

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.



PRESIDENT'S PAGE

Mediation World — Irish Divorce Mediation Divorce has been legal in Ireland for a mere 11 years since 1997, and the Irish government immediately noted and appreciated the role of mediators. Since 2003, there has been free government-funded mediation service available to divorcing and separating opposite and same sex couples. Perhaps the US, and more particularly Massachusetts, should get moving on institutionalizing mediation services in our courts.

Mediation Tips — Focusing on Kids Think about using a flipchart as a mediation tool. It can be particularly helpful when you are dealing with a parenting dispute and the children have been lost in the discussion. Assist the parties with developing a parenting “mission statement” that is printed in bold lettering on the chart that can be referred back to when needed. For extra emphasis, clip a picture of the children up on the flipchart as well.

Practice Tips — 2008 Tax Tables For those who just can't wait, the IRS has released a draft, but not final, version of the 2008 tax tables & instructions. Although most of us refer tax questions to the tax experts, it can pay off to stay abreast of the changes in the laws and regulations that affect our clients. You can find the draft publication at <http://www.irs.gov/pub/irs-dft/i1040gi—dft.pdf>

Business Tips — Be Seen Again and Again Get a headshot photo done of yourself and load it into your computer for easy transmission. You can get it done professionally or go ahead and do it yourself at home. Take a look at your local paper to see what headshots appeal to you — just the head or shoulders also, teeth or no teeth, smile or serious, fashion statement, etc.

Did you know — Membership Drive Rewards MCFM is offering free MCFM fabric shopping bags and T-shirts to members who support our membership drive by giving us 2 names and contact info on colleagues who are not members for a free bag and by giving us 5 names and contact info for a free T-shirt.

MCFM — Join a Committee All of our board committees have room for members. We have openings on Membership, Program, Finance, Policy & Ethics, and Institute Committees. Email your president for more info.



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EDITOR'S NOTICE

MCFM Family Mediation Quarterly

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

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



CONTENTS

- 1 **THE CONCLUSION OF CONNECTICUT'S SUPREME COURT UPHOLDING THE RIGHT OF SAME-SEX MARRIAGE**
- 3 **A LAWYER/MEDIATOR'S ETHICAL QUANDARY**
Commentary by Amy Bricker
- 8 **CONTEMPLATING MY NAVAL & CONFLICT RESOLUTION**
By Laurie Israel
- 11 **RIGHTS OF NEVER-MARRIED & SAME-SEX COUPLES**
By Marta J. Papa
- 14 **WHAT'S NEWS? National & International Family News**
Chronologically Compiled by Les Wallerstein
- 17 **JANET MILLER WISEMAN: Fourth Annual Fiske Award**
Presented by John A. Fiske
- 19 **AN ACT RELATIVE TO PARENTAL CHOICE OF TERMINOLOGY IN CERTAIN DOMESTIC RELATIONS MATTERS: BBA Proposed Legislation**
- 21 **GOING GREEN: MCFM Endorses the Eco Challenge Pledge**
By Debra L. Smith
-
- | | |
|------------------|--------------------|
| 22 Email | 30 Join Us |
| 23 MCFM News | 31 Directorate |
| 25 Announcements | 32 Editor's Notice |

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THE CONCLUSION OF CONNECTICUT'S SUPREME COURT UPHOLDING THE RIGHT OF SAME-SEX MARRIAGE

Editor's Note: On October 28, 2008, the Connecticut Supreme Court held that the state failed to establish adequate reasons to justify the statutory ban on same sex marriage, and based on the equal protection provisions of the state constitution, upheld the right of same-sex couples to marry. Below is the conclusion of the court with footnote references omitted. Justice Richard N. Palmer's complete decision in Elizabeth Kerrigan et al. v. Commissioner of Public Health et al. is available on the RESOURCES page of MCFM's web site at www.mcfm.org.

CONCLUSION We recognize, as the Massachusetts Supreme Judicial Court did in *Goodridge v. Dept. of Public Health*, 440 Mass. 309, that "our decision marks a change in the history of our marriage law. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions

As the constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before [the court]. Our concern is with [our state]

[c]onstitution as a charter of governance for every person properly within its reach."

The drafters of our constitution carefully crafted its provisions in general terms, reflecting fundamental principles, knowing that a lasting constitution was needed. Like the framers of the federal constitution, they also "knew [that] times can blind us to certain truths, and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the [c]onstitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence v. Texas*, supra, 539 U.S. 579.

Not long ago, this court made the same essential point, explaining that "as we engage over time in the interpretation of our state constitution, we must consider the changing needs and expectations of the citizens of our state." *State v. Webb*, 238 Conn. 389, 411, 680 A.2d 147 (1996). This admonition applies no less to the guarantee of equal protection embodied in our constitution than to any other state constitutional provision.

Even though the right to marry is not enumerated in our constitution, it long has been deemed a basic civil right. E.g., *Loving v. Virginia*, supra, 388 U.S. 12 ("[m]arriage is one the basic civil rights of



man” [internal quotation marks omitted]; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (same). Although we traditionally have viewed that right as limited to a union between a man and a woman, “if we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women over the past half-

century, it is that even the most familiar and generally accepted of social practices and traditions often mask unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions. It is instructive to recall in this regard that the traditional, well-established legal rules and practices of our not-so-distant past (1) barred interracial marriage, (2) upheld the routine exclusion of women from many occupations and official duties, and (3) considered the relegation of racial minorities to separate and assertedly equivalent public facilities

and institutions as constitutionally equal treatment.” In re Marriage Cases, supra, 43 Cal. 4th 853–54.

Like these once prevalent views, our conventional understanding of marriage must yield to a more contemporary appreciation of the rights entitled to constitutional protection. Interpreting our

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state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice. To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others. The guarantee of equal protection under the law, and our obligation to uphold that command, forbids us from doing so. In accordance with these state constitutional requirements, same sex couples cannot be denied the freedom to marry.



**“Love: a temporary insanity,
curable by marriage.”**

Ambrose Bierce



A LAWYER/MEDIATOR'S ETHICAL QUANDARY

Commentary By Amy Bricker

Editors Note: This article presents a real ethical quandary from an anonymous lawyer/mediator. It is followed by commentary by lawyer-mediator Amy Bricker, and ends with what the anonymous lawyer-mediator really did. Anonymity is stressed to encourage all mediators to submit ethical dilemmas they have confronted for peer review. Accordingly, reactions to this ethical quandary or the commentary from named or unnamed mediators are welcome.

QUANDARY: In 2005 I represented a wife (as counsel) in her mediated divorce. In 2008 her ex-husband decided to remarry, and sought to enter into a prenuptial agreement with his bride-to-be, which he drafted pro se.

My client (now his ex-wife) emailed a request for me to review his prenuptial agreement... to insure that none of her rights arising from her separation agreement (which I drafted) were compromised by his prenuptial. My client attached his prenuptial in her email to me.

Despite my assurance that the separation agreement would trump any of the ex-husband's prenuptial text, she implored me to review it, and I agreed. When I opened the prenuptial I discovered that I had mediated the divorce of my client's ex-husband's bride-to-be (from her then husband), also in 2005.

Can a lawyer review a client's ex-

husband's prenuptial agreement in anticipation of the ex-husband's marriage to the lawyer's prior mediation client? If not... why not? If so... how so?

COMMENTARY: This scenario illustrates the kind of ethical issues that may arise where an individual provides both legal advocacy and mediation services. The facts presented raise issues related to representing clients, duties to mediation clients, loyalty, obligation to disclose real or potential conflicts of interest, client confidentiality and the confidentiality of the mediation process. As so often happens with the issues that come up in our work, an analysis of the scenario doesn't yield a definitive black and white answer. It is helpful to look to the established rules and standards for guidance in order to address the gray areas of legal and mediation practice. The Lawyer-mediator should consider the circumstances in light of the applicable rules and ethical standards and avoid even the appearance of impropriety in determining a course of action.

As lawyers, we are bound to follow the Massachusetts Rules of Professional Conduct (SJC Rule 3:07), which are described as "rules of reason," in determining our obligations and duties to clients. Rules 1.2 (Scope of Representation); 1.6 (Confidentiality of



Information); 1.7 (Conflict of Interest: General Rule); 1.9 (Conflict of Interest: Former client); and 2.4 (Lawyer Serving As Third Party Neutral), address the lawyer's duties to a client, past, present or future, with respect to scope and nature of representation, loyalty, disclosure, and conflict of interest. The Rules require a lawyer to disclose actual and potential conflicts of interest to clients and to get their written consent, absent certain exceptions.

As mediators, we are also guided by the MCFM Ethical Standards, (1984 Standards, as Amended March 4, 1987 and November 10, 1997). The MCFM Standards contemplate possible future relationships of a mediator with clients. Ethical Standard 6(B)(2)(c) and (d) address circumstances where one or both parties to a past mediation request services (other than mediation) of the mediator at a future time. According to the Standard, the Mediator may provide the services, including representation of a party, if he discloses to both parties the potential loss of his impartiality for future mediations and both parties knowingly consent.

While private mediators are not bound by the SJC Uniform Rules of Dispute Resolution, Rule 1:18, which are designed to promote honesty, integrity and impartiality by neutrals in court-connected dispute resolution services, the Uniform Rules provide a third source of authority for considering ethical issues. Uniform Rule 9, "Ethical Standards" compliments the Rules of

Professional Conduct and MCFM Standards, with respect to establishing a neutral's obligation to disclose all actual and potential conflicts of interest and to maintain confidentiality of information disclosed during the course of the dispute resolution process.

Reviewing the Rules of Professional Conduct, the MCFM Ethical Standards and the SJC Uniform Rules of Dispute Resolution together should be helpful in understanding the scope and nature of the obligations of the individual who is both lawyer and mediator. Lawyer-mediator needs to consider his obligations to the various parties in choosing a course of action.

The Lawyer-Mediator's Responsibility Towards his Current Client, the Wife:

Lawyer-mediator did not mediate Wife's divorce but he represented her in a mediated divorce from Ex-husband. Wife now wants Lawyer-mediator to review a prenuptial agreement that her Ex-Husband drafted in anticipation of his upcoming marriage to Wife-to-be, with respect to its effect on her rights under the divorce. Under the Massachusetts Rules of Professional Conduct, a lawyer has an affirmative duty to inform his client of an actual or potential conflict of interest. Upon reading the prenuptial agreement supplied by Wife, Lawyer-mediator learned that "Wife-to-be", who also a party to that agreement, is his previous mediation client. Lawyer-mediator has a duty to inform Wife of his actual or

Continued on next page



potential conflict of interest before he proceeds any further in representing her. He also needs to consider the scope of the representation Wife requests. Although the previous client's mediation concluded several years ago and the facts of the scenario do not indicate that Lawyer gained any information in his role as mediator that would affect the validity or enforceability of the prenuptial agreement or impact Wife's separation agreement, Lawyer-mediator should nevertheless recognize that there is a potential, if not actual conflict of interest.

Lawyer-mediator has an obligation to inform Wife of the conflict of interest. Under ordinary circumstances, Lawyer-mediator, after represented Wife in a

As so often happens with the issues that come up in our work, an analysis of the scenario doesn't yield a definitive black and white answer.

mediated divorce, might reasonably expect to advise or represent her in the future regarding a matter flowing from the divorce. Wife's request for representation creates an actual or potential conflict of interest for Lawyer-mediator with respect to his previous mediation clients.

The Lawyer-Mediator's duty to his past mediation clients Lawyer-mediator mediated the divorce of Wife-

to-be and her "Then-husband" several years ago. We will assume that the mediated divorce is now final, because of the amount of time that has passed and the fact that "Wife-to-be" is now contemplating another marriage. We will also assume that Lawyer-mediator complied with the MCFM Ethical Standards at the time he mediated the divorce. The MCFM Ethical Standards exist in part to protect the integrity and impartiality of the dispute resolution process. The mediator's conduct and obligations to the parties and third persons during the dispute resolution process is intended to assure that result. The Ethical Standards require that a mediator inform the parties that all communications made in the presence of the mediator are confidential. Parties to the process have a reasonable expectation that confidentiality will be maintained during and after the mediation process. The passage of several years since the client's mediation does not negate their expectation of the mediator to maintain their confidentiality.

The Lawyer-mediator should consider his obligation to the previous mediation clients in light of Wife's request for representation. The fact that Lawyer-mediator provided mediation services rather than "legal representation" to his past clients does not diminish his obligation to maintain their confidentiality. Wife's request for legal advice regarding the prenuptial agreement may create a potential or actual conflict of interest with respect to the mediation clients. Wife's interests



may be adverse to those of Wife-to-be, who is a party to the prenuptial agreement and/or to the interests of Then-Husband. We don't have enough information to determine the likelihood that there is or may be a conflict of interest, or what the significance of such a conflict might be with respect to either or both of the past clients.

While it may be unlikely that Lawyer-mediator would intentionally breach the confidentiality of his past mediation, it is still possible that he might have actual information, or access to information that would create the appearance of a conflict of interest. Whether there is an actual or potential conflict of interest, or circumstances that could give rise to an appearance of a conflict of any size, Lawyer-mediator should disclose the conflict to the past mediation clients. Lawyer-mediator should avoid the appearance of improper conduct with respect to both his current client and his past mediation clients.

On determining that there is or may be a conflict of interest, Lawyer-mediator should immediately consult with his past mediation clients and disclose the conflict before taking any further action. If the clients are willing to authorize disclosure of confidential information and provide a written waiver, the Lawyer-mediator may then decide to continue to represent Wife. In the event that either past client is unwilling to provide such an authorization, the Lawyer-mediator should so advise the

Wife and withdraw from representing her. Beyond protecting the integrity of his relationships with clients, Lawyer-mediator has a responsibility to protect public confidence in the dispute resolution process.

WHAT REALLY HAPPENED: As I opened the prenuptial agreement I realized that I had mediated the wife-to-be's divorce. I had no idea what the "right" thing to do was... but I knew I felt conflicted. In retrospect I would have benefited from Amy's wise and well-reasoned counsel. In its absence I felt that before I could proceed I needed consent from two people: (i) my ex-

MCFM Ethical Standards exist in part to protect the integrity and impartiality of the dispute resolution process.

mediation client (the wife-to be) and (ii) my present client... because even though she had asked me to review the prenuptial, she had no knowledge of the potential conflict... and she was entitled to that information.

I decided that the safest form of consent was written consent. I separately emailed the potential conflict of interest to both... and both so readily consented that I began to doubt why I had been so concerned.

I was also uncertain of my ethical duties to the ex-husband of the wife-to-be, as he too had been my divorce mediation

Continued on next page



client. Believing that he had no potential interest in his ex-wife's remarriage, I decided that he didn't need to be notified, so I never sought his consent. (Here I diverged from Amy's advice.) Unbeknownst to me, the wife-to-be had forwarded my email seeking her consent for my review of her prenuptial to her ex-husband, and she included his reply to her in her email reply to me. Her ex-husband found it funny that we live in so small a world, and readily sanctioned my review

of the prenuptial. All's well that ends well.



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**“Security is mostly a superstition.
It does not exist in nature....
Life is either
a daring adventure
or nothing.”**

Helen Keller



CONTEMPLATING MY NAVEL & CONFLICT RESOLUTION

By Laurie Israel

At my age, I find my thoughts wandering backwards in time, with long-lost memories bubbling up occasionally. I ponder these memories and cherish them. I parse them for meaning, like dreams in the night remembered suddenly the next day, with a jolt of recognition into their inner meaning.

Recently, as I was preparing for a presentation on Prenuptial Agreements for a mediation conference in Utah, I started to recall a joke that was going around my parents' generation around 1960, when I was about 13 years old (and my parents were in their 40s). It was the joke about "the hexagonal nut in the navel". I barely remembered the joke, but I remembered how funny my parents thought the joke was. My brother and sister (and all my friends of about my age whom I asked), either remembered it dimly or not at all. Finally, I searched the internet, and found several versions of the joke:

A boy (or girl, man, woman), was born with a hexagonal nut (or golden screw) in his navel. He couldn't remove it no matter how hard he tried. It caused him much embarrassment as he grew up. Finally, after he grew up, he traveled to Tibet because he heard that there was a wise woman (or holy man) there who might help him. After climbing up the mountain, the wise woman told the man to sit down. She began to unscrew the hexagonal nut in his navel and turned the

screw for many hours. Finally, the screw came off. Very excited, the man stood up, and his butt fell off.

Why did this joke come up for me as I was preparing for the conference? What possible relevance does the joke about the hexagonal nut in the navel have to the practice of law and mediation?

Jokes, as we all know, often have an element of seriousness, and, at their core, are not funny at all. The hexagonal nut in the navel joke is no exception. It teaches us that we may not know the reason for something, but if we "monkey" with it, we can destroy something very essential and precious. It also teaches us that sometimes, in addressing conflict, the best thing to do is wait it out. As mediators, we are sometimes very much like water, moving with the currents, bobbing up and down as the waves pass us.

The joke has three ramifications in my law and mediation practice that come up very frequently. One relates to the presence of "boilerplate" language in legal documents. The term "boilerplate" derives from the steel sheets used to build steam boilers in the nineteenth century, then to printing plates for text stamped in steel (rather than softer lead alloys) that were used over and over again in printing newspapers. The term eventually made its way into law, acquiring the meaning of those parts of a contract that are used over and over again.

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As a new lawyer, I quickly learned not to mess with the boilerplate. It is there for a reason. If you remove any part of it, there might be severe repercussions later for your client. Figuratively speaking, your client's butt may fall off.

The "teaching" of the joke applies to Prenuptial Agreements, too. Prenuptial Agreements have now unfortunately become the contract "du jour," even in first marriages. People are asking for them without thinking about or knowing the serious and often detrimental effects one

We learn through experience that some things should just be left alone.

may have on their marriage. I have had calls from people in their twenties the day before a wedding, asking me to prepare a valid, binding Prenuptial Agreement in one day. (The answer to these calls is always a firm "no".)

So how does the hexagonal nut joke relate to Prenuptial Agreements?

Well, when parties enter into a Prenuptial Agreement, they are monkeying around with the very basis (the "boilerplate", if you will) of what a marriage is. Often, it is a first marriage, and they are fairly clueless as to what a marriage really entails. They may change what they think is a very small thing by means of their Prenuptial Agreement, but in doing so may change part of the very fabric of their marriage and the ties that may make them feel closely connected. The effect of a Prenuptial Agreement (both the

negotiations, and the actual contract) can linger and fester for years, corroding the marriage and actually causing a divorce to occur years later. Figuratively speaking, they have removed the hexagonal nut binding them together for life. When they stand up — well — you know the rest of the joke.

In my mediation practice, the hexagonal nut in the navel joke also has relevant meaning.

We as mediators want to be very active at helping our mediation clients. We tend to react to everything said by the parties. That's how we think we can best help them. Here again, the relevance of the joke becomes apparent: sometimes getting right into a particular conflict is a mistake. It is like unscrewing the hexagonal nut in the navel. We go deeper and deeper, and the result could be disastrous for our clients and the mediation. We need to know when to stop, and in fact, whether to proceed down a particular direction (which may turn out to be a rabbit's hole) in the first place.

Sometimes it is better for you to be like "water" and let the parties themselves go at their conflict. After the "training" mediation gives them in conflict resolution, the parties may be able to actually model mediation skills. When they work on their own communication flaws and distorted thoughts, it is so much better. We can assist with a knowing look of compassion and understanding. This is powerful learning and strength they will draw on in their future life together,



whether as spouses, ex-spouses, or family members. We will not always be there for them, removing their hexagonal nut.

The moral of the story is that, as mediators, we may contemplate our navels as much as we like. But we learn through experience that some things should just be left alone. If we don't tread carefully, we may remove the metaphoric hexagonal nut in our mediation clients' navels, and bad things can happen. Being aware of when we should act, and when

we should *not* act, is part of what good mediation practice is all about.

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**“A woman is like a tea bag.
You never know
how strong she is
until she gets in hot water.”**

Eleanor Roosevelt



RIGHTS OF NEVER-MARRIED & SAME-SEX COUPLES

Marta J. Papa

Editor's Note: *This article was written after California legalized same-sex marriage but before Connecticut followed suit.*

Headlines across the country have been reading, "Same-Sex Marriage Now Legal in California!" What does that mean for the gay and lesbian community in other states? The answer, unfortunately, is not much. Since California and Massachusetts are the only states that have legalized same-sex marriages, the rights extended by statute to married couples are only available in California and Massachusetts. Simply stated, you could plan a romantic vacation to California and tie the knot while you're there, however, all of the rights and responsibilities inherent to marriage will not cross over the border with you as you return to your home state.

In states that do not recognize same-sex marriage, you won't be able to:

- File joint tax returns;
- Visit your partner in the ICU of a hospital;
- Make any medical decisions about your partner;
- Presume that property purchased together is "jointly" owned;
- Automatically inherit property from your partner;
- Be covered on your partner's health plan;
- Sue for wrongful death or loss of consortium should something happen to your partner;

- Transfer property to your partner without invoking Gift or Estate Taxes;
- Collect survivor benefits from your partner.

So, what's all the excitement about?

Since the California State Supreme Court held that it is illegal to discriminate on the basis of sexual orientation, many other state Supreme Courts are expected to follow the same logic. The California State Supreme Court is one of the most powerful and respected state Supreme Courts in the country. So, if California decides that members of the gay and lesbian community have the right to marry, other state Supreme Courts now have some type of precedence to support a similar decision.

If the California decision does not apply to my state, what can my partner and I do to protect ourselves?

The answer is: Plenty. Even if a statute fails to grant you a specific right, such as rights of survivorship, you can enter into a written agreement with your partner granting many of these rights using contract law.

In a "Partnership Agreement", you can each set out what rights and responsibilities you would like to grant each other. In this way you can protect yourself from family members or the state swooping in and taking property that you intended your partner to have in the event that something happens to you. Most people are unaware of just how



unprotected they are in these situations. It is true that some rights are not subject to contract, however, you and your partner can create a fairly comprehensive plan about how you are going to live together and your expectations of one another.

How do we obtain a Partnership Agreement? The best and most economical way to design such an agreement is to use a mediator. Since the mediator is not the “attorney” for either party, the mediator can meet with both parties and address sensitive issues which are often difficult for a couple to discuss alone. The mediator is also trained in helping explore options the parties may not have thought of on their own. The mediator then drafts a document entailing all of the couples’ decisions. This is what we call a “Partnership Agreement”.

What about a heterosexual couple living together without the benefit of marriage? They are in exactly the same position. Without a Dissolution of Marriage Statute to govern the division of their property, the couple is left to fight it out with each other or take each other to court. Most states have a concept known as “the Source of Funds Rule”. In a nutshell this rule provides that whoever provided the money for the asset and has the receipt or proof of purchase is awarded the asset. If an unmarried couple’s relationship ended and the parties landed in court dueling over assets, the Judge would most likely apply this rule. This method of dividing property can render very unfair results. For example, consider a couple in which one person works and the other stays at

home to care for children. If this relationship dissolves, the court could give every asset to the wage earner because he or she was the source of the funds that bought the asset. The other person would get nothing.

Does the ‘Source of Funds Rule’ apply to same-sex relationships? Yes. I recently mediated with a couple who had been together for fifteen years. Party A (let’s call him John) was the primary wage earner. Since John earned a large salary, had a very steady work record and a great credit rating, the couple used John’s name to buy their house, car and all of the assets they acquired during their fifteen year relationship. Now, Party B (let’s call him Bob) was an excellent carpenter. John and Bob decided to rehab their Victorian home, which was titled only in John’s name. Their agreement was that John would provide the money for the materials needed and Bob would do the actual labor of rehabbing the house. Bob’s labor was provided for free because, in their minds, they owned the property together. When John decided he no longer wanted to stay in the relationship, Bob was devastated to learn that John would get the home, the car, the furniture... everything. John provided the source of funds that purchased all of those assets. Bob’s efforts were not recognized or given any value. Consequently, Bob would be left homeless and penniless. Fortunately, this couple sought mediation to help them agree upon a plan that recognized both parties’ contributions in the relationship. John and Bob walked out of mediation with a plan for dividing

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their assets in a way each felt was fair and appropriate. Again, had John and Bob mediated a Partnership Agreement at the beginning of their relationship, they would have had a plan for distributing their assets and Bob would not have been in such a vulnerable position when the relationship ended.

Does everyone need such an “Agreement”? Yes. If you think about it, EVERY relationship eventually ends... either by death or by the choice of one (or both) of the parties. The question is not whether you will one day be apart... you will. The real question is: When we no longer live together, what is going to happen to our home, property investments, pets, vehicles, etc? Accordingly, some type of an agreement is essential for every couple, regardless of sexual orientation, in order to protect

themselves, their loved ones and their property. If a statute doesn't provide for this, then it makes good sense to draft an agreement that addresses these issues should the need arise. Such agreements are generally easy to prepare and, in the end, will give the couple the peace of mind of knowing that their affairs are in order and their future is protected.



Marta J. Papa is a family law attorney and mediator who focuses her practice in St. Louis on traditional divorce litigation and mediation as well as mediation for never-married and same-sex couples. Marta is a Missouri Supreme Court Approved Trainer in divorce mediation and teaches mediation at St. Louis University. She welcomes any questions and comments at her website www.consideringdivorce.com.



**You did the best that you knew how.
Now that you know better,
you'll do better.**

Maya Angelou



WHAT'S NEWS?

National & International Family News

Chronologically Compiled by Les Wallerstein

US Census Will Not Record Same-Sex Marriages Same-sex marriage is legal in two states, but not a single one will show up in the 2010 census. The Census Bureau says the federal Defense of Marriage Act bars the agency from recognizing same-sex marriages, even though they are legal in Massachusetts and California. Same-sex marriage was not an issue in the 2000 census because it was not legal in any state. (New York Times, Associated Press, 7/18/2008)

Same-Sex Couples from Other States May Now Marry in Massachusetts Governor Deval Patrick signed a measure repealing a 1913 law that barred Massachusetts from marrying couples whose unions would be illegal in their home states. The 1913 law was designed to prevent out-of-state, interracial couples from marrying in Massachusetts. Gov. Patrick also signed into law a first-in-the-nation measure allowing all married couples to receive Medicaid benefits, even though federal law does not recognize same-sex marriage. Medicaid money for same-sex couples will come from state coffers. (Katie Zezima, New York Times, 8/1/2008)

New York Gay Couples Coming to Massachusetts to Marry With NY Governor Patterson's blessing, New Yorkers who get married in Massachusetts — or Canada or California — are eligible for a host of benefits they cannot receive

now. Firefighters and police officers have a lot to gain, because NY gives significant benefits to the spouses of those killed in the line of duty. An analysis by an institute at the UCLA School of Law estimated that Massachusetts could add \$11 million to its economy over three years by allowing out-of-state same-sex couples to marry. (Tina Kelley, New York Times, 8/3/2008)

Health Benefits Inspire Rush to Marry, or Divorce Though money and matrimony have been linked since Genesis, marrying for health coverage is a more modern convention. In the US, where insurance is out of reach for many, it is not uncommon for couples to marry, or even to divorce, at least partly so one spouse can obtain or maintain health coverage. In a poll conducted this spring by the Kaiser Family Foundation, a health policy research group, 7 percent of adults said someone in their household had married in the past year to gain access to insurance. (Kevin Sack, New York Times, 8/13/2008)

Census Finds More US Women than Ever Are Childless According to a new Census Bureau report, twenty percent of women ages 40 to 44 have no children — double the level of 30 years ago, and women in that age bracket who do have children have fewer than ever — an average of 1.9 children, compared with a median of 3.1 children in 1976. The study

Continued on next page



found that women with advanced degrees are more likely to be childless. (Katie Zezima, New York Times, 8/19/2008)

Improved Health for the Never Married People who do not marry have often been found to have poorer health than those who do, but a new study has found things may be changing. Based on a National Health Information Survey of more than a million people from 1972 to 2003, the self-rated health of men and women who never married improved, with the gap between married men and never-married men narrowing. The study also found that the health of people who were widowed, divorced or separated had grown worse compared with married people. (Eric Nagourney, New York Times, 8/19/2008)

Arkansas to Vote on Banning Same-Sex Adoptions A proposal intended to ban gay men and lesbians from becoming foster or adoptive parents was cleared for this fall's ballot. The measure would also prohibit unmarried couples living together from fostering or adopting children. Arkansas Families First is campaigning against the measure and says it plans to sue to keep it off the ballot. (New York Times, Associated Press, 8/26/2008)

Falling UK House Prices Keeps Marriages Together Homeowners in England may despair as turmoil in the property market slashes value off their houses, but new research shows they could have the weak economic climate to thank for helping them hang on to their spouse. Data from the Office of National

Statistics suggests that an unforeseen consequence of falling house prices is a lower rate of divorce among married homeowners over the past 10 years. Researchers found a "strong correlation" between high house prices and high divorce rates. (Rowena Mason, Telegraph.CO.UK, 9/3/2008)

NYC Changes Weddings Locale As far back as 1895, aldermen performed weddings for free in the basement of City Hall. After complaints that aldermen were charging fees and pocketing the money, the NY State Legislature established a marriage bureau in 1916, located in the newly built Municipal Building. The 92 year-old Manhattan Marriage Bureau — which houses the wedding chapel — now looks as bureaucratically stiff as all the other Municipal Building offices. Later this fall it will move to newly revamped quarters a short walk away. The move was inspired in part by city officials seeking to market Manhattan as a wedding destination — a more tasteful alternative to Las Vegas — where a bride can be led down the aisle by an Elvis impersonator or married in a drive-through chapel. (Fernanda Santos, New York Times, 10/5/2008)

Gay Couples Rush to Wed in California In anticipation of a state-wide vote on same-sex marriage in California in November, some 3,800 couples gay couples are marrying each month. According to a study by the Williams Institute at the University of California, Los Angeles, 11,440 couples had married since the state Supreme Court legalized same-sex marriage, which became



effective in mid-June, 2008. In the three month period ending September 17th, California had more same-sex marriages than Massachusetts (at 10,300) had in four years. (Jesse McKinley, New York Times, 10/8/2008)

Portuguese Parliament Rejects Same-Sex Marriage By overwhelming majorities, two proposals to allow same-sex marriage in Portugal were rejected by Parliament. In a 230-seat legislature, one bill received 17 votes, and the other received eleven. (New York Times, Associated Press, 10/11/2008)

Same-Sex Marriage Ruled Legal in Connecticut A sharply divided Connecticut Supreme Court ruled that

same-sex couples have a constitutional right to marry. The court's groundbreaking decision marks the first time a state high court has ruled that civil union statutes violate the equal protection clause of a state constitution. The ruling, which cannot be appealed, takes effect on October 28th. Connecticut now joins Massachusetts and California as the only other states to have legalized gay marriages. (Robert D. McFadden, New York Times, 10/11/2008)



Les Wallerstein is a family mediator and collaborative lawyer in Lexington. He can be contacted at (781) 862-1099, or at wallerstein@socialaw.com.



**“All truth passes through three stages.
First, it is ridiculed.
Second, it is violently opposed.
Third, it is accepted as being self-evident.”**

Arthur Schopenhauer (1788-1860)



FOURTH ANNUAL FISKE AWARD HONORS JANET MILLER WISEMAN

Presented by John A. Fiske

Dearly Beloved:

Goethe says when you commit yourself to something, Providence takes over. The day I met Janet Miller Wiseman in Jerry's living room Providence took over.

That was in the summer of 1979 and I was among about 15 people who Jerry had attracted to discuss and explore divorce mediation. I kept hearing perceptive

comments from Janet during the meeting and talked with her afterwards. In about 5 minutes we agreed to collaborate: she would teach me about therapy and I would teach her about law.

We did our jobs, and are still working on them. We wrote an article together for Social Work Magazine in the fall of 1980: what a pleasure. She did more than her share, writing her own insights into how a mental health

professional could contribute to a lawyer-therapist mediation team approach, "making sure we don't pull the wrong tooth."

In actual practice I soon learned her value as a diagnostician and began to refer couples to her to help them decide the future of their marriage. Many couples in early states of mediation were unclear as to what they wanted to do, and Janet had a gift for respecting their choices and clarifying their decision. I asked her once what she does in these "mediation therapy"

sessions and she said, "I get people ready for you." When she thought I was interested in a more detailed analysis she gave me a copy of her book, Mediation Therapy, which incorporates her practical therapeutic approach to family dissolution.

She also steered many of her own couples to me for mediation, as well as introducing me to many family therapists who were looking for a more benign approach to the

legal components of a divorce. I still get couples coming to me from some of these early referrals.

Janet was an immediate and loyal supporter of the Massachusetts Council on Family Mediation, participating in its creation and serving as its third president. She personifies the collegial approach to a professional practice and continues to bestow gifts on the Council, always focusing on how we and our clients can go

forward in a productive way.

Thank you from all of us.



John A. Fiske is a founding member, past president director emeritus and the namesake of MCFM's Fiske award. 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>.



2008
FOURTH ANNUAL
JOHN ADAMS FISKE AWARD

FOR
EXCELLENCE IN MEDIATION

PRESENTED TO
JANET MILLER WISEMAN



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



AN ACT RELATIVE TO PARENTAL CHOICE OF TERMINOLOGY IN CERTAIN DOMESTIC RELATIONS MATTERS: BBA Proposed Legislation

***Preface by John Fiske:** The Boston Bar Association Parenting Plan bill has been approved by the Council of the Bar Association for submission to the legislature for the 2008-2009 session. The BBA Family Law Section has been working on this bill for several years, trying to accommodate concerns of different viewpoints. A Working Group of Joan Armstrong, John Fiske, Kelly Leighton, Jennifer Rivera-Ulwick and Mark Warner helped to compile and edit this final bill. It will allow parents and judges to choose “parenting plans” instead of “custody and visitation” in defining arrangements for children, and related changes.*

Section 31B. Parental rights and responsibilities; parenting plans; use of terms.

1. In agreements relative to custody or parenting plans pursuant to section 31 of this chapter, the parties may use alternative terms if they specifically agree to do so in writing. The following terms may be substituted, the definitions of which are identical to the terms contained in section 31. Any provision of law or court order or court rule that allocates “parental rights and responsibilities” shall correspond to the definitions of custody as provided in section 31 and any provision of law or court order or court rule that refers to the “custody” of minor children shall correspond to the definitions in this section.

2. For the purposes of this chapter, the following words shall have the following meaning unless the context requires otherwise:

“Sole decision making responsibility,” one parent shall have the right and responsibility to make major decisions regarding the child’s welfare including matters of education, medical care and emotional, moral and religious development. This term corresponds with “sole legal custody.”

“Shared decision making responsibility,” continued mutual responsibility and involvement by both parents in major decisions regarding the child’s welfare including matters of education, medical care and emotional, moral and religious development. This term corresponds with “shared legal custody.”

“Primary residential responsibility,” a child shall reside with and be under the supervision of one parent, subject to reasonable time with the other parent, unless the court determines that such time with the other parent would not be in the best interest of the child. This term corresponds with “sole physical custody.”

“Shared residential responsibility,” a child shall have periods of residing with



and being under the supervision of each parent; provided, however, that such periods shall be shared by the parents in such a way as to assure a child frequent and continued contact with both parents. This term corresponds with “shared physical custody.”

“Parental rights and responsibilities” means all rights and responsibilities parents have concerning their child, including decision-making responsibility and residential responsibility. This term corresponds with “custody.”

“Parenting plan” means a written plan describing the rights and responsibilities of each parent. A parenting plan may include, without limitation, provisions relating to:

- (a) decision-making responsibility and residential responsibility;
- (b) information sharing and access, including telephone and electronic access;
- (c) legal residence of a child for school attendance;

- (d) parenting schedule, including
 - (1) holiday, birthday and vacation planning,
 - (2) weekends, including holidays and school in-service days preceding or following weekends;
- (e) transportation and exchange of the child;
- (f) relocation of parents;
- (g) the safety of the child and of the parents;
- (h) procedure for review and adjustment of the plan; and
- (i) methods for resolving disputes.

Postscript by John Fiske: A number of other states have incorporated parenting plans by legislation, and we hope the entire mediation community will follow and support our efforts to secure passage of this bill in this legislative session. After all, we are not asking for any money.



“Marriage is the chief cause of divorce.”

Groucho Marx



GOING GREEN: MCFM Endorses the Eco Challenge Pledge

By Debra L. Smith

The Massachusetts Council on Family Mediation, Inc. has signed the Eco Challenge Pledge. The MCFM's Family Mediation Quarterly is printed on 100% recycled post consumer content paper. The board is making best efforts to reduce the carbon footprint at meetings by copying documents on two-sided paper, recycling and communicating electronically when appropriate.

What can one do to be green? The Massachusetts Bar Association's Eco Challenge Task Force has written Green Guidelines which can be viewed at: <http://www.massbar.org/media/252221/greenguidelines0108.pdf>.

The areas on these Green Guidelines include “energy conservation, paper reduction, recycling, greenhouse gas reduction, environmentally conscious purchases, sustainable practices, education and support for environmental conservation.” Simple tasks that can be done include turning off lights when not in the room, changing light bulbs to energy efficient bulbs, using 100% recycled copy paper, getting off mailing lists, purchasing duplexing or two sided new copy machine that has a printing feature and recycling. Using public transportation, biking, walking, carpooling or purchasing a hybrid vehicle are ways to reduce greenhouse gases.



Other ways to be green are providing pitchers of filtered water instead of water bottles and unbleached paper towels and napkins at meetings. Instead of cleaning with toxic chemicals, one can clean with baking soda, white vinegar and club soda. Products such as coffee, sugar, salt could be purchased in bulk instead of individually wrapped. One can read a “Healthy Environment Starts at Home,” an excellent publication of the Massachusetts Water Resource Authority. See www.mwra.state.ma.us/index.html.

The benefits of making best efforts to be green are saving money, feeling good about doing ones part in reducing one's carbon footprint and being healthier.



Debra L. Smith is a Watertown attorney and mediator, a member of the Eco Challenge Task Force for the Massachusetts Bar Association, and a director of the Massachusetts Council on Family Mediation.



EMAIL

To the editor:

I thought this exchange of emails would stimulate some thought and perhaps email discussion of The Butterfly Effect, which in this case is more The Buffalo Stampede Effect: does the collapse of a bank in Australia, plus a few other financial institutions and maybe a few million foreclosures etc, affect us as Massachusetts divorce mediators? How will that effect play out?

Cheers,

John Fiske

Subject: cancel

To: jadamsfiske@yahoo.com

Date: Wednesday, October 8, 2008

very sorry we have to cancel on you for thursday. we are really strapped and not in the position to pay a retainer and we think we have another firm that will get us through the process for \$1000+ less.

we were really stuck and i was especially conflicted because i got a sense from our few communications that you are very good at what you do . . . patient, clear, organized, understanding.

in any event, sorry for any inconvenience on your end.

best,

bill

Subject: Good wishes to you both

To: "Bill Johnson" at bjohnson@awol.com

Date: Wednesday, October 8, 2008

Dear Bill:

Thanks for the nice note. I am indeed good at what I do (I better be, after 1500 tries etc) but so are lots of other good mediators out there. The point is that you two will stay in charge of your lives throughout the process and later in carrying out YOUR agreement.

It will be interesting to see how the global economy affects our lives. I wonder about the effect on my mediation practice. You may be a harbinger, we'll see.

Good wishes,

John



MCFM NEWS

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 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.

Pioneer-Valley Mediators Group: This Western Mass group is newly organized and will be meeting monthly in December on the first Wednesday of every month at the end of the day, from 4 to 6 pm or 6 to 8 pm (depending on the interest) in Northampton at a location to be announced. Please email Kathy Townsend for further information at <Kathleen@divmedgroup.com>



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@sociallaw.com.**



MCFM BROCHURES

Copies of MCFM's brochure are available for members. Brochure costs are as follows: Two for \$1; 25 for \$10; 60 for 20; 100 for \$30; and 150 for \$40. A blank area on the back is provided for members to personalize their brochures, or to address for mailing.

MEMBERS ONLY:

call Ramona Goutiere: 781-449-4430
or email: masscouncil@mcfm.org



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Front

All lettering
& graphics
are bright
GREEN



Back



ANNOUNCEMENTS

All mediators and friends of mediation are invited to submit announcements of interest to the mediation community to wallerstein@socialaw.com, for free publication.

CORRECTION

The last edition of the FMQ inadvertently omitted Lynda J. Robbins as an MCFM Director. According to MCFM by-laws, Immediate Past Presidents serve as MCFM Directors and sit on the Executive Committee. This edition updates the Directorate on page 31 to correct that omission, with apologies to Lynda.



BASIC MEDIATION TRAININGS

Presented by The Mediation & Training Collaborative (TMTC)

November 1, 7, 14 and 15, 2008: 30-hour intensive training in collaboration with the Holyoke Community College Center for Business and Workforce Development

These highly interactive, practice-based trainings are open to anyone who wishes to increase skills in helping others deal with conflict, whether through formal mediation or informal third-party intervention processes in other professional settings. TMTC is a court-approved mediation program, and these trainings meet SJC Rule 8 and Guidelines training requirements for those who wish to become court-qualified mediators.

For more details or brochure, contact Susan Hackney at shackney@communityaction.us or 413-774-7469.



ELDER MEDIATION TRAINING FOR MEDIATORS

**Wednesday and Thursday - November 5 and 6, 2008
 8:30 am - 4:30 pm
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Elder mediation helps seniors and their adult children resolve conflicts around issues such as living arrangements, caregiving, financial planning, inheritance/estate disputes, medical decisions, family communication, driving, and guardianship.

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Advisor, Consensus Building Institute. We plan to offer workshops on the following topics or related issues:

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Register online at: www.neacr.org Questions? Email Ruthy Kohorn Rosenberg at ruthyk@mit.edu, or call her at 617.252.1062. For information on registration for the dinner and placing ads in the program book, contact Mindy Milberg at milberg@milbergmediation.com or Steve Linsky at smlinsky@rcn.com



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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>**.

REFERRAL DIRECTORY: Every MCFM member is eligible to be listed in MCFM's Referral Directory. Each listing in the Referral Directory allows a member to share detailed information explaining her/his mediation practice and philosophy with prospective clients. The Referral Directory is printed 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 <lynncooper@aol.com>**. For certification or re-certification applications contact **Ramona Goutiere at <masscouncil@mcfm.org>**.



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