

HOUSE No.

The Commonwealth of Massachusetts

PRESENTED BY:

Kay Khan (BY REQUEST)

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act relative to child custody.

PETITION OF:

NAME:

Sanford A.Kowal

DISTRICT/ADDRESS:

Attorney at Law
56 Chestnut Hill Ave.
Boston, Ma. 02135

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. 1539 OF 2007-2008.]

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT RELATIVE TO CHILD CUSTODY.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 31 of Chapter 208 of the General Laws as appearing in the 2004
2 Official Edition is hereby amended by striking out the text of section 31 and inserting in place
3 there of the following new text:—

4
5 Section 31. (a) For the purposes of this section, the following words shall have the following
6 meaning unless the context requires otherwise:

7
8 "Sole legal custody", one parent shall have the right and responsibility to make major decisions
9 regarding the child's welfare including matters of education, medical care and emotional, moral
10 and religious development.

11
12 "Shared legal custody", continued mutual responsibility and involvement by both parents in
13 major decisions regarding the child's welfare including matters of education, medical care and
14 emotional, moral and religious development.

15
16 "Sole physical custody", a child shall reside with and be under the supervision of one parent,
17 subject to reasonable visitation by the other parent, unless the court determines that such
18 visitation would not be in the best interest of the child.

19

20 "Shared physical custody", a child shall have periods of residing with and being under the
21 supervision of each parent; provided, however, that physical custody shall be shared by the
22 parents in such a way as to assure a child frequent and continued contact with both parents.
23

24 (b) In making an order or judgment relative to the custody of children, the rights of the parents
25 shall, in the absence of misconduct, be held to be equal, and the rights of the parents and the
26 happiness and welfare of the children shall determine their custody. When considering the
27 happiness and welfare of the child and the rights of the parents, the court shall consider whether
28 or not the child's present or past living conditions adversely affect his physical, mental, moral or
29 emotional health and who was responsible if this is the case.
30

31 (c) Upon the filing of an action in accordance with the provisions of this section, section twenty-
32 eight of this chapter, or section thirty-two of chapter two hundred and nine and until a judgment
33 on the merits is rendered, absent emergency conditions, abuse or neglect, the parents shall have
34 temporary shared legal and physical custody of any minor child of the marriage; provided,
35 however, that the judge may enter an order for temporary sole legal and/or physical custody for
36 one parent if written findings are made stating facts in this case, that support a finding that such
37 shared custody would not be in the best interest of the child.
38

39 (d) In determining whether temporary shared legal and/or physical custody would not be in the
40 best interest of the child, the court shall consider all relevant facts including, but not limited to,
41 whether any parent abuses alcohol or other drugs, has deserted the child or alienated the children
42 toward the other parent; but a history of the parties inability to cooperate will not be
43 determinative of the issue of custody. If there are facts of a lack of cooperation or by agreement
44 of the parties, the agreement or order must contain a provision for resolution of matters of
45 dispute in the future during joint legal or physical custody by final alternative dispute resolution
46 a) arbitration in accordance with the provision of c. 105C in this court, b) by agreement, or c)
47 presentation of the issue in dispute only to the probate court by complaint pursuant to c. 231A
48 for future resolution and an enforcement order. Such alternative dispute resolution must be tried
49 and fail before a modification can be entered in this regard. Orders described herein after hearing
50 or trial and or an agreement enforced by the court shall be considered a final judgment
51 notwithstanding future dispute resolution provisions are included therein. In addition it shall be
52 grounds for modification of custody and the awarding of counsel fees to the other party, if a
53 parent is found to have persistently and/or in bad faith, failed to carry out the terms of the said
54 joint custody order or engaged in parental alienation in regard to the other parent with a child.
55

56 (e) If despite a current or permanent restraining order against one parent pursuant to chapter two
57 hundred and nine A being in effect, the court orders shared legal or physical custody either as a
58 temporary order or at a trial on the merits, the court shall provide written findings to support such
59 shared custody order and cause the 209A order to be amended in regard thereto. The denial, or

60 vacating of such an order first issued in a prior 209A matter by any court, shall be binding on this
61 court, and the facts alleged or which could have been alleged, shall not be permitted to be
62 considered again in regard to its custody or visitation determinations under this section. The
63 definition of 'abuse' shall be the same in custody and visitation matters as defined by c. 209A.
64

65 (f) There shall be a prima facie presumption in favor of shared legal and physical custody in
66 determining final custody and visitation on the merits, at trial by agreement and/or at a hearing.

67
68 (g) At any trial on the merits, if the issue of custody or visitation is contested and either party
69 seeks shared legal or physical custody, the parties, jointly or individually, shall submit to the
70 court at the trial a shared custody implementation plan setting forth the details of shared custody
71 including, but not limited to, the child's education; the child's health care; procedures for
72 resolving disputes between the parties with respect to child-raising decisions and duties; and the
73 periods of time during which each party will have the child reside or visit with him, including
74 holidays and vacations, or the procedure by which such periods of time shall be determined.

75
76 (h) After the trial on the merits, the court shall consider the shared legal and physical custody
77 implementation plans submitted by either of the parties as part of the evidence. The court may
78 issue a shared legal and physical custody order and, in conjunction therewith or may accept the
79 shared custody implementation plan submitted by either party. If the plan is submitted by the
80 agreement of the parties jointly, the court may not reject such a joint custody plan submission
81 and issue a sole legal and/or physical custody award, unless there is a preponderance of the
82 evidence submitted sufficient to overcome the presumption of shared custody or to support an
83 amendment to the joint plan, and the court issues findings of fact and law giving its reasons for
84 such actions.

85
86 (i) A shared custody implementation plan and/or any other custody and or visitation or support
87 award ordered or accepted by the court shall become part of the judgment in the action. Such an
88 agreement and/or order shall also contain a provision for resolution of any dispute concerning
89 such joint custody, sole custody and/or visitation matters in the future, by i) arbitration in
90 accordance with the provision of c. 105C in this court, ii) by agreement, or iii) presentation of the
91 issue to a probate court by complaint under c. 231A for future resolution and an enforcement
92 order. Custody visitation and or support orders, described herein after trial, hearing and/or by
93 agreement to be enforced by the court, shall be ordered as a considered a final judgment,
94 notwithstanding future dispute resolution provisions included therein.

95
96 Provisions regarding shared custody contained in an agreement executed by the parties and
97 submitted to the court for its approval that addresses the details of shared custody shall be

98 deemed to constitute a shared custody implementation plan for purposes of this section.

99

100 An award of shared physical custody shall be considered in determining the amount of child
101 support owed by either parent based on the time the children are supported by either of them
102 when in their residences under the plan and the economic circumstances of the parties. An order
103 of shared custody shall constitute grounds for modifying a prior support order based on sole
104 custody if there is a demonstrated economic impact that is a sufficient basis to warrant
105 modification, or may be the basis for changed orders during joint custody if the economic
106 circumstances of either of the parties shall change in the future.

107

108 The entry of an order or judgment relative to the custody of minor children shall permit the non-
109 custodial or each joint custodial parent, without the necessity of an order from any court, to have
110 full access to the academic, medical, hospital or other health records of any minor child of the
111 parties or if any child is unimancipated and/or still being supported by either party, to age 23,
112 notwithstanding any other law or order; unless there a specific order to the contrary entered in
113 this court, stating the reasons therefore.

114

115 Where the parents have reached an agreement providing for the custody and visitation and/or
116 support of the children, the court shall enter an order in accordance with such agreement, unless
117 specific findings are made by the court supported by clear and convincing factual evidence in the
118 case, indicating how such an agreement would not be in the best interests of the children.

119

120 SECTION 2. Section 9 of Chapter 215 of the General Laws as appearing in the 2004 Official
121 Edition is hereby amended by striking out the text of section 9 and inserting in place there of the
122 following new text:—

123 **Persons entitled to appeal**

124 C. 215, section 9

125

126 A person aggrieved by an order, judgment, decree or denial of a probate court made after this
127 chapter takes effect, may, within thirty days after the entry thereof, appeal there from to the
128 appeals court or, subject to the provisions of section ten of chapter two hundred and eleven A, to
129 the full court of the supreme judicial court. Said courts shall have like powers and authority with
130 respect thereto as upon an appeal in any civil action, except that an appellate court in any case
131 involving an appeal of an initial judgment or order or modification of a judgment or order
132 concerning the custody of, or visitation with children, shall determine whether the judgment or
133 order is supported by a preponderance of the evidence.