I. Introduction and Historical Background

Child custody is among the most difficult, complex, and challenging type of family court determinations.¹ The broadly defined “best interest” standard governing child custody in the United States often increases parental conflict and adversarial tactics, which is exacerbated when domestic violence is involved.² An estimated 25 to 50 percent of disputed custody cases involve domestic violence, and the adverse effects of maintaining regular contact with the abusive parent through custody and visitation are well documented.³

Nearly all states have enacted statutes codifying domestic violence as a factor in their “best interest” standard for child custody decisions.⁴ Some statutes encourage courts to consider the existence of domestic violence in the family and its impact on the child as a relevant factor, while others actually require the judicial officer to consider evidence of domestic violence and provide written justification for orders that place a child in the custody of the abusive parent.⁵ Many jurisdictions have enacted statutory rebuttable presumptions to shift the burden of proof and guide judicial discretion in child custody cases involving domestic violence based on the National Council of Juvenile and Family Court Judges Model Code on Domestic Violence and Family Violence, which provides a framework for developing legal approaches to domestic

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³ A.C. Morrill, Child Custody and Visitation Decisions: When the Father Has Perpetrated Domestic Violence Against the Mother, 11-8 VIOLENCE AGAINST WOMEN 1076-1107 (2005).
⁴ Id.
⁵ Id.
violence. The Model Code was developed in 1990 by a multidisciplinary Advisory Committee and sets forth guidelines for domestic violence legislation related to criminal penalties and procedures, civil orders for protection, prevention and treatment, and family and children.

There is little dispute about the benefits of including domestic violence as a relevant factor in the best interest analysis, but statutory presumptions against custody for the abusive parent is a more dramatic change in the law that has generated much debate. Early proponents predicted they would reduce litigation in cases involving domestic violence and children’s exposure to conflicts by providing “surer, quicker, and more certain results when families break up.” Opponents raised concern about the effects of introducing an additional phase of litigation to rebut the presumption, such as defining the evidence that constitutes a finding of domestic violence triggering the presumption and determining how other provisions in the larger legislative scheme reinforce judges’ misconceptions about parenting and the dynamics of domestic violence. These “unintended consequences” are highlighted throughout the literature and in many of the published and unpublished appellate cases where the presumption against custody is triggered and successfully rebutted by the abusive parent.

8 Weithorn, supra note 6.
10 Id.
11 Hon. Donna Hitchens & Patricia Van Horn, *The Court’s Role in Supporting and Protecting Children Exposed to Domestic Violence in Courts Responding to Domestic Violence*, 6 J. CENTER FOR FAMILIES, CHILDREN, & COURTS 31-48 (2005); Cal. Fam. Code §§ 3020(b), 3161 (legislative preference for custodial arrangements that support frequent and consistent contact with both parents).
1. Historical Rules

Historically, domestic violence was absent from the legal standards for determining child custody. At common law, parental rights vested exclusively in the husband, viewed as an extension of his property rights acquired during marriage. In the 1800s, courts began adopting the “tender years doctrine,” which presumed that a child’s need for love and nurturance was more likely to be met by a mother, absent a showing of maternal unfitness. By the end of the nineteenth century, this doctrine was recognized in almost all states, either by case law or statute. The “tender years doctrine” continued as a rebuttable presumption favoring maternal custody until 1973, when the Family Court of New York held that it violated fathers’ rights to equal protection under the fourteenth amendment.

In response, states adopted a gender-neutral standard making the welfare or “best interests” of the child the primary concern in resolving custody disputes. As the impact of domestic violence on children has become widely recognized, most jurisdictions have adopted legislation incorporating it into their “best interest” standard. Today, all states recognize

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16 Act to Amend the Law Relating to Custody of Infants, 2 & 3 Vict., ch. 54 (1839); 36 & 27 Vict. ch. 12 (1873); *Commonwealth v. Addicks*, 5 Bin.. 520 (Pa. 1813).
domestic violence as a relevant factor, but only some jurisdictions give it the weight of a presumption against custody.\footnote{21 J. S. Meier, Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions, 11 AM. U. J. GENDER SOC.POL’Y & L., 657, 662 (2003) (reporting that courts quite frequently grant joint or even sole custody to batterers).}

2. “Best Interests of the Child” Standard

The “best interest of the child” standard is a fact-intensive inquiry governing all custody proceedings.\footnote{22 Cal. Fam. Code § 3040, subd. (b).} Often described as an elusive guideline in need of rigid definition, the standard is designed to “maximize a child's opportunity to develop into a stable, well-adjusted adult.”\footnote{23 Adoption of Matthew B. (1991), 232 Cal. App. 3d 1239, 1263.} Factors favoring or opposing custody are weighed and balanced on the basis of the evidence presented by the competing parties.\footnote{24 Burchard v. Garay, 42 Cal. App. 3d 531, 535 (1986); Marriage of Burgess, 13 Cal. App. 4th at pp. 31-32 (1996); Marriage of LaMusga, 32 Cal. App. 4th 1072, 1087 (2004).} There is no “hard-and-fast rule” for applying the standard; all circumstances which may affect the child must be considered.\footnote{25 N.K.D. Lemon, Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They? 28 WM. MITCHELL L. REV. 601, 619-20 (2001).} The most relevant factors typically include economic needs, emotional needs, child’s wishes, age and sex, and affectional ties with each parent.\footnote{26 R.A. Thompson, The Father's Case in Child Custody Disputes: The Contributions of Psychological Research, FATHERHOOD AND FAMILY POLICY 53, 56 (Michael E. Lamb & Abraham Sagi eds. 1983).} The extent of each parent's involvement with the child prior to separation and the environment the child will be living in with each parent going forward are often considered in the analysis.\footnote{27 Lemon, supra note 25 at 620.} Parental nurturance has been replaced in most states by focusing on the economic resources of the parents to achieve a more gender-neutral standard.\footnote{28 Id.} This is often
criticized, particularly in domestic violence cases, for its unfair implications on the parent with inferior resources, who is not necessarily the parent who can best provide for a child's needs.29

In California, the presumption triggered by a finding of domestic violence does not change the “best interest” test, nor do the rebuttal factors supplant other Family Code provisions governing custody proceedings; it merely shifts the burden of persuasion to the abusive parent to demonstrate parental fitness instead of the victimized parent having the burden to prove the abuser is unfit.30 Once the presumption against custody is rebutted, the abused parent must then convince the court that the child has been adversely affected by the abuse, or that there is ongoing danger to the victim parent or child.31 Ultimately, since none of the “best interest” factors are independently determinative, judges have significant discretion to determine whether the abusive parent is granted custody.32 However, relatively few reported cases exist in California to guide the application of Family Code section 3044.33

The “best interest” standard permits judicial bias at the trial court level because of the broad discretion judges have in balancing each of the factors.34 Trial court judgments outlining final custody orders are non-modifiable except through a showing of material changed circumstances, and cannot be set aside on appeal unless there is a clear abuse of discretion.35

Subtle judicial biases may be overlooked on appeal because of the multiple factors involved and

29 Ver Steegh, supra note 13 at 1387. (discussing economic resource distribution in domestic violence cases, where the parent with greater resources is often the perpetrator, whose economic advantage is a contributing factor in the parents’ unbalanced power dynamic)
31 Fam. Code §§ 3020; 3044.
33 85 to 95% of California child custody cases on Fam. Code section 3044 are unreported. For custody modification and move away cases, this figure drops to 60 to 70%. (Westlaw Next and Lexis Advance, 2/19/2015).
weighed differently by trial courts, which focus on the best interest test, and appellate courts, which focus on abuse of discretion.\textsuperscript{36}

II. Presumption Statutes in the United States

Over 40 jurisdictions have adopted statutory presumptions and/or other custody provisions to consider the impacts of domestic violence on children as part of the “best interest of the child” standard.\textsuperscript{37} In jurisdictions that have enacted presumptions, the language varies in terms of: 1) whether it applies to all types of custody or only to joint custody; 2) how domestic violence is defined and what type of evidence/evidentiary standard is required to trigger/rebut the presumption; and 3) handling allegations of mutual abuse, and the appropriate standard to apply when the presumption is found inapplicable.\textsuperscript{38} In many states, judges and attorneys are criticized for being inadequately informed of these rapid changes, which often results in inappropriate practices (e.g., failing to present evidence of abuse at trial, entering into mediated agreements that may be dangerous to victims of family violence, encouraging clients to trade protection for money, and/or making other inappropriate settlements).\textsuperscript{39}

Proponents of statutory presumptions argue they are an effective mechanism for reducing demands on the court and the time required to adjudicate issues, facilitating common expectations of the likely outcome of a case, and reducing overall litigation in contested family law cases.\textsuperscript{40} But given that parental rights are constitutionally protected, courts are faced with

\textsuperscript{36} See generally, Levin & Mills \textit{supra} note 34.

\textsuperscript{37} See, e.g. Cal. Fam. Code, § 3020, subd. (a); See generally, Lemon, \textit{supra} note 25.

\textsuperscript{38} Saunders, \textit{supra} note 20.

\textsuperscript{39} C.F. Klein & L.E. Orloff, \textit{Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law}, 21 HOFSTRA L. REV. 801, 964 (1993) (citing cases where courts considered evidence of spousal abuse in custody determinations even where abuse was not directed against the children).

\textsuperscript{40} Lemon, \textit{supra} note 25 at 667, 668.
the challenge of maintaining a primary focus on the best interests of the child while applying presumptions against custody with consistency and fairness.41

1. Challenges in California

California was the fifteenth state to adopt a statutory presumption against custody, which took effect January 2000.42 This legislation, A.B. 840, was based on the Model Code, sponsored by the California Alliance Against Domestic Violence and carried by Speaker Pro Tem Sheila Kuehl, a long-time advocate for victims of domestic violence.43 Now codified in Family Code section 3044, the presumption is triggered by a finding of domestic violence within the past five years, which may be overcome by six narrowly defined and clearly measurable factors (e.g., completion of a batterer’s intervention program, parenting class, drug counseling, and/or probation/parole), and one broadly defined factor which requires substantial judicial discretion -- 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.44 The presumption does not apply if both parents are found to have perpetrated domestic violence.45

Early opponents of California Family Code section 304446 feared it would elevate domestic violence above other important considerations, such as the emotional benefits of frequent and continuing contact between children and each parent.47 During legislative hearings, the Family Law Executive Committee of the State Bar commented that the statute places

41 See, e.g., Stanley v. Illinois, 405 U.S. 645, 651 (1972) (noting that the rights to "raise one's children have been deemed 'essential'. . . ."); Weithorn, supra note 6 at 16.
43 Lemon, supra note 25 at 619-20.
44 Fam. Code § 3044(b).
45 Id.
46 All further statutory references are to the California Family Code, unless otherwise noted.
“additional burdens upon already-complicated custody proceedings.” Others feared it would increase false claims of violence as a tactic in custody and support cases by giving greater incentive for a parent to falsely accuse the other of domestic violence to gain an advantage in custody and support awards. The true impact of domestic violence presumptions against custody is not yet clear, but anecdotal accounts of how the law is working suggests that the requirements for overcoming the presumption, once triggered, appear to be on the more lenient side, and challenges arise due to “inconsistent and often distorted application.”

While most agree on the need for targeted statutory measures to address domestic violence in custody cases, section 3044 continues to be criticized as “a [] hollow victory for social justice.” In March 2001, students at Boalt Hall School of Law, UC Berkeley conducted a telephone survey of 24 attorneys, judicial officers, legislative aides, custody evaluators, survivors of domestic violence, domestic violence experts, and community resource people from nine counties throughout the state, to evaluate the implementation progress of section 3044. Survey respondents identified key areas of concern, which are highlighted throughout the literature: ambiguously constructed statutory language, gaps in resources for adequate supervised visitation and batterers intervention programs, unequal bargaining power in mandated family court mediation, application in overlapping proceedings (e.g., restraining order hearings), and conflicting statutory provisions. Each of these areas is discussed below.

a. Ambiguous Construction

48 Id.
50 Lemon, supra note 25, at 663.
51 Id. at 662.
52 Id.
53 Morrill, supra note 3 at 1101; Lemon, supra note 25 at 662.
A common critique of statutes addressing domestic violence is that they rely on inadequate legal definitions, which tend to focus on violent acts and fear of violent acts and ignore patterns of domination, coercion, and control. Likewise, California’s section 3044 has been criticized for its broad statutory language and inadequate guidance on the rebuttal factors, which many characterize as overly ambiguous. The statute uses the criteria for obtaining a Domestic Violence Restraining Order to define domestic violence, and the presumption may be rebutted only by a preponderance of the evidence. Ambiguities can lead to situations in which a perpetrator seeks to rebut the presumption by complying with one, but not all of the enumerated factors. For instance, in Marriage of Riedel, a father successfully rebutted the presumption by showing that joint custody was in the child’s best interest, an enumerated factor, despite a history of perpetrating violence against the mother. Finding no statutory bar against joint or sole custody to the father, the order changing sole physical custody from mother to father was affirmed. As a justification, the court found that the presumption did not eliminate the public policy preference for “frequent and continuing parental contact” as a relevant factor to determine the best interest of the child.

The very essence of section 3044 is that custody with an abusive parent is presumed to be “detrimental to the best interest of the child.” Despite evidence showing the limited impact of a batterer intervention program (BIP) on preventing the reoccurrence of domestic violence,

54 Ver Steegh, supra note 13 at 1415.
55 Lemon, supra note 25 at 661.
56 Compare Fam. Code § 3044(d) with § 6320, defining “domestic violence” for the purpose of obtaining a civil protective order; Cal. Fam. Code, § 3044, subd. (c).
57 Lemon, supra note 25 at 661.
59 Id. (“Where domestic violence has occurred within the last five years, custody may not be awarded to a batterer in the absence of a finding the presumption under section 3044 has been rebutted and an affirmative finding that awarding custody to that parent would be in the best interest of the child.”)
60 Fam. Code § 3044(a).
completion of BIP is an enumerated rebuttal factor. In *Popovich v. Newton*, despite repeated violations of a restraining order protecting the mother, a father rebutted the presumption against custody by completing a BIP. Rejecting the mother’s argument that “successful completion” of a BIP should require a reasonable showing that an abusive parent is unlikely to commit future acts of domestic violence, the court ordered joint legal and physical custody because “maintaining the status quo [sole custody with mother] denied the children meaningful parent/child experiences and marginalize[d] their relationship with their father.”

b. Limited Judicial Resources

Limited judicial resources contribute to a number of problems in child custody disputes. Judges often have severe time constraints on their calendars, making section 3044 “yet another hurdle they have to surmount.” These judges are faced with a dilemma regarding how to structure temporary custody and visitation, given that it may be months before the calendar is free for an actual evidentiary hearing, so the temporary order is usually based only on allegations. When judges are faced with inadequate training in child development and limited resources for a full investigation of intensely fact-sensitive cases, they tend to rely solely on their personal values, which is problematic in domestic violence cases if personal biases exist regarding the credibility and motives of victims. The 2001 UC Berkeley study found substantial judicial resistance to section 3044 in several counties, due in part to lack of such

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63 Id. (mother’s proposed definition of “successful completion” based on Cal. Penal Code section 1210.1, which requires “reasonable cause” to believe that a defendant convicted of a nonviolent drug offense will not abuse controlled substances in the future after completing a prescribed treatment program).
64 Lemon, supra note 25 at 662-63.
65 Id.
66 Id. at 661.
resources. Many judges expressed a resentment towards statutorily imposed restrictions on their discretion, and opined that joint custody was almost always appropriate, even in domestic violence cases. Examples of this resistance took the form of ordering litigants to repeatedly try to mediate their dispute in the hopes that they would eventually come to an agreement, or awarding joint custody in spite of police reports or even prior convictions for domestic violence.

In contrast, judges who feel they have sufficient resources to hold timely evidentiary hearings indicate they either always give domestic violence great weight in making custody decisions, or changed their court practices and procedures to give the issue greater weight in response to section 3044. These findings illustrate a correlation between judicial training, frustration with the statute, and appropriate custody decisions in cases involving domestic violence.

c. Consequences of Mandatory Mediation

Family law statutes across the United States increasingly require mediation for child custody disputes because of the equal bargaining power it is designed to give each of the parents. However, in cases involving domestic violence, the party’s abusive relationship creates in an uneven playing field in which victims of domestic violence “may readily sacrifice economic entitlements for custody of the children,” often lack sufficient resources to retain legal counsel to litigate their true interests. In 1980, California became the first state to enact a

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67 Id. at 662-63.
68 Id.
69 Id.
70 Id.
mandatory mediation requirement.\textsuperscript{72} Today, the legislative scheme in California provides for special requirements in cases involving domestic violence, but litigants are still required to undergo mediation.\textsuperscript{73}

Research has emerged highlighting the unintended consequences of mandatory mediation to resolve custody disputes in domestic violence cases. For instance, some data suggest that an abused parent may trade other rights to maintain custody during mediation to avoid an abusive parent’s threat of litigating as a means of continuing the cycle of power of control over the victim as negotiations during mediation.\textsuperscript{74} Marriage of Schropp illustrates the consequences of mediation in cases where issues of power and control are at play, where a mother agreed to joint legal custody in exchange for permission to move out of state with the child after experiencing a history of violence throughout the marriage.\textsuperscript{75}

d. Adverse Impacts on Restraining Orders

In some counties, California’s statutory presumption against custody has caused a “backlash” in the judicial response to restraining order requests.\textsuperscript{76} The 2001 UC Berkeley study found increased obstacles for litigants obtaining protective orders after the enactment of section 3044.\textsuperscript{77} Attorneys reported an increase in judges requiring independent corroboration of allegations of abuse (for which many victims are unable to provide), or an increased issuance of consecutive temporary orders to avoid triggering of the presumption.\textsuperscript{78} Commentators have

\textsuperscript{72} Charlotte Germane, Margaret Johnson, and Nancy Lemon, Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence, 1 BERKELEY WOMEN'S L.J. 175 (1985).
\textsuperscript{73} See Cal. Fam. Code § 3181 (“mediator shall meet with the parties separately and at separate times”).
\textsuperscript{74} Greenberg et al., supra note 49.
\textsuperscript{76} Lemon, supra note 25 at 664.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
attributed this response to judicial concern for triggering the presumption through the issuance of a restraining order, with some judges being unclear as to whether the mere issuance of a restraining order is in fact a finding that triggers the presumption. More recently, case law has clarified that, “a finding of domestic abuse sufficient to support a DVPA restraining order [temporary or permanent] necessarily triggers the presumption in section 3044.” Yet still, trial courts apply the presumption inconsistently, particularly when the trigger is a restraining order or past criminal conviction.

e. Competing Statutory Schemes

The best interest test is interwoven throughout the Family Code and is used by family and juvenile courts to resolve an array of issues involving children. However, conflicting statutory provisions and policy goals between each division and within the Family Code can result in inconsistencies due to competing priorities. In 2004, the legislature codified new prohibitions in section 3044 preventing an abusive parent from invoking the public policy favoring frequent and continuing contact between children and both parents to rebut the presumption against custody. Yet, in Keith R. v. H.R, the court was clearly influenced by these policy concerns when it articulated its methods of balancing the public policy preference for “frequent and

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80 Marriage of Fajota, 230 Cal.App.4th 1487, 1500 fn. 10 (2014) (noting the trial court’s misunderstanding of section 3044 and its application to all acts of domestic violence even if no restraining order has been issued); Christina L. v. Chauncey B., 229 Cal.App.4th 731, 736 (2014) (finding the trial court ignored the legal effect of the judicial findings that are necessarily made with a DPVA restraining order); F.T. v. L.J., 194 Cal.App.4th 1, 28–29 (2011) (remanded to trial court to expressly find whether section 3044 presumption had been rebutted where mother had previously plead guilty to battery of the child). See also, In re S.M., No. B248815, 2014 WL 1088321 at *1-8 (Cal. Ct. App. Mar. 20, 2014) (emphasizing that a restraining order protecting mother from father did not make joint legal custody inappropriate because child was not a protected party.).
82 California Senate Bill History, 2003-2004 S.B. 265.
continuing parental contact” against the parameters of section 3044. It reasoned that section 3044 does not change the best interest test, “nor supplant other Family Code provisions governing custody proceedings, “frequent and continuing contact” is still a highly persuasive consideration. As one of the few reported cases addressing section 3044, Keith R. sends a message that the public policy preference for frequent and continuing contact remains relevant even when the presumption against custody for an abusive parent has been triggered.

Domestic violence may not trigger a presumption against custody when the issue arises in a juvenile court. In 2014, the California Court of Appeal affirmed a juvenile court’s award of joint legal custody after finding that section 3044 of the Family Code did not apply. Instead, the juvenile court used the best interest test codified in section 362.4 of the Welfare Code, and found that the lack of evidence demonstrating the parents were unable to cooperate on legal issues relating to the children supported the order of joint legal custody, despite documented acts of domestic violence committed by the father.

2. Statutory Presumptions in other States

Currently, at least 24 states have adopted rebuttable presumptions against awarding custody to abusive parents. The rebuttable presumptions adopted by these states vary in many aspects, including how domestic violence or abuse is defined, the severity and frequency of the

83 Keith R., supra note 30 at 1047.
84 Id. at 1056
85 Id. (noting in dicta several additional considerations that a party bearing the burden of persuasion under section 3044 must have the opportunity to introduce: evidence about the parent’s relationship with the children, his ability and willingness to care for them, the extent to which he poses a risk of physical and emotional abuse, his receptivity to being a “friendly parent,” and the children’s needs for more than marginalized parental relationship).
87 Id. at 1, 8 (citing relevant juvenile court cases applying the best interest standard; emphasizing that the restraining order against the father protected the mother only, and not the child).
acts of violence necessary to trigger the presumption, the evidentiary standard required to trigger the presumption, and the type of custody the presumption applies to. Only eight of the states that have adopted rebuttable presumptions against awarding custody to abusive parents specify the evidentiary standard necessary to trigger the presumption. For example, in many states, such as Alaska, California, Louisiana, Massachusetts, Mississippi, and Wisconsin, the presumption may be rebutted by a preponderance of the evidence. Overall, judges in family courts throughout the United States have little guidance for interpreting the best interests standard in the context of domestic violence, and determining whether the presumption has been raised or overcome.

Minnesota was the first state to enact a rebuttable presumption statute against awarding custody to abusive parents. Approved on May 3, 1990, Minnesota's rebuttable presumption statute applies only to joint custody cases. Minnesota's statute created a rebuttable presumption that awarding "joint legal or physical custody is not in the best interests of the child if domestic abuse . . . has occurred between the parents." On March 14, 1991, North Dakota became the second state to adopt a rebuttable presumption statute. North Dakota's statute provides that if the court finds "credible evidence that domestic violence has occurred," there is "a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded residential responsibility for the child." The state has set the standard to rebut the presumption particularly high, legislating that the presumption may be overcome "only by clear and convincing evidence that the best interests of the child require that [the abusive] parent have residential

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89 Id.
91 1990 Minn. Laws 2123-43.
92 Id.
93 1991 N.D. Laws 413.
94 Id.
responsibility." Oklahoma followed closely behind Minnesota and North Dakota, approving its rebuttable presumption statute on April 25, 1991. Other states including Delaware, Florida, Idaho, and Louisiana created their own rebuttable presumption statutes soon thereafter.

a. Burden of Proof: Rebuttable Presumption Rarely Raised in Florida

Florida’s rebuttable presumption statute requires evidence of a felony conviction before being raised. The burden of proof is so high that it is rarely invoked. In the first appellate case decided after the statute was enacted in 1995, the court upheld the trial court order transferring primary custody from the mother to father in spite of his conviction and imprisonment for murdering his first wife. In that case, the court noted its concerns about the mother’s sexual orientation and its potential affect on the child who had “displayed inappropriate sexual behavior.” Since the newly enacted statute was not raised at trial and the mother’s argument on appeal was based on reversible error as opposed to fundamental error, the appellate court rejected the mother’s request to invoke the presumption. Instead, it concluded that even if the presumption had been properly invoked, the father’s subsequent marriage, stable employment, and property ownership effectively amounted to a rebuttal.

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95 N.D. Cent. Code § 14-09-06.2(j) (2009) (stating, “the presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent have residential responsibility.”).
101 As of 2012, Florida’s presumption statute had resulted in only four appellate decisions. See generally, Lemon, supra note 25 at 642; Burke v. Watterson, 713 So. 2d 1094-95 (Fla. Dist. Ct. App. 1998) (preemption triggered after father was convicted of killing the mother and a custody battle ensued with maternal grandparents).
103 Id. at 252.
104 Id. at 255.

South Dakota’s presumption statute leaves open many unanswered questions, such as: how the presumption is to be rebutted and how the presumption should apply in the event that the court finds both parents have a history of domestic abuse.\textsuperscript{105} It was recently expanded to apply in cases where a parent has a history of abuse as opposed to having only a limited reach to cases where a parent had been convicted of domestic violence or assault against a household member.\textsuperscript{106} Despite these changes, the judiciary's lack of understanding of the dynamics of domestic abuse and what triggers its application continues to be a major weakness of the statute.\textsuperscript{107}

The South Dakota Supreme Court applied the presumption against custody in the 2009 case, \textit{Stavig v. Stavig}, in which the parents were previously married and had a son together.\textsuperscript{108} The divorced couple shared joint legal custody and "primary physical custody" was with mother. The father sought a modification of custody based on allegations that the mother had restricted his visitation and left the child in the care of an inappropriate guardian. A custody evaluation was ordered and the evaluator testified that the father’s completion of an anger management class overcame the party’s history of abuse (and the presumption). The court accepted this and awarded physical custody to the father.\textsuperscript{109} On appeal, the court found that mother’s allegations (e.g., vulgar language, incidents of pushing and shoving) did not constitute domestic abuse and the presumption should not have been triggered. Looking solely to the “best interests” test, the trial court’s orders were affirmed.

\textsuperscript{105} 1997 S.D. Sess. Laws 232; S.B. 209, 72d Leg. (S.D. 1997)
\textsuperscript{107} Lamprecht, \textit{supra} note 88 at 351.
\textsuperscript{108} 2009 SD 89, 774 N.W.2d 454.
\textsuperscript{109} \textit{Id.} at 458.
c. Definitional Problems: Narrowly Defined Presumptions in Iowa and Idaho

Enacted in 1995, Iowa’s presumption statute applies only to joint custody and requires the trial court to take into consideration whether there is a history of domestic violence when it is deciding how to award custody. If there is a history of violence, it outweighs all other factors in the custody determination.\(^{110}\) Yet, in *Marriage of Mulford* this legislative directive against custody to an abusive parent was undermined by the court’s failure to recognize domestic violence when the Iowa Court of Appeals upheld a trial court award of joint legal custody to the mother and father and physical custody to the father.\(^{111}\) The court found that the statutory presumption against custody to the abusive parent did not apply because both parents had requested joint legal custody.\(^{112}\) It characterized the documented incidents of violence following the party’s separation to be “aberration[s] due to the temporary stress of the breakdown of the marriage.”\(^{113}\)

In Idaho, family courts have minimized the effects of domestic violence by focusing on the absence of injuries as an indication that the violence is not significant and should not invoke the presumption. For example, in *King v. King*, the Idaho Supreme Court awarded joint legal custody, with the father receiving physical custody of the child after finding that the presumption against giving joint legal custody to a batterer did not apply because the father was not a “habitual perpetrator of domestic violence” as required to invoke the presumption.\(^{114}\) The court minimized incidences of violence as being due to the father’s mental illness, discounting numerous incidents of violence against the mother throughout marriage, and characterizing the

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\(^{112}\) *Id.*
\(^{113}\) *Id.*
\(^{114}\) 50 P.3d 453 (Idaho Ct. App. 2002).
parties’ relationship as merely “dysfunctional.” In the opinion by the Idaho Supreme Court, testimony was quoted from the trial that “[the mother] is not a good housekeeper . . . the house . . . was filthy, dirty dishes, dirty laundry, unmade beds, etc.,” and commented that, “the house was kept cleaner without Melissa's presence.” Ultimately, the Court affirmed the magistrate’s custody orders in favor of the father.

d. Competing Statutory Scheme: Friendly Parent Provision in Minnesota

In jurisdictions with a statutory presumption, a non-abusive parent may face the obstacle of underlying public policy values favoring the “friendly parent,” which often disfavors the victim of abuse. “Friendly parent” provisions focus mostly on the “unfriendly behaviors” of the custodial parent. These statutes and policies often work against battered women because their concerns about their own safety and/or contact between the child and the other parent are often interpreted as a lack of cooperation and thus the father is more likely to gain custody. For instance, a mother might refuse to give her address or consent to unsupervised visitation, or parents who raise concerns about child sexual abuse can be severely sanctioned through the loss of custody to the alleged offender, restricted visitation, and being told not to report further abuse or take the child to a therapist.

This occurred in Canning v. Wieckowski, when Minnesota Court of Appeal affirmed an order granting custody to a father in a case where each party alleged abuse by the other after

\[\text{\textsuperscript{115}} Id. at 458-59.\]
\[\text{\textsuperscript{116}} Id.\]
\[\text{\textsuperscript{117}} Id\]
\[\text{\textsuperscript{118}} \text{Morrill, supra note 3.}\]
\[\text{\textsuperscript{119}} \text{J. Zorza, “Friendly Parent” Provisions In Custody Determinations, 26 CLEARINGHOUSE REV., 921-925 (1992).}\]
\[\text{\textsuperscript{120}} Id.\]
\[\text{\textsuperscript{122}} \text{A. Neustein & M. Lesher, From Madness to Mutiny: Why Mothers are Running From the Family Courts—And What Can Be Done About It, 214 (Northeastern University Press, eds., 2005).}\]
finding that the father was the more “friendly parent” and more equipped to meet the interests of the child.\footnote{No. C4-98-1638, 1999 WL 118509, at *1-5 (Minn. Ct. App. Mar. 9, 1999).} Focusing on the best interest standard, the trial court appointed an evaluator who concluded that the father’s abuse towards the mother had no affect on the children, while the mother’s allegations appeared to be fabricated.\footnote{\textit{Id}. at *4 n. 5.}

III. Recommendations for California

Child custody decisions are driven by multiple factors -- state statutes, case law and the specific facts of a case.\footnote{Greenberg et al., \textit{supra} note 49 at 142.} Although statutory presumptions have become a common part of the decision making process in custody cases involving domestic violence, most jurisdictions have limited published appellate decisions available for guidance.\footnote{As of May 2014, basic searches on Westlaw Next and Lexis Advance for cases containing the terms “rebuttable presumption,” “domestic violence” and “custody” returned seven reported cases compared to 70+ unreported cases.} However, the cases that do exist (published and unpublished) suggest that the presumption and its rebuttal factors are often applied inconsistently due to ambiguous construction, definitional weaknesses, limited training and resources, and competing statutory provisions.\footnote{\textit{Lemon}, \textit{supra} note 25.} The following recommendations focus on addressing these major areas of concern in California.

1. Clarify Rebuttal Factors

Statutory presumptions should be amended to require greater judicial scrutiny in situations where an abusive parent seeks to rebut the presumption against custody. The cases outlined in the previous section illustrate some of the consequences of broadly defined rebuttal factors.\footnote{Relevant cases, \textit{supra} notes 58, 62, 80, 81 (California), 102 (Florida), 108 (South Dakota), 111 (Iowa), 114 (Idaho), and 125 (Minnesota).} To address these consequences, courts should look to resources in other areas of the law to increase the level of specificity for the criteria to determine when a factor has been
satisfied. For example, research shows that successful completion of a BIP does not alone reduce the risk of continued domestic violence.\textsuperscript{129} Thus, the Cal. Penal Code could provide guidance to judges to determining what constitutes “successful completion” of a Batterer’s Intervention Program (BIP) by incorporating mandatory monitoring of an abusive parent’s attitudinal changes to end violent behaviors and improve parenting skills before finding that the presumption has been rebutted.\textsuperscript{130} To ensure that completion of a BIP has addressed a batterer’s coercive and controlling behaviors, courts could impose an interdisciplinary assessment as an extended rebuttal requirement.\textsuperscript{131}

2. Address Definitional Weaknesses

Early research on domestic violence focused primarily on female victims and children fleeing from severely violent relationships in which the male perpetrator exhibited a pattern of controlling and physically violent behavior.\textsuperscript{132} Since then, definitions of domestic violence have evolved and increasingly focus on patterns of coercive conduct by one partner aimed at controlling the behavior of the other.\textsuperscript{133} While there is a general consensus that exposure to domestic violence can be harmful to children, there is less unanimity regarding the correlation between children’s distress and other behaviors that some states and scholars now include in their definition of domestic violence (e.g., assessing evidence of the harmful effects on children exposed to high levels of parental conflict).\textsuperscript{134} As a result, definitions of domestic violence are varied and non-uniform, both in the research and in statutes governing child custody decisions.

\begin{itemize}
\item \textsuperscript{129} D. G. Saunders, \textit{Interventions for men who batter: Do we know what works?} 2(3) \textit{INSESSION PSYCHOTHERAPY}, 81-94 (1996).
\item \textsuperscript{130} See generally, Cal. Penal Code section 1210. Pen.Code, §§ 1210, subd. (c), 1210.1, subd. (e).
\item \textsuperscript{131} Ver Steegh, \textit{supra} note 13 at 1427.
\item \textsuperscript{133} Greenberg et al., \textit{supra} note 49, at 155.
\item \textsuperscript{134} Id.
\end{itemize}
For example, some states have adopted statutes governing child custody decisions requiring a showing of physical injury or criminal conviction, while others allow for much broader definitions.135

A “one-size-fits-all” approach for defining domestic violence endangers children and victims because it ignores the need for appropriate court procedures and services tailored to specific patterns of abuse.136 Recent studies have highlighted a number of factors that may contribute to the impact of domestic violence on children, such as the nature of the events, ongoing parental conflict, preexisting mental health/resilience of the children and parents, systemic stressors, and access to treatment.137 To prioritize children’s safety over other factors in determining parenting plans and custody arrangements, statutes addressing custody in the context of domestic violence must define key terms such as “domestic violence,” “high conflict,” and “safety,” with greater specificity.138 Some commentators advocate for enhanced assessment of domestic violence “subtypes” to address broadly defined statutes promoting the mistaken view that domestic violence is a single phenomenon.139

3. Enhance Training for Judges and Attorneys

An enhanced ethical and training standard among judicial officers and mental health professionals is considered the best approach for improving results where training gaps exist.140

Even the most well written and comprehensive statutes are inadequate for solving the complex issues of custody cases involving domestic violence. Training for judges, mediators, custody

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135 Greenberg et al., supra note 49 at 155.
136 Ver Steegh, supra note 13 at 1379.
137 Austin, supra note 132.
138 Greenberg et al., supra note 49 at 156.
139 Ver Steegh, supra note 13 at 1385-87 (discussing the misidentification of “intimate terrorism” as “situational couple violence”).
140 Greenberg et al., supra note 49 at 151.
evaluators, family law attorneys, and guardians ad litem is necessary to specifically address the problems that informed the development of presumption statutes and criteria for how they should be rebutted.\textsuperscript{141}

Some states require initial and/or continuing domestic violence education for judges, custody evaluators, and mediators, which is essential to close the gap between professional standards and their implementation.\textsuperscript{142} A 1995 study on the effectiveness of presumption statutes reported that in judicial districts and states where there has been specialized training of the bar, “the ‘presumption’ has shaped judicial decision-making and has produced custody awards designed to safeguard children and abused parents.\textsuperscript{143} In fact, the positive changes that were anticipated in practice have been most noticeable in those jurisdictions where the courts and legal services programs developed specialized programs.”\textsuperscript{144} In one study, judges with domestic violence education and more knowledge of domestic violence were more likely to grant sole custody to abused mothers.\textsuperscript{145}

4. Increase Access to the Appellate Process

A review of unpublished cases suggests that trial courts often analyze the rebuttal factors inconsistently, and/or are reluctant to issue protective orders due to their implication on child custody.\textsuperscript{146} Appellate review is designed to correct problematic trial court decisions, and is a hallmark of our legal system. When litigants have no access to the appellate courts, this system

\textsuperscript{141} Lemon, supra note 25 at 616, 671-72.
\textsuperscript{142} Saunders, supra note 20.
\textsuperscript{143} Family Violence Project, supra note 14 at 222.
\textsuperscript{144} Id., at 221.
\textsuperscript{145} Morrill, supra note 3.
\textsuperscript{146} Relevant cases, supra notes 58, 62 and 80.
becomes ineffective.\textsuperscript{147} Typically, successful appellate cases that overturn trial court decisions regarding custody involving domestic violence involve parties who are represented by counsel.\textsuperscript{148} Low-income victims of domestic violence face financial obstacles to filing appeals when the family court awards custody to the abusive parent. For example, in California, an estimated 70 percent of the 200,000 divorce cases filed in California each year involve at least one self-represented litigant.\textsuperscript{149} Adequate legal aid resources are essential for representing litigants at the trial court level to raise the presumption issue appropriately and for appealing decisions that appear to be in violation of the statute. Attorneys with Legal Aid agencies who routinely represent victims at the trial court level must be adequately trained so that a foundation exists from which an appeal can be pursued when necessary.\textsuperscript{150}

5. Adopt a “Tiered” Approach to Visitation

Visitation is a highly important issue in domestic violence cases given that most abusive parents retain some level of contact with their children through visitation orders.\textsuperscript{151} Unsupervised contact with an abusive parent may result in continued acts of violence or psychological abuse to the custodial parent through patterns of domination and control.\textsuperscript{152} Thus, developing an appropriate visitation arrangement is essential to ensure the safety and promote the wellbeing of children in families with a history of domestic violence. Some commentators recommend a “tiered approach” beginning at a visitation center while the abusive parent engages

\textsuperscript{147} See generally, \textit{supra} note 33 (discussing limited availability of published opinions on California Family Code section 3044).
\textsuperscript{148} \textit{Lemon, supra} note 25 at 675-76
\textsuperscript{150} \textit{Id.} at 674.
\textsuperscript{151} Ver Steegh, \textit{supra} note 13, at 1408.
\textsuperscript{152} \textit{Id.} at 1408-11
in treatment, followed by community-based visitation with increased frequency and reduced supervision as the parent demonstrates appropriate and non-abusive behaviors.  

IV. Conclusion

 Judicial discretion is the “cornerstone of our family law system,” for which no generalized rule can adequately substitute. Family law judges are tasked with assessing “explosive [] issues in their rawest emotional form,” which is particularly challenging when issues of domestic violence are at play. Statutory presumptions give judges a tool to respond to these complex problems formulaically, with a simple answer of “yes” or “no.” However, a rebuttable presumption merely shifts the focus of a controversy and serves little purpose when drafted ambiguously, particularly when courts underestimate or dismiss the significance of domestic violence due to a lack of training. By clarifying key terms and increasing resources for education, training, and pro bono legal assistance, statutory guidelines can inform judicial discretion to determine custody arrangements that are truly in each child’s “best interest.”

153 American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.11(2); § 2.11(2) (a), (b). (2002); Ver Steegh, supra note 13 at 1405, 1411.
154 Greenberg et al., supra note 49 at 167.
155 Peter G. Jaffee et al., Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes, 54 JUV. & FAM. CT. 57, 58 (2003).
156 Greenberg et al., supra note 49 at 142.
157 Relevant cases, supra note 80.