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11198 SENATE JUDICIARY

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 385(JUD)
(H) Publish Date: 3/3/04

Revision Date/Time (Note if correction):
Dept. Affected:

Title: Awarding Child Custody
BRU: Alaska Court System
Component: Trial Courts

Sponsor: Representative McGuire
Requester:
Component No.:

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The court system does not anticipate any fiscal impact from the passage of HB 385.

Prepared by: Doug Wooliver Administrative Attorney
Phone 463-4750
Division: Alaska Court System
Date/Time 2/25/04 4:33 PM

Approved by: Stephanie Cole Administrative Director by Doug Wooliver
Date 2/25/2004
Agency: Alaska Court System

(Revised 9/2003 OMB)

National Conference of State Legislatures

LEGISBRIEF

BRIEFING PAPERS ON THE IMPORTANT ISSUES OF THE DAY

AUG./SEPT. 2003 VOL. 11, NO. 36

When Children Witness Domestic Violence

By Stephanie Walton

Children exposed to violence at home also are more likely to become perpetrators or victims of domestic abuse as adults.

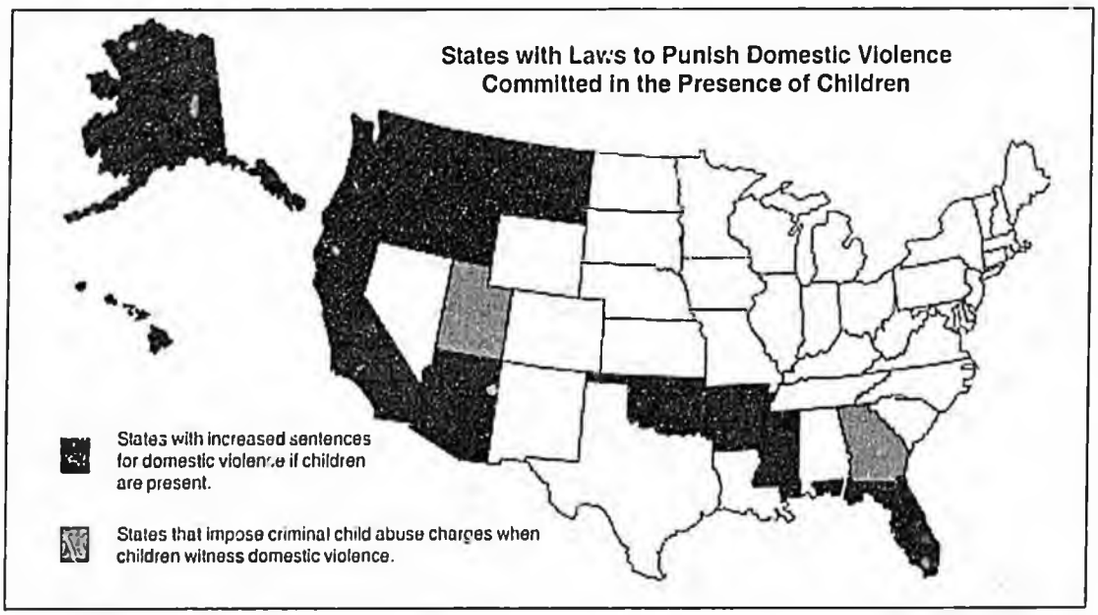
In homes where one partner abuses the other, children also are more likely to be abused. Hundreds of studies have documented the negative effects for children exposed to violence. Even when they aren't physically abused, they can show symptoms of trauma, which include:

- Increased aggression.
- Depression, anxiety and fear.
- Lower scores on verbal, motor and cognitive skills tests.
- Physical symptoms, including headaches, stomach aches, ulcers and asthma.

Children exposed to violence at home also are more likely to become perpetrators or victims of domestic abuse as adults, according to the American Psychological Association.

State Action

At least 12 states allow or mandate increased penalties for a perpetrator if a child witnessed the domestic violence. Most of these laws allow courts to increase sentences, while a few require stiffer sentences. Oklahoma law, for example, requires the minimum penalty for domestic violence to be increased to a six-month sentence if a child is present. There is a one-year sentence for a second or subsequent violation in the presence of a child. In Oregon, a fourth degree domestic violence assault is raised from a Class A misdemeanor to a Class C felony if a child is present. Delaware, Georgia and Utah can charge defendants with a separate crime of child abuse when children witness a violent episode.



In most states, these laws are only a few years old, but their effects are already apparent. In Multnomah County, Ore., felony domestic violence charges rose nearly 150 percent after the stricter sentencing law was passed. Prosecutors in Georgia and Utah report they use the child abuse charges as additional "bargaining chips," leading to more convictions. Law enforcement officers in these states also are more likely to note in their crime reports whether children were present during a domestic violence incident. In addition, prosecutors are more likely to report the affected families to child welfare agencies, even though the laws don't require it.

Advantages and Disadvantages. Proponents of stiffer laws argue that criminal laws for violence in the presence of a child increase batterer accountability. In some states children become eligible for crime victim services and compensation. The laws also increase public awareness of the harm on children. Also, prosecutors have another way to pursue charges if the adult victim doesn't cooperate. Finally, a study commissioned by the National Institute of Justice suggests that such laws educate prosecutors, police and the courts about the harmful effects on children.

Proponents of stiffer laws argue that they increase batterer accountability.

Opponents argue that prosecutors who use these laws as bargaining chips trivialize the real damage inflicted on children. They also note that since prosecutors are more likely to report families to child welfare agencies in states with these laws, workers need to be trained to understand the dynamics of family violence. Without training, they may hold victims responsible for exposing children to violence and remove them from the family. This can further traumatize both the children and the victim parent—although in some instances, the removal may be warranted. Children also may be required to testify against the batterer in court. This can frighten and confuse them, especially if the batterer is a parent. Finally, opponents say these laws increase the burden on the criminal justice system when state budgets already are severely strained.

Opponetents argue that prosecutors may hold victims responsible for exposing children to violence.

Other Approaches. Some states have taken different approaches. Alaska law includes witnessing domestic violence as civil child maltreatment, and authorizes child welfare intervention. Advocates claim, however, that, in some cases, removing children penalizes the victim for the perpetrator's behavior. She may be held responsible for failing to protect her children. Child welfare agencies are removing children from homes even under more general "failure to protect" regulations.

Other states, including Alaska, focus efforts at the local level, providing cross-training for domestic violence workers, child welfare agencies, police officers, prosecutors, judges, probation officers and others who need to understand how witnessing domestic violence affects children. Localities in Colorado, Massachusetts and a number of other states place domestic violence advocates in child welfare offices to increase communication and understanding between the two systems.

Other states focus efforts at the local level.

It will take time to understand how states can best respond to help domestic violence victims and their children, but everyone agrees on the ultimate goal: keeping families safe.

Selected References

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I. INTRODUCTION

"Any time you go through a process of major social change, you have four stages of response. The first is anger; the second is retribution; the third is grudging acceptance. In the fourth stage, people all of a sudden get it . . . ."[1]

While this quote by Donna Lopiano is related to the acceptance of women in sports and the effect of Title IX, it could apply equally to the response of legislatures and courts to domestic violence over the last twenty-five years. Given the historical condonation of such violence by the U.S. legal system, we are indeed going through a process of major social change as we advocate for the same system to take a stand against domestic violence. In the custody arena, laws first allowing, then mandating that courts consider domestic abuse, and most recently creating presumptions against batterers as custodial parents, have met with very mixed results. While some states seem to have made this transition without significant problems, other states have seen a backlash in the courts' response to such presumptions.

This article will examine the effect of state statutes creating a rebuttable presumption against custody to batterers. Part II will trace the development of these presumption statutes, situating them within historical trends in custody law. Part III will describe the statutes, including how they vary. Part IV will examine how the presumption statutes are being implemented, including the backlash seen in some jurisdictions. Part V will propose solutions to problems with implementation of presumption statutes. These include legislative amendments; training for judges, attorneys, guardians ad litem, mediators, and evaluators; seeking clarification from appellate courts; funding for attorneys for indigent victims of

1. Bill Blum, *Fighting Over Title IX*, CAL. LAW. Feb. 2001, at 90 (quoting Donna Lopiano, Executive Director, Women's Sports Foundation).

domestic violence; and community organizing. The conclusion, Part VI, notes that while the passage of such statutes is not a "quick fix" to the fundamental problems presented by these cases, the process of enactment and implementation of the presumption statutes is worthwhile, as another step on the long road toward the elimination of domestic violence.

II. DEVELOPMENT OF REBUTTABLE PRESUMPTION STATUTES

A. *Historical Custody Standards*

Until the 1970s and the advent of no-fault divorce, abuse by one parent of the other was considered quite relevant to custody decisions throughout the United States, as this was evidence of the abuser's poor morals.[2] While the rate of divorce was low, victims of domestic violence were usually awarded custody of the parties' children.[3]

A significant change in custody decisions took place in the 1970s, as most U.S. states amended their divorce laws from fault-based divorce to no-fault divorce.[4] Under the new regime, domestic violence was no longer seen as relevant by divorce courts; judges were trained to look toward the future, not admit evidence of past misdeeds, and to consider the parents as generally equally qualified to be custodians of children.[5] Unless the children were physically harmed, what a husband did to his wife[6] was not seen as relevant to his ability to parent.[7]

No-fault divorce was generally hailed as a progressive move,

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2. Naomi R. Cahn, *Civil Images Of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1043 (1991).

3. *Id.*

4. *Id. See also* Note, *Developments in the Law: Legal Response to Domestic Violence, VI. Battered Women and Child Custody Decisionmaking*, 106 HARV. L. REV. 1597, 1597 (1993).

5. Lynne R. Kurtz, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB. L. REV. 1345, 1347 (1997).

6. While domestic violence can be committed by either sex, most domestic violence is committed by men against women. The U.S. Dept. of Justice reported in 1998 that a woman is seven to fourteen times more likely to be severely injured by an intimate than a man is. Patricia Tjaden & Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey*, NATIONAL INSTITUTE OF JUSTICE, *at* http://www.ncjrs.org/pdffiles/172837.pdf (last visited Oct. 3, 2001).

7. Cahn, *supra* note 2, at 1044; Kurtz, *supra* note 5, at 1347.

both by feminists and by fathers' rights groups.[8] Fathers' rights groups celebrated this as a move away from what they saw as gender bias, whereby mothers were allegedly awarded custody solely by virtue of their sex. However, the emphasis on no longer making findings of fault set the stage for courts refusing to consider domestic violence as a relevant factor in custody decisions. Domestic violence was not seen as affecting the best interests of the child unless the child was also physically abused.[9] And even though the overlap between partner abuse and physical child abuse is great,[10] courts often failed to acknowledge this connection in making custody decisions.[11]

B. Move To Allow, Then Require Courts To Consider Domestic Violence In Custody Decisions

By the 1980's, the domestic violence movement had become a vocal presence, and was developing some sophistication in terms of changing entrenched policies. Advocates began to call for legislators and courts to protect children from batterers.[12] Feminists stressed the harmful effects of exposure to domestic violence on children, and stated that it is not actually possible to be a violent husband and a good father.[13]

At the same time, there was a strong trend toward trying to keep fathers close to their children. Father's rights groups pushed for, and succeeded in getting, legislation stressing the importance of joint custody.[14] Families were no longer seen as "broken," but

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8. LENORE J. WEITZMAN, THE DIVORCE REVOLUTION (1985); MICHAEL WHEELER, NO-FAULT DIVORCE (1974); Erin R. Melnick, *Reaffirming No-Fault Divorce: Supplementing Formal Equality with Substantive Change*, 75 IND. L. J. 711, 714 (2000); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 2 (1987). *See generally*, Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291 (1987); Howard Krom, *California's Divorce Law Reform: A Historical Analysis*, 1 PAC. L. J. 156 (1970).

9. Charlotte Germane et al., *Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence*, 1 WOMEN'S L.J. 175, 179 (1985).

10. PETER G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN, 20-21 (1990); *see infra* note 35 (citing social science literature about effects of domestic violence on children).

11. Germane et al., *supra* note 9.

12. *Id.*

13. *Id.*

14. Nancy K. Lemon, *Joint Custody as a Statutory Presumption: California's New Civil Code Sections 4600 and 4600.5*, 11 GOLDEN GATE U. L. REV. 485, 505, 510, 516 (1981); Germane et al., *supra* note 9, at 181-182.

instead were "in transition," with the goal being that both parents were still involved in their children's lives.[15] In some cases, courts gave fathers more time with their children than they had generally spent with them while living with the children's mother; in these cases the goal was not merely to continue the father/child relationship, but to try to strengthen it.

Legislatures started to respond to both these groups. Some states enacted laws stating that domestic violence could be taken into account in making custody decisions, but leaving the decision up to the judge whether or not to even admit such evidence.[16] Other states went further, actually mandating that judges consider domestic violence.[17]

A few states passed laws stating that perpetration of domestic violence was detrimental to children.[18] Others required that judges state their reasons for awarding custody to alleged or proven batterers on the record[19] or make findings of fact that joint custody is not detrimental to the children despite the violence, if joint custody were granted in a domestic violence case.[20]

Meanwhile, many states were also enacting laws allowing for or preferring joint custody of children. Some states created presumptions favoring joint custody if the parents agreed to it[21] or required judges to state their reasons for denying joint custody.[22]

In all too many cases, these two trends worked at cross-purposes. Given the high rates of domestic violence in the U.S.,[23] especially among divorcing couples,[24] there were many cases in

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15. Germane et al., *supra* note 9, at 181-82.

16. *See* Barbara J. Hart, *Custody and Visitation Decision-Making When There are Allegations of Domestic Violence, at* http://www.mincava.umn.edu/hart/telecon.htm.

17. *See, e.g.*, ALASKA STAT. § 25.20.090 (Michie 2000); OHIO REV. CODE ANN. § 3109.04 (West 2000).

18. The Family Violence Project of the Nat. Council of Juv. & Fam. Ct. Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L. Q. 199, 225-227 (1995) [hereinafter Family Violence Project].

19. *See, e.g.*, CAL. FAM. CODE § 3011 (West 1994), N.H. REV. STAT. ANN. § 458:17(II)(c) (1992).

20. *See, e.g.*, N.H. REV. STAT. ANN. § 458:17(II)(c) (1992); OHIO REV. CODE ANN. § 3109.04 (West 2000).

21. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-56a (1995); N.H. REV. STAT. ANN. § 458:17(II)(c)(1992); *see also* Lemon, *supra* note 14, at 500 (discussing the legislative history of the first joint custody statute in the U.S.).

22. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-56a (1995); N.H. REV. STAT. ANN. § 458:17(II)(c) (1992).

23. Tjaden & Thoennes, *supra* note 6.

24. Estimates of the incidence of wife-beating range from at least one in three marriages to up to one-half of all marriages. M. STRAUS ET AL., BEHIND CLOSED

which courts were presented with one parent arguing for joint custody and the other parent arguing that the history of domestic violence should preclude such a decision. Starting in 1991, some states resolved this conflict by enacting statutes creating a presumption against custody to batterers.[25]

III. INCREASING SUPPORT FOR ENACTMENT OF REBUTTABLE PRESUMPTIONS AGAINST CUSTODY TO BATTERERS

A. Policy Statements

There were several bases for this new trend. The first U.S. national policy statement supporting a rebuttable presumption in domestic violence cases was H. R. Congressional Resolution 172: "It is the sense of Congress that, for purposes of determining child custody, credible evidence of physical abuse of a spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse."[26] While Congress does not have the authority to tell states how to handle custody decisions, this Resolution was intended to encourage states to pass their own statutes establishing such presumptions.

In 1994, the National Council of Juvenile and Family Court Judges released the Model Code on Domestic and Family Violence.[27] This Code was developed in conjunction with legislators, the American Bar Association, the American Medical Association, domestic violence experts, prosecutors, and defense counsel over a period of three years.[28] Section 401 of the Model Code states:

In every proceeding where there is at issue a dispute as to

DOORS: VIOLENCE IN THE AMERICAN FAMILY 31 (1980); Eisenberg & Micklow, *The Assaulted Wife: 'Catch 22' Revisited*, 3 WOMEN'S RTS. L. REP. 138 (1977); Laurie Woods, *Litigation on Behalf of Battered Women*, 7 WOMEN'S RTS. L. REP. 39, 41 (1981). *See also* HOFF ET AL., INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW 3-15 (1982) (scope of wife battering and the extent of underreporting).

25. Family Violence Project, *supra* note 18, at 208.

26. H.R.J. Res. 172, 101st Cong. (1994) (sponsored by Rep. Constance Morella and passed unanimously on Oct. 25, 1990).

27. NAT. COUNCIL OF JUV. AND FAM. CT. JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE (1994), [hereinafter MODEL CODE].

28. Christine L. Bailey & Maureen Sheeran, *The Model Code on Domestic and Family Violence: A Call for Legislative Action and Community Response*, NEV. PUB. AFF. REV. 24 (Legis. Issues: 1995).

> the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.[29]

The American Bar Association (ABA) passed a resolution in August 1989 that joint custody is inappropriate in cases in which spouse abuse, child abuse, or parental kidnapping is likely to occur.[30] In 1994, the ABA published a report to its president suggesting the adoption of statutes creating a presumption against custody to batterers.[31] In July 2000 the ABA adopted new policy statements with respect to domestic violence and custody, and recommended that states and lawyers take action to provide for the safety of adult and child domestic violence victims during visitation and visitation exchanges.[32]

In 1996, the American Psychological Association also recommended that states adopt such statutes:

> 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.[33]

Similarly, the Uniform Adoption Act provides for terminating a father's rights if "the respondent has been convicted of a crime of violence or of violating a restraining or protective order, and the facts of the crime or violation and the respondent's behavior indicate that the respondent is unfit to maintain a relationship of

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29. MODEL CODE, *supra* note 28, § 410, at 33.

30. A.B.A. HOUSE OF DELEGATES, APPROVED RESOLUTIONS RELATED TO DOMESTIC VIOLENCE (1989); *see also* A.B.A. Model Joint Custody Statute, 15 FAM. L. REV. 1494, 1495 (1989) (requiring courts to consider domestic violence in making joint custody awards).

31. Howard Davidson, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE A.B.A. (1994).

32. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction, and Refining Support Issues*, 34 FAM. L.Q. 607, 626 (Winter, 2001). For content of new A.B.A. policies, see http://www.abanet.org (last visited Oct. 3, 2001).

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

parent and child with the minor . . . ."[34]

1. Social Science Literature

Another reason statutes establishing a presumption against custody to batterers were enacted was the growing body of social science literature showing the often severe and long-lasting effects of domestic violence on children.[35] This literature also argued that joint custody was contraindicated when there has been family violence.[36]

2. Mothers Losing Custody

Furthermore, studies and articles started to show that when fathers in general or batterers in particular fought for custody, they usually won.[37] There are also many cases in which mothers initially

34. UNIFORM ADOPTION ACT § 3-504 (1994).

35. ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN (E. Peled et al., eds., 1995); P.G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN (1990); D.A. 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); N.Z. Hilton, *Battered Women's Concerns About their Children Witnessing Wife Assault*, 7 J. INTERPERSONAL VIOLENCE 77 (1992); J.R. Johnston & L.E.G. Campbell, *Parent-child Relationships in Domestic Violence Families Disputing Custody*, 31 FAM. & CONCILIATION CTS. REV. 282, 282-83 (1993); M. Roy, *Children in the Crossfire*, HEALTH COMM. (1988); P.G. Jaffe et al., *Child Witnesses of Woman Abuse: How Can Schools Respond?*, 14 RESPONSE TO VICTIMIZATION OF WOMEN AND CHILDREN 12 (1992); D. G. Saunders, *Child Custody Decisions in Families Experiencing Wife Abuse*, 39 SOC. WORK 51 (1994).

36. L. Crites & D. Coker, *What Therapists See That Judges May Miss: A Unique Guide to Custody Decisions When Spouse Abuse is Charged*, JUDGES J. 9-13 (Spring, 1988); Germane et al., *supra* note 9; M. D. Pagelow, *Justice for Victims of Spouse Abuse in Divorce and Child Custody Cases*, 8 VIOLENCE & VICTIMS 69 (1993); Pauline Quirion, *Increased Protection for Children from Violent Homes: The Presumption Against Awarding Child Custody to a Batterer*, 16 MASS. FAM. L. J. 67 (1998); Saunders, *supra* note 35, at 56 (citing R. E. Emery and M. M. Wyer, *Divorce Mediation*, 42 AM. PSYCHOLOGIST 472 (1987)).

37. Pagelow, *supra* note 36 (citing R. Geffner & M. Pagelow, *Victims of Spouse Abuse, in* TREATMENT OF FAMILY VIOLENCE: A SOURCEBOOK 81-97 (R. T. Ammerman & M. Hersen, eds.) (1990)); L. A. Marks, *Mandatory Mediation of Family Law and Domestic Violence Cases*, NCADV VOICE, 18-22 (Winter, 1988); M. B. Liss & G. B. Stahly, *Domestic Violence and Child Custody, in* BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 175 (M. Hansen & M. Harway, eds., 1993); J. Zorza, *Protecting the Children: Custody Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113 (April 1996) (citing R. I. ABRAMS AND J. M. GREANEY, REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT [OF MASSACHUSETTS] 62-63 (1989) that stated fathers won in seventy percent of contested custody cases and noting that this report also cites similar findings from California and the entire nation); M. A. Mason & A. Quirk, *Are Mothers Losing Custody? Read My Lips: Trends*

or eventually lost custody due to their inability to get along with the fathers. In some of these, in which there were no allegations of partner abuse, the court first awarded joint custody, then found after awhile that this was unworkable due to continued conflict between the parents.[38]

In other cases, there was extensive evidence of partner abuse. The fact that a formerly battered mother and her former batterer are not able to co-parent effectively is not at all surprising. However, it is very unfortunate that many courts are still so unaware of how domestic violence dynamics enter into custody cases. One wonders why the court ever expected people in this situation to suddenly be able to cooperate.

An example of such a case is found in *In re Marriage of Devilbiss*.[39] In that case, the evidence included fifteen police reports, testimony by the daughter that the father used to hit the mother, and allegations that he also choked the daughter.[40] However, the court ignored this evidence in its order changing the joint custody order to "rotating custody."[41] Under this arrangement, the daughter was ordered to live with her mother for seven months each year and with her father for five months.[42] The court noted that the parents had not been able to cooperate as required by the joint custody order.[43] Another example is found in

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in Judicial Decision-Making in Custody Disputes—1920, 1960, 1990, and 1995, 31 FAM. L. Q. 215 (1997) (citing a study finding that fathers won in sixty-three percent of contested custody cases, Lisa Genasci, *Increasingly, Working Mothers Lose in Custody Fights*, L.A. TIMES, January 20, 1995, at D8); Mary Lynne Vellinga, *Custody Laws Under Fire: Parents Who Batter Often Allowed to Retain Joint Care*, SACRAMENTO BEE, March 23, 1997, at A1.

38. *See, e.g., In re* Marriage of Cobb, 988 P.2d 272, 273 (Kan. Ct. App. 1999) (court briefly mentions without comment allegations that father abused child, then changed joint custody award to sole custody to father due to parents' inability to co-parent); Brown v. Brown, 19 S.W.3d 717, 722-23 (Mo. Ct. App. 2000) (without any allegations of abuse, the court modified the joint custody arrangement to sole custody to the father because of the mother's unwillingness to co-parent and that the father is best suited to make decisions in the best interests of the child); Thomas v. Thomas, 991 P.2d 7, 10 (N.M. Ct. App. 1999) (noting no allegations of abuse, the court changed joint custody to sole to father due to parents' inability to co-parent).

39. 719 N.E.2d 375 (Ill. App. Ct. 1999).

40. *Id.* at 378-80.

41. *Id.* at 383.

42. *Id.* at 380 (affirming the trial court's ruling that the daughter live with the father from the first Saturday after the end of the school year to the first Saturday of November).

43. *Id.* at 385.

Canty v. Canty,[44] in which the trial court modified the joint legal and split physical custody award to sole physical custody with the father, in spite of his admitting that he had committed domestic violence on the mother.[45] The appellate court upheld this order, noting that the evidence of domestic violence was merely one factor in the best interests analysis.[46]

In all too many cases, batterers are in effect using the family courts to re-victimize their victims.[47] Instead of preventing this, courts sometimes collude with this behavior by awarding the batterer joint custody, sole custody, or extensive unsupervised visitation. While examining appellate cases decided in states without such a presumption or before the enactment of the presumption is beyond the scope of this article, it is noteworthy that in many such cases judges clearly ignored extensive histories of domestic violence in making custody decisions.[48]

IV. DESCRIPTION OF STATUTES ESTABLISHING PRESUMPTIONS AGAINST CUSTODY TO BATTERERS

A. *Overview*

In response to the growing body of policy statements, studies, articles and cases, states started to adopt statutes establishing a rebuttable presumption against custody to batterers.[49] As of January 2001, there were sixteen states plus the District of

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44. 874 P.2d 1000 (Ariz. Ct. App. 1994).

45. *Id.* at 1005.

46. Arizona later amended its custody statute to provide that domestic violence created a presumption against custody to the batterer. ARIZ. REV. STAT. § 25-403 (2000).

47. This problem is described at length in Leigh Goodmark, *From Property to Personhood: What the Legal System Should do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237 (1999). *See also*, Quirion, *supra* note 36, at 67.

48. See cases described in Goodmark, *supra* note 47, at 254-75. *See also*, NANCY K. D. LEMON, DOMESTIC VIOLENCE & CHILDREN: RESOLVING CUSTODY AND VISITATION DISPUTES, FAMILY VIOLENCE PREVENTION FUND, 39-40 (1995). *But see* Bruscato v. Bruscato, 593 So. 2d 838 (La. Ct. App. 1992) (remanding case for more thorough evaluation and retrial where batterer father was awarded sole custody even though rebuttable presumption was not yet in effect).

49. For an argument in favor of the adoption of such a presumption in Massachusetts, see Pauline Quirion et al., *Commentary: Protecting Children Exposed To Domestic Violence In Contested Custody And Visitation Litigation*, 6 B.U. PUB. INT. L.J. 501 (1997). A similar argument in New York is found in Kurtz, *supra* note 6, at 1346.

Columbia which had adopted such statutes.[50] In the summer of

50. These included Alabama, Arizona, California, Delaware, District of Columbia, Florida, Hawaii, Idaho, Iowa, Louisiana, Massachusetts, Minnesota, Nevada, North Dakota, Oklahoma, Oregon, and South Dakota. In Alabama, there exists a rebuttable presumption that it is detrimental to child and not in best interest of child to be placed in sole custody, joint legal custody, or joint physical custody when court determines that domestic violence has occurred. ALA. CODE § 30-3-131 (1975). In addition, the state has a rebuttable presumption that it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic or family violence. ALA. CODE § 30-3-133 (1975). The state of Arizona makes it a rebuttable presumption that an award of custody to the parent who committed the act of domestic violence is contrary to the child's best interests, if the court determines that a parent has committed an act of domestic violence against the other parent; however, such presumption does not apply if both parents have committed an act of domestic violence. ARIZ. REV. STAT. § 25-403 (2000). California provides that a rebuttable presumption exists against sole or joint physical or legal custody if the court finds that a party perpetrated domestic violence. CAL. FAM. CODE § 3044 (West Supp. 2001). The statute allows that this presumption may be rebutted by a preponderance of the evidence. *Id.* The statute identifies factors to overcome the presumption. *Id.* In Delaware, there is a rebuttable presumption that no perpetrator of domestic violence shall be awarded sole or joint custody and a rebuttable presumption that no child shall primarily reside with perpetrator of domestic violence. DEL. CODE ANN. tit. 13 § 705A (1999). This presumption is overcome by a preponderance of the evidence. *Id.* The statute identifies factors needed to overcome presumption. *Id.* Otherwise the presumption may be overcome only if a judicial officer finds extraordinary circumstances that warrant the rejection of the presumption. *Id.* The state of Florida has a rebuttable presumption of detriment to the child and against ordering shared parental responsibility, including visitation, residence of the child, and decisions made regarding the child, if there is evidence that a parent has been convicted of a felony of the third degree or higher involving domestic violence. FLA. STAT. ANN. § 61.13 (West 1997). Hawaii's rebuttable presumption statute provides that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody if the court determines that family violence has been committed by a parent. HAW. REV. STAT. ANN. § 571-46 (Michie 1999). In Iowa, rebuttable presumption exists against joint custody if the court finds a history of domestic abuse. IOWA CODE ANN. § 598-41 (West Supp. 2001). This finding, if not rebutted, outweighs any other factor in determining the award of custody. *Id.* Louisiana has a presumption against sole or joint custody if a parent has a history of perpetrating family violence. LA. REV. STAT. ANN. § 9:364 (West 2000). The court must find that that one incident of family violence resulted in serious bodily injury or more than one incident of family violence occurred before such a presumption can be applied. *Id.* Such a presumption may be overcome by a preponderance of the evidence. *Id.* This statute also identifies factors to overcome the presumption. *Id.* Massachusetts has a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody, or shared physical custody with the abusive parent if court finds, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred, which may be overcome by a preponderance of the evidence that such custody award is in the best interests of the child. MASS. GEN. LAWS ANN. chs. 208 § 31A, 209 § 38, 209C § 10 (West Supp. 2001). In Nevada, the statute provides that a rebuttable presumption that

2001, Texas passed legislation strengthening its statute, creating a rebuttable presumption against joint custody, sole custody, or unsupervised visitation in cases of child abuse, child neglect, or

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sole or joint custody with the perpetrator of domestic violence is not in the best interests of the child if court determines after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence. NEV. REV. STAT. ANN. § 125.480 (Michie Supp. 1999). The state also provides that there exists a rebuttable presumption that sole or joint custody of the child by the perpetrator of sexual assault is not in the best interest of the child if the person is convicted of sexual assault and the parties later divorce. NEV. REV. STAT. ANN. §125C.210 (Michie Supp. 1999). In addition, there exists a rebuttable presumption that sole or joint custody by the parent convicted of first degree murder of the other parent is not in the best interest of the child and also includes a rebuttable presumption that rights to visitation with the child by the parent convicted of first degree murder of the other parent are not in the best interest of the child and must not be granted if custody is not granted. NEV. REV. STAT. ANN. § 125C.220 (Michie Supp. 1999). There is a rebuttable presumption that sole or joint custody by the perpetrator of domestic violence is not in the best interest of the child, if after an evidentiary hearing the court finds by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence against the child, a parent, or any other person residing with the child. NEV. REV. STAT. ANN. § 125C.230 (Michie Supp. 1999). Nevada also provides a rebuttable presumption that custody with the perpetrator of domestic violence is not in the best interests of the child if court determines after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence. NEV. REV. STAT. ANN. § 432B.157 (Michie 2000). In North Dakota, there is a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody if the court finds credible evidence that domestic violence has occurred and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding. N.D. CENT. CODE § 14-09-06.2 (1999). This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent's participation as a custodial parent. *Id.* Oklahoma's rebuttable presumption statute provides that it is not in the best interests of the child to have custody, guardianship or unsupervised visitation granted to the abusive person if the occurrence of ongoing domestic abuse is established by clear and convincing evidence. OKLA. STAT. ANN. tit. 43 § 112.2, tit. 10 § 21.1 (West 2001). In Oregon, there exists a rebuttable presumption that it is not in the best interests and welfare of the child to award sole or joint custody to the parent who committed abuse. OR. REV. STAT. § 107.137 (1989). In South Dakota, there is a rebuttable presumption that awarding custody to the abusive parent is not in the best interests of the minor if the person has been convicted of domestic abuse or assault against a person, other than a person related by consanguinity, but not living in the same household. S.D. CODIFIED LAWS § 25-4-45.5 (Michie 1999). In addition, there is a rebuttable presumption that awarding custody or granting visitation to the parent convicted for the death of the other parent, excluding vehicular homicide, is not in the best interests of the minor. S.D. CODIFIED LAWS § 25-4-45.6 (Michie 1999).

partner abuse, including sexual abuse resulting in the birth of the child.[51] Additionally, at this point, three states have adopted presumptions against joint custody in domestic violence cases or considered the perpetration of domestic violence stronger than a factor, but do not actually state a presumption against awarding custody to the abusive parent.[52]

These twenty states plus the District of Columbia are a subgroup of the forty-eight jurisdictions that had adopted some type of legislation regarding domestic violence as a custody factor by the beginning of 2001.[53] The only states without any statute discussing this issue as of that date were Connecticut, Mississippi, and Utah.[54]

The presumption statutes vary greatly, in terms of 1) whether the presumption applies to all types of custody or only to joint custody; 2) how domestic violence is defined, that is what type of evidence is required to trigger the presumption; 3) what evidentiary standard is required to trigger the presumption; 4) what type of evidence is required to rebut the presumption; and 5) what evidentiary standard is required to rebut the presumption. They also vary in terms of what the court is to do if both parents appear to have been abusive, and what standard should be applied if the presumption is found inapplicable.

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51. *See* Tex. Sess. Law Serv. 586 (Vernon) (amending TEX. FAM. CODE ANN. § 153.004 (Vernon 1996)). *See also* Steve McGonigle, *'Girls' Slayings Inspire Bill: Unsupervised Visits Would Require Judge's Approval*, THE DALLAS MORNING NEWS, May 26, 2001, *available at* http://www.dallasnews.com/metro/stories/377451_battaglia26me.html (last visited Sept. 7, 2001).

52. These included Colorado, Washington, and Wisconsin. In Colorado, if the court makes a finding of fact that domestic violence has occurred, then it shall not be in the bests interest of the child to allocate mutual decision-making responsibility over the objection of the other party or the child's representative, unless the court finds that the parties can make shared decisions about their children without physical confrontation and that places the abused party or child in danger. *See* COLO. REV. STAT. ANN. § 14-10-124 (1.5)(b)(v) (West 1997). In the state of Washington, a parent's residential time with child will be limited if there exists a history of acts of domestic violence or assault/sexual assault "which causes grievous bodily harm or fear of such harm." WASH. REV. CODE ANN. § 26.09.191(2)(a)(ii)-(iii) (West 1997). In Wisconsin, a rebuttable presumption exists that the parents will not be able to cooperate in future decision-making when domestic violence is present. *See* WIS. STAT. ANN. § 767.24(2)(b)-(c) (West 1993). Pennsylvania also gives great weight to the perpetration of domestic violence or sexual assault by requiring successful completion of a batterer's treatment program if the abuser is convicted of certain crimes. *See* 23 PA. CONS. STAT. ANN. § 5303 (West 1991).

53. Elrod & Spector, *supra* note 32, at 613-14.

54. *Id.*

B. Presumption Applicable Only to Joint Custody

Some presumption statutes apply only to decisions regarding joint custody. In a few of these states, the presumption against joint custody to the abuser is coupled with a presumption favoring joint custody in the absence of abuse.[55] The District of Columbia Code provides that there is a rebuttable presumption that joint custody is not in the best interest of the child if the court finds by a preponderance of the evidence that an intra-family offense has occurred.[56] It also provides for a rebuttable presumption favoring joint custody unless the court finds by a preponderance of the evidence that an intra-family offense has occurred.[57] Similarly, section 32-717B of the Idaho Code states that there is a presumption that joint custody is not in the best interests of a minor child if the court finds that one of the parents is a habitual perpetrator of domestic violence.[58] It also contains a presumption that joint custody is in the best interest of the child absent a preponderance of the evidence to the contrary.[59] This type of provision is not very beneficial for victims of domestic violence, since even if the presumption against joint custody is rebutted through evidence of abuse, the victimized parent must still prove to the court that it is in the best interests of the child to be placed with him or her rather than with the abusive parent.

A particularly problematic statute is found in Minnesota, which contains a similar provision, but applicable only to joint legal custody.[60] Minnesota Statute section 518.17 includes a rebuttable presumption that joint legal custody is not in the best interests of the child if domestic abuse has occurred between the parents.[61] However, the same code section states that there is also a rebuttable presumption that joint legal custody, if requested by either or both parties, is in the best interests of the child.[62] Clearly there will be many cases in which these two policies conflict, especially when the abusive parent can trigger the presumption favoring joint legal

55. *See, e.g.*, D.C. CODE ANN. §§ 16-119(a)(5), 16-914(a)(2) (1997); IDAHO CODE § 32-717 B (Michie 1996).
56. D.C. CODE ANN. §§ 16-119(a)(5), 16-914(a)(2) (1997).
57. *Id.*
58. *See* IDAHO CODE § 32-717 B (5) (Michie 1996).
59. *See id.* § 32-717 B (4).
60. *See* MINN. STAT. § 518.17, subd. 2(d) (2000).
61. *Id.* The statute does not state what evidence rebuts the presumption. *Id.*
62. *Id.* New Hampshire law provides a similar provision. *See* N.H. REV. STAT. ANN. § 458:17(II)(e)(1992) (amended by 2001 N.H. Laws 102).

custody merely by requesting it. Case law demonstrating how courts have resolved this dilemma will be discussed below. On the other hand, the Minnesota statute does state that if the court awards joint custody, it must make detailed findings of fact on each of the best interest standards.[63]

C. *Presumption Applicable to Sole or Joint Custody*

Most of the presumption states have no contrary presumption favoring joint custody in the absence of domestic violence or when requested by a parent. Statutes stating that the presumption applies to sole or joint custody to a perpetrator are in effect in Alabama, Arizona, California, Delaware, Florida, Hawaii, Iowa, Louisiana, Massachusetts, Nevada, North Dakota, Oklahoma, Oregon, Texas, and South Dakota.[64]

D. *What Triggers the Presumption?*

Statutes vary in terms in how they define domestic violence and what standard of proof is required in order to trigger the presumption against awarding custody to an abuser. Several states define domestic violence by cross-referencing other statutes, such as a state's restraining order statute.[65] It is important to take note whether these statutes include threats of physical harm, or only actual physical harm. Also note that the statutes tend to leave out other types of batterer behavior which are intended to dominate and control victims, such as emotional abuse, sexual abuse, financial abuse, and property abuse, all of which may be intended to dominate and control the victim.[66]

In terms of standards of proof, in some states, the statute merely provides that there must be a "finding of domestic violence,"[67] or "credible evidence of domestic violence."[68] A few statutes specify that the standard will be the lowest possible, the

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63. MINN. STAT. § 518.17 (2000).

64. For citations to the rebuttable presumption statutes, see *supra* note 51.

65. *See, e.g.*, CAL. FAM. CODE § 3044 (West Supp. 2001); DEL. CODE ANN. tit. 13 § 705A (1999); MINN. STAT. § 518.17 (2000); WIS. STAT. ANN. § 767.24 (West 1993).

66. Amy Pincolini, *A Tool for Safety: Child Custody Presumptions*, 5 SYNERGY 6, 7 (2000) (published by Nat. Council of Juv. & Fam. Ct. Judges, Reno, NV).

67. *See, e.g.*, LA. REV. STAT. ANN. § 9:364 (West 2000); MINN. STAT. § 518.17 (2000).

68. *See, e.g.*, N. D. CENT. CODE § 14-09-06.2 (1)(j) (West Supp. 2001).

preponderance of the evidence.[69] Other states require the standard of "clear and convincing evidence" of domestic violence.[70] Wisconsin requires evidence of a crime of inter-spousal battery or abuse, as defined in the statute providing for civil protective orders.[71] However, actual conviction is not required in this state before the presumption is triggered.

Some states require that the domestic violence have occurred more than once. For example, Idaho requires that the abuser be a "habitual perpetrator" before the presumption is triggered.[72] Iowa requires "a history of domestic abuse,"[73] and Oklahoma requires "ongoing domestic abuse."[74] In several states, there must be either a pattern or history of abuse, or at least one serious incident before the presumption is triggered. These include Louisiana, Massachusetts, and North Dakota.[75]

The highest standards of proof are found in states requiring that the abuser first be convicted of a domestic violence crime.[76] As stated above, Nevada's presumption can be triggered by clear and convincing evidence of domestic violence; alternatively, it can be triggered by a conviction of sexual assault or first-degree murder of the other parent.[77]

Setting the standard for triggering the presumption high will

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69. *See, e.g.*, CAL. FAM. CODE § 3044 (West Supp. 2001); D.C. CODE ANN. §§ 16-911, 16-914 (1997); MASS. GEN. LAWS ANN. chs. 208, § 31A, 209, § 38, 209C § 10 (West Supp. 2001).

70. *See* NEV. REV. STAT. § 125.480(5) (1999); OKLA. STAT. ANN. tit. 43, § 112.2 (West 2001); 2001 Okla. Sess. Laws 141 (amending OKLA. STAT. tit. 10, § 21.1 (2000)).

71. WIS. STAT. ANN. §§ 767.24, 813.12 (West 1993).

72. IDAHO CODE § 32-717B(5) (Michie 2000).

73. IOWA CODE ANN. § 598-41 (West Supp. 2001).

74. OKLA. STAT. ANN. tit. 43, § 112.2 (West 2001); 2001 Okla. Sess. Laws 141.

75. Louisiana requires more than one incident or a finding that one incident of family violence resulted in serious bodily injury. LA. REV. STAT. ANN. § 9:364(A) (West 2000). Massachusetts requires either a pattern or serious incident of abuse. MASS. GEN. LAWS ANN. chs. 208, § 31A, 209, § 38, 209C § 10 (West Supp. 2001). North Dakota requires either one incident resulting in serious bodily injury or involving the use of a dangerous weapon, or a pattern of domestic violence within a reasonable time proximate to the proceeding. N. D. CENT. CODE § 14-09-06.2(i)(j) (1999).

76. Florida requires a conviction for a third degree felony or higher involving domestic violence. 2001 Fla. Laws ch. 2001-2 (amending FLA. STAT. ANN. § 61.13 (West 1997)). South Dakota requires a conviction of domestic abuse or assault, or homicide of the other parent. S.D. CODIFIED LAWS §§ 25-4-45.5, 25-4-45.6 (Michie 1999).

77. NEV. REV. STAT. ANN. §§ 125.480, 125C.210, 125C.220, 125C.230 (Michie Supp. 1999).

of course exclude many domestic violence cases, in which there has been only one incident of abuse, and no conviction. In many relationships, one incident of abuse can be sufficient to dominate and control the victim throughout the relationship. This can occur when the batterer uses the incident to warn and remind the victim of what can happen.[78] Of course, children who are aware of the abuse by one parent toward the other can also be traumatized by one incident.[79]

However, in some cases the high standards enumerated here were narrowly drafted to account for the possibility that some abused parents might use violence in self-defense or to protect children, in which case the presumption was not designed to apply.[80] As will be seen in the discussion in Part IV, in states with lower standards for triggering the presumption, such actions by the abused parent may be seen as nullifying the presumption. In drafting the language of such statutes, legislators and advocates must always engage in balancing tests, weighing the benefits of a lower standard for triggering the presumption against the danger to victims who fight back.

E. Cases In Which Both Parents Have Engaged in Domestic Violence

Some of the presumption statutes address situations in which both parents appear to have engaged in abuse. In at least one state, Louisiana, the statute contains a "primary aggressor"[81] provision. This directs the court to determine which of the parents is the main or dominant aggressor, and to ascertain whether one of the parents was actually acting to defend herself or himself or another person, such as the child.[82] The North Dakota Supreme Court has developed such a concept through its decisions interpreting the presumption.[83] In other states, the statute provides

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78. DONALD G. DUTTON AND SUSAN K. GOLANT, THE BATTERER: A PSYCHOLOGICAL PROFILE 13, 23, 24 (1995).

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

80. The Family Violence Project, *supra* note 18, at 206.

81. This term was changed to "dominant aggressor" in CAL. PENAL CODE § 836, effective January 2001. The legislative history indicates that this change was made in order to clarify that the focus should be on which party dominates the other, rather than on who "started the fight."

82. *See*, LA. REV. STAT. ANN. § 9:362(3) (West 2000).

83. *See, e.g.*, Krank v. Krank, 529 N.W.2d 844, 848 (N.D. 1995).

that if both parents are found to have committed domestic violence, the presumption against the abuser does not apply.[84]

Given the likelihood that both parents will be found to be abusers in states with low standards for triggering the presumption, it would probably be advisable to amend these statutes to provide for a primary or dominant aggressor analysis. This is similar to the analysis which law enforcement uses in some states when determining which party to arrest.[85]

F. Rebutting the Presumption

The statutes also vary in terms of what is necessary in order to rebut the presumption. Most states do not specify what is required for rebuttal, which does not give courts any guidance. A few states specify the evidentiary standard required, but do not list actual factors for consideration, which also leaves the court having to create its own standards from case to case.[86]

Other states list specific factors that the court must consider in finding that the presumption has been rebutted.[87] For example, California states that the court must consider 1) whether the perpetrator has shown that it is in the best interest of the child to be in the custody of that parent; 2) successful completion of a batterer's program; 3) successful completion of a program for alcohol or drug abuse if found appropriate by the court; 4) compliance with court orders and with probation and parole conditions, if applicable; and 5) whether there has been any further violence.[88] The Arizona[89] and Delaware factors are virtually identical to this.[90] Louisiana requires the successful completion of a treatment program for batterers, refraining from abuse of alcohol

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84. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-403(N) (2000) (amended by 2001 Ariz. Sess. Laws 14); CAL. FAM. CODE § 3044(c) (West Supp. 2001).

85. *See, e.g.*, CAL. PENAL CODE § 836 (West Supp. 2001). However, see the discussion in Part IV regarding the controversy surrounding whether to include such a provision.

86. For example, in Massachusetts the court must find by preponderance of evidence that custody to abuser is in best interests of child. MASS. GEN. LAWS ANN. chs. 208 § 31A, 209 § 38, 209C § 10 (1998). In North Dakota, the presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent's participation as custodial parent. N.D. CENT. CODE § 14-09-06.2(1)(j)(1999).

87. These states include: Arizona, California, Delaware, and Louisiana.

88. CAL. FAM. CODE § 3044(b) (West Supp. 2001).

89. ARIZ. REV. STAT. § 25-403 (2000) (amended by 2001 Ariz. Sess. Laws 14).

90. DEL. CODE ANN. tit. 13, § 705A (1999).

or illegal drugs, and demonstrating that the absence or incapacity of the abused parent or other circumstances are such that custody granted to the perpetrator is in the best interests of the child.[91] Its statute also directs the court to give sole custody to the parent who is least likely to continue perpetration of family violence.[92]

As noted previously, Wisconsin has a presumption only against joint legal custody in domestic violence cases.[93] In order to rebut this, there must be clear and convincing evidence that the perpetrator will not interfere with the abused party's ability to cooperate in future decision-making.[94]

G. If the Presumption is Found Inapplicable or Rebutted

If the presumption is found inapplicable or rebutted, then the parties may still have the benefit of statutes requiring that domestic violence be considered in custody decisions.[95] Legislatures are strongly encouraged to enact such statutes, so that the issue of domestic violence does not disappear from the custody decision. In the absence of such statutes, the court applies the general best interest of the child standard and the parties are on a level playing field. This may be very problematic for the battered parent, who then still has to convince the court that the child has been adversely affected by the abuse, or that there is ongoing danger to the victim parent or child.

H. Case Study: Development of the Presumption in California

While California was not the first state to adopt a rebuttable presumption statute, the history of its legislation is a useful example of a "step by step" approach. Like many other states, California attempted several different versions of its custody statutes before passing a statute establishing a presumption against custody to batterers.

California was the fifteenth state to adopt such a presumption statute, which took effect January 2000.[96] This legislation, A.B.

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91. LA. REV. STAT. ANN. § 9:364(A) (West 2000).
92. *Id.* § 9:364(B).
93. *See supra* note 52.
94. WIS. STAT. ANN. § 767.24 (West 1993).
95. *See, e.g.*, CAL. FAM. CODE § 3011 (West Supp. 2001).
96. CAL. FAM. CODE § 3044 (West 2000) (added by Stats. 1999, c. 445 (A.B. 840), §1).

840,[97] was carried by Speaker Pro Tem Sheila Kuehl, a long-time advocate for victims of domestic violence.[98] The California Alliance Against Domestic Violence (C.A.A.D.V.) sponsored the bill.[99] Supporters included medical groups, law enforcement, prosecutors, Boards of Supervisors, many women's groups, the California State PTA, and numerous domestic violence organizations.[100] Opposition included the California Judges Association, the Judicial Council, the Family Law Section of the State Bar, and the Coalition of Parent Support, a father's rights group.[101] This legislation was based on the Model Code.[102] Kuehl had been a member of the national task force which wrote that Code.

A.B. 840 was preceded by two bills, both of which were carried by Assemblywoman Kuehl. A.B. 800, introduced in 1996, died in the Senate Judiciary Committee, and A.B. 200, introduced in 1997, was amended in that same committee to remove the rebuttable presumption language. A.B. 200, amending Family Code sections 3011 and 3020, was effective January 1998.[103] Among other provisions, these sections now mandate that judges prioritize the child's health, safety, and welfare over the policy favoring frequent and continuing contact with each parent after separation.[104] They also require judges to make written findings of fact or statements on the record as to why they are awarding custody to an alleged perpetrator of domestic violence or child abuse, or to an alleged substance abuser.[105]

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97. A.B. 840/ Assembly Bill 840, 1999 Legs. (Cal. 1999).

98. Syrus Devers, AB 840 Assembly Bill, Bill Analysis 3, *at* http:www.leginfo.ca.gov/pub/9900/bill/asm/ab_08010850/ab_840_cfa_19990422_080416_asm_comm.html (April 20, 1999). *See also,* http://democrats.sen.ca.gov/senator/kuehl (describing Senator Kuehl's achievements). Assemblywoman Sheila Kuehl is serving her first term in the California Senate after serving six years in the State Assembly. *Id.* She was formerly the Speaker Pro Tempore of the Assembly (from 1997-98). *Id.* Kuehl is also a former Professor of Law at Loyola, U.C.L.A. and U.S.C. Schools of Law and co-founder of the California Women's Law Center. *Id.*

99. Devers, *supra* note 98, at 3.

100. *Id.* at 8-9.

101. *See id.* at 9.

102. *See id.* at 3. *See also, supra* note 27 and accompanying text (describing the ABA's Model Code).

103. CAL. FAM. CODE § 3011 (amended by stats. 1997, c.899 (A.B. 200), §2); CAL. FAM. CODE § 3020 (amended by Stats. 1997, c. 849 (A.B. 200), § 3).

104. CAL. FAM. CODE § 3020(c) (West Supp. 2001).

105. *Id. See also,* Marlene Rapkin, *The Impact of Domestic Violence on Child Custody Decisions,* 19 J. JUV. L. 404 (1998) (describing the legislative history of A.B. 200 and

A.B. 840 created a new code section, Family Code section 3044.[106] Subdivision (a) describes how a victim of domestic violence raises the presumption.[107] There are several limitations. First, the incident must have occurred within the last five years.[108] Second, the presumption is triggered only by incidents in which the victim was the other person seeking custody of the child, the child, or the child's siblings.[109] Third, the court must make a finding that domestic violence occurred, so that allegations alone do not trigger the presumption.[110] If the court makes such a finding, the burden of proof then shifts to the perpetrator to prove why it is in the best interests of the child to be in his or her custody.[111] All types of custody are specifically included, whether legal or physical, sole or joint.[112] However, the new code section does not address visitation.[113]

Subdivision (b) of Family Code section 3044 describes how the perpetrator can rebut the presumption, clarifying that the standard of proof is a preponderance of the evidence, and listing several factors that the court is directed to consider in making this determination.[114] According to subdivision (c) the presumption does not apply if both parents are found to have perpetrated domestic violence.[115] This subdivision had originally provided for a "primary aggressor" analysis, cross-referencing the California Penal

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arguing that it did not go far enough, that is that California needed to enact a presumption against custody to batterers).

106. CAL. FAM. CODE § 3044 (West Supp. 2001). A particularly useful document in terms of legislative history of this code section was written by Syrus Devers, legislative counsel for the California Assembly Judiciary Committee, when the bill was heard in that committee April 22, 1999. *See* Devers, *supra* note 98.

107. CAL. FAM. CODE § 3044(a) (West Supp. 2001) (stating "[u]pon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child's sibling within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to the person who has perpetrated the domestic violence is detrimental the best interest of the child.").

108. *Id.*

109. *Id.*

110. *Id.*

111. CAL. FAM. CODE § 3044(b)(1) (West Supp. 2001).

112. *Id.* § 3044(a).

113. *Id.*

114. *Id.* § 3044(b)(1)-(6).

115. *Id.* § 3044(e) (stating that "[i]n most cases in which both parents are perpetrators of domestic violence, this presumption shall not be applicable.").

Code's definition of that term,[116] but was amended in the Senate Judiciary Committee to delete that provision. Subdivision (d) defines domestic violence, using the same standard as is used in Family Code section 6320 for obtaining a Domestic Violence Restraining Order.[117]

I. Effects of Presumption Statutes

1. Overview

How are these statutes working? Are they accomplishing the objectives of the legislators who authored them and the groups who supported them? Is implementation uniform or uneven? Do presumptions against custody to batterers mean that family courts now are giving domestic violence the weight it deserves? Is there a backlash in some jurisdictions, and if so, what does it look like? In attempting to answer these questions, this section will look at appellate cases,[118] articles by commentators, surveys, and anecdotal comments from advocates, attorneys, judges, and academics in the presumption jurisdictions.

Appellate cases from the jurisdictions with such a presumption indicate that in general it appears to be useful.[119] However, there

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116. *See* CAL. PENAL CODE § 863 (e)(3) (West 2001) (defining the term "primary aggressor"). Section 836 also states the factors that a police officer should consider in identifying the primary aggressor, including "the intent of the law to protect victims of domestic violence from continuing abuse" and "the history of domestic violence between the persons involved." *Id.*

117. CAL. FAM. CODE § 3044(d) (West Supp. 2001) (stating that a person has "perpetrated domestic violence" for the purposes of section 3044 "when he or she is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person . . . for which a court may issue an ex parte order pursuant to section 1320.").

118. *See generally* Jack M. Dagleish, Annotation, *Construction and Effect of Statutes Mandating Consideration of, or Creating Presumptions Regarding, Domestic Violence in Awarding Custody of Children*, 51 A.L.R.5th 241 (1997) (Supp. Sept. 2000).

119. Cases decided in and anecdotal reports from the states that give domestic violence great weight but do not have an actual rebuttable presumption against awarding custody to a perpetrator will not be included here, as they are beyond the scope of this article. *See, e.g.*, Bartholf v. Bartholf, 619 N.W.2d 308 (Wis. Ct. App. 2000). Anna Farber Conrad, Criminal Justice Advocacy Director of the Colorado Coalition Against Domestic Violence, stated that Colorado judges often do not see any correlation between partner abuse and custody issues, and may not allow domestic violence experts to testify at custody trials. E-mail from Anna Farber Conrad, Criminal Justice Advocacy Director of the Colorado Coalition Against Domestic Violence to author, Professor of Law, University of California at

are some problems with implementation found in the appellate cases. These include a lack of guidance for judges as to what factors should be considered in determining whether the presumption has been raised or overcome.

The jurisdictions will be discussed in roughly the order in which they adopted the rebuttable presumption, with the most experienced jurisdictions first, followed by those which have moderate experience with this statute, and finishing with jurisdictions where the presumption is very new. Looking at the jurisdictions in rough chronological order is useful in determining whether the initial problems presented by the enactment of such statutes, if any, are eventually resolved over time.

2. *Jurisdictions With Many Years Experience Applying the Presumption*

a. North Dakota

North Dakota has by far the most reported appellate decisions applying the rebuttable presumption, having enacted its first such statute in 1991.[120] Notably, the statute has been amended several times in response to some of these decisions.[121] While the North Dakota Supreme Court has had to restate the basic rules many times (for example, that the trial courts must make findings as to whether domestic violence occurred), it appears that the statute is effective in ensuring that domestic violence is taken seriously in custody decisions.

The first North Dakota case decided under the new presumption was *Schestler v. Schestler*.[122] In this case, the wife's evidence of domestic violence by the husband was found to have triggered the presumption.[123] However, the court then held that

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Berkeley (June 18, 2001). *See also* Caven v. Caven, 966 P.2d 1247 (Wash. 1998) (relying on the plain language of the statute to conclude that the father's history of domestic violence restricted the trial court's discretion in determining whether the parents should mutually make decisions about the children).

120. North Dakota, like several other less populous states, has no intermediate appellate court, so whenever a trial court decision is appealed, it is heard by the state supreme court.

121. *See* Kathleen B. Garner, *Infants, Parent and Child: Applying the Rebuttable Presumption Against Awarding Custody to Perpetrators of Domestic Violence*, Heck v. Reed, 529 N.W.2d 155 (N.D. 1995), 72 N.D. L. REV. 155 (1996).

122. 486 N.W.2d 509 (N.D. 1992).

123. *Id.* at 511-12.

REBUTTABLE CUSTODY PRESUMPTIONS IN MICHIGAN: BEYOND THE BEST INTEREST FACTORS IN DOMESTIC VIOLENCE CASES

By Lynelle Morgan, J.D.

Two conflicting bills that would amend the Child Custody Act of 1970, MCLA 722.21 *et. seq.*, are currently pending before the Michigan Legislature. HB 4546 would, upon a showing of a history of domestic violence, create a presumption against awarding custody to the perpetrator of domestic violence. HB 4664 would require trial courts to begin with a presumption of joint custody between parent/parties in all divorce actions involving minor children. Under both bills, courts would be required to treat custody disputes differently than they are currently treated. Each presumption would be applied before application of the 12 best interest factors. If a triggered presumption were not successfully rebutted, the best interest factors would not apply, and custody would be determined solely by application of the respective presumption. This article discusses each presumption, and their probable effects on cases involving domestic violence.

HOUSE BILL 4546 – PRESUMPTION AGAINST AWARDING CUSTODY TO A PERPETRATOR OF DOMESTIC VIOLENCE

How it Works

House Bill 4546 provides a civil remedy for survivors of domestic violence by creating a rebuttable presumption against awarding custody to a perpetrator of domestic violence. Under the bill, a court must treat a custody dispute where there is domestic violence differently from other cases. If a victim demonstrates by clear and convincing evidence that a history of domestic violence exists in the relationship, the presumption against awarding custody (sole or joint, physical or legal) to the other party is raised. The other party may present evidence to rebut the presumption, but must also do so by clear and convincing evidence. If the presumption is not successfully rebutted, sole legal and physical custody is awarded to the non-violent parent. If the other party is successful in rebutting the presumption, the court then applies the 12 best interest factors under the Child Custody Act.

Why It Was Introduced

The Michigan Coalition Against Domestic and Sexual Violence (MCADSV) garnered support from key Senators and Representatives in the Michigan Legislature to introduce HB 4546. The motivation in sponsoring the bill was to bring civil and family law reforms in Michigan in line with the many criminal justice reforms that have been passed over the past ten years to protect victims of domestic violence. Domestic violence advocates know that parent-survivors are almost always willing to trade every other remedy – including criminal penalties, property settlements, and support issues - for control and safety with respect to custody and parenting time issues. Indeed, for most battered women, the greatest source of stress in their lives is the fear of losing their children.[1] Furthermore, custody, parenting time and child support are often arenas that batterers will use to further victimize and manipulate the victim and the children.

The substance of HB 4546 has been expressly approved by the National Council of Juvenile and Family Court Judges through its *Model Code on Domestic and Family Violence* (Model Code). Chapter Four, section 401 of the Model Code recommends that states pass the following language with regard to presumptions concerning custody:

> in every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interests of the

[1] Crites, Laura and Coker, Donna, *What Therapist's See That Judges May Miss: a Unique Guide to Custody Decisions When Spouse Abuse is Charged,* THE JUDGE'S JOURNAL (spring, 1988), p. 14.

> child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence. [2]

Sixteen states and the District of Columbia have already enacted laws based in some part on the rebuttable presumption found in the model code.[3] The NCJFCJ justifies the recommendation in its comment to section 401:

> support for the presumptions incorporated in this section, that domestic violence is detrimental to the child and that it is contrary to the child's best interest to be placed in sole or joint custody with the perpetrator is *extensive* (emphasis supplied).[4]

Why the Law Should Presume that Batterers Don't Make Good Custodial Parents

A 1994 report from several special sections of the American Bar Association, to the President of the ABA, entitled "the Impact of Domestic Violence on Children," states:

> anyone who has committed several or repetitive incidents of abuse to an intimate partner is presumptively not a fit sole or joint custodian for children. Where there is proof of abuse, batterers should be presumed by law to be unfit custodians for their children.[5]

The report continues by delineating three characteristics of such "unfit custodians." 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 the children, as a means of controlling their former spouse or partner. [6]

The last characteristic, the question of *why* an abuser is seeking custody, is an important consideration in assessing the assailant's fitness for custody. A batterer who has been the secondary parent frequently seeks custody of the children for two reasons: to punish his spouse for leaving and to continue to control her and maintain contact with her through the children.[7] Abusers also may have difficulty providing care and nurturing to children, and are frequently distant or uneasy parents. [8]

There is also substantial evidence regarding the negative effects that domestic violence has on children. Many studies show that witnessing violence between ones parents or caretakers is a more consistent predictor of future violence than being the victim of child abuse.[9] Furthermore, the abuser's violence has been shown to cause a variety of psychological problems for children, similar to those experienced by children who have themselves been abused: fear, somatic complaints, school phobias, enuresis, and insomnia. Boys as young as two have showed fierce aggressiveness and boys continue to become aggressive and disruptive as they get older. Girls tend to withdraw, and to become passive and anxious.[10]

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[2] Section 401 of *the Model Code on Domestic and Family Violence*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (1994).
[3] *State Legislation: Rebuttable Presumptions Against Awarding Custody to the Perpetrator of Domestic or Family Violence, Found in Custody or Protection Order Statutes*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES – FAMILY VIOLENCE DEPARTMENT (October 2000).
[4] Commentary to Section 401 of the *Model Code*, *supra* note 2.
[5] Davidson, Howard *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (1994).
[6] *Id.*
[7] Crites & Coker, *supra* note 1 at 12.
[8] *Id.*
[9] *Id.*
[10] *Id.*

Why Factor K is not Enough

The Child Custody Act of 1970 sets forth twelve factors that a court is to consider in determining the "best interests of the child" for purposes of a child custody dispute. Factor (k), added in 1993, requires the court to consider domestic violence, regardless of whether the violence was directed against or witnessed by the child.[11] Critics of HB 4546 have suggested that, because Michigan Courts are already required to consider domestic violence as ***one factor*** in making custody determinations, the ***presumption*** of HB 4546 is unnecessary. However, HB 4546 would provide additional, necessary protections for children and survivors.

To begin, the very fact that domestic violence is one of twelve factors that the court must consider is problematic. The statute emphasizes no one factor over any other, and case law suggests that, although trial courts must make findings of fact as to each of the twelve factors, they are not required to attribute special weight to any factor, or even to weigh the findings as to any given factor into their decision.[12] Additionally, although judges theoretically have discretion to make a custody determination based on their findings as to only one or two factors, family law attorneys report anecdotally that this is rarely the case. Judges are therefore very unlikely, under current Michigan law, to base a custody determination wholly or in large part on the finding that one party has a history of domestic violence against the other party.

The failure of current law to emphasize domestic violence over the other factors in this way defies common sense. Most parents at some point find themselves in a position to seek childcare for their children. One can imagine a scenario where a parent facing this task had several pieces (for example, 12) of information about a prospective childcare provider. Regardless of how positive some of the information might be (e.g. early childhood education degree, 25 years of experience, beautiful home-like setting) most, if not all, parents would not give the slightest consideration to a provider with a demonstrated history of violence. Outside of the context of custody disputes, it is simply not considered wise or safe to place children with violent caregivers.

Because factor (k) is not given any special weight under the Child Custody Act, there is always the possibility that judges will not afford it enough consideration. In fact, the recently published *Report and Recommendations by the Domestic Violence Homicide Prevention Task Force*, chaired by Lt. Governor Dick Posthumous, recognizes this risk in its finding that, "in certain cases, there is insufficient weight applied to domestic violence as one of the child custody factors."[13]

A recent unpublished opinion from the Court of Appeals underscores this same concern. In *Brion West v Lauri Smallman*, no. 223163, the Michigan Court of Appeals affirmed the award of custody to the plaintiff-father in spite of its finding that there was significant evidence of domestic violence perpetrated by the father against the defendant-mother. At trial, the lower court failed to specifically make a finding on factor k, and erroneously insinuated that factor k would favor the plaintiff-father had it been specifically considered. The Court of Appeals noted the trial court's dual error in failing to make the finding, and in failing to make the finding in the mother-defendant's favor. The evidence of domestic violence was alarming, including: plaintiff discharging a rifle into a mattress upon which defendant laid; plaintiff destroying items in the home; plaintiff punching defendant with a closed fist; plaintiff throwing things at defendant and abusing animals. Nonetheless, the Court of Appeals held that the trial court's ultimate decision to grant plaintiff custody, *considering all of the factors as a whole*, was not a palpable abuse of discretion.[14] This case demonstrates clearly why factor k may not be enough, and how the rebuttable presumption of HB 4546 could significantly change the outcome of a case. In *West v*

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[11] MCLA 722.23(k),MSA 25.312(3)[k]

[12] See *Fletcher v Fletcher*, 229 Mich App 19, 581 NW2d 11 (1998).

[13] Posthumus, Lt. Governor Dick (Chair), *Domestic Violence Homicide Prevention Task Force Report and Recommendations* (2001), p. 12.

[14] *Brion West v Lauri Smallman and Judy Wozniak*, Michigan Court of Appeals No. 223163, (LC No. 92-204605-DC), Wayne Circuit Court, Unpublished Opinion of June 1, 2001.

Smallman, the Court of Appeals apparently had no trouble finding a history of domestic abuse by the plaintiff-father. Under HB 4546 that finding would have triggered the presumption against awarding custody to the perpetrator and, unless the presumption were successfully rebutted, the best interest factors would not have been considered and weighed in the fashion that they were.

Application of the best interest factors may also inadvertently favor batterers and punish victims. Several of the factors arguably disfavor survivors of domestic violence:

Factor (c) relates to economics – the capacity of each party to provide food, clothing, medical care and other material needs to a child.[15] A common element of a domestic violence relationship is for the perpetrator to control the finances of their partner, by prohibiting her from working, alienating her from other resources, and controlling the parties' joint monies. Therefore, a woman who has recently left a violent relationship may continue to struggle financially, and a perpetrator may appear to be a more stable provider.

Factor (d) relates specifically to the stability of the child's environment.[16] Because domestic violence survivors are in the midst of crisis during most child custody disputes, most aspects of their lives are not stable. Many are forced to leave their homes, stay temporarily with friends or relatives, or even to seek refuge in a domestic violence shelter. Meanwhile, the perpetrator is often free to continue living in the children's previous home environment, giving him a possible preference under this factor.

Factor (g), which relates to the mental and physical health of the parties involved,[17] may also favor batterers. Drug or alcohol abuse, depression and anxiety may plague the battered woman. When such is the case, she may be considered "troubled", "stressed-out" and/or incapable of appropriate parenting. Batterers often use these sequae of domestic violence, created by the batterer himself, to label the victim as "mentally ill" or "crazy." Further, although a battered woman demonstrates strength when she decides to end a violent marriage, she may appear in court as unstable, nervous or inarticulate – a result of her ordeal. The batterer, on the other hand, may appear in command of himself, calm, well spoken and so forth.[18]

Factor (j), the so-called "friendly parent provision", provides perhaps the worst prejudice against a domestic violence survivor. This provision favors the parent who is willing and able to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent. [19] Abusers often appear in court to be the "friendly parent". A victim often wants to limit her and the children's contact with the batterer, out of concern for her children's and her own safety. This concern may appear to court mediators, evaluators and judges as hostility toward the batterer, when in fact she may be voicing valid concerns.[20] This factor is particularly troublesome where, as in Michigan, there is a statutory presumption that it is in the best interests of a child for the child to have a strong relationship with both of his or her parents.[21] Judges face the difficult task of balancing the "strong relationship" presumption (overcome only by clear and convincing evidence on the record) with a statute that merely lists domestic violence as one factor in a best interest analysis.

Factor k, the domestic violence factor,[22] may itself weigh against domestic violence survivors. There are times when, after a long period of being victimized, manipulated and controlled, a

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[15] MCLA 722.23(c), MSA 25.312(3)[c].
[16] MCLA 722.23(d), MSA 25.312(3)[d].
[17] MCLA 722.23 (g), MSA 25.312(3)[g].
[18] Crites & Coker, *supra*, note 1 at 12.
[19] MCLA 722.23(j), MSA 25.312(3)[j].
[20] *State Statutes and Case Law: Custody Law Overview*, RESOLVING CUSTODY AND VISITATION DISPUTES, National Council of Juvenile and Family Court Judges (1995), p. 45.
[21] MCLA 722.27a(1), MSA 25.312(7a)[1].
[22] MCLA 722.23(k), MSA 25.312(3)[k].

survivor will strike back physically against a batterer. Many times this is done in self-defense. Nevertheless, courts may consider acts of violence by both equally. To do so is troublesome:

> Those who equate any violence by her with his, fails to consider who initiated the violence, the different impact in terms of fear and injuries which distinguish the violence, and also the likelihood that her violence stems from attempts to defend herself or fight back. This is not to justify her violence, but simply to distinguish it from his.[23]

HB 4546 confronts this problem directly. Under the bill, if the court finds that each party has a history of domestic violence, it is directed to apply the presumption in favor of the party that is least likely to commit acts of domestic violence in the future. Thus, the victim who retaliates in a single incident, or who strikes out in self-defense, should not be punished with respect to the custody determination.

Rebutting the Presumption

Once a presumption is triggered under HB 4546, it may only be rebutted by a showing of clear and convincing evidence that it is in the best interest of a child for the perpetrator of domestic violence to be awarded custody. Things that a court may consider might include whether the perpetrator has successfully completed a batterer's treatment program; a showing by the batterer that he is abstaining from drugs and/or alcohol; or a showing that no further domestic violence has occurred.

If the perpetrator of domestic violence rebuts the presumption against awarding him custody, then the parties are back on a level playing field and the custody determination will be made pursuant to the 12 best interest factors. Even if a party fails to rebut the presumption, the proposed bill does nothing to limit the party's statutory right to parenting time.

HB 4664 – PRESUMPTION OF AWARDING JOINT CUSTODY IN ALL PARENT -TO - PARENT CHILD CUSTODY DISPUTES

How the Bill Works

HB 4664 would change Michigan Law by requiring judges to start with a presumption that it is in the child's best interests for the parents in a child custody case to be awarded both joint legal and joint physical custody. Under the proposed law, if a parent attempts to rebut the presumption of joint legal and joint physical custody, the court shall presume that each of the best interest factors weights evenly for both parents unless proven otherwise by clear and convincing evidence. Thus, the law would place a heightened standard of proof to findings on the best interest factors. It would also place a special emphasis on the "friendly-parent" provision (factor j), by allowing the court to consider awarding sole legal and physical custody to the party who is more inclined to be willing to cooperate with the other party in terms of parenting decisions and material issues affecting the child's welfare.

Under current Michigan law, in custody disputes between parents, the trial court is required to advise the parents of joint custody and, at the request of either parent, to consider an award of joint custody. Under these circumstances the court must state on the record the reasons for granting or denying a request. Rather than applying a presumption of joint custody, however, the court is required to determine whether joint custody is in the best interest of the child by considering the statutory factors, as well as whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.[24]

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[23] Crites & Coker, *supra* note 1, at 14.
[24] MCLA 722.26a(1), MSA 25.312(6a)[1].

Concerns About The Bill

There are several areas for concern regarding proposed HB 4664. Foremost, joint custody is not necessarily reflective of the parental arrangement prior to a divorce and, in fact, there are times that parties do not want a joint custody arrangement.[25] As a result of these and other factors, there are times when joint custody is not in the best interest of the child. Particularly in relationships involving domestic violence, one parent may use a custody award to manipulate and control the other parent and their relationship with their child.

A presumption of joint custody would also create a particular burden to parents in light of the recently enacted "100-Mile Rule" (a statutory requirement that all custody orders contain a provision prohibiting a parent from moving a child's residence more than 100 miles (intrastate) without prior consent of the other party or permission of the court).[26] The "100 Mile Rule" does not apply in cases where one parent is granted sole legal and physical custody.[27]

Particularly troubling is that the bill does not contain an exception for cases involving domestic violence. Joint custody (either physical or legal) requires an ability on the part of the parents to work cooperatively and equitably in meeting the needs of their children. However, uneven bargaining power, manipulation and control, fear and acquiescence are the markings of most relationships involving domestic violence. Because cooperation and joint decision-making is virtually impossible for a batterer and his victim, Michigan's recently enacted court rule on mandatory mediation excepts domestic violence victims from its' requirements.[28] In fact joint custody arrangements, like mediation, may be not only problematic but also dangerous in relationships with a violent history.[29] Indeed, many abusers find that, after separation, use of the children is often the best way to continue to abuse and harass their former partners.[30] Many battered women report threats against their lives during visitation and exchanges, and some are killed in those contexts.[31] In fact, it has been found that a key indicator of risk in domestic violence situations is the abuser's access to the victim,[32] which joint custody arrangements inevitably supply.

CONCLUSION

HB 4546 and HB 4664, as proposed, will have diametrically opposite effects for survivors of domestic violence in child custody proceedings. HB 4546, which creates a presumption against awarding custody to perpetrators of domestic violence, would go a long way in protecting survivors of domestic violence and their children. Rather than tossing domestic violence in the mix with eleven other best interest factors, it would create a common sense presumption in the law that it is not in the best interests of our children to be raised by parents with a history of violent behavior.

HB 4664, however, would create a mandatory presumption of joint custody in all custody disputes between parents, regardless of whether the relationship involved domestic violence. Such a presumption would do a disservice to children, who suffer the detrimental effects of living with domestic violence, and to survivors, whose only hope of regaining control and safety in their lives is complete disconnection with their batterer. Joint custody in domestic violence situations forces

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[25] *Position Paper*, Family Law Section of the Michigan State Bar (2001).
[26] MCLA 722.31, MSA 25.313(1)
[27] *Id.*
[28] MCR 3.216(D)(3)(b).
[29] Crites & Coker, *supra* note 1, at 14.
[30] Zorza, Joan, *Protecting the Child in Custody: Disputes When One parent Abuses the Other*, CLEARINGHOUSE REVIEW, Vol. 29, No. 12 (April 1996), p. 1117.
[31] Sheeran, Maureen and Hampton, Scott, *Supervised Visitation in Cases of Domestic Violence*, JUVENILE AND FAMILY COURT JOURNAL (spring 1999), p. 14.
[32] *Id.* At 14.

a survivor to have ongoing contact with her batterer, and would require her "cooperation" with a person that has successfully used force, coercion and manipulation against her during their relationship. The batterer can therefore maintain access to the victim through their judicially created relationship as joint custodians.

Although as a society we place a high value on the parent's right of access to their children, we must balance that right with the dangers posed to domestic violence survivors and their children following a separation. HB 4546 would make it harder for abusive parents to gain custody of their children, thereby raising the safety and well being of victim-parents and children above the other best interest considerations generally applied to child custody disputes. HB 4664, on the other hand, would make it easier for abusive parents to be awarded joint custody of their children, and would virtually eliminate the application of factor (k), as well as the other best interest factors, to parental custody disputes. The adoption of HB 4546, and rejection of HB 4664, would bring Michigan in line with the many other states that have strengthened the civil relief available to protect domestic violence survivors and their children.

HB

397

Representative Nancy Dahlstrom
Representative Lesil McGuire
Representative Ralph Samuels
Representative Bill Stoltze

MEMORANDUM

To: Senator Ralph Seekins, Chair,
Senate Judiciary Committee

From: Representative Lesil McGuire, Chair
House Judiciary Committee

Date: February 25, 2004

Re: Request for Hearing, CSHB 397 (JUD): Defense Contacts With Victims & Witnesses

I respectfully request that CSHB 397 (JUD): Defense Contacts With Victims & Witnesses, be scheduled for a hearing in the Senate Judiciary Committee. I have attached the following for your information:

1. Sponsor Statement
2. CSHB 397 (JUD)
3. Sectional Analysis
4. HB 397
5. Correspondence from the Office of Victims' Rights
6. Letter of Support
7. Applicable Statutes
8. Zero Fiscal Notes

If you have any questions please feel free to contact me personally, or my staff, Vanessa Tondini, at 4990.

Representative Nancy Dahlstrom
Representative Lesil McGuire
Representative Ralph Samuels
Representative Bill Stoltze

CSHB 397 (JUD)

"An Act relating to defense contacts with and recordings of statements of victims and witnesses of sexual offenses."

"The Brooke Act"

Sponsor Statement

Victims and witnesses to crime are unfortunately placed at risk of harassment, intimidation, and unwarranted invasions of privacy when their lives are unwillingly thrust into the legal system. These potential harms increase when a victim or witness is a minor and also when the crime they have been involved in is a sexual offense.

HB 397, also know as the Brooke Act, would require criminal defense attorneys and investigators to first obtain the consent of a minor's parent or guardian prior to conducting a tape-recorded interview with a minor sexual assault victim or witness. When a criminal defense attorney or defense investigator speaks to a minor victim or witness, and the interview is not recorded, written authorization must first be obtained from the parent or guardian of the victim or witness. However, if the statement *is* recorded, there is no present requirement in the law that the minor's parent or guardian be consulted to decide whether the minor should waive his or her rights not to speak with defense representatives. This loophole in the law leaves juvenile victims vulnerable and parents in the dark. Current law already embodies an important provision that does not allow a defendant who is the parent or guardian of a minor sexual assault victim or witness to provide the authorization required by this bill.

HB 397 will help parents and guardians of minors to learn what is going on in their lives and empower them to make smart decisions about what is in their best interests, not the best interests of criminal attorneys or their clients.

Alaska State Capitol Building, Juneau, AK 99801

LEGAL SERVICES

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

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

MEMORANDUM February 13, 2004

SUBJECT: Sectional Summary - CSHB 397(JUD)
(Work Order No. 23-LS1510\I)

TO: Representative Lesil McGuire
Attn: Vanessa Tondini

FROM: Gerald P. Luckhaupt
Legislative Counsel

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. Provides a short title.

Section 2. Amends AS 12.61.125(a), provides that the defendant accused of a sexual offense, or the defendant's attorney or investigator or other person working on behalf of the defendant, may not obtain a recorded statement from the victim or a witness unless written authorization is first obtained from the victim or witness or the parent of the victim or witness if a minor.

GPL:med
04-185.med

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 397(JUD)
(H) Publish Date: 2/12/04

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to defense contacts....
BRU: Legal and Advocacy Services
Component: Office of Public Advocacy
Sponsor: Representatives McGuire, Samuels, D Samuels & McGuire
Requester: (H) Judiciary
Component No.: 43

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill could impact the operations of the Office of Public Advocacy in that it may result in increased investigation costs.

Prepared by: Josh Fink, Director
Phone 907-269-3501
Division: Office of Public Advocacy
Date/Time 2-9-04 9:00 a.m.
Approved by: Mike Miller, Commissioner
Date 2/9/2004
Agency: Administration

(Revised 9/2003 OMB)

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 397(JUD)
(H) Publish Date: 2/12/04

Revision Date/Time (Note if correction):
Dept. Affected: Administration

Title: An Act relating to defense contacts...
BRU: Legal and Advocacy Services
Component: Public Defender Agency

Sponsor: Representatives McGuire, Samuels
Requester: (H) Judiciary
Component No.: 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill could impact the operations of the Public Defender Agency in that it may result in increased investigation costs.

Prepared by: nda K. Wilson, Deputy Director
Phone (907)-334-4416
Division: Public Defender Agency
Date/Time 2/9/04 9:00 a.m.

Approved by: Mike Miller, Commissioner
Date
Agency: Administration

(Revised 9/2003 OMB)

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: CSHB 397(JUD)
(H) Publish Date: 2/12/04

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to defense contacts with and recrodings of statements of victims or witnesses..."
RDU Criminal
Component Criminal Justice Litigation
Sponsor Representative McGuire, Samuels, Dahlstrom, Stolze
Requester House Judiciary
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill amends AS 12.61 by adding an new act to be known as the Brooke Act. The amendments add further protection for minor crime victims or witnesses by requiring that a parent or guardian act as a point of contact with the minor, and consent before a defendant or person acting on behalf of a defendant may contact or make a recorded statement from a minor victim or witness of a crime for which the defendant may be charged. The bill also adds the requirement that the parent or guardian of a minor victim or witness be informed of certain victim's rights. The bill also allows a parent or guardian of a minor victim or witness to obtain a transcript of any recorded statement made by a minor victim or witness.

Passage of this legislation will have no foreseeable fiscal impact on The Department of Law.

Prepared by: Kathryn A. Daughhetee, Director
Phone 465-3673
Division Administrative Services
Date/Time 1/26/04 9:31 AM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 1/26/2004
Agency Department of Law

(Revised 12/2003 OMB)

STATE OF ALASKA
OFFICE OF VICTIMS' RIGHTS

Representative Lesil McGuire, Chair
House Judiciary Committee
716 W. 4th Avenue Ste 430
Anchorage, AK 99501-2133

December 10, 2003

Re: Proposed amendment to AS 12.61.120(d)

Dear Representative McGuire:

I am writing to ask for your help to close a loophole that was unintentionally created in 1996 when the legislature enacted AS 12.61.120 to protect victims and witnesses from criminal defense attorneys and their investigators. Since then, this oversight has hurt sexual assault and other victims as well as the prosecutors who have pursued their cases in court. I personally witnessed this when prosecuting cases and was reminded of it recently when it happened again to here in Anchorage. My office now represents . The District Attorney's office is prosecuting her assailant and the case is in the pre-indictment stage at this time.[1]

16-year-old was sexually assaulted at a party in May. Her assailant was a friend and fellow classmate in a Junior ROTC class. He was a graduating senior and is being prosecuted as an adult. There were witnesses at the party and at the time of his arrest he made incriminating admissions to the police so the chances of securing a conviction for sexual assault looked promising. Or at least that *was* the case until November 2003 when AS 12.61.120(d) helped the defense undermine and weaken the evidence against 's attacker.

1007 WEST 3RD AVENUE, SUITE 205 • ANCHORAGE, ALASKA 99501-1936
TELEPHONE: 1-907-272-2620 • FACSIMILE: 1-907-272-2640

In November, as the defense was beginning the investigative phase of their case, an investigator from the Alaska Public Defender's Agency called at home and spoke with her directly. The defense investigator, followed the letter of the law found in AS 12.61.120 and .125. He clearly informed that he worked for the defendant and told her that she need not speak with him and that if she decided to speak with him she could have a third party like the DA or her parents present, pursuant to AS 12.61.120. He then asked if she would speak to him about the case.

As is the case with many 16 year old girls was a naïve and vulnerable high schooler. Following the sexual assault she was very traumatized and confused and even felt concern for her classmate, a person it turned out she didn't really know after all. She was afraid that her former friend, although he had deeply hurt her, was also agonizing over what he had done to her. She wanted to hear from him that he was sorry for his crime. She also wanted to know that he was coping with the situation just as she was trying to do.

Sixteen-year old girls who have been raped do not understand the legal ramifications of speaking with a defense legal team and how that almost always undermines the prosecutor's ability to hold a criminal accountable for his crime. Nonetheless, she agreed to speak with the defense investigator. She drove herself down to the public defender's office and engaged in a two and a half hour recorded interview with the defense investigator and a paralegal that witnessed her interview. Even though she was a minor, 's parents had not been contacted. They had no idea that she had been called by the defense or had agreed to speak to them. Had they known, her parents would not have permitted the interview.

was led to believe by that she would be able to learn about case developments during the meeting. She was expecting a two-way discussion. Instead she was subjected to hostile questioning without the knowledge of the District Attorney or consent of her parents. Whenever she asked questions, claimed to know nothing about the case and refused to give any information. As a juvenile, was not competent to understand the implications of such a meeting with a skilled and very experienced adversary such as It is certain that what told the defense during the meeting will have grave consequences with regard to the strength of the prosecution's case against her assailant. Indeed, the very purpose of the meeting was not to learn details from about the crime since under the very liberal Alaska Criminal Rules of discovery the defense had already obtained a complete copy of all the police reports 's police statement, witness statements and the like. Instead, it was to trick into making arguably inconsistent statements about the crime –

statements that will be used by defense counsel at trial to impeach her and undermine her credibility before the jury. Even if the case is ultimately settled without a trial through a plea-bargain, the defense will now have more leverage to obtain a more lenient sentence since the state's case has been prejudiced.

This case came to our attention when 's parents finally learned from what had occurred. They were expecting to file a complaint against the Public Defender Agency for grave violations of their daughter's victim rights. Unfortunately, given the loophole that exists in AS 12.61.120(d), we had to inform her parents that the conduct of the investigator was not prohibited under present law. But the law needs to be changed. The legislature should act to close this loophole and prevent such an unfair result from ever happening again to other victims and witnesses, as it surely will. Here's the specific problem with 12.61.120.

AS 12.61.120 deals with situations where a defense representative wishes to obtain information or a statement from a victim or witness. It provides in pertinent part that:

> (c) If a defendant or a person acting on behalf of a defendant contacts the victim of an offense with which the defendant is or could be charged, the person shall clearly inform the victim
>
> (1) of the person's identity and specific association with the defendant;
>
> (2) that the victim does not have to talk to the person unless the victim wishes; and
>
> (3) that the victim may have a prosecuting attorney or other person present during an interview.
>
> (d) If a defendant or a person acting on behalf of a defendant wishes to make a recording of statements of the victim of an offense with which the defendant is or could be charged in this or another jurisdiction, or of a witness, the person shall, before recording begins, obtain the consent of the victim or witness, to record the statement by clearly informing the victim or witness (1) of the information set out in (c) of this section, (2) that the statement will be recorded if the victim or witness consents, and (3) that the victim or witness may obtain a transcript or other copy of the recorded statement upon request. When recording begins, the person making

> the recording shall indicate in the recording that the victim or witness has been informed as required by this subsection, and the victim or witness shall state in the recording that consent of the victim or witness to the recording has been given.

Section (d), the section at issue, provides for a waiver of a victim or witnesses' right to avoid speaking to defense representatives. However, because of its careless language, section (d) allows even a *minor* victim or witness to consent to speaking with a defense representative without a requirement that the minor's parent or guardian be made aware of the defenses' effort to obtain the minor's statement. This must have been an oversight when the legislature drafted this section because in almost all other areas where minor's rights are implicated, a juvenile is not deemed competent to waive important rights without guidance from a responsible adult.

Even though it is sufficient, the logic of first checking with a minor's parent or guardian before signing away valuable rights alone does not provide the sole basis for my request that AS 12.61.120(d) be amended. More compelling support for my opinion that this statutory loophole was unintended by the legislature, and that section (d) needs to be quickly amended, can be found in AS 12.61.125, the section that immediately follows AS 12.61.120.

Unlike AS 12.61.120, which deals with defense efforts to obtain information or statements from victims and witnesses, AS 12.61.125 is a law that governs defense contacts with sexual assault victims and witnesses. In this law, the legislature *did require* the parent or guardian of a minor victim or witness to invoke rights on their behalf.

AS 12.61.125 provides in pertinent part:

> (a) The defendant accused of a sexual offense, the defendant's counsel, or an investigator or other person acting on behalf of the defendant, may not
>
> (1) notwithstanding AS 12.61.120, contact the victim of the offense or a witness to the offense **if the victim or witness, or the parent or guardian of the victim or witness if the victim or witness is a minor**, has informed the defendant or the defendant's counsel in writing or in person that the victim or witness does not wish to be contacted by the defense; a victim or witness who has not informed the defendant or the defendant's counsel in writing or in person that

> the victim does not wish to be contacted by the defense is entitled to rights as provided in AS 12.61.120;
>
> (2) obtain a statement from the victim of the offense or a witness to the offense, unless,
>
> (A) if the statement is taken as a recording, the recording is taken in compliance with AS 12.61.120; or
>
> (B) if the statement is not taken as a recording, **written authorization is first obtained from the victim or witness, or from the parent or guardian of the victim or witness if the victim or witness is a minor**; the written authorization must state that the victim or witness is aware that there is no legal requirement that the victim or witness talk to the defense; a victim or witness making a statement under this subparagraph remains entitled to rights as provided in AS 12.61.120.
>
> (b) A defendant who is the parent or guardian of a minor victim or witness may not provide the authorization required under (a) of the section. [Emphasis added].

In sum, where a victim or witness is a minor and wishes to have no contact with the defense, the parent or guardian of that individual must inform the defense agent in writing or in person that the victim does not wish to be contacted by the defense. Where a victim or witness is a minor, and a statement is taken *but not recorded*, written authorization must first be obtained from the parent or guardian of the victim or witness. However, pursuant to AS 12.61.120, if the statement is recorded as it was here, the victim or witness may waive his or her rights not to speak with defense representatives and *no consent or authorization* from the parent or guardian is required. This inconsistency leaves juvenile victims vulnerable to exploitation by the defense in the same way that B.A. was manipulated. It is well known that the best form of impeachment is found in the prior recorded statements of witnesses. Consequently, many contacts with minor victims are recorded such as occurred in this case and unless AS 12.61.120(d) is amended such abuses will continue.

This problem can be cured by adding the simple phrase "or the parent or guardian of the victim or witness if the victim or witness is a minor" to AS 12.61.120(d) as the legislature has already done in AS 12.61.120. Such a technical amendment will mean that many future child victims may be spared the trauma

and exploitation suffered by She has been deeply hurt by the rape and the subsequent events. Thanks to this loophole, I expect it can only get worse for her. But in the long run, it would materially advance her healing, and would be a great comfort to her family, to know that no future victims will be similarly misled and taken advantage of.

She and her parents have sought assistance from the OVR, and we in turn now seek your support for the proposed change to AS 12.61.125 that will bring it in line with the intent and spirit of the chapter. For your convenience I have attached a proposed amendment.

Respectfully,

Stephen E. Branchflower, Director
Alaska Office Of Victims' Rights

Cc: Representative Dahlstrom
Rex Shattuck

Representative Samuels
Sara Nielson

Representative Stoltze
Kelly Huber

Vanessa Tondini

STATE OFFICE
ALASKA PEACE OFFICERS ASSOCIATION

P.O. Box 240106 Anchorage, Alaska 99524-0106 Phone (907) 277-0515 Fax (907) 272-5355

February 10, 2004

Representative Lesil McGuire
House of Representatives
State Capitol
Juneau, Alaska 99801-1182

Dear Representative McGuire,

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for co-introducing HB 397, an act relating to defense contacts with and recording of statements of victims or witnesses; and amending Rule 16, Alaska Rules of Criminal Procedure.

This proposed legislation will better protect a minor witness or victim of a crime by consent first having to be obtained by a parent or guardian by a person acting on behalf of the defendant

We thank you for addressing this issue.

Please contact the APOA office in Anchorage at 277-0515 if there is anything our organization can do to assist in the passage of this bill.

Sincerely,

Leo J. Brandlen

Leo J. Brandlen
State President

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

Article 2. Victim and Witness Information Confidentiality.

Section
100. Declaration of purpose
110. Confidentiality of victim and witness addresses and telephone numbers
120. Disclosure to defense; contacts with victims and witnesses
125. Victims and witnesses of sexual offenses
127. Inadmissibility of statements taken in violation of AS 12.61.120 or 12.61.125
130. Disclosure during court proceedings
140. Disclosure of victim's name
150. Public and media access

Sec. 12.61.100. Declaration of purpose. The purpose of AS 12.61.100 — 12.61.150 is to protect victims of and witnesses to crime from risk of harassment, intimidation, and unwarranted invasion of privacy by prohibiting the unnecessary disclosure of their addresses and telephone numbers. (§ 13 ch 57 SLA 1991)

Sec. 12.61.110. Confidentiality of victim and witness addresses and telephone numbers. The residence and business addresses and telephone numbers of a victim of a crime or witness to a crime are confidential. A report, paper, picture, photograph, court file, or other document that relates to a crime and contains the residence or business address or telephone number of a victim or witness, and that is in the custody or possession of a public officer or employee, may not be made available for public inspection unless the residence and business addresses and telephone numbers of all victims and witnesses have been deleted. (§ 13 ch 57 SLA 1991)

Sec. 12.61.120. Disclosure to defense; contacts with victims and witnesses. (a) The prosecution in a criminal case may not be required to furnish to the defendant personally the address or telephone number of a victim or witness absent a showing of good cause as determined by the court. Except as provided in (b) of this section, good cause exists when the defendant is proceeding without counsel. When a defendant is represented by counsel, the address and telephone number of a victim or witness may be disclosed to the defendant's counsel, but the court shall order the defendant's counsel to not disclose the information to the defendant.

(b) If the defendant is proceeding without counsel in a case involving a charged violation of AS 11.41, AS 11.46.300 — 11.46.330, AS 11.56.740, 11.56.807, 11.56.810, AS 11.61.190 — 11.61.210, or a crime involving domestic violence and the court finds that the defendant may pose a continuing threat to the victim of or witness to the offense charged, the court shall protect the address and telephone number of the victim or witness by providing the information only to a person specified by the court or by imposing other restrictions that the court considers necessary. When an address or telephone number is released to a person specified by the court under this subsection, that person, who shall be ordered not to disclose the information to the defendant, shall contact the victim or witness on behalf of the defendant, and the defendant shall meet or speak with the victim or witness only in the presence of that person.

(c) If a defendant or a person acting on behalf of a defendant contacts the victim of an offense with which the defendant is or could be charged, the person shall clearly inform the victim

(1) of the person's identity and specific association with the defendant;

(2) that the victim does not have to talk to the person unless the victim wishes; and

(3) that the victim may have a prosecuting attorney or other person present during an interview.

(d) If a defendant or a person acting on behalf of a defendant wishes to make a recording of statements of the victim of an offense with which the defendant is or could be charged in this or another jurisdiction, or of a witness, the person shall, before recording begins, obtain the consent of the victim or witness to record the statement by clearly informing the victim or witness (1) of the information set out in (c) of this section,

next page.

(2) that the statement will be recorded if the victim or witness consents, and (3) that the victim or witness may obtain a transcript or other copy of the recorded statement upon request. When recording begins, the person making the recording shall indicate in the recording that the victim or witness has been informed as required by this subsection, and the victim or witness shall state in the recording that consent of the victim or witness to the recording has been given.

(e) If a victim or witness requests a transcript or other copy of a recorded statement taken under (d) of this section, the defense shall prepare the transcript or other copy and provide it to the person whose statement was recorded.

(f) In this section, "recording" means capturing a statement of a person, whether by magnetic tape or other electronic or electromagnetic means. (§ 13 ch 57 SLA 1991; am § 29 ch 79 SLA 1992; am §§ 17 — 19 ch 64 SLA 1996; am § 19 ch 92 SLA 2002)

Revisor's notes. — In 1991, "AS 11.56.740" was substituted for "AS 11.61.120(a)(6)" to reconcile § 13, ch. 57, SLA 1991, and §§ 1 and 2, ch. 64, SLA 1991. Section 1, ch. 64, SLA 1991 added AS 11.56.740 and § 2, ch. 64, SLA 1991 deleted AS 11.61.120(a)(6).

Cross references. — For effect of this section on Alaska Rule of Criminal Procedure 16, see § 26, ch. 57, SLA 1991 in the Temporary and Special Acts.

Effect of amendments. — The 1992 amendment, effective September 14, 1992, made section reference substitutions in the first sentence in subsection (b).

The 1996 amendment, effective July 1, 1996, in subsection (b), in the first sentence, inserted ", or a crime involving domestic violence" and made section reference substitutions; rewrote the introductory language of subsection (c); and added subsections (d)-(f).

The 2002 amendment, effective June 28, 2002, inserted a section reference in subsection (b).

Sec. 12.61.125. Victims and witnesses of sexual offenses. (a) The defendant accused of a sexual offense, the defendant's counsel, or an investigator or other person acting on behalf of the defendant, may not

(1) notwithstanding AS 12.61.120, contact the victim of the offense or a witness to the offense if the victim or witness, or the parent or guardian of the victim or witness if the victim or witness is a minor, has informed the defendant or the defendant's counsel in writing or in person that the victim or witness does not wish to be contacted by the defense; a victim or witness who has not informed the defendant or the defendant's counsel in writing or in person that the victim does not wish to be contacted by the defense is entitled to rights as provided in AS 12.61.120;

(2) obtain a statement from the victim of the offense or a witness to the offense, unless,

(A) if the statement is taken as a recording, the recording is taken in compliance with AS 12.61.120; or

(B) if the statement is not taken as a recording, written authorization is first obtained from the victim or witness, or from the parent or guardian of the victim or witness if the victim or witness is a minor; the written authorization must state that the victim or witness is aware that there is no legal requirement that the victim or witness talk to the defense; a victim or witness making a statement under this subparagraph remains entitled to rights as provided in AS 12.61.120.

(b) A defendant who is the parent or guardian of a minor victim or witness may not provide the authorization required under (a) of the section.

(c) If an attorney, or a person acting on behalf of the defendant for an attorney, violates this section, the court shall refer the violation to the Disciplinary Board of the Alaska Bar Association as a grievance.

(d) In this section,

(1) "recording" has the meaning given in AS 12.61.120;

(2) "sexual offense" means a violation of AS 11.41.410 — 11.41.470. (§ 20 ch 64 SLA 1996)

Effective dates. — Section 83, ch. 64, SLA 1996, makes this section effective July 1, 1996.

HB 398

23-LS1521\QA.1
Luckhaupt
2/26/04

AMENDMENT

OFFERED IN THE SENATE

TO: CSHB 398(JUD) am

Page 3, lines 16 - 19:

Delete all material.

Insert a new bill section to read:

"* **Sec. 2.** AS 24.65.170 is amended to read:

Sec. 24.65.170. Annual report. The victims' advocate shall make available to the public an annual report of the victims' advocate's activities under this chapter and notify the legislature that the report is available. **The victim's advocate may include in the report a summary of the advocate's participation as an ex officio member of domestic violence fatality review teams established under AS 18.66.400.**"

ALASKA STATE LEGISLATURE

Co-Chair:
Resources

Vice Chair:
Joint Armed Services Committee

Member:
Military and Veterans Affairs Committee
Labor and Commerce Committee
Economic Development, Trade, & Tourism Committee

Session:
Alaska State Capitol
Juneau, AK 99801-1182
Phone: (907) 465-3783
Fax: (907) 465-2293
Toll Free (877) 460-3783

Interim:
716 West 4th Avenue
Anchorage, AK 99501-2133
Phone: (907) 269-0174
Fax: (907) 269-0177

REPRESENTATIVE NANCY DAHLSTROM

ELMENDORF AFB • FORT RICHARDSON • BIRCHWOOD • FIRE LAKE • GOVERNMENT HILL • MULDOON

Representative_Nancy_Dahlstrom@legis.state.ak.us

MEMORANDUM

TO: Senator Ralph Seekins
Senate Judiciary Committee

FROM: Representative Nancy Dahlstrom

DATE: March 4, 2004

RE: Hearing Request

I respectfully request that HB 398, "An act relating to domestic violence fatality review teams" be scheduled for a hearing as soon as possible in the Senate Judiciary Committee.

Thank you for your attention to this matter. Feel free to contact me if you have any questions.

Representative Nancy Dahlstrom
Representative Lesil McGuire
Representative Ralph Samuels
Representative Bill Stoltze

HB 398 Domestic Violence Fatality Review Team

Sponsor Statement

"An Act relating to domestic violence fatality review teams"

HB 398 is legislation that empowers municipalities and cities throughout the State of Alaska to create a Domestic Violence Fatality Review Teams.

Unfortunately, a growing number of homicides in Alaska are domestic violence related. In the year 2002 11 out of 18, or 61% of the homicides in Anchorage were a result of domestic violence.

We learn from the past that domestic violence fatalities are handled through the justice system. However, this process does little to review the effectiveness of the systems in place, which protects those vulnerable to domestic violence. The purpose of Domestic Fatality Review Teams is to gain knowledge and insight to more effectively prevent domestic violence fatalities.

This legislation authorizes the State of Alaska and its municipalities to empower teams to systematically review facts of escalating cases of domestic violence fatalities. These teams could identify potential changes in policies, procedures, and protocols leading to the prevention of such crimes.

The legislation would provide state and local governments with additional tools to gather information on many aspects of domestic violence. This information could then be used to create legislation to combat domestic violence.

With the creation of such review teams the legislature will help stop these devastating crimes.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 398(JUD)
(H) Publish Date: 2/12/04

Revision Date/Time (Note if correction):
Dept. Affected: Administration

Title: An Act relating to domestic violence fatality review teams
BRU: Legal and Advocacy Services
Component: Public Defender Agency

Sponsor: Representative, Dahlstrom, Stoltze
Requester: (H) Judiciary
Component No.: 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill should have minimal fiscal impact on the operations of the Public Defender Agency.

Prepared by: Linda K. Wilson, Deputy Director
Phone (907)-334-4416
Division: Public Defender Agency
Date/Time 1/26/04 11:25 A.M.

Approved by: Mike Miller, Commissioner
Date
Agency: Administration

(Revised 9/2003 OMB)

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 398(JUD)
(H) Publish Date: 2/12/04

Revision Date/Time (Note if correction):
Dept. Affected: Administration

Title: An Act relating to domestic violence fatality review
BRU: Legal and Advocacy Services
Component: Office of Public Advocacy

Sponsor: Representatives Dahlstrom, Stoltze, S Samuels & McGuire
Requester: (H) Judiciary
Component No.: 43

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
This bill should have no fiscal impact on the operations of the Office of Public Advocacy.

Prepared by: Josh Fink, Director
Phone 907-269-3501
Division: Office of Public Advocacy
Date/Time

Approved by: Mike Miller, Commissioner
Date
Agency: Administration

(Revised 9/2003 OMB)

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: CSHB 398(JUD)
(H) Publish Date: 2/12/04

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to domestic violence fatality review teams."
RDU Criminal
Component CDCO
Sponsor Representatives Dahlstrom, Stolze, Samuels, McGuire, Wilson
Requester House Judiciary
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill allows the Commissioner of Public Safety or a municipality to establish domestic violence fatality review teams for the purpose of preventing domestic violence-related fatalities, improving law enforcement response and providing consultation and coordination for agencies involved in the prevention and investigation of domestic violence.

Passage of this legislation will have no foreseeable fiscal impact on the Department of Law.

Prepared by: Kathryn A. Daughhetee, Director
Phone 465-3673
Division Administrative Services
Date/Time 2/11/04 1:12 PM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 2/11/2004
Agency Department of Law

(Revised 12/2003 OMB)

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 4
Bill Version: CSHB 398(JUD)
(H) Publish Date: 2/12/04

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety
Title: Domestic Violence Review Teams
RDU: Alaska State Troopers
Component: Alaska Bureau of Investigations
Sponsor: Rep. Dahlstrom
Requester: (H) Judiciary
Component No.: 2744

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill authorizes that the commissioner of Public Safety or a municipality may establish domestic violence fatality review teams. The purpose of the teams is to review events leading up to a domestic violence incident in order to prevent domestic violence fatalities and to provide consultation and coordination for agencies involved in the prevention and investigation of domestic violence.

This bill would also allow those participating in the teams to receive confidential and other records of a department or an agency of the state or municipality relating to a domestic violence incident. The confidentiality of those records would be maintained.

Prepared by: Lt. Al Storey
Phone 269-4532
Division: Alaska State Troopers
Date/Time 2/8/04 8:07 PM
Approved by: Commissioner William Tandeske
Date 2/8/2004
Agency: Department of Public Safety

STATE OF ALASKA
2004 LEGISLATIVE SESSION

BILL NO. CSHB 398(JUD)

ANALYSIS CONTINUATION

Page 2

While the language of this bill empowers the commissioner of Public Safety to establish domestic violence fatality review teams, the teams themselves do not need to be actively over sighted by the Department of Public Safety (DPS).

The direct fiscal impact to DPS, therefore is expected to be very minimal. There would be some expected costs as the processes by which the teams will conduct business are established, as members of DPS attend the meetings, and as final reports from the teams are presented for archiving, but those costs could be absorbed by current resources.

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Amanda L. Matthews
2308 W 46th Ave.
Anchorage, AK 99517
907- 223- 6429

To Whom It May Concern:

I am writing in support of the proposed legislation to enact domestic violence fatality review teams. I think that it will give the community a better understanding of the challenges that victims face in the justice system related to domestic violence. Knowing that Alaska and Anchorage specifically, has a high rate of domestic violence and DV related homicides, it's important to put review teams in place to figure out how or why we have this rate. More importantly, to look at what needs to change in the current system to prevent domestic violence related fatalities.

Similar programs of review have proven to be useful in other communities across the United States, for example look at Florida, the first state to enact review teams. Since the teams started, they have identified possible changes in policy and/or procedures with the potential to prevent future domestic violence related deaths. I believe Anchorage has a strong core of people who are dedicated to assisting victims of domestic violence and many more who want to.

Please take this in to consideration when moving forward with this legislation.

Sincerely,

Amanda L. Matthews

Susan J. Pearson
814 W. 11th Avenue
Anchorage, AK 99501
907-272-7863

To whom it may concern,

I am writing in support of the proposed legislation to enact domestic violence fatality review teams. I feel that review of potentially fatal cases can help us better understand the benefits and challenges we face in the justice system as related to domestic violence cases.

This system of review has proven useful in other counties and states around the country and could shed light on the domestic violence issue in Alaskan municipalities.

Sincerely,

Susan J. Pearson

January 23, 2004

To Whom It May Concern:

I am writing this letter to inform you of my stand on the proposed legislation to initiate domestic violence fatality review teams. I am in support of this service being provided in the state of Alaska.

Sincerely,

Jacqueline Villalpando

HB

414

23-LS1514\W
Kurtz
4/16/04

SENATE CS FOR CS FOR HOUSE BILL NO. 414( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): HOUSE JUDICIARY COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to filling a vacancy in the office of United States senator, and to the definition of 'political party.'"

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 15.40.140 is amended to read:

Sec. 15.40.140. Condition and time of calling special election. When a vacancy occurs in the office of **United States senator or** United States representative, the governor shall, by proclamation, call a special election to be held on a date not less than 60, nor more than 90, days after the date the vacancy occurs. However, if the vacancy occurs on a date that is less than 60 days before or is on or after the date of the primary election in **the** general election **year during which a candidate to fill the office is regularly elected** [YEARS], the governor may not call a special election.

*** Sec. 2.** AS 15.40 is amended by adding a new section to read:

Sec. 15.40.165. Term of elected senator. At the special election, a United States senator shall be elected to fill the remainder of the unexpired term. The person

elected shall take office on the date the United States Senate meets, convenes, or reconvenes following the certification of the results of the special election by the director.

* **Sec. 3.** AS 15.40.200 is amended to read:

Sec. 15.40.200. Requirements of party petition. Petitions for the nomination of candidates of political parties shall state in substance that the party desires and intends to support the named candidate for the office of **United States senator or** United States representative**, as appropriate,** at the special election and requests that the name of the candidate nominated be placed on the ballot.

* **Sec. 4.** AS 15.40.220 is amended to read:

Sec. 15.40.220. General provisions for conduct of special election. Unless specifically provided otherwise, all provisions regarding the conduct of the general election shall govern the conduct of the special election of the **United States senator or** United States representative, including [, BUT NOT LIMITED TO,] provisions **concerning voter qualifications; provisions regarding the duties, powers, rights, and obligations of the director, of other election officials, and of municipalities; provision for notification of the election; provision for payment of election expenses; provisions regarding employees being allowed time from work to vote; provisions for the counting, reviewing, and certification of returns; provisions for the determination of the votes and of recounts, contests, and appeal; and provision for absentee voting** [SPECIFICALLY REFERRED TO IN AS 15.40.130].

* **Sec. 5.** AS 15.40.310 is amended to read:

Sec. 15.40.310. General provisions for conduct of special election. Unless specifically provided otherwise, all provisions regarding the conduct of the general election shall govern the conduct of the special election of the governor and lieutenant governor, including [, BUT NOT LIMITED TO,] provisions **concerning voter qualifications; provisions regarding the duties, powers, rights, and obligations of the director, of other election officials, and of municipalities; provision for notification of the election; provision for payment of election expenses; provisions regarding employees being allowed time from work to vote; provisions for the counting, reviewing, and certification of returns; provisions for the**

determination of the votes and of recounts, contests, and appeal; and provision for absentee voting [SPECIFICALLY REFERRED TO IN AS 15.40.130].

* **Sec. 6.** AS 15.40.470 is amended to read:

Sec. 15.40.470. General provision for conduct of special election. Unless specifically provided otherwise, all provisions regarding the conduct of the general election shall govern the conduct of the special election of state senators, including [, BUT NOT LIMITED TO, THE] provisions **concerning voter qualifications; provisions regarding the duties, powers, rights, and obligations of the director, of other election officials, and of municipalities; provision for notification of the election; provision for payment of election expenses; provisions regarding employees being allowed time from work to vote; provisions for the counting, reviewing, and certification of returns; provisions for the determination of the votes and of recounts, contests, and appeal; and provision for absentee voting** [SPECIFICALLY REFERRED TO IN AS 15.40.130].

* **Sec. 7.** AS 15.60.010(21) is amended to read:

(21) "political party" means an organized group of voters that represents a political program and

(A) that [EITHER] nominated a candidate for governor who received at least three percent of the total votes cast for governor at the preceding general election or has registered voters in the state equal in number to at least three percent of the total votes cast for governor at the preceding general election;

(B) if the office of governor was not on the ballot at the preceding general election but the office of United States senator was on that ballot, that nominated a candidate for United States senator who received at least three percent of the total votes cast for United States senator at that general election or has registered voters in the state equal in number to at least three percent of the total votes cast for United States senator at that general election; or

(C) if neither the office of governor nor the office of United States senator was on the ballot at the preceding general election, that

nominated a candidate for United States representative who received at least three percent of the total votes cast for United States representative at that general election or has registered voters in the state equal in number to at least three percent of the total votes cast for United States representative at that general election;

* **Sec. 8.** AS 15.40.010, 15.40.050, 15.40.060, 15.40.070, 15.40.075, 15.40.130, and 15.40.135 are repealed.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

THE GREEN PARTY OF ALASKA,

Plaintiff,

vs.

THE STATE OF ALASKA, DIVISION OF ELECTIONS, and LAURA GLAISER, Director of the Division of Elections,

Defendants.

Case No. 3AN 03-9936 CI

ORDER

I. Introduction

The Green Party of Alaska ("Green Party") is seeking a preliminary injunction against the State to receive treatment as a political party defined in AS 15.60.010(21). The State opposes the motion arguing that the Green Party does not satisfy the requirements to receive the injunction. The motion should be granted.

II. Facts

In 1990, Green Party gubernatorial candidate Jim Sykes received over 3% of the votes. After that election, the Green Party was deemed a "political party" by the State pursuant AS 15.60.010 (21). Green Party candidates continued to receive at least 3% of the vote in gubernatorial races through 2002, so the organization maintained its political party status. In 2002, Diane Benson ran for governor as a Green Party candidate and received less than 3% of the vote. After the 2002 election, the Green Party was no

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longer considered a political party by the State. In 2002, two other Green Party candidates ran for federal positions—U.S. Representative and U.S. Senator—and each candidate received over 6% of the vote.

The Green Party filed a suit against the state alleging its equal protection rights are being violated and seeking a declaratory judgment that it is unconstitutional to deny political party status to the Green Party while granting that status to other political organizations. Because the adjudication of the underlying claims may continue through the next election (or at least through the important deadlines), the Green Party currently seeks a preliminary injunction so it can plan its political campaign accordingly.

Discussion

A political party is defined as:

> [A] group of organized voters that represents a political program and that either nominated a candidate for governor who received at least three percent of the total votes cast for governor at the preceding general election or has registered voters in the state equal in number to at least three percent of the total votes cast for governor at the preceding general election.

AS 15.60.010 (21). A political group is a group of organized voters with a political program that does not otherwise satisfy the requirement for political party. AS 15.60.010(20). Political groups that want to place a candidate on a ballot must first file a petition including an adequate number of signatures on the day of the primary election. AS 15.25.140-60. Political party candidates, to the contrary, do not have to gather voter signatures in order to be placed on the ballot. Instead, they must file a declaration of candidacy by June 1 of the year of the election. AS 15.25.030-04.

The plaintiff seeks a preliminary injunction to receive treatment as a political party despite its failure to satisfy AS 15.60.010 (21). The following is the applicable statutory standard for granting an injunction:

> When it appears that (1) the plaintiff is entitled to the relief demanded, and the relief or any part of it includes restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff; or (2) the defendant is doing, or threatens or is about to do, or is procuring or suffering to be done some act in violation of the plaintiff's rights concerning the subject of the action and tending to render the judgment ineffectual...

AS 09.40.230.

When ruling on whether to grant preliminary relief, the court must "avoid extensive involvement in the merits of the issues between the parties." *A.J. Industries v. Alaska Public Service Commission*, 470 P.2d 537,540 (Alaska 1970). When the party seeking relief will not be harmed by the injunction, that party must establish a clear showing of probable success before the motion is granted. *Id.* However, when the party seeking the relief would be irreparably harmed and the opposing party can be adequately protected from harm, then the court must apply a "balance of hardships" approach. *State of Alaska v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270 (Alaska 1992). The balance of hardships approach involves a three-part test:

> (1) the plaintiff must be faced with irreparable harm; (2) the opposing party must be adequately protected; and (3) the plaintiff must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'

Id. at 1273 (quoting *Messerli v. Dep't of Natural Resources*, 768 P.2d 1112, 1122 (Alaska 1989)).

Here, the plaintiff argues that it will be irreparably harmed if the injunction is not granted, so the balancing test applies. The defendant, however, argues that the plaintiff will not be irreparably harmed, so it must establish probable success on the merits. The determination of which test applies turns on whether the plaintiff will be irreparably harmed if the injunction is not granted.

Irreparable harm

An irreparable injury is an injury, regardless of its size, that cannot be reasonably redressed in a court of law. *Kluti Kaah*, 831 P.2d at 1273 n.5, citing Black's Law Dictionary, 786 (6th Ed. 1990). For purposes of the balancing test here, the injury must be established with substantial certainty.

The State argues that the plaintiff will not suffer any harm because it has sufficient time to register enough Green Party voters to be recognized as a political party in time for the primary. After the 2002 elections, the Libertarian party did exactly that after it had lost its party status.

The Green Party states that it has never been able to register enough voters to be recognized as a political party. Its only option, therefore, is to gather signatures in preparation of the 2004 election. The Green Party argues that if the injunction is not granted, the organization will be harmed because it will have to "jump through additional registration and petitioning hurdles," including gathering signatures. The Green Party will also be fiscally impaired because AS 15.13.070(b) significantly limits the amount of contributions that can be made to the organization if it is a political group instead of a political party. In addition, the plaintiff will not be able to participate in the primary, an event with great political value and media coverage.

Participation in a primary has great political value. As noted in *Vogler v. Miller*, 660 P.2d 1192 (Alaska 1983) ("*Vogler II*"), candidates that participate in primaries receive intense media coverage, whereas a candidate from a small party that is simply on the ballot will likely go unnoticed. *Id.* at 1194. The primary has been described as "one of the great drive engines of American politics." *Id.* (quoting T. White, *The Making of the President 1972*, 71 (1973)). The Green Party's absence from the primary may have a harmful effect on that party's recognition and future support. The Green Party has clearly made strides over the past twelve years by maintaining its party status and having two candidates for federal office receive over 6% of the vote. Precluding the Green Party from the primary, coupled with imposing limitations on its fundraising abilities will likely harm the party in a way that could not be compensable in a court of law.

Because the plaintiff will be irreparably injured if the injunction is not granted, the balance of hardship approach must be applied.

Adequate protection of the defendant

The injunction may only be granted if the State is adequately protected. The court must consider the clear ramifications of an injunction, including potential for similar actions by other parties seeking injunctive relief, and whether similarly situated parties would be treated differently. *See Kluti Kaah*, 831 P.2d at 1273. In *Kluti Kaah*, the superior court improperly granted an injunction to a Native Village without considering that other similarly situated Native Villages would seek the same relief. In fact, seven other Villages sought the same relief. The court is prohibited from treating similarly situated Villages differently. The purpose of the underlying restriction was to

increase the moose population, and granting all eight injunctions would not have adequately protected the state's interest in increasing the moose population.

The State argues that it will be harmed by the injunction because it will have to spend its limited funds for printing and computer programming associated with a candidate. In addition, the State argues that it has an interest in ensuring that the candidates on each ballot have a modicum of support by voters. Without that support, the voters will be subject to overcrowding and confusion. The Green Party argues that the amount of money the State would spend on printing is minimal and not enough to constitute harm and the Green Party has received sufficient support over the years to prevent voter confusion.

No evidence was presented that any other political organization is situated similarly to the Green Party.[1] Therefore, it does not appear that a similar injunction will be sought by other parties, overburdening the defendant. Over the past decade the State has absorbed the cost of having a Green Party candidate on the gubernatorial ballot. Including the Green Party in the upcoming primary will not be any different from previous races, thus not financially harming the State.

The State does have an interest to ensure parties with at least a modicum of support are on the ballot. *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982) ("*Vogler I*"). However, the Green Party has established a modicum of support by maintaining its political party status from 1990 to 2002 and by obtaining over 6% of the votes in the

[1] The Republican Moderate Party also lost its party status after the 2002 election. However, no evidence has been presented that it has been recognized as a political party as long as the Green Party and that they received over 3% of the votes in the races for U.S. Representative and U.S. Senator.

most recent U.S. Senate and U.S. Representative races. The state's interest will not, therefore, be harmed by granting the preliminary injunction.

Serious and substantial question

The final question in the inquiry is whether the Green Party has raised a serious and substantial question that goes to the merits of the case. The plaintiff alleges that taken together, AS 15.60.010(21), 15.25.030, and 15.25.140 violate its equal protection rights under the state and federal constitutions. The plaintiff argues that it is situated similarly to organizations that are recognized as political parties because it has received more than 3% of the vote in a state-wide election and that depriving the plaintiff of its political party status because the requisite votes arose from candidates for federal positions instead of the candidate for governor is unconstitutional.

The Green Party did have a modicum of support during the 2002 election. Although the candidate for governor did not receive the requisite 3% vote, two other state-wide candidates did receive over 6% of the votes. Because such support for the Green Party does exist, the State may be treating the Green Party differently from other similarly situated political organizations in violation of the state and federal constitutions. This issue has yet to be litigated in Alaska courts. The Green Party, therefore, has raised a serious and substantial question that goes to the merits of the case and is not frivolous

III. Conclusion

Because the Green Party will be irreparably harmed, the State is adequately protected, and the Green Party presents a serious and substantial question, the motion

for a preliminary injunction is GRANTED.

It is so ORDERED.

DATED at Anchorage, Alaska this 30th day of October, 2003.

JOHN REESE
Superior Court Judge

I certify that on 11/3/03 a copy of the above was mailed to each of the following at their address of record:
Manford / AG (Feldman)

Administrative Assistant

Kevin M. Morford, attorney at law
P. O. Box 672263
Chugiak, AK 99567
(907) 688-5888
Attorney for plaintiffs
Alaska Bar No. 8406040

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

THE GREEN PARTY OF ALASKA, Plaintiff, vs. THE STATE OF ALASKA, DIVISION OF ELECTIONS, and LAURA GLAISER Director of the Division of Elections, Defendants.	)	Case No. 3AN-03-9936 CI
STATE OF ALASKA	)	
	) ss	
THIRD JUDICIAL DISTRICT	)	

AFFIDAVIT OF JIM SYKES

Jim Sykes, being first duly sworn, upon oath, deposes and says:

1. I am presently a co-chair of the Green Party of Alaska in the above captioned action, and I make this affidavit based upon my own personal knowledge.

2. I am presently deciding whether or not to run for statewide office in the 2004 primary and general elections in Alaska. If I do run, it will be as a candidate of the Green Party of

Alaska.

3. Until the court decides whether or not to grant the Green Party of Alaska's pending motion for a preliminary injunction in this lawsuit, it remains uncertain whether or not I will be required to gather signatures on a nominating petition, pursuant to AS 15.25.140 et seq., in order to be able to appear on the primary ballot, and (if I win in the primary election) the general election ballot. Knowing whether or not I will be required to gather signatures on a nominating petition would significantly change the timing and structure of my campaign. I would be reluctant to waste limited time and resources from my campaign seeking signatures on a nominating petition which could subsequently become unnecessary if the Green Party's motion for a preliminary injunction is granted.

4. The Green Party of Alaska is also currently suffering from the uncertainty of not having a decision from the court on the motion for a preliminary injunction. It will continue to be harmed by that uncertainty until the court is able to decide that pending motion. Because existing and ongoing interests of the Green Party of Alaska are presently being harmed, and because its potential candidates like me are also being harmed while the motion for preliminary injunction remains unresolved, I request that the court agree to decide the motion for a preliminary injunction on an expedited basis.

Jim Sykes

Subscribed and sworn to before me this 23 day of October, 2003.

Kathleen D. Johnson

Notary Public in and for Alaska
My Commission Expires: 7-16-2007

Kathleen D. Johnson
Notary Public - State of Alaska
My Comm. Expires 7-16-2007

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was sent by first class mail, postage paid, to Sarah J. Felix, attorney for defendants, on the 23rd day of October, 2003.

Kevin Morford

Kevin M. Morford

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. Jim Holm
Rep. Dan Ogg
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

MEMORANDUM

To: Senator Ralph Seekins
Chair, Senate Judiciary Committee

From: Representative Lesil McGuire
Chair, House Judiciary Committee

Date: March 22, 2004

Re. Request for Hearing, SCS CSHB 414 (JUD): U.S. Senate Vacancy/
Def. Of Political Party

I respectfully request that SCS CSHB 414 (JUD), "An Act relating to filling a vacancy in the office of United States senator, and to the definition of 'political party,'" be scheduled for a hearing at your earliest convenience. Please refer to the attached bill packet for background information.

If you have any questions please feel free to contact me personally, or my staff, Vanessa Tondini, at 4990. Thank you for your time and consideration.

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. Jim Holm
Rep. Dan Ogg
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Sponsor Statement
CSHB 414 (JUD)

"An Act relating to filling a vacancy in the office of United States senator, and to the definition of 'political party'"

HB 414 seeks to redress two current shortcomings in Alaska's Elections Act. There are two primary components to HB 414, each a response to a clear call for changes to Alaska Statutes so as to provide: firstly, for the fairest method of selecting individuals for a vitally important public office; and, secondly, to respect the will of the Alaskan people regarding choices they make to associate as political parties.

HB 414 will change the way a vacancy in one of Alaska's two seats in the United States Senate is filled when such a vacancy occurs. Currently, Alaska law provides that the Governor appoints a person of his or her choice from the same political party as the person who vacated the seat, when one of Alaska's two U.S. Senate seats becomes vacant, a process governed by the 17th Amendment to the U.S. Constitution. Last year a group of Alaskans calling itself "Trust the People" began gathering signatures to place an initiative on the ballot this year that would change Alaska Statutes to allow for a special election in the case of any vacancy in one of Alaska's two U.S. Senate seats. If it is determined that this group obtained enough signatures, the initiative will be certified and placed on the November 2004 ballot.

HB 414 listens to the will of the many Alaskans who signed petitions in favor of electing some one to fill a vacancy in one of Alaska's two U.S. Senate seats. The sections of the bill that change Alaska law relating to filling such vacancies are exactly the same, word for word, as the language of the initiative. Supporting HB 414 is a clear way to implement the will of a large number of Alaskan voters.

The second part of HB 414 addresses a lawsuit brought by the Green Party of Alaska against the State Division of Elections. The case grew out of the Green Party's dissatisfaction with the interplay between the results of the 2002 gubernatorial election and the definition of "political party" in the Alaska Elections Act. In order to obtain political party status, the current definition requires a party to have nominated a candidate for Governor who received at least three percent of the popular vote in the preceding gubernatorial election. Alternatively, a party is recognized if it has registered voters under its banner equal in number to three percent of the total number of votes cast for Governor in the immediately preceding general election.

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. Jim Holm
Rep. Dan Ogg
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

In 2002, the Green Party candidate for Governor garnered less than the minimum three percent needed to maintain the Green's status as a political party and, thus, the party sought an injunction of the law. The court acceded to the Green Party's request and enjoined enforcement of the law so that the Greens could avoid irreparable harm by continuing to participate in politics with the benefits of being a full political party. The order accompanying the court's injunction noted that the Green Party had been successful in winning over six percent of the vote in races for federal elective positions, namely U.S. Representative and U.S. Senator, and instructed the State to continue treating the Green Party with the deference due to a statutorily-defined political party until the General Election in November 2004 or until the Legislature, "corrects the problems with party eligibility in the statutes."

HB 414 responds directly to the court's order by expanding the types of statewide races to which the Division of Elections can look in ascertaining whether a party enjoys enough popular support to merit official status. It adds two different gauges to the law, so that if there is not a gubernatorial election, then an assemblage of voters can refer to its success in the most recent U.S. Senate or U.S. House race to earn official political party status under the statutes. The changes to the Alaska Elections Act wrought by the second half of HB 414 will inject fairness to the process of obtaining political party status in Alaska. Parties will be able to refer to their good showing in the most recent statewide race, never more than two years in the past, in order to demonstrate that they are supported by the voting public and deserve the statutory benefits conferred on political parties.