MCFM

Family Mediation Quarterly

Vol. 14 No. 2 Spring 2015

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 March 27th the Massachusetts Chapter of The Association of Family and Conciliation Courts (AFCC) held its annual conference on the topic, Parenting Plans and Shared Custody: Recent Research and Implications for Family Law Professionals. Robert Emery, Ph.D., practicing psychologist, mediator, parenting coordinator, and author of a number of books on divorce and children, was the conference's keynote speaker. Emery's focus was the most recent research on the relationship of shared custody and parenting plans to health - related outcomes for children. Emery pointed out that while the research from these studies does not show a clear correlation between shared custody or parenting plans and healthy outcomes for children, the research does highlight an important take away for family law professionals – the strong correlation between the positive future psychosocial health of children and the degree to which parents keep interparental conflict to a minimum during and after their divorce. One may infer from these new studies that there is compelling reason for parents to shield their children from divorce - related parental conflict, and for mediators to help their clients succeed at their mediations.

How can mediators better help their clients succeed at their mediations? This question was at the center of the MCFM's April professional development members' meeting, during which panel members Kate Fanger, Jonathan Fields, and Ellen Waldorf discussed some of the biggest challenges facing mediators. Panel members focused on one of the most important challenges mediators face-managing the expectations of clients. When we meet with clients to tell them about mediation we try to help them understand what they may reasonably expect from the mediation. Directly addressing the question of which expectations of the clients are reasonable may also be helpful. Having clients think about and articulate their goals for the mediation may help the mediator identify and better manage client expectations. Checking in with clients at each meeting about how things are going outside of the mediation may also be helpful. Failing to adequately manage client expectations can derail a mediation.

An example from one of my cases illustrates this point. After a couple of meetings with mediation clients, the parties notified me that they would not continue the mediation. When I spoke with them individually they let me know that the reason for their decision was that their communication outside of the mediation was riddled with the same issues that had plagued their marriage for years. Why did the parties assume that a few mediation sessions would be a panacea? Could I have anticipated this unrealistic expectation and done a better job managing it? Eventually the parties decided to return to mediation.They established concrete realistic goals and expectations to help them navigate their divorce and guide them in communicating with one another about their children outside of the mediation. They hoped that these goals would serve as a blueprint for the future that would foster better communication around co - parenting their children.

The recent research about the relationship between parental conflict and future psychosocial health outcomes for children raises the stakes for divorcing parents and for mediators who work with them. Helping our clients succeed at their mediations may well depend on how effectively we manage their expectations. Our clients and their children are depending on us.

My best to all,

Fran L. Whyman

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DRAFTING SELF-EXECUTING PROVISIONS IN SEPARATION AGREEMENTS

Lisa Smith, Doris Tennant, and Rackham Karlsson

On March 18, 2015, Doris Tennant and Lisa Smith presented at the MCFM Workshop on the subject of self-modifying provisions (a.k.a. self-executing provisions or contingent clauses), beginning with a discussion of the prevailing law in Massachusetts.

The seminal case, Stanton-Abbott v. Stanton-Abbott, 372 Mass. 814 (1977), dealt with court-ordered alimony that was to be periodically recalculated based on the retail price index. There, the SJC held that judges have the authority to enter orders containing "a contingent or variable clause," and application of the contingent clause does not amount to a modification of a judgment, even though it "produce[s] results which in some sense are new."

However, in Hassey v. Hassey, 85 Mass. App. Ct. 518 (2014), the Appeals Court considered self-modifying provisions in light of the Alimony Reform Act of 2011 (Act). There, the trial judge had ordered the husband to pay alimony of a base amount plus 30% of his gross annual income above $250,000. The Appeals Court held that this order was unenforceable, in part because any change in the amount of alimony would be considered a modification lacking the requisite findings of "increased need and ability of the obligor to satisfy that need." The Hassey court did clarify that "a general term alimony award established as a percentage of income and not as a fixed amount may be valid in some circumstances," and "in a 'special case,' a general term alimony award containing a 'self-executing formula' that is based on the recipient spouse's needs may be permissible." However, absent clear guidance as to what constitutes a "special case," Hassey seems to suggest that judges have significant limits when entering self-modifying alimony awards.

Turning to the world of mediated agreements, Tennant and Smith noted that Hassey applies only to court-ordered provisions, and parties have considerably more freedom in the agreements they reach privately, including through mediation. Through careful drafting, mediators can help clients agree to self-executing provisions that are clear and enforceable. Smith and Tennant offered the following best practices for drafting self-executing provisions.

1. Identify the purpose of the self-executing provision. It is not necessary that the purpose be written in the agreement, but the reason that the parties wish to have a self-executing provision should be clear.

2. Identify the triggering event or contingency. What is the event that triggers a self-adjustment? Parties may agree to an adjustment based on the occurrence of an event, such as a change in earnings, emancipation of a child, a specific date, or remarriage

of a spouse. Consider whether the trigger or contingency results in an action that must be taken or may be taken. If the term "shall" is used, what is the consequence if the adjustment or recalculation does not occur?

3. Clearly define the formula to be used or action to take. What should the parties do, and when should they do it? Is there a formula they can use for the recalculation or change in action? Clearly define all components of the action to be taken — for example, define the terms "income" and "child expenses" to avoid ambiguity.

4. Define the timeframe for action to be taken. If the parties will be recalculating child support, when should they apply the formula? Consider whether a rationale is needed to explain the reason for the adjustment.

5. Specify the effective date. For example: recalculated child support begins May 1 of each year; or alimony ends upon the occurrence of a number of clearly delineated events. If the effective date is prior to the recalculation date, it is important to describe how the under or overpayment is to be reconciled.

6. Identify documentation or information required prior to action. There is a balance between the necessary information and future privacy interests. Are full tax returns necessary or would W2s with pay stubs suffice? Can either party request further information? Include the date by which information must be provided.

7. Consider acknowledgement of action taken or a process to follow if there is disagreement. Is the recalculation or other change to be acknowledged by written agreement signed by the parties? If they disagree, do they want to describe a process for addressing the disagreement?

8. Consider using an example. Sometimes an example is helpful to avoid ambiguity, particularly if it involves a complicated formula. For example, a provision including a cost of living adjustment (COLA) might benefit from an example.

9. Be intentional. Don't unintentionally change a standard for future modification. Will the list of triggers for an adjustment be considered exhaustive? If not, the following language might be helpful: "Nothing in this provision prohibits either party from filing for a modification based on circumstances that would permit the parties otherwise to seek modification or based on then-current legal standards."

10. Caution parties. Discuss the uncertainty of enforceability of a self-executing provision, since there is no clear legal standard as to whether such provisions, when executed, require court approval if the adjustment is later disputed.

APPEALS COURT OVERTURNS MANDATORY PRE-LITIGATION MEDIATION

William Driscoll, Esq.

Editor's Note: Since the Ventrice decision came out, there has been considerable discussion about its implications for Massachusetts mediators. In this issue, we share the views of Attorney William Driscoll, who represented Mr. Ventrice on appeal. We welcome readers' comments — whether in agreement or disagreement — for the next issue of FMQ.

On March 19, 2015, the Massachusetts Appeals Court published its opinion in *Ventrice v. Ventrice*, which involved questions of child custody and mandatory pre-litigation mediation. Of particular interest is the mediation issue. Specifically, the trial court's post-trial judgment of divorce ordered the parties to participate in privately funded mediation before filing a future complaint, excepting only contempt. The trial court did not consult the parties or receive their assent to mandatory pre-litigation mediation.

The Appeals Court declared it unlawful for a trial court to order privately funded pre-litigation mediation because it "violates [the] right of free access to the courts under art. 11 of the Declaration of Rights of the Massachusetts Constitution." It is unconstitutional for a court to require litigants to "purchase" assess to justice. The imposition of privately funded pre-litigation mediation is an unconstitutional burden that introduces an impermissible delay and cost and "chills the [parties'] right to freely petition the courts." The published decision of the Appeal Court was unequivocal and without dissent.

The practical considerations for rejecting mandatory pre-litigation mediation are numerous. Modifications of Family Court matters can hinge on retroactive relief, such as child support modification, or deal with important medical or child custody issues where further harm is introduced with delay. How many well-qualified disclaimers would be necessary to address those concerns (e.g., mandatory mediation except in cases of contempt, child support modification, medical needs, "emergency," etc.)? Who is to make that assessment? What if the case presents a mixed issue (e.g., issues in addition to child support)? Forcing mediation before filing delays the parties' access to justice and impacts other fundamental rights. For example, in the case of child support, there is the deprivation of property (i.e., money); no child support order may provide retroactive support prior to the service of the complaint! In the case of child custody, there is the deprivation of liberty (i.e., parenting) or harm to the child; but the court is entrusted with the power of *parens patriae*. As the quote goes, "justice delayed is justice denied."

Beyond *Ventrice*

Several issues are left open, including: (1) whether the trial court can order publicly funded mediation during the period where there is no active litigation; (2) whether a mandatory pre-litigation mediation clause may be incorporated into a judgment; and (3) whether existing agreements and orders calling for mandatory pre-litigation mediation are binding or enforceable. As I explain here, I believe that mandatory pre-litigation mediation orders and provisions are non-binding and unenforceable in all situations. If a party sought to dismiss suit for failure to participate in mandatory pre-litigation mediation, then an opposition should prevail. If not, I believe there would be a strong legal basis to prevail on appeal.

Mandatory *Publicly* Funded Dispute Resolution

While *Ventrice* presented a mandatory *privately* funded pre-litigation mediation situation, the language surrounding the Court's remand to the trial court indicates its views on mandatory *publicly* funded dispute resolution. Specifically:

> On remand, the judge may in her discretion refer the parties to court-appointed dispute resolution in accordance with the Uniform Rules on Dispute Resolution, but may not condition the right of either party to petition the court on participation in such a process. Moreover, even if the parties participate in court-ordered dispute resolution, absent their agreement, any court-appointed official may only recommend a disposition to the judge, who retains the nondelegable duty to make a final and binding resolution to the case. . . . In addition, the judge may not foreclose either party's right to commence a nonfrivolous action, nor may she order the parties to bear the cost of any mandatory dispute resolution services.

The Court found the 2014 case of *Bower v. Bournay-Bower* "instructive" and incorporated its sentiments into the remand order. In *Bower,* the Supreme Judicial Court vacated an order that granted binding authority to resolve parenting conflicts to a parenting coordinator who had been appointed over the objection of one parent.

As for court-connected dispute resolution, Supreme Judicial Court Rule 1:18 defines the uniform rules. The Rule defines the purpose of the dispute resolution service as one "engaged to assist in the process of settling a case or otherwise disposing of a case without a trial . . . ." The Rule defines a court-connected referral as "provid[ing] a party to a case with the name of one or more dispute resolution service providers or to direct a party to a particular dispute resolution service provider." Given this foundation, one would be hard pressed to argue that court-ordered dispute

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resolution is appropriate in a final judgment of the trial court where its need is purely speculative. The court already has a tool for this purpose, the parenting coordinator. *Bower* tells us that the assent of both parents is required before a parent coordinator may be appointed. The trial court may impose court-connected dispute resolution if and when a future complaint is filed. The trial court simply may not impose post-judgment court-ordered dispute resolution as an end run around *Bower.*

"Public" mediation is funded by the taxpayers and available to parties after the case has entered the Family Court. If there is no active case, then how could a judge assign a "public" mediator? Why should one couple be entitled to publicly funded pre-litigation mediation while another couple must pay for privately funded mediation? Even if an asset qualification were performed at the time of judgment, then who is to say the couple would still qualify if and when a future dispute were to arise? The SJC Rule states the requirements for "public" mediators, but at the time of judgment there is no indication that a mediator will be needed, or when that need might arise. Moreover, a public mediator named at the time of judgment may lose status under the SJC Rules by the time mediation is "required" (i.e., each dispute resolution professional must be pre-approved by the Court and continue qualification). Suppose a party seeks to file an action for modification — but to obtain a court-connected referral or to modify a referral requires an active case (i.e., they need to file a complaint first). Do you see where I am going here?

Assented-To and Negotiated Mandatory Pre-Litigation Mediation

By "assented-to," I refer to the parties' verbal assent prior to the court's entry of a judgment. While this is technically different from a provision in a separation agreement, the same principles apply.

As the *Ventrice* Court noted in footnote 14, Rule 2 of the Uniform Rules on Dispute Resolution (S.J.C. Rule 1:18) defines "mediation" as a "voluntary" process (emphasis included in *Ventrice*). During mediation training, we were all taught that mediation cannot occur unless all parties agree to mediate and mediation cannot continue if one party decides to end mediation. People put all kinds of things in agreements, but that does not make them enforceable.

Although parties may agree to "mandatory pre-litigation mediation" at the time of divorce, they may not agree to mediate when a dispute arises at some future date. To insist on "mandatory mediation" based on prior consent that no longer exists makes a mockery of mediation. The would-be-defendant is encouraged to stall, even in choosing the mediator or scheduling the first meeting. The would-be-plaintiff is encouraged to get a quick first meeting and then declare that they do not wish to mediate. Is it ethical to force mediation when one party makes clear that they do not wish to mediate?

This situation is similar to that of a prenuptial agreement. Couples can contract for whatever they like, but that does not mean it will pass muster at the "second look." Here, the "second look" asks whether mandatory mediation is appropriate at the time of the dispute. Obtaining a legal answer requires filing a complaint in violation of the judgment and then surviving a motion to dismiss and likely a complaint for contempt for failure to mediate before filing the complaint. This tension is unacceptable.

In light of *Ventrice*, mandatory pre-litigation mediation clauses should now be an obsolete practice. Clients should be made aware that such a clause violates *Ventrice*.

Lawfulness and Enforceability of Mandatory Pre-Litigation Mediation Clauses

At the time of judgment, a separation agreement must meet the approval of the court before it may be incorporated into the judgment. *Ventrice* tells us that a judge cannot order mandatory pre-litigation mediation; therefore, a judge may not lawfully incorporate a mandatory pre-litigation mediation clause into a judgment. To do so would violate *Ventrice*.

Ventrice also speaks to the enforceability of existing mandatory pre-litigation mediation clauses.

> Because the Probate and Family Court has exclusive jurisdiction in this area, [parties] would have no alternative forum in which to pursue such a claim. In this light, we conclude that the [mandatory pre-litigation mediation clause] does precisely what art. 11 of the Declaration of Rights forbids, i.e., it chills the [parties'] right to freely petition the courts.

Should a litigant violate an existing mandatory pre-litigation mediation clause and be met with a motion to dismiss, or complaint for contempt, their defense should be *Ventrice*. The trial court cannot deny a party the fundamental right to petition the court for relief and cannot punish them for asserting their right to petition the Government. However, once the case is entered in the trial court, the parties may be referred to publicly funded court-connected dispute resolution.

Ventrice should be a warning to stop including mandatory mediation clauses in agreements. For existing agreements with a mandatory mediation clause, the basic premise of mediation suffices; no party may be made to believe that they must mediate before filing a complaint. Rather than include such a clause in a settlement agreement, one may provide a "preference" that the parties attempt mediation prior to filing a new complaint. However, parties to such agreements must be fully

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informed of their Constitutional right to petition the court for relief regardless of any such language. Parties may always ask the trial court to order court-connected dispute resolution after the complaint is filed.

The natural next question is: who should be entitled to court-connected mediation, funded by the taxpayers, in light of the limited resources of the trial court budget? What happens to those individuals in need of public court-connected dispute resolution when the resources simply are not present (i.e., budgeted) or are depleted? This is a topic of great interest to the judiciary and one where the Massachusetts Counsel on Family Mediation can provide insightful leadership.

William Driscoll is an appeals attorney devoted to preparing and presenting cases to the Massachusetts Appeals Court and Supreme Judicial Court (SJC). His article, *Information Security: A Business Necessity for Mediators*, appeared in the Summer 2009 issue of Family Mediation Quarterly. His article, Rule 56(f): *Precursor to a Substantive Opposition to Summary Judgment*, appeared in the June 2013 issue of the Massachusetts Law Review. Further information is available at www.DriscollEsq.com or by calling him at 978-846-5184.

"Our pre-nup guarantees that we'll be together forever. In the event of divorce, you and I get custody of each other!"

WHY AMERICA CHANGED ITS MIND ON GAY MARRIAGE

By Stephanie Coontz

This article first appeared on CNN.com on October 13, 2014. It is reprinted here by permission of the author.

In 2003, Massachusetts became the first state to legalize same-sex marriage. At that time, 60% of Americans opposed the idea and the move provoked an immediate backlash. In the next year, 12 states passed constitutional amendments outlawing same-sex marriage. Eventually 30 states, including traditionally liberal California, passed such measures.

But since then there has been an astounding transformation of public opinion and legal thinking. Support for gay and lesbian civil rights, starting from a much lower base than support for racial and gender equality, has risen with stunning speed. Between 2003 and 2013, the proportion of Americans supporting same-sex marriage rose 21 points nationwide, from 32% to 53%, writes Robert P. Jones in The Atlantic.

Even in the socially conservative South, support more than doubled, increasing from 22% to 48%. By contrast, in 1978, 11 years after the Supreme Court struck down laws prohibiting interracial marriage, only 36% of Americans supported such unions.

This rapid and massive change in public attitudes toward same-sex marriage undercuts the argument that "judicial activism" has frustrated the will of the American people. But the legal tide has certainly turned as well. In the past year and a half, 42 separate court rulings have upheld marriage rights for gays and lesbians.

Because of this month's Supreme Court decision not to hear appeals of such rulings, 24 states and the District of Columbia now permit same-sex marriage.[1] Today more than 50% of Americans live in places where it is legal for gays and lesbians to wed. That will soon rise to 60%, because the Supreme Court's actions affect six other states in the judicial circuits overseen by the same appellate courts.

Many factors have contributed to these changes in public and legal opinion. One is the increased visibility of gays and lesbians across the culture, as more come out of the closet. Three-quarters of Americans now say they have a relative, friend or co-worker who is gay and millions have become used to sympathetic gay and lesbian characters on television and to openly gay talk-show hosts and entertainers. It is harder to deny rights to people who are no longer faceless "others."

Another factor in the rapid acceptance of marriage equality is the success the civil rights and feminist movements have had in establishing social equality as a moral and ethical principle. Fifty years ago, when the Civil Rights Bill was introduced in Congress, congressional

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opponents openly vowed to resist anything that might "bring about social equality."

No public figure would say that today. Even politicians who oppose measures to protect the rights of minorities, women or gays and lesbians now frame their opposition as a defense of equality against "special privileges." So when advocates for social change can claim their goal is a simple matter of equity, they have an advantage they lacked in the 1960s and even the 1970s, when substantial numbers of Americans were still willing to admit to opposing gender and racial equality.

"Ironically, the most important factor in persuading many Americans to support same-sex marriage may have been the dramatic changes heterosexuals have made in their own marriages."

A third factor behind changing public opinion has been the growing tendency to treat freedom of choice in marriage as a basic right. This was not the case historically. Before the late 1960s, a majority of states had laws prohibiting marriage of whites to blacks, Asians or Filipinos.

Twelve states forbade "drunks" or "mental defectives" from marrying. Several states denied marriage to any person with tuberculosis. Prisoners had no right to marry, and employers were legally entitled to refuse to hire a woman who was married, or to fire her if she married after getting the job.

But in 1967, invalidating anti-miscegenation laws, and in 1987, ruling that prisoners could not be denied marriage rights, the Supreme Court ruled that states could not prohibit marriages just because they disapproved of the partnership. Once it became a violation of individual rights to prevent prisoners, inter-racial couples, flight attendants, and female teachers from marrying, gays and lesbians could argue that they, too, should have the right to marry a partner of their choice.

Ironically, the most important factor in persuading many Americans to support same-sex marriage may have been the dramatic changes heterosexuals have made in their own marriages.

For thousands of years, marriage was defined as the union of two individuals who had different and unequal rights and responsibilities based on their gender.

Until the late 1970s, husbands — but not wives — were legally obliged to support their families, while wives — but not husbands — were legally obliged to perform services (including providing sex) in the home. This is why the legal definition of rape was a man's forcible intercourse with a woman not his wife. It is also why a husband could sue for the loss of companionship, affection and sex (when the actions of another deprived him of the relationship benefits he was due), but a wife, who was not legally entitled to such services, could not.

In the past 30 years, however, as Americans have rejected such rigid gender roles, the courts have redefined marriage as a union of two individuals who have equal rights and responsibilities, and who can organize their marital division of labor on the basis of personal inclinations rather than pre-assigned gender roles.

As late as 1977, two-thirds of Americans believed that the man should be "the achiever outside the home" and the woman should take "care of the home and family." Today 62% of all Americans prefer a marriage where husband and wife share breadwinning, child care, and homemaking. The more that heterosexual couples organize their own marriages without regard to gender roles, the less reasonable they find it to deny marriage to two people who happen to be the same biological sex.

Stephanie Coontz teaches history and family studies at The Evergreen State College in Olympia, Washington, and is Director of Research and Public Education for the Council on Contemporary Families. Coontz is an award-winning author whose publications include *Marriage, A History: How Love Conquered Marriage* (Viking Press, 2005).

Editor's Note: *The numbers have changed significantly even since this article was first published. At least 37 states now allow same-sex marriages.*

"Most of us can remember who we were 10 years ago, but we find it hard to imagine who we're going to be."

Dan Gilbert

TO COVENANT OR NOT TO COVENANT: THAT IS THE QUESTION

By Vicki Shemin, JD, LISCW, ACSW

Jeopardy Question:

What do Arizona,Arkansas and Louisiana all have in common?

Jeopardy Answer:

These three states offer couples the option of a covenant marriage.

The Proposal:

In a traditional scenario[1], if a man asks a woman to marry him in Arizona, Arkansas or Louisiana, the prospective bride is likely to consider, "Well, it depends….Are you asking me to enter into a traditional marriage, or, into a covenant marriage?" In other words, she may want to know if she is more-or-less in it for life or whether there is an escape clause.[2] At first blush, the idea of keeping one's promises, in either a traditional marriage or covenant marriage is not new. "In addition to the obvious virtues cultivated by marriage, the selection of covenant marriage encourages the virtue of keeping one's promises, which ironically is required in simple contractual relationships with strangers."[3]

So, what is distinctive about a covenant marriage?

The essential difference between the traditional marriage and the covenant marriage is how the parties enter into the marital contract. For the former, as we all know, the couple need only obtain a marriage license, a state-licensed agent to perform the wedding, and two witnesses to the same. In a covenant marriage, in addition to all of the above essentials, couples agree to be married for so long as each shall live. The couples recite a specific, state-mandated wedding vow ("Declaration of Intent") whereby they acknowledge their acceptance of marriage as a covenant for life and their commitment to take all reasonable efforts to preserve the marriage.

More specifically, in this uniquely legal kind of marriage, the betrothing couple generally agrees (a) to obtain premarital counseling; (b) to obtain counseling before getting a divorce; and (c) to accept far more limited grounds for later seeking divorce. A no-fault divorce is not an option for these couples.

Not surprisingly, both proponents – as well as critics - of this "two-tiered system" of covenant marriage, have equally strong convictions about the pros and cons of this alternative. Those advocating for covenant marriage assert that all the public policy goals which promulgate marriage as a strong and desirable institution to strengthen families will be served: couples, having had the benefit of premarital counseling, will enter the marriage with a more realistic understanding of the commitment before them; in turn, cohabitation will be discouraged; the number of children born out of wedlock will lessen; divorce rates will

decline; and, the economy will be better served (i.e., divorce reduces worker productivity and two households are more expensive to maintain than one). The naysayers counter that covenant marriage is "an example of religion harnessing state power"[4] and creating roadblocks to the progressive alternative of no-fault divorce. As such, covenant marriages could lock-in families into toxic situations that are harmful for one or both spouses and the children. The detractors further assert that adding "[w]aiting periods and mandatory classes 'add a new frustration to already frustrated lives'" and are merely "a form of paternalism – expanding government in pursuit of socially conservative ends."[5]

Public Policy Goals & The Covenant Marriage Antidote

The thinking goes that if we are to honor the institution of marriage, it logically follows that we should make all best efforts to denounce divorce. If couples enter into the bonds of matrimony knowing that they have an easy out, then marital ties are too tenuous at the outset. Legislatures are rethinking how to implement public policy goals to strengthen marriages. Florida's remedy is to *require* applicants for a marriage license to receive a pamphlet prepared by the Family Law Section of the Florida Bar Association explaining the Florida law of divorce; as a further incentive, couples can save $32.50 on their marriage license fees if they take a premarital counseling course and, as a disincentive, they may have a wait an additional 3 days to get their licenses if they don't take a premarital course!)[6]

As to the covenant marriage antidote to fortify the institution of marriage, a key part of public policy philosophy can be found in the Declaration of Intent. The covenant couple is asked to sign this document in advance of taking their vows: in so doing, they affirm that the institution of marriage must be preserved and promoted (particularly if there are going to be children) and they must reveal any misgivings they have that might place their marriage in jeopardy. As preparation for the execution of this document, their premarital counseling has stressed the importance of their mutual commitment and the expectation that their vows are to be life-long and that the couple is entering into a legally binding agreement. It has been made clear to the couple that there is collective societal condemnation if there is misconduct on the part of a spouse.

"[o]ne of the more controversial aspects of covenant marriages is that there is a 2-year waiting or "cooling off" period for divorce."

And speaking of society, throughout the ages, one of the ways in which the family has always stayed together has been with the aid of community support and encouragement [read: pressure!] to foster and strengthen marital ties. Covenant marriage reinvigorates societal input by institutionalizing premarital counselors before the marriage (be they religious or secular) and then, at

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the hint of any marital dissolution, by re-upping the counselors to make all best efforts to keep the couple united.

What happens to couples who choose to divorce if they are in a covenant marriage?

As we know, in traditional marriages, if one marital partner wants to get divorced, the divorce will go forward under the relatively accessible no-fault legislation now in effect in all 50 states.[7]

In contrast, one of the more controversial aspects of covenant marriages is that there is a 2-year waiting or "cooling off" period for divorce. The hope is that, during this time, the mandatory marriage counseling sessions will help salve marital strains. Moreover, the law specifies and narrows the grounds for divorce:

1. Adultery
2. Commitment of a felony or sentence of death or imprisonment
3. Abandonment of matrimonial domicile for a year and refusal to return
4. Physical or sexual abuse
5. Separation for 2 years[8]
6. Separation for 1 year from date of execution of Separation Agreement

In short, covenant marriage offers couples a way to limit the grounds for divorce in their marriage if they both enter into this "contract" knowingly and with much forethought in the hopes that it will solidify their marital bonds. To critics, it smacks of a rigid, *parens patriae* interference in marital affairs that keeps two people (and perhaps innocent children) locked into a miserable situation due to unforeseeable or other circumstances.[9] And as to some very practical considerations, alimony payors are concerned that the cooling off period may well increase the size or duration of alimony payments as they are typically calibrated to the total length of the marriage. Moreover, the length of time during which assets earned by either spouse are considered "community property" is, by definition, extended (Arizona and Louisiana are community property states).

On balance, what has been the actual impact of covenant marriage?[10]

Although covenant marriage was thought by many to be a good alternative whose time had come and for whom there would be a lot of romantic takers, the statistics seem to be telling a different story (although statistics are arguably not the best normative indicators of what is in the best interests of marriage/family/society). Reportedly, between 2000 - 2010, there were 3,964 covenant marriages in Louisiana – roughly 1% of the 373,068 performed in the state.

The rates for covenant marriages were even lower in Arizona and Arkansas. Although Arkansas – which has one of the nation's highest divorce rates at 6.5% per 1,000, (the national average for divorce in the U.S. is approximately 4.2 per 1,000 population), between 2001-2004, only 400 couples opted for covenant marriage licenses.

Similarly, Arizona reported that (approximately) only one-fourth of 1% of couples getting married opted for a covenant marriage.

Is the pendulum swinging back to pre-1969?

It has been said that marriage is the only true act of heroism most of us can attempt.[11] Recognizing that perhaps more heroic measures are in order since too many marriages are on life supports, recently, 11 states from Alabama to Washington have considered everything from effectively eliminating no-fault divorce (Kansas) to extending the waiting period for parents from six months to one year. Even if couples are not willing to enter into the more restrictive bonds of a covenant marriage, are some states proactively taking more considered life-saving measures to resuscitate the institution of marriage on our behalf?

Vicki L. Shemin, J. D. LICSW, ACSW, of counsel to Boston Law Collaborative brings 35 years of family law/therapy experience to offering clients ADR options including mediation, collaborative law, consultation/coaching, parenting coordination, GAL evaluations, pre-marital/post-nuptial agreements – and agreements to stay married. Since 2011, listed annually as one of the Top Women Lawyers in the Northeast, Vicki is also an adjunct instructor at Northeastern University and at Boston University School of Social Work. She is currently researching a book, "Letters To Ex-Spouses: And I Just Wanted You To Know," combining her interests in psychology/law. She can be reached at VShemin@BostonLawCollaborative.com

(Endnotes)

1 The author apologizes for falling back on the stereotype of a straight couple for this illustrative purpose.

2 What we traditionally think of as "no-fault" divorce.

3 http://faculty.law.lsu.edu/katherinespaht/covenantmarriage.htm

4 http://www.brandeis.edu/hbi/gcrl/images/mcclainWP.pdf

5 http://www.washingtonpost.com/opinions/conservatives-arent-just-fighting-same-sex-marriage-theyre-also-trying-to-stop-divorce/2014/04/11/5f649bd6-bf48-11e3-bcec-b71ee10c9bc3_story.html

6 http://www.flclerks.com/PDF/2000_2001_pdfs/7-99_VERSION_Family_Law_Handbook.pdf

7 In 1969, California became the first state to legalize no-fault divorces. New York was the last hold-out of the 50 states to follow suit, having just recognized no-fault divorces five years ago.

8 This *may*, depending on the jurisdiction, be increased to 2 ½ years if the couple has minor children. However, if abuse of a child was the basis for separation, then the couple must live separate and apart for only one year from the date the judgment was signed. www.nwamarriages.com/married-couples/covenant-marriage-licensc

9 Under Arkansas' Covenant Marriage Law, enacted in 2001, since nothing requires couples to seek counseling together, a man or woman in an abusive relationship would have the opportunity to avail himself/herself of a safe alternative. www.nwamarriages.com/married-couples/covenant-marriage-licensc

10 These statistics are quoted from http://marriage.about.com/cs/covenantmarriage/a/covenant_3.htm

11 Gallagher, Maggie, La. R.S. 13:3201 B (paraphrasing)

"I can't help but think that things might have turned out differently if we had never met."

NATIONAL DIVORCE SURVEY YIELDS SURPRISING INSIGHTS

Many feel unprepared for financial decision making and are unhappy with settlements.

By J. Anthony Licciardello, CDFA

Divorce is as popular as ever in America, with over 50% of first marriages and 70% of second marriages ending prematurely. In addition to traditional litigation couples are increasingly turning to mediation and the "do it yourself" pro se divorce process in the quest to have "successful" divorces as measured by satisfactory settlements, minimal relationship damage and reasonable cost.
However a recent survey conducted by the Wentworth Divorce Financial Advisors LLC suggests these benefits are not being realized by a significant portion of divorcing couples, and that there is room for improvement in helping them through the financial aspects of their divorce.
Of interest was whether mediation or pro se divorce approaches scored better than traditional litigation along the measures described above.

The Survey
Over 400 divorced Americans were asked 17 questions regarding their divorce process, and how they felt about their divorce experience and key indicators of divorce success.[1] They were also asked about their experience in building their financial settlement and whether using a divorce financial expert would have been helpful to them.

Some of the survey results are:

- More people chose pro se "do it yourself" divorces over mediation as an alternative to litigation.
- People that used mediation alone were only slightly more satisfied with their financial settlements than those choosing litigation.
- Those using a litigated divorce process reported the most damage to spousal relationships, but mediation comes in a close second.
- Nearly 40% felt at least somewhat unprepared to enter financial negotiations
- Most felt the cost of their divorce was reasonable.Those going the do it yourself route were the most satisfied, while those opting out of mediation in favor of litigation were the least satisfied.
- 75% felt a financial coach would be helpful in preparing for negotiations, assisting in the development of their settlement, and in reorganizing their financial life after divorce was complete.

Pro Se Divorce is Gaining Ground

Pro se divorce appears to be gaining in popularity vs. mediation or traditional litigation. Fully one third of respondents (32.9%) divorcing in the last 5 years chose to go it alone vs. 28% choosing mediation. Only 19% chose litigation, which had been the dominant choice (40%) of respondents divorced over 15 years.

It should be noted that 29% said they used a "combination of mediation and litigation" which could suggest a significant number of mediations which were started but did not result in completed agreements.

Mixed Results on Mediation's Affect on Spousal Relationships

Respondents were asked "How did the process of getting divorced affect your relationship with your spouse? Of those who litigated, 43% said it either "somewhat" or "greatly" worsened as compared to 24% of mediation only clients.

Of those using a combination of mediation and litigation 46% reported worsened relationships.

Dissatisfaction with Financial Settlements

Respondents were asked "How well do you feel your divorce settlement met your financial needs". Those that used a combination of mediation and litigation were least satisfied with 41% saying they were somewhat or very dissatisfied.

It should be noted that 24% of "successful" mediation clients were also somewhat or very dissatisfied with their financial settlements. 30% of litigating respondents were dissatisfied, while only 11% of those choosing the pro se approach were dissatisfied.

Many People Feel Unprepared to Enter Financial Negotiations

A full 40% of people who mediated said they were either "completely" (24%) or somewhat (16%) unprepared to enter financial negotiations. Those litigating were the most unprepared (45%) followed by mediation/litigation (42%). Pro se divorcing couples fared best with "only" 31% feeling somewhat or completely unprepared.

Divorcing Couples Want Financial Guidance

Regardless of the approach couple's chose to get divorced, most would have found it helpful to have had a financial expert help them throughout the divorce process.

For mediation clients 68% would have found it "extremely" or "very" helpful to have a divorce financial specialist help them understand their finances in advance of negotiations. Similarly 55% of those choosing litigation would have found it extremely or very helpful to have financial help.

Continued on next page

Most people looked to their attorney as their primary source for advice in making financial decisions in mediated (40%) and litigated divorces (57%). The second most popular source for advice was "no one" with 36% choosing to go it alone. 70% of those doing it themselves with a pro se divorce process used no advisor.

Potential Conclusions, More Questions

This survey supports the idea that, relative to litigation, successful mediations help support positive spousal relationships, and potentially better settlements.

However, nearly half of mediating clients were dissatisfied with the amount of financial guidance they received throughout the divorce process, and they were only slightly more satisfied with their financial settlements than those who litigated. And one cannot overlook the data suggesting many couples bail out of mediation and choose litigation, which results in the most perceived damage to relationships, and the least satisfactory settlements.

The questions that are raised are numerous, among them:

- How can the mediation process be adjusted to help prepare divorcing couples feel more prepared for financial negotiations?
- How can mediation become a more attractive alternative to the pro se divorce?
- How do we keep couples from leaving the mediation process and opting into litigation?

I leave it to the many professionals who are committed to helping couples through the divorce process to discuss and debate the meaning of these results, and what might be done, if anything, to create a better divorce experience for their clients.

J. Anthony Licciardello is the President of Wentworth Divorce Financial Advisers LLC of Providence Rhode Island, a fee only financial planning firm. He welcomes questions and comments from readers, and can be reached at (401) 519-3780 or via email at wentworthplanning@gmail.com.

(Endnotes)

1 Survey conducted through Survata, Inc. Questions were developed by Wentworth Divorce Financial Advisors LLC, and refined with assistance from Survata survey analysts. All 401 respondents were US residents with incomes in excess of $50,000. 59% were female, 41% were male. 84% were between the ages of 35 and 64 years of age. Respondents were balanced by geographic region. In depth analysis of results was conducted using Statwing®. Only statistically significant results are described in this article.

RE: DRAFTING AGREEMENTS AS AN ATTORNEY-MEDIATOR: REVISITING WSBA ADVISORY OPTINION 2223

An Email Exchange, With Benefits

TO: John Fiske
FROM: Chris Kane

You can find the UW Law School Review Note by pasting in:

https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1399/89WLR1035.pdf?sequence=1

TO: Chris Kane ckane@kanelaw.net
FROM: John Fiske

Dear Chris:

Thank you for sending me this excellent and comprehensive review of various ethical opinions on an issue of great concern to all family mediators. I'm sending a copy of this email to Steve Abel, Ken Neumann and Don Saposnek, all in the center of spreading the word about such research and writings. I'm not sure who else was on your distribution list, so I include them as a way of reaching the entire membership of the Academy of Professional Family Mediators. I also send this email to Fran Wyman, the president of our Massachusetts Council on Family Mediation and Kate Fanger, editor of our excellent Family Mediation Quarterly, to spread the word among our 250 plus members.

I have not thoroughly studied this review, maybe reading it for half an hour. Its citation of Massachusetts Bar Association 1985 ethical opinion is accurate. I did not see a mention of our Supreme Judical Court decision in re Bott, 462 Mass 430 (2012), allowing a disbarred lawyer to become a divorce mediator as long as he does not hold himself out as a lawyer in any way since "mediation is not the practice of law." Nor is there mention of the ethical opinion of the Boston Bar Association in 1978 which I believe to be the first bar association in the United States to address the question. Boston Bar Journal June 1979 p. 14. It concludes among other things, "...it is our opinion that an attorney may act as a mediator in connection with the divorce and preparation of a separation agreement between husband and wife and in that connection may prepare either a separation agreement or the draft of a separation agreement." I have based my thriving divorce mediation practice for 35 years and divorce mediation training for 25 years on this opinion, which I carry in my briefcase everywhere.

I tried to find Caitlin Park Shin on google without success, and if you know how to reach her I hope you will forward this email to her also. She has done family mediation a service by compiling a lot of relevant material bearing on this apparently unending question. Maybe some day we will all have a decisive answer to the question and in the meantime we will continue to have fun being mediators and debating all sides.

Cheers, John

VIDEO AND THE MEDIATION STAR

Justin L. Kelsey, Rackham Karlsson
Jonathan R. Eaton and Dave Mitchell

In this regular column, we examine various ways that technology can improve the practice of mediation, in a manner that we hope you will find "user-friendly." In this issue, we review the use of video conferencing in mediation.

It is our hope that this regular column will be an effective resource for improving your practice. To that end, you are encouraged to contact any of the contributors with questions or suggestions for articles. Our contact information can be found at the end of this column.

Video Conferencing in Mediation

In family mediation, the connections we make with clients are imperative to helping them communicate and negotiate better for themselves. They need to feel comfortable enough and empowered enough to discuss difficult and often painful subjects. Body language, tone of voice, facial expressions, and the things we don't say in a mediation can have as much effect as the actual words we use. There is no substitute for in-person communication. But that is not always an option.

For Better or Worse

We live in an increasingly mobile society, with individuals who may be unable to participate in-person at every meeting because of geographic, work, scheduling, or other limitations. If we want mediation to be an option for every potential client, we need to accept those limitations and be able to explain to clients best practices while also being prepared for practical realities. Businesses and individuals are using video conferencing at an ever-increasing rate, ranging from technologies as simple as Apple's FaceTime to the futuristic Video Conferencing Rooms created by Cisco and other technology companies.

While these technologies cannot fully replicate the benefits of in-person meetings, they are increasingly better than a telephone conference call. The ability to see at least some of a person's facial expressions and body language adds considerably to the conversation, and helps people engage more than when they are on the telephone. Another virtue of video conferencing is that it avoids power dynamics when one client is present and the other is on the phone; in such situations, the in-person client is able to communicate nonverbally to the mediator — perhaps, for example, through the suggestive eyeroll — without the knowledge of the client on the telephone. Finally, the visual component increases the mediator's ability to gauge when someone is not paying attention or disconnected.

For all these reasons, if your fallback technology for clients who can't attend an in-person meeting is to use the phone, you are failing to offer your clients the best possible service in

that scenario and could potentially be introducing a power imbalance.

It's Easier than You Think

The hardware necessary for a video conference includes: webcam, microphone, speakers or headset, internet connection, and computer. Almost all modern desktops, laptops, tablets, and smartphones have all of these features built-in. Some of the most common software available for video conferencing on desktop and laptop computers is now built into many smartphones and tablets. For example, FaceTime allows video conferencing between two Apple products, while Google Hangouts does the same for any devices on which it is installed. Free versions of other apps are available through a device's app store and also provide unlimited domestic calling to other people who are using the same application (e.g., Skype).

Tutorials for any of these options can be found by a quick web search and they are specifically built to be user-friendly. Even so, you may want to practice using them with friends and family or as an option for committee meetings to get comfortable with the platforms prior to using them with a client. All that is required, though, is familiarity: if you can use e-mail or make a phone call from a smartphone, then you can videoconference.

Choice of Software

Taking some time to practice using video conferencing software with your friends and family will help you become familiar with some of the pitfalls of the technology and decide which of the available software options you prefer using. While ultimately you may have to adapt to your clients, they may be open to multiple options, if you have a preference and a good explanation for your preference.

In addition, each of these options has different features, and those may affect whether a technology will even work for your purpose. For instance, FaceTime doesn't allow group calls at this time, meaning video conferencing with people in more than two locations is not possible.

This market is also quickly evolving and services are constantly adding new features. For example, the free version of Skype didn't previously include group calls, but that feature was recently added (though group calls still cannot be initiated from their mobile app as of the time this article was written). To find what options are currently available, conduct a web search for "video conferencing" and review the features of the different options yourself.

Etiquette

We're used to having visual privacy when on the phone and because the person on the other end of the video call is not in the same room, we can sometimes fall into habits we're used to on the phone. It's important to remember that the video format is very different. How you dress matters, the backdrop and lighting of the room you're in matters, and your body

Continued on next page

language matters. Luckily, you can get a sense of how you look and whether your microphone is working by using the test call button that most of these applications provide. Most video conferencing software also includes a small window that shows how you appear to the other participants during the call.

You should treat a video call with the same formality that you would if that person were sitting in front of you, and sometimes that can take some practice and getting used to. Once you've mastered acting professional on camera, it will help you and the video conferencing format be less of a distraction to your clients, who may also make some of these mistakes themselves.

Secure Options

While both Google Hangouts and FaceTime claim to use encryption for their video and audio file transfers, they are only referring to the message being encrypted in transit, which is true of almost all messaging services (including SSL-encrypted e-mail). However, in-transit is not the only area where security is an issue. Who has access to the encryption key, even while in transit, is a concern as well.

According to the Electronic Freedom Foundation (a non-profit committed to online freedoms and privacy), FaceTime communications are more secure in transmission than Skype and Google Hangouts, which fail to protect the transmissions from the provider, meaning that employees of those companies can access any transmissions sent over their networks, and presumably so could government agencies through these employees. While this is probably not a concern for non-profit committee meetings, it may be a concern for your clients and something you should discuss with them before using video conferencing.

For a more secure option, Crystal Thorpe of Elder Decisions® recommends software called Zoom, available at www.Zoom.us. "Zoom is encrypted, and very easy to use," Thorpe reports. "We've used it at Elder Decisions® in mediations with siblings settling estates, and it enables families to have secure, private conversations. Meeting participants are also able to screen-share, so as a mediator, I can share drafts of agreements and next-steps with parties for immediate feedback as the documents are being created. The encryption is what sold me on the software, but it also has many other features that make it well-suited for mediation."

Zoom has a security white-paper on their website that describes their security features, and while we are not endorsing any particular software in this article, you will want to review carefully the features of any software you choose to employ.

In most instances, video conferencing is no less secure than a phone line, but requires thinking about security in a different way. Some potential areas of security breakdown to consider are: failure to use strong passwords; failure to speak in a private and secure location during the call; failure to use a network connection with a firewall; and failure

to keep software updated. Passing on these simple tips to clients will probably solve most, if not all, potential security concerns with using these technologies.

Do you have another suggestion, or thoughts on the options discussed here?

Let us know!

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"Marriage is two people trying to solve together problems they wouldn't have had alone."

Anonymous

MASSACHUSETTS FAMILY LAW: A PERIODIC REVIEW

By Jonathan E. Fields

Retirement Age and Cohabitation Provisions Not Apply to Pre-ARA Judgments A trio of SJC cases about the Alimony Reform Act (ARA) addressed alimony modification and, in so doing, made a distinction between judgments entered before March 1, 2012 (pre-ARA) and those decided after March 1, 2012 (post-ARA).

Specifically, the ex-husbands (whose judgments were all pre-ARA) sought an end to their alimony because of the ARA's provision regarding termination of payments upon the attainment of social security retirement age. One of the ex-husbands also argued for a prospective application of the cohabitation provisions in the ARA.

All of the ex-husbands lost. As a result of these cases, pre-ARA payors with merged alimony judgments do not have the benefit of the new termination and modification rights set forth in the ARA, with two exceptions: the presumptive general term alimony durational limits for marriages under 20 years and the cohabitation provisions.

A recap of the law of alimony modification may be useful in order to contextualize the changing landscape. First, *merged* alimony orders are modifiable if there has been a material change in circumstances pursuant to G.L. c.208 s.37. That was the law pre-ARA and the ARA did not change that. Second, the ARA provides that the duration of old orders can be modified based solely on the *durational limits* in the new Act, even if there hasn't been a change in circumstances. Third, the *amount* of the alimony order cannot be modified under the ARA if there have been no material and significant changes since the order. Fourth, modifications of *survived* alimony provisions are still subject to the almost-impossible-to-meet "countervailing equities" standard that has been in effect for over 35 years.

Finally, interested readers should check out Bill and Chouteau Levine's blog posts on the recent cases. From the punchy titles, like "No Country for Old Men," (which, as a Coen Brothers fan, I love,) to the thoughtful and provocative analysis, I think readers will be both entertained and engaged. See generally www.levinedisputeresolution.com. Another terrific resource that you may want to print out for clients is the colorful graphical flow chart about alimony modification that Justin Kelsey created. I refer to it constantly. See generally www.skylarklaw.com.

Chin v. Merriot, 470 Mass. 527; *Rodman v. Rodman*, 470 Mass. 539; *Doktor v. Doktor*, 470 Mass. 547 (all decided January 30, 2015)

Court Cannot Compel Parties to Mediate. The Appeals Court vacated

a Probate and Family Court decision that included a provision requiring that the parties enter into mandatory paid mediation before either of them could file another action in the matter. The appellate court characterized this requirement as "an unconstitutional burden to the parties because it delays an objecting party's right to file a complaint in our courts and also because it forces the parties to bear a likely costly expense for court ordered mediation services." Of course, this decision (correctly decided, in my view) is a limit on what a *judge* can order parties to do *after* a hearing. Mediators should remember, however, that the parties are still free to bind themselves to mediation clauses in their agreements. *Ventrice v. Ventrice*, 87 Mass.App.Ct. 190 (March 19, 2015)

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"If you spend your time hoping someone will suffer the consequences for what they did to your heart, then you're allowing them to hurt you a second time in your mind."

Shannon L. Alder

WHAT'S NEWS?
NATIONAL & INTERNATIONAL FAMILY NEWS

Chronologically Compiled & Edited by Les Wallerstein

Spanish High Court Takes Paternity Suit Against Ex-King The Spanish Supreme Court agreed to examine a paternity suit against King Juan Carlos, filed by a Belgian woman who claims he had an affair with her mother. After Juan Carlos abdicated in favor of his son, he lost his full immunity from prosecution. The plaintiff asserts that her mother became pregnant while having an affair with Juan Carlos in the 1960s, before the end of the Franco dictatorship and the return of the Spanish monarchy in late 1975. The plaintiff is expected to demand that Juan Carlos take a DNA test. (Raphael Minder, NY Times, 1/14/2015)

Supreme Court to Decide Marriage Rights for Same-Sex Couples Nationwide The US Supreme Court has agreed to decide whether all 50 states must allow gay and lesbian couples to marry, positioning it to resolve one of the great civil rights questions in a generation before its current term ends in June. The four cases to be decided were brought by 15 same-sex couples, and consolidated to address the following two questions: 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state? The number of states allowing same-sex marriage has since grown to 36, and more than 70 percent of Americans live in places where gay couples can marry. (Adam Liptak, NY Times, 1/16/2015)

Chile Approves Civil Unions for Same-Sex and Heterosexual Couples After nearly four years of legislative wrangling, legislators in socially conservative Chile approved civil unions for same-sex and unmarried heterosexual couples. The bill will give many of the legal rights afforded to married couples to an estimated two million Chileans. Most of those expected to benefit from the civil unions are heterosexual couples, though the move is also seen as a big step forward for gay rights. (NY Times, Reuters, 1/29/2015)

US Marriage Statistics The percentage of married households in the United States has fallen to a historic low. Census data cited in a 2014 study by the Pew Research Center show that the number of married households fell to 50.5 percent in 2012 from a high of about 72 percent in 1960. Among the less well educated, the number of married households has fallen even more. A 2011 study by Pew found that although 64 percent of college-educated Americans were married, fewer than 48 percent of those with some college or less were

married. In 1960, the report found, the two groups were about equally likely to be married. The divorce rate has helped reduce the number of married households in the United States. At the same time, others have postponed marriage or never married. And census data show that the number of cohabiting couples has shot up to 7.5 million in 2011 from 450,000 in 1960. Yet, the desire to marry remains strong. In a 2013 Gallup Poll, only 5 percent of Americans reported that they did not want to marry. (Andrew L. Yarrow, NY Times, 2/8/2015)

Adultery No Longer a Crime in South Korea The Constitutional Court struck down a 62-year-old law that made adultery an offense punishable by up to two years in prison, citing South Korea's changing sexual mores and a growing emphasis on individual rights. An estimated 53,000 South Koreans have been indicted under the law since the authorities began keeping count in 1985, but in recent years, it has been increasingly rare for defendants to go to prison. The adultery law was adopted in 1953, with the stated purpose of protecting women who had little recourse against cheating husbands in a male-dominated society. (Choe Sang-Hun, NY Times, 2/26/2015)

U.S. Push for Abstinence and Fidelity Fails Against AIDS in Africa The $1.3 billion that the United States government has spent since 2005 encouraging Africans to avoid AIDS by practicing abstinence and faithfulness did not measurably change sexual behavior and was largely wasted, according to a study presented at an AIDS conference sponsored by Stanford Medical School. The cost-benefit analyses examined records showing the age of people having sex for the first time, teenage pregnancy, and the number of sexual partners in international health surveys that have been paid for by the U.S. State Department since the 1970s. President George W. Bush's global AIDS plan was enacted in 2003 and marshaled billions of dollars to treat Africans who had AIDS with lifesaving drugs. Conservative Republican leaders in the House of Representatives successfully included a provision that one-third of AIDS prevention money go to programs to encourage abstinence and fidelity. That campaign — known as ABC, for abstain, be faithful and use condoms — was part of the bargain made when Christian conservatives joined with liberals to pass the law. (Donald G. Mcneil Jr., NY Times, 2/27/2015)

Alabama Halts Same-Sex Marriages The curtain abruptly fell on Alabama's brief experiment in same-sex marriage. Across the state, all 48 county probate offices that had been issuing marriage licenses to same-sex couples decided they could no longer do so. The Alabama Supreme Court issued a ruling ordering the probate judges to comply with an existing state ban on same-sex marriage — even though the ban had been ruled unconstitutional by a Federal District Court judge. The ruling pushed this conservative state into

Continued on next page

confusing and largely uncharted legal territory, raising complex questions of state and judicial authority. (Alan Blinder, Richard Fausset & Campbell Robertson, NY Times, 3/5/2015)

Largest Presbyterian Denomination Gives Final Approval for Same-Sex Marriage After three decades of debate over its stance on homosexuality, members of the Presbyterian Church (U.S.A.) voted on Tuesday to change the definition of marriage in the church's constitution to include same-sex marriage. The final approval by a majority of the church's 171 regional bodies, known as presbyteries, enshrines a change recommended last year by the church's General Assembly. The vote amends the church's constitution to broaden marriage from being between "a man and a woman" to "two people, traditionally a man and a woman." The church, with about 1.8 million members, is the largest of the nation's Presbyterian denominations. Ministers who object will not be required to perform a same-sex marriage. Other religious denominations that have officially decided to permit their clergy to perform same-sex marriages include the Episcopal Church, the United Church of Christ, the Quakers, the Unitarian Universalist Association of Churches and, in Judaism, the Reform and Conservative movements. The Evangelical Lutheran Church in America left it open for individual ministers to decide. (Laurie Goodstein, NY Times, 3/17/2015)

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

"Having children is like living in a frat house – nobody sleeps, everything's broken and there's a lot of throwing up."

Ray Romano

LETTERS TO EX-SPOUSES:... AND I JUST WANTED YOU TO KNOW

Dear Colleagues:

I write to invite your assistance to participate in a unique educational opportunity. I am writing a book that will be a collection of actual letters to ex-spouses. These are not necessarily copies of letters that were ever sent to an ex-spouse, but are more likely to be letters divorced individuals would be writing now - for the first time, expressing to their former spouses what they just wanted them to know as they reflect back upon their marriage, divorce - and all that has followed.

My hope is that engaging in the actual introspection and writing of these anonymous letters will not only prove cathartic to the letter-writer, but will serve as a tremendous contribution to the professions of psychology, law, theology and medicine as judges, therapists, family lawyers, and clergy have much to learn from the breadth of experiences of those who have gone through the process. Just as importantly, however, dozens of those who have completed the surveys/letters have followed-up to tell me how cathartic the mere act of writing has been – even 10, 15, 20 years after their divorces, even though they thought they had closure.

I have received advance, express permission to share this letter with you. By doing so, perhaps you will understand how impactful this book promises to be.

Thank you for your efforts in helping to make this book a reality. Here is the link for the survey (and to write the letter). The survey takes about 2-5 minutes; the time it takes to write the actual letter varies, depending upon the individual; the resulting impact is immeasurable. www.surveymonkey.com/s/XC89FQ9

Kind regards, Vicki

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, CFP®, CDFA™, Thomas E. Seder, CDFA™ and group members.

Morning Meetings are usually from 10:00 am to 12:00 pm at the offices of Insight Financial Strategists, 271 Waverly Oaks Road, Suite 2, Waltham. Seating is limited. **Please contact Chris at 781-489-3014,chris.chen@insightfinancialstrategists.com or Tom at 781-489-3014, to m.seder@insightfinancialstrategists.com for more information.**

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: **[10 brochures – $10, 100 brochures – $50. Postage included.]**, 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.**

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!

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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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.

* *

Building a Profitable and Satisfying Peacemaking Practice

A nuts and bolts, "how to" workshop led by Woody Mosten and David Hoffman

June 19-20, 2015, Union Club of Boston, Boston, MA

- Join two leaders in the field of mediation and peacemaking and learn:
- Ideas and resources to help you make the transition to satisfying and income-generating peacemaking work
- Important issues to consider before establishing a neutral and/or collaborative practice
- Proven models and methods of practice that Hoffman and Mosten have developed over a combined 60 years in mediation

Participants from all professional backgrounds welcome.

Forrest (Woody) Mosten is in solo private practice as a Family Lawyer and Mediator in Los Angeles. Learn more about Woody at www.mostenmediation.com

David Hoffman is the founding member of Boston Law Collaborative, LLC Learn more about David at www.bostonlawcollaborative.com.

Registration: $550 (*Register by May 19th for the early bird discount rate: $450*)

To Register: Fill out the registration form (2nd page) at http://bit.ly/1DhLowZ and email to Audrey (email below) or fax to 617.439.0700

Questions? Contact Audrey Lee, BLC Senior Mediator and Training Director: alee@BostonLawCollaborative.com or 617.439.4700 x214

DIVORCE IN MASSACHUSETTS: Alternatives to Litigation Some 23,000 Massachusetts couples divorce every year. Before 1975, all divorces were adversarial. Today, uncontested divorces are increasingly common, and many spouses represent themselves in court without lawyers. Separation agreements can be used to resolve contested and uncontested divorces...and there is now a "generic" joint petition, which allows ex-spouses to modify their judgments by agreement after a divorce. Come explore mediation, collaborative law and other alternatives to litigation. Bring your questions. Extensive written materials provided.

CAMBRIDGE CENTER FOR ADULT EDUCATION
Saturday, July 25, 2015 • From 9:30 - 11:30 AM
Cost: $45 / Limited to 8
Presenter: Les Wallerstein
Online Registration: http://www.ccae.org
Phone Registration: 617-547-6789

Elder Decisions® - Elder (Adult Family) Mediation Training

July 21-23, 2015 or
November 13-15, 2015
Newton, MA

This training provides mediators with tools and strategies for successfully mediating adult family conversations around issues such as living arrangements, caregiving, driving, family communication, medical decisions, Powers of Attorney / Health Care Proxies / Guardianship / Conservatorship, financial planning, estate planning, will contests, family real estate, and personal property distribution.

Join trainers Arline Kardasis and Crystal Thorpe, with guest experts from the fields of elder law and gerontology, for three days packed with content, skill-building, role plays, and opportunities to interact with fellow participants (who often travel from around the world to attend).

Cost: $795 early rate by June 11 & October 2, respectively; $895 thereafter.
Includes lunches, snacks, and course materials.

Held at The Walker Center in Newton, MA.
Presented by Elder Decisions®, a division of Agreement Resources, LLC.

For more info, visit: www.elderdecisions.com/pg19.cfm,
email training@ElderDecisions.com,
or call: 617-621-7009 x29.

Social Work Continuing Education Credits: *This program has been approved for Continuing Education Credits for relicensure in the period of October 1, 2014 - September 30, 2016, in accordance with 258 CMR, as follows: 21.25 hours for all 3 days. Boston University School of Social Work Authorization Number B-16-067.*

This training is approved under Part 146 by the New York State Unified Court System's Office of ADR Programs for 16 hours of Additional Mediation Training. Please note that final placement on any court roster is at the discretion of the local Administrative Judge and participation in a course that is either approved or pending approval does not guarantee placement on a local court roster.

Please contact us with questions regarding Continuing Legal Education credits for specific states.

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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EDITOR'S NOTICE

MCFM
Family Mediation Quarterly

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

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

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

The FMQ is mailed and emailed to all MCFM members. The FMQ is mailed to all Probate & Family Court Judges, all local Dispute Resolution Coordinators, all Family Service Officers and all law school libraries in Massachusetts. An archive of all previous editions of the FMQ are available online in PDF at <www.mcfm.org>, accompanied by a cumulative index of articles to facilitate data retrieval.

MCFM members may submit notices of mediation-related events for free publication. Complimentary publication of notices from mediation-related organizations is available on a reciprocal basis. Commercial advertising is also available.

Please submit all contributions for the FMQ to the editor, either by email or computer disk. Submissions may be edited for clarity and length, and must scrupulously safeguard client confidentiality. The following deadlines for all submissions will be observed:

Summer: July 15th Fall: October 15th
Winter: January 15th Spring: April 15th

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

Massachusetts Council on Family Mediation

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