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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.

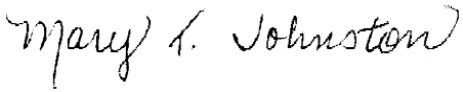
From The President

Mediation received strong validation this fall upon the awarding of the Nobel Peace Prize to former President Jimmy Carter. This international acclaim for his work served as a ringing endorsement of the effectiveness of mediation in peacefully resolving disputes throughout the world. One couldn't help but note the contrast of this award at the time our country is considering using force to resolve a potential conflict.

As family mediators, we are dedicated to assisting our clients in reaching solutions to their disputes by non-adversarial means. Due to our own beliefs and experiences, we each have reached the decision that mediation is a process with which we wish to be involved. No doubt, many of us through our professional work have seen the effects on a family of the adversarial process and are determined that there has to be a better way to resolve the issues confronting a divorcing couple. I would guess that Jimmy Carter determined to devote his skill and energy to peaceful means of problem solving on an international level as a result of his own experience as President.

Although we family mediators do not assist in the negotiation of issues involving large numbers of people or affecting significant areas of the world, nevertheless, couple by couple, family by family, we are contributing by providing non-adversarial means of ending disputes. Hold your heads high, mediators, and continue to believe in the value of what you do. You are promoting peace too.

Remember to let your Board members know of your concerns and ideas. We'd like to hear from you.



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MEDIATOR CONFIDENTIALITY UPHELD!

by Fern Frolin

On October 1, 1985, the Massachusetts legislature passed the Mediation Confidentiality Act, G.L. c. 233, § 23C. This statute applies to all types of mediation except labor disputes, which are subject to different confidentiality legislation. Since its enactment, mediators and their clients widely relied on Section 23C as meaning that mediation communications – like other settlement negotiations – are protected from disclosure in all judicial or administrative proceedings. The relevant part of the mediator confidentiality statute provides:

"All memoranda, and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding..."

For nearly seventeen years, the commonwealth's appellate courts were not called upon to interpret the mediation confidentiality statute. This year, for the first time since its enactment, Section 23C was subjected to judicial review in a high-profile civil case involving clergy sex abuse.

In Leary v. Geoghan, 84 alleged victims of Father John J. Geoghan asserted that they had reached a final and binding agreement with the defendant Archdiocese of Boston, and other defendants who failed to adequately supervise Father Geoghan. To prove their claim, the plaintiffs subpoenaed the mediator engaged by the parties to preside over their settlement negotiations. The plaintiffs asserted that their sole purpose in seeking the mediator's testimony was to determine whether the document drafted at the conclusion of their mediation contained all of the terms that the parties wished to include in their settlement. The plaintiffs were not seeking disclosure of the terms of the settlement, but whether a full settlement had been reached. The mediator objected and filed a motion for a protective order, to shield him from the plaintiff's subpoena to compel his testimony. Superior Court Judge Constance M. Sweeney denied the mediator's motion and ordered him to testify.

"Section 23C confers an absolute evidentiary disqualification for mediation materials, not a waivable privilege."

The only basis of the mediator's motion for protective order that Judge Sweeney considered was the mediator's claim that Section 23C absolutely disqualifies mediation materials and communications from admissibility in any litigation forum. In denying the mediator's motion, the judge held that the mediation confidentiality statute does not in all circumstances disqualify evidence of the mediation. Rather, Judge Sweeney ruled that the statute creates a "privilege" that parties to the mediation may assert in order to protect the confidentiality of their mediation negotiations.

A confidentiality privilege, as distinguished from an evidentiary disqualification, is not absolute. Parties to litigation may waive a privilege at any time during the proceedings. Moreover, Judge Sweeney held that the mediation privilege belongs only to the litigants, not to the mediator. She wrote:

"It is the parties who hold the privilege and the right of confidentiality, not the mediator. The plaintiff's have not asserted the privilege.... The defendant waived it by directly inquiring about conversations between the mediator, counsel and [a defendant]."

The mediator appealed to the single justice session of the Massachusetts Appeals Court. His appeal presented legal questions of first impression: What is the nature of mediation confidentiality? Is it waivable, and, if so, by whom?

On August 5, 2002, Justice Cynthia J. Cohen reversed Judge Sweeney and held that Section 23C confers an absolute evidentiary disqualification for mediation materials, not a waivable privilege. In a decision of critical import to mediators in this commonwealth, (Docket No. 2002-J-0435), Justice Cohen wrote:

"I conclude that whether or not the parties have chosen to maintain the confidentiality of the mediation, G. L. c. 233, § 23C, does not permit a party to compel the mediator to testify, when to do so would require the mediator to reveal communications made in the course of and relating to the subject matter of the mediation. Compelling such testimony, even if potentially helpful to the motion judge's decision on the merits of the parties' dispute, would conflict with the plain intent of the statute to protect the mediation process and to preserve mediator effectiveness and neutrality." (Emphasis added.)

It is important to note that the single justice decision in Leary v. Geoghan is the product of one judge's time-constrained analysis. Single justice procedures are designed to remedy immediately pending concerns. Neither the rules nor the time limits of those procedures permit the level of appellate consideration given to full bench appellate decisions.

Recognizing the significance of the first impression questions before her, Justice Cohen reflected that further interpretation of Section 23C would benefit from thorough appellate consideration, perhaps with opportunity for the bar and mediation groups to file friend of the court briefs. But further review will not occur in Leary v. Geoghan. The parties reached a new settlement in late September, obviating the need for further hearings to enforce their

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previously mediated agreement.

Time will tell whether we wait another seventeen years for further consideration of the mediation confidentiality statute, or whether another case will present the issue sooner. Until then, the single justice decision in Leary v. Geoghan controls. With mediation materials and communications disqualified as evidence, a mediator's work and testimony are absolutely protected.

Practice Notes: The mediation agreement in Leary v. Geoghan also contained a contractual provision to protect the mediator from compelled testimony. Justice Cohen avoided ruling on the enforceability of the contract clause because the language of Section 23C resolved the question. Since the single justice decision is not likely to be the last word interpreting the mediation confidentiality statute, mediators should continue to protect the privacy of their notes, files and testimony through contractual provisions in addition to reliance on the statute.

The complete text of Justice Cohen's decision is now available on MCFM's web site <www.mcfm.org>

Fern Frolin is an attorney mediator.

"Your brother and my sister no sooner met, but they looked; no sooner looked but they loved; no sooner loved but they sighed; no sooner sighed but they asked one another the reason; no sooner knew the reason but they sought the remedy: and in these degrees they have made a pair of stairs to marriage which they will climb incontinent, or else be incontinent before marriage."
William Shakespeare, As You Like It

Mediating Dishonesty

by Kenneth Cloke

The purpose of the search for truth in conflict resolution is twofold: first, to help the parties achieve a substantively fair result; and second, to help them feel a result is fair, allowing their wounds to heal. While the second purpose is not always achieved, it cannot take place without a level of personal honesty that is hard to fake, particularly when each side believes that they have been treated unfairly. Genuine sociopathic behavior is difficult to mediate, mostly because the false appears authentic, and the lies are not even metaphors.

As mediators, we often propose a ground rule that the parties agree to fully and honestly tell the truth. We surface concerns over trust and accuracy, and press disputing parties to resolve their doubts by objective means, such as documents, experts, criteria, witnesses, or whatever proves satisfactory to them. We caucus with each side to explore the veracity of critical information whenever we suspect intentional dishonesty. We press parties to reconsider outcomes that do not seem fair to both of them, or at least equally unfair. We directly confront dishonesty with curiosity about what made the person do it, and why. Beyond this, we have to accept that whatever agreements the parties reach belong to them. It is, after all, their sense of what is fair that matters, not ours. At the same time, to be able to own the results of the process, they need to have a sense that the truth has been told.

It is not uncommon for one party to assume he or she has borne the brunt of the sacrifice, or relied on a falsehood, or cannot prove the other person's dishonesty, particularly in divorce mediations, where this becomes a way of ending the relationship as a victim. Often, the complaint is a disguised form of grief, which rationalizes the act of leaving by finding fault with the other person's lack of integrity. Yet it also is a subtle form of dishonesty, albeit one that is personal, that cheats the one being dishonest out of truths that only emerge by working through the pain and grief of loss.

For example, if a husband has an affair, his wife may rage and call him names. But it is also useful for her to ask herself: "Were there other, earlier instances of dishonesty that I did not confront?" "How soon after meeting him did I first realize he might lie to me, or betray me?" "In what way was this marriage not intimate or satisfying for me?" "Why didn't I do something to save it at the first sign of trouble?" "What did I

"... we have to accept that whatever agreements the parties reach belong to them. It is, after all, their sense of what is fair that matters, not ours."

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contribute to its demise?" These lead to learning, growth, change, and preparation for a different kind of relationship, while the first response does not.

Dishonesty in nondivorce conflicts similarly limits the parties' capacity to resolve their disputes. It creates a continuing sense of unfairness and inequity that prevents healing, which is aided by emotional catharsis and truth-telling. Dishonesty rekindles false expectations and builds relationships on sand, rather than cement, leading to eventual structural collapse and future conflict rather than closure.

I comediated a sexual harassment dispute involving two women who had kept a diary over a period of several years chronicling every obscene comment, lewd gesture, and sexual suggestion their supervisor had made. The evidence seemed extremely damaging. The supervisor, however, denied everything and insisted they had made it all up. One of the attorneys representing the company, in finding out who was telling the truth, ordered a scientific analysis of the diary. The tests revealed that the pen used to make the entries for 1993 was not manufactured until 1995. The claim was dropped when the lie was exposed in mediation, but without the test, no one would have believed the supervisor.

As conflict resolvers, mediating dangerously means encouraging people not to agree when they think information is dishonest or outcomes are unfair, and taking steps to verify the accuracy of assertions that might be untrue. Only in this way can everyone be satisfied with their agreements and surrender their desire for revenge.

"Mediating Dishonesty" is an excerpt from Ken Cloke's most recent book entitled Mediating Dangerously, The Frontiers of Conflict Resolution, Jossey Bass, Inc. (2001). **Ken Cloke** is the director of the Center for Dispute Resolution in Santa Monica, CA.

"A truth that's told with bad intent beats all the lies you can invent."
William Blake 1757 - 1827

POST-DIVORCE PARENTING
A Baker's Dozen of Suggestions for Protecting Children

by Patricia Papernow

As we all know too well, a multiplicity of issues arises when two adults who have chosen not to remain married must somehow continue to parent their children together. These issues often intensify when one or both of the divorced parents re-couples. Dozens of studies now tell us that high conflict between divorced parents predicts poor post-divorce adjustment for children. That makes sense. Parents are the crucible in which children's worlds are held. When parents (and their partners) are fighting, a child's world becomes unsafe. The results can be devastating on a wide variety of measures: Poorer school performance, higher rates of depression and anxiety, lower self-esteem, more antisocial behavior.

I hope the following guidelines, based on our most recent research combined with twenty-plus years of clinical experience, will help you to help your clients to protect their children when parenting across households after divorce. Many may already be part of your practice. Feel free to copy this column and share it with your clients.

1. Urge your clients not to badmouth each other to their children. The urge to complain about an ex (or his or her new partner) to a child is very powerful. We can validate our clients' need to complain about their ex-spouses, or about their children's new stepparents. However, it is critical that we help divorced parents resist the pull to spill these thoughts to children, including their adult children. Ex-spouses can be encouraged to complain to their new spouses, to their hairdressers, or to their friends, not to their children, no matter how old they are.

2. Help clients to handle their differences out of children's earshot. Ask your clients when and where they plan to handle problems like scheduling issues, after-school and camp decisions with their ex-spouses. These should never be discussed in front of children. Establishing a regular call-in time, when children are not around, at work if necessary, functions well for some divorced parents.

A "Transfer Message" delivered by e-mail or voice mail can help to communicate critical information peacefully. Some couples use an email fill-in form that lists:

- Homework assignments due or in process.
- School events the other parent needs to know about.
- Two good things that happened.
- Two things the child struggled with.
- Any questions for the other parent.

You may want to help your clients design their own form. Note: Some people are not good about this kind of thing. If one of your clients is terrific and one is lousy at regularly filling out forms (due to learning disabilities, poor organizational "wiring," depression, etc.), this may be an idea that creates more conflict than it resolves. Drop it!

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3. Counsel your clients to let go of all but life and death differences between houses. Conflict between parents will do much more long-lasting, irrevocable damage than whether or not a child eats sugar cereal. The guideline I use is: If it does not affect your household, unless it is an extremely serious health or mental health issue (i.e., close to life or death), I suggest that ex-spouses raise the issue once or twice, very constructively (See Number 4, below). If you don't get through, letting it go will, most often, actually serve your children best.

4. Teach your clients how to bring up differences constructively. Teach your clients that it is in their best self-interest to keep it clean and to be extremely disciplined when they need to confront each other. Nasty confrontations feel good at first, but they take much more energy to resolve and are more likely to spill over on to kids. Avoid name calling. Avoid labels. Avoid accusations. Teach the model:

DATA: "When you... (Give the factual, purely descriptive, behavioral data about what the person did.)

FEELINGS: "I feel.." (Describe how you felt, or the effects on the child.) (Feelings are: sad, mad, glad, like it/don't like it. "I feel that you don't care," is not a feeling. It is an assumption about the other guy.)

REQUEST: "Would you.....?" (Make a request for action.)

(Julia Ross' "Joint Custody with a Jerk" is a short, very helpful book. If you recommend it, please note to your clients that the book includes several vignettes of parents screaming at each other in front of children but does not ever directly address the fact that this is completely unacceptable. For those who like to read, "Difficult Conversations" by Stone, et. al. is another terrific book about handling hot topics well.)

5. Coach clients to talk to children about differences between houses in a factual, neutral way. Just as they handle the differing demands of their different teachers, children can handle the fact that the rules in one house differ from those in another, as long as the adults do not drag them into conflict over the differences. Parents will support their children best if they can learn to speak about differences between their children's households in a purely factual and neutral way: "In your dad's house you can watch as much TV as you wish, but you can't swear, ever. In Mom's house, your TV is limited but you are allowed to swear when you are upset as long as you don't call a person names to his or her face."

"... ranting and raving about the offending absent parent meets the parent's need. It makes a bad situation even more painful for children."

6. Help your clients to keep transition times as peaceful as possible for children. For children, moving from one household to another requires huge shifts in physical and emotional relationships. During these transition times, conversation between the adults needs to remain calm and civil. This is not the time for that "honest exchange" your client has been hankering for. I tell my clients to err on the side of never raising issues with an ex at these times.

7. Suggest to divorced parents that they plan for the stress of transition times. None of us are at our best under stress. Like adults, children respond to the stress of changing households in different ways. Some "act out" just after or just before a transition. Some become withdrawn. Many parents assume this behavior indicates something is wrong in the other household. While that may sometimes be true, I suggest parents treat the behavior as normal unless there is a marked change in transition behavior.

It is generally wise to plan some "down time" for children before and after household changes. At these times, I advise my clients to keep requirements for intense interaction to a minimum. Some children may need to be alone. Others may need a period of close contact with their biological parent. (For many children, this is a good time for the stepparent to disappear.) A regular routine can be very helpful: We switch to mommy's house, have a snack, play a game and then brush teeth and get into jammies. Then we have our normal bedtime ritual.

8. When conflict remains high, lower the number of contacts between the adults. When parents remain contentious, protect children by finding ways to lower contact between the adults: Lower the number of transitions between households (i.e. change from every half-week to once a week). Have one parent deliver children to school in the morning and the other pick up in the afternoon. If necessary, find a neutral drop-off and pick-up place.

9. Talk to your clients about establishing a "Dutch door" between households. Divorced parents' relationships can range from quite distant to very friendly. However, in my clinical experience, while fixing an ex-wife's plumbing or taking late night calls about an ex's latest heartbreak may feel perfectly normal when both partners are single, new partners find these activities intrusive and disturbing. Thus, when ex-spouses have been "friendly buddies," remarriage usually necessitates a shift to more distance and separation.

I think it helps to think of the boundary between ex-spouses, especially after remarriage, like a Dutch door with a top and bottom half. The top half needs to stay open, allowing communication to flow about children so that all the adults can form a "parenting team" about child issues. The bottom half of the door needs to close, drawing a firmer boundary between ex-spouses concerning more personal adult issues.

These shifts can be especially challenging for a still single ex-spouse, who is, statistically, more likely to be the ex-wife. I coach newly marrieds to prevent trouble by being both kind and firm with their ex's: "This is a big change for both of us. But

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talking about intimate things/fixing your plumbing/phone calls at midnight just isn't working for me any more. It's too hard on my new relationship. I know we will continue to be cooperative parents for our kids. I'm afraid you'll need to get someone else to help with that old toilet. We can have a regular call-in time that's during my work hours to talk about kids. And I am so sorry that I won't be able to talk late at night/ fix your plumbing/talk to you about your dating life any longer. Know that I think the best of you."

10. Respect the parent in charge. Either parent can ask for a change in the custody schedule. However, on his or her watch, the "custodial" parent has final say over the children's schedules for those days or hours. Likewise, the "off" parent gets to say whether he or she wishes to give up a "free" day to provide coverage for kids. If the response is "no," the asker needs to simply back off.

Likewise, neither parent should ever make a disciplinary decision that affects the other parent's time, unless both parents agree ahead of time. Neither parent should make arrangements for the child on the other parent's time.

11. Direct your clients to let their children be where they are. Children will do best if they are allowed to be grounded and present where they are. As hard as this may be for the absent parent, it is more supportive to children to limit phone calls to times that do not interrupt the routine in the house where children are. For instance, calling children at bedtimes in the other house is often more comforting to the absent parent than to the child. It can actually make it harder for many children to settle down and sleep. Likewise, constant phone calls place children in a loyalty bind: "I am at my dad's but my mom misses me." Again, we know that loyalty binds are a sure-fire way to create depression and anxiety for children.

In extreme cases, where one or both parents cannot stop calling, you may want an order that limits phone calls to once during a weekly visit and to certain times of day. In my clinical experience, no phone calls at all are better for kids than constant phone calls from an absent parent, which create conflict for the child.

12. When an ex-spouse behaves badly. One of the most painful and confusing events for a parent occurs when an ex-spouse does or says something awful to a child. At these times, you can help parents to support their children without placing them in a loyalty bind. The rule is: Validate the factual behavior in a neutral tone: "Your dad does get drunk." "Your mom says very bad things about your stepmom sometimes." Then shift your attention immediately to the child: "That must be really tough for you." "That must be very confusing for you when she says those things." "That must be very scary when he starts drinking. Let's make a plan for you to be safe."

Switching attention to the child's dilemma helps parents to be supportive without badmouthing the other parent. Needless to say, ranting and raving about the offending absent parent meets the parent's need. It makes a bad situation even more painful for children.

13. Help divorced parents to keep special events special for children. Graduations, weddings, Parents' Days, Bar and Bat Mitzvahs, school plays, etc., belong to the child, not to the parents. If the school play happens on only one night, parents need to remain absolutely civil and pleasant with each other. If both parents cannot share a Parents' Day without creating tension or conflict, encourage them to take turns. One year dad comes on Parents' Day and mom comes another time. And switch the next year. If stepmother's presence makes mom crazy, it is usually in the child's best interest for stepmother to skip Parents' Day and come for a special visit another time. Unless children spontaneously express a strong preference ("I really want my stepdad at Parents' Day"), do not involve children in these decisions.

At graduations and weddings, conflicted ex-spouses can be seated far from each other. To free the bride and groom, a rotating team of friends can be assigned to a parent who cannot behave him or herself. Arrange staggered arrivals and departures for especially contentious spouses at a rehearsal dinner, graduation celebration, or an adult child's thirtieth birthday party. Likewise, if a young child is having a particularly hard time with a remarriage, assign close adults to him or her, and make sure she or he has close friends at the wedding.

This is the first in a series of somewhat regularly appearing columns addressing stepfamilies and post-divorce parenting issues.

Patricia Papernow, Ed.D., is a psychologist in private practice who teaches and is on the training faculty of the Stepfamily Association of America. She is the author of "Becoming a Stepfamily: Stages of Development in Remarried Families" (available from www.analyticpress.com). Questions, comments, case vignettes and suggestions for future columns are welcome. Patricia can be contacted at (617) 354-4829, or by email at <ppapernow@aol.com>.

"Mix a little foolishness with your serious plans: it's lovely to be silly at the right moment."
Horace
65 - 8 B.C.

Dividing Retirement Plans: Basic Ingredients & Jargon

by Edward P. Berger

Dividing retirement assets after divorce presents a host of options couched in technical terms. The first step is always to identify the type of retirement plan to be divided. Since there are only two basic types of plans this task can seem deceptively simple. Often it is harder than it looks. Uncertainty about the type of plan will lead to frustration and a waste of time and energy. The two types of plans are defined contribution plans and defined benefit plans.

1) DEFINED CONTRIBUTION PLAN – A package of money, which is usually invested in mutual funds, stocks, bonds or certificates of deposit. **The key phrase in a defined contribution plan is "account balance."**

In defined contribution plans, each participant has his/her own separate account and since the contents of that account (stocks, bonds, mutual funds) have market values every day, the entire account has a value every day – hence, the "account balance" can be computed on any given day. Examples of defined contribution plans include Profit Sharing Plans; 401(k)s; 403(b)s, IRAs and Tax Sheltered Savings Plans.

Hint: The exact legal name of the plan will often reveal the type of plan. For example, if "savings" or "401(k)" are part of the plan's name, then you are surely dealing with a defined contribution plan.

2) DEFINED BENEFIT PLAN – A package of promises (via a benefit formula) made by the plan to provide a monthly benefit to retired employees for the remainder of that person's lifetime. The benefit formula is usually one that is based upon the employee's income level in the last three or five years of his/her employment, the years of employment and the age at which s/he retires. **The key phrase in a defined benefit plan is "accrued benefit."**

In defined benefit plans, the participants do not have separate accounts. Instead they accrue a retirement benefit, which will be paid on a monthly basis at some point in the future. Look for the phrase "$ per month" or "$ per year" on any report from the plan to the participant. If you see one of those phrases, you are dealing with a defined benefit plan.

When dealing with a defined benefit plan, if you refer to the employee's account in any correspondence with the plan, you should expect the plan to reply saying that s/he "has no account" with our plan. While s/he might not have an account, s/he might very well have an "accrued benefit" which is usually payable on a monthly basis, starting at some future date.

Hint: A defined benefit plan is often called a "pension plan." If "pension" is part of the plan's name, then you are surely dealing with a defined benefit plan.

QDROs & DROs: A QDRO is a Qualified Domestic Relations Order. A QDRO becomes an "order" of a court after it is signed by a judge. A QDRO creates and recognizes the existence of an Alternate Payee's right (usually a former spouse) to receive a portion of the Participant's benefits payable under an employer or union-sponsored retirement plan which is qualified under Section 401 of the Internal Revenue Code of 1986, as amended (the "Code"), the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and the Retirement Equity Act of 1984, as amended ("REA"). To be "qualified" by the Plan's Administrator, the order must also meet the requirements under Section 414(p) of the Code, Section 206(d)(3) of ERISA, and Chapter 208, Section 34 of the Massachusetts General Laws. Both defined contribution and defined benefit plans require QDROs to effect a division.

Sample QDRO Assignment Language for Defined Contribution Plans: This Order assigns to the Alternate Payee ----% (or, $ ----) of (from) the Participant's vested account balance, as of DATE (often, but not always the date of divorce).

Sample QDRO Assignment Language for Defined Benefit Plans: This Order assigns to the Alternate Payee ----% of the Participant's vested accrued benefit, as accrued through DATE (often, but not always the date of divorce).

Some retirement plans are not required to meet the requirements of ERISA. For example, retirement plans provided for government employees (federal, state, municipal, and government agencies, including military personnel) are not ERISA "qualified" plans; and, as a result, one cannot draft a QDRO to divide the benefit. Nor is an IRA an ERISA qualified plan. But that does not mean that the accrued benefit (or account balance) of a non-ERISA plan cannot be assigned to a former spouse.

Dropping the letter "Q" from QDRO results in a DRO, i.e. a Domestic Relations Order. Like a QDRO, a DRO also becomes an "order" of a court after it is signed by a judge. Since DROs apply to non-ERISA plans, DROs drop all references to ERISA and to the Code to divide the benefit or account balance. The net result of a QDRO and a DRO is almost the same – a Plan Administrator is "ordered" to assign a benefit to a former spouse as an alternate payee. Despite the significant differences between a QDRO and a DRO, many people incorrectly use the acronyms DRO and QDRO interchangeably, as though a QDRO were a nickname for a DRO. It isn't.

Here are examples of several other kinds of court orders to divide retirement benefits: For employees of the federal government, the court order is called a Court Order Acceptable for Processing ("COAP"). For employees of the armed forces, the court order is called a Qualifying Court Order ("QCO"). For employees of states or municipalities, the court order is called a DRO.

In Massachusetts the Supreme Judicial Court first ruled that public employee pension benefits can be divided by court

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order in a case captioned Contributory Retirement Board of Arlington v. Mangiacotti, 406 Mass. 184 (1989). Thus, a DRO of a Massachusetts public employee pension may also be referred to as a "Mangiacotti Order."

Following are definitions and examples of some key terms for those who seek to venture further into the realm of retirement benefits:

Annuity: An annuity is a contract (usually with an insurance company) to pay the purchaser a fixed sum of money (per month) - for as long as s/he shall live - or for some fixed period. Sometimes there are guaranteed payment periods (5, 10, 15, 20 years) and sometimes the annuity is paid over two lifetimes, (e.g. when a survivor benefit is included). Obviously, the more that is guaranteed, the smaller the monthly benefit or the higher the purchase price. For pensions, an annuity means that the retirement benefit will be paid to the employee on a monthly basis for the remainder of that employee's lifetime.

Vesting: A period of time, which is specified in the document governing the rules of the plan, after which benefits earned become the absolute property of the participant. After this time the benefits can no longer be lost by the participant should s/he terminate service with (or be terminated by) the company, government, institution or union.

For example, most retirement plans now have a five-year vesting requirement. "Vesting" means that after five years of service under that plan, the participant has earned a benefit which cannot be taken away from him/her, should s/he quit his/her job or be fired.

Accrual vs. Vesting: Many people confuse the concept of "accrual" with the concept of "vesting." The easiest way to understand the difference is by considering an example. An individual who works under a pension plan with a five-year vesting requirement customarily accrues retirement benefits every month s/he is employed – so that after the first year of employment, s/he might have "accrued" a benefit of $120 per month, with payments to start when s/he reaches age 65, with the "vesting" requirement that s/he will only receive that $120 per month, provided that s/he will have worked under that plan (or for that company) for at least five years.

“... the precise legal name of the plan is often the most difficult information to acquire.”

If s/he does not complete the five years of vesting service, s/he will never receive what s/he has accrued. After 4 years and 11 months of service (assuming that s/he accrues $10 per month of service), s/he will have accrued a benefit of $590 per month - payable at age 65, which is not yet vested. If s/he quits his/her job after 4 years and 11 months, the $590 per month that s/he had "accrued" will be lost - it just disappears – and s/he gets nothing at age 65 because his/her "accrued benefit" ($590 per month) was not yet vested at the time s/he quit.

However, if s/he works for just one more month (to the five-year "vesting" point), the $590 per month becomes vested, so s/he cannot lose it. S/he will also have "accrued" another $10 per month for the last month s/he worked - giving him/her a total "accrued and vested" benefit of at least $600 per month, payable starting at age 65, even if s/he terminates work after the five-year point.

Plan Name: In assembling the information needed to draft a QDRO, the precise legal name of the plan is often the most difficult information to acquire. By using the incorrect legal name of the plan in a QDRO, you are most certainly going to have your QDRO rejected by the attorney for the plan. In my experience, getting the name right, requires asking for the legal name at least three times. If you ask the employee (participant) for the name of the plan, s/he will usually give you the nickname given that plan by other employees, e.g. "we have always called it the 'XYZ 401(k) Plan.'" Often the precise legal name of the plan will be something like the "XYZ Corporation Employee Savings and Investment Plan."

Plan Administrator: The Plan Administrator is almost always the corporation itself or a committee appointed by the board of directors of the corporation or the treasurer of the corporation - where one individual is given the job of making sure that all legal documents (such as QDROs) get put in the proper hands. While the Plan Administrator often arranges for some investment firm to provide the investment vehicles and quarterly statements for the participants (for defined contribution plans), the investment firm is almost never the Plan Administrator.

If you send your QDRO directly to the investment firm (rather than to the real Plan Administrator), you are running the risk of having it drop into one of those black holes. Correspondence to a Plan Administrator should be addressed to a person at the company, e.g. "Attention: Joe Jones." Always send DROs and QDROs by certified mail, return receipt requested.

Participant: The party who is (or was) the employee of the company (government, institution, union, etc.) under whose sponsorship the retirement plan exists.

Alternate Payee: The former spouse of the participant, to whom a portion of the participant's account balance (in a defined contribution plan) or a portion of the participant's accrued benefit (in a defined benefit plan) is being assigned pursuant to the QDRO.

Conclusion: While defined contribution and defined benefit plans may seem easy to differentiate, often they are not. The distinction is critical. Be sure you understand the intricacies and implications of any order to divide a retirement plan before drafting it.

Edward P. Berger is a Boston-based mathematician who specializes in the valuation of pensions and in drafting court orders to divide retirement assets. He can be contacted at (617) 227-4900.

ADR NEWS FROM THE COURTS

By Christine W. Yurgelun

ADR Providers: The Probate and Family Court Department has a new set of ADR providers which recently applied for, and received, approval to provide court-connected dispute resolution services through June 30, 2004. Some approved ADR providers offer a single process option while others are able to provide a wider range of services. Of the thirty-three programs currently approved to provide alternative dispute resolution services in the Probate and Family Court Department, twenty-two have been approved to provide mediation, five have been approved to provide arbitration, five have been approved to provide conciliation, and three have been approved to provide case evaluation.

Nine of the thirty-three programs currently approved to provide ADR services in the Probate and Family Court Department are "new" to the department, i.e. they did not previously seek approval in the Probate and Family Court Department. The MCFM has been re-approved to provide mediation, arbitration, case evaluation and conciliation for court referrals from Berkshire, Bristol, Essex, Franklin, Hampden, Hampshire, Middlesex, Norfolk, Suffolk, and Worcester. Currently there are twelve neutrals serving on MCFM's roster for court referrals.

Permanency mediation services have been funded for this fiscal year. In order to be an approved provider of permanency mediation services, a program must have received separate approval specifically for permanency mediation, and must have been approved in both the Probate and Family Court and the Juvenile Court Departments. Of the twenty providers approved for permanency mediation, seven programs were approved exclusively for permanency mediation, while thirteen programs were approved for additional services.

This fall, the Coordinator of Court-Connected Dispute Resolution Services has arranged meetings at each Division with representatives of the approved programs and the court personnel of that Division.

"... the initial primary task of the new Standing Committee shall be to review the proposed qualification standards for neutrals...."

These meetings are intended to insure that the neutrals and ADR program administrators understand local requirements and procedures and will provide opportunities for court personnel to become better acquainted with ADR programs' representatives and services. Additionally, meetings with the Local Dispute Resolution Coordinators from each division are held quarterly to insure uniform awareness of the development as implementation of SJC Rule 1:18 (Uniform Rules on Dispute Resolution) continues.

SJC/Trial Court Standing Committee on Dispute Resolution: The membership of the new SJC/Trial Court Standing Committee on Dispute Resolution has been announced. The Committee is composed of the Chair (Judge Cratsley), a representative of each Trial Court Department and the Administrative Office of the Trial Court, and four non-court members. The Trial Court representatives are: Cynthia Brophy (BMC); Charles Brownlee (District); Donna Ciampoli (Juvenile); Robert Lewis (Housing); Timothy Linnehan (AOTC); Judge Stephen Neel (Superior); Deborah Patterson (Land); and former MCFM president **Judge Gail Perlman** (Probate and Family). The non-court members are: Susan Jeghelian (MODR); Scott Moriearty (Bingham McCutchen, LLP); Professor Frank Sander (Harvard Law School); and Beth Anne Wolfson, Esq.

Chief Justice Marshall's letter announcing the new committee membership stated that the "initial primary task of the new Standing Committee shall be to review the proposed qualification standards for neutrals in light of guidance provided by the Supreme Judicial Court Rules Committee, along with the other Uniform Rules, and make recommendations for changes as necessary."

Re-appointment: On October 10, it was announced that Chief Justice Sean M. Dunphy has been re-appointed to a second term as Chief Justice of the Probate and Family Court. His new term of office begins on November 3, 2002 and expires on November 2, 2007. In accepting the re-appointment, Chief Justice Dunphy said, "I am pleased to have the opportunity to serve a second term as Chief Justice. Despite an initial shortage of judges and the recent budget cuts, the past five years have been a time of unprecedented activity and productivity in the Probate and Family Court. With the help of judges, registers, probation officers, other court staff, members of the bar, legislators, mental health professionals, educators, ADR providers, and parent education providers, we have undertaken a number of initiatives to uniformly improve case flow management and make access to justice less burdensome to lawyers and litigants. There is much more to be done."

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

"Laws are like cobwebs which may catch small flies, but let wasps and hornets break through"
Jonathan Swift
1667 - 1745

John Fiske, Jerry Weinstein & Janet Wiseman - circa 1981

Massachusetts Council on Family Mediation History: Interviews with Three Founders

by Debra L. Smith

Formation The seeds for the first organizational meeting of the MCFM were planted in 1982 at the annual meeting of the Society of Family Therapy and Research in Wellesley. Janet Wiseman, John Fiske, Jerry Weinstein and Joanne Forbes were the four original founding members of what was to become the MCFM. At that time, almost everyone interested in developing an organization of mediators had a mental health background. All believed that a group of mediators could come together to effect real changes in the adversarial manner in which family law disputes were resolved. John recalled their shared belief that strength lay in unity.

MCFM founders at the 1982 Society of Family Therapy and Research meeting came from diverse backgrounds. John Fiske had practiced corporate law on Wall Street and worked for a large Boston firm. He practiced municipal law for the Boston Law Department and acted as Executive Secretary of the Supreme Judicial Court. After traveling around the world with his family for a year, John returned with the intent of practicing divorce mediation.

Jerry Weinstein was an engineer who had also worked as an administrator for Boston University Medical School. Following his personal experience with divorce in 1970, he became a licensed social worker specializing in family therapy. After co-founding the Divorce Resource and Mediation Center, Jerry devoted substantial energy promoting public interest in mediation.

Janet Miller Wiseman came to mediation with expertise as a psychiatric social worker with a specialty in couples and family therapy, and as an adjunct professor at several Boston area universities. She saw the founding of the MCFM as a way to advance mediation education, as well as a means of forming a bond with other mediators.

Initial Organization The Massachusetts Council on Family Mediation was organized as a nonprofit corporation on November 2, 1982, in Wellesley. Later, the founding group met at the Divorce Resource and Medication Center, then located at 2464 Massachusetts Avenue near Alewife Brook Parkway in North Cambridge. Early activists included Harry Keshet, Patrick Phear, Freida Grayzel, Oliver Fowlkes and Larry Madfis. MCFM's first elected officers were Jerry Weinstein, president; John Fiske and Joanne Forbes, vice presidents; and Oliver Fowlkes, secretary.

A central idea was to involve people from different disciplines. Sam Magolies from the Academy of Family Mediators offered technical assistance. According to John Fiske, Sam's advice was to "exclude no one."

Outreach The early incorporators were inspired to promote mediation and believed that outreach was essential. Everyone worked to get the message out. Some made presentations to local community groups while others wrote articles. Janet wrote a "mediation script" that aired on Lexington Cable TV in which she and John co-mediated for a divorcing couple, portrayed by Julie Ginsburg and Ronald Fox. In 1982, Jerry Weinstein convinced the telephone company in Massachusetts to provide the first Yellow Pages section titled under the heading of Mediation. MCFM's public appeal was to pursue the resolution of family law matters by non-adversarial means. MCFM members were also supportive of each other in developing mediation practices.

MCFM's first conference was at Pine Manor College in 1983. Tom Bishop, now a Connecticut judge, gave the keynote address. In 1983 the MCFM promulgated the first standards of practice for mediators in Massachusetts. Patrick Phear wrote the first draft of the confidentiality statute. In 1985, after sustained efforts led by John Fiske, that statute was enacted as M.G.L. Chapter 233, Section 23C.

Bench & Bar Reactions Jerry recalls that in the early days the reactions of the bar and bench were negative. There was enormous resistance to change as mediation was perceived as an infringement on lawyers' practices. Janet's view was similar. She too found the bar and the bench disinterested, and especially un-accepting of mediators with therapeutic backgrounds.

"The fire in the belly that got us started needs to be maintained."

Although John does recall some initial resistance from individual members of the bench and bar, he felt their overall reaction was positive. He remembers the Boston Bar Association, the domestic bar, and SJC Chief Justice Hennessey, his former boss, accepting of divorce mediation.

Lessons According to Jerry, mediation works because it is helpful to people. He learned from his family therapy background that a mediator has to connect

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with people to develop trust, by coming together in a humanistic process.

John relates that he's learned that one cannot speak ill of anyone. He says people argue over control and acknowledgment. People look for apologies which is a part of atonement and thus acknowledgment. As a mediator, John has learned to go with the flow, especially if someone does not want to talk about something.

Janet stated that the frontier spirit needs to be kept alive. "The fire in the belly that got us started needs to be maintained."

What's Changed Janet is now doing organizational team building and consulting, as well as continuing as a divorce mediator. She also maintains a clinical practice as a psychotherapist and practices mediation therapy: short term decision making for relationships in crisis. She is on the Board of Directors of the Program on Negotiation and Study at Harvard University.

John has found that a lot more people are mediating with different skill levels. The Massachusetts Supreme Judicial Court now has a Standing Committee on Dispute Resolution, and overall there seems to be a system-wide and country-wide acceptance of mediation. As indicative of its increasing acceptance, John notes that even some governmental disputes are resolved through mediation.

Jerry finds that more lawyers are involved in mediation now than in the early days, when therapists outnumbered lawyers. He observes that people are more focused on family and children and seem less litigious. There is more technical support available. Jerry finds the appointment of judges in the last ten years is better, especially with the appointment of more women. The focus of the court was on probate and now is more on families and children. Non-adversarial processes are now available including mediation and collaborative law. Jerry supports collaborative law for individuals who do not want to participate in mediation.

Future Visions John perceives mediation as a growing consumer movement. He referred to Howard Irving's book "Divorce Mediation," which describes divorce as a human problem. He foresees divorce mediation becoming more accepted. John's suggestions include: putting new energy into public education, using radio advertisement to promote the MCFM, working towards improving the confidentiality statute, and much better interface between the courts and mediation.

Jerry plans to retire when he turns 75 in May, 2003. In the future he would like to see more assistance for pro se litigants and education of the public.

Janet would like to see mediation and collaborative law as the primary methods of resolving family disputes. She suggests learning more from innovations in other states, like conciliation courts in Arizona. Janet urges us to keep striving to improve the judicial system and the practice of family mediation in Massachusetts, so the passion is not lost.

The seeds for the MCFM that were planted 20 years ago took root. They have grown and changed color, but the tree has to be fed and nurtured so it can continue to grow.

Debra L. Smith is an attorney and mediator in Watertown, Massachusetts. She invites you to visit her web site at <www. lawdebsmith.com>.

SOCIAL SECURITY BENEFITS RE-CONSIDERED

By James McCusker

When dividing the marital estate, what's the most overlooked asset on the family balance sheet? No, it's not the dwindling dot.gone stock options. It's not the collection of Star Trek memorabilia. And, it's not the Barry Manilow complete CD set. The hidden gem in your clients' estate may be their future Social Security benefits. Although the value of Social Security benefits can amount to tens of thousands of dollars, it is an asset that is often completely ignored when allocating marital property. Based on current case law it appears that this may be a trend that is about to undergo substantial change.

In 1997 the Mahoney case was argued before the Supreme Judicial Court in Massachusetts. (Mahoney v. Mahoney, 425 Mass. 441 (1997).) One of the outcomes of this case was the court affirming that "... Federal law prohibits such [Social Security] benefits from being included as an asset in the marital estate." (Mahoney at 443.) However, the decision went on to hold that "... a judge may consider a spouse's anticipated Social Security benefits as one factor, among others, in making an equitable distribution of the distributable marital assets." (Mahoney at 446.)

"... the present value of future Social Security benefits can be used as a factor in making an equitable distribution of the marital estate."

Under Federal law, one spouse's Social Security benefits cannot be partitioned and distributed to the other spouse. Nevertheless, from an asset allocation standpoint, the present value of future Social Security benefits can be considered by a judge as a factor in making an equitable distribution of the marital estate. In effect, the Mahoney court has added Social Security benefits as an additional factor to consider under Massachusetts General Laws Chapter 208, Section 34, the statute dealing with the assignment of marital property.

So what does this mean from a practical standpoint? The following example illustrates how the Mahoney case might be applied in your practice. Let's assume you have a husband and wife ages 50 and 48, respectively. The husband's Social Security benefit at age 65 will be $1,500 per month, and the wife's will be $750 per month, also at age 65. Per actuarial tables both their life expectancies at age 65 will be 20 years. Let's also assume that annual Social Security cost of living adjustments for the period will average 3% and that the discount rate is 5%. (The discount rate is the rate of return which we can expect to receive on our investments.) Using these assumptions we find that the present value of those future Social Security benefits at

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age 65 is $287,366 for the husband and $143,683 for the wife.

We then need to perform another calculation to convert those amounts to current dollars. To do this we simply take those amounts and discount them at 5% annually- 15 years for the husband and 17 years for the wife. When we're finished we arrive at an estimate of what those future benefits are worth today. In this case the husband's benefits are worth $138,228 in current dollars and the wife's benefits are worth $62,688. This is a discrepancy of $75,540. To keep a 50/50 division of the marital estate intact, the parties would now have to make a compensating allocation of $37,770 (i.e. $75,540 divided by 2) to the wife with some other marital asset.

This is just what the court did in the Mahoney case. The court considered the disparity in anticipated Social Security benefits and awarded the wife a disproportionate share of current marital assets in order "... to equalize the standard of living both parties will enjoy in the present and future." (Mahoney at 446.)

The ruling in the Mahoney case may have a greater impact on smaller marital estates where Social Security benefits represent a larger proportion of the total asset base. But, even in larger estates I believe we would be remiss to overlook assets that in absolute terms could represent thousands of dollars in distributable assets. So when planning an asset allocation strategy with your clients, be sure to include Social Security benefits on that list along with the stock options and the Manilow collection.

Jim McCusker is a CPA and a certified financial planner. His articles explore tax issues that bear on family mediation. Comments or suggestions are invited. He can be contacted at (978) 256-1323, or by email at <James@McCuskerAssociates.com>.

FREE FORMS ONLINE

The Middlesex County Probate & Family Court <www.mcpfc.com> hosts a web site filled with information such as court fees, informational pamphlets, and many court forms. All the forms are in PDF (Portable Document Format). Each one can be downloaded, saved, filled out on your computer and printed on your printer.

The divorce forms now available include: Joint Petition, Vital Statistics form (R-408), Affidavits Disclosing Care & Custody, Child Support Guidelines Worksheet and the Short Form Financial Statement. The web site indicates that additional forms will be added.

For Better or For Worse: Divorce Reconsidered

Reviewed by Lynn K. Cooper

In "For Better or For Worse; Divorce Reconsidered," E. Mavis Hetherington writes about what she's learned from the nearly 1,400 families she studied, including over 2,500 children, some of whom she followed for decades. In comparing the adjustment and development of people from divorced families to people from intact families, Hetherington differentiates between problems shared by all families and problems unique to divorced families. The panorama of issues she examined include: how divorce changes people's behavior, feelings, health, work and sex lives; why casual post-divorce sex is risky, especially for women; why the most painful period is one year after the divorce; gender differences in the decision to divorce and post-divorce adjustment; and many other topics of interest relating to divorce.

Hetherington begins her discussion of divorce by turning her attention to marriage. She describes five kinds of marriage: the Pursuer-Distancer Marriage, the Operatic Marriage, the Disengaged Marriage, the Cohesive/Individuated Marriage, and the Traditional Marriage. She describes the strengths and weaknesses of each and the divorce statistics in her samples for each type. Each chapter ends with a summary in the form of Points to Remember, a distillation of the high points covered. Most of these points are couched as specific advice to the newly (or not so newly) divorced. I found her advice to be honest, supportive and full of wisdom.

Hetherington views human lives as having characteristic patterns; she describes patterns for groups and individuals over the marital life cycle:

"Marital failure cannot be understood as a single event; it is part of a series of interconnected transitions on a pathway of life experiences that lead to and issue from divorce. The quality of life in a first marriage influences adults' and children's responses to divorce and experiences in a single-parent family, and these in turn cast a shadow across new romantic relationships, a second marriage, and life in a stepfamily." (p.4)

"... the big headline in my data is that 80% of children from divorced homes eventually are able to adapt to their new life and become reasonably well adjusted."

There is ample corroboration for the belief that divorce is very stressful. Hetherington describes the end of the first year post-divorce as the most painful time for people, where physical and psychological vulnerability is a hazard both to adults and children.

Hetherington finds that the best thing divorcing parents can do for their children

Continued on next page

is to maintain a respectful and cooperative parenting relationship, by talking over their children's problems, coordinating household rules and child-rearing practices, and adapting their schedules to fit their children's needs. Twenty-five percent of divorcing couples in her sample were able to achieve this.

In "The Unexpected Legacy of Divorce," Wallerstein, Lewis and Blakeslee found that fully half of the children in their small sample of divorced families experienced long-term negative effects on their mental health. In their view, the children of divorce are at significantly greater risk to suffer social maladjustment and an impaired ability to successfully form future intimate relationships. By contrast, Hetherington offers a far more optimistic perspective based on a substantially larger sample.

"... the big headline in my data is that 80% of children from divorced homes eventually are able to adapt to their new life and become reasonably well adjusted." (p. 228)

In Hetherington's samples, some ten percent of youths in non-divorced families, (as opposed to 20% in divorced families) were described as troubled. There is another minority in her sample (20%) who are able to use the "window of change" resulting from the breakdown of the stable married self in order to grow in ways they never would have experienced had they stayed married. These "Enhancers" are usually women. The largest category in-between are what Hetherington calls the "Good Enoughs," for whom divorce is a temporary stressful blip on the radar screens of their lives, not defeating them, but not leading to growth and significant life change.

Hetherington vividly describes the experiences, challenges, gender differences, and risk and protective factors in the post-divorce period. She provides illustrative vignettes and wise advice for the struggling. She also discusses the hazards and challenges of remarriage with characteristic clarity and a wealth of illustrative description.

I found many impressive qualities in this book. It is a comprehensive illumination of varied life patterns encompassing marriage, divorce, post-divorce, and remarriage. It describes the adjustment of both adults and children, men and women, boys and girls; combined with considerations of positive and negative risk factors that influence life outcomes. It is based on the longest longitudinal studies of divorced families with married control groups conducted in America to date. Thus, differences solely due to divorce can be reliably distinguished. It is eminently readable, with an engaging style and many vignettes illustrating and enlivening each important point of information. Most important, it describes what families and children can actually do in non-technical terms to enhance their lives while navigating the shoals of marriage, divorce, post-divorce, and remarriage. In the end Hetherington offers hope.

"I think our findings ultimately contain two bottom-line messages about the long term effects of divorce on children.... While divorce creates developmental risks, except in cases of extraordinary stress, children can be protected by vigorous, competent parenting. The second bottom-line is ... [that] divorce is not a form of developmental predestination...." (pp. 229-230)

This is a "must read" for anyone in the process of divorce, or anyone (lay person or professional) wishing to help someone coping with divorce.

E. Mavis Hetherington and John Kelly, For Better Or For Worse, Divorce Reconsidered, W. W. Norton & Company, New York, 2002, is 307 pages and is available from bookstores and web sites.

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

PARENT EDUCATION BROCHURES

The Administrative Office of the Massachusetts Probate & Family Court issues a free brochure listing every approved provider of parent education classes. The brochure also has a copy of the court order (Standing Order 1-99) that mandates parental attendance for all parties to any action for divorce where there are minor children.

The court tries to update all listings in the brochure approximately every four months. The latest brochure is dated June, 2002. A current brochure is available on request from:

Probate & Family Court
Administrative Office
Edward W. Brooke Courthouse
24 New Chardon Street
Boston, MA 02114

or by email to

Mark Quigley, Administrative Attorney at <quigley_m@jud.state.ma.us> or
Sonya Smiddy, Head Administrative Assistant at <smiddy_s@jud.state.ma.us>.

Be sure to give your clients the most recent brochure!

Resolution Reflections: Mediation and Meditation

by Jay Uhler

People often look at mediation or meditation in print and the opposite one registers in their mind. The thought could be that they look a lot alike. Let me suggest that they are more similar than a first glance would indicate.

Resolving conflicts can be difficult. Meditation in my experience is far more difficult. Why then would a mediator consider it? I believe that meditation can assist a mediator to mediate better. I also believe that mediation can be a form of meditation.

The Focused Mediator Meditation is a conscious process of learning to focus the mind inward. Meditation can be done with the eyes closed or open. Each approach leads us to a different experience of ourselves. As each approach can be beneficial to a mediator, I believe that both are relevant to mediation.

The eyes closed approach may be used more easily to explore memories and emotions, because it may seem safer. The eyes open approach is better to develop the experience of meditation with mediation. I am pleased to recommend two books[1] about meditating with eyes open as a way of being connected with the outer world while exploring the inner world.

In mediation, the capacity to focus is important. The mediator needs to focus on the needs of the disputants, even when they do not know their own needs. The mediator also must be in tune with the feelings that the disputants bring to the table. If their core needs and feelings do not get addressed, resolution of the conflict is often blocked. Resolution occurs when all of the parties to the dispute have their needs met to the greatest possible satisfaction of everyone.

The discipline and experience of meditation assists our capacity to focus. In meditation a person may place his/her focus on his/her breath, a word, or a sound, as a way to clear his/her mind. The mind constantly wants to take over with thoughts about anything and everything. It wants to avoid focusing on events or emotions that clear the mind. The mind resists the possibility of pain. It continuously creates distracting thoughts to take the mind away from focusing on anything that will be more upsetting than life is already.

Disputants in mediation constantly shift away from the issues, especially if they become afraid that their needs will not be met, or that they will lose something or have to give up something. They may do it unconsciously or consciously, but it takes a well-focused mediator to avoid being led astray by subtle, and sometimes not so subtle diversions from the issues at hand.

During mediation, some people bring emotions to the conflict that they are unable to express because they have never been taught the skills to express their feelings in constructive ways. Other people have repressed their feelings because they learned that to express emotions has negative repercussions that are painful. Often a role of the mediator is to create safety for the person to release his/her feelings, and at times the mediator must help the disputants to recognize core emotions that are present but unconscious.

The Peaceful Mediator In order to do this, mediators must be aware of and comfortable with their own feelings. When mediators practice meditation it opens our hearts and minds to unexplored memories and emotions. When we are able in our personal meditation to avoid judging our thoughts and feelings, we can get in touch with ourselves in a way that permits us to experience our humanity in new ways. When we do that, we enable others to be in better touch with their humanity. When meditation is based on a connection with universal love, we deepen our acceptance of our own humanity and emotions, which leads to peace within ourselves. This leads to peace with others and becomes a model for peace between others.

"As models of peace, we bring a calm to the mediation process that is contagious."

As models of peace, we bring a calm to the mediation process that is contagious. We bring an acceptance of the ideas and emotions of the disputants that is calming. We bring a solid presence when we set limits on disputants' actions that interfere with safety in the room. We provide the opportunity for the disputants to express themselves and to connect through positive interactions that lead to resolution.

Meditative Mediation Both as a therapist and as a mediator, I am aware of a level of content underneath the words that people speak. By tuning into disputants at a deeper level, we are better able to hear their true meanings. They are often surprised that we understand their intent better than they are able to express it themselves. They are also pleased that when the other party does not hear them accurately, we are able to present their thoughts and feelings in a different or more direct way so they are better understood. This adds clarity to the process.

Meditation not only helps clear the mind of clutter and chatter, it opens us up to ourselves and to others and to the energy of the universe. I believe that there are often insights that come to me during therapy and mediation that are not my own. The source of those insights is what I refer to as Love Energy which is universal. Others have their own labels for that Source.

When meditation is practiced with our eyes open, it assists us to be aware of three dimensions, which spiritually are all one. It connects us with the Source of universal insight. It connects us with our deeper selves. It connects us with the outside world of others. This experienced during mediation can be called meditative mediation.

My concluding reflections are these: Training, supervision and skill are essential. Meditation can take mediation to

Continued on next page

another level --- one of heightened consciousness.

Footnote

1. Chödrön, Pema. 1997. "When Things Fall Apart: Heart Advice for Difficult Times." Boston, Massachusetts: Shambhala Publications, Inc.; and Perrin, Stuart. 2001. "A Deeper Surrender: Notes on a Spiritual Life." Charlottesville, Virginia: Hampton Roads Publishing Company, Inc..

Jay Uhler is an organizational and clinical psychologist, an ordained minister and the facilitator for the Peervision Case Conference in the Program on Negotiation at Harvard Law School. He is also the author of "How to Make Friends With Your Feelings" (available from bookstores and web sites). Comments or suggestions for future articles are invited. Jay can be contacted at (978) 685-8550 or at <JRUhler@att.net>.

"Resolution Reflections" relates psychology and spirituality to the mediation process.

"... And let us all to meditation."

William Shakespeare, Henry VI

Disengagement

by Les Wallerstein

One morning, a wife called to ask about divorce mediation after 23 years of marriage. I agreed to mail some introductory materials. Before the end of the day she called back to say that she and her husband had decided on a "disengagement" instead. When I asked what that meant, she explained, "If it makes sense for a couple to spend a period of time being 'engaged' before getting married, it also makes sense to spend some time being 'disengaged' before getting divorced."

They planned to continue living together during their disengagement, probably for a year, or until they decided to divorce or stay together. "This way we can be more certain if divorce is really what we want. I think this makes sense after being married so long."

But for a decision to reconcile, this seemed to be the second best way to lose prospective clients.

Announcements

FIRST EDITION SOLD OUT!

The summer edition of the MCFM Family Mediation Quarterly sold out! We have printed extra copies of the fall edition. We're pleased to make them available at introductory prices while supplies last. The cost of additional FMQs is $5.00 each for members, and $7.50 each for non-members. Please mail requests for additional copies to DeLaurice Fraylick, 23 Parker Road, Needham Heights MA 02494-2001, and enclose a check made payable to MCFM.

LEAVE THE FMQ IN YOUR WAITING ROOM
GIVE COPIES TO YOUR CLIENTS

Mediation Peer Group Meetings

Merrimack Valley Area

Please join us for our (almost) monthly mediator peer support group. We are a group of family law mediators who have been meeting for approximately three years. At some meetings we invite guest speakers to address a topic that helps us improve our mediation skills. Sometimes the topics relate to substantive issues, and sometimes to mediation techniques. At most meetings, we address questions from the members about problems they may be having in their own mediation cases. Our discussions are lively and informative. The criterion for membership is a desire to learn and share. We invite interested mediators to come to our next meeting.

The meetings are held at 8:15 AM 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 or directions.

Metro-West Area

Open to all MCFM members. Monthly meetings are (usually) held at 9:30 AM at Janet Weinberger's home, located at 206 Windsor Road, Waban. Please call (617) 965-4432 for dates and driving directions.

Announcements

MCFM Member Meetings

MCFM invites guest speakers to present topics of interest at free quarterly member education meetings. Members are encouraged to bring guests at no cost. Our next meeting is scheduled for Wednesday, December 4th, from 4-6 PM, at the Wellesley Community Center located at 219 Washington Street. The presentation will be made by Mitchell B. Macey, a C.P.A. of Cunningham & Macey in Hingham. His presentation will focus on tax issues related to divorce and an update on tax changes anticipated in the near future. See our web site at <www.mcfm.org> for driving directions.

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 on-line at <www.massclc.org>.

NEW MEMBERS 2002

BOSTON: Hon. Eileen M. Shaevel (ret.)
BROOKLINE: Martin L. Aronson
DEDHAM: Mary Banach, Nancy Greenberg
HOLLISTON: Audrey Kleinberg
NEWTON: Bette Winik
NORTHAMPTON: Christina Kerr
NORWOOD: Crystal Thorpe
PITTSFIELD: Cynthia Kadel
STOW: Tina Ruth
WALTHAM: Robin Tyler
WORCESTER: Paige Firment, Gerald Krieger, Janet L. Lombardi, Catherine Mitchell, Hon. Arline S. Rotman, (ret.)

CONNECTICUT: Mary Ann Carney of Guilford
NEW HAMPSHIRE: Barbara Holstein of Wolfboro

Editorial

Happy Birthday- Stay Vigilant

This year we turned twenty. Since MCFM's inception, family mediation has grown exponentially as part of a rising tide of alternative dispute resolution. Nonetheless our profession remains in its infancy.

Massachusetts law devotes only one long sentence to define a mediator. It appears in the last paragraph of the mediator confidentiality statute (M.G.L. c. 233, § 23C), and says, in part:

"... a 'mediator' shall mean a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body."

The enactment of c. 233, § 23C marked a giant step forward for the profession of mediation. That accomplishment was due in large part to the work of MCFM's founding members, especially the tireless efforts of John Fiske. In 1985 there were very few mediators or dispute resolution organizations. Today there are many. We have good cause to celebrate our 20th.

However, almost anyone who wants to hang out a shingle as a mediator can do so. Thirty hour mediation courses are now readily available, and membership in any one of a dozen or more organizations would satisfy the statutory requirements.

In the absence of substantive statewide guidelines, MCFM has always gone to great lengths to protect the profession. MCFM was the first to issue standards of practice for family mediators and the first to certify mediators. MCFM was also the first to develop an internal mechanism to process complaints against mediators.

Most mediators come to the field through a "profession of origin," (e.g. social work, psychology or law). MCFM general membership has always been open to anyone who subscribed to our standards of practice. MCFM certified mediators are held to a slightly higher standard. They are required to be members in good standing in their professions of origin.

With the practice of mediation so loosely defined, it has unfortunately become a magnet for a few people who are not in good standing in their professions of origin. A handful have sought to cloak themselves in professional legitimacy as mediators with MCFM affiliation while they are currently being disciplined by their professions of origin.

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Join Us

MCFM membership is open to all practitioners and friends of family mediation. MCFM invites guest speakers to present topics of interest at four, free, member education 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 participate on any MCFM Committee.

All members are listed on-line at MCFM's web site, and all listings may be "linked" to a member's email and web site. Annual membership dues are $75. Please direct all membership inquiries to **Dee Fraylick at <mcfm23@aol.com>**.

REFERRAL DIRECTORY: Every MCFM member is eligible to be listed in the MCFM Referral Directory. Each listing in the Referral Directory allows a member to share detailed information explaining his/her mediation practice and philosophy with prospective clients. The Referral Directory is printed and mailed to all Massachusetts judges and to each listed member. The referral directory is also available on-line at the MCFM web site.

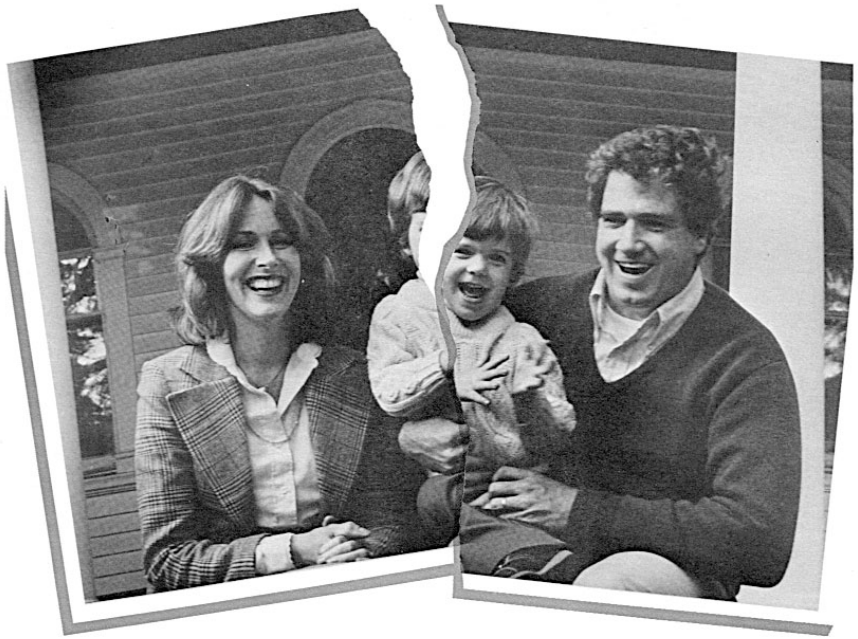
MCFM was the first organization to issue practice standards for mediators in Massachusetts. To be listed in the MCFM Referral Directory, each member must agree to uphold the MCFM Standards of Practice. Copies of the MCFM Standards of Practice are available on-line at the MCFM web site.

The annual Referral Directory fee is $50. Please direct all referral directory inquiries to **Jerry Weinstein at (617) 965-2315**.

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. A copy of the MCFM certification requirements is available on-line at the MCFM web site.

Every MCFM certified mediator is designated as such in both the electronic and the printed Referral Directory. Only certified mediators are eligible to provide mediation services to the Massachusetts Probate & Family Court through MCFM. Certification must be renewed every two years.

Certification applications cost $100, and re-certification applications cost $50. Certification and re-certification applications are available on request from **Lynn Cooper at <lynnkcooper@aol.com>**.



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MASSACHUSETTS COUNCIL ON FAMILY MEDIATION, INC.

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www.mcfm.org

Letters

To the editor:
Your recent "Practice Tip" based on Quinn v. Quinn, 49 Mass. App. Ct. 144 (2000) has me wondering.... If a post-divorce reduction in child support is pursuant to a clear formula stated in a separation agreement, is that reduction then "court ordered" and therefore enforceable, even if the parties do not return to court at the time of the reduction? The Quinn opinion does not indicate that the child support reduction in that case was based on a formula in the separation agreement. It is possible to read Quinn as not having addressed this precise issue. Do you think mediators should, nonetheless, take the most cautious approach and have all agreements state that a party seeking a reduction must seek a modification in court? Two attorneys I discussed this with expressed concern that such an approach might burden clients and the court system to an extent neither required by Quinn nor desired by the bench. I would be grateful if you and other MCFM members would share your thoughts on this issue.

Marion Lee Wasserman
Needham, MA

Editor's reply:
I believe you are asking all the right questions. As is often the case, an appellate decision settles one issue while raising others, which will probably require further appellate review. In the interim these are my thoughts:

If at the time of the divorce hearing a separation agreement clearly stated that at some specific time in the future, (or on the occurrence of some event), there would be a reduction of child support by a sum certain (or by a specific formula), I believe the parties would not have to return to court to achieve an enforceable reduction. As you correctly note, when a separation agreement is found to be fair and reasonable, it has the same force of law as a court order. Thus, an agreement found to have been fair and reasonable would have already "ordered" that child support reduction.

The harder question seems to be the enforceability of a voluntary, post-divorce child support reduction when the parties' separation agreement allows for future, periodic child support reviews at either unspecified times (e.g. "at the request of either party"), or for unspecified (e.g. "equitable") amounts. Despite the lack of specificity, the application of the same logic should result in a consistent conclusion. Thus, if a judge at the time of divorce decided that unspecified, future, equitable reductions in child support were fair and reasonable, they too should be enforceable without returning to court.

Since Quinn never addressed these questions, its silence creates uncertainty. In my view Quinn stands for the proposition that in the absence of a separation agreement that "orders" a future reduction in child support, no voluntary, post-divorce agreement to reduce child support will be enforceable unless it has been approved by a judge.

Until Quinn is subjected to further appellate review that clarifies these ambiguities, I will advise clients contemplating a voluntary, post-divorce reduction in child support that this remains an area of unsettled law. I will also remind them that a court may always refuse to enforce any reduction in child support that harms a child.

Since Quinn I have added the following sentence to some child support exhibits: "The parties acknowledge that voluntary reductions in child support may require court approval before they will be considered enforceable."

To the editor:
The subject quarterly is truly packed with wisdom and provides me an opportunity for badly needed new learning related to many of the covered issues. You people did a great job. I now have an incentive to renew my expired membership in MCFM. Thank you.

Ed Gebelein
Winchester, CT

GIVE VOICE TO YOUR IDEAS: EMAIL A LETTER TO THE EDITOR wallerstein@socialaw.com

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Editorial

MCFM members and certified mediators should be held to the same threshold, ethical standard. We can accomplish this by amending our standards of practice. All MCFM applicants should be required to attest to good standing in their profession of origin, or explain why they are not. The fact that an applicant is not in good standing in his/her profession of origin should not automatically bar MCFM membership.

Massachusetts barbers and electrologists need licenses to practice – mediators do not. As long as mediation remains largely unregulated, we should stay vigilant and err on the side of caution – to protect our profession and the clients we serve.

The opinions expressed in this editorial are those of Les Wallerstein. He can be contacted at (781) 862-1099, or by email at <wallerstein@socialaw.com>

Directorate

Editor's Notice

MCFM

Family Mediation Quarterly

Editor: Les Wallerstein
1620 Massachusetts Avenue
Lexington, MA 02420-3802
Telephone: (781) 862-1099
Fax: (781) 861-8797
email: wallerstein@socialaw.com

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, local dispute resolution coordinators, and all law school libraries in Massachusetts. Excerpts from prior editions will appear on the MCFM web site <www.mcfm.org> after the FMQ has been printed and mailed.

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	Winter - January 15th
Fall - October 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.

Family Mediation Quarterly

MASSACHUSETTS COUNCIL ON FAMILY MEDIATION
23 Parker Road
Needham Heights, MA 02494-2001