ROBERT BROOKS

STATE REPRESENTATIVE • 60TH ASSEMBLY DISTRICT

Assembly Committee on Judiciary
Thursday, April 11, 2019

Thank you for holding a hearing on Assembly Bill 100 and allowing me to testify in favor of this legislation.

During this past session, I served as the Chair of the Study Committee on Child Placement and Support. Senator Lena Taylor was the committee's vice chair.

The committee was tasked with reviewing current standards for determining physical placement and child support obligations.

The committee was composed of 5 legislators and 8 public members, including a judge, court commissioner, private family law attorney, domestic violence advocate, fathers' rights activists, and county child support agency directors.

The diverse membership of the committee allowed us to hear from multiple stakeholders. It was important for us to receive feedback from both practitioners and those parents that would be directly impacted by policy change – both of which were represented on the committee.

Assembly Bill 100 would allow courts in a family law action involving minor children to take judicial notice of records for specific convictions and restraining orders. The convictions must involve crimes subject to domestic abuse surcharge, crimes against the convicted individual's child, or retraining orders that were ordered by the other parent.

The study committee heard testimony that the court is frequently unaware if a family has a history of domestic violence, even when a parent has a conviction or injunction that is publicly available in court records. Judges do not always ask a party about possible history of domestic violence, unless prompted by something in the case file. Additionally, victims of domestic violence are often hesitant to speak up about past instances, so judges would be able to look at records themselves.

This bill would allow judges to have all of the relevant information when determining periods of physical placement of a child.

The Study Committee on Child Placement and Support passed Assembly Bill 100 out of committee on a vote of 12-1.

Thank you for your time and attention and I ask that you support this common sense legislation. I would be happy to answer any questions.

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FAMILY LAW SECTION

To: Members, Assembly Family Law Committee
From: State Bar of Wisconsin Family Law Section Board
Date: April 11, 2019
Re: AB 100 – judicial notice of court records

The State Bar of Wisconsin's Family Law Section Board supports AB 100, legislation produced from the Legislative Council Study Committee on Child Placement and Support related to judicial notice of court records.

The proposed changes to section 767.135 in AB 100 would allow courts to take judicial notice of certain criminal convictions and injunctions involving domestic violence and child abuse when issues of child custody and placement are subjects of litigation in family law actions.

Currently, under the judicial ethical code issued by the Wisconsin Supreme Court, judges are prohibited from independently investigating facts in a case, but Wisconsin Statute Section 902.01 permits courts to take judicial notice of facts capable of accurate and ready determination from sources whose accuracy cannot reasonably be questioned. As proposed, AB 100 eliminates the potential conflict between those directives.

All too often, unrepresented litigants in family law actions are not aware of the importance a history of domestic abuse and child victimization plays in the court's determination of issues of custody and placement of minor children. In addition, victims of such offenses may be unwilling to recite that history in front of their abuser in open court.

Permitting judges to review existing court records they can access from the bench for prior incidents of domestic abuse, child abuse, child neglect and exploitation enables judges to make decisions on custody and placement consistent with the legislative directive that courts act in the best interests of minor children.

For these reasons, the State Bar's Family Law section respectfully requests the support of committee members in the passage of AB 100, and expresses gratitude to the members of the Child Placement and Support study committee for their efforts on this legislation.

For more information, please do not hesitate to contact our Government Relations Coordinator, Lynne Davis, ldavis@wisbar.org or 608.852.3603.

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.

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L.C.

memo

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Date: April 11, 2019
From: Chase Tarrier, Public Policy Coordinator
Adrienne Roach, Policy and Research Program Director
Re: AB 100 – Judicial Notice of CCAP Records

Chairman Ott and Members of the Assembly Judiciary Committee,

Thank you for the opportunity to provide feedback on Assembly Bill 100 (AB 100) regarding judicial notice of certain records related to domestic violence crimes. We appreciate your consideration of our perspective on this issue. End Domestic Abuse Wisconsin (End Abuse) is the statewide organization that represents domestic violence survivors and local domestic violence victim shelters and service providers. In addition to articulating our thoughts regarding AB 100, this memo will include an overview of a recent research project conducted by End Abuse in collaboration with various partners that work in, or tangent to, the Family Law system. Some of the research findings are included in this memo and should help to provide context for our perspective on this legislation.

We would like to thank the members of the Legislative Council Study Committee on Child Placement and Support who prioritized this legislation in response to our concerns that criminal convictions of domestic violence crimes are often overlooked in the context of family law cases, leading to dangerous outcomes for children and non-abusive parents. As is apparent from the results of our research project, even in cases in which one party has been previously convicted of a domestic violence related crime against the other party, many judges do not make official findings of domestic abuse as permitted by 2003 WI Act 130 or implement safety provisions for non-abusive parents and children. For this reason, it seems natural that End Abuse would support legislation to allow judges to take notice of these criminal convictions by looking up a party's criminal history in the Wisconsin Court System - Consolidated Court Automation Programs (CCAP). Despite the fact that AB 100 nominally addresses our concerns regarding the family law system's failure to respond to domestic violence, there are several reasons for our current neutral position on this proposal.

No Conviction Does Not Mean No Abuse

Advocates and survivors consistently describe a family law system that is overloaded with cases and therefore unable to spend the time necessary to identify domestic abuse dynamics in a family. Moreover, a great majority of victims of domestic violence in the family law system are

pro se litigants, making it difficult for them to follow the established protocols of the court system when bringing their history of domestic violence to light. For this reason, family courts tend to funnel litigants through the system as quickly as possible, often using limited evidence to make definitive claims about the nature of the case in question. For many judges in Wisconsin, the lack of an established history of domestic violence in CCAP may serve as a tempting reason to conclude that no abuse has occurred, and the case should proceed as normal. Unfortunately, for a multitude of reasons, most cases with a history of domestic violence will not have a documented criminal record of the abuse. While this proposal could prove helpful in a narrow set of cases like those we examined in our research project, it is likely to encourage judges to ignore other relevant signs of abuse in the more common, and more complex, cases with a history of family violence. We recommend an amendment stating that a domestic violence-related criminal conviction, or lack thereof, is not enough to determine whether abusive dynamics exist in a family. Information regarding a criminal domestic violence conviction may provide helpful information to the court but is insufficient on its own. Judges must still examine the unique aspects of each case to determine if domestic abuse dynamics exist and how that abuse may be harming the family and the child.

Judges Assume that Separation Will End the Abuse

Even in cases in which the judge is made aware of a history of domestic violence they often assume that if child abuse has not occurred, placement and custody is still appropriate for the abusive parent. This common decision is based on a fundamental misunderstanding of both the nature of domestic abuse following separation or divorce, as well as the impact that exposure to domestic violence has on children. Unfortunately, simply presenting a judge with evidence of domestic abuse is not enough to ensure that they will make determinations that keep victims safe and independent from abusers. More than notice of records, judges need the training and time necessary to take exposure to domestic violence and ongoing abuse post separation into account when making decisions for a family. Without these systemic reforms, judges will continue to make determinations that keep victims and children entangled with abusive parents, regardless of their knowledge of previous criminal convictions.

Victims are Wrongly Convicted of Domestic Abuse

The typical abuser is highly adept at using the legal system to further manipulate and control their victim. Whether dealing with police at the scene of a domestic dispute or arguing their case in a court room, abusers often utilize deceit, intimidation, and control of resources to hide the abuse they inflict on victims. For this reason, it is quite common for victims of domestic abuse to have criminal records themselves, often including convictions and restraining orders subject to the judicial notice outlined in AB 100. For a pro se victim arguing their case against an abuser with an attorney, judicial notice of these records could be used to discredit their claims and obscure the nature of the domestic abuse that has occurred. While this proposal may assist victims without a criminal history who have successfully acquired a restraining order or criminal conviction against their abuser, it could also negatively affect the numerous survivors whose abusers have successfully used the legal system as another tool of manipulation and control.

No Outlined Process to Ensure Notice Applies Only to Specific Crimes

Current practice for judges regarding their knowledge of a party's criminal history varies from county to county with some judges commonly taking notice of CCAP records and others defining such notice as an unlawful independent investigation. However, there is no indication that counties with judges who do take notice of such records have better outcomes for victims and their children in family law cases. Furthermore, it remains unclear what the process should be for judges to take notice of CCAP records related to certain crimes without becoming aware of a person's full criminal history. While a judge may intentionally search for a history of domestic abuse or child abuse, they may unintentionally find a prior conviction unrelated to the matter at hand and allow this criminal history to affect their decision making in the case. For victims who are often coerced into criminal activity, or who turn to drugs or alcohol to cope with severe trauma, an unintentional discovery of a previous drug possession conviction, for example, could bias the perspective of the judge in their family law case. Furthermore, in a state with wildly differing outcomes in both the criminal and civil legal systems for litigants from communities of color, we are concerned that unrelated criminal records will be used against some parents disproportionally.

End Abuse's 2017/2018 Family Law Research Project

For nearly forty years, the policy work of End Domestic Abuse WI has been grounded in the experience of survivors and the advocates who serve them. Throughout that period, survivors and advocates have consistently reported that one of the main challenges survivors face is navigating the often unfriendly, rigorous, and officious family law system to keep themselves and their children safe. Over the years, horror stories about survivors' experiences in court have driven us to search for innovative solutions to inspire the Family Law system to become more victim-friendly.

Therefore, we set out to collect data to better understand how courts apply current law, such as 2003 WI Act 130[1], in family law cases with a history of domestic violence, taking great care in selecting which cases to review. We examined a period from 2008-2015, matching parties in criminal cases with domestic violence-related criminal convictions no less severe than misdemeanor battery with subsequent family law cases to determine child custody and placement between the victim and the criminal defendant. Using the Wisconsin Circuit Court Access Platform (WCCA, also known as CCAP), we identified the matches in a random selection of twenty counties from all ten judicial districts across the state. Small, medium, and large counties were all included in the sample, from the smallest, Ashland County, to the largest, Milwaukee County.

One of our key findings in this study was that many judges, and court personnel in general, do not recognize domestic abuse in family court. We know this because of the 361 cases reviewed, all with a criminal history of domestic abuse, the court made formal domestic violence findings in only 8% (29) of these cases. When we looked closer at the individual case files to see if there

[1] Wisconsin State Legislature. *2003 Wisconsin Act 130.* March 12, 2004. https://docs.legis.wisconsin.gov/2003/related/acts/130.

was any mention of domestic violence at all, the percentage increased, but not by much, to 27% of cases. We expected domestic violence findings in more than half of all the cases we reviewed, so this statistic was alarming. We also expected to find that the custody and placement outcomes in these cases would favor the victims about 75% or more of the time, but that was not the case. Placement decisions were the most favorable to victims (sole or primary placement awarded to the victim), but even that percentage was lower than we expected, at about 65% of all the cases reviewed.

There is no doubt that these preliminary findings illustrate the need for changes to the family law system. However, what they also indicate is that there is no simple solution to the problems currently faced by survivors in family law cases, particularly because this cross section of cases represents a very narrow minority that are the most clear-cut, as far as evidence of domestic violence is concerned. While AB 100 could prove helpful in this small minority of cases, we are concerned about the unintended consequences that could arise in cases that do not have a criminal history of domestic abuse, but where the dynamics of abuse are active and just as dangerous.

In conclusion, we are currently neutral on this legislation. Moving forward, we encourage this Committee to consider broad, systemic reforms to the family law system that will give judges the time, training, and resources necessary to evaluate the numerous complicating factors that exist in the majority of family law cases with a history of domestic violence.

Thank you for considering our views. Please feel free to contact Chase Tarrier, Public Policy Coordinator at chaset@endabusewi.org or Adrienne Roach, Policy and Research Program Director at adrienner@endabusewi.org for additional information.