

THE VOCATIONAL EXPERT AS A WITNESS
IN CIVIL DIVORCE LITIGATION

By

Donna Carroll Smith, Ed.S. and Bruce Growick, Ph.D.

The Ohio State University

This paper addresses the need for vocational expert testimony in divorce litigation and how that information contributes to more equity for spouses who are placed at a severe financial disadvantage when engaged in a divorce settlement procedure.

Abstract

The use of the vocational expert as a witness in civil divorce litigation is a relatively new area. A search of the literature in the fields most relevant to this topic, namely, rehabilitation and family law, revealed very little information. In the last ten years of the

Family Law Quarterly, for example, alimony, a topic closely associated with the use of vocational experts, was addressed frequently. Unfortunately though, there was no mention of the involvement of a vocational expert as a witness in divorce litigation to provide information relevant to the career development, interests, abilities, and marketability of the litigant. This article addresses pertinent information regarding equitable financial settlements, state codes and the roles and traits of a valuable vocational expert.

Statement of the Problem

Inequities are replete in divorce settlements. Particularly if there are children, one or other of the partners will focus on child care and household maintenance, and will be the "less skilled" partner when household income and marketplace skill development are determined. While this applies to both men and women, in the majority of cases there is more likely to be inequity for woman. Because women are the child bearers and typically the homemakers, generally they are the partners who suffer the most financial inequities in a divorce case. Often they have reduced their labor force participation to look after the home and children. After examining the inequities in support, Bell (1988) found that older women who were never in the work force, or who were returning after a ten or fifteen-year hiatus, were rarely equipped for professional positions that are typically male dominated and receive higher salaries. She found that women who leave the work force to stay home do not make up those years when they do return to the workplace.

Even if a woman, who had remained at home to care for the minor children is capable of returning to the work force and earning her own living after the divorce, as the custodial parent, she will disproportionately bear the expenses and time constraints of the care of the minor children. These circumstances could apply to a male who assumes the responsibility as homemaker, as well as a female. As caretaker, therefore, he or she will not be allowed the time and freedom to put in extra hours and devote all energy to work. In addition, employers are less apt to take an older person on the management track. And, if an older person, following a lengthy marriage, obtains a management track job, that person will start behind others due to those years he or she was out of the work force. Even if the wife receives her share of the family assets, she will still remain financially behind the husband, who continues to accumulate retirement credits at higher salary levels and accrues higher benefits, as the wife struggles up the ladder. At the time of Bell's study, the mean salary for men in managerial positions was over twice that of women. In the spring of 1986, she found that only 16.4 percent of divorced women had been awarded alimony in the United States, and only 10.7 percent actually received the alimony.

Although women entered the workforce in record numbers during the last 30 years, their wages are still lower than men's. Overall, a woman earns about 74 cents to a man's dollar. According to the U.S. Census Bureau, women are not equally represented in all professions. Women continue to be over-represented (77 percent) in clerical, administrative support, and service occupations, including education.

Despite the fact that college enrollment for women exceeds that of men, the median earnings of women who worked full-time year-round rose by 1.3 percent between 1991 and 1992. According to the annual demographic survey completed by the United States Bureau of Labor Statistics and the Bureau of the Census (1997), the female householder earns 65 percent of what the average male householder earns, and she lives on an income that is only 43 percent of the family earnings that she may have enjoyed as a partner in a marriage. This is true even though the female is more likely to have children in her home dependent upon her care and financial support.

These inequities call for more resources to be used by the legal community to force the courts to adhere to Civil Code mandates regarding divorce financial issues. Most states have provisions in their Family Law or Civil Codes relating to what is to be taken into consideration in the financial aspects of divorce cases. A leader in the movement for

adding legal force to more equitable financial accommodations, California has not only a provision in Family Code § 4320 (a-1) in relation to divorce and financial equity, but California's Family Codes also include the usefulness and importance of a vocational expert. In accordance with Family Code § 4331, the courts are given the right and responsibility of requesting the services of the vocational evaluation and expert testimony to be entered as evidence in divorce litigation. The responsibilities and the qualifications of the vocational expert ("vocational training counselor") are defined in Family Code § 4331 (a) and (e), but the definition of the "expert witness" in the California Evidence Code § 720 is also addressed.

California Family Code § 4331 states that, "In a proceeding for dissolution of marriage or for legal separation of the parties, the court may order a party to submit to an examination by a vocational training counselor. The examination shall include an assessment of the party's ability to obtain employment based upon the party's age, health, education, marketable skills, employment history, and the current availability of employment opportunities. The focus of the examination shall be on an assessment of the party's ability to obtain employment that would allow the party to maintain herself or himself at the marital standard of living."

A "vocational training counselor" in California Family Code § 4331 (d), is defined as, "an individual with sufficient knowledge, skill, experience, training, or education in interviewing, administering, and interpreting tests for analysis of marketable skills, formulating career goals, planning courses of training and study, and assessing the job market, and to qualify as an expert in vocational training under Section 720 of the Evidence Code."

An "expert witness" is defined in § 720 (b) of The California Evidence Code as, "a person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert. A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony."

California Family Code § 4331 (e) goes on to say that a vocational training counselor shall have at least the following qualifications: 1) A master's degree in the behavioral sciences, 2) Be qualified to administer and interpret inventories for assessing career potential, 3) Demonstrated ability in interviewing clients and assessing marketable skills with understanding of age constraints, physical and mental health, previous education and experience, and time and geographic mobility constraints, 4) Knowledge of current employment conditions, job market, and wages in the indicated geographic area, and 5) Knowledge of education and training programs in the area with costs and time plans for these programs

In the absence of specific codes addressing vocational evaluations, evaluators' qualifications, and the need for these services, most state civil courts make judgements on spousal support based on a list of pertinent attributes related to the wage-earning capacities of both parties. While these attributes are similar from state to state, states may differ in their laws on spousal support (DivorceSource, 1999). More thought and analysis needs to be given to financial settlement process in divorce proceedings, particularly in long-term marriages.

As in most states, in Ohio, for example, the court is mandated by Revised Civil Codes (1998) relating to spousal support, to take into consideration the following elements: a) income of the parties; b) earning abilities of the parties; c) ages, physical, mental, and emotional conditions of the parties; d) retirement benefits of the parties; e) duration of the marriage; f) extent to which it would be inappropriate for a party to seek employment outside the home; g) standard of living of the parties established during the marriage; h) relative extent of education of the parties; i) assets and liabilities of the parties; j) contribution of each party to the education, training, or earning ability of the other party; k) time and expense of the spouse seeking support to acquire education, training, or job experience so that person will be qualified to obtain appropriate employment; l) tax consequences; m) lost income production capacity of either party that resulted from the party's marital responsibilities; and n) any other factor that the court expressly finds relevant or equitable.

The Ohio Revised Code § 3105.18 A. (1998) defines "spousal support" as "any payment or payments to be made to a spouse or former spouse, or to a third party for the benefit of a spouse or former spouse, that is for sustenance and for support of the spouse or former spouse. It does not include and payment made to a spouse or former spouse, or to a third party for the benefit of a spouse or former spouse, that is made as a part of a division or distribution of property or a distributive award under 3105.171 of the Revised Code". The Ohio Revised Code goes on to say that, upon the request of either party, the court may award reasonable support to either party. The award can be allowed in real or personal property, or both, or by decreeing a sum of money, paid in full or by installments. All factors are not always taken into consideration as the law intended, plus, the list of factors is not as complete as it could be. Unfortunately, whether or not a person receives support, and an amount that is supposed to be equitable, is at the discretion of the court. For this reason, the use of a vocational evaluation and expert testimony is essential. Vocational experts are capable of providing the specific information that is required to produce a logical, equitable settlement.

Civil Codes and Support.

The list of the pertinent attributes in the current state civil codes related to the wage-earning capacities of the litigants does not take into consideration skill transferability, market analysis, and personalizing and interpreting the many components involved in job placement. These data are often related to the duration of a marriage and can best be delivered by trained vocational experts. Washington State Judge Robert Windsor (1982) discussed his suggestions for the "duration of marriage" component of the information taken into consideration when considering maintenance. His position was that in a short marriage (one to five years), the parties should be placed in an economic position as closely paralleling their pre-marriage state as possible. In mid-range marriages (five to 25 years), he argued for an evaluation and rehabilitation maintenance when necessary to assist the less skilled partner in acquiring the necessary training for employability. In long marriages (25 years or more), he advocated a forward economic appraisal and an awarding of property or maintenance that would provide as equal a financial position for both parties as possible.

At the beginning of the 21st century, awards are often based upon models created in the early 1970s and are no longer relevant. In a culture where divorce affects more than half of all marriages, a new approach to more equitable solutions to financial considerations in divorce has to be addressed (Miller, 1988). A vocational evaluator is the most highly trained professional to assist the court in providing the information necessary to ensure equitable resolution of the finances of divorce.

Typical State Provisions

The State of Ohio is typical of most states with regard to state codes and vocational experts. Ohio has Revised Civil Codes (1998) relating to spousal support, but there is no reference to vocational evaluators. The introduction of "no-fault" divorce in most of North America has eliminated the traditional basis for spousal support without providing a satisfactory alternative (Rea, 1995). About one half of all families below the poverty level in 1990 were maintained by women with no husband present. The poverty rate for such families was 45.1 percent, compared with 5.1 percent for the married couple families and 1.4 percent for families with a male householder, no wife present (Bureau of labor Statistics & U.S. Census Bureau, 1997). Because there is a significant need to address this crisis, the courts should be compelled to uphold stipulations in the laws (listed earlier in this document) regarding alimony or spousal support.

In contrast to other states, California is a pioneer in the practice of statutorily encouraging and/or ordering the services of the vocational expert in regard to financial equity in divorce settlements. In addition to the California Family Codes §§ 4320-4324 that include a list of considerations when determining spousal support, the court encourages the use of a vocational expert (vocational training counselor) to assess the parties and admits into evidence the objective vocational evaluation. Not only is the extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, but the court also takes into account the marketable skills of the supported party, requirements of additional education, and the extent to which the supported party's present or future earning capacity is impaired by periods of unemployment during the marriage to permit the supported party to devote time to domestic duties. The goal is that the supported party shall be self-supporting within a reasonable period of time. A reasonable period of time is considered to be one-half the length of the marriage. The court can use its discretion to grant support for a greater or lesser length of time, however.

Issues in Using a Vocational Expert.

In an excellent presentation, *Use of a Vocational Expert for Long Term Marriages*, Meister (1997) addresses several significant questions regarding the role of the vocational expert witness: When does one need a vocational witness? How does one use a vocational expert? What does a vocational expert do?

He suggests that an individual needs a vocational expert in determining child support and spousal support issues. The information provided by the expert fulfills the Ohio Revised Code which deals with the concept of imputing income to a spouse for purposes of determining child support amounts based on the income of the parties and the earning abilities of the parties.

He suggests that, as the vocational expert defends against a claim for spousal support, his or her testimony can be used to accomplish the following:

- ï To demonstrate that the support seeking spouse has meaningful opportunities for employment,
- ï To demonstrate that the support seeking spouse is working and has specific skills,
- ï To demonstrate what might be required to enable the spouse to become employed/self-sufficient, and
- ï To assist in determining whether to impute income because the support-seeking spouse is voluntarily un- or under-employed.

The testimony can be used in supporting a request for spousal support in the following ways:

- ï To demonstrate the spouse's level of employable skills,
- ï To demonstrate the opportunities, or lack thereof, for a person with the support-seeking spouse's abilities,
- ï To demonstrate the necessity, if any, for additional training/education in order to create meaningful opportunities for employment, and
- ï To determine whether the support-seeking-spouse is appropriately employed or whether his/her un- or under-employment is voluntary.

In examining what a vocational expert does, he points out that assessment procedures vary according to the background, expertise, and philosophy of the expert. Activities generally included in any assessment are, a) personal interviews to determine work/earnings history as well as assess any other factor; b) skill assessment which will vary depending upon the particular expert's practice (a psychologist/expert might administer an IQ test or an aptitude test to assist in determining ability); c) research regarding vocations/occupations available; and d) research into salary levels for various occupations.

Statutory factors, which are significant in the process of equitable financial determinations, should involve the expertise of the trained vocational evaluator. Meister suggests that Ohio Revised Code § 3113.215 (A)(5)(a) defines what a Court examines in imputing income. He suggests that is what the vocational expert must consider. He says that this statute is helpful in the spousal support context as well, since the Code does not specifically deal with how one might determine earning ability. The vocational expert can assist in recommending the imputed income that the court or agency determines the litigant would have earned if fully employed. This is determined from the individual's employment potential and probable earnings based on the person's recent work history, the individual's occupational qualifications, and the prevailing job opportunities and salary levels in the community in which he or she resides.

Meister lists several factors that must be considered by the expert in vocational assessment. He points out that the manner in which the expert addresses each of the foregoing factors is individual to that expert. However, the attorney presenting a spousal support case, or arguing against spousal support, must work with that expert to ensure that, at a minimum, the foregoing six factors have been dealt with in some way.

1. The income of the parties, where the trial court may abuse its discretion in awarding support payments without requiring evidence of both parties' wages.
2. The relative earning abilities of the parties, where trial court fails to consider relative earning abilities of the parties and the duration of marriage.

3. The ages and the physical, mental, and emotional condition of the parties, where the order of permanent spousal support abuses of discretion of health problems which seriously impeded a spouse's employment chances.
4. The relative extent of education of the parties, where one spouse obtains a degree during the marriage, it should be considered; or where calculated ability does not consider job market.
5. The time and expense necessary for the spouse who is seeking spousal to acquire education, training, or job experience so that the spouse will be qualified to appropriate employment, where the court abuses its discretion in ordering spouse to pay rehabilitative support for educational purposes.
6. The lost income production capacity of either party that resulted from that party's marital responsibilities, where getting into the job market after twenty-two years is problematically sufficient to sustain the necessity for an award.

To determine what the vocational expert needs from the attorney, Meister suggests that it is obvious that much of the information received and used by the expert is self-reported information from the client. The attorney must work with the expert to present to the court all of the information that applies to the support factors. This includes the following.

- i Tax returns from the client's last employment
 - i Any work or job evaluations done by any employer in the past,
- ii Medical facts, including lists of medications and medical/ physical history presented to the court by the client's physician or other expert if possible,
- iii Diplomas, certificates, or other evidence of level of education,
- iv Applications for employment, resumes, and any other efforts to seek employment, including evidence of rejections, denials or other negative responses, and
- v Anything else the expert thinks might be helpful.

Meister contends that if a spousal or child support or imputed income factor presents itself, a vocational expert/consultant is generally necessary. He says that an expert can present information to the court about prevailing salary or employment standards in the community, current and accurate information that would be difficult for a client or judge to research adequately.

Regarding the qualifications of the vocational expert witness, Meister calls attention to extremely important personal qualities of a "good " vocational expert. First, an expert is only as good as the information he or she is given. He adds that given such information, the expert should be able to provide a complete, detailed, thorough and persuasive report to present to the court. Evidence regarding every factor in the State Code must be presented to the court in every case, both to supplement the vocational expert's report and to enhance it. The expert should be compatible with the client and the client's problems. If aptitude and IQ tests are necessary, for example, a psychologist/expert may be the best choice or an expert who can interpret such data be used.

Impartiality is vital to the expert testimony. It is important that the ultimate outcome of the case be unimportant to the expert. The expert evaluates the client's employment potential, earning potential, and all the other factors already discussed; he or she is not an advocate for a particular position.

Another essential skill for the vocational expert is the ability to present in court. Well-researched reports could become less effective if presented badly. Moreover, it is

necessary for the expert to be willing to testify in court. Early in the process of becoming an expert witness, therefore, there should be a determination whether he or she will be a thorough investigator, a meticulous evaluator of skills and marketability, a strong presenter in court, an effective witness and a person who can withstand the harshest of cross-examinations.

Meister points out that California was the first state to use the vocational expert in divorce litigation about 20 years ago. Ohio began to use vocational experts for the same purpose nine or ten years ago. Meister estimated that, in 1998, he employed the services of the vocational expert in 30 percent to 40 percent of his spousal support cases. Of that number, only about five percent actually went to court for the determination of award. Generally, the parties determine settlements out of court. If a case does go to court, however, the judge usually rules more equitably when vocational evidence is submitted. It gives the judge facts and figures, personal to the litigants, to weigh in his judgement. Additionally, the vocational expert is used in both amicable and contentious divorces. Meister said that the vocational expert brings more to the case than the career counselor or the economist, both in training and understanding the relationship of the individual to the marketplace.

Future Directions for Vocational Experts

Family Law attorneys in the State of Ohio are speaking for the need of the vocational expert in the litigation of divorce, especially in long-term marriages (Meister, 1997, Lowe, 1997, Durgan, 1997). Referring to the personal-vocational attributes listed by the court when determining spousal support, as well as citing specific cases on record, proponents of vocational experts' importance in divorce litigation outline how the vocational consultant can address each of the issues stated in the Ohio Revised Codes. Durgan (1997) stated that the work of the "vocational economic expert" can be of key importance in cases of spousal support when predicting an individual's capacity to work and earn money. He states that the most critical element of spousal support may be the effort to analyze the relative earning abilities of both parties. The vocational expert accomplishes this by performing a vocational assessment to determine the individuals' capacities to perform work and their power to earn money over their lifetimes. General learning ability, in his opinion, is the "strongest predictor of earning capacity." But there may be mitigating factors to take into account. Achievement represents what the individual has learned and retained over his or her lifetime. An individual can have a fairly high intelligence level and yet demonstrate low achievement, as in the case of one who has been a homemaker for 15 years and was not exposed to opportunities to use cognitive assets. Included in the vocational evaluation is a complete review of the client's history and a vocational profile. Labor market access and earnings data may be included at the local, state, and national levels.

Miller (1998) states that the foundation of any divorce settlement plan should include the following:

1. A career plan that
 - a. Analyzes an individual's strengths and weaknesses;
 - b. Evaluates an individual's suitability for various types of work,
 - c. Identifies appropriate career opportunities,
 - d. Prescribes necessary training and/or education, and
 - e. Estimates associated costs and projects wages over time.

2. A financial plan that includes
 - a. Pre and post divorce budget planning;
 - b. A comprehensive list of assets and asset valuations
 - c. An income tax and cash flow analysis; and
3. A long term (ten year plus) cash flow analysis
- a. Coordinated retirement estimates and projects for pensions, IRAs, and other investments, and
- b. Tax consequences of liquidating various assets.

She states that divorce settlements will become increasingly equitable when attorneys implement vocational experts who will evaluate and document career and financial planning to analyze the short- and long-term consequences of spousal maintenance. Having all of the necessary evidence will help close the gap between divorcing parties and make sure that the benefits and burdens of dissolution are fairly distributed.

The vocational expert is particularly qualified to establish the capacity of an individual to perform work and earn money in litigation involving issues of spousal support. In cases where parties have been underemployed or out of the workplace for lengthy periods of time, and spousal support is sought, the State Codes indicate that the earning capacity should be determined

As a final outcome of the vocational/economic evaluation, the vocational expert can provide information as to what the earning potential of the individual might have been, had he or she chosen to progress in a career rather than carrying out marital responsibilities away from the workplace. The vocational expert synthesizes all of the data and submits it to the court.

Summary

This paper examined the literature and the Civil Codes, particularly in California and in Ohio, regarding the vocational expert as a witness in civil divorce litigation. The State of California has regulations written in the Family Codes that directly address the necessity for, and qualifications of, the vocational training counselor as a witness in divorce litigation. It appears other states could move in the direction of California, in that lawyers and vocational experts are writing and presenting at conferences about need for vocational experts in divorce litigation. In Ohio, for example, lawyers are actively seeking the services of the vocational expert witness in order to determine the most equitable financial solutions for their clients. There are no laws written at this time, however, and there is not a legislative bill in committee relating to this issue.

The California Codes are clear and comprehensive, and seem to be the wave of the future. An independent witness who is trained in the area of vocational assessment would be the most reasonable professional to present the evidence as to the employability and earning capacities of the litigants based on facts fully assessed and figures fully researched. This method of presenting evidence is far better than relying upon a partially informed, arbitrary decision by the court.

The vocational expert is particularly suited to submit detailed information, results of standardized tests, and report current labor market information that will withstand the scrutiny of the law, even in court. He or she has the capacity to assist the attorney and the court in formulating and presenting a clear picture of an individual's ability to work and earn money over his or her lifetime. This is done through the analysis of earning

capacity, the assessment of re-training potential, and estimation of lost income over time due to marital responsibilities, and a regional analysis of the job market for that individual's skills. Finally, when a judge has all of the necessary information presented by a skilled vocational expert witness in divorce litigation, the court will be more capable of making informed and equitable financial rulings.

References

Bell, Rosalyn, B. (1988). Alimony and the financially dependent spouse in Montgomery County, Maryland. *Family Law Quarterly*, 22, 3.

Bureau of Labor Statistics and the Bureau of the Census Annual Demographic Survey. March, 1999 [On-line], Available:
http://ferret.bls.census.gov/131998/pov/new15_000.htm

California Evidence Code § 720 (a).

California Evidence Code § 720 (b).

California Family Code § 4320 (a-1).

California Family Code § 4331 (a).

California Family Code § 4331 (d).

California Family Code § 4331 (e).

DivorceSource [On-line], Available: www.divorce.com

Durgan, Rod D. (1997) Use of a vocational expert for long term marriages, *Advanced Family Law Reference Manual*. 97-30, Ohio CLE Institute Publication, 4d.1 - 4d.9.

Levin, Dennis P. (1997). FAQs about Ohio Spousal Support. [On-line], DivorceSource. Available: www://divorcesource.com/OH/ARTICLES/levin5.html

Lewis, Eugene B. (1997). Use of a vocational expert for long term marriages. *Advanced Family Law Reference Manual*. 97-30, Ohio CLE Institute Publication, 4a.1 - 4a.25.

Lowe, Beal (1997). Use of a vocational expert for long term marriages. *Advanced Family Law Reference Manual*. 97-30, Ohio CLE Institute Publication, 4c.1 - 4c.4.

Meister, Frederick (1997). Use of a vocational expert for long term marriages. *Advanced Family Law Reference Manual*. 97-30, Ohio CLE Institute Publication, 4b.1 - 4b.4.

Miller, Kathleen (1996). Closing the gap on disparity. *American Journal of Family Law*, 10, 99 - 104.

Ohio revised Code § 3105.08 (1997).

Rea, Samuel A. (1995). *Breaking Up is Hard to Do: The Economics of Spousal Support*. Department of Economics and Institute for Public Analysis: Toronto, Canada.

United States Bureau of the Census (1990). Money income of households, families and persons in the United States, Current Population Reports, Sept. 1993, at XII. Table A. (Series P60, No. 184).

United States Bureau of the Census (1980), Characteristics of the population below the poverty level. Current Population Reports, March 1981, (Series P60 No. 133).

United States Bureau of Labor Statistics & Bureau of the Census (1997, March). Annual Demographic Survey [On-line],. Available:
http://ferret.bls.census.gov/macro/031997/faminc/01_000.htm.

Winsor, Robert D. (1982, January). Guidelines for the exercise of judicial discretion in marriage dissolutions. Washington State Bar News.

The Vocational Expert as a Divorce Witness □

PAGE □13□