THE STATE OF MAINE

MAINE COMMISSION ON DOMESTIC AND SEXUAL ABUSE

REPORT TO THE JOINT STANDING COMMITTEE ON JUDICIARY

PURSUANT TO LD 1143

RESOLVE, DIRECTING A STUDY OF DOMESTIC VIOLENCE AND PARENTAL RIGHTS AND RESPONSIBILITIES

FEBRUARY 2010

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I. INTRODUCTION

A. Statement of Purpose

The 124th Legislature considered L.D. 1143, a proposal to amend Maine law relative to parental rights and responsibilities and domestic abuse. After receiving testimony on the proposed legislation, the Judiciary committee amended L.D. 1143 to become a resolve directing the Maine Commission on Domestic and Sexual Abuse (hereinafter "the Commission") to study domestic violence and parental rights and responsibilities. The Commission identified a subcommittee and charged it with that study. That subcommittee included representation from each of the stakeholder groups, including the Maine Judicial Branch, the Family Law Advisory Commission, the Family Law Section of the Maine State Bar Association, the Maine Association of Criminal Defense Lawyers, the Maine Guardian ad Litem Institute, the Maine Coalition to End Domestic Violence, the Muskie School of Public Service and Commission members. *See* Appendix A for full list of subcommittee members. The subcommittee began meeting in June 2009 with the goal of reporting to the Commission for review and submission of a final report to the legislature in February 2010.

The resolve directed the Commission to

> study domestic abuse, parental rights and responsibilities and the protection from abuse process, including the laws and practices governing parental rights when domestic abuse is alleged or suspected. The study must include:
>
> 1. A review of how the best interests of the child are determined;
>
> 2. An examination of the issues concerning the presentation of evidence that accurately portrays domestic violence and its effects in the family relationship;
>
> 3. How other states have addressed domestic violence when establishing parental rights and responsibilities, including the adoption of rebuttable presumptions, and how those procedures are working in those states;
>
> 4. Whether misuse of the protection from abuse process is happening and, if so, why and to what extent the misuse is occurring and whether there are problems with the process itself that lead participants to the conclusion that the process is biased, unfair or inconsistently applied; and
>
> 5. A review of the training provided to the judiciary and guardians ad litem concerning domestic abuse and parental rights and responsibilities . . .

L.D.1143. *See* Appendix B for a copy of the full resolve.

B. A Description of the Framework

Maine's trial courts are the Superior Court and District Court. Judges and Justices of the Maine Supreme Judicial Court, the Superior Court, and the District Court are all cross-designated and on occasion hear cases in a different court. *See* 4 M.R.S. §§ 2-A, 121, 157-C; Admin. Order JB-07-03. Cases involving the parental rights and responsibilities of children, whether in the context of a divorce, an unmarried parental rights and responsibilities action, or post-judgment actions in both kinds of cases, are generally heard in the District Courts.[1] Collectively, these are called "family matters" cases in Maine courts. Interim conferences and hearings as well as uncontested final hearings in cases involving children may be held before a Family Law Magistrate instead of a judge. Final contested hearings, with the exception of cases where child support is the only issue, must be heard by judges.

Maine no longer uses the term "custody". Rather, Maine statutes use the concept of "parental rights and responsibilities". That concept in turn can be divided into three basic areas: parental decision-making, residence, and contact (visitation). Those distinctions must be kept in mind in discussing the interrelationships of domestic violence and parental rights and responsibilities.

The Resolve also focuses on guardians *ad litem* ("GALs"). The qualification and appointment of Maine guardians *ad litem* are governed by the Maine Rules for Guardians ad Litem. In child protection cases (Title 22), GALs must be licensed attorneys or court-appointed special advocates. In parental rights and responsibilities cases (Title 19-A), a GAL may be either a licensed attorney or a licensed mental health professional. Me. R. G.A.L. II(1)(B), II(2)(C)(i).[2] Since 2000, GALs must be on the Guardian ad litem Roster maintained by the Court in order to be appointed.[3] GALs may be qualified to be appointed in both Title 19-A and Title 22 cases, but the training is a bit different and the Court maintains separate rosters. Of significance, in Title 22 cases, the GAL is appointed by the Court and paid by the Court. In Title 19-A cases, the parties decide whether to hire a GAL, and ask the Court to appoint one. Generally, the specific guardian *ad litem* is chosen or suggested by the parties. Finally, in Title 19-A parental rights and responsibilities cases, the GAL is paid by the parties except in the small number of cases where the GAL agrees to serve pro bono.

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[1] Divorce and parental rights and responsibilities cases could be filed in the Superior Court until January 1, 2001; now they must be filed exclusively in the District Court The Superior Court continues to hear post-judgment motions in those cases filed there before 2001

[2] The Chief Judge of the District Court can waive the licensure or qualification requirements. Me. R. G.A.L. II(2)(C)(i)(4).

[3] In individual cases, judges can appoint a guardian *ad litem* who is not on the roster for good cause shown. Me. R. G.A.L. II(1)(B).

C. Description of the Study

The multi-disciplinary Commission and its subcommittee identified issues to research and a process to develop recommendations for the Legislature. The subcommittee designed, collected and evaluated survey data on current practice in Maine, including electronic surveys of attorneys, judges, guardians *ad litem*, victims of domestic violence, and domestic violence advocates. The subcommittee also conducted focus groups among domestic violence victims and advocates, reviewed laws, practice and literature, and contacted representatives from other states and national groups addressing with similar issues.

With the assistance of law student summer interns employed by Pine Tree Legal Assistance (PTLA), the Commission developed a memorandum and chart outlining how other states handle parental rights and responsibilities cases when domestic violence is present. The Family Law Advisory Committee also contributed a research memorandum entitled "Overview of Rebuttable Presumption Statutes" written for that Committee by Kimberly Pacelli, a Bernstein fellow. Those findings are presented in summary fashion in Section II(C) of this report and are discussed in more detail in the memoranda and chart which are attached as Appendices. *See* Appendix C, Pine Tree Memorandum, "Memorandum and Chart of Other State Statutes" and Appendix D, FLAC Memorandum, "Overview of Rebuttable Presumption Statutes".

The subcommittee also gathered input from key stakeholders including victims and victim advocates. The Maine Coalition to End Domestic Violence undertook a statewide effort to survey and interview victims, victim advocates and attorneys who are primarily representing victims.

1. MCEDV Study

The Maine Coalition to End Domestic Violence (MCEDV), a named partner in the Commission study pursuant to L.D. 1143, conducted focus groups and used survey tools with victims of domestic violence and with domestic violence advocates employed by the member projects in order to collect data to inform this study. Jill Barkley and Lyn Carter, staff of MCEDV, conducted the study with the assistance of advocates at local domestic violence projects. Each victim of domestic violence who participated in this project has our respect and our heartfelt thanks for sharing their stories and ideas for positive change. This data was collected and managed as follows.

Victims: MCEDV conducted a series of 12 focus groups with 64 victims at 9 domestic violence programs in Maine serving all of the counties in Maine, This sampling represents a subgroup of victims who have received services at the member projects of MCEDV and had experience with the areas of inquiry in the resolve. In addition, an 11-page survey gathered information on demographics; victims' experiences with the protection from abuse process, the District Court process regarding family matters, guardians *ad litem* and court personnel; and the impact of resources and safety issues. The survey used both hard copy and electronic format resulting in 87 responses. The surveys were distributed at the member programs, at the Maliseet Domestic Violence and Sexual Assault Program and were available on the MCEDV website. The data from the focus groups and the survey was collected from September through November 2009.

Advocates: MCEDV conducted a series of 11 focus groups with 48 advocates at their work sites at 9 domestic violence programs in Maine serving all of the counties in Maine. In addition, MCEDV used a survey tool to collect information on advocates' experience assisting victims in the protection from abuse process and District Court family matters processes. 42 survey responses were received. This data was collected from September through November 2009.

Data from both surveys was summarized and presented to the Commission as well as made available for the subcommittee in charge of the study. Information from the focus groups was collected and documented by MCEDV staff and reviewed by domestic violence advocates, and then presented in summary form to the Commission and subcommittee.

2. Stakeholder Surveys

With the assistance of students from the University of Maine School of Law and the Muskie School of Public Service, the Commission designed and sent out detailed survey questions for judges and magistrates, attorneys and guardians *ad litem* (GALs). While each survey was designed to capture issues pertaining to that group, there was a core set of questions that were asked of all groups. The electronic surveys were completed through the internet and participants were invited to participate by email. All Maine judges and magistrates were invited to participate and 44 (69% of judicial officers or 77% of active sitting judges) responded.4. Attorneys were invited to participate through the Maine State Bar Association, both generally and through the Family Law Section. A total of 207 attorneys responded. Of the attorneys responding to the survey, 43.9% indicated they had represented alleged abusers, and 51.42% indicated they had represented alleged victims. One-third of the attorneys responding had acted as the guardians *ad litem* in cases involving domestic violence. The survey was also sent to at least 98 guardians *ad litem*,5 and 34 (34%) responded. GALs responding included 63% attorneys, 22% mental health providers and 15% others.

3. Limitations in the Study

The Commission tried to be as comprehensive as possible in its approach, but there are gaps and limitations in the study performed. There was no funding and no staff for the study, factors that inherently limited the abilities of the Commission. Certain data and stakeholders were not reached. For example,

- Although victims and advocates in Maine's tribes were included in the MCEDV data, the study may be missing the voices of Maine's immigrant and refugee populations as well as other underserved people.
- The participation of MCEDV meant that there is an identified group of victims of domestic violence whose input was sought. There is no such equivalent group of opposing parties or alleged perpetrators of domestic violence, and their voices are represented only through the attorneys who serve them.
- Although there is a great deal of data which could be mined from court records, the Commission did not have the resources to examine those records, and the Judicial Branch does not have the resources to do it for the Commission.
- A more in-depth analysis of the data collected could yield additional conclusions which the Commission did not feel able to make.

Thus, the report includes recommendations for further study and follow-up on the issues in some areas.

[4] The kinds of cases considered in this study are heard by District Court judges; see notes 3 and 4. The number of judges who responded exceeds the number of sitting District Court judges; justices from other courts responded if they felt qualified to do so.

[5] The survey was not sent to all GALs. The subcommittee was only able to invite GALs who are members of the Maine Guardian Ad Litem Institute (MEGALI) because the Administrative Office of the Courts does not maintain an electronic list of rostered GALs. Many GALs are attorneys and may also have received the attorney survey, including GALs who are not members of MEGALI.

D. Executive Summary of Conclusions and Recommendations.

The 124th Maine Legislature passed L.D.1143 (Chapter 120), a Resolve, Directing a Study of Domestic Violence and Parental Rights and Responsibilities. This Resolve required the Maine Commission on Domestic and Sexual Abuse to study domestic abuse, parental rights and responsibilities and the protection from abuse process, including the laws and practices governing parental rights when domestic abuse if alleged or suspected. This study includes a review of how the best interests of the child are determined. This included an examination of the issues concerning the presentation of evidence that accurately portrays domestic violence and its effects in the family relationship. This review included how other states have addressed domestic violence when establishing parental rights and responsibilities, including the adoption of rebuttable presumptions, and how those procedures are working in those states. This review examined whether misuse of protection from abuse process is happening and, if so, why and to what extent the misuse is occurring and whether there are problems with the process itself that lead participants to the conclusion that the process is biased, unfair or inconsistently applied. This study assesses the content and effectiveness of training provided to the judiciary and guardians *ad litem* concerning domestic abuse and parental rights and responsibilities.

As a result of the study, the Commission recommends that the parental rights and responsibilities statute should be amended to clarify the weight to be given to domestic violence over shared parenting. However, each case is unique and must be decided on its individual facts. There should not be any presumptions added to the statute regarding parental rights and responsibilities, residence or contact when there is domestic violence. Judicial discretion in determining and weighing the different facts in a case is necessary and appropriate.

Some of the most significant problems in the legal process involving parental rights and responsibilities and domestic violence are problems of scarce resources. Courthouse security is inadequate, which both compromises safety in our courthouses and undermines the effectiveness of the legal process and enforcement. There are few supervised visitation or exchange facilities in Maine, sometimes leaving the parties and court few appropriate options in cases of domestic violence. Parties often simply do not have the financial ability to hire, access or use attorneys, guardians *ad litem* or other expert evaluations. All of this can significantly impact the quality of the decision-making and the result of the legal process.

The Commission did not find a pattern of willful abuse of the protection order system, but the process sometimes becomes a substitute both for emergency interim orders in family matters as well as for child abuse and neglect matters. Such cases may involve domestic abuse, but it may not be the primary or only problem. This is a consequence of the underfunding of the legal system and the inability of the courts to provide consistent adequate and timely intervention on an emergent or expedited basis.

II. FINDINGS AND RECOMMENDATIONS

A. A review of how the best interests of the child are determined.

Summary: *The existing statutes and processes have many strengths, but significant problem areas need to be addressed and improved. These problem areas include a lack of clarity in the existing statutes, as well as problems in policy and implementation within the family matters processes, needed safety improvement and improved training initiatives. Some of the identified problems require more study, and their complexity requires more work. It is the intention of the subcommittee to refer these problems back for further study over the next year. However, some of these problems have recommendations that can be implemented now and will make significant positive change for families. Most significantly, it is clear to the Commission that participants in the process – judges and magistrates, attorneys, guardians ad litem and litigants - have contradictory interpretations of the statute when it comes to the interrelationship of domestic violence and shared parenting. The Commission recommends that the parental rights and responsibilities statute should be amended to clarify the weight to be given to domestic violence over shared parenting. However, each case is different and dependent on a myriad of facts. There should not be any presumptions added to the statute regarding parental rights and responsibilities, residence or contact when there is domestic violence. Judicial discretion in determining and weighing the different facts in a case is necessary and appropriate.*

1. Legal framework.

In Maine, the parental rights and responsibilities, contact and residence with regard to children are determined by the standard of the best interest of the child. The statute governing the analysis is 19-A M.R.S. §1653. The full text of §1653 is attached as Appendix E. Three subsections are of particular import in the discussion of domestic violence and parental rights and responsibilities.

First, section 1653(1) sets forth legislative findings, including the following:

> B. The Legislature finds that domestic abuse is a serious crime against the individual and society, producing an unhealthy and dangerous family environment, resulting in a pattern of escalating abuse, including violence, that frequently culminates in intrafamily homicide and creating an atmosphere that is not conducive to healthy childhood development.
>
> C. The Legislature finds and declares that it is the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

These legislative findings could be seen as inconsistent, or even contradictory when determining matters of a child's best interest.

Next, subsection (3) of §1653 requires the court to apply the standard of the best interest of the child in determining parental rights and responsibilities. It provides that

> In making decisions regarding the child's residence and parent-child contact, the court shall consider as primary the safety and well-being of the child.

Subsection (3) goes on to list 18 different factors to be considered in applying the best interest analysis, including domestic violence.

Finally, subsection (6) of §1653 provides for a variety of conditions that may be imposed in cases of domestic violence. The statute directs that the court "shall establish conditions of parent-child contact in cases involving domestic abuse" in accordance with that subsection. Without using the words, it seems to create an apparent presumption related to residence and contact but not the other rights and responsibilities when there is domestic violence.

When a parent brings a protection from abuse (PFA) complaint for herself or himself, the court may also determine temporary custody or parental rights and responsibilities for minor children. If there is a custody order in the final PFA order, the statute directs the court to determine the parental rights and responsibilities in accordance with 19-A M.R.S. §1653, above. 19-A M.R.S. §4007(G).[6] A parent may also bring a complaint for protection on behalf of a child who is being abused. A copy of the pertinent parts of the protection from abuse statute, 19-A M.R.S. §4001 *et seq*., is attached as Appendix F.

2. Statutory Clarity.

Maine's statute governing the determination of parental rights and responsibilities, 19-A M.R.S. §1653, does not distinguish among the weight or importance assigned to the various best interest factors. In particular, there is a tension between the goals of safety in the presence of domestic violence and an expectation of shared parenting. This unresolved tension is demonstrated by the data across all the respondent categories.

In addition, the interrelationship is not clear between the three subsections of the statute that address domestic violence in the context of parental rights and responsibilities. Subsection (1) contains the legislative findings and purpose; subsection (3) lists the best interest of the child factors; and subsection (6) sets forth conditions of parent-child contact in cases involving domestic abuse. The statute provides little guidance on how to harmonize or weigh the different provisions which may be inconsistent.

Specifically, it is not clear which of the legislative findings in §1653(1) holds more weight, the presence of domestic violence or the shared parental rights expectation. Survey results from the practitioners reflect this same lack of clarity as to how to apply the two inconsistent legislative findings, with different actors in the system holding different ideas as to which is the more important. The data demonstrates that the majority of judges and advocates believe that the presence of domestic violence must be more heavily weighted. The data also demonstrates that a large subgroup of attorneys and GALs in practice believe that the expectation of shared parental rights is more important, even to the extent of creating a "de facto" rebuttable presumption on behalf of the co-parenting factor. The Commission is concerned that when primary emphasis is put on co-parenting rather than safety, there is a risk of inappropriately seeing domestic violence victims as "uncooperative" when the victims try to protect themselves or their children.

Subsection 6 of 19-A M.R.S. §1653, which seems to function as a rebuttable presumption against awarding primary residence to an abuser, is sometimes overlooked in the discussion or actors are confused about its import. Judges, in their comments in response to the survey, note that §1653(6) is crucial to the decision-making process when domestic violence is involved. Lawyers and advocates seem less aware of it and the impact on contact and residence. The import of this subsection and its relationship to the other elements of the statute needs to be clarified.

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[6] The statute provides that the court may provide the following relief:

> G Either awarding some or all temporary parental rights and responsibilities with regard to minor children or awarding temporary rights of contact with regard to minor children, or both, under such conditions that the court finds appropriate as determined in accordance with the best interest of the child pursuant to section 1653, subsections 3 to 6-B The court's award of parental rights and responsibilities or rights of contact is not binding in any separate action involving an award of parental rights and responsibilities pursuant to chapter 55 or in a similar action brought in another jurisdiction exercising child custody jurisdiction in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act

The survey results demonstrate that this lack of clarity about the interrelationship of co-parenting and domestic violence is present across the judiciary, the attorneys, the GALs and the domestic violence advocates. Interestingly, many members of the Commission initially mistakenly assumed that the best interest statute was clear, and that other professionals held the same interpretation that they did. However, the surveys demonstrated across the board that there are substantially different interpretations of the statute in this area, causing the Commission to conclude that the statute needs clarification.

The presence of domestic violence usually means not only physical violence or the threat of physical violence, but also that the perpetrator holds power over the victim. This is a framework that is not conducive to equal or shared parenting and decision-making. Additionally, in cases of domestic violence an order of shared parental rights may pose serious safety concerns. Often an allocation of parental rights and responsibilities may be an appropriate resolution and in the best interest of the child, rather than shared parenting. There are also other family matter cases where the severity, duration and continuation of severe conflict result in a failure of successful co-parenting as well as multiple returns to court to resolve disputes. These cases may include a subset where domestic violence is present, but many are high conflict cases that do not include domestic violence. It is important to note that domestic violence and high conflict are separate circumstances, not degrees on a continuum. They may coexist. Nonetheless, they pose some of the same challenges for the legal process. An allocation of parental rights in these kinds of high conflict cases could also be an effective resolution and in the best interest of the child.

There is significant support for weighting domestic violence more clearly and more strongly than other factors. This intent should inform any clarifications to the statute and the future study of the family matters process. When domestic violence is present, it should be the lens through which the other factors are assessed: As section 1653(3) states, safety is primary.

The data does not indicate whether statutory criteria for the presence of domestic violence should be more clearly articulated in section 1653. Stakeholders often borrow existing statutory definitions from the protection from abuse statute and domestic violence crimes. They also look to whether there has been an adjudication with a finding of abuse in a protection order or a criminal conviction for a crime of domestic violence. While there is little support for including sociological components of abuse, such as control, emotional abuse and financial abuse as evidence of domestic abuse, these elements are taken into consideration by judges in determining the context of an act of domestic violence. The flexibility in this approach is consistent with the flexibility and discretion that all participants agreed should be present in the best interest determination.

All groups in the study noted that all domestic violence is not the same and that there is a difference among instances of domestic violence, particularly in

i. Level of violence: dangerousness
ii. One time occurrence or pattern of abuse
iii. Timeliness of the abuse related to the family matter: whether it was in the distant past *with no likelihood of repetition*
iv. Whether there has been a finding of abuse in a permanent protection order. A temporary order has little weight with judges or other actors in the family matter process in deciding parental rights and responsibilities. This is actually an important finding in the data, as there is a common mistaken assumption that merely having a

temporary PFA impacts the court's decisions on parental rights and responsibilities.

A significant majority of each of the survey respondent groups rejected instituting rebuttable presumptions that infringe on judicial discretion. The response was the same both for a rebuttable presumption against the sharing of parental rights and responsibilities and a rebuttable presumption against primary residence. There is a preference for a set of factors that appropriately weights the presence of domestic violence and allows significant judicial discretion to evaluate the real life context of the alleged domestic violence. It is clear that judicial discretion to assess context is valued across the board.

Recommendation 1:

Section 1653 should be amended to clarify the interplay of the legislative findings in subsection 1, the best interest factors in subsection 3, and conditions of parent-child contact in subsection 6, specifically the interplay between the presence of domestic violence and shared parental rights. While the subcommittee recommends clarifying the statute in these stated areas, members do not recommend that Maine conduct a major revision of the underlying premises used to assign parental rights and responsibilities or establish a rebuttable presumption that erodes judicial discretion. This statutory clarification should weight domestic violence as a primary factor. This statutory revision should maintain the focus on the best interest of the child. This clarification should also continue to allow judges to exercise discretion in evaluating the larger context of the domestic violence so as to act in the best interest of the child. Allocation of parental rights should be formally defined in statute with clear instructions as to when and how it would occur. An additional best interest factor that addressed the presence of high conflict should be considered as an option in that revision.

We suggest that the Family Law Advisory Committee develop this statutory language during this session of the legislature.

3. Safety concerns.

Summary: *Concerns for victim safety in the courthouse and its environs were expressed by a number of stakeholders. Lack of prevention and consequences for violations of protection orders occurring in the courthouse together with lack of security are recurring problems. These safety concerns are not statutory issues; rather, they are issues of resources and training.*

There are frequent violations and perceived violations of protection orders in the courthouse which go unenforced. Some conduct may be viewed as minor or may not be in clear violation of an existing order, and some is flagrantly and frighteningly in violation of the existing order. From the victim perspective, the occurrence of such conduct and violations in the courthouse

threatens both actual safety and the perception of safety. From the defendant or perpetrator viewpoint, the lack of any immediate consequence to the behavior undermines the effectiveness of the process and allows them to escape accountability.

Many courthouses have only one Judicial Marshal, or security officer, on the premises, and that marshal must remain with a judge on the bench. Thus, there is little or no security immediately available to litigants who are in the courthouse waiting or are not directly engaged in a hearing at that moment.

A related concern is that there is little screening for weapons, and that scanning equipment stands unused at the courthouses. Safety concerns also include service and enforcement of court orders and making victim services consistently available for victims. Finally, there is a concern with firearms and domestic violence, particularly with regard to the seizure of firearms with arrests for domestic violence or when there is a PFA. These laws surrounding firearms need to be clarified and consistently enforced.

Safety in the courthouse and its environs, both actual and perceived, is of critical importance in the administration of justice. The lack of safety in our courthouses can infect the process and the results.

Recommendation 2:

a. **Clarify laws concerning firearms and domestic violence; train relevant personnel and consistently enforce these laws.**

b. **There needs to be sufficient funding of court security to be able to implement and carry out effective consistent safety protocols and exit strategies at courthouses and the vicinity.**

c. **There needs to be sufficient funding of court security to be able to prevent violations of PFA orders and to provide effective enforcement of the PFA orders (which may include notifying local police to enforce the violation) within these facilities and in the parking lots or surrounding court environs.**

d. **Participants need to recognize that the PFA and the family matters processes serve different function with different goals. Safety issues do not necessarily go away, and in fact may increase during family matter processes in some cases. There should be no pressure to discontinue any PFA needed for safety just because the family matter process is underway. Safety should always be the primary goal in the PFA process.**

e. **Use metal detectors and observe other safety protocols as intended. Chief Justice Saufley in her annual State of the Judiciary address has repeatedly raised concerns about safety which parallel the advocate and victim concerns.**

f. **Serve PFA orders effectively and quickly. The Commission is aware of pending legislation to implement electronic service, and fully supports this legislation that would help.**

g. **Enforce orders consistently.**

h. **Judges and lawyers need to write protection orders and parental rights and responsibilities orders in clear, unambiguous language so that both implementation and enforcement is clear.**

4. Victim Assistance.

Summary: *The assistance and presence of advocates is important for the victim, as is the attitude, demeanor and helpfulness of the court clerks.*

Victims clearly state that the legal process is very confusing, especially for those without representation, which is supported by the data from the judiciary and the attorneys. In an ideal

world, everyone would have an attorney when critical and fundamental issues such as safety and parental rights are at stake. At a minimum, however, having an advocate who explains and assists the victim allows more effective use of court time, as well as informs the victim's actions.

The Commission also finds that the demeanor of the actors in the process has an impact. Specifically, advocates and victims note that the court clerks who are the first contact with the system vary in their courtesy, appropriateness and whether or not they provide referral information. The interaction with the clerk is critical.

Recommendation 3:

a. **Consistently allow advocates in the courtroom with the victims. Currently, the ability of an advocate to sit with a victim during a hearing is discretionary; it should be permitted as a matter of course pursuant to judicial administrative order.**

b. **Clerks should receive specific training around domestic violence and interactions with victims and plaintiffs seeking protection orders. Part of the current court package given to those seeking protection orders includes a handout from the MCEDV listing the victim service organizations. The courts should ensure that there is consistency in the referral processes for victims to victim service organizations.**

B. An examination of the issues concerning the presentation of evidence that accurately portrays domestic violence and its effects in the family relationship.

Summary: *The Commission does not recommend any changes to the rules of evidence that apply to parental rights and responsibilities or protection from abuse cases. The most important factor impacting the quality of decision-making in these cases is resources. The Commission recommends finding resources to support low cost supervised exchange and visitation facilities, as well as access to GALs, psychological, parenting and substance abuse evaluations.*

The Maine Rules of Evidence apply to trials in both protection from abuse and family matters cases. Attorneys, judges and GALs were specifically asked about changes in evidence rules as well as the availability of other resources that could affect what information is available.

There is little support for changing the evidence rules or making additional or different rules for these cases. Respondents felt that physician or medical care provider reports should generally come in, but it is also true that they generally come in under existing rules of evidence.[7] A significant minority thought that other expert reports and evaluations should also come into evidence. There were no other categories of evidence that are currently excluded that respondents supported admitting routinely.[8] Many noted that when a GAL is involved, such evaluations and statements will come into evidence at least indirectly through the GAL report.

Child protective cases already contain a number of exceptions to the hearsay rule, most notably the admissibility of out of court statements made by children.9 There was not support for importing all of these exceptions into the family law arena.

The Commission also investigated the usefulness of other kinds of resources that may assist attorneys, judges and litigants in parental rights and responsibilities cases involving domestic violence. Specifically, the Commission asked about the following resources:

- Guardians *ad litem*
- Parenting evaluations
- Psychological evaluations
- Batterer's Intervention Programs
- Substance abuse evaluations

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[7] See Me. R. Evid. 803(6); 16 M.R.S. §357 (medical records from hospitals and other medical facilities admissible).

[8] Attorneys and judges were specifically asked about the following:

Affidavits of lay witnesses
Police records
Physician or medical care provider reports
Reports of psychologists and psychiatrists
Reports of therapists, counselors and other mental health providers
Expert reports and evaluations
Out of court statements of children offered for the truth of the matter asserted

[9] 22 M.R.S. § 4007(2)(authorizing admission of child's out of court statements in child protective cases); *See also* 22 M.R.S. § 4007(3-A) (written report of a licensed mental health professional who has treated or evaluated the child admissible if furnished in advance.); 22 M.R.S. § 4007(4) (Interstate Compact on Placement of Children (ICPC) home study report admissible to show compliance with ICPC).

- Experts on the dynamics and effects of domestic abuse
- Supervised exchange facility
- Neutral or professional visit supervisor

All categories of respondents agreed that it would be a helpful to have a guardian *ad litem* appointed in all contested parental rights and responsibilities cases. GALs are frequently not available, however, because of the parties' financial resources.

All categories of respondents, especially judges, reported that the lack of supervised exchange facilities and the lack of neutral or professional visit supervisors often affected the final decision. Absent these resources, judges may be left with the choice of no visitation at all, unsupervised visits, or visits supervised by the other parent or family member.

Many respondents also believe that greater availability of parenting evaluations, psychological evaluations, and substance evaluations would be helpful. Again, these evaluations are frequently not available because of the lack of finances of the parties.

Respondents were also asked about the usefulness and availability of two other resources in making parental rights and responsibilities decisions: experts on the dynamics and effects of domestic abuse, and Batterer's Intervention Programs. No group of respondents thought either of those resources is very helpful in trying to make better decisions regarding parental rights and responsibilities and contact in cases with domestic violence.

Recommendation 4:

a. No changes to the Maine Rules of Evidence are recommended.

b. Resources to fund the appointment of GALs in cases of contested parental rights and responsibilities and domestic violence should be found.

c. The Commission recommends finding resources to support low cost supervised exchange and visitation facilities. Without such facilities, victims continue to be put at increased risk of domestic violence, as they often need to facilitate visitation. The alternative is no visitation, and often victims themselves do not support a cessation of visitation.

d. There needs to be an increased access to psychological, parenting and substance abuse evaluations in cases where parties can not afford to pay for them out of pocket.

C. How other states have addressed domestic violence when establishing parental rights and responsibilities, including the adoption of rebuttable presumptions, and how those procedures are working in those states.

Summary: *In surveying the law in other states, approximately 24 states have rebuttable presumptions relating to custody or residence in cases involving domestic violence. Every state's statutory scheme is unique. The Commission was not persuaded that such statutes increase the accuracy or safety of best interest determinations, and was not persuaded that Maine ought to add any such statutory presumptions in domestic violence cases.*

Every state in the U.S. except one has a statutory provision aimed at guiding courts in determining custody in cases where domestic abuse is present. No two statutes do this exactly the same way. Unlike Maine, very few states draw a distinction between "residence" and "parental rights and responsibilities." Instead, most states combine these rights into a determination of "custody." *But see* Massachusetts statute excerpted in Appendix C.

Most states adopt one of three basic approaches to determining custody when domestic abuse is present: (1) factor tests, which encourage judges to weigh the effects of domestic abuse in determining a child's best interests; (2) rebuttable presumption statutes, which presume that it is not in a child's best interests for the abusive spouse to have sole or joint custody of the child; or (3) no mention of domestic abuse in the statute.[10] Only Connecticut's child custody statute does not mention domestic abuse, instead providing generally that the court shall be "guided by the best interests of the child."[11]

There are numerous variations within each of the first two approaches. Twenty-six states require courts to consider the effects of domestic abuse as a factor in making a child custody determination (without creating a rebuttable presumption). Statutes that prescribe factor tests differ in the number and types of factors that a court must consider and the weight that each factor should be given. Some states have as few as three or four factors (e.g. Nevada and Nebraska). Maine's statute contains eighteen factors—more than any other state.[12] Some statutes include both a best interest factor related to domestic abuse and a "friendly parent" factor that asks the court to consider each parent's willingness and ability to cooperate with the other. A "friendly parent" factor can sometimes disadvantage an abused parent who, understandably, might be unwilling or unable to cooperate with their abuser. Among the statutes that contain both a domestic abuse factor and a "friendly parent" factor, some provide guidance to courts in resolving this tension, and some do not. *See* Oregon statute excerpted in Appendix C for an example of a statute that does provide guidance.

Twenty-four states have rebuttable presumption statutes. The model code provided by the National Council of Juvenile and Family Court Judges also adopts this approach.[13] These statutes differ in whether they use the explicit phrase "rebuttable presumption" or whether they employ other language to create a rebuttable presumption.[14] They also differ in how (or whether) they provide the types and standard of proof needed to

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[10] Levin, Amy and Linda G. Mills, "Fighting for child custody when domestic violence is at issue: survey of state laws," *Social Work*, 3. http://findarticles.com/p/articles/mi_hb6467/is_4_48/ai_n29043675/pg_8/?tag=content;col1

[11] Conn. Gen. Stat. Ann. § 46b-56a.

[12] 19-A M R S §1653(3), set forth in Appendix E. *See also* the state statutes table, Appendix C

[13] National Council of Juvenile and Family Court Judges, *Model Code on Domestic and Family Violence* (1994), http://www.ncjfcj.org/images/stories/dept/fvd/pdf/modecode_fin_printable.pdf.

[14] The existence of a rebuttable presumption is sometimes a matter of statutory interpretation. For example, the American Bar Association concluded that the Maine statute contains a rebuttable presumption of joint custody (before being complicated by any consideration of domestic violence). On the other hand, the Commission concluded that, on the contrary, the statutory language favoring joint custody does not rise to the level of a rebuttable presumption. Moreover, the Commission has remarked that § 1653(6), which provides for conditions

trigger the presumption. The Florida statute, for example, has one of the highest standards of proof, requiring one parent to be convicted of a felony of the third degree or higher involving domestic violence in order for the presumption to be triggered. Other states, such as Mississippi, require proof by a preponderance of the evidence of a single incident of domestic violence that resulted in serious bodily harm or a pattern of domestic abuse. Presumption statutes also differ in how (or whether) they provide the types and standard of proof needed to rebut the presumption. For example, California's statute provides that, in making a determination that the presumption has been overcome, the court may consider the best interests of the child, the successful completion of a batterers' treatment program, drug counseling, compliance with a protection order or parole terms, etc. *See* Appendix C.

In addition, twenty-two state statutes contain a presumption that awarding parents joint custody (or shared parental rights and responsibilities) is in a child's best interests. Among the statutes that contain both presumptions—a presumption favoring joint custody and a presumption against awarding sole or joint custody to the abusive parent, some statutes endeavor to clarify which presumption is controlling in cases where domestic abuse exists, and some do not.

The evidence reviewed by the Commission as to the effectiveness of rebuttable presumptions in other states is equivocal. The Commission was not persuaded that Maine ought to add any such presumptions in domestic violence cases to its statute.

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of contact and residence in cases of domestic violence, may be viewed as creating a rebuttable presumption against giving primary residence to the abuser. Certainly the Maine statute does not use the word "presumption."

D. Whether misuse of the protection from abuse process is happening and, if so, why and to what extent the misuse is occurring and whether there are problems with the process itself that lead participants to the conclusion that the process is biased, unfair or inconsistently applied.

Summary: *There is no evidence that indicates widespread abuse of the protection from abuse system by malicious use by plaintiffs or retaliatory use by perpetrators. There are two areas where the PFA system is not used properly or effectively. These areas of misuse result from other problems in the legal systems.*

1. Abuse of Protection Orders

The data indicates that abuse of the protection from abuse system by malicious use by plaintiffs or retaliatory use by perpetrators is infrequent. Judges note that it occurs rarely, and when it does, it can be dealt with by not granting the orders or by use of existing sanctions. Section 1653 specifically provides for a judge to consider willful misuse of the protection order system in order to gain an advantage in determining the best interest of a child, but such a finding is rarely made.[15]

2. Misuse of the Protection Order System

There are two areas where the PFA system is not used properly or effectively. These areas are not willful misuse solely to gain an advantage, but rather misuse that results from other problems in the legal systems.

a. Improper use of the protection order to address the needs of children. There is data from all parties reporting suggesting that the Department of Health and Human Services [DHHS] makes a practice of recommending or requiring that parents file for protection orders to protect their children from the other parent. There is also some indication that law enforcement may be pushing for protection orders in cases involving children's needs. Judges, magistrates and other respondents clearly indicate that neglect of children belongs in DHHS, not in court in a protection from abuse proceeding. If there is sufficient information that serious neglect has occurred, then DHHS should act. Requiring or encouraging parents to access protection in these cases through the protection from abuse process creates inefficiency in the court, has the appearance of misuse of a protection order, and creates cost, potential danger and unproductive stress for victims, alleged perpetrators and other involved personnel. In particular, the Commission notes that even if a temporary protection order is granted for abuse or extreme neglect of a child, the plaintiff parent often cannot prove the abuse at the final hearing because of evidentiary limitations, in particular the hearsay exclusion of a child's out of court statements about the abuse. These are limitations that do not apply when child abuse and neglect is handled

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15 19-A M R S §1653(3)(O) provides:

> A parent's prior willful misuse of the protection from abuse process in chapter 101 in order to gain tactical advantage in a proceeding involving the determination of parental rights and responsibilities of a minor child Such willful misuse may only be considered if established by clear and convincing evidence, and if it is further found by clear and convincing evidence that in the particular circumstances of the parents and child, that willful misuse tends to show that the acting parent will in the future have a lessened ability and willingness to cooperate and work with the other parent in their shared responsibilities for the child The court shall articulate findings of fact whenever relying upon this factor as part of its determination of a child's best interest The voluntary dismissal of a protection from abuse petition may not, taken alone, be treated as evidence of the willful misuse of the protection from abuse process

in the child protective system. Finally, even if a final protection is order is obtained, the parents then have little or no access to supervision of visits or other services that would be available if the case were handled by DHHS in the child protective system.

b. Use of a protection order to get interim relief. It appears that some complaints for protection are brought because there is no timely access to hearing time in the court handling family matters. All parties highlighted this misuse of the protection order process. This does not mean that allegations of abuse are not true, but that the purposes of the protection order and the family matter processes had become confused in practice due to several factors, the most obvious being the need for an immediate judicial response in situations of conflict where there is no other fast access to the appropriate court setting. The conflict may involve children, but could also involve issues of access to funds, family home, transportation, or other similar issues. This circumstance places issues better handled within the family case into the PFA proceedings, confusing a legal process that is designed for safety into a process that creates interim family orders which can remain in place for a long time. The sense was that much of the anguish for the other parent is caused by temporary decisions based on safety risks that remain in place during a long wait for a hearing in the family court.

In addition, because the PFA process has become used (or confused) with interim family plans, protection orders that are needed for ongoing safety are inappropriately dropped when the family matters court process begins—when the risks in certain dangerous relationships can increase. Protection from abuse and family matter proceedings have different purposes and can occur concurrently. One should not supplant the other.

3. Other Perceptions Regarding the Protection Order System

There are a number of "urban myths" involving the PFA process, but the Commission did not find data to support such myths. One hears that having a temporary protection order can influence parental rights and responsibilities results, but the evidence is to the contrary. While findings of abuse in a final order of protection, entered after notice and opportunity to be heard, do carry weight in how a judge or GAL views the presence of domestic violence, the mere filing or granting of a temporary order does not carry weight in family matters decisions.

Another "myth" frequently heard is that protection orders are "handed out like candy." Again, the data does not bear this out. Of the total number of protection from abuse complaints filed, approximately 80% result in a temporary order, and only 33% result in a final order. This means that judges refuse 1 in 5 requests for temporary orders. It also means that 2 out of 3 cases do not ultimately result in a final order, although the reasons for that are variable.[16]
It is also clear that victims and advocates perceive that having a finding of abuse in the protection order is extremely important for a victim when domestic violence has occurred, producing a more supportive court environment and providing credibility in the family matter setting.

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[16] For example, some cases are never served, some plaintiffs choose not to proceed or appear for a variety of reasons, and some orders are denied after full hearing.

Finally, survey and data respondents were asked a number of questions designed to elicit questions of bias in the system. Most respondents do not believe that there is such a bias. To the extent some attorneys thought there was a bias in the system, they believe the bias favors victims and gives too much weight to domestic violence. The majority of GALs agreed that they did not think there was a bias. A a minority of GALs did think there was a bias, but disagreed with attorneys: they thought the system favored the abusers and gave too little weight to domestic violence. Based on the evidence collected, the Commission does not believe that there is an institutional bias one way or another. There will always be variable results based on the litigants, the lawyers, the judges, and the facts.

<u>Recommendation 5:</u> The protection from abuse statute does not need revision. What does need change is the misuse of the protection order process to address the needs of other systems. The most significant problem is a lack of resources in the court system, in the child protective system, and in the community. Improvement in these systems should decrease inappropriate use of the PFA process as well as to decrease the stress and hardship on both the victim and the accused

a. **The Commission should work with the Office of Child and Family Services at DHHS to clarify that child protective caseworkers should not be suggesting or requiring victims to initiate PFAs on behalf of the child for neglect and appropriately train workers in these issues. Initiate conversations with DHHS about ongoing policy and practice concerning their expectations of victims and the PFA process.**

b. **Commit resources to the Judicial Branch so that timely hearings can be held on an emergent basis. Although there is a process which allows litigants to request an expedited or emergency hearing in the parental rights and responsibilities case, the courts are so heavily scheduled that there is often little ability to meet these requests in a timely fashion despite best efforts to do so.**

c. **Commit resources for parents to use to protect their children, and to provide services including supervision of visits to parents. This means both resources in the community that can be accessed without the necessity of the involvement of DHHS in the case, and the resources to allow DHHS to appropriately handle these cases instead of referring them to the PFA process.**

E. A Review of Training Provided to the Judiciary and Guardians Ad Litem Concerning Domestic Abuse and Parental Rights and Responsibilities

Summary: *All new judges receive training in parental rights and responsibilities and domestic abuse. Thereafter, all judges receive at least 12 hours of continuing judicial education each year which often addresses parental rights and responsibilities and domestic abuse issues. All GALs receive core training in parental rights and responsibilities and domestic abuse, and must receive at least 6 hours of continuing education each year thereafter which often addresses parental rights and responsibilities and domestic abuse issues.*

1. Judicial Training and Continuing Education

Maine judges are nominated by the Governor and confirmed by the legislature. As lawyers, judges come to the bench with very diverse backgrounds and training. Some have had extensive experience with parental rights and responsibilities and domestic violence as lawyers; some have had very little. Judicial training can be broken into three basic categories:

1) training provided to all new judges when sworn in;
2) ongoing training and education attended by all judges; and
3) additional training and conferences attended by individual judges.

While some training is focused exclusively on domestic abuse and parental rights and responsibilities, many other training programs have a different primary focus but incorporate domestic abuse and parental rights and responsibilities issues. For example, conferences in the child protection arena may focus on topics such as reunification or treatment, but domestic abuse and parental rights and responsibilities issues are integral undercurrents to those discussions.

a. Training for new judges.

The Judicial Branch provides comprehensive general training for all new judges over the course of the first month, consisting of both "classroom" components as well as shadowing and sitting in courts in many locations. The training covers the whole spectrum of cases that come before Maine judges, which means a full range of family, civil and criminal cases. Judges sitting in the Maine District Court are the judges who hear all protection from abuse cases, all contested parental rights and responsibilities cases, including divorces, and all child protective cases. The specific components of the training are somewhat fluid and dependent on the experience and background of the judge. All new judges receive approximately about 10 hours on family law and about 7.5 hours on protection from abuse cases. Generally, experienced judges will provide information to each new judge on each subject matter. The new judge then observes an experienced judge handle a docket involving that subject matter and then the new judge handles a docket with the experienced judge available to answer questions and provide feedback to the new judge. Each new judge is also provided with reading material on most subjects, including parental rights and responsibilities and protection from abuse.

In addition, domestic violence and parental rights and responsibilities issues are frequently included in other training components such as child protective or criminal matters.

b. Continuing judicial education offered to all Maine judges.

The Judicial Branch requires that all Maine judges complete at least 12 credits of continuing judicial education each year. In order to facilitate that, trainings and conferences are held twice a year during administrative weeks for all judges. These meetings often cover a broad range of timely topics. In addition to the focus topics, judges who attend out of state conferences provide a summary of the training to other members of the bench. Recent topics at "all judges" meetings have included the following parental rights and domestic abuse issues:

- April 2009: federal implications of state convictions of domestic violence crimes.
- April 2009: confidentiality and other issues in domestic violence bail bonds.
- October 2008: Protection from abuse issues, including new clerks' manual, procedures and forms; issues relating to foreign judgments in protection from abuse cases, including registration and full faith and credit; new Family Division civil rules and procedures.
- April 2008: computerization of bail issues; presentation of the Domestic Abuse Homicide Review Panel report.
- November 2007: extension of Protection from Abuse orders; domestic violence court dockets.

In addition to the semiannual all-judges meetings, there are occasionally special trainings provided to the whole judiciary, usually grant-funded. Most recently, Maine judges attended an all-day conference on June 5, 2009 entitled "Biology and Psychology of Trauma: Implications for the Judicial Process". Funded by U.S. Department of Justice Arrest grant, the training focused on the effects of trauma, primarily domestic violence and sexual assault.

Through the use of grant funds, the Judicial Branch has also sponsored several annual conferences and training for judges as well as attorneys and guardians *ad litem.* Most judges attend these programs, sometimes as presenters. First, over the last several years, the Judicial Branch Family Division has presented an annual 3-hour Court Improvement Forum in multiple locations statewide focused on a variety of child protective issues. Second, the Judicial Branch has also annually presented a 2-day conference on child protective issues. The 2010 2-day child protection conference will focus on childhood trauma. Again, although the focus is child protection and not parental rights and responsibilities, the discussions necessarily touch on issues of domestic abuse and parental rights since those topics underscore so many child protective cases.

c. Training of individual judges.

In addition to the statewide training discussed above, individual judges also attend a variety of conferences and trainings on domestic violence issues as well as parental rights and responsibilities. These are far too numerous and varied to list. Of particular note, most of the District Court judges who run domestic violence courts have attended extensive trainings in-state and out on domestic violence issues and courts. At least six judges have attended the 4-day program "Enhancing Judicial Skills in Domestic Violence Cases" workshop sponsored by the National Judicial Institute on Domestic Violence; two more judicial officers are attending that workshop to be held in February 2010 with the assistance of grant funds.

Finally, the importance of the collegiality of the Maine bench and the frequent informal exchange of ideas and issues should not be discounted.

2. Guardian ad litem Training and Continuing Education

In order to be rostered, each GAL must be screened and must complete the Core Guardian Training sponsored by the Family Division of the Judicial Branch. All GALs must also complete an additional 6 hours of continuing education annually.

a. Core guardian ad litem training

The 4-day core GAL training is offered in the fall every year. *See* Appendix G, the curriculum from 2009. The training covers many different aspects of family law and parental rights and responsibilities. It includes 2 hours specifically devoted to the impact of domestic violence on families and children. In addition, the role of domestic violence is integral to and discussed throughout many other portions of the curriculum.17

b. Ongoing continuing education of guardians ad litem

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17 For example, Judge Stanfill specifically discusses the interplay of 19-A M R S §§1653(3) and 1653(6) in her presentation on family law statutes Justice Levy specifically discusses the role of domestic violence on the determination of primary residence in his presentation

In addition to the core training, each GAL must complete at least 6 hours of continuing education each year. There are a variety of offerings for GALs from numerous sources. Of particular note, the Judicial Branch presented an all-day training in May 2005 entitled "Domestic Violence: Research & Implications for Practice". This was a training for Child Abuse and Neglect Evaluators and GALs.

The Maine Guardian ad Litem Institute has also actively provided additional continuing education to GALs focused on domestic abuse.[18] For example, at the annual meeting of the Institute in May 2009, the Department of Public Safety presented a workshop on "Identifying the Predominant Aggressor". At the same meeting, there was also an Advanced Domestic Abuse workshop presented for those GALs who had already taken the Department of Public Safety workshop. Guardians *ad litem* received 3 hours continuing education credit for attendance. Although voluntary, it is worth noting that 53 GALs were in attendance for both workshops, which was over half of the MEGALI membership at the time. Under the guidance of a multi-disciplinary Advisory Board the Bingham Program has funded the Muskie School to develop an advanced curriculum on Domestic Abuse for Guardians ad Litem.

18 The Institute, known as MEGALI, is a statewide voluntary organization of Maine GALs

3. Additional Training.

Respondents in the data collected believed that judges were already adequately trained in general on domestic violence, but also noted regional variations in the judicial response to domestic violence. Because of the size of Maine's judiciary, regional variation may indeed be variation among individual judges. Respondents were less persuaded that attorneys have adequate training in this area. This may well simply be a product of the fact that most Maine attorneys do not specialize in this area of law (or any other). The view of the training given to GALs varies quite a bit, and it is in this area that there was the greatest variation. It is probably safe to say that some GALs are very well trained and qualified, and others not as much so.

The data in this study as already discussed suggests that certain specific elements of training are recommended, particularly related to GALs. Some of these training recommendations are clear and can be implemented right away. Others need more development and will be reflected in the recommendations for further study. Current recommendations are:

Recommendation 6:

a. **The Family Law Section of the Maine State Bar Association should provide training to family law attorneys regarding any statutory changes as well as the recommendations of this Commission. It is particularly important under the existing statute that the pressure to co-parent does not become a default "rebuttable presumption". If the statute is amended to resolve this tension, then make sure that training happens at all levels about the changes.**

b. **Judges and lawyers should be trained to create clear, unambiguous orders that can be understood and implemented both for PFAs and for parental rights and responsibilities. Lack of clarity interferes with the ability of law enforcement to effectively implement the orders and can also result in cases being brought back to court repeatedly.**

c. **Refine entry points into the legal system: train court clerks to be appropriate with victims and accused. Create and train on effective protocols supporting referrals to victim services. As reported and recognized by the Maine Domestic Abuse Homicide Review Panel in their 2009 report, "professionals who have repeated contact with a single victim may experience compassion fatigue. Professionals and agencies must recognize the impact this can have on their judgment and the resulting impact this may have on victims."** [19]

[19] The 8th Report of the Maine Domestic Abuse Homicide Review Panel, p. 18 (January 2010).

F. Recommendations for Further Study

The Commission recommends that the Judiciary Committee of the Maine Legislature commission a further study to review the processes governing family matters in District Court. The current data indicates a number of flaws in the process that require attention. However, given the limitations of time and resources in this study, full review and recommendations were not possible. The next study can build on the consensus established to date and continue the project. We believe that implementing the current recommendations will improve the family matters process significantly, but that there is more work to be done in order to establish best practices in Maine.

The following consensus points from the data and the stakeholders' discussions should inform the future study of family matters processes. This is not meant to limit the scope of the study to just these topics or recommendations.

1. Family Matters

Investigate the possibility of creating an expedited process for cases with domestic violence and/or high conflict. The focus would be to review and establish best practices for managing these cases to achieve safety and the most positive outcomes for the families. An effective way to reduce the waiting time will also reduce the misuse of the PFA process which was attributed to the long waiting period for hearings in family cases where there is immediate and serious conflict between the parents, whether or not it rises to the level of abuse as defined by statute. Look at additional system responses that can get people into the family matter system faster — there is agreement in all responding groups that people sometimes use the PFA process on behalf of children or themselves because they cannot get a timely response from the family court system. This does not mean that the need for protection orders in situations where safety is an ongoing issue goes away when one gets into the family matter system, but rather that this will help allow parents to take their issues to the correct hearing arena.

2. Guardians ad Litem.

Guardians' reports and recommendations have an enormous importance within the system, and all actors in the court system rely on them. GALs have differing levels of training and expertise, including around domestic violence. Judges note that they want the GALs with the highest level of expertise and experience dealing with cases involving domestic violence. The GAL responses to the survey indicate that their training is not consistent; even those who report training beyond the basic level do not necessarily have the same trainings, or any coordinated and systemic training. There is a place for systemic training.

In 2008, the Judicial Branch Advisory Committee on Children and Families gave the Legislature a detailed report entitled "Recommendations for a Guardian *ad litem* Program for the State of Maine." The report was prepared in response to a 2006 OPEGA report regarding Guardians ad litem in child protective cases. The Commission urges the Legislature to revisit this report; the Commission agrees in substance with the recommendations made there and need not address those concerns in great detail here. A few points stood out in our data review, however.

First, the system for accountability for GALs is not well known or understood, and there is a question whether it is effective.

Second, there is no evaluative process other than the disciplinary process that would assist GALs in improving their performance and more effectively meeting the needs of parents.

Third, litigants are clearly entitled to dispute the guardian *ad litem's* recommendations and findings at a hearing, but many litigants do not clearly understand this and may feel they have no choice but to accept a guardian *ad litem's* report with which they disagree.

Finally, there is a concern that litigants perceive a bias by the GAL—however unintended—toward whoever writes the paycheck for the GAL's fees.

Recommendations for next year: Integrate the 2008 Advisory Committee report and its recommendations together with the following points to improve the functioning of GALs in Maine.

a. GALs who take domestic violence cases need to have domestic violence expertise. Design and implement a thorough domestic violence training, such as the one the Muskie School of Public Service is developing.

b. Issues of bias toward who is writing the paycheck: evaluate a funding system that is anonymous such as New Hampshire uses.

c. Create an effective system of accountability, including both evaluative and grievance processes. One such system exists in New Hampshire and can be explored.

3. Domestic Violence and High Conflict cases.

Domestic violence and high conflict cases are both misunderstood and confused with each other. There is a consistent sense that more training and better understanding of these situations is required. FLAC's recommendations may assist in the management of domestic violence and high conflict cases. However, training will need to co-exist to help actors in the court systems understand the difference and the different appropriate responses.

4. Legal Representation.

Legal representation is crucial for all parties to receive fair treatment, as well as for the judicial process to be efficient. There is a current lack of representation for victims (and indeed of all litigants) primarily due to lack of low cost legal options. What options, such as the Cumberland Legal Aid Clinic at the University of Maine School of Law, the Women's Law Section/Volunteer Lawyers Project Pro Bono Project, or other legal clinic options, including use of paraprofessional supports, can be implemented that improve the access to legal representation? The Maine Bar Foundation and Justice Action Group have also repeatedly identified this concern.

5. Resources.

Resource issues make family court decisions more difficult. Indeed, lack of resources underlies many of the problems identified in this report. In a low resource era, what options can improve these systems? What federal or other grants are available to support state resources? What can be done to support an organization's willingness to develop these services?

a. Lack of supervised visitation and supervised exchange facility options can complicate or obstruct parent's access to children and force the court into more restrictive orders, or orders that may increase the safety risk.

b. Other resources that are lacking include funds for GALs and other experts and evaluations.

6. Linguistic and Cultural competency.

There needs to be further study of linguistic and cultural issues in the legal process, particularly as it relates to domestic violence and parental rights and responsibilities. Translation services may not be sufficient to address these issues, as cultural norms in immigrant and refugee communities may affect behaviors in these cases in ways that are different than what has been the historical view. The Commission did not study this issue in detail, and it needs further study.

III. CONCLUSION

While we know that the judicial system is not the main avenue for culture change for the society at large or for a discussion of the full range of domestic violence, it is a crucial intervention point and small changes can have significant impact on safety and accountability, as well as the wellbeing of children and families. Maine's processes for the determination of parental rights and responsibilities in cases of domestic violence have many strengths, but there are ways in which the system can be improved. With small changes and some additional resources, Maine can be a model for all.

APPENDICES

APPENDIX A

MAINE COMMISSION ON DOMESTIC AND SEXUAL ABUSE

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APPENDIX B

HP0787, LD 1143, item 2, 124th Maine State Legislature , Amendment C "A", Filing Number H-472 'Resolve, Directing a Study of Domestic Violence and Parental Rights and Responsibilities'
HP0787, Filing Number H-472, LR 902, item 2, First Regular Session - 124th Maine Legislature, page 1

PLEASE NOTE: Legislative Information ***cannot*** perform research, provide legal advice, or interpret Maine law. For legal assistance, please contact a qualified attorney.

Amend the bill by striking out the title and substituting the following:

'Resolve, Directing a Study of Domestic Violence and Parental Rights and Responsibilities'
Amend the bill by striking out everything after the title and before the summary and inserting the following:

'**Sec. 1 Study. Resolved:** That the Maine Commission on Domestic and Sexual Abuse shall study domestic abuse, parental rights and responsibilities and the protection from abuse process, including the laws and practices governing parental rights when domestic abuse is alleged or suspected. The study must include:
1. A review of how the best interests of the child are determined;
2. An examination of the issues concerning the presentation of evidence that accurately portrays domestic violence and its effects in the family relationship;
3. How other states have addressed domestic violence when establishing parental rights and responsibilities, including the adoption of rebuttable presumptions, and how those procedures are working in those states;
4. Whether misuse of the protection from abuse process is happening and, if so, why and to what extent the misuse is occurring and whether there are problems with the process itself that lead participants to the conclusion that the process is biased, unfair or inconsistently applied; and
5. A review of the training provided to the judiciary and guardians ad litem concerning domestic abuse and parental rights and responsibilities; and be it further

Sec. 2 Participation. Resolved: That the commission shall invite interested parties to participate in the study, including but not limited to: the Family Law Advisory Commission; the Maine Coalition to End Domestic Violence; the Maine Guardian Ad Litem Institute; the Family Law Section of the Maine State Bar Association; the judicial branch; the Maine Association of Criminal Defense Lawyers; and any others the commission determines helpful to the study; and be it further

Sec. 3 Report; legislation. Resolved: That the commission shall submit a report to the Joint Standing Committee on Judiciary no later than February 1, 2010. The report must summarize the activities of the commission, identify the participants in the study under section 1 and include recommendations for action by the legal profession, the judicial branch, advocates for victims of domestic violence, law enforcement and prosecutors. The report may include recommendations for further data collection, research and analysis to address the subjects that are included in the study. The report may include recommended legislation. The Joint Standing Committee on Judiciary may report out legislation to the 124th Legislature in 2010 based on the report.'

SUMMARY

This amendment deletes the bill, changes the title and replaces it with a resolve directing the Maine Commission on Domestic and Sexual Abuse to undertake a study on domestic violence, parental rights and responsibilities and the protection from abuse process. The commission shall invite interested parties to participate and shall report to the Joint Standing Committee on Judiciary by February 1, 2010. The report may include recommendations for further data collection, research and analysis to address the subjects that are included in the study. The committee may report out legislation to the 124th Legislature in 2010.

FISCAL NOTE REQUIRED
(See attached)

APPENDIX C

Memorandum to the Maine Commission on Domestic and Sexual Abuse to Accompany the Table of State Child Custody-Domestic Violence Statutes

Maine

Regardless of which statutory approach is in effect, almost every court charged with determining custody in cases where domestic abuse exists must endeavor to resolve "an inherent tension between preserving and maintaining parent-child relationships and protecting children from emotional and physical harm."20 Maine's current child custody statute encounters this tension from the very beginning in its preamble. Provisions B and C of the Legislative findings and purpose in Section 1653 of the Maine Revised Statutes provide:

> B. The Legislature finds that domestic abuse is a serious crime against the individual and society, *producing an unhealthy and dangerous family environment*, *resulting in a pattern of escalating abuse*, including violence, that frequently culminates in intrafamily homicide and *creating an atmosphere that is not conducive to healthy childhood development*.
>
> C. The Legislature finds and declares that it is the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that *it is in the public policy interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy*.

19-A M.R.S.A. § 1653(1) (emphasis added). To the extent that these findings inform the subsequent law including the best interest factors, they may send an inconsistent message to courts making custody determinations in cases involving domestic abuse.

The following section of this memorandum describes three proposals that could help provide Maine's courts with additional guidance: 1) creating a rebuttable presumption that it is not in a child's best interests to award primary or shared residence or sole or shared parental rights and responsibilities to an abusive parent; 2) adjusting the best interest factors to give appropriate weight to domestic abuse, clarify how to prove domestic abuse, and describe how the court should respond once domestic abuse is proven; and 3) clarifying the discrepancy in the legislative findings by adding some additional language to the findings.

The first proposal is to create a rebuttable presumption that it is not in a child's best interests to award primary or shared residence or sole or shared parental rights and responsibilities to an abusive parent. The legislature specifically requested that the Commission investigate this option in its resolve. For a discussion of some of the policy arguments related to a rebuttable presumption, please see the Pros and Cons of a

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20 Levin at 1.

Rebuttable Presumption memorandum. If the Legislature wanted to pursue this option, it would be useful to examine other states' rebuttable presumption statutes (and to speak to experts in those states) to see which ones are clearly drafted and which create unnecessary confusion.

The second proposal entails adjusting the current best interest provision to give appropriate weight to domestic abuse, clarify how to prove domestic abuse, and describe how the court should respond once domestic abuse is proven.

The Maine legislature might adjust the best interest factors to provide courts with better guidance as to how much weight they should give to domestic abuse in determining residence and parental rights and responsibilities. In Maine's current statute, domestic abuse is one of eighteen factors. This large number of factors—the most in the U.S.—may serve to dilute the importance of any one factor. Also, domestic abuse can directly affect a number of the other factors, including (B) the relationship of the child with the child's parents, (D) the duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity, (H) the capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, including physical access, and (I) the capacity of each parent to cooperate or to learn to cooperate in child care. The statute does not provide guidance as to whether or how courts should consider each of these factors in conjunction with the effects of domestic abuse.

The Maine legislature might clarify how domestic abuse must be proven in order to make it an appropriate factor for a court to consider. Possible ways to prove the existence of domestic abuse could include providing evidence of a criminal conviction of assault, stalking, or terrorizing by one parent against the other, a finding of abuse by a court in a prior proceeding, or proof by a preponderance of the evidence that abuse has occurred based upon the definition of abuse found in 19-A M.R.S.A. § 4002(1).

Lastly, the Maine legislature might provide courts with guidance as to how they should treat a finding of domestic abuse. Short of creating a rebuttable presumption that it is not in a child's best interests to award primary or sole residence or joint or shared parental rights and responsibilities to an abusive parent, the legislature can clarify the weight to be given to a finding of abuse in considering a child's best interests and provide other guidance to courts in making a decision. (See excerpt from Massachusetts statute below related to options the court may consider regarding visitation).

The third proposal is to add language that clarifies the existing legislative findings and purpose by explaining that it is not always in the public interest to award shared parental rights and responsibilities to both parents. Provision C could be amended as follows to make it more consistent with provision B:

> C. The Legislature finds and declares that it is the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public policy interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy , except where the contact or shared parental rights and responsibilities would not be in the best interests of child, as provided in Section 1653, Subsection 3.

Amending part C of the legislative findings will ensure that the findings do not provide conflicting guidance to courts that are determining parental rights and responsibilities in cases where domestic abuse is present.

The remainder of this memorandum compiles excerpts from state statutes that we interns found to be particularly notable.

Massachusetts

In its child custody provision, Massachusetts's statute defines clearly at the outset which rights it is talking about. In the next provision, it describes how to prove the existence of domestic abuse, creates a presumption in relation to the defined rights, explains how to rebut the presumption, and guides the court in devising a strategy for visitation.

Section 31. For the purposes of this section, the following words shall have the following meaning unless the context requires otherwise:

"Sole legal custody", one parent shall have the right and responsibility to make major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development.

"Shared legal custody", continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development.

"Sole physical custody", a child shall reside with and be under the supervision of one parent, subject to reasonable visitation by the other parent, unless the court determines that such visitation would not be in the best interest of the child.

"Shared physical custody", a child shall have periods of residing with and being under the supervision of each parent; provided, however, that physical custody shall be shared by the parents in such a way as to assure a child frequent and continued contact with both parents.

* * * * *

Section 31A. In issuing any temporary or permanent custody order, the probate and family court shall consider evidence of past or present abuse toward a parent or child as a factor contrary to the best interest of the child. For the purposes of this section, "abuse" shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing bodily injury; or (b) placing another in reasonable fear of imminent bodily injury. "Serious incident of abuse" shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing serious bodily injury; (b) placing another in reasonable fear of imminent serious bodily injury; or (c) causing another to engage involuntarily in sexual relations by force, threat or duress. For purposes of this section, "bodily injury" and "serious bodily injury" shall have the same meanings as provided in section 13K of chapter 265.

A probate and family court's finding, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create 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. Such presumption may be rebutted by a preponderance of the evidence that such custody award is in the best interests of the child. For the purposes of this section, "an abusive parent" shall mean a parent who has committed a pattern of abuse or a serious incident of abuse.

For the purposes of this section, the issuance of an order or orders under chapter 209A shall not in and of itself constitute a pattern or serious incident of abuse; nor shall an order or orders entered ex parte under said chapter 209A be admissible to show whether a pattern or serious incident of abuse has in fact occurred; provided, however, that an order or orders entered ex parte under said chapter 209A may be admissible for other purposes as the court may determine, other than showing whether a pattern or serious incident of abuse has in fact occurred; provided further, that the underlying facts upon which an order or orders under said chapter 209A was based may also form the basis for a finding by the probate and family court that a pattern or serious incident of abuse has occurred.

If the court finds that a pattern or serious incident of abuse has occurred and issues a temporary or permanent custody order, the court shall within 90 days enter written findings of fact as to the effects of the abuse on the child, which findings demonstrate that such order is in the furtherance of the child's best interests and provides for the safety and well-being of the child.

If ordering visitation to the abusive parent, the court shall provide for the safety and well-being of the child and the safety of the abused parent. The court may consider:

(a) ordering an exchange of the child to occur in a protected setting or in the presence of an appropriate third party;

(b) ordering visitation supervised by an appropriate third party, visitation center or agency;

(c) ordering the abusive parent to attend and complete, to the satisfaction of the court, a certified batterer's treatment program as a condition of visitation;

(d) ordering the abusive parent to abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding visitation;

(e) ordering the abusive parent to pay the costs of supervised visitation;

(f) prohibiting overnight visitation;

(g) requiring a bond from the abusive parent for the return and safety of the child;

(h) ordering an investigation or appointment of a guardian ad litem or attorney for the child; and

(i) imposing any other condition that is deemed necessary to provide for the safety and well-being of the child and the safety of the abused parent.

Nothing in this section shall be construed to affect the right of the parties to a hearing under the rules of domestic relations procedure or to affect the discretion of the probate and family court in the conduct of such hearings.

Mass. Gen. Laws 208 §§ 31-31A.

Oregon

The Oregon statute includes domestic abuse as a best interest factor, and incorporates its rebuttable presumption into a provision that addresses weighing the different factors. The statute also provides clear guidance to courts in resolving the tension between its domestic abuse factor (d) and its "friendly parent" factor (f) in cases where domestic abuse exists.

107.137 Factors considered in determining custody of child. (1) In determining custody of a minor child under ORS 107 105 or 107.135, the court shall give primary consideration to the best interests and welfare of the child. In determining the best interests and welfare of the child, the court shall consider the following relevant factors:

(a) The emotional ties between the child and other family members;

(b) The interest of the parties in and attitude toward the child;

(c) The desirability of continuing an existing relationship;

(d) The abuse of one parent by the other;

(e) The preference for the primary caregiver of the child, if the caregiver is deemed fit by the court; and

(f) The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child. However, the court may not consider such willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in a pattern of behavior of abuse against the parent or a child and that a continuing relationship with the other parent will endanger the health or safety of either parent or the child.

(2) The best interests and welfare of the child in a custody matter shall not be determined by isolating any one of the relevant factors referred to in subsection (1) of this section, or any other relevant factor, and relying on it to the exclusion of other factors. However, if a parent has committed abuse, as defined in ORS 107.705, there is a rebuttable presumption that it is not in the best interests and welfare of the child to award sole or joint custody of the child to the parent who committed the abuse.

(3) In determining custody of a minor child under ORS 107 105 or 107.135, the court shall consider the conduct, marital status, income, social environment or life style of either party only if it is shown that any of these factors are causing or may cause emotional or physical damage to the child.

(4) No preference in custody shall be given to the mother over the father for the sole reason that she is the mother, nor shall any preference be given to the father over the mother for the sole reason that he is the father. [1975 c.722 §2; 1987 c.795 §14; 1997 c.707 §35; 1999 c.762 §2]

Or. Rev. Stat. § 107.137 (bold-face added).

Texas

Texas's statute contains an outright prohibition on shared decision-making when one parent has abused the other. It contains a rebuttable presumption that it is not in a child's best interests to award sole parental rights to an abusive parent. It also contains a rebuttable presumption that it is not in a child's best interests to have unsupervised visits with an abusive parent.

Sec. 153.004. HISTORY OF DOMESTIC VIOLENCE. (a) In determining whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of abusive physical force by a party against the party's spouse, a parent of the child, or any person younger than 18 years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit.

(b) The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child, including a sexual assault in violation of Section 22.011 or 22.021, Penal Code, that results in the other parent becoming pregnant with the child. A history of sexual abuse includes a sexual assault that results in the other parent becoming pregnant with the child, regardless of the prior relationship of the parents. It is a rebuttable presumption that the appointment of a parent as the sole managing conservator of a child or as the conservator who has the exclusive right to determine the primary residence of a child is not in the best interest of the child if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child.

(c) The court shall consider the commission of family violence in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator.

(d) The court may not allow a parent to have access to a child for whom it is shown by a preponderance of the evidence that there is a history or pattern of committing family violence during the two years preceding the date of the filing of the suit or during the pendency of the suit, unless the court:

(1) finds that awarding the parent access to the child would not endanger the child's physical health or emotional welfare and would be in the best interest of the child; and

(2) renders a possession order that is designed to protect the safety and well-being of the child and any other person who has been a victim of family violence committed by the parent and that may include a requirement that:

(A) the periods of access be continuously supervised by an entity or person chosen by the court;

(B) the exchange of possession of the child occur in a protective setting;

(C) the parent abstain from the consumption of alcohol or a controlled substance, as defined by Chapter 481, Health and Safety Code, within 12 hours prior to or during the period of access to the child; or

(D) the parent attend and complete a battering intervention and prevention program as provided by Article 42.141, Code of Criminal Procedure, or, if such a program is not available, complete a course of treatment under Section 153.010.

(e) It is a rebuttable presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with the child if credible evidence is presented of a history or pattern of past or present child neglect or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child.

(f) In determining under this section whether there is credible evidence of a history or pattern of past or present child neglect or physical or sexual abuse by a parent directed against the other parent, a spouse, or a child, the court shall consider whether a protective order was rendered under Chapter 85, Title 4, against the parent during the two-year period preceding the filing of the suit or during the pendency of the suit.

Tex. Fam. Code § 153.131

California

California's statute provides legislative findings similar to Maine's, but it qualifies the language favoring shared parental rights and responsibilities in certain cases by reference to the best interest provision. The best interest provision lists certain types of evidence useful in proving the existence of domestic abuse. It also requires a court to provide written findings if it awards sole or joint custody to a parent who the court finds abused the other parent.

3020. (a) The Legislature finds and declares that it is the public policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children. The Legislature further finds and declares that the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child.

(b) The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, **except where the contact would not be in the best interest of the child, as provided in Section 3011.**

(c) Where the policies set forth in subdivisions (a) and (b) of this section are in conflict, any court's order regarding physical or legal custody or visitation shall be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members.

* * * * *

3011. In making a determination of the best interest of the child in a proceeding described in Section 3021, the court shall, among any other factors it finds relevant, consider all of the following:

(a) The health, safety, and welfare of the child.

(b) Any history of abuse by one parent or any other person seeking custody against any of the following:

(1) Any child to whom he or she is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary.

(2) The other parent.

(3) A parent, current spouse, or cohabitant, of the parent or person seeking custody, or a person with whom the parent or person seeking custody has a dating or engagement relationship.

As a prerequisite to the consideration of allegations of abuse, the court may require substantial independent corroboration, including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence. As used in this subdivision, "abuse against a child" means "child abuse" as defined in Section 11165.6 of

the Penal Code and **abuse against any of the other persons described in paragraph (2) or (3) means "abuse" as defined in Section 6203 of this code.**

(c) The nature and amount of contact with both parents, except as provided in Section 3046.

(d) The habitual or continual illegal use of controlled substances or habitual or continual abuse of alcohol by either parent. Before considering these allegations, the court may first require independent corroboration, including, but not limited to, written reports from law enforcement agencies, courts, probation departments, social welfare agencies, medical facilities, rehabilitation facilities, or other public agencies or nonprofit organizations providing drug and alcohol abuse services. As used in this subdivision, "controlled substances" has the same meaning as defined in the California Uniform Controlled Substances Act, Division 10 (commencing with Section 11000) of the Health and Safety Code.

(e) (1) Where allegations about a parent pursuant to subdivision (b) or (d) have been brought to the attention of the court in the current proceeding, and the court makes an order for sole or joint custody to that parent, the court shall state its reasons in writing or on the record. In these circumstances, the court shall ensure that any order regarding custody or visitation is specific as to time, day, place, and manner of transfer of the child as set forth in subdivision (b) of Section 6323.

(2) The provisions of this subdivision shall not apply if the parties stipulate in writing or on the record regarding custody or visitation.

* * * * *

3044. (a) Upon 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 siblings 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 a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence.

(b) In determining whether the presumption set forth in subdivision (a) has been overcome, the court shall consider all of the following factors:

(1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. In determining the best interest of the child, the preference for frequent and

continuing contact with both parents, as set forth in subdivision (b) of Section 3020, or with the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, may not be used to rebut the presumption, in whole or in part.

(2) Whether the perpetrator has successfully completed a batterer's treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code.

(3) Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate.

(4) Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate.

(5) Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole.

(6) Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions.

(7) Whether the perpetrator of domestic violence has committed any further acts of domestic violence.

(c) For purposes of this section, a person has "perpetrated domestic violence" 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 or to another, or to have engaged in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property or disturbing the peace of another, for which a court may issue an ex parte order pursuant to Section 6320 to protect the other party seeking custody of the child or to protect the child and the child's siblings.

(d) (1) For purposes of this section, the requirement of a finding by the court shall be satisfied by, among other things, and not limited to, evidence that a party seeking custody has been convicted within the previous five years, after a trial or a plea of guilty or no contest, of any crime against the other party that comes within the definition of domestic violence contained in Section 6211 and of abuse contained in Section 6203, including, but not limited to, a crime described in subdivision (e) of Section 243 of, or Section 261, 262, 273.5, 422, or 646.9 of, the Penal Code.

(2) The requirement of a finding by the court shall also be satisfied if any court, whether that court hears or has heard the child custody proceedings or not, has made a finding pursuant to subdivision (a) based on conduct occurring within the previous five years.

(e) When a court makes a finding that a party has perpetrated

domestic violence, the court may not base its findings solely on conclusions reached by a child custody evaluator or on the recommendation of the Family Court Services staff, but shall consider any relevant, admissible evidence submitted by the parties.

(f) In any custody or restraining order proceeding in which a party has alleged that the other party has perpetrated domestic violence in accordance with the terms of this section, the court shall inform the parties of the existence of this section and shall give them a copy of this section prior to any custody mediation in the case.

Cal. Fam. Code §§ 3020, 3011, 3044 (bold-face added).

APPENDIX D

To: Members of the Family Law Advisory Commission
From: Kimberly Pacelli, Bernstein Fellow
Re: Overview of rebuttable presumption statutes
Date: August 2009

I. Introduction

Courts in all states continue to grapple with how to best address and assist families impacted by domestic violence, particularly in matters regarding child custody decisions. For the past several decades, research has consistently identified the harm done to children when exposed to domestic violence. For example, these children suffer emotional and psychological trauma, are more likely to be abused or neglected themselves, are at a higher risk for depression and self-destructive behavior, and are more likely to repeat these behavioral patterns in their adulthood.21

While these concerns gained prominence in strategies to deal with custody determinations, a simultaneous trend developed to reinforce relationships between children and their fathers.22 States began to enact laws to encourage or presume joint custody of children.23 As legislatures and courts began to try to simultaneously address domestic violence and strengthen fatherhood, these trends often worked against each other.24

Beginning in the 1990s, states began enacting statutes to create a rebuttable presumption against custody to batterers. The U.S. Congress encouraged states to establish such a presumption and the National Council of Juvenile and Family Court Judges released its Model Code on Domestic and Family Violence, which included a rebuttable presumption against custody.25 Both the American Bar Association and the American Psychological Association both support a presumption.26 Currently, approximately half of the states have passed a rebuttable presumption statute in some form.

This memo summarizes the national landscape with respect to how states have approached the concept of rebuttable presumptions against child custody for batterers. The second section describes the current status of statutes in all fifty states and the District of Columbia with respect to how domestic violence is addressed in child custody matters. The third section describes how other common elements of custody statutes, such as presumptions or preferences for joint custody and so-called "friendly parent provisions" can negatively impact the efficacy of rebuttable presumption provisions. The fourth section briefly describes some typical appellate developments in states that have extensive experience implementing rebuttable presumption statutes. The fifth and final section summarizes empirical and other research that has evaluated the effectiveness of these statutes.

II. National Landscape

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21 Leslie D. Johnson, *Caught in the Crossfire: Examining Legislative and Judicial Response to the Forgotten Victims of Domestic Violence*, 22 LAW & PSYCHOL. REV. 271, 274-75 (1998).
22 *See* Nancy K. D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 604-05 (2001).
23 *Id.* at 605.
24 *Id.* at 606.
25 *Id.*
26 Lisa Bolotin, *When Parents Fight: Alaska's Presumption Against Awarding Custody to Perpetrators of Domestic Violence*, 25 ALASKA L. REV. 263, 273 (2008).

All states have enacted some form of statutory language requiring courts to consider the impact of domestic violence in child custody matters.27 Typically domestic violence is one of the factors in the "Best Interests of the Child" statutory language, which directs courts to weigh many factors to determine the best custody arrangement for a family.28 In addition to serving as a constant reminder of the importance of this issue, inclusion of the "best interest" standard ensures that domestic violence considerations do not disappear from custody determinations in circumstances where an abusing parent has successfully rebutted the presumption against custody.29 New York notably debated and considered whether or not to enact a rebuttable presumption and instead determined that including domestic violence in the best interests factors was preferable than a rebuttable presumption.30

Twenty-five states have gone further, by enacting a rebuttable presumption that upon a finding of domestic violence a court may not grant custody to the perpetrator of domestic violence.31 Alaska's decision to enact a presumption was prompted, in part, by data that indicated that even though domestic violence was a factor in the best interests analysis, abusive fathers still won custody in seventy percent of cases.32

A few states have enacted statutes that closely follow the Model Code.33 North Dakota passed a rebuttable presumption statute in 1991, upon which Louisiana's Post-Separation Family Violence Act appears to be loosely based when it was first enacted in 1992. Both are a variation on the Model Code and Louisiana's version has prompted the enactment of similar statutory language in several other states, including Alaska, California, Massachusetts, Minnesota, and the District of Columbia.34 In Maine, L.D. 1143, which was introduced in the 2009 legislative session, is based in large part on Louisiana's statute.35

Rebuttable presumption statutes vary greatly across states, largely because the law has developed significantly over time due to legislative amendments and appellate decisions interpreting the law.36 How is "domestic violence" defined and what is required to "trigger" the presumption? Is one incident sufficient or must there be a pattern or history of violence? What standard of proof is required? How is the presumption rebutted and by what standard of proof? What shall courts do if there is credible evidence that both parents have engaged in domestic violence? Does the presumption apply to residency, parental rights and responsibilities, visitation, or more? The paragraphs that follow attempt to illustrate the variations and describe any consensus as to how to best address these questions.

Defining "Domestic Violence" – How is the Rebuttable Presumption "Triggered?"37

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27 Am. Bar Ass'n Comm'n on Domestic Violence, Statutory Summary Charts, *Child Custody & Domestic Violence* (2008), http://www.abanet.org/domviol/docs/custody.pdf. This memo's author checked each state to identify approximately four statutory changes since the chart's publication.

28 *See, e.g.*, ME. REV. STAT. ANN. tit. 19-A § 1653(3)(L) (2004) (Courts shall consider "the existence of domestic abuse between the parents, in the past or currently" and its effect on the child's emotional health and physical safety.) South Dakota and West Virginia appear to be the only two states that have no reference to domestic violence in their Best Interests standards. *See* Am. Bar Ass'n Comm'n on Domestic Violence, *supra* note 7.

29 Lemon, *supra* note 2, at 619.

30 Bolotin, *supra* note 6, at 277.

31 Am. Bar Ass'n Comm'n on Domestic Violence, *supra* note 7.

32 Bolotin, *supra* note 6, at 288 (citing Transcript of Audio Cassettes of Committee Minutes on House Bill No. 385).

33 *See, e.g.*, ALA. CODE § 30-3-131 (2007); HAW. REV. STAT. § 571-26(9) (2007); 2009 OKLA. SESS. LAW SERV. Ch. 307 (H.B. 1739) (West 2009) (effective November 1, 2009).

34 Bolotin, *supra* note 6, at 284.

35 Maine's L.D. 1143 was entitled "An Act to Establish Child Custody and Domestic Violence Presumptions." H.P. 787, 124th Leg., 1st Reg. Sess. (Me. 2009) [hereinafter "L.D. 1143"].

36 Lemon, *supra* note 2, at 613.

37 Statutes utilize a variety of terminology, including "domestic violence," "family violence," "domestic abuse." For purposes of this memo, the term "domestic violence" is used regardless of the specific terminology in individual states.

There is wide variety and little consistency among the 25 states with rebuttable presumption statutes as to the behavior that must be demonstrated in order to "trigger" the presumption. Whereas approximately half of the statutes apparently can be triggered by a single incident, the remaining states look to the seriousness of a single incident or require a pattern of violent behavior.

The original Model Code language would trigger the presumption when domestic violence "has occurred," having the apparent effect of triggering after one incident.38 The Hawaii statute incorporates this identical language.39 Several other states also have statutory language that could trigger the presumption as long as a court makes a finding that the parent is a perpetrator of domestic violence.40 Conversely, four states have taken a more stringent approach, by apparently overlooking one incident and only triggering upon a finding of a "pattern" or "history" of domestic violence.41

A few states, including Louisiana, take an intermediate approach by triggering the presumption after a single incident of violence resulting in serious bodily injury or more than one incident of domestic violence.42 This type of statutory language seeks to include serious incidents while excluding an isolated minor incident. In addition to nearly identical language as Louisiana, North Dakota's statute additionally triggers the presumption after a single incident that involves a dangerous weapon.43

Two states specifically articulate a desire to exclude distantly past incidents from triggering the presumption. California requires that the incident have occurred within the past five years.44 North Dakota allows courts to look to a pattern of behavior, as long as the incidents are "within reasonable time proximate to the proceeding."45

Another uncommon, but procedurally significant variation includes the three states, such as Florida, which look only to a domestic violation conviction to trigger the presumption.46 The Florida legislature amended its law earlier this year, which had previously required a felony conviction. The new law now triggers the presumption in cases of misdemeanor convictions.47 The felony requirement resulted in only one reported appellate case in which the presumption was triggered, in which the father had murdered the mother.48 Oklahoma statute creates a rebuttable presumption that custody or guardianship is not in the best interests of the child if there has been a domestic violence conviction that has occurred within the past five years.49 Missouri does not require a conviction, but does only permit the rebuttable presumption in a custody award that is made pursuant to the issuing of a protection order.50

Standard of Proof Required

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38 FAMILY VIOLENCE: A MODEL STATE CODE § 401 (Nat'l Council of Juvenile & Fam. Ct. Judges 1994).
39 HAW. REV. STAT. § 571-46(9) (2009).
40 *See, e.g.,* ALA. CODE § 30-3-131 (2007) (domestic or family violence has occurred); COLO. REV. STAT. § 14-10-124(b)(V) (2009) (a "perpetrator" of spousal abuse); NEV. REV. STAT. § 125C.230 (2009) (one or more acts against the parent).
41 *See, e.g.*, ARK. CODE ANN. § 9-15-215(c)(2009) (a pattern); IDAHO CODE ANN. § 32-717B(5) (2009) (habitual perpetrator); TEX. FAM. CODE § 153.004(b) (Vernon 2009) (history or pattern).
42 LA. REV. STAT. ANN. § 9:361 (2009).
43 N.D. CENT. CODE § 14-09-06.2(1)(j) (2009).
44 CAL. FAM. CODE § 3044(a) (West 2009).
45 N.D. CENT. CODE § 14-09-06.2(1)(j) (2009).
46 *See, e.g.*, FLA. STAT. §61.13(2)(b)(2) (West 2009).
47 2009 Fla. Sess. Law. Serv. Ch. 2009-180 (C.S.C.C.S.S.B. 904) (West).
48 Lemon, *supra* note 2, at 642-43 (citing Burke v. Watterson, 713 So. 2d 1094, 1095 (Fla. Dist. Ct. App. 1998) (per curiam) (upholding a trial court's award of custody to the maternal grandparents when the father had been convicted of homicide manslaughter of the children's mother)).
49 OKLA. STAT. tit. 43 § 112.2 (2009).
50 MO. REV. STAT. § 455.050(5) (2009) ("In making an award of custody, the court shall consider all relevant factors including the presumption that the best interests of the child will be served by placing the child in the custody and care of the nonabusive parent").

States vary as to whether or not the statute specifies the standard of proof necessary to trigger the presumption. The Louisiana statute merely provides that the court make a "finding of domestic violence" without specifying the standard of proof necessary. Other states, however, call for "credible evidence,"51 a "preponderance of the evidence,"52 or "clear and convincing evidence."53 Generally speaking, most statutes call for a lower standard of proof than clear and convincing evidence.

A few statutes are very specific regarding the types of evidence that courts may consider to make a finding of domestic violence. Specifically, some statutes direct courts to consider the initiation of a protection action, the granting of a protection order by order or consent, police response to a domestic violence call, a domestic violence arrest, or a conviction.54 Arizona's statute is very specific, permitting courts to consider evidence of domestic violence documented in findings from another court, police or medical reports, child protective services records, domestic violence shelter records, school records, or witness testimony.55 Massachusetts's statute, by contrast, explicitly limits the role of protection orders, specifying that the issuance of a protective order shall not alone suffice as evidence of a serious incident or pattern of abuse required to trigger the presumption pursuant to that state's statute.56 Several statutes require trial courts to make written findings to support the invocation of the presumption.57

Application of the Presumption to Custody, Parental Rights & Responsibilities, Visitation

Statutes differ as to what parenting roles and rights are impacted once the presumption is triggered.58 Most statutes specify that once the presumption has been triggered, the abusing parent may not have sole or joint residency or parental rights and responsibilities.59 Two states expressly limit the application of the statute to apply only to shared parental rights and responsibilities.60

Surprisingly few statues address the issue of visitation explicitly. It is unclear whether this is because the overall construction and definition of "custody" as used elsewhere in a particular state's family law statute incorporates visitation or if the statutes are silent on this particular issue. A few states have expressly noted that visitation rights may be permissible after the presumption has been triggered, as long as it is safe for both the child and abused parent.61 Indiana law calls for supervised parenting time once the presumption has been triggered.62 Texas

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51 *See, e.g.*, N.D. CENT. CODE § 14-09-06.2(1)(j) (2009).
52*See, e.g.*, D.C. CODE §16-914(a)(2) (2009); MASS. GEN. LAWS ANN. ch. 208 § 31A (West 2009); MISS. CODE § 93-5-24(9)(a)(i) (West 2009).
53 *See, e.g.*, NEV. REV. STAT. ANN. § 125.480(5) (West 2009).
54 *See, e.g.*, IOWA CODE § 598.41(1)(j) (West 2009).
55 ARIZ. REV. STAT. ANN. § 25-403.03(C) (2009).
56 MASS. GEN. LAWS ANN. ch. 208 § 31A (West 2009).
57 *See, e.g.*, MINN. STAT. ANN. § 518.17(Subd.2.)(d) (West 2009) (when the rebuttable presumption is used to give custody over the objection of a party, the court shall make detailed findings relevant to all the factors considered in the custody determination); NEV. REV. STAT. ANN. § 125.480(5) (West 2009) (findings must support the court's determination that one or more incidents of domestic violence occurred and that the custody arrangement ordered protects the child, parent, or other victim of domestic abuse).
58 These variations are exemplified by the differing statutory terms; whereas some states simply use the term "custody," others use "physical custody" and "legal custody." For purposes of this memo, the concepts are described in the terms familiar under Maine statute, "residency," "parental rights and responsibilities," and "visitation."
59 *See e.g.*, CAL. FAM. CODE § 3044(a) (West 2009) (no sole or joint physical or legal custody); DEL. CODE ANN. tit 13 § 705A(a) (2009) (no sole or joint custody, no primary residency); HAW. REV. STAT. § 571-46(9) (2009) (no residency or shared parental rights and responsibilities).
60 *See* COLO. REV. STAT. § 14-10-124(b)(V) (West 2009), WIS. STAT. ANN. § 767.41(2)(d) (West 2009).
61 *See e.g.*, MASS. GEN. LAWS ANN. ch. 208 § 31A (2009) (statute allows visitation if safety allows and suggests ways to ensure safety, such as use of a third party exchange); N.D. CENT. CODE § 14-09-06.2(1)(j) (2009) (visitation may be permissible if safe for the child).

statute, by contrast, prohibits visitation if the court makes a finding of a pattern or history domestic violence by a preponderance of evidence within two years unless the court is assured of the child's safety.63

Rebutting the Presumption

State statutes also differ as to what is required to rebut the presumption. Most statutes do not specify what is required to rebut the presumption, providing no uniform guidance for courts.64 The Louisiana law was viewed as an improvement over the Model Code in part because it specified what an abusing parent needed to demonstrate in order to rebut the presumption against custody. Specifically, Louisiana statute requires successful completion of a batterer's treatment program, abstention from alcohol or other drug abuse, and a demonstration that it is in the best interests of the child to be in that person's custody.65 Other states additionally include compliance with court orders, probation and parole conditions where applicable, and whether or not there has been further violence.66

Only a few states specify what standard of proof is required to show that the presumption has been rebutted.67 Approximately six states specify that a defendant seeking to rebut the presumption must demonstrate by a preponderance of the evidence some or all of the factors enumerated by the statute.68 Massachusetts has a somewhat looser standard, by requiring a demonstration by the preponderance of the evidence that the best interests of the child require it, without further specific factors described.69 Two states only permit rebuttal of the presumption by a demonstration of clear and convincing evidence of the best interests of the child.70

When both parents have engaged in violence

Given the high degree of conflict often inherent in these types of cases, as well as the frequency with which battered women engage in self-defense to protect themselves or their children, courts are often confronted with how to apply the rebuttable presumption in cases where both parents have engaged in violence. The large majority of statutes are silent on this issue.

Four statutes specifically call upon the court to make a determination of which parent was the primary aggressor or to grant custody to the parent less likely to continue committing domestic violence.71 Delaware's statute refers these cases to the state's Department of Services for Children, Youth and their Families for an investigation and presentation of findings to assist the court's determination of the best interests of the child.72

III. So-called "competing" provisions: Joint Custody Presumptions and "Friendly parent" provisions

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62 IND. CODE § 31-17-2-8.3 (West 2009).
63 TEX. FAM. CODE § 153.004(b) (Vernon 2009).
64 Lemon, *supra* note 2, at 618. *See e.g.*, ALA. CODE § 30-3-131 (2007); FLA. STAT. § 61.13(2)(b)(2) (amended 2009); NEV. REV. STAT. ANN. § 125.480(5) (West 2009).
65 LA. REV. STAT. ANN. § 9:361 (2009). Nearly identical language was introduced in Maine's L.D. 1143.
66 *See e.g.*, CAL. FAM. CODE § 3044(a) (West 2009); ARIZ. REV. STAT. § 25-403.03(D) (2009); and DEL. CODE ANN. tit 13 § 705A(a) (2009).
67 Lemon, *supra* note 2, at 618.
68 *See e.g.*, CAL. FAM. CODE § 3044(a) (West 2009); ARIZ. REV. STAT. § 25-403.03(D) (2009); LA. REV. STAT. ANN. § 9:361 (2009).
69 MASS. GEN. LAWS ANN. ch. 208 § 31A (2009).
70 N.D. CENT. CODE § 14-09-06.2(1)(j) (2009); WIS. STAT. ANN. § 767.41(2)(d) (West 2009).
71 *See, e.g.*, LA. REV. STAT. ANN. § 9:361 (2009) (if finding of dual history, then custody to parent less likely to continue domestic violence); MISS. CODE ANN. § 93-5-24(9)(b)(ii) (West 2007) (court shall determine which parent is likely to continue being violent); NEV. REV. STAT. ANN. § 125.480(5) (West 2009) (court shall determine who was primary aggressor); WIS. STAT. ANN. § 767.41(2)(d) (West 2009) (court shall determine who was primary aggressor; if neither, then presumption is invalidated)
72 DEL. CODE. ANN. tit. 13 § 705A(d) (2009).

In states with and without rebuttable presumptions, battered women are often disadvantaged by other state laws that encourage or mandate shared parenting.73 Specifically, many commentators have drawn attention to statutory presumptions or preferences for joint custody and "friendly parent" provisions, which direct courts to favor parents who can better cooperate with the other parent in custody decisions, as being particularly inappropriate for high-conflict families affected by domestic violence. These provisions can have the effect of undercutting the efficacy of rebuttable presumptions statutes. One study, which is discussed in detail in the last section of this memo, evaluated this phenomenon across six different states.74

Joint Custody presumptions

Joint custody presumptions, which developed in response to criticism that courts favored mothers in custody matters, may provide helpful guidance for non-violent families, because they encourage and direct courts to provide for the involvement of both parents for the betterment of the child.75 In families with domestic violence, however, the parents are often unwilling and unable to negotiate differences and separate their spousal roles from their parenting roles.76 Battered women may agree to joint custody to their detriment because they are coerced or do not want to look uncooperative before a judge.77 Joint residency or shared parental rights and responsibilities, customarily intended to provide for the best interests of the child, can have the unintended consequence of exposing an abused parent to ongoing violence and continued domination and control.78 Families with domestic violence may realistically be unable to parent cooperatively the way that joint custody presumptions are intended.79

In total, twenty states have joint custody presumption statutes. Among these states, twelve are states that also have rebuttable presumption statutes and eight are states without the rebuttable presumption.80

"Friendly Parent" Provisions

Many states have added a "friendly parent" factor to the best interests statute in order to encourage effective co-parenting and prevent one parent from interfering with the other's contact and visitation with the child.81 Maine's statute, for example, in its best interest of the child factors, directs courts to consider "the capacity of each parent to allow and encourage frequent and contributing contact between the child and the other parent, including physical access."82 In total, thirty states have a "friendly parent" statute. Half of these states also have a rebuttable presumption statute.83

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73 Allison C. Morrill, et.al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1078 (2005).
74 *Id*.
75 *Id.* at 1078.
76 Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Women Abuse*, 39 SOCIAL WORK 51, 56 (1994).
77 *Id*.
78 Bolotin, *supra* note 6, at 268-69.
79 *Id.*
80 Am. Bar Ass'n Comm'n on Domestic Violence, *supra* note 7.
81 Linda D. Elrod and Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 394 (2008).
82 ME. REV. STAT. ANN. tit. 19-A § 1653(3)(H) (2009).
83 Am. Bar Ass'n Comm'n on Domestic Violence, *supra* note 7.

Some commentators have noted, however, that this type of provision also may be inappropriate in domestic violence cases and may reduce the efficacy of the rebuttable presumption statutes.84 This may occur and be particularly problematic in cases where there is violence in the family, but not enough to satisfy the statutory elements to trigger the presumption against custody.85

Iowa and Minnesota have crafted their joint custody and "friendly parent" provisions to better insulate victims of domestic violence from unintended consequences by making explicit in the statutory language that these provisions shall not apply to domestic violence cases.86

Recent legislative activity

Maine is not the only state to have considered these issues in the past two years. As referenced above, Florida's recent legislative session saw a revision to its rebuttable presumption statute to trigger the presumption for a misdemeanor conviction, rather than the felony conviction previously required.87 The new law additionally creates a new role of "parenting coordinator" to provide families with an alternative dispute resolution process to help families create a parenting plan.88 Domestic violence cases are exempt from this requirement unless both parties consent to participating.89 Oklahoma enacted an expanded version of the Model Code in May 2009.90

IV. Case law evolution

Some states that have had rebuttable presumption statutes in place for many years have seen an evolution of the law in this area through reported cases in which appellate courts have interpreted and refined these statutes and reviewed their applicability to specific circumstances.91 Whereas some states have had several dozen reported cases, other states have had very few. In an effort to provide some introduction to the types of issues that have come up on appeal, this section of the memo will illustrate a small sliver of the case law evolution in two states, North Dakota and Louisiana, that have extensive appellate cases.92 North Dakota and Louisiana have statutes that are nearly identical to Maine's proposed bill, L.D. 1143.

Overall, appellate courts have been called upon largely to clarify the statute, including what is needed to trigger the presumption, what a defendant must demonstrate to rebut the presumption, what standard of proof should be used, how to address incidents of violence by both parents, and other procedural matters.93 At times, the appellate decisions or clarifications have resulted in legislative amendments.

North Dakota94

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84 Bolotin, *supra* note 6, at 278.
85 Lemon, *supra* note 2, at 649-50.
86 IOWA CODE ANN. §§ 598.41(1)(c), 598.41(3)(e); 598.41(1)(a), 598.41(2)(b) (West 2009); MINN. STAT. §§518.17(13), 518.17(Subd. 2) (West 2009) ("This factor does not apply if DV exists.").
87 2009 Fla. Sess. Law. Serv. Ch. 2009-180 (C.S.C.C.S.S.B. 904) (West).
88 *Id.*
89 *Id.*
90 2009 Okla. Sess. Law Serv. Ch. 307 (H.B. 1739) (West) (variation from the Model Code provisions includes the addition of stalking as triggering the presumption, and specific language permitting visitation under very limited circumstances).
91 *See generally* Lemon, *supra* note 2. In 2001, Lemon published an exhaustive review of all reported appellate decisions at that time in an effort to evaluate their effectiveness overall.
92 Interestingly, in some jurisdictions with relatively long histories of rebuttable presumption statutes there are relatively few reported appellate decisions, such as in Hawaii, Idaho, and the District of Columbia. *Id.* at 635.
93 *See generally* Jack M. Dalgleish, Jr., 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 (2009).
94 North Dakota does not have an intermediate appellate court, therefore, all trial court decisions are appealed directly to the North Dakota Supreme Court.

Since the rebuttable presumption statute was enacted in 1991, the Supreme Court of North Dakota has considered approximately three dozen appeals. Not surprisingly, the court was first called upon to provide guidance on questions of what is needed to trigger or rebut the presumption. In later cases, the court continued to refine those questions, as well as address issues of dual violence and other procedural matters.95

In the first case contemplating the statute, the North Dakota Supreme Court upheld the lower court's decision that the wife had demonstrated enough evidence to trigger the presumption and that the husband had successfully rebutted it.96 Over a strong dissent, which was subsequently quoted with approval in subsequent cases, the court agreed with the lower court that despite the statutory language, domestic violence evidence had no priority over other best interest factors.97 The legislature amended the statute the next year to clarify that that the presumption could only be rebutted upon clear and convincing evidence that the best interests of the child require the abusing parent to have custody.98

Another early North Dakota case was *Krank v. Krank*, in which the court considered what level of violence was necessary to trigger the presumption, holding that a single act could do so.99 Further refinement came later in *Flemming v. Ryan*, in which the court found that the presumption had not been triggered when a father admitted to breaking a flowerpot and tearing a phone out of the wall. These incidents did not involve injury to the mother and were too isolated to trigger the presumption. Over time, the legislature responded by amending the legislation in 1997, enacting the current language that the presumption could be triggered by one incident resulting in serous injury or involved a dangerous weapon or a pattern of violence.100

These two cases typify the kind of case-by-case refinement of what is needed to trigger the presumption as well as what is needed to rebut it that is common to all states. After the 1997 amendment, the next several years of case law addressed fewer "trigger questions" and instead turned to other types of questions.101 For example, the court upheld a trial court's decision in a case involving dual violence, validating the trial court's finding that one parent's violence was significantly greater than the other parent's.102

Overall, the North Dakota Supreme Court seems mostly deferential to the findings of trial court. Cases where the court has reversed trial court decisions seem to focus on careful attention to the mechanics of triggering and rebutting the presumption. In some cases, the court was called to review decisions where the trial court judge refused to apply new amendments to the law.103

Other cases continued the process of reviewing the functional mechanics of triggering and rebutting. For example, in *Zuger v. Zuger*, the court reversed a joint custody decision where the presumption had been triggered but not rebutted. The abusing parent had persuaded the trial court that the victim parent was over-protective, the violence would stop, and that the violence was not directed at the children. The Supreme Court reversed, holding that these factors were not sufficient to rebut under the statute.104

Statutory interpretation is still ongoing, however. As recently as 2006, fifteen years after the statute was first enacted, the Court was called upon to clarify that "credible evidence" is the standard of proof for triggering the presumption.105

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95 *See generally* Lemon, *supra* note 2, at 623-30.
96 *Id.* at 623-24, 630-31 (citing Schestler v. Schestler, 486 N.W.2d 509 (N.D. 1992)).
97 *Id.*
98 *Id.* at 624.
99 *Id.* at 625 (citing Krank v. Krank, 529 N.W.2d 844 (N.D. 1995)).
100 *Id* .at 625 (citing Flemming v. Ryan, 533 N.W.2d 920 (N.D. 1995)).
101 *Id.* at 627-628.
102 *Id.* at 627 (citing Kluck v. Kluck, 561 N.W.2d 263 (N.D. 1997)). Note that the North Dakota statute is silent on the issue of dual violence.
103 *Id.* at 627 (citing Heusers v. Heusers, 574 N.W.2d 880 (N.D. 1997)).
104 *Id.* at 627 (citing Zuger v. Zuger, 563 N.W.2d 804 (N.D. 1997)).
105 DeMers v. DeMers, 717 N.W.2d, 545 (N.D. 2006).

Louisiana[106]

Like North Dakota, the Louisiana appellate courts have been called upon to interpret the statute, provide guidance where the statute is silent, and review trial court application of the statute. Rather than repeating much of the same kind of description as cases considered in North Dakota, the cases below demonstrate some other types of issues that have come up on appeal. Although Louisiana has had many cases on appeal, it seems that there have been relatively fewer cases in recent years compared to North Dakota. Put another way, whereas North Dakota continues to consider several appeals each year, Louisiana has had relatively few since 2001, when Nancy Lemon published her exhaustive summary.

As in North Dakota, Louisiana's first appellate case called for an interpretation of what is required to trigger the statute. In *Simmons v. Simmons* the court upheld a trial court's determination that, upon a weighing of the evidence and a review of the entire circumstances of the case, a single past act of violence is not a "history of perpetrating family violence" sufficient to trigger the presumption.[107] That same year, however, another circuit held that violence does not have to be frequent or continuous in order to trigger the presumption.[108] Within three years, the Louisiana legislature amended the statute to clarify and enact the current language that the presumption is triggered by a single incident resulting in serious bodily injury or a history or pattern of violence.[109] It is interesting to note that both Louisiana and North Dakota ended up with the same trigger, but after the North Dakota courts said one incident was enough and Louisiana courts said one incident was not enough to trigger the presumption.

The *Simmons* decision was also noteworthy because that court added two additions to the statutory factors required to rebut the presumption: whether the violence occurred in the presence of the children and whether the violence was provoked.[110] Though it appears that the legislature remained silent regarding these two factors, they were subsequently rejected in *Hicks v. Hicks*.[111]

A few appeals have corrected inexplicable trial court failure to apply the presumption to relevant cases. For example, in *Hicks*, the trial court used a best interests analysis, rather than the rebuttable presumption, despite uncontroverted evidence of severe domestic violence. The appellate court reversed accordingly.[112] Similarly, an appellate court found reversible legal error when a trial court refused to apply the presumption to a case where the husband had admitted to abusing the wife multiple times.[113]

Notable cases and trends from other jurisdictions

Like Louisiana, courts in several states have held that a single act of domestic violence should not be enough to trigger the presumption and courts must make a finding of ongoing or patterned violence.[114]

Even when statutes are silent on the issue, appellate courts in several states have held that trial courts are required to make findings of fact when evidence of domestic violence is present.[115] Though some statutes articulate this requirement, as well, may are silent on the issue.

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106 The Louisiana judicial system includes the Louisiana Supreme Court and intermediate appellate Courts of Appeals.
107 Lemon, *supra* note 2, at 630 (citing Simmons v. Simmons, 649 So. 2d 799 (La. Ct. App. 1995)).
108 *Id.* at 631 (citing Michelli v. Michelli, 655 So.2d 1342 (La. Ct. App. 1995)).
109 *Id.* at 631.
110 *Id.* at 632 (citing *Simmons*, 649 So.2d at 802).
111 *Id.* at 633 (citing Hicks v. Hicks, 733 So.2d 1261 (La. Ct. App. 1999).
112 *Id.*
113 *Id.* at 634 (citing Lewis v. Lewis, 771 So. 2d 856 (La. Ct. App. 2000).
114 Dalgleish, *supra* note 73, at § 4 (citing Hamilton v. Hamilton, 886 S.W.2d. 711 (Mo. App. 1994); Brown v. Brown, 867 P.2d 477 (Okla. App. 1993)).
115 Dalgleish, *supra* note 73, at § 5 (citing Gant v. Gant, 892 S.W.2d 342 (Mo. App. 1995)).

Assessment and Scholarly Commentary

Overall, very few researchers have undertaken to examine whether or not rebuttable presumption statutes have had their desired effect of better protecting children and abused parents from ongoing threat of harm from domestic violence. This last section of this memo endeavors to summarize the limited amount of research available, discuss scholarly commentary, and illustrate other recent evolutions in domestic violence law since the advent of rebuttable presumption statutes that may help to illuminate what new enactments or revisions to existing statutes should consider including.

*Morrill study*116

In 2005, a team of researchers, lead by Allison Morrill, trained as both a lawyer and psychologist, published a study of six states to evaluate the effectiveness of statutes mandating a presumption against custody to a perpetrator of violence.117 At the time the study began, 15 states had enacted statutes including the presumption.118 The study's goal was to assess the direct and indirect impacts of rebuttable presumption statutes on child custody and visitation orders.119 In undertaking the study, Morrill and her colleagues hypothesized that rebuttable presumption statutes would lead to fewer awards of residency and/or parental rights and responsibilities to abusing parents, more restrictions on visitation in order to protect mothers and children, and that states with "competing provisions" would find a moderating effect on the success of the rebuttable presumption. The study's methodology looked at court records in six states, Delaware, Florida, Kentucky, Massachusetts, Minnesota, Rhode Island, and resulted in a sample of 393 cases decided by 60 different judges.120

The study concluded that the presumption had its intended effect of granting more orders for sole parental rights and responsibilities to the mother in those states without competing statutes.121 In contrast, states without the presumption were twice as likely to grant joint parental rights and responsibilities.122 In the one state with a rebuttable presumption statute and competing provisions, orders granted joint parental rights and responsibilities four times as often as sole custody.123 Residency, in contrast, seemed to be unaffected by the existence or not of a presumption statute; however, competing provisions had a strong effect in favor of fathers. Specifically, competing provisions resulted in sole residency to a mother in only four percent of cases and shared or primary residency to the mother in 82 percent of cases.124 Basic visitation rights seemed unaffected by either the enactment of a presumption statute or by competing provisions; however, states with the presumption were more likely to structure visitation orders to better protect the mother, including a requirement for supervision, a requirement to attend counseling or a batterer intervention program, or other safety conditions.125

In discussing the results of the study, Morrill noted that the methodological choice of looking to prior protection orders as a proxy for "previous domestic violence" was an imperfect method because it overlooked cases that did not include an order as well as considered an order as

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116 This study was funded by the National Institute of Justice, which is the research office of the U.S. Department of Justice. The DOJ funded the study but does not necessarily support the position of the study. Due to the study's sample containing relatively few number of cases of domestic violence against men, the study only looked at cases when mothers were the victims of alleged abuse.
117 The study also examined the effect of judicial education about domestic violence. Because the results are largely inconclusive, were not the main focus of the study, and are outside the scope of this memo, these results have not been included this summary.
118 Morrill, *supra* note 54, at 1080.
119 *Id.* at 1081.
120 *Id.* at 1083-91.
121 *Id.* at 1091.
122 *Id.* at 1091-92.
123 *Id.* at 1092.
124 *Id.*
125 *Id.* at 1092-94.

conclusive on the issue of prior domestic violence in cases where perhaps it really was not.126 In summarizing her findings, Morrill noted that although the presumption appears effective with regard to parental rights and responsibilities, even with the presumption 40 percent of fathers were granted joint parental roles and responsibilities even though they had been found to have perpetrated domestic violence.127 It is unclear from this study whether these cases involved domestic violence insufficient as a matter of law to "trigger" the presumption, a successful rebuttal of the presumption, or an unwillingness or error of a court to apply it to the particular case at hand.

Morrill characterized the "competing provisions" as "severely undermin[ing]" the effectiveness of the rebuttable presumption statute; however, she noted that only one of the six states had both a presumption and competing provisions.128 Morrill characterized a "disturbing" pattern regarding visitation orders in states without competing provisions, where the data seems to indicate that visitation structure and conditions seemed to be ordered as alternatives to sole physical custody to the mother.129 Morrill posited that these arrangements are designed to make the arrangement palatable for all parties or that visitation structure is not necessary when the mother is granted sole residency.130 In contrast, states with the presumption seemed to impose conditions on visitation regardless of the residency order.131

Differentiating Among Types of Domestic Violence

Nancy Ver Steegh's summary of recent domestic violence research as it applies to rebuttable presumption statutes may be helpful backdrop in considering new statutes or amendments to existing statutes. She assessed the interplay between child custody statutes and domestic violence in the context of more recent psychosocial research differentiating among kinds of domestic violence.132 She began by synthesizing recent research that tends to indicate that there are multiple types of domestic violence that require differential treatment by courts. She focused her attention on Intimate Terrorism (IT), which involves an "escalating pattern of coercive control," and can often be symptomized by threats, economic control, manipulation, threats, isolation, and emotional and sexual abuse. 133 IT is typified by more frequent incidents, more severe violence, and more serious injury.134 Situational Couple Violence (SCV), in contrast, involves isolated incidents of conflict between partners.135 SCV tends not to involve a larger pattern of control and power and the violence is less severe.136

Ver Steegh argued that courts must understand these different kinds of domestic violence in order to be able to respond effectively. In particular, she focused on how child custody laws, including rebuttable presumption statutes and competing provisions have different effects – and at times, unintended consequences – depending upon the type of domestic violence in each family. When courts view all domestic violence cases as the same, they may not be able to sufficiently address the control dynamic that lies at the heart of IT cases and may "overreact" to family dynamics in SCV cases.

Ver Steegh concluded that states should adopt statutory definitions of domestic violence that acknowledge and address patterns of domination, coercion, and control in addition to physical violence.137 Maine is specifically noted for doing this somewhat effectively;138 however, Ver Steegh would improve Maine statute by expanding the definition to include patterns of psychological abuse, use of privilege and

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126 *Id.* at 1100.
127 *Id.* at 1101.
128 *Id.*
129 *Id.* at 1102.
130 *Id.*
131 *Id.*
132 Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379 (2005).
133 *Id.* at 1384, 1387.
134 *Id.* at 1387-88.
135 *Id.* at 1384.
136 *Id.* at 1394.
137 *Id.* at 1415.
138 *Id.* at 1416.

punishment, isolation, and manipulation of children.139 More specific and accurate descriptions of typical behavior in IT cases would help to ensure that court processes can address dynamics in these families.

Ver Steegh looked closely at the dynamic of competing provisions in domestic violence cases. She recommended that "friendly parent" provisions not be used in any cases of domestic violence, whether they are IT or SCV.140 She argued that this provision is especially inappropriate in IT cases because the batterer often appears to the court as the more cooperative parent, the victim may be coerced into agreeing to visitation, the victim would be forced to have additional exposure to the batterer, and the batterer will use the provision as a further opportunity for control and manipulation.141 She recommended that states with these provisions should explicitly exempt domestic violence cases from their application, as several states have done.142

Joint custody provisions are also an area of concern, but may be less problematic in SCV cases, where the parties may be able to parent jointly without further incidents of violence.143 Joint custody presumptions are especially dangerous in IT cases because the continued contact between parents is an opportunity for further "manipulation, control, and additional violence by the batterer."144 States should exempt domestic violence cases from joint custody presumptions; Ver Steegh cites Minnesota as having an effective rebuttable presumption on this point.145

Ver Steegh further looked at presumption statutes against custody awards to batterers. Looking broadly, she focused on three problematic areas: triggering the presumption, dual violence, and rebutting the presumption. With regard to triggering the presumption, she posited that the lack of a distinction between IT and SCV and the absence of statutory acknowledge of coercion and control has the effect of capturing the wrong kind of cases the statute was intended to include.146 Courts might errantly exclude cases where violence is not present but coercion and control are dominant and may include SCV cases where the violence is relatively mild, isolated, and no longer an ongoing concern.147 She specifically critiqued Louisiana's statute, upon which Maine's proposed bill was crafted, noting that even if most IT cases end up falling within the purview of the presumption, courts are not clearly and articulately directed toward identifying them, leaving a certain degree of error.148 Ver Steegh would similarly treat dual violence cases differently depending upon whether or not the family is typified by IT or SCV.149

With regard to rebutting the presumption, Ver Steegh argued that the factors in the Louisiana statute (batterer's treatment program, abstention from alcohol and drugs, and the best interests of the child) are a good start.150 She would expand this list, however, to include some measure intended to evaluate if the pattern of domination and control has ceased.151 She noted that a perpetrator of IT could meet all the requirements of the statute with little real impact on the problematic behavior.152

Ver Steegh made a multitude of recommendations, both specific and broad, as to how courts can better identify and address child custody and domestic violence in light of this new differentiation among types of domestic violence. In summary, however, these

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139 *Id.* at 1418.
140 *Id.* at 1421.
141 *Id.*
142 *Id.* at 1421. *See* statues cited *supra* note 66.
143 *Id.* at 1421-22.
144 *Id.* at 1422.
145 *Id.*
146 *Id.* at 1423-24.
147 *Id.* at 1424.
148 *Id.*
149 *Id.* at 1424-25.
150 *Id.* at 1425.
151 *Id.*
152 *Id.* at 1425-26.

recommendations include improved and broadened statutory definitions, differentiated case management to identify types of violence and adoption of rebuttable presumptions against custody to Intimate Terrorists only.153

153 *Id.* at 1427-30.

Chart 1: Summary of Rebuttable Presumption Statutes by State

Reflects if state has no competing provisions, one, or both

Rebuttable Presumption?	Competing Provisions?			
	Neither	"Friendly Parent" provision?	Joint Custody presumption?	Both
Yes (25)	IN, MA, SD, ND IA*, MN*	AK, AZ, CO, DE, HI, MO, TX	DC, ID, MS, OK	AL, AR, CA, FL, LA, NV, OR, WI,
No (26)	KY, MD, MT, NE, NY, NC, RI, SC, VA, WA,	GA, IL, KS, NJ, PA, UT, VT, WY	WV	CT, ME, MI, NH, NM, OH, TN

* Iowa and Minnesota statutes have both "competing provisions," but have express exemptions that state that they shall not apply to cases with domestic violence.

Chart 2: State-by-state list indicating rebuttable presumption and competing provisions

		FRIENDLY PARENT PROVISION	JOINT CUSTODY PRESUMPTION
States with Rebuttable Presumption Statutes	Alabama	✓	✓
	Alaska	✓	
	Arizona	✓	
	Arkansas	✓	✓
	California	✓	✓
	Colorado	✓	
	DC		✓
	Delaware	✓	
	Florida	✓	✓
	Hawaii	✓	
	Iowa		
	Idaho		✓
	Indiana		
	Louisiana	✓	✓
	Mass.		
	Minnesota		
	Missouri	✓	
	Mississippi		✓
	North Dakota		
	Nevada	✓	✓
	Oklahoma		✓
	Oregon	✓	✓
	South Dakota		
	Texas	✓	
	Wisconsin	✓	✓
States without rebuttable presumption statutes	Conn.	✓	✓
	Georgia	✓	
	Illinois	✓	
	Kansas	✓	
	Kentucky		
	Maryland		
	Maine	✓	✓
	Michigan	✓	✓
	Montana		
	North Carolina		
	Nebraska		
	New Hampshire	✓	✓
	New Jersey	✓	

	New Mexico	✓	✓
	New York		
	Ohio	✓	✓
	Penn.	✓	
	Rhode Island		
	South Carolina		
	Tennessee	✓	✓
	Utah	✓	
	Virginia		
	Vermont	✓	
	Wash.		
	West Virginia		✓
	Wyoming	✓	

APPENDIX E

Title 19-A § 1653. Parental rights and responsibilities

1. LEGISLATIVE FINDINGS AND PURPOSE. The Legislature makes the following findings concerning relationships among family members in determining what is in the best interest of children.

A. The Legislature finds and declares as public policy that encouraging mediated resolutions of disputes between parents is in the best interest of minor children.

B. The Legislature finds that domestic abuse is a serious crime against the individual and society, producing an unhealthy and dangerous family environment, resulting in a pattern of escalating abuse, including violence, that frequently culminates in intrafamily homicide and creating an atmosphere that is not conducive to healthy childhood development.

C. The Legislature finds and declares that it is the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or

dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

2. PARENTAL RIGHTS AND RESPONSIBILITIES; ORDER. This subsection governs parental rights and responsibilities and court orders for parental rights and responsibilities.

. . . .

D. The order of the court awarding parental rights and responsibilities must include the following:

1) Allocated parental rights and responsibilities, shared parental rights and responsibilities or sole parental rights and responsibilities, according to the best interest of the child as provided in subsection 3. An award of shared parental rights and responsibilities may include either an allocation of the child's primary residential care to one parent and rights of parent-child contact to the other parent, or a sharing of the child's primary residential care by both parents. If either or both parents request an award of shared primary residential care and the court does not award shared primary residential care of the child, the court shall state in its decision the reasons why shared primary residential care is not in the best interest of the child;

2) Conditions of parent-child contact in cases involving domestic abuse as provided in subsection 6;

3) A provision for child support as provided in subsection 8 or a statement of the reasons for not ordering child support;

4) A statement that each parent must have access to records and information pertaining to a minor child, including, but not limited to, medical, dental and school records and other information on school activities, whether or not the child resides with the parent, unless that access is found not to be in the best interest of the child or that access is found to be sought for the purpose of causing detriment to the other parent. If that access is not ordered, the court shall state in the order its reasons for denying that access;

. . .

E. The order of the court may not include a requirement that the State pay for the defendant to attend a batterers' intervention program unless the program is certified under section 4014.

3. BEST INTEREST OF CHILD. The court, in making an award of parental rights and responsibilities with respect to a child, shall apply the standard of the best interest of the child. In making decisions regarding the child's residence and parent-child contact, the court shall consider as primary the safety and well-being of the child. In applying this standard, the court shall consider the following factors:

A. The age of the child;

B. The relationship of the child with the child's parents and any other persons who may significantly affect the child's welfare;

C. The preference of the child, if old enough to express a meaningful preference;

D. The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity;

E. The stability of any proposed living arrangements for the child;

F. The motivation of the parties involved and their capacities to give the child love, affection and guidance;

G. The child's adjustment to the child's present home, school and community;

H. The capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, including physical access;

I. The capacity of each parent to cooperate or to learn to cooperate in child care;

J. Methods for assisting parental cooperation and resolving disputes and each parent's willingness to use those methods;

K. The effect on the child if one parent has sole authority over the child's upbringing;

L. The existence of domestic abuse between the parents, in the past or currently, and how that abuse affects:

1) The child emotionally; and

2) The safety of the child;

M. The existence of any history of child abuse by a parent;

N. All other factors having a reasonable bearing on the physical and psychological well-being of the child;

O. A parent's prior willful misuse of the protection from abuse process in chapter 101 in order to gain tactical advantage in a proceeding involving the determination of parental rights and responsibilities of a minor child. Such willful misuse may only be considered if established by clear and convincing evidence, and if it is further found by clear and convincing evidence that in the particular circumstances of the parents and child, that willful misuse tends to show that the acting parent will in the future have a lessened ability and willingness to cooperate and work with the other parent in their shared responsibilities for the child. The court shall articulate findings of fact whenever relying upon this factor as part of its determination of a child's best interest. The voluntary dismissal of a protection from abuse petition may not, taken alone, be treated as evidence of the willful misuse of the protection from abuse process;

P. If the child is under one year of age, whether the child is being breast-fed;

Q. The existence of a parent's conviction for a sex offense or a sexually violent offense as those terms are defined in Title 34-A, section 11203; and

R. If there is a person residing with a parent, whether that person:

1) Has been convicted of a crime under Title 17-A, chapter 11 or 12 or a comparable crime in another jurisdiction;

2) Has been adjudicated of a juvenile offense that, if the person had been an adult at the time of the offense, would have been a violation of Title 17-A, chapter 11 or 12; or

3) Has been adjudicated in a proceeding, in which the person was a party, under Title 22, chapter 1071 as having committed a sexual offense.

4. EQUAL CONSIDERATION OF PARENTS. The court may not apply a preference for one parent over the other in determining parental rights and responsibilities because of the parent's gender or the child's age or gender.

5. DEPARTURE FROM FAMILY RESIDENCE. The court may not consider departure from the family residence as a factor in determining parental rights and responsibilities with respect to a minor child when the departing parent has been physically harmed or seriously threatened with physical harm by the other parent and that harm or threat of harm was causally related to the departure, or when one parent has left the family residence by mutual agreement or at the request or insistence of the other parent.

5-A. EFFECT OF PROTECTIVE ORDER. Although the court shall consider the fact that a protective order was issued under chapter 101, the court shall determine the proper award of parental rights and responsibilities and award of rights of contact de novo and may not use as precedent the award of parental rights and responsibilities and rights of contact included in the protective order.

6. CONDITIONS OF PARENT-CHILD CONTACT IN CASES INVOLVING DOMESTIC ABUSE. The court shall establish conditions of parent-child contact in cases involving domestic abuse as follows.

A. A court may award primary residence of a minor child or parent-child contact with a minor child to a parent who has committed domestic abuse only if the court finds that contact between the parent and child is in the best interest of the child and that adequate provision for the safety of the child and the parent who is a victim of domestic abuse can be made.

B. In an order of parental rights and responsibilities, a court may:

1) Order an exchange of a child to occur in a protected setting;

2) Order contact to be supervised by another person or agency;

3) Order the parent who has committed domestic abuse to attend and complete to the satisfaction of the court a domestic abuse intervention program or other designated counseling as a condition of the contact;

4) Order either parent to abstain from possession or consumption of alcohol or controlled substances, or both, during the visitation and for 24 hours preceding the contact;

5) Order the parent who has committed domestic abuse to pay a fee to defray the costs of supervised contact;

6) Prohibit overnight parent-child contact; and

7) Impose any other condition that is determined necessary to provide for the safety of the child, the victim of domestic abuse or any other family or household member.

C. The court may require security from the parent who has committed domestic abuse for the return and safety of the child.

D. The court may order the address of the child and the victim to be kept confidential.

E. The court may not order a victim of domestic abuse to attend counseling with the parent who has committed domestic abuse.

F. If a court allows a family or household member to supervise parent-child contact, the court shall establish conditions to be followed during that contact. Conditions include but are not limited to:

1) Minimizing circumstances when the family of the parent who has committed domestic abuse would be supervising visits;

2) Ensuring that contact does not damage the relationship with the parent with whom the child has primary physical residence;

3) Ensuring the safety and well-being of the child; and

4) Requiring that supervision is provided by a person who is physically and mentally capable of supervising a visit and who does not have a criminal history or history of abuse or neglect.

G. Fees set forth in this subsection incurred by the parent who has committed domestic abuse may not be considered as a mitigating factor reducing that parent's child support obligation.

6-A. CUSTODY AND CONTACT LIMITED; CONVICTIONS FOR SEXUAL OFFENSES. The award of primary residence and parent-child contact with a person who has been convicted of a child-related sexual offense is governed by this subsection.

A. For the purposes of this section, "child-related sexual offense" means the following sexual offenses if, at the time of the commission of the offense, the victim was under 18 years of age:

1) Sexual exploitation of a minor, under Title 17-A, section 282;

2) Gross sexual assault, under Title 17-A, section 253;

3) Sexual abuse of a minor, under Title 17-A, section 254;

4) Unlawful sexual contact, under Title 17-A, section 255-A or former section 255;

5) Visual sexual aggression against a child, under Title 17-A, section 256;

6) Sexual misconduct with a child under 14 years of age, under Title 17-A, section 258;

6-A) Solicitation of a child by computer to commit a prohibited act, under Title 17-A, section 259; or

7) An offense in another jurisdiction that involves conduct that is substantially similar to that contained in subparagraph (1), (2), (3), (4), (5), (6) or (6-A). For purposes of this subparagraph, "another jurisdiction" means the Federal Government, the United States military, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam, American Samoa and each of the several states except Maine. "Another jurisdiction" also means the Passamaquoddy Tribe when that tribe has acted pursuant to Title 30, section 6209-A, subsection 1, paragraph A or B and the Penobscot Nation when that tribe has acted pursuant to Title 30, section 6209-B, subsection 1, paragraph A or B.

B. A court may award primary residence of a minor child or parent-child contact with a minor child to a parent who has been convicted of a child-related sexual offense only if the court finds that contact between the parent and child is in the best interest of the child and that adequate provision for the safety of the child can be made.

C. In an order of parental rights and responsibilities, a court may require that parent-child contact between a minor child and a person convicted of a child-related sexual offense may occur only if there is another person or agency present to supervise the contact. If the court allows a family or household member to supervise parent-child contact, the court shall establish conditions to be followed during that contact. Conditions include, but are not limited to, those that:

1) Minimize circumstances when the family of the parent who is a sex offender or sexually violent predator would be supervising visits;

2) Ensure that contact does not damage the relationship with the parent with whom the child has primary physical residence;

3) Ensure the safety and well-being of the child; and

4) Require that supervision be provided by a person who is physically and mentally capable of supervising a visit and who does not have a criminal history or history of abuse or neglect.

6-B. CONVICTION OR ADJUDICATION FOR CERTAIN SEX OFFENSES; PRESUMPTION. There is a rebuttable presumption that the petitioner would create a situation of jeopardy for the child if any contact were to be permitted and that any contact is not in the best interests of the child if the court finds that the person seeking primary residence or contact with the child:

A. Has been convicted of an offense listed in subsection 6-A, paragraph A in which the victim was a minor at the time of the offense and the person was at least 5 years older than the minor at the time of the offense except that, if the offense was gross sexual assault under Title 17-A, section 253, subsection 1, paragraph B or C, or an offense in another jurisdiction that involves conduct that is substantially similar to that contained in Title 17-A, section 253, subsection 1, paragraph B or C, and the minor victim submitted as a result of compulsion, the presumption applies regardless of the ages of the person and the minor victim at the time of the offense; or

B. Has been adjudicated in an action under Title 22, chapter 1071 of sexually abusing a person who was a minor at the time of the abuse.

The person seeking primary residence or contact with the child may present evidence to rebut the presumption.

. . . .

APPENDIX F

Protection from Abuse Statute

19-A § 4001. Purposes

The court shall liberally construe and apply this chapter to promote the following underlying purposes:

1. RECOGNITION. To recognize domestic abuse as a serious crime against the individual and society, producing an unhealthy and dangerous family environment, resulting in a pattern of escalating abuse, including violence, that frequently culminates in intrafamily homicide and creating an atmosphere that is not conducive to healthy childhood development;

2. PROTECTION. To allow family and household members who are victims of domestic abuse to obtain expeditious and effective protection against further abuse so that the lives of the nonabusing family or household members are as secure and uninterrupted as possible;

3. ENFORCEMENT. To provide protection by promptly entering and diligently enforcing court orders that prohibit abuse and, when necessary, by reducing the abuser's access to the victim and addressing related issues of parental rights and responsibilities and economic support so that victims are not trapped in abusive situations by fear of retaliation, loss of a child or financial dependence;

4. PREVENTION. To expand the power of the justice system to respond effectively to situations of domestic abuse, to clarify the responsibilities and support the efforts of law enforcement officers, prosecutors and judicial officers to provide immediate, effective assistance and protection for victims of abuse and to recognize the crucial role of law enforcement officers in preventing further incidents of abuse and in assisting the victims of abuse;

5. DATA COLLECTION. To provide for the collection of data concerning domestic abuse in an effort to develop a comprehensive analysis of the incidence and causes of that abuse; and

6. MUTUAL ORDER. To declare that a mutual order of protection or restraint undermines the purposes of this chapter.

19-A § 4002

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. ABUSE. "Abuse" means the occurrence of the following acts between family or household members or dating partners or by a family or household member or dating partner upon a minor child of a family or household member or dating partner:

A. Attempting to cause or causing bodily injury or offensive physical contact, including sexual assaults under Title 17-A, chapter 11, except that contact as described in Title 17-A, section 106, subsection 1 is excluded from this definition;

B. Attempting to place or placing another in fear of bodily injury through any course of conduct, including, but not limited to, threatening, harassing or tormenting behavior;

C. Compelling a person by force, threat of force or intimidation to engage in conduct from which the person has a right or privilege to abstain or to abstain from conduct in which the person has a right to engage;

D. Knowingly restricting substantially the movements of another person without that person's consent or other lawful authority by:

1) Removing that person from that person's residence, place of business or school;

2) Moving that person a substantial distance from the vicinity where that person was found; or

3) Confining that person for a substantial period either in the place where the restriction commences or in a place to which that person has been moved;

E. Communicating to a person a threat to commit, or to cause to be committed, a crime of violence dangerous to human life against the person to whom the communication is made or another, and the natural and probable consequence of the threat, whether or not that consequence in fact occurs, is to place the person to whom the threat is communicated, or the person against whom the threat is made, in reasonable fear that the crime will be committed; or

F. Repeatedly and without reasonable cause:

1) Following the plaintiff; or

2) Being at or in the vicinity of the plaintiff's home, school, business or place of employment.

§ 4007. Relief

1. PROTECTION ORDER; CONSENT AGREEMENT. The court, after a hearing and upon finding that the defendant has committed the alleged abuse or engaged in the alleged conduct described in section 4005, subsection 1, may grant a protective order or, upon making that finding, approve a consent agreement to bring about a cessation of abuse or the alleged conduct. This subsection does not preclude the parties from voluntarily requesting a consent agreement without a finding of abuse. The court may enter a finding that the defendant represents a credible threat to the physical safety of the plaintiff or a minor child residing in the plaintiff's household. Relief granted under this section may include:

A. Directing the defendant to refrain from threatening, assaulting, molesting, harassing, attacking or otherwise abusing the plaintiff and any minor children residing in the household;

A-1. Directing the defendant not to possess a firearm or other dangerous weapon for the duration of the order;

A-2. Prohibiting the defendant from the use, attempted use or threatened use of physical force that would reasonably be expected to cause bodily injury against the plaintiff or a minor child residing in the household;

B. Directing the defendant to refrain from going upon the premises of the plaintiff's residence;

C. Directing the defendant to refrain from repeatedly and without reasonable cause:

1) Following the plaintiff;

2) Being at or in the vicinity of the plaintiff's home, school, business or place of employment; or

3) Engaging in conduct defined as stalking in Title 17-A, section 210-A;

D. Directing the defendant to refrain from having any direct or indirect contact with the plaintiff;

E. When the mutual residence or household of the parties is jointly owned or jointly leased or when one party has a duty to support the other or their minor children living in the residence or household and that party is the sole owner or lessee:

1) Granting or restoring possession of the residence or household to one party, excluding the other; or

2) A consent agreement, allowing the party with the duty to support to provide suitable alternate housing;

F. Ordering a division of the personal property and household goods and furnishings of the parties and placing any protective orders considered appropriate by the court, including an order to refrain from taking, converting or damaging property in which the plaintiff has a legal interest;

F-1. Ordering the termination of a life insurance policy or rider under that policy owned by the defendant if the plaintiff is the insured life under the policy or rider. Upon issuance, a copy of the court order must be sent to the insurer that issued the policy;

G. Either awarding some or all temporary parental rights and responsibilities with regard to minor children or awarding temporary rights of contact with regard to minor children, or both, under such conditions that the court finds appropriate as determined in accordance with the best interest of the child pursuant to section 1653, subsections 3 to 6-B. The court's award of parental rights and responsibilities or rights of contact is not binding in any separate action involving an award of parental rights and responsibilities pursuant to chapter 55 or in a similar action brought in another jurisdiction exercising child custody jurisdiction in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act;

Guardian *ad litem* Training

Maple Hill Farm, Hallowell, Maine

Day One

Monday, October 19, 2009

7:45 - 8:30		**Registration**
8:30 - 9:00		**Welcome, Overview of Agenda & GAL Rostering; Responsibilities of the Chief Judge's Office** Hon. Ann M. Murray, Chief Judge
9:oo - 10:15		**Overview of GAL Rules, Standards, and Caselaw: Duties and Obligations of the GAL as an Agent of the Court** Hon. Valerie Stanfill
10:15 - 10:30	**Break**	
10:30 - 11:30		**Overview of Family Law: Title 19-A; Title 22, Title 18-A;** **UCCJEA; UIFSA; Similarities and Differences Between Types of Cases** Hon. Valerie Stanfill
11:30 - 12:30		**GAL Probate Law 101** Hon. Susan Longley, Judge of Probate
12:30 - 1:15	**Lunch**	
1:15 - 3:15		**Determining Primary Residency: One Judge's Perspective** Hon. Jon D. Levy
3:15 - 3:30	**Break**	
3:30 - 4:30		**Report Writing and Testifying** Debbie Mattson, MSW, GAL, Mediator, Steven Chandler, Esq., GAL & Susan Snyder, Esq., GAL, CASA GAL *Moderator: Hon. Charles LaVerdiere, Deputy Chief Judge*

Guardian *ad litem* Training

Maple Hill Farm, Hallowell, Maine

Day Two

Tuesday, October 20, 2009

8:30 - 9:30	**Children's Needs: A Developmental Perspective** Roy Siegfriedt, LCPC, MA
9:30 - 10:30	**Relationship Building with Children and Families** Thomas Chalmers McLaughlin, Ph.D., MSW
10:30 - 10:45	**Break**
10:45 - 12:00	**Substance Abuse & Mental Health – Adults & Children** Barbara Piotti, LCSW & Bob Long, MS, LCPC, LADC
12:00 - 1:00	**Lunch**
1:00 - 2:15	**Substance Abuse & Mental Health – Adults & Children** Barbara Piotti, LCSW & Bob Long, MS, LCPC, LADC
2:15 - 2:30	**Break**
2:30 - 3:30	**Educational Issues for Children & Youth** Sara Meerse, Esq., MSW, GAL
3:30 - 4:30	**Culturally & Socially Competent Child Advocacy** Sara Meerse, Esq., MSW, GAL & Thom Harnett, Esq., AAG

Guardian *ad litem* Training

Maple Hill Farm, Hallowell, Maine

Day Three
Family Law Day

Thursday, October 22, 2009

8:3o - 9:30		**Family Law: Case Management, Pre-trial, Trial Process and Post-Judgment Motions** Hon. Patricia G. Worth & Magistrate Bruce Jordan
9:30 - 10:15		**A View from the Bench and the Bar** Magistrate Bruce Jordan, Magistrate E. Mary Kelly, Tobi L. Schneider, Esq., GAL & Michael J. Levey, Esq. *Moderator: Hon. Patricia G. Worth*
10:15 - 10:30		**Break**
10:30 - 12:30		**Domestic Violence: The Impact on Children and Families** Juliet Holmes- Smith, Esq., Kate Huntress, Shawn Lagrega, Kristina Joyce-Smith, Esq., GAL & Richard Dubois, Esq., GAL *Moderator: Hon. E. Paul Eggert*
12:30 - 1:30		**Lunch**
1:30 - 2:30		**The Impact of Separation and Divorce on Children and Families: Co- Parent Education and Access & Visitation Programs and Services** Jed French, Esq. & Susan Wiggin, LMSW, GAL
2:30 - 2:45	**Break**	
2:45 - 3:30		**The Role of Consensus Building** Felicity Myers, LCSW, GAL, Pamela Holmes, Esq., GAL & Toby Hollander, Esq., GAL *Moderator: Hon. John O'Neil*
3:30 - 4:30		**A View From the Trenches: Two GALs' Perspectives** Terry Hayes, GAL & Toby Hollander Esq., GAL

Guardian *ad litem* Training

Maple Hill Farm, Hallowell, Maine

Day Four

Child Protection Day

Friday, October 23, 2009

8:30 - 9:45		**Introduction to Child Welfare Law** *Hon. Rick E. Lawrence*
9:45 - 10:45		**A View From the Bench** Hon. John B. Beliveau, Hon. Keith A. Powers & Hon. Christine Foster *Moderator: Hon. Rick E. Lawrence*
10:45 – 11:oo		**Break**
11:00 - 12:00		**Identifying & Assessing Risk: Forensic Assessment of Child Abuse and Neglect** Diane Tennies, Ph.D., GAL
12:00 - 1:00	**Lunch**	
1:00 - 1:30		**DHHS 101: New Initiatives and What Every GAL Needs to Know** Martha Proulx, MSW & Michael Kearney, Esq., AAG
1:30 - 2:30		**Protective Custody Law and Process: The Role of the Title 22 GAL in Each Critical Stage of a Child Protection Case** David Hathaway, Esq., AAG, Sheila Cook, Esq., GAL & Robert Bennett Esq., Parent's Attorney *Moderator: Hon. John B. Beliveau*
2:30 - 2:45		**Break**
2:45 - 3:30		**The Last Word: Young People Who Have Experienced the Foster Care System on Creating Youth/Adult Partnership** Penthea Burns, MSW & The Youth Leadership Advisory Team
3:30 - 4:00		**Wrap up and Closing Remarks** Hon. John B. Beliveau