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MEMORANDUM

To: Representative Robert Brooks
From: Mark Fremgen
Re: Possible statutory changes to assist courts in investigating incidents of domestic violence and child abuse in a family court matter.
Date: August 29, 2018

Once again I appreciate the opportunity to be on this Legislative Council Committee and look forward to future meetings. I gave additional thought to your question about the judiciary and the ability to review "evidence" not submitted by the parties, in particular the issue about prior domestic violence issues. I spoke to a few colleagues, including one on Records Management Committee (RMC). This issue has been raised with RMC in the past, and according to this commissioner, there have been equally persuasive arguments given by both sides as to the inclusion of such information in the petition for divorce (or motion, etc…) as well as the exclusion. Interestingly, both arguments come from domestic violence advocacy groups. On the one hand, it would be information that Courts should be aware of, especially in light of the rebuttable presumptions in the family court statute related to custody and placement when domestic violence is present. On the other hand, DV advocates are hesitant to mandate the reporting of such information if the victim of the domestic violence is not in favor of including that information in the court pleadings (e.g., victims may be embarrassed, a victim may feel this will simply result in further domestic violence, or the incident was so long ago that the victim does not consider it relevant).

There was a published case dealing with domestic violence and a custody decision by a judge in Milwaukee County. In ***Glidewell v. Glidewell***, 2015 WI App 64 (CA 2015), the judge essentially held that the mother had waived any issues related to DV when the judge entered a modified custody order in that she failed to raise it at the time of the initial order and was not raising an issue as to new incidents of domestic violence. I was on the Family Law Section of the State Bar at that time of the decision. The section was inclined to file a letter objecting to the publishing of the opinion (since a published opinion holds greater weight as precedent than a non-published opinion). By the time the board decided to act, the opinion had been published. However, the issue that was raised by DV advocates and legal services members of the board at that time was the "slippery slope" that adopting a waiver standard would create. In fact, the section members considered proposing legislation that would, in essence, require a judge to ask the parties at the time of the final hearing (divorce judgment, paternity judgment, evidentiary hearing) whether any domestic violence, as contemplated by the statute, exists before entering the final order. No proposed legislation was created by the section.

The issue you have suggested is ***"How can the statutes, or other court-related rules, be modified to allow a court commissioner or judge to independently determine the existence or non-existence of domestic violence in a family action?"***

There seems to be a number of ways in which this issue could be addressed:

First, and quite frankly the easiest, is to require judges and commissioners to ask the question. Some may believe that by including the presumptions in the statute pertaining to domestic violence and child abuse when addressing custody and placement, that there is an expectation that the Court will make the necessary inquiry. This is not always the case. No rules changes would be necessary. However, there would need to be a concerted effort on the judiciary to ***remember*** to ask the proper question. The best way to address this would be to include continual training on the issue or develop bench-cards or other prompts to remind the court of this responsibility.

Second, the Supreme Court would need to modify its rules to allow the court commissioner or judge to make limited independent investigations into domestic violence and child abuse. SCR 60.04 (1)(g) [fn] states that "*A judge must not independently investigate facts in a case and must consider only the evidence presented*". Based on this Supreme Court Rule, a judge or commissioner should not engage in any independent investigation outside of what is raised by the parties in court, including a review of CCAP for information of a potential history of domestic abuse or child abuse (despite the fact that most judges and commissioners are probably reviewing CCAP on a routine basis). One way to address the rule to meet the stated goal, would be to include specific language to allow for an independent review of CCAP or other records held by the Clerk of Court's Office (the custodian of the court file) to determine the existence of domestic violence or child abuse. Someone would need to file a petition to amend the SCR, serve all necessary parties, and await a hearing on the petition (the Supreme Court could rule on it summarily or hold a public hearing on the petition). Petitions to the Supreme Court can range from four months to a year before they are addressed.

Third, if the law permitted it, the Court could take judicial notice of the contents of the public record, in particular CCAP. The legislature could amend sec 902.01 (2) Wis. Stats. to include as the "Kind of Facts" that can be judicially noticed… "records of the Clerks of the Circuit Court managed and maintained by the Consolidated Court Automation Programs (CCAP)". SCR 60.04 (1)(g) 5 allows a judge to initiate or consider an ex parte communication when expressly authorized by law. Since the evidence statute, as amended, would consider a CCAP record (criminal charge, juvenile/CHIPS matter, restraining order) as the type of record that a court could take judicial notice, it would be expressly authorized by law and be an exception to the SCR without needing to modify the SCR.

Fourth, section 767 could be amended in one of two ways. One, it could be amended to include a separate section on the court's duties and responsibilities as it pertains to domestic violence and child abuse. Specifically, it could be created to require a judge to inquire and investigate to determine the existence of domestic violence or child abuse. This would also qualify as an exception under SCR 60.04 (1)(g)5. Second, sec. 767.215 (2), the contents needed for a petition for divorce, could be amended to include "any reported incidents of domestic violence or child abuse, including the case number, county of filing, and date of incident(s)". The RMC form could then be modified to include a section, not unlike the current divorce petition form which requires parties to list the last 5 years residences and any prior divorce actions (dates, parties names, county and state). The down-side to the proposal to amend the contents of the petition is that it would only apply to the filing of an action, and RMC (the pro se forms committee) only provides pro se forms for filing divorce (no other family action has a corresponding RMC form).

In considering these proposals, I believe that a modification of sec. 902.01 (2) may be the best resolution (or possibly creating a section in 767 which requires the courts to independently determine the existence of domestic violence or child abuse history). These two proposals would not require a petition to the

Supreme Court and would work well within the current exceptions under SCR 60.04 (1)(g)5. Although I believe that the courts are fully supportive of the concerns over domestic violence, I have to confess that I do not always ask a party about any possible history of domestic violence unless prompted by something in the file. And, although the change to the petition requirements in sec. 767.215 (2) Wis. Stats. would lend itself to changes to the pro se forms, under the current availability of forms, this change would only address divorce matters, and no other family action.

I appreciate the opportunity to review this issue and offer my feedback.

Sincerely,

Mark R. Fremgen