Family Mediation Quarterly

MASSACHUSETTS COUNCIL ON FAMILY MEDIATION
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Family Mediation Quarterly

Vol. 5 No. 4 Fall 2006

The Massachusetts Council On Family Mediation is a nonprofit corporation established in 1982 by family mediators interested in sharing knowledge and setting guidelines for mediation. MCFM is the oldest professional organization in Massachusetts devoted exclusively to family mediation.

From The President: Lynda J. Robbins

As those of you who attended the Institute know, the recipient of this year's John Adams Fiske Award for Excellence in Mediation is Jerry Weinstein. Jerry has the distinction of introducing John Fiske to mediation and, with John, Joanne Forbes and Janet Miller Wiseman, of founding the Massachusetts Council on Family Mediation. As I speak to mediators from other jurisdictions, I realize how fortunate we are here in Massachusetts to have had Jerry's wisdom, guidance and pioneering spirit. As a result, MCFM has grown into an organization that serves the public and its members with amazing harmony. Yes, you may say, we are mediators; we should be able to work together. But, historically and, continuing to the present, many areas of the country have experienced a conflict between mediators originating from different professions. Through Jerry's leadership, Massachusetts has avoided such discord and we have a strong, united mediation community. This is not to say we have not disagreed amongst ourselves on important issues, on the contrary! But, with Jerry's help, we have resolved the differences and become stronger for it.

On behalf of all of us, I thank you, Jerry.

And many thanks to Deb Smith, Laurie Udell, Lynn Cooper, Jon Fields, Steve Nisenbaum, Les Wallerstein and all our speakers and presenters for their tireless work in making our 5th Annual Family Mediation Institute a success.

The next year promises to be an interesting year for mediation in Massachusetts. The pending Uniform Mediation Act offers possibilities for joining with our fellow mediators in Massachusetts and throughout the nation in improving our professional standing and clarifying our rights and obligations to our clients. However, as with any attempt to standardize and codify, we must be wary of the pitfalls. Please get involved in the discussions and the process. Go to www.massuma.com for more information about the Act and the Massachusetts efforts to address the issue of adapting the UMA to the needs of Massachusetts mediators. And contact me with your comments and input.

Please mark your calendars for our Professional Development Programs. The next one is Wednesday, December 6 from 4 to 6 p.m. and focuses on Domestic Violence issues in Divorce Mediation. The speakers are excellent and the program promises to be of great value. We have a wonderful variety of programs this year. They are free to members and guests and I encourage everyone to attend. In order to grow our practices, we must grow.

EDITOR'S NOTICE

MCFM
Family Mediation Quarterly

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The FMQ is dedicated to family mediators working with traditional and non-traditional families. All family mediators share common interests and concerns. The FMQ will provide a forum to explore that common ground.

The FMQ intends to be a journal of practical use to family mediators. As mediation is designed to resolve conflicts, the FMQ will not shy away from controversy. The FMQ welcomes the broadest spectrum of diverse opinions that effect the practice of family mediation.

The contents of the FMQ are published at the discretion of the editor, in consultation with the MCFM Board of Directors. The FMQ does not necessarily express the views of the MCFM unless specifically stated.

The FMQ is mailed to all MCFM members. Copies are provided to all Probate & Family Court Judges, all local Dispute Resolution Coordinators, all Family Service Officers and all law school libraries in Massachusetts. An archive of all previous editions of the FMQ are available on-line in PDF at <www.mcfm.org>, accompanied by a cumulative index of articles to facilitate data retrieval.

MCFM members may submit notices of mediation-related events for free publication. Complimentary publication of notices from mediation-related organizations is available on a reciprocal basis. Commercial advertising is also available.

Please submit all contributions for the FMQ to the editor, either by email or computer disk. Submissions may be edited for clarity and length, and must scrupulously safeguard client confidentiality. The following deadlines for all submissions will be observed:

Summer- July 15th Fall- October 15th
Winter-January 15th Spring- April 15th

All MCFM members and friends of family mediation are encouraged to contribute to the FMQ. Every mediator has stories to tell and skills to teach. Please share yours.

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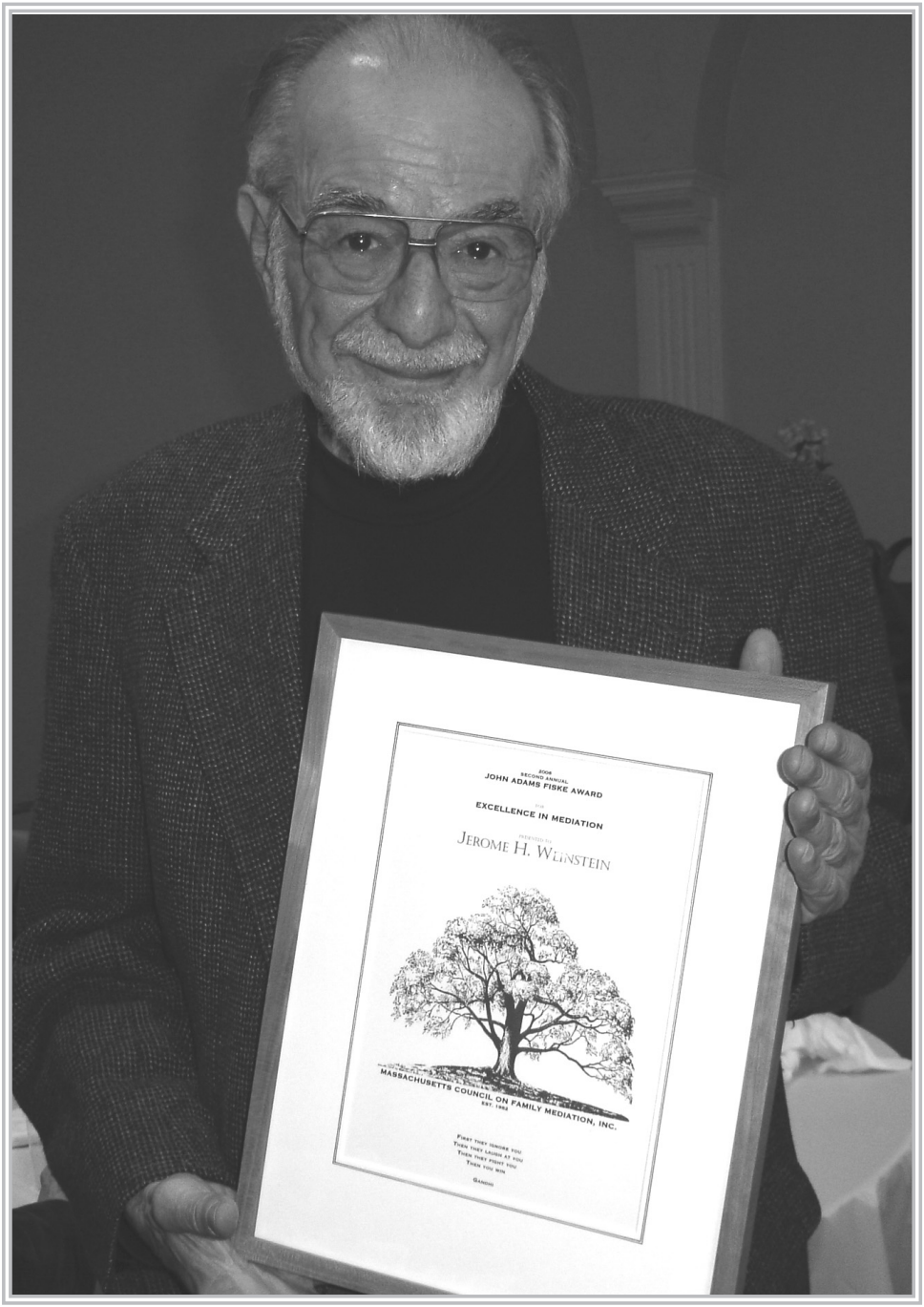

2008
SECOND ANNUAL
JOHN ADAMS FISKE AWARD
FOR
EXCELLENCE IN MEDIATION
PRESENTED TO
JEROME H. WEINSTEIN
MASSACHUSETTS COUNCIL ON FAMILY MEDIATION, INC.
EST. 1982
FIRST THEY IGNORE YOU
THEN THEY LAUGH AT YOU
THEN THEY FIGHT YOU
THEN YOU WIN
GANDHI

SECOND ANNUAL FISKE AWARD HONORS JEROME H. WEINSTEIN

Presented by John A. Fiske

Photos by Lynn K. Cooper

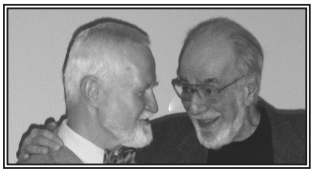
In the beginning, there was Jerry.

He had many roles. As PIONEER, he founded the Divorce Resource and Mediation Center 30 years ago. As TRAINER, he ran divorce mediation trainings for years through the Divorce Center and showed many of us how to become family mediators. Oliver Fowlkes and Mary Harvey were in Amherst and wanted to take mediation training in North Carolina and couldn't get in O.J. Coogler's course, so they took Jerry's and ended up working at the Center for many years. As HOST, he organized and ran the meetings to establish the Massachusetts Council on Family Mediation. In August 1979 he invited me to a meeting in his living room where I met him and Janet Wiseman and began a collaboration that has lasted 27 years so far. As LICENSED SOCIAL WORKER, he provided therapy for families and children through the Divorce Center and hired other therapists to join the staff of the Center. As LEADER, he was by acclimation the first president of the MCFM. Most important, as quintessential COLLEAGUE he gave encouragement to the rest of us, constantly and generously helping the rest of us to learn about mediation and to establish a mediation practice.

He broadened the scope of mediation for many of us. I remember an early conversation with him about how long a mediation should last. I told him most of my mediation are done after about 10 hours and he said he needed at least 10 meetings. "There are all these loose ends that need to be tied," he said. Having a Social Work License as well as a Master in Science degree helped him do that in his unique Jerry way. He worked closely with therapists, including Harry Keshet, to provide counseling for couples who were separating. He organized a support group of mediators who met once a month Friday afternoon in his living room and in all my lawyer meetings I've never been to one like Jerry's Friday afternoon case discussions. They were spirited meetings, many fights for air time, and we never did resolve whether the mediator must insist that all assets be valued by a professional appraiser.

He will never retire, though he says he has. He still attends all the meetings of the Board of the MCFM, I am told because I don't. It is fitting that a list of allied professionals be named after Jerry because he is ever so open to helping anyone who could enlighten the divorce process.

HIS THIRST FOR PEACE WILL NEVER QUENCH,
THIS AWARD BELONGS TO SUCH A MENSCH!



John & Jerry

WHAT TO DO ABOUT MOM'S FAILING HEALTH?
Mediation & Elder Care

By Louise Phipps Senft

One Scenario: Mom is about to turn 92 and has been living in her own home since the 1920's. She always said, "Just carry me out in a basket." Mom can still walk and talk, but now she is failing and becoming increasingly reclusive. She lacks energy on many days, often not eating much. One daughter, who lives in town, has been checking in on her for years, but now is having to go twice daily. The other siblings have not had much input except to question their sister from time to time about why she doesn't do something else with Mom. Daughter feels somewhat out of touch with her sisters, wants to be the caretaker, but it is getting harder and harder physically, emotionally and time-wise. She doesn't want to say anything for fear of burdening Mom or creating conflict between herself and her sisters. If she moved Mom anywhere now, Daughter thinks she might die....

Another Scenario: At a family meeting in the lawyer's office, Mom, who is only 66, is repeating to the lawyer that she wants to remain in control of her money. The three adult children are arguing, clearly agitated as they discuss the future and dredge up old wounds from childhood. Mom looks bewildered by the exchanges. Dad is reassuring Mom that the family wants the best for her, as he looks lovingly at a wife he is losing to dementia....

Some people, and older people in particular, often are worried about offending anyone, especially a family member.

Many conflicts of all kinds arise because of misunderstandings or lack of information. This can also be true where older people are involved. The misunderstandings may be among family members, health care providers, care home administrators or staff, or even friends or patient roommates, as well as the older person herself or himself. Such situations are not always dealt with effectively in people's daily lives especially when faced with the process of loved ones aging in unexpected ways. There is a much better chance that these situations can be dealt with effectively in the mediation setting, a much better chance.

Since mediation is a process focused on quality decision making, the participants have nothing to lose and a lot to gain by trying to thoughtfully, quickly, satisfactorily and inexpensively resolve a matter. Mediation is especially appropriate where one or more of the participants is perceived as dominant or is strong and forceful, or quiet but aggressive. Mediation is equally appropriate in situations where one or more of the participants is less equipped to deal with conflict, is less able to articulate concerns, is feeling less powerful, or is less able to negotiate. The latter can often be the case when one of the participants is elderly.

Older people sometimes become confused. They may appreciate that there is something wrong or that they are not happy, but not fully understand their problem or what will solve their problem. Or, they may have unrealistic ideas of what should be done. Or, they may be contented with their living situation, but concerned about the poor relationships of their children and often a sense of burden that their children shoulder. Families can clarify their thinking just by the process of talking things out, ideally with a third party neutral who is there to make room in the conversation for all voices, all experiences and all ideas. A mediator makes it safe to have an otherwise difficult discussion about various possibilities and their consequences and benefits.

In mediation, people of all ages have had the experience of seeing light bulbs go on as they speak about a situation, and the mediator can help this process for older people and their family members, as well as their other caregivers, without losing neutrality. With reflecting, summarizing and asking thoughtful open questions, the mediator can invite each person to speak more and try to explain more and to feel more relaxed and comfortable with speaking more and explaining more.

Even where there is no confusion, a person timid or having other difficulty expressing herself or himself can often function better in a mediation - where one of the listening persons is the mediator who is not challenging or questioning what the person is saying. Some people, and older people in particular, often are worried about offending anyone, especially a family member. They may find it easier to direct some of their comments to the mediator, with the other people listening.

Sometimes older people are caught up in disagreements between family members or other loved ones over what care or other arrangements are seen as appropriate for them. This can make their life uncomfortable as they try to avoid siding with one person or the other. It may even happen that the views of the older person are not even sought by the family members who become, understandably, either caught up in their role of their parent's care, or who defer to others to decide. This is common. What is also common is that different family members have different ideas, spoken or unspoken, about what the elderly parent desires, or what is best for the parent. In mediation, the views and preferences of the older person may be invited out before others speak so that the older person can talk without having to be in the position of disagreeing with what others have said, and the differences between siblings, in the presence of or outside the presence of the parent, can be discussed and better understood.

Face saving is often involved in resolving family conflicts.

In addition, since there are so many options available to consider in mediation, there is room for all participants to agree on temporary or trial arrangements. These trial arrangements can include where the

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parent shall live; who shall care for the parent; expectations of other family members and the variety of shared care-giving responsibilities; clarified expectations for compensation or thanks; benchmarks for how long the older person can remain at home; whether the person receives home care or care as a resident of an institution; what kind of facility will work best; hospice care at home or in a facility; what other financial arrangements or options are feasible; legal and other documents needed; and how future decisions will be made. It can happen that different options considered and tried as a follow up to mediation will prove themselves as being good ideas or not so good ideas. Face saving is often involved in resolving family conflicts. For this reason also, trying out the suggestions of different people, or even giving them serious consideration, can help bring the various participants together. And the participants can always decide on back up plans or return to the mediation process.

Better process...better outcome

Mediation gives everyone an opportunity to be heard and to be involved in the process. When this happens, ultimate decisions are better accepted by everyone. Again, this can be important where arrangements or other important decisions affecting an older loved one or family member are involved. It has been said that there is a larger grace bestowed on society when families demonstrate their respect for and acceptance of loved ones growing old and together thoughtfully make decisions about their care. A mediator can assist in the process of every one being involved.

Disagreements or unspoken bad feelings or guilty feelings concerning mom, dad or another family member can cause lasting rifts. This is so unfortunate, especially where these can possibly be avoided or mended. Consideration of mediation really makes sense where what is presently going on isn't working or where there are divisive side conversations going on. If anyone reading this article is aware of a situation described above, I would urge that serious consideration be given to mediation where people can better understand where each participant is coming from and gain other helpful information. At the very least what might become apparent in a mediation is that more information is in fact needed, and the mediation opportunity can provide a clear plan of next steps.

Mediation is a dialogue and decision-making process facilitated by a neutral person. For elder care situations, it is usually one of the best alternatives for families and elder caregivers and providers. Better process...better outcome.

Louise Phipps Senft is an Adjunct Professor of Law at the University of Maryland School of Law with over twenty years of mediation training and experience. She was voted "Baltimore's Best" Mediator by the Daily Record, and is owner of the Baltimore Mediation Center for Divorce And Family Business Conflicts. Louise can be contacted at 443-524-0833, or at www.BaltimoreMediation.com

PARSING ALIMONY
Deciphering the 1/3, 1/3, 1/3 Metric

By James McCusker

What to do about alimony? When there are no children to consider, and hence no support guidelines to fall back on, how do we fairly divvy up marital income. The Massachusetts law (MGL Chapter 208 Sec. 34) dealing with alimony tells the courts that, when attempting to establish an appropriate amount, it should consider a diverse range of attributes. Station in life, health, age, employability, are but a few of the factors to be considered. Over the years there have been numerous attempts to devise a mathematical computation to convert the essence of MGL Chapter 208 Sec. 34 to dollars and cents. One that has gained a measure of popularity is the 1/3, 1/3, 1/3 method. This metric purports to give equal 1/3 shares of the marital income to the Husband, the Wife and the Taxman. But do all parties really end up with the same size piece of pie using this mathematical shorthand? Is the wisdom of Solomon hidden in the simple elegance of this equation? Or is it a simple shell game with one party destined to lose before the outset? Let's take a look at some examples to determine if and when it's appropriate.

The basic premise of the 1/3 method is that the Payor Spouse should give 1/3 of his/her excess income to the Payee Spouse as alimony. The Payor Spouse's remaining income is then split 1/3 to the Taxman and 1/3 is retained by the Payor Spouse. In theory all parties to this transaction are set equal in the final accounting. The Payor's excess income is defined as the amount by which his/her income exceeds the Payee's income before any transfer of alimony. As an example, if we assume that the Payor Spouse has gross income of $150,000 and the Payee spouse has gross income of $30,000, then the Payor's excess income is $120,000 ($150,000-$30,000) and the alimony transfer is $40,000 ($120,000/3). In order to test the thesis, that all pie pieces are the same size, I ran a series of tax and cash flow projections at various income levels for both the Payor and Payee Spouse. In all cases I assumed both parties employed the Standard Deduction.

What I found was that in almost all cases the Payor Spouse wound up with the biggest slice of the pie. And surprisingly, one of the big contributors to this imbalance was that the Taxman didn't get his fair share. I found that not until the combined income level of Payor and Payee exceeded $300,000 did tax rates approach 33%. If I extend our previous example by incorporating taxes, the result is that the Payor Spouse receives $72,500 (Gross Income $150,000 minus Alimony $40,000 minus Taxes $37,500) of the gross marital income of $180,000. This represents 40%

Do all parties really end up with the same size piece of pie using this mathematical shorthand?

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of the total. The Payee Spouse receives $52,500 (Gross Income $30,000 plus Alimony $40,000 minus Taxes $17,500) of the gross marital income of $180,000. This represents 29% of the total. And the Taxman gets 31% of the total ($55,000). Clearly the loss of the Payee Spouse and the Taxman is the Payor Spouse's gain.

If your goal is to distribute marital income equally between the parties, it doesn't appear that the 1/3 method should be your vehicle.

Using the 1/3 method of alimony distribution, the Payor Spouse will always come out ahead when his/her combined tax rate (including FICA/Medicare) is below 33%. The presumption of the 1/3 method is that the Payor Spouse will pay 33% of his/her excess income to the government. If the Taxman's payout is below that percentage it will be retained by the Payor. This effect will be more pronounced at lower combined income levels partly due to the favorable tax impact to the Payor Spouse associated with the alimony transfer. The 1/3 method may have been more equitable in the past when tax rates were higher, but given today's historically low tax rates it will most likely accrue benefits to the Payor Spouse when employed in the current environment.

If your goal is to distribute marital income equally between the parties, it doesn't appear that the 1/3 method should be your vehicle. But given the government's penchant for running half trillion dollar budget deficits and a Social Security system that is bursting under the weight of the boomers, it shouldn't be long before tax rates are on the rise. Just as my wife is wont to point out, that if I wait long enough even "my" wardrobe will one day be fashionable again, so too will the 1/3 method be an equitable means for distributing marital income. Until that day comes, there may be more balanced formulas for allocating marital income. I will review those methods in future publications.

Jim McCusker, CPA, is a certified financial planner. He can be contacted at (978) 256-1323, or by email at James@McCuskerAssociates.com.

"If your outgo exceeds your income, your upkeep will be your downfall."

Unknown

"JUST BECAUSE THEY'RE MARRIED"
The Emerging Field of Postnuptial Agreements & Mediation to Stay Married

By Laurie Israel

There is a veil of silence that surrounds every married couple. Spouses express loyalty by not complaining about their partner or their marriage. People feel ashamed if other people know there are problems in their marriage. People often feel that they are the only ones with an imperfect marriage.

Why Not Learn How to Make Your Marriage Work? People use books and take classes to learn everything – how to kayak, how to use a computer program, skiing, painting with oils – the list is endless. A marriage is one of the most important aspects of one's life. And yet when a marriage is suffering, and needs to be fixed, somehow people don't tend to seek the knowledge and education that would help put the marriage back on the right track.

Marriage is a complex and difficult institution. A lifetime can be a very long time. People change. Life poses new challenges and setbacks, and a marriage can encounter difficulties as a result. To be sure, it is often not a good idea to discuss one's marital problems with friends or relatives for a number of sound reasons. But this veil of silence leaves the married couple in the very difficult position of trying to navigate this land of complexity and difficulty with little to fall back on except the mythology and societal expectations of what a "good" marriage is.

Fortunately, many married couples actively address this problem by seeking individual psychological therapy and/or marital counseling at different times during their married lives. It is a very good thing to address an institution that is complex, lifelong and fraught with difficulties. Getting assistance outside the marriage can help couples get through tough times, and also provide tools for communication and change. Outside resources can also assist couples who have made the decision to terminate their marriage to have a fair and effective divorce leading to a peaceful and productive "aftermarriage."

There is a veil of silence that surrounds every married couple.

There is no substitute for the training, skill and experience of mental health professionals. They have a particular skill set that can be invaluable in assisting people in sorting out personal and couples problems, and often can provide help in a foundering marriage.

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The best marriage book I know of for marriages is a slim, out-of-print book by George Pransky, Ph.D., entitled "The Relationship Handbook." It is clear, succinct, and can be the basis of mutual study by a married couple. You find used copies of this book (also under the name "Divorce is Not The Answer" in an earlier printing) on the internet.

How a Lawyer Can Help There is also a certain realm of marital problems that can be most effectively addressed by a lawyer. These mainly deal with financial concerns and stress and conflict relating to legal rights and responsibilities of the married couple. These "legal" problems often spill into and contaminate the good will and love between spouses. Lawyers are generally trained and experienced in financial matters.

There is no substitute for the training, skill and experience of mental health professionals.

Marriage is both a financial and personal partnership. Divorce entails the dismantling of both. Divorce lawyers generally have a deep understanding of personal finances and business gained during law school and afterwards, during their practice of divorce law. The rules on divorce are quite clear, and therefore, a divorce lawyer can generally give a client a good "read" on the probable financial terms of his or her divorce.

Estate planning lawyers and probate lawyers, too, are experts in financial matters. Estate planning lawyers have a deep knowledge of all the investments and assets a person or a couple can have, from the family home to interests in limited liability companies and intellectual property rights. These lawyers are conversant in the rules of inheritance and marital rights upon death. It is helpful to consult with both types of attorneys when a marriage is in trouble due to financial or security issues.

A Troubled Couple Should Use All the Resources Available The problem is that people in troubled or difficult marriages either consult with no one (until it is too late). Or they may consult with mental health professionals first. But if that process fails, the couples will assume that their marriage is not viable, and will each consult with an attorney with the aim of divorce. Unfortunately, many attorneys will not realize that this divorce might be reversible, and begin "execution mode" with the legal and fact-finding work that makes the divorce move forward. A good divorce attorney should really take that first step of probing with the client whether the divorce is inevitable, or whether continued work can be done by the married couple to revitalize their marriage.

That's where "marital mediation" or "mediation to stay married" can come into play. But first a little history of why this powerful technique has been so little utilized and is only now becoming known to the general public.

A Brief History of Contracts Between Spouses Until recently, the legal acceptance of prenuptial and postnuptial agreements (agreements made before or after the marriage) was in question. This was the case for a number of reasons. Prenuptial agreements were disfavored, as being against "public policy." This public policy was to financially support a wife in marriage, the wife being generally the non-moneyed person who waived rights in a prenuptial agreement. Also, a prenuptial agreement affects the mutual feelings between a couple right before the marriage takes place, so that it was deemed to work counter to the ultimate success of a marriage.

With respect to postnuptial agreements, prior to the mid-twentieth century, husbands and wives were considered to be one person – the husband. Therefore, since you cannot have a contract with "yourself," there could be no binding postnuptial contract between husband and wife.

During the twentieth century, case law gradually changed and prenuptial agreements were eventually permitted in most jurisdictions. In these agreements, future spouses could contract away and modify property rights which would have been theirs under law once they got married, but with very strong safeguards of fairness imposed. (See infra.) So even though prenuptial agreements were considered dangerous (and rightly so), they were permitted. But there was still little or no acceptance of postnuptial agreements, because it was thought that a contract between husband and wife was much more potentially harmful after the marriage took place.

A Double-Edged Sword The potential harm inherent in prenuptial (and postnuptial) agreements is borne out by human experience. Negotiating and putting into effect a prenuptial agreement on the eve of a marriage is a very difficult and sensitive thing. There are often hurt feelings, tears shed. At the heart of it, a party is taking away something from his or her spouse. It is rarely a level playing field, and the negotiations can sometimes be so damaging to the relationship that it makes a divorce much more likely to take place. That's certainly not the result anyone wants.

The problem is that people in troubled or difficult marriages either consult with no one (until it is too late).

I liken a prenuptial agreement to a double-edged sword – if not done in appropriate cases it can harm the marriage. But if done unskillfully or roughly it can also harm the relationship and make divorce much more likely. Sensitive legal practitioners are careful to make a prenuptial agreement as least restrictive as possible. Many of us build "sunset" provisions into the agreement so that the restrictions (or some of them) disappear over time or after there are children of the marriage. Some of us carve out areas of "marital

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enterprise" in the agreements where typical prenuptial agreement restrictions in divorce rights do not apply, and the normal factors, instead - length of marriage, relative financial resources, potential for inheritance - will be applicable in case of divorce. I will only work on a prenuptial agreement for a client in a case in which I think it would help rather than hurt a marriage.

What About Postnuptial Agreements? Prenuptial agreements are inappropriate in most cases. They are difficult to enter into and require legal counsel for each party as described below. As a result, most people do not enter into prenuptial agreements prior to a marriage, even if there might have been a need to (or reason to) enter into one. But what if there is no prenuptial agreement (as is the usual case) and a couple runs into a significant dispute that really comes down to problems that are essentially money or financial conflicts after their marriage?

Courts in many jurisdictions around the United States are beginning to enforce postnuptial agreements.

For instance, the marriage is struggling, and one party is about to come into an inheritance. The spouse who will receive the inheritance may want to settle his or her rights regarding the inheritance. Or one party is an entrepreneurial risk-taker who needs marital funds for a business venture, and the other spouse wants to live conservatively because they are both close to retirement age. Or one party has significantly more assets than the other, it is short-term marriage, the ultimate success of the marriage is in question, and the moneyed spouse would like to pursue the marriage without having a longer marriage be held against him or her in property division if the marriage fails.

Often the problem arises when each of the spouses have children of a first marriage, and a prenuptial agreement was not done at the time of marriage. The spouses now realize that they want to make sure their own children have at least some of their premarital and marital assets when they die, while still perhaps wanting to share some of their assets with their second spouse.

Can something be done to accommodate the styles and wishes of each of the parties? Is there a way to allay their fears and conflicts to allow the marriage proceed without divorce? If nothing is done, these conflicts can have a detrimental effect to an otherwise sound marriage and can lead to divorce. But can a postnuptial agreement be legally binding?

Courts in many jurisdictions around the United States are beginning to enforce postnuptial agreements. In Massachusetts, there is no specific ruling permitting them. However, there is one case on postnuptial agreements in which in dicta, the Supreme Judicial Court

implied that under certain conditions postnuptial agreements might be permitted. In that case, Fogg v. Fogg, 409 Mass. 531 (1991), the Supreme Judicial Court held that the particular postnuptial agreement in question was unenforceable on account of bad faith. (In Fogg, the Court found that the wife initiated the agreement in which she received property in order to gain a better position in the divorce, which she filed a short time later.)

While not ruling beyond the facts presented in the Fogg case, the Court left the door open to possible validity of postnuptial agreements in the future. Reading between the lines (and adding the rules for a valid prenuptial agreement), a postnuptial agreement would need to be free from fraud, bad faith and coercion. It would need to be fair at the time of the contract, and fair at the time it goes into effect. Another requirement of a postnuptial agreement (as with prenuptial agreements) is that it must not strip a spouse of essentially all his or her marital rights.

Should Negotiations Always Result in a Written Postnuptial Agreement? Very few attorneys in Massachusetts are writing postnuptial agreements, Of those who do, I have seen agreements that range between the standard "Separation Agreement" with the title replaced with "Postnuptial Agreement" and the standard "Prenuptial Agreement," again with the title changed to "Postnuptial Agreement." My sense is that a postnuptial agreement is very sensitive – even more so than a prenuptial agreement (which in itself entails a very difficult, sensitive process). Often, postnuptial legal negotiations between spouses may result in non-written understandings or changes of title holding of assets. Even though a non-written "understanding" is not legally binding, it may be personally or morally binding to the parties and helpful in relieving conflict and permitting them to move forward. And that is what's important.

If the negotiations result in a written agreement, it should be done with the same formalities as a prenuptial agreement (as described above), and each party should be separately represented by a lawyer. Because of the sensitivity involved, it is probably best for an attorney to work with both the parties in setting forth the terms of the agreement as a neutral mediator with the parties' separate counsel "in the wings" during the mediation process.

Often, postnuptial legal negotiations between spouses may result in non-written understandings or changes of title holding of assets.

Issues that might be worked out in a written agreement (or by enhanced personal understanding) include steps that can be taken in holding or title to property, transfers to

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Mediation to stay married offers couples a safe place to work their way through sustaining (or dissolving) their marriage.

trusts, agreements to make testamentary transfers for the benefit of children or others. Limitations on spending or borrowing can be set. Financial accounts and assets can be separated. Talking about these issues with a lawyer-mediator – even without entering into a formal, written agreement – can be extremely helpful.

The rules of divorce can be explained so that the concerned spouses can understand what to expect if the divorce occurs. This knowledge, in itself, may be enough to permit the marriage to proceed. Knowing your rights in divorce can be very empowering to an ongoing marriage, because it can help provide relief from stress and uncertainty. These rules are complex . You can get a sense of what's taken into account by reading the many factors listed in M.G.L. chapter 208, section 34.

Mediation to Stay Married The best place for a married couple to start working through the legal understanding and decisions that they need to make to potentially sustain and continue their marriage is to find a lawyer/mediator. A good place to find one is at the web sites for the Massachusetts Council On Family Mediation (mcfm.org) and the Massachusetts Collaborative Law Council (massclc.org). A couple seeing a martial counselor or in personal therapy should also continue with these efforts. And it is very helpful continue to read books about marriages (together) while you are working on your marriage. Use whatever tools are available.

Mediation to stay married offers couples a safe place to work their way through sustaining (or dissolving) their marriage. It's voluntary, neutral and non-adversarial, and led by an attorney/mediator, who will help the couple define areas of conflict and find mutual solutions. In a non-threatening and comfortable setting the mediator will set the stage for frank discussions. If the mediator is an attorney, the parties will have the benefit of legal insights into their problems.

What is it really like for a lawyer to assist clients in resolving problems during their marriage? It is actually quite daunting. The responsibility of addressing marital problems at a very difficult point in the couples' lives is enormous. It is many times more difficult than assisting a client with a prenuptial agreement. The attorney mediator is very mindful of doing what is needed so that the marriage will be helped and not hurt.

Mediation is a neutral process. It is not adversarial. It tends to achieve results quickly with immediate, concrete solutions. Aside from dealing with financial issues, it can address sharing of household and parental responsibilities. Once the big items are agreed to (e.g., what assets a spouse may be limited to in funding his or her new business

venture), often the other personal issues and marital conflicts can quickly resolve. Communication stalemates and misunderstandings can be worked out. Unproductive patterns of behavior can be identified by the neutral. Aside from being legal technicians, attorney-mediators have a great deal of "people knowledge" from their practice of law, which can be a powerful force in the mediation context.

As a result, postnuptial mediation (also known as "Marital Mediation" and "Mediation to Stay Married"), where irrevocable steps towards divorce have not been taken, can be very effective and powerful resource for a married couple in trouble. Working with an attorney/mediator may be a very useful step for a married couple and may let a marriage live to see a new day.

Laurie Israel is an AV-rated attorney who has practiced in Coolidge Corner, Brookline, Massachusetts, for 16 years. Laurie can be contacted at 617-277-3774, or at lisrael@socialaw.com. She invites you to visit her web sites at www.laurieisrael.com and www.mediationtostaymarried.com

"What counts in making a happy marriage is not so much how compatible you are, but how you deal with incompatibility."

Leo Tolstoy

FIRST MEETING OF THE MASS-UMA WORKING GROUP

By Ericka B. Gray

The first meeting of the Massachusetts Uniform Mediation Act (UMA) Working Group, held on September 8, 2006, was attended by approximately 50 representatives of interest groups including the Massachusetts Council on Family Mediation, Association of Family and Conciliation Courts, New England Chapter of the Association for Conflict Resolution, Massachusetts Bar Association, Massachusetts Office of Dispute Resolution, the Massachusetts Trial Court's Standing Committee on Dispute Resolution, and many individual mediators not representing any organizations.

Convened by Israela Brill-Cass, Chuck Doran, Ericka Gray, and David Hoffman, the purpose of the meeting was to begin an open, collaborative process to adapt the UMA to the specific needs of the practice of mediation in Massachusetts prior to what is anticipated to be the third filing of the bill in Massachusetts in the next twelve months. The conveners believe that this is a better approach than drafting a new statute, amending the current one, or passing the UMA without any changes. This follows on the heels of meetings of the Boston Bar Association's Litigation Section ADR Committee's Working Group, which has been involved in efforts to address the confidentiality issue.

The hope of the conveners is that the mediation community in Massachusetts can, through a collaborative process, support a statute with a united voice in the Massachusetts legislature. By doing so, we believe that the ADR community has the best chance of enacting a bill that represents the needs of all mediators and that protects the mediation process.

A web site, www.massuma.com has been established to provide links, resources, articles, information about meetings, minutes, and, it is hoped, a collaborative on-line workspace for the work of the committees that are under development.

Many of the attendees of the initial meeting expressed interest in continued participation and an initial list of committees was established. The areas that need to be addressed in the near future include the process that will be used to achieve both the inclusive collaboration of the mediation community as well as address the suggested time frame; issues of confidentiality, privilege, and the exceptions to such; the definitions of

The hope of the conveners is that the mediation community in Massachusetts can, through a collaborative process, support a statute with a united voice in the Massachusetts legislature.

mediation, mediator, and training requirements; and how such a statute would interact with open meeting and records laws, among other issues.

Committees are in the process of being formed, and input from the broadest spectrum of the Massachusetts mediation community is welcome. Please check the website at www.massuma.com for updates and meeting information.

Ericka B. Gray, DisputEd, has been a mediator and trainer since 1985. She has served as Director of the Middlesex Multi-Door Courthouse, as Director of Professional Services and Senior Mediator with JAMS/Endispute, and as Executive Director of the Academy of Family Mediators. Erica can be reached at 781.643.3577, or info@disputed.com

"It is easier to be a lover than a husband, for the same reason that it is more difficult to be witty everyday than now and then."

Balzac

PUBLIC BENEFITS & DIVORCE
Focusing on SSI & Medicaid

By Neal A. Winston

Recognizing and creating or maintaining public benefits eligibility for an elderly or disabled partner in a divorce or separation can be a critical part of a mediators work in facilitating the parties to come to terms in a marriage dissolution. This article will discuss how to handle the two common programs, Supplemental Security Income (SSI) and Medicaid (called MassHealth in Massachusetts). It will focus on benefits for disabled and aged members of couples, rather than their disabled children, although similar procedures may apply to both categories.

There are two general categories of public benefits programs: "needs based" and "entitlement." Entitlement programs generally do not have non-work income and resource limitations and therefore are not affected by allocation of resources or alimony in couples that break up. In fact, some entitlement Social Security programs recognize and add to the limits of cash benefits for divorced individuals.

However, needs based programs are generally very sensitive to any income or resources available to the disabled or elderly member of a couple, and failure to properly consider and allocate these benefits can result in needless denial and termination of benefits. Attorneys in several states have been found negligent and professionally liable for public benefit eligibility oversight, particularly involving failure to use supplemental needs trusts.

There are two general categories of public benefits programs: "needs based" and "entitlement."

Programs administered by the Social Security Administration are often confused. Individuals who work under the Social Security system, and their dependents and survivors, can receive Social Security Insurance benefits including retirement, disability, wife's and husband's, child's, adult disabled child's, widow's and widower's, divorced spouse, and so on. These are all entitlement programs. Eligibility is based strictly on work credits, family relationship, and sometimes dependency requirements. Assets and other sources of income (other than certain governmental pensions) have no affect whatsoever on Social Security Insurance benefits. Insurance checks arrive on the 3rd of the month or the week of the month that the individual's birth date occurs.

Supplemental Security Income (SSI), is a needs based program administered by the Social Security Administration for the aged, disabled, and blind. No work history is required, although there are residency and citizenship requirements. Countable resources cannot be more than $2,000. for an individual, and countable income reduces the benefit amount dollar for dollar. Consider SSI as a minimum

guaranteed cash income program after taking into consideration all other income. Individuals often receive both Social Security Insurance and SSI (note the similarity of the acronyms, and thus the confusion), as well as other types of entitlement and needs based benefits. The SSI check always arrives or is direct deposited on the first day of the month.

MassHealth is a needs based medical assistance program that is automatically payable if an individual receives any amount of SSI. A companion program for individuals with higher countable income is called CommonHealth. Even if an individual is not otherwise eligible for SSI, the person can also become eligible for Medicaid by either receiving other types of needs based benefits, being a child, disabled and under the age of 65, or 65 and older if the income and asset criteria are met. In contrast, Medicare is the national health insurance entitlement program for individuals who receive Social Security disability insurance for two years or longer, or are eligible for retirement benefits at age 65. Eligible disabled or retired dependents and survivors are also covered under the same criteria.

Resources and income of spouses living together are counted as available to each other (called deeming) for both SSI and MassHealth eligibility. Conversely, if the individuals are separated (other than by medical necessity such as in a nursing home), the income and resources of the other spouse do not count against the eligibility of the recipient. Since providing a direct source of countable income to the recipient will often affect the amount and overall eligibility for needs based public benefits, supplemental Needs Trusts are used as a method for one party to provide support for the other and otherwise minimize the effect of the income.

Programs administered by the Social Security Administration are often confused.

Certain resources such as a principal residence, a vehicle, household goods, and a burial contract are not countable assets for SSI or MassHealth purposes. Certain income based on need, such as Massachusetts Veterans benefits, are also not countable. Income paid "in kind," meaning paid directly by a third party to the vendor of goods or services, only affects SSI payments up to a limited amount each month, and does not affect MassHealth eligibility whatsoever.

When negotiating a separation and divorce, resources and income need to be reasonably allocated, but not to otherwise overly affect the receipt of public benefits that might be needed for minimal subsidence by the divorced or separated individual.

Consider The Following Planning Devices

1. Valid court-ordered divisions of property do not create benefit eligibility transfer penalties;

Continued on next page

2. Certain transfers of property do not cause a penalty, even without a court order. Married individuals can pass property freely between themselves, and then when separated or divorced, the property held by one individual is not deemed to the other;

3. Assets and sources of income can be freely gifted to a disabled or minor child of the recipient spouse without penalty;

4. The home can be gifted to any child without penalty who has lived with and cared for a parent for two years immediately prior to institutionalization;

5. A home can be gifted to a sibling who has held an equity interest in the home for one year or longer prior to institutionalization;

6. One spouse can fund a Supplemental Needs Trust for the benefit of the other spouse without penalty;

7. The ill or aged spouse can also fund a Supplemental Needs Trust for his or her own benefit without penalty under certain conditions;

8. Once a trust is funded, the maximum benefit reduction due to "in-kind" distributions for food or shelter from the trust to the individual receiving SSI is $221. per month in year 2006. There is no reduction for in-kind distributions for MassHealth, or for SSI if not for food or shelter;

9. Purchase of resources such as a home, vehicle, household goods, or a burial contract convert countable to non-countable resources;

10. Payment of loans, personal care contracts with family members, and other "for value" transfers reduce countable assets without benefit eligibility penalty;

11. Gifts to other non-qualified third parties, such as non-disabled adult children, have a maximum three-year disqualification period for SSI. There is no gifting disqualification period for community level MassHealth. Institutional level MassHealth has a more complex gifting disqualification procedure, but there would be no penalty if the gift was made by the healthy spouse after divorce.

12. There is a non-attorney caseworker at each agency that will be reviewing your use of these planning techniques. Complex programs with highly technical legal terminology are open to interpretations that often differ from person to person and office to office with some techniques. Be prepared to support or defend what you do.

Additional benefit program information can be obtained through the Social Security Administration by accessing its operations manual, known as the "POMS". It is found on the Social Security web site, www.socialsecurity.gov under Resources - Our Program Rules - Program Operation Manual System. Medicaid rules can be reviewed by accessing the state regulations found at 130 CMR 505 and 515, et seq.

Neal A. Winston is a partner in the law firm of Moschella & Winston, LLP, in Somerville. He is a Certified Elder Law Attorney (CELA), past president of the Massachusetts Chapter of the National Academy of Elder Law Attorneys, and a member of the Special Needs Alliance, an invitational group of attorneys from across the nation who specialize in Supplemental Needs Trusts and related public benefit eligibility. He can be contacted at (617)776 3300, or naw@moschellawinston.com.

"Nothing can be more cruel than to preserve by violence a union, which at first was made by mutual love, and is in effect dissolved by mutual hatred...."

John Milton
The Doctrine and Discipline of Divorce (1643)

ADR IN THE COURTS

An Update by Christine W. Yurgelun

The current approval of ADR programs by the Trial Court Departments to receive referrals for court-connected dispute resolution services, pursuant to Rule 4(a) of the Uniform Rules on Dispute Resolution (SJC Rule 1:18), expires as of December 31, 2006. **All currently-approved programs need to re-apply if they wish to continue serving as court-connected programs.** Chief Justice for Administration and Management Robert A. Mulligan has announced the (re-)application period is now open; applications are due to the Department Chief Justices by November 17, 2006.

In response to feedback from programs, trial court application procedures have been revised. The process has been bifurcated to provide a streamlined process for those programs which submitted applications in 2004. "New" programs (i.e. not currently approved) must complete a full application; programs which are currently approved need to augment information received in the last application process. The application forms are available at the trial court website at www.state.ma.us/courts/admin/legal.html.

Another modification of the application process was made in response to concerns expressed by some programs and some trial court personnel. Chief Justice Mulligan has announced that the term of the new approvals will be three years. This is a change from the previous approval which was for two years.

Programs seeking to be approved as of January 1, 2007 to receive referrals for dispute resolution services in the Probate and Family Court should submit completed applications to Chief Justice Dunphy no later than November 17, 2006.

Christine W. Yurgelun is an attorney who coordinates court-connected dispute resolution services for the Massachusetts Probate and Family Court. She can be contacted at (617) 788-6600

"Be not the first by whom the new are tried,
Nor yet the last to lay aside the old."

Alexander Pope (1688-1744)

THE PRACTICE OF HUMILITY:
Avoiding the Impulse to Judge Our Clients

By Michael L. Lavender

Mediators, therapists, lawyers, counselors - everyone who works with people in the helping professions has had cause to consider their own very human impulses to judge a client's challenging behavior or destructive, pain-creating attitudes. After all, most of us see our clients at their worst - in profound fear, depression and loss or fear of loss. From that jittery place of derailed perspective, clients often express anger, greed, self-pity, victim-hood, and every conceivable painful human emotion in the most blunt and unsavory ways.

In the context of divorce mediation, this is pretty much the norm, and I must admit that for the first ten years of my sixteen year practice, I was totally unaware of how my private disgust at a client's expression of fear based behavior would create a climate of non-safety in my office.

For the purpose of this article I would like to clarify what I mean by "judging" our clients. I do not mean making an appropriate evaluation of a client's personalities or emotional states of mind, maturity, or other levels of discernment. This allows us to tailor our communications in ways that are most likely to be non-threatening, understandable and appreciated. I am speaking of the experience of "closing our hearts," and the palpable feelings of superiority and botherment that we experience when our clients' behaviors or attitudes push our buttons. While subtly transmitting this form of relational dissonance, mediators can act covertly uncompassionate, detached, and even manipulative. What I am fundamentally speaking about here is the practice of becoming aware of our own ego's getting involved when working with clients.

I don't believe anyone would disagree that mediators are less helpful to clients when we unawarely drift into resistance mode by becoming identified with a stream of judgments toward our clients. This implies to our clients that they don't deserve our compassion. It causes them to feel less safe and trusting of us, and thereby negates any prospect we may have at offering practical solutions or attitudes which could have a positive influence on the direction of our sessions.

So this begs the fundamental question: How do we not judge given our life-long societal conditioning to do just that? First,

Most of us see our clients at their worst.

I think it is useful to recognize that it is unrealistic to suspend judgment 100% of the time. It is also useful not to blame (judge) ourselves when we inevitably forget and act from our less-than-loving selves in our professional roles.

Second, I believe it is helpful to gain a greater understanding at least two of the ego's misrepresentations of the emotional realities governing how clients in pain and

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fear will become non-responsive or threatened by a mediator's expression of what I will call either unconscious judgment or intentional judgment.

Unconscious Judgment One of the ego's most glaring distortions can be its blind failure to see when it can and does act in the same fearful and unhelpful ways as the behavior it judges. The fact that a mediator is bothered or emotionally charged by a client's particular behavior is compelling proof that the ego is running the show while in denial of its own dark side.

After all, only people who are themselves in pain create pain for others.

Think about it. If I am speaking or behaving in a kind of self-righteous "I'm-the-professional-and-I-know-where-it's-at" demeanor toward a client regarding what he or she said or did, or even mildly judging them for some hurtful attitude, what purpose does that serve? It serves to elevate and strengthen a kind of false "me" that is my ego and thereby diminishes the client in a way that makes him or her perceive me as a potential enemy rather than an ally. I have very little persuasive influence on a client who is invalidated by me in this way.

So what would impede my ability to express compassion in the face of a client's greed, victim-hood or aggression? Well, that would be my inability to see that I am absolutely capable of the same behavior in this or a similar context. Seeing the truth of this, I would have to either judge both of us or neither of us. Acknowledging that I am capable under this or other imagined circumstances of expressing every realm of negative human emotion infuses my work with humility. It softens me, making me more tolerant toward the human imperfections of others.

All of us suffer in our personal and professional relationships as a result of our ego's constantly threatened world view. Fear, unhappiness, depression, and conflict are the ego's most delicious sustenance. They can often have overriding power in obscuring a client's deeper integrity. It is of great value for a mediator to offer as a primary strategy an attempt to dissolve or soften a client's fearful shell by training one's self to interpret a client's unskillful and unconscious behavior as deserving of compassion, rather than blame, judgment and condemnation. After all, only people who are themselves in pain create pain for others. The key to doing this is humility - appreciating that as human beings we are all at times inescapably caught in the grip of our ego's insanity.

Intentional Judgment Intentional judgment is an active belief that our closed heart and subtle or forceful negativity toward our clients is justified by the inappropriateness of their behavior and the resulting pain they inflict on others. This approach presupposes that a harsh, stern, "put-the-the-clients-in-their-place" and blame-laden correction from the mediator will "jar" and "awaken" them in the direction of positive change.

In the quasi therapeutic context of mediation this approach is totally without value. It has the result of feeding clients' already present feelings of unworthiness, badness, and vulnerability, and results in withdrawal, shut down or worse, e.g., counter attack. Firm boundaries and opinions by the mediator - even those which are divergent to clients' views - can always be expressed respectfully.

I am not suggesting that unconsciously motivated behavior that wreaks havoc on others should be without real world consequences. I am simply suggesting the in the context of professional mediation, both intended and unintended negativity by a mediator in the form of closed-hearted judgments run counter to the objective of pointing our clients in the direction of understanding and healing.

Attorney Michael L. Lavender owns and operates Center For Divorce Mediation located in Barnstable Village, MA. He can be reached at 508-362-1189, or <ML@CapeMediation.com>, or by visiting www.CapeMediation.com

"It is unwise to be too sure of one's own wisdom. It is healthy to be reminded that the strongest might weaken and the wisest might err."

Mohandas K. Gandhi

WHAT'S NEWS?

Chronologically Compiled by Les Wallerstein

Washington State Upholds Same-Sex Marriage Ban In an angrily divided 5-to-4 decision, the Washington Supreme Court upheld a state law banning same-sex marriages. The justices issued six opinions, with some in the majority emphasizing that the Legislature remained free to extend the right to marry to gay and lesbian couples. The four dissenting justices said the majority relied on speculation and circular reasoning to endorse discrimination (Adam Liptak and Timothy Egan, New York Times, 7/27/2006)

Parental Rights Upheld For Lesbian Ex-Partner In a unanimous decision, the Vermont Supreme Court ruled that Isabella Miller-Jenkins has two mothers. The court rejected a host of arguments from Isabella's biological mother, Lisa Miller, that her former lesbian partner, Janet Jenkins, should be denied parental rights. In 2000, Miller and Jenkins entered into a Civil Union in Vermont and Isabella was born in 2002. Sixteen months later her mothers separated and Miller moved back to Virginia her daughter. In 2005 Miller said she no longer considered herself a lesbian. The Vermont decision conflicts with a lower court ruling in Virginia that granted sole custody of Isabella to Miller, based on Virginia's Marriage Affirmation Act, which makes same-sex unions from other states "void in all respects in Virginia." Miller's lawyer predicted that the U.S. Supreme court would eventually resolve the dispute. (Adam Liptak, New York Times, 8/5/2006)

The New Gender Divide At virtually every level of education fewer Americans are marrying, but the decline is most pronounced among men with less education. About 18 percent of of men ages 40 to 44 with less than four years college have never married. That is up from about 6 percent a quarter-century ago. (Eduardo Porter and Michelle O'Donnell, New York Times, 8/6/2006)

A Father May Share Polygamy Beliefs with his Daughter The Pennsylvania Supreme court ruled that a father may teach his 13 year old daughter about his belief in polygamy despite his ex-wife's objection. The state's highest court held that he had a constitutional right to express his beliefs about plural marriages and multiple wives even though bigamy is illegal. The girl's mother testified that his interest in polygamy broke up their marriage, and that he might introduce their daughter to men in preparation for marriage at age 13. The divorced parents have joint custody of the child. (AP, New York Times, 9/29/2006)

Rhode Island Couple Win Same-Sex Marriage Case A Massachusetts Superior Court judge has ruled that same-sex couples who live in Rhode Island can marry in Massachusetts. Since Rhode Island does not prohibit same-sex marriages by statute or in

its constitution, same-sex couples are allowed to marry here. The Massachusetts attorney general, Thomas F. Reilly said he would not appeal the ruling. Rhode Island's attorney general said the marriages would not be valid in his state. Rhode Island is the only state with no express prohibition of same-sex marriage. (Katie Zezima, New York Times, 9/30/2006)

MA Family Court Judge Issues an Arrest Warrant Norfolk Probate and Family Court Judge Paula Carey issued a warrant for Whitney Houston's husband, Bobby Brown's arrest, after the singer failed again to show up in court to address his overdue child support payments. "Whether or not he's going through a divorce doesn't negate the fact that he still owes child support to two children that he had prior to his marriage," said Judge Carey. (Carol Beggy & Mark Shanahan, Boston Globe, 10/3/2006)

Dead Bachelors in Remote China Still Find Wives To insure a son's contentment in the afterlife, some grieving parents will search for a dead woman to be his bride, and once a corpse is obtained, bury the pair together as a married couple. The rural folk custom, startling to Western sensibilities, is known as "minghun," or afterlife marriage. Scholars who have studied it say it is rooted in the Chinese form of ancestor worship. (Jim Yardley, New York Times, 10/5/2006)

Women Face Greatest Threat of Violence at Home The World Health Organization's most comprehensive and scientific international study has confirmed that violence against women by their live-in spouses or partners is a wide-spread phenomena, both in the developed and developing world, as well as in urban and rural areas. Based in interviews with nearly 25,000 women, W.H.O. researchers found that rates of partner violence ranged from a low of 15 percent in Yokohama Japan, to a high of 71 percent in rural Ethiopia. The W.H.O. study provides an unusual amount of quantitative, scientific data on the subject. In the USA, national surveys by the Centers for Disease Control and Prevention have found that about 25 percent of women said that they had been physically or sexually assaulted by a spouse, partner or date. (Elizabeth Rosenthal, New York Times, 10/6/2006)

A California Court Upholds Same-Sex Marriage Ban In a 2-to-1 decision, a California appeals court reversed a lower court's finding that a same-sex marriage ban violates California's Constitution. The attorney for San Francisco said the city and other plaintiffs would appeal to the California Supreme Court. (Jesse McKinley, New York Times, 10/7/2006)

A Maximum Security Marriage While a man incarcerated in the state's maximum security prison in Massachusetts has the right to marry while behind bars, he can't put a

Continued on next page

ring on his bride's finger and kiss her. After learning about that restriction the prisoner went to court to challenge it. After a Superior Court judge upheld that policy the prisoner argued to the Appeals Court that his constitutional rights were being violated, but the court disagreed. "A prisoner has no constitutional right to 'unfettered visitation,' much less to visitation that includes physical contact," the court said. (Massachusetts Lawyers Weekly, 10/9/2006)

Its Official: To Be Married Means to Be Outnumbered Married couples, whose numbers have been declining for decades as a proportion of American households, have finally slipped into a minority. Figures released by the Census Bureau found that 49.7 percent, or 55.2 million of the nation's 111.1 million households in 2005 were made up of married couples - with and without children - down from m ore than 52 percent five years ago. The numbers by no means suggest that marriage is dead... the total number of married couples is higher than ever.... Among Americans ages 35 to 64, married couples still make up a majority of all households. (Sam Roberts, New York Times, 10/15/2006)

CORRECTIONS

Family Mediation Quarterly
Vol. 5, No. 3 - Summer, 2006

Past-president Laurie S. Udell was inadvertently omitted from the Directorate on page 35. Per MCFM by-laws, immediate past-presidents serve as un-elected directors and members of the executive committee.

For inexplicable reasons (read software "upgrade") there were two printing errors. In all editions "00" precedes the heading "MCFM NEWS" on page 29, and some copies were printed without text on the inside front & back covers. If your FMQ has no inside front & back cover text please contact the editor.

The FMQ welcomes information about errors

Please email the editor at <wallerstein@socialaw.com>

WHAT MAKES MCFM MEMBERS THE BEST INFORMED MEDIATORS?

ATTENDING FREE PROFESSIONAL DEVELOPMENT PROGRAMS!

Bankruptcy Issues in Divorce, Mark G. DeGiacomo, Esq. • **Alimony**, Judge Edward Ginsburg • **Business Valuations,** Robert Sharkansky • **QDROs** Ed Berger • **Health Insurance & Divorce,** Ruth Budd, Esq. & Clare McGorrian, Esq. • **Family Law: Legislative Update,** Fern Frolin, Esq. • **Legal Rights of Lesbian & Gay Couples: Co-parenting & Adoption,** Joyce Kauffman, Esq. • **Court-Connected Dispute Resolution Services,** Christine W. Yurgelun, Esq. • **Stock Options,** Chocteau Merrill, Esq. • **Mediation & the Unauthorized Practice of Law,** David Hoffman, Esq. • **Power Imbalance in Mediation,** Diane Neumann, Esq. • **Step Parenting,** Pat Pappernow, Ed.D. • **Mortgage Mysteries,** Robert Loss and Dale Evans • **Alimony Formulas,** Jim McCusker, CPA • **Health Insurance Coverage After Divorce,** Clare D. McGorrian, Esq. • **Psychology for Mediators,** Sandford Portnoy, Ph.D. • **You Got The Gold Mine & I Got The Shaft: A Financial Planning Forum,** Susan Dickie, CPA, CFP, Jim McCusker, CPA, CFP, Barbara Shapiro, CFP, CDFA, & Paulette Speight, Financial Therapist • **The Future of Marriage, Divorce & Mediation: How Same-Sex Marriage Will Change the Practice of Family Mediation,** Maureen Monks, Esq. & Cindy Bauman, Esq. • **The Mediator Experience: Reflections on Building a Successful Mediation Practice,** John Fiske, Esq., Janet Weinberger, Esq., Howard Goldstein, Esq., & Jerry Weinstein, MS • **Immigration Primer for the Family Mediator,** Monique Kornfeld, Esq. • **Elder Mediation,** Rikk Larsen, MBA, & Blair Trippe, MBA • **Zen Listening,** Rebecca Shaffir • **How Should Mediators Deal With Financial Statements?** John Fiske, Esq., Doris Tennant, Esq. & Les Wallerstein Esq. • **Credit in Divorce,** Bob Loss & Dawn Evans • **The Urge to Merge vs. The Drive To Survive,** Howard I. Goldstein, Esq. • **Paternity & Mediation,** Alison E. McCrone, Esq. • **Tax Issues that Mystify Mediators,** James McCusker, CPA & Dennis O'Leary, CPA. • **Divorce and the Special Needs Child,** Neal A. Winston, Esq. & Dafna Krouk-Gordon • **Domestic Violence Issues in Divorce Mediation,** Cynthia Bauman, Esq. & Janet Donovan, Esq.

TAKE ADVANTAGE OF YOUR MEMBER BENEFITS. COME TO THE NEXT MEETING & BRING A GUEST!

MCFM NEWS

NEW WEB SITE ONLINE!

MCFM'S web site <www.mcfm.org> has just completed the most significant upgrade since its creation! For the first time there is a members only section. Members can now update their internet presence on the referral directory at any time, from their their own computers. All members should have received passwords, and if you've forgotten yours please contact Dee Fraylick at <masscouncil@mcfm.org>. The newest feature is an interactive search function for all posted issues of the Family Mediation Quarterly, available to everyone. An interactive search function has also been installed for all back issues of MCFM Newsletters & News (1983 - 2002) issues of the MCFM Newsletters and News, but this is available for members only. **These two search functions allow members immediate access to the largest archive of mediation-related articles in Massachusetts.** Take the time to familiarize yourself with the newest opportunities available.

NEXT EXECUTIVE COMMITTEE &
BOARD OF DIRECTORS MEETING

Monday, November 13, 2006
5 PM: Executive Committee
6 PM: Directors

In the Office of Debra L. Smith
134 Main Street
Watertown, MA 02472
Phone: (617) 924-6728
Email: lawdeb@aol.com

Directions to Deb's office are available online at www.lawdebsmith.com

PLEASE EMAIL ANY AGENDA ITEMS FOR CONSIDERATION TO:
Lynda J. Robbins at <ljrobbinsesq@verizon.net>, or to any other officer,
all of whom are listed in the DIRECTORATE on page 35.

MCFM's NEXT, FREE
PROFESSIONAL DEVELOPMENT WORKSHOP

DOMESTIC VIOLENCE ISSUES IN DIVORCE MEDIATION

Date: Wednesday, December 6th
Time: 4:00 p.m. to 6:00 p.m.
Place: Needham Public Library
Community Room, 1139 Highland Avenue

SPEAKERS: Cynthia Bauman, Esq., Senior Supervising Attorney, Family Law Unit, Legal Assistance Corporation of Central Massachusetts; Coordinator of Court Programs, Community Dispute Settlement Center, and **Janet Donovan, Esq.,** Manager, Legal Advocacy Program, Casa Myrna Vazquez, Inc..

Need Directions??? Go to www.mcfm.org

always
MCFM MEMBERS ARE ∧ WELCOME TO BRING GUESTS!

MEDIATION PEER GROUP MEETINGS

Merrimack Valley Mediators Group: We are a group of family law mediators who have been meeting (almost) monthly since before the turn of the century! The criterion for membership is a desire to learn and share. Meetings are held at 8:15 AM on the last Tuesday of the month from January to June, and from September to November, at the office of Lynda Robbins, 11 Summer Street, Chelmsford. Please call Lynda at (978) 256-8178 or Karen Levitt at (978)458-5550 for information and directions. All MCFM members are welcome.

Metro-West Mediators Group: The Metro-West group (usually) meets on the first Friday of the month at the home of S. Tracy Fischer, located at 120 Cynthia Road, in Newton. Monthly meetings begin at 9:15 AM and are open to all MCFM members. Please call (617) 964-4742 or email <tracyfischer@rcn.com> for confirmed dates and directions.

ANNOUNCEMENTS

INVITES YOU TO ITS FALL GALA
THE SPIRIT OF MEDIATION

November 15, 2006, 5:30-9:00 PM
Cambridge, MA
A Reception, Silent Auction, Dinner & Program

Honoring Melissa Brodrick, Brad Honoroff & Jane Honoroff
with Community Peacemaker Awards &
Public Service Recognition of Senator Steven Tolman

Email: CDSCINFO@communitydispute.org

NE ACR MASTER CLASS
SOCIAL PSYCHOLOGY & MEDIATION:
WE PRACTICE WHAT THEY TEACH
November 17, 2006, 12:30 to 4:30 PM
Boston University Conference Center, Tyngsboro, MA

You may have heard the terms: Naïve realism. Reactive devaluation. Biased assimilation. Loss aversion. Groupthink. Now learn how to apply to your practice what social psychologists teach: How and why do individuals and groups act as they do? and How can you apply that information to your mediation practice? NE-ACR is pleased to invite you to participate in an interactive Master Class led by **Dr. Julie Turchin,** a social psychologist from Stanford and **James E. McGuire,** a mediator with JAMS.

Register at www.neacr.org or on-site.
Registration includes lunch & program materials.
NE ACR Members: $125
Non-members: $150*
Students: $75
* (on the spot discount for becoming a NE ACR Member)

THE FMQ WANTS YOU!

The Family Mediation Quarterly is always open to submissions,
especially from new authors.
Every mediator has stories to tell and skills to share.

To submit articles or discuss proposed articles
call Les Wallerstein (781) 862-1099
or email wallerstein@socialaw.com

ITS TIME TO SHARE YOUR STORY!

HELP BUILD AN ARCHIVE!

In the early summer of 2006, the Healey Library at the University of Massachusetts in Boston agreed to create an archive of Massachusetts dispute resolution materials. Two key goals are to preserve our history and make materials available for research purposes. To date six boxes have been donated by John Fiske and Jerry Weinstein.

The scope of interest in Massachusetts mediation materials is broad. It ranges from originals and copies of meeting agendas and minutes, budgets, treasurer's reports, committee reports, correspondence, publications, fliers, posters, photographs, advertisements and announcements.

We need your help to maximize this opportunity to preserve the history of mediation in Massachusetts. Please rummage through your office files, attics, basements and garages. If you discover materials that you are willing to donate please contact Les Wallerstein at wallerstein@socialaw.com.

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COMMUNITY DISPUTE SETTLEMENT CENTER
Building Bridges o People to People o Face to Face

60 Gore Street
Cambridge, MA 02141

Established in 1979, the CDSC is a private, not-for-profit mediation service dedicated to providing an alternative and affordable forum for resolving conflict. CDSC also provides training programs in mediation and conflict management to individuals and organizations. For more information please contact us at (617) 876-5376, or by email: cdscinfo@communitydispute.org, or at our web site: www.communitydispute.org.

MASSACHUSETTS COLLABORATIVE LAW COUNCIL, INC.

The MCLC offers legal representation to people in conflicts who share a commitment to resolving disputes without litigation. To find out more, or to locate a collaborative lawyer near you, visit MCLC on-line at www.massclc.org.

"Do not do unto others as you would that they should do unto you. Their tastes may not be the same."

George Bernard Shaw

JOIN US

MEMBERSHIP: MCFM is open to all practitioners and friends of family mediation. MCFM invites guest speakers to present topics of interest at four, free, member meetings annually. Educational meetings often satisfy certification requirements. Members are encouraged to bring guests at no cost. MCFM members also receive the Family Mediation Quarterly and are welcome to serve on any MCFM Committee.

All members are listed online at MCFM's web site, and all listings are "linked" to a member's email. Annual membership dues are $90, or $50 for full-time students. Please direct all membership inquiries to **DeLaurice Fraylick at <masscouncil@mcfm.org>.**

REFERRAL DIRECTORY: Every MCFM member is eligible to be listed in MCFM's Referral Directory. Each listing in the Referral Directory allows a member to share detailed information explaining her/his mediation practice and philosophy with prospective clients. The Referral Directory is printed annually and mailed to all Massachusetts judges, and to each listed member. **The most current referral directory is also available online at www.mcfm.org.** The annual Referral Directory fee is $60. Please direct all referral directory inquiries to **Jerry Weinstein at <JWeinsteinDivorce@comcast.net>.**

PRACTICE STANDARDS: MCFM was the first organization to issue Practice Standards for mediators in Massachusetts. To be listed in the MCFM Referral Directory each member must agree to uphold MCFM's Standards of Practice. MCFM's Standards of Practice are available online at **www.mcfm.org.**

CERTIFICATION & RE-CERTIFICATION: MCFM was the first organization to certify family mediators in Massachusetts. Certification is reserved for mediators with significant mediation experience, advanced training and education. Extensive mediation experience may be substituted for an advanced academic degree. MCFM's certification and re-certification requirements are available on-line at **www.mcfm.org.**

Every MCFM certified mediator is designated as such both online and in the printed Referral Directory. Certified mediators must have malpractice insurance, and certification must be renewed every two years. Only certified mediators are eligible to receive referrals from the Massachusetts Probate & Family Court through MCFM.

Certification applications cost $150 and re-certification applications cost $75. For more information contact **Lynn Cooper at <lynnkcooper@aol.com>.** For certification or re-certification applications contact **DeLaurice Fraylick at <masscouncil@mcfm.org>.**

DIRECTORATE

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