

**HOUSE . . . . . No. 1330**

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**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 adoption 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*

**HOUSE . . . . . No. 1330**

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By Ms. Khan of Newton (by request), a petition (accompanied by bill, House, No. 1330) of Sanford A. Kowal relative to the determination of the legal custody of children in court cases. The Judiciary.

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

**The Commonwealth of Massachusetts**

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**In the Year Two Thousand Eleven**  
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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  
5 following meaning unless the context requires otherwise:

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

9 "Shared legal custody", continued mutual responsibility and involvement by both parents  
10 in 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  
13 parent, 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  
19 parents shall, in the absence of misconduct, be held to be equal, and the rights of the parents and  
20 the 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  
25 twenty-eight of this chapter, or section thirty-two of chapter two hundred and nine and until a  
26 judgment on the merits is rendered, absent emergency conditions, abuse or neglect, the parents  
27 shall have temporary shared legal and physical custody of any minor child of the marriage;  
28 provided, however, that the judge may enter an order for temporary sole legal and/or physical  
29 custody for one parent if written findings are made stating facts in this case, that support a  
30 finding that such 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  
32 in the best interest of the child, the court shall consider all relevant facts including, but not  
33 limited to, whether any parent abuses alcohol or other drugs, has deserted the child or alienated  
34 the children 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  
48 chapter two hundred and nine A being in effect, the court orders shared legal or physical custody  
49 either as a temporary order or at a trial on the merits, the court shall provide written findings to  
50 support such shared custody order and cause the 209A order to be amended in regard thereto.  
51 The denial, or vacating of such an order first issued in a prior 209A matter by any court, shall be  
52 binding on this court, and the facts alleged or which could have been alleged, shall not be  
53 permitted to be considered again in regard to its custody or visitation determinations under this

54 section. The definition of 'abuse' shall be the same in custody and visitation matters as defined  
55 by c. 209A.

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

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

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

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

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

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

94 The entry of an order or judgment relative to the custody of minor children shall permit  
95 the non-custodial or each joint custodial parent, without the necessity of an order from any  
96 court, to have full access to the academic, medical, hospital or other health records of any minor

97 child of the parties or if any child is unimancipated and/or still being supported by either party, to  
98 age 23, notwithstanding any other law or order; unless there a specific order to the contrary  
99 entered in this court, stating the reasons therefore.

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

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

108 Persons entitled to appeal

109 C. 215, section 9

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