CHILD CUSTODY AND DOMESTIC VIOLENCE ALLEGATIONS: NEW YORK'S APPROACH TO CUSTODY PROCEEDINGS INVOLVING INTIMATE PARTNER ABUSE

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INTRODUCTION

The issues that arise from personal relationships involving domestic violence are both numerous and far reaching. When a relationship produces children, the issues become even more complicated and courts must determine how to award custody of the child or children. In New York, courts must consider, by a preponderance of the evidence, how the domestic violence affects the best interests of the child.[1] Additionally, the court must also evaluate the credibility of each parent (who has been the primary caregiver for the child), the child's desire, and each parent's ability to provide for the child.[2] Weighing all of these factors, among others, the court must create a custody order that is in the best interests of the child or children involved.[3]

The first section of this paper addresses the link between domestic violence within an intimate relationship, and future violence against a child, as well as the consequential negative effects of domestic violence on a child. Many courts seem incredibly hesitant to acknowledge that there may be danger for a child to be placed with a parent who performed acts of domestic violence against the other parent.[4] However, a person with the capability to abuse and exploit an intimate partner seems to be just as capable of abusing a child, who is an obviously more vulnerable victim.[5] This section also addresses the complications that arise when the court requires a couple, with a history of domestic violence, to interact regarding their child.

The second section looks specifically at New York and how courts handle domestic violence in child custody cases. Currently, there is no presumption within the New York court system against batterers obtaining custody of their child. In fact, in New York, the court will acknowledge the presence of domestic violence (if proven by a preponderance of the evidence) and only then will a court evaluate the domestic violence in relation to the totality of the circumstances surrounding the best interests of the

[1] N.Y. DOM. REL. LAW § 240(1) (McKinney 2010).

[2] Khaykin v. Kanayeva, 849 N.Y.S.2d 646, 647 (App. Div. 2008).

[3] N.Y. DOM. REL. LAW § 240(1); *Khaykin*, 849 N.Y.S.2d at 647–48.

[4] Joan Zorza & Leora Rosen, *Introduction to Special Issue on Custody and Domestic Violence*, *in* DOMESTIC VIOLENCE LAW 439, 444 (Nancy K. D. Lemon ed., 3d ed. 2009).

[5] *See* Anne E. Appel & George W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 J. FAM. PSYCHOL. 578, 596 (1998).

child.[6] This method of evaluation fails to consider the consequences of abuse on the victim, how that is reflected in their demeanor in court[7] and their behavior outside of court.[8]

In cases of domestic violence, the victim of abuse often appears to be the less capable parent to the court. There are many explanations for this phenomenon. For example, trauma endured by a victim of domestic violence often leads to severe anxiety and depression, or even substance abuse.[9] Therefore, the victim appears less capable of raising children, and is often less financially secure than the abuser.[10] These facts increase the likelihood that the abuser will obtain custody of the child from the court.[11] In light of these inequities, this paper aims to establish a rebuttable presumption that requires abusers to show there has never been any violence towards the child; it will then address the positive and negative consequences that this proposed presumption would bring to a child custody proceeding.

Section three will examine the domestic relations laws of other states where presumptions against a batterer obtaining custody have been implemented (notably, North Dakota and Delaware), and how different states address domestic violence in child custody cases through legislation and case law. This inspection of other states will provide insight into both the positive and negative aspects of legislation, as well as allow for reflections on the success and failures in the implementation of these statutes.

Finally, this paper will compare and contrast the methods of other states to those in New York, as a guideline to determine the most effective way of addressing domestic violence within custody proceedings. In some states, the trial judge in a custody case may "presume by statute that a batterer should not have joint or sole

[6] N.Y. DOM. REL. LAW § 240(1).

[7] Note that the term demeanor is used throughout this paper to mean the physical presentation of domestic violence victims, as well as the conclusions about credibility, judgment, motive, and other character attributes which the court draws from victims' mannerisms, tone of voice, testimony, and general behavior in court.

[8] Zorza & Rosen, *supra* note 4, at 440.

[9] Jan Jeske, *Custody Mediation Within the Context of Domestic Violence*, 31 HAMLINE J. PUB. L. & POL'Y 657, 665 (2010).

[10] Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163, 197 (2009).

[11] Elayne E. Greenberg, *Beyond the Polemics: Realistic Options to Help Divorcing Families Manage Domestic Violence*, 24 ST. JOHN'S J. LEGAL COMMENT. 603, 610–11 (2010) (footnotes omitted).

custody of the child at issue."[12] When this presumption is triggered, the perpetrator of domestic violence is unable to receive joint or sole custody of any child and the presumption will "be applied regardless of the applicable best interest standard."[13]

I. THE LINK BETWEEN DOMESTIC VIOLENCE AND CUSTODY

In New York, courts often neglect to consider the existence of domestic violence between the parents in determining the custody of the child.[14] Courts have held that only "[w]here allegations of domestic violence are proven by a preponderance of the evidence, 'the court must consider the effect of such domestic violence upon the best interests of the child.'"[15] Generally, the courts make "custody determination[s] . . . to a great extent upon the Family Court's assessment of the credibility of the witnesses and upon the assessments of the character, temperament, and sincerity of the parents."[16] This determination becomes especially complicated when there is domestic violence involved, which severely affects the demeanor and mental well being of the victim.

To address the issue of domestic violence in custody cases, New York changed the Domestic Relations Law in 1996.[17] The state amended the law to require courts to consider domestic violence in custody cases.[18] However, in 2009, the legislature again amended section 240 to require the courts to not only consider domestic violence, but also write into their decisions how the evidence of domestic violence affected their determinations.[19]

[12] Conner, *supra* note 10, at 189.

[13] *Id.* at 197.

[14] Zorza & Rosen, *supra* note 4, at 444.

[15] Khaykin v. Kanayeva, 849 N.Y.S.2d 646, 648 (App. Div. 2008) (involving a mothers appeal of a Family Court decision granting the father's petition for custody and dismissing her family offense petition because the Family Court "determined that the mother's allegations were not supported by a preponderance of the evidence"). The court made the best interest determination based solely on assessing the credibility of each parent: "The father denied the mother's allegations, and the court resolved the conflicting testimony in favor of the father." *Id.* That is the extent of the appellate court's consideration of the domestic violence.

[16] *Id.* at 647.

[17] Act of May 21, 1996, ch. 85, 1996 N.Y. Laws 1971, 1971–72 (codified at N.Y. DOM. REL. LAW § 240(1) (McKinney 2010)).

[18] *Id.*

[19] Act of Sept. 26, 2009, ch. 476, 2009 N.Y. Sess. Laws 1223, 1224 (McKinney) (codified at § 240(1)).

This suggests that even after the enactment of the 1996 law, the courts did not give proper weight to issues of domestic violence in these custody cases. Here, the difficulty for the court is its task of assessing the credibility of each parent as a witness.[20] Properly assess the credibility of a parent as a witness, where any domestic violence occurred within the parents' relationship, creates an almost impossible task for the court precisely because not all cases of domestic violence will look the same.[21] This makes it difficult for the court to evaluate so many individual situations while maintaining an objective viewpoint.

As of June 8, 2010, the Second Department in *Pierre-Paul v. Boursiquot*[22] held that where "the mother's allegations of domestic violence were not supported by a preponderance of the evidence," domestic violence would not be considered in custody determinations.[23] In that case, the mother appealed from a lower court judgment awarding sole custody of the couple's children to the father; however, the court refused to consider her appeal because the lower court did not accept beyond the preponderance of the evidence her allegations of domestic violence.[24] Therefore, the allegations of domestic violence were probably not given any weight in the determinations.[25] This sets a dangerous precedent that might allow courts to refuse to hear any evidence of domestic violence in a custody proceeding unless the occurrence of such violence has been proven beyond a preponderance of the evidence.

The black-and-white manner in which the New York courts handle allegations of domestic violence in child custody proceedings is more shocking when current and extensive knowledge of the nature of domestic violence is considered. There are five stated realities of domestic violence.[26] While acknowledging that domestic violence continues to create debate, these five realities are critical to understand when dealing with litigants involved in intimate partner violence, including: (1) that "[t]here is no agreement about what constitutes domestic

[20] *See Khaykin*, 849 N.Y.S.2d at 647.

[21] Greenberg, *supra* note 11, at 608. It should be noted that realistically, the court is assessing the credibility of the parent claiming the other is abusive, more so than the parent accused of abuse. *Id.*

[22] 903 N.Y.S.2d 94 (App. Div. 2010).

[23] *Id.* at 96.

[24] *Id.*

[25] *See id.*

[26] Greenberg, *supra* note 11, at 606–07 (articulating research completed that examines the realities of domestic violence within society).

violence," (2) that "[t]here is no fool-proof screening for domestic violence," (3) that the "[c]ourts have been ineffective in stopping many forms of violence," (4) that "[b]atterers are statistically more successful than survivors at securing custody of their children," and (5) that "[c]hildren are the causalities of their family's violence."[27] These realities coalesce to create extreme difficulty for the courts dealing with these cases.

A. Realities of Domestic Violence

The first and most glaring problem when addressing domestic violence in the court is that "there is not one prototype for domestic violence."[28] All cases of domestic violence will not look the same, and often the victims of domestic violence are difficult to identify.[29] Generally speaking, domestic violence can include "[p]hysical abuse, emotional abuse, financial abuse, and parental alienation . . . [as] variations of how control may be exerted when there is domestic violence."[30] Without a clear understanding of what constitutes domestic violence, and who the victim is (meaning the party that is subjected to abusive, violent, and controlling behavior), it becomes difficult for a court to address the issue in any effective capacity.

The second stated reality that there is no foolproof way to screen for domestic violence, increases the difficulty for the court to handle these cases.[31] Currently there are several different screening mechanisms for domestic violence. However, each "are designed for specific types of violence, excluding the identification of others beyond their scope."[32] This creates limitations to the usefulness of these screening tools, when the results only accurately describe a narrow type of violence. Ultimately, this results in the courts being "deprived of vital information they need about the family's interactions" in order to make a proper determination of what is in the child's best interest.[33]

The third reality is that the courts have proven ineffective in handling domestic violence in a manner that stops the violence. Greenberg notes that oftentimes, cases of domestic violence

[27] *Id.*
[28] *Id.* at 608.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 609.
[32] *Id.*
[33] *Id.*

appear in court for the first time "as custody, visitation petitions, or divorce complaints, not as orders of protection," which makes discovery of domestic violence less likely.[34] The fourth and arguably most disturbing reality articulated by Elayne Greenberg, mediation expert, is that within custody proceedings, the abuser is statistically more likely than victims to secure custody of the child.[35]

The fifth reality concerns the child of relationships involving intimate partner violence, concluding that the child is ultimately a casualty of the violence.[36] "There is a direct correlation between domestic violence and child abuse. Studies indicate that in families where there is domestic violence, there is a 30% to 60% chance that the batterer will also abuse the child."[37] The experience of direct abuse, or even just witnessing one parents' abusive behavior of the other, leads a child to "heightened rates of behavioral problems, social difficulties, hyperactivity, anxiety, withdrawal, and learning difficulties."[38] Although there are studies documenting these statistics, courts in New York fail to consider not only the link between domestic violence and child abuse, but also the detrimental effects that witnessing abuse may have on a child.[39] The research suggests that when a child is exposed to domestic violence, he or she develops a host of problems, including aggressive behavior, and other psychological issues, including higher rates of post traumatic stress disorder than other children.[40]

When the issue of custody is contested, "the batterer is 70% more likely to prevail" than the abused.[41] Greenberg states eight basic reasons that this is the case.[42] The first reason is that a survivor of domestic violence often appears less capable of managing the child.[43] Additionally, victims of domestic violence often "make poor witnesses."[44] The experience of being a victim of

[34] *Id.* at 609–10.
[35] *Id.* at 610 (footnote omitted).
[36] *Id.* at 611.
[37] *Id.* at 611–12 (footnotes omitted).
[38] *Id.* at 612 (footnote omitted).
[39] Peter G. Jaffe et al., *Excerpt Adapted from Matching Parenting Arrangements to Child Custody Disputes in Family Violence Cases*, *in* DOMESTIC VIOLENCE LAW, *supra* note 4, at 436, 436.
[40] *Id.*
[41] Greenberg, *supra* note 11, at 610 (footnote omitted).
[42] *Id.* at 610–11.
[43] *Id.* at 610.
[44] Allison Cleveland, *Specialization has the Potential to Lead to Uneven*

domestic violence often manifests as "nervousness, timidity, and body language that may be perceived as suspect or deceptive."[45] Recent quantitative and qualitative studies have shown that victims of domestic violence suffer psychological damage as a result of the abuse.[46] This psychological damage manifests itself "in the form of fear and anxiety . . . loss of self-esteem, depression, and posttraumatic stress," which all negatively affects the credibility of the abused and the perception of their ability to manage the child.[47]

The second reason the batterer is more likely to obtain custody revolves around his or her ability to manipulate the child to side with them.[48] Thirdly, a batterer is able to outperform the victim on psychological tests given to determine the competency of both parents.[49] Moreover, batterers "are often confident and self-controlled, giving an appearance of reliability and truthfulness in court[ ]" when the history of a couples' domestic violence is not given weight.[50] Fourth, not every custody evaluator is educated in domestic violence and therefore is unable to determine if abuse is present within the intimate relationship.[51] Fifth, there are studies that show fathers are favored in contested custody cases because courts have gender and racial biases that look more favorably upon fathers.[52] Sixth, often courts will look unfavorably on the survivor of domestic violence because they may refuse to "promote their children's relationship with the other parent."[53] Seventh, many attorneys lack the understanding of the dynamics involved in domestic violence cases to properly represent survivors.[54] And eighth, "batterers frequently have more financial resources to fund their persistent litigation assaults" and therefore have better legal representation in court.[55]

Justice: Domestic Violence Cases in the Juvenile & Domestic Violence Courts, 6 MODERN AM. 17, 19 (2010).

[45] *Id.*

[46] Jeske, *supra* note 9, at 665 (articulating the research compiled on the various types of domestic violence perpetrated).

[47] *Id.*

[48] Greenberg, *supra* note 11, at 610.

[49] *Id.*

[50] Cleveland, *supra* note 44, at 19.

[51] Greenberg, *supra* note 11, at 611.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

B. The Five Types of Domestic Violence

The nature of domestic violence itself complicates the court system's ability to handle custody proceedings that involve a parental relationship with a history of violence. There are five types of generally recognized domestic violence: "[c]oercive [c]ontrolling [v]iolence, [s]eparation-[i]nstigated [v]iolence, [s]ituational [c]ouple [v]iolence, [v]iolent [r]esistance, and [i]ntimate [p]artner [s]exual [a]buse."[56] The most common type of domestic violence is coercive controlling violence, which is typically used to describe "all domestic violence [causing] confusion for the courts, legislature, attorneys, social services, and the victims."[57] Situational couple violence is the most common domestic violence involving physical aggression; however, it does not typically involve issues of power and control or coercion by the abuser, and can often occur in an "isolated incident."[58]

Separation-instigated violence involves episodes of violence "at the time of separation where there is no other history of domestic violence."[59] This is often limited to one or two violent episodes. However, it should not be underestimated because the violence can be severe.[60] Violent resistance is the fourth type of domestic violence and is limited to the violent retaliations of victims of coercive controlling violence.[61] This type of violence occurs as an immediate response to an act of coercive controlling violence, often to "protect themselves and/or children."[62] The last type of domestic violence that is regularly acknowledged is intimate partner sexual assault.[63] This category can include a wide range of behaviors from the perpetrator, from "verbal degradation relating to sexuality to felony-level sexual abuse and torture."[64]

Because there are various types of domestic violence that can occur within a relationship initially complicates the courts' treatment of domestic violence in custody proceedings because

[56] Jeske, *supra* note 9, at 664–65.
[57] *Id* at 663.
[58] *Id.* at 666.
[59] *Id.* at 667.
[60] *Id.* (footnote omitted).
[61] *Id.* at 668.
[62] *Id.*
[63] *Id.* at 669.
[64] *Id.*

the signs of abuse are often hard to interpret.[65] Additionally, the very issue of "[t]he preservation of parental rights becomes enmeshed with the substantiation of domestic violence allegations," and further complicates the proceedings.[66]

C. Interactions between Domestic Violence and Child Custody

Although it can be difficult for a court to identify domestic violence given its many intricacies, it is vital to execute justice, and the safety of the victim and the child, that the courts properly assess the circumstances surrounding the violence. In cases of domestic violence it is exceedingly risky for the court to attempt to separate the "safety concerns" for the victim from those of the child—"the two are linked."[67] There is evidence that suggests that "[c]hildren exposed to batterers, in some cases, are in as much risk as their abused parent."[68] In support of this argument, Evan Stark, an expert on domestic violence, states "domestic violence is the single most common context for child abuse and neglect."[69]

Given the extent of the dangers known to surround domestic violence, it seems to make little sense that courts will only consider domestic violence within the "totality of [the] circumstances."[70] Evidence that domestic violence exists within the relationship between the parents is a clear indicator that the well being of the child has been disrupted, simply by the fact that the child lives in a violent home.[71] Studies suggested that a direct correlation exists between domestic violence and child abuse.[72] In fact, these studies indicate that a batterer is between 30 percent to 60 percent likely to abuse the child, as well as the mother.[73] This abuse can range from physical abuse directed at the child, to incidental physical abuse as a result of the perpetrator's attempt to abuse his or her partner, and even to psychological abuse

[65] Greenberg, *supra* note 11, at 609.

[66] *Id.* at 615.

[67] Conner, *supra* note 10, at 185.

[68] *Id.* (footnote omitted).

[69] *Id.* It should be noted that the numbers supporting Evan Stark's assertion are somewhat inconclusive in the range of cases of child abuse or neglect that involved domestic violence within the home. *Id.*

[70] Assini v. Assini, 783 N.Y.S.2d 51, 53 (App. Div. 2004) (quoting Friederwitzer v. Friederwitzer, 447 N.Y.S.2d 893 (App. Div. 1982)).

[71] Greenberg, *supra* note 11, at 612.

[72] *Id.* at 611.

[73] *Id.* at 611–12 (footnote omitted).

inflicted on the child to "hurt or intimidate the mother."[74]

However, any abuse, whether direct or incidental, is detrimental to the welfare of the child, and should be given proper weight in a custody determination. Through years of practice, experts Lundy Bancroft and Jay Silverman have observed a pattern of batterers "replicat[ing] their abusive style with the partner in their relationships with the children."[75] They note that both extensive research and clinical experience suggests that the manner in which a batterer treats his or her partner is "an important predictor of how he is likely to treat children."[76] In addition, the majority of studies done regarding the connection between domestic violence and child abuse indicate that when domestic violence is present, child abuse is also likely to be present.[77]

Even when the batterer does not directly target a child, the child is seriously damaged by the mere witnessing of domestic violence.[78] It is well documented that a child who witness domestic violence "experience[s] heightened rates of behavioral problems, social difficulties, hyperactivity, anxiety, withdrawal, and learning difficulties" in later life.[79] These conditions have an obvious effect on the child's well being, emotionally and mentally. A condition imposed by a parent on a child that results in behavioral problems and learning difficulties is certainly one that affects the best interests of that child. In addition, children who witness domestic violence, when questioned directly, express to researchers a keen awareness of the fact that incidents of violence occur within their home.[80] Therefore, a child's exposure to domestic violence is clearly against his or her best interests.

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[74] LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 58 (2d ed. 2011).

[75] *Id.* at 59.

[76] *Id.* at 60.

[77] Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Abuse*, NAT'L ELECTRONIC NETWORK ON VIOLENCE AGAINST WOMEN, Apr. 1999, at 3, http://www.bvsde.paho.org/bvsacd/cd67/AR_overlap.pdf (five of seven studies showed a range of 30 percent to 60 percent that where one type of abuse occurred, the other was also present).

[78] Greenberg, *supra* note 11, at 612 (footnote omitted).

[79] *Id.* (footnote omitted).

[80] Jaffe et al., *supra* note 39, at 436.

II. NEW YORK'S APPROACH TO CUSTODY DETERMINATIONS IN CASES INVOLVING DOMESTIC VIOLENCE

New York uses the best interests standard for making custody determinations.[81] Determining what custody arrangement is in the best interest of the child is done through a factor analysis.[82] Although the statute articulates that a court shall consider various factors in custody cases, the only specific factor mentioned is domestic violence.[83] The court considers domestic violence when either party has alleged domestic violence in a sworn pleading, and "proven by a preponderance of the evidence."[84] If so proven, then "the court *must* consider the effect of such domestic violence upon the best interests of the child."[85] In addition to the domestic violence, the court will also consider "such other facts and circumstances as the court deems relevant in making a direction pursuant to this section and state on the record how such findings, facts, and circumstances factored into the direction."[86]

As discussed in the introduction, the legislative demand that the court must consider the effect of domestic violence, is a recent one resulting from a previous refusal to consider allegations of domestic violence in custody determinations.[87] In 1996, the New York statute was amended to mandate the consideration of domestic violence as a factor, and the legislature noted, "[r]ather than imposing a presumption, the legislature hereby establishes domestic violence as a factor for the court to consider in child custody and visitation proceedings, regardless of whether the child has witnessed or has been a direct victim of the violence."[88] This amendment establishes that New York's standard of examination in custody cases is a factors analysis. The court will consider whatever a variety of factors the judge deems relevant to

[81] Act of May 21, 1996, ch. 85, 1996 N.Y. Laws 1971, 1972 (codified at N.Y. DOM. REL. LAW § 240(1) (McKinney 2010)).

[82] *Id.* The factor approach method will be discussed in more detail in Part IV, including an examination of other states that employ this test, as well as the strengths and weaknesses that result from its application in custody cases where domestic violence is involved.

[83] *Id.*

[84] *Id.*

[85] *Id.* (emphasis added).

[86] *Id.*

[87] *Id.*

[88] *Id.*

a particular case.[89] This approach creates a host of barriers for victims of domestic violence in court. Three cases in particular exemplify these barriers: *E.R. v. G.S.R*,[90] *Wissink v. Wissink*,[91] and *Assini v. Assini*.[92]

A. Reviewing Several New York State Custody Cases that Consider Domestic Violence in the Custody Determination

1. *E.R. v. G.S.R.*

In an interesting 1996 case in Westchester County, *E.R. v. G.S.R*, the court addressed in detail the allegations of domestic violence and how they should be considered within the custody proceeding.[93] It is important to note, however, that this case differs from the norm because the petition was filed by the father one year after the couple agreed voluntarily to share custody of the child, allowing alternate weekend visitation by the father who admitted to committing acts of domestic violence against the mother.[94] The case progressed to a full fact-finding hearing that continued over several days.[95] The basic facts of the case are that the father filed for sole custody accusing the mother of being mentally unstable, however, admitting on the record to "slapping the Respondent three times on one occasion, throwing food at her another time, and in a fit of anger and jealousy, destroying an entire dining room set in their home with a baseball bat on yet another occasion, apparently in the presence of the child."[96]

Given the admission of acts of domestic violence by the father, the court did not face the problem of assessing if the allegations were credible. This allowed the court to give the issue of domestic violence within the relationship, as much weight as it felt was necessary in weighing the best interests of the child.[97] In addition to the admissions, the court heard testimony from a doctor, who met with all parties, and the law guardian assigned to the child.[98]

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[89] *Id.*
[90] 648 N.Y.S.2d 257 (Fam. Ct. 1996).
[91] 749 N.Y.S.2d 550 (App. Div. 2002).
[92] 783 N.Y.S.2d 51 (App. Div. 2004).
[93] *E.R.*, 648 N.Y.S.2d at 260.
[94] *Id.* at 259.
[95] *Id.* at 258.
[96] *Id.* at 259.
[97] *Id.* at 260.
[98] *Id.* at 260–61.

Despite the serious admissions by the father of committing acts of domestic violence in front of the child, both the doctor and the law guardian recommended to the court that the father receive custody of the child.[99]

This case is significant because although both an expert and the law guardian recommended the father receive custody, the court disagreed with their testimony mainly because of their refusal to acknowledge the likely impact the father's violence has had on the child.[100] In part the court noted that the doctor "skims over the many episodes of domestic violence, except to say that Petitioner was forthcoming in his admissions. . . . [And] offered very little as to the effects the domestic violence exhibited by Petitioner in both of his marriages might have on his son."[101] Additionally, the court expressed concern with the law guardian's recommendation because of the fact that "[t]he Law Guardian also . . . discounted the history of Petitioner's domestic violence."[102]

Ultimately, the court held that even though both the expert and the law guardian recommended custody be given to the abusive father, the court's great concern with the father's history of domestic violence, as well as additional factors, resulted in the court awarding custody to the mother-victim.[103] This case provides insight into custody cases occurring just after the amendment to the New York law requiring courts to consider domestic violence as a factor in the best interests' standard. The case also shows how seriously the court approached the issue, even in a situation where experts involved in the proceeding refused to acknowledge the gravity of the admissions.

2. *Wissink v. Wissink*

In *Wissink v. Wissink*, a 2002 decision, the Second Department addressed a case that arose from an appeal over a custody award to a father with a history of domestic violence toward the mother, without "ordering comprehensive psychological evaluations to ensure that this award of custody was truly in the child's best

[99] *Id.* at 262.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*

interest."[104] The appellate court specifically stated that "[w]ere it not for the documented history of domestic violence confirmed by the court after a hearing," they would have affirmed the custody award.[105] There was clear evidence that the child had a preference to live with the father, and he had never been violent toward the child.[106] The only factor considered in the reversal of the Family Court's decision was the domestic violence between the parents.[107]

The court expressed particular concern for the fact that the child had an "unequivocal preference for the abuser, while denying the very existence of the domestic violence that the court found she witnessed."[108] The concern resulted in a reversal of the custody award to the father, and a holding stressing the "overwhelming authority that a child living in a home where there has been abuse between the adults becomes a secondary victim and is likely to suffer psychological injury."[109] This sort of serious consideration of domestic violence in a custody determination is unfortunately rare in New York cases.[110]

III. CASES INVOLVING THE NON-PARENTAL ABUSIVE BOYFRIEND: *ASSINI V. ASSINI* AND *YIZAR V. SAWYER*

Typically in New York, the domestic violence factor in custody cases is considered as it was in *Assini v. Assini*. This case involves a couple that divorced in 1996, establishing that the mother would have sole legal custody of their child.[111] However, in 2003, the father petitioned the court for sole custody.[112] He alleged a change in circumstances, due to the presence of domestic violence in the home of the mother and her live-in boyfriend.[113] The Supreme Court established that there were:

> [R]epeated complaints filed by the [mother] with law enforcement authorities asserting numerous incidents of domestic violence,

[104] Wissink v. Wissink, 749 N.Y.S.2d 550, 550 (App. Div. 2002).
[105] *Id.* at 551.
[106] *Id.* at 550.
[107] *Id.* at 551.
[108] *Id.*
[109] *Id.* at 552.
[110] *See* Symposium, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 667 (2003).
[111] Assini v. Assini, 783 N.Y.S.2d 51, 52 (App. Div. 2004).
[112] *Id.*
[113] *Id.* at 53.

> including emotional, verbal, and physical abuse of her by her live-in boyfriend. At least one of the reported incidents involved the parties' child and several led to the boyfriend's arrest in the presence of the child.[114]

On appeal, the court held that "under the circumstances of this case, it was not in the child's best interests for custody to remain with the [mother,]" even though the boyfriend was no longer living in the house and she had obtained an order of protection against him.[115] Ultimately, the court concluded that these actions by the mother did not "overcome the detrimental effect of allowing the child to be subject to such repeated instances of domestic violence."[116]

A second case from 2002, *Yizar v. Sawyer*,[117] demonstrates the court's continued use of the domestic violence factor to remove custody from a mother because she began to co-habitate with a man, not the child's father, who perpetrated acts of domestic violence against her.[118] It is important to note that this case is particularly complicated because both the child's parents had a past involving drugs and alcohol.[119] Despite the involvement of other parental issues, this case remains relevant because many victims of domestic violence are present in court with additional mental, emotional, or drug problems that correlate to the abuse they have suffered.[120] The court also acknowledged that "despite her shortcomings, [respondent] was a loving mother, that the child had bonded with respondent and the child was 'well behaved,'" and that the father "did not fully exercise his visitation."[121]

The father's modification petition alleged that the only change in circumstances was that "the violence in respondent's home appeared to be escalating, creating an unsafe environment for the child."[122] The hearing revealed that the mother's new relationship was in fact "plagued by domestic violence, including one incident involving a knife . . . [and] [t]he child was reportedly

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[114] *Id.*
[115] *Id.*
[116] *Id.* at 53–54.
[117] 751 N.Y.S.2d 117 (App. Div. 2002).
[118] *Id.* 118–19.
[119] *Id.* at 118.
[120] Cleveland, *supra* note 44, at 17.
[121] *Yizar*, 751 N.Y.S.2d at 118. The father alleged he did not exercise visitation due to the "hostility and obstruction" by the mother, however, the court failed to officially address this allegation in their opinion. *Id.*
[122] *Id.*

exposed to some of the violence."[123] Unlike in previously discussed cases where the mother makes allegations of domestic violence perpetrated by the father, the court in this case willingly investigated and addressed the issue of domestic violence within the mother's new relationship, and the danger to which the child was exposed.

Although the court acknowledged the determination was a close one, they awarded custody to the father, noting that "factors such as domestic violence . . . can support a change in custody."[124] This case represents another instance of the court removing custody from a mother, who is the victim of an abusive relationship not with the child's father, and giving enough weight to the factor of domestic violence to allege a change in circumstances.[125] However, this type of weight seems only to be given where one parent is involved in a subsequent relationship where domestic violence is present. Hence, the factor works as a means of removing the child from that victim parent, and transferring custody to the noncustodial parent.

As these cases demonstrate, the courts have been less likely to consider the effects of domestic violence on a child when the perpetrator of the violence petitions for custody; courts are more than willing to remove custody from the victim if the victim is involved in other instances of domestic violence in the home through a later relationship.[126] This paradigm is fundamentally problematic for victims of domestic violence. It means that domestic violence will only be consistently considered in a custody case to remove custody from the victim, and transfer it to the other parent. Therefore, the Domestic Relations Law in New York seems to create an additional struggle for victims of domestic violence, rather than providing them protection when leaving a violent relationship. A presumption against the perpetrator of the domestic violence from obtaining custody of their child would force a change in this regard, and ensure that the courts are giving weight to domestic violence in all situations and not just when the victim is involved in a later violent relationship.

A. The Consequences of New York's Failure to Implement a

[123] *Id.*
[124] *Id.* at 119.
[125] *Id.*
[126] *Id.*

Presumption Against Abusers Obtaining Custody

As noted above, New York has not established a rebuttable presumption requiring a respondent to address allegations of domestic violence in a custody proceeding if the allegations were proven in court. Instead, it provides that domestic violence is only one factor to be considered by the court in a custody proceeding. Ultimately, "[t]he court's paramount concern in any custody dispute is to determine, under the totality of the circumstances, what is in the best interests of the child."[127] Therefore, even when considered, a history of domestic violence between the parents becomes only one consideration, among many, in a custody proceeding.[128]

Applying the best interest standard in a case where domestic violence is present in the relationship is fundamentally flawed in its failure "to appreciate that battering, by its very nature, is unmistakable evidence that the abusive parent's actions are contrary to what is best for the child."[129] Although there is ample evidence to support the negative consequences of a child being raised in an abusive environment, the best interest standard allows courts to refuse to consider this fact that the very nature of a batterer's personality makes them a poor parent. "Batterers by definition are poor decision-makers, negative role models for their children, more likely to place their children at risk both emotionally and physically, and, if vested with power, more likely to present a risk of physical or emotional harm to the battered parent."[130]

In addition to overlooking the fundamental inadequacies of the parenting skills of a batterer, the best interest standard as currently interpreted by New York courts elevates the ability of one parent to provide financial and emotional stability over the

[127] Little v. Renz, 897 N.Y.S.2d 142, 143 (App. Div. 2010). This case arose from a father's appeal of the Family Court granting the mother sole custody after their separation. *Id.* In this case, the court articulates the main factors to be given weight in custody proceedings:

> [T]he original placement of the child, the length of that placement, and the relative fitness of the parents. Moreover, inasmuch as custody determinations depend in large part on an assessment of the character and credibility of the parties and witnesses, the hearing court's findings will not be disturbed unless they lack a sound and substantial basis in the record. *Id.* (citations omitted).

[128] *Id.*

[129] Conner, *supra* note 10, at 196.

[130] *Id.*

likely danger to the child of abuse by the abusive partner-parent.[131] Victims of domestic violence often appear much less stable, suffering the psychological effects from the trauma of the abuse, and are often "less likely to have adequate financial resources and stable housing, and [are] more likely to remove the children from their current educational environment, home, and community."[132] Therefore, a traditional understanding of the standard places a victim of domestic violence at a disadvantage in obtaining custody of his or her child. This notion is especially disturbing when considered in conjunction with the fact that a child is often at a greater safety risk when left in the care of a batterer. Applying the best interest standard to a factor analysis, as is done in New York, inherently places children at risk and discourages victims of domestic violence from escaping the relationship because they may be unlikely to get out safely with custody of their child.

IV. REVIEWING ALTERNATIVE APPROACHES TO ADDRESSING THE ISSUE OF DOMESTIC VIOLENCE WITHIN CUSTODY CASES

As previously discussed, New York State court system's approach to addressing domestic violence within custody cases under the current Domestic Relations Law creates a system where victims are provided little to no protection. Suitably, other states have different approaches that New York should consider. There are alternative ways to handle the issue of domestic violence between the parents in a subsequent custody case. In some states, the trial judge may "presume by statute that a batterer should not have joint or sole custody of the child at issue."[133] In these states, the perpetrator of the domestic violence will not receive joint or sole custody of any child once the presumption is triggered, and it will be applied "regardless of the applicable best interest standard."[134] Therefore, even if the batterer would prevail as the primary custodial parent under the best interest standards, if the presumption were properly triggered by allegations or rulings of domestic violence, the batterer is presumed unfit to obtain joint or sole custody of their child.

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[131] *Id.* at 196–97.
[132] *Id.* at 197.
[133] *Id.* at 189 (footnote omitted).
[134] *Id.* at 197.

A. States with a Presumption Against the Perpetrator of Domestic Violence Obtaining Custody

There are ten states that currently have a rebuttable presumption against an abuser.[135] Arizona and Hawaii provide in their statutes "that it is not in the best interests of children for their abusive parents to have unsupervised visitation and that visitation arrangements must protect the safety of battered women and children."[136] These statutes remove the need for judicial discretion in making custody determinations.[137] By removing a judge's discretion, the statute compels the court to determine that custody with the non-abusive parent is in the best interests of the child.[138] The statutes permit, however, a rebuttal of this presumption from the alleged perpetrator of domestic violence, enabling them to obtain some form of custody.[139] The standard required to rebut the presumption varies in each of the states with such a law.[140] In some instances, a showing of a successful completion of a batterer's treatment program, coupled with proof that alcohol and illegal substances are not being abused, can rebut the presumption.[141] Examined in more detail, the Alabama statute provides that:

> [A] determination by the court that domestic or family violence has occurred raises a rebuttable presumption by the court that it is detrimental to the child and not in the best interest of the child to

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[135] Amy Levin & Linda G. Mills, *Fighting for Child Custody When Domestic Violence Is at Issue: Survey of State Laws*, 48 SOC. WORK 463, 467 (2003) (listing the ten states as: Alabama, California, Delaware, Hawaii, Louisiana, Massachusetts, Nevada, North Dakota, Oklahoma, and South Dakota).

[136] *Id.* (citations omitted); *see* ARIZ. REV. STAT. ANN. § 25-403.03 (2007); HAW. REV. STAT. ANN. § 571-46(9) (LexisNexis 2006).

[137] Levin & Mills, *supra* note 135, at 468.

[138] *Id.*

[139] *Id.* at 467.

[140] *Id.*

[141] *Id.* Louisiana, for example, allows:

> The presumption shall be overcome only by a preponderance of the evidence that the perpetrating parent has successfully completed a treatment program as defined in R.S. 9:362, is not abusing alcohol and the illegal use of drugs scheduled in R.S. 40:964, and that the best interest of the child or children requires that parent's participation as a custodial parent because of the other parent's absence, mental illness, or substances abuse, or such other circumstances which affect the best interest of the child or children. The fact that the abused parent suffers from the effects of the abuse shall not be grounds for denying that parent custody.

LA. REV. STAT. ANN. § 9:364(A) (2006).

> be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of domestic or family violence.[142]

Alabama law further articulates factors that the court *must* consider if this presumption is activated. These factors include "[t]he safety and well-being of the child and of the parent who is the victim," as well as "[t]he perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault, to another person."[143] This law creates a great deal of safety for victims of domestic violence in court by requiring the court to consider not only the safety of the child, but also the safety of the victim of the violence. As an additional safeguard, the statute also directs the court to consider the "impact the domestic violence had on the child" separately from the provision concerning the rebuttable presumption.[144]

Hawaii's statute regarding the rebuttable presumption reads identically to Alabama's, requiring courts to consider the safety of both the child and victim in custody determinations.[145] This particular drafting of rebuttable presumption legislation provides victims of domestic violence with the most protection from the court system. This type of rebuttable presumption against the perpetrator of violence based upon even one act of violence, one of the lowest thresholds to trigger the presumption, creates a safeguard for victims that the courts are otherwise unable or unwilling to provide. A court system that considers the effect of the domestic violence on both the child and victim protects victims by acknowledging the impact of the domestic violence on the child, but fails to consider how their custody determination will impact the safety of the victim.

B. States Implementing a Factors Test to Determine Custody, which Includes Domestic Violence as a Factor

Another approach involving a factors test, currently utilized in New York, provides the judge in family court with discretion to determine the effect of the domestic violence on a child's best interest.[146] As of 2000, thirty-four states and the District of

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[142] ALA. CODE § 30-3-131 (LexisNexis 1998).
[143] *Id.* § 30-3-132.
[144] *Id.* § 30-3-131.
[145] HAW. REV. STAT. ANN.§ 571-46(9) (LexisNexis 2006).
[146] Levin & Mills, *supra* note 135, at 465, 467.

Columbia employed this type of statute.[147] As previously discussed, these statutes provide the court discretion to consider domestic violence as one of the factors in determining the best interests of the child.[148]

In the majority of these states the statute indicates that all custody factors are to be considered with equal weight; there is no additional weight to be given to the presence of domestic violence.[149] There are states, however, that give additional weight to the domestic violence factor.[150] Although some consideration of domestic violence is better than no consideration, these statutes "give judges too much discretion in terms of how much weight to accord domestic violence in their custody decisions."[151] As previously mentioned, there are serious problems with the implication of this factors test in New York cases, and it is likely that this problem persists in other states.

Exploring the language of the Indiana statute concerning domestic violence in custody cases indicates that domestic violence is one of eight best interest factors considered by the court.[152] In order for domestic violence to be considered as a factor, there must be evidence of a pattern of violence.[153] Domestic violence is defined in another section of the statute and provides that domestic violence can range from an attempt to cause physical harm, to beating, torturing, or stalking a family or household member.[154] Although the statute does provide for a wide range of actions to qualify as domestic violence, it remains limited in ability to protect a victim because domestic violence

[147] *Id.* at 467. An update from 2007 reveals that "[e]very state now lists domestic violence as a factor to be considered, but does not necessarily give it special weight." Daniel G. Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns*, VAWNET.ORG, Oct. 2007, at 1, http://www.vawnet.org./Assoc_Files_VAWnet/AR_CustodyRevised.pdf. The thirty-four states are: Alaska, Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming. Levin & Mills, *supra* note 135, at 467.

[148] Levin & Mills, *supra* note 135, at 467.

[149] *Id.*

[150] *Id.* States that provide additional weight to the factor of domestic violence are California and Iowa. *Id.*

[151] *Id.*

[152] IND. CODE ANN. § 31-17-2-8(7) (LexisNexis 2007).

[153] *Id.*

[154] IND. CODE ANN. § 31-9-2-42 (LexisNexis 2007).

remains one of eight factors considered in a custody dispute. Without creating more weight for domestic violence as a factor, it remains within the courts discretion to deem other factors more important. However, the statute also provides that "killing a vertebrate animal without justification with the intent to threaten, intimidate, coerce, harass, or terrorize a family or household member" qualifies as domestic violence within the meaning of the statute.[155] This language addresses an increasingly common means of asserting dominance and control over the victim, where the perpetrator of domestic violence abuses or kills pets as a means of abuse and control.

Similar to Indiana, the Ohio statute considers domestic violence as one of many factors.[156] The statute specifically mentions fifteen factors to be considered in a custody determination, but does allow the court to consider any factor found relevant to the inquiry.[157] There is no additional weight given to domestic violence as a factor; in fact the statute merely decrees that "[a]ny history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent[ ]" shall be considered in determining the best interest of the child.[158] This provides very minimal instruction to the court for how to consider domestic violence in these cases. The Ohio statute articulates a definition of domestic violence in three circumstances:

> (A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.
>
> (B) No person shall recklessly cause serious physical harm to a family or household member.
>
> (C) No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member.[159]

However, even the definition of domestic violence offers little insight into how domestic violence works as a factor within the custody statute. The custody laws of Indiana and Ohio highlight that approaching domestic violence as one factor to be considered creates situations where the court has a vast amount of discretion with little guidance from the law in shaping that discretion.

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[155] *Id.*
[156] OHIO REV. CODE ANN. § 3109.04(F)(2)(c) (LexisNexis 2008).
[157] *Id.* § 3109.04(F).
[158] *Id.* § 3109.04(F)(2)(c).
[159] *Id.* § 2919.25(A)–(C).

C. Examination of the Realities of the Application of the Rebuttable Presumption in Several States

Critics of the rebuttable presumption standard argue that the statutes place severe limitations on judicial discretion.[160] These limitations provide less ability for a judge "to allow for a case-by-case assessment of the violent dynamic in the family," that restricts their ability to assess violence from both partners.[161] Many critics point to what they call "a documented increase in arrests of women involved in domestic violence disputes."[162] However, these studies only report initial arrests without following the case through to completion.[163] Therefore, these statistics fail to consider the reasons a woman may have been behaving violently when the arrest occurred, and the complicated cycle of violence that occurs within a domestic violence relationship.[164]

A closer examination of the rebuttable presumption standard reveals that although it initially appears more beneficial in providing protection to the victims of domestic violence and their child, problems still arise in the application of the presumption. In several states, the presumption is rendered almost entirely useless due to its existence in a legal system with "an extensive history of gender bias and inequality."[165] For example, while some states exercise this presumption, it is rendered meaningless in its application, thus stripping victims of domestic violence and their child of any meaningful protection under the law.[166]

An examination of specific state laws indicates that there are often steep hurdles to overcome in order to trigger a presumption against awarding custody to an accused batterer. For example, in North Dakota the presumption removing the ability for the batterer to be awarded any form of custody only takes effect if "there is *credible evidence* that the batterer caused 'serious bodily injury,' used a dangerous weapon, or committed *recent* acts that rise to the level of a pattern of violence."[167] On one hand, it is beneficial that this law does not require a conviction of domestic

[160] Levin & Mills, *supra* note 135, at 468.
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] Conner, *supra* note 10, at 189.
[166] *Id.* at 198.
[167] *Id.* (quoting N.D. CENT. CODE § 14-09-06.2(1)(j) (2007)).

violence to trigger the presumption. However, making the factors so specific creates serious problems in the applicability of this presumption for domestic violence victims.

In addition to complicating any practicability of this presumption, the factor requirement moves the statute away from the intended purpose by shifting the focus of the court to the extent of the domestic violence, rather than focusing on the actions of the batterer.[168] Focusing on injury resulting from the domestic violence, rather than on the actions of the batter, removes the real reason a batter makes a poor custodial parent. There is significant evidence that supports the conclusion that when a child is exposed to a batterer, they are at serious risk to suffer abuse or neglect.[169] The focus of this North Dakota law is problematic: the reason a child is at a risk of abuse or neglect is connected to the actions of the batterer, not the extent of the harm done to the victim of the domestic violence.

This shift in the focus of the court to physical injury caused by the domestic violence, coupled with the requirement that a dangerous weapon be used during acts of violence, or that the violence be recent and repetitive, suggests that the court will only consider a batterer a danger to the child if they make use of deadly force, or have acted violently recently, and with regularity.[170] This shift neglects to consider a situation that could arise where actual acts of domestic violence have not occurred recently because, for example, the couple has been separated, but has not yet gone through an official custody proceeding. In this example the presumption would not be triggered, even if the violence were horrific and dangerous; the perpetrator of domestic violence would not be subject to the presumption against their receiving custody of their child. In essence, this North Dakota statute will not trigger a presumption even where a batterer is a known danger to his or her partner and child; abusers therefore, can, and likely will, be granted some form of sole or joint custody of their child.[171]

Other states have enacted even stricter requirements to trigger a presumption against a perpetrator of domestic violence obtaining custody.[172] In Delaware, for example, the presumption

[168] *Id.*
[169] *Id.* at 199; *see supra* Part II.C.
[170] *Id.* at 198.
[171] *See* N.D. CENT. CODE § 14-09-06.2.
[172] Conner, *supra* note 10, at 199.

may only be triggered "upon the conviction of the batterer. . . . [And] the abuser's act must fall within one of the enumerated offenses defined by law . . . ."[173] Typically, this requirement means the batterer must be convicted of a felony level offense or a specified misdemeanor "against the other parent, the child at issue or any minor child or adult living in the home . . . ."[174] Meeting this standard before the presumption will kick in makes it almost impossible to achieve. In many cases of domestic violence, the police are not called, and often when they are called officers are reluctant to make an arrest or file an office report.[175] Not only are the police not often called in cases of domestic violence, but in many cases domestic violence appears in court for the first time as a simple custody or visitation petition.[176] If a judge is witness to a domestic violence victim's testimony for the first time, without any substantiation of police reports, it becomes difficult to properly assess the facts.

Ultimately, the consequence of this presumption in Delaware is fewer convictions and the inability for the presumption to provide any protection for victims of domestic violence. More often than not, the existence of this presumption does nothing more than "provide the illusion of protection for women and children, but also build obstacles that few victims have any hope of overcoming."[177] The existence of these statutes creating a presumption against a batterer obtaining custody of his or her child are certainly a step in the right direction. However, when drafted with such specific focus on the outcome of the violent episode, the consequence is that they provide little to no actual protection for victims of domestic violence. Examining the specific state statutes operating within custody determinations highlights the variety of approaches for handling custody determinations when domestic violence is an issue. However, there are some approaches that produced unintended consequences, and create barriers to providing protection for victims of domestic violence that should be reexamined.

[173] *Id.* (DEL. CODE ANN. tit. 13, § 703(A) (2006)).
[174] *Id.* (DEL. CODE ANN. tit. 13, § 703(A)).
[175] *Id.* at 200.
[176] Greenberg, *supra* note 11, at 609–10.
[177] Conner, *supra* note 10, at 200.

CONCLUSION

The manner in which New York is currently addressing domestic violence in custody cases fails to protect the safety of victims and their children from perpetrators of domestic violence. Originally, in 1996 when domestic violence was added as a factor to the Domestic Relations Law, it required only that the court consider domestic violence as a factor in determining custody.[178] In 2009, the statute was amended a second time requiring the court to consider domestic violence in custody cases, and also compelled the court to write into their decision the impact the information about the domestic violence had on the outcome of the case.[179] As discussed in section two, it would appear the legislature rewrote the statute to mandate the courts actually to consider domestic violence as a *negative* factor in custody cases.[180]

Given that the courts continue to fail to give proper weight to serious allegations of domestic violence, enacting a rebuttable presumption against an abuser obtaining custody of their child would be an appropriate solution. It is well documented that domestic violence has serious effects on the well being of a child.[181] It is also well established that courts are unable to safely address the issue of domestic violence within the parental relationship when it comes to custody determinations.[182] Therefore, a rebuttable presumption would ensure not only that the courts give proper weight to the effects of domestic violence on the child, but would also demand that proper fact investigation occur within these cases.

It is important to note that the mere adoption of a presumption against a batterer's ability to be awarded either sole or joint custody of their child is not, in itself, assurance of protection for victims of domestic violence. In several of the states that have taken the step of enacting a statutory presumption against a batterer receiving custody, the statute has provided little protection to the victims of domestic violence.[183] Discussed in depth in Part IV, both North Dakota and Delaware have statutes

[178] Act of Dec. 17, 1996, ch. 12, 1996 N.Y. Laws 47 (codified at N.Y. DOM. REL. LAW § 240 (McKinney 2010)).

[179] 2009 N.Y. Sess. Laws 1223, 1224 (McKinney) (codified at N.Y. DOM. REL. LAW § 240).

[180] *Id.*

[181] Conner, *supra* note 10, at 199.

[182] Greenberg, *supra* note 11, at 609–10.

[183] *See* Conner, *supra* note 10, at 198.

creating a presumption against a batterer.[184] However, both these statutes have been drafted and are applied in such a way that triggering this presumption to ensure a victim any additional protection is nearly impossible.[185] While such a presumption has the potential to ensure a court gives proper weight to domestic violence as a factor, there are additional hurdles to be considered. One of these hurdles lies in the statutory language; the wording of these statutes is immensely important in safeguarding a proper implementation of this type of presumption. Should New York State act to encourage such legislation, a great deal more research into the statutes of other states, and the impact such legislation in each state should be produced.[186]

The consequences and harm to children of exposure to domestic violence within family relationships are well documented and far-reaching. A batterer displays a repetitive pattern of abuse and control over their victim, who is more often than not a more vulnerable individual. Therefore, this begs the question, is an individual capable of exhibiting abuse and control over a more vulnerable individual fit to be a custodial parent to their child? Common sense would tell us that a person who displays an abusive and controlling personality is likely to do so in the majority of his or her personal relationships. In order to provide proper protection to victims of domestic violence, the law needs to find a way to ensure that statutes drafted to protect domestic violence victims are able to supply actual protection to these victims. In New York, the factor analysis of the best interest standard has been shown to fail to provide the necessary protection for victims of domestic violence. Therefore, a precisely drafted rebuttable presumption statute could provide significant protection for victims of domestic violence in New York.

[184] *Id.* at 198–99.
[185] *Id.*
[186] For example, ALA. CODE §§ 30-3-131, 30-3-132 (LexisNexis 1998).