

A Guide to How Probate and Family Courts Handle Cases Involving Domestic Violence

You Have the Right to Protection Against Domestic Violence

Violent behavior is unacceptable. No one deserves to be abused. If you have been hit, threatened, forced to have sex or otherwise abused, you have a right to ask a court for an order to prevent the abuse. This order is called a “restraining order.” It is also called a 209A order because the law that gives you the right to protection is Chapter 209A of the Massachusetts General Laws.

You can get a restraining order by going to a District Court, Superior Court, or Probate and Family Court in your area.

This booklet focuses on how Probate and Family Courts (“Probate Court” for short) handle domestic violence.

What You Need to Know About Probate Courts

What Kinds of Cases do Probate Courts Handle?

Probate Courts handle many different types of cases involving families and children, including:

- Divorces
- Paternity
- Child Custody
- Visitation
- Child Support
- Domestic Abuse
- Legal Separation

Probate Courts can also issue orders to prevent a spouse from removing, hiding, spending or using up marital property and assets.

What Can the Probate Courts Do About Domestic Violence?

The Probate Court can issue "restraining orders" to prohibit the abusive behavior of household members, family members, and certain other people defined by law. (See page 8.) The Probate Court can also make custody and visitation orders that provide for the safety of abused parents and children.

Restraining orders are also called "Abuse Prevention Orders" or "209A" orders because they are issued under Chapter 209A of the Massachusetts General Laws.

Also, if you are involved in a Probate Court case such as a divorce, legal separation, paternity, custody, or visitation case, you can get your restraining order at the Probate Court.

209A orders can last for up to one year, and they may be extended by the court for additional periods of time of up to one year.

IMPORTANT NOTE — District Courts can also issue 209A orders, but Probate Courts can change them. So, if you already have a 209A order from the District Court and the person who has abused you goes to Probate Court to get reduced child support, custody or visitation of your children, or a divorce — **be aware that a Probate Court can override the District Court's 209A order.**

What Is the Family Service Office?

Each Probate Court has a Family Service Office (FSO).

Probate Court judges refer many cases to the FSO, including divorce, custody, visitation, and support. The staff of the FSO are called "probation officers" or "Family Service Officers". Most people whose cases are sent to the FSO have questions about the FSO and its function. Here are the answers to the most commonly asked questions:

TWELVE QUESTIONS people often ask about the Family Service Office of the Probate & Family Court

1. What does the Family Service Office (FSO) do?

- The FSO helps identify what problems or disagreements are before the court.
- The judge may order the FSO to gather facts about the case and report them to the court.
- The judge may ask the FSO for recommendations.
- The FSO calculates how much child support would be paid using the Child Support Guidelines.
- The FSO evaluates whether the parties can come to a full or partial agreement.
- The FSO helps the parties come to an agreement. The agreement does not have to cover all of the issues before the court. The FSO helps the parties write up the agreement.

- The FSO does investigations and makes written reports to the court.

2. How will the FSO handle my case if I have a restraining order or have been abused?

You are NOT required to meet with the Family Service Officer and the abusive person at the same time. The FSO rules say that trying to negotiate an agreement may be inappropriate where there are power differences or the presence of intimidation.

3. What do I do if I feel unsafe in the FSO process because of abuse?

If you feel unsafe because of abuse, are seeking an abuse prevention order, or where there has been domestic violence, you can tell the Family Service Officer who may then meet with you separately. You also have the option of not participating in the negotiation phase of the dispute intervention process. You will still be required to participate in the FSO's information gathering phase of "dispute intervention".

4. What is "dispute intervention"?

"Dispute intervention" is the name of the process used by the FSO. It used to be called "mediation". Dispute intervention involves meeting with a Family Service Officer to assess issues and, if possible, coming to an agreement on one or more issues before the court. In the dispute intervention process the Family Service Officer gathers information about the case from the parties or their attorneys and evaluates and assists parties in negotiating and writing up full or partial agreements. Also, the Family Service Officer reports

information to the judge or makes recommendations, if asked by the judge.

5. How did my case end up in the Family Service Office for "dispute intervention"?

When you came to the Probate & Family Court for a hearing, you may have been referred by the Court to the FSO. Cases are referred to the FSO when court documents show that certain issues are in dispute: custody, visitation, and child support are the most common.

6. When does the dispute intervention take place?

The court refers the case to the FSO on the day of the hearing. The FSO usually completes its intervention that day, including possibly reporting back to the judge.

7. If I become involved in the negotiation phase of a dispute intervention, do I have to come to an agreement?

No. Either party may withdraw from negotiation at any time. At that point the negotiation phase is over and the parties go before the judge where each can present his or her case.

8. If I do sign an agreement, what makes it enforceable?

Where an agreement (sometimes called a "stipulation") is reached in the FSO, the agreement is put in writing, signed by the parties, and then presented to a judge who generally "approves" the agreement by making a court order requiring that the parties comply with the agreement.

9. Can the Family Service Office make court orders?

No. Family Service Officers are not judges. They do not have the authority or power to make decisions or court orders.

10. Will the Family Service Officer advise me or help me figure out what to do about the problem I came to court about?

No. The Family Service Office must remain impartial and therefore cannot give you advice or help you make decisions. The FSO's responsibility is primarily to the judge.

11. Does the Court provide foreign language interpreters for meetings with the Family Service Office?

Yes. If you or the other party has difficulty speaking or understanding English, you are entitled to have an interpreter in court. Each court has a clerk who has the responsibility to arrange for court interpreters. You should notify that clerk in advance so that arrangements can be made.

12. Is what I tell a Family Service Officer confidential?

No. Disclosures to a Family Service Officer are not confidential. Anything you or the other party says to the FSO can be reported to the judge or appropriate outside authority such as the Department of Social Services.

Getting a Restraining Order

What Can a Restraining Order Include?

In a restraining order, a judge can order the person who is abusing you to:

- Stop abusing you.
- Leave your home and return house keys, even if the person owns or pays rent in the place where you live.
- Not contact you and stay away from you, your children, your home, and your workplace.
- Pay child support.
- Pay your living expenses, if you are married to the person.
- Pay you for expenses you have had because of the abuse, such as medical expenses, lost wages, or damage to property.
- Give up any firearms he may have.

The judge can give you temporary custody of your children.

The judge can also recommend that the person who is abusing you attend a recognized batterer's treatment program.

The judge can "impound" your address - order that it be kept secret.

Can a Restraining Order Be Designed to Fit Your Safety Needs?

Yes. You can tell the judge what you want the restraining order to include. A restraining order does not have to include all of the orders listed on page 8. If there is a particular order that you **do not want** included in your restraining order or that you **want worded in a particular way**, be sure to tell the judge.

For example, if you wanted the children to visit the other parent after the restraining order goes into effect, you could ask that the no contact part of the order apply to you and not the children. For more information on how Probate Courts handle visitation in domestic violence cases, see **How Does the Probate Court Handle Visitation When There is Domestic Violence?** on page 17.

Remember – You can request orders that fit your safety needs, and the court can make orders that fit your safety needs.

IMPORTANT NOTES – Probate Courts have important powers in 209A cases that District Courts and Superior Courts do not have. District/Superior courts cannot issue visitation orders. A Probate Court can issue 209A orders that permit visitation, order no visitation, or permit only supervised or other structured visitation.

If a Probate Court has issued a “child support order” or a “child custody order,” then a District or Superior Court cannot issue one of these orders at a later date.

Whom Can You Get a Restraining Order Against?

You have a right to get a restraining order if you have been abused by:

- Your husband or wife.
- Your former husband or wife.
- A household or former household member.
- The parent of your minor child (even if you are not married).
- A blood relative.
- Anyone with whom you have had a substantial dating relationship.

You can get a restraining order against someone even if you are not currently living with the person. The purpose of a restraining order, or 209A order, is not to punish the person abusing you. **The purpose of the order is to protect you.**

How Does the Law Define “Abuse?”

For purposes of obtaining a restraining order, “abuse” is defined as:

- Attempting to cause or causing you or your children physical harm;
- Placing you or your children in fear of "imminent (near and threatening) serious physical harm"; or
- Causing you to have sexual relations by force, threat or duress.

What Can You Do If a Restraining Order is Violated?

If the person who abused you violates a restraining order, it is a criminal offense. **Immediately call 911.** Tell the police that you have a 209A order and that you need help **immediately.**

**Violating a 209A order
is a criminal offense.**

Does the Court Have Information About Prior Incidents of Domestic Violence or Crimes?

Yes. When you file for a restraining order, the court is required to search a statewide computer system to determine whether the person who has abused you has been charged with a crime, been involved in domestic or other violence, or has an outstanding arrest warrant. In any of these situations, the court may be required to take further action, which could result in the arrest of the abuser.

Taking Care of Your Children

How Do Probate Courts Handle Custody of Children When There Has Been Domestic Violence?

In making custody decisions, Probate Courts must consider the effects of domestic violence.

Chapter 179 of the Acts of 1998 tells Probate Courts how to consider the effects of domestic violence in custody cases.

In issuing any temporary or permanent custody order, the Probate Court must consider past or present abuse toward a parent or child as a factor that is against the child's best interests.

The law applies to abuse involving certain acts between a parent and the other parent or between a parent and child. **Abuse** is defined as

- attempting to cause or causing bodily injury or
- placing another in reasonable fear of imminent bodily injury.

The law tells Probate Courts how to make custody decisions where there has been a **pattern of abuse** or a **serious incident of abuse**. A "serious incident of abuse" means

- attempting to cause or causing serious bodily injury;

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

"Bodily injury" is defined as **substantial impairment** of your **physical condition**, including, among other things, fractures, burns, internal injuries, or repeated harm to any bodily function or organ, including the skin.

If the Probate Court finds or decides that most of the evidence shows that a pattern or serious incident of abuse has occurred, then there is a **rebuttable presumption** that it is not in the best interests of the child to be placed in sole legal or physical custody, shared legal custody, or shared physical custody with the abusive parent.

This "presumption" means that if the court decides that a pattern or serious incident of abuse has occurred, then the court must assume that it is not in the best interests of the child to be placed in the custody of the abusive parent. "Rebuttable" means the "abusive parent" has the right to try to rebut or cancel the presumption. The "abusive parent" can rebut the presumption and get custody only if he/she can prove that most of the evidence shows that an award of custody to him/her is in the best interests of the child, even though he/she has perpetrated a patterns or serious incident of abuse.

The term **an abusive parent** means a parent who has committed a pattern of abuse or a serious incident of abuse to the other parent or the child.

Under this law the issuance of a restraining order under chapter 209A does not by itself constitute a pattern of serious incident of abuse.

The law also says that if the court finds that a pattern or serious incident of abuse has occurred and issues a temporary or permanent custody order, then the court must, within 90 days, issue written findings about the effects of the abuse on the child and demonstrate that the custody order is in the child's best interests and that it provides for the safety and well-being of the child.

If you think that this law applies to you, it is important to speak to a lawyer.

Even if the provisions of Chapter 179 do not apply to your case, the 1996 *Custody of Vaughn* decision of Massachusetts' highest court, the Supreme Judicial Court (SJC), may provide important protections for your child.

In *Custody of Vaughn*, the SJC said that in custody and visitation cases involving domestic violence, Probate Court judges must make detailed written decisions about domestic violence and its effect on the children and on the perpetrator's parenting ability. The SJC also said that witnessing domestic violence has a profound impact on children 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.

What Types of Custody Are Ordered By the Probate Court?

Massachusetts law provides for two types of custody, **legal custody** and **physical custody**. The law also provides that these types of custody may be either **sole** for one parent or **shared** between parents.

MARRIED PARENTS

Before awarding temporary **shared legal custody**, Probate Courts must also consider whether either of the parents abuses alcohol or has deserted the child, and whether the parents have a history of cooperating in matters that concern the child.

Note: Legal terms about custody are defined on page 16.

UNMARRIED PARENTS

For children born to unmarried parents, the mother of the child automatically has custody unless a Probate Court orders otherwise.

The Probate Court can award **shared legal** or **shared physical custody** only if the parties agree or if the court finds that the parties have successfully exercised joint responsibility for the child prior to the beginning of the case and have the ability to plan and communicate with each other concerning the child's best interest.

If there is or has been a restraining order because of domestic violence, Probate Courts can only order *temporary* **shared legal** or **shared physical custody** if they put the reason for the decision in writing.

Legal Terms About Custody

Sole legal custody means that one parent has the right and responsibility to make major decisions regarding the child's welfare, including matters of education, medical care and emotional, moral and religious development.

Shared legal custody means continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare, including matters of education, medical care and emotional, moral and religious development.

Sole physical custody means that a child resides with and is under the supervision of one parent, subject to reasonable visitation by the other parent, unless the court determines that such visitation would not be in the best interest of the child.

Shared physical custody means that a child has periods of residing with and being under the supervision of each parent, and that physical custody is shared by the parents in such a way that assures the child frequent and continued contact with both parents.

How Does the Probate Court Handle Visitation When There Has Been Domestic Violence?

The 1998 custody law requires that if ordering visitation for the abusive parent, the Probate Court must provide for the safety and well-being of the child and the safety of the abused parent.

Under the law court may consider:

1. ordering an exchange of the child to occur in a protected setting or in the presence of an appropriate third party;
2. ordering visitation supervised by an appropriate third party, visitation center, or agency;
3. ordering the abusive parent to attend and complete to the satisfaction of the court, a certified batterer's treatment program as a condition of visitation;
4. ordering the abusive parent to abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding visitation;
5. ordering the abusive parent to pay the costs of supervised visitation;
6. prohibiting overnight visitation;
7. requiring a bond from the abusive parent for the return and safety of the child;
8. ordering an investigation or appointment of a guardian ad litem or attorney for the child;
9. imposing any other condition that is deemed necessary to provide for the safety and well-being of the child, and the safety of the abused parent.

Probate Courts can also order that there be no visitation.

How Does a Probate Court Make a Child Support Order?

Probate Courts have the power to order a parent to pay child support in cases involving restraining orders, divorces, custody, or any other cases involving children. The courts use “Child Support Guidelines” to determine the amount of child support. These guidelines use a formula to figure out the amount of support. The formula takes into consideration a person’s “gross” weekly income, the number of children, and the children’s ages. A worksheet that the court uses to calculate the amount of support is on page 21.

The amount of child support a parent must pay is based on a certain percentage of his or her gross weekly income. You will find the percentages used by the Probate Court in the **Child Support Obligation Schedule** on page 20. (*Note:* After considering special circumstances, a court can decrease or increase the amount of child support by as much as 2%. This is what is meant on the form when it says +/- 2%.)

If you think that you know the income of the other parent, fill out this worksheet and show it to the judge. If filling out this form is too difficult – be sure to get help from an attorney or a Family Service Officer.

All court orders must provide that support may be taken from wages by the employer and sent through the Department of Revenue, to the other parent – unless the other parent receives public assistance. This is called an "income assignment" or "wage assignment."

If the court determines that a person is either purposely unemployed or underemployed in order to avoid paying child support, a judge can order that person to pay child support based on his **potential earnings** rather than actual earnings.

Visitation Rights and Child Support Obligations — Is There a Connection?

As a general rule, child support payments and visitation rights are not connected. A person paying child support is not automatically entitled to visit a child. At the same time, failure to pay child support will not automatically stop visitation rights.

The court grants visitation rights when a judge determines that it is in the best interest of the child. The court determines child support by applying the Massachusetts Child Support Guidelines.

How Can I Get Help to Get Child Support?

The Commonwealth of Massachusetts Department of Revenue (DOR) has a Child Support Enforcement Division that can help you get child support. The DOR can go to court to get child support orders. It is able to get information about the income and place of employment of the other parent. The DOR is also able to find out where the other parent lives. It can intercept tax refunds for child support. You can call them at (617) 577-7200 (outside Greater Boston 1-800-332-2733) to get information about their services. The DOR has an application form that you can get at the Probate Court or by calling the number above. Attorneys can also help you get child support.

Child Support Guidelines Obligation Schedule

Child Support Obligation Schedule

A. Basic Order

The basic child support obligation, based upon the income of the non-custodial parent is as follows:

| Gross Weekly Income | Number of Children | | |
|---------------------|---|-----------|-----------|
| | 1 | 2 | 3 |
| \$0- \$100 | Discretion of the court, but no less than \$80.00 per month | | |
| \$101-\$280 | 21% | 24% | 27% |
| \$281 - \$750 | \$59 +23% | \$67+28% | \$76+31% |
| | (% refers to all dollars over \$280) | | |
| \$751 - max. | \$167+25% | \$199+30% | \$222+33% |
| | (% refers to all dollars over \$750) | | |

For children in excess of 3 covered by the order, the support shall be no less than that for 3 children; should a judge order support at the 3 child level, written findings shall describe the circumstances of the particular case which warrant the minimum order. Within the discretion of the court, and in consideration of the totality of the circumstances of the parties, the Basic Order may be either increased or decreased by 2%. An adjustment of 2% shall not be considered a deviation.

B. Age Differential

The above orders are to be increased to reflect the costs of raising older children. The following is intended to be applied to the age of the oldest child in the household for whom support is sought under the pending action.

Age of Oldest Child Percentage Increase

| | |
|---------|--|
| 0 -12 | Basic Order Applies |
| 13 - 18 | Basic Order + 10% of Basic Order |
| Over 18 | If statute permits, at discretion of the Court |

C. Custodial Parent Income Adjustment

Where the custodial parent works and earns income in excess of \$20,000 after consideration of child care expenses, the support order is to be reduced by the percentage that the excess represents in relation to the combined incomes of both parents minus the custodial parent's disregard.

Child Support Guidelines Worksheet

COMMONWEALTH OF MASSACHUSETTS

The Trial Court

_____ Division Probate and Family Court Department Docket No. _____

vs.

Worksheet

Child Support Guidelines

Worksheet Completed by _____ Date Completed _____

All provisions of the guidelines should be reviewed prior to the completion of the worksheet. These guidelines will apply (absent a prior agreement acceptable to both parties) in cases where combined gross income of both parties does not exceed \$135,000 and where the income of the non-custodial parent does not exceed \$100,000. **Worksheets shall be completed for all cases.**

1. Basic Order

- a) Non-custodial gross weekly income (less prior support orders actually paid, for child/family other than the family seeking this order) \$ _____
- b) Basic order (from chart) (A) \$ _____

2. Adjustment for Age of Children

- a) If age of oldest child is 13-18, calculate 10% times (A) _____
- b) Adjusted order (A) + (2a) (B) \$ _____

3. Custodial Parent Income Adjustment

- a) Custodial parent gross income (annual) \$ _____
- b) Less \$20,000.00 -20,000.00
- c) Less child care cost (annual) - _____
- d) Custodial adjusted gross \$ _____
- e) Non-custodial gross (annual) \$ _____
- f) Total available gross (3d) + (3e) \$ _____
- g) Line (3d) _____ Line (3f) _____
- h) (3d) divided by (3f) _____ %
- i) Adjustment for custodial (line 3h%) X (B) (C) \$ _____

4. Calculation of Final Order

- a) Adjusted order, (B) above (B) \$ _____
- b) Less adjustment for income (C) above (C) - _____
- c) Less 50% of weekly cost to obligor of family group health insurance [section G(1)] - _____
- or
- Plus 50% weekly cost of obligee's family group health insurance [section G(1)] + _____

Weekly Support Order (B) - (C) +/- (4c) \$ _____

If You Are a Victim of Domestic Violence And Do Not Have Legal Status in the U.S., Do Immigration Laws Have Any Effect on Whether You Should File for Divorce?

Yes. U.S. Immigration laws say that if you are being abused by your U.S. Citizen or Lawful Permanent Resident ("green card") spouse, you can get legal status WITHOUT the help of your battering spouse.

Because you must be married to get legal status under this law, you **should not** get divorced until you have filed your papers with the Immigration and Naturalization Service. If you or your spouse have already started divorce proceedings be sure to get legal help immediately to protect your rights.

You can get a pamphlet called *Immigration Rights for Victims of Domestic Violence* by calling Community Legal Services And Counseling Center at 617-661-1010.

Getting Help

Is It Important to Have an Attorney in Probate Court?

Yes. Family law is complicated. It is very hard to deal with domestic abuse on your own. Although you are not required to have an attorney if you go to Probate Court, is it very important to try to get legal help.

If you have to go to Probate Court, try to get legal help.

Whom Can You Call for Help?

Free Legal Assistance for People with Low Incomes

The following agencies provide free legal assistance in the greater Boston area in family law cases to low income people facing domestic abuse. Community Legal Services And Counseling Center serves Arlington, Belmont, Boston, Brookline, Cambridge, Chelsea, Everett, Medford, Somerville, and Watertown. Their phone number is 617-661-1010.

| | |
|---|--------------|
| Cambridge & Somerville Legal Services | 617-494-1800 |
| Community Legal Services | |
| And Counseling Center | 617-661-1010 |
| TTY | 617-661-1216 |
| Greater Boston Legal Services | 617-371-1234 |
| TTY | 617-371-1228 |
| Volunteer Lawyers Project | 617-423-0648 |
| TTY | 617-338-6790 |
| Women's Bar Association | 617-695-1368 |

Reduced Fee Panels for Low Income People

| | |
|-------------------------------------|----------------|
| National Lawyers Guild | 617-227-7008 |
| Boston Bar Association | 617-742-0625 |
| Massachusetts Bar Association | 617-654-0400 |
| | 1-800-392-6164 |
| Women's Bar Association | 617-695-1368 |

If you still need a referral, call the Legal Advocacy and Resource Center at 617-742-9179 or 1-800-342-5297.

Battered Women's Services for Support, Advocacy and Shelter

| | |
|--|----------------|
| Asian Shelter and Advocacy Project..... | 617-338-2355 |
| Casa Myrna Vazquez | 1-800-992-2600 |
| Elizabeth Stone House | 617-522-3417 |
| F.I.N.E.X. House | 617-288-1054 |
| Harbor COVE..... | 617-884-9909 |
| Renewal House | 617-566-6881 |
| Respond | 617-623-5900 |
| Transition House | 617-661-7203 |
| Support Committee for Battered Women | 781-899-8676 |
| | 1-800-899-4000 |

Probate & Family Courts for Middlesex, Suffolk, and Norfolk Counties

| | |
|---------------------------------------|--------------|
| Middlesex Probate & Family Court..... | 617-768-5808 |
| in Cambridge | |
| Suffolk Probate & Family Court | 617-788-8300 |
| in Boston | |
| Norfolk Probate & Family Court | 781-326-7200 |
| in Dedham | |

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