WORKING TOWARDS THE WELFARE OF OUR CHILDREN: AN ARGUMENT FOR A REBUTTABLE PRESUMPTION AGAINST AWARDING ABUSERS CUSTODY AND OTHER NON-LEGISLATIVE PROPOSALS

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INTRODUCTION

Approximately 1.5 million women and 835,000 men are physically assaulted and/or raped by an intimate partner in the United States every year.[1] Adults,

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however, are not the only victims of domestic violence.[2] According to the National Crime Victimization Survey, children under twelve years of age witness over one half of the incidents of domestic abuse; this amounts to an estimated ten million children in the United States each year out of a population of seventy-seven million children.[3]

Children that witness domestic violence are more likely to have detrimental effects on their physical and mental well-being.[4] A study conducted in 2003 showed that children are more likely to intervene in an incident of domestic violence when they witness violence against a parent than when they do not, which places the child at risk of injury or death.[5] Another study in 2005 found that children exposed to domestic violence in their homes are more likely to become sick, with frequent headaches or stomachaches, lethargic, and tired.[6] Furthermore, children residing in places where domestic violence occurs suffer from abuse or neglect at rates ranging from 30% to 60%, taking into account both the exposure to domestic violence as well as other forms of abuse or neglect.[7]

In order to address domestic violence and the impact it has on their children, some victims seek to separate themselves from the abuser and obtain custody of their children by filing complaints in court. Although New York and almost every other state now takes domestic violence into account when deciding cases of child custody,[8] victims of domestic violence still face an uphill battle for a number of reasons. A battered parent can be manipulated into relinquishing custody when the parents separate.[9] Additionally, as scholars have recently concluded, "trial courts are granting custody to batterers 'more often than not.'"[10] This is partially due to findings that even when there is proof of violence, it does not rise to the "level of abuse established by the relevant statute," even when the standard of proof is at the lowest legal level, the preponderance of the evidence standard, as is the case in the State of New York.[11] Moreover, even if he or she successfully gains custody of the child or children, many abusers continue their violent behavior with and

through to its end.

[1] PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUST., EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, at iii (2000), http://www.ncjrs.gov/pdffiles1/nij/181867.pdf.

[2] PETER A. SHERMAN, DOMESTIC VIOLENCE AND CHILDREN, A CHILDREN'S HEALTH FUND REPORT, CHILDREN'S HEALTH FUND 2 (2001), http://www.childrenshealthfund.org/sites/default/files/publications/DomViolenceWP0101.pdf.

[3] *Id.*

[4] *Domestic Violence: Statistics & Facts*, SAFE HORIZON, http://www.safehorizon.org/page/domestic-violence-statistics--facts-52.html#sthash.hezX4wYu.dpuf (last visited Nov. 5, 2014).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *See* N.Y. DOM. REL. LAW § 240(1) (McKinney 2015).

[9] *See* NAOMI CAHN, HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 3, 11 (2011).

[10] *Id.*

[11] *Id.*

harassment against the victim, and abuse the children in order to punish the mother.[12]

In the last two decades, several states have become increasingly sensitive to the problems that victims of domestic violence encounter and twenty-three states, in addition to the District of Columbia, have included a rebuttable presumption against custody of children being granted to batterers/abusers in their domestic relations or domestic violence statutes.[13] One of these states, Delaware, only allows the court to consider granting partial or joint custody to an abuser if he or she successfully completes a program of evaluation and counseling (designed specifically for perpetrators of family violence) and alcohol or drug abuse counseling, if such counseling is appropriate; the abuser must also demonstrate that entrusting him or her with the custodial or residential responsibilities of the child affected is in the best interests of the child.[14] Such a provision allows the abuser an opportunity to play a greater role in the child's life while also taking into account the safety of the victim and child. New York State does not have a rebuttable presumption provision, but would benefit greatly from adding such a provision to its domestic relations statute,[15] using Delaware's statute as a model.

Aside from adding a statutory provision, other non-legislative remedies can also be implemented in order to help protect children from the harms of domestic violence while assisting victims in meeting the standard of proof for the occurrence of domestic violence. Mediation of child custody disputes might be helpful in certain circumstances, as it allows both parties to communicate in a cooperative way, rather than in an environment that might exacerbate the impact of an abusive relationship on the child, as the adversarial system often does.[16] To determine which cases are appropriate for mediation, however, uniform and systematic screening procedures should established.[17] This would require a joint investigative effort on part of attorneys, judges, mediators, and all others who are a part of the process.[18] In addition, to provide further insight into whether family violence has

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[12] *Id.*

[13] Alabama, Alaska, Arizona, Arkansas, California, Delaware, District of Columbia, Florida, Hawaii, Idaho, Iowa, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, and Wisconsin. *See* REBUTTABLE PRESUMPTION * STATES, RESOURCE CTR. ON DOMESTIC VIOLENCE, http://www.ncjfcj.org/sites/default/files/chart-rebuttble-presumption.pdf (last updated Dec. 2013) [hereinafter RCDV REBUTTABLE PRESUMPTION].

[14] DEL. CODE ANN. tit. 13, § 705A (West 2015).

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

[16] Susan L. Pollet, *Mediating Domestic Violence a Potentially Dangerous Tool*, 77 N.Y. ST. B.J. 42, 42 (2005).

[17] *See* Eduardo R.C. Capulong, *Family Mediation After* Hendershott*: The Case for Uniform Domestic Violence Screening and Opt-in Provision in Montana*, 74 MONT. L. REV. 273, 296 (2013); *see* Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L. Q. 53, 53 (2005).

[18] Capulong, *supra* note 17, at 296-97.

occurred in a given case, the court may ask the child—either through the child's testimony in open court, or an in camera inspection.[19] If one considers the advantages and disadvantages of both of these methods of questioning children, different techniques would be successful in different cases, each of which should be evaluated individually.

Part I of this Note provides a brief background on the definition of domestic violence in New York and what the state has accomplished on the legislative front in terms of taking domestic violence into account when making child custody determinations. Part II elaborates on the hurdles victims encounter in obtaining favorable custody determinations as a result of not having previously addressed the issue of domestic violence in a legal forum out of fear or embarrassment and lacking enough evidence to meet the preponderance standard, even when witnesses are available to testify. Part II also addresses the challenges victims face after the child custody determination has been made, in terms of filing an appeal or seeking modification of child custody.

In order to address these issues and work towards creating a safer environment for children involved in child custody litigation where domestic violence is a factor, Parts III and IV suggest legislative and non-legislative solutions. Part III argues for the implementation into the relevant New York statute of a rebuttable presumption against awarding abusers custody of their children, and uses the Delaware statute as a model while maintaining New York's preponderance of the evidence standard in order to prove the occurrence of domestic violence. Part IV focuses on non-legislative solutions for New York State in addressing evidentiary concerns that the preponderance standard poses to victims of domestic violence. Part IV also discusses using child custody meditation as an alternative forum to resolve custody disputes where domestic violence is at issue.

I. THE DEFINITION OF DOMESTIC VIOLENCE IN NEW YORK STATE AND LEGISLATIVE PROGRESS: SECTION 240 OF THE NEW YORK DOMESTIC RELATIONS LAW

A victim of domestic violence in the State of New York is defined as:

> [A]ny person over the age of sixteen, any married person or any parent accompanied by his or her minor child or children in situations in which such person or such person's child is a victim of an act which would constitute a violation of the penal law, including, but not limited to acts constituting disorderly conduct, harassment, aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, menacing, reckless endangerment, kidnapping, assault, attempted assault, attempted murder, criminal obstruction of breathing or blood circulation, or strangulation; and (i) such act or acts have resulted in actual physical or emotional injury or have created a substantial risk of physical or emotional

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[19] *See* LUCY S. MCGOUGH, CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM 18-19 (1994).

> harm to such person or such person's child; and (ii) such act or acts are or are alleged to have been committed by a family or household member.[20]

Although domestic violence cases are often litigated in criminal court, Article 8 of the Family Court Act establishes Family Court as an alternative venue for resolution of domestic violence and sexual abuse cases.[21] Section 812(1) of the Act states that Criminal and Family Court have concurrent jurisdiction over proceedings concerning acts such as disorderly conduct, harassment, and those that are sexual in nature, including forcible touching and sexual abuse.[22] In Family Court, these proceedings are called family offense proceedings, and their purpose is to protect victims of domestic violence by offering "a civil, non-criminal alternative to a criminal prosecution"[23] when family members commit certain criminal offenses.[24]

When a petition includes allegations involving one or more family offenses, the Family Court will hold a fact-finding hearing, whereby the petitioner has the burden of proving that the allegations occurred by a fair preponderance of the evidence.[25] In seeking to establish the claims in the petition, the petitioner can only use "competent, material and relevant evidence."[26] If the petitioner is able to prove that the respondent has committed a family offense, the court will then hold a dispositional hearing.[27] In a dispositional hearing, a broader standard of admissibility of evidence is available than at a fact-finding hearing; evidence may be submitted as long as it is "material and relevant."[28] This includes hearsay and other evidence that would otherwise not be admissible.[29] The Family Court can order the following remedies to a perpetrator or victim of a family offense: suspend judgment for up to six months, place respondents on probation for up to one year and require them to participate in an educational program, issue an order of protection, or order restitution.[30]

Once the occurrence of domestic violence has been proven beyond a preponderance of the evidence, the State of New York, along with almost every other state, now takes this into account when making child custody determinations.

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20 N.Y. SOC. SERV. LAW § 459-a(1) (McKinney 2015).

21 N.Y. FAM. CT. ACT § 812(1) (McKinney 2015).

22 Criminal and Family Court have concurrent jurisdiction over: "[A]ny proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law." *Id.*

23 V.C. v. H.C., 257 A.D.2d 27, 27 (N.Y. App. Div. 1999).

24 *Id.* at 31-32.

25 N.Y. FAM. CT. ACT § 832 (McKinney 2015).

26 *Id.* § 834.

27 *V.C.*, 257 A.D.2d at 31-32.

28 *Id.* at 32 (citing N.Y. FAM. CT. ACT § 834).

29 *Id.*

30 *Id.* (citing N.Y. FAM. CT. ACT § 841).

When making these decisions, as is the case in most other states, New York uses the "best interests of the child" standard, which states:

> In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court shall require verification of the status of any child of the marriage with respect to such child's custody and support, including any prior orders, and shall enter orders for custody and support as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child and subject to the provisions of subdivision one-c of this section.[31]

Case law has developed several factors that courts use to attempt to define the best interests of the child standard. Some courts have found that the best interests of the child lie in the ability to provide for the child's intellectual and emotional well-being, the quality of the environment in the residence, and in the guidance that the parents provide.[32] Other relevant factors in making custody determinations include each parent's conduct, stability, morality, lifestyle, professional achievements, and personal associations.[33] Another factor that can be taken into account is the past parental performance of the litigants.[34]

In 1996, the state legislature added domestic violence as a statutory best interest factor that the courts must consider, instead of a factor that courts may consider.[35] With respect to custody or a right of visitation with the child:

> By statute, DRL § 240 (subd. 1), the court is required to consider the effect of domestic violence upon the best interests of the child in determining custody or visitation. In order for domestic violence to be considered under the new statute, the party seeking to have the abuse considered must allege in a sworn pleading that the other party has committed an act of domestic violence against the complaining party or a member of his or her family or household. The allegation standing alone is not enough; the allegation must be proven by a preponderance of the evidence. But, even if the allegations are proven, the fact of the domestic violence is not, by itself, determinative of the custody question. [36]

Therefore, the statute clearly indicates that a party must allege that the opposing party committed an act of violence, as well as prove that such violence

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[31] N.Y. DOM. REL. LAW § 240(1) (McKinney 2015) (emphasis added).

[32] Louise E.S. v. W. Stephen S., 64 N.Y.2d 946 (1985).

[33] *See, e.g.*, Church v. Church, 238 A.D.2d 677 (N.Y. App. Div. 1997); Wallinger v. Wallinger, 96 A.D.2d 988 (N.Y. App. Div. 1983).

[34] Pawelski v. Buchholtz, 91 A.D.2d 1200 (N.Y. App. Div. 1983).

[35] N.Y. DOM. REL. LAW § 240(1) (McKinney 2015) (emphasis added).

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

took place by a preponderance of the evidence standard.[37] Only then will the domestic violence be taken into account during a custody determination.[38]

Incorporating domestic violence into the "best interests" statute has enabled courts to consider the detrimental impact of domestic violence on children more seriously during custody litigation. For example, in *E.R. v. G.S.R*, the father filed a petition seeking custody of his four-year-old son, alleging that the mother was mentally ill.[39] In her response, also seeking custody of the son, the mother pointed out that she had had custody of the child since his birth, and that she had provided him with a stable home.[40] She also alleged that the father had committed acts of domestic violence against her, and the child had witnessed these acts on more than one occasion.[41] The Family Court heard testimony not only from the two parties, but also from the petitioner's mother, step-father, and former wife, the respondent's mother, two of the respondent's friends, her fiancé, and the therapist for one of her other children.[42] Ultimately, the father admitted to slapping the mother three times on one occasion, throwing food at her on another occasion, and destroying the dining room set in their home with a baseball bat on a third occasion, in the presence of the child.[43]

The Family Court found that the respondent had established the alleged domestic violence in her petition by a preponderance of the evidence.[44] Therefore, the court factored the events of domestic violence into its custody determination, along with competence of the mother as a parent.[45] The court noted that although the mother endured a violent and unstable familial environment for most of her life, there was no evidence presented to establish her unfitness as a parent.[46] Furthermore, the petitioner failed to provide any assurance that such incidents would not recur, and that he had taken any affirmative steps towards the treatment of his volatile temperament.[47] Consequently, the court held that based on the above factors, it would be in the best interests of the child to be placed in the mother's care and custody.[48]

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[37] *Id.*
[38] *Id.*
[39] E.R. v. G.S.R., 170 Misc. 2d 659, 661 (N.Y. Fam. Ct. 1996).
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* at 667.
[45] *Id.*
[46] *Id.* at 666.
[47] *Id.* at 667.
[48] *Id.*

II. IS THERE ROOM FOR IMPROVEMENT?

Despite the amendment to the statute, perpetrators of domestic violence are still able to benefit from custody litigation in courts.[49] For example, even though domestic violence victims in New York City can secure orders of protection against the fathers of their children, in cases where victims withdraw their petitions for orders of protection, the abusive fathers' custody petitions are often granted.[50] Courts have recognized that withdrawing petitions for orders of protection is a fairly common practice for several victims, in part because they "repeated[ly] grant. . .forgiveness to the abuser" or are exploited by him or her in a number of other ways.[51] Withdrawal of one's application to seek an order of protection certainly has a detrimental impact on the cases of victims who seek to gain custody of their children, as it taints their credibility as victims of domestic violence.[52]

Further, it oftentimes becomes virtually impossible in custody litigation for a potential victim to prove that domestic violence occurred by a preponderance of the evidence due to a dearth of evidence.[53] On occasion, victims will present evidence that the abuser has already been convicted for an act of domestic violence, which would certainly place the custody determination in their favor.[54] These cases, however, are extremely rare since even in criminal court, the issue of a lack of evidence in such cases exists.[55] A study of domestic violence across Rhode Island in 2002, based on 6,200 police incident reports involving adult victims under the age of 50, found the following evidence reported in cases: victim photos (in 17% of cases), crime scene photos (16%), suspect photos (3%), physical evidence (8%) and weapons collected (11%), medical reports (9.4%), witnesses' interviews (37%: adults 24%, children 12%), suspect statements (18%) and signed victim statements (53%).[56] The Rhode Island Data is not unique.[57] In another study conducted in Mecklenburg, North Carolina, researchers determined that presentation of physical evidence was rare:

> Photos were available in only 15 percent of the cases submitted by patrol officers and only 30.5 percent of cases submitted by the police department's specialized domestic violence unit. Medical evidence was

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[49] *See generally* CAHN, *supra* note 9.

[50] *See* Leora N. Rosen, & Chris S. O'Sullivan, *Outcomes of Custody and Visitation Petitions When Fathers Are Restrained by Protection Orders: The Case of the New York Family Courts*, 11 VIOLENCE AGAINST WOMEN 1054, 1054 (2005).

[51] People v. Santiago, No. 2725-02, 2003 WL 21507176, at *37 (N.Y. Sup. Ct. Apr. 7, 2003).

[52] *See id.*

[53] *See* Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 44 (2000).

[54] *Id.*

[55] NAT'L INST. OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS, AND JUDGES 42 (2009), http://www.nij.gov/topics/crime/intimate-partner-violence/practical-implications-research/ch6/Pages/available-evidence.aspx#.

[56] *Id.*

[57] *Id.*

> available in less than 10 percent of the patrol cases and 34 percent of the special-unit cases, which selected out the more serious cases such as those involving injuries.[58]

Given the fact that most domestic violence incidents occur in private, it is not surprising that witnesses are available in only a small percentage of cases.[59] Oftentimes, the only evidence available to a court regarding the domestic violence is the testimony of the two parties.[60] *E.R. v. G.S.R.* is, therefore, an atypical case, in that the respondent was able to provide the testimony of several witnesses to the domestic violence.[61] The fact that the father admitted to committing acts of domestic violence in the presence of the child was another uncommon element of the case. This fact makes it easier for the mother to establish that domestic violence had occurred upon a preponderance of the evidence.[62]

In *Pierre-Paul v. Boursiquot*, a more typical case, the mother appealed an award of sole custody of her children to the father in a divorce action. [63] In order to determine the best interests of the children, the trial court considered the original placement of the child, the length of that placement, and the relative fitness of both of the parents.[64] The mother argued that the court failed to consider her allegations of domestic violence.[65] The appellate court affirmed the lower court's decision, finding that the mother failed to prove her allegations by a preponderance of the evidence.[66] The appellate court noted that the father denied the mother's allegations, and that the lower court found the father's testimony more credible, thus there was no basis for disturbing the lower court's ruling.[67] This case illustrates the difficult position in which victims of domestic violence are placed when the only evidence they have, to prove that a family offense took place, is their testimony.

Other evidentiary issues arise during the course of custody litigation when victims attempt to prove the occurrence of domestic violence. Incidences of abuse are often exposed for the first time during custody litigation, which begs the question; why did the victim not escape her abuser or file a police report prior to this?[68] In addition, even if the subject child initially made a statement corroborating that domestic violence had occurred, it is not uncommon for the

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[58] *Id.*

[59] *Id.*

[60] *See id.*

[61] E.R. v. G.S.R., 170 Misc. 2d 659, 665 (N.Y. Fam. Ct. 1996).

[62] *Id.* at 667.

[63] Pierre-Paul v. Boursiquot, 74 A.D.3d 935, 936 (N.Y. App. Div. 2010).

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] Aiken & Murphy, *supra* note 53, at 50.

subject child to later recant his or her statement out of guilt or fear.[69] The following case illustrates both of these issues.

In *Williams v. Williams*, [70] the mother of two children appealed an order of temporary custody to the father, arguing that the trial court did not give weight to her allegation of domestic violence against the father and thus, the court's decision lacked a sound and substantial basis in the record. Specifically, the mother testified that the father mentally abused her and had shaken and sexually abused their daughter.[71] The appellate court reasoned that the lower court should have considered the following factors while making its custody determination: "how the decision would impact the child[ren]'s stability, the home environment of both parents, 'each parent's willingness to foster a relationship with the other parent, and their past performance and ability to provide for the [children's] overall well-being.'"[72] The children had been residing with their father since 2006 and seemed to be in good health.[73] The court further noted that the mother never filed a police report, nor did she begin a Family Court proceeding against the father, and that the daughter had recanted any allegations of physical abuse that she had made against her father.[74] Based on these facts, the court held that the mother's claims of domestic violence were not established by a preponderance of the evidence, and the Supreme Court correctly declined to consider them in its custody assessment.[75]

Some of the issues above can be explained by the fact that victims are often dis-incentivized to file petitions against their abusers out of fear and humiliation, and find themselves hard-pressed in such situations due to the manipulative and exploitive tactics of their abusers.[76] Indeed, many victims are stuck in a cycle of abuse, where learned helplessness, or a paralyzing fear of their abusers, is perpetuated.[77] Even when they testify, victims of domestic violence are often not believed, or their testimony is left unacknowledged by the court.[78] Despite changes in legal and popular conceptions of domestic violence, judges and juries continue to discount testimony of victims regarding abuse.[79]

To help remedy these situations, courts have become more predisposed to allowing experts to facilitate custody determinations.[80] Their testimony offers insight into the current and potential effects that residing in a domestic violence household has on children's physical, psychological, cognitive and emotional

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[69] Williams v. Williams, 78 A.D.3d 1256, 1258 (N.Y. App. Div. 2010).

[70] *Id.* at 1257.

[71] *Id.*

[72] *Id.* (quoting Clupper v. Clupper, 56 A.D.3d 1064, 1065-66 (N.Y. App. Div. 2008)).

[73] *Id.* at 1258.

[74] *Id.* at 1257-58.

[75] *Id.* at 1258.

[76] People v. Santiago, No. 2725-02, 2003 WL 21507176, at *37 (N.Y. Sup. Ct. Apr. 7, 2003).

[77] People v. Torres, 128 Misc. 2d 129, 132-33 (N.Y. Sup. Ct. 1985).

[78] Aiken & Murphy, *supra* note 53, at 44.

[79] *Id.*

[80] *Id.* at 50.

functioning.[81] However, as useful as experts can be, they have to cross the hurdle of having their testimony admitted, which can be costly and impractical.[82] The summary nature of order of protection hearings, for instance, renders calling an expert unlikely even if the victim could afford an expert.[83]

A. The Best Interests Standard

Section 240 of the New York Domestic Relations Law poses several challenges to victims of domestic violence, ranging from facing difficulties filing a petition for custody or an order of protection to being unable to prove, by a preponderance of the evidence, that domestic violence occurred.[84] The "best interests of the child" standard presents another subset of hurdles to victims. Pursuant to this standard, the trial judge has a great deal of discretion in selecting which factors to consider when making custody determinations.[85]

> The statutory mandate for custody determinations is deliberately broad, enabling the court to approach and decide each individual case on its own facts and to tailor the decision to justly fit the particular circumstances. The court acts as parens patriae to do what is best for the child. The court is to place itself in the position of a "wise, affectionate, and careful" parent and make provision for the child accordingly.[86]

The standard offers judges little guidance in making custody determinations, and simultaneously grants judges discretion to decide on the weight of each relevant factor in a given proceeding for custody determination.[87] Oftentimes, the judge lacks all of the facts necessary to make an informed decision—especially when the only evidence available is the testimony of the parties.

B. Options After the Initial Order of Custody

If a victim has failed to prove that domestic violence occurred, even if he or she files a petition to modify the trial court's decision, seeking modification of custody is difficult; section 240 of the New York Domestic Relations Law sets a high bar for changes in custody, and the statute mandates that custody be established on a long term basis whenever possible.[88] Therefore, any requested changes to a custody arrangement can be made only if there is a sufficient change in circumstances that demonstrates a real change is needed in order to ensure the

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[81] *Id.* at 50-51.

[82] *Id.* at 52.

[83] *Id.*

[84] *See* N.Y. DOM. REL. LAW § 240 (McKinney 2015).

[85] Duffy Dillon, *Child Custody and the Developmentally Disabled Parent*, 2000 WIS. L. REV. 127, 147 (2000).

[86] Finlay v. Finlay, 240 N.Y. 429 (1925).

[87] Dillon, *supra* note 85, at 134.

[88] *See* N.Y. DOM. REL. LAW § 240.

welfare of the child.[89] Even if a parent were able to show a sufficient change in circumstances, he or she would still have to prove that it would be in the best interests of the child for the parent to have custody of the child, or that "modification of custody is required."[90] In the case of a victim's decision to appeal, appellate courts are generally reluctant to substitute their own evaluation of factors selected by the trial court in determining custody and treat lower court decisions with a high degree of deference.[91]

For example, in *State ex. rel. H.K. v. M.S.* the father initially sought joint custody of the child, but then brought a writ of habeas corpus seeking sole custody of his son. [92] At the end of the trial, the Supreme Court denied the father's petition, dismissed the writ of habeas corpus, awarded sole custody of the child to the mother, and ordered supervised visitation for the father.[93] The appellate court held that in custody matters such as these (especially where the same judge has presided over the case for about five years), "the findings of the trial court must be accorded great respect," as the decision turns on assessments of the credibility, character, and temperament of the parties.[94]

III. LEGISLATIVE SOLUTION—REBUTTABLE PRESUMPTION AGAINST AWARDING CUSTODY TO ABUSIVE PARENT

In order to address partially the issue of the safety and well-being of a child in the context of custody litigation, twenty-three states, in addition to the District of Columbia, have imbedded within their domestic relations or domestic violence statutes a rebuttable presumption against custody of children being granted to batterers or abusers.[95] These states have established different standards of proof that a perpetrator of domestic violence must meet in order to rebut this presumption.[96]

A. The Delaware Statute

Delaware has a particularly detailed statute that can provide a model for the State of New York in the context of custody determination. Pursuant to title 13 of the Delaware Code, section 705A:

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[89] Dintruff v. McGreevy, 34 N.Y.2d 887 (1974).

[90] N.Y. FAM. CT. ACT § 467(a) (McKinney 2015).

[91] *See, e.g.*, People *ex rel.* Portnoy v. Strasser, 303 N.Y. 539 (1952); State *ex rel.* H.K. v. M.S., 187 A.D.2d 50 (N.Y. App. Div. 1993), *see* Walden v. Walden, 112 A.D.2d 1035 (N.Y. App. Div. 1985).

[92] *State* ex rel. *H.K.*, 187 A.D.2d 50.

[93] *Id.* at 52.

[94] *Id.* at 52-53.

[95] These states are: Alabama, Alaska, Arizona, Arkansas, California, Delaware, District of Columbia, Florida, Hawaii, Idaho, Iowa, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, and Wisconsin. RCDV REBUTTABLE PRESUMPTION, *supra* note 13.

[96] *Id.*

> [T]here shall be a rebuttable presumption that no perpetrator of domestic violence shall be awarded sole or joint custody of any child . . .[and that] no child shall primarily reside with a perpetrator of domestic violence. The above presumption shall be overcome if there have been no further acts of domestic violence and the perpetrator of domestic violence has: (1) Successfully completed a program of evaluation and counseling designed specifically for perpetrators of family violence and conducted by a public or private agency or a certified mental health professional; and (2) Successfully completed a program of alcohol or drug abuse counseling if the Court determines that such counseling is appropriate; and (3) Demonstrated that giving custodial or residential responsibilities to the perpetrator of domestic violence is in the best interests of the child.[97]

In order to trigger this presumption in the state of Delaware, one of the parties must show that the other party is a perpetrator of domestic violence.[98]

> Perpetrator of domestic violence means any individual who has been convicted of committing any of the following criminal offenses in the State, or any comparable offense in another jurisdiction, against the child at issue in a custody or visitation proceeding, against the other parent of the child, or against any other adult or minor child living in the home: (1) Any felony level offense; (2) Assault in the third degree; (3) Reckless endangering in the second degree; (4) Reckless burning or exploding; (5) Unlawful imprisonment in the second degree; (6) Unlawful sexual contact in the third degree; or (7) Criminal contempt of Family Court protective order based on an assault or other physical abuse, threat of assault or other physical abuse or any other actions placing the petitioner in immediate risk or fear of bodily harm.[99]

Though this version of domestic violence is arguably more difficult to establish since it requires proof of an actual conviction, other states have adopted similar versions of the rebuttable presumption in their statutes and require the same standard of proof for domestic violence as New York does, albeit with broader definitions of domestic violence.[100] This Note proposes adopting Delaware's rebuttable presumption provision, while maintaining New York's standard of proof (preponderance of the evidence) for establishing the occurrence of domestic violence for the purposes of custody determination. Though the preponderance of the evidence standard poses evidentiary issues for domestic violence victims, as has been discussed above, it is still the lowest standard of proof that exists within the

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97 DEL. CODE ANN. tit. 13, § 705A (West 2015).

98 *See, e.g.*, Kuhn v. Danes, 821 A.2d 335 (Del. Fam. Ct. 2001).

99 DEL. CODE ANN. tit. 13, § 703A(b).

100 Another example of a broad statute is California's, where domestic violence must be established by a preponderance of the evidence and is defined as "intentionally or recklessly causing or attempting to cause bodily injury or sexual assault or placing a person in reasonable apprehension of imminent serious bodily injury to that person or another or engaging in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property or disturbing the peace of another." CAL. FAM. CODE § 3044(c) (West 2015).

justice system. Furthermore, in its next section, this Note provides suggestions on how to address these concerns.

B. The Delaware Statute Applied

The following case serves as an illustration of how the state of Delaware implements the rebuttable presumption. In *M.M. v. J.B.*, the mother (the petitioner) sought sole physical and legal custody of the children and alleged that the father had committed acts of domestic violence against her.[101] The mother met the standard of proof necessary to establish the father as a perpetrator of domestic violence, in part because he had a previous conviction in which the father stalked the mother when he placed a GPS tracker on the mother's vehicle.[102] It was also during the 2009 hearing for stalking that the mother received temporary custody of the children and the father was ordered not to commit any acts of abuse against the petitioner or children residing in the petitioner's household.[103] During a subsequent hearing, the court found that the father had not overcome the presumption against awarding custody or primary residential placement to a perpetrator of domestic violence because he had engaged in subsequent acts of domestic violence.[104] He had, for example, sent text messages to his five-year old's cell phone that included statements such as "inconsiderate little bitch."[105] The court further noted that the father did not complete a program of evaluation and counseling designed specifically for perpetrators of family violence.[106] Even though the father submitted a certificate of completion of a parenting class for families with domestic violence issues, the program did not constitute domestic violence intervention counseling because it was, instead, a class for divorcing parents with a domestic violence component.[107]

To determine the best interests of the child, the court considered the incidents of domestic violence, as well as factors related to the children's familial relationships and the children's adjustment to home and school.[108] The court ultimately awarded the mother with sole legal custody and primary residency.[109] In reaching its decision, the court was concerned that the father refused to acknowledge the harmful impact of his actions on the children and ordered him to complete a certified program of domestic violence counseling.[110] Only after

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[101] M.M. v. J.B., No. CN08-05322, 2010 WL 1200329, at *1 (Del. Fam. Ct. Jan. 12, 2010).
[102] *Id.* at *2.
[103] *Id.* at *1.
[104] *Id.* at *2.
[105] *Id.*
[106] *Id.* at *3.
[107] *Id.*
[108] *Id.* at *8.
[109] *Id.*
[110] *Id.*

completing such a program would the father's weekend visitation be extended to include overnight stays.[111]

The use of the rebuttable presumption would certainly increase, if not ensure, the safety and well-being of children in child custody determinations. In *M.M. v. J.B.*, the mother was awarded temporary custody as result of the presumption, among other things. This provided the children with a safe home and adequate care while allowing the father an opportunity to reform his abusive behavior. When the father demonstrated that he had not complied with the stipulations of the statute, the court ordered that the mother maintain sole legal custody. The presumption within the statute, however, allowed for the father to obtain partial physical custody of the children if he were to refrain from abusive acts against the mother and minor children and complete the counseling program. In this way, the court strictly enforced reform, thus maintaining a balance between promoting the welfare and safety of the children, while providing the parent with a fair chance to bond with his children in the future, if he chooses to take responsibility for his actions in the present.

It should be noted that incorporating such a rebuttable presumption into Section 240 of New York's Domestic Relations Statute would not solve certain threshold problems victims currently face in meeting the standard of proof for establishing domestic violence, which would be the proposed standard for triggering this presumption.[112] Furthermore, the presumption could potentially increase the number of unfounded allegations of spousal abuse in custody proceedings.[113] It also does not take into account the rare cases where parents use self-defense against violent children who may suffer from psychological or behavioral issues.[114] Such concerns should be addressed by the legislature when incorporating the presumption into New York's Domestic Relations Statute. This Note provides a starting point in the following section.

IV. NON-LEGISLATIVE SOLUTIONS

A. Mediation of Family Disputes Involving Domestic Violence

Apart from passing legislation to promote the well-being of children in custody disputes involving domestic violence, New York State can commit to additional methods, such as mediation of child custody.[115] Since proving domestic violence through a preponderance of the evidence during custody disputes can be difficult, if not impossible for victim parents, mediation can serve as a healthy

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[111] *Id.*

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

[113] *Id.* at 1372.

[114] *Id.* at 1374.

[115] Pollet, *supra* note 16, at 42.

alternative. Mediation can be defined as a form of negotiation in which the parties use a neutral third party, or mediator, to assist them in forming a voluntary settlement.[116] If, however, the parties do not arrive at a consensus through mutual agreement, the mediator is not authorized to impose a decision on the parties.[117]

Though it has been conceded that there are settings where mediation is inappropriate, proponents of mediation acknowledge that there is a "continuum" of family violence, ranging from "pervasive abuse to occasional violence."[118] Proponents have thus argued that mediation can be implemented effectively to resolve custody disputes for at least a percentage of people whose lives have been affected by domestic violence, most often those who have been involved in occasional, rather than pervasive, violence.[119] Furthermore, effective mediators can restore a balance of power where there is an imbalance because of domestic violence.[120] Mediation would also serve as a better alternative than the litigation route, for many cases. Mediation promotes an environment that welcomes compromise and cooperation, rather than the trial environment that might exacerbate the impact of an abusive relationship on the child, in part because of the adversarial and time-consuming nature, and expense of trials.[121]

Those who question the efficacy of using mediation in this context point to some noteworthy drawbacks to mediation.[122] For instance, some scholars suggest that the success of mediation is premised on the equal balance of power between two parties, and that even the most skilled mediator will not be able to compensate for the disparity in power where domestic violence is concerned.[123] In the most pervasive cases, the unequal positions of abuser and victim have raised concerns about the effectiveness and safety of mediation.[124] Part of the reason for this is that mediation requires joint decision-making, the basis of which is honesty, a desire to settle the dispute, and the potential willingness to compromise; these characteristics are lacking in a relationship involving domestic violence.[125] For example, abusers often blame the victim and refuse to accept responsibility for their violence and its impact on the family unit.[126] At the same time, victims are often reluctant to disagree with the abuser and may fear punishment from the batterer if they address

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[116] Sarah Krieger, *The Dangers of Mediation in Domestic Violence*, 8 CARDOZO WOMEN'S L.J. 235, 242 (2002).

[117] *Id.*

[118] Rene L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. DISP. RESOL. 95, 100-01 (2001).

[119] *Id.*

[120] *See* Pollet, *supra* note 16, at 42.

[121] *Id.*

[122] *Id.* at 43.

[123] Rimelspach, *supra* note 118, at 101.

[124] Pollet, *supra* note 16, at 42.

[125] *Id.* at 42-43.

[126] Lois Schwaeber, *Domestic Violence: The Special Challenge in Custody and Visitation Dispute Resolution*, 10 DIVORCE LITIG. 141, 160 (1998).

the issue of violence.[127] Critics further assert that mediation can put victims at risk since the most dangerous time for a battered woman is when she separates from the abuser.[128] Lastly, there is a concern that the mediator may not be insightful enough to pick up on the occurrence of domestic violence, since it is often difficult to detect.[129]

Taking into account both the advantages and disadvantages of using mediation to resolve custody disputes within the domestic violence context, some states have chosen to implement some form of mediation for domestic disputes, and a minority of states mandate mediation.[130] Pace Women's Justice Center sponsored a program entitled, "Domestic Violence and Responsible Mediation: A Critical Look at Screening and Safety."[131] Participants in this program included lawyers, judges, mediators, and members of the domestic violence prevention community.[132] These participants unanimously agreed that mediation should not be used in situations where persistent, ongoing, and violent abuse is concerned.[133] That being said, some participants concluded that mediation can be effective in certain situations involving domestic violence, but must be screened in order to determine where and when mediation is appropriate and employ safeguards.[134] Some services utilize safeguards such as having the parties sit in different rooms during mediation, assuring that attorneys are present with each client during each session, formulating a safety plan for parties upon the end of mediation, using mediators of only the utmost experience in the field, and performing more intensive follow-up of the enforcement of agreements reached.[135]

Critics of implementing screening argue that screening for domestic violence in mediation of child custody is poor and that there is an absence of legislative mandates for mediator training.[136] Further, for a party who has never had therapy, this might be a necessary component to begin mediation, even in a case where mediation would be appropriate.[137] Thus, the domestic violence community, mediators, attorneys, and courts must work together to come up with the proper protocol and rules for screening to determine whether mediation would be an appropriate fit for resolution of custody cases.

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[127] *Id.* at 160.

[128] Rimelspach, *supra* note 118, at 99-100.

[129] Pollet, *supra* note 16, at 42-43 (citing DOMESTIC VIOLENCE SCREENING TRAINING CURRICULUM, POLICY OF NEW YORK STATE'S UNIFIED COURT SYSTEM, OFFICE OF ADR PROGRAMS, CDRC PROGRAM MANUAL, GUIDELINE II, ch. 4, pt. 4.030).

[130] California took the lead in 1981 by becoming the first state to make mediation of child custody and visitation disputes mandatory. Pollet, *supra* note 16, at 42-43.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.* at 44.

[136] *Id.*

[137] *Id.*

As has been stated, practitioners, scholars, and advocates are in support of implementing a systematic screening process in order to select family situations ripe for mediation of child custody.[138] The Model Standards of Practice for Family and Divorce Mediation, the result of collaboration between the family law section of the American Bar Association, the Association of Family and Conciliation Courts, and American Law Institute, make screening mandatory.[139] These and other standards do not, however, recommend a specific screening tool or method.[140] In his law review article, Eduardo R.C. Capulong discusses a basic screening process for the state of Montana through a combination of common procedures, which the State of New York could use as a model to implement its own screening process.[141]

First, a screening process must be pervasive in that screening for domestic violence should be the responsibility of all members involved: lawyers, judges, the court, program directors, mediators, the parties, court clerks, law enforcement, volunteers, and others.[142] These individuals must collaborate in order to detect and address domestic violence.[143] Furthermore, court personnel, attorneys, judges, mediators, settlement masters, and advocates must take primary investigatory responsibility, particularly since domestic violence is underreported.[144] Indeed, many victims of domestic violence are ashamed of abuse and do not acknowledge, or sometimes even comprehend, that they are, in fact, victims.[145]

Secondly, the screening must be conducted in order to detect a pattern of coercive controlling violence.[146] Though mediation of child custody has often been discouraged in family situations where persistent and violent abuse is present, mediation seems to be accepted by many institutions, advocates, and courts when violence between the couple is situational (which encompasses a vast majority of cases) or a result of poor conflict-management skills.[147] These advocates and courts throughout the country have established and currently use various screening methods that measure coercive control.[148]

One example of a screening method is the Mediator's Assessment of Safety Issues and Concerns ("MASIC") model, developed by Amy Holtzworth-Munroe, Connie J.A. Beck, and Amy G. Applegate.[149] Among other noteworthy features,

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[138] *Id.* at 42-43.

[139] Capulong, *supra* note 17, at 296; *see* Murphy & Rubinson, *supra* note 17, at 53.

[140] Capulong, *supra* note 17, at 296.

[141] *Id.*

[142] *Id.* at 296-97.

[143] *Id.*

[144] Lydia Belzer, *Domestic Abuse and Divorce Mediation: Suggestions for a Safer Process*, 5 LOY. J. PUB. INT. L. 37, 55-57 (2003).

[145] Capulong, *supra* note 17, at 297.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] Amy Holtzworth-Munroe, Connie Beck & Amy Applegate, *The Mediator's Assessment of*

"the MASIC combines strengths of various instruments, providing for behaviorally and temporally specific questions, personal interviews of both parties, sensitivity to *pro se* parties, the assessment of multiple types of domestic violence, and options for the mediator's consideration."[150] In addition to the substantive questions recommended by the various instruments used by MASIC, experts suggest the use of multiple methods, including a standardized questionnaire and confidential interviews of the parties, which are to be conducted separately.[151] The use of multiple methods increases the probability that users will detect a pattern of coercive control if this type of domestic violence exists within the family.[152]

To supplement the MASIC and create a thorough screening process, four additional measures can be implemented. One such measure would be to have advocates, attorneys, family law self-help centers, and others begin reviewing records prior to a party's filing of a petition.[153] These individuals would be in charge of searching for signs of abuse and would advise victims to report this abuse to the court.[154] After a petition for dissolution or a parenting plan is filed, court staff should review the pleadings and perform a criminal and civil records check to determine whether the parties are or have been involved in proceedings related to domestic violence; such proceedings can include an application for an order of protection or prior or pending cases of child abuse and neglect.[155] The court should also investigate any forms it comes across to determine whether there is any reason to suspect abuse. [156] If the court thereafter determines that there is no reason to suspect domestic abuse, it may then offer mediation services for custody determination.

If, however, the court determines there is reason to suspect domestic abuse after conducting a review of the record, the court should perform a second level of review to confirm the initial finding.[157] This would entail retaining the services of a trained domestic violence advocate who would administer a written questionnaire and conduct personal interviews.[158] These screening tools should involve questions that are specific to the behavior of each party because general questions about assault or victimization have been found to be too invasive to detect violence.[159] As has been mentioned, the parties should also be interviewed

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Safety Issues and Concerns: A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain, 48 FAM. CT. REV. 646, 646 (2010).

[150] Capulong, *supra* note 17, at 298.

[151] *Id.* at 299.

[152] *Id.*

[153] *See* Murphy & Rubinson, *supra* note 17, at 67-69.

[154] Capulong, *supra* note 17, at 299.

[155] *Id.*

[156] *Id.* at 300.

[157] *Id.*

[158] *Id.*

[159] Holtzworth-Munroe, Beck & Applegate, *supra* note 149, at 646; Robin H. Ballard, Amy Holtzworth-Munroe & Amy Applegate, *Detecting Intimate Partner Abuse in Family and Divorce Mediation: A Randomized Trial of Intimate Partner Violence Screening*, 17 PSYCHOL. PUB. POL'Y

separately so as to obtain the most honest answers possible. During the course of the interview, third-party advocates should be allowed to participate in order to encourage openness.[160]

A third measure would be to conduct a case-by-case assessment to determine which of the five levels of domestic violence the family situation falls into: (1) coercive, controlling violence; (2) situational couple violence; (3) self-defense; (4) separation-instigated violence; and (5) mutual violent control.[161] Cases involving coercive, controlling violence would not be appropriate for mediation, while cases involving situational couple violence would most likely be well suited for mediation.[162] Additionally, couples that resort to violence due to their lack of conflict-management skills would benefit a great deal from mediation since it models peaceful conflict resolution by its very nature.[163]

The fourth and last measure is specific to the mediator.[164] Mediation provides significant insight into the couple's relational dynamics, so mediators are in a unique position to pick up on domestic abuse.[165] The mediator thus has a continuing responsibility to screen for indications of such behavior throughout the entire mediation.[166] Given that the entire screening process proposed above requires lawyers, judges, and mediators to play a significant role in the detection of domestic violence, these individuals should be required to undertake and retake intensive training regarding domestic violence and its indicators.

The primary concern that would most likely arise given the above proposals is that such a thorough screening process would require extensive resources. For example, training and retraining professionals means that new personnel would need to be hired and volunteers would need to be recruited, in addition to greater judicial involvement during a time when court systems are overloaded in terms of time and funds.

B. Having Subject Children Testify or Serve as Witnesses and the Alternatives

Aside from mediating custody and visitation disputes involving domestic violence, and more on the litigation end, another means of addressing the problem of lack of evidence to prove domestic violence in custody cases would be to ask the subject child, who might serve as a witness to the alleged domestic violence. "It is [however] generally improper for children to be required to testify as witnesses in a custody case of which the children are the subject."[167] In *Casarotti v. Casarotti*,[168]

& L. 241, 243, 256-57 (2011) (Conflict Tactics Scale and Relationship Behavior Rating Scale).

[160] Capulong, *supra* note 17, at 300.

[161] *Id.*

[162] *Id.* at 300-01.

[163] *Id.* at 301.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] Hon. Lee H Elkins, Jane Fosbinder & Melissa Breger, N.Y. LAW OF DOMESTIC VIOLENCE §

the appellate court found that the Family Court had improperly required a child in a custody case to testify in open court. The issue had not been raised on appeal, though the appellate court found that the Family Court had abused its discretion "to put the child in this awkward position, notwithstanding that her wishes were already known to her parents, particularly considering the testimony that the mother attempted to influence the testimony of her children."[169]

Though having a child testify during a child custody case should not be required, modern social research has characterized children's testimony as reliable and useful, despite the legal system's skepticism about the utility of the testimony of child witnesses.[170] For instance, research shows that children cannot only testify effectively in court, but are more capable witnesses than most adults believe them to be.[171] In terms of memory, children retain and retrieve more information as they get older and so are less able to access distant experiences than are adults.[172] While it is true that developmental immaturity may make children less able to encode and retrieve information,[173] children can recall experiences accurately and describe them effectively in court.[174] Even very young children can accurately recall historical events, although they are not as proficient as adults in responding to open-ended questions.[175] As age decreases, children recall less information spontaneously and must be assisted in recalling what they know, though when cues and prompts are used to trigger retrieval, young children's memory improves substantially.[176]

In terms of conceptualizing, children may run into issues that affect testimony due to their developmental immaturity.[177] Young children appear to be more faithful to what they actually saw, heard, or smelled and less prone to make assumptions about details that might have been present.[178] It follows that children may have difficulty with questions that require them to make abstract inferences.[179] Children as young as four can provide reliable descriptive data about colors and

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4:15 (2015).

168 Casarotti v. Casarotti, 107 A.D.3d 1336 (N.Y. App. Div. 2013).

169 *Id.* at 785.

170 *See* MCGOUGH, *supra* note 19, at 18-19.

171 Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 285 (1999); *see* JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES (STUDIES IN LOGIC AND THE FOUNDATIONS OF MATHEMATICS) 353 n.149 (1994).

172 Goodmark, *supra* note 171, at 285.

173 *Id.*; *see* Julie A. Dale, *Ensuring Reliable Testimony from Child Witnesses in Sexual Abuse Cases: Applying Social Science Evidence to a New Fact-Finding Method*, 57 ALB. L. REV. 187, 190 (1993).

174 Goodmark, *supra* note 171, at 286.

175 *See* Jean Montoya, *Something Not so Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927, 955-56 (1993).

176 Goodmark, *supra* note 171, at 286.

177 *Id.* at 288.

178 *Id.* at 288-89; *see* MCGOUGH, *supra* note 19, at 37-38.

179 Goodmark, *supra* note 171, at 288.

basic object characterizations, but the ability to make time and distance categorizations only appears at least four years later.[180] Thus, social science research supports, for the most part, the position that children possess sufficient memory capacity to testify, particularly at eight years of age or older.[181]

Some of the more common issues with children testifying are suggestibility and dishonesty. Suggestibility is the tendency to accept and incorporate false or misleading information into one's memory.[182] Some research indicates that children are more suggestible than adults, although the scientific community has not come to a consensus on this issue.[183] By the time children turn ten to twelve years of age, however, they are no more suggestible than adults.[184] The manner in which one questions a child is the key to whether suggestibility will taint the child's memory.[185]

> The accuracy of a child's report decreases when the child is interviewed in leading or suggestive ways by investigators who are not open to considering theories other than those they seek to support through the interview. If the initial interview of the child is neutral, it helps to protect the child's memory against later suggestive interviews.[186]

It has been shown that it is more difficult to mislead children when the events in question are fresh in their memories than when they have faded.[187] Additionally, some children are not susceptible to suggestion.[188]

With respect to the issue of dishonesty, children can distinguish between reality and fantasy by the age of four.[189] At least as early as age six, children can and do lie when the motivation to lie is strong enough.[190] "Motivations to lie include avoiding punishment, gaining an otherwise unattainable material benefit, protecting themselves or others from harm, protecting friends from trouble, winning the admiration of others, avoiding awkward social situations, avoiding embarrassment, maintaining privacy, demonstrating authority, sustaining a game, or keeping a promise."[191] In addition to the problems of suggestibility and dishonesty, allowing a child to testify can pose a whole host of other problems, including emotional and psychological damage and placing the child in danger if

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[180] *Id.* at 288-89; *see* MCGOUGH, *supra* note 19, at 31.

[181] Goodmark, *supra* note 171, at 288.

[182] *Id.*

[183] *Id.*; *see* Lisa Maushel, *The Child Witness and the Presumption of Authenticity After* State v. Michaels, 26 SETON HALL L. REV. 685, 692-93 (1996).

[184] Goodmark, *supra* note 171, at 288.

[185] *Id.* at 289.

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *Id.* at 290; *see* MCGOUGH, *supra* note 19, at 40.

[190] Goodmark, *supra* note 171, at 290.

[191] *Id.*

the child testifies against an abusive parent and then is placed in the custody of or allowed unsupervised visitation with this parent.[192]

Therefore, rather than allowing a child to testify against a parent, the court will often exercise its discretion and conduct an in-camera interview with the child outside of the presence of the parties or the attorneys—this is referred to as a Lincoln hearing in custody cases.[193] In Casarotti[194] the appellate court found that rather than having had a child testify in open court, "'a Lincoln hearing would have limited the risk of harm and 'would have been far more informative and worthwhile than . . . an examination of the child under oath in open court.'"[195]

The court is not bound to conduct an in camera interview of a child in a custody case. For instance, in *David C. v. Laniece J.*, the appellate court held that the lower court's decision not to conduct an in camera hearing with the subject child did not constitute error.[196] It also held that it was sufficient that the child's attorney expressed the child's preference to live with the mother.[197] On the other hand, the appellate court in *Stramezzi v. Scozzari* reversed a ruling by the Family Court awarding custody to the father because the Family Court failed to hold a Lincoln hearing.[198] The appellate court found that without it, the evidence was insufficient based on the facts of the case and that it would not be able to make a fully informed decision as to the best interests of the child.[199] Similarly, in *Seeley v. Seeley*, the appellate court remanded a visitation issue to the lower court to consider whether a Lincoln hearing would be appropriate since the lower court's decision did not reflect that the child's wishes were either known to it or that it considered the child's wishes in making the visitation schedule.[200] In *Norback v. Norback*, the Court remanded the case to the lower court where, despite requests by the mother of the subject children and the children's lawyer, the Family Court refused to conduct a Lincoln hearing with the children, then nine and thirteen years of age.[201] The appellate court deemed the hearing necessary in order to determine their wishes and the reasons for their strained relationship with their father and held that without such information there is insufficient evidence to determine what, if any, modification to the prior order would be in the children's best interests.[202] Lastly, in *Yeager v. Yeager*, the appellate court remanded the case because it could

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[192] *Id.* at 291.

[193] Hon. Lee H Elkins, Jane Fosbinder & Melissa Breger, N.Y. LAW OF DOMESTIC VIOLENCE § 4:15 (2015).

[194] Casarotti v. Casarotti, 107 A.D.3d 1336, 1339 (N.Y. App. Div. 2013).

[195] *Id.*

[196] David C. v. Laniece J., 102 A.D.3d 542, 543 (N.Y. App. Div. 2013).

[197] *Id.*

[198] N.Y. LAW OF DOMESTIC VIOLENCE § 4:15 (citing Stramezzi v. Scozzari, 106 A.D.3d 748, 748 (N.Y. App. Div. 2013)).

[199] *Id.*

[200] *Id.* (citing Seeley v. Seeley, 119 A.D.3d 1164, 1164 (N.Y. App. Div. 2014)).

[201] *Id.* (citing Norback v. Norback, 114 A.D.3d 1036, 1036 (N.Y. App. Div. 2014)).

[202] *Id.*

not determine whether the lower court failed to consider the child's wishes or whether it considered the child's wishes but rejected them.[203] Therefore, it can be concluded that in New York, though Lincoln hearings are not required in custody cases, they should be conducted when there is a lack of evidence without such a hearing, the child's wishes are not indicated through any other means, or the child's wishes are pertinent to the case for some other reason.

To determine whether the court should conduct an in camera interview or allow the child to testify in court, a number of factors are to be considered. Children testifying in an open courtroom are more likely to claim that they have no knowledge of something about which they do have knowledge and are less likely to recall information than are children testifying in a private room outside of the presence of the abuser.[204] One study divided children into two groups: those who were interviewed in school and those who were interviewed in open court.[205] The children interviewed in court were more likely to provide incorrect information to leading questions, whereas the children interviewed at school made fewer errors in response to leading questions.[206] The children interviewed in court found their experience to be more stressful, and the more stressful the child perceived the setting, the fewer correct answers the child provided through free recall.[207]

Therefore, as has been discussed, these concerns regarding stress and a child's unwillingness to divulge information in front of his or her parents can be alleviated by conducting an in camera interview.[208] Many judges, however, are reluctant to interview children in private due to their lack of training in speaking with children in this capacity, the lack of time they have to interview the child, and the pressure they feel in deciding the custodial fate of the children.[209] To assuage some of these concerns, prior to the interview, "the court should delineate the subject matter of the interview and make the goal of the interview clear to counsel, the parties, and most importantly, the child. . . .The court should also articulate guidelines for evaluating the child's testimony."[210]

CONCLUSION

In 1996, the State of New York incorporated domestic violence into the list of factors courts take into account when making custody determinations. Despite this addition, perpetrators of domestic violence are awarded custody too often

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[203] Yeager v. Yeager, 110 A.D.3d 1207, 1207 (N.Y. App. Div. 2013).

[204] Goodmark, *supra* note 171, at 309.

[205] *See* Karen Saywitz & Rebecca Nathanson, *Children's Testimony and Their Perception of Stress In and Out of the Courtroom*, 17 CHILD ABUSE & NEGLECT 613, 619 (1993).

[206] *See id.*

[207] *See id.*

[208] *In Re* I.B., 631 A.2d 1225, 1232 n.12 (D.C. 1993).

[209] Goodmark, *supra* note 171, at 310.

[210] *Id.* at 311; *see* NANCY K.D. LEMON & PETER JAFFE, DOMESTIC VIOLENCE AND CHILDREN: RESOLVING CUSTODY AND VISITATION DISPUTES 82, 86 (1995).

either due to the lack of evidence to prove that the alleged acts took place by a preponderance of the evidence or because victims fear bringing an action against the perpetrator. The problem is exacerbated when trial judges have broad discretion in making custody determinations based on the best interests of the child standard, and do so without being well-informed about issues of domestic violence and its effects on the victims and children involved.

States such as Delaware have adopted a rebuttable presumption against granting custody to the perpetrators of domestic violence. In Delaware, in order to rebut this presumption, the noncustodial parent must meet certain standards, such as having successfully completed a program of evaluation and counseling designed specifically for perpetrators of family violence. This lessens the likelihood of abusers gaining custody without at least attempting to reform their behavior; however, even if, in order to trigger this presumption, the preponderance of the evidence standard is used as this Note proposes, the issue of proving domestic violence in the first place still remains.

To address the difficulty that victims have in proving the occurrence of domestic violence in child custody cases, the parties may make use of mediation in certain circumstances. To determine which cases are appropriate for mediation, screening procedures should be established, and there should be a collaborative investigative effort on part of attorneys, judges, mediators, and all those involved in the process. To provide further insight into whether or not family violence has occurred in a given case, the court may ask the child—either through the child's testimony in open court, or in camera interview. Taking the advantages and disadvantages of both methods into account, it would seem that different methods would be successful relative to the facts of the case. Thus, the State of New York, by implementing all of the above methods, both legislative and non-legislative, would create a safer environment for children involved in child custody cases.