

CHAPTER 9

CHILD CUSTODY

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Introduction 245

- The Most Common Types of Custody Arrangements 246
- How Does Custody Relate to Visitation? 246
- What Are the Options for Visitation? 246

Differences Between Married Parents and Unmarried Parents 248

How Do I Get Court-Ordered Custody or Visitation? 248

- Filing the Complaint 248
- Types of Court Actions 249
- Giving Notice to the Other Parent That You Have Started
a Custody Case 250
- Temporary Orders 250
- The Temporary Orders Hearing 251
- In Which Court Do I Bring My Custody Case? 252
- Filing an Answer 252

How Does the Judge Decide Custody Cases? 252

- Who Has Been the Primary Caretaker? 253
- Is the Primary Caretaker Unable to Provide Appropriate Care? 253
- If There Has Been Domestic Violence Between the Parents 253

Preparing for the Temporary Orders Hearing 254

- Putting Together Your Argument 255
- Documents 255
- Your Presentation 255

□ **CHAPTER 9: CHILD CUSTODY**

Witnesses..... 256

Getting Experts and Other Professionals Involved..... 257

How Can I Change a Custody Order? 258

Filing 258

Visitation 259

Are There Legal Differences in the Visitation Between Children Born to Married and Unmarried Parents? 259

Can Parents Make Their Own Visitation Arrangements?..... 259

What Should We Include in the Agreement? 260

Should the Custodial Parent Wait to Go to Court or Allow Visits Right Away?..... 260

Does the Court Require Children to Always Go on Visits? 260

What If a Noncustodial Parent Is Mentally Ill, Actively Alcoholic, or Physically Sick or Disabled?..... 261

What If a Noncustodial Parent Insists on Having Visits When a New Boyfriend or Girlfriend Is There?..... 261

What If the Noncustodial Parent Is in Jail? 261

What If the Child Does Not Want to Visit the Noncustodial Parent? . 261

What If the Baby Is Too Young to Go Out for Long Periods of Time?..... 262

What If the Custodial Parent Would Just As Soon Eliminate the Noncustodial Parent from the Child’s Life? 262

What If the Custodial Parent Fears That the Noncustodial Parent Will Cause Physical Harm to Him or Her or the Children During the Visits? 262

Other Problems Concerning Visitation..... 262

What Are the Legal Obligations of Parents After a Court Order Sets out a Visit Schedule? 263

Massachusetts Child Custody Jurisdiction Act 263

How Do I Figure out Which State Has Jurisdiction Over My Custody Case? 264

What Happens If It Is Unclear Which Is My Child’s Home State or If There Is an Emergency? 264

Even If I Meet the Requirements, Is It Possible That I Would Still Have to Go to the Other State to Deal with Custody Issues? 265

Does My Child Have to Be Physically Present in Massachusetts for This State’s Court to Take Jurisdiction and Make a Custody Order? 265

What Happens If There Is Already a Custody Suit in Another State?	265
What Happens If I Start a Custody Case in Massachusetts When This State Does Not Have Jurisdiction?	265
Parental Kidnapping/Custodial Interference	266
How Do I Know If I Am the Legal Custodian of My Child?	266
What If I Am Not the Legal Custodian of My Child?.....	266
How Can I Try to Prevent the Other Parent from Taking Our Child Out of the Country?	266
What Can I Do If I Am the Legal Custodian of My Child and the Noncustodial Parent Takes My Child Away From Me?	267
Can I File Criminal Charges Also?	268
Grandparents' Rights	268
Custody Actions.....	269
Grandparents' Visitation	269
How to File a Complaint for Grandparent's Visitation	269
EXHIBIT 9A—Custody Checklist	271
EXHIBIT 9B—Supplemental Order—Visitation Issues.....	273
EXHIBIT 9C—Petition for Writ of Habeas Corpus	276
EXHIBIT 9D—Complaint for Contempt.....	278
EXHIBIT 9E—Emergency Ex-Parte Motion to Produce Minor Child	279

INTRODUCTION

If you and your partner have separated and you have a child or children, you will have to resolve the following issues:

- **Physical custody**—with whom will your children live?
- **Legal custody**—who will make important decisions about their lives?
- **Visitation**—how will you best arrange for the children to see the parent they are not living with?

Custody can be arranged in several possible ways. Parents can share physical or legal custody, or one parent can have sole physical or legal custody. When a child lives with one parent, it is referred to as “sole” physical custody. When a child lives part of the time with one parent and part of the time with the other parent, it is referred to as “joint” or “shared” physical custody.

Legal custody refers to who makes important decisions in the child’s life, such as decisions about the child’s education, medical treatment and religious upbringing. “Sole” legal custody means one parent makes all the major decisions in the child’s life. “Joint” or “shared” legal custody means the parents jointly make major decisions.

The Most Common Types of Custody Arrangements

Different types of custody arrangements are appropriate in different situations. The general question is what is best for the child(ren). Many issues are relevant when evaluating what is in the best interest of the child, such as:

- what is best for the child,
- the ability of the parents to communicate with each other,
- each parent's relationship to the child, and
- where each parent lives and whether the housing conditions are appropriate.

The following are the three of the most common custody arrangements:

- **Sole physical custody to one parent and shared legal.** This means that the child will live with one parent who will be responsible for making day-to-day decisions for the child. However, both parents will be expected to make decisions together on important issues in the child's life.
- **Sole physical and legal custody to one parent.** This means that the child lives with one parent who is solely responsible for making the important decisions for the child. This may be a good idea when there has been violence by one parent toward the other and communication may not be possible or safe. Sole physical and legal custody to one parent may also be appropriate in the following situations where the other parent:
 - has a serious alcohol or drug problem,
 - has a serious mental health problem,
 - has a serious criminal history,
 - has a history of abusing a child, or
 - has never before taken any responsibility for the child.
- **Shared physical and legal custody**—This means that the child lives part of the time with one parent and part of the time with the other parent, and that both parents make decisions on important issues together. This works best when there is good communication between the parents and they live near each other.

Practice Note

Before any court action has been filed, married parents have shared physical and legal custody. Where the parents never married, however, the mother has sole physical and legal custody. In order to grant shared legal custody, the court should find that the parents have successfully exercised joint responsibility for the child prior to coming to court.

How Does Custody Relate to Visitation?

Visitation refers to the arrangements for a child to see the parent with whom he or she does not live. In many situations where one parent has physical custody, the other parent has visitation. Sole legal custody does not prevent the other parent from visiting.

What Are the Options for Visitation?

There are a number of different ways to arrange visitation; how you do it depends on your situation. The following are three options for visitation arrangements:

- **Visitation schedule**—In most cases, parents will want to set up a clear visitation schedule. Even in the most friendly of separations, it is difficult for parents to be in constant contact to try and agree on when visits will take place each week. When setting up a visitation schedule, parents should base it on the needs of the child as well as the schedules of both parents.

Practice Note

The most typical visitation schedule in cases where the visiting parent is used to spending significant time with the child(ren) is for overnight visits to occur every other weekend, either Friday or Saturday

through Sunday evening, plus one or two dinner visits per week. Be creative in your scheduling; very young children may need more-frequent, shorter visits while older children may need extra flexibility to accommodate extra-curricular activities or time with friends.

- **Reasonable visitation upon reasonable notice**—If communication between the parents is excellent, another option is to leave visitation flexible rather than setting up a schedule in advance. Parents can then arrange with each other when visits can take place. Reasonable visitation upon reasonable notice can also be appropriate where the visiting parent lives far away and is not particularly involved with the child. The visiting parent then can contact the custodial parent when he or she is coming to Massachusetts and arrange for an appropriate visit.
- **Supervised visitation**—In some situations, it may not be safe for a child to be left alone with a parent during visitation. If this is the case, one option is to arrange for supervised visitation. Supervised visitation means that a third party is present during the visits to make sure that the child is safe and that the visiting parent acts appropriately. If a supervisor believes that the child is not safe, he or she can stop the visit. The supervisor can be a supervised visitation center, a trusted friend or family member, or a therapist. In rare circumstances, the custodial parent may be an appropriate supervisor.

Supervised visitation may be appropriate in situations such as:

- when the visiting parent has a history of abuse toward that child or another child,
- when the visiting parent has a history of abuse toward the other parent,
- when the visiting parent has an alcohol or drug abuse problem (particularly if he or she cannot be trusted to abstain from using during an unsupervised visit,
- when the visiting parent has a violent criminal record,
- when the visiting parent has mental health problems that affect his or her parenting ability, or
- when the visiting parent has a serious problem with the Department of Social Services.

Supervised visitation might also be appropriate when the child has significant special needs and the visiting parent is not able to meet them without assistance. In this situation in particular, supervision may be able to transition into unsupervised visitation over time.

Practice Note

When arranging supervised visitation, the supervisor should either be a supervised visitation center or someone selected by both parents and with whom your child feels comfortable. If visitation is not supervised, but a safety risk or high degree of tension exists at the exchange of the child, visitation exchange can be supervised or effected by a third party.

If you and the other parent are unable to agree on custody and visitation arrangements before you see a judge, then the judge will decide these issues. It is important to keep in mind that a judge will not know your children's needs as well as you and your partner will, and his or her decision will be based only on the information presented to him or her.

If you think that you and the other parent may be able to come to an agreement on custody and visitation, it is worthwhile to try to do so. By coming to an agreement you can avoid a great deal of conflict, time in court, and attorney fees (if either of you decides to retain an attorney). In addition, sometimes you can come up with an agreement that better meets your children's needs and your needs than a judge's orders would.

Sometimes, however, it is not possible to come to an agreement with which both parties feel comfortable.

Practice Note

It can be more difficult to persuade a judge to alter agreements between the parties than an order of the court. This is one reason to try to avoid agreeing to visits with which you are uncomfortable.

DIFFERENCES BETWEEN MARRIED PARENTS AND UNMARRIED PARENTS

When married parents separate, each has an equal claim to the custody of their children. Without any court order in place, the parents have joint legal and joint physical custody. If you and your children's other parent are married but have separated or plan to separate, you will need to work out an arrangement between yourselves for custody and visitation, or go to court right away to get court orders.

The situation is different for unmarried parents. The mother of a child born to unwed parents has sole legal and sole physical custody of the child unless a judge orders that the father has custody. The father, on the other hand, has no legal right to see or take the child unless the mother agrees to let him, or unless he has been legally declared by a judge to be the father of the child and has been granted visitation rights by a judge. See Chapter 7, Paternity Issues.

Practice Note

If you are the mother of a child born out of wedlock, keep in mind that a judge may not look favorably upon your denying the child's father visitation rights unless you have a real concern about the child's safety, or unless you have a reason to believe that he is not, in fact, the child's father. Often in paternity cases, the father has no experience caring for the child. Visitation can be reasonably crafted in light of the father's ability to care for the child, the child's feeding and sleep schedule (particularly if breast-feeding), and other considerations.

HOW DO I GET COURT-ORDERED CUSTODY OR VISITATION?

In order to obtain any court order, you need to start a legal action in a court. To start any legal action in court, you need to file a "complaint." To get a custody order, you need to file a complaint in the Probate and Family Court. The only other court that can issue custody orders is the District Court, and this is only if one party seeks a domestic abuse prevention order under G.L. c. 209A (often referred to as a "restraining order" or "209A") to prevent domestic violence by the other parent. This will be discussed below.

Filing the Complaint

In order to start an action in court, you need to file a complaint in the appropriate Probate and Family Court. As described above, depending on your particular situation, you will file one of the following types of complaints:

- Divorce complaint, G.L. c. 208, §§ 6B (filing of action; statistical report), 8 (commencement of actions). See Chapter 5, Divorce.
- Separate support complaint, G.L. c. 209, §§ 32, 32F. See Chapter 4, Separate Support.
- Custody complaint, G.L. c. 209, § 37.
- Paternity complaint or complaint for support, custody, or visitation, G.L. c. 209C. See Chapter 6, Alimony, Pensions and Other Relief.
- Abuse prevention order, G.L. c. 209A, §§ 7–9. See Chapter 3, Safety and Protection Issues.

Practice Note

Each of these complaints will ask for your address. If the other parent does not know your address, and you fear physical harm if he or she learns of your address, you can file a motion to impound address. See a sample motion at Chapter 3: Safety and Protection Issues, **Exhibit 3C**.

If you already have a final judgment on one of the types of complaints listed above, and you want to change it, you need to file a complaint for modification. In order to prevail in a complaint for modification, you must prove that there has been a "substantial change in circumstances" since the original judgment was issued and that a change is in the best interest of the child(ren). A sample complaint for modification is included as **Exhibit 16B**.

The chapters referenced above provide a step-by-step outline of what you need to do to file the different types of complaints.

Practice Note

A filing fee is required when you file most complaints (but never for the filing of 209A abuse prevention orders). If you cannot afford the filing fee, you may be able to have the fee waived. You will need to fill out an affidavit of indigency to request that the filing fee be waived. A sample affidavit is included as **Exhibit 2A**. If your income is more than 125 percent of the poverty level and you do not receive public benefits, you will be asked to fill out a supplement to the affidavit of Indigency with more details about your expenses.

Keep in mind that whenever you file an action related to children, you must file an affidavit disclosing care and custody proceedings. A sample affidavit is included as **Exhibit 5I**. On this affidavit you must provide the following information:

- the names of each child who is a child of both you and the person you are filing the complaint against;
- the addresses where the children have lived for the past two years;
- information about any legal action that has been filed in any court concerning these children; and
- the names of all people who claim a right to custody of these children.

The purpose of this form is to insure that anyone who claims to have a right to custody of your children is notified that the case has been filed so that they have the opportunity to come to court to explain why they should have custody. You cannot bring a case in which children are involved without filing the affidavit disclosing care and custody.

Practice Note

If you cannot remember what type of action was filed or in what court it was filed, you should still indicate that some action was filed and write that you do not know further information. You will be signing the affidavit of indigency “under pains and penalties of perjury” and must be sure not to exclude information simply because you do not remember all of the details.

Types of Court Actions

The type of case that you will bring depends on your situation. If you and your child’s other parent are married and have decided to legally end your marriage, either of you can file a complaint for divorce. If you have decided to separate, but are not certain that you want to divorce, and you need court orders regarding custody or visitation, you can file a complaint for separate support in the Probate and Family Court. In both divorce and separate support actions, you can obtain court orders for custody and visitation as well as child support and some other kinds of orders. The difference between a divorce and a separate support action is that, at the end of a divorce, the court will legally terminate your marriage, whereas in a separate support action, the court does not terminate your marriage. See Chapter 4, Separate Support, and Chapter 5, Divorce.

Married people who do not wish to terminate their marriages and are seeking only custody, visitation, and child support orders may also file custody actions in the Probate and Family Court. This complaint is called complaint for custody between married people, and is seldom used.

A parent who is not married to his or her children’s other parent, but who wishes to resolve custody and visitation issues, can bring a paternity action in the Probate and Family Court. In a paternity action, you can obtain custody and visitation as well as child support orders. See Chapter 7, Paternity Issues.

If you are being abused by your child’s other parent and you need protection from domestic violence, you can obtain a 209A order in either your local District Court or your county’s Probate and Family Court. If you obtain a 209A order and you have your children, you can ask the judge for an order giving you custody of the children. It is important to keep two things in mind about custody and visitation with domestic abuse prevention orders. First, the person against whom the order is issued does not have a right to seek custody or visitation of children as a part of the order. Second, a Probate and Family Court order related to custody or visitation will override any contradictory

□ CHAPTER 9: CHILD CUSTODY

orders issued by a District Court judge. For more information about restraining orders, see Chapter 3, Safety and Protection Issues.

Practice Note

You should be aware that, while the District Court does not have the authority to order visitations, some District Court judges order the parties to negotiate a visitation schedule. You should not agree to a schedule with which you are not comfortable. If the opposing party obtains a visitation order in Probate and Family Court, that order will not allow unlimited access to a child with whom he or she has been ordered to have no contact. Rather, the Probate and Family Court's visitation order will create a specific time and manner in which contact is permitted.

Giving Notice to the Other Parent That You Have Started a Custody Case

Once you file the complaint, you need to insure that the other parent gets a copy of your complaint in the specific manner required by the Rules of Domestic Relations Procedure. This is because the other parent has a right to know that you have filed a complaint against him or her in court. The process of getting the complaint to the other parent is called "service of process." The law requires that you complete service of process in certain ways to insure that the other person has been notified. The rules for service of process are described in Chapter 2, Overview of the Probate and Family Court.

Practice Note

If you have filed an affidavit of indigency, you can give a copy of the approved document to the sheriff or constable in order to have the state billed for service of process instead of you.

Temporary Orders

Once you have filed your complaint, you may not want to wait until a final hearing to get custody orders. The final hearing can be months, occasionally even years, away.

In most cases, the parties need some intervention of the court right away, whether to determine temporary custody, set a visitation schedule, or decide on the proper amount of child support. If you need orders right away, you can file a motion for temporary orders. To file a motion, you can fill out a form available at the court or you may write or type up your own motion. You need to tell the court clearly and concisely what custody and visitation orders you want and why you think that you need them. A sample motion for temporary orders is included as **Exhibit 2D**.

You then need to schedule a hearing date for your motion for temporary orders. The hearing date has to be far enough away so that you can give the other parent the notice that the law requires you to give. If you send your notice by mail, you must mail it at least ten days before the hearing date you have scheduled. It is important to remember that the date you mailed the notice does not count toward the ten days. For example, if you mail the notice on a Monday, the hearing cannot be scheduled for any time before the Thursday of the following week. If you hand deliver the notice, it must be delivered to the other parent at least seven days before the hearing. For example, if you hand deliver the notice on a Monday, the hearing cannot be scheduled for any time before the Monday of the following week. Because things often take longer than expected, you should give yourself a few extra days.

Practice Note

The courts work on an "individual calendar" system. When you file your complaint, it will be assigned to a particular judge. That judge will be the one before whom each of your court dates will be scheduled. When you file your motion and ask for a hearing date, the date will probably be the first date, at least ten days away, on which your judge is hearing motions.

When you give notice of the hearing, you must give the other parent a copy of your motion and a copy of any other papers you filed to support the motion. You must also notify the other parent of the date, time, and location of the hearing. You then must file a document with the court stating the date that you sent the notice, whether you sent it

by mail or hand delivered it, and informing the court of what date, time, and location you informed the other parent of. This is called a “certificate of service.”

You can file your motion for temporary orders at the same time you file your complaint. You can then include it along with your summons and complaint when you serve notice upon the other parent.

The Temporary Orders Hearing

On the date of the hearing for your motion for temporary orders, you must arrive at court at the time scheduled for your hearing. In most courts, you will usually be sent to meet with a probation officer, sometimes called a family services officer. The probation officers are trained mediators who will try to help you and the other parent to reach an agreement. If you reach an agreement, you will not need to go before a judge. You and the other parent will sign a “stipulation” describing the orders which you agree should be entered. The officer cannot require you to make an agreement and cannot make any orders. The role of the Probation Office is to assist you in mediating—you may always go before a judge.

Practice Note

In the Worcester Probate and Family Court, and possibly other courts, you may be directed to a hearing before the “motion mediator.” The motion mediator may seem more like a judge than the probation officer, but again has no authority to make an order you have not agreed with. Mediators and probation officers help create stipulations, which must be signed by the parties. Judges do not ask you to sign stipulations; they make orders as they see fit.

If you come to an agreement, you may be able to leave the courthouse right after signing the agreement without seeing the judge at all. However, some judges want you to be present in the courtroom when they review your agreement so that they can ask you questions about it. Follow the instructions of the mediator or family services officer as to where you should go after signing the stipulation. The stipulation is not enforceable until it has been made into an order of the court.

Practice Note

If you are a victim of domestic violence, you are not required to mediate relief under G.L. c. 209A with your abuser. If you are seeking an abuse protection order or a restraining order to prevent abuse, or if there has been domestic violence, you are not required to meet with the person against whom you have an order or are seeking an order. In order to screen for domestic violence, probation officers are supposed to interview each party individually. Such screening sessions, however, are not the practice in all courts.

If you are involved in a matter against your abuser, and you do not feel comfortable meeting with him or her, tell the probation officer that you do not want to meet with the abuser. If you have a restraining order and you either fear for your safety or for your ability to stand your ground with the abuser present, let the probation officer know this so that you are not required to participate. The probation officer may then want to meet with you separately to gather information or to see if an agreement can be reached. Do not sign any agreement with which you do not feel comfortable, or that you do not understand, no matter what the probation officer tells you.

If you do not reach an agreement, you will need to go before the judge to present your arguments and your position. You will need to tell the judge your reasons for the position you are taking, and your concerns about what the other person is asking for and why you do not agree with those demands. More information on what to present in front of the judge is included later in this chapter. Sometimes the court will ask for a report from the probation officer who offered dispute intervention services. You should insist that this report be made on the record (that is, that the report be stated in court before all of the parties). You have a right to state your objections to the report on the record as well.

Practice Note

At the start of any dispute intervention session, you should ask the probation officer what you can expect if there is no agreement. If the report is going to be submitted to the court, ask the probation officer to go over the report with you and to explain the basis for any recommendations prior to presenting the report before the judge.

□ CHAPTER 9: CHILD CUSTODY

If you came to an agreement in court, you will receive in the mail a copy of your stipulation along with a copy of the judge's order making your stipulation an order of the court. It is important to hold onto both of these. The stipulation spells out the terms of your agreement. If there is a problem about how things are supposed to work, you can both refer to your agreement for clarification. If the other parent violates the agreement, you can go back to the court to ask it to enforce its order.

If you did not come to an agreement in court, and you had a hearing before the judge, you will receive documents indicating whether your motion for temporary orders was granted or denied, and what orders the judge made.

The order that you get at a temporary orders hearing is called a "temporary order." A temporary order stays in place until another order replaces it. In many cases the temporary order that you get shortly after filing your complaint will last throughout the life of the court action until you receive a judgment after your final hearing (trial) or you and the other parent come to a stipulation for judgment. Often there will be several temporary orders while a case is proceeding in court. As new information comes to light or as situations change, one party may seek further temporary orders. The Probate and Family Court has instituted time standards, which direct the pace at which your case will proceed. Because of the time standards, further temporary orders are no longer as common as they once were. However, they will usually be allowed if circumstances have changed since the original temporary orders were issued.

In Which Court Do I Bring My Custody Case?

All family law cases are heard in the Probate and Family Court. However, there are a number of Probate and Family Courts throughout Massachusetts. Each Probate and Family Court serves one or more counties. Massachusetts law designates which court is the proper "venue" in which to bring your case. See Chapter 2, Overview of the Probate and Family Court.

For divorce and separate support actions, if one person is still living in the county where you last lived together as husband and wife, then you must start your divorce in the Probate and Family Court of that county. If neither of you is still living in the county where you last lived together, then you may start your case either in the county where you are currently living or the county where your spouse is currently living. For separate support actions under G.L. c. 209, § 32F, you must file in the county where the child lives. If there are no minor children of the marriage, or if the child(ren) of the marriage do not live with either party, you may file in either the county in which you live or the county in which the other party lives. Paternity actions must be filed in the county where the child lives.

Filing an Answer

When one parent starts a case and gives notice to the other party, the other parent is then required to file an answer. In the answer, the other parent must admit or deny each of the claims made in the complaint. The parent filing the answer may also make their own "counterclaim" stating what he or she wants regarding custody, visitation, or any other issue in the case. Sample answers are provided for each type of complaint in the chapters related to that type of proceeding.

Practice Note

It is nearly always a good idea to file an answer and counterclaim, which is to be filed within twenty days of service of the complaint or within twenty days of a motion to dismiss being denied by the judge. If you do not file a counterclaim and the other party does not appear in court for final disposition, you will be unable to obtain a judgment in the action filed by the other party. You will, however, be able to obtain a judgment on your counterclaim. Although this is usually the best practice, there are no default judgments in Massachusetts family court cases.

HOW DOES THE JUDGE DECIDE CUSTODY CASES?

Under Massachusetts law, in the absence of a court order, married parents have equal rights to custody of their children. G.L. c. 208, § 31. It is important to keep this in mind when you think about your custody case. What this

means is that, under the law, there is no assumption that the mother should have custody of a young child simply because she is the mother. This old doctrine, which was referred to as the Tender Years Doctrine (that a young child is assumed to be better off with his or her mother) has been specifically rejected in Massachusetts. Unmarried parents are in a different situation. As described earlier in this chapter, the mother has sole legal and sole physical custody in the absence of a court order.

Judges are required to base custody decisions on “the best interest of the child.” This means that a judge looks at all of the circumstances, including what the mother can offer, what the father can offer and what the specific needs of the child are. The judge then decides what living situation will be best for the child.

While no one can predict how a particular judge will decide your case, it is helpful to be aware of the factors that a judge will consider when deciding who will have custody of the children. Massachusetts has no specified list of factors to be considered in the “best interest of the child” analysis. Some of the most common factors are addressed below. Other factors may include: which parent as custodial parent would facilitate a relationship between the child and the noncustodial parent; whether the child is thriving (or failing) in the current situation; the child’s school performance and attendance record; the comparative quality of schools in each parent’s town; and the amount of quality time each parent can spend with the child.

Practice Note

The wishes of a child, particularly an older child, may be relevant to the judge’s decision. Except in extraordinary circumstances, however, the child’s wishes will not be the deciding factor. It is extremely important not to pressure, coach, or otherwise seek to influence a child’s opinions regarding custody. Such pressure would be viewed by the court as a factor *against* placing the child in your custody.

Who Has Been the Primary Caretaker?

One thing that judges consider to be very important—especially in deciding who the child should live with—is who has been the child’s primary caretaker.

The primary caretaker is the parent who has had the main responsibility for care of the child—the person who spent the most time with the child, who took the child to the doctor, changed diapers, fed the child, and made arrangements for schooling and other activities. In some situations, it is very clear which parent is the primary caretaker. In other situations it is less clear.

Practice Note

It is important to recognize that the primary caregiver may change over time. If your child is ten years old, the judge will not be interested in who changed diapers when your child was an infant. Current caregiving, which may include the past two or three years, will be more relevant to the judge.

Is the Primary Caretaker Unable to Provide Appropriate Care?

Often, judges give physical custody to the primary caretaker, unless a judge concludes that the primary caretaker has a serious problem that would put the child at risk of abuse or neglect. Some examples of such problems include:

- a serious alcohol or drug problem,
- a serious mental health problem affecting the ability to parent,
- a serious criminal history,
- a serious problem with the Department of Social Services, or
- a history of child or partner abuse.

If There Has Been Domestic Violence Between the Parents

Amendments to G.L. c. 208, § 31A, G.L. c. 209, § 38, G.L. c. 209A, § 3, and G.L. c. 209C, § 10 added a statutory presumption against the award of custody of a minor child to a parent who has committed a pattern of abuse or a serious incident of abuse, when the abuse occurred between the parents or by a parent against a child. The court

□ CHAPTER 9: CHILD CUSTODY

must consider past or present abuse toward a parent or child as an indication that placing the child in the abusive parent's custody would be against the child's best interest. This presumption is "rebuttable," meaning that the abusive parent may present evidence that the child would be best cared for in his or her custody, even if the abuse has been proven.

Abuse is defined as the attempt to cause or the causing of bodily injury, or the placing of another person in reasonable fear of imminent bodily injury. The presumption applies only to cases in which there has been a pattern or a serious incident of abuse, which is defined as

- attempting to cause or causing serious bodily injury;
- placing another person in reasonable fear of imminent bodily injury; or
- causing another person to involuntarily engage in sexual relations by force, threat, or duress.

If the court finds that a pattern of abuse or a serious incident of abuse has occurred, then the presumption is raised that it is not in the child's best interest to be placed in the sole legal or physical custody, or shared legal or physical custody of the parent who has committed the abuse. Raising the presumption means that the burden is now on the apparently abusive parent to show that, despite the evidence of a pattern or serious incident of abuse, it is in the child's best interest to be placed in his or her custody. The fact that the other parent has a restraining order against him or her is not, by itself, enough to raise the presumption, although the reasons that the parent obtained the restraining order may be sufficient.

If the court finds that a pattern or a serious incident of abuse has occurred and issues a custody order, the judge must make "written findings of fact" (that is, make written statements) about the effects of the abuse on the child. These findings of fact must explain how the custody order is in the child's best interest, and must show that it provides for the safety and well-being of the child. If the court makes a visitation order, it must provide for the safety and well-being of the child *and* the safety of the abused parent.

In 1996, the Supreme Judicial Court ruled that when there has been domestic violence between parents, judges must consider the effects that this violence has had on the child *before* making a decision about custody.

The Supreme Judicial Court said that "physical force within the family is intolerable," and such violence is "a violation of the most basic human right . . . the right to live in physical security." *Custody of Vaughn*, 422 Mass. 590, 595 (1996). The court also stated that witnessing domestic violence has a major impact on children and can create serious psychological problems for them, and that judges must consider the risks to children when awarding custody to a parent who has committed acts of violence toward the other parent.

The combination of the recent changes to the statutes and the *Vaughn* decision means that there are two tiers of analysis when there is some evidence of domestic violence. Where there is a pattern or serious incidence of abuse, the presumption is triggered. However, where there is no pattern or a serious incident of abuse, but some abuse is shown, the holding in *Vaughn* would require that the judge awarding custody to an abuser give written findings as to why the award is in the child's best interest.

Practice Note

If you believe that there has been a history of domestic violence that may trigger the presumption, you may wish to speak to an attorney who is experienced in handling custody matters about your rights and the evidence you will need to prove your case. Many organizations throughout the state hold training sessions addressing domestic violence and custody issues. You may wish to review materials from these training sessions. See the Resources section at the end of this book for a list of organizations that might be of help to you.

PREPARING FOR THE TEMPORARY ORDERS HEARING

The most important thing to keep in mind when you are preparing for your hearing is that what will convince a judge or a probation officer that you should have custody or visitation is not that you are *entitled* to custody or visitation, but that giving you custody or visitation is *in the child's best interest*.

The other important thing to keep in mind is that the best way to convince a judge or probation officer that what you are saying is true is to prove it. Documents are evidence, witnesses are evidence. Though your testimony is also evidence, it is inherently biased. In those situations where it will just be your word against the other parent's, it is important that what you say is detailed, precise and not exaggerated, and said calmly. Presenting your facts this way helps to insure that what you say will be believable to the judge or probation officer.

Before your hearing, write down each reason why you should have custody. For each point, write down:

- how it shows that it is in the child's best interest that you have custody and
- how you can prove that this fact is true.

Putting Together Your Argument

Documents

Bring whatever documentation you can to support your argument. Proof that you are the primary caretaker parent might include:

- a letter from your child's school, teacher, or daycare provider;
- a letter from your child's pediatrician; or
- a letter from your child's counselor or therapist.

Proof that the other parent is unable to be an appropriate primary caregiver might include:

- documentation or information regarding criminal charges against the other parent;
- documentation or information regarding Department of Social Services investigations of the other parent;
- documentation or information regarding the other parent's substance abuse problems, including substance abuse treatment programs; or
- pleadings from other court proceedings in which the other parent was alleged to be unfit.

Proof that the other parent has been violent towards you might include:

- current or past temporary restraining orders against the alleged abuser held by you or anyone else (note that a restraining order held by someone else will not prove domestic violence against you, but may help to establish a pattern of violence);
- documentation or information about criminal charges or convictions of crimes, involving violence;
- police incident reports, which are written whenever police are called to a scene of a crime; or
- any doctor or hospital records showing injury.

Practice Note

Documents are not helpful to you if the judge does not see them. You need to offer the evidence to the judge by physically holding it out until either the court officer takes it or the judge says he or she does not want to see it. A common error (made by pro se litigants and lawyers alike) is to tell the judge "I have letters from . . ." but never hand them to the judge.

Your Presentation

If you are arguing that you are the primary caretaker, you should:

- briefly summarize the child's day-to-day schedule;
- tell the court the significant caretaking functions you perform for the child; and
- make sure to mention any of the following if they are applicable:
 - you get up with your child in morning;
 - you change your baby's diapers;
 - you breast-feed your baby or prepare and feed your baby bottles;

□ CHAPTER 9: CHILD CUSTODY

- you prepare meals for your child;
- you pack lunch for school, if applicable;
- you are with your child during the day or take your child to school or day care;
- you pick up your child from school or day care;
- you are with your child after school or day care;
- you help your child with his or her homework;
- you bathe your child;
- you put your child to bed;
- you get up with your child at night when he or she is sick, afraid, hungry, or needs a diaper change;
- you are the person that your child runs to when he or she is hurt;
- you stay home with your child when he or she is sick;
- you take your child to the pediatrician;
- you are responsible for communicating with your child’s school;
- you attend parent-teacher conferences;
- you are responsible for your child’s religious training;
- you take your child to his or her weekend activities; or
- you participate in parent-child activities.

If you are arguing that the other parent is unable to provide proper care, you should provide the following information about the specific incidents that you feel prove that it is not in the best interest of your child to be in the custody of the other parent:

- the date, time, and place it occurred;
- who witnessed it;
- where your children were;
- if your children saw, heard, or learned about the incident;
- the impact of the incident on your children; and
- the actions you took to protect your children.

Practice Note

It is usually in your interest to keep the presentation as civil as possible. You may have evidence of incidents showing the other parent is cruel or abusive to the children. Other incidents may be evidence of poor parenting skills and a lack of patience. It is important to recognize which incidents are which, and not accuse a parent of abuse when the problem is poor parenting skills.

Witnesses

When considering using witnesses at your hearing, keep the following things in mind:

- the most reliable witnesses are those who appear neutral;
- a professional will be a more reliable witness than a relative or friend of yours;
- for a temporary orders hearing, consider getting an affidavit (a sworn statement from a witness) rather than bringing the witnesses into court; for a trial, you must bring the witness into court; and
- if your child is in therapy, a statement from the therapist regarding his or her understanding of who is the primary caretaker of the child, and of the impact upon the child of any alleged unfitness is very helpful; if the therapist is not comfortable submitting an affidavit, ask if he or she will feel comfortable speaking to a probation officer or other investigator to provide information.

Practice Note

A letter or written statement becomes an affidavit when the witness either has the statement notarized or writes before the signature: “signed under the pains and penalties of perjury.” This act makes the witness subject to perjury laws just as he or she would be when appearing in court.

GETTING EXPERTS AND OTHER PROFESSIONALS INVOLVED

Often custody and visitation issues are too complicated to be resolved in a quick temporary orders hearing. A judge who hears allegations of serious unfitness or hears about a complicated situation may very well conclude that he or she does not have the information needed to make a custody or visitation decision. At this point, a judge may appoint a neutral person to investigate and/or evaluate the situation and present a report on all factors that might affect the child’s best interest. The judge will then use this report to help him or her make a custody decision.

There are a number of people that a judge might appoint to conduct this investigation or evaluation of your custody situation. The judge may appoint one of the following:

- a mental health professional,
- a lawyer, or
- a probation officer.

Some courts have special court clinics that are an arm of the Family Service Office, which are staffed by mental health professionals who will conduct custody investigations and/or evaluations.

When one or both of the parents have the resources to pay for a third-party investigation and/or evaluation, the party or parties who are able to will be ordered to pay the expert for his or her services. When neither party has the resources to pay, the judge may either order that the Commonwealth cover the evaluator’s fee or may ask that the Family Service Office or the court clinic handle the investigation and/or evaluation since these are both arms of the court and do not charge for their services.

The following are the types of evaluations possible, and the statutes that authorize them:

- Mental Health Professional Guardian ad Litem, G.L. c. 215, §§ 56A, 56B;
- Attorney Guardian ad Litem, G.L. c. 215, §§ 56A, 56B; G.L. c. 208, § 15 (for divorces);
- Family Service Office Investigations, G.L. c. 276, §§ 85A, 85B; and
- Family Court Clinic Investigation (only in Middlesex and Norfolk counties).

There are several advantages of having the court appoint a “neutral expert” to investigate and/or evaluate custody and visitation in your case. One is that it brings important information before the court that the court needs to make the decision that truly takes your child’s needs into account. Another is that often having a neutral expert can prevent a situation where both sides hire their own experts to support their own position; the situation where both parties hire their own experts can become very costly, very contentious, and, from the judge’s perspective, can still leave him or her with many questions about what is truly in the child’s best interest.

If a judge has appointed a “neutral third party” in your case, there are several things you should be aware of. First, find out if you are working with a mental health professional, a lawyer, or a probation officer. Keep in mind that attorneys should not be making mental health diagnoses unless they are also licensed mental health professionals. Also keep in mind that mental health professionals may not be aware of all aspects of the law, such as your right or your child’s right to protect the confidentiality of some information.

If you are not clear about exactly what the neutral expert is supposed to be doing on your case, make sure you find out. The judge has most likely issued an appointment order, stating what the neutral expert is supposed to be doing and identifying issues that he or she is supposed to be looking at. If you are still not clear about what the neutral expert is supposed to evaluate, it is possible that the neutral expert is not clear about it either. There may be some issues that you consider important for the neutral expert to look into that he or she may not consider to be within the scope of his or her appointment. If this happens, consider making another motion for temporary orders asking for a clarification of the neutral expert’s role.

□ CHAPTER 9: CHILD CUSTODY

Remember that although judges rely heavily on these reports, the neutral expert is not the final decision-maker—the judge is. You have the right to review the report of the custody evaluator before the hearing or trial so that you can challenge the report. *Duro v. Duro*, 392 Mass. 574, 580 (1984).

If you have not retained an attorney up until this point, once a child custody evaluation is ordered, you should consider retaining one. The stakes are very high at this point, the judge has indicated that there is a serious question as to whom the child should live with, and whether and how visitation should take place. You have important rights to confidentiality and rights to challenge the expert that you may not be able to exercise effectively without an attorney.

HOW CAN I CHANGE A CUSTODY ORDER?

A custody order issued in a paternity, divorce, or separate support matter can be changed by filing a complaint for modification. See **Exhibit 16B**. You must show the court that there has been a significant change in the circumstances that make the earlier judgment of custody not in the child's best interest. G.L. c. 208, § 28. See *O'Brien v. O'Brien*, 347 Mass. 765 (1964). A temporary custody order may also be changed if the change is warranted by the child's best interest. G.L. c. 208, § 31. The change must have occurred after the court made its order. *Breton v. Breton*, 332 Mass. 317 (1955).

Because judges believe that stability is almost always in a child's best interest, they will be cautious about changing custody, even when many circumstances have changed. The fact that there has been a change in the custodial parent's residence, job, health, or income or the fact that he or she is involved in a relationship is not, by itself, considered sufficient justification to change custody. The modification must be necessary to the child's welfare. See *Haas v. Puchalski*, 9 Mass. App. Ct. 555 (1980). The decision of whether to change an order is left to the discretion of the judge hearing the case. Each individual judge hearing the facts and reviewing the evidence will decide if the change in circumstances in the case before the court is material and negatively affects a child's best interest. See *Palmer v. Palmer*, 357 Mass. 764 (1970); *Jenkins v. Jenkins*, 304 Mass. 248 (1939). A court can always change a custody order if it is in the child's best interest to do so, even if the parties have made a separate agreement about custody. *DeCristofaro v. DeCristofaro*, 24 Mass. App. Ct. 231 (1987).

Generally, modification actions are brought because one parent is planning to move a significant distance, visitation arrangements need to be changed, or the custodial parent is not taking sufficient care of the child's needs.

Practice Note

If a custody order was made pursuant to a 209A request for a protective order, it may be changed simply by filing an action for divorce, paternity, or separate support in the Probate and Family Court. G.L. c. 209A, § 3. A subsequent custody order from any of these actions overrides a custody award issued under G.L. c. 209A. There is no requirement to show a material change of circumstances in these cases. However, the court may use evidence of domestic violence as a factor when making its custody or visitation decisions. *Custody of Vaughn*, 422 Mass. 590 (1996). 1998 Mass. Acts c. 179 amended several statutes requiring courts to consider domestic violence as a factor in making custody awards where there is evidence of a pattern or a serious incident of abuse. See "If There Has Been Domestic Violence Between the Parents," above.

Filing

Either parent may file a complaint to modify the previous custody order. A third party may also file on behalf of the minor child. G.L. c. 208, § 28. The complaint for modification can be obtained from a clerk and should at least contain the following:

- a statement about which part of the previous order needs to be changed;
- a description of the circumstances at the time of the previous order;
- a description of the changes since the previous order;
- a description of the impact that the changes have had on the child leading you to believe that the order should be changed; and

- a statement about what you want the court to do.

The hearing on a complaint for modification is similar to the hearing in a custody case, with the exception of the need to prove change of circumstances. You may wish to review Chapter 16 to determine what additional information you need to present to the judge. For more on modifications, see Chapter 16, particularly if you are served with a complaint.

Visitation

It is believed to be important for a child's general well-being to know and love both of his or her parents, even if the parents have never lived together. Society has placed a great emphasis on encouraging both parents to have "frequent and continuing association" with their children. *DiRusso v. DiRusso*, 12 Mass. App. Ct. 892, 893 (1981).

The noncustodial parent is generally given an opportunity to see the child and take him or her for certain periods of time. This is called "visitation." Visitations can range from a broad flexible agreement between the parents to a fixed schedule that can be enforced by the courts. In certain circumstances, visitation can be restricted and supervised by a third party. Legally, visitation is considered a part of the whole judgment regarding the custody of the minor children. For example, see G.L. c. 208, § 31, which states that shared custody plans require detailed visitation arrangements. If a parent actively interferes with the relationship between the child and the other parent, the court may find that parent in contempt. *Petruzzello v. Newman*, 8 Mass. App. Ct. 896 (1979). Continued interference could result in the judge changing custody.

There is a strong presumption in the law that it is in the child's best interest to have an ongoing relationship with each parent. See *McCarthy v. McCarthy*, 21 Mass. App. Ct. 924 (1985), where visitation order is encouraged even though the parents are unable to cooperate. While visitation between children and the noncustodial parent is encouraged, parents do not have an absolute right to associate with their child. *Vilakazi v. Maxie*, 371 Mass. 406 (1976); *Felton v. Felton*, 383 Mass. 232, 233 (1981).

Are There Legal Differences in the Visitation Between Children Born to Married and Unmarried Parents?

As a practical matter, there is no legal difference between visitation actions on behalf of children born within a marriage and that of children born outside of a marriage once the case has been filed with the court. Visitation actions for children born outside of a marriage are governed by G.L. c. 209C. Visitation actions for children of a marriage are governed by G.L. c. 208. The best interest of the child standard applies to visitation issues arising in paternity, divorce and separate support actions. The only barrier in paternity cases is that paternity must be established before a father can be awarded visitation rights. Please refer to Chapter 7, Paternity Issues, for additional information.

Can Parents Make Their Own Visitation Arrangements?

If parents can work together to develop a visitation arrangement that serves their needs as well as the needs of their child, they should do so. In fact, courts often send parents who have filed a complaint regarding visitation or other disputes to a probation officer (probation officers in Probate and Family Courts are often referred to as family services officers) to get help in negotiating the terms of an agreement. The courts believe that people are more likely to follow an agreement that they developed themselves.

The critical factor here is whether the parties can truly negotiate. People cannot effectively negotiate an agreement that is likely to stick if either party feels incompetent, afraid, or disadvantaged as a result of violence between the parties, perceived lack of skill or experience, or inequality. If there is a history of domestic violence between you and the other parent, you may wish to go in front of the judge rather than attempt to negotiate with the other party.

Practice Note

Agreements made with the probation officer or motion mediator will be made into an enforceable order of the court. Arrangements made outside of court can be incorporated into a court order if the parties

□ CHAPTER 9: CHILD CUSTODY

eventually do go to court. However, if the arrangement is not made a part of a court order, it will be difficult to enforce the terms of the agreement if one party refuses to comply.

What Should We Include in the Agreement?

You should make your first agreement temporary. This will give both of you the opportunity to test the arrangement to make certain that it is feasible. It also makes it easier to reach agreement because it will be clear that the arrangement can be changed if it does not work for both of you.

Put your agreement in writing. You should make at least two copies so that each of you can have a signed and dated version. Before writing it, think about your needs and those of the children. Consider the following:

- the frequency of visits (every other week, twice a week, etc.);
- the duration of visits (overnight, weekends, five hours, etc.);
- major family celebrations that you would like your child to attend (e.g., family reunions);
- how major holidays will be divided (every other year, split the day, etc.);
- how birthdays or other significant dates will be divided;
- how Father's Day and Mother's Day will be divided;
- how school vacation periods will be divided (particularly those involving major holidays);
- how summer vacation will be divided;
- whether any special rules or guidelines should be used, for example, length of notice needed for scheduling or canceling a visit;
- whether parents should exchange an itinerary for out of town vacation trips;
- whether parents should provide emergency contact numbers;
- transportation arrangements and costs;
- who will pick up and/or drop off the child for visitation; and
- whether third parties can (or must) pick up or drop off the child for visitation.

You may wish to consider using a mediator to help you develop a plan that works for everyone. Please refer to Chapter 19, Mediation. Some community mediation resources are also listed in Chapter 20, Resources.

Should the Custodial Parent Wait to Go to Court or Allow Visits Right Away?

If a child has an established relationship with the noncustodial parent, and the noncustodial parent does not present a physical danger to the child or the other parent, the custodial parent should encourage contact between the child and the child's other parent.

Does the Court Require Children to Always Go on Visits?

If visits have been ordered, it is the obligation of the custodial parent to make the child available for the visit and encourage the child to visit. Failure to do so could result in being found in contempt of the court order. Reasonable scheduling accommodations should be requested in advance. The law has a strong presumption that frequent and continued contact with the noncustodial parent is in the best interests of all children. G.L. c. 208, § 31; G.L. c. 209C, §§ 1, 10. This means that a court will consider a situation or arrangement to be acceptable, good, or necessary until it learns of facts that show otherwise. *Felton v. Felton*, 383 Mass. 232 (1981); *Handrahan v. Handrahan*, 28 Mass. App. Ct. 167 (1989).

What If a Noncustodial Parent Is Mentally Ill, Actively Alcoholic, or Physically Sick or Disabled?

The noncustodial parent's physical or mental illness does not automatically mean that his or her child should never visit him or her. The court will only limit visitation if it can be shown that the parent's illness will have a bad effect on the child's well-being. The court may limit visits by not allowing visits to occur while the noncustodial parent is under the influence of substances or alcohol, or by allowing visits only in the presence of a third person (supervised visitation). See Chapter 3, Safety and Protection Issues.

What If a Noncustodial Parent Insists on Having Visits When a New Boyfriend or Girlfriend Is There?

The issue that the court will be concerned with is whether the child will be exposed to adult matters inappropriate for him or her. The mere presence of a new boyfriend or girlfriend, therefore, is not presumptively bad. If it can be shown that new people in the parent's household have a detrimental effect on the child, that the visiting parent's new significant other is improperly disciplining the child, or that the visiting parent is exposing the child to a stream of new boyfriends or girlfriends, the court may order that the parent's friends not be present during visits. See *Fort v. Fort*, 12 Mass. App. Ct. 411 (1981), for a discussion of the impact of cohabitation on children.

What If the Noncustodial Parent Is in Jail?

The fact that a parent is incarcerated does not necessarily mean that the court would never order a child to visit that parent. The court may be reluctant to allow visits at the prison or jail unless it is shown that it would be in the child's best interest to have some contact with the incarcerated parent. The older the child and the more secure the bond with the parent, the more likely it is that visits will be ordered.

Practice Note

If you are seeking visits on behalf of an incarcerated parent, you should be prepared to answer questions in detail about the actual visitation process the child will be expected to go through. For example, will the child be allowed to have contact with the parent? Will other inmates be present? Will the child be searched? It will be easier to obtain visits if you can show that the impact on the child of visiting within a prison setting can be minimized, by using a family visitation center in a minimum security prison, for example.

Massachusetts law does restrict visitation with a parent who is incarcerated for murder of the other parent. Such visitation cannot be ordered over the objection of the child, no matter the age of the child or whether the child witnessed the murder. This law is referred to as "Lizzie's Law" and is designed to protect children from forced contact with a parent who willfully and wantonly murdered the other parent. 1998 Mass. Acts c. 179.

What If the Child Does Not Want to Visit the Noncustodial Parent?

The law does not generally presume that a child can make choices about whether to go on a visit at all or on a particular visit with the other parent. (However, see discussion of Lizzie's Law under "What If the Noncustodial Parent Is in Jail," above.) Parents are presumed to be in control of a child's schedules and activities. The law favors time with a noncustodial parent over play dates, birthday parties, spontaneous vacations or holiday celebrations, and school or sporting events. However, children's activities with family and friends still are important to the child. Both parents should make an effort to consider these activities when making visitation arrangements so as to minimize the times that a child is forced to miss events. A custodial parent could risk a finding of contempt if a child regularly misses visits with the other parent.

If the child is an adolescent who adamantly refuses to go on visits with the other parent, you may want to involve a third party. This third party could either be a mediator to assist in developing a schedule that meets the teenager's needs as well as those of the parents, or a therapist who can work with family members to identify and work toward removing barriers that interfere with the enjoyment of the visits.

□ CHAPTER 9: CHILD CUSTODY

If a young child refuses to go on visits with the other parent, you may wish to seek therapeutic intervention in order to determine if there is some underlying cause that may cause the child to be at risk.

What If the Baby Is Too Young to Go Out for Long Periods of Time?

The age of a child and the nature of the relationship with the noncustodial parent are acceptable factors for the court to consider in determining visitation arrangements. The mere fact that the child is young will not, in and of itself, prevent the noncustodial parent from having access to the child. An infant or breast-feeding baby may benefit from frequent, short visits with the other parent but be upset by long periods away from the primary caregiver. Young toddlers not yet in school might be able to have one or two separate overnight visits each week but not be ready for entire weekends away.

What If the Custodial Parent Would Just As Soon Eliminate the Noncustodial Parent from the Child's Life?

The custodial parent should not unilaterally end a court-ordered visitation. If the child has established a relationship with the noncustodial parent, the law presumes that the custodial parent's willingness and ability to facilitate a relationship between the noncustodial parent and the children should be a factor in a final decision about custody. See Edward M. Ginsberg, "Guidelines for Child Custody Cases," *Boston Bar Journal*, Oct. 1982, at 23. So, if the custodial parent refuses to allow visits, or makes visitation difficult, it could count against him or her later in court. However, if the child has never known the noncustodial parent, as in a situation where the parents were never married, have never lived and parented together, the custodial parent may ask that the request for visits be denied or supervised. Courts are reluctant to restrict or terminate visits without a clear showing of likely harm to a child. *Felton v. Felton*, 383 Mass. at 232.

What If the Custodial Parent Fears That the Noncustodial Parent Will Cause Physical Harm to Him or Her or the Children During the Visits?

If you believe that your child is at risk with the noncustodial parent during a visitation, you should go to court to seek permission to end the visits. You must show that continuing the visits is not in the child's best interests. *Vilakazi v. Maxie*, 371 Mass. 406 (1976); *Donnelly v. Donnelly*, 4 Mass. App. Ct. 162 (1976). If the custodial parent is at risk of harm, but the child is believed to be safe during the visit, you may wish to seek an order for supervised visitation exchange. If there is no court order, you should use your judgment about allowing visits, as knowingly putting a child in the care of a person who presents physical danger to the child could be considered neglect. An example of this would be helping a drunk person put a child into his or her car.

Other Problems Concerning Visitation

Many other problems can arise concerning visitation. For example, the noncustodial parent could be inconsistent with visits, try to use a visitation schedule to make the custodial parent appear uncooperative, try to use visits to harass or control the custodial parent, or the custodial parent could fear physical harm from the noncustodial parent.

Before deciding on a strategy, the custodial parent should do some safety planning. Part of this planning is to acknowledge that, while you may know and understand the other parent's pattern of behavior, you do not have the ability to change another person. People can only change themselves. If he or she does not like the situation, it is his or her responsibility to change it. For him or her, that may mean choosing to cease harassing or drinking, or choosing to go to court, or both. The custodial parent should take a realistic look at the current situation, set his or her own agenda, and be prepared to respond if the other parent takes action to change his or her agenda. A sample safety plan is included as **Exhibit 3D**.

Practice Note

Keep a log of the noncustodial parent's actions regarding visits. Include information about the date, time, place, and manner of contacts regarding visits and calls. Note whether the child was picked up on time

and returned on time. Do not use the log as a diary of personal feelings; make it a matter-of-fact recording of events.

What Are the Legal Obligations of Parents After a Court Order Sets out a Visit Schedule?

The parents must follow the court order regarding visitation. If the custodial parent does not follow the court order, the noncustodial parent can file a complaint for contempt to get the court to compel the custodial parent to follow the terms of the order. A sample complaint for contempt is included as **Exhibit 9D**. If the custodial parent is found by the court to have willfully disobeyed the court order, the court can change the visit schedule or give custody to the other parent; the custodial parent can be held in contempt, and even ordered to pay the other parent's attorney fees. If the noncustodial parent does not follow the court order (i.e., if he or she fails to show up for visits, or is late for a pick-up and drop-off), the court will seldom find him or her in contempt. However, in this kind of case, a custodial parent may seek a change in the schedule or terms of the visitation order.

MASSACHUSETTS CHILD CUSTODY JURISDICTION ACT

The Massachusetts Child Custody Jurisdiction Act (MCCJA), G.L. c. 209B, deals with child custody cases when the child has been or is currently living in another state. There is a federal law that deals with this issue, but each state has its own law. Other states may have different laws than Massachusetts. The MCCJA helps decide which state's court should hear the custody case, and helps make sure that courts in different states do not issue conflicting custody orders. In this situation, "jurisdiction" is the legal power a state has to hear and decide a custody case. When a state's court "assumes jurisdiction," it means it has decided to hear your case, instead of having another state's court hear it.

Caution

These types of cases can be very difficult to figure out. It is strongly recommended that you speak with an attorney to determine which state's court has the authority to hear your case. It is very important to do this before you leave one state and go to another state. If, for example, you leave New Jersey and move to Massachusetts with your child, and you do not meet any of the requirements described below, your child's other parent may bring a custody case in New Jersey, forcing you to return to New Jersey to confront the custody suit there.

Practice Note

Parties cannot decide on their own that Massachusetts can keep jurisdiction over a case after the child moves out of state. If Massachusetts does not have jurisdiction under the MCCJA, it cannot hear the case, even if the parties want it to. *MacDougall v. Acres*, 427 Mass. 363 (1998); *Cricenti v. Weiland*, 44 Mass. App. Ct. 785 (1998).

If you are a victim of domestic violence and need to leave your state quickly, you should at least obtain a temporary custody order through a restraining order before you leave (if possible and your state allows for it). If at all possible, consult with an attorney before you leave. Even if your situation is an emergency, you can still be forced to return to your original state in order to negotiate or litigate custody.

The MCCJA pertains to cases involving child custody where the child has lived in more than one state. It can apply in the following cases:

- divorce,
- paternity,
- separate support,
- custody, and
- restraining orders.

How Do I Figure out Which State Has Jurisdiction Over My Custody Case?

The easiest way to determine whether Massachusetts will assume jurisdiction over your custody case (i.e., whether you can file your custody case in Massachusetts) is to determine whether Massachusetts is your child's "home state." This is commonly referred to as the "home state rule."

"Home state" is defined as either:

- the state in which your child has lived, either with a parent or someone acting as a parent, for the six consecutive months before the custody proceeding is filed in court; or
- if your child is less than six months old, the state in which your child has lived (with a parent or someone acting as parent) since birth.

Additionally, you must meet the following conditions:

- Massachusetts must be considered your child's home state when the custody proceeding begins; or
- Massachusetts must have been your child's home state within the six months before the custody proceeding began if your child is now outside of Massachusetts because the other parent has taken your child, but you are still living in Massachusetts.

If you determine, using the definition above, that Massachusetts is your child's home state, you may file for custody here. If it is clear that another state is your child's home state, you must file for custody in that state. If it is unclear which state is your child's home state, or there is an emergency situation, you may fit into one of the exceptions to the home state rule listed below.

What Happens If It Is Unclear Which Is My Child's Home State or If There Is an Emergency?

There are some exceptions to the home state rule, both for emergencies and for situations where it is not clear which is your child's home state. The following exceptions might allow you to file your custody case in Massachusetts even if Massachusetts may not be your child's home state. Your situation must fall into at least *one* of the four categories listed below in order for a Massachusetts court to assume jurisdiction over your custody case:

- No other state has jurisdiction, and it is in the best interest of your child that a Massachusetts court take jurisdiction because:
 - you and your child have significant ties to Massachusetts; and
 - Massachusetts has substantial evidence regarding your child's care and protection.
- Your child is here in Massachusetts and has been abandoned.
- Your child is here in Massachusetts and no other state has jurisdiction, or another state has determined Massachusetts is the more appropriate state, and it is in your child's best interest that a Massachusetts court take jurisdiction.
- Your child is here in Massachusetts and there is an emergency that makes it necessary for a Massachusetts court to assume jurisdiction.

It is not entirely clear what may be considered an emergency, but it is generally thought to be a situation in which the child is in physical danger (abuse or neglect) or there is real fear that the other parent may kidnap the child. Unless your situation fits into another category in addition to the "emergency" category, even if a Massachusetts court takes jurisdiction, it is likely to be on a temporary basis only, and you may need to go to the other state to litigate the matter in the future.

Caution

Some of these categories have more than one requirement. In those cases, all requirements must be met in order for a Massachusetts court to assume jurisdiction.

Even If I Meet the Requirements, Is It Possible That I Would Still Have to Go to the Other State to Deal with Custody Issues?

Yes. Even when a Massachusetts court *can* assume jurisdiction, it may choose not to at any time before making a custody decision, even if you meet the requirements, if it decides the following:

- that assuming jurisdiction would be in violation of the law;
- that assuming jurisdiction would be based on the illegal or wrongful conduct of either party; or
- that assuming jurisdiction would be inconvenient, or less convenient than another state (e.g., Massachusetts is technically the home state, but all parties and children are living in another state).

Does My Child Have to Be Physically Present in Massachusetts for This State's Court to Take Jurisdiction and Make a Custody Order?

Your child is not required to be in this state in order for a Massachusetts court to take jurisdiction. Conversely, Massachusetts may decide not to take jurisdiction even if your child is here in the state.

What Happens If There Is Already a Custody Suit in Another State?

As a general rule, if there is a custody case pending in another state, a Massachusetts court will not become involved simultaneously. This rule is established both by the MCCJA and the Parental Kidnapping Act. G.L. c. 265, § 26A.

However, there are three exceptions to these rules:

- an emergency exists;
- the other state decides not to keep the case because Massachusetts is the better state to decide custody, and it is in the best interest of the child for it to do so; and
- the other state stops the custody action or allows a Massachusetts court to take jurisdiction.

Practice Note

If another state's court has made a custody ruling at any time in the past, that state will continue to have jurisdiction over all custody matters until that state's court relinquishes jurisdiction. You will have to go back to the original state and ask that it relinquish jurisdiction. Where another state has already assumed jurisdiction, the courts in Massachusetts cannot act unless there is an emergency and the child is present in the Commonwealth. In this event, Massachusetts can issue a temporary order, but must give jurisdiction back to the other state unless the other state does not want it.

What Happens If I Start a Custody Case in Massachusetts When This State Does Not Have Jurisdiction?

The other parent could request that the Massachusetts court give jurisdiction to the other state, and you could be forced to return to the other state to confront the custody suit there. If you know that Massachusetts is not the appropriate place to bring your custody case, you should file it in the appropriate state. If you have filed a custody suit in a Massachusetts court and the Massachusetts court later determines that the other state is a better place for your custody suit to be heard, the Massachusetts court could do one or more of the following things:

- dismiss your custody case in Massachusetts;
- vacate any order or judgment you already have;
- stay (freeze) the custody suit here while the case in the other state is heard;
- refuse to make a decision in the custody case;
- make a temporary order;
- make you pay costs, including attorney fees, travel and court costs to the other parent; and/or
- impose sanctions on you for improperly bringing the suit here.

PARENTAL KIDNAPPING/CUSTODIAL INTERFERENCE

In some circumstances, a parent can be guilty of kidnapping his or her own child. This crime is commonly called “parental kidnapping” or “custodial interference” (in Massachusetts, these terms are used interchangeably). G.L. c. 265, § 26A. It is a crime for the noncustodial parent to take a child away from the custodial parent (without his or her permission) if the custodial parent has an order granting him or her physical custody. It is also a crime in Massachusetts for an unmarried father to take his child from the child’s mother unless he has a specific order granting him physical custody.

If a noncustodial parent takes a child away from the legal custodian without his or her permission, he or she is committing the crime of parental kidnapping. The legal custodian is the parent who, in the eyes of the law, has physical custody of his or her child.

How Do I Know If I Am the Legal Custodian of My Child?

In Massachusetts, you are the legal custodian of your child if you are:

- a married parent and there is a court order granting you physical custody;
- an unmarried mother and no one has been to court to adjudicate paternity;
- an unmarried mother and there has been a paternity adjudication but no custody order; or
- an unmarried parent and there is a court order granting you physical custody.

Practice Note

The key issue is physical custody, not legal custody. Even if the other parent shares legal custody with you, it is still a crime for him or her to take your child without your permission if you have physical custody.

Caution

You are not considered to be the legal custodian if you are married and there is no court order regarding physical custody. If there is no court order regarding physical custody, you and your spouse have equal custody of your child. This means that it is not considered parental kidnapping for either parent to take the child away from the other parent.

What If I Am Not the Legal Custodian of My Child?

If you do not meet any of the requirements listed above, you are not the legal custodian, and therefore it is not a crime if the other parent takes your child without your permission. However, you still have options. You may go to Probate and Family Court and file a complaint for custody. If you believe your child may be in imminent harm as a result of the other parent taking him or her, you may also file an “ex parte” emergency motion for temporary custody. The court should hear your motion immediately without hearing from the other side because your situation is considered an emergency. If the court grants you custody, you may give a copy of that order to the police, a constable or a sheriff who may assist you in getting your child back.

Caution

If you are considering leaving with your child, it is best to obtain custody and permission to leave the state (if applicable) first. See Chapter 12 for more information about leaving the state with your child. If at all possible, talk to an attorney before you leave with your child. If you are a victim of domestic violence and need to leave quickly, you may at least be able to obtain temporary custody through a restraining order under G.L. c. 209A.

How Can I Try to Prevent the Other Parent from Taking Our Child Out of the Country?

If you already have a case pending in the court, you may file two motions:

- Requesting that the judge confiscate, or hold, the child's passport in the courthouse while the case is pending. You will need to demonstrate to the judge why this is necessary.
- Requesting an order that the other parent not be permitted to take the child out of the country while the case is pending. You will need to demonstrate to the judge why this is necessary.

You may also contact the Children's Passport Issuance Alert Program at (202) 736-7000. You can enter your child's name into the program and this will enable the State Department to notify you if an application for a U.S. passport for your child is received anywhere in the United States or at any U.S. embassy or consulate abroad. If you have a court order that grants you sole custody, joint legal custody, or prohibits the other parent from traveling with your child without your permission or permission from the court, the State Department may refuse to issue a U.S. passport for your child. However, the Department cannot revoke a passport that has already been issued to a child. There is also no way to track the use of a passport once it has been issued. For more information, see http://travel.state.gov/family/abduction/prevention/prevention_560.html.

What Can I Do If I Am the Legal Custodian of My Child and the Noncustodial Parent Takes My Child Away From Me?

If you are the legal custodian of your child and the noncustodial parent takes your child away from you, he or she has committed the crime of parental kidnapping. Often, this occurs when the noncustodial parent takes your child for a visit and refuses to return him or her, or simply disappears with your child. You have several civil and criminal remedies available to you to help you get your child back and to punish the noncustodial parent for what he or she has done.

In order to get your child back, you must know where he or she has been taken. If you do not know and you need assistance locating your child, you should call your local police or the Massachusetts State Police (1-800-622-5999) and ask for the child kidnapping unit. You can also contact the National Center for Missing and Exploited Children (1-800-843-5678). You may also consider hiring a private detective to help you find your child. It might help to contact the noncustodial parent's family and friends to see whether they have information regarding your child's whereabouts.

If you do know where your child is, you should call the police station in the town where your child is and explain that you are the legal custodian of your child, and the noncustodial parent will not return your child to you. Be prepared to show the police a copy of your custody order if you have one.

If you are an unmarried mother, you may be the legal custodian, but you may not have a court order that says so. If this is the case, you need to explain to the police your situation, and tell them that under G.L. c. 209C, § 10(b), you are the legal custodian of your child. See "Differences Between Married Parents and Unmarried Parents," above, for more information about your rights.

If the police will not assist you, you must go to Probate and Family Court and ask for assistance. You may file three different complaints:

- petition for writ of habeas corpus, included as **Exhibit 9C**;
- complaint for contempt, included as **Exhibit 9D**; or
- ex-parte motion to produce minor child, included as **Exhibit 9E**.

Caution

You may only file a complaint for contempt if there is already a court order granting you physical custody. If there is no order, the other parent is not in contempt of court.

Practice Note

It may be a good idea to file all three together (if applicable to your situation). You should always also file an affidavit that explains the situation.

The quickest way to get a response from the court is to file a petition for writ of habeas corpus and/or an ex-parte motion to produce the minor child. If you have a case pending, the motion can be filed on its own. If the case is

□ CHAPTER 9: CHILD CUSTODY

already over and you have a judgment granting you physical custody, you need to file a complaint for contempt along with the motion. To file either or both of these, you can go into court immediately. You should not have to give the noncustodial parent notice that you are filing the petition or motion because the court generally will consider your situation to be an emergency.

If the court grants your motion to produce the minor child, you can request that the court issue an order for the local police to go get your child and return him or her to your house. You may be able to go with the police so that it will be less traumatic for your child. The court might also call the police station and ask the police to enforce your custody order and get your child back for you.

If the court grants your petition for a writ of habeas corpus, a sheriff or constable will be sent to pick up your child and bring him or her directly to the court. It may be possible for you to accompany the sheriff or constable in order to reduce the trauma to your child. You must appear at the hearing; the noncustodial parent has a right to appear at the hearing also. The judge will conduct a hearing and determine what to do with your child. If you have a valid custody order and there is not a good reason why the noncustodial parent took your child (for example, you have not been endangering your child), your child will likely be returned to you at this time. While it can be traumatic for your child to have to be in court, rest assured that judges usually do not ask children to come into court at all during the hearing.

The complaint for contempt will not be heard right away, and therefore is not the quickest way to get your child back. However, it is a good idea to file a complaint for contempt also, providing there was an existing order granting you physical custody at the time the other parent took your child. During the contempt hearing, the court has an opportunity to punish the noncustodial parent, including restricting or suspending visitation and imposing a jail sentence.

Practice Note

You may also ask the court to restrict visitation (e.g., by ordering supervision of the visits) or temporarily suspend visitation because of the custodial interference.

Can I File Criminal Charges Also?

Yes, you may also file criminal charges. Parental kidnapping is a state crime (*see* The Parental Kidnapping Act, G.L. c. 265, § 26A), and may be a federal crime if the noncustodial parent takes your child out of state. You may file a criminal charge at the police station or at the criminal clerk's office in the District Court closest to your home. It is recommended that you file the complaint in the District Court, where you may obtain information and assistance from a victim witness advocate from the district attorney's office.

Practice Note

If your child has been taken to another country, the Hague Convention may apply to your situation. An application may be submitted to the State Department's Office of Children's Issues. For more information about the Hague Convention, see http://travel.state.gov/family/abduction/abduction_580.html.

GRANDPARENTS' RIGHTS

Occasionally grandparents become involved in Probate and Family Court proceedings involving their grandchildren. This happens in the following two situations:

- grandparents may need to seek guardianship of their grandchildren if they believe that their grandchildren are at risk in the care of their own parents; or
- under some circumstances grandparents have the right to seek visitation of their grandchildren if the children's custodial parent has denied them access.

Custody Actions

If grandparents believe that their grandchildren are at risk while in the care of their parents, they may choose to seek custody of the children. They can do this by filing a guardianship action in the Probate and Family Court. This proceeding is described in detail in Chapter 13, Guardianship of a Minor.

In order to gain guardianship of their grandchildren, grandparents must either have the agreement of the parents or prove that the parents are currently unfit to care for their children. This is harder to do than proving that it would be in the children's best interest to live with the grandparents.

Grandparents' Visitation

Grandparents do not always have the right to go to court to seek visitation of their grandchildren. Grandparents cannot seek a court order allowing grandparent's visitation if the children's parents are still married and they deny the grandparents access to their grandchildren. Under G.L. c. 119, § 39D, grandparents can seek visitation only under the following circumstances:

- the parents are divorced or separated;
- one or both parents have died; or
- the child was born out of wedlock, the parents are living apart and, if the paternal grandparents are seeking visitation, paternity of the child has been established.

If these conditions are met, grandparents have a right to file a complaint for grandparent's visitation in the Probate and Family Court. However, just because they have a right to seek visitation does not necessarily mean that a judge will allow that visitation; it only means that their request will be considered by the court. Because a custodial parent has the right to make decisions regarding the child, "the grandparents must allege and prove that the failure to grant visitation will cause the child significant harm by adversely affecting the child's health, safety, or welfare." *See Blixt v. Blixt*, 437 Mass. 649 (2002).

As with any other visitation decision, the judge decides the question of grandparents' visitation based on what is in the child's best interest. Again, there is no specific list of factors, but the judge will probably consider the following factors in making his or her decision:

- the prior relationship between the grandparent and grandchild and the impact on the child of loss of that relationship;
- the physical and emotional health of the grandparent(s), parent(s) and children if it affects their ability to properly care for the children;
- the length of time and nature of disagreement between the grandparent(s) and parent(s);
- the reasons that the parent(s) are opposing the grandparent(s) visitation;
- any prior history of abuse or neglect of the children by either the parent(s) or grandparent(s);
- the child's need for free time; and
- any other relevant facts that either the parent(s) or the grandparent(s) present.

How to File a Complaint for Grandparent's Visitation

The procedure for filing a complaint for grandparent's visitation is the same as that for other complaints. See Chapter 2, Overview of the Probate and Family Court. The grandparents must file the complaint along with an affidavit disclosing care and custody in the Probate and Family Court where the divorce or separate support complaint or the complaint to establish paternity was filed. A sample affidavit disclosing care and custody is included as **Exhibit 5I**. If the divorce, separate support or paternity complaint was filed in another state, the grandparent's visitation complaint must be filed in the county where the child lives. Note that the statute does not address the situation where the grandparents are allowed to seek visitation due to the death of one of the parents, and, therefore, no divorce complaint has been filed. Presumably, this situation would be treated in the same way as when the complaint was filed out of state, and the grandparent would be required to file their complaint in the county where the child is living. Check local practice in this situation by calling an assistant register in the court

□ CHAPTER 9: CHILD CUSTODY

serving the county where the child lives. The grandparents must then give notice to the parents and any other people whom they have listed on the affidavit disclosing care and custody as having a claim to custody of the child. The grandparents give notice by serving them with a summons and complaint and filing a return of service with the court, following the method described in the section entitled “Giving Notice to the Other Parent That You Have Started a Custody Case,” above.

EXHIBIT 9A—Custody Checklist

This checklist should be used as a guide when you present or defend your custody claim or visitation issues. However, it is not a substitute for reading the chapter or obtaining competent legal advice or assistance.

1. Review and understand the various terms describing custodial arrangements, including:
 - sole legal custody,
 - sole physical custody,
 - shared (joint) legal custody and
 - shared (joint) physical custody.
2. Determine whether the other parent is incapable of meeting the child's needs because of any of the following reasons:
 - he or she has a substance abuse problem (i.e., alcoholism, drug dependency);
 - he or she is mentally ill or deficient;
 - he or she has a history of criminal convictions;
 - he or she has a history of child abuse or child neglect; or
 - he or she has a history of domestic violence.

Make sure that you have or are able to obtain proof of each allegation that you make; this proof can include witnesses, medical reports, police reports and DSS records.

Make sure that you can show the effects of the behavior on our child; you can do so with your child's medical records, a therapist's testimony, and DSS records.

3. Be ready to prove that you are capable of meeting the health needs of your child.
4. Be ready to prove that you are capable of meeting and providing for the educational needs of your child.
5. Be prepared to discuss the issues affecting your child with the other parent. If you cannot, why not? (This is relevant to your arguments for or against shared custody.)
6. Be prepared to show that you and the other parent have a history of cooperating in matters concerning your child. (You will need to prove that you can cooperate if you want shared custody. However, if you are opposing shared custody, you will need examples of your inability to cooperate.)
7. Be prepared to support your request for shared custody with a plan for discussing:
 - your child's education and development, including religious training;
 - your child's health and dental care; and
 - methods for resolving disputes outside of court.
8. If visitation is acceptable,
 - plan the weekend visits, deciding if they should be
 - every weekend;
 - on alternate weekends; or
 - on some other arrangement (e.g., the first weekend of month);
 - plan visits during the week, if any; consider the timing of these visits, particularly when the child is in school;
 - plan school vacation periods or summer visits;
 - plan holiday visits, including:
 - New Year's Eve or Day;

□ CHAPTER 9: CHILD CUSTODY

- Memorial Day;
 - Easter;
 - the Fourth of July;
 - the child’s birthday;
 - the parents’ birthdays;
 - Mother’s Day and Father’s Day;
 - Rosh Hashanah and Yom Kippur;
 - Thanksgiving;
 - Christmas, Hanukkah or Kwanzaa; and
 - other holidays;
- plan important family events, such as family reunions, that the children have traditionally participated in;
 - build in flexibility for change in schedule to accommodate special events for the child or either parent, or in the event of illness;
 - include details for pick-up or drop-off, including who is responsible for costs associated;
 - decide whether the child’s grandparents will have visitation; if so, include details pertaining to that visitation;
 - consider whether there are other people who can pick up or drop off your child for visitation;
 - consider if there are people who should not be around the child during the visits;
 - consider exchanging emergency contact information
 - consider what should be done in the event of an emergency
 - decide how you and the other parent will share information concerning the child’s activities, in order to inform or invite the other parent to participate in those activities; and
 - consider a plan for sharing school reports and medical information.
9. If the visits should be supervised, address:
- where the visits should take place;
 - if there is a fee involved, how will it be paid;
 - if there are any potential supervisors among friends and family who could be acceptable to the other parent;
 - what the terms of the supervision are (think about what you want to accomplish through supervision: a way of ensuring safety for yourself or your child; a way to allow your child to remain close with his or her other parent; a method of assessing the other parent’s parenting skills, etc.)
10. If there is a history of domestic violence between you and the other parent, or abuse of the child by a parent, you should seek the advice of an attorney experienced in family law matters.

EXHIBIT 9B—Supplemental Order—Visitation Issues

COMMONWEALTH OF MASSACHUSETTS

[], ss.

Probate and Family Court Dept.
Docket No. 000000

)
[NAME],
Plaintiff)
)
)
v.)
)
[NAME],)
Defendant)
_____)

SUPPLEMENTAL ORDER: VISITATION ISSUES

After hearing, it is ordered that the Order of Protection dated [DATE] shall incorporate the following provisions:

1. The Defendant shall have visitation in accordance with the following schedule:

This visitation is conditional on the Defendant’s compliance with each and every applicable order set forth below.

Any costs incurred in connection with professional supervision shall be paid as follows:

Restricted Transfer

2. The transfer shall take place at [PLACE].

The parties are not to make any negative comments about each other or discuss Court matters.

3. [NAME], a third party, shall be responsible for transporting the child(ren) to and from the visitation, and leaving the property immediately.
4. When the Defendant picks the child(ren) up for visitation, he or she shall pull up in front of the home, sound the horn to signify his or her arrival, and remain in the car at all times. The Plaintiff shall remain in the home and send the child(ren) to the car.
 - a. Due to the age of the child(ren), the Plaintiff or his or her designee may secure the child(ren) in the appropriate safety seat(s). There is to be no communication between the parents during the transfer.
5. The Plaintiff shall deliver the child(ren) to [PLACE] at least fifteen minutes prior to the designated time for commencement of the visitation. The Defendant shall pick the child(ren) up no sooner than fifteen minutes after the designated time for commencement of the visitation. The reverse procedure shall take place upon the child(ren)’s return, with the Defendant returning the child(ren) fifteen minutes prior to the designated time for the conclusion of the visitation, and the Plaintiff picking the child(ren) up fifteen minutes after the designated time for the conclusion of visitation. There is to be no contact between the Plaintiff and Defendant during the transfer.
6. The Plaintiff shall deliver the child(ren) to [PLACE], a visitation center, where the transfer shall be supervised according to the visitation center requirements.

□ **CHAPTER 9: CHILD CUSTODY**

Supervision

7. The Defendant's visitation with the minor child(ren) shall be supervised for the following reason(s):
 - a. to protect the child(ren) from physical abuse during visits
 - b. to protect the child(ren) from verbal abuse during visits
 - c. to protect the child(ren) from the Defendant's abuse of alcohol or drugs
 - d. to allow the child(ren) to feel safe based upon their prior exposure to violent behavior
 - e. _____
8. Visitation shall be supervised at all times by:
 - a. the visitation center at [ADDRESS]
 - b. the Department of Social Services (only if DSS has legal custody)
 - c. the paternal-maternal grandmother, grandfather, aunt, uncle, etc.
 - d. a third party approved by the Probation Office/GAL
 - e. _____

If an individual, as opposed to a visitation center or DSS, is designated to supervise visitation, then that individual shall first meet with the Probation Office/GAL to review the duties and obligations involved in supervising visitation.

Evaluation

9. [NAME] is appointed as guardian ad litem to evaluate both parties and the child(ren) concerning the issue of visitation. The evaluator shall specifically address the issue of domestic violence and its impact on the visitation issue and report in writing to the Court with recommendations concerning an appropriate visitation plan. The report shall be filed within [] days. The cost of the evaluation shall be paid as follows:
10. The child(ren) are to be seen at [NAME OF FACILITY] or by [NAME OF CLINICIAN] forthwith for immediate assessment of their needs.

Treatment and Intervention

11. The child(ren) are to be enrolled in counseling forthwith to assist them in coping with exposure to violent behavior.
12. The Defendant shall forthwith enroll in any one of the certified batterer treatment programs set forth on the attached list. The cost shall be borne by the Defendant. Should it be determined that no local program presently has, or will soon have, an opening, the Defendant may submit an alternative plan for treatment with an individual counselor who must be approved by the Probation Office of this Court upon review of the counselor's credentials in the area of domestic violence.
13. The Defendant shall attend parenting classes offered by [NAME OF PROGRAM] or approved by the Probation Department or the GAL. The defendant shall pay the costs associated with the classes.
- 14a. The defendant shall submit to drug/alcohol detection screening [] times a week at a location approved by the Probation Office after consultation with the Defendant. The testing facility shall notify the Probation Office forthwith of test results indicating drug/alcohol abuse. A positive test result for drug/alcohol use shall result in the automatic suspension of visitation pending further Court hearing. Every two weeks, the Defendant, or the

testing facility, shall provide the Probation Office with verification that the testing is taking place. The Defendant shall pay the cost of the testing.

- 14b. The Defendant shall submit to random drug/alcohol-abuse detection screening within twenty-four hours of notification by the Probation Office. The testing facility shall notify the Probation Office forthwith of test results indicating drug/alcohol abuse. A positive test result for drug/alcohol use shall result in the automatic suspension of visitation pending further Court hearing. The Defendant shall pay the cost of the testing.
- 15. The Defendant shall abstain from possession or consumption of alcohol or illegal controlled substances during the visitation and for twenty-four hours preceding the visitation.
- 16. The Defendant shall attend at least [NUMBER] Alcoholics Anonymous (AA) meetings per week.

Further Order

- 17. It is further ordered that:

Review

- 18. The issue of visitation and the conditions imposed by this order shall be reviewed on [DATE].

Justice of the Probate
and Family Court

Date:

EXHIBIT 9C—Petition for Writ of Habeas Corpus

COMMONWEALTH OF MASSACHUSETTS

[], ss.

Probate and Family Court Dept.
Docket No.

_____)
[NAME],)
Plaintiff)
)
v.)
)
[NAME],)
Defendant)
_____)

PETITION FOR WRIT OF HABEAS CORPUS

THIS PETITION IS BROUGHT ON THE OATH OF THE UNDERSIGNED PETITIONER AND IS EXECUTED UNDER THE PAINS AND PENALTIES OF PERJURY

1. The petitioner lives at [ADDRESS].
2. The respondent lives at [ADDRESS].
3. The petitioner and respondent [were married on [DATE]] [had a child together on [DATE]].
4. The petitioner/respondent filed a Complaint for [paternity/divorce/custody] in this Court on [DATE], Docket No. [].
5. On [DATE], this Court granted the petitioner [] custody of the minor child(ren), namely [].
6. On [DATE], this Court also granted the respondent the following visitation rights:
_____.
7. At all times since the above order, the petitioner has retained sole physical custody of the minor child(ren) who have resided in [his/her] home.
8. On [DATE], after a visit with the minor child(ren), the respondent did not return the minor child(ren) to the petitioner's home.
9. On [DATE], the petitioner contacted the police in an attempt to have the minor child(ren) returned to [him/her]. The police declined to assist [him/her].
10. Since [DATE] and continuing to the present, the respondent has failed and refused to return the minor child(ren) to the petitioner.

Spell out all of the details of the situation—what the other parent has done and said, what you have done in order to get your child back, any danger your child might be in as a result of the other parent taking him or her.

11. If this Court fails to issue a writ of habeas corpus for the minor child to be immediately returned to the custody of the petitioner, the respondent will retain physical custody of the minor child contrary to the order of this Court and the best interests and welfare of the minor child. This will cause irreparable injury to both the petitioner and the child.

WHEREFORE, the petitioner prays that pursuant to G.L. c. 208, § 32, this Court:

1. Issue a writ of habeas corpus commanding a sheriff or constable to return the minor child to the petitioner to protect and promote the best interest of the minor child.
2. Make the writ returnable forthwith.
3. Enter temporary orders that visitation [be suspended] [be supervised by _____].
4. Enter temporary orders restraining the respondent from contacting the minor child.
5. Enter temporary orders restraining the respondent from abusing the petitioner, from contacting the petitioner, and from coming within 50 yards of the petitioner.
6. Order an immediate hearing on the merits.
7. Make such final order of judgment as the court may deem appropriate and just.

[PETITIONER'S NAME]

Date:

EXHIBIT 9D—Complaint for Contempt

Commonwealth of Massachusetts
The Trial Court
Probate and Family Court Department

Division _____ Docket No. _____

COMPLAINT FOR **CIVIL** **CONTEMPT**
 CRIMINAL

_____, Plaintiff v. _____, Defendant

1. Plaintiff resides at _____
(Street address) (City/Town) (County) (State) (Zip)

2. Defendant resides at _____
(Street address) (City/Town) (County) (State) (Zip)

3. By judgment order of the Court, dated _____ defendant was ordered

- to pay alimony and/or support for minor or dependent child(ren) in the sum of \$ _____ weekly monthly .
- to grant visitation rights with _____
- not to impose any restraint on the personal liberty of plaintiff
- to pay health insurance premiums for plaintiff and/or child(ren)
- to pay reasonable medical and dental expenses for plaintiff and/or child(ren)
- _____

and said judgment order is still in force.

4. Defendant has not obeyed that judgment order and
- is in arrears of court-ordered support payments.
 - there now remains due and unpaid to plaintiff the sum of \$ _____ plus such further amounts as may accrue to the date of hearing.
 - plaintiff has been denied parenting time on _____
 - has violated the order on _____ by _____

5. Wherefore, plaintiff requests that defendant be required to appear before this Court to show cause why defendant should not be adjudged in contempt of Court and for such other relief as the Court deems just.

Date _____

(Signature of attorney or plaintiff, if pro se)

(Print name)

(Street address)

(City/Town) (State) (Zip)

Tel. No. _____
B.B.O. # _____

EXHIBIT 9E—Emergency Ex-Parte Motion to Produce Minor Child

COMMONWEALTH OF MASSACHUSETTS

[], ss.

Probate and Family Court Dept.
Docket No.

)
[NAME],)
Plaintiff)
)
v.)
)
[NAME],)
Defendant)
_____)

EMERGENCY EX-PARTE MOTION TO PRODUCE MINOR CHILD

NOW COMES [NAME], the plaintiff in the above action, and respectfully moves this Court to do the following:

1. Order the defendant, [NAME], to return the minor child to the plaintiff forthwith.
2. Issue temporary orders that visitation [be suspended] [be supervised by _____].
3. Enter temporary orders restraining the defendant from contacting the minor child.
4. Enter temporary orders restraining the respondent from abusing the plaintiff, from contacting the plaintiff, and from coming within 50 yards of the plaintiff.

As reasons therefore, plaintiff states as follows:

1. The [plaintiff/defendant] filed a Complaint for [] in this Court on [DATE], Docket No. [].
2. On [DATE], this Court granted the plaintiff [] custody of the minor child, namely [].
3. On [DATE], this Court also granted the defendant the following visitation rights:
_____.
4. At all times since the above [judgment/order] was entered, the plaintiff has retained sole physical custody of the child who has resided in [his/her] home.
5. On [DATE], after a visit with the minor child, the defendant did not return the minor child to the plaintiff's home.
6. On [DATE], the plaintiff contacted the police in an attempt to have the minor child returned to [him/her]. The police declined to assist [him/her].
7. Since [DATE] and continuing to the present, the defendant has failed and refused to return the minor child to the plaintiff.

Spell out all of the details of the situation—what the other parent has done and said, what you have done in order to get your child back, any danger your child might be in as a result of the other parent taking him or her.

□ **CHAPTER 9: CHILD CUSTODY**

8. If this Court fails to issue a writ of habeas corpus for the minor child to be immediately returned to the custody of the petitioner, the respondent will retain physical custody of the minor child contrary to the order of this Court and the best interests and welfare of the minor child. This will cause irreparable injury to both the petitioner and the child.

WHEREFORE, the plaintiff respectfully requests that this Court grant [his/her] motion.

[PETITIONER'S NAME]

Date: