



MASSACHUSETTS FAMILY LAW A Periodic Review

By Jonathan E. Fields

Alimony Bill Becomes Law Of course, the biggest news in the last quarter was the passage of the landmark alimony reform bill. I won't tackle it in this space but interested readers are directed to John A. Fiske's and James McCusker's articles in this FMQ for several in-depth views on the subject.

Judges Imputing Income Be Forewarned – There's a Recession Out There! In a divorce action, a Probate and Family Court found that a father in the real estate business was underemployed and imputed income to him for purposes of calculating child support. The Court averaged the father's income over the previous five years while acknowledging that it did not reflect his current actual income. The Appeals Court reversed because there was no finding that the father, who was working 60 hours per week, was earning less than he could through reasonable efforts.

Further, the Appeals Court went on, considering "the economic climate wherein the real estate industry was in steep decline, jobs were far from plentiful, and the husband was making reasonable efforts to earn at his full capacity, the judge ... was not permitted to factor in that the [father] was underemployed." *Sullivan v. Sullivan*, 79 Mass.App.Ct. 1131 (July 20, 2011) (Unpublished)

Lawyer-Mediator's Subsequent Representation of Party A Nebraska attorney served as a mediator for an unmarried couple in a child custody dispute; later, after the mediation had concluded, this same attorney represented the mother against the father in a suit involving the father's alleged wrongful theft of certain of the mother's property. The father sought to disqualify the attorney on the grounds of the prior mediation relationship. The Court, interpreting Nebraska law, *did not disqualify* the attorney. *Hossaini v. Vaelizadeh*, D. Neb. (August 4, 2011)

That's Nebraska. What does Massachusetts law say?

Here, Massachusetts Rules of Professional Conduct (MRCP) 1.12 prohibit a lawyer from representing a person "in connection with a matter in which the lawyer participated *personally and substantially*" as a mediator "unless all parties to the proceeding consent after consultation." The "personal and substantial" requirement is fact-specific and, in any event, it is unclear what it means.

Be thankful, then, for MCFM's Standards of Practice which are clear and unambiguous. Standard 6 (B)(2)(a) says that a mediator "shall never represent [a]



party to the mediation against any other party to the mediation in any matter whatsoever.” Even with the consent of the parties, the mediator may only act for them as an “arbitrator or case evaluator.” Note, too, that the Standard applies to “other individuals with whom the mediator is in business, such as other lawyers in a firm, or other mental health professionals in a group practice.”

The Vineyard, Valuation, and Present Divisions After a trial, a Probate and Family Court entered a divorce judgment (1) valuing the husband’s 25% interest in a Martha’s Vineyard property at 25% of the market value of the property and (2) awarding a present interest in that property to the wife. The Appeals Court reversed.

On the issue of valuation, the appellate court noted that, while there was evidence of the market value of the *entire* Martha’s Vineyard property, there was no evidence as to the husband’s 25% interest – simply

valuing it at 25% of market value was without basis.

Further, since the Court acknowledged that the husband’s interest was unlikely to be sold and unlikely to generate income for him, ordering the husband to make a present payment to his wife for \$360,000 is “plainly wrong and excessive.” While the law strongly favors *present payments* to “*if, as, and when*” payments, the law also recognizes that where a present division would cause an undue hardship to a party, it is inappropriate. *Elliott v. Elliott*, 2011 Mass.App.Unpub. LEXIS 992 (September 6, 2011)



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**“The important thing is
not to stop questioning.”**

Albert Einstein