

SEPARATION AND DIVORCE



WHICH COURT?

Almost all divorce cases are heard in the Probate and Family Court in the county where you or your spouse are living at the time you petition for relief or in the county where you and your spouse last lived together. If you are in need of immediate relief from abuse to yourself or your children, you may petition the nearest District Court or Probate and Family Court for emergency relief. If the court is closed, the police can help you to speak with a judge who is on call and available to issue a protective order.

Most public libraries have copies of the *Massachusetts General Laws Annotated* and the *Massachusetts Rules of Court*. You may also access this information from various online resources.

HOW DO YOU PETITION THE PROBATE AND FAMILY COURT FOR RELIEF?

You can initiate an action for divorce or for separate support by filing a complaint in the Probate and Family Court. You do not have to be living apart from your spouse in order to file a divorce or separate support complaint.

A complaint for divorce requests that the court end the marriage itself by granting a divorce. A separate support

complaint asks the court to find that you are living separate and apart from your spouse for a legally sound reason and that the court officially recognizes that you are living separate and apart from your spouse.

WHAT ARE THE RESIDENCY REQUIREMENTS IN MASSACHUSETTS?

Massachusetts courts have jurisdiction to hear divorce actions in which the parties lived together as husband and wife in Massachusetts, where the cause of action for divorce occurred in Massachusetts, or when the parties lived together as husband and wife in Massachusetts and the cause of action occurred while at least one of the spouses was living in Massachusetts. Otherwise, the court can hear a divorce no matter if the moving party has lived in Massachusetts for one year preceding the commencement of the divorce action (if the cause of the action occurred outside of the commonwealth).

There are no residency requirements for filing of a separate support complaint provided you are living in Massachusetts at the time your complaint is filed.

WHAT WILL THE ATTORNEY DISCUSS AT YOUR FIRST OFFICE CONFERENCE?

When you meet with an attorney regarding a divorce or separation, the attorney may discuss the following subjects:

- The possibility of marriage counseling or other steps to be taken to help save the marriage;
- Assistance to you as a parent in meeting the needs of your children, and issues involving custody and visitation;
- Dissolving the marriage by divorce or obtaining a permanent separation;
- Financial matters involving support, real estate and personal property;
- You and your spouse's legal rights and obligations;
- Remedies available in abusive situations;
- Procedures in the Probate and Family Court; and
- Procedures employed in the attorney's law office in the handling of the case.

Be sure to discuss legal fees and expenses at your first

meeting and secure a written fee agreement between you and your attorney.

WHAT IS THE FIRST STEP IN PROBATE AND FAMILY COURT?

Should you decide to petition the court, your attorney will prepare either a divorce complaint or a separate support complaint on your behalf.

HOW QUICKLY CAN THE PROBATE JUDGE ACT ON YOUR CASE?

The Probate and Family Court has the power to make temporary orders on behalf of both spouses upon the filing of either a separate support complaint or a divorce complaint. Except in cases of emergency, the attorney is required to give your spouse at least seven days' notice that the motion will be heard in the Probate and Family Court on a specific date and time scheduled by the court. Although the time it takes to obtain a motion date varies by county, the average wait is approximately four weeks. If service is by mail, an additional three days must be added to the time of service.

Every motion must be accompanied by a proposed order setting forth what action you are seeking from the court. You may file an affidavit in support of your motion. Opposing affidavits must be served no later than two business days before the hearing.

Upon giving proper notice to your spouse, the following temporary orders can be made by the Probate and Family Court:

- Granting temporary custody of the minor children;
- Granting a temporary restraining order that your spouse not impose any restraint on your personal liberty;
- Ordering you or your spouse to vacate the home in which you are living together;
- Granting temporary support for you or your spouse and the minor children;
- Imposing a wage assignment on your spouse's pay in order to ensure the payment of support;
- Granting visitation rights to the spouse who does not have physical custody of the minor children;

- Issuing an order restraining you and your spouse from transferring or further encumbering your assets and to designate a spouse as beneficiary or survivor of accounts/policies;
- Appointing a guardian *ad litem* to investigate concerns about your child(ren) and to report to the court regarding issues of visitation and custody; and
- Requiring a party to maintain health and life insurance and other temporary orders at the request of the parties or on its own motion.

WHAT DO YOU DO WHEN YOU RECEIVE NOTICE THAT YOUR SPOUSE IS GOING TO APPEAR IN PROBATE AND FAMILY COURT TO REQUEST TEMPORARY ORDERS?

If you receive notice that your spouse will appear in court to request that temporary orders be made on a separate support complaint or a divorce complaint, you should consult an attorney immediately or appear in court on the date on the notice.

This is a crucial phase of the court proceeding. If proper notice has taken place, the order of the Probate and Family Court will be binding upon the parties. Your failure to abide by the court order may result in your being found guilty of contempt of the Probate and Family Court even if you did not attend the hearing. In at least one county, this may be your only opportunity to obtain temporary relief from the court. Therefore, it is important that all requests for relief be presented at that time.

In addition, you may be required to meet with a Family Service Officer, a highly trained and experienced probation officer who will work with you to try to resolve your differences. In many counties, you must meet with Family Services prior to addressing the judge. Any unresolved issues will be presented to the judge for determination.

WHAT HAPPENS AFTER THE GRANTING OF TEMPORARY ORDERS?

After the hearing before the probate judge and the granting of temporary orders, various procedures need to be undertaken before the trial that involve gathering information before the date of the hearing.

Within 45 days of the service of the complaint, each party must provide specific financial documents to each other. When discovery is complete, the case will be assigned to a pre-trial conference at the court. Prior to this court conference, the parties must conduct an in-person conference to try to resolve or narrow the issues in the case. At the trial, after all of the witnesses have testified and all the evidence has been presented to the court, the judge will enter a judgment of divorce or separate support. The judgment may contain final orders with respect to support obligations, custody of minor children, visitation rights, division of assets and other financial matters. Under certain circumstances, the Probate and Family Court may modify these orders at a later date upon filing a complaint for modification of this judgment.

Every party to a divorce action in which minor children are involved must attend an approved program. Usually you have to attend two two-hour classes at a cost of \$50. When you complete the program, you should write your case number on the certificate and mail it to your county Registry of Probate.

WHAT ARE THE GROUNDS FOR DIVORCE IN THE COMMONWEALTH OF MASSACHUSETTS?

There are several grounds for divorce in Massachusetts:

- **Irretrievable breakdown of the marriage**—this is a no-fault concept where neither spouse is required to allege fault or blame the other spouse for the breakdown of the marriage. Although the court can consider the conduct of the parties in ordering alimony or in dividing assets, the court does not require either spouse to give testimony to prove the other spouse at fault for the breakdown of the marriage.
- **Cruel and abusive treatment**—divorce on this ground does not require proof of physical violence by one spouse upon the other. This ground is broad enough to include mere words, if they create a reasonable fear of physical violence, or if they tend to wound the feelings to such a degree as to affect the health of the party or create a reasonable apprehension that health may be affected.

- **Nonsupport**—requires that you show that your spouse, although able to support the family, did grossly, wantonly and cruelly refuse and neglect to provide suitable support for you.

Other grounds for divorce include utter desertion for at least one year, adultery, impotency, gross and confirmed habits of intoxication by liquor or drugs or a prison sentence of five or more years. Note that the above grounds need not be proven at the time of the initial granting of temporary orders but must be proven at the time of the divorce trial.

CAN YOU GET A DIVORCE IF YOU COMMITTED THE ACTS LISTED ABOVE?

The laws in Massachusetts no longer require that the spouse seeking the divorce be without blame for the failure of the marriage. A spouse who can prove one of the grounds for divorce can no longer be denied a divorce simply because his or her spouse can prove that the other also committed acts that amount to one of the grounds for divorce.

DO YOU NEED A WITNESS?

In most cases, you do not need a witness to support your testimony. However, you must testify as to the fault ground for your divorce. Your attorney will advise you and it will be up to the judge to decide whether or not you need a witness to support your testimony.

HOW LONG DOES THE DIVORCE TAKE?

If you and your spouse agree upon all issues, you may be able to receive a court date within a couple of months of filing the necessary papers. If any issues are contested, a divorce may take longer.

This pamphlet is issued as a public service of the Massachusetts Bar Association and does not constitute legal advice, which can only be given by an attorney. The contents of this pamphlet pertain only to the laws of Massachusetts at the time of publication.

Legal assistance is available through the Massachusetts Bar Association services listed below.

■ Dial-A-Lawyer

Call and speak to an attorney, free of charge, on the first Wednesday of every month.
5:30–7:30 p.m. (617) 338-0610

■ Lawyer Referral Service

Open Monday through Friday, from 9 a.m. to 4:45 p.m., the Lawyer Referral Service helps solve legal problems by referring callers to lawyers or appropriate agencies. The LRS does not offer legal advice. There is no charge to use the service. To contact the LRS, call:

Boston area: (617) 654-0400
Toll-free: (866) MASS LRS (866) 627-7577
TTY: (617) 338-0585
E-mail: LRS@massbar.org
Web site: MassLawHelp.com

■ Legal Fee Arbitration Board

When your attorney's fee is in dispute, call:

Statewide: (617) 338-0552
E-mail: FAB@massbar.org
Web site: www.MassBar.org/LawHelp

■ MassLawHelp.com

Free legal information and online referrals to attorneys is available on the Massachusetts Bar Association's Web site at www.MassLawHelp.com.

■ Speakers Bureau

Whether you're looking to educate your group or class about a particular area of law or trying to add variety to your regular meetings, the Massachusetts Bar Association Speakers Bureau is your solution. Speakers Bureau attorneys are available for free presentations on a wide variety of legal topics.

Statewide: (617) 338-0571
E-mail: communityservices@massbar.org



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