MASSACHUSETTS Lawyers Weekly

SJC: judges must consider pre-divorce abuse evidence

Are also advised to address §31A presumption explicitly

By: Kris Olson January 2, 2020

A Probate & Family Court judge must consider evidence of both past and present domestic abuse during a modification proceeding, including evidence of abuse that occurred prior to the entry of the divorce judgment, the Supreme Judicial Court has decided.

The judge must also explicitly consider the applicability of the rebuttable presumption under G.L.c. 208, §31A, that it is not in the best interest of a child to be placed in the custody of an abusive parent, even in the absence of evidence of abuse occurring after the divorce judgment, the court added.

After an August 2015 divorce judgment, the wife In *Malachi M. v. Quintina Q.* raised an alleged 2013 incident of abuse in the context of proceedings related to a complaint for modification of her divorce judgment.

When Judge Randy J. Kaplan granted the father sole legal custody of their child, the mother appealed, arguing that the judge erred by failing to consider evidence of domestic violence that had occurred before the entry of the divorce judgment.

The father countered that "the law neither requires nor permits courts to retry domestic violence issues that were subsumed in the underlying original custody judgment" and that, absent "material and substantial changes in circumstances," res judicata should apply.

But by using "shall" in G.L.c. 208, § 31A, the Legislature evinced an intent to deprive the judge of discretion regarding whether to consider evidence of "past or present abuse," Justice Elspeth B. Cypher wrote on the court's behalf.

"Put another way, regardless of whether it is an initial divorce proceeding or a modification proceeding, the plain language of §31A requires a Probate and Family Court judge to have a complete view of abuse when determining whether a custody decision is in the child's best interest," Cypher wrote.

Malachi M. v. Quintina Q, Lawyers Weekly No. 10-197-19 (30 pages)

THE ISSUE: At a modification proceeding, must a Probate & Family Court judge consider evidence of both past and present domestic abuse, including evidence of abuse that occurred prior to the entry of the divorce judgment?

DECISION: Yes (Supreme Judicial Court)

LAWYERS: Robert E. Curtis Jr. of North Andover; Mark R. Griffith of Woburn (plaintiff)

Michael J. Traft of Boston (defense)

"[R]egardless of whether it is an initial divorce proceeding or a modification proceeding, the plain language of §31A requires a Probate and Family Court judge to have a complete view of abuse when determining whether a custody decision is in the child's best interest."

— SJC Justice Elspeth B. Cypher

However, the court added that the judge retains discretion regarding the nature and scope of the evidence to be admitted on those issues.

In the case before the court, it was apparent that Kaplan had considered evidence of past and present domestic abuse, the SJC said in upholding her decision.

The court also made clear that its holding should not be taken as an expansion of the ability of parties to file a complaint for modification but merely a clarification of the scope of the Probate & Family Court's treatment of allegations of domestic abuse when a complaint for modification is properly before the court.

Well-struck balance

The father's attorney, Robert E. Curtis Jr. of North Andover, said he was pleased with the outcome for his client and thought the SJC struck a good balance on an important issue in the context of child custody disputes: a history of domestic violence.

Lawyer for father

But he said he had some lingering concerns related to the aspect of the holding dealing with the rebuttable presumption under G.L.c. 208, §31A.

In urging the SJC to import "the long-established common-law principle of res judicata," particularly its "claim preclusion" aspect, Curtis said his concern was that the court kept open a party's ability to return to court repeatedly on the same facts, hoping that a different judge will view them differently.

Meanwhile, the mother's attorney, Michael J. Traft of Boston, took some solace that the court adopted his client's position on the "critical issue" of whether it was necessary for a judge to consider the entire past history of domestic violence in modification hearings.

But Traft said he still believed, contrary to the SJC's findings, that Kaplan failed to give such thorough consideration to the father's history. Instead, he said the manner in which she restricted the evidence tainted her appraisal of the issue.

But Traft said he was at least heartened that the SJC's ruling applies equally to future litigation in his client's case.

Mansfield attorney Kevin J. Powers, co-author of an amicus brief in the case, said he shared Curtis' concern over litigants who insist on dragging their adversary into court over and over on the same allegations. But he said he thought the SJC incorporated into its decision some important safeguards, reaffirming the judge's authority to prevent litigation from becoming abusive.

He cited the court's discussion of the judge retaining the discretion to limit the scope of evidence, as well as the need for judges to find by a preponderance of the evidence that a pattern or serious incident of abuse occurred before taking the inquiry further.

Roberta Mann Driscoll of Gilmanton, New Hampshire, who joined with Powers on the brief, said she was pleased that the SJC had not gone as far as Curtis had urged with the res judicata concept, which she said might come into conflict with the best interest of the child in cases in which the prior abuse allegations might be relevant based on the nature of the change in circumstances.

Boston attorney Robert J. Rivers Jr. said his concern with the court requiring past abuse to be fully considered was a "proof problem," noting that guardian ad litem reports sometimes contain "multiple layers of hearsay."

Parties typically are allowed to cross-examine GALs with respect to the contents of their reports, but that opportunity may not exist if a party needs to rebut a years-old report during a modification hearing, he said.

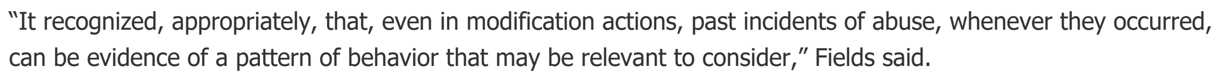
But beyond those concerns, the SJC's decision was generally greeted favorably by the family law bar.

Boston attorney Richard M. Novitch, who filed an amicus brief in the case, welcomed the reaffirmation that the best interest of the child is "elevated above all else" in modification proceedings.

If the judge is not considering a party's full history of abuse, it is "the equivalent of making a decision with one eye open," he said.

Wellesley Hills attorney Jonathan E. Fields also commended the SJC for harmonizing in a sensible way §31A and §28, which limits modifications to instances of "changed circumstances." At the outset of *Malachi*, Cypher noted that

the SJC was being called upon to “resolve the tension” between the two sections.



“It recognized, appropriately, that, even in modification actions, past incidents of abuse, whenever they occurred, can be evidence of a pattern of behavior that may be relevant to consider,” Fields said.

‘Key’ incident resurfaces

“Malachi M.” and “Quintina Q.” met in 2001, married in 2003, and had their only child together in 2006. In 2014, the father filed for divorce.

As part of the divorce judgment entered in August 2015, the couple agreed to share legal custody of the child.

As part of the divorce proceedings, a court-appointed guardian ad litem conducted an investigation, submitted a report, and testified at the divorce trial, detailing the mother’s allegations that the father hit her and slapped her on and off throughout their marriage, turned physical three or four times a year, and “raged” if the mother tried to speak with him about the child’s care.

In addition, the mother described “a particularly egregious occurrence of father assaulting mother in Florida in 2011,” in which the father screamed at her, pushed her into a wall, and knocked the door down after she locked herself in the bedroom. The incident allegedly occurred after she returned home two hours late from a shopping trip.

The father acknowledged much of what the mother had alleged but added that, after the 2011 incident, he immediately sought and received treatment for anger management. The mother confirmed that he had not been physical toward her since that time.

Certain post-divorce-judgment incidents led the father to seek modification of the divorce judgment in May 2016. One involved an incident in early February 2016 in which the mother unsuccessfully sought police intervention to retrieve a baby tooth that the child had lost while staying with the father.

A few days later, the mother reported an alleged 2013 incident of abuse to the police, which had allegedly culminated with the father throwing the mother’s car keys at her head. When she ducked, the keys struck their child’s leg, causing her to bleed, according to the mother’s account.

An application for a criminal complaint issued against the father but was denied for lack of probable cause.

Five days later, the mother sought an abuse prevention order against the father, which was granted on an ex parte basis but not extended after a full hearing at which both parties were present.

Around the same time, the Department of Children and Families also declined to become involved after investigating a report from a mandated reporter.

After a pre-trial conference, Kaplan issued an order that the scope of the testimony at the modification trial would be from Aug. 15, 2015, until the present. During the one-day modification trial, the judge allowed limited testimony regarding events that occurred before the divorce judgment.

The modification judgment detailed the mother’s allegations concerning abuse and its impact on the child, the credibility of the mother’s allegations, and the parties’ parental abilities.

Kaplan found that, despite those allegations, the mother had testified that she trusted her ex-husband to care for the child, and that the child had told a guardian ad litem that she liked spending time with both parents and was not afraid of either of them.

The modification judgment granted the father sole legal custody and left the divorce judgment’s shared custody provision in place. Kaplan awarded the father legal fees and found the mother guilty of civil contempt.

The mother appealed, and the SJC granted her motion for direct appellate review.

Rebuttable presumption

Referencing G.L.c. 208, §31A, the mother contended that Kaplan had also erred by failing to apply the rebuttable presumption that it is not in the best interest of a child to be placed in the custody of an abusive parent.

Again, the SJC agreed with the mother in principle, holding that a judge at a modification proceeding must address the applicability of the rebuttable presumption, even in the absence of evidence of abuse occurring after the divorce judgment.

But here, even though Kaplan had not expressly used the term "rebuttable presumption," her rationale demonstrated that she had determined the father to have rebutted the presumption.

However, the court advised that, "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."

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