MCFM

Family Mediation Quarterly

Vol. 14 No. 4 Fall 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:

At MCFM's October 14th professional development members' meeting, past MCFM president Janet Wiseman described for participants the seven-step technique she uses in her mediations to help couples resolve difficult issues related to their relationships, marriage and divorce. In her new book, *Seven Visual Steps to Yes: Difficult Decisions, Mediations and Negotiations Made Easier,* Wiseman uses cases from her mediation practice to illustrate the way she guides couples through these 7 steps to "a mutually agreeable resolution." After her clients have clearly identified the issues for decision-making and articulated their individual needs and interests, she assists them to generate options and create proposals and "supposals" (which she defines as softer and gentler than a proposal). While many mediators utilize these same techniques in their mediations, Wiseman adds another dimension to them by asking her clients to numerically rate (not just prioritize) what they have described as important to them.

Wiseman has her clients rate their needs, interests and proposals by using a scale from 0 to 5, with 0 being of no importance and 5 being of the utmost importance. This concept is analogous to the technique physicians often use in diagnosing and treating a patient with pain. When a patient reports to a physician that he is having pain, the physician often asks the patient, "On a scale of zero to ten, with zero representing no pain and ten representing severe pain, how would you rate your pain?" With the patient's numerical assessment the physician is better able to generate a diagnosis and treatment plan. Wiseman illustrates through her cases the usefulness of a numerical rating system in helping clients realize "what really really matters" to them and in visualizing how far apart they are in their interests. By rating her need for freedom as a 5, one of Wiseman's clients was better able to help her husband see how far apart his desire to keep the marriage intact was from her own needs. With a more concrete visual image of the difference in their needs, husband was able to reset his expectation for what would be necessary to reach resolution. These results remind us of the effectiveness of using visuals in the decision-making process. A visual is difficult to ignore; it lingers as a reminder to the viewer of what was important long after the spoken word may have been forgotten, misinterpreted or dismissed.

As I write this page, MCFM is in the process of rolling out its new website, thanks in no small part to the work of Board Member Justin Kelsey. The launching of the new site was just in time to receive member registrations for the annual MCFM Institute on November 20th. The Institute provided a full day of professional development and the chance to catch up with colleagues and friends and make new connections. I enjoyed seeing many of you there.

My best to all
– Fran

CONTENTS

COPYRIGHT NOTICE

MCFM GRANTS PERMISSION TO REPRODUCE AND DISSEMINATE ARTICLES & GRAPHICS PROVIDED THAT MCFM AND THE AUTHORS ARE CREDITED, EACH AUTHOR CONSENTS AND DISTRIBUTION IS NOT-FOR-PROFIT.
MCFM © 2015

KEEP THE CONFLICT SMALL

By Bill Eddy, LCSW, Esq.

Whether you're having an argument with a family member, friend or co-worker, it's easy nowadays to make little conflicts way too big. All around us are repeated images of people arguing and losing control of their emotions – in emails, on the Internet, in movies and on TV – especially in the news (do you know what so-and-so said about you-know-who?) Not only is this unnecessary, but allowing conflicts to get large can be harmful to important relationships, increase the anxiety of those around us (especially children) and lower one's status in other people's eyes.

For example, in a recent article in *Parade Magazine* about the steps to becoming a successful entrepreneur, the author-expert Linda Rottenberg wrote: "*The most important step is to manage your emotions.*" ("An Entrepreneur Should Never Be a Daredevil," November 2, 2014.) In a recently-reported study about children's brain development, child psychiatrist and researcher Jeffrey Rowe said the first five years of life are critically important to forming proper brain connections."*If you can't control yourself, can't control your emotions, you can't pay attention to the outside world.*" (B.J. Fikes, "Money, brain size linked," *U-T San Diego*, March 31, 2015)

This article has some suggestions for keeping conflicts small by managing our emotions. Managed emotions are a big part of our skills-training methods, New Ways for Families and New Ways for Work, and may be more important in today's world than ever before.

Try to Avoid This

- A Family Feud:

  An argument in a couple: "*You always leave your socks on the floor.*" (That's a little conflict.) "*You're such a slob*." (Now it's a judgment about the whole person.) "*You men, you're all alike – irresponsible and self-centered!*" (Now it's about a whole gender.) If another family member came into this argument at this point, he or she would probably take gender sides and the conflict could easily get much bigger.

- A Workplace Conflict:

  Some people clean up after themselves in the lunchroom and others don't. Joe is a cleaner-upper. "*Look at this banana peel and sandwich bag, just left behind*." (A problem to solve.) "*Why do I always have to clean up for everyone else!*" (Now it's about being a victim of everyone.) "*Maybe I should go someplace to work where I'm appreciated!*" (Now it's about quitting – ending the relationship.)

- A Divorce Dispute:

  Parents have to discuss a change of schedule:"*I've got an opportunity*

for this coming Wednesday night – can we switch so I see the kids Tuesday or Thursday?" (A common problem to solve.) "*I've told you a hundred times, I'm sticking to our Agreement, with no exceptions. 100%. The kids need absolute stability.*" (Now we're slipping into all-or-nothing thinking. Doubtful that it's been a hundred times. However, rare cases do require no changes, because of extreme manipulation or violence in the past.) "*In fact, I'm going to take you back to court to reduce your time with the kids, you f—ing jerk! You're the worst father/mother in the world.*" (Oops. Guess the children's stability isn't the issue after all.)

Try This Instead

In all of the above examples, the speaker quickly went from a simple problem to solve into *all-or-nothing thinking* and *intense emotions*. We refer to these emotions as *unmanaged emotions*, because they don't get the person what the person really wants: respect, peace and quiet, a happy relationship, or whatever they were looking for. Now they have a bigger problem to solve and probably feel helpless or victimized, and distracted. Remember what the brain researcher said above: You can't pay attention to the outside world when you're busy reacting. So how can you manage your emotions in situations like this?

Regularly remind yourself to keep the conflict small.

Ask yourself:

"Is this really a big deal?"

"Can this problem be solved by making a proposal?"

"What is the smallest issue here? Let's start by solving that."

"What are my choices here? I always have choices."

Regularly give yourself encouraging statements. This will help you feel less defensive and less likely to overreact to other people's behavior or emotions:

"It's not about me!"

"I'm doing fine! I don't have to prove anything here."

"I can take a break!"

"I can handle this. No reason to lose control."

Emotions Are Contagious

This all might seem very easy to do while you're reading this. But actually it's harder to do when other people aren't managing their emotions, because emotions are contagious. There seems to be at least two reasons for this impact on our brains.

Amygdala responses: We have two amygdalae in our brains; one in the middle of each hemisphere. The right amygdala quickly reacts to other people's facial expressions of fear and anger, and instantly starts a fight, flight or freeze response. Apparently the left

Continued on next page

amygdala responds more to threats in writing. You can see the protective response happening when someone else overreacts – it's usually sudden and extreme, and sometimes shocking in an office or in a meeting. But our prefrontal cortex (right behind your forehead) can override the amygdala and say: *Relax, it's not a crisis.* And the amygdala quiets down. This comes with practice – lots of practice telling yourself what's not a crisis. This is a lot of what adolescence is about: figuring out what are real dangers that need fast all-or-nothing action and what are just problems to solve rationally.

Mirror neurons: Apparently we have neurons in our brains that fire when we do something AND when we just watch someone else doing something. Is seems that it's a shortcut to learning – our brains are constantly getting us ready to do what others are doing. It may be a part of our group survival skills that we're born with. Better to quickly run or fight or hide when others are doing so, rather than risk getting isolated and not surviving. But these responses can also be overridden – once you know about this. (So now you know about this.) But it also takes practice.

With this knowledge, you can be more specific with yourself when reminding yourself to keep the conflict small:

"I don't have to mirror other people's emotions."

"I'm just having an amygdala response. But it's not a crisis, so I can relax."

"I have a choice: to react or focus on problem-solving. This is just a problem to solve."

Get Support and Consultation

Another way to keep the conflict small is to talk to other people and get encouragement for yourself. This way you'll feel less defensive and less anxious. Also, get their consultation suggestions for how to deal with a conflict and help keep it small. Ask: "*Do you think this is a crisis? What do you see as my choices? What do you suggest?*" Just talking to someone else can make a big difference.

You also may be facing a new problem you've never faced before. Don't feel like you have to deal with it alone and don't feel ashamed of yourself for being in your situation. Today, the types of problems most of us face have come up for thousands or millions of other people. Family issues, workplace conflicts, divorce disputes are extremely common. Yet it's easy to see these problems as huge and overwhelming, and become isolated and feel helpless. Remind yourself: "*It's just a problem to solve. I can get consultation and suggestions from someone else. I don't have to deal with this alone.*"

Tune Out Extreme Media

Much of today's media repeatedly shows dramatic images of people losing control over ordinary problems: from sitcoms to movies to the evening news. They compete to grab your attention with more and more extreme behavior, to get viewers and "market

share" in the highly competitive world of modern media. But remember mirror neurons. We are absorbing this extreme loss-of-control behavior we observe, even when we aren't thinking about it. Use your prefrontal cortex and remind yourself: These aren't crises; they're entertainment designed to grab my amygdala and mirror neurons. I can tune this out. It's up to me what I think and feel.

Conclusion

Modern life has made us more aware of problems around the world, and exposes us constantly to other people's overreactions to problems. However, we can keep the conflict small, by what we tell ourselves and by understanding that we have control over our emotions to a great extent – especially if we practice encouraging statements and getting support. We're not alone with these problems – at home or at work. We can handle them and get help when we need it. We can "Keep the conflict small!"

Bill Eddy is a mediator, lawyer, therapist and the President of the High Conflict Institute based in San Diego. High Conflict Institute provides consultation for high-conflict situations, coaching for BIFF Responses (written responses that are Brief, Informative, Friendly and Firm), and training for professionals in managing high conflict disputes in legal, workplace, healthcare and educational settings. He is also co-author with L. Georgi DiStefano, LCSW, of the Axiom Award-Winning book: It's All Your Fault at Work! Managing Narcissists and Other High-Conflict People. For books, videos for anyone, free articles or to schedule a training: www.HighConflictInstitute.com.

THE LARGER SELF

By Richard Schwartz, Ph.D.

Editor's note: What follow is the first in a series of articles about Internal Family Systems (IFS) which will appear in the FMQ over the next several issues. A number of mediators in our community believe, as I do, that IFS concepts and tools can have great utility in family mediation work. My goal here is to share some general ideas of IFS, not to provide the detailed information that can be found elsewhere, or to train anyone in it. This first article is a much-abbreviated form of the same title that appears at www.selfleadership.org, the IFS website. The full article, and much more information, can be found there. –KF

Internal Family Systems:

Dr. Richard Schwartz developed Internal Family Systems in response to clients' descriptions of experiencing various parts–many extreme–within themselves. He noticed that when these parts felt safe and had their concerns addressed, they were less disruptive and would accede to the wise leadership of what Dr. Schwartz came to call the "Self." In developing IFS, he recognized that, as in systemic family theory, parts take on characteristic roles that help define the inner world of the client. The coordinating Self, which embodies qualities of confidence, openness, and compassion, acts as a center around which the various parts constellate. Because IFS locates the source of healing within the client, the therapist is freed to focus on guiding the client's access to his or her true Self and supporting the client in harnessing its wisdom. This approach makes IFS a non-pathologizing, hopeful framework within which to practice psychotherapy. It provides an alternative understanding of psychic functioning and healing that allows for innovative techniques in relieving clients' symptoms and suffering.

We all know about those luminous moments of clarity and balance, in our own lives and in those of our clients, which come briefly now and again. However we get there, we suddenly encounter a feeling of inner plenitude and open-heartedness to the world that wasn't there the moment before. The incessant nasty chatter inside our heads ceases, we have a sense of calm spaciousness, as if our minds and hearts and souls had expanded and brightened. Sometimes, these evanescent experiences come in a bright glow of peaceful certainty that everything in the universe is truly okay, and that includes us – you and me individually – in all our poor struggling, imperfect humanity. At other times, we may experience a wave of joyful connection with others that washes away irritation, distrust, and boredom. We feel that, for once, we truly are ourselves, our real selves, free of the inner cacophony that usually assaults us.

For much of my life, the closest I'd come to actually experiencing this kind of blissful oneness was on the basketball court. Over the years I'd become addicted to basketball because of the fleeting

moments when I entered into a state in which my inner critics disappeared and my body seemed to know just what to do. I had total confidence in my abilities and experienced a sense of joy and awe at being spontaneously in the moment.

When I became a family therapist, I longed to experience something similar in sessions with my clients. Instead my work seemed hard, frustrating, and draining. I believed that it was up to me to restructure families – to use the force of my personality to pry apart enmeshed relationships and open up blocked communication patterns. I thought I needed to change clients by pure force of intellect and will. I had to come up with reframes for their symptoms, solutions to their problems, and new perspectives on their dilemmas. And then I had to find a way to motivate them to do the homework I gave them, and to not feel totally frustrated when they didn't. All this responsibility for creating change, and doing it quickly, not only precluded any peak experiences in my work, it was burning me out.

Then in the early 1980's, I began noticing that several clients with eating disorders described extensive internal conversations with what they called different parts of themselves when I asked about what happened inside them to make them binge and purge. I was intrigued. I had one client, Diane, ask the pessimistic voice she was describing why it always told her she was hopeless. The voice responded that it said she was hopeless so that she wouldn't take any risks and get hurt; it was trying to protect her. This seemed like a promising interaction. If this pessimist really had benign intent, then Diane might be able to negotiate a different role for it. But Diane wasn't interested in negotiating. She was angry at this voice and kept telling it to just leave her alone. I asked her why she was so rude to the pessimist and she went on a long diatribe, describing how that voice had made every step she took in life a major hurdle.

It then occurred to me that I wasn't talking to Diane, but to another part of her that constantly fought with the pessimist. In an earlier conversation, Diane had told me about an ongoing war inside her between one voice that pushed her to achieve and the pessimist who told her it was hopeless. Could it be that the pushing part had jumped in while she was talking to the pessimist?

I asked Diane to focus on the voice that was so angry at the pessimist and ask it to stop interfering in her negotiations with the pessimist. To my amazement, it agreed to "step back," and Diane immediately shifted out of the anger she'd felt so strongly seconds before. When I asked Diane how she felt toward the pessimist now, it seemed like a different person answered. In a calm, caring voice, she said she was grateful to it for trying to protect her, and felt sorry that it had to work so hard. Her face and posture had also changed, reflecting the soft compassion in her voice. From that point on, negotiations with the inner pessimist were easy.

I tried this "step back" procedure with several other clients. Sometimes we had to ask two or three voices to not interfere before the client shifted into

Continued on next page

a state similar to Diane's, but we got there nonetheless. When they were in that calm, compassionate state, I'd ask these clients what voice or part was present. They each gave a variation of the following reply: "that's not a part like those other voices are. That's more of who I really am. That's my Self.

I've devoted the ensuing two decades refining methods for helping clients to release this state and to get in this state myself, for I've found that the most important variable in how quickly clients can access their Selves is the degree to which I'm Self-led. When I can be deeply present to my clients from the core of my being, free from anxiety about how I'm doing, or who's in control of the therapy, or whether the client is following the correct therapeutic agenda, clients respond as if the resonance of my Self were a tuning fork that awakens their own. It's this deep, true, and faithful presence of the therapist – without portfolio or baggage – that every client yearns to connect with.

How did I go from often dreading doing therapy, hoping clients would cancel, and feeling chronically depleted, to enjoying therapy as a spiritual practice filled with experiences of connection and awe-inspiring beauty? How did I come to be as refreshed after an intense therapy session as if I'd been meditating for an hour? How did doing therapy come to replace playing basketball as my greatest source of that flow feeling?

The short answer is that over the years, I've come to trust the healing power of what I'll call the Self in clients and in myself.When there's a critical mass of Self in a therapy office, healing just happens. When I'm able to embody a lot of Self, as was the case with Margie, clients can sense in my voice, eyes, movements, and overall presence that I care a great deal about them, know what I'm doing, won't be judging them, and love working with them. Consequently, their inner protectors relax, which releases more of their Self. They then begin to relate to themselves with far more curiosity, confidence, and compassion.

As clients embody more Self, their inner dialogues change spontaneously. They stop berating themselves and instead, get to know, rather than try to eliminate, the extreme inner voices or emotions that have plagued them. At those times they tell me, they feel "lighter," their minds feel somehow more "open" and "free." Even clients who've shown little insight into their problems are suddenly able to trace the trajectory of their own feelings and emotional histories with startling clarity and understanding.

What's particularly impressed me in those moments isn't only that my clients, once they've discovered the Self at the core of their being, show characteristics of insight, self-understanding and acceptance, stability and personal growth, but that even disturbed clients, who'd seem to be unlikely candidates for such shifts so often are able to experience the same qualities.

The more this happened, the more I felt confronted by what were in essence spiritual questions that simply couldn't be addressed in the terms of problem-solving, symptom-focused, results-orientated, clinical technique. It

turns out that the divine within – what the Christians call the soul or Christ Consciousness, Buddhists call Buddha Nature, the Hindus Atman, the Taoists Tao, the Sufis the Beloved, the Quakers the Inner Light – often doesn't take years of meditative practice to access because it exists in all of us, just below the surface of our extreme parts. Once they agree to separate from us, we suddenly have access to who we really are.

I have also found, however, that the most important variable in how quickly clients can access their Self is the degree to which I am fully present and Self-led. It's this presence that constitutes the healing element in psychotherapy regardless of the method or philosophy of the practitioner.

In this age of highly technical therapies, manualized methodologies, pharmaceutical propaganda, and, of course, the managed-care-generated atmosphere of therapy-lite, it's hard to remember the healing potential of your openhearted presence. And yet, patiently being with clients from the deepest core of ourselves is the most important resource we have to offer. I've learned that if I fully trust the power of my Self, I can also trust the power of my client's Self. If I can show up with confidence, and compassion, and curiosity, my client, eventually, will show up, too, and we can spend much of our time together with a river of energy flowing between us. When that happens, we both heal.

Richard Schwartz earned his Ph.D. in Marriage and Family Therapy from Purdue University, after which he began a long association with the Institute for Juvenile Research at the University of Illinois at Chicago, and more recently at The Family Institute at Northwestern University, attaining the status of Associate Professor at both institutions. He is coauthor, with Michael Nichols, of Family Therapy: Concepts and Methods, the most widely used family therapy text in the United States.

He has also published four books and over fifty articles about IFS. His books include Internal Family Systems Therapy, Introduction to the Internal Family Systems Model, and The Mosaic Mind (with Regina Goulding), as well as Metaframeworks (with Doug Breunlin and Betty Karrer). His most recent book is about using IFS with couples, titled You Are The One You've Been Waiting For. Dr. Schwartz lives and practices in Brookline, MA.

DIVORCE MEDIATION: THE BEST FORUM FOR FAMILIES WITH SPECIAL NEEDS CHILDREN

By Dr. Lynne C. Halem

Families who have children with special needs constitute a significant percentage of the divorced population. This should come as no surprise. After all, marriage is full of trials and pitfalls. Daily, the stamina of spouses is subject to testing. Children, all children, present a mixed blessing. Some times they may help to save a marriage; other times they add to the stresses of daily living in ways that parents are not able to handle.

Of course, statistics calculating the interactions of real live people cannot be analyzed so simplistically. Thus, to state that families with special needs children figure more prominently in the depiction of divorced couples cannot be taken at face value. After all, there are many different kinds of special needs children, ranging from those with mild physical and mental difficulties to those who are severely handicapped. The conclusion to be drawn here is only that the parents of special needs children may need to have more skills and agility in coping with family issues and with systems that pose problems for helping their children to thrive. Schools, hospitals, and the like are not easy to negotiate, posing a challenge for all who seek to maximize the services available for their children. These obstacles may constitute a hurdle that presents "one problem too many" for the family unit.

Regardless of divorce statistics and regardless of the accuracy, or lack there of, of the statistics, parents with special needs children who elect to mediate their divorce, or at the least their parenting plans and custodial arrangements, produce agreements that best serve their children.

"[P]arents of special needs children may need to have more skills and agility in coping with family issues and with systems that pose problems for helping their children to thrive.

Mediation presents a collaborative, problem-solving approach for identifying and dealing with present and future issues and problems. The more questions that need to be answered, the more problems to be resolved, the more mediation is the process of choice. The back-and-forth interactions of legal negotiations or the imposition of judicial rulings do not provide the data or the forum for dealing with this kind of decision making, in which it is essential to involve parental interactions with each other, with their children, and with the organizations and services from whom their children receive or may receive services.

What kind of questions should your mediation address?

•Where will the child reside? Will the child move back and forth on a fairly equal basis between two homes or will there be one primary home? And, if there is one primary home, how is time with the other parent structured? In some cases, questions may also pertain to the nature of the housing. Are there, for example, any physical requirements or any location requirements (e.g., near schooling)? Not to be overlooked is cost. Will assets have to be used, such as the marital home, or will assets have to be liquidated to finance an agreement? As the questions multiply, the collaborative nature of the mediation process provides an ideal forum for crunching numbers and weighing advantages and disadvantages which are focused, on achieving the long-term best interests of the child.

• How is child support calculated for parents with special needs children? Are there specific expenses required that need to be recognized in a certain way?

Does one parent bear the burden of the "extra" costs, or will it be shared equally? Is one parent's financial liability offset by greater responsibility for the child's day-to-day care by the other parent? Is ability to pay and ability (or desire) to assume more of the hands-on oversight and involvement not considered a trade-off, but rather a reflection of what is most logical and practical in the best interests of the child?

• Are any of these costs borne by the state, or will they be in the future? How would that affect the financial settlement? And, if the laws should change, will a return to the mediation table be required? Or, can parents agree in advance how to handle such changes?

•What kind of custodial arrangements are made in the event of the death of either parent? Who would be the custodian or custodians in the event of the death of both parents prior to the emancipation of the child?

•How will information about the child's IEP and other evaluative reports be shared? Will parents attend evaluative and other meetings together? How will decisions about the child be made? Are both parents equal decision makers, jointly making decisions? Or is one parent the primary decision maker with or without input from the other parent?

•How do parents determine services to be used for the child? What if an advocate needs to be retained? Is private school a consideration to be pursued by the parents outside of the public school system and at their cost or through advocacy of the school system?

•How is the daily schedule structured? What arrangements are made for before and after school? What kind of parental involvement is agreed upon for bedtime rituals? How is parental time divided for holidays, special days, and school vacation periods?

Although I have enumerated only a smattering of the many questions to be answered and issues to be resolved, the mediation process holds the key to reaching agreements. At CMDR, a skilled mediator knows the questions to ask and how to guide the couple in problem solving focused on the

Continued on next page

child's best interests. Parents who feel that they play important roles in the determination of their child's welfare typically are more committed to the care and financial support needed to carry out key objectives. Participation in the mediation process not only inspires collaborative problem solving, but also helps to build a life-long partnership between parents.

This article first appeared on mediate.com

Dr. Lynne C. Halem is the director at the Centre for Mediation & Dispute Resolution in Wellesley, MA. Dr. Halem has worked in the mediation field since 1982. She is on the Family Dispute Service Panel of the American Arbitration Association and a past board member of the Divorce Center, Inc. Dr. Halem served two terms as President of the Massachusetts Council of Family Mediation. She has been featured in *Boston Globe* and *Boston Herald* articles on divorce mediation and has appeared on television and radio programs as an expert in the field of mediation and alternative dispute resolution.

MAKING A FEDERAL CASE OF SURVIVING SEPARATION AGREEMENTS

By William M. Levine and E. Chouteau Levine

Originally published in *Massachusetts Lawyers Weekly*, Volume 43, Issue No. 50 (August 3, 2015).

The divorce bar does not often look to the federal trial court for guidance in family law matters. In fact, outside of discovery and the Rules of Civil Procedure, we rarely look to federal courts at all when constitutional rights are not at issue.

But U.S. District Court Judge William G. Young's ruling in *Irish v. Irish* is a noteworthy exception.

Young's findings and conclusions establish contractual liability from a former husband's false statement on his Supplemental Probate Court Rule 401 Financial Statement, filed in a Middlesex Probate & Family Court divorce case and referred to in a separation agreement that the state court incorporated into its divorce judgment. Critically, the agreement survived incorporation in the judgment and did not merge therein.

The federal case concerns a payout to defendant Craig S. Irish that plaintiff Dawn E. Irish, and now Judge Young, view as a form of phantom equity, in which the former wife has continuing contractual rights. Young makes quick and eloquent work of Mr. Irish's contention that a substantial sum received by him after divorce was merely a bonus and, thus, outside the scope of Ms. Irish's property claims. The forum and the substance both merit close consideration for divorce lawyers.

Contract claim vs. contempt or Rule 60

Enforcement actions arising from divorce are typically heard in Probate Court contempt proceedings. That court has equitable powers to enforce its own judgments, into which separation agreements are routinely incorporated. Mass. R. Dom. Rel. P. 60(b)(1)-(3) governs motions for relief from judgment for causes including fraud. Those, too, are Probate Court remedies.

We do not know why the *Irish* case left the Probate Court and veered instead to an action at law, let alone in federal court, but we can speculate a bit. The plaintiff initially sued two business entities as well has her former husband, and jurisdiction may have been a challenge in the divorce court.

Second, Rule 60(b)(1)-(3) motions have a one-year limitation from entry of judgment. The *Irish* findings suggest that two years passed from judgment to filing, so Rule 60 proceedings appear to have been time-barred.

Third, the plaintiff may have sought benefit from the lower standard of proof required in a contract action as compared to contempt proceedings (preponderance, rather than clear and convincing evidence), given the technical challenges of the case

Continued on next page

and the number of critical judicial inferences required for success.

Finally, the separation agreement itself appears not to be ambiguous, which may have limited the admission of parol evidence, otherwise admissible to prove breach of contract.

The decision did not disclose why federal jurisdiction attached, nor if it had been a source of controversy, but the multiple defendants suggest that diversity jurisdiction is the answer. Whatever the reason, Young found himself with the rare duty of addressing an equitable property division case, which, he carefully notes, is normally the exclusive province of state courts.

Addressing the issue, Young concludes that the matter does not impinge on the "domestic relations exception," or the state's preclusive right to "obtain, alter or amend" a divorce judgment, established in state law and recognized by the 1st U.S. Circuit Court of Appeals.

The case demonstrates that divorce practitioners need to think about enforcement matters broadly. Without creative and compelling advocacy, Young would not have encountered the *Irish* case at all. Breach of contract is rarely a practical remedy for individuals. The costs and duration are simply too great. The remedies at law lack coercive equitable powers. Most enforcement matters can be handled more expeditiously, and less expensively, in the Probate Court. But sometimes, in some circumstances, the opposite is true. Ms. Irish found her way into the civil side of the federal court, a decision that must look awfully good to her right now.

'Boilerplate' matters

Without the two essential features of the underlying separation agreement, Mr. Irish's conduct may be a wrong without a remedy. Both provisions appear generally in what is frequently called the "boilerplate" section of the agreement. Those are the more or less generic provisions that lawyers include in everyone's separation agreements, often with little or no editing, from case to case.

Most clients skim over the dense legal language, and their lawyers often struggle to capture the attention of clients in review of these important provisions. They are far more interested in the specifically negotiated terms that relate to their own family.

The *Irish* case contains two prime examples of why boilerplate is so important. First, Young found that the separation agreement contains a set of provisions that incorporate both parties' Supplemental Probate Court Rule 401 financial statements into the agreement by reference, with each party swearing to and then warranting accuracy.

Second, the separation agreement provides that it survives incorporation in the divorce judgment, meaning that all provisions remain contractual despite their incorporation into the divorce judgment. Conversely, merger would mean that the terms cease to have significance as a contract, but exist

thereafter as the terms of a judgment only.

Without both provisions, Young would have had no "hook" on which to hang a breach of contract. Effective drafting turned a Rule 401 violation into a contract breach, enhancing the integrity of the transaction and expanding the potential remedies for the aggrieved party.

Without that kind of language, Ms. Irish may well have found herself out of court — and out of luck.

Merger and survival care

Too often, merger and survival are treated indifferently or without sufficient specificity.

For many years, divorce lawyers recited that entire separation agreements merged, meaning that when incorporated into the Probate Court judgment, the agreement ceased to exist as an independent contract, except where explicitly noted. That limited enforcement to contempt actions, as no contract existed from which a breach could arise.

Sometimes, drafters designate property distribution for survival, but allow the agreement otherwise to merge in the judgment.

Neither of those approaches is sufficient. They do not insulate important foundational contract terms from later modification, as all merged terms are subject to later modification by the Probate Court.

More importantly, they needlessly give away enforceability for breach of contract, undermining the parties' mutual intent and reducing enforcement remedies.

Fortunately, in recent years, drafting has generally evolved in a manner that is more protective of contract language. Rather than have default merger with surviving terms called out, the better practice by far is to draft survival as the default status, with care to exclude that which must be merged, such as custody and parenting matters and, typically, child support.

The *Irish* separation agreement protected the integrity of the deal and gave Ms. Irish a remedial option that otherwise would been foreclosed. Clearly, Young found Mr. Irish's behavior compelling, but with the wrong contract terms, Ms. Irish would have been half-armed. Comprehensive agreement drafting closed the loop of liability.

Conclusion

It takes nothing away from the resourceful lawyers who made Mr. Irish's financial statement a federal case, but half of the winning ammunition was good "boilerplate." That should be reaffirming for all who toil at creating effective and enforceable separation agreements.

William M. Levine, Esq. and Hon. E. Chouteau Levine (Ret.) are principals of Levine Dispute Resolution Center, LLC in Westwood and Northhampton, MA. Bill may be reached at wmlevine@levinedisputeresolution.com; and Chouteau may be reached at eclevine@levinedisputeresolution.com.

WHAT DOES THE MEDIATOR SAY WHEN THE PARTIES ASK FOR A RECOMMENDATION ABOUT WHEN TO DIVIDE JOINT ACCOUNTS?

by John Fiske

John Fiske invites your thoughts and offers his own…

Thought for the Day at 6 am

Dear Bill and Sally:

ACBD.

Good Wishes,

John

P.S. That is the recommendation of the Harvard Program on Negotiation to any person, organization or country that wants a relationship with someone else. **A**lways **C**onsult **B**efore **D**eciding.

That is also my answer to your excellent question yesterday if I had any recommendation about when to divide joint bank accounts. If you were to agree to consult each other before spending more than $XX, that would take a lot of pressure off you both. The trap many couples fall into is worrying about the other person taking OUR money for HER or HIS personal use without checking with the other spouse first.

You may already know of the useful Probate and Family Court Rule 411 which creates an automatic restraining order. When a complaint for divorce is filed it restrains the plaintiff, and when it is served on the defendant it restrains the defendant. From what?

"Neither party shall sell...or in any way dispose of any property... belonging to either party except (a) as is required for reasonable expenses of living; (b) in the ordinary and usual course of business; ...(e) written agreement by both parties....."

So my "advantages and disadvantages" answer depends on whether you agree to consult each other before taking more than $XX out of the joint account. Without such agreement you risk offending the other by spending joint account money, however innocently: to avoid that you should consider dividing your joint accounts right now. With such agreement you can take your time during what Sally called last night "this temporary transition between two different systems" which I believe was also a point made by Bill. In a paradoxical way, such an agreement becomes quite liberating for both of you. The whole issue of control goes away and you can take your time.

That what your mediator thinks. The answer, of course, is it is always up to you.

Sleep well.

John A. Fiske is of counsel at Healy, Fiske, Richmond & Matthew, a Cambridge firm concentrating in family law and mediation.
www.mediate.com/fiske

THE SECRET KEY TO MINIMIZING DIVORCE DRAMA: MANAGING EXPECTATIONS!

By Karen Covy, Esq.

How do you think divorce – and specifically YOUR divorce if you are in the middle of one – should go? Should everything be amicable? Should you be able to get along for the sake of the kids? Or, do you think it is more likely that you and your spouse will be battling like Roman gladiators over everything from your 401(k) Plan to the tupperware? However you think things SHOULD go, those are your expectations. Managing expectations and making sure yours are realistic, can make the difference between having a relatively peaceful divorce, and one that has more drama than a reality TV show!

Common Divorce Expectations

The first thing to understand about expectations is that they are always future-focused. By definition, an "expectation" is the act or state of looking forward to something. An expectation is not something that has already happened. It is something that we expect will happen. The sticky part is that, because our expectations are so ingrained in the way we see the world, we often don't realize that what we expect might not ever occur.

When it comes to divorce, everyone has expectations! Those expectations include everything from what you believe you are entitled to get, to how the process is likely to go, and what you think should happen with the kids. You have ideas about how long your divorce should take, what it should cost, and what a "fair" settlement would be.

The problem with expectations is that, a lot of times (especially in divorce) they are not realistic. They also tend to hide. For example, even though you may have no idea about how the divorce system works, you probably expect it to be fair. Even though you don't know how your spouse is going to act during the divorce, you probably expect him/her to behave the same way they behaved while you were married. (… which may or may not be a good thing!)

"[B]ecause our expectations are so ingrained in the way we see the world, we often don't realize that what we expect might not ever occur."

The point is that, even if you don't realize it, you expect certain things from your spouse, your situation and your divorce. Those expectations set the stage for how much drama you are likely to experience in your divorce.

Are You Expecting the Best or Expecting the Worst?

People who expect the best think that everything (or at least all of the

Continued on next page

most important things) will go their way. They assume that they will get the support, custody arrangement, and financial deal in their divorce that they want. Why? Because that's what is fair! (Or, at least that's what they believe.)

People who expect the worst think that their divorce is going to be a disaster and that everything that can go wrong will. They assume that the system is unfair. They assume that they are going to get screwed. They assume that they will be totally miserable throughout their divorce and probably for years thereafter. Not surprisingly, they usually are.

While you may think that expecting the best is better than expecting the worst (or vice versa) the truth is that neither of those kinds of expectations will serve you well in your divorce.

If you are overly optimistic you will tend to dig in your heels and refuse to negotiate unless you get what you think you deserve. That makes settling your case amicably way harder. If you are overly pessimistic you tend to assume that your spouse has an ulterior motive for everything s/he does. So you over-analyze every offer your spouse makes and every action your spouse takes.

Consequently, your case takes much longer and costs much more than it should.

Either way, you lose.

Why Managing Expectations Helps

At this point you may be thinking that the best solution is to have no expectations at all. Unfortunately, unless you have reached a stage of spiritual enlightenment usually reserved for gurus who meditate on mountain tops their entire lives, that is not likely to happen. Everyone has expectations. It is part of the human experience.

The key is not to eliminate your expectations. It is to learn to manage them. How? By being realistic.

If your expectations are well-grounded in reality, they become an asset rather than a liability. Once you know what is realistically likely to happen in your case, you can finally start to relax a little bit and go with the flow. By not expecting that you will get the sun, the moon, and the stars in your divorce settlement, your negotiations start going much more smoothly. By not searching for the hidden agenda behind everything your spouse does, your ability to communicate, as well as your negotiations, will improve.

How Can You Manage Your Divorce Expectations?

The first step in managing your expectations is understanding that you have them. Whenever you find yourself saying, "Oh, that will never happen," or "Of course, I will get …" stop! Anything that you are discussing that hasn't happened yet, but which you are predicting will, might, or should happen in the future, is not a fact. It is an expectation.

Once you know what your expectations are, step two is to find out whether they are realistic. Take the time to talk to an attorney, therapist, financial planner, or a trusted divorce advisor about how the divorce system works, and what

is realistic to expect in your case.

Step three is to work to keep your expectations in line with what you have learned. No matter how realistic you might start out, it's easy to get off track when you emotions take over (which happens from time to time in divorce!). Have someone around you – a counselor, an attorney, or anyone else who understands divorce — act as your "reality check." Whenever you are not sure if your expectations are getting out of line, check in with that person.

Managing expectations in your divorce may not be easy. but it is definitely possible. Not managing them is a sure fire way to add misery and drama to your divorce. Is managing your expectations really possible in a divorce? I don't know. What do you expect?

Karen Covy is a divorce attorney and advisor who is committed to helping couples resolve their disputes as amicably as possible. She is the author of *When Happily Ever After Ends: How to Survive Your Divorce Emotionally, Financially, and Legally.* Karen is also a mediator, arbitrator, collaborative divorce practitioner, and former adjunct law professor. She is a regular contributor to The Huffington Post, Divorced Moms, and Your Tango, as well as her own website at www.karencovy.com.

KEEP MEDIATION AND ARBITRATION SEPARATE?

By John Sturrock

My wife and I recently spent a very convivial evening at the beautiful home in Sydney of leading Australian mediator Alan Limbury and his wife, Dr. Rosemary Howell, who coaches a team from the University of New South Wales in the annual ICC mediation competition.

One topic which stimulated some forthright conversation was the use of hybrids whereby a mediator takes on the role of arbitrator if the matter does not resolve by mediation. In particular, we discussed the transition from mediator to arbitrator with the consent of the parties. It's a topic on which I recently addressed a group in Dublin too and, contrary to my regular pontification about the value of ambiguity and the need to avoid binary thinking, the more I think about it, I find myself adopting an increasingly dogmatic view.

"Mediation and arbitration are so fundamentally different that, as I see it, [...] in-mixing carries very significant risks for both."

So, here's the dogma, dressed up as provocation. Mediators should not get involved in hybrids if that means the mediator taking on any sort of adjudicative role in the matter, even if parties request it and the rules allow it. To do so compromises mediation as a hugely valuable process, and the overall risks associated with doing so outweigh any short term benefit in an individual case.

For similar reasons, I am concerned when I see mediators and arbitrators associating in the same professional body. I am concerned by a trend which seems to align the two dispute resolution methods more closely. Mediation and arbitration are so fundamentally different that, as I see it, this in-mixing carries very significant risks for both. However, I write as a mediator and it would be presumptuous to express my views from any other perspective.

Arbitration, like litigation, is an adjudicative process. It involves the presentation of argument and evidence designed to persuade a third party to evaluate and make a decision. It is of course generally a private process, governed to a greater extent than litigation by the parties' preferences. Mediation is also private and the parties have considerable control over it. But further key attributes of mediation are, or should be, that:

- The parties retain the ultimate decision-making function and responsibility for determining the outcome
- The mediator's role is to assist the parties to exercise this responsibility autonomously
- The parties may elect to withdraw at any time, for any reason
- There is an (almost) infinite flexibility in the use of the process

- Solutions can be found by exploring all aspects of relationships: personal, commercial, past, future, and all manner of issues and options may be discussed

- A critical role of the mediator is to help parties assess risk and different possibilities, including alternatives to reaching an agreement on the presenting issues

- Such an outcome (no formal agreement) is a valid result of engaging in mediation

- The mediator will never know everything and his or her knowledge of facts, arguments and risks is necessarily limited by the nature of the process.

In the mediator's assisting role, he or she may ask challenging questions and ponder with parties a range of possible solutions, outcomes, alternatives or "settlements". It is not however the role of the mediator to pronounce a decision. Such is beyond his or her competence or capability by nature of the role and the process.

On this analysis, and in passing only, "evaluative" mediation seems to be an oxymoron, if that means the parties expect and rely on the mediator to express a view which is designed to provide them with an outcome. Any views the mediator expresses can only be provocative and provisional. Anything else assumes to the role a responsibility and the making of judgments which, I suggest, cannot validly be assumed or made.

There is a further, fundamental, factor which appears to militate against a mediator assuming a formal adjudicative role of any sort. As studies of the brain tell us, we are all victims of our unconscious minds. Perhaps to our horror, something like 90% of our thinking is unconscious. This has wide reaching implications but, for mediators, this means that the parties, and us, are affected by what we understand the process to be or what it may become. Therefore, any possibility that the mediator may express a determinative view is bound, whether we like it or not, to influence how we and the parties approach our conversations and relationships.

The value of mediation should be the pushing of boundaries in a way that is only possible because the mediator is wholly disinterested in the outcome and unencumbered by any prospect of reaching a view. In such a setting, the parties are free to explore things in a way which is quite unique. Inevitably, it seems, that would be different if the roles are – or might become – different.

It may go further. The possibility of some form of adjudication may in fact diminish the prospect of a mediated outcome being achieved by the parties exercising self-determination. We are who we are and, after a long hard day, it may suit both the parties and the mediator for the latter to express a view. We are creatures of habit. Self-determination is extraordinarily hard work. It engages the neo-cortex

Continued on next page

structure in the brain and consumes far more energy than intuitive problem-solving. Resisting the urge to offer a view as mediator can be difficult, especially if one can see a way through and one has the credibility and authority to carry it off. But, and I say this sincerely as well as provocatively, the danger is that it's a cop-out.

We have all experienced those days when all seems lost. When, despite best efforts, no solution can be found. This is the hard case when it would be easy to bow to the adjudicative way out. But, have we also not all seen cases where, because there is no alternative, the parties have nevertheless reached agreement in such circumstances? With the guidance of really excellent mediators, it is arguable that nearly all impasses can be overcome. That is true mediation in action. If not, after all the hard work, a pause may be preferable to a third party decision.

This may all seem rather purist. "Get real", I hear you say. "We need to be more pragmatic". I have no objection to people engaging in activity that has mixed components, but just don't do it within a process where one individual is expected to play both roles and to inter-mingle the two radically different approaches. Mediation has huge potential as we move from hierarchical, top-down decision making to flatter, more participatory models generally. Our collective future probably depends on the success of these innovations. As an example, mediation can (and already does) expand into many areas of human activity. But it is still not well understood by the wider public, including policy makers. It is still too often confused with arbitration. One of the reasons for mediation's relative lack of use may indeed be that misperception. I argue that we compound the problem if, within our emerging profession, we add to the confusion by mixing up the two roles.

Wouldn't it be ironic if, while trying to meet the needs we perceive (and indeed are told) that clients have, we mediators in fact damage what is very special about what we do? The baby could still go out with the bathwater…..

John Sturrock QC is founder and chief executive of Core Solutions, Scotland's leaders in business mediation and high quality training in conflict management and dispute resolution. He is one of the most experienced commercial mediators in Scotland and the UK, mediating in a wide range of sectors in the UK as well as Europe and the Middle East. He also works as a mediator from the leading barristers' chambers, Brick Court, in London and is a member of a number of international panels.

BEYOND EMAIL: SCREENSHARING & GUEST WIFI

By Dave Mitchell, Esq.

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 discuss screensharing as a mediation tool and the accompanying question of securing your wifi network.

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.

Introduction to Screensharing

In simple terms, screensharing means projecting (or "sharing") the screen from a tablet, phone, or laptop onto a television monitor or projector. In mediation, screensharing can be used as a tool to stimulate the discussion and exploration of options, such as child support, alimony, asset division, and even parenting plan design. This can be especially helpful in engaging a client who is primarily a visual learner in the conversation.

There are several different smartphone and tablet applications that can calculate presumptive child support and general term alimony obligations, as well as websites that do the same. When a couple is beginning the discussion on what might be paid from one to the other in support, oftentimes two sets of eyes will settle on the mediator before one asks, "What do you think?"

As the mediator, you can illustrate what the presumptive obligation under the child support guidelines would be by running the formula during the conversation. If there is a fluctuation in one parent's income, a range can be immediately displayed. Now that the parents have seen what might be ordered if their case were in court, the mediator has the opportunity to steer the conversation back to the interests of each in receiving or paying support. A similar process can be followed for alimony or asset division, if the mediator has software or spreadsheets that enable rapid adjustments and exploration of different options. For parenting plans, Skylark Law & Mediation, P.C. has an interactive parenting plan worksheet at http://divorce.skylarklaw.com/parentingplan. (Full disclosure: Justin Kelsey is a principal and Jonathan Eaton is *of counsel* at Skylark.)

While it might be possible to accomplish something similar without screensharing, getting the picture onto a much larger screen can prevent, or at least mitigate, the difficulty of reading small characters on the comparatively small screens of smartphones, tablets, and laptops. Further, it adds a nice touch that will be appreciated by clients seeking a

Continued on next page

contemporary and tech-savvy mediator.

The How-Tos of Screensharing

How you project your device's screen onto your television will depend on which devices you use. For computers, the most basic option is to run a video cable (such as DVI or HDMI) from the computer to the screen. This can be cumbersome, though, because of the physical restrictions imposed by the cable itself.

If possible, you should consider an option that doesn't require a cable. For example, Apple users can easily project the screen from their Mac, iPhone, or iPad through an Apple TV, using a technology called AirPlay. Google's Chromecast offers similar functionality. Whichever technology you use generally will require that the screensharing device is physically connected to the television and also logged into the same wireless network as the device from which you are screensharing. Unfortunately, the logistics of configuring your specific setup are beyond the scope of this column.

Taking It to the Next Level - Your Clients Can Screencast, Too

Information gathered prior to a meeting, if incomplete, can limit the productivity of the meeting. If a client is bringing a laptop, tablet, or smartphone to a meeting, the potential exists for gathering and exchanging financial information in real time. This ability can be enhanced by allowing the client to screenshare his or her laptop, tablet, or smartphone onto a television screen in the conference room, for the spouse and mediator to see.

However, because screensharing generally requires access to your wireless network, security precautions are in order. Specifically, you should be wary of providing clients with the password to the same wireless network used by your office computers. Doing so could compromise your security and give your clients access to your sensitive business records, including other clients' documents. (If you are also an attorney, this raises concerns about attorney-client confidentiality.) Your office policy, which should be documented in your Written Information Security Program (a.k.a. WISP, discussed in this column in the last issue of FMQ), should be to never allow guests to access your internal network, including by wifi.

Instead, many current routers allow you to configure a separate wifi network for guests; this network provides access to the Internet and other devices logged into the guest network (such as a screensharing device), but is separate from the primary network that you and any employees access.

Setting up a guest wireless network allows you to keep your network's security password from clients and guests, and limits who has access to your firm's network of computers, servers, storage appliances, and printers.

Once the client's device is on your guest wireless network, the device can screencast to your conference room monitor by connecting to your Apple TV or Chromecast to the guest network.

Added Value to your Clients

Whether it's offering a guest wifi network or enabling screensharing, using technology in your office should always be aimed at improving the client experience. Family mediation often involves stressful events in the lives of our clients and technology can be an added stress if misunderstood or malfunctioning. It is, therefore, very important that you test out any technology you add to your office and spend the time to be comfortable using it yourself. Ultimately, the added value to your clients will be worth it. Helping clients access information more quickly and in different formats can only improve informed decision making, the goal of every mediation.

Jonathan R. Eaton (jonathan@finnandeaton.com) of Finn & Eaton, P.C. in Woburn and Saugus

Justin L. Kelsey (jkelsey@skylarklaw.com) of Skylark Law & Mediation, P.C. in Framingham

Rackham Karlsson (rhk@rhklawoffice.com) of Zephyr Legal Services, LLC in Cambridge

Dave Mitchell
dmitchelladr@gmail.com

PFANNENSTIEHL – ANOTHER REASON TO SETTLE TRUST CASES

by Jonathan E. Fields

If ever parties and mediators needed another reason to settle a divorce matter involving trusts, *Pfannenstiehl v. Pfannenstiehl*, 88 Mass. App. Ct. 121 (2015) is the reason.

The trust at issue was settled by the husband's father. It distributed income to the husband and his siblings on a regular basis. Although the distributions to husband ceased just prior to his filing for divorce – while they continued for his siblings – the trust income funded the lifestyle of the parties and was "woven into the fabric of the marriage."

Further, the court examined the trustee distribution standard – technically only one factor favoring inclusion of a trust interest in the marital estate but, more often than not, the dominant one. Here, the trust was not a wholly discretionary trust but rather involved a judicially enforceable trustee fiduciary standard. For this and other reasons, the trial court found and the Appeals Court *affirmed the trust's inclusion in the marital estate*.

The trust also had a spendthrift clause which here was not, by itself, a bar to including the interest in the marital estate. *Pfannenstiehl* reaffirmed longstanding caselaw holding that a spendthrift clause, *per se*, does not bring a trust outside of the marital estate.

Next up was the issue of valuation. The trial court valued the trust at nearly $25,000,000 and calculated the husband's interest at one-eleventh of that value based on the current number of beneficiaries – eleven. The Appeals Court did not disturb the trial court's "fractional share" approach to valuation, finding that it was not an abuse of discretion. If there was expert testimony proffered on trust valuation, it is not apparent from the case.

Apart from the wide berth given trial courts on appellate review, the Appeals Court was likely persuaded to affirm the valuation because, among other reasons, the trust was not administered impartially. The co-trustees were the husband's brother and an outside trustee and, as noted above, the trust distributed income to the husband and his siblings on a regular basis except that the distributions to the husband ceased just prior to his filing for divorce – while they continued for his siblings.

As the judge put it, "the proverbial family wagons circled the family money." The professional trustee, "ostensibly an outside trustee" administered the trust in a "hands-off" manner, exercising little if any scrutiny to distributions. He was not independent but, rather, "inextricably interconnected with, and aligned with, the husband's family."

The dissenting opinion in *Pfannenstiehl* – yes, there was a dissent in a divorce case! – argued that the fractional share "valuation of the husband's interest [was] too speculative to

stand and further demonstrates why the interest *should not have been included in the marital estate*."

First, argued the dissent, "the trust also allows for distributions to be made in equal or unequal shares, and upon consideration, in the trustees' discretion, of funds available from other sources for the needs of each beneficiary."

Second, according to the dissent, "the trust instrument make[s] clear that the class of beneficiaries is open (and the number of beneficiaries may well increase)" and "both the near-term and long-term interests of the beneficiaries are implicated." The dissent argued that the "generational nature" of a trust is one factor that militates against its inclusion.

The timing of division also surfaces in the case. Present divisions of trust interests are rare in the reported cases and where an offset is impractical, such a division can be problematic. In *Pfannenstiehl,* the Appeals Court affirmed the trial court's award of a present division to the wife of a share of the husband's trust interests. Specifically, the husband was ordered to transfer as a property division approximately $48,000 per month in 24 installments.

The husband made the first few payments, borrowing money from his father to do so. At some point, after the father refused to give his son any more money, the husband wrote to the trustees requesting distributions to satisfy the judgment. The trustees, not surprisingly, refused.

The wife then filed a contempt complaint against the husband for failure to pay the monthly payments and the trial court adjudged him in contempt. The Appeals Court (the same court that upheld the finding that the Husband's trust interest was part of the marital estate!) vacated the contempt judgment, holding that there was no clear and convincing evidence that the husband had the ability to pay the judgment.

Huh? Assuming the judgment survives any further appellate review, how or whether the wife ever sees any part of the trust-related property division awarded her is, perhaps, the most intriguing aspect of the case. If a trial court compels the husband to sue the trust, what will the outcome be? Or will the husband be forced to pay from the assets already awarded him in the divorce?

In sum, while uncertainty abounds in divorce cases generally, judicial guidance is particularly lacking in the trust/divorce area. Bottom line: remind our mediation clients about the fuzzy legal landscape and wide judicial discretion -- and, above all, tell them that they *must* settle their case.

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

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

During a meeting in which we were starting to discuss a parenting schedule, the conversation blew up when the wife announced that she was demanding "primary custody" and parenting time, and husband was shocked and upset. They were unable to focus on anything more that day after husband got so angry, and the session ended. I knew from the first meeting that the husband expected 50/50 time and also that it might be a trigger topic for him, since he worked many more hours than wife. Should I have talked to them separately beforehand to manage this?

What a common problem this is in mediation! You won't always know something is going to be inflammatory until it comes up, but if you get a clue that it might be during intake from either or both parties, or perhaps when making an agenda for the next meeting, you can try to use what I call an "oven mitt". An oven mitt means that when you suspect some information may be particularly "hot" to one or both clients, you use certain strategies to attempt to reduce the heat conducted, either to the client(s) or to yourself. Either kind of heat transfer can damage the immediate conversation, or sometimes even the whole mediation. If a client's emotions combust in session, it can be difficult to have a productive discussion, or be able to move toward agreement. Alternatively, clients often direct their heat at the mediator, as messenger, and their perception of your neutrality can be damaged.

Examples of oven mitts:

1. Framing expectations at the beginning of the mediation by explaining how you will handle sharing legal information during the process, including the fact that at times such information might benefit one party's interests over the other's – I talk about that explicitly in my introduction.
2. Sending clients to sources of information other than the mediator before getting into the subject deeply in mediation – either to attorneys, other appropriate professionals, or even print resources. Hearing the information from outside the mediation can both take the heat off of you as the messenger, and also allow the party to consider the implications before they respond.
3. Mediators who caucus can use individual meeting time as an oven mitt, providing the space and support for the client to hear unexpected or unwelcome information away from the other party; again allowing for some processing before a productive joint discussion.

Kate Fanger can be found at Kate Fanger Mediation in Somerville MA, where she offers divorce mediation, marriage mediation, communication coaching, and case supervision. She can be reached at KF@katefangermediation.com

WHAT'S NEWS?
NATIONAL & INTERNATIONAL FAMILY NEWS

Chronologically Compiled & Edited by Les Wallerstein

Uganda: Supreme Court Bans Refunds of Bride Price Uganda's top court on has banned the practice of refunding bride price — normally livestock given by the groom to his bride's family — when a marriage ends in divorce. The Supreme Court agreed with activists that paying bride price undermines women's dignity but upheld the practice nonetheless. A spokeswoman for the Ugandan group behind the case said the decision was a victory. She said studies by her group showed that many women were stuck in abusive marriages because divorce meant their families would be obligated to refund the bride price. (The Associated Press, NY Times, 8/6/2015)

Baker Cannot Refuse to Serve Same-Sex Couples A Colorado appeals court has ruled that a baker cannot cite religious beliefs in refusing to make wedding cakes for same-sex couples. The decision is the latest in a series of similar rulings across the country that have been cheered by civil rights groups but attacked by conservative Christians as assaults on religious liberty. Whether photographers, florists, bakers and other vendors who are Christians should have a right to refuse services for same-sex marriages has emerged as a major cultural and legal battle, one that has intensified since the Supreme Court decision establishing same-sex marriage as a constitutional right. (Erik Eckholm, NY Times, 8/13/2015)

Kentucky Clerk Defies US Court on Same-Sex Marriage Licenses Months after the Supreme Court declared a constitutional right to same-sex marriage, a Kentucky county clerk's office — in defiance of a federal court order — turned away several gay couples seeking marriage licenses. The clerk says her Christian faith bars her from authorizing same-sex marriages, and has refused to issue any licenses either to same-sex or heterosexual couples — ignoring a direct order from the governor that she do so. A judge of United States District Court for Eastern Kentucky has ordered the clerk to resume issuing licenses. He wrote that the clerk is "free to believe that marriage is a union between one man and one woman, as many Americans do. However, her religious convictions cannot excuse her from performing the duties that she took an oath to perform as County Clerk." (Sheryl Gay Stolberg, NY Times, 8/14/2015)

Vatican Expedites Marriage Annulments Pope Francis announced new procedures to make it easier for Roman Catholics to obtain marriage annulments, a move intended to streamline the process. The new rules take effect on Dec. 8 and are expected to speed up cases in which neither spouse is contesting the annulment. These fast-track cases can be heard as

Continued on next page

soon as 30 days after a couple files an application, and at most within 45 days. The new procedures also eliminate one of the two church trials that are required of all couples seeking an annulment, a process that can drag on for years, at great cost. Vatican experts said the new system was expected to be free, not counting legitimate fees to maintain the tribunal process. More than half of the annulments granted by the church worldwide go to Catholics in the United States. (Jim Yardley & Elisabetta Povoledo, NY Times, 9/8/2015)

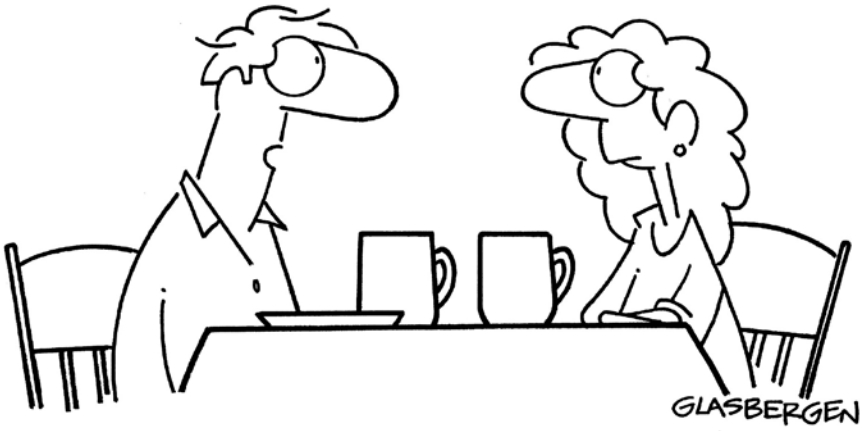
Report Finds Most Nations Hinder Women The United States is one of four countries around the world with no national laws requiring paid parental leave for new mothers. Russia bars women from a variety of jobs, including freight train conductor and mining rig operator. And Iran and Qatar are among 18 countries that require a married woman to ask for her husband's permission to go to work. Those are among the findings of a World Bank study of 173 countries on how domestic laws impede women's ability to work, open a business and participate in public life. The bank said 90 percent of the countries surveyed had at least one law that discriminated against women. (Somini Sengupta, NY Times, 9/10/2015)

Settling the Case of 'Happy Birthday' It is one of the most beloved and famous of all songs, belted out at countless gatherings for infant and octogenarian alike. Yet "Happy Birthday to You," was far from being as free as a piece of cake at a party, as it was considered private property. A lawsuit filed in Federal District Court in Los Angeles by a group of independent artists has changed that. Their lawyers said they had found evidence in the yellowed pages of a nearly century-old songbook that proves the song's copyright — first issued in 1935 — is no longer valid. The federal court agreed. Invalidating the copyright places the song in the public domain. If upheld on appeal it will cost the Warner Music Group, which holds the rights, millions of dollars in lost licensing fees, as it reportedly still collects some $2 million annually in licensing fees for the song. (Ben Sisario, NY Times, 9/22/2015)

California: Sexual Consent Lessons Now Required The state approved legislation aimed at making California the first in the nation to make lessons about sexual consent required at many colleges into high schools. The legislation requires school districts that already include health as a graduation requirement to teach about "yes means yes" and sexual violence prevention starting next year. It also asks state education officials to update curriculum guidelines for high school health classes with information about those topics. Under a "yes means yes" standard, sexual activity is considered consensual only when both partners clearly state their willingness to participate through "affirmative, conscious and voluntary agreement" at every stage. (The Associated Press, NY Times, 10/1/ 2015)

California Enacts Right-To-Die Law The nation's most populous state now allows doctors to prescribe life-ending drugs, joining Oregon, Washington, Vermont and Montana. The measure applies only to mentally sound people and not those who are depressed or impaired. The bill includes requirements that patients be physically capable of taking the medication themselves, that two doctors approve it, that the patients submit several written requests and that there be two witnesses, one of whom is not a family member. The law cannot take effect until the legislative session formally ends, which probably will not happen until at least mid-2016. Comparable legislation has been introduced this year in at least two-dozen other states. (The Associated Press, NY Times, 10/6/2015)

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



"Honey, when you say we can't communicate... what exactly do you mean?"

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.***

CLASSIC MCFM "T" SHIRTS

Equal blends of cotton & polyester
Choose black or cream
CAN'T DECIDE? ORDER ONE OF EACH!
All lettering & graphics are green

SIZES AVAILABLE: S, M, L, & XL
SUPPLIES ARE LIMITED
Cost $10 each plus S&H*
***S&H: $3 for 1 shirt, $4 for 2, $5 for 3, etc…**
Make checks payable to MCFM, Inc.

SEND YOUR CHECK & ORDER TO:
Ramona Goutiere
P.O. Box 59
Ashland, NH 03217-0059

QUESTIONS? CALL: 781-449-4430

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

MASSACHUSETTS COUNCIL ON FAMILY MEDIATION, INC.
P.O. Box 59, Ashland, NH 03217-0059
Local Telephone & Fax: 781-449-4430
email: masscouncil@mcfm.org

www.mcfm.org

OFFICERS

President — **Fran Whyman,** Whyman Law & Mediation, 220 North Main Street, Suite 301, Natick, MA 01760, 508-655-0700, Fran@Whymanmediation.com

Vice-President — **Laurie S. Udell,** 399 Chestnut Street, 2nd Floor Needham, MA 02492, 781-449-3355, lsudellesq@aol.com

Vice-President — **Kate Fanger,** Kate Fanger Mediation, 21 Properzi Way, Suite G, Somerville, MA 02143, 617-599-6412, KF@katefangermediation.com

Vice-President — **Barbara Kellman,** 1244 Boylston Street, Suite 200, Chestnut Hill, MA 02467, 617-278-1881, bkellman@sneiderkellman.com

Clerk — **Vicki L. Shemin,** Boston Law Collaborative, LLC, 99 Summer Street, Suite 1600, Boston, MA 02110, 617-439-4700 ext. 210

Treasurer — **Kathleen Townsend,** Divorce Mediation Group, Inc., 1441 Main Street, Springfield, MA 01103, 413-733-4444, kathleen@divmedgroup.com

Past President — **Jonathan E. Fields,** Fields & Dennis, LLP, 20 William Street, Suite 165, Wellesley, MA 02481, 781-489-6776, jfields@fieldsdennis.com

DIRECTORS

Lynn K. Cooper, S. Tracy Fisher, Tanya Gurevitch, David Kellem, Justin L. Kelsey, Amy Martell, Steven Nisenbaum, Cynthia Runge, Mary Sheridan, Crystal Thorpe, Les Wallerstein, Marion Lee Wasserman, Kim Whelan

EMERITI DIRECTORS

John A. Fiske, Janet B. Weinberger, Jerome Weinstein & Barbara N. White

ADMINISTRATOR

Ramona Goutiere, Goutiere Professional Business Services, P.O. Box 59, Ashland, NH 03217-0059, 781-449-4430, masscouncil@mcfm.org

EDITOR'S NOTICE

MCFM
Family Mediation Quarterly

Kate Fanger, Editor
Kate Fanger Mediation, 21 Properzi Way Suite G, Somerville, MA 02143
kf@katefangermediation.com (617) 599-6412

Rackham Karlsson, Contributing Editor
2294 Massachusetts Ave. Cambridge, MA 02140
rackham@zephyrlaw.com (617) 475-0861

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

INSPIRING SETTLEMENTS SINCE 1982 • INSPIRING SETTLEMENTS SINCE 1982 • INSPIRING SETTLEMENTS SINCE 1982 •

MCFM

www.mcfm.org

The Family Mediation Quarterly is printed on paper stock manufactured with non-polluting wind-generated energy, 100% recycled (with 100% post consumer recycled fiber), processed chlorine free & FSC (Forest Stewardship Council) certified.