

CHAPTER 1

USING THIS MANUAL

JACQUELYNNE J. BOWMAN, ESQ.
Greater Boston Legal Services, Boston

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USING THIS MANUAL

Important Note

The material included in this manual was current at the time of publication. You should check with a family law advocate or the court to make certain that information you are relying upon is up to date. There are a number of resources available to help you check the status of the law. One resource is Massachusetts Legal Answers Online (<http://www.masslao.org>), a resource to get an answer from an advocate. You can also go to the Massachusetts Legal Resource Finder (<http://www.masslrf.org>) to see if you are eligible for help from a civil legal aid program. You can also visit MassLegalHelp (<http://www.masslegalhelp.org>) to obtain basic information about a variety of legal matters, including any significant changes in family or child custody legal issues. In addition, several courthouses have a court services center where you can get legal information and help filling out court forms.

Participating in the family court system can be a frustrating and confusing experience. The court system appears to be a foreign community with its own unique language and ways of operating. Yet it is through this system that decisions are made affecting your life, that of your children, and of other family members. You may be unable to obtain an attorney to guide you through the system. This manual will provide you with some basic information to help you begin to understand the system. Basic knowledge of your legal rights can enable you to protect yourself and your children. It is also important to understand the limitations of the law and what cannot be achieved through the court process, and to know what to expect from the court and what the court expects of you. This manual will also give you information about your rights and direct you to resources which may help you further.

This manual is general in nature and is not intended to provide specific answers to your situation. Each case depends upon the particular facts peculiar to it. This manual will give you a general overview of the law that will allow you to begin to weigh your options. References to important case law and statutes are included, as well as a resource

directory and a glossary with definitions of important terms. Throughout the manual you will find Practice Notes designed to assist you in completing forms or to advise you of a particular situation. Note that the Practice Notes do not apply to everyone all of the time. Also included are sample motions, complaints, and other pleadings to show you how court forms should be completed and suggestions about how to think about your case. Do not simply copy these forms and submit them to the court; you must read the materials and think about how the given information applies to your situation. Using this manual should help you to organize the critical facts, records, and other documents you need to proceed with your case and to help you decide whether you should go forward without the assistance of an attorney.

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

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

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

Do You Need A Lawyer?

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

You can hire or retain an attorney for any part of a case. If you are not sure whether your problem can be resolved by a court, you can consult an attorney for guidance. Similarly, if you think you and the other side can reach an agreement, you can hire an attorney for that purpose only.

Unfortunately, hiring an attorney to represent you throughout a family law matter can be expensive. A contested case may involve numerous court appearances before it is resolved. As a result, many of the attorneys who take on family law matters ask for a sizable retainer. Some family law cases are minimally contested or are not contested at all. These may be cases that you can more easily handle yourself, pro se (pronounced “pro say”). Judges and other staff in the family court system often look for ways to make the court more accessible to litigants without lawyers. You do have the right to represent yourself in court, and many litigants have been successful on their own. However, the family court system can be complex. You must know when to seek advice. Many family law attorneys are increasingly available for advice only or other limited assistance. In some courts, lawyers may be able to provide limited assistance representation. This means that the client and lawyer can agree that the lawyer will provide advice or assistance on one or more issues but not the whole case. Some judges may not allow this in every case.

However, there are certain circumstances where you are strongly encouraged to seek legal representation. If you are a victim of domestic violence, you should not try to handle a case completely on your own against the person who abused you. If there is a substantial amount of money or property involved or you have major issues involving child custody, you should contact an attorney for advice, guidance, or representation.

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

If you have a problem with a lawyer, the Board of Bar Overseers (BBO) handles complaints from clients. The BBO can be contacted at: Office of Bar Counsel, 99 High Street, Boston, MA 02110; by telephone at (617) 728-8750; and online at <http://www.mass.gov/obcbbo/complaint.htm#how>.

There are certain instances in which you have a right to a court-appointed attorney if you cannot afford to pay for one and are determined to meet the indigency guidelines. (See chapter 2 of this book for more information about indigency guidelines.) You have the right to have an attorney appointed for you if you are a defendant in a criminal case and cannot afford to pay for an attorney. You also have the right to have an attorney appointed for you if the Department of Children and Families takes you to court for issues related to abuse or neglect of your child, even if you are the noncustodial parent. You have the right to a court-appointed attorney if someone has filed to become guardian of your child. At present, there is no right to an attorney, even if you cannot afford one, if you are involved in a divorce or custody case.

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

CAN YOU RESOLVE YOUR PROBLEM OUTSIDE OF THE COURT SYSTEM?

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

Alternative dispute resolution is sometimes called mediation, which is an informal process where a person, or mediator, works with you and your partner to resolve a problem in a way that is satisfactory to both of you. The Massachusetts trial courts offer court-connected alternative dispute resolution programs as an alternative to litigation in every Trial Court department. Some of these programs charge fees. The Probate and Family Court also offers dispute resolution services conducted by probation officers. In Probate and Family Court, these people are sometimes called family services officers. There are also independent agencies and neighborhood service agencies that provide mediation for a small fee or for free. A list of these agencies is included in the Appendix at the end of this book.

Mediation techniques vary somewhat by which program they are provided through. Some programs use one mediator, while others use two or three to facilitate cooperative problem solving. They share some basic concepts. The purpose of mediation is to arrive at an agreement by mutual consent. Mediation efforts will almost always fail if the parties are unwilling to compromise. In many mediation programs, the legal rights and responsibilities of the parties are considered to be irrelevant. Effective mediation depends on the good faith and equal footing of the participants. The focus of mediation is on reaching an agreement that is satisfactory to the parties using the mediation process. To learn more about the advantages and disadvantages of mediation, see chapter 18 of this book.

THE MASSACHUSETTS COURT SYSTEM

The Massachusetts court system has three levels, as you can see in the chart included as **Exhibit 1A**. Two departments of the Trial Court are responsible for most family law cases. Some family law matters are also presented in the Juvenile Court, mostly those arising out of care and protection cases, which involve the Department of Children and Families or other child protection entities. Review chapter 3 of this book for information on cases

involving the Department of Children and Families. Keep in mind, however, that this manual is not focused on child welfare matters.

The Trial Court Department

The Probate and Family Court

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

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

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

The District Court

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

Court Personnel

Court personnel bring the law to life. Key staff include

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

Judges

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

Clerks and Assistant Registers

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

Probation Officers

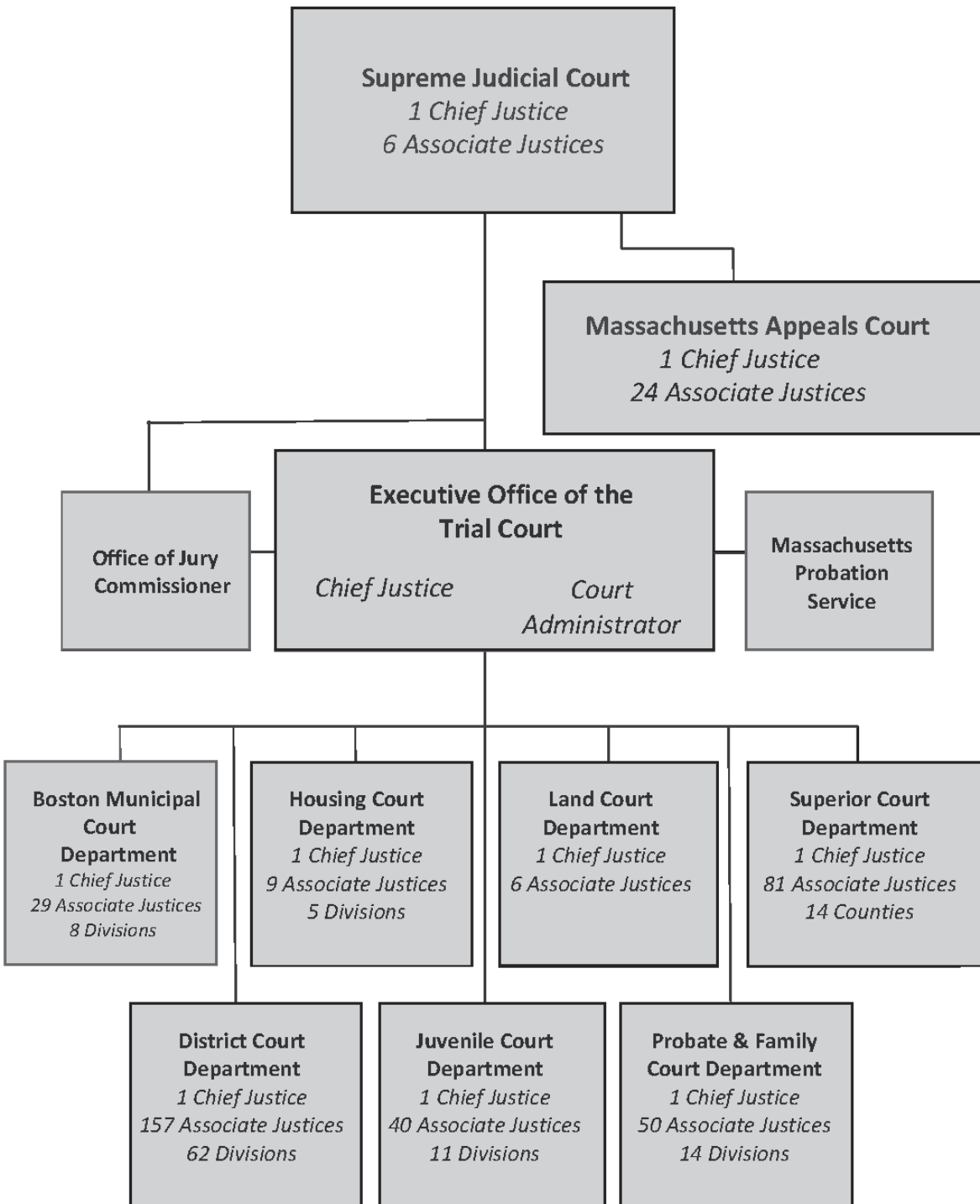
Probation officers also work in the Probate and Family Court. They perform many different functions, including probation officers and investigation of custody issues. For more information on probation officers, see chapter 2, Overview of the Probate and Family Court, for general information; and chapter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

Court Officers

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

EXHIBIT 1A—Overview of Massachusetts State Court System

Chart taken from the Massachusetts Court System website at <http://www.mass.gov/courts>.



The number of justices for all courts is the total authorized by law.