Appeals Court: Order to Vacate Marital Home Justified by Divorcing Parent's Inappropriate Comments to Child

June 1, 2023 | By Jason Owens

Categories: Family Law, Divorce, Restraining Orders

The Massachusetts Appeals Court issues a rare decision clarifying the legal standard for motions to vacate a spouse from the marital home pursuant to G. L. c. 208, § 34B.

Under the Massachusetts vacate statute, G. L. c. 208, § 34B, a Probate & Family Court judge may enter an order to "vacate" a divorcing spouse from the marital home if "the health, safety or welfare of the moving party or any minor children residing with the parties would be endangered or substantially impaired by a failure to enter such an order." However, Massachusetts appellate courts have offered little guidance interpreting the legal standard for § 34B vacate orders over the years due the unusual "temporary" nature of vacate orders, which has largely prevented the issue from being reviewed on appeal.

The Massachusetts Appeals Court, in a recent unpublished insight, JC v. AC (2023), provided some much needed clarification on the legal standard under § 34B, ruling that a Probate & Family Court judge was justified for ordering a husband to vacate the marital home under § 34B based on the wife's allegation that the husband "was discussing the divorce proceeding with the parties' minor child, who was only six years old at the time of the hearing, and blaming the situation on the wife".

Because appellate review of § 34B vacate orders is so rare, the decision in JC v. AC provides Massachusetts judges, attorneys and litigants with unusual opportunity to better understand the type of spousal behaviors that justify the issuance of a § 34B vacate order.

Understanding Marital Vacate Orders Under 208 § 34B

A Massachusetts spouse who is subject to a vacate order under § 34B is generally required to immediately leave and stay away from the marital home for a 90-day period that is subsequently subject to review and extension every three months. Like violations of 209A restraining orders and 258E harassment orders, a spouse who violates a vacate order under § 34B by returning to the marital home following the entry of the order will be arrested and criminally charged. Vacate orders under § 34B are only available when parties are engaged in open divorce proceedings, although a party may seek a vacate order simultaneously with their

initial filing of a Complaint for Divorce. A vacate order can force a spouse to leave a home even if he or she is sole owner of the property.

In general, an "opposing party shall be given at least three days' notice" of a hearing when a party seeks a § 34B vacate order. However, much like 209A restraining orders and 258E harassment orders, a party may seek an emergency § 34B vacate orders through an *ex-parte* hearing (i.e. the opposing party is not present) if the moving party can demonstrate "a substantial likelihood of immediate danger to his or her health, safety or welfare or to that of such minor children from the opposing party" if an immediate vacate order is not granted. If an emergency vacate order is granted without notice to the other party, courts are supposed to schedule a follow-up hearing within five days, at which point the affected party can object to the order.

Experienced divorce attorneys will tell you that a substantial number of motions to vacate are filed and granted on an emergency, *ex-parte* basis. Judges hearing an emergency motion to vacate generally have four choices, depending on the strength of the moving party's argument:

(1.) enter an emergency vacate order that day without notice to the other party, and schedule a second hearing within a few days, where the other party can attend.

(2.) decline to enter the vacate order that day, but schedule a short-notice hearing within a few days which both parties will attend, then decide on the motion at the second hearing.

(3.) decline to enter the vacate order that day, but schedule a hearing at the court's next regular motion date (i.e. potentially several weeks later).

(4.) deny the motion to vacate outright without scheduling a follow-up hearing.

If the Court enters a vacate order, a copy of the order is provided to local police in the town where the marital home is located. With emergency vacate orders, the order will typically be served on the affected party by local police. The involvement of police – along with the criminal penalties associated with violations of separates § 34B orders – is the main characteristic that separates § 34B vacate orders from ordinary temporary orders entered by a Probate & Family Court in divorce cases. In contrast, the violation of a typical temporary order entered in a divorce case only subjects a party to a civil Complaint for Contempt, but generally will not result in a party being charged with a crime or otherwise warrant police involvement, absent conduct that would violate the law regardless of the probate court order.

As discussed further below, the legal standards for § 34B vacate orders differs significantly than for 209A restraining orders; however, the legal procedure for obtaining and extending a vacate order shares several similarities with that of restraining orders. Both vacate orders and restraining orders generally require a party to prepare an affidavit describing the negative conduct of the other party. Both orders can be issued by a court on an emergency basis, with the other party only receiving notice when he or she is served by the police. Both orders require courts to promptly schedule follow-up hearings where the other party may contest the order and/or the order may be extended; 5 days in the case of vacate orders and 10 days for 209A orders. Both

orders can require a party to leave and stay away from their home. Both orders carry criminal penalties if violated.

Vacate Orders vs. Orders for Sole Use and Occupancy of the Marital Home

If a § 34B vacate order enters against a party, it is not unusual for one or both parties' attorneys to suggest that the vacate order be replaced with an order granting "sole use and occupancy of the marital home" to the party who obtained the vacate order. Unlike a vacate order, an order for sole use and occupancy of the marital home does not carry criminal penalties or need to be renewed with a separate hearing every 90 days. Thus, replacing vacate order with a use and enjoyment order is often viewed as a de-escalation tool; a way of resolving which party will reside in the home moving forward, without the harsh criminal penalties and negative stigma associated with vacate orders.

As noted above, if a judge enters an emergency § 34B vacate order, the statute requires the court to schedule a second hearing within 5 days; however, in practice, many such hearings are not scheduled for up to two weeks, depending on the court. At the "return" hearing, the party subject to the vacate order can make his or her case against the extension of the vacate order. However, at the hearing, the Probate & Family Court judge may choose to replace the vacate order with a sole use and occupancy order if (a.) the judge feels a party's removal from the home is warranted, but (b.) criminal penalties associated with a § 34B vacate order would be excessive. (During the hearing, the judge might inform the parties that he or she is not inclined to extend a vacate order but would be inclined to enter a sole use and occupancy order.)

It may be worth noting here that orders for sole use and occupancy are somewhat controversial. The concepts underpinning use and enjoyment orders are largely borrowed from real estate and landlord-tenant law; there is no specific statute authorizing Probate & Family Court judges to enter such orders in domestic relations cases. Moreover, some argue that in the case of married spouses, the § 34B statute should be the exclusive remedy for parties seeking to remove a spouse from the home for non-violent behavior. Despite these concerns, attorneys and Probate & Family Court judges alike have often viewed orders for exclusive use and enjoyment of the home as an important tool for accomplishing the sometimes necessary task of separating hostile spouse without triggering the somewhat draconian criminal penalties provided under § 34B.

Put simply, a party who violates a § 34B vacate order will be arrested and criminally charged, while a party who violates a sole use and enjoyment order will be subject to a civil Complaint for Contempt.

Vacate Orders Vs. 209A Restraining Orders: A Question of Violence

One cannot understand the legal standard for § 34B vacate orders without considering the legal standard for the issuance of a 209A restraining order. Unlike § 34B vacate orders, which are almost never subject to appellate review, there is a vast body of Massachusetts law defining and interpreting the legal standard for the issuance of 209A restraining orders. The depth and breadth of law surrounding 209A thus shapes our understanding of their less closely examined cousins, § 34B vacate orders.

Fundamentally, the difference between the legal standards for a § 34B vacate order and a 209A restraining order comes down to the threat of *physical violence*. As we have discussed in our many blogs on 209A orders, the issuance of a 209A abuse prevention order requires a showing that the restraining order is needed because of a "substantial likelihood of immediate danger of abuse", with abuse defined as follows: "the defendant has caused or attempted to cause physical harm, committed a sexual assault, or **placed the plaintiff in reasonable fear of imminent serious physical harm**". In short, actions by a spouse that are merely annoying, inappropriate or emotionally distressing generally provide insufficient grounds for the issuance of a 209A restraining order, absent a specific threat of violence.

The statutory legal standard for § 34B vacate orders does not specifically require a threat of violence, where the statute provides that a vacate order may issue upon a showing that "**the health, safety or welfare of the moving party or any minor children residing with the parties would be endangered or substantially impaired by a failure to enter such an order**." While this language has been long understood to require a showing of *something less* than the threat of physical violence required for the issuance of a 209A restraining order, broad phrases like "health, safety or welfare" and "substantially impaired" have long frustrated judges and attorneys seeking to quantify *exactly* what kind of behaviors justify the issuance of a § 34B vacate order. With virtually no appellate cases interpreting the § 34B standard, judges and advocates have been forced to muddle through Motions to Vacate with minimal guidance for decades.

New Decision Clarifies Legal Standard for § 34B Vacate Orders

In JC v. AC (2023), the Appeals Court offered some much needed clarification regarding the legal standard for the issuance of § 34B vacate orders. Like many unpublished opinions, the Court's factual summary of the husband's purported behavior in JC v. AC is somewhat sparse, but sets forth the basic allegations in sufficient detail to understand the situation:

Here, the judge found that **the husband was discussing the divorce proceeding with the parties' minor child, who was only six years old at the time of the hearing, and blaming the situation on the wife**. The judge concluded that "the environment that that creates in [the] household" posed a threat to the health, safety, and welfare of both the wife and the child. … Although the husband claims that the wife fabricated her allegations, the judge expressly found the wife's version of events credible and the husband's version not credible, and we will not disturb those credibility determinations on appeal.

The Court's substantive analysis was similarly brief and to the point:

To the extent the husband argues that the order was unjustified because there was no evidence that he physically threatened the wife, **no such evidence was required**. Under G. L. c. 208, § 34B, a judge has broad discretion to determine whether a temporary order precluding cohabitation during the pendency of a divorce action is necessary to protect the "health, safety or welfare" of a party or minor child. **The judge here was within her discretion to enter an order to protect, at a minimum, the welfare of the child, based on her finding that the husband was making inappropriate comments to the child about the wife and the pending divorce**.

The opinion does not provide specific details quoting the husband's alleged "inappropriate comments to the child about the wife", but scenarios involving one parent's over-sharing of legal information or inappropriate criticisms of the other parent to a minor child are familiar terrain for Probate & Family Court judges and practitioners. Indeed, some may argue that the behavior, as alleged, is so common that the imposition of a vacate order could be viewed as excessive. Without knowing more about the husband's alleged comments (which, it is important to note, the husband denied saying to the court), it is difficult to engage in a deeper analysis. Moreover, for judges and clarity simply seeking clarity on the legal standard, JC v. AC is invaluable; the case provides a clear minimum threshold for the type of behavior that warrants a vacate order when there is no allegation of domestic violence.

Put simply, JC v. AC stands for the proposition that a § 34B vacate order may be justified if one parent is inappropriately discussing the legal proceedings and "blaming the situation on the" other parent with a minor child. Moving forward, the case significantly enhances the understanding of judges, attorneys and litigants considering § 34B vacate orders in the context of inappropriate but non-violent spousal/parental conduct.

Do Vacate Orders Apply to Unmarried Parents/Couples who Reside Together?

On its face, G. L. c. 208, § 34B applies only to married couples who are engaged in an open divorce case. There is no clear authority applying the vacate rule to unmarried parents or couples who reside together, despite the ever-increasing prevalence of unmarried parents or individuals who cohabitate together. Nevertheless, an argument can be made that unmarried partners should be afforded the protection of § 34B, regardless of the statutory focus on divorcing spouses.

Over the years, a number of Massachusetts decisions have come down extending protections enjoyed by married individuals to unmarried parents. These decisions have held that children of unmarried parents should be entitled to the same child support and other protections that are provided to children of married parents under our statutes. Over time, statutes that once applied only to married parents have been expanded to unmarried parents, such as G. L. c. 208, § 30, the so-called removal statute, which requires parents to obtain permission before relocating out-of-state with a child. While the statute refers only to "a minor child of divorced parents", the Supreme Judicial Court applied the law to all children, regardless of their parents' marital state, as far back as 1985.

Vacate orders under § 34B protect not just adults, but "any minor children residing with the parties" whose "health, safety or welfare" is "endangered or substantially impaired" by the conduct of one parent. To the extent that the statute appears to discriminate against non-marital children by limiting its protections to only children born of married parents, there is a solid argument that § 34B should be expanded to protect children of unmarried parents on equal protection grounds (whether such protection should also be extended to unmarried cohabitants without children is another question).

The issue most likely to frustrate attempts to apply § 34B to unmarried parents is likely the same issue that has frustrated appellate review over the years; namely, the peculiar, "temporary"

nature of 90-day vacate orders under § 34B increases the complexity and difficulty of applying the statute's protections to individuals who do not have an open divorce case.

(Rather than seeking to apply § 34B directly to unmarried parents, a clever attorney might also consider arguing that the § 34B standard should apply to the vacate provisions under 209A. Clearly, 209A restraining orders usually require a threat of violence, but it would be interesting to see how the Appeals Court would react to a lower threshold being applied to just the vacate provisions of 209A on the grounds that unmarried parents are unfairly discriminated against under § 34B.)

Is JC v. AC Binding Precedent in Massachusetts?

As noted at the outset of this blog, the temporary nature of § 34B vacate orders has historically prevented challenges of § 34B vacate orders from reaching the Appeals Court. Most appeals occur after a final judgment has entered in a case; where § 34B vacate orders are temporary in nature, and a judge generally *cannot* include a permanent vacate order in a final judgment of divorce, there are simply not many opportunities for the Appeals Court to weigh in on vacate orders through the normal appeal process.

In JC v. AC, the husband took the somewhat unusual step of appealing the probate court judge's temporary vacate order to a "single justice" of the Appeals Court, which is the only remedy for a party seeking appellate review of a temporary order. After the single justice denied the husband's petition, the husband then appealed the single justice's denial to the full Appeals Court. It was only through this circuitous path that the Appeals Court was finally in a position to meaningfully interpret the legal standard for § 34B vacate orders in JC v. AC.

Although unpublished opinions of the Appeals Court are not binding precedent in Massachusetts, such opinions are often cited in Massachusetts courts for their persuasive value. Moreover, in the absence of a published opinion from the full Appeals Court examining a given issue, some unpublished opinions can have an outsized impact on the law. One particularly famous (or infamous, depending on who you ask) example of an unpublished opinion having an outsized impact on Massachusetts law surrounds so-called Vaughan Affidavits.

Massachusetts is generally acknowledged as the only state in the country that allows a divorcing party to subpoena the parents of their spouse to determine the inheritance the spouse would be likely to receive if his or her parents/family die. (Virtually every other state protects parents from such subpoenas on privacy grounds). However, for more than 30 years, Massachusetts divorce

attorneys have been preparing so called Vaughan Affidavits, which is an affidavit that enables a spouse's parents or family to avoid being deposed in their child's divorce case by preparing an affidavit that summarizes their estate plans.

Incredibly, the entire legal basis for Vaughan Affidavits is based entirely on a 1990 Memorandum and Order entered by a single justice of the Appeals Court. This single justice's decision, which is not even an *unpublished* opinion of the Appeals Court, has not only controlled this area law for more than 30 years – the case has even spawned the name of the specific legal instrument that Massachusetts divorce lawyers know well.

Thus, if we ask whether JC v. AC will be viewed as binding precedent for § 34B vacate orders in the years ahead, the best answer may be: *No, but it's probably the best law we've got*. After all, if an entire generation (or two) of Massachusetts attorneys and judges have used Vaughan Affidavits based on the unpublished 1990 memo of a single justice of the Appeals Court, one can imagine the comparatively *greater* authority that the JC v. AC opinion may have on § 34B vacate orders in the future.

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