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Editor
Debra S. Frank, Esq.

**CHILD SUPPORT, VOCATIONAL EXAMINATIONS, AND
EARNING CAPACITY:
NEW CASES AND UTILIZING VOCATIONAL EXPERTS**

By

**SUSAN WISE MILLER, M.A.
Career Counselor/Vocational Expert
California Career Services**

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Career Counselor/Vocational Expert
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I. THREE RECENT APPELLATE DECISIONS

In re Marriage of Lim and Carrasco (2013) 214 Cal.App.4th 768 (hereafter *Lim and Carrasco*); *In re Marriage of Barth* (2012) 210 Cal.App.4th 363 (hereafter *Barth*); and *In re Marriage of Ficke* (2013) 217 Cal.App.4th 10, mod. by *In re Ficke* (Cal.App.4th Dist., July 11, 2013) 2013 Cal.App. LEXIS 549 (hereafter *Ficke*).

A. Introduction

In these three cases that involve employability and earning capacity, the appellate court emphasized what was in the best interest of the children. In *Lim and Carrasco*, the court based the earning capacity of a parent on an 80% rather than a 100% work schedule. (*Lim and Carrasco, supra*, 214 Cal.App.4th 768.) In *Barth*, the court used the report and testimony of a vocational expert to impute earnings to an accountant who underreported his earnings available for child support. (*Barth, supra*, 210 Cal.App.4th 363.) In *Ficke*, the court said it was not appropriate to impute earnings to a custodial parent based on a job offer that was turned down because it would have required too much travel. (*Ficke, supra*, 217 Cal.App.4th 10, mod. by *In re Ficke* (Cal.App.4th Dist., July 11, 2013) 2013 Cal.App. LEXIS 549.) In two of these three cases, vocational experts were utilized to render opinions.

B. Family Law Code Sections and Vocational Examinations

The best interests of the children or the ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party is one of the factors in **Family Code section 4320, subsection (g)** that needs to be addressed by vocational experts. Other factors include: marketable skills of the supported party; job market for those skills; time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment. Further, the extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties needs to be considered by vocational experts. Other factors in **section 4320** include "(c) the ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living; [¶] (d) the needs of each party based on the standard of living established during the marriage; [¶] . . . [¶] (f) the duration of the marriage; [and] [¶] (h) the age and health of the parties."

According to **Family Code section 4320, subsection I**, the goal of the State of California is "that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a long-duration marriage or a marriage of more than ten years, a 'reasonable period of time' is generally one-half of the length of the marriage."

C. The Three Recent Appellate Decisions

Lim and Carrasco was published at the request of the Association of Certified Family Law Specialists (ACFLS). Lily Lim was a partner in a law firm, and Michael Carrasco was a college professor. The appeals court upheld the decision of the trial court, basing support orders on Lily's 80% work schedule, where that percentage constituted an objectively reasonable work regimen and was in the best interests of the children. (*Lim and Carrasco*, *supra*, 214 Cal.App.4th 768.)

Michael sought custody of the children, stating that his flexible work schedule would allow him more time to care for the children, while Lily's heavy burden of billable hours required her to work much more. Lily had been on medical leave for two months because of an incidence of domestic violence. Upon her return, her employer agreed to a reduced or 80% schedule. The court then calculated child and spousal support based on her earnings in an 80% work schedule, after Lily explained that she would have to work 80 hours per week to bill 2,000 hours per year, as required by the law firm. Michael argued that Lily's support payments should be based on her full-time salary. The appeals court cited *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269 that defines earning capacity and *In re Marriage of Simpson* (1992) 4 Cal.4th 225 that states that earning capacity should be based on a reasonable work regimen, not one involving excessive hours.

In *Barth*, Jeffrey Barth fought to have the case heard in California rather than in Ohio. After three years, the case was back in California, where the trial court granted retroactive child support to the date Jeffrey originally filed his divorce in California. Jeffrey was ordered to pay significantly higher support than what the court in Ohio had ordered. Jeffrey appealed, but the decision of the trial court was upheld. Although he was a CPA with practices in Ohio and California, the court found that Jeffrey lacked credibility when it came to his own financial matters and that he was purposely vague and evasive. While Jeffrey reported earning \$36,000 to \$60,000 per year from 2007 to 2009, Andrea's (wife) vocational expert opined that Jeffrey had the ability to earn and that there were opportunities for him to earn in the range of \$120,000 to \$150,000, plus bonus. The court used the lower figure or \$10,000 per month to determine support, saying Jeffrey had grossly under reported his actual income to the courts in Ohio. (*Barth, supra*, 210 Cal.App.4th 363.)

In *Ficke*, both child and spousal support were at issue; Julie, who appealed the trial court's decision, prevailed. Regarding child support, the appeals court said the trial court abused its discretion by imputing income to Julie without an express finding supported by evidence that the imputation would benefit the children. The court cited *In re Marriage of Cheriton, supra*, 92 Cal.App.4th 269, *In re Marriage of Mosley* (2008) 165 Cal.App.4th 1375, and *In re Marriage of Cryer* (2011) 198 Cal.App.4th 1039. (*Ficke, supra*, 217 Cal.App.4th 10, mod. by *In re Ficke* (Cal.App.4th Dist., July 11, 2013) 2013 Cal.App. LEXIS 549.)

Regarding spousal support, the appeals court said that the trial court abused its discretion in making a spousal support award that required Julie to pay support to Greg. Income that was imputed to Julie of \$13,333 per month was based on income she would have earned had she taken a position that was offered to her. From 2004 to 2008, Julie worked with a dental implant manufacturer, doubling the company's total worldwide sales, earning a final salary of approximately \$200,000 per year plus bonuses. According to Julie's 2007 W-2 from the dental implant manufacturer, her total compensation was approximately \$729,000. Julie was terminated in spring 2008, and her explanation to a vocational examiner was that a new CEO came on board and wanted a male for the job. In the three months after her lay-off, Julie completed a job search, which eventually yielded one offer: a marketing manager job for a biotech company with a salary of \$125,000. She declined the offer because she had already started a pet healthcare membership insurance program, modeled after a similar business run by her mother in Arizona. She also declined the job offer because it would have required considerable travel, and she would not be home in the evenings with her two children.

The appellate court indicated that nowhere in the statement of decision or in the trial judge's remarks were there any references to the interests of the children. Further, Greg did not need support, as he worked as a real estate broker for Cushman & Wakefield; was a City Council member in Aliso Viejo; and received income from two rental properties. Although the trial court indicated that the ability of Julie to pay spousal support would not be easy because she was working in a start-up company, they nevertheless imputed an income to her of \$13,333 per month when her real income was \$251 per month. The appeals court

reversed both the child and spousal support orders and remanded both the support issues for further proceedings.

II. Vocational Expert's Role

A vocational expert needs to address the ability of supported and/or supporting spouses to work in various positions and the availability of those jobs, as well as the compensation for the positions. In *Ficke* and *Barth*, a vocational expert was used as an information provider to the attorneys and the judge about employability and earning capacity issues. (*Ficke, supra*, 217 Cal.App.4th 10, mod. by *In re Ficke* (Cal.App.4th Dist., July 11, 2013) 2013 Cal.App. LEXIS 549; *Barth, supra*, 210 Cal.App.4th 363.)

A. Standards and Practices for Vocational Evaluations

Standards have been created by the San Francisco Bay Area Vocational Experts (BAVE), a professional association. As a member of this group, I have received written permission to use an edited version of the Standards for this article.

In California family law proceedings in which either child and/or spousal support is at issue, the employability and earning capacity of both the payor and recipient must be considered.

The function of the Vocational Evaluation in Family Law is to provide the judges, mediators, or triers of facts and the parties with objective, verifiable information regarding employment issues for use in determining appropriate support levels. In California, vocational evaluations may be ordered by the court, requested by one party, or agreed to by both parties.

Vocational experts need to maintain objectivity throughout the vocational evaluation process, regardless of the source of the referral. Vocational experts receive and evaluate information relevant to the vocational evaluation and make reasonable efforts to obtain relevant information needed to form an expert opinion. They form expert opinions and base their conclusions on all relevant information available. They may also disclose the need for information that is not available but necessary to form an expert opinion.

To ensure ethical treatment of the individual being evaluated, the vocational expert discloses to the person being evaluated the role of the independent vocational expert as an evaluator and not a provider of services, the limits of confidentiality to the person being evaluated, and the potential for a conclusion and opinions with which the person being evaluated may not agree.

When both parties jointly request the evaluation, the expert communicates orally and in writing with both parties simultaneously. The expert requires written information offered by either party to be provided to the other party. When appointed as the court's expert according to **Evidence Code section 730**, the expert may contact or request information from either party or attorney directly, or request a joint conference. Neither party may initiate contact with the expert without prior agreement. Neither party may submit written material to the expert without simultaneously submitting a copy to the other party. The expert submits written reports simultaneously to the court and/or to both attorneys/parties.

The vocational expert gathers relevant information pertaining to the person being evaluated that is necessary to complete the evaluation, following a standardized vocational evaluation process which may include a structured interview, assessment exercises, vocational testing, and a review of vocational test results with the person being evaluated.

To provide informed participation in the vocational evaluation, the vocational expert considers the issues of diversity, including age, gender, sexual orientation, religion, country of origin, disability, language ability, and ethnicity and cultural differences; explains the influence of the individual's motivation and cooperation; and explains the possible consequences on the evaluation. The expert also explains the option of using the evaluation findings and vocational plan for the individual's personal career planning; explains the concept of imputed income that can be determined through the evaluation findings; requests the cooperation of the person being evaluated in providing needed information; and integrates the individual's feedback in the evaluation.

To gather current, relevant, labor market information, the vocational expert determines and uses appropriate sources of information about salaries, wages, and job availability; conducts research appropriate to the occupation, geographic location, and individual attributes of the person being evaluated; provides current, accurate information relevant to the occupations; and weighs the labor market information on the basis of its source, currency, and applicability.

Among the factors that need to be considered by a vocational expert are work restrictions based on physical or mental health, transferable employment skills and abilities, and needs of dependent children as was the case in *Ficke, Barth and Lim and Carrasco*. (*Ficke, supra*, 217 Cal.App.4th 10, mod. by *In re Ficke* (Cal.App.4th Dist., July 11, 2013) 2013 Cal.App. LEXIS 549; *Barth, supra*, 210 Cal.App.4th 363; *Lim and Carrasco, supra*, 214 Cal.App.4th 768.)

The vocational expert identifies potential occupations and conducts current, relevant labor market research to determine wages, salary or earnings, and availability of employment opportunities associated with the identified occupations. Reports provide vocational plans by outlining the steps to achieve a vocational or career goal, training programs, costs, reasonable timelines, and potential barriers to reaching the career goal.

B. Vocational Examination Reports

At California Career Services, we follow the BAVE Standards and take into account the applicable Family Law Code sections. We document the current and future employability and earning capacity of a supported or supporting spouse, including the availability of openings and pay ranges for specific jobs, as well as any pertinent education or training that would enhance employability and earning capacity.

We may address the issue of whether half the length of the marriage is “a reasonable period of time” for an unemployed spouse to become self-supporting. We also assess whether a supported/supporting spouse has made reasonable, “good faith” efforts to contribute to his or her own support by seeking employment, building a business, or exploring career options.

We often create a detailed, re-entry career development plan for the supported spouse based on his or her education, marketable skills, work-related experience, and the marital standard of living, determining the costs and duration of any education and training needed. We address issues such as age and physical or emotional health that affect employability. Further, we identify potential childcare costs and costs of before-school and after-school programs that may need to be utilized by a spouse returning to work.

The vocational examination at California Career Services takes from four to six hours and consists of an in-depth, structured interview that includes reviewing educational background, work history, unpaid work, volunteer work, and any professional affiliations, licenses and credentials. We also ask examinees about their efforts to seek employment. We ask that examinees prepare in advance for their examination by sending a resume and additional information pertaining to the interview portion of the examination.

Further, we administer assessments to determine career values, career interests, marketable/transferable skills, and personality issues as they relate to work. Then, we discuss the jobs that we plan to research and document in our report with the examinee. Our reports often provide a road-map for the examinee to enhance his/her employability and earning capacity.

ENDNOTE

- 1 Susan Wise Miller, M.A., Master Career Counselor, National Certified Career Counselor, Diplomate, American Board of Vocational Experts, Certified Vocational Evaluator Susan@californiacareerservices.com, 323-933-2900.

Additional forensic vocational services offered by California Career Services include Labor Market Information (LMI) Declarations. This is helpful when there is only one job or position title to be researched and when pertinent, accurate, updated information is available about the individual whose occupation is being researched. To prepare a declaration without meeting with the individual, we request detailed information about the person's background and experience, including a resume. Using this information, we conduct research on job availability and earnings for someone with the education and experience similar to that individual.

Another service we provide is to review another expert's Vocational Examination Report and give oral or written feedback.

Career Counseling Services. As career counselors, we can provide follow-up services to vocational examinee clients with permission from the attorneys. In addition, with three career counselors on staff, California Career Services provides career counseling to a myriad of individuals with career-related needs. Further, we have been the Southern California service provider for the career counseling component of the State Bar of California's Lawyers Assistance Program (LAP) since 1995. The Bar will pay for two hours of career counseling for any active member of the Bar, so we can provide services to examinees' lawyers, as well as to examinees.

For additional information, please visit www.californiacareerservices.com.