

## CHAPTER 18

# APPELLATE ISSUES

PATRICIA A. LEVESH, ESQ.  
Greater Boston Legal Services, Boston

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## OVERVIEW

Occasionally, a judge may make a decision or order that you feel is wrong. There are a number of ways to seek relief from a court's order. The most common way is by making an appeal. An appeal is a request made by a party, usually the losing party in a case, to another judge in a higher court to review the first judge's decision and change it. In some court matters, such as in murder cases, there is an automatic right to an appeal. In other cases there must be a rule or law that says you can appeal the decision. Most of the cases in the Probate and Family Court can be appealed. The primary statutes governing appeals in this court are G.L. c. 215, §§ 9–24, which provide specific

authority for appeals from both interlocutory (i.e., not yet final but could dispose of some issues) and final orders in probate and family law matters.

The following statutes also authorize certain types of appeal:

- G.L. c. 231, § 118—interlocutory reviews, which authorize temporary appellate relief to a petitioner; and
- G.L. c. 211, § 3—grants the Supreme Judicial Court general supervisory authority over the lower courts to correct or prevent errors if there is no other remedy.

### Practice Note

This chapter contains a cursory overview of the appeals process. Attorneys and others seeking to learn more about appellate practice are advised to examine the statute and other sources for information, such as the *Massachusetts Divorce Law Practice Manual* (MCLE, Inc. 3d ed. 2012 & Supp. 2104, 2016) and *Appellate Practice in Massachusetts* (MCLE, Inc. 4th ed. 2016).

The Probate and Family Court is considered to be an intermediate court. Two other courts may review its orders—the Appeals Court and the Supreme Judicial Court. The Supreme Judicial Court is the highest court in Massachusetts.

The decision of whether you ought to appeal a case is one you should take seriously. It is a difficult process that should not be undertaken without careful thought. First ask whether there are any alternatives to making an appeal. Can you ask the judge to reconsider the decision or order? Do you have additional facts that could persuade a judge to rule in your favor upon reconsideration? Is it feasible to seek a modification of the court's order?

The purpose of this chapter is to give you a diagram of the appellate process so that you can be more aware of what is involved in making an appeal. Appealing a case is a difficult process and, as such, it is beyond the scope of this book to give you a detailed primer on how to conduct an appeal. There are many procedural requirements that must be followed in order to keep the case flowing through the appellate system. These cases are difficult to handle on your own. If you are considering an appeal, you are strongly advised to speak to an attorney who has experience in appealing family law matters. Be aware that few attorneys will take on a case at this stage. You will probably have to show that the judge clearly made a mistake. It is also rare to access free legal services at this stage of the case. The court is required to appoint counsel for parents appealing the decision to terminate their parental rights if they are not able to afford one. *Adoption of Meaghan*, 461 Mass. 1006 (2012); *Public Welfare v. J.K.B.*, 379 Mass. 1 (1979); *Adoption of William*, 38 Mass. App. Ct. 661 (1995); *Adoption of Olivia*, 53 Mass. App. Ct. 670 (2002); see also G.L. c. 210, § 3. A good place to begin your search for legal counsel is the Massachusetts Bar Association (MBA) Lawyer Referral Panel. You can also find helpful information online at the Appeals Court Help Center at <https://www.mass.gov/appeals-court-help-center>. Litigants may also find pro se assistance at the Civil Appeals Clinic located at the Appeals Court clerk's office (see [https://www.vlpnet.org/volunteer/item.6901-Civil\\_Appeals\\_Clinic](https://www.vlpnet.org/volunteer/item.6901-Civil_Appeals_Clinic)). See chapter 20, Resources, at the end of this book.

## STANDARD OF REVIEW

Even though an appeal involves a different judge (or judges), it is *not* an opportunity for you to retry your case. The role of the appellate courts is to review the trial court's decision in light of the evidence presented in the court below. No new evidence is accepted and you have no opportunity to argue the facts of your case again. The appellate courts look at the documents you submit for it to review and decides whether the judge who heard your case either made a clear error of law or abused his or her discretion in making the decision. Both of these things have special meaning in the law and both are difficult to prove.

In order to find that a judge abused his or her discretion in your case, the Appeals Court must find that the trial judge made a clear error in judgment in weighing the facts presented in the case. *LL. v. Commonwealth*, 470 Mass. 169 (2014). The Appeals Court will not decide whether the judge was correct in finding that a witness or other evidence was or was not credible (i.e., truthful or reliable). The only time the Appeals Court will set aside a factual finding of the court is when there is no evidence to support it and it is clear from the record that the judge made a mistake. *Tiernan v. Tiernan*, 9 Mass. App. Ct. 901 (1980); see also *Custody of Eleanor*, 414 Mass. 795 (1993). If the findings of the court below are not clearly erroneous, the Appeals Court will consider whether the judge abused his or her discretion. *Williams v. Massa*, 431 Mass. 619 (2000).

The court has made a clear error of law if the legal conclusion stated is not supported by existing law or if the court applied the incorrect law to the facts.

### Practice Note

After the appeal is heard, the Appeals Court can do one or more of the following:

- affirm the judgment;
- reverse the judgment entirely, or in part;
- enter an order that the trial court judge should have entered; and/or
- remand, or send the case back for further proceedings.

## DO I HAVE TO WAIT UNTIL THE END OF THE CASE TO FILE AN APPEAL?

In most instances, a petitioner must wait until a case is over before asking a higher court to review a judge's decision. This means that you can only appeal from a final judgment, with certain exceptions. When a court issues an interim or temporary decision, not considered a final resolution of the whole controversy, the order is often referred to as "interlocutory." Interlocutory orders are difficult to appeal. A temporary order can easily be changed by the court during the pendency of the case. As a result, higher courts are often reluctant to hear cases asking for a review of these orders. In addition, the Supreme Judicial Court has clearly stated that the policy limiting appeals of intermediate or temporary decisions is justified because it would not be fair to allow one party to continually disrupt the case by asking for appellate review of questions that turn out to be unimportant in the long run. *Borman v. Borman*, 378 Mass. 775 (1979). However, there are times when a trial judge issues an order that makes it difficult to go to trial on a case or matter. If you are able to show the reviewing court that the order, if applied, would have serious consequences that could not be remedied when the case is over or through a regular appeal, you may be able to ask an appellate court to review the order even though it is not final. *Maddocks v. Ricker*, 403 Mass. 592, 598 (1988); *Metzler v. Lanoue*, 62 Mass. App. Ct. 655 (2004); see also *Brum v. Town of Dartmouth*, 428 Mass. 684 (1999) (interlocutory order immediately appealable because it concerned issue collateral to basic controversy and later appeal would have been futile had order been executed). Motions for temporary support and other orders pending the outcome of the case, orders to vacate the marital home, denials of motions to dismiss, and decisions related to discovery are usually not considered appealable until a final judgment is issued.

The majority of cases from the Probate and Family Court where a petitioner is seeking an interlocutory review are filed in the single justice session of the Appeals Court pursuant to G.L. c. 231, § 118. They can also be filed in the Supreme Judicial Court.

A "single justice" session is simply a single appellate judge hearing the petition. The single justice has broad discretion. He or she may suspend, modify, or annul the interlocutory order. The single justice may also report the case to a full panel of judges for an immediate review of the decision. *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 614 (1980) (citation omitted).

It is often difficult to convince a single justice to vacate a Probate and Family Court matter. You are in the position of asking another judge to second-guess the first judge, who is probably more familiar with the facts of the case and has actually seen and heard the witnesses. You will probably have to convince the judge that the trial judge made a mistake of law or that the judge clearly abused discretion.

### Procedure

The record of the lower court proceedings is not forwarded to the Appeals Court in connection with an appeal from an interlocutory order. It is, therefore, incumbent upon the petitioning party to bring as much information to the attention of the single justice by way of pleadings, factual representation, and a copy of the order as is necessary to enable the single justice of the Appeals Court to understand the background for the entry of the order and the rationale of the argument for relief. The petition must contain, in the following order,

- a request for review stating the nature and date of the order appealed from, and the name of the judge who entered the order or judgment,
- a statement of issues,

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- a statement as to whether a party has filed, served, or intends to file a motion for reconsideration in the lower court,
- a statement of the relief requested, and
- a copy of the order.

### ***Proposed Order or Statement***

You can include a proposed order or statement of what you want the Appeals Court to order. You must include a memorandum of law of no more than fifteen pages with portions of the record identifying the issues you are requesting the single justice to review. (A memorandum of law is a written document in which you explain how the law should be applied in your case.) One copy of the petition must be filed with the clerk of the Appeals Court. The same general format is used for filing oppositions to petitions for review. Appeals Court Standing Order Concerning Petitions to the Single Justice Pursuant to G.L. c. 231, § 118 (First Paragraph).

The petition should set forth in numbered paragraph form the following:

- the parties (i.e., who is involved in the case);
- the forum in which the proceedings appealed from was held (i.e., what court were you in?);
- a statement of the facts presented to the trial court; and
- a clear indication of why immediate relief is necessary.

In addition to the petition and memorandum of law, you must submit a “record appendix” that contains copies of the trial court docket entries, and any papers that were filed during the case that are relevant to the issue being appealed. The record appendix must have a table of contents.

The other side should be served with a copy of the petition. If you have been served with a copy of the petition, respond to it in writing within seven days. The response should also be in numbered paragraphs and respond to the statements made in the petition. Also state why you feel that the relief requested should not be granted. Pleadings and other documentary materials introduced at the trial court proceeding that were not included in the petition but are helpful to your answer should be included with your response.

### ***Hearing***

You may request a hearing when you file your petition. You do not have a right to a hearing. Whether you get one generally depends on the particular judge and the court’s availability. The single justice sessions tend to be less formal than regular court hearings, but you should be prepared to present your case. The sessions are sometimes held outside of the courtroom in the judge’s lobby (generally, a reference to an informal setting where the judge and the parties sit around a table and discuss the case). The single justice tends to have tight control over the direction of the hearing and highlights the issues of most interest to the court. Be prepared to tell the court why you believe that the lower court ruled as it did, the importance of the issue to you, and the negative impact the decision, if implemented, will have on you. You can assume that the single justice is familiar with the pleadings you submitted to the court.

In the Appeals Court, single justice sessions are held daily. The single justice is assigned on a monthly basis. Emergency hearings are available at any time by contacting the clerk’s office. In the Supreme Judicial Court, single justice sessions are held on Wednesdays except in July, August, and September. An emergency hearing can be scheduled through the clerk’s office.

## **WHAT DO I DO IF MY JUDGMENT IS FINAL?**

A judgment given at the end of the case may be appealed directly to the Appeals Court and will be heard by a full panel of judges. The statute that governs these appeals is G.L. c. 215, § 9, which states in pertinent part:

A person aggrieved by an order, judgment, decree or denial of a probate court . . . may, within thirty days after entry thereof, appeal therefrom to the appeals court or subject to the provisions of section ten of chapter two hundred and eleven A, to the full court of the Supreme Judicial Court.

The Massachusetts Rules of Appellate Procedure outlines the process for appeals of family law matters. Note that for purposes of an appeal, a judgment divorce nisi is considered final when issued by the court even though it really does not become “final” for ninety days. See chapter 5, Divorce. An appeal of a divorce judgment does not automatically stop the running of the nisi period, nor does it stay provisions related to custody, visitation, support, or property division. You must file a motion to stay any other order or judgments of the court affecting these issues pending appeal. See *Huber v. Huber*, 408 Mass. 495 (1990); *Yanolis v. Yanolis*, 402 Mass. 470 (1988).

## HOW DO I DECIDE IF I SHOULD APPEAL?

Again, the decision to undertake an appeal is a difficult one. If you are considering appealing an order, seek advice from a lawyer with appellate experience. Having said this, many lawyers examine the following types of issues when trying to decide if it is feasible to appeal a case:

- Is the judge’s order consistent with the facts or the evidence?
- Was the judge clearly biased in favor of or against one of the parties?
- Is it clear from the record?
- Does the judge have the power to make the order?
- Did the judge allow someone else to make the decision? For example, did a guardian ad litem or a probation officer (also known as a family service officer) determine which facts were relevant or true and issue a recommendation that the court followed without making an independent assessment of facts presented by the parties?
- Does the judgment unlawfully infringe on a party’s constitutional rights?
- Did the judge apply the law correctly?
- Did the court abuse its discretion?

Ultimately, the question is whether anything significant can be obtained through an appeal. In short, is it worth the effort?

## COSTS OF APPEAL

There are costs associated with conducting an appeal. If a party does not have sufficient funds to pay these costs, he or she may file a motion to proceed *in forma pauperis* (as a pauper, without payment). This would also enable a party to request that the Commonwealth pay the costs of transcription. The motion may be filed in the trial court or in the Appeals Court. Mass. R. App. P. 12.

## NOTICE AND TIMING OF APPEAL

In most instances, you must file a notice of appeal within thirty days of the judgment or order. See **Exhibit 18A** for a sample notice of appeal. If the Commonwealth (or a state agency) is a party, you have sixty days, except for cases where the Department of Children and Families is a party, which must also be filed within thirty days. If another party to the case files a notice of appeal, you may also file one but should do so within fourteen days of the first filing unless some other rule gives you a longer time period. Mass. R. App. P. 4(a). The notice must state the party taking the appeal and what order or part of the order is being appealed. You must clearly state what part or parts of the order you are appealing from, as you will likely not be entitled to claim relief from any other aspect of the judgment that you did not appeal. The notice of appeal must be filed with the Probate and Family Court. If the notice of appeal is filed while a motion to amend or add findings of facts is pending, the notice will need to be filed again after a judgment is entered. *Sawyer v. Sawyer*, 66 Mass. App. Ct. 906 (2006).

If a party files a motion in the lower court asking the judge to reconsider its judgment, the thirty days does not start until the lower court rules on the motion. These motions must be filed within ten days after entry of judgment in order to get this extra time. A new notice of appeal must be filed if the motion is denied.

**Practice Note**

Pay attention to the timing of filing a notice of appeal. Once the time to appeal expires, you no longer have the right to appeal, except in extraordinary circumstances.

## RECORD ON APPEAL

Rules 8 and 9 of the Massachusetts Rules of Appellate Procedure govern the procedures that must be followed in assembling the record on appeal. The record on appeal contains the original papers and exhibits on file, the transcript, if any, and a certified copy of the docket entries. Mass. R. App. P. 8(a). The person filing the appeal (the appellant) is responsible for ordering the transcripts of any part of the proceedings not already on file that need to be included in the record. Mass. R. App. P. 8(b)(1). Unless the entire transcript is included, you must file and serve on the other side (the appellee) a description of the parts of the transcript that you intend to include as well as a statement of the issues you are raising on appeal. You must do this within ten days of filing your notice of appeal. If you are served with this notice, you have ten days to tell the other side what else you think ought to be included. The other side must order that part of the transcript as well. Mass. R. App. P. 8(b)(1). If you cannot afford to pay the costs of an appeal, you can ask the Commonwealth to pay the fee by filing a motion under the Indigent Court Costs Act, G.L. c. 261, §§ 27A–27G. Also see chapter 2, Overview of the Probate and Family Court, for a form and discussion.

If there is no stenographic record, follow the procedure outlined in Mass. R. App. P. 8(b)(3) to obtain and transcribe a copy of an electronic recording. If there is no electronic recording, the appellant may file a statement of the evidence within thirty days of filing the notice of appeal. This statement can be developed from whatever sources of evidence may exist, including memory. It must be served on the other party, the appellee. The appellee has ten days to file any objections to this statement of the evidence or to offer proposed amendments. These are then submitted to the trial judge for approval or the settlement of any dispute. Once approved or settled, the statement becomes a part of the record on appeal. Mass. R. App. P. 8(c).

## ASSEMBLY OF RECORD ON APPEAL

Rule 9 of the Massachusetts Rules of Appellate Procedure governs the assembly of the record for appeal. It places responsibility for assembling the record on the clerk of the trial court. However, Mass. R. App. P. 9(c) outlines the appellant's obligations in assembling the record, requiring the moving party to perform any act "reasonably necessary" to enable the clerk to prepare the record. It is an important procedural step. If you fail to comply with this rule, the court could dismiss your appeal. *Vyskocil v. Vyskocil*, 376 Mass. 137 (1978).

The transcript must be filed with the clerk of the trial court within ten days of the filing of the notice of appeal. If the transcript is not available, you must file a statement that it has been ordered and then file the transcript forthwith once it has been received. Failure to do so could result in dismissal of the appeal. *Russell v. McOwen-Hanelt*, 413 Mass. 106 (1992).

## DOCKETING THE APPEAL

Within ten days after receiving notice of assembly of the record or of approval by the lower court, the appellant has the obligation to pay the docket fee (currently \$300 per appellant, including cross-appellants) to the clerk of the appellate court, unless the fee has been waived. Upon payment or proof of fee waiver, the Appeals Court clerk will enter the appeal on the docket. Once the appeal is on the court's docket, the clerk will notify each party by written notice. Mass. R. App. P. 10(a)(3). The docketing of an appeal in the Appeals Court does not mean that the Probate and Family Court judge cannot continue further proceedings in the case. However, because further review in the trial court may make the issues raised in the appeal meaningless, parties should notify the Appeals Court of actions in the trial court. *Custody of Deborah*, 33 Mass. App. Ct. 913 (1992).

If the appellant fails to comply with the Rule 9(c) obligations in assembling the record or Rule 10 payment of the fee to docket the appeal, the lower court, upon motion with notice by the appellee, may dismiss the appeal. If the error was not attributable to the appellant, the court has held that the case should not be dismissed. *Hawkins v. Hawkins*, 397 Mass. 401, 404 (1986); *Mailer v. Mailer*, 387 Mass. 401, 406 (1982).

## DIRECT APPELLATE REVIEW

Aside from the general appellate process, there is an opportunity for direct appellate review within the concurrent appellate jurisdiction of the Appeals Court and the Supreme Judicial Court. Such appellate review may be requested by any of the parties or ordered *sua sponte* (without request by either party) by any two justices of the Supreme Judicial Court or by all or a majority of the justices of the Appeals Court. If the application for direct appellate review is to be made by one of the parties, the application cannot be submitted until an appeal has been entered. Within twenty days of the docketing of the appeal in the Appeals Court, counsel may apply in writing to the Supreme Judicial Court for direct appellate review, provided that the questions presented are

- questions of first impression (i.e., issues that have not been decided by the court before), or questions of law to be submitted for final determination to the Supreme Judicial Court;
- questions of law concerning the Constitution of the Commonwealth or the Constitution of the United States; or
- questions of such public interest that justice requires a final determination by the full Supreme Judicial Court.

Mass. R. App. P. 11(a).

The form of the application for direct appellate review shall contain

- a request for direct appellate review;
- a statement of prior proceedings;
- a short statement of facts;
- a statement of the issues of law raised by the appeal;
- a brief argument, not more than ten pages in length, containing appropriate authorities in support of the position of the applicant;
- a statement of reasons why direct appellate review is appropriate; and
- a certified copy of the docket entries.

Mass. R. App. P. 11(b).

Within ten days of the filing of the application, the other party may file and serve an opposition setting forth the reasons why the application should not be granted. Mass. R. App. P. 11(c). One copy of the application and one copy of the opposition shall be filed in the office of the clerk of the Appeals Court and fourteen copies are to be filed in the office of the clerk of the Supreme Judicial Court. The opposing party must be served as required by Mass. R. App. P. 13.

According to Mass. R. App. P. 11(f), if any two justices of the Supreme Judicial Court vote for direct appellate review, or if a majority of the justices of the Appeals Court certify that direct appellate review is in the public interest, they shall submit to the Appeals Court an order allowing the application (or transferring the appeal *sua sponte*) or the certificate, as the case may be. When the Appeals Court receives either the order allowing the application by one of the parties or the *sua sponte* transfer, direct appellate review shall be deemed granted. Mass. R. App. P. 11(f).

Filing an application for direct appellate review does *not* extend the time for the filing of briefs. The time for filing briefs begins to run on the date the appeal is docketed in the appellate court.

Once the application for direct appellate review is granted, no further briefs may be filed, with two exceptions. First, a reply brief may be filed in accordance with Mass. R. App. P. 11(g)(1). Second, if the case is transferred to the Supreme Judicial Court *and* only the appellant's brief has been served and filed in the Appeals Court, then the appellant may file an amended brief with the Supreme Judicial Court. The amended brief must be filed within twenty days of the date on which the appeal is docketed in the Supreme Judicial Court. The appellee must serve and file his or her brief within thirty days after service of any amended brief of the appellant or within fifty days after the date on which the appeal is docketed in the full Supreme Judicial Court, whichever is later. If, at the time of the transfer to the Supreme Judicial Court, no party has served or filed a brief, then service and filing shall comply with Mass. R. App. P. 19. Mass. R. App. P. 11(g).

## APPELLATE BRIEFS

### Filing

Each party must file a brief. The purpose of the brief is to help the judges learn about your case and to convince them to rule in your favor. Select your issues carefully and be concise. The brief of the moving party (the appellant) must be served and filed within forty days after the date on which the appeal is docketed. The appellee (the other side) has thirty days after service of the appellant's brief to serve and file his or her brief. The appellant may serve and file a reply brief within fourteen days after service of the brief of the appellee. Mass. R. App. P. 19(a). Seven copies of each brief must be filed with the clerk of the appellate court and two copies must be sent to the other side. On appeals to the Supreme Judicial Court, an original and seventeen copies of each brief should be filed with the clerk of the Supreme Judicial Court. Mass. R. App. P. 19(b). If an appellant fails to file a brief within the time provided or extended time, the appellee may move for dismissal. If the appellee fails to file a brief, he or she will not be able to give oral argument unless permitted by the appellate court. Mass. R. App. P. 19(c).

### Form and Content

Rule 16 of the Massachusetts Rules of Appellate Procedure provides a prescription for the form and content of the brief. If you are filing a brief, use the rule as a checklist for what you must do. An appellant's brief must contain the following:

- in briefs of twenty or more pages, a table of contents with page references and a table of cases, statutes, and authorities cited with page references;
- a statement of the issues presented for review;
- a statement of the case that briefly explains the nature of the case, the course of proceedings, and its disposition in the trial court (the type of case and its history in the trial court);
- a statement of relevant facts with references to the record;
- the argument laying out your position with respect to the issues presented, reasons, and supporting cases or other materials relied on;
- a brief conclusion stating the relief sought;
- names, addresses, and bar numbers of any counsel; and
- certification that the brief complies with court rules governing briefs.

Mass. R. App. P. 16(a), (k).

It is important to raise all issues on appeal, including those that have already been brought before a single justice. In *Aronoff v. Board of Registration in Medicine*, 420 Mass. 830 (1995), an issue that the appellant failed to raise on appeal was deemed waived, even though the issue was already brought before a single justice. In addition, you must support issues in the brief with legal authority. An appellant in *Cameron v. Carelli*, 39 Mass. App. Ct. 81 (1995), failed to do so, resulting in the court's unwillingness to consider said issues.

The brief of the appellee should contain the same sections as that of the appellant except that you do not have to include a statement of the issues or a statement of the case unless you disagree with the statement of the appellant. The appellant may file a reply brief in accordance with Rules 16(a)(1) and 16(c). (However, you should think carefully about whether you need to respond. If the appellee has seriously misstated the law or some material fact, you should respond. The brief should not be used as an opportunity to reargue your case.)

In writing the brief, it is better to refer to the parties through a descriptive term (e.g., plaintiff/defendant, husband/wife, mother/father). Mass. R. App. P. 16(d).

It is important to keep in mind that the only purpose of a brief is to put forth the client's position based on the record. A brief is not the place to allege new facts. *See Brash v. Brash*, 407 Mass. 101, 104 n.4 (1990); Mass. R. App. P. 16(e).

Further details on the form of the brief are set forth in Mass. R. App. P. 20. You are strongly encouraged to read the rules governing the form and content of briefs and appendices. If your brief does not comply with the rules, it could be struck from the files. Mass. R. App. P. 16(k).



## PRESERVING CONFIDENTIALITY

Many family law matters contain impounded information or other information that is deemed to be confidential by the court or statute. If a brief or other document contains impounded or confidential information, notice must be given to the clerk and other parties at the time of filing. The cover of the document should indicate that confidential or impounded information is contained within the document. Rules 16 and 18 of the Massachusetts Rules of Appellate Procedure describe in detail the types of notices that must accompany documents that are completely or partially impounded. To protect the parties and preserve confidentiality, it is critical that you review these rules prior to submitting documents that contain confidential or impounded material.

## ORAL ARGUMENT

The clerk of the appellate court will notify the parties of the time and place at which oral argument will be heard. Fifteen minutes will be permitted for the argument of each party. The appellant argues first and should include a brief statement of the case. No rebuttal time is allowed. Mass. R. App. P. 22. The parties may agree to allow the court to decide the case based on the briefs. However, the court may want to hear from the parties. You may waive your right to oral argument at any time by written notice. Mass. R. App. P. 22.

After oral argument, a party may make a request to file a further brief. Mass. R. App. P. 27.

## DECISION

The appellate court can review all questions of law, fact, and discretion. *Krokyn v. Krokyn*, 378 Mass. 206 (1979). The court could decide to issue a “summary disposition” without allowing oral argument. The court could affirm, modify, or reverse the judgment. These cases tend to be cases where it is clear that there is no substantial question of law presented or that the proper disposition is otherwise clear. The court usually does not issue an opinion in these instances.

An opinion states the court’s reasons for its decision. The court is not limited by findings in the lower court. It can include its own findings. Sometimes one judge writes for all of the judges; at other times, the judges write for themselves individually or as a group. All of the judges do not have to agree on an outcome; the majority rules. The judges who do not agree with the majority may write their own dissenting opinion.

The court does not have to write an opinion. It could issue its decision in a rescript. A rescript is simply what the court decided and what it states should happen next. For example, “reversed and remanded for entry of a decree in accordance” means that the lower court is directed to change its opinion to conform with the appellate court’s decision.

## COSTS OF APPEAL

Sometimes the losing party is ordered to pay the winning party’s costs in bringing or defending the appeal, as well as attorney fees. Mass. R. App. P. 26.

## DAMAGES

If an appellate court determines that an appeal is frivolous, it could assess damages. The damages could be double the actual costs of the appeal and include interest. Mass. R. App. P. 25.

## FURTHER APPELLATE REVIEW

Any party to an appeal in the Appeals Court may file an application for further appellate review of the case by the full Supreme Judicial Court within twenty days after the date of rescript by the Appeals Court. Reasons for such an application must be substantial, affecting public interest or the interest of justice. An application must contain the following:

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- a request for further appellate review;
- a statement of prior proceedings in the case;
- a short statement of facts relevant to the appeal;
- a statement of points with respect to which further appellate review is sought;
- a statement (not more than ten typed pages), including authorities, that explains why further appellate review is appropriate; and
- a copy of the rescript and opinion, if any, of the Appeals Court.

Mass. R. App. P. 27.1(b).

Within ten days of filing the application any other party to the appeal may file an opposition. Mass. R. App. P. 27.1(c). Rules 13 and 27.1(d) detail who must be served and the number of copies to be filed with the court.

Within ten days of the granting of further appellate review, a party may apply for permission to file a separate or supplemental brief. If the request is granted, the brief should be filed in compliance with Mass. R. App. P. 27.1(f).

### **PETITION FOR REHEARING**

A party may file a petition within fourteen days for a rehearing specifying points that the Appeals Court may have overlooked. Mass. R. App. P. 27(a). The petition is basically a letter to the senior judge of the panel or the chief justice of the Appeals Court. The letter should not be more than ten typewritten pages. Oral argument on the petition is discretionary with the panel that decided the appeal. There is no need to file an answer to a petition for rehearing unless the appellate court requests one. The petition is decided by the same panel that decided the appeal. If the petition for rehearing is granted, the court may make a final disposition without reargument or may ask for further argument. Mass. R. App. P. 27(a).

*MCLE and the author are grateful to Jacquelynne J. Bowman, Esq., for her contributions to a previous version of this chapter.*

**EXHIBIT 18A—Sample Notice of Appeal**COMMONWEALTH OF MASSACHUSETTS  
TRIAL COURT DEPARTMENT  
PROBATE AND FAMILY COURT

Suffolk Division

Docket No. 00D0000

JESSICA JAMES,  
Plaintiff

v.

## NOTICE OF APPEAL

JORDAN JAMES,  
Defendant

The Plaintiff, Jessica James, hereby appeals from the Judgment entered by the Suffolk County Probate and Family Court (Felix Farmer, Justice) on February 5, 2018.

Respectfully Submitted,

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 Jessica James, pro se  
 123 Any Street  
 Anytown, MA 00000  
 617-111-1111  
 Jjames@gmail.com

Date: February 5, 2018

## CERTIFICATE OF SERVICE

I, Jessica James, certify that I served this Notice of Appeal on the Defendant, Jordan James by mailing a copy of it to him by first class mail, postage prepaid to him at 123 Elm Street, Othertown, MA 00000 on this 5th day of February, 2018.

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 (signature)

