NEW YORK STATE COUNCIL ON DIVORCE MEDIATION

THE REPORT

VOLUME 2014, NO. 2

THE REPORT is NYSCDM's journal for members and other interested readers. It is distributed by email approximately three times per year. The current and recent issues are available on the web at http://nyscdm.org/resources/the-report/. The NYSCDM permits printing of THE REPORT for personal use, and redistribution of the entire issue.

The information, opinions, references or other materials herein should not be considered legal advice on specific subjects, but rather should alert readers to issues which are raised during mediation. Actual application of any of the matters discussed depends on the facts in each case. Readers and their clients should obtain specific advice from the most appropriate professional. The views expressed by the authors or submitters in THE REPORT are their own and do not necessarily reflect those of the NYS Council on Divorce Mediation or of the editors.

The editors of THE REPORT, Eli Uncyk, Chuck Newman, and Justine Borer, would like the journal to be a two-way conversation. We encourage healthy debate. In addition to classic "Letters to the Editor," we welcome your comments, feedback, criticisms, compliments and other thoughts about anything that appears in these pages. We also seek your suggestions for improvement and areas of coverage. If you would like to publish an article or any other kind of paper in THE REPORT, please send us a one-paragraph proposal. The best way to reach us is by email to nyscdmpubs@yahoogroups.com. We look forward to hearing from you.

THE REPORT is published by the New York State Council on Divorce Mediation.

Eli Uncyk, Esq., Charles (Chuck) M. Newman, Esq., and Justine Borer, Esq., Editors

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EDITORS' PAGE

Hi, welcome back. The editors hope you'll find this a varied and interesting issue.

The Interview this issue is of Winnie Backlund, a noted transformative mediator. In Immediate Past President Bobbie Dillon's conversation with her, p. 6, we learn a great deal about this model of mediation and how Winnie uses it to great effect with divorcing couples. Dan Burns reports, p. 10, about the extremely successful (my words, not his) Annual Conference that he co-chaired in May at Saratoga. It was a hit both in subject matter content and in members and others getting to know one another better in a very pleasant setting.

Kathy Jaffe takes a random thought about how ego can get in peoples' way and turns it, p. 14, into an engaging consideration of how mediators can actually use ego — their clients' and their own — in the service of dispute resolution. That philosophical article is followed by two very practical ones. Sabra Sasson writes, p. 17, about a number of real estate topics divorce mediators have to keep in mind; and Mark Josephson has an article, p. 24, packed with many different income tax tips.

We have a number of short punchy pieces you can put to work in practice immediately. The editors have contributed a case note, p. 30, about a recent Appellate Division decision involving mutual mistake, and an alert, p.31, about pending legislation that would, among other things, create a formula for permanent maintenance. We invite you, p. 34, to think about what might be an unintended consequence of Obamacare and invite you to share your observations of how if may effect your clients' decisions about when to file for divorce. In our T4 section (Mediator's Toolbox: Tips, Tricks and Techniques), p. 35, we have a discussion of a venerable social science construct, Maslow's Hierarchy of Needs, and what it shows about the value of mediating divorces; two easy, practical tips for the business side of your practice p. 37; and a reminder of how useful the New York State Courts' website is for divorce mediators, p. 38. Special considerations about Native American children are on p. 40.

In our Inside Scoop section, p. 42, we bring you several tid-bits about what's going on around the Council and with its members. There's an introduction to your new NYSCDM Board members; highlights of the Board meetings since the last issue of THE REPORT came out; and a notice of an honor recently bestowed on our colleague, Bud Baker.

We would love to hear from you about what you like in this issue, what you don't, and what you'd like to see in a future issue. As always, you should feel free to pitch us article ideas. You can reach us for any of those reasons, or just to say hi, at nyscdmpubs@yahoogroups.com. Thanks for joining us.

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President's Page

By Clare A. Piro

One of the many benefits of being the President of the Council is becoming custodian of "the box," a diverse collection of materials chronicling the Council's history from its inception.

The hand-off occurs during the weekend of the Annual Meeting when you are elected, and when Past President Bobbie Dillon transferred it to me, I didn't quite know what to make of it. Here was this beat-up box that had originally served as storage for "Client Files A to H," with some former Presidents' names scribbled on it and crossed out. My reactions were, first, that I would get a new box to give to my successor, and second, that this looks like some really great stuff. I removed what I thought I would need immediately, and I put the box in my basement for later investigation.

It wasn't until the dust settled and I had time to explore the box's contents fully that I realized what a treasure trove this was and that I am fortunate to be its keeper. I also recognized that the beat-up box itself was part of the allure.

The first thing that caught my eye was the Council's Certificate of Incorporation, which includes among its purposes, "to promote expertise among professionals applying mediation skills and to develop standards for accreditation of divorce mediators." I find it so interesting that at its inception, education and accreditation were primary motivations for the formation of this organization, and that the Council has never wavered from fulfilling this goal.

Then, I pulled out the Press Release of the first conference held in 1984 announcing: "Divorce Mediators from all over New York State meeting for the first conference for the new statewide organization formed in 1983 to stimulate greater public awareness of divorce mediation, to facilitate the exchange of information among divorce mediators and others interested in mediation..." The materials from that first conference, including the hotel and food bills, brought me back thirty years and inspired me with thoughts of how exciting and wondrous that first meeting must have been for those embarking upon a career in divorce mediation when divorce mediation was not as accepted and prevalent as it is today.

Randomly, I pulled out minutes from a Board of Directors meeting in 1988 in which the Board addressed a theme that is familiar to every Board of Directors before and since: how to increase public awareness of the benefits of mediation (a concern of their Public Relations committee). The suggestions were to establish a hotline phone number and a community networking system and to advertise in the Pennysaver, Spotlight and Women's News. Similarly, in 2014, our strong and vibrant Public Awareness Committee emphasizes that our mission is to educate

PRESIDENT'S PAGE, CONTINUED

the public about the benefits of mediation and not just to market ourselves and the Council as a commodity to get clients. Of course, the media at our disposal is radically different than it was in 1988. Emails and website hits far outnumber phone calls, and our website is at the top or close to the top in website searches for "mediation," a goal of any campaign to increase awareness. In 1988, the Board envisioned a community networking system; today we have peer groups. Different names, different practices, but the same mission lives on.

In terms of membership, initially there were 36 members as shown on a typewritten list of members I found in the box. In a 1991 Board report, I learned we had 78 members, and that of those 78 members, 33 were Accredited Members. While we now average approximately 240 members, I'm sorry to report that our number of Accredited Members has not increased at that same pace, and we now have only 47 Accredited Members. (Clearly, I must seize the opportunity to encourage our members to apply for accreditation as soon as they meet the requirements. Let's increase the percentage to match 1991 levels!)

I also came across Numbers 2 and 4 of the newsletter which was published in 1985 under the names of "Council News" and "Mediation Notes." These are professionally presented and newsworthy publications. It is a testament to the dedication of the Council members that they were able to publish a newsletter for a newly minted organization.

As fascinated as I was to be able to witness the Council's history in documents that I could pick up and examine at will, the box may soon become a piece of history. In the interests of being green (and ensuring that our records can always be located), minutes of our board meetings from 2000 going forward are maintained in a remote storage location, as well as with our Administrative Consultant. Our minutes and other Board documents from 2012 and forward are also posted on our website.

When my term is over, I plan to pass to my successor some materials that have already been printed, but mostly documents on a flash drive. Since our Board packages alone are now forty plus pages, flash drives make storage easier. But the passing of a flash drive does not hold the same allure as the passing of a box of papers in binders and folders contributed by each of the past Presidents.

Without a doubt, I will also pass on that same crumpled box, bursting at the seams, with all the scribbles and cross-outs hinting at the wealth of information ripe for exploration. No matter how technology may "age" paper documents, a history of the Council in such documents will remain a testament to those who worked so hard in the early years and to whom we are all thankful.

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THE INTERVIEW

WINNIE BACKLUND

Using Transformative Mediation in Divorce Cases

By Bobbie L. Dillon, M.S.

Winnie Backlund

Winnie Backlund, M.Ed., is a Fellow of The Institute for the Study of Conflict Transformation. She has extensive experience and training in the field of conflict resolution and mediation, and has been a mediator for community, family, organizational and workplace disputes since 1987. As an experienced conflict resolution trainer and educator, Ms. Backlund presents mediation and conflict resolution programs locally, across New York State and nationally for various organizations.

Ms. Backlund is a member of the Court Custody Mediation Advisory Panel in Montgomery County, Pennsylvania, and a Court Approved Mediator Supervisor. She was the Conference Coordinator for the first National Conference on Transformative Mediation, "Looking Back, Looking Forward: Ten Years After the Promise of Mediation," held in Philadelphia in November 2004. Ms. Backlund is past president of Pennsylvania Council of Mediators, former editor of PCM's newsletter, "The Report," and was a participant of the Model Standards Symposium that developed the "Model Standards of Practice for Family and Divorce Mediation," published in 2000.

Prior to focusing her professional activities on the field of mediation and conflict resolution, Ms. Backlund was a management consultant to national and international companies, as well as Assistant Professor of Psychology, adjunct faculty member of Philadelphia University and Montgomery County Community College. She earned a B.A in Psychology from Ithaca College and an M.Ed. in Counseling from Antioch University.

Ms. Backlund was kind enough to speak at length with NYSCDM's Immediate Past President, Bobbie Dillon, to share with our members her thoughts on the use of Transformative Mediation in our practices.

Reading the first edition of *The Promise of Mediation*, by Robert A. Baruch Bush and Joseph P. Folger, published in 1994, left Winnie Backlund wanting to mediate differently. "A colleague also read [the book], and it made much more sense to us than the problem solving, linear approach," said Buckland. "It was a different way — not that one is better than another. It was better for me, because it more closely aligned with my beliefs and world view."

Backlund had initially trained as a community mediator in Montgomery County, Pennsylvania, and then in 1990 trained as a divorce mediator with CDR Associates in Colorado. Both trainings were based on the problem-solving, facilitative form of mediation, a steps-based approach that assumes that without each party getting their individual needs met, there can be no resolution.

The Promise of Mediation, on the other hand, emphasized that while people are interested in having their individual needs met, they also care about their

THE INTERVIEW, continued

relationships with others. People are both individual and interconnected. Recognizing both aspects at once would better serve people in conflict, according to the authors.

Backlund wanted to learn how to apply this relational approach. "We struggled on our own to figure it out, and eventually were able to connect with some folks who were part of establishing the Institute." Not only did she learn about the model, she was invited to participate in the Institute. "I became a part of a work group, looking at what the challenges were that the [community dispute resolution] centers faced." At the time, Backlund was a Director of a community dispute resolution center in Pennsylvania. "We co-sponsored training [with] Joe Folger and Dorothy Della Noce in the Philadelphia area and did a train-the-trainer."

The Institute for the Study of Conflict Transformation, Backlund explains, has provided an opportunity for her to gain clarity about the model over time. "There is a good mix of academics and practitioners, which provides a setting for really delving into the theory behind the practice. But we also stay consistent with the premises and principles. Purpose drives practice, so we're always striving to be consistent with the purpose."

From a Transformative perspective, conflict is a crisis in human interaction. This theory holds that a conflict occurs when there is some kind of imbalance in a relationship. This causes upset of some kind, such as anger or sadness. These strong emotions leave people feeling weak and unable to recognize the other person and his or her needs. This, in turn, escalates the conflict as both parties feel less and less heard. In order to resolve the conflict, each person has to gain clarity about his or her feelings, perspective, and what he or she truly wants. This clarity empowers the person, so she or he feels strong enough to recognize the other person and his or her needs.

The overall goals of mediation using the Transformative approach are to assist parties to move from positions of relative weakness and uncertainty to positions of strength; to support parties' opportunities to act from compassionate strength; and to help parties move from self-absorption to an ability to listen and respond to another's perspective. Throughout the mediation, the mediator is called to remember that premises shape practice and that beliefs guide action. A tenet of the model is that people are best placed to make decisions for themselves and that the mediator should not supplant the parties' abilities by directing the process. Rather, the mediator is there to support the parties in having the conversation they wish to have. Appropriate Transformative mediator "moves" or interventions include maintaining a micro-focus on the conversation, reflection, backing-out and staying-out, summary, and check-ins.

"One of the things I hear from parties on a regular basis in response to my reflecting in the moment is what a relief it is that someone heard them," says Backlund. "Whether it's the speaking party or the listening party, our supportive responses support *party* responsiveness and empowerment. Small steps are what cause bigger shifts."

In contrasting the models of mediation, Backlund admits, "It is almost scary to not know where it's going to go — that whole idea of following parties instead of leading. Facilitative mediators lead and it gives them some control — the mediator is in charge of the process and the parties are in charge of the

THE INTERVIEW, continued

content. We don't make a distinction. The parties know best, they'll get to where they need to be if it's possible. They can get to an agreement. If they can, they will. But they can also make decisions along the way and be very clear. They can talk about what to do in the absence of an agreement. They are clear about what they need to do and why."

Now a Fellow of the Institute herself, Backlund works as a private mediator in the area of divorce, relying solely on the Transformative model. Buckland finds Transformative Mediation "supports people in having the difficult conversations they need to have." Using this approach, she finds "I don't need to be in a prescriptive role or evaluative role, deciding what they need. It's their conflict — they know best what they need. I believe they are capable of figuring out what they need to talk about. While they may not be able to do it on their own, they are certainly capable."

"I don't need to be in a prescriptive role or evaluative role, deciding what they need. It's their conflict."

Many mediators contend that the Transformative Model of mediation is not appropriate in divorce cases because relying solely on the parties would make it impossible for the mediator to impart information that is needed to make, well, informed decisions, such as the Child Support Standards Act formula or issues about long-term liability. Backlund finds that this absence does not prohibit people from reaching the agreements they need. "I help people identify what information they need and where the appropriate source is to get that information.... When people ask me to give information, it goes back to the basic principle [of Transformative Mediation]. If I believe that people are capable, would I get in the way? If I start telling them what to do, I've started to take ownership for their conflict. It's a bottom-up way to practice and it's about opening conflict, it's not about containing conflict. That's a hallmark of the practice that is different from other forms of mediation practice. Other forms don't open conflict. Being able to sit in the heat of the conflict, it's the emotion, what people are feeling, how they're expressing it, and we don't put constraints on that."

"Support guidelines are a good example," says Backlund. "The attorney gives them the kind of information they ask about, they come to mediation and they have two different figures. So then what? If I were responsible for running the support guidelines, I could preference one of them. That goes to the heart of impartiality."

Backlund clarifies that this does not mean that she cannot raise questions. "What is important is how I raise questions. I make it very clear to clients that I do not give legal information." Check-ins are often used to ask the parties what they may want to do next, which could include getting legal answers if that is important to them. "I am always happy to make referrals to other professionals if needed," says Backlund. She also has pamphlets created by the Bar Association about matrimonial law available to clients. She refers clients to a list of mediation-friendly attorneys from which they may choose to complete the legal work and file the documents.

THE INTERVIEW, continued

Some might wonder if it is really possible to have a successful practice taking such an approach. Backlund mediates regularly with couples and says that when the Center she worked for transitioned to Transformative Mediation, their caseload actually went up. "One of the things that I found was that we were talking about the process differently. If people were saying that they want someone to tell them what's fair (instead of what I do), I'd ask them if it would be helpful to understand what I do and how I work. I would explain that mediation is an opportunity to have a conversation. People would actually begin their decision making with the first phone call, saying things like, 'That's really what I want. I want to be able to talk to the other person, I want to be able to make these decisions....' We were actually getting more mediations in the door in the Center as we had these initial conversations."

Backlund illustrates the problem with trying to give people a quick fix. "It was pretty interesting, there's a local group who spent time and a lot of money promoting and advertising divorce mediation. What they found was the people who called just wanted a quick cheap divorce." Backlund seeks to serve people who find value in the process of sitting together to reach agreement. "If people want to work together to make the decisions and not use lawyers and stand behind their lawyers to do the negotiation for them, that is really what will be the determining factor."

When asked if she believes there are any shortcomings or limitations to the model, Backlund says Transformative Mediation is the only way she practices. "I think that it offers, from my perspective, more opportunities for parties to really talk about what they need to talk about. Sometimes it's their emotions, things that others have done to hurt them. There's a history there and sometimes they need to talk about that history to get past it and get to where they need to be to practice as a team. One must have a belief in the parties' ability to make decisions and believe in the process and that people have the ability. It's the impact of the conflict that prevents them from accessing strengths and capacities they might otherwise be able to access in the absence of the conflict."

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THE 31ST ANNUAL CONFERENCE OF THE NEW YORK STATE COUNCIL ON DIVORCE MEDIATION

By Daniel R. Burns

The theme of the conference this year, *Building Bridges*, was designed around the idea that we, as divorce mediators, help carry our clients from where they are to where they want to go. David Louis and your author were Co-Chairmen. NYSCDM's administrative consultant, Melissa Burns, ably handled a great many of the details that led to the Conference running smoothly and, as some have said, captivatingly. The Conference was held in Saratoga Springs on May 2nd through 4th.

The Conference opened on Friday with a presentation by **Forrest (Woody) Mosten** with a program called, "40 Things Every Mediator Should Know." True to his practice of always giving more, Woody came to the presentation with "47 Things," including "Mediators are Teachers," "Conflicts are Opportunities" and "Dating Agreements Between the Parties." I believe he may have covered "20 Things" in the six hours that were scheduled. And nearly everyone in the room wished he had agreed to spend another full day covering the rest.

On Friday evening we awarded Woody our "Lifetime of Service to Mediation" award, taking him completely by surprise by our recognition of his years of service to our community and our mission to the peaceful resolution of conflict.

But the real surprise of the evening came when **Glenn Dornfeld** was called up to the podium by **Steve Abel** to announce the "**Abel Award**" winner. Although many in attendance thought the award was Glenn's this year, he was actually asked by Steve to introduce this year's winner, **Sydell Sloan**, who was moved to tears. In true Sally Field fashion, she spoke of how "we liked her," as if that was a surprise!

On Saturday morning, Woody told us how to use our "peacemaking values" to build our practices, by creating a peacemaking signature to use not only at the mediation table, but in our marketing efforts.

The other session at 9:00 a.m. on Saturday was the **Lois Rubin Memorial Presentation** by **Kevin Decker** from the Valuation Resource Group, who provided us with the nuts and bolts of pension evaluation.

Session 2 began at 11:00 with a presentation by **Barbara Stark**, who showed us how to use technology to mediate financial issues in divorce. At the same time, **Mark Kleiman** presented on mediating the consequences of military service, certainly an extremely important topic for any mediator who has faced the impact of the military culture. Many who heard Mark thought that his insights about mediating with actual warriors could be used in mediating with folks whose conflicts were not on battle fields. The third session was conducted by **Wayne Greenwald**, who engaged us in a lively discussion on Bankruptcy and Divorce.

ANNUAL CONFERENCE, continued

During lunch on Saturday, President **Clare Piro** thanked the "retiring" board members, **Gail Ferraioli** and **Bill Hoefer**, for their service to the board, and introduced new director **Renee LaPoint** of Rochester. An election was then held to fill the remaining spots on the board, and **LJ Freitag** of Horseheads and **Deborah Hope Wayne** of New Rochelle were elected. (*See the related story at p. 42 —Eds.*) Also elected was **Mark Josephson** as Vice President. **Kate Bar-Tur** was re-elected as a director and **David Louis** was re-elected as a director and Treasurer.

Session 3 started at 2:00 p.m. on Saturday and featured three different presentations. Our own marketing guru, **Patty Murray**, showed us how to use the Council's public awareness resources to promote our practices. Long-time and recently retired board member, **Al Frankel**, showed us how mediators can do it with feeling; and **Teresa Calabrese** and **Katie Cole** provided the highlights of many of the important issues facing same-sex couples after the U.S. Supreme Court struck down the Defense of Marriage Act.

The Saturday sessions ended with a plenary by **Steve Abel**, who did his usual outstanding job of updating all of us on the law, reviewing cases of significance that were decided over the past year.

We kept Steve busy on Saturday by introducing him as the auctioneer after dinner. He helped us raise over $5,000. A special thanks goes to **LJ Freitag**, who solicited numerous items and services, including a vacation, a cooking lesson, marketing advice, trainings and mentoring. Just after the auction we had a gift baskets raffle that raised several hundred dollars. Most of the gift baskets were won by people who bought their tickets early— as I shamelessly and baselessly suggested early and often. Thanks to **Rita Medaglio-Barrera**, who purchased all the gift baskets and made this a success. Again this year, **Al Frankel** enlivened the festivities after the auction and raffle by DJ'ing a very energetic dance party. He made a big hit by playing big hits.

On Sunday morning, **BJ Mann**, who is also a former board member, told us how to help our clients tell their spouse that the marriage is over. **Bob Collins** discussed 36 techniques of divorce mediation. **Scott Schulz** and **Robert Jones**, from Valuation Resource Group, discussed how they value a business, professional license and degree.

BJ also presented during the final morning session, telling us how to help our clients tell their children that the marriage is over. **J. Michael Fox** provided us with a re-mix of the highly acclaimed "bringing creativity to the table" presentation that he gave at the fall one-day conference in Buffalo in September 2013.

ANNUAL CONFERENCE, continued

Also presenting during the 11:00 a.m. session was matrimonial attorney **Eric Tepper**, who kept the audience engaged during a 90 minute presentation on spousal maintenance that included a discussion on where he thinks the law is heading.

The final session was an ethics plenary. **Kim Reisch** and I led a lively interactive discussion of the limits of self-determination. This reprised a presentation at the winter one-day conference in New York in December 2013.

Glenn Dornfeld, Sydell Sloan and Steve Abel

This year we tried a couple of new ideas. We welcome your feedback and input. First, we moved the Conference to run from Friday through Sunday, rather than Thursday through Saturday as in the recent past. We hoped it would allow more people to attend if they didn't have to take off two days from the office.

Second, we dispensed with the printed and bound workbooks. The Conference materials were made available to attendees at a link on the web, so that people could review them in advance, save everything but bring only what they needed to the Conference, and they could read them on WiFi-enabled devices during the Conference presentations. There were several reasons for this change, including to save trees and cost. We on the Conference Committee would very much like your input on these as well as on any other matters that you believe we should consider for the Conference next year.

I would like to thank the members of the Conference Committee this year, especially my co-chair, David Louis, who provided invaluable insight and input when I was struggling about a presentation or speaker.

A special thanks also goes to my favorite PITA, Kathy Jaffe, who put together the CLE program; LJ Freitag, who created a wonderful auction; Susan Ingram, who handled the workbook ads; Renee LaPoint, Mark Josephson and Ada Hasloecher, who helped with the sponsors; Elena Jaffe Tastensen, who arranged for the flowers on the tables; and Rita Medaglio-Barrera who handled the gift baskets.

Finally, thanks to Melissa Burns who handled all the administration such as hotel arrangements, food, audio visual equipment, the workbooks, the awards and the registration, to name just of few of the details that she took care of and that go into putting on a successful conference.

I recall a conversation I had a few years back with **Rod Wells**. We were discussing why people come to a conference. He said it was for the content of the program and I said it was for the socializing. Based on the feedback from the 2014 Conference, I would say we were both correct.

ANNUAL CONFERENCE, continued

Dan Burns, a lawyer and mediator and a mentor and inspiration to many, practices in Latham. He is a Past President of the New York State Council on Divorce Mediation. He can be reached at (518) 785-9522 or info@BurnsMediator.com. His website is www.burnsmediator.com.

Editors' Addendum

As Dan's article mentions, The Abel Award was presented at the Annual Conference to Sydell Sloan, with offices in Bayside and Manhattan, for her outstanding contributions to the Council. In Sydell's case, the contributions date to the founding of the Council. (In addition to all her work for the Council, she has been to every annual conference, save one for a family celebration.) Sydell sent a thank-you note to the Board. When Sydell gave us permission to reprint her note, she expressed the thought that "particularly new members should be aware of how much their professional and personal lives can be enriched by Council membership and participation." Here's Sydell's note:

TO ALL THE WONDERFUL BOARD MEMBERS:

I want to thank you all for the incredible and totally unexpected honor you bestowed on me at the Conference. I feel that there were so many other worthy candidates for the award and I am amazed, shocked, and honored that you chose me.

In Glenn [Dornfeld's] introduction, he spoke of my contributions to the Council during the past 31 years. They don't come close to the contributions the Council has made to my life, professional and personal. I have learned much from presenters, members, and former board members that has enhanced my practice. There has always been a common thread of commitment to our profession regardless of geography, age, or background.

But most importantly, I feel that I come "home" at each board meeting, retreat, or conference. We greet each other with hugs and kisses and care about each other's families. I attend events as much or maybe more to see everyone than to learn.

The clock [that accompanied the award] is magnificent and is in a prominent place in my office. I am tempted to point it out to every client who enters.

My private thoughts range from "Why Me" to "Thank You, Thank You, Thank You."

With much love and hugs and kisses,

Sydell

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Using Ego

By Kathy Jaffe

Someone made a comment that started me thinking. "Many times, conflict is based on clashing egos. The absence of conflict in long-happy couples (and others) can result from a reduced or relaxed ego. For example, you can picture someone thinking, 'I don't care enough to fight with you about this.' If that's true, how do we de-ego our clients as part of the work of mediators? How do we de-ego *ourselves*?"

But are those the right questions? Shouldn't we be thinking about how to *use* Ego productively?

First I must give you a few brief definitions. I'm thinking of "conflict" within a person as a struggle, often unconscious, between mutually exclusive impulses or desires. The "Id" is the part of our unconscious mind that acts according to the "pleasure principle," which seeks instant gratification at any cost. I want, I need, I have to have it now.

"Fighting for everything is the Id talking."

The "Ego" is the part of our mind that acts according to the "reality principle." The Ego is the part of our thought process which mediates between the demands of the mind and the reality of the environment. It wants to satisfy the Id's pleasure principal needs, but in a realistic way. Ego can also mean how a person views him- or herself, one's self-esteem; one's sense of self-worth.

The "Super Ego" is the direct opposite of the Id. It is our conscience, which controls our sense of right and wrong and works to create a socially acceptable way of behaving in the world.

Conflict arises from the clashing of different ideas, beliefs, morals, values, past experiences, needs, wants and expectations, etc. When people are in conflict, it can be created by a combination of the above or one aspect of the above. Conflict only means that people have a difference of opinion about something, it doesn't mean they don't care about each other.

Couples who have been married a long time and decide not to fight often do that because they realize that the "Win" is not that important. For example, one spouse may realize he or she is not going to change the other person's point of view, no matter what he or she says. Or one or both people realize it just isn't that important an issue. In those cases, both people are winners. The person who doesn't respond wins because he/she has stopped the conflict before it has started. That person's Ego has received what it wanted, which was "don't fight." In this situation you might think that that person's Ego has relaxed or has been reduced. But on the other hand, maybe that person's Ego has been inflated, because he or she had the ability to stop an argument before it started. It all depends on which side you are coming from and how you view the other person's reaction. It doesn't necessarily mean one's ego is more relaxed than the other. It also doesn't mean that one person has stopped caring about the other person or about the issued being discussed.

Using Ego, continued

Fewer conflicts in a marriage doesn't mean that the couple is lacking in strong Egos. It only means each person knows what issues are worth fighting for, or choosing not to fight for everything. Fighting for everything is the Id talking. Picking and choosing the battles that are worth having is the Super Ego mediating. The brain, through the Super Ego, understands that if I choose to battle this, then certain things are likely happen, or not happen. Do I want those things? Do I want them enough to have this fight?

As a mediator working with people "in conflict," I try to look for the common ground, where the parties agree, and try to build on that. For example, suppose a child has a big nose and is unhappy about his looks. He asks his parents for a nose job. Let's assume one parent says, "Absolutely!" That parent might be concerned that the child could suffer from poor self-esteem and lack confidence. The other parent might say, "No way to surgery, and I won't pay for an elective procedure." That parent might believe that the child's large nose gives him character and strength. That parent might feel it is in the child's best interest to learn how to be proud of whom he is. Both parents have valid points of view. Both of their Egos are in motion. There is likely no winning at this point. The mediator should try to point out where they agree: they both want the best for their son, both care about how he sees and feels about himself, and both care about how he is seen by the outside world. Each parent is correct in their thinking and each has a valid, clearly expressed view. Still, there is no winner at this point.

"We also have an Ego that is in the room with the clients."

But — and there is always a "But" — a mediator can suggest, for example, that first the child and then the parents speak to a therapist to see if the child has an emotional problem or if this just a passing fancy. Let the therapist help in the son's and parents' decision-making process, which could help to eliminate the battle of their Egos. It also allows me to remain neutral and keep my Ego in check. In that case, everyone is a winner.

As mediators, we try to be neutral, to let our clients do what they think and feel is best for him- or herself. Once the parties have been given all of the information necessary for them to make an informed decision, we need to respect our clients' values, belief systems, preferences and their agreements. They are the ones who have to live with the agreement, not us. But *we* also have an Ego that is in the same room with the clients. We have our own opinions about who's more right and who's more wrong. I manage my Ego by doing a reality test. I reframe what each person has said, in order to make sure that both parties have understood the other's point of view. This also gives each party the chance to hear, really hear, his or her own opinions in different words, and this may help that party to clarify or refine his or her thinking.

I point out where the parties agree and disagree. Quite often, people in conflict don't realize

USING EGO, CONTINUED

that they are actually in agreement on some things, because they are too immersed in the conflict. If I know that I have asked, re-framed, suggested and informed each party about their many options, my own Ego is satisfied and I have done my job. In the event I am not able to relay all of their possible alternatives and/or if the couple is still in discord, I have to use my coping tools to come to terms with having done the best job possible, under the circumstances before me, while continuing to maintain my role as a neutral third party supportive of both people.

Ego is something we all have. It is something that mediators can both work around and work with. Everyone in the mediation needs to protect it. We need to nurture it and make it a friend of resolution.

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Real Estate Concepts for Divorce and Family Mediators

By Sabra R. Sasson

As a mediator, you probably already know that you are wearing many "hats" while being sensitive to the participants and helping maintain a balance between the emotional and the cognitive aspects in a mediation. Being aware of and helping the couple to identify the issues to be resolved — issues that are obvious and not so obvious — is of tremendous value to your clients so that they can see the full picture and make better and informed choices.

A general comment, that applies in many aspects of mediation, is appropriate to start this discussion. Many financial and legal aspects of divorce mediation clients' lives involve highly specialized subjects. No one is born knowing everything. If mediators don't know all the answers, they should at least know the questions. Mediators who do not feel well-informed about the details that affect any part of their clients' concerns should make sure their clients understand the limitations of the mediator's role, and where they can find the specialist advisors they need — about real estate and anything else.

"Real estate law can be complicated and confusing."

Of all the many things that have to be discussed and resolved in divorce mediation, the marital residence comes up in almost all cases, and it is often one of the issues that requires the most consideration. If the couple has other real estate, there are yet more issues. What can a mediator do, or how can the mediator be most helpful? That is the purpose of this article: to arm the mediator with information and questions to bring to the surface for consideration and resolution.

Any real estate lawyer will tell you that real estate law can be complicated and confusing. But it is also an opportunity to be creative. This article covers the basics of what every divorce mediator ought to know about real estate so that as the professional, you can help the parties to have a thoughtful and productive conversation about their real property. Note, however, that this article focuses on the kind of real estate that divorce mediators are likely to come across in every case. For some couples, a great deal more specific expertise may be needed. For example, if one or both of the spouses are commercial or residential real estate developers or speculators, a great deal of attention must be paid to many details about the real estate, far beyond our scope here.

For simplicity, we will assume that either or both of the parties have property located in New York State, and that there are no pre-nuptial or post-nuptial agreements between the parties. We will also assume that the real estate is not subject to a contract with any third parties, which you will sometimes find, especially for commercial property. Sometimes, of course, people don't own real property, they lease it. The leaseholds can be very valuable (or a burden), and if the parties rent the marital residence, you will have all the same post-divorce occupancy and expense issues. This article focuses on property that is owned, not rented.

Real Estate Concepts, continued

FIRST STEP: Identify *all* real property by location, type, date of acquisition, title, use and the source of funds used to acquire such property.

Location: This is simply identifying the address. Number, Street, City, State and Zip Code. Farm and other rural property could have other identifiers.

Type: Identify whether the property is vacant land, one or more residential buildings or one or more commercial buildings. If residential, it should be further identified as either a single family or multi-family house, a cooperative apartment unit or a condominium apartment unit.

Date of Acquisition: The date that title was received by one or both parties, not to be confused with the date that a contract of sale was entered into. How can you determine the date of acquisition? Look at the title document. This date is of particular importance as it relates to the date of the parties' marriage.

Title: What are the names on the title instrument? Typically the title instrument is a deed. However, where there is a cooperative apartment unit, the title instrument is represented by a Stock Certificate and Proprietary Lease. (When you buy a cooperative apartment, you are actually buying shares in the corporation that owns the overall real estate, and the coop corporation gives you a long-term "proprietary" lease for your own apartment.) Examine the title documents and verify in whose name title is held. It could be in the name of one spouse or both. In the event that title is held in one or both of the spouse's names and another name, identify who that other named party is. Sometimes it could be a family member, such as a parent or sibling. This means that the parties may not own the full value of the property, and to distribute the property, the parties may need the consent and signatures of people outside the mediation.

"Discuss the parties' needs and interests. What do the parties want? Do both parties want and expect the same thing?"

If title is held by the husband and wife, it could be as "tenants in common," "joint tenants," or "tenants by the entirety." (Someone — let's guess in 13th Century England! — decided it would be a good idea to call the form of *ownership* a "tenancy". Don't confuse the term in this context for a rental.) In a tenancy in common, each party owns an undivided share. Each share can be sold separately and if one person dies, his or her estate gets that share. In a joint tenancy, which you'll often see written as "joint tenants with right of survivorship," when one owner dies, the surviving owner immediately and automatically owns the whole thing, even without probate. "Tenants by the entirety" is a type of joint ownership available only to married couples, and though neither party can unilaterally sever such tenancy, upon divorce, the tenancy by the entirety is dissolved and both spouses become tenants in common. This is a crucial point and has its own consequences. If the parties do not choose to address this change in form of ownership, how will repairs and improvements be addressed? Who may occupy the premises if they own it as tenants in common?

REAL ESTATE CONCEPTS, CONTINUED

How will each be entitled, if at all, to transfer their respective interest during their lifetime and by will? This can lead to awkward consequences. The parties, of course, may agree to change the law's default about the post-divorce form of ownership and about all those other consequences, but they must be aware of what would happen without an agreement and they should clearly focus on how they want to resolve such issues as who will continue to reside in the premises and whether such occupancy will be exclusive, who will be responsible for repairs, who will make mortgage payments, who can deduct the interest payments, when or if the premises will be sold in the future.

Source of Funds to Acquire: Identify whether the property was purchased with all cash or a combination of cash and a mortgage. What is the source of the cash portion of the purchase? Were the funds from pre-marital savings, wedding or other gifts, inheritance, marital savings? This is also a good time to inquire whether there are any additional encumbrances — such as a line of credit or any personal judgment liens or tax liens. The participants may not know what liens, if any, there are against the property and a title or lien search (in the case of a coop) will identify, what, if any, liens there are.

Use: What is the primary use of the property? Is it used as a primary residence; a secondary or vacation home; as an investment property (rental property); as an accommodation for others (*e.g.*, a party's parents); some other use? If a primary residence, the discussion will involve whether one spouse will buy out the interest of the other, whether the property will be sold or whether the property will be held and sold at a later date.

NEXT STEPS: Help the couple to understand whether the property is separate or marital. Also, discuss the valuation of the property and identify any debt that is a lien against the property. How will the value be determined? Was the property recently acquired? Will the couple hire an appraisal company, rely upon the valuation of a real estate broker, or refer to a website such as www.propertyshark.com?

> *"Be sure to do the analysis regarding the source of the down-payment."*

Understanding when the property was acquired will help to determine whether the property is separate property or marital property. As a starting point, if it was acquired before marriage, it is separate property and if it was acquired after marriage, it is marital. But that is often only the starting point. As with any separate asset, some or all of it can lose its character as separate and become transmuted to marital (and therefore subject to equitable distribution). Transmutation is beyond the subject of this article, but you can see why it is important to understand whether the property was purchased with a mortgage, and many other questions about how it was acquired and carried. Was the down-payment separate property (*e.g.*, savings accumulated before marriage, an inheritance or a gift)? There are many other issues to consider about whether separate property should be treated as marital, but again, not in this article.

Real Estate Concepts, continued

Notice that marital vs. separate property is an equitable issue that is only relevant to divorce. "Title" is a law, not equity, issue, and it applies whether or not there is to be a divorce. Do the parties own the property as tenants in common or is there a right of survivorship? That question is more significant if the property is separate property. If the property is a marital asset, then the regular discussions will continue.

Discuss the parties' needs and interests. What do the parties want? Do both parties want and expect the same thing? Will one spouse keep the property, and if it is the marital residence, continue living in it? Do they intend to sell the property and divide the proceeds? If they will keep the property, will they keep it for a period of time and sell upon the occurrence of a particular event (*e.g.*, when the real estate market improves, when the youngest child graduates from high school) or will the spouse who will reside in the property buy out the interest of the other spouse? And how would the proceeds of such a sale be divided? Who will be responsible for the carrying costs and any future repairs or improvements?

"What if the parties have young children and they decide not to sell the property at the time of divorce?"

Example: Husband and wife have been married for six years. The couple purchased a house using funds that they accumulated during the marriage. A few months later she decided to end the marriage. The couple could decide to sell the property and divide the proceeds. Another option might be for one of them to buy out the other's interest, which would require looking at the equity in the property. Since the property was acquired recently, they could agree that the value of the property has not changed, in which case the spouse who remains in the property would pay one half of the down-payment to the other spouse and the lender would be contacted to remove the bought-out spouse from title and from the mortgage. But be careful about this. It is often problematic to remove one spouse from the title, as the mortgagee will be concerned about the ability of the spouse who will remain on title to repay the loan.

Another Example: I recently met with a couple who sought my help in determining equitable distribution of their assets. They had sold a coop a couple of months prior to meeting with me. It seemed easy to them to simply divide the proceeds. But as we spoke further, it became apparent that the coop was purchased by them as tenants in common eight months before their marriage, making each of their undivided half interests separate property. The down-payment for the coop was paid from her separate funds. There was a mortgage (the proper name is a coop loan, but it's the same thing for these purposes) on the property, some of which was paid pre-marriage using separate funds and most of which was paid during the marriage, let's assume from marital funds. So, we had a "hybrid" situation. The parties agreed that she should first receive the return of her investment of the down-payment, and then they would split evenly the balance of the net sale proceeds. Of course, that couple could have chosen a number of other approaches. For instance, they could have credited each other for the

REAL ESTATE CONCEPTS, CONTINUED

portion of coop loan payments and/or coop maintenance (rent on the proprietary lease) that each had made from his or her own funds. After they were made aware of all the issues and had some ideas about how they could divide the sale proceeds, they chose not to worry about the detailed math, but the choice was theirs among a number of options they hadn't previously thought of.

If title is in both spouses' names and the property was acquired after marriage, the property is likely to be marital property and equitable distribution rules would apply. However, be sure to do the analysis regarding the source of the down-payment. If it was from premarital funds, the couple could decide to refund the down-payment to the spouses in the amounts they originally paid and divide the rest of the net sale proceeds equally between them. But what if there will not be enough sale proceeds after paying off the mortgage and closing costs to cover the full refund of the down-payment? Another option is to look to the *pro rata* — in other words, if both parties contributed a portion of the down-payment, then the sale proceeds would be distributed between them in the same proportions as their contributions. Another issue to consider is if one spouse paid 100% of the down-payment and one or both spouses paid all of the mortgage payments, what would be a fair distribution of the sale proceeds then? And how will they address repairs and improvements? Were repairs or improvements factored into the valuation of the property, or do they want to refund the cost of them to the payor? And should the parties refund the cost of utilities? Some of the couples with whom I have worked have agreed to discuss the impact of improvements and possibly reimburse, or partially reimburse, each other for such costs, while, repairs, coop maintenance and utilities have typically not been.

> *"If these things aren't arranged in the mediation, they are traps for creating conflict in the future."*

Here's an example to demonstrate. Let's say John and Betty were married in May 2010. And in February 2011, they purchased a home. John contributed $60,000 (60%) toward the $100,000 down-payment and Betty contributed $40,000 (40%). In 2014 they decide to divorce. They agree it is best to sell the property, repay the downpayments each made, and then split the rest of the proceeds equally. If the sale proceeds, after paying off the mortgage, brokerage commissions, legal fees, etc., are less than the $100,000 down-payment, then dividing the proceeds *pro rata*, 60% to John and 40% to Betty, would be a fair solution.

What if the parties have young children and they decide not to sell the property at the time of divorce? What are their options?

Maybe the couple decides to keep the marital home until the youngest child finishes high school or attains the age of 18, because they want to raise the children in their familiar home. Many families choose to do this, when they can afford to. So the question comes down to whether the spouse who will remain in the house will buy out the other spouse's interest. This is the cleanest method.

REAL ESTATE CONCEPTS, CONTINUED

Or, if they will keep the house in joint names until the youngest completes high school or turns 18 years old, then the discussion turns to carrying costs of maintaining the property — how the mortgage will be paid, utilities, maintenance, repairs, insurance — and then determining when the property should be sold. Who will get the income tax deduction for mortgage interest? And if they consider selling in the future, how will they determine the initial listing price, price to agree upon for the ultimate sale, how they will list the property, with a broker or not, how to choose the broker. Will they hire an appraisal company or accept the valuation of a real estate agent? How will they select the appraisal company or real estate broker? Will they each choose one, and if so, which appraisal or somewhere in between will they use, or will they agree upon a single valuation from one appraiser or one real estate broker? What if improvements to the property would make the property more saleable or increase the value, and who will pay for the improvements? Tax considerations should be discussed as well.

If these things aren't arranged in the mediation, they are traps for creating conflict in the future. If they are not resolved during the divorce mediation, there will be more of an incentive in the future for one party to delay or make the sale more problematic, even impossible. The extra problems that can come up in the future include that the spouse who remained in the house may no longer want to leave, or the spouse who has less income may have an incentive to sell fast and at whatever cost.

When running the numbers to determine whether there is sufficient equity in the property to divide between them in the event that the couple should decide to sell, it is important to be mindful of the following:

a) Carrying costs until closing, *e.g.*, monthly mortgage payments, maintenance or common charges, utilities;

b) Closing costs such as real estate attorneys fees, mortgage loan payoff, broker commission in the amount of 6% (or other contracted rate) of the sales price, and real estate transfer taxes and capital gains taxes.

It is also critically important to discuss a number of tax considerations with your clients.

a) There are no income tax consequences on transfers of property between spouses, or former spouses if incident to a divorce. (Internal Revenue Code ("IRC") §1041.

b) In the event of a sale of the principal residence, the parties may be entitled to a tax exclusion of up to $250,000 on an individual income return or up to $500,000 on a joint income tax return (IRC §121) if certain requirements are met.

c) Real Property Transfer Taxes. New York State real property transfer tax is 0.4% of the total sales price. If the property is located in any of the five boroughs of New York City, there will be an additional City transfer tax to pay based upon the sales price. If the sales price is $500,000 or less, then it would be 1% of the sales price. If sold for more than $500,000, it is 1.425%. If any New York State property is sold for $1 million or more, then the purchaser would be responsible for a "mansion tax" equivalent to 1% of the gross consideration. Note that if the transfer of the property is between spouses pursuant to a separation agreement or after the divorce decree and in accordance with the terms of the divorce, the value being transferred will be treated as equal to one half of the fair market value. And, in

REAL ESTATE CONCEPTS, CONTINUED

that event, the party coming off title would be obligated to pay such transfer tax to NYS and NYC, where applicable.

d) If investment property, there may be consideration of a 1031 tax deferred exchange (IRC §1031), which means that there may not be any taxes due upon the sale if the proceeds are immediately utilized to purchase a similar property. The rules of a 1031 exchange are complex and detailed and must be strictly followed in order to get this benefit. The details will not be discussed in this article.

As you can see from the foregoing, real estate can be quite complicated, but with the foregoing in your arsenal, you can help your clients have a meaningful and productive conversation.

Sabra R. Sasson, Esq., is the principal of Sabra Law Group, PLLC, a New York City-based law firm which provides mediation and legal services to individuals and couples in the areas of residential real estate, divorce and premarital planning. Sabra also represents clients in the capacity of consulting or review attorney when couples are mediating. She can be reached by telephone at (646) 472-7971, by email at sabra@sassonlaw.net, and you can learn more about her and the Firm at its website, www.sassonlaw.net.

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Divorce Income Tax Tidbits

by Mark A. Josephson

Here is some important information, in little bites, to keep in mind regarding the many tax consequences of divorce. Mediators should be aware of these details so they can make sure their clients are aware of them, and deal with them in their agreements.

Filing Status

Filing status is determined by whether your clients are considered unmarried or married on December 31st under state law. (See also the discussion of "unmarried" in the section below about "head of household" filing status.)

Generally, if spouses file a joint return and they later obtain a divorce, both are still responsible for the tax due on the joint return and any subsequent tax, interest, and penalties due as a result of an audit or amendment of the joint return.

This applies even if the separation agreement, stipulation of settlement and divorce decree state that *as between the two of you*, only one spouse is responsible for the payment of taxes. (The parties' agreement as to who will pay doesn't bind the government.) It also applies even though the spouses may not have had any income on that tax return as originally filed.

If either spouse files a separate return (which by law requires the other spouse to file separately or head of household as well, as noted below), he or she may amend to file a joint return any time within three years from the due date of the separate returns.

If spouses file a joint return, they cannot amend to file separate returns after the due date of the joint return.

Head of household filing status may be available if the taxpayer is considered "unmarried." For this purpose, your client is considered unmarried on the last day of the tax year if all of the following tests are met:

The client files a separate return. A separate return includes a return claiming married filing separately, single, or head of household filing status.

The client paid more than half the cost of keeping up his or her home for the tax year.

TAX TIDBITS, CONTINUED

The spouse did not live in the taxpayer's home during the last 6 months of the tax year. The spouse is considered to live in the taxpayer's home even if he or she is temporarily absent due to special circumstances.

Your client's home was the main home of the child, step-child, or foster child for more than half the year.

Your client must be able to claim an exemption for the child. However, a taxpayer meets this test if he or she cannot claim the exemption only because the non-custodial parent can claim the child using the rule described below in special rule for divorced or separated parents under "Claiming Your Child as a Dependent."

Claiming Your Child as a Dependent

Generally, the custodial parent is allowed to claim the dependent exemption for the child. The custodial parent is the parent with whom the child lived for the greater part of the year. Tax law considers the other parent to be the non-custodial parent. Here are some examples from the IRS:

Example 1 – child lived with one parent greater number of nights. You and your child's other parent are divorced. In 2013, your child lived with you 210 nights and with the other parent 156 nights. You are the custodial parent.

Example 2 – child is away at camp. In 2013, your daughter lived with each parent for alternate weeks. In the summer, she spent six weeks at summer camp. During the time she is at camp, she is treated as living with you for three weeks and with her other parent, your ex-spouse, for three weeks, because this is how long she would have lived with each parent if she had not attended summer camp.

Example 3 – child lived same number of days with each parent. Your son lived with you 180 nights during the year and lived the same number of nights with his other parent, your ex-spouse. Your adjusted gross income is $40,000. Your ex-spouse's adjusted gross income is $25,000. You are treated as your son's custodial parent because you have the higher adjusted gross income.

Source: IRS Publication 504, "Divorced or Separated Individuals," http://www.irs.gov/pub/irs-pdf/p504.pdf. For 2013 taxes, this is on p. 10.

A special rule applies to child(ren) of divorced or legally separated parents, or parents who live apart. The non-custodial parent may claim the exemption for the child(ren) if all of the following are true:

TAX TIDBITS, CONTINUED

1. The parents:
   (a) Are divorced or legally separated under a decree of divorce or separate maintenance;
   (b) Are separated under a written separation agreement; or
   (c) Lived apart at all times during the last 6 months of the year, whether or not they are or were married.

2. The child received over half of his or her support for the year from the taxpayer.

3. The child is in the custody of one or both parents for more than half of the year.

4. Either of the following applies.
   (a) The custodial parent signs a written declaration that he or she will not claim the child as a dependent for the year, and the non-custodial parent attaches this written declaration to his or her return. (IRS Form 8332 must be filed if divorce decree or separation agreement went into effect after 2008. If effective after 1984 and before 2009, the non-custodial parent may be able to attach certain pages from the decree or agreement in lieu of Form 8332.)
   (b) A pre-1985 decree of divorce or separate maintenance or written separation agreement that applies to 2013 states that the non-custodial parent can claim the child as a dependent, the decree or agreement was not changed after 1984 to say the non-custodial parent cannot claim the child as a dependent, and the non-custodial parent provides at least $600 for the child's support during 2013.

Careful consideration should be given to properly evaluate which spouse would receive a greater benefit for claiming the dependency exemption.

Itemized Deductions on Separate Returns

The same itemized deductions cannot be claimed by both parties.
For married filing separate returns, if one spouse itemizes, the other must also itemize.

The following chart about which spouse may take certain deductions applies to taxpayers in New York and nearby states. (If you are mediating for a community property couple — Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington or Wisconsin — see the note in Publication 504, which is cited below the chart.)

TAX TIDBITS, CONTINUED

IF YOU PAID ...	AND YOU ...	THEN YOU CAN DEDUCT ON YOUR SEPARATE FEDERAL RETURN...
MEDICAL EXPENSES	PAID WITH FUNDS DEPOSITED IN A JOINT CHECKING ACCOUNT IN WHICH YOU AND YOUR SPOUSE HAVE AN EQUAL INTEREST	HALF OF THE TOTAL MEDICAL EXPENSES, SUBJECT TO CERTAIN LIMITS, UNLESS YOU CAN SHOW THAT YOU ALONE PAID THE EXPENSES.
STATE INCOME TAX	FILE A SEPARATE STATE INCOME TAX RETURN	THE STATE INCOME TAX YOU ALONE PAID DURING THE YEAR.
STATE INCOME TAX	FILE A JOINT STATE INCOME TAX RETURN AND YOU AND YOUR SPOUSE ARE JOINTLY AND INDIVIDUALLY LIABLE FOR THE FULL AMOUNT OF THE STATE INCOME TAX	THE STATE INCOME TAX YOU ALONE PAID DURING THE YEAR.
STATE INCOME TAX	FILE A JOINT STATE INCOME TAX RETURN AND YOU ARE LIABLE FOR ONLY YOUR OWN SHARE OF STATE INCOME TAX	THE SMALLER OF: THE STATE INCOME TAX YOU ALONE PAID DURING THE YEAR, OR THE TOTAL STATE INCOME TAX YOU AND YOUR SPOUSE PAID DURING THE YEAR MULTIPLIED BY THE FOLLOWING FRACTION. THE NUMERATOR IS YOUR GROSS INCOME AND THE DENOMINATOR IS YOUR COMBINED GROSS INCOME.
PROPERTY TAX	PAID THE TAX ON PROPERTY HELD AS TENANTS BY THE ENTIRETY	THE PROPERTY TAX YOU ALONE PAID.
MORTGAGE INTEREST	PAID THE INTEREST ON A QUALIFIED HOME HELD AS TENANTS BY THE ENTIRETY	THE MORTGAGE INTEREST YOU ALONE PAID.
CASUALTY LOSS	HAVE A CASUALTY LOSS ON A HOME YOU OWN AS TENANTS BY THE ENTIRETY	HALF OF THE LOSS, SUBJECT TO THE DEDUCTION LIMITS. NEITHER SPOUSE MAY REPORT THE TOTAL CASUALTY LOSS.

Source: IRS Publication 504, "Divorced or Separated Individuals," http://www.irs.gov/pub/irs-pdf/p504.pdf. For 2013 taxes, this is Table 1 on p. 5.

TAX TIDBITS, CONTINUED

Child Support vs. Maintenance

Maintenance is typically tax deductible by the payer and includable as income by the recipient.

Child support payments are not tax deductible or includable as income.

Careful consideration should be given to the allocation between the two types of payments to avoid unintentional tax consequences. Note that the IRS may challenge the appropriateness of such allocations.

Tax Withholding

If you have a client who has been claiming a withholding exemption for his or her spouse and they divorce or separate, the employee spouse must file a new Form W-4 (Employee's Withholding Allowance Certificate), with his or her employer to claim the proper withholding allowances.

Estimated Tax Payments

If the spouses made joint estimated tax payments but subsequently file separate returns, either of them may claim all of the payments, or they may divide them in any way they agree.

Refunds

Refund checks issued from a joint return are usually payable to the order of both spouses and mailed to the address shown on the tax return. If the tax return requests a direct-deposit refund, the IRS will directly deposit the refund into the account specified, probably in both names. The IRS will not issue checks payable to each spouse separately. Mediators will want to keep this in mind, so that the parties clearly agree on how much each party gets from a refund, and the banking mechanics of how each person will get the right amount.

Injured Spouse

If a taxpayer files a joint return and all or part of his or her share of the overpayment is applied against the spouse's past due federal tax, state income tax, child or spousal support, or federal non-tax debt (such as a student loan), the taxpayer may be entitled to injured spouse relief. For more information about injured spouse relief, see IRS Publication 504, "Divorced or Separated Individuals," http://www.irs.gov/pub/irs-pdf/p504.pdf, in the section on Married Filing Separately. (In the version for 2013 taxes, it is on p. 4.)

TAX TIDBITS, CONTINUED

Innocent Spouse Relief

"Injured" spouse is different from "innocent" spouse. Under certain circumstances a spouse may be relieved of the tax, interest, and penalties resulting from a liability on a jointly filed return. If the IRS increased taxes, penalties or interest because of Spouse 1's unreported income or disallowed deductions, and Spouse 2 knew nothing about the unreported or erroneous items when Spouse 2 signed the return, tax relief may be available to Spouse 2.

Address Change

If your clients change their mailing addresses, they should be sure to notify the IRS using Form 8822, Change of Address.

Name Change

If a divorce mediation client changes his or her name, he or she should be sure to notify the Social Security Administration office, so the name on the tax return is the same as the one the SSA has on its records. This can be done by filing Form SS-5.

You may have noticed several references in this article to IRS Publication 504, "Divorced or Separated Individuals," http://www.irs.gov/pub/irs-pdf/p504.pdf. Divorce mediators would do well to keep a current version of that instruction manual on hand, and to let their clients know that it's freely available to answer questions and give them context for thinking about the tax implications of their divorce.

Mark A. Josephson, Esq., CPA, CFP, CFE, CGMA *is a …. Well, the number of letters after his name is a clue to how my professional hats Mark wears. He's a lawyer, accountant, forensic accountant, financial planner and mediator. Then after lunch, he gets busy. He serves on many professional and community organizations, including NYSCDM's Board of Directors. Mark is the Treasurer and a Board member of the Family and Divorce Mediation Council of Greater New York (FDMC). He practices in Manhattan as a partner in Murray & Josephson CPAs, LLC, www.murrayjosephson.com. He can be reached at (212) 644-2100 x202 or mark@murrayjosephson.com.*

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PRACTICE ISSUES, CASES OF INTEREST AND NEW DEVELOPMENTS

Hackett v. Hackett, Mutual Mistake

As are most negotiations, negotiations involving settlement agreements are holistic. Parties trade one asset, right, debt, etc. for another, with the goal of reaching an overall fair outcome. The role the mediator plays in determining fairness will vary based on the mediator's approach and philosophy, always mindful of the parties' rights of self-determination.

Once the parties have executed a properly prepared separation agreement under proper procedures, courts strongly prefer not to set them aside. If one spouse later wants a "look back" because he claims there was a problem with the agreement, he faces an uphill battle. One such problem a spouse can allege is a "mutual mistake." While the meaning of this term is self-evident, the bar for proving it is high.

As explained in the Appellate Division, Second Department's decision in *Hackett v. Hackett*, ___ A.D.3d ___, 2014 N.Y. App. Div. LEXIS 1679, 2014 NY Slip Op 1715, http://www.nycourts.gov/courts/ad2/calendar/webcal/decisions/2014/D40992.pdf (2d Dep't 3/19/14), the mistake must be "so material that it goes to the foundation of the agreement," .pdf p. 3, and, as a result, the evidence must be powerful. In this case, the court decided that there was no "mutual mistake" in the settlement agreement. A copy of the decision is reproduced starting on p.48.

Under the terms of the settlement agreement, the wife (defendant and appellant) took possession of the marital residence as well as responsibility for the mortgage and HELOC secured by it. The husband (plaintiff and respondent on the appeal) took sole ownership of his restaurant business. The wife waived her right to seek valuation of the husband's CPA degree (acquired during the marriage and thus presumptively marital property subject to equitable distribution at divorce). "An accompanying 'Schedule A' listed the dollar values of the assets being allocated to each party, and purportedly equalized the division of assets by requiring the plaintiff to pay the defendant the sum of $19,336." .pdf p. 2.

Two years after the settlement agreement was executed, the husband went to court and alleged that "mutual mistake" resulted in an unequal division of marital assets, in contravention of language in the agreement evidencing intent to divide the assets equally. Specifically, the husband claimed that a computational error in Schedule A undervalued the wife's assets, resulting in a $100,000-plus windfall for her. The wife denied a mistake, and emphasized that she had assumed all marital debt and agreed to undervalue the Husband's restaurant business.

The court agreed with the wife that the husband failed to meet the high evidentiary bar necessary for proving mutual mistake. The court cited the extensive negotiations used to reach the agreement, the wife's sense of having made "fair trades," and the wife's statement that she would not have entered into the agreement if she had known that she would be required to pay the husband upwards of $100,000.

The takeaways for mediators? Whether you're drafting a memorandum of understanding, a separation agreement or anything else, make considerable efforts to ensure that the facts are correct, that the parties understand all the details, and that each party feels the terms of the agreement are fair. The parties should know that it will be difficult for either of them later to have any of the terms set aside by a court. Indeed, they probably expect and want the agreement to survive the other spouse's effort to change it, so the thoroughness is giving the parties what they seek.

— Justine Borer

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PRACTICE ISSUES, CONTINUED

Legislation on Permanent Maintenance

LEGISLATIVE ALERT! Readers may recall that in THE REPORT Issue 2013:2, Eli Uncyk wrote about the New York State Law Revision's report about the 2010 changes in divorce law. http://nyscdm.org/nyscdmsite/wp-content/uploads/2013/08/NYSCDM-TheReport-Vol.2013-No.02.pdf, starting at p. 18. The Law Revision wrote, among other things, about amending the Domestic Relations Law and the Family Court Act to create a formula for *permanent* maintenance, as the 2010 legislation had created a formula for *temporary* maintenance.

Permanent maintenance legislation is here, in the form of Senate Bill S7266, Assembly Bill A9606. The bill was introduced late in the session, on May 8th. It does far more than just create a permanent maintenance formula. Reprinting for you the memorandum by Assemblywoman Helene Weinstein that explains the purposes and effects of the bill is the fastest way to describe the bill. The Justification section of the memo is fairly long, but the Purposes and Summary of Provisions sections at the top provide a brief but thorough rundown of the bill.

PURPOSE OF BILL: To continue taking steps toward reforming the state's spousal maintenance awards in connection with temporary and final spousal maintenance awards, providing consistency and predictability in calculating maintenance awards; and to update spousal support awards law to mirror the revised provisions for temporary maintenance awards.

SUMMARY OF PROVISIONS OF BILL:

Section 1. Subdivision 5-a of Part B of section 236 of the Domestic Relations Law (DRL) as added by chapter 371 of the laws of 2010, is amended to clarify the calculation of the guideline amount of temporary maintenance awards and to revise the factors to be considered to adjust the guideline amount where the court finds the guideline amount is unjust or inappropriate. This section also reduces the income cap from $500,000 to $300,000.

Section 2. Subdivision 6 of part B of section 236 of the DRL, as amended by chapter 371 of the laws of 2010, is amended to provide, in determining post-divorce maintenance, provisions that track the provisions for determining temporary maintenance. This section also provides for the guideline duration of post-divorce maintenance.

Section 3. Subparagraph 1 of paragraph b of subdivision 9 of Part B of section 236 of the DRL, as amended by chapter 182 of the laws of 2010, is amended to make conforming terminology changes such as replacing the term "recipient" with "payee".

Section 4. Section 12 of the Family Court Act, as amended by chapter 281 of the laws of 1980, is amended to mirror the provisions of temporary maintenance set forth in subdivision 5-a of Part B of section 236 of the DRL.

Section 5. Paragraph a of subdivision 1 of Part B of section 236 of the DRL is amended to make conforming terminology changes such as replacing the term "recipient" with "payee".

Section 6. Subparagraph 7 of paragraph d of subdivision 5 of Part B of section 231 of the DRL, as amended by chapter 281 of the laws of 1980 and as renumbered by chapter 229 of the laws of 2009, is amended to provide that in determining an equitable disposition of property pursuant to subdivision 5(c) of Part B of section 236 of the DRL, the court shall not consider as marital property subject to distribution the value of a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement. However, the court, in arriving at an equitable division of marital property, shall consider the direct or indirect contributions, to the development during the marriage of the enhanced earning capacity of the other spouse.

Section 7. Section 248 of the DRL is amended to introduce gender-neutral language.

Section 8. Provides for the effective date.

PRACTICE ISSUES, CONTINUED

JUSTIFICATION: This bill completes reforms of New York divorce laws begun in 2010 with the adoption of standards for temporary maintenance similar to the standards used for child support. The bill makes several kinds [of] changes to current law. First, it amends the provisions for temporary maintenance enacted in 2010 by lowering the provision's income cap and by making technical and clarifying amendments, including restating in simpler language the method for calculating the temporary maintenance guideline amount. Second, the bill adopts maintenance standards for Post-divorce maintenance awards similar to those for temporary maintenance awards. Third, the bill extends the concept of guidelines to the Family Court Act's provisions for spousal support. Fourth, within the context of comprehensive legislation providing for post-divorce maintenance guidelines, the bill eliminates increased earning capacity from consideration in the distribution of marital assets. Finally, the bill conforms other portions of the Domestic Relations Law to make them consistent with the bill's provisions for post-divorce maintenance.

In 2010, New York State adopted standards for temporary maintenance similar to the standards for child support in the Child Support Standards Act in use since 1989. This reform was a response to serious concerns about the ability of the State's then existing spousal maintenance provisions to produce equitable results. Spousal maintenance awards at the time were inconsistent and unpredictable, creating questions about the fairness of awards and discouraging settlements. Litigation to establish maintenance was lengthy and complex. For parties who could not afford protracted litigation, maintenance was an illusory remedy.

The 2010 reforms began the process of incorporating into provisions for spousal maintenance the concept of marriage as an economic partnership, an idea that New York State adopted for equitable distribution in 1980. Divorce remedies that look to the economic partnership premise base maintenance on the recognition that parties make different contributions to a marriage, that only some of those contributions are financial, and that some contributions, particularly of those caring for children and a household, diminish post-divorce earning prospects.

As stated in the justification for the 2010 temporary maintenance legislation, a commission of the American Academy of Matrimonial Lawyers (AAML Commission) noted that various jurisdictions had adopted a formula approach to determining spousal support. The AAML Commission recommended use of a formula based on two universal factors, the income of the parties and the length of the marriage. Additionally, the American Law Institute, in "Principles of the Law of Family Dissolution; Analysis and Recommendations" (2000) of the American Law Institute (ALI Principles), identified economic losses that spouses suffer at the end of marriage. These losses often take the form of lower earning capacity for spouses who are primary caretakers of children. The ALI Principles suggest that these losses be shared through a formula for determining post-marital spousal support that takes into account the incomes of the parties and the length of the marriage.

The 2010 temporary maintenance law provided not just consistency but flexibility through provisions allowing the court to adjust guideline amounts up or down when numbers produced by the formula were inappropriate or unjust. Also, the law provided a list of factors for the court to consider when making adjustments and required courts to provide written explanations for their justifications.

Attorneys representing low and middle income parties report that clients, who in spite of great need would have been unable to undertake the litigation necessary for a maintenance award under the vague provisions of the previous law, have been receiving temporary maintenance as a result of the law enacted in 2010. These awards are the result of judicial rulings under the new law and, equally importantly, of settlements informed by clear standards allowing lawyers to predict litigation outcomes. Courts have taken advantage of the provisions providing flexibility and have adjusted awards when necessary for equity in particular cases. Dozens of decisions have been published.

The 2010 law also directed the New York State Law Revision Commission (LRC) to, among other things; "review the maintenance laws of the State, including the way in which they are administered to determine the impact of these laws on post marital economic disparities and the effectiveness of such laws and their administration in achieving the state's policy goals and objectives of ensur[ing] that the economic consequences of a divorce are fairly and

PRACTICE ISSUES, CONTINUED

equitably shared by the divorcing couple." (Sec. 3 of Chapter 371 of the Laws of 2010).

Following a study, including interviews with stakeholders and interested parties, a roundtable discussion with stakeholders, investigation of maintenance laws in other jurisdictions, and analysis of data on maintenance awards in nine counties in the State, the LRC issued its final report on May 15, 2013 of its findings, conclusions and recommendations (the LRC Report). The LRC Report, among other things, recommended that the mathematical formula set forth in the 2010 law for the calculation of the guideline amount of temporary maintenance be continued and that a mathematical formula be similarly used to calculate the guideline amount of post-divorce maintenance, with consideration by the court of a set of factors to determine whether the guideline amount of post-divorce maintenance should be increased where the parties' income exceeds the income cap. The LRC also recommended that the provisions providing for spousal support in Family Court proceedings be amended to mirror the temporary maintenance law, revised as recommended by the LRC.

This bill incorporates most of the recommendations set forth in the LRC Report.

Section one of this bill makes small adjustments that refine, clarify, and streamline the current temporary maintenance standards law. The provisions for calculating the formula amount have been simplified. Factors for judges to consider when adjusting awards have been condensed and clarified, and factors inapplicable to temporary maintenance removed. Provisions confirming judicial practice, concerning allocation of responsibility for family expenses and the independence of decisions on temporary and post-divorce maintenance, have been added. The bill retains provisions for courts to consider the length of marriage in setting the duration of maintenance so that judges hearing cases involving short-term marriage may terminate maintenance before the divorce is final. And, last, the bill lowers the income cap used in temporary maintenance provisions from $500,000 to $300,000. The $300,000 cap takes into account the high cost of litigating a right to maintenance
without the kind of simplified method provided for families by maintenance guidelines. This cost is sufficiently high so that only the wealthiest divorcing spouses can afford to litigate maintenance.

Section two of this bill extends the benefits of the temporary maintenance provisions to post-divorce maintenance awards. Post-divorce maintenance awards remain the "wild card" in divorce litigation. Awards are still inconsistent and unpredictable, and lengthy, expensive litigation is still necessary to achieve equitable results. Using guidelines based on a formula with flexibility for adjustments up and down for final maintenance will change this.

Much of the second section of the bill tracks the language of the temporary maintenance law, including the restated and clarified provisions set forth in this bill for calculating the guideline amount of a temporary maintenance award. The major differences between the temporary and post-divorce maintenance provisions are the provisions on duration. Temporary maintenance usually lasts until a legal case concludes with a final judgment of divorce, except where courts terminate temporary maintenance prior to the divorce becoming final based on consideration of the length of marriage as mentioned above. Post-divorce maintenance needs its own clear end point, and this bill proscribes a duration calculated as a percent of the length of the marriage. Like the recommendations on duration in the AAML Commission and the ALI Principles, the longer the marriage, the longer the time post-divorce maintenance will be paid. The bill also provides that maintenance payments will end on the death of either party.

The bill's spousal support provisions closely track provisions for temporary maintenance and make available to vulnerable spouses the same kind [of] consistent, predictable results that maintenance guidelines provide to divorcing couples.

Section six amends the Domestic Relations Law to eliminate a form of marital property, enhanced earning capacity, recognized by the Court of Appeals in O'Brien v O'Brien, 66 NY 2d 576 (1985). The provisions in the bill providing for the use of formulaic guidelines to calculate post-divorce maintenance for amount and duration allow the post-divorce maintenance outcomes to substitute for treating enhanced earning capacity as a marital asset. To eliminate enhanced earning capacity as a marital asset without these critical reforms to our maintenance laws would be a great in justice to spouses who have sacrificed their education and/or careers for the benefit of the marital partnership.

PRACTICE ISSUES, CONTINUED

> Section seven amends the Domestic Relation Law relating to applications made to the court by a spouse when their former spouse is cohabitating with another person and is holding themselves out as a spouse of that person. The bill makes gender-neutral changes to this section of the Domestic Relation Law.

The memorandum, the text of the bill and other information about the bill are available at http://www.assembly.state.ny.us/leg/?default_fld=&bn=A09606&term=2013&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y

The bill has been progressing. At press time for THE REPORT, it had advanced to a third reading in the Senate. NYSCDM members and other readers who have any positions on the bill should contact their legislators quickly, as the legislative session will probably end soon.

Addendum added at 6/19/14 press time. The bill was amended on June 16th to drop the income cap to $200,000 per year. Our sources tell us, one day before the end of the regular session, that the bill will not come to a vote in this session. However, it's obvious that the Legislature is paying attention to permanent maintenance.

— Chuck Newman

Obamacare and Divorce:
An Observation and a Request

Some divorce mediators are finding that couples decide not to file for divorce right after signing a separation agreement, for the simple reason that both spouses (to say nothing of the kids) rely on the health insurance provided by one spouse's employer. It also seems — again, anecdotally — that such spouses have greater difficulty finding secure full-time jobs after the 2008 financial crisis.

Some mediators report that with the availability of health insurance from the federal or state marketplaces set up under the Patient Protection and Affordable Care Act of 2010 ("Obamacare") (and perhaps elsewhere), there are now more health insurance options available to ex-spouses, meaning that couples in troubled marriages don't have to stay married just for the health insurance.

The purpose of this article is not to debate the pro's and con's of the ACA. On a practical level: in post-2013 mediations, have you noticed a difference in the speed with which clients move from executing the separation agreement to filing for divorce? For that matter, is post-divorce COBRA disappearing? We would like to hear from you about this, even if you report no change, and certainly if you want to weigh in with a few stories. Please email THE REPORT's editors at nyscdmpubs@yahoogroups.com. Better yet, if you've given this some thought, please email us at the same address to propose writing a full article for a future issue. Thanks.

— Chuck Newman

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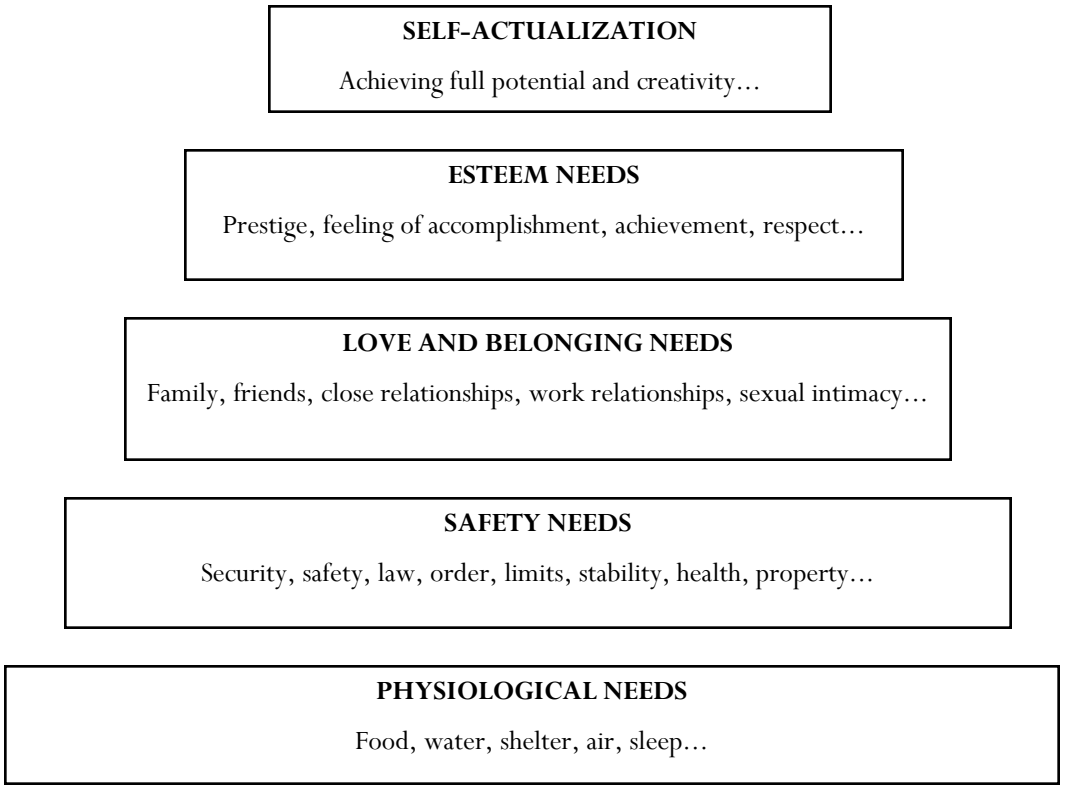
T4: Mediator's Toolbox: Tips, Tricks and Techniques

Maslow's Hierarchy of Needs for People Going through Divorce

In 1943, psychologist Abraham Maslow first proposed his hierarchy of human needs. He developed the concept further in his 1954 book, *Motivation and Personality*. Maslow's book has since become a touchstone for understanding human emotion and behavior. The idea is that humans have strata of needs, starting from the most basic necessities for survival climbing up a pyramid toward self-actualization. Here's a rough-and-ready shot at it:



The two lowest levels are sometimes spoken of as the "basic needs". The two above that are sometimes thought of as the "psychological needs." And the pinnacle is sometimes called the "self-realization" level. A reasonable conclusion: until the lower levels of needs are fully met, there's no real hope of complete self-realization.

Think for a moment about the needs of people getting divorced. If people put their divorce in the hands of the litigation process, a judge's power is limited by the law. A judge will certainly try to deal with the physiological needs by means of support and maintenance orders. The judge might be asked, and might have some power, over the safety needs, via orders of protection, for instance. So we expect judges to be able to deal with the basic Maslow needs of each divorcing spouse.

TOOLBOX, CONTINUED

But then go up one level, and then two. The judge has zero power over love and belonging needs or esteem needs. Indeed, we probably wouldn't want to imbue judges with the power to weigh in on with whom each spouse associates in the future, has committed or intimate relationships, reaches achievements, etc. And judges certainly have no ability or insight into how either of the parties may self-actualize.

There is a big "but." In mediation, each spouse — and the couple as an entity — has great control and influence over the other spouse's basic needs. So the spouses can handle all the same needs the judge can handle. In addition, as the spouses work through their agreements about how they will order their lives after divorce, they have the ability to recognize and deal with all the other, higher needs in any way that makes sense for both of them.

Through the Maslow lens, we can see that when courts work well, litigation can bring acceptable results for basic needs. But for the parties to obtain a resolution best designed to anticipate and meet all of their higher needs, mediation is the far stronger choice.

— Chuck Newman

The genesis of the idea for this article came from a portion of a Manhattan continuing legal education program about neuroscience for dispute resolvers, given by Pauline Tesler for the New York State Bar Association Dispute Resolution Section in February 2014. You can learn more about Ms. Tesler and her work at http://integrativelawinstitute.org/, or you can search for her at a number of other websites.

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TOOLBOX, CONTINUED

Practical Tips

Mediators need to know the *business* of a professional practice. Here are two tips.

Make a mediation website. Websites are important marketing tools. Simple and effective websites can include a professional headshot (or simply an attractive picture); a brief (or less brief) biography; and a resume and/or a link to a resume. The resume should include the names of mediation trainings taken, memberships in any mediation organizations, and any mediation accreditations; links to publications, if any (if you have less than three publications, don't list them); and contact information. Websites don't have to be complicated. You might choose to make one that functions simply as an "electronic business card" that allows potential client and colleagues to locate your contact information. Many web designers are affordable. Setting up a website and making changes to it can be straightforward; don't feel intimidated that you have to be a geek to have a good site. In short: if you've been delaying (for money reasons or because you're leery of technology), delay no longer!

The initial client phone call is an important time to establish rapport and ground rules. Usually the initial phone call is from one potential client, not both, which creates a problem for mediators, who aim to be neutral. Never give advice (legal or otherwise) to one potential client during the initial phone call. Often the potential client will attempt to explain the situation in detail, and may try to gain your empathy. Deferring your explanations until the consultation, when both parties are present, can be an ideal solution. Sending a neutral email to both parties to schedule the consultation can get the mediation off on the right foot.

— Justine Borer

Justine Borer, Esq. is a Manhattan-based family and divorce mediator and lawyer. With the guidance of Chuck Newman, she developed the seminar Practical Tips for Family and Divorce Mediators *to help mediators navigate the business aspect of running a mediation practice. She recently produced a DVD version of the seminar. She can be reached at justine@borerlawmed.com or (646) 385-4444. Her website is http://www.justineborer.com.*

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TOOLBOX, CONTINUED

The Courts Have a Useful Website

The New York State Unified Court System's website, www.courts.state.ny.us, provides information for litigants and lawyers in all New York State counties. There is a whole section with information for *pro se* divorce litigants, meaning a spouse who is seeking a divorce without representation by a lawyer, www.courts.state.ny.us/divorce. The high points:

Important changes in New York State divorce law and court rules in the last five years, divided by year (http://www.courts.state.ny.us/divorce/legislationandcourtrules.shtml. Recently, for example, it mentions increases in the child support and temporary maintenance "caps" in 2014);

FAQ's (http://www.courts.state.ny.us/divorce/info_faqs.shtml), such as "Do I need a lawyer to get divorced" and "How can I get a divorce using a Separation Agreement";

Definition of an "uncontested divorce" (http://www.courts.state.ny.us/divorce/glossary.shtml#Uncontested_Divorce)

Required divorce forms (http://www.courts.state.ny.us/divorce/divorce_withchildrenunder21.shtml#ucdforms). Note that not all forms are required in cases in which there are no children, and that filing requirements vary somewhat by country.);

Instructions for filling out the required forms (http://www.courts.state.ny.us/divorce/pdfs/Divorce-Packet-Instructions.pdf);
Divorce resources by county (http://www.courts.state.ny.us/divorce/county_specific_divorce_info.shtml); and

Definition of divorce mediation and court mediation resources (http://www.courts.state.ny.us/ip/adr/divorcemediation.shtml).

This website is extremely useful for divorce mediators and their clients. Most links will be helpful for both. For example, non-lawyer mediators (and non-matrimonial lawyers) may not know the distinction between an "uncontested divorce" and a "contested divorce," and the court website provides a succinct explanation. So, too, for questions about whether a lawyer is needed to get a divorce (different mediators have different philosophies; divorcing spouses can file uncontested divorce papers themselves, without legal representation) and how a separation agreement — often the end result of divorce mediation — is used in the divorce process.

Information about changes in the law is crucial to the mediator. Most mediation clients will be unaware of either the original information or the changes; it is essential that mediators keep themselves in the loop.

TOOLBOX, CONTINUED

The "definition of court mediation" is unhelpful and confusing; mediators should be aware of its existence in case mediation clients view it before mediation.

The link to "divorce resources by county" may be helpful if mediation clients are no longer able to afford a private mediator and need to be directed to lower-cost options.

The website's uncontested divorce form packet is a crucial tool for both mediators and clients. Clients may file the forms in court themselves, or lawyers may do it for them. (Non-lawyer mediators may not file the forms in court.) The instructions for filling out the forms are thorough and somewhat confusing. Mediators should warn clients to set aside 20+ hours to put together the uncontested papers if they will do so on their own, and explain that clients will need to file them in court personally (an additional time burden, particularly if the clerk rejects the papers on the first go, as frequently happens with *pro se* litigants). And even lawyer-mediators who prepare and file the papers on their own will likely find the process time-consuming and tedious the first couple times, though the process will likely get faster with repetition and may be a worthwhile undertaking.

— Justine Borer

NY State Council on Divorce Mediation

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READ ELSEWHERE

Children in Native American Families and the Advantages of Mediation

The New York State Bar Association's main membership publication is called the *Journal*. The March/April 2014 issue (Vol. 86, No. 3) had a series of articles about family law relating to Native American kids. The first was the cover story, "Government Law and Policy and the Indian Child Welfare Act," by Carrie E. Garrow. The article is introduced this way:

> Since the formation of the United States, Indian nations and Indian people have been impacted by the numerous laws and policies focused on acquisition of Indian lands and assimilation of Indian people. These federal laws and policies led to states, such as New York, breaking up Indian families and removing Indian children from their homes in order to achieve assimilation. This article provides an overview of these laws and policies, which led to the need for the Indian Child Welfare Act (ICWA). It then discusses ICWA's requirements and New York's implementation. With awareness of these issues, attorneys will be better equipped to represent their clients in family law cases when application of ICWA is required.

Just as family lawyers should be aware of family law issues regarding Native American families, so, too, should divorce mediators whose clients are Native American.

Another of the articles in the March/April issue was "Best Interests of an Indian Child," by Hon. Peter J. Herne. Judge Herne, a New York trained lawyer, is the Chief Judge of the St. Regis Mohawk Tribal Court. He summarizes the "best interests of the child" standard used by New York courts and reports that research does not disclose any New York decisions that use the phrase "best interests of the *Indian* child" (italics added for emphasis). To Judge Herne, that suggests a question: "Where should the fact that the child is an Indian child be placed in New York's best interests of the child standard?" The rest of his article proposes a standard, different from that used in non-Indian cases, that should be used in decisions about Indian kids in family disputes. The differences, he proposes, are not just factors of race that could be applied in any best-interests determination, but unique factors of "the political status of the child's being 'Indian'. An Indian child enjoys certain rights and privileges by virtue of being a Tribal Nation citizen/member."

Mediation can allow Native American parents to make parenting decisions based on considerations running the gamut from the political status of their children to anything else the parents think is important. They need not wait for legislatures or courts to work out the interplay between state family law and federal Indian law. They can figure out what's best for their own kids, agree to do it, and then do it. Indeed, Anglo-Saxon and other parents can even borrow from ideas embedded in Native American law or custom if they think it is useful for their own family.

READ ELSEWHERE, CONTINUED

Mediators with Native American clients (or even clients with Native American lineage) may want to consider learning about the laws and customs of families in the clients' tribes. Mediators could also encourage their clients to do so, if relevant.

The issue of *The State Bar Journal* and the several articles about Native American children are available to members of the NYSBA at http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=47571&loggedIn=True. The cover article starts on p. 10. Judge Herne's article starts on p. 22. Unfortunately, the issue is not available on the web to people who aren't members of NYSBA.

— Chuck Newman

Charles M. Newman is a Director of NYSCDM and a co-editor of THE REPORT. Chuck's divorce and commercial mediation and law practice is in Manhattan.

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INSIDE SCOOP/AROUND THE COUNCIL

New Directors of NYSCDM

We'd like to introduce you to three new members of the NYSCDM Board of Directors. One fills the seat held by a director who had to resign and two were elected at the 2014 Annual Meeting (held on May 2nd at Saratoga Springs during the Annual Conference) to fill vacancies caused by terms normally expiring.

As noted in THE REPORT 2014:1, http://nyscdm.org/nyscdmsite/wp-content/uploads/2014/01/NYSCDM-TheReport-Vol.2014-No.01.pdf, p. 43, Gail Ferraioli of Fairport served the Board with distinction until last Fall. With family newly nearby her and the development of other aspects of her practice, Gail felt it best to allow another member the opportunity to contribute to the Council as a Director.

Renee O. LaPoint, of Rochester, was elected at the December 2013 Board meeting to serve the remainder of Gail's term. Renee is the President of the Rochester Association of Family Mediators. She is certified by the Center for Dispute Settlement and the Unified Court System to mediate court-referred cases, and she is involved with Restorative Justice initiatives. She earned her master's degree in Counseling and Educational Administration from Syracuse University and her undergraduate work in Psychology and Sociology at Skidmore College.

Renee "found" mediation as a result of her own divorce. More, she says that mediation "found" her. She loves the field, the work, her colleagues and the clients. She says that she accepted the position on the NYSCDM board because she wants to work with like-minded people to raise awareness about, and the professionalism of, mediation.

Renee remarried three years ago and has three children and three step-children. She thinks of her Airedale terrier as her seventh. Enjoying the water and the outdoors, Renee hikes, skis and kayaks. She loves to travel. When she's not doing any of those things, you can reach her at (585) 269-8140 or renee@divorceandfamilymediate.com. Her website is http://divorceandfamilymediate.com.

LJ Freitag, who works out of the Southern Tier, Syracuse and Buffalo areas, was elected to the Board at the Annual Meeting. A graduate of Syracuse University with a dual degree in Psychology and Communication, he began his interest in mediation while working towards his master's degree in Industrial and Labor Relations at Cornell University.

LJ spent over 20 years as Manager of Human Resources for companies including Chrysler Corporation, the Dial Corporation, Nabisco Brands, World Kitchen, Inc., and the Rich Products Corporation, where his functions included mediating employee disputes. As an active member of the New York State Dispute Resolution Association, LJ received his training in divorce mediation approximately five years ago, and continues to mediate for several counties in the Southern Tier.

INSIDE SCOOP/AROUND THE COUNCIL

New Directors, continued

LJ also serves as a mediator for the Juvenile Restorative Justice program, and as a panel member for the New York State Justice Center's Surrogate Decision-Making program. In addition, he is a member of the Arbitration Panel for the Erie County Bar Association, arbitrates Lemon Law cases, and is a member of the Corning Inc. Labor Grievance Arbitration panel. Since joining NYSCDM, LJ has been a member of the Annual Conference Committee and has worked on its Annual Conference Auction event for the past two years. LJ is also an active member of the Academy of Professional Family Mediators.

LJ's current goals include continuing to work on efforts to improve the information available to the public regarding the advantages of divorce mediation; and learning from other experienced mediators how to make the overall process and experience more effective for all parties. Another goal is to hike the Finger Lakes Trail, end to end. LJ can be reached at ljftoo2002@yahoo.com or at (315) 559-2801.

Deborah Hope Wayne, with offices in New Rochelle and Manhattan, was also elected by the membership at the Annual Meeting. Deb is a mediator and collaborative lawyer. She has over twenty years' experience in family and matrimonial law and principled negotiations. She is a founding member of the Academy of Professional Family Mediators. She is also on the roster for court-referred mediation cases for the New York State Supreme Court, Westchester County.

Deb earned her BA, *cum laude*, at Boston University; she studied at the University of Grenoble in France; and has her JD from Pace University School of Law. Not leaving education behind, she is passionate about developing programs to train professionals and students in collaborative law and mediation. She is on the Board of the New York Association of Collaborative Professionals and is Co-Chair of its Training Committee. She co-developed one of the first law school programs on collaborative law in the United States, and is currently an Adjunct Professor of Collaborative Law at Pace University School of Law. Deb is fluent in French and Spanish.

Deb has said that her membership in NYSCDM "has provided me with a sense of community in the mediation world and a forum for discussion of best practices.... I try to maintain the highest standards in my practice, and the Council provides many resources to help me reach this goal."

Deb expects to use her term as a Director to actively participate in helping the Council reach its goals for the education and competence of its members. She is a member of the Council's Professional Development Committee because, as she says, she is "interested in working on projects that are stimulating and helpful in meeting future credentialing requirements." You can reach Deb at (914) 365-1200, (646) 435-5570 or deborah@deborahwaynelaw.com. Her website is www.deborahwaynelaw.com.

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INSIDE SCOOP/AROUND THE COUNCIL

Board Meeting Highlights

February 2014

The Board of Directors of the New York State Council on Divorce Mediation meets four times per year. In order to keep the membership informed of Board activities, we present you with some of the highlights of the February, 2014 meeting, which was held via telephone.

In addition to his written report, treasurer David Louis reported that there was a cash balance as of December 31, 2013 of $79,000 and that although $8,442 of reserves were used, it was less than anticipated.

Clare reported that there were still sixty members who had not renewed but that Bob Badolato expected that more members would renew when he sends out the final notices. Clare asked that either the Board or Membership follow up with non-renewing members. Clare also reported that by an email vote, David Louis was nominated as the Board appointee to the Nominating Committee.

Written reports were submitted by Melissa Burns, administrative consultant; Bob Badolato, database manager; and Patricia Murray, public relations consultant. Melissa also reported that Google Voice did not appear to be a reliable option for our phone service, but that she would report on alternative plans for wireless service at the May meeting.

The Board unanimously approved the following:

(1) The Abel Award recipient for 2014, to be revealed at the Dinner on the first night of the conference.

(2) Amendment to the by-laws to clarify that the Immediate Past President is the Chair of the Nominating Committee; that the Board appoint a Board member to serve in addition to the three persons voted on by the membership; and that a solicitation for nominees be included in a publication published by the Council prior to February 1st.

(3) A survey to be distributed by the Membership Committee at the Annual Conference and via Survey monkey.

(4) The formation of The Strategic Partnership Committee as a new standing committee.

(5) The adoption of a member logo that can be downloaded and used by members.

(6) A Past President and New Member Reception at the Annual Conference.

The Board asked that the Accreditation Committee review the issue of requiring a minimum number of CE credits for Accredited Members who have suspended their practice and to submit an amended recommendation.

INSIDE SCOOP/AROUND THE COUNCIL

Board Meeting Highlights

Written reports were submitted by the following committees:

The Downstate Mini-Conference Committee reported that the Conference in December was a success and earned a profit of $3,100 for the Council in spite of poor weather the day of the conference.

The Revenue Ad Hoc Committee will make a recommendation at the May meeting.

The Public Awareness Committee reported on the very positive Google Analytics results achieved as a result of the Committee's efforts, and it was suggested that a summary be provided to the membership as well. Blog posts, especially posts of original content, will help to drive the Google ratings higher. They also reported that they will be sending the PowerPoint presentation to members soon.

The Membership Committee reported that they revised the new member welcome letter and will include with the letter a description of the buddy program.

David Louis reported on behalf of the Annual Conference Committee that Patty Murray agreed to provide a workshop as to how members can use the marketing tools provided by the council and that they are still working on a venue for the 2015 conference.

***

May 2014

As noted above in the highlights of the February Board of Directors meeting, THE REPORT offers highlight information about the meetings to the members. The Board's May 1, 2014 meeting was held in Saratoga, New York, just prior to the Annual Conference.

In addition to his written report, treasurer David Louis advised that there was a cash balance as of $90,020.

President Clare Piro reported that the Council's website now includes a shopping cart feature that can be used for mini-conferences and membership renewals, plus the ability to make a donation to the Council's Public Awareness fund online. Clare reported that she and Kathy Jaffe completed an audit of the Council's financial records and that all was in order. She noted that Bill Hoefer will be chairing an *ad hoc* committee to make a recommendation regarding the Council's listserv.

INSIDE SCOOP/AROUND THE COUNCIL

Board Meeting Highlights

Written reports were submitted by Melissa Burns (administrative cosultant), Bob Badolato (database manager) and Patricia Murray (public relations consultant). In addition to Patty's report, Susan Ingram, co-chair of the Public Awareness Committee, reported that we are number 1 or 2 on common Google searches for divorce mediation; and that Google Analytics for March and April showed that the most visited pages of our website are the Homepage, Members-Only Area, Divorce Mediation and Find-a-Mediator.

The Board unanimously approved the following:

(1) The Advertising Policy as proposed by an *ad hoc* committee of Bobbie Dillon and Chuck Newman.

(2) That the Council may accept ads in the Members-Only section of the website and in Council publications, the details and specifications of which will be considered by a newly formed committee.

(3) That the Council seek to become an Accredited Provider of Continuing Education credits for New York State Licensed Social Workers.

The Finance Committee submitted its report detailing the need for our conferences to meet certain financial goals in order to continue to meet the Council's expenses without increasing member fees.

The Membership Committee submitted its minutes discussing the survey to be distributed at the Annual Conference, and the Board discussed the Past-President/New Member Reception to be held on the opening evening of the Annual Conference.

The editors of THE REPORT submitted a memorandum in which they provided information regarding the publication schedule, expanding the editorial board, increasing visibility of THE REPORT on the Council website, distribution and formatting and possibly changing the name of the publication.

Board meeting minutes, once approved, and committee reports are posted in the Members-Only section of the website, and we invite all members to review them for more detail.

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INSIDE SCOOP/AROUND THE COUNCIL

Watercooler

NYSCDM member Bud Baker, of Buffalo, was honored this Spring as the first recipient of the National Association for Community Mediation's (NAFCM) Outstanding Volunteer Award. Bud's service as a community mediator is through the CDRC for the 8th Judicial District, the Center for Resolution and Justice of Child and Family Services. CRJ provides divorce mediation services using a sliding scale fee structure. The 8th District includes Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans and Wyoming Counties.

Bud was selected from numerous nominees from mediation centers across the nation. NAFCM said, "Raymond 'Bud' Baker stood out as the most exceptional community mediation volunteer in the entire country." Bud was recognized at NAFCM's annual conference, where he was presented with a framed certificate of his award and a copy of Ken Cloke's new book, *The Dance of Opposites: Explorations in Mediation. Dialogue and Conflict Resolution Systems Design*. He was also interviewed on a special episode of the Conflict Specialists Show, available here: http://www.conflictengagementspecialists.com/blog/raymond-bud-baker-nafcm-outstanding-volunteer-award-winner/.

NY State Council on Divorce Mediation

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COURT OPINION: HACKETT V. HACKETT

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D40992
W/htr

_____AD3d_____ Argued - November 22, 2013

RANDALL T. ENG, P.J.
MARK C. DILLON
THOMAS A. DICKERSON
SANDRA L. SGROI, JJ.

2012-04064 DECISION & ORDER

Roland Hackett, respondent, v Carol Hackett, appellant.

(Index No. 3338/08)

Charles A. Termini, Oceanside, N.Y., for appellant.

Wolfson & Carroll, New York, N.Y. (John W. Carroll of counsel), for respondent.

In an action to reform the parties' settlement agreement, which was incorporated but not merged in their judgment of divorce dated February 3, 2006, the defendant appeals, as limited by her brief, from so much of an order of the Supreme Court, Kings County (Sunshine, J.), dated February 21, 2012, as granted those branches of the plaintiff's motion which were to reject so much of the report and recommendations of a court attorney referee dated May 26, 2011, as, after a hearing, recommended that the settlement agreement should not be reformed on the ground of mutual mistake and that the defendant should be awarded a counsel fee in the sum of $10,000, and denied those branches of her cross application which were to confirm so much of the report and recommendations as recommended that the settlement agreement should not be reformed on the ground of mutual mistake and, in effect, to confirm so much of the report and recommendations as recommended that she be awarded a counsel fee in the sum of $10,000, and reformed the settlement agreement to require her to pay the plaintiff the sum of $100,276.50.

ORDERED that on the Court's own motion, the notice of appeal from so much of the order as denied those branches of the defendant's cross application which were to confirm so much of the report and recommendations as recommended that the settlement agreement should not be reformed on the ground of mutual mistake and, in effect, to confirm so much of the report and recommendations as recommended that she be awarded a counsel fee in the sum of $10,000, is deemed to be an application for leave to appeal from those portions of the order, and leave to appeal

COURT OPINION, CONTINUED

is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, those branches of the plaintiff's motion which were to reject so much of the report and recommendations as recommended that the settlement agreement should not be reformed and that the defendant should be awarded a counsel fee in the sum of $10,000 are denied, and those branches of the defendant's cross application which were to confirm so much of the report and recommendations as recommended that the settlement agreement should not be reformed and, in effect, to confirm so much of the report and recommendations as recommended that she should be awarded a counsel fee in the sum of $10,000 are granted, and the provision thereof reforming the settlement agreement to require the defendant to pay the plaintiff the sum of $100,276.50 is vacated.

The parties were married in November 1982. More than 22 years later, in February 2005, the plaintiff commenced an action for a divorce. On January 12, 2006, the parties settled their divorce action and executed a written settlement agreement, which was incorporated but not merged into their ensuing judgment of divorce. Under the terms of the settlement agreement, the marital residence, which then had an estimated fair market value of $465,000, was awarded to the defendant, and she assumed responsibility for repayment of a first mortgage and a home equity loan with a combined outstanding balance of $195,124. The plaintiff was awarded sole ownership of his restaurant business, which had an appraised value of between $360,000 to $385,000, but which the parties agreed to value, for purposes of the settlement, at only $325,000. The defendant also agreed, inter alia, to waive her right to seek valuation of the plaintiff's certification as a public accountant, which he acquired during the marriage. An accompanying "Schedule A" listed the dollar values of the assets being allocated to each party, and purportedly equalized the division of assets by requiring the plaintiff to pay the defendant the sum of $19,336. The parties acknowledged in open court that they had read and understood the terms of the settlement agreement, and had not been forced or coerced into signing it.

Approximately two years later, in January 2008, the plaintiff commenced this action, seeking to reform the settlement agreement on the ground that an alleged mutual mistake had resulted in the unequal division of the marital assets. The plaintiff alleged that the settlement agreement contained a "computational error" on Schedule A that undervalued the defendant's share of the marital assets, resulting in a windfall to her in excess of $100,000. The plaintiff maintained that this represented a mutual mistake because certain language in the agreement expressed an intent to equally divide the parties' assets. The defendant denied that the calculation of marital assets set forth in the settlement agreement was a mistake in light of, inter alia, her assumption of all of the marital debt and the parties' stipulation to undervalue the plaintiff's business. The defendant also requested an award of counsel fees in connection with her defense of the terms of the settlement agreement and her counterclaims for enforcement of certain of its provisions.

The Supreme Court referred the matter to a court attorney referee to hear and report. After a hearing, the court attorney referee issued a report and recommendations which, inter alia, recommended that the cause of action seeking reformation of the settlement agreement be denied and that the defendant be awarded a counsel fee in the sum of $10,000. The plaintiff moved pursuant to CPLR 4403 to reject the report and recommendations, and the defendant made a cross application

COURT OPINION, CONTINUED

to confirm the report and to increase the recommended award of counsel fees. The Supreme Court granted the plaintiff's motion to reject the report and recommendations, and denied the defendant's cross application, concluding that the settlement agreement should be reformed because there had been a mutual mistake in calculating the value of the assets allocated to each party that undermined their intent to divide their assets equally. Based upon its determination, the court reformed the settlement agreement to require the defendant to pay the plaintiff the sum of $100,276.50.

"Marital settlement agreements are judicially favored and are not to be easily set aside" (*Simkin v Blank*, 19 NY3d 46, 52; *see McCoy v Feinman*, 99 NY2d 295, 302; *Christian v Christian*, 42 NY2d 63, 71-72). Although a mutual mistake by the parties may form the basis for reformation of a marital settlement agreement, "the mistake must be 'so material that . . . it goes to the foundation of the agreement'" (*Simkin v Blank*, 19 NY3d at 52, quoting *Da Silva v Musso*, 53 NY2d 543, 552). "[T]o overcome the heavy presumption that a deliberately prepared and executed written instrument manifested the true intention of the parties, evidence of a very high order is required" (*George Backer Mgt. v Acme Quilting Co.*, 46 NY2d 211, 219; *see True v True*, 63 AD3d 1145, 1147; *Book v Book*, 58 AD3d 781, 783; *Friedman v Friedman*, 247 AD2d 430, 431). The party seeking reformation must show clearly and beyond doubt that there has been a mutual mistake, and must show "with equal clarity and certainty 'the *exact* and *precise* form and import that the instrument ought to be made to assume, in order that it may express and effectuate what was really intended by the parties'" (*Janowitz Bros. Venture v 25-30 120th St. Queens Corp.*, 75 AD2d 203, 215, quoting 13 Walter H. E. Jaeger, Williston on Contracts § 1548 at 125 [3d ed 1970]; *see True v True*, 63 AD3d at 1147).

Contrary to the Supreme Court's determination, the plaintiff failed to meet his high burden of proof of demonstrating that, as a result of a mutual mistake, the settlement agreement did not reflect the true intent of both parties with respect to the distribution of the marital estate, and that the precise form the agreement was intended to take would require the defendant to pay the plaintiff the sum of $100,276.50 (*see Book v Book*, 58 AD3d at 783; *Hannigan v Hannigan*, 50 AD3d 957, 958; *Weissman v Weissman*, 300 AD2d 261, 262 ; *Friedman v Friedman*, 247 AD2d at 431). The plaintiff testified at the hearing that the parties intended to divide their assets equally, and that this intention was not fulfilled because a computational error resulted in the defendant's receipt of assets that exceeded the stipulated value of the assets he received. According to the defendant, however, the settlement agreement, which was the product of extensive negotiations, conformed to her expectation that she would be awarded title to the marital residence in exchange for her assumption of marital debt and relinquishment of her claims to the plaintiff's business, an interest in his certification as a public accountant, and spousal maintenance. Further, the defendant testified that she would not have entered into the agreement had she been aware that she would be required to pay the plaintiff the sum of $100,276.50 to precisely equalize the stipulated value of the assets allocated to each party. Under these circumstances, the plaintiff has not shown, clearly and beyond doubt, that the settlement agreement was the result of mutual rather than unilateral mistake, and that it must be reformed to require the defendant to pay him $100,276.50 in order to effectuate the true intent of both parties (*see Friedman v Friedman*, 247 AD2d at 431; *see also Surlak v Surlak*, 95 AD2d 371, 384). Accordingly, the Supreme Court should have confirmed the referee's recommendation that the settlement agreement not be reformed.

COURT OPINION, CONTINUED

The Supreme Court also should have confirmed the referee's recommendation to award the defendant a counsel fee in the sum of $10,000, since she incurred counsel fees in seeking to uphold and enforce the valid settlement agreement (*see* Domestic Relations Law § 238; *Montero v Montero*, 85 AD3d 986, 987; *Stephenson v Stephenson*, 116 AD2d 504, 506; *cf. Fine v Fine*, 26 AD3d 406).

ENG, P.J., DILLON, DICKERSON and SGROI, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

THE NEW YORK STATE COUNCIL ON DIVORCE MEDIAITON

SAVE THE DATE!

What: NYSCDM Upstate Mini-Conference

When: Saturday, September 6, 2014

Where: Canandaigua, New York

Details to Follow

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NY State Council on Divorce Mediation