

# *“The Art of Interest-Based Negotiation”*

*~ Conceptual Frameworks and Practical Strategies  
for Collaborative Professionals ~*

## **Program Materials**

Presented by

**The Collaborative Law Institute of Minnesota  
2013 Annual Forum**

**December 5-6, 2013  
Minneapolis, MN**

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## About the Presenter

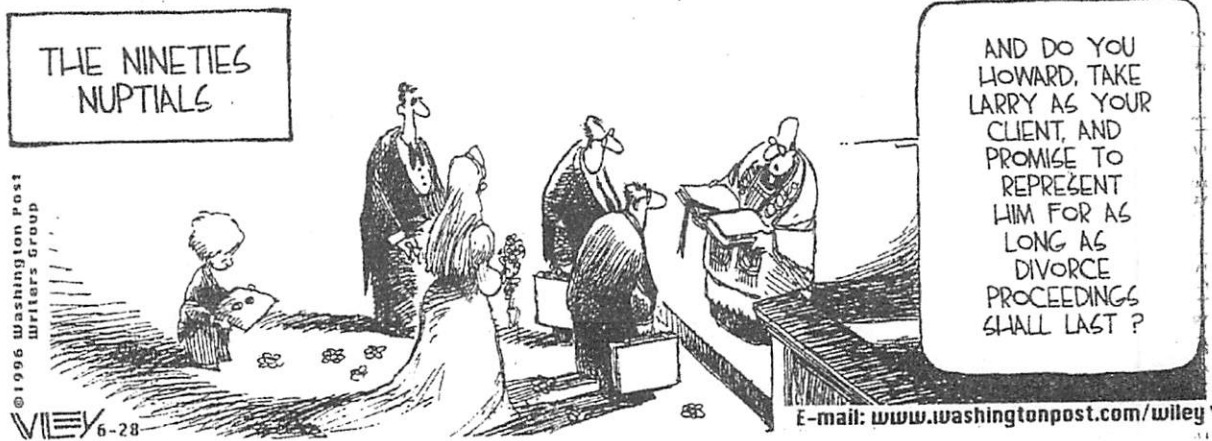
Chip Rose is Director of the Mediation Center in Santa Cruz, California and certified as a Specialist in Family Law by the State Bar of California Board of Legal Specialization. Chip maintains private practices in Mediation and Collaborative Practice in Santa Cruz, California.

Chip is recognized nationally and internationally as an innovator and expert in the field of mediation and collaborative conflict resolution. He is a past member of the Board of the International Academy of Collaborative Professionals (IACP) and is currently a founding board member of the Academy of Professional Family Mediators (APFM). An adjunct faculty member of the Strauss Institute for Dispute Resolution at the Pepperdine University School of Law, he teaches workshops in basic and advanced mediation and Collaborative Practice. Chip is the author of *The Collaborative Law Practice*; *The Creative Solution* column in the quarterly Family Section Newsletter of APFM; the chapter, "*Mediating Financial Issues*" in Divorce and Family Mediation: Models, Techniques and Applications edited by Jay Folberg; and co-authored the chapter "*Psychology and Divorce*" in The Financial Handbook of Divorce, edited by Crumbley and Apostolou. Since 1994, Chip has also been providing training throughout the United States and Canada in the theory and application of mediation and Collaborative Practice.

More information regarding Chip Rose and the content of his workshops and seminars may be accessed on the website [www.mediate.com/crose](http://www.mediate.com/crose).

NON SEQUITUR

Wiley



Why collaborative practice has a withdrawal protocol...

## Workshop Overview

- How do we maximize interest-based bargaining;
- Examining who we are and what we do;
- Understanding who the clients are and what they need;
- Designing process structure to fill need;
- Designing a process for substantive issues to maximize success;
- Practical applications for practical issues.

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## Living in the Question or Assuming the Answer?

- Living in the Answer: The comfort zone of authority
- Becoming mindful and curious
- Messaging and modeling
- Living in the Question: safe, strategic, critical questions
- Facilitating client self-examination and empowerment?

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## **Assume Nothing. Ask Everything.**

- Who are our clients?
- How do they come into the process?
- What do they think they need?
- What are their real needs?
- What are their goals?
- How do the answers to these questions shape the design of an effective process?

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## **Mapping Your Process**

- What is the map of your process?
- How does the end inform the beginning?
- How does the beginning shape the end?
- How does the organic nature of relationship issues affect the design of an effective process structure?

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## **Interest-Based Negotiation**

- Self-focused v. self-centered
- Self-interest and mutuality
- Impediments to self-interest
- Process design and maximization

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## **What Does It Mean to be “Client-Centered”?**

- As opposed to being law-centric?
- What do we know about our clients?
- What do we need to know?
- What do they think they need?
- What are their real needs?

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## **The Role of Goals**

- Educating clients about the importance of goals they share;
- Danger of overlooking the obvious;
- Designing a process that achieves the goals;
- Characteristic of negotiation: Problem-solving approach;

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## **The Role of the Professionals**

- Re-defining professional-client relationship
- Re-defining definitions of duty and responsibility
- Re-designing tasks and strategies
- Reframing client thinking and behavior
- Exploring with safe questions
- Being mindful and curious

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## The Role of the Clients

- They come as they are;
- Embrace the process as it is developed;
- Respect process boundaries;
- Take responsibility for one's own role;
- Take responsibility for one's choices;
- Take responsibility for the outcome;

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## Role of the Process

- Guarantee a safe environment through establishing boundaries;
- Create a structure for the thorough development of substantive issues;
- Identify and respond to individual need;
- Support the principles of collaborative negotiation;
- Provide road map to successful negotiation;
- Inform the clients: ★ You Are Here

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## Framework for Analytical Thinking

### **MACRO VIEW**

(Shared Goals)



*Micro View*

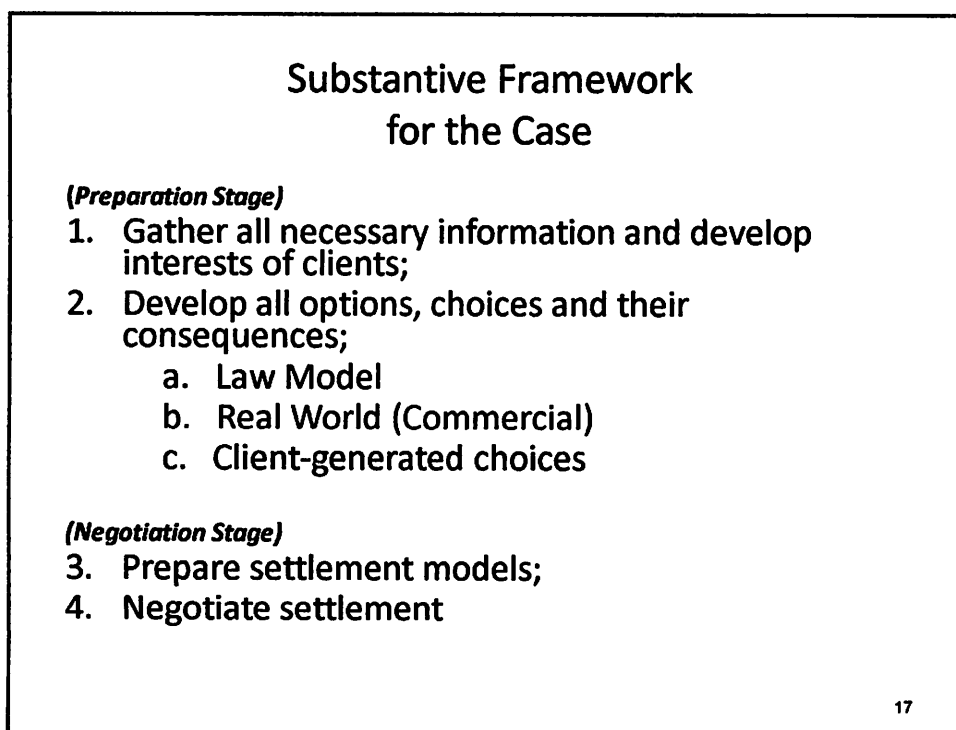
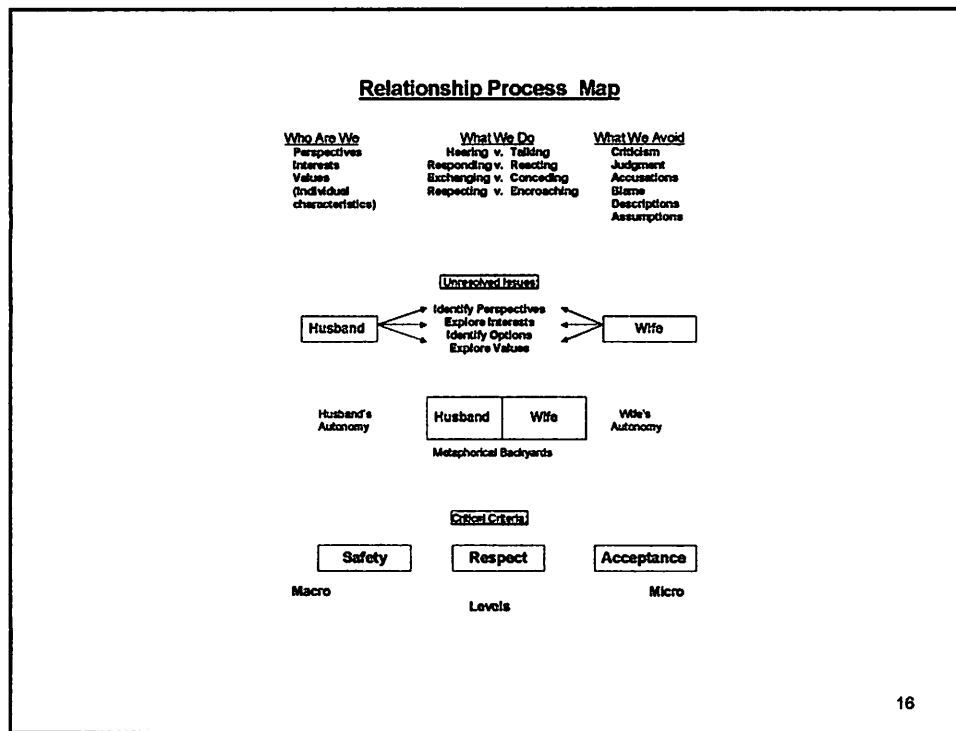
(Positions and demands)

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## Broad Process Overview

- |                      |   |
|----------------------|---|
| <b>Goals:</b>        | Broad process goals of the parties.                         |
| <b>Principles:</b>   | CP principles most likely to achieve goals.                 |
| <b>Processes:</b>    | Specific processes that put principles into effect.         |
| <b>Rules:</b>        | Mutually agreed upon rules for effective behavior.          |
| <b>Anchors:</b>      | Short hand approaches to reinforcing rules.                 |
| <b>Applications:</b> | Applications of anchors to client's specific process needs. |

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## Identifying Macro Goals

“Would it be a goal of yours to...”

- Resolve issues in a manner that caused no harm to you children?
- Created a settlement that was maximally beneficially to each of you?
- Keep control of this process, control its cost and have control over all the agreements?
- Work in a process that you experienced as *Safe*?

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## Process Decoder Tool

(or Break Glass In Case of Emergency)

*Ask Questions that....*

1. Assess the Circumstances
2. Identify the Choices
3. Evaluate the Consequences
4. Facilitate Making a Decision

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## The Law Model

- Origins and purpose of the Law Model
- ***Characteristics*** of the court model
- Impact of characteristics on clients
- ***Assumptions*** of the Law Model
- The threat and use of power as negotiating vehicle

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## Characteristics of the Collaborative Approach

- Identification and development of each party's needs in the process
- Development of common goals, objectives and interests
- Self-interest and mutuality are interrelated
- Neither can achieve maximization unless each achieves maximization
- A maximized outcome requires cooperation, coordination and collaboration
- The process concepts and applications are prerequisites to the achievement of the goals

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## Strategies for Substantive Issues

- Identifying intervention strategies
- Altering the relationship negotiation paradigm
- Inform, educate, analyze, empower
- Facilitate discussion of contended issues
- Model appropriate discourse
- Demonstrate curiosity, engagement and respect

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## Reinforcing the Frameworks

- Reminding clients of the design structure
  - *Framework for conduct and behavior*
  - *Framework for substantive issues*
- Linking structure to goals
- Securing client commitment to structure
- Implementing client commitment (or holding them accountable)

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## Implementing Structural Design

- Turning resistance into revelation
- Self-interest and a safe environment
- Self-interest and full disclosure
- Self-interest and full discussion
- Revealing bargaining chips for negotiation

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## Implementing Process Frameworks

### **A. Relationship Process Model:**

- Suffering each other's process v. discovering more marbles
- Backyard metaphor template creates safety and respect
- Control comes from process design based on mutuality and maximizing self-interest

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## Implementing Process Frameworks

### **B. Substantive Two-Stage Model:**

- Goals and Tasks of the Preparation Stage
- Walking the boundaries of marital estate
- Opening boxes of issues
- What the three lenses reveal
  - *The Law Model*
  - *The Real World*
  - *Client-generated Choices*

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## The Family Residence

- Collaborative approach v. client approach
- Reframing the role for settlement purposes
- Information gathering:
  - Purchase history
  - Source of funds
  - Prior residences
  - Finance history
  - Current debt service and cash flow considerations
  - Client concerns and goals

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## The Family Residence

- The Law Model
  - Application of Equitable Distribution policies
  - Determination of Net Equity for buyout or trade
  - Temporary use issues—Watts model
- The Real World
  - Fair Market Value
  - Tax considerations
  - Basis/Gain calculations
  - Mortgage transfers
- Client-Generated Choices
  - Goals/objectives of clients
  - Positive conditional considerations

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## Child Support

- The Law Model
  - State Guideline
  - Assumptions of guidelines
  - Basic child support
- The Real World
  - Expenses not addressed in guideline
  - Non-deductible, non-taxable
  - Dependency exemptions, head of household status
- Client-Generated Choices
  - Shared goals and objectives of the parties
  - Customizing agreement in the context of financial concerns of the parties

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## Spousal Maintenance

- The Law Model
  - State Policies and guidelines
  - Risk factors in adjudicated model
  - Necessity of future review or modification
- The Real World
  - Deductible/Taxable
  - Impact on ability to borrow (payor/recipient)
  - Opportunities for employment and self-sufficiency
- Client-Generated Choices
  - Predictability
  - Method
  - Terms and conditions

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## Retirement Assets

- The Law Model
  - Calculation of marital interest
  - Method of division
- The Real World
  - Types of tax-deferred savings and benefits
  - Plan policies (e.g. City of San Jose Police & Fire)
  - Tax implications and consequences
- Client-Generated Choices
  - Trading pre-tax and post-tax assets
  - Customized methods of valuation
  - Customized approaches to disposition

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## Protocols For Negotiation

- Understanding marital model of negotiating
- Reframing model for collaborative negotiation
- Backyard metaphor and real world
- Autonomy over what anything is “worth”
- Key characteristics of a proposal
  - CA casual meets TX hold'em
- Negotiating with respect
- Reading the tea leaves
- Pathway to “real” bottom line

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## Ask Strategic Questions

*Questions which:*

- Identify the parties concerns and fears
- Validate the legitimacy of those fears and concerns
- Recognize the limitations of their resources
- Focus on specific interests
- Highlight sensitive issues in constructive conversation
- Stretch the range of possible solutions

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## Agreement Concepts

- Establish need for agreements:  
*Separate clients from issues*
- Create process framework:  
*Big enough to solve problem, small enough to not create more*
- Identify types of agreements:  
*Oral, written, temporary, long-term, binding, non-binding*

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## Helping Clients Reframe:

Emotional...	<i>Strategic</i>
Conflicted...	Collaborative
Dependent..	<i>Capable</i>
Ignorant..	<i>Informed</i>
Stuck...	<i>Resolved</i>

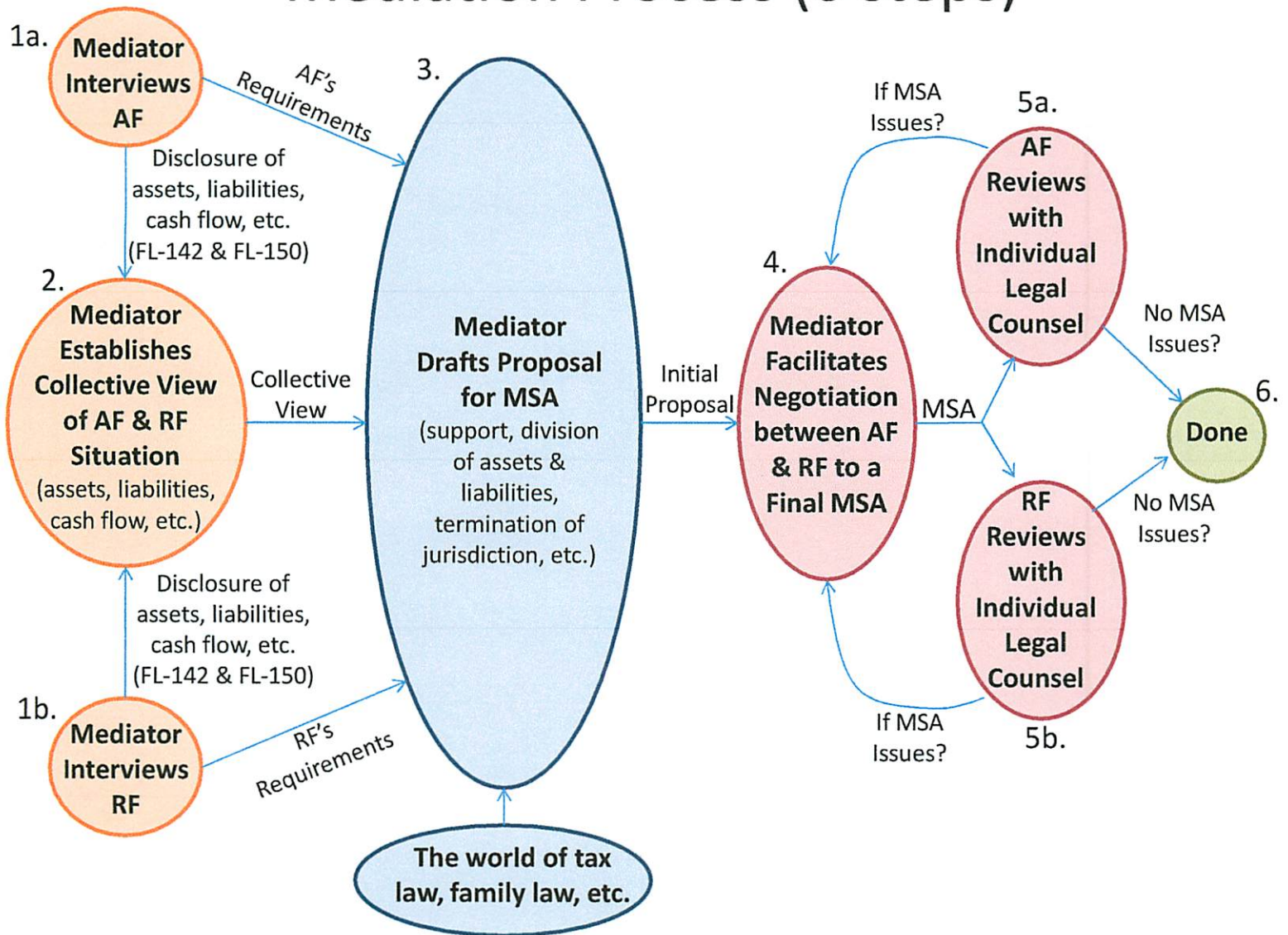
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# MAPPING THE COLLABORATIVE PROCESS

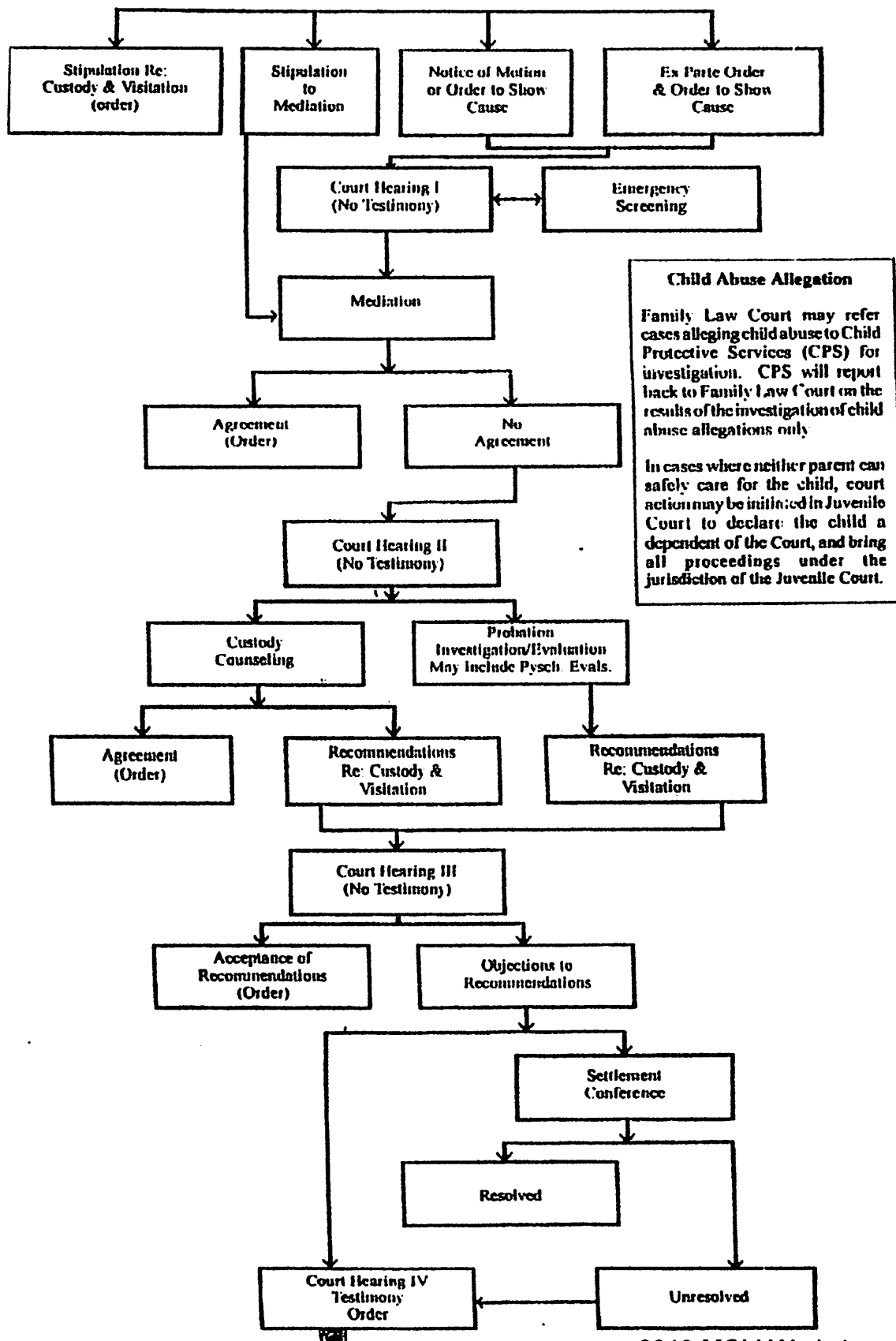
**INITIAL CONSULTATION**

**FINAL AGREEMENT**

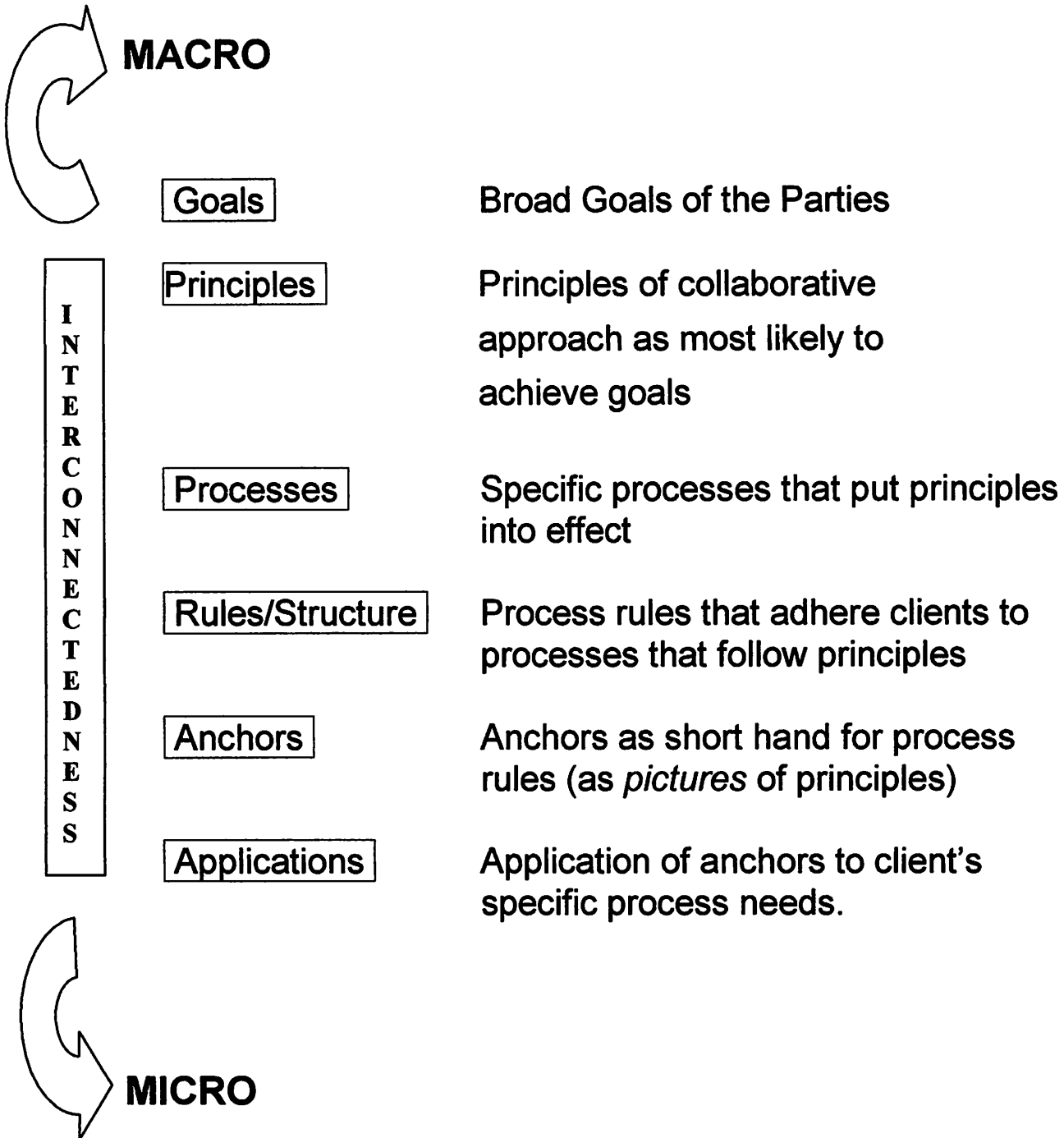
# Mediation Process (6 steps)



# Child Custody Dispute Resolution Process



# Broad Process Overview



# Relationship Process Map

## Who Are We

Perspectives  
Interests  
Values  
(Individual  
characteristics)

## What We Do

Hearing v. Talking  
Responding v. Reacting  
Exchanging v. Conceding  
Respecting v. Encroaching

## What We Avoid

Criticism  
Judgment  
Accusations  
Blame  
Descriptions  
Assumptions

## Metaphorical Backyards

<u>Husband's</u>	<u>Wife's</u>
<ul style="list-style-type: none"> <li>• Autonomy</li> <li>• Safe space</li> <li>• Express perspectives</li> <li>• Articulate feelings</li> <li>• Ask questions</li> <li>• Obtain information</li> <li>• Seek analysis</li> <li>• Explore options</li> <li>• Determine value</li> <li>• Formulate proposal</li> </ul>	<ul style="list-style-type: none"> <li>• Autonomy</li> <li>• Safe space</li> <li>• Express perspectives</li> <li>• Articulate feelings</li> <li>• Ask questions</li> <li>• Obtain information</li> <li>• Seek analysis</li> <li>• Explore options</li> <li>• Determine value</li> <li>• Formulate proposal</li> </ul>

## Critical Criteria for a Successful Process:

Safety

Respect

Acceptance

Macro ←-----→ Micro



# Process Anchors

**1. Recognize the futility of arguing.**

Characteristics of the parties that are ignored in conflict:

Perspectives

Interests

Beliefs

Identify your perspectives, interests, and beliefs and listen for what you can learn about how to negotiate to the other party's perspectives, interests and beliefs.

**2. Recognize your own process needs and respect those process needs of the other.**

A party needs to go through his/her own development of the issues, evaluation of options and determination of needs. The more prepared to negotiate each party is the more successful the agreement will be for each. Be mindful of conduct which interferes with the process needs of the other. Make it *safe* for the other to say what needs to be said.

**3. Speak only for yourself. Use "I" statements.**

Listen for the tendency to include reference to the other party in one's language. Reframe speech to exclude references to what the other party thinks, feels, wants or needs.

**4. Avoid language about the other that is critical, judgmental, accusatory, blame-oriented, sarcastic or inflammatory.**

To understand the value in this principle, ask yourself how well you respond to this type of language.

**5. Commit to the fullest development of choices and alternatives.**

This will dovetail into anchor #2. The widest range of all possible choices will only be developed by each party having the ability to express all interests, perspectives and objectives. Remember that your self-interest is served by contributing to the creation of the widest range of choices.

**6. Just say "No".**

The process is entirely voluntary and no amount of legal force will be used to create an outcome over the objection of the other. Each is empowered

to control the outcome by having the right to say “no” to anything that is not acceptable to that party.

**7. Be effective.**

Can you think of any better word to characterize your conduct in the process than “effective”? Measure the value of anything you do by asking whether it is *effective* in advancing you to your desired goals or objectives. Emotions may compel you to show your anger, hurt, pain, distrust, or contempt for the other. Be mindful of how effectively will such conduct be in achieving your goals.

**8. Be empowering. Take responsibility for your feelings, your interests and your choices.**

Holding another responsible for how you feel, what you need and what you choose, serves only to make you *dependent* on that other person. By taking responsibility for your feelings, your needs and your choices, you take control over your life in every meaningful sense of the word.

## **Two Stage Process Model**

### **(For Substantive Issues)**

#### ***(Preparation Stage)***

1. Gather all necessary information
  - Relevancy test
  - Disclosure requirements
  - Key to widest range of alternatives
  - Develop client interests
2. Identify the choices
  - The law model
  - Real world considerations
  - Client generated choices
  - (Assess consequences of each choice)*

#### ***(Negotiation Stage)***

3. Develop settlement models
  - Application of personal values
  - Consideration of available alternatives
  - Consideration of partner's objectives
  - Negotiating strategies
4. Negotiate to resolution
  - Bargain for consideration
  - Build on what is acceptable
  - Leave no chip unused

#### ***Process Objectives:***

- Give clients a conceptual framework for tasks at hand
- Establish distinction between exploring and negotiating
- Reinforce application of principle of **safety**
- Allow clients to track progress to agreement
- Demonstrate effective model for problem-solving

## **Macro Goal Questions**

(Big, round, river rock questions)

### **Regarding Children:**

Are you wanting to protect the children from any emotional harm from the divorce?

Would you like your children to feel comfortable when they are with you?

Is there anything in the world that is more important to you than your children?

When your children are grown up, do you hope for them to be successful in their interpersonal relationships?

Would you like your children to feel as safe as possible while the family is going through this divorce?

### **Regarding Finances:**

Would it be a goal of yours to reach an agreement that gave you the best result that was possible anywhere, as you would measure it?

Would you like to be as financially secure as possible once you have reached an agreement?

Is it important to you to have control over the financial circumstances that will result from this divorce?

### **Regarding the Process:**

Is it important for you to feel safe while you are working through the divorce process?

Would it be important to you to work in a process that gave you control over your circumstances while you are getting divorced?

Is it important to you to be working in a process that will make sure that you are fully prepared before you negotiate a settlement?

Is it important to you to work in a process that is designed to make all your options known to you before you negotiate?

# **Decoding the Process**

(A Strategy For Effective Problem-Solving)

*Ask Questions that...*

## **1. Assess Circumstances**

*What are the facts?  
What are the feelings?  
What is involved?  
What things need to be considered?  
What are the macro goals?*

## **2. Identify Choices**

*Explore the widest range of possibilities  
Think outside the box  
Consider everything, exclude nothing*

## **3. Evaluate Consequences**

*What would each option bring?  
Consequences to you?  
Consequences to your spouse?  
Immediate, intermediate, long-term impacts?*

## **4. Come to a Decision**

*What do you see as your best decision?  
Is this better than all the alternatives?  
Do you feel comfortable making it?*

## Estimating Financial Calculations Regarding the Family Residence

Located at:

### Calculation of Equity:

Fair Market Value	<u>650,000</u>	
<b>Less</b> Mortgage 1st	< <u>375,000</u> >	
<b>Less</b> Equity Line	< <u>20,000</u> >	
Gross Equity	=	<u>255,000</u> ÷ 2 = 127,500
<b>Less</b> Costs of Sale (7%±)	< <u>45,500</u> >	↕
Approximate Net Equity	=	<u>209,500</u> ÷ 2 = 104,750

### Calculation of Gain:

Net Sale Price	<u>604,500</u>	(Sales price less costs of sale)
<b>Less</b> Purchase Price	< <u>235,000</u> >	
<b>Less</b> Improvements	< <u>30,000</u> >	
<b>Add</b> Gain From Prior Residence	+ <u>0</u>	
Estimated Capital Gain	=	<u>339,500</u>
<b>Less</b> Exclusion	< <u>\$250,000.00</u> >	(per person)
Estimated Taxable Gain	=	<u>89,500</u>
<b>Multiply</b> by Tax Rate	x	<u>.25</u>
Estimated Capital Gains Tax	=	<u>\$22,375</u>

*[These numbers are solely to establish a sense of "scale" to begin the review of this asset. Actual numbers should be obtained from the appropriate professionals.]*

## DissoMaster Data Screen

### Monthly Figures

Input Data	John	Mary	Guideline (2013)	Cash Flow Analysis	Gdln.	Prop.	
Party Info	John	Mary	Nets (adjusted)	Comb. net spendable	11708	11708	
Number of children	0	2	John	9002	Percent change	0%	0.0%
% time with NCP	20.00	0.00	Mary	2706	John, payor of SS, CS, Prop. SS, Prop. CS		
Filing Status	Single	HH/MLA	Total	11708	Payment cost	3290	3290
# federal exemptions	1	3	Support		Net spendable income	5156	5156
Wages + salary	13083	3333	Presumed CS	2242	Change from guideline	0	0
Self-employment income	0	0	Basic CS	2242	% of combined spendable	44.0%	44.0%
Other taxable income	0	0	Add-ons	0	% of saving over guideline	0%	0.0%
TANF plus CS received	0	0	Per Kid		Total Taxes	3623	3623
Other nontaxable income	0	0	Child 1	824	Dep. exemptions value	0	0
New-spouse income	0	0	Child 2	1418	# withholding allowances	0(es)	0(es)
Wages + Salary	0	0	S. Clara SS	1604	Net wage paycheck	9574	9574
Self-employment income	0	0	Total	3846	Mary		
SS paid other marriage	0	0	Proposed, Tactic 9		Payment benefit	3534	3534
Retirement contrib. if ATI	0	0	Presumed CS	2242	Net spendable income	6552	6552
Required union dues	0	0	S. Clara SS	1604	Change from guideline	0	0
Nec. Job-related exp.	0	0	Total	3846	% of combined spendable	56.0%	56.0%
Adj. income (ATI)	0	0	Comb. Savings	0	% of saving over guideline	0%	0.0%
SS paid other marriage	0	0	Additional	0	Total Taxes	323	323
CS paid other relationship	0	0	releases		Dep. exemptions value	0	0
Health insurance	458	0	Default Case Settings		# withholding allowances	0(es)	0(es)
Itemized deductions	1138	0	1 Tax Settings Changed		Net wage paycheck	3174	3174
Other medical expenses	0	0					
Property tax expenses	0	0					
Ded. interest expense	1138	0					
Charitable contribution	0	0					
Miscellaneous itemized	0	0					
Required union dues	0	38					
Mandatory retirement	0	267					
Hardship deduction	0*	0*					
Other guideline deductions	0	0					
AMT Info (IRS Form 6251)	0	0					
Child support add-ons	0	0					

## **Sample Categories of Child Expenses**

Employment (or school) related child care  
Summer child care expenses  
Health care insurance premiums  
Health care expenses not covered by insurance  
School clothes  
School supplies (material, backpacks, etc.)  
Computer supplies  
Counselor  
School activities  
School projects and field trips  
Sport activities  
Major gifts (bicycle, computer, skis surfboard, etc.)  
Major pet expenses (horses, farm animals, etc.)  
Lessons and classes (piano, dance, art, etc.)  
Tuition expenses  
Tutoring expenses  
Pre-school  
Religious training and church activity expenses  
Summer camp  
Driving lessons and permits  
Auto insurance  
Auto expenses  
College applications and test fees  
College inspection travel costs  
College tuition, books, living expenses and travel  
Birthday presents for other children  
Special needs



#	Property Items	Joint			Before Tax		Tax Basis	After Tax		G	L
		FMV	Debt	Equity	John(P)	Mary(R)		John(P)	Mary(R)		
	<b>No Category</b>	<b>1261182</b>	<b>490000</b>	<b>771182</b>	<b>415844</b>	<b>355339</b>	<b>734334</b>	<b>326245</b>	<b>324263</b>		
1	127 Laurel Lane	460000	290000	170000	0	170000	460000	0	170000		
2	Westland Ave. Stockton duplex (subject to HSP claim)	175000	200000	-25000	-25000	0	175000	-25000	0		
3	Household furnishings-personal property	0	0	0	0	0	0	0	0		
4	Autos	0	0	0	0	0	0	0	0		
5	Bank account--BFCU Money Market acct. 1118 Stockton rental	4000	0	4000	2000	2000	4000	2000	2000		
6	BFCU Business Checking Suzanne 8708	9004	0	9004	4502	4502	9004	4502	4502		
7	BFCU Business Savings 7343 Suzanne	62330	0	62330	31165	31165	62330	31165	31165		
8	BFCU Checking 8484 WSP inheritance [IGNORED]	99514	0	99514	49757	49757	99514	49757	49757		
9	Chase Checking Mike Jt.	6000	0	6000	3000	3000	6000	3000	3000		
10	Chase Savings Mike Jt. Tax \$\$ on 1099 income	18000	0	18000	9000	9000	18000	9000	9000		
11	BofA Checking/CD HSP Mike inheritance [IGNORED]	105000	0	105000	52500	52500	105000	52500	52500		
12	BofA Trust G.W. MacDonald Trust [IGNORED]	2000	0	2000	1000	1000	2000	1000	1000		
13	Stocks/Bonds WSP [IGNORED]	0	0	0	0	0	0	0	0		
14	Northrup Grumman (B/H account) Rollover IRA Mike	51343	0	51343	25672	25672	0	19791	19791	X	
15	Lockheed Salaried Savings Plan	395505	0	395505	325505	70000	0	250948	53967	X	
16	Boeing Salaried Savings Plan	80000	0	80000	40000	40000	0	30838	30838	X	
17	Northrup Grumman Pension CP%=15.38%+/- of \$791/mo. beginning 5/21	0	0	0	0	0	0	0	0		
18	Lockheed Pension (100% CP) \$2341/mo. beginning 5/21	0	0	0	0	0	0	0	0		
19	Mary Smith Realtor--Business	0	0	0	0	0	0	0	0		
20	Debts	0	0	0	0	0	0	0	0		
<b>TOTALS:</b>		<b>1261182</b>	<b>490000</b>	<b>771182</b>	<b>415844</b>	<b>355339</b>	<b>734334</b>	<b>326245</b>	<b>324263</b>		
<b>EQUALIZING PAYMENTS:</b>					<b>30253 to Mary</b>			<b>991 to Mary</b>			

## Summary

	Joint			Before Tax		Tax Basis	After Tax		G	L
	FMV	Debt	Equity	John(P)	Mary(R)		John(P)	Mary(R)		
<b>TOTALS:</b>	<b>1261182</b>	<b>490000</b>	<b>771182</b>	<b>415844</b>	<b>355339</b>	<b>734334</b>	<b>326245</b>	<b>324263</b>		
<b>EQUALIZING PAYMENTS:</b>				<b>30253 to Mary</b>			<b>991 to Mary</b>			

## Tax brackets:

	<b>John</b>	<b>Mary</b>
Federal income tax	25.00%	25.00%
State income tax	9.30%	9.30%
Short-term capital gains	25.00%	25.00%
Long-term capital gains	15.00%	15.00%