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SJC Decision Deals Blow to Domestic Violence Victims in Child Custody Cases

By Jason V. Owens | December 30, 2019

Family Law Divorce Restraining Orders Modification

Attorney Jason V. Owens reviews an important decision that limits the impact of past domestic abuse in child custody cases by the Massachusetts Supreme Judicial Court.

The Massachusetts Supreme Judicial Court (SJC) has ruled against an alleged domestic violence victim in a case with potentially far-reaching implications for parents who are victims of domestic violence. In the decision, which is sure to disappoint domestic violence advocates, the SJC declined to reverse a Probate and Family Court judge's ruling that granted sole legal custody of a 12-year old to a divorced father, after the family court judge prohibited the mother from offering testimony about the father's alleged history of domestic violence. A Massachusetts statute, G.L. c.208, § 31A, requires family court judges to "consider evidence of past or present abuse toward a parent" in child custody decisions, and prohibits judges from granting custody to an abusive parent without written findings stating why the order is in "the child's best interests".

Although the SJC upheld the requirement under § 31A that family court judges consider evidence of past abuse in all child custody cases, the Court declined to reverse the lower court decision granting sole custody of the child to the father, despite evidence of a "serious incident of abuse" and the lack of written findings by the family court judge detailing the alleged abuse or explaining how the custody change benefited the child despite the alleged abuse. The

highly anticipated decision drew interest from state and national advocacy groups, including amicus briefs from the Women's Bar Association of Massachusetts, the Domestic Violence Legal Empowerment and Appeals Project and others.

Advocates are likely to view the decision as significantly weakening § 31A by allowing judges in custody cases to satisfy the requirement that they “consider evidence of past or present abuse toward a parent” by admitting a single document referencing the abuse into evidence while prohibiting live testimony or cross examination on the alleged abuse at trial. In addition, the decision suggests that family court judges can grant joint or primary custody of a child to a domestic abuser without making detailed written findings describing the abuse or the impact on the child or victim/parent.

Evidence of Alleged Past Domestic Abuse Excluded from Custody Trial

The case before the SJC involved two trials: (1.) the original divorce trial that was heard by Essex County judge, Hon. Theresa Bisenius, which resulted in the original Judgment of Divorce in 2015, and (2.) a trial on the father’s Complaint for Modification, in which he sought primary custody of the child, filed in 2016. Following the divorce trial, Judge Bisenius granted primary physical custody to the mother, and shared legal custody of the child to both parties in 2015. The following year, the father filed a Complaint for Modification seeking primary custody of the child. The basis for father’s 2016 request for custody seemed to be a series of reports made by the mother to the child’s doctors, DCF and local police alleging that the father was abusing the child. The father argued that the mother’s false reports to caregivers, child services and police constituted “parental alienation” that warranted a change in custody to father.

The 2015 divorce case included a GAL report that described a series of alleged incidents of violence, including “a particularly egregious occurrence of father assaulting mother in Florida in 2011” that Bisenius noted in her written findings of fact. In the modification case, however, Kaplan strictly limited testimony and evidence to events occurring after the 2015 divorce.

In her Appellate Brief, the mother described the restrictions on evidence

> In a series of pre-trial rulings, [Judge Kaplan] determined that evidence at trial would be limited only to events which had occurred after the date

> of the judgment of divorce, August 15, 2015. Depositions of the parties could not include testimony about previous events even if they related to domestic violence.

A second GAL, who was appointed by Judge Kaplan, was permitted to testify at the 1-day modification trial. At the modification trial, Kaplan "allowed [the GAL] to confirm that he spoke with individuals about predivorce events, but did not allow him to expand upon the details of those conversations or events." Kaplan repeatedly sustained objections to the entry of evidence of alleged abuse prior to the divorce, stating from the bench that such evidence was not relevant to the modification case.

SJC Won't Say if "Serious Incident of Abuse" Occurred in Case

In her Judgment and Findings, Judge Kaplan made only the following reference to domestic violence:

> The parties have both engaged in physical assaults upon the other during the early part of the marriage which culminated in a particularly egregious occurrence of father assaulting mother in Florida in 2011. Following that incident, father engaged in anger management counseling at his own initiative and there have been no further incidents.

Kaplan's finding appears to be drawn entirely from the 2015 divorce judgment of Judge Bisenius. In other words, there is no reason to believe that Kaplan made the finding above based on an independent review of the alleged domestic violence, such as the 2015 divorce GAL report, which was admitted into evidence at the modification trial, but not otherwise referenced in Kaplan's findings. Indeed, Judge Kaplan's pretrial orders, trial commentary, and Judgment and Findings all appear to consistently reflect the Kaplan's position that any pre-divorce conduct of the parties was outside the scope of evidence at the modification trial, and was not purposely excluded and not considered by the judge at trial.

Despite the judge's clear and consistent orders excluding evidence of pre-divorce violence, the SJC's decision reaches this rather remarkable conclusion:

> The judge here expressly found that abuse occurred during the parties' marriage ... Although the judge did not expressly use the term "rebuttable

> presumption," her rationale demonstrates that, assuming she found the 2011 incident to be a “serious incident of abuse,” she determined the father to have rebutted the presumption, and that she entered written findings in accordance with § 31A.

To be clear, nothing in Judge Kaplan’s Judgment and Findings suggest that she “consider[ed] evidence of past … abuse toward” the mother in her decision, where she expressly excluded all testimony pertaining to allegations of such abuse before and during trial. Moreover, nothing in the judgment suggests that Kaplan found the 2011 incident to constitute a “serious incident of abuse", nor is the there any reason to believe that Kaplan felt bound by the rebuttable presumption against placing sole legal custody of the child “with the abusive parent” under § 31A.

Nowhere in Judge Kaplan’s decision did she “enter written findings of fact as to the effects of the abuse on the child”, nor did she explain why her orders were in the child’s best interests despite a “serious incident of abuse”. It seems clear to any reader that Judge Kaplan declined to enter these findings because she either felt that no “serious incident of abuse” had occurred or that she was not required to make such a finding where the history of past abuse had been previously examined by Judge Bisenius in the divorce trial.

With respect to Judge Kaplan’s review of specific allegations of pre-divorce domestic violence, the SJC appears to rely on the thinnest of rationales. Specifically, the SJC notes that the 2015 GAL report from the divorce was trial was available to Judge Kaplan as a documentary exhibit, and concluded that Judge Kapan must have reviewed and considered the evidence of past abuse as follows:

> Review of the record and the modification judgment shows that the judge allowed evidence of past abuse as part of the modification proceeding and that she incorporated information contained in the parties' exhibits into the modification judgment. The judge stated at the start of the modification trial that she reviews the exhibit books in detail and “look[s] at uncontested exhibits as they're in for everything.”

Of course, at the trial itself, Judge Kaplan resolutely excluded all testimony and evidence of pre-divorce violence at trial on the grounds that it was outside the scope of evidence on modification. In its analysis, the SJC makes no attempt to explain why Kaplan would consider and rely on the evidence of past violence contained in an old GAL report that the (presumably) read after the conclusion of trial.

Notably, in its factual summary of the alleged past abuse, the SJC relies extensively on the GAL report that was filed in the 2015 divorce trial. The SJC relies on this report to detail the “egregious” 2011 incident and other acts of alleged violence. However, Judge Kaplan makes absolutely no reference to this GAL report in her Judgment and Findings, and the SJC appears to pin its determination that Kaplan must have relied on the 2015 report in her Judgment on the judge’s general statement at the beginning of trial “that she reviews the exhibit books in detail”.

Despite the SJC’s analysis, there is simply no reason to believe that Judge Kaplan considered the allegations of past violence describe in the 2015 report in her judgment. Every pretrial order, comment from the bench during trial, and line from her Judgment and Findings suggests just the opposite: Judge Kaplan felt that evidence of pre-divorce abuse was outside the scope of evidence at trial, where Judge Bisenius had addressed the issue at the divorce trial.

For domestic violence advocates, the most troubling part of the SJC’s decision is the Court’s determination that no further hearing was required in the case even if a “serious incident of abuse” that required careful scrutiny by the judge had occurred. The decision suggests that, in practice, Massachusetts judges can easily sidestep the rebuttable presumption against granting custody to domestic abusers by: admitting a document containing a victim’s allegation into evidence, excluding all testimony about such allegations at trial, and granting custody to the abusive parent for whatever reason the judge sees fit.

The SJC Could Have Decided Case Narrowly with Minimal Damage to § 31A

Nothing in the record suggests that Judge Kaplan intended for her judgment to circumvent § 31A. Instead, it appears that Judge Kaplan did not believe that § 31A did not apply because Judge Bisenius declined to expressly find that

abuse had occurred pursuant to § 31A following the 2015 divorce trial. To be clear, the rebuttal presumption under § 31A prohibits judges from entering orders for "shared legal custody" if a pattern or serious incident of abuse has occurred.

In the divorce judgment, Judge Bisenius granted shared legal custody to the parties. Although Judge Bisenius referenced the history of violence, including the "egregious" 2011 incident, in her Judgment, she did not expressly find that a pattern or serious incident of abuse had occurred, nor did she appear to "enter written findings of fact as to the effects of the abuse on the child" nor explain why shared legal custody was in the child's best interest despite the past violence.

From Judge Kaplan's perspective, the question of whether "abuse" occurred – as specifically defined under § 31A – was resolved at the divorce trial. Although Judge Bisenius made reference to past abuse in the judgment, the 2015 ruling did not find the violence constituted a "pattern or serious incident of abuse" or enter special findings under § 31A. At the modification trial, Judge Kaplan likely believed that § 31A simply did not apply.

Had the SJC followed this thread of logic in its decision, it could have confined its analysis to the somewhat narrow set of cases in which an initial custody judgment is entered after a trial on the merits, with a focus on whether a judge in a subsequent modification action is required to re-examine past incidents of abuse if the first trial judge did not find evidence of abuse as defined under § 31A. Within this framework, the SJC could have easily found that a modification judge must consider evidence of past-violence only if the judge at the original trial did not enter findings relative to § 31A after trial. Conversely, the Court could have found that a modification judge must always consider evidence of past violence, regardless of whether the initial trial judge made findings relative to § 31A.

The Damage Done: SJC Decision Strikes at the Heart of § 31A

By opting for the broadest possible decision, however, the SJC appears to have significantly watered down the protections embodied in § 31A for all child custody cases, not just custody modifications. Specifically, the decision dilutes the requirements of § 31A by finding that Judge Kaplan overcame the rebuttal presumption against granting custody to domestic abusers, when nothing in

the lower court Judgment suggests that Kaplan actually believed that the father qualified as an “abusive parent” under the statute.

Judge Kaplan made no attempt to overcome the rebuttable presumption under § 31A in her judgment. She entered no factual findings of past abuse, declined to allow evidence of past abuse at trial, and made no reference to the rebuttable presumption under § 31A in her Judgment. Accordingly, it is deeply problematic for the SJC to say that not only did § 31A apply in the case, but that Kaplan fully considered the evidence of past abuse and satisfied the rebuttable presumption in her Judgment and Findings.

In its decision, the SJC seems to blame Judge Kaplan’s lack of findings under § 31A on a momentary oversight – i.e. Kaplan must have simply forgotten to enter the appropriate findings. The decision attempts to excuse the oversight (which was likely no oversight at all) by explaining that judges must follow the statute in the future:

> Although we hold that the judge in the present case properly considered application of the rebuttable presumption, moving forward, when parties present evidence of abuse, judges should explicitly state on the record that they have considered whether the parties have met the preponderance standard for the presumption to apply and, if so, whether the abusive parent has rebutted the presumption.

Of course, the statute already required every judge to do exactly this in any custody case involving allegations of abuse.

For domestic violence advocates, the fallout from the SJC’s decision is likely to be felt through lasting damage to the core principles underpinning § 31A. Although the decision urges judges to enter written findings under § 31A, the decision appears to hallow out of the requirement that judges seriously consider past evidence of abuse in child custody cases. Under the decision, judges can likely restrict evidence of past abuse to a single documentary exhibit. The decision suggests that as long as an allegation is contained somewhere on the record, the judge has satisfied his or her burden to “consider evidence of past or present abuse toward a parent or child” in making orders for custody. The judge is not required to call witnesses or offer live testimony about past abuse.

With respect to the rebuttable presumption against granting custody to abusive parents, the decision suggests that judges scarcely need to enter “written findings of fact as to the effects of the abuse on the child”, where the

decision makes clear that even the most indirect or cursory reference to allegations of abuse satisfies the SJC. Meanwhile, the decision suggests that the rebuttable presumption under § 31A requires little or no searching inquiry by a judge. Instead, cursory "best interest of the child" findings that would be required in *any* case involving custody seem to satisfy the SJC's standard.

Domestic Violence and PTSD: A Connection not Recognized by Massachusetts Courts

As noted above, it appears clear that Judge Kaplan's decision did not consider whether or not the father was an "abusive parent", despite the SJC's assumption to the contrary. However, Kaplan did enter detailed findings pertaining to the mother's conduct after the divorce, which focused on a cluster of allegations of abuse that the mother made against the father.

The mother's actions included subjecting the child to an STD test, reporting the father to the police for alleged physical abuse, seeking a 209A restraining order against father, and reporting father to the Department of Children and Families (DCF) for alleged neglect and/or abuse. The record seems clear that none of the mother's actions resulted in father being found responsible for abusing the mother or child after the divorce.

As an outsider, it is impossible to know the motives of individual parties based on court papers and pleadings. However, both Judge Kaplan's Judgment and the SJC's decision include striking findings about the mother's conduct. Specifically, both Kaplan and the SJC appeared to credit the mother's admission that she struggled to co-parent with the father due to trauma caused by past abuse:

> Mother alleges that she continues to be afraid of Father, due to the past abuse, which impacts her ability to co-parent with him.

However, neither Kaplan nor the SJC appeared sympathetic to the notion that an alleged abuse victim might struggle to cooperate with their former abuser. Instead, the SJC echoed Kaplan's findings suggesting that the mother's conduct stemmed from malice or lack of self-control. The SJC appeared to agree with the conclusion that the mother lacked the ability to "separate [the child's] issues from the parties' issues" and that her actions arose out of the mother "attempting to punish Father" for his past conduct.

Again, as an outsider, it is difficult to assess the above findings. What seems evident from the record, however, is that neither court spent much time considering whether the mother's conduct was the product of post-traumatic stress disorder (PTSD), which is highly prevalent in victims of domestic violence, and includes symptoms such as anxiety, hyper vigilance and unwanted or fearful thoughts.

The failure to consider the impact of domestic violence on the mother's co-parenting ability is more troubling for the SJC than for Kaplan, where the SJC's decision was based on "assuming [that] the 2011 incident [was] a 'serious incident of abuse'" under § 31A. If one assumes, as the SJC does, that the 2011 incident was a "serious incident of abuse", it is striking that the Court seemed to so easily disregard the mother's statement that she "continues to be afraid of Father, due to the past abuse, which impacts her ability to co-parent with him".

We have no way of knowing whether PTSD was a factor in the mother's actions in the case. All we know is that the SJC did not appear to consider the question at all in its analysis.

Who Pays the Price for Domestic Violence Between Parents in MA, Victims or Abusers?

Stepping away from the SJC's case, the broader question for courts is whether domestic violence victims in child custody cases should bear sole responsibility for the negative impacts of domestic violence, such as PTSD, including the extreme difficulty many victims experience when forced into constant contact with their abusers through co-parenting orders.

Is a domestic violence victim solely to blame for the uncontrollable anxiety, hyper vigilance and unwanted or fearful thoughts that he or she feels as a result of past domestic abuse? Should we ask victims to choose between custody of their children and the trauma of repeated exposure to their abusers? Or should courts pay more attention to PTSD and related disorders when setting parenting time in custody cases involving violence?

For appellate court watchers, the motivations of the specific parties matter less than the manner in which Massachusetts courts *process* child custody cases involving domestic violence. What questions are judges expected to ask and what burdens are they expected to meet in such cases? The

answers, at least based on the SJC's recent decision, seem to be not many and very few.

About the Author: Jason V. Owens is a Massachusetts divorce lawyer and family law attorney for Lynch & Owens, located in Hingham, Massachusetts and East Sandwich, Massachusetts.

Schedule a consultation with Jason V. Owens today at (781) 253-2049 or send him an email.

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