



MASSACHUSETTS FAMILY LAW A Quarterly Review

By Jonathan E. Fields

Editor's Note: Following is Jon Fields' first quarterly column offering synopses & comments on cutting edge changes in Massachusetts family law that affect mediators and their clients.

Restraining Order against Out-of State Man - The SJC held that a District Court could issue a 209A abuse prevention order against a Florida resident even though it had no personal jurisdiction over him. The court noted that so long as the order imposed no affirmative obligations on him, personal jurisdiction was not required. *Caplan v. Donovan*, 450 Mass. 463 (January 17, 2008)

Parental Fitness – Drug Use - The Appeals Court overturned a Juvenile Court judgment finding the mother of a child unfit and terminating her parental rights. While the mother had a history of drug use, the Appeals Court found there was no evidence that such use was linked to her ability to parent. The case reminds practitioners of the long-standing requirement of a “nexus” between drug use and the ability to parent. Drug use alone, past or present, is simply insufficient. *Adoption of Zoltan*, 71 Mass.App.Ct. 185 (February 7, 2008)

QDRO Needed to Disclaim Interest in Retirement Plan? – The United States Supreme Court agreed to hear an appeal from a decision by the Fifth Circuit Court of Appeals. At issue is whether a QDRO

is required even in the event that the non-participant spouse *disclaims* all interest in the at-issue retirement plan, as the Fifth Circuit held. This, of course, would be a radical departure from current practice. Although a handful of other federal and state courts agree with the Fifth Circuit, the majority of courts appear to follow the traditional practice of not requiring a QDRO unless an interest in a retirement plan is actually being divided. The First Circuit (which covers Massachusetts) has not squarely addressed the issue but case law suggests that it follows the majority rule. *Kennedy v. Plan Adm'r for Dupont Sav. and Inv. Plan*, 497 F.3d 426 (2007), *cert. granted in part by Kennedy v. Plan Adm'r for Dupont Sav. and Inv. Plan* 128 S.Ct. 1225 (February 19, 2008)

Unauthorized Practice of Law – In an opinion that should be of interest to non-lawyer mediators, the SJC found that a suspended attorney violated the terms of his suspension order by practicing law. On behalf of an acquaintance, the suspended attorney had prepared a complaint for divorce, a motion to file marriage certificate late and a motion to vacate the marital home. The acquaintance appeared *pro se*. The court, finding him in violation of the suspension order, noted that the practice of law “includes preparation of pleadings, process, and other papers incident to an action or proceeding.” Non-lawyer mediators who draft separation



agreements and financial statements may wish to reconsider this practice. *Matter of Kafkas*, 451 Mass. 1001 (March 28, 2008)

Child Support – One Child with Each Parent – Where one child resided with the mother, who earned about \$119,000 and the other child resided with the father who earned about \$32,000, the Probate Court did not order the mother to pay child support to the father. The Appeals Court, troubled by the failure to award support to the father, vacated the support

determination and remanded the case to the Probate Court. The case may be instructive, as well, for shared physical custody arrangements in which there is significant income disparity between the parents. *Meade v. Meade*, 71 Mass. App. Ct. 1118 (April 9, 2008) (Unpublished).



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**“The difference between divorce
and legal separation is that a legal
separation gives a husband time
to hide his money.”**

Johnny Carson