

The Impact of Case Law on Vocational Expert Examinations and Opinions in Marital Dissolution

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As vocational experts, there is much that can be learned from the decisions of judicial officers in past marital dissolution cases. Consistently, the courts are not in favor of relying on generalizations when rendering their decisions. Reviewing those judicial opinions can assist vocational experts in conducting vocational exams and research to arrive at opinions that are reasonable, ethical, credible and persuasive. Court decisions included in this article are summarized regarding spousal support, alimony, and child support in family law cases. A vocational expert was not retained in all cases cited; however the information considered and the decisions of the court are relevant to our work. This article discusses earning capacity, opportunity, effort, and the other considerations of the courts in governing support.

Vocational testimony is never controlling, but provides the trier of fact with factual foundation on which to base his/her decisions. Spousal support is the domain of the states and state law. This article addresses what we found to be common amongst most of the state codes and legal opinions. We found that the laws governing spousal support or alimony are similar from one state to the next. Some states have enacted state-wide spousal support guidelines. In addition, several counties in several states have enacted county-wide spousal support guidelines. And although not all states have appellate cases that address earning capacity and employability through the use of a vocational expert, oftentimes, attorneys and judges argue rulings from other states. Therefore, there is value in considering the opinions rendered from other states as well as one's own. Cases can be cited from other states if the jurisdictional state does not have a case addressing the issue or has conflicting cases. In those situations, attorneys can advise the court how other jurisdictions have handled the issue. For example, in the case of Dixon (SC 1999), the case of Milam (OH 1994) was cited.

In establishing earning capacity for either the supported or supporting spouse, the court and family law attorneys are turning more and more to vocational ex-

perts for our particular unique set of skills and knowledge. The increased use of vocational experts may be the single greatest change in family law over the past fifteen years as it relates to spousal support. Familiarity with case law can improve the manner in which vocational testimony is presented to the court.

The following factors were found to be common elements of many state codes governing marital dissolution:

Earning Capacity

As a general rule, vocational testimony is relevant whenever the court is permitted to look at earning capacity. Vocational testimony is therefore a tool for meeting a party's factual burden on one specific legal issue: the question of imputed income.

According to *Black's Law Dictionary* (Garner, 1999) earning capacity is defined as: "A person's ability or power to earn money, given the person's talents, skills, training and experience. Earning capacity is one element considered when measuring the damages recoverable in a personal-injury lawsuit. And in family law, earning capacity is considered when awarding child support and spousal maintenance (or alimony)

and in dividing property between spouses upon divorce.” (547-548)

Only a few states define earning capacity through case law, those being California, Florida and Louisiana. In *re* Marriage of Regnery (CA 1989), earning capacity was identified as being composed of (1) the ability to work, taking into account such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work as exemplified through good faith efforts, due diligence and meaningful attempts to secure employment; and (3) the opportunity to work as evidenced by the availability of job openings. Later the California courts, recognizing that the second element of willingness to work should be taken for granted, recast Regnery’s three-prong test as a simple two-prong test: ability and opportunity. In the case of Bardzik (CA 2008), the court further clarified the definition of opportunity to indicate a showing of ability and opportunity, while ignoring the consideration of whether the individual would in fact be hired. These elements, as outlined in Regnery and further clarified in Bardzik, set a foundation for determining an individual’s employability and earning capacity by vocational experts, i.e., the factors of ability and opportunity. We also believe a comment as to effort is a valuable piece of the overall assessment of employability and earning capacity and many states continue to evaluate effort to obtain employment.

There are a variety of variables that go into the determination of earning capacity. The case of *G.V.W. v. L.M.W.* (FL 2001) states that “The education of an individual may indicate the capacity to earn; however, it does not guarantee the ability to earn when that individual suffers from other limitations.”

In the case of the State of New York, the family code addresses another factor, that of a reduced or lost lifetime earning capacity. A variety of factors could result in reduced or lost lifetime earning capacity including health issues, age, downsizing and/or offshoring of an industry and/or occupation, criminal history, and geographical limitations.

A case from California, *Iredale and Cates* (CA 2004), addresses earning capacity in those cases where the individual is in a professional occupation or self-employed. The court found that the average salaried person standard is not the only valid measure for establishing reasonable compensation under the excess earnings method. Where supported by substantial evidence, use of the similarly situated professional standard, as advocated by Iredale’s expert and adopted by the trial court, is appropriate. As vocational experts, this case provides us with a new term of art and guidance in such situations.

Further, courts have held that determination of earning capacity has to be based on tangible evidentiary foundation. In the case of *Cohn* (CA 1998), the father

was an attorney who had unsuccessfully attempted a solo practice and had been unable to obtain employment. The trial court imputed income to the father of \$40,000 per year. On appeal, the court upheld the trial court’s decision to rely on the father’s earning capacity, agreeing that he had the ability and opportunity to earn income. However, the appellate court reversed for insufficient evidence to support the finding as to the amount of income imputed: “[F]igures for earning capacity cannot be drawn from thin air; they must have some tangible evidentiary foundation.”

According to *Walker* (MO 1996), the court took judicial notice stating that earning capacity is not a proper subject for judicial notice. It depends upon too many specific facts which are too far removed from the experience of ordinary persons in general or trial judges in particular. (Judicial notice is a rule in the law of evidence that allows a fact to be introduced into evidence if the truth of that fact is so notorious or well known that it cannot be refuted). Although the wife demonstrated that there were jobs advertised in Joplin, Missouri paying \$6.25 to \$7 per hour (in one instance, \$12 per hour), the evidence did not establish that the husband possessed the required qualifications for any of them.

When addressing earning capacity, the vocational expert may find that the evaluatee’s past income was derived from more than salary or wages, i.e., also from bonuses, stock options, etc. Although in our earnings evaluations, we adhere to the concept that the past is a predictor of the future, these other forms of income are not predictable in many cases. In the opinion of these authors, such income should not be included as part of the probable earning capacity of an evaluatee, although comment can be given as to the possibility and/or likelihood of such additional income. In California in the case of *Mosley* (CA 2008), the appellate court found that the lower court had abused its discretion to base support obligations on the predicted receipt of a huge bonus that might never materialize. “The assumption underlying [the calculation of a parent’s annual gross income] is that past income is a good measure of the future income from which the parent must pay support. However, the law recognizes that this is not always the case. Thus, the court is given the discretion to adjust... ‘the monthly net disposable income figure [if it] does not accurately reflect the...*prospective* earnings of the parties at the time the determination of support is made...’ The court stated “We must be wary of “the logical fallacy of extrapolation, in which some series of events in the past is necessarily assumed to continue in exactly the same way into the future.” The case was remanded with the higher court stating that the lower court was to determine husband’s monthly support obligations based on his base salary exclusive of a speculative bonus.

Unlike Mosley, in the case of Havener (LA 1997) which related to child support guidelines, the court found "[T]he wage earned prior to voluntary underemployment or unemployment is the best estimate of an obligated party's potential income." This points to the general notion that the past is a good predictor of the future; although the case could be made, especially in poor economic times, that this may not be the only factor relied upon in determining earning capacity.

Elements of the Vocational Examination Process

The vocational examination process usually consists of:

- A face-to-face interview with a vocational expert;
- Vocational testing which includes assessment of interests, aptitudes, and abilities;
- Assessment of abilities through transferable skills analysis and occupational research;
- Research of the labor market to determine employment opportunities available and suited to the party, as well as the general state of the national and local labor market;
- Comprehensive report.

The vocational exam lays the foundation for the ability to work. Most states consider factors of age, health and the background of the person. Areas of inquiry include: social factors; education; work history; volunteer experience; unpaid work experience; transportation; geographic area; health; hobbies and leisure activities; perceived skills, preferences & interest; job seeking efforts, sources, resume; vocational goals.

Vocational testing helps the evaluator to identify vocational assets and limitations. It is standard practice for a vocational evaluator to utilize selective testing when necessary to assess abilities, interests, aptitudes and preferences. Review of case law identified at least two cases (Moorehead (FL 1999) and McHugh (FL 1997) where there was specific reference to testing administered. In the case of Moorehead, the vocational expert found that although the wife's intelligence was slightly below average she was capable of obtaining full-time employment. The expert was able to give examples of jobs she could attain with and without further education. The court used this information to impute income to the wife and ultimately formulate an award of alimony.

It is the authors' experience that objective measures can be persuasive and can be useful in giving objective foundation to our opinions as to ability. Reliance on the tests by themselves has several problems, however. In one of our cases, where English was the second language for the wife, her various talents, accomplishments, and abilities were ignored by the cross-examining attorney who focused solely on poor performance on the testing instruments.

The vocational counselor will make an assessment as to possible vocational options or goals for present or future employability. Depending on the case and/or the state, there could be three possible plan levels: (a) direct job placement given existing transferable and marketable skills; (b) job placement following short-term training or education; (c) job placement following advanced training and/or education. The assessment will also address: type of activity required for successful job placement; duration of the plan(s); cost of the plan(s); and entry-level versus experienced-level wages or earning capacities for each vocational option.

The focus of the examination is the assessment of the person's ability to obtain employment that would allow the person to maintain herself or himself at the "marital standard of living." Although the person may not be able to gain employment and/or reach the financial "standard of living" level achieved at the time of the marriage, there is an expectation by the Court that the supported spouse work toward the goal of self-sufficiency and make a good-faith effort in this regard.

Ability to Work

Assessment of ability to work may take many factors into consideration, again depending on state codes and legal interpretation, e.g., the qualifications of an individual for a specific job; needs of dependent children; age; health; marketable skills; results of vocational testing. The assessment may also include consultation with outside sources such as verification of prior employment, licenses, and certifications. Addressing ability also lays foundation for opportunity and effort.

How do we answer the challenge that the client's background does not exactly match the requirements of a job cited from the labor market research? In some cases how we present our findings can have as much benefit or detriment to the case, as the extent of research conducted. In the case of Vriesenge (FL 2006), a vocational expert testified on behalf of the former wife that, with the former husband's training and experience, he should be able to earn between \$60,000 and \$70,000 per year. Although the expert considered teaching positions, he also looked at other positions, including some Air Force and Department of Defense positions for civilians that paid between \$51,000 and \$67,000, notably a faculty position at Air University (with a salary range of \$45,000 to \$115,000) where the former husband had previously taught. On cross-examination, the expert conceded that the former husband's qualifications did not necessarily match every qualification asked for on many of the job positions he considered. In her order modifying alimony, the trial judge stated that she did not attribute great weight to the vocational expert's testimony because, upon

cross-examination, it became clear that the former husband was not eligible for many of the positions the vocational expert considered. Is it possible this is a case of lack of understanding by the trier of fact of the concept of transferable skills or the fact that the vocational expert did not explain that one could still qualify for a job even if not matching all qualifications?

In the case of *G.V.W. v. L.M.W.* (FL 2001), the trial court was reversed for accepting the testimony of the wife's vocational expert. After reviewing wage studies and surveying area law firms, the expert had concluded that the husband was employable for \$50,000 per year as an attorney. "On cross-examination the vocational expert admitted that her opinion did not take into account any physical or emotional limitations that the husband may suffer." The husband's emotional limitations were significant, as the wife's own mental health expert admitted. Because the crucial question of mental health was not considered, the expert was not credible, and the trial court's decision was reversed. "The education of an individual may indicate the capacity to earn; however, it does not guarantee the ability to earn when that individual suffers from other limitations."

When addressing one's ability to work, marketable skills are considered. In *Van Riesen v. Cross IV* (OR 2007), the court found that a high tech professional's work experience and outdated skills were not directly marketable. [See detailed discussion of case below.]

Barriers to Employment: Health & Medical Considerations

There are many barriers to employment that vocational evaluators address, such as language, criminal history, transportation, rural location, child care and age. But the one potential barrier to employment we found most frequently addressed in our review of cases is health. In *Van Reisen v Cross IV* (Oregon 2007), employment recruiters called as expert witnesses testified the husband had a number of barriers making it unlikely the husband would find a job in the high tech field in which he previously worked. He had several health problems including depression and a noticeable facial scar from cancer surgery. The court found: "Although we conclude that husband is capable of working, given his age, health problems, and specialized work experience, we recognize that it may take some time for him to find suitable work, even at minimum wage."

Where the expert is aware of health problems, and takes those problems into account in rendering his or her opinion, the expert's testimony can be persuasive. In the vocational examination, the evaluatee is asked if there are health issues he or she believes interfere with his or her ability to work. If so, the vocational expert should make further inquiry of the evaluatee as to the nature, perceived impact, and treatment. The

evaluatee has the burden of proof to provide objective medical information. As a course of practice, one author makes a detailed inquiry if the evaluatee alleges a medical condition interfering with their ability to work. She then contacts the treating physician, with written permission of the evaluatee, to complete a functional capacity form to determine if the medical provider would impose any work limitations.

To the extent that the issue is whether a person with a given set of symptoms is or is not employable, the testimony of a vocational (as opposed to medical) expert might be required. In another case, *Milam v. Milam* (OH 1994), the wife had no medical expert, but a vocational expert testified on her behalf that a person with her symptoms was unemployable. A later case refused to apply *Milam* where the vocational testimony was absent. It was held that "an award of spousal support based on unemployability does not require an expert medical opinion when unemployability can be proven by the testimony of the spouse and a vocational expert who bases his opinion, in part, upon the spouse's subjective complaints concerning which she testified." Thus, while a party could certainly testify subjectively about his or her inability to work, some other type of supporting testimony should normally be offered.

In some cases, the vocational expert may have concerns that the treating physician is acting more as an advocate for their patient than the objective medical evidence may show based on a review of chart notes, diagnostic testing, and reports. In those cases, the vocational expert may suggest the parties consider obtaining an agreed or independent medical examination. This may have been an alternative in the case of *Kirchner v. Kirchner* (S.C. 2005), where the wife testified regarding her ailments, including a heart condition, depression, anxiety, and fatigue, as well as the hurdles she would have to overcome in order to return to her former employment as a nurse. The husband's vocational expert testified as to the general ability of someone with a nursing license to obtain employment based on wife's educational level, experience, skills, and abilities, but did take into consideration the wife's mental and physical condition. The vocational expert admitted she reviewed the health records. The wife presented the testimony of her treating psychiatrist as an expert in reply. The medical expert testified that wife's skills and abilities were limited because of her depression and mitral valve prolapse condition, thereby severely restricting her employment capabilities. The court admitted the testimony of her psychiatrist and affirmed wife's alimony.

Opportunity to Work

Addressing the evaluatee's opportunity to work occurs after the data is gathered, skills are determined and barriers are assessed. This is where the rubber meets the road. Are their jobs, where are there jobs, does this

particular individual qualify for the occupation and for the available jobs?

In the view of the authors, triangulation should be employed, utilizing the data specific to this evaluatee, and the available statistical data and information from employer sampling that is specific to the local labor market.

There are cases from a number of states in the nation that specifically address the issue of opportunity and needed specificity in relation to the particular evaluatee. For example, in the case of *Van Riesen v Cross IV* (WA 2007), the husband consulted with two expert witnesses from staffing and recruiting firms that place high-tech professionals. As cited above, despite the husband's qualifications, he did not have opportunities to work due to the barriers to employment.

In the case of *Cohn* (CA 1998), the court found the opportunity element that simply an employer is willing to hire was too narrow a definition. The court observed that for professionals or trades people who are self-employable that the "employer willing to hire" definition is too narrow. Thus the court held that a more appropriate definition of "opportunity to work" is the substantial likelihood that a party could, with reasonable effort, apply his or her education, skills and training to produce income. Under this definition, the court found substantial evidence of opportunity. In *Cohn*, the father was an attorney who had unsuccessfully attempted a solo practice and had been unable to obtain employment. The trial court imputed income to the father of \$40,000 per year. On appeal, the court upheld the trial court's decision to rely on the father's earning capacity, agreeing that he had the ability and opportunity to earn income. However, the appellate court reversed for insufficient evidence to support the finding as to the amount of income imputed: "[F]igures for earning capacity cannot be drawn from thin air; they must have some tangible evidentiary foundation."

In the case of *Hogan* (Mo 1999), the court found credible the testimony from husband's vocational expert that current demand for seamstresses was good and that salaries ranged from \$7 to \$10 dollars per hour. He also testified there were positions for seamstresses to work in their own homes. Substantial evidence supported the trial court's finding of wife's ability to contribute in part toward her own support.

In a case where the defendant did not present any evidence that there were other employment opportunities available to a person with plaintiff's education and work experience that would be likely to generate greater income than plaintiff's earning as a realtor, support was changed from rehabilitative to permanent (*Milner v. Milner*, NJ 1996). The plaintiff's vocational expert was persuasive in concluding that plaintiff's age, physical handicaps, and lack of readily transferable job skills, "make her a disadvantaged ap-

plicant for consideration as a worker." The trial court found that the plaintiff should "embark on a new career" but did not state how, what or where. The trial court's opinion was reversed on appeal and support was changed from rehabilitative to permanent.

And finally, in the case of *McCord* (VA 1999) the husband testified that wife could work at a GS-5 or GS-6 level, but he did not know the salary ranges or if opportunities were actually available. He presented no evidence regarding wife's specific skills or the value of those skills, and the appellate court found the lower court did not err by refusing to impute income.

Occupation, Wage, Labor Market Research & Employer Sampling

When addressing opportunity, the vocational expert must show opportunities exist; but how does the court evaluate sufficient opportunity? For example, in general, the ex-spouse's testimony as to opportunity is not persuasive. The authors have examined the opinions of the courts where they have ruled that opportunities were demonstrated as sufficient to impute income. In the opinion of the authors, the vocational expert must show that jobs exist that match the evaluatee's qualifications, abilities and skills.

In the case of *Foreman v. Ketchum* (VA 1999), the husband's expert testified that there were three full-time positions available in Fairfax County where the wife could earn approximately \$30,000. The wife challenged his expert on whether the vacancies were in "cued speech," her specialized field, how many applications each position had, and what the competition was for each. Under these circumstances, the court held that the wife had not unreasonably refused employment for which she was qualified.

In the case of *Howsman* (MO 200), the court held that testimony from the other spouse may not be especially persuasive where it does not meet the normal standard of specificity. The author's experience is that there has to be opportunities at the time of testimony and that secondly, the specificity referred to means this evaluatee is qualified for this job; that there is a match.

In the case of *Wheaton* (VA 1997), testimony was introduced from a health-care professional recruiter who testified that the wife could work as a licensed professional nurse earning between \$26,000 and \$37,900. But the expert also stated that she had never seen the wife's resume or interviewed her. Further, the expert testified that "the marketplace for nurses is fairly tight at this time" and that "there are not a tremendous number of opportunities." She provided generalizations about the nursing field, suggesting a broad salary range of \$26,000 to \$37,900, but had no specific knowledge of the wife's qualifications for any particular position. At the time of the hearing, wife

was 40 years of age, and although she had maintained her nursing license, she had not worked for 10 years. No evidence was introduced of specific job openings, the requirements for such positions, their salaries, or the likelihood that wife would be hired for a particular nursing position. The trial court refused to impute income, and the appellate court affirmed. This is a case in which the authors feel a vocational expert experienced in spousal support examinations would have evaluated the case more thoroughly in order to demonstrate opportunity.

Support Modification

A supporting party may request modification of support when there has been a material change in circumstance. Change of circumstances can include: loss of job, voluntary or involuntary; age/retirement; health issues; reasonable period of time to become self-supporting; termination date; step down/step up. A vocational expert may be called upon to update an earlier assessment or to address a specific issue. Whether a vocational expert was utilized or the trier of fact reached an employment-related conclusion, the following cases are instructive.

In *Stewart v. Rich*, (Fla. 1995), citing *Hinton*, the appeals court reversed an imputation of income to a spouse who had recently obtained her law degree and license to practice law. Their concern was not with the decision to modify alimony or the amount imputed, but with the trial court's decision to impute income effective immediately. The court stated that wife should be provided a reasonable period to search out available employment opportunities in the legal field before implementing the modification. The court further stated that after a reasonable period of time, the burden would then be on the former wife to show that she is unemployed or underemployed as a result of any number of factors unrelated to her own efforts to secure employment, including her state of health or the realities of the job market.

In another case where the wife had a specific plan, *Young* (VA 2000), wife's testimony of her past education, her past work experience, her present training and job expectations was sufficient evidence for the trial court to conclude her financial condition would change in one more year, upon completion of her training.

A custodial parent often seeks modification to increase child support, claiming the supporting parent is shirking responsibility; that he or she has a greater capacity to earn than his or her actual earnings. Or, the supporting spouse seeks a reduction of support or arrears based on actual versus past earnings (capacity).

The appellate court found in the case of *Everett* (CA 1990): "The case of *Everett* puts a different twist on

the earning capacity issue. Simply put, we must decide whether the trial court abuses its discretion when it declines to impute additional income to a parent operating a small business on a quasi-self-employed basis where there is evidence this parent made substantially more money years ago in the same profession. We think not in this case." The facts of the case and the foundation for the rulings are of interest to the vocational expert. When the husband sought a reduction modification, the wife asserted he should be held to his earning capacity as a union baker versus his present lower income. The court found that the husband and his new wife "are in good faith pursuing a small business enterprise, a bakery, which is struggling." Further, it found that the husband in good faith attempted to discharge his (past) child support obligations, despite serious financial problems. The courts' considerations included: evidence that the husband's salary as a union baker was 12 years ago and there has been a 12-year lapse in union membership; more recent evidence that he and the new wife paid an assistant baker \$7 per hour; husband's alcoholism (6 years sober) and his own assessment that the present situation is less stressful to him. Further, his labor and talents are key to the bakery, and his absence would obviously affect the bakery's profits. The facts and figures do not necessarily mean the husband today could secure a position earning union or assistant baker's wages for another company. The trial court, reviewing all these facts, could determine the husband would be no better off abandoning self-employment for outside employment. The court discussed many interrelated factors and reasoned that the husband was doing the best he could at this point in his life, and to "rock the boat" might in fact be detrimental to him and the children. And if the business succeeded, the children in all likelihood would share in its prosperity.

Good Faith/Reasonable Effort

Effort is the easiest place for one to denigrate the evaluatee, be it by the former spouse, the attorneys or vocational expert. It is the task of the vocational expert to objectify effort. The attorney who made the referral has lived with the case for a while and has one view of the evaluatee, usually as an advocate for the opposing spouse. It is easy to pick apart anyone if one tries. The vocational expert can help the family court by not falling into the "critic pit" and by looking at the evaluatee based on the data and sticking to the facts.

Some efforts that constitute a good faith job search are: has the evaluatee applied or not for jobs that are appropriate based on their background and qualifications; how many; signed on with staffing agencies and the local state/federal employment offices; do they have a resume? Have they limited their job search to the Internet; are they networking? The vocational ex-

pert has methods for assessing motivation and efforts to become self-supporting; however, the focus of this article is to review what the courts opine regarding good faith and reasonable effort.

When addressing effort, one must first look to see that some effort has been made. In *Shaughnessy* (CA 2006), the court stated that it contemplated that a supported spouse will take some action. They concluded that the trial court did not abuse its discretion in modifying the prior spousal support award, based on the following changed circumstances: Wife failed to diligently seek to become self-supporting, as required by the terms of the prior spousal support award. In its initial spousal support award, the trial court found that the wife did "not possess marketable employment skills for the current job market." The court noted she realized, a year earlier, that she would have to obtain marketable employment skills and consider employment retraining options. The trial court's initial spousal support award was premised, in part, on the court's stated expectation that the wife would obtain retraining in order to increase her part-time florist income and become self-supporting. A year later, the evidence presented to the trial court indicated that the wife had done little, if anything, to obtain retraining to increase her income, and that she had not otherwise been diligent in attempting to become self-supporting.

Similarly, in the case of *Schlegel v. Schlegel* (FL 2008), the court found that no effort had been made. The wife of the long-term marriage was age 49 and unemployed despite possessing a law degree, but having failed to pass the Florida bar on four occasions. The wife testified that she cannot get a job and that she is subject to discrimination because she is Turkish. The wife acknowledged that she had not attempted to obtain any employment since March 2005. The court accepted the conclusions of the vocational expert in part, noting several specific jobs in the local market for someone with a law degree but who had no license to practice law, such as a legal assistant, legal recruiter, and a paralegal performing specialized legal research to aid attorneys in complex cases. Based on the evidence presented, the trial court took the approximate average of the salaries for positions in the local market contained in the vocational report and imputed \$40,000 annual income to the wife.

The courts have also opined in situations where a spouse makes poor career decisions that they were responsible for those decisions and made an assumption that they should have known better. In the case of *Schaffer* (1999 CA), the court stated that the supported spouse cannot make unwise decisions. The court early on opined that wife did not have the emotional stability to work in the occupation for which she was training, as a counselor or psychologist. Whereas support was extended many times over 19 years, she was unable to demonstrate the emotional stability to

work in counseling and the court finally found that enough was enough and terminated support.

In the case of *Pappas v. Pappas* (2004 VA), the husband produced evidence that his opportunities for technology sales jobs were scarce due to industry-wide downturn. The wife's expert persuaded the judge that (A) while the husband showed lots of current job-search correspondence, he had not been "aggressive enough," (B) most of his correspondence was "mere networking" to contact people he had known in his previous employments, and so that did not count, and (C) he should have taken lower-classified and lower-paid jobs within the same industry (technology sales). This particular case points to the impact a vocational expert can have on the court. The term "aggressive enough" was not defined by the expert, and counter to Bolles, author of *What Color is Your Parachute*, who advises that networking is the most effective way of gaining employment, this vocational expert was able to persuade the court that networking with former colleagues was not a credible effort. These authors are of the opinion that the husband could have benefited from having his own vocational expert.

In the case of *Hicks v. Hicks* (Mo.App.1990), the record before the trial court sufficiently demonstrated that the wife had made reasonable efforts by working full-time, by periodically seeking new positions which promised either better experience or better pay, and by obtaining computer skills which she used in her current position. In contrast, the husband's expert, "a psychologist with expertise in women's careers, testified that the wife did not assert reasonable efforts to seek training and experience and, had she done so, she could have substantially increased her earnings." The real holding of the case is probably that the trial court was allowed to believe the wife and disbelieve the expert. The expert's opinion was relevant but not persuasive.

In one case, *Magruder* (CA 2008), the court outlined specific job search efforts the husband should make to constitute reasonable effort. The husband was laid off from his technical job after 20 years of experience including the last 6 years in sales, earning \$90,000 his last year of employment. He was ordered by the court to submit eight applications per week after seven months of job search and failure to secure employment. However, he submitted far less than half by the next court date, and instead was setting up a consulting practice, working part-time for a friend's plumbing business. The trial court ordered him to see a vocational consultant, who found the husband was able to work as a sales rep and account executive in technology. Job seeking skills suggestions made to the husband were not followed. The court found that the husband was underemployed as he failed to make reasonable efforts to find a job.

Rehabilitative Support vs. Permanent Support

Some states specifically address the length of support as rehabilitative. Further, some states require that a specific plan be outlined. Rehabilitative support is awarded to help the financially impacted spouse obtain the skills, training or education needed to become self-sufficient. Typically, rehabilitative support is awarded to spouses who have been denied the opportunity to pursue an education or a career due to family, childcare and household responsibilities. The spouse has to convince the court it is necessary, calculate the financial costs involved, and set forth the goals and the timeframes, so the support payments are not misused. Cases were identified wherein the court provided specific guidelines for the rehabilitative alimony awarded, some based on recommendations of a vocational expert.

An Alaskan court found in *Myers* (AK 1996) that a spouse's educational plan is sufficient for the purpose of supporting a rehabilitative alimony award if the spouse identifies a career goal, a degree program aimed at realizing that goal, and a time frame during which the degree may be earned through reasonable diligence.

In the case of *Weintruab* (Fl. 2003), the wife had a bachelor's degree in biology and a master's degree in genetics, and worked periodically as a genetics counselor during marriage, last working seven years prior. The trial court found that the wife's maximum first year earning potential would be \$40,000 in the field of genetics. It further found that, assuming the wife immediately became employed in the genetics field, in four years her imputed amount would be \$55,000. The wife testified she no longer wanted to pursue a career in genetics and wanted to start a small business in fine chocolates and gourmet desserts; she had no prior experience in running such a business and provided no evidence regarding the income that such a business would generate. The trial court awarded the wife rehabilitative alimony for a period of four years "in order to get the business off the ground, or failing that, to return to her former profession." The appellate court found the award of rehabilitative alimony was improper because the wife and her vocational expert failed to present a future earnings estimate and a rehabilitation plan; and a spouse may not receive rehabilitative alimony by abandoning the field in which he or she has been trained to start a speculative business venture. The case was remanded back to the trial court and ordered to consider that the wife be given a bridge-the-gap alimony award for the period of time in which she would need to prepare to reenter the genetics field.

Of interest in the case of *Fowler* (NH 2000), we have the court finding that if the rehabilitative alimony during a period of retraining is not likely to result in a

job which will allow the wife to maintain independently a standard of living comparable to that enjoyed during her marriage, they will consider permanent alimony. The wife's plan was to work part-time as a receptionist and take college courses to improve her skills. The court provided her with rehabilitation alimony for six years on the condition she complete her bachelor's degree within that period of time, and if she withdrew from college, there was a schedule to reduce alimony for the remaining period of rehabilitative alimony. The wife contested the award as she believed she was entitled to permanent alimony and, contesting not only the duration of the award, but also its amount, filed a motion for reconsideration. The trial court denied her motion, but the appellate court found that the trial court abused its discretion in making what they considered "an insubstantial award." They found that the wife had "a very modest job history," and was unlikely to obtain a job which would allow her to maintain independently a standard of living comparable to that enjoyed during her marriage.

Summary and Conclusions

As stated at the beginning of this article, we find court decisions can provide insight into the questions judicial officers have related to support; and insight as to insufficient data and gaps in the presentations of the parties or experts. Vocational experts can increase their credibility through an understanding of case law and the thought processes of the triers of fact. What is persuasive to the court is not generalized data, but specificity addressing the facts in an individual case. For example, the court does not gain value from hearing what job opportunities there are for any nurse, but those opportunities specific to Ms. Smith, RN who has been out of the work force for 10 years, whose skills are outdated due to technological advances, or who is precluded from prolonged standing. Triangulating data and an individualized approach is what is beneficial to the court.

After reviewing family law cases nationwide, the authors recognized the court can benefit from the utilization of a vocational expert. A vocational expert has the unique combination of education, training, experience and methodology to assess abilities, locate job opportunities, match the evaluatee's skills with the requirements of the jobs, procure wage data from multiple sources, discuss the vocational implications of medical issues, develop rehabilitative alimony plans, describe and evaluate good faith effort, and advise as to a reasonable time needed to gain employment and generate income. As reviewed in this article, these are the issues before the court in determining spousal and child support.

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