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

PRESIDENT'S PAGE: FRAN WHYMAN

Dear Mediators:

On October 8th, social workers Oona Metz and Douglas Baker led mediators in a discussion of the psychological implications of divorce at the MCFM's professional development meeting. How the panoply of emotions clients experience during divorce can get in the way of their work in mediation, how men and women may deal with these emotions differently, and how mediators can best support clients going through divorce were at the center of the discussion.

Participants were first asked to identify emotions divorcing clients experience. In seconds over 30 emotions were listed, including hopelessness, depression, shame, isolation, rage, to name just a few. Noteworthy were Metz and Baker's generalizations about the way older men, as compared to women, may handle divorce: that they have fewer social connections outside their families and are particularly vulnerable - 10 times more likely to commit suicide than women going through divorce; that while women tend to talk and connect with others, men less often identify their need for help or seek counseling on their own, become more isolated, succumb to depression or high anxiety, self medicate, act out.

Metz and Baker suggest that, considering the range and degree of emotions clients experience during divorce, and that the onslaught of these emotions may shut down the rational part of the brain during mediation, the mediator needs to be vigilant. How can the mediator be more sensitive to clients' emotions during mediation without opening the box, they ask. Participants were reminded of the basics - be aware and awake to the signs of what clients are feeling, something that can be challenging in the midst of the substantive discussions of mediation. They suggest that the mediator might say, "I noticed this is a little hard for you. What do you need?" or, "I'm not hearing much from you; I want to hear what you are thinking and feeling." The mediator should then be prepared to normalize the emotions and need for additional support, by suggesting, for example, "This is such a difficult thing you are going through. Everyone needs support. Are you getting enough? If not you might want to reach out to a family member, a friend, a professional."

I was reminded at this meeting that we go to MCFM's professional development meetings not only to learn something new, speak with friends and colleagues, meet new people, widen our circle of connections, but also to reawaken our consciousness. Our presenters reminded us that the inability to handle the emotional fallout from divorce can get in the way of a client's ability to make mindful decisions necessary to resolution. Paying attention to our clients' emotions may be the most important thing we can do during mediation.

I look forward to seeing many of you on November 14th for a full day of professional development at the MCFM Institute, and on December 10th at the next professional development members' meeting.

My best to all,

Fran L. Whyman

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HOW DIVORCED PARENTS LOST THEIR RIGHTS

By Robert E. Emery, PhD.

My wife and I disagree, sometimes vehemently, about how best to raise our four children. She's a lawyer, and I am sure the thought of suing me has crossed her mind once or twice. But she cannot. American courts consistently refuse to entertain child-rearing disputes between married parents.

In 1936, the New York State Court of Appeals explained the reasoning: "Dispute between parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law. The vast majority of matters concerning the upbringing of children must be left to the conscience, patience, and self-restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children."

Married parents cannot sue each other. Divorced parents (or those who never married) can and do. Judges routinely decide where the children of divorced parents will attend school, worship and receive medical care; judges may even decide whether they play soccer or take piano lessons.

Judges do this because the law assumes that divorced parents' interests in their children, unlike the interests of married parents, are not aligned. This is an outdated idea. The view of exes as opponents dates from an era when divorce and childbearing outside of marriage were rare. It is reflected in the legal language of a bygone time. One parent won custody, care and control of the children. The other became a visitor.

Psychologists and decades of research support this shift. Cooperative parenting benefits children, whether parents live together or apart. Just ask any kid whose divorced parents are at war, "What are three wishes for your family?" You can bet that one will be a version of "I wish my parents would stop putting me in the middle."

Surprisingly, even when unmarried parents agree on a plan, judges can overrule it. For example, a judge may not like a complex joint custody schedule. If so, she can decide when the separated parents spend time with their children, even though they agreed otherwise.

This makes no sense. We may need judges to decide some divorce disputes. But when it comes to parenting, as much as possible, the law should treat unmarried people more like married people. Instead of telling parents how to bring up their children, we should honor — and encourage — agreements between parents.

We can do this with a very simple change in the law. When judges make decisions, they are guided by the "best interests of the child" — a list of factors like the parents' mental health and the child's wishes. States should add parental agreement to the list, and make it the primary consideration. This would mean that, at least when they agree, unmarried parents, not judges, make decisions about their children.

In a 2001 randomized study of child custody conflicts, I compared litigation and mediation, and found that six hours of mediation caused huge improvements in family relationships a full 12 years later. Other cooperative methods include collaborative law (where lawyers negotiate cooperatively) and parenting coordination (an informal mediation-arbitration procedure). We must make these our primary methods, not alternatives.

By honoring parental agreements, our laws would allow parents living apart to make enforceable contracts. Parents could make a deal, for example, that a parenting coordinator could make decisions for them in the future if they fail to agree. Currently, the legal status of such agreements is questionable, because judges, not divorced parents, hold decision-making authority over children. In an extreme move, Pennsylvania recently outlawed this practice, ruling that only judges could make decisions in custody cases.

Allowing parents to make contracts would help solve another thorny problem: sharing care of very young children. Experts are debating how much time babies should spend with just one parent versus with both parents. Many believe that babies need to form a secure attachment to one parent (most often the mother) and that too much separation will undermine a baby's sense of security. Others worry that too little contact will weaken the second parent's attachment, potentially leading him to drop out of his child's life.

A logical solution is for parents to make a plan that will grow and change along with their child. A baby might stay mostly with one parent, and time with the other parent could increase during the toddler and preschool years. Perhaps the parents would share 50-50 custody when their baby is of school age.

"Instead of telling parents how to bring up their children, we should honor — and encourage — agreements between parents."

Sadly, this common-sense approach is undermined by laws that do not honor such agreements, and push parents to fight instead. Lawyers wisely tell breast-feeding mothers to fight for full custody. Judges are likely to be sympathetic to a nursing mother. Yet lawyers also wisely tell the fathers of babies to fight for their custody share. The father's case will be weakened if he waits until his baby is older, because he will have a record of relative uninvolvement.

Our legal system has always seen the wisdom of encouraging married parents to work together. Now it needs to recognize that divorced and never-married parents are not so different. After all, partners with children are

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tied together forever. My first wife and I separated in 1989. On May 1 of this year, we sat together in a maternity ward waiting room, sharing the anxiety and joy of the birth of our first grandchild. We struggled at times. But we always struggled to work together as parents.

Your emotional impulse in divorce is to hurt back, because you hurt so badly. Our legal system should work against that impulse, not encourage it. That, truly, is in the best interest of the child.

Robert Emery, Ph.D. is Professor of Psychology and Director of the Center for Children, Families, and the Law at the University of Virginia. He has authored over 150 scientific publications, and several books including **Marriage, Divorce, and Children's Adjustment; Renegotiating Family Relationships: Divorce, Child Custody, and Mediation;** and his guides for parents, **The Truth about Children and Divorce: Dealing with the Emotions So You and Your Children Can Thrive** and the forthcoming, **Two Homes, One Childhood: A Parenting Plan to Last a Lifetime.**

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Ten percent of marital conflicts are due to difference in opinion, ninety percent are due to wrong tone of voice.

Anonymous

DIVORCE AND TRUST INTERESTS: DEMYSTIFYING THE LEGAL LANDSCAPE FOR THE PRACTICTIONER

By Jonathan E. Fields, Esq.

The interplay between divorce and trust interests may be one of the most vexing for practitioners and mediators. This primer attempts to synthesize the legal landscape in this area and to demystify the issue so that we may better serve our clients.

I. INTERPRETATION OF TRUST.

In interpreting a trust, a court must "ascertain the …. [donor's] intention from the whole instrument… and to give effect to that intent unless [the law forbids]." *Upham v. Siskind*, 16 Mass.App.Ct. 588, 594 (1983) *citing Putnam v. Putnam*, 366 Mass. 261, 266-67 (1974). Where the donor's intent is ambiguous, one must now consult, in addition to case law, the newly enacted *Massachusetts Uniform Trust Code*, G.L. c.203E generally ("MUTC.)

II. TRUST ASSETS AS PART OF MARITAL ESTATE.

Where a trust asset is an issue in a divorce, G.L. c.208, § 34 comes into play. Our equitable distribution statute, as the practitioner knows, is quite expansive – the estate of a party includes all property to which he or she holds title, however acquired, *Rice v. Rice*, 372 Mass. 398, 401 (1977) and the trial judge has broad discretion to assign assets in the pursuit of equity, *Bianco v. Bianco,* 371 Mass. 420 (1976).

Moreover, "[i]n making the determination of what to include in the estate, the judge is not bound by traditional concepts of title or property." *S.L. v. R.L.,* 55 Mass. App. Ct. 880, 882 (2002).

Interests do not have to be vested in order to be included in a § 34 estate, *see Baccanti v. Morton*, 434 Mass. 787 (2001) (unvested stock options are part of estate).

III. IS THE TRUST REVOCABLE?

The first question to consider when dealing with a trust in a divorce case is whether it is revocable or irrevocable[1]. Where a trust established by a party can be revoked at will, courts across the United States have "generally refused to treat the trust as a distinct entity …[because they consider]… the power to revoke … as tantamount to … ownership." 2 Brett R. Turner, *Equitable Distribution of Property* § 6:93 (3rd Ed. 2005).

[1] In most cases, this will be apparent from the instrument. If not, it is presumed to be revocable as to instruments drafted after July 9, 2011. (*MUTC* at § 602(a))3

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Since the assets in a revocable trust would be viewed as owned by the settlor, they are subject to division under § 34. *See*, *e.g. Wolfe v. Wolfe*, 21 Mass. App. Ct. 254 (1985):

> Where a settlor of a revocable trust had the absolute right and power to withdraw up to five-sixths of the trust corpus for his own use and benefit, the corpus could be invaded to that extent in order to meet payments due from the settlor to his former wife pursuant to a probate judge's order under G. L. c. 208, Section 34.

Similarly, where a non-spouse third party sets up a revocable trust for the benefit of a spouse, the courts generally treat the trust as an asset of that non-spouse. *Id.* Of course, in Massachusetts, the courts are required to consider expectancy interests in rendering a division of assets. G.L. c.208 § 34

IV. INTERESTS SUBJECT TO POWERS OF APPOINTMENT

Courts have consistently held that a spouse with a beneficial interest subject to a power of appointment has only an expectancy that should not be included in the marital estate. For example, one case involved a trust in which the husband's father had a testamentary power of appointment over the principal – specifically, he could devise the principal to any beneficiary of his choosing. The Appeals Court agreed with the trial court that the interest was like an expectancy interest under a will and that it was properly excluded from the marital estate. *D.L. v. G.L.,* 61 Mass.App. Ct 488 (2004).

In another case, a trust was properly excluded because the wife's mother, a lifetime income beneficiary under her father's trust, had a power of appointment over any remaining corpus. Furthermore, the wife's mother had the ability, upon request, to withdraw all of the trust assets. *S.L. v. R.L.,* 55 Mass.App. Ct. 880, 882 (2002).

Where the settlor-spouse holds a power of appointment, as in *Ruml v. Ruml*, 50 Mass.App.Ct. 500 (2000), the assets in the trust are subject to equitable distribution. In other words, if the spouse owns it, it is in the estate.

V. WITHDRAWAL RIGHTS IN AN IRREVOCABLE LIFE INSURANCE TRUST

Another general power of appointment that surfaces in our practices is the beneficiary's right of withdrawal in an irrevocable life insurance trust. 3 Phyllis E. Federico, Peter F. Zupcofska, et al., *Massachusetts Divorce Law Practice Manual* § 29.10.4 (3rd Ed. 2014).

Some background for those less familiar with estate planning might be useful.

When the life insurance policy is owned by the trust rather than the insured, the proceeds of the policy are not included in the insured's gross estate for estate tax purposes. See generally I.R.C. § 2042. How does the trustee, then, pay the premiums without gift tax consequences? Usually, the trustee utilizes the annual gift tax exclusion under I.R.C. § 2503 (currently $14,000 for 2014).

Unfortunately, the gift tax exclusion only covers gifts of a "present interest" – which does not include gifts to a trust unless the beneficiary has an immediate right to the gift. Therefore, the trust will typically provide that when funds are added to the trust (or in the case of a whole life policy, when income is earned), the beneficiaries have a right to withdraw all or part of the gift within thirty days, after which it lapses. The idea, of course, is that the beneficiaries will not exercise the withdrawal right because the ultimate benefit of the trust is the life insurance proceeds.

Since, as noted earlier, the withdrawal right is a general power of appointment, the gift property is reachable to creditors and, arguably, included in the marital estate and subject to division. *See, e.g., State Street Bank & Trust v. Reiser,* 7 Mass.App. Ct. 633 (1979) and *Lipsitt v. Sweeney,* 317 Mass. 706 (1945) (creditor's right to attach gifted property prior to lapsing). Again: since the spouse owns it, it is in the estate.

As to whether the spouse's share of the death benefit would be a § 34 asset, the court would apply the "fairly certain" test, Section VII *infra.*

ILIT's are the most common of the irrevocable gifting trusts. But there are other types that might surface in our practices. For example, a case might involve trusts that "hold stock in a closely held company as part of a gifting strategy to shift the stock to a younger generation without putting the stock directly in their hands." Federico and Zupcofska, *supra* at § 29.10.4.

VI. NOMINEE TRUSTS

As with the withdrawal right in an ILIT, a beneficiary's ownership interest in a nominee trust is similarly unencumbered.

Briefly, a nominee trust is often used to conceal the identity of the true owner of property, typically real estate; this is accomplished because the beneficiaries are not set forth in the trust instrument but in a separate unrecorded schedule of beneficiaries. Further, the nominee trustee holds legal title to the property and acts only at the discretion of the beneficiaries, *see, e.g. Roberts v. Roberts*, 419 Mass. 685, 687 (1995), who have fully vested transferable interests in the property, Charles E. Rounds, Jr. et al., *Loring and Rounds: A Trustee's Handbook* § 9.6 (2014).

These factors have led most commentators to conclude that the nominee trust is in most cases "not really a trust at all" but "an agency agreement." Robert L. Marzelli and Elizabeth S. Marzelli, *Massachusetts Real Estate* § 7.4 (2003).

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Considering the nature of the beneficiary's interest in the nominee trust, it is certainly subject to equitable distribution. Once more: if the spouse owns it, it is in the estate.

VII. THE "FAIRLY CERTAIN" STANDARD

In and of itself, the characterization of an interest in an irrevocable trust – whether it is a contingent or remainder interest, for example – does not dictate whether it is included in the marital estate. These categories, central to trust law, are less important in cases involving the division of a marital estate. In the latter context, equity predominates over bright-line trust concepts – the core issue for the Court is to determine what to include in the marital estate and to render an "equitable" division of property.

That is where the "fairly certain" requirement comes in.

Consider, for example, two hypothetical cases in which a spouse has a contingent interest in a trust. In one case, the interest of a healthy 25-year-old beneficiary is contingent on surviving his 95-year-old mother. One might consider that interest "fairly certain" as opposed to "highly speculative" or "remote." In another case, the spouse-beneficiary is a 25-year-old cancer patient whose interest is contingent on surviving her 50-year-old father. Most of us would agree that this case stands on a different footing. Although they are both contingent interests, one can see how inequitable it would be to include both interests in the marital estate.

Massachusetts law recognizes that equity demands a flexible approach to trusts in the context of a divorce. The SJC has made clear that so long as "the future acquisition of assets is fairly certain, and current valuation possible, the assets may be considered for assignment under § 34." *Williams v. Massa*, 431 Mass. 619, 628 (2000). Interests considered "too remote or speculative" for inclusion within the estate are instead weighed under the § 34 criterion of "opportunity of each [spouse] for future acquisition of capital assets and income" in dividing the marital property. *Williams v. Massa*, *supra* at 629.

A threshold question in determining whether a trust interest is included in the § 34 estate is whether the beneficiary has a "present, enforceable, equitable right to use the trust property for his benefit." *Lauricella v. Lauricella*, 409 Mass 211 (1991). Note, however, that the lack of such an interest does not necessarily guarantee its exclusion. *Child v. Child*, 58 Mass. App. Ct. 76, 84 (2002).

VIII. THE EXTENT OF TRUSTEE DISCRETION

The right of a beneficiary to income or principal where the trustee has discretion to invade principal or distribute income is frequently controversial. In determining those rights, it is critical to examine the specific language of the trust. Many of the cases turn on the extent of trustee discretion.

In *Woodberry v. Bunker*, 359 Mass. 239 (1971), a trustee had the discretion to invade principal "as in the opinion of [the] trustees shall be needed for his or her comfortable support, medical or nursing care, or other purposes which seem wise to [the] trustees."

While the standard on its face may seem amorphous and unenforceable, this, like most other "broadly expressed fiduciary standards," is a "judicially enforceable, external, and ascertainable standard." Specifically, the court went on, the beneficiary in this case has a right to be maintained "in accordance with the standard of living which was normal for him before he became a beneficiary of the trust." Moreover, the phrase "which seem wise to [the] trustees" does not affect the judicial enforceability of the standard.

At issue in *Marsman v. Nasca*, 30 Mass.App.Ct. 789 (1991), was the trustee's discretion to pay the beneficiaries such amounts "as they deem advisable for his comfort, support, and maintenance." As with *Woodberry*, the Court interpreted a judicially enforceable standard – "to maintain the … beneficiary in accordance with the standard of living which was normal for him before he became a beneficiary of the trust."

In *Child*, *supra,* the trustee had "sole discretion" to distribute principal and income to the husband, the beneficiary spouse, without any judicially enforceable standard. Because the husband, however, conceded at trial that the trust was a marital asset, the Appeals Court did not disturb the trial court's finding that it was a marital asset. However, were the issue properly before them, the Appeals Court opined, the "sole discretion" standard appeared to suggest that the husband's interests were "too remote and speculative" and that he probably did not have a present enforceable right to trust assets.

"[T]rust assets are commonly misunderstood by clients going through divorce and [f]urther, emotional issues around trusts and inheritances are common."

In *Comins v. Comins*, 33 Mass. App. Ct. 28 (1992), the trustee was empowered to distribute income and principal as "in its discretion it deems advisable to provide for the comfort, welfare, support, travel and happiness of [the wife]." Since the trustee standard here was judicially enforceable, *see Woodberry, supra*, the Court found that the wife had a "present, enforceable, equitable right to use the trust property for her benefit." Her beneficial interest was properly included in the marital estate.

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In one of the several trusts at issue in *D.L. v. G.L.,* 61 Mass.App.Ct 488 (2004), the trustees had the authority to distribute income and principal to the husband in their "uncontrolled discretion" as they deemed "advisable." Upon the termination of the trust, the remaining corpus is distributed to the husband's children.

The trial court found that, over the past 38 years, all of the income was distributed to the husband and none of the principal. The Appeals Court affirmed the trial court's finding that the husband did not have a present and enforceable right to the principal and, therefore, it was proper to conclude that the trust was not a part of the § 34 estate. The trial court correctly considered the trust under the § 34 factor opportunity of each spouse for future acquisition of capital assets and income. The Court also correctly considered income from the trust for support and alimony purposes.

IX. INTERESTS CONTINGENT ON SURVIVAL OF ANOTHER

Often, a spouse-beneficiary will have a vested remainder interest in trust property – the right to receive trust property when the trust terminates. In that case, the only uncertainty may be if the spouse is not alive to take possession. This, in most instances, would be considered property subject to division in a § 34 case. *See, e.g. S.L. v. R.L, supra.*

The husband in *Lauricella, supra* had a vested remainder interest in the trust corpus, a two-family house in West Newton. He was 26 years old at the time of divorce and would receive a share of the trust principal when the trust terminated in seventeen years. Additionally, he was a current equitable beneficiary in that he had the right to use the property and to rent the property. In fact, he was living in the house. Here, the interest was properly included in the marital estate.

From the relative certainty of vested remainder interests, we move to a common set of slightly less certain interests – specifically, interests contingent on a spouse surviving his/her parent. In and of itself, considering the equitable nature of the landscape, this condition does not guarantee exclusion or inclusion in the § 34 estate. The cases, instead, reveal "no clear consensus," and the "decisions turn more on the particular attributes of the respective disputed interests than on principles of general application." *S.L. v. R.L at 883, citing Lauricella* at 215-216. In four of the other trusts in *D.L. v. G.L, supra,* the husband's contingent remainder interests were properly excluded from the marital estate. All of these trusts terminated at a date that was seven years from the divorce judgment – at which point husband would receive a share of the trust principal provided that he survived his father. His father, at the time of trial, was 67 years old and no evidence was presented on his health. Therefore, since it cannot be "fairly certain" that those contingencies would be met, the trust interests were properly excluded from the marital estate.

In four of the trusts at issue in *S.L. v. G.L., supra*, the only contingency was the wife, 55 years old at trial, surviving her mother, 77 years old at trial. The court found that the wife was healthy and there was no evidence as to her mother's health. All four of the trusts were properly included in the marital estate, according to the Appeals Court.

In one *S.L. v. G.L.* trust, the wife's mother was a lifetime income beneficiary. The trustees had the discretion to distribute principal to the mother "taking into consideration other income and assets available to her, to allow her to maintain the standard of living enjoyed during [her father's] life." Upon the mother's death, the trust assets would be distributed in equal shares to the wife and her siblings. This trust was properly included in the marital estate, according to the Appeals Court.

In another *S.L. v. G.L.* trust, the wife's mother was also a lifetime income beneficiary and, upon her death, the trust income was to be paid to wife and her siblings until each of the siblings reached 21 years of age – at which point, the principal would be distributed in equal shares. The wife's mother had no right to principal. This trust was properly included in the marital estate, according to the Appeals Court.

The wife's mother was a lifetime income beneficiary in two of the other trusts in *S.L. v. G.L., supra*. In both trusts, during the wife's mother's life, the trustee had discretion to distribute principal subject to specific objective financial condition of the trust and certain other trusts. Upon the wife's mother's death, both trusts would be divided into separate equal portions for the wife and her siblings who would be lifetime income beneficiaries. Upon wife's death, the wife's children would receive distribution of the wife's portion of the trust principal. These trusts were properly included in the marital estate, according to the Appeals Court.

Davidson v. Davidson, 19 Mass. App. Ct. 364 (1985) involved a remainder interest contingent on survivorship. Here, the interest was subject to the husband surviving his mother. But the remainder interest at issue was a vulnerable one. Despite the fact that the trustees had the right to invade principal for the mother in their "uncontrolled discretion," the trial court included the trust in the marital estate. The Appeals Court upheld it warily, noting that this was on the "outer limits" of what might be properly included in the marital estate. As *Davidson* predates the *Williams v. Massa*, *supra*., "fairly certain" requirement, it remains an open question whether a similar trust could be included in a § 34 estate today.

X. SPENDTHRIFT CLAUSES

By itself, a spendthrift clause, *i.e.* a clause that seeks to prevent attachment of trust property by creditors, is generally not a bar to including the interest in the marital estate. *See Davidson, supra* (that the remainder interest was subject to a spendthrift

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provision did not prevent its inclusion in the marital estate), *S.L. v. R.L., supra* (three of the trusts properly included in the marital estate contained valid spendthrift clauses) and *Ruml v. Ruml*, 50 Mass.App. Ct. 500, 512, n. 19 ("We also note that the spendthrift clause in the trust agreement does not preclude the distribution of trust assets to the wife.")

However, although a spendthrift interest may be properly included in the marital estate, courts generally do not order a spendthrift trustee to make payments from a trust in order to satisfy obligations related to the divorce. This becomes relevant for the spouse or ex-spouse who is a creditor.

> [T]he path of the wife seeking recovery from her husband's trust interest for alimony or support of children is more difficult in Massachusetts. . . It has been held that she can recover neither as a judgment creditor . . . nor in a suit to require the trustee to pay reasonable sums from the trust income for the support of legal dependents of the beneficiary.

Pemberton v. Pemberton, 9 Mass. App. Ct. 9 (1980) summarizing the holdings of *Bucknam v. Bucknam,* 294 Mass. 214 (1936) and *Burrage v. Bucknam*, 301 Mass. 235 (1938) (holding that where the trust does not mention the ex-husband's family, it would "do violence to the plain words" of the settlor to read their names into the instrument and direct the trustee to pay anything to them.)

MUTC, notably, does not include Section 503 "which would have changed Massachusetts law by creating spendthrift exceptions for certain preferred creditors, including children, spouses and former spouses with court orders against the beneficiary for support." *Report of the Ad Hoc Massachusetts Uniform Trust Code Committee*, p. 26, § 503 (2012).

XI. WHAT HAPPENS ONCE THE TRUST ASSET IS IN THE MARITAL ESTATE

Once it is determined that a spouse's trust interest is divisible, the question becomes whether that interest will be divided with the other spouse. And, to that question, courts, of course, look to G.L. c.208, § 34 generally – length of marriage, age, health, station, conduct, relative contributions, *etc.* Of particular relevance in the trust context are many of the principles that attach generally to the division of inherited assets.Two factors surface in the case law about trusts – the extent to which parties relied upon the asset and the history of the distributions.

The reliance factors were central in *Lauricella* and *Comins*.

In *Lauricella*, *supra*., the husband's father created a trust which held title to the marital home which had been occupied by the family for the whole marriage.Thus, the trust principal, the only asset available for distribution upon divorce, was fully incorporated into the marriage.

The family in *Comins*, similarly, relied upon the wife's trust assets during the marriage.This factor, among others, was significant in the court's decision to include the asset in the marital estate.

The history of principal and income distributions can also be important in a case.

In one case, the trustees had the authority to distribute income and principal to the husband-beneficiary in their "uncontrolled discretion" as they deemed "advisable." Upon the termination of the trust, the remaining corpus is distributed to the husband's children. *D.L. v. G.L.*, 61 Mass.App.Ct 488 (2004). In finding that the husband did not have a present and enforceable right to the principal, the trial court and Appeals Court were influenced both by the pure discretionary nature of the trust as well as the fact that over the past 38 years, the trustee did not distribute any of the principal to the husband.

On the contrary, in the same case, over the past 10 years, all of the income was distributed to the husband. The Appeals Court affirmed the judge's decision not to include the husband's income interest in the trust as part of the marital estate for purposes of property division but, rather, as a stream of income for child support and alimony – at least, as here, "where income from the trust has historically been distributed to the husband on a consistent basis." *Id.* at 498.

XII. TIMING OF DIVISION OF TRUST ASSETS

If the trust interest is not possessory, it may be appropriate to divide it on an "if as and when received" basis. The court noted that, although such a disposition is "generally disfavored," it can be appropriate in certain instances. *S.L. v. R.L* at 885, *citing Dewan v. Dewan*, 399 Mass. 754, 757 (1987) and *Williams v. Massa* at 628.

One rationale for a deferred division is "where there are insufficient assets available at the time of divorce to divide the present value of the future interest without causing undue hardship to either spouse." *Id.*

An "if as and when received" approach also makes sense, according to the *S.L. v. G.L.* court, "where present valuation [of the future trust interest] is uncertain or impractical," such as an employee-spouse's contingent interest in unvested stock options; if he/she does not remain employed with the company until vesting he may never realize any value. *Baccanti v. Morton, supra*. *See also Davidson* at 373, n. 12 (suggesting that where an interest has not vested in possession at the time of trial, the court may consider an "if, as, and when received" division).

A court may also use an "if as and when received" approach when it is unable to compel a trustee to disburse trust assets. *See Bucknam* and *Burrage supra*.

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Conversely, courts may reject a request for an "if, as, and when received" distribution in favor of an offset, for example. Where valuation is uncontested and the parties have sufficient assets to permit a present division, the SJC upheld the trial court's assignment to the husband of "a particular investment vehicle" and crediting the wife with a sum equal to one-half the value. *Zaleski v. Zaleski*, 469 Mass. 230 (2014).

XIII. CONCLUSION

A few parting thoughts are in order.

The first is that trust assets are commonly misunderstood by clients going through divorce and that, before we can opine how a court might view such an interest, the documents must be closely reviewed. Further, emotional issues around trusts and inheritances are common. As such, we might remind the beneficiary resisting disclosure or claiming non- access that they often have the right to information about the trust – depending on the remoteness of their interest. *See MUTC* at §§ 103, 813 (trustee's duty to inform a "qualified beneficiary"). And, moreover, they might be reminded that the Probate and Family Court having personal jurisdiction over them would have the right to compel them to demand information from the trustee if necessary.

The second point is that, putting aside the arcane terminology, the way to think about how a trust asset intersects with divorce is straightforward. Compare it first to a simple asset. If a spouse owns an asset (a bank account, for example), it is in the marital estate. Put that on one end of the continuum. On the other end, put an expectancy interest – for example, the hope that your mother will remember you in her will. So, when you look at a trust, ask yourself – is it reasonable that this interest should be counted as an asset? How far across the continuum is the trust interest from, say, your everyday checking account?

The "fairly certain" test properly recognizes that rigid rules have no place in equity and, instead, attempts to locate that interest on an ownership continuum, as set forth above. When contextualized in this way, the soundness of the Massachusetts approach to trust interests in a divorce context is apparent.

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THE POWER OF WORDS

By Mark Baer, Esq.

It has long been recognized that the meanings of words influence human behavior. In fact, the Bible says, "Reckless words pierce like a sword, but the tongue of the wise brings healing." If two people had endured similar traumatic events and one were labeled a "victim" and the other a "survivor," would they be perceived the same? Please keep in mind that they would both have been both "victims" and "survivors." The power of verbal insults, verbal abuse, and words to affect your emotions and actions is well demonstrated in science. For example, scientists found that just hearing sentences about elderly people led research subjects to walk more slowly. In other research, individuals who read words of 'loving kindness' showed increases in self-compassion, improved mood, and reduced anxiety. As they say, "the pen is mightier than the sword."

Within the context of family law, the following terms have been found to negatively influence people's behavior: divorce, child custody, visitation, access, sole, and primary. In an effort to gain a better understanding of the reasoning behind the response, it is important to consider the meanings of those terms.

Let's start with the process itself. Divorce is "the legal separation of [spouses], effected, for cause, by the judgment of a court, and either totally dissolving the marriage relation, or suspending its effects so far as concerns the cohabitation of the parties." Dissolution is "the cancellation or abrogation of [a contract] by the parties themselves, with the effect of annulling the binding force of the agreement, and restoring each party to his original rights." The legal distinction between a divorce and dissolution of marriage involves fault. No-fault divorce is known as "dissolution of marriage." Please note that fault-based divorce does not — and never has — addressed the underlying feelings and emotions. Rather, it merely requires proof of the existence of such fault before a divorce will be granted. As a result, fault-based divorce tends to be even more contentious than no-fault based divorce. How would that impact any familial relations stemming from the marriage? Is it any wonder that along with the elimination of fault, many jurisdictions changed the name of the proceeding to dissolution of marriage?

Historically, when such proceedings involved minor children, they involved issues pertaining to child custody and visitation. Child custody is "the term applied to the support and control of a child that is determined by the court when the parents of the child are divorced or separated." Since minor children are not legally competent to enter into contracts or otherwise give consent for themselves, parents have the right to make decisions relating

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to their health, education and welfare. When parents are no longer a "unit," so to speak, this authority is frequently referred to as "legal custody" and the timeshare is referred to as "physical custody."

In a 2001 article on Mediate.com, Donald Saposnek wrote:

> The term 'custody' . . . once had a positive connotation . . . . Over time, . . . it became a 'fighting' term associated with power, control and ownership of the child by one of the parties.

Sole custody is defined as "the care, control, and maintenance of a child, which a court may award to one of the parents following a Divorce or separation proceeding." Primary custody "refers to the parent with whom a child lives after both parents separate or divorce." Joint custody is "a court order whereby custody of a child is awarded to both parties. In joint custody, both parents are 'custodial parents' and neither parent is a non-custodial parent; or, in other words, the child has two custodial parents."

"Within the context of family law, the following terms have been found to negatively influence people's behavior: divorce, child custody, visitation, access, sole, and primary."

The term "joint custody" is a fighting term in that one parent typically wants it and the other does not. Unfortunately, unless the parents have joint custody, one will have visitation, which is defined as "the right of a parent to visit a child who is in the custody of the separated or divorced spouse or a guardian." Not surprisingly, as Saposnek wrote:

> [T]he term 'visitation' began to acquire connotations that left non-custodial parents feeling tangential, limited, peripheral, and involved in an awkward and even unnatural relationship with their children . . . . In attempts to minimize the negative connotations of the term 'visitation,' visiting parents increasingly went back to court to request joint custody. . . . With such a designation, these parents felt at least equally empowered in their legally designated role, even if not in their actual scheduled time with their children."

Rather than using the term "visitation", some jurisdictions use the term "access," which means "the ability, opportunity, permission, or right to approach, communicate, enter, pass to and from, or view without interference or obstruction." The term "access" does not appear to be any less offensive to a parent than the term "visitation." In other words, terms such as "custody," "visitation," and "access" have become known as "fighting words" and lead to what we frequently refer to as "custody battles," wherein parents battle over possession of their children, as if they were chattel or pawns in a game of chess. Don't such terms, by definition, create "win/lose" dynamics?

In 1999, attorney Richard Crouch of Arlington, Virginia wrote:

> When we look at what hideous things people do to one another in order to prevail in the fight over child custody - to win custody as the prize - and at how devastated the party is who loses and is instantly relegated in a day or half-day of trial (for let's face it: most courts do not think this coin-toss is very important) to the dehumanized status of ex-parent; when we see how badly traumatized and permanently warped the minds of children are after participating in the custody litigation and being actively recruited by one side or both to do so. . . .

Brené Brown, Ph.D., LMSW, is a research professor at the University of Houston Graduate College of Social Work and has spent the past decade studying vulnerability, courage, worthiness, and shame. During the course of her research, Dr. Brown discovered the following twelve categories of shame: (1) appearance & body image; (2) money & work; (3) motherhood/fatherhood; (4) family; (5) parenting; (6) mental & physical health (including addiction); (7) sex; (8) aging; (9) religion; (10) speaking out; (11) surviving trauma; and (12) being stereotyped & labeled. Do you realize that when dealing with the dissolution of relationships where families are involved, at least 3 categories of shame can potentially come into play? Under those circumstances, is it any surprise that no parent wants to be relegated such that they merely have "visitation" or "access" to their children? After all, unless you win the prize of custody, the terminology itself causes a parent to experience shame. This therefore frequently results in a "win at all costs" mentality.

In an effort to change the "win/lose" dynamic and hopefully put an end to the parental fighting caused by such emotionally charged terms, many jurisdictions have eliminated them entirely. They have been replaced with more neutral and conciliatory terms such as "parenting plan," "time-sharing," "parental responsibility," "parenting arrangements," "parenting time," "residential time," and "contact." These changes have occurred in England, Wales, Australia, and in many states in the U.S. Saposnek noted that even in jurisdictions that are "hold-out[s] on

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these changes legislatively, . . . many enlightened practitioners use the new language, nonetheless." Unfortunately, however, since people's Internet searches involve the use of "fighting terms," practitioners' websites do often contain them.

Do you think that a larger timeshare "victory" has the same cachet as taking home the custody prize? Does the parent with less of a timeshare feel shamed as a parent? Words are powerful. Think about it.

Mark Baer is a family law attorney based in Pasadena, California. A former litigator, Baer now advocates the use of mediation and collaborative law whenever possible. His practice offers a range of services that pertain to marriage, dissolution of familial relationships, legal separations, parenting plans, time sharing schedules, child support, spousal support, pre-marital agreements, and pre-domestic partnership registration agreements.

"We're looking for something to fix our marriage. I'm in Barnes & Noble, he's in Home Depot."

"A PROFESSIONAL QUANDARY" – AN EMAIL EXCHANGE WITH JUNE JOHNSON, KAREN LEVITT AND JOHN FISKE

On Thursday, October 2, 2014 9:28 AM, June Adams Johnson <june@commongroundmediation.net> wrote:

I am emailing the two of you out of the great respect I have for both of you... in maybe pointing out concerns I might not think of.

For once I am not sure what to do.

I started mediation with a fairly typical couple, no unusual problems. Husband an engineer, sort of an anxious person, wife with an associates degree but driving a school bus.. Both seemed fully participatory. However wife claimed she didn't understand the finances and needed someone to do it for her, so she was getting an attorney. I told her a consultation with an attorney would probably be very helpful. From that consultation she wants that attorney to represent her and speak for her at the mediation though she would be present. The attorney is someone I know to be pretty fair and reasonable though zealous for her client. The husband is probably not going to have an attorney in the mediation. I'm very concerned about being put in the position of being his advocate "to balance the table". I'm tempted to try being the mediator but what guidelines should I insist on,.....or should I just walk away and say I won't do the mediation unless Husband also has an attorney present.

From: john fiske [mailto:jadamsfiske@yahoo.com]

Sent: Thursday, October 02, 2014 10:24 AM

To: June Adams Johnson; Karen Levitt
Subject: Re: Professional Quandary

Dear June, cc Karen:

Thanks for writing to us. I hope this correspondence finds its way into the FMQ, as all of us face this quandary from time to time. Here are my first thoughts.

1. Do you have a square or rectangular table? Form follows function. On one side you have the wife and her lawyer. On the other side you have the husband and an empty chair. At the end, sitting in the middle, is the mediator.

2. From time to time you can remind the husband of his right to an attorney and remind everyone in the room, starting with yourself, that you are the mediator. "All we do is give people a place to talk."

3. One of the wild cards in mediation is who the lawyers are. In this case you know the lawyer for the wife to be pretty fair and reasonable although zealous.

4. Many times I mediate with the wife having a lawyer present and the husband is by himself for himself, pro se in every sense of the word. "I know what's fair and I don't need a lawyer," he may say.

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5. Since your wise concern is for your own professional role as the neutral mediator, you can continually ask yourself if you would be behaving any differently if there were no lawyers in the room or if each person had a lawyer there.

6. To me it all comes back to free will, and what two informed adults want to do. It's a travesty to mediation if a well informed couple can't mediate because one wants a lawyer and the other doesn't. My love of mediation comes from helping people stay in charge of their own lives and respecting their choices, as long as they are well informed and freely made. As *Ansin says,* these contracts are fine if there is no fraud and no duress.

Wheee, John

hoping this email helps. It will be fun to see what wise Karen says.

On Thursday, October 2, 2014 6:55 PM, Karen Levitt <klevitt@levittlawgroup.com> wrote:

June and John: I too have mediated where one or both parties have counsel. If only one party has counsel, I believe it is important to have the other party agree to their presence if they are not having counsel themselves. If they don't agree I would be uncomfortable mediating. I usually talk with both parties about the benefits of counsel in terms of consultation outside of mediation; but if in mediation one party needs support throughout the mediation or around just a particular issue such as finances, it can actually be a positive addition to resolution as without their presence there may be no agreement. It is still cheaper than Court! If there are two lawyers, I do a joint phone call with them in advance of the mediation session, to explain process, set expectations, and design a session that ensures that the lawyers are there to support and advise their clients but not to be adversarial. As long as the neutral maintains control of the process and both parties and counsel (one or two!) allow the neutral to do that, I find my neutrality is not compromised but respected and used to benefit the parties and the process. I agree that it is key to make sure everyone is fully informed. I also find I tend to do more caucusing when there are two attorneys; if there is only one attorney I generally try to avoid caucusing although I caucus as part of my regular mediation sessions when counsel are not present when necessary.

Hope the above is helpful, just my random thoughts/response to your very good questions/concerns!

Perhaps we should write an article for the FMQ with the question and our responses and ask for dialogue!

Karen

From: john fiske

Sent: Thursday, October 02, 2014 9:49 PM
To: Karen Levitt ; June Adams Johnson
Subject: Re: Professional Quandary

Dear Karen and June:

Your suggestion about talking to lawyers ahead of time is very good, especially if they are new to mediation or to a mediation by you. I also agree that sometimes the lawyer for the person who wants one can be very helpful when it comes to defining an agreement and to "closing the deal," when the client may be scared and the lawyer knows the client is getting a fair agreement.

June, thanks for triggering this good discussion. Others may join if they read about it.

Cheers, John

From: june@commongroundmediation.net

Subject: Re: Professional Quandary

Date: October 3, 2014 11:53:09 AM EDT

As soon as I put out the email to both clients and the one attorney that I was seeking collegial input, the unrepresented husband wrote right back to me saying he was fine, and didn't expect me to be any more than my mediator self, so I am going to do it, starting out with having a phone discussion with the one attorney about process and our respective roles in it. Thanks all for the input.

"The single biggest problem in communication is the illusion that it has taken place."

George Bernard Shaw

IS MEDIATING PRENUPS A FORM OF MARITAL MEDIATION?

By Laurie Israel, Esq.

My mediation practice during the past several years has taken a turn towards mediating prenuptial agreements. Here's how it happened:

At times, being the "other" attorney reviewing an agreement sent by the lawyer of the more moneyed spouse-to-be, I noticed a trend: The first draft of these agreements generally sketched out a marriage with no guaranteed financial interplay.

The typical lawyer-proffered prenup says that no (or little) money or assets are to be shared with the other spouse unless the moneyed spouse wants to. Further, generally there is no guarantee or minimum of assets provided to the less-moneyed spouse if the parties are married at the death of the more moneyed spouse. And there are ironclad provisions preventing a spouse from claiming rights to the deceased's estate.

Once the first barrage in the prenup wars is sent by the more-moneyed spouse's lawyer, it's an uphill battle to change the initial terms of the agreement. Generally the spouse-to-be's attorney has convinced him (or her) that it is a matter of "risk control" in case of divorce and a restrictive prenup is necessary and proper to protect the client.

It doesn't take a rocket scientist to see the harm such a prenup can do to a marriage. During the negotiations, feelings are harmed, generally irreparably. I have seen people walk down the aisle with a marriage — with all but the financial connection. The feeling of being abused and marginalized persists through the marriage. Having little or no vested martial rights weakens and harms the marital relationship.

Of course, these concerns apply much less (and sometimes do not apply) to later-in-life marriages where the parties are financially secure and there are children of previous marriages. For these people, a prenup is often helpful to create family peace and provide for one's own children at death, often balancing this with the needs of the new spouse.

Mediation is an excellent way for people to resolve their differences and have clear communications. A mediator can help level the playing field, and elicit all thoughts and concerns of both parties in a non-confrontational setting. Mediating these conversations helps the clients discuss difficult issues without emotions, anger and hot speech overcoming them.

The discussion can be rational and productive. Ideas as to how to fairly and accurately balance and accommodate the parties' legitimate concerns can be proposed by the parties and the mediator. Some of the mediator-proposed ideas may be ones that the parties may not even have thought about or thought were possible.

So, a number of years ago, I started suggesting to clients who approached me about prenuptial agreements to consider formulating them through mediation. It turns out it is a wonderful way to do a prenup. At the end, the parties almost invariably feel fairly treated, and the resulting prenup is not overreaching or over-restrictive.

How does mediating a prenuptial agreement relate to marital mediation? Marriage relies on generosity. In "The Generous Marriage," Tara Parker-Pope discusses a recent study by the University of Virginia's National Marriage Project (a marriage research think tank) that studied the role of generosity in marriage. Its conclusion: generosity is the glue that leads to increased "happiness quotients" for marriages. Significantly more of the couples in a "generous" marriage reported being "very happy" together.

Cutting your spouse out of your earnings and financial wherewithal (which many standard-issue prenups do) is ungenerous. The old adage "money is love" is really true. It is an expression of love and caring. As the National Marriage Project's W. Bradford Wilcox (who led the "generosity" research) said, "Living that spirit of generosity in a marriage does foster a virtuous cycle that leads to both spouses on average being happier in the marriage."

So in essence, premarital agreement mediation is a form of marital mediation in several senses: it encourages generosity, truthfulness and clear communications. It's about money and security, which is a deep concern in marriages. It helps to train the couple in their ability to discuss and resolve difficult issues. This is identical to marital mediation where couples are struggling over difficult issues, often money issues, which are extremely common in marriages.

"[Mediation] is a wonderful way to do a prenup. At the end, the parties almost invariably feel fairly treated, and the resulting prenup is not overreaching or over-restrictive."

Facilitating a client-controlled prenuptial agreement, with honesty and direct communication between the spouses-to-be, means that you are helping the couple embark on a stronger, clearer, more generous marriage. This bodes well for the health of the marriage.

So as I started, is mediating prenups a form of marital mediation? The resounding answer is "yes."

Laurie Israel is a lawyer-mediator practicing in Brookline, Massachusetts. She helps people resolve their disputes with dignity, integrity and creativity. For more about her work in Mediation to Stay Married, see www.laurieisrael.com and www.mediationtostaymarried.com

A CONSUMERS GUIDE TO MEDIATION AND COLLABORATIVE LAW IN CASES INVOLVING UNMARRIED PARENTS

By Debra L. Smith, Esq.

In cases involving children of unmarried parents, it is better for the parents and children to use alternative dispute resolution such as mediation or collaborative law processes, than costly of litigation to resolve matters. Children who are born to unmarried parents should be treated the same as if they were born to parents who are married. These children are entitled to the same rights and protections of the law as other children. See M.G.L. Chapter 209C, Section 1.

Using alternative dispute resolution processes like mediation or collaborative law could allow the parents to maintain a positive relationship between them. Using mediation or collaborative law processes to resolve issues involving unmarried parents are private as the only people hearing the issues during this process would be the mediator or the collaborative team, consisting of each parent's lawyer, a coach or the financial professional.

Has Paternity Been Established?

Paternity could be established in the hospital after the child is born when both parents sign the birth certificate for the child. If that was not done and there is any question about who is the father, the parents should consider genetic marker testing to determine paternity. Genetic marker testing could be pursued using a Buccal Swab test or blood test. The Buccal Swab test involves taking cells from inside the mouth with the swipe of a Qtip. Whether a Buccal Swab test or a blood test is used, they are sent to the lab for testing to be done. A private lab could be used. (Department of Revenue, Child Enforcement Division in Massachusetts does provide genetic marker testing, but a suit will need to be filed in the court.) The genetic marker test will show that a putative father is "not excluded" via a high statistical probability to determine if he is the biological father. Once the genetic marker test results come back, if the gentleman is the father, then the parties may want to sign a Voluntary Acknowledgment of Parentage. This document must be read, completed in full, signed in front of a Notary Public and the back page must be initialed. Then the parents could begin to try to resolve issues involving the child via mediation or the collaborative law process. Paternity could be decided in court. However, the goal in using mediation or the collaborative law process is to avoid litigation and work all matters out.

What Needs to be Considered in Cases Involving Unmarried Parents?

Issues in cases involving unmarried parents are determining custody/parenting time, child support, life insurance, health insurance and other matters.

Is the Word "Custody" Still Used?

The paternity statute in Massachusetts still refers to "custody" not parenting time.

In Massachusetts, "the mother shall have custody of a child born out of wedlock," if there is no father named on the birth certificate, no court action where a gentleman has been adjudicated the father and no Voluntary Acknowledgment of Paternity signed by the parents." See M.G.L. Chapter 209C, Section 10 (b) However, either parent could seek to have custody or parenting time and these issues could be resolved using alternative dispute resolution such as mediation or the collaborative law process. If these issues are not resolved in mediation or using the collaborative law process and the parents have to go to court, the judge could award custody to either parent or another suitable person depending on the facts of the case. See M.G.L. Chapter 209C, Section 10 (a). If a parent seeks "custody" then the court needs to look at where the child lived the last six months and which parent(s) has a personal and parental relationship with the child before an action is filed in court. See M.G.L. Chapter 209C, Section 10(a)

What is Shared Legal Custody in Massachusetts?

"Shared legal custody" is continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare including matters of education, medical care and emotion, moral and religious development." under the divorce statute M.G.L. Chapter 208, Section 31. In Massachusetts, for children who are born to parents who are married and then divorce, there is a presumption of shared legal custody. See M.G.L. Chapter 208, Section 31. However, children who are born to parents who are unmarried and the parents do not have a relationship before they separate, there is no presumption of shared legal custody. Parents who are unmarried need to have the ability to communicate and plan with each other for the child's best interest and have to have successfully exercised joint responsibility for the child before any action is filed in court to have shared legal custody. See M.G.L. Chapter 209C, Section 10 (a).

What is in the Child's Best Interest for Parenting time and Child Support?

Parenting Time of Children for Unmarried Parents

As a mediator or collaborative lawyer, who is working with unmarried parents, one should call the time spent with the child "parenting time" and not argue over "custody" of the child. To determine parenting time, the mediator or collaborative lawyer should look at what is in the best interest of the child. A child's age, special needs, interests and needs are relevant for scheduling parenting time. A schedule for an infant is going to be looked at differently than parenting time for a school-aged child. The child's school, activities and educational, physical or emotional special needs need to be looked into. Both parents' schedules and their available time needs to be considered as well. Each

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parent should examine how they plan to address the child's special needs, if any. The adults should be making decisions for the children, when decisions are made using alternative dispute resolution, such as mediation or collaborative law. If there is a teenager involved, he or she may be consulted for parenting time and future planning. Both parents should be involved in raising the child, as in the long run it is in the best interest of the child if both parents can get along and communicate effectively.

Child Support in Cases Involving Unmarried Parents

"Mediation and collaborative law processes are better ways to resolve matters involving children of unmarried parents."

The amount of child support payments should not be the only focus for parenting time. One needs to determine the amount of child support based on the parties gross incomes, the costs for day care, medical insurance, dental insurance and vision insurance and prior child support obligations. See August 1, 2013 Massachusetts Child Support Guidelines: and the Massachusetts Child Support Guideline Worksheet.

The child support guidelines contemplate these options for parenting time: parents can share parenting time and financial support approximately equally, one third/ two thirds, greater than one-third/less than 50% or more than two thirds/less then one third.

What parenting schedule is best should be determined during the mediation or collaborative law process and then the child support should be considered based on that schedule. Money, i.e. the amount of child support payments, should not drive what is in the child's best interest for parenting time.

In a case involving unmarried parents there is no way to maximize the amount of money available by calling it unallocated alimony and child support to obtain a tax benefit as there is no alimony in matters involving unmarried parents. Child support payments must be called "child support" in matters involving unmarried parents.

Other Financial Issues for Cases Involving Unmarried Parents

Children of unmarried parents need to be covered under one of the parents' medical insurance or another type of medical insurance through the state. If dental and vision insurance is available through one of the parent's employer provided insurance, a child should also be covered under it. Uninsured medical expenses should be shared between the parties. If there are extraordinary expenses, then the parents should decide how they should be shared before the issue comes up, such as equally, based on a proportional share of the incomes or if one of the parties with higher income will pay the costs or some other reasonable division of these costs.

Life insurance should be provided by both unmarried parents for their child until the child is emancipated. Term life insurance policies are not expensive and are often provided by employers. If they are not available, an inexpensive policy should be obtained and paid for until the child is emancipated, if financially feasible.

Whether a child born to unmarried parents should attend post-high school education at college or trade school should be considered and talked about in the junior year of high school. However, when planning for the future, payment of the costs for tuition and fees for the child should be considered, if is at all financially feasible.

Other Issues

If there are other siblings involved, it should be decided how the children will visit with each other. Looking at a history of how the children have spent time beforehand is important. Also, the child's schedule, special needs and time available for transporting the child/ren should be arranged on a consistent schedule.

It should be discussed whether there are special circumstances such as other caretakers available that are interested and involved with the child. It is important for the children to have involvement from family, if the family is involved in a positive way.

Children should not be exposed to domestic violence in any way, whether it be verbal, physical or other types of abuse. Cases involving domestic violence may not be able to be mediated but parents may be able to participate in a collaborative law process.

In unusual situations, one of the unmarried parents may consider moving out of state or to the other part of Massachusetts. If so, it needs to be considered: what has been the involvement of each parent, who has custody or what the parenting time with the child has been to date and what support systems are there in both locations. In addition, the reasons the parent wants to relocate such as job opportunities, family, etc. should be discussed. Also, what effect will the move have on the children for their school? Medical care is important to address too. It is important to have the court approve an Agreement made by unmarried parents involving the child or children to provide an enforcement vehicle. If either parent violates an Agreement, then either parent could go to court to enforce it.

Conclusions

Mediation and collaborative law processes are better ways to resolve matters involving children of unmarried parents. Using these types of alternative dispute resolution are beneficial as they are private and could maintain positive relationships for unmarried parents.

Debra L. Smith is an attorney and mediator in Watertown. She can be contacted at (617) 924-6728, or by email at<lawdeb@aol.com>. Deb invites you to visit her web site at www.lawdebsmith.com

"REVOLUTION CALLING"

By John Licciardello, CDFA

My son Geoffrey loves the song "Revolution Calling" by the 80's big hair band Queensryche. It a classic formulaic rocker in every way...over-emoted, predictable, and guaranteed to get in your head the entire day. Be forewarned. You will be humming it in the shower if singing "revolutions calling...revolutions calling you..dah, dah, dah, dah, dah!"

But this article isn't about hair bands... its about mediation, and my observation that there is a revolution coming in the world of divorce. More people are choosing to go it alone with a pro se approach or using a mediator to exit their marriage. And it appears there may be a time where it will seem old fashioned for people to choose a lawyer and litigate their socks off.

It is not surprising. Let's face it...if the divorce process were looked at as a product on the shelf at Target no one would buy it. It is costly, time consuming, and the outcomes are often dreadful; with broken relationships and bank accounts and inequitable and poorly designed settlements. There has to be a better way, and I think the current trend suggests that mediated or collaborative approaches are going to fill the need over time.

But if we as mediators are truly dedicated to giving couples the best process for exiting their marriage I suggest there is a new approach to consider. One where we address the reality that divorce is not a discrete event that is largely the hammering out of an agreement and moving on to the next. It starts months or years before the first meeting, and ends months or years later.

The divorce experience starts early... perhaps in the therapists office and the Wednesday reading group where the decision is made...quietly... to move on. And once the papers are signed there are months of recovery, both financial and psychological, until a sense of "normal" is achieved. The whole process can take several years from start to finish, and involves a host of professionals; psychologists, lawyers, mediators, financial people, and a number of bit players. All brought in by a divorcing person who is under the most severe stress of their life and not in the best mindset to make thoughtful and rational decisions, or ask for the right help. There is little coordination. No divorce "Sherpa" who is there to escort them through the process. So it is no small surprise that the outcomes are varied and often poor.

I don't have the complete answer. But I do believe that the more we can be part of the preparation and recovery part of the divorce process, and have a coordinated approach among professionals which guides the client every step of the way, the better off divorcing couples will be.

Perhaps we do need a divorce "Sherpa". Someone who would be the lead person in coordinating the talent needed to help someone through the process in a step-by-step fashion. In the same way there are health care advocates who will guide someone through the maze of the healthcare system, our divorce Sherpa would make sure the client has everything they need to get the best outcome possible.

If I were a divorce "Sherpa" I would work to ensure my client had the people they need to have great support in the three main domains of divorce: the legal, psychological, and financial; and a mediator to guide the couple in crafting an agreement right for them. Each professional would sign on to the idea of being part of a team effort to give the individual or couple the help they needed to navigate through their divorce from preparation to recovery. The psychologist would assist in parenting plans, relationship issues, and mental health, the lawyer would handle all legal matters, and the financial person would work the numbers in all phases making sure there was informed financial decision making. A team approach. Total support and guidance from initial divorce preparation to recovery. What a concept.

"I do believe that the more we can ...... have a coordinated approach among professionals which guides the client every step of the way, the better off divorcing couples will be."

So is it possible to pull this off? Will people buy it? I have no idea. There are a host of habits, beliefs, and systems in place that make it difficult to make it a quick reality. But I have a pretty good handle on how I would play my role as the Certified Divorce financial guy in this process. I would have three distinct advisory services; a "before" service that would help them understand and organize their financial data, a "during" service that would help them make informed decisions during negotiations, and a recovery service that would help get their financial life back in the best shape possible. (In fact, that is the way I have organized my practice.)

In the same way, the psychologist would have a "before" service helping map out potential parenting approaches and creating a life vision for the future. They would be an integral part of designing a workable parenting agreement during negotiations, and would provide counseling and deal with helping children acclimate after the divorce was finalized. The attorney, who already has a core role in the "before" and "during" phases would play a role in the "recovery" process working with the financial specialist as needed to put the clients estate plan house in order.

From the client's standpoint they would feel more supported the entire way through the divorce experience. There would be fewer surprises, and mistakes, and faster recovery. They might even have better relations with their ex and

Continued on next page

their children and as John Fiske says "dance together at their children's wedding"

Of course, it is the mediation process which holds the key to making this all work. The basic mediation approach would remain the same, but the other advisors would be more involved in a less ad hoc fashion, especially in the preparation phase. If the parties are financially and legally up to speed, have a sense of the potential agreements that would work for them, and have mental clarity on their needs and goals, our odds of successful mediations can only increase.

Yes, I know nobody works this way... and divorce can be acrimonious and too messy and unpredictable for this approach. But perhaps we can take a step by creating an affiliation of professionals who would work towards the goal of "start to finish" support, and would recognize that from the client's view the divorce experience lasts a lot longer than we are typically involved. And that we have a role and responsibility in helping them through the whole ordeal...the whole way through.

And perhaps the time has come for divorce Sherpas. I am confident that if we respond well to the need for a more coordinated approach, the less we will need someone to escort our clients through the maze of divorce.

I would love to hear feedback on this concept. I am somewhat new to the mediation game and am a financial person by heritage, so please tell me where I am off target in my thinking.

But how great would it be to have a coordinated approach that truly helps people get to their ultimate goal of a fresh start; with relationships and finances intact, and a plan for the future they can believe and pursue with optimism.

Just sayin'...it would be cool. "Revolutions calling, revolutions calling, revolutions calling you..." dah,dah, dah, dah, dah....

John Licciardello is a Certified Divorce Financial Advisor and President of Wentworth Divorce Financial Advisors based in Providence Rhode Island. He is the creator of the FreshStart ProgramTM, an advisory service specifically designed to help couples and individuals navigate successfully through the financial maze of divorce.

He can be reached at 401 519-3780 or at wentworthplanning@gmail.com.

IMAGINATION EXPANDED

By Roger B. Ley, Esq.

Roger B. Ley graduated from Boston University Law School in 1970 and practiced general law in Seattle from 1971 to 2007. In 2007 he relocated to Svensen in rural Oregon and practiced in Oregon until 2013. This essay is based on the study of collaborative law, personal experience, the practice of law in a rural area, and loosely upon a book about practical neuroscience called, Buddha's Brain, by Rick Hanson and Richard Mendius, New Harbinger Publications, Inc., 2009.

Long ago, I went to B. U. Law School. One of the professors told us we should think for ourselves, and I remembered that. I have tried to think for myself over the years. This essay is the product of my own thoughts. That being the case, there isn't much citation of authority, and anyone who reads this is welcome and qualified, equally qualified, to present their own thoughts about dispute resolution.

Divorce law is an ideal place to start with dispute resolution because the parties are usually or perhaps always tied to each other after the divorce.is done.

The lawyers should think about the welfare of the opposing spouse when considering a divorce. That stimulates imagination and helps the lawyers to create helpful and unconventional solutions for their cases. That may be the only idea in this essay which is not a recast of what others have already said, so I will say it again: If the lawyers think about the welfare of both spouses, their imagination will flower.

I have searched, but have not found any literature which would help me understand how imaginative problem solving is fostered. Typically lawyers think about how a divorce case or any case would be resolved in trial. They predict the result of battle and negotiate from that basis. Lawyers have done this for centuries, but thinking about trial smothers the imagination. It's necessary to make a conscious effort of will to think about the welfare of the parties instead of programming oneself for trial.

A corollary is that an accountant can be better at dividing assets because an accountant would know better how to divide the estate so as to maximize its value. The accountant can help everyone with tax planning and enable both parties to get more from the resolution of the case.

I am well aware that not all lawyers and not all parties will think about the welfare of both parties. But this does not prevent one lawyer, even in the midst of conflict, from thinking about the welfare of both sides.

Sometimes a lawyer has to be tenacious and determined in keeping the client or perhaps all the parties on the track of

Continued on next page

a benevolent settlement. This requires attention to the true desires of the client because the lawyer must do what the client wants, not what the lawyer might think is best. A delicious idea is to expand the concept of thinking of the welfare of both sides to all litigation. Any lawyer can think about the welfare of the opposing client and lawyer, and it isn't necessary to tell them or even the client about it. Litigation and legal conflict cover the range of human activity, so I leave it to other lawyers to apply these concepts to different kinds of litigation. I do believe that if all lawyers, or many lawyers, thought about the welfare of the opposing lawyer, and the opposing client, or clients, it would change the nature of litigation, and it would change our so deeply conflicted society for the better. In cases where the parties are trying to hurt one another, for ideological reasons, or personal reasons, or reasons of greed, or other reasons, it is even more meaningful to think about the welfare of the opposing parties.

"Typically lawyers think about how a divorce case or any case would be resolved in trial. They predict the result of battle and negotiate from that basis. Lawyers have done this for centuries, but thinking about trial smothers the imagination."

I was a general practice lawyer in Seattle for many years, and I represented clients in criminal, divorce and contingency fee litigation. I also practiced on the coast of Oregon, for a while, where most of my few cases were business disputes. I developed my ideas about dispute resolution after seeing the futility, anguish and waste caused by some of my cases, especially the business cases. I have not had much chance to apply my ideas about dispute resolution. It can be very hard to think in a benevolent manner in litigation, but it is worth it to try.

Roger B. Ley, WA, CT and OR bar – admitted 1970 in CT and WA; 2009 in OR Boston University Law School, JD 1970; Yale University, BA in American Studies in 1967.

HOW CAN YOU SAY THAT?

By Kate Fanger

Words can float boats or sink good will. Choosing words carefully is not the small stuff, in work or life, but is particularly important in conflict conversations like divorce mediation. Have questions about what phrasing to use with clients (or other professionals) in those tricky and sticky situations? Please send me your challenges: KF@katefangermediation.com

"Note to self: Create a weapons provision in my client information packet, that directs clients to leave weapons outside of the mediation room."

I know other mediators/lawyers ask people when they come in whether they have a weapon, but never thought to, as it's never been an issue before. It wasn't exactly an issue today, actually, but it was the first time I've had a loaded gun in my office. One of my mediation clients this evening was a correctional officer - he came in wearing his jacket/shirt so I didn't notice the gun when he came in. Mid-meeting he took off his coat, and there was his gun. Luckily these two are easy-going clients who laughed through their meeting, but I can think of a billion ways that it could have gone so very, and horribly, different.

You always ask, right? Or do you only ask certain people?

I have had cases where I have asked/talked about weapons, but it has not been part of every case, only those where there has been some factor to raise the issue, such as job (a case with a state trooper) or stated history of any violence in the relationship (several cases).

Taking your experience and question as a good reminder to be more consistent, I have now put a question on my initial intake form, and will ask it routinely as part of my "How is communication between the two of you/What is it like when you disagree?" line of inquiry. I will ask explicitly about whether there are weapons in the home (or permits to carry), whether any weapon (or object used as a weapon) has been part of any argument between them, etc. I will explain that I ask this in all cases, and remind them that in order for mediation to be safe and effective I ask that no weapons ever be brought into the mediation room, and get their verbal agreement on that point.

I think it's probably both more neutral and more effective to handle this during an intake than as a line item in handout materials. You never know what clients have/haven't read, plus I never want to miss out on the non-verbal information you get from asking an in-person question, or two, or three…

Any reader have a different approach?

Kate Fanger is the face and voice of Kate Fanger Mediation in Somerville MA, where she offers divorce mediation, marriage mediation, conflict coaching, parent/teen communication coaching and professional supervision. She can be reached at KF@katefangermediation.com

MASSACHUSETTS FAMILY LAW: A PERIODIC REVIEW

By Jonathan E. Fields

SJC Upholds Rehabilitative Alimony Award. This case reminds practitioners that, even in a long-term marriage, general term alimony is not the only way to go. The parties here were in their forties and married over sixteen years when the complaint was filed. The husband earned a base salary of $400,000 and had a history of significant bonuses. The wife was also very successful; she was employed for all but the last four years of the marriage, having lost her job and started her own business that failed in the interim "through no fault of her own." She had been earning about $170,000 per year when she lost her job but, the Probate Court found, had not used her best efforts to secure reemployment.

The Probate Court ordered husband to pay 35% of his base salary as rehabilitative alimony to the wife for the presumptive limit of five years rather than general term alimony that would have carried a term of thirteen years. The court found, consistent with the definition of rehabilitative alimony under the Alimony Reform Act, that the wife can be "expected to become economically self-sufficient by a predicted time." The judge further found that the wife wanted to work, was highly employable, and that her skills were transferable.

The wife appealed on a number of issues – the two most significant were that the Probate judge abused her discretion by (1) failing to order general term alimony and (2) failing to include the husband's bonus in the calculation. The SJC took the case and found no abuse of discretion in her ordering rehabilitative alimony rather than general term alimony. To the wife's argument that rehabilitative alimony was improper "because there [was] no specific event upon which termination was based," the SJC was unimpressed. The Court held that the prospect of future employment where the spouse had a long history of employment and a brief hiatus was, in this case, "sufficiently predictable, even in the absence of an available, specifically identifiable job."

Consider this case in conjunction with *Nystrom v. Nystrom*, 85 Mass. App. Ct. 1121 (2014) discussed in the previous issue of FMQ. There, the Appeals Court overturned an order of six months of rehabilitative alimony to a wife who was 58 at time of the trial, was laid off a few years before the divorce, and turned down a job in her field located in Boston where she lived in western Massachusetts.

On the issue of the bonus being excluded from the calculation, the SJC remanded the case to the Probate Court because "the alimony amount was not calculated on the basis of all of the husband's income" and, further, that it was not apparent from the findings that the judge considered all of the statutory factors set forth in G.L. c.208 §53(a) in making an alimony determination – particularly the lifestyle of the parties. *Zaleski v. Zaleski*, 469 Mass. 230 (August 1, 2014)

SJC Rules on Parent Coordinators. Wading into a long-unsettled area, the SJC determined that a court has no authority to appoint a parenting coordinator paid for by the parties to make binding decisions, even interim ones, in the absence of agreement of the parties. Likening the parent coordinator to an arbitrator, the case is consistent with existing case law holding that it is an improper delegation of judicial authority to require parties to submit to binding arbitration absent their agreement, *Gustin v. Gustin*, 420 Mass. 854 (1995). Finally, the SJC, noting the important role that parent coordinators play in helping families, referred the matter to the Probate and Family Court to consider promulgating a rule governing the appointment of parent coordinators. Such a rule, however, may be of limited utility since the SJC also notes that judges may not require parties, absent their agreement, to pay for the parenting coordinator. Of course, it is important to remember that in *Ruddy v. Ruddy*, 84 Mass. App. Ct. 1110 (2013), the Appeals Court held that judges must enforce parent coordinator agreements made by the parties. *Bower v. Bournay-Bower*, 469 Mass. 690 (September 15, 2014)

Alimony does not Automatically Terminate Upon Remarriage. Stripped to its essentials, the parties here agreed to a survived provision requiring the wife to pay alimony to the husband. The obligation terminated upon the death of either party or the payment in full of the wife's property division obligation. None of those conditions applied. After the husband remarried, the wife brought a complaint for modification seeking to terminate alimony. The trial court dismissed the complaint, the wife appealed, and the Appeals Court affirmed. In accordance with *Keller v. O'Brien*, 420 Mass. 820 (1995), the Court held that remarriage does not automatically terminate alimony. Further, since the alimony provision survived, the obligation could not be modified as a result of the remarriage. *Becker v. Phelps*, 86 Mass. App. Ct. 169 (August 22, 2014)

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

WHAT'S NEWS?
NATIONAL & INTERNATIONAL FAMILY NEWS

Chronologically Compiled & Edited by Les Wallerstein

Study Tracks Millions of Child Brides More than 700 million women alive today were married as children, and about 250 million of them — more than one in three — were wed before they reached 15, UNICEF said in a study released Monday, on the eve of an international meeting in London, the Girl Summit, sponsored by Unicef and the British government. It aims to mobilize efforts to end female genital mutilation and child, early and forced marriages. The study said child marriage remains widespread in parts of South Asia and sub-Saharan Africa. South Asia is home to almost half of all child brides worldwide, the study found. While an adolescent girl today is about a third less likely to be subjected to genital mutilation compared with 30 years ago because of activism, legislation and changing attitudes, Unicef said that in countries where it is still practiced, parents "continue to compel their daughters to undergo the procedure because of strong social pressure." (Rick Gladstone, NY Times, 7/22/2014)

UN Report Outlines Risks to Human Development The 85 richest people in the world have as much wealth collectively as the 3.5 billion poorest, the United Nations said in its annual human development report. With nearly a third of humanity poor or vulnerable to poverty, governments need to put a higher priority on creating jobs and providing basic social services, the United Nations Development Program said in the report. The report warns of the risks to human development posed by climate change, a global "race to the bottom" by big corporations that is forcing more and more workers to live on less and government budgets "balanced on the backs of the poor." About 842 million of all people, or about 12 percent, suffer from chronic hunger, the report said. (Associated Press, NY Times, 7/24/2014)

China's Black Market in Child Surrogacy As in most countries, surrogacy is illegal in China. But a combination of rising infertility, a recent relaxation of the one-child-per-family policy and a cultural imperative to have children has given rise to a booming black market in surrogacy that experts say produces well over 10,000 births a year. The trade links couples desperate for children with poor women desperate for cash in a murky world of roughly 1,000 baby brokers nationwide, dubious private clinics and expensive trips to foreign countries. Although Chinese law forbids surrogacy, some agencies send poor women to Bangkok for the embryo implantation then fly them back to China, where they live hidden lives during the pregnancy and birth. When successful, surrogates can earn $24,000. (Ian Johnson and Cao Li, NY Times, 8/2/2014)

Louisiana Affirms Ban on Same-Sex Marriages Since 2013 there have been 21 consecutive federal court decisions finding that same-sex marriage bans were unconstitutional. A federal judge in Louisiana has upheld the state's ban on same-sex marriage, going against what had been a unanimous trend of federal court decisions striking down such bans. Same-sex marriage is currently allowed in 19 states and the District of Columbia, as a result of court decisions, legislative action or referendums. In some other states, courts have struck down bans, but those decisions have been stayed pending appeal. The Louisiana ruling will be appealed. (Campbell Robertson, NY Times, 9/3/2014)

Same-Sex Marriage Bans Fall in Wisconsin and Indiana A federal appeals court declared the bans on same-sex marriage in Indiana and Wisconsin to be unconstitutional. Both states argued that their electorates should have the right to continue policies based on centuries of tradition. Traditions can be harmful, such as foot-binding, Judge Posner wrote, or innocuous, such as handshaking. But if a tradition is "written into law and it discriminates against a number of people and does them harm," he wrote, "it is not just a harmless anachronism; it is a violation of the equal protection clause." While both states will appeal, most legal experts think that the Supreme Court will decide the issue for the entire country within the next year or two. (Erik Eckholm, NY Times, 9/4/2014)

In Jordan, Ever Younger Syrian Brides The Jordanian government has struggled to accommodate more than 600,000 of the more than three million Syrians who have fled their country. For many Syrians stuck in Jordan's squalid and sometimes dangerous refugee camps, marrying girls off at younger and younger ages is increasingly being seen as a necessity — a way of easing the financial burden on families with little or no income and allaying fears of rape and sexual harassment in makeshift living spaces. As a result, UNICEF says, the number of marriages involving girls younger than 18 has ballooned since the war in Syria started. During the first six months of this year, 32 percent of all registered marriages of Syrian refugees in Jordan involved a girl under the age of 18, according to the Jordanian government. That percentage was up from 25 percent during all of 2013, and more than twice as high as the 13 percent of marriages in Syria just before the war that included girls younger than 18. (Rana F. Sweis, NY Times, 9/13/2014)

US Marriage Rates Steadily Decline Of all the milestones on the road to adulthood, Americans are increasingly forgoing one of the biggest: marriage. Twenty percent of adults older than 25, about 42 million people, have never married, up from 9 percent in 1960, according to data in a new Pew Research Center report. The trend has been consistent for decades, and Pew projects that a quarter of today's young adults will have never married by 2030, which would be the highest share in modern history. (Claire Cain Miller, NY Times, 9/24/2014)

California Will Allow Family Members to Seek Seizure of Guns California will be the first state in the country to allow private citizens to

Continued on next page

ask a court to seize guns from family members who they believe pose a threat to themselves or the public. The law will allow law enforcement officials, family members and some others to seek a gun restraining order from a judge. That order would authorize officials to temporarily seize any firearm owned by someone deemed potentially violent, who would also be placed on a list of people prohibited from purchasing weapons. Several states have passed laws allowing law enforcement officials to petition to take firearms from people considered dangerous, but California is the first to allow family members to do so as well — a provision that gun control advocates said would be crucial in preventing suicides as well as mass shootings. (Ian Lovett, NY Times, 10/1/2014)

Missouri Judge Recognizes Same-Sex Couples Married Out Of State Missouri must recognize marriages of same-sex couples legally performed in other states, a state judge ruled, saying the state's Constitution and laws banning the unions are unconstitutional. The order means that such couples would be eligible for a range of tax, health insurance, veterans and other benefits afforded to opposite-sex couples. The case, which dealt only with marriages performed elsewhere, is among at least three challenging Missouri's ban. (Associated Press, NY Times, 10/3/2014)

Supreme Court Declines to Review Same-Sex Marriage Cases The US Supreme Court decided to let stand rulings that allow same-sex marriage in Virginia, Utah, Oklahoma, Indiana and Wisconsin, a move that may dramatically expand across the nation a decades-long movement legalizing such unions. The court's action marks a turning point. A majority of Americans now live in states where gay couples can wed, and the court's decision could soon bring the number of those states to 30, meaning there may be no going back. The decision is likely to expand same-sex marriage to other states covered by the federal appeals courts that already have ruled that the bans are unconstitutional: Colorado, Wyoming, Kansas, West Virginia, North Carolina and South Carolina. (Robert Barnes, Washington Post, 10/6/2014)

Same-Sex Marriage Is Upheld in Nevada and Idaho A federal appeals court struck down same-sex marriage bans in Idaho and in Nevada, the latest in a nearly unbroken string of courtroom victories for gay couples. The decision, by the United States Court of Appeals for the Ninth Circuit, in San Francisco, came a day after the Supreme Court allowed similar rulings by three other appeals courts to stand, clearing the way for same-sex marriage to start immediately in Indiana, Oklahoma, Utah, Virginia and Wisconsin and to be extended soon to six other states in those circuits. (Erik Eckholm, NY Times, 10/7/2014)

Les Wallerstein is a family mediator, collaborative lawyer, and the founding editor of the FMQ. He can be contacted at 781-862-1099, or at wallerstein@socialaw.com

MCFM NEWS

MEDIATION PEER GROUP MEETINGS

Peer Group Focused on Financial Issues in Divorce Open to all divorce professionals, the purpose of the group is to focus awareness on the financial intricacies of divorce in an open forum that promotes discussion of a wide range of issues. Discussions will be led by Chris Chen, CDFA, CFP, Diane Pappas, CDFA, and group members. Morning Meetings are usually from from 10:00 am – noon at Cambridge Savings Bank, Arlington Center, 626 Mass Avenue – upstairs conference room. **Seating is limited. Please contact Diane @ (978-833-6144), diane.pappas@insightfinancialstrategists.com or Chris @ (781-489-3994), chris.chen@insightfinancialstrategists.com**

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.**

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.**

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

Mediators in Search of a Group? As mediators we almost always work alone with our clients. 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 Kathy Townsend at Kathleen@divmedgroup.com, as she will coordinate this outreach, and put mediators in touch with like-minded mediators.**

OFFER MCFM's BROCHURES TO PROSPECTIVE CLIENTS

Copies of MCFM's brochure are available for members only. Brochure costs are: **[1-20 @ 50¢ each, 21-50 @ 40¢ each & 51+ @ 30¢ each]** plus shipping, (unless you pre-arrange to pick them up at a professional development meeting or other MCFM event). A blank area on the back is provided for members to personalize their brochures, or to address for mailing. **Remember: when you buy 21 or more brochures the "per copy" price is less than the cost to print!**

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

AN INVITATION FOR MCFM MEMBERS ONLY

All MCFM members are invited to fill out the Member Profile Questionnaire posted on the MEMBERS ONLY page of mcfm.org and submit it for publication in the FMQ. Please email your questionnaire with a personal photo (head shot) and an optional photo of your primary mediation space (or office) to KF@katefangermediation.com. Since the questionnaire is intended to help others learn about you, feel free to customize it by omitting questions listed, or adding questions you prefer. Only questions answered will be published, and all submissions may be edited for clarity and length. **Please help us get to know you.**

HELP BUILD AN ARCHIVE!

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

We're looking for anything and everything related to family mediation in Massachusetts — both originals and copies — including: meeting agendas and minutes, budgets, treasurer's reports, committee reports, correspondence, publications, fliers, posters, photographs, advertisements and announcements.

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

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THE FMQ WANTS YOU!

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

To submit articles or discuss proposed articles
call Kate Fanger 617-599-6412
or email KF@katefangermediation.com

NOW'S THE TIME TO SHARE YOUR STORY!

ANNOUNCEMENTS

* *

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

* *

MCFM Professional Development Meeting

December 10, 2014
2:00- 4:00 pm
Wellesley Public Library

"What You Need To Know About LGBT Families": Legal issues affecting LGBT people and families can be complicated and often impact the mediation process. In addition to learning about how the law does – and does not – protect LGBT families, mediators will benefit by getting practical tips for increasing their cultural competence with this population. Attorney Patience Crozier and Attorney Joyce Kauffman, Kauffman Crozier LLP.

"I have two mommies. I know where the apostrophe goes."

JOIN US

MEMBERSHIP

MCFM membership is open to all practitioners and friends of family mediation. MCFM invites guest speakers to present topics of interest at four, free, professional development meetings annually.These educational meetings often satisfy certification requirements. Members are encouraged to bring guests. MCFM members also receive the Family Mediation Quarterly and are welcome to serve on any MCFM Committee. Annual membership dues are $90, or $50 for fulltime students. Please direct all membership inquiries to **Ramona Goutiere at masscouncil@mcfm.org.**

REFERRAL DIRECTORY

Every MCFM member with an active mediation practice who adheres to the Practice Standards for mediators in Massachusetts is eligible to be listed in MCFM's Referral Directory. Each listing in the Referral Directory allows a member to share detailed information explaining her/his mediation practice and philosophy with prospective clients. The most current directory is always available online at www.mcfm.org. The annual Referral Directory listing fee is $60. Please direct all referral directory inquiries to **Ramona Goutiere at masscouncil@mcfm.org.**

PRACTICE STANDARDS

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

CERTIFICATION & RECERTIFICATION

MCFM was the first organization to certify family mediators in Massachusetts. Certification is reserved for mediators with significant mediation experience, advanced training and education. Extensive mediation experience may be substituted for an advanced academic degree.

MCFM's certification & recertification requirements are available online at www.mcfm.org. Every MCFM certified mediator is designated as such in the Referral Directory. Certified mediators must have malpractice insurance, and certification must be renewed every two years. Only certified mediators are eligible to receive referrals from the Massachusetts Probate & Family Court through MCFM.

Certification applications cost $150 and re-certification applications cost $50. For more information contact **S. Tracy Fischer at tracy@tracyfischermediation.com.** For certification or re-certification applications contact **Ramona Goutiere at masscouncil@mcfm.org.**

DIRECTORATE

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

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

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

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Summer: July 15th   Fall: October 15th
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