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SJC Decision Could Have Major Impact on Child Custody Cases Involving Domestic Violence

By Jason V. Owens | September 24, 2019

Family Law Child Custody Modification

Jason V. Owens reviews a major upcoming decision affecting domestic violence in child custody cases in Massachusetts.



On Monday, September 9, 2019, the Supreme Judicial Court (SJC) heard oral arguments in *T.D. vs. J.O. (2019)*, an appeal originating in the Essex County Probate and Family Court case that focuses on how Massachusetts courts treat evidence of past domestic violence in child custody cases. The SJC's decision has the potential to reshape how Probate and Family Courts make [child custody decisions](#) by excluding evidence of past domestic violence from cases where a parent with a history of domestic violence seeks custody of a child through a complaint for modification.

Specifically, *T.D. vs. J.O.* focuses on whether a mother should have been permitted to present evidence of alleged past [domestic abuse](#) by her former husband, after the former husband filed a [Complaint for Modification](#) seeking custody of the parties' 12-year old daughter less than a year after the parties were divorced in 2014. If the SJC agrees with the lower court's decision to prohibit the mother from introducing evidence of the father's history of

domestic abuse, it could have far-reaching implications in similar cases that play out on a regular basis in Massachusetts probate and family courts.

The Ordinary Rule: A Parent's History of Domestic Violence is an Important Factor in Child Custody Cases

Two Massachusetts statutes require probate and family courts to consider past domestic violence between parents when making custody decisions. The statutes, [Ch. 208, § 31](#) (for married and divorced parents) and [Ch. 209C § 10](#) (for parents who were never married), include nearly identical language that apply to child custody cases where past domestic violence is an issue:

In 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. A probate and family court's finding ... that a pattern or serious incident of abuse has occurred shall create a **rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent.**

The statutes define "abuse" as any of the following incidents between parents or with a child: (a) attempting to cause or causing bodily injury; or (b) placing another in reasonable fear of imminent bodily injury. The statutes define "serious incident of abuse" as: (a) attempting to cause or causing serious bodily injury; (b) placing another in reasonable fear of imminent serious bodily injury; or (c) causing another to engage involuntarily in sexual relations by force, threat or duress.

The presumptive rule against allowing a parent to have primary custody kicks in under [Ch. 208, § 31](#) and/or [Ch. 209C § 10](#) if the court finds that either multiple incidents of "abuse" or a single "serious incident of abuse" occurred. The question before the SJC in [T.D. vs. J.O.](#) is whether a probate and family court can exclude evidence of one parent's past abuse if the parent accused of abuse has filed a Complaint for Modification seeking custody of a child sometime *after* the initial divorce or judgement.

Although the Massachusetts statutes require judges to consider "past or present abuse" when making child custody decisions, many probate and family judges will restrict parties from introducing evidence of past abuse in

custody modification cases that can be filed at any time before a child's 18th birthday.

SJC Deciding: Is Evidence of Past Abuse Admissible in Modification Proceedings?

In T.D. vs. J.O., the parties were divorced in August 2015 following a trial in the Essex Probate and Family Court. The judge at the 2015 trial, Hon. Theresa Bisenius, awarded mother primary physical custody of the parties' daughter and granted joint legal custody to the parties. In the divorce trial, Judge Bisenius would have been required by statute to "consider evidence of past or present abuse toward a parent or child as a factor contrary to the best interest of the child". However, Judge Bisenius was not required to make extensive written findings about abuse in the divorce judgment because she did not award primary custody (legal or physical) to the father.

In the Rationale she filed for the Judgment of Divorce, Judge Bisenius wrote only this about domestic violence:

The Court finds that 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.

In May of 2016, less than a year after the divorce judgment, the father filed a Complaint for Modification seeking sole legal and physical custody of the daughter, who is now 12 years old.

At some point, the presiding judge in the case changed from Judge Bisenius, who heard the divorce case, to the Hon. Randy Kaplan, a Circuit Court justice who hears cases across multiple Massachusetts counties. Judge Kaplan has been the trial court judge in some of the more famous probate and family court cases of the last two decades, including the subject of our [recent blog on Bernier v. Bernier](#). A [search of Judge Kaplan's name](#) yields more than 140 entries in the Massachusetts appellate court's search page, which is likely the highest figure for any judge now sitting in Essex Probate and Family Court sitting in Massachusetts.

According to [Mother's appellate brief](#), Judge Kaplan entered orders prohibiting the parties from seeking evidence regarding any domestic violence that occurred prior to the judgment of divorce in August 2015. Among the evidence

Mother pursued was an admission that the father allegedly made in a restraining order hearing, in which the father purportedly discussed physically abusing the mother in the child's presence. In her Brief, Mother argues that the orders preventing Mother from entering evidence of domestic violence during the marriage violated the plain language of the statutes requiring Massachusetts courts to consider evidence any "past or present abuse toward a parent" in a child custody case.

Prior to trial, Judge Kaplan appointed a [Guardian ad Litem \(GAL\)](#) to investigate child custody issues. According to Judge Kaplan, the "GAL specifically found that the allegations by Mother of the events prior to 2014 were already examined in the prior investigation and during the trial in 2015." On November 15, 2017, Judge Kaplan held a 1-day trial on the father's Complaint for Modification on. On April 6, 2019, more than 16 months after the 1-day trial concluded, Judge Kaplan entered her Judgment of Modification. (A [lengthy delay following trial](#) is common in the Probate and Family Court, although a 16-month delay following a 1-day trial is unusual.)

Judge Kaplan's decision granted sole legal custody of the daughter to the father and imposed 23 paragraphs of restrictions on the parties (including prohibiting any direct contact between the mother and the child's medical or educational providers), and included an 11-page single spaced narrative rationale explaining the decision. (The judgment is also attached to [Mother's appellate brief](#).)

Judge Kaplan's Rationale includes multiple references to the alleged history of abuse, but includes no evidence of the specific incidents of abuse, including the "particularly egregious" incident that Judge Bisenius referenced in 2011. The Rationale is highly critical of mother's parenting behavior, which included mother making repeated reports to the child's medical providers about potential abuse by the father. The Rationale ascribes the mother's behavior to mother failing to "separate [the child's] issues from the parties' issues" and frequently references the history of alleged abuse as a potential motivation for Mother's actions, including from the mother's own testimony:

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

Somewhat unusually, the Rationale does include a description of an alleged incidents of abuse that occurred before the 2015 divorce – but uses this evidence as a means of questioning the mother's credibility. Specifically, the Rationale focuses on a May 16, 2013 incident in which mother alleged that

father threw a set of keys at her. After noting that the father denied throwing the keys, Judge Kaplan wrote:

On May 13, 2016, at a hearing at the Salem District Court for an application for criminal complaint Mother testified about the events that occurred on May 16, 2013. The application was denied because no probable cause was found.

The inclusion of the 2013 incident in the Rationale appears somewhat unusual, given that the parties themselves were barred from introducing evidence pertaining to events that occurred prior to 2015. Ultimately, the Rationale characterizes the mother's behavior with the child's caregivers as "overreaction" and found that the "issues between the parties are mainly due to Mother's ongoing concerns about the father, although there is almost no evidence to support any current concerns that Father is a threat to the child, or that he is behaving inappropriately."

Ultimately, the Court made several findings about the mother's motivations, including:

- The Court finds that Mother's actions, since at least February 2016 have been designed to try and prove that Father has been abusive to the child.
- The Court finds that Mother is still attempting to punish Father and has not been able to separate their prior relationship with that of his relationship with the child.

The Rationale says almost nothing about the specific needs of the parties' 12-year old daughter, or how restrictions – such as the order preventing the mother from communicating with the child's *dentist* -- advance the daughter's best interest. The Rationale does not describe the child's health, grades or mental or emotional state in significant detail, nor does it address either party's abilities as a parent with respect to the child's future. According to the Rationale, the "child's biggest fear was the ongoing fighting between the parents", but the decision does not say if the child recalled witnessing domestic violence. A fair reading of the decision, which includes an order for mother to pay \$10,000 to the father for legal fees, is that the judge intended for the judgment to be somewhat punitive towards the mother.

In addition to the evidentiary issues, the mother argues on appeal that the court did not consider whether the problematic behavior that the court ascribed to the mother, including her distrust and difficulty communicating with father, could have been the result of post-traumatic stress disorder (PTSD),

depression or anxiety – i.e. some of the [widely accepted impacts that domestic violence has on women](#). Among the questions now before the SJC is whether probate court judges should be required to consider the impact of domestic violence on a parent’s problematic behavior.

The Domestic Violence Related Issues that the SJC Must Consider on Appeal

On appeal, the mother raises three principle issues:

- Whether the trial judge erred by refusing in a Complaint for Modification seeking a change of child custody to consider evidence of domestic violence committed prior to the entry of the original judgment of divorce?
- Whether the trial judge erred by failing to apply the rebuttable presumption under G.L. c. 208, § 31A that it is not in the best interest of the child to be placed in the sole custody of an abusive parent?
- Whether the determination of the trial judge ... [failed] to adequately consider the history of domestic violence in the parties' relationship?

Setting aside the specific facts of [T.D. vs. J.O.](#), it is important to understand how the SJC’s answers to these questions could impact other Massachusetts cases moving forward. In terms of binding precedent, all three questions raised above are relevant. At the core of the case is the question of whether, in a custody modification case, a history of “past abuse” under [Ch. 208, § 31](#) and [Ch. 209C, § 10](#) applies to the events that occurred before the initial judgment. Given that parents can return to court seeking custody at *any time* after the initial custody judgment, it is easy to see why the definition of “past abuse” matters.

If evidence of past abuse predating a custody judgment is not admissible in a modification case, it will render [Ch. 208, § 31](#) and [Ch. 209C, § 10](#) largely toothless by redefining “past abuse” as only that abuse which occurred after the initial entry of judgment. For example, a parent who was the victim of serious abuse throughout his or her marriage could enter an agreement granting him or her sole custody of the children, only to have the other parent file a modification a few months later. The SJC’s decision will determine whether the prior history of violence will be considered in the modification.

Abuse Victims vs. Children: When Courts Blame the Impacts Domestic Violence on the Victim

In T.D. vs. J.O., Judge Kaplan's Rationale includes no description of the father's alleged history of abuse. Far more detail is provided about the mother's alleged problematic behavior, the blame for which is assigned almost exclusively to mother. The Rationale does not appear to consider whether the mother's alleged behavior could have been the product of PTSD, depression or anxiety resulting from the alleged abuse.

It is impossible (and would be irresponsible) to characterize the "abuse" referenced in T.D. vs. J.O., or to speculate on whether violence may have caused the mother to actually suffer from PTSD, depression, anxiety or other behavioral issues affecting her perspective towards and ability to communicate towards father. We simply don't know. However, the case raises questions for judges, practitioners and parents, that broadly apply to what courts should consider when weighing the harm resulting from (alleged) domestic violence in *any* child custody case.

The core question posed by the case focuses on which parent should bear the blame for the harmful impacts of domestic violence: is the abuser or the victim who finds him or herself unable to "get over" the violence he or she experienced?

Should Victims of Domestic Violence be Forced to Co-Parent with their Abusers?

Assume for a moment that a now divorced mother was the victim of serious domestic violence at the hands of her children's abusive father during their marriage. There seems to be broad scientific and social consensus that domestic violence has lasting impacts on such victims, including [PTSD](#), [depression and anxiety](#) in general. Specific negative behaviors exhibited by victims of violence include substance abuse, self-harm, eating disorders. Moreover, in the child custody context, there is a growing body of research surrounding the [particular and very specific difficulties that domestic violence victims face](#) in the when they are asked to co-parent with their abusers following a divorce or separation.

Despite all of the negative outcomes associated with domestic violence, parents who are victims of domestic violence often receive little sympathy in child custody cases. As noted in this [Pacific Standard magazine piece](#), domestic violence perpetrators prevail in *most* contested custody cases in the United States:

The [American Psychological Association](#) found that "most people, including the battered woman herself, believe that, when a woman leaves a violent man, she will remain the primary caretaker of their children." But, as the APA report goes on to conclude, family court may not consider the history of abuse relevant when awarding custody. It's common practice for family courts to preach that both parents should be in the picture for the "best interest of the child." In fact, a 2012 report by the [American Judges Association](#) states that, "batterers have been able to convince authorities that the victim is unfit or undeserving of sole custody in approximately 70% of challenged cases."

The attitude of many (if not most) family court judges seems to be that domestic violence victims must "get over" the abuse and act like normal co-parents with their abusers for the sake of the children. As noted in our blog on parental alienation, there are two competing bodies of social science regarding child custody:

On the one hand, there is [persuasive science](#) demonstrating that children who have positive and active relationships – including substantial parenting time – with both of their parents develop into healthier adolescents, teenagers and adults. This science is often referenced by victims of parental alienation, particularly in cases in which a child refuses to spend time with the parent and reacts badly to the parent's presence. The argument, in such cases, is that the long-term impact of a child having a positive relationship with both parents outweighs the short-term trauma the child may experience from being forced to see the unwanted parent.

On the other hand, there is an equally deep and persuasive [body of science](#) demonstrating that children who are exposed to parental conflict – in the form of bickering, disputes over parenting time, and verbal and physical confrontations between parents – suffer greatly from the feelings of instability, guilt and fear they experience. It is this body of law, for example, that caused Massachusetts to require divorcing parents to take the state's [Parent Education Class](#). Similarly, it is this science that underpins the many rulings in which Massachusetts courts have held that shared custody is inappropriate for parents who lack the ability to cooperate or co-parent.

In practice, however, any difficulty that a domestic violence victim experiences while trying to co-parent with his or her abuser is generally blamed on the victim in child custody cases. Said another way: following the separation, the

negative impacts of domestic violence typically become the sole responsibility of the victim to overcome. If the victim's PTSD or anxiety negatively impacts the victim's ability to engage in a normal co-parenting relationship with their former abuser is generally construed as the victim's inability to "separate [the child's] issues from the parties' issues".

Should a Domestic Violence Victim's PTSD Impact a Court's Custody Decision?

In 2017, Massachusetts enacted [new Domestic Violence Guidelines](#) for court personnel. (In [T.D. vs. J.O.](#), one part of mother's appeal focuses on the GAL's lack of familiarity with the new guidelines.) However, the Massachusetts Guidelines make no reference to PTSD or other impacts associated with domestic violence. In contrast, [Domestic Violence Guidelines](#) promulgated by the Association of Family and Conciliation Courts arguably offer far greater awareness of "post-separation abuse tactics" affecting child custody cases.

Although Massachusetts judges have broad discretion to consider all evidence when making child custody decisions, and courts recognize that a [parent's happiness has a positive impact on children](#) in other contexts, there is little reason to believe that Massachusetts Probate and Family Court judges consider the rights – or mental well-being – of parents who are domestic abuse victims in many cases.

One thing is certain: Most family law practitioners I know are *extremely hesitant* to present evidence of a client's PTSD from domestic violence in a Massachusetts Probate and Family Court, out of the very real fear that the client's PTSD diagnosis will be used to attack the client's capabilities as a parent. The fear is that a judge will use the client's PTSD diagnosis as proof positive that the client cannot "separate [the child's] issues from the parties' issues".

Realistically, most Massachusetts judges will only begin considering the impact of PTSD on parents who were the victims of domestic violence if they are required to do by statute or appellate decisions.

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What Should Happen When Domestic Violence Victims are Unable to “Get Over” Their Abuse in the Co-Parenting Context?

As recognition of the harmful impacts of domestic violence grows, society at large – and family courts specifically – must grapple with who to “blame” for the negative impacts of domestic violence. Is it fair to label a victim of domestic violence who is overwhelmed by fear of their former abuser as engaging in “parental alienation”, even if the victim presents evidence from his or her mental health providers of PTSD resulting from the abuse? As unfair as this may sound, most family law practitioners acknowledge that this is the status quo in many courtrooms across Massachusetts and the country.

Few would argue that domestic abusers should be free from blame for the negative impact of domestic violence. However, most judges are highly receptive to the argument that children receive enormous measurable benefits from the active involvement of both parents in the child’s life, even if (a.) one parent has a history of domestic violence and (b.) interacting with a former abuser causes trauma for the victim-parent that can be observed by the child. (Few judges appear to scrutinize the social science underpinning their belief that “time with both parents is always better”. This science is significantly thinner that is often assumed.)

For most judges, the only grounds for severely restricting contact between abusive parent and his or her children is direct evidence that the parent is likely to abuse *the child*. If the abuse was directed solely at the other parent, and not a child, the judge is quite likely to order substantial parenting and shared legal custody. Following such an order, the court then expects the domestic violence victim to conceal the impact of the abuse from the child and behave normally with the abuser in all respects, as if the abuse never happened. If the victim parent fails to co-parent with their abuser, criticizes or expresses fear or paranoia about the abuser, reports the abuser to professionals, or engages in any number of other behaviors that are perceived

as undermining the abusive parent, the victim will likely be found in contempt, labeled a [parental alienator](#), and face reductions in his or her parental rights.

These attitudes are deeply engrained in Massachusetts, despite the so-called “Me Too movement” and the [epidemic of murder-suicide cases](#) involving former partners across the state and country. In 2016, Texas Representative Ted Poe (R-Texas) introduced a congressional resolution that included the following goals:

- identify child safety as the first priority in custody and visitation adjudications, considering it before all other interest factors;
- allow only qualified scientific evidence and certified expert testimony to be introduced in cases involving child abuse claims; and
- mandate Congressional hearings around the practices of family courts when handling family violence allegations

More than two years later, Poe’s bill remains stalled in the judiciary committee.

What will the SJC Say in the T.D. vs. J.O. Decision?

In general, there are three ways that the SJC can handle the T.D. vs. J.O. decision. The SJC could broadly affirm Judge Kaplan’s decision, leading to a sea change in how child custody modification cases are handled in Massachusetts. The SJC could very narrowly affirm, reverse or remand the judgment in a way that minimizes the case’s applicability as precedent in future cases while avoiding strong positions on the broad issues of domestic violence and child custody cases. Or the SJC could use the decision to articulate a strong set of principles surrounding how probate and family court judges should weigh the interests of domestic violence victims against the competing interests of their children.

Family law attorney Richard Novitch, who submitted an amicus brief in support of J.O., made a good point to MassLive in an [article about the case](#):

Novitch ... said judges are “all over the map” in whether they will consider events that happened before a divorce in a later custody case.

“What would be helpful for the SJC would be to provide guidance to all trial court judges to do the same thing so there’s more consistency in application on matters as important as spousal abuse,” Novitch said.

No matter how the SJC rules, Novitch is right about one thing: judges throughout the state would benefit from guidance on how to handle child custody cases when past domestic violence is an issue.

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