

## Parent and child – Custody – Domestic abuse

*Supreme Judicial Court*

📌 By: Mass. Lawyers Weekly Staff 🕒 December 27, 2019

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Where a Probate & Family Court judge modified a judgment and awarded a divorced father sole legal custody of the parties' child, the modification ruling should be affirmed because a substantial change in circumstances warranted modification of the custody order and the judge did not fail to consider (1) evidence of past and present domestic abuse and (2) the rebuttable presumption that it is not in the best interest of the child to be placed in the custody of an abusive parent.

"This is an appeal by the mother from a modification judgment that granted sole legal custody of the parties' child to the father. In this case we must resolve the tension between the requirement in G.L.c. 208, §31A, that '[i]n issuing any temporary or permanent custody order, the probate and family court shall consider evidence of past or present abuse toward a parent or child as a factor contrary to the best interest of the child' and the constraints of G.L.c. 208, §28, limiting modifications to changed circumstances. The issues presented are whether (1) during a proceeding to modify a child custody decision the judge must consider evidence of domestic abuse that occurred prior to the entry of the divorce judgment; (2) during a proceeding to modify a child custody decision the judge must consider the applicability of the rebuttable presumption that it is not in the best interest of the child to be placed in the custody of an abusive parent, even in the absence of evidence of abuse occurring after the divorce judgment; and (3) there was a material and substantial change in circumstances to warrant the modification.

"We hold that pursuant to G.L.c. 208, §31A, the judge at a modification proceeding must consider evidence of both past and present abuse, including evidence of domestic abuse that occurred prior to the entry of the divorce judgment, and must address the applicability of the rebuttable presumption, even in the absence of evidence of abuse occurring after the divorce judgment. We further hold that in the present case, a substantial change in circumstances warranted modification of the custody order. For the reasons that follow, we affirm. ...

"We first address whether, during a proceeding to modify a child custody decision, the statute requires that the judge must consider evidence of domestic abuse that occurred prior to the entry of the divorce judgment. ... We hold that in a proceeding to modify a child custody decision, the judge must consider evidence of domestic abuse that occurred before the entry of the divorce judgment. We further hold that the judge in the present case did consider evidence of abuse that predated the entry of the divorce judgment. ...

"In conclusion, although the judge limited the testimony during the modification trial to the time period after the divorce judgment, she allowed the parties to submit evidence of past abuse through the trial exhibits, which she stated she would review in detail. The judge also considered the mother's postdivorce allegations of abuse, which the judge admitted through testimony and documentary evidence. Our review of the modification judgment shows that the judge did review the exhibits and that her findings incorporated the contents of the exhibits, her credibility determinations, and her consideration of the impact on the child of each of the mother's allegations. Therefore, it is apparent that the judge considered evidence of past and present domestic abuse as a factor contrary to the best interest of the child, in accordance with G.L.c. 208, §31A. ...

"We next address the accompanying issue of whether a judge at a modification proceeding must consider the applicability of the rebuttable presumption that it is not in the best interest of a child to be placed in the custody of an abusive parent, G.L.c. 208, §31A, even in the absence of evidence of abuse occurring after the divorce judgment. ... We hold 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. As explained *infra*, the judge here properly considered application of the rebuttable presumption. ...

"Nothing in §31A's language limits application of the rebuttable presumption to the initial divorce proceeding. ... Therefore, the rebuttable presumption remains applicable at a modification proceeding.

"If a judge finds by a preponderance of the evidence 'that a pattern or serious incident of abuse has occurred and issues a temporary or permanent custody order,' the judge must then 'enter written findings of fact as to the effects of the abuse on the child, which findings demonstrate that such order is in the furtherance of the child's best interests and provides for the safety and well-being of the child.' ...

"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. ...

"The final issue is whether a substantial change in circumstances warranted modification of the custody order. ... We hold that the judge was warranted in modifying the custody order. ...

"In the present case, the judge's decision was informed by substantial findings, a thorough review of the record, and her assessment of the witnesses' credibility. After detailing the mother's allegations against the father, the judge found that the mother 'is still attempting to punish Father and has not been able to separate their prior relationship [from] that of his relationship with the child' and that 'this could potentially be extremely detrimental to the child.' Because of her findings regarding the mother's behavior, the judge determined that 'it is in the child's best interest that Father shall have sole legal custody of the child.' In addition, the judge had the mother's allegations of abuse before her, and addressed them in her findings. As such, the judge was able to look to the allegations for context for the mother's behavior, but the judge still determined that it was in the best interest of the child to award legal custody to the father. At the modification trial, the judge heard testimony from the mother and the father, as well as multiple professionals involved with the parties and the child. The judge was in the best position to determine the credibility of the witnesses, and to the extent credibility determinations played a role in her decision, we see nothing to disturb them."

*Malachi M. v. Quintina Q. (Lawyers Weekly No. 10-197-19) (30 pages) (Cypher, J.) A complaint for modification was heard by Randy J. Kaplan, J., in Probate & Family Court. Michael J. Traft for the mother; Robert E. Curtis Jr. for the father; the following submitted briefs for amici curiae: Kia L. Freeman and Wyley S. Proctor for Women's Bar Association of Massachusetts and another; Richard M. Novitch, pro se; Sasha Drobnick, of the District of Columbia, Philip A. O'Connell Jr. and Tony K. Lu for Domestic Violence Legal Empowerment and Appeals Project; Kevin J. Powers, Elizabeth V. Brennan, Christine M. Bonardi, Roberta M. Driscoll and Amy DiDonna for D.M. and others (Docket No. SJC-12674) (Dec. 26, 2019).*

[Click here to read the full text of the opinion.](#)

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