

Cutting to the Chase: The Use of the Vocational Assessment to Evaluate the Alimony Applicant's Ability to Work

*by Paul J. Mastrangel
Dean & Fulkerson, P.C.*

Whenever a party requests alimony in a domestic relations case, the court must consider the applicant's "ability to work". The applicant's *present* ability to work based upon existing employment, skills, training or education is always relevant. The applicant's *future* potential to earn a living based upon yet-to-be-acquired skills and education may also be relevant. The income associated with the petitioner's present or future ability to work is a material factor in a trial court's award of ex-spousal alimony.

Domestic relations practitioners are familiar with the arguments of alimony applicants that they are unemployable at their current level of skills, training and education and as unemployable in the future because of opportunities lost during the marriage. Practitioners are also familiar with prospective payers of ex-spousal support who invariably insist that their soon-to-be former spouse is fully employable and capable of earning sufficient income to meet all necessary and reasonable needs. The prospective payer will argue that with proper motivation the applicant can, after a long hiatus from the workplace, return to an economically-rewarding job or career. These disparate positions reflect the intense adversarial tone of most contested domestic relations proceedings and tend, unfortunately, to obscure the real issue. A rational method for evaluating a party's ability to work

has long been absent from these considerations.

Both the applicant and prospective payer may testify to their respective knowledge of the applicant's education, job skills, past work experience, present earnings and current efforts to obtain employment. These are factual matters and appropriate for lay testimony. Evaluating whether the applicant is properly motivated to seek employment, the applicant's aptitude for a given occupation or profession, the current employment climate as it affects the acquisition and likely duration of a particular occupation, what other work the applicant may be qualified to perform in light of the applicant's current job skills, education and experience, whether the applicant's plan to acquire additional skills or education is either reasonable or realistic, the cost associated with any necessary remedial training or education to implement such a plan, and the compensation for each occupation urged by either the applicant or the prospective payer are areas in which counsel, the parties and the court can only speculate. These are matters appropriate for expert testimony.

When a matter at issue is beyond the knowledge or skill of an ordinary layperson, MRE 702 permits expert testimony to assist the trier of fact. This expertise may be in the form of "recognized scientific, technical or other specialized knowledge". A witness may qualify as an expert on

the basis of "knowledge, skills, experience, training or education". The decision to admit expert testimony is always within the court's discretion. In divorce cases, all issues of fact are determined by the trial court. Although the trial court may receive and be guided by expert testimony in making its findings of fact and, ultimately, its decision, it is never bound to accept the conclusions of any expert witness.

Although the vocational assessment is relatively new in domestic relations cases, it has proven remarkably adaptable to this area of law. The first state-wide presentation on this subject was in a January, 1991 Family Law Section seminar on valuations in divorce cases. The topic of the vocational assessment shared that program with presentations on the valuation of closely-held businesses, pensions, post-Postema degrees, and real and personal property. Despite this, the vocational assessment has, until recently, been under-utilized.

Surprisingly, many cases continue to be tried without the use of expert testimony to assist the court in determining an alimony applicant's ability to work. Not surprisingly, the Court of Appeals continues to remand cases back to the trial court for additional testimony when the record is deficient in this area. Two unpublished 1994 decisions reversing awards of transitional alimony and awarding periodic alimony suggest that certain panels of the Court of

Appeals are also tempted from time to time to add or substitute their speculations for those of the trial court and parties.

Vocational assessments have been widely used in other areas of law for many years. They have become a fixture in personal injury cases. Where an injured party's ability to work is material, vocational assessors identify suitable occupations for the injured party and formulate rehabilitation plans to assist the worker to return to the workplace. These rehabilitation plans may include re-education, physical therapy or the acquisition of new skills or training in connection with a targeted occupation. Counsel in those cases have found this expertise extremely useful for settlement as well as trial. These reports assist counsel in quantifying for the client the potential risk or exposure at trial.

Domestic relations law practitioners engaging the services of vocational assessors will find the acronyms for the degrees, licenses and certifications held by those currently working in this field bewildering. The most common are the following: Licensed Professional Counselor (LPC), Certified Vocational Evaluation Specialist (CVES), Certified Rehabilitation Counselor (CRC), Certified Insurance Rehabilitation Specialist (CIRS), Certified Work Evaluation and Work Adjustment Specialist (CWEWAS), Certified Case Worker (CCW), Certified Social Work (CSW), Nationally Certified Counselor (NCC), and Certified Case Manager (CCM). Of these, only the LPC is licensed by the State of Michigan; CSW is the only Michigan certification. The remaining certifications are by national or industry-related organizations. Each organization has varying requirements for certification.

The State of Michigan does not specifically license or certify vocational assessors working in the do-

mestic relations setting. At the present time, the discipline, experience, training and education varies with each individual assessor. Many have a background in the social sciences. The insurance industry has also contributed to the discipline, as that group has had a vested interest in developing a dispassionate approach to the question of an injured party's ability to work.

An individual vocational assessor's practical experience may be just as persuasive as an impressive collection of academic credentials. Extensive practical experience in counseling those who are about to return to the workplace and familiarity with the success of these job placement efforts is likely to carry more weight with the finder of fact than the forensic academics. Academic credentials combined with practical experience is the best formula for an expert in this field.

To date, few vocational assessors have achieved statewide recognition or notoriety. The bench and bar are likely to be unfamiliar with the qualifications and background of most vocational assessors. The proponent of the witness and opposing counsel must familiarize themselves with the proposed witness' practical experience, licensing and certification history. The proponent needs this background to lay the proper foundation to qualify the witness as an expert. Opposing counsel will utilize this information in cross-examination to probe for deficiencies in the witness' methodology or conclusions.

When formulating an opinion on a party's present or prospective ability to work, the following factors may be relevant: 1) the applicant's employment history, 2) if the applicant has been previously employed, the reason or reasons the employment was terminated; 3) the applicant's current education, 4) the applicant's current job skills, 5) the employment opportunities presently

available to the applicant at the applicant's current level of job skills and education, 6) the impact of any physical or psychological limitations claimed by the applicant, 7) the applicant's diligence in seeking work, 8) the applicant's present availability for work, 9) the practicality of the applicant's plan for re-entry into the job market, 10) whether the applicant needs additional skills, training or education before re-entering the job market, 11) the employment opportunities likely to be available to the applicant with these after-acquired skills or education, 12) the applicant's aptitude and commitment to acquire the special skills, training or education needed, 13) the time and cost associated with acquiring these special skills, training or education, 14) the present and future availability of jobs targeted by the applicant in the local geographic area, 15) the prevailing wage rates associated with present and future employment opportunities in the local geographic area, 16) the applicant's efforts during the pendency of the divorce to acquire desired education or job skills, 17) the applicant's diligence in attempting to secure work during the pendency of the divorce, and 18) the likelihood that the applicant will encounter age discrimination in the targeted occupation and how that will impact upon the applicant's earnings.

The vocational assessor will rely upon the attorney for essential background information about the applicant. Interrogatories are useful to obtain an applicant's educational, health and prior employment history. Interrogatories can also determine whether there is any claim of physical or psychological limitation and discover relevant third-party health care providers who can substantiate these limitation claims. Medical records can be obtained by subpoena duces tecum on the health care provider accompanied by the applicant's

written authorization to release medical records.

Most vocational assessors find it helpful to interview the applicant. A personal interview gives the vocational assessor an opportunity to gain insight into an applicant's motives and purpose in selecting or rejecting particular categories of employment. It also provides the opportunity to administer appropriate psychological, personality, intelligence and aptitude testing. Vocational assessors with counseling experience can assist the applicant in the personal interview in identifying appropriate occupations. After these occupations are targeted, the vocational assessor can help the applicant quantify the time and cost associated with achieving those goals. The interview and testing can generally be completed in a single morning or afternoon session with little or no inconvenience to the alimony applicant when sufficient background information is provided to the expert.

Not every alimony applicant will be receptive to the idea of being personally interviewed by the opposing party's vocational expert. The applicant may even assume that the expert will be hostile to the applicant or the applicant's position. When an alimony applicant refuses to voluntarily participate in a vocational assessment, counsel for the prospective payer may move the court for an order compelling the applicant's cooperation.

As vocational assessments are relatively unfamiliar to the bench, counsel may encounter some reluctance to welcome another "expert" to the domestic relations arena. This resistance may take the form of refusing to order a recalcitrant applicant to cooperate with the prospective payer's proposed expert. Those members of the bench who are disinclined to order a petitioner to cooperate should consider the contribution that other experts have made to the domestic relations practice. Experts

value real estate, businesses, professional practices, pensions, advanced degrees and routinely offer opinions on such elusive matters as child custody and visitation. Allowing a recalcitrant applicant to avoid the personal interview may unwittingly encourage unwarranted alimony requests and contribute to the overcrowding of the court's docket. Those who would invoke the exercise of the court's equitable powers to award alimony but who resist or prove less than fully cooperative with a vocational assessor should be suspect. The court may condition its order to cooperate in the interview and testing upon such protection provisions as it deems reasonable under the circumstances.

Vocational assessors commonly use four resource materials in their efforts to quantify an applicant's ability to work. The *Dictionary of Occupational Titles* is a nationally recognized source published by the Federal Government which identifies general employment categories for which the applicant is or can be qualified. The *Employment Statistics Quarterly* reports the number of people currently employed in the Detroit metropolitan area in each of these standardized categories. The *Michigan Occupational Information System* publishes projected openings in each of these job categories in the Detroit metropolitan area, and the *Michigan Occupational Wage Information* catalogs salary ranges in the beginning, intermediate and senior levels in each occupational category. The *Employment Statistics Quarterly*, the *Michigan Occupational Information System* and the *Michigan Occupational Wage Information* are publications of the State of Michigan.

Armed with the background information gathered by counsel, personal observations gained through the interview, test results, input from the applicant, and the statistical data from reliable and established

resources, the vocational assessor can accurately project for the parties and the court a particular applicant's present and future ability to work and the range of compensation associated with a particular occupation. Whenever additional training or education appears warranted, the vocational assessor can calculate for the court the cost of that training or education by a survey of available educational or vocational training courses in the area. The court can, with this information, evaluate the cost-effectiveness of further training and education and determine whether an applicant's aptitude and abilities appear to warrant such an investment at the expense of the former spouse. When the applicant is without a personal plan to obtain employment, the vocational assessor can propose for the court's consideration a rehabilitative plan appropriate to the applicant.

MRE 703 allows an expert witness to base an opinion on facts or data which are themselves inadmissible as evidence or which may not have already been offered or admitted into evidence. The court may require that the data or facts be placed in evidence. The court can also require that the underlying facts or data be disclosed before or during trial.

Whenever a vocational assessor is identified by the other party as a potential witness, counsel should depose the witness. The subpoena duces tecum for the deposition should also demand in advance of the deposition date production of any underlying facts or data upon which the assessor relies to formulate the opinion. The subpoena duces tecum should also request the written curriculum vitae of the assessor, if one is available, and a copy of any written report the vocational assessor has prepared. The curriculum vitae, any underlying data and report should be thoroughly reviewed before taking the putative expert's deposition.

On average, only about 2% of domestic relations cases ever reach trial. The vast majority of these cases settle sometime before trial, either through the efforts of the parties and their counsel or with the assistance of a mediator. In most domestic relations cases, the vocational assessment is likely to be used by counsel, the parties and a mediator to help focus and frame the issues and assist them in assessing their relative risk and exposure at trial and the cost-effectiveness of accepting or rejecting a settlement offer.

Some may be concerned that the introduction of the vocational assessment as a routine practice in domestic relations cases will simply create two more “experts” to champion the prejudices and biases of the party by whom they have been hired. That risk, always present, does not outweigh the probative value of such testimony. “Advocate-experts” are easily identified through cross-examination. It is not long before they become known to the bench and bar for what they are and their opinions are automatically discounted or discredited by the trial judge who sits as the finder of fact. Offering this kind of “expert” only enhances the credibility of the other party’s vocational assessor who has taken pains to consider all relevant factors and render a balanced opinion.

The vocational assessment is a two-edged sword. The bench and bar are familiar with unjustified alimony demands being interposed as the quid pro quo for the expeditious resolution of a case. With the current overcrowded trial docket, this practice is likely to continue and flourish absent close scrutiny of the applicant’s true ability to work. Used properly, the vocational assessment will discourage posturing and inflammatory rhetoric. The vocational assessment can also be an effective vehicle for the presentation of a bona-fide alimony applicant’s position. A concise, well-written report enumerating the relevant facts

and outlining the data supporting the expert’s opinion is likely to be favorably received by a beleaguered and overworked trial court.

The petitioner’s ability to work is an important consideration for the court in any alimony petition. The vocational assessment is a useful tool for the parties to present the factual basis for their respective positions. Although the vocational assessment is relatively new to the domestic relations practice, it has proven its usefulness and reliability in other areas of law. It offers the court a rational basis upon which to evaluate a party’s ability to earn income. It can help the court winnow out those who may be consciously or unconsciously bent upon exacting the maximum financial premium for the termination of the marriage from those who are, for a variety of reasons, unable to work or able to work only at occupations with minimal compensation. It should discourage posturing by both the applicant and prospective payer. When properly used, the vocational assessment will encourage the timely resolution of a major issue in many divorce proceedings.