

# HOUSE . . . . . No. 1539

By Ms. Khan of Newton (by request), petition of Sanford A. Kowal relative to child custody. The Judiciary.

## The Commonwealth of Massachusetts

In the Year Two Thousand and Seven.

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

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

7 “Sole legal custody”, one parent shall have the right and responsi-  
8 bility to make major decisions regarding the child’s welfare  
9 including matters of education, medical care and emotional, moral  
10 and religious development.

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

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

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

24 (b) There shall be a prima facie presumption in favor of shared  
25 legal and physical custody in determining temporary or final custody  
26 and visitation.

27 (c) Upon the filing of an action in accordance with the provisions  
28 of this section, section twenty-eight of this chapter, or section thirty-  
29 two of chapter two hundred and nine and until a judgment on the  
30 merits is rendered, absent emergency conditions, abuse or neglect by  
31 one party or the other, in making a temporary or permanent order or  
32 judgment relative to the custody of children, the rights of the parents  
33 shall be held to be equal, and the rights of the parents and the happi-  
34 ness and welfare of the children shall determine their custody. When  
35 considering the happiness and welfare of the child and the rights of  
36 the parents, the court shall consider whether or not the child's pre-  
37 sent or past living conditions adversely affect his physical, mental,  
38 moral or emotional health and who was responsible if this is the  
39 case. In determining whether temporary shared legal and/or physical  
40 custody would not be in the best interest of the child, the court shall  
41 consider all relevant facts including, but not limited to, whether any  
42 parent abuses alcohol or other drugs, has deserted the child or alien-  
43 ated the children toward the other parent; but a history of the parties  
44 inability to cooperate presently or in the past, will not be determina-  
45 tive of the issue of issuing a joint custody order.

46 (d) The parents shall have temporary shared legal and physical  
47 custody of any minor child of the marriage notwithstanding prior  
48 disputes between the parties; provided, however, that the judge may  
49 enter an order for temporary sole legal and/or physical custody for  
50 one parent if written findings are made stating facts in this case, that  
51 support a finding that such shared custody would not be in the best  
52 interest of the child. If there are facts of a lack of cooperation during  
53 such future temporary joint custody or sole custody orders, disputes  
54 shall be submitted to the court or its probation officers for mediation  
55 and/or final resolution.

56 (e) In all final judgments under this section, by agreement of the  
57 parties or order of the court, as to custody and/or visitation or sup-  
58 port, the agreement or order must contain a provision for resolution  
59 of matters of dispute under the order or agreement in the future  
60 except modification due to changed circumstances i.) by final alter-  
61 native dispute resolution as to custody or visitation or support, by  
62 arbitration and enforcement in the same manner as private arbitra-

63 tion agreements if both parties agree within 30 days or ii.) presenta-  
64 tion of the issue in dispute by contempt, or iii.) by complaint pur-  
65 suant to c. 231A for future resolution and an enforcement order only  
66 in the probate court. Orders for relief as to custody, visitation and  
67 support described herein after hearing or trial and or an agreement to  
68 be enforced by the court, shall be considered a final judgment  
69 notwithstanding future dispute resolution provisions are included  
70 therein as described herein by order of the court or voluntarily. In  
71 addition it shall be grounds for modification of custody and visita-  
72 tion and the awarding of counsel fees to the other party, if a parent is  
73 found to have persistently and/or in bad faith, failed to carry out the  
74 terms of a custody order or agreement, or engaged in ‘parental alien-  
75 ation’ in regard to the other parent with a child.

76 (f) If despite a current or permanent restraining order against one  
77 parent pursuant to chapter two hundred eight or two hundred and  
78 nine A being in effect, the court orders shared legal or physical cus-  
79 tody either as a temporary order or after a trial on the merits, the  
80 court shall provide written findings to support of such shared cus-  
81 tody order and cause the 209A order to be amended in regard  
82 thereto. The denial, or vacating of such an order first issued in a  
83 prior 209A matter by any court, shall be binding on this court, and  
84 the facts alleged or which could have been alleged in such matter,  
85 shall not be permitted to be considered again in regard to its custody  
86 or visitation determinations under this section. The definition of  
87 ‘abuse’ to be used herein, shall be the same in custody and visitation  
88 matters as defined by c. 209A.

89 (g) seeks shared legal or physical custody, the parties, jointly or  
90 individually, may submit to the court at the trial a ‘shared custody  
91 implementation plan’ setting forth the details of shared custody  
92 including, but not limited to, the child’s education; the child’s health  
93 care; procedures for resolving disputes between the parties with  
94 respect to child-raising decisions and duties; and the periods of time  
95 during which each party will have the child reside or visit with him,  
96 including holidays and vacations, or the procedure by which such  
97 periods of time shall be determined.

98 (h) After the trial on the merits, the court shall consider the shared  
99 legal and physical custody implementation plans submitted by either  
100 of the parties as part of the evidence. The court may issue a shared  
101 legal and physical custody order and, in conjunction therewith or

102 may accept the shared custody implementation plan submitted by  
103 either party even if the other party objects.

104 (i) If a plan of joint custody is submitted by the agreement of the  
105 parties, or as provisions which are part of a written agreement in  
106 regard to divorce, the court may not reject such a joint custody plan  
107 or such provisions, and issue a sole legal and/or physical custody  
108 award or require a change in such provisions, unless there is a pre-  
109 ponderance of the evidence submitted sufficient to overcome the  
110 presumption of shared custody or to support an amendment to the  
111 joint plan, and the court issues findings of fact and law giving its  
112 reasons for such actions.

113 (j) Provisions regarding shared custody contained in an agreement  
114 for divorce executed by the parties and submitted to the court for its  
115 approval that addresses the details of shared custody shall be deemed  
116 to constitute a 'joint custody implementation plan' for purposes of  
117 this section.

118 (k) An award of shared physical custody shall be considered in  
119 determining the amount of child support owed by either parent based  
120 on the time the children are supported by either of them when in  
121 their residences under the plan and the relative economic circum-  
122 stances of the parties and shall not be subject to support guidelines  
123 for sole physical custody situations. An order of shared custody shall  
124 constitute grounds for modifying a prior support order based on sole  
125 custody if there is a demonstrated economic impact that is a suffi-  
126 cient basis to warrant modification, or such an order may be the  
127 basis for changed orders during joint custody if there is or will be  
128 known circumstances showing relatively large changes in the time  
129 the children spend with each party each year, or there is or will be  
130 known economic circumstances of either of the parties which shall  
131 significantly change during a year period of time in the future justi-  
132 fying a modification in regard thereto.

133 (l) The entry of any type of order or judgment relative to the cus-  
134 tody of minor children under this section or c. 209A, shall still  
135 permit the non-custodial or each joint custodial parent their parental  
136 rights, without the necessity of an order from any court, to have full  
137 access to the academic, medical, police or administrative records,  
138 hospital or any other health records of any minor child of the parties  
139 directly from the third party sources who shall be required to pro-  
140 vide them (and not from the other parent except voluntarily unless

141 there is joint custody) or if any child is unemancipated and/or still  
142 being supported by either party until age 23, notwithstanding any  
143 other law or order; unless there a specific order to the contrary under  
144 this section entered in the probate court, stating the reasons there-  
145 fore.