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Vocational Evaluations After *Graybow v. Graybow*

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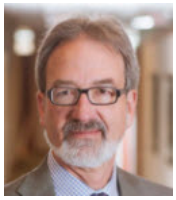
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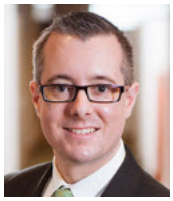
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Vocational assessments have long been an important tool in litigating spousal maintenance cases, and their importance has expanded following *Passolt v. Passolt*, 804 N.W.2d 18 (Minn. Ct. App. 2011). In *Passolt*, the Court of Appeals held that bad faith was not a prerequisite to considering a spousal maintenance recipient's ability to be self-supporting even after a long-term marriage. Whether viewed as a clarification of existing law or an expansion of the law, the impact of *Passolt* is unmistakable: the earning capacity of those seeking spousal maintenance is relevant in all cases, regardless of the length of the marriage.

That's where a vocational assessment comes in. We tend to cooperate these days on everything from custody evaluations to pension valuations, and vocational evaluations are no exception. When there is an agreement, the legal basis for the expert's appointment may not even be considered. But when no agreement is reached, the law suddenly matters. Some types of evaluations are provided for by statute. For example, a party may bring a motion for a custody evaluation under Minn. Stat. § 518.167 and a party may bring a motion for the appointment of an actuary to value pension benefits under Minn. Stat. § 518.582, subd. 1. But what about vocational evaluations, for which no similar statutory authority exists?

Most of us would probably look to Rule 35 of the Minnesota Rules of Civil Procedure, which may be used to require an adverse party to undergo "a physical, mental or blood examination by a suitably licensed or certified examiner." Thus, in cases where the person seeking spousal maintenance contends that her ability to work is limited by her physical or mental health, Rule 35 may be the answer. However, Rule 35 applies only when a party's "physical or mental condition" is actually "in controversy." Where the dispute about earning capacity has nothing to do with health, such as choosing one vocational path over another or considering the propriety of the recipient's chosen path, Rule 35 may be inapplicable. That was the conclusion reached by the Court of Appeals in *Graybow v. Graybow*, A12-0249 (Minn. Ct. App. Dec. 10, 2012).

When the Graybows' marriage was dissolved in 2001, husband was 50 years old and had net monthly income of $7,000, and wife was 47 years old and a stay-at-home mother for the parties' three young children. The stipulated judgment and decree required husband to pay $1,500 per month in child support and $3,000 per month (later increasing to $4,500 per month) in spousal maintenance. Ten years later, husband sought to reduce his obligations and asked for a vocational evaluation of wife. The district court granted husband's motions related to child support but denied his motions related to spousal maintenance, including his request for a vocational evaluation. Among other issues raised on appeal, husband challenged the district court's denial of his request for a vocational evaluation.

The Court of Appeals noted that both parties had framed their arguments in terms of the need for a vocational evaluation and that neither party had addressed the legal basis for husband's request. Husband's motion was likely governed by Rule 35 because a vocational evaluation was a discovery device, but the language of Rule 35 seemed to limit vocational evaluations to only those instances where the physical or mental condition of a party is in dispute. The only published Rule 35 opinion, *Wills v. Red Lake Mun. Liquor Store*, 350 N.W.2d 452 (Minn. Ct. App. 1984), involved a vocational evaluation conducted in connection with a medical examination, making it "doubtful" that Rule 35 encompassed

vocational evaluations in cases where the party to be examined was not claiming an inability to work because of a physical or mental condition.

The Court of Appeals then turned to husband's argument concerning the need for the evaluation. Husband argued that the vocational evaluation was necessary so that income could be imputed to wife under Minn. Stat. § 518A.32, subds. 1 and 2(1) and Minn. Stat. § 518A.34(b)(1). The Court of Appeals summarily rejected husband's argument because these statutes concerned child support and not spousal maintenance and affirmed the district court's denial of husband's request for a vocational evaluation.

Conspicuously absent from the decision in *Graybow* and from the parties' arguments, is any mention of *Passolt*. However, the *Passolt* opinion was issued on August 22, 2011, after the district court had already denied husband's request for a vocational evaluation but before the hearing on the remaining issues which resulted in the order from which husband appealed. (Nonetheless, it is surprising that *Passolt* is not addressed in *Graybow*, especially considering that Judge Bjorkman served on the panels in both *Passolt* and *Graybow*.)

Other appellate decisions involving requests for vocational evaluations do not provide much guidance on the law because they address the issue in terms of the need for the evaluation. In *Wetterberg v. Wetterberg*, No. C4-97-1256 (Minn. Ct. App. Feb. 24, 1998), the Court of Appeals affirmed the district court's denial of the obligor's post-decree request for a vocational evaluation based on his failure to establish the need for his request and without discussion of what legal authority might justify the request. Similarly, in *Merwin v. Merwin*, No. A07-1948 (Minn. Ct. App. July 1, 2008), the Court of Appeals affirmed the district court's denial of the obligor's post-decree request for an evaluation because he had not shown a substantial change in circumstances. The only hint of law in *Merwin* is a "cf." reference to Rule 35, suggesting that Rule 35 was not directly on point but perhaps an analogous source of authority for ordering a vocational evaluation.

Given the impact of *Passolt*, the notion that Rule 35 cannot be used to compel a vocational evaluation where health is not an issue may seem extreme, but, consistent with *Graybow*, at least one other court has reached the same conclusion. In a reverse discrimination lawsuit, a federal district court opined that Rule 35 could not be used to force the plaintiff to undergo a vocational evaluation because the plaintiff's claims were based on his inability to find new employment and had nothing to do with his health. *Sheehan v. City of Markham*, 282 F.R.D. 428 (N.D. Ill. 2012). Thus, the legal landscape surrounding vocational evaluations under Rule 35 in spousal maintenance cases is murky.

One way to avoid the Rule 35 debate is to bring a motion for the appointment of a vocational evaluator under Rule 706 of the Minnesota Rules of Evidence, which permits the appointment of expert witnesses. Appellate cases involving Rule 706 appointments are few and far between but it nonetheless has been used in family law cases to appoint experts where no agreement exists. *See Pekarek v. Pekarek*, 362 N.W.2d 394 (Minn. Ct. App. 1985) (reversing district court's adoption of one expert's valuation of tax shelter and remanding for the appointment of a Rule 706 neutral expert); *see also Duckwall v. Duckwall*, No. A09-1060 (Minn. Ct. App. Apr. 6, 2010) (affirming district court's appointment of Rule 706 neutral to perform psychosexual evaluation). Although Rule 706 cannot be used to obtain your own vocational expert, Rule 706 is a powerful tool if no agreement can be reached.

Obviously, the spousal maintenance recipient is always free to obtain her own vocational evaluation so this is an issue that affects only spousal maintenance payors (although the recipient may be hard-pressed to defend her refusal to participate in an adverse evaluation if she obtains her own). Given the importance of vocational evaluations in the wake of *Passolt*, should the Rules of Civil Procedure be amended to expressly authorize vocational evaluations in spousal maintenance cases?

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