



# The UCCR News

Volume 4

Autumn 2001

## ADR Pioneer, Gerald Williams, Returns Home

*BYU Law Professor Gerald Williams returned home last month after serving an LDS mission in France. The following is an interview conducted with him over email by Michael Zimmerman:*

### **How is it to come home to America, either pre or post September 11th?**

It was not easy to leave France. Over my lifetime, I have spent a total of seven years there, and once I get settled in there, it is always difficult to leave. My wife Claudia speaks French better than I do, so she also has developed many friendships there that we cherish. That being said, it was unex-

pectedly wonderful to be home and to renew our relationships with family and friends here.

The events of September 11 were terrible beyond belief, but I am glad that we were here to share in the pain of those events and to experience first-hand the changes that are occurring as a result of those events.

### **As a mediator, what do you see as the challenges to the mediative approach in the current crisis between the Islamic world and the West?**

As you may recall, I have lived a total of four years in Islamic countries.

Thirty years ago, I was visiting a Professor of Law in Kabul, Afghanistan for two years (1970-1972) and, with the help of a good tutor, my wife and I were once able to speak Dari fairly fluently. It happens that our third child was born in Kabul. At that time, Afghanistan was a peaceful, stable country that was seeking to become more active in the international family of nations. We also were able to visit Pakistan many times as well.

During our time in Kabul, my Islamic friends often told me that if I wanted to really understand Islam, I should go to Cairo, the intellectual

capital of the Muslim world. Later, when I began at the BYU Law School in 1973, I had the goal in mind of finding a way to get to Egypt. In 1978, out of the blue, a chance came along, and I appointed a Visiting Professor of Law at the University of Cairo for two years.

Through these experiences in the Middle East, I have developed a great love and respect for our Muslim brothers and sisters. It is terribly painful to see a rising level of mistrust and misunderstanding that is increasingly a factor in certain international (Continued on Page 2)

### **Upcoming Events**

- *Restorative Justice Conference. March 21-22, 2002*
- *UCCR Symposium. May 3-4, 2002*

## **Family Law Update** by Marcella Keck

As the legislative session nears, we are reminded that ADR in the family practice arena is constantly changing. As mediators, we are practicing "in the shadow of the law." Both our practices and the kinds of agreements our clients can reach are impacted by the legislature's actions. The following are some of the more recent changes that affect our clients and us.

First, remember that "**visitation**" has now become "**parent time**."

Second, there have been substantial changes to the law concerning **joint legal custody** and the requirement for filing specific **parenting plans** if at least one parent desires to have joint legal custody. This term "joint legal custody" has been undefined in the past and

the statutory provisions now specify what must be addressed in the parenting plans. Among others, these statutes provide the following:

The parenting plan shall allocate decision-making authority to one or both parties regarding the children's education, health care, and religious upbringing. (Continued on Page 2)

## Gerald Williams Interview (Continued)

relationships. I have an abiding faith in the innate goodness and sensibility of the peoples of the Islamic world, but they (and especially the less educated among them) are no less susceptible to a mob psychology that anyone else, and we seem to be in a period such feelings are being exploited with stunning effectiveness against the U.S.

I have an urgent sense that we must all increase our dialogue and foster our relationships with our Islamic colleagues both at here at home and, even more so, in the Islamic countries, to build bridges of understanding that are capable, in the long run, of prevailing over forces of divisiveness and antagonism.

### **What is your view of how the ADR scene has changed in America since your return? How about Utah's?**

I've only been home a few months, and I'm still in the process of catching up, but I am struck at the degree to which ADR has matured and become institutionalized in the U.S. in the past three years. Certainly that was bound to happen, but the speed with which it happened is impressive.

### **How has your time away, and the opportunity to contemplate this all from abroad, informed your view of ADR and its possibilities? Its future?**

I am working with my colleagues, Larry Farmer and Stan Neeleman, on the question of how experts become very good at what they do, how they develop their expertise. In sports and in the professions, for example, most practitioners rise fairly quickly to a certain minimal level of competence and then level off. But there are a few who are not content to level off, but who continue to grow and develop far beyond the norm and eventually become recognized by their peers as truly outstanding. The research shows there are a few key elements that permit individuals to rise to higher levels of expertise, and we are seeking to show how they operate in the legal context.

I wonder if this is not a good question also for the ADR movement. ADR has now been largely accepted and incorporated into the legal system. We, as ADR practitioners, have risen to a certain level of competence, and we are pretty good

at training others so that they also quickly come up to that level of competence. From discussions I have had with lawyers in a few different states over the past four months, I am afraid that the quality of ADR services generally rendered is not good enough, and if it does not improve significantly, ADR may ultimately be discredited. The challenge and opportunity before us now is to rally and find ways to move ourselves and our colleagues to ever greater levels of effectiveness and expertise.

### **What are your personal plans in terms of involvement in ADR and its promotion in Utah and elsewhere?**

I have long considered the study and teaching of negotiation and conflict resolution to be my life's work. I am hoping to pick up where I left off and to see these processes develop to their fullest potential.

*The UCCR would like to thank Gerald Williams for his comments and his outstanding contribution to our field.*

## Family Law (Continued)

The parties may incorporate an agreement related to the care and growth of the children in these specified areas. Regardless of the allocation of decision-making in the parenting plan, either parent may make emergency decisions affecting the health or safety of the child.

Each parent may make decisions regarding the day-to-day care and control of the child while the child is residing with that parent.

When mutual decision-making is designated but cannot be achieved, the parties shall make a good faith effort to resolve the issue through the dispute resolution process.

ess.

The parenting plan shall include a residential schedule which designates in which parent's home each minor child shall reside on given days of the year, including provisions for holidays, birthdays of family members, vacations, and other special occasions.

If a parent fails to comply with a provision of the parenting plan or a child support order, the other parent's obligations under the parenting plan or the child support order are not affected. Failure to comply with a provision of the parenting plan or a child support order may result in

a finding of contempt of court. See *Section 10-3-10.9 (5) of the Utah Code*.

Apparently the 3rd District Court is not yet requiring parenting plans to be filed. However, there is increasing talk among lawyers about the need for these plans to be filed. Consequently, it would be important for each ADR practitioner to be familiar with the statute.

All statutes are all available for review on the Legislature's Web Site at <http://www.leg.state.ut.us/~code>.

## 2002 Symposium—An Invitation to Dialogue

by Michelle Roybal

Planning is underway for the Fourth Annual Utah ADR Symposium for Spring of 2002. This year's symposium is chaired by Michelle Roybal, and the theme of the 2002 Symposium is "An Invitation to Dialogue." It will be held on Friday, May 3 and Saturday, May 4, 2002 at the Utah Law and Justice Center. The 2002 symposium will feature Barbara Ashley Phillips as the keynote speaker.

Barbara Ashley Phillips is an ardent supporter of conflict resolution education and practice. Ms. Phillips is a former Assistant United States Attorney, and she has practiced federal civil trial law in Oregon and California. She also has served on the Deep Foundation Construction Industry Round-Table and as an ADR consultant for the Aviation Defense Managers Council. Ms. Phillips has taught at Golden Gate Law School, the University of San Francisco and the University of Santa Clara Law

School. She is the author of *Finding Common Ground, A Field Guide to Mediation* and is a trainer for the American West Institute for Conflict Resolution.

The 2002 Symposium will feature breakout sessions on skills-based topics such as agreement writing, the unauthorized practice of therapy, and dealing with mental illness in mediation. The Symposium will also include discussions of UCCR's progress throughout the year, work on certification of mediators in Utah, and the impact the recently ratified Uniform Mediation Act.

Remember to mark **May 3 and 4, 2002** on your calendars for this event. We look forward to welcoming you and Ms. Phillips to our dialogue! For more information about the Symposium, please contact Michelle Roybal at the (801) 524-6128.

## California Supreme Court Upholds Confidentiality

by Jim Holbrook

On July 9, the California Supreme Court issued a decision in *Foxgate v. Bra-malea Homeowners*. Reversing the Court of Appeals, the Court held that mediation communications are confidential pursuant to California's Evidence Code, and that mediators are prohibited by statute from reporting mediation communications to a court.

The decision reads in part: "We conclude that there are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator's reports. Neither a mediator nor a party may reveal communications made during the mediation... We also conclude that, while a party may do so, a mediator may not report to the court about the conduct of participants in a mediation session." (Source: ACResolution, Fall 2001).

In another California case regarding mediator confidentiality, *Olam v. Congress Mortgage Company*, 68 F.Supp. 2d

1110 (N.D. Cal. 1999), Hon. Wayne Brazil ruled that, although mediator confidentiality is usually absolute, it yields to the need for evidence when the mediator provides the only reliable source of evidence. This recent California Supreme Court decision appears to differ from Judge Brazil's conclusion, and reiterates that mediation is absolutely confidential in California.

In Utah, the court-annexed mediation program provides a privilege of confidentiality to mediators under the Utah Supreme Court Rules which govern the program. However, there is no state statute which creates such a privilege for mediators who are assisting in disputes that are not part of the court-annexed program. The UCCR is currently considering whether to propose such a statute to the Utah State Legislature that would provide uniformity regarding confidentiality to all mediators.

## Restorative Justice Conference Rescheduled

by Kathy Elton

The events of Sept. 11 caused the cancellation of the Utah Law Review's annual symposium. The University of Utah College of Law and the Utah Administrative Office of the Courts have rescheduled the interdisciplinary conference on restorative justice **March 21-22, 2002**.

Restorative justice is an approach to crime that includes all stakeholders in a particular offense in a process of group decision making on how to handle the effects of the crime and its consequences for the future. Through paper presentations, panel dialogues, and audience discussion, leading scholars and officials will present their views on restorative justice and engage co-participants and audience members in an open conversation on the subject. In addition to inspiring intellectual dialogue on restorative justice during the two-day period, the participants will produce both written scholarship and a best practices scheme to spark a broad discussion on restorative justice that extends beyond the conference.

For more info., contact Kathy Elton, at (801) 578-3982 or [kathye@email.utcourts.gov](mailto:kathye@email.utcourts.gov)

## The Utah Council on Conflict Resolution

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If you would like to join UCCR, please  
contact Michelle Roybal  
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### ADR Academy: Lawyering in ADR Processes

The ADR Section of the Utah State Bar is hosting a series of short training sessions on the subject of advocacy skills in alternative dispute resolution processes.

The sessions will be held one Monday per month from 5:30 to 6:45 at the Utah Law and Justice Center. Each session will be facilitated by local lawyer / mediator with expertise in the subject matter.

Wed. December 12, 2001  
Ethical Issues  
In Mediation

Wed., January. 9, 2001

Tactics of Opening  
Statements

Wed. March 6, 2001

Advocacy in  
Private Caucuses

Wed. April 10, 2001

Arbitration

*Please send your ideas or articles for the UCCR newsletter to Diane Hamilton via email:  
[dianehamilton@sisna.com](mailto:dianehamilton@sisna.com)*