

MEMO

Date: December 7, 2010

To: Representative Anthony Staskunas - Wisconsin State Legislature

From: Michael J. Bruch Family Court Commissioner - Milwaukee County

Re: **Special Committee on Review of Spousal Maintenance Awards
in Divorce Proceedings - Wisconsin Legislative Council**

Comments Regarding Bill Drafts - December 2, 2010

Representative Staskunas:

I apologize for not being able to attend the meeting on December 8, 2010, but it is one of the dates that my divorce final hearing court is open all day, and I was unable to find anyone who could take my place as presiding judicial official. The calendar is scheduled a month to 6 weeks in advance, so matters could not be adjourned.

Since this meeting may be the last one for the committee, in the alternative, I have prepared this memorandum for you with my comments both on the proposed bill drafts and also my general comments regarding this area of the law.

Of course, if there is still another meeting, I will make every effort to be present for that meeting.

mjb

First, as a general comment as to status of the present law, it would seem that the provisions now in effect in Sec. 767.56 Wis. Stats. would be sufficient to guide the court in making specific findings and determinations in each individual case. This is very clear by the considerations listed in that section, especially sub. (10), which makes it clear that the court should consider "such other factors as the court in each individual case determine to be relevant."

As a practical matter, it is also clear that this can result in vastly different decisions among the judges who make these determinations and might be more pronounced in neighboring counties where there are only one or two judges in each county. This, I can understand, has the ability to raise questions about the fairness of widely-disparate decisions.

Also, as another practical consideration, even though there was much opposition to the development of child support amount standards and their adoption as statutory law, there

now appears to be general acceptance of them, especially since those statutes allow for judicial discretion to deviate from them when there are specific findings that, in a particular case, the standards are not appropriate.

The basic difference in statutory direction between the two – Child support and maintenance – is the use of standards which are to be followed unless the court makes specific findings that such standards are not appropriate for an individual case, and those findings must be given on the record or in the written decision.

It seems to me that a very carefully crafted development of standards for the court to use could be useful provided whatever is developed would allow for the same judicial discretion which is now afforded the court in the child support statutes. This would then allow for a common “starting point” which would govern each county of the state and could increase the perception of fairness.

One last general comment – because of the present ability for the courts, under Sec. 767.531 *Wis. Stats.*, to make orders for family support, with components of both maintenance and child support, any statutory change proposal must take this concept into account.

With that in mind, my specific comments on the draft bills presented follow.

WLC: 0006/1

If this draft is considered by the committee for approval, I believe that use of the AAML commission options for the amount of maintenance award, the duration of maintenance award and the factors for deviation – which include “such other factors as the court may in each individual case determine to be relevant - would be preferable over all the other options suggested.

I believe the definition of “gross income” under proposed Sec. 767.56(1) – even though it is basically the same as the statute regarding child support – may be a good starting point, but there could be tax aspects which should be considered which are generally not the same as for child support.

I believe that sub (7) of the draft also would be of help in maintaining a perception of fairness and would make it clear in each case why certain decisions were made by the court. Failure to make these explanations by the trial court under the existing statutes are often the reason for remands from the court of appeals back to the trial courts.

WLC: 0007/1

This appears to be a fundamental change in statutory approach to maintenance which rules it out except by exception - a finding that there is some nominal need. In tandem with Ch. 766 of the statutes (marital property) this might appear attractive, but I find to much too limiting, especially since this argument can be advanced under the provisions of the current law - "such other relevant factors...."

WLC: 0015/1

As previously mentioned above, if the committee wishes to make a recommendation as to a new maintenance statute, I generally do not have any problems with the AAML recommendations. It appears that judicial discretion is also preserved in this draft, and the draft also includes the technical provision as to determining the length of the marriage.

WLC: 0016/1

I am generally opposed to any statute which prohibits something where the underlying event is subject to broad interpretation. I would not necessarily be opposed to the development of this concept as one of the specific factors to be considered by the court but I am opposed to a statute that grants "blanket" prohibition without a case by case fact determination.

WLC: 0030/1

I would be opposed to any statute which would give a "blanket" denial of maintenance without some judicial determination of best interest.

WLC: 0031/1

I am not opposed to this technical provision. However, there must be some consideration given to what are popularly called "Section 71 payments" which are contractual in nature. Those are often part of a broader agreement or compromise which many times have some elements of compromise on property division issues. All of this must be considered in light of the federal (and state) tax laws regarding such payments.

The requirement for self-reporting of any remarriage is appropriate.

WLC: 0039/1

Cohabitation has, for at least the 40+ years I have been an attorney, always been a "hot" issue. On the face of it, it would seem that this proposal would help in solving the issue. However, the obvious complication comes in with the question of the definition of

"cohabitation." Likewise, the term "marriage-like relationship" has its share of problems with definition. Of all the proposals made for this committee to consider, I believe this one would have the best chance of increased litigation. Also, this is clearly a factor to be considered in the court's discretion under the present law.

WLC: 0040/1

Keeping in mind my theory that most parties, especially self-represented litigants, do not carefully read anything, I still believe that any notice given at the beginning of the action is helpful in moving the case through the judicial system. So, I am in favor of this concept.

WLC: 0041/1

Once again, I have no objection to this proposal as a standard subject to judicial discretion given the facts of a particular case, or as a rebuttable presumption. But there are just too many cases with unique fact situations where I believe these provisions would be unfair and not in the interest of justice.

Respectfully submitted:

FCC Michael J. Bruch