SJC-12674

MALACHI M. vs. QUINTINA Q.[1]

Essex. September 9, 2019. - December 26, 2019.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Divorce and Separation, Child custody, Modification of judgment. Minor, Custody. Parent and Child, Custody. Evidence, Child custody proceeding.

Complaint for divorce filed in the Essex Division of the Probate and Family Court Department on February 12, 2014.

A complaint for modification, filed on May 19, 2016, was heard by Randy J. Kaplan, J.

The Supreme Judicial Court granted an application for direct appellate review.

Michael J. Traft for the mother.
Robert E. Curtis, Jr., for the father.
The following submitted briefs for amici curiae:
Kia L. Freeman & Wyley S. Proctor for Women's Bar Association of Massachusetts & another.
Richard M. Novitch, pro se.
Sasha Drobnick, of the District of Columbia, Philip A. O'Connell, Jr., & Tony K. Lu for Domestic Violence Legal Empowerment and Appeals Project.

[1] The parties' names are pseudonyms.

Kevin J. Powers, Elizabeth V. Brennan, Christine M. Bonardi, Roberta M. Driscoll, & Amy DiDonna for D.M. & others.

CYPHER, J. 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.[2]

Background. 1. 2015 judgment of divorce nisi. The parties met in 2001 and married in 2003. They have one child, who was born in 2006. In 2014, the father filed for divorce. The parties entered into a partial agreement for judgment, in which they agreed to share legal custody of the child. After a trial in which both parties were represented by counsel, the judgment of divorce nisi (divorce judgment), which incorporated the partial agreement for judgment, was entered in August 2015.[3]

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[2] We acknowledge the amicus briefs submitted in support of the mother by the Women's Bar Association of Massachusetts and Massachusetts Law Reform Institute; Richard M. Novitch; and the Domestic Violence Legal Empowerment and Appeals Project, as well as the amicus brief submitted in support of the father by D.M. and the six M. children.

[3] Even if the separation agreement provided for the child's physical and legal custody, the divorce judge still would have had to evaluate whether the agreement was in the best interests of the child. See G. L. c. 208, § 31 (when approving separation agreement that provides for child custody, judge "may enter an order in accordance with such agreement, unless specific findings are made by the court indicating that such an order would not be in the best interests of the children"); C.P. Kindregan, Jr., M. McBrien, & P.A. Kindgregan, Family Law and Practice § 8:20 (4th ed. 2013) ("while the courts have given wide latitude to the parties to negotiate and enter into

The divorce judgment provided that the parties would share legal and physical custody of the child.

As part of the divorce proceedings, the court appointed a guardian ad litem (divorce GAL), who conducted an investigation, submitted a report (divorce GAL report), and testified at the divorce trial.[4] The divorce GAL interviewed the mother, the father, and the child, as well as other individuals connected to the parties. The divorce GAL report stated, inter alia, that the mother alleged that the father hit her and slapped her on and off throughout their marriage, that the father turned physical three or four times per year, and that the father "rage[d]" if the mother tried to speak with him about the child's care. In addition, the mother described to the divorce GAL what the divorce judge found to be "a particularly egregious occurrence of father assaulting mother in Florida in 2011" (2011 incident). The mother alleged that after she was two hours late returning home from a shopping trip, the father yelled and

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separation agreements the courts retain the power to provide otherwise when the best interests of the children require[] it").

[4] On appeal, the mother asserts that there was no testimony about domestic abuse at the divorce trial and that the statement regarding domestic abuse in the divorce judgment derived from statements the parties made to the divorce GAL. The transcript from the divorce trial is not part of the appellate record, but the father does not dispute this assertion. The divorce GAL report is a part of our record.

screamed at her, pushed her into a wall, knocked the door down after she locked herself in the bedroom, told her "I will teach you a lesson," and stabbed the chair she had just purchased.[5] The mother told the divorce GAL that the child was present in the home during this incident. The divorce GAL report addressed the father's description of this incident, with the father recalling that he pushed the mother to the floor; that, after the mother locked herself in a room, he then pushed the door off the hinge; and that the fight ended when he pushed the mother up against a wall. The divorce GAL report stated that the father said that he and the mother had had five or six fights that became physical and that the mother had hit and slapped him.[6] The divorce GAL report also noted the father's statement that after the 2011 incident he "immediately looked for an anger management class and booked himself in" and that he had not been physical toward the mother since that time, which the mother confirmed.

The divorce judgment includes two sentences about domestic violence: "The Court finds that the parties have both engaged in physical assaults upon the other during the early part of the

[5] The father disputed both that he had a knife and that he damaged the chair.

[6] The mother asserted to the divorce GAL that she never hit, slapped, or threatened to hit the father.

marriage which culminated in a particularly egregious occurrence of father assaulting mother in Florida in 2011. Following that incident, father engaged in anger management counseling at his own initiative and there have been no further incidents." Neither party appealed from the divorce judgment.[7]

2. Postdivorce events. Certain incidents occurred after the divorce judgment, leading the father to seek modification of the divorce judgment in May 2016. In the time between the divorce judgment and the modification trial, the father learned that the mother had brought the child to the child's pediatrician to be tested for a sexually transmitted disease (STD),[8] that the mother told the child's therapist that the child showed signs of regression corresponding to visits with the father, and that the mother brought the child to her pediatrician for a bruise on the child's face and alleged that the bruise could have been from the father squeezing the child's face.

In early February 2016, the child was staying with the father when she lost a baby tooth. The mother requested that the father give the mother the tooth, but by the time she made

[7] The docket indicates that the mother filed a notice of appeal, but that she took no further action and the appeal was dismissed.

[8] The STD testing occurred in March 2015, but the father did not learn about it until June 2016.

the request the father was traveling and could not provide the mother with the tooth. The mother contacted the police to seek assistance with obtaining the tooth from the father's home, but the police declined to become involved.

A few days after the tooth incident, the mother reported an alleged 2013 incident of abuse to the police (2013 incident). The resulting police report stated that an argument between the father and the mother led the father to grab the mother's arm, "squeezing extremely hard," and to the father throwing the mother's car keys at her head; however, the mother ducked and the keys landed on the child's leg, causing her to bleed.[9] As a result of the mother's report, an application for a criminal complaint issued against the father, but the application was denied for lack of probable cause.

Five days after the denial of the application for a criminal complaint, the mother sought a G. L. c. 209A abuse prevention order against the father. A judge granted an ex parte abuse prevention order, which, in part, prohibited contact between the child and the father for fifteen days, but after a full hearing at which both parties were present, the order was not extended.

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[9] The mother recorded the incident in a notebook the same evening.

In February 2016, after receiving a report pursuant to G. L. c. 119, § 51A, from a mandated reporter (51A report), the Department of Children and Families (department) began a screening process concerning the father. However, the department screened the 51A report out, thereby declining to become involved.

3. 2016 complaint for modification. In May 2016, the father filed a complaint for modification of the divorce judgment, alleging multiple material changes in circumstances, including that he "has serious concerns regarding Mother's intentional alienation efforts to keep him from exercising his parenting time." The mother filed an answer and counterclaim, alleging, in part, that during the abuse prevention order hearing, the father admitted to multiple "newly revealed" incidents of domestic violence. The modification judge (judge) appointed a guardian ad litem (modification GAL) and ruled that the modification GAL report would be an uncontested exhibit at trial.[10] During the modification proceeding, the judge reviewed documentary evidence from the divorce trial and heard testimony from the parties.

a. Documentary evidence. The modification GAL discussed the 2013 incident in his report, writing that the child "did

[10] The judge who presided over the modification trial was not the same judge who had presided over the divorce trial.

state that she had been struck in the leg by car keys during an incident in 2013, when her parents had been arguing and her father had thrown the keys." Other exhibits the judge admitted during the modification trial included the police report for the 2013 incident, the mother's journal narrative of the 2013 incident, and the divorce GAL report. The judge also reviewed the allegations the mother presented in support of the abuse prevention order.

b. Scope of the testimony. After a pretrial conference, the judge issued an order that, at the modification trial, "[t]he scope of the testimony shall be from August 15, 2015 until the present." The judge subsequently denied the mother's motion in limine seeking modification of the order.[11] During the pretrial hearings, the judge did not waver from her trial order, but she did state that she would take questions about evidence on a case-by-case basis.

During the one-day modification trial, the judge allowed limited testimony regarding events that occurred before the divorce judgment. The judge stated multiple times that she would not consider predivorce incidents during the trial, including those concerning alleged abuse, stating at one point,

[11] The mother argued that limited discussion of incidents that predated the divorce was "necessary to give context to the parties' conduct after the divorce judgment."

"Counsel, I have to be honest. Even if you convince me these things have happened, . . . there was a trial and there was a judgment on this issue. So even if you convince me there's something there, there's no change in circumstance." The judge did not allow testimony that provided more than cursory reference to predivorce events. For instance, during the modification GAL's testimony, the judge allowed him to confirm that he spoke with individuals about predivorce events, but did not allow him to expand upon the details of those conversations or events.[12]

c. The modification judgment. The modification judgment details the mother's allegations concerning abuse and its impact on the child, the credibility of the mother's allegations, and

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[12] The mother's counsel: "Did you speak to [the child] about an incident in 2013?"

The father's counsel: "Objection."

The judge: "No, she can --"

The mother's counsel: "It was in the Liberty Tree Mall."

The modification GAL: "Yes."

The mother's counsel: "Okay. And what did [the child] indicate to you happened on that day?"

The father's counsel: "Objection."

The judge: "Sustained. He may have spoken to her, but I'm not going to let it into evidence. . . . I think what's going to be relevant is how much he relied upon that."

the parties' parental abilities. The modification judgment states that in the divorce proceeding, "in support of the Judgment of Divorce, the Court found that both parties had engaged in physical assaults on the other parent during the early years of the marriage which culminated in an assault by Father against Mother in Florida in 2011" and after "that incident Father voluntarily engaged in anger management counseling and that there were no further incidents between the parties." The judge also found that in the modification proceedings, "Mother has raised allegations about Father's abusive behavior towards her, and the child, which she claims occurred prior to the Trial on the Judgment of Divorce. Mother alleges that she continues to be afraid of Father, due to the past abuse, which impacts her ability to co-parent with him."

Regarding the mother's specific allegations of abuse, the judge found that the mother alleged that the father physically abused the child, resulting in a bruise on the child's face; "had been inappropriate with the child to get back at [the mother] and [she] believed that he was capable of sexually abusing the child"; and threw the mother's car keys at the mother, striking the child in the 2013 incident. The judge also found that the mother alleged that the child showed signs of regression after visiting with the father. As discussed in more detail infra, the judge addressed each of the mother's

allegations that the father abused the child and found that the professionals (the department, the police, the child's pediatrician and therapist, and the modification GAL) responsible for responding to the respective allegations did not substantiate them.

The judge further found that the application for a criminal complaint, stemming from the mother's 2016 report of the 2013 incident, was denied for lack of probable cause. She also found that the mother obtained the ex parte abuse prevention order five days after the application was denied, the ex parte order was not extended, and the mother's statement that she did not intend the abuse prevention order to prohibit contact between the father and the child was not credible.

Moreover, the judge found that despite the mother's allegations against the father, "at [the modification] trial, Mother testified that she trusts Father to care for the child and he does not neglect her." She further found that the child told the modification GAL that "she liked spending time with both parents and was not afraid of either of them" and "she enjoys her time with Father."

The modification judgment granted the father sole legal custody and left the divorce judgment's shared custody provision

in place.[13] The judge awarded the father legal fees and found the mother guilty of civil contempt for "unilaterally authoriz[ing]" the child to undergo STD testing without telling the father, and thereafter refusing to provide the father with information about the testing.[14] The mother timely appealed, and we granted her motion for direct appellate review.[15]

Discussion. 1. Temporal limits on domestic abuse evidence. 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. The mother argues that the judge erred "by failing to consider evidence of events

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[13] Although phrased as "sole legal custody," the mother retained the right to obtain copies of the child's dental, medical, and therapeutic records; enroll the child in extracurricular activities; and maintain the child's primary address for educational purposes.

[14] The judge did not find the father in contempt. The modification judgment noted that the court had found the mother in contempt on two occasions since the divorce, both relating to the mother not complying with provisions in the divorce judgment regarding communicating with the father about the child's care.

[15] Prior to oral argument before this court, the father moved for this court to "take judicial notice of two trial-court orders entered after the docketing of this appeal, as well as the updated trial court docket entries through [September 5, 2019]." See Jarosz v. Palmer, 436 Mass. 526, 530 (2002). A third trial court judge allowed the mother's motion to present evidence of domestic abuse allegations that occurred prior to the parties' divorce and appointed a third guardian ad litem to interview the child about domestic violence allegations that predate the divorce.

of domestic violence which had occurred before the entry of the divorce judgment" because the paramount concern is "what is now and will in the future be in the best interest of the children." The father counters that "the law neither requires nor permits courts to retry domestic violence issues that were subsumed in the underlying original custody judgment." He further emphasizes that res judicata applies to a child custody judgment, unless "material and substantial changes in circumstances have occurred." 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.

We begin with the language of the statute.[16] General Laws c. 208, § 31A,[17] provides in relevant part: "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."[18] The Legislature's use of "shall" evinces an intent that the judge does not have discretion regarding whether to consider evidence of "past or present abuse" -- the judge must

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[16] "We interpret a statute according to the intent of the Legislature, which we ascertain from all its words, 'construed by the ordinary and approved usage of the language' and 'considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished.'" Stearns v. Metropolitan Life Ins. Co., 481 Mass. 529, 532 (2019), quoting Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006). See generally G. L. c. 4, § 6, Third. "[W]here the language of a statute is plain and unambiguous, it is conclusive as to legislative intent." Thurdin v. SEI Boston, LLC, 452 Mass. 436, 444 (2008).

[17] In 1998, Governor Paul Cellucci signed into law "An Act relative to the consideration of domestic violence in custody and visitation proceedings," amending G. L. cc. 208, 209, 209A, and 209C. See St. 1998, c. 179, § 3. See generally Quirion, Increased Protection for Children from Violent Homes: The Presumption against Awarding Child Custody to a Batterer, 16 Mass. Fam. L.J. 67 (1998) (providing overview of legislative history). The legislation was "aimed at providing increased protection to children exposed to domestic violence and [required] a more careful analysis of claims of abuse whenever custody or visitation are contested." Id. at 67.

[18] The statute defines "abuse" as "the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing bodily injury; or (b) placing another in reasonable fear of imminent bodily injury."

do so. See Hashimi v. Kalil, 388 Mass. 607, 609 (1983) ("The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation"). The Legislature's use of "past or present abuse" requires a consideration of evidence of abuse that occurred at any point during the parties' relationship, including before the divorce judgment. See Webster's Third New International Dictionary 1652 (1993) (defining "past" as "belonging to a former time: having existed or taken place in a period before the present"). Moreover, nothing in the language of § 31A limits its application to the initial custody order made at the time of divorce; it remains applicable at modification proceedings. See G. L. c. 208, § 31A ("any temporary or permanent custody order"); Webster's Third New International Dictionary 97 (defining "any" as "one, some, or all indiscriminately of whatever quantity").

Section 31A's mandate that the judge "consider evidence of past or present abuse . . . as a factor contrary to the best interest of the child" contrasts with the context of a modification proceeding, the evidentiary focus of which is on changed circumstances since the entry of the prior custody order. See G. L. c. 208, § 28 (court may modify earlier child custody judgment if "a material and substantial change in the circumstances of the parties has occurred and the judgment of modification is necessary in the best interests of the

children"); Taverna v. Pizzi, 430 Mass. 882, 884 (2000); Loebel v. Loebel, 77 Mass. App. Ct. 740, 750 (2010) (changed circumstances are circumstances that occur subsequent to divorce judgment).

However, because the central focus of any child custody proceeding is the best interest of the child, evidence of past or present abuse, expressly labeled in § 31A as "a factor contrary to the best interest of the child," must be taken into account by the judge. See G. L. c. 208, § 28 (court may modify earlier judgment if "modification is necessary in the best interests of the children"); Adoption of Hugo, 428 Mass. 219, 231 n.21 (1998), cert. denied sub nom. Hugo P. v. George P., 526 U.S. 1034 (1999), quoting Ardizoni v. Raymond, 40 Mass. App. Ct. 734, 738 (1996) ("decision concerning a child's best interests is within the discretion of the judge, allowing the judge 'to consider the widest range of permissible evidence'"); Supreme Judicial Court, Gender Bias Study of the Court System in Massachusetts 4 (1989) (Gender Bias Study) ("The Legislature and/or appellate courts should make it clear that abuse of any family member affects other family members and must be considered in determining the best interests of the child in connection with any order concerning custody"). Cf. Tammaro v. O'Brien, 76 Mass. App. Ct. 254, 259 n.8 (2010), citing Hinds v. Hinds, 329 Mass. 190, 191-192 (1952) ("Even in modification

actions, a judge is not necessarily precluded from considering matters prior to the earlier judgment"). Put another way, regardless of whether it is an initial divorce proceeding or a modification proceeding, the plain language of § 31A requires a Probate and Family Court judge to have a complete view of abuse when determining whether a custody decision is in the child's best interest. See Custody of Kali, 439 Mass. 834, 845 (2003), quoting Rosenberg v. Merida, 428 Mass. 182, 191 (1998) ("we will not sustain an award of custody 'unless all relevant factors in determining the best interests of the child have been weighed'"); K.A. v. T.R., 86 Mass. App. Ct. 554, 559 (2014) ("The best interests of a child is the overarching principle that governs custody disputes in the Commonwealth" [citation omitted]).

In order for the judge to evaluate evidence of past abuse, the parties must be able to present such evidence at a modification proceeding, despite such a proceeding's focus on postdivorce occurrences. Prohibiting the parties from presenting evidence of past abuse, whether raised or not during an initial divorce proceeding, may preclude the modification judge from effectuating the legislative intent and from creating a custody order in the best interest of the child. See Custody of Vaughn, 422 Mass. 590, 599 (1996) ("The very frequency of domestic violence in disputes about child custody may have the

effect of inuring courts to it and thus minimizing its significance"); Hersey v. Hersey, 271 Mass. 545, 555 (1930) ("The governing principle by which the court must be guided in deciding [issues relating to child custody] is the welfare of the child. That is so both as matter of law and as matter of humanity"). In addition, even if a divorce judgment addressed all of the allegations of domestic abuse occurring before a divorce, the modification judge must still consider the allegations; it is not enough for the modification judge to state that the allegations were addressed at the prior proceedings.

Although a modification judge must consider all allegations of domestic abuse, including alleged domestic abuse that preceded a divorce, the judge retains discretion regarding the nature and scope of the evidence to be admitted on these issues. See G. L. c. 208, § 31A ("Nothing in this section shall be construed . . . to affect the discretion of the probate and family court in the conduct of [a hearing under the rules of domestic relations procedure]"). In the present case, the judge did not err in limiting the hearing portion of the modification proceeding to testimony regarding postdivorce events, and allowing other evidence, including evidence of predivorce abuse, to be admitted through exhibits because, as explained infra, she

considered the evidence of pre- and postdivorce abuse and factored the evidence into her decision.

Review of the record and the modification judgment shows that the judge allowed evidence of past abuse as part of the modification proceeding and that she incorporated information contained in the parties' exhibits into the modification judgment. The judge stated at the start of the modification trial that she reviews the exhibit books in detail and "look[s] at uncontested exhibits as they're in for everything." The judge reviewed the mother's claim of domestic abuse in the 2013 incident, admitting the attendant police report and the mother's journal narrative as exhibits. In addition, the modification GAL addressed the 2013 incident in his report, which was an uncontested exhibit. The judge also admitted the divorce GAL report as an exhibit, and she referenced in her findings the mother's allegations presented at the ex parte abuse prevention order hearing and the divorce judgment's description of domestic abuse.

Moreover, the judge reviewed the mother's postdivorce allegations. The judge's findings covered the department screening out the 51A report, the mother obtaining the ex parte abuse prevention order five days after the application for a criminal complaint had been denied for lack of probable cause, the mother raising concerns to the child's pediatrician about

the father physically and sexually abusing the child, and the mother expressing concerns to the child's therapist that the child was regressing after visits with the father.

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.[19]

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[19] We note that the language of G. L. c. 208, § 31A, requires a judge to consider the evidence of past abuse but does not mandate the manner in which the judge considers the evidence, nor does it distinguish between previously reported or unreported abuse. We emphasize that our holding does not restrict a party from presenting evidence of past abuse that was not previously reported. There are various reasons a person suffering from abuse may not make a contemporaneous report of such abuse, and particularly where the best interests of a child are at issue, such evidence may be an important factor. See Commonwealth v. Gordon, 87 Mass. App. Ct. 322, 333 n.13 (2015). See also Family Law and Practice, supra at §§ 76:1, 76:2

We are cognizant of the oftentimes overwhelming burden faced by Probate and Family Court judges. Our holding does not expand the ability of parties to file a complaint for modification. Instead, we clarify the scope of the Probate and Family Court's treatment of allegations of domestic abuse when a complaint for modification is properly before the court. A complaint for modification must still be based on changed circumstances. See G. L. c. 208, § 28.

2. Rebuttable presumption. 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. The mother contends that the modification judge erred by failing to apply the rebuttable presumption. The father argues that because allegations of domestic violence were addressed during the divorce proceedings, for the rebuttable presumption to apply to the father on the complaint for modification, "it would have to be a new rebuttable presumption derived from new domestic violence allegations." We hold that a judge at a modification proceeding must address the

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(detailing history of legal protections for victims of domestic abuse and describing battered woman syndrome).

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.

We begin again with the language of the statute. See note 17, supra. General Laws c. 208, § 31A, provides in relevant part:

> "A probate and family court's finding, by a preponderance of the evidence, 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. Such presumption may be rebutted by a preponderance of the evidence that such custody award is in the best interests of the child."[20]

See Opinion of the Justices, 427 Mass. 1201, 1206-1207 (1998) ("Because a child's interest in being free from the effects of domestic violence is extremely significant, proof by a preponderance of the evidence appears to be a sufficient standard to allow the rebuttable presumption to attach in custody disputes between parents").

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[20] The statute defines "serious incident of abuse" as "the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (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." G. L. c. 208, § 31A.

Nothing in § 31A's language limits application of the rebuttable presumption to the initial divorce proceeding. See G. L. c. 208, § 31A ("If the court finds that a pattern or serious incident of abuse has occurred . . ."). Against the backdrop of § 31A's mandate that the judge consider past or present abuse as a factor contrary to the best interest of the child, the negative impacts to a child from such abuse, and the overarching emphasis on the best interest of the child during child custody proceedings, a broad application of the rebuttable presumption is warranted.[21] See G. L. c. 208, § 31A; Opinion of the Justices, 427 Mass. at 1206, quoting Custody of Vaughn, 422 Mass. at 595 ("To allow a child to experience or witness domestic violence 'is a violation of the most basic human right, the most basic condition of civilized society: the right to live in physical security, free from the fear that brute force will determine the conditions of one's daily life'"); Gender Bias Study, supra at 3 ("Our research indicates that witnessing, as well as personally experiencing, abuse within the family causes serious harm to children"). Therefore, the rebuttable presumption remains applicable at a modification proceeding.

[21] Although a judge must consider evidence of past abuse, the age of the abuse bears on whether the presumption has been rebutted. Age of the abuse, however, is just one factor for the judge to consider, and an absence of abuse after a divorce does not necessarily rebut the presumption.

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." G. L. c. 208, § 31A. See Custody of Vaughn, 422 Mass. at 599 ("Domestic violence is an issue too fundamental and frequently recurring to be dealt with only by implication"); Maalouf v. Saliba, 54 Mass. App. Ct. 547, 549 (2002) (G. L. c. 208, § 31A, codified requirements in Custody of Vaughn, 422 Mass. at 599-600).

The judge here expressly found that abuse occurred during the parties' marriage and discussed in detail the mother's allegations regarding abuse and its impact on the child, the credibility of the mother's allegations, and the parental ability of the mother and the father. Although the judge did not expressly use the term "rebuttable presumption," her rationale demonstrates that, assuming she found the 2011 incident to be a "serious incident of abuse," she determined the father to have rebutted the presumption, and that she entered written findings in accordance with § 31A.

Notably, the judge found that the child told the modification GAL that "she liked spending time with both parents

and was not afraid of either of them" and that "she enjoys her time with Father."

In addition, the judge credited the mother's testimony "that she trusts Father to care for the child and he does not neglect her." The judge also addressed the 2013 incident. The judge recounted the mother's allegation that the father threw the car keys at her but that the keys struck the child, and she recounted the father's denial of throwing the keys. The judge further noted, however, that after a hearing for an application for a criminal complaint relating to the 2013 incident, during which the mother testified, the application was denied because no probable cause was found. Furthermore, the judge noted that the mother reported to the police the "alleged abuse that she suffered by Father in 2013," in 2016, only after the father did not immediately return one of the child's baby teeth that had fallen out while the child was with the father.

Moreover, the judge reviewed the mother's postdivorce allegations, noting that the respective professionals involved with the various allegations had found no basis to substantiate the mother's claims. In this regard, the judge found that the department had closed its 51A report screening process for lack of protective concerns; that the mother had obtained the ex parte abuse prevention order five days "after [she] was unsuccessful in pressing criminal charges against Father,

accusing him of potentially sexually and physically abusing the child, and of physically abusing the child"; that the judge had not extended the ex parte abuse prevention order; and that the mother was not credible when she testified that she did not intend the abuse prevention order to prohibit contact between the father and the child. In addition, the judge addressed the mother's claims of abuse regarding the child, finding that when the mother brought the child to the doctor for STD testing and for a bruise on her face, on both occasions the mother raised concerns about the father, but the doctor found no basis to substantiate the mother's allegations. Moreover, the judge found that the mother "had completely overreacted to her perception of the child's behavior" when she informed the modification GAL that the child regressed after spending time with the father. Therefore, assuming the judge determined the 2011 incident to be a "serious incident of abuse," and applied the rebuttable presumption, the record and modification judgment reflect that the judge found that the father rebutted the presumption.

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.

3. Substantial change in circumstances. The final issue is whether a substantial change in circumstances warranted modification of the custody order. The mother argues that the modification judge erred by finding a substantial change of circumstances because the past abuse provided context for the mother's actions since the divorce. The father argues that modification was warranted "because mother's inappropriate and recently-escalating campaign of unsubstantiated abuse allegations against father was detrimental to the child's best interests." We hold that the judge was warranted in modifying the custody order.

"In custody matters, the touchstone inquiry [is] . . . what is 'best for the child,'" and "[t]he determination of which parent will promote a child's best interests rests within the discretion of the judge . . . [whose] findings . . . 'must stand unless they are plainly wrong.'" Hunter v. Rose, 463 Mass. 488, 494 (2012), quoting Custody of Kali, 439 Mass. at 840, 845; Mason v. Coleman, 447 Mass. 177, 186 (2006). "The judge is afforded considerable freedom to identify pertinent factors in assessing the welfare of the child and weigh them as she sees fit." Smith v. McDonald, 458 Mass. 540, 547 (2010). Such factors may include "whether one parent seeks to undermine the

relationship a child has with the other parent," Hunter, supra at 494, as well as "past or present abuse toward a parent or child," G. L. c. 208, § 31A. When determining whether an initial custody order should be modified, the court inquires whether "a material and substantial change in the circumstances of the parties has occurred and the judgment of modification is necessary in the best interests of the child[]." G. L. c. 208, § 28.

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. See Custody of Eleanor, 414 Mass. 795, 799 (1993) ("judge's assessment of the . . . credibility of the witnesses is entitled to deference").

Moreover, by allowing the mother to retain some aspects of legal custody, see note 14, supra, the judge crafted the modification of the custody order to address the mother's actions. For instance, the judge found that the mother "has attempted to use the child's providers to bolster her case against Father," and therefore gave the father the responsibility of scheduling all of the child's medical, dental, and therapeutic appointments.

For the foregoing reasons, the judge's conclusion that the mother's actions warranted modification of the custody order is not plainly wrong or clearly erroneous. See Hunter, 463 Mass. at 494; Mason, 447 Mass. at 186. We affirm the modification judgment in full and decline to vacate the award of attorney's fees.

So ordered.