MASSACHUSETTS FAMILY LAW
A Periodic Review
By Jonathan E. Fields

Material Change Trumps Inconsistency Standard. Marlene Morales sought to modify child support when her ex-husband's hourly wage increased $.87 per hour. Although child support would have increased in this Guidelines case, the Probate and Family judge dismissed Marlene's modification action on the basis that she failed to prove "a *material* change of circumstances." On appeal, Marlene relied on the "inconsistency standard" in M.G.L. c.208 s.28 (creating "a rebuttable presumption that the amount of the order which would result from the application of the guidelines is the appropriate amount of child support") which, according to her, required the Court to allow her modification. The Appeals Court disagreed. Affirming the Probate and Family Court decision, the Appeals Court noted that a petitioner can succeed in a modification action only where she demonstrates a material change of circumstances – inconsistency with the Guidelines is not enough. *Morales v. Morales*, 2011 Mass.App.Unpub. LEXIS 1089 (October 17, 2011) (Unpublished).

Don't Just Agree to Modify. Go to Court. A recent Superior Court case illustrates the pitfalls of informal modifications. A divorce judgment incorporated an agreement in which a merged provision required the father to pay alimony to the mother. Later, the parties agreed in writing to lower the support but they did not bring the matter to court. The mother, predictably, filed a complaint for contempt. The father brought a breach of contract action in Superior Court seeking to hold the mother to the written agreement they had. The Court found that since the alimony provision merged, the parties did not have the freedom to privately contract with one another without court approval. Yet another reason that we must make clear to the clients that they must go to court with their modification agreements after they leave our offices. *Reed v. Luther*, 2011 Mass.Super. LEXIS 254 (November 30, 2011)

Language Matters or Don't Draft in the Hallway. There can't be too many reminders for mediators about how much language matters. A hallway revision of a separation agreement provided that the parties will "equalize IRA accounts." The Agreement was approved and, shortly afterwards, the wife sought to modify the provision on the grounds that *what the parties really meant was* that "all assets" should be equalized. The Probate and Family Court refused to modify and, on appeal, the Appeals Court affirmed the Probate and Family Court decision. *Acheson v. Acheson*, 2011 Mass.App.Unpub. LEXIS 1335 (December 21, 2011) (Unpublished)

Looking for a Discount? Don't Look Here. In a divorce trial involving a wife's closely-held business interests, the Probate and Family Court found that the value of her interests should be adjusted by a *marketability discount* (an adjustment designed to reflect the lack of a market for an interest in a business) as well as a *minority discount* (an adjustment that acknowledges a loss of value that attaches to a non-controlling interest). The Appeals Court reversed – holding that since the sale of the business was not "presently anticipated," such discounts were improper under *Bernier v. Bernier*, 444 Mass. 774 (2007). *Caveney v. Caveney*, 81 Mass.App.Ct. ---- (January 12, 2012).

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