

# NEW YORK STATE COUNCIL ON DIVORCE MEDIATION

# THE REPORT



WINTER 2013, VOLUME 9, ISSUE 1

## **NYSCDM Board of Directors**

Bobbie L. Dillon, M.S.,  
President

Daniel R. Burns, Esq.,  
Immediate Past President

Clare A. Piro, Esq.,  
Vice President

Bill Hoefer, Esq.,  
Secretary

David M. Louis, MPA,  
Treasurer

Kate Bar-Tur, LCSW, FIPA

Gail Ferraioli

Ada L. Hasloecher, B.A.

Susan Ingram, Esq.

Kathy Jaffe, LMSW

Nadia Shahram, Esq.

**This is the updated version of the former “Monthly Mailer”. It is now being sent via email and is available on the web at [www.nyscdm.org](http://www.nyscdm.org). The NYSCDM permits printing and distribution of this edition of THE REPORT.**

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 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](mailto:nyscdmpubs@yahoogroups.com). We look forward to hearing from you.

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

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

**Melissa Burns, Production Manager**

## TABLE OF CONTENTS

Editor's Page.....	<a href="#"><u>3</u></a>
Letters to the Editor.....	<a href="#"><u>4</u></a>
Response to Previous Article.....	<a href="#"><u>5</u></a>
President's Page.....	<a href="#"><u>6</u></a>
Parent Education.....	<a href="#"><u>8</u></a>
Help — Sperm Needed.....	<a href="#"><u>15</u></a>
Practice Issues, Cases of Interest and New Developments.....	<a href="#"><u>19</u></a>
Case of Interest: Greater Flexibility in Mediation, at Lower Cost.....	<a href="#"><u>19</u></a>
T4: Mediator's Toolkit: Tips, Tricks and Techniques.....	<a href="#"><u>20</u></a>
Book Review.....	<a href="#"><u>23</u></a>
Inside Scoop/Around the Council.....	<a href="#"><u>25</u></a>
Board Highlights.....	<a href="#"><u>25</u></a>
Pre-Conference.....	<a href="#"><u>26</u></a>
Membership Committee.....	<a href="#"><u>27</u></a>
Peer Groups.....	<a href="#"><u>28</u></a>
Public Awareness and Education Committee.....	<a href="#"><u>29</u></a>
TidBits.....	<a href="#"><u>30</u></a>
Web Resources.....	<a href="#"><u>31</u></a>
Court and Other Opinions Discussed in This Issue.....	<a href="#"><u>34</u></a>
30th Annual Conference.....	<a href="#"><u>36</u></a>

## EDITOR'S PAGE

This edition of THE REPORT contains especially timely and useful information about parenting and the effects of divorce on children; the difficult issues in sperm donor relationships with lesbian couples who are not legally married; commentary on failed mediations and how mediators may handle them; important web sites to which mediators should have links on their computers for easy reference; a review of a book about sibling rivalry and conflict, which can give mediators and trainers insights into resolution possibilities and training hypotheticals.

Also, we include a court decision which forms the foundation for implementing intermediate decisions during the course of mediation, rather than waiting for a global settlement agreement.

All the hard work, thought and insight in this edition, as well as other editions of THE REPORT, are, in my opinion, precious pearls not sufficiently appreciated. When NYSCDM sent the Monthly Mailer to its members and other professionals and organizations by ordinary mail in printed form, I got feedback and acknowledgments from readers I ran into in various venues. I made no requests for recognition, or letters to the editor or publisher. Yet there seemed to be general acknowledgement — expressed orally and in occasional personal emails — that there were many readers, and that they found something sufficiently useful or interesting that they looked forward to the next issue.

We encourage letters to the editors and other forms of dialogue, which we can publish. One correspondent wrote so extensively about an article in the Fall issue that she's in our long-planned section on Responses to Previous Articles. (It's the first time we've had something to include in that section, and we thank Diane Cohen very much!) Diane's is not, however, the typical response to THE REPORT since it started being distributed electronically. (It is now distributed as an email .pdf attachment and the .pdf is available at [www.nyscdm.org](http://www.nyscdm.org).)

If my personal experience is any guide, it appears that THE REPORT does not get nearly the readership it had when a paper copy of the predecessor publication, the Monthly Mailer, was sent by US mail for the ten or so years I produced it and for the several years before that when Jill Sanders-DeMott assembled it. That's unfortunate, and also discouraging, and I hope my tentative observation is wrong.

The cost of distribution by regular mail (not counting the value of the volunteered work of my office staff) was about \$700 an issue, which included copying, paper and postage. The costs could have been reduced if there had been some effort to get modest income from paid advertisements, as had been done with *The Council News*, the short-lived joint publication of our Council and the Family & Divorce Mediation Council of Greater New York. (FDMC originated that publication and agreed with NYSCDM that a joint publication made more sense.)

Money is meant to be spent for, among other things, educating members, keeping them connected by a common culture, and having them share some common forum on a more regular basis. THE REPORT can provide that, as well as a library of material for waiting rooms.

More important than any of this, I must express my deepest appreciation to Chuck Newman, my co-editor. He has taken an enormous amount of the burden from me, and has truly turned THE REPORT into a scholarly publication. It was interesting to observe how the NYSCDM's Monthly Mailer evolved, over nearly 20 years, from a few pages of information sent monthly, into THE REPORT. I cannot say enough about Chuck's dedication to the quality, substance and consistent efforts to get meaningful content; and his efforts to overcome technical and timing setbacks.

— Eli Uncyk

[Back To Contents](#)

## LETTERS TO THE EDITOR

To the Editors:

I wanted to take a moment to thank you both for the excellent job you do in publishing THE REPORT for our community every — well, I'm not sure how often it comes out, but I always perk up to see it!

As a former editor of *Council News*, a publication of the Family & Divorce Mediation Council of Greater New York (FDMC) and former co-editor of the later *Mediation Council News*, a joint publication of NYSCDM and FDMC, I know how challenging it can be to generate articles and other items of interest for our discerning colleagues on a regular basis, and to insure that they lay out well on the page, too!

THE REPORT is a wonderful contribution to our community of mediators in NYSCDM, and helps us stay informed and connected between conferences and other live events. Thank you!

June Jacobson

*June is a divorce and family mediator, collaborative law attorney, and licensed clinical social worker practicing in Manhattan. She is a former president of FDMC and a former member of the Board of Directors of NYSCDM.*

---

To the Editors:

THE REPORT is fantastic! Thanks to Chuck and Eli for this outstanding effort.

Susan Ingram

*Susan Ingram, Esq., is a Manhattan-based mediator and coach. She co-chairs NYSCDM's Public Awareness and Education Committee.*

---

And a little letter *from* the editors, if we may. Please make sure to read an extended letter in this issue from Diane Cohen, who comments on Abby Tolchinsky's interview of Dan Weitz in the Fall issue. It's on page [5](#), in the section on "Responses to Previous Articles." ... We very much appreciate the kind words from June, Susan and others. But we also remind readers that we'd like to hear suggestions, challenges and complaints, too. ... June's kudos for layout really go to Melissa Burns, our production manager.



[Back To Contents](#)

## RESPONSE TO PREVIOUS ARTICLE

### WEITZ ON NEUROSCIENCE IN DISPUTE RESOLUTION

#### A Reader Comments on an Article in the Fall Issue of THE REPORT

By Diane Cohen, Esq.

To the Editors:

Abby Tolchinsky's interview with Dan Weitz in the Fall 2012 Issue of THE REPORT contains an abundance of insights regarding mediation. In the interview, Dan indicates how he incorporates research in neuroscience into his mediations and mediation trainings; and also shares other helpful and nuanced ideas about mediation. In addition, he uses his knowledge of the brain to explain some of the effects of good mediator interventions, such as reflecting and summarizing, and why they work. It is food for thought for any mediator.

Like all mediator interventions, the ideas Dan shares require skillful handling by a mediator who has a sensitive understanding of himself, and of the parties in the room. So, for example, Dan suggests as a possible question to a party, "To what extent are there things you may not be conscious of that are influencing your view?" One can imagine a mediator asking that as a gentle and objective query. But one can also imagine a mediator asking that question — or a party hearing it — as a subtle or overt challenge. In posing that question, the mediator must be careful what he is conveying — or even what he is thinking. If the question is posed to one party rather than both parties, it could imply that one party is being unreasonable. If the mediator is thinking that the parties are being unreasonable, that thought is likely to come through when asking the question. If the question is posed to parties who are already feeling defensive and challenged, they may interpret the question as a threat to their deeply held thoughts and feelings; and even to their sense of well-being.

The starting point for any mediator is a firm grasp on the mediator mindset of neutrality and respect for self-determination. That sounds simple, but it is hard-earned from self-reflection after every mediation; participation in co-mediations; and apprenticeship with a mentor. It also requires sensitivity toward the feelings and reactions to those in the room as well as a willingness to be self-critical. Moreover, it requires a respect for the differences among people — including their principles and their world views. In addition it requires humility — the realization that the mediator does not know what is motivating a party; does not know what the party wants or needs and does not know what is best for the parties. Once the mediator mindset is firm, a mediator is unlikely to ask a question in a way that is perceived as a challenge to a party. At that point, as well, the mediator will have an easier time choosing a useful intervention from a host of possibilities.

On another point, Dan's observations regarding the tension between emotion and cognition are important. It can also be described as the tension between logical thought and intuitive thought. Intuitive thought is just as important to good decision-making as is rational thought. They must both be tested against one another to maximize good decision-making. Emotions can reflect intuitive thought or something less reliable. When a party is permitted the time and space to explore his or her intuitive needs and desires and reflect upon them in mediation, the party is likely to be able to sort it out in his own mind. Some of the sorting may be based on gut reaction and some may be based upon rational analysis. So, there are layers upon layers of inter-mixing of the rational, the intuitive, and the emotional.

*Diane Cohen is a mediator in New York City. She is a past co-president of the Family and Divorce Mediation Council of Greater New York.*

[Back To Contents](#)

## PRESIDENT'S PAGE

### Looking Forward: Accreditation Kudos



During my tenure as President, I set as a goal encouraging our members to seek Accreditation. Today I am happy to report that more than a quarter of our mediator members are Accredited. I applaud those who have taken the time and effort required to apply and receive this distinction. These mediators have demonstrated they have met experience requirements, have completed initial and continuing education, have completed case consultation, and have written comprehensive memoranda or separation agreements. I encourage you, if you haven't already, to apply at <http://nyscdm.org/application-for-accreditation-in-divorce-mediation>. Remember, many of our Accredited members offer a free hour of case consultation which can be completed over the phone.

### Looking Back: All Sorts of Kudos

It is my distinct pleasure to have been the 15th President of the New York State Council on Divorce Mediation at a time when the Council begins celebrating its 30th year of existence. As I have heard the story told, in 1983 a few mediators from around the state started connecting over the phone and decided they should meet. As a result of that meeting, the Council was born.

As these pioneers struggled to develop their own practices and a whole new field, they took the time to develop an organization that would help others for generations to come. Their belief that families should be able to make their own choices and divorce in a non-adversarial way, led them to want to promote divorce mediation and support those who undertook to provide these services. Their vision led to a highly respected organization that mediators could count on for continuing education, ethical guidance, and peer support.

Some things have changed. We have grown to be an organization of more than 200 members from Buffalo to Long Island, the North Country to the Southern Tier. Member communication takes place via email and list-serve. Consumers seeking divorce mediation look to our website to find qualified mediators and information about divorce mediation. Our members promote the Council on social media sites like Facebook and LinkedIn.

*Our founders' vision led to a highly respected organization that mediators could count on for continuing education, ethical guidance, and peer support.*

Yet, our core values haven't changed. As a community, we still believe that mediation offers the preferred option of a non-adversarial approach for families to make their own decisions as they divorce. Our members are still drawn to the Council for continuing education, peer support, and ethical guidance. And we still rely on busy divorce mediators from around the state to donate their time, talent, and leadership.

As I prepare to pass the baton to our 16th President at our Annual Meeting in May, I would like to take the time to recognize the fourteen Presidents who came before. It is because of their vision, leadership, and dedication, along with the countless volunteers who have donated and continue to donate their time, that the Council celebrates 30 wonderful years.

**1983-85: Jack Heister**

**1985-87: Ken Neumann**

**1987-89: Leonard Marlow**

**1989-91: Lorraine Marshall**

**1991-93: Doris Friedman**

**1993-95: Ron Heilman**

**1995-97: Barbara Badolato**

**1997-99: Steve Abel**

**1999-2001: Barbara Potter**

**2001-03: Jill Sanders-DeMott**

**2003-05: Glenn Dornfeld**

**2005-07: Tim Mordaunt**

**2007-09: Rod Wells**

**2009-11: Dan Burns**





## A LOOK AT PARENT EDUCATION FOR FAMILIES EXPERIENCING DIVORCE AND SEPARATION

By Lesley Ann Friedland, Esq. and Constantine Kalogiannis of FamilyKind

### Introduction

Recent research indicates that approximately fifty percent of marriages today are expected to end in divorce. The impact on parents, and especially children, is great. In fact, it is second only to death in the degree of stress it creates. The way that children react to divorce has gained increased scrutiny, but the research results are still quite varied. It is well documented that children who experience family dissolution are at greater risk than those in stable, intact families for a multitude of problems, including poor psychological adjustment, greater incidence of behavioral problems, higher utilization of mental health services and higher rates of disruption in their own marriages. These children may also be at risk of academic failure, social skills deficits, delinquent behaviors, psychological distress and disorders, self-destructive behaviors and other negative outcomes. However, when properly addressed with education and support, children of even high conflict divorce can successfully cope.

### Impact of divorce and separation on families

It is very important for parents to help themselves and to learn how best to guide and protect their children through these changes. Parental divorce is not an isolated event in a child's life, but something that will stay with the child throughout his or her lifetime. Many children of divorce grow up fearful of the future while being angry at their parents. They may harbor feelings of loneliness, as well as a fear of abandonment and rejection. Since their model for marriage has been marred by their prior experiences, they are sometimes hesitant or unable to form their own loving relationships. These children may repeat the

same mistakes their parents made, thus creating a cycle or legacy of divorce.

Research over the last few decades shows that the level of conflict in a family is more of a factor in the well-being of children than the status of the family unit (*i.e.*, divorced or intact). Studies show that child well-being is inversely related to the level of post-divorce conflict between parents. This supports the notion that divorce does not inherently damage children, but how the parents handle divorce plays a much larger role in the equation.

Younger children may be more impacted by divorce at the outset since they have not formed the coping mechanisms that older children may have gained. The psychological effects are felt more by younger children because they are still at an age where they look to their parents for support and nurture, while older children may have more outlets and a more extensive support structure. While older children may be more equipped to handle this difficult situation, the lasting effects are just as significant as with younger children.

Children's responses to parental divorce can fall anywhere along a long spectrum. This is so because each child's experience will be different, and each child may be more or less equipped to handle everything that is happening around them. There are many risk and protective factors at play, and the mix of each will determine a child's reaction to the divorce. Some children may have more social supports and internal resources that may encourage voicing their concerns and emotions, while other children may choose to bury their feelings.





## PARENT EDUCATION, continued

### Benefits of Parent Education

Since separation and divorce can be traumatic for all parties involved, common sense dictates that families will be better off if they can learn strategies to help them through this difficult and often turbulent time. If parents can learn the skills necessary to interact with each other in healthy ways and not allow their children to be used as pawns, the negative effects on children may not be as great. Once parents learn about the legal process involved and how

their actions will affect their children, the entire situation can take less of an emotional toll them. This is where Parent Education Classes come into play.

When parents become involved in Parent Education programs, they learn ways to encourage their children to be more resilient, and they are also taught about the risk factors that are common in the divorce process. These education programs strive to harness the knowledge and skills parents already have while giving them additional tools. The programs are child-focused, showing parents how the divorce is being experienced by their children.

Through these classes, parents can gain a better understanding of the court's role in this process, which will make the entire event less stressful. When parents have more information about the legal processes of custody, visitation and child support proceedings, they will be better equipped to support their children through the experience because it will seem less daunting and unfamiliar.

Additionally, educational programs for children will help them adjust by providing emotional support for their feelings and helping them view the

divorce in a way where they will not blame themselves. With proper education and support, a feeling of hope and resilience in parents and children can be instilled.

### Definition of Parent Education

Parent education is a generic term often used to refer to a variety of information and awareness programs for parents. The aim of these programs is to provide information to parents about how parental breakup or conflict affects children, how children experience family change, and ways in which parents can help their children manage the family reorganization.

Even though there are positive outcomes if only one parent attends classes, maximum rewards are obtained if both attend. Parents always attend classes at different times. If the court determines that parent education is a viable option, both parents are either referred or ordered into a certified parent education class. A court order or referral to a parent education and awareness program does not delay the expeditious progress of the underlying proceeding.

Program administrators and court personnel must screen out parties when there are signs of domestic violence. The victim may be emotionally and psychologically overwhelmed as a result of the abuse, and the potential for stalking or violence in or around a parent education class is a serious threat. Additionally, children may be placed back in the cycle of violence, possibly being used as pawns for reconciliation, or as tools for control or intimidation. If a party is ordered into a class and opts out for reasons of domestic violence, they still receive a "certificate of compliance." That way, confidentiality is protected and the court is unaware whether the party attended the class or opted out because of violence or abuse concerns.

*"Each child's experience will be different, and each child may be more or less equipped to handle everything that is happening around them. There are many risk and protective factors at play, and the mix of each will determine a child's reaction to the divorce."*

## PARENT EDUCATION, continued

### History of Classes

Programs designed for divorcing or separating parents have been in existence in the United States since the 1970's. The first documented program, General Responsibilities As Separating Parents (GRASP), began in Johnston County Kansas in 1978. Since then, these programs have popped up throughout the nation. In 1994, the Association of Family and Conciliation Courts (AFCC) held its first International Congress on Parent Education and Access Programs.

Since the 1980's, New York State has offered parent education programs by the courts and various not-for-profit organizations. Unlike many other states, New York's parent education program is provided for separating parents whether or not they have been married. In addition to being court-ordered, parents are free to attend the program voluntarily or to be referred by a variety of sources, including mediators, attorneys and mental health professionals.

Chief Judge Judith S. Kaye, a proponent of Parent Education for divorcing families, announced the creation of the New York State Parent Education and Awareness Program in her 2001 State of the Judiciary Address. She recognized that the interests of a child whose parents are appearing before the court in divorce, separation or child custody and visitation litigation would be well-served by educating the parents about the child's emotional needs and the effects of family restructuring on a child's development. The program's website is available at <http://www.nycourts.gov/ip/parent-ed/index.shtml>.

Some of the aims of the Parent Education and Awareness Program were to make judges aware of parent education and its benefits; to clarify judicial authority to refer parents to these programs; and to encourage greater and more uniform utilization of this resource by court-involved parents. The Chief Judge emphasized that parent education programs would be required to meet certain standards for judges to refer parents to them.

According to those statewide standards, as promulgated by the New York Parent Education and Awareness Program, parents should be encouraged to work on creating and maintaining supportive parent-child relationships; to provide a stable, supportive home environment; to maintain healthy parental functioning and psychological well-being; and to protect children from ongoing conflict between parents.

Chief Judge Kaye went on to commission the multi-disciplinary Parent Education Advisory Board to set and ensure standards of quality, safety and accountability regulating parent and education programs and their ability to accept court-referred or mandated parents. This Board consists of highly committed professionals from around the State with backgrounds in pediatric medicine, child psychiatry and psychology, family life science, social work, domestic violence awareness and prevention, and matrimonial and family law.

With the help of such standards, parent education programs would provide information that is accurate, appropriate, and based on research data. This initiative was enabled by an Administrative Order of the Chief Administrative Judge of the Courts, Jonathan Lippmann, which allowed courts to refer parents to education programs. Currently, New York State judges may order or refer parents into Parent Education classes.

During the early 2000's, many parent education classes started operations all over New York State. The New York City Family Courts embraced the idea and started operating classes in Manhattan, Brooklyn and the Bronx under the name of the P.A.C.T. program (Parents and Children Together). Although there was no formal budget attached to these programs, administrative personnel were assigned to oversee them and materials were supplied by the New York State Parent Education and Awareness Program. The adult education in the New York City Family Courts flourished and the need soon became clear for a program specifically for children whose parents were involved in divorce and separation court

## PARENT EDUCATION, continued

proceedings. There are school-based child education programs in New York State, including the Banana Splits and CODIP (Children of Divorce Intervention Program). Additionally, there are independent programs including A.C.T. ~ for the Children, which operates out of Rochester. However, there was a desire in New York City for a court-based children's education program.

The Kings County Family Court launched its Children's P.A.C.T. (Parents and Children Together) program in May of 2007. The curriculum was designed by judges, lawyers and mental health professionals over the period of two years and drew inspiration from the A.C.T.

(Assisting Children Through Transition) Program; Rollercoasters, a children's education program developed by Families First based in Atlanta; CODIP; and the research of Pedro-Caroll, Fischer, Geasler & Blaisure and others.

All of the children's programs are designed to support and educate children whose parents are divorcing, separating or are divorced or separated. Children going through divorce are often subjected to conflict from both parents, but these programs teach children that what is happening is not their fault. Through a support-group style model, the children have a chance to interact with their peers who are also going through similar life transitions. By sharing their experiences, they can learn that they have rights in the process, and they have an outlet for the emotions they are feeling. Participation in the children's programming is purely voluntary.

In 2009, due to the economic crisis, a number of parent education classes ceased operations around New York State, including the classes offered in the New York City Family Courts. The office that oversaw the certification of Parent Education pro-

grams throughout the State also ceased operations, which was not a good sign for the future of new certified programs.

However, in 2012, a group of lawyers and mental health professionals that had been involved in the development and implementation of the P.A.C.T. programming in Kings County came together to form FamilyKind, a not-for-profit which offers Adult, Child and Teen Classes, as well as Mediation and Parent Coordination to families in New York City on a sliding fee scale. The curriculum for the adult program follows the standards set out in the New York State Parent Education and Awareness

Program and is New York State Certified. Like other children's programs, FamilyKind's Child and Teen Classes serve to de-mystify the process, engage the children in a more active way, and promote informed participation in their cases. By "demystifying" this sensitive subject and creating a positive atmosphere of shared experiences, the program provides young people with awareness and empowerment, reducing their feelings of isolation and ultimately resulting in resilience.

*"Education programs strive to harness the knowledge and skills parents already have while giving them additional tools. The programs are child-focused, showing parents how the divorce is being experienced by their children."*

### Class Curriculum

Most New York State Parent Education Classes include a legal and mental health presentation, viewing of a DVD documenting children speaking out about their parents' divorce, and small group discussion. During classes, parents are presented with a continuum of parenting models from parallel parenting to a cooperative model.

The NYS Parent Education Advisory Board believed that the best structure and content of parent

## PARENT EDUCATION, continued

education for New York State is child-centered. The content is aimed at promoting children's healthy adjustment and development by educating parents about what they can do to reduce the stress of the family transition and to protect their children from the negative effects of ongoing parental conflict. The goal is to provide parents with information, practical strategies, and tools that they can use to mitigate the often detrimental effects of divorce and separation on children.

### How Parents Get into the Classes

Court referrals and orders are helpful because even though the importance and value of such programs is clear, many individuals believe that they do not have time for such programs, or their time would be better spent doing other things. In order to ensure the most benefit from these programs, the court should strive to make the referrals as early in the proceeding as possible. The more active and involved the court is in making these referrals, the more positive outcomes we will see in the future. Organizations can currently charge up to \$100.00 per adult to take a certified class.

Parents are also referred into these classes by their mediators, attorneys and mental health providers. The referral sources are often pleased with the outcome, as their clients have a better overall understanding of the process and their choices on how to conduct themselves.

Parent education is not mandated in New York as it is in some other states, but courts are aware of the positive outcomes when parents involved in divorce or separation proceedings can attend educational programs. Although New York was behind the curve in instituting these programs, it has

allowed programs here to integrate the experiences of other programs and choose the most beneficial methods and guidelines. There have been many studies conducted, and parent education programs in our state have the benefit of using this empirical evidence to fashion their standards.

### How Education and Mediation are Related

Parent Education Classes, taught by a lawyer and mental health professional, explore litigation and other means of resolution. In fact, participants of the class are cautioned about the high financial and emotional price of litigation. The Handbook provided by the New York State Parent Awareness Program, and given to participants in certified programs, states in part: "Litigation often fuels the anger and high emotions already present in the fight over the children. It can take a long time, and the cost, both emotional and financial, can grow." The Handbook is available at <http://www.nycourts.gov/ip/parent-ed/ParentsHandbook.pdf>. The program extols the benefits of mediation, negotiation and Collaborative divorce, when appropriate, saying that solutions reached through those processes can be "more creative, detailed and flexible ... than may be possible through litigation."

It is stressed during the class that even though litigation is an option, it should not be pursued unless necessary. Not only are the financial and emotional costs great, the damage that is done when a child testifies against a parent is something that is not easy healed.

Mediation, as taught in the class, is a positive and effective way for couples to take control of their separation and or divorce without the expense, time and often damaging effects of litigation. The class participants learn that an experienced mediator helps the couple navigate the issues of parenting time, support, and distribution of the parties' assets using a child-focused approach.

## PARENT EDUCATION, continued

It is best for parents to participate in a Parent Education class early in their separation. In that case, they can get fully educated about their legal options, including the choice of mediation. However, parents can benefit from a class well into the litigation or mediation process as well. If they are litigating, they may rethink that choice once they learn what is fully involved. If they are mediating, they can be reassured that the mediation process is fully sanctioned and accepted by New York State.

A class can be helpful even after the divorce has been finalized. Parents have a long journey together as they parent their children through their lives. They often need assistance at various points on how to best communicate and take control of their futures. Mediation is presented as a tool to help the families navigate positively into the future.

### Conclusion

As a society, we are all too familiar with the traditional idea of divorce and the turmoil that can come with it. Over the last few decades, professionals from many fields have worked together to embrace the idea that parent education programs and mediation can promote healthy family functioning after a divorce or separation. Parent education and mediation should be seen as ongoing tool for parents, not as a last-ditch effort. The resources available can greatly improve the chances of children developing into healthy, functioning adults, and can facilitate positive parent-child relationships at the same time.

New York State may not have been at the forefront of the parent education movement, but it is poised to learn from the lessons of the past and become a national leader in this essential area. With a vast history of empirical studies and research data, we can integrate these findings into our own research and continue to help families in the most efficient and effective ways possible. In a world where time is one of

our greatest resources, families can invest some time now to see exponential benefits in the future.

**Editors' Note:** The authors did not wish to burden readers with footnotes containing citations supporting each assertion in this article. The authors are personally familiar with the issues from their own experiences, and many readers may feel the statements are for context and background so that no citations of authority are required. However, the authors wish to include the following list of sources, which are among those they consulted in preparing this article.

#### Proposed Guidelines, Standards and Requirements for Parent Education Programs

Report of the New York State Parent Education Advisory Board to the Chief Judge and the Chief Administrative Judge, October 1, 2003

(Available at <http://www.courts.state.ny.us/reports/ParentEdProgram.pdf>).

#### The New York State Parent Education and Awareness Program

(Available at <http://www.nycourts.gov/ip/parent-ed/>)

Adler, Nancy, "Examining Divorce from a Developmental Perspective: The Legacy of Divorce on Children," May 30, 2012 (unpublished paper)

Grimaldi, James, "A Video Assessment of the Brooklyn Family Court's Children's P.A.C.T. Program: Toward a Model of Efficacy," The New School for Social Research (unpublished paper).

Tippins, Timothy M., "Child Custody Factors: Relationship With Both Parents Gains in Importance." New York Law Journal, January 4, 2013.

(Available with paid subscription at <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202583208890&slreturn=20130123142557>).

## PARENT EDUCATION, continued

Joanne Pedro-Carroll and Evelyn Frazee, "Program Can Help Protect Children in Break-ups," N.Y.L.J., Jan. 4, 2001

Bacon, Brenda L. and Brad McKenzie, Parent Education After Separation/Divorce - Impact of the Level of Parental Conflict on Outcomes, 42 Fam. Ct. Rev. 85 (Jan. 2004)

Pedro-Carroll, JoAnne, Ph.D, Putting Children First, 2010.

"The New York State Parent Education and Awareness Program", authored by Evelyn Frazee and Susan L. Pollet, July/August 2008 - New York State Bar Association Journal



*Lesley Ann Friedland, Esq. is the founder and Executive Director of FamilyKind, a New York City based not-for-profit organization which offers divorcing and separating parents classes, mediation and parent coordination services on a sliding fee scale. Previously, Lesley served as a court attorney and referee in the New York City Family Court. FamilyKind can be reached at 646-580-4735. Its website is: [www.familykind.org](http://www.familykind.org)*

*Constantine Kalogiannis is a 2012 graduate of St. John's University School of Law, where he focused his studies on Family Law courses and earned a certificate in divorce mediation as part of an intensive, interactive course. He interned at Queens County Family Court, where he provided assistance to individuals seeking to modify child support orders or file for paternity. He can be reached at [constantine.kalogiannis@gmail.com](mailto:constantine.kalogiannis@gmail.com) or through LinkedIn at: [www.linkedin.com/pub/constantine-kalogiannis/b/193/376/](http://www.linkedin.com/pub/constantine-kalogiannis/b/193/376/).*



[Back To Contents](#)

## HELP — SPERM NEEDED

By Teresa Calabrese, JD, and Katie Cole, JD

In 2009, William Marotta, a resident of Topeka, Kansas, responded to a Craigslist ad placed by a lesbian couple seeking a sperm donor. The two women, Jennifer Schreiner and Angela Bauer, had been together for eight years and had fostered and adopted several children, some with disabilities. When Marotta consented to donate, the three of them signed a written agreement stating that Marotta would provide his sperm to the couple and relinquish his parental rights. In return, the couple would not look to him for financial support for any child conceived with his sperm. In March 2009 the women performed the insemination without medical assistance; Schreiner became pregnant and in December gave birth to a healthy daughter. The only name listed as a parent on the child's birth certificate was Schreiner's.

The couple split up when their daughter was one year old. They maintained a good relationship and continued to share parenting. When in 2012 Bauer, who had been the wage earner, was unable to find work after the diagnosis of a "significant illness,"<sup>1</sup> Schreiner applied for Medicaid to provide health insurance for their daughter. The Kansas Department of Children and Families required that the identity of the sperm donor be revealed to the agency. Bauer explained that she and Schreiner were co-parents and that she is financially responsible for the child. However, the agency would not speak to Bauer: the state of Kansas does not recognize same-sex unions, nor does it permit second-parent adoptions,<sup>2</sup> and any discussion with Bauer would recognize her as a parent. Instead, the Department for Children and Families sought to have Marotta declared the child's father, in order to pursue child support from him.

Marotta argued that his written agreement with Schreiner and Bauer spells out that the intention of the parties was that he would have no parental or financial responsibility for any resulting child and that Bauer would assume the parental rights and responsi-

bilities. The Agency relied on the Kansas Parentage Act.<sup>3</sup> That law provides that if a man donates sperm to be used in the artificial insemination of a woman who is not his wife, then he will not be treated as if he were the birth father of the child, *but* only if the sperm was provided to a licensed physician who would perform the procedure. The Agency claims that since Marotta acted contrary to the law by delivering his donation directly to Schreiner and Bauer and not to a physician, Marotta is a parent and must reimburse the state for the support of the child. An evidentiary hearing is scheduled for April 9-10, 2013; oral arguments are set for June 17, 2013.<sup>4</sup>

### Who Is A Parent?

The question of parentage is no longer confined to heterosexual marriage. The possibilities for all couples, but particularly for same-sex couples and single women, have expanded exponentially. Do-it-yourself methods decrease the costs associated with medical intervention, making family creation more affordable for many people.

Unfortunately, the legal framework for defining families and parents lags far behind. The Uniform Parentage Act (UPA),<sup>5</sup> in those states that have adopted it, has allowed for more predictability within and between states in cases involving assisted insemination. The current, 2002, version of the UPA no longer requires physician assistance to presume the donor is not a parent.<sup>6</sup> The New York State legislature has not yet adopted the UPA.





## SPERM DONOR, continued

New York State's regulation of assisted insemination is limited to the legitimacy of children born within a marriage:

Domestic Relations Law §73. *Legitimacy of children born by artificial insemination.*

1. Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes.
2. The aforesaid written consent shall be executed and acknowledged by both the husband and wife and the physician who performs the technique shall certify that he had rendered the service.

*The question of parentage is no longer confined to heterosexual marriage. The possibilities for all couples, but particularly for same-sex couples and single women, have expanded exponentially.*

Although the statute refers specifically to the terms *husband and wife*, the New York State Marriage Equality Act requires that gender-specific statutory language be construed as gender-neutral in all state statutes referring to the rights or obligations of spouses.<sup>7</sup>

Given the same facts in New York as in the Kansas case, Marotta would be regarded as the child's other parent, not Bauer. Typically, in a written donor agreement, the donor agrees to relinquish his parental rights and promises not to interfere with the parenting of the child. He also promises to consent to the recipient's partner's adoption after the child's birth. In return, the recipient agrees to hold the donor harmless for any financial support, including child support.

Since New York has not adopted the UPA, a known sperm donor cannot relinquish parental rights before the child's birth except under the limited circumstances stated in DRL §73. Nor is there a legal mechanism for the donor to surrender his parental rights and obligations after the child's birth unless, as in the case of a lesbian couple, the non-biological partner completes a second-parent adoption of the child. The second-parent adoption requires the sperm donor to consent in writing to the partner's

adoption of the child, which would consequently terminate his parental rights and obligations to the child. Furthermore, with regard to child support, it is against public policy for a parent to contract away his or her obligation to support his or her child. Parties could include an indemnification clause that in the event that a federal, state, city or other local government agency seeks financial compensation for the child's support or medical expenses from the donor, the recipient will hold the donor harmless and reimburse him for all

expenditures. Whether that would be enforceable is unknown.<sup>8</sup> Therefore, in New York, Bauer would only be regarded as a parent if, at the time of the child's birth, she were legally married to Schreiner, or after the child's birth she had completed a second-parent adoption.

### How Mediation Can Add Value When Creating Families

In this article we will limit our discussion to mediating with lesbian couples creating a family with the help of a known donor in New York — although problems can and do arise even with unmarried heterosexual couples using assisted insemination.<sup>9</sup>

## SPERM DONOR, continued

Some women prefer using sperm from a known donor for various reasons, including the desire to have a name to give the child who may ask as he or she gets older, or to involve the donor in the child's life, even as a co-parent. And on a practical level, pregnancy is more likely to result from the use of fresh sperm, making a home insemination more efficient.

Known donors may often be a brother, cousin, or uncle of the non-biological partner, or a close male friend or a gay male couple where each man provides sperm during alternate cycles. Donors may even be solicited over the Internet, as in the Kansas case.

In our practice, we will not mediate a known-donor agreement unless each party has his or her own attorney to consult with throughout the process. Even with consulting attorneys involved, it is still important that mediators have an understanding of the law in this area.

Prior to meeting with the parties, we provide them with suggested discussion topics. We encourage them to each reflect on his or her intent in participating/creating a family. We invite them to envision his or her role in the child's life. If the donor does not intend to play a parenting role, we recommend that he speak to other men who have been donors and ask to hear their experiences. We also suggest that he talk with family and friends about his plan to contribute to creating a family where he will have no parenting role.

Starting a family creates much excited anticipation, and conversations naturally center on preparing for the baby's arrival. The mediation process can help the parties to structure a discussion that gives each party a place to speak of his or her motives, expectations, and intentions in starting a family, along

with questions and concerns about his or her role. It is essential that any discussion includes the legal risks and the potential consequences if the unexpected happens. For example: what if the donor changes his mind and wants to co-parent? What if the birth mother dies after the child's birth? What if the lesbian couple breaks up before a second-parent adoption is completed? What if the lesbian couple marries before the child's birth and the donor wanted to be listed on the birth certificate?

Obviously, not all contingencies can be addressed, but having the discussion with the couple and the donor together creates an opportunity for each party to make the most informed decision possible amid the legal pitfalls.

Even though donor agreements are not enforceable in New York, the advantage of a written, mediated agreement memorializes the parties' intentions and expectations. A mediated agreement doesn't guarantee that a party won't change his or her mind after the birth of the child, but it does minimize the likelihood of a party's

change of heart, and helps parties maintain the integrity of their promises.

### Final Words from Kansas

"More and more gays and lesbians are adopting and reproducing," Bauer, the non-birth mother in the Kansas case, recently said, and the state's actions represent "a step backward."<sup>10</sup> Mediation is one way to help LGBTQ families to move in the right direction, even if the law lags behind.

*We encourage clients to each reflect on his or her intent in participating/creating a family. We invite them to envision his or her role in the child's life.*

## SPERM DONOR, continued

*Katie Cole is a mediator/collaborative attorney in New York City. Her practice focuses on the family and divorce area. She specializes in working with families and couples within the Lesbian, Gay, Bisexual and Transgender (LGBT) community. Katie is also the mediation coordinator for special education, early intervention and custody/visitation at the New York Center for Interpersonal Development (NYCID) in Staten Island.*

*Teresa Calabrese is a New York City mediator and collaborative lawyer concentrating her practice on serving the LGBTQ community. As a mediator and collaborative lawyer, Teresa assists individuals and couples as they form relationships, create families and/or dissolve their relationships.*

*Teresa and Katie have presented formal and informal educational programs at a wide variety of organizations, including a session on mediation for same-sex couples at the NYSCDM 2012 Annual Conference.*

<sup>1</sup> <http://cjonline.com/news/2012-12-29/topeka-mothers-support-sperm-donor-child-support-battle-kansas-dcf>

<sup>2</sup> A second parent adoption is a judicial proceeding which allows the partner to legally adopt his or her partner's biological child. In New York State the legal authority for permitting second parent adoption originated with the Court of Appeals companion cases, *Matter of Dana & Matter of Jacob*, 86 NY2d 651 (1995). An unofficial version of the opinion is available at [http://www.law.cornell.edu/nyctap/I95\\_0241.htm](http://www.law.cornell.edu/nyctap/I95_0241.htm). In these two cases the Court of Appeals decided that the unmarried partner of a child's biological mother, whether heterosexual or homosexual, who is raising the child together with the biological parent, can become the child's second parent by means of adoption without terminating the biological mother's parental rights.

<sup>3</sup> The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman. *Kansas Statutes Annotated* §23-2208(f). [http://kslegislature.org/li\\_2012/b2011\\_12/](http://kslegislature.org/li_2012/b2011_12/)

[statute/023\\_000\\_0000\\_chapter/023\\_022\\_0000\\_article/023\\_022\\_0008\\_section/023\\_022\\_0008\\_k/](http://statute/023_000_0000_chapter/023_022_0000_article/023_022_0008_section/023_022_0008_k/), last visited February 15, 2013.

<sup>4</sup> <http://cjonline.com/news/2013-01-31/sperm-donor-case-marotta-give-deposition#.UQrx6solhwo.twitter>, last visited on February, 3, 2013.

<sup>5</sup> [http://www.uniformlaws.org/Act.aspx?title=Parentage Act](http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act)

<sup>6</sup> Kansas only adopted the 1994 version of the UPA, which requires physician assistance.

<sup>7</sup> The NYS Marriage Equality Act Section 10-a(2) states in part:  
“When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law”.

<sup>8</sup> According to news accounts, the agreement with Marotta also called for Bauer and Schreiner to hold Marotta harmless “for any child support payments demanded of him by any other person or entity, public or private, including any district attorney's office or other state or county agency, regardless of the circumstances or said demand.” <http://www.kansascity.com/2012/12/29/3986152/state-pursuing-child-support-from.html>, last visited Feb 21, 2013.

<sup>9</sup> For example, a Manhattan unmarried heterosexual couple had a child together using anonymous sperm donation because of fertility problems. The mother committed suicide five months after the birth, and the non-biological father has had to petition the court for custody of his son. [http://www.nytimes.com/2013/02/03/nyregion/a-custody-battle-after-the-law-says-a-parent-isnt-a-parent.html?\\_r=0](http://www.nytimes.com/2013/02/03/nyregion/a-custody-battle-after-the-law-says-a-parent-isnt-a-parent.html?_r=0), last visited February 6, 2013.

<sup>10</sup> <http://cjonline.com/news/2012-12-29/topeka-mothers-support-sperm-donor-child-support-battle-kansas-dcf>, last visited February 8, 2013.

## PRACTICE ISSUES, CASES OF INTEREST AND NEW DEVELOPMENTS

### **Case of Interest: Greater Flexibility in Mediation, at Lower Cost**

While mediators often tell clients that each case decided in court is unique, some decisions provide lubricants for parties and their mediators to reach resolutions faster and reduce some stress-inducing problems early. You probably know from your own practice that some issues get worse if they are only addressed at the same time that all the other issues are resolved, near the end of mediation.

It is sometimes true that all elements of a settlement are dependent on each other. But there are plenty of exceptions which can permit parties to implement portions of their settlement before all issues are resolved. This concept has renewed judicial sanction, as shown in the *Nederlander* case. The text of the Appellate Division, First Department's January 3rd decision is reprinted below starting on page 34 and is available at [http://www.courts.state.ny.us/reporter/3dseries/2013/2013\\_00023.htm](http://www.courts.state.ny.us/reporter/3dseries/2013/2013_00023.htm)

In *Nederlander*, the parties were in the midst of divorce litigation when their home was about to go into foreclosure. The wife asked the court to order the husband to complete the papers

needed to refinance the home, or in the alternative, to come up with one half of the amount needed to pay off the mortgage.

In mediation, this interim step could be taken without deciding the equitable distribution of the equity (if any) in the home. The post-divorce ownership or sale of the home would not have to be decided at that stage, either. Those issues could be determined later in the mediation (as the court was going to do in the *Nederlander* case). If the market value of the home is less than the mortgage balance, (in current terms, if the house is "under water"), then practicality seems to dictate that the mortgage be paid to keep the home. It appears that the costs of the alternative were going to be non-recoverable at any time, while the cost of staying in the home was comparable to the cost of living somewhere else.

In mediation, cooperating parties have greater freedom to fashion solutions which are practical, even if not in accord with conventional wisdom or the limits of what a judge could order. If a home which is "under water" is sold for less than the mortgage, the bank lender will take a loss, and the family will get nothing on the closing (except possibly two or three thousand dollars from the cooperating bank to help them move and to keep the home in salable condition while the sale approval process goes on). This

process is called a "short sale", and is becoming more common in recent months. Bank lenders lose even more money on the foreclosure of a "under water" home because of the legal and other fees and expenses involved in legal proceedings. The "short sale" gives the lenders and the owners the opportunity to work together to reduce the lender's loss, and to give the family the opportunity to transition to a new home in a less hasty fashion. The homeowners can live in and maintain the appearance of the home so that it can be sold for more than the property would fetch in a foreclosure of an empty house.

Finally, keeping a home which is "under water" gives the family the hope that, if the economy gets better and each of the parties returns to their pre-divorce normalcy, the residential custodial parent and the children will be living in their home, and the other parent will still have the opportunity to recover a share of any increased value in the future.

Much of this analysis is mathematical, with a bit of hopeful thinking injected. But in mediation, even more options are available if the parties refrain from acrimony, save the costs of litigation and focus on their future economic status. Even math can sometimes get a boost from a good dose of optimism.

— Eli Uncyk

[Back To Contents](#)

## PRACTICE ISSUES, ETC., continued

**T4: Mediators' Toolkit: Tips,  
Tricks & Techniques  
TO LEARN FROM FAILED  
MEDIATIONS:  
CLOSING MEETINGS  
By Eli Uncyk, Esq.**

No one is perfect. Nothing works all the time. Mediation is not always successful. Why? An anthology of reasons would be informative and possibly even instructive. To answer the questions in time for an intervention would require some device or method. I'll share one of mine with you. It's not always successful, and sometimes you may not get the opportunity to try. Let us know what you do to keep a mediation from failing.

Many years ago, I had mediated a divorce which was nearly wrapped up, but for the details and an agreement. These were going to be concluded in the next scheduled session. (I generally don't do a Memorandum of Understanding, but I think it's often better to do one. Even if you are going to draft the final agreement; clients may get lost in an agreement, but can more easily follow an MOU.)

A few days before the expected final mediation session, the wife called and canceled, telling me the deal was off and she was going to tell her attorney to start legal proceedings. She was going to get every penny she could.

I asked her why. She told me she had taken their three young sons to a neighborhood diner for Sunday brunch, and to meet the boys' friends. While at the diner, her soon-to-be ex-husband walked in and sat down at the other end, next to a woman who had apparently been waiting for him. They didn't see her or the boys. When one of the boys noticed his father, he started to get up to greet him. The mother told him to sit down and not acknowledge his father. She felt humiliated.

*Mediators  
should consider  
a "closing  
meeting" when  
a mediation  
has been  
terminated or  
failed.*

The mother hurriedly called for the check, leaving brunch unfinished, and took the boys home. She hadn't known of the "other woman" and was embarrassed and worse in front of her acquaintances in the diner. At home, she didn't know what to tell the boys. She went to the bathroom and cried.

That was the reason the mediation was over, she told me.

I understood her feelings, but didn't believe it was enough of a reason. I couldn't speak for her husband and I couldn't convince her to confront him at a mediation session. She told me her lawyer would take over from there.

More recently, a couple ended their mediation after I decided that separate sessions, in the nature of caucusing, would make the most sense because of the husband's general, persistent overbearing behavior and his hostile demeanor and interactions with his wife. They made me feel that the edge of abuse was being reached. The parties were in active litigation and both sets of lawyers had thought mediation could avoid a very difficult and expensive trial. The lawyers had convinced them to see a mediator or face an emotionally and financially ruinous trial.

The lawyers, jointly, gave me a summary of the facts and issues, so that I could get a running start in mediation. I wanted to avoid the hostility which kept the parties from what the lawyers thought were reasonable compromises. Although the hostility continued during our sessions, I thought I had made some progress. However, I misunderstood the wife's acquiescence to some demands, which I considered inconsequential. When the wife hadn't done what she agreed to do by the time of subsequent sessions, and I asked her about that.

## PRACTICE ISSUES, ETC., continued

Her husband figuratively pounced on her and started his verbal abuse.

I intervened and told the husband that I wanted him to address me and not his wife. I asked him to stop using the tone he was using. Each time he turned to his wife, I directed his attention to me. I told him that as long as he was going to sound hostile and insulting, he needed to address me. I would try to see if I could understand him through the vitriol. He couldn't control his anger and my interventions kept him from directing it at his wife. He stormed out.

The wife stayed in my office, but told me she wanted to terminate the mediation. She thought I was pressing her and was on her husband's side, because I asked why she hadn't followed up from the last session on what seemed a minor issue. She told me it wasn't minor. She felt it strongly because it followed the same pattern of pressure and bullying she had been enduring for nearly 20 years. I pointed out that when the husband started attacking her, I intervened and stopped it. I hadn't known of the past pattern, but when I saw the husband's reaction, I stepped in for her immediately. I reminded her that her husband had walked out because I wouldn't allow him to continue addressing her inappropriately. She then recognized and acknowledged that I had intervened and protected her.

She agreed to continue the mediation if I could continue to protect her. I told her I would meet with her husband alone next, and fashion a way of going forward peacefully.

After that meeting, I read the Model Standards for Family and Divorce Mediators again, as well as some other literature about mediating where there was an abusive relationship. I ultimately determined that caucusing

could work to create a safe environment for mediation. Abuse outside the mediation sessions would be addressed by the attorneys already actively involved in this litigated case.

I arranged a separate session with the husband, and described why I felt I needed to do that. However, during my session alone with him, I found that nothing had changed in his demeanor or approach, except for the object of his abuse. Now it was I being harangued. While I was able to deal with and even manipulate it, the husband persisted and we made no progress. When he realized I could not be bullied, he terminated the mediation.

I think I could have salvaged the first mediation I described in this article, if I could have gotten the parties together in my peaceful part of the world. However, the wife's lawyer was now in charge. I shared this story in a peer group meeting and asked how I could have done better.

One of the participants, Mary Miller, suggested that mediators should consider a "closing meeting" when a mediation has been terminated or failed.

I have little doubt that if I gotten the first couple to attend a closing meeting, the mediation would have resumed. At the peer group, several participants had suggestions about what to say, how to approach the offended wife, what to say to the husband. All were good suggestions. The only missing piece was a final opportunity to try these suggestions. Had I provided for a mandatory "closing meeting" in our Agreement to Mediate, it may be that either or both would simply have refused to come in. But I think I could have persuaded them to fulfill their commitment to me and have the closing meeting.

Whether a closing meeting is successful or not, it still gives the mediator the opportunity to evaluate his or her efforts. Feedback from clients is important in the process of self-analysis. We seldom get feedback. When we do, people tend to find it is positive things to say, rather than negative. While positive feedback can strengthen the ego, it also interferes with the growth which comes after considering negative feedback, without being defensive or apologetic.

The second matter described here was not one in which I offered or required a closing

## PRACTICE ISSUES, ETC., continued

meeting. Despite the advice to include a closing meeting requirement in mediation retainers, I have rarely included one, which I couldn't enforce anyway. However, when I saw that this second matter, described above, was failing, I used a different approach. During the last meeting, after her husband walked out, I persuaded the wife to stay and tell me her impressions. That is when she told me she thought I was joining her husband in pressuring her.

The wife was reassured after we talked it out. I later let her know I would be caucusing

separately, and she returned for an additional session, alone. The husband also returned for a caucus session. However, when he angrily terminated the session, it became readily apparent that his major purpose in meeting with me, in the wife's absence, was to vent and vilify his wife. He would not focus on any solutions, other than punishing his wife.

A failed mediation is not always a personal or professional shortcoming. Mediations will fail sometimes, for reasons over which mediators have no control.

However, if we can get the parties back into a room together and explore the reasons for the failure, we may snatch a bit of victory out of the teeth of failure.



Eli Uncyk





## BOOK REVIEW

**Brothers and Sisters: The Ingredients  
of Parent Stew****Book Review of Jeanne Safer, Ph.D.'s  
*Cain's Legacy*****Reviewed by Eli Uncyk**

Jeanne Safer's book, *Cain's Legacy*, is both lyrical and pragmatic. She starts with a description of the conflict between Cain and Abel — apparently the first sibling rivalry recorded, which ends in murder — to the stories about several sibling pairs she introduces who could easily be our clients or ourselves. Her apparent conclusion is that serious sibling conflict often begins when a parent favors one sibling over another, whether overtly or not, often for no rational or apparent reason. Dr. Safer also concludes (and states early in this captivating book) that “reconciliation among strife-ridden siblings, when it does come, is poignant, late and hard-won.” She notes that the Bible describes several very vivid examples of sibling rivalries. They can take very different courses and have very different results throughout the lives of the siblings, and even into later generations.

Among the many interesting stories Dr. Safer tells is that Sigmund Freud, “the first psychoanalyst,” made only a handful of references to his own siblings, or to sibling conflict in general, in his entire body of work.

Not all sibling conflict is a matter of concern, Dr. Safer points out. “Ferocious competition among child rivals is perfectly normal.” She explains that sibling rivalry and sibling strife are not the same. There is a normal range of disagreements and competition between siblings. Strife is rivalry gone out of control.

The worrisome sort of conflict, rivalry or strife can lead, in our times, to litigation, estrange-

ment, ongoing deficits in interacting with others, and passing on the negative consequences. This can happen by siblings “reproduc[ing] their original dynamics,” such as patterns of envy, guilt, betrayal and re-enactment of the errors of the past.

Although Freud ignored the effect of siblings on each others' lives, and did not evaluate or analyze them, Dr. Safer does that in this book. She points out the dearth of professional commentary about sibling rivalry and conflict. Rather, she points out, literature and the Bible have been the sources which have confirmed her observation that the effects of sibling relationships are very important in under-

standing how people deal with conflict in general throughout their lives. She points out that contemporary “blended families” and second families are now among the venues in which the shortcomings of un-addressed problems in sibling relationships will be fought out.

Dr. Safer, who interviewed sixty siblings in conflicted relationships, describes many types of strife, and how they sort themselves out or remain unresolved. Interest-

ingly, some of these conflicts follow very closely the kinds of litigated cases I have handled as a lawyer, and even some family situations in which siblings will likely become engaged in litigation when their parent dies. Of particular interest to mediators is a subsection in the chapter titled “For the Sake of the Parents.” The subsection is entitled “Wills and Estates: Poisoned Legacies,” and includes examples of strife, reconciliation and growth in dealings among siblings when their parents are dying or have died.

This section of *Cain's Legacy* contains several stories which would be very useful in trainings, role-plays and peer group discussions. The cases which ended well can be analyzed for the elements of

*Sibling rivalry can take very different courses and have very different results throughout the lives of the siblings, and even into later generations.*

## BOOK REVIEW, continued

positive interactions prompted by one or two unforeseen acts of one of the siblings. One story involves the heirs of a mother who decided to disregard the mother's will and worked out a division of the estate they thought was equitable. Another story involves three brothers suing their sister for the return of jewelry. The sister claimed the mother had given the jewelry to her, while the brothers claimed that the mother's will, which divided all the assets of the estate in four equal portions, included the jewelry. This litigated matter was not at all about the money or the value of the jewelry, Safer says.

Professionals involved in family mediation might see how individuals can respond to the rivalry that results from the actual or perceived preferences of some parents for one child over others. Mediators

should be ready to address, or at least be sensitive to, the conflict so that one or multiple siblings can actually confront the problems early enough to deal with them.

There are encouraging aspects to *Cain's Legacy*. For instance, Safer does highlight how siblings who expected to be enemies forever are able to restore a positive relationship despite their parents' often irrational or arbitrary favoritism.

Sibling strife "is far more pervasive than I imagined," writes Dr. Safer, who has conducted 240 interviews for several other books on other "taboo topics." *Cain's Legacy* is instructive and a pleasure to read, whether you are a mediator, a family member who can identify with aspects of the stories, or just a casual reader interested in a book well-written.

Editors' Addendum: This book review was originally assigned to another writer who, at the last moment, could not submit one. Jeanne Safer and her husband, Richard Brookhiser (a journalist, biographer and historian, and a senior editor at *National Review*), have been friends of Eli's for many years. Eli has taken care to try not to let the relationship affect this review. We add this note to insure full disclosure, as there was insufficient time to assign the review to another writer.



[Back To Contents](#)

## INSIDE SCOOP/AROUND THE COUNCIL

### Board Highlights

#### Highlights of the February NYSCDM Board Meeting

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 2013 meeting:

Treasurer David Louis reported that our final 2012 budget resulted in a surplus.

President Bobbie Dillon reported that a website upgrade will allow easy online registration for conferences and an updated online member directory by May.

The Association for Professional Family Mediators has agreed to promote our annual conference in their publications, thanks to the efforts of Ada Hasloeher.

The Annual Conference Committee co-chairs, Dan Burns and David Louis, reported that speakers are set and registration information will be mailed soon for the Council's 30th Anniversary conference in Saratoga.

Bill Hoefer, the liaison from the New York Institute for Family and Divorce Mediators to the Board, reported that the Institute has determined it is not possible to certify mediators at the state level due to the number of mediators required to create a statistically valid testing instrument. The Board expressed their gratitude for the hard work and dedication of the members of the Institute in pursuing efforts to increase mediator excellence.

The Accreditation Committee reported in writing that six members were accredited in 2012.

Downstate Mini-Conference co-chairs, Sydell Sloan and Glenn Dornfeld, reported in writing that there was lower than expected attendance due to hurricane Sandy, but there were rave reviews of the program from those who did attend.

The Board expressed their gratitude to the Ethics Committee in their efforts to educate the membership through thought-provoking articles in THE REPORT.

Public Awareness and Education co-chair Susan Ingram reported that Patty Murray, PR consultant, has secured two journal article placements on behalf of the Council and is promoting the annual conference through media around the State.

The Strategic Planning Committee, chaired by Clare Piro, is surveying the membership to gather information to be used in setting the direction of the Council for the next two years. It was also reported that a former Board member and two newer members of the Council will attend the Strategic Planning Session in March to provide input from differing perspectives.

Board meeting minutes, once approved, are posted in the Member's Area of the website for any member who is interested in more detail ([www.nyscdm.org](http://www.nyscdm.org)).

[Back To Contents](#)

## INSIDE SCOOP/AROUND THE COUNCIL, continued

**Pre-Conference****High Conflict at the Pre-Conference! (Discussed, not Expected.)**

This year at the Pre-Conference Institute on Thursday, May 2, 2013, mediator, therapist, attorney and author Bill Eddy will be presenting hands-on tools and techniques for working with high conflict clients. In his own words, Bill explains his presentation:

High conflict clients are often stuck in unmanageable emotions and all-or-nothing thinking, leading divorce mediators to feel frustrated, angry and hopeless. This Pre-Conference Institute presents a new approach that emphasizes more structure for mediators, more skills for clients and less stress for all in managing potentially high conflict clients. Using such an approach, the presenter has found that we can help more high conflict clients to reach reasonable settlements in mediation.

Please join the Council and your colleagues for this practical presentation and learn how to feel more confident in the midst of those unpredictable high conflict mediation sessions. Cost for the day-long presentation is \$100 for Council members who register by April 12th or \$110 for those who register after April 12th. For non-Council members, the cost is \$120 for the early-bird registration or \$130 after April 12th. The cost includes the presentation, lunch and two breaks.

For more information on Bill Eddy and his conflict resolution approaches, please visit his High Conflict Institute website at <http://www.highconflictinstitute.com/>. For Bill's biography, see <http://www.highconflictinstitute.com/speakers-a-trainers/speaker-bios>.



[Back To Contents](#)

## INSIDE SCOOP/AROUND THE COUNCIL, continued

**Membership Committee****SO WHAT'S THE MEMBERSHIP COMMITTEE UP TO?****By Robin Bauer**

The Membership Committee's big push this year is to promote the Buddy System. The Buddy System, unlike the Mentoring program, is not meant to be a formal arrangement, but rather more of an informal pairing of a long-time NYSCDM member with a new-ish member. The relationship is meant to act as a bridge, to help the new member with any issues that might come up. These issues may include, for example, helping to obtain malpractice insurance, helping to access a necessary form, discussing a pressing issue that arose in a mediation, or simply supplying emotional support. It is thought that the commitment between buddies should be one year. Then, of course, if the relationship continues ... all the better.

The form of contact between buddies will largely be determined by the buddies themselves. Some suggestions are phone conversations on a regular basis, meetings for coffee or perhaps just taking a walk (which is what I did with my buddy!). Eventually we would like the NYSCDM membership application form to have a box to check if someone is interested in the buddy program. For now however, if anyone is interested they can contact me, Robin Bauer, co-chair, with Nadia Shahram, of the membership committee. My email address is [RbauerJ@aol.com](mailto:RbauerJ@aol.com) and my cell number is (914) 391-0052. I look forward to hearing from you!



*Robin Bauer is an accredited divorce and family mediator who is also an attorney. Her practice is in White Plains. You can learn more about her at [www.linkedin.com/pub/robin-bauer/17/518/372/](http://www.linkedin.com/pub/robin-bauer/17/518/372/).*

[Back To Contents](#)

## INSIDE SCOOP/AROUND THE COUNCIL, continued

**Peer Groups****THE WHITE PLAINS PEER GROUP****By Clare Piro, Esq.**

The White Plains Peer group meets in the evenings on the last Tuesday of most months at different locations in and around White Plains.

I send out a notice to NYSCDM members in lower Westchester County before each meeting to let all know the meeting location. If anyone from outside the area would like to join, please let me know. We have between five and twelve or so members attending any given meeting. It is not mandatory that attendees be members, but any non-members who want to attend will have to let me know so they are added to the email list.

Typically, there is no agenda, and anyone who has a question about a case or a practice question is invited to bring it up. Some topics we've addressed are the role of a financial neutral, the use of coaches and attorneys in mediation, when or if to terminate a mediation that is not moving along, addressing power imbalances, separate property contributions and appreciation of separate property, therapists attending mediation sessions, the temporary maintenance statute and its effect in mediation, the interplay of the law and the parties' choices, and the always-compelling issue of working with difficult clients.

We also share knowledge and information we've received from workshops and conferences, both from the NYSCDM and other providers. These have recently included topics such as how to mediate when your clients are in bankruptcy or with a house underwater, retirement distribution when the plan is in pay-out status and the effect of boiler plate language. We have also had some amusing and lively discussions about the colorful conference presentations made by Paul Marcus and Diane Neumann.

We are of varied backgrounds and professional experiences, leading to much sharing of knowledge and expertise. We're also a friendly group, so there is quite a bit of socializing thrown into the mix as well.

If you're not near an existing peer group, I strongly urge you to consider forming one in your area. Being relatively new to both mediation and the Council, I started the White Plains Peer Group about eight years ago at the request of the late Nancy Gardner, who ran a Peer Group in Northern Westchester. I simply looked on the website and emailed everyone in the area to get the group up and running. Admittedly, some meetings were less well attended than others, but after a few years, the meetings caught on, and we now have a dedicated core group who are joined by several others for a fun and informative evening.

This was my first venture into involvement in the Council, and it was a great way to begin. The old adage — you get out what you put in — is often repeated for a reason. This first foray led to much more for me, both in terms of my membership and leadership in the Council and in furthering my mediation practice through the support of other members. [In addition to Clare being NYSCDM's Vice President, she is Chair of its Strategic Planning Committee and brings a wealth of varied contributions to the Council. —Eds.]

After reading descriptions of the other NYSCDM Peer Groups, I would say that the White Plains Peer Group is much less structured, so you should not be intimidated by descriptions of some of the other Peer Groups. A Peer Group has no rules and is solely what the participants want it to be.

## INSIDE SCOOP/AROUND THE COUNCIL, continued

So, if you're looking for an easy and fun way to get involved, learn from your peers, share your experience and expertise and further your practice along the way, form a peer group in your area! Feel free to contact me with any questions about how to get started. Or, of course, if you'd like to join our White Plains group.



*Clare Piro, a NYSCDM Accredited Divorce Mediator and Vice President of the NYSCDM, mediates and practices law in Harrison. She is a member of the Family and Divorce Mediation Council of Greater New York, and serves on the ADR Committee of the Westchester Women's Bar Association. She can be reached at [clare@mplawandmediation.com](mailto:clare@mplawandmediation.com). Her website is at [www.mplawandmediation.com](http://www.mplawandmediation.com).*

### Public Awareness & Education Committee

#### NYSCDM'S PUBLIC AWARENESS & EDUCATION COMMITTEE

**By Helene Bernstein, Esq.**

Susan Ingram, a NYSCDM board member, and I are co-chairs of the Public Awareness & Education Committee. We have been working closely together for the past year with the goal of spreading the word about the virtues of divorce mediation to the public and the professional community.

We are making our final edits to the reference page to our website with the assistance of our law school intern, Allison Gilbert. Allison is a third-year law student at Brooklyn Law School.

On April 17, 2013, the Council and FamilyKind Ltd. — a non-profit organization that assists families experiencing separation and divorce — will be co-sponsoring a Divorce Mediation Workshop geared toward the public. The Workshop will be held at 6:30 PM at John Jay College in Manhattan, thanks to the support of Prof. Maria Volpe's Dispute Resolution Program. The original program date of January 14, 2013 was changed due to logistical problems. A videographer will be on hand to record the panel discussions and role plays. The videos will be edited and uploaded to our website, so they will be available to the public at any time without charge. Our public relations consultant, Patty Murray, will be promoting the event throughout the New York City area.

We invite Council members to join this important Committee. We are seeking members who would like to contribute blog posts and write press releases, and who are seeking a rewarding experience. We would like to thank the Board for all the support during the past year, and encourage all members to donate money to our Committee and to renew your membership to the NYSCDM.

*Helene Bernstein is a divorce mediator and attorney in Brooklyn. Her practice has been serving adults and children for the past twenty-five years. Helene also serves as Director of Mediation and Parent Coordination for FamilyKind Ltd., a nonprofit organization assisting families experiencing separation and or divorce. Helene's email is [helene@hbernsteinlawandmediation.com](mailto:helene@hbernsteinlawandmediation.com) and her website is [www.hbernsteinlawandmediation.com/](http://www.hbernsteinlawandmediation.com/)*

[Back To Contents](#)



## INSIDE SCOOP/AROUND THE COUNCIL, continued

**TidBits****GETTING TO KNOW YOU ...**

It's not just for *The King and I*.

In future issues of THE REPORT, we'd like to include a new column, "**TidBits**". As a professional organization, most of what we focus on together is our professions and how we practice them. But we're not just professionals. Many of us are also people, and sometimes people first. **TidBits** will be a place to write about general goings-on for NYSCDM members and their families. Certainly, it could include, for instance, members' awards, appointments, publications, promotions, moves, honors, life milestones, etc. But it doesn't have to be limited to that. Did you take an interesting course (mediation or completely unrelated)? Did your child get into college? Hole-in-one? Did you go to a concert or on vacation with a colleague? How was your vacation to an exotic place? What was your most recent Personal Best? Who helped you talk through a knotty problem? Whose kid is your kid playing soccer with? What great insight did you have? What struck you as funny? Read any good books lately? What did you learn from your child today? What can you add to "good & welfare"? You can tell us about yourself or ask friends to tell us.

THE REPORT is one of several ways that the Council keeps in touch with members and encourages members to be in touch with one another. There's also the [website](#), [blog](#), [listserv](#), [Facebook](#), [Twitter](#), [LinkedIn](#), [YouTube](#), ... phew! We're offering this new "olde tyme" channel, which we hope will be fun. Please join in the chatter and encourage your colleagues. **Send your pearls and scoops to [nyscdmpubs@yahoogroups.com](mailto:nyscdmpubs@yahoogroups.com).** **TidBits** will be as good as you make it. Thanks.



[Back To Contents](#)

## SOME USEFUL WEBSITES

We all have favorite websites. Maybe we use bookmarks in our browsers, maybe not. We have lists, mental or otherwise, of the sites to which we go often, or that we may need on short notice, or that we just couldn't bear to lose track of even if we visit only occasionally. We have professional favorites and personal ones. For whatever it's worth, here's a little corner of THE REPORT's editors' hemi-demi-semi-Google of websites for family and divorce mediators. (What? Idiosyncratic? You got a problem with that? We actually use many of these sites regularly.)

Model Standards of Practice for Family and Divorce Mediation:

<http://nyscdm.org/resources/model-standards-of-practice-for-family-and-divorce-mediation/>

Association of Family and Conciliation Courts, "A Guide for Joint Custody and Shared Parenting":

<http://www.afccnet.org/resourcecenter/resourcesforfamilies/pamphletinformation/categoryid/1/productid/3>

Florida Basic Parenting Plan and Instructions (including calendar and areas of decision-making):

[http://12circuit.state.fl.us/Portals/0/PDF/Family/BPPlan\\_Inst.pdf](http://12circuit.state.fl.us/Portals/0/PDF/Family/BPPlan_Inst.pdf)

New Hampshire Judicial Branch — Parenting Plan Form:

<http://www.courts.state.nh.us/forms/nhjb-2064-fs.pdf>

Circuit Courts of the State of Oregon — Detailed Parenting Arrangements Form:

<http://courts.oregon.gov/OJD/docs/OSCA/cpsd/courtimprovement/familylaw/BasicParentingPlanTabbedREV6savable10-10-08.pdf>

The Child Support Standards Act (in the Domestic Relations Law and in the Family Court Act), including the statutory standards for deviation from the CSSA):

Domestic Relations Law §240: <http://public.leginfo.state.ny.us/LAWSSEAF.cgi?>

[QUERYTYPE=LAWS+&QUERYDATA=\\$\\$DOM240](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$DOM240)

[\\$\\$@TXDOM0240+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=16875428+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$DOM240$$@TXDOM0240+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=16875428+&TARGET=VIEW)

Family Court Act §413:

[http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$\\$FCT413](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$FCT413)

[\\$\\$@TXFCT0413+&LIST=SEA73+&BROWSER=BROWSER+&TOKEN=55249215+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$FCT413$$@TXFCT0413+&LIST=SEA73+&BROWSER=BROWSER+&TOKEN=55249215+&TARGET=VIEW)

## SOME USEFUL WEBSITES, continued

Resources for Parenting And Family Mediation by the Association of Family and Conciliation Courts:

<http://www.afccnet.org/resourcecenter/resourcesforfamilies/categoryid/1>

### Free Legal Research Resources

Westlaw, Lexis-Nexis and FindLaw are pay research sites, either by subscription or pay-per-search (with credit card). However, they may have “courtesy” subscriptions (free, limited or lower-cost).

New York State Consolidated Laws - Laws of the State of New York, is a comprehensive site for all New York statutes, and includes search ability by word or phrase:

<http://public.leginfo.state.ny.us/MENUGETF.cgi?COMMONQUERY=LAWS+&TARGET=VIEW>

New York Official Reports: New York State Law Reporting Bureau. The Law Reporting Bureau is the New York State agency responsible for publishing the decisions of the New York courts in the Official Reports:

<http://www.courts.state.ny.us/reporter/>

New York State Unified Court System: Decisions. Includes search by party name, index numbers, judge, words, phrases, etc.

<http://www.nycourts.gov/decisions/>

Follow your case status online at the Court’s web site, which includes all Supreme Court cases, and many other courts of lesser jurisdiction (SCROLL):

<http://iapps.courts.state.ny.us/scroll/>

New York State Division of Child Support Enforcement:

<https://childsupport.ny.gov/dcse/home.html>

New York State Child Support Standards Chart. The chart is released each year on or before April 1st. The income tables are used to determine the annual child support obligation amount.

[https://childsupport.ny.gov/dcse/child\\_support\\_standards.html](https://childsupport.ny.gov/dcse/child_support_standards.html)

United States Department of State Child Abduction from the United States:

[http://travel.state.gov/abduction/solutions/solutions\\_3848.html](http://travel.state.gov/abduction/solutions/solutions_3848.html)

## SOME USEFUL WEBSITES, continued

Mediation Rules and Descriptions for Some State and Federal Courts in New York State:

<http://nycourts.gov/ip/adr/index.shtml>

<http://nysd.uscourts.gov/mediation.php>

Community Mediation Services (selected):

NYC Community Mediation Services:

<http://www.nycservice.org/organizations/414>

Community Mediation Services:

<http://www.mediatenyc.org>

New York State Early Intervention Mediation Services

[http://www.health.ny.gov/community/infants\\_children/early\\_intervention/parents\\_questions\\_and\\_answers.htm#services](http://www.health.ny.gov/community/infants_children/early_intervention/parents_questions_and_answers.htm#services)

Uniform Mediation Act:

<http://uniformlaws.org/Act.aspx?title=Mediation Act>

<http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/239/Legislation-Where-the-Uniform-Mediation-Act-Stands-in-the-States-Web.aspx>

Uniform Mediation Act Summary:

<http://uniformlaws.org/ActSummary.aspx?title=Mediation%20Act>



[Back To Contents](#)

## COURT AND OTHER OPINIONS DISCUSSED IN THIS ISSUE

This opinion is discussed in "Case of Interest: Greater Flexibility in Mediation, at Lower Cost" starting at p.[19](#) above.

Decided on January 3, 2013

Sweeny, J.P., Saxe, Richter, Abdus-Salaam, Román, JJ.

[Appellate Division, First Department Docket No.] 8237. [Index No.] 350510/07

**Lindsey Kupferman Nederlander, Plaintiff-Respondent,**

**v.**

**Eric Nederlander, Defendant-Appellant.**

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered on or about April 17, 2012, which, to the extent appealed from, ordered defendant to pay 50% of the balances owed on the mortgages on the marital residence in the event that he is unable to refinance the mortgages or obtain extensions of the mortgage notes, unanimously affirmed, without costs.

Domestic Relations Law (DRL) § 234 empowers the court to "make such direction, between the parties, concerning the possession of property, as in the court's discretion justice requires having regard to the circumstances of the case and of the respective parties." Accordingly, pursuant to DRL § 234, the court can not only order that a party turn over marital property, but also that he or she refrain from transferring or disposing of it (*Leibowits v Leibowits*, 93 AD2d 535, 537 [2d Dept 1983]). The power to issue preliminary injunctions affecting property in divorce actions stems from the recognition that while spouses have no legal or beneficial interest in marital property prior to a judgment of divorce, they nevertheless have an expectancy in that property (*see id.* at 540-545 [O'Connor, J. concurring]). Thus, in order to protect that expectancy pending equitable distribution, to maintain the status quo, and to prevent the dissipation of marital property, the court must be able to issue orders to ensure that such marital property is protected should it later become the subject of equitable distribution

(*id.*; *Rosenshein v Rosenshein*, 211 AD2d 456, 456 [1st Dept 1995]; *Drazal v Drazal*, 122 AD2d 829, 831 [2nd Dept 1986]).

Here, contrary to defendant's assertion, the motion court's order, insofar as it ordered defendant to pay 50% of the balances owed on the mortgages on the marital residence in the event that he is unable to refinance the mortgages or obtain extensions of the mortgage notes, was a proper exercise of its discretion pursuant to DRL § 234. Specifically, the record indicates that the bank was planning to foreclose on the marital residence and that defendant - in failing to submit a requested application and financial information to the bank until after the instant motion was made, months after the same was requested by the bank, and months after plaintiff submitted her information and application to the bank - was either by design or neglect contributing to the foreclosure. Thus, the motion court, to ensure that the marital home would not be lost to foreclosure, prior to trial and a final judgment of divorce, providently exercised its discretion in ordering defendant to cooperate in obtaining an extension of the loans and/or a refinancing of the loans (*see Weinstock v Weinstock*, 8 Misc 3d 221 [Sup Ct, Nassau County 2005] [defendant directed to cooperate and execute the documents necessary to secure refinancing of the loan on the marital premises since the failure to do so would result in dissipation of the property]; *Lidsky v Lidsky*, 134 Misc 2d 511 [Sup Ct, Westchester County 1986]).

For the very same reasons, despite defendant's purported inability to pay half of the outstanding mortgages on the marital home, the motion court properly ordered that he do so if he was unsuccessful in refinancing or obtaining an extension. Contrary to defendant's assertion, the motion court did not err in implicitly concluding that defendant had the ability to pay half of the outstanding mortgages. While defendant, pointing to his modest earnings and substantial debt, claims that he lacks the financial resources to comply with the court's order, his deposition testimony belies his assertion, evincing instead that he actually has access to seemingly unlimited financial resources, which can be, and were, justifiably imputed to defendant as income and/or assets.

At his deposition, defendant testified that while he only earned approximately \$700 per week as an employee with his father's company, all of his bills, both personal and business, are, and have been paid by his father. Defendant

## COURT AND OTHER OPINIONS DISCUSSED IN THIS ISSUE, continued

further testified that all of his bills are mailed directly to his father's company where they are then reviewed by defendant's assistant. Thereafter, defendant's father wires funds to the company's account sufficient to cover defendant's expenses, defendant's assistant then draws company checks, and defendant then executes them. Thus, the record evinces significant distributions to defendant from his family business during the marriage and that defendant received support from his father extending several over years. While defendant characterized his father's aid as loans, totaling \$4 million at the time of his deposition, and as per his statement of net worth, over \$6.5 million in 2010, he nevertheless testified that he has not paid his father back. Based on the foregoing, clearly, the substantial and ongoing financial aid provided to defendant by his father is either a gift, imputable as income (*Fabrikant v Fabrikant*, 62 AD3d 585, 586 [1st Dept 2009]; *Rostropovich v Guerrand-Hermes*, 18 AD3d 211, 211 [1st Dept 2005]; *Wildenstein v Wildenstein*, 251 AD2d

189, 190 [1st Dept 1998]; *Lapkin v Lapkin*, 208 AD2d 474, 474 [1st Dept 1994]) or a benefit provided to defendant by his father's company, also imputable as income (*Issacs v Issacs*, 246 AD2d 428, 428 [1st Dept 1998] [trial court properly imputed income to defendant husband insofar as he received numerous benefits from his company, namely cash outlays for personal expenses]).

Lastly, we find no merit to the defendant's contention that the motion court's order constitutes prejudgment equitable distribution of marital property. While it is true that in an action for divorce the court cannot distribute property by pendente lite order and prior to a final judgment of divorce (*Stewart v Stewart*, 118 AD2d 455, 456-457 [1st Dept 1986]), here, the motion court never made any determination as to the parties' interests in the marital residence. Nor did the motion court order the equitable distribution of the marital property pendente lite.

[Back To Contents](#)



---

### **Feel Free to Share!**

THE REPORT is created for the benefit of NYSCDM members and selected other interested readers. Members are welcomed to send copies of THE REPORT, or integrally complete sections of it, to clients, professionals, other people interested in alternative dispute resolution and researchers, as long as the NYSCDM is fully credited, copyright is noted, and information about contacting the NYSCDM is provided to the recipient.

---

## **THE NEW YORK STATE COUNCIL ON DIVORCE MEDIATION PRESENTS ITS 30<sup>TH</sup> ANNUAL CONFERENCE: MEDIATING “BETWEEN A ROCK AND A HARD PLACE”**

JOIN US **MAY 2<sup>ND</sup>, 3<sup>RD</sup>, & 4<sup>TH</sup>, 2013** TO CELEBRATE 30 YEARS!

GIDEON PUTNAM RESORT, SARATOGA SPRINGS, NEW YORK

REGISTER ONLINE AT [WWW.NYSCDM.ORG](http://WWW.NYSCDM.ORG)

“New York State Council on Divorce Mediation has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York from July 25, 2012 – July 24, 2015.” CLE credits will be earned depending on sessions attended. Financial hardship policy is available upon written request. To apply, write Kathy Jaffe at 978 Route 45, Suite 107, Pomona, NY 10970



[www.NYSCDM.org](http://www.NYSCDM.org)

[Back To Contents](#)