MCFM

Family Mediation Quarterly

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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.

Family Mediation Quarterly
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MCFM *INSPIRING SETTLEMENTS SINCE 1982* MCFM

From The President: Lynda J. Robbins

Don't the seasons pass so quickly? As you read this, we will have concluded our 6th MCFM Family Mediation Institute, once again bringing knowledgeable speakers and interesting topics to our members and generating great discussions and networking. Of course, we don't just do this once a year, watch for notices of upcoming Professional Development Programs and plan on attending.

This year's John Adams Fiske award for excellence in mediation was awarded to Barbara White, one of our founding MCFM members and a true inspiration to us all. Congratulations and thanks, Barbara!

As we look forward to the holiday season and get busy, don't forget to take the time to regularly reflect on and develop the mediation skills that improve our practice and our lives. Add one or more of these books to your "wish list:"

- **Bringing Peace Into the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution** by Daniel Bowling and, our own, David Hoffman.
- **Taking the War Out of Our Words** by Sharon Strand Ellison, lessons to live by.
- **Beyond Reason: Using Emotions as You Negotiate** by Roger Fisher and Daniel Shapiro, who shared his insights with us at a prior Institute.
- **Mediating Dangerously: The Frontiers of Conflict Resolution** by Kenneth Cloke, another former inspirational Institute keynote speaker.
- **Narrative Mediation: A New Approach to Conflict Resolution** by John Winslade and Gerald Monk—explore different mediation styles.

And, I'm sure many of you could quickly add to this list of great references! Share your favorites with us and use them to start discussions with your colleagues. A great way to brighten the winter season.

Enjoy!

EDITOR'S NOTICE

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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 affect 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 online 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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CURRENT STATUS OF SAME-SEX MARRIAGE IN AMERICA

An Overview by Mary L. Bonauto

Editor's Note: *This article was adapted from Attorney Bonauto's keynote address to the 2007 MCLE Family Law Conference in Boston.*

My goal this morning is to provide a capsule summary of where we are and where we are going with respect to the familial relationships of same-sex couples, both in Massachusetts and nationally.[1]

The short answer of where we're headed, in my view, is to marriage. It will take some time, but in my view the rest of the country will catch up with Massachusetts. Today is not the time for a strategy discussion. However I want to reflect briefly about certain aspects of living through this particular civil rights movement.

First, there is overwhelming evidence about just how enormous a difference marriage makes in people's everyday lives. I suspect virtually all of you have now seen this first hand. There are now nearly 9000 married couples in Massachusetts who prior to May 17, 2004 were barred from marrying. The outbreak of happiness that began then remains alive and well.

Second, the process of seeking these rights over the last 15 years has had the effect of moderating the views of many Americans on the broader issue of whether same-sex relationships deserve legal recognition. We do not yet have a majority, but more and more Americans understand that it is wrong to treat committed same sex couples as legal strangers. In 1996, only 27% of Americans nationwide supported marriage equality. In 2006, that number was 39% and the Pew organization now reports support for marriage rights at 46% nationally. [2]

Third, I believe it is challenging for all of us – married couples, lawyers, judges, clients, advocates – to navigate this period of change. For example, it is difficult, but also crazy-making, to be married at the state level and then suddenly unmarried at the federal level because of Congress' 1996 law disrespecting marriages of same-sex couples for all federal purposes.

[1] GLAD's materials for the conference also address parenting and other family issues. Contact GLAD if you would like a copy.

[2] See generally Pew Research Center, *Most Want Middle Ground on Abortion: Pragmatic Americans Liberal and Conservative on Social Issues* (2006) <http://people-press.org/reports/display.php3?ReportID=283>; Pew Research Center, *Strong Support for Stem Cell Research: Abortion and Rights of Terror Suspects Top Court Issues* (2005) <http://people-press.org/reports/display.php3?ReportID=253>; Pew Research Center, *GOP the Religion-Friendly Party: But Stem Cell Issue May Help Democrats* (2004) <http://people-press.org/reports/display.php3? ReportID=223>. Note also that the Gallup organization reports that 46% of Americans now support including same-sex couples within marriage. The Gallup Poll, Tolerance for Gays at High-Water Mark (2007) http://www.galluppoll.com/content/?ci=27694.

Beyond federal discrimination is state discrimination, and we live in a country with an elaborate architecture of anti-gay laws: forty-four states have laws and/or amendments establishing policies against marriage (and sometimes other forms of relationship recognition) for same-sex couples. At the same time, those laws and amendments will not stand the test of time, and are already giving way in some places and revealing unintended consequences in others. More on that later.

In this vein, I should note that I believe we will get to the United States Supreme Court on a "right to marry" case for gay, lesbian, bisexual and transgeder people some day – a case like the Supreme Court's decisions in Loving v. Virginia (1967) or Zablocki v. Redhail (1978). Hopefully, that will not happen for a good long while, and only after more states move forward on relationship recognition measures and the country as a whole more deeply engages with the problems created by marriage discrimination.

Another aspect of this movement is the rate and constancy of change. Its swiftness startles historians and pollsters alike. To take one example, from early 2003 through the November elections in 2006, a key threat had been Congressional approval of a federal marriage amendment to the United States Constitution.[3] If approved and then ratified by three-fourths of the states, it would represent the first time the United States Constitution would have been amended to deny rights to a specific group of people. Now, just a few months later, it is Dead On Arrival in the Congress.

There is overwhelming evidence about just how enormous a difference marriage makes in people's everyday lives.

States continue to take actions to protect relationships of same-sex couples. Both the discussion about marriage and the process of trying to secure rights have moved us forward.

- Maryland and Washington have passed limited domestic partnership bills. Maryland's allows insurers to cover domestic partners. [Since that time, the Maryland Court of Appeals in a 4-3 decision ruled against the plaintiffs in a challenge to discriminatory marriage laws.[4] After a disappointing 5-4 high

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[3] Federal Marriage Amendment, H.J. Res. 22, 110th Cong. (2007) can be viewed at http://thomas.loc.gov/cgi-bin/query/D?c110:3:./temp/~c110s7RqxK::.

[4] Conaway, et al v. Deane, et al , — A.2d — —, 2007 WL 2702132 (Md., 2007).

court loss in a marriage case, Washington created a statewide registry with a specific set of protections.

• The New Hampshire House easily passed a civil union law that the Senate is expected to pass and the Governor to sign.[5]

• In Oregon, a state that ratified an anti-gay marriage amendment in November 2004 has now advanced a blue-ribbon panel recommended bill to the House that is civil unions by another name [this bill also became law and can be found at http://www.leg.state.or.us/07reg/measpdf/hb2000.dir/hb2007.a.pdf. Note that opponents of the law were unable to muster sufficient signatures for a referendum on the measure.

• In California, the House Judiciary Committee advanced to the Assembly floor the same marriage bill Governor Schwarzenegger vetoed in 2005, and the odds are both chambers will approve of it again.[6]

• In Connecticut, the combined House and Senate Judiciary Committee voted 27-15 in favor of a marriage bill. This is the same Committee that re-crafted a marriage bill in 2005 into what became the civil union law. This is the same committee that told the proponents to keep it short since the committee knew the issues, but then heard over 12 hours of compelling testimony on why civil unions are not the same as marriage and do not provide the same protections.[7]

MASSACHUSETTS Turning first to the judicial landscape, the Supreme Judicial Court's 2003 Goodridge decision ruled that excluding same-sex couples from marriage is a violation of the liberty and equality guarantees of the Massachusetts Constitution. If you want to feel good about the law and being a lawyer, read it, or even just read the first paragraph. It states in part:

> Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations. The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. In reaching our conclusion we have given full deference to the arguments made by the Commonwealth. But it has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples.

In applying those principles to rule that that same-sex couples are entitled to nothing short of equality in marriage, the Supreme Judicial Court broke an historic barrier and forever changed the standard by which all future efforts to treat lesbian and gay citizens fairly will be judged.

We live in a country with an elaborate architecture of anti-gay laws.

The fulfillment of marriage equality in even one state has had powerful effects. The list of recent actions in other state legislatures is a testament to this state's leadership.

The SJC's Advisory Opinion in Opinions of the Justices in 2004 opined that a proposed Senate bill creating civil unions was not an adequate substitute for marriage for same-sex couples. Two other states are now also addressing this very issue: the Kerrigan case in Connecticut and a variety of coordinated cases in California.[8]

Effective May 17, 2004, then-Governor Romney resurrected the "1913 Law," G.L. c. 207, secs. 11-12, which forbids people from marrying in Massachusetts if the marriage is prohibited or void in the couple's home state. In Cote-Whitacre v. Department of Public Health, the SJC upheld that law as to states with express legislation or controlling appellate precedent.

One concrete result is that on remand with respect to our Rhode Island plaintiffs in that case, the Superior Court ruled that Rhode Island residents may marry in Massachusetts as a matter of Massachusetts law. Some are doing so, and that state's business and

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[5] These events came to pass, the law can be found at http://www.gencourt.state.nh.us/legislation/2007/HB0437.html.

[6] A bill establishing marriage for same-sex couples passed the House and Senate of California, but Governor Schwarzenegger vetoed the bill in October. Steve Lawrence, Schwarzenegger Vetoes Gay Marriage, Associated Press/Hartford Courant, October 15, 2007, courant.com/news/nationworld/sns-ap-gay-marriage,0,704080.story.

[7] Ultimately, the bill did not move forward. The Conn. Supreme Court heard oral argument in Kerrigan & Mock et al. v. Dep't of Public Health in May, 2007. Information is available at http://www.glad.org.

[8] The Connecticut marriage case is Kerrigan et al. v. State of Connecticut, et al. (Conn. Super. Ct. Filed Sept. 28, 2004), and in California the case is In re. Marriage Cases No. S147999 (Cal. Coordinated March 14, 2005). More information about the California case can be found at http://www.nclrights.org/site/PageServer?pagename=issue_marriage_ca.

cultural institutions have easily integrated the newly married couples. Not only has that state's Legislature acquiesced in this state of events by refusing to pass a law expressly prohibiting these marriages, but Attorney General Patrick Lynch has opined that the marriages should be respected under RI comity/recognition law. The Rhode Island Supreme Court is also now considering reported questions from the Family Court involving Rhode Island residents who married in Massachusetts before our executive branch closed the state's borders to same-sex couples.[9]

GLAD will be pursuing remaining issues for states that have no statute or controlling appellate precedent or that did not at the time of the marriage.[10]

Turning to the political perspective in Massachusetts, I believe it is a well kept secret outside of Massachusetts – and to some extent within this state — that a majority of the Legislature here supports marriage equality and the Goodridge decision.

Of course, it didn't start that way. In March 2004, a legislative amendment to the state constitution – one which would have banned marriage for same-sex couples and created civil unions for same-sex couples only – passed 105-92 after four sessions of raucous debate in constitutional convention. Such amendments need 101 votes (out of 200 total) to pass. In September 2005, after a year of living with the reality of marriages of same-sex couples, this same measure was defeated 39-157 after two hours of debate.

There are some big problems out there. Chief among them is a federal law passed in 1996, known as DOMA – Defense of Marriage Act – that we call Discrimination in Marriage Act – DIMA, because it only discriminates against admittedly married couples and does not defend a thing.

While the previous amendment is dead, there is a current pending amendment that has been proposed through the citizen initiative process. It provides:

> When recognizing marriages entered into after the adoption of this amendment by the people, the Commonwealth and its political subdivisions shall define marriage only as the union of one man and one woman.

[9] More information about Chambers v. Ormiston litigation can be found at: http://glad.org/GLAD_Cases/ri_briefs.html.

[10] Since this time, the DPH has acknowledged that residents of New Mexico may marry in Mass., and that all New York state couples who married in Mass. prior to that state's Appellate Court ruling in Hernandez v. Robles are in valid marriages. For more information see GLAD's blog from July 20, 2007 at http://blog.glad.org/2007/07/new-mexico-same-sex-couples-can-marry.html which references several of GLAD's publications.

Because this measure was proposed by the citizen initiative process, it requires the support of only 50 of the 200 legislators convening in constitutional convention in two successive legislatures in order to advance to the ballot.

It has already passed its first hurdle. On Jan. 2, 2007, the last day of the last session of the 2005-2006 legislature, 62 members of the Legislature voted in favor and 134 were opposed. Even with new pro-marriage legislators in place, there is no assurance that fewer than 50 legislators will support this measure. We expect another vote – the critical second vote – later this year.[11]

We have a number of concerns about this amendment, as you might imagine. On a human level, it is terrible to take away this precious right from a group of citizens. A vote for the amendment is a vote to change the status quo of equality and to jeopardize the equality rights of all gay people in the Commonwealth by making our equality rights contingent on the approval of others.

As a legal matter, we do not comprehend how, if marriage discrimination is irrational, as the SJC found in Goodridge, such discrimination be reinstated into Massachusetts law just because the voters say so. Remember that the people have no more power than lawmakers to do something that is arbitrary or irrational. The referendum process does not cleanse the constitutional infirmity.

Moreover, this amendment does exactly what the SJC said our Constitution does not permit: it creates classes of citizens. While SJC in Goodridge talked about forbidding second class citizens, this amendment would create multiple classes: (1) Heterosexual people – who can do what they want; (2) Currently married same-sex couples; (3) People in marriages with a same-sex spouse who divorce or whose spouse dies and who cannot remarry; and (4) People who never get a chance to marry.

Our final concern is how this amendment might be used to deny rights other than marriage.[12] This addresses what I raised earlier about unintended – or at least unanticipated – effects of amendments. We know that some will say that once the state Constitution limits marriage to man and woman, then the legal rights incident to marriage must be limited to married couples as well or else marriage is nothing more than a name.

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[11] The citizen intiative was defeated by the legislature on June 14, 2007 by a vote of 45-151. Frank Phillips, "Legislators vote to defeat same-sex marriage ban," The Boston Globe, June 14, 2007.

[12] Russell Shorto, "What's Their Real Problem With Gay Marriage? (It's the Gay Part)" NY Times, June 19, 2005, available at: http://www.nytimes.com/2005/06/19/magazine/19ANTIGAY.html.

We know this because this is what is happening in other states. In Michigan, for example, the amendment says the government may only "recognize" marital relationships.[13] In litigation concerning the state's power as an employer to offer domestic partnership benefits (e.g. health insurance) to state employees, the Michigan Court of Appeals held that the amendment barred the extension of such benefits because the benefits system constituted "recognition."[14] This same argument has been made when a marriage limitation is in a statute as well, but so far both California and Maine courts have rejected it.

It is even possible that if the Massachusetts amendment were ratified, family values groups would also be able to make arguments, successful in at least one other state, that the state lacks power to protect unmarried *heterosexual* couples as well. The Ohio Supreme Court is currently considering a case about whether a man can be prosecuted under felony domestic violence laws for assaulting his female partner.[15] A lower court held he could not be prosecuted where the domestic violence law applies to a "family or household member" who is further defined as someone "living as a spouse" because it would unlawfully recognize the relationship.[16]

This type of argumentation is not new to Massachusetts, but it would arguably be more potent with an amendment ratified.

Apart from the amendments, there is pro-active legislative activity in Massachusetts. This includes two different bills to codify the result in Goodridge, a repeal of the so-called "1913 law" which is backed by both Governor Patrick and Senate President Murray, a bill to address name changes since the federal government won't rely on a name change in a marriage certificate as proof of a new name when issuing passports, and a bill to ensure that folks who need MassHealth are treated as though their marriages were respected at the federal level.

[13] The Amendment states: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Mich. Const., art. 1, §§ 25.

[14] Nat'l Pride at Work v. Granholm, 274 Mich. App. 147 (Mich. App. 2007). One of the ironies is that the group behind the amendment repeatedly campaigned that the amendment was only about marriage and not about benefits.

[15] State of Ohio v. Carswell, Ohio S.Ct. Case No. 06-0151. The Ohio amendment provides in part:This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage. Ohio Const. Art. XV, §§ 11.

[16] The Ohio Supreme Court did not accept the expansive view of the amendment urged by the defendant in that case. State of Ohio v. Carswell, 873 N.E.2d 1317 (2007).

NATIONAL LANDSCAPE Let's now look at the rest of the country.

Federal Disrespect of Marriages On the negative side, there are some big problems out there. Chief among them is a federal law passed in 1996, known as DOMA – Defense of Marriage Act – that we call Discrimination in Marriage Act – DIMA, because it only discriminates against admittedly married couples and does not defend a thing.

Section 3 of that law provides that the federal government, which normally defers to the states about who is married and who is not, will not respect the marriages of same-sex couples for purposes of all 1,138 programs, statutes and the like in which marital status is a factor. It does so by inserting definitions of "marriage" and "spouse" in the United States Code.[17]

The federal discrimination against married couples is not only unfair, it is legally wrong. Even though Massachusetts has validly set the state's standards for who can marry, this federal law reaches into the Commonwealth and divides that one class of married people into two classes. It acknowledges and supports some, while disrespecting others. Based on what? Based on whether their underlying relationship is same-sex or different-sex.

We see this as a classic double standard, also known as a classic equal protection issue. The federal government is free to extend or deny benefits to married people, but in our view, it has no valid reason for denying benefits only to married people who are gay or lesbian.[18]

It's also crazy making to be married at the state level but not in the eyes of the federal government. At GLAD, we've spoken with two WWII veterans who are in their eighties, have been together 61 years, and are currently facing serious health issues. We fervently hope a nursing home is not in their future. But if it is, under DIMA, given Medicaid's role in paying for that care, the state must place a lien on their very modest

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[17] Defense of Marriage Act of 1996, Pub. L. No. 104-199, §§ 3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. §§ 7 (2000)) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.")

[18] The Democratic Presidential Candidates for the 2008 election favor the extension of federal benefits to all state-defined spouses. Six out of the eight Democratic candidates (Clinton, Dodd, Edwards, Obama, Richardson and Biden) support civil unions while the remaining two (Kucinich and Gravel) support marriage for same-sex couples. (The Pew Forum on Religion and Public Life: The Candidates on Gay Marriage http://tinyurl.com/3bu8y9). In addition, all Democratic candidates for President support the repeal of the provision in the federal Defense of Marriage Act defining marriage as between a man and a woman for federal purposes.

home and may well be required to foreclose. The result would be to drive out the spouse still able to live independently – something that would not happen to a heterosexual married couple. We've talked to people in all kinds of circumstances: married women working side by side in a paper mill - now for 20 years — who simply want what their co-workers get – their spouse to get their pension on death. We've heard from couples who can't rely, as a federally respected spouse can, on the other spouse's social security to maintain a standard of living at retirement or upon death.

The issue of how states will address the very real needs of same-sex couples and their children is alive in every state.

The other provision of the 1996 federal "DIMA" law – known as section 2 – deals with interstate respect of marriages. It purports to authorize states to deny respect to marriages of same-sex couples by enacting public policies against such marriages.[19]

This federal law was read by states as federal encouragement, or at least approval, of anti-gay laws, and states took up the invitation. Prior to the Goodridge decision in November 2003, 38 states had already enacted statutes limiting marriage or recognition of marriage for same-sex couples.[20]

Four states had already amended their constitutions to the same effect. (Clearly, the "backlash" that is claimed to have followed Goodridge began long before that case was won or even filed.) At the present time, there are 27 state amendments, 21 in states that also have statutes, and forty statutes altogether.[21]

Interstate Respect of Marriages I want to take some time to discuss the issues of respect and disrespect of state licenses, both of marriage and of civil unions. In other words, what happens to people who validly secure a legal status in one place and then return to their home state, or relocate to a different state? What can Massachusetts couples married here when they relocate for work, or to care for a family member, or for retirement?

The first thing I'll say is that many of us have long regarded section 2 of DIMA, the interstate respect piece, as odd. The reason: for over 200 years, states have wrestled

[19] The federal Defense of Marriage Act, Pub. L. 104-199, contains three sections. Section 2, denominated "Powers Reserved to the States," adds section 1738C to title 28 of the United States Code as follows: §§1738C. Certain act, records, and proceedings and the effect thereof No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any State, territory, possession, or tribe respecting the relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship. Defense of Marriage Act, Pub. L. 104-199, §§2.

[20] See Mary L. Bonauto, Ending Marriage Discrimination: A Work in Progress, 40 Suffolk U. L. Rev. 813, 835 n. 135. (2007) .

[21] Mary L. Bonauto, Ending Marriage Discrimination: A Work in Progress, 40 Suffolk U. L. Rev. 813, 835 n. 135. (2007)

with the validity of a marriage licensed in one place but not permissible in the state currently dealing with an issue involving the couple. They all have a well-developed body of state law to address the issue.

While some claim to fear that marriages of same-sex couples will be thrust on unwilling states by virtue of the Full Faith and Credit Clause of the U.S. Constitution,[22] I am aware of no reported judicial decision (and no literature discussing any such decision) applying the Full Faith and Credit Clause to the question of recognizing the validity of a marriage entered into in another jurisdiction. This is undoubtedly so because American courts have been able to resolve all questions of marriage recognition by resort to the principles of comity.

Congress' primary purpose in adopting this §2 of DIMA was not to require any State to do anything, that is, either respect or disrespect marriages. Rather, it was designed to give the States the freedom to do as they please vis-à-vis respecting the marriages of same-sex couples, a freedom they already had.

The issue of respect for a marriage – same-sex or otherwise – is really, then, a conventional issue of conflict of laws. All cases in this area regarding the recognition of foreign marriages begin with the long-standing principle of the conflict of laws that a marriage valid where celebrated is valid everywhere. That rule is subject to a public policy exception, but application of that exception is often complex, highly dependent on the case law, the state statutes and the facts of the case.

As a result, there is a long history of courts applying conflict of laws principles to recognize interracial, consanguineous and underage marriages celebrated in a foreign jurisdiction, as well as remarriages following divorce where the remarriage is prohibited in the state granting the divorce, even though by statute the marriage would be void if celebrated in the forum state. Some states have set aside their public policies specifically prohibiting the marriage and recognized it with respect to a particular "incident" of the marital relationship, such as the right to divorce, the obligation of spousal or child support, or the right to intestate succession. In other words, neither DIMA section 2 nor a state statute or amendment is necessarily dispositive on issues of respect.

There are a few important lessons to be taken from this background. First, those who rush to federal law – either the Federal "DIMA" or the Constitution's Full Faith and Credit Clause – are taking the wrong approach. Unfortunately, some appellate courts have advanced in this direction.[23]

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(noting that 4 states had enacted constitutional amendments banning marriage for same-sex couples prior to the end of 2003, and 23 states enacted them afterwards.)

[22] U.S. Const., art. IV, §§1.

[23] Rosengarten v. Downes, 71 Conn.App. 372, 802 A.2d 170 (Conn. App., 2002). See also Validity of out-of-state same-sex marriages in Michigan, 2004 Mich. OAG No. 7160 (September 2004).

Secondly, when it comes to recognition of a marriage in another state that would not license the marriage, it is not enough for the second state to say that it doesn't license the marriages and therefore doesn't have to respect them. If that were the situation, there would be no such thing as conflict of laws in this area.

Let's take some examples of how states are addressing marriages and civil unions of same-sex couples.

As to civil unions, the litigated cases so far involve Vermont. Courts in Iowa, Massachusetts and West Virginia have recognized civil unions for the limited purpose of entering a judicial decree dissolving the unions.[24] Texas and Connecticut have taken the opposite approach.[25] In *Langan v. St. Vincent's Hospital*,[26] a New York appellate court held that a surviving civil union partner could not be treated as the deceased partner's "spouse" for purposes of filing a wrongful death action because the wrongful death statute spoke of spouses and "they were not joined in marriage."

As to marriages, relying on the distinction between what marriages a state will license and what marriages it will recognize as consistent with its public policies, numerous New York State officials have stated they will respect a valid marriage entered into by their residents outside the State. In 2004, the New York State Attorney General and Comptroller both opined that New York State comity law requires respect to valid foreign marriages.[27] Connecticut and Rhode Island will also recognize marriages of same-sex couples for certain purposes.[28]

The litigated cases in New York have been mixed, and some have blurred the distinction between marriage licensing statutes on the one hand and recognition of a

[24] See Alons v. Iowa Dist. Ct. for Woodbury County, 698 N.W.2d 858, 874 (Iowa 2005) (discussing a trial court ruling in that state extending equitable jurisdiction to dissolve a couple's civil union from Vermont); Salucco v. Alldredge, 17 Mass. L. Rptr. 498, not reported in N.E.2d, 2004 WL 864459 (Mass. Super. 2004) (equity jurisdiction); In re M. G. and S. G., No. 02-D-292 (Fam. Ct. W.Va., Jan. 3, 2003).

[25] In re R.S. and J.A., No. F-185063 (Dist. Ct. Jefferson County, Tex., Mar. 3, 2003); Rosengarten v. Downes, 701 Conn. App. 372, 802 A.2d 170, 181 (Conn. Ct. App. 2002), cert. granted and dismissed, 806 A.2d. 1066 (2002), relying on a statement of public policy in its adoption law providing that the state's "current public policy" is that marriage is "limited to marriage between a man and a woman").

[26] 802 N.Y.S.2d 476, 483, 25 A.D. 3d 90. 99, (App. Div., 2d Dept. 2005).

[27] 2004 N.Y. Op. Att'y Gen. 1, 34-35 (Mar. 3, 2004), available at http://www.oag.state.ny.us/press/2004/mar/mar3a_04_attach2.pdf;; Op. of N.Y. State Comptroller Alan G. Hevesi (Oct. 8, 2004). Since then, the New York State Department of Civil Service announced in April 2007 that it will respect out of state marriages of same-sex couples for purposes of extending spousal insurance benefits to current and retired employees of state and local governments. See Civil Service Recognizes Same-Sex Marriages for Spousal Coverage Under New York State Health Insurance Program, April 27, 2007, available at http://www/cs.state.ny.us/pio/pressrel/nyship_samesexspousalcoverage.cfm.

[28] See Connecticut Op. Att'y Gen. (Aug. 2, 2004) (establishing that marriage licenses from Massachusetts of same-sex spouse would be recognized in Connecticut to change name on driver's license and car registrations); Rhode Island Op. Att'y Gen. (February 20, 2007) (opining that the Rhode Island Board of Governors for Higher Education should extend respect to employees who validly married their partners of the same sex in Massachusetts for purposes of employee benefits); Rhode Island Op. Att'y Gen. (Oct. 19, 2004) (stating that employees with same-sex spouses married in

validly licensed marriage from elsewhere on the other. In *Godfrey v. Spano*[29] a trial court upheld the Westchester County Executive's order that marriages of same-sex couples would be respected. On the other hand, another New York trial court denied respect to a retired employee's marriage to his same-sex spouse in Canada, pointing to a New York Court of Appeals ruling that same-sex couples may not marry in New York.[30]

To date, there are only two reported cases in which lower courts have addressed jurisdiction for a divorce action for couples married in Massachusetts. In both cases, the courts ruled that the marriages were void as a matter of Massachusetts law. The focal point of their analysis was Mass. Gen. L. c. 207, §§11-12. Taken together, these laws bar non-residents from marrying in Massachusetts when their marriages were void or expressly prohibited by their home states.[31]

In *Lane v. Albanese*[32] a couple married in Massachusetts sought an annulment in the Connecticut Superior Court relying on Mass. Gen. L. c. 207, §11. That statute addresses states that make marriages void. Although Connecticut law does not describe marriages of same-sex couples as "void," the Trial Court held that there was nothing to annul because the marriage was void under §11. To me, this is a matter of a court pretending that the marriage did not exist. It was not void under §11. If the couple had lied when completing their licensing forms in Massachusetts, then the marriage would have been voidable under §12. Otherwise, the marriage was valid and the court should have engaged the general rule of respect for validly licensed marriages and entertained the public policy analysis.

In *Gonzalez v. Green*[33] the couples were New York State residents but owned a home on Nantucket. They married in Massachusetts in November 2005. They later separated and entered into a written agreement. The lesser resourced spouse later filed for divorce, and the other, relying on an appellate decision rejecting

Continued on next page

Massachusetts are eligible to receive spousal benefits under teacher's retirement system). See also Michael P. McKinney, Towns providing benefits to married same-sex couples, Providence Journal (February 11, 2005) (Tiverton School Committee extending health care benefits to retired teacher married to her spouse of the same sex based on terms of collective bargaining agreement), available at: .http://www.projo.com/news/content/projo_20050211_tnmarr11.256127.html

[29] 15 Misc. 3d 809, 836 N.Y.S.2d 813, 818-819 (N.Y. Sup. 2007).

[30] See Funderburke v. N.Y.S. Civ. Serv., 13 Misc. 3d. 284, 822 N.Y.S. 2d 393, 394 (N.Y. Sup. 2006). After an appeal was filed by the employee, the State announced its position to allow the benefits, consistent with the 2004 Opinions of the Attorney General and State Comptroller.

[31] As a matter of Massachusetts law, the Massachusetts Supreme Judicial Court, construing that law, clarified that non-resident couples who are not expressly forbidden to marry in their home state are and have always been eligible to marry in Massachusetts. Cote-Whitacre v. Dep't of Pub. Health, 446 Mass. 350, 844 N.E.2d 623, 658-659 (2006) (Marshall, C.J., concurring). Thus, the parties both cases were actually eligible to marry when they did and their marriage is valid as a matter of Massachusetts law.

[32] 39 Conn. L. Rptr. 3, 2005 WL 896129(Conn. Super., March 18, 2005).

[33] 14 Misc. 3d 641, 831 N.Y.S.2d 856 (N.Y. Sup. 2006).

constitutional claims of same-sex couples for marriage, countered with claims to void the marriage and to strike the separation agreement.

The Supreme Court upheld the agreement but dismissed the divorce action because, in its view, there was no marriage as a matter of Massachusetts law.

The *Gonzalez* and *Lane* courts had an erroneous view of Massachusetts law. To the extent an out-of-state same-sex couple who married in Massachusetts came from a state that would have declared their marriage "void" if contracted at home, the couples' resulting marriage would violate Mass. G. L. c. 207 §11 and be deemed void as a matter of Massachusetts law.[34] Connecticut expressly prohibits same-sex couples from marrying, so a Connecticut couple's resulting marriage would violate §12 and be considered "voidable" as a matter of Massachusetts law, not void.[35] At the time of the disputed New York marriage in *Gonzalez*, that state had no statute or controlling appellate decision prohibiting marriage for same-sex couples, and thus §§11-12 do not apply to them at all and their marriages are valid.[36]

CONCLUSION The issue of how states will address the very real needs of same-sex couples and their children is alive in every state. As in any movement for legal and social justice, all three branches of government play a critical role as well as the court of public opinion. As lawyers and others involved in the legal system, I hope you will add your voice and efforts to ending the remaining discrimination in Massachusetts and nationwide.

Mary L. Bonauto, Esq. has been the Civil Rights Project Director at Gay & Lesbian Advocates & Defenders (GLAD) since 1990. In 1999, she and two Vermont co-counsel won a ruling that same-sex couples are entitled to all of the benefits and protections of civil marriage in the case of *Baker v. State of Vermont*. This ruling prompted the Vermont legislature to enact the nation's first "civil union" law for same-sex couples. She was lead counsel in *Goodridge v. Dept. of Public Health*, which resulted in the Massachusetts Supreme Judicial Court declaring that prohibiting civil marriage for same-sex couples is unconstitutional. Mary can be contacted at (617) 426-1350, or by email at <mbonauto@glad.org> **Mary gratefully acknowledges the assistance of Sarah Morton in the preparation of this article.**

[34] See Cote-Whitacre, 844 N.E.2d at 636 & n. 8 (Spina, J., concurring).

[35] Id. at 636-637 & nn. 10-11.

[36] See Cote-Whitacre v. Dep't of Pub. Health, Assented to Motion for Amended and Final Judgment, May 10, 2007 (confirming that all pre-Hernandez marriages of New York domiciliaries in Massachusetts are valid in New York).

NEW HAMPSHIRE HAS ELIMINATED CUSTODY

By Honey Hastings

New Hampshire's Parental Rights and Responsibility Act, took effect October 1, 2005. The law states that "Children do best when both parents have a stable and meaningful involvement in their lives." It declares that it is the policy of the state to "support frequent and continuing contact between each child and both parents" and "to encourage parents to share in the rights and responsibilities of raising their children."

The laws for separating and divorcing parents were changed by eliminating the terms "legal custody" and "physical custody." Instead, "parental rights and responsibilities" are allocated between the parents. The old terms led to "win-lose" thinking with the children as the prize. The new language supports the shared parenting that benefits children.

All the provisions concerning children in the divorce statute were moved to a new statutory chapter entitled, "Parental Rights and Responsibilities." This is available at http://www.gencourt.state.nh.us/rsa/html/NHTOC/NHTOC-XLIII-461-A.htm. In addition to the language changes, "best interest" criteria for parenting decisions were codified for the first time, including: the ability of each parent to provide the child with nuture, love, affection, and guidance; the child's developmental needs and the ability of each parent to meet them, both in the present and in the future; and the support of each parent for the child's relationship with the other parent.

This law requires divorcing and separating parents to complete a "parenting plan" describing how they will share responsibility for their child or children. This is a separate document from the agreement dealing with the divorce and alimony and property division. It requires more detail than most lawyers, mediators, or *pro se* parties have been putting in agreements. The plan includes the weekly and holiday schedule, information sharing and access, decision-making procedures, transportation and exchange of child, relocation, and procedures for adjustment of the plan. The enactment of the statute has increased the number of families choosing a customized parenting schedule, rather than the traditional alternate weekends and one night during the week.

Continuing education programs on the Parental Rights and Responsibilities Act for mediators, lawyers, and judges have included copies of the Massachusetts AFCC booklet, *Planning for Shared Parenting*. This publication, which is consistent with the goals of the Parental Rights and Responsibilities Act, gives both parents and professionals assisting them basic information on developing a parenting schedule. It discusses how to approach the task of writing a parenting plan, children's needs by age groups, and suggested schedules for each age group.

In court rules adopted to implement the statute, the Judicial Branch has prescribed a standard paragraph lettering system for the topics covered in parenting plans.

Continued on next page

Every parenting plan must cover the basic issues in the same order, making it easy for judicial officers, lawyers, and mediators to locate a specific provision and to compare proposals. For example, the parenting schedule is in paragraph B, transportation is in paragraph D, and relocation of a residence of a child is in paragraph F. Rules also require a "proposed parenting plan" if the parents can not agree or preferably a "partial parenting plan" showing the issues agreed on. The courts offer fill-in-the-blank versions of parenting plans, with instructions. See http://www.courts.state.nh.us/superior/selfhelp/ divorceforms.htm for both standard lettering system (see "instructions") and the form. This site also has the standard "final decree" for the financial issues, using a court-prescribed numbering system.

The new law places more emphasis on alternative dispute resolution in family matters. Mediation is one method for parents to work out a parenting plan and make other divorce decisions and the Act has increased its use. The mediation is not limited to parenting but also includes support and asset division. Under prior law, a judicial officer could refer a case to mediation only if the parties agreed. Now, the court is able to order most divorcing couples to mediation. The exceptions are cases with domestic violence, alcoholism, or substance abuse; in these cases, mediation may be ordered only if the parties agree.

The laws for separating and divorcing parents were changed by eliminating the terms "legal custody" and "physical custody." Instead, "parental rights and responsibilities" are allocated between the parents.

New Hampshire "certifies" mediators who meet specified training and internship requirements. See http://www.gencourt.state.nh.us/rsa/html/NHTOC/NHTOC-XXX-328-C.htm and http://www.nh.gov/marital/rules.htm. Certification is not required for private practice but only certified mediators participate in the court-referred program. Such mediators contract with the Judicial Branch to accept the program's fee schedule - the state pays a $300 flat fee for "indigent" cases and the parties pay $60/hour in all others. The court-referred program requires participating mediators to have malpractice insurance.

Enactment of the Parental Rights and Responsibilities Act coincided with legislation expanding the pilot project "Family Division" to all New Hampshire counties. The Family Division handles certain types of cases formerly handled by the Superior, Probate, and District Courts. Traditionally, divorces have been granted by the Superior Court. As part of a political compromise between the three branches of government, the Family Division will grant divorces, the number of Superior Court judges will be reduced as judges retire, and the resulting savings will be used to hire more "marital masters" (judicial officers appointed to 5-year renewable terms) and other staff for the expanding Family Division.

Key to the Judicial Branch changes has been Supreme Court Chief Justice John T. Broderick Jr.'s leadership. In his 2005 State of the Judiciary speech he said:

> "My colleagues and I are interested in creating alternatives to trial by combat for those who want them. We need to infuse our court system with new ways in which parties can choose to resolve disputes more efficiently, at lower cost and without having to appear before a judge . . .
>
> In my judgment we also need to fundamentally rethink how divorce is handled in our courts. Taking spouses and children in stress and forcing them into an adversarial system, with no other meaningful alternative, is neither economically sound nor socially beneficial."

The Parental Rights and Responsibilities Act was recommended by a multi-disciplinary Task Force on Family Law. Two ACR Advanced Practitioners played key roles in the statutory change. In 2002, John Cameron, a lawyer-mediator who frequently serves as a GAL, proposed the original legislation to require parenting plans. The bill was amended to establish a Task Force to make recommendations on how to reduce adversarialness in divorce and custody cases. Cameron and Honey Hastings, also a lawyer-mediator, were appointed to the Task Force.

The Task Force spent two years studying the divorce process and the adversarialness question. Its report, http://www.nhbar.org/publications/newsroom-archives.asp#Family, recommended a change in approach to divorce and custody cases with a presumption that parents will make the decisions for their children, that courts be empowered to order mediation, elimination of "custody language," and the use of parenting plans.

This law requires divorcing and separating parents to complete a "parenting plan" describing how they will share responsibility for their child or children.

Hastings drafted this statute for the Task Force and both she and Cameron provided testimony to and lobbied the legislature.

The new statute may be found at http://www.gencourt.state.nh.us/rsa/html/NHTOC/NHTOC-XLIII-461-A.htm.

Honey Hastings practices as a lawyer mediator in Wilton, NH. She focuses on services that help individuals and couples facing divorce resolve disputes respectfully and efficiently without fighting in court. Honey can be reached at 603-654-5000. An earlier version of this article appeared in AFCC News, Spring 2006, volume 25, number 2.

EXCERPTS OF NEW HAMPSHIRE LAWS ON PARENTAL RIGHTS AND RESPONSIBILITIES

Title XLIII
Domestic Relations Chapter 461-A
Parental Rights and Responsibilities

Section 461-A:7, Mediation of Cases Involving Children

I. The general purpose of this section is to:

(a) Manage conflict and decrease acrimony between parties in a dispute concerning parental rights and responsibilities for minor children.

(b) Promote the best interest of children.

(c) Improve the parties' satisfaction with the outcome of disputes concerning parental rights and responsibilities.

(d) Increase the parties' participation in making decisions for themselves and their children.

(e) Increase compliance with court orders.

(f) Reduce the number and frequency of cases returning to court.

(g) Improve court efficiency.

II. The mediator has no authority to make a decision or impose a settlement upon the parties. The mediator shall attempt to focus the attention of the parties upon their needs and interests rather than upon their positions. Any settlement is entirely voluntary. In the absence of settlement, the parties lose none of their rights to a resolution of their dispute through litigation.

III. In all cases involving disputed parental rights and responsibilities or grandparents' visitation rights, including requests for modification of prior orders, the court may order the parties to participate in mediation. If the parties are ordered to participate in mediation under this section, all issues relevant to their case, including but not limited to child support and issues relative to property settlement and alimony under RSA 458, shall also be mediated unless the court orders otherwise.

IV. Reasons the court may choose not to order mediation include, but are not limited to, the following:
(a) A showing of undue hardship to a party.
(b) An agreement between the parties for alternate dispute resolution procedures.
(c) An allegation of abuse or neglect of the minor child.
(d) A finding of alcoholism or drug abuse, unless all parties agree to mediation.
(e) An allegation of serious psychological or emotional abuse.
(f) Lack of an available, suitable mediator within a reasonable time period.

V. The court shall not order mediation if there is a finding of domestic violence as defined in RSA 173-B:1, unless all parties agree to mediation.

VI. Either party may move to have the mediator replaced for good cause.

VII. Mediation proceedings shall be held in private, and all communications, oral or written, made during the proceedings, which relate to the issues being mediated, whether made by the mediator, or a party, or any other person present, shall be privileged and confidential and shall not be disclosed and shall not be admissible in court, except as provided in RSA 328-C:9.

VIII. Any mediated agreement reached by the parties on all or some of the disputed issues shall be reduced to writing, signed by each party, and filed with the court as soon as practicable.

IX. The parties shall participate at mediation in good faith. If the mediator determines that mediation is not helpful in resolving the dispute, the mediator shall report that fact to the court and return the matter to the court for adjudication of the underlying issues.

X. In the event both parties are indigent, the mediator shall be paid a set fee for his or her services. The amount of the fee shall be set annually by supreme court rule. The court may order each party to pay a proportional amount of said fee. The fee shall be paid from the special fund established pursuant to RSA 461-A:17 and repaid by the parties in accordance with RSA 461-A:18.

XI. The supreme court shall establish rules and take such action as necessary to effectuate the purpose of this section.

Section 461-A:20 References to Child Custody and Custodial Parent.

Any provision of law that refers to the "custody" of minor children shall mean the allocation of parental rights and responsibilities as provided in this chapter. Any provision of law which refers to a "custodial parent" shall mean a parent with 50 percent or more of the residential responsibility and any reference to a non-custodial parent shall mean a parent with less than 50 percent of the residential responsibility.

"The language of law must not be foreign to the ears of those who are to obey it."

Learned Hand

ELIMINATING "CUSTODY" & "VISITATION" FROM MASSACHUSETTS FAMILY LAW

By John A. Fiske and Jennifer Rivera-Ulwick

The first recommendation of the U. S. Commission on Child and Family Welfare in 1996 was to replace these words "with terms that more accurately describe parenting responsibilities and are less likely to foster conflict…." By that time Maine, Vermont and Ohio were among the states that had already taken this step, adopting "parental rights and responsibilities" in 1980, 1985 and 1990 respectively. New Hampshire did the same in 2005 and we recommend you read their remarkable new law yourself to have the joy of discovery. Google "NH chapter 461-A."

The American Law Institute Principles of Family Dissolution recommend focusing on decision making authority of parents and residential arrangements for the child, emphasizing the important role of the law in guiding parents to cooperate and plan together how to raise their children. As the Ohio State Bar Association wrote in their booklet, Sharing Responsibilities After Separation, recent decades have seen dramatic changes in laws regarding children of divorces. Lawyers, judges, psychologists and others realized how damaging it was for parties to fight over children much the same way they fought over property. "The courts and the legislature began to shift their focus from the rights of the parents to the rights of the children…. Procedures for dividing parental rights and responsibilities now emphasize the rights of the child to be loved, protected and supported…."

We believe Massachusetts should join the various states that now allocate between parents the residential and decision-making responsibilities for their children. We are working closely with the Boston Bar Association Family Law Steering Committee and other organizations to amend G.L. c. 208 and related chapters of the General Laws, and the Child Support Guidelines and other court rules, to eliminate the two words by replacing "custody and visitation" with "parental rights and responsibilities" and "parenting plans." On the website of John Fiske you will find a rewritten version of the core of the bill, G.L. c. 208 section 31. www.mediate.com/fiske "Parenting Plan Bill." Members of the Massachusetts Council on Family Mediation, the Collaborative Law Council, the Massachusetts Psychological Association and the Children and the Law Project of Massachusetts General Hospital have already expressed enthusiasm for this approach, along with many family lawyers and Probate and Family Court judges, assistant judicial case managers, probation officers and other court personnel.

We believe Massachusetts should join the various states that now allocate between parents the residential and decision-making responsibilities for their children.

Honey Hastings and John Cameron drafted this statute and both provided testimony for the task force. We recognize such a bill takes time; Honey Hastings worked on c. 461-A in New Hampshire for at least five years, for example. We hope the Mass. Council on Family Mediation will actively support this bill and the work to achieve it.

John A. Fiske is a founding member, past president and director emeritus of MCFM. He is also a partner at Healy, Fiske & Richmond, a Cambridge firm concentrating in family law and mediation. John can be contacted at (617) 354-7133, or by email at <jadamsfiske@yahoo.com>.

Jennifer Rivera Ulwick, Esq. served as a judicial clerk for the Massachusetts Probate and Family Courts for two years, and then worked as an associate at the law firm of Packenham, Schmidt & Federico. In 2000 she became Assistant Judicial Case Manager at the Middlesex Probate & Family Court. Jennifer can be contacted at jennifer.rivera-ulwick@jud.state.ma.us

"… but do not give it to a lawyer's clerk to write, for they use a legal hand that Satan himself will not understand."

Cervantes

A QDRO OFFERS A LITTLE KNOWN SAFETY NET

By Sharon Lund

Finances can be especially tight after a divorce. As a result, a client will most certainly appreciate your educating them about whatever flexibility you may have been able to weave successfully into his/her divorce agreement. A QDRO (Qualified Domestic Relations Order) for an ERISA "qualified" defined contribution plan (such as a 401(k), 403(b), KEOGH profit sharing, or money purchase pension plan) offers just such an opportunity to provide some of that desired flexibility as well as an emergency "safety net" to a client in need.

Did you know that the alternate payee specified in a QDRO is NOT subject to the 10% IRS penalty for early distribution before the age of 591/2? Many divorce mediators, financial planners, and even CPA's are unaware of this fact (per Internal Revenue Code, Title 26, Subtitle A, Chapter 1, Subchapter B, Part II, Section 72(t)(2)(C)). The owner of a QDRO account most certainly owes income tax upon any withdrawal, but definitely does NOT owe the standard additional 10% IRS penalty for a withdrawal prior to 591/2.

None of us wants to encourage a client to liquidate long-term retirement savings. However, sharing this important piece of information provides "peace of mind" to your client who then knows that, in the event of an emergency, he/she could tap these funds without being hit with an extra tax penalty as well.

If there is any possibility of your client needing access to financial resources from a QDRO account, it would be beneficial to advise him/her to withdraw in as tax-efficient manner as possible. Liquidating too much in any one calendar year could cause a client's federal marginal tax bracket to jump dramatically, from say perhaps 15%, 25%, or 28% to as high as 35% (or even up to 39.6% in 2011 when the current historically low marginal federal tax rates are scheduled to expire). Minimizing and/or spreading withdrawals from a QDRO account across multiple tax years would reduce the total taxes owed. In addition, taking any anticipated withdrawal before 2011 would help keep taxes to a minimum.

The divorce mediator can also play a crucial role in inoculating a client from poor financial advice once he/she ultimately emerges from the mediation process. The mediator can ensure that a client understands that the flexibility of withdrawing penalty-free from a QDRO account before the age of 591/2 disappears with a direct transfer or rollover to an IRA (per Internal Revenue Code, Title 26, Subtitle A, Chapter 1, Subchapter B, Part II, Section 72(t)(3)(A)). Sadly, if the client makes the mistake of rolling over a QDRO retirement plan account into an IRA – too often at the behest of an adviser who does not recognize the consequences – the flexibility to withdraw penalty-free is lost until the owner turns 591/2.

Lastly, it would be helpful for the divorce mediator to set expectations with the client that, although the flexibility does exist to withdraw without penalty before 591/2, he/she should proceed with caution and should carefully review any tax documents received from the financial institution in custody of the QDRO account. After having distributed proceeds from a QDRO to a client, one common mistake for a financial institution to make is to miscode the required 1099-R tax distribution form with a "1" which means "early distribution, no known exception." If this incorrectly coded form is processed by a client's accountant "as is," tax software will automatically calculate and apply the standard 10% penalty. A correct 1099-R should instead reflect a code of "2," meaning "early distribution, exception applies." If the coding on the 1099-R is incorrect, the client is still certainly entitled to the early withdrawal without being hit with a penalty, but he/she (and/or the accountant) must also file a Form 5329 to correct the error. If a client needs access to the money but is intimidated by the potential for an administrative quagmire, it would likely be valuable for him/her to consult with an adviser, specifically knowledgeable in this area, who can help navigate through any red tape.

Did you know that the alternate payee specified in a QDRO is NOT subject to the 10% IRS penalty for early distribution before the age of 591/2?

Sharon Lund is a MA registered investment adviser and an Accredited Asset Management Specialist℠ who provides independent financial planning and investment advice. She is also an allied professional and the current Treasurer for the Women Lawyers Network of Needham. She can be contacted at 781-444-9931 or at sharon.lund@stanfordalumni.org.

"Money can't buy love, but it improves your bargaining position."

Christopher Marlowe

THIRD ANNUAL FISKE AWARD HONORS BARBARA N. WHITE

Presented by Jerome H. Weinstein

It is an honor and a pleasure to present the John Adams Fiske award for Excellence in Mediation to a longtime friend and colleague, Barbara White.

Barbara has been a member and director of the Mass Council since 1983, and for many years served as treasurer of the organization when being treasurer meant dealing with and protecting from overspending a very tight budget.

Barbara came to mediation after a career as a psychologist in the field of child development. She has presented papers at national meetings of the Society for Research in Child Development, The American Psychological Association and The Massachusetts Psychological Association. Together with her husband Shep White who was a well-known and highly respected leader in the field of child development, she authored a book "Childhood: Pathways of Discovery" published by Harper Rowe in 1980.

It was her background in child development and a very strong concern for children and families that made her a very special mediator.

It was her background in child development and a very strong concern for children and families that made her a very special mediator. She always worked very hard to connect with the families she worked with, to solve problems in a healthy way and particularly to protect the children from the psychological dislocations of divorce.

Barbara and her close friend and colleague Lynn Halem trained with 0. J. Coogler who was the leader in creating the field of divorce mediation in the U.S. From 1982 to 1989 they were co-directors of Mediation Associates in Newton. Later Barbara established an individual practice known as Mediation Alternatives also in Newton, and continued until she retired to care for her husband who had became severely ill.

On a personal note, Barbara and I often talked about our cases and commuted to Mass Council meetings together. Barbara, I am delighted to present to you the well-deserved John Adams Fiske Award for Excellence in Mediation.

Jerome H. Weinstein, MSW was a founding member of MCFM and the first divorce mediator in Massachusetts. He was also the second recipient of the Fiske Award.

2007
THIRD ANNUAL
JOHN ADAMS FISKE AWARD

FOR

EXCELLENCE IN MEDIATION

PRESENTED TO

BARBARA N. WHITE

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

UNIFORM PRACTICES OF PROBATE COURTS
PRACTICE XXXIII. STANDARDS FOR COMPUTER GENERATED FORMS

As amended, effective September 4, 2007

Editor's Note: *Online court forms are works in progress. If your divorce mediation clients are planning to represent themselves in court they would be well advised to call the court beforehand to see whether the "old" paper forms are still acceptable.*

Preamble: This Uniform Practice governs the use of computer-generated forms by counsel and parties.

Definition: For the purposes of this Uniform Practice XXXIII, the "official form" shall be defined as either: (i) the paper form promulgated and distributed by the Administrative Office of the Probate and Family Court or (ii) the electronic form most recently posted on the Massachusetts Judiciary web site, www.mass.gov/courts and approved by the Administrative Office of the Probate and Family Court.

I. Use. The Use of computer-generated forms is hereby permitted, except where the Court blank ("official form") is a multi-part form, such as the G.L. c. 209A Complaint for Protection from Abuse form.

II. Specifications.

A. Paper. Twenty-pound, 8 1/2 X 11, acid free paper shall be used for all computer-generated forms. Acid free paper is specified to ensure archival quality and permanence.

B. Paper and Ink Color. A computer-generated form shall be printed with black ink on white paper.

C. Printing. All computer-generated forms shall be printed with "letter quality" or "near letter quality" output. "Draft" quality output is not acceptable.

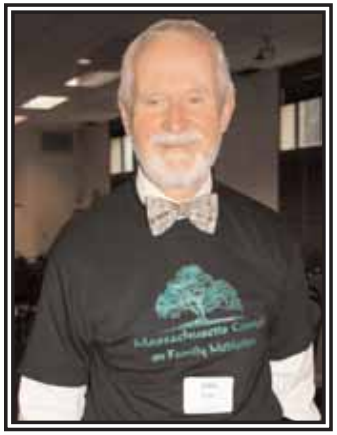
III. Consequences of Failing to Follow These Standards. The Register of Probate may reject any form that fails to comply with these standards. In the event that a Register deems a submitted form to be outside these standards, such determination may be reviewed by the Chief Justice of the Probate and Family Court at the request of the submitting counsel or party. It is the responsibility of the submitting party to ensure that the form adheres to the above standards. If the form is rejected, the submitting party shall forfeit the filing fee. The submitting party-s attorney shall not be allowed to pass this cost on to his/her client, but shall bear the financial burden personally. Accordingly, the submitting party's attorney shall either reimburse the client for the forfeited fee or the attorney shall personally pay the filing fee when he/she refiles the form.

Uniform Probate Practice XXXIII
Adopted effective Jan. 1, 1992

MCFM'S 6th ANNUAL FAMILY MEDIATION INSTITUTE

A Photo Array by Lynn K. Cooper & Debra L. Smith

Roberta Benjamin



John Fiske

John Fields

Cate Woolner

Dee Fraylick & Lynda Robbins

Jenny Daniell & Oran Kaufman

Pat Shea & David Morris

Dee Fraylick & Ramona Goutiere

Mark Zarrow & Kathy Townsend

Dan Finn & Cathy Heenan

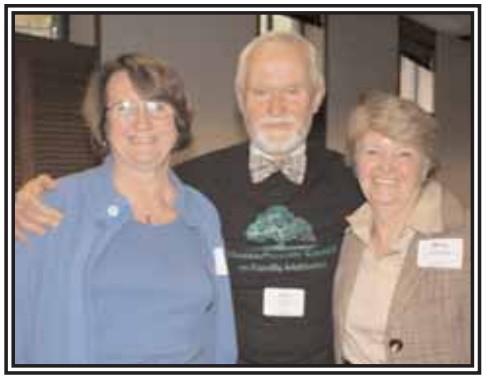
John Fiske Andrew, Barbara & Greg White Jerry Weinstein

Les Wallerstein & Fern Frolin

Marsha Tannenbaum

Sandy Furman

Julie Ginsburg & Arline Rotman



Kathy Townsend, John Fiske & Mary Johnston

Debra L. Smith is an attorney and mediator in Watertown, Massachusetts. She can be contacted at (617) 924-6728, or by email at <lawdeb@aol.com>. Deb invites you to visit her web site at www.lawdebsmith.com, and to **view an exhibition of her Nature Photography at the Watertown Free Public Library ART OF THE SEASONS showing from December 1-30, 2007.**

Lynn K. Cooper, Ed.D. is a clinical psychologist and mediator with offices in Chestnut Hill and Watertown. Lynn can be contacted at (617) 527-3152, or by email at <lynnkcooper@aol.com>

WHAT'S NEWS?

Chronologically Compiled by Les Wallerstein

Washington: First Same-Sex Partnerships Scores of gay and lesbian couples lined up to register as domestic partners as a new state law took effect. Couples that register as domestic partners receive enhanced rights, including hospital visitation, the ability to authorize autopsies and organ donations, and the ability to inherit in the absence of a will. (AP, New York Times, 7/24/2007)

Domestic Violence Law Exception Rejected Ohio's State Supreme Court ruled that domestic violence laws do not conflict with its ban on same-sex marriage. In a 6-1 decision the justices rejected an argument that the domestic violence law was unenforceable in cases involving unmarried couples because it refers to them as living together "as a spouse." The case is being closely watched around the country for the precedent it could set affecting dozens of similarly worded statutes. Twenty-seven states have constitutional language defining marriage as between a man and a woman. (AP, New York Times, 7/26/2007)

New Mexican Same-Sex Couples Welcome to Wed in Massachusetts Gay and lesbian couples from New Mexico can marry in Massachusetts because their home state has not explicitly banned same-sex marriage. New Mexico joins Rhode Island as the only other state whose same-sex residents are allowed to marry in Massachusetts. Neither Rhode Island nor New Mexico has said it would recognize the marriages. (AP, New York Times, 7/27/2007)

Jewelers in Global Battle for Brides Americans are shelling out more than ever on diamond engagement and wedding rings. Last year bridal jewelry made up 14% of Tiffany's U.S. sales. The average purchase price of $4,500, a 6.8% increase from 2005, was higher than any other product category. In Paris, Van Cleef & Arpels opened a "bridal bar" that serves Champagne and chocolate. In April, Cartier opened the first of 14 bridal salons in China. (Christina Passariello, Wall Street Journal, 8/3/2007)

The Myth, The Math, The Sex According to Cheryl D. Fryar, a health statistician at the National Center for Health Statistics, between 1999 and 2002 men had a median of seven partners and women had four. On average, men would have to have three more partners than women, raising the question of where those partners might be. According to David Gale, an emeritus professor of mathematics at the University of California, Berkley: "Surveys and studies to the contrary, the conclusion that men have substantially more sex partners than women is not and cannot be true for purely logical reasons…. When such data are published with no asterisk saying this can't be true, they just reinforce the stereotypes of promiscuous males and chaste females." Ronald Graham, a professor of mathematics and computer science at the University of California, San Diego agrees: "Some may be imaginary." (Gina Kolata, New York Times, 8/12/2007)

The Economics of Divorce & Remarriage As far back as 1977, the economist Gary Becker showed that couples experiencing any unexpected, drastic rise in net worth are at risk for divorce. The same holds true for a drastic decline in net worth. Dr. Becker, who won the Nobel Prize in 1992 and teaches at the University of Chicago, has explored the economic argument for what many people today call trading up, or finding a trophy spouse. Noting that 75% of men and more than 70% of women remarry within 15 years of divorce, he found that divorced men with higher earnings have the greatest likelihood of remarrying. (Christine Haughney, New York Times, 8/12/2007)

Arkansas: Error Allows Non-Pregnant Children to Marry A law enacted this year allows non-pregnant Arkansans of any age — even infants — to marry if their parents give approval. The legislation was intended to establish 18 as the minimum age to marry, but allow younger pregnant teenagers to marry with parental consent. The bill contains an extraneous "not." "In order for a person who is younger than 18 years of age and who is not pregnant to obtain a marriage license, the person must provide the county clerk with evidence of parental consent to the marriage." The governor may call a special session of the legislature to fix the mistake. (AP, New York Times, 8/18/2007)

Iowa Permits Same-Sex Marriage for 4 Hours As word spread that a judge had overturned a state law banning same-sex marriage, same-sex couples converged on Des Moines. Their chances were fleeting. After four hours, the same judge who had deemed the ban on same-sex marriage unconstitutional delayed further granting of licenses until the Iowa Supreme Court decides whether to hear an appeal. In the hours before the stay was granted, 20 couples applied for licenses and one actually wed. (Monica Davey, New York Times, 8/31/2007)

Tell-All PCs and Phones Transform Adversarial Divorces The age-old business of breaking up has taken a decidedly Orwellian turn, with digital evidence like email messages, traces of Web visits and mobile phone records now permeating many contentious divorces. Spurned lovers steal each other's BlackBerrys. Suspicious spouses hack into each other's email accounts, or load surveillance software to discover infidelities. Gaetano Ferro, president of the American Academy of Matrimonial Lawyers says "It has completely changed our field." (Brad Stone, New York Times, 9/15/2007)

25th Anniversary Mark Elusive for Many Couples For the first time since at least WW II, women and men who married in the late 1970s had a less than even chance of still being married 25 years later.

Continued on next page

According to the US Census Bureau in 2004, most Americans eventually marry, but they are marrying later and are slightly more likely to marry more than once. Couple who separate do so on average after 7 years, and divorce after 8 years. As of last week, more American women live without a husband than with one. (Sam Roberts, New York Times, 9/20/2007)

In Marital Arguments, Venting Feeling Affects Spouses Differently Recent studies show that how often couples fight or what they fight about usually doesn't matter. Instead, it's the nuanced interactions between men and women, and how they react to and resolve conflict, that appear to make a meaningful difference in the health of the marriage and the health of the couple. A study of nearly 4,000 men and women from Framingham, MA, asked whether they typically vented their feelings or kept quiet in arguments with their spouse. Notably, 32 percent of the men and 23 percent of the women said they typically bottled up their feeling. In men, keeping quiet during a fight had no measurable effect on their health. But according to the July report in Psychosomatic Medicine, women who didn't speak their minds in those fights were four times a likely to die during the 10-year study period as women who always told their husbands how they felt. (Tara Parker-Pope, New York Times, 10/2/2007)

"For two people in a marriage to live together day after day is unquestionably the one miracle the Vatican has overlooked."

Bill Cosby

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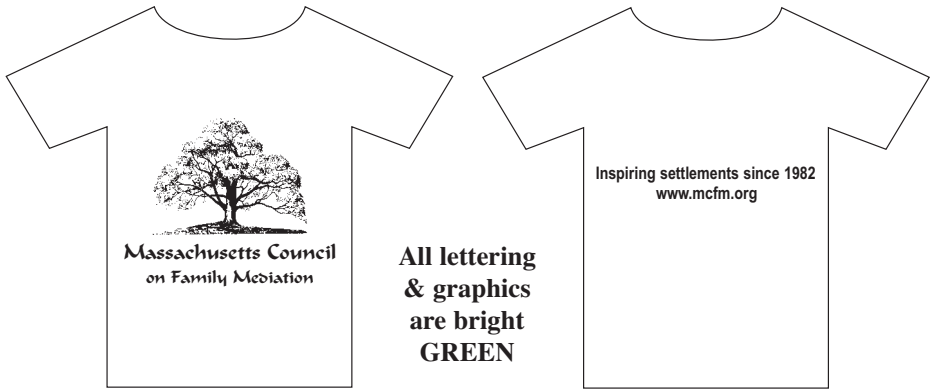

PROFESSIONAL DEVELOPMENT WORKSHOP
FOR ALL MCFM MEMBERS & THEIR GUESTS

BRINGING PEACE INTO THE ELECTRONIC MEDIATION ROOM
How To Communicate Collaboratively In Cyberspace

Presented by David A. Hoffman
Thursday, November 29, at 4-6 PM

Community Room
Needham Free Public Library
1139 Highland Avenue
Needham, MA

While there is no substitute for face-to-face communication in mediation, in some cases communication between sessions is done by email, via attachments, and by phone conference. There is an emerging sense of etiquette in these arenas (some call it "netiquette," for email communications), but beyond politeness, what are the techniques that mediators can use to foster collaboration and productive negotiations using electronic media? This workshop will use specific examples of what works and doesn't work, as well as addressing some of the technical issues, such as meta-data and the use of word-processing vs. PDF document formats. The format will be interactive, with lots of time for people to share their mishaps and positive experiences in the electronic mediation room.

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.

HELP BUILD AN ARCHIVE!

In the spring of 2006, MCFM entered into an agreement with the Department of Dispute Resolution at the University of Massachusetts to create an archive of Massachusetts family-related mediation materials. The two key goals are to preserve our history and make it available for research purposes.

We're looking for anything and everything related to family mediation in Massachusetts — both originals and copies — including: 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.***

MCFM BROCHURES AVAILABLE

Copies of MCFM's beautifully redesigned brochure are still available for members. Brochure costs are as follows: **Two for $1.00; 25 for $10.00; 60 for 20.00; 100 for $30.00; and 150 for $40.00.** A blank area on the back is provided for members to personalize their brochures, or to address for mailing.

TO OBTAIN COPIES MEMBERS MAY
call Ramona Goutiere: 781-449-4430
or email: masscouncil@mcfm.org

"Alone, all alone. Nobody, but nobody
Can make it out here alone."

Maya Angelou

ANNOUNCEMENTS

PARENTING TOGETHER
Presented by Sylvia Sirignano, Ph.D.
& Glenn Smith, LICSW
Wednesday Evenings, From 7:30 - 9 pm
Fee: $30 per session ($45 for parenting couples)

PARENTING AS A TEAM
What to Do When We Cannot Agree
November 14, 2007
From 7:30 - 9 pm

AFTER DIVORCE
Co-Parenting with a Difficult Ex-Spouse
January 30, 2008
From 7:30 - 9 pm

IS IT WORTH TRYING TO SAVE THIS MARRIAGE?
What's Best for the Kids?
March 19, 2008
From 7:30 - 9 pm

PARENTING IN STEPFAMILIES
Presented by Glenn Smith, LICSW
Wednesday Evenings, From 7:30 - 9 pm
Fee: $30 per session ($45 for parenting couples)

GREAT EXPECTATIONS
Debunking Old and New Myths About Stepfamilies
Oct 17, 2007
From 7:30 - 9 pm

STEPFAMILIES
Holidays and New Traditions
Nov 7, 2007
From 7:30 - 9 pm

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JOIN US

MEMBERSHIP: MCFM membership is open to all practitioners and friends of family mediation. MCFM invites guest speakers to present topics of interest at four, free, professional development meetings annually. These educational meetings often satisfy certification requirements. Members are encouraged to bring guests. 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 **Ramona Goutiere at <masscouncil@mcfm.org>**.

REFFERAL 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 and mailed to all Massachusetts judges, and to each listed member. **The most current directory is always 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 the MCFM Standards of Practice. **MCFM's Practice Standards are available online at www.mcfm.org.**

CERTIFICATION & RECERTIFICATION: 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 & recertification requirements are available online at www.mcfm.org.**

Every MCFM certified mediator is designated as such in both the online and 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 **Ramona Goutiere at <masscouncil@mcfm.org>**.

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