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MCFM

Family Mediation Journal

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.

EDITOR'S MESSAGE

Greetings Loyal FMQ Readers,

You may have noticed that you have not received an edition of the FMQ in quite a while and that the name and cover art of this publication have been updated. The original FMQ (Family Mediation Quarterly) was founded and edited by Les Wallerstein in the summer of 2002 and published quarterly through the summer of 2013. Kate Fanger then took over and edited the FMQ from fall, 2013 through the spring of 2016. Upon Kate Fanger's retirement as Editor, the MCFM Board created a Publishing Subcommittee to assist with starting a blog on the MCFM website with the intention of having the MCFM blog and the FMQ complement one another. The goal was for the blog to be a frequently updated resource for members to view and post and the written publication would include highlights from the blog and some lengthier articles more appropriate for publication. In 2017, the blog (The Family Mediation Blog - https://mcfm.org/blog) went live and with the frequent content generated on the blog, we decided to move away from a quarterly publication and instead publish a semi-annual Journal (published in the Fall and the Spring). This Fall 2018 FMJ (Family Mediation Journal) is the first edition of the new publication!

As your new Editors, we want to thank you all for your patience as we develop these new publications/platforms. We hope that you enjoy this inaugural edition of the FMJ which contains elements of old and new with a nod to the past happenings of MCFM, divorce mediation and family law and some fresh updates to guide you in your practice. Moving forward, we are always open to new content and any feedback you may have so we invite you to send any and all blog or FMJ articles to us for publication at jhawthorne@skylarklaw.com and erin@ewpennocklaw.com.

Thank you in advance for your readership and loyalty to the new FMJ!

Your Editors, Jen and Erin

Jennifer Hawthorne is a mediator and Collaborative Attorney at Skylark Law and Mediation in Southborough. Jen focuses her practice on out-of-court resolutions to family conflicts. She can be reached at jhawthorne@skylarklaw.com or 508-655-5980.

Erin Pennock is a family law attorney and mediator with a practice in Belmont, MA. For more information on Erin and her practice go to www.ewpennocklaw.com. She can be reached at erin@ewpennocklaw.com or 617-489-2288

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PRESIDENT'S MESSAGE – From Vicki Shemin

2020: A VISION FOR THE FUTURE OF MCFM

As the 24th President of MCFM, it is a formidable task to pen a President's message. In thinking about all that I would like to convey, I was struck by the fact that my presidency will span the years 2018-2020.

2020.

The irony of 2020 did not escape me. The familiar maxim that "hindsight is 20-20" is commonly understood to mean that we don't always see clearly in the moment and that we only gain a perfect view of events after they have transpired - - that is, we are better able to evaluate past choices in retrospect rather than at the time of the occurrence.

But what if one had the benefit of an amazing Board of Directors who brings a perfect equipoise of past experience and fresh insights? And, what if one had the benefit of energetic and creative Members who bring synergy and creativity to this incredible organization? Wouldn't that propel us to turn the aphorism on its head - - meaning, with the 20-20 ability to evaluate, strategize and implement changes ahead of the curve, we could have the foresight to carve out a path towards an even prouder legacy?

For those who know me, there is a standing joke that I tend to say in 15 words what others convey in 5. In my effort to be contemporaneously focused with my sights set both on past lessons and future challenges, I am excited and honored to have the opportunity to help advance the aims of an organization with a proud and storied history.

It is my hope that when I write my Past-President's Message, you will recognize positive changes that future leaders of the organization will build upon with their own insights and energies.

So, between now and 2020, it is my fervent hope that I can count on you to make the most of your membership by challenging us with your energy and ideas, all to the end that we will ever strive and actualize our organizational ideals. Practically speaking, what does this mean? Give us constructive critiques, give us your wish list, join an established committee (or present us with the idea for a new committee), join in and take advantage of all that we have to offer you…and let us take full measure of all that you can offer MCFM.

I look forward to partnering with you as we look ahead to, and reflect back upon, 2020.

Vicki L. Shemin

Vicki L. Shemin, J.D., LICSW, ACSW (family law attorney and clinical social worker) is a partner at Fields and Dennis, LLP, in Wellesley, Massachusetts. She specializes in all areas of alternative dispute resolution - including mediation, collaborative law and parenting coordination. Vicki is also President of MCFM.

LETTER FROM PAST PRESIDENT BARBARA KELLMAN

Editor's Note: *We want to thank Barbra Kellman for her time as President of MCFM. She was a fabulous leader and we appreciate all of her hard work and assistance she provided!*

Dear Colleagues,

It has been an honor to serve for two years as MCFM President. Now if I could only convince Mr. Trump of the value of a two-year presidency. . . but, back to reality.

Our profession is extraordinarily important as we encourage parties to actually listen to and to hear the real (i.e., non-fake) needs and interests of each other. Whether their needs and interests intersect only a bit or a lot, in one place or in several, it is our job to help them to see and strengthen those intersection(s).

Easier Said Than Done

Though it is easier said than done, like our Senator Warren, we Persist. We seek connections that have been lost or perhaps were never sufficiently strong. We promote disclosure in situations that can be fraught with mistrust, suspicion, and secrecy. We encourage looking forward through the whole, wide windshield in front of us and not back through the small rearview mirror, as Kate Fanger taught me.

Why do we do this often difficult work? Speaking for myself, I do it to help people find energy to build their future lives; to help people to not just LOOK forward but to MOVE forward: to accept mistakes and create opportunities; to grieve their losses and begin to shed the burdens of regret.

We work to try to help clients replace old fixed ideas with imagination. We work to make proposals have more strength than demands. We work to make suggestions more valuable than orders. We work to make what the law says clear and useful to the parties. And as we promote these ways of working for others, we strenuously try to improve our own use of these values.

Cultivating Productive Neutrality.

What qualities do we/I need to cultivate our role as productive, effective neutrals? For me **patience** is the "virtue" I most strive for in my work. Second, is perhaps **persistence** or **tenacity.** Third, I work to educate my clients with as much **clarity** as possible about the law and about helpful parenting practices and plans. Fourth,

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I try to nurture **curiousity** in myself and the parties about their particular history, present, and future; to keep my ears open to different perspectives from which to understand their emotional and financial circumstances. Finally, I look for connections as I work in order to maintain my **enthusiasm** in order to contribute meaningfully to the parties' negotiation.

How Does MCFM Help?

Through programs, institutes, and social gatherings we educate and support each other. We share information about new laws and ideas and how to interpret them to best help our clients improve their circumstances.

Future Focus

I look forward to working with our new Board and Officers as we continue existing programs and increase public awareness of (market!!) the value of mediation to a larger and larger community, coordinate our programming with other organizations with similar goals and interests, and find ways to make mediation services more affordable through our continued work with the Courts of the Commonwealth and through our own internal efforts.

Thank you for these opportunities.

Barbara S. Kellman is an attorney, family mediator, and collaborative lawyer, Brookline, MA. She is a Partner at Sneider Kellman P.C. and trained as a lawyer and social worker. Ms. Kellman just completed a two year term as President of MCFM and will stay on the Board for two more years as Past President. She is a past Board Member at Community Dispute Settlement Center. Ms. Kellman can be reached at bkellman@sneiderkellman.com.

"Seeking the truth, finding the truth, telling the truth and living the truth has been and will always be what guides my actions."

– Colin Kaepernick

THE ALIMONY REFORM ACT: LESSONS LEARNED IN THE LAST SIX YEARS

by Valerie Qian & Justin L. Kelsey

The Alimony Reform Act of 2011 defined what alimony is and how it should work in much greater detail than the prior law. The Alimony Reform Act, 2011 Mass. Acts ch. 124. However, it also left many questions unanswered. In the six years since the Act became effective, on March 1, 2012, the courts have slowly been further clarifying, and in some cases arguably undercutting, the Act. In this article, we will summarize the provisions of the Act and note the court cases that have affected the language of those sections.

Alimony: What is it?

Alimony is defined in the Act as ' the payment of support from a spouse, who has the ability to pay, to a spouse in need of support for a reasonable length of time, under a court order.' Mass. Gen. Laws ch. 208 §48 (2012) [hereinafter §48].

Since March 2012, the courts have made clear that this is how the law has defined alimony even prior to the Act, and the Act did not change this (except for the addition of "reasonable length of time").

"The Act altered neither the fundamental purpose nor the basic definition of alimony: 'the payment of support from a spouse, who has the ability to pay, to a spouse in need of support.' G. L. c. 208, § 48." Hassey v. Hassey, 85 Mass. App. Ct. 518, 522, 2014.

The federal definition of alimony is a little different. In order to qualify for tax deductibility to the payor, the Internal Revenue Code requires that the alimony payment must be in cash, received as a result of a divorce instrument executed prior to December 31, 2018, while the payor and payee spouse are not living in the same household, and where the payment terminates upon the death of the recipient spouse. 26 U.S. Code §71 (2018). See also The Tax Cut and Jobs Act, Pub. L. No. 115-97 (2017, removing the alimony deduction for agreements entered after December 31, 2018).

What are the types of alimony?

The Act separates alimony into four different types, with distinct purposes. The type of alimony that most cases will have is dubbed "general term alimony" and refers to any type of support paid by one ex-spouse to another ex-spouse who is "economically dependent." §48, *supra*. Section 4 of the Act, which was not incorporated into the General Laws, indicates that prior alimony awards "shall be deemed

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general term alimony." The Alimony Reform Act, *supra* at §4.

The Act also creates a form of alimony called "rehabilitative alimony," which is paid to an ex-spouse who is anticipated to become economically independent "by a predicted time." §48, *supra*. The "predicted time" need not be a specific date, or even a specific expected future event of self-sufficiency such as graduation from an educational program, for example, so long as there is a general expectation that the recipient should be able to find reemployment in the future. Zaleski v. Zaleski, 469 Mass. 230, 234 (2013).

Two other forms of alimony created by the Act apply only to marriages of five or fewer years: *reimbursement alimony* which is used to reimburse a spouse for contributions to the marriage; and *transitional alimony* which is used to allow a spouse to transition to a new location or lifestyle. §48, *supra*.

The Act requires that to determine the appropriate form, duration, and amount of support the court must consider:

"the length of the marriage; age of the parties; health of the parties; income, employment and employability of both parties, including employability through reasonable diligence and additional training, if necessary; economic and non-economic contribution of both parties to the marriage; marital lifestyle; ability of each party to maintain the marital lifestyle; lost economic opportunity as a result of the marriage; and such other factors as the court considers relevant and material." Mass. Gen. Laws ch. 208 §53 (2012) [hereinafter §53].

A judge must consider these mandatory factors when deciding the form of alimony, and should not consider any "irrelevant factors," but has broad discretion in this evaluation so long as "the record indicate[s] clearly that the judge considered all the mandatory factors." Zaleski, *supra* at 236.

What is the correct amount of alimony?

The Act provides guidance for setting alimony orders by giving divorcing parties and attorneys a formula to calculate the maximum amount of alimony that can be paid by one former spouse to another. §53, *supra* at (b). Alimony, except for reimbursement alimony, is capped at the recipient's "need" or 30-35% of the difference in the parties' gross incomes. *Id.*

The Act provides that "gross income" for alimony purposes should be defined in the same way it is defined in the Massachusetts Child Support Guidelines, subject to certain limitations. *Id.* This means that bonuses are included in a party's income for alimony purposes, as the

Zaleski case confirms. Zaleski, *supra* at 243. There are differences, though. For example, distinguishing the income used for alimony from child support, the Vedensky case indicates that if a payor spouse obtains a new second job after the initial order of alimony, there is a presumption against including this new job in a future Modification of the original alimony order. Vedensky v. Vedensky, 86 Mass. App. Ct. 768, 778 (2014).

Despite a temptation to use the Act's formula in all alimony cases, the Hassey case makes clear that alimony is still defined by the payor's ability to pay and the recipient's need for financial support:

"Although the Act creates express guidelines to aid judges in fashioning alimony orders, it does not alter the principle that the central issue relevant to a financial award is the dependent spouse's 'need for support and maintenance in relationship to the respective financial circumstances of the parties.' Partridge v. Partridge, 14 Mass. App. Ct. 918 , 919 (1982)." Hassey, *supra* at 524.

It is not appropriate to simply apply the formula for the cap and use that formula in all situations as a starting point. Need can obviously be less than the formula cap, and in Hassey, the Appeals Court noted that need can also exceed the formula and an amount greater than 35% would be permissible "if based on a specific determination of the recipient's need…" *Id.* at 526. Of course, this leads to the question:

What is "need?"

Since the Act, the courts have clarified that "need" is a relative term and must reflect the parties' marital lifestyle in addition to other mandatory considerations contained in § 53(a) (as quoted above). Zaleski, *supra* at 243. However, the courts have also made clear that judges have significant discretion in setting orders. In the Zaleski case, for example, the Supreme Judicial Court allowed a lower court to find that the parties overspent during their marriage and therefore their "need" was less than the lifestyle they had enjoyed during the marriage. *Id.*

Court cases since 2012 have also clarified that "marital lifestyle" need is tied to the time-period of the marriage. If the parties have been separated for a period of time prior to the filing of a divorce action, the lifestyle of the recipient spouse during the marriage, and not just during the period of separation, should be a factor in determining the amount of alimony. Steele v Steele, *85 Mass. App. Ct. 1113* (2014, Rule 1:28 decision). Need is not defined by the standard of living a spouse would have enjoyed in the future had he/she remained married to the payor spouse. Young v. Young, 478 Mass. 1, 3 (2017).

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What is the correct length of alimony?

Under the Act, rehabilitative alimony presumptively ends in five years, the remarriage of the recipient, or the death of either spouse. Mass. Gen. Laws ch. 208 §50 (2012). General term alimony ends upon the remarriage of the recipient spouse or death of either party, and its duration is capped at certain percentages of the length of the parties' marriage:

- 50% of the length of the marriage for a marriage of 5 years or less
- 60% of the length of the marriage for a marriage of 5 – 10 years
- 70% of the length of the marriage for a marriage of 10 – 15 years
- 80% of the length of the marriage for a marriage of 15 – 20 years, and
- indefinite duration for a marriage of more than 20 years. Mass. Gen. Laws ch. 208 §49(a-c) [hereinafter §49].

General term alimony orders set under the Act also presumptively end upon the payor reaching full Social Security retirement age. *Id.* at §(f). The courts have the discretion to order alimony beyond the payor's social security retirement age, but under one of the first 1:28 decisions released after the Act, the Appeals Court directed that the lower court must clearly explain in writing the reason for ordering alimony past social security retirement age. Green v. Green, 84 Mass.App. Ct. 1109 (2013, Rule 1:28 decision).

Since the Act, the courts have clarified that alimony that is ordered on a temporary basis under a temporary court order does not count towards the maximum duration of general term alimony that a payor may have to pay under the statute. Holmes v. Holmes, 467 Mass. 653, 659 (2014). Under the Holmes case, the court also noted that the duration limits are maximums, and the court has the discretion to order alimony for a shorter duration of time than the maximum duration allowed under the statute. *Id.* at 660.

The Act also creates a presumption that alimony will be suspended, reduced, or terminated when a recipient spouse has been sharing a common household for three or more months with someone and lists factors that the court should consider in determining how the relationship might affect the alimony order. §49, *supra* at (f).

When can an alimony order be modified?

Under the Act, the court can modify the duration or amount of alimony "upon a material change of circumstances warranting modification," "unless the payor and recipient agree otherwise." *Id.* at (e). The Act makes clear that existing orders that were non-modifiable or survived still cannot be modified,

and this has been reaffirmed by the Appeals Court. Lalchandani v. Roddy, 86 Mass.App. Ct. 819, 822 (2015).

A "material change of circumstances" is not defined specifically in the statute, and is case specific. For example, even in a case where the recipient's income, or ability to earn income, had increased, the court found that a material change could still be sufficient where the recipient's need at the time of the modification had increased and was greater than her income, and the payor had increased assets, decreased expenses and was able to pay the additional support. Flor v. Flor, 92 Mass.App. Ct. 360, 364 (2017).
In the same case, the court found that a child's emancipation and the resulting ending of child support could qualify as a change in circumstances. *Id.* This was the case even though a child's reaching "adulthood" is an event that was obviously anticipated at the time of the divorce, but in this case not specifically identified in the Agreement as qualifying as a change in circumstances. *Id.*

Because the determination of what qualifies as a "material change" is vague, some parties and courts may want to avoid potential returns to court by incorporating a self-modifying order that changes with the parties' incomes. In the Hassey case, the Appeals Court addressed whether a self-modifying order created by a judge was permissible under the Act. Hassey, *supra.* The self-modifying provision in Hassey was vacated because:

1) it set up future modifications of alimony that would not be based on a judge's finding that the recipient's need, and the payor's ability to pay, had both increased at the time of each modification, and
2) it only required the *payor* to disclose his income going forward, and did not take the recipient's income into consideration. *Id.* at 527-528.

The Appeals Court took care not to indicate that all self-modifying orders are prohibited. *Id.* Parties who wish to use self-modifying provisions in their Agreements may do so, but should be careful to ensure that whatever mechanisms they put in place to modify alimony in the future give due consideration to what future need and ability to pay may be, and provide for possible modification if the circumstances change so that the self-modifying provisions are no longer viable. This requires careful and thoughtful drafting.

Do the same rules for modification apply to pre-Act cases?

Section 4 of the Act, which was not incorporated into the General Laws, indicates that the changes to the statute are not sufficient, by themselves, to warrant a material change of circumstances as to the

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modification of amount. The Alimony Reform Act, *supra* at §4. However, "existing alimony judgments that exceed the *durational* limits under section 49 of said chapter 208 shall be deemed a material change of circumstance that warrant modification." *Id*.

This means that, in a case with a merged pre-Act agreement for alimony in which the only change in circumstance is the passage of the Act itself, only the duration of that award can be modified and only if the award exceeds the percentage durational limits contained in §49(b). *Id.*

This ability to modify the duration of pre-Act awards does not apply to the other duration endpoints in the statute. The SJC ruled that pre-Act alimony awards cannot be modified due to the payor reaching full retirement age if the original agreement provided for a later termination date. Chin v. Merriot, 470 Mass. 527 (2015); Rodman v. Rodman 470 Mass. 539 (2015); and Doktor v. Doktor 470 Mass. 547 (2015). While the Act has language presumptively ending alimony when the payor reaches full retirement age, the SJC ruled in these three cases that this portion of the Act does not apply retroactively to agreements approved by the courts or judgments before the Act became effective on March 1, 2012.

Similarly, pre-Act agreements and judgments cannot be retroactively modified to allow alimony to terminate or be suspended pursuant to the cohabitation language in the Act. Chin v. Merriot, 470 Mass. 527 (2015). While these cases limit use of the Act to provide an automatic modification for cohabitation or full social security retirement age, the "material change" in circumstances provisions still apply. This means that if a recipient's cohabitation reduced their need materially, or a payor's actual retirement reduced their ability to pay materially, then a modification might still be appropriate. This type of modification would be based on the pre-Act case law, and not the provisions of the new Act. For example, the pre-Act Pierce case contains direction as to how the court must balance a payor's "good faith retirement" with the other factors relating to support. Pierce v. Pierce, 455 Mass. 286, 28 (2009).

Recent cases have also questioned whether the retroactive application of the duration limits in §49(b) is constitutional. In Van Arsdale and Popp, cases which came down the same day from the SJC in 2017, the court ruled that this option for retroactive modification of duration is constitutional and does not violate due process. Van Arsdale v. Van Arsdale, 477 Mass. 218 (2017); and Popp v. Popp, 477 Mass. 1022 (2017). The court reasoned that the Act only creates a presumption for a certain duration of alimony in each

case, not an automatic termination date that applies regardless of circumstances. *Id.* In each case, the presumption can be argued against by either party, and therefore allows for proper due process. *Id.*

Because of these differences between pre-Act and post-act cases, it is important to note that modification of pre-Act cases are subject to the pre-Act rules on these issues. This means that a pre-Act Separation Agreement that reserved the right to future alimony but waived past and present alimony is considered a "pre-Act" initial order when seeking future alimony. Flor, *supra* at 365. Contrast this with the Snow case, in which the initial divorce did not mention alimony at all, and therefore the modification case was treated as an "initial order." Snow v. Snow, 476 Mass. 425, 429 (2017).

Is alimony tax-deductible to the payor and taxable income to the recipient?

Until the passage of The Tax Cuts and Jobs Act in December 2017, alimony that met the definition in the tax code was tax-deductible to the payor spouse and taxable to the recipient spouse. 26 U.S. Code §71 (2018). This means that for federal tax purposes, across all states, payor spouses have been able to deduct their alimony payments from their gross income, and the tax burden of higher-earning payor spouses has been shifted to recipient spouses in lower income tax brackets. Divorced couples as a unit have thus paid lower income taxes overall to the IRS under this previous tax treatment of alimony.

The Tax Cuts and Jobs Act has ended this "tax benefit" for any divorce or separation instrument executed after December 31, 2018. The Tax Cut and Jobs Act, *supra*. The tax deductibility of alimony will only remain in effect for divorce instruments that are executed on or before December 31, 2018. Those who already have divorce instruments for alimony, or have them on or before December 31, 2018, can continue to take advantage of the old rule for tax deductibility, unless they expressly state that they want the Tax Cuts and Jobs Act to apply to them. *Id.*

The waiting period in Massachusetts, (90 to 120 days for the finalization of a Judgment when a Separation Agreement is approved) raises the question of how the IRS will define this December 31, 2018 deadline. No one will know for sure until the IRS weighs in on these issues, but the simplest interpretation of the plain language of the Tax Cut and Jobs Act would suggest that as long as a Separation Agreement is signed by both parties and notarized on or before December 31, 2018, any agreements for alimony should still be tax deductible. The Tax Cut and Jobs Act defines the term 'divorce or separation instrument' as:

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"(i) a decree of divorce or separate maintenance or a written instrument incident to such a decree,
(ii) a written separation agreement, or
(iii) a decree (not described in clause (i)) requiring a spouse to make payments for the support or maintenance of the other spouse." The Tax Cut and Jobs Act, *supra*.

The loss of this deduction for instruments signed after December 31, 2018 will also raise additional questions about the application of the Alimony Reform Act. The formula for capping the general term alimony amount, for example, was written at a time when 30-35% of the difference in income took into account the tax deductibility of alimony to the payor. This cap is much higher when considering the change in tax law, and perhaps will require a stronger focus on the "need" provisions in the Act and subsequent cases.

If nothing else, these questions guarantee the ongoing need for thoughtful mediation of cases, and the promise of future appeals for those who fail to find solutions out of court.

Editor's Note: *As of the printing of this edition of the FMJ in September 2018, to the best of the Editors' knowledge, the Massachusetts Legislature has not begun taking steps to reconcile the Federal Tax Cuts and Jobs Act (26 U.S. Code §71 (2018)) with the Massachusetts Alimony Reform Act (2011 Mass. Acts ch. 124). Please check back in future editions of the FMJ and follow our blog, The Family Mediation Blog, for updates…*

Valerie Qian was born in Wisconsin, grew up in Hong Kong, and has been in the Boston area since 2004. Valerie graduated from Boston University School of Law and was an English Literature major at Wellesley College. Valerie has been an Associate at Skylark since February 2013, and is trained in both mediation and collaborative law. She practices primarily in the areas of family law and juvenile defense.

Justin L. Kelsey is a Collaborative lawyer and an MCFM Certified Mediator. Justin is a Past President of the Massachusetts Collaborative Law Council and he is on the Board of Directors of MCFM. Justin is the owner of Skylark Law & Mediation, PC and Gray Jay Endeavors, LLC. Justin focuses his practice on dispute resolution for families. Justin is currently one of the faculty for the MCLE Mediation training and the upcoming MCLC Introduction to Collaborative Law Training in September of 2018.

YOUNG V. YOUNG: WHAT'S OLD AGAIN IS NEW AGAIN

By Vicki Shemin

How times have changed. And yet not. When it comes to divorce, it has become part of our cultural parlance to hear the familiar refrain that - whatever else happens, clients want to continue to live in the manner to which they've become accustomed. Reflecting back and forward to 3 points in time, this article will provide context to, and perspective, on marital lifestyle, station in life, and alimony.

A Look back: "O, reason not the need!"

Just over 25 years ago, in *Rosenberg v. Rosenberg*, 33 Mass. App. Ct. 903 (1992), the Appeals Court considered whether the probate court judge erred in awarding the wife alimony of $2,000 per week when her needs could be met with income from the $4,000,000 cash component of the capital assets apportioned to her in the divorce. In answering that question, the Court appealed (pun intended) to a higher authority – namely, Shakespeare: "O, reason not the need!" (*King Lear*, Act II, sc. 2).

The husband (scion of the founder of Dunkin' Donuts) estimated that the wife could expect to receive between $251,465-$320,000 in annual investment income from her $4,000,000 cash allocation. Pointedly, the husband stressed that the probate judge found that the wife's stated needs were "exaggerated" and that she had managed to survive on a post-tax support order of about one-half of that sum ($122,980) for three years in the interim timeframe between the couple's separation and divorce. But the Appeals Court was not persuaded that just because the wife "should be able to keep the wolf from the door - - in accustomed style - - on the investment income from the capital assets awarded to her," it necessarily followed that the probate judge abused his discretion in additionally awarding a tidy sum of alimony to the wife.

In fashioning its decision, the Appeals Court likened the Rosenbergs' 29 year marriage to the dissolution of a partnership of an almost $22,000,000 marital estate. When balancing pertinent factors, the Court tipped the scales of justice by weighting more heavily the wife's "need" through alimony and emphasized the ample discretion that judges have in fashioning alimony awards to enable the more dependent spouse to be maintained "in an economic style close to which the spouse had become accustomed during the marriage." In denying the husband's appeal, the Court reasoned that the probate judge was well within the bounds of his broad discretion to award $2,000/week alimony to "provide a fund that approximated the wife's need through alimony, while making an allocation of marital assets that undoubtedly provided her an economic base for a life beyond even fairly elevated need." Thus, in *Rosenberg*, "need" sat front-and-center flanked

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by judicial discretion and equitable resolution.

Birth of the Alimony Reform Act

Fast forward to 2011 when the Alimony Reform Act of 2011, St. 2011, c. 124 ("Act") was given life. Many welcomed the Act, predicting that the statute would do for alimony what the Child Support Guidelines had done for child support - that is, the Wild, Wild West aspect of free-wheeling alimony awards would be tamed by the law and order prescribed in the Act. But even those who heralded the Act quickly recognized that there were vague aspects of the Act that would keep divorce professionals (and courts) struggling for years to come with its inherent vagaries.

The interplay of "need" and "ability" to pay

With more than a hint of irony, it soon became clear that one of the vagaries in the Act concerned one of its key features – namely, alimony. In the statute, "alimony" is defined as "the payment of support from a spouse, who has the *ability* to pay, to a spouse in *need* of support for a reasonable length of time . . . (emphasis added)" (G. L. c. 208, § 48). Because neither "ability to pay" nor "need of support" are defined in the Act, when making alimony awards in which considerations of need come into play, judges are given discretion to balance numerous other factors, such as the parties' ages, health, incomes, and economic and non-economic contributions to the marriage (à la *Rosenberg* and the dissolution of an economic partnership) (G. L. c. 208, § 53 (a)).

And the following subparagraph further blurs the contours of certainty by adding the following: "[T]he amount of alimony should generally not exceed the recipient's *need or* 30 to 35 per cent of the difference between the parties' gross incomes established at the time of the order being issued" (emphasis added) (G. L. c. 208, § 53 (b)).

So, along with the birth of the Act, the quandary as to what constitutes "need" pursuant to the statute was also born, leaving fertile ground for family law practitioners to sow countervailing arguments.

***Young v. Young*: What's Old Again is New Again**

Now, fast forward to 2017. In the historical continuum of Massachusetts alimony awards cases, *Young v. Young* is, and predictably shall remain, well-noted for its efforts to delineate the metes and bounds of measuring "need." *Young v. Young*, 478 Mass. 1 (2017). Two key questions were before the SJC. In a case of first impression, the SJC considered whether and under what circumstances the Act permits a judge to award alimony based on a percentage of the supporting spouse's income (e.g., variable and self-effectuating general term alimony awards). But - of equal import, the case examined the interrelationship between "need" and "ability to pay" in general term alimony determinations focusing on how to

ascertain "need" - - and, more specifically, highlighting the relevant time frame for determining "need". Is it a static point in time? Is it a fluid concept?

Background

The parties in *Young* were married for over twenty years. At the time of the divorce filing, the husband worked as a high-level financial executive, earning a base salary as well as income through highly variable compensation systems, such as stock options and bonuses. Mr. Young's gross income ranged from $1.53 million in 2008 to nearly $8 million in 2011 and 2012. Notably, throughout the marriage, as the husband's gross income increased, so, too, the parties' station in life concomitantly escalated as they spent more and more on the hallmarks of an upwardly mobile and affluent lifestyle – an 8-bedroom lavish home, luxury vehicles, expensive vacations, and designer clothing.

After trial in the probate court, Judge Ulwick declined to order a fixed alimony award. Instead, she ordered Mr. Young to pay his wife 33% of his annual gross income from all sources (including salary, bonus, interest, dividends and perks of in-kind compensation to the extent they were, in effect, a regular source of income). In reaching her decision, Judge Ulwick reasoned that since the parties had historically lived with the anticipation and realization that the husband's gross income was on "an upward trajectory" – and that since their needs historically tracked that upward trajectory (i.e., the more the husband made, the more the couple spent) – and that since the nature of the husband's compensation was complex, it was only fair and reasonable to use a percentage-based formula to capture the fluctuating nature of Mr. Young's income, even after the divorce. Obviously, Mrs. Young was pleased that the Judge's decision put her in the best position not only to maintain her standard of living, but perhaps to even enjoy an elevated station in life, even after the divorce. But Mr. Young cried foul.

A New Sheriff in Town: The SJC lays down the law

On its own initiative, the SJC transferred the case from the Appeals Court. Had the SJC been biding its time, waiting for a ripe case to come along so that the SJC could impose some law-and-order to tame the Act's unsettled alimony features? As Justice Holmes might quip, would this be the case that would make bad law – or, for better or worse, would the *Young* decision bring clarity and predictability?

SJC's Analysis Part I

How to Determine a Payee Spouse's "Need" for Alimony

As noted, one of the questions before the SJC was whether Mrs. Young should be entitled to a general term alimony award tethered to post-divorce increases in her husband's variable income, thereby enabling her to enjoy a standard of living corresponding to the marital lifestyle in which the parties' needs had grown commensurate with the parties' increasing available income. Whereas the

Continued on next page

probate judge found that, in light of the complexities and ever-changing nature of the husband's overall compensation, it was only fair and reasonable that Mrs. Young should be awarded 33% of her husband's gross income, rather than a fixed amount, the SJC took a decidedly different view. The court held that Mrs. Young's needs should be measured at the time of the divorce, and should not be based on a general term alimony award that would otherwise enable her to maintain the lifestyle she would have had in the future if the divorce had not occurred. In reaching its decision, the SJC tracked a long line of well-established Massachusetts cases, pertinent treatises, and the Act, before ruling that the relevant point in time for establishing need in the context of marital lifestyle is what the couple enjoyed *during* the marriage.

More particularly, the SJC found that the probate court erred in making an award that enabled the wife's need for support to continue to grow after the Judgment of Divorce in direct proportion to the husband's "upward [income] trajectory." The court emphasized that general term alimony awards must be rooted in the couple's actual marital lifestyle at a fixed point in time at or prior to the divorce – and not what the couple *might* have enjoyed had the divorce not occurred. "[N]othing in the language of the statute or our case law suggests that the recipient spouse is entitled, by way of alimony, to enjoy a lifestyle *beyond* what he or she experienced during the marriage" (emphasis not added). In its rationale, the SJC stressed that its decision was based on the Alimony Reform Act of 2011. "[B]oth the act and the case law interpret 'need' in terms of the marital lifestyle the parties enjoyed *during the marriage*, as established by the judge at the time of the order being issued, in this case, the judgment of divorce," Chief Justice Ralph D. Gants wrote for a unanimous court (emphasis not added). But query whether it was circular reasoning to interpret the words *during the marriage* literally without giving due reasoned consideration to what that meant – and thus what *need* meant - under the facts and circumstances of the Young's marriage?

The SJC held that the trial judge had misconstrued the phrase "need of support" in the Alimony Reform Act when she awarded the wife general term alimony with the goal of allowing her to increase her standard of living proportionately to the husband's income, even following their divorce. The SJC held that "the need for support of the recipient spouse (here, the wife) under general term alimony is the amount required to enable her to maintain the standard of living she had at the time of the separation leading to the divorce, not the amount required to enable her to maintain the standard of living she would have had in the future if the couple had not divorced." In sum, the SJC found that although it was fair for Judge Ulwick to award the wife an amount of alimony intended to enable her to live the more expensive lifestyle to which she had grown accustomed by the end of the marriage, the judge should not have considered the husband's future potential earnings as part of the calculus of the wife's "need for support."

SJC's Analysis Part II

Is it ever appropriate for a Judge to Order that Alimony should be Calculated as a Percentage of Payor's Income?

Another key issue in the case was based on the husband's contention that the percentage-based award ordered by Judge Ulwick was, in effect, "self-modifying", and, as such, was prohibited by G.L. c. 208, §49(e) which only permits alimony modifications upon a showing that there has been a material change of circumstances. The SJC flatly rejected Mr. Young's challenge that a judge is not imbued with statutory authority to order variable amounts of alimony that may be triggered by variables or contingencies spelled out in the order, and further pronounced that not all such variations or triggers constitute modifications of the judgment. For example, if the payor spouse lives in the United States and the payee spouse resides in England, and if the order requires automatic and periodic increases in alimony proportional to a percentage increase in the British retail price index, then this is an essential part of the original Order, contemplated and bargained for by the parties, and therefore not a modification of the judgment. (In fact, the SJC endorsed alimony provisions that contain cost-of-living adjustments as precisely the type of variable awards that have the dual purpose of keeping the original order in place while anticipating the realistic need for purchasing power corrections.)

Notwithstanding, the SJC was crystal clear in its distinct alimony preferences, recognizing that just because the Act does not expressly bar alimony orders with variable or contingent terms does not mean that they are "advisable on the merits, or compatible with the fundamental principles of alimony." Rather, the SJC cautioned that such cases should be considered the exception, and not the rule, and "must be justified by the special case circumstances of the case."The rationale for this line of thinking is to enable the parties to have a "clean break"; to avoid the "strife and uncertainty" that often accompanies post-divorce calculations triggered by contingencies; and to avoid the temptation to manipulate income to skirt increased alimony obligations.

Circling back to "need," the SJC parsed theory and fact as it applied to the Youngs: the percentage-based alimony award rose to the level of an abuse of judicial discretion not because the general term alimony award was variable, but because the net effect provided Mrs. Young with an alimony award in excess of what she needed to maintain the lifestyle to which she had become accustomed during the marriage.The SJC would not countenance a percentage-based formula that prospectively funded a lifestyle even more lavish than her marital standard of living to the extent it was tied to post-divorce income increases earned by Mr. Young.

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Teachable Moments for Mediators: It's Still the Same Old Story

Mediators will find that *Young v. Young* will likely remain a seminal case – indeed, almost a primer – on several key points that our clients wrestle with during their negotiations. Chief Justice Gants clarified several uncertainties about general term alimony law in Massachusetts: (a) how to determine a payee spouse's need for alimony; (b) whether post-divorce alimony payments should increase in correlation to any increases in the payor's income; and (c) whether and when it might be appropriate for a judge to order that alimony be calculated as a percentage of the payor's income. Although one can unpack these issues, mediators well know that they are inextricably intertwined – and mediators well know that clients are well served when they bargain in the shadow of the law.

Although the *Young* case focused on a high net worth couple, the lessons are instructive for general term alimony awards for all our clients. In its ancillary analysis, the SJC considered cases other than those involving high net worth parties and opined that if the combined income of the couple does not enable both spouses to maintain the same lifestyle they had during the marriage once their household is cleaved, the recipient spouse does not have a right to live in a manner to which s/he had been accustomed to the detriment of the supporting spouse. When presented with those circumstances, the judge is obliged to consider all the statutory factors and arrive at a "fair balance of sacrifice between the former spouses when financial resources are inadequate to maintain the marital standard of living." In making this obligatory determination, the SJC noted that the Act was helpful in filling in an analytical gap by setting "presumptive parameters" for general term alimony awards which, in the usual case, should not exceed (a) the recipient's need, **or** (b) 30%-35% of the difference in the parties' gross incomes established at the time of the order (G.L. c. 208, § 53(b)). Armed with knowing the pertinent statutory and evolving case law, mediators will be best positioned to guide discussions that enable clients to retain control of their financial destinies.

Back to the question of whether good cases make bad law, it is critically important to underscore that the SJC could have analyzed the case in a number of other different ways. Specifically, Section 53(a) of the Alimony Reform Act considers a number of factors that the court could have weighted differently alone or in any combination. It was not in dispute that the parties agreed early in the marriage that Mrs. Young would be a stay at home parent and not work outside the home. In the end, Mrs. Young relied to her detriment on that covenant. Having been out of the job force for almost a quarter of a century at the time of the divorce – in contrast to the husband's ability to earn well into the future – couldn't the court have weighed more heavily the statutory salient factors applicable to ascertaining Mrs. Young's need – namely, the "income, employment and employability" of both parties; her "non-economic contributions" to the marriage; the ability of each to

"maintain the marital lifestyle"; and "lost economic opportunity" as a result of the marriage? Clearly, Mr. Young's employability far exceeds that of his wife. Clearly, Mrs. Young had entered into a partnership of lost economic opportunity. And – when it comes to maintaining the marital lifestyle, since that was expressly built on an escalating foundation, why should Mr. Young have the exclusive benefit of what his wife helped him build? Recalling the *Rosenberg's* view of marriage as an economic partnership, by not overturning Judge Ulwick's percentage-based alimony award, wouldn't the net effect have been that the parties shared the upside – as well as the downturns – of the vicissitudes of the husband's complex compensation package, a concept which is the very essence of a fiscal partnership?

It's Still the Same Old Story

Whether casting a look back to the *Rosenberg* case 25 years ago (which notably did not have the strictures, or benefits, of the Act), or a look ahead to the evolution of alimony awards in the next quarter century, predictably the basic tenets of general term spousal support have not – and shall not - change. Courts and mediators will struggle to find the equipoise between need and ability to pay, between equity and discretion, between certainty and uncertainty. Mediators can skillfully assist couples in seeing the upside and downside of self-adjusting support orders to ascertain whether they seem inherently fair to both parties, and, they can facilitate discussion about the Act's section 53(a) discretionary factors when trying to ascertain *need* and marital lifestyle, keeping those discussions within the confines of the conference room rather than the bailiwick of the court room.

And, as such, helping couples reach accord about alimony will always remain an area ripe for mediators – and now more than ever after December 31, 2018.

Endnotes

[i] In an instructive footnote, the SJC makes the important distinction between general term and other types of alimony and considers the specific example of what amount and duration of alimony would be apocopate where one party was "on the cusp of being able to afford a more expansive lifestyle after separating from the spouse who had financially supported him or her while he or she completed medical school or business school. See fn. 9

[ii] Section 53 (a) of the Alimony Reform Act:
In determining the appropriate form of alimony and in setting the amount and duration of support, a court shall consider: the length of the marriage; age of the parties; health of the parties; income, employment and employability of both parties, including employability through reasonable diligence and additional training, if necessary; economic and non-economic contribution of both parties to the marriage; marital lifestyle; ability of each party to maintain the marital lifestyle; lost economic opportunity as a result of the marriage; and such other factors as the court considers relevant and material.

Vicki L. Shemin, J.D., LICSW, ACSW (family law attorney and clinical social worker) is a partner at Fields and Dennis, LLP, in Wellesley, Massachusetts. She specializes in all areas of alternative dispute resolution - including mediation, collaborative law and parenting coordination. Vicki is also President of MCFM.

REVOKING THE IRREVOCABLE TRUST IN A DIVORCE – OR - NEVER SAY CAN'T, SAY DECANT! PART II*

By Jonathan E. Fields

Editor's Note: *In light of Ferri v. Powerll Ferri, 476 Mass. 651 (2017), this is an update and revision to an article previously written by Jonathan Fields and published by MCFM in the FMQ. The original article can be found in the FMQ archives. (https://mcfm.org/sites/default/files/FMQ/fall2015.pdf, page 25)*

Even with *Pfannenstiehl* behind us, the complex interplay of the irrevocable trust and divorce continues to vex practitioners. The topic *du jour* is decanting and divorce – and the SJC just dove right in with *Ferri v. Powell Ferri,* 476 Mass. 651 (2017).

Before we go further, a quick primer. "Decanting" is the process of pouring assets from an irrevocable trust into a newly created trust. The big question at the heart of decanting and divorce: what if, during (or anticipating) a divorce, the trustee decanted the assets into a newly created trust that was, say, more divorce-proof than the original trust? But, before we examine that issue, what is the law about decanting generally? When can a trustee decant the assets in an irrevocable Massachusetts trust to another trust?

Since Massachusetts, unlike other states, has no decanting statute, we look to case law and, in particular, *Morse v. Kraft*, 466 Mass. 92 (2013). Essentially, the case involved an irrevocable trust created by Robert Kraft which contained four sub-trusts, one for each of the donor's sons who were very young when the trust was created in 1982. The sub-trusts were administered by a trustee, Morse, and, under the trust terms, the sons could not participate in any distribution decisions. Now that the children were all in their forties and financially sophisticated, Morse wanted to delegate some of his trustee powers to them.

Since the trust gave Morse no explicit right to decant and Massachusetts has no decanting statute, Morse filed a petition asking the court to interpret the trust's language as authorizing decanting without court approval. The SJC agreed with Morse's position – that the trust authorized him to decant.

In its analysis, the SJC reminded practitioners that, in interpreting a trust, the donor's intent is the paramount consideration. Here, because the trust gave Morse broad discretion to make outright distributions to or for the benefit of the beneficiaries, the SJC concluded that the discretion, therefore, encompassed a distribution to a new trust if doing so would serve the beneficiaries' best interests. In addition to considering the language of the trust, the Court also relied on affidavits from the donor, the drafter, and Morse to the effect that each intended the trustee to have the right to decant.

Notably, the *Morse* court put on notice drafters of future, post-Morse, trusts: if you want a trustee to have a right to decant, you would be best served by

articulating that power in the trust. With that brief background, let us return to the main issue – decanting the assets during (or anticipating) a divorce to a more divorce-proof trust.

So, let's dispose of the easy case first: with a post-Morse Massachusetts irrevocable trust without an explicit power to decant, it is likely that decanting would not be permissible.

With a pre-*Morse* Massachusetts irrevocable trust without an explicit power to decant, we look to *Morse v. Kraft*. That is, a trustee may well be permitted to decant if the trustee's discretion is sufficiently broad to make outright distributions to or for the benefit of the beneficiaries, if it is in line with the donor's intent, and it is in the beneficiaries' best interests.

The recent *Ferri* decision involved a Connecticut divorce and a 1983 pre-*Morse* irrevocable Massachusetts trust that did not articulate an explicit decanting power for the trustee. The trustee decanted to another trust in the context of a divorce. The Connecticut Supreme Court certified three questions to the SJC – the essence of the inquiry for our purposes was that they sought a ruling on whether the trustee had the power to decant per the terms of the 1983 trust.

Reviewing the trust language in detail, which is beyond our scope here, the SJC found that the trustee's powers were broad enough to encompass the authority to decant. Notable, too, was the SJC's reliance on the affidavit of the settlor who stated his intention that the trustee had the authority to decant, particularly in light of the pending divorce and the need to protect the trust assets from the wife as a potential creditor. The Connecticut Supreme Court found that because the husband was unaware of the decanting, it did not violate that state's public policy.

Before divorce attorneys and estate planners get too excited about what they may be able to accomplish for their divorcing clients, such a decanting may not work in Massachusetts. The concurring opinion made clear that whether such a decanting would violate state public policy remains an open question:

Where, as here, the trustees created a new spendthrift trust for the sole purpose of decanting the assets of an earlier trust that, at least in part, would be included within the [marital estate] … [our law] would require us to consider whether the creation of the new spendthrift trust was contrary to public policy.

As decanting becomes more widespread nationwide, it will continue to surface in more of our cases involving divorcing parties. *Morse* and *Ferri* provide welcome guidance to the bar– and we await future case law and/or legislation to sharpen the contours. In any event, it would behoove both the estate planning practitioner as well as the domestic relations bar to become versed in the legal trends to best steer our clients down this new path.

Jonathan E. Fields, Esq. is a partner at Fields and Dennis, LLP in Wellesley. Jon can be contacted at 781-489-6776, or at jfields@fieldsdennis.com

FACILITATED FAMILY MEETINGS

By Halee Burg

I suspect many of us have experienced, at one time or another, how quickly extended family conflicts can unfold, and the damaging impact on valued relationships that often follows. Identity and values conflicts among family members may emerge and communication may unravel. Even in the closest of families, feelings about issues relating to aging parents or other loved ones run deep, and adult children and grandchildren may have vastly different perspectives regarding how evolving challenges should be managed. It is not uncommon for longstanding sibling rivalries to manifest as family members attempt to tackle – often without the support of a neutral third party – issues involving caregiving roles and responsibilities, residential options, decision making, and the like.

Facilitated family meetings, and/or mediation, can help families productively work together to address the wide range of issues that increasingly face elders and adult families. Guided by a third party neutral who can assist in building agendas, structuring discussions, sharing information and resources, and helping participants manage triggered and sometimes long dormant emotions, families become more capable of focusing on the topics at hand and working toward consensus-based solutions.

One of the most significant challenges faced by neutrals doing this work involves convening the group and getting buy-in from all stakeholders. Patience is required. It is often weeks or months after the first family contact before a joint meeting takes place, if at all. In the interim, the neutral may be participating in multiple conversations and emails with various family members (and sometimes their attorneys) regarding the process, who will participate, how fees will be shared, where it will take place, and other process-related issues. Several pre-mediation communications with various parties are usually necessary to address these preliminary process questions.

Facilitated family discussions cover a wide swath of issues. Topics participants commonly discuss include:

- Living arrangements for aging family members
- Caregiving roles and responsibilities
- End-of-life planning
- Who will serve as Power of Attorney and/or health care agent
- Wills, trusts, and inheritance issues
- Guardianship
- Family business management and succession
- Disposition of personal property

When facilitating or mediating discussions of this nature with adult families, it is essential to have sufficient topic-specific knowledge, so one can share with families information and resources germane to their concerns. Participants may be unfamiliar with Continuing Care Communities, Aging Life Care Managers, advance directives, etc. They may not understand the differences between a living will, a durable power of attorney, and a health care proxy. They may not recognize the value of a neurological evaluation to help inform their discussions and decisions. They may be unfamiliar with elder law issues germane to the topics they wish to explore, for example, Medicaid look-back rules. The mediator who couples general information with identification of resources and referrals is much appreciated.

Facilitated family meetings routinely involve large groups. Alternate Dispute Resolution ("ADR") professionals working with adult families should carefully consider whether a case would benefit from co-mediation or co-facilitation. Co-mediation can enrich the process and bring tremendous value to the clients. Both the number of participants (sometimes including attorneys) and the level of conflict is often significant; thus, thoroughly attending to and capturing all that is going on in the room can be difficult for a solo neutral. When listening deeply to the speaker, it is easy to miss the reactions of those on the other side of the table, or the side conversations taking place across the room. A co-mediator brings another set of eyes and ears, another layer of experience and expertise, and another valuable perspective regarding structuring the process and evaluating what to do in the moment. As in all process-related decisions, when considering whether to work with a co-mediator and/or who the co-mediator might be, the overarching consideration should always be how to best serve the family and provide the level of service appropriate to their situation.

Two other vital considerations in working with adult families and elders involve screening – for abuse, and for capacity to participate.

When working with adult families, it is important to understand and remain mindful of the potential for elder abuse and/or neglect – physical, emotional, or financial. During intake or convening, occasionally a family member will express concern that abuse or neglect may have transpired in the past, or worry that it might occur in the future. To assess the appropriateness of any family matter for ADR, as well as one's own capacity to capably work with a particular family, the neutral needs to be knowledgeable about these topics and gently but fully explore these concerns.

A vital step in adult family facilitations or mediations involves separate meetings (often by phone) with each participant in advance of the joint family meeting. These meetings provide the facilitator/mediator additional information regarding a number of topics, including each party's interests, concerns, goals, and hot

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buttons. In cases involving an elder, meeting privately with the elder – in person whenever possible – gives the mediator a view of the elder's ability to participate in the process and to meaningfully represent his or her own interests and desires. While it is not the neutral's role to make a legal or medical evaluation of capacity, it is incumbent on the neutral to consider whether the elder seems able to follow a conversation; can express him/herself clearly and cogently; feels capable of expressing his/her wishes in the midst of family members who may be pushing the elder in different directions; and/or desires to be present during a larger family meeting. Together with the elder and the family, and perhaps aided by medical assessments, the neutral needs to think carefully about how best to bring the elder's voice into the room.

Finally, neutrals also should anticipate the logistical and scheduling challenges inherent in family facilitations. With family members sometimes scattered across the country, flexibility is key. This may require meeting on a weekend, traveling, respecting the needs of parties in different time zones, and/or permitting some parties to participate in person and others by audio or videoconference. Of course, all parties should be in agreement about whatever alternative arrangements are made.

Facilitated family meetings and mediations are enormously challenging and rewarding. Patience, experience, knowledge, and planning are the foundational keys to success for any mediator or facilitator undertaking this important work.

Halee Burg, J.D., is a mediator at Elder Decisions® - a division of Agreement Resources, LLC, in Norwood, Massachusetts. Halee mediates disputes among adult family members regarding caregiving, living arrangements, guardianship, family communication, selection of individuals to serve as a health care agent and/or attorney-in fact, estate planning and inheritance, and family property distribution and management (real and/or personal property). Halee also mediates extensively with couples going through divorce and working through post-divorce, parenting, and/or co-heabitation issues. Halee can be reached at halee@ElderDecisions.com or 617-621-7009 x24.

"History will judge us by the difference we make in the everyday lives of children.

– Nelson Mandela

MCFM – READING CORNER

We are adding this to the new FMJ as a space to feature any fellow MCFM authors and any reading suggestions made by members. We encourage readers to send us any contributions moving forward.

In December 2017, the first MCFM Blog Post discussed the importance of sharing our favorite mediation-related books with our fellow family mediators and John Fiske graciously provided some suggested books along with a poem to start the dialogue:

I hope these blurbs are good for your blog

And help us begin a real dialogue

To find the right book by hook or by crook

To strengthen your neutral and wise outlook.

He suggested:

1. **A Guide to Divorce Mediation**, Gary Friedman, Workman Publishing (1993). The book opens with a quote from Hillel: "If I am not for myself, who is for me? And being for myself alone, what am I?" This focus on the Self is a foundation on which I believe all agreements should be built. His book describes how he became a mediator in 1979 in California following a process similar to mine in Massachusetts at the same time. Part Two is unique: 12 actual mediations are defined, complete with the dialogue and explanations of why the mediator did what he did and why it worked or did not. For example, in "Would I Lie to You?" he demonstrates practical strategies for addressing and dismantling deceit, as he puts it. Other chapters will also ring true with mediators: "Tell Me What To Do," "If I'm not Yours, Who Am I?" present couples we often encounter who present archetypal dilemmas and here we can read what he said to whom and when and why and the result. It's the next best thing to being in the room with him, and he is very good at mediating. A helpful guide, who helps you find your own path.

2. **The Divorce Remedy, The Proven 7 Step Program for Saving Your Marriage**, Michele Weiner Davis, Simon and Schuster (2001)..This book and its predecessor helped me to establish marital mediation for couples who wanted to stay married on new and different terms. She is the only author I have found who tells people to know what they want and to say what they want. This point is as applicable in all human relationships, including divorce and marriage. She also points out that you can only control yourself, and when you decide to change some aspect of yourself you automatically change the relationship with your spouse. She says, "It takes one to tango." Suppose you take out the garbage without being asked (!) for the first time in three years: you will change your relationship. Other

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suggestions: stop going down cheeseless tunnels (i.e. dead ends) and keep positive changes going. She writes well and is very practical.

3. **Getting to Yes: Negotiating Agreement Without Giving In**, Roger Fisher and William Ury, Houghton Mifflin (1981) and subsequent versions. The basic negotiation book, based on principles including focusing on interests and not positions. Ask your clients "Why?" and listen. They will tell you their concerns, their fears, what is most important to them. That will help you generate options with them, and you can use the law to help establish some objective criteria. The first principle of "separating the people from the problem" seems like Harvard Obtuseness until you carefully read the chapter which encourages you to try to understand the point of view of another person. For a mediator who wants to separate people from problem, stand up and write the problem on a flip chart and stand there with them looking at the problem. They include lots of examples and stories, and help or reassure you as you mediate seemingly unresolvable questions.

We encourage readers to send us their suggested reading or go to the MCFM December 2017 blog post and share your suggested reading in the comments.

"Many of the truths we cling to depend greatly on our point of view."

– Obi-Wan Kenobi

"THE GENEROUS PRENUP: HOW TO SUPPORT YOUR MARRIAGE AND AVOID THE PITFALLS"

by Laurie Israel

Editor's Note: *MCFM Member Laurie Israel recently published the book The Generous Prenup" How to Support Your Marriage and Avoid the Pitfalls. Laurie provides some background and insight into why she wrote this fabulous and informative book. To learn more, check out Laurie's author website at www.laurieisrael.com.*

As some of you may know, I spent a good part of the past 3 years writing a book about prenups. Our mediation (and law) practices sometimes take interesting turns. I started out as a tax lawyer, and then morphed into a general practice lawyer, concentrating on family law and estate planning. I've been practicing for a little over 30 years.

About 10 years ago, after representing a number clients in prenup negotiations, I wrote an article called "Ten Things I Hate about Prenuptial Agreements" and posted it online. This was during the relative infancy of the World Wide Web. Because the article was written by a lawyer, and because it struck a chord with many people who had faced or were facing a prenup, it more or less went viral. People are still reading it today and contacting me.

This caused more clients to seek me out for prenup representation, and I started building more expertise. That's what "practicing law" is. I sure got a lot of practice! I represented both the less-moneyed spouses concerned about their futures, as well as the more-moneyed spouses who (generally) wanted to be fair and supportive of the other future spouse. My clients understood that a prenup could be detrimental to their marriage, and wanted to avoid that result. About eight years ago I started working with both parties seeking a prenup as a mediator, which worked wonderfully in most cases. I'd send them to reviewing attorneys once the term sheet was settled through mediation.

I continued to have very negative experiences representing less-moneyed spouses, especially when the prenup was the idea of the "shadow parties." These are usually the parents of the more-moneyed future spouse. Usually the parents required the prenup, and pretty much set the terms. This put their child in a terrible situation – the child would have to go against their parents, or not act in the best interests of the future partner.

Worsening the situation, often the attorney representing the more-moneyed future spouse was the business lawyer or estate planning lawyer of the parents. As a result,

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that lawyer generally didn't function truly independently on behalf of his or her client. This was a very bad situation causing much heartache and suffering in prenup negotiations. These prenups often brooked no compromise, and almost always ended up badly for the less-moneyed future spouse.

I started getting very interested in writing a full-length a book (rather than the articles I had been posting on the internet) that would explain the problems inherent in prenups (both in process and in content), and how they have the potential effect of destabilizing marriages.

I started the process by formulating a comprehensive a book proposal with chapter descriptions. I followed the chapter descriptions as I was writing, and 3 years later (after much research and many revisions) I ended up with a 21-chapter book, plus an introduction.

The real surprise is that I enjoyed writing the book, from beginning to end! I was motivated, I guess by wanting to reduce the suffering I'd seen with people who are trying to enter into a prenup. I wanted to change that dynamic, and move the needle towards a process and a result that would help a couple, rather than hurt them. I wanted to influence the way lawyers tend to think about prenups. After all, in my practice, I found that a prenup can be generous and fair to the less-moneyed spouse, while still providing certainty and reasonable protection to the more-moneyed spouse.

Too many lawyers are concerned with asset protection to the detriment of the health of the upcoming marriage. Isn't part of giving good counsel to a client trying to find a prenup solution that would improve and support that upcoming marriage? Unfortunately, many attorneys still don't view it this way.A prenup can become a self-fulfilling prophecy for divorce.

My book is quite comprehensive. It's for the (very smart) general public, but will also be a very good resource for lawyers and mediators. It strongly promotes mediation as the best way to start the process in many cases. It has chapters on prenups for wealthy people, estate planning prenups, prenups for people with businesses, "gray" prenups for second marriages, LGBT prenups, immigration prenups, the question of alimony in prenups, and a chapter about the factors that make prenups enforceable, and factors that make them unenforceable. (They usually are enforceable, so if you sign one, assume it will be in force 40 years from now.)

Because so many areas of law are described, The Generous Prenup will be very useful to a non-attorney mediator who would like to learn more about the law of divorce and inheritance. The book is national in scope, but since I am a Massachusetts

lawyer, it's full of Massachusetts law, including case law.

The Generous Prenup discusses the drawbacks to prenups, and how to make both parties happy. There is a chapter on postnuptial agreements for couples who want to try to stay together. I call that chapter "The Postnup: A Powerful Tool to Be Handled with Care" Because I think postnups are fraught with dangers. There are chapters about how to choose an attorney or mediator, and how to begin the process.

If you're getting a prenup most times (but not always) one of the parties has some present (or future) wealth. But how much wealth is enough? Why not share some of it over time with your spouse? Unfortunately, many prenups have no sharing of "separate property" whatsoever, except at the choice of the more-moneyed spouse.

My book suggests that sharing can be written into the prenup. For instance, income generated by "separate property" (or part of it) could become shared "marital property" immediately or over time. The same with increases in value of "separate property," or a percentage of it, and even for the value of "separate property" itself. Participation in the joint venture of marriage (including the financial side of marriage) is extremely important to the health of a marriage in most cases.

I tried to make the book interesting, and I've included many interesting facts and some good jokes. Here are a few:

- There is a prenup from 1995 that required the parties to engage in "healthy sex" three to five times per week.
- Donald Trump married Ivana subject to a prenup. Sometime after the marriage, he initiated a postnuptial agreement to benefit Ivana because, as he said, "I thought it was appropriate. I was upwardly mobile."
- Mark Zuckerberg got married the day after the IPO of Facebook. The reason for the timing of the marriage was likely to establish Facebook's value at the time of the marriage.
- Alimony laws in Texas give it the reputation as the "wife-dumping" state, and give new meaning to the lyrics of the Tammy Wynette song, "Stand By Your Man."
- A gay journalist said as he was contemplating the possibility that he and his partner would enter into a legal marriage, "Nor could I add up the hours my partner and I spent eyeing marriage as if it were a fat slug on the carpet that we needed to deal with but didn't really want to touch."
- In discussing the definition of "unconscionability," I was able

Continued on next page

to quote Justice Potter Stewart's famous line in Jacobellis v. Ohio, about the definition of obscenity, in which he said, ". . . I know it when I see it."

· And here's a joke that I put in the lifestyle prenup chapter: A couple in their 70s is negotiating a prenup. The future wife says, "If we divorce I want to keep the house." He says, "That's OK with me." she says, "I want to keep the Rolls-Royce." He says, "That's OK with me." then she says, "And while we are married, I want to have sexual relations six times a week." And he says, "Put me down for Fridays."

There's lots of serious stuff in The Generous Prenup too. It is almost a primer on all the areas of law impacting prenups and postnups. You'll learn a lot about estate planning, divorce laws in various states, community property versus equitable distribution, the uniform laws on prenups, estate planning techniques useful in prenups, whether spouses are responsible for each other's debts, what happens when you marry without one, and many more.

I try to explain these things clearly and simply. One of the people providing advance praise for the book said in part, ". . . the author has a knack for explaining complex legal issues in plain English, with useful examples drawn from her work as a lawyer and mediator."

The book is available on Amazon, Barnes & Noble, and other online retailers as an eBook and a softcover print book. To learn more about the book, you can visit my author website www.laurieisrael.com. I've posted the table of contents and the complete index on the site, as well as several excerpts from the book.

The next part of my job is launching the book. I've been surprised to find that this is an adventure and is actually kind of fun to do. I hope you like the book, and find it useful in your practices.

Laurie Israel is a mediator/lawyer practicing in Brookline, Massachusetts. She combines a family law practice with estate planning, divorce mediation, and prenuptial agreement representation and mediation. Her mediation practice also includes marital mediation. Her email address is lisrael@ivkdlaw.com.

MCFM NEWS

An overview of noteworthy updates at the Massachusetts Probate & Family Court, what MCFM members have been up to and any other information we feel compelled to share with you! If you have any news you would like to suggest for future editions, let us know!

In Memoriam: June Adams Johnson
By Shuneet Thomsom

Our friend and colleague June Adams Johnson passed away on April 18, 2018 in her home in Groton, MA, surrounded by family and accompanied by the music of the Threshold Singers of Indian Hill Music. She was a wonderful person and a valued member of our Mediators Education and Support Group, which meets monthly in Interpeople's offices in Littleton, MA. Her passing was sudden and we still feel shocked and bereft.

June was born June Louise Adams in Portland, Maine, on June 1, 1939.

She leaves behind her devoted (second) husband, Steve Lieman, four adult children, five grandchildren and one great-granddaughter.

June graduated high school as valedictorian, then went on to earn a BS at the University of Maine, a Masters in Counseling at Boston University and a JD in 1985 at Northeastern Law School.

June started practicing mediation alongside her legal practice in 1988. Mediation became the majority of her practice starting about 10 years later. She did a lot of pro-bono work for many different nonprofits, including the Nashua River Watershed Association and Indian Hill Music (where she learned to play the harp in sixties). June also served for 34 years as Trustee of Groton Conservation Trust and served on the Groton Land Foundation.

As part of her devotion to peace and non-violence, June facilitated Alternatives to Violence Project (AVP) workshops at Shirley Medium Prison for 14 years. She spent 32 evenings per year doing AVP group sessions for 8 of those 14 years ("that's a lot of days spent behind bars!" observes her husband).

June served as facilitator for C4RJ (Communities for Restorative Justice) over five years. June was a very active member of First Parish Church of Groton Unitarian Universalist.

Continued on next page

More? Little did we know:

- June created 'Neighbor to Neighbor' dialogue to help encourage Groton citizens to get to know and appreciate their fellow citizens better.
- She was the co-founder of 'Carrying On,' a support group for those who have lost a loved one through suicide.
- June inspired the start of 'Friends of the Tree Warden' non-profit organization.
- June also created 'Sharing the Journey', an 8-week workshop to strengthen the relationships of committed couples, which is something she told us about in our group meetings.

In our group of mediators June's contribution always revealed her kindness, generosity of spirit, intelligence, wisdom and professional integrity. Her voice and her presence in our meetings will be acutely missed. May she rest in peace.

Shuneet Thomson was a close friend of June's and has been a mediator since 1988. In 1996 she established Interpeople Inc., with offices in Littleton and Arlington. Her website is interpeople-inc.com, email: drthomson@interpeople-inc.com Office phone: 978-486-3338.

Child Support Guidelines Update

On May 18, 2018, the Executive Office for the Trial Court – Probate and Family Court issued a statement announcing that the existing child support guidelines and worksheet would be amended effective June 15, 2018 following a Trial Court review of the issues raised with the initial guidelines and the manner in which some of the calculations were made. The press release issued by the Trial Court indicated:

These amendments are a result of a Trial Court review conducted after issues were raised regarding the application of the adjustment factors for children 18 years of age or older, and the adjustment for child care, health care coverage, and dental/vision insurance costs when parents share financial responsibility and parenting time approximately equally. *See May 2018 Press Release from the Executive Office for the Trial Court "Trial Court Issues New Child Support Guidelines"*

The new guidelines are posted and available online at **https://www.mass.gov/info-details/child- support-guidelines**. Take a look if you haven't already!

Election Results

At the May 2, 2018 Annual Meeting MCFM had an election for the 2018/2019 Officers and Board. The Officers and Board for the 2018/2019 year:

President: Vicki L. Shemin
Vice President: Justin L. Kelsey
Vice President: Cynthia T. Runge
Vice President: Laurie S. Udell
Clerk: Mary W. Sheridan
Treasurer: Kim U. Whelan
Past President: Barbara S. Kellman

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Les Wallerstein
Andrea M. Wells
Fran L. Whyman

Director Emeritus:

John A. Fiske
Janet B. Weinberger
Jerome H. Weinstein

Please join us in congratulating the Officers and welcoming new board members – Beth Aarons, Susan Matthew and Andrea Wells!

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News from the Certification Committee

Mediators have been presented with a confusing situation regarding certification. In Massachusetts, there is no state licensing or certification program offered by the Commonwealth. Taking a 30 or 40 hour mediation course through one of the varied training options does not give an individual mediator certified or advanced status. MCFM is the only Massachusetts organization that provides a standardized certification application process that is reviewed by a committee of one's peers and requires a significant level of experience.

There are some national organizations that do offer mediator certification, but not with a similar review process.

Whether you are an attorney, therapist or financial mediator, listing oneself as "certified" when you are actually not can be a breach of your professional ethics. Lawyers, specifically, if holding themselves out to be a specialist or certified, must list the certifying agency or organization when they make reference to that certification for marketing purposes.

Are you a new mediator? Are you thinking you might like to become an MCFM certified mediator? If so, start by keeping track of all programs related to family law, mediation, insurance, pensions, developmental and emotional issues that you are taking. Come to MCFM members meetings which are free and always provide an educational component. Keep track of the name, location, trainer and number of hours. If you are keeping a comprehensive list in real time the application will be a breeze to fill out.

Are you an experience mediator? Have you ever considered the idea of becoming an MCFM Certified Mediator but felt the process was too complicated? If you have an advanced degree, 90 hours of related substantive training and over 100 hours of face to face mediation experience in 10 or more mediations you are eligible to become certified. MCFM's Certification Committee is delighted to announce a variety of upgrades to the process of applying for Certification and new benefits of maintaining your Certified Member status.

The application for Certification is now available as a fillable pdf form on the MCFM website. The hours of training needed for each category of study automatically add up.The entire application can be filled out on your computer.

Payment for the Certification application can be made online by credit card once a member is logged into their MCFM account. Once payment is made, the Certification application will then be available for download. After the application is filled out it will be emailed for review, making the whole process much more user friendly.

The renewal process for Certification occurs every two years and is also now accessible online. Once a member is logged into their account, payment for the renewal and an affidavit can be accessed. Mailing of forms and checks will no longer be necessary.

A new and exciting benefit for Certified Mediators is a Certified Mediator Badge that all Certified Mediators may feature on their websites, email signatures and marketing materials. This badge is already displayed on the profile page of the MCFM website of all certified mediators. This icon is hyperlinked and when clicked on, will bring the user to the page of the MCFM website that details the explanation of what a MCFM Certified Mediator means.

The Certification Committee has implemented these updates to make the certification process more streamlined. We hope that these changes will persuade those of you who are experienced mediators to participate in the certification application process. Prominent display of the MCFM Certified Mediator logo is a strong message to potential clients that a mediator is experienced and well trained.

If you have any questions about Certification, feel free to reach out to the chair of the Certification Committee,Tracy Fischer at tracy@tracyfischermediation.com

MCFM Annual Institute - Save the Date!

MCFM Annual Institute will be held on December 7, 2018. Details to follow on the MCFM website (www.mcfm.org) and if you are an MCFM member you will receive an email. We look forward to seeing you there!

Peer Groups

Peer Groups are a great way to get to know other mediators in your area. Here is a list of the existing Peer Groups open to members of MCFM

Central Massachusetts Mediators Group: We serve mediators in Central Mass and towns along Rt. 2 West of Rt. 128. We meet to discuss topics and/or cases, sometimes with guest speakers, in the offices of Interpeople Inc. in Littleton. Interpeople is located about 1/2 a mile off Rt. 495, at Exit 31. Meetings begin at 8:30 AM on the last Thursday of every month, except December, July and August. If you are a family and divorce mediator — attorney or non-attorney —you are welcome to join us. New members are asked to please call ahead of time: 978-486-3338, or email Shuneet at drthomson@interpeople-inc.com.

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Metrowest Peer Consultation Group: This brown bag lunch meeting usually meets the 4th Thursday of each month at the office of Skylark Law & Mediation, PC, 9 Main St., Southborough, from Noon -1:30 PM. It is a fairly casual group with no attendance requirements, although "regular" participants are likely to get more out of it. New members are welcome. Discussion includes peer case review and related topics like marketing, best practices, ethical questions, fee agreements, etc. Please contact Beth Aarons at beth@aaronslaw.net or (617) 964-7870 x125 for more information and to confirm meeting schedules.

Newton Practice Group: This breakfast meeting usually meets on the 3rd Wednesday of each month at the Newton Marriott Riverbend restaurant on Rt. 30 from about 8:45-10:00 AM (with separate checks for food). It is a fairly casual group with no attendance requirements, although "regular" participants are likely to get more out of it. New members are welcome. Discussion includes peer case review and related topics like marketing, best practices, ethical questions, fee agreements, etc. Please contact Kim Whelan at kim@kimwhelanmediation.com or 617-581-0747 for more information and to confirm meeting schedules.
North Suburban Mediators Group: Join fellow mediators meeting to learn and share and network. Meetings are held at 8:30 a.m. on the second Tuesday of the month from January to June and from September to November at the offices of Lynda Robbins and Susan DeMatteo, 34 Salem Street, Suite 202, Reading. Please call Lynda at 781-944-0156 for information and directions. All MCFM members are welcome.

Not seeing a group in your area? Peer supervision offers mediators an opportunity to share their experiences of that process, and to learn from each other in a relaxed, safe setting. Most MCFM directors are members of peer supervision groups. All it takes to start a new group is the interest of a few, like-minded mediators and a willingness to get together on a semi-regular, informal basis. In the hope of promoting peer supervision groups a board member will volunteer to help facilitate your initial meetings. Please contact Tanya Gurevich at tgcounseling@gmail.com, as she will coordinate this outreach, and put mediators in touch with like-minded mediators.

If you have any news or updates you would like to propose for the next edition feel free to reach out to Erin (erin@ewpennocklaw.com) or Jen (jhawthorne@skylarklaw.com)

The Ginsburg family is pictured after Julie Ginsberg was awarded the John Fiske Award for Excellence in Mediation at the MCFM Institute at Waltham Woods in December 2017.

"No two people see the external world in exactly the same way. To every separate person a thing is what he thinks it is -- in other words, not a thing, but a think."

– Penelope Fitzgerald

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The John Fiske Award for Excellence in Mediation winners present at the MCFM Institute at Waltham Woods in December 2017. (Left to Right: Lynne Cooper, Oran Kaufman, Michael Leshin, Julie Ginsberg and John Fiske)

"Bravery is the choice to show up and listen to another person, be it a loved one or perceived foe, even when it is uncomfortable, painful, or the last thing you want to do."

— Alaric Hutchinson

JOIN US

MEMBERSHIP

MCFM membership is open to all practitioners and friends of family mediation.

Our members include mediators, professors, mental health professionals, attorneys, judges, court employees, financial professionals, social workers, and others interested in furthering the use of family mediation and promoting excellence in mediation.

Annual membership dues are $90 for the Basic Annual Membership and $190 for the Premium Annual Membership.

Basic Annual Membership includes:

- Newly updated website with more info and exclusive "Members Only" section
- Standard online member listing (name/address/phone)
- Access to at least four free professional development events (guests also welcome)
- Annual Family Mediation Institute—attend at member rate
- Certification program for qualified divorce mediators
- Subscription to the "FMJ"
- Access to MCFM's network of mediators and allied professionals
- Welcome to participate in ANY of MCFM's committees

Premium Annual Membership includes:

- All the benefits of Basic Annual Membership
- Enhanced profile in the online "Find a Mediator" Referral List. Market yourself to prospective clients by showcasing your skills, training and experience. Get listed in advanced online searches, including practice area and geographic location. You can even upload a photo!
- If you have completed 30 hours of mediation training and are actively practicing mediation, the Premium Annual Membership with Referral List and Profile offers the best value for your membership dollar.

Did you know that 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. Practice Standards are available at www.mcfm.org/pro/about-mcfm.

MCFM was also the first organization to certify mediators in Massachusetts. Certification is reserved for mediators with significant mediation experience, advanced training, and education. Extensive mediation experience may be substituted for an advanced academic degree. MCFM's certification and recertification requirements are available at www.mcfm.org/standards-certification. For more information, contact S. Tracy Fisher at tracy@tracyfischermediation.com.

Please direct all membership inquiries to Ramona Goutiere at masscouncil@mcfm.org.

DIRECTORATE

MASSACHUSETTS COUNCIL ON FAMILY MEDIATION, INC.
P.O. Box 59, Ashland, NH 03217-0059
Telephone: 781-449-4430
Email: masscouncil@mcfm.org
Website: www.mcfm.org

OFFICERS

President	**Vicki L. Shemin**, Fields and Dennis, LLP, 80 Williams Street, Suite 210, Wellesley Hills, MA 02481, VShemin@FieldsDennis.com, www.FieldsDennis.com, 781-489-6776
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EDITOR'S NOTICE

MCFM Family Mediation Journal

Jennifer Hawthorne, Co-Editor
Skylark Law and Mediation, 9 Main Street, Southborough, MA 01772
jhawthorne@skylarklaw.com 508-655-5980

Erin Whelan Pennock, Co-Editor
The Law Office of Erin Whelan Pennock, 83 Leonard Street, Suite 6,
Belmont, MA 02478, erin@ewpennocklaw.com, 617-489-2288

The FMJ intends to be a resource for family mediators, Probate and Family Court Judges and court personnel, and those interested in learning more about conflict resolution for families. The FMJ strives to be a journal of practical use to practitioners.

The FMJ recognizes that all family mediators share common interests and concerns regardless of their clients' family structures, genders, sexual orientations, races or religions. As mediation is designed to resolve conflicts, the FMJ, like it's predecessor, the FMQ, will not shy away from controversy. The FMJ welcomes and aims to publish the broadest spectrum of diverse opinions that affect the practice of family mediation.

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

The FMJ is mailed and emailed to all MCFM members, Family and Probate Court Judges, all local Dispute Resolution Coordinators, all Family Service Officers, and all law school libraries in Massachusetts. Many of the articles can be found on MCFM's blog, The Family Mediation Blog, located at www.mcfm.org/blog. The Family Mediation Blog also publishes articles not published in the FMJ.

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 to the FMJ or The Family Mediation Blog by emailing the Co-Editors at the addresses above. If you are only interested in having your submission considered for either the FMJ or The Family Mediation Blog, please note your preference in your email. If you do not specify your preference, it will be assumed we may use our discretion to determine whether your submission is appropriate for the FMJ, The Family Mediation Blog, or both. Submissions may be edited for clarity and length and must scrupulously safeguard client confidentiality. The following deadlines for submissions will be observed:

The Family Mediation Blog: Rolling
Fall FMJ: June 15th
Spring FMJ: January 15th

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

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