CHAPTER 9

CHILD CUSTODY

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INTRODUCTION

If you and your partner have separated and you have a child or children, you will have to resolve issues of where the child lives, who makes decisions about medical, educational, and religious care, and when the child spends time with each parent. Taken together, this is called a parenting plan. This chapter will discuss what these different issues are

called, and will provide some explanation of how these decisions can be made. The language used by the courts is in transition as the Massachusetts legislature reviews proposed changes to the law. This chapter will use both the terms used by the law as it exists at the time of this writing and the newer language. The guiding principle in Massachusetts for creating a parenting plan is the "best interest" of the child, also described in the law as "happiness and welfare."

The big questions:

- **Physical custody.** With whom will your children live? (This may also be called **residential responsibility**.)
- **Legal custody.** Who will make important decisions about their lives? (This may also be called **decision-making responsibility**.)
- **Parenting time.** How will you best arrange for the children to see the parent they are not living with? (The law still calls this **visitation**, but the Probate and Family Court forms have begun to use the term "parenting time," which is the term that will be used in this chapter.)

A parenting plan can be arranged in many ways. When a child lives mostly with one parent, it is referred to as "sole" or "primary" physical custody. When a child lives approximately half of the time with one parent and half 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, especially decisions about the child's education, medical treatment, and religious upbringing. "Sole" legal custody means one parent has the right to make the major decisions in the child's life. "Joint" or "shared" legal custody means the parents make major decisions together, with both parents needing to agree to big changes in these areas of the child's life.

The Most Common Types of Custody Arrangements

Legal and physical custody do not have to *both* be either shared or sole, but can be split up in a way that is best for your family. Some examples are as follows:

Sole physical custody to one parent and shared legal custody. This means that the child will live mostly with one parent who will be responsible for making day-to-day decisions for the child, and will also spend some time with the other parent. Since legal custody is shared, the 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 mostly with one parent who is solely responsible for making the important decisions for the child. This does not mean that the other parent cannot spend time with the child—the other parent may have parenting time in this arrangement as well—but it means that the "custodial parent" has the authority to make important decisions independently of the other parent. Sole physical and legal custody to one parent may be appropriate where the other parent

- has been violent toward the other and communication may not be possible or safe;
- has not been involved in the child's life enough to know what decisions are in the child's best interests;
- has a serious alcohol or drug problem;
- has a serious mental health problem that impacts decision making;
- 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 (usually at least a third of the time with each parent), and that both parents make decisions on important issues together. This works best when there is good communication between the parents, when they live near each other, and when they each have a living space the child can feel comfortable in for multiple nights in a row.

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

- what the caretaking arrangements have been, and whether those arrangements have been good for the child;

- whether each parent, individually, has the ability and desire to increase or decrease their role in day-to-day caretaking;
- the relationships the child has with other household members in each parent's home;
- the ability of the parents to communicate with each other;
- each parent's relationship to the child;
- any special needs of the child, which may affect the caretaking ability of each parent and the impact on the child of transitioning between homes;
- where each parent lives and whether the housing conditions are appropriate;
- whether any of the safety concerns listed above are present.

Practice Note

Before any court action has been filed, married parents automatically 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 starting a court case. A child born during a marriage between a same-sex couple is deemed to be a child of the marriage and both spouses are the lawful parents even though only one parent may have a have a biological connection to the child.

How Does Custody Relate to Parenting Time?

Parenting time, formerly called 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 parenting time. Sole custody to one parent, whether physical or legal, does not prevent the other parent from having parenting time.

What Are the Options for Parenting Time?

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

- **Parenting schedule.** In most cases, parents will want to set up a clear parenting 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 schedule, parents should base it on the needs of the child as well as the schedules of both parents.

Practice Note

The most typical parenting schedule in cases where the parent who does not have physical custody/ residential responsibility is used to spending significant time with the child 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 periods of time with the other parent, while older children may need extra flexibility to accommodate extracurricular activities or time with friends.

- **Reasonable parenting time upon reasonable notice.** If communication between the parents is excellent, another option is to leave the parenting schedule flexible rather than setting up a schedule in advance. Parents can then arrange with each other when visits can take place. This form of parenting time is not recommended when there has been a history of conflict between the parties or violence against a parent. Reasonable parenting time upon reasonable notice can also be appropriate where the other parent lives far away and is not particularly involved with the child. The other parent then can contact the custodial parent when he or she is coming to Massachusetts and arrange for an appropriate opportunity. If the parents have a history of conflict, this may work best if communication happens through a family member who is trusted by both parties and the child.
- **Supervised parenting time.** In some situations, a child may not have seen the other parent in a long time, or it may not be safe for a child to be left alone with a parent during visitation because of concerns about that parent's conduct. If this is the case, one option is to arrange for supervised parenting time. Supervised parenting time means that a third party is present during the noncustodial parent's time to make sure that the child is safe and that the 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, an independent professional visitation supervisor or other professional, a trusted friend or family member, or a therapist. In rare circumstances, the custodial parent may be an appropriate supervisor.

Supervised parenting time may be appropriate in situations such as the following:

- when the child does not really know the parent;
- when the child has special needs that the parent has not yet learned to accommodate;
- 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, particularly if the child witnessed violent incidents;
- when the visiting parent has an alcohol or drug-abuse problem, particularly if he or she cannot be trusted to abstain from using during unsupervised parenting time;
- when the visiting parent has a violent criminal record or a record of sexual assault;
- when the visiting parent has mental health problems that affect parenting ability; or
- when the Department of Children and Families has safety concerns related to the parent's ability to properly care for the child.

Supervision may be able to transition into supported or unsupervised parenting time as the parent and child's relationship develops and the parent's parenting skills improve.

Practice Note

When arranging supervised parenting time, the supervisor should either be a supervised visitation center or someone selected by both parents and with whom the child feels comfortable. If parenting time is not supervised but a safety risk or high degree of tension exists at the exchange of the child, the exchange can be supervised or effected by a third party. Sometimes the transition of the child can happen in a neutral location such as the child's school or day care, or even at a restaurant or police station.

Practice Note

The first parenting plan that is set up during a court case is not often the last. You are likely to have at least one temporary order along the way. It can be more difficult to persuade a judge to alter orders entered into because of an agreement between the parties than an order written by the judge. Many courts have the parents meet with a probation officer (sometimes called a family service officer) whose role is to see if the parents can reach an agreement. Though you might feel some pressure, you do not want to agree to a parenting plan with which you are uncomfortable. If you have an abuse protection order and are in Probate and Family Court for your custody case, you are not required to meet with the person against whom you have an order. The probation officer may meet with each party separately or with the lawyers instead of the parties, or might choose to send the case back to the courtroom without dispute intervention happening.

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 spouse are parents of a child and 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. If the father is on the birth certificate, he is the legal father without court action. Without a court order, however, the father does not have a right to see the child, make decisions about the child's wellbeing, or take the child without the mother's consent. If the father is on the birth certificate, the father can use a complaint for support, custody, and parenting time under Chapter 209C to seek these rights. If the father is not on the birth certificate, however, he will need to be legally declared by a judge to be the father or other parent of the child through a complaint to establish paternity. Once paternity is established,

the court can go on to address custody, support, and parenting time without a separate complaint being filed. See chapter 7, Paternity Issues. In the case of an unmarried same-sex couple, a person without a biological connection to the child may be able to establish parentage under Chapter 209C. Factors such as the full acknowledgment, participation, and consent of both parties to use of in vitro fertilization of one party, representing themselves publicly as the child's parent, and jointly raising the child may allow a court to find the person without a biological connection to be a parent. *Partakan v. Gallagher*, 475 Mass. 632 (2017).

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 you denying the child's father parenting time unless you have a real concern about the child's safety, the father has not been involved with the child at all, or you have 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. A parenting plan 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 breastfeeding), and other considerations.

HOW DO I GET COURT-ORDERED CUSTODY OR PARENTING TIME?

In order to obtain any court order, you need to start a legal action in 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 a "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 that addresses custody, 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 types of complaints listed. If you have more than one child with the same other parent but you are not married to that parent, you will need to file a separate complaint for each child.

- 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.
- Complaint to establish paternity, G.L. c. 209C. See chapter 7, Paternity Issues.
- Complaint for support, custody, and parenting time, G.L. c. 209C. See chapter 7, Paternity Issues.
- Abuse prevention order, G.L. c. 209A, §§ 7–9. See chapter 3, Safety and Protection Issues. As noted in chapter 3 and below, a complaint for abuse prevention can also be brought in District Court.

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 the other parent learns of your address, you can file a motion to impound address. See a sample motion in chapter 3, Safety and Protection Issues, included as **Exhibit 3C**. The exception is that in a complaint for abuse protection, a person may check sections on the complaint form asking that home, school, and work addresses not appear on any order.

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. A sample complaint for modification is included as **Exhibit 16A**.

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 and to ask that the fee for serving the complaint (described below) be paid by the Commonwealth. 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 or custody proceedings. A sample affidavit is included as **Exhibit 5H**. 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 each child has lived for the past two years;
- information about any legal action that has been filed in any court concerning each child (including any case involving guardianship and any case brought by the Department of Children and Families, such as a care and protection case); and
- the names of all people who claim a right to custody of each child.

The purpose of this form is to ensure 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 proceedings.

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 disclosing care or custody proceedings "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 you have decided to legally end your marriage, either of you can file a complaint for divorce, or, if both of you want a divorce and you have agreed on all issues, you can file a join petition for divorce on the grounds of irretrievable breakdown of the marriage. 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 about who stays in the home you lived in together, alimony, and division of the debts and assets of the marriage. 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. The complaint for custody between married people is seldom used, and the court has stopped making forms for it. You can create one on your own, though, on a form you can get from the court. You might want the assistance of a Lawyer for the Day or Court Services Center to do this.

A parent who is not married to his or her child's other parent, but who wishes to resolve custody and parenting time issues, can bring a paternity action in the Probate and Family Court. In a paternity action, you can obtain custody and parenting time 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. If the children are at risk of harm from the other parent, the judge can also order that the other parent not have any contact

with the children and stay away from them and their schools. It is important to keep two things in mind about custody and parenting time with domestic abuse prevention orders. First, the person against whom the order is issued does not have a right to seek custody of or parenting time with children as a part of the order. Second, a Probate and Family Court judge can make any order related to custody or parenting time, even one that contradicts a 209A order issued by a District Court judge, and amend the 209A order to be consistent with the Probate and Family Court order. For more information about restraining orders, see chapter 3, Safety and Protection Issues.

Practice Note

Be aware that while the District Court does not have the authority to order parenting time, some District Court judges order contact between the defendant and the children, or instruct the parties to negotiate a parenting schedule. You should not agree to a schedule with which you are not comfortable. If the opposing party obtains a parenting time 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 order will create a specific time and manner in which contact is permitted as an exception to the no-contact rule.

Giving Notice to the Other Parent that You Have Started a Case

Once you file the complaint, you need to ensure 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, and the summons issued by the court, to the other parent is called service of process. The law requires that you complete service of process in certain ways to ensure 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. After service of process is complete, most other documents in the court case may be served by mail or by you or someone you know leaving the documents at the other party's home or workplace. You will then need to file the return of service with the court, so that you can show you provided proper notice to the other side. If you have not properly issued service of process on the other party, the judge will not hear your requests.

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.

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 county has a Probate and Family Court Department. In some counties there is only one courthouse in which family cases are heard, but in other counties they may be heard in a number of different courthouses. 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 a married couple, 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 children 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 supposed 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 a "counterclaim" stating their own requests regarding custody, parenting, or other issues in the case. A counterclaim can be a person's own complaint for divorce, complain for separate support, or complaint for support, custody, or parenting time. Sample answers are provided for each type of complaint in the chapters related to that type of proceeding. If no answer is filed, the court assumes that the other party does not object to what

you have requested, and will usually schedule your case for an uncontested trial. The other party can still come to court at any point before a trial happens and participate in the proceedings (turning it from "uncontested" to "contested). In most types of cases, the failure to file an answer leads to a "default judgment," in which the party who filed wins because the other side did not respond. In divorce and paternity cases in Massachusetts, however, there are no default judgments.

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 if you filed one. Even if the twenty days has passed it is a good idea to file an answer as soon as you can.

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 one parent or the other should have custody of the child or children of a marriage. 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 each parent can offer and the specific needs of the child. 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; the amount of quality time each parent can spend with the child; and the capacity of each parent to arrange for appropriate child care when needed.

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.

Legislative Note

As of this writing, the Massachusetts legislature is considering two different bills that would each specify factors for judges to consider when deciding custody cases. When getting ready to file, you will want to research the law or ask a lawyer (or consult with the Lawyer for the Day or Court Services Center) to find out whether these factors have been enacted.

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, put the child to bed, got the child ready for school in the mornings, and made arrangements for schooling and other activities. In some situations it is clear which parent is the primary caretaker; in other situations it is less clear; and in some cases it may be that parents shared equally in these tasks and activities.

Practice Note

It is important to recognize that the primary caretaker 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 caretaking, 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 Children and Families, or
- a history of child or partner abuse.

If There Has Been Domestic Violence Between the Parents

Parts of the law, G.L. c. 208, § 31A, G.L. c. 209, § 38, G.L. c. 209A, § 3, and G.L. c. 209C, § 10, create 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 must consider past or present abuse toward a parent or child as an indication that placing the child in the abusive parent's custody, either shared or sole, 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 there are claims during hearings on temporary orders of custody or parenting time that there is a pattern of abuse or a serious incidence of abuse, the judge has to take evidence on this claim and may schedule a separate hearing. 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 allegedly 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 an order granting shared or sole custody to the abusive parent, 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 wellbeing of the child. If the court makes a visitation order, it must provide for the safety and wellbeing 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 these 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 incident 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

Probate and Family Court judges do not usually apply the custodial presumption unless it is raised by one of the parties. If there has been a history of domestic violence that you believe may trigger the presumption, you need to tell the probation officer and/or the judge that there has been a pattern or serious incident of abuse and that the custodial presumption may apply. In these circumstances, you may wish to speak to an attorney who is experienced in handling custody matters involving domestic violence about your rights and the evidence you will need to prove your case. Many organizations throughout Massachusetts hold training sessions addressing domestic violence and custody issues. You may wish to review materials from these training sessions. See chapter 20, Resources, for a list of organizations that might be helpful.

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 parenting 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 orders you want and why you think you need them and why they are in the best interests of the child. A sample motion for temporary orders is included as **Exhibit 2G**.

When you file a motion with the court, 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. 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 showing the court what you told the other parent about the date, time, and location of the hearing. This document filed with the court is called a certificate of service.

It is also possible that the other parent might file a motion for temporary orders. That parent would have to take the same steps to file motions and to give you notice the required number of days before the hearing. If you get a motion with fewer days' notice than required, do not ignore the motion or just not show up. The court may think you are in agreement or do not want to challenge the request. You should immediately call or go to the court and ask to talk to the judge's judicial case manager and explain to that person that you did not get adequate notice and want the hearing rescheduled to a later date.

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. Because the Probate and Family Courts in Massachusetts are extremely busy, most of the time your hearing will be scheduled at least two weeks, and possibly six to eight weeks, away from the date you file. Make sure you ask how to schedule the hearing if you are not told the hearing date by the clerk to whom you give your motion. If you need the hearing to be earlier because of an emergency situation, ask the clerk what the process is in that court for speeding up a hearing date.

In most courts, 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. Some courts will not allow you to file a motion for temporary orders until you have filed proof that you have served the underlying complaint.

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 check in at the courtroom, but might then be sent to meet with a probation officer, sometimes called a family services officer. The probation officers are trained in "dispute intervention" and will try to help you and the other parent reach an agreement. If you reach an agreement, you might not need to go before a judge. You and the other parent will sign a "stipulation" describing the orders you agree should be entered. The probation officer cannot require you to make an agreement and the probation officer cannot make any orders. The role of the probation officer is to assist you in trying to reach an agreement and, if no agreement is reached, to report to the judge a summary of what happened in the dispute intervention session. You may always go before a judge.

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 questions about it, make sure that each party signed it voluntarily, and schedule the next date in the case. Follow the instructions of the probation or family services officer as to where you should go after signing the stipulation. Remember that a stipulation is not enforceable until it has been approved by the court. You should get a copy of any agreement from the probation officer who worked with you, and you will also receive an order from the judge in the mail that "incorporates" the stipulation (i.e., makes the stipulation part of a court order) and/or orders the parties to comply with the stipulation. You will want to keep the two documents together.

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 have an abuse protection order and are in Probate and Family Court for your custody case, you are not required to meet with the person against whom you have an order. The probation officer may meet with each party separately, with the lawyers instead of the parties, or might choose to send the case back to the courtroom without dispute intervention happening.

If you are involved in a matter against someone who has been abusive to you, and you do not feel comfortable meeting with that person, tell the probation officer. Even if you do not have a restraining order, if you 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 and 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 position and your reasons for that position. You will need to tell the judge why you are taking a particular position and your reasons for not agreeing to what the other person is proposing. 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. Insist that this report be made available to you to read before the judge reads it, or that it be read aloud 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, ask the probation officer what you can expect if there is no agreement. If a 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.

If you came to an agreement in court, you will receive a copy of your stipulation, either in the mail or that day, along with a copy of the judge's order making your stipulation an order of the court. It is important to hold on to 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 for enforcement of the 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 judge might tell you the decision in the courtroom, or might "take it under advisement," which means the judge will think about what everyone has said, read any documents that were submitted or are already in the file, and make a decision later. The decision will hopefully be made that day or within a week, and then sent to you.

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. In other cases there will be several temporary orders while the 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 the needs and circumstances of the parties or the children have changed since the original temporary orders were issued.

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, not exaggerated, and said calmly. Presenting your facts this way helps to ensure that what you say will be believable to the judge or probation officer.

If you and the other parent are unable to agree on a parenting plan—including custody and parenting schedule—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 the judge's decision will be based only on the information presented in the courtroom.

If you think you and the other parent may be able to come to an agreement on custody and parenting time, 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 order would. This is especially true when the parties have complex or unusual work schedules or the child has very particular needs.

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

Putting Together Your Argument

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.

If there is a current or past 209A abuse prevention order between you and the other parent, a 209A order against the other parent by another person, or if the Department of Children and Families has been involved with your family,

you need to tell the clerk in the courtroom or the probation officer, whomever you speak with first, so they can get the records. In addition, you need to bring whatever documentation you can to support your argument.

Documents

Proof that you are the primary caretaker parent might include

- records or a letter from your child's school, teacher, or day-care provider;
- records or a letter from your child's pediatrician; or
- a letter from your child's counselor or therapist that talks only about the role each party plays in bringing the child to therapy and any observations made by the counselor or therapist—it *should not disclose* any communications between the child and the 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 (the Probation Department *might*, but does not always, get a copy of each party's criminal record and provide it to the judge);
- documentation or information regarding Department of Children and Families 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.

Practice Note

If any of the criminal records or child welfare records are from another state, it may take several days for the Probation Department to get them. You may want to go to the court several days before any hearing, ask to speak to a probation officer, and explain that there are important records from other states and can they obtain those records.

Proof that the other parent has been violent toward you might include

- current or past temporary 209A abuse prevention orders against the alleged abuser held by you or anyone else (note that an abuse prevention or anti-harassment 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 breastfeed your baby or prepare and feed your baby bottles;
  - you prepare meals for your child;

- you pack lunch for school;
- 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 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 after-school activities, including interactions with other children; 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.

If you have a history of difficulties that might impact your ability to parent, you will want to present documentation of the steps you have taken to address those issues and keep them from impacting your parenting. Examples might include

- documentation regarding a substance abuse treatment program, including negative drug tests;
- a letter from your therapist or doctor;
- documentation of any actions you have taken in compliance with a Department of Children and Families service plan;
- evidence of attendance at group meetings such as Alcoholics Anonymous or other applicable program;
- proof of enrollment in or completion of a parenting support program; and
- a letter from someone who has witnessed improvement in your ability to provide caretaking.

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. Also, do not interrupt the judge, the lawyers, or the other parent.

Witnesses

Temporary orders hearings are usually short, with judges having only five to fifteen minutes to devote to each case scheduled for that day. In addition, you are likely going to be sent to engage in the dispute intervention process, where no witnesses are permitted. For these reasons, consider getting an affidavit (i.e., a sworn statement from a witness) rather than bringing the witnesses into court. This is different from a trial, where you must bring the witness into court. 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;
- for a temporary orders hearing, consider getting an affidavit 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 that *does not* disclose communications between the child and the therapist, but presents the therapist's understanding of who is the primary caretaker of the child, of any special needs of the child, and of the impact upon the child of either parent's behavior is very helpful; if the therapist is not comfortable submitting an affidavit, ask if the therapist could be available by telephone on the day of the hearing to speak to a probation officer or other investigator to provide this 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 testifying in court.

GETTING EXPERTS AND OTHER PROFESSIONALS INVOLVED

Often custody and parenting time disputes are too complicated to be resolved in a quick temporary orders hearing. A judge who hears allegations of serious problems or hears about a complicated situation may conclude that the information needed to make a decision as to the best custody or parenting plan is not yet available. 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 make a custody decision.

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.

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 some counties; Middlesex and Norfolk as of this writing).

There are several advantages of having the judge appoint a neutral third party expert to investigate and/or evaluate custody and parenting time in your case. One is that it brings important information before the court that the judge 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 costly, contentious, and, from the judge's perspective, can still leave questions about what is truly in the child's best interest.

If a judge has appointed a neutral expert 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.

Be aware also that the neutral expert will likely want to speak to the child and may want to observe you with the child and the other parent with the child. The neutral expert will likely ask you for a list of "collaterals" to speak with—collaterals are people who will have personal knowledge of the issues of your case. The neutral expert will probably speak with two or three of these collaterals from each party, and may also speak to others without your prior knowledge.

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 to be looked into. 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.

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, consider retaining one. The stakes are 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.

ATTORNEYS REPRESENTING CHILDREN

In 2013, Massachusetts started the Attorneys Representing Children (ARC) program. Attorneys volunteer to be appointed by judges in custody or parenting disputes to represent a child in the case. It is important to remember that ARC attorneys are *not* neutrals; they are appointed for the purpose of identifying and expressing the child's point of view. This is a role that differs significantly from a GAL or other neutral expert, because instead of being appointed to investigate what is in the child's best interest, the ARC attorney is tasked with learning the child's preferences and the reasons behind them, and then presenting those preferences to the court. When a child is preverbal or otherwise is unable to express a position to the ARC attorney, the ARC attorney might use "substituted judgment" and try to assess what is in the best interest of the child. In addition, an expert is usually required to write a report, and can be called to testify at trial. An ARC attorney, on the other hand, is an advocate who cannot be called to testify but *can* question witnesses at trial.

HOW CAN I CHANGE A PARENTING PLAN?

As noted previously, temporary orders may be changed as the circumstances of the parties change (e.g., work schedules change, an addicted parent successfully maintains sobriety, a parent-child bond is rebuilt through supported or supervised parenting time, there are incidents of violence against you, the children, or any other person) and as information is brought to the court (e.g., a GAL report identifies a significant safety concern in one of the parents' homes). If you want to make changes to a parenting plan that was established through temporary orders, you can file a motion for further temporary orders. A temporary custody order may be changed if the change is in the child's best interest. The temporary order may also be changed after a trial—the final hearing before the judge—in accordance with the best interest of the child.

A parenting plan issued as a final judgment in a paternity, divorce, or separate support matter can only be changed by filing a complaint for modification. See **Exhibit 16A**. You must show the court that there has been a significant change in the circumstances that make the earlier judgment no longer in the child's best interest. G.L. c. 208, § 28; *see O'Brien v. O'Brien*, 347 Mass. 765 (1964); G.L. c. 208, § 31. The change must have occurred after the court made its order, *Breton v. Breton*, 332 Mass. 317 (1955); modification is not available just because you do not like the judgment.

Because judges believe that stability is usually in a child's best interest, and because a judgment enters only upon a final agreement reached by the parties or after a trial, they will be cautious about changing custody or making significant changes to a parenting schedule. The fact that there has been a change in the custodial parent's residence,

job, health, or income, or the fact that a party is involved in a new relationship is not, by itself, considered sufficient justification to change custody. The modification must be significant, material (i.e., relevant to the child's care), and 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. The 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). Because of the court's resistance to changing parenting plans, temporary orders are rare in modification cases. In order to modify the parenting plan, the judge must make findings of fact that "injury, harm or damage . . . might reasonably be expected to occur" if orders are not entered pending a judgment. G.L. c. 208, § 28A.

Some of the reasons complaints for modification are brought requesting changes in the parenting plan include the following: one parent is planning to move a significant distance; the parenting schedule needs to be changed to accommodate the child's schedule; the parties' ability to communicate has either improved or deteriorated drastically; there are incidents of violence against you, the children, or any other person; or one of the parents is not taking sufficient care of the child's needs when with the child.

Practice Note

If a custody order was made pursuant to a 209A request for a protective order, it may be changed by orders in 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 from the 209A order. 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). Several statutes were amended by 1998 Mass. Acts c. 179 to require 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 a Complaint for Modification

Either parent may file a complaint to modify the previous custody judgment. 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.

Why Is There Parenting Time?

It is believed to be important for a child's general wellbeing 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 "parenting time" can range from a broad flexible agreement between the parents to a fixed schedule that can be enforced by the courts. In certain circumstances, one party's parenting time might be restricted and supervised by a third party. Legally, setting up a parenting schedule 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. *Petruzziello 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 parenting time for both parties is encouraged even though the parents are unable to cooperate. When parenting time would be unsafe, physically or emotionally, however, 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).

Can Parents Make Their Own Parenting Schedule?

If parents can work together to develop a parenting plan that serves their needs as well as the needs of their child, they should do so. As discussed earlier in this chapter, courts often send parents at court for a contested motion to a probation officer 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 succeed if either party feels incompetent, afraid, or disadvantaged as a result of violence between the parties, perceived lack of skill or experience, or power imbalance. 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 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 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. 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. Especially as you get closer to a final agreement (to be made into a judgment of the court), consider the following:

- the frequency of parenting time (e.g., every other week, twice a week, etc.);
- the duration of parenting time (e.g., 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 (e.g., 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 summer vacation will be divided;
- whether any special rules or guidelines should be used (e.g., length of notice needed for scheduling or canceling parenting time);
- whether parents should exchange an itinerary for out-of-town vacations or trips;
- whether parents should provide emergency contact numbers;
- transportation arrangements and costs;
- who will pick up and/or drop off the child for parenting time; and
- whether third parties can (or must) pick up or drop off the child for parenting time.

You may wish to consider using a mediator to help you develop a plan that works for everyone. Refer to chapter 19, Dispute Resolution Options. Some community mediation resources are also listed in chapter 20, Resources.

Should the Custodial Parent Wait to Go to Court or Allow the Other Parent to See the Child 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 Have Parenting Time?

If a parenting schedule has been ordered, it is the obligation of the custodial parent to make the child available for the other parent's time and encourage the child to visit. Failure to do so could result in being found in contempt of the court order. Reasonable scheduling accommodations, needed by either party, should be requested in advance. Avoid scheduling appointments and extracurricular activities for the child during the other parent's time without the agreement of the other parent.

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 see him or her. The court will only limit parenting time if it can be shown that the parent's illness will have a bad effect on the child's wellbeing. The court may limit parenting time by ordering that neither parent be under the influence of substances or alcohol when with the child, or by allowing parenting time 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 a New Boyfriend or Girlfriend at Parenting Time?

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 always a problem. If it can be shown that new people in the parent's household have a detrimental effect on the child, that a parent's new significant other is improperly disciplining the child, or that a 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 parenting time. 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, 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 contact 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 See 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, and the parent with primary physical custody is expected to ensure the child's availability for the other parent's parenting time. The law favors parenting time over playdates, 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 developing a parenting plan so as to minimize the times that a child is forced to miss events. When the child is asking to attend an event or participate in an activity during the other parent's time, the parent with primary physical custody should be notifying the other parent, having a discussion about whether the other parent can accommodate by taking the child to the event, and/or offering make-up parenting time. 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 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. There also may be some underlying cause that may place even an older child at risk (such as physical or emotional abuse) or the other parent may be saying negative things about the custodial parent. In such a case, a motion to change a temporary order or a complaint for modification might be necessary and the court might appoint a neutral third party to investigate.

If a young child refuses to go on visits with the other parent, you may wish to seek therapeutic intervention in order to determine whether there is some underlying factor 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 developing a parenting plan. 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 breastfeeding 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?

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 contact with the noncustodial parent or makes exercising parenting time difficult, it could count against him or her later in court. However, if the child has never known the noncustodial parent—such as a situation where the parents were never married or have never lived and parented together—the custodial parent may ask for a slow, and possibly supervised, start to the relationship. Courts are reluctant to restrict or terminate one party's parenting time 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 if Given Parenting Time?

If you believe that your child is at risk with the noncustodial parent, you should go to court to seek permission to end or suspend that parent's time. You must show that continuing contact with the noncustodial parent is not in the child's best interest. *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, you may wish to seek an order for supervised exchange. If there is no court order, use your judgment about allowing contact, 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. You might be able to make arrangements for another friend or family member, someone the child knows and you trust, to participate in the exchange or remain present during the other parent's time with the child.

Some Other Issues that Might Arise Regarding Parenting Time

Many other problems can arise concerning the parenting plan. For example, the noncustodial parent could be inconsistent in showing up, try to use the parenting schedule to make the custodial parent appear uncooperative, try to use contact with the child to harass or control the custodial parent, or the custodial parent could fear physical harm from the noncustodial parent.

Before deciding on a strategy for managing these problems, 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 in a notebook or calendar. Include information about the date, time, place, and manner of contacts regarding missed parenting time and calls, worrisome behavior during exchanges, or other issues. 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. This will help you in answering questions about the relevant period of time in court.

What Are the Legal Obligations of Parents After a Court Order Sets Out a Parenting Plan?

The parents must follow court orders. 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 9A**. If the custodial parent is found by the court to have willfully disobeyed the court order, the custodial parent can be held in contempt. A finding of contempt could lead to significant makeup time, a change to the parenting plan, and possibly even a change of custody; the parent violating the court order can even be ordered to pay the other parent's attorney fees. If the noncustodial parent does not follow the court order (e.g., if he or she fails to show up for parenting time 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 order, or might be able to ask for reimbursement if the missed parenting time led to missed work or an extra child-care expense.

WHAT IF MY CHILD DOES NOT (OR DID NOT) LIVE IN MASSACHUSETTS?

The Massachusetts Child Custody Jurisdiction Act (MCCJA), G.L. c. 209B, tells the Massachusetts Probate and Family Court when it has the authority to make decisions about child custody if the child has been or is currently living in another state. Every state's law about this is different. 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. These laws decide which state's court has the legal power (called jurisdiction) to hear and decide a particular 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.

Interstate jurisdiction cases involving moves from one state to another can be 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. If at all possible, do this before you leave one state and move 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. Even if you are leaving to escape domestic violence and your situation is an emergency, you can still be forced to return to your original state in order to litigate custody.

Practice Note

The right to move a child *out of Massachusetts* is also a question for the Probate and Family Court if the parties do not agree in writing. This is discussed in chapter 12, Leaving Massachusetts. 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).

The MCCJA becomes relevant if there is a custody case and the child has lived in more than one state. It can apply in all of the types of cases discussed in this chapter, including divorce, paternity, separate support, custody, modifications of any of these types of cases, and abuse prevention 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 custody of the child (i.e., whether the judge can make orders related to the custody of the child) 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 in Massachusetts. 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.

Practice Note

If a court action involving custody is already happening in another state, you will probably not be able to persuade a Massachusetts judge to take jurisdiction over the case even if the child has lived in Massachusetts for much longer than six months.

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 seek custody orders 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 child custody:

- 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 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 has been abandoned or an order is required to prevent abuse or neglect of the child.
- Your child is here in Massachusetts and there is an emergency that makes it necessary for a Massachusetts court to assume jurisdiction.

If Massachusetts issues custody orders based on the third or fourth category, and the situation does not also fit into category one or two, Massachusetts will likely take jurisdiction on a temporary basis only. The court in the other state will be the one to make the final decisions regarding care and custody of your child, with Massachusetts making orders until a full hearing can occur in the other state.

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:

- assuming jurisdiction would be in violation of the law;
- assuming jurisdiction would be based on the illegal or wrongful conduct of either party; or
- 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 may 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 exercised jurisdiction, the courts in Massachusetts cannot act unless there is an emergency or risk of neglect/abuse *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 Massachusetts 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.

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

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 from your care without your permission. However, you still have options. You may go to Probate and Family Court and file whichever complaint is applicable to your situation (see “How Do I Get Court-Ordered Custody or Parenting Time?,” above). If you believe your child may be in immediate harm as a result of the other parent having the child, 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 agrees that your situation may be an emergency, the judge should hear your motion even without hearing from the other side and then schedule another hearing after notice can be given. If the court grants you custody (or sometimes “extended parenting time”), 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.

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 court, you can request that the judge restrict the other party from traveling with the child. You will probably be filing a motion for temporary orders or motion for further temporary orders. As with any motion, you will need to explain to the judge why such restrictions are necessary. Some of the protective measures available to you include

- requiring that the child’s passport be held at the courthouse by the Probation Department unless released by a court order;

- prohibiting the other parent from taking the child out of the country while the case is pending; and
- prohibiting the other party from applying for a passport for the child without your written consent.

If you agree with international travel, but have good cause to fear that the other parent will not return with the child at the end of the scheduled vacation, the judge might be willing to require the other party to post a bond—money that would be forfeited if the party fails to return and you need to spend money on travel or a lawyer in order to get the child back.

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 or 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 State 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 without a court order, he or she may have committed the crime of parental kidnapping. This crime is sometimes also called 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. 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.

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 or court authorization (such as scheduled parenting time) if you have physical custody.

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, 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). It might help to contact the noncustodial parent's family and friends to see whether they have information regarding your child's whereabouts. You may also consider hiring a private detective to help you find your child.

If you do know where your child is, 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 unless and until a court order states otherwise.

If the police will not assist you, you must go to Probate and Family Court and ask for assistance. There are three different types of court filings that may be useful, depending on the circumstances:

- petition for writ of habeas corpus, included as **Exhibit 9B**;
- complaint for contempt (if a court order has been violated by the other party), included as **Exhibit 9A**; and/or
- ex parte motion to produce minor child, included as **Exhibit 9C**.

Practice Note

It may be a good idea to file all of the types of filings that are applicable to your situation. You should always also file an affidavit that explains the situation and why it is an emergency.

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 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 under the circumstances.

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 you. You may be able to go with the police so that it will be less traumatic for your child (if there is a history of domestic violence, however, discuss this option with the police and then decide what is safest for you and 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 (such as child endangerment or child abuse), 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 court officers usually spend time entertaining the child during the wait, and judges usually do not ask children to come into the courtroom at all during the hearing.

A complaint for contempt will not be heard right away, and therefore is not the quickest way to get your child back (although the judge might hear an ex parte motion filed at the same time as the contempt). However, it is a good idea to file a complaint for contempt if there was an order granting you physical custody at the time the other parent took your child. During the contempt hearing, the judge has an opportunity to punish the noncustodial parent, including restricting or suspending parenting time, paying you back for expenses of enforcing the order, and even imposing a jail sentence if the parent does not comply.

Can I File Criminal Charges?

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 on the Civil Aspects of International Child Abduction 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 regular contact with their grandchildren if the children's custodial parent has denied them access.

Guardianship Actions

If grandparents believe that a grandchild is at risk while in the care of their parents, they may choose to seek the nonparent equivalent of custody of the child. 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, grandparents must either have the agreement of the parents or prove that both parents are currently unfit to care for their child. This is harder to do than proving that it would be in a child's best interest to live with the grandparents.

Grandparents' Visitation

Grandparents do not automatically have the right to contact with their grandchild. Grandparents cannot seek a court order allowing grandparent's visitation if the child's parents are still married. 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 decision about the care and custody of a child, 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 proceedings 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 5H**.

Practice Note

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, or where the maternal grandparents are seeking visitation and no paternity 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 speaking with an assistant register in the court serving the county where the child lives.

As with other types of complaints, the grandparents must give notice to the parents and to any other people whom they have listed on the affidavit disclosing care and custody proceedings as having a claim to custody of the child. The grandparents give notice by serving the summons and complaint and filing a return of service with the court, following the method described above in "Giving Notice to the Other Parent that You Have Started a Custody Case."

MCLE and the authors are grateful to Jennifer K. Dieringer, Esq., and Susan R. Elsen, Esq., for their contributions to a previous version of this chapter.

✓ CHECKLIST 9.1

Child Custody

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. Consider your role in caring for the child, and/or what tasks you are able to take on in terms of day-to-day care. For example:
   - getting up with your child in morning;
   - changing your baby's diapers;
   - breast-feeding your baby or preparing and feeding your baby bottles;
   - preparing meals for your child;
   - packing lunch for school;
   - spending time with the child during the day or take your child to school or day care;
   - picking up your child from school or day care;
   - being with your child after school or day care;
   - helping your child with his or her homework;
   - bathing your child;
   - putting your child to bed;
   - getting up with your child at night when he or she is sick, afraid, hungry, or needs a diaper change;
   - being the person that your child runs to when he or she is hurt;
   - staying home with your child when he or she is sick;
   - taking your child to the pediatrician;
   - communicating with your child's school;
   - attending parent-teacher conferences;
   - participating in your child's religious training;
   - taking your child to his or her weekend or after school activities, including interactions with other children; or
   - participating in parent-child activities.

3. Think about what role the other parent has taken or can take, and whether the other parent is incapable of meeting the child's needs because of any of the following concerns. Be sure to think about how those concerns impact the ability to provide care:
   - 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 Children and Families, or
   - a history of child or partner abuse.

If There Has Been 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 DCF 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 DCF records.

4. Be ready to prove that you are capable of meeting the health needs of your child.

5. Be ready to prove that you are capable of meeting and providing for the educational needs of your child.

6. 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.)

7. Be prepared to show whether 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.)

8. 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.

9. In creating a parenting plan,
   - 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;
     - 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 parenting time;

- consider whether there are other people who can pick up or drop off your child for parenting time;
- consider if there are people who should not be around the child during parenting time;
- 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.

10. If parenting time should be supervised, address:
    - where supervised parenting time should take place;
    - if there is a fee involved, how will it be paid;
    - whether there are any potential supervisors among friends and family who could be acceptable to both parents;
    - 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.)

11. 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 9A—Complaint for Contempt

Commonwealth of Massachusetts
The Trial Court
Probate and Family Court Department

Division _____ Docket No. _____

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

_____, 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. # _____

CJ-D 103 (10/07) C.G.F

EXHIBIT 9B—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 9C—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.

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.

Date: _____
[PETITIONER'S NAME]

EXHIBIT 9D—Supplemental Order—Parenting Time Issues

COMMONWEALTH OF MASSACHUSETTS

[_____], ss. Probate and Family Court Dept.
Docket No. 000000

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

SUPPLEMENTAL ORDER: PARENTING TIME ISSUES

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

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

Defendant's parenting time 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].

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.

Supervision

7. The Defendant's parenting time 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. Parenting time shall be supervised at all times by:

a. the visitation center at [ADDRESS]

b. the Department of Children and Families (only if DCF 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 DCF, 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 parenting time. 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 parenting time 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.

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

Further Order

18. It is further ordered that:

_____

_____

_____

Review

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

_____
Justice of the Probate and Family Court

Date: