

HOUSE No. 01330

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

Kay Khan

DISTRICT/ADDRESS:

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HOUSE No. 01330

By Ms. Kay Khan of Newton (by request), petition (accompanied by bill, House, No. 01330) of Kay Khan relative to the determination of the legal custody of children in court cases. Joint Committee on the Judiciary.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE
□ HOUSE
□ , NO. 1486 OF 2009-2010.]

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

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

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

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

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

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

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

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

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

47 (e) If despite a current or permanent restraining order against one parent pursuant to chapter two
48 hundred and nine A being in effect, the court orders shared legal or physical custody either as a
49 temporary order or at a trial on the merits, the court shall provide written findings to support such
50 shared custody order and cause the 209A order to be amended in regard thereto. The denial, or
51 vacating of such an order first issued in a prior 209A matter by any court, shall be binding on this
52 court, and the facts alleged or which could have been alleged, shall not be permitted to be

53 considered again in regard to its custody or visitation determinations under this section. The
54 definition of ‘abuse’ shall be the same in custody and visitation matters as defined by c. 209A.

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

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

64 (h) After the trial on the merits, the court shall consider the shared legal and physical custody
65 implementation plans submitted by either of the parties as part of the evidence. The court may
66 issue a shared legal and physical custody order and, in conjunction therewith or may accept the
67 shared custody implementation plan submitted by either party. If the plan is submitted by the
68 agreement of the parties jointly, the court may not reject such a joint custody plan submission
69 and issue a sole legal and/or physical custody award, unless there is a preponderance of the
70 evidence submitted sufficient to overcome the presumption of shared custody or to support an
71 amendment to the joint plan, and the court issues findings of fact and law giving its reasons for
72 such actions.

73 (i) A shared custody implementation plan and/or any other custody and or visitation or support
74 award ordered or accepted by the court shall become part of the judgment in the action. Such an

75 agreement and/or order shall also contain a provision for resolution of any dispute concerning
76 such joint custody, sole custody and/or visitation matters in the future, by i) arbitration in
77 accordance with the provision of c. 105C in this court, ii) by agreement, or iii) presentation of the
78 issue to a probate court by complaint under c. 231A for future resolution and an enforcement
79 order. Custody visitation and or support orders, described herein after trial, hearing and/or by
80 agreement to be enforced by the court, shall be ordered as a considered a final judgment,
81 notwithstanding future dispute resolution provisions included therein.

82 Provisions regarding shared custody contained in an agreement executed by the parties and
83 submitted to the court for its approval that addresses the details of shared custody shall be
84 deemed to constitute a shared custody implementation plan for purposes of this section.

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

92 The entry of an order or judgment relative to the custody of minor children shall permit the non-
93 custodial or each joint custodial parent, without the necessity of an order from any court, to have
94 full access to the academic, medical, hospital or other health records of any minor child of the
95 parties or if any child is unimancipated and/or still being supported by either party, to age 23,

96 notwithstanding any other law or order; unless there a specific order to the contrary entered in
97 this court, stating the reasons therefore.

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

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

105 Persons entitled to appeal

106 C. 215, section 9

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