Statutory Presumption of Domestic Batterers’ Unfitness as Parents: Lessons from Jordan v. Jordan

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This casenote analyzes the background and consequences 2011 D.C. Appellate Circuit decision of Jordan v. Jordan. This decision affirmed a lower court which found that though a statutory presumption of unfitness on the part of the father due to a finding of domestic violence, the presumption was rebutted and joint custody was awarded. The procedural elements of the statute and the decision are scrutinized, as well as how the decision comports with public policy and the legislative intent behind the statute.
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I. INTRODUCTION

Divorce cases are often extremely contentious, especially when child custody is in dispute. Joint custody and visitation rights force parents that may be particularly disinclined to deal with one another to maintain contact with one another. This is especially troubling in cases of alleged abuse of one parent against another, where courts must balance the parental rights of both the abuser and the victim, all while giving the greatest weight to the best interest of the child.¹ Despite the popular perception that custody hearings are biased toward mothers, the American Judges Association found that 70% of male batterers in child custody disputes succeed in obtaining sole or joint custody.²

To mitigate this alarming trend, many jurisdictions, including the District of Columbia,³ have adopted statutes that establish a “rebuttable presumption” that parents who abuse or abused their partners are unfit parents and to grant them custody would not be in the best interest of the child.⁴ The court in the recent case Jordan v. Jordan⁵ affirmed a lower court decision granting joint custody despite a finding of domestic violence.

² http://www.stopfamilyviolence.org/info/custody-abuse/statistics/rates-at-which-batterers-receive-custody
⁴ As of 2001, there are 20 states plus the District of Columbia that have adopted such statutes, with great variation of burdens of proof, definitions of domestic violence, the evidentiary standard to trigger the presumption, and what kinds of custody disputes the presumption may apply to. Nancy D.K. Lemon, Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They? 28 Wm. Mitchell L. Rev. 601, (2001).
abuse and a lack of specific findings of fact of how the presumption was overcome, holding the court below complied “substantially” with the statute. By only requiring substantial compliance from lower courts, the Jordan v. Jordan decision has undermined the legislative intent of protecting children’s development and non-violent parents’ safety and largely vitiated the judicial guidance the statute provides.

II. FACTS

Elena and David Jordan were married for 11 years prior to their separation and divorce. At the time of the divorce they had two daughters, both born of the marriage, E.J., born in 1999, and A.J., born in 2006. The court characterized the marriage as “tumultuous,” with frequent explosive arguments between the parties. E.J. gradually became “alienated” from her father, and would pressure her younger sister A.J. to ignore their father as well. During the custody proceeding, the court found that Mr. Jordan had committed two intrafamily offenses. The first was in July 2005, when he grabbed Ms. Jordan by her upper arms and shook her with enough force to leave bruises. The second was on August 3, 2008, when Mr. Jordan “put a dish towel around the back of [Ms. Jordan’s] neck while the parties argued face to face.” Testimony of other “incidents” was introduced, but the trial court found that these did not “fall within the definition of domestic violence in the District of Columbia.” However, the two interfamilial offenses Mr. Jordan was found to commit gave rise to a rebuttable

6 Id.
7 Id.
8 Id.
9 Id. at 1141.
10 Id.
11 Id.
12 Id.
13 Id. at 1142.
14 Id. at 1150.
presumption against him being a fit parent.\textsuperscript{15}

Mr. Jordan introduced a dearth of evidence to rebut the presumption, most notably the extensive testimony of Dr. William Zuckerman, a court-appointed licensed clinical psychologist tasked with conducting a custody evaluation.\textsuperscript{16} Dr. Zuckerman characterized Mr. Jordan’s violent episodes as “situational” and not indicative of a violent disposition.\textsuperscript{17} His findings were bolstered by similar testimony from Dr. Ruth Zitner, a psychologist who was conducted family reunification therapy with Mr. Jordan and E.J. Dr. Zuckerman also consulted two other psychologists and a licensed clinical social worker who worked with the family as a reunification specialist, all of whom stated that Mr. Jordan did not pose a danger to the children or had any abnormal difficulty in controlling his anger.\textsuperscript{18} Drawing upon his evaluation of Ms. Jordan and the daughters, Dr. Zuckerman found both parents to be fit parents and “strongly in E.J.’s best interests to redevelop a good relationship with her father.”\textsuperscript{19} The court found that, despite the findings of domestic violence and the presumption of unfitness, the evidence Mr. Jordan offered regarding his fitness overcame the presumption.\textsuperscript{20} Ms. Jordan appealed on the grounds that the trial court failed to make explicit, written findings as to how and why the presumption was overcome, as required by D.C. Code § 16-914.\textsuperscript{21}

III. LEGAL BACKGROUND

Traditionally, divorce courts made findings of “marital fault” on the part of one or both parties and would structure judgments, including child custody, with the goal of

\textsuperscript{15} Id. at 1142.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 1143.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id. at 1146.
punishing marital malfeasors.\textsuperscript{22} However, a fault existed with this system in that many couples that mutually desired for personal reasons found themselves confounded by arcane legal requirements for divorce. A consensus between the spouses that they would prefer to go their separate ways was not sufficient basis to give rise of the cause of action for divorce. To this end, many couples

In the late 1960s, many jurisdictions adopted “no-fault” divorce statutes, barring courts from considering marital wrongdoing in divorce proceeding, and instead structuring judgments along equitable lines and, notably, considering only the best interests of the child in custody determinations.\textsuperscript{23} Courts in such jurisdictions are statutorily barred from considering factors that do not directly affect the children’s well-being, such as parent’s religion, sexual activity, or income.\textsuperscript{24} Unlike the old doctrine of fault-based divorce, this new standard allowed violent parents to retain custody of children, provided they never abused the children themselves. Concerned by this unforeseen consequence of the “best interest” custodial standard, the United States Congress unanimously passed a resolution which recommended to the State legislatures that “credible evidence of physical abuse of a spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse.”\textsuperscript{25} To comport with these Congressional findings, many jurisdictions passed laws requiring courts to establish “rebuttable presumptions” that abusive spouses are unfit parents.\textsuperscript{26}

\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{Id.}
\textsuperscript{26} \textit{Id.} at 604.
The District of Columbia enacted such a statute in 1994. Under the D.C. statute, courts are required to presume parental unfitness on the part of a parent who was found to commit an interfamily offense by a preponderence of the evidence, and award custody to the other party unless the presumption was rebutted. If the court found the presumption to be rebutted, then it is required to also make a written finding why.\(^{27}\) Beyond this presumption, in making child custody determinations the court is required to weigh certain enumerated factors of each parent in terms of the best interest of the child, and absent findings of domestic abuse, neglect, child abuse, or parental kidnapping it is presumed that joint custody is in the best interest of the child.\(^{28}\) The D.C. bill enacting the statute described it as “AN ACT to amend title 16 of the District of Columbia Code to specifically allow the admission of evidence of an intrafamily offense in child custody cases and to provide that the court shall make specific findings which support a determination that awarding custody or granting visitation to a contestant for custody who has committed an intrafamily offense is in the child's best interest.”\(^{29}\)

The D.C. Court of Appeals will only reverse a lower court’s order “upon a finding of manifest abuse of discretion,” and decisions of lower court’s judges carry a “presumption of correctness.”\(^{30}\)

IV. HOLDING

The court in Jordan found that the court below made no reversible error under the “manifest abuse of discretion” standard.\(^{31}\) Though the trial court made no express

\(^{27}\) D.C. Code § 16-914 (2009).
\(^{29}\) FAMILY LAW—CHILD CUSTODY—EVIDENCE OF INTRAFAMILY OFFENSE, 1994 District of Columbia Laws 10-154 (Act 10–270)
\(^{31}\) Jordan, 14 A.3d at 1146.
findings as to the rebutting of the presumption of unfitness per D.C.Code § 16-914(a-1), the appellate court determined that “implicit findings” were made which complied substantially with the statute’s requirements, and the appellate court therefore upheld the lower court’s order of joint custody.32

V. COMMENT

The result of Jordan v. Jordan is troubling. The D.C. Circuit has contravened its own precedent, in addition to the explicit language of the statute itself, by not requiring the court below to make specific findings of fact pertaining to the custody decision. Without a strict requirement of making explicit written findings as to how and why the presumption was overcome, future cases will lack sufficient precedence to make consistent orders in similar situations.

The joint custody order at issue in Jordan v. Jordan is also at odds with the legislative intent behind the statute, to drastically limit orders of joint custody in cases involving domestic abuse.

The requirement of written findings of fact also serves as an avenue to police judicial decisions in custody proceedings by ensuring that no improper factors will be considered in making the determination. Despite the progress made in recent years, there remains a gender bias against women in custody proceedings. 33 By reigning in judicial discretion in such cases, gender bias on the part of judges can be mitigated somewhat.

32 Id. at 1151.
A. An Absence of Specific, Written Findings of Fact Required Remand to the Court

Below

By only requiring trial courts to “substantially” comply with the statute’s requirements, Jordan v. Jordan has effectively eliminated what little judicial guidance D.C. Code § 914 provides, contrary to the policy justification behind the statute. Merely forcing courts to ‘consider’ domestic abuse while adhering to the best interest of the child rule allows for too much judicial discretion. The court calls Mr. Jordan’s violent episodes “situational” and “unlikely to repeat themselves,” but neglects to address the possibility of Mr. Jordan co-habitating with a new partner. He may soon find himself in similar situations, and possibly reverting back into abusive behavior while around his children.

Courts in other jurisdictions with similar statutes have made findings that separation itself does not overcome the presumption or ensure that children will not be exposed to future abuse. In Engh v. Jensen, the South Dakota Supreme court notes that while abuse behavior can be “unlearned,” it does not “change the psychological characteristics of the parties.” The court further notes, citing another opinion, that there must be “compelling or exceptional circumstances under NDCC § 14-09-06.2(1)(j) to award custody to a perpetrator of domestic violence, and certainly something more than the customary weighing and reciting of the [statutory factors].” While Mr. Jordan’s rehabilitative efforts and the expert testimony in his favor may well be considered to be “compelling or extraordinary circumstances,” the D.C. appellate court’s lack of specific written findings to that effect goes against the legislative intent of requiring exceptional

35 Id.
36 Id.
circumstances to overcome the presumption.

In *Dumas v. Woods*, a custody case with no allegations of abuse, the court notes that “[a] failure by the trial court to make findings as to each of the relevant factors requires remand.”\(^{37}\) Though *Dumas* did not involve domestic abuse, the trial court found that the rebuttable presumption that joint custody was in the best interest of the child was overcome, and the appellate court found that a lack of explicit findings on why constituted an abuse of discretion. Since the Jordan case used the identical standard of “rebuttable presumption” and the same standard of review, it stands to reason that the ruling in *Dumas* should have been applied to the facts of *Jordan*, and the case should have been remanded for explicit findings. Given the lack of judicial guidance in the statute itself, the written findings are necessary to create precedent and give some measure of guidance and consistency in future custody orders. The D.C. Circuit Court expressed as much itself in the earlier child custody decision *Ysla v. Lopez*: “Such express reasoning can also function as a guide to what changes in circumstances would or would not support a modification of the order.”\(^{38}\) Though the record showed Mr. Jordan had considerable evidence in his favor, the lack of express written findings by the trial court is violative of both the statute itself and the holding of *Ysla*.

In *P.F. v. N.C.*, the D.C. appellate court remanded a custody case for “the absence of any meaningful analysis of the … evidence of domestic violence” and therefore “lacked assurance that the purposes of this important legislation were duly carried out by the trial judge.”\(^{39}\) There seem to be no substantial distinguishing characteristics between the lack of findings in *P.F.* and *Jordan*, and so it is perplexing


that appellate court would remand on one and affirm the other. It would seem the only logical conclusion is that the decision in Jordan v. Jordan was in error for not comporting with precedent.


The policy justification behind presumption of unfitness statutes lies in recognizing that spousal abuse almost always has detrimental effects on a child’s development, even if the children themselves are never directly abused. Children witnessing spousal abuse are often traumatized, and in time begin to exhibit unhealthy aggression or, alternatively, depression and low self-esteem. Sons of domestic batters are far more likely to become domestic batterers themselves, and daughters are likewise more likely to become victims of domestic violence in their teenage and adult relationships. Furthermore, joint custody arrangement ensure continuing contact between a child’s parents, which in cases of former domestic violence can be especially dangerous for the former battered spouse. Separation is the most dangerous period for victims of domestic violence, and divorce women are attacked by ex-husbands twenty times more often than married women.

Though a parent’s interest in preserving contact with his or her children is very

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42 Id. at 1610.
43 Id.
strong, so is the interest in victims being protected from further violent aggression from their former spouses and children’s interest in developing in a healthy, violence-free environment. The South Dakota Supreme Court said of their state’s passing of a presumption statute that “the legislature does not intend absurd or unjust results.”45 But surely restricting an abuser’s access to his or her former victim and children does not rise to the level of absurd or unjust, given the recent information showing the danger these groups can be put in.

In Heck v. Reed the South Dakota Supreme Court notes that the South Dakota presumption statute “is intended to counteract the myths that: domestic violence is not a serious crime; victims provoke or deserve the violence; victims habitually lie or exaggerate the extent of violence; and domestic violence is a private family matter.”46

Specifically, the bill which Amended D.C.’s custody statute to include the rebuttable presumption called for courts to “make specific findings which support a determination that awarding custody or granting visitation to a contestant for custody who has committed an intrafamily offense is in the child’s best interest.”47 Obviously, the legislature did not intend for the Jordan court’s “substantial compliance” to satisfy the elements of the statute. Judges are often obligated to consider the legislative intent behind statutes and give weight to the will of the citizenry as applied by the legislature.48

The decision in Jordan v. Jordan exposes a critical weakness in such presumption of unfitness statutes: an over-abundance of judicial discretion. Though the D.C. statute clearly defines when the presumption arises, judges have little to no

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46 Id.
guidance on when or how the presumption is overcome.

C. The Requirement of Written Findings of Fact are Necessary to Protect Abused Parents from Judicial Consideration of Improper Evidence in Custody Proceedings

Other jurisdictions with similar statutes have interpreted them to “make domestic violence the paramount factor to consider in a custody decision.” The South Dakota Supreme Court has also said that merely incorporating evidence of domestic violence into a traditional best interest of the child analysis is improper. The same court has held that, in the event that both parents are violent towards one another, the presumption should operate only against the more violent parent.

Increasingly, claims of “parental alienation” are arising in custody cases, and are far more frequently applied against women, especially women who allege domestic or child abuse. The term was coined by psychiatrist Dr. Richard Gardner, who alleged himself that that parental alienation “is almost exclusively inflicted by mothers against fathers.” The American Psychological Association does not recognize “parental alienation syndrome” as a valid diagnosis. Despite these facts, the Jordan court not only heard evidence of “parental alienation” but considered it in the best interest of the child analysis. Without written findings of why the presumption was overcome, Ms. Jordan has no way of understanding what factors were considered in the determination.

49 Engh, 547 N.W.2d at 924.
50 Id.
51 Krank, 529 N.W.2d at 850.
54 Meier at 688.
55 Jordan, 14 A.3d at 1143.
that the presumption was rebutted, and so is ill-equipped on appeal to challenge the rebuttal.

The requirement of written findings of facts also procedurally protects abused parents by preventing courts from considered unacceptable factors in making custody determinations. The court below in Jordan note Ms. Jordan’s obstinacy and that she “contributed to the problems in the relationship.”\textsuperscript{56} While the D.C. circuit has not yet decided how to interpret the presumption, the South Dakota approach of imposing the presumption only against the more violent parent would seem to be a logical application of the statute, otherwise a mutual presumption of unfitness would apply where a woman’s acts of violence were primarily defensive. Given the lack of written findings and the lower court’s attention to their difficulties in dealing with Ms. Jordan, there is a risk that her rights under the statute were infringed upon by the court improperly weighing the possibility of mutual violence.

VI. CONCLUSION

Even if a batterer’s children are never directly assaulted, they almost always suffer from unhealthy social development or psychological trauma just by witnessing or even being aware of household abuse. The “best interest of the child” standard has historically failed to recognize this fact, often allowing batterers to retain control of their children, through them a measure of control over their former victims.\textsuperscript{57} \textit{Jordan v. Jordan} illustrates that while statutes requiring courts to adopt a “presumption of unfitness” for parents that abuse their spouses or partners is a step in the right direction, the standard for rebutting the presumption may be too low to effectively and consistently

\textsuperscript{56} Id. at 1141.

keep children out of the grasp of batterers. In addition, the statute provides no guidance for judges on what exactly should overcome the presumption, therefore judges must look to prior case law to make that determination. But without specific written findings, judges in future cases may find themselves bereft of any precedence, potentially leading to inconsistent decisions in factually similar cases. The interests of justice would have been better served by rigidly adhering to the procedural requirements set forth in the statute and thereby conforming to the legislative intent behind the law.

Even though joint custody may still have been awarded to both parents had the court below made explicit written findings of fact, the legislature intended to protect children and abused parents both with the statute’s procedural safeguards.