



NATIONAL COUNCIL OF
JUVENILE AND FAMILY COURT JUDGES

WWW.NCJFCJ.ORG

CASE LAW

UPDATE

Domestic Violence Rebuttable Presumption

CASE LAW UPDATE FOR
2018-2020

Compiled by
Amanda Kay, JD, Senior Program Attorney, NCJFCJ

Domestic Violence Rebuttable Presumption

CASE LAW UPDATE FOR 2018-2020

This document contains summaries of published state court decisions of interest related to a rebuttable presumption against awarding sole or joint custody to a parent who has engaged in domestic violence against the other parent. Such provisions have been adopted in some form in 28 states. While most of these summaries are brief, containing only the court's holding and any necessary background or procedural details, a few have been expanded based on their complexity, their uniqueness, or the importance of their holding. Cases have been categorized by their main issue below. Cases granted a rehearing before publication of this document are noted below.

APPLICATION OF THE PRESUMPTION:

1. *John E. v. Andrea E.*, 445 P.3d 649 (Alaska 2019). The trial court found the rebuttable presumption was not triggered by Mother's conduct against the parties' teen daughter after excluding expert testimony from a psychologist who had seen the daughter once the day before the hearing, based on the trial court's conclusion that the visit had not been for treatment but solely for litigation purposes. Mother had previously had sole custody after a series of physical assaults by Father on Mother; following the incident involving Mother and the child, Father was given emergency sole custody of that child until a hearing on his motion to change custody. Trial court declined to significantly modify custody,

simply removing the requirement of supervision on Father's visitation but not increasing the time. The Supreme Court reversed and remanded on the evidentiary issue but discussed with approval the trial court's analysis and application of the presumption statute; the Supreme Court also suggested that the trial consider expanding Father's visitation in light of the time spent with Father under the emergency order, apparently without incident.

- 2. *Solomon v. Solomon, 420 P.3d 1234 (Alaska 2018)*.** The trial court applied the presumption and awarded Mother sole legal and physical custody based on Mother's testimony of several violent incidents, including her assertion that Father was incarcerated for domestic violence crimes. The Alaska Supreme Court found the record was sufficient to evaluate Mother's credibility and that the custody decision was within the trial court's discretion in light of Father's long-term incarceration and parenting problems when not in custody, but the trial court's finding of domestic violence was reversed for more detailed findings about the alleged incidents and how they met the terms of the statute.

BACKGROUND:

The parties were married for about 15 years and had four children. At the time of the divorce, Father was in a military prison for unspecified crimes, which Mother testified related to incidents of domestic violence. Mother testified that Father had engaged in acts of domestic violence throughout the marriage. At the time of trial, Father had just been sentenced to 12 years in prison. His attorney had tried to obtain his telephonic appearance but apparently had great difficulty in arranging it through Fort Leavenworth. After several continuances failed to result in confirmed arrangements for a remote appearance, the trial court declined to grant yet another and held trial in his absence. His attorney, however, was present and cross-examined Mother and introduced other evidence, including impeachment evidence. In addition to Mother's testimony on the domestic violence incidents, other evidence indicated he had substance abuse problems and mental health issues that impaired his capacity to parent. Father admitted he could not parent and consented to his only

contact with the children being through letters screened by Mother.

TRIAL COURT DECISION:

The trial court found the presumption had been triggered and awarded sole legal and physical custody to Mother, with Father to have contact via letters to the children. The court determined that Mother's testimony described many incidents of domestic violence, more than enough to establish a pattern as required by the applicable statute.

APPELLATE DECISION:

On appeal, the court rejected Father's arguments that he should have been granted a continuance and that the trial court lacked a sufficient basis to evaluate Mother's credibility. The court also ruled that the decision to award sole custody to Mother was appropriate. The court determined, however, that application of the rebuttable presumption could not be upheld because the trial court failed to make sufficiently detailed findings regarding the domestic violence incidents to allow for meaningful appellate review. The court further held that the error was not harmless because, while the custody arrangement could be upheld on other grounds, the domestic violence finding required Father to complete a batterers' intervention program. This posed an additional burden before Father could seek to exercise any visitation upon his release. The court vacated the domestic violence finding and remanded for more detailed findings; the rest of the judgment was affirmed.

- 3. *Burns-Marshall v. Krogman, 433 P.3d 1121 (Alaska 2018)*.** The trial court allowed Mother to testify and introduce evidence of domestic violence at the divorce trial, which was the first time that domestic violence had been mentioned in the parties' documents; the trial court found Mother credible and applied the presumption. The Alaska Supreme Court affirmed.

BACKGROUND:

At the parties' divorce trial, Mother for the first time testified to multiple acts of domestic violence by Father against her, as well as alcohol abuse. Father had not conducted any discovery, and while he objected to

application of the presumption, he did not object to admission of Mother's evidence. He requested and was granted additional time to present rebuttal evidence, which he did.

TRIAL COURT DECISION:

The trial court found Mother to be credible and found that Father had a history of domestic violence, thus triggering the presumption. Mother, who had relocated to Arizona with the child, was awarded sole legal and physical custody, with Father receiving Skype or FaceTime visitation twice a week. If Father completed a batterers' intervention program, he would have unsupervised extended visitation during the child's school breaks. Over six weeks later, Father moved to reopen the evidence, well after the time allowed by court rule for such a motion. The trial court found no good cause and denied the motion. Father appealed.

APPELLATE DECISION:

The Supreme Court affirmed in all respects. The court held that the trial court did not abuse its discretion in denying Father's post-trial motion or admitting Mother's testimony regarding domestic violence. Further, it determined that the trial court had properly applied the domestic violence presumption based on Mother's evidence, deferring to the trial court's credibility determination.

- 4. *Engstrom v. McCarthy, 243 Ariz. 469, 411 P.3d 653 (2018)*.** The trial court found evidence of "significant" domestic violence and awarded Mother sole legal custody and awarded shared parenting time to both parties. Appellate court vacated and remanded, including for findings regarding Father's conduct that met the statutory definition of domestic violence and reconsideration of whether shared parenting time was appropriate.

BACKGROUND:

During the proceedings, the parties entered into an agreement regarding custody, and an order was entered based on the agreement. At trial, Mother sought to change the custody terms, stating that she thought the agreement was temporary. She further claimed a history of domestic

violence and coercive control by Father, including forcing her to engage in online porn, prostitution, coercion of sexual acts, and emotional abuse and manipulation, often using the children (e.g., getting the children clothes with a brand name similar to Mother's online porn name). Father admitted engaging in the described conduct, but argued it did not meet the statutory definition of domestic violence and, thus, was not properly considered.

TRIAL COURT DECISION:

The trial court did not address the pretrial order incorporating the parties' agreement and instead turned directly to the merits of the custody determination. The court found that Father's conduct constituted a pattern of domestic violence and, thus, ruled that the presumption was triggered. It awarded Mother sole decision-making, but despite the presumption, it awarded the parties shared parenting time. Both parents appealed, with Mother challenging the shared parenting time and Father (1) asserting that the parties' agreement was final and could only be modified based on changed circumstances and (2) challenging application of the presumption.

APPELLATE DECISION:

The appellate court ruled that the trial court used the wrong standard in refusing to follow the agreement, holding that it was clearly a permanent agreement and could be modified only based on changed circumstances. It further found that while some of the conduct described might be domestic violence under the Arizona statute, much of it was not (though "distasteful"). Thus, additional findings were needed to support a finding of changed circumstances that would permit alteration of the agreement's custody terms, which must be based solely on conduct found to satisfy the statutory definition of domestic violence. The appellate court agreed with Mother, however, that once domestic violence is found, parenting time to the perpetrator is permissible only as set forth in the statute, requiring an analysis of the children's safety and emotional development. Consequently, if on remand the trial court finds domestic violence as defined by the statute, it must follow the statute regarding whether parenting time to Father is appropriate.

5. ***Szwedo v. Cyrus, 602 S.W.3d 759 (Ark. 2020)***. On Father's motion to modify, the trial court changed custody from primary to Mother to joint physical custody; joint legal custody was not changed. The court refused to admit Mother's evidence of serious physical, sexual, and mental abuse during the parties' relationship since it occurred before the judgment Father sought to modify, but allowed a proffer, which it considered. Mother appealed, arguing that the domestic violence presumption should apply, no changed circumstances were shown, and the parties could not cooperate for joint custody. The court affirmed without addressing the presumption, holding that the trial court considered the domestic violence appropriately in evaluating best interest, which was all that was required, Mother's increasing alienation constituted changed circumstances, and the lack of cooperation was solely Mother's and, thus, not a basis to reject joint custody.
6. ***Smith v. Holloway, 289 So. 3d 647 (La. 2020)***. On Father's motion to modify custody shortly after entry of the decree, the trial court initially granted Father emergency ex parte relief based on his assertion that the child had a bite mark, a bruise, and a diaper rash when he picked up the child for visitation. Eventually, following a hearing over a year later, the trial court granted a permanent change from Mother to Father, with Mother to have supervised visitation, holding that Father's conduct was insufficient to trigger the presumption and noting Mother's substance use issues and implicitly finding that Mother had abused the child. The appellate court affirmed in all respects, holding that the presumption was not triggered and the evidence supported the trial court's decision.
7. ***Hudson v. Strother, 246 So.3d 851 (La. 2018)***. On Father's motion to modify custody, the trial court refused to apply the domestic violence presumption based on alleged violence by Mother's new boyfriend and found that changed circumstances did not warrant a change of custody from Mother to Father. On appeal, the court agreed with the trial court's decision not to apply the presumption, noting that even if domestic

violence by Mother's boyfriend had occurred, Mother was the victim and, thus, the presumption was not properly applied against her. The court upheld the trial court on the other issues and affirmed.

8. *Malachi M. v. Quintina Q.*, 136 N.E.3d 704 (Mass. 2019). On Father's motion to modify custody from joint legal custody to sole legal custody with him, the trial court allowed Mother to submit some exhibits, but refused to hear testimony about prejudgment domestic violence. In its decision to grant Father's motion for sole legal custody based on changed circumstances of Mother's inability to co-parent with Father and her "alienating" conduct, it did not expressly address the domestic violence presumption but did consider evidence of domestic violence, including some facts in the submitted exhibits regarding prejudgment incidents. The Supreme Judicial Court granted direct review and affirmed, agreeing with Mother's two legal contentions—that past abuse must be considered on a motion to modify and that the rebuttable presumption must be considered and applied when domestic violence is present—but nevertheless upholding the trial court's decision. The court held that admission of the written exhibits was sufficient for the trial court to consider past abuse, without live testimony (mentioning the time pressures on family courts), and the trial court's order, while not expressly addressing the presumption, did discuss the domestic violence and accorded it proper weight. Finally, the appellate court determined that substantial evidence in the record of Mother's alienating conduct was sufficient to support the trial court's order.

9. *Warner v. Thomas*, 281 So. 3d 216 (Miss. 2019). On Mother's motion to modify custody following an altercation at the child's basketball game in which Father grabbed her arm and shoved her, after which the parties had difficulty communicating and co-parenting, the trial court rejected Mother's argument that the altercation triggered the domestic violence presumption, finding that the standard in the statute had not been met and finding insufficient evidence of changed circumstances, noting that while the parties' communication had deteriorated, the evidence indicated

the child did well with both parties and was not affected. The trial court directed the parties to be civil to each other. (Mother's motion for reconsideration and for clarification of how to be civil to each other was denied.) Mother appealed, arguing the presumption should apply. The appellate court affirmed, upholding the trial court's order in all respects.

10. *Carlson v. Carlson*, 938 N.W.2d 413 (N.D. 2020). The trial court awarded primary physical custody and decision-making authority to Father, stating in the order that “no credible evidence” of domestic violence had been presented despite an incident acknowledged by both parties (and witnessed by Mother's mother). Other evidence indicated that Father regularly used corporal punishment on the parties' two children (aged 4 and 5), the extent and severity of which was disputed. On appeal, the court reversed and remanded for findings regarding domestic violence, a determination of whether the presumption was triggered, and if not, consideration of and findings regarding domestic violence as a part of the best interests analysis.

BACKGROUND:

The parties were married for about two years, during which Mother adopted Father's two children from a prior relationship. When they separated, both parties sought custody of the children. Mother, Father, and Mother's mother all testified about an altercation during which Father discharged a gun into the air. Several witnesses testified about Father's corporal punishment of the children; Father and his witnesses apparently testified that it was reasonable, and Mother and others testified that it was excessive.

TRIAL COURT DECISION:

The trial court found that certain statutory best interest factors favored Father and most were neutral. The court further stated that “[t]here was no credible evidence of domestic violence” and did not further address the issue. The court granted Father physical custody and sole decision-making authority on most issues.

APPELLATE DECISION:

The appellate court began by quoting prior cases, stating that “[w]hen credible evidence of domestic violence exists, it ‘dominates the hierarchy of factors to be considered’ when determining the best interests of the child,” and holding that despite the trial court’s statement that “no credible evidence of domestic violence” existed, the record contained such evidence and the trial court was obliged to address it. The court noted the requirement of findings regarding the presumption, which were absent in this case. The court further cited precedent holding that even if the rebuttable presumption was not triggered, the trial court was required to consider domestic violence in its custody determination and make appropriate findings to permit appellate review. The court remanded for consideration of the custody decision under the appropriate standard and for specific findings as required by the statute and the court’s opinion.

11. *Zuraff v. Reiger, 911 N.W.2d 887 (N.D. 2018).* The trial court denied Mother’s request for primary physical custody, finding insufficient evidence of serious injury to trigger the presumption and apparently not considering the statute’s alternative basis of a pattern of domestic violence to trigger the presumption. According to the opinion, evidence of domestic violence included Father’s conviction for simple assault for “body-checking” Mother, and her testimony of a history of domestic violence, including that Father “put his hands over my mouth to cut off my breathing. He’s whipped me down to the floor. He’s jabbed me with shower curtain rods. He’s thrown me into ovens. Just some violent stuff.” The appellate court concluded that the trial court’s decision was not clearly erroneous and affirmed. The opinion discusses only the conduct underlying the criminal conviction, not Mother’s other allegations, and does not address the “pattern” prong of the presumption statute.

12. *Dickson v. Dickson, 912 N.W.2d 321 (N.D. 2018).* The trial court denied Mother’s motion for primary physical custody and stated regarding evidence of a domestic violence incident, “I don’t need to make another finding because it’s already a finding.” The North Dakota Supreme Court

reversed and remanded, quoting the same language noted above for *Carlson v. Carlson* and concluding that the trial court misapplied the law and must determine whether the presumption applies and if so, whether it has been rebutted. The case was remanded to the trial court to analyze and determine whether domestic violence occurred, whether the evidence triggered the rebuttable presumption, and if triggered, whether it has been rebutted.

13. *Matter of Marriage of Harrison, 557 S.W.3d 99 (Tex. Ct. App. 2018)*. The trial court found Mother's evidence of domestic violence not credible and, therefore, refused to apply the presumption, awarding custody to Father with supervised visitation to Mother. The parties were both attorneys who initially separated when their children were two and six; the divorce proceedings lasted for over 11 years, including two appeals, with Mother having at least a dozen attorneys. The parties mediated an interim agreement for joint custody following the first appeal; Mother refused to comply with its terms regarding Father's visitation and was found in contempt, sanctioned, and when she failed to pay the sanctions, briefly jailed. At trial, many of Mother's exhibits, most of which concerned evidence of alleged domestic violence, were excluded for failure to provide them to opposing counsel, but Mother was permitted to testify, cross-examine Father, and introduce testimony from other witnesses to support her allegations, primarily relating to three incidents, in which Mother's and Father's testimony, and that of other witnesses, differed substantially. Other evidence regarding the children included evidence that Mother's persistent disregard of school policies resulted in the children being asked not to return to their private school and testimony from the children's counselors that they wanted to go back to their school and wanted the divorce over. The trial court found Mother's testimony regarding Father's alleged violence not to be credible and, therefore, refused to apply the presumption. In light of Mother's conduct in keeping the children from Father and interfering with their education, the court gave Father sole custody, with Mother having supervised visits twice a month. Mother appealed, and the court affirmed in all respects, including exclusion of the exhibits, refusal to apply the domestic violence presumption, and the ultimate custody determination.

REBUTTAL OF THE PRESUMPTION:

- 1. *Joy. B. v. Everett B., 451 P.3d 365 (Alaska 2019).*** The trial court found Father rebutted the presumption and that the child's best interests were served by an award of sole custody to Father. Mother had alleged two domestic violence incidents, which the trial court found triggered the presumption and, therefore, ordered Father to participate in a batterers' intervention program (BIP). The program performed an intake and concluded that Father was the victim of stalking and emotional abuse by Mother and thus was not suitable for inclusion in the program. The trial court did not disturb its prior finding that the presumption had been triggered in Mother's favor, instead finding that it had been rebutted by his application for the BIP and its decision not to admit him. After applying the best interest factors and considering other facts, including interference by Mother with Father's remote visitation and Mother's failure to obtain certain medical treatment for the child (at a time when Father was not paying anything toward the child's support), the trial court ordered sole custody to Father, with limited visitation for Mother. The Supreme Court affirmed in all respects.
- 2. *DeLuna v. Petitto, 247 Ariz. 420, 450 P.3d 1273 (2019).*** The trial court found domestic violence, but not "significant" domestic violence and awarded joint decision-making and unsupervised parenting time to Father. On appeal, the Arizona Supreme Court reversed and remanded, holding that the trial court failed to make sufficient findings to rebut the presumption.

BACKGROUND:

The parties were married with three children. Mother obtained a protection order against Father's stalking and harassment, and Father was ordered to have no contact except for texts regarding the children's welfare. He violated the order, entering Mother's residence and taking her cell phone from her. Later that day, he waited outside Mother's residence, but left before police arrived. (It is not clear from the opinion whether he was ever arrested or otherwise sanctioned for violating the protection order.) Mother filed for divorce and asked that the domestic violence presumption be applied.

TRIAL COURT DECISION:

The trial court found evidence of domestic violence, but stated that it wasn't "significant" domestic violence and, thus, did not preclude Father from having joint decision-making or parenting time. The court did not make specific findings regarding the presumption or rebuttal and awarded joint decision-making and unsupervised weekend and holiday parenting time to Father. Mother appealed.

APPELLATE DECISION:

The appellate court reversed and remanded. The court initially noted that, under the statute, "significant" domestic violence precludes an award of joint decision-making as a matter of law. But, the court further held that any finding of domestic violence triggers the rebuttable presumption, which bars sole or joint decision-making unless the court makes findings in support of rebuttal. The court rejected Father's argument that findings regarding rebuttal could be implied from the record. The court similarly refused to imply the findings that would be required to support the parenting time awarded to Father. The statute directs that parenting time is to be permitted in cases with domestic violence only when the offending parent demonstrates that it will not endanger the child or impair the child's development. Here, the trial court failed to perform this analysis. The court, therefore, reversed the decision-making and parenting time provisions and remanded for consideration under the proper standards and findings as required by the statute.

- 3. *S.Y. v. Superior Ct., 29 Cal. App. 5th 324 (2018).*** The trial court found that Father had rebutted the presumption by showing that his exercise of custody would not be detrimental to the child, based on his care of the child during his parenting time and Mother's admission that she had no concerns about the child being with Father, and awarded joint legal and physical custody in an interim order. The trial court considered in its decision Father's "greater fluency" in English and Mother's actions in withholding the child from Father for the first six months after separation (following an incident in which Father hit her, shoved her, strangled her, and threw her and the child (then two years old) out of the house, locking

them out). Mother's writ petition challenging this interim order was later consolidated with the appeal from the final judgment after resolution of the remaining issues. The appellate court denied Mother's petition, holding that substantial evidence supported the trial court's findings on rebuttal, which were sufficient for meaningful appellate review, that Mother's withholding of the child was properly considered as part of the child's best interests, and that consideration of Father's "greater fluency" was harmless error.

4. ***Jaime G. v. H.L., 25 Cal. App. 5th 794 (2018)***. The trial court found that Father's conduct toward Mother, which consisted of pushing and scratching her and on one occasion driving the car toward her and the child, warranted a protection order and triggered the domestic violence presumption, but was rebutted because Father was the "far better parent" and had a more stable home. Evidence described in the opinion indicated that both parties lived in rather cramped conditions in homes with several adults, including each party's current partner; Mother claimed that Father denied her contact with the child when in his care and at times refused to let her see the child; Father's home was close to the child's school and Mother did not have a car, resulting in the child often being tardy to school when in her care; and Father did not contribute to Mother for the child's care despite his claims otherwise. The trial court did not make findings on the record, which was ended early due to counsel's repeated interruptions, and the written order was summary with no findings. The appellate court reversed and remanded for findings on the statutory factors for rebuttal, refusing to rule on the final custody arrangement, but holding that the domestic violence presumption was properly triggered and, thus, could only be rebutted by the trial court making statutorily required findings on the record or in writing, which it did not do. While the court expressed some sympathy for the trial court's frustration with counsel's interruptions, the court noted that the judge has tools available to control the courtroom, and if despite that the hearing is terminated before required findings are entered in the record, the court must enter written findings.

5. *Gizzo v. Gerstman*, 245 Md. App. 168, 226 A.3d 372 (2020). The trial court found that Mother had rebutted presumptions based on domestic violence against Father and neglect of the child based on her actions over years between those events and trial, and based on various factors, awarded Mother sole legal and primary physical custody. The appellate court affirmed, finding that evidence supported the trial court's decision, which was supported by required findings.

BACKGROUND:

Parties were not married and appeared to have had unstable incomes and housing at the time the child at issue was conceived. At the time Mother became pregnant, they were living with Father's father in New York, who at some point refused to let her live in the house any longer. Father remained there while Mother lived in his car for several months. At some point, as her pregnancy advanced, she moved into a homeless shelter until she gave birth. After the child was born, Father's father allowed her and the child to move back into his home, but they had many arguments and at one point, Mother kicked him. Shortly thereafter, the parties moved to Maryland, where Father enrolled in the police academy. Mother became pregnant with their second child. Their relationship was volatile, and Mother was arrested when she hit him in the arm and later slapped his face at a police academy event. (This incident was the basis for later application of the domestic violence presumption.) She was briefly incarcerated; upon her release, she and the child moved to a House of Ruth shelter, with Father visiting the child. He filed a custody case, seeking sole legal and physical custody; Mother counterclaimed, seeking the same. In the criminal case, she entered into a probation agreement (that apparently did not result in a conviction) and moved, with the child, to transitional housing with other women she met at the House of Ruth shelter. Shortly thereafter, the child, then an infant, was found crying and bruised on the floor between Mother's bed and the wall; a child welfare case was opened and Mother was charged with child abuse and neglect. Mother asserted that she asked her roommate to watch the child while she took a shower and he fell off the bed, but she admitted she had not immediately sought medical help for the child after finding him injured. The custody case was briefly stayed while the child

welfare case proceeded, and eventually the child was placed with Father on an interim basis, pending trial, and Father's father moved to Maryland temporarily to help with the child; he ended up staying for several months. Mother was sentenced to probation, conditioned on her staying for one year in a treatment house for pregnant women and mothers of young children. While there, she gave birth to the parties' second child. Father filed a paternity action and Mother answered, acknowledging paternity, but the parties then dismissed the case. (Father showed no interest in the second child, testifying later at the custody trial that it was different because she was a girl (the older child is male).) After a few months, Father's father returned to New York and the child was cared for by Father's girlfriend while he was at work. When they broke up after about 18 months and she moved out, Father sent the child to live with his father in New York; he indicated he visited the child once or twice a month. Mother continued to litigate the custody case and sought more contact with the child; Father blocked her from his phone and insisted she go through his father to contact the child; as noted above, however, they had a poor relationship and often, Mother was not able to have her designated phone or FaceTime contact with the child. In the meantime, Mother had completed her sentence, obtained counseling, and moved to California where her family was, to provide additional support. (Father did not object to her bringing the parties' daughter to California and apparently never sought any contact with her.) Once there, Mother obtained steady employment and housing. She later married someone she met at work. During the early part of the case, she made a few allegations of abuse against Father, but always recanted before they were ruled upon.

TRIAL COURT DECISION:

Following trial, the court noted this was a difficult case, but based on the evidence of Mother's progress since the neglect and domestic violence charges, Father's actions in wholly delegating his parental responsibilities, Father's lack of any objection to Mother's parenting of the parties' daughter, the parties' history of troubled contact (at the time of trial, Father still had Mother blocked), and the geographic distance involved, the trial court awarded sole legal and primary physical custody

to Mother, with Father having extended holiday and summer visits. The trial court's order made findings regarding Mother's rebuttal of the presumptions against awarding custody to a parent who abused the child or the other parent.

APPELLATE DECISION:

Father appealed, contending the trial court erred in not following the domestic violence and neglect presumptions. The appellate court disagreed, concluding that the trial court made the proper findings, supported by substantial evidence, and did not abuse its discretion in the ultimate custody decision.

ANALYSIS OF CUSTODY AFTER REBUTTAL:

1. *Angelica C. v. Jonathan C., 459 P.3d 1148 (Alaska 2020)*. The trial court found that the presumption was triggered by Father's sexual abuse of Mother as a minor, but that he rebutted it, and awarded sole legal custody and primary physical custody to Father. The Alaska Supreme Court reversed and remanded, concluding that even allowing the rebuttal of the presumption to stand, the trial court erred in failing to consider Father's long-term sexual abuse of Mother as a minor in evaluating the best interest factors.

BACKGROUND:

Father, who was 18 and 19 at the time, engaged in a sexual relationship with Mother, who was 13, and she became pregnant. Father was arrested, convicted, and incarcerated for sexual abuse of a minor. At first, Mother remained living with her parents and they helped her care for the child. Mother later attempted to move out and live independently, but was unable to find stable housing. At one point, she left the child with her parents while she lived in a nearby town; some evidence indicated that she engaged in substance abuse. When Father was released from prison, he sought custody. Mother did not appear at the hearing, and her parents, with whom the child was living, at first contested the petition, but then withdrew their objection. The trial court found that Father was not suitable, but that his father should be granted custody. Mother appealed,

and the Alaska Supreme Court reversed, stating that Mother had not been given notice that a non-parent was being considered for custody. On remand, Mother contested Father's motion and filed a petition to terminate Father's rights based on Father's sexual abuse of her as a minor.

TRIAL COURT DECISION:

The trial court dismissed the termination of parental rights petition on the basis that it was improperly filed in the custody case. The court then concluded that the domestic violence presumption was triggered by the sexual abuse, but rebutted by evidence that Father completed a parenting class while in prison and underwent counseling; the court accepted this as fulfilling the statutory requirement of a batterers' intervention program because the town had no such program. In evaluating the best interest factors, the trial court expressed doubt that Father's sexual abuse of Mother constituted domestic violence and did not consider it under the domestic violence best interest factor. Similarly, in considering the friendly parent factor (which has a domestic violence exception), the court did not exclude from consideration evidence that Mother disparaged Father and that she and her parents had at times interfered with Father's visitation. Finally, while Mother's living situation had improved by the time of trial, the court found that most best interest factors weighed in favor of Father and the others were at best neutral. The court awarded primary physical and sole legal custody to Father. Mother appealed, contesting both the dismissal of her termination of parental rights petition and the custody award.

APPELLATE DECISION:

The Alaska Supreme Court reversed and remanded, holding first that the trial court erred in dismissing the termination of parental rights petition on procedural grounds and that it was appropriately submitted within the custody case under Alaska's statute, which the court interpreted as allowing such a petition to be filed in this manner. The court remanded for consideration of the petition's merits. Regarding the custody decision, the court approved the trial court's application of the presumption and accepted without discussion the trial court's decision that it had been

rebutted by the parenting class and counseling in place of a batterers' intervention program. But the court held that the trial court had erred in failing to consider the sexual abuse as domestic violence and, thus, had abused its discretion in its analysis of the best interest factors. In particular, the sexual abuse should have been considered as domestic violence that weighed against Father, and the trial court should not have considered the evidence regarding Mother's disparagement or visitation interference under the domestic violence exception to the friendly parent factor. The court stated that rebuttal of the presumption simply makes that parent eligible for custody, but that the best interest factors must still be evaluated and applied, including evidence of domestic violence. Here, the trial court failed to do that. The case was remanded for consideration of the termination of parental rights petition's merits and reconsideration of the best interest factors and custody decision in light of the opinion.

2. ***Thornton v. Bosquez, 933 N.W.2d 781 (Minn. 2019).*** The trial court applied the presumption, interpreting the language as prohibiting joint custody, but not that sole or primary custody must be awarded to the victim, and awarded sole legal custody to Mother, who had engaged in domestic violence as defined by the statute. The trial court found that the presumption had been rebutted as to physical custody and awarded joint physical custody to both parents. Father appealed, and the court of appeals affirmed; he then filed a petition with the Minnesota Supreme Court, which affirmed in all respects.

BACKGROUND:

Mother was found to have engaged in acts of domestic abuse against Father, including physical abuse resulting in scratches and bruises (none serious) and threats of suicide, including one attempt, to exercise power over him. Mother did not contest entry of a protection order, and her conduct ceased upon its entry. Other evidence revealed coercive manipulation throughout the relationship by Father against Mother, including an almost constant stream of verbal and emotional abuse. The evidence, including Father's behavior during the court case, indicated that he was still attempting to control Mother, whereas Mother's abusive

conduct ceased with the protection order.

TRIAL COURT DECISION:

Minnesota's presumption requires physical abuse, threats of physical abuse, or "terroristic threatening"; other types of abuse do not trigger the presumption. Mother's physical abuse (the scratches and bruises) and suicide threats ("terroristic threatening") met this definition, thus triggering the presumption; Father's pattern of coercive manipulation and verbal/emotional abuse, however, did not. The court concluded that Mother's physical abuse was caused by her attempts to gain some control in the context of the coercive relationship Father established. The trial court considered the language of the Minnesota presumption statute and concluded that it, unlike many others, was not phrased in terms of a presumption against either parent, but rather only against a joint custody arrangement. The court further found that Mother's abuse was never in the child's presence and had little, if any, effect on the child's relationship with either parent. Based on this finding, as well as a guardian ad litem report stating, after extensive investigation, that the child had a good relationship and liked spending time with both parties, the court concluded that the presumption had been rebutted as to physical custody. Therefore, based on the evidence of the child's relationship with both parents, the trial court awarded joint physical custody to both parents. Based on the evidence of Father's continued attempts at control, including during the case itself, coupled with the cessation of any abusive acts by Mother and evidence of counseling Mother had received, the court first found that the parties could not cooperate for joint legal custody and that the child's best interest would be served by Mother having sole legal custody, subject to soliciting input in specified ways from Father for major decisions, but the final decision would belong to Mother. Father appealed, resulting in an affirmation of the decision by the intermediate appellate court, and Father petitioned for review by the state supreme court.

APPELLATE DECISION:

The Minnesota Supreme Court affirmed in all respects. The court recognized arguments, including by several amici, that the presumption should be held to favor the victim, but contrasted the language in the domestic violence rebuttable presumption to that in other presumptions that specified against whom they applied and/or assigned the burden of overcoming them. Unlike these other presumptions, the language in the domestic violence presumption simply stated that joint custody was presumed not to be in the child's best interest, not that custody should go to a particular party, and neither party was allocated the burden of overcoming the presumption. The court concluded that the trial court's factual findings were well-supported and that the custody decision was not an abuse of discretion.

This project was supported by Grant No. 2016-TA-AX-K026 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Justice. The recipient also agrees to ensure that any subrecipient at any tier will comply with this condition.



NATIONAL COUNCIL OF
JUVENILE AND FAMILY COURT JUDGES

WWW.NCJFCJ.ORG