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Appealing Child Custody Decisions In Massachusetts
By Jason V. Owens | December 29, 2021

Family Law Child Custody Jason Owens

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Appellate attorney Jason V. Owens reviews the difficult process of appealing child custody decisions in Massachusetts.

As appellate attorneys who focus on family law cases, we are in the position to regularly review a large volume of child custody judgments from across Massachusetts. Following a trial for divorce involving minor children, a child custody modification or 209C proceedings involving unmarried parents, a Probate & Family Court judge typically issues a judgment awarding legal custody or physical custody to one or both parents (i.e. joint or shared custody), along with written findings of fact or a narrative rationale explaining his or her decision. The judge's decision typically cites the controlling "best interests of the child standard" before describing the specific facts the judge relied on when determining child custody and parenting time in that case.

For parents who disagree with a judge's decision on custody or parenting time, the question often arises: Can they appeal the judge's decision, and if so, what are their chances of success on appeal? Answering the first question is easy: Yes, following a trial, a party typically has the opportunity to file a Notice of Appeal within 30 days of the judgment. The answer to the second question - i.e. what are their chances of success on appeal - is only slightly less definitive.

Appellate reversals of Probate & Family Court judgments for child custody or parenting time are exceedingly rare, where the "best interest of the child" standard Massachusetts judges rely on to determine custody issues is so amorphous and vaguely defined that it is difficult for parties to show that a judge abused his or her discretion in any given case. Vacating a custody judgment on appeal is not impossible - it certainly happens on occasion - but as a matter of simple statistics, few attorneys would dispute that such decisions do not happen very often in Massachusetts.

Defining the "Best Interest of the Child" Standard in Massachusetts

As noted above, Massachusetts judges generally determine child custody issues based on "what is in the child's best interest." (There seems to be an enduring question over whether the phrase should be "best interest" or "best interest<u>s</u>" of the child. Judges seem to use both interchangeably.) Even when the legal standard for child custody differs based on the type of case, the best interest of the child standard permeates seems to permeate every child custody in the end. For example, in a child custody modification case, the legal standard for a change in an existing parenting plan is that the parent seeking the change must demonstrate a material and substantial change in circumstances that warrants the change. In 209C cases involving unmarried parents, there is a presumption against ordering shared custody unless a party can prove the parents can communicate on child-related matters. In cases involving domestic violence, there is a presumption against granting sole or shared custody to the alleged abuser. In guardianship proceedings, custody of the child turns on parental unfitness. (Contempt proceedings on child custody issues touch on related subject matter, but generally do not involve the best interest of the child standard.)

Although each class of cases above turns on somewhat different legal standards, the appellate opinions surrounding all of these cases invariably mention the best interest of the child standard in some form or fashion. How do the cases describe the standard? Here is a typical example from the unpublished Appeals Court opinion in Heine v. Heine (2018).

> In custody matters, the touchstone inquiry [is] . . . what is best for the child. In determining the child's best interests, there is no definitive list of criteria for the judge consider. Rather, [t]he judge is afforded considerable freedom to identify pertinent factors in assessing the welfare of the child and weigh them as [he] sees fit. Findings of fact shall not be set aside unless clearly erroneous, and we consider whether there was an abuse of discretion in how the judge accounted for the child's best interests. (Internal citations omitted.)

Although it probably was not intended, the Heinle Court seems to be saying that the best interest of the child standard is essentially…whatever the Probate Court judge says it is. However, in those rare cases where the Appeals Court or SJC vacates or reverses a Probate Court judge's custody judgment, a somewhat clearer picture emerges. One case that is sometimes cited is El Chaar v. Chehab (2010), in which the Appeals Court characterized the best interest standard as follows:

> Our decisional law has not required a definitive list of criteria that must be considered in determining what is in a child's best interest [, but certain] constants are revealed in our [cases]. Such constants, or factors, include, for example, consideration of which parent has been the primary caretaker of, and formed the strongest bonds with, the child, the need for stability and continuity in the child's life, the decision-making capabilities of each parent to address the child's needs, and the living arrangements and lifestyles of each parent and how such circumstances may affect the child. Although the relevance of particular factors may vary from case to case, the above listed factors underscore that in the Commonwealth the best interests analysis is a child-centered one that focuses on the specific needs and interests of a child and how these might best be met. All relevant factors must be considered. (Internal citations omitted.)

Another Appeals Court opinion that is often featured in successful appeals of child custody decision is Charara v. Yatim (2010). (Interestingly, both the Charara and El Chaar decisions involved international child custody issues that required the Appeals Court to compare the child custody standards used in foreign countries with the Massachusetts standard.) In Charara, the Court characterized the "best interests" standard as follows:

> [N]o case has set forth a definitive list of criteria that must be considered in determining what is in a child's best interest. However, some constants are revealed in our decisional law. See, e.g., *Custody of Kali, supra* at 842 (it is in best interests of child to preserve "current placement with a parent, if it is a satisfactory one"; "stability and continuity with the child's primary caregiver

is itself an important factor in a child's successful upbringing"; it is a gender-neutral inquiry). Other factors that have been considered all focus on what is in the child's best interest. See, e.g., *Hersey* v. *Hersey,* 271 Mass. 545, 555 (1930) (parental fault does not override child's best interest; child happy and healthy in present home with half-brother and in care of her mother); *Allen* v. *Allen,* 326 Mass. 214, 217 (1950) (in deciding custody, judge could credit testimony "as to the home in which the girl seemed to be happier"); *Vilakazi* v. *Maxie,* 371 Mass. 406, 409 (1976) ("In providing for the custody of a minor child, while the feelings and the wishes of the parents should not be disregarded, the happiness and the welfare of the child should be the controlling consideration"), quoting from *Jenkins* v. *Jenkins,* 304 Mass. 248, 250 (1939); *Felton* v. *Felton,* 383 Mass. 232, 233 (1981) (discussing diverse religious practices of parents; overriding goal is to serve best interests of children even where "attainment of that purpose may involve some limitation of the liberties" of a parent); *Williams* v. *Massa,* 431 Mass. 619, 636 (2000) (consideration given to which parent "would more likely be able to make appropriate decisions to address the children's special needs"); *Haas* v. *Puchalski,* 9 Mass. App. Ct. 555, 557 (1980) (judge could consider that father's home not "a settled home" as child would be cared for by many different relatives); *Rolde* v. *Rolde,* 12 Mass. App. Ct. 398, 405 (1981) (that mother was "primary nurturing parent" and "primary caretaker," and that children have "strongest bond" with mother, were factors "highly significant for the welfare of the children"); *Bouchard* v. *Bouchard,* 12 Mass. App. Ct. 899, 899-900 (1981) (findings should examine "relative advantages of the respective parental environments" and "in what respects that environment has been helpful or detrimental to the child's wellbeing"). This is by no means an exhaustive list of all the factors that have been considered by our courts as relevant to a child's best interests, nor do we suggest which of these factors are appropriate to consider in any given case. We list them only to underscore our determination that, in the Commonwealth, as in most jurisdictions in the United States, the best interest's analysis is a child-centered one that focuses on the specific needs and interests of a child and how these might best be met. The standard does not focus on "purely parental interests," *Tazziz,* 26 Mass. App. Ct. at 813, and significantly, it requires a gender-neutral analysis. (Footnotes omitted.)

In terms of appellate argument, the Charara and El Chaar decisions serve somewhat different purposes. The Charara opinion provides a list of specific case citations that are useful to illustrate how Massachusetts courts have historically decided child custody issues. Arguably, the El Chaar is even more useful, inasmuch as the decision arguably provides a list of four discreet factors that a Court should theoretically consider in determining custody and parenting

time: (1.) who has been the child's primary caretaker and has the strongest bonds with the child, (2.) which parent is likely to provide stability and continuity for the child, (3.) which parent demonstrates the better decision-making and parental skills, and (4.) the living arrangements and lifestyles of each parent to the extent they affect the child.

For many parties appealing a child custody decision, his or her best chance may involve showing that the Probate Court judge failed to fully consider one or more of the above factors in his or her findings of fact or rationale supporting the judgment.

What Does a Successful Child Custody Appeal Look Like?

One example of the Appeals Court applying the El Chaar standard can be found in Robinson v. Robinson (2020), an unpublished opinion in which the Court vacated and remanded a modification judgment in which the Probate Court judge "modified a child custody order by changing sole legal and physical custody of the minor child from the mother to the father". In Robinson, the Court cited the El Chaar opinion to define the best interest of the child standard as follows:

> We have stated that "[t]he best interests of a child is the overarching principle that governs custody disputes in the Commonwealth." Charara v. Yatim, 78 Mass. App. Ct. 325, 334 (2010). While there is no definitive checklist of factors to determine the best interests of the child, we consider certain constants such as "which parent has been the primary caretaker of, and formed the strongest bonds with, the child, the need for stability and continuity in the child's life, the decision-making capabilities of each parent to address the child's needs, and the living arrangements and lifestyles of each parent and how such circumstances may affect the child." Chaar v. Chehab, 78 Mass. App. Ct. 501, 506 (2010). We review the determination regarding a child's best interests "for clear error of fact finding and abuse of discretion." Prenaveau v. Prenaveau, 81 Mass. App. Ct. 479, 486 (2012).

In Robinson, the Appeals Court vacated the order granting sole custody of the child to Father and remanded the case back to the Probate Court for further proceedings. Notably, the Appeals Court did not challenge the "detailed findings regarding the mother's false statements, obstruction, and interference with the father's efforts to reunify with the child." Rather, the Appeals Court focused on the omissions - i.e. the judge's lack of factual findings - on issues described in the El Chaar opinion:

> While the judge's factual findings were otherwise detailed and extensive, he made no findings regarding the factors we set forth in Chaar to determine

> the best interests of the child in these circumstances. There were no specific findings regarding (1) the mother and father's relative caretaking abilities, (2) their living arrangements, (3) their bonds with the child, or (4) how the change in custody and parenting would promote stability and continuity in the child's life. In particular, the judge's findings did not address all of the evidence regarding the father's domestic violence and substance abuse. While we defer to the judge's assessment of the mother's credibility on those subjects, the judge's decision does not adequately address the reports of domestic violence and substance abuse made by the child, the mother's older daughter, and the mother's former husband. Absent a more detailed assessment of that evidence, we cannot agree, for example, with the judge's conclusion that the "boiling water incident [was] exaggerated." Nor does the judge's decision address why it was in the child's best interests for the mother's parenting time to be limited to one supervised hour per week. Simply put, without more detailed findings, we cannot assess whether the judge "made `a clear error of judgment in weighing' the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). Accordingly, we shall remand the case to the Probate and Family Court for further factual findings and, if necessary, redetermination on the counterclaim for modification.

It is important to recognize that even as Robinson represents a rare “win” for a party challenging a custody judgment, the end result was that the Appeals Court remanded the case back to the very same Bristol County Probate & Family Court judge who issued the initial judgment. Nothing in the Appeals Court opinion appears to prevent the Probate Court judge from entering a similar custody decision, so long as the next decision is supported by adequate findings.

A Judge’s Omissions May be Easier Challenge that Specific Findings of Fact

Two legal standards typically control the appellate review of child custody decisions. The overall decision is reviewed under and “abuse of discretion” standard. In Prenaveau v. Prenaveau (2012), the Appeals Court described the standard as follows:

> The reviewing court treats the probate judge's custody determination with deference. However, an error of law apparent on the record, or the absence of evidence in support of findings, or the failure of the findings to support the judge's orders will constitute "an abuse of discretion" and require reversal.

However, a party who challenging the validity of the specific findings of fact made by the Probate Court judge faces an even tougher hurdle. Overcoming a findings of fact requires a showing that the finding was “clearly erroneous.” The Appeals Court explained this difficult standard in the unpublished case, In Re Adoption of Violet (2021):

> A finding is “clearly erroneous” when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Although these two standards may appear similar, most appellate attorneys will tell you that it is significantly more difficult to prove that a finding is “clearly erroneous” than it is to prove abuse of discretion. Part of this distinction is practical; if an Appeals Court had to review every single factual finding from every single trial, the Court would struggle to ever finish a case. The “clearly erroneous” standard ensures that an appellate court is only expected to scrutinize the most obvious factual errors made by a judge.

Although the “clearly erroneous” standard presents a major hurdle to challenging a judge’s findings in most appeals, there are a few ways for clever attorneys to sidestep the harshness of the rule. The first is focusing on factual *omissions* by the judge. A good example of this is found in Robinson case cited above, where the Appeals Court explained that it could not determine whether there was “clear error” because the judge’s findings were incomplete:

> Simply put, without more detailed findings, we cannot assess whether the judge "made `a clear error of judgment in weighing' the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (citation omitted).

Appellate attorneys must be judicious when weighing how much time to devote to challenging a judge’s factual findings, where the Appeals Court is so reluctant to apply the clearly erroneous standard. Fewer hurdles stand in the way of arguing omissions from the judge’s findings - i.e. issues the judge should have made findings on, but failed to. Another avenue for challenging a judge’s findings can arise if the attorney successfully argues that the judge made the findings based on an incorrect legal standard. This exception was articulated in Yankee Microwave, Inc. v. Petricca Communications Systems, Inc. (2002), where the Appeals Court noted:

> As to matters of law, however, we scrutinize without deference the legal standard which the judge applied to the facts, and the `clearly erroneous'

> standard of appellate review does not protect findings of fact or conclusions based upon incorrect legal standards. (Citations omitted.)

In a straight-forward child custody case, it may be difficult to argue that a judge made a finding based upon incorrect legal standards. However, in cases such as child custody modifications (substantial change in circumstances), interstate relocation (“real advantage” test), 209C cases with unmarried parents (presumption against shared custody), or cases involving domestic violence (presumption against custody for abuser), or guardianship cases (parental unfitness), the best interest of the child standard does not strictly control. In these cases, an appellate attorney may stand a better chance at arguing that the judge’s finding was based on an incorrect application of the law.

When Does a Judge Abuse His or Her Discretion in a Child Custody Case?

In Massachusetts, appellate reversals of child custody decisions are rare. Don’t believe us? Feel free to head over to Google Scholar to search the cases. We recommend a search that includes the terms “vacated” and “child custody”, sorted by date. Start clicking on cases. The first thing you are likely to notice is that word “vacated” is most often used to describe the many reasons why custody decisions are not typically vacated on appeal. If you are not sure what the Appeals Court did in the case, skip to the bottom - if the decision says the judgment was “affirmed” then the appeal was unsuccessful.

It quickly becomes apparent that *most* appeals of child custody issues are unsuccessful.

To the extent you see the occasional reversal of a child custody decision, the cases most often involve somewhat unusual or unique issues, like international travel, interstate relocation and domestic violence, or joint custody for unmarried parents. Cases involving novel or unique legal issues are frequently more ripe for appeal than a typical divorce or modification case.

In cases where the appealing party convinces the Appeals Court to vacate the Probate Court custody ruling, as in Robinson, the cases are frequently remanded back to the very same Probate Court judge who issued the original ruling, with an invitation to correct whatever flaws the Appeals Court found in the judge’s reasoning. A somewhat similar decision to Robinson issued Manning v. Manning (2020), again resulting in a remand of the case back to the original Probate Court judge.

Perhaps the strongest recent appellate opinion involving the reversal of a Probate Court custody order was in Michelon v. Deschler (2020), in which the Appeals Court heavily criticized the Probate Court judge for uncritically adopting the proposed findings of fact of the father, while failing to address the main arguments of the mother:

> Here, the judge adopted verbatim the father's proposed findings of fact, only updating the ages of the children. The judge also by and large adopted the father's proposed rationale, deleting only four paragraphs and one sentence. The result of these deletions was to reject the father's characterizations of the mother's evidence. At the same time, the judge did not incorporate any of the mother's proposed findings on these points or otherwise make his own findings regarding that evidence, thus leaving a vacuum in the findings with respect to significant portions of the evidence. Notably the judge's findings and rationale are silent with respect to the troubling aspects of the mother's evidence, such as the father's alcohol consumption and his arrest for operating a motor vehicle while under the influence of alcohol, the episode regarding his alleged mistreatment of the family's ailing cat, his decision to allow R (a young child) to drive an all-terrain vehicle, the father's exposing the children to his multiple dating partners and enlisting them in helping him keep them from learning of each other, his watching pornography in the children's presence, the allegations of physical violence, and the ample evidence of the parents' difficulties in communicating with each other regarding the children. The judge was not required to accept the mother's evidence, but the judge was required to deal with it; indeed much of it was uncontested. Troublesome facts ... are to be faced rather than ignored. ... Only then is the judge's conclusion entitled to the great respect traditionally given to discretionary decisions. (Citations omitted).

In some ways, however, Michelon is the exception that proves the rule. After, all even in this highly unusual decision, the Appeals Court ultimately sent the case back to the same trial judge for further findings:

> [W]e are unable to assess the judge's order regarding parenting time or the award of joint legal custody over educational matters, and these matters require remand for further findings that address the difficult issues raised by the evidence. In addition, we are concerned by the complete absence of findings or explanation for the judge's order that the children attend the Sudbury school system (in which they had not previously been enrolled). Nothing in the findings or the rationale permit us to understand how the judge assessed the best interests of the children or the basis for the judge's conclusion that the children were best served by attending a new school

> system. Accordingly, the children's school placement also requires further findings.
>
> For these reasons, so much of the divorce judgment as addressed the parenting schedule, the award of joint legal custody over educational matters, and the placement of the children into the Sudbury schools, is vacated. These issues are remanded for further proceedings as the judge in his discretion determines necessary, recognizing that circumstances since the time of the judgment may affect the judge's assessment of the children's best interests. The current provisions of the judgment will remain in effect until otherwise ordered in the trial court. The remainder of the judgment is affirmed.

What Happens When a Custody Case is Remanded by the Appeals Court?

Most successful appeals of child custody decisions involve a “remand” to the Probate Court judge. Although the Appeals Court may vacate the custody decision, the case is sent back to the same Probate Court judge for what amounts to a re-trial. Frequently, there is little to stop the Probate Court judge from issuing a similar judgement, so long as the judge takes care to correct whatever concerns were raised by the Appeals Court.

The challenge of a remand for further proceedings is illustrated in the Appeals Court’s unpublished decision, SP v. BD (2019). The parties first appeared before the Appeals Court in 2017. In SP v. BD (2017), the Appeals Court vacated and remanded the Probate Court order “granting the mother sole legal and physical custody of the parties' two children, and providing the father with six hours of supervised visitation per week.” The case then returned to the Probate Court for further trial.

In 2019, the parties returned to the Appeals Court, ostensibly on the same case. After further trial, the Probate Court judge had entered a new custody order following the remand. The 2019 custody order was virtually identical to the 2017 order that the Appeals Court had vacated. Here is how the Appeals Court described the case in 2019:

> The father … appeals from a Probate and Family Court judgment, **entered after remand**, **granting the mother … sole legal and physical custody of the couple's two minor children, with up to six hours per week of supervised visitation for the father**, with expenses for the visitation to be paid by the father. **On remand, the same judge issued amended findings**

of fact and rationale, and judgment entered nunc pro tunc to the date of the prior judgment. In this appeal, the father submits that the judge abused her discretion by granting the mother sole legal and physical custody, arguing that (1) there was insufficient evidence to support the judge's finding that the father committed abusive conduct; and (2) the judge failed to credit both the father's efforts to improve his parenting, and his past success in coparenting with the mother. We affirm.

In short, the father prevailed on his appeal of the custody judgment in 2017, only to see the case remanded to the same Probate Court judge, who entered a nearly identical custody judgment in 2019. When father appealed the second custody judgment, he lost. These illustrate how even a seeming "victory" on appeal of a child custody order can, a year or two later, end in seeming defeat.

Winning Child Custody Appeals is Extremely Challenging in Massachusetts

In Massachusetts, not all family law appeals are equal. Successful appeals often focus on specific financial issues, such as business valuation or elements of the Child Support Guidelines or the Alimony Reform Act. Complex financial issues make for idiosyncratic rules, which in turn tend to make better appeals. (Complaints for contempt are likewise often more fertile grounds for appeal.)

Appeals are more challenging in those areas of family law where judges have the greatest discretion, such as the division of marital assets, which is decided based on so many factors in Massachusetts that is difficult to understand what the legal standard means. However, child custody is unquestionably the area where Probate & Family Court judges are afforded the broadest discussion by appellate courts. In case after case before the Appeals Court and/or Supreme Judicial Court (SJC), the opinions strain to emphasize how deferential appellate courts are to the Probate & Family Court judges who hear trials.

None of this is to say that winning an appeal of a child custody decision is impossible. As noted above, reversals of child custody decisions do occasionally occur.

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