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Wisconsin's Safe at Home Program Helps Victims Leave Abusive Relationships

By Amber Peterson

Deciding whether to leave an abusive situation is an incredibly difficult decision for victims to make. Leaving is often the most volatile time in an abusive relationship. Victims must consider their safety and the safety of their children. Because abuse does not always end after a victim leaves, many victims may wish to escape an abusive situation and reside in a location that is unknown to their abuser.

Attorneys and other legal professionals can play an important role in helping to keep victims and their children safe by being familiar with resources that can assist victims in leaving an abusive relationship.

The Safe at Home Program

On April 1, 2017, Wisconsin became one of over 35 states to adopt an address confidentiality program, Safe at Home, that helps victims escape more safely from an abusive situation.

The program is administered by the Wisconsin Department of Justice (DOJ) Office of Crime Victim Services, and allows victims of abuse to keep their home, work, or school address private.[1]

Individuals are eligible to participate in Safe at Home if they meet the following criteria:[2]

- individuals are a resident of Wisconsin;
- individuals are either one of the following: (a) a victim of abuse, a parent or guardian of a person who is a victim of abuse, or a person who resides with a victim of abuse or (b) a person who fears for his/her physical safety or the safety of his/her child or ward;
- individuals reside in a location that is not known by the abuser; and
- individuals will not disclose their actual address to the abuser.

The definition of "abuse" is broad, and includes an act or threat of child abuse, domestic abuse, sexual abuse, stalking, or trafficking.[3]

To participate in Safe at Home, there is no requirement that an individual report the incident to law enforcement, file a petition for a restraining order, or have a criminal case pending.[4]

Individuals can apply for the address confidentiality program by visiting the Safe at Home website (doj.state.wi.us/ocvs/safe-home). The application and enrollment process are completely free.[5]

As part of the application process, individuals are required to create a safety plan with an application assistant – trained victim service providers or advocates designated by Safe at Home. Currently, applications assistants are available in all 72 Wisconsin counties.

The Assigned Address

If accepted into the Safe at Home program, participants receive an "assigned address" that serves as a legal substitute for their actual address.[6] Using an assigned address helps to protect against the participant's actual address from being made available to the public online, or accidentally disclosed to an abuser by a business or organization.

Participants provide their assigned address to any business, organization, or individual that requires an address, including the Department of Motor Vehicles, the court system, child support, public benefits programs, employers, schools, utility companies, banks, phone service providers, and friends and family. No state or local agency or unit of government may refuse to use the assigned address for any official business, unless a specific statutory duty requires the agency or unit of government to use the actual address.[7]

Any mail sent to a participant's assigned address will be routed to DOJ. Safe at Home staff then forward the mail to the participant's actual address. For legal paperwork, DOJ is the designated agent for service of process for Safe at Home participants.[8] Legal documents that do not require personal service can be mailed to the Safe at Home participant's assigned address. Legal documents that require personal service can be served to the DOJ.

Once participants are enrolled in the Safe at Home program, participants remain enrolled five years, unless they decide to cancel their enrollment early.[9] There is no time limit on how long individuals may participate in Safe at Home, so it is possible to re-enroll once the five years is about to expire.[10]

A participant may be dis-enrolled by DOJ from the Safe at Home program if the participant fails to provide updated address information or if the participant no longer meets the eligibility criteria.[11]

Disclosing the Address

The Department of Justice is required to keep a Safe at Home participant's actual address completely confidential and may only disclose it in two circumstances:[12]

- pursuant to a court order, or
- to a law enforcement officer for official purposes.

There may be times when legal professionals, such as a guardian ad litem or custody evaluator in a family case, may need to know a Safe at Home participant's actual address to conduct a home visit. If this situation occurs, the Safe at Home participant may voluntarily provide his or her address to the professional, or the professional may have to get an order from the court ordering DOJ to disclose the address.

In either situation, it is very important that the disclosed address not be reflected in any open record that is filed with the court or any record that is made available to the other party. Not only could disclosure of the actual address jeopardize a participant's safety, but anyone who intentionally releases a Safe at Home participant's address is guilty of a misdemeanor.[13]

Even though DOJ cannot disclose a participant's actual address without a court order or to law enforcement, DOJ can provide confirmation of an individual's status as a Safe at Home participant to any state or local agency or unit of government, or to any person or organization at the request of the Safe at Home participant.[14]

Helping the Transition to Safety

The Safe at Home program is becoming more well-known throughout the state. Since its launch on April 1, 2017, there have been more than 1,200 participants in the program, with almost 60 of the 72 counties having at least one participant. Several hundred participants are children.

Because leaving an abusive relationship is such a dangerous time for victims and their children, it is essential that attorneys and other legal professionals be familiar with resources that can help provide for the ongoing safety of victims and their children. Safe at Home is just one resource that can help make that transition to safety a little more possible.

About the Author

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Endnotes

1 2015 Wisconsin Act 356.
2 Wis. Stat. § 165.68(2)(a).
3 Wis. Stat. § 165.68(1)(a).
4 Wis. Stat. § 165.68(2)(b).
5 Wis. Stat. § 165.68(3)(a).
6 Wis. Stat. § 165.68(4)(a).
7 Wis. Stat. § 165.68(5)(b).
8 Wis. Stat. § 165.68(3)(b)4.g.
9 Wis. Stat. § 165.68(3)(b)4.a.
10 Wis. Stat. § 165.68(3)(b)4.e.
11 *Id.*
12 Wis. Stat. § 165.68(4)(d).
13 Wis. Stat. § 165.68(7).
14 Wis. Stat. § 165.68(4)(c).

Conducting Family Mediation over Video Conferencing

By Paul Stenzel

The convergence of technological and cultural changes has led to the increasing use of the internet to resolve disputes including in family law. This article focuses on the option of conducting divorce mediation with unrepresented parties via video conferencing.

Background

One byproduct of the rise of the internet and high-speed electronic communication is the advent of online services: medicine, shopping, and banking, to name a few. Legal services have followed slowly (as is often the case).

Despite that, there are growing numbers of online legal services. The population at large, and millennials especially – who in 2017 overtook baby boomers as the largest generational cohort in the United States[1] – expect to be able to access services quickly and easily.

In its broadest use, the term "online dispute resolution" or ODR includes the use of information and communications technology to help disputants find resolutions to their disputes.[2]

ODR takes a variety of forms. Online businesses, like eBay and PayPal, innovated out of necessity and expediency.[3] They resolve millions of disputes per year through their own resolution systems, independent from the courts.[4] These disputes lend themselves to online resolution because they are mostly low value and multijurisdictional. In the world of the internet, people expect to go online, make a few clicks and reach their objective. Dispute resolution is no different.

Within online dispute resolution, internet-enabled legal assistance in family law is growing. Options range from pure DIY, to lawyer assisted to AI data input with computer-generated results, to mediation with a lawyer over video conference.[5] (The success and quality of DIY legal services and websites has vexed the legal profession and provided, at best, mixed results to consumers.)[6]

There are many potential drivers of demand for mediation over video conference, which combines the value of personalized guidance with the ease of video. As already mentioned, our culture is changing: many expect speed and convenience when obtaining goods and services. If you can work, see a doctor, and bank over the internet, you should be able to obtain legal services that way as well.

Another driver is the lack of legal services in rural areas.[7] There is an ongoing shortage of legal professionals in rural areas.[8] Video conferencing can be an effective way to overcome the issue.

Finally, the desire for obtaining legal services over the internet dovetails with the large number of individuals (estimated over 70% in Wisconsin) who no longer individually retain lawyers to handle their disputes.

Mediation over video conferencing is a way for lawyers to potentially recapture some of that lost market while still delivering a quality service.

Adapting the Process

In order to mediate a divorce over video conference, the mediator's regular process must be adapted in several ways.

First, any intake forms should be made into fillable PDFs. (Adobe Acrobat Pro DC is a useful tool for this). Fillable PDFs can be used to obtain and exchange information without the need for printing, writing, and scanning.

Second, when everyone is not physically present in the same room, the integrity of the process needs to be ensured. One way to address this is by modifying the

retainer agreement to specifically outline the process, including stating that the parties agree there will not be other individuals listening in or watching who are outside the frame when they appear by video.

Third, establish a secure, online method of payment. This is routine now for most law firms, but even more important when providing service to parties who will not be in your office.

Fourth, understand local practice. Although Wis. Stat. chapter 767 applies throughout the state, each county has its own special requirements and practices. When filing in a new county, call the clerk's office and try to establish connection with someone who can answer your questions. To effectively guide couples through the process, you need to know required steps, from filing through the final hearing.

Technology Is Required

There are several technology pieces recommended to conduct mediation over video conference: a video conferencing service, file sharing, and a digital signature tool.

Video Conferencing Services. The heart of mediation over video is having a reliable, easy-to-use method for video conferencing with the parties. There are many choices in this regard. Some of the better-known options are Skype, Zoom, JoinMe, GoToMeeting, and Webex. Nearly all are web-based – meaning you're purchasing a service that requires an internet connection and a web browser (usually for a monthly fee). There's no software to purchase. Some services have free accounts, which then have limitations on features, such as the number of participants and the length of meeting.

Zoom has many features well-suited for mediation. It provides easy screen sharing with participants. For $15 per month, it provides more capacity and features than are even needed for divorce mediation.[9] Most importantly, Zoom reliably and consistently provides the most important feature: a clear, smooth video connection between users. Clients can join from their desktop computer (provided it has a camera), tablet, or phone. They do not need an account.

Other features to look for: a way to easily "caucus" with one party or the other by temporarily sequestering one party from the meeting. Easy screen sharing for displaying documents. Do your research, try some out, and choose one.

File Sharing. The other technology piece that is a necessity is secure file sharing. A divorce requires documents that contain Social Security numbers and individuals' personal financial information. It is a bit risky to share this information over email. There are many file sharing services which solve this problem and provide additional benefits.

Services like Sharefile, Dropbox, and OneDrive permit users to securely upload and download files from a digital file cabinet. This has other advantages besides avoiding email for documents. When parties need to send you documents, the service permits a secure upload. Likewise, if you want to securely share a document with your clients, you can upload to the digital file cabinet. The other side benefit is that everything is in one space for the clients and the mediator.

Digital Signature Tool. The third useful technology piece is some type of digital signature tool,[10] a service or application whereby a person can sign a document on a screen, rather than having to receive it, print it, sign, and then scan back. Wisconsin law permits an electronically filed document to serve as the official record, and essentially treat PDFs the same as the original.[11]

Adobe Acrobat has a built-in digital signature tool. There are several other services including DocuSign, SignNow, SignEasy, and RightSignature by Citrix. Like with other services, each has different features and pricing.[12]

Conducting Mediation Over Video

Mediation over video differs from in-person contact in many ways.

The most noticeable specific difference is that it may be difficult, at first, to build rapport with the parties through the screen. Video communication lacks the texture of in-person relationship building. The nonverbal is important in any communication, but especially in mediation where the issues can be weighty and emotional. Listening intently, always required, is even more important when interfacing over video.

Despite these challenges, the distance of video conferencing can sometimes be helpful: it's a buffer between parties during intense moments. Being in the same room for emotional issues can add to the intensity. Mediation over video takes some of that away.

One issue that comes up occasionally is when one party may be in person and one may be over video. It is true that there is a different feel between an in-person conversation and one over video. Whether to require both over video or permit one in person is likely a judgment call for the mediator in consultation with the parties. Sometimes it is practical for one party to be in person, because he or she is not as tech savvy or

can bring needed documents. Other times, even a local person appreciates the convenience of not having to leave their home or office.

There are no additional or special ethics considerations for mediation over video. SCR 20 does not have rules applicable to online mediation. SCR 20:1.12 and 2.4 specifically address attorneys working as a third-party neutral and apply whether working with parties in person or over video conferencing. Furthermore, SCR 20:5.8 extends all of SCR 20 to law-related services, which arguably includes mediation.

One general acknowledgement: it is important for the mediator to be comfortable and confident with his or her in-person process. Effective training and experience are essential. Mediation, like legal advocacy, can require a lot of mental bandwith to be used at once: listening, analyzing, assessing, thinking quickly, etc. Mediation has all of these.

Adding in a layer of communicating in a new medium can overload a mediator's circuits. The risk of overload is minimized if a mediator can handle his or her regular in-person process with a comfort and familiarity that permits adding the layer of communicating over video and navigating the entire process over distance.

In this regard, a good way to gain some confidence with using video conferencing is to integrate in small steps. Instead of a phone call, occasionally talk by video conference with a colleague. Then perhaps try it with a client. A next step might be a settlement conference via four-way video conference with you, your client, opposing counsel, and the other party.

Conclusion: The Future Is Here

Mediators thinking about embarking on mediation over video conferencing should adapt their mediation process, ensure they have the proper technology, and gain comfort and confidence with conducting a meeting over video conferencing.

The implication of this technology is that parties anywhere in Wisconsin with a family law dispute can obtain high-quality, mediation regardless of their location.

About the Author

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Endnotes

1 *See* "Millennials: Coming of Age," goldmansachs.com/insights/archive/millennials/.

2 Colin Rule Online Dispute Resolution video, youtube.com/watch?v=BWI1amcBYn8.

3 *Id.*

4 *Id.*

5 Wevorce, Legal Zoom, 3 Step Divorce, it's over easy, Rocket Lawyer, Ask-a-Lawyer, ...

6 "Do DIY divorce apps deliver? Services promise and easier process," *ABA Journal*, July 1, 2019.

7 "Out of Luck: Need a Rural Family Law Attorney," *Wisconsin Lawyer Magazine,* Sept. 2019.

8 *Id.*

9 The Pro account allows 100 participants per meeting and up to 24 hours in meeting length.

10 While Wis. Stat. secion 801.18 permits "users" to sign by typing "Electronically signed by," the statute implies that this is only available to those registered to use the electronic filing system, which most pro se parties in mediation do not choose to do.

11 Under Wis. Stat. section 801.18(9), electronically filed documents have the same force and effect as document filed by traditional methods and the electronic version constitutes the official record. There is no need for a lawyer mediator to obtain the paper signed "original" of a document.

12 Some may question the cost of adding three services: video conferencing, file sharing, and digital signatures. Use of these tools is not limited to telemediation. All can and should be used in representation of individual clients. In today's tech-dominated world, clients expect lawyers to providing these conveniences.

The Impact of the 2017 Tax Cuts and Jobs Act on Maintenance and Property Division Negotiations

By Grant Zielinski

The 2017 Tax Cuts and Jobs Act (TCJA) created a substantial departure regarding alimony (i.e., spousal support) from prior tax law for couples divorcing after Dec. 31, 2018. Section 71 of the Internal Revenue Code (IRC) was removed and, at first glance, this change may seem like a significant financial impact on families going through divorce.

In reality, this change is impacting only a small percentage of divorcing couples – specifically those who have income and alimony payments high enough to create tax savings.

The TCJA does not affect any couple divorced before Dec. 31, 2018, as all prior alimony orders were grandfathered as part of the new tax code. The payers under a pre-2019, deductible alimony order will, however, need to use caution when approaching a modification of their grandfathered alimony order to retain the deductibility of the modified payments. Any couple divorcing after Jan. 1, 2019 however, will be subject to the new limitations that result in alimony payments effectively becoming cash transfers from the payor spouse to the recipient spouse.

Background

For over 60 years, the financial benefit of tax-deductible alimony had been in the ability to take income from a higher income tax bracket and have that income taxed at a lower income tax bracket. This frequently resulted in lower overall income tax for some couples in divorce.

However, Section 71 required certain restrictions to be met to treat alimony as tax deductible. For example, divorcing couples formerly needed to be concerned about alimony payments terminating at death, front loading, child contingency rules, and alimony recapture. Without the need to satisfy the requirements of Section 71, a couple may have more flexibility on how they can establish and modify alimony payments as those restrictions were in place to prevent agreements from disguising property division as tax-deductible alimony payments.

Impact on Alimony Negotiations

So, how does the change in the law impact how we approach alimony negotiations in divorce?

Couples still need to determine how much alimony will be paid and for how long. However, without restrictions that prevent parties form 'disguising' property division as alimony, couples can use property to offset alimony, and develop creative agreements around the division of both property and income.

It is important to consider that changing the alimony rules may actually save some couples money, especially at income levels under $100,000. Figure A illustrates the new overall tax savings and impact on a couple where the higher earner earns $80,000 annually and the lower earner earns $20,000 to $50,000 annually.

Figure A: Combined Income at 50/50 with spouse A income at $80,000

		Combined Income at 50/50		
Spouse A Income	Spouse B Income	Deductible	Non-Deductible	Savings in Deductible Maintenance
$80,000	$20,000	$90,245	$91,321	($1,076)
$80,000	$30,000	$95,767	$96,577	($810)
$80,000	$40,000	$101,182	$101,552	($370)
$80,000	$50,000	$108,401	$107,476	$925

As a payor spouse's income increases, the above savings begin to change. However, even at these income levels, the overall impact of the change to the law is minimal – see Figure B, which illustrates the impact when the higher earner earns $150,000 annually.

Figure B: Combined income at 50/50 with spouse A income at $150,000

		Combined Income at 50/50		
Spouse A Income	Spouse B Income	Deductible	Non-Deductible	Savings in Deductible Maintenance
$150,000	$20,000	$133,765	$136,331	($2,566)
$150,000	$30,000	$140,845	$141,587	($742)
$150,000	$40,000	$147,955	$146,562	$1,393
$150,000	$50,000	$154,755	$152,486	$2,269
$150,000	$60,000	$161,071	$159,819	$1,252
$150,000	$70,000	$167,385	$167,132	$253
$150,000	$80,000	$173,700	$173,465	$235

It is not until the highest income brackets that there is a significant loss in after-tax income due to the change in the law. Overall, the new tax law impacts cases with incomes over $250,000 and is less impactful for cases with incomes under $250,000. See Figure C.

Figure C: Combined income at 50/50 with spouse A income at $300,000

		Combined Income at 50/50		
Spouse A Income	Spouse B Income	Deductible	Non-Deductible	Savings in Deductible Maintenance
$300,000	$20,000	$231,017	$221,134	$9,883
$300,000	$30,000	$237,132	$228,929	$8,203
$300,000	$40,000	$243,245	$234,663	$8,582
$300,000	$50,000	$249,298	$240,587	$8,711
$300,000	$60,000	$255,317	$247,920	$7,397
$300,000	$70,000	$261,358	$255,233	$6,125
$300,000	$80,000	$267,402	$261,566	$5,836

While the focus of discussion has been on the elimination of Section 71 and deductible maintenance, it is actually other changes within the TCJA that have contributed to the savings we see illustrated above. An outline of those changes follows.

Changes to Tax Brackets

It may be a minor change, but the adjustments to the tax brackets for head of household and single tax filers have decreased the benefits of filing head of household versus filing as single. This change allows families to allocate children to one spouse to maximize tax credits, while the other spouse files as Single.

In the past, the difference between the head of household tax bracket and single tax bracket were significant enough to offset savings created by other tax credits, like Earned Income Credit.

Changes to Standard Deduction

One of the most impactful changes to the law has been the increases to the standard deduction. The increase has pushed many taxpayers into taking the standard deduction instead of itemizing on their return.

This shift is also due to the limitation put on state and local taxes, now capped at $10,000. Before the TCJA, the standard deduction for a married couple filing joint was $12,700, while now a married couple filing jointly can deduct $24,800.

In some cases where both parties can file as head of household, the parties could each deduct $18,650 of their income. That is $37,300 in deductions to the family income that has saved quite a bit for lower income families. The savings created here is often offset the loss by the elimination of Section 71.

Elimination of Exemptions and Increases to the Child Tax Credit

The TCJA has essentially eliminated the personal and dependent exemption.

Technically, the exemption amount was changed to $0. The reduction of the exemption, which was an above the line deduction to taxable income, has now shifted to a below-the-line tax credit, by increasing the child tax credit by $1,000 per child and more than doubling the threshold.

Families who earn less than $200,000 now have more tax benefits for children than they did under the old law. The changes provide higher tax savings for lower income families and an increased the number of families eligible for this credit.

Increase in the Number of Spouses Eligible for Earned Income Credit

While nondeductible alimony may seem like a financial loss to the payor, in many cases it has allowed the lower income spouse to be eligible for low income credits like the Earned Income Credit (EIC), thereby increasing the payee spouse's income and lowering monthly alimony payments.

The calculation and thresholds for EIC are based upon adjusted gross income. In the past, alimony received was included in the payee's adjusted gross income, and pushed the payee spouse above the thresholds. With alimony no longer deductible, we have a much larger population of recipient spouses that will be eligible for EIC. See Figure D.

Figure D: Earned Income Credit

Item	Earned Income Credit: Number of Qualifying Children			
	One	Two	Three or More	None
Earned Income Amount	$10,540	$14,800	$14,800	$7,030
Maximum Amount of Credit	$3,584	$5,920	$6,660	$538
Threshold Phase-out	$19,330	$19,330	$19,330	$8,790
Completed Phase-out	$41,756	$47,440	$50,954	$15,820
Threshold Phase-out Married Joint	$25,220	$25,220	$25,220	$14,680
Completed Phase-out Married Joint	$47,646	$53,330	$56,844	$21,710

Saving Tax via Circular Flow and Qualified Plans

The TCJA has removed our ability to use alimony for this purpose, but IRC Section 1041 still allows the transfer of property between spouses. With the ability to transfer property using Section 1041, we continue to have some ability to transfer income from a high tax bracket to a lower tax bracket.

One opportunity to accomplish this is by transferring qualified plans or annuities to a spouse and having the spouse take a distribution under Section 72(t) or Section 72(q). These sections allow the distribution from annuities and qualified plans to be exempt from the 10% penalty for premature distributions.

Thus, an award of qualified plans or annuities and subsequent distribution could be used as an income source for the spouse in which the taxes are paid in a lower tax bracket rather than the payor's often higher tax bracket. This will not work in all cases, but if the couple has significant assets to support this option, it could provide tax savings similar to what would be created using tax-deductible alimony.

For example, IRC Section 72(t)(C) allows for distributions to an alternate payee pursuant to a Qualified Domestic Relations Order (QDRO) to be exempt from the 10% penalty for premature distributions. If the plan allows, an alternate payee could take periodic distributions from the amount awarded under a QDRO and such payments could mimic the receipt of taxable alimony.

Further, the qualified ERISA-based plans (e.g., 401(k) or 403(b) plans) could be drawn out by the non-participant spouse to accomplish other goals, such as debt reduction, or even rebated back to the other spouse to offset other property division (e.g., home equity) via "circular flow."

While the use of Section 72 distributions does not work in all cases, it is a new creative tool that can be used to minimize taxes for a couple post divorce. It is critical to have proper legal and financial advice, as well as drafting, when employing circular flow or any tax strategy, as tax-deferred accounts must be divided by Qualified Domestic Relations Order (QDRO) for 401(k)/403(b) accounts or proper Rollover Application for Individual Retirement Accounts.

Failure to comply with these requirements can not only defeat these cost saving strategies, but also create a substantial tax consequence.

Alimony Buyouts and Buy Downs

In addition to Section 72 distributions as a creative option, we would anticipate the use of alimony buyouts or alimony buy downs to increase with the passing of the new tax law.

Alimony buyouts or buydowns are creative ways to eliminate, reduce, or shorten the amount or duration of alimony, by transferring an asset to the recipient spouse instead. Alimony buyout calculations can be speculative, and come with a significant amount of risk. However, in high income cases, where the tax savings of monthly payments has been lost, the use of property to satisfy an ongoing obligation may be appealing to some parties.

A spouse looking at making support payments to a former spouse over an extended or unknown number of years may wish to "buy-out" the former spouses share of those payments. Further, buy-downs can be an effective approach using property division to improve current cash flow or meet other goals and objectives.

While courts cannot order such an arrangement, courts typically approve a couple's settlement and stipulation. This can be effective in providing certainty and a tailored approach to a couple's specific circumstances.

An alimony buy-out calculation is similar to a pension valuation in that the valuation attempts to predict future events. The calculation has two chief probable discounts – mortality and interest rate – and a third, more tenuous discount for remarriage. Specifically:

- Mortality Discount: The probability that payor and/or payee spouse will decease prior (mortality discount) to the termination of payments rendering the termination of such payments.
- Interest-rate Discount: This discount is applied to reduce the gross value of the payments by an expected or anticipated rate of return (interest) earned on the unused portion of the future payments required. A lower interest rate will produce a higher present value.
- Remarriage Discount: The probability of remarriage of the payee spouse during the projected maintenance term. This is the most contentious factor – and, if not broached carefully, can end alimony buy-out negotiations.

The discounts for mortality and interest rates, and for taxes are fairly simple and easy to understand.

In regard to the remarriage discount, there are numerous approaches, but none of the approaches are mathematically sound. Some experts have simply applied a flat rate discount to the probability that a former spouse may remarry, but research and tables are not as uniform and standard as the actuarial standards that pertain to the mortality discount. Accordingly, application of the first two discounts are likely the most viable and applicable in a settlement context.

Keep Creative to Maximize Savings

Although the TCJA has changed the way we look at alimony, it should not change the way we look at taxes as it relates to transferring property and income in divorce. In many cases, the newly created tax benefits may require more attention and creativity to make sure we can maximize savings under the new law.

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Daubert, Act 2, and Family Law Practice

By Hon. Scott Horne

Shortly after taking the bench in 2007, I faced an objection in a family law case. One of the attorneys responded to the evidentiary objection by advising me the case was "family law" and the rules of evidence did not apply.

To be sure, many litigants are unable to afford the cost of expert witnesses or prolonged litigation, and informal agreements frequently result in questionable evidence being admitted without objection.

Nonetheless, the rules of evidence apply in family law cases, and counsel has no right to complain if a proper objection is raised by opposing counsel and sustained by the court. For that reason, any family law attorney ought to be familiar with the rules of evidence and able to apply them.

This article focuses on the application of the *Daubert* standard for expert testimony embodied in Wis. Stat. section 907.02 to family law cases.

Background

No recent evidentiary issue prompted as much discussion and anxiety as 2011 Wis. Act 2 (Act 2), the "tort reform bill" that altered the standard for admission of expert opinion evidence for all cases filed after Feb. 1, 2011, whether civil, criminal, and, yes, family law cases as well.

In order to understand the applicability of the *Daubert* standard, particularly as it pertains to family law cases, one must

- understand the distinction between lay and expert opinion;
- be familiar with the distinctions between the general acceptance standard, relevancy standard that controlled prior to Feb.1, 2011, and the *Daubert* reliability standards reflected in post Act 2 filings; and
- be familiar with the relevant Wisconsin case law following the enactment of Act 2.

Finally, one must be able to apply Act 2 in a family law context.

Lay Opinion

Opinion evidence may be classified in one of two ways: by lay opinion, governed by Wis. Stat. section 907.01; and expert opinion governed by section 907.02. Distinguishing the two determines whether section 907.02, and the *Daubert* standard even need to be addressed.

For cases filed prior to Feb. 1, 2011, section 907.01, provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Two conditions must be met. First, the opinion must be rational and based on perception, as opposed to facts supplied by other witnesses.

Second, the lay opinion must be (in the judgment of the court) helpful to understand the testimony or determine a fact in issue. Examples of lay opinions may include "the car was going 'really fast,'" "he appeared 'drunk,'" or "he sounded really 'angry.'"

In each case, the witness is basing the opinion on personal observation and, to the extent a reasoning process is used, it is one applied commonly by lay observers.

Expert Opinion

In contrast to lay opinion evidence, expert opinion evidence is rooted in specialized knowledge, skill, or training possessed by a qualified witness.

Three tests or standards for admissibility have dominated the Wisconsin and federal debate: the relevancy standard, Frye general acceptance standard, and *Daubert* reliability standard.

The Relevancy Standard

Prior to Feb. 1, 2011, section 907.02(a) provided:

> 907.02 (1) If scientific, technical, or other specialized knowledge will assist the fact-finder to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Three requirements must be met under the relevancy standard:

> 1) The opinion or knowledge must be the product of scientific, technical or other specialized knowledge and beyond the common sense or experience of a lay juror;
>
> 2) The information must assist the fact-finder in understanding the evidence or determining a fact in issue – it must be relevant to a material issue in the case; and
>
> 3) The witness must be qualified by virtue of specialized knowledge, skill, experience, training, or education.

Importantly, the court is not asked to determine the "reliability" of the opinion; this determination is made by the jury in assessing the weight to be given to the opinion. Cross-examination, impeachment, and introduction of contrary opinions are the tools most commonly employed to assist the jury in determining weight of the evidence.

Frye General Acceptance Standard

In contrast to the relevancy test, the federal courts for many years relied on the "general acceptance" test, articulated in Frye v. United States.[1]

In Frye, the court addressed the admissibility of a systolic blood pressure test for deception in a homicide prosecution and noted, "[t]he thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs."[2] In other words, expert opinion testimony is only admissible if the method from which the opinion is derived is "generally accepted" within the particular field.

The Wisconsin Supreme Court rejected the use of the general acceptance test. In *State v. Walstad*,[3] the court noted that Wisconsin had virtually unlimited cross-examination, and that "…. the underlying theory or principle on which admissibility is based can be attacked by cross-examination or by other types of impeachment. Whether a scientific witness whose testimony is relevant is believed is a question of credibility for the finder of fact, but it clearly is admissible."[4]

Rather than vesting the trial court with the power to exclude opinion evidence deemed not to be generally accepted within a community, Wisconsin courts admitted the opinion testimony, and then relied on the use of cross-examination, impeachment, and presentation of alternate explanations to determine the credibility of the opinion.

Daubert Reliability Standard

The genesis for the rule articulated in Act 2 was enunciated in a trilogy of United States Supreme Court decisions. The reliability test was first articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[5] and was further defined in *Kumho Tire Co. v. Carmichael* and *GE Electric Co. v. Joiner*.[6]

In *Daubert*, the Court rejected the Frye standard, noting it had been superseded by then section 702 of the Federal Rules of Evidence, the precursor to the pre-Act 2, Wis. Stat. section 907.02 (1).[7] Nothing in the text of Rule 702 embodied the general acceptance standard:[8]

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

Despite the language of rule 702 being virtually identical to section 907.02 pre-Act 2, the interpretation expressed in federal decisions differed from those of the Wisconsin appellate courts.

The Court noted that expert testimony must be "scientific knowledge" – that is, an inference or assertion derived from the scientific method.[9] The Court noted the expert opinion must be "helpful" to the fact-finder, i.e., the opinion "requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."[10]

The Court then noted characteristics of a scientific methodology which would normally guarantee a measure of reliability including:

- hypothesis testing;
- peer review and publication;
- known or potential rate of error;
- existence and maintenance of standards controlling the technique's operation; and
- whether the method is generally accepted in the scientific community.[11]

General acceptance, while relevant to the reliability inquiry, is not required.

The Court declared the standard to be a "flexible" one and noted the "overarching subject is the scientific validity – and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission."[12] The trial court is assigned "… the task of ensuring that an expert's opinion both rests on a reliable foundation and is relevant to the task at hand."[13]

This approach, anchored in the scientific method, arguably works well with respect to scientific testimony. However, what are we to make of other types of expert opinion testimony that are not rooted in the scientific method?

In the family law arena, appraisers may offer opinions as to the value of a home or business, evaluators may offer opinions related to child custody and placement, vocational experts may offer opinions regarding employability. Each of these opinions is derived from specialized training, skill, or experience, but none are derived from the scientific method.

The admissibility of this type of expert opinion was addressed in *Kumho Tire*. In *Kumho Tire*, the Court applied *Daubert* to nonscientific expert opinion testimony.

Recognizing that the characteristics of the scientific method do not apply well to engineering or other experiential disciplines, the Court reaffirmed *Daubert's* requirement that the trial court is required to "ensure the reliability and relevancy of expert testimony," and in making this determination the trial court "must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."[14]

In exercising its discretion, the trial court may consider factors beyond those pertinent to scientific testimony. The Court identified three factors pertinent to the tire analysis at issue:

> 1) whether other experts make use of the method employed by the expert witness;
>
> 2) whether the approach is validated by other publications or articles; or
>
> 3) whether the opinion is one formulated primarily for court purposes.[15]

In 2000, the federal rules committee identified additional factors beyond those described in *Kumho Tire* to include:

- whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for the purposes of testifying;"[16]
- whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;[17]
- whether the expert has unjustifiably accounted for obvious alternative explanations;[18]
- "whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting;"[19] and
- whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.[20]

Following *Kumho Tire*, the focus was placed not on the scientific method *per se*, but whether the opinion rested on a body of learning or expertise appropriate to the expert's field, and whether the opinion flows reasonably from this body of knowledge:

> What the trial court must determine at the outset is 'whether the reasoning or methodology underlying the testimony is … valid under the principles of the discipline involved.' So, whether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.[21]

Such a test is more demanding than the relevancy test, but more flexible than the general acceptance test.

Federal Experience

While the *Daubert* reliability standards clearly provide the trial court with a greater basis for excluding expert testimony than under the relevancy standard, the federal experience under *Daubert* had not suggested widespread exclusion of expert opinion testimony.

The committee revising rule 702 in 2000 noted, "A review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule." In assessing the impact of *Daubert*, the 5th Circuit Court of Appeals noted, "*Daubert* did not

work a 'sea change over federal evidence law'" and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system."[22]

The primary techniques for testing reliability remained cross-examination, impeachment, and alternative explanations, so long as an initial threshold of reliability is established.

Wisconsin Response

Even after *Daubert* and *Kumho Tire*, the Wisconsin courts reaffirmed the relevancy test:

> Once the relevancy of the evidence is established and the witness is qualified as an expert, the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability challenges must be made through cross-examination or by other means of impeachment."[23]

The relevancy test remained the Wisconsin standard until Act 2.

Act 2

Against this backdrop of consistent rejection of the federal reliability standards, the Wisconsin Legislature passed Act 2. As amended by Act 2, section 907.01, governing lay opinions, provides:

> 907.01 **Opinion testimony by lay witnesses.** If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following:
>
> (1) Rationally based on the perception of the witness.
>
> (2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.
>
> (3) Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02 (1).

Not only must the lay opinion be rationally based on first-hand knowledge of the witness and helpful, it must also not be the subject of expert knowledge. If an opinion is the subject of "scientific, technical or other specialized knowledge," it must meet the requirements of section 907.02.

As Prof. Daniel Blinka observed, "[i]n sum, all testimony is subject to a binary analysis: it must conform to section 907.01 as lay testimony or section 907.02 as expert testimony. There is no third way."[24]

Similarly, Act 2 amended the requirements for expert opinion testimony under section 907.02 by incorporating the *Daubert* standards:

> 907.02 (1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

In addition to establishing the relevancy of the testimony and qualifications of the witness, the proponent must now establish in addition:

- the sufficiency of the facts or data;
- the reliability of the principles and methods utilized; and
- the reliability of the application of the principles and methods to the facts and data.

Clearly, expert opinion testimony must meet a stricter standard of admissibility. The question asked following the adoption of Act 2 was how the effects of this change would be felt in Wisconsin, and in particular the family courts.

Wisconsin Post Act 2

Similar to the federal experience, Act 2 has not worked a sea change in the treatment of expert testimony in Wisconsin.

While there have been a limited number of Wisconsin decisions applying the *Daubert* standards, all have resulted in expert opinion testimony, scientific or otherwise, passing muster under Act 2.[25]

In *State v. Giese*, the Wisconsin Court of Appeals applied the *Daubert* standards to an OWI prosecution. The forensic toxicologist applied the concept of retrograde extrapolation from a single test result to a time of alleged driving several hours prior. Giese contended that, without at least two distinct tests as a reference point, the extrapolation back to a point in time hours earlier could not be based on "sufficient facts and data."

The court noted the doubts and disagreements among experts but concluded, "… The accuracy of the facts upon which the expert relies and the ultimate determinations of credibility and accuracy are for the jury, not the court."[26]

Retrograde extrapolation is widely used in the field of forensic toxicology, and the sufficiency of the data is sufficient to pass through the *Daubert* gate.

Similarly, in *Seifert v. Balink*, the Wisconsin Supreme Court considered expert testimony from a physician establishing the standard of care for family practice doctors practicing obstetrics.

While the trial court, in admitting the opinion evidence, found that the testimony, "although shaky, is not junk science and that Dr. Werner is not a junk scientist."[27] The experience was supplemented by knowledge of the practice through education, repeated observations in decades of clinical experiences, and numerous teaching and supervisory experiences.[28]

And the court noted, "Instead of exclusion, the appropriate means of attacking 'shaky but admissible' experience-based medical expert testimony is by 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'"[29]

Applying an erroneous exercise of discretion standard of review, the court found the expert opinion evidence to be sufficiently rooted in the principles and methodology appropriate to the field and was properly admitted.[30]

And, in *State v. Jones*, the Wisconsin Supreme Court upheld a circuit court decision to admit expert opinion testimony based in significant part on the results of an array of actuarial instruments designed to measure the risk of re-offense.

The court noted that, while *Daubert* establishes "a more burdensome standard, it is not exceedingly high; the court's 'role (is to ensure) that the courtroom door remains closed to junk science.'"[31]

In evaluating the reliability of the methodology, the court examined the degree to which the same methodology is relied upon by experts in the field and found that, while the instruments were not subject to peer-reviewed journals, the tests had been routinely published, open to review, and were widely used in the field. Given the common acceptance of the methodology, any disputes were left to the judgment of the jury.

Practice Suggestions

While Act 2 may require more intellectual rigor on the part of expert witnesses, it has not had the severe impact imagined or feared by many practitioners. Act does however have implications for family law practitioners.

Expert or Lay Opinion

The first question is whether the proposed testimony is lay or expert opinion testimony. A teacher or administrator, for example, may testify on a custody and placement question. Testimony such as, "Johnny typically appeared sleepy and unprepared after nights with dad and rested and alert after nights with mom," are likely to be viewed as lay opinions based on the personal observations of the witness, and the *Daubert* standards incorporated in section 907.02, will not apply.

However, if the teacher were to incorporate data such as test scores or other material going beyond personal observations or experience, the testimony may be deemed expert testimony triggering the *Daubert* analysis.

Trial Preparation

Witnesses must understand the rules. Testimony from witnesses based solely on experience, without an attempt to anchor the opinion in a methodology appropriate to the field of expertise, i.e., *ipse dixit* testimony, will more likely be excluded.

As the U.S. Supreme Court declared, "What must be avoided in applying an expert methodology is the *ipse dixit* (because I told you so) of the expert.[32]

And as Prof. Blinka succinctly put it, "[n]o matter whether the witness has a Ph.D. or wears a police badge, she is expected to articulate her methodology and how she applied it to the facts."[33]

Attorneys will no longer be able to introduce the curriculum vitae of the witness and proceed to elicit opinions on the grounds that the witness is qualified and the opinions are helpful. Custody evaluators, for example, must be prepared to establish not only their qualifications but describe the methodology used and why it should be deemed reliable; is it generally accepted in the community of custody evaluators or supported in research related to custody evaluations? Business valuation experts must be prepared to discuss the method used and demonstrate why the court should accept it as reliable: is the method one commonly used in the field of business valuation or supported in professional literature?

Counsel must educate the witness. If the expert is familiar with the *Daubert* standards, there should be few cases in which the opinion is excluded. However, if the expert is not familiar with the *Daubert* standards and has not contemplated the reliability factors, the danger exists that the testimony will appear to be *ipse dixit* testimony and excluded.

Pretrial Procedures

Act 2 leaves procedural requirements for determining the admissibility of expert opinion testimony within the discretion of the trial courts.[34]

The trial courts remain responsible for determining the procedures in applying its gatekeeping function. Options may include pretrial hearings with testimony from proposed experts, rulings based on reports and other written material, or a response to foundation objections at trial. The trial court is responsible for determining the procedure to be employed.

Some courts may address procedures for determining *Daubert* challenges in a scheduling order. However, recognizing that most family law issues are resolved in bench trials, many courts may not lay out procedures in a scheduling order.

In such cases, counsel should be proactive and raise the issue of a *Daubert* challenge with the trial judge in advance – if two hours has been set aside for a hearing, many judges may be resistant to taking up an unexpected *Daubert* challenge in the middle of trial, while others may prefer to do so at the time of trial but may set aside additional time if available.

Conclusion: Research Is Necessary

The rules of evidence indeed apply to family law trials as well as criminal and major civil cases, and in bench trials as well as jury trials.

Issues such as custody and placement, business valuation, and earning capacity may rely heavily on opinions based on "specialized knowledge or experience" beyond the "personal observation" of the witness and trigger the application of section 907.02.

The federal experience interpreting *Daubert*, coupled with the limited number of Wisconsin appellate decisions following Act 2, has shown there should be relatively few instances of evidence now being excluded, so long as counsel analyzes the evidence in terms of the "reliability" standard, communicates the standard to witnesses in advance of hearings, and elicits proper foundation testimony.

About the Author

Judge Scott Horne, U.W. 1979, is a circuit court judge for La Crosse County. He can be reached at scott.horne@wicourts.gov.

Endnotes

1 *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

2 *Frye*, 293 F. at 1014.

3 *State v. Walstad*, 119 Wis.2d 483, 351 N.W.2d 469 (1984).

4 *Id.* at 519.

5 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

6 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *GE Electric Co. v. Joiner*, 522 U.S. 136, 146, (1997).

7 Rule 702 was subsequently amended in 2000 to reflect the *Daubert* standards; these 2000 amendments to Rule 702 serve as the basis for the Act 2 amendments to section 907.02.

8 *Daubert* at 588.

9 *Id.* at 590.

10 *Id.* at 592

11 *Id.* at 594.

12 *Id.* at 594-5.

13 *Id.* at 597.

14 *Kumho Tire* at 151-2.

15 *Id.* at 157.

16 Citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).

17 *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

18 *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994).

19 *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997).

20 *Kumho Tire* at 151.

21 Standards and Procedures for Determining the Admissibility of Expert Testimony after *Daubert*, 157 F.R.D. 571, 579 (1994).

22 *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996).

23 *State v. Peters*, 192 Wis.2d 674, 690 (Ct. App. 1995).

24 Daniel D. Blinka, "The *Daubert* Standard in Wisconsin: A Primer," *Wisconsin Lawyer* magazine, March 2011.

25 *Seifert v. Balink*, 2017 WI 2, 372 Wis.2d 525, 888 N.W.2d 816; *State v. Jones*, 2018 WI 44, 381 Wis.2d 284, 911 N.W.2d 97; *State v. Giese*, 2014 WI App 92, 356 Wis.2d 796, 854 N.W.2d 687; *State v. Smith*, 2016 WI App 8, 366 Wis.2d 613, 874 N.W.2d 610; *Bayer v. Dobbins*, 2016 WI App 65, 371 Wis.2d 428, 885 N.W.2d 173.

26 *Giese*, 854 N.W.2d at 692-693.

27 *Seifert*, 372 Wis.2d at 577.

28 *Id.* at 578.

29 *Daubert*, 509 US at 597, cited in Seifert, 372 Wis.2d at 567.

30 *See also* Advisory Committee Notes, 2000 amendments: "nothing in this amendment is intended to suggest that experience alone – or experience in conjunction with other knowledge, skill, training or education – may not provide a sufficient foundation for expert testimony. ... To the contrary, the text of rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experiences the predominant, if not sole, basis for a great deal of reliable expert testimony." *See, e.g., United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997).

31 *Seifert*, 372 Wis.2d 525, cited in *Jones*, 381 Wis.2d at 306.

32 *GE Electric Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512 (1997).

33 *Blinka*, "The *Daubert* Standard in Wisconsin: A Primer."

34 Again, this principle is consistent with the federal practice. "The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony. See Daniel J. Capra, *The Daubert Puzzle*, 38 Ga.L.Rev. 699, 766 (1998) (*sic*, should be "32 Ga.L.Rev. 699, 766") cited in Advisory Committee Notes, 2000 Amendments.

Hot Tips for New Attorneys: Choose Kindness

By Amanda Aubrey

On Jan. 23, 2020, I woke at 3:30 a.m. to the sound of my cellphone buzzing on my nightstand, which I know from experience is never good. I looked at the readout and it was my aunt, calling to let me know that my grandfather had passed away the night before. He was very much like a father to me, and while his age made it less unexpected, the actual news of his passing hit us all like so many bricks.

Opening my email later that morning, I knew I would be heading out of state to Grandpa's funeral and all the events that so often accompany a large family funeral, so I started reviewing my calendar for things that I needed to clear. The client phone calls and appointments were easiest to move, and my paralegal handled those with no problem.

I still had a couple of court hearings that week, though. For the first hearing, a temporary order hearing in a contested divorce, I contacted opposing counsel and explained the situation, and she graciously agreed to a joint adjournment request. One down, one to go.

The second hearing was an annulment hearing, and the opposing party was not only pro se, but also very hard to contact. I emailed the judge's clerk directly and explained the situation, asking for her advice as to whether the judge would want me to file a formal letter requesting an adjournment. I sent that email at 6:30 a.m. and went about the business of getting ready for my day.

I heard my phone signal an incoming email at 7:25 a.m., when no reasonable person should ever be at work, especially if one is a judicial clerk already checking her email from chambers. The clerk had responded immediately to let me know she was removing the hearing from the calendar and that she "would tell the judge what he was doing."

I gaped at my phone for a moment in sheer awe, thinking, "Wait a minute; there are people who just tell the judge what he's doing?"

When I recovered, I read the email again and released the breath I didn't realize I had been holding, and silently blessed my late mom – a legal secretary for nearly 25 years – and her advice to me when I was sworn into the bar:

Remember that the relationships you build will save your a** one day. There will come a time when you need something from a clerk, a security officer, a judge's assistant, a court reporter – heck, even a member of the cleaning crew – and you will sink or swim based on how you have treated that person.

That January morning, I heard my mom's voice in my head as I read the clerk's email, and I was deeply and immediately grateful I had taken her advice to heart. I make a point to learn a little bit about everyone I work with in the courthouses (their birthday, children's names, favorite kind of pie, etc.), because those are the kinds of tidbits that germinate into relationships. It also has the benefit of making our near-daily trips to the courthouse a little bit brighter.

In this case, my mom was right, and this practice of kindness to everyone – not just the judge whose favor you are hoping to garner for your client or her cause – saved my bacon.

Because of the relationship I had built with the clerk, the judge, and opposing counsel in the other case, I was able to clear my schedule when I most needed it, and I was able to get the time I needed with my family without stressing about work.

HOT TIP: Choose kindness. As a new attorney, you will be tempted to curry favor with the judges and those who seem most in control of your or your client's destiny. But as cliché as this may sound, the smallest kindness goes a long way, and hell hath no fury like a judge whose clerk you have treated with disrespect.

Choose wisely. Choose kindness.

About the Author

Amanda Aubrey, Univ. of the District of Columbia 2013, is with Legal Action of Wisconsin. She also plays a kind bass. She can be reached at aca@legalaction.org.

A View from the Bench: Judge Marc Hammer

By Hon. Thomas Walsh

Brown County Circuit Court Judge Marc A. Hammer talks with Judge Thomas Walsh about his experiences on the bench with family law matters. Included in the interview are his thoughts on custody and placement of children as well as financial issues.

About Judge Hammer

- Undergraduate degree: Illinois at Champaign-Urbana, B.A. in political science and history
- Law school: Univ. of Missouri at Columbia 1989
- Year became judge: 2008
- Favorite movie: 12 Angry Men
- Favorite book: The Caine Mutiny
- Hobbies: "Whatever my wife tells me they are!"

Questions and Answers

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

Before going to law school I worked at the now defunct Montgomery Ward and Company retail store. I was a debt collector for credit accounts customers had with the retail company.

What career path would you have chosen if you had not become a lawyer?

I think I am a pretty patient person. I think I may have gone into teaching or some type of mental health work.

What type of law did you practice?

I primarily practiced family law in Brown County.

Who would you say had the most influence on your career?

When I moved to Green Bay as a law school graduate, I had no family or friends in the area. The people who had influenced me the most were the lawyers that I had the opportunity to work with in the first law firm that I was hired.

How long have you been assigned primarily to the family law area?

When I was initially appointed judge, I was assigned a family law rotation for the first two years on the bench. As of January 2019, I have returned to the family law division here in Brown County.

How often have you been asked to review family court commissioner's decision?

Review of family court commissioner's decisions here in Brown County is relatively rare.

How frequently do you find yourself differing from the family court commissioner's decisions?

In reviewing the family court commissioner's decisions, I normally take a "de novo" approach in listening to the facts and applying the law. Given that our commissioners are analyzing the facts and law of the case under the same statute, it is unusual that my decisions would substantially differ from the family court commissioner's orders.

What does the phrase "regularly occurring, meaningful periods of placement with each parent 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?

Assuming we have two parents who are capable of parenting, and generally amenable to working with his/her co-parent, I take this phrase to mean the court should craft an order that accounts for the parties' availability to exercise placement, after considering the obligations that each parent may have in their current household.

Do you require parents to file parenting plans? Do you find parenting plans helpful?

Generally, I would prefer for parents to file parenting plans. I believe this forces a parent to consider a number of custody and/or placement issues that they may not ordinarily focus on.

At what age do you believe a child is capable of expressing preference about placement?

It is difficult to identify a specific "age" in which a child is capable of expressing a preference. Rather, I focus on the child's level of maturity, relationship with siblings and school, and the basis of a preference before I reach a conclusion that any child is capable of expressing a meaningful placement schedule.

How do you go about getting the child's preference?

The guardian ad litem is in the best position to fairly and accurately express whether or not the child has a preference, what that preference is, and the basis of the child's preference. I am also interested in what the child may have shared with a teacher, coach, or therapist.

How do you see the mediation process for custody and placement disputes working in your county?

It is my understanding that the Brown County Mediation Center does a good job in attempting to reconcile custody and placement disputes.

What can attorneys do to make the mediation process more productive?

Frequently, lawyers will tell their clients to participate in mediation and "let them know how it went." I think mediation may be more successful if lawyers are able to sit down with their clients and explain to them to the purpose of mediation, its goal, and the ramifications in the event the parties are unable to come to agreement on custody and placement matters.

What role do you find extramarital relations and cohabitation playing on making placement decisions?

Parent's third-party relationships are most relevant for me at the commencement of the divorce proceeding. As the old saying goes, you can learn a lot about a person by the company he or she keeps.

How useful is the opinion of an independent psychologist in a custody case?

I think these opinions are helpful in providing information about the parties and parents that may not be patently obvious in the limited time that lawyers, judges, and guardians ad litem can spend with the parties.

Do you allow a psychologist or other professional to express an ultimate fact conclusion with respect to custody and placement?

While I will typically allow a psychologist to express an ultimate fact conclusion, I do not feel bound by their findings, and am much more interested in the foundation for any opinions which they may express.

Do you think the historical preference in favor of the mother in placement cases exists anymore?

I really do not believe there is any longer a preference for either mother or father in placement disputes. This is particularly true given that both parties frequently carry similar work hours and/or work commitments. Further, it appears to me that fathers generally have been more involved in the day-to-day routine involving children than they had been in the past.

Do you consider placement problems as a reason for changing custody?

It would be unusual for me to modify custody based upon placement disputes. When those disputes directly impact typical custodial decision involving a child that may serve as a basis for modifying custody orders.

How often do you find yourself deviating from the child support percentage standards, if at all?

I typically will not deviate from child support percentage standards, unless there is a usual and significant cost associated with a child in a specific or given case.

How do you approach disputes regarding variable costs?

People have differing opinions as to what would be classified as a "variable cost," and whether or not it's reasonable to expect a sharing of specific expenses. Normally, my goal is to first identify what the parties are willing to recognize as variable expense, and thereafter, crafting an order that considers the nature of the expense, the benefits of the expense, and each parent's ability to pay.

Do you consider the parties' assets and debts in setting or modifying child support?

I normally do not consider parties' assets or debts in setting child support, unless a party's asset is an income producing entity.

Do you consider inflation alone as a factor to justify support revisions? If so, how much increase or decrease is necessary before a change will be considered?

No.

What factors do you consider in a shirking determination?

I will typically look at the basis for a parent maintaining a specific employment, a parent's efforts in increasing their earning and/or earning capacity, and the historical earnings which a party had generated prior to and during the marriage.

Do you find vocational experts to be helpful in determining earning capacity?

I do find vocational experts to be helpful in setting a range of earning for support calculation.

Have you ever sentenced anyone to jail for nonpayment of child support? If so, under what circumstances?

I have found payors in contempt for failing to pay child support when they had the ability to do so. Typically, I will order payment of some/part/all of the arrearage as purge condition to a jail sentence.

Do you have a general formula for setting maintenance?

While many judges in my county have a "rule of thumb," I really prefer to look at each divorce separately, and consider the relevant statutory factors in setting maintenance.

Do you have any benchmarks in determining whether a marriage is short-term or long-term? If so, what are they?

While there are certainly no "bright line" that would define a short-term or long-term marriage, I think that a marriage of six years or less is relatively short term. A marriage of 20 or fewer years would be considered a midterm marriage, and a marriage of 20 years or more would be considered long term.

As a practical matter, exclusive of situations where there is a medical need, how many years must parties be married before maintenance is considered?

I think once the parties have been married for 3 or 4 years, there may be a justification for a short-term maintenance award so as to allow the payee an economic adjustment post-divorce.

How many years of marriage do you consider to be "long term" so as to qualify the payee for "permanent maintenance"?

Typically, I will not order "permanent maintenance," regardless of how long the marriage may be. Rather, if left to my own device, I prefer "indefinite maintenance" that would allow some flexibility as the parties age and their respective conditions change.

If a maintenance candidate has never worked during the marriage, but gets a job during the divorce, will the maintenance award be affected?

Typically, unless there is a reason to disregard a party's employment, I will assume actual earnings by both parties as of the date of divorce.

Is there an age for children at which a homemaker should be working outside of the home?

For me, there is no magic age at which a homemaker should be working outside of the home. Rather, I am most interested in what arrangements the parties had for their family prior to the divorce action, and whether or not it is reasonable to maintain that arrangement when the parties physically separate and are forced to maintain the cost of separate households. It would be difficult for me to justify a "homemaker" remaining in the home exclusively for the benefit of the parties' children once the youngest child reaches high school age.

At what point in time do you feel that a maintenance ward is affected by the extent of the property awarded to the parties?

I think it reasonable to consider any income that may be produced from property awarded to a party for purposes of calculating a maintenance award.

Have you ever awarded maintenance to a man?

Yes, but it is an infrequent occurrence.

When one spouse has put the other spouse through professionals chook would you consider that a factor in awarding maintenance?

I would.

Do you let a parent with minor children stay in a house for a number of years before selling it, if the house has to be sold, or do you normally order sold immediately? What sort of factors do you consider in making this determination?

Unless there is a unique or special need for children to remain in a specific structure, I normally order that the house be sold immediately. I have a difficult time in accepting the notion that there is an emotional attachment to a physical structure that the court should recognize as a factor in property division.

How often have you diverged from the 50-50 presumption? What is the basis for the divergence in most of these cases?

I approach each disputed placement case on an individual basis. I normally do not have as a "goal" to divide placement of the minor children between parties on a 50-50 basis. Rather, I am interested in the parties' ability to actually spend time with their child, the child's needs, and the minimization of problems that any placement schedule may have for the family.

Have you ever issued any sanctions for the failure of a party to timely file a financial statement, such as striking his testimony or entering an order that the financial disclosure statement of the other party is to be accepted as true?

I have not entered any sanctions, but in the event a party fails to provide financial information, my record will normally indicate that the orders issued from the bench were based exclusively on information provided by the party who complied with the court order regarding disclosure of financial materials.

What has been your experience in dealing with the exemption of inherited and gifted property from equitable distribution?

I will frequently consider arguments or evidence of gifted and inherited property in any disputed property division.

Do you have a policy with respect to the appreciation of nondivisible property during the marriage?

I really want to see how the property appreciated during the marriage, and whether or not the parties themselves treated the appreciation as a marital or individual asset.

Do you ever award a contribution by one party to the attorney fees of the other? What do you base it on?

It is rare that I would require one party to pay the other party's fees. I have considered such a request if I am satisfied that there is evidence of over trial or discovery abuses.

How do you approach discovery disputes? Have you ordered the appointment of a special master to resolve those disputed? If so, what type of authority do you grant to the special master?

Typically in a discovery dispute, I want to get the parties in as quickly as possible to understand the basis of the disagreement, and set a clear path forward regarding what information would not be discoverable between the parties, and why. I tend not to appoint a special master to resolve discovery disputes.

What is the average waiting time past the statutory period for trial dates in your courts, as to both contested and uncontested matters?

Generally, we try to get divorce actions completed within six to eight months of filing

How rewarding or satisfying do you find the hearing of family law matters as compared to other kinds of cases?

I enjoy presiding over family law proceedings. I had practiced in this area for a lengthy period of time, and believe that I am willing to listen to the parties' requests in a sincere and fair fashion.

What do you see lawyers doing that bothers you the most?

Overstating problems or disagreements which the parties had experienced prior to and/or during the divorce action.

What do you think lawyers could do to help make it easier for the litigants when they appear in court?

I think it important that lawyers explain to their clients the different procedures that the court will use in a stipulated divorce versus a contested divorce. I also think it helpful if lawyers explain to clients that the court will base many of the decisions in a contested matter on statutory factors, and not emotion.

What do you think lawyers could do to help make it easier for the court in hearing family law cases?

I think it always helpful that at the beginning of a divorce action, the lawyers outline what issues are resolved and what issues are in dispute. As to the disputed issues, it is helpful to understand each party's position on the issue and a brief statement as to why they have taken such position.

What words of wisdom do you have for parties appearing before you?

I encourage parties to focus on the issues in dispute. Further, I want the parties to understand that while they are entitled to their own beliefs and perceptions of fairness, the court is guided by fairly objective statutory factors.

What words of wisdom do you have for family law attorneys appearing before you?

The better prepared you are, the more likely you will maintain the court's ear during any proceeding.

What type of music do you listen to?

I have three teenage sons. I am not allowed to set the music at the house or in the car.

Are you married?

I have been married to my wife Kathy for 25 years. (I think).

How many children do you have?

I have three sons, ages 23, 21, and 17. I am now experiencing the blessing and curse of my kids "leaving the nest" (and returning to feed).

Interview with Comm. Jennifer L. Weber

By Tiffany Highstrom

Tiffany Highstrom talks with Comm. Jennifer L. Weber about her experiences as a court commissioner in Jefferson County. She has been a court commissioner for nearly 5 years, with her time split between family law cases and criminal defense. She discusses her thoughts on placement, child support, and other issues that she faces on a daily basis.

About Comm. Weber

- Undergraduate: UW-Madison; B.A. in Psychology and Social Work; Criminal Justice Certificate
- Law School: Marquette University 1999.
- Married: 24 years, with one child.
- Hobbies: I enjoy spending time with my family and friends at the pool, on the boat, or on the motorcycle.

Questions and Answers

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

I worked various part-time positions. I graduated from UW-Madison, bought a house, got married and started law school within a three month period.

What career path would you have chosen if you had not become a lawyer?

I intended to pursue a career in social work primarily working with adolescents.

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

My practice was split between family law, including guardian ad litem appointments, and criminal defense.

What is the most rewarding part of your job?

The most rewarding part is when you can provide a path for the parents to recognize and achieve stability, both for themselves and the children.

What is the least rewarding?

The least rewarding is when you recognize that a child's life path has been altered by the parents to the point that orders are generated solely on the basis of preventing further damage.

Who would you say has had the most influence on your career and why?

There is no one person as there have been different individuals at different times throughout my career. If I had to choose only one, that person would be Dean Howard Eisenberg. Throughout law school he provided words of wisdom, both about the law and how to personally survive a career in the law.

Do you keep track of how many of your decisions are reviewed by judges? If so, what trend do you see?

I do not keep track of how many decisions are reviewed by the assigned judge. In 2019 less than 1% of all contested hearings held by a commissioner resulted in a de novo hearing being heard by the assigned judge. When a de novo hearing is held, I do review the orders from the hearing, however it is very uncommon

for the same evidence to be presented at both hearings so slightly different results are expected.

What does the phrase "regularly occurring, meaningful periods of placement with each parent 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?

This factor provides a general guideline to the court to attempt to maximize the children's time with each parent. There are many other individual factors to consider such as proximity of residence, work schedules, age of the children, etc. No two families are alike and this factor allows individual consideration of all of the circumstances with the intent to maximize the time the children have with each parent. Many parents believe this phrase means they are entitled, as a right, to an equal placement schedule regardless of any other circumstances.

Do you require parents to file parenting plans? Do you find parenting plans helpful?

I do not require parents to file parenting plans. If a Family Court Services Legal Custody and Physical Placement Study is ordered, then a parenting plan is required by each parent. I do not find parenting plans helpful as circumstances are often changing throughout the pendency of the case.

What temporary placement schedule do you find works the best in most cases?

There is not a temporary placement schedule that works best in most cases. Each case has individual factors resulting in a temporary placement schedule that works at that moment. One or both of the parents may be in temporary housing or one of the parents may be seeking new employment resulting in reduced availability for the children. Every temporary placement schedule is unique to the case.

How do you see the mediation process for custody and placement disputes working in your county?

The mediation process in Jefferson County works very well. The parents participating in mediation reach agreements, with no additional court hearing necessary, over 40% of the time. Parents may return to mediation, at no additional cost, within one year of the last mediation session to address any additional concerns that may arise.

How could the mediation process work better?

During the mediation orientation session, the parents are often in a heightened emotional state and cannot process the information being provided. If I refer a case to mediation at the time of hearing, I explain to the litigants exactly what mediation is and what will happen, including the higher costs if mediation is not successful. Better education and knowledge of what mediation is and the benefits of reaching an agreement would allow for the parents engaging in mediation to be in a more compromising mindset for the best interests of the children.

What can attorneys do to make the mediation process more productive?

Attorneys can provide detailed information regarding the mediation process and encourage their clients to actively participate in mediation. They should also provide information to the client about the next steps, including the additional costs, if mediation is unsuccessful. If mediation is not successful, a FCS study may be ordered, additional GAL fees will be incurred, both resulting in several thousand dollars owing. Most importantly, the additional time before final hearing will likely be six to nine months later, resulting in uncertainty and distress for the children.

Do you make post-judgment placement modification decisions? If so, how extensive is the testimony and what factors do you consider?

Yes, all post-judgment modification motions are heard by the commissioners. If the motion cannot be resolved without an evidentiary hearing, we will schedule up to a one day trial. The time is equally allocated to the parties whether that be direct examination or cross examination of witnesses. By allocating the time equally, this prevents any argument regarding the use of delay tactics. It keeps parties focused on the relevant issues. I consider all of the statutory factors and enter detailed findings as to each factor.

Do you consider placement problems as a reason for changing custody?

Placement problems may be a factor in determining if legal custody should be modified. As the factors set forth in Wis. Stat. section 767.41(5)(am) are the same for legal custody and physical placement determinations, coupled with the factors set forth in Wis. Stat. section

767.41(2), there may be a case wherein legal custody should be modified to address physical placement problems. For example, a parent may not allow a child to attend an extracurricular activity or part-time employment because the activity occurs during that parent's placement time. That parent will then use legal custody as the basis for the non-cooperation. The only person this type of non-cooperation hurts is the child, and based upon the risk of emotional harm to the child, I may consider modifying legal custody.

What is your approach on determining temporary support issues?

A review of the actual cash income available to pay expenses and what expenses are absolutely necessary.

What is your goal for the parties when you set temporary orders?

The primary goal in entering financial temporary orders is fairness and preservation of the marital estate to the best extent possible. The primary goal in entering non-financial temporary orders is providing the parties with a framework to move forward to final hearing. In some cases, there may be a need for more than one hearing to address changing events.

How often do you find yourself deviating from the child support percentage standards, if at all? What is the most compelling argument for deviation?

The calculation always starts with the child support amount based upon the child support percentage standards. I next inquire as to each party's position regarding child support and consider any requests for a deviation. I estimate I deviate from the percentage standard guidelines in approximately 25% of all pre- and post-judgment child support hearings, excluding deviations for the cost of health insurance.

The reasons I have found the application of the standard are unfair to either of the parents or the children vary on a case by case but are primarily based upon income available for payment of reasonable expenses. For example, a child may be placed out of home pursuant to a Children's Court order and CSA seeks a child support order based upon the alternate care placement. If a parent is actively working with Human Services to obtain housing, counseling, or treatment addressing the reasons why the child was placed out of home, I may order a deviation to allow the parent a better financial opportunity to have the child returned to his/her care.

Another example to deviate would be the financial resources of the parties such as a parent that does not have any housing, utility, and/or food expense and does not anticipate having one in the future versus a parent that if ordered to pay the percentage standards would lose his/her housing.

How do you approach disputes regarding variable costs?

Disputes regarding variable expenses are often the most tedious to get through but I generally follow these steps: 1) what is each parent's responsibility; 2) were the orders regarding consent prior to incurring the expense, if any, complied with; 3) were the orders regarding claims for reimbursement, if any, complied with; 4) were the expenses reasonable.

What role does insurance premium costs for the children play in the establishment of child support and/or the allocation of variable costs? What about life insurance premium payments?

The cost of health insurance premiums for the children is a factor for deviation (up or down depending on which parent carries the health insurance) in each case. If a parent has other children or a new spouse on the policy, I will prorate the cost for each additional person after deducting the employee only cost. Most of the time, I will then divide the prorated cost for the children in half. For life insurance premiums for a child, if both parties seek to remain beneficiaries on the policy, I will order the cost to be shared equally. If only one seeks to remain a beneficiary, then that party will be ordered to pay the cost.

How do you think the child support "special circumstances" formulas are working? What problems do you see with them?

The special circumstances formulas work very well for the most part. At times, they can get very complicated when many children are involved with different parents. One of the problems I see is when a parent has multiple children with the same person, but other children were also born to the parent in between the children born with the same person. The other problem I have encountered is the consideration of a derivative social security benefit or the child's social security benefit when the parents share placement.

Do you consider the parties' assets and debts in setting or modifying child support?

Yes to both.

Do you consider inflation alone as a factor to justify support revisions? If so, how much increase or decrease is necessary before a change will be considered?

No, I have never considered inflation alone as a factor to justify support revisions.

In a modification action, how valuable is the parties' previous agreement in revising the amount of support?

The parties' previous agreement, as shown by the prior order, is extremely valuable. A party's "buyer's remorse" is not a substantial change of circumstances. I will review whether the same circumstances the parties based their agreement on are still applicable.

What factors do you consider in a shirking determination?

I consider whether the reduction of income was voluntary and unreasonable.

Do you find vocational experts to be helpful in determining earning capacity?

Vocational reports can be helpful when accurate information is provided to the expert. The opinion often times provides a range of income that can be used in consideration of other factors in determining an earning capacity.

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?

Assuming a party has an ability to work, I will often order a job search. At first hearings, I would not impute income to a party that does not have employment. Instead I would enter findings and temporary orders based upon the actual income to support the parties and the children. I would then schedule a review hearing in approximately 30 days to determine employment status and/or compliance with job search order. At the review hearing, I will amend the temporary orders accordingly.

When is it appropriate, if at all, for a party who has traditionally stayed at home with the children to re-enter the workforce?

Both parents are equally responsible to provide for their children. Often, parties in an intact household will assume different roles. Each of those roles needs to be fulfilled to provide for the care of the children. When parents are no longer together in the household, each parent must take on all of the different roles that had historically been divided. This often requires a parent that has traditionally stayed at home to reenter the workforce. Reentry into the workforce is appropriate and often necessary for each parent to adequately care for and support the children.

In determining maintenance on a temporary basis, do you have a general approach to setting maintenance?

My general approach is to review the parties' net income and their expenses. I exclude all unnecessary expenses or expenses that may be pushed off (i.e., clothes, donations, gifts). I also look at fundamental fairness. I would generally not order a party to pay maintenance such that the payment of maintenance would not allow the party to afford basic needs (i.e., food, transportation, housing, utilities).

Do you have any benchmarks in determining whether a marriage is short-term or long-term? If so, what are they?

I do not have definitive benchmarks, but generally speaking, less than 5 years is short term; midterm is 5-15 years; long term is over 15 years.

In a post-judgment situation, what situations will cause maintenance to be modified? What factors will lead to a termination or extension of maintenance?

A substantial change of income (either up or down) may cause maintenance to be modified, extended or terminated. Another related change of circumstances is a party's ability to work. More common in recent years is cohabitation.

Do you ever award a contribution by one party to the attorney fees of the other? What do you base it on?

If a party is found in contempt, I will typically award attorney fees. In other situations, the most common reason for the award of attorney fees is unreasonable positions (i.e., a parent is unwilling to share any holidays).

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

80% divorce/20% paternity.

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

75% of cases have both parties acting pro se.

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

Wis. Stat. section 767.281 allows for enforcement or modification motions to be filed in a county other than the county in which the judgment or order was rendered without the determination that a change of venue is appropriate. In this situation, a motion to modify placement may be heard in one county while a child support order is running in another county. I have had several motions filed under this statute resulting in delay and confusion among the parties and courts.

What do you see lawyers doing that bothers you the most?

Not being prepared; both parties and attorneys appear at a hearing requesting financial orders and one or both do not have financial statements prepared.

What do you think lawyers could do to help make it easier for the litigants when they appear in court?

Prepare their clients, both in case preparation as well as demeanor in the courtroom.

What do you think lawyers could do to help make it easier for the court in hearing family law cases?

Tell the court:

1) what your client specifically wants – set out an exact placement schedule and/or perform the calculations for financial order;

2) what is the factual basis for the request; and

3) what authority (case law or statutory) does the court have to give your client what they want.

What words of wisdom do you have for parties appearing before you?

Keep the best interests of the children in mind and remember it isn't what is fair to you, but what is fair to your children.

What words of wisdom do you have for family law attorneys appearing before you?

Your clients don't always tell you the truth. When in doubt, read the texts/emails, and if someone says they have a video, watch it before it is played before the court.

Get Helpful Tips and Updates on the Family Law Elist

Join the Family Law Section elist to gain access to helpful tips and the latest updates in family law practice. As a section member, you have free access to the list.

To join, visit WisBar.org, then navigate to the drop-down menu under About Us and choose Memberships. Click on E-lists, then Available Lists and then Subscribe. The Family Law elist is listed under Section/Division Lists.

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

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

Chair's Column

What's New on the Horizon

By David B. Karp

Welcome, spring 2020.

The Family Law Section Board continues to work throughout the year to better the practice of family law in a number of different ways, including through:

- the *Wisconsin Journal of Family Law*;
- our monthly blog posts;
- our seminars and web casts;
- our annual Door County workshop; and
- introducing legislation that improves Wisconsin's family law statutes.

Upcoming Board Meetings

Our next Family Law Section Board meetings are:

- Friday, June 12, 2020, at 1:30-4:30 p.m., at the Osthoff Resort, Elkhart Lake, held in conjunction with the State Bar Annual Meeting & Conference.
- Thursday, Aug. 6, 2020, at 8:30 a.m., at the Stone Harbor Resort, Sturgeon Bay, held in conjunction with the annual Family Law workshop.

All section members are welcome to attend our meetings.

Upcoming Seminars

Family Law Mediation Training

The Family Law Section is co-sponsoring the upcoming Family Law Mediation Training on April 23-24, 2020, and May 7-8, 2020, in Milwaukee. This training is designed for family lawyers, and will focus on mediation with self-represented couples. Experienced Wisconsin mediators will provide a step-by-step process of interdisciplinary mediation for divorce professionals that will include practical skills, ethics, interactive learning, and a binder of tools with handouts on each step. The Family Mediation Center is presenting the training at the University Club in Milwaukee. For more information and registration, familymediationcenter.org/professional-training.html.

Family Law at the State Bar of Wisconsin Annual Meeting and Conference

The State Bar of Wisconsin offers its Annual Meeting and Conference (AMC) on June 11 & 12, 2020, at the Osthoff Resort in Elkhart Lake. During the AMC, the Family Law Section is presenting a CLE session with the State Bar Indian Law and the Children & the Law sections. The session is entitled "The Indian Child Welfare Act: Is it the Gold Standard or Flawed Law?"

In addition, the Family Law Section is also presenting a CLE session on technology and the law, including social media issues, featuring Hon. Sally-Anne Danner, family court commissioner for Fond du Lac County; Hon. Michael Fitzpatrick, who serves on the Wisconsin Court of Appeals; Hon. Mark Fremgen, family court commissioner for Dane County; and State Bar ethics counsel Timothy Pierce. I will serve as moderator for the panel.

Family Law Section Annual Door County Workshop

Mark your calendars now for the Family Law Section Annual Door County Workshop, on Aug. 6, 7 and 8, 2020, at the Stone Harbor Resort, Sturgeon Bay. The seminar is currently in the planning stages, but will feature a guest speaker Thursday afternoon, the traditional beginners' and advanced tracks Friday morning, and a Saturday morning ethics presentation, including the annual case law update.

Our *Journal*

The *Wisconsin Journal of Family Law* is always looking for contributing writers with ideas on important areas in the area of family law.

Have you have encountered a complex family law legal issue or unique area in the law that may not have been touched in the past? If so, consider writing an article for consideration to be printed in our journal. For more information, contact the editor-in-chief, Hon. Thomas Walsh at *Thomas.Walsh@wicourts.gov*.

Our Blogs

The Family Law Section Board is committed to posting monthly blogs on important family law issues.

If you have an idea for a blog, or would like to contribute a blog, you do not need to be on the social media/blogging committee to be a participant.

If you are interested in writing a blog, you are free to contact me, or the current committee chair, James Carson Bock at james@jcwbesq.com for more information.

About the Chair

David B. Karp is a shareholder with Karp & Iancu, S.C. in Milwaukee. He can be reached at dbk@karplawfirm.com.

Editor's Column

Get Engaged with the Practice of Family Law

By Hon. Thomas Walsh

The practice of law is changing very rapidly. Family law is no exception. Mediators drafting documents, unbundling of legal services, and the explosion of self-represented litigants are just a few of the ways the practice of family law is changing. There are other ways it is changing as well.

As the profession changes, it is important to stay engaged in the workings of your profession if you want to remain relevant and/or profitable. Here are a few ways.

First, it is still very important to realize that a good and experienced family law lawyer will always have a place. An attorney who does a case or two a year may not always find a place in the market. Family law is growing too complex to simply dabble in it and be effective.

Second, the State of Wisconsin has many opportunities to get engaged and improve your profile in family law. There are organizations such as the State Bar of Wisconsin Family Law Section, the Association of Family and Conciliation Courts (AFCC), the American Academy of Matrimonial Lawyers Wisconsin Chapter (AAML – WI), the Collaborative Family Law Council of Wisconsin and others. All of these organizations accept new members and all of them are engaged, in their own way, in leading the profession forward.

Our Family Law Section engages in lobbying, seminar presentations, the Family Law Workshop, and other efforts to impact the improvement of the practice. AFCC includes cross-disciplinary professionals to present workshops/seminars. Its membership includes many of the different players in our profession, and it gears presentations toward Wisconsin-specific practitioners.

The practice of collaborative law is an innovative way to resolve marital discord without resort to destructive litigation. The Collaborative Law Council is dedicated to this area our profession.

If family law is your area of interest, reach out to any one of these organizations (or others) and make an impact.

Third, the number of published cases coming out of our appellate courts and our Supreme Court has gone down drastically, and that drop will likely continue. The Wisconsin Journal of Family Law (WJFL) strives to provide timely and relevant articles that either analyze family law issues or provide forward looking ideas for improvement of the practice. Articles in the WJFL have been cited in appellate court opinions in the past. Scholarly work in legal journals often impacts the decisions of courts, and you can engage in the practice in a meaningful way by writing an article. Get engaged by providing insight to your family law colleagues throughout the state — write for the WJFL.

In any case, our practice is too important to simply neglect it as others guide it. Make your presence felt. You and the practice will be better for it.

About the Editor-in-Chief

Judge Thomas Walsh, Hamline 1992, is a circuit court judge for Brown County. He can be reached at Thomas.Walsh@wicourts.gov.

39th Annual Family Law Workshop

Hosted by the Family Law Section of the State Bar of Wisconsin

Save the date for the 39th annual Family Law Workshop. The next Workshop is Aug. 6-8, 2020, at the Stone Harbor Resort in Sturgeon Bay.

This Workshop provides 3 half-days of CLE programming and allows time to enjoy Door County.

Day 1 will feature internationally recognized mediator, trainer, and speaker Dr. Gregory Firestone who will focus on negotiation and collaboration skills.

Day 2 will offer a track for those new to the family law field and a second track for the experienced practitioner. The schedule will include a family court commissioner panel discussion and presentations on the following topics:

- Dealing with Difficult Clients and Difficult Lawyers
- Assisted Reproductive Technology
- How to Read and Use Tax Returns in a Family Law Case

Day 3 will feature Judge Walsh and others presenting on case law review, legislative updates and an interactive evidence presentation and will close with an ethics presentation.

Stay tuned for the full details and registration will open by May 1.

Thank You, PINNACLE Authors

The State Bar of Wisconsin thanks the following members of the Family Law Section for their contributions to PINNACLE® publications over the past eight months.

Anderson on Wisconsin Insurance Law: Kelly J. Stohr

Appellate Practice and Procedure: Michael S. Heffernan

Wisconsin Judicial Benchbook – Family: Hon. Michael J. Dwyer (ret.), Hon. Barbara W. McCrory, Hon. Thomas J. Walsh

Wisconsin Judicial Benchbook – Juvenile: Hon. Thomas J. Walsh

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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.