



WISCONSIN LEGISLATIVE COUNCIL

REVIEW OF SPOUSAL MAINTENANCE AWARDS IN DIVORCE PROCEEDINGS

Legislative Council
Large Conference Room

December 8, 2010
10:00 a.m. – 1:25 p.m.

[The following is a summary of the December 8, 2010 meeting of the Special Committee on Review of Spousal Maintenance Awards in Divorce Proceedings. The file copy of this summary has appended to it a copy of each document prepared for or submitted to the committee during the meeting. A digital recording of the meeting is available on our Web site at <http://www.legis.state.wi.us/lc>.]

Call to Order and Roll Call

Chair Staskunas called the committee to order. The roll was called and it was determined that a quorum was present.

COMMITTEE MEMBERS PRESENT: Representative Tony Staskunas, Chair; Representative Amy Sue Vruwink, Vice-Chair; and Public Members Tom Grogan, Malcolm Keith Hatfield, Korey Lundin, Andrew Matznick, Robert Mawdsley, Dan Pence, William Pocan, Jared Potter, and Kenneth Seubert.

COMMITTEE MEMBERS EXCUSED: Representative Joel Kleefisch; Sens. Luther Olsen and Jeff Plale; and Public Members Michael Bruch, Judith Budny, and Marsha Mansfield.

COUNCIL STAFF PRESENT: Don Salm, Senior Staff Attorney; and Chadwick Brown and Margit Kelley, Staff Attorneys.

***ATTENTION:** This was the final meeting of the Special Committee on Review of Spousal Maintenance Awards in Divorce Proceedings. Committee members are requested to send any corrections regarding these Minutes to the Legislative Council staff. After the incorporation of any corrections, these Minutes will be considered approved by the committee.

Approval of the Minutes of the Committee's October 14, 2010 Meeting

Mr. Grogan moved, seconded by Mr. Hatfield, to approve the minutes of the committee's October 14, 2010, meeting; the minutes were approved by unanimous consent.

Description of Materials Distributed

Mr. Brown and Ms. Kelley briefly described the following materials distributed to the committee for this meeting:

- WLC: 0006/1, relating to amount and duration of maintenance awards.
- WLC: 0007/1, relating to when a maintenance award may be granted and the duration of such an award.
- WLC: 0015/1, relating to amount and duration of maintenance awards.
- WLC: 0016/1, relating to prohibiting certain individuals from receiving maintenance where there is evidence of domestic abuse.
- WLC: 0030/1, relating to eliminating maintenance awards in actions affecting the family.
- WLC: 0031/1, relating to termination of maintenance upon the payee's or payer's death and notices relating to maintenance.
- WLC: 0039/1, relating to termination of maintenance upon cohabitation of the payee.
- WLC: 0040/1, relating to providing notice in a summons in certain actions affecting the family describing a court's authority to grant a maintenance award.
- WLC: 0041/1, relating to prohibiting consideration of income of payer's subsequent spouse, and permitting consideration of an inheritance received by a payee, for maintenance revision purposes.

Discussion of Committee Assignment

Chair Staskunas noted that six of the committee's 17 members were unable to attend this meeting, and that some of the members present would not be able to stay for the entire meeting. He directed that in order to allow all committee members to have a voice in voting on the bill drafts that voting would be done by mail ballot after the committee's discussion. Chair Staskunas noted that this is the last meeting of the committee.

WLC: 0030/1, relating to eliminating maintenance awards in actions affecting the family

Mr. Brown briefly described bill draft WLC: 0030/1, which repeals the maintenance factors and prohibits an award of maintenance under the statutes. He noted that as the committee considers this

option, the elimination of maintenance would have a substantive effect in other areas of the divorce code (ch. 767, Stats.), such as family support and property division.

Judge Pocan asked if other states had eliminated maintenance, and if so, what the consequences in those states were. The staff indicated that they were not aware of any states that had done so.

Mr. Pence commented that he did not think that eliminating maintenance altogether was this group's intent in requesting this study committee be formed. He stated that the group's goals were to eliminate indefinite maintenance, except in exceptional circumstances, and to provide some structure for the amount of maintenance awards.

Judge Mawdsley noted that there are members of the committee who are payers of maintenance, who have had negative results in their cases, but that the committee did not have any members who are recipients of maintenance to bring a perspective of how they were helped by a maintenance award.

Mr. Seubert commented that elimination of maintenance goes too far, and is not what he's after. He expressed concern about: (1) the real-life tax consequences that parties have due to a divorce; and (2) lifetime maintenance awards when the recipient is able to work and be self-supporting.

Mr. Pence moved, seconded by Mr. Hatfield, that bill draft WLC: 0030/1 not be submitted to the committee for a mail ballot; the motion was approved by unanimous consent.

WLC: 0031/1, relating to termination of maintenance upon the payee's or payer's death and notices relating to maintenance

Mr. Brown briefly described bill draft WLC: 0031/1, noting that it provides for the termination of maintenance upon the death of the payer, revising current law that already provides for its termination upon the death of the payee. He noted that the draft also requires the payee to provide notice of remarriage, revising current law that already provides for its termination upon notice by the payer. Mr. Brown noted that these two revisions probably reflect current practice.

In response to a question, Mr. Brown stated that the Internal Revenue Code (IRC) requires termination of maintenance upon the death of the payer. He explained that although the IRC does not mandate that Wisconsin adopt this requirement, it requires that if payments extend beyond the death of the payer that the tax deductions are lost.

In response to a question, Judges Pocan and Mawdsley commented that contractual Section 71 payments, based on the IRC: (1) could require payments beyond the death of the payer; and (2) can be a negotiation tool for divorcing parties although such payments cannot be ordered by the court on its own.

Committee members discussed whether or not it should be clarified that the termination upon death provision would not affect contractual Section 71 payments, and concluded that it would not be necessary, as contractual Section 71 payments are already outside of the explicit statutory authority.

Chair Staskunas directed that bill draft WLC: 0031/1 be submitted to the committee for a mail ballot.

WLC: 0016/1, relating to prohibiting certain individuals from receiving maintenance where there is evidence of domestic abuse

Mr. Brown briefly described bill draft WLC: 0016/1, which prohibits maintenance to a recipient who had committed domestic abuse against the payer within the previous two years. He noted that the bill draft treats domestic abuse incidents very broadly, and the committee could consider what level of proof could be required, ranging from a letter to the court alleging abuse, to an evidentiary hearing on abuse, or to a record of conviction. He also noted that if this provision is enacted, it would likely lead to increased litigation.

Mr. Pence shared his own family history and commented how awful it would be for a victim who is the provider for the family to have to pay maintenance to the abuser. He commented that the level of proof should be a record of a conviction, since under today's laws if there is any domestic disturbance then one person automatically has to go to jail, which would be insufficient proof for this type of bill.

Mr. Hatfield commented that if the required level of proof is a record of conviction, that the bill draft is reasonable.

Judge Pocan, Mr. Lundin, Mr. Potter, and Judge Mawdsley stated that the bill draft is based on a good intent, but that it could lead to increased litigation in either the criminal court or the family court even if the level of proof is clearly defined, as those cases are often proceeding simultaneously. Each also noted that in cases of domestic abuse, a court can currently avoid awarding maintenance by citing s. 767.56 (10), Stats., which allows a court to consider all relevant factors.

Chair Staskunas and Judge Pocan noted that it would be preferable not to add domestic abuse as an example within s. 767.56 (10), Stats., as that could then become a limit on what may be considered relevant under that subsection. Both noted that if it is desirable to include domestic abuse in the factors, that it should be its own separate factor for consideration.

Mr. Pence commented that he would have no objection to setting aside this bill draft.

Chair Staskunas noted that the committee reached a consensus to not submit bill draft WLC: 0016/1 to the committee for a mail ballot.

WLC: 0039/1, relating to termination of maintenance upon cohabitation of the payee

Mr. Brown briefly described bill draft WLC: 0039/1, which terminates maintenance upon the cohabitation of the payee. He noted that some issues for the committee's consideration are the difficulties in defining cohabitation, what level of proof might be required, and the likely increase in litigation. Mr. Brown noted that currently, cohabitation may be considered to the extent that it affects a party's monthly budget expenses, but that it is not a disqualifying factor for receiving maintenance.

Chair Staskunas posed a question for discussion: what would happen if a payee spends six overnights a week with her boyfriend, but they have separate apartments?

Judge Mawdsley cited the Wisconsin Court of Appeals decision, *Woodard v. Woodard*, [2005 WI App 65, 281 Wis. 2d 217, 696 N.W.2d 221 (2005)], which allows consideration of cohabitation as it affects the party's budget if they share expenses when either setting an initial award of maintenance or revising an award of maintenance.

Mr. Grogan noted that the criminal law outlawing cohabitation in Wisconsin was repealed sometime around the early 1980s. He commented that he would be concerned that adding this language to the divorce code would revive this as an archaic moralistic judgment on the parties.

Mr. Seubert commented that this type of provision would be largely unnecessary if maintenance awards were more strictly limited in amount and time for getting training or a job.

Mr. Lundin commented that this provision could lead to an increase in litigation, and that it would almost necessitate the hiring of private investigators to prove the cohabitation. He also questioned whether or not recognizing cohabitation as a marriage-like relationship would be prohibited by the State Constitution [Article XIII, Section 13], and thought that it might be.

Mr. Hatfield commented that some easy proof of cohabitation could be required, such as a mailing address, but also commented that such proof would be easy for parties to sidestep.

Mr. Potter commented that cohabitation is litigated already in cases where it is a relevant issue, and that the standard is already provided based on appellate court decisions. He also noted two concerns, that the provision might promote people not to remarry, and might promote people to set up an artificial life.

Mr. Pence commented that the provision might address the problem of people cohabitating until maintenance runs out, and only then getting married.

Judge Pocan stated that this provision would not affect current law, but that it could lead to increased litigation if added to the statutes. He noted that costs would increase for parties who needed to hire private investigators and litigate the issue of cohabitation. He stated that it could be similar to the litigation that was seen when adultery was a consideration in divorce cases.

Mr. Salm noted that some states have created a rebuttable presumption that there is a decreased need for maintenance if the payee is cohabiting.

Chair Staskunas directed that bill draft WLC: 0039/1 be submitted to the committee for a mail ballot, revised to provide a rebuttable presumption that there is a decreased need for maintenance if the payee is cohabiting.

WLC: 0007/1, relating to when a maintenance award may be granted and the duration of such an award

Ms. Kelley briefly reviewed bill draft WLC: 0007/1, which repeals the current maintenance statute and specifies that a court may only award maintenance if the recipient has insufficient property to provide for his or her own needs, and that either the recipient is unable to support himself or herself through employment or has caretaking responsibilities for a child that makes reduced employment appropriate.

Judge Pocan commented that this approach removes the fairness objective that applies to current maintenance awards, and only looks at the needs of the recipient.

Mr. Seubert requested that a specific time-limit be added to the bill draft, specifying that the duration of a maintenance award may not exceed 1.5 years for every 10 years of marriage.

Chair Staskunas directed that bill draft WLC: 0007/1 be submitted to the committee for a mail ballot, revised to specify that the duration of a maintenance award may not exceed 1.5 years for every 10 years of marriage.

WLC: 0015/1, relating to amount and duration of maintenance awards

Ms. Kelley briefly reviewed bill draft WLC: 0015/1, which specifies a graduated formula for the duration of a maintenance award, and defines the length of marriage for this purpose as through the date of filing of the action between the parties. She noted that the bill draft also includes an option specifying that no indefinite maintenance may be awarded, except in certain exceptional circumstances.

Mr. Seubert stated that he prefers the option to disallow indefinite maintenance unless the spouse or a child is disabled.

Mr. Hatfield commented that indefinite maintenance can be a problem for payers who are looking to retire, because they have to keep working to maintain the income.

Mr. Matznick commented that he would prefer to disallow indefinite maintenance awards in all cases.

Committee members commented that in this draft it would be difficult to choose between allowing indefinite maintenance in only limited circumstances versus allowing indefinite maintenance in marriages of 26 or more years.

Mr. Lundin noted that if parties remarry each other, and divorce again, appellate courts have held that it is permissible for the divorce court to consider the total amount of time that the parties were married to each other. He questioned whether it would be necessary, or not, to address that circumstance in the bill draft.

Chair Staskunas directed that bill draft WLC: 0015/1 be submitted to the committee for a mail ballot, and structured (or a separate bill draft created for a mail ballot) to allow a separate vote on the option that no indefinite maintenance may be awarded except in the specified exceptional circumstances.

WLC: 0006/1, relating to amount and duration of maintenance awards

Ms. Kelley briefly reviewed bill draft WLC: 0006/1, which repeals the current maintenance statute and gives options for four separate formulae for the amount and duration of maintenance awards, with specified deviation factors, based principally on recommendations from the American Academy of Matrimonial Lawyers, New Mexico guidelines, Texas Family Code, and Public Member Dan Pence.

Mr. Pence and Mr. Hatfield expressed concern about items that are included in the bill draft's definition of gross income.

Mr. Lundin commented that the definition of gross income is parallel to the definition used for child support purposes, and that if the definition would be modified here, then courts might have to determine two separate gross income amounts within each case.

Judge Pocan commented that repealing the current maintenance statute and setting up a formula would be a revolution in divorce law, and that there would likely be litigation to determine what it means in actual cases. He suggested that such a revolution would need more study before being

implemented. He commented that it is necessary to keep judicial discretion, and that the current law allows a good judge to make a fair decision based on each particular case. He stated that it is not necessary to change the whole system when some cases are not decided well, as that could always be the case. Judge Pocan commented that he would support the insertion of a Legislative Council note in the maintenance statute encouraging courts to look at and use national standards such as the American Academy of Matrimonial Lawyers recommendation.

Mr. Seubert and Mr. Matznick expressed their preference for the option based on the Texas Family Code.

Mr. Pence commented that he is not looking for a bill draft to be revolutionary, he is just looking to clean up some areas, and make maintenance more uniform and predictable with a formula that still gives discretion for deviation when appropriate.

Mr. Hatfield noted that when there is judicial discretion, the court's decision is difficult to overturn on appeal.

Chair Staskunas directed that bill draft WLC: 0006/1 be submitted to the committee for a mail ballot, divided into separate drafts for each option.

WLC: 0040/1, relating to providing notice in a summons in certain actions affecting the family describing a court's authority to grant a maintenance award

Ms. Kelley briefly reviewed bill draft WLC: 0040/1, which requires a notice to be included in a summons that describes the court's authority to award maintenance. She noted that this is a broad description of the law, using language from the current Wisconsin *pro se* form instructions. She noted that a limitation on the bill draft is that when including such a notice in the summons, the notice is not available to parties who file jointly, because no summons is used in those cases. She noted that placement of the notice in the petition would be unsuitable, as the petition is primarily for the biographical data of the parties and the children, and not for general notices. She noted that there may be other options the committee could consider for providing a notice to litigants, such as requiring a written notice to the parties directly from the court upon filing.

Mr. Grogan commented that the bill draft looks acceptable as it is. He stated that he would also like to see a public policy statement at the beginning of the maintenance statute or the divorce code along the lines that the Legislature recognizes that divorce has many implications and, therefore, the Legislature urges all parties to seek counsel and be cautious when proceeding without counsel.

Mr. Lundin agreed that the petition would be an unsuitable location for such a notice, but noted that this information is already available in the *pro se* forms.

Judge Pocan stated that he both agrees and disagrees with this bill draft proposal, noting that his fear is that the more information that is put in the summons, the less likely people are to actually read it. He stated that he might prefer a very short announcement in the summons that essentially provides a statement that maintenance may be available.

With reference to this topic, Chair Staskunas read a pertinent excerpt from Public Member Michael Bruch's memo, dated December 7, 2010, and submitted to the committee at this meeting.

Mr. Pence stated that he favors this notice requirement, adding that if parties do not actually read it, that is their own choice.

Chair Staskunas directed that bill draft WLC: 0040/1 be submitted to the committee for a mail ballot.

Discussion of WLC: 0041/1, relating to prohibiting consideration of income of payer's subsequent spouse, and permitting consideration of an inheritance received by a payee, for maintenance revision purposes

Mr. Brown briefly reviewed bill draft WLC: 0041/1, which provides two amendments to the statutory considerations for a revision of a maintenance award: (1) that if a payer remarries, the income of the payer's new spouse may not be considered in revising the amount of a maintenance award; and (2) that if the recipient receives an inheritance, it is considered a substantial change in circumstances sufficient to allow review of a maintenance award.

Mr. Lundin commented that, under current law, a court may consider a new spouse's income for how it affects the party's budget, and therefore this bill draft would change that law.

Chair Staskunas posed a question for discussion: what if the payer's new spouse makes a substantial amount of money and the payer quits his job? Mr. Brown responded that the bill draft does not address issues relating to imputed income for voluntary under-employment.

Mr. Pence stated that it is his understanding that earning capacity is a consideration, so if a payer quits working voluntarily, he would still be obligated to pay maintenance, but that with this bill draft, the recipient could not come back and ask for more maintenance based on the new spouse's income.

On the inheritance section of the bill draft, Mr. Pence clarified that the bill draft applies only to the payee's receipt of an inheritance, not the payer's, and that it does not allow a recipient to come back and ask for more maintenance if a payer receives an inheritance.

Mr. Brown commented that under the bill draft the court may consider the payee's receipt of an inheritance when considering the parties' budgets, not that it is automatic.

Chair Staskunas directed that bill draft WLC: 0041/1 be submitted to the committee for a mail ballot.

Other Business

Chair Staskunas stated that this is the final meeting of the committee, and that a mail ballot would be circulated for the committee's final approval of its proposed bill drafts.

Adjournment

The meeting was adjourned at 1:25 p.m.

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