

Caution: Spouses at Work - An Overview of Vocational Experts in Divorce Proceedings

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A common issue in modern matrimonial proceedings is the earning capacity or vocational potential of one or both spouses. This is because employment or earning ability directly impacts the resolution of the economic aspects of a divorce including both alimony and child support. Vocational experts are professionals who evaluate the employability of an individual for the purpose of assessing his or her ability to secure employment and thereby to earn income. Such employability assessments may be necessary to determine the amount of support a spouse can contribute, the entitlement of a spouse to support, and/or whether he or she is capable of contributing to his or her own support and support of the children.

When do I need a vocational expert and employability assessment?

An employability assessment is used in cases where, for example, a question exists as to either party's income potential or capacity for employment. Through the use of the services of a vocational expert, a party seeks to determine the highest level of occupational capacity and income a party can achieve. Situations commonly arise where a husband or wife is voluntarily or involuntarily underemployed (i.e., due to early retirement, change in career or lay-off), has left the workforce for childcare responsibilities or has never worked outside the home. One spouse should not be saddled with a support obligation based on the fact that the other is not working at the time of a divorce. Similarly, spouses should not be able to insulate themselves from support obligations because he or she has the ability to earn a higher income but has voluntarily decreased their earning capacity to avoid or limit support obligations. The use of employability experts to examine and assess the actual ability of individuals to work and to earn income at their highest appropriate level is a valuable tool in divorce cases. Such experts can ultimately identify potential employment for a party and thereby "impute" the income such party could or should be earning, rather than simply relying on that party's current employment status.

What does an employability assessment entail?

Once the need for a vocational expert is established, the process of obtaining such an employability assessment in divorce proceedings is fairly straightforward. The initial action taken is to retain the services

of the expert by entering into a retainer agreement with that expert. The expert will then arrange to interview the subject spouse and question him or her on education, aptitude, work history, career options and job market information, health, duration of the marriage and absence from the work force, as well as any other factor bearing on the ability of the subject to be gainfully employed. After an interview has been conducted, the expert will issue a report in which an opinion is given concerning the ability of the subject to secure employment and income at a level commensurate with other individuals in a comparable position. The report will assess the capabilities and circumstances of the subject spouse and the income he or she can earn. This imputed income is then used for the purposes of calculating a fair support amount in settlement discussions, and if a settlement agreement cannot be achieved, a vocational expert can ultimately be offered to testify at trial as to the earning capacity and income potential of a party at trial.

When does an employability assessment occur?

An assessment of the employability and earning capacity of a spouse is generally conducted in the initial stages of the litigation known as “discovery.” An assessment may be requested by either attorney or may be ordered by the court.

Issues concerning the employability of a spouse are often complex and fact sensitive. Experienced matrimonial practitioners are trained to identify cases where employment should be disputed, and employability experts are required. Such experts are capable of leveling the playing field for spouses who find themselves at a disadvantage because the other party has decided to engage in divorce planning to decrease their income or demand support in lieu of working. It is accordingly important to consult with an attorney knowledgeable in dealing with such issues in order to protect the right to support and a secure future.