

FAMILY LAW

Vocational Rehabilitation Experts in Matrimonial Cases

TESTIMONY CAN HELP ESTIMATE A DIVORCING SPOUSE'S EARNING CAPACITY

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The vocational rehabilitation expert can be a useful tool in proving your client's or your opponent's earning capacity, or lack thereof. Vocational evaluations or assessments may be employed in divorce or postjudgment situations to assist in obtaining or modifying orders of alimony and child support where the actual earnings or earning capacity of a party is in dispute.

Vocational evaluation is a process in which a vocationally trained expert meets with an individual to gather information in order to evaluate that person's vocational potential. Through a combination of interviews, vocational testing, situational assessment, records review and resource survey, the evaluator can guide the individual toward (or away from) specific jobs, fields of interest or ability, vocational training, courses of study or placement. Likewise, the vocational expert can opine on the earning capacity of a person or whether the person is employed in a position which maximizes

their earning potential.

Vocational assessment is similar to vocational evaluation but is done without direct contact with the individual. The evaluator uses information about the person gathered from other sources, i.e., written discovery or depositions, when the individual is not available or uncooperative. Given enough information, a reasonable assessment can be made that can be presented in report form and court testimony.

Earning capacity assessment in general focuses on two principle sets of factors. Those factors that constitute the worker's vocational profile and those factors that are attributed to employers and the greater economy. Vocational questions in a divorce earning capacity assessment will also consider family responsibilities and other personal factors as they relate to the spouse's specific vocational profile. In other words, not only the common vocational factors such as age, health, level of education, work experience and physical abilities are assessed in divorce cases, but also other personal factors such as home care and care of minor children.

In cases where the claim is that one spouse is underemployed or is unemployed, a vocational evaluation can provide an estimate of the reasonable earning potential of that spouse. Earning capacity evaluations and assessments take into



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consideration not only factors specific to that spouse but also factors specific to the labor market as well.

For example, a spouse may have pursued a path of vocational development that does not maximize his or her earning potential. However, this does not mean the spouse is absent the requisite skills to realize a greater level of earning potential, just that the spouse has not chosen to pursue that path. These two streams

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of future income (expected earnings vs. earning capacity) may be very different, although the only foundation factor that may differ is the personal/family choices made. The vocational expert can be valuable in dissecting the vocational development of a spouse and making subsequent recommendations or suggesting a plan for greater levels of earnings to be realized. In practice, these opinions may translate into higher or lower support awards rather than relying on actual earnings.

Sometimes the issue of earning capacity is further confounded by the presence of a disability condition that limits full access to the labor market. An assessment should be made of the impact the disability has on not only the person's employability, but also placeability. A person may be employable based on their vocational characteristics, but the person may not be placeable; eligible for work but cannot obtain or secure that work.

Family Responsibilities

A common issue arises when a spouse has not worked full time or has not worked at all due to family responsibilities. The spouse may or may not have previously acquired work skills or had acquired work skills that have long since fallen out of date. Vocational intervention can assist in the development of a vocational rehabilitation training plan that will positively influence the spouse's future earning capacity and, possibly, the imputed income established by the judge. This is especially important when one spouse is unskilled or lacks recent employment experience. Without a plan to improve financial self-sufficiency, the spouse could be awarded indefinite alimony versus simple rehabilitative alimony.

Despite the lack of statutory authority to specifically permit the courts to order vocational rehabilitation evaluations or assessments, Connecticut statutes and regulations used in matrimonial matters clear the path for practitioners to request the

court's permission to engage vocational experts to assess certain factors in proving a spouse's earning capacity for purposes of establishing or modifying alimony and child-support orders.

For example, Connecticut General Statutes Section 46b-82 instructs the court to look at factors such as age, health, vocational skills and employability of the parties in determining an appropriate alimony award and duration. These are some of the same factors assessed by the vocational expert to determine a spouse's earning capacity. Also, C.G.S. Section 46b-84 provides that in determining the respective abilities of the parents to provide maintenance and the amount thereof (for a minor child), the court shall consider the age, health, earning capacity, vocational skills and employability of each of the parents. C.G.S. Section 46b-215a-3(b) specifically states that the "earning capacity" of a parent may be considered an appropriate reason to deviate from a presumptive child-support amount. Depending on which spouse you are representing, and whether you wish to establish the earning capacity of your client or your opponent, a vocational rehabilitation expert could prove valuable in achieving a higher child-support or alimony order or reducing a claim for lifetime alimony to only a short rehabilitative period of limited duration. In either case, expert testimony is essential to persuasively refute the self-serving testimony of a spouse who may be unemployed or underemployed.

An attorney looking to offer the testimony of a vocational expert must be prepared to jump the potential hurdles of admissibility if raised by a learned opponent. Ever since the U.S. Supreme Court decisions of *Daubert v. Merrell Dow Pharmaceuticals*, *General Electric v. Joiner* and *Carmichael v. Kumho Tire* regarding the admissibility of expert testimony, there has been a controversy among vocational experts regarding what is and is not an acceptable

methodology for assessment in vocational evaluation. Debate has existed over whether nonscientific as well as scientific methods are admissible, but the Supreme Court has been clear: the scientific method is the standard for vocational evaluation and vocational expert testimony.

Vocational evaluation as a profession falls within the purview of *Daubert* and subsequent rulings in that the profession includes scientific, technical and specialized knowledge. Tests, work samples and other measures vocational experts use in daily practice to measure individual abilities or capabilities are clearly scientific. Most have known reliability, validity and error rates.

For the practitioner, it is important for your vocational expert's methodology to satisfy the following *Daubert* criteria:

- 1) Has the method been independently tested and is it scientifically reliable?
- 2) Has the method been subjected to peer review and published in a peer-reviewed journal?
- 3) What is the known error rate of the method and what standards does it use?
- 4) Is the method commonly used and generally accepted in the field?

Remember, *Daubert* offered guidelines on admissibility of scientific evidence, but only if it was both relevant and reliable; relevant to the task at hand and based on a reliable foundation.

Conclusion

Vocational experts in divorce cases are helpful in providing attorneys with an arsenal of facts and conclusions in the establishment of a spouse's earning capacity, which may impact the amount and duration of a support order as opposed to having to rely on actual earnings. Should an attorney wish to provide testimony from the vocational expert, be sure the expert's methodology will withstand a *Daubert* challenge of admissibility from opposing counsel. ■