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New GAL Training Requirements Begin Jan. 1, 2021

By Amber Peterson

Domestic abuse affects millions of Americans each year, including more than 5 million children.[1] Many victims of domestic abuse turn to the family court system to help them end their abusive relationships in a way that provides safety for themselves and their children. However, these cases can be some of the most complicated and challenging for the family court to handle.

Guardians ad litem (GALs) play a crucial role in identifying whether domestic abuse exists in a particular family and alerting the court of its existence. Under Wisconsin law, GALs are required to investigate whether there is evidence of domestic abuse, and must report those findings to the court.[2] However, without specialized training, this requirement can be difficult to accomplish.

According to Jenna Gormal, director of Public Policy and Systems Change at End Domestic Abuse Wisconsin "children growing up with an abusive parent experience feelings of conflict and anxiety, and may not be forthcoming about the abuse they are witnessing or experiencing. It is incumbent upon the GAL to recognize patterns of abuse even when the child is not forthcoming. We must ensure that GALs are educated in the dynamics of domestic violence because their recommendations have a critical impact on the lives of victims and their children."

In other words, the information gathered by a GAL can significantly assist the court in making custody and placement decisions that promote the ongoing safety of the children and non-abusive parent once the parties have separated.

To ensure GALs receive the necessary training to recognize domestic abuse, effective Jan. 1, 2021, any GALs appointed in family cases are required to be trained on domestic abuse – due to a recent change to Wisconsin Supreme Court Rule 35.

Training Requirements Under Rule 35

To better ensure that GALs are prepared to represent the best interests of the child in family cases, the Wisconsin Supreme Court approved a petition to amend Supreme Court Rule (SCR) 35, which governs eligibility requirements for appointment as a GAL.

The following is a summary of the new requirements for GALs resulting from Wisconsin Supreme Court Order No. 19-13, issued July 20, 2020.[3] The new requirements must be met before a GAL can accept an appointment after Jan. 1, 2021. The changes highlighted below only apply to GALs appointed under Wis. Stat. chapter 767, and do not affect GAL appointments under Wis. Stat. chapters 48 or 938.[4]

- For a lawyer's first GAL appointment on or after Jan. 1, 2021, the Court increased the overall number of GAL education hours required from 6 to 9 hours.[5]
- The 9 hours of education must be approved under SCR 35.03 and completed during the combined current reporting period specified in SCR 31.01(7)[6] and the immediately preceding reporting period.[7] In other words, any GAL education an attorney completed in this reporting period or the preceding one can be counted retroactively toward the 9 required credits.
- At least 3 of the 9 hours must be approved education addressing the topic of family violence (a.k.a. "domestic abuse" or "domestic violence").[8]
- Of the remaining 6 hours that are not on the topic of family violence, at least 3 of the 6 hours must be approved education on any of the following topics identified under SCR 35.03(1m)(a), including: (1) proceedings under chapter 767; (2) child development; (3) the effects of conflict and divorce on children; (4) mental health issues in divorcing families; and (5) sensitivity to various religious backgrounds, racial and ethnic heritages, and issues of cultural and socioeconomic diversity.[9]
- The remaining 3 hours of education can be any type of approved "guardian ad litem" or "family court guardian ad litem" education, meaning it could also be education directed at GALs taking appointments chapters 48 or 938.[10]

Once a GAL has satisfied the initial requirement of 9 hours of education on the topics described above, there are additional requirements for any subsequent appointments. The GAL must subsequently attend at least 6 hours of GAL education approved under SCR 35.03 during the combined current reporting period specified in SCR 31.01(7) and the immediately preceding reporting period.[11] The 6 hours must include at least 1 hour on the topic of family violence, at least 2 or more hours on topics identified in SCR 35.03(1m)(a); and the remaining hours can be on any type of approved "guardian ad litem" or "family court guardian ad litem" education.[12]

Unchanged in SCR 35.015(2) is the exception provided for receiving these education hours, if the court makes "a finding in writing or on the record that the action or proceeding presents exceptional or unusual circumstances for which the lawyer is otherwise qualified by experience or expertise to represent the best interests of the minor."

Background of the Rule 35 Change

The genesis for this rule change began in 2018 when the Wisconsin Legislative Council convened the Study Committee on Child Placement and Support.[13]

Members of the committee included Wisconsin legislators, a judge, a circuit court commissioner, a family law attorney, as well as representatives from a county child support agency, a local domestic violence agency, and fathers' rights organizations. The committee was directed to review the standards under current law for determining periods of physical placement and child support obligations.

Over the course of five meetings, the committee heard testimony on a number of considerations related to the topic of physical placement, including on the importance of recognizing if there is domestic abuse in the relationship. Although Wisconsin law requires GALs to investigate whether there is domestic abuse in every case,[14] Supreme Court Rules did not require GALs to receive training on domestic abuse, but only made it optional.

In its final report to the Joint Legislative Council, the committee recommended petitioning the Supreme Court to amend the rules governing GAL education. Specifically, the committee suggested requiring attorneys to obtain minimum education relating to the dynamics and impact of family violence, in order to be eligible to accept an appointment by a court as a GAL in a family action.[15] Sen. Roger Roth and Rep. Robert Brooks filed Petition 19-13 on behalf of the Study Committee on April 9, 2019, asking the Wisconsin Supreme Court to amend SCR 35.[16]

The Supreme Court conducted a public hearing Oct. 22, 2019, on the rule petition. At the hearing, a number of individuals spoke in favor of the proposed rule change, including several survivors who shared their personal stories of abuse and the difficulty they had navigating the family court system and protecting their children from ongoing harm when GALs failed to recognize the presence of and impact of domestic abuse.

Those opposing the rule change argued that GALs should continue to exercise discretion in determining the topics on which they receive training. Additionally, opponents argued that the topic of family violence should not be specifically required over the number of other topics that affect the family in divorce, such as mental health and substance abuse.

After the public hearing, the Court voted to grant the rule petition, and on July 20, 2020, issued Order No. 19-13. In the order, the Court noted that "[w]e are persuaded that additional education on the topic of family violence is appropriate to better ensure that guardians ad litem appointed in family law cases are prepared to advocate for the best interests of the child."[17]

Upcoming Domestic Violence Training

To assist GALs in receiving the 3 required credit hours on the topic of family violence before Jan. 1, 2021, the Wisconsin Director of State Courts Office is offering four free training sessions in October 2020. These trainings are offered virtually, using Zoom, on these dates:

- Tuesday, Oct. 13 from 8:30 a.m. – noon
- Friday, Oct. 16 from 8:30 a.m. – noon
- Tuesday, Oct. 20 from 1 p.m. – 4:30 p.m.
- Friday, Oct. 23 from 1 p.m. – 4:30 p.m.

The training primary focuses on information contained the Domestic Abuse Guidebook for Wisconsin Guardians Ad Litem: Addressing Custody, Placement, and Safety Issues (GAL Guidebook),[18] created by the Governor's Council on Domestic Abuse and End Domestic Abuse Wisconsin and released in March 2017.

The GAL Guidebook assists GALs in handling cases involving domestic abuse by providing information on domestic abuse and offering a concrete method to investigate if domestic abuse exists in a case. Training topics include:

- dynamics of domestic abuse with a particular emphasis on coercive control;
- effects of domestic abuse and trauma on children;
- overview of the four-step framework for investigating the existence of domestic abuse;
- statutory requirements related to GAL responsibilities, domestic abuse, and best interest factors in family cases; and
- developing recommendations that account for the safety and well-being of the children and non-abusive parent even after the parties separate.

Presenters are Amber Peterson, a legal advisor in the Office of Court Operations, and Morgan Young, director of the Office of Judicial Education and former victim services training officer at the Wisconsin Department of Justice. Both presenters have extensive experience training on the topic of domestic abuse in family cases. If you are interested in attending this training, email Amber Peterson at *amber.peterson@wicourts.gov* for registration information.

Conclusion: Training is Critical

When hearing family cases, it is imperative that the courts have knowledge of domestic abuse when making decisions related to custody and placement for a particular family. Guardians ad litem play a significant role in providing this essential information to the court.

Accordingly, it is important for GALs to have the training necessary to fulfill their statutory responsibility to investigate whether there is evidence of domestic abuse in every case. The recent amendment to Supreme Court Rule 35 requiring GALs to receive training on domestic abuse will better equip them to successfully complete this critical task.

Endnotes

1 National Coalition Against Domestic Violence, ncadv.org/statistics.

2 Wis. Stat. § 767.407(4).

3 *See* Wisconsin Supreme Court Order No. 19-13, wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=271756

4 *See* SCR 35.01.

5 SCR 35.015(1).

6 *See* SCR 31.01(7), docs.legis.wisconsin.gov/misc/scr/31/01/7?view=section

7 SCR 35.015(1).

8 SCR 35.015(1)(a).

9 SCR 35.015(1)(b).

10 SCR 35.015(1)(c).

11 SCR 35.015(1m).

12 SCR 53.015(1m)(a)-(c).

13 2018 Legislative Council Study Committee on Child Placement and Support website, docs.legis.wisconsin.gov/misc/lc/study/2018/1785.

14 Wis. Stat. § 767.407(4).

15 Report to the Joint Legislative Council, pp. 8, 25, docs.legis.wisconsin.gov/misc/lc/study/2018/1785/080_recommendations_to_the_joint_legislative_council/lcr_2019_10.

16 Supreme Court Rule Petition 19-13, www.wicourts.gov/scrules/1913.htm.

17 Order No. 19-13, at pg. 4.

18 Domestic Abuse Guidebook for Wisconsin Guardians ad Litem, March 2017, wicourts.gov/publications/guides/docs/galguidebook.pdf

About the Author

Amber Peterson, Marquette Law School 2010, is a legal advisor with the Wisconsin Director of State Courts Office, Office of Court Operations. She can be reached at amber.peterson@wicourts.gov.

When Your Client 'Friends' the Judge: Wisconsin Supreme Court, Social Media, and *Miller*

By Jennifer Van Kirk

In 2002, one of the first social media platforms, Friendster, was created. In 2003, our society changed with the advent of Myspace.com, one of the first social media networks with individuals sharing their thoughts, music, and preferences with the world. In February 2004, Facebook was launched in Cambridge, Massachusetts. By 2006, Facebook launched its News Feed feature, and in 2009, its blue thumbs-up "like" button.[1]

Over the past 18 years, social media has come to play a significant role in our society. Some readers are well versed in social media with accounts on multiple platforms. Others may be unfamiliar with social media or choose to have little online presence.

In *Miller v. Carroll*,[2] the Wisconsin Supreme Court made a determination that impacts Wisconsin parties and attorneys who engage in social media connections with judicial officers. The 23-page decision in *Miller* – with a lead opinion, three concurring opinions, and one dissent – suggests the complicated nature of rules regarding social media and the different viewpoints of the justices.

Social Media Platforms

There are multiple online platforms that are in the business of connecting people which, at its core, is the intent of social media. Some electronic social media platforms focus on making connections via individual posts or via imagery, while others concentrate on videos and allow users to subscribe to individual channels and add comments.

Social media are constantly evolving – adding new features and addressing security. As the demise of Friendster and Myspace suggests, social media platforms will rise and fall in the future. Here are some of the social media platforms currently popular today:

Facebook is a photo and information sharing website. It has frequently been in the news lately for its political ads. There are organizational pages, personal pages, and company pages. You can "follow" a company's page or become a Facebook "friend" with an individual. It also allows for private messaging between individuals.

Posts can be set at different privacy levels, including public (viewable to anyone on the internet), friends (viewable by only your friends) and custom (viewable only to the friends that you select).

Facebook messages can be deleted or archived, but only in your account.[3] You can also remove a message that you sent for up to 10 minutes after sending it, if you have sender's remorse. You can choose to block an individual entirely from seeing any of your posts or comments on Facebook, using Facebook's blocking feature.

Instagram is a free photo- and video-sharing application that allows you to "like" or comment on posts from other users, and to repost them on your own account feed. It is analogous to a personal photo album with captions.

Pinterest, like Instagram, focuses on images and links, but is more analogous to posting information on a bulletin board. "Pinterest is a visual discovery engine for finding ideas like recipes, home and style inspiration, and more."[4] Unless you create a board only you can view, the boards are public and can be viewed or followed by anyone.

Like Facebook, Pinterest generates a news feed. While both platforms focus largely on visual media, their purpose and the way individuals utilize them are quite different.

Used by 180 million people a day, **Snapchat** has a variety of functions, including photo filters, a chat format with messages that disappear after a set period of time, videos and pictures, a "Discover" area for obtaining news from mainstream news sources, a Snap Map function, and a personal emoji.[5]

Snap Map allows you the opportunity to view where others are located or to block your location from connected individuals. You can post Snap stories that are visible only for a certain period of time, or send individual messages, which you also can set to disappear after a period of time.

Twitter "is a service for friends, family, and co-workers to communicate and stay connected through the exchange of quick, frequent messages. People or organizations post tweets, which may contain photos,

videos, links, and text. These messages are posted to your profile, sent to your followers, and are searchable on Twitter search."[6]

On Twitter, you can follow another's account, receiving their messages on your own "home timeline." You can like, retweet, and comment on another user's tweet. A page owner can choose a private or public profile. Twitter is currently testing a tweet that disappears after a set time, similar to Snap Chat.

Somewhat unique to Twitter (unlike Facebook in particular), is that users can "tag" another Twitter user, which could be an organization or a person, without the user's consent or permission, by using the person's twitter "handle." A Twitter user has no control over who tweets a reference to the user's public account and who shares their public tweet. For example, if Judge Jane Smith had a public Twitter account, any user could "tweet at" her public account whether or not she consents. The user could write "@JudgeJaneSmith is amazing!" and Judge Smith would see the message on her Twitter feed – without giving specific consent to the use of her Twitter handle.

You can view a user's *public* tweets without having a Twitter account yourself, if the account is public. Additionally, you can block another user – helping you to control how you interact with other accounts. This feature helps users restrict specific user accounts from contacting them, seeing their tweets, and following them.

Tumblr is a "microblogging" platform, where users can make a blog about any topic in a variety of different media. Tumbler includes stories, photos, GIFs, TV shows, links, quips, Spotify tracks, mp3s, videos, fashion, art, pictures, and other items. Tumblr has 492 million different blogs, filled with anything the user chooses to post.

Nextdoor is self-described as "the world's largest social network for the neighborhood," and aims to enable online conversations among neighbors "to build stronger and safer communities."[7] This site connects people in a given neighborhood or area, and allows users to post questions and comment on other users' posts. For example, there may be a request for the name of a reliable plumber, or there may be a link to a Ring camera video showing a stolen package.

LinkedIn claims to be "the world's largest professional network with nearly 660+ million users in more than 200 countries and territories worldwide," and "[t]he mission of LinkedIn is simple: connect the world's professionals to make them more productive and successful."[8] Its messaging format allows direct messages between users, who can also create or share posts. There are free and paid versions of LinkedIn – the paid version offers additional features, such as the ability to see who has viewed your profile.

TikTok is a video-sharing app where users can create videos they share publicly or with their friends on the network. It is hugely popular with teenagers and young adults, and is used by hundreds of millions of people around the world.

Recent news articles talk about its serious security flaws, and President Donald Trump threatened to ban the app, which is under scrutiny because it is Chinese-owned. In December 2019, the U.S. military and other governmental agencies banned its use on government-issued phones, saying the app is a cyber security threat.[9]

Reddit is a mixture of discussion platforms and link distributors, organized into topic forums or subreddits. Users (the topic editors) are content creators as well as consumers and curators. Using a points system of upvotes and downvotes, the community determines which content and discussions are important and subsequently displayed at the top of the news feed. The platform is largely self-managed, with moderators acting as forum guardians.

The *Miller v. Carroll* Decision

In its recent decision in *Miller,* the Court addresses an issue of first impression: the "allegation of judicial bias arising from a circuit court judge's undisclosed social media connection with a litigant."[10]

The underlying case before the judge was a child custody and placement determination. After the conclusion of testimony but before the circuit court's decision was issued, the mother sent the judge a Facebook friend request, which the judge accepted.[11] After learning of the connection, father filed a motion for reconsideration, which was denied.[12]

In its decision, the Court held that the extreme facts of the case rebutted the presumption of judicial impartiality and established a due process violation.[13] The Court stated that every social connection on Facebook is called a "friend," and that a Facebook user "'typically knows massive amounts of information about each of his Facebook friends – far more than what he knows about the average 'real life' acquaintance.'" The Court noted that the "accessibility of personal information on popular social media platforms such as Facebook presents unique concerns and implications regarding potential for judicial bias."[14]

The Court considered the "totality of the circumstances and conclude[d] that [father] has rebutted this presumption by showing 'a serious risk of actual bias.'"

The circumstances considered by the Court include the:

1) timing of the friend request and the judge's acceptance of the request;
2) volume of mother's Facebook activity and likelihood that the judge viewed her posts and comments;
3) content of mother's Facebook activity as related to the context of the pending proceeding; and
4) judge's lack of disclosure.[15]

The Court noted that the judge's affirmative step in accepting the friend request was significant. By accepting the friend request, the Court noted, the judge accepted access to off-the-record facts relevant to the dispute – in particular about mother's character and parental fitness.[16]

The Court also considered the likelihood that the judge would have seen mother's Facebook activity when determining whether there was a serious risk of actual bias, and noted that there would have been a Facebook notification for every one of mother's reactions and comments and the judge's posts.[17]

The Court noted that the number of undisclosed contacts in the 25 days before the judge issued a decision increased the likelihood of serious risk of actual bias.[18]

Additionally, the Court considered the context and nature of the pending litigation when determining if there was a serious risk of actual bias, noting that the judge was the sole factfinder regarding character and parental fitness, and that mother's Facebook posts allowed her additional opportunities to portray herself in her best light regarding her values, character and parental fitness, as compared with father. The Court noted that mother "shared" posts regarding domestic violence, which was an issue in the case.[19]

Finally, the Court criticized the judge's complete lack of disclosure of the contacts as an important factor in assessing the serious risk of actual bias.[20] The Court noted that "judges should be cautious when using social media and appreciate the risk of *ex parte* communications being sent through social media sites," defining an *ex parte* communication as a "communication between counsel or a party and the court when opposing counsel is not present."[21]

The Court further noted that it did not explicitly focus on *ex parte* communication concerns as a factor in its analysis, but it did consider the undisclosed nature of the communications as an important factor in assessing the serious risk of actual bias.[22]

Based on these facts, the Court concluded that that the "extreme facts" of this case rebutted the presumption of judicial impartiality and established a due process violation.[23]

Concurrence and Dissent

Of importance to judges and attorneys navigating social media waters, Justice Annette Ziegler's concurrence cautioned the Wisconsin bench about the "hazards of electronic social media, and Facebook in particular. I caution judges to avoid using social media such as Facebook unless significant safeguards are in place to avoid a situation like that present here. If a judge chooses to participate in social media, then additional – not fewer – precautions must be taken."[24]

Justice Ziegler also noted that the case involved a judge's choice to create a Facebook account and to affirmatively "accept and maintain a Facebook friendship with a litigant, during a pending proceeding, giving that litigant the opportunity to communicate with the judge, and without any safeguards to ensure the integrity of the pending proceeding."[25]

Justice Ziegler additionally noted that the judge personally created, maintained, managed, and monitored his Facebook account.[26] She noted that a judicial campaign account is monitored by the *campaign* and not necessarily in existence beyond the campaign.[27] She noted a concern about access of one party to the Court on relevant issues, during the decision making process, and with the judge, not a jury, as the sole decision-maker.[28]

Justice Ziegler noted that a judge who uses electronic social media "subjects himself or herself to the risk of misuse of a social media relationship by a third party," and that, no matter how cautious and attentive, a judge who uses electronic social media may "expose both the judge and the judiciary as a whole to an appearance of bias or impropriety."[29]

Therefore, Justice Ziegler urged judicial officers to weigh the advantages and disadvantages of electronic social media.[30] Justice Ziegler's concurrence was, in part, to caution the bench about the hazards of electronic social media, and Facebook especially, unless safeguards are in place.[31]

Another concurrence, written by Justice Rebecca Dallet, indicates that there is "nothing inherently inappropriate about a judge's use of social media platforms like Facebook." To put it succinctly, judges must be cautious and smart about using Facebook. She writes that a Facebook connection to a party or a lawyer, without more, does not rebut the presumption of impartiality. However, she writes, as with real life friendships, social media friendships must be approached with care and caution.[32]

The dissent, written by Justice Brian Hagedorn, does not focus on social media itself, but says that "[e]very member of this court would agree that [the judge] should have been more careful. Knowingly or not, accepting a Facebook friend request from a party while a case is pending raises an appearance of bias that judges should strive to avoid." However, he noted that the "very concept of an impartial judiciary depends on the belief that judges can manage through their biases, news feeds, political supporters, former co-workers, and neighbors to render decisions without fear or favor to any party."[33]

The Judiciary and Social Media

The citations above of *Miller* focused largely on the views of the Wisconsin Supreme Court regarding the usage of social media. Based on the Supreme Court's decision regarding judicial use of social media, it is apparent that there is a divergence on how the Court views social media.

All the justices indicate a concern with the judge's caution and timing, some to a greater extent than others. The critiques of the lead Miller decision regarding the judicial use of social media have a pointed focus on the timing of the Facebook friendship, the judge's affirmative acceptance of the contact and relationship, context of mother's posts compared to the proceeding at hand (a custody and placement proceeding, with domestic violence arguments), volume and the likelihood of disclosure, and the lack of disclosure to the opposing party and counsel.

Justice Ziegler cautioned against the use of social media directly and specifically, unless there were safeguards. These safeguards, based on a reading of the concurrence as a whole, may be an outside account manager other than the judge him/herself.

Justice Dallet, in an opinion joined by Justice Hagedorn, indicated that a social media presence, in and of itself, is not inherently inappropriate, and that a Facebook connection to a party or a lawyer is not *per se* indicative of partiality.

Justice Hagedorn, in a dissent joined by Justice Daniel Kelly and Justice Rebecca Bradley, noted that judges are always subject to outside information, and are trusted to weigh them appropriately, but stated plainly that the judge should have been more careful.

The *Miller* decision itself strongly suggests that parties should not send friend requests to circuit court judges during pending litigation, and certainly that judges should not, during pending litigation, engage with litigants on social media, as it is *ex parte* communication.

Concerns and Conclusions

A concern with this opinion is regarding attorneys' contact with judicial officers, because the *ex parte* communication was broadly defined by the Supreme Court as a "'communication between counsel or a party and the court when opposing counsel or party is not present.'"[34] This statement was not limited as to the content of the communications itself, which could lead some judges to assume that social media connections, when attorneys have cases before a circuit court judge, is prohibited *ex parte* communication.

From the majority opinion in this case, judges and attorneys can draw several conclusions.

First, clients should not send friend requests to circuit court judges. This should not be surprising, but may be attempted by uninformed clients. Clients should not tweet at judges and should resist all desires to communicate with circuit court judges.

Second, if a judge receives a contact, tweet, or other social media connection, a disclosure to opposing counsel was looked upon with favor by the Court, with its favorable discussion of how a Texas judge handled a contact from an existing Facebook friend (a litigant's father) through disclosure and follow through with the judicial commission.[35]

Third, if the content of the Facebook activity is relevant to the Supreme Court's determination of propriety, it also applies to attorneys as well as clients. Attorneys with judges as social media contacts should refrain from posting case relevant information when the judge is a social media connection.

The *Miller* decision demonstrates that there is a split on how the Supreme Court justices view social media connections, and that a case with less extreme facts may not have triggered the Court's reversal of the circuit court's decision.

However, attorneys should counsel clients as to social media use with judicial officers. The decision also suggests that judges should exercise extreme caution with their social media connections with litigants, and when in doubt, err on the side of disclosure.

Endnotes

1 *See* "15 Moments That Defined Facebook's First 15 Years," Feb. 4, 2019, wired.com/story/facebook-15-defining-moments.

2 *Miller v. Carroll*, 2020 WI 56, filed June 16, 2020.

3 Based on personal experience, this author does not believe anything can be entirely deleted from Facebook.

4 *See* help.pinterest.com.

5 *See* whatis.snapchat.com.

6 *See* New User FAQ, help.twitter.com.

7 *See* About Us, about.nextdoor.com.

8 *See* About LinkedIn, about.linkedin.com.

9 *See* Army Follows Pentagon Guidance, Bans Chinese-Owned TikTok App, Dec. 30, 2019, military.com/daily-news/2019/12/30/army-follows-pentagon-guidance-bans-chinese-owned-tiktok-app.html

10 *Miller* ¶ 1.

11 *Id.* ¶ 26.

12 *Id.* ¶ 3.

13 *Id.* ¶ 5.

14 *Id.* ¶ 20 (citation omitted).

15 *Id.* ¶ 25.

16 *Id.* ¶ 27.

17 *Id.* ¶ 28.

18 *Id.* ¶ 29.

19 *Id.* ¶¶ 30-32.

20 *Id.* ¶ 33.

21 *Id.* ¶ 34, n. 22 (citing *Black's Law Dictionary*, 2014).

22 *Id.* ¶ 34, n. 22.

23 *Id.* ¶ 36.

24 *Id.* ¶ 67 (J. Ziegler, concurring).

25 *Id.* ¶ 72 (J. Ziegler, concurring).

26 *Id.*

27 *Id.* ¶ 73, n. 3 (J. Ziegler, concurring).

28 *Id.* ¶¶ 74, 77 (J. Ziegler, concurring).

29 *Id.* ¶ 94 (J. Ziegler, concurring).

30 *Id.* ¶ 95 (J. Ziegler, concurring).

31 *Id.* ¶ 98 (J. Ziegler, concurring).

32 *Id.* ¶¶ 100-102 (J. Dallet, concurring).

33 *Id.*¶ 123-124 (J. Hagedorn, dissenting).

34 *Id.* ¶ 34, n. 22 (citing *Black's Law Dictionary*, 2014).

35 *Id.* ¶ 33.

About the Author

Jennifer Van Kirk, U.W. 2002, is with Peckerman, Klein & Van Kirk LLP, Milwaukee. She can be reached at jvk@pkvlaw.com.

On Setting Maintenance

At the end of July 2020, Dodge County Circuit Court Judge Steven Bauer retired after 12 years on the bench. On his last day, he forwarded to his colleagues on the Wisconsin bench two articles for us to peruse – one on criminal sentencing and one on setting maintenance in a family law case. They contain reflections on sorting through those two challenging, but very distinct, judicial processes. This one is his maintenance piece. Thank you, Judge Bauer, for your service to the legal community and for sharing your insights on maintenance. – Ed.

A Judge's Reflection on the Fairness Objective of a Maintenance Award

By Hon. Steven G. Bauer

One of the first mistakes I made as new circuit court judge was issuing a decision from the bench awarding maintenance.[1]

I was trained to consider the statutory factors in light of the two objectives of support and fairness.[2] I studied the parties' budgets. I dutifully discussed each factor.[3] And then the two objectives coalesced in my brain, and out of my mouth shot a monthly maintenance award and the period of duration for the award.

Magic, I thought.

But then, after returning to my chambers, second thoughts kicked in. By the next day, I was pretty sure I had made a mistake. I knew I had not made a legal mistake. However, I was quite sure that I had erred substantively.

I reread the leading cases on maintenance and could find little on which to evaluate the substantive decision. I really couldn't tell if my substantive decision was wrong. I had explained my decision using the statutory factors and the facts before me and therefore my decision was not "unreasonable," therefore it was legally sound.

Shortly after that day, I reread and thought about maintenance in an attempt to more competently make the substantive maintenance decision.

Support Objective of Maintenance

The support objective is relatively straightforward. The circuit court should consider maintenance to support the recipient spouse in accordance with the needs and earning capacities of the parties.

In *LaRocque v. LaRocque,* the court must "consider the feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage and the length of time necessary to achieve this goal if the goal is feasible." The court went on to note that "[i]n other words, the goal of maintenance is to provide support at pre-divorce standards, and this goal may require that the recipient spouse be awarded maintenance above bare subsistence needs."[4]

Basic budgeting principles can be used to calculate a party's projected (or imputed) income and expenses to determine whether or not their financial needs will be met after the marriage.

If a spouse requires maintenance to support themselves, when is an award of maintenance fair? This article attempts to address this issue.

The Fairness Objective of Maintenance

The fairness objective of a maintenance award is conceptually more difficult than the support calculation. What does it mean "to ensure a fair and equitable financial agreement between the parties"?[5]

After all the efforts of the marriage are cashed out and all the assets and debts of the marriage are divided equally, why should anyone receive maintenance from a former spouse upon a divorce? Why shouldn't divorcing spouses just divorce, divide up their marbles, and each walk their separate way? Why would requiring one ex-spouse to support another ex-spouse ever be fair? Doesn't the responsibilities of one spouse to the other end at divorce? If not, wouldn't maintenance slide into involuntary servitude?

Carlton Stansbury recently discussed the difficulty of formulating a maintenance award.[6] He also touched on cases and factors he believed to be more salient than any "rule of thumb" in formulating a maintenance award. They include the contributions and sacrifices of the parties to the marriage.

The Wisconsin Supreme Court opined that some of the factors a trial court needs to consider are specifically related to the fairness objective. That is, they are meant to "compensate the recipient spouse for contributions made to the marriage, give effect to the parties' financial arrangements, or prevent unjust enrichment of either party. ..."[7]

The Court noted that "[w]here a spouse has subordinated his or her education or career to devote time and energy to the welfare, career or education of the other spouse or to managing the affairs of the marital partnership, maintenance may be used to compensate this spouse for these nonmonetary contributions to the marriage."[8] These factors strike at the heart of the fairness objective in a substantive maintenance decision.

Although a separate common-law unjust enrichment claim cannot be made within a divorce case,[9] the equitable principals behind the doctrine of unjust enrichment can guide the fairness objective in a substantive maintenance decision.[10]

Unjust Enrichment

The equitable doctrine of unjust enrichment arises when a benefit is conferred by one party on a second party, the second party appreciated the benefit, and, under the circumstances, the acceptance and retention by the second party of that benefit without payment of its value to the first party, would be inequitable.[11]

The first party has to make restitution to the second party to even up the relationship, or in other words, to be fair to the parties.

The fairness objective of a maintenance award comes into play when benefits and/or costs of a marriage continue to accrue to parties unequally after divorce. If after the property division in a divorce, one party will still retain a larger share of any unliquidated, continuing benefits or costs of the marriage, then a maintenance award may be required so one party is not unjustly enriched to the detriment of the other party.

Homemaker Spouse Maintenance

What are these continuing benefits and costs? The fact pattern of many of the older maintenance cases involve a wife who worked in the home, raised the parties' children, and subordinated her career, while, with the assistance of the wife, the husband developed his career becoming the principal breadwinner. (For clarity purposes, from this point on I will use Spouse A to identify the spouse who may have a claim for maintenance from the other spouse, who will be designated Spouse B. I will use female pronouns for Spouse A and male pronouns for Spouse B.)

Impaired Earning Capacity of Homemaker Spouse

The cost of raising children includes the direct cash cost provided by Spouse B and the market value of the in-kind child care and homemaking services provided by Spouse A. However, these costs may not be the only cost of raising the children.

If Spouse A could have earned more than what it would have cost to hire child care and homemaking services, then the cost of raising the children also includes an opportunity cost. This opportunity cost is the lost income to Spouse A, and is calculated, while children are being cared for, as the difference between Spouse A's income had she pursued and developed her

career outside the home, and the cost to hire outside child care and homemaking services.

For example, assume the market value of the child care and homemaking services is $25,000 per year. If Spouse A could have earned $35,000 per year, then the $10,000 difference between $35,000 and $25,000 is the opportunity cost of choosing to stay home with the children.

Even if Spouse A goes back to work after the children are grown, she likely will not be earning the same income she would have been earning had she not been out of the labor market. Spouse A's earnings potential is often permanently impaired. Therefore, the opportunity cost for raising the children may continue to accrue throughout the potential working years of Spouse A. This opportunity cost is calculated as the difference between Spouse A's earning capacity had she developed her career during the years she cared for children and Spouse A's actual earning capacity.

For example, if Spouse A earns $35,000 per year, but could have been earning $50,000 per year had she developed her career rather than raising the children, the unliquidated continuing opportunity cost is $15,000 per year ($50,000-$35,000).

If the parties stay married, this opportunity cost is shared equally by the parties along with the benefits of the children. Equity exists.

However at divorce, without a maintenance award, this continuing loss of income shifts solely to Spouse A. At divorce it would be inequitable (not fair), if Spouse B could retain the benefits of having capable children without compensating Spouse A for the continuing costs of raising the children reflected by her impaired earning capacity. Spouse B would retain the benefits of the children without compensating Spouse A for the cost she now bears, i.e., her loss of a developed career. Spouse A would have an equitable claim on some of the earnings of Spouse B.

This same equitable evaluation can be made if Spouse A subordinates a career for the career of Spouse B. Spouse A may have stayed home to care for the home, entertain business associates, or moved around the country to benefit the career of Spouse B to the detriment of the career of Spouse A. Again, at divorce, Spouse A may leave the marriage with a reduced earning capacity because she subordinated her career. She leaves the marriage with an unliquidated continuing cost.

A central question is whether or not Spouse A has subordinated her career for either the care of children, the household, or the career of Spouse B. If Spouse A had a promising career path that she gave up for a substantial number of years for the benefit of the children, household, or the other spouse's career, then she is leaving the marriage with an unliquidated continuing cost. She would have a significant equitable claim for maintenance. If the earning capacity of Spouse A was not appreciably impaired, the equitable claim for maintenance would be less.

Homemaker Spouse Enhances Income of Other Spouse

One must also ask if the efforts of Spouse A contributed to the current income of Spouse B. Assume Spouse A developed her career as she desired, but she also worked hard entertaining business guests of Spouse B, did extra child care and extra housework so Spouse B could develop his career, and did other tasks beyond normal housework to benefit the career of Spouse B. While married, the benefits from the parties' efforts to enhance the income of Spouse B's are captured by the marriage. Both parties benefit.

However, at divorce, without a maintenance award, Spouse B can leave the marriage with an income enhanced by Spouse A's efforts without compensation for the efforts by Spouse A. If Spouse A's efforts would have helped Spouse B build a business, she would have been entitled to one-half of the business.

Under these circumstances, what was built was a career rather than a business. If these circumstance existed, then Spouse A would have a direct claim on some of the earnings of Spouse B at divorce. Without the efforts of Spouse A, Spouse B wouldn't have the income he has. Spouse A has an equitable claim on the income of Spouse B. She is leaving the marriage without a share of the income flow from Spouse B after exerting extraordinary efforts during the marriage to enhance the income.

The amount of that claim is related to the amount of extra effort performed by Spouse A to enhance Spouse B's career, and therefore the income of Spouse B. The measure of this claim is either the value of the extra efforts by Spouse A to enhance the career of Spouse B, or the return these efforts had on enhancing Spouse B's career.

Examples

For example, assume Spouse A was highly educated, and if she had pursued her career, she would have been making $80,000 per year. However, she cared for the children, household, and her spouse's career for 20 years, and now her earning capacity is $40,000 per year. Her lost income due to subordinating her career is $40,000 per year. She clearly has a substantial equitable claim.

Further, her efforts helped her spouse's career, and he is now earning $100,000 per year. Under those

circumstance, it would not be unrealistic to use the equalization of income as the starting point in the calculation of a maintenance award, in this case about $30,000 per year.[12] Thus ($100,000 plus $40,000) divided by two = $70,000 income for each spouse.

This $30,000 maintenance award is comprised of Spouse B's share of the unliquidated continuing costs of the marriage reflected in Spouse B's income loss that she experienced because she subordinated her career, or $20,000 ($40,000 divided by two).[13]

The remaining $10,000 can be considered her share of Spouse A's income for her efforts at enhancing his career. She is not being overcompensated. Because the parties' combined incomes are being shared equally, the unliquidated continuing opportunity cost of raising the children and supporting Spouse B's career is also being shared equally, and Spouse A is receiving some compensation for her efforts at enhancing Spouse B's career.

Now assume Spouse A had a high school education, and if she pursued her career, she would have been earning $30,000 per year. However, she didn't pursue her career but raised the children and supported Spouse B's career and now her earning capacity is $24,000 per year. Her lost income due to subordinating her career is $6,000 per year. She has a modest, equitable claim of $3,000 ($6,000 divided by two). If her spouse was earning $100,000 per year, then a maintenance award that would equalize income would be about $38,000 per year. (($100,000 plus $24,000) divided by two = $62,000 income for each spouse.) This $38,000 is far greater than $3,000, Spouse A's share of Spouse B's lost income. If the value of Spouse B's efforts at enhancing Spouse A's career, or the returns from these efforts are $35,000 per year, then dividing the income may be fair. If not, then it would be unfair to divide the income equally, as Spouse A would be taking from Spouse B more than any unliquidated continuing cost to her or any direct claim on his income.

The court also has to consider whether the term of the maintenance should be limited, or if it should be open-ended. This determination will be directly related to the number of years that it will take Spouse A to get her income back to where it would have been, had she not subordinated her career, and the number of years it will take for Spouse A to be compensated for her efforts at enhancing Spouse B's career.

Of course, the court must consider the work incentives for both parties that are created by the maintenance award.

Student Spouse and Supporting Spouse Maintenance

Another fact pattern of older maintenance cases, involves a wife who works and pays to put her husband through school, and after he starts his promising career, they divorce.

The Wisconsin Supreme Court addressed the issue of student and supporting spouses in detail, including several approaches to valuing a supporting spouse's contribution to a student spouse's education, in *Haugan v. Haugan*.[14] The Court stated:

> "The guiding principles for the trial court are fairness and justice. Our legislature has created a progressive and flexible scheme for trial courts to compensate a supporting spouse; flexibility will maximize the fairness achieved in each case. Leaving the ultimate determination of the award and the manner of arriving at it to the trial court's discretion comports with the notion of flexibility inherent (in the statutes)."[15]

The Court in *Haugan* examined five different nonexclusive methods of providing that compensation. All of these formulas have some economic merit, but their economic descriptions are incomplete.

The cost of obtaining the education is comprised of the increased out-of-pocket expenses for such things like tuition, fees, transportation, and books. The cost also includes any lost income because the student spouse may forgo employment to attend school (the opportunity cost of the education).

The student spouse may also depend more heavily on the supporting spouse to perform homemaking duties, or may not be available to provide as much companionship to the other spouse. If the couple remains married, the costs and the benefits of the education both accrue to the family entity. Equity is achieved.

The benefits of an education may include an increase in earning capacity of the student spouse and the intangibles of an education, such as a more cultured, and perhaps richer, life. If the couple remains married, the benefits of these increased capabilities flow to the student spouse as well as to the supporting spouse and any children. The benefits accrue to the family entity. Equity is achieved.

At divorce, the situation changes. The cultural benefits of the education remain with the student spouse and are also shared with the children (assuming placement is granted). Any financial benefit of increased income remains with the student spouse. The financial benefit is also shared with the children who remain at least partially part of the student spouse household.

The next question is what happens to the costs? If all of the out-of-pocket costs were paid during the marriage from the income of the supporting spouse, and the opportunity cost of the lost income of the student spouse was handled by less income and a more frugal lifestyle during the marriage (and extra household work by the supporting spouse), then the entire cost of the education was borne completely by the marriage. No debts related to the education remain to be divided. The marriage bore the entire costs of the education.

At divorce, the student spouse leaves with all the benefits of the education. If the supporting spouse does not obtain some recompense for her sacrifice, an inequity results. The benefits of the education is conferred by the supporting spouse to the student spouse who appreciated the benefit. The acceptance and retention by the student spouse of that benefit without payment of its value to the supporting spouse, would be inequitable, or again, not fair.

The fairness objection requires a maintenance award to the supporting spouse for reimbursement for the cost of the education of the student spouse for which the supporting spouse will not receive any benefit. If the supporting spouse paid for half of the education that will now benefit the student spouse, she should receive restitution for her share of the cost of the education.

This can be accomplished by diverting some of the income of the student spouse to the supporting spouse in the form of maintenance payments, or through an unequal property division, or a combination of both.[16] The benefit of the education to the student spouse can be viewed as an increase in the student spouse's stream of income as a result of the education, or if this stream of income is capitalized can be considered an asset of the school spouse to be divided with other assets. The benefits must not be counted twice.

Assume that the supporting spouse earns $50,000 per year after taxes and the student spouse earned $25,000 per year after taxes, then left that job and went to school for two years, and now earns $50,000 per year after taxes. Assume the out-of-pocket costs for school was $20,000 total. Under this scenario, the opportunity cost of the education was $50,000 in lost income ($25,000 X 2) plus $20,000 for direct costs of the education for a total of $70,000. Looking at it another way, if the student spouse would not have gone to school, the couple would have had an additional $70,000 to spend or save. Each spouse would have had $35,000 additional funds to spend or save over the two years of school.

If at divorce, the student spouse leaves with enhanced earnings and other benefits from the education, an inequity would result without an offset. The benefits will accrue solely to the student spouse, while the supporting spouse had paid for one-half of the education. A maintenance award totaling $35,000 would need to be made from the student spouse to the supporting spouse to restore the supporting spouse to the same position she would have been if the student spouse would have not gone to school. The supporting spouse may have an additional claim for the extra household work she may have done while the student spouse was in school.

In another situation, if the parties financed the entire out-of-pocket expenses of the education, borrowed money to cover the lost income of the student spouse, and maintained their lifestyle, including the division of household work as it was before the one spouse started school, and then upon receiving the education the parties divorced, the costs would divide differently. In this scenario, none of the costs were borne by the parties during the marriage. All of the costs were transferred to the future via debt. If the parties divorce, any enhanced earnings and other benefits of the education again solely accrue to the party with the education. However, under this scenario the student spouse should be assigned responsibility for most, if not all of the debt, which is the cost of the education.

Using our example above, the supporting spouse continues to work for $50,000 per year, but now over the two year education, the parties borrowed $50,000 to make up for the lost income and $20,000 for the out-of-pocket expenses. At divorce, the couple has loans of $70,000, or $35,000 per person. Under this example, it may be fair to require the student spouse to assume the full debt of $70,000, because he would also be taking with him the benefits of the education.

One needs to ascertain the benefits of the education. As mentioned above, some of the benefits of the education may be intangibles, such as a fuller and more meaningful life derived from the education. However, the more salient benefit is usually the increased earning capacity resulting from the education. In today's economy, it is not uncommon that the student spouse does not realize any substantial increase in income. Sometimes the student spouse is unable to get a position in the field she trained in, or gets the position with an income that is not greatly enhanced.

How does one address the scenario where income is not enhanced? The investment in the education may not be a good investment. The investment may be a losing investment. As discussed above, either the marriage has borne the entire cost of the education, or the cost was financed and a student debt remains. At divorce, the only benefit that continues to accrue are the intangible benefits that do not provide support for

either spouse. If the decision to have one spouse obtain an education was a marital decision, and this decision does not result in enhanced earnings for the student spouse, shouldn't both parties now be responsible for most of the student debt, as they would be if they had made any other poor investment?

The above examples assume that all the education was obtained during the marriage, and that the marriage ends when the education ends. Therefore, no benefits from the education accrue to either party during the marriage. However, a divorce may not occur at the same time the student spouse finishes school. Sometimes, the student spouse obtains the education during the marriage, and both parties benefit from the enhanced earnings from the education during the marriage. The question then becomes how has the cost of the education tracked with the benefits of the education? What amount of the costs of the education borne by the marriage have been recovered by increased income during the marriage? What amount of the debt associated with the education has been paid during the marriage and while the marriage benefited from the increased income from the education? These are all questions that need to be factored into the fairness component of any maintenance award.

Attending school during the marriage may involve a combination of self-financing and debt. How the marriage has financed the costs of the education have to ferreted out. The benefits of any enhanced earnings due to the education have to be ascertained, as well as whether or not the marriage has already recovered the costs of the education because these enhanced earnings have already been occurring during the marriage.

The above analysis deals with the fairness component. Increases in education can also impact the support objective. A more educated person may now be able to support themselves, whereas before the education they may not have had that ability. If the fairness objective would mean that all the student debt is assigned to the student spouse, the student spouse's ability to support themselves may be impaired. If the increase in income resulting from the education obviated the need for maintenance from the supporting spouse because the student spouse can now support herself, then a more equal division of the student debt should be made.

For example, assume the supporting spouse was making $50,000 per year after taxes, and the student spouse was making $25,000 after taxes. The cost of the education was $100,000 and was completely financed through debt. After the education, the parties divorce and the student spouse is now making $50,000 per year after taxes.

At divorce, both spouses are earning $50,000 per year. However, if the student spouse is assigned the entire debt for the education because he is leaving with benefits of the education, then his cash available for living is considerable less than $50,000 because he is responsible for the debt service on the $50,000 student debt. If we assume the yearly interest and principal payment on the student debt is $15,000 then the student spouse will have $35,000 of cash available for living. This may or may not be sufficient to meet the support objective of maintenance.

If the parties have children and equally share placement, because they have the same income, no child support will be paid. Assume that the marginal cost of raising the children is $16,000 per year. If the student spouse is assigned all the student debt, then the student spouse will have $19,000 of cash available for his living expenses. ($50,000 - $15,000 - $16,000) while the nonstudent spouse will have $34,000 of cash available for her living expenses. This division of income may not be sufficient to meet the support objective of maintenance.

Maintenance to Effectuate Special Characteristics of a Marriage

Sometimes the parties have no unjust enrichment claim on the other's income as discussed above. In such a case, if one party needs support, should maintenance be denied because of the lack of an unjust enrichment claim to support the fairness objective for a maintenance award?

I believe another reason exists to support the fairness objective of a maintenance award – to recognize and effectuate a difference between a purely private contractual agreement of cohabitating individuals and the civil (and often spiritual) contract of a marriage. At the end of a period of cohabitation, the parties divide their property based on property law and possibly partnership and unjust enrichment law, and go their separate ways. They both leave with their own incomes. No residual obligation to each other exists after the property is divided.

The law grants more rights and imposes more responsibilities on married partners than on those who merely cohabitate. Our society, through the law, recognizes that marriage creates a new (and at least secularly) revered entity beyond the individual, and a series of moral obligations on part of one spouse to the other spouse that cannot be ignored without ignoring the difference between a marriage and cohabitation. One such obligation is a support obligation during the marriage that can extend after divorce via a maintenance award.

If one party requires maintenance from the other party for support independent of any mismatch of continuing benefits and costs as discussed above, a maintenance award may still be fair, to recognize the difference between a marriage and cohabitation by continuing to honor the obligation of mutual support of the marriage. A limited-term maintenance award may be justified as reorientation support as the party's transition from a married couple to two single people.

The length of the reorientation period is probably proportional to the length of the marriage, in recognition of what the marriage had once been and the loss the divorce has established (in spite of the fact that the ending may be unpleasant). The marriage legally ends at the date of the divorce, but with a limited maintenance award it has a fuzzy ending as it practically fades away with a limited maintenance award.

Conclusion: A Judge's Most Difficult Decisions

A judge's decision regarding maintenance and sentencing a defendant are the two most difficult decisions a judge makes.

The law grants the judge great discretion in both of these decisions. Because a reviewing court will not be able to correct a substantive decision easily, it is imperative that the circuit court judge makes a well-reasoned, substantive decision that fully incorporates both the fairness and support objectives of the law. These decisions are often complex, fact specific decisions, and need to be thought through carefully.

Hopefully this article has identified some of the salient factors related to the fairness objective of a maintenance decision.

Endnotes

1 I now almost always write these decisions to allow for thought and reflection.

2 *See LaRocque v. LaRocque*, 139 Wis. 2d 23, 33 (1987).

3 Wis. Stat. § 767.56.

4 *LaRocque v. LaRocque*, 139 Wis.2d 23, 35 (1987).

5 *LaRocque* at 33.

6 *See* Carlton D. Stansbury, "On Reaching an Equitable Maintenance Result: The Case Against Rules of Thumb," *Wisconsin Journal of Family Law*, September 2019, p. 65.

7 *LaRocque* at 33.

8 *LaRocque* at 37.

9 *Dahlke v. Dahlke*, 258 Wis. 2d 764, 776 (2002).

10 *Dahlke* at 775

11 Wis. JI-Civil 3028.

12 *See LaRocque* at 39 (discussing equalization of income under certain circumstances).

13 The equalization of income is just the starting point. The statutory factors need to be followed. *See Bisone v. Bisone*, 165 Wis.2d 114, 120 n.3, 477 N.W.2d 59, 61 (Ct. App. 1991).

14 *Haugan v. Haugan*, 117 Wis. 2d 200, 214-15 (1984).

15 *Id.*

16 *Haugan* at 210.

About the Author

Judge Steven G. Bauer, U.W. 1992, retired in July 2020 after 12 years on the bench in Dodge County Circuit Court. He can be reached via the editor, Judge Thomas Walsh, at Thomas.Walsh@wicourts.gov.

Pulkkila Highlights Enforcement Language in Marital Settlement Agreements

By Katherine Charlton and Amy Shapiro

An important aspect of any Marital Settlement Agreement (MSA) is not just the terms to which the parties agree, but how those terms can be enforced.

Many times, when we finish a case after arduous negotiations, we look to complete it as quickly as possible, so the parties can obtain court approval of the MSA, get divorced, and move on.

However, in drafting an agreement, parties and their attorneys often pay less attention to the provisions that include *how* the terms of the MSA will be enforced, if one of the parties does not follow its terms.

We learn to be more careful in drafting clear language around issues, such as variable expenses or placement, because most post-judgment matters

come to us as disputes about such things. We see less frequently issues that arise after a parent dies, because family court loses jurisdiction.

Yet our provisions on life insurance do live on, and can be extremely consequential to a parent who no longer has child support available to pay for the continuing costs of the children at the death of a payor.

An Important Reminder

A recent Wisconsin Supreme Court decision in *Pulkkila v. Pulkkila*[1] reminds us of the importance of those provisions when it interpreted a section of the agreement regarding life insurance coverage.

An important takeaway is that your legal expertise in representing parties in divorces is still needed even after you help parties reach an agreement – be sure to pay attention to the enforcement provisions in their marital settlement agreement.

For example: What happens if a parent dies after listing a new spouse, instead of the minor children, as beneficiary of their life insurance policy in violation of the written agreement?

MSAs frequently include life insurance sections that require parents to name their minor children (or a trust for the benefit of their minor children) as the beneficiaries of life insurance policies as long as the children are minors – or even longer.

The purpose is to serve as income replacement to cover the child support and additional ongoing living expenses for the children, who are now living only with one parent, as well as replacing the deceased parent's contributions to medical premiums for health insurance coverage for the children, unreimbursed medical expenses for the children and "variable expenses" such as day care and extracurricular activities.

Problems can arise if the parent who was to name the children as beneficiaries remarries and names the new spouse and/or subsequent children as the beneficiaries. Usually, MSA terms include provisions concerning what options the nonbreaching parent has in those circumstances to enforce or be made whole despite this violation.

On April 14, 2020, the Wisconsin Supreme Court addressed these issues in *Pulkkila*.

Background: *Pulkkila*

James and Joan Pulkkila divorced in 2009. Their MSA required each of them to maintain their existing life insurance policy or replace them with a comparable policy, and to name their minor children as the beneficiaries of the policy as long as they were minors. Subsequently, in 2013, James married Lynnea, and named her as the sole beneficiary of a life insurance policy he purchased before the divorce with a death benefit of $250,000. James died in 2015 (during the period the court order required the children to be beneficiaries), and the life insurance company paid the $250,000 death benefit to Lynnea, the named beneficiary.

James and Joan's MSA provided that, if a party failed to comply with the life insurance provisions, the surviving party could enforce a lien interest against the deceased party's estate. Unfortunately, James' estate in probate was worth only $5,600 independent of the life insurance proceeds. A lien does not reach other assets that may pass to a beneficiary by other means. Those other means include designating a beneficiary on a retirement account, or naming another on a deed as a joint tenant with rights of survivorship where the property automatically passes to the other party on the deed at death. A lien only reaches assets that are part of a probate.

Joan filed a motion asking the court to order that Lynnea return the $250,000 she received as life insurance proceeds, and asking the court to take control over the $250,000 by creating a "constructive trust" that would allow the court to determine to whom the proceeds be distributed, presumably James' minor children. A constructive trust is created by the courts outside any formal statute, but tries to bring equity or fairness to a situation and create remedies that try to reach the intent of a law or agreement, and not allow one party to be "unjustly enriched" by the application of a law or agreement.

In *Pulkkila*, the trial court denied Joan's request for a "constructive trust," saying the articulated remedy in the document of filing of a lien against James' estate was her *only* recourse, because that is the remedy to which she and James agreed. In essence, this meant that James' children would only get $5,600, not the $250,000 the MSA intended. The court of appeals rejected the circuit court judge's decision and imposed a "constructive trust" on the insurance proceeds. Lynnea appealed to the Wisconsin Supreme Court.

The Supreme Court ruled that filing a lien was not Joan's exclusive remedy, stating that, while the children could use that remedy, there were other equitable remedies available as well. Then the Court directed the trial court judge to hold a hearing on whether it was appropriate to impose a "constructive trust" as a remedy, sending it back to the trial court for a hearing.

The Supreme Court first looked at whether the MSA was a judgment or a contract, something that the dissent devoted pages of analysis to. The dissent cited

myriad cases that the agreement should be interpreted as a contract, and that this meant the articulated remedy could be the only remedy, as the document did not list any others. The majority opinion gave that analysis short shrift. It held that regardless of whether to call it a judgment, given that it was incorporated into the judgement of divorce, or a contract, since it did not articulate it as the sole remedy, it did not matter. The court's decision to allow a constructive trust did not conflict with the language of the agreement.

Ensuring that the parties' intent for life insurance provisions to be enforced and that proceeds are paid to the person named under the MSA has many seemingly unsolvable situations. The Supreme Court's *Pulkkila* decision is only the beginning of this journey for these parties, as they now have to go back to the trial court to determine if a constructive trust is appropriate and available, and participate in more expensive court hearings to determine the facts and remedies. Lynnea may have already spent the proceeds from the life insurance by the time the court hears the case, effectively making this a situation with no remedy if the $250,000 is no longer available to be put in trust.

The challenges the *Pulkkila* trial court faces illustrate the importance of matching intent with implementing language in the MSA.

Recommendations

What should parties and attorneys do in light of the *Pulkkila* decision? As attorneys draft these agreements, there are many possible options.

First, if the parties in fact intended to make the lien the exclusive remedy as a bargained provision of the agreement, **create more specific and clear language** in the MSA.

Second, **expressly provide for a broader remedy** than a lien. Put in language to create a constructive trust on all assets that are owned by the deceased at the time of death.

As stated earlier, a lien can help the parties reach assets that go through probate, but many assets do not get distributed in that way, so the lien may be ineffectual. In addition to deeds and beneficiary designations on retirement accounts, a person may create a paid on death (POD) account, which passes automatically at the time of death.

Many estate planners do all they can to have their clients avoid dying with a probate estate, so this problem in *Pulkkila* is not unusual. An MSA could include a provision to reach all assets however they pass, to ensure that the money owed to the children is paid from any and all assets owned by the deceased at death, in the event there is a violation of the life insurance provisions.

Third, attorneys can send the **MSA to the life insurance company**, if the parties agree to a specific policy being designated for this purpose of protecting future support obligations, so the life insurance company is on notice that there is a claim by the first family.

Fourth, the **actual transfer of the policy to the other party as part of the division of assets is an option** if it is a private insurance policy that is designated to protect the children in the future, rather than insurance through employment.

However, this could result in many complications and additional concerns. Issues could then arise about payment of premiums – the MSA could set up an arrangement so the cost is paid as an addition to child support through a wage assignment. Issues may also arise about transferring the policy back to the owner of the policy after the children are no longer minors, if the parties so intend.

Lastly, **other options** include bringing the life insurance company in as a party to the divorce, so the court can order it to not distribute proceeds other than to the designated party in the divorce decree, or requiring the insured to write a letter to the company indicating it wishes there be no change to the policy without the other party's permission.

Saving Time and Cost

There is clearly value in identifying one of these enforcement mechanisms when drafting an MSA so parties can avoid the time and cost associated with litigating the issue raised in *Pulkkila*.

Endnote

1 *Pulkkila v. Pulkkila*, 2020 WI 34, 2018AP712-FT (2020)

About the Authors

Katherine Charlton, Vermont 1983, is with Hawks Quindel S.C., in Milwaukee. She can be reached at kcharlton@hq-law.com.

Amy Shapiro, Boston 1981, is with Hawks Quindel S.C., in Milwaukee. She can be reached at ashapiro@hq-law.com.

The Future of Voluntary Paternity Acknowledgments

By Katherine A. Neugent

For more than two decades, the Voluntary Paternity Acknowledgement (VPA) form has been used to establish paternity in Wisconsin. The enactment of the new administrative paternity in 2019 Wis. Act 95, under Wis. Stat. section 767.804, changes the landscape of establishing paternity.

This article examines Wisconsin's process of establishing and disestablishing paternity in cases involving a VPA and how the introduction of administrative paternity under Wis. Stat. section 767.804 will impact the VPA in the future.

A Hypothetical Situation

Bob and Mary have been dating for three years when Mary gives birth to a healthy baby boy. Mary has given Bob no reason to doubt that he is the biological father, and when presented with the Voluntary Paternity Acknowledgment in the hospital, Bob happily signs next to Mary, and he becomes the legal father of their son, Sam. The parties continue to live together with Sam as a family.

Five years later, Bob and Mary decide to separate. When Mary learns that Bob intends to pursue shared placement, she drops a bombshell and confesses that she had been seeing another man and Bob may not be Sam's biological father. Bob is devastated, and insists that they take a genetic test before either files a court action. They obtain a genetic test for $100 and the test excludes Bob as Sam's father.

Although Bob has a good relationship with Sam, he is crushed by the news that he isn't his biological father, and he doesn't want to pay child support for a child that is not his. He files a motion to disestablish paternity under Wis. Stat. section 767.805(5).

A Look at *State v. Cross*

In January 2020, the Wisconsin Court of Appeals issued a decision in the case of *State v. Cross*.[1] Although the case has not been published, and the court clearly stated that "its remand does not imply and should not be construed as implying any position regarding the ultimate decision,"[2] it calls attention to section 767.805(5) and the process of vacating a paternity determination initially established by a Voluntary Paternity Acknowledgment (VPA).

The mother (Cross) and the father (Shaffale) filed a signed VPA on March 24, 2017, three months after the child's birth. In September 2017, the state started a support action, naming Cross and Shaffale as co-respondents. On Jan. 31, 2018, the parties appeared before the trial court, and at that time, obtained and presented a private genetic test excluding Shaffale as the biological father. Shaffale did not exercise his right to request a genetic test prior to signing the VPA. He testified that he quickly signed the VPA to obtain insurance for the minor child, and based on the genetic test results, he now wanted to void his paternity acknowledgment. The state requested and the court appointed a guardian ad litem.[3]

The guardian ad litem initially indicated that, since the child was young and a relationship had not been established, it was in the child's best interest to locate the biological father. However, when the biological father refused to participate in testing, the guardian ad litem and the state asked the court to deny Shaffale's motion to void. The trial court denied Shaffale's request, indicating that "there was no evidence of fraud, duress, or mistake of fact and Shaffale was the best and only father."[4] The state indicated that removing Shaffale from the child's birth certificate was not in the child's best interest because it would leave the child fatherless.

The court of appeals found that an evidentiary hearing was necessary to determine whether there was fraud, duress, or mistake of fact, and that a sufficient evidentiary hearing had not occurred at the trial level. The court stated that there was insufficient evidence to support the trial court's decision not to void the determination. Finally, the court of appeals drew attention to section 767.805(5), highlighting that, although the motion or petition must set forth fraud, duress, or mistake of fact and the court must make a finding that the male is not the biological father, the "best interest" of the minor child is not considered in section 767.805(5) when voiding a determination of paternity based on a VPA.[5]

Voluntary Paternity Acknowledgment in Wisconsin

The VPA form has been used to establish paternity in Wisconsin since 1998. In April 1998, Wisconsin signed into law Wisconsin Act 191, which mandated that all birthing hospitals in the state participate in the VPA program. A signed, notarized, and filed VPA was given the same force and effect as paternity judgments

issued by the courts. The introduction of VPAs resulted in a dramatic increase in paternity determinations and therefore a reduction in fatherless children in Wisconsin. Prior to the VPA, paternity was only established by marital presumption or court action.[6]

Under the Federal Paternity Act, states individually address how a VPA is completed, when it can be rescinded, who can bring an action to challenge a VPA, how and when a genetic test is ordered, and the procedure and standard for relief from a VPA.[7]

Wisconsin's VPA includes a formal statement acknowledging that either party could request a genetic test prior to signing the form, and that the male acknowledging paternity is in fact the biological father of the child. When a VPA is filed, the father's name is added to the birth certificate, and legal paternity is established.

A genetic test is not required prior to signing and establishing paternity. Consequently, either or both parties can and occasionally do sign knowing or suspecting that the male acknowledging paternity is not the biological father. This may occur as a result of pressure, fear, or perhaps a desire to maintain a relationship.

What happens in Wisconsin when one or both of the parties has on-going doubts or changes their mind after signing a VPA? The statement may be rescinded by either signatory under Wis. Stat. section 69.15(3m) within 60 days and before the court enters orders involving the man who signed.

Under section 767.805(5), after 60 days, a paternity determination from a VPA may be voided at any time upon a motion or petition stating facts that show fraud, duress, or mistake of fact. If a court then finds that the male is not the biological father of the child, the court shall vacate any order entered under sub. (4), which includes custody, placement, child support, tax exemption, and repayment of birth expenses to the state. The court shall notify the state registrar to remove the male's name from the birth certificate, and no paternity action shall thereafter be filed against the same male.

Wisconsin and the majority of other states do not set a time limit on challenging a paternity determination from a VPA.[8] A petition to challenge or disestablish paternity could feasibly be filed any time after the 60 days and before the child's 18th birthday. There is no reference to age, the best interest of the child, or even the appointment of a guardian ad litem in section 767.805(5).

Consequently, regardless of the length or strength of the parental relationship with the child or the psychological impact that disestablishing paternity may have, the court in Wisconsin can void a legal determination of paternity based on a petition or motion showing fraud, duress, or mistake of fact and a finding that the male is not the father of the child.

Determining Fraud, Duress, or Mistake of Fact

What constitutes fraud, duress, or mistake of fact, and how does genetic testing play a role? Since section 767.805(5) is silent on these terms, we look at what the limited case law tells us.

In the Wisconsin published case of *T.W. v. Joni K.W.*,[9] the court of appeals found that, because the parties made no attempt to rescind the VPA and because Daniel, the legal father, was aware he was not the biological father at the time he signed the VPA, fraud was perpetrated by Daniel and not against Daniel. Therefore, the court did not find that the requirement of fraud, duress, or mistake of fact was met in Daniel's petition seeking relief, and there were no grounds to void the VPA. The court of appeals affirmed the trial court's decision to dismiss the action, despite the fact that Daniel was not the biological father.

This suggests that a genetic test excluding the male may not result in a disestablishment of paternity if the male was aware that he was not the father at the time he signed the VPA.

In *Cross*, the father, Shantelle, signed the VPA quickly because "he was in a hurry to get insurance coverage for the child and his employer required a signed birth certificate for the child"[10] He did not seek a genetic test prior to signing. The court found that not enough evidence had been established to dismiss Shantelle's motion to void the VPA, and reversed and remanded with directions. Shantelle said "no" when the trial court asked whether anyone made him promises, threatened him, or forced him to sign the VPA. It is unclear whether he knew that Cross had sexual relations with another man during the conceptive period, because the trial court failed to question him about his awareness.

The court might find it reasonable to disestablish paternity in a case where the male was led to believe either through fraud committed by the mother or mistake of fact as a result of mother's omission that he was the only possible biological father and a genetic test was not believed to be necessary prior to signing the VPA.

Clarification Needed

If the VPA form indicates parties recognizes that they have the right to obtain a genetic test prior to signing, and they without a genetic test, do they effectively give

up their right to use a genetic test result as the basis for motioning to void the VPA later? In other states, the form itself indicates that the signor is "giving up their right to a genetic test." Several other states include a best interest hearing in the process of vacating a VPA.[11]

Should the legislature amend section 767.805(5) to include a best interest standard? When a marital presumption of paternity is challenged in Wisconsin under Wis. Stat. section 767.863(1m), a guardian ad litem is appointed immediately and a best interest determination is made prior to the court ordering genetic tests.

In the Wisconsin published case of *Stuart S. v Heidi R.*,[12] Scott and Heidi were married when the child was born, and Scott was presumed to be the legal father. Another man, Stuart, later filed a motion asserting he was the biological father, and that in Heidi and Scott R.'s divorce, the marital presumption should be overcome and Stuart should be named the father.

The trial court appointed a guardian ad litem, who recommended dismissing Stuart's action, because it was not in the best interest of the child to overcome the marital presumption. Stuart had obtained a genetic test on his own showing that he was the biological father, and argued that, since he already obtained the genetic test results, the court could not dismiss his action.[13]

The court of appeals found that the "circuit court never had the opportunity to determine before the genetic tests were performed whether a judicial determination that Stuart is A.R.R.'s father would be in her best interest," going on to say that "we do not believe the legislature, in enacting section 767.863(1m), intended to allow parties to circumvent a court's authority to dismiss paternity actions at the initial stage of the proceeding based on the child's best interest by preemptively obtaining genetic testing without court approval."[14]

In the earlier hypothetical situation, Bob could motion the court to void the VPA and remove all of his rights and responsibilities as Sam's legal father. Based on the facts and section 767.805(5), it is reasonable to anticipate that the court would find that Bob had effectively illustrated fraud or mistake of fact. Since genetic tests proved that he was not the biological father, the court could feasibly proceed with disestablishing paternity, regardless of what is in Sam's best interest or the impact it will have on his life.

The Future of the VPA

With genetic tests being inexpensive and easily obtainable, and with the absence of a best interest examination in section 767.805(5), are we at risk of seeing a steady increase in successful motions to void paternities established by VPAs?

Could we eliminate the need for motions to disestablish paternity determinations by requiring a genetic test prior to completing and filing a VPA? If a genetic test was required prior to submitting a VPA, would it eliminate the need for VPAs all together?

2019 Wisconsin Act 95 expanded the definition of parent under Wis. Stat. section 767.803 to include "a person conclusively determined from genetic test results to be the father under 767.804." Wis. Stat. section 767.804 states that, if genetic tests are performed, the test results constitute a conclusive determination of paternity effective on the date on which the report (genetic test) is submitted to the state registrar by the child support agency.

This has the same effect as a judgment of paternity, and is referred to as administrative paternity, giving Wisconsin a fourth means of establishing paternity. If a genetic test were required prior to signing a VPA, the results could be filed with the state registrar under section767.804, and the outcome of a conclusive paternity determination would be the same as if they had signed a VPA.

VPA vs. Genetic Tests

So, if both section 767.805 and section 767.804 are intended to increase paternity determinations while decreasing the hassle and need for court involvement, what advantage does the VPA route offer over the genetic test route?

Perhaps the advantages of the VPA route are short sighted, while the genetic test route has the greatest long-term benefit to both parties and the minor child. The short-term benefit of the VPA might be the speed at which it can be signed and filed, the ability to avoid an uncomfortable conversation while focusing on a new baby, or perhaps the opportunity for the parties to proceed with their best intentions of assuming parental responsibilities regardless of biology.

The long-term risk of signing a VPA without a genetic test may very well outweigh the short-term benefit. The psychological harm to a child and/or a parent could be devastating if a motion is filed to void the establishment of paternity years later.

Even if the court dismisses the action and does not void the VPA, the process itself may significantly disrupt the parent-child relationship. A child may be left with a legal father who is angry and resentful that he is being forced to financially support a nonbiological child that he now finds difficult to love and parent. Even more significant is the child who feels betrayed, lost, and determined to find his or her biological father regardless of whether the court modifies the legal paternity.

If genetic tests were required prior to signing a VPA, the paternity determination would be biologically accurate, which could effectively eliminate the potential trauma associated with discovering that the legal father is not the biological father years later.

Alternatively, if a genetic test is not required prior to signing a VPA, perhaps Wisconsin's VPA form should be modified to include a "waiver of the signatory's right to a genetic test." This may reduce the number of motions that are filed to vacate the VPA after obtaining a private genetic test years later. This would not, however, address the child's need or desire to know the truth and have an opportunity to have a relationship with his or her biological father.

What about the Best Interest of the Child?

Finally, if Wisconsin continues to allow parties to sign VPAs without genetic tests, and continues to afford those same parties the opportunity to file actions to void paternity determinations at any time prior to their child's 18th birthday, then at the very least Wisconsin should consider the children who are impacted by section 767.805(5) motions, and require the appointment of a guardian ad litem and a best interest examination when making a ruling on whether to void a paternity determination established by a VPA.

The VPA as a means of establishing paternity may lose its vitality in the future, in light of readily available genetic testing, the implementation of administrative paternity under section 767.804, and unpredictability and inevitable harm created by the motions to vacate a VPA under section 767.805(5).

Endnotes

1 *State v. Cross*, 390 Wis. 2d 834, 2020 WI App 10 (Ct. App. Jan. 7, 2020).

2 *Id.* ¶ 36

3 *Id.*

4 *Id.* ¶ 16

5 *Id.*

6 Patricia R. Brown and Steven T. Cook, "A Decade of Voluntary Paternity Acknowledgement in Wisconsin 1997-2007," Institute for Research on Poverty at the University of Wisconsin-Madison, May 2008.

7 Paula Roberts, "Truth and Consequences: Part 1. Disestablishing the Paternity of Non-Marital Children," *Center for Law and Social Policy*, September 2003.

8 *Id.*

9 *In re the Marriage of Daniel T.W. v. Joni K.W.*, 2009 WI App 13.

10 *State v. Cross*, ¶ 28.

11 Caroline Rogus, "Fighting the Establishment: The Need for Procedural Reform of Our Paternity Laws," *Michigan Journal of Gender & Law*, 2014.

12 *Stuart S. v. Heidi R. (In re the Paternity of A.R.R.)*, 2015 WI App 19.

13 *Id.*

14 *Id.* ¶ 37.

About the Author

Kate A. Neugent, Marquette 2005, is with Burbach & Stansbury S.C., Milwaukee. She can be reached at kneugent@burbach-stansbury.com.

Welcome, New Board Member
Chris Olsen

Chris Olsen has been practicing law since 1988. In 1996, she started Olsen Law Office in Wausau, where her practice encompasses working with families to resolve disputes through divorce, custody, and post-divorce matters. She is frequently appointed guardian ad litem for children in high-conflict family law matters.

Chris has been active in several organizations in the community, including with the Marathon County Domestic Abuse Intervention Team, as president of the Birch Trails Girl Scout Council, with the Business and Professional Women Association, and is past president of the Marathon County Bar Association. She served as chair of the district ethics committee for the Wisconsin Supreme Court. Her work with the State Bar of Wisconsin includes serving on the Board of Governors and on various State Bar professional committees and divisions, including on the Family Law Section Board.

In her spare time, Chris enjoys sitting on the deck of her Door County property while enjoying a glass of wine and a good book as a perfect way to relax!

Interview with Comm. Peggy Miller

By Hon. Thomas Walsh

Judge Thomas Walsh speaks with Commissioner Peggy Miller about her experiences as a court commissioner for Oconto County Circuit Court. She has been a court commissioner for one year, and was a private practice family law attorney before that. She discusses her thoughts on placement, child support, and other issues she faces on a regular basis.

About Comm. Miller

- Undergraduate: Concordia University, 1995
- Law School: Marquette, 2000
- Years as Commissioner: One year (began 2019)

Questions and Answers

Did you work before going to law school? If so, what kind of work did you do?

My path to law school was long and winding. I was employed by an attorney as a secretary, and decided to take paralegal classes so I could understand why I was doing what I was doing. After five years of attending school part time – having three young children and working full time – I graduated with an associate degree.

After a stint as a caseworker in the Brown County Child Support Agency, I became a paralegal in a local law firm. Most of my work involved family law and administration of estates. I obtained my bachelor's degree in criminal justice at night while working as a paralegal.

After 10 years of working as a legal secretary, child support case worker, then paralegal, I decided to go to law school. I traveled from Green Bay to Marquette Law School every day for three years. During the summers in my 1L and 2L years, I worked for a large insurance company and a law firm. I also taught numerous paralegal courses in the same paralegal associate degree program I graduated from. Because of my work experience and the attorneys I worked with, I knew I wanted to practice in family law.

What type of law did you practice before you became a court commissioner?

I was lucky to be hired by the law firm of my choice before I graduated from law school. While many associates do a little bit of everything and I did as well, I was still able to focus primarily on family law and guardian ad litem work. As my practice evolved and other opportunities became possible, I incorporated mediation into my practice.

What does the phrase "regularly occurring, meaningful periods of placement with each party and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households" mean to you? What do you find that most parents who appear before you believe this phrase means?

Most parties are not aware of this phrase, or at least do not state it in the courtroom. They talk to other neighbors, co-workers, friends, and relatives, and are much more likely to say "I know someone that has exactly the same _____ and they got 50/50." Litigants don't take into account that every circumstance is different in some manner.

To me, the phrase means I need to make a case-by-case analysis that specifically takes into account the children's needs, age, education, activities, and relationships with each parent and others in the parent's home. Then I look at the parent's availability for the children, co-parenting, and special circumstances, such as alcohol, abuse, etc.

I do my best to maximize available time each parent has, even if that means short bursts of time every day, which in turn limits the parties cost outlay for day care. When both parents are active parents, it is my goal to minimize the impact of the parent's separation on the children as much as possible, while also taking into account their health and safety. This doesn't always mean equally shared placement.

What is your approach on determining temporary support issues?

As a commissioner, I use the same method to calculate temporary support as I did in private practice. At a temporary order hearing, I begin with the premise that the parties are still married. Thus, one half of every dollar each party makes is the other party's asset, and each debt (not household budgetary expenses) is one half the other party's debt. I begin at both party's net income, and begin subtracting debts for which each party is responsible. I do not typically calculate child support or maintenance. I then equalize the net remaining income, after payment of assigned debt.

The equalization payment may be called child support or maintenance, for Wisconsin Support Collections Trust Fund purposes. There are cases in which I deviate from this method, but this is my typical initial support calculation starting point. I do not impute income to a nonworking individual, because I calculate the temporary order support based on the income and debts that actually exist at the time of the temporary order hearing.

If a party has not been employed during the marriage, do you order a job search? Do you impute income? How do you address the income issue in that situation?

At a temporary order hearing, if the party is not or has not been working, I do not impute income. It is my belief that, at this stage, I can only work with what I have. If there is state aid involved, then the child support agency will require work searches for the party with less placement, absent a documented reason for not being employed. If there is no state aid, then I do not order work searches.

If the parties are pro se, then it would not be unusual for me to mention to an unemployed party that they may be imputed income for the final hearing if there is no known medical condition to stop them from working.

What is the ratio of cases assigned to you that are paternity actions versus divorce actions?

In 2019, there were 48 and to date in 2020 there are 69 paternity cases filed. For divorce cases, in 2019 there were 109 cases, and to date in 2020 there are 69 cases.

What is the ratio of cases assigned to you that involve one party acting pro se? Both parties acting pro se?

For paternity cases in 2019, 6% of the paternity cases filed had one party pro-se, and 91.6% cases filed had two parties pro-se. In 2020, 8.6% of the paternity cases filed have one party pro-se, and 87% of the cases both parties are pro se.

For divorce cases, in 2019, one party was pro se in 28% of the cases, and both parties were pro se in 43% of the cases. To date in 2020, one party is pro se in 10% of the cases, and both parties are pro se in 74% of the cases.

For post judgment matters filed in 2019, one party was pro se in 7% of the cases, and both parties were pro se in 85.7% of the filed actions. To date in 2020, one party was pro se in 16.6% of the cases, and both parties were pro se in 75% of the filed actions.

What statutes or concepts would you like changed in the area of family law?

I would like some type of notification on my dashboard when a party is receiving state aid. This would negate my need to contact our child support agency every time there is a child or children in the case.

Also, I would love to see a statute(s) regarding surrogacy. I've had surrogacy termination/adoption cases in which the parent adopting is from another country. While the adults agree to the termination/adoption, there is no statute that requires a guardian ad litem to be appointed. I'm concerned that there is no confirmed information as to the adopting parent's character and fitness as it relates to the best interests of the child. This process shouldn't be left to each county's discretion. It should be standardized within the state, so there are general expectations for all parties, including the court.

Chair's Column: Section Status During COVID-19

By James Carson W. Bock

It's my honor and privilege to serve as your 2020-21 Family Law Section chair. I first served on the board since substituting for a term completion in 2010-11, and continue to remain active since. Feel free to contact me directly if you have any questions on what the board does for your section.

Please know our board continues to meet regularly (and virtually), on an approximate quarterly basis, during this uncertain COVID-19 period. Our last meeting was on the morning of Thursday, Aug. 6, 2020, when we would traditionally have met in person at the Door County Workshop – though unfortunately we had to reschedule our favorite workshop.

Our upcoming Family Law Section Board meetings are:

- Fall meeting is Oct. 17, 2020, at 8:30 – 11:30 a.m., virtually
- Spring meeting is March 20, 2021, at 8:30 – 11:30 a.m., tentatively at the American Club, Kohler
- Summer meeting is June 11, 2021, tentatively at the Wilderness Resort, Wisconsin Dells
- The FY22 Door County Workshop board meeting is Aug. 5, 2021, at Stone Harbor Resort, Sturgeon Bay

Our next Door County Workshops are planned for Aug. 5-7, 2021, and Aug. 4-6, 2022.

All section members are welcome to attend our meetings. Our section board has many committees, with board and section members, and we are always looking for members to get involved and be active in our section.

In fact, absent the difficult times we are all experiencing with COVID-19 and other struggles our communities and the nation face, the Family Law Section stays vibrant and active in our community. The section remains financially healthy, even after having to suspend this year's Workshop, and we continue to regularly produce the *Wisconsin Journal of Family Law* (WJFL) to all section members, circuit court judges, and circuit court commissions in print format. I want to thank the Hon. Thomas Walsh for having sustained the WJFL, as well as all the contributors and authors published therein.

We want to hear your voice and learn of your experiences. We seek articles for the WJFL, as well as shorter writings for our section blog. Please contact me at james@jcwbesq.com and let me know your suggestions or topics you would like to write on, and we will coordinate with the WJFL editor and subcommittees to apply your energy.

The Family Law Section Board is here to serve you, our section. Please be and stay well.

About the Chair

James Carson W. Bock is the principal of JCWB ESQ, LLC, in Minneapolis. He can be reached at james@jcwbesq.com.

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Once you join, you have access to the lists archives as well.

Questions? Contact Jane Corkery, section coordinator, at jcorkery@wisbar.org.

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Hon. Thomas J. Walsh, Editor-in-Chief
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Individuals interested in joining the Family Law Section should contact the State Bar of Wisconsin at (608) 257-3838 or (800) 728-7788.