

CHAPTER 1

USING THIS MANUAL

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Important Note

The material included in this manual was current at the time of publication. You should check with a family law advocate or the court to make certain that information you are relying upon is up to date. The Massachusetts Law Reform Institute (MLRI) is a good place to contact for information about the status of the law. It can be contacted at:

99 Chauncy Street, Suite 500
Boston, MA 02111
(617) 357-0700
Fax: (617) 357-0777

Please note that MLRI does not generally provide individual representation. If you have access to the Internet, you can also check http://www.masslegalhelp.org to obtain basic information about a variety of legal matters, including any significant changes in family or child custody legal issues.

Participating in the family court system can often be a frustrating and confusing experience. The court system appears to be a foreign community with its own unique language and ways of operating. Yet it is through this system

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that decisions are made affecting your life, that of your children, and of other family members. You may be unable to obtain an attorney to guide you through the system. This manual will provide you with some basic information to help you begin to understand the system. We believe that basic knowledge of your legal rights enables you to protect yourself and your children. It is also important to understand the limitations of the law and what cannot be achieved through the court process.

This book is general in nature and is not intended to provide specific answers to your situation. Each case depends upon the particular facts peculiar to it. This manual will give you a general statement of the law that would allow you to adequately weigh your options. We have included references to important case law and statutes, a resource directory, and a glossary with definitions of important terms. Throughout the manual, we have included practice notes designed to assist you in completing forms or to advise you of a particular situation. Please note that the practice notes do not apply to everyone all of the time. We have also included sample motions, complaints, and other pleadings to show you how court forms should be completed and suggestions about how to think about your case. You should not simply copy the forms and submit them to the court. You must read the materials and think about how the given information applies to you. Using this manual should enable you to organize the critical facts, records, and other documents you need to proceed with your case and to determine if you can proceed without the assistance of an attorney.

Before you file any type of court complaint, you should evaluate whether you have a good case. A good case has three essential elements: it states a valid legal claim, it is supported by substantial evidence according to court rules, and the decision of a court will provide the result or legal relief that you are seeking. Use this manual to determine whether you have a valid legal claim. In general, if the legal issue is covered by a statute, you have a legal claim (obtaining a divorce, for example).

It is important to understand that the court has its own rules about what evidence is acceptable. For example: in general, a witness can provide testimony based only on his or her own personal knowledge. This means that, save a few exceptions, his or her testimony cannot include statements about what someone else said to him or her. The court rules regarding evidence are very complicated. If you are unsure about the strength of your evidence, you should consult an attorney to help you evaluate it.

What is your goal in bringing a court case? Use this manual to determine what it is you want the court to do. You should not use the court system primarily to harass, intimidate, frustrate, or hurt someone, although these are sometimes by-products of legitimate court cases. It is important to clearly define the goal you are seeking with your case and whether you can attain it through court action.

DO YOU NEED A LAWYER?

Lawyers are people who are trained to give legal advice and counsel, organize evidence, file court papers, create legal arguments, help you negotiate a good settlement, and otherwise represent you in the court system. If you can find a lawyer to represent you, you are almost always in a better position to use the courts. This is because the court system has complex rules with which lawyers are familiar. To use an example from another profession, if you are not a mechanic and your car breaks down, you generally do not try to fix the engine without consulting a mechanic. If you act on your own, you may sometimes make things worse instead of fixing the problem. The same premise holds true for most court actions.

You can hire or retain an attorney for any part of a case. If you are not sure whether your problem can be resolved by a court, you can consult an attorney for guidance. Similarly, if you have won a money judgment in court but are unsure how to collect, you can hire an attorney for that purpose only.

Unfortunately, hiring an attorney to represent you in a family law matter can be expensive. A contested case may involve numerous court appearances before it is resolved. As a result, many of the attorneys who take on family law matters ask for a sizable retainer. Some family law cases are minimally contested or are not contested at all. These may be a type of case that you can more easily handle yourself, *pro se* (pronounced “pro say”). Judges and other staff in the family court system often look for ways to make the court more accessible to litigants without lawyers. You do have the right to represent yourself in court and many litigants have been successful on their own. However,

the family court system can be complex. You must know when to seek advice. Family law attorneys are increasingly available for advice only or other limited assistance. However, there are certain circumstances where you are strongly encouraged to seek legal representation. If you are a victim of domestic violence, you should not try to handle a case completely on your own against the person who abused you. If there is a substantial amount of money or property involved or you have major issues involving child custody, you should contact an attorney for advice, guidance, or representation.

If possible, find a lawyer who has experience handling your type of family law matter. A list of lawyer referral services and legal services offices that represent low-income litigants is in the Appendix at the end of this book. When you meet with a lawyer, you should discuss exactly how much his or her fees are. You should also get this in writing, as well as a statement about the nature of the representation and what it does and does not include. The written document is called a retainer agreement. It details what the attorney will do for you, how much you will be charged, and for what.

If you have a problem with a lawyer, the Board of Bar Overseers (BBO) handles complaints from clients. The BBO can be contacted at:

Office of Bar Counsel
99 High Street
Boston, MA 02110
(617) 728-8750

Internet: <http://www.mass.gov/obcbbo/complaint.htm#how>

There are certain instances in which you have a right to a court-appointed attorney if you cannot afford to pay for one and are determined to meet the indigency guidelines (see Chapter 2 of this manual for more information about indigency guidelines.) You have the right to have an attorney if you are a defendant in a criminal case and cannot afford to pay for an attorney. You also have the right to have an attorney if the Department of Social Services takes you to court for issues related to abuse or neglect of your child, even if you are the noncustodial parent. At present, there is no right to an attorney, even if you cannot afford one, if your spouse is suing you for divorce or custody.

A critical question to ask is whether you or your attorney believe that the case can be resolved outside of the court system.

CAN YOU RESOLVE YOUR PROBLEM OUTSIDE OF THE COURT SYSTEM?

Court cases can be lengthy, expensive, time-consuming, and emotionally draining. As the final step in evaluating your case, you should consider whether you have exhausted all the reasonable alternatives. At some point, the majority of cases can be informally resolved outside of the court system. Only a small percentage of cases filed in court actually proceed to trial and final judgment by the court. A number of alternative dispute resolution services have been created in response to the need for a less cumbersome process to solve problems. The most common technique is called mediation.

Mediation is an informal process where a person, or mediator, works with you and your partner to resolve a problem in a way that is satisfactory to both of you. Probate and Family Courts and some District Courts have staffs who mediate cases. In Probate and Family Court, these people are called probation officers or family services officers. There are also independent agencies and neighborhood service agencies that provide mediation for a small fee or for free. A list of these agencies is included in the Appendix at the end of this book.

Mediation techniques vary somewhat by which program they are provided through. Some programs use one mediator, while others use two or three to facilitate cooperative problem-solving. They share some basic concepts. The purpose of mediation is to arrive at an agreement by mutual consent. Mediation efforts will almost always fail if the parties are unwilling to compromise. In many mediation programs, the legal rights and responsibilities of the parties are considered to be irrelevant. Effective mediation depends on the good faith and equal footing of the

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participants. The focus of mediation is on reaching an agreement that is satisfactory to the parties using the mediation process. To learn more about the advantages and disadvantages of mediation, see Chapter 18 herein.

THE MASSACHUSETTS COURT SYSTEM

The Massachusetts court system has three levels, as you can see in the chart in **Exhibit 1A**. Two departments of the trial court are responsible for most family law cases. Some family law matters are also presented in the Juvenile Court, mostly those arising out of care and protection cases, which involve the Department of Social Services or other child protection entities. You may review Chapter 3 for information on cases involving the Department of Social Services. Keep in mind, however, that this manual is not focused on child welfare matters.

The Trial Court Department

The Probate and Family Court

The Probate and Family Court handles family-related matters, including:

- divorce;
- separate support;
- petitions for protection in family, elderly, or disabled person abuse cases;
- paternity issues;
- custody;
- adoptions; and
- child support matters.

This court also handles wills, trusts, guardianship of minors, and conservatorship matters. Each county has at least one location for the Probate and Family Court. Some counties, such as Middlesex and Plymouth, have several locations.

The District Court

The District Court has the greatest number of locations. It handles a broad range of civil and minor criminal matters, such as petty theft, abuse prevention restraining orders, support and paternity matters, and small claims.

Court Personnel

Court personnel bring the law to life. Key staff include:

- judges,
- clerks and assistant registers,
- probation officers (sometimes referred to as family services officers), and
- court officers.

Judges

The judge is the most critical person in the courtroom. The judge will rule on what procedures to follow, what evidence is acceptable, and how the law applies to your case. The judge may take notes or ask questions. The judge may also send you and the other party to other people to determine whether your case can be settled or to get some more information. The assignment of a judge to a case is more or less random, dependent in part on the number of judges assigned to a particular court at a given time. The trend is to have only one judge hear the matters arising out of one case, although in some counties, you may have one judge hear items on motion day and another judge assigned to hear the full case. You can check with the clerk in your county to find out how cases are assigned in your local Probate and Family Court. Judges in Massachusetts are appointed by the governor for a term that expires

when they turn seventy. Keep in mind that judges are people who are faced with a very difficult job—making very important decisions one after the other, often under high-pressure conditions.

Clerks and Assistant Registers

Clerks and assistant registers organize court business. Their job is to file papers, call cases to be heard, locate files, make routine fee waiver decisions, and otherwise assist the judge. In the courtroom, the clerk or assistant registrar usually sits in front of or next to the judge. You may ask the clerk or assistant registrar to explain court procedures, such as how cases are assigned. However, they are not permitted to give legal advice.

Probation Officers

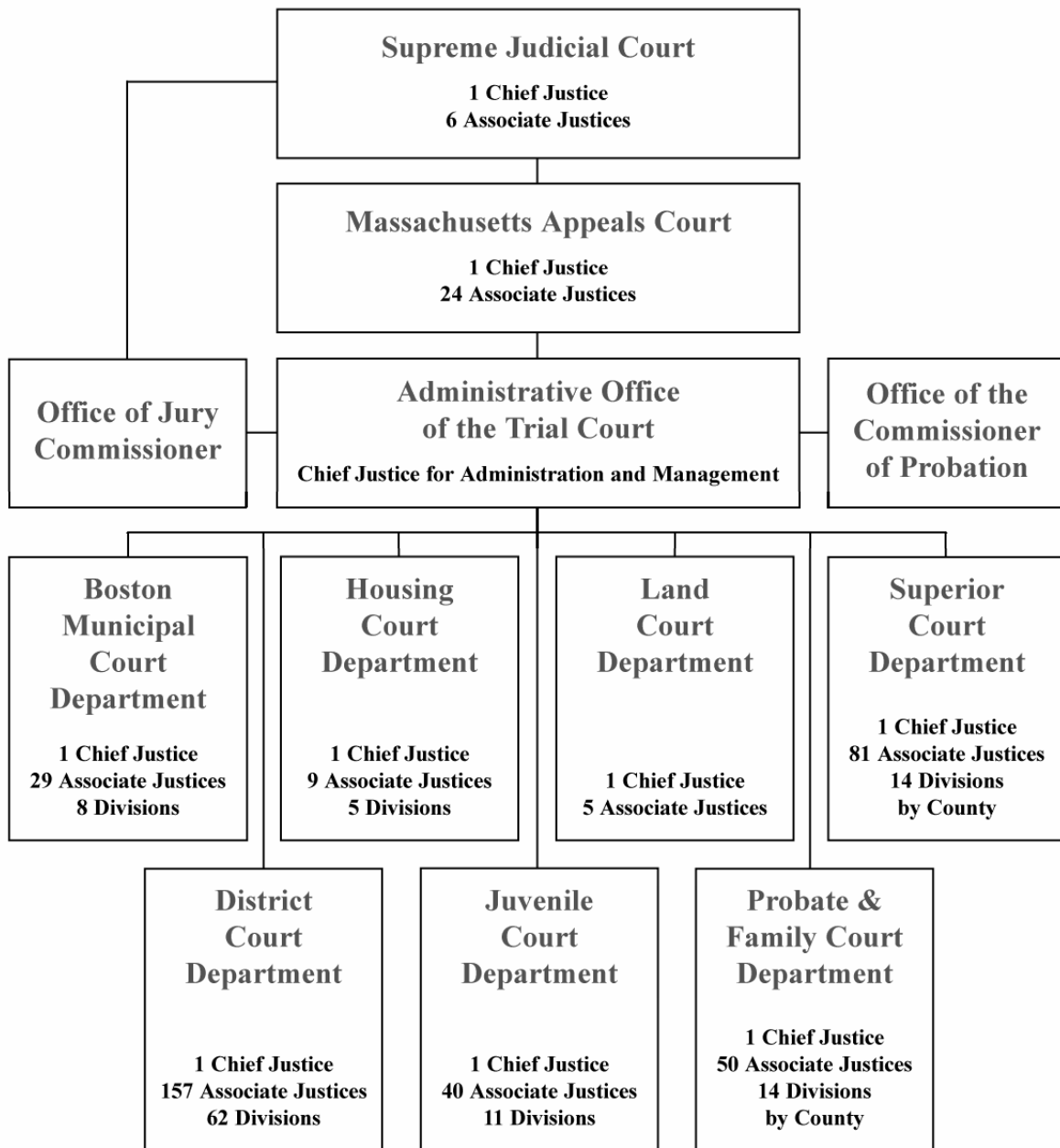
Probation officers also work in the Probate and Family Court. They perform many different functions, including case mediation and investigation of custody issues. For more information on probation officers, please see Chapter 2, Overview of the Probate and Family Court, for general information; and Chapter 3, Safety and Protection Issues, for information on probation officers and domestic violence.

Court Officers

Court officers are responsible for keeping order in the court. They open and close each court session with the familiar “all rise.” They are not police officers, although they work in close contact and harmony with them if needed.

EXHIBIT 1A—Overview of Massachusetts State Court System*

THE MASSACHUSETTS COURT SYSTEM



The number of justices for all Courts is the maximum authorized by statute; the actual number of judges varies depending on vacancies.

* Chart taken from the Massachusetts Court System Web site (<http://www.mass.gov/courts>).