OF THE CHILD, *supra* note 13, at 314.

and, in effect, financially and emotionally abuse them as well.²⁸

Only a small percentage of male batterers have mental health diagnoses.²⁹ One researcher found a greater proportion of batterers have a personality disorder—specifically, a form of antisocial personality disorder:

Perpetrators who are psychopaths have a high likelihood of re-offending. While psychopaths represent a relatively small percentage of men who abuse women (15% to 30%) their behavioral traits of superficial charm, need for stimulation, callousness, and manipulation are quite familiar to clinicians who provide service to their victims . . . Psychopaths will have a history of early behavioral problems, impulsivity, antisocial behavior, and callousness.³⁰

Most battering men, or coercive controllers, have no psychological diagnosis. These men are socialized to believe that they are entitled to control their female partners and to use intimidation, isolation, control and physical force to maintain that control. While abuse of alcohol or another drug does not *cause* domestic violence, it may exacerbate it and increase the frequency. Coercive control does not have its genesis in abuse of a drug. Cocaine has been shown to increase the incidence of interpersonal violence. About two-thirds of methamphetamine users reported violent behavior as a result of their use.³¹

Some judges, trained to believe that parents have a “right” to parent their children, believe that persons who have committed crimes against their intimate partners will change their behaviors once their transgressions have been noticed. Courts often ignore the danger that abusive parents pose to their partners and children who are placed in their care. Few judges understand or accept the facts that these men who have that sense of entitlement *are highly unlikely to change their behaviors, even after completing a batterer intervention program*. This means that such men are highly likely to use their coercive and abusive tactics to control subsequent partners, which will expose their children to more of the abuse that they witnessed or endured during the abusive parent’s prior intimate

28. See PETER G. JAFFE ET AL., CHILD CUSTODY & DOMESTIC VIOLENCE; A CALL FOR SAFETY AND ACCOUNTABILITY 32 (2003) (describing the dynamic); Peter G. Jaffe & Robert Geffner, *Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals*, in CHILDREN EXPOSED TO MARITAL VIOLENCE; THEORY, RESEARCH, AND APPLIED ISSUES 380–83 (George W. Holden, Robert Geffner & Ernest N. Jouriles eds., 1998); BANCROFT, SILVERMAN & RITCHIE, *supra* note 7, at 5, 15, 98; LUNDY BANCROFT, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN 291–314 (2002).

29. BANCROFT, SILVERMAN, & RITCHIE, *supra*, note 7, at 24–26.

30. Daniel J. Sheridan et al., *Prediction of Interpersonal Violence: An Introduction*, in ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS 12 (2d ed., Jacquelyn C. Campbell ed., 2007).

31. *Id.* at 14 (reporting that in a study of more than 1,000 methamphetamine users, eighty percent of the women reported abuse or violence by a partner).

relationship.³²

A Quincy, Massachusetts, study of a statistically significant sample of batterers who were arrested demonstrated the basic intractability of abusive and controlling men. In a ten-year study, an examination of 342 men revealed:

[D]ecade-long criminal and abuse careers largely undeterred by arrest, prosecution, probation supervision, incarceration, and batterer treatment. Although only a minority reabused (32%) or were arrested for any crime (43%) within a year of the study court arraignment, over the next decade, the majority (60%) reabused, and almost three fourths were arrested for a domestic abuse or non-domestic abuse crime. The research suggests that short-term cessation of domestic violence achieved after a variety of interventions may not indicate longer-term behavior change.

. . . the majority of abusers reabused, and the majority of reabusers did so more than once. . . although found to be significant, reabuse rates were undoubtedly higher than measured.³³

Designing research protocols that study recidivism among abusive men convicted of domestic assaults is difficult.³⁴ Those who have worked in treatment of battering men have had little success in proving these abusers actually change their behaviors. Research has shown that intensive, group-centered treatment programs, long considered the most likely to succeed in this endeavor, have only succeeded in cases that include continued close monitoring by the courts.³⁵ In a program directed at developing a batterer intervention program centered on educating batterers to see how their violence affects their children, some insights into batterer behaviors are determined:

32. Stark, *supra* note 24, at 64 (stating "Reoffending is a near certainty in domestic violence cases.").

33. Andrew R. Klein & Terri Tobin, *A Longitudinal Study of Arrested Batterers, 1995-2005; Career Criminals*, 14 *VIOLENCE AGAINST WOMEN* 136, 144 (2008). See also DONALD G. DUTTON & SUSAN K. GOLANT, *THE BATTERER: A PSYCHOLOGICAL PROFILE* 28 (1995), stating:

We were astonished to find that about 20 percent of our batterers actually showed a decline in heart rate during the course of the nonviolent argument . . . the batterers who showed this heart rate decrease were the most belligerent and contemptuous toward their wives . . . the "disconnected" group showed the highest rates of violence outside the marriage, and were the most likely to have reported violence in their family of origin.

34. Juan Carlos Arean & Lonna Davis, *Working with Fathers in Batterer Intervention Programs: Lessons from the Fathering After Violence Initiative*, in *PARENTING BY MEN WHO BATTER: NEW DIRECTIONS FOR ASSESSMENT AND INTERVENTION* 122 (Jeffrey L. Edleson & Oliver J. Williams eds., 2007) [hereinafter *PARENTING BY MEN WHO BATTER*] (noting that batterer intervention programs do not have the tools to assess and select the men who might be ready to start working on healing their relationships with their children).

35. See ANDREW R. KLEIN, *NAT'L INSTITUTE OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES* 73 (2009).

Very few men will be able to take more than the first few steps during their first year of batterer intervention. . . . A percentage of men do not stop their violence after attending a batterer intervention group (the actual number is the subject of great and ongoing debate). Fathers who are actively violent should not be encouraged to pursue this work.³⁶

Change is a slow process. A recent period without violence does not mean the abuser has “changed.”³⁷ Seventy to eighty-five percent of men who batter their partners do not change their abusive and controlling behaviors from one relationship to the next. Why should they change? It works for them!³⁸ Children in their care will be exposed again to the abuse they witnessed in that parent’s previous relationship.³⁹ In other words, the children will be at risk of both direct abuse and the “collateral” abuse they receive from their parents’ violence.⁴⁰

Why do these men get sole or joint custody? Family court judges rely on whatever admissible evidence they have concerning the parents’ relative qualities as parents and assess appearance and demeanor of witnesses under circumstances where the judges’ expectations may be erroneous. In a description of courtroom demeanor of the abusive parent, the book for judges of the National Council of Juvenile and Family Court Judges states the following:

[T]here is no one pattern of behavior that you will observe in either the abusive parent or the at-risk parent. There are some behaviors, however, that indicate disrespect toward the other parent. These behaviors should raise red flags for you to determine whether they result from a pattern of control.

Often abusive parents present well, as they are skilled at maintaining control. An abusive parent might:

- Believe or claim that the other parent is stupid, unsophisticated or inflexible;
- Anger easily;
- Behave in an arrogant or superior manner;
- Attempt to present as the true victim in the relationship;

36. *Id.* at 129.

37. BANCROFT, SILVERMAN, & RITCHIE, *supra*, note 7, at 224, citing Scott L. Feld & Murray A. Straus, *Escalating and Desistance of Wife Assault in Marriage*, PHYSICAL VIOLENCE IN AMERICAN FAMILIES (Murray A. Straus & Richard J. Gelles eds., 1990) (noting that although the average batterer assaults three times a year, some batterers went twelve months or even two years, and that batterers tend to carry their abusive behavior from relationship to relationship).

38. Lundy Bancroft, Address at Alaska Women’s Resource Center Seminar (Oct. 2003). Bancroft, who worked for many years in batterer intervention programs in Massachusetts, is the author of *Batterers as Parents in THE EFFECT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER’S HANDBOOK* (2d ed. 2004).

39. BANCROFT, SILVERMAN, & RITCHIE, *supra*, note 7, at 22, 224.

40. Jeffrey L. Edleson, *Studying the Co-occurrence of Child Maltreatment and Domestic Violence in Families*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN, *supra* note 12, at 91. See also Katherine M. Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71(2) J. COUNSELING & CLINICAL PSYCH. 339–52 (2003).

- Appear vulnerable or otherwise engender empathy with the court or with third parties;
- Be unwilling to understand another's perspective;
- Expect the child to meet the parent's needs;
- Advocate or adhere to strict gender roles;
- Patronize the other party, counsel, and even the court;
- Attempt to create an alliance with you;
- Minimize, deny, blame others for, or excuse inappropriate behavior.

This controlled courtroom presence of the abusive parent may contrast with the at-risk parent's behavior.⁴¹

B. Why Victims Sometimes Do Not Look Like Good Parents

Fitting into male-developed credibility norms is difficult for a victim, particularly abused women. Women who have been traumatized and terrorized by physical abuse and intimidation by their intimate partners may find it difficult to communicate with the court—especially while sitting at a courtroom table ten feet from their abuser. Trauma affects people in predictable ways. The effects of exposure to trauma can interfere with a person's ability to concentrate on questions, formulate answers in a cogent manner and recall past traumatic events.⁴² This disabling effect stems from the power imbalance and “persuasion imbalance” that begins in the intimate moments when men assert their physical power and attempt to control their partners with infliction of traumatic (mental and/or physical) injuries.⁴³ Post Traumatic Stress Disorder (PTSD) can result. At trial, the battering partner may manipulate a judge into believing that the abuser is the better parent. This perception is enhanced because of the inability of the abused parent to effectively communicate, because of the effects of the intimate terrorism inflicted by the abuser and the added stress of having him or her sitting in the same courtroom during court hearings. In testifying about how she was abused, the victim is likely to re-experience the terror, fear, and pain she felt during the abuse, and her PTSD symptoms may interfere with her ability to recall or willingness to talk about it.⁴⁴ The judge is often convinced that the child is more appropriately placed in the

41. JERRY J. BOWLES ET AL., NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, A JUDICIAL GUIDE TO CHILD SAFETY IN CUSTODY CASES 9 (2008).

42. JUDITH HERMAN, TRAUMA AND RECOVERY at 42–43, 116, 122 (1997); MARY MALEFYT SEIGHMAN, ERIKA SUSSMAN & OLGA TRUJILLO, REPRESENTING DOMESTIC VIOLENCE SURVIVORS WHO ARE EXPERIENCING TRAUMA AND OTHER MENTAL HEALTH CHALLENGES: A HANDBOOK FOR ATTORNEYS, NATIONAL CENTER ON DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH 41–43 (2011). The DSM-IV-TR 468, 476, describes the behaviors, which can include the victim's mind going blank on the witness stand, her failure to remember details of the crimes against her, and becoming flooded with emotion as she recalls the fear she felt when she was assaulted.

43. HERMAN, *supra* note 42, at 28, 34, 42, 77, 122.

44. *Id.* at 42, 46.

custody of the abuser.⁴⁵ One judge's guide describes why the at-risk parent may not present as well and might:

- Have difficulty presenting evidence for any number of reasons: cognitive impairments resulting from abuse, fear, or a conviction that she [footnote omitted] will not be believed.
- Demonstrate inappropriate affect resulting from fear, depression, post-traumatic stress disorder, or other response to abuse.
- Be extremely anxious and unfocused in the presence of the abusive parent.
- Be aggressive or angry when testifying.
- Show signs of distress when listening to the other parent's testimony.
- Appear numb, unaffected, or disinterested.⁴⁶

In fact, a victim with posttraumatic stress disorder (PTSD) or generalized anxiety disorder caused by a perpetrator's abuse may at times be unable to testify about the abuse because PTSD or generalized anxiety disorder.⁴⁷ A person with generalized anxiety disorder or PTSD could have her thoughts go completely blank when asked a question. Counsel for battered victims must be prepared to deal with the behaviors of clients having PTSD.

PTSD symptoms include *intrusive symptoms* (reliving the traumatic experience as if it were continually recurring in the present, through nightmares and flashbacks), *avoidant symptoms* (emotional numbing, withdrawal, or the repression of memories of violent incidents), and *hyperarousal* (being in a constant state of alertness for and expectation of danger, which often leads to irritability and angry outbursts One analysis of a large set of existing studies found that almost 64% of battered women displayed symptoms that could be diagnosed as PTSD. . . . Other studies showed that approximately half of the women who experienced PTSD remained symptomatic even after they had been out of a violent relationship for 6 to 9 years.⁴⁸

C. Problems with Joint Custody

While statutory or case law requires all child custody decisions in the United States and Canada to be based on the best interests of the child, a major custody litigation pitfall for victims of violence is the legal or de facto presumption in favor of joint legal and/or physical custody.⁴⁹ Judith

45. Evan Stark, *Reframing Child Custody Decisions in the Context of Coercive Control*, 11–6, 11–23, 11–25, 11–29, 11–31, in *DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY*, 13–6, 13–7 (Therese Hannah & Barry Goldstein eds., 2010); Brigner, *supra* note 5.

46. *Id.* at 10.

47. See DSM-IV-TR, *supra* note 42 at 463. See also LENORE WALKER, *THE BATTERED WOMAN SYNDROME* 71 (3d ed. 2009) (explaining that battered woman syndrome is not a mental disorder but a psychological reaction of a normal person when exposed to traumatic events and characterizing battered woman syndrome as a component of posttraumatic stress disorder).

48. GOODMAN & EPSTEIN, *supra* note 25, at 55.

49. E.g., FLA. STAT. ANN. § 61.13 (West 2012).

Wallerstein and Joan Kelly originally thought that children whose parents shared custody after their divorce fared nearly as well as children whose parents remained in unified families.⁵⁰ Shared custody, legal and physical, was promoted as the preferred child placement after divorces, irrespective of the level of conflict between the former spouses. In the 1980s, research began to reveal that children who were exposed to battering behavior in their homes tended to develop negative behaviors.⁵¹ In a ten-year follow-up study, Wallerstein and Blakeslee reported that a re-analysis of shared custody data from the earlier research, together with interviews with many of the original participants, revealed that the children who fared well in shared custody were only those whose parents had *agreed* to share custody.⁵² Those children who had one parent who objected to sharing custody after divorce, often because of allegations of abuse, fared *much worse* than children in unified families and children in the other shared-custody group. They explain:

Children raised in joint custody arrangements that result from a court order in the wake of bitterly contested divorces seem to fare much worse than children raised in traditional sole custody families also torn by bitter fighting. . . . there is no evidence that joint custody is best for all, or even for most, families.⁵³

Judges, trained to be impartial and unbiased fact-finders, consider only the admissible evidence presented in court when considering the best interest of the children. Many are unaware of the social science data on the harm to children from being in the middle of high conflict. Court custody practices and philosophy have not changed to accommodate the new information. Judges, and some state legislatures, continue to see shared custody as the favored mode, despite numerous research statistics that call that presumption into question. One recent study of divorce outcomes after the enactment of a joint custody presumption in one state reports an increase in the amount of child abuse allegations as well as lengthier, more costly, and more contentious custody proceedings.⁵⁴ Many commentators now recognize that where there has been domestic violence, joint custody is inappropriate. As one scholar noted:

Unfortunately, cases that get to litigation (or even to judicial intervention short

50. JUDITH WALLERSTEIN & JOAN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980).

51. See, e.g., David Wolfe et al., *Children of Battered Women: the Relation of Child Behavior to Family Violence and Maternal Stress*, 53 J. CONSULTING & CLINICAL PSYCHOL. 657 (1985).

52. JUDITH WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES; MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* (1996).

53. *Id.* at 273.

54. Douglas W. Allen & Margaret Brinig, *Do Joint Parenting Laws Make Any Difference*, 8 J. EMPIRICAL LEGAL STUD. 304, 307 (2011).

of litigation) are exactly those most likely to involve domestic violence. Recent research shows that approximately seventy-five percent of the contested custody cases that require judicial intervention are cases in which there is a history of domestic violence. . . . Presumptions in favor of shared custody then do not make sense given that so many of the cases in which the parties cannot resolve the children's custody without judicial intervention are cases involving domestic violence.⁵⁵

Parents who have been victims of violence and who seek to protect their children from further abuse by the former partner find the courts are biased against sole custody.⁵⁶ Joint legal or physical custody have forced thousands of victims into the nightmare of having to coparent after divorce with an abusive ex-partner and doomed many children to continued exposure to the harms detailed.⁵⁷ As two prominent researchers have indicated:

[The best innovations of the late 1900's, such as mediation and joint custody, are not appropriate solutions to child-custody disputes involving domestic violence because these remedies require two parents who have some basic respect and trust in each other, as opposed to fear and hesitancy to even be in the same room. . . . Legal and mental-health professionals who ignore warning signs of domestic violence can endanger children and parents by minimizing, denying, or excusing the reality of domestic violence.⁵⁸

The National Council of Juvenile and Family Court Judges published a judicial guide, which indicates that ensuring the child's physical, emotional and psychological safety are always in his or her best interest and notes:

Generally speaking, it is considered detrimental to a child and not in his or her best interest to be placed in the sole custody, joint legal custody, or joint physical custody with the abusive parent. . . Providing for the physical, mental, and emotional safety of the child will include providing safe visitation by the abusive parent, if truly safe visitation can be arranged. You should award visitation to an abusive parent only if you find that adequate provisions for the child's and the abused parent's safety can be made, assuming that contact with the abusive parent is advised at all.⁵⁹

55. Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 411–13 (2005). See also Dana Harrington Conner, *Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence*, 18 J. DUKE J. GENDER L. & POL'Y 223 (2011).

56. Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657 (2003).

57. REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE, DEFENDING CHILDHOOD: PROTECT HEAL THRIVE 1 (2012) [hereinafter DEFENDING CHILDHOOD].

58. Peter G. Jaffe & Claire V. Crooks, *Assessing the Best Interests of the Child; Visitation and Custody in Cases of Domestic Violence*, in PARENTING BY MEN WHO BATTER, *supra* note 34, at 49.

59. BOWLES ET AL., *supra* note 41, at 5 (citing the NCJFCJ's Family Violence: A Model State Code § 401 (1994)).

III. Effects of Domestic Violence on Children

Many judges who adjudicate child custody cases do not make the connection between the abuse of the mother and the abuse of her children.⁶⁰ Family court judges do not acknowledge the connection between a parent who intimidates, isolates, denigrates and physically abuses his child's mother *and the harm likely to befall a child who is placed in that parent's custody*. Children in homes where men believe they are entitled to use force on their female partners in order to maintain control are much more likely to be physically abused themselves. These children are also about six times more likely to be sexually abused in those homes.⁶¹

Within the past few decades, research has shown that children are harmed by high conflict. As some researchers have noted:

[I]f parental conflict is high, and if the nature of that conflict is such that it harms children . . . then frequent contact with both parents is likely to be more harmful than beneficial to children. In the face of high conflict, therefore, children would do better living primarily in one household with an authoritative mother or father and having more limited contact with the other parent.⁶²

Domestic violence cases are high-conflict cases.⁶³ In recent years, research has established the existence of a wide range of possible adverse effects on children who have been exposed to domestic violence in their families.⁶⁴ Researcher Janet Johnston has noted that:

Children of such primary abusers are more likely to be abused directly, to witness one of their sibling's abuse, and to be exposed to continuing scenes of intimate-partner abuse when their abusive father or mother cohabits or remarries. More commonly, they are subjected to emotional abuse such as name-calling, cruel put-downs, and distortion of their reality by telling false and frightening stories. At times they are made the favorite at the expense of siblings who are isolated or outrightly rejected. At other times, they may be encouraged in morally corrupt and criminal behavior. . . . Boundary violations between adult domestic violence abusers and children are more likely especially where substance abuse is also involved, with a greater incidence of child sexual abuse being reported. . . .

After the separation, abusive ex-spouses often make exaggerated claims about their good relationship with their children and can use family litigation as a new forum to continue their coercive controlling behavior and to harass their former

60. STARK, COERCIVE CONTROL, *supra* note 22, at 42.

61. See Meier, *supra* note 56, at 700-01.

62. Robert E. Emery, Randy K. Otto, & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations*, 6 PSYCHOL. SCI. IN THE PUB. INT. 1, 16 (2005).

63. Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings: Critical Assessment of Child Custody Evaluations*, 42 FAM. L. Q. 381, 395 (2008).

64. See, e.g., Bruce D. Perry, *The Neurodevelopmental Impact of Violence in Childhood*, Ch. 18 TEXTBOOK OF CHILD AND ADOLESCENT FORENSIC PSYCHIATRY 221 (D. Schetky & E.P. Benedek eds., 2001).

partner. . . Upon closer scrutiny, however, in a range of obvious and more insidious ways they try to alienate the children from the other parent's affection (by asserting blame for the dissolution of the family and telling negative stories), sabotage family plans (by continuing criticism or competitive bribes), and undermine parental authority (by explicitly instructing the children not to listen or obey).⁶⁵

Recent research has shown that about half of children who are exposed to violence in their homes are left with long-lasting negative effects. Evidence of such violence is usually used by one parent against the other—typically, but not always, the dad abusing their mother. Interpersonal violence also occurs in same-sex relationships at an approximately equal rate, with the same impact on the children. Often, but not always, the family violence includes direct physical or sexual abuse of the child.⁶⁶

Each year in the United States, millions of children are exposed to violence as victims of physical or sexual abuse, witnesses to intimate partner violence, or witnesses to violence that occurs in their neighborhoods. Exposure to violence causes major disruptions of the basic cognitive, emotional, and brain functioning that are essential for optimal development and leaves children traumatized. When their trauma goes unrecognized and untreated, these children are at significantly greater risk than their peers for aggressive, disruptive behaviors; school failure; posttraumatic stress disorder (PTSD); anxiety and depressive disorders; alcohol and drug abuse; risky sexual behavior; delinquency; and repeated victimization. When left unaddressed, these consequences of violence exposure and the impact of psychological trauma can persist well beyond childhood, affecting adult health and productivity. They also significantly increase the risk that, as adults, these children will engage in violence themselves. Exposure to violence constitutes a major threat to the health and well-being of . . . children, ages 0 to 21 years. . . .

For far too many children, exposure to violence is a matter of life and death. Eighty percent of child fatalities due to abuse or neglect occur within the first 3 years of life and almost always at the hands of adults responsible for their care. . . [footnotes omitted.]⁶⁷

Research in recent years has confirmed that children in homes marked by domestic violence can be harmed in direct and indirect ways.

[Even when direct child abuse is not a factor, children are put at increased risk of various kinds of harm by living in a home where violence occurs Regardless of a child's individual experience, the risks of physical, behavioral, and emotional injury are substantially higher than for children who do not suf-

65. JOHNSTON ET AL., *supra* note 13, at 36 (citations omitted).

66. Jeffrey L. Edleson, *Studying the Co-occurrence of Child Maltreatment and Domestic Violence in Families*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN, *supra* note 12, at 91 (. . . "approximately 30–60% of children whose mothers are being abused are themselves likely to be abused.").

67. DEFENDING CHILDHOOD, *supra* note 57, at 1.

fer exposure to domestic violence.⁶⁸

Research into how children from homes marked by coercive and controlling violence has evolved over the past decades from observation of their behaviors to focusing on the physiological changes in children's brains that results from their exposure to violence. A striking image of how such children lived is this:

Children growing up in spouse abusive families live in a type of war zone. Sometimes they feel they can predict the "attacks" and sometimes the aggression is unexpected. This leaves them with a sense of danger and uncertainty.⁶⁹

The National Task Force describes the harms that may befall a child who has been exposed to the repeated violent acts of a father assaulting the child's mother:

When children are exposed to violence, the convergence between real life events and their worst fears—about physical injury and loss of life, loved ones, and control of their actions and feelings—is an "experience of overwhelming and often unanticipated danger [that] triggers a traumatic disruption of biological, cognitive, social and emotional regulation that has different behavioral manifestations depending on the child's developmental stage." These traumatic disruptions of brain functioning, healthy development, relationships, and subjective experience often lead to symptoms of distress, including difficulties with sleeping and eating, irritability, attention and concentration problems, aggression, depressed mood and withdrawal, relationship problems, anxiety and intrusive thoughts, and impulsivity (such as dangerous risk-taking, alcohol and drug abuse, delinquency, or promiscuous sexual behavior.)

These symptoms result from abrupt changes in brain activity and altered perceptions of self, others, and the environment, leaving the child "stuck" or "frozen" without a way to escape the state of fear (and also often shock, anger, grief, betrayal, and guilt or shame) from the original violent experience. Children traumatized by exposure to violence cannot move forward in their lives. When parents, caregivers, and others identify the impact of the violence exposure and provide adequate support and treatment, affected children are able to heal and recover. However, when violence is chronic or sources of support are inadequate, the result can be a severe and lasting impact on every aspect of the child's development.

In these situations, exposure to violence may "substantially alter a child's biological makeup through long-lasting changes in brain anatomy and physiology. These children are at high risk of suffering chronic and severe symptoms of traumatic stress, including long-term psychiatric problems and lifelong limita-

68. Billie Lee Dunford Jackson, *The Role of Family Courts in Domestic Violence*, PROTECTING CHILDREN FROM DOMESTIC VIOLENCE: STRATEGIES FOR COMMUNITY INTERVENTION 189 (Peter Jaffe, Linda Baker, & Alison Cunningham eds., 2004) [hereinafter PROTECTING CHILDREN FROM DOMESTIC VIOLENCE].

69. B. B. Robbie Rossman & Joyce Ho, *Posttraumatic Response and Children Exposed to Parental Violence*, CHILDREN EXPOSED TO DOMESTIC VIOLENCE 85 (Geffner, Jaffe, & Marlies Sudermann eds., 2002).

tions on health, well-being, relationships, and personal success. These risks are especially high when exposure to violence involves a fundamental loss of trust and security, which happens when children are exposed to sexual and physical abuse, witness intimate partner violence, or are severely victimized or witness extreme violence outside the home.⁷⁰

The last paragraph is particularly important. Neuroscientists have found that very young children who are traumatized by seeing or hearing their father assaulting their mother may undergo physiological changes that can have lifelong effects on their behavior. These changes, caused by repeated traumatic events experienced by very young children, involve repeated activation of neural threat-response systems activated by stress in children exposed to violent events, particularly in the family setting. One of the threat-response systems that is particularly open to modification by experience during early life is the limbic hypothalamic pituitary adrenal axis:

Not surprisingly, alterations in pituitary and adrenal function have been associated with illnesses common among previously abused individuals, including depression, anxiety, post-traumatic stress disorder (PTSD), fibromyalgia, hypertension, and immune system suppression.⁷¹

The fate of a sizeable portion of children exposed to serious family violence (i.e., a sample found in shelter populations) is to be so traumatized by violence between their parents that they develop conditions such as posttraumatic stress disorder:

More than half of the school-age children in domestic violence shelters show clinical levels of anxiety or posttraumatic stress disorder. . . . Without treatment, these children are at significant risk for delinquency, substance abuse, school drop-out, and difficulties in their own relationships.

Children may exhibit a wide range of reactions to exposure to violence in their home. Younger children (e.g., preschool and kindergarten) oftentimes, do not understand the meaning of the abuse they observe and tend to believe that they "must have done something wrong." Self-blame can precipitate feelings of guilt, worry, and anxiety. It is important to consider that children, especially younger children, typically do not have the ability to adequately express their feelings verbally. Consequently, the manifestations of these emotions are often behavioral. Children may become withdrawn, non-verbal, and exhibit regressed behaviors such as clinging and whining. Eating and sleeping difficulty, concentration problems, generalized anxiety, and physical complaints (e.g., headaches) are all common.

70. DEFENDING CHILDHOOD, *supra* note 57, at 2–3.

71. Seth D. Pollak, *Mechanisms Linking Early Experience and the Emergence of Emotions: Illustrations From the State of Maltreated Children*, 17 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 370, 372 (2008). *See also* National Scientific Council on the Developing Child, *Persistent Fear and Anxiety Can Affect Young Children's Learning and Development*, Working Paper No. 9 (2010), available at www.developingchild.harvard.edu.

. . . the pre-adolescent child typically has greater ability to externalize negative emotions (i.e., to verbalize). In addition to symptoms commonly seen with childhood anxiety (e.g., sleep problems, eating disturbance, nightmares), victims within this age group may show a loss of interest in social activities, low self-concept, withdrawal or avoidance of peer relations, rebelliousness and oppositional-defiant behavior in the school setting. It is also common to observe temper tantrums, irritability, frequent fighting at school or between siblings, lashing out at objects, treating pets cruelly or abusively, threatening of peers or siblings with violence (e.g., "give me a pen or I will smack you"), and attempts to gain attention through hitting, kicking, or choking peers and/or family members. Incidentally, girls are more likely to exhibit withdrawal and unfortunately, run the risk of being "missed" as a child in need of support.

Adolescents are at risk of academic failure, school drop-out, delinquency, and substance abuse. Some investigators have suggested that a history of family violence or abuse is the most significant difference between delinquent and non-delinquent youth. An estimated 1/5 to 1/3 of all teenagers who are involved in dating relationships are regularly abusing or being abused by their partners verbally, mentally, emotionally, sexually, and/or physically. . . . Between 30% and 50% of dating relationships can exhibit the same cycle of escalating violence as marital relationships . . .⁷²

A number of resilience factors minimize the adverse consequences for about half of the children.⁷³ "Only" about half of children who have been exposed to domestic violence are known to develop the adverse physiological, psychological, emotional or behavioral changes that result from being abused by a parent figure. One study that analyzed data from 118 studies of children exposed to conflict and violence, some of whom were themselves abused directly, found the rate was sixty-three percent. Others have found the ratio of children adversely affected to be "only" about forty percent. Those are, quite simply, horrible odds for the children of divorce or separation. Although children may be exposed to violence that is not coercive control, a high percentage of those involved in child custody contests are exposed to battering behavior.

72. JOSEPH S. VOLPE, EFFECTS OF DOMESTIC VIOLENCE ON CHILDREN AND ADOLESCENTS: AN OVERVIEW (1996). See also Steve Stride et al., *The Physiological and Traumatic Effects of Childhood Exposure to Intimate Partner Violence in CHILDREN EXPOSED TO DOMESTIC VIOLENCE; CURRENT ISSUES, INTERVENTIONS, AND RESEARCH* 8–97 (Robert A. Geffner et al. eds., 2009). A reduced IQ may also result. See Kathryn H. Howell and Sandra A. Graham-Besmann, *The Multiple Impacts of Intimate Partner Violence on Preschool Children in HOW INTIMATE PARTNER VIOLENCE AFFECTS CHILDREN: DEVELOPMENTAL RESEARCH, CASE STUDIES, AND EVIDENCE-BASED INTERVENTION* 92–93 (Sandra A. Graham & Alytia A. Levendosky eds., 2011).

73. DENISE A. HINES & KATHLEEN MALLEY-MORRISON, FAMILY VIOLENCE IN THE UNITED STATES: DEFINING, UNDERSTANDING AND COMBATING ABUSE 95 (Bill Bowers ed., 2005) (resiliency factors for children exposed to violence in their homes include a relationship with a supportive, nonabusive caregiver, a high IQ and certain genetic factors).

The Alaska Supreme Court clearly has recognized the adverse effects visited on children by an abusive parent:

Although the children had not witnessed any physical violence between Rob and Kimberly since their parents separated, the deleterious impact on children of witnessing domestic violence is widely recognized. * * * (citing *Custody of Vaughn* . . . "It is well documented that witnessing domestic violence . . . has a profound impact on children. There are significant reported psychological problems in children who witness domestic violence, especially during important developmental stages.") * * * Furthermore, social science studies have noted that even if the physical violence between the parties has ceased, the abusive ex-spouse may continue to engage in controlling behaviors that adversely affect the children. In one such study, researchers found:

Perpetrators of . . . [ongoing or episodic] domestic violence tend to have a very poor ability to differentiate their needs from those of their children, or to appreciate the impact of their violent behavior upon their children. Because of their need to control others, their low stress tolerance and willingness to rely upon physical coercion, these perpetrators are at elevated risk of eventually generalizing their violence and control to their children. Following a separation, they are at elevated risk of using the children to validate their own view of the separated partner and the relationship, or using the children as a method of exerting control over or punishing the separated partner. * * *

The trial court did not impermissibly punish Rob for past domestic violence, but appropriately considered Rob's proven past domestic violence and his current behavior in the context of the present impact on the children and their relationships with their parents.⁷⁴

IV. Wingspread Conference on Domestic Violence

Most statutory schemes describing the best interest standard leave flexibility for the courts to incorporate safety and other considerations not explicitly enumerated in the statute. Many judges consider safety as a significant factor in custody and visitation decisions. Other judges, however, refuse to consider factors not specifically enumerated in their jurisdiction's best-interest statute.

In an effort to promote the development of legal systems more protective of the children, a group of international experts in psychology, law and domestic violence met at the Wingspread Center in 2007 to examine interpersonal violence in families and its relationship to children's well-being during and after parental separation.

74. See *Borchgrevink v. Borchgrevink*, 941 P.2d 132, 140 (Alaska 1997) (citing Phyllis E. Federico & Dr. Robert Kinscherff, *Custody of Vaughn: Impact of Domestic Violence on Child Custody: Children Are No Longer the Forgotten Victims*, 40 BOSTON L. J. 8, 22 (1996)).

A. Wingspread White Paper

Convened by the National Council of Juvenile and Family Court Judges (NCJFCJ) and the Association of Family and Conciliation Courts (AFCC), the gathering of judges, mental health professionals, attorneys, legal educators, and advocates for victims of family violence developed a new paradigm for deciding child custody cases that involve family violence allegations. The paradigm proposes that the safety of the child and safety of the victim parent should be the paramount factors, even at the expense of the abusive parent's usual "right" to continued frequent contact with the children.⁷⁵

The resulting "white paper" summarized the debates and some surprising agreements among the experts who comprised the group. Most importantly, the report gave context in which judges may incorporate child safety when considering the best interest of the child.

. . . [C]ourts are faced with important but often conflicting priorities. In cases in which domestic violence is proven or credibly alleged, for example, the initial focus of the court system must necessarily be on safety. Yet Judges must simultaneously remain cognizant of the importance of children's healthy relationships with parents or other family members and the costs of disrupting those relationships.

. . . Janet Johnston suggested a specific method for analyzing conflicting interests. The initial goal . . . should be to meet five guiding principles or priorities:

- Priority 1: Protect children.
- Priority 2: Protect the safety and well-being of the victim parent.
- Priority 3: Respect the right of adult victims to direct their own lives.
- Priority 4: Hold perpetrators accountable for their abusive behavior.
- Priority 5: Allow child access to both parents [footnote omitted].

However, where simultaneous achievement of all five priorities is not possible, priorities lower on the list should be successively relinquished until the conflict is resolved. Thus, in a situation where visitation cannot safely occur, for example, Priority 5 (access) may be sacrificed in favor of the other four priorities.⁷⁶

That report signaled a consensus for a proposed paradigm shift in the U.S. legal system: *the safety of children trumps the "custodial rights" of abusive parents*. The significance of the Wingspread Report is that a critical mass of interdisciplinary professionals recognized the failings of a judicial system that has largely ignored child and victim safety in making child access decisions in cases where one parent has abused the other.

Contemporaneously, other researchers wrote about the need to place safety first when judges determine child access:

75. Nancy Ver Steegh & Claire Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454 (2008).

76. *Id.* at 464.

. . . What is needed is a risk-benefit analysis of different kinds of parenting plans that are in the best interests of the particular child and family. . . . the goals of any plan should be prioritized in the following order:

1. Protect children directly from violent, abusive, and neglectful environments;
2. Provide for the safety and support and well-being of parents who are victims of abuse (with the assumption that they will then be better able to protect their child);
3. Respect and empower victim parents to make their own decisions and direct their own lives (thereby recognizing the state's limitations in the role of *loco parentis*);
4. Hold perpetrators accountable for their past and future actions (i.e., in the context of family proceedings, have them acknowledge the problem and take measures to correct abusive behavior);
5. Allow and promote the least restrictive plan for parent-child access *that benefits the child*, along with parents' reciprocal rights.

Premised on the notion that the goal of protecting children must never be compromised, the strategy is to begin with the aim of achieving all five goals and to resolve conflicts by abandoning the lower priorities. . . . For example, in principle, if a parent denies engaging in his or her substantiated violence and does not comply with court-ordered treatment, Priority 5 should be dropped or modified by suspending or supervising access. Furthermore, the victims should be allowed to relocate upon request (forgoing Priorities 4 and 5).⁷⁷

The adoption of a presumption against placing a child in the custody of an abusive parent is in effect an election that the presence of domestic violence should be the most important criterion. This changes the view of courts, which hold that when a legislature has prescribed a list of criteria to use in finding the best interests of a child without prioritizing them no one criterion should be elevated above the others in the court's calculus of the child's best interests.⁷⁸ This is not totally revolutionary, however, as early as 1994, the NCJFCJ Family Violence Model Code noted:

In addition to other factors that a court must consider in a proceeding in which the custody of a child or visitation by a parent is at issue and in which the court has made a finding of domestic or family violence . . . The court shall consider as primary the safety and well-being of the child and of the parent who is the victim of domestic or family violence.⁷⁹

77. Jaffe, Johnston et al., *supra* note 9 (citations omitted).

78. See, e.g., *Holmes v. Wooley*, 788 A.2d 131 (Del. 2002) ("[t]he clear intent of the legislature in passing the best interest standards was that each factor listed in the statute be independently considered and then given its due weight and importance relative to the other factors"); *accord Pierron v. Pierron*, 765 N.W.2d 345, 363 (Mich. Ct. App. 2009).

79. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 402 1(a), 33 (1994).

Other national organizations similarly recommended the presumption against awarding custody to abusers, including the American Medical Association.⁸⁰ The American Psychological Association also stated:

In matters of custody, preference should be given to the nonviolent parent whenever possible, and unsupervised visitation should not be granted to the perpetrator until an offender-specific treatment program is successfully completed, or the offender proves that he is no longer a threat to the physical and emotional safety of the child and the other parent.⁸¹

The American Bar Association has recommended:

Even if your state statute does not have a rebuttable presumption against custody, there are three reasons to support a finding that a batterer is an unfit custodian: First, the abuser has ignored the child's interests by harming the child's other parent. Second, the pattern of control and domination common to abusers often continues after the physical separation of the abuser and victim. Third, abusers are highly likely to use children in their care, or attempt to gain custody of their children, as a means of controlling their former spouse or partner.⁸²

Installation of a custody presumption of this type has in at least one state placed domestic violence at the top of the list of best-interest criteria, and failure to consider and analyze it is reversible error.⁸³

B. Why Domestic Violence Should Top the List of Factors

The obvious reason to place domestic violence at the top of the list is the need to protect children. As noted in section III, children are abused when placed in the care of an abusive parent. An influential educator and psychologist summarizes research results of effects of domestic violence on children:

Domestic violence does not occur as a singular traumatic life event for children . . . Child witnesses to domestic abuse are likely to have a history of multiple stressors that include separation, high-conflict divorce, loss, and disruptions of their care-taking. . . . A plethora of research findings confirm that exposure to high-conflict and violent family environments is seriously damaging to infants, children, and youth. In fact, to varying degrees, children from violent homes have substantially the same kinds of problems as those who are directly abused by their caretakers. . . . The long-term prognosis for the children of violent families is at best guarded: there is evidence that as adults they have problems with anxiety and depression, and tend to make poor choices in selecting mates. . . . [T]hese children as adults, especially the boys, are more likely to repeat the

80. APA FAMILY VIOLENCE REPORT, *supra* note 12.

81. *Id.* at 99.

82. AMERICAN BAR ASSOCIATION, A JUDGE'S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES 132 (2008).

83. *Wee v. Eggener*, 225 P.3d 1120, 1125 (Alaska 2010); *Williams v. Barbee*, 243 P.3d 995, 1004 (Alaska 2010).

cycle of victimization in the next generation.⁸⁴

Some researchers have offered a list of common-sense reasons why courts should place domestic violence at the top of its list of family characteristics to consider in child custody cases.⁸⁵ Those reasons are as follows:

1. Separation seldom ends the domestic violence. Stalking, physical abuse, and harassment often continue beyond separation, and they may escalate. Frequent contact between the batterer and his child, child exchanges, and visitation provide an ideal opportunity for continued abuse and manipulation.
2. Children in homes where there is domestic violence are subjected to a much higher likelihood of being physically abused themselves.
3. Children of battering men are likely to be exposed to continued demonstrations of coercion and control in family relationships, which may socialize them to believe they are entitled to use the same behaviors in their own interpersonal relationships.
4. Men who batter may undermine their former partners' parenting. They may tell their children that their mother was at fault for the break-up or urge their children not to follow their mother's directions.
5. Male batterers often use the court as a tool of abuse. They attempt to continue their control by seeking custody of their children and causing the victim great financial expenses. These men are often articulate, persuasive and manipulative men who present well in court.
6. Domestic violence perpetrators in some extreme cases may use lethal force on their victims after separation. Women are in more danger of homicide after separation. Visitation exchanges provide opportunities that may result in the children witnessing homicidal violence or being victimized directly.
7. The trauma of the violence may have left the victim with depression, substance abuse, or posttraumatic stress disorder.⁸⁶

Research has helped to identify the kinds of adjustment problems to which such children are most vulnerable. These include a variety of both internalizing and externalizing symptoms such as depression, including shame, self-deprecation, hopelessness, helplessness; anxiety, including distress over the violence, worry about themselves and their families; and

84. Janet R. Johnston, *Group Interventions for Children At-Risk from Family Abuse and Exposure to Violence: A Report of a Study*, in *THE EFFECTS OF INTIMATE PARTNER VIOLENCE ON CHILDREN 204–05* (Robert Geffner, Robyn Spurling Igelman & Jennifer Zellner eds., 2003).

85. Peter G. Jaffe, Claire V. Crooks & Nicholas Bala, *A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes*, 6 *J. CHILD CUSTODY* 169, 171 (2009).

86. *Id.*

aggression and oppositionality toward parents, teachers, and peers. One way to protect these children is to ensure their safety and the safety of the abuse victim postseparation.

C. Effect of "Friendly Parent" Provisions

About thirty states have statutes that include the "friendly parent" concept among the best-interest factors. The judge should consider which parent is more likely to foster a close and loving relationship between the child and the other parent.⁸⁷ As one might expect, a batterer uses this law to try to win a custody battle against his victim. The victim, who is unlikely to want to continue to have open communication with her abuser and may have a well-founded fear that she and the children are endangered by frequent contact with him, will *not* be willing to foster significant contact between the child and the abusive father. The mother's attorney will have to rely on the evidence of the batterer's assaults, destruction of property, threats, and other abusive and coercive behaviors to establish good reasons why the victim wants to minimize the children's contact with their abusive father. Counsel for the victim spouse also can use the batterer's past actions against him, since they often are an insidious continuation of his predivorce abusive behaviors.⁸⁸ Some states prohibit the use of this factor in cases where one parent has engaged in domestic violence.⁸⁹

The former director of the National Council of Juvenile and Family Court Judges, who for many years presented trainings for family court judges, summarizes the issue:

The interplay of the domestic violence factor with the "friendly parent" factor seems to give the courts the most difficulty. The typical statute tells them to look with favor on the parent more likely to cooperate with the other in decision making concerning the children and in making them accessible for visitation. Where there has been domestic violence, the perpetrator is likely to favor custody arrangements that offer the parents the fewest restrictions on access to the children and to each other. By contrast, the victim parent will naturally favor any arrangement that calls for the least possible contact between the two adults and that best protects the children from the opportunity for the abuser to manipulate or harm them further. Given the demands of their dockets and the complicated nature of these cases, it is often difficult for courts, particularly without considerable training and experience in domestic violence, to sort all of

87. See, e.g., ARIZ. REV. STAT. ANN. § 25-403(A)(6); KAN. STAT. ANN. § 23-3203 (f) (2012); FLA. STAT. ANN. § 61.13(3)(a); UTAH CODE ANN. § 30-3-10.2(2)(c).

88. BANCROFT, SILVERMAN & RITCHIE, *supra*, note 7, at 33-42 (describing batterer's behaviors and parenting techniques) and 57-66 (describing the dynamic); Jaffe & Geffner, *supra* note 28, at 378.

89. See, e.g., ALASKA STAT. § 25.24.150(c)(6); IOWA CODE ANN. § 598.41(); MINN. STAT. § 518.17; MONT. CODE ANN. § 40-4-212; N.J. STAT. § 9:2-4(c); OR. REV. STAT. § 107.137(a)(f); VA. STAT. § 20-124.3(6).

this out. *The risk is that judges may see the abuser's manipulative behavior as cooperation and the victim's protective behavior as hostility.*⁹⁰

V. Implementing Safety First

For many years, most mental-health professionals have told lawyers and judges involved in child custody litigation that children must have postdivorce relationships with even the most abusive fathers.⁹¹ They do so despite research that has shown, to an increasing degree over the past thirty years, that children are harmed by exposure to violence between their parents and that children in violent homes are often themselves physically abused.⁹² These men, who use coercive control as their dynamic, perpetrate the majority of domestic violence in the United States and are likely to carry the abusive pattern into new relationships.⁹³ The atmosphere in their homes is aptly described as the following:

Children growing up in spouse abusive families live in a type of war zone. Sometimes they feel they can predict the "attacks" and sometimes the aggression is unexpected. This leaves them with a sense of danger and uncertainty.⁹⁴

Changing the view that both parents should have continuing contact with the child in all situations is the first step. As one psychologist stated:

It is safer for the child to be placed in the custody of a parent who may be exaggerating a violence allegation than to be placed in the custody of a potentially abusive parent.⁹⁵

Family judges should memorize that statement. Among the options the judge can consider in dealing with a violent parent are no contact, supervised visitation, and other less restrictive forms of contact between father and child.⁹⁶ Some commentators have recommended supervised visitation for some of those cases.⁹⁷ Research has shown that some children so victimized are better off having no contact at all with fathers who abused

90. Dunford Jackson, *supra* note 68, at 190.

91. Jaffe & Crooks, *Assessing the Best Interests*, *supra* note 58, at 59, 65.

92. BANCROFT, SILVERMAN, & RITCHIE, *supra* note 7; *see also* George W. Holden, Joshua D. Stein et al., *Parenting Behaviors and Beliefs of Battered Women*, in CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH, AND APPLIED ISSUES 289 (1998).

93. *Id.*

94. Rossman & Ho, *supra* note 69.

95. William G. Austin, *Assessing Credibility in Allegations of Marital Violence in the High-Conflict Child Custody Case*, 38 FAM. & CONCIL. CTS. REV. 462 (2005).

96. Jaffe, Crooks & Bala, *Framework*, *supra* note 85 (recommending less restrictive options for cases in which the violence was not of the coercive control variety).

97. *See* Jennifer L. Hardesty & Jacquelyn C. Campbell, *Safety Planning for Abused Women and Their Children*, in PROTECTING CHILDREN FROM DOMESTIC VIOLENCE; STRATEGIES FOR COMMUNITY INTERVENTION 89 (2004).

them.⁹⁸ Even those who do not advocate a no-contact option list it as one available to courts dealing with violent parents.⁹⁹

Another option is to award primary physical custody to the nonabusive parent and less time to the abusive parent. While this results in the children's spending less time with the abusive parent, it does not eliminate some significant safety concerns.¹⁰⁰ Will either of those methods protect the most vulnerable members of separating families? As discussed earlier, male batterers are unlikely to change their coercive and abusive behaviors simply because their relationships end. Such men are also much more likely than other men to directly inflict physical and sexual abuse on children in their care.¹⁰¹

Some researchers contend that "children benefit from less, rather than more," contact with abusive fathers.¹⁰² Research published in the last two decades has provided the factual basis to enable the court to decide on appropriate rulings where intractable and severely abusive fathers are involved. Psychologists are beginning to research the outcomes of particular visitation arrangements in the context of domestic violence:

For example, a recent study looking at behavioral and emotional outcomes with preschool-aged children following separation in the context of domestic violence identified a potential catch-22. On the one hand, children who did not see their fathers at all were more likely to have internalizing problems independent of the extent of the violence they had witnessed. On the other hand, children who did see their fathers exhibited externalizing behavior problems, predicted in part by the extent of the violence experienced by their mothers. *Overall, the effect size of children's problems if they had been exposed to severe violence was larger than the negative effects of being deprived of contact with their father.*¹⁰³

Experience shows that psychologists, custody evaluators, judges and custody lawyers may be choosing the more harmful alternative for children of an abusive father:

98. A. M. Bailey, *Restricting Contact with Toxic Fathers*, 2 (3) *FAM. & INTIMATE PARTNER VIOLENCE Q.* 225 (Win. 2010).

99. Jaffe & Crooks, *supra* note 58.

100. Peter G. Jaffe, Samatha E. Poisson, & Alison Cunningham, *Domestic Violence and High-Conflict Divorce: Developing a New Generation of Research for Children*, in *DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN*, *supra* note 12, at 190.

101. Melanie Shepard, *Child-Visiting and Domestic Abuse*, 71 *CHILD WELFARE* 357 (1992); Oliver J. Williams, Jacquelyn L. Boggess, & Janet Carter, *Fatherhood and Domestic Violence: Exploring the Role of Men Who Batter in the Lives of Their Children*, in *DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN*, *supra* note 12, at 157, 176; Jaffe, Crooks & Bala, *supra* note 85, at 192.

102. Carolyn Y. Tubbs & Oliver J. Williams, *Shared Parenting After Abuse*, in *PARENTING BY MEN WHO BATTER*, *supra* note 34, at 41.

103. Jaffe & Crooks, *supra* note 58, at 59 (emphasis added).

A recent review of the literature on father visitation examined 38 studies published since 1990 . . . [this review] did not yield strong support for the relationship between father visitation and child well-being. Only 42% of the studies reviewed showed that father contact predicted any aspect of child well-being.

Some studies indicate that despite the feelings of loss and anger children experience over the termination of contact with their fathers, this may be the appropriate decision when considering the overall outcomes for the children.¹⁰⁴

The authors discuss a study that found (based on mothers' reports) that frequent contact with fathers did not benefit children more than infrequent contact.¹⁰⁵ Children who had frequent visits with their fathers, but whose mothers were dissatisfied with the visitation scheme, were *less well-adjusted and had lower indices of global well-being*. Another study involving a statistically significant sample of children stated:

It is apparent that these results provide little, if any, support for the hypothesis that paternal contact is beneficial to the child. . . . an examination of the coefficients . . . revealed an implausible pattern: *children who had not seen their father in five years did significantly better than those who spent between 0 and 13 days with their father in the previous year*. . . . In sum, we find that paternal contact is unrelated to a variety of well-being measures in the 1981 data. . . . *Apparently, children in maritally disrupted families were not doing better if they saw their fathers more regularly than if they saw them occasionally or not at all.*¹⁰⁶

The authors also state that their data indicated that children's relationships with their mothers *are* important to the children's well-being. The sample did not focus on children whose parents had experienced domestic violence:

The general absence of effects of paternal participation on children's well-being is surprising in view of the widespread belief that children benefit from maintaining contact with their fathers. In addition, the effects of father's participation did not depend on the sex of the child or the presence of a stepfather.

The policy implications of findings reported here are unsettling because they clash with prevailing practice that attempts to increase paternal involvement. On the basis of our study, we see no strong evidence that children will benefit from the judicial or legislative interventions that have been designed to promote paternal participation, apart from providing economic support.¹⁰⁷

104. Carla Stover et al., *The Effects of Father Visitation on Preschool-Aged Witnesses of Domestic Violence*, 18 J. INTERPERSONAL VIOLENCE 1149 (2003).

105. Valarie King & Holly E. Heard, *Nonresident Father Visitation, Parental Conflict, and Mother's Satisfaction: What's Best for Child Well-Being?*, 61 J. MARRIAGE & FAM. 385 (1999).

106. Frank F. Furstenberg Jr., S. Phillip Morgan, & Paul D. Allison, *Paternal Participation and Children's Well-Being after Marital Dissolution*, 52 AM. SOC. REV. 695 (1987) (emphasis added).

107. *Id.*

Although the authors speculate that mothers may benefit from fathers' sharing of child care duties and that fathers themselves might receive emotional benefit from contact, the data only suggested that continued contact with fathers *does not result in uniformly positive outcomes for children*. Their conclusion, published *two decades* ago:

This topic surely merits more careful attention by researchers and policy makers. It is disconcerting to discover weak evidence for an almost commonplace assumption in popular and professional thinking—that children in disrupted families will do better when they maintain frequent contact with their fathers. In the absence of better and more convincing evidence, policy makers rely on conventional wisdom that is, unfortunately, an unreliable guide for social reform.¹⁰⁸

Unfortunately, this topic has received little attention in the intervening years. One study dealt with the interrelationship of father visitation, mothers' satisfaction with the visitation schedule, and how those matters affected children's well-being. They reported overall satisfaction with father-child contacts, *except in those cases where the mother was unhappy with continued involvement by the father*. As previous research based on national surveys had found, these researchers concluded that not only was father visitation not positively associated with child well-being, but also that in families in which mothers are dissatisfied with high levels of father contact, children appear to be the worst off.¹⁰⁹

The study found that the presence of conflict did not alter those results. The portion of these cases involving "conflict" was a small minority of cases. It is likely, however, that a substantial portion of them involved abuse, since there is only limited knowledge and skill on the part of many professionals who try to detect the battering dynamic by interviewing victims.¹¹⁰ In fact, women are often traumatized by the physical abuse they encounter in their relationships, leaving them reluctant to disclose to others the facts of the abuse. One could therefore speculate that *many* cases that the authors believed were nonviolent actually did involve coercive control.¹¹¹

The adverse effects some researchers wrote about before 1987 were bland compared to what is now known about how exposure to domestic violence affects children. Children are affected directly and indirectly.¹¹²

108. *Id.*

109. King & Heard, *supra* note 105.

110. Jaffe & Crooks, *Assessing the Best Interests*, *supra* note 58, at 50, 50–51.

111. Jeffrey L. Edleson, *Should Childhood Exposure to Adult Domestic Violence Be Defined as Child Maltreatment Under the Law?* in PROTECTING CHILDREN FROM DOMESTIC VIOLENCE, *supra* note 68, at 15.

112. George W. Holden, *Introduction: The Development of Research into Another Consequence of Family Violence*, in CHILDREN EXPOSED TO MARITAL VIOLENCE, *supra* note 28, at 6–10; Jaffe & Geffner, *supra* note 28, at 374–75.

As noted earlier in Section II, neuroscientists have found that very young children who are traumatized by seeing their father assaulting their mother may undergo *physiological changes* that can have lifelong effects on their behavior.¹¹³

Women tend to be at a higher risk for more extreme abuse following separation, especially in connection with visitation, so the harm to children does not end with divorce or separation of the parents. The severity of abuse during the relationship is related to the adverse effects the children experience after separation, and exposure of the mother to continuing physical or mental abuse resulted in *increased* behavioral problems in the children.¹¹⁴

Because professionals who deal with child custody disputes have often failed to make safe decisions regarding placement, particularly placement of the children of controlling and abusive men, an entire new generation of children who were exposed to domestic violence in their families has been sentenced to years of further mental abuse and, in many cases, physical abuse, *where a safer alternative was known all along*: that is, the elimination of most, if not all, contact between the battering parent, often the father, and his child.

If lawyers educate the judges who make child custody decisions about the dangers awaiting children of controlling and abusive men, as well as the fact that children *may not even be further harmed by removing the abusive parent from their lives entirely*, those judges would truly be free to focus on *the safest* alternatives (if there are any) for children after parents end a violent relationship.¹¹⁵ That safe solution for children could even include potential elimination of all contact between father and child in extreme cases where it is appropriate.

VI. Conclusion

Many courts appropriately see stability in children's lives as being in their best interests, yet readily destroy the stable relationship a child has with a primary caregiver for the purpose of trying to turn an inattentive father into a parent who will be a good parent only half of the time. One advocate has stated:

The entire family court system lags far behind the rest of the justice and service system in its understanding of and response to abuse, clinging to attitudes and practices that have been discredited in policy, child welfare, medical, crim-

113. NATIONAL SCIENTIFIC COUNCIL ON THE DEVELOPING CHILD, EXCESSIVE STRESS DISRUPTS THE ARCHITECTURE OF THE DEVELOPING BRAIN: WORKING PAPER NO. 3 (2005).

114. Stover et al., *supra* note 104, at 1160.

115. Meier, *supra* note 56, at 716.

inal justice, mental health, and social welfare settings.¹¹⁶

It is time for family courts that are charged with meeting the best interests of children to accept and implement the research that demonstrates that the *primary* interest of all children is to live a safe existence in the care of a loving and nonviolent parent. The judges doing this work need not wait for legislative action (in nearly all states) to change the list of criteria, as they can, by judicial decision, find that all children's needs will always involve being safe. The bottom line is that "Children benefit less, rather than more, from contact with abusive or neglectful parents."¹¹⁷ Adoption of the process proposed by the experts at the Wingspread 2007 conference will provide a positive benefit to society by reducing the number of adults who have adopted violent behaviors in response to their childhood exposure to abuse.

116. Evan Stark, *Rethinking Custody Evaluation in Cases Involving Domestic Violence*, 6 J. CHILD CUSTODY 287, 315 (2009).

117. Carolyn Y. Tubbs & Oliver J. Williams, *Shared Parenting After Abuse: Battered Mothers' Perspectives on Parenting After Dissolution of a Relationship*, in PARENTING BY MEN WHO BATTER, *supra* note 34, at 41 (citations omitted).

212 West 9th Street
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March 28, 2016

Representative Cathy Munoz
Alaska State Legislature
Juneau, Alaska

Re: HB 334

Dear Representative Munoz,

I have been an attorney in Alaska since 1979. I support HB 334 as a helpful correction to the current law's unintended consequence of depriving some very good fathers of meaningful contact with their children.

Sincerely,



Mary Alice Mckeen



Comments Regarding HB 334 Before the HSS Committee.
March 28, 2016

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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 3 are 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

SITKANS AGAINST FAMILY VIOLENCE

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March 28, 2016

Members of the House Health and Social Services Committee
Juneau, Alaska

Dear Committee Members,

I am writing in opposition of HB334. SAFV has been advocating for survivors of domestic violence since 1984. We have concerns with language in HB334 changing requiring a history of perpetuating domestic violence to invoke rebuttable presumption to requiring a criminal conviction of domestic violence.

Often times, victims do not press criminal charges for various reasons but will instead get a civil protective order. Currently judges can review civil history in order to make an informed decision with regards to custody agreements involving domestic violence. This is also important because domestic violence criminal cases are often plead down. With the current language, these pleas can still be considered by judges in custody cases.

Children who are exposed to domestic violence in their home are at an increased risk of physical injury and can have a severe impact both emotionally and to their mental health. In addition, there is an increased risk for the children exposed to domestic violence to be in a violent relationship as an adult.

Please protect Alaskan children from the damaging effects of domestic violence by considering our input on HB 334. Thank you for your time.

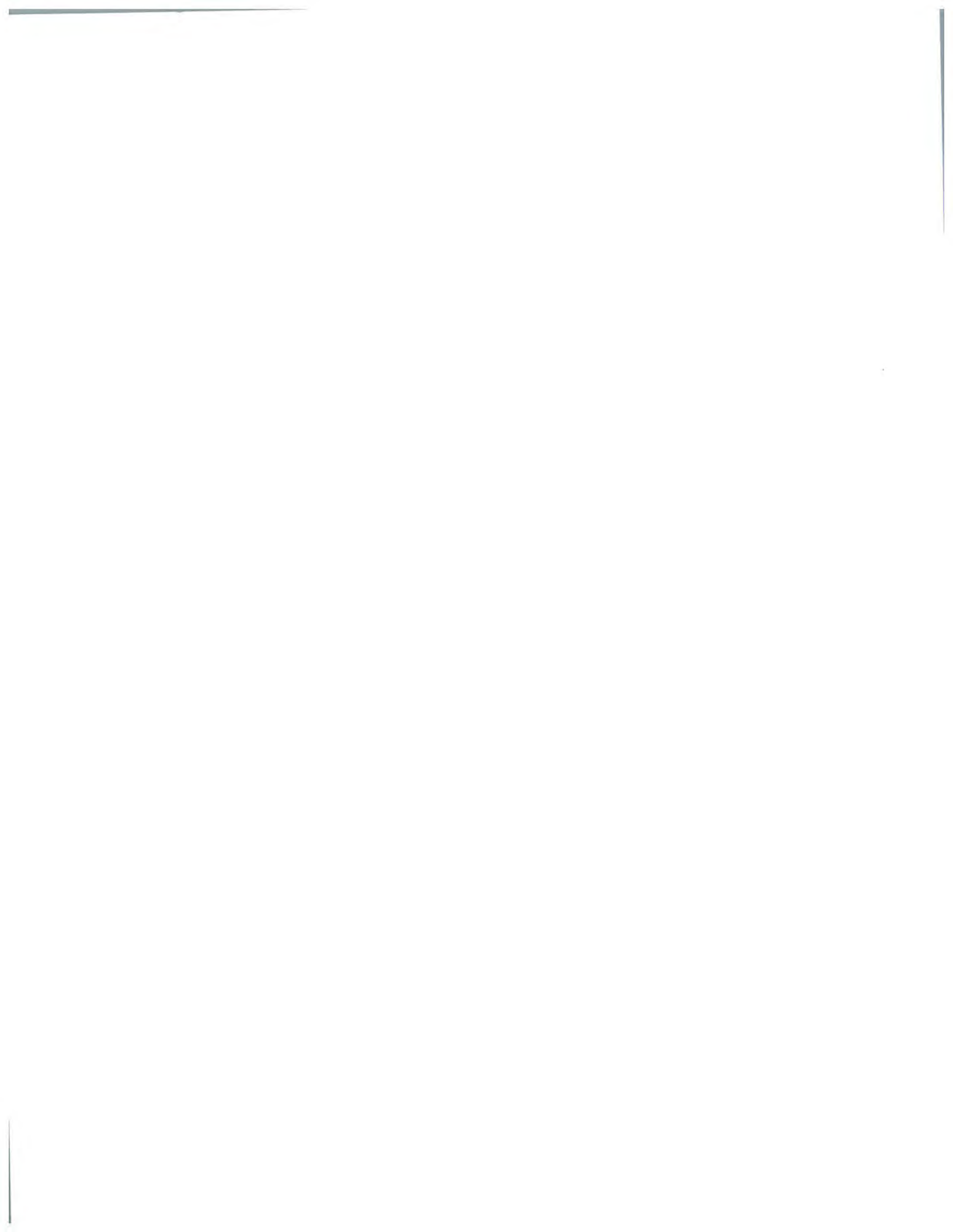
Sincerely,



Michelle Mahoney, Acting Director
Sitkans Against Family Violence



Member of the Alaska Network on Domestic Violence and Sexual Assault
United Way Member Agency



Taneeka Hansen

From: Allison Mendel <AMendel@mendelcolbert.com>
Sent: Tuesday, March 22, 2016 12:05 PM
To: Rep. Neal Foster; Rep. Paul Seaton; Rep. Liz Vazquez; Rep. Louise Stutes;
Representative.Dave.Telerico@akleg.gov; Representative.Adam.Woll@akleg.gov
Subject: Opposition to HB 334

I am an Anchorage domestic relations lawyer with 33 years' experience in the courts of this state. I represent both mothers and fathers in divorce and custody cases. The proposed revision to the child custody statutes are misguided, unworkable, and harmful to children. Requiring evidence of a conviction before a parent is considered to have a "history of domestic violence" is wrongheaded.

Very few people are ever convicted of domestic violence, compared to its prevalence in the community. It makes no difference to the children who are the helpless victims of family violence, whether the perpetrator was ever charged or convicted. As everyone knows, very few victims even seek criminal enforcement, due to the dynamics of domestic violence and the victims' inability or reluctance to seek that kind of help. Further, the criminal justice system is not equipped to bring more DV prosecutions, nor is the criminal justice system in place to control or influence private custody cases.

The custody statute should remain as it is. The proposed change would effectively eliminate any real consequences of domestic violence by a parent in custody cases. This would not be in the best interests of children, but would place them at risk of further danger. This is not a way to "choose respect" or to reduce or eliminate domestic violence. It effectively favors perpetrators over children. Please oppose this bill.

Allison Mendel

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